

No. 19-

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In the  
Supreme Court of the United States

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James Clayton Johnson,

Petitioner,

v.

State of Arizona,

Respondent

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF ARIZONA

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**APPENDIX FOR PETITION FOR A WRIT OF CERTIORARI**

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## APPENDIX

|                                                                                                                                |              |
|--------------------------------------------------------------------------------------------------------------------------------|--------------|
| A. Opinion, <i>State v. Johnson</i> .....                                                                                      | Appendix-001 |
| B. Order denying Motion for Reconsideration .....                                                                              | Appendix-065 |
| C. Opening Brief .....                                                                                                         | Appendix-067 |
| D. Answering Brief .....                                                                                                       | Appendix-310 |
| E. Reply Brief .....                                                                                                           | Appendix-465 |
| F. Motion to Dismiss the Death Penalty .....                                                                                   | Appendix-603 |
| G. Transcript, 1/25/2013 (attached to Motion to Dismiss the Death Penalty) .....                                               | Appendix-613 |
| H. Transcript, 5/3/2013 .....                                                                                                  | Appendix-661 |
| I. Order Granting Motion for Joinder and Omnibus Hearing on Motion to<br>Dismiss Death Penalty and setting oral argument ..... | Appendix-724 |
| J. Transcript, 4/24/2015 .....                                                                                                 | Appendix-726 |
| K. Transcript, 5/8/2015 .....                                                                                                  | Appendix-770 |

# Appendix A

IN THE  
SUPREME COURT OF THE STATE OF ARIZONA

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STATE OF ARIZONA,  
*Appellee,*

*v.*

JAMES CLAYTON JOHNSON,  
*Appellant.*

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No. CR-16-0261-AP  
Filed August 23, 2019

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Appeal from the Superior Court in Maricopa County  
The Honorable M. Scott McCoy, Judge  
No. CR2010-048824-001  
**AFFIRMED**

COUNSEL:

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CHIEF JUSTICE BRUTINEL authored the opinion of the Court, in which  
VICE CHIEF JUSTICE TIMMER and JUSTICES BOLICK, GOULD, LOPEZ,  
BALES (RETIRED), and JUDGE MCMURDIE\* joined.

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\* Pursuant to article 6, section 3 of the Arizona Constitution, the Honorable  
Paul J. McMurdie, Judge of the Arizona Court of Appeals, Division One,  
was designated to sit in this matter.

STATE v. JOHNSON  
Opinion of the Court

CHIEF JUSTICE BRUTINEL, opinion of the Court:

¶1 This automatic appeal arises from James Clayton Johnson's convictions and death sentence for the murder of Xiaohung Fu. We have jurisdiction under article 6, section 5(3) of the Arizona Constitution and A.R.S. §§ 13-4031 and 13-4033(A)(1).

¶2 In December 2010, Johnson entered Taiwan Massage. Inside, he encountered its owner, Fu. A struggle ensued, in which Johnson bound and repeatedly stabbed Fu, killing her.

¶3 Next door, Marvin Pearce and Terry Weathers heard the commotion. Weathers rushed to check on Fu. When he entered Taiwan Massage, he found the front entrance in disarray. Weathers shouted "hello" but got no response. After a moment, Johnson exited the bathroom at the end of the hall, drying his hands. Weathers asked where Fu was, and Johnson replied she had cut herself and left in an ambulance. Weathers then rushed next door to tell Pearce what he witnessed and called for help. Weathers and Pearce then watched as Johnson got into his truck and sped away. When officers arrived on the scene, they found Fu dead. Fu had been stabbed several times, including one laceration down her back that penetrated through her lung and a near four-inch cut into her neck. She also suffered superficial cuts across her stomach.

¶4 Johnson fled to his girlfriend's apartment where he washed his clothes and truck. Three days later, Johnson robbed a Christmas tree lot and was arrested. (Johnson pleaded guilty to armed robbery on December 21, 2010.) Based on similarities between the two crimes, police linked Johnson to the Taiwan Massage killing. Cell phone tower data and DNA evidence substantiated Johnson's involvement. The State charged Johnson with one count each of first degree murder, kidnapping, and burglary in the first degree.

¶5 The State noticed its intent to seek the death penalty, alleging the following aggravating circumstances: (1) Johnson was previously convicted of a serious offense, A.R.S. § 13-751(F)(2); (2) Johnson committed the offense for pecuniary gain, § 13-751(F)(5); (3) Johnson committed the offense in an especially heinous, cruel, or depraved manner, § 13-751(F)(6); and (4) Johnson committed the offense while on release, § 13-751(F)(7)(a), and while on probation for a felony, § 13-751(F)(7)(b).

STATE v. JOHNSON  
Opinion of the Court

¶6 After trial, the jury found Johnson guilty on all counts and found that the State had proved the (F)(2), (F)(6), and (F)(7)(a) and (b) aggravating factors beyond a reasonable doubt. After considering mitigation evidence, the jury found that Johnson’s proffered mitigation was not sufficiently substantial to call for leniency and sentenced Johnson to death.

**DISCUSSION**

**A. The A.R.S. § 13-751 Sentencing Scheme**

¶7 Johnson argues that Arizona has not complied with its constitutional obligation to legislatively narrow the class of first degree murders that are eligible for the death penalty. We review Johnson’s constitutional challenge de novo. *See State v. Smith*, 215 Ariz. 221, 228 ¶ 20 (2007).

¶8 In 2013, Johnson joined in litigation challenging Arizona’s death penalty for failing to sufficiently narrow the class of first degree murders eligible for a capital sentence. As part of the challenge, the defendants requested but were denied an evidentiary hearing. The trial court denied the defendants’ consolidated challenge to the constitutionality of Arizona’s death penalty statutes. That litigation eventually led to our decision in *State v. Hidalgo (Hidalgo I)*, 241 Ariz. 543, 549–52 ¶¶ 14–29 (2017). There, we observed that United States Supreme Court case law undermined the defendants’ position, *id.* at 550 ¶ 19, and affirmed the constitutionality of Arizona’s sentencing scheme, *id.* at 550–52 ¶¶ 19–29. For the same reasons we expressed in *Hidalgo I*, we reject Johnson’s argument here.

¶9 Johnson next argues the court erred when it failed to hold the requested evidentiary hearing to allow defendants to support their challenge. Johnson further contends that the failure to hold an evidentiary hearing resulted in an incomplete record likely to preclude Supreme Court review. *See Hidalgo v. Arizona (Hidalgo II)*, 138 S. Ct. 1054, 1057 (2018) (mem.) (Breyer, J., respecting the denial of certiorari). We review the denial of an evidentiary hearing for an abuse of discretion. *See Hidalgo I*, 241 Ariz. at 548 ¶ 7.

¶10 As we noted in *Hidalgo I*, neither *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), nor *Mathews v. Eldridge*, 424 U.S. 319 (1976) requires an evidentiary hearing. 241 Ariz. at 548–49 ¶¶ 10–13. And though Johnson

STATE v. JOHNSON  
Opinion of the Court

points to Justice Breyer's statement respecting the denial of certiorari in *Hidalgo II*, Justice Breyer neither implied that the Constitution requires an evidentiary hearing in that case nor explained why an expanded record would provide a more compelling basis for granting review than the explicit finding that the defendant's factual claims were true. *See Hidalgo II*, 138 S. Ct. at 1057 (stating that the "opportunity to develop the record through an evidentiary hearing was denied" and, "[a]s a result," the record was undeveloped).

¶11 Further, though Johnson argues that denying remand and an evidentiary hearing will condemn a future petition for writ of certiorari to the United States Supreme Court to the same fate as Hidalgo's, he can include the deprivation of the hearing as a basis for review where Hidalgo chose not to. And to the extent Johnson argues that Hidalgo was unable to adequately present the issue to the Supreme Court, his argument ignores that Hidalgo was allowed to supplement the record on appeal with an expanded study of first degree murder cases in Arizona, which found that one or more aggravating circumstances were present in 856 of 866 murders. *See Hidalgo I*, 241 Ariz. at 549 ¶ 17. The trial court's denial of the evidentiary hearing was not an abuse of discretion. *See id.* ¶ 13.

¶12 Separately, Johnson claims the trial court's rulings violated his right to effective assistance of counsel because his counsel's ability to challenge the death penalty was impeded by the denial of the hearing. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984) (providing that the right to counsel includes the right to effective assistance of counsel). But counsel is not ineffective where he requested, and the court denied, the exact hearing Johnson complains was required.

¶13 Lastly, Johnson argues that *Hidalgo I* did not address whether Arizona's constitution provides broader protections or requires an evidentiary hearing. But Johnson fails to develop the argument or offer any legal support as to why the Arizona Constitution would mandate a different result than that required by the Constitution of the United States. We thus decline to consider it. *See State v. Bolton*, 182 Ariz. 290, 298 (1995) (stating that an argument not sufficiently developed on appeal is waived).

STATE v. JOHNSON  
Opinion of the Court

**B. The A.R.S. § 13-751(F)(6) Aggravator**

*i. Unconstitutionality of the (F)(6) aggravator*

¶14 Johnson argues that the (F)(6) especially cruel, heinous, or depraved aggravator is unconstitutionally vague and that the narrowing instructions were inaccurate and insufficient. We review de novo both the constitutional challenge, *see Hidalgo I*, 241 Ariz. at 548 ¶ 7, and whether the jury instructions correctly stated the law, *see State v. Burbey*, 243 Ariz. 145, 146 ¶ 5 (2017).

¶15 During the trial, the court instructed the jury as follows:

Definition of especially heinous, cruel, or depraved. Concerning this aggravating circumstance, all first degree murders are to some extent heinous, cruel, or depraved. However, this aggravating circumstance cannot be found to exist unless the State has proved beyond a reasonable doubt that the murder was especially cruel, especially heinous, or especially depraved.

“Especially” means unusually great or significant. The terms “especially cruel,” or “especially heinous or depraved” are considered separately. Therefore the presence of any one circumstance is sufficient to establish this aggravating circumstance. However, to find that this aggravating circumstance is proven, you must find that the [sic] especially cruel has been proven unanimously beyond a reasonable doubt or that . . . especially heinous or depraved has been proven unanimously beyond a reasonable doubt.

“Especially cruel.” The term “cruel” focuses on the victim’s pain and suffering. If you find the murder was committed in an especially cruel manner, you must find that the victim consciously suffered physical or mental pain, distress, or anguish prior to death. The defendant must know or should have known that the victim would suffer.

“Especially heinous or depraved.” The term “especially heinous or depraved” focuses . . . upon the defendant’s state



STATE v. JOHNSON  
Opinion of the Court

of mind at the time of the offense as reflected by the defendant's words and acts. A murder is especially heinous if it is hatefully or shockingly evil. In other words, grossly bad. A murder is especially depraved if it is marked by de[b]a[s]ement, corruption, perversion, or deterioration.

¶16 The court then instructed on the *State v. Gretzler* factors of gratuitous violence, helplessness, and senselessness, stating:

To determine whether a murder was especially heinous or depraved, you must find that the State proved beyond a reasonable doubt that the defendant exhibited such a mental state at the time of killing by inflicting gratuitous violence on the victim beyond that necessary to kill. To find that the defendant inflicted gratuitous violence you must find the defendant intentionally inflicted violence clearly beyond what was necessary to kill the victim and that the defendant continued to inflict this violence after the defendant knew or should have known that the defendant had inflicted a fatal injury.

To assist you in determining whether the murder is heinous or depraved, you may consider the helplessness of the victim and the senselessness of the murder. Helplessness means that the victim is unable to resist. All murders are senseless because of their brutality and finality, yet not all are senseless as the term is used to distinguish those first degree murders that warrant a death sentence from those that do not. Rather a senseless murder is one that is unnecessary to achieve the defendant's objective.

A finding of helplessness and/or senseless[ness] alone or together is not sufficient to prove that a first degree murder was heinous or depraved. A first degree murder is not heinous or depraved unless you also unanimously find that the defendant inflicted gratuitous violence on the victim beyond that necessary to kill.

*See* 135 Ariz. 42, 51–53 (1983).

STATE v. JOHNSON  
Opinion of the Court

¶17 First, Johnson argues that the (F)(6) “especially cruel” aggravator violates the Eighth and Fourteenth Amendments to the United States Constitution because it does not adequately limit the jury’s discretion when deciding whether to impose the death penalty. *See Walton v. Arizona*, 497 U.S. 639, 652–53 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002). We have repeatedly rejected this argument in light of further narrowing instructions, as were provided here. *See, e.g., State v. Champagne*, No. CR-17-0425-AP, 2019 WL 3676317, at \*15 ¶¶ 75–76 (Ariz. Aug. 7, 2019).

¶18 Johnson next argues the trial court’s narrowing instructions failed to provide sufficient guidance on whether Johnson’s murder exceeded the norm of first degree murders. But again, we have repeatedly upheld jury instructions like those given here. *See, e.g., State v. Chappell*, 225 Ariz. 229, 237 ¶ 27 & n.6 (2010).

¶19 Nevertheless, Johnson argues that while the *Walton* Court affirmed Arizona’s capital sentencing scheme on the basis that the court – familiar with comparable first degree murder cases – determined whether the crime was “especially heinous, cruel or depraved,” 497 U.S. at 652–56, the jury has no such contextual knowledge, and thus *Walton*’s justification no longer applies. Johnson further argues, citing *State v. Mata (Mata II)*, 185 Ariz. 319, 324 (1996), that it is impossible to craft a formulaic set of narrowing instructions that can sufficiently guide the jury without comparative review. But we have previously rejected such challenges when the court provides further narrowing instructions based on *Gretzler* and *State v. Knapp*, 114 Ariz. 531, 543 (1977) (providing narrowing definitions for “heinous,” “cruel,” and “depraved”), *see State v. (Ruben M.) Johnson*, 212 Ariz. 425, 431–32 ¶¶ 19–22 (2006) (approving narrowing instructions and disavowing comparative review), and Johnson provides no persuasive reason for us to revisit those decisions here. *See also Smith v. Ryan*, 823 F.3d 1270, 1293–95 (9th Cir. 2016) (approving the narrowing construction employed in *Gretzler*).

¶20 Lastly, Johnson argues the “gratuitous violence” instruction incorrectly focused the jury’s attention on the physical violence rather than Johnson’s mental state. But the instruction specifically required the jury to find that Johnson “exhibited such a mental state” and “intentionally” inflicted gratuitous violence, thereby focusing the jury on Johnson’s mental state and intentions at the time he committed the crime. *See State v.*

STATE v. JOHNSON  
Opinion of the Court

*Bocharski*, 218 Ariz. 476, 494 ¶ 87 (2008) (requiring the state to “show that the defendant continued to inflict violence *after he knew or should have known that a fatal action had occurred*,” because “[a] showing that a defendant continued to inflict violence after he knew or should have known that a fatal action had occurred provides essential evidence of the defendant’s intent to inflict gratuitous violence”).

¶21 The instructions, when viewed as a whole, required that to find the aggravator, the crime must be “unusually great or significant,” “especially cruel,” or “hatefully or shockingly evil,” and therefore correctly informed the jury that the crime must be above and beyond the normal first degree murder. These instructions sufficiently narrowed the (F)(6) aggravator. *See State v. Prince*, 226 Ariz. 516, 532 ¶ 51 (2011) (upholding jury instructions from vagueness challenge).

*ii. Arguing the (F)(6) aggravator during closing*

¶22 Johnson next argues the trial court improperly prevented him from arguing during closing that the State failed to meet its burden in showing the murder was committed in an especially cruel, heinous, or depraved manner. We review the trial court’s ruling on the scope of closing argument for an abuse of discretion. *State v. Pandeli*, 215 Ariz. 514, 525 ¶ 30 (2007).

¶23 During closing, Johnson reiterated the burden of proof required to prove the murder was “especially” cruel, heinous, or depraved, and rhetorically asked whether his crime was “unusually great or significant” where the jury had “nothing . . . to compare it to.” The State immediately objected.

¶24 Counsel is given wide latitude in closing argument to “comment on the evidence and argue all reasonable inferences therefrom.” *State v. Zaragoza*, 135 Ariz. 63, 68 (1983). “Counsel may not, however, comment on matters which were not introduced in evidence” or “call matters to the attention of the jury that the jury could not properly consider.” *Id.* Just as we have denied the consideration of proportional review in jury instructions, *supra* ¶¶ 20–21, we decline to allow closing arguments suggesting comparative review. *See State v. Bible*, 175 Ariz. 549, 602 (1993) (limiting closing argument to the evidence presented at trial); *State v. Greenway*, 170 Ariz. 155, 171 (1991) (“The trial court’s consideration

STATE v. JOHNSON  
Opinion of the Court

of other similarly situated defendants is inapposite to *this* defendant's 'character or record', and does not show any of the circumstances surrounding *this* defendant's 'offense' that would call for a sentence less than death.").

¶25 Thus, Johnson could not argue that his crime was not cruel, heinous, or depraved by comparing it to other murders, nor could he argue that the State did not meet its burden by failing to introduce evidence of similarly situated defendants. He was allowed, however, to argue from the evidence that his crime was not especially cruel, heinous, or depraved; and he was free to point to jury instructions and elaborate upon them, based on the evidence in the record, which he did here. *See Prince*, 226 Ariz. at 532 ¶ 51 (allowing defendants to rely on "norm of first-degree murder" instruction and argue it during closing).

*iii. Sufficiency of (F)(6) evidence*

¶26 Last, Johnson argues that there was insufficient evidence to support the (F)(6) aggravator. Although the (F)(6) aggravator is a single aggravating circumstance, it is written in the disjunctive, and thus we will uphold the (F)(6) finding so long as the murder was either especially cruel or especially heinous or depraved. *See State v. Gunches*, 225 Ariz. 22, 25 ¶ 15 (2010). In reviewing Johnson's claim, we "review[] the record to determine whether substantial evidence supports the jury's finding, viewing the facts in the light most favorable to sustaining the jury verdict." *State v. Roque*, 213 Ariz. 193, 218 ¶ 93 (2006). "Substantial evidence is such proof that reasonable persons could accept as adequate and sufficient to support [the finding of the aggravator] beyond a reasonable doubt." *Id.* (internal quotation marks omitted) (citation omitted).

¶27 After deliberation, the jury unanimously found that the murder was especially cruel, inflicted gratuitous violence beyond that necessary to kill, was senseless, and that the victim was helpless.

¶28 The finding that the murder was especially cruel is supported by the record. "A murder is especially cruel if the victim consciously experiences physical abuse or mental anguish before death." *Bolton*, 182 Ariz. at 311. In addition to the fatal neck wound, which involved at least two cuts to Fu's neck, Johnson inflicted a deep wound to her jaw, a gash to her ribs, and a long gash down her back that collapsed her lung. *See State*

STATE v. JOHNSON  
Opinion of the Court

*v. Boyston*, 231 Ariz. 539, 555 ¶¶ 82–84 (2013) (stating the jury could conclude, based on the number of stab wounds, which included a 3.5-inch deep cut to the pericardium and heart, that the victim suffered physical pain and mental anguish while being stabbed to death and that the defendant knew or should have known that). Though Johnson argues the evidence did not establish that Fu was alive and conscious, Dr. Keen testified that Fu was likely alive during the attack: The angle of the back wound indicated Fu was standing, the evidence established that there was a struggle, and Fu suffered defensive hand wounds. *See State v. McCray*, 218 Ariz. 252, 259 ¶¶ 31–33 (2008) (finding consciousness where the expert concluded, based on the nature of the victim’s injuries and condition of the apartment, that a struggle probably occurred).

¶29 Johnson next argues the murder was not especially cruel because there was no evidence that he inflicted pain and suffering in a wanton, insensitive, or vindictive manner. Johnson argues the infliction of pain “in a wanton, insensitive, or vindictive manner” focuses on the defendant’s state of mind and that there was no evidence that he committed the crime as revenge or to inflict harm, pain, or with no regard for the victim’s pain. Our caselaw defeats this argument. In *State v. Stokley*, we stated that “[c]ruelty focuses on the victim.” 182 Ariz. 505, 517 (1995) (contrasting that “[h]einousness and depravity” go to the “mental state and attitude” of the defendant “as reflected by his words or actions” (quoting *State v. Brewer*, 170 Ariz. 486, 502 (1992))). The evidence sufficiently supports the jury’s finding of cruelty.

¶30 The evidence also supports a finding that the murder was committed in an especially heinous or depraved manner. The state may prove the murder was especially heinous or depraved by establishing that the defendant inflicted gratuitous violence. *Gunches*, 225 Ariz. at 25 ¶ 15. A murder involves gratuitous violence when the defendant uses violence beyond that necessary to kill. *See Gretzler*, 135 Ariz. at 52. To prove gratuitous violence, the state must first show that the defendant did “use violence beyond that necessary to kill.” *Bocharski*, 218 Ariz. at 494 ¶ 85. Second, the state must show “the defendant continued to inflict violence after he knew or should have known that a fatal action had occurred.” *Id.* ¶ 87 (emphasis removed). In addition to the multiple stab wounds, Johnson carved on the victim’s stomach. Based on the blood loss, Dr. Keen confirmed that the stomach carving likely occurred after the victim suffered the fatal neck wound, which itself likely required multiple cuts and

STATE v. JOHNSON  
Opinion of the Court

penetrated four inches into Fu's neck. Even if Johnson did not know that the neck wound was fatal, he should have.

¶31 Johnson argues that the instructions blurred the line between mutilation and gratuitous violence. Even if true, the manner of the murder and the stomach carving reflected mutilation. *See State v. Vickers*, 129 Ariz. 506, 515 (1981) (upholding the finding of depravity where the defendant carved "Bonzai" on the victim's back after killing him). Either Fu was alive when Johnson carved into her stomach, establishing gratuitous violence, or she was already dead, resulting in mutilation. *See State v. Bearup*, 221 Ariz. 163, 173 ¶¶ 50-53 (2009) (upholding the finding of heinous or depraved where the defendant cut off the victim's finger after beating the victim with an aluminum bat, reasoning that the removal of the finger constituted either gratuitous violence or mutilation).

¶32 Johnson does not challenge the jury's finding that the murder was senseless and the victim helpless, but the evidence nonetheless supports those conclusions.<sup>1</sup> The evidence established that Fu was bound, and therefore helpless, and that her restraints prevented her from interfering with Johnson's attempt to rob her or flee, indicating the murder was senseless. *See State v. Ross*, 180 Ariz. 598, 605 (1994) ("A murder is senseless when it is unnecessary to allow the defendant to complete his objective.").

**C. The *Lynch v. Arizona* "Ineligible for Parole" Instruction**

¶33 Johnson argues the court erred by initially failing to instruct the jury that he was ineligible for parole. Johnson further argues that, following the United States Supreme Court's decision in *Lynch v. Arizona* (*Lynch II*), 136 S. Ct. 1818 (2016), the trial court erred by failing to declare a mistrial. We review jury instructions de novo "as a whole to ensure that the jury receives the information it needs to arrive at a legally correct decision." *Prince*, 226 Ariz. at 536 ¶ 77 (quoting *State ex rel. Thomas v. Granville*, 211 Ariz. 468, 471 ¶ 8 (2005)). We review a trial court's decision whether to grant a mistrial for an abuse of discretion. *State v. Leteve*, 237 Ariz. 516, 526 ¶ 33 (2015).

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<sup>1</sup> Arizona law requires that we review the sentencing portion, including finding the aggravating factors, for reasonable evidence. *See infra* ¶¶ 192-93.

STATE v. JOHNSON  
Opinion of the Court

¶34 Before trial, Johnson requested a jury instruction that he was ineligible for parole, in accordance with *Simmons v. South Carolina*, 512 U.S. 154 (1994). Under *Simmons*, when future dangerousness is placed at issue, the defendant has the right to a jury instruction that he is ineligible for parole if the only alternative to a death sentence is natural life. *Id.* at 162, 168–69. Relying on our decision in *State v. Lynch (Lynch I)*, 238 Ariz. 84, 103 ¶ 65 (2015), the trial court granted Johnson’s request to instruct the jury that parole was not currently available but declined his request to inform the jury that he was never eligible for parole since § 13-751(A) authorized release in the form of executive clemency. The court then instructed the jury that, among the sentences imposable if it found Johnson guilty, was “a life sentence with the possibility of parole after serving 25 years imprisonment.”

¶35 On the second day of the penalty phase, the United States Supreme Court issued *Lynch II*, reversed our decision in *Lynch I*, and held that the possibility of executive clemency did not justify refusing the parole-ineligible instruction. 136 S. Ct. at 1819–20. Johnson moved for a mistrial. The State responded that future dangerousness was never placed at issue and that a curative instruction could be given regardless. The court denied Johnson’s motion.

¶36 After the penalty phase trial, the court instructed the jury as follows:

Defendant ineligible for parole. A defendant sentenced to life without the possibility of release after [sic] 25 years must serve the entire 25 years before the defendant can apply for release. There is no automatic release after 25 years. Arizona law does not provide for parole. The only form of release for which defendant is eligible is executive clemency.

¶37 The trial court complied with *Lynch II*. It informed the jury that Johnson was ineligible for parole and that the only possibility for release was by executive clemency after he served at least twenty-five years. The jury thus “receive[d] the information it need[ed] to arrive at a legally correct decision.” *Prince*, 226 Ariz. at 536 ¶ 77.

¶38 Nevertheless, Johnson argues the post-*Lynch II* instruction could not cure the court’s original deficient instruction because the jury

STATE v. JOHNSON  
Opinion of the Court

repeatedly heard during voir dire that Johnson was eligible for parole and the only way to ensure his right to a fair trial was to declare a mistrial.

¶39 But “[d]eclaring a mistrial is an unusual remedy for trial error and should not be resorted to unless justice requires such a result.” *State v. White*, 160 Ariz. 24, 33 (1989). The State neither raised nor argued future dangerousness. Johnson does not point to any evidence showing the jury was confused regarding the law, either before or after the curative instruction. And during closing, Johnson argued that the only alternative to a death sentence was life in prison; the State did not argue otherwise.

¶40 After the issuance of *Lynch II*, the trial court instructed the jury that Johnson was ineligible for parole and that “release” meant only executive clemency; we presume the jury followed those instructions. See *State v. Dann*, 205 Ariz. 557, 570 ¶ 46 (2003). The court did not abuse its discretion in denying Johnson’s motion for mistrial.

**D. The Significant Impairment Instruction**

¶41 Johnson argues the court’s significant impairment instruction reflected the standard established by the guilty except insane (“GEI”) instruction and that it, therefore, imposed a higher burden than that required by the § 13-751(G)(1) mitigator. Because Johnson did not object at trial, we review his claim for fundamental error only. See *State v. Velazquez*, 216 Ariz. 300, 309 ¶ 37 (2007). An error is fundamental if it goes to the foundation of the case, takes away from the defendant a right essential to his defense, or is of such magnitude that the defendant could not have possibly received a fair trial. *State v. Escalante*, 245 Ariz. 135, 142 ¶ 21 (2018). To prevail, a defendant must establish both that fundamental error occurred and that it caused him prejudice (though showing the former may establish the latter). *Id.* at 140–41 ¶¶ 13, 16 (stating that “an error of such a magnitude that a defendant could not possibly have received a fair trial is always prejudicial” (internal quotation marks omitted)).

¶42 Section 13-751(G)(1) provides mitigation when “[t]he defendant’s capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.” During the trial, Johnson attempted to show that he was under the influence of Xanax



STATE v. JOHNSON  
Opinion of the Court

and possibly cocaine at the time of the murder. The court instructed the jury as follows:

Significant impairment. It is a mitigating circumstance that the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired but not so impaired as to constitute a defense to prosecution. The defendant has the burden of proving this mitigating circumstance by a preponderance of the evidence.

"Significantly impaired" means that the defendant suffered from mental illness, personality disorder or substance abuse at or near the time of the offense that prevented the defendant from appreciating the wrongfulness of the conduct or conforming his conduct to the requirements of law.<sup>[2]</sup>

¶43 The State concedes that limiting the definition of "significantly impaired" to the defendant being *prevented* from appreciating the wrongfulness of the conduct was error, but argues the error is not prejudicial. The jury instructions specifically noted that the burden was not so high "as to constitute a defense to prosecution." And the State did not argue that Johnson was required to prove the impairment *fully* prevented him from knowing the criminal act was wrong, but instead that he was not so high on Xanax that he was unable to appreciate the wrongfulness of his conduct. Indeed, the State argued that impairment only referred to an "impact [on] his ability to know right from wrong," and it argued that the jury had heard how Johnson acted when he was actually impaired—slurring his speech, being unable to stay awake—but that on the day of the murder nobody described any such impairment. Instead, the evidence showed that Johnson took affirmative steps to conceal his role in the murder—Johnson falsely claimed that Fu had cut herself, reversed his truck when driving away to prevent his license plate from being seen, and went

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<sup>2</sup> The Revised Arizona Jury Instructions (Criminal) now provide that significant impairment "substantially reduce[s] the defendant's ability to appreciate the wrongfulness of the conduct . . . ." Rev. Ariz. Jury Instr. (Crim.) Capital Case 3.2, at 620 (4th ed. 2018), <https://www.azbar.org/media/1904900/rajicriminal-4thed2018.pdf>.

STATE v. JOHNSON  
Opinion of the Court

to his girlfriend's apartment to clean his truck and clothes—indicating that he knew his conduct was wrong.

¶44 Further, the court instructed the jury that it was “not limited to the mitigating circumstances offered by the defendant,” but must “also consider any other information that you find is relevant in determining whether to impose a life sentence so long as it relates to an aspect of the defendant's background, character, propensities, history or record or circumstances of the offense.” Johnson presented a large mitigation case. He called several mitigation witnesses who testified that he was a student at Columbine during the infamous school shooting, about his history of substance abuse and a personality disorder, his family love and support, his adoption, and other struggles. Similarly, Johnson presented evidence of his behavior while on drugs. Yet, the jury heard and considered Johnson's mitigation and found it lacking when compared to the three aggravating factors and the nature of the murder. Johnson was not prejudiced by the instruction.

**E. Prison Housing Conditions and Johnson's Right to Trial**

¶45 Johnson argues the court erred by allowing the State to introduce evidence of prison housing conditions and to comment on his exercise of the right to trial. We review the court's rulings regarding the admissibility of evidence for an abuse of discretion. *State v. Gill*, 242 Ariz. 1, 3 ¶ 7 (2017). “An error of law committed in reaching a discretionary conclusion may, however, constitute an abuse of discretion.” *State v. Wall*, 212 Ariz. 1, 3 ¶ 12 (2006).

*i. Prison housing conditions*

¶46 Before trial, Johnson moved to admit his offers to plead guilty as mitigating evidence, per *Busso-Estopellán v. Mroz*, 238 Ariz. 553, 554–55 ¶¶ 5–7 (2015). The State responded that it intended to rebut Johnson's plea offers with evidence that the offers were conditioned on receiving a life sentence and that prisoners serving such sentences have better prison housing conditions than those on death row. While Johnson agreed that the State could rebut his plea offers by showing they were conditioned, he argued that the prison housing evidence was irrelevant because he was unaware of preferable prison housing conditions and the State had no evidence showing he offered to plead guilty to obtain them. The court

STATE v. JOHNSON  
Opinion of the Court

granted Johnson's motion to admit his plea offers, but deferred ruling on the scope of the State's rebuttal until trial.

¶47 During trial, Johnson repeated his objection, filing a motion to preclude the evidence. The State countered that it did not "have to prove that this was the defendant's sole motivation," but that "this is a man who's been to [the Department of Corrections] twice" and thus was "aware of classifications and movement systems and numbering." The court denied Johnson's motion.

¶48 At trial, Johnson introduced his conditioned plea offers. In rebuttal, the State presented the testimony of a Department of Corrections administrator, who explained the potential housing differences, based on custody levels, between an inmate serving a life sentence and one serving a death sentence. In her testimony, she described the "privileges" and "incentives" a life sentence inmate can receive as a result of potential lower custody levels.

¶49 At the close of mitigation, Johnson allocuted. He apologized for the murder, stated that he "would have pled guilty to this first-degree murder as early as March of 2012," and asked for leniency.

¶50 In closing, the State argued:

And you never heard once, in the mitigation claim or the defendant standing in front of you, that he only made a conditional offer to plead guilty to the crimes. That condition being you give me the sentence I want and I'll plead guilty.

Nothing stops a defendant from pleading guilty if that's what they choose. But in this case, the defendant would only plead guilty if he could get the least sentence available. Is that truly admitting guilt and accepting responsibility, to demand he get the least sentence available if convicted of this crime? How worthy is that evidence when the defendant slaps a condition on it?

And you heard from [the Department of Correction's administrator] the possible benefits he can get with a natural life sentence, that being within the first five years and on a

STATE v. JOHNSON  
Opinion of the Court

review period thereafter, being reduced all the way down from maximum custody, to closed custody, to medium custody, enjoying all of those privileges, freedoms and benefits. In light of that evidence introduced to solely rebut the defendant's claim of an offer of responsibility, of an acceptance of responsibility, how mitigating are those facts when compared to that defendant would only plead guilty if the State gave him what he wanted?

¶51 In *Busso-Estopellan*, we held that the "[a]cceptance of responsibility is a non-statutory mitigating circumstance" and that defendant's plea offer "is relevant because it tends to make his acceptance of responsibility . . . more probable." 238 Ariz. at 554-55 ¶ 67. We further stated that "the court may exercise its discretion to determine how best to admit the evidence," "may avert . . . confusion . . . by instructing the jury that the State was not required to extend a plea offer," and "may permit introduction of part of the offer letter." *Id.* at 555 ¶¶ 10-11.

¶52 Johnson argues that evidence of prison housing conditions is irrelevant. See, e.g., *People v. Quartermain*, 941 P.2d 788, 807 (Cal. 1997) ("[E]vidence of the conditions of confinement that a defendant will experience if sentenced to life imprisonment without parole is irrelevant to the jury's penalty determination because it does not relate to the defendant's character, culpability, or the circumstances of the offense."). The State argues that it was permitted to include evidence of prison housing conditions to rebut Johnson's plea offers by establishing a motivation for pleading guilty other than remorse or acceptance of responsibility. See *People v. Ledesma*, 140 P.3d 657, 724 (Cal. 2006) (finding nothing improper about the prosecutor questioning defense witnesses about the defendant's motive to plead guilty to rebut defendant's claim that he pled guilty to accept responsibility).

¶53 But the State presented no evidence that Johnson was aware of the housing differences or that a difference in housing conditions motivated his plea offer. The State thus failed to prove the antecedent fact necessary to make the evidence relevant and thus admissible.

¶54 And even if the State introduced evidence that Johnson knew of the differences and made his plea offer based on those differences, evidence of prison housing conditions would still likely be inadmissible.

STATE v. JOHNSON  
Opinion of the Court

The State may rebut the motivation of the plea offers by showing that some motivating factor compelled the plea offer other than remorse or an acceptance of responsibility. *Busso-Estopellán*, 238 Ariz. at 554–55 ¶¶ 5–7, 10–11. But evidence of prison housing conditions is only marginally probative of an alternative motive for the plea offer and is likely outweighed by the potential prejudice from the inference that a defendant would receive enhanced living conditions if not sentenced to death. *See id.* at 554 ¶ 6 (stating that though “the Arizona Rules of Evidence do not apply in the penalty phase, we are ‘guided by fundamentally the same considerations’” (quoting *State v. Guarino*, 238 Ariz. 437, 439 ¶ 6 (2015)); *see also Guarino*, 238 Ariz. at 441 ¶ 15 (noting that unduly prejudicial evidence in the penalty phase may be precluded, even where it would otherwise be relevant). The trial court erred in denying Johnson’s motion.

¶55 The State argues the error is nevertheless harmless. *See Escalante*, 245 Ariz. at 144 ¶ 30 (stating that under this standard the state must show “beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence” (internal quotation marks omitted)). We agree.

¶56 Johnson did not object to the evidence’s prejudicial impact nor does he now argue that the evidence deprived him of due process because it was unduly prejudicial. *Cf. Prince*, 226 Ariz. at 534 ¶ 65 (“[T]he Fourteenth Amendment’s Due Process Clause prohibits . . . evidence that ‘is so unduly prejudicial that it renders the trial fundamentally unfair.’” (quoting *Payne v. Tennessee*, 501 U.S. 808, 825–26 (1991))). Even so, in cross-examination of the Department of Corrections administrator and closing, Johnson showed the differences in housing conditions were minimal. Further, the State offered evidence of the prison housing conditions for a limited purpose—“to solely rebut the defendant’s claim of an offer of responsibility” (which was also motivated by Johnson’s desire to escape the death penalty). It did not rely on the evidence of prison housing conditions to argue that death was required because a life sentence would otherwise reward Johnson and the evidence was cumulative to the State’s evidence that his plea offer was contingent on his receiving a natural life sentence. Last, the jury found significant aggravation in this case—the (F)(2), (F)(6), and (F)(7)(a) and (b) aggravators. Based on the foregoing, we conclude that even if the erroneously admitted evidence had been excluded, no reasonable jury would have reached a different result. *Cf. State v. Dann*, 206 Ariz. 371, 374 ¶ 14 (2003) (asking whether, after reviewing the evidence, a

STATE v. JOHNSON  
Opinion of the Court

reasonable jury would weigh the mitigation evidence differently and thus reach a different result).

*ii. Comment on plea offers and Johnson's allocution*

¶57 Johnson next argues the court erred by allowing the State to comment during the penalty phase closing that “[n]othing stops a defendant from pleading guilty if that’s what they choose. . . . Is [it] truly admitting guilt and accepting responsibility, to demand he get the least sentence available if convicted of this crime?” But the State’s comment related to evidence in the record and was proper rebuttal to Johnson’s allocution and plea offers. *See Chappell*, 225 Ariz. at 238 ¶ 32 (stating the right to allocution is not absolute and that the state may present appropriate rebuttal); *United States v. Fell (Fell II)*, 531 F.3d 197, 220–21 (2d Cir. 2008) (finding the prosecutor’s comment — “if [the defendant] wanted to plead guilty he could have” — to be a reasonable response to defendant’s use of his plea offer and that no Fifth or Sixth Amendment right was violated). And the State’s closing did not otherwise comment on or reference Johnson’s allocution in a way that penalized him for exercising his right to go to trial. *Cf. United States v. Whitten*, 610 F.3d 168, 195 (2d Cir. 2010) (stating that the defendant’s “constitutionally protected decision to go to trial was cited as a reason to sentence him to death, and thus to ‘enhance’ what would otherwise be a life sentence”).

**F. Inconsistent Mercy, Sympathy, and Presumption of Death Instructions**

¶58 Johnson argues the trial court gave internally inconsistent jury instructions regarding mercy, sympathy, and the presumption of death and that the instructions likely caused juror confusion resulting in an unconstitutional sentence. Because Johnson failed to object at trial, we review for fundamental error only. *Velazquez*, 216 Ariz. at 309 ¶ 37.

¶59 During the trial, the jury was instructed as follows:

Each one of you must decide individually whether any mitigating circumstance exists.

You are not limited to the mitigating circumstances offered by the defendant. You must also consider any other information

STATE v. JOHNSON  
Opinion of the Court

that you find is relevant in determining whether to impose a life sentence so long as it relates to an aspect of the defendant's background, character, propensities, history or record or circumstances of the offense.

The defendant bears the burden of proving the existence of any mitigating circumstance that the defendant offers by a preponderance of the evidence . . . .

. . . .

Even if a juror believes that the aggravating and mitigating 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 the defendant does not present any mitigation evidence.

. . . .

[E]ach of you must determine whether, in your individual assessment, the mitigation is of such quality or value that it warrants leniency in this case.

The law does not presume what is the appropriate sentence. The defendant does not have the burden of proving that life is the appropriate sentence. The State does not have the burden of proving that death is the appropriate sentence. It is for you as jurors to decide what you individually believe is the appropriate sentence.

In reaching a reasoned, moral judgment about which sentence is justified and appropriate, you must decide how compelling or persuasive the totality of the mitigating factors is when evaluated in connection with the totality of the aggravating factors and the facts and circumstances of the case. This assessment is not a mathematical one, but instead must be made in light of each juror's individual qualitative evaluation of the facts of the case, the severity of the aggravating factors, and the quality of the mitigating factors found by each juror.

STATE v. JOHNSON  
Opinion of the Court

If you unanimously agree there is mitigation sufficiently substantial to call for leniency, then you shall return a verdict of life. If you unanimously agree there is no mitigation, or the mitigation is not sufficiently substantial to call for leniency, then you shall return a verdict of death.

Your decision is not a recommendation. Your decision is binding. . . .

¶60 Johnson argues the stated instructions were confusing because at separate times they suggested there was a presumption for life, then death. But the above instructions correctly conveyed that Arizona “law does not presume [there] is [an] appropriate sentence.” See *State v. Glassel*, 211 Ariz. 33, 52 ¶ 72 (2005) (discussing scheme’s constitutionality where it does not create a “presumption of death”). Further, the instructions accurately describe that it is the duty of each juror to decide whether a life or death sentence is appropriate “in light of each juror’s individual qualitative evaluation of the facts of the case, the severity of the aggravating factors, and the quality of the mitigating factors found by each juror.”

¶61 Johnson additionally argues the instructions allowed the jury to believe that the responsibility for determining whether a death sentence should be imposed rested elsewhere, i.e., with the state or defense upon meeting their burdens of proof. See *Caldwell v. Mississippi*, 472 U.S. 320, 328–32 (1985) (noting concern that jurors could “delegate” their responsibility to a higher court in review). The instructions, however, reinforced that each juror’s decision was his or her own, that the jury’s “decision [was] not a recommendation” but was “binding,” and that neither Johnson nor the State had a burden to prove that a life or death sentence was appropriate.

¶62 Johnson next argues the court gave conflicting “mercy” and “sympathy” instructions and that this error prevented the jury from giving a “reasoned moral response” to Johnson’s mitigation. We rejected a similar argument in *State v. Carreon*, 210 Ariz. 54, 70–71 ¶¶ 81–87 (2005), and *State v. Kuhs*, 223 Ariz. 376, 386–87 ¶¶ 51–56 (2010), and Johnson provides no reason to revisit those decisions. The instructions did not obfuscate the concepts of mercy or sympathy, nor did they prevent the jury from giving Johnson’s mitigation a reasoned moral response. The instructions limited the jury’s consideration to the evidence presented as it related to Johnson’s



STATE v. JOHNSON  
Opinion of the Court

character, record, and the circumstances of the offense. See *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (stating that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion"). No error occurred.

**G. Execution Impact Evidence**

¶63 Johnson argues the trial court erred by excluding execution impact evidence because it was relevant to his character and showed his family's love and support, citing *Woodson v. North Carolina*, 428 U.S. 280, 288, 304 (1976), *State v. Carriger*, 143 Ariz. 142, 162 (1984), and *People v. Ochoa*, 966 P.2d 442, 505-06 (Cal. 1998). But we have previously held execution impact evidence inadmissible. See *State v. Rose*, 231 Ariz. 500, 513-14 ¶¶ 63-65 (2013); *Chappell*, 225 Ariz. at 238 ¶¶ 28-30; *Roque*, 213 Ariz. at 222 ¶¶ 117-20. We decline to revisit those decisions.

¶64 To the extent Johnson argues that the court prevented him from presenting evidence touching on his character and family support, we note that the court's ruling "[did] not preclude the defendant's family, friends, associates or representatives from expressing support and/or mitigation." The "ruling simply restrict[ed] anyone on behalf of the family from expressing views regarding the impact upon the family should the defendant be executed." See *Rose*, 231 Ariz. at 514 ¶ 65 n.3 ("To the extent *Rose* argues that his family ties and the love of a defendant's family has been held by this Court to be mitigation, we agree that the existence of family ties is a mitigating factor." (alterations omitted) (citation and internal quotation marks omitted)).

¶65 To the extent Johnson urges this Court to allow execution impact evidence to counter victim impact evidence, we are not persuaded. Allowing victim impact evidence reflects the view that for a "jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." See *Payne*, 501 U.S. at 825. Victim impact evidence bears on the "harm imposed[] upon the victims" of the crime, and thus relates to the circumstance of the offense, *id.* at 826-27, whereas execution impact evidence relates only to the impact on the defendant's family, *cf. Chappell*, 225 Ariz. at 238 ¶ 29 (stating that the requirements of the Eighth and Fourteenth Amendments do not limit the trial court's

STATE v. JOHNSON  
Opinion of the Court

authority “to exclude, as irrelevant, evidence not bearing on the defendant’s character, prior record, or the circumstances of his offense” (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 n.12 (1978)). No error occurred.

**H. Limitation of Mitigation Evidence**

¶66 Johnson argues the court erred by limiting his presentation of mitigation evidence. We review the trial court’s rulings on the admissibility of evidence for an abuse of discretion. *Gill*, 242 Ariz. at 3 ¶ 7.

¶67 Under the Eighth and Fourteenth Amendments, a defendant may present mitigation evidence based on any aspect of his character, record, or the circumstances of the offense. *Chappell*, 225 Ariz. at 238 ¶ 29 (citing *Lockett*, 438 U.S. at 604). Consequently, § 13-751(G) provides that the jury shall consider any factors proffered by the defendant that are relevant in determining whether to impose a sentence less than death. And § 13-751(C) provides that “the defendant may present any information that is relevant to any of the mitigating circumstances included in subsection G . . . regardless of its admissibility under the rules governing admission of evidence at criminal trials.” Though the Arizona Rules of Evidence do not apply in the penalty phase of a first degree murder trial, we are nevertheless “guided by fundamentally the same considerations.” *Busso-Estopellan*, 238 Ariz. at 554 ¶ 6.

*i. Columbine*

¶68 Johnson was a student at Columbine High School at the time of the school shooting. Before trial, the State filed a motion to narrow the scope of Columbine mitigation to evidence “relevant as it relates to defendant’s character, prior record or the circumstances of his offense.” The State sought to limit, at the time, roughly 23,000 pages of evidence touching on the effect Columbine had not only on Johnson, but on other students and the community generally. As such, the State sought to preclude irrelevant information and limit unduly cumulative evidence. The court agreed. While it allowed Johnson to “tell the story” of the Columbine shooting with approximately three to five witnesses, introduce evidence of Johnson’s reactions during and after the shooting, its effects on him, and its effects on the school and town generally, the court precluded testimony from fellow students of Columbine’s impact on their lives and on the lives of other individuals, finding it irrelevant.

STATE v. JOHNSON  
Opinion of the Court

¶69 The court did not abuse its discretion. Johnson introduced evidence about the Columbine shooting, that he was a freshman at Columbine High School at the time of the shooting, its effects generally on the community, its effects personally on him, and that he was thereafter diagnosed as suffering from post-traumatic stress disorder (“PTSD”). Testimony by other Columbine survivors as to its effects on their lives does not bear specifically on Johnson’s character. The trial court correctly noted that such testimony risks confusing the jury, unfair prejudice, and wasting time, and is cumulative to the other, admissible, Columbine-related evidence. The court did not abuse its discretion by excluding this testimony.

*ii. Adopted-child syndrome*

¶70 Johnson argues the court incorrectly limited his presentation of adopted-child syndrome evidence. During the trial, Johnson introduced evidence that he was adopted from Korea as an infant and that Dr. Kirschner had diagnosed him with a dissociative disorder called “adopted-child syndrome.” But adopted-child syndrome is not officially recognized in any edition of the Diagnostic and Statistical Manual of Mental Disorders (“DSM”). Johnson claims the court prevented him from asking Dr. Kirschner why adopted-child syndrome was not yet recognized.

¶71 Reviewing the record, the court simply prevented Dr. Kirschner from speculating why the diagnosis was not officially recognized in the DSM, a matter outside of the scope of his testimony and the trial. The court did not prevent Johnson from asking whether the DSM was the “be-all-end-all” as it pertains to diagnoses to establish that it was not. Nor did it prevent Johnson from asking Dr. Kirschner to identify the basis for his diagnosis. No abuse of discretion occurred.

*iii. Drug-seeking behavior*

¶72 Johnson argues the court erred by preventing him from eliciting testimony during redirect examination that he sought counseling for psychological benefits and not to obtain prescription drugs.

¶73 During cross-examination of Dr. Abrams, the State elicited testimony that in 2008, Johnson “wanted something to help him relax,”

STATE v. JOHNSON  
Opinion of the Court

“that he was out of Xanax,” and that “[h]e was at the hospital asking for more Xanax.” On redirect, Johnson sought to ask whether “there [was] any indication at that point in time [that] Johnson [was] going to the hospital in order to obtain drugs?” The State objected, arguing that it elicited only testimony showing that Johnson minimized his substance abuse issues. *See State v. Hicks*, 133 Ariz. 64, 69 (1982) (limiting redirect examination to the scope of cross-examination). Though the State claimed during its objection that it did not elicit testimony of drug-seeking behavior during its cross-examination of Dr. Abrams, the question implied that the reason for Johnson’s hospital visit was to obtain drugs. The court’s ruling sustaining the State’s objection was therefore arguably error. But because Johnson admitted that the inference was only implied, not directly stated, and because his question was unclear, any error was harmless.

¶74 Further, the record reveals that some of Johnson’s redirect questions on this issue were answered before the State’s objection and Johnson addressed the alleged drug-seeking behavior by asking the same questions to Dr. DeMarte, who testified later during the trial. To the extent Johnson generally argues that the court improperly limited mitigation evidence regarding drug-seeking behavior, Johnson introduced evidence that he had a genetic predisposition to substance abuse, was an adolescent when he started abusing drugs, and that he had a history of substance abuse, which he tied back to Columbine and his PTSD diagnosis.

*iv. PTSD*

¶75 Johnson argues that the court prevented him from fully detailing the effects of his PTSD. However, as discussed above, Johnson presented evidence of his PTSD diagnosis to the jury. To the extent Johnson argues the court improperly limited redirect on PTSD criteria, Johnson’s objected-to question related to substance abuse, whereas, as Johnson acknowledged at trial, the portion of the State’s cross-examination at issue related only to nightmares. After sustaining the State’s objection, the trial court nevertheless allowed Johnson to ask, “Why [are] nightmares important?” to which Dr. Abrams answered that nightmares were “one of the criteria for [PTSD].” The court did not abuse its discretion.

*v. Counseling*

¶76 Johnson argues the court limited his ability to discuss

STATE v. JOHNSON  
Opinion of the Court

counseling as mitigation evidence. Johnson has waived this argument by not developing it. *See Bolton*, 182 Ariz. at 298. Nevertheless, we note that Johnson introduced evidence that he attended counseling and therapy post-Columbine and sought out counseling when he was having issues with his marriage; he was not prevented from arguing that he fared better and improved with counseling. No error occurred.

*vi. Antisocial personality disorder*

¶77 Last, Johnson inconsistently argues (1) that the State impermissibly implied that he had an antisocial personality disorder diagnosis the State knew did not exist, and (2) that he should have been allowed to introduce evidence that he had an antisocial personality disorder as mitigating evidence.

¶78 In mitigation, Johnson introduced evidence that he displayed paranoid, avoidant, and alexithymic features and that Dr. Abrams diagnosed him with personality disorder “NOS” (“not otherwise specified”). However, neither Dr. Abrams nor Dr. Kirschner diagnosed him with a specified personality disorder, such as antisocial personality disorder. Nevertheless, Dr. Abrams and Dr. Kirschner discussed Johnson’s antisocial tendencies, as well as antisocial and conduct disorders generally, effects of which dated back to Columbine.

¶79 In rebuttal, the State called Dr. DeMarte, who defined antisocial personality disorder as “a personality disorder where an individual has a pervasive pattern of disregarding societal standards and following rules and engaging in society in a productive manner.” She further testified that adolescent conduct disorder was indicative of later antisocial personality disorder, and thus a diagnosis of a conduct disorder in youth usually preceded a diagnosis of an antisocial personality disorder in adulthood. Because she found evidence of a conduct disorder lacking, Dr. DeMarte determined there was no antisocial personality disorder, though Johnson displayed antisocial traits. The State then elicited testimony indicating that Johnson withheld instances of antisocial conduct from her which occurred when he was younger, and Dr. DeMarte answered that such adolescent behavior “would support evidence for antisocial personality disorder.” Johnson objected, arguing the State was attempting to back-door an antisocial personality disorder diagnosis, and moved for a mistrial. The State responded that it was only seeking to show that Johnson

STATE v. JOHNSON  
Opinion of the Court

underreported his adolescent activities. The court denied Johnson's motion, and ordered the State to confirm with Dr. DeMarte that there was no diagnosis, which she did.

¶80 The court did not abuse its discretion. The court sustained Johnson's objection and remedied the improper inference by requiring the State to ask whether there was a diagnosis, to which Dr. DeMarte responded there was not. Nor was there any harm. Johnson introduced evidence of antisocial traits and his personality disorder. And he presented evidence generally describing antisocial personality disorders and conduct disorders. Lastly, he introduced evidence that doctors did not diagnose him with an antisocial personality disorder. The State's cross-examination, challenging Johnson's underreporting to Dr. Abrams, Dr. Kirschner, and Dr. DeMarte, was permissible rebuttal. To the extent Johnson argues evidence of an antisocial personality disorder should have been allowed, he was not prevented from arguing that his personality disorder and antisocial traits were mitigating circumstances, which he did.

¶81 Contrary to Johnson's claims, he presented evidence regarding the Columbine shooting, his PTSD, his history of substance abuse and his biological predisposition, and how his adoption affected him. Each of the court's rulings correctly excluded irrelevant, cumulative evidence, or testimony outside the scope of cross or redirect examination.

**I. Defense Counsel's Attorneys' Notes**

¶82 Johnson argues the court erred by ordering the disclosure of his attorneys' notes. We review the legal scope of disclosure under Arizona Rule of Criminal Procedure 15 de novo, while we review the judge's rulings for an abuse of discretion. *Roque*, 213 Ariz. at 205 ¶ 21.

¶83 In his July 2015 notice of mitigation witnesses, Johnson included summaries of witness statements. The State argued the summaries did not comply with Rule 15.2(h) and asked the court to order that Johnson turn over all written witness statements, not just summaries. Johnson responded that the notes were not subject to disclosure because they were investigatory notes of the defense team and reflected counsel's opinions, conclusions, and impressions. Johnson further asserted that counsel's notes of meetings were inaccurate because they did not reflect verbatim statements and instead were "only quick notes of their own

STATE v. JOHNSON  
Opinion of the Court

impressions of the statements made by the witnesses,” and that a conflict might arise should counsel be called to verify the veracity of any statements. *See Dean v. Superior Court*, 84 Ariz. 104, 110–13 (1958). The court entered an order for Johnson to “disclose as soon as possible . . . any and all witness statements not previously disclosed, with defense team opinions, theories and conclusions redacted.” The court further informed Johnson that he could seek in camera review if he believed disclosure of a specific witness statement would violate an ethical obligation.

¶84 Johnson sought special action relief, which was denied. The court of appeals concluded that the order allowed Johnson to redact opinions, theories, and conclusions from the handwritten notes, and stated that “[p]ending the result of an *in camera* review,” it was “in no position to rule in the abstract on whether disclosure of any specific witness statement may raise ethical concerns.”

¶85 Arizona Rule of Criminal Procedure 15.2(h)(1)(A)(ii) requires disclosure of any written or recorded statement. Rule 15.4 defines a statement to include “a written record or summary of a person’s oral communications,” but protects “[s]uperseded [n]otes” which are not “statement[s] if they were substantially incorporated into a document or report . . . .” Ariz. R. Crim. P. 15.4(a)(1)(C), (a)(3). Further, Rule 15.4 protects an attorney’s work product, providing that a “party is not required to disclose . . . records, . . . reports, or memoranda to the extent they contain the opinions, theories, or conclusions of the prosecutor or defense counsel.” *Id.* 15.4(b)(1).

¶86 Rule 15.2(h) statements, however, “do not meet the ‘work product’ exception to disclosure under Rule 15.4(b)(1), . . . as they are not ‘theories, opinions and conclusions’ of the parties or their agents.” *See State v. Nunez*, 23 Ariz. App. 462, 463 (1975) (citation omitted). “To rule otherwise would make a premium out of [n]ot taking verbatim statements in order to avoid the disclosure required by the rules.” *Id.*; *see also Austin v. Alfred*, 163 Ariz. 397, 403 (App. 1990) (stating that it “would be incongruous to allow a party” to use the attorney-client privilege as a strategic tool to “deny access of the opposing party to relevant information”).

¶87 Johnson cites *Hickman v. Taylor*, 329 U.S. 495, 508–14 (1947), and *Upjohn Co. v. United States*, 449 U.S. 383, 399–401 (1981), to support his argument, but neither compels a different result. In *Hickman*, the petitioner

STATE v. JOHNSON  
Opinion of the Court

sought the disclosure of witness statements, private memoranda, and personal recollections. 329 U.S. at 510. The Court found the petitioner's request to be a simple attempt, "without purported necessity or justification," *id.*, to gather evidence "revealed to him already through the interrogatories or . . . readily available to him direct from the witnesses for the asking," *id.* at 509, "only to help prepare himself to examine witnesses and to make sure that he ha[d] overlooked nothing," *id.* at 513. The Court stated that "[u]nder ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness" and that "[n]o legitimate purpose" would be served. *Id.* at 512-13.

¶88 But the Court did not preclude the production of statements in all cases. Instead, it stated that "[w]here relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." *Id.* at 511. Indeed, "[w]ere production of written statements and documents to be precluded under such circumstances, the liberal ideals of [discovery] would be stripped of much of their meaning." *Id.* at 511-12.

¶89 In *Upjohn*, the Court reiterated that "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes." 449 U.S. at 399; *see also Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000) (reasoning that attorney notes reveal the attorney's legal conclusions because, when taking notes, attorneys focus on those facts they deem legally relevant). But as in *Hickman*, the *Upjohn* Court explicitly stated that it was not adopting a bright-line rule. 449 U.S. at 401 ("We do not decide the issue at this time.").

¶90 Here, the statements being sought were not protected by any privilege, *see Nunez*, 23 Ariz. App. at 463, nor did the court allow "unfettered scrutiny" of the notes, *cf. State ex rel. Corbin v. Ybarra*, 161 Ariz. 188, 192 (1989). Rather, it properly ordered production by in camera review to allow Johnson to redact any "opinions, theories, or conclusions" that defense notes included, and Johnson does not raise any dispute arising from that process.

¶91 No abuse of discretion occurred. And although Johnson challenges the court's ruling on Fifth, Sixth, Eighth, and Fourteenth



STATE v. JOHNSON  
Opinion of the Court

Amendment grounds, as well as on article 2, sections 4, 15, and 24 of the Arizona Constitution, he provides no basis to conclude the trial was unfair or that a due process or right to counsel violation occurred, fails to develop this portion of his argument, and thus waives it. *Bolton*, 182 Ariz. at 298.

**J. Motion to Withdraw from the 2010 Armed Robbery Plea**

¶92 Johnson argues the court denied him the presumption of innocence when it refused to allow him to withdraw from his guilty plea in his unrelated armed robbery case. As the State correctly notes, however, this Court is limited to the issues raised in this appeal. *See* Ariz. R. Crim. P. 31.2(b) (stating that the automatic appeal of a death penalty verdict operates “with respect to all judgments entered and sentences imposed *in that case*” (emphasis added)). This Court has no jurisdiction over the armed robbery plea or the court’s denial of Johnson’s motion to withdraw his plea agreement in that case.

**K. Compelled Releases**

¶93 Johnson argues the court erred by ordering him to sign releases for certain records. We review the trial court’s discovery rulings for an abuse of discretion, but note that when the court commits an error of law in the process of reaching a discretionary conclusion, it may be regarded as having abused its discretion. *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 253–54 ¶ 10 (2003).

¶94 Both before and during the trial, the State requested records from BYU-Idaho, Mesa Community College, and Johnson’s Colorado presentence report. *See* A.R.S. § 13-752(G) (providing that “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” and may present “any evidence regarding the defendant’s character, propensities, criminal record or other acts”). After the State encountered difficulty obtaining the records, the court ordered Johnson to sign releases so the State could obtain them. Johnson does not challenge the disclosure of the records, but instead only being compelled to sign the releases.

¶95 Johnson argues the compelled release order was improper, citing *Sherlock v. Fontainebleau*, 229 F.Supp.3d 1277, 1282–83 (S.D. Fla. 2017) (holding that, under the Health Insurance Portability and Accountability

STATE v. JOHNSON  
Opinion of the Court

Act of 1996 (“HIPAA”), a party must comply with the disclosure procedures of HIPAA and the court may not compel a party to sign release authorizations). Johnson further argues that a compelled release is not voluntary and that the court’s orders cast doubt upon the fairness of the proceedings.

¶96 But in *Sherlock*, the court recognized the “absence of controlling authority” and that courts were split regarding whether the compelled signing of releases was permissible. *See id.* at 1281–82. And its holding was dependent upon, and limited to, Federal Rule of Civil Procedure 34 and the disclosure procedures of HIPAA. *See id.* at 1282–83 (stating that “[u]nder the HIPAA regulations, a health care provider is authorized to produce records in response to a subpoena,” which “should be more than sufficient to cause a provider to turn over the responsive medical records”).

¶97 Here, the court had the authority to order Johnson to make records available to the State. *See* Ariz. R. Crim. P. 15.2(g)(1) (granting the court the authority to order, upon the state’s motion, the disclosure of material or information not already included if the state has substantial need for it, the “State cannot obtain the substantial equivalent by other means without undue hardship,” and the disclosure would not violate the defendant’s constitutional rights). The State sought relevant records, to which it was entitled, but as it related to BYU-Idaho, claimed its only access to such records was by an Idaho court order or signed authorization; BYU-Idaho would not recognize an Arizona court order. As for Mesa Community College, the State argued that Mesa Community College waits ten days for an opposing side to respond to a court order and that the college failed to respond to the last court order because it did not believe the order was served properly. Similarly, the State informed the court that Colorado required a court order or signed release.

¶98 Given the State’s right to the records and the difficulty in otherwise obtaining the records, we find no error.

**L. Voir Dire**

¶99 Johnson argues the court prevented him from choosing a constitutionally adequate jury by limiting his ability to question jurors on whether they would be willing to consider mitigation evidence. We review

STATE v. JOHNSON  
Opinion of the Court

rulings on voir dire and motions to strike for an abuse of discretion. *Glassel*, 211 Ariz. at 45 ¶ 36.

¶100 Before trial, the State filed a motion to prohibit Johnson from asking potential jurors their views on specific types of mitigating circumstances. In opposition, Johnson argued the court should allow “case specific” questions regarding whether jurors could impartially vote for life or death in light of certain mitigating circumstances. The court forbade questions “that groom or condition prospective jurors regarding evidence that may be presented at trial,” but stated that it might allow appropriate case-specific questions.

¶101 After voir dire, Johnson filed a motion declining to pass the jury panel, arguing that he had inadequate “time and opportunity” to “vet” the jury panel pursuant to *Morgan v. Illinois*, 504 U.S. 719 (1992). Johnson further argued that he should have been allowed to ask the jurors whether, given the facts of the case as set out in the defendant’s proposed juror questionnaire, they would render a verdict of death. The court denied Johnson’s motion, finding “its rulings have all been within the [sic] its discretion and consistent with Arizona Supreme Court precedent.” We agree.

¶102 A defendant is entitled to a fair and impartial jury. *Velazquez*, 216 Ariz. at 306 ¶ 18. As such, due process requires that trial courts permit a defendant to inquire whether prospective jurors would always impose the death penalty. *Morgan*, 504 U.S. at 729–33. However, this principle does not permit the defendant to “ask a juror to speculate or precommit on how that juror might vote based on any particular facts,” *Smith*, 215 Ariz. at 231 ¶ 42 (internal quotation marks omitted), nor does it allow the defendant to ask questions regarding specific aggravating circumstances or “what types of evidence the [jury] will consider to be mitigating,” *State v. Patterson*, 230 Ariz. 270, 273 ¶ 8 (2012) (quoting *Glassel*, 211 Ariz. at 47 ¶ 44).

¶103 Here, Johnson sought to ask whether, based on the facts of the case, potential jurors would render a death verdict. He further sought to ask, “[w]hat would ‘mitigation’ mean to you?” He thus tried to ask the case-specific questions our case law generally prohibits.

¶104 Insofar as Johnson argues he should have been allowed to ask permissible case-specific questions, he ignores that the court granted him

STATE v. JOHNSON  
Opinion of the Court

the opportunity to ask such questions when appropriate. *See State v. Garcia*, 224 Ariz. 1, 8–9 ¶¶ 14–16 (2010) (allowing case-specific questions in order to “properly probe[] beyond abstract juror views on capital punishment” so long as they “merely asked [whether] jurors . . . could *consider* the death penalty in circumstances in which it is permitted under Arizona law”). In addition to multiple juror questionnaire questions about predispositions on capital punishment, *see Glassel*, 211 Ariz. at 46 ¶ 38, Johnson asked jurors “whether [they] could imagine a situation where the totality of a defendant’s character, including things he’s endured or accomplished, could warrant mercy, despite his crimes.”

¶105 Separately, Johnson argues that voir dire was inadequate because the court limited the parties to roughly four-and-a-half minutes per juror. Johnson’s claim is meritless. First, the jurors completed a 100-question juror questionnaire to help the parties narrow their follow-up questions. Second, the court stated that it was “willing to work with [the parties] if somebody says something that needs more follow-up than anticipated,” and would allow “reasonable continuances where appropriate.” The court showed overall flexibility by granting additional time when needed. *See State v. Acuna Valenzuela*, 245 Ariz. 197, 208 ¶ 19 (2018). No abuse of discretion occurred. *See State v. Escalante-Orozco*, 241 Ariz. 254, 271 ¶¶ 33–34 (2017) (affirming five-minute-per-juror time limit), *abrogated on other grounds by Escalante*, 245 Ariz. 135.

**M. Motions to Strike Jurors for Cause**

¶106 Johnson argues he was precluded from using peremptory strikes on prospective jurors 56, 154, and 294 because he was forced to use them on prospective jurors 9, 31, and 59, whom the court refused to strike for cause. We review the trial court’s denial of a motion to strike a juror for an abuse of discretion, giving deference to the trial court, which was in the best position to observe the potential jurors. *Patterson*, 230 Ariz. at 274 ¶ 14.

*i. Non-strike of prospective jurors 9, 31, and 59*

¶107 During voir dire, Johnson posed the following question to prospective juror 9:

[L]et’s say you’re sitting as a juror on a case, and that it’s a first-degree murder case, intentional premeditated murder;

STATE v. JOHNSON  
Opinion of the Court

that you and 11 other members of that jury found the defendant, beyond a reasonable doubt, guilty of intentional premeditated killing of an innocent victim; that you and the 11 other jurors considered any defenses that might have been offered, whether it was self-defense, defense of others, heat of passion. For you, in that case, would the death penalty be the only reasonable penalty that you would consider?

Johnson asked similar questions to prospective jurors 31 and 59.

¶108 The State objected, arguing that “[w]hile [Johnson] can ascertain whether going into a penalty phase . . . a juror may be leaning one way or the other, that hypothetical is improper because it does not fully tell the juror—and they can’t bait the juror into yes or no, without telling them they have to consider mitigation.” The court agreed, finding the question misleading. Nevertheless, the court allowed Johnson to ask the question as a three-part question, with follow-up questions whether the juror could apply the law as it pertained to finding an aggravating circumstance and considering mitigation. Prospective jurors 9 and 31 answered “no,” that they could not imagine a situation where the totality of someone’s character could warrant mercy in such a scenario, while prospective juror 59 answered that she would lean towards the death penalty. Johnson then moved to strike the three prospective jurors for cause. The court denied Johnson’s motion, finding that the hypothetical posed was confusing and misleading, and stated that the core question was whether the jurors could be impartial at the beginning of the penalty phase, which the court believed they could be.

¶109 “A juror who will automatically vote for the death penalty without considering the presence of mitigating circumstances does not meet th[e] threshold requirement of impartiality.” *Velazquez*, 216 Ariz. at 306–07 ¶ 18 (internal quotation marks omitted). But a prospective juror is not precluded from serving on the jury simply because he favors the death penalty. *Id.* at 307 ¶ 19. “[I]f the juror is willing to put aside his opinions and base his decisions solely upon the evidence, he may serve.” *Id.* (citation and internal quotation marks omitted).

¶110 Here, prospective jurors 9, 31, and 59 all stated they would keep an open mind during the trial, could consider mitigation evidence, and would not automatically vote for the death penalty. *See Wainwright v.*

STATE v. JOHNSON  
Opinion of the Court

*Witt*, 469 U.S. 412, 423 (1985) (requiring jurors to “conscientiously apply the law and find the facts”). Further, prospective juror 31 answered that she could responsibly and respectfully make a decision based on the facts of the case, but only after she heard the case details and was provided evidence. And prospective juror 59 added that even in the face of absolute guilt, she would find sentencing the defendant to death to be difficult.

¶111 Though prospective jurors 9 and 31 answered that they could not imagine a situation where the totality of the defendant’s character could warrant mercy, they did so only after a misleading hypothetical that presupposed guilt and an aggravating circumstance, omitted mitigation, and risked implying that a death sentence was required. Indeed, prospective juror 59 answered that she would lean towards the death penalty but qualified that her answer was based on Johnson’s hypothetical. The court was in the best position to observe the prospective jurors and determine whether they were impaired. *See Patterson*, 230 Ariz. at 274 ¶ 14. And the record does not indicate that prospective jurors 9, 31, or 59 were substantially impaired or unable to perform their duties as jurors in accordance with the instructions and oath such that denying Johnson’s motion to strike was an abuse of discretion.

*ii. Failure to strike prospective jurors 56, 154, and 294*

¶112 Johnson next claims the court erred by refusing to strike prospective jurors 56, 154, and 294 for cause. Johnson did not move to strike prospective jurors 56 or 154, however, so we review Johnson’s challenge as to them for fundamental error. *See Velazquez*, 216 Ariz. at 309 ¶ 37.

¶113 Section 21-211(2) and (4), A.R.S., provides that any person who is “interested directly or indirectly in [a] matter” is disqualified from sitting on a jury in that case, as are those who are “biased or prejudiced in favor of or against either of the parties.” Further, Arizona Rule of Criminal Procedure 18.4(b) provides that “[o]n motion or on its own, the court must excuse a prospective juror or jurors from service in the case if there is a reasonable ground to believe that the juror or jurors cannot render a fair and impartial verdict.” *See also State v. Moore*, 222 Ariz. 1, 10 ¶ 38 (2009) (stating a judge must remove a potential juror if that person’s “views may ‘prevent or substantially impair the performance of [the juror’s] duties’” (alteration in original) (quoting *Witt*, 469 U.S. at 424)). However, a “prospective juror need not be disqualified unless his opinion is

STATE v. JOHNSON  
Opinion of the Court

unqualified” or “fixed.” *State v. Narten*, 99 Ariz. 116, 122 (1965). And “a juror’s assurances of impartiality need not be couched in absolute terms.” *State v. Hoskins*, 199 Ariz. 127, 139 ¶ 37 (2000). “If a juror is willing to put aside his opinions and base his decision solely upon the evidence, he may serve.” *State v. Martinez*, 196 Ariz. 451, 459 ¶ 28 (2000) (citation omitted).

a. Prospective juror 56 (impaneled juror 1)

¶114 Johnson claims prospective juror 56 (hereinafter impaneled juror 1) was predisposed in favor of the State and believed the State had “godly authority.” But a review of juror 1’s responses does not indicate bias. In his questionnaire, juror 1 stated he believed Arizona’s criminal laws were generally appropriate and that he “believe[d] that the government has the authority from God to uphold the law and to keep citizens safe.” When asked whether he would accept the responsibility of serving on a death sentence jury, juror 1 answered that God gave the authority to the State and it was juror 1’s faith in God that allowed him to accept the responsibility.

¶115 None of his answers indicated that he believed God favored the State or imposition of the death penalty. Rather, each of his answers provided why he felt the death penalty could be imposed, as he wrote, “if necessary.” Indeed, juror 1 stated that he neither opposed nor favored the death penalty, was willing to follow the law as instructed, that “it would be hard to have someone’s life in [his] hands, but [he] could be impartial,” he would keep an open mind, and that he would not automatically vote for the death penalty without considering the evidence.

b. Prospective juror 154 (impaneled juror 8)

¶116 Johnson claims prospective juror 154 (hereinafter impaneled juror 8) had a strong, pro-law enforcement bias and was more likely to believe police officers. In his questionnaire, juror 8 disclosed that he had a friend in the Phoenix Police Department and answered that he had favorable experiences with law enforcement because he “work[ed] with law enforcement at [his] church.” However, juror 8 answered that he would follow Arizona law requiring him to give no greater or lesser weight to a law enforcement officer’s testimony, stated he would keep an open mind, and would follow the law as instructed.

STATE v. JOHNSON  
Opinion of the Court

¶117 During follow-up questioning, Johnson asked whether juror 8 would lean towards believing law enforcement based on his relationships. Juror 8 responded, “You know, I’ll be honest. I want to say no that I wouldn’t, but I would do my best not to.” When asked again whether his close relationship with law enforcement would prevent him from impartially judging the credibility of law enforcement officers, juror 8 answered “no.” Only when Johnson pushed further, asking “in [juror 8’s] heart of hearts” whether it was not a “no” but a “maybe,” did juror 8 state that though he would do his best to check his prejudices, he would be lying if he said it was a definite no, and that his close friendship with a “good” officer might cause him to give other officers the benefit of the doubt.

¶118 But juror 8 also stated that he would do his best to check any prejudice or bias, and repeatedly answered that he would follow the instructions and law. Subsequently, juror 8 stated that he would not believe every word an officer said just because of his or her title but instead would look at what was being said and determine on his own whether it made sense to him. Taken as a whole, juror 8’s answers do not evidence a pro-law enforcement bias or inability on his part to be impartial. *See State v. Clabourne*, 142 Ariz. 335, 344 (1984) (finding no bias, and thus no error, where, though a juror had acquaintances with members of law enforcement, all jurors stated they would view the evidence fairly).

c. Prospective juror 294 (impaneled juror 12)

¶119 Johnson argues that prospective juror 294 (hereinafter impaneled juror 12) was biased because she voiced strong feelings regarding victims’ rights and had a friend who suffered domestic violence. On her questionnaire, juror 12 revealed that a good friend had been the victim of domestic violence and that her view of the criminal justice system was negatively affected because restraining orders did not seem to work. However, in the very next question, she answered that those views would not impact her ability to be fair and impartial in the case. And as with jurors 1 and 8, juror 12 responded that she would keep an open mind during each phase of the trial.

¶120 During follow-up, Johnson asked juror 12 to clarify her questionnaire statement that she was “a strong believer in victim’s rights.” Juror 12 said that while she regularly heard about the rights of the accused, she rarely hears about the possible horror the victim might have gone



STATE v. JOHNSON  
Opinion of the Court

through and would be interested in hearing that. When asked whether hearing victim impact testimony would sway her, juror 12 answered that she did not know how it would affect her but stated she “would try very hard to be open minded, and strong and impartial.” Upon further questioning by the court, juror 12 answered that she could set aside any feelings and be fair and impartial.

¶121 Jurors 1, 8, and 12 all answered that they could be fair and impartial, and none of their colloquies indicate otherwise. The court did not abuse its discretion in failing to strike them for cause. *See State v. Tison*, 129 Ariz. 526, 533 (1981) (“Without a showing of unqualified partiality of the juror, we will not upset a determination so clearly within the province of the [trial] court.”).

**N. Motion to Strike Juror 6**

¶122 Johnson argues the court erred by denying his motion to strike impaneled juror 6 for cause. Again, we review the court’s denial for an abuse of discretion. *See Lynch I*, 238 Ariz. at 105 ¶ 71.

¶123 During the trial, Johnson moved to disqualify juror 6 because the juror’s daughter had been the victim in an unrelated case arising in February 2016, and Johnson argued this would bias juror 6 in favor of the prosecution. Juror 6 said she had only learned of the incident involving her daughter months after completing the juror questionnaire.

¶124 Rule 18.4(b) requires dismissal of “jurors who cannot render a fair and impartial verdict,” *Eddington*, 228 Ariz. at 363 ¶ 7, while § 21-211(2), (3), and (4) bar jurors who are interested in the matter or “biased or prejudiced in favor of or against either of the parties.” Johnson argues that juror 6’s daughter becoming a victim in another case biased juror 6 in favor of the State. We disagree.

¶125 In *Eddington*, we held that “a peace officer currently employed by the law enforcement agency that investigated the case [was] an ‘interested person’ who [was] disqualified from sitting as a juror,” regardless whether he believed he could be impartial. 228 Ariz. at 365 ¶ 18. There, the officer was an “interested person” due to his working relationship with his law enforcement employer, and by extension, the prosecution. Here, no such relationship exists.

STATE v. JOHNSON  
Opinion of the Court

¶126 Even though a juror may have an experience with law enforcement or a victim of a crime, such experience alone is not disqualifying. *See, e.g., Hoskins*, 199 Ariz. at 139 ¶ 40, 141 ¶ 48 (affirming refusal to disqualify juror who had once been the victim of an armed robbery). Upon further questioning, juror 6 answered that she would be fair and impartial, that her daughter’s incident had nothing to do with Johnson’s case, and that she was “100 percent here.” The court found her answers appropriate, candid, and credible, leaving the court confident that she could serve. The law requires nothing more. *See id.* at 141 ¶ 48. No abuse of discretion occurred.

**O. Arizona Rule of Evidence 106**

¶127 Johnson argues the court erred during trial by limiting questioning and giving Arizona Rule of Evidence 106 preclusive effect. We review the trial court’s evidentiary rulings for an abuse of discretion but review de novo the court’s interpretation of the Arizona Rules of Evidence. *State v. Steinle*, 239 Ariz. 415, 417 ¶ 6 (2016).

¶128 Rule 106, the rule of completeness, provides that “[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.” It is thus “a rule of inclusion rather than exclusion.” *Steinle*, 239 Ariz. at 418 ¶ 10. Johnson argues that the court incorrectly relied on Rule 106 to limit Johnson’s cross-examination of Ms. Legg—the DNA technician—as well as his examination of mitigation witness Jonathan W.

¶129 First, the State objected to Johnson’s cross-examination of Ms. Legg. Johnson sought to impeach Ms. Legg by introducing evidence of lab errors. Although the court at one point stated the objection was on Rule 106 grounds, the State’s objections focused on lack of foundation and relevance: Johnson failed to cite which records he was relying on and attempted to impeach Ms. Legg by introducing evidence of lab errors in unrelated cases. Regardless, the court allowed Johnson to cross-examine Ms. Legg on each of his proffered grounds, so no exclusion of evidence occurred. There was no error.

STATE v. JOHNSON  
Opinion of the Court

¶130 Second, the State objected, citing Rule 106, to Johnson’s introduction of an incomplete statement that Johnson’s DNA could neither be included nor excluded from the zip ties found binding the victim. During cross-examination of Ms. Legg, Johnson asked whether she had emailed Detective Denning telling him that Johnson was not a match. The State objected and argued that Ms. Legg’s full statement was that “[i]t [was] not possible to include or exclude . . . Johnson.” The trial court correctly sustained the State’s objection. And though Johnson claims error, he received the answer he wanted: that the test was inconclusive, and that Johnson could not definitively be considered a “match.”

¶131 Third, the State objected during Johnson’s examination of family friend Jonathan W. Johnson asked Jonathan whether he thought Johnson “was the type of person that is open to growth and change,” based on a letter Jonathan had written on Johnson’s behalf. The State objected, citing Rule 106, argued that Johnson was picking and choosing words from the letter, and asked that it be allowed to re-cross Jonathan if the court allowed Johnson to continue. The court sustained the State’s objection. Rule 106 arguably applied, but the court allowed Johnson to continue asking Jonathan about his opinion, so even if its decision was wrong, no harm resulted.

¶132 Johnson argues the court improperly gave Rule 106 exclusionary effect, in that he believes the court precluded him from introducing evidence on Rule 106 grounds. Johnson’s argument borders on the frivolous: in each instance, the court allowed Johnson to introduce the evidence he sought. No error occurred.

**P. Prosecutorial Misconduct**

¶133 Johnson argues his conviction was tainted by prosecutorial misconduct. We review claims of prosecutorial misconduct by assessing each claim independently. *Acuna Valenzuela*, 245 Ariz. at 216 ¶ 66. If Johnson objected, we review the purported misconduct for harmless error; if he failed to object, we review for fundamental error only. *Id.* “After determining which claims constitute error,” we consider whether their cumulative effect resulted in an unfair trial. *Id.* (quoting *State v. Hulsey*, 243 Ariz. 367, 388 ¶ 88 (2018)). “To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor’s misconduct so infected the trial with unfairness as to make the resulting

STATE v. JOHNSON  
Opinion of the Court

conviction a denial of due process.” *Id.* (quoting *State v. Martinez*, 230 Ariz. 208, 214 ¶ 24 (2012)).

*i. DNA evidence*

¶134 During the trial, the State produced evidence that officers found fourteen zip ties left behind at Taiwan Massage in addition to the pair of zip ties found binding the victim. Ms. Legg testified that Johnson’s DNA matched DNA left on the fourteen zip ties in at least ten of sixteen allele locations and that his DNA was found at the other allele locations but at insufficient levels to contribute to a result. Ms. Legg testified that the random match probability of the result was one in 600 trillion Caucasians, one in 3.40 quadrillion Southwestern Hispanics, and one in 145 quadrillion African-Americans. While Korean statistics were not used, Ms. Legg testified that the random match probability was generated based on the expected population in a given area—here, Mesa, Arizona—so the inclusion of any Asian statistics would have likely only increased the rarity of a match. As to the zip ties found binding the victim, Ms. Legg testified that Johnson’s DNA profile was present at between four and five allele locations, so his DNA could be included, but that there was not enough DNA present at enough allele locations to establish Johnson as a “match.”

¶135 During closing, the State argued that Johnson’s DNA was on the zip ties found binding the victim, stating this his “DNA remains [at] up to five locations” and that his “DNA is there.” During rebuttal closing, the State further argued, in response to Johnson’s defense that his DNA was not on the zip ties, that “[h]is DNA is on those zip ties . . . . He’s there between four and five loci. He’s just not there enough to call and he’s there on the zip ties, not just at 10 locations.” Johnson objected that the prosecutor’s closing misstated the evidence but was overruled.

¶136 Johnson argues the State’s closing argument was improper because it misstated the strength of the DNA evidence, citing *Duncan v. Commonwealth*, 322 S.W.3d 81, 91-92 (Ky. 2010). But in *Duncan*, the court only concluded the state’s argument—that “not excluded” meant “included” and that the defendant’s DNA was a “match”—was improper because there was no scientifically valid estimate of the probability that alleles would match. *Id.* Thus, by asking the jury to infer on the basis of the expert’s testimony that the defendant was the source of the DNA, “the

STATE v. JOHNSON  
Opinion of the Court

prosecutor sought to wring from that testimony a conclusion it could not reasonably yield.” *Id.* at 92.

¶137 Here, Johnson’s argument borders on frivolous. The evidence showed that Johnson “matched” the DNA found on the fourteen zip ties left at Taiwan Massage and that Johnson’s DNA profile was consistent with the zip ties found on the victim at between four and five allele locations. The State did not use the word “match” to link Johnson’s DNA to the ties found binding Fu, and its comment that Johnson’s DNA “is there” was nothing more than a reasonable argument based on the evidence. Further, because the State itself emphasized during closing that Ms. Legg wrote in an email to Detective Denning that Johnson could neither be included nor excluded, the jury knew the State was arguing a reasonable inference and not mispresenting a determined fact. *Contrast id.* at 91–92. There was no misconduct.

*ii. Withholding evidence*

¶138 Johnson argues the State violated its Rule 15 disclosure obligations, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), based on the State’s 2012 failure to timely disclose supplemental police reports and a letter purportedly written by Johnson.

¶139 Under *Brady*, the State must disclose all material, exculpatory evidence. 373 U.S. at 87. But though the State’s failure to timely disclose the police reports and letter constituted a late disclosure violation, the late disclosure did not result in the suppression of favorable evidence, and thus no *Brady* violation occurred. *See United States v. Walters*, 351 F.3d 159, 169 (5th Cir. 2003) (finding no *Brady* violation where the defendant received evidence four weeks before trial and “had almost a month after the government disclosed” it to investigate the material and “put it to effective use at trial” (internal quotation marks omitted)). The disclosure dispute occurred nearly four years before trial and Johnson admitted that no prejudice resulted.

*iii. Comment on Columbine evidence and Johnson’s allocution*

¶140 Johnson argues the State misled the jury into believing that the lack of evidence regarding Columbine and Johnson’s allocution proved Johnson was neither affected by Columbine nor sorry for his actions, where

STATE v. JOHNSON  
Opinion of the Court

the State had successfully precluded such evidence before trial. Johnson further argues the State improperly commented on the invocation of his right to remain silent. Johnson did not object at trial.

¶141 At the close of mitigation, Johnson presented his allocution, stating:

I'm very sorry for killing Ms. Fu. It was senseless and horrible. You have heard the mitigating factors of my life that my attorneys feel is relevant in bringing me to this point in my life. I would have pled guilty to this first-degree murder as early as March of 2012.

¶142 The State responded, relying on evidence adduced at trial, and argued that “[Johnson] didn’t touch on the tremendous harm and suffering and pain. . . . He didn’t care at the time he murdered [the victim] after dragging her into the back room, whether she was a mother or that he would absolutely destroy a family. He certainly never told you that. . . . Instead, when he talks about this crime, he asks about a book deal. . . . [H]e laughed when he was talking to Dr. DeMarte, both about the murder and the armed robbery. . . . How much sympathy did the defendant show any of his victims at any time[?]” The State further argued that Johnson “didn’t address a single factor in his life” but “told [the jury] that the mitigation [it was] presented . . . [is] what his attorneys believe [is] what brought the defendant to that point in his life,” and that, as it related to Columbine, “[n]ever once, ever, other than the mention of [his friend] Steven, did [the jury] ever hear any statement made by the defendant . . . about feeling bad for the murdered classmates, or teachers or the wounded.”

¶143 Johnson argues that it is improper for the State to take unfair advantage of the court’s evidentiary rulings, citing *People v. Daggett*, 225 Cal. App. 3d 751, 758 (1990). *Daggett* is inapposite. There the trial court erroneously precluded relevant information—that the child molestation victim, who was himself accused in an unrelated case of molesting other children, had been molested by other children in the past—and this error was compounded by the prosecutor’s argument during closing that the victim had learned the inappropriate behavior from being molested by the defendant. *Id.* at 754–57.

STATE v. JOHNSON  
Opinion of the Court

¶144 Here, the prerequisite error is missing. The court correctly precluded irrelevant Columbine evidence. *See supra* ¶¶ 68–69, 81. And as to his allocution, neither the court nor the State prevented Johnson from allocuting; the State argued that it had the right to rebut Johnson’s allocution should he claim remorse. *See State v. Goudeau*, 239 Ariz. 421, 468 ¶¶ 207–09 (2016).

¶145 As to his claim that the State improperly commented on the invocation of his right to remain silent, the State’s comments came in response to his allocution, *see id.* (finding no improper comment on the defendant’s Fifth Amendment right where the prosecutor’s comments came in response to the defendant’s allocution), and were based on evidence in the record, *see State v. Anderson*, 210 Ariz. 327, 350 ¶ 97 (2005) (allowing the prosecutor to comment that evidence was “not particularly relevant” or “entitled to little weight”). The State’s Columbine comments followed its argument that although Johnson presented a large portion of evidence regarding the Columbine shooting, no mitigation witness could testify that Johnson expressed remorse for the Columbine victims. Instead, the State argued, the evidence showed that Johnson felt sympathy for the shooters because they were bullied. No misconduct occurred.

*iv. Misstating the law*

¶146 Johnson argues the State misstated the law by arguing that the jurors had to find one mitigating circumstance was alone sufficient to warrant leniency, where mitigation is correctly considered in the aggregate. Johnson bases his argument on a statement in the State’s closing:

What value, what import, what importance, what weight, if any, do you give to a fact you believe was proven? Does it reduce the defendant’s moral culpability, his blameworthiness for the murder? And, finally, is it sufficiently substantial—is it proven and sufficiently substantial to call for leniency?

¶147 But the entirety of the State’s closing argument shows no misconduct occurred. The State correctly reiterated that the jurors “must decide how compelling or persuasive the totality of the mitigating factors are against the totality of the aggravating factors.” The State’s comment was only an argument that, as to each of Johnson’s ten proffered mitigating

STATE v. JOHNSON  
Opinion of the Court

circumstances, the jurors should evaluate each one to determine whether it was proven by a preponderance of the evidence and whether it truly related to an aspect of Johnson's background, character, propensities, record or circumstance of the offense. The State never argued that the jurors were limited to considering one mitigating factor to the exclusion of others or that Johnson had to prove that any single mitigating factor was sufficiently substantial on its own to warrant leniency.

*v. Shifting the burden of proof*

¶148 Johnson argues the State shifted the burden of proof to Johnson to submit evidence and prove his innocence. During the guilt phase closing argument, the State argued in rebuttal:

The physical evidence in this case does not have a motive or a reason to lie. And the plain and simple matter is that if what the defense is arguing to you is true there would be evidence to support those claims and there's an overwhelming lack of any evidence that anyone, other than the defendant, committed these crimes. This was a thorough and complete investigation regardless of the attacks you just heard.

Johnson did not object.

¶149 Due process requires the State to prove every element of a charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). The State improperly shifts the burden when it implies a duty upon the defendant to prove his innocence or the negation of an element, *see State v. Corona*, 188 Ariz. 85, 91 (App. 1997), and otherwise errs when it comments upon the failure of a defendant to testify or present a defense, *see State v. Still*, 119 Ariz. 549, 551 (1978). However, "[a] comment that certain facts brought out by the prosecution are uncontradicted is not objectionable." *Still*, 119 Ariz. at 551.

¶150 The entirety of the State's rebuttal closing argument was that, while Johnson argued in closing that the State did not prove that he committed the crime, "[Johnson] just did not count on the phone evidence, the DNA evidence, and those cell phone towers we know now he drove by going to the scene, while waiting at the scene, and running away, driving away from the scene." Further, the State did not argue unprompted that



STATE v. JOHNSON  
Opinion of the Court

Johnson failed to show someone else committed the murder. During his closing, Johnson argued the investigation was inadequate and inferred that someone else committed the crime even though he never noticed a third-party defense. The State objected. *Cf. State v. Acosta*, 101 Ariz. 127, 129 (1966) (“The general context of the argument surrounding the statements complained of was not to allude to defendant’s failure to testify, but rather to bring home the point that the evidence was, at least in the view of counsel for the state, uncontroverted, and justified a verdict of guilt.”). No misconduct occurred.

*vi. Impugning the integrity of defense counsel*

¶151 Johnson argues the State repeatedly impugned the integrity of defense counsel. Johnson fails to develop his argument, however, and so we find it waived. *Bolton*, 182 Ariz. at 298. Regardless, we note that the comments Johnson cites were either made in response to defense theories, mischaracterized in Johnson’s briefing, or occurred outside the presence of the jury. *See Acuna Valenzuela*, 245 Ariz. at 220 ¶ 93 (“[R]eferring to defense evidence as ‘myth’ or ‘fanciful’ and attacking defense theories [is] permissible, so long as it is directed at defense *theories* rather than defense *counsel*.”) (internal quotation marks omitted)).

*vii. Arguing inferences and conclusions during openings*

¶152 Johnson argues the State improperly argued inferences and conclusions during opening. “Opening statement is counsel’s opportunity to tell the jury what evidence they intend to introduce. [It] is not a time to argue the inferences and conclusions that may be drawn from evidence not yet admitted.” *Bible*, 175 Ariz. at 602 (citation omitted).

¶153 During the guilt phase opening, Johnson claims the State improperly focused on the victim’s family’s use of an interpreter by stating “their home language . . . is what is comfortable and safe . . . [a]s they listen to these horrific details of the murder.” Johnson argues this opening comment was paired with the State’s request during closing that the jury remember “how [the family] appeared in front of [them] heartbroken and the difficulties they encountered . . . trying to put into words in a language with letters and symbols we don’t understand, with the use of an interpreter[, t]he enormity of this loss, their grief, funneled through the interpreter.”

STATE v. JOHNSON  
Opinion of the Court

¶154 Johnson also argues the State impermissibly implied that the crime included deliberation, a conclusion, during its opening by arguing that Johnson took “the time effort and deliberation” to commit the murder. Again, Johnson timely objected.

¶155 As to the first statements, the prosecutor’s comments were not improper, but even if they were, any error was harmless. The jury was repeatedly instructed that the lawyer’s arguments were not evidence and the jurors were able to judge for themselves the manner in which the family spoke and the murder’s effect on them. *See State v. Newell*, 212 Ariz. 389, 403 ¶ 68 (2006) (stating “[w]e presume that . . . jurors follow[] the court’s instructions”).

¶156 As to the second statement, the prosecutor’s comment was a conclusion drawn from the facts and thus improper argument in opening remarks. But again, the error was harmless. The jury was instructed that the lawyer’s arguments were not evidence. *Id.* And “[w]hile[] the comment during opening statement was improper at that point, it was a reasonable inference from evidence later introduced and would have been proper during closing argument.” *Bible*, 175 Ariz. at 602.

*viii. Vouching*

¶157 Johnson argues the State engaged in vouching. “Two general forms of prosecutorial vouching exist: (1) when ‘the prosecutor places the prestige of the government behind its witness’; or (2) when ‘the prosecutor suggests that information not presented to the jury supports the witness’s testimony.’” *Acuna Valenzuela*, 245 Ariz. at 217 ¶ 75 (quoting *State v. Vincent*, 159 Ariz. 418, 423 (1989)). “Placing the prestige of the state behind its witness ‘involves personal assurances of a witness’s veracity,’ while ‘[t]he second type of vouching involves prosecutorial remarks that bolster a witness’s credibility by reference to matters outside the record.’” *Acuna Valenzuela*, 245 Ariz. at 217 ¶ 75 (alteration in original) (quoting *State v. King*, 180 Ariz. 268, 277 (1994)).

STATE v. JOHNSON  
Opinion of the Court

a. The prestige of the government

¶158 Johnson first argues that the State placed the weight of the government behind the witnesses by arguing that the victim’s daughter testified with “wisdom beyond her years” and that her husband “stood before you and told you how his family suffered a profound loss” which was “the measure of a man.” Johnson did not object.

¶159 But these statements, taken in the context of closing argument, do not establish vouching. Neither statement placed the weight of the government behind a witness by providing personal assurances of a witness’s veracity, *cf. Vincent*, 159 Ariz. at 423 (where the prosecutor argued that “the State wouldn’t have put Mr. Calaway on the witness stand if [it] didn’t believe every word out of his mouth”), nor did the statements imply that the jury should find them more credible because they were State witnesses, *see Acuna Valenzuela*, 245 Ariz. at 217 ¶ 75 (stating that vouching of this kind “involves personal assurances of a witness’s veracity” (quoting *King*, 180 Ariz. at 277)).

¶160 Johnson also claims the prosecutor improperly vouched by placing the weight of the government behind herself during arguments to the court, by avowing that she “probably touched those pages more times than the defense,” by arguing that she was “so detailed” and “so prepared” for her interviews, and by stating her “office’s position” on certain issues — “Judge, our office’s position is that the . . . State shouldn’t be in a position to come up with it just because the State disagrees.” But reviewing the record, we do not find that the State’s arguments to the court regarding its position on a disputed matter constitute vouching. And further, we note that each cited argument was made outside the presence of the jury.<sup>3</sup>

b. Facts not in evidence

¶161 Johnson next argues the State vouched by implying that facts not in evidence supported the State’s desired verdict. First, Johnson argues

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<sup>3</sup> Johnson argues, for the first time in his reply brief, that the State improperly vouched by using “we know” statements. *See Acuna Valenzuela*, 245 Ariz. at 218 ¶ 85. Because Johnson did not raise the issue in his opening brief, we do not consider it. *State v. Cannon*, 148 Ariz. 72, 79 (1985).

STATE v. JOHNSON  
Opinion of the Court

the State improperly vouched by implying that the judicial system already dismissed Johnson's claim of innocence:

You would have to believe this man is the unluckiest man on the face of the planet if you're to buy he was just merely present. You would also have to think the last four weeks of your life were an absolute waste because he just happened to be there. It's not a coincidence. It's not dumb, bad luck. Everything you've heard, everything the state has shown you is evidence of the defendant's guilt.

Johnson did not object.

¶162 The State's comment was based on evidence in the record and did not imply that facts not in evidence supported the State's desired verdict. *Cf. State v. Leon*, 190 Ariz. 159, 161–62 (1997) (where the prosecutor argued that the jury was "not going to have the inside information as to what occurred"). Neither was the State's comment isolated nor unprompted. Rather, the State's comment came in response to Johnson's cross-examination that attempted to portray Johnson as an unlucky, innocent bystander. To the extent the comment that "[y]ou would also have to think the last four weeks of your life were an absolute waste because he just happened to be there" was improper, any error was harmless, as the jury was properly instructed that the law presumed Johnson to be innocent and the jury "must not think that the defendant is guilty just because of a charge."

¶163 Johnson next claims the State improperly vouched by referencing the victim's family's use of an interpreter, as discussed above. *See supra* ¶¶ 153, 155. But just as the comments did not suggest the family was more credible because the State believed them, neither did they bolster the family's credibility by reference to something other than the facts in the record. No misconduct occurred.

*ix. Appealing to fears and sympathy*

¶164 Johnson claims the State improperly played to the jury's fears and sympathies. During its guilt phase closing argument, the State argued the following:

STATE v. JOHNSON  
Opinion of the Court

These were the last injuries inflicted, completely, totally without a doubt unnecessary. Completely. Completely. Completely unnecessary. As she was dying, as her heart no longer could beat, as her lungs could no longer fill with air, he's carving into her stomach.

....

If the defendant did nothing wrong or was just simply at the wrong place at the wrong time, why the lies and why the nature that little cutting mocking humor, but then again this is the same man who within an hour of leaving [Fu] tucked away in that back room could eat dinner with [his girlfriend] and spend part of the evening with his parents.

....

The killer is the defendant and he killed with premeditation. He killed with deliberation. He killed after thinking about it and he killed after he could have stopped and he killed because he wanted to and then he carved into her body because he wanted to.

Johnson did not object.

¶165 “Attorneys, including prosecutors in criminal cases, are given wide latitude in their closing arguments to the jury.” *State v. Comer*, 165 Ariz. 413, 426 (1990). Within that wide latitude, the State “may comment on the vicious and inhuman nature of the defendant’s acts.” *Id.* The State may not, however, make arguments which appeal to the passions, fears, or prejudices of the jury. *Id.* at 426–27.

¶166 The arguments here were not an appeal to fear, as the State made no argument that, in the absence of a guilty verdict, Johnson would pose a future danger. Instead, the arguments were directed at how terrible the murder was. To the extent the argument should have been reserved for the aggravation phase of the trial and went to the (F)(6) aggravator, any impropriety in the guilt phase closing was harmless. The comments did not have the effect of encouraging the jury to convict on a basis other than the evidence and the elements of the offense. Further, as in *Escalante-Orozco*, the comments were fleeting and unconnected, and the jury was instructed that the lawyer’s comments were not evidence and that they

STATE v. JOHNSON  
Opinion of the Court

were “not [to] be influenced by sympathy.” 241 Ariz. at 282 ¶ 102 (alteration in original). The comments were “not of such magnitude to deprive [Johnson] of a fair trial” during either the guilt phase or the aggravation phase. *Id.* (citation omitted).

*x. Encouraging the jury to use the verdict to send a message*

¶167 Johnson argues the State improperly encouraged the jury to use its verdict to send a message. During her penalty phase closing argument, the prosecutor argued:

Someone much smarter than I am gave a quote that a society declares its attitude toward crime by the punishment it exacts. We express how we feel about crime by the punishment we impose.

Another simple, less artful way to say this is that the punishment should fit the crime. And should reflect the horror, the disgust, that all of you must have felt as these days in trial unfolded and you saw the full extent of what this man has been capable – capable of in his life.

¶168 The prosecutor further argued later in closing that:

The death penalty is such an expression of moral outrage for crimes that some people choose to commit. Our society has a death penalty because we have a right to express our moral outrage for such behavior, and because you have a right to demand where does personal responsibility fit in? Because the exaggerations, the blame, and the excuses, and the lies are all going to stop now.

Johnson did not object to either comment.

¶169 But the State did not ask the jury to send a message to the community. *Cf. United States v. Runyon*, 707 F.3d 475, 514–15 (4th Cir. 2013) (“Whereas reminding the jury that it ‘express[es] the conscience of the community’ nevertheless maintains a proper focus on the defendant (since any ‘expression’ is directed at the defendant alone), urging it to ‘send a message to the community’ invites it to play to an audience beyond the

STATE v. JOHNSON  
Opinion of the Court

defendant” and “to use its decision . . . to serve some larger social objective,” which “is at least in tension with the individualized assessment of the defendant’s culpability that the Constitution requires.”) (alteration in original; *Sinisterra v. United States*, 600 F.3d 900, 910–11 (8th Cir. 2010) (finding error where the prosecutor linked the defendant’s charges to the broader drug problem, told the jury to act as the “conscience of the community,” and asked the jury to send a message with its verdict)). The State focused its argument on Johnson and argued that “the punishment should . . . fit the defendant, the criminal, in addition to fitting the crime.”

*xi. Improperly seeking to inflame the jury*

¶170 Johnson argues the State committed misconduct by attempting to inflame the jury, by arguing the murder was “grotesque,” “brutal,” “bizarre,” “horrific,” and “violent,” and by using the following adjectives to describe Johnson’s actions: “severely,” “terribly,” “vicious,” and “ceremoniously.”

¶171 Johnson claims that during its mitigation phase opening statements, the State further attempted to inflame and taint the jury by arguing that Johnson’s mitigation witnesses had “bias,” “motive,” and maybe even “an agenda.”

¶172 Finally, Johnson claims the State, during its closing argument, improperly tarnished the defense and its witnesses by telling the jury:

The problem with all of the evidence [Johnson] wants and needs you to believe is that a lot of it is simply just not true, was just not proven, or is exaggerated, or is presented in such a way to make you feel responsible that the defendant is now found guilty of first-degree murder with circumstances, those three [aggravators] that you found, that made the defendant eligible for the death penalty.

The bottom line is that the mitigation presented is not sufficiently substantial to justify leniency in this case.

Johnson never objected.

STATE v. JOHNSON  
Opinion of the Court

¶173 The State certainly used strong language during opening statements to describe the murder, but the evidence would later indicate that the murder was violent and brutal. *See State v. Phillips*, 202 Ariz. 427, 437 ¶ 47 (2002) (finding no impropriety in the prosecutor’s opening statement that defendant’s actions were “terrorizing,” that he appeared “outraged, beyond control, and absolutely terrifying,” and that the victims were “cowering, hiding, and praying to God Almighty” because those remarks were based on the evidence), *superseded by statute on other grounds as recognized in State v. Carlson*, 237 Ariz. 381 (2015).

¶174 The State’s warning of “bias” and “motive” addressed the credibility of Johnson’s witnesses and responded to Johnson’s attempt to bolster his mitigation witnesses’ credibility. During Johnson’s opening, he stated:

Ladies and gentlemen, you’re going to hear from [Johnson’s] friends, family, former classmates. We all know they’re going to be put in an uncomfortable seat as witnesses . . . . They’re not professional witnesses . . . .

. . . .

They’re certainly not going to be as polished as some of those other witnesses that you heard . . . .

. . . .

They’re going to be subject to cross-examination, too. And like all witnesses, you have to consider their credibility; but again, consider their situation. They’re here because they love [Johnson]. . . . Decide their credibility, but these folks are coming from a good place to come and testify for [Johnson], and they didn’t do anything wrong.

The State’s comments were not improper.

¶175 Nor were the State’s final comments, *supra* ¶ 172, an attempt to appeal to the jurors’ emotions by telling them the defense was trying to make them feel guilty about their decisions. Even if the comments could be read to represent an attack on the defense, *see Hulsey*, 243 Ariz. at 390 ¶¶ 98–99, they were minor and couched in the State’s argument that the jury was to impose the death penalty if it did not find mitigation sufficiently



STATE v. JOHNSON  
Opinion of the Court

substantial to call for leniency. On this record, we cannot say that any of these statements affected the jury's verdict or deprived Johnson of a fair trial, especially in light of the jury instructions that counsel's arguments were not evidence.

*xii. Cumulative effect*

¶176 Johnson argues the State repeatedly used improper arguments to obtain a conviction and death sentence and that the cumulative impact of its misconduct deprived him of due process. See *Acuna Valenzuela*, 245 Ariz. at 223 ¶ 118. But “[c]umulative error requires reversal only when misconduct is ‘so pronounced and persistent that it permeate[s] the entire atmosphere of the trial, indicating that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant.’” *Id.* at 224 ¶ 119 (quoting *State v. Payne*, 233 Ariz. 484, 515 ¶ 134 (2013)).

¶177 Here, the record does not support Johnson's claim. Johnson rarely objected and ignores that several of the purported improper comments occurred outside the presence of the jury during argument to the court. Indeed, the record reveals only a few minor instances of misconduct relating to improper inferences during opening statements. Accordingly, Johnson has failed to show the allegations so infected his trial as to deprive him due process.

**Q. Motion to Change Counsel**

¶178 Johnson argues the court improperly denied his two motions to change counsel. We review the court's denial of a request for new counsel for an abuse of discretion. *State v. Cromwell*, 211 Ariz. 181, 186 ¶ 27 (2005).

¶179 “A criminal defendant has a Sixth Amendment right to representation by competent counsel.” *Id.* ¶ 28; see also U.S. Const. amend. VI. “The presence of an irreconcilable conflict or a completely fractured relationship between counsel and the accused ordinarily requires the appointment of new counsel.” *Id.* ¶ 29. However, “single allegation[s] of lost confidence,” “disagreements over defense strategies,” or other conflicts “less than irreconcilable” do not necessarily require the appointment of new counsel. *Id.* Rather, “[t]o constitute a colorable claim, a defendant's

STATE v. JOHNSON  
Opinion of the Court

allegations must go beyond personality conflicts or disagreements”; the defendant instead bears the burden to demonstrate “facts sufficient to support a belief that an irreconcilable conflict exists warranting the appointment of new counsel in order to avoid the clear prospect of an unfair trial.” *Id.* at 187 ¶ 30.

*i. Johnson’s 2015 motion to change counsel*

¶180 In September 2015, Johnson filed a motion to change counsel and asked that “any competent lawyer” be substituted for all future proceedings. Johnson complained that (1) he wanted to see every motion defense counsel had filed on his behalf, but his lawyers had not sent them; (2) he had not seen the most recent “plea proposal” and that his lawyers included information in the proposals over his objection; (3) his lawyers had not filed motions that other capital defendants had filed in their cases; and (4) his lawyers had not given him copies of his mental health reports.

¶181 Johnson’s lawyers explained that they had not sent the mental health records to the prison for confidentiality reasons and that they had not sent a copy of every motion filed because the agency did not have the staff to send him five years’ worth of information at the time. His lawyers assured the court that they had filed all appropriate motions on Johnson’s behalf and spoke with Johnson “on a regular basis.” His lawyers denied that there was an irreconcilable conflict but acknowledged that if Johnson refused to cooperate in the future or insisted on inappropriate trial strategies, then one could develop.

¶182 The court informed Johnson that it found his lawyers were thorough, prepared, and diligent. The court further praised how consistently prepared Johnson’s lawyers were, despite complex issues, and how well they had worked with opposing counsel. The court denied Johnson’s motion, advised Johnson that he would be disadvantaged by a change of counsel because his current counsel had firsthand knowledge of all aspects of his case, and recommended that Johnson cooperate with his counsel.

¶183 Johnson has not met his burden to show that an irreconcilable conflict existed. Johnson’s disagreements in his 2015 motion were minor, and his attorneys regularly contacted him. *Cf. State v. Gomez*, 231 Ariz. 219, 224 ¶ 20, 225–26 ¶ 29 (2012) (concluding trial court did not err in denying

STATE v. JOHNSON  
Opinion of the Court

motion for change of counsel where defendant alleged that defense counsel had not visited him in more than a year and had not devoted enough time to prepare for the case). And though defense counsel noted there were some frustrations, counsel advised the court that they could continue to work together. The court was in the best position to consider the evidence of a conflict, found it insufficient, and so do we. See *Cromwell*, 211 Ariz. at 187 ¶ 35 (stating that the denial of the motion for change of counsel is discretionary and finding no abuse of discretion).

¶184 Nevertheless, Johnson argues the court erred by failing to consider the *State v. LaGrand* factors. See 152 Ariz. 483, 486–87 (1987) (stating that the court should consider “whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and quality of counsel”).

¶185 But “[t]he nature of the inquiry will depend upon the nature of the defendant’s request.” *State v. Torres*, 208 Ariz. 340, 343 ¶ 8 (2004). And in the grand scheme, the “request for new counsel should be examined with the rights and interest of the defendant in mind tempered by exigencies of judicial economy.” *LaGrand*, 152 Ariz. at 486.

¶186 Johnson argues the court erred by focusing on his counsel’s competence, citing *Torres*, 208 Ariz. at 344 ¶ 15 (stating that “in most cases, . . . ‘quality of counsel’” will not be a factor to consider when defendant requests substitution of counsel), but Johnson’s complaints regarding the motions his lawyers were filing on his behalf necessarily concern the adequacy of counsel and whether they were properly representing his interests. As the court recognized, nothing in the record indicated they were not.

¶187 As to the other *LaGrand* factors, “although the trial court could have engaged in a more searching exploration” of Johnson’s claims and counsel’s responses, “the court did not abuse its discretion because it sufficiently inquired into the purported [breakdown.]” *State v. Champagne*, No. CR 17-0425, 2019 WL 3676317, at \*3 ¶ 13 (Ariz. Aug. 7, 2019) (alteration omitted) (citation and internal quotation marks omitted). The court sought out counsel’s responses to Johnson’s claim of a breakdown and found them sufficient to dispel any concern. Further, the court considered that

STATE v. JOHNSON  
Opinion of the Court

Johnson's motion came four years into his case after many complex issues were resolved and found that he would be disadvantaged because not all firsthand knowledge his counsel possessed could be communicated to new counsel. The court did not abuse its discretion in denying Johnson's 2015 motion to change counsel.

*ii. Johnson's 2016 motion to change counsel*

¶188 During the penalty phase, Johnson made an oral motion for change of counsel. Johnson complained that (1) his lawyers were not asking the questions he wanted; (2) his attorneys did not impeach Detective Denning with a statement he believed was impeachment worthy; (3) his lawyers were not objecting to statements Dr. DeMarte assigned to him as Johnson expected they would; and (4) when Johnson requested to waive his presence because his friend was in attendance, his lawyers were overly concerned when told the friend's identity.

¶189 The court responded that Johnson's case was complicated and informed him that his lawyers had to make "difficult decisions on the fly," so "there's always a possibility of miscommunication [and] changes in strategy, depending on how the evidence comes in." However, nothing Johnson told the court persuaded it that the level of communication was diminished enough that the attorney-client relationship was affected. Rather, the court advised Johnson that his counsel was doing a "pretty darn good job, and they're doing their best for you," and denied his motion.

¶190 The court did not abuse its discretion in denying Johnson's 2016 motion to change counsel. Again, the disagreements were minor and related to trial strategy. *See Cromwell*, 211 Ariz. at 186 ¶ 29 (stating that differences in strategy are not an irreconcilable conflict). Though Johnson guessed that he and his counsel had "this communication breakdown between us" and that the relationship was "strained," the record does not suggest the relationship was fractured. After his 2015 motion to change counsel request, but before trial, Johnson filed a request to represent himself in the armed robbery matter, but specifically stated, when asked if he was getting along with his current counsel, "Yeah, yes, I am." Johnson further stated that nothing about his current counsel was bothering him and accepted that his current counsel would remain his advisory counsel for the armed robbery matter, without complaint.

STATE v. JOHNSON  
Opinion of the Court

¶191 Based on Johnson’s general complaints, the timing of his motion to change counsel, and the lack of evidence indicating the relationship was fractured or that communication was impaired, we hold the court did not abuse its discretion in denying his 2016 motion to change counsel.

**R. Abuse of Discretion Review**

¶192 Arizona law requires that we “review the sentencing portion of the trial even when a defendant fails . . . to challenge the jury’s decision with regard to either the aggravating factors or the imposition of the death sentence.” *State v. Morris*, 215 Ariz. 324, 340 ¶¶ 75–76 (2007); *see also* A.R.S. § 13-756(A).

*i. Aggravating circumstances*

¶193 We will uphold the jury’s findings of aggravating circumstances “if there is ‘any reasonable evidence in the record to sustain it.’” *Morris*, 215 Ariz. at 341 ¶ 77 (quoting *State v. Veatch*, 132 Ariz. 394, 396 (1982)). As to the (F)(6) aggravator, we have already confirmed that substantial evidence supports it. *See supra* ¶¶ 26–32. Evidence also supports the jury’s findings of the (F)(2) and (F)(7) aggravators: for the (F)(2) aggravator, that Johnson was previously convicted of a serious offense—the armed robbery—and for the (F)(7) aggravator, that Johnson committed the murder while on probation and release.

*ii. Imposition of the death sentence*

¶194 We will uphold the jury’s death verdict “if any reasonable juror could conclude that the mitigation presented was not sufficiently substantial to call for leniency.” *State v. Naranjo*, 234 Ariz. 233, 250 ¶ 89 (2014) (internal quotation marks omitted).

¶195 Johnson presented the following mitigating factors to the jury: (1) Johnson’s capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired but not so impaired as to constitute a defense to prosecution; (2) Johnson has a genetic predisposition to substance abuse; (3) Johnson has a genetic predisposition to mental health issues; (4) Johnson was adopted as an infant and has been diagnosed as suffering from dissociative disorder

STATE v. JOHNSON  
Opinion of the Court

as a result of his adoption, i.e., “adopted-child syndrome”; (5) Johnson was a freshman at Columbine High School at the time of the infamous school shooting and has been diagnosed with PTSD as a result; (6) Johnson was an adolescent when he started abusing substances and has a history of substance abuse; (7) Johnson has a history of mental illness; (8) Johnson’s willingness to accept full responsibility for his actions and his willingness to plead guilty to all charges and agree to be sentenced to life in prison without the possibility of parole; (9) Johnson’s life has value to his family and friends; and (10) Johnson has the love and support of his family.

¶196 Johnson’s mitigation focused mainly on his substance abuse, the Columbine shooting, and his PTSD, but was countered by the State during rebuttal. Though Johnson argued that Columbine changed and affected him, the State produced evidence showing that Johnson abused drugs and acted recklessly before the Columbine shooting. The State also presented rebuttal showing the Columbine shooting’s impact on Johnson was not as severe as he claimed. Johnson presented evidence that he was bullied because of his adoption and race, but the evidence also indicated that his family loved and supported him and that his cousins protected him from bullying. Further, although Johnson presented the testimony of Dr. Kirschner to establish adopted-child syndrome, family members testified that Johnson did not display anger about his adoption or otherwise show that it negatively affected him. And despite his family’s love and support, Johnson’s family recognized he was untruthful and dangerous at times.

¶197 Johnson argued that he had a genetic predisposition to substance abuse, but the State showed Johnson’s erratic behavior was not limited to drugs: he street-raced cars, passed counterfeit money, and engaged in fights. To the extent medical experts diagnosed Johnson with PTSD and personality disorder NOS, the State produced evidence indicating that Johnson underreported or misrepresented his behavior. Last, to the extent Johnson claimed remorse, his sincerity was undercut by testimony from Dr. DeMarte that he laughed and was dismissive about the murder.

¶198 Even if Johnson’s mitigation evidence were given its full weight, the jurors could reasonably have concluded that it did not call for leniency in light of the brutality and senselessness of the murder along with the other aggravating factors. The jury did not abuse its discretion when it sentenced Johnson to death.

STATE v. JOHNSON  
Opinion of the Court

**S. Excessive Page Limits**

¶199 Though not raised by either party, we must address the excessive lengths of Johnson’s briefs. Some cases are more complex than others, and in those cases, flexibility is required. But Johnson’s filings stretch that flexibility too far.

¶200 Johnson submitted an original opening brief totaling 105,621 words and covering more than 400 pages, nearly four times our limit, which itself is greatly expanded beyond page limits in civil and non-capital criminal cases. *See* Ariz. R. Crim. P. 31.14(a) (limiting opening briefs to 28,000 words). We struck it but nevertheless granted him 42,000 words to file a revised opening brief. In doing so, we stated:

In all capital cases, the Court independently reviews the record in its entirety, including all evidence, transcripts, and briefs. For that reason counsel’s arguments regarding the need to file a brief far exceeding the extended page limits provided for capital cases are not well-taken, and in any event they should have been raised in advance of the due date to prevent further delay in this case.

¶201 Johnson complied, submitting 41,958 words, but did so by shortening some of his arguments and relegating record citations and legal citations to footnotes without legal analysis. *See* Ariz. R. Crim. P. 31.10(a)(7)(A) (requiring arguments to contain (1) “appellant’s contentions with supporting reasons for each contention,” along with (2) “citations of legal authorities and appropriate references” to the record). Johnson essentially “evade[d] our page limit by manipulating the format of his brief,” of which we disapprove. *Bolton*, 182 Ariz. at 298.

¶202 In response, the State argued that Johnson had waived issues that were not sufficiently developed, specifically issues H, M, O, and P. Johnson then claimed this Court’s previous order and imposition of a 42,000-word limit prevented him from fully developing his arguments. In *Bolton*, we rejected that exact argument. *Id.* (noting the “[d]efendant could very well have complied with our rules in the first instance”). There, we “strongly disapprove[d] of defendant’s attempt to create legal issues out of

STATE v. JOHNSON  
Opinion of the Court

his own failure to cooperate with this [C]ourt in reviewing his case.” *Id.* We do so again here.<sup>4</sup>

¶203 Nevertheless, we granted Johnson 21,000 words in his reply brief, 7,000 more than our traditional limit, *see* Ariz. R. Crim. P. 31.14(a) (limiting reply briefs to 14,000 words), to further develop the arguments that the State claimed were waived. Johnson submitted a 41,853 word reply brief. By Johnson’s own recording, 9,072 words were spent supplementing the challenged issues, while 32,781 words were for its regular reply. Its 32,781-word reply alone exceeds our order by over 10,000 words.

¶204 Johnson argues he could not comply with our word limits because winnowing issues is unethical, citing ABA Guidelines 6.8(a)(5) and comment to Guideline 10.15.1.C, along with *Lockett*, 438 U.S. at 604 (noting the importance of procedural protections to ensure the reliability of sentencing). We reject Johnson’s argument. As we stated in *State v. Atwood*:

Each member of this court is acutely aware of the gravity of the decisions we are called upon to make in capital cases. Therefore, to argue that such deviations from professional appellate practice as occurred in this case are justifiable because the death penalty is at issue is unpersuasive. Rather than aiding our review of defendant’s case by judiciously selecting, fully researching, and concisely arguing the colorable issues raised by the trial record, appellate counsel has bombarded this court with a salvo of dubious claims serving little purpose other than to detract from those issues having arguable legal merit.

171 Ariz. 576, 659 (1992).

¶205 Good advocacy requires winnowing.

Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive

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<sup>4</sup> To dispel any concern that Johnson did not have time to edit his briefs to comply with our limits, he requested, and we granted, five extensions. And when we struck his original opening brief in April 2018, we granted him an additional month to edit his brief to comply.



STATE v. JOHNSON  
Opinion of the Court

to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. . . . [E]xperience on the bench convinces [us] that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.

Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 25 Temple L.Q. 115, 119 (1951).

¶206 Similarly, good advocacy requires editing. It may be that it is “harder to write shorter and crisper,” Bryan A. Garner, *Interview with Chief Justice John G. Roberts, Jr.*, 13 Scribes J. Legal Writing 5, 33 (2010) (quoting Chief Justice Roberts), and that writing with “[s]implicity and clarity” requires more “rounds of editing,” Bryan A. Garner, *Interview with Justice Clarence Thomas*, 13 Scribes J. Legal Writing 99, 99 (2010) (quoting Justice Thomas), but such is the price of good advocacy. We do not read the ABA Guidelines to provide otherwise.

¶207 Indeed, in *State v. Amaya-Ruiz*, we were “able to address the 21 arguments submitted by defendant under 11 issues, reflecting our belief that the brief could have withstood further editing without compromising the quality of its arguments.” 166 Ariz. 152, 183 (1990) (stating that the court’s page limits do not infringe due process rights). Here, we consolidated twenty-one arguments into seventeen issues, some of which were foreclosed by previous decisions. And without stating which arguments were overdeveloped (or without merit), we conclude that Johnson could have effectively edited his arguments to fit within the provided word count. Our conclusion is bolstered by our independent review of the record, finding no reversible error.

¶208 Johnson is entitled to a meaningful opportunity to be heard, but that does not mean that he may decline to comply with this Court’s requirements and orders or that he is excused from the obligation to edit his work.

**T. Issues Preserved for Federal Review**

¶209 Johnson identifies thirty-two issues he seeks to preserve for federal review. As he concedes, we have previously rejected each of his

STATE v. JOHNSON  
Opinion of the Court

claims. We decline to revisit them.

**CONCLUSION**

¶210 For the reasons above, we affirm Johnson's convictions and sentences.

# Appendix B

SUPREME COURT OF ARIZONA

STATE OF ARIZONA, ) Arizona Supreme Court  
 ) No. CR-16-0261-AP  
 Appellee, )  
 ) Maricopa County  
 v. ) Superior Court  
 ) No. CR2010-048824-001  
 JAMES CLAYTON JOHNSON, )  
 ) **FILED 09/19/2019**  
 Appellant. )  
 )  
 \_\_\_\_\_ )

O R D E R

On August 27, 2019, Appellant Johnson filed a "Motion for Reconsideration." Upon consideration,

**IT IS ORDERED** denying the Motion for Reconsideration.

DATED this 19<sup>th</sup> day of September, 2019.

\_\_\_\_\_/s/  
ROBERT BRUTINEL  
Chief Justice

TO:  
Lacey Stover Gard  
Ginger Jarvis  
Mikel Steinfeld  
Rena P Glitsos  
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Amy Armstrong  
kj

# Appendix C

## ARIZONA SUPREME COURT

STATE OF ARIZONA

Appellee,

v.

JAMES CLAYTON JOHNSON,

Appellant.

No. CR 16-0261-AP

Maricopa County Superior Court  
No. CR2010-048824-001 DT

### APPELLANT'S OPENING BRIEF

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## **ISSUES PRESENTED FOR REVIEW**

1. Nearly 99% of first-degree murder cases qualify for at least one aggravator. Has Arizona complied with its constitutional obligation to legislatively narrow which first-degree murders are eligible for the death penalty?
2. Did the trial court deny Jimmy's right to due process, a meaningful appeal, and effective assistance of counsel when the court denied Jimmy's request for an evidentiary hearing on the *Furman v. Georgia* claim?
3. Is the especially cruel, heinous, or depraved aggravator under A.R.S. §13-751(F)(6) unconstitutionally vague?
4. Were the trial court's instructions regarding A.R.S. §13-751(F)(6) accurate and legally sufficient?
5. Did the trial court improperly prevent Jimmy from arguing the state had not met its burden to prove the murder was committed in an especially cruel, heinous, or depraved manner when the court precluded argument on the especially prong?
6. Was the evidence to support the especially cruel, heinous, or depraved aggravator sufficient?
7. Did the trial court err when it denied Jimmy's motion for mistrial when *Lynch v. Arizona* changed Arizona law one day into the mitigation phase and the trial court had incorrectly instructed the jury that parole was available?
8. Was the trial court's significant impairment instruction legally accurate when it required Jimmy to prove he did not know the difference between right and wrong?
9. Did the court err when it allowed the state to admit evidence and make argument regarding prison housing conditions and Jimmy's exercise of his right to trial during the sentencing phase?
10. Did internally inconsistent jury instructions regarding mercy, sympathy, and the presumption of death likely cause juror confusion and a constitutionally unreliable death sentence?

11. Did the court err when it precluded execution impact evidence offered to illustrate Jimmy's mitigation regarding family support and character?
12. Did the court improperly limit mitigation evidence?
13. Did the trial court err when it ordered Jimmy's attorneys to turn over their attorney notes to the prosecutor and allowed the prosecutor to use the notes to cross-examination mitigation witnesses?
14. Did the trial court violate the presumption of innocence when it denied Jimmy's motion to withdraw from his plea agreement in the armed robbery case on the grounds that Jimmy knew he had committed a murder?
15. Did the trial court improperly order Jimmy to sign waivers so the prosecutor could obtain documents?
16. Did the court's rulings limiting voir dire prevent Jimmy from properly screening and selecting a constitutionally adequate capital jury?
17. Did the trial court err when it denied Jimmy's motion to strike three jurors for cause?
18. Did the trial court improperly deny Jimmy's motion to strike Juror 6?
19. Did the court err when it gave Evidence Rule 106 preclusive effect?
20. Was Jimmy's conviction tainted by prosecutorial misconduct?
21. Issues preserved for federal review.
22. Did the trial court improperly deny Jimmy's motion to change counsel?



## TABLE OF CONTENTS

|                                                                                                                                                                                                                                                              | <u>Page</u> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| ISSUES PRESENTED FOR REVIEW .....                                                                                                                                                                                                                            | i           |
| TABLE OF CITATIONS .....                                                                                                                                                                                                                                     | xiv         |
| STATEMENT OF FACTS .....                                                                                                                                                                                                                                     | 1           |
| ARGUMENT 1 .....                                                                                                                                                                                                                                             | 35          |
| ARIZONA HAS NOT COMPLIED WITH ITS CONSTITUTIONAL<br>OBLIGATION TO LEGISLATIVELY NARROW WHICH FIRST-<br>DEGREE MURDERS ARE ELIGIBLE FOR THE DEATH<br>PENALTY. INSTEAD, NEARLY 99% OF FIRST-DEGREE<br>MURDER DEFENDANTS ARE ELIGIBLE FOR THE DEATH<br>PENALTY. |             |
| <i>History of death penalty constitutionality</i> .....                                                                                                                                                                                                      | 36          |
| <i>Background Facts</i> .....                                                                                                                                                                                                                                | 41          |
| <i>Standard of Review</i> .....                                                                                                                                                                                                                              | 42          |
| <i>Discussion</i> .....                                                                                                                                                                                                                                      | 42          |
| 1. Arizona's aggravation scheme does not narrow the first-degree<br>murders eligible for the death penalty.....                                                                                                                                              | 42          |
| A. In determining whether the legislature has comported with<br>their duty to narrow, this Court considers the entire scheme.....                                                                                                                            | 44          |
| B. If courts have not looked at the entire scheme of aggravation,<br>that is a failure that this Court should avoid. ....                                                                                                                                    | 48          |
| 2. Arizona's scheme fails to narrow because Arizona's scheme fills<br>the field conceptually and in practice.....                                                                                                                                            | 52          |

|                                                                                                                                                                                                                    |    |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| A. Arizona’s scheme conceptually fills the field. Nearly any possible first-degree murder is conceptually eligible for at least one aggravating factor. ....                                                       | 52 |
| B. Arizona’s scheme also fills the field in practice. Statistically, nearly 99% of first-degree murders would qualify for at least one aggravating factor.....                                                     | 57 |
| 3. The distinctions this Court offered in <i>State v. Hidalgo</i> do not hold up to scrutiny. ....                                                                                                                 | 58 |
| A. Arizona’s broad definition of first-degree murder does not satisfy the legislative duty to narrow. ....                                                                                                         | 59 |
| B. Arizona’s aggravating circumstances fail to narrow. ....                                                                                                                                                        | 60 |
| C. Reliance upon jury function at the aggravation stage is misplaced.....                                                                                                                                          | 62 |
| D. Individualized sentencing is insufficient without legislative guidance. ....                                                                                                                                    | 63 |
| <i>Conclusion</i> .....                                                                                                                                                                                            | 64 |
| ARGUMENT 2 .....                                                                                                                                                                                                   | 66 |
| THE TRIAL COURT DENIED JIMMY’S RIGHTS TO DUE PROCESS, A MEANINGFUL APPEAL, AND EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE COURT DENIED HIS REQUEST FOR AN EVIDENTIARY HEARING ON THE <i>FURMAN V. GEORGIA</i> CLAIM. |    |
| <i>Standard of Review</i> .....                                                                                                                                                                                    | 66 |
| <i>Discussion</i> .....                                                                                                                                                                                            | 66 |
| 1. To empower Jimmy’s rights to due process, appeal, and assistance of counsel, the trial court should have allowed an evidentiary hearing.....                                                                    | 67 |

|                                                                                                                                                                                               |    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| 2. This court should reach a different decision than in <i>State v. Hidalgo</i> in light of recent developments and different arguments raised herein. ....                                   | 71 |
| <i>Conclusion</i> .....                                                                                                                                                                       | 73 |
| ARGUMENT 3 .....                                                                                                                                                                              | 75 |
| THE (F)(6) ESPECIALLY CRUEL, HEINOUS, OR DEPRAVED AGGRAVATOR IS UNCONSTITUTIONALLY VAGUE.                                                                                                     |    |
| <i>Standard of Review</i> .....                                                                                                                                                               | 75 |
| <i>Discussion</i> .....                                                                                                                                                                       | 75 |
| 1. On its face, the cruel, heinous or depraved aggravator is unconstitutionally vague. ....                                                                                                   | 75 |
| 2. This Court’s jurisprudence has not adequately narrowed the (F)(6) aggravator. ....                                                                                                         | 77 |
| 3. Instead, this Court has improperly broadened the sweep of the (F)(6) and rendered statutory language meaningless. ....                                                                     | 81 |
| A. Through its use of the word “especially,” the (F)(6) aggravator requires the government to prove the cruelty, heinousness, or depravity of a given murder is set apart from the norm. .... | 81 |
| B. This Court’s jurisprudence has removed the necessary comparison to the norm. ....                                                                                                          | 84 |
| C. As a result, this Court has broadened the sweep of the (F)(6) and judicially excised the word “especially” from the (F)(6) statute. ....                                                   | 86 |
| 4. Even if this Court’s jurisprudence has provided some narrowing, jury instructions cannot adequately communicate the narrowing.                                                             |    |

|                                                                                                                                                                |     |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| This Court’s (F)(6) jurisprudence is inherently descriptive; jury instructions require a prescriptive approach. ....                                           | 87  |
| <i>Conclusion</i> .....                                                                                                                                        | 90  |
| ARGUMENT 4 .....                                                                                                                                               | 92  |
| THE TRIAL COURT’S (F)(6) INSTRUCTION WAS INACCURATE AND INSUFFICIENT.                                                                                          |     |
| <i>Standard of Review</i> .....                                                                                                                                | 92  |
| <i>Discussion</i> .....                                                                                                                                        | 92  |
| 1. The (F)(6) instruction did not communicate the illustrative examples set forth by case law. ....                                                            | 92  |
| A. The lower court’s cruelty instruction lacked necessary insight available in this Court’s cases. ....                                                        | 95  |
| B. The lower court’s heinous or depraved instruction lacked necessary insight. ....                                                                            | 98  |
| 2. The trial court’s instruction failed to set forth the two-step process necessary for heinousness and depravity findings. ....                               | 101 |
| 3. The (F)(6) instruction operated as a judicial comment. ....                                                                                                 | 103 |
| 4. Gratuitous Violence has become a catchall for inadequate cases of mutilation. ....                                                                          | 104 |
| <i>Conclusion</i> .....                                                                                                                                        | 105 |
| ARGUMENT 5 .....                                                                                                                                               | 106 |
| THE TRIAL COURT IMPROPERLY PREVENTED JIMMY FROM ARGUING THE STATE HAD NOT PROVED THE MURDER WAS COMMITTED IN AN ESPECIALLY CRUEL, HEINOUS, OR DEPRAVED MANNER. |     |

|                                                                                                                                                                                                                                                   |     |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| <i>Standard of Review</i> .....                                                                                                                                                                                                                   | 106 |
| <i>Discussion</i> .....                                                                                                                                                                                                                           | 107 |
| ARGUMENT 6 .....                                                                                                                                                                                                                                  | 110 |
| EVIDENCE WAS INSUFFICIENT TO SUPPORT THE (F)(6)<br>VERDICT.                                                                                                                                                                                       |     |
| <i>Standard of Review</i> .....                                                                                                                                                                                                                   | 110 |
| <i>Discussion</i> .....                                                                                                                                                                                                                           | 110 |
| 1. Evidence of cruelty was insufficient. ....                                                                                                                                                                                                     | 110 |
| A. Evidence did not conclusively prove the victim was<br>conscious. ....                                                                                                                                                                          | 110 |
| B. Evidence did not prove the infliction of pain was done in a<br>wanton, insensitive, or vindictive manner. ....                                                                                                                                 | 112 |
| 2. Evidence of heinousness and depravity was insufficient. ....                                                                                                                                                                                   | 113 |
| <i>Conclusion</i> .....                                                                                                                                                                                                                           | 115 |
| ARGUMENT 7 .....                                                                                                                                                                                                                                  | 116 |
| THE TRIAL COURT SHOULD HAVE GRANTED JIMMY’S<br>MOTION FOR MISTRIAL WHEN <i>LYNCH V. ARIZONA</i> CHANGED<br>ARIZONA LAW ONE DAY INTO THE MITIGATION PHASE AND<br>THE TRIAL COURT HAD INCORRECTLY INSTRUCTED THE<br>JURY THAT PAROLE WAS AVAILABLE. |     |
| <i>Standard of Review</i> .....                                                                                                                                                                                                                   | 117 |
| <i>Discussion</i> .....                                                                                                                                                                                                                           | 118 |
| 1. The trial court should have granted Jimmy’s Motion for Mistrial<br>when <i>Lynch v. Arizona</i> was issued just one day into the                                                                                                               |     |

|                                                                                                                                                                                                            |     |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| sentencing phase and held that the instructions the trial court had read throughout trial were incorrect. ....                                                                                             | 118 |
| 2. The trial court’s subsequent instructions did not cure the error.....                                                                                                                                   | 120 |
| <i>Conclusion</i> .....                                                                                                                                                                                    | 122 |
| ARGUMENT 8 .....                                                                                                                                                                                           | 124 |
| THE TRIAL COURT INCORRECTLY INSTRUCTED THE JURY THAT SIGNIFICANT IMPAIRMENT REQUIRED JIMMY TO PROVE HE DID NOT KNOW THE DIFFERENCE BETWEEN RIGHT AND WRONG.                                                |     |
| <i>Standard of Review</i> .....                                                                                                                                                                            | 124 |
| <i>Discussion</i> .....                                                                                                                                                                                    | 125 |
| 1. The trial court incorrectly instructed the jury that Jimmy had to prove his mental health issues or impairment “prevented” him from knowing right from wrong or conforming his conduct to the law. .... | 125 |
| 2. The “prevented” instruction constituted fundamental error because the error stripped Jimmy of his right to have the jury consider significant impairment as a mitigating factor.....                    | 126 |
| 3. The error prejudiced Jimmy. ....                                                                                                                                                                        | 128 |
| <i>Conclusion</i> .....                                                                                                                                                                                    | 128 |
| ARGUMENT 9 .....                                                                                                                                                                                           | 129 |
| THE TRIAL COURT IMPROPERLY ALLOWED THE STATE TO ADMIT EVIDENCE AND MAKE ARGUMENT REGARDING PRISON HOUSING CONDITIONS AND JIMMY’S EXERCISE OF HIS RIGHT TO TRIAL DURING THE SENTENCING PHASE.               |     |
| <i>Standard of Review</i> .....                                                                                                                                                                            | 129 |

|                                                                                                                                                                                                                                                                                                                            |     |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| <i>Discussion</i> .....                                                                                                                                                                                                                                                                                                    | 130 |
| 1. The trial court improperly admitted evidence of housing conditions. ....                                                                                                                                                                                                                                                | 130 |
| A. Confinement conditions are generally irrelevant in sentencing.....                                                                                                                                                                                                                                                      | 130 |
| B. Here, the state did not present any evidence to prove that its evidence regarding housing conditions was connected to Jimmy or his willingness to accept responsibility. ....                                                                                                                                           | 131 |
| C. The trial court abused its discretion when it allowed the state to present evidence of confinement conditions.....                                                                                                                                                                                                      | 132 |
| 2. The trial court improperly allowed the prosecutor to argue that Jimmy could have entered a guilty plea at any point. In doing so, the trial court placed at issue Jimmy’s relationship with his attorneys and their ethical duties and allowed the prosecutor to comment on Jimmy’s exercise of his right to trial..... | 134 |
| <i>Conclusion</i> .....                                                                                                                                                                                                                                                                                                    | 137 |
| ARGUMENT 10 .....                                                                                                                                                                                                                                                                                                          | 138 |
| INTERNALLY INCONSISTENT JURY INSTRUCTIONS REGARDING THE PRESUMPTION OF DEATH, MERCY, AND SYMPATHY LIKELY CAUSED JUROR CONFUSION RESULTING IN AN UNCONSTITUTIONAL DEATH SENTENCE.                                                                                                                                           |     |
| <i>Standard of Review</i> .....                                                                                                                                                                                                                                                                                            | 138 |
| <i>Discussion</i> .....                                                                                                                                                                                                                                                                                                    | 138 |
| ARGUMENT 11 .....                                                                                                                                                                                                                                                                                                          | 143 |
| THE TRIAL COURT SHOULD HAVE ALLOWED JIMMY TO PRESENT EXECUTION IMPACT EVIDENCE BECAUSE IT WAS RELEVANT TO HIS CHARACTER AND FAMILY SUPPORT.                                                                                                                                                                                |     |

|                                                                                                                                                                                                     |     |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| <i>Standard of Review</i> .....                                                                                                                                                                     | 143 |
| <i>Discussion</i> .....                                                                                                                                                                             | 143 |
| 1. The United States and Arizona constitutions guaranteed Jimmy the right to present all relevant mitigation to the jury.....                                                                       | 144 |
| 2. This Court has created an absolute bar to execution impact evidence in error.....                                                                                                                | 145 |
| A. This Court’s decisions banning execution impact evidence are premised upon a misreading of Arizona cases.....                                                                                    | 146 |
| B. This Court’s reliance upon cases from other jurisdictions fails to recognize the distinctions underlying execution impact evidence.....                                                          | 149 |
| 3. Execution impact evidence is proper when it relates to a defendant’s character, family support, role in society, or other mitigation.....                                                        | 152 |
| 4. The admission of execution impact evidence that does not recommend a particular sentence aligns the currently disparate treatment of victim impact statements and execution impact evidence..... | 153 |
| <i>Conclusion</i> .....                                                                                                                                                                             | 155 |
| ARGUMENT 12 .....                                                                                                                                                                                   | 156 |
| THE COURT IMPROPERLY LIMITED MITIGATION EVIDENCE.                                                                                                                                                   |     |
| <i>Standard of Review</i> .....                                                                                                                                                                     | 156 |
| <i>Discussion</i> .....                                                                                                                                                                             | 156 |
| ARGUMENT 13 .....                                                                                                                                                                                   | 160 |
| THE TRIAL COURT IMPROPERLY ORDERED THE PRODUCTION OF ATTORNEY NOTES, IN VIOLATION OF                                                                                                                |     |



WORK PRODUCT PRIVILEGE, AND ERRONEOUSLY ALLOWED THE PROSECUTOR TO USE THE DEFENSE TEAM NOTES TO ATTACK CREDIBILITY.

*Standard of Review* .....160

*Factual Background* .....160

*Discussion* .....162

1. The plain language of Rule 15.2 does not require production of an attorney’s notes of a witness’s oral statement. ....163
2. Even if attorney notes could be construed as a statement, attorney notes are protected work product. ....164
3. Arizona jurisprudence supports protection of attorney notes. ....170
4. Public policy supports protecting attorney notes. ....172
5. The trial court incorrectly overruled Jimmy’s repeated objections to the prosecutor’s impeachment with the notes. ....176
6. The errors negatively impacted Jimmy’s rights to due process, effective assistance of counsel, and a fair and reliable sentencing hearing. ....178
7. Dismissal of the death penalty is the only viable remedy. ....179

ARGUMENT 14 .....180

THE TRIAL COURT VIOLATED JIMMY’S RIGHT TO BE PRESUMED INNOCENT WHEN THE COURT DENIED JIMMY’S MOTION TO WITHDRAW FROM HIS PLEA AGREEMENT IN THE ARMED ROBBERY CASE ON THE GROUNDS THAT JIMMY KNEW HE HAD COMMITTED THE MURDER.

*Standard of Review* .....180

*Discussion* .....180

|                                                                                                               |     |
|---------------------------------------------------------------------------------------------------------------|-----|
| ARGUMENT 15 .....                                                                                             | 185 |
| THE TRIAL COURT IMPROPERLY ORDERED JIMMY TO SIGN<br>WAIVERS SO THE PROSECUTOR COULD OBTAIN<br>DOCUMENTS.      |     |
| <i>Standard of Review</i> .....                                                                               | 185 |
| <i>Discussion</i> .....                                                                                       | 185 |
| ARGUMENT 16 .....                                                                                             | 188 |
| THE COURT’S RULINGS PREVENTED THE DEFENSE FROM<br>SCREENING AND CHOOSING A CONSTITUTIONALLY<br>ADEQUATE JURY. |     |
| <i>Standard of Review</i> .....                                                                               | 188 |
| <i>Discussion</i> .....                                                                                       | 188 |
| ARGUMENT 17 .....                                                                                             | 191 |
| THE TRIAL COURT INCORRECTLY DENIED JIMMY’S MOTION<br>TO STRIKE THREE JURORS FOR CAUSE.                        |     |
| <i>Standard of Review</i> .....                                                                               | 191 |
| <i>Discussion</i> .....                                                                                       | 191 |
| ARGUMENT 18 .....                                                                                             | 194 |
| THE TRIAL COURT IMPROPERLY DENIED JIMMY’S MOTION<br>TO STRIKE JUROR 6.                                        |     |
| <i>Standard of Review</i> .....                                                                               | 194 |
| <i>Discussion</i> .....                                                                                       | 194 |

|                                                                |     |
|----------------------------------------------------------------|-----|
| ARGUMENT 19 .....                                              | 197 |
| THE LOWER COURT IMPROPERLY GAVE RULE 106<br>PRECLUSIVE EFFECT. |     |
| <i>Standard of Review</i> .....                                | 197 |
| <i>Discussion</i> .....                                        | 197 |
| ARGUMENT 20 .....                                              | 198 |
| JIMMY’S CONVICTION WAS TAINTED BY PROSECUTORIAL<br>MISCONDUCT. |     |
| <i>Standard of Review</i> .....                                | 198 |
| <i>Discussion</i> .....                                        | 198 |
| 1. The prosecutor repeatedly misstated the DNA evidence. ....  | 198 |
| 2. Cumulative Error. ....                                      | 201 |
| ARGUMENT 21 .....                                              | 205 |
| ISSUES PRESERVED FOR FEDERAL REVIEW.                           |     |
| ARGUMENT 22<br>UNDER SEAL.                                     |     |

## TABLE OF CITATIONS

|                                                                  | <u>Page</u>                      |
|------------------------------------------------------------------|----------------------------------|
| <b>UNITED STATES SUPREME COURT CASES</b>                         |                                  |
| <i>Abdul-Kabir v. Quarterman</i> , 550 U.S. 233 (2007).....      | 139, 142, 157                    |
| <i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....         | 106                              |
| <i>Arave v. Creech</i> , 507 U.S. 463 (1993).....                | 52                               |
| <i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991).....          | 194                              |
| <i>Armstrong v. Manzo</i> , 380 U.S. 545 (1965).....             | 68                               |
| <i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....             | 139                              |
| <i>Baldwin v. Hale</i> , 68 U.S. 223 (1863).....                 | 68                               |
| <i>Beech Aircraft Corp. v. Rainey</i> , 488 U.S. 153 (1988)..... | 197                              |
| <i>Booth v. Maryland</i> , 482 U.S. 496 (1987).....              | 154                              |
| <i>Bordenkircher v. Hayes</i> , 434 U.S. 357 (1978).....         | 135                              |
| <i>Boyde v. California</i> , 494 U.S. 370 (1990).....            | 141, 156, 202                    |
| <i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....               | 171, 201                         |
| <i>Brown v. Sanders</i> , 546 U.S. 212 (2006).....               | 55                               |
| <i>Bumper v. North Carolina</i> , 391 U.S. 543 (1968).....       | 186                              |
| <i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985).....        | 142, 179                         |
| <i>Carey v. Piphus</i> , 435 U.S. 247 (1978).....                | 68                               |
| <i>Coppedge v. U.S.</i> , 369 U.S. 438 (1962).....               | 67                               |
| <i>Coffin v. U.S.</i> , 156 U.S. 432 (1895).....                 | 181, 183                         |
| <i>Douglas v. California</i> , 372 U.S. 353 (1963).....          | 67, 73                           |
| <i>Draper v. Washington</i> , 372 U.S. 487 (1963).....           | 67                               |
| <i>Enmund v. Florida</i> , 458 U.S. 782 (1982).....              | 52                               |
| <i>Estelle v. Williams</i> , 425 U.S. 501 (1976).....            | 181                              |
| <i>Estes v. State of Texas</i> , 381 U.S. 532 (1965).....        | 118, 144                         |
| <i>Fuentes v. Shevin</i> , 407 U.S. 67 (1972).....               | 68                               |
| <i>Furman v. Georgia</i> , 408 U.S. 238 (1972).....              | 36-38, 45, 50, 52, 60-61, 66, 68 |
| <i>Giglio v. U.S.</i> , 405 U.S. 150 (1972).....                 | 201                              |

## **TABLE OF CITATIONS Continued**

|                                                                                                                                     | <b><u>Page</u></b>          |
|-------------------------------------------------------------------------------------------------------------------------------------|-----------------------------|
| <b>UNITED STATES SUPREME COURT CASES Continued</b>                                                                                  |                             |
| <i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980) .....                                                                               | 76                          |
| <i>Gonzales v. U.S.</i> , 348 U.S. 407 (1955) .....                                                                                 | 67                          |
| <i>Gregg v. Georgia</i> , 428 U.S. 153 (1976) .....                                                                                 | 37-38, 40, 45, 52, 60, 205  |
| <i>Griffin v. California</i> , 380 U.S. 609 (1965) .....                                                                            | 202                         |
| <i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004) .....                                                                                | 68                          |
| <i>Hamilton v. Texas</i> , 498 U.S. 281 (1990) .....                                                                                | 69                          |
| <i>Hickman v. Taylor</i> , 329 U.S. 495 (1947) .....                                                                                | 165-174, 176                |
| <i>Hidalgo v. Arizona</i> , 538 U.S. ___, 2017 WL 3536644, No. 17-251 (Breyer, J., statement respecting denial of certiorari) ..... | 59-60, 63-64, 67, 69-72, 74 |
| <i>In re Murchison</i> , 349 U.S. 133 (1955) .....                                                                                  | 178, 186-187                |
| <i>In re Winship</i> , 397 U.S. 358 (1970) .....                                                                                    | 106, 202                    |
| <i>Irvin v. Dowd</i> , 366 U.S. 717 (1961) .....                                                                                    | 118, 144, 194               |
| <i>J.E.B. v. Alabama</i> , 511 U.S. 127 (1994) .....                                                                                | 190                         |
| <i>Jones v. Barnes</i> , 463 U.S. 745 (1983) .....                                                                                  | 67                          |
| <i>Jurek v. Texas</i> , 428 U.S. 262 (1976) .....                                                                                   | 37-40, 46, 59               |
| <i>Kansas v. Carr</i> , __ U.S. ___, 136 S.Ct. 633 (2016) .....                                                                     | 153                         |
| <i>Lockett v. Ohio</i> , 438 U.S. 586 (1978) .....                                                                                  | 127, 144, 156               |
| <i>Lowenfield v. Phelps</i> , 484 U.S. 231 (1988) .....                                                                             | 42, 44-46, 59               |
| <i>Lynch v. Arizona</i> , __ U.S. ___, 136 S.Ct. 1818 (2016) .....                                                                  | 116-118, 128                |
| <i>Maynard v. Cartwright</i> , 486 U.S. 356 (1988) .....                                                                            | 52, 76                      |
| <i>McKane v. Durston</i> , 153 U.S. 684 (1894) .....                                                                                | 67                          |
| <i>McKleskey v. Kemp</i> , 481 U.S. 279 (1987) .....                                                                                | 46                          |
| <i>McMann v. Richardson</i> , 397 U.S. 759 (1970) .....                                                                             | 69                          |
| <i>Mincey v. Arizona</i> , 437 U.S. 385 (1978) .....                                                                                | 203                         |
| <i>Morgan v. Illinois</i> , 504 U.S. 719 (1992) .....                                                                               | 188, 191                    |
| <i>Napue v. Illinois</i> , 360 U.S. 264 (2012) .....                                                                                | 201                         |
| <i>Neder v. U.S.</i> , 527 U.S. 1 (1999) .....                                                                                      | 194                         |

## **TABLE OF CITATIONS Continued**

|                                                             | <b><u>Page</u></b>   |
|-------------------------------------------------------------|----------------------|
| <b>UNITED STATES SUPREME COURT CASES Continued</b>          |                      |
| <i>Nichols v. U.S.</i> , 511 U.S. 738 (1994).....           | 118, 144             |
| <i>Offutt v. U.S.</i> , 348 U.S. 11 (1954).....             | 186                  |
| <i>On Lee v. U.S.</i> , 343 U.S. 747 (1952) .....           | 201                  |
| <i>Pandeli v. Arizona</i> , 536 U.S. 953 (2002).....        | 83                   |
| <i>Payne v. Tennessee</i> , 501 U.S. 808 (1991) .....       | 153-155              |
| <i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989) .....         | 138-139              |
| <i>Proffitt v. Florida</i> , 428 U.S. 242 (1976) .....      | 37-39, 46            |
| <i>Pulley v. Harris</i> , 465 U.S. 37 (1984) .....          | 46                   |
| <i>Ring v. Arizona</i> , 536 U.S. 584 (2002).....           | 97, 100              |
| <i>Roberts v. Louisiana</i> , 428 U.S. 325 (1976) .....     | 37-38, 40, 59, 64    |
| <i>Robinson v. California</i> , 370 U.S. 660 (1962) .....   | 144                  |
| <i>Sansing v. Arizona</i> , 536 U.S. 954 (2002).....        | 83                   |
| <i>Simmons v. South Carolina</i> , 512 U.S. 154 (1994)..... | 116, 119-120         |
| <i>Smith v. Phillips</i> , 455 U.S. 209 (1982) .....        | 194                  |
| <i>Strickland v. Washington</i> , 466 U.S. 668 (1984) ..... | 69, 118, 144, 178    |
| <i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993).....     | 202                  |
| <i>Taylor v. Kentucky</i> , 436 U.S. 478 (1978) .....       | 181, 183             |
| <i>Tennard v. Dretke</i> , 542 U.S. 274 (2004) .....        | 156                  |
| <i>Tison v. Arizona</i> , 481 U.S. 137 (1987) .....         | 52                   |
| <i>Tuilaepa v. California</i> , 512 U.S. 967 (1994).....    | 46-47, 52            |
| <i>Tumey v. Ohio</i> , 273 U.S. 510 (1927) .....            | 186, 194             |
| <i>Upjohn Company v. U.S.</i> , 449 U.S. 383 (1981).....    | 168-170, 173         |
| <i>U.S. v. Gonzalez-Lopez</i> , 548 U.S. 140 (2006) .....   | S-1                  |
| <i>U.S. v. Nobles</i> , 422 U.S. 225 (1975).....            | 165, 168, 170, 178   |
| <i>U.S. v. Wade</i> , 388 U.S. 218 (1967).....              | 69                   |
| <i>Walton v. Arizona</i> , 497 U.S. 639 (1990).....         | 75-76, 78-80, 87, 91 |

## **TABLE OF CITATIONS Continued**

### **Page**

#### **UNITED STATES SUPREME COURT CASES Continued**

|                                                             |                                       |
|-------------------------------------------------------------|---------------------------------------|
| <i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)..... | 37-38, 40, 64, 68, 118, 144, 155, 179 |
| <i>Zant v. Stephens</i> , 462 U.S. 862 (1983) .....         | 42-43, 45, 60, 64                     |

#### **ARIZONA SUPREME COURT CASES**

|                                                                             |              |
|-----------------------------------------------------------------------------|--------------|
| <i>Arizona Public Service Co. v. Brittain</i> , 107 Ariz. 278 (1971).....   | 89           |
| <i>Busso-Estopellan v. Mroz</i> , 238 Ariz. 553 (2015) .....                | 129, 183     |
| <i>Dean v. Superior Court</i> , 84 Ariz. 104 (1958).....                    | 170-174, 176 |
| <i>Donnelly v. DeChristoforo</i> , 416 U.S. 637(1974).....                  | 202          |
| <i>Evans v. Pickett</i> , 102 Ariz. 393 (1967).....                         | 89           |
| <i>Gorman v. City of Phoenix</i> , 152 Ariz. 179 (1987).....                | 132-133      |
| <i>Heimke v. Munoz</i> , 106 Ariz. 26 (1970).....                           | 89           |
| <i>In re Ethics Opinion No. 74-28</i> , 111 Ariz. 519 (1975).....           | 186          |
| <i>In re Peasley</i> , 208 Ariz. 27 (2004).....                             | 201          |
| <i>In re Zawada</i> , 208 Ariz. 232 (2004) .....                            | 201-202      |
| <i>Longs Drug Stores v. Howe</i> , 134 Ariz. 424 (1983) .....               | 171-172      |
| <i>Matter of Walker</i> , 153 Ariz. 307 (1987) .....                        | 186          |
| <i>McElhanon v. Hing</i> , 151 Ariz. 403 (1986) .....                       | 186          |
| <i>McKaney v. Foreman</i> , 209 Ariz. 268 (2004).....                       | 205          |
| <i>Mejak v. Granville</i> , 212 Ariz. 555 (2006).....                       | 81           |
| <i>Miller v. Bd. of Sup'rs of Pinal County</i> , 175 Ariz. 296 (1993) ..... | 68           |
| <i>Newton v. Maine</i> , 96 Ariz. 319 (1964) .....                          | 89, 108      |
| <i>Reah v. Jipin</i> , 68 Ariz. 335 (1949).....                             | 120-121      |
| <i>Rodriguez v. State</i> , 129 Ariz. 67 (1981) .....                       | 186          |
| <i>Simpson v. Miller</i> , 241 Ariz. 341 (2017) .....                       | 181          |
| <i>State ex rel. Brnovich v. City of Tucson</i> , 242 Ariz. 588 (2017)..... | 192          |
| <i>State ex rel. Corbin v. Ybarra</i> , 161 Ariz. 188 (1989) .....          | 171-172      |

## **TABLE OF CITATIONS Continued**

### **Page**

### **ARIZONA SUPREME COURT CASES Continued**

|                                                                                |                                 |
|--------------------------------------------------------------------------------|---------------------------------|
| <i>State ex rel. Thomas v. Granville (Baldwin)</i> , 211 Ariz. 468 (2005)..... | 138-139, 183                    |
| <i>State v. Adamson</i> , 136 Ariz. 250 (1983) .....                           | 118                             |
| <i>State v. Alvarez</i> , 205 Ariz. 110 (2003).....                            | 127                             |
| <i>State v. Anderson</i> , 210 Ariz. 327 (2005).....                           | 82, 88, 118, 122, 141, 198, 207 |
| <i>State v. Andriano</i> , 215 Ariz. 497 (2007).....                           | 85, 208                         |
| <i>State v. Barreras</i> , 181 Ariz. 516 (1995) .....                          | 80                              |
| <i>State v. Benson</i> , 232 Ariz. 452 (2013) .....                            | 119                             |
| <i>State v. Bible</i> , 175 Ariz. 549 (1993).....                              | 201, 203                        |
| <i>State v. Bocharski</i> , 218 Ariz. 476 (2008).....                          | 88, 99-104, 113-114, 145        |
| <i>State v. Boggs</i> , 218 Ariz. 325 (2008).....                              | 207                             |
| <i>State v. Bolt</i> , 142 Ariz. 260 (1984) .....                              | 51                              |
| <i>State v. Bolton</i> , 182 Ariz. 290 (1995) .....                            | 110                             |
| <i>State v. Bowen</i> , 104 Ariz. 138 (1969).....                              | 171                             |
| <i>State v. Boyston</i> , 231 Ariz. 539 (2013).....                            | 75, 145                         |
| <i>State v. Brewer</i> , 170 Ariz. 486 (1992).....                             | 112                             |
| <i>State v. Burbey</i> , 243 Ariz. 145 (2017) .....                            | 92, 138                         |
| <i>State v. Burns</i> , 237 Ariz. 1 (2015) .....                               | 110, 132                        |
| <i>State v. Canez (Canez I)</i> , 202 Ariz. 133 (2002).....                    | 55, 88, 98-100, 113             |
| <i>State v. Cannon</i> , 148 Ariz. 72 (1985) .....                             | 198, 202                        |
| <i>State v. Carlson</i> , 237 Ariz. 381 (2015).....                            | 54-55, 77, 126                  |
| <i>State v. Chaney</i> , 141 Ariz. 295 (1984).....                             | 88                              |
| <i>State v. Chappell</i> , 225 Ariz. 229 (2010).....                           | 119, 145-146, 148-149, 202, 207 |
| <i>State v. Comer</i> , 165 Ariz. 413 (1990).....                              | 203                             |
| <i>State v. Correll</i> , 148 Ariz. 468 (1986) .....                           | 112                             |
| <i>State v. Cromwell</i> , 211 Ariz. 181 (2005) .....                          | 82, 205, S-2                    |



## **TABLE OF CITATIONS Continued**

### **Page**

### **ARIZONA SUPREME COURT CASES Continued**

|                                                               |                                     |
|---------------------------------------------------------------|-------------------------------------|
| <i>State v. Cropper</i> , 223 Ariz. 522 (2010) .....          | 81-82                               |
| <i>State v. Cruz</i> , 218 Ariz. 149 (2008) .....             | 119                                 |
| <i>State v. Dann</i> , 205 Ariz. 557 (2003) .....             | 128, 206                            |
| <i>State v. Dann</i> , 220 Ariz. 351 (2009) .....             | 106, 119, 145, 153, 206-207         |
| <i>State v. Davolt</i> , 207 Ariz. 191 (2004) .....           | 106                                 |
| <i>State v. Decello</i> , 113 Ariz. 255 (1976) .....          | 202                                 |
| <i>State v. Delahanty</i> , 226 Ariz. 502 (2011) .....        | 205, 207                            |
| <i>State v. De Nistor</i> , 143 Ariz. 407 (1985) .....        | 181                                 |
| <i>State v. Eddington</i> , 228 Ariz. 361 (2011) .....        | 194-196                             |
| <i>State v. Ellison</i> , 111 Ariz. 167 (1974).....           | 180                                 |
| <i>State v. Ellison</i> , 213 Ariz. 116 (2006).....           | 101                                 |
| <i>State v. Escalante-Orozco</i> , 241 Ariz. 254 (2017) ..... | 125, 200, 202                       |
| <i>State v. Ethington</i> , 121 Ariz. 572 (1979) .....        | 67                                  |
| <i>State v. Finch</i> , 202 Ariz. 410 (2002).....             | 148-149, 151                        |
| <i>State v. Fisher</i> , 141 Ariz. 227 (1984) .....           | 88                                  |
| <i>State v. Fulminante</i> , 161 Ariz. 237 (1988) .....       | 206                                 |
| <i>State v. Gallardo</i> , 225 Ariz. 560 (2010) .....         | 201                                 |
| <i>State v. Garcia</i> , 224 Ariz. 1(2010).....               | 189, 207                            |
| <i>State v. Forde</i> , 233 Ariz. 543 (2014) .....            | 127                                 |
| <i>State v. Gill</i> , 242 Ariz. 1 (2017).....                | 129, 143, 160, 185                  |
| <i>State v. Gillies</i> , 135 Ariz. 500 (1983) .....          | 110                                 |
| <i>State v. Glassell</i> , 211 Ariz. 33 (2005).....           | 141, 206                            |
| <i>State v. Goudeau</i> , 239 Ariz. 421 (2016) .....          | 106, 202                            |
| <i>State v. Greene</i> , 192 Ariz. 431 (1998) .....           | 148                                 |
| <i>State v. Greenway</i> , 170 Ariz. 155 (1991) .....         | 84-85                               |
| <i>State v. Gretzler</i> , 135 Ariz. 42 (1983).....           | 54, 77-78, 80, 83, 86, 96, 101, 126 |

## **TABLE OF CITATIONS Continued**

### **Page**

### **ARIZONA SUPREME COURT CASES Continued**

|                                                        |                                                                                    |
|--------------------------------------------------------|------------------------------------------------------------------------------------|
| <i>State v. Gulbrandson</i> , 184 Ariz. 46 (1995)..... | 206                                                                                |
| <i>State v. Gunches</i> , 225 Ariz. 22 (2010).....     | 76, 102                                                                            |
| <i>State v. Hampton</i> , 213 Ariz. 167 (2006).....    | 130, 208                                                                           |
| <i>State v. Hardy</i> , 230 Ariz. 281 (2012).....      | 119                                                                                |
| <i>State v. Harrod</i> , 200 Ariz. 309 (2001).....     | 205                                                                                |
| <i>State v. Harrod</i> , 218 Ariz. 268 (2008).....     | 145, 153, 207                                                                      |
| <i>State v. Haskie</i> , 242 Ariz. 582 (2017).....     | 130, 132-133                                                                       |
| <i>State v. Hausner</i> , 230 Ariz. 60 (2012).....     | 54                                                                                 |
| <i>State v. Henderson</i> , 210 Ariz. 561 (2005).....  | 124, 127-128                                                                       |
| <i>State v. Henry</i> , 189 Ariz. 542 (1997).....      | S-2, S-4, S-5                                                                      |
| <i>State v. Hickman</i> , 205 Ariz. 192 (2003).....    | 192                                                                                |
| <i>State v. Hidalgo</i> , 241 Ariz. 543 (2017).....    | 42, 44, 46, 48-49, 51, 58, 61-62, 66,<br>71, 75, 107, 143, 156, 160, 180, 188, S-1 |
| <i>State v. Hinchey</i> , 165 Ariz. 432 (1990).....    | 88                                                                                 |
| <i>State v. Hinchey</i> , 181 Ariz. 307 (1995).....    | 208                                                                                |
| <i>State v. Hopkins</i> , 108 Ariz. 210 (1972).....    | 103                                                                                |
| <i>State v. Howard</i> , 106 Ariz. 403 (1960).....     | 181                                                                                |
| <i>State v. Hughes</i> , 193 Ariz. 72 (1998).....      | 202-203                                                                            |
| <i>State v. Hulsey</i> , 243 Ariz. 367 (2018).....     | 106, 203                                                                           |
| <i>State v. Hunter</i> , 142 Ariz. 88 (1984).....      | 124                                                                                |
| <i>State v. Hursey</i> , 176 Ariz. 615 (1993).....     | 186                                                                                |
| <i>State v. Hyde</i> , 186 Ariz. 252 (1996).....       | 83, 86                                                                             |
| <i>State v. Jessen</i> , 130 Ariz. 1 (1981).....       | 171                                                                                |
| <i>State v. Jimenez</i> , 165 Ariz. 444 (1990).....    | 96                                                                                 |
| <i>State v. Jones</i> , 197 Ariz. 290 (2000).....      | 159                                                                                |
| <i>State v. Jorgenson</i> , 198 Ariz. 390 (2000).....  | 201                                                                                |

## **TABLE OF CITATIONS Continued**

### **Page**

#### **ARIZONA SUPREME COURT CASES Continued**

|                                                      |                                                                           |
|------------------------------------------------------|---------------------------------------------------------------------------|
| <i>State v. King</i> , 180 Ariz. 1024 (1994) .....   | 83, 86, 203                                                               |
| <i>State v. Knapp</i> , 114 Ariz. 531 (1977) .....   | 77, 80, 83, 96, 101, 103, 112                                             |
| <i>State v. Lacy</i> , 187 Ariz. 340 (1996) .....    | 88                                                                        |
| <i>State v. LaGrand</i> , 152 Ariz. 483 (1987) ..... | S-2, S-5                                                                  |
| <i>State v. LaGrand</i> , 153 Ariz. 21 (1987) .....  | 55                                                                        |
| <i>State v. Lawson</i> , 144 Ariz. 547 (1985) .....  | 118                                                                       |
| <i>State v. Lee</i> , 189 Ariz. 590 (1997) .....     | 88                                                                        |
| <i>State v. Lehr</i> , 227 Ariz. 140 (2011) .....    | 206                                                                       |
| <i>State v. Leon</i> , 190 Ariz. 159 (1997) .....    | 203                                                                       |
| <i>State v. Leteave</i> , 237 Ariz. 516 (2015) ..... | 117, 131, 133                                                             |
| <i>State v. Lynch</i> , 238 Ariz. 84 (2015) .....    | 119-120, 128                                                              |
| <i>State v. Madrid</i> , 105 Ariz. 534 (1970) .....  | S-3                                                                       |
| <i>State v. Manuel</i> , 229 Ariz. 1 (2011) .....    | 145                                                                       |
| <i>State v. Mata</i> , 185 Ariz. 319 (1996) .....    | 80, 86, 88-89, 93, 108                                                    |
| <i>State v. McCray</i> , 218 Ariz. 252 (2008) .....  | 82                                                                        |
| <i>State v. McGill</i> , 213 Ariz. 147 (2006) .....  | 42, 64, 75, 107, 117, 130, 143, 145,<br>148, 153, 156, 160, 180, 188, S-1 |
| <i>State v. Medina</i> , 193 Ariz. 504 (1999) .....  | 88                                                                        |
| <i>State v. Medrano</i> , 173 Ariz. 393 (1992) ..... | 88                                                                        |
| <i>State v. Miles</i> , 186 Ariz. 10 (1996) .....    | 105, 206                                                                  |
| <i>State v. Milke</i> , 177 Ariz. 118 (1993) .....   | 80                                                                        |
| <i>State v. Miller</i> , 234 Ariz. 31 (2013) .....   | 128                                                                       |
| <i>State v. Mincey</i> , 115 Ariz. 472 (1977) .....  | 203                                                                       |
| <i>State v. Minnitt</i> , 203 Ariz. 431 (2002) ..... | 201                                                                       |
| <i>State v. Moody</i> , 192 Ariz. 505 (1998) .....   | 185, S-1                                                                  |
| <i>State v. Moody</i> , 208 Ariz. 424 (2004) .....   | 42, 66, 75, 107, 117, 143, 156, 160, 180,<br>188, 191, 203, S-1           |

## **TABLE OF CITATIONS Continued**

### **Page**

#### **ARIZONA SUPREME COURT CASES Continued**

|                                                                      |                             |
|----------------------------------------------------------------------|-----------------------------|
| <i>State v. Moore</i> , 108 Ariz. 532 (1972) .....                   | 67                          |
| <i>State v. Moore</i> , 222 Ariz. 1 (2009) .....                     | 148, 191                    |
| <i>State v. Morris</i> , 215 Ariz. 324 (2007) .....                  | 201                         |
| <i>State v. Murdaugh</i> , 209 Ariz. 19 (2004) .....                 | 101, 104                    |
| <i>State v. Newell</i> , 212 Ariz. 389 (2006) .....                  | 101, 104, 128, 185          |
| <i>State v. Ortiz</i> , 131 Ariz. 195 (1981) .....                   | 96                          |
| <i>State v. Ovante</i> , 231 Ariz. 180 (2013) .....                  | 128                         |
| <i>State v. Pandeli</i> , 200 Ariz. 365 (2001) .....                 | 83, 86, 207                 |
| <i>State v. Pandeli</i> , 215 Ariz. 514 (2007) .....                 | 76                          |
| <i>State v. Patterson</i> , 230 Ariz. 270 (2012) .....               | 118, 122, 189               |
| <i>State v. Piper</i> , 113 Ariz. 390 (1976) .....                   | 160, 185                    |
| <i>State v. Poland</i> , 132 Ariz. 269 (1982) .....                  | 112                         |
| <i>State v. Poyson</i> , 198 Ariz. 70 (2000) .....                   | 206                         |
| <i>State v. Prince</i> , 226 Ariz. 516 (2011) ... ..                 | 107, 118, 120, 122, 189     |
| <i>State v. Ramirez</i> , 178 Ariz. 116 (1994) .....                 | 111                         |
| <i>State v. Reid</i> , 114 Ariz. 16 (1976) .....                     | 171                         |
| <i>State v. Richmond (Richmond I)</i> , 136 Ariz. 312 (1983) .....   | 88                          |
| <i>State v. Richmond (Richmond III)</i> , 180 Ariz. 573 (1994) ..... | 88                          |
| <i>State v. Ring</i> , 204 Ariz. 534 (2003) .....                    | 207                         |
| <i>State v. Rodriguez</i> , 192 Ariz. 58 (1998) .....                | 103                         |
| <i>State v. Romero</i> , 239 Ariz. 6 (2016) .....                    | 130, 132-133                |
| <i>State v. Roque</i> , 213 Ariz. 193 (2006) .....                   | 125, 145-148, 198, 202, 206 |
| <i>State v. Rose</i> , 231 Ariz. 500 (2013) .....                    | 145-146                     |
| <i>State v. Ross</i> , 180 Ariz. 598 (1994) .....                    | 205                         |
| <i>State v. Rossi</i> , 146 Ariz. 359 (1985) .....                   | 88                          |
| <i>State v. Rossi</i> , 171 Ariz. 276 (1992) .....                   | 88                          |

## **TABLE OF CITATIONS Continued**

### **Page**

### **ARIZONA SUPREME COURT CASES Continued**

|                                                                                                |                        |
|------------------------------------------------------------------------------------------------|------------------------|
| <i>State v. Ruben Johnson</i> , 212 Ariz. 425 (2006) .....                                     | 83-86, 189, 205        |
| <i>State v. Salazar</i> , 173 Ariz. 399 (1992).....                                            | 84-85, 111             |
| <i>State v. Sansing</i> , 200 Ariz. 347 (2001) .....                                           | 83, 86, 205            |
| <i>State v. Schackart</i> , 175 Ariz. 494 (1993).....                                          | 67, 95-96              |
| <i>State v. Schrock</i> , 149 Ariz. 433 (1986).....                                            | 202                    |
| <i>State v. Scott</i> , 177 Ariz. 131 (1993).....                                              | 98                     |
| <i>State v. Serna</i> , 163 Ariz. 260 (1990).....                                              | 202                    |
| <i>State v. Smith</i> , 219 Ariz. 132 (2008).....                                              | 127                    |
| <i>State v. Snelling</i> , 225 Ariz. 182 (2010).....                                           | 95-97                  |
| <i>State v. Speer</i> , 221 Ariz. 449 (2009).....                                              | 118                    |
| <i>State v. Steinle in and for the County of Maricopa (Moran)</i> , 239 Ariz. 415 (2016) ..... | 197                    |
| <i>State v. Still</i> , 119 Ariz. 549 (1978).....                                              | 202                    |
| <i>State v. Stokley</i> , 182 Ariz. 505 (1995) .....                                           | 112                    |
| <i>State v. Styers</i> , 177 Ariz. 104 (1993) .....                                            | 88                     |
| <i>State v. Tapia</i> , 159 Ariz. 284 (1988).....                                              | 185                    |
| <i>State v. Thornton</i> , 187 Ariz. 325 (1996).....                                           | 159                    |
| <i>State v. Torres</i> , 208 Ariz. 340 (2004) .....                                            | S-1, S-2, S-4, S-5     |
| <i>State v. Trostle</i> , 191 Ariz. 4 (1997).....                                              | 202                    |
| <i>State v. Trujillo</i> , 237 Ariz. 314 (2011).....                                           | 127                    |
| <i>State v. Valenzuela</i> , 216 Ariz. 300 (2007) .....                                        | 188                    |
| <i>State v. Valenzuela</i> , 239 Ariz. 299 (2016) .....                                        | 55, 88, 99, 113        |
| <i>State v. Valverde</i> , 220 Ariz. 582 (2009) .....                                          | 188                    |
| <i>State v. Velazquez</i> , 216 Ariz. 300 (2007).....                                          | 82, 124, 128, 145, 148 |
| <i>State v. Vidalez</i> , 89 Ariz. 215 (1961).....                                             | 120                    |
| <i>State v. Villalobos</i> , 225 Ariz. 74 (2010) .....                                         | 76, 82                 |

## **TABLE OF CITATIONS Continued**

### **Page**

#### **ARIZONA SUPREME COURT CASES Continued**

|                                                                    |                                                 |
|--------------------------------------------------------------------|-------------------------------------------------|
| <i>State v. Walden</i> , 183 Ariz. 595 (1995).....                 | 208                                             |
| <i>State v. Wall</i> , 212 Ariz. 1 (2006) .....                    | 183                                             |
| <i>State v. Wallace (Wallace I)</i> , 219 Ariz. 1 (2008).....      | 88, 99-100, 113                                 |
| <i>State v. Wallace (Wallace II)</i> , 229 Ariz. 155 (2012) .....  | 88, 114                                         |
| <i>State v. Wallace</i> , 151 Ariz. 362 (1986).....                | 103                                             |
| <i>State v. Watson</i> , 129 Ariz. 60 (1981).....                  | 85                                              |
| <i>State v. West</i> , 176 Ariz. 432 (1993) .....                  | 207                                             |
| <i>State v. West</i> , 226 Ariz. 559 (2011) .....                  | 110                                             |
| <i>State v. White</i> , 168 Ariz. 500 (1991).....                  | 115                                             |
| <i>State v. Williams</i> , 183 Ariz. 368 (1995).....               | 146-148                                         |
| <i>State v. Wilson</i> , 95 Ariz. 372 (1964).....                  | 181                                             |
| <i>State v. Wilson</i> , 237 Ariz. 296 (2015).....                 | 88                                              |
| <i>State v. Womble</i> , 225 Ariz. 91 (2010).....                  | 205                                             |
| <i>Tipton v. Burson</i> , 73 Ariz. 144 (1951).....                 | 121                                             |
| <i>Twin City Fire Ins. Co. v. Burke</i> , 204 Ariz. 251 (2003).... | 66, 107, 117, 124, 130, 143, 160, 180, 185, S-1 |

#### **ARIZONA COURT OF APPEALS CASES**

|                                                                                |          |
|--------------------------------------------------------------------------------|----------|
| <i>Carter v. Pain Center of Arizona, P.C.</i> , 239 Ariz. 164 (App. 2016)..... | 89       |
| <i>Duran v. Superior Court</i> , 162 Ariz. 206 (App. 1989) .....               | 182, 184 |
| <i>In re Natalie Z</i> , 214 Ariz. 452 (App. 2007) .....                       | 125      |
| <i>State v. Corona</i> , 188 Ariz. 85 (App. 1997).....                         | 202      |
| <i>State v. Dockery</i> , 169 Ariz. 527 (App. 1991) .....                      | 182, 184 |
| <i>State v. Fritz</i> , 157 Ariz. 139 (App. 1988) .....                        | 182      |
| <i>State v. Gibbs</i> , 6 Ariz.App. 600 (App. 1968).....                       | 181      |
| <i>State v. Martinez</i> , 130 Ariz. 80 (App. 1981).....                       | 202      |
| <i>State v. Nunez</i> , 23 Ariz.App. 462 (App. 1975).....                      | 171      |

## **TABLE OF CITATIONS Continued**

### **Page**

### **ARIZONA COURT OF APPEALS CASES Continued**

|                                                                                           |     |
|-------------------------------------------------------------------------------------------|-----|
| <i>State v. Richardson</i> , 175 Ariz. 336 (App. 1993).....                               | 181 |
| <i>State v. Rubio</i> , 219 Ariz. 177 (App. 2008) .....                                   | 191 |
| <i>State v. Turrentine</i> , 152 Ariz. 61 (App. 1986).....                                | 203 |
| <i>Suluaga by and through Zuluaga v. Bashas', Inc.</i> , 242 Ariz. 205 (App. 2017)....    | 103 |
| <i>TM2008 Investments, Inc. v. Procon Capital Corp.</i> , 234 Ariz. 421 (App. 2014) ..... | 89  |

### **ARIZONA ETHICS OPINION**

|                                                        |          |
|--------------------------------------------------------|----------|
| <i>State Bar of Arizona Ethics Opinion 13-02</i> ..... | S-3, S-4 |
|--------------------------------------------------------|----------|

### **FEDERAL CASES**

|                                                                             |         |
|-----------------------------------------------------------------------------|---------|
| <i>Baker v. U.S.</i> , 412 F.2d 1069 (5th Cir. 1969).....                   | 135     |
| <i>Brown v. Craven</i> , 424 F.2d 1166 (9th Cir. 1970) .....                |         |
| <i>Estrada v. Scribner</i> , 512 F.3d 1227 (9th Cir. 2008).....             | 194     |
| <i>Jackson v. Dretke</i> , 450 F.3d 614 (5th Cir. 2006).....                | 149-150 |
| <i>Knox v. Collins</i> , 928 F.2d 657 (5th Cir. 1991).....                  | 189     |
| <i>Loraine v. U.S.</i> , 396 F.2d 335 (9th Cir. 1968).....                  | 201     |
| <i>Sherlock v. Fontainebleau</i> , 229 F.Supp.3d 1277 (S.D. Fla. 2017)..... | 185     |
| <i>Sinisterra v. U.S.</i> , 600 F.3d 900 (8th Cir. 2010).....               | 203     |
| <i>Smith v. McCormick</i> , 914 F.2d 1153 (9th Cir. 1990) .....             | 202     |
| <i>Smith v. Stewart</i> , 140 F.3d 1263 (9th Cir. 1998) .....               | 159     |
| <i>Stenson v. Lambert</i> , 504 F.3d 873 (9th Cir. 2007).....               | 149-150 |
| <i>U.S. v. Amlani</i> , 111 F.3d 705 (9th Cir. 1997) .....                  | 202     |
| <i>U.S. v. Anagnos</i> , 853 F.2d 1 (1st Cir.1988) .....                    | 193     |
| <i>U.S. v. Arendale</i> , 444 F.2d 1260 (5th Cir. 1971).....                | 202     |
| <i>U.S. v. Atcheson</i> , 94 F.3d 1237 (1996) .....                         | 198     |
| <i>U.S. v. Bernal-Obeso</i> , 989 F.2d 331 (9th Cir. 1993) .....            | 201     |

## **TABLE OF CITATIONS Continued**

### **Page**

#### **FEDERAL CASES Continued**

|                                                                                                      |              |
|------------------------------------------------------------------------------------------------------|--------------|
| <i>U.S. v. Contreras–Castro</i> , 825 F.2d 185 (9th Cir.1987) .....                                  | 193          |
| <i>U.S. v. Fell</i> , 372 F.Supp.2d 766 (D.Vt. 2005) .....                                           | 193          |
| <i>U.S. v. Moore</i> , 159 F.3d 1154 (9th Cir. 1998).....                                            | S-4          |
| <i>U.S. v. Pearson</i> , 746 F.2d 787 (11th Cir. 1984) .....                                         | 108-109, 201 |
| <i>U.S. v. Rabuffo</i> , No. <a href="#">14-14585</a> , 2017 WL 5565229 (11th Cir. Unpub. 2017)..... | 119          |
| <i>U.S. v. Rucker</i> , 557 F.2d 1046 (1977).....                                                    | 189          |
| <i>U.S. v. Runyon</i> , 707 F.3d 475 (4th Cir. 2013) .....                                           | 203          |

#### **OTHER STATE CASES**

|                                                                                                                   |              |
|-------------------------------------------------------------------------------------------------------------------|--------------|
| <i>Brooks v. U.S.</i> , 115 A.3d 1217 (D.C.App. 2015) .....                                                       | 177          |
| <i>Burns v. State</i> , 699 So.2d 646 (Fla. 1997).....                                                            | 151          |
| <i>Commonwealth v. Harris</i> , 817 A.2d 1033 (Pa. 2002) .....                                                    | 149, 151-152 |
| <i>Courtless v. Jolliffe</i> , 507 S.E.2d 136 (W.Va. 1998) .....                                                  | 68           |
| <i>Duncan v. Commonwealth</i> , 322 S.W.3d 81 (Ky. 2010) .....                                                    | 199, 201     |
| <i>Matter of Brigham Park Coop. Apts. v. Finance Adm’r of City of N.Y.</i> , 83 A.D.2d 551 (N.Y. Supr. 1981)..... | 119          |
| <i>McCarty v. State</i> , 765 P.2d 1215 (Okla.Cr.App. 1988).....                                                  | 202          |
| <i>Pelmer v. State</i> , 389 So.2d 584 (Ala.App. 1980).....                                                       | 135          |
| <i>People v. Ballard</i> , 794 N.E.2d 788 (Ill. 2002).....                                                        | 71           |
| <i>People v. Daggett</i> , 225 Cal.App.3d 751 (Cal.App. 1990).....                                                | 202          |
| <i>People v. Murray</i> , 64 A.D.2d 916 (N.Y. 1978).....                                                          | 202          |
| <i>People v. Ochoa</i> , 966 P.2d 442 (Cal. 1998) .....                                                           | 152-153      |
| <i>People v. Quartermain</i> , 941 P.2d 788 (Cal. 1997) .....                                                     | 131          |
| <i>People v. Sanders</i> , 905 P.2d 420 (Cal. 1995) .....                                                         | 152          |
| <i>People v. Smith</i> , 347 P.3d 530 (Cal. 2015).....                                                            | 131, 133     |
| <i>People v. Vera</i> , 94 A.D.2d 728, 462 N.Y.S.2d 467 (N.Y. Supreme Ct. 1983) ....                              | 202          |
| <i>Rauf v. State</i> , 145 A.3d 430 (Del. 2016).....                                                              | 70           |



## **TABLE OF CITATIONS Continued**

### **Page**

#### **OTHER STATE CASES Continued**

|                                                                 |          |
|-----------------------------------------------------------------|----------|
| <i>Smith v. Superior Court</i> , 440 P.2d 65 (Cal. 1968).....   | S-3      |
| <i>State v. Bloom</i> , 516 N.W.159 (Minn. 1994) .....          | 199      |
| <i>State v. Bowman</i> , 623 S.E.2d 378 (S.C. 2005) .....       | 130, 133 |
| <i>State v. Cardus</i> , 949 P.2d 1047 (Haw.App. 1998) .....    | 202      |
| <i>State v. Carr</i> , 331 P.3d 544 (Kan. 2014) .....           | 153      |
| <i>State v. Dene</i> , 533 So.2d 265 (Fla. 1988) .....          | 83       |
| <i>State v. Dixon</i> , 283 So.2d 1 (Fla. 1973).....            | 83       |
| <i>State v. Evans</i> , 637 S.E.2d 313 (S.C. 2006).....         | 131      |
| <i>State v. Farnham</i> , 479 A.2d 887 (Me. 1984).....          | 135      |
| <i>State v. Hudson</i> , 619 N.E.2d 1190 (Ohio App. 1993) ..... | 202      |
| <i>State v. King</i> , 204 P.3d 333 (Kan. 2009) .....           | 202      |
| <i>State v. McCorkendale</i> , 979 P.2d 1239 (Kan. 1999) .....  | 202      |
| <i>State v. Loftin</i> , 680 A.2d 677 (N.J. 1996) .....         | 151      |
| <i>State v. Mayhorn</i> , 720 N.W.2d 776 (Minn. 2006).....      | 198      |
| <i>State v. Stenson</i> , 940 P.2d 1239 (Wash. 1997) .....      | 151      |
| <i>State v. Stevens</i> , 879 P.2d 162 (Or. 1994).....          | 153      |
| <i>Thompson v. Anderson</i> , 153 P.2d 665 (Utah 1944).....     | 83       |
| <i>Whack v. State</i> , 73 A.3d 186 (Md.App. 2013).....         | 199-200  |
| <i>Williams v. State</i> , 168 S.W.3d 433 (Mo. 2005) .....      | 149-150  |
| <i>Zant v. Stephens</i> , 297 S.E.2d 1 (Ga. 1982) .....         | 42, 57   |

#### **OTHER RESOURCES**

|                                                                                                                                          |                   |
|------------------------------------------------------------------------------------------------------------------------------------------|-------------------|
| ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003).....                                 | 134-136, 175, 178 |
| Am. Law Institute, Report of the Council to the Membership of The American Law Institute on the Matter of the Death Penalty (2009) ..... | 139               |
| Black's Law Dictionary (5th ed. 1979) .....                                                                                              | 83                |

## **TABLE OF CITATIONS Continued**

### **Page**

### **OTHER RESOURCES Continued**

|                                                                                                                                                                                       |                             |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------|
| Black’s Law Dictionary (10th ed. 2014) .....                                                                                                                                          | 82-83, 112, 120, 133, 192   |
| Bryan Garner, <i>Garner’s Modern American Usage</i> (2009) .....                                                                                                                      | 81, 93                      |
| Jalem Peguero, <i>On Mitigation: The Role of “Execution Impact” Evidence</i> , 16 Berkeley J. of Afr.-Am. L. & Pol’y 65 (2014) .....                                                  | 154                         |
| Merriam-Webster Dictionary, (available at <a href="https://www.merriam-webster.com/dictionary/">https://www.merriam-webster.com/dictionary/</a> ).....                                | 112, 125                    |
| RAJI Capital 1.6 (available at <a href="http://www.azbar.org/media/1642904/rajicriminal-4thed2017.pdf">http://www.azbar.org/media/1642904/rajicriminal-4thed2017.pdf</a> , 600) ..... |                             |
| Random House Webster’s College Dictionary (Random House 1992) 108, 111, 164                                                                                                           |                             |
| Random House Webster’s College Dictionary (Random House 1998) .....                                                                                                                   | 163                         |
| <i>State v. Chappell</i> , AB, 2009 WL 5850810. ....                                                                                                                                  | 149                         |
| <i>State v. Chappell</i> , OB, 2009 WL 5510829 .....                                                                                                                                  | 149                         |
| <i>State v. Hidalgo</i> , Corrected OB, 2015 WL 12977498.....                                                                                                                         | 72-73                       |
| Steiker & Steiker, <u>Courting Death</u> <i>Courting Death: The Supreme Court and Capital Punishment</i> (2016) .....                                                                 | 43-44, 48-50, 58, 60-61, 63 |
| Susan Bandes, <i>Empathy, Narrative, and Victim Impact Statements</i> , 63 U. Chi. L. Rev. 361 (1995).....                                                                            |                             |
| The New College Edition of the American Heritage Dictionary (1979).....                                                                                                               | 83                          |
| The Random House Dictionary of the English Language (Unabridged 1973) ....                                                                                                            | 108, 110-111                |
| Wayne Logan, <i>When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials</i> , 33 U. Mich. J. L. Reform 1 (1999).....                           | 154-155                     |
| Webster’s Third New International Dictionary .....                                                                                                                                    | 112                         |
| Webster’s II New College Dictionary (1995).....                                                                                                                                       | 81, 93                      |

## **TABLE OF CITATIONS Continued**

### **Page**

#### **CONSTITUTIONAL PROVISIONS**

##### **United States Constitution**

|                   |                                           |
|-------------------|-------------------------------------------|
| Amendment 4.....  | 185                                       |
| Amendment 5.....  | 51, 68, 118, 134, 142, 162, 178-179, 202  |
| Amendment 6.....  | 69, 162, 178, 190, 194, S-2, S-4          |
| Amendment 8.....  | 47, 64, 127, 144, 156, 162, 178-179       |
| Amendment 14..... | 68, 118, 127, 134, 142, 144, 156, 178-179 |

##### **Arizona State Constitution**

|                              |                                           |
|------------------------------|-------------------------------------------|
| Article 2, Section 2.1 ..... | 154                                       |
| Article 2, Section 4 .....   | 51, 68, 118, 127, 134, 144, 162, 178, 181 |
| Article 2, Section 8 .....   | 162, 185                                  |
| Article 2, Section 10 .....  | 51, 202                                   |
| Article 2, Section 15 .....  | 127, 144, 162, 178-179                    |
| Article 2, Section 23 .....  | 134, 190                                  |
| Article 2, Section 24 .....  | 51, 67-69, 134, 178, 190-191, S-2, S-4    |
| Article 6, Section 17 .....  | 134                                       |
| Article 6, Section 27 .....  | 103                                       |

#### **STATUTES**

##### **Arizona Revised Statutes**

|                |                                                                                                                  |
|----------------|------------------------------------------------------------------------------------------------------------------|
| §13-502 .....  | 125                                                                                                              |
| §13-703 .....  | 76, 84                                                                                                           |
| §13-705 .....  | 73, 74                                                                                                           |
| §13-751.....   | 32, 54-56, 62, 75-78, 81, 83-87, 89-97, 100-103, 105-106,<br>108, 110, 113, 115, 125-126, 130, 138-139, 141, 183 |
| §13-752 .....  | 139, 156                                                                                                         |
| §13-756 .....  | 76                                                                                                               |
| §13-1101 ..... | 59                                                                                                               |
| §13-1105 ..... | 52, 55-56, 59                                                                                                    |

## **TABLE OF CITATIONS Continued**

|                                           | <b><u>Page</u></b> |
|-------------------------------------------|--------------------|
| <b>Arizona Revised Statutes Continued</b> |                    |
| §13-1410 .....                            | 74                 |
| §13-2501 .....                            | 56                 |
| §13-2503 .....                            | 56                 |
| §13-2504 .....                            | 56                 |
| §13-3405 .....                            | 55                 |
| §13-3407 .....                            | 55                 |
| §13-3408 .....                            | 55                 |
| §13-3409 .....                            | 55                 |
| §13-3623 .....                            | 74                 |
| §13-4062 .....                            | 137                |
| §21-211 .....                             | 191-192, 195       |
| §28-101 .....                             | 208                |

## **RULES**

### **Arizona Rules of Criminal Procedure**

|                 |                  |
|-----------------|------------------|
| Rule 6.3 .....  | 175, 178         |
| Rule 6.8 .....  | 136              |
| Rule 15 .....   | 163              |
| Rule 15.2 ..... | 163-164          |
| Rule 15.4 ..... | 163-165, 170-171 |
| Rule 17.3 ..... | 185              |
| Rule 17.5 ..... | 181              |
| Rule 18.4 ..... | 191-193          |
| Rule 26 .....   | 170              |

### **Arizona Rules of Evidence**

|                |     |
|----------------|-----|
| Rule 104 ..... | 133 |
| Rule 106 ..... | 197 |
| Rule 401 ..... | 130 |

## **TABLE OF CITATIONS Continued**

|                                                                                                                                                                     | <b><u>Page</u></b> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| <b>RULES Continued</b>                                                                                                                                              |                    |
| <b>Arizona Rules of Professional Conduct</b>                                                                                                                        |                    |
| E.R. 1.2 .....                                                                                                                                                      | S-3                |
| E.R. 1.3 .....                                                                                                                                                      | S-3                |
| E.R. 1.4 .....                                                                                                                                                      | S-3, S-4           |
| E.R. 1.6 .....                                                                                                                                                      |                    |
| E.R. 1.7 .....                                                                                                                                                      |                    |
| E.R. 1.9 .....                                                                                                                                                      |                    |
| E.R. 1.10 .....                                                                                                                                                     |                    |
| E.R. 3.8 .....                                                                                                                                                      | 171                |
| <b>Federal Rules</b>                                                                                                                                                |                    |
| Fed.R.App.P. 32.1.....                                                                                                                                              | 119                |
| <b>OTHER CODES</b>                                                                                                                                                  |                    |
| ALI Model Penal Code: Sentencing (available at<br><a href="https://www.ali.org/projects/show/sentencing/">https://www.ali.org/projects/show/sentencing/</a> ) ..... | 139-140            |
| 720 Ill. Comp. Stat. Ann. 5/9-1.....                                                                                                                                | 70                 |
| Del. Code Ann. tit. 11, §4209 .....                                                                                                                                 | 53                 |
| Fla. Stat. §921.141 .....                                                                                                                                           | 53                 |
| Ga. Code Ann. §17-10-30 .....                                                                                                                                       | 53                 |
| Ind. Code Ann. §35-50-2-9.....                                                                                                                                      | 53                 |
| La. Code Crim. Proc. Ann. art. 905.4 .....                                                                                                                          | 53                 |
| La.Rev.Stat. §14.30.1 (1986) .....                                                                                                                                  | 58                 |
| Mass. Gen. Laws Ann. ch. 279, §69 .....                                                                                                                             | 53                 |
| MD Code, Criminal Law, §2-303.....                                                                                                                                  | 53                 |
| Mo. Ann. Stat. §565.032 .....                                                                                                                                       | 53                 |
| N.C. Gen. Stat. Ann. §15A-2000 .....                                                                                                                                | 53                 |
| N.H. Rev. Stat. Ann. §630:5 .....                                                                                                                                   | 53                 |
| N.M. Stat. Ann. §31-20A-5 (2008).....                                                                                                                               | 53                 |

**TABLE OF CITATIONS Continued**

|                                         | <b><u>Page</u></b> |
|-----------------------------------------|--------------------|
| <b>OTHER CODES Continued</b>            |                    |
| Okla. Stat. Ann. tit. 21, §701.12 ..... | 53                 |
| S.C. Code Ann. §16-3-20.....            | 53                 |
| S.D. Codified Laws §23A-27A-1 .....     | 53                 |
| Vt. Stat. Ann. tit. 13, §2303 .....     | 53                 |

## **STATEMENT OF FACTS**

I'm reminded of a time where I—there was one night I couldn't sleep, and I was so terrified. And Jimmy called me, and he actually stayed on the phone with me and was like, "You can sleep, and I'm right here. I won't hang up." And we actually slept, like, on the phone together. And it was just—he was a protector and very compassionate and very gentle ...<sup>1</sup>

Life was already too much of a struggle for Byung Gu Choi, he didn't feel that he and his partner, Sun Ja, should raise a child on top of that.<sup>2</sup> While Sun Ja "was quite outgoing, ... the problem was that her intelligence level, she was quite lower than [a] normal person."<sup>3</sup> She acted strangely, she didn't fit in with Korean norms.<sup>4</sup> At one point, she even took another person's child for the better part of a day.<sup>5</sup>

Byung Gu had problems of his own.<sup>6</sup> He was disabled by polio,<sup>7</sup> he had a serious limp in one leg,<sup>8</sup> he struggled for money,<sup>9</sup> he had to take the work he could get.<sup>10</sup> While he and Sun Ja were together for just under two years, they lived together

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<sup>1</sup> RT-6/9/2016, 124 (Michelle Ferro testimony).

<sup>2</sup> RT-5/26/2016, 85, 91-92.

<sup>3</sup> *Id.* at 85.

<sup>4</sup> *Id.* at 84-85.

<sup>5</sup> RT-6/23/2016, 37-38.

<sup>6</sup> RT-5/26/2016, 81-82, 84, 91.

<sup>7</sup> *Id.* at 81.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 82, 84, 91.

<sup>10</sup> *Id.* at 82.

most of that time.<sup>11</sup> But they lived in a small home near the shoe factory where Byung Gu worked.<sup>12</sup> Noxious fumes seeped from the factory through the entire community.<sup>13</sup>

Just a few months into their relationship, while living together under the stench of the shoe factory, Sun Ja became pregnant.<sup>14</sup> By this point, Byung Gu realized he no longer wanted to be with Sun Ja.<sup>15</sup> They decided that once the child was born—a child they eventually named Hyung Joon Choi—they would put him up for adoption.<sup>16</sup>

When Hyung Joon Choi was born, Byung Gu and Sun Ja followed through on their agreement.<sup>17</sup> They gave the child up for adoption and separated about one month later.<sup>18</sup>

Byung Gu didn't think about Hyung Joon Choi from that point on.<sup>19</sup> Instead, he continued with his life.<sup>20</sup> He continued to struggle with his disability.<sup>21</sup> And he

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<sup>11</sup> *Id.* at 83.

<sup>12</sup> *Id.* at 87-89.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 83-89.

<sup>15</sup> *Id.* at 85.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 90.

<sup>18</sup> *Id.* at 90.

<sup>19</sup> *Id.* at 80.

<sup>20</sup> *Id.* at 80, 90.

<sup>21</sup> *Id.* at 90.



struggled with addiction, a struggle his biological son would come to know.<sup>22</sup> Byun Gu's addiction—alcohol—eventually ravaged his system, leaving him with liver cirrhosis and doctor's orders that he stop drinking.<sup>23</sup> Despite these orders, Byun Gu couldn't stop drinking.<sup>24</sup> Instead, he felt he had it under control because he was drinking “about a bottle every day.”<sup>25</sup>

---

Kevin and Shelley Johnson wanted children.<sup>26</sup> They tried for years, saw doctors, even had surgeries.<sup>27</sup> But they couldn't.<sup>28</sup> Eventually, they decided to adopt.<sup>29</sup> They learned domestic adoption was difficult and time-consuming.<sup>30</sup> Adoptions from other countries, however, could be processed faster.<sup>31</sup> Kevin and Shelley started working with an agency that specialized in Korean adoptions.<sup>32</sup> In about six months, the newest member of their family was on the way.<sup>33</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> RT-5/31/2016(afternoon), 18.

<sup>27</sup> *Id.* at 18-19.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 19.

<sup>30</sup> *Id.* at 19-20.

<sup>31</sup> *Id.* at 21.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

The first few months of Hyung Joon Choi's life were spent at a Korean adoption agency.<sup>34</sup> He spent so much time lying on his back, and with so little activity, that he developed a flat, malformed head.<sup>35</sup> But when the adoption with Kevin and Shelley came through, the agency picked Hyung Joon Choi up, put him on a plane, and sent him to Colorado.<sup>36</sup>

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The entire family packed into the airport to greet the new addition.<sup>37</sup> Pacing in hospital hallways was replaced with a large, joyous grouping in the terminal.<sup>38</sup> And when Hyung Joon was brought off the plane, everyone huddled around to see their newest cousin, grandchild, and son.<sup>39</sup> Kevin and Shelley named him James Clayton Johnson, although his friends and family came to call him Jimmy.

As the family left the airport, happy for Kevin and Shelley, they didn't think about what they didn't have.<sup>40</sup> Everyone realizes that a newly adopted child doesn't come with an instruction manual, but the adoption agency also didn't send along any medical information about Jimmy.<sup>41</sup> Nothing about his biological mother's possible

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<sup>34</sup> RT-6/13/2016, 92-93.

<sup>35</sup> RT-5/31/2016(afternoon), 23-24.

<sup>36</sup> *See id.* at 21-22.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 22-23.

<sup>41</sup> *Id.* at 22.

mental health issues.<sup>42</sup> Nothing about his father's physical health problems.<sup>43</sup> And nothing about the plague of his father's struggles with addiction.<sup>44</sup> As Shelley put it, "[y]ou just don't know ... what kind of attention and, you know, bonding they get. You just don't know."<sup>45</sup>



Two years later, Kevin and Shelley adopted another child from Korea, Mauri.<sup>46</sup>

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As Jimmy grew up, everything seemed fine to Kevin and Shelley. Even though he was Korean and had been thrust into the middle of a white family with

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<sup>42</sup> *See id.*

<sup>43</sup> *See id.*

<sup>44</sup> *See id.*

<sup>45</sup> *Id.* at 23.

<sup>46</sup> *Id.* at 24.

deep devotion to the Church of Latter Day Saints and lived in a white suburb, Jimmy seemed to get along fine.<sup>47</sup> He made friends.<sup>48</sup> He did well in the Boy Scouts and earned his Eagle Scout.<sup>49</sup> He succeeded in sports.<sup>50</sup> And he was an incredibly outgoing kid—good-natured, the life of the party, the class clown.<sup>51</sup> He was a loving cousin<sup>52</sup> and doting big brother.<sup>53</sup>

But Kevin and Shelley knew Jimmy faced some struggles.<sup>54</sup> When Jimmy was in fifth grade, he was bullied.<sup>55</sup> On top of that, the bullying had racist overtones: other students called him “slant eyes” and “chink boy.”<sup>56</sup>

Kevin and Shelley also didn’t see warning signs.<sup>57</sup> Jimmy was reckless, he was the kid who was willing to take risks that others wouldn’t. Jimmy’s uncle Johnathan Woods remembered Jimmy as a rambunctious child who would take on a challenge.<sup>58</sup> Uncle John also saw “plenty of kids” willing to “taunt him to go do

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<sup>47</sup> *Id.* at 13-14, 24-25.

<sup>48</sup> *Id.* at 29.

<sup>49</sup> *Id.* at 36-37.

<sup>50</sup> *Id.* at 36, 38, 86-87.

<sup>51</sup> *Id.* at 24-26.

<sup>52</sup> *Id.* at 33.

<sup>53</sup> *Id.* at 29, 101.

<sup>54</sup> *Id.* at 28.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *See id.* at 29-30.

<sup>58</sup> RT-6/1/2016, 35.

something.”<sup>59</sup> Jimmy’s scout leader, John Grange, saw that Jimmy had a need for an adrenaline rush,<sup>60</sup> a need to do “wild and crazy” things “for a thrill.”<sup>61</sup>

This recklessness turned to experimentation during middle school.<sup>62</sup> One of Jimmy’s friends had a father who kept prescription drugs unlocked.<sup>63</sup> The two of them would occasionally use the drugs.<sup>64</sup> Jimmy’s experimentation reached further—he would also get high with Benadryl.<sup>65</sup>

While his grades slipped,<sup>66</sup> Jimmy kept a decent grade point average through middle school and the beginning of his freshman year at Columbine High School in Littleton, Colorado.<sup>67</sup> But more red flags started to pop up. Dan Grange, John’s son, recalled that Jimmy would go into garages and steal items.<sup>68</sup> John Grange even remembered Dan telling him about it.<sup>69</sup>

Despite slipping grades and risky behavior, Jimmy outright succeeded in sports.<sup>70</sup> While he also played football, Jimmy found his greatest success on the

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<sup>59</sup> *Id.*

<sup>60</sup> RT-6/14/2016, 17.

<sup>61</sup> *Id.* at 11.

<sup>62</sup> RT-5/31/2016(afternoon), 53-54, 80-81.

<sup>63</sup> *Id.* at 53-54, 81.

<sup>64</sup> *Id.* at 53-54, 81-82.

<sup>65</sup> RT-6/15/2016, 47, 93-94.

<sup>66</sup> RT-5/31/2016(afternoon), 32, 38.

<sup>67</sup> *Id.* at 38.

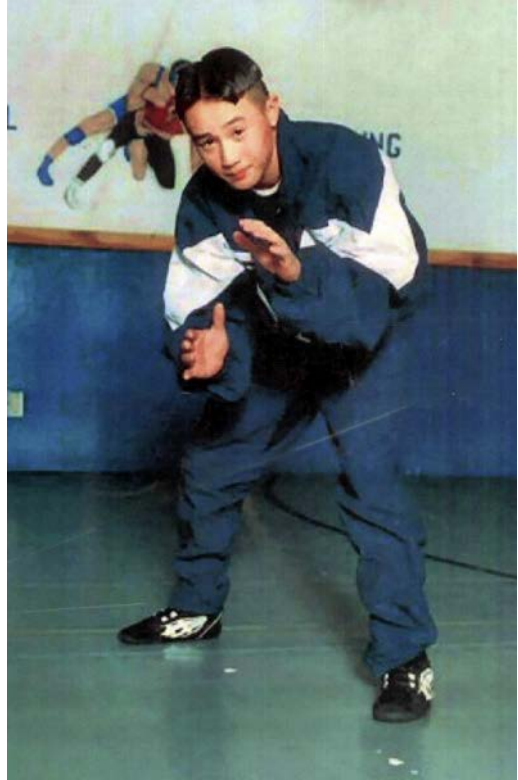
<sup>68</sup> RT-6/13/2016, 63-64.

<sup>69</sup> RT-6/14/2016, 11.

<sup>70</sup> RT-5/31/2016(afternoon), 38, 86-87.

mat.<sup>71</sup> His freshman year, Jimmy made the varsity wrestling team.<sup>72</sup> His parents were excited and went to several meets.<sup>73</sup>

Through this, Jimmy still had a big heart and was always trying to help people. Christopher Markham, his teammate, recalled one wrestling meet when he forgot his kneepads.<sup>74</sup> Jimmy immediately came to his aid.<sup>75</sup> The two of them ran to a local sporting goods store, and when Christopher didn't have



the money to buy the kneepads, Jimmy paid.<sup>76</sup> On the run back to school, Jimmy's spirits were high—he thought the run would be a good warm-up.<sup>77</sup>

Everything got worse April 20, 1999.

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 38.

<sup>74</sup> RT-6/9/2016, 45.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

Just after 11:00 a.m., Eric Harris and Dylan Klebold walked into the lunchroom of Columbine High School.<sup>78</sup> They dropped off bags containing homemade bombs, walked back out, and went to a car in the parking lot.<sup>79</sup> Harris and Klebold waited.<sup>80</sup> When the bombs did not go off by 11:17,<sup>81</sup> Harris and Klebold got out of the car and returned to the hallway.<sup>82</sup> At 11:19, they fired the first shot.<sup>83</sup>

It was a massacre. Harris and Klebold alternated between firing shots from several guns and throwing pipe bombs.<sup>84</sup> Panic spread quickly as Harris and Klebold moved through the school and the death toll mounted. As students ran from gunfire, someone pulled the fire alarm.<sup>85</sup>

Jimmy was in the weight room when he heard the alarm.<sup>86</sup> Initially, the students were slow to move, thinking it was just another fire drill<sup>87</sup> or a prank.<sup>88</sup> After a few minutes, they migrated toward the exit.<sup>89</sup> Jimmy wasn't the first out.<sup>90</sup>

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<sup>78</sup> RT-6/21/2016, 13.

<sup>79</sup> *Id.* at 78.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 77-78.

<sup>82</sup> *Id.* at 78.

<sup>83</sup> *Id.* at 13.

<sup>84</sup> *Id.* at 64-65, 78-79.

<sup>85</sup> RT-6/9/2016, 47-48.

<sup>86</sup> RT-5/31/2016(afternoon), 39, 41.

<sup>87</sup> RT-6/21/2016, 28.

<sup>88</sup> RT-6/9/2016, 8.

<sup>89</sup> *See* RT-6/9/2016, 8; RT-6/21/2016, 8; RT-6/22/2016, 41.

<sup>90</sup> RT-6/22/2016, 41.

As he waited to get through the door, he looked down a hallway<sup>91</sup> and saw students running<sup>92</sup> and screaming.<sup>93</sup> As the students went through the door, they saw chaos.<sup>94</sup>

Everyone was running.<sup>95</sup> Screams came from all around.<sup>96</sup> Pops and explosions clattered from the side.<sup>97</sup> The starting quarterback sprinted toward the nearest fence.<sup>98</sup> When he came upon it, he hurled himself over and kept running.<sup>99</sup> As each student was confronted with this scene, they ducked down, followed the path of other students, and ran to the park just past the fence.<sup>100</sup>

In the park, Jimmy was confused.<sup>101</sup> He didn't know what was going on and he couldn't get any answers.<sup>102</sup> But with an army of police showing up,<sup>103</sup> Jimmy caught a ride home.<sup>104</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> RT-6/21/2016, 28.

<sup>94</sup> RT-6/9/2016, 11.

<sup>95</sup> *Id.* at 48.

<sup>96</sup> *Id.*; RT-6/21/2016, 30.

<sup>97</sup> RT-6/9/2016, 11; RT-6/21/2016, 30.

<sup>98</sup> RT-6/9/2016, 9-10.

<sup>99</sup> *Id.* at 10.

<sup>100</sup> *See id.* at 10-12.

<sup>101</sup> RT-6/22/2016, 41.

<sup>102</sup> RT-6/9/2016, 120-21.

<sup>103</sup> RT-6/23/2016, 71.

<sup>104</sup> RT-5/31/2016(afternoon), 39.



The gaps filled in at home.<sup>105</sup> He turned on the news and saw what happened in his school.<sup>106</sup> Twelve students dead.<sup>107</sup> One a friend, one an acquaintance.<sup>108</sup> Twenty-one more injured.<sup>109</sup> A teacher dead.<sup>110</sup> Harris and Klebold committed suicide to end it.<sup>111</sup>

The following days were a whirlwind for Jimmy.<sup>112</sup> There were vigils and emotional events.<sup>113</sup> There were police officers and investigations.<sup>114</sup> The entire community reacted to the tragedy.<sup>115</sup> Personally, Jimmy struggled with his emotions.<sup>116</sup> As the investigation revealed more and the news reported it every evening, Jimmy couldn't let go—he wished he could have done something more to prevent or stop what had happened.<sup>117</sup> He had trouble sleeping and, when he could, he had nightmares.<sup>118</sup>

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<sup>105</sup> *Id.* at 40.

<sup>106</sup> RT-6/13/2016, 101-02.

<sup>107</sup> RT-6/21/2016, 9.

<sup>108</sup> RT-6/15/2016(morning), 29.

<sup>109</sup> RT-6/21/2016, 9.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 23.

<sup>112</sup> RT-5/31/2016(afternoon), 40.

<sup>113</sup> RT-6/9/2016, 22-23.

<sup>114</sup> RT-6/21/2016, 54-55.

<sup>115</sup> RT-6/9/2016, 22-23; RT-6/13/2016, 102-03.

<sup>116</sup> RT-6/15/2016(morning), 35.

<sup>117</sup> RT-6/2/2016, 13-14.

<sup>118</sup> RT-6/23/2016, 53.

As he struggled with his own demons and self-doubts, he tried to support his friends. Michelle Ferro talked about just how important Jimmy's support was as she tried to recover.<sup>119</sup> Jimmy was always there to listen, to talk, to support her, and just to stay with her.<sup>120</sup> She recalled one time in particular when he stayed on the phone with her when she could not fall asleep:

I'm reminded of a time where I—there was one night I couldn't sleep, and I was so terrified. And Jimmy called me, and he actually stayed on the phone with me and was like, "You can sleep, and I'm right here. I won't hang up." And we actually slept, like, on the phone together. And it was just—he was a protector and very compassionate and very gentle ...<sup>121</sup>

While Jimmy was helping others, however, his family missed out on the chance to truly help him. The community response was wonderful.<sup>122</sup> Several groups converged on Columbine to provide any help they could.<sup>123</sup> The police departments brought in therapists and psychologists to help the students deal with the trauma.<sup>124</sup> Counseling was offered to everyone.<sup>125</sup> But not everyone accepted the help.<sup>126</sup>

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<sup>119</sup> See RT-6/9/2016, 123-24.

<sup>120</sup> *Id.* at 121-22, 123-24.

<sup>121</sup> *Id.* at 124.

<sup>122</sup> *Id.* at 22-22.

<sup>123</sup> RT-6/21/2016, 31, 53-55.

<sup>124</sup> *Id.* at 30-32.

<sup>125</sup> RT-5/31/2016(afternoon), 83-84.

<sup>126</sup> See RT-6/21/2016, 51-52.

Jimmy's family was—and still is—devoutly Mormon.<sup>127</sup> They tried to deal with all struggles through the Church.<sup>128</sup> And the Church was somewhat responsive.<sup>129</sup> For a short time, the Church brought in therapists to help student members deal with the damage.<sup>130</sup> So when the police department offered counseling, Jimmy's family declined.<sup>131</sup> Instead, they opted for the counseling provided by the Church.<sup>132</sup>

But Jimmy's trauma couldn't be fixed with just a couple of sessions, he needed more help. Jimmy's family, however, didn't understand why Jimmy struggled to move on.<sup>133</sup>

There were constant reminders of what had happened. The students were shipped off to a different school.<sup>134</sup> Schedules changed because the new high school now had to accommodate two populations: their own students and the Columbine students.<sup>135</sup> Teachers, struggling to find answers themselves,<sup>136</sup> gave students a

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<sup>127</sup> RT-6/13/2016, 86, 89, 94.

<sup>128</sup> RT-5/31/2016(afternoon), 42, 84.

<sup>129</sup> *Id.* at 42.

<sup>130</sup> *Id.* at 42-43.

<sup>131</sup> RT-6/21/2016, 51-52.

<sup>132</sup> RT-5/31/2016(afternoon), 42-43; RT-6/21/2016, 52.

<sup>133</sup> RT-5/31/2016(afternoon), 116.

<sup>134</sup> RT-6/9/2016, 24.

<sup>135</sup> *Id.*

<sup>136</sup> *See* RT-6/9/2016, 56.

pass.<sup>137</sup> Class periods were often spent talking about what had happened.<sup>138</sup> If students didn't show up to class, nobody minded.<sup>139</sup>

While Jimmy battled his demons and trauma, surrounded by constant reminders, Jimmy's family told him he just needed to get over it and move on with life.<sup>140</sup> Jimmy was in the school and heard gunshots,<sup>141</sup> and his family told him to just get over it.<sup>142</sup> Jimmy had friends die and other friends he was barely able to help keep together,<sup>143</sup> and his family told him to just get over it.<sup>144</sup> Jimmy was guilt-ridden, believed he could have and should have done more to stop the violent attack,<sup>145</sup> and his family told him to just get over it.<sup>146</sup>

With friends who all needed his help and with a family that wanted to avoid the problem, Jimmy had nobody and nothing he could rely upon to deal with his emotions. Struggling to cope, struggling with nightmares,<sup>147</sup> struggling with feelings of weakness and guilt,<sup>148</sup> Jimmy turned to drugs.<sup>149</sup>

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<sup>137</sup> *Id.* at 53-54.

<sup>138</sup> *See id.* at 25.

<sup>139</sup> *Id.* at 23

<sup>140</sup> RT-5/31/2016(afternoon), 116-17.

<sup>141</sup> RT-6/9/2016, 11; RT-6/21/2016, 30.

<sup>142</sup> RT-5/31/2016(afternoon), 116-17.

<sup>143</sup> RT-6/9/2016, 123-25.

<sup>144</sup> RT-5/31/2016(afternoon), 116-17.

<sup>145</sup> RT-6/2/2016, 13-14.

<sup>146</sup> RT-5/31/2016(afternoon), 116-17.

<sup>147</sup> RT-6/23/2016, 53.

<sup>148</sup> RT-6/2/2016, 13-14.

<sup>149</sup> RT-5/31/2016(afternoon), 43-44, 57.

Ill-equipped to address the change,<sup>150</sup> Jimmy’s parents resorted to “talking to him about his choices and where they would lead.”<sup>151</sup>

The next year the students walked back into Columbine High School.<sup>152</sup> It was held out as an event to take back their school.<sup>153</sup> But where the school tried to erect a new and bright facade,<sup>154</sup> the students saw the event—the empty library behind new lockers, the same cafeteria despite different tables.<sup>155</sup>



Back at Columbine, Jimmy tried to move on. He played sports his sophomore and junior years.<sup>156</sup> He stayed involved in Boy Scouts—he eventually earned his Eagle Scout.<sup>157</sup> And Jimmy met Julie Landis his junior or senior year.<sup>158</sup> Michelle Ferro saw almost immediately that Jimmy acted differently around

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<sup>150</sup> *Id.* at 46.

<sup>151</sup> *Id.* at 45.

<sup>152</sup> RT-6/9/2016, 23.

<sup>153</sup> *Id.* at 23-24, 28, 58-59.

<sup>154</sup> RT-6/21/2016, 59-61.

<sup>155</sup> *See* RT-6/9/2016, 30-31.

<sup>156</sup> *See* RT-5/31/2016(afternoon), 38; *see also* RT-6/9/2016, 177.

<sup>157</sup> RT-6/14/2016, 7.

<sup>158</sup> *See* RT-5/31/2016(afternoon), 51; RT-6/13/2016, 118.

her.<sup>159</sup> While normally Jimmy was funny, he was sweet with Julie.<sup>160</sup> The two dated through the rest of high school and after.<sup>161</sup>

But Jimmy's grades also dropped.<sup>162</sup> Where he had normally been a B-average student, his grades dropped to Cs and Ds.<sup>163</sup> His attempts to move on didn't resolve his pain. He still struggled with the trauma,<sup>164</sup> still felt mad at himself for doing nothing,<sup>165</sup> still had nightmares.<sup>166</sup> He still felt powerless and weak as a result of the shooting.<sup>167</sup>

Jimmy again went to counseling for a couple of months.<sup>168</sup> It didn't help.<sup>169</sup>

His senior year, Jimmy stopped wrestling.<sup>170</sup> He also started using Xanax and steroids.<sup>171</sup> Over a short period of time, Jimmy added a lot of muscle.<sup>172</sup> That wasn't the only effect of the steroids.<sup>173</sup>

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<sup>159</sup> RT-6/9/2016, 132-33.

<sup>160</sup> *Id.*

<sup>161</sup> RT-5/31/2016(afternoon), 51.

<sup>162</sup> RT-6/15/2016, 25; *see* RT-5/31/2016(afternoon), 43; RT-6/14/2016, 75.

<sup>163</sup> RT-6/15/2016, 25.

<sup>164</sup> RT-6/23/2016, 74-79.

<sup>165</sup> *Id.* at 75-76.

<sup>166</sup> *Id.* at 81-82.

<sup>167</sup> *Id.* at 75-76.

<sup>168</sup> RT-5/31/2016(afternoon), 47, 57, 90.

<sup>169</sup> *Id.*

<sup>170</sup> *See* RT-6/13/2016, 74.

<sup>171</sup> RT-6/15/2016(afternoon), 31; RT-5/31/2016(afternoon), 58, 92, 113.

<sup>172</sup> RT-5/31/2016(afternoon), 58.

<sup>173</sup> *Id.* at 58-59.

Jimmy also struggled with anger.<sup>174</sup> The rage he felt from the shooting started to manifest in his behaviors.<sup>175</sup> He developed a short fuse, he yelled at friends, acted aggressively,<sup>176</sup> and threatened people.<sup>177</sup> On one occasion, he threatened another student by brandishing a BB gun.<sup>178</sup> He was adjudicated delinquent in juvenile court and placed on probation.<sup>179</sup> On another occasion, he aggressively drove over a grassy area, narrowly missing several students.<sup>180</sup>

Jimmy was changing—physically, mentally, attitudinally—right before his family’s eyes. They helped him get an attorney for the juvenile case,<sup>181</sup> kept him involved in other activities, and worried about him, but they thought he just needed to get over the shooting and move on with life. The problem was, Jimmy couldn’t. Drugs had become his coping mechanism.<sup>182</sup> Where there had previously been promise and success, Jimmy experienced failure and doubt.<sup>183</sup>

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<sup>174</sup> *Id.* at 54, 113.

<sup>175</sup> RT-6/13/2016, 69.

<sup>176</sup> RT-6/9/2016, 63; RT-6/13/2016, 51-52.

<sup>177</sup> RT-5/31/2016(afternoon), 113.

<sup>178</sup> *Id.* at 47-48, 103-04.

<sup>179</sup> *See* RT-6/13/2016, 110; RT-6/22/2016, 62.

<sup>180</sup> RT-6/9/2016, 126-27.

<sup>181</sup> RT-5/31/2016(afternoon), 105.

<sup>182</sup> RT-6/9/2016, 66-67.

<sup>183</sup> *See* RT-6/15/2016, 25.

When Jimmy graduated high school, his prospects were minimal. His grades were poor, so no colleges accepted him.<sup>184</sup> Eventually, his family was able to help get Jimmy into a summer program at Brigham Young University Idaho.<sup>185</sup> If Jimmy succeeded over the summer, he would be accepted for the fall semester.<sup>186</sup>

Jimmy made it just a couple of weeks.<sup>187</sup> Jimmy had alcohol in his room in violation of school policy.<sup>188</sup> The school kicked him out.<sup>189</sup>

Jimmy tried to go on a mission—something of a rite of passage in the Church of Latter Day Saints.<sup>190</sup> But he missed Julie and struggled with the training.<sup>191</sup> Jimmy dropped out.<sup>192</sup>

Jimmy moved to Arizona and lived with his aunt.<sup>193</sup> He enrolled at Mesa Community College and took some classes.<sup>194</sup> Like before, though, Jimmy didn't do well.<sup>195</sup> Jimmy had horrible grades and he continued to struggle with drugs and poor

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<sup>184</sup> RT-5/31/2016(afternoon), 49.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 49, 96-97.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> RT-6/2/2016, 53; RT-6/7/2016, 157.

<sup>191</sup> RT-6/2/2016, 57.

<sup>192</sup> RT-6/13/2016, 60-61.

<sup>193</sup> RT-5/31/2016(afternoon), 50.

<sup>194</sup> *Id.* at 50, 97.

<sup>195</sup> *Id.* at 97.



decisions.<sup>196</sup> During his stay with his Aunt in Arizona, Jimmy was accused of stealing<sup>197</sup> and his drug use expanded to include cocaine.<sup>198</sup>

Next, Jimmy moved back to Colorado and started working for his father, a plumber.<sup>199</sup> Jimmy had worked for his father through high school<sup>200</sup> and was good at the work.<sup>201</sup> But Jimmy still struggled. His drug use continued—he and Julie spent her large inheritance binging cocaine.<sup>202</sup> Jimmy also became more involved in street racing.<sup>203</sup> Bad decisions compounded bad decisions, and Jimmy was arrested for having a gun in the car—a crime in light of his adjudication and probation.<sup>204</sup> Although Julie testified the gun was hers, the jury convicted Jimmy.<sup>205</sup>

Still, Jimmy struggled. Still, Jimmy's drug problem got worse.

Jimmy and Julie married in 2005.<sup>206</sup> Jimmy's family saw that Julie was good for Jimmy.<sup>207</sup> And they believed Jimmy was good for her too.<sup>208</sup>

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 97-98.

<sup>198</sup> *Id.* at 92.

<sup>199</sup> *Id.* at 50-51.

<sup>200</sup> *Id.* at 95.

<sup>201</sup> RT-6/13/2016, 108-09.

<sup>202</sup> RT-6/15/2016(morning), 31.

<sup>203</sup> RT-6/1/2016, 67-68.

<sup>204</sup> RT-5/31/2016(afternoon), 105.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 51.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

Shelley and Kevin moved to Arizona shortly before the marriage.<sup>209</sup> Jimmy and Julie followed and Jimmy continued working for Kevin.<sup>210</sup>

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Things started to look up when Jimmy and Julie had a daughter. From the moment Lilly was born, Jimmy's family believed Jimmy had finally come into his own.<sup>211</sup> They saw a son who seemed to be a good, loving father and husband.<sup>212</sup> And while Shelley and Kevin could tell the relationship wasn't perfect, neither Jimmy nor Julie were forthcoming about any problems.<sup>213</sup> Jimmy and Julie were active in their church ward,<sup>214</sup> they even taught a Sunday school class together.<sup>215</sup>



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<sup>209</sup> *See id.* at 51-52.

<sup>210</sup> *Id.* at 51-53.

<sup>211</sup> *Id.* at 59.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 55, 124.

<sup>214</sup> *Id.* at 56.

<sup>215</sup> *Id.*

In reality, the relationship wasn't happy. Julie felt that Jimmy did little to care for Lilly, she did all the work.<sup>216</sup> Jimmy started using drugs again.<sup>217</sup> Julie and Jimmy argued and Jimmy was aggressive.<sup>218</sup> Shelley and Kevin tried to get Jimmy and Julie help; Shelley's brother John, a life coach, met once with Jimmy and Julie.<sup>219</sup> It didn't work. Julie and Jimmy's arguments became physical and threatening.<sup>220</sup> At one point, Jimmy threatened Julie with a knife, tracing the tip of the blade over her stomach.<sup>221</sup>

Julie went to Jimmy's parents for help.<sup>222</sup> And she received it—Kevin helped Julie move back to Colorado, where she and Lilly stayed.<sup>223</sup>

His wife and child gone, Jimmy fell.<sup>224</sup> He went back to the fast life, as he described it: "lots of drugs, lots of girls, lots of money, lots of fun."<sup>225</sup> Jimmy even went to work high.<sup>226</sup> Kevin and Shelley tried to get Jimmy help.<sup>227</sup> Jimmy still got in trouble.<sup>228</sup> He was arrested for stealing rings from two different jewelry stores in

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<sup>216</sup> RT-6/20/2016, 26-27.

<sup>217</sup> *Id.* at 28.

<sup>218</sup> RT-5/31/2016(afternoon), 112-13.

<sup>219</sup> *Id.* at 55-56.

<sup>220</sup> RT-6/20/2016, 24-25.

<sup>221</sup> *Id.* at 25.

<sup>222</sup> RT-6/13/2016, 130-31.

<sup>223</sup> *See* RT-6/7/2016, 99; RT-6/13/2016, 131.

<sup>224</sup> RT-5/31/2016(afternoon), 60, 62.

<sup>225</sup> RT-6/20/2016, 30-32.

<sup>226</sup> *Id.* at 28.

<sup>227</sup> RT-5/31/2016(afternoon), 60, 62.

<sup>228</sup> *Id.* at 61.

two different malls<sup>229</sup> and was convicted of forgery in 2009.<sup>230</sup> His probation was revoked and Jimmy was sent to Colorado to serve time in the Department of Corrections.<sup>231</sup>

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Prison was good for Jimmy.<sup>232</sup> With the imposed structure of prison, as well as the unavailability of drugs, Jimmy flourished.<sup>233</sup> He participated in a rehabilitation program, became sober, and even found joy in teaching other inmates.<sup>234</sup> Incarceration forced a new start.

Jimmy carried that momentum into his parole term.<sup>235</sup> He went to live with his aunt and uncle, Lynn and Mitch Woods.<sup>236</sup> Jimmy was helpful around the house, respectful, a good tenant.<sup>237</sup> He spent time with his grandmother,<sup>238</sup> was an involved and affectionate uncle, and a good cousin.<sup>239</sup>

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<sup>229</sup> See RT-6/14/2016, 34-35.

<sup>230</sup> See *id.*; Exh.294.

<sup>231</sup> RT-5/31/2016(afternoon), 61.

<sup>232</sup> *Id.* at 63.

<sup>233</sup> *Id.*

<sup>234</sup> See *id.*

<sup>235</sup> *Id.* at 64-65.

<sup>236</sup> *Id.* at 64.

<sup>237</sup> RT-6/2/2016, 100-01.

<sup>238</sup> RT-6/7/2016, 32-33.

<sup>239</sup> See RT-6/9/2016, 84-85.

Jimmy's cousin, Joshua Woods, told the jury about Jimmy's relationship with Joshua's son. Joshua's son had been diagnosed with an immune disease.<sup>240</sup> Jimmy was wonderful with him and the child loved Jimmy to death.<sup>241</sup> Jimmy spent a lot of time with him—they hung out, played catch, played video games.<sup>242</sup> “[T]he impression that Jimmy made on his life was pretty tremendous at that time when he was only seven or eight years old.”<sup>243</sup>

Jimmy also helped Joshua install floors in his townhouse.<sup>244</sup> Jimmy was there every weekend, doing anything he could to help, “from 8:00 a.m. to 10:00 or 11 o'clock at night.”<sup>245</sup> Joshua didn't pay Jimmy, Jimmy willingly helped.<sup>246</sup>

Over this period of time, Joshua came “to know Jimmy and become good friends with him ....”<sup>247</sup> They had a fun time together and built a good relationship.<sup>248</sup>

The time in prison seemed to have brought about a change for the better.

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<sup>240</sup> *Id.* at 82-85.

<sup>241</sup> *Id.* at 84.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 85.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 85-86.

Jimmy's stay with Lynn and Mitch was meant to be short, just long enough for paperwork processing his transfer to Arizona to be finalized.<sup>249</sup> But that created a number of accompanying problems: "And then as things progressed, and he went out and was trying to look for jobs—and no transportation. He was just kind of left on his own."<sup>250</sup> Jimmy also wanted to visit Lilly and work things out with Julie, but was unsuccessful.<sup>251</sup> He became frustrated.<sup>252</sup>

Jimmy started spending time with friends.<sup>253</sup> Bad influences.<sup>254</sup> At one point, Jimmy started driving a very nice car when there was no way Jimmy could afford it.<sup>255</sup> Mitch also believed Jimmy wasn't supposed to own a car as a condition of his parole.<sup>256</sup> When Mitch confronted Jimmy about it, Jimmy said the car was loaned to him by a friend.<sup>257</sup> Jimmy soon returned the car.<sup>258</sup>

Around that time a doctor also diagnosed Jimmy with post-traumatic stress disorder stemming from the Columbine shooting and prescribed Wellbutrin.<sup>259</sup>

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<sup>249</sup> RT-5/31/2016(afternoon), 63-64.

<sup>250</sup> *Id.* at 65.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> RT-6/1/2016, 111-12, 134; RT-6/2/2016, 111; *see also* RT-5/31/2016(afternoon), 111.

<sup>256</sup> RT-6/1/2016, 134.

<sup>257</sup> *Id.* at 112.

<sup>258</sup> *Id.*

<sup>259</sup> RT-6/14/2016, 159; RT-6/15/2016(morning), 15-16.

Jimmy abused his medication.<sup>260</sup> Once, when entering Jimmy's room, Lynn found that Jimmy's prescription, which had recently been filled, was nearly empty.<sup>261</sup> Additionally, Jimmy's cousin Joshua reported that Jimmy snorted his medication while Jimmy helped with the home improvement project.<sup>262</sup>

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After about four months, Jimmy returned to Arizona.<sup>263</sup> Jimmy was happy and excited to be home with his parents.<sup>264</sup> He went to a doctor and was prescribed medication, including Xanax.<sup>265</sup> Kevin and Lynn, knowing Jimmy's substance abuse history, were worried and called his doctor to express concern.<sup>266</sup> They also tried to prevent abuse by dispensing Jimmy's medications to him.<sup>267</sup>

Jimmy went to work for his father again.<sup>268</sup> He started a new romantic relationship with Leandra Yazzie.<sup>269</sup> But the substance abuse continued.<sup>270</sup> Then it

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<sup>260</sup> RT-5/31/2016(afternoon), 110.

<sup>261</sup> RT-6/2/2016, 107.

<sup>262</sup> *See id.* 109-10; RT-6/9/2016, 90.

<sup>263</sup> RT-5/31/2016(afternoon), 65-66; 6/13/2016, 135.

<sup>264</sup> RT-5/31/2016(afternoon), 66.

<sup>265</sup> *Id.* at 66-67; RT-6/15/2016(afternoon), 43.

<sup>266</sup> RT-5/31/2016(afternoon), 67.

<sup>267</sup> *Id.* at 69.

<sup>268</sup> RT-6/13/2016, 142.

<sup>269</sup> RT-5/31/2016(afternoon), 94, 120-21.

<sup>270</sup> RT-6/13/20, 142-43.

worsened.<sup>271</sup> Jimmy abused his prescription medication, took steroids, and used cocaine.<sup>272</sup>

Jimmy's downward progression was fast and noticeable, just eight weeks.<sup>273</sup> Kevin and Lynn watched as Jimmy fell into old patterns: abusing his medication,<sup>274</sup> using steroids and cocaine,<sup>275</sup> drinking,<sup>276</sup> emotional swings including outbursts of anger.<sup>277</sup> Shelley believed Jimmy attempted suicide several times.<sup>278</sup> She described one occasion:

We just went in for – to get him for dinner and I couldn't wake him up. He just – he had overdosed with something. But we took him to the hospital, to the emergency, which then they bring in a counselor there and just sat and visited with him. But then we just ended up bringing him home.<sup>279</sup>

Personal struggles compounded his substance abuse issues.<sup>280</sup> Jimmy missed his daughter and had been working with Julie to arrange a visit.<sup>281</sup> Everything was

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<sup>271</sup> See RT-6/14/2016, 40-41.

<sup>272</sup> *Id.*

<sup>273</sup> RT-5/31/2016(afternoon), 66-67.

<sup>274</sup> RT-6/13/2016, 143-44.

<sup>275</sup> RT-6/15/2016(morning), 52.

<sup>276</sup> RT-6/15/2016(afternoon), 49.

<sup>277</sup> RT-5/31/2016(afternoon), 67-68, 112.

<sup>278</sup> *Id.* at 68.

<sup>279</sup> *Id.* at 68-69.

<sup>280</sup> *Id.* at 64-65.

<sup>281</sup> *Id.* at 68.



set, Jimmy was going to get to see Lilly again, albeit just for a visit.<sup>282</sup> But the plans fell through, the visit was cancelled.<sup>283</sup> Jimmy spiraled deeper.<sup>284</sup>

Over the course of just eight weeks from when he moved back in with his parents, Jimmy transformed into someone different.<sup>285</sup> As Shelley explained, “It wasn’t our Jimmy. But just having seen that – the mental state where he was, it wasn’t the same boy.”<sup>286</sup>

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On December 7, 2010, Jimmy took Xanax,<sup>287</sup> went into the Taiwan Massage Parlor and murdered X.F. Before this, he had gone to a sporting goods store and bought bbs and co2 cartridges for an air gun.<sup>288</sup> Using the gun Jimmy made his way into the massage parlor.<sup>289</sup> Over the course of the murder, Jimmy struck X.F.’s head on a wall,<sup>290</sup> bound her with zip-ties,<sup>291</sup> and stabbed her several times.<sup>292</sup> While the medical examiner could not tell how long the attack took,<sup>293</sup> most of the stab wounds

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<sup>282</sup> RT-6/15/2016(morning), 52.

<sup>283</sup> RT-5/31/2016(afternoon), 65; RT-6/15/2016(afternoon), 51-53.

<sup>284</sup> RT-5/31/2016(afternoon), 65.

<sup>285</sup> *Id.* at 71.

<sup>286</sup> *Id.*

<sup>287</sup> RT-6/22/2016, 84; RT-6/15/2016(morning), 54.

<sup>288</sup> RT-5/5/2016(morning), 34-39.

<sup>289</sup> RT-6/22/2016, 94-95.

<sup>290</sup> RT-4/27/2016, 77.

<sup>291</sup> RT-4/21/2016, 38.

<sup>292</sup> *See* RT-4/27/2018, 89-91.

<sup>293</sup> RT-5/25/2016, 27.

would not have been fatal<sup>294</sup> and the fatal wound, a slash across X.F.'s neck,<sup>295</sup> was amongst the last wounds.<sup>296</sup>

The neighbors heard a pounding and Terry Weathers went into Taiwan Massage to see if everything was okay.<sup>297</sup> He encountered Jimmy and Jimmy said X.F. had been taken to the hospital.<sup>298</sup> Weathers called the police<sup>299</sup> and Jimmy left in his truck.<sup>300</sup>

After the murder, Jimmy took more Xanax and drove to Leandra Yazzie's apartment.<sup>301</sup> There, he cleaned his truck and washed his clothes.<sup>302</sup> Yazzie, however, didn't see any blood.<sup>303</sup> The two of them ate dinner together and Jimmy left for a family event.<sup>304</sup>

Three days later, Jimmy committed an armed robbery.<sup>305</sup> He parked across the street from a Christmas tree lot.<sup>306</sup> An officer approached him while he was there

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<sup>294</sup> See RT-4/27/2016, 32, 43, 44, 47, 90-91, 93.

<sup>295</sup> *Id.* at 39.

<sup>296</sup> RT-5/25/2016, 28.

<sup>297</sup> RT-4/21/2016, 99-100.

<sup>298</sup> *Id.* at 103.

<sup>299</sup> *Id.* at 104, 108.

<sup>300</sup> *Id.* at 106-07.

<sup>301</sup> RT-6/15/2016(morning), 56; RT-4/26/2016, 63.

<sup>302</sup> RT-4/26/2016, 65-66, 68-69.

<sup>303</sup> *Id.* at 82.

<sup>304</sup> *Id.* at 71, 73.

<sup>305</sup> See *id.* at 137; RT-4/27/2016, 108-09; Exh.293 (2010-164968-001, ME-12/21/2010); Appx.B (CR 2010-164968-001 plea agreement).

<sup>306</sup> RT-4/27/2016, 109; see RT-6/14/2016, 51-52.

and Jimmy said he was waiting for his girlfriend to arrive so they could pick out a tree.<sup>307</sup> Jimmy again got high on Xanax and waited for the lot to close.<sup>308</sup>

C.P. testified he was in his motor home with his wife, D.P., when the television power went out.<sup>309</sup> C.P. went outside to check the circuit breaker.<sup>310</sup> When he did, Jimmy came from behind the motor home with a flashlight and an air gun.<sup>311</sup> Jimmy tried to zip-tie C.P.'s hands, but was unable.<sup>312</sup> He had C.P. call D.P. to come out with the cash till.<sup>313</sup>

D.P. was already on the phone with 911.<sup>314</sup> She brought out the till and gave it to Jimmy.<sup>315</sup> Jimmy emptied the till and ran away when police arrived.<sup>316</sup> Police chased him.<sup>317</sup> They brought out the helicopter<sup>318</sup> and dogs.<sup>319</sup> Eventually, the officers found Jimmy in a shed.<sup>320</sup> When Jimmy did not come out, the officers sent

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<sup>307</sup> RT-4/27/2016, 108-11.

<sup>308</sup> RT-6/20/2016, 86-88.

<sup>309</sup> RT-4/26/2016, 137-38.

<sup>310</sup> *Id.* at 138.

<sup>311</sup> *Id.* at 139.

<sup>312</sup> *Id.* at 140-41.

<sup>313</sup> *Id.* at 142-43.

<sup>314</sup> *Id.* at 176.

<sup>315</sup> *Id.* at 143.

<sup>316</sup> *Id.* at 145.

<sup>317</sup> *Id.* at 179.

<sup>318</sup> RT-5/4/2016, 9.

<sup>319</sup> RT-4/27/2016, 99-101.

<sup>320</sup> *Id.* at 101, 103.

a dog in.<sup>321</sup> The dog latched onto Jimmy's arm, causing substantial damage.<sup>322</sup> Jimmy was taken into custody.<sup>323</sup>

Looking over the scene, officers found the zip-ties.<sup>324</sup> The common use of zip-ties led officers to wonder if Jimmy had been responsible for both crimes.<sup>325</sup> The officers obtained a DNA sample from Jimmy and submitted that sample for comparison to the zip-ties found at the scene of the murder.<sup>326</sup>

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Jimmy was charged with armed robbery for the Christmas tree lot. Jimmy took a plea almost immediately.<sup>327</sup> He entered his change of plea while still at the Regional Court Center—an early disposition court for felony offenses in Maricopa County—and agreed to a lengthy term in prison.<sup>328</sup>

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Murder charges soon followed.<sup>329</sup> Jimmy's DNA was not inconsistent with the DNA that could be obtained from the zip-ties found at the scene of the murder.<sup>330</sup>

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<sup>321</sup> *Id.* at 105-06.

<sup>322</sup> *Id.* at 22, 118-19.

<sup>323</sup> *Id.* at 107.

<sup>324</sup> RT-5/4/2016, 10.

<sup>325</sup> RT-5/5/2016, 19.

<sup>326</sup> *See* RT-5/11/2016, 28-30.

<sup>327</sup> *See* RT-5/25/2016, 56-57; Exh.293; Appx.B (CR 2010-164968-001 plea agreement).

<sup>328</sup> *See* Appx.B (CR 2010-164968-001 plea agreement).

<sup>329</sup> Instrument ("I.") 5.

<sup>330</sup> RT-5/11/2016, 29-30.

Additionally, cell tower records revealed Jimmy was in the area of the Taiwan Massage on the date of the murder.<sup>331</sup>

Once charged with murder, Jimmy continually tried to accept responsibility. He first offered to plead guilty to first-degree murder in exchange for a sentence of life with the possibility of release after 25 years.<sup>332</sup> The state turned this offer down.<sup>333</sup>

Jimmy offered to plead guilty to first-degree murder in exchange for a sentence of natural life.<sup>334</sup> The state turned this offer down.<sup>335</sup> After the case was pending for quite some time, Jimmy again offered to plead guilty in exchange for a natural life sentence.<sup>336</sup> The state again turned the offer down.<sup>337</sup>

However, incarceration seemed to help Jimmy again. In particular, Jimmy regularly met with his Bishop and made spiritual progress.<sup>338</sup> He also would reach out to his family.<sup>339</sup>

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<sup>331</sup> RT-5/9/2016, 45-46.

<sup>332</sup> See I.298, 2-3; I.301.

<sup>333</sup> See I.298, 3.

<sup>334</sup> See RT-5/31/2016(afternoon), 73.

<sup>335</sup> See I.298, 3.

<sup>336</sup> See *id.*

<sup>337</sup> See *id.*

<sup>338</sup> RT-6/9/2016, 184-91.

<sup>339</sup> See *e.g.*, RT-6/1/2016, 122

At trial, the jury convicted Jimmy of murder.<sup>340</sup> The jury also found the murder was cruel, heinous, or depraved under the (F)(6) aggravator<sup>341</sup> and Jimmy had committed a serious offense under the (F)(2) aggravator.<sup>342</sup> The jury rejected the pecuniary gain aggravator.<sup>343</sup>

During mitigation, Jimmy presented evidence of the trauma he suffered as a child,<sup>344</sup> his ongoing struggles with substance abuse,<sup>345</sup> his mental health issues,<sup>346</sup> and his family support.<sup>347</sup> The state disputed the nature of Jimmy's mental health issues, but everyone agreed issues existed. Whether labeled as ongoing post-traumatic stress disorder,<sup>348</sup> antisocial personality disorder,<sup>349</sup> adopted child syndrome,<sup>350</sup> or something else,<sup>351</sup> Jimmy has mental health concerns.

However, Jimmy was not allowed to tell the whole story.

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<sup>340</sup> RT-5/17/2016, 57.

<sup>341</sup> RT-5/26/2016, 10-11.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.* at 11.

<sup>344</sup> RT-5/31/2016(afternoon), 28, 39-41; RT-6/15/2016(morning), 47-54.

<sup>345</sup> RT-5/31/2016(afternoon), 54, 57.

<sup>346</sup> RT-6/14/2016, 158-59, 164-66.

<sup>347</sup> *See* RT-5/31/2016(afternoon), 115; RT-6/2/2016, 25; RT-6/2/2016, 117; RT-6/7/2016, 24, 36, 90, 139.

<sup>348</sup> RT-6/15/2016(morning), 65.

<sup>349</sup> RT-6/22/2016, 131-40.

<sup>350</sup> RT-6/16/2016, 23, 41, 28-30.

<sup>351</sup> RT-6/15/2016(morning), 13-14, 65-73.

The trial court did not let him get in additional information about the fallout from Columbine.<sup>352</sup> Jimmy wanted to present evidence of the struggles other victims went through in order to contextualize his own, to illustrate that the trauma he suffered was real and not an aberration.<sup>353</sup> The trial court precluded this information, leaving the prosecutor able to argue that Columbine was not Jimmy's story to tell.<sup>354</sup>

The trial court limited Jimmy's ability to present evidence regarding his genetic predisposition to substance abuse and the impact mental illness and post-traumatic stress disorder had on his drug-seeking behavior.<sup>355</sup> The trial court prevented Jimmy's expert from explaining why adopted child syndrome is not in the Diagnostic and Statistical Manual of Mental Disorders (DSM).<sup>356</sup> But the prosecution was allowed to present testimony that exclusion from the DSM meant a mental disorder was not legitimate.<sup>357</sup>

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<sup>352</sup> I.379, 3; RT-5/23/2016, 8-11.

<sup>353</sup> RT-8/29/14, 4-5; RT-11/7/14, 23-42; RT-12/12/14, 21; RT-7/24/15, 11, 24; RT-2/16/16, 40-41; RT-2/19/16, 13-14; RT-2/26/16, 5, 142; RT-3/16/16, 10-25; RT-3/18/16, 11-24; RT-3/30/16, 55-58; RT-5/4/16, 33-35; RT-5/17/16, 71; RT-5/23/16, 8-11; RT-5/31/16(afternoon), 4-5; RT-6/1/16, 13-27; RT-6/3/16, 5-27.

<sup>354</sup> RT-6/27/2016(morning), 9, 24, 33; RT-6/27/2016(afternoon), 30-34.

<sup>355</sup> RT-6/20/2016, 122-24.

<sup>356</sup> RT-6/16/2016, 79-92, 95, 100, 102, 125-26.

<sup>357</sup> RT-6/22/2016, 108-09.

After deliberating one day, the jury returned a verdict of death.<sup>358</sup> The trial court ordered the death sentence and Jimmy's appeal was automatically initiated.<sup>359</sup>

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<sup>358</sup> RT-6/29/2016, 6.

<sup>359</sup> *Id.* at 21.



## **ARGUMENT 1**

ARIZONA HAS NOT COMPLIED WITH ITS CONSTITUTIONAL OBLIGATION TO LEGISLATIVELY NARROW WHICH FIRST-DEGREE MURDERS ARE ELIGIBLE FOR THE DEATH PENALTY. INSTEAD, NEARLY 99% OF FIRST-DEGREE MURDER DEFENDANTS ARE ELIGIBLE FOR THE DEATH PENALTY.

“Judge, the bottom line is that every first degree murder defendant should be eligible for the death penalty.” Prosecutor Jeannette Gallagher, 5/3/2013.<sup>360</sup>

This is the Arizona scheme. Nearly every first-degree murder, committed under a broad first-degree murder statute, is eligible for the death penalty. And the prosecutors, responsible for enforcing such an aggressive law, see no problem with it.

But the Constitution requires more. The death penalty is meant for the worst of the worst, not “every first degree murder defendant ....” To ensure the death penalty is not subject only to prosecutorial discretion and the adversarial system, the legislature must enact a scheme that narrows eligibility. This narrowing, working in concert with prosecutorial discretion and the adversarial system, creates a constitutionally acceptable capital punishment system.

Arizona’s scheme fails. The scheme provides no meaningful legislative narrowing, leaving criminal defendants subject to the discretionary whims of

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<sup>360</sup> RT-5/13/2013, 46.

prosecutors—prosecutors who believe all murder defendants should be eligible for the death penalty.

***History of death penalty constitutionality:***

In 1972, the Supreme Court held that capital punishment, as it was then administered, was unconstitutional in *Furman v. Georgia*.<sup>361</sup> There were two key problems identified by the plurality. First, there was wide discrepancy between death eligibility and imposition.<sup>362</sup> In his dissent, Chief Justice Burger noted, “it is thought that from 15% to 20% of those convicted of murder are sentenced to death in States where it is authorized.”<sup>363</sup> The plurality believed this wide discrepancy between eligibility and imposition illustrated that capital punishment, as it was imposed at the time, was unconstitutional.<sup>364</sup> Second, the plurality was also bothered by the fact that decisions to impose death were largely unguided.<sup>365</sup>

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<sup>361</sup> 408 U.S. 238 (1972).

<sup>362</sup> See *id.* at 276-77 (Brennan, J., concurring)(discussing infrequent imposition of the death penalty and correlation with arbitrariness), 309 (Stewart, J., concurring)(“In the second place, it is equally clear that these sentences are ‘unusual’ in the sense that the penalty of death is infrequently imposed for murder ....”), 311-12 (White, J., concurring)(discussing infrequency), 340 (Marshall, J., concurring)(noting infrequency).

<sup>363</sup> *Id.* at 386 n.11 (Burger, C.J., dissenting).

<sup>364</sup> *Id.* at 276-77, 293-94 (Brennan, J., concurring), 309 (Stewart, J., concurring), 311 (White, J., concurring).

<sup>365</sup> *Id.* at 293-94 (Brennan, J., concurring), 309-10 (Stewart, J., concurring), 313 (White, J., concurring).

In the four years after *Furman*, approximately two-thirds of state legislatures, as well as Congress, modified their capital punishment schemes.<sup>366</sup> The goal was to narrow the divide between eligibility and imposition and provide guidance.<sup>367</sup> There were two primary approaches. States like North Carolina made the death penalty mandatory for all persons convicted of capital offenses, including murder.<sup>368</sup> Other states, like Georgia and Florida, established a limited number of aggravating factors the prosecution was required to prove before a defendant became death eligible.<sup>369</sup> In a slight variation, Texas established a separate offense that incorporated the aggravating factors into the guilt phase.<sup>370</sup> Louisiana took a hybrid approach, establishing a narrowed definition of murder but making imposition mandatory.<sup>371</sup>

Facially, both approaches addressed the problems identified in *Furman*. A mandatory death scheme obviated the need for guidance and reduced the variance between eligibility and imposition by increasing imposition. The aggravators approach, on the other hand, decreased eligibility, driving it closer to expected imposition. The aggravators, combined with consideration of mitigation, also guided the jury decision.

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<sup>366</sup> *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976).

<sup>367</sup> *Id.* at 180.

<sup>368</sup> *Woodson v. North Carolina*, 428 U.S. 280, 285-87 (1976).

<sup>369</sup> *Gregg*, 428 U.S. at 162-68; *Proffitt v. Florida*, 428 U.S. 242, 247-53 (1976).

<sup>370</sup> *Jurek v. Texas*, 428 U.S. 262, 267-75 (1976).

<sup>371</sup> *Roberts v. Louisiana*, 428 U.S. 325, 328-31 (1976).

On July 2, 1976, the Supreme Court issued five cases concerning these reactions: *Gregg v. Georgia*,<sup>372</sup> *Proffitt v. Florida*,<sup>373</sup> *Jurek v. Texas*,<sup>374</sup> *Woodson v. North Carolina*,<sup>375</sup> and *Roberts v. Louisiana*.<sup>376</sup>

In *Gregg*, the Georgia legislature had listed a limited number of aggravating factors that would make a defendant eligible for death.<sup>377</sup> The defendant also had the opportunity to present mitigation in an attempt to persuade the jury to sentence him to life.<sup>378</sup> If convicted, the defendant had the right to an automatic appeal, during which the Georgia Supreme Court would evaluate the sentence.<sup>379</sup> The Supreme Court found this scheme constitutional.<sup>380</sup>

In *Proffitt*, the Florida legislature had implemented a system much like Georgia with one primary difference: the defendant was sentenced by a judge, not a jury.<sup>381</sup> Still, the judge was guided by a limited number of aggravators that reduced the number of defendants who would be eligible, the defendant had the opportunity to present mitigation and the judge was required to consider the mitigation, and the

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<sup>372</sup> 428 U.S. 153 (1976).

<sup>373</sup> 428 U.S. 242 (1976).

<sup>374</sup> 428 U.S. 262 (1976).

<sup>375</sup> 428 U.S. 280 (1976).

<sup>376</sup> 428 U.S. 325 (1976).

<sup>377</sup> 428 U.S. at 164-65.

<sup>378</sup> *Id.* at 164.

<sup>379</sup> *Id.* at 198.

<sup>380</sup> *Id.* at 207.

<sup>381</sup> 428 U.S. at 252.

Florida Supreme Court reviewed all death sentences.<sup>382</sup> The Supreme Court did not, at that point, find the difference in sentencer important and held the scheme constitutional.<sup>383</sup>

In *Jurek*, Texas had created a separate and substantially narrowed definition of first-degree murder that incorporated the aggravating factors into the guilt phase.<sup>384</sup> After conviction the jury was required to answer three questions regarding the defendant's crime and background.<sup>385</sup> Only if all three questions were answered in the affirmative was death imposed.<sup>386</sup> During this phase, the defendant was allowed to offer mitigation and persuasive mitigation would lead the jury to answer at least one question in the negative.<sup>387</sup> Death sentences were automatically reviewed on appeal in the Texas system as well.<sup>388</sup> Thus, the only difference between the Georgia and Texas systems was the mechanism for how the field was narrowed: in Georgia, there was a separate phase during which jurors decided if an aggravator

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<sup>382</sup> *Id.* at 250-51.

<sup>383</sup> *Id.* at 259-60.

<sup>384</sup> 428 U.S. at 270-71.

<sup>385</sup> *Id.* at 269.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.* at 272-73.

<sup>388</sup> *Id.* at 269.

existed;<sup>389</sup> in Texas, this decision was folded into the guilt phase.<sup>390</sup> Because the scheme narrowed and guided discretion, it was constitutional.<sup>391</sup>

The schemes used in North Carolina and Louisiana did not fare so well. In *Woodson*, North Carolina had kept a broad definition of murder and made the death penalty mandatory.<sup>392</sup> After considering society's rejection of mandatory capital punishment, the Supreme Court struck down North Carolina's system.<sup>393</sup> In *Roberts*, Louisiana had established a more narrowed definition of murder but made death mandatory upon conviction.<sup>394</sup> Mandatory imposition of the death penalty was fatal to its scheme.<sup>395</sup> Even if it narrowed the class of persons eligible for capital punishment, the sentencer must still be vested with discretion whether to impose the harshest of penalties.<sup>396</sup>

In all, these cases established five fundamental principles that must be met for a capital scheme to be constitutional:

1. The capital sentencing scheme, established by the legislature, must narrow those eligible for the death penalty to a subclass of individuals convicted of the relevant offenses.

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<sup>389</sup> See *Gregg*, 428 U.S. at 164-65

<sup>390</sup> See *Jurek*, 428 U.S. at 269.

<sup>391</sup> *Id.* at 276-77.

<sup>392</sup> 428 U.S. at 286-87.

<sup>393</sup> *Id.* at 305.

<sup>394</sup> 428 U.S. at 332-33.

<sup>395</sup> *Id.* at 336.

<sup>396</sup> *Id.* at 334-35.

2. The defendant must have the ability to present mitigating circumstances to the sentencer.
3. The sentencer's discretion must be guided by the aggravating factors and consideration of the mitigation.
4. The sentencer must have the discretion to impose a sentence other than death if persuaded.
5. The defendant must have an opportunity for meaningful appellate review.

These guiding principles still animate our capital punishment jurisprudence.

***Background Facts:***

Before trial, Jimmy moved to join a Motion to Dismiss the Death Penalty filed by another defendant, which was granted.<sup>397</sup> At the hearing, the trial court denied the defendants' request for an evidentiary hearing.<sup>398</sup> Instead, the court presumed the defendants' alleged facts to be true: every murder filed in Maricopa County over a two-year period was eligible for at least one aggravating factor.<sup>399</sup> At the end of the hearing, the court denied the motion.<sup>400</sup>

A year-and-a-half later, Jimmy joined a second Motion to Dismiss Death Penalty.<sup>401</sup> Again, the court denied the defendants' request for an evidentiary hearing and presumed the defense allegations were true: over a ten-year period, 98.8 percent

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<sup>397</sup> I.114; *see also* I.118; I.119; I.121; I.122; I.123; I.143; I.151; RT-5/3/2016, 6.

<sup>398</sup> RT-5/3/2013, 12-18; *see also* I.121, 4-8, 36-38, 41.

<sup>399</sup> RT-5/3/2013, 17-18, 21.

<sup>400</sup> *Id.* at 55-59.

<sup>401</sup> I.224; *see also* I.227; RT-4/24/2015, 7.

of charged first-degree murders qualified for at least one aggravating factor.<sup>402</sup> Although the judge was “troubled by what I believe to be a lack of narrowing in the statute,” he relied heavily upon this Court’s precedent from 2005 and denied the motion.<sup>403</sup> Nonetheless, the court was “troubled by the evolution of the statutory factors ....”<sup>404</sup>

### ***Standard of Review:***

This Court reviews constitutional issues de novo.<sup>405</sup>

### ***Discussion:***

#### **1. Arizona’s aggravation scheme does not narrow the first-degree murders eligible for the death penalty.**

As this Court conceded in *Hidalgo*, “To be constitutionally sound, a capital sentencing scheme 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.”<sup>406</sup>

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<sup>402</sup> RT-4/24/2015, 18-29.

<sup>403</sup> RT-5/8/2015, 41-43.

<sup>404</sup> *Id.* at 43.

<sup>405</sup> *Hidalgo*, 241 Ariz. 543, ¶7; *State v. McGill*, 213 Ariz. 147, ¶45 (2006); *State v. Moody*, 208 Ariz. 424, ¶62 (2004).

<sup>406</sup> *Hidalgo*, 241 Ariz. 543, ¶14 (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) and *Zant v. Stephens*, 462 U.S. 862, 877 (1983))(quotation marks omitted).



In *Zant v. Stephens*, the Supreme Court approved of the Georgia Supreme Court's delineation of this narrowing function into three planes.<sup>407</sup> First, the legislature defines murder from other homicides.<sup>408</sup> "The second plane separates from all murder cases those in which the penalty of death is a possible punishment."<sup>409</sup> This is generally done through aggravating circumstances, as it is in Arizona.<sup>410</sup> The third plane is the actual imposition of the penalty.<sup>411</sup>

A legislative scheme must provide for each plane to be constitutional. And the second phase is actually two concepts. First, the aggravators must reflect legislative narrowing. As the Supreme Court said in *Zant*, "statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty."<sup>412</sup> Second, the jury holds its typical fact-finder function to decide aggravators.

Arizona's list of aggravating circumstances does not "circumscribe the class of persons eligible for the death penalty." It is an illusory protection. In their book Courting Death: The Supreme Court and Capital Punishment, Carol and Jordan Steiker observed that Georgia's scheme did not adequately separate the worst

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<sup>407</sup> *Zant v. Stephens*, 462 U.S. 862, 870-73 (1983)(quoting *Zant v. Stephens*, 297 S.E.2d 1, 3-4 (Ga. 1982)).

<sup>408</sup> *Id.* at 871.

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

<sup>411</sup> *Id.* at 871-72.

<sup>412</sup> *Id.* at 878 (1983).

murders.<sup>413</sup> But their criticism applies equally to Arizona, which “has not articulated a circumscribed theory of what the state might regard as the worst murders. Instead, [Arizona] has simply described the various factors that collectively account for the circumstances surrounding most murders.”<sup>414</sup>

**A. In determining whether the legislature has comported with their duty to narrow, this Court considers the entire scheme.**

In *Hidalgo*, the defendant argued this Court should review the aggregate impact of aggravators to determine whether the statutory scheme narrowed.<sup>415</sup> This Court recognized the argument found support, but relegated that support to academic commentators and “isolated quotes—as opposed to actual holdings—in opinions of the United States Supreme Court and our Court.”<sup>416</sup>

Despite this Court’s contention that it was merely isolated quotations from the Supreme Court that established this argument, this Court was unable to avoid using those isolated quotations. Twice, including in the very first sentence of the discussion, this Court quoted *Lowenfield v. Phelps* for the proposition that “a capital sentencing scheme must ‘genuinely narrow the class of persons eligible for the death

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<sup>413</sup> Steiker & Steiker, Courting Death, 161

<sup>414</sup> Steiker & Steiker, Courting Death, 161 (emphasis original).

<sup>415</sup> 241 Ariz. 543, ¶17.

<sup>416</sup> *Id.* at ¶18.

penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.’”<sup>417</sup>

Moreover, this Court’s conclusion ignored several cases decided by the Supreme Court that evaluated the entire scheme. Foremost, the Supreme Court looked at the entire scheme involved in *Furman*.<sup>418</sup> Because the scheme in *Furman* did not narrow or guide discretion, the scheme was unconstitutional.<sup>419</sup>

The Supreme Court also looked at the entire scheme involved in the cases decided July 2, 1976. The *Gregg* plurality expressly noted it looked at the entire scheme:

While there is no claim that the jury in this case relied upon a vague or overbroad provision to establish the existence of a statutory aggravating circumstance, the petitioner looks to the sentencing system as a whole (as the Court did in *Furman* and we do today) and argues that it fails to reduce sufficiently the risk of arbitrary infliction of death sentences.<sup>420</sup>

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<sup>417</sup> *Id.* at ¶¶14, 21 (quoting *Lowenfield*, 484 U.S. at 244 (quoting *Zant*, 462 U.S. at 877)(emphasis added)).

<sup>418</sup> *See Furman*, 408 U.S. at 276-77, 294-95 (Brennan, J., concurring)(discussing arbitrary infliction); *Gregg*, 428 U.S. at 877 (noting Court addressed system as a whole in *Furman*).

<sup>419</sup> *See* at 276-77, 293-94 (Brennan, J., concurring), 309-10 (Stewart, J., concurring), 311, 313 (White, J., concurring).

<sup>420</sup> *Gregg*, 428 U.S. at 200 (emphasis added).

Similarly, the Court looked at the entire scheme in *Jurek*<sup>421</sup> and *Proffitt*.<sup>422</sup> Since the 1976 decisions, the Court has repeatedly engaged in this overarching review of capital sentencing schemes.<sup>423</sup>

The Court will, as this Court noted, consider the scope of individual aggravators.<sup>424</sup> However, this is a second step in its analysis. In *McKleskey v. Kemp*, the Court made clear, “Although our constitutional inquiry has centered on the procedures by which a death sentence is imposed, we have not stopped at the face of a statute, but have probed the application of statutes to particular cases.”<sup>425</sup> Thus, the discussion of specific aggravators in cases like *Tuilaepa v. California*<sup>426</sup>—the primary case this Court relied upon to assert only individual aggravators are considered<sup>427</sup>—is a second-tier evaluation. As Justice Scalia noted in his concurring opinion in *Tuilaepa*, there is a difference between the overarching methodology and the evaluation of any individual aggravator: “It is my view that once a State has adopted a methodology to narrow the eligibility for the death penalty, thereby

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<sup>421</sup> *Jurek*, 428 U.S. at 268-75.

<sup>422</sup> *Proffitt*, 428 U.S. at 247-59.

<sup>423</sup> See, e.g., *Pulley v. Harris*, 465 U.S. 37 (1984); *McKleskey v. Kemp*, 481 U.S. 279, 302-03, 306-08 (1987); *Lowenfield v. Phelps*, 484 U.S. 231, 241-46 (1988).

<sup>424</sup> See *Hidalgo*, 241 Ariz. 543, ¶27.

<sup>425</sup> *McKleskey*, 481 U.S. at 304-05.

<sup>426</sup> *Tuilaepa v. California*, 512 U.S. 967 (1994).

<sup>427</sup> *Hidalgo*, 241 Ariz. 543, ¶¶21-23.

ensuring that its imposition is not ‘freakish,’ the distinctive procedural requirements of the Eighth Amendment have been exhausted.”<sup>428</sup>

The constitutionality of a capital scheme looks at the entire scheme. Each of the five guarantees discussed above—legislative narrowing, ability to present mitigation, sentencer’s discretion guided, sentencer discretion to impose sentence other than death, and appellate review—must be present in a capital sentencing scheme. If one element is not present, the scheme is unconstitutional.

Notably, the trial court reached the correct decision to review the aggravators in their entirety in the second hearing.<sup>429</sup> The court rightly believed consideration of an individual aggravator was merely a logical extension because “if an individual aggravating circumstance can be read to incorporate all murders, then there’s no narrowing.”<sup>430</sup>

Here, Arizona’s scheme fails at the first level. It doesn’t matter that the trial court instructs the jury on aggravators, the defendant can present mitigation, the jury has the authority to impose a life sentence, or this Court reviews the sentence. Arizona’s comprehensive list of aggravating factors fails to meaningfully narrow death penalty eligibility.

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<sup>428</sup> *Tuilaepa*, 512 U.S. at 980 (Scalia, J., concurring)(citations omitted).

<sup>429</sup> See RT-5/8/2015, 18.

<sup>430</sup> *Id.*

**B. If courts have not looked at the entire scheme of aggravation, that is a failure this Court should avoid.**

As a backstop, this Court cited to Courting Death, by the Steikers, to support the proposition, “Observing that at least one of several aggravating circumstances could apply to nearly every murder is not the same as saying that a particular aggravating circumstance is present in every murder.”<sup>431</sup> To validate this assertion, this Court stated, in parenthetical, that the Steikers were “noting that the Court assesses ‘whether individual aggravators’ rather than ‘aggravating factors taken collectively’ narrow the class of offenders eligible for the death penalty.”<sup>432</sup>

First, the discussion above illustrates the Steikers were incorrect; the Supreme Court has consistently looked to whether the entire scheme narrows. Second, even if the Steikers were correct, this Court ignored the fact that the Steikers were criticizing such a confined review. The Steikers’ full language was: “Though the Court goes through the motions of assessing whether individual aggravators narrow the class of death-eligible offenders, the Court has never inquired whether aggravators taken collectively accomplish anything along these lines.”<sup>433</sup> The criticism was clear in the expression that the Supreme Court “goes through the motions” of narrowing.

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<sup>431</sup> *Hidalgo*, 241 Ariz. 543, ¶26 (citing Steiker & Steiker, Courting Death, 160).

<sup>432</sup> *Id.* (quoting Steiker & Steiker, Courting Death, 160 (emphasis original)).

<sup>433</sup> Steiker & Steiker, Courting Death, 160 (emphasis original).

But if the single line did not sufficiently convey the criticism, a wealth of context makes that point clear. Foremost, the line arises in a chapter titled “The Failures of Regulation.”<sup>434</sup> The Steikers described the Supreme Court’s jurisprudence as “at once so messy and so meaningless,”<sup>435</sup> such that it gave only the “appearance of intensive regulation” that “provided unjustified comfort to actors within the system—prosecutors, jurors, executive officials—whose discretionary choices were made against the background of the Court’s highly visible role.”<sup>436</sup>

In the discussion that followed the sentence this Court misconstrued, the Steikers were even clearer. While some jurisdictions may have started with short lists of aggravators, “aggravator creep” has led to longer lists with more aggravators.<sup>437</sup> This has created a circumstance wherein most murders are encompassed within the ever-growing list of aggravators: approximately 86 percent in Georgia,<sup>438</sup> nearly 99 percent here.<sup>439</sup> The failure may even prejudice defendants because higher death rates “might be the result of [aggravator creep], with jurors giving special weight in sentencing decisions to [a state’s] adoption and endorsement of statutory aggravating circumstances.”<sup>440</sup>

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<sup>434</sup> *See id.* at 154.

<sup>435</sup> *Id.* at 155.

<sup>436</sup> *Id.* at 156.

<sup>437</sup> *Id.* at 160-61.

<sup>438</sup> *Id.* at 161.

<sup>439</sup> *Hidalgo*, 241 Ariz. 543, ¶17.

<sup>440</sup> Steiker & Steiker, Courting Death, 162.

The Steikers ultimately concluded the Court’s narrowing, which they describe as being at the individual aggravator level, is a failure:

Ultimately, the effort to achieve meaningful narrowing through aggravating factors has failed. Before *Furman*, jurors could impose the death penalty against essentially any offender who committed murder. After *Furman*, the states’ enumeration of numerous and broad aggravating factors, combined with the Court’s minimalist policing, leaves jurors in virtually the same place—except now they are more likely to believe that the offense before them is especially deserving of death.<sup>441</sup>

The Steikers encouraged courts to “look more closely at whether state aggravating factors collectively accomplish much in terms of limiting the class of death-eligible offenders.”<sup>442</sup> They even proposed a method: “The Court could require states to use aggravating factors that are subject to precise measurement” which would place the Court “in a position to assess whether the breadth of death eligibility in a state scheme corresponds meaningfully to the number of offenders sentenced to death.”<sup>443</sup>

As noted above, Jimmy’s position is that the Steikers were incorrect in their assertion that the Supreme Court has only looked to the impact of individual aggravators. However, if the Steikers and this Court are correct, and review is limited to just individual aggravating factors, that is a problem in need of correction.

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<sup>441</sup> *Id.*

<sup>442</sup> *Id.* at 177.

<sup>443</sup> *Id.*



This Court has the ability to correct it. This Court is free to construe Arizona's Constitutional protection against cruel and unusual punishment more broadly than the United States Constitution.<sup>444</sup> Such an approach would make sense. Where the United States Constitution lists due process among several other rights in the Fifth Amendment, Arizona's Constitution places due process on its own.<sup>445</sup> The framers did not list due process in the panoply of trial rights listed in Article 2, §24, or join it with self-incrimination and double jeopardy in Article 2, §10; the framers gave it greater weight by listing it separately at Article 2, §4. Further, the Steikers, an authority this Court already found persuasive in *Hidalgo*, explained why a broader interpretation better protects the integrity of a capital sentencing scheme. Thus, regardless of how this Court interprets the precedent of the Supreme Court of the United States, this Court can and should require a holistic review of aggravators under the Arizona Constitution.

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<sup>444</sup> *E.g.*, *State v. Bolt*, 142 Ariz. 260, 264-65 (1984).

<sup>445</sup> *See* Ariz.Const.Art. 2, §4.

**2. Arizona’s scheme fails to narrow because it fills the field conceptually and in practice.**

**A. Arizona’s scheme conceptually fills the field. Nearly any possible first-degree murder is conceptually eligible for at least one aggravating factor.**

Foremost, it is improper for a scheme to conceptually apply to nearly every murder. If a scheme does, it does not accomplish the narrowing requirement set forth by *Furman*, *Gregg*, and their progeny.

The clearest issue arises when a single aggravating factor applies to all possible murders. In *Tuilaepa v. California*, the Supreme Court concluded an aggravating “circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder.”<sup>446</sup> Thus, it would be improper to make the death of a victim an aggravating factor because that would apply to any murder. *Tuilaepa* also noted the aggravating circumstance cannot be unconstitutionally vague.<sup>447</sup> A vague circumstance—such as the cruel, heinous, or depraved aggravator—has the potential to be misunderstood and therefore applied to nearly every murder.<sup>448</sup> During the second hearing, the court correctly understood this as an extension of the narrowing requirement imposed upon the entire scheme.<sup>449</sup>

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<sup>446</sup> 512 U.S. 967, 972 (citing *Arave v. Creech*, 507 U.S. 463, 474 (1993)).

<sup>447</sup> *Id.*

<sup>448</sup> See *Maynard v. Cartwright*, 486 U.S. 356, 363 (1988).

<sup>449</sup> RT-5/8/2015, 17-18.

A hypothetical scenario of three aggravating factors does not improve the circumstance. In Arizona, a person can commit first-degree murder in three ways: 1) premeditated murder, 2) felony murder, and 3) death of a law enforcement officer.<sup>450</sup> It would be just as problematic to create an aggravation scheme that set forth three aggravating factors that, between them, encompassed 100 percent of each subclass.

For example, a three-factor aggravation scheme could be invented that encompassed every single possible first-degree murder in Arizona: 1) the murder was premeditated, 2) the murder was committed during the commission of a felony, and 3) a law enforcement officer was the victim. This hypothetical scheme would cover 100% of all first-degree murders under Arizona's broad definition and contravene any narrowing purpose.

These hypothetical aggravators are not very hypothetical. Several states include premeditation as an aggravating factor.<sup>451</sup> Multiple states also include the concurrent commission of a felony as an aggravating factor.<sup>452</sup> Finally, it is aggravating in many states if the victim is a law enforcement officer.<sup>453</sup>

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<sup>450</sup> A.R.S. §13-1105(A).

<sup>451</sup> N.H. Rev. Stat. Ann. §630:5(VII)(f).

<sup>452</sup> See S.C. Code Ann. §16-3-20(C)(a)(1); MD Code, Criminal Law §2-303(x); Mass. Gen. Laws Ann. ch. 279, §69(a)(10); Mo. Ann. Stat. §565.032(2)(11); N.C. Gen. Stat. Ann. §15A-2000(e)(5); Vt. Stat. Ann. tit. 13, §2303(e)(3).

<sup>453</sup> See Del. Code Ann. tit. 11, §4209(e)(1)(c); Fla. Stat. Ann. §921.141(6)(j); Ga. Code Ann. §17-10-30(b)(8); Ind. Code Ann. §35-50-2-9(b)(6); La. Code Crim. Proc.

Such a system would be no improvement over a single aggravating factor that fails to narrow. Every first-degree murder committed under Arizona's broad statute would still be eligible for the death penalty.

Arizona's scheme reaches the same problem, and compounds it with additional aggravating factors. While Arizona does not make simple premeditation an aggravating factor, the (F)(13) cold, calculated aggravator touches on the question of premeditation.<sup>454</sup> Similarly, it is hard to identify a premeditated first-degree murder that a jury would not also find was committed in a heinous or depraved manner.<sup>455</sup>

Further, nearly every felony-murder is automatically eligible for an aggravating factor. This is due, in large part, to Arizona's expansive (F)(2) aggravator. Felony murder includes 16 underlying felony offenses: 1) sexual conduct with a minor; 2) sexual assault; 3) molestation of a child under fifteen years of age; 4) terrorism; 5) transport for sale or sale of marijuana; 6) manufacture of, transport for sale, or sale of dangerous drugs; 7) transport for sale or sale of narcotic

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Ann. art. 905.4(A)(2); MD Code, Criminal Law, §2-303(g)(1)(i); Mo. Ann. Stat. §565.032(2)(5) & (2)(8); N.M. Stat. Ann. §31-20A-5(A)(2008)(death penalty abolished in 2009; current non-capital version identical); Okla. Stat. Ann. tit. 21, §701.12(8); S.C. Code Ann. §16-3-20(C)(a)(7); S.D. Codified Laws §23A-27A-1(7).

<sup>454</sup> *State v. Hausner*, 230 Ariz. 60, ¶104 (2012); see also Argument 4, *infra*.

<sup>455</sup> See A.R.S. §13-751(F)(6); see also *State v. Gretzler*, 135 Ariz. 42, 51 (1983), *superseded by statute on other grounds*, *State v. Carlson*, 237 Ariz. 381, ¶46 (2015).

drugs; 8) involving or using minors in drug offenses; 9) drive by shooting; 10) kidnapping; 11) burglary in the first, second, or third degree; 13) robbery, aggravated robbery, and armed robbery; 14) escape in the first or second degree; 15) intentional or knowing abuse of a child under fifteen years of age; and 16) unlawful flight from a pursuing law enforcement vehicle.<sup>456</sup>

As this Court recognized in *State v. Carlson*, nine of these felonies are typically included in the (F)(2) “serious offense” aggravator: sexual conduct with a minor, sexual assault, molestation of a child, terrorism, kidnapping, burglary, arson, robbery, and child abuse.<sup>457</sup> Instead, this Court concluded that “several predicate offenses for felony murder—including marijuana offenses, dangerous drug offenses, certain other narcotics offenses, drive-by shootings, escape, and unlawful flight from a pursuing law enforcement vehicle—are not ‘serious offenses’ that would allow a jury to find the (F)(2) aggravator.”<sup>458</sup>

While this is true, it is an incomplete evaluation because most remaining predicate offenses immediately qualify for at least one other aggravating factor:

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<sup>456</sup> A.R.S. §13-1105(A)(2).

<sup>457</sup> 237 Ariz. 381, ¶¶47-48 (2015).

<sup>458</sup> *Id.*

- Each drug offense involves the manufacturing, sale, or transport for sale of the drug<sup>459</sup> and would qualify for the pecuniary gain aggravator.<sup>460</sup>
- Drive by shooting is likely to be accompanied by one of a host of aggravators, including: the defendant created a grave risk of death to additional persons;<sup>461</sup> committed the murder in a cruel, heinous, or depraved manner;<sup>462</sup> committed multiple homicides;<sup>463</sup> committed the offense to promote, further, or assist a gang;<sup>464</sup> sought to prevent cooperation with law enforcement;<sup>465</sup> or possessed sufficient premeditation that the murder was committed in a cold and calculated manner.<sup>466</sup>
- Escape is automatically eligible for aggravation under the (F)(7)(a) aggravator, which applies when a defendant is in custody.<sup>467</sup>
- Unlawful flight resulting in a death is likely to have been committed in such a manner that “the defendant knowingly created a grave risk of death to another person,” thereby qualifying for the (F)(3). This doesn’t even include the high probability that the flight will have been from a serious offense ((F)(2)) or committed by a person who was on probation or authorized release ((F)(7)) or that the victim was a police officer ((F)(10)).

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<sup>459</sup> See A.R.S. §13-1105(A)(2)(listing offenses under A.R.S. §§13-3405(A)(4)(transport for sale or sale of marijuana); 13-3407(A)(4)(manufacturing dangerous drugs); 13-3407(A)(7)(transport for sale or sale of dangerous drugs); 13-3408(A)(7)(transport for sale or sale of narcotic drugs); 13-3409 (hiring, employing, using a minor to engage in drug activities or selling or transferring drugs to a minor)).

<sup>460</sup> See A.R.S. §13-751(F)(5); *State v. Canez*, 202 Ariz. 133, ¶93 (2002), *abrogated on other grounds by State v. Valenzuela*, 239 Ariz. 299, ¶11 n.1 (2016); *State v. LaGrand*, 153 Ariz. 21, 35-36 (1987).

<sup>461</sup> A.R.S. §13-751(F)(3).

<sup>462</sup> A.R.S. §13-751(F)(6).

<sup>463</sup> A.R.S. §13-751(F)(8).

<sup>464</sup> A.R.S. §13-751(F)(11).

<sup>465</sup> A.R.S. §13-751(F)(12).

<sup>466</sup> A.R.S. §13-751(F)(13).

<sup>467</sup> See A.R.S. §§13-2501(3)(defining custody), 13-2503 (second degree), 13-2504 (first degree).

While there is not perfect alignment between Arizona’s predicate felonies for felony murder and the listed serious offenses, there is a near-match between the predicate felonies and the entire list of aggravating factors.

Finally, intentionally or knowingly causing the death of a law enforcement officer in the line of duty qualifies for both first-degree murder and an aggravator.<sup>468</sup>

Interestingly, the trial court touched on this issue in the second hearing when it noted, “it is hard to fathom a factual situation in which a first degree murder does not have an aggravating circumstance.”<sup>469</sup> The conceptual overlap is so great that effort comes in inventing how a person could commit a murder without becoming death eligible. Even if one could envision a first-degree murder that does not qualify for the death penalty—a challenge in itself—the alignment is so substantial it illustrates the legislature has failed in its duty to narrow the class of first-degree murder defendants eligible for the death penalty.

**B. Arizona’s scheme also fills the field in practice. Statistically, nearly 99% of first-degree murders qualify for at least one aggravating factor.**

The data proves the conceptual overlap discussed above. Over the reviewed decade, 856 of 866 first-degree murders qualified for at least one aggravating factor.<sup>470</sup> The data, which this Court must take as true, proves that Arizona’s

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<sup>468</sup> Compare A.R.S. §13-1105(A)(3) with §13-751(F)(10).

<sup>469</sup> RT-5/8/2016, 41-42.

<sup>470</sup> RT-4/24/2015, 18-20.

aggravation scheme does not narrow the class of murder defendants eligible for the death penalty.<sup>471</sup>

In concept and effect, Arizona has gotten the law backwards. Death eligibility is meant to be the exception, exclusion the norm. Winnowing out 1.2 percent of murder defendants from the death penalty does not reserve death for the worst of the worst. It institutionalizes eligibility. As the Steikers framed it, Arizona “has not articulated a circumscribed theory of what the state might regard as the worst murders. Instead, [Arizona] has simply described the various factors that collectively account for the circumstances surrounding most murders.”<sup>472</sup>

On this point, the trial court expressed its discomfort during the second hearing.<sup>473</sup> Based upon the record before it and the facts it assumed to be true, the court concluded the aggravation scheme did not meaningfully narrow the class of first-degree murders eligible for the death penalty.<sup>474</sup>

**3. The distinctions this Court offered in *State v. Hidalgo* do not hold up to scrutiny.**

Finally, the distinctions and reasons identified by this Court do not save the constitutional inadequacy of Arizona’s aggravation scheme. In *Hidalgo*, this Court found Arizona’s scheme narrowed in four manners: 1) only first-degree murder was

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<sup>471</sup> *Id.*

<sup>472</sup> Steiker & Steiker, *Courting Death*, 161 (emphasis original).

<sup>473</sup> See RT-5/8/2016, 41, 43.

<sup>474</sup> *Id.* at 22, 41, 43.



eligible, 2) an aggravating circumstance was required, 3) the jury had to find the aggravating circumstance beyond a reasonable doubt, and 4) defendants receive individualized sentencing.<sup>475</sup> This Court’s reliance on each was problematic.

**A. Arizona’s broad definition of first-degree murder does not satisfy the legislative duty to narrow.**

Foremost, the fact that only first-degree murder is eligible is of little import because Arizona has an expansive definition of first-degree murder. In Arizona, any premeditated murder (regardless of duration of premeditation), any death occurring during the commission of a serious offense, and any conduct resulting in the death of a law enforcement officer on active duty, is a first-degree murder.<sup>476</sup> Such a broad definition does not provide the narrowing seen in cases like *Jurek*, *Lowenfield*, or even *Roberts*. Arizona’s definition of first-degree murder is even more expansive than Louisiana’s definition of second-degree murder, as reported in *Lowenfield*.<sup>477</sup> Arizona’s homicide scheme does not meaningfully narrow death eligibility. Justice Breyer, joined by three more Justices, observed the breadth of Arizona’s murder statute in his statement respecting the denial of certiorari in *Hidalgo v. Arizona*.<sup>478</sup>

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<sup>475</sup> *Hidalgo*, 241 Ariz. 543, ¶128.

<sup>476</sup> A.R.S. §13-1105(A); *see also* A.R.S. §13-1101(1)(defining premeditation as any intention or knowledge to kill that “precedes the killing by any length of time to permit reflection”).

<sup>477</sup> *See Lowenfield*, 484 U.S. at 241 n.5 (quoting La.Rev.Stat. §14.30.1 (1986)).

<sup>478</sup> 2017 WL 3536644, \*2, [No. 17-251](#), 3-4 (Breyer, J., statement).

Our definition, Justice Breyer indicated, “does not ‘provid[e] for categorical narrowing at the definition stage.’”<sup>479</sup>

More problematic, the state never offered any data to indicate how much narrowing the definitions actually provide.<sup>480</sup> As noted above, the breadth of the first-degree murder statute provides a compelling reason to ignore other homicide classifications. If the state wanted to argue the classifications served an adequate narrowing function, they could have offered evidence to quantify such a claim.

**B. Arizona’s aggravating circumstances fail to narrow.**

Second, and the issue this brief and *Hidalgo* focus upon, the requirement for an aggravating circumstance is meaningless. The purpose of an aggravating factor scheme is to “circumscribe the class of persons eligible for the death penalty.”<sup>481</sup> As Justice White explained in *Gregg*, the purpose of the aggravating factors is to drive down eligibility closer to imposition in order to avoid the variance problem seen prior to *Furman*.<sup>482</sup>

This is where Arizona’s scheme fails. Because of the number and breadth of Arizona’s aggravating factors, nearly 99 percent of murders qualify for the death penalty. This reflects the failed effort to narrow noted by the Steikers: “Before

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<sup>479</sup> *Id.* at \*4, 6 (quoting *Zant*, 462 U.S. at 879).

<sup>480</sup> See RT-5/8/2015, 42-43.

<sup>481</sup> *Zant*, 462 U.S. at 878.

<sup>482</sup> *Gregg*, 428 U.S. at 222 (White, J., concurring).

*Furman*, jurors could impose the death penalty against essentially any offender who committed murder. After *Furman*, [Arizona’s] enumeration of numerous and broad aggravating factors, combined with the Court’s minimalist policing, leaves jurors in virtually the same place—except now they are more likely to believe that the offense before them is especially deserving of death.”<sup>483</sup>

Moreover, this Court’s holding in *Hidalgo* that the aggravator requirement narrows the field is inconsistent with the facts that must be presumed in the case. As this Court noted, the trial court refused to hold an evidentiary hearing in *Hidalgo*.<sup>484</sup> In denying Jimmy this hearing, the trial court agreed to accept the defense factual allegations as true.<sup>485</sup> This Court concluded the denial of an evidentiary hearing was not error because “due process does not require an evidentiary hearing on a motion when the legal claims do not turn on disputed facts.”<sup>486</sup>

Here, the pertinent fact alleged by the defense was simple: nearly every murder defendant would qualify, conceptually and in practice, for an aggravating factor. The trial court presumed as true that nearly 99 percent of all murders committed in Arizona in the last decade qualified for an aggravating factor. And

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<sup>483</sup> Steiker & Steiker, Courting Death, 162.

<sup>484</sup> *Hidalgo*, 241 Ariz. 543, ¶6.

<sup>485</sup> *Hidalgo*, 241 Ariz. 543, ¶6.

<sup>486</sup> *Id.* at ¶11.

because the trial court refused a hearing based on this presumption, this Court must endorse the same factual conclusion.

But this Court essentially disputed the allegation when it relied upon the aggravators as a narrowing factor. This Court stated, “Arizona’s statutes further limit death eligibility to the identified aggravating circumstances (which, as noted above, Hidalgo does not challenge individually as either overly broad or vague).”<sup>487</sup> This assertion presumed that “limit[ing] death eligibility to the aggravating circumstances” somehow “narrows the class of persons eligible for death.”<sup>488</sup>

This presumption contradicts the singular fact which must be held true in this case: the prosecution can allege at least one aggravating factor in nearly 99 percent of all first-degree murders. This presumption also contradicts the trial court’s legal conclusion that Arizona’s aggravation scheme does not narrow.<sup>489</sup> An aggravation scheme that applies to nearly 99 percent of all first-degree murders does not meaningfully narrow.

**C. Reliance upon jury function at the aggravation stage is misplaced.**

Allowing a jury to exercise its function does not absolve the legislature of its responsibility to narrow. Further, labeling vague or expansive factors—such as the (F)(6) cruel, heinous, or depraved, or (F)(2) contemporaneous felony factors—as

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<sup>487</sup> *Id.* at ¶28.

<sup>488</sup> *Id.*

<sup>489</sup> RT-5/8/2015, 41.

“aggravating factors,” bestows an imprimatur of uniqueness upon the fact. As the Steikers observed, such aggravating factors transform “every killing during a convenience store or a liquor store robbery into a ‘worst of the worst’ offense. The ‘additional felony’ aggravator means that taking some property from the dead victim (robbery) or temporarily restraining the victim before the killing (kidnapping) will convert an otherwise ordinary murder into a death-eligible offense.”<sup>490</sup> And the jury is then “more likely to believe that the offense before them is especially deserving of death.”<sup>491</sup>

Again, Justice Breyer, joined by three other Justices, was concerned with this Court’s reliance upon the jury function as a narrowing function: “the third and fourth narrowing methods the Arizona Supreme Court invoked are basically beside the point—they do not show the necessary legislative narrowing that our precedents require.”<sup>492</sup> The trial court correctly disregarded this during the second hearing.<sup>493</sup>

**D. Individualized sentencing is insufficient without legislative guidance.**

This Court’s final claim was that individualized sentencing offered the final narrowing. While it is correct to say that individualized sentencing narrows the defendants upon whom the death penalty is imposed, it is false to claim Arizona’s

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<sup>490</sup> Steiker & Steiker, Courting Death, 160.

<sup>491</sup> *Id.* at 162 (emphasis original).

<sup>492</sup> 2017 WL 3536644, \*4, [No. 17-251](#), 7 (Breyer, J., statement)(emphasis original).

<sup>493</sup> RT-5/8/2016, 25.

scheme uniquely provides for this. Individualized sentencing is a constitutional mandate, not a benefit the Arizona legislature conferred upon Arizona citizens out of a sense of magnanimity. In *Woodson* and *Roberts*, the Supreme Court struck down mandatory death schemes because the Eighth Amendment requires individualized sentencing. Individualized sentencing does not, therefore, fix the failures of the Arizona legislature. Arizona must provide individualized sentencing and legislative narrowing. As Justice Breyer explained it, individualized sentencing “concerns an entirely different capital punishment requirement—the selection decision—which is not at issue ....”<sup>494</sup> And the trial court, during the second hearing, rightly concluded jury function was not an example of legislative narrowing.<sup>495</sup>

### ***Conclusion:***

Ultimately, this Court made two errors. First, this Court ignored the singular fact that it must take as true: nearly 99 percent of all murder defendants qualify for an aggravating factor. Consequently, it was improper for this Court to conclude that the allegation of an aggravating factor had any narrowing impact. Second, this Court improperly presumed that compliance with other constitutional narrowing requirements somehow absolved the legislature of its separate duty to “circumscribe the class of persons eligible for the death penalty.”<sup>496</sup> Neither Arizona’s broad

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<sup>494</sup> 2017 WL 3536644, \*4, [No. 17-251](#), 7 (Breyer, J., statement).

<sup>495</sup> RT-5/8/2016, 25.

<sup>496</sup> *See Zant*, 462 U.S. at 878.

definition of first-degree murder nor the required jury function, whether at the aggravation or sentencing phase, stands in for the required legislative narrowing. This Court should declare Arizona's death penalty scheme unconstitutional.

## **ARGUMENT 2**

THE TRIAL COURT DENIED JIMMY’S RIGHTS TO DUE PROCESS, A MEANINGFUL APPEAL, AND EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE COURT DENIED HIS REQUEST FOR AN EVIDENTIARY HEARING ON THE *FURMAN V. GEORGIA* CLAIM.

### ***Standard of Review:***

Normally, this Court reviews the “decision whether to hold an evidentiary hearing for an abuse of discretion ....”<sup>497</sup> However, a trial court abuses its discretion when it makes legal error and this Court reviews the underlying legal question de novo.<sup>498</sup> Moreover, the heart of Jimmy’s claim is constitutional in nature and this Court reviews constitutional issues de novo.<sup>499</sup>

### ***Discussion:***

The fear identified by the defense at the very beginning became a reality when *Hidalgo* went to the Supreme Court. The defense wanted to hold a hearing, explaining: “We don’t have an appropriate appellate record if you don’t make findings of fact. This all just – there is no point in really doing this if you don’t make findings of fact.”<sup>500</sup> That’s precisely what happened. Justice Breyer and three joining

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<sup>497</sup> *Hidalgo*, 241 Ariz. 543, ¶7.

<sup>498</sup> *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, ¶10 (2003).

<sup>499</sup> *Hidalgo*, 241 Ariz. 543, ¶7; *McGill*, 213 Ariz. 147, ¶45; *Moody*, 208 Ariz. 424, ¶62.

<sup>500</sup> RT-5/3/2016, 13.



Justices were concerned about Arizona’s system.<sup>501</sup> But they respected the denial of certiorari because there were no findings of fact, there was no hearing, there was no real record.<sup>502</sup> Thus, there was no point.

There needs to be a point. Defendants need to have the ability to raise arguments and make them mean something. Jimmy needs to have his right to an appeal be of import.

**1. To empower Jimmy’s rights to due process, appeal, and assistance of counsel, the trial court should have allowed an evidentiary hearing.**

While the federal constitution does not guarantee a right to appeal,<sup>503</sup> Article 2, section 24 of the Arizona Constitution does.<sup>504</sup> Where a right to appeal exists, the right must include a meaningful appeal, not just “a meaningless ritual ....”<sup>505</sup> The right to a meaningful appeal means the parties must have a “record of sufficient completeness” to accomplish the appellate review.<sup>506</sup> A record of sufficient

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<sup>501</sup> *Hidalgo v. Arizona*, 538 U.S. \_\_\_, 2017 WL 3536644, \*1-\*4, [No. 17-251](#), pg. 1-7 (Breyer, J., statement respecting denial of certiorari).

<sup>502</sup> *Id.* at \*5, 7-8.

<sup>503</sup> *See Jones v. Barnes*, 463 U.S. 745, 751 (1983); *McKane v. Durston*, 153 U.S. 684, 687 (1894).

<sup>504</sup> Ariz.Const.Art. 2, §24; *see also State v. Ethington*, 121 Ariz. 572, 573-74 (1979).

<sup>505</sup> *Douglas v. California*, 372 U.S. 353, 358 (1963); *see also Gonzales v. U.S.*, 348 U.S. 407, 415 (1955).

<sup>506</sup> *Draper v. Washington*, 372 U.S. 487, 497 (1963)(citing *Coppedge v. U.S.*, 369 U.S. 438, 446 (1962)); *see also State v. Schackart*, 175 Ariz. 494, 499 (1993); *State v. Moore*, 108 Ariz. 532, 534 (1972).

completeness is one in which the trial court makes findings of fact, not just assumptions of the truth of a party's factual assertions.<sup>507</sup>

The requirement for a record of sufficient completeness also exists within the due process clauses of the United States and Arizona Constitutions.<sup>508</sup> Fundamental to due process is the opportunity to be heard at a meaningful time and in a meaningful manner.<sup>509</sup> This has been a central requirement of due process “[f]or more than a century,”<sup>510</sup> and “does not depend upon the merits of a claimant’s subjective assertions ....”<sup>511</sup>

Moreover, capital cases are entitled to a heightened due process protection because death is uniquely different from other sentences in its finality.<sup>512</sup> Thus, “there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”<sup>513</sup> By asking whether Arizona’s death penalty scheme is too broad, the *Furman* challenge addressed the

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<sup>507</sup> See *Miller v. Bd. of Sup’rs of Pinal County*, 175 Ariz. 296, 301 (1993); see also *Courtless v. Jolliffe*, 507 S.E.2d 136, 142 (W.Va. 1998).

<sup>508</sup> U.S.Const.Amend.. 5, 14; Ariz.Const.Art. 2, §4.

<sup>509</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004)(quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Baldwin v. Hale*, 68 U.S. 223, 233 (1863); and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

<sup>510</sup> *Id.*

<sup>511</sup> *Id.* at 530 (quoting *Carey v. Piphus*, 435 U.S. 247, 266 (1978)).

<sup>512</sup> *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

<sup>513</sup> *Id.*

fundamental basis for heightened protection: whether the punishment is appropriate in Jimmy’s case.

Finally, Jimmy’s right to counsel is separately guaranteed by the United States and Arizona constitutions.<sup>514</sup> While the right to counsel is, at its core, a trial right, meaningful representation is necessary at all critical proceedings.<sup>515</sup> And “the right to counsel is the right to the effective assistance of counsel.”<sup>516</sup> Where a counsel’s ability “to make independent decisions about how to conduct the defense” is impeded, the defendant’s right to effective assistance of counsel is disrupted.<sup>517</sup>

Here, the trial court’s refusal to hold a hearing resulted in an absence of any findings of fact. As such, the trial court’s refusal violated Jimmy’s appellate right to a record of sufficient completeness and due process right to be heard in a meaningful manner. This failure was at the heart of Justice Breyer’s statement regarding denial of certiorari in *Hidalgo*.<sup>518</sup> Justice Breyer and three other Justices—which would have been enough to grant certiorari<sup>519</sup>—were concerned about this Court’s

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<sup>514</sup> U.S.Const.Amend.. 6; Ariz.Const.Art. 2, §24.

<sup>515</sup> See *U.S. v. Wade*, 388 U.S. 218, 227 (1967).

<sup>516</sup> *Strickland v. Washington*, 466 U.S. 668, 686 (1984)(quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

<sup>517</sup> *Id.*

<sup>518</sup> See *Hidalgo*, 538 U.S. \_\_\_, 2017 WL 3536644, \*5, [No. 17-251](#), pg. 8 (Breyer, J., statement respecting denial of certiorari).

<sup>519</sup> See *Hamilton v. Texas*, 498 U.S. 281, 281-82 n.\* (1990)(explaining the rule of four).

application of Supreme Court precedent.<sup>520</sup> However, Justice Breyer pointed out that “the opportunity to develop the record through an evidentiary hearing was denied.”<sup>521</sup> “As a result, the record as it” went to the Supreme Court was “limited and largely unexamined by experts and the courts below in the first instance.”<sup>522</sup> Because other litigants “may have the opportunity to fully develop a record with the kind of empirical evidence” Hidalgo wanted to present, Breyer and the three joining Justices believed it would be best to await a future case.<sup>523</sup>

Indeed, the trial court’s denial of an evidentiary hearing means that any decision that Arizona’s capital scheme is unconstitutional would merely be advisory. The trial court expressed its opinion that if an appellate court found the defense assertions regarding a lack of narrowing raised a constitutional problem, the court would then hold an evidentiary hearing to determine if the assertions were true.<sup>524</sup> This process rendered review by the Supreme Court of the United States meaningless. The Supreme Court is not in the practice of providing advisory opinions based upon the mere assertion of fact. Nor is this Court.

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<sup>520</sup> See *Hidalgo*, 2017 WL 3536644, \*5, [No. 17-251](#), pg. 7-8.

<sup>521</sup> *Id.* at \*5, 8.

<sup>522</sup> *Id.*

<sup>523</sup> *Id.*

<sup>524</sup> RT-4/24/2015, 29.

**2. This court should reach a different decision than in *State v. Hidalgo* in light of recent developments and different arguments raised herein.**

While this Court rejected a similar claim in *State v. Hidalgo*,<sup>525</sup> this case is different from *Hidalgo* for four reasons.

First, the statement respecting denial of certiorari authored by Justice Breyer and joined by three additional Justices places the trial court's decision in new light. The trial court's decision to deny an evidentiary hearing operated to deprive the defendant in *Hidalgo* review by the Supreme Court because the record was not adequately developed. While not overruling this Court, Justice Breyer's statement contradicts this Court's conclusion that "Hidalgo was afforded an adequate opportunity to be heard."<sup>526</sup>

Justice Breyer's statement further undercut this Court's evaluation of *People v. Ballard*.<sup>527</sup> This Court distinguished *Ballard* on the grounds that the Illinois Supreme Court concluded the defense had not substantiated their claim.<sup>528</sup> But that, in essence, is the reason Justice Breyer supported the denial of certiorari: the defense had not had the opportunity to develop the record sufficiently to substantiate its claim.<sup>529</sup>

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<sup>525</sup> 241 Ariz. 543, ¶¶8-13 (2017).

<sup>526</sup> *Id.* at ¶11.

<sup>527</sup> 794 N.E.2d 788 (Ill. 2002).

<sup>528</sup> 241 Ariz. 543, ¶12.

<sup>529</sup> *See Hidalgo*, 2017 WL 3536644, \*5, [No. 17-251](#), pg. 8.

Second, the attorneys in *Hidalgo* did not include the deprivation of the hearing as a basis for review in the petition for writ of certiorari.<sup>530</sup> Thus, while the Supreme Court was concerned about the deprivation of a hearing, they did not have the issue before them. This provides context for the distinction identified above. Based solely upon the new information provided by the statement respecting the denial of certiorari, this Court should remand this case and order an evidentiary hearing. Otherwise, this Court condemns Jimmy to the same fate upon filing any future Petition for Writ of Certiorari.

The statement regarding the denial of certiorari further illustrates the third distinction: denial of the right to counsel. The attorneys in *Hidalgo* did not address this claim as a denial of the right to counsel.<sup>531</sup> But the record in *Hidalgo*, and this case by extension, illustrates how counsel was deprived. The Supreme Court wanted a better record and a better record could have been developed. The attorneys wanted to develop a better factual record to preserve subsequent review. But the trial court interfered with their ability to do so. Because Jimmy joined the proceedings, that decision violated Jimmy's right to counsel as well.

Finally, while the attorneys in *Hidalgo* addressed the due process right to be heard, they did not couch their argument in terms of the Arizona constitutional

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<sup>530</sup> See *Hidalgo v. Arizona*, 17-251, [Pet. Cert.](#) i, 10, 21.

<sup>531</sup> See *State v. Hidalgo*, Corrected OB, 2015 WL 12977498, \*10-\*19.

guarantee to appeal or the right to counsel.<sup>532</sup> The Arizona constitution provides broader protections for criminal appeals and a clear explanation of the error. This broader protection carries with it a greater demand for process. Because Arizona has guaranteed the right to an appeal, Arizona must also guarantee the right to a meaningful appeal. Arizona must guarantee a sufficiently complete record such that review can occur. The statement regarding denial of certiorari illustrates that right was not protected in this case.

***Conclusion:***

Jimmy has a right to appeal under the Arizona constitution. This right should not be converted to nothing more than “a meaningless ritual ....”<sup>533</sup> By denying Jimmy an evidentiary hearing, the trial court interfered with Jimmy’s constitutional rights. Accordingly, this Court should remand to the trial court and order the trial court to hold the evidentiary hearing and make factual findings at its conclusion.

Moreover, this Court should ensure the parties have adequate time to further develop the record for this hearing. The data available at the time of the hearing spanned from 2002 to 2012. More than five years have passed. Thus, additional data must be gathered, analyzed, and incorporated. Moreover, Justice Breyer and the four joining Justices indicated any evidentiary hearing should consider how many

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<sup>532</sup> *See id.*

<sup>533</sup> *See Douglas*, 372 U.S. at 358.

aggravating factors are implicated.<sup>534</sup> In light of this guidance, Jimmy will need time to develop the record further before an evidentiary hearing is held.

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<sup>534</sup> See *Hidalgo*, 2017 WL 3536644, \*5, [No. 17-251](#), pg. 8.



### **ARGUMENT 3**

THE (F)(6) ESPECIALLY CRUEL, HEINOUS, OR  
DEPRAVED AGGRAVATOR IS  
UNCONSTITUTIONALLY VAGUE.

Before trial, Jimmy filed a Motion to Strike the Allegation of Especially Cruel, Heinous or Depraved as Set Forth In A.R.S. §13-751(F)(6).<sup>535</sup> The state objected<sup>536</sup> and the trial court denied the motion.<sup>537</sup> Jimmy also submitted a requested jury instruction for the (F)(6) aggravator<sup>538</sup> that the court denied.<sup>539</sup>

#### ***Standard of Review:***

This Court reviews constitutional issues de novo.<sup>540</sup> This Court also interprets statutes de novo.<sup>541</sup>

#### ***Discussion:***

- 1. On its face, the cruel, heinous or depraved aggravator is unconstitutionally vague.**

“[T]here is no serious argument that Arizona’s ‘especially heinous, cruel or depraved’ aggravating factor is not facially vague.”<sup>542</sup> Since the Supreme Court of

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<sup>535</sup> I.274.

<sup>536</sup> I.316, 2-3.

<sup>537</sup> I.347, 13-14.

<sup>538</sup> I.470.

<sup>539</sup> RT-5/17/2016, 66-67; *see also* RT-5/24/2016, 41-43.

<sup>540</sup> *Hidalgo*, 241 Ariz. 543, ¶7; *McGill*, 213 Ariz. 147, ¶45; *Moody*, 208 Ariz. 424, ¶62.

<sup>541</sup> *State v. Boyston*, 231 Ariz. 539, ¶14 (2013).

<sup>542</sup> *Walton*, 497 U.S. at 654.

the United States decided *Walton v. Arizona*, this Court’s (F)(6) jurisprudence has started from the premise that the (F)(6) aggravator is unconstitutionally vague.<sup>543</sup>

Prior to *Walton*, the Supreme Court had invalidated similar aggravating factors in *Maynard v. Cartwright*<sup>544</sup> and *Godfrey v. Georgia*.<sup>545</sup> However, the Court relied upon two distinctions to uphold Arizona’s vague (F)(6). First, *Maynard* and *Godfrey* had jury sentencing; in Arizona, at the time, judges sentenced the defendant.<sup>546</sup> Second, the appellate courts in *Maynard* and *Godfrey* did not “purport to affirm the death sentence by applying a limiting definition of the aggravating circumstance to the facts presented.”<sup>547</sup>

Now, neither justification exists. Generally, judges no longer decide whether the death penalty should be imposed.<sup>548</sup> Further, this Court no longer independently reviews aggravation.<sup>549</sup>

The Supreme Court’s two justifications for upholding Arizona’s vague (F)(6) aggravator no longer exist. Thus, the starting point for any discussion regarding the constitutionality of the (F)(6) is the recognition that the aggravator is vague.

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<sup>543</sup> See e.g., *State v. Villalobos*, 225 Ariz. 74, ¶31 (2010); *State v. Pandeli*, 215 Ariz. 514, ¶18 (2007).

<sup>544</sup> 486 U.S. 356 (1988).

<sup>545</sup> 446 U.S. 420 (1980).

<sup>546</sup> *Walton*, 497 U.S. at 653.

<sup>547</sup> *Id.*

<sup>548</sup> See A.R.S. §§13-703, 13-703.01 (2002).

<sup>549</sup> See *State v. Gunches*, 225 Ariz. 22, ¶13 (2010)(citing A.R.S. §13-756(A)).

**2. This Court’s jurisprudence has not adequately narrowed the (F)(6) aggravator.**

In *State v. Gretzler*,<sup>550</sup> this Court endorsed definitions for heinous, cruel, and depraved previously used in *State v. Knapp*:<sup>551</sup>

heinous: hatefully or shockingly evil; grossly bad.

cruel: disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic

depraved: marked by debasement, corruption, perversion or deterioration.<sup>552</sup>

This Court further explained cruelty focuses on “pain and distress visited upon the victims,” and heinousness and depravity “go to the mental state and attitude of the perpetrator as reflected in his words and actions.”<sup>553</sup> Cruelty, thus, involves the infliction of physical pain or mental distress on a victim.<sup>554</sup> Heinousness and depravity involves relishing a murder, gratuitous violence, needless mutilation, senselessness of a crime, and helplessness of a victim.<sup>555</sup> While senselessness or helplessness on its own could be sufficient, it “need always lead to a holding that the crime is heinous or depraved ....”<sup>556</sup>

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<sup>550</sup> 135 Ariz. 42, 51 (1983), *superseded by statute on other grounds*, *State v. Carlson*, 237 Ariz. 381, ¶46 (2015).

<sup>551</sup> 114 Ariz. 531, 543 (1977).

<sup>552</sup> *Gretzler*, 135 Ariz. at 51.

<sup>553</sup> *Id.*

<sup>554</sup> *Id.*

<sup>555</sup> *Id.* at 52.

<sup>556</sup> *Id.* at 52-53.

In *Walton*, a slim majority of the Supreme Court of the United States found these concepts adequately narrowed the sweep of the (F)(6) aggravator.<sup>557</sup> However, this Court’s overarching (F)(6) jurisprudence undercuts this conclusion.

The four *Walton* dissenters were disturbed by the fact that *Gretzler* did not limit itself to the identified factors.<sup>558</sup> “Rather, the [Arizona Supreme Court] stated: ‘Where no circumstances, such as the specific factors discussed above, separate the crime from the “norm” of first-degree murders, we will reverse a finding that the crime was committed in an “especially heinous, cruel, or depraved manner.”’”<sup>559</sup>

Moreover, this Court regularly expanded the application of the (F)(6).<sup>560</sup> This constant expansion proved that this Court never “purported to announce necessary conditions for a finding of heinousness or depravity”; a murder could be set apart from others for any reason.<sup>561</sup>

With no limits and minimal guidance, the vast majority of murders would fit into Arizona’s (F)(6) scheme.<sup>562</sup> Indeed, completely opposite behaviors would warrant a death penalty under such a vague factor.<sup>563</sup>

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<sup>557</sup> *Walton*, 497 U.S. at 654.

<sup>558</sup> *Id.* at 694 (Blackmun, J., dissenting).

<sup>559</sup> *Id.* (emphasis in *Walton*).

<sup>560</sup> *Id.* at 695 (internal citations omitted).

<sup>561</sup> *Id.*

<sup>562</sup> *Id.* at 696.

<sup>563</sup> *Id.*

The dissent's criticism was not isolated to the especially heinous or depraved prong; the dissenters also believed this Court's jurisprudence "made it clear that the murder which is 'especially cruel' is the norm rather than the exception."<sup>564</sup> This conclusion arose from the fact that this Court's cases merely require that the victim be conscious and experience some form of pain or apprehension.<sup>565</sup> This Court "has not required that the defendant must have deliberately delayed or protracted the killing for the purpose of causing the victim mental anguish. Nor has the court required that the period of fear or uncertainty be of extended duration ...."<sup>566</sup> The only distinctions this Court has drawn is an unconscious victim or one who is killed instantly.<sup>567</sup>

Reviewing the entirety of this Court's jurisprudence at the time, the four dissenters believed "Arizona case law, like the bare words of the statute, provided 'no principled way to distinguish this case' from other homicides where capital sentences were not imposed."<sup>568</sup>

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<sup>564</sup> *Id.* at 698.

<sup>565</sup> *Id.*

<sup>566</sup> *Id.* (emphasis original).

<sup>567</sup> *Id.*

<sup>568</sup> *Id.* at 699.

Since *Walton*, this Court has expanded the scope of the *Gretzler* factors<sup>569</sup> and repeatedly insisted *Gretzler* did not announce exclusive factors.<sup>570</sup> Instead, this Court's has made clear that it has set forth some "basic principles" to guide gratuitous violence decisions.<sup>571</sup> The dissenting Justices in *Walton* saw *Gretzler* and its progeny precisely for what this Court conceded it is in *State v. Mata*: an inexhaustive collection of prior decisions merely "identifying types of murders that meet the definition of especially heinous, cruel, or depraved."<sup>572</sup>

But therein lies the problem. There is no meaningful definition of cruel, heinous, or depraved; this Court has simply endorsed generic analogs. The definitions adopted in *Knapp* and *Gretzler* are dictionary definitions,<sup>573</sup> they don't provide any additional insight. The word "heinous" is not crystallized by the phrase "grossly bad." The word "depraved" is not given new light by the phrase "marked by corruption." And the word "cruel" is not clarified by the synonym "sadistic." The definitions are just as vague as the statutory terms.

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<sup>569</sup> See *State v. Milke*, 177 Ariz. 118, 126 (1993); see also *State v. Barreras*, 181 Ariz. 516, 522-23 (1995).

<sup>570</sup> *Milke*, 177 Ariz. at 126; *Barreras*, 181 Ariz. at 521; *State v. Mata*, 185 Ariz. 319, 324 (1986).

<sup>571</sup> *Id.*

<sup>572</sup> *Mata*, 185 Ariz. at 324.

<sup>573</sup> *Knapp*, 114 Ariz. at 543; *Gretzler*, 135 Ariz. at 51.

**3. Instead, this Court has improperly broadened the sweep of the (F)(6) and rendered statutory language meaningless.**

When interpreting a statute, this Court “must interpret the statute so that no provision is rendered meaningless, insignificant, or void.”<sup>574</sup> But this Court’s interpretation of the (F)(6) has removed any meaning from the word “especially.”

**A. Through its use of the word “especially,” the (F)(6) aggravator requires the government to prove the cruelty, heinousness, or depravity of a given murder is set apart from the norm.**

The plain meaning of the word especially expects a comparison against the ordinary, against the norm. Especially is the adverb form of especial.<sup>575</sup> As Garner’s *Modern American Usage* explains, “Traditionally, *especial* (= distinctive, significant, peculiar) is the opposite of *ordinary*.”<sup>576</sup> The New College Edition of *The American Heritage Dictionary* also provides a use note in the definition of special: “Especial and especially are often preferred, but not the only possibilities, when the sense is that of pre-eminence or exceptional degree ....”<sup>577</sup>

Even the definition that has been used in Arizona, and was used by the trial court, expects a comparison. The trial court defined especially as “unusually great or significant.”<sup>578</sup> This definition first appeared in this Court’s jurisprudence in *State*

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<sup>574</sup> *Mejak v. Granville*, 212 Ariz. 555, ¶9 (2006).

<sup>575</sup> Webster’s II New College Dictionary, 384 (1995).

<sup>576</sup> Bryan Garner, *Garner’s Modern American Usage*, especial 318 (2009).

<sup>577</sup> *Id.* at 1240.

<sup>578</sup> RT-5/24/2016, 41.

*v. Cropper*, decided in 2010.<sup>579</sup> *Cropper*, however, did not evaluate the definition.<sup>580</sup> Rather, the instruction was discussed in the context of a prosecutorial misconduct claim.<sup>581</sup>

The defendant in *State v. Villalobos*, issued less than four months later, did challenge the definition of especially.<sup>582</sup> This Court rejected the argument, holding “We have repeatedly rejected similar arguments, holding that jury instructions materially identical to those here sufficiently narrowed the ‘especially cruel’ aggravator.”<sup>583</sup> However, none of the cases this Court cited—*State v. McCray*,<sup>584</sup> *State v. Velazquez*,<sup>585</sup> *State v. Cromwell*,<sup>586</sup> *State v. Anderson*<sup>587</sup>—evaluated the definition of especially.

Regardless, the definition given by the trial court—“unusually great or significant”—still contemplated a comparison through its use of the word unusually. The current edition of Black’s Law Dictionary defines unusual as “Extraordinary;

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<sup>579</sup> 223 Ariz. 522, ¶12 fn.6 (2010).

<sup>580</sup> *See id.*

<sup>581</sup> *See id.*

<sup>582</sup> 225 Ariz. 74, ¶31 (2010).

<sup>583</sup> *Id.*

<sup>584</sup> 218 Ariz. 252, ¶26 fn.3 (2008).

<sup>585</sup> 216 Ariz. 300, ¶28 (2007).

<sup>586</sup> 211 Ariz. 181, ¶42 (2005).

<sup>587</sup> 210 Ariz. 327, ¶111 fn.19 (2005).



abnormal” and “Different from what is reasonably expected.”<sup>588</sup> The Fifth Edition defined unusual as “Uncommon; not usual, rare.”<sup>589</sup>

Placed in the context of the (F)(6), the degree of cruelty, heinousness, or depravity must be unusually great or significant. The cruelty, heinousness, or depravity must be something beyond the ordinary. Beyond the norm.

Every definition of especially contemplates a comparison to the usual. Thus, for years, this Court consistently held that the (F)(6) did not apply to all murders; the (F)(6) only applied when circumstances of the offense set the crime “apart from the usual or the norm.”<sup>590</sup> This was drawn from the Florida Supreme Court’s decision in *State v. Dixon*.<sup>591</sup>

This changed in 2006 with *State v. Ruben Johnson*.<sup>592</sup>

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<sup>588</sup> Black’s Law Dictionary (10th ed. 2014), unusual.

<sup>589</sup> Black’s Law Dictionary, 1380 (5th ed. 1979)(citing *Thompson v. Anderson*, 153 P.2d 665, 666 (Utah 1944)); *see also* The New College Edition of The American Heritage Dictionary, 1405.

<sup>590</sup> *Knapp*, 114 Ariz. at 543 (citing *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), *superseded by statute on other grounds as noted in State v. Dene*, 533 So.2d 265, 267-68 (Fla. 1988)); *accord Gretzler*, 135 Ariz. at 51; *State v. King*, 180 Ariz. 1024, 1043 (1994); *State v. Hyde*, 186 Ariz. 252, 281 (1996); *State v. Sansing*, 200 Ariz. 347, ¶25 (2001), *vacated on other grounds by Sansing v. Arizona*, 536 U.S. 954 (2002); *State v. Pandeli*, 200 Ariz. 365, ¶34 (2001), *vacated on other grounds by Pandeli v. Arizona*, 536 U.S. 953 (2002).

<sup>591</sup> *See Knapp*, 114 Ariz. at 543 (citing *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973)); *Gretzler*, 135 Ariz. at 51 (citing *Knapp* and *Dixon*).

<sup>592</sup> 212 Ariz. 425, ¶¶19-20 (2006).

**B. This Court’s jurisprudence has removed the necessary comparison to the norm.**

In *State v. Ruben Johnson*, the defendant argued “the term ‘especially’ in section 13-703.F.6 essentially requires some kind of comparison between death-eligible murder cases and the ‘norm.’”<sup>593</sup> The defendant further argued, “Because Arizona law prohibits proportionality review, ... the F.6 language fails to provide jurors adequate context for deciding whether certain aggravating circumstances warrant the death penalty.”<sup>594</sup> This Court rejected that claim because “Arizona law prohibits proportionality review ....”<sup>595</sup>

Unfortunately, the defense made an inaccurate presumption that led this Court down the wrong path to an incorrect conclusion. The defense presumed that this Court’s prohibition of proportionality review had something to do with the (F)(6) aggravator. It did not.

To support the rejection of proportionality review, this Court cited<sup>596</sup> the majority opinion in *State v. Salazar*,<sup>597</sup> which adopted Justice Moeller’s concurrence in *State v. Greenway*.<sup>598</sup> However, the majority opinion in *Salazar* and concurring

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<sup>593</sup> *Id.* at ¶19.

<sup>594</sup> *Id.*

<sup>595</sup> *Id.*

<sup>596</sup> *Johnson*, 212 Ariz. 425, ¶20.

<sup>597</sup> 173 Ariz. 399, 417 (1992).

<sup>598</sup> 170 Ariz. 155, 173 (Moeller, J., concurring).

opinion in *Greenway* concerned the broader concept of a proportionality review, not the comparison to the norm expressly required by the plain language of the (F)(6).<sup>599</sup>

The genesis of the problem was this Court's 1981 opinion in *State v. Watson*.<sup>600</sup> In *Watson*, this Court adopted an appellate proportionality review to compare the case before it against others and decide if the case was "above the norm of first degree murders ...."<sup>601</sup> But the mere use of the phrase "above the norm" did not align appellate proportionality review and (F)(6) jurisprudence.

By joining the two strands, the defendant in *Johnson* inaccurately presented the image of conflicting authority.<sup>602</sup> The defendant presumed the abolition of an overarching proportionality review had some impact on this Court's (F)(6) jurisprudence. It did not. But by muddying the issues, the defendant led this Court to a faulty conclusion: that this Court's abolition of the overarching proportionality review governed the comparison to the norm demanded by the (F)(6).

And that faulty conclusion has expanded the sweep of the (F)(6) and rendered the word especially void.

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<sup>599</sup> See *Salazar*, 173 Ariz. at 416-17; *Greenway*, 170 Ariz. at 171-73 (Moeller, J., concurring).

<sup>600</sup> 129 Ariz. 60, 63 (1981).

<sup>601</sup> *Id.*

<sup>602</sup> See *Johnson*, 212 Ariz. 425, ¶19; see also *State v. Andriano*, 215 Ariz. 497, ¶39 (2007).

**C. As a result, this Court has broadened the sweep of the (F)(6) and judicially excised the word “especially” from the (F)(6) statute.**

Because of the defendant’s problematic advocacy in *Johnson*, and this Court’s resulting holding, the (F)(6) now has substantially broader application. This is due, in large part, to the fact that the word especially now holds no meaning in the (F)(6) aggravator.

As noted above, before *Johnson*, this Court repeatedly held the (F)(6) required evidence that the defendant committed the murder in a manner that set it apart from a prototypical murder.<sup>603</sup> The *Gretzler* factors were used to describe, not prescribe, possible facts that could support an (F)(6) finding.<sup>604</sup> As a result, the *Gretzler* factors were set forth as guidance, not express requirements. In the wake of *Johnson*, however, this comparison to the prototypical murder vanished.

The instructions in this case illustrate this problem. Here, the instructions told the jury, “‘Especially’ means unusually great or significant,” but gave the jury no way to determine whether the conduct met this definition.<sup>605</sup> This is discussed in more depth in Argument 4, dealing with the inadequacies of the instruction.

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<sup>603</sup> *Gretzler*, 135 Ariz. at 51; *King*, 180 Ariz. at 1043; *Hyde*, 186 Ariz. at 281; *Sansing*, 100 Ariz. 347, ¶25; *Pandeli*, 200 Ariz. 365, ¶34.

<sup>604</sup> See *Mata*, 185 Ariz. at 324.

<sup>605</sup> See RT-5/24/2016, 41-43.

4. **Even if this Court’s jurisprudence has provided some narrowing, jury instructions cannot adequately communicate the narrowing. This Court’s (F)(6) jurisprudence is inherently descriptive; jury instructions require a prescriptive approach.**

Finally, presuming this Court’s jurisprudence provides some quantum of guidance, it cannot be adequately communicated to a jury. When the Supreme Court concluded the (F)(6) was constitutional, the majority stated, “we conclude that the definition given to the ‘especially cruel’ provision by the Arizona Supreme Court is constitutionally sufficient because it gives meaningful guidance to the sentencer.”<sup>606</sup> But this holding was contextual. The Supreme Court did not hold that this Court’s jurisprudence gave meaningful guidance to any sentencer; the Supreme Court held that this Court’s jurisprudence gave meaningful guidance to a trial judge who was “presumed to know the law and apply it in making their decisions.”<sup>607</sup>

Even if this Court’s (F)(6) jurisprudence can be said to give guidance, its complexity cannot be overlooked. This Court’s cases are full of close calls that inform a trial court, but cannot be reduced to a simple instruction. Gratuitous violence illustrates this complexity because determining what is or is not gratuitous violence requires an in-depth knowledge of this Court’s cases.

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<sup>606</sup> *Walton*, 497 U.S. at 655.

<sup>607</sup> *Id.* at 653.

Multiple shots fired might, or might not, constitute gratuitous violence.<sup>608</sup> The use of ammunition designed to inflict greater damage may, or may not, be gratuitous violence.<sup>609</sup> Multiple stab wounds has seen both results,<sup>610</sup> as has multiple blunt wounds.<sup>611</sup> Repeatedly running over a victim has been both sufficient and insufficient to establish gratuitous violence,<sup>612</sup> as has repeated and ongoing attacks.<sup>613</sup>

Certainly, surrounding facts provide context and lead to different decisions. However, while those surrounding facts might give a trial judge context and insight, they cannot be reduced to instructions. This Court recognized this impossibility in *Mata*: “Because it is an impossible task to craft a formula into which a judge might

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<sup>608</sup> Compare *State v. Chaney*, 141 Ariz. 295, 313 (1984) with *State v. Lacy*, 187 Ariz. 340, 354 (1996) and *State v. Lee*, 189 Ariz. 590, 606 (1997).

<sup>609</sup> Compare *State v. Rossi*, 146 Ariz. 359, 365 (1985) and *State v. Rossi*, 171 Ariz. 276, 280 (1992) with *State v. Styers*, 177 Ariz. 104, 115 (1993).

<sup>610</sup> Compare *State v. Medrano*, 173 Ariz. 393, 398 (1992) with *State v. Bocharski*, 218 Ariz. 476, ¶91 (2008).

<sup>611</sup> Compare *State v. Fisher*, 141 Ariz. 227, 252 (1984), *abrogation on other grounds recognized in State v. Wilson*, 237 Ariz. 296, ¶12 (2015), and *State v. Wallace (Wallace I)*, 219 Ariz. 1, ¶¶34-35 (2008) with *id.* at ¶35 and *State v. Wallace (Wallace II)*, 229 Ariz. 155, ¶¶27, 33-35 (2012).

<sup>612</sup> Compare *State v. Medina*, 193 Ariz. 504, ¶37 (1999) with *State v. Richmond (Richmond I)*, 136 Ariz. 312, 322-26 (1983)(Cameron and Gordon, JJ., concurring and Feldman, J., dissenting) and *State v. Richmond (Richmond III)*, 180 Ariz. 573, 579-80 (1994), *abrogated on other grounds by State v. Mata*, 185 Ariz. 319, 323 (1996).

<sup>613</sup> Compare *State v. Hinchey*, 165 Ariz. 432, 439 (1990) with *State v. Anderson*, 210 Ariz. 327, ¶¶123-124 (2005) and *State v. Canez*, 202 Ariz. 133, ¶106 (2002), *abrogated on other grounds by State v. Valenzuela*, 239 Ariz. 299, ¶11 fn.1 (2016).

insert facts to determine if a defendant is death-eligible, we must content ourselves with identifying types of murders that meet the definition of especially heinous, cruel, or depraved.”<sup>614</sup>

In essence, this Court’s guidance has not been prescriptive; it has been descriptive.

But jury instructions must be prescriptive. Jury instructions must establish “a formula into which a [sentencer] might insert facts to determine” the existence of an element, crime, or aggravating factor. As this Court explained in *Newton v. Maine*, “The test to be used in determining the correctness of instructions is whether upon the whole charge the jury will gather the proper rules to be applied in arriving at a correct decision.”<sup>615</sup>

The (F)(6) aggravator eludes concise formulation. This is illustrated by the complex and inconsistent results this Court has reached. As a result, this Court has refused to create a prescriptive formula for the (F)(6). However, this Court’s refusal demonstrates precisely why a jury instruction cannot adequately define the (F)(6) for a jury.

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<sup>614</sup> 185 Ariz. at 324.

<sup>615</sup> 96 Ariz. 319, 321 (1964); *see also Arizona Public Service Co. v. Brittain*, 107 Ariz. 278, 281 (1971); *Evans v. Pickett*, 102 Ariz. 393, 397 (1967), *overruled on different grounds by Heimke v. Munoz*, 106 Ariz. 26, 30 (1970); *Carter v. Pain Center of Arizona, P.C.*, 239 Ariz. 164, ¶6 (App. 2016); *TM2008 Investments, Inc. v. Procon Capital Corp.*, 234 Ariz. 421, ¶18 (App. 2014).

To the extent that this Court's decisions give guidance, they do so through a complex system of analogy. Trial judges, who are presumed to know the law, have been trained in legal reasoning, and understand how to consider the factual context of opinions, can apply this complex system of analogy to a case. The judge can consider the facts of those opinions when deciding whether the case before them presents an especially cruel, heinous, or depraved murder.

But that complex system of analogy cannot be adequately reduced to a jury instruction. Even the most competent of judges cannot communicate the examples offered in this Court's jurisprudence through instructions.

Put simply, if this Court, after more than 40 years of considering the (F)(6) aggravator, has been unwilling and unable to establish a prescriptive test, it is unrealistic to expect any trial judge to successfully communicate our complex system of analogy in a jury instruction. Jury instructions do not, and cannot, adequately communicate any narrowing this Court's opinions may have provided.

***Conclusion:***

Arizona's cruel, heinous, or depraved factor is facially vague. It was approved only because the sentencer was a judge presumed to know and apply this Court's precedent and this Court independently reviewed the finding. Neither justification exists today.



More problematic, this Court's (F)(6) jurisprudence does not actually narrow the (F)(6). This Court has been unwilling to outline requirements, instead opting to engage in post hoc determinations of whether the facts of a case qualify. But the list of qualifying conduct has been left open and has grown since *Walton*.

In light of the problems identified above, this Court should declare the (F)(6) unconstitutional.

## **ARGUMENT 4**

### THE TRIAL COURT’S (F)(6) INSTRUCTION WAS INACCURATE AND INSUFFICIENT.

#### ***Standard of Review:***

This Court reviews “whether jury instructions properly state the law ... de novo.”<sup>616</sup>

#### ***Discussion:***

**1. The (F)(6) instruction did not communicate the illustrative examples set forth by case law.**

First, the (F)(6) is inherently qualitative. The fact-finder must decide if a murder was committed in an especially cruel, heinous, or depraved manner. Cruelty, heinousness, or depravity is not enough.

Accordingly, the trial court correctly instructed the jury that “all first-degree murders are, to some extent, heinous, cruel or depraved. However, this aggravating circumstance cannot be found to exist unless the state has proved beyond a reasonable doubt that the murder was especially cruel, especially heinous or especially depraved.”<sup>617</sup>

The court also instructed the jury as to the definition of especially: “‘Especially’ means unusually great or significant.”<sup>618</sup> Thus, as discussed above, to

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<sup>616</sup> *State v. Burbey*, 243 Ariz. 145, ¶5 (2017)(quotation marks omitted).

<sup>617</sup> RT-5/24/2016, 41 (emphasis added).

<sup>618</sup> *Id.*

decide what is unusually great or significant, a person must know what is normal.<sup>619</sup> The (F)(6) is not meant to apply to murders involving an ordinary degree of cruelty; the aggravator is meant to apply only to a murder that is especially cruel. Thus, to decide whether the evidence supports an (F)(6) finding, a person must know the degree of cruelty or depravity that exists in any murder.

A trial judge has access to several resources to provide this context: her experience as a judicial officer who has hopefully sentenced a number of murderers; her experience as an attorney, which need not necessarily include criminal experience to be valuable; the consultation and advice of her brethren. Even if a trial judge was brand new, had minimal experience as an attorney, and no way to consult with another judge, she would still have the ability to read numerous published opinions and unpublished decisions describing murder convictions and the resulting sentences.

That is the purpose of this Court's (F)(6) cases. In *State v. Mata*, this Court concluded it would be "an impossible task to craft a formula into which a judge might insert facts to determine" if a murder is cruel, heinous, or depraved.<sup>620</sup> Instead,

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<sup>619</sup> See Argument 3, §3(A), *supra*; Webster's II New College Dictionary, especial 384 (1995); Bryan Garner, Garner's Modern American Usage, especial 318 (2009)

<sup>620</sup> 185 Ariz. 319, 324 (1996).

this Court has focused on “identifying types of murders that meet the definition of especially heinous, cruel, or depraved”; on providing sentencing judges context.<sup>621</sup>

One way or another, a trial judge has a context for what murder carries a degree of cruelty, heinousness, or depravity that is “normal”; significantly cruel, heinous, or depraved; and especially cruel, heinous, or depraved.

Jurors do not. The average juror is not an attorney, let alone one with homicide experience. The average juror is not a judge. And jurors are expressly instructed not to consult with other people or outside resources, even if the other person or outside resource could provide context.<sup>622</sup>

Because Arizona’s (F)(6) cases are descriptive, not prescriptive, any jury instructions must reflect this structure. The instructions must empower the jury to make a qualitative decision about the cruelty, heinousness, or depravity of the murder before them. To do this, the instructions must give the jury some way to establish a context. Without a context of prior cases, a jury will never be able to determine if the case before them involves a murder committed in a cruel, significantly cruel, or especially cruel manner. The trial court’s instructions illustrate this shortcoming.

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<sup>621</sup> *Id.*

<sup>622</sup> See RT-4/20/2016, 23; RAJI (Criminal) Preliminary Criminal 13—Admonition.

**A. The lower court’s cruelty instruction lacked necessary insight available in this Court’s cases.**

The trial court’s (F)(6) instruction did not provide the jury with any context, baseline, or insight. For example, while the court instructed the jury that cruelty required the jury to “find that the victim consciously suffered physical or mental pain, distress or anguish prior to death,”<sup>623</sup> the instruction lacked any context that could have given the instruction meaning. Context like that provided by *State v. Snelling*.<sup>624</sup>

In *Snelling*, this Court considered a murder by strangulation.<sup>625</sup> Even though strangulations almost always involve a period of consciousness, this Court was “unwilling to say that all stranglings are per se cruel.”<sup>626</sup>

Rather, the state still had to prove “mental anguish or physical pain before death.”<sup>627</sup> And this Court required more than the simple existence of some minimal quantum of mental anguish.<sup>628</sup> Even though there was evidence that the victim was conscious and likely terrified when the attack started,<sup>629</sup> there was no proof “that Curtis contemplated her fate for very long.”<sup>630</sup> “Absent any evidence of defensive

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<sup>623</sup> RT-5/24/2016, 42.

<sup>624</sup> 225 Ariz. 182, ¶¶22-38 (2010).

<sup>625</sup> *Id.* at ¶26.

<sup>626</sup> *Id.* (quoting *State v. Schackart*, 190 Ariz. 238, 248 (1997)).

<sup>627</sup> *Id.*

<sup>628</sup> *See id.* at ¶¶27-32.

<sup>629</sup> *Id.* at ¶29.

<sup>630</sup> *Id.* at ¶28.

injuries, a struggle, or pleas for help, the record shows only that Curtis was suddenly confronted by an assailant who promptly strangled her to death. ‘It is not inherently “cruel” to murder a victim quickly and by surprise.’”<sup>631</sup>

The jurors were deprived of the comparative value *Snelling* provides; a case a trial judge would presumably have been aware of. As a result, the jurors never knew that a murder committed in a manner that surprises and quickly kills the victim, or renders the victim unconscious, is not cruel. Rather, the jury was left with the inaccurate instruction that any mental anguish satisfies the (F)(6).

As this Court recognized in *Gretzler*, the (F)(6) factor was “not intended to apply to all first degree murders,” only those “wherein additional circumstances ... set the crime apart from the usual or the norm.”<sup>632</sup> While consciousness and suffering may establish a bare minimum below which cruelty should not be found, mere consciousness and some slight quantum of suffering does not justify an (F)(6) finding. The (F)(6) is not meant to be a “catch-all for those first degree murders where no other aggravating circumstance applies.”<sup>633</sup> It is meant to apply only to those murders where the facts “set the crime apart from the usual or the norm.”<sup>634</sup>

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<sup>631</sup> *Id.* at ¶32 (quoting *State v. Jimenez*, 165 Ariz. 444, 454 (1990)).

<sup>632</sup> *Gretzler*, 135 Ariz. at 50-51 (quoting *Knapp*, 144 Ariz. at 543).

<sup>633</sup> *Id.* at 51 (quoting *State v. Ortiz*, 131 Ariz. 195, 206 (1981)).

<sup>634</sup> *Id.*

The trial court, however, instructed the jury to find the (F)(6) based solely upon the baseline with no consideration for the norm: “To find that the murder was committed in an especially cruel manner, you must find that the victim consciously suffered physical or mental pain, distress or anguish prior to death.”<sup>635</sup> The court did not instruct the jury to consider the usual or the norm.

While Jimmy’s proposed instruction did not provide case examples, it at least touched on the missing legal issues. In line with *Snelling*, his proposed instruction would have informed the jury 1) the (F)(6) was only proper if the victim’s suffering exceeded that experienced in a prototypical murder and 2) they could “consider the length of time the victim was conscious” when deciding the especially cruel allegation.<sup>636</sup>

Put differently, consciousness and suffering is a necessary, but not sufficient, condition to an especially cruel finding. Jimmy’s proposed instruction attempted to assist the jurors in understanding this. Under the court’s instruction, however, consciousness and suffering became a necessary and sufficient condition to an especially cruel finding. The issue was not that simple.

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<sup>635</sup> RT-5/24/2016, 42.

<sup>636</sup> I.470, 2.

**B. The lower court’s heinous or depraved instruction lacked necessary insight.**

Nor was the issue simple for gratuitous violence. The court instructed the jury: “To find that the defendant inflicted gratuitous violence, you must find that the defendant intentionally inflicted violence clearly beyond what was necessary to kill the victim, and that the defendant continued to inflict this violence after the defendant knew or should have known that the defendant had inflicted fatal injury.”<sup>637</sup> Again, the trial court’s instruction referenced the baseline, but provided no insight.

The instruction failed to inform the jury that the amount of post-death injury can be considered. For example, in *State v. Scott* the defendant fired three shots at the victim, at least two of which were fatal.<sup>638</sup> Thus, one or two shots followed the fatal wound. But this Court concluded that “the firing of one, or even two, unnecessary shots does not lead to the conclusion that gratuitous violence was inflicted.”<sup>639</sup> The trial court’s jury instruction gave the jury no way to make this nuanced, but correct, assessment.

The instruction failed to inform the jury that escalated violence was not necessarily gratuitous. In *State v. Canez*, the defendant “attempted to strangle [the

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<sup>637</sup> RT-5/24/2016, 42-43.

<sup>638</sup> 177 Ariz. 131, 143 (1993).

<sup>639</sup> *Id.*



victim], stabbed him six times, and delivered 21 blunt force injuries, ten of them to the head. He attacked Hale with his fist, a frying pan, a laundry bag, and a knife.”<sup>640</sup> However, this violence merely built to the ultimately fatal wound.<sup>641</sup> Because the defendant “merely escalated his attacks until he succeeded in killing” the victim, this Court could not “find beyond a reasonable doubt that the violence exceeded that necessary to kill.”<sup>642</sup> By giving an incomplete instruction, the trial court deprived the jury of the ability to attach meaning to escalation.

And the instruction failed to inform the jury how to weigh the duration of the attack. This Court considered short duration in *State v. Bocharski*<sup>643</sup> and *State v. Wallace*.<sup>644</sup> In *Bocharski*, this Court distinguished an attack that lasted less than a minute from prior cases finding gratuitous violence due to a prolonged attack.<sup>645</sup> The short duration contributed to this Court’s conclusion that the evidence of gratuitous violence was insufficient.<sup>646</sup> In *Wallace*, this Court relied upon *Bocharski* and again considered the short duration of the attack to conclude evidence did not support the

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<sup>640</sup> 202 Ariz. 133, ¶106 (2002), *abrogated on other grounds by State v. Valenzuela*, 239 Ariz. 299, ¶11 fn.1 (2016).

<sup>641</sup> *Id.*

<sup>642</sup> *Id.*

<sup>643</sup> 218 Ariz. 476, ¶89 (2008).

<sup>644</sup> 219 Ariz. 1, ¶36 (2008).

<sup>645</sup> 218 Ariz. 476, ¶89.

<sup>646</sup> *Id.*

(F)(6) finding.<sup>647</sup> The instruction read by the trial court gave the jury no way to consider duration.

The nuance provided by cases like *Scott*, *Canez*, *Bocharski*, and *Wallace* illustrates the point made above: the tool that provides sufficient guidance to a trial judge does not sufficiently guide a juror. But even if a jury instruction could be crafted to give sufficient guidance to jurors, the instruction in this case did not. The instruction in this case did not instruct the jury how to weigh—or even that they could weigh—the degree of post-death injury, the escalation of violence, and the timing. All three of these factors were important to this case. Instead, the trial court instructed the jury that as long as there was violence beyond that necessary to kill, and at least some of that violence followed the fatal blow, an (F)(6) finding was justified.

The errors discussed in this section have focused just on the lack of nuance and context in the trial court’s instruction. There is, however, a more fundamental problem with the instruction: the instruction failed to accurately advise the jury of the two-step process inherent in the (F)(6).

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<sup>647</sup> 219 Ariz. 1, ¶36.

**2. The trial court’s instruction failed to set forth the two-step process necessary for heinousness and depravity findings.**

The heinous and depraved portion of the (F)(6) focuses on the defendant’s state of mind.<sup>648</sup> This Court has given standard meaning to the terms heinous and depraved.<sup>649</sup> Heinous means “hatefully or shockingly evil: grossly bad,” and depraved means “marked by debasement, corruption, perversion or deterioration.”<sup>650</sup> The focal point of the heinous or depraved portion of the (F)(6) is the defendant’s state of mind; the defendant’s actions and words merely aid the fact-finder in considering the state of mind.<sup>651</sup> Thus, as this Court explained in *Bocharski*, while “[t]he fact finder must consider the killer’s intentional actions,” this is done so the sentencer can “determine whether [the defendant] acted with the necessary vile state of mind.”<sup>652</sup>

In *Bocharski*, this Court explained that the heinous or depraved inquiry is actually a two-step process.<sup>653</sup> The first step is to determine whether any of the defendant’s conduct aligned with the examples set forth in *Gretzler* and its

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<sup>648</sup> *State v. Newell*, 212 Ariz. 389, ¶84 (2006); *State v. Murdaugh*, 209 Ariz. 19, ¶59 (2004).

<sup>649</sup> *Knapp*, 114 Ariz. at 543.

<sup>650</sup> *Id.*

<sup>651</sup> *Murdaugh*, 209 Ariz. 19, ¶59.

<sup>652</sup> 218 Ariz. 476, ¶85.

<sup>653</sup> *Id.*

progeny.<sup>654</sup> If the defendant’s conduct aligns, the second step is triggered.<sup>655</sup> During that second step, the fact-finder must determine whether the conduct proves the defendant possessed a vile state of mind.<sup>656</sup> Only when the conduct proves a vile state of mind can the sentencer find the (F)(6).<sup>657</sup>

This Court then applied the two-step process in *Bocharski*.<sup>658</sup> First, this Court looked to the defendant’s conduct.<sup>659</sup> Based on the evidence, which included twenty-four knife wounds, this Court concluded “the evidence supports the conclusion that Bocharski inflicted more violence than that necessary to kill.”<sup>660</sup> This Court then considered whether the violence continued after the defendant knew or should have known the fatal wound had been struck, a question that “provides essential evidence” of the defendant’s state of mind.<sup>661</sup> Because the evidence was unclear and the attack quick and unbroken, the state did not prove the defendant acted with the requisite state of mind.<sup>662</sup>

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<sup>654</sup> *Id.*

<sup>655</sup> *Id.*

<sup>656</sup> *Id.*

<sup>657</sup> *Id.*

<sup>658</sup> *Id.* at ¶¶86-91.

<sup>659</sup> *Id.* at ¶86.

<sup>660</sup> *Id.*

<sup>661</sup> *Id.* at ¶87.

<sup>662</sup> *Id.* at ¶¶88-91; see also *State v. Gunches*, 225 Ariz. 22, ¶¶13-25 (2010).

Gratuitous violence and knowledge of a fatal blow are necessary elements of the heinous or depraved factor; they are not sufficient elements.<sup>663</sup> The ultimate question is whether the conduct reflects a vile state of mind.<sup>664</sup>

Here, the trial court's instructions omitted the entire second inquiry.<sup>665</sup> The instruction combined the two steps into one, merely requiring the state to prove "beyond a reasonable doubt that the defendant exhibited such a mental state at the time of the killing by inflicting gratuitous violence on the victim beyond that necessary to kill."<sup>666</sup> This instruction told the jury that a finding of knowing gratuitous violence established the mental state. A finding of the first prong satisfied the ultimate question.

### **3. The (F)(6) instruction operated as a judicial comment.**

By folding the two steps into one, the trial court also commented on the evidence.<sup>667</sup> The instruction "interfere[d] with the jury's independent evaluation of ... evidence" when the court instructed the jury that gratuitous violence established a vile state of mind.<sup>668</sup> Thus, while the trial court did not opine that the evidence

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<sup>663</sup> *Bocharski*, 218 Ariz. 476, ¶85.

<sup>664</sup> *Knapp*, 114 Ariz. at 543.

<sup>665</sup> RT-5/24/2016, 42-43.

<sup>666</sup> *Id.*

<sup>667</sup> Ariz.Const.Art. 6, §27; *State v. Hopkins*, 108 Ariz. 210, 211 (1972); *State v. Rodriguez*, 192 Ariz. 58, ¶29 (1998); *accord Suluaga by and through Zuluaga v. Bashas', Inc.*, 242 Ariz. 205, ¶22 (App. 2017).

<sup>668</sup> *See Rodriguez*, 192 Ariz. 58, ¶29.

supported a gratuitous violence finding, the trial court opined that if gratuitous violence was found, the violence alone proved a vile state of mind.

**4. Gratuitous Violence has become a catchall for inadequate cases of mutilation.**

Finally, as described in the trial court's instruction, gratuitous violence is nothing more than a catchall for insufficient allegations of mutilation. "Mutilation requires an act separate and distinct from the killing itself, committed with the intent to mutilate the victim's corpse."<sup>669</sup> Similarly, this Court has repeatedly noted that the gratuitous violence factor focuses on the defendant's intent and that the defendant's actions are relevant to "determine whether he acted with the necessary vile state of mind."<sup>670</sup>

But here, the trial court instructed the jury that the government proved the necessary mental state if they proved Jimmy inflicted "gratuitous violence beyond that necessary to kill."<sup>671</sup> Under the trial court's instruction, conduct was determinative, not the state of mind. Such an instruction renders gratuitous violence a catchall for inadequate allegations of mutilation. Mutilation requires an act clearly separate from the killing; gratuitous violence, especially under the instruction, blurs that line. Mutilation requires the separate act be needless and done with an intent to

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<sup>669</sup> *Bocharski*, 218 Ariz. 476, ¶84.

<sup>670</sup> *Id.* at ¶84; *accord Newell*, 212 Ariz. 389, ¶84; *Murdaugh*, 209 Ariz. 19, ¶59.

<sup>671</sup> RT-5/24/2016, 42-43.

mutilate the body; the gratuitous violence instruction merely requires violence exceeding what was necessary to kill.

The trial court's instruction broadened the gratuitous violence factor too much. Without an instruction that adequately advises the jury of the necessary mental state—not just the conduct that may be considered—any claim of mutilation is subsumed by gratuitous violence.

***Conclusion:***

Because the (F)(6) instruction was inadequate, this Court should vacate the death sentence and order a new trial on the aggravation and sentencing phases.

## ARGUMENT 5

THE TRIAL COURT IMPROPERLY PREVENTED JIMMY FROM ARGUING THE STATE HAD NOT PROVED THE MURDER WAS COMMITTED IN AN ESPECIALLY CRUEL, HEINOUS, OR DEPRAVED MANNER.

### ***Standard of Review:***

De novo is the proper review standard. While a trial court's preclusion order is generally reviewed for an abuse of discretion, these rulings typically involve the preclusion of evidence, not argument derived from evidence.<sup>672</sup> During closing argument, counsel should be given wide latitude, during which they can argue all "reasonable inferences from the evidence ...."<sup>673</sup>

Here, the trial court prevented Jimmy from presenting argument regarding the burden of proof required by the (F)(6). Preclusion of argument drawn from reasonable inferences from the evidence and touching upon the burden of proof is of a different variety, it is constitutional in nature.<sup>674</sup> And this Court reviews

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<sup>672</sup> See *State v. Goudeau*, 239 Ariz. 421, ¶159 (2016)(preclusion of third-party evidence); *State v. Dann*, 220 Ariz. 351, ¶117 (2009)(preclusion of evidence and argument regarding residual doubt); *State v. Davolt*, 207 Ariz. 191, ¶83 (2004)(preclusion of third-party evidence).

<sup>673</sup> *State v. Hulsey*, 243 Ariz. 367, ¶97 (2018); see also *Davolt*, 207 Ariz. 191, ¶83 (noting defendant was allowed to generally argue an unknown person committed the murders).

<sup>674</sup> See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *In re Winship*, 397 U.S. 358, 364 (1970).



constitutional questions de novo.<sup>675</sup> Moreover, a trial court abuses its discretion if it rests its decision upon a legal error, and this Court reviews the underlying legal question de novo.<sup>676</sup>

***Discussion:***

In *State v. Prince*, this Court considered whether inclusion of the “norm of first-degree murder” language was proper.<sup>677</sup> This Court ruled the trial court had not erred when it included the “norm of first-degree murder” language, but the language was not necessary.<sup>678</sup> Regardless of the language, however, this Court concluded the defense “can certainly make that point in closing arguments ....”<sup>679</sup>

Here, Jimmy attempted to argue only what this Court guaranteed in *Prince*: that the state had not proved this murder was committed in an especially cruel, especially heinous, or especially depraved manner.<sup>680</sup> The trial court, however, sustained the state’s objection, precluded the argument, and left Jimmy with nothing more than generic argument discussing the burden in the abstract.<sup>681</sup>

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<sup>675</sup> *Hidalgo*, 241 Ariz. 543, ¶7; *McGill*, 213 Ariz. 147, ¶45; *Moody*, 208 Ariz. 424, ¶62.

<sup>676</sup> *Twin City Fire Ins. Co.*, 204 Ariz. 251, ¶10.

<sup>677</sup> 226 Ariz. 516, ¶51 (2011).

<sup>678</sup> *Id.*

<sup>679</sup> *Id.*

<sup>680</sup> RT-5/25/2016, 84-88.

<sup>681</sup> *Id.* at 88-90

At its heart, this illustrates why the (F)(6) can never be appropriate for jury consideration. This Court's (F)(6) jurisprudence has been descriptive, not prescriptive.<sup>682</sup> This illustrative process of "identifying types of murders that meet the definition of especially heinous, cruel, or depraved"<sup>683</sup> is beneficial to a trial court because it provides a context. But instructions to a jury must give the jury "the proper rules to be applied in arriving at a correct decision."<sup>684</sup> Jury instructions cannot be descriptive or illustrative; jury instructions must be prescriptive. A system focused on describing, illustrating, and identifying murders that are cruel, heinous, or depraved, cannot be converted into the prescriptive system necessary for jury decisions.

However, presuming the (F)(6) is constitutional, can be constitutionally conveyed to a jury, and the instruction in this case was adequate, the trial court should not have precluded Jimmy from arguing the jury lacked a context.

Moreover, the trial court sustained the prosecutor's objection. In doing so, the trial court communicated to the jury that it was improper to consider the lack of context. The Eleventh Circuit Court of Appeals, in *U.S. v. Pearson*, noted how an incorrect ruling during closing argument can incorrectly communicate an instruction

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<sup>682</sup> *State v. Mata*, 185 Ariz. 319, 324 (1996).

<sup>683</sup> *Id.*

<sup>684</sup> *Newton v. Maine*, 96 Ariz. 319, 321 (1964).

to the jury.<sup>685</sup> While this case does not address an improper prosecutorial argument, the rationale nonetheless applies. By sustaining the objection before the jury, the trial court ordered the jury not to consider the lack of context. Indeed, the trial court had already instructed the jury to disregard comments when an objection is sustained.<sup>686</sup>

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<sup>685</sup> 746 F.2d 787, 796 (11th Cir. 1984).

<sup>686</sup> See RT-4/20/2016, 18.

## **ARGUMENT 6**

### **EVIDENCE WAS INSUFFICIENT TO SUPPORT THE (F)(6) VERDICT.**

#### ***Standard of Review:***

The “question of sufficiency of the evidence is one of law, subject to de novo review on appeal.”<sup>687</sup> However, this Court reviews “the facts in the light most favorable to sustaining the verdicts and resolve[s] inferences against the defendant.”<sup>688</sup>

#### ***Discussion:***

##### **1. Evidence of cruelty was insufficient.**

###### **A. Evidence did not conclusively prove the victim was conscious.**

“A murder is especially cruel if the victim consciously experiences physical abuse or mental anguish before death.”<sup>689</sup> To establish the (F)(6), the state must prove “the victim was conscious and suffered pain or distress at the time of the offense.”<sup>690</sup> This evidence must be conclusive; “[i]f the evidence is inconclusive as to whether the victim was conscious during the infliction of violence, the court cannot find that the killing was especially cruel.”<sup>691</sup>

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<sup>687</sup> *State v. West*, 226 Ariz. 559, ¶15 (2011).

<sup>688</sup> *State v. Burns*, 237 Ariz. 1, ¶72 (2015).

<sup>689</sup> *State v. Bolton*, 182 Ariz. 290, 311 (1995).

<sup>690</sup> *Id.*

<sup>691</sup> *Id.*; accord *State v. Ellison*, 213 Ariz. 116, ¶121 fn.19 (2006); *State v. Gillies*, 135 Ariz. 500, 513 (1983).

Here, the evidence of consciousness was not conclusive. Rather, the state's primary witness on the issue, Dr. Philip Keen, consistently qualified his testimony regarding duration and whether X.F. was conscious.<sup>692</sup> This qualification is crucial because X.F. suffered a blow to the head that could have caused a loss of consciousness.<sup>693</sup> It was simply difficult to attribute because "if you don't have any bleeding or disruption of the brain itself you don't know for sure."<sup>694</sup> But the potential was there.<sup>695</sup>

No other evidence stepped in to prove consciousness. Where this Court found scratches on the defendant's chest conclusively proved the victim's consciousness in *State v. Salazar*,<sup>696</sup> none of Jimmy's injuries were attributed to this incident. Whereas the victim's consciousness was proved by a neighbor's testimony regarding the victim's screams and cries for help in *State v. Ramirez*,<sup>697</sup> the next door neighbors in this case did not hear screams.<sup>698</sup>

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<sup>692</sup> See RT-4/27/2016, 19, 39, 49-50, 52-53, 84; RT-5/25/2016, 12-13, 23, 27-29.

<sup>693</sup> *Id.* at 27.

<sup>694</sup> *Id.*

<sup>695</sup> *Id.*

<sup>696</sup> 173 Ariz. 399, 412 (1992).

<sup>697</sup> 178 Ariz. 116, 129 (1994).

<sup>698</sup> RT-4/21/2016, 100.

**B. Evidence did not prove the infliction of pain was done in a wanton, insensitive, or vindictive manner.**

Even if the evidence established the victim was conscious when murdered, the evidence did not establish the necessary state of mind. In *State v. Knapp*, this Court defined “cruel” as “disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic.”<sup>699</sup> Cruelty does not merely require proof that the victim suffered; cruelty requires proof that “there has been an infliction of pain and suffering in a wanton, insensitive, or vindictive manner.”<sup>700</sup>

The infliction of pain “in a wanton, insensitive, or vindictive manner” focuses on the defendant’s state of mind. The conduct must show the defendant inflicted pain either for the purpose of exacting revenge or with a particularly cold mind that paid no regard to the victim’s suffering.<sup>701</sup>

Here, no evidence supports the necessary state of mind. There is certainly no evidence that Jimmy committed this murder to exact revenge upon the victim. There is also no evidence that Jimmy committed this murder with the purpose of inflicting

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<sup>699</sup> 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977)(quoting Webster’s Third New International Dictionary).

<sup>700</sup> *State v. Stokley*, 182 Ariz. 505, 517 (1995); *accord State v. Brewer*, 170 Ariz. 486, 501 (1992); *State v. Correll*, 148 Ariz. 468, 480 (1986); *State v. Poland*, 132 Ariz. 269, 285, 645 P.2d 784, 800 (1982).

<sup>701</sup> See Black’s Law Dictionary (10th ed. 2014), wanton; [Merriam-Webster Dictionary, wanton](#); [Merriam-Webster Dictionary, insensitive](#); [Merriam-Webster Dictionary, vindictive](#).

harm. Dr. Keen testified he could not determine the duration of the attack from the wounds.<sup>702</sup> Moreover, the fatal wound was the last or near last wound inflicted.<sup>703</sup>

There is no evidence Jimmy committed this murder with the goal of inflicting pain or with no regard for the victim's pain. The evidence merely shows an escalation of the attack until the victim died.

## **2. Evidence of heinousness and depravity was insufficient.**

The evidence of heinousness and depravity was also insufficient. Heinousness and depravity focus on the defendant's mental state.<sup>704</sup> The state gave three reasons to support the heinous or depraved portion of the (F)(6): gratuitous violence, senselessness, and helplessness.<sup>705</sup> "However, heinousness or depravity aggravation must stand or fall with a gratuitous violence finding because a showing of helplessness and senselessness, without more, is not, as a matter of law, sufficiently aggravating."<sup>706</sup>

Gratuitous violence, like mutilation, focuses "on the intent of the killer as evidenced by his actions."<sup>707</sup> In *State v. Bocharski*, this Court set forth the two base

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<sup>702</sup> RT-5/25/2016, 27.

<sup>703</sup> *Id.* at 28-29.

<sup>704</sup> *State v. Bocharski*, 218 Ariz. 476, ¶83 (2008).

<sup>705</sup> See RT-5/24/2016, 42-43 (trial court instructing on gratuitous violence, senselessness, and helplessness), 54 (State's closing).

<sup>706</sup> *State v. Canez*, 202 Ariz. 133, ¶105 (2002), *abrogated on other grounds by State v. Valenzuela*, 239 Ariz. 299 (2016); accord *State v. Wallace*, 219 Ariz. 1, ¶25 (2008).

<sup>707</sup> *Bocharski*, 218 Ariz. 476, ¶85.

elements that must be met to prove gratuitous violence.<sup>708</sup> First, “the state must show that the defendant did, in fact, use violence beyond that necessary to kill.”<sup>709</sup> Second, “[t]he state must also show that the defendant continued to inflict violence after he knew or should have known that a fatal action had occurred.”<sup>710</sup> Neither prong is satisfied.

First, Dr. Keen’s testimony shows Jimmy did not inflict more violence than necessary to kill. Rather, the wounds showed an escalation of violence to the fatal wound, which was the last or near last wound inflicted.<sup>711</sup>

Second, the evidence did not prove Jimmy knew or should have known the fatal action had occurred. This Court confronted a similar offense in *State v. Wallace*, wherein the defendant struck at least ten blows to one of the victims and stabbed her in the neck.<sup>712</sup> While the question of whether the defendant used more violence than necessary to kill was close, this Court concluded additional violence had been used.<sup>713</sup> However, the evidence did not establish the defendant knew or should have known the victim was dead because the murder was more a clumsy and escalating attack.<sup>714</sup>

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<sup>708</sup> 218 Ariz. 476, ¶¶85, 87 (2008).

<sup>709</sup> *Id.* at ¶85.

<sup>710</sup> *Id.* at ¶87 (emphasis omitted).

<sup>711</sup> RT-5/25/2016, 27-29.

<sup>712</sup> 229 Ariz. 155, ¶18 (2012).

<sup>713</sup> *Id.* at ¶21.

<sup>714</sup> *Id.* at ¶27.



Even if this Court concludes Jimmy used more violence than necessary to kill, this crime reflects a clumsy and escalating attack. And the placement of the fatal wound as the last or near last wound, with no idea how long the attack took, illustrates the shortcoming in the state's evidence.

***Conclusion:***

The evidence presented was not enough to support cruelty or heinousness and depravity. Thus, the (F)(6) finding was error and this Court should order a new sentencing.

## ARGUMENT 7

THE TRIAL COURT SHOULD HAVE GRANTED JIMMY'S MOTION FOR MISTRIAL WHEN *LYNCH V. ARIZONA* CHANGED ARIZONA LAW ONE DAY INTO THE MITIGATION PHASE AND THE TRIAL COURT HAD INCORRECTLY INSTRUCTED THE JURY THAT PAROLE WAS AVAILABLE.

Before trial, Jimmy asked for a *Simmons v. South Carolina*<sup>715</sup> instruction.<sup>716</sup>

The court refused<sup>717</sup> and repeatedly instructed the jury that parole was available.<sup>718</sup>

The court also precluded Jimmy's proposed mitigator that he would be sentenced to life without parole.<sup>719</sup>

On the second day of the sentencing phase, the Supreme Court issued *Lynch v. Arizona*.<sup>720</sup> Jimmy moved for mistrial, but the court denied his motion.<sup>721</sup>

Throughout trial, both parties referenced parole on several occasions, even echoing the court's instruction that parole was available.<sup>722</sup> Further, the state elicited

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<sup>715</sup> 512 U.S. 154 (1994).

<sup>716</sup> I.307; *see also* I.254, 3; I.311; RT-2/19/2016, 26-27; RT-5/17/2016, 63.

<sup>717</sup> I.347, 4; *see also* RT-2/19/2016, 26-27; RT-5/17/2016, 63-64.

<sup>718</sup> *See* RT-4/12/2016, 10-11, 106-07, 161-62; RT-4/13/2016, 23, 88; RT-4/14/2016(morning), 7; RT-4/14/2016(afternoon), 8; *see also* RT-5/24/2016, 34-36.

<sup>719</sup> *See* I.254, 3; RT-5/24/2016, 122-27.

<sup>720</sup> *See Lynch v. Arizona*, \_\_ U.S. \_\_, 136 S.Ct. 1818 (2016); RT-5/31/2016(afternoon), 129.

<sup>721</sup> I.498; RT-6/1/2016, 4-10.

<sup>722</sup> RT-4/11/2016, 134; RT-4/12/2016, 34-35, 135, 137, 215-19, 222, 224; RT-4/13/2016, 41, 103-04; RT-4/14/2016(morning), 24-25; RT-4/14/2016(afternoon), 44, 47, 50; RT-5/24/2016, 57, 61-62; RT-5/25/2016, 79-81, 122-27  
*See also* RT-4/12/2016, 227-28.

information that went to future dangerousness.<sup>723</sup> The defense, however, was left to conform its advocacy to the court's rulings.<sup>724</sup> While the court ultimately read a *Lynch*-style instruction,<sup>725</sup> the court refused to read Jimmy's proposed instruction explaining the clemency process<sup>726</sup> and never brought the jury's attention to the change.<sup>727</sup>

### ***Standard of Review:***

This Court reviews a trial court's decision whether to grant a mistrial for an abuse of discretion.<sup>728</sup> However, a trial court abuses its discretion when it misapplies the law and this Court reviews the underlying legal and constitutional questions de novo.<sup>729</sup>

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<sup>723</sup> See e.g., RT-4/26/2016, 134-82; RT-4/27/2016, 97-123; RT-5/31/2016, 103-07; RT-6/13/2016, 175-84; RT-6/15/2016(afternoon), 64, 103-06; RT-6/20/2016, 14, 134, 142; RT-6/22/2016, 140; RT-6/23/2016, 17-18.

<sup>724</sup> See e.g., RT-5/26/2016, 34, 36, 38, 49.

<sup>725</sup> RT-6/23/2016, 151-52.

<sup>726</sup> See I.521; RT-6/21/2016, 96-101; RT-6/23/2016, 151-52.

<sup>727</sup> See RT-6/23/2016, 140.

<sup>728</sup> *State v. Leteve*, 237 Ariz. 516, ¶34 (2015).

<sup>729</sup> *Twin City Fire Ins. Co.*, 204 Ariz. 251, ¶10; *McGill*, 213 Ariz. 147, ¶45; *Moody*, 208 Ariz. 424, ¶62.

## ***Discussion:***

- 1. The trial court should have granted Jimmy’s Motion for Mistrial when *Lynch v. Arizona* was issued just one day into the sentencing phase and held that the instructions the trial court had read throughout trial were incorrect.**

Jimmy, like all defendants, is guaranteed due process.<sup>730</sup> Due process ensures the right to a fair trial,<sup>731</sup> which, by its nature, is a reliable one.<sup>732</sup> The right to a fair and reliable trial takes on more importance in the context of death decisions. Death, as the most severe punishment, uniquely requires reliability.<sup>733</sup>

Motions for mistrial are linked to this right to a fair trial. As this Court has noted in *State v. Lawson*, the focus of a mistrial inquiry is on “whether defendant was able to obtain a fair trial.”<sup>734</sup> Thus, while mistrials are considered a dramatic remedy to be imposed rarely, it is necessary when the interests of a fair and impartial trial demand.<sup>735</sup> This case presents one such situation.

Understandably, few courts have considered whether a change in the law during trial justifies a mistrial upon request of counsel. However, when faced with

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<sup>730</sup> U.S.Const.Amend.. 5, 14; Ariz.Const.Art. 2, §4.

<sup>731</sup> *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

<sup>732</sup> *Nichols v. U.S.*, 511 U.S. 738, 762 (1994); *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Estes v. State of Texas*, 381 U.S. 532, 583 (1965).

<sup>733</sup> *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

<sup>734</sup> *State v. Lawson*, 144 Ariz. 547, 556 (1985); see also *State v. Patterson*, 230 Ariz. 270, ¶19 (2012); *State v. Prince*, 226 Ariz. 516, ¶84 (2011); *State v. Anderson*, 210 Ariz. 327, ¶45 (2005); *State v. Speer*, 221 Ariz. 449, ¶44 (2009).

<sup>735</sup> *State v. Adamson*, 136 Ariz. 250, 262 (1983).

the issue, both the New York Supreme Court Appellate Division and Eleventh Circuit concluded a trial court should grant mistrial when there is a change in the law in the middle of trial that affected a party's decisions or strategies.<sup>736</sup>

Both cases got to a fundamental fairness issue: it is fundamentally unfair to change the rules in the middle of trial.<sup>737</sup> Here, too, Jimmy and his attorneys prepared for trial expecting to apply the law as it existed. And as the trial court and prosecution correctly noted, this Court had a long history of decisions holding *Simmons* instructions were not necessary.<sup>738</sup> As a result, the jurors heard the incorrect instruction and Jimmy's attorneys were forced to incorporate the incorrect instructions into their voir dire and argument. This impacted decisions governing preparation and strategy that permeated the entirety of the trial, but especially the sentencing phase.

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<sup>736</sup> *Matter of Brigham Park Coop. Apts. v. Finance Adm'r of City of N.Y.*, 83 A.D.2d 551, 551 (N.Y. Super. 1981); *U.S. v. Rabuffo*, No. [14-14585](#), 2017 WL 5565229, \*3-4 (11th Cir. Unpub. 2017). Arizona Supreme Court Rule 111 allows parties to "cite a decision of a tribunal in another jurisdiction, as permitted in that jurisdiction." The Federal Rules authorize citation of unpublished decisions as long as the citation designates the decision as unpublished and the decision was issued after January 1, 2007. Fed.R.App.P. 32.1(a). In such a case, the citing party must provide a copy only if it is not otherwise available in a publicly accessible database. Fed.R.App.P. 32.1(b). In addition to the Westlaw citation listed above, the hyperlink links to the case on the Eleventh Circuit's webpage.

<sup>737</sup> *Brigham Park*, 83 A.D.2d at 551, *Rabuffo*, 2017 WL 5565229, \*3-4.

<sup>738</sup> I.347, 4 (citing *State v. Lynch*, 238 Ariz. 84 (2015)); I.311 (citing *State v. Benson*, 232 Ariz. 452 (2013); *State v. Hardy*, 230 Ariz. 281 (2012); *State v. Chappell*, 225 Ariz. 229 (2010); *State v. Dann*, 220 Ariz. 351 (2009); *State v. Cruz*, 218 Ariz. 149 (2008)).

The trial court's decision was further unreasonable in light of the timing. *Simmons* and *Lynch* are sentencing phase cases. They do not have an impact on guilt or aggravation phase jury decisions. When Jimmy asked for the mistrial, the trial had just gotten through the first day of mitigation.<sup>739</sup> There would have been no need to go through guilt or aggravation again.<sup>740</sup>

## **2. The trial court's subsequent instructions did not cure the error.**

At the end of the sentencing phase, the trial court gave instructions that were more in accordance with *Simmons* and *Lynch*. However, the trial court's instructions did not cure the prior error.

First, the trial court's final instructions failed to adequately bring the jury's attention to the change in the law. Generally, this Court presumes juries follow curative instructions. This presumption is warranted because curative instructions normally follow a sustained objection or bring the jury's attention to the improper content and expressly instruct them to disregard it.<sup>741</sup> For example, in *Reah v. Jipin*, a curative instruction was used to tell the jury to disregard an incorrect instruction

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<sup>739</sup> See RT-5/26/2016 (first day of mitigation phase); *Lynch v. Arizona*, 136 S.Ct. 1818 (May 31, 2016).

<sup>740</sup> See A.R.S. §13-752(K) & (L).

<sup>741</sup> See e.g., *Lynch*, 238 Ariz. 84, ¶12; *State v. Prince*, 226 Ariz. 516, ¶87 (2011); *State v. Vidalez*, 89 Ariz. 215, 218-19 (1961); Black's Law Dictionary (10th ed. 2014), jury instruction, curative instruction ("A court's instruction to the jury to disregard something that should not have happened in court, such as an improper outburst, misconduct by a lawyer, or testimony that flouts an order in limine.").

previously given.<sup>742</sup> Here, however, the final instructions did not follow a sustained objection or draw the jury's attention to the incorrect prior instructions and advise the jury to disregard the prior instructions.

Second, the failure to present an adequate curative instruction is problematic because the final instructions were inconsistent with prior instructions. The trial court repeatedly instructed the jury that parole was available.<sup>743</sup>

Third, the final instructions did not clarify any interaction with the evidence. The final instruction advised the jury that parole was not available.<sup>744</sup> The instruction did not discuss its interaction with testimony from Mr. Mehner that he was a parole officer with the Arizona Department of Corrections.<sup>745</sup> The instruction did not discuss its interaction with testimony that Jimmy had served a term of parole.<sup>746</sup> The instruction did not discuss its interaction with the prosecutor's argument that community supervision was the functional equivalent of parole.<sup>747</sup> And, unlike the instruction proposed by the defense, the instruction did not explain clemency or the process involved.<sup>748</sup>

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<sup>742</sup> 68 Ariz. 335, 339 (1949), *overruled on other grounds in Tipton v. Burson*, 73 Ariz. 144, 150 (1951).

<sup>743</sup> See RT-4/12/2016, 10-11, 106-07, 161-62; RT-4/13/2016, 23, 88; RT-4/14/2016(morning), 7; RT-4/14/2016(afternoon), 8.

<sup>744</sup> RT-6/23/2016, 151-52.

<sup>745</sup> See RT-5/24/2016, 61.

<sup>746</sup> See RT-6/23/2016, 151-52.

<sup>747</sup> See *id.*

<sup>748</sup> Compare RT-6/23/2016, 151-52 with I.521, 2-3.

Even if a reasonable juror would have identified the difference, the juror would have been faced with a wealth of contradiction and sought reconciliation. Reconciliation would have gone against Jimmy. A reasonable juror trying to reconcile the prior instructions, evidence, and argument, would have concluded “parole” was not available, but its functional equivalent was.

Fourth, even if the final instruction could be seen as curative instruction, it did nothing to address the problems that already occurred regarding the defendant’s decisions on tactics and evidence preparation and presentation.

Finally, the standard this Court has used further supports reversal because the standard is “could have affected” the verdict, not “did affect” the verdict.<sup>749</sup> Jimmy need not prove the jury would have reached a different decision, only that they could have. The wealth of mitigation establishes that likelihood.

***Conclusion:***

In light of the long list of impacts the trial court’s rulings had on the defense team’s preparation and presentation of their case and the confusing and conflicting nature of earlier instructions, there is a reasonable likelihood that the error “could have affected the jury’s verdict and denied [Jimmy] a fair trial ....”<sup>750</sup>

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<sup>749</sup> See *State v. Patterson*, 230 Ariz. 270, ¶19 (2012); *Prince*, 226 Ariz. 516, ¶84; *Anderson*, 210 Ariz. 327, ¶45.

<sup>750</sup> See *id.*



Because the trial court refused to grant a mistrial and failed to adequately correct the impact of its errors, this Court should order a new sentencing phase.

## **ARGUMENT 8**

THE TRIAL COURT INCORRECTLY INSTRUCTED  
THE JURY THAT SIGNIFICANT IMPAIRMENT  
REQUIRED JIMMY TO PROVE HE DID NOT KNOW  
THE DIFFERENCE BETWEEN RIGHT AND WRONG.

### ***Standard of Review:***

This Court “generally review[s] de novo whether the penalty phase jury instructions correctly state the law ....”<sup>751</sup> However, where a defendant did not object, this Court reviews for fundamental error.<sup>752</sup>

Fundamental error applies only in “those rare cases that involve ‘error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.’”<sup>753</sup> “To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice.”<sup>754</sup>

The underlying question, however, is still whether the instruction correctly stated the law. Thus, this Court should review the legal question—the error prong—de novo.<sup>755</sup>

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<sup>751</sup> *State v. Velazquez*, 216 Ariz. 300, ¶37 (2007).

<sup>752</sup> *Id.*

<sup>753</sup> *State v. Henderson*, 210 Ariz. 561, ¶19 (2005)(quoting *State v. Hunter*, 142 Ariz. 88, 90 (1984)).

<sup>754</sup> *Id.* at ¶20.

<sup>755</sup> *See Twin City Fire Ins. Co.*, 204 Ariz. 251, ¶10.

### ***Discussion:***

- 1. The trial court incorrectly instructed the jury that Jimmy had to prove his mental health issues or impairment “prevented” him from knowing right from wrong or conforming his conduct to the law.**

A.R.S. §13-751(G)(1) provides a mitigating factor when “The defendant’s capacity to appreciate the wrongfulness of his conduct or to conform his conduct ... was significantly impaired, but not so impaired as to constitute a defense to prosecution.”<sup>756</sup> The trial court’s instruction, however, demanded that Jimmy prove his “mental illness, personality disorder or substance abuse ... prevented” him “from appreciating the wrongfulness of the conduct or conforming his conduct to the requirements of the law.”<sup>757</sup> The difference between “impair” and “prevent” reflects in its plain language the distinction between the insanity defense and significant impairment mitigator.<sup>758</sup>

Under Arizona’s guilty except insane (“GEI”) plea, a person can be found insane “if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong.”<sup>759</sup>

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<sup>756</sup> A.R.S. §13-751(G)(1).

<sup>757</sup> RT-6/23/2016, 147.

<sup>758</sup> Compare [Merriam-Webster, prevent](#) with [Merriam-Webster, impair](#).

<sup>759</sup> A.R.S. §13-502(A); see also *State v. Roque*, 213 Ariz. 193, ¶¶71-72 (2006), disapproved on other grounds by *State v. Escalante-Orozco*, 241 Ariz. 254, ¶¶13-14 (2017); *In re Natalie Z.*, 214 Ariz. 452, ¶¶8-12 (App. 2007).

By requiring Jimmy to prove that his mental health problems “prevented [him] from appreciating the wrongfulness of [his] conduct or conforming his conduct to the requirements of the law,” the trial court’s instructions reflected the GEI plea. But the significant impairment mitigator is intended to apply in circumstances when the defense would not.<sup>760</sup> This Court applied the mitigator accordingly in *State v. Gretzler*.<sup>761</sup> Although the defendant was not GEI, “the defendant’s mental capabilities were significantly, but only partially, impaired.”<sup>762</sup> Thus, the mitigator applied.<sup>763</sup>

By instructing the jury they could only find significant impairment if Jimmy proved his mental health issues or intoxication “prevented [him] from appreciating the wrongfulness of the conduct or conforming his conduct to the requirements of the law,”<sup>764</sup> the trial court improperly heightened the mitigation burden.

**2. The “prevented” instruction constituted fundamental error because the error stripped Jimmy of his right to have the jury consider significant impairment as a mitigating factor.**

An error is fundamental if it “goes to the foundation of [a defendant’s] case, takes away a right that is essential to his defense, and is of such magnitude that he

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<sup>760</sup> See A.R.S. §13-751(G)(1).

<sup>761</sup> 135 Ariz. 42, 57-58 (1983), *superseded by statute on other grounds as noted in State v. Carlson*, 237 Ariz. 381, ¶46 (2016).

<sup>762</sup> *Id.*

<sup>763</sup> *Id.*

<sup>764</sup> RT-6/23/2016, 147.

could not have received a fair trial.”<sup>765</sup> As this Court recognized in *State v. Forde*, “An illegal sentence constitutes fundamental error.”<sup>766</sup> Legal errors that disrupt the balance of aggravating and mitigating circumstances render a sentence illegal.<sup>767</sup> The sentencer must be allowed to consider as mitigation, any aspect of a defendant’s character or record and any of the circumstances of the offense.<sup>768</sup> The Arizona Constitution independently guarantees the rights assured by the Eighth and Fourteenth Amendments.<sup>769</sup>

Insanity is an affirmative defense that forecloses conviction. Significant impairment is a mitigating factor that juries must consider when imposing sentence in capital cases. By improperly elevating the burden, the trial court’s instructions stripped Jimmy of a right essential to his defense—the mitigating factor of significant impairment. Without this mitigating factor, there was no way for the jury to properly consider the weight of Jimmy’s mitigation.

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<sup>765</sup> *Henderson*, 210 Ariz. 561, ¶24.

<sup>766</sup> 233 Ariz. 543, ¶137 (2014).

<sup>767</sup> See *State v. Trujillo*, 237 Ariz. 314, ¶15 (2011); *State v. Smith*, 219 Ariz. 132, ¶¶19, 22 (2008); *State v. Alvarez*, 205 Ariz. 110, ¶18 (2003).

<sup>768</sup> *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); U.S.Const.Amend.. 8, 14; Ariz.Const.Art. 2, §§4, 15.

<sup>769</sup> (cruel and unusual punishment).

### 3. The error prejudiced Jimmy.

Under a fundamental error standard, prejudice is a fact-intensive question that “differs from case to case.”<sup>770</sup> Generally, the defendant must show “that a reasonable jury, applying the appropriate standard of proof, could have reached a different result ....”<sup>771</sup>

Because this jury is presumed to have followed this incorrect instruction,<sup>772</sup> the instruction alone establishes prejudice. Additionally, the prosecutor capitalized on the instruction, repeatedly arguing Jimmy had not proved his intoxication or mental health problems “prevented” him from appreciating the wrongfulness of his actions.<sup>773</sup>

#### **Conclusion:**

For these reasons, this Court should order a new trial.

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<sup>770</sup> *Henderson*, 210 Ariz. 561, ¶26.

<sup>771</sup> *Id.* at ¶27.

<sup>772</sup> *State v. Newell*, 212 Ariz. 389, ¶68 (2006); *accord State v. Lynch*, 238 Ariz. 84, ¶¶26, 37, 49, 52 (2015), *reversed on other grounds by Lynch v. Arizona*, 136 S.Ct. 1818 (2016); *State v. Miller*, 234 Ariz. 31, ¶22 (2013); *State v. Ovante*, 231 Ariz. 180, ¶24 (2013); *State v. Velazquez*, 216 Ariz. 300, ¶50 (2007); *State v. Dann*, 205 Ariz. 557, ¶48 (2003).

<sup>773</sup> RT-6/27/2016(afternoon), 5, 7, 8-9, 12-13, 15, 16, 18.

## **ARGUMENT 9**

THE TRIAL COURT IMPROPERLY ALLOWED THE STATE TO ADMIT EVIDENCE AND MAKE ARGUMENT REGARDING PRISON HOUSING CONDITIONS AND JIMMY'S EXERCISE OF HIS RIGHT TO TRIAL DURING THE SENTENCING PHASE.

Before trial, Jimmy requested permission to present his offers to plead guilty as mitigation.<sup>774</sup> The state agreed but also indicated its intent to present rebuttal evidence, including: 1) Jimmy's first plea offer would have included the possibility of release after twenty-five years, 2) Jimmy could have entered a guilty plea at any time, and 3) life inmates have better confinement conditions than death inmates.<sup>775</sup>

Over Jimmy's objection,<sup>776</sup> the trial court allowed the state to present the requested evidence and argument.<sup>777</sup> Thus, the state presented evidence of confinement conditions and argued Jimmy could have entered a guilty plea at any point.<sup>778</sup>

### ***Standard of Review:***

Generally, this Court reviews a trial court's ruling regarding the admissibility of evidence for an abuse of discretion.<sup>779</sup> However, a trial court abuses its discretion

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<sup>774</sup> I.299; I.301 (citing *Busso-Estopellan v. Mroz*, 238 Ariz. 553 (2015)).

<sup>775</sup> I.330, 4-5.

<sup>776</sup> See RT-2/19/2016, 40-55; see also I.510; RT-6/20/2016, 4-18.

<sup>777</sup> I.347; RT-6/20/2016, 18.

<sup>778</sup> RT-5/23/2016, 5; RT-6/20/2016, 5, 134-49; RT-6/27/2016(afternoon), 41-42.

<sup>779</sup> *State v. Gill*, 242 Ariz. 1, ¶7 (2017).

when it makes legal error and this Court reviews the underlying legal question de novo.<sup>780</sup>

**Discussion:**

**1. The trial court improperly admitted evidence of housing conditions.**

**A. Confinement conditions are generally irrelevant in sentencing.**

To be admitted, rebuttal evidence must be relevant.<sup>781</sup> As a result, rebuttal evidence must have a “tendency to make a fact more or less probable than it would be without the evidence” and the fact must be “of consequence in determining the action.”<sup>782</sup> Moreover, this Court has repeatedly held that the offering party bears the burden of proving admissibility, including relevance.<sup>783</sup>

As a general rule, prison housing conditions are not relevant to sentencing decisions. While it appears this Court has not evaluated the general rule, other Courts have set forth compelling reasons for this rule. In *State v. Bowman*, the South Carolina Supreme Court concluded, “questions regarding escape and prison

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<sup>780</sup> *Twin City Fire Ins. Co.*, 204 Ariz. 251, ¶10.

<sup>781</sup> See A.R.S. §§13-751(B), 752(G); *State v. Hampton*, 213 Ariz. 167, ¶51 (2006); *State v. McGill*, 213 Ariz. 147, ¶40 (2006).

<sup>782</sup> Ariz.R.Evid. 401.

<sup>783</sup> See *State v. Haskie*, 242 Ariz. 582, ¶16 (2017)(“The burden of establishing admissibility lies with the proponent of the testimony—in this case, the State. Like all evidence, such testimony must be relevant to be admissible.”); *State v. Romero*, 239 Ariz. 6, ¶11 (2016).



conditions are not relevant to the” sentencing decision.<sup>784</sup> And in *People v. Smith*, the Supreme Court of California observed, “As a general rule, evidence of prison conditions is not admissible at a penalty trial ... because it has no bearing on the defendant’s character, culpability, or the circumstances of the offense ....”<sup>785</sup>

This Court endorsed this approach in *State v. Leteve*, holding “the harsh conditions a child-killer might face in prison ... is not specific to a defendant’s character, propensities, or prior record, nor does it go to the circumstances of his offense.”<sup>786</sup>

**B. Here, the state did not present any evidence to prove that its evidence regarding housing conditions was connected to Jimmy or his willingness to accept responsibility.**

Jimmy’s life proffer did not make confinement conditions relevant because the prosecutor never presented evidence showing Jimmy considered housing conditions when making the plea offers. While the state correctly noted Jimmy’s prior incarceration, they presented no evidence suggesting Jimmy learned of the different housing conditions for inmates sentenced to life and death during his incarceration.<sup>787</sup> Defense counsel rightly pointed out, “the defendant does not

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<sup>784</sup> 623 S.E.2d 378, 385 (S.C. 2005), *abrogated on other grounds by State v. Evans*, 637 S.E.2d 313, 314-16 (S.C. 2006).

<sup>785</sup> 347 P.3d 530, 583 (Cal. 2015).

<sup>786</sup> 237 Ariz. 516, ¶¶39-40 (2015)(citing *People v. Quartermain*, 941 P.2d 788, 807 (Cal. 1997)(cited in *Smith*, 347 P.3d at 556-59)).

<sup>787</sup> RT-6/20/2016, 6; *see also* I.15.

know any of this information, has no way to know this information.”<sup>788</sup> Without that, “there’s no connection between what the State is offering in regards to the defendant’s acceptance of responsibility and making an offer to plead guilty.”<sup>789</sup>

This is not to say that confinement conditions will never become relevant. The state simply has to show the defendant considered confinement conditions when deciding to enter a plea. This process aligns with *State v. Burns*, in which this Court found evidence regarding prior acts, gang affiliation, and racist attitudes was relevant because it was connected to the defendant personally.<sup>790</sup> Here, however, there was no evidence Jimmy considered housing conditions.

**C. The trial court abused its discretion when it allowed the state to present evidence of confinement conditions.**

The trial court abused its discretion in at least one of two ways. First, the record indicates the trial court misapplied the law.<sup>791</sup> The offering party must prove evidence is admissible by a preponderance of the evidence.<sup>792</sup> Here, the state bore the burden to prove the admissibility of confinement conditions. However, the state sought to shift that burden to the defense.<sup>793</sup>

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<sup>788</sup> RT-6/20/2016, 10.

<sup>789</sup> *Id.* at 11.

<sup>790</sup> 237 Ariz. 1, ¶¶128-134 (2015).

<sup>791</sup> *See Gorman v. City of Phoenix*, 152 Ariz. 179, 182 (1987).

<sup>792</sup> *See Haskie*, 242 Ariz. 582, ¶16; *Romero*, 239 Ariz. 6, ¶11.

<sup>793</sup> RT-6/20/2016, 6.

The court’s ultimate ruling also did not illustrate an understanding of the standard. The court allowed evidence regarding confinement conditions because “it may serve—the jury may find that it rebuts—may fairly find that it rebuts the argument that” Jimmy accepted responsibility.<sup>794</sup>

This ruling incorrectly deferred the issue of relevance to the jury. Additionally, the ruling ignored the basic premise of relevance, that the offered evidence must make a certain fact at issue more or less likely. Here, as *Leteve*, *Bowman*, and *Smith* hold, the fact must connect to the defendant’s character, culpability, or crime. Without any evidence that Jimmy considered or knew of incarceration conditions, there was no connection. The state, as the offering party, was responsible for presenting that proof, but didn’t.

This leads to the second possible way the court abused its discretion. A trial court abuses its discretion if the record does not support its factual conclusions.<sup>795</sup> Here, the state had to establish admissibility by a preponderance of the evidence.<sup>796</sup> The state’s mere assertion that Jimmy knew the differing confinement conditions was not evidence.<sup>797</sup> Indeed, when the defense asked the state’s witness if she knew

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<sup>794</sup> *Id.* at 12.

<sup>795</sup> *Gorman*, 152 Ariz. at 182.

<sup>796</sup> *Haskie*, 242 Ariz. 582, ¶16; *Romero*, 239 Ariz. 6, ¶11.

<sup>797</sup> See Black’s Law Dictionary (10th ed. 2014), evidence; Ariz.R.Evid.104

whether Jimmy was aware of the different confinement conditions, she answered, “No, I do not.”<sup>798</sup>

2. **The trial court improperly allowed the prosecutor to argue that Jimmy could have entered a guilty plea at any point. In doing so, the trial court placed at issue Jimmy’s relationship with his attorneys and their ethical duties and allowed the prosecutor to comment on Jimmy’s exercise of his right to trial.**

The trial court also erred when it allowed the state to argue that Jimmy could have entered a guilty plea at any time. During argument, both parties agreed the ABA Guidelines required defense attorneys to conduct the trial.<sup>799</sup> The parties split, however, regarding the impact of this point.<sup>800</sup> Siding with the state, the court indicated it would allow argument<sup>801</sup> and the state argued the issue.<sup>802</sup>

First, the trial court’s ruling placed an improper issue before the jury: Jimmy’s exercise of his right to trial.<sup>803</sup> The Supreme Court observed, “To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the state to pursue a course of action whose

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<sup>798</sup> RT-6/20/2016, 149.

<sup>799</sup> RT-2/19/2016, 40, 51.

<sup>800</sup> *See id.* at 40-51.

<sup>801</sup> I.347.

<sup>802</sup> RT-5/23/2016, 5; RT-6/20/2016, 5; RT-6/27/2016(afternoon), 41.

<sup>803</sup> *See* U.S.Const.Amend.. 5, 14; Ariz.Const.Art. 2, §§4, 23, 24, Art.6, §17.

objective is to penalize a person's reliance on his legal rights is patently unconstitutional.”<sup>804</sup>

Here, the trial court's ruling, however, allowed the prosecutor to argue for a harsher penalty—the harshest penalty—based upon Jimmy's exercise of his right to trial.<sup>805</sup> This is particularly troubling when, as here, the prosecutor refused all conditional pleas. For example, the Alabama Court of Criminal Appeals considered a claim that the trial court imposed a more severe sentence when the defendant rejected a plea offer in *Pelmer v. State*.<sup>806</sup> Even where the defendant rejected a favorable plea, the Court concluded it would be improper to impose a harsher sentence based upon the defendant's exercise.<sup>807</sup> Here, the trial court's ruling allowed the prosecutor to argue the death penalty should be imposed because Jimmy did not plead guilty without any benefit.

Second, the trial court's ruling placed Jimmy's relationship with his lawyers at issue. The commentary to the ABA Guidelines instructs, “If no written guarantee can be obtained that death will not be imposed following a guilty plea, counsel

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<sup>804</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); see *Baker v. U.S.*, 412 F.2d 1069, 1073 (5th Cir. 1969); *State v. Farnham*, 479 A.2d 887, 891 (Me. 1984); *Pelmer v. State*, 389 So.2d 584, 588-89 (Ala.App. 1980).

<sup>805</sup> See RT-6/27/2016(afternoon), 41.

<sup>806</sup> 389 So.2d at 587-89.

<sup>807</sup> *Id.* at 588-89.

should be extremely reluctant to participate in a waiver of the client’s trial rights.”<sup>808</sup> The commentary explains, “Because of the factors described supra in the text accompanying notes 178-92, it will often require the combined and sustained efforts of the entire defense team to dissuade the client from making a self-destructive decision.”<sup>809</sup> Entering a guilty plea without the benefit of a life sentence is the very sort of self-destructive decision the Guidelines demand defense counsel overcome.<sup>810</sup> The Rules of Criminal Procedure promulgated by this Court require attorneys to “be familiar with and guided by the performance standards in the” ABA Guidelines.<sup>811</sup>

Jimmy’s attorneys were required to follow the ABA Guidelines, which required them to try to dissuade Jimmy from entering any plea not avoiding death. In fact, the Guidelines say it would have been ineffective assistance for them to simply acquiesce to such a wish.

Allowing the state to argue Jimmy could have entered a plea of guilty at any time places the ethical model this Court requires defense attorneys to follow in contention with trial strategy. It also creates a horrible conflict for defense counsel:

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<sup>808</sup> ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.9.2, Commentary.

<sup>809</sup> *Id.*

<sup>810</sup> ABA Guideline 10.5, Commentary.

<sup>811</sup> Ariz.R.Crim.P. 6.8(b)(1)(iii)(2016).

the state's argument implicates privileged communications between attorney and client.<sup>812</sup>

***Conclusion:***

Neither housing conditions nor Jimmy's ability to enter a guilty plea actually provided meaningful rebuttal to Jimmy's offer to plead in exchange for a life without parole sentence. Accordingly, this Court should reverse Jimmy's sentence and order a new penalty phase.

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<sup>812</sup> See A.R.S. §13-4062(2).

## **ARGUMENT 10**

INTERNALLY INCONSISTENT JURY  
INSTRUCTIONS REGARDING THE PRESUMPTION  
OF DEATH, MERCY, AND SYMPATHY LIKELY  
CAUSED JUROR CONFUSION RESULTING IN AN  
UNCONSTITUTIONAL DEATH SENTENCE.

### ***Standard of review:***

This Court reviews “whether jury instructions properly state the law ... de novo.”<sup>813</sup>

### ***Discussion:***

A.R.S. §13-751(E) mandates a death sentence if the trier of fact “determines that there are no mitigating circumstances sufficiently substantial to call for leniency.” Each juror must give meaningful consideration to all of the mitigation in the case, and must make a reasoned moral response to the defendant’s background, character, and crime in deciding whether to impose a death sentence.<sup>814</sup>

When mitigation is presented by the defense, the jurors must decide whether its existence was proven by a preponderance of the evidence.<sup>815</sup> The defense has no burden of persuasion and does not need to prove by a preponderance of the evidence that the mitigation merits leniency.<sup>816</sup> Additionally, there is no statutory burden of

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<sup>813</sup> *State v. Burbey*, 243 Ariz. 145, ¶5 (2017)(quotation marks omitted).

<sup>814</sup> *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

<sup>815</sup> A.R.S. §13-751(C).

<sup>816</sup> *State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468, ¶14 (2005).



proof for any mitigation that stems from any source other than the defense in the penalty phase.<sup>817</sup>

The state also has no statutory burden of proof for its rebuttal to mitigation presented by the defense,<sup>818</sup> and is allowed to present “rebuttal” type evidence even if the defense presents no mitigation at all.<sup>819</sup>

Thus, the decision of whether or not to impose the death penalty is based on each individual juror’s own moral considerations.<sup>820</sup> Any instruction that prevents a reasoned moral response is constitutionally invalid.<sup>821</sup> If mitigation evokes mercy in a juror, they can’t be told not to apply it.<sup>822</sup>

Studies show capital jurors are frequently confused by the jury instructions and have difficulty following them.<sup>823</sup> This pervasive juror confusion caused the American Law Institute to eliminate the model death penalty statute from the Model

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<sup>817</sup> See A.R.S. §13-751(C).

<sup>818</sup> A.R.S. §13-751(D).

<sup>819</sup> A.R.S. §13-752(G).

<sup>820</sup> *Baldwin*, 211 Ariz. 468, ¶18.

<sup>821</sup> See *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007).

<sup>822</sup> See *Penry v. Lynaugh*, 492 U.S. 302, 325-28 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>823</sup> See Am. Law Institute, [Report of the Council to the Membership of The American Law Institute on the Matter of the Death Penalty](#) (ALI Report), 5 (Apr. 15, 2009); *id* at Annex B, 31-34 (citing results of studies by Capital Jury Project).

Penal Code.<sup>824</sup> Capital jurors are known to look to outside factors to avoid taking responsibility for their vote for death.<sup>825</sup>

Here, the confusion noted by the studies is even more inherent because the court's instructions were full of contradiction. First, the instructions suggested there was a presumption of life because a defendant can get a life sentence "even if the Defendant does not present any mitigation evidence."<sup>826</sup> But they also told the jurors that the law doesn't presume an appropriate sentence.<sup>827</sup> Later on the same page, the jurors were told that they had to impose death if the mitigation was not sufficiently substantial to call for leniency.<sup>828</sup>

The confusion created by these contradictory instructions was compounded by the instructions regarding "mercy" or "sympathy." First, they were told: "You are not to be swayed by mere sympathy not related to the evidence presented during this phase."<sup>829</sup> Later, they were told: "Mitigating circumstances are not an excuse or justification for the offense, but are factors that in fairness or mercy may reduce the defendant's moral culpability."<sup>830</sup>

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<sup>824</sup> ALI Report, Annex B, 31-34.

<sup>825</sup> ALI Report, Annex B, 32 fn.130.

<sup>826</sup> I.524, 8.

<sup>827</sup> *Id.*

<sup>828</sup> *Id.*

<sup>829</sup> *Id.* at 2.

<sup>830</sup> *Id.* at 5.

Because sympathy and mercy are both concepts based upon human empathy, the message sent to the jury was unclear. If a juror finds mitigation compelling, they may feel sympathetic toward a defendant and want to grant mercy. This is particularly true when mitigation contextualizes a defendant's moral culpability. A juror will view a defendant who suffers from mental health problems, who was a victim of a horrible trauma in his youth, or who has struggled with substance abuse his entire life with more sympathy. They will be able to see how that defendant came to his unfortunate position. And a juror will be more likely to see someone like Jimmy, who suffers from all three, with an even greater degree of sympathy. Indeed, this is the purpose of mitigation—to contextualize Jimmy's past so the jury can understand and empathize with it and determine if mercy is warranted.

Further, while the plain language of A.R.S. §13-751(E) says the jury must impose the death penalty if they find mitigation lacking, Arizona case law states that our capital statutes do not create a presumption of death.<sup>831</sup> But the instructions did not adequately explain the distinction. As a result, “there is a reasonable likelihood that the jury has applied the challenged instruction” erroneously.”<sup>832</sup> Specifically, there is a reasonable likelihood the jury relied upon the instruction to place the responsibility for a death decision elsewhere.

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<sup>831</sup> *State v. Glassell*, 211 Ariz. 33, ¶72 (2005); *State v. Anderson*, 210 Ariz. 327, ¶77 (2005).

<sup>832</sup> *Boyde v. California*, 494 U.S. 370, 380 (1990).

In *Caldwell v. Mississippi*, the Supreme Court “conclude[d] that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”<sup>833</sup> And in *Abdul-Kabir v. Quarterman*, the Supreme Court made clear that a death sentence is constitutionally infirm if the jurors’ ability to properly consider mitigation is impaired by a statute or the court’s interpretation of a statute.<sup>834</sup>

The instruction given here advised the jury that death must be imposed if mitigation was lacking.<sup>835</sup> This allowed the prosecutor to argue that death was the only alternative.<sup>836</sup> This argument had the same effect as the argument in *Caldwell*: the prosecutor absolved the jury of accountability. The only difference was mechanism. In *Caldwell* the jury was absolved by subsequent review; here the jury was absolved by legal duty. This provided a hook for jurors to hang their decision on, a means to bypass the necessary scrutiny of mitigation required by the 8th amendment and the due process clauses of the 5th and 14th amendments.

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<sup>833</sup> *Id.* at 328-29.

<sup>834</sup> 550 U.S. 233, 264 (2007).

<sup>835</sup> I.524, 8.

<sup>836</sup> *See* RT-6/27/2016(afternoon), 51-52.

## **ARGUMENT 11**

THE TRIAL COURT SHOULD HAVE ALLOWED JIMMY TO PRESENT EXECUTION IMPACT EVIDENCE BECAUSE IT WAS RELEVANT TO HIS CHARACTER AND FAMILY SUPPORT.

### ***Standard of Review:***

Generally, this Court reviews admissibility of evidence rulings for abuse of discretion.<sup>837</sup> A court abuses its discretion when it makes legal error and this Court reviews underlying legal questions de novo.<sup>838</sup> Additionally, Jimmy's claim is constitutional in nature and this Court reviews constitutional issues de novo.<sup>839</sup>

### ***Discussion:***

This Court should announce a clearer rule regarding execution impact evidence ("EIE"):

Execution impact evidence is admissible if it has some bearing—either direct or indirect—on the material questions of the defendant's character, family support, or other proper mitigation.

This rule more accurately clarifies the propriety of execution impact evidence.

Applying this rule to Jimmy's case, the trial court improperly precluded EIE. Jimmy proffered to support his character, family support, and role in society.

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<sup>837</sup> *Gill*, 242 Ariz. 1, ¶7.

<sup>838</sup> *Twin City Fire Ins. Co.*, 204 Ariz. 251, ¶10.

<sup>839</sup> *Hidalgo*, 241 Ariz. 543, ¶7; *McGill*, 213 Ariz. 147, ¶45; *Moody*, 208 Ariz. 424, ¶62.

**1. The United States and Arizona constitutions guaranteed Jimmy the right to present all relevant mitigation to the jury.**

Both the U.S. and Arizona constitutions guarantee Jimmy the rights to be free from cruel and unusual punishment<sup>840</sup> and due process.<sup>841</sup> Under these provisions, Jimmy is entitled to a fair trial,<sup>842</sup> a reliable one.<sup>843</sup> The right to a fair and reliable trial takes on more importance in the context of death decisions because death uniquely requires reliability.<sup>844</sup> To ensure reliability, a sentencer must be allowed to consider “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”<sup>845</sup>

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<sup>840</sup> U.S.Const.Amend.. 8; *Robinson v. California*, 370 U.S. 660, 666 (1962); Ariz.Const.Art. 2, §15..

<sup>841</sup> U.S.Const.Amend.. 14; Ariz.Const.Art. 2, §4.

<sup>842</sup> *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

<sup>843</sup> *Nichols v. U.S.*, 511 U.S. 738, 762 (1994); *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Estes v. State of Texas*, 381 U.S. 532, 583 (1965).

<sup>844</sup> *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

<sup>845</sup> *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Historically, defendants offered EIE in mitigation.<sup>846</sup> Here, Jimmy also proffered EIE as a means to prove his character, family support, and position in society.<sup>847</sup> The trial court, however, precluded that evidence.<sup>848</sup>

**2. This Court has created an absolute bar to execution impact evidence in error.**

In a trilogy of cases—*State v. Rose*,<sup>849</sup> *State v. Chappell*,<sup>850</sup> and *State v. Roque*<sup>851</sup>—this Court created an absolute bar on EIE. However, this trilogy of cases stands on a shaky foundation. First, the trilogy is premised upon a misreading of Arizona cases. Second, the trilogy fails to distinguish between the different purposes of execution impact evidence. As a result, Arizona has improperly created a bar where a more nuanced approach is legally correct.

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<sup>846</sup> See e.g., *State v. Boyston*, 231 Ariz. 539, ¶85 (2013); *State v. Manuel*, 229 Ariz. 1, ¶46 (2011); *State v. Dann*, 220 Ariz. 351, ¶152 (2009)(finding evidence of impact sufficient and linking to family support); *State v. Harrod*, 218 Ariz. 268 (2008)(recognizing link between execution impact evidence and family support mitigator); *State v. Bocharski*, 218 Ariz. 476, ¶109 (2008)(finding evidence of impact sufficient); *State v. Velazquez*, 216 Ariz. 300, ¶74 (2007)(finding evidence of impact sufficient); *State v. McGill*, 213 Ariz. 147, ¶67 (2006)(finding evidence of impact sufficient and linking to family support).

<sup>847</sup> See I.256 (motion to permit execution impact evidence); I.312 (state’s response); see also I.306 (motion to preclude or limit victim impact evidence); I.309 (state’s response).

<sup>848</sup> See RT-2/19/2016, 25; I.347.

<sup>849</sup> 231 Ariz. 500 (2013).

<sup>850</sup> 225 Ariz. 229 (2010).

<sup>851</sup> 213 Ariz. 193 (2006).

**A. This Court’s decisions banning execution impact evidence are premised upon a misreading of Arizona cases.**

The trial court relied exclusively on the *Rose*, *Chappell*, *Roque* trilogy when it precluded Jimmy’s evidence.<sup>852</sup> The trial court did not evaluate this trilogy; the court merely relied upon the conclusion that EIE was not relevant to a defendant’s character or mitigation. This trilogy was wrongly decided.

As a starting point, it is inaccurate to isolate *Rose*, *Chappell*, and *Roque*. *Rose* relied on *Chappell*,<sup>853</sup> *Chappell* relied on *Roque*.<sup>854</sup> The three are conjoined and an error *Roque* is an error in all.

*Roque* concerned a letter from the defendant’s sister “addressing the suffering of Roque’s family.”<sup>855</sup> Quoting *State v. Williams*, this Court concluded the trial court did not abuse its discretion when it excluded the statement because, “We have held that a sister’s testimony expressing concern for the defendant’s family’s well-being is ‘altogether unrelated to defendant, to his character, or to the circumstance of the offense’ and is therefore not relevant mitigating evidence.”<sup>856</sup>

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<sup>852</sup> See I.347, 2 (citing *Rose*, 231 Ariz. 500, ¶64; *Chappell*, 225 Ariz. 229 (without pin citation); and *Roque*, 213 Ariz. 193, ¶119).

<sup>853</sup> *Rose*, 231 Ariz. 500, ¶64.

<sup>854</sup> *Chappell*, 225 Ariz. 229, ¶30.

<sup>855</sup> 213 Ariz. 193, ¶119.

<sup>856</sup> *Id.* (quoting *State v. Williams*, 183 Ariz. 368, 385 (1995)).



*Roque* read *Williams* incorrectly. In *Williams*, the proffered mitigation was that the victim's sister supported life imprisonment.<sup>857</sup> Moreover, the victim's sister's decision was not premised upon any knowledge of the defendant; the decision was based "on her family's grief and on a concern for defendant's family."<sup>858</sup> Thus, *Williams* correctly concluded that the sentence recommendation of a person who was not related to the defendant and whose recommendation was not grounded in the defendant's character or mitigation was irrelevant.<sup>859</sup>

It was not the *Williams* witness's status as a sister that made her testimony irrelevant. It was that she was not the defendant's sister and her recommendation had no connection to the defendant's mitigation or character.

But in *Roque*, this Court took the illogical position that EIE offered by the defendant's sister was the legal equivalent of a victim's sister offering a sentencing recommendation based upon her concern for the defendant's family or general opposition to the death penalty.

Nothing in *Williams* changed the understanding that a defendant's family could offer EIE. Three years after *Williams*, this Court again "g[a]ve some mitigating weight to the effect [a defendant's] execution would have on the emotional well-

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<sup>857</sup> 183 Ariz. at 385.

<sup>858</sup> *Id.*

<sup>859</sup> *Id.*

being of his children” in *State v. Greene*.<sup>860</sup> Another four years later, in *State v. Finch*, a defendant challenged a “trial court’s refusal to find that the effects of [his] execution on his children is a non-statutory mitigator.”<sup>861</sup> Citing to *Greene*, this Court concluded EIE was proper.<sup>862</sup> The difference was that the witnesses in *Finch* “did not testify as to the effects of Finch’s execution on his two children.”<sup>863</sup>

*Roque* misinterpreted *Williams*. Moreover, the decision was unnecessary to the ultimate outcome. In independent review, this Court reduced the defendant’s sentence to life.<sup>864</sup> But this Court amplified this misunderstanding in *Chappell*. Through *Chappell*, what had started as an understandable holding that a victim’s sister’s sentencing recommendation was not admissible was converted to an outright bar on EIE from the defendant’s family.<sup>865</sup>

In footnote, this Court distinguished other cases that had considered EIE, asserting, “in none of those cases was the admissibility of the execution impact evidence at issue on appeal.”<sup>866</sup> However, this Court omitted *Finch* from this list,<sup>867</sup>

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<sup>860</sup> 192 Ariz. 431, ¶58 (1998).

<sup>861</sup> 202 Ariz. 410, ¶38 (2002).

<sup>862</sup> *Id.* at ¶39 (citing *Greene*, 192 Ariz. 431, ¶58).

<sup>863</sup> *Id.*

<sup>864</sup> *Roque*, 213 Ariz. 193, ¶¶166-171.

<sup>865</sup> 225 Ariz. 229, ¶30.

<sup>866</sup> *Id.* at ¶30 n.8 (citing *State v. Moore*, 222 Ariz. 1, ¶134 (2009); *State v. Velazquez*, 216 Ariz. 300, ¶74 (2007); *State v. McGill*, 213 Ariz. 147, ¶67 (2006); and *State v. Greene*, 192 Ariz. 431, ¶58 (1998)).

<sup>867</sup> *See id.*

despite its inclusion in both the Opening<sup>868</sup> and Answering Briefs.<sup>869</sup> While the cited cases may not have concerned the admissibility of EIE, *Finch* did.

What started as a reasonable limit has been errantly converted to an outright ban on EIE. But that is not the proper scope of exclusion.

**B. This Court’s reliance upon cases from other jurisdictions fails to recognize the distinctions underlying execution impact evidence.**

In *Chappell*, this Court noted a number of other jurisdictions have also found EIE irrelevant.<sup>870</sup> This Court pointed to the Ninth Circuit decision in *Stenson v. Lambert*,<sup>871</sup> Fifth Circuit decision in *Jackson v. Dretke*,<sup>872</sup> Missouri Supreme Court decision in *Williams v. State*,<sup>873</sup> and Pennsylvania Supreme Court decision in *Commonwealth v. Harris*.<sup>874</sup>

These cases illustrate two categories of EIE:

1. The defendant asked for a particular sentence, or
2. The defendant asked for mercy based solely upon third party impact.

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<sup>868</sup> *Chappell* OB, 118-19 (2009 WL 5510829).

<sup>869</sup> *Chappell* AB, 81 (2009 WL 5850810).

<sup>870</sup> *Chappell*, 225 Ariz. 229, ¶30 n.7.

<sup>871</sup> 504 F.3d 873, 891-92 (9th Cir. 2007).

<sup>872</sup> 450 F.3d 614, 618 (5th Cir. 2006).

<sup>873</sup> 168 S.W.3d 433, 445 (Mo. 2005).

<sup>874</sup> 817 A.2d 1033, 1053-54 (Pa. 2002).

Here, Jimmy offered the EIE for two reasons. First, Jimmy offered the evidence to ask for mercy based upon the impact to his family.<sup>875</sup> This would align with the second category above. Second, Jimmy also asked to present EIE to prove his life had value to his friends and family and he had his family's love and support.<sup>876</sup> This rationale is distinct from the bases for rejection previously recognized.

Foremost, neither *Stenson* nor *Jackson* are compelling as they relate to review under the Anti-Terrorism and Effective Death Penalty Act,<sup>877</sup> which allows relief only if a state decision is “contrary to, or involved an unreasonable application of, clearly established federal law ....”<sup>878</sup>

The Missouri Supreme Court's decision in *Williams v. State* illustrates the first category: a sentence recommendation.<sup>879</sup> The Court concluded, “this holding [that victims may not give a sentence recommendation] would likely extend to exclude testimony from the defendant's family regarding the appropriate punishment.”<sup>880</sup> As noted above, however, Jimmy did not want his witnesses to give a sentencing recommendation.<sup>881</sup>

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<sup>875</sup> I.254, 2.

<sup>876</sup> *Id.*; I.256, 5-8.

<sup>877</sup> *See Stenson*, 504 F.3d at 881; *Jackson*, 450 F.3d at 616.

<sup>878</sup> *Stenson*, 504 F.3d at 881 (citing 28 U.S.C. §2254(d)(1)); *accord Jackson*, 450 F.3d at 616.

<sup>879</sup> *See* 168 S.W.3d at 445.

<sup>880</sup> *Id.*

<sup>881</sup> I.256, 5-8.

The Pennsylvania Supreme Court's decision in *Commonwealth v. Harris* illustrates the second category. In *Harris*, the defendant wanted to present EIE for the sole purpose of asking for mercy based upon the impact his offense and execution had on his family.<sup>882</sup> The Court "concluded that third party impact evidence is irrelevant to the defendant's character or record or the circumstances of the crime."<sup>883</sup> This Court, however, reached a different conclusion regarding the second category in *Finch*.<sup>884</sup>

Even the cases cited in *Harris* support this distinction. *State v. Stenson* illustrates the first category because the defendant offered opinions regarding sentence.<sup>885</sup> *Burns v. State*<sup>886</sup> and *State v. Loftin*<sup>887</sup> fit into the second category because they asked for mercy based upon the impact to a different person.

Here, Jimmy's EIE was not offered to present a sentence recommendation.<sup>888</sup> Nor was it presented for the sole purpose of asking for mercy based upon the impact to a third person,<sup>889</sup> although this would be proper under *Finch*.<sup>890</sup> It was offered to

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<sup>882</sup> 817 A.2d at 1053-54.

<sup>883</sup> *Id.* at 1054.

<sup>884</sup> 202 Ariz. 410, ¶¶38-39.

<sup>885</sup> See 940 P.2d 1239, 1282 (Wash. 1997).

<sup>886</sup> 699 So.2d 646, 654 (Fla. 1997).

<sup>887</sup> 680 A.2d 677, 712 (N.J. 1996).

<sup>888</sup> I.256, 5-8.

<sup>889</sup> *Id.*

<sup>890</sup> 202 Ariz. 410, ¶¶38-39.

prove his character and role within his family and society.<sup>891</sup> This request reflects a third category for EIE.

**3. Execution impact evidence is proper when it relates to a defendant’s character, family support, role in society, or other mitigation.**

When cases have considered whether EIE demonstrated a defendant’s character and family love—directly or indirectly—courts have concluded EIE is admissible.

California is illustrative. In *People v. Sanders*,<sup>892</sup> which the Supreme Court of Pennsylvania cited in *Harris*,<sup>893</sup> the defendant wanted to present EIE to both ask for a particular sentence and to ask for mercy based upon the stigma his family would suffer.<sup>894</sup> The California Supreme Court rejected both.<sup>895</sup>

Three years later, in *People v. Ochoa*, the Court again considered whether sympathy for the defendant’s family was a proper mitigating factor.<sup>896</sup> The Court decided EIE was relevant as “indirect evidence of the defendant’s character.”<sup>897</sup> Thus, “sympathy for a defendant’s family is not a matter that a capital jury can consider in mitigation, but ... family members may offer testimony of the impact of

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<sup>891</sup> I.256, 5-8.

<sup>892</sup> 905 P.2d 420 (Cal. 1995).

<sup>893</sup> 817 A.2d at 1054.

<sup>894</sup> *Sanders*, 905 P.2d at 459.

<sup>895</sup> *Id.*

<sup>896</sup> 966 P.2d 442, 470-72 (Cal. 1998).

<sup>897</sup> *Id.* at 471-72.

an execution on them if by so doing they illuminate some positive quality of the defendant's background or character.”<sup>898</sup>

California's conclusion is in line with the Supreme Courts of Oregon and Kansas.<sup>899</sup> It is also in line with this court's recognition of the interplay between family support and EIE.<sup>900</sup>

**4. The admission of execution impact evidence that does not recommend a particular sentence aligns the currently disparate treatment of victim impact statements and execution impact evidence.**

The Supreme Court of the United States has already recognized impact statements help illustrate a person's “‘uniqueness as an individual human being,’ whatever the jury might think the loss to the community resulting from his death might be.”<sup>901</sup> The only difference is identity. The Supreme Court reached that decision in *Payne v. Tennessee* when concluding there was no constitutional bar to victim impact evidence (“VIE”).<sup>902</sup>

But *Payne* went further. Part of the authorized purpose of victim impact statements was to “demonstrat[e] the loss to the victim's family and to society which

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<sup>898</sup> *Id.* at 472.

<sup>899</sup> *State v. Stevens*, 879 P.2d 162, 168 (Or. 1994); *State v. Carr*, 331 P.3d 544, 726 (Kan. 2014), *reversed on other grounds by Kansas v. Carr*, \_\_ U.S. \_\_, 136 S.Ct. 633 (2016).

<sup>900</sup> *State v. Harrod*, 218 Ariz. 268, ¶59 (2008); *see also Dann*, 220 Ariz. 351, ¶152; *McGill*, 213 Ariz. 147, ¶67.

<sup>901</sup> *Payne v. Tennessee*, 501 U.S. 808, 823 (1991).

<sup>902</sup> *Id.*

has resulted from the defendant's homicide."<sup>903</sup> VIE is important to illustrate "the victim is an individual whose death represents a unique loss to society and in particular to his family."<sup>904</sup>

VIE is regularly admitted;<sup>905</sup> EIE is not. This creates a discrepancy in treatment academic commentators have called into question. Professor Wayne Logan observed the imbalance "has at once limited jurors' capacity to respond in an empathic way to already convicted capital defendants, and withdrawn all meaningful limits on emotion and pathos with respect to their victims."<sup>906</sup> Another observed: "to the extent courts admit victim impact evidence because it circumstantially sheds light on a victim's character and the harm caused, it is inconsistent for courts to exclude execution impact evidence."<sup>907</sup>

The impact of this evidence is tremendous. As Professor Logan put it, VIE "is the singularly most compelling type of evidence available to the State: invariably positive, highly emotional testimony, coming directly from the hearts and mouths of those left behind, and imbued with the imprimatur of the State."<sup>908</sup> Because of the

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<sup>903</sup> *Id.* at 822.

<sup>904</sup> *Id.* at 825 (quoting *Booth v. Maryland*, 482 U.S. 496, 517 (1987)(White, J., dissenting)).

<sup>905</sup> Ariz.Const.Art. 2, §2.1(A)(4).

<sup>906</sup> Wayne Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials*, 33 U. Mich. J.L. Reform 1, 31-32.

<sup>907</sup> Jalem Peguero, *On Mitigation: The Role of "Execution Impact" Evidence*, 16 Berkeley J. of Afr.-Am. L. & Pol'y 65, 76 (2014).

<sup>908</sup> Logan, *When Balance and Fairness Collide*, 33 U. Mich. J.L. Reform at 42.



power of VIE and the imbalance in the system, Professor Logan encouraged “reciprocal use of an emotional counterweight in the form of EIE.”<sup>909</sup>

Jimmy too “is an individual whose death represents a unique loss to society and in particular to his family.”<sup>910</sup> The trial court prevented him from presenting evidence to illustrate the magnitude of this loss. Where the surviving victims were able to illustrate the important role the decedent played in their family’s life,<sup>911</sup> Jimmy’s family was left unable to talk about how execution would impact their family’s life.

### ***Conclusion:***

With both distinctions discussed above in mind, a rule can be identified:

Execution impact evidence is admissible if it has some bearing—either direct or indirect—on the material questions of the defendant’s character, family support, or other proper mitigation.

Under this rule, the trial court should have allowed Jimmy to present his evidence. Because the court erred, this Court should vacate the sentence and remand for a new penalty phase.

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<sup>909</sup> *Id.* at 43.

<sup>910</sup> *See Payne*, 501 U.S. at 823; *see also Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)(requiring individualized sentencing).

<sup>911</sup> RT-5/31/2016(morning), 12-23.

## **ARGUMENT 12**

### **THE COURT IMPROPERLY LIMITED MITIGATION EVIDENCE.**

#### ***Standard of Review:***

This Court reviews constitutional issues de novo.<sup>912</sup> The focus of this issue is the trial court's denial of Jimmy's Eighth Amendment right to present mitigation evidence. Thus, de novo review is proper.

#### ***Discussion:***

Under the Eighth and Fourteenth Amendments, the defense must be allowed to present mitigation based on any aspect of the defendant's character or record, and the jury must give it consideration.<sup>913</sup> To be relevant, evidence merely must have a tendency to make a fact more or less probable.<sup>914</sup> This is a low threshold.<sup>915</sup>

Once met, "the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence."<sup>916</sup> Thus, A.R.S. §13-752(2)(G) specifies that both sides may present any evidence "that is relevant to ...

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<sup>912</sup> *Hidalgo*, 241 Ariz. 543, ¶7; *State v. McGill*, 213 Ariz. 147, ¶45 (2006); *State v. Moody*, 208 Ariz. 424, ¶62 (2004).

<sup>913</sup> *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

<sup>914</sup> *Tennard v. Dretke*, 542 U.S. 274, 284-85 (2004).

<sup>915</sup> *Id.*

<sup>916</sup> *Id.* at 285 (quoting *Boyde v. California*, 494 U.S. 370, 377-78 (1990)).

whether there is mitigation sufficiently substantial to call for leniency.” And if the defendant is prevented from presenting mitigation, the sentence is fatally flawed.<sup>917</sup>

Here, through a long litigation process, the trial court repeatedly limited Jimmy’s ability to present evidence related to Columbine that touched upon his experience and struggle in the aftermath.<sup>918</sup> The court limited the number of witnesses who could be called<sup>919</sup> and their ability to discuss their experiences<sup>920</sup> and struggles following Columbine.<sup>921</sup>

That evidence would have put Jimmy’s struggles into context. Jimmy’s claim that he was severely affected by Columbine, even though he was in the gym, is far more reasonable when others explain how Columbine drastically impacted their lives. Instead, Jimmy was left with vague references to a generic impact on the

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<sup>917</sup> *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264-65 (2007).

<sup>918</sup> See RT-5/23/2016, 8-11; I.379, 3; *see also* RT-3/7/2014, 29; RT-4/11/2014, 20; RT-7/11/2014, 14-44; RT-8/29/2014, 4-5; RT-11/7/2014, 23-42; RT-12/12/2014, 21; RT-7/24/2015, 11, 24; RT-2/16/2016, 40-41; RT-2/19/2016, 13-14; RT-2/26/2016, 5, 142; RT-3/16/2016, 10-25 (limiting evidence); RT-3/18/2016, 11-24 (limiting evidence); RT-3/30/16, 55-58 (limiting evidence); RT-5/4/16, 33-35; RT-5/17/2016, 71; RT-5/23/16, 8-11 (discussions of limiting evidence); RT-5/31/16(afternoon), 4-5; RT-6/1/16, 13-27 (ordering restrictions); RT-6/3/16, 5-27; I.207; I.350; I.379; I.389.

<sup>919</sup> RT-5/23/2016, 8-11; *see also* I.474

<sup>920</sup> I.379, 3; *see also* RT-3/30/2016, 56-58; RT-5/4/2016, 33-35.

<sup>921</sup> I.379, 3; RT-3/30/2016, 55; *see also* RT-3/30/2016, 56-58; RT-5/4/2016, 33-35.

community.<sup>922</sup> Evidence so general that the state could credibly argue that Columbine was not Jimmy's "story to tell."<sup>923</sup>

The court also limited Jimmy's ability to present mitigation evidence to the jury regarding Adopted-Child Syndrome, drug-seeking behavior, Posttraumatic Stress, and counseling.<sup>924</sup>

The state was not so limited. For example, the state was allowed to back-door an Antisocial Personality Disorder ("ASPD") diagnosis with Dr. DeMarte.<sup>925</sup> The prosecutor knew there was insufficient evidence to support ASPD, and gave lip service to that fact, but nonetheless cobbled together an ASPD diagnosis after assuring the court she would not.<sup>926</sup> The defense moved for mistrial, which the court denied.<sup>927</sup> The defense moved to strike the testimony, which the court also denied.<sup>928</sup> And in her closing, the prosecutor argued this personality disorder was not

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<sup>922</sup> See RT-6/7/2016, 22-23, 158; RT-6/9/2016, 75; RT-6/14/2016, 159; RT-6/15/2016(morning), 15-16; see also RT-5/31/2016(afternoon), 32-72; RT-6/7/2016, 115-20, 132-38; RT-6/13/2016, 96-114, 133-45, 157-61, 170-74; RT-6/14/2016, 32-33.

<sup>923</sup> See RT-6/27/2016, 31.

<sup>924</sup> RT-6/16/2016, 79-92, 95, 100, 102, 125-26; RT-6/20/2016, 122-24; RT-6/23/2016, 35-36; RT-6/20/2016, 177-80; RT-6/7/2016, 177-80.

<sup>925</sup> See RT-6/22/2016, 140.

<sup>926</sup> RT-6/22/2016, 133-46.

<sup>927</sup> *Id.* at 146-60.

<sup>928</sup> *Id.* at 158-60.

mitigating.<sup>929</sup> This hair-splitting analysis short circuited the real problem: in Arizona, a diagnosis of personality disorder or ASPD can be mitigation evidence.<sup>930</sup>

Because Jimmy's proffered evidence passed the minimal relevance standard and should have been allowed, this Court should vacate the sentence and remand for a new sentencing hearing.

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<sup>929</sup> RT-6/27/2016, 38.

<sup>930</sup> *State v. Jones*, 197 Ariz. 290, ¶70 (2000), *State v. Thornton*, 187 Ariz. 325, 334 (1996); *Smith v. Stewart*, 140 F.3d 1263, 1270 (9th Cir. 1998).

### **ARGUMENT 13**

THE TRIAL COURT IMPROPERLY ORDERED THE PRODUCTION OF ATTORNEY NOTES, IN VIOLATION OF WORK PRODUCT PRIVILEGE, AND ERRONEOUSLY ALLOWED THE PROSECUTOR TO USE THE DEFENSE TEAM NOTES TO ATTACK CREDIBILITY.

#### ***Standard of Review:***

Generally, a trial court's rulings regarding admissibility and disclosure are subject to an abuse of discretion review.<sup>931</sup> However, a trial court abuses its discretion when it makes legal error and this Court reviews the underlying legal question de novo.<sup>932</sup> Moreover, Jimmy's claims are constitutional and this Court reviews constitutional issues de novo.<sup>933</sup>

#### ***Factual Background:***

Before trial, the state moved for disclosure of defense notes.<sup>934</sup>

The defense objected to any order to disclose their notes.<sup>935</sup> They argued the notes reflected the team's "opinions, theories, conclusions, impressions and thoughts of the witnesses as well as any potential statements that they feel are important to

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<sup>931</sup> *Gill*, 242 Ariz. 1, ¶7; *State v. Piper*, 113 Ariz. 390, 392 (1976).

<sup>932</sup> *Twin City Fire Ins. Co.*, 204 Ariz. 251, ¶10.

<sup>933</sup> *Hidalgo*, 241 Ariz. 543, ¶7; *McGill*, 213 Ariz. 147, ¶45; *Moody*, 208 Ariz. 424, ¶62.

<sup>934</sup> I.304 (motion); I.337 (reply); RT-2/16/2016, 25-33.

<sup>935</sup> I.327.

their case” and were not accurate because the notes were not verbatim.<sup>936</sup> Jimmy also argued the notes were work product and disclosure would violate Jimmy’s rights to counsel, mitigation investigation and presentation, and due process.<sup>937</sup>

During oral argument, Jimmy also noted disclosure would convert the defense team, particularly the attorneys, into witnesses.<sup>938</sup> This underscored a potential landmine: impeachment by attorney notes.<sup>939</sup> Counsel predicted it was possible that the prosecutor could cross-examine a witness by asking “Isn’t it true you said this to Mr. Jones or Mr. Reinhardt or their mitigation specialist.”<sup>940</sup> And if the witness disagreed, there would be a dispute that created a conflict of interest.<sup>941</sup>

Over these objections, the court granted the state’s request.<sup>942</sup> The court believed the notes did not reflect “the opinions, theories or conclusions” of a defense attorney and found “the possibility of defense counsel being required to testify at trial highly speculative—and far too speculative to justify blanket nondisclosure.”<sup>943</sup>

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<sup>936</sup> *Id.* at 4-5.

<sup>937</sup> *Id.* at 6-17.

<sup>938</sup> RT-2/16/2016, 10.

<sup>939</sup> *Id.* at 23.

<sup>940</sup> *Id.*

<sup>941</sup> *Id.*

<sup>942</sup> I.344 (ruling); *see also* Appx.J (special action); Appx.K (special action appendix); Appx.L (Limited Response of Judicial Officer); I.359 (Court of Appeals order); RT-3/16/2016, 23-24.

<sup>943</sup> I.344, 2-3.

As predicted, the prosecutor used the notes to attack the credibility of several defense witnesses: Shelley Johnson,<sup>944</sup> Jonathan Woods,<sup>945</sup> Mitchell Woods,<sup>946</sup> Lynn Woods,<sup>947</sup> John Grange,<sup>948</sup> and Kevin Johnson.<sup>949</sup> On several occasions the defense objected, but the court overruled every objection<sup>950</sup> and eventually told the defense, “Look, that ship has sailed.”<sup>951</sup>

### ***Discussion:***

The trial court’s conclusion that attorney notes were subject to disclosure incorrectly interpreted the work product privilege—a privilege that is necessary to ensure the proper administration of an adversarial system. By granting disclosure, the trial court allowed the prosecutor to delve into the defense file and learn the defense attorney’s thoughts and impressions. In doing so, the trial court violated the work product privilege and interfered with Jimmy’s right to counsel,<sup>952</sup> due process,<sup>953</sup> and a reliable sentencing proceeding.<sup>954</sup>

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<sup>944</sup> RT-5/31/2016(afternoon), 79-82.

<sup>945</sup> RT-6/1/2016, 53-57, 75-78.

<sup>946</sup> *Id.* at 121, 125, 129, 133.

<sup>947</sup> RT-6/2/2016, 126-28, 134-35, 138-41, 146, 151, 157.

<sup>948</sup> RT-6/14/2016, 17.

<sup>949</sup> *Id.* at 36-37, 61.

<sup>950</sup> RT-6/1/2016, 53-57; RT-6/2/2016, 128, 139-41.

<sup>951</sup> RT-6/2/2016, 140.

<sup>952</sup> U.S.Const.Amend.. 6; Ariz.Const.Art. 2, §8.

<sup>953</sup> U.S.Const.Amend.. 5, 14; Ariz.Const.Art. 2, §4.

<sup>954</sup> U.S.Const.Amend.. 8; Ariz.Const.Art. 2, §15.



**1. The plain language of Rule 15.2 does not require production of an attorney's notes of a witness's oral statement.**

Both the parties and the trial court started with Rule 15. Rule 15.2 required Jimmy to disclose “The names and addresses of all persons, other than that of the defendant, whom the defendant intends to call as witnesses at trial, together with their relevant written or recorded statements.”<sup>955</sup> In this context, “their” is a pronoun defined as “a form of the possessive case of they used as an attributive adjective.”<sup>956</sup> As such, it modifies the phrase “relevant written or recorded statements.”

While Rule 15.4 provides an expansive definition of what counts as a statement, the rule does not modify the language or structure of Rule 15.2. Thus, the written or recorded statement must be the witness's. An attorney's notes, on the other hand, do not require the approval of the witness. Here, defense counsel told the trial court the witnesses did not “sign off” on the statements.<sup>957</sup> Defense counsel had not taken verbatim notes,<sup>958</sup> so they weren't witness statements; they were the defense's preparation material.

The trial court relied upon the second definition of the word statement in Rule 15.4: “A mechanical, electronic or other recording of a person's oral

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<sup>955</sup> Ariz.R.Crim.P. 15.2(c)(1).

<sup>956</sup> Random House Webster's College Dictionary, 1333 (Random House 1998).

<sup>957</sup> RT-2/16/2016, 24.

<sup>958</sup> I.327, 5; RT-2/16/2016, 19-21.

communications or a transcript thereof ....”<sup>959</sup> Attorney notes are neither mechanical nor electronic. They aren’t transcripts. Attorney notes are not even a “recording,” which is “an account in writing or the like preserving the memory or knowledge of facts or events.”<sup>960</sup> This illustrates the problem: the defense never saw their notes as a tool used for the purpose of “preserving the memory or knowledge of facts” and thus didn’t take down verbatim quotations.<sup>961</sup>

Although the definition of “statement” is broad, it does not include attorney notes. Rather, the definition works in harmony with the possessive nature of the word “their” in Rule 15.2. Attorney notes are not a witness’s statement. They are the attorney’s personal memoranda regarding their investigation—accurate or inaccurate, constantly influenced by the attorney’s viewpoint and thoughts.

**2. Even if attorney notes could be construed as a statement, attorney notes are protected work product.**

The trial court also looked to the exception for work product in Rule 15.4.<sup>962</sup>

Subsection (b) excludes work product from disclosure:

*Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecutor, members of the prosecutor’s legal or investigative staff or law

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<sup>959</sup> See I.344, 2; Ariz.R.Crim.P. 15.4(a)(1)(ii).

<sup>960</sup> Random House Webster’s College Dictionary, 1126 (Random House 1992).

<sup>961</sup> I.327, 5; RT-2/16/2016, 19-21.

<sup>962</sup> I.344, 2-3.

enforcement officers, or of defense counsel or defense counsel's legal or investigative staff.<sup>963</sup>

However, the trial court concluded that any statements would not reveal the opinions, theories, or conclusions of defense counsel.<sup>964</sup> This conclusion ignores the robust protection for work product provided by that language.

The comments to the 2016 Rules of Criminal Procedure explained work product protection aligns with the Supreme Court's decision in *Hickman v. Taylor*.<sup>965</sup> *Hickman* protected precisely this type of circumstance.

Two classes of "statements" were at issue in *Hickman*: 1) actual statements of witnesses in the party's possession and 2) oral statements in attorney notes or memoranda.<sup>966</sup> The majority distinguished these two categories.<sup>967</sup> Regarding the first class, *Hickman* did not foreclose the possibility of disclosure.<sup>968</sup>

Regarding the second class, the Court saw no justification to require disclosure.<sup>969</sup> "[F]orcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of

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<sup>963</sup> Ariz.R.Crim.P. 15.4(b)(1).

<sup>964</sup> I.344, 2-3.

<sup>965</sup> See Ariz.R.Crim.P. 15.4, cmt Rule 15.4(b)(1)(2016)(citing *Hickman v. Taylor*, 329 U.S. 495 (1947); internal citations omitted).

<sup>966</sup> 329 U.S. at 498-99.

<sup>967</sup> See *id.* at 511-13; see also *U.S. v. Nobles*, 422 U.S. 225, 252 (1975)(White, concurring).

<sup>968</sup> *Hickman*, 329 U.S. at 511-12.

<sup>969</sup> *Id.* at 512.

inaccuracy and untrustworthiness.”<sup>970</sup> The Court concluded, “[n]o legitimate purpose is served by such production” and any such production would force “the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses’ remarks.”<sup>971</sup> But such testimony “could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness.”<sup>972</sup> The Court concluded that professional standards would suffer under such a regime.<sup>973</sup>

The Supreme Court’s concerns are proved by this case. The Court was concerned about the inaccuracies of attorney notes because they reflected what the attorney saw fit to note; here, the defense attorneys explained their notes were inaccurate. The Court believed it would be improper to use such notes for impeachment or corroboration; here, the prosecutor repeatedly attacked the credibility of several witnesses with the defense team’s inaccurate notes. The Court believed it would alter the role of the attorney; here, the attorneys were converted into a conduit for the state and placed in apparent opposition to Jimmy’s witnesses.

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<sup>970</sup> *Id.* at 512-13.

<sup>971</sup> *Id.* at 513.

<sup>972</sup> *Id.*

<sup>973</sup> *Id.*

This case proves the very simple conclusion reached by the Supreme Court 60 years ago: “No legitimate purpose is served by such production.”<sup>974</sup>

Justice Jackson’s predictions were even more on point. “The real purpose and the probable effect of the practice ordered by the district court,” Justice Jackson separately opined, “would be to put trials on a level even lower than a ‘battle of wits.’”<sup>975</sup> He could “conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him.”<sup>976</sup> Indeed, “[e]ven if [the lawyer’s] recollection was perfect, the statement would be his language permeated with his inferences.”<sup>977</sup> But lawyer recollections are not perfect, “it is almost impossible so fairly to record the expressions and emphasis of a witness that when he testifies in the environment of the court and under the influence of the leading questions there will not be departures in some respect.”<sup>978</sup>

Such disclosures would place attorneys and witnesses at odds.<sup>979</sup> Opposing counsel would offer the notes to contradict witness statements regardless of the expected answer as any answer would indicate someone—witness or attorney—was

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<sup>974</sup> *Id.* at 513.

<sup>975</sup> *Id.* at 516 (Jackson, J., concurring).

<sup>976</sup> *Id.*

<sup>977</sup> *Id.* at 516-17.

<sup>978</sup> *Id.* at 517.

<sup>979</sup> *Id.*

not truthful.<sup>980</sup> “[I]f this practice were adopted,” as it was here, “that scene would be repeated over and over again.”<sup>981</sup> The result would be a quagmire, where the defense attorney is “branded a deceiver” but cannot reasonably take the stand.<sup>982</sup>

The general impropriety of disclosing attorney notes became even clearer in *U.S. v. Nobles*.<sup>983</sup> In *Nobles*, a defense investigator interviewed two witnesses and wrote an internal report.<sup>984</sup> During trial, both witnesses gave answers inconsistent with the investigator’s interview.<sup>985</sup> The defense decided to impeach the witnesses by calling the investigator.<sup>986</sup> The Court concluded the work product privilege protected the report because the privilege applied to criminal cases and agents of the attorney.<sup>987</sup> However, because the defense wanted to call the investigator to impeach the witnesses, the defense waived the privilege.<sup>988</sup>

Here, the defense did not seek to impeach witnesses with their internal documents. The defense did not put the propriety of their notes at issue; the prosecutor did.

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<sup>980</sup> *Id.*

<sup>981</sup> *Id.*

<sup>982</sup> *Id.*

<sup>983</sup> 422 U.S. 225 (1975).

<sup>984</sup> *Id.* at 227.

<sup>985</sup> *Id.* at 227-28.

<sup>986</sup> *Id.* at 228-29.

<sup>987</sup> *Id.* at 238-39.

<sup>988</sup> *Id.* at 239-40.

Finally, in *Upjohn Company v. U.S.*, the Supreme Court again ensured the protection of an attorney's notes.<sup>989</sup> In *Upjohn*, an attorney interviewed dozens of witnesses in anticipation of litigation.<sup>990</sup> When asked by the government to produce "memorandums or notes of the interviews," the company declined.<sup>991</sup> The government argued *Hickman* recognized the possibility of disclosure of written materials prepared by attorneys.<sup>992</sup> Reiterating the distinction drawn in *Hickman*, the *Upjohn* majority noted the cited language "did not apply to 'oral statements made by witnesses ... whether presently in the form of [the attorney's] mental impressions or memoranda.'" <sup>993</sup> The Court repeated its holding from *Hickman* that "the Court did 'not believe that any showing of necessity can be made under the circumstances of this case so as to justify production.... If there should be a rare situation justifying production of these matters petitioner's case is not of that type.'" <sup>994</sup>

Citing both the *Hickman* majority and Justice Jackson's concurring opinion, the Court also explained that "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes." <sup>995</sup> And the Court highlighted Justice Jackson's

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<sup>989</sup> 449 U.S. 383 (1981).

<sup>990</sup> *Id.* at 386

<sup>991</sup> *Id.* at 387-88.

<sup>992</sup> *Id.* at 399.

<sup>993</sup> *Id.* (quoting *Hickman*, 329 U.S. at 512).

<sup>994</sup> *Id.* (quoting *Hickman*, 329 U.S. at 512-13).

<sup>995</sup> *Id.* (quoting *Hickman*, 329 U.S. at 513 & *id.* at 516-17 (Jackson, J., concurring)).

conclusion that “the statement would be his [the attorney’s] language, permeated with his inferences ....”<sup>996</sup>

The Court then considered the protection provided by Rule 26, which similarly protected theories, conclusions, or opinions.<sup>997</sup> The Court concluded that the rule’s language—language similar to Rule 15.4(b)—protected attorney notes and memoranda regarding witness statements.<sup>998</sup>

Rule 15.4(b)(1) was meant to align with *Hickman*. *Hickman* protected the very type of notes at issue in this case as work product. Applying *Hickman*, *Nobles* concluded the very type of notes at issue in this case were work product, but that the privilege had been waived. And also applying *Hickman*, *Upjohn* protected the very type of notes at issue in this case as work product.

By protecting the “legal research[,] records, correspondence, reports or memoranda ... that ... contain the opinions, theories or conclusions of ... defense counsel or defense counsel’s legal or investigative staff,” Rule 15.4(b)(1) protects attorney notes produced while interviewing potential witnesses.

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<sup>996</sup> *Id.* (quoting *Hickman*, 329 U.S. at 516-17 (Jackson, J., concurring)).

<sup>997</sup> *Id.* at 400.

<sup>998</sup> *Id.* (emphasis added).



### 3. Arizona jurisprudence supports protection of attorney notes.

Arizona's cases are consistent with *Hickman* and its progeny. In *Dean v. Superior Court*,<sup>999</sup> this Court drew the same line *Hickman* had in protecting attorney notes.<sup>1000</sup> Where *Hickman* had held that such statements could be discoverable, this Court ordered disclosure.<sup>1001</sup> However, this Court drew the same line *Hickman* had in protecting attorney notes.<sup>1002</sup>

Thus, this Court refused production of “memoranda in the possession, custody or control of the petitioner purporting to set forth the substance of any oral statements.”<sup>1003</sup> Such a requirement “is fraught with an inherently dangerous practice which must by its very nature lead to inaccuracies, resulting in confusion and misinterpretation rather than to a presentment of the truth.”<sup>1004</sup>

This Court then agreed with Justice White's concurring opinion in *Hickman*, quoting his discussion regarding how such a practice would be demoralizing to the legal practice, create inaccurate conflict between the witness and attorney, and harm

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<sup>999</sup> 84 Ariz. 104, 111 (1958).

<sup>1000</sup> *Id.* (emphasis added).

<sup>1001</sup> *Id.* at 111.

<sup>1002</sup> *Id.* (emphasis added).

<sup>1003</sup> *Id.* at 111-12.

<sup>1004</sup> *Id.* at 112.

the client's case.<sup>1005</sup> Since *Dean*, this Court has repeatedly reiterated this standard.<sup>1006</sup>

Here, defense counsel advised the court their notes reflected mental impressions.<sup>1007</sup> The court's decision to the contrary was incorrect.<sup>1008</sup>

Moreover, the court never based its decision upon an argument of unequal access,<sup>1009</sup> and such a holding would have been incorrect. While the state argued they needed access to hunt for impeachment,<sup>1010</sup> the state could interview the witnesses.<sup>1011</sup> A fishing expedition for impeachment material does not establish substantial need.<sup>1012</sup>

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<sup>1005</sup> *Id.* (quoting *Hickman*, 329 U.S. at 516-17 (White, J., concurring)).

<sup>1006</sup> See *State v. Bowen*, 104 Ariz. 138, 142 (1969); *Longs Drug Stores v. Howe*, 134 Ariz. 424, 426 (1983); *State ex rel. Corbin v. Ybarra*, 161 Ariz. 188, 194 (1989). However, in a trilogy of cases, this Court and the Court of Appeals required a prosecutor to turn over notes based upon Rule 15.4. *State v. Nunez*, 23 Ariz.App. 462, 463 (App. 1975); *State v. Reid*, 114 Ariz. 16, 29-30 (1976); *State v. Jessen*, 130 Ariz. 1, 4 (1981). To the extent these holdings reflect a prosecutor's heightened duties under *Brady v. Maryland*, 373 U.S. 83 (1963) and E.R. 3.8, they do not apply to attorney notes created by defense attorneys. To the extent they would have applied to defense teams, the reasoning of this trilogy has essentially been abandoned and *Dean* has been extended. See *Ybarra*, 161 Ariz. at 194; *Longs Drug Stores*, 134 Ariz. at 426.

<sup>1007</sup> RT-2/16/2016, 19-21.

<sup>1008</sup> See I.344, 3.

<sup>1009</sup> *Id.* at 1-4.

<sup>1010</sup> See I.337, 1-2; RT-2/16/2016, 27.

<sup>1011</sup> See I.327, 11-12; RT-2/16/2016, 9

<sup>1012</sup> See *Ybarra*, 161 Ariz. at 194; *Longs Drug Stores*, 134 Ariz. at 429.

#### 4. Public policy supports protecting attorney notes.

*Hickman*, *Dean*, and their progeny were based both upon the work product privilege and public policy. *Hickman* identified a “public policy underlying the orderly prosecution and defense of legal claims,”<sup>1013</sup> as well as a one protecting the privacy necessary for attorneys to work.<sup>1014</sup> And *Dean* found it immaterial whether the privacy protection was based on privacy or public policy because the immunity was “essential to an orderly working of our system of legal procedure.”<sup>1015</sup>

Here, defense counsel argued that disclosure would make defense counsel a conduit to the state.<sup>1016</sup> The trial court dismissed this as a speculative fear of testifying.<sup>1017</sup> Such flippant dismissal missed the overarching concern, which was not that defense counsel would have to testify, but that unreliable evidence would be offered as authoritative. The trial court’s decision further ignored the importance of this concern in *Hickman*<sup>1018</sup> and *Upjohn*.<sup>1019</sup>

The defense explained their notes were inaccurate.<sup>1020</sup> *Hickman* observed that disclosure of attorney notes “gives rise to grave dangers of inaccuracy and

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<sup>1013</sup> 329 U.S. at 510.

<sup>1014</sup> *Id.* at 512.

<sup>1015</sup> 84 Ariz. at 111.

<sup>1016</sup> RT-2/16/2016, 10.

<sup>1017</sup> I.344, 3.

<sup>1018</sup> 329 U.S. at 512-13; *id.* at 516-17 (White, J., concurring).

<sup>1019</sup> *Upjohn*, 449 U.S. at 399-400.

<sup>1020</sup> I.327, 5, 11; RT-2/16/2016, 19-21.

untrustworthiness.”<sup>1021</sup> *Dean* found disclosure of attorney notes “fraught with an inherently dangerous practice which must by its very nature lead to inaccuracies, resulting in confusion and misinterpretation rather than to a presentment of the truth.”<sup>1022</sup>

And the risk posed by disclosing inaccurate notes played out during trial. Discrepancies arose with Shelley Johnson.<sup>1023</sup> Discrepancies arose with Jonathan Woods, prompting defense counsel to object and remind the trial court that the notes were not accurate.<sup>1024</sup> And during the testimony of Lynn Woods, impeachment with the inaccurate notes prompted two objections.<sup>1025</sup> The first, the court didn’t even let the attorneys approach to state the objection.<sup>1026</sup> During the second, the trial court shut down any further objections, making clear he did not want “to hear the same thing” because “that ship has sailed.”<sup>1027</sup>

The defense attorneys also argued impeachment by attorney notes created an untenable conflict, pitting the attorneys against the witnesses.<sup>1028</sup> Justice White predicted, “[w]henver the testimony of the witness would differ from the ‘exact’

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<sup>1021</sup> 329 U.S. at 512-13.

<sup>1022</sup> 85 Ariz. at 112.

<sup>1023</sup> RT 5/31/2016 (afternoon), 79-82.

<sup>1024</sup> RT 6/1/2016, 53-57.

<sup>1025</sup> RT 6/2/2016, 127-28, 138-40.

<sup>1026</sup> *Id.* at 127-28.

<sup>1027</sup> *Id.* at 138-40.

<sup>1028</sup> RT-2/16/2016, 10.

statement the lawyer had delivered, the lawyer’s statement would be whipped out to impeach the witness.”<sup>1029</sup> In doing so, the cross-examining lawyer “could lose nothing by saying ‘Here is a contradiction, gentlemen of the jury. I do not know whether it is my adversary or his witness who is telling the truth, but one is not.’”<sup>1030</sup> And the attorney who provided the notes is then in the impossible quandary of being “branded a deceiver” or taking the stand and contradicting the witness.<sup>1031</sup> In *Dean*, this Court agreed with Justice White’s concerns.<sup>1032</sup>

Because this reasoning was not persuasive to the court,<sup>1033</sup> the state used the defense team notes to impeach Shelley Johnson,<sup>1034</sup> Jonathan Woods,<sup>1035</sup> Lynn Woods,<sup>1036</sup> and Kevin Johnson, just as Justice White, this Court, and the defense predicted.<sup>1037</sup> And through it, the defense was left powerless—branded deceivers, unable to take the stand to clarify the issue for the jury.

Additionally, Arizona requires attorneys to take notes. Rule 6.3 requires capital counsel to maintain and make available the entire file “as well as all

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<sup>1029</sup> See *Hickman*, 329 U.S. at 516-17 (White, J., concurring).

<sup>1030</sup> *Id.* at 517.

<sup>1031</sup> *Id.*

<sup>1032</sup> 84 Ariz. at 112.

<sup>1033</sup> I.344, 3.

<sup>1034</sup> RT-5/31/2016(afternoon), 79-82.

<sup>1035</sup> RT-6/1/2016, 53-57, 75-78; see also *id.* at 121, 125, 129, 133 (using notes during examination of Mitchell Woods).

<sup>1036</sup> RT-6/2/2016, 126-28, 138-41; see also *id.* at 134-35, 146, 151, 157.

<sup>1037</sup> RT-6/14/2016, 36-37, 61; see also *id.* at 17 (using notes during examination of John Grange)

information regarding every aspect of the representation ....”<sup>1038</sup> The 2009 comment explained the purpose “is to ensure that files are maintained in accordance with the ABA Guidelines ....”<sup>1039</sup> And the file includes, but is not limited to “notes, electronic files and correspondence, investigator produced product and mitigation specialist produced product ....”<sup>1040</sup> The ABA Guidelines for The Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.13 also requires defense counsel to maintain such a file.<sup>1041</sup>

The Arizona Rules require the creation of the notes at issue in this case. Defense counsel had no way to ethically maintain a file without falling subject to this ill-advised order. This creates an imbalance seen in this case. Here, the prosecutor spent an entire day with a key witness, the case agent for the Columbine shooting, and never produced a single note.<sup>1042</sup> Prosecutors can get away with this; defense attorneys cannot.

A second problem arises if defense counsel does not maintain files: insufficient records on post-conviction proceedings. Files should be maintained to preserve memory and aid successor counsel in raising claims.<sup>1043</sup> If defense counsel

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<sup>1038</sup> Ariz.R.Crim.P. 6.3(d)(2016).

<sup>1039</sup> Ariz.R.Crim.P. 6.3(2016), 2009 cmt. to 6.3(d).

<sup>1040</sup> *Id.*

<sup>1041</sup> ABA Guideline 10.13.

<sup>1042</sup> RT-3/16/2016, 23-24.

<sup>1043</sup> *Id.*

does not maintain a record, the defendant is hamstrung in his ability to bring post-conviction relief or habeas claims. Trial counsel will simply be unable to recall what he or she did, or why.

**5. The trial court incorrectly overruled Jimmy’s repeated objections to the prosecutor’s impeachment with the notes.**

Even if the disclosure were proper, the trial court still should not have allowed the prosecutor to impeach witnesses with notes that defense counsel stated were not accurate. The policy issues discussed in *Hickman* and *Dean* explain why impeachment with unreliable notes is improper.

Additionally The District of Columbia Court of Appeals recently considered a similar claim in *Brooks v. U.S.*<sup>1044</sup> There, the Court disapproved of the prosecutor’s use of an attorney-written summary to impeach witnesses because the process pitted “defense counsel’s credibility as an officer of the court against his client’s own defense and interest.”<sup>1045</sup> However, the defense in *Brooks* agreed the statements could be used to impeach the witness and participated in fashioning a stipulation.<sup>1046</sup> Thus, the Court reviewed for plain error.<sup>1047</sup> Because the defendant did not meet this heightened standard, the Court affirmed.<sup>1048</sup>

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<sup>1044</sup> 115 A.3d 1217 (D.C.App. 2015).

<sup>1045</sup> *Id.* at 1220.

<sup>1046</sup> *Id.* at 1221.

<sup>1047</sup> *Id.*

<sup>1048</sup> *Id.*

No such stipulation was entered here. Instead, the defense steadfastly objected to disclosure and use but the lower court overruled all objections.<sup>1049</sup> These rulings allowed the prosecutor to repeatedly use the defense team's inaccurate notes to challenge witness testimony and pit the credibility of defense counsel against Jimmy's witnesses.<sup>1050</sup> Even if the court's decision to mandate disclosure is excusable, its rulings allowing impeachment of defense mitigation witnesses with inaccurate notes is not.

**6. The errors negatively impacted Jimmy's rights to due process, effective assistance of counsel, and a fair and reliable sentencing hearing.**

Allowing the state to pierce privilege and access defense notes is a problem of constitutional weight, impacting the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, as well as Article 2, §§4, 15, and 24 of the Arizona Constitution.

Piercing privilege renders defense attorneys incapable of ethically representing clients, thereby depriving defendants of effective assistance of counsel.<sup>1051</sup> Counsel must maintain records,<sup>1052</sup> but those records are then turned

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<sup>1049</sup> RT-2/16/2016, 19-21; RT-6/1/2016, 53-57; RT-6/2/2016, 127-28, 138-40.

<sup>1050</sup> RT-5/31/2016(afternoon), 79-82; RT-6/1/2016, 53-57; RT-6/2/2016, 127-28, 138-40; RT-6/14/2016, 36-37.

<sup>1051</sup> See U.S.Const.Amend.. 6; Ariz.Const.Art. 2, §24; *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

<sup>1052</sup> See Ariz.R.Crim.P. 6.3, 2009 cmt. to 6.3(d); ABA Guideline 10.7(A); ABA Guideline 10.7(A) Commentary, Guilt/Innocence; ABA Guideline 10.13.



over to the prosecution so no attorney can protect their investigations. *Hickman* noted this concern and concluded “the effect on the legal profession would be demoralizing”<sup>1053</sup> and “[t]he standards of the profession would ... suffer.”<sup>1054</sup>

Due process is also implicated.<sup>1055</sup> In *Nobles*, the Supreme Court recognized the connection between privilege and the reliability of a criminal trial.<sup>1056</sup> Privilege protects this fairness because it prevents the prosecutor from pitting a defense witness against the credibility of defense counsel and his inaccurate notes. This need for fairness is heightened in the context of capital sentencing.<sup>1057</sup>

Here, the impropriety did not occur in a non-capital case or the guilt-phase; the improper impeachment occurred during the sentencing phase. Indeed, the very intrusion was into mitigation phase notes. In light of this error, the sentencing was not fair under the Fifth and Fourteenth Amendments and did not satisfy the heightened reliability standard required by the Eighth Amendment.

## **7. Dismissal of the death penalty is the only viable remedy.**

The damage in this case has been done. The state has already pierced the protection of work product privilege and seen defense counsel’s notes. A transcript

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<sup>1053</sup> 329 U.S. at 511.

<sup>1054</sup> *Id.* at 513.

<sup>1055</sup> U.S.Const.Amend.. 5, 14; Ariz.Const.Art. 2, §4; *In re Murchison*, 349 U.S. 133, 136 (1955).

<sup>1056</sup> 422 U.S. at 238.

<sup>1057</sup> *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985)(quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)); *see also* Ariz.Const.Art. 2, §15.

has been produced detailing conflicts. The very production of this brief requires reference to conflicts, as will the state's brief. The intrusion has occurred and no combination of protections can protect Jimmy upon retrial.

While a sentencing error would normally result in a new sentencing proceeding, most sentencing errors do not have the lasting impact of this one. The prosecution in this case cannot unsee defense notes and no replacement counsel could be adequately walled off to circumvent the error. Dismissal of the death penalty is the only remedy possible.

## **ARGUMENT 14**

THE TRIAL COURT VIOLATED JIMMY’S RIGHT TO BE PRESUMED INNOCENT WHEN THE COURT DENIED JIMMY’S MOTION TO WITHDRAW FROM HIS PLEA AGREEMENT IN THE ARMED ROBBERY CASE ON THE GROUNDS THAT JIMMY KNEW HE HAD COMMITTED THE MURDER.

### ***Standard of Review:***

Normally, a trial court’s decision whether to grant a motion to withdraw from a guilty plea is reviewed for an abuse of discretion.<sup>1058</sup> However, a trial court abuses its discretion when it makes legal error and this Court reviews the underlying legal question de novo.<sup>1059</sup> Additionally, Jimmy’s claim is constitutional in nature and this Court reviews constitutional issues de novo.<sup>1060</sup>

### ***Discussion:***

The Supreme Court has made clear, “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal

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<sup>1058</sup> *State v. Ellison*, 111 Ariz. 167, 168 (1974).

<sup>1059</sup> *Twin City Fire Ins. Co.*, 204 Ariz. 251, ¶10.

<sup>1060</sup> *Hidalgo*, 241 Ariz. 543, ¶7; *McGill*, 213 Ariz. 147, ¶45; *Moody*, 208 Ariz. 424, ¶62.

law.”<sup>1061</sup> Although the phrase “presumption of innocence” is not constitutionally mandated, due process requires guilt to be proven beyond a reasonable doubt.<sup>1062</sup>

Nothing about a plea withdrawal decision changes this presumption. The Rules of Criminal Procedure give trial courts discretion to grant motions to withdraw from pleas.<sup>1063</sup> Our Court of Appeals observed this discretion “should be liberally exercised in favor of permitting the withdrawal where there is any showing that justice will be served thereby.”<sup>1064</sup> Although a defendant’s dissatisfaction with the plea bargain is not generally a basis for reversal,<sup>1065</sup> the court is given wide discretion to allow withdrawal.<sup>1066</sup> Withdrawal must be allowed when necessary for the interests of justice.<sup>1067</sup>

Here, Jimmy did not know the state had a murder charge forthcoming and that his guilty plea would be used as an aggravator to make him death eligible.<sup>1068</sup> This

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<sup>1061</sup> *Taylor v. Kentucky*, 436 U.S. 478, 482 (1978)(quoting *Coffin v. U.S.*, 156 U.S. 432, 453 (1895)).

<sup>1062</sup> *Id.* at 485-86 (quoting *Estelle v. Williams*, 425 U.S. 501, 503 (1976)); *see also Simpson v. Miller*, 241 Ariz. 341, ¶16 (2017); Ariz.Const.Art. 2, §4.

<sup>1063</sup> Ariz.R.Crim.P. Rule 17.5.

<sup>1064</sup> *State v. Gibbs*, 6 Ariz.App. 600, 602 (App. 1968); *accord State v. De Nistor*, 143 Ariz. 407, 411 (1985)(“As to the withdrawal of a plea of guilty, the court is given wide discretion in allowing the defendant to change his mind.”).

<sup>1065</sup> *State v. Howard*, 106 Ariz. 403, 405 (1960).

<sup>1066</sup> *State v. De Nistor*, 143 Ariz. 407, 411 (1985).

<sup>1067</sup> *Id.*; *State v. Wilson*, 95 Ariz. 372, 373 (1964).

<sup>1068</sup> Mot. Withdraw, 5/25/2012 (Appx.C); *see also State v. Richardson*, 175 Ariz. 336, 339 (App. 1993); Direct Complaint, CR 2010-164968-001 (Appx.A); Plea Agreement, CR 2010-164968-001 (Appx.B); Exh.293 (CR 2010-164968-001, ME-12/21/2010).

charge was information that impacted the apparent benefit of the plea agreement.<sup>1069</sup> Jimmy learned the state did not use the plea process to negotiate a single case in earnest; the state used the plea process to create a tactical advantage in a subsequent charge.<sup>1070</sup>

The court's only support was an improper violation of Jimmy's presumption of innocence.<sup>1071</sup> The trial court concluded Jimmy did not learn of new information when he was charged because he "was aware of what he had done or had not done at the time he entered into this plea" and "could have shared it with his attorney."<sup>1072</sup> But the only way to reach that conclusion was to discard the presumption of innocence.

This illustrates the problem. An innocent person—a person who did not commit this murder—never would have known a murder charge was forthcoming. An innocent person—a person who did not commit this murder—never would have had reason to ask his Armed Robbery attorney how the conviction would impact a forthcoming murder charge. An innocent person—a person who did not commit this murder—never would have made a choice to withhold information. The knowledge

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<sup>1069</sup> Mot. Withdraw, 5/25/2012 (Appx.C); *see also State v. Dockery*, 169 Ariz. 527, 529 (App. 1991).

<sup>1070</sup> Mot. Withdraw, 5/25/2012 (Appx.C); *see also Duran v. Superior Court*, 162 Ariz. 206, 208 (App. 1989); *State v. Fritz*, 157 Ariz. 139, 141 (App. 1988).

<sup>1071</sup> St. Resp. to Def. Mot. Withdraw, 6-7 (Appx.D).

<sup>1072</sup> RT-8/10/2012, 18.

simply did not exist. The only way the trial court could have reached its decision was to discard the presumption of innocence.

In doing so, the trial court not only disregarded the law, but a principle so “axiomatic and elementary” that “its enforcement lies at the foundation of the administration of our criminal law.”<sup>1073</sup> As this Court has recognized, “An error of law committed in reaching a discretionary conclusion may ... constitute an abuse of discretion.”<sup>1074</sup> Here, the court premised its discretionary decision upon a legal error, abusing its discretion.

Further, the error harmed Jimmy. Part of the state’s proof of the (F)(2) aggravator was the Armed Robbery plea.<sup>1075</sup> Thus, when the jury considered whether to impose life or death, the jury considered the weight of the (F)(2) aggravator, bolstered by the conviction.<sup>1076</sup>

Finally, the focus is not whether the state would otherwise obtain a verdict; the question is whether there is “an objective reason for the defendant’s reevaluation

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<sup>1073</sup> *Taylor*, 436 U.S. at 482 (quoting *Coffin*, 156 U.S. at 453).

<sup>1074</sup> *Busso-Estopellan v. Mroz*, 238 Ariz. 553, ¶5 (2015)(quoting *State v. Wall*, 212 Ariz. 1, ¶12 (2006)).

<sup>1075</sup> RT-5/25/2016, 56-57; *see also* RT-5/26/2016, 10-11; RT-6/29/2016, 6; I.492; I.529.

<sup>1076</sup> *See* RT-6/23/2016, 151; *State ex rel Thomas v. Granville*, 211 Ariz. 468, ¶17 (2005); A.R.S. §13-751(E).

....”<sup>1077</sup> Here, the murder charge provided an objective reason for Jimmy to reevaluate the plea.

Accordingly, this Court should vacate the death sentence and remand for new aggravation and penalty phases.

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<sup>1077</sup> *Duran*, 162 Ariz. at 208; *accord Dockery*, 169 Ariz. at 528-29.

## **ARGUMENT 15**

THE TRIAL COURT IMPROPERLY ORDERED  
JIMMY TO SIGN WAIVERS SO THE PROSECUTOR  
COULD OBTAIN DOCUMENTS.

### ***Standard of Review:***

A trial court's rulings regarding disclosure are reviewed for an abuse of discretion.<sup>1078</sup> A trial court abuses its discretion when it makes a legal error and this Court reviews the underlying legal question de novo.<sup>1079</sup>

### ***Discussion:***

While few opinions have considered whether a trial court can compel a litigant to sign a waiver for the opposing party, a Federal District Court considered the question last year in *Sherlock v. Fontainebleau* and concluded that compelled signature was improper.<sup>1080</sup> Here, the trial court ordered Jimmy to sign waivers to release records to the State and Jimmy complied.<sup>1081</sup> This decision was improper.

Moreover, the order undercut the voluntariness of the waiver. At its base, coercion renders an act involuntary.<sup>1082</sup> As the Supreme Court has noted, the burden

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<sup>1078</sup> *Gill*, 242 Ariz. 1, ¶7; *Piper*, 113 Ariz. at 392.

<sup>1079</sup> *Twin City Fire Ins. Co.*, 204 Ariz. 251, ¶10.

<sup>1080</sup> 229 F.Supp.3d 1277, 1282-83 (S.D. Fla. 2017)

<sup>1081</sup> RT-2/16/2016, 54-56; RT-2/26/2016, 11-13; RT-4/21/2016, 86-89; RT-5/23/2016, 12-14.

<sup>1082</sup> See *State v. Moody*, 192 Ariz. 505, ¶23 (1998); *State v. Newell*, 212 Ariz. 389, ¶44 (2006); *State v. Tapia*, 159 Ariz. 284, 288 (1988); U.S.Const.Amend.. 4; Ariz.Const.Art. 2, §8; Ariz.R.Crim.P. 17.3.



to show consent “cannot be discharged by showing no more than acquiescence to a claim of lawful authority.”<sup>1083</sup> Jimmy’s mere compliance with the court’s order was not a voluntary “waiver” of his privacy rights.

The court’s order also casts doubts upon the fairness of the proceedings. In *In re Murchison*, the Supreme Court noted that for the court system “to perform its high function in the best way ‘justice must satisfy the appearance of justice.’”<sup>1084</sup> A trial court’s failure “to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.”<sup>1085</sup>

Relying in part upon *Murchison*, this Court recognized in *McElhanon v. Hing*, “Even where there is no actual bias, justice must appear fair.”<sup>1086</sup> Thus, in *McElhanon*, this Court agreed that “justice must not only be done fairly but ... must be perceived as having been fairly done.”<sup>1087</sup> “Anything else tends to undermine public confidence in the judicial system.”<sup>1088</sup>

Here, however, the appearance of impropriety is substantial. Over Jimmy’s objections, the trial court ordered Jimmy to sign waivers authorizing the state to gain

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<sup>1083</sup> *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968).

<sup>1084</sup> 349 U.S. 133, 136 (1955) (quoting *Offutt v. U.S.*, 348 U.S. 11, 14 (1954)).

<sup>1085</sup> *Id.* (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

<sup>1086</sup> 151 Ariz. 403, 411 (1986); *see also State v. Hursey*, 176 Ariz. 615, 618-19 (1993); *Matter of Walker*, 153 Ariz. 307, 310-11 (1987); *Rodriguez v. State*, 129 Ariz. 67, 73-74 (1981); *In re Ethics Opinion No. 74-28*, 111 Ariz. 519, 521-22 (1975).

<sup>1087</sup> 151 Ariz. at 412.

<sup>1088</sup> *Id.*

access to his records.<sup>1089</sup> Such compulsion did not “hold the balance nice, clear, and true between the State and the accused” and therefore denied Jimmy “due process of law.”<sup>1090</sup>

Because the court’s orders were improper, rendered Jimmy’s signature involuntary, and possess an appearance of impropriety, this Court should vacate the sentence and order a new penalty phase.

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<sup>1089</sup> RT-2/26/2016, 12-13; RT-5/23/2016, 14.

<sup>1090</sup> *Murchison*, 349 U.S. at 136.

## **ARGUMENT 16**

THE COURT’S RULINGS PREVENTED THE  
DEFENSE FROM SCREENING AND CHOOSING A  
CONSTITUTIONALLY ADEQUATE JURY.

### ***Standard of Review:***

Trial by a biased trier of fact is structural error and prejudice is presumed.<sup>1091</sup>

Moreover, constitutional errors are reviewed de novo.<sup>1092</sup>

### ***Discussion:***

Under *Morgan v. Illinois*, a capital jury cannot include any juror who would automatically vote for death.<sup>1093</sup> Inadequate voir dire prevents the trial court from fulfilling its obligation to remove jurors who will not follow the court’s instructions.<sup>1094</sup> Proper voir dire is instrumental in discovering a prospective juror’s ability to set aside their own opinions.<sup>1095</sup> General questions about fairness and following the law don’t satisfy a capital defendant’s right to inquire because the juror might not even be aware they harbor bias.<sup>1096</sup> The Fifth and Fourth Circuits have observed a voir dire procedure “that effectively impairs the defendant’s ability to

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<sup>1091</sup> *State v. Valverde*, 220 Ariz. 582, ¶10 (2009).

<sup>1092</sup> *Hidalgo*, 241 Ariz. 543, ¶7; *McGill*, 213 Ariz. 147, ¶45; *Moody*, 208 Ariz. 424, ¶62.

<sup>1093</sup> 504 U.S. 719, 738 (1992).

<sup>1094</sup> 504 U.S. at 729-30.

<sup>1095</sup> *State v. Valenzuela*, 216 Ariz. 300, ¶19 (2007).

<sup>1096</sup> *Morgan*, 504 U.S. at 734-35.

exercise his challenges intelligently is ground for reversal, irrespective of prejudice.”<sup>1097</sup>

As this Court explained in *State v. Prince*, “stakeout” questions seek a precommitment from the juror about how they will vote based on certain facts.<sup>1098</sup> Case-specific questions are not stakeout questions if they seek to determine whether jurors can be fair in considering evidence and applying law.<sup>1099</sup> The only commitment extracted is to properly perform their duties.<sup>1100</sup>

Here, the trial court sustained several objections to questions asking whether jurors would be willing to consider mitigation or immediately ignore it.<sup>1101</sup> The court gave the prosecutor this leeway, though.<sup>1102</sup> Without the ability to ask these questions, Jimmy was left unable to adequately engage in the jury selection process. Additionally, the court’s time limit allowed just four-and-a-half minutes per

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<sup>1097</sup> *Knox v. Collins*, 928 F.2d 657 (5th Cir. 1991); accord *U.S. v. Rucker*, 557 F.2d 1046, 1049 (1977).

<sup>1098</sup> *State v. Prince*, 226 Ariz. 516, ¶35 (2011).

<sup>1099</sup> *Id.*

<sup>1100</sup> *Id.*; see also *State v. Garcia*, 224 Ariz. 1, ¶16 (2010); *State v. Patterson*, 230 Ariz. 270, ¶¶7-8 (2012); *State v. Ruben Johnson*, 212 Ariz. 425, ¶¶29-31 (2006).

<sup>1101</sup> RT-4/11/2016, 145-49, 150, 151-53, 157-63, 181-88; RT-4/12/2016, 33, 40-42, 200-03, 226-29; RT-4/13/2016, 120-21; RT-4/14/16, 37-40, 47; see also I.403, 2-3.

<sup>1102</sup> See, e.g., RT-4/13/2016, 45-46, 165.

juror.<sup>1103</sup> This process impaired Jimmy's ability to intelligently exercise his challenges intelligently, undercutting his right to a fair and impartial jury.<sup>1104</sup>

In light of these errors, the empaneled jury cannot be trusted and this Court should vacate the conviction and sentence and order a new trial.

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<sup>1103</sup> RT-3/25/2016, 4-5; RT-4/11/2016, 52, 103-05, 122-23, 127-30.

<sup>1104</sup> *See J.E.B. v. Alabama*, 511 U.S. 127, 143-44 (1994); U.S.Const.Amend.. 6; Ariz.Const.Art. 2, §§23, 24.

## **ARGUMENT 17**

THE TRIAL COURT INCORRECTLY DENIED  
JIMMY’S MOTION TO STRIKE THREE JURORS FOR  
CAUSE.

### ***Standard of Review:***

The trial court’s decisions regarding striking jurors for cause are reviewed for abuse of discretion.<sup>1105</sup> To preserve, the party must object<sup>1106</sup> and use a peremptory strike.<sup>1107</sup> Jimmy did both.<sup>1108</sup>

### ***Discussion:***

Jimmy was entitled to a trial by an impartial jury, including in the penalty phase.<sup>1109</sup> If even one juror who would automatically vote for death remains and death is imposed, “the State is disentitled to execute the sentence.”<sup>1110</sup>

The comment to Rule 18.4(b) states that a challenge for cause can be based on a showing of facts “from which an ordinary person would imply a likelihood of

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<sup>1105</sup> *State v. Moore*, 222 Ariz. 1, 10 ¶37 (2009).

<sup>1106</sup> *See State v. Moody*, 208 Ariz. 424, ¶85 (2004).

<sup>1107</sup> *State v. Rubio*, 219 Ariz. 177, ¶¶4-13 (App. 2008).

<sup>1108</sup> RT-4/11/2016, 180-89; I.403; I.540, 1-2.

<sup>1109</sup> *Morgan v. Illinois*, 504 U.S. 719 (1992); Ariz.R.Crim.P. 18.4(b); A.R.S. §21-211(4); Ariz.Const.Art. 2, §24.

<sup>1110</sup> *Id.*

predisposition in favor of one of the parties.”<sup>1111</sup> A.R.S. §21-211(4) requires disqualification of anyone biased or prejudiced in favor of or against either party.<sup>1112</sup>

To prevail on a claim of error for a court’s failure to grant strikes for cause, the defendant must show prejudice.<sup>1113</sup> Although Prospective Jurors 9, 31, and 59 each unambiguously answered they could not envision any mitigation that would warrant a sentence less than death in a first-degree murder case,<sup>1114</sup> the trial court refused to strike them.<sup>1115</sup> Because the defense had to use three peremptory strikes on Jurors 9, 31, and 59,<sup>1116</sup> they couldn’t remove three other jurors biased towards the state:

- Prospective Juror 56/Impaneled Juror 1, who believed the state had God-given authority to impose death.<sup>1117</sup>
- Prospective Juror 154/Impaneled Juror 8, who agreed he would be more likely to believe police officers.<sup>1118</sup>
- Prospective Juror 294/Impaneled Juror 12, who had severe problems with domestic violence, an issue in this case, and was a strong proponent of victim’s rights.<sup>1119</sup>

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<sup>1111</sup> Ariz.R.Crim.P. 18.4(b) cmt.

<sup>1112</sup> *See State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, ¶¶31-32 (2017); Black’s Law Dictionary (10th ed. 2014), shall.

<sup>1113</sup> *State v. Hickman*, 205 Ariz. 192, ¶32 (2003).

<sup>1114</sup> RT-4/11/2016, 156-57, 167-68, 176; *see also* I.429, 95.

<sup>1115</sup> RT-4/11/2016, 187.

<sup>1116</sup> I.540, 1, 2.

<sup>1117</sup> I.431, 124, 126, 130.

<sup>1118</sup> I.435, 142; RT-4/12/2016, 117-20, 149-50.

<sup>1119</sup> I.441, 43; RT-4/13/2016, 60-64, 68-76.

The defense should have been permitted to exercise its peremptories on these jurors, and their inclusion on the final jury violated Jimmy’s right to a fair and impartial jury. A juror who believes one party has godly authority holds a “predisposition in favor of one of the parties.”<sup>1120</sup> Strong, pro-law enforcement leanings is such a detrimental form of bias in criminal cases that some jurisdictions have deemed it reversible error to fail to inquire about such bias.<sup>1121</sup> And a juror who has strong leanings in favor of domestic violence victims cannot be a fair juror in a case where evidence will be introduced that the defendant committed domestic violence.

Accordingly, this Court should vacate the conviction and sentence and order a new trial.

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<sup>1120</sup> See Ariz.R.Crim.P. 18.4(b), cmt.

<sup>1121</sup> *U.S. v. Anagnos*, 853 F.2d 1, 3 (1st Cir.1988); *U.S. v. Contreras–Castro*, 825 F.2d 185, 187 (9th Cir.1987); *U.S. v. Fell*, 372 F.Supp.2d 766, 769 (D.Vt. 2005).



## **ARGUMENT 18**

### **THE TRIAL COURT IMPROPERLY DENIED JIMMY'S MOTION TO STRIKE JUROR 6.**

#### ***Standard of Review:***

This Court should review for structural error. Although the Supreme Court has indicated that “most constitutional errors can be harmless,”<sup>1122</sup> it has limited this view to cases where “the defendant had counsel and was tried by an impartial adjudicator ....”<sup>1123</sup> In cases where the defendant is deprived of his right to an impartial decision maker, error is structural and “subject to automatic reversal.”<sup>1124</sup>

#### ***Discussion:***

The Constitution guarantees the right to trial by a fair and impartial jury.<sup>1125</sup> As Justice O'Connor noted, “implied bias” can violate the 6th Amendment and create “manifestly unjust procedures resulting in a miscarriage of justice.”<sup>1126</sup>

This Court reached a similar conclusion in *State v. Eddington*.<sup>1127</sup> This Court concluded it was improper to leave a deputy sheriff on the jury in a case where the defendant was charged as an accomplice with murdering the son of a Tucson police

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<sup>1122</sup> *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991).

<sup>1123</sup> *Neder v. U.S.*, 527 U.S. 1, 8 (1999).

<sup>1124</sup> *Id.*; see *Tumey v. Ohio*, 273 U.S. 510, 535 (1927); *Estrada v. Scribner*, 512 F.3d 1227, 1235 (9th Cir. 2008).

<sup>1125</sup> *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

<sup>1126</sup> *Smith v. Phillips*, 455 U.S. 209, 222-24 (1982)(O'Connor, J., concurring)

<sup>1127</sup> 228 Ariz. 361 (2011).

officer.<sup>1128</sup> Such a juror “might feel pressure in judging the credibility and conduct of coworkers, a role with potential consequences for his future working relationships.”<sup>1129</sup> This Court noted, “A deputy sitting as a juror might hesitate to join a defense verdict in a criminal case ....”<sup>1130</sup> Moreover, a substantial basis for A.R.S. §21-211, which mandates dismissal of biased or interested jurors, was “to promote public confidence in the judicial system.”<sup>1131</sup> The inclusion of an officer would undermine public confidence.<sup>1132</sup> Accordingly, this Court concluded the officer should have been struck for cause.<sup>1133</sup>

Here, Juror 6 developed a similar impairment when her juvenile daughter was named a victim in a case charged by the same agency prosecuting Jimmy near the time of guilt phase deliberation.<sup>1134</sup> Just as a police officer could want to “see one side prevail,” a mother who wants successful prosecution of her daughter’s abuser would want to see the prosecution prevail. Just as an officer “might feel pressure in judging the credibility and conduct” of the state’s witnesses, a mother wanting to protect her daughter and see justice done could feel more inclined to evaluate witnesses in the state’s favor. Like *Eddington*, “the public likely—and the defendant

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<sup>1128</sup> *Id.* at ¶¶1-2.

<sup>1129</sup> *Id.* at ¶12 (quotation marks omitted).

<sup>1130</sup> *Id.*

<sup>1131</sup> *Id.* at ¶14.

<sup>1132</sup> *Id.*

<sup>1133</sup> *Id.* at ¶¶1, 4, 19.

<sup>1134</sup> RT-6/28/2016, 4-23; *id.* at 8; RT-5/16/2016; I.540, 23-25.

undoubtedly—would reasonably perceive that a fair trial had not been had, even if all the jurors had sworn during voir dire that they could be fair and impartial.”<sup>1135</sup> Unlike *Eddington*, Jimmy could not use a peremptory on Juror 6 and she deliberated.<sup>1136</sup>

Because the only information is Juror 6 learned of the accusations in “mid-May,”<sup>1137</sup> this Court should vacate the conviction. At a minimum, however, Juror 6 developed an interest before penalty deliberations and this Court should vacate the sentence.

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<sup>1135</sup> *Eddington*, 228 Ariz. 361, ¶14.

<sup>1136</sup> See *Eddington*, 228 Ariz. 361, ¶3; RT-5/16/2016, 121.

<sup>1137</sup> RT-6/28/2016, 8.

## **ARGUMENT 19**

### **THE LOWER COURT IMPROPERLY GAVE RULE 106 PRECLUSIVE EFFECT.**

#### ***Standard of Review:***

This Court generally reviews “a trial court’s evidentiary rulings for an abuse of discretion.”<sup>1138</sup> However, this Court reviews “de novo the interpretation of the Arizona Rules of Evidence.”<sup>1139</sup>

#### ***Discussion:***

Evidence Rule 106 “is a rule of inclusion rather than exclusion.”<sup>1140</sup> It “provides that if one party introduces part of a recorded statement, an adverse party may require the concurrent introduction of other parts when fairness demands, thereby ‘secur[ing] for the tribunal a complete understanding of the total tenor and effect of the utterance.’”<sup>1141</sup>

Here, the trial court repeatedly gave Rule 106 preclusive effect in a manner that modified defense questioning.<sup>1142</sup> These rulings interfered with Jimmy’s ability to present his case and mitigation.

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<sup>1138</sup> *State v. Steinle in and for the County of Maricopa (Moran)*, 239 Ariz. 415, ¶6 (2016).

<sup>1139</sup> *Id.*; see also Ariz.R.Crim.P. 106.

<sup>1140</sup> *Moran*, 239 Ariz. 415, ¶10.

<sup>1141</sup> *Id.* (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171-72 (1988)).

<sup>1142</sup> See RT-5/11/2016, 40-44, 48-77, 101-02, 128-31; RT-6/1/2016, 79-80.

## **ARGUMENT 20**

### **JIMMY’S CONVICTION WAS TAINTED BY PROSECUTORIAL MISCONDUCT.**

#### ***Standard of Review:***

When a defendant objects to prosecutorial misconduct, the issue is preserved; when a defendant fails to object, this Court reviews for fundamental error.<sup>1143</sup> This Court will reverse a conviction if misconduct is present and “a reasonable likelihood exists that [it] could have affected the jury’s verdict ....”<sup>1144</sup> Even if alleged misconduct does not individually warrant reversal, this Court considers whether acts “contribute to a finding of persistent and pervasive misconduct.”<sup>1145</sup>

#### ***Discussion:***

##### **1. The prosecutor repeatedly misstated the DNA evidence.**

It is improper for a prosecutor to misstate evidence and an intentional misstatement is “a serious breach of the prosecutor’s duty.”<sup>1146</sup> More specifically, it is improper to misstate the impact of DNA evidence. The Supreme Court of Minnesota warned they “will not hesitate to award a new trial to a defendant if [their] review of the trial record reveals that quantitative or qualitative DNA identification

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<sup>1143</sup> *State v. Roque*, 213 Ariz. 193, ¶154 (2006).

<sup>1144</sup> *State v. Anderson*, 210 Ariz. 327, ¶45 (2005).

<sup>1145</sup> *Roque*, 213 Ariz. 193, ¶155.

<sup>1146</sup> *State v. Cannon*, 148 Ariz. 72, 77 (1985); *see also e.g., U.S. v. Atcheson*, 94 F.3d 1237, 1244 (9th Cir. 1996); *State v. Mayhorn*, 720 N.W.2d 776, 788 (Minn. 2006).

evidence was presented in a misleading or improper way.”<sup>1147</sup> The Court of Appeals of Maryland granted a new trial when the prosecutor overstated the statistics of a DNA evaluation and argued DNA matched defendant’s DNA when, in actuality, a mixed sample was consistent with defendant’s DNA at 11 of 15 tested locations.<sup>1148</sup>

The Supreme Court of Kentucky also faced a similar issue in *Duncan v. Commonwealth*.<sup>1149</sup> There, the prosecutor cross-examined the defendant and asserted, “The DNA has to be wrong for your story to be true. Isn’t that correct.”<sup>1150</sup> The Court found this questioning egregious because the DNA retrieved was mixed and several sites yielded incomplete results.<sup>1151</sup> The sample couldn’t exclude the defendant, but also didn’t exclude others.<sup>1152</sup> Thus, it was improper to cross-examine the defendant via a misrepresentation of DNA evidence.<sup>1153</sup>

This misrepresentation was compounded in closing argument.<sup>1154</sup> The prosecutor argued “not excluded”—the term used by the expert—meant “‘included,’ to ‘the bottom line: What is Errick Duncan’s DNA doing in SM’s panties?’”<sup>1155</sup> The Kentucky Supreme Court observed this argument was inconsistent with

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<sup>1147</sup> *State v. Bloom*, 516 N.W.159, 169 (Minn. 1994).

<sup>1148</sup> *Whack v. State*, 73 A.3d 186, 195-202 (Md.App. 2013).

<sup>1149</sup> 322 S.W.3d 81 (Ky. 2010).

<sup>1150</sup> *Id.* at 87.

<sup>1151</sup> *Id.* at 88, 90.

<sup>1152</sup> *Id.* at 91.

<sup>1153</sup> *Id.*

<sup>1154</sup> *Id.*

<sup>1155</sup> *Id.*

testimony.<sup>1156</sup> The expert testified the defendant “could not be excluded as a source of the panty DNA,” not “that Duncan was the source.”<sup>1157</sup> The Court concluded, “By asking the jury to infer on the basis of [the expert’s] testimony that [the defendant] was, the prosecutor sought to wring from that testimony a conclusion it could not reasonably yield.”<sup>1158</sup> Because of the weight jurors give DNA evidence, the errors “rendered Duncan’s trial manifestly unfair.”<sup>1159</sup>

Here, through two witnesses, the prosecutor misstated the weight of the DNA evidence and improperly converted consistency at a small number of locations to “the Defendant’s DNA.”<sup>1160</sup> And during closing, she converted consistency at four or five DNA locations to a conclusive match.<sup>1161</sup>

The prosecutor engaged in the precise conduct Minnesota, Maryland, and Kentucky condemned: she converted the experts’ testimony that Jimmy could not be excluded into an assertion that Jimmy’s DNA was found. In *State v. Escalante-Orozco*, this Court distinguished *Duncan*, concluding the prosecutor in *Escalante-Orozco* did not mischaracterize expert testimony.<sup>1162</sup> Here, the prosecutor

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<sup>1156</sup> *Id.* at 92.

<sup>1157</sup> *Id.*

<sup>1158</sup> *Id.*

<sup>1159</sup> *Id.*

<sup>1160</sup> See RT-5/11/2016, 36, 128-34, 147-56 (Ms. Legg); *id.* at 182-84 (Ms. Placko); RT-5/16/2016, 33.

<sup>1161</sup> RT-5/16/2016, 33, 108-09.

<sup>1162</sup> 241 Ariz. 254, ¶49 (2017).

mischaracterized DNA evidence in the same manner as in *Duncan*: the prosecutor converted a “not excluded” to a “match.”

Moreover, Jimmy timely objected and the trial court overruled the objections, essentially communicating the state’s argument was proper.<sup>1163</sup>

## 2. Cumulative Error.

This Court should also evaluate the cumulative impact of misconduct.<sup>1164</sup> In reviewing a claim of prosecutorial misconduct, this Court’s “focus is on the fairness of the trial, not the culpability of the prosecutor.”<sup>1165</sup> However, a prosecutor’s intent or indifference can be measured and may be relevant to prove errors were not inadvertent.<sup>1166</sup>

Here, several instances of misconduct should be considered:

- withholding evidence in violation of *Brady v. Maryland*;<sup>1167</sup>

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<sup>1163</sup> *E.g. U.S. v. Pearson*, 746 F.2d 787, 796 (11th Cir. 1984).

<sup>1164</sup> *State v. Gallardo*, 225 Ariz. 560, ¶35 (2010)(alterations original)(quoting *State v. Morris*, 215 Ariz. 324, ¶47 (2007)).

<sup>1165</sup> *State v. Bible*, 175 Ariz. 549, 601 (1993).

<sup>1166</sup> *See State v. Minnitt*, 203 Ariz. 431, ¶37 (2002); *State v. Jorgenson*, 198 Ariz. 390, ¶14 (2000); *Minnitt*, 203 Ariz. 431, ¶38 (2002); *In re Peasley*, 208 Ariz. 27, ¶40 (2004); *In re Zawada*, 208 Ariz. 232, ¶22 (2004).

<sup>1167</sup> *See Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264, 269-70 (1962); *Giglio v. U.S.*, 405 U.S. 150, 154-55 (1972); *On Lee v. U.S.*, 343 U.S. 747, 757 (1952); *U.S. v. Bernal-Obeso*, 989 F.2d 331, 333-34 (9th Cir. 1993); *Lorraine v. U.S.*, 396 F.2d 335, 339 (9th Cir. 1968); I.72; I.88; RT-8/10/2012, 19-43; RT-10/1/2012, 3-5; RT-10/16/2012, 4-7; RT-6/20/2016, 72-75.



- improperly taking advantage of trial court rulings and arguing no evidence existed where evidence was precluded;<sup>1168</sup>
- misstating law;<sup>1169</sup>
- shifting burden of proof;<sup>1170</sup>
- commenting on Jimmy's invocation of right to remain silent;<sup>1171</sup>
- impugning integrity of defense;<sup>1172</sup>

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<sup>1168</sup> See *State v. Goudeau*, 239 Ariz. 421, ¶¶205-209 (2016); *State v. Roque*, 213 Ariz. 193, ¶161 (2006), *abrogated on other grounds by State v. Escalante-Orozco*, 241 Ariz. 254, ¶¶13-14 (2017); *In re Zawada*, 208 Ariz. 232, ¶14 (2004); *State v. Cannon*, 148 Ariz. 72, 77 (1985); *People v. Daggett*, 225 Cal.App.3d 751, 754-58 (Cal.App. 1990); I.379; RT-3/30/2016, 55; RT-5/23/2016, 8; RT-5/26/2016, 60; RT-6/21/2016, 85-88; RT-6/22/2016, 187-88; RT-6/23/2016, 131, 136-37; RT-6/27/2016(morning), 22-26; RT-6/27/2016(afternoon), 31-33;.

<sup>1169</sup> See *State v. Serna*, 163 Ariz. 260, 266 (1990); *State v. Chappell*, 225 Ariz. 229, ¶¶45-46 (2010) *Boyde v. California*, 494 U.S. 370, 377-78 (1990); *Smith v. McCormick*, 914 F.2d 1153, 1168 (9th Cir. 1990); RT-6/27/2016(morning), 60-61.

<sup>1170</sup> See *In re Winship*, 397 U.S. 358, 364 (1970); *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993); *State v. Still*, 119 Ariz. 549, 551 (1978); *State v. Corona*, 188 Ariz. 85, 91-93 (App. 1997); *U.S. v. Arendale*, 444 F.2d 1260, 1266 (5th Cir. 1971); *People v. Murray*, 64 A.D.2d 916, 916-17 (N.Y. 1978); RT-5/16/2016, 114-15.

<sup>1171</sup> See U.S.Const.Amend.5; Ariz.Const.Art. 2, §10; *Griffin v. California*, 380 U.S. 609, 614 (1965); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *State v. Schrock*, 149 Ariz. 433, 438-39 (1986); *State v. Decello*, 113 Ariz. 255, 258 (1976); *State v. Trostle*, 191 Ariz. 4, 16 (1997) *State v. Martinez*, 130 Ariz. 80, 82 (App. 1981); RT-6/21/2016, 85-88; RT-6/27/2016, 22, 26, 33.

<sup>1172</sup> *State v. Hughes*, 193 Ariz. 72, ¶¶33, 58-59 (1998); *U.S. v. Amlani*, 111 F.3d 705, 711 (9th Cir. 1997); *McCarty v. State*, 765 P.2d 1215, 1220-21 (Okla.Cr.App. 1988); *People v. Vera*, 94 A.D.2d 728, 730 (N.Y. Supr. Ct. 1983); *State v. Cardus*, 949 P.2d 1047, 1060 (Haw.App. 1998); *State v. McCorkendale*, 979 P.2d 1239, 1252-53 (Kan. 1999), *disapproved on other grounds by State v. King*, 204 P.3d 333 (Kan. 2009); *State v. Hudson*, 619 N.E.2d 1190, 1192-93 (Ohio App. 1993); RT-4/28/2016, 21-23; RT-5/2/2016, 4, 17-18, 22-23; RT-5/11/2016, 41-45, 49, 72-74, 89; RT-5/12/2016, 93; RT-5/16/2016, 51-54, 65-66, 103, 112-16; RT-5/24/2016, 66-87; RT-5/25/2016, 4, 62, 73; RT-5/26/2016, 129-35; RT-6/2/2016, 54-55, 67.

- improperly arguing inferences and conclusions during openings;<sup>1173</sup>
- vouching by placing weight of government behind victims;<sup>1174</sup>
- vouching by implying facts not in evidence supported state's desired verdicts;<sup>1175</sup>
- appealing to fears and sympathy;<sup>1176</sup>
- encouraging jury to use verdict to send message;<sup>1177</sup>
- improperly seeking to inflame jury.<sup>1178</sup>

Even if this Court concludes some instances didn't amount to misconduct, or error was individually harmless, the cumulative impact of the prosecutor's

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<sup>1173</sup> See *State v. Bible*, 175 Ariz. 549, 602 (1993); RT-4/20/2016, 36, 49; RT-6/27/2016(morning), 20.

<sup>1174</sup> *State v. Bible*, 175 Ariz. 549, 600 (1993); *State v. King*, 180 Ariz. 268, 277 (1994); RT-5/10/2016, 7; RT-5/11/2016, 73; RT-6/15/2016, 38-39, 77; RT-6/21/2016, 99; RT-6/27/2016(morning), 23.

<sup>1175</sup> *Bible*, 175 Ariz. at 600; *King*, 180 Ariz. at 277; *State v. Leon*, 190 Ariz. 159, 161-63 (1997); RT-5/16/2016, 55; RT-5/31/2016(morning), 14-17; RT-6/27/2016(morning), 20.

<sup>1176</sup> *State v. Comer*, 165 Ariz. 413, 426 (1990); *State v. Moody*, 208 Ariz. 424, ¶¶149-150 (2004); *State v. Hughes*, 193 Ariz. 72, ¶70 (1998); *State v. Mincey*, 115 Ariz. 472, 483-84 (1977), reversed on other grounds by *Mincey v. Arizona*, 437 U.S. 385 (1978); RT-5/16/2016, 28, 53, 115.

<sup>1177</sup> *State v. Turrentine*, 152 Ariz. 61, 67 (App. 1986); *U.S. v. Runyon*, 707 F.3d 475, 514 (4th Cir. 2013); *Sinisterra v. U.S.*, 600 F.3d 900, 910 (8th Cir. 2010); RT-6/27/2016(morning), 5, 12; RT-6/27/2016(afternoon), 52.

<sup>1178</sup> *State v. Hulsey*, 243 Ariz. 367, ¶109 (2018); RT-4/20/2016, 35-39, 47, 49-50, 52; RT-5/26/2016, 53; RT-6/27/2016(afternoon), 4.

misconduct is significant. A seasoned prosecutor repeatedly used improper arguments to obtain conviction and a death sentence.

## **ARGUMENT 21**

### ISSUES PRESERVED FOR FEDERAL REVIEW.

Jimmy raises the following issues for preservation. As noted, this Court has previously rejected each of these claims.

1. The death penalty is cruel and unusual under any circumstance.<sup>1179</sup>
2. The death penalty violates international law.<sup>1180</sup>
3. Death penalty applied in discriminatory manner.<sup>1181</sup>
4. No meaningful distinction between capital and non-capital cases.<sup>1182</sup>
5. Death sentence violates Jimmy's rights since not indicted for capital crime.<sup>1183</sup>
6. Application of death penalty on facts of this case cruel and unusual.<sup>1184</sup>
7. Death penalty cruel and unusual because arbitrarily imposed and serves no purpose not adequately addressed by life.<sup>1185</sup>
8. The prosecutor's discretion to seek death penalty has no standards, violating rights.<sup>1186</sup>
9. Refusal to permit voir dire of prospective jurors regarding views on specific aggravation and mitigation violated unconstitutional.<sup>1187</sup>

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<sup>1179</sup> *Gregg v. Georgia*, 428 U.S. 153, 186-87 (1976); *State v. Harrod*, 200 Ariz. 309, ¶59 (2001).

<sup>1180</sup> *State v. Ross*, 180 Ariz. 598, 602 (1994).

<sup>1181</sup> *State v. Sansing*, 200 Ariz. 347, ¶46(D)(11)(2001).

<sup>1182</sup> *State v. Delahanty*, 226 Ariz. 502, 509 (2011).

<sup>1183</sup> *McKaney v. Foreman*, 209 Ariz. 268, ¶16 (2004).

<sup>1184</sup> *State v. Womble*, 225 Ariz. 91, 104 (2010).

<sup>1185</sup> *State v. Cromwell*, 211 Ariz. 181, ¶63 (2005).

<sup>1186</sup> *id.* at ¶58.

<sup>1187</sup> *State v. Johnson*, 212 Ariz. 425, ¶¶29-35 (2006).

10. Instructing jury that time of reflection for premeditation need not be long violated Appellant's rights.<sup>1188</sup>
11. Reasonable doubt jury instruction lowered burden of proof and deprived Appellant of his right to jury trial and due process.<sup>1189</sup>
12. Statute unconstitutionally requires death penalty whenever at least one aggravating circumstance and no mitigation exist.<sup>1190</sup>
13. Arizona's death statute creates unconstitutional presumption of death and places burden on defendant to prove mitigation "sufficiently substantial to call for leniency."<sup>1191</sup>
14. The statute unconstitutionally requires defendants to prove lives should be spared.<sup>1192</sup>
15. Death scheme unconstitutional because doesn't require sentencer find beyond a reasonable doubt aggravation outweighs accumulated mitigation.<sup>1193</sup>
16. Arizona's death statute unconstitutional because doesn't require state prove death appropriate.<sup>1194</sup>
17. Failure to instruct jury state bore burden to prove rebuttal to mitigation beyond reasonable doubt, violating Appellant's rights.<sup>1195</sup>
18. Arizona's capital scheme violates Appellant's rights by not requiring state to prove beyond reasonable doubt mitigation not sufficiently substantial to call for leniency once mitigation proved.<sup>1196</sup>

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<sup>1188</sup> *State v. Lehr*, 227 Ariz. 140, ¶¶51-59 (2011).

<sup>1189</sup> *State v. Dann*, 205 Ariz. 557, ¶74 (2003).

<sup>1190</sup> *State v. Miles*, 186 Ariz. 10, 19 (1996).

<sup>1191</sup> *State v. Glassel*, 211 Ariz. 33, ¶68 (2005).

<sup>1192</sup> *State v. Fulminante*, 161 Ariz. 237, 258 (1988).

<sup>1193</sup> *State v. Poyson*, 198 Ariz. 70, ¶59 (2000).

<sup>1194</sup> *State v. Gulbrandson*, 184 Ariz. 46, 72 (1995).

<sup>1195</sup> *State v. Roque*, 213 Ariz. 193, ¶¶138-140 (2006).

<sup>1196</sup> *State v. Dann*, 220 Ariz. 351, ¶¶94-95 (2009).

19. Arizona's death statute insufficiently channels sentencer's discretion.<sup>1197</sup>
20. Statute provides no objective standards for weighing aggravating and mitigating circumstances.<sup>1198</sup>
21. Arizona's death statute unconstitutionally fails to require cumulative consideration of mitigation or jury make specific findings regarding mitigation.<sup>1199</sup>
22. Arizona's death scheme violates equal protection since it does not require jury to make factual findings and legal conclusions reviewable on appeal.<sup>1200</sup>
23. Requiring Jimmy to prove mitigation by preponderance of evidence precludes jurors from considering all mitigating facts.<sup>1201</sup>
24. Permitting state to argue Appellant's mitigation evidence should be given limited or no weight absent causal nexus violated Jimmy's rights.<sup>1202</sup>
25. Arizona's statutory scheme for considering mitigating evidence unconstitutional because limits full consideration of mitigation.<sup>1203</sup>
26. Refusing to instruct jury or permit introduction of evidence and argument regarding residual doubt violated Appellant's rights.<sup>1204</sup>
27. Victim impact evidence admitted at penalty phase violated Appellant's rights.<sup>1205</sup>
28. Second trial on aggravation and punishment before new jury, after appeal, will violate double jeopardy.<sup>1206</sup>

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<sup>1197</sup> *State v. West*, 176 Ariz. 432, 454 (1993).

<sup>1198</sup> *State v. Pandeli*, 200 Ariz. 365, ¶90 (2001).

<sup>1199</sup> *State v. Garcia*, 224 Ariz. 1, 23 (2010).

<sup>1200</sup> *State v. Dann*, 220 Ariz. 351, ¶¶127-128 (2009).

<sup>1201</sup> *State v. Boggs*, 218 Ariz. 325, ¶97 (2008).

<sup>1202</sup> *State v. Anderson*, 210 Ariz. 327, ¶97 (2005).

<sup>1203</sup> *State v. Delahanty*, 226 Ariz. 502, 509 (2011).

<sup>1204</sup> *Harrod*, 218 Ariz. 268, ¶¶37-46.

<sup>1205</sup> *State v. Chappell*, 225 Ariz. 229, 244 (2010).

<sup>1206</sup> *State v. Ring*, 204 Ariz. 534, ¶¶39-40 (2003).

29. Proportionality review of death sentence constitutionally required.<sup>1207</sup>
30. Execution by lethal injection is cruel and unusual.<sup>1208</sup>
31. Arizona's execution protocols and procedures are cruel and unusual.<sup>1209</sup>
32. Entry of plea is not a conviction for purposes of aggravation; a conviction requires sentencing.<sup>1210</sup>

RESPECTFULLY SUBMITTED this 17th day of May, 2018.

**LAW OFFICE OF THE PUBLIC DEFENDER**

By /s/ Mikel Steinfeld  
MIKEL STEINFELD

By /s/ Rena Glitsos  
RENA GLITSOS  
Deputy Public Defenders

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<sup>1207</sup> *State v. Hampton*, 213 Ariz. 167, 186 (2006).

<sup>1208</sup> *State v. Hinchey*, 181 Ariz. 307, 315 (1995).

<sup>1209</sup> *State v. Andriano*, 215 Ariz. 497, ¶¶61-62 (2007).

<sup>1210</sup> *State v. Walden*, 183 Ariz. 595, 615 (1995); A.R.S. §28-101.

# Appendix D



# ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee,

v.

JAMES CLAYTON JOHNSON,

Appellant.

CR-16-0261-AP

Maricopa County

Superior Court

No. CR-2010-048824-001 DT

## APPELLEE'S ANSWERING BRIEF

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## QUESTIONS PRESENTED FOR REVIEW

1. Should this Court reconsider its decision in *Hidalgo*?
2. Did the trial court abuse its discretion by refusing to hold an evidentiary hearing on whether Arizona's capital sentencing statutes are constitutional, where there was no factual dispute to resolve?
3. Should this Court reconsider its multiple prior holdings that the A.R.S. § 13-751(F)(6) aggravating factor, while facially vague, can be narrowed through jury instructions?
4. Did the trial court abuse its discretion in its instruction to the jury with regard to the (F)(6) capital aggravator?
5. Did the trial court abuse its discretion by sustaining the State's objection to Johnson's improper aggravation phase closing argument?
6. Was there sufficient evidence to sustain the jury's finding of the (F)(6) aggravator?
7. Did the trial court abuse its discretion by denying Johnson's motion for mistrial based on *Lynch v. Arizona*?
8. Did the trial court commit fundamental error in its instruction to the jury regarding the meaning of "significant impairment?"
9. Did the trial court abuse its discretion by admitting the State's rebuttal evidence in the penalty phase?
10. Did the trial court commit fundamental error in its jury instructions regarding "presumption of death," "mercy," and "sympathy?"
11. Did the trial court abuse its discretion by precluding admission of "execution impact evidence?"
12. Did the trial court abuse its discretion by limiting admission of "Columbine mitigation evidence?"
13. Did the trial court abuse its discretion by ordering disclosure of

defense penalty phase witness interview notes?

14. Is Johnson's motion to withdraw from his armed robbery plea agreement in a different case before this Court?

15. Did the trial court abuse its discretion by ordering Johnson to release his BYU Idaho school records as part of authorized disclosure?

16. Did the trial court abuse its discretion in conducting *voir dire* and precluding questions regarding specific types of mitigation evidence?

17. Did the trial court abuse its discretion by denying motions to strike three jurors for cause?

18. Did the trial court abuse its discretion by denying a motion to dismiss Juror 6 during trial?

19. Did the trial court abuse its discretion in applying Rule 106 of the Arizona Rules of Evidence?

20. Did the prosecutor commit misconduct?

21. Should this Court revisit several settled issues of law?

22. UNDER SEAL. Did the trial court abuse its discretion by denying Johnson's motion for change of counsel?

## TABLE OF CONTENTS

|                                                                                                                                                                                                                            | Page |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| QUESTIONS PRESENTED FOR REVIEW .....                                                                                                                                                                                       | i    |
| TABLE OF CONTENTS .....                                                                                                                                                                                                    | iii  |
| TABLE OF AUTHORITIES .....                                                                                                                                                                                                 | vii  |
| STATEMENT OF THE CASE .....                                                                                                                                                                                                | 1    |
| ARGUMENTS.....                                                                                                                                                                                                             | 48   |
| I                                                                                                                                                                                                                          |      |
| THIS COURT SHOULD NOT REVISIT ITS DECISION IN<br>HIDALGO. ....                                                                                                                                                             | 48   |
| II                                                                                                                                                                                                                         |      |
| THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY<br>REFUSING TO HOLD AN EVIDENTIARY HEARING ON<br>WHETHER ARIZONA’S CAPITAL SENTENCING STATUTES<br>ARE CONSTITUTIONAL WHERE THERE WAS NO FACTUAL<br>DISPUTE TO RESOLVE..... | 50   |
| III                                                                                                                                                                                                                        |      |
| THIS COURT SHOULD NOT OVERRULE DECADES OF<br>PRECEDENT CONCLUDING THAT, WHILE FACIALLY<br>VAGUE, THE A.R.S. § 13–751(F)(6) AGGRAVATING FACTOR<br>MAY BE NARROWED BY JURY INSTRUCTIONS. ....                                | 53   |
| IV                                                                                                                                                                                                                         |      |
| THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WITH<br>REGARD TO THE (F)(6) JURY INSTRUCTION. ....                                                                                                                           | 59   |

V

|                                                                                                                                            |    |
|--------------------------------------------------------------------------------------------------------------------------------------------|----|
| THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY SUSTAINING THE STATE’S OBJECTION TO JOHNSON’S IMPROPER AGGRAVATING PHASE CLOSING ARGUMENT. | 68 |
|--------------------------------------------------------------------------------------------------------------------------------------------|----|

VI

|                                                                |    |
|----------------------------------------------------------------|----|
| THE (F)(6) AGGRAVATOR IS SUPPORTED BY SUFFICIENT EVIDENCE..... | 72 |
|----------------------------------------------------------------|----|

VII

|                                                                                                                              |    |
|------------------------------------------------------------------------------------------------------------------------------|----|
| THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING JOHNSON’S MOTION FOR MISTRIAL BASED ON <i>LYNCH V. ARIZONA</i> ..... | 81 |
|------------------------------------------------------------------------------------------------------------------------------|----|

VIII

|                                                                                                                                   |    |
|-----------------------------------------------------------------------------------------------------------------------------------|----|
| THE TRIAL COURT DID NOT COMMIT FUNDAMENTAL ERROR IN ITS JURY INSTRUCTION REGARDING THE MEANING OF “SIGNIFICANT IMPAIRMENT.” ..... | 84 |
|-----------------------------------------------------------------------------------------------------------------------------------|----|

IX

|                                                                                                                   |    |
|-------------------------------------------------------------------------------------------------------------------|----|
| THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE STATE’S REBUTTAL EVIDENCE IN THE PENALTY PHASE..... | 89 |
|-------------------------------------------------------------------------------------------------------------------|----|

X

|                                                                                                                                            |    |
|--------------------------------------------------------------------------------------------------------------------------------------------|----|
| THE TRIAL COURT DID NOT COMMIT FUNDAMENTAL ERROR IN ITS JURY INSTRUCTIONS REGARDING “PRESUMPTION OF DEATH,” “MERCY,” AND “SYMPATHY.” ..... | 96 |
|--------------------------------------------------------------------------------------------------------------------------------------------|----|

XI

|                                                                                                            |    |
|------------------------------------------------------------------------------------------------------------|----|
| THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PRECLUDING ADMISSION OF “EXECUTION IMPACT EVIDENCE.” ..... | 99 |
|------------------------------------------------------------------------------------------------------------|----|

XII

|                                                                                                |     |
|------------------------------------------------------------------------------------------------|-----|
| THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY LIMITING ADMISSION OF MITIGATION EVIDENCE..... | 104 |
|------------------------------------------------------------------------------------------------|-----|

XIII

|                                                                                                                           |     |
|---------------------------------------------------------------------------------------------------------------------------|-----|
| THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ORDERING DISCLOSURE OF DEFENSE PENALTY PHASE WITNESS INTERVIEW NOTES..... | 110 |
|---------------------------------------------------------------------------------------------------------------------------|-----|

XIV

|                                                                      |     |
|----------------------------------------------------------------------|-----|
| JOHNSON’S ARMED ROBBERY PLEA AGREEMENT IS NOT BEFORE THIS COURT..... | 117 |
|----------------------------------------------------------------------|-----|

XV

|                                                                                                                                                |     |
|------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ORDERING JOHNSON TO RELEASE HIS BYU IDAHO SCHOOL RECORDS AS PART OF AUTHORIZED DISCLOSURE..... | 118 |
|------------------------------------------------------------------------------------------------------------------------------------------------|-----|

XVI

|                                                                                                                                                           |     |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONDUCTING <i>VOIR DIRE</i> AND PRECLUDING QUESTIONS REGARDING SPECIFIC TYPES OF MITIGATION EVIDENCE..... | 121 |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------|-----|

XVII

|                                                                                                       |     |
|-------------------------------------------------------------------------------------------------------|-----|
| THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING MOTIONS TO STRIKE THREE JURORS FOR CAUSE..... | 125 |
|-------------------------------------------------------------------------------------------------------|-----|

XVIII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY  
DENYING A MOTION TO DISMISS JUROR 6 DURING TRIAL..... 132

XIX

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN  
APPLYING ARIZONA RULE OF EVIDENCE 106..... 135

XX

THE PROSECUTOR DID NOT COMMIT MISCONDUCT. .... 137

XXI

THIS COURT SHOULD NOT REVISIT SEVERAL SETTLED  
ISSUES OF LAW. .... 140

XXII

TO BE FILED SEPARATELY UNDER SEAL. .... 141

## TABLE OF AUTHORITIES

| CASES                                                                             | PAGE               |
|-----------------------------------------------------------------------------------|--------------------|
| Ariz. Indep. Redistricting Comm’n v. Fields, 206 Ariz. 130 (App. 2003).....       | 114                |
| Busso-Estopellan v. Mroz/State, 238 Ariz. 553 (2015) .....                        | 91, 95             |
| California v. Brown, 479 U.S. 538 (1987).....                                     | 20, 99             |
| Commonwealth v. Harris, 817 A.2d 1033 (Pa. 2002).....                             | 41, 103, 147       |
| Duncan v. Commonwealth, 322 S.W.3d 81 (Ky. 2010) .....                            | 139                |
| Eddings v. Oklahoma, 455 U.S. 104 (1982).....                                     | 94, 109            |
| Emergency Care Dynamics, Ltd. v. Superior Court,<br>188 Ariz. 32 (App. 1997)..... | 114, 115           |
| Green v. Nygaard, 213 Ariz. 460 (App. 2006) .....                                 | 115                |
| Hidalgo v. Arizona, 138 S. Ct. 1056 (2018) .....                                  | 49                 |
| Jackson v. Dretke, 450 F.3d 614 (5th Cir. 2006) .....                             | 103                |
| Lockett v. Ohio, 438 U.S. 586 (1978).....                                         | 94, 109            |
| Morgan v. Illinois, 504 U.S. 719 (1992).....                                      | 122, 123, 124      |
| Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610 (1983).....                          | 145                |
| Mu’Min v. Virginia, 500 U.S. 415 (1991) .....                                     | 121                |
| Parker v. Dugger, 498 U.S. 308 (1991) .....                                       | 80                 |
| People v. Bennett, 199 P.3d 535 (Cal. 2009) .....                                 | 103                |
| Phillips v. Araneta, 208 Ariz. 280 (2004) .....                                   | 119, 120           |
| Planned Parenthood of S. Ariz. v. LaWall, 180 F.3d 1022 (9th Cir. 1999) .....     | 50, 51             |
| Ring v. Arizona, 536 U.S. 584 (2002) .....                                        | 71                 |
| Simmons v. South Carolina, 512 U.S. 154 (1994) .....                              | 82, 83             |
| Singleton v. C.I.R., 439 U.S. 940 (1978).....                                     | 50, 51             |
| Slade v. Schneider, 212 Ariz. 176 (App. 2006) .....                               | 114                |
| State ex rel. Corbin v. Ybarra, 161 Ariz. 188 (1989).....                         | 115, 116           |
| State ex rel. Thomas v. Granville (Baldwin),<br>211 Ariz. 468 (2005).....         | 92, 94, 98, 109    |
| State ex rel. Thomas v. Newell (Milagro), 221 Ariz. 112 (2009) .....              | 110, 118           |
| State v. Acuna Valenzuela, 245 Ariz. 197 (2018) .....                             | 48                 |
| State v. Andriano, 215 Ariz. 497 (2007) .....                                     | 54, 58, 98         |
| State v. Bible, 175 Ariz. 549 (1993) .....                                        | 81                 |
| State v. Bocharski, 218 Ariz. 476 (2008).....                                     | 54, 67, 77         |
| State v. Bolton, 182 Ariz. 290 (1995) .....                                       | 105, 126, 135, 138 |
| State v. Boyston, 231 Ariz. 539 (2013).....                                       | 75, 102            |



|                                                          |                                              |
|----------------------------------------------------------|----------------------------------------------|
| State v. Burns, 237 Ariz. 1 (2015).....                  | 122, 123, 124, 125, 129, 132, 134            |
| State v. Bush, 244 Ariz. 575 (2018).....                 | 48, 83                                       |
| State v. Carlson, 237 Ariz. 381 (2015).....              | 92                                           |
| State v. Carreon, 210 Ariz. 54 (2005) .....              | 97, 99                                       |
| State v. Chappell, 225 Ariz. 229<br>(2010).....          | 58, 60, 62, 93, 100, 101, 102, 107, 109, 110 |
| State v. Cromwell, 211 Ariz. 181 (2005) .....            | 54, 59, 141, 145, 146                        |
| State v. Cruz, 218 Ariz. 149 (2008) .....                | 125, 132, 137                                |
| State v. Dann, 220 Ariz. 351 (2009) .....                | 102                                          |
| State v. Djerf, 191 Ariz. 583 (1998).....                | 74                                           |
| State v. Doerr, 193 Ariz. 56 (1998).....                 | 64                                           |
| State v. Dumaine, 162 Ariz. 392 (1989) .....             | 71                                           |
| State v. Ellison, 213 Ariz. 116 (2006).....              | 130                                          |
| State v. Ferrero, 229 Ariz. 239 (2012) .....             | 54                                           |
| State v. Finch, 202 Ariz. 410 (2002).....                | 60, 102                                      |
| State v. Fitzgerald, 232 Ariz. 208 (2013).....           | 120                                          |
| State v. Garcia, 224 Ariz. 1 (2010) .....                | 123                                          |
| State v. Gilfillan, 196 Ariz. 396 (App. 2000).....       | 82                                           |
| State v. Glassel, 211 Ariz. 33 (2005) .....              | 121, 122, 125, 129, 130, 132                 |
| State v. Goudeau, 239 Ariz. 421 (2016).....              | 138, 139, 140                                |
| State v. Greene, 192 Ariz. 431 (1998).....               | 102                                          |
| State v. Gretzler, 135 Ariz. 42, 52 (1983) .....         | 55, 56, 57                                   |
| State v. Hampton, 213 Ariz. 167 (2006) .....             | 59                                           |
| State v. Hargrave, 225 Ariz. 1 (2010) .....              | 54, 59, 74                                   |
| State v. Hausner, 230 Ariz. 60 (2012).....               | 73                                           |
| State v. Henderson, 210 Ariz. 561 (2005).....            | 60, 68, 84, 96, 126, 137, 140                |
| State v. Herrera, 176 Ariz. 21 (1993).....               | 74                                           |
| State v. Hickman, 205 Ariz. 192 (2003) .....             | 48, 51, 56, 59, 112, 113, 114, 125           |
| State v. Hidalgo, 241 Ariz. 543 (2017) .....             | i, 48, 49, 50, 51, 52, 53                    |
| State v. Hulsey, 243 Ariz. 367 (2018).....               | 48                                           |
| State v. Johnson, 212 Ariz. 425 (2006).....              | 54, 58, 124                                  |
| State v. Jones, 205 Ariz. 445 (2003) .....               | 67, 78                                       |
| State v. Koch, 138 Ariz. 99, 673 P.2d 297 (1983).....    | 82                                           |
| State v. Kuhs, 223 Ariz. 376 (2010) .....                | 81, 97                                       |
| State v. Lacy, 187 Ariz. 340, 929 P.2d 1288 (1996) ..... | 66                                           |
| State v. Logan, 200 Ariz. 564 (2001).....                | 85                                           |
| State v. Lopez, 163 Ariz. 108, 786 P.2d 959 (1990) ..... | 49, 51, 74                                   |
| State v. Manuel, 229 Ariz. 1 (2011).....                 | 102                                          |

|                                                               |                              |
|---------------------------------------------------------------|------------------------------|
| State v. McCray, 218 Ariz. 252, 183 P.3d 503 (2008) .....     | 63, 74, 75                   |
| State v. McGill, 213 Ariz. 147 (2006) .....                   | 90, 102, 104                 |
| State v. Milke, 177 Ariz. 118 (1993).....                     | 57                           |
| State v. Moody, 192 Ariz. 505, 968 P.2d 578 (1998).....       | 145, 147                     |
| State v. Moore, 222 Ariz. 1 (2009) .....                      | 67, 101                      |
| State v. Murdaugh, 209 Ariz. 19 (2004) .....                  | 67                           |
| State v. Naranjo, 234 Ariz. 333 (2014) .....                  |                              |
| State v. Newell, 212 Ariz. 389 (2005).....                    | 65, 83, 88, 110              |
| State v. Nordstrom, 230 Ariz. 110 (2012).....                 | 90, 94, 104                  |
| State v. Pandeli, 200 Ariz. 365 (2001).....                   | 56, 59, 78                   |
| State v. Patterson, 230 Ariz. 270 (2012) .....                | 121, 122, 124, 128           |
| State v. Prasertphong, 210 Ariz. 496 (2005).....              | 137                          |
| State v. Prince (Prince III), 226 Ariz. 516 (2011) .....      | 74                           |
| State v. Prince, 226 Ariz. 516 (2011).....                    | 57, 74, 130                  |
| State v. Ring (Ring III), 204 Ariz. 534 (2003).....           | 56, 67                       |
| State v. Roque, 213 Ariz. 193 (2006).....                     | 90, 100, 101, 102            |
| State v. Rose, 230 Ariz. 500 (2013) .....                     | 100, 101, 102                |
| State v. Rushing, 243 Ariz. 212, 225, ¶ 54.....               | 119                          |
| State v. Sanders, 245 Ariz. 113 (2018).....                   | 83                           |
| State v. Sansing, 206 Ariz. 232 (2003) .....                  | 78, 80                       |
| State v. Schackart, 190 Ariz. 238 (1997) .....                | 65, 119                      |
| State v. Serna, 163 Ariz. 260 (1990) .....                    | 71                           |
| State v. Smith, 215 Ariz. 221 (2007) .....                    | 123, 124                     |
| State v. Stokley, 182 Ariz. 505 (1995) .....                  | 76                           |
| State v. Torres, 208 Ariz. 340 (2004) .....                   | 146, 147                     |
| State v. Towery, 186 Ariz. 168 (1996) .....                   | 110                          |
| State v. Tucker, 215 Ariz. 298 (2007) .....                   | 62                           |
| State v. VanWinkle, 230 Ariz. 387 (2012) .....                | 67                           |
| State v. Villalobos, 225 Ariz. 74 (2010).....                 | 62, 73, 76                   |
| State v. Walden, 183 Ariz. 595 (1995).....                    | 64                           |
| State v. Wallace, 229 Ariz. 155 (2012) .....                  | 66, 147                      |
| State v. Womble, 225 Ariz. 91 (2010).....                     | 90, 104                      |
| Stenson v. Lambert, 504 F.3d 873 (9th Cir. 2007).....         | 103                          |
| Stringer v. Black, 503 U.S. 222 (1992).....                   | 80                           |
| Teague v. Lane, 489 U.S. 288 (1989) .....                     | 49, 51                       |
| United State v. McVeigh, 153 F.3d 1166 (10th Cir. 1998) ..... | 123                          |
| United States v. Mitchell, 783 F.2d 971 (10th Cir. 1986)..... | 20, 28, 29, 50, 51           |
| United States v. Nobles, 422 U.S. 225 (1975).....             | 111, 112, 113, 115, 116, 117 |

|                                                    |         |
|----------------------------------------------------|---------|
| Wainwright v. Witt, 469 U.S. 412 (1985) .....      | 130     |
| Walton v. Arizona, 497 U.S. 639 (1990).....        | 56, 59  |
| Williams v. State, 168 S.W.3d 433 (Mo. 2005) ..... | 103     |
| Witherspoon v. Illinois, 391 U.S. 510 (1968).....  | 129     |
| Zant v. Stephens, 462 U.S. 862 (1983).....         | 94, 109 |

## STATUTES

|                                 |                                          |
|---------------------------------|------------------------------------------|
| A.R.S. § 13–114(2) (2001) ..... | 145                                      |
| A.R.S. § 13–703(G) .....        | 101                                      |
| A.R.S. § 13–751(C) .....        | 93, 109, 120                             |
| A.R.S. § 13–751(D) .....        | 120                                      |
| A.R.S. § 13–751(F)(2) .....     | 1, 149                                   |
| A.R.S. § 13–751(F)(5) .....     | 1                                        |
| A.R.S. § 13–751(F)(6) .....     | i, 18, 53-60, 62, 67, 68, 71-73, 80, 149 |
| A.R.S. § 13–751(F)(7) .....     | 1, 18, 149                               |
| A.R.S. § 13–751(F)(7)(a).....   | 1                                        |
| A.R.S. § 13–751(F)(7)(b) .....  | 1                                        |
| A.R.S. § 13–751(G) .....        | 86, 92, 105                              |
| A.R.S. § 13–751(G)(1) .....     | 86                                       |
| A.R.S. § 13–752(G) .....        | 92, 93, 94, 109                          |
| A.R.S. § 13–756(A) .....        | 72, 149                                  |
| A.R.S. § 13–756(B) .....        | 79                                       |
| A.R.S. § 13–4031.....           | 48                                       |
| A.R.S. § 13–4033(A) .....       | 48                                       |

## OTHER AUTHORITIES

|                                                                                                                                                                                                                            |            |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|
| MIKEL STEINFELD, “RAJI REVERENCE: UNDERSTANDING THE REVISED ARIZONA JURY INSTRUCTIONS COMMITTEE PROCESS AND HOW IT IMPACTS YOUR ABILITY TO LITIGATE INSTRUCTIONS,” FOR THE DEFENSE, VOL. 27, ISSUE 2 (MAY–JULY 2017) ..... | 86         |
| RAJI CAPITAL CASE SENTENCING INSTRUCTIONS 2.3 MITIGATION AND 2.6 MITIGATION ASSESSMENT AND THE SENTENCE BURDEN OF PROOF.....                                                                                               | 99         |
| REVISED ARIZONA JURY INSTRUCTION (“RAJI”),<br>THIRD EDITION, CAPITAL CASE 3.2,.....                                                                                                                                        | 85, 86, 89 |

## **RULES**

|                                   |               |
|-----------------------------------|---------------|
| Ariz. R. Crim. P. 6.1.....        | 145           |
| Ariz. R. Crim. P. 11.7.....       | 120           |
| Ariz. R. Crim. P. 15.....         | 112           |
| Ariz. R. Crim. P. 15.2.....       | 110, 111, 116 |
| Ariz. R. Crim. P. 15.2(c).....    | 110           |
| Ariz. R. Crim. P. 15.2(c)(2)..... | 114           |
| Ariz. R. Crim. P. 15.2(e)(2)..... | 114           |
| Ariz. R. Crim. P. 15.2(h).....    | 110           |
| Ariz. R. Crim. P. 15.4.....       | 111           |
| Ariz. R. Crim. P. 18.5(d).....    | 124           |
| Ariz. R. Evid. 106.....           | ii, 135, 136  |
| Ariz. R. Evid. 401 or 403.....    | 93            |
| Ariz. R. Evid. 404(b).....        | 93            |

## **CONSTITUTIONAL PROVISIONS**

|                                   |                        |
|-----------------------------------|------------------------|
| Ariz. Const. art. II, § 24.....   | 145                    |
| Ariz. Const. art. VI, § 5(3)..... | 48                     |
| U.S. Const., amend. V.....        | 113, 119               |
| U.S. Const., amend. VI.....       | 71, 117, 144, 146, 147 |
| U.S. Const., amend. VIII.....     | 48, 49                 |

## STATEMENT OF THE CASE

On January 6, 2011, the Maricopa County Grand Jurors indicted Appellant James Clayton Johnson for: Count 1, first degree murder, a class 1 dangerous felony; Count 2, kidnapping, a class 2 dangerous felony; and Count 3, burglary in the first degree, a class 3 dangerous felony. (R.O.A. 5.)<sup>1</sup> On February 23, 2011, the State filed a notice of intent to seek the death penalty, alleging five aggravating factors: (1) that Johnson had previously been convicted of a serious offense (A.R.S. § 13-751(F)(2)); (2) that Johnson committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value (A.R.S. § 13-751(F)(5)); (3) that Johnson committed the offense in an especially heinous, cruel or depraved manner (A.R.S. § 13-751(F)(6)); (4) that Johnson committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency, or a county or city jail (A.R.S. § 13-751(F)(7)(a)); and (5) that Johnson committed the offense while on probation for a felony offense (A.R.S. § 13-751(F)(7)(b)). (R.O.A. 26, at

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<sup>1</sup> “R.O.A.” refers to Record on Appeal.

1–2.) Viewed in the light most favorable to sustaining the jury’s verdicts, the evidence and all reasonable inferences therefrom,<sup>2</sup> revealed the following.

**A. Guilt Phase.**

**1. The Crime.**

In December of 2010, Terry Weathers and his boss, Marvin Pearce, worked at Pearce’s business, Kirby Company, a vacuum repair service center and sales office located in a strip mall on West Baseline Road in Mesa, Arizona. (R.T. 4/21/16, at 95–98, 141–42.) The Kirby Company shared a wall with the business next door, Taiwan Massage, owned and operated by Xiaohung Fu and her husband, Shigang Song, both Chinese immigrants who primarily spoke Chinese. (R.T. 4/21/16, at 97, 142, 165; R.T. 4/25/16, a.m., at 22–23.) While Mr. Song managed the business, Mrs. Fu ran it, and generally worked alone. (R.T. 4/21/16, at 97–99, 142–44; R.T. 4/25/16, a.m., at 12–14.) The couple have a son, Janguang Song, and a daughter, Jia Song, who last saw her mother alive on December 7, 2010, when Xiaohung picked her up from Tempe High School, where Jia was a sophomore, and took her home before returning to work. (R.T. 4/25/16, a.m., at 13, 32–36.) On the afternoon of December 7, 2010, Xiaohung worked alone at the Taiwan Massage. (*Id.* at 17.)

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<sup>2</sup> *State v. Cropper*, 205 Ariz. 181, 182, ¶ 2 (2003).

A little after 4:00 p.m. on December 7, 2010, Weathers and Pearce heard a loud pounding or crashing “racket,” including the sounds of a screaming or crying female, coming from the Taiwan Massage. (R.T. 4/20/16, at 70–72; R.T. 4/21/16, at 30–33, 59–60, 99–100, 144; R.T. 5/4/16, at 79.) Concerned, Weathers went next door to check on Mrs. Fu, finding things in the Taiwan Massage broken and in disarray. (R.T. 4/21/16, at 100–01, 144, 166.) Weathers did not venture past the security door in the lobby leading to the back of the business, but stopped and yelled, “Hello!” repeatedly; he got no response. (*Id.* at 101–02, 123.)

However, Weathers was startled to see a man emerge from the bathroom at the end of the hallway, shaking his hands as if to dry them. (R.T. 4/21/16, at 102, 123–24, 129.) The man proceeded quickly down the hallway toward Weathers, and Weathers twice asked him about Mrs. Fu before the man said that she left. (*Id.* at 103.) Looking out the window at Mrs. Fu’s black Lexus in the parking lot, Weathers asked, “How did she leave?” (R.T. 4/21/16, at 99, 103, 143–44; R.T. 4/25/16, a.m., at 17–18.) The man replied that she left in an ambulance because she had cut herself. (R.T. 4/21/16, at 103.) Knowing that he had not heard an ambulance, Weathers sensed something was wrong and returned next door to call for help. (*Id.* at 103–04.)

Back inside the vacuum business, a visibly anxious Weathers alerted Pearce, and both men watched the man who had exited the Taiwan Massage quickly leave the parking lot. (R.T. 4/21/16, at 153.) The man—whom they described as Asian, approximately 5 feet 6 inches tall, with a slender build, pimply face, and black hair, wearing a baseball cap and a brown unzipped jacket, and acting nervous, scared or “shook up”—ran to a white Chevrolet pickup truck with a large silver toolbox in the back, and then “peeled out” of the parking lot backwards, so that Weathers and Pearce could not view his license plate. (R.T. 4/20/16, at 72; R.T. 4/21/16, at 33–34, 105–07, 124, 130, 150–53, 167–68.) The man appeared to “stare down” Weathers and Pearce as he fled. (R.T. 4/21/16, at 152–53, 167.)

While Weathers called 911 at about 4:18 p.m., Pearce went to the Taiwan Massage to check on Mrs. Fu. (R.T. 4/21/16, at 107–08, 153–54.) Inside Taiwan Massage, there was blood spatter on a white security screen door. Pearce proceeded down a hallway, checking multiple rooms and passing ominous signs of a struggle, including a broken security camera; destroyed bloody window blinds; a bloody and disheveled hallway runner rug; overturned office equipment; Mrs. Fu’s emptied purse and open wallet; several open and pre-looped zip ties; and significant amounts of blood on the floor and walls. He found a lifeless Mrs. Fu in the last room, lying on her back on the floor with



her wrists bound together with zip ties, with her eyes open, and her head and neck in a pool of her own blood and a zip tie around her neck. (R.T. 4/20/16, at 77–80, 85–95; R.T. 4/21/16, at 36–38, 40–61, 154–56, 171; 4/25/16, a.m., at 37; R.T. 4/15/16, p.m., at 46–47, 50–55, 61–65; R.T. 5/4/16, at 79–95, 103–05, 108–18, 120–31; R.T. 5/9/16, at 130–32.)

Mrs. Fu had severe wounds to both sides of her face and a large wound to the left side of her neck, exposing her throat and spinal cord. (R.T. 4/20/16, at 80; R.T. 4/21/16, at 38.) Her wrists were bound so tightly that the zip ties were cutting into her skin. (R.T. 4/20/16, at 80; R. T. 4/21/16, at 38.) Additionally, there were lacerations, deep enough to expose fatty tissue, that looked like carvings into her exposed stomach; they did not appear to be bleeding. (R.T. 4/20/16, at 81, 105–07; R.T. 4/21/16, at 38.)

## **2. The Aftermath.**

Leandra Yazzie, Johnson’s longtime friend and then-current girlfriend, lived in an apartment at Dobson and Warner, about four miles from the Taiwan Massage. (R.T. 4/26/16, at 52–53, 56–58, 117–19; R.T. 5/5/16, p.m., at 6.) On December 7, 2010, Johnson called Yazzie four times between 3:50 p.m. and 5:00 p.m. and, sounding rushed, told her that he was coming over to her apartment, though she was not expecting him. (R.T. 4/26/18, at 60–62; R.T. 5/5/16, p.m, at 9, 13–14.) Johnson asked her to bring him a cup of water with

vinegar, paper towels, and a trash bag, and he also asked her to move her car from her assigned space so that he could park in the back by her apartment, rather than up in front near the apartment complex office. (R.T. 4/26/16, at 62–63, 76.) Johnson did not ordinarily ask her to move her car, but indicated he wanted to clean out his truck. (*Id.* at 64–66, 122.) Johnson arrived shortly after calling. (*Id.* at 63.)

Eventually, Johnson joined Yazzie in her apartment, bringing a gym bag and the requested trash bag with him, and told Yazzie that he was going to wash his jeans in her washing machine—something he had not previously ever done at her apartment. (R.T. 4/26/16, at 68–70.) Johnson also asked Yazzie for a bowl “that you don’t need anymore,” because he needed to clean something. (*Id.* at 76–78.) Yazzie gave him a green ceramic bowl, which Johnson used and washed, and Yazzie later gave to police. (*Id.* at 78, 91, 113.)

While using the bowl for cleaning, Johnson instructed Yazzie not to come over near him because he was cleaning something with blood, at which point Yazzie began to get worried. (R.T. 4/26/16, at 78–79.) Johnson told Yazzie that he had gotten into a “hustle” or fight. (*Id.* at 79; R.T. 5/5/16, p.m., at 11.) When pressed about the nature of the fight, Johnson got irritated. (R.T. 4/26/16, at 82–83.) Yazzie and Johnson talked and had dinner while his jeans washed and dried. Yazzie noted that Johnson was “stressed” and “didn’t seem

his usual self,” though by the time he left, he had calmed down. (*Id.* at 70–71, 74, 84, 114–15, 122.) When Johnson left, he took the gym bag, the trash bag, and his washed and dried jeans. (*Id.* at 73–74.)

Cell tower records reflect Johnson’s presence at or near the Taiwan Massage at 3:54 p.m. on December 7, 2010, and then at or near Yazzie’s residence between 4:25 and 7:00 p.m. (R.T. 5/9/16, at 45–47.) The cell tower records for Johnson’s cellular telephone also correspond with security video from a neighboring business showing his white pickup leaving the Taiwan Massage parking lot, as well as the time period he was at Yazzie’s apartment, and then later at his home in Gilbert. (R.T. 5/5/16, a.m., at 7–9; R.T. 5/9/16, at 49–53.) The security video captured Johnson’s white pickup truck with a silver tool box in the bed entering the parking lot at about 3:54 p.m. and then rapidly reversing out of the parking lot at about 4:16 p.m. (R.T. 5/5/16, a.m., at 7, 9–11.)

### **3. The Capture.**

In December of 2010, Chuck Puckett, a retired United States Army veteran, and his wife Donnel worked at a Christmas tree lot on the corner of Lindsay and Baseline in Gilbert, Arizona. (R.T. 4/26/16, at 134–36, 172–73.) The lot, surrounded by a secured chain link fence, operated largely on a cash

basis, and the Pucketts kept the cash drawer in their motorhome where they lived, parked onsite. (*Id.* at 136–39, 174–75.)

On the night of December 10, 2010, the Pucketts were watching television in their motorhome when suddenly, the television went off, so Chuck went outside to check and reset the circuit breaker. (R.T. 4/26/16, at 137–38, 175.) Chuck discovered that the problem was not the circuit breaker—their electrical cord had been unplugged, and Johnson was behind the motorhome pointing a light and what appeared to be a semiautomatic 9 millimeter Glock handgun at Chuck and telling him to get face down on the ground with his hands behind his back. (R.T. 4/26/16, at 138, 140, 168; R.T. 4/27/16, at 113; R.T. 5/4/16, at 22–23, 45–47.) Chuck complied, and Johnson tried (and failed) to zip-tie Chuck’s hands behind his back. (R.T. 4/26/16, at 140–41.) Johnson then ordered Chuck at to get up and face the motorhome, while demanding to know how much money they had and ordering Chuck to give it to him. (*Id.* at 141–42, 165–66.)

Inside, Donnel, alarmed to hear Chuck speaking with someone, tiptoed toward the door and overheard Chuck saying something about “all the money.” (R.T. 4/26/16, at 175–76.) Donnel quickly called 9-1-1 on her cellular telephone, whispered their location, and reported that they were being robbed. (*Id.* at 176.)

Chuck told Donnel to come out of the motorhome and bring the money, which she did. (R.T. 4/26/16, at 142–43, 176.) Johnson took the money, forcing Chuck and Donnel to stand in front of the motorhome at gunpoint. (*Id.* at 143, 176–78.) Johnson took in excess of \$1000 from the cash drawer, and when police arrived, he took off running, leaving behind the empty cash drawer, a handheld knife, a small saw, several sets of zip ties, and a large hole cut into the chain link fence. (*Id.* at 144–47, 155, 164, 179; R.T. 5/4/16, at 10–11, 15, 42.)

A large police search ensued, including a police helicopters, K-9 units, and officers from the Mesa and Gilbert Police Departments. (R.T. 4/27/16, at 97–103; R.T. 5/4/16, at 7–9, 44–45.) Johnson was eventually discovered, detained by a police K-9, and arrested in a backyard shed of a residence just south of the Christmas tree lot. (R.T. 4/27/16, at 103–06; R.T. 5/4/16, at 19–23, 29–30, 43–44.) Inside the shed near where Johnson had been hiding, police recovered a box cutter with the blade open, and a distinctive backpack. (R.T. 4/27/16, at 106–08.) With, and inside, the backpack were a white towel, blue gloves, a small flashlight, several zip ties, and tools such as a pry bar and small sledge hammer. (R.T. 5/4/16, at 60–64.) Additionally, Johnson had the Pucketts’ stolen money and checks in his pants pocket. (*Id.* at 23, 30.) Zip-ties

from the Christmas tree lot robbery were similar to those found on Mrs. Fu and in the Taiwan Massage. (R.T. 5/5/16, p.m., at 92.)

To rob the Pucketts at the Christmas tree lot, Johnson used a pellet gun made to look like a regular handgun, and police found it in a backyard in a nearby neighborhood. (R.T. 5/4/16, at 7; R.T. 5/4/16, at 41.) Johnson pled guilty to the armed robbery of the Pucketts. (R.T. 5/31/16, p.m., at 94.)

#### **4. Physical evidence.**

The Gilbert Police Department informed Mesa Police Department Thomas Denning, case agent for Mrs. Fu's homicide case, about Johnson's (an Asian male) robbery of a Christmas tree lot using zip ties. Based on the similarity to Mrs. Fu's murder, Detective Denning connected Johnson to a plumbing business entitled Wright Connection Plumbing, and ultimately to his home at 636 East Vermont in Gilbert and his 2006 white Chevrolet Silverado pickup. (R.T. 5/5/16, a.m., at 19–20.) There, police discovered evidence connecting Johnson to both the Christmas tree lot robbery and Mrs. Fu's murder.

For example, blue latex gloves were found in Johnson's white Chevrolet pickup truck and in the trash of Johnson's bathroom at home. (R.T. 4/26/16, at 47–48; R.T. 5/5/16, a.m., at 21–22.) A Big 5 Sporting Goods bag and receipt for a packet of BB pellets and CO2 cartridges, purchased on day of Mrs. Fu's

murder, were in the tool box in Johnson's truck bed, and paid for by a credit card in Johnson's wallet. (R.T. 5/5/16, a.m., at 34–37; R.T. 5/9/16, at 84–85.) The cartridges and pellets were consistent with the gun Johnson used during the Christmas tree lot robbery. (R.T. 5/5/16, a.m., at 37–39.) Cell tower records placed Johnson at or near the Big 5 Sporting Goods store on Val Vista in Gilbert at the time on the receipt in Johnson's truck. (R.T. 5/9/16, at 48–49.)

Police also found security camera equipment in two pieces in Johnson's truck. (R.T. 5/5/16, p.m., at 29–30; R.T. 5/9/16, at 87.) In the truck bed, in addition to the fixed tool box, police found loose zip-ties, long white pipes, copper pipe, and a red gas can. (R.T. 5/9/16, at 76–82.) Inside the truck, among other items, was an open box of blue latex gloves. (*Id.* at 83.) And inside the fixed tool box was, among other things, a box of zip ties. (*Id.* at 84–85.)

Both Johnson's and Mrs. Fu's DNA were on the bloody zip-ties binding her wrists. (R.T. 5/11/16, at 24–29, 33–34, 148, 155, 170–71.)

## **5. The Victim's Injuries.**

An autopsy revealed that Xiaohung Fu died from stabbing and incised wounds, and that she sustained a number of additional injuries, including sharp force injuries, cuts, cutting, carvings, perforation of the peritoneal cavity, damage to the right lung with pneumothorax, as well as nonlethal wounds, such

as defensive wounds on her hands. (R.T. 4/27/16, at 18–19, 29–30.) Mrs. Fu was alive when she received the cutting/stabbing wound to the right side of her jaw, which would have bled profusely, but would not have been fatal. (*Id.* at 30–32.)

A gaping, deep wound to the left side of Mrs. Fu’s neck involved repeated cutting and caused significant damage and would have been fatal. (R.T. 4/27/16, at 32–33, 38–39.) This wound penetrated all the way to her spine, nicking it and cutting between two cervical vertebra, severing major blood vessels, including the jugular vein and the carotid artery, the trachea, and the windpipe—which would have robbed Mrs. Fu of her voice. (*Id.* at 34–35.) Mrs. Fu’s phrenic nerve was also severed, meaning the diaphragm could no longer contract and expand to breathe. (*Id.* at 35.) She was still alive when she suffered this approximately 4-inch deep injury, resulting in substantial bleeding. (*Id.* at 35–38.)

Mrs. Fu also sustained a stabbing wound just below her left breast and another below it in her abdomen. (R.T. 4/27/16, at 40.) The abdominal wound was caused by a single cutting edge non-serrated blade. (*Id.* at 41–42.) The wound above it was scalloped and likely made with the same blade, exposing subcutaneous fat and likely penetrating the diaphragm and into the abdominal cavity. (*Id.* at 39–43.) This upper wound was potentially fatal, but not



instantaneously so. (*Id.* at 43–44.) There was some bleeding with both of these wounds, but not a large volume. (*Id.* at 43–44.)

Johnson also inflicted a 5-inch stab wound to Mrs. Fu’s back, through the back muscles and the space between her ninth and tenth ribs to penetrate the lower lobe of her right lung. (*Id.* at 44–47.) This resulted in a pneumothorax—hemorrhaging and a collapsed lung and difficulty breathing, a potentially, though not instantaneously, fatal wound. (*Id.* at 46–47.) Mrs. Fu suffered this injury while alive, but likely near to her time of death. (*Id.* at 47–48.)

The zip-ties left furrowed wounds on Mrs. Fu’s wrists, indicating that she struggled against them for some time prior to her death. (R.T. 4/27/16, at 48–49.) While alive, she also sustained a number of defensive wounds, including deep cut across the base of her thumb and across the top of her hand; slashing wounds to the tips of the three middle fingers on her right hand; a deep incision wound at the base of her left thumb; and significant swelling, contusions, and abrasions caused by the zip ties around her wrists. (*Id.* at 49–53.)

These wounds indicate that Mrs. Fu was not only alive when inflicted, but she was moving and trying to evade the attack, as well. (R.T. 4/27/16, at 52–53.) The fatal wound likely came after these wounds on her hands. (*Id.* at

58.) She also had bruising under her lips and blunt force trauma to her scalp, consistent with impact with a wall or the floor, and similar bruising on her back, shoulders, and legs. (*Id.* at 55–57, 61.)

Additionally, Johnson inflicted superficial carving wounds on Mrs. Fu’s abdomen, which also bled, but would not have been lethal. (R.T. 4/27/16, at 44.) Due to the low volume of bleeding, the design carved into Mrs. Fu’s abdomen were likely the last series of injuries, inflicted after the fatal neck injury, but still perimortem. (*Id.* at 58–59.) There were no postmortem injuries. (*Id.* at 74.) The wounds involved not just knife thrusting, but knife movement and manipulation as well. (*Id.* at 94.)

## **6. The Verdict.**

Johnson, aware of his constitutional right to testify, chose not to, and the defense rested without presenting any evidence. (R.T. 5/12/16, at 57, 70.) The jury found Johnson guilty of all three charged counts: Count 1, first-degree murder; Count 2, kidnapping; and Count 3, burglary in the first degree. (R.T. 5/17/16, at 57.) The jury also found each count was a dangerous offense, based both on use of a deadly weapon or dangerous instrument and on the infliction of serious physical injury. (R.T. 5/24/16, at 28–33.)

**B. Aggravation Phase.**

**1. The Evidence.**

In December of 2010, Johnson, previously convicted of a felony in Colorado, was on parole and under the supervision of the Arizona Department of Corrections because he was on authorized release from the Colorado Department of Corrections; he also was on probation in Arizona from an Arizona felony conviction. (R.T. 5/24/16, at 62–64, 76–77; Trial Exhibits 291, 292, 293, 294, 295.)

Mrs. Fu likely struggled against the zip-ties cinched tightly around her wrists and sustained numerous defensive injuries to her hands, fingertips and wrists, typical of trying to defend oneself against the cutting edge of a knife. (R.T. 5/25/16, at 7–12.) This struggle indicates not only that Mrs. Fu was alive, but that she was conscious and experiencing both fear and pain. (*Id.* at 12–13.)

The penetrating knife wound to Mrs. Fu’s back, which resulted in at least a partial collapse of her right lung and penetration of the intercostal space between her ninth and tenth ribs would have been as, or likely even more, painful as the defensive wounds to her hands and fingers. (R.T. 5/25/16, at 13–15.) This painful wound also occurred while Mrs. Fu was still alive and before the fatal wound to her neck. (*Id.* at 15.) Moreover, the pattern of the wound on Mrs. Fu’s back indicated that the assailant reached over Mrs. Fu, across the top

of her shoulder, to inflict the wound downward into her back, which necessarily implies that she was conscious and standing for this wound. (*Id.* at 15–16.)

The 3-inch penetrating stab wound to Mrs. Fu’s torso beneath her left breast also occurred while she was still alive and would have been very painful, though not, by itself, fatal. (R.T. 5/25/16, at 16–17.) The second, smaller stab wound to the left side of her torso would also have been inflicted while she was alive and painful, though not independently fatal. (*Id.* at 17–18.) Similarly, the penetrating stab wound to Mrs. Fu’s right jaw was inflicted while she was alive, would have bled and would have been painful, but was not independently fatal. (*Id.* at 18–19.)

The 4-inch wound to the left side of Mrs. Fu’s neck (Trial Exhibit 192), caused by repeated knife cuttings, was the overarching fatal wound because it not only severed the jugular vein and carotid artery, but also vertebral artery, disrupting the central nervous system and her ability to breath. (R.T. 5/25/16, at 19–20.) This fatal wound is likely one of the last because it caused profuse bleeding (Trial Exhibit 75), and alone would have rapidly caused her death. (*Id.* at 19–20.)

All of the bruises, contusions, and blunt force trauma that Mrs. Fu suffered—to her lips, shoulder, legs, knees, head, most likely caused by impact

with walls or the floor—would have caused pain until she lost consciousness. (R.T. 5/25/16, at 22–23.) Blood smeared and pooled in various distinct locations indicate Mrs. Fu suffered injuries and struggled in several areas inside the Taiwan Massage business. (*Id.* at 23–34.)

The eight separate shallow, patterned slashing wounds resembling a symbol carved into Mrs. Fu’s stomach area (Trial Exhibit 194) were an “afterthought” because they were not deep and, while painful if Mrs. Fu were still conscious, did not bleed profusely, likely because of decreased blood pressure caused by the obviously fatal wound to her neck. (R.T. 5/25/16, at 19–22, 26, 30.) Ultimately, Mrs. Fu suffered far more injuries than just a fatal wound. (*Id.* at 26.)

## **2. The Verdict.**

At the conclusion of the aggravation phase, the jurors found unanimously that the State had proved beyond a reasonable doubt that Johnson was previously convicted of a serious offense<sup>3</sup> (*see* A.R.S. § 13–751 (F)(2)); that Johnson committed the murder in an especially cruel, heinous or depraved manner (based on cruelty, gratuitous violence, and senselessness and

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<sup>3</sup> *See* Exh. 293 (12/21/10 conviction for armed robbery of Christmas tree lot), as well as burglary and kidnapping convictions from instant case; R.T. 5/25/16, at 56–57.

helplessness) (*see* A.R.S. § 13–751(F)(6)); and that Johnson committed the murder while on authorized release from a law enforcement agency or while on probation (*see* A.R.S. § 13–751(F)(7)). (R.T. 5/26/16, at 10–12.) However, the jurors also found that that the State failed to prove beyond a reasonable doubt that the murder was committed in expectation of pecuniary gain (*see* A.R.S. § 13–751 (F)(5)). (*Id.* at 11.)

### **C. *Penalty Phase***

#### **1. *Victim Impact Statements.***

Mrs. Fu’s son, Yanghuang Song, spoke regarding the loss of his mother, who was also his friend and confidant, and the negative impact it has had on their family, his father, and on him personally, including causing his gambling addiction. (R.T. 5/31/16, a.m., at 11–14.) Jia Song, Mrs. Fu’s daughter, spoke of the profound effect of losing her mother as a high school student beginning to prepare for SAT exams, and the devastating and lasting impact it has had on her emotional health and peace of mind. (*Id.* at 17–21.) Shigang Song, Mrs. Fu’s husband, spoke about the abrupt and horrific end to his happy 25-year life with his wife, whom he loved and misses daily; that Mrs. Fu was the cherished only daughter in her family; and that Mrs. Fu provided the major financial support of their family. (*Id.* at 21–23.)

## **2. Defense Mitigation Presentation.**

Johnson asserted the following mitigating circumstances: (1) Johnson's capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law was significantly impaired, though not sufficiently impaired to constitute a defense to prosecution; (2) Johnson had a genetic predisposition to substance abuse; (3) Johnson had a predisposition to mental health issues; (4) Johnson was adopted as an infant and has dissociative disorder as a result; (5) Johnson was a freshman at Columbine High School at the time of the school shooting and has post-traumatic stress disorder (PTSD) as a result; (6) Johnson has a history of substance abuse beginning in adolescence; (7) Johnson has a history of mental illness; (8) Johnson has a potential for rehabilitation;<sup>4</sup> (9) Johnson was willing to plead guilty and be sentenced to life in prison without the possibility of parole; (10) Johnson's life has value to his friends and family; and (11) Johnson has family support and love. (R.T. 5/26/16, at 27–29.) In support of these proffered mitigating circumstances, Johnson presented the following evidence.

### **a. Personal and family history.**

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<sup>4</sup> Johnson later stipulated to remove Number 8 from his list of proffered mitigation, and the jurors were not instructed on "potential for rehabilitation." (R.T. 6/23/16, at 16, 145–46.)

Johnson's biological father, Byung Gu Choi from South Korea, testified that he put Johnson up for adoption and forgot about him until he became aware of Johnson's murder of Mrs. Fu. (R.T. 5/26/16, at 79–80.) Choi never married Johnson's mother, and she became pregnant after they had been dating about three months. (*Id.* at 83–84.) They agreed to put Johnson up for adoption because it was the best thing for Johnson, and then they separated and have had no contact since. (*Id.* at 85, 90–92.) According to Choi, Johnson's biological mother, Sun Ja Jeong (83) had alcohol "twice or three times" and smoked "a little bit" during her pregnancy with Johnson. (*Id.* at 83, 86.) Choi also claimed that they both worked and lived at a shoe factory during her pregnancy, and this resulted in exposure to chemicals and fumes. (*Id.* at 87–89.) Choi testified that he drinks about "a bottle [of alcohol] every day." (*Id.* at 90.)

Johnson also presented the testimony of several members of his large adoptive family, including: Shelly Johnson, his mother. (R.T. 5/31/16, p.m., at 10–128); Kevin Johnson, his father (R.T. 6/13/16, at 83–186; R.T. 6/14/16, at 22–88); Jonathan Woods, his maternal uncle (R.T. 6/1/16, at 29–80); Mitchell Woods, his maternal uncle (*Id.* at 85–143); Alicia Kim, his cousin (*Id.* at 147–83); Donna Johnson-Brown, his paternal grandmother (R.T. 6/7/16, at 13–55); Pamela Weaver, his paternal aunt (*Id.* at 56–110); Brittanie Smith, his cousin



(*Id.* at 112–50); Alma Weaver, his paternal uncle (*Id.* at 151–84); and Joshua Woods, his cousin (R.T. 6/9/16, at 80–92), along with John Grange, Johnson’s local church leader (R.T. 6/14/16, at 5–20).

Johnson, adopted as a 3-month-old infant, was lovable, fun, physically and mentally healthy, active, happy, good-natured, helpful, funny, “happy-go-lucky,” charismatic, sincere, playful, nice, caring, very intelligent, and athletic as a child and teenager. (R.T. 5/31/16, p.m., at 26; R.T. 6/1/16, at 35, 89, 91, 120, 149, 155; R.T. 6/7/16, at 20–21, 24–25, 113; R.T. 6/9/16, at 6, 44–46, 81, 118; R.T. 6/13/16, at 92, 94, 96, 98.) Johnson was the beneficiary of a stable, happy upbringing with a stay-at-home mom; a kind, involved dad who provided well for the family and supported Johnson and his sister’s sports and other activities; and a loving extended family on both sides. (R.T. 5/31/16, p.m., at 17, 26–27, 31, 34–35, 86–88; R.T. 6/1/16, at 34, 86–87, 100, 148–49, 159; R.T. 6/7/16, at 16–19, 36, 90, 113–14, 152, 154; R.T. 6/9/16, at 88, 129; R.T. 6/13/16, at 95–96, 149.) Johnson’s family took many vacations, including a cruise and many snowboarding and other trips, and Johnson and his father took hunting trips and also attended many camping trips in association with church and Boy Scouts. (R.T. 6/13/16, at 150–51.)

Discipline and help with Johnson’s academic challenges were handled jointly by Shelley and Kevin and generally involved discussion, counseling,

“loss of privileges,” and the like, rather than corporal punishment. (R.T. 5/31/16, p.m., at 34, 37; R.T. 6/7/16, at 93; R.T. 6/13/16, at 97–98, 100, 107–08, 111.) However, Shelley and Kevin were generally naïve about Johnson’s activities and life style, and Johnson lied to them to conceal it. (R.T. 6/9/16, at 170–71, 177–78.)

Shelley and Kevin were good, hard-working people and loving, engaged parents who provided Johnson and his younger sister, Mauri with a normal childhood. (R.T. 6/1/16, at 33–34, 87, 119–20; R.T. 6/7/16, at 17–18, 21, 76–77; R.T. 6/9/16, at 165; R.T. 6/13/16, at 114, 147; R.T. 6/14/16, at 11–12.) Johnson enjoyed a good relationship with his parents. (R.T. 6/9/16, at 129.) Johnson and Mauri, who was also adopted as an infant from Korea, were loved and accepted inside and outside of the family, despite being ethnically different from their parents. (R.T. 6/7/16, at 19–20, 75, 118; R.T. 6/9/16, at 148, 165–66; R.T. 6/13/16, at 93–94.) Johnson was close to his sister, Mauri, and he was protective of her. (R.T. 5/31/16, p.m., at 24, 29; R.T. 6/13/16, at 58–59.)

Johnson was a good student and a good athlete, participating in a number of sports, as well as piano lessons, and he made friends easily and had no behavioral issues. (R.T. 5/31/16, p.m., at 27–30.) Shelley testified that in middle school, Johnson began to struggle academically, yet exhibited a gift for mentoring peers with special needs. (*Id.* at 32–33.) Johnson worked for his

father's business during high school, completing a 4-year plumbing apprenticeship. (R.T. 6/13/16, at 108–09.) Johnson was a hard worker and skilled at his job. (*Id.* at 109–10.)

Johnson was also active in Boy Scouts, earning his Eagle Scout award. (R.T. 5/31/16, p.m., at 36–37; R.T. 6/1/16, at 91; R.T. 6/13/16, at 112–14; R.T. 6/13/16, at 7–8.) Johnson seemed to need additional stimulation or “thrills” than did the other boys his age. (R.T. 6/14/16, at 19–20.)

As a freshman at Columbine High School in Colorado, Johnson made the varsity wrestling team and also played football. (R.T. 5/31/16, p.m., at 38, 86–87.) However, he was also suspended as a freshman for stealing hall passes. (*Id.* at 82.) In high school, Johnson had many friends both at church and at school. (R.T. 6/13/16, at 106–07; R.T. 6/13/16, at 151.) He also had great leaders, both as coaches and at church. (R.T. 6/13/16, at 151.)

Beginning in eighth grade and continuing into high school and beyond, Johnson experimented with drugs (over the counter, prescription, and illicit) and alcohol, regularly getting high. (R.T. 5/31/16, p.m., at 43–45, 47, 54, 57, 81; R.T. 6/1/16, at 40; R.T. 6/7/16, at 41–42, 119–20, 132, 136, 141–42; R.T. 6/9/16, at 130–31, 141–42; R.T. 6/13/16, at 107, 111–12, 153–54; R.T. 6/14/16, at 9–10.) In fact, Johnson engaged in theft, often stole things from garages with the doors up, and was stealing prescription drugs and marijuana from a

neighbor with a chronic illness. (R.T. 5/31/16, p.m., at 81–82; R.T. 6/9/16, at 167; R.T. 6/13/16, at 155, 157; R.T. 6/14/16, at 11.)

Kevin and Shelley, aware of Johnson’s drug abuse, including steroids, tried to work with and help Johnson get counseling and to understand the consequences of his bad choices. (R.T. 5/31/16, p.m., at 89–92, 136.) However, Kevin and Shelley also had a tendency to ignore or downplay Johnson’s misbehavior. (R.T. 6/9/16, at 147–48; R.T. 6/13/16, at 62–63.)

The shooting at Columbine occurred in April of 1999, Johnson’s freshman year. (R.T. 5/31/16, p.m., at 39, 82.) Johnson was in the school gymnasium at the time of the shooting, and was driven home by a friend’s father. (*Id.* at 39; 6/13/16, at 101.)

After the shooting, Johnson had counseling with specialists at church brought in to help the students deal with the aftermath. (R.T. 5/31/16, p.m., at 42–43; R.T. 6/13/16, at 104–05, 158–59.) However, his family turned down additional counseling offered by the school because Johnson did not seem to require it. (R.T. 5/31/16, p.m., at 83–84; R.T. 6/13/16, at 105.) There was a great deal of community support for the students following the shooting, including an abundance of counseling resources. (R.T. 6/13/16, at 159–61.) Johnson’s academic performance declined after the shooting, but his parents

provided extra tutoring on more than one occasion. (R.T. 6/13/16, at 105–06, 161–62.)

Johnson graduated from high school in the spring of 2002, with a 1.87 GPA. He attended college at BYU Idaho, despite at first not being accepted, in part because his bishop (local church leader) did not provide a required “ecclesiastical endorsement” because of Johnson’s behavior. (R.T. 5/31/16, p.m., at 48–49, 96; R.T. 6/13/16, at 115, 170–71.) However, after being admitted only for the summer session with a three-class schedule of “Introduction to Business,” “Beginning Bowling” and “Book of Mormon,” Johnson was quickly expelled for possession of alcohol, smoking and other misbehavior, and instead went to stay with a maternal aunt in Arizona. There, Johnson enrolled at Mesa Community College, but again quickly withdrew, eventually returning to Colorado to work in Kevin’s plumbing business. (R.T. 5/31/16, p.m., at 49–51, 96–98; R.T. 6/13/16, at 116, 172–74.) During his time with relatives in Mesa, family members reported that Johnson had stolen some money. (R.T. 5/31/16, p.m., at 97–98.)

Johnson also tried to serve a 2-year mission for the LDS (“Mormon”) church, but lasted only a week before abandoning the effort and returning to Colorado. (R.T. 6/13/16, at 117–18.) In 2005, after his failed attempt at a church mission, Johnson married Julie, his high school girlfriend, in the LDS

temple in Colorado. (R.T. 5/31/16, p.m., at 51; R.T. 6/1/16, at 158; R.T. 6/7/16, at 27; R.T. 6/9/16, at 132–33; R.T. 6/13/16, at 61–62, 118–19, 181.) Johnson was short-tempered and did not always treat Julie well. (R.T. 6/7/16, at 27–28.)

In about 2004, Shelley and Kevin moved to Arizona for better business opportunities; eventually, Johnson and Julie followed and Johnson worked for Kevin’s company. (R.T. 5/31/16, p.m., at 51–54, 56; R.T. 6/1/16, at 41–42; R.T. 6/13/16, at 119–25.) In 2007, Johnson and Julie had a daughter, Lily, to whom he was a good father. (R.T. 5/31/16, p.m., at 53, 59; R.T. 6/13/16, at 126, 129, 181.)

Before moving to Arizona, Johnson had additional criminal justice issues in Colorado and issues with abusing prescription drugs. (R.T. 5/31/16, p.m., at 53–54; R.T. 6/1/16, at 52.) As an adult, Johnson used and abused substances, such as prescription medication, steroids, and cocaine, and increasingly exhibited mood swings and a short temper. (R.T. 5/31/16, p.m., at 58–59; R.T. 6/1/16, at 65–66, 71–72; R.T. 6/7/16, at 29–30, 92, 147.)

From 2006–2008, Johnson and Julie were active members of their LDS ward in Arizona, teaching young children in Sunday School, and also engaged in counseling with a “life coach” for issues, which included violence, in their marriage. (R.T. 5/31/16, p.m., at 55–56, 91; R.T. 6/1/16, at 41–42, 159–60;

R.T. 6/13/16, at 127, 185.) It was Julie who primarily prepared, planned, and taught the Sunday School classes, because Johnson was either hung over or high while at church. (R.T. 6/13/16, at 185–86.) These issues resulted in Julie and Lily, with Kevin’s advice and assistance, moving out and obtaining a restraining order against Johnson in June of 2008. (R.T. 5/31/16, p.m., at 59–60; R.T. 6/13/16, at 130–31; R.T. 6/14/16, at 23–24, 27–28.) Johnson and Julie eventually divorced, and Julie and Lily returned to Colorado. (R.T. 5/31/16, p.m., at 60; R.T. 6/1/16, at 44–45; R.T. 6/13/16, at 131; R.T. 6/14/16, at 30.) Julie was afraid of Johnson, and feared for her life. (R.T. 5/31/16, p.m., at 62; R.T. 6/7/16, at 29, 47, 99, 100, 173–74; R.T. 6/9/16, at 195–96; R.T. 6/15/16, p.m., at 63.)

After Julie and Lily left, on June 23, 2008, Johnson was arrested for stealing rings from two different jewelry stores in two different Arizona malls, and on August 16, 2008, he was arrested for passing and using counterfeit money. (R.T. 6/14/16, at 34.) Following a guilty plea to one count of forgery, Johnson was sentenced to a mitigated term of 1.5 years of incarceration.

In early December 2009, Johnson went to Colorado to serve time for the probation violations there, and he also spent 6 months in a rehabilitation facility before coming back to Arizona in October 2010. (R.T. 5/31/16, p.m., at 61–65, 107; R.T. 6/1/16, at 45, 51–52, 93; R.T. 6/13/16, at 131–32; R.T.

6/14/16, at 31–36; R.T. 6/14/16, at 33–35; Exh. 294.) He was released from prison in June 2010. (R.T. 5/31/16, p.m. at 108.)

As a result of this, Johnson stayed with his maternal uncle, Mitchell Woods and his wife Lynn, in Colorado during a transition period for about 4 months from June through September 2010, before he could return to Arizona. (R.T. 6/1/16, at 95–97; R.T. 6/7/16, at 31–33, 39, 59, 159, 170; R.T. 6/13/16, at 135–36; R.T. 6/14/16, at 38.) During his stay with his Uncle Mitchell, Johnson had a positive relationship with Mitchell’s grandson, whom Mitchell and Lynn cared for a couple nights a week. (R.T. 6/1/16, at 97–100; R.T. 6/9/16, at 83–84.) Johnson also helped his cousin, Joshua Woods, on a remodeling project. (R.T. 6/9/16, at 85.) Joshua had previous drug abuse issues, but turned his life around when his son was born, and was a good role model and friend to Johnson. (R.T. 6/9/16, at 90–91.)

Nevertheless, Johnson took, and began to abuse, prescribed and other drugs, including steroids, even exaggerating symptoms to get additional prescriptions. (R.T. 6/1/16, at 101–02, 109–11, 124, 126, 132–33; R.T. 6/7/16, at 31–32, 40–41, 60, 65; R.T. 6/9/16, at 86–87; R.T. 6/13/16, at 139–40; R.T. 6/14/16, at 39.) He began manipulating and faking and/or exaggerating symptoms to get prescriptions and knew which drugs to use so he would not fail mandatory drug urine tests. (R.T. 5/31/16, p.m., at 108–09.) Sometimes



Johnson crushed his prescription medication and snorted it up his nose. (R.T. 6/9/16, at 90.)

Johnson participated in an addiction counseling program at church with Mitchell. (R.T. 6/1/16, at 103–05.) At one point, Johnson showed up at Mitchell’s house driving (a violation of his parole) a white Audi convertible that belonged to a girl with whom he had been “clubbing.” (*Id.* at 111–12, 133–35.) During this time, Johnson’s attitude changed from desiring to straighten out his life, to he “just didn’t care.” (R.T. 6/7/16, at 171–72.)

Despite professional help, and counseling through church, enlisted by Shelley and Kevin, Johnson quickly returned to old, bad habits—including outbursts of anger, overdoses, and drug dealing. (R.T. 5/31/16, p.m., at 65–69; R.T. 6/1/16, at 45–50; R.T. 6/7/16, at 146–47; R.T. 6/13/16, at 143–44; R.T. 6/14/16, at 39.) Kevin considered Johnson dangerous with a violent temper and “out of control.” (R.T. 6/7/16, at 46–47, 54; R.T. 6/14/16, at 45–46.)

In early October of 2010, Johnson returned to Arizona to live with his parents, Shelley and Kevin, and work for Kevin’s business. (R.T. 6/13/16, at 142; R.T. 6/14/16, at 40.) Despite parole restrictions banning use of drugs illegally, Johnson continued to use steroids and abuse his prescribed medications, resulting in at least one hospital visit for an overdose. (R.T. 6/13/16, at 140, 142–43; R.T. 6/14/16, at 40–42.)

Kevin testified that Johnson was “willing to accept responsibility” killing Mrs. Fu and to “plead guilty” and “be sentenced to spend the rest of his life in prison.” (R.T. 6/13/16, at 146–47.) However, Kevin also described Johnson as “really duplicitous,” able to act one way at church while still carrying on an alternate life of drug abuse without “the two paths crossing.” (*Id.* at 148.) Moreover, right up until trial began, Kevin consistently kept himself from learning the details of Johnson’s murder of Mrs. Fu, and, further, testified that the only reason Johnson would have pleaded guilty was to ensure a natural life sentence. (*Id.* at 163–65.) Kevin testified that he will always love Johnson, despite his shocking actions. (R.T. 6/14/16, at 76–77.)

**b. Criminal history.**

Johnson’s criminal history spanned from 2005 to 2010, and includes convictions in both Colorado and Arizona. (R.T. 6/7/16, at 43–44; R.T. 6/13/16, at 120.) While in high school, in July 2001, Johnson was charged in juvenile court for pointing a BB gun at another person during a road rage incident, for which he was placed on 18 months of probation. (R.T. 5/31/16, p.m., at 47–48, 103–04; R.T. 6/13/16, at 110, 166–69.) In Colorado, he also had a 2004 weapons possession arrest, but the case was dismissed. (R.T. 6/13/16, at 175–76.)

In March 27, 2005, Johnson was arrested for street racing, and possession of a shotgun, brass knuckles, and an expandable baton. (R.T. 6/13/16, at 176–78.) Johnson was convicted by a jury of possession of a weapon with a prior juvenile offense, and Kevin paid Johnson’s legal bills. (R.T. 5/31/16, p.m., at 105; R.T. 6/13/16, at 177–79.) Johnson told the sentencing judge that he was a Columbine student; that he had only drank alcohol twice and tried marijuana only once, and that he had a 3.5 GPA—none of which was true, apart from having attended Columbine. (R.T. 6/13/16, at 179–80.) Between the arrest for this charge in the spring of 2005, and the conviction in the fall of 2005, Johnson got married to Julie. (*Id.* at 181.) Johnson was placed on probation. (*Id.* at 183.)

While on probation, in 2006, Johnson was arrested for trespassing and breaking into cars, which led to another Colorado conviction and more probation. (R.T. 6/13/16, at 183.) Johnson was also placed on probation for convictions in Colorado for other felonies: larceny and criminal trespass. (R.T. 5/31/16, p.m., at 104–05.)

There are two separate felonies and cause numbers for Johnson in Arizona in 2009 for crimes committed in 2008, and he was sentenced to prison. (R.T. 5/31/16, p.m., at 106.) Johnson bought electronics with counterfeit money and resold them for cash profit. (R.T. 6/9/16, at 89–90.)

**c. Columbine High School Shooting Witnesses.**

Johnson presented the testimony of several survivors of the Columbine school shooting, as well as his LDS bishop, to convey the impact the shooting had on Johnson and the community at large.

Richard Hoover was a 2001 Columbine High School graduate. (R.T. 6/9/16, at 5–39.) Hoover had weights class with Johnson in April of 1999, and was lifting weights at the time the fire alarm sounded as a result of the shooting, and he exited out the double doors at the back of the weight room to the outdoors and eventually off campus. (*Id.* at 6–15.) Hoover turned his experience into a 10-year public speaking tour at other schools, raising money to build a new library at Columbine. (*Id.* at 5–31, 36–37.) Hoover has no memory of Johnson being in class on the day of the shooting, did not see him on the day of the shooting, and never spoke with him about their experiences on that day. (*Id.* at 33.) Hoover has not had any contact with Johnson since graduation in 2001. (*Id.* at 38.)

Christopher Markham was a friend of Johnson's in high school and middle school, as well as the wrestling team. (R.T. 6/9/16, at 43–80.) Markham and Johnson were freshmen at Columbine High School and were on the wrestling team together. (*Id.* at 44–45.) Markham was in the school cafeteria and witnessed other students get shot, ran through the building

looking for safety and alerting other students to the danger, and eventually exited and ran across the street to a park. (*Id.* at 46–49.) Johnson was friendly with Markham during and after high school, and after the shooting, checked on him and wondered why Markham did not go out for the wrestling team the next year. (*Id.* at 61–62, 74–75.)

Markham remembered that Johnson was sociable, sincere and “friends with a lot of different people.” (R.T. 6/9/16, at 62.) But after the shooting, Johnson was aggressive and had a “shorter fuse.” (*Id.* at 63.) However, Johnson used alcohol and wanted to try anabolic steroids. (*Id.* at 64, 66–68, 76.) After high school, Johnson talked about doing other drugs, like Ecstasy or acid, and Markham observed Johnson buying an airsoft rifle in the summer of 2003 at an Asian shop at the mall. (*Id.* at 66, 78–79.) He has not had contact with Johnson since 2006. (*Id.* at 79.)

Michelle Ferro was another Columbine High School friend of Johnson’s. (R.T. 6/9/16, at 117–38.) Ferro met Johnson in Spanish class in the fall of 1998 when they were freshmen, and was instantly drawn to him; they eventually dated the following spring for a few months, and remained friends through high school. (*Id.* at 117–19.) Ferro was at school on the day of the shooting, and ran from the building into the park nearby, where she found Johnson, “visibly shaken” from the events. (*Id.* at 120–21.) Both she and Johnson knew

victims of the shooting and attended a memorial together a couple of days later. (*Id.* at 122–23.) Johnson helped Ferro through the summer after the shooting, comforting her, reminding her that it was a blessing to be alive, and even staying up on the telephone all night with her so that she could sleep. (*Id.* at 123–24.) Later in high school, Johnson became more reckless, boisterous, confident, and also became more muscular from steroid use. (*Id.* at 126–28, 132, 137, 169–70.) After high school, Ferro and Johnson lost contact, and had virtually no interaction for at least 10 to 12 years. (*Id.* at 134, 137–38.)

Timothy Blatter was a childhood and church friend of Johnson's. (R.T. 6/9/16, at 139–78.) Blatter recalled that Johnson enjoyed sports and riskier activities like roller-blading and snowboarding. (*Id.* at 140–41.) Johnson began violating the LDS “health code” in junior high by smoking, drinking alcohol, and using illicit drugs and other substances, which caused their friendship to wane. (*Id.* at 141–43, 168–69.) However, Johnson and Blatter maintained contact because both participated in wrestling, and they both continued to attend church, although they have not had contact in at least a decade now. (*Id.* at 143–44, 168, 171–72.)

Dan Grange knew Johnson in junior high school and high school through the LDS church and Boy Scouts. (R.T. 6/13/16, at 47–82.) Grange and Johnson got their Eagle Scout awards together. (*Id.* at 49.) Grange testified

that Johnson smoked and drank alcohol in high school and had “anger issues,” demonstrated by a quick temper and getting aggressive quickly over small incidents. (*Id.* at 50–51, 74.) Grange recalled that Johnson also used steroids in high school and beyond, and that Johnson had even tried to obtain Grange’s mother’s prescription pain medication. (*Id.* at 52–54, 74–75.) Grange also knew that Johnson shoplifted and committed theft in junior high and high school, including once stealing a ring and swallowing it so as to avoid detection by police. (*Id.* at 54–56, 64, 71–72, 76–77.) Grange testified that Johnson sought out risks and was an aggressive driver, but was also charming and charismatic. (*Id.* at 57–58, 60.)

Grange was in the cafeteria when the shooting happened and escaped upstairs, where he was in a classroom for three or four hours until he was evacuated by the SWAT team. (R.T. 6/13/16, at 65.) Grange discussed the general effect of the shooting on students, but did not notice specific changes in Johnson. (*Id.* at 66–68, 73.) Grange did not know where Johnson was during the shooting and they never spoke about it, but Johnson was fearless and not afraid of anyone. (*Id.* at 73–74.) After graduating from high school in 2002, Grange only saw Johnson two or three times. (*Id.* at 78.)

James Cobb, bishop of Johnson’s ward (LDS congregation), also testified on Johnson’s behalf. (R.T. 6/9/16, at 179–208.) Cobb first met

Johnson playing flag football on Thanksgiving Day, 2010. (*Id.* 182–83, 193.) As bishop, Cobb began visiting Johnson in jail roughly once a month 2011–2016, to let Johnson know that he and the church care about him and to talk about faith and discuss updates on friends and family. (*Id.* at 184, 188–91, 197, 207.) Cobb never perceived that Johnson had any lingering issues as a result of the Columbine shooting or about being adopted or a member of a different race. (*Id.* at 197–99.) Cobb also had no knowledge of Johnson’s extensive criminal history. (*Id.* at 200.) And at no time did Johnson ever ask Cobb about repentance or the repentance process. (*Id.* at 202.)

**d. Mental health expert testimony.**

Johnson presented the testimony of psychiatrist Dr. Alan Abrams (R.T. 6/14/16, at 120–74; R.T. 6/15/16, a.m., at 12–97; R.T. 6/15/16, p.m., at 20–65; R.T. 6/20/16, p.m., at 22–131.) Among Johnson’s previous medical records that Dr. Abrams reviewed was a 2008 MMPI test that Abrams concluded showed that Johnson “had a very superficial presentation of being a normal individual,” but, underneath, “was extremely pathological mentally,” and “had little control over his behavior,” especially as “related to anger,” he concluded that Johnson was “mixed schizoaffective without psychosis” or “associated with acute psychosis or very borderline situations.” (R.T. 6/14/16, at 137, 142–43, 154–55; Exh. 311.) Dr. Abrams opined that this “would be among the



worst psychiatric diagnoses” because the person had both schizophrenia and a “major depressive illness” such as bipolar illness. (R.T. 6/14/16, at 143.) Dr. Abrams explained that the test offered a “suggestion” of “paranoid schizophrenia,” but also offered an alternative “suggestion” that Johnson was “undergoing severe turmoil because of a recent loss,” which “was exactly the case” because Johnson took the test near the time Julie, Johnson’s wife, was moving back to Colorado. (*Id.* at 156.)

Dr. Abrams also reviewed a previous doctor’s 2008 diagnosis that Johnson had post-traumatic stress disorder (PTSD) and recurrent, severe depression, and the medications she ordered as a result. He also reviewed his previous psychiatric history from 2010, listing “bipolar disorder, not otherwise specified,” “mood challenges,” and “grandiosity,” and the various medications prescribed as a result. (R.T. 6/14/16, at 159, 162, 164–65, 171; R.T. 6/15/16, a.m., at 13–17.) Dr. Abrams also reviewed police reports and DOC records, and interviewed Johnson’s mother in 2012. (R.T. 6/15/16, a.m., at 17, 24.) Dr. Abrams agreed with Johnson’s mother that Johnson was unable to move on past the Columbine shooting. (*Id.* at 21–22.)

Dr. Abrams also interviewed Johnson on several occasions. (R.T. 6/15/16 a.m., at 26–27.) Johnson reported carving the Chinese symbol in Mrs. Fu’s stomach to draw police attention away from him, simply copying it from a

Chinese calendar on the wall. (R.T. 6/20/16, p.m., at 72, 75.) Johnson admitted not needing money, but nevertheless, went into the Taiwan Massage to rob it because he believed there would be a lot of cash on hand. (*Id.* at 76–77.) Similarly, Johnson thought the Christmas tree lot would have a lot of cash on hand, even though he did not need cash. (*Id.* at 79.) Johnson stabbed Mrs. Fu because she was screaming. (*Id.* at 82–83.)

However, among the materials Dr. Abrams reviewed, was Julie’s report that, on last day together, Johnson intentionally burned her with a cigarette lighter, tried to choke and strangle her while on top of her with the baby next to her on the bed. (R.T. 6/20/16, p.m., at 24–25.) Johnson also threatened an undressed Julie with a knife to her abdomen, telling her that the “best, easiest, cleanest way” to kill someone was a knife through the rib cage. (*Id.* at 25–26.) Johnson also put a heated lighter on Julie’s skin, choked her with a pillow, and threatened her with a knife to her bare abdominal area. (R.T. 6/15/16, p.m., at 64–65.)

Johnson also presented the testimony of Dr. David Kirschner, a psychotherapist, with an expertise in adoption. (R.T. 6/15/16 p.m., at 78–110; R.T. 6/6/16, at 5–222.) Dr. Kirschner did a clinical forensic evaluation of Johnson regarding adoptions issues. (R.T. 6/15/16, p.m., at 107.) Dr. Kirschner opined regarding the “trauma of rejection” experienced by adoptees, and that

“adopted child syndrome”<sup>5</sup> (which he compared to antisocial personality disorder) can include “traits such as compulsive lying, stealing, violation of rules, learning problems, academic underachievement, identity confusion, alcohol and substance abuse.” (R.T. 6/16/16, at 13–15.) Dr. Kirschner speculated that Johnson has an undetected “deep feeling of rage . . . connected to his feelings about his identity . . . and feelings of abandonment and rejection,” and that Johnson has a “dissociative disorder” as a result of having been adopted. (*Id.* 41, 61–62.) He further opined that the shooting at Columbine High School was a “PTSD situation” for Johnson. (*Id.* at 65–66.)

Johnson admitted to Dr. Kirschner that he killed Mrs. Fu for money, zip-tying and stabbing her when she resisted, and specifically reported that the victim “had the stupidest look on her face,” and she had a knife in her hand, so he “grabbed it,” “spun her around,” “stabbed her in the back” and “cut her throat.” (R.T. 6/16/16, at 70–71, 159–60.) Johnson also reported that the victim was screaming. (*Id.*) Johnson wondered whether it is “hard to get a book published” and speculated that he would write a book in prison. (R.T. 6/16/16, at 160.) Johnson also claimed to have taken a lot of Xanax at the time of the crime. (*Id.* at 71.)

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<sup>5</sup> However, “adopted child syndrome” is not in the DSM. (R.T. 6/16/16, at (continued ...))

Dr. Kirschner diagnosed Johnson with a dissociative disorder, not otherwise specified, and PTSD. (R.T. 6/16/16, at 75–76, 103–05.) However, the doctor acknowledged that Johnson was adopted as a 3-month-old to a good, loving family and never suffered any neglect or abuse. (*Id.* at 130.)

### **3. State rebuttal evidence.**

Stacey Crabtree, bureau administrator of inmate classification and records at the Arizona Department of Corrections, testified regarding the housing differences for an inmate between a life sentence and a death sentence. (R.T. 6/20/16, p.m., at 134–60.) For example, an inmate with a life sentence has the possibility to work toward a lower classification of custody, while an inmate with a death sentence will always be classified at a level of maximum custody. (*Id.* at 139–41.) With lower classifications of custody come additional privileges, such as more phone calls, recreation time, and visits, as well as additional in-prison job possibilities. (*Id.* at 141, 146.) Thus, a willingness to plead to a life sentence may be motivated more by personal interest than a desire to be responsible.

The state also presented the testimony of Kathleen Battan, lead detective in the April 20, 1999, Colorado Columbine High School shooting, who factually contradicted testimony from the defense Columbine survivor

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witnesses. (R.T. 6/21/16, at 6–80.) In the course of interviewing as many of the then-current Columbine high school students as possible, law enforcement interviewed Johnson, who reported being in the weight room when the alarms went off and escaping to a nearby park with other students. (*Id.*, at 26–29.) Johnson did not know the shooters, Harris and Klebold. (*Id.* at 28–29.)

The State also presented the testimony of clinical psychologist, Dr. Janeen DeMarte, who reviewed many materials related to Johnson, including medical and psychological reports and tests, interviews, and criminal history, and also interviewed, tested and observed Johnson. (R.T. 6/22/16, at 6–185; R.T. 6/23/16, at 16–121.) Johnson reported a positive relationship with his parents and that he had never suffered or witnessed physical or sexual violence; however, he also denied being physically violent in relationships. (R.T. 6/22/16, at 31–32.) Johnson reported being very integrated into and loved by his adoptive family, with his adoption being a nonfactor to him. (*Id.* at 32–33.) Johnson reported being on campus during the shootings at Columbine, but thinking at the time a senior prank was underway, escaping to a nearby park, and not understanding what had transpired until much later. (*Id.* at 40–43.) His reports of knowing victims were inconsistent, and later he did not speak of Columbine much except to express empathy for the shooters. (*Id.* at 42–44.)

Johnson admitted to abusing alcohol and a wide variety of drugs, prescription (including Xanax, Percocet, and steroids) and illegal (including cocaine, marijuana, and ecstasy) from adolescence through adulthood, and that he manipulated doctors and prescriptions to justify obtaining the drugs, as well as to explain urine test results. (R.T. 6/22/16, at 52–59.) But he denied that the substance abuse ever caused problems with his interpersonal relationships. (*Id.* at 55.)

Johnson reported that he enjoyed doing drugs and primarily did it for entertainment and because he liked being high, with the exception of perhaps one time right after the shootings at Columbine to “numb” himself, but even then it was more because he enjoyed the high. (R.T. 6/22/16, at 59–60.) He also reported liking being surreptitious—being high and nobody in his life realizing it. (*Id.* at 60.) However, even in reporting his substance abuse, he downplayed it and underreported his history of drug use. (*Id.* at 69–70.)

Johnson also downplayed his criminal history, such as describing his armed robbery of the Christmas tree lot as “casual” and claiming that he assured the victims everything was “okay” and that he just wanted their money—in stark contrast to the police report of the incident. (R.T. 6/22/16, at 60–62.) Johnson downplayed or underreported the rest of his criminal history as well, including his juvenile criminal record. (*Id.* at 61–67.) Johnson

additionally downplayed or denied other physical violence, including 17 in-prison fights, and once slitting a dog's throat. (*Id.* at 67–68.)

Dr. DeMarte explained that the under-reporting (or non-reporting) of Johnson's cocaine use, in particular, explains past psychological diagnoses and reports of anxiety because the symptoms are instead explained by the presentation of someone on cocaine. (R.T. 6/22/16, at 71–76, 79–81.) In fact, Johnson admitted that some of his reported anxiety was fear of the discovery of his cocaine use, particularly by the police, and this anxiety and paranoia spread to other areas of life, leading to abuse of other drugs. (*Id.* at 80.)

Johnson reported taking “a lot” of Xanax the morning of the murder. (R.T. 6/22/16, at 84.) Johnson further reported to Dr. DeMarte that he ended up somehow at Mrs. Fu's business and wanted money to buy steroids. (*Id.* at 84–86.) Once inside the Taiwan Massage, Johnson reported a lot of yelling between him and Mrs. Fu, who was ordering him to leave, and “things went crazy after that.” (*Id.* at 86, 94.) Johnson smiled as he told Dr. DeMarte that he had a pellet gun with him in Taiwan Massage and that he was looking for money, but said, “I don't know what a fucking pellet gun would have done, but whatever.” (*Id.* at 94–95.) Laughing, Johnson told Dr. DeMarte that he had the pellet gun for shooting “beer cans and shit.” (*Id.* at 95.) Johnson reported going into the “little room” in the Taiwan Massage looking for money and that

the victim was yelling at him, but does not remember anything after that until calling Leandra Yazzie as he drove away. (*Id.* at 95–96.)

Saying he was “in shock,” he arrived at Yazzie’s apartment and was “sure he realized what happened.” (R.T. 6/22/16, at 96.) Claiming he had no blood on his clothing, he reported staying 30 minutes to an hour at Yazzie’s apartment before going to the gym to work out for three to four hours. (*Id.* at 96–97.) Johnson claimed not being able to remember stabbing Mrs. Fu or carving a symbol into her stomach. (*Id.* at 98.) However, Johnson gave more details to Drs. Kirschner and Abrams, such as that Mrs. Fu attacked Johnson first with both a hammer and a knife. (*Id.* at 99.) However, Dr. DeMarte explained that a loss of memory after recounting it to others does not occur, rather, memory generally increases the more it is recounted and recalled. (*Id.* at 100.)

Johnson also told Dr. DeMarte that he robbed the Christmas tree lot a few days later because it would have a lot of cash, and he wanted cash to return to Colorado. (R.T. 6/22/16, at 100–01.) Johnson told Dr. DeMarte that while hiding in the shed after his armed robbery of the Christmas tree lot, he was telephoning friends to come and pick him up. (*Id.* at 101–02.) Laughing, Johnson reported also trying to deceive police by asking a friend to call the



police and report that Johnson had run in a different direction so he could be free to leave the shed. (*Id.* at 102.)

In fact, Johnson laughed when he reported what little he claimed to remember about Mrs. Fu's murder as well. (R.T. 6/22/16, at 103.) When Dr. DeMarte showed Johnson photos of the murder crime scene, Johnson said that he did not like seeing them, then began laughing and said, "What else do you want me to say?" (*Id.*) In the few days after the murder before he was arrested for the armed robbery, Johnson reported no emotional changes and that he went to the gym and worked out a lot. (*Id.* at 103–05.) Dr. DeMarte observed that Johnson has no "alexithymic features," as identified by others because Johnson has no trouble showing, recognizing or expressing emotions. (*Id.* at 106–07, 166.)

Dr. DeMarte did not diagnose Johnson with a personality disorder, though she did find that Johnson has traits of a personality disorder as an adult, including consistently disregarding and/or breaking rules and laws. (R.T. 6/22/16, at 131–33, 164.) And, in contrast to Drs. Abrams and Kirschner, who diagnosed Johnson with a personality disorder with avoidant traits, Dr. DeMarte opined that Johnson did not have such a disorder "at all" because he did not avoid social situations or have difficulty dating or display any other symptoms of that disorder. (*Id.* at 164–66.) Further, Dr. DeMarte concluded

that, while Johnson had some symptoms of PTSD directly after the shootings at Columbine, he had no cumulative effect and no full diagnosis of PTSD. (*Id.* at 179–80.) Additionally, Johnson had no mood disorder, or any type of anxiety or impulse disorder, and no symptoms of any dissociative disorder. (*Id.* at 180–83.)

However, Dr. DeMarte gave Johnson four different diagnoses related to disordered relationships with substance abuse—including sedatives, stimulants, opioids, and anabolic steroids. (R.T. 6/22/16, at 183.) Further, the maladaptive traits Johnson demonstrated resulted in deceitful or manipulative behavior to facilitate this substance abuse. (*Id.* at 183–84; R.T. 6/23/16, at 17.)

Dr. DeMarte further testified that Johnson displayed no empathy for his very violent crimes, and displayed no change in emotional state after committing them. (R.T. 6/22/16, at 185; R.T. 6/23/16, at 19.) More evidence of maladaptive traits was Johnson’s assaultive and aggressive behavior, such as Johnson telling Julie that he would cut the corners of her mouth, and, if she screamed, it would rip her mouth open. (R.T. 6/23/16, at 16–17.) Johnson also threatened pregnant Julie with cutting the baby out of her and stabbing the baby. (*Id.* at 17.)

Concluding, Dr. DeMarte testified that along with four substance abuse diagnoses, Johnson has one personality disorder, but no other psychological

disorder. (R.T. 6/23/16, at 21.) However, Dr. DeMarte explained that there is nothing about having a personality disorder with predominantly antisocial traits that causes a person to be incapable of internal control. (R.T. 6/23/16, at 21.)

#### **4. Johnson's allocution.**

Johnson exercised his right to allocute, telling the jury:

Ladies and gentlemen, I'm very sorry for killing Ms. Fu. It was senseless and horrible. You have heard the mitigating factors of my life that my attorneys feel is relevant in bringing me to this point in my life. I would have pled guilty to this first-degree murder as early as March of 2012. I say consider the mitigation presented and give leniency for those reasons when deciding my sentence. Thank you.

(R.T. 6/23/16, at 136–37.)

#### **5. Verdict and sentences.**

On June 29, 2016, the jurors decided that Johnson should be sentenced to death for the first-degree murder of Mrs. Fu. (R.T. 6/29/16, at 6–8.) The trial court sentenced Johnson, pursuant to the armed-robbery plea agreement, to an aggravated sentence of 12 years of imprisonment. In the instant case, the court sentenced Johnson as follows: for Count 1 (first-degree murder) death; for Count 2 (kidnapping), the presumptive term of 10.5 years of imprisonment; and for Count 3 (burglary in the first degree), the presumptive term of 7.5 years of imprisonment. The court ordered the sentences in the instant case to run

concurrently to one another, but consecutively to that imposed in the armed robbery case. (R.T. 6/29/16, at 16–18, 20–23.)

On June 30, 2016, the Clerk of the Superior Court automatically filed a timely notice of appeal from the judgment and sentence. This Court has jurisdiction under Arizona Constitution Article VI, Section 5(3), and Arizona Revised Statutes §§ 13–4031, and -4033(A).

## **ARGUMENTS**

### **I**

#### **THIS COURT SHOULD NOT RIVISIT ITS DECISION IN HIDALGO.**

Johnson mounts a facial challenge to Arizona’s capital-sentencing scheme, proposing that it contains too many aggravating factors, fails to sufficiently narrow the class of death-eligible defendants, and violates the Eighth Amendment. (O.B. 35–65.) Just last year, this Court rejected this very argument on a materially identical record. *See State v. Hidalgo*, 241 Ariz. 543, 549–52, ¶¶ 14–29 (2017). This Court has already repeatedly upheld *Hidalgo*. *See State v. Hulsey*, 243 Ariz. 367, 384–85, ¶¶ 65–71 (2018); *State v. Bush*, 244 Ariz. 575, 597, ¶ 101 (2018); *State v. Acuna Valenzuela*, 245 Ariz. 197, ¶ 121 (2018). Johnson has not offered a persuasive reason to reconsider this recent decision, let alone a compelling one. *See State v. Hickman*, 205 Ariz. 192, 200, ¶ 37 (2003).

Both Hidalgo and Johnson joined litigation commenced in *State v. Gittens*. (R.O.A. 114–124.)<sup>6</sup> Johnson also joined in a subsequent round of litigation in *State v. Lopez*. (R.O.A. 224, 227, 246.) The same judge resolved both rounds of litigation, and stated that his minute entry in *Lopez* should be read in conjunction with his one in *Gittens*. (R.O.A. 252, at 2 n.2.) This Court should review Johnson’s claim *de novo*. *Hidalgo*, 241 Ariz. at 548, ¶ 7.

In *Hidalgo*, this Court unanimously concluded that Arizona’s sentencing statutes provide sufficient narrowing to satisfy the Eighth Amendment. *Id.* at 549–59, ¶¶ 14–29. The only thing that has changed between *Hidalgo* and Johnson’s opening brief is United States Supreme Court Justice Breyer’s statement respecting the denial of certiorari (which 5 justices did not join). See *Hidalgo v. Arizona*, 138 S. Ct. 1056 (2018) (Mem.).

This statement, however, is entitled to no precedential or persuasive force. See *Teague v. Lane*, 489 U.S. 288, 296 (1989) (“The variety of considerations [that] underlie denials of the writ counsels against according denials of certiorari any precedential value. Concomitantly, opinions accompanying the denial of certiorari cannot have the same effect as decisions on the merits.”) (quotations omitted); *Singleton v. C.I.R.*, 439 U.S. 940, 945

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<sup>6</sup> (See also R.T. 4/19/13; R.T. 5/3/13; R.T. 1/23/15; R.T. 4/24/15; and R.T. (continued ...))

(1978) (Mem.) (Opinion of Stevens, J., respecting the denial of certiorari) (“One characteristic of all opinions dissenting from the denial of certiorari is manifest. They are totally unnecessary. They are examples of the purest form of dicta, since they have even less legal significance than the orders of the entire Court which ... have no precedential significance at all.”); *Planned Parenthood of S. Ariz. v. LaWall*, 180 F.3d 1022, 1026 n.3 (9th Cir. 1999) (“[I]ntermittent statements accompanying denials of certiorari or denials of stays pending appeal do not amount to intervening changes of law”); *United States v. Mitchell*, 783 F.2d 971, 977 n.5 (10th Cir. 1986) (“[N]o precedential conclusion can be drawn from the denial of certiorari or the statements made by the dissenting justices ....”). This Court’s reasoning and result in *Hidalgo* were correct, and this Court should affirm it here.

## II

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO HOLD AN EVIDENTIARY HEARING on whether Arizona’s capital sentencing statutes are constitutional WHERE THERE WAS NO FACTUAL DISPUTE TO RESOLVE.**

Johnson next contends that the trial court abused its discretion, and violated several constitutional rights, by refusing to hold an evidentiary hearing

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on the consolidated motion to dismiss the death penalty.<sup>7</sup> (O.B. 66–74.) This Court rejected Johnson’s claim in *Hidalgo*, and he has shown no compelling reason to revisit that decision. *See Hickman*, 205 Ariz. at 200, ¶ 37.

The trial court twice denied a hearing (once in the *Gittens* litigation and once in the *Lopez* litigation), instead presuming the defendants’ proffered facts were true for the purpose of resolving their claim. (*See* R.T. 4/24/15, at 23.) This Court affirmed that decision in *Hidalgo*, concluding that “evidentiary hearings are not required when courts need not resolve factual disputes to decide constitutional issues.” *Hidalgo*, 241 Ariz. at 548, ¶ 8. This Court also rejected Hidalgo’s argument that the denial of a hearing violated due process and that it hindered appellate review. *Id.* at 548–49, ¶¶ 8–12.

Johnson asks this Court to reconsider *Hidalgo* for meritless reasons, pointing to Justice Breyer’s statement, which Johnson claims “places the trial court’s decision in a new light.” (O.B. 71.) But as previously discussed, Justice Breyer’s statement is not precedential or persuasive. *See Teague*, 489 U.S. at 296; *Singleton*, 439 U.S. at 945; *Planned Parenthood of S. Ariz.*, 180 F.3d at 1026 n.3; *Mitchell*, 783 F.2d at 977 n.5. Additionally, Johnson notes

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<sup>7</sup> This Court reviews a trial court’s denial of an evidentiary hearing for an abuse of discretion and reviews constitutional issues *de novo*. *Hidalgo*, 241 Ariz. at 548, ¶ 7.

that Hidalgo did not petition for certiorari on the evidentiary-hearing issue. (O.B. 72.) Johnson does not explain the relevance of this strategic decision by Hidalgo, and it is in fact irrelevant.

Third, Johnson contends that the denial of an evidentiary hearing denied his right to counsel, and that Hidalgo’s attorneys did not present a right-to-counsel argument to this Court. (O.B. 72.) Johnson, however, fails to explain how the mere failure to hold an evidentiary hearing violates a defendant’s right to counsel, and no such explanation is readily apparent, especially when there are no facts in dispute. (*Id.*) Fourth—without citation to any authority—Johnson argues that the Arizona Constitution (which Hidalgo apparently did not cite) provides broader rights to appeal and to counsel than the United States Constitution. (*Id.* at 72–73.) Even if this is true, Johnson does not explain how those rights were violated here, where he was represented by an attorney who requested an evidentiary hearing, and where the trial court created a record for this Court’s review.

Finally, any error in the denial of an evidentiary hearing was harmless. Like Hidalgo, Johnson does not identify “any particular evidence that he would have offered that would materially add to the factual record before the trial court or this Court on appeal,” or how that evidence would have made a difference to the outcome. *Hidalgo*, 241 Ariz. at 548, ¶ 9. Johnson failed to



prove his claim, despite the trial court assuming the truth of his factual allegations. In fact, Johnson's insistence on an evidentiary hearing is perplexing, because subjecting his proffered facts to adversarial testing can only serve to undermine them. In other words, a hearing can only make things worse for Johnson. This Court should reject his claim.

### III

**THIS COURT SHOULD NOT OVERRULE DECADES OF PRECEDENT CONCLUDING THAT, WHILE FACIALLY VAGUE, THE A.R.S. § 13-751(F)(6) AGGRAVATING FACTOR MAY BE NARROWED BY JURY INSTRUCTIONS.**

Johnson contends that the A.R.S. § 13-751(F)(6) aggravating factor is facially vague and cannot be narrowed by jury instructions. (O.B. 75-91.) This Court has rejected this argument numerous times, and Johnson has offered no persuasive reason for this Court to deviate from those decisions.

#### ***A. Standard of review.***

Before trial, Johnson moved to strike the State's allegation of the A.R.S. § 13-751(F)(6) aggravating circumstance, arguing that it is unconstitutionally vague. (R.O.A. 274.) The State responded. (R.O.A. 316.) The trial court denied Johnson's motion. (R.O.A. 347, at 13-14.) This Court reviews constitutional issues *de novo*. *State v. Bocharski*, 218 Ariz. 476, 483, ¶ 17 (2008).

### **B. Pertinent facts.**

In denying Johnson’s motion to strike the State’s allegation of the (F)(6) aggravator for unconstitutional vagueness, the trial court cited this Court’s repeated rejections of this argument. *See State v. Johnson*, 212 Ariz. 425, 431–32, ¶¶ 19–20 (2006); *State v. Cromwell*, 211 Ariz. 181, 188–89, ¶¶ 40–42 (2005); *State v. Anderson*, 210 Ariz. 327, 352–53, ¶¶ 109–14 (2005). The court further indicated that it intended to appropriately instruct the jurors to give the aggravator substance and specificity, pursuant to this Court’s instruction. *See State v. Gallardo*, 225 Ariz. 560, 566, ¶¶ 21–23 (2010); *State v. Hargrave*, 225 Ariz. 1, 13–14, ¶¶ 42–46 (2010); *State v. Andriano*, 215 Ariz. 497, 505, ¶¶ 38–39 (2007) (*abrogated on other grounds, State v. Ferrero*, 229 Ariz. 239 (2012)).

The trial court instructed the jurors on both aspects of the (F)(6) aggravator:<sup>8</sup>

Definition of especially heinous, cruel, or depraved.  
Concerning this aggravating circumstance, all first-degree murders are, to some extent, heinous, cruel or depraved. However, this aggravating circumstance cannot be found to exist unless the State has proved beyond a reasonable doubt that the murder was especially cruel, especially heinous or especially depraved.

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<sup>8</sup> “Because [the (F)(6)] is stated in the disjunctive, a finding of either cruelty or heinousness/depravity will suffice to establish this factor.” *State v. Lynch*, 225 Ariz. 27, 42, ¶ 84 (2010).

“Especially” means unusually great or significant. The terms “especially cruel,” or “especially heinous or depraved” are considered separately. Therefore the presence of any one circumstance is sufficient to establish this aggravating circumstance. However, to find that this aggravating circumstance is proven, you must find that especially cruel has been proven unanimously beyond a reasonable doubt or that especially heinous or depraved has been proven unanimously beyond a reasonable doubt.

“Especially cruel.” The term “cruel” focuses on the victim’s pain and suffering. To find that the murder was committed in an especially cruel manner, you must find that the victim consciously suffered physical or mental pain, distress or anguish prior to death. The defendant must know or should have known that the victim would suffer.

“Especially heinous or depraved.” The term “especially heinous or depraved” focuses upon the defendant’s state of mind at the time of the offense, as reflected by the defendant’s words and acts. A murder is especially heinous if it is hatefully or shockingly evil. In other words, grossly bad. A murder is especially depraved if it is marked by debasement, corruption, perversion or deterioration.

(R.T. 5/25/16, at 47–49.) The court then listed and defined the *Gretzler*<sup>9</sup> factors of gratuitous violence, helplessness, and senselessness. (*Id.* at 49–50) The jurors unanimously found that the State had proved both cruelty and heinousness/depravity—specifically that Johnson inflicted gratuitous violence beyond that necessary to kill, the murder was senseless and that the victim was helpless. (R.T. 5/26/16/, at 11; R.O.A. 494.)

***C. This Court is bound by Walton and, in any event, nothing in this Court’s post-Walton jurisprudence calls that holding into question.***

As Johnson acknowledged, this Court and the United States Supreme Court have repeatedly rejected the argument that the (F)(6) circumstance cannot be constitutionally narrowed through jury instructions. (O.B. 75–86.) See, e.g., *Walton v. Arizona*, 497 U.S. 639 (1990); *State v. Guarino*, 238 Ariz. 437, 445, ¶¶ 39–40 (2015); *State v. Pandeli*, 215 Ariz. 514, 523, ¶¶ 17–19 (2007); *Anderson*, 210 Ariz. at 352–53, ¶¶ 109–14. Johnson offers no compelling reason for this Court to depart from its prior decisions. See *Hickman*, 205 Ariz. at 200, ¶ 37 (“Respect for precedent demands that we not lightly overrule precedent and we do so only for compelling reasons.”) (quotations omitted). And this Court is, of course, bound by *Walton*, regardless whether Johnson believes that decision is unsound. E.g. *State v. Ring (Ring III)*, 204 Ariz. 534, 557, ¶ 61 (2003).

In any event, Johnson is incorrect that that this Court’s post-*Walton* jurisprudence has called that decision into question. (O.B. 80–91.) Johnson first argues that, since *Walton*, this Court has regarded the *Gretzler* factors as mere guides, and has thereby expanded the (F)(6)’s sweep. (O.B. 80 (citing *State v. Milke*, 177 Ariz. 118, 126 (1993) (“We have never said that the

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( ... continued)

<sup>9</sup> See *State v. Gretzler*, 135 Ariz. 42, 52 (1983).

*Gretzler* factors are exclusive.”)). But as Johnson notes, this Court suggested in *Gretzler* itself that the enumerated factors were not exclusive. (O.B. 80.) See *Gretzler*, 135 Ariz. at 53 (stating that when no factors “such as the specific factors discussed” in the opinion are present, court will reverse (F)(6) finding) (emphasis added). The Supreme Court was well aware of this when it decided *Walton*, as evidence by the dissent’s argument. See *Walton*, 497 U.S. at 694–95 (Blackmun, J., dissenting) (“The principles announced in *Gretzler* have failed to place meaningful limitations on the application of the (F)(6) aggravating circumstance. Since its decision in *Gretzler*, the Arizona Supreme Court has continued to identify new factors which support a finding that a particular murder was heinous or depraved.”) (collecting cases). Accordingly, nothing in this Court’s post-*Walton* jurisprudence casts doubt on *Walton*.

Next, Johnson asserts that this Court has broadened the (F)(6) by failing to enforce the statutory requirement that a murder be “*especially* heinous, cruel or depraved.” A.R.S. § 13–751(F)(6) (emphasis added). (O.B. 81–83.) This Court, however, has repeatedly upheld against vagueness challenges jury instructions defining “especially” as “unusually great or significant”—the definition the court used here. (R.T. 5/25/16, at 48.) See *State v. Prince*, 226 Ariz. 516, 531–33, ¶¶ 48–54 (2011); *State v. Chappell*, 225 Ariz. 229, 237–38, ¶ 27 n.6 (2010); *Gallardo*, 225 Ariz. at 566, ¶¶ 21–23. Contrary to Johnson’s

impression, this definition brings concrete meaning to the term and conveys to jurors that the degree of cruelty or heinousness/depravity must be above the norm. In fact, this Court’s approved definition of “especially” is consistent with the dictionary definitions Johnson cites. (O.B. 83.)

Johnson’s reliance on *Johnson*, 212 Ariz. at 431–42, ¶¶ 19–20, is misplaced. (O.B. 83–86.) Johnson maintains that, in *Johnson*, this Court deprived “especially” of any meaning by declining to require an explicit comparison between the murder at issue and the norm of first-degree murders. (O.B. 84–86.) But this Court in *Johnson* was addressing the defendant’s argument that a jury must conduct proportionality review. *Id.*; see also *Andriano*, 215 Ariz. at 505, ¶ 39 (rejecting, based on *Johnson*, argument that “[t]he (F)(6) aggravating factor is unconstitutionally vague when applied by a jury because without proportionality review the jury has no way to determine whether the murder for which it has found the defendant guilty is “above the norm of other first degree murders”). That decision did not diminish the definition of “especially” this Court has approved. This Court should reject Johnson’s arguments.

**D. This Court should reaffirm its prior holdings that jurors, when correctly instructed, are capable of understanding and applying the (F)(6).**

Johnson next argues that “[p]resuming this Court’s jurisprudence does provide guidance, it cannot be adequately communicated to guide a jury.” (O.B. 87.) Johnson construes *Walton* to apply only to judge sentencing. (O.B. 87–91.) This Court rejected this very argument in *Anderson*, 210 Ariz. 394–95, ¶¶ 109–14. This Court has since affirmed *Anderson*’s holding multiple times. See *Pandeli*, 215 Ariz. at 523, ¶ 19; *Hargrave*, 225 Ariz. at 13, ¶ 44; *State v. Hampton*, 213 Ariz. 167, 176, ¶¶ 35–36 (2006); *Cromwell*, 211 Ariz. at 188–90, ¶¶ 40–45. Johnson does not acknowledge this precedent, let alone provide a persuasive reason to overturn it. (*Id.*) *Hickman*, 205 Ariz. at 200, ¶ 37. This Court should therefore affirm this precedent and reject Johnson’s arguments.

#### IV

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WITH REGARD TO THE (F)(6) JURY INSTRUCTION.**

Johnson next argues that the trial court abused its discretion by instructing the jurors regarding the (F)(6) aggravator. (O.B. 92–105.) This contention is also without merit.

**A. Standard of review.**

Whether jury instructions correctly state the law receives de novo

review. *Chappell*, 225 Ariz. at 237, ¶ 26, 236 P.3d at 1184. But when a party fails to object to an alleged error in a jury instruction, review is limited to fundamental error. *State v. Finch*, 202 Ariz. 410, 415, ¶ 19 (2002). This standard of review places the burden on the defendant to establish fundamental error and resulting prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005).

**B. *Pertinent facts.***

Johnson requested a special instruction with regard to the definition of the cruelty aspect of the (F)(6) aggravator (R.O.A. 470), but did not request anything with regard to heinous/depravity. (R.T. 5/25/16, at 36.) As such, Johnson’s challenge to the trial court’s definition of the heinous or depraved aspect of the (F)(6) aggravator is reviewable only for fundamental error. (O.B. 98–105.)

Prior to the end of the aggravation phase, Johnson filed a motion requesting an embellishment to the recommended jury instruction defining the “especially cruel” element of the (F)(6) aggravator:

Requested Jury Instruction No. 1

Especially cruel

All first-degree murders are to some extent cruel. This aggravating circumstance, however, cannot be found to exist unless the state proves beyond a reasonable doubt that a murder is “especially” cruel. That is, where the circumstances of the murder



raise it above the norm of cruelty in other first-degree murders.

“Especially” means beyond the norm, standing above or apart from others.

Cruelty involves the infliction of physical pain and mental anguish on a victim before death. A murder is committed in an especially cruel manner when a defendant either intended or knew that the manner in which the murder is committed would cause the victim to experience physical pain and mental anguish before death in a manner beyond what is normally experienced by other first degree murder victims. The victim must be conscious when the pain and anguish were inflicted. You may consider the length of time the victim was conscious in determining whether the offense was especially cruel.

Requested Jury Instruction No. 2

Consciousness during cruelty

The law provides that an unconscious person cannot suffer pain and anguish that supports a finding that the murder was especially cruel. The state must prove beyond a reasonable doubt that the pain and anguish occurred while the victim was conscious. If there is a reasonable doubt that the victim was conscious at the time that the pain and anguish occurred, you must find that the State failed to prove that the murder was especially cruel.

(R.O.A. 470, at 1–2.)

As detailed previously, the trial court instructed the jurors in accordance with this Court’s case law, specifically as relevant to this claim, that “[e]specially’ means unusually great or significant,” and that:

The term “cruel” focuses on the victim’s pain and suffering. To find that the murder was committed in an especially cruel manner, you must find that the victim consciously suffered physical or mental pain, distress or anguish prior to death. The defendant must

know or should have known that the victim would suffer.

(R.T. 5/25/16, at 47–49.)

**C. *Law and argument.***

“The (F)(6) aggravator is facially vague but may be remedied with appropriate narrowing instructions.” *State v. Tucker*, 215 Ariz. 298, 310, ¶ 28, 311, ¶ 33 (2007).

**1. Cruelty.**

This Court has approved “especially cruel” instructions where they required the jury to find two “essential narrowing factors:” (1) that the victim was conscious during the mental anguish or physical pain, and; (2) that the defendant knew or should have known that the victim would suffer. *Id.* at 310, ¶ 31, 160 P.3d at 189–90. No error occurred because the trial court’s especially cruel instruction contained the two “‘essential narrowing factors’ identified in *Tucker*” and was “materially identical” to instructions this Court has upheld in prior cases. *Gallardo*, 225 Ariz. at 566, ¶ 23, 242 P.3d at 165 (citing, as examples, *Chappell*, 225 Ariz. at 237–38, ¶ 27 & n.6, 236 P.3d at 1184–85 & n.6, and *State v. Villalobos*, 225 Ariz. 74, 82, ¶ 31 & n.4, 235 P.3d 227, 235 & n.4 (2010)).

Johnson’s contention that the trial court’s cruelty instruction lacked sufficient “illustrative examples” to ensure the jury’s understanding of what

composes an “especially cruel” first-degree murder is without merit. (O.B. 92–97. Illustrative examples, however, are not required. Further, they would invite jurors to engage in unauthorized proportionality review. Examples are further inappropriate because the victims’ pain and anguish includes the entire murder transaction and whether cruelty exists depends on facts specific to each case. *State v. McCray*, 218 Ariz. 252, 259, ¶ 31 (2008). Here, the victim experienced physical pain and mental anguish during an attack that ranged through several rooms and involved Johnson using zip ties on the victim’s wrists and neck to immobilize her. (R.T. 4/20/16, at 77–80, 85–95; R.T. 4/21/16, at 36–38, 40–61, 154–56, 171; 4/25/16, a.m., at 37; R.T. 4/15/16, p.m., at 46–47, 50–55, 61–65; R.T. 5/4/16, at 79–95, 103–05, 108–18, 120–31; R.T. 5/9/16, at 130–32.)

Johnson cites *State v. Snelling*, 224 Ariz. 182, ¶¶ 22–38 (2010), a strangulation case, for support of his contention that the trial court’s cruelty definition was inadequate. (O.B. 95–96.) However, *Snelling* supports the trial court’s actions in this case. “[T]o establish that a murder by strangulation or any other means is especially cruel, the state must prove that the particular victim consciously suffered mental anguish or physical pain before death.” *Snelling*, 225 Ariz. at 188, ¶ 26. The trial court’s instruction was accorded with this principle because it informed the jurors that to find cruelty, they had to find

“that the victim consciously suffered physical or mental pain, distress, or anguish prior to death.” (R.T. 5/25/16, at 48.) Moreover, nothing in the instant case is analogous to the concerns this Court expressed in *Snelling*—that is, that “it is not inherently cruel to murder a victim quickly and by surprise.” 225 Ariz. at 189, ¶ 32.

Rather, in contrast to the record in *Snelling*, there was ample evidence that Mrs. Fu struggled with Johnson. She had multiple stab wounds, as well as defensive injuries. (R.T. 4/27/16, at 18–19, 29–30.) As stated previously, there was physical evidence of a struggle throughout her business, including blood and disturbed items in several rooms. *See State v. Doerr*, 193 Ariz. 56, 67, ¶ 52 (1998) (crime scene evidence of pursuit and struggle and “violent, moving confrontation” support cruelty finding); *State v. Walden*, 183 Ariz. 595, 618 (1995) (finding signs of a struggle when victim’s hands were intertwined in the electrical cord used to strangle her and blood was sprayed around the room).

Further, Mrs. Fu had been bound by zip-ties at the wrists, which were swollen and injured, indicating her struggle against the restraints. This is evidence of both mental anguish and physical pain. *See State v. Morris*, 215 Ariz. 324, 341 ¶ 79 (2007) (finding cruelty when the state presented evidence of a struggle in addition to expert testimony that strangulation victims remain conscious and experience pain for some time); *State v. Schackart*, 190 Ariz.

238, 248 (1997) (period of suffering from as short as 18 seconds to two to three minutes can be enough to support the application of the cruelty aggravator); *State v. Newell*, 212 Ariz. 389, 406 ¶ 85 (2005) (finding cruelty in a ligature strangulation case when evidence showed “bruising that occurred at or near the time of death consistent with grasping [the victim’s] arms, sexual-assault-related bruises and injuries, testimony that it normally takes two minutes for death by asphyxiation to occur, and marks showing that [the victim] was grasping at the ligature”).

Thus, the instruction given here, and repeatedly affirmed by this Court provided the essential constitutional narrowing.

## **2. Heinousness/depravity.**

Preliminarily, this argument is moot because the jury’s verdict indicated that it unanimously found the murders especially cruel *and* especially heinous or depraved. (R.T. 5/26/16, at 10; R.O.A. 494.) In its instructions, the trial court explained to the jurors that, even if they determined that especially cruel and especially heinous or depraved were proven beyond a reasonable doubt, they could “only consider this as one aggravating circumstance.” (R.T. 5/25/11, at 50.) Consequently, even without the finding that the murders were especially heinous or depraved, the jury still could consider the (F)(6) aggravator because it found that the murders were especially cruel. *See Lynch*,

225 Ariz. at 42, ¶ 84 ((F)(6) is a single aggravating circumstance that may be established in alternative ways); *see also State v. Lacy*, 187 Ariz. 340, 354 (1996) (even where evidence insufficient to support finding of heinousness and depravity, court upheld (F)(6) factor “on the basis of the cruelty finding alone”). As a result, Johnson cannot meet his burden of establishing prejudice under fundamental error review.

In any event, the instruction accurately stated the law. In *State v. Wallace*, for example, this Court, in addressing a sufficiency-of-the-evidence claim regarding gratuitous violence, looked to whether “the State proved beyond a reasonable doubt that [the defendant] continued to inflict injury after he knew *or should have known* that he had inflicted a fatal wound.” 229 Ariz. 155, 161–62, ¶¶ 22–28, 162–63, ¶¶ 31–35 (2012) (emphasis added). The jurors here were instructed on the knew-or-should-have-known requirement. (R.T. 5/25/16, at 49.) The trial court’s heinousness/depravity instruction therefore accurately stated the law and no error, fundamental or otherwise, occurred.

Johnson’s additional contentions regarding the gratuitous violence instruction also fail. (O.B. 98–105.) This Court has held that the definition of gratuitous violence provided here sufficiently narrows the especially heinous or depraved aggravating circumstance to satisfy constitutional standards.

*Anderson*, 210 Ariz. at 352 n.18, ¶ 109 (2005) (citing *State v. Jones*, 205 Ariz. 445, 449–50, ¶¶ 16–18 (2003)).

The trial court’s instruction correctly referenced “the defendant’s state of mind at the time of the offense as reflected by the defendant’s words and acts.” (R.T. 5/25/16, at 49.) See *State v. VanWinkle*, 230 Ariz. 387, 393 ¶ 26 (2012); *Bocharski*, 218 Ariz. at 494, ¶ 87. However, even had the trial court incorrectly instructed the jurors with regard to heinousness and depravity, there was no prejudice because the evidence that Johnson carved an Asian symbol into Mrs. Fu’s bare abdomen at or near the time of death “eliminates the possibility that failing to instruct the jury [properly] contributed to the verdict.” *VanWinkle*, 230 Ariz. at 393, ¶ 27. See also *State v. Moore*, 222 Ariz. 1, 16–17, ¶¶ 86–87 (2009) (finding no fundamental error when “no reasonable jury could fail to find” aggravator proven beyond a reasonable doubt); *State v. Murdaugh*, 209 Ariz. 19, 30, ¶ 51 (2004) (“When ‘a defendant stipulates, confesses or admits to facts sufficient to establish an aggravating circumstance, [the court] will regard that factor as established.’” (quoting *Ring*, 204 Ariz. at 563, ¶ 93 (alteration in *Murdaugh*))). Similarly, in the instant case, no reasonable juror could fail to find this aggravator.

As such, there was no error, fundamental or otherwise, in the trial court’s (F)(6) jury instruction.

## V

### **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY SUSTAINING THE STATE'S OBJECTION TO JOHNSON'S IMPROPER AGGRAVATING PHASE CLOSING ARGUMENT.**

Johnson next argues that the trial court abused its discretion by sustaining the State's objection to Johnson's reference in his aggravation phase closing argument regarding the "especially" nature of the (F)(6) argument and the lack of other murders for the jurors to compare Johnson's stabbing of Mrs. Fu. (O.B. 106–10.) This contention is also without merit.

#### **A. *Standard of review.***

Johnson did not object to the trial court's handling of the State's objection requiring defense counsel to conform his closing argument to consistently reflecting the law and the court's jury instructions. As such, this claim is reviewed for fundamental error. *See Henderson*, 210 Ariz. at 568, ¶¶ 23–24. To establish fundamental error, Johnson must show there was error that went to the foundation of his case and denied him a fair trial, and that he was, in fact, prejudiced by the error. (*Id.*)

#### **B. *Pertinent facts.***

During Johnson's aggravation phase closing argument, the following exchange, in pertinent part, took place:



And folks, I want you to just take a look at your jury instructions because we're talking about page 5 and that—page 5. And right under the definition of “especially heinous, cruel, or depraved” the State has to prove beyond a reasonable doubt that the murder was especially cruel, that it was especially heinous, especially depraved. And they define especially for you and I don't know if that's such a great definition but unusually great or significant. Is this stabbing death, is it unusually great or significant? And the problem you have, ladies and gentlemen, is what are you going to compare it to? There's nothing for you to compare it to.

[THE PROSECUTOR]: Judge, objection; may we approach?

THE COURT: Yes.

(Conference held at the bench outside the hearing of the jury.)

[THE PROSECUTOR]: Judge, that's not the standard in the law. That's absolutely misleading. I made a record when the defense attempted to bring this information out through Dr. Keen.<sup>10</sup> There's no comparison. You don't look to other things. And what he argued is objectionable about is this the worst you've ever seen. That's not the law. The defense is required to use the law and not make the jurors think there's more or different out there. That's improper and I ask that the defense not be allowed to argue that any further.

[DEFENSE COUNSEL]: Judge, problem is [sic] this jury any base line to decide that this is especially cruel. And that's what I'm asking. They don't have that and that's all I've said to them. They don't have a base line. They see this and they—all murders to some extent are cruel and the State has to prove that

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<sup>10</sup> (R.T. 5/25/16, at 29.)

this is especially cruel and that is all that I'm making an argument for.

[THE PROSECUTOR]: No, the defense is saying you have to compare it and that is absolutely not the case law and the defense can't cite a single case that allows the argument. And the defense can't get up there and say, "Folks, I don't think this is a very good argument and I know you want to turn away." The defense has to stop talking about themselves in the first person and asking them to compare to other murders. That's not a fact in evidence. That's not the law.

In fact, the defense can say exactly what they said. To some extent, all murders are especially cruel, heinous, and depraved. That's the law. But then to say, "Well, Doctor, there's been other stabbings," they don't get to talk about other murders or comparison. That's improper. There's no case law that supports that. And I'm trying to nip it in the bud because we've already talked about the, "Well, I don't know if this is a good definition." Well, that's fine but the defense doesn't get to argue that. They get to argue what he just said is fine but it crosses the line when he starts talking about comparison to other murders. That's not what the case is. Maybe that flies in a dangerous scenario where it talks about the serious physical injury or emotional harm when in a *Blakley* hearing the family stands up, but not in a capital case, not when there's no evidence of anything other than this case.

[DEFENSE COUNSEL]: I didn't ask them to compare something. I just said they don't have any base line to compare it to.

[THE PROSECUTOR]: There was at least two sentences about that and there is no requirement that this be the worse of the worst or the worst they've ever seen.

THE COURT: All right. I'll sustain the objection. I think you can rephrase it following the instructions the way you did earlier. I'll leave it at that.

(R.T. 5/25/16, at 84–88.)

**C. Law and argument.**

Counsel are afforded wide latitude in closing arguments and may argue all reasonable inferences from the evidence presented. *State v. Dumaine*, 162 Ariz. 392, 401 (1989). However, counsel is not permitted to refer to matters outside the record or encourage jurors to ignore the law. Although “[e]ach side is permitted to argue its version of the evidence to the jury,” lawyers “may *not* misstate the law to the jury.” *State v. Serna*, 163 Ariz. 260, 266 (1990).

In the instant case, defense counsel effectively encouraged the jurors to ignore the court’s instructions and speculate about how Mrs. Fu’s murder compared to others. The trial court correctly sustained the State’s objection by requiring defense counsel to keep his closing argument consistent with the court’s instructions and the applicable law. This cannot be error of any kind, fundamental or otherwise.<sup>11</sup>

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<sup>11</sup> Moreover, to the extent Johnson argues that “the (F)(6) can never be appropriate for jury consideration” (O.B. 108), this appears to suggest that a defendant’s Sixth Amendment right for a jury determination of capital aggravating factors identified by the United States Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 609 (2002), somehow violates his due process rights. The absurdity of this argument is self-evident.

## VI

### **THE (F)(6) AGGRAVATOR IS SUPPORTED BY SUFFICIENT EVIDENCE.**

Johnson next contends that there was insufficient evidence to support the jury's finding of the (F)(6) aggravator—that he committed the murders in an especially cruel and in an especially heinous or depraved manner. (O.B. 110–15.) This claim should be rejected because substantial evidence supported the jury's findings.

#### **A. *Standard of review.***

Because the murder occurred after August 1, 2002, this Court must determine whether the jury abused its discretion in finding the (F)(6) aggravator. A.R.S. § 13–756(A); *State v. Gunches*, 225 Ariz. 22, 25, ¶ 13 (2010). In reviewing a sufficiency-of-the-evidence claim for an abuse of discretion, an appellate court reviews the record to determine whether substantial evidence supports the jury's finding, viewing the evidence in the light most favorable to sustaining the verdict. *Gunches*, 225 Ariz. at 25, ¶ 14 (quoting *Roque*, 213 Ariz. at 218, ¶ 93). “Substantial evidence is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of [the] defendant's guilt beyond a reasonable doubt.” *Id.*; see also *Morris*, 215 Ariz. at 341, ¶ 77 (court will uphold finding of aggravator if there is “any reasonable evidence in the record to sustain it”).

**B. *Law and argument.***

First-degree murder is aggravated when committed in “an especially heinous, cruel or depraved manner.” *Lynch*, 225 Ariz. at 41, ¶ 77, 23; A.R.S. § 13–751(F)(6). Although written in the disjunctive, this describes one aggravating circumstance, and this Court will uphold the (F)(6) finding if the evidence supports one of the statutory grounds. *Lynch*, 225 Ariz. at 41, ¶ 77. Here, the jury found that both murders were: (1) especially cruel, *and* (2) especially heinous or depraved. (R.O.A., Item 389.) Substantial evidence supporting one of these findings is sufficient to satisfy the (F)(6) aggravator. *See State v. Hausner*, 230 Ariz. 60, 81, ¶ 96 (2012) ((F)(6) aggravator satisfied where jury’s heinous or depraved finding supported by the evidence; court need not address whether evidence also supported jury’s finding of cruelty); *Villalobos*, 225 Ariz. at 84, ¶ 44, 235 P.3d at 237 (“A finding of cruelty alone is sufficient to establish the (F)(6) aggravator.”) (quotation omitted).

**1. *Substantial evidence established that Mrs. Fu’s murder was especially cruel.***

As discussed above, “a murder is especially cruel under A.R.S. § 13–751(F)(6) when the victim consciously suffered physical pain or mental anguish during at least some portion of the crime and the defendant knew or should have known that the victim would suffer.” *State v. Dixon*, 226 Ariz. 545, 556, ¶ 61 (2011) (internal quotation omitted). “The entire murder

transaction, not just the final act, may be considered.” *McCray*, 218 Ariz. at 259, ¶ 31. “Mental anguish includes a victim’s uncertainty about her ultimate fate.” *Hargrave*, 225 Ariz. at 17, ¶ 70 quotation omitted). This Court has found especial cruelty when the victim has suffered mental pain “for a very short time.” *Prince*), 226 Ariz. at 540 n.7; *see also State v. Herrera*, 176 Ariz. 21, 34 (1993) (“18 seconds to two or three minutes”). Finally, the victim need not “be conscious for each and every wound.” *State v. Lopez*, 163 Ariz. 108, 115 (1990).

The State established that Mrs. Fu suffered physical pain and mental anguish, and that Johnson should have known she would suffer. Johnson bound his victim with zip ties, and this, coupled with her defensive wounds, show that she was not only alive, but struggling and fighting against the attack. (R.T. 4/27/16, at 48–53.) *See Gallardo*, 225 Ariz. at 565–66, ¶ 17 (“Rudy almost certainly was conscious when bound, as there is no reason to bind an unconscious person.”); *State v. Djerf*, 191 Ariz. 583, 596, ¶ 49 (1998) (“There is no reason to bind an unconscious person who offers no resistance.”). Additionally, the bruising to Mrs. Fu’s wrists and finger indicate she tried to defend herself, providing further evidence of consciousness during the attack. *See State v. Van Adams*, 194 Ariz. 408, 421, ¶ 45 (1999) (“Injuries to [the victim’s] hands and wrists signify that she struggled and attempted to defend

herself.”).

She also had blunt force trauma wounds consistent with impact with a wall or the floor. (*Id.* at 55–57, 61.) Moreover, the painful, penetrating stab wound to her back—which resulted in at least a partial collapse of her right lung—was inflicted by Johnson reaching over the top of her shoulder, indicating she was conscious and standing for this wound. (R.T. 5/25/16, at 13–16.)

In sum, the multiple stab wounds and other injuries established not only the mental anguish Mrs. Fu suffered as she fought for her life and struggled through several rooms, but also that she was conscious during the violent attack. This evidence supported a finding that Mrs. Fu experienced both physical pain and mental anguish from uncertainty as to her ultimate fate before her death. *See State v. Boyston*, 231 Ariz. 539, 555, ¶¶ 82–84 (2013) (jurors could reasonably conclude victim suffered physical pain while being stabbed to death and defendant knew or should have known that); *Dixon*, 226 Ariz. at 556, ¶ 61 (The victim “surely must have suffered mental anguish while being raped, hit, and strangled.”); *McCray*, 218 Ariz. at 259, ¶¶ 32–33 (medical examiner’s testimony that victim died 1 to 5 minutes after strangulation began and nature of injuries and condition of scene indicated a struggle established that victim was conscious during substantial part of the

attack and suffered mental and physical pain); *Van Adams*, 194 Ariz. at 421 (evidence of struggle surrounding death by strangulation established that victim suffered mental anguish; fact that expert testimony did not establish which injuries necessarily occurred before death went to strength of cruelty factor, not its existence); *Morris*, 215 Ariz. at 341, ¶ 79 (expert testimony that strangulation victims experience pain combined with evidence of struggle established cruelty); *Villalobos*, 225 Ariz. at 84, ¶ 43 (cruelty established where victim conscious during fatal beating and suffered its effects while conscious); *State v. Stokley*, 182 Ariz. 505, 517 (1995) (evidence sufficient to support cruelty in death by strangulation where evidence showed victim struggled and that at least some of victim’s additional injuries were caused while victim was conscious).<sup>12</sup>

Because the evidence established that Mrs. Fu consciously suffered physical pain and mental anguish before her death, and that Johnson knew or should have known she would suffer, the jury did not abuse its discretion when

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<sup>12</sup> Johnson suggests that Mrs. Fu was not conscious for the duration of his attack on her because the neighbors “did not hear screams.” This is belied by the record. (R.T. 4/20/16, at 71–72; R.T. 4/21/16, at 32–33.) Moreover, if the screaming ceased, it is because Johnson severed Mrs. Fu’s windpipe, robbing her of her ability to scream. (R.T. 4/27/16, at 34–35.) Further, Johnson admitted that he stabbed Mrs. Fu because she was screaming. (R.T. 6/20/16, p.m., at 82–83.)



it found her murder was especially cruel.

**2. *Substantial evidence supported the jury’s findings that Mrs. Fu’s murder was especially heinous or depraved.***

The especially heinous and depraved aspect of the (F)(6) aggravator goes “to a defendant’s mental state as reflected in his words and actions at or near the time of the offense.” *Gunches*, 225 Ariz. at 25, ¶ 15 (internal citations and quotations omitted). One way in which the State may prove heinousness/depravity is to establish that the defendant inflicted gratuitous violence. *Id.* As previously addressed, the trial court correctly instructed the jurors on gratuitous violence. (R.T. 5/25/16, at 47–50.) To prove gratuitous violence, the State must establish that the defendant: “(1) ‘inflicted more violence than that necessary to kill,’ and (2) ‘continued to inflict violence after he knew or should have known that the fatal action had occurred.’” *Id.* at 25–26, ¶ 16 (quoting *Bocharski*, 218 Ariz. at 494, ¶¶ 86–87).

First, the evidence established that Johnson continued to inflict violence—particularly, the carving of an Asian symbol into Mrs. Fu’s abdomen—after he knew or should have known the fatal action had occurred. (R.T. 5/25/16, at 19–22, 26, 30; Trial Exhibit 194.)

Second, the evidence established that Johnson inflicted more violence than was necessary to kill Mrs. Fu. Because Johnson killed Mrs. Fu by repeatedly stabbing her, and also caused numerous blunt force injuries to the

face and head, including injuries to her wrists and neck caused by zip ties, shows that Johnson inflicted more violence than necessary to kill. *Gunches*, 225 Ariz. at 25–26, ¶ 16; *see also State v. Sansing*, 206 Ariz. 232, 238, ¶ 22 (2003) (“rape, face wounds, neck ligatures, gagging, blind-folding, and grinding of the knife constitute violence beyond that necessary to kill”); *Jones*, 205 Ariz. at 450, ¶ 17 (victim died from blunt force injury to head which shattered skull, but also suffered stab wounds to throat, abrasions to face and chest, and vaginal and anal assault); *State v. Pandeli (Pandeli I)*, 200 Ariz. 365, 375, ¶8 (2001) (cause of death a single knife wound to throat, but victim also suffered blows to head and chest which fractured sternum, as well as attempt at strangulation).

Moreover, any potential error is harmless, because Johnson reported to his mental health expert that he carving the Chinese symbol in Mrs. Fu’s stomach to draw police attention away from him, simply copying it from a Chinese calendar on the wall. (R.T. 6/20/16, p.m., at 72, 75.) Thus, Johnson’s own admissions established that he continued to inflict violence—carving a symbol in an attempt to deflect police attention away from him—even after he knew or should have known that “the fatal action,” *i.e.*, the strangulation, had occurred. *See Gunches*, 225 Ariz. at 25–26, ¶ 16.

In *Bearup*, the defendant and accomplices fatally beat the victim, placed him in the trunk of a car, and dumped his body. 221 Ariz. at 172, ¶ 42, 211 P.3d at 693. After the beating, when the victim still may have been alive, the defendant cut off the victim’s finger. *Id.* This Court held that cutting off the finger satisfied the (F)(6) aggravator by establishing mutilation if the victim was already dead, and by establishing gratuitous violence if the victim was still alive, because the “fatal action”—the beating—already occurred. *Id.* at 173, ¶¶ 52–53, 211 P.3d at 694.

Similarly, here, the fatal action had already occurred when Johnson continued to inflict violence upon Mrs. Fu by carving a symbol into her body. Consequently, substantial evidence established that Johnson inflicted gratuitous violence, satisfying the (F)(6) aggravator as proof Mrs. Fu’s murder was especially heinous or depraved.

**3. *Any theoretical error was harmless.***

Even if this Court were to strike the (F)(6) aggravating factor for insufficient evidence, it should nonetheless affirm Johnson’s death sentence.

A.R.S. § 13–756(B) provides:

If the supreme court determines that an error occurred in the sentencing proceedings, the supreme court shall determine whether the error was harmless beyond a reasonable doubt. If the supreme court cannot determine whether the error was harmless beyond a reasonable doubt, the supreme court shall remand the case for a new sentencing proceeding.

*See also Stringer v. Black*, 503 U.S. 222, 230–31 (1992) (“In order for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor.”); *Parker v. Dugger*, 498 U.S. 308, 319 (1991) (“In a weighing State, when a reviewing court strikes one or more of the aggravating factors on which the sentencer relies, the reviewing court may, consistent with the Constitution, reweigh the remaining evidence or conduct a harmless error analysis.”). Such error is harmless if the court can say beyond a reasonable doubt that no reasonable jury could find that the mitigation was sufficiently substantial to call for leniency. *See Sansing*, 206 Ariz. at 235, 237, ¶¶ 5, 16.

Here, any error in the jury’s (F)(6) findings was harmless beyond a reasonable doubt. The remaining aggravators—(F)(2), Johnson’s prior serious convictions, and (F)(7), Johnson’s release status, which he does not contest on appeal, qualified him for the death penalty. Also, even if the evidence were insufficient to establish the (F)(6) aggravator, the jury would have considered the same evidence supporting that factor part of the facts and circumstances of the crimes. Accordingly, the (F)(6)’s consideration did not allow the jurors to hear evidence they would not otherwise have considered. Moreover, Johnson presented a weak case for mitigation. Balancing Johnson’s unpersuasive

mitigation against the aggravating circumstances, the mitigation was not sufficiently substantial to call for leniency. In light of the multiple undisputed aggravators, the facts and circumstances of the crimes, and the unpersuasive mitigation, no reasonable jury could find that the mitigation was sufficiently substantial to call for a life sentence. Any hypothetical error, therefore, was harmless beyond a reasonable doubt.

## VII

### **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING JOHNSON'S MOTION FOR MISTRIAL BASED ON *LYNCH V. ARIZONA*.**

Johnson next contends that the trial court abused its discretion by denying his motion for mistrial based on the mid-trial issuance of *Lynch v. Arizona*, 136 S. Ct. 1818 (2016). (O.B. 116–23.) This contention is without merit.

#### **A. *Standard of review.***

This Court reviews a trial court's denial of a motion for mistrial for an abuse of discretion. *State v. Kuhs*, 223 Ariz. 376, 380, ¶ 18 (2010). A trial court's ruling on a motion for mistrial is accorded deference “because the trial judge is in the best position to evaluate ‘the atmosphere of the trial, the manner in which the objectionable statement was made, and the possible effect it had on the jury and the trial.’” *State v. Bible*, 175 Ariz. 549, 598 (1993) (quoting *State v. Koch*, 138 Ariz. 99, 101 (1983)). “Declaring a mistrial is an unusual

remedy for trial error and should not be resorted to unless justice requires such a result.” *State v. Gilfillan*, 196 Ariz. 396, 405, ¶ 35 (App. 2000).

**B. *Pertinent facts.***

On the second day of the month-long penalty phase, the trial court alerted counsel to the United States Supreme Court’s issuance of *Lynch* earlier that day and invited counsel to address its impact on the court’s previous rulings in the case. (R.T. 5/31/16, p.m., at 129.) The next day, Johnson moved for a mistrial based on *Lynch*. (R.O.A. 498.) The court and counsel discussed the issue; the State did not oppose giving a *Lynch/Simmons* instruction, despite future dangerousness not being an issue in the case; and the trial court denied the motion for mistrial, ruling that Johnson would receive a fair trial. (R.T. 6/1/16, at 4–10.) The court indicated that it would give the instruction, and both parties acknowledged that nothing had changed for either party’s plans for the penalty phase. (*Id.* at 10–11.)

Accordingly, in the final penalty phase instructions, the jurors were instructed:

Defendant ineligible for parole. A defendant sentenced to life without the possibility of release after 25 years must serve the entire 25 years before the defendant can apply for release. There is no automatic release after 25 years. Arizona law does not provide for parole. The only form of release for which defendant is eligible is executive clemency.

(R.T. 6/23/16, at 151–52.) The trial court also instructed the jurors that “the law that applies is stated in these instructions” and they had a duty to follow them. (*Id.* at 139.) The court further instructed the jurors:

The instructions that were given to you in the first and aggravation phases remain in effect *unless changed by these instructions*.

(*Id.* at 140, emphasis added.)

**C. *Law and argument.***

The trial court correctly instructed the jurors in accordance with *Lynch* and *Simmons v. South Carolina*, 512 U.S. 154, 161 (1994), per the State’s stipulation, without regard to whether the State in fact put future dangerousness at issue. The jurors presumably followed these instructions. *See, e.g. Newell*, 212 Ariz. at 403, ¶ 68. *Lynch* cannot have justified a mistrial where the court incorporated its holding seamlessly into the penalty phase instructions.

Moreover, *Lynch* issued on the second day of a month-long penalty phase in a capital trial lasting over 3 months. And the parties admitted that *Lynch* did not change their penalty phase strategies. As such, there can be no prejudice, particularly in light of recent cases finding no reversible error even when a *Simmons* instruction was not given. *See Bush*, 244 Ariz. at 593, ¶¶ 70–75; *State v. Sanders*, 245 Ariz. 113, \_\_\_, ¶ 32 (2018). There were no grounds for a mistrial.

## VIII

### **THE TRIAL COURT DID NOT COMMIT FUNDAMENTAL ERROR IN ITS JURY INSTRUCTION REGARDING THE MEANING OF “SIGNIFICANT IMPAIRMENT.”**

Johnson next argues that the trial court committed fundamental error in jury instruction defining “significant impairment.” (O.B. 124–37.) This contention is also without merit.

#### ***A. Standard of review.***

Johnson concedes that he did not object to the court’s instruction defining “significant impairment,” and thus this Court reviews for fundamental error. (O.B. 124.) *See Henderson*, 210 Ariz. at 567, ¶ 19. In fact, Johnson agreed to the final penalty phase instructions, which included the “significant impairment” instruction. (R.T. 6/23/16, at 134.)

#### ***B. Pertinent facts.***

The trial court instructed the jurors, in pertinent part, as follows:

The circumstances proposed as mitigation by the defendant for your consideration in this case are: One, the defendant’s capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, but not so impaired as to constitute a defense to prosecution;

\* \* \*

Significant impairment. It is a mitigating circumstance that the defendant’s capacity to appreciate the wrongfulness of his



conduct or to conform his conduct to the requirements of law was significantly impaired but not so impaired as to constitute a defense to prosecution. The defendant has the burden of proving this mitigating circumstance by a preponderance of the evidence.

“Significantly impaired” means that the defendant suffered from mental illness, personality disorder or substance abuse at or near the time of the offense that prevented the defendant from appreciating the wrongfulness of the conduct or conforming his conduct to the requirements of the law.

If any juror finds by a preponderance of the evidence that the defendant was significantly impaired, then that juror shall consider this impairment as a mitigating circumstance when determining whether to sentence the defendant to life imprisonment or death.

(R.T. 6/23/16, at 145, 147.)

**C. *Law and argument.***

Essentially, Johnson argues that the word “prevented” in the instruction kept the jury from “considering” this proffered mitigating circumstance. (O.B. 127.) Johnson is incorrect.

The significant impairment instruction the court gave to the jury was the Revised Arizona Jury Instruction (“RAJI”), Third Edition, Capital Case 3.2, that was in effect at the time of Johnson’s trial, and was approved by both counsel. (R.T. 6/23/16, at 134.) Although the RAJIs are no longer approved by the Arizona Supreme Court, they are created by the Arizona State Bar, *see State v. Logan*, 200 Ariz. 564, 566, ¶ 12 (2001), and the committee that produces them “is comprised of several judges, prosecutors, and defense

attorneys.” Mikel Steinfeld, “RAJI Reverence: Understanding the Revised Arizona Jury Instructions Committee Process and How it Impacts Your Ability to Litigate Instructions,” *For the Defense*, vol. 27, issue 2 (May–July 2017). Moreover, Johnson overstates the impact of the word “prevented” in the context of the “significant impairment” definition instruction.

Claiming that the wording “stripped” him of “a right essential to his defense,” Johnson argues that the word “prevented” in the instruction “elevated” his proffered mitigation to a heightened level. (O.B. 126–27.) However, the court’s instruction was only relevant to the circumstances under which the jury could find that Miller’s mental health illness proved a *statutory* mitigating factor. A.R.S. § 13–751(G)(1). The remainder of the jury instructions required the jury to consider the mitigating impact of Johnson’s mental health evidence even if it did not find that it prevented him from appreciating wrongfulness or conforming his conduct to the law.

For example, the trial court also instructed the jurors:

Both the State and the defendant have a right to expect *that you will consider all the evidence*, follow the law, exercise your discretion conscientiously and reach a just verdict.

\* \* \*

*The evidence you shall consider consists of the testimony and exhibits the Court admitted in evidence during the trial of this case, during the first part of the sentencing hearing and during the second part of the sentencing hearing.*

\* \* \*

*Mitigating circumstances may be found from any evidence presented during the trial during the first part of the sentencing hearing or during the second part of the sentencing hearing. You should consider all the evidence without regard to which party presented it. Each party is entitled to consideration of the evidence whether produced by that party or by another party.*

\* \* \*

*Mitigation. Mitigating circumstances are any factors that are a basis for a life sentence instead of a death sentence, so long as they relate to any sympathetic or other aspect of the defendant's character, propensity, history or record or circumstances of the offense.*

*Mitigating circumstances are not an excuse or justification for the offense but are factors that, in fairness or mercy, may reduce the defendant's moral culpability.*

Mitigating circumstances may be offered by the defendant or State or be apparent from the evidence presented at any phase of these proceedings. You are not required to find that there is a connection between mitigating circumstance and the crime committed in order to consider the mitigation evidence. Any connection or lack of connection may impact the quality and strength of the mitigation evidence. You must disregard any jury instruction given to you at any other phase of this trial that conflicts with this principle.

\* \* \*

*You are not limited to the proffered mitigating circumstances in considering the appropriate sentence. You may consider anything related to the defendant's character, propensity, history or record or circumstances of the offense.*

\* \* \*

*You are not limited to the mitigating circumstances offered by the defendant. You must also consider any other information that you find is relevant in determining whether to impose a life sentence so long as it relates to an aspect of the defendant's background, character, propensities, history or record or circumstances of the offense.*

(R.T. 6/23/16, at 140, 142, 144–46, 149, emphasis added.) In other words, the jurors were repeatedly told to consider any and all mitigation evidence, whether finding a statutory mitigating factor or not, when arriving at their reasoned, moral decision regarding the appropriate sentence.

These instructions made clear to the jurors that they were still required to consider the mitigating impact of Johnson's mental health evidence, including his claims of drug impairment at the time he murdered Mrs. Fu, even if they did not find that it prevented him from appreciating the wrongfulness of his actions and from conforming his conduct to the law. This Court presumes that the jurors followed these instructions and considered his mental health evidence, including his claims of impairment at the time of the murder, even if that evidence did not satisfy the demands statutory significant impairment instruction. *See Newell*, 212 Ariz. at 403, ¶ 68.

Moreover, Johnson fails to explain why there is a reasonable probability the jurors would have sentenced him to life had the significant impairment instruction been worded differently. This jury demonstrated its ability to ferret through evidence and follow the court's instructions when it found proven

beyond a reasonable doubt only three of the four alleged aggravating factors. (R.T. 5/26/16, at 10–12.) Nevertheless, they found proved three weighty aggravating factors in the face of a weak mitigation case. Johnson viciously attacked and murdered Mrs. Fu, carving a symbol in her stomach to deflect police suspicion from him after trying to rob her business because he knew it would be flush with cash. (R.T. 6/20/16, p.m., at 72, 75–77.) Johnson’s attempts to explain this behavior through mental health testimony was competently rebutted by the State’s expert. (R.T. 6/22/16, at 6–185; R.T. 6/23/16, at 16–121.) And the statutory (G)(1) mitigating factor would not automatically carry greater weight than the proposed non-statutory mitigation based on the same evidence. As such, there was no fundamental error or prejudice.

## IX

### **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE STATE’S REBUTTAL EVIDENCE IN THE PENALTY PHASE.**

Johnson contends that the trial court abused its discretion by permitting the State to present relevant rebuttal evidence in the penalty phase, specifically in response to Johnson’s proffered mitigation that he was willing to plead guilty. (O.B., at 129–37.) This contention should be rejected.

#### **A. *Standard of review.***

This Court reviews admission of evidence in the penalty phase for an

abuse of discretion, *State v. Nordstrom*, 230 Ariz. 110, 114, ¶ 8 (2012), giving “deference to a trial judge’s determination of whether rebuttal evidence offered during the penalty phase is ‘relevant’ within the meaning of the statute.” *State v. McGill*, 213 Ariz. 147, 157, ¶ 40 (2006); *see also State v. Womble*, 225 Ariz. 91, 103, ¶ 47 (2010). “The threshold for relevance is a low one, and the evidence [need only] tend to prove a matter at issue.” *State v. Roque*, 213 Ariz. 193, 221, ¶ 109 (2006).

**B. *Pertinent facts.***

Johnson filed a pretrial motion to use his offer to plead guilty to Count 1, first-degree murder, in exchange for a natural life sentence. (R.O.A. 298.) The State responded that if Johnson presented his conditional plea offer as mitigation, it was entitled to rebut the argument that Johnson was willing to “accept responsibility” for his crime by introducing evidence of his first conditional plea offer (which included release after 25 years); the fact that Johnson could plead guilty any time; and evidence regarding the difference between housing for inmates sentenced to life versus inmates sentenced to death. (R.O.A. 308, at 4–5.) The court heard argument on the issue (R.T. 2/19/16, at 35–55), and subsequently issued a minute entry citing *Busso-Estopellan v. Mroz/State*, 238 Ariz. 553 (2015), permitting Johnson to present

his offers to plead guilty as mitigation evidence, and permitting the State to rebut that mitigation as requested. (R.O.A. 347, at 1–2.)

In allocution, Johnson claimed, “I would have pled guilty to this first-degree murder as early as March of 2012.” (R.T. 6/23/16, at 136–37.) In rebuttal during the penalty phase, the State presented the testimony of Stacy Crabtree, who explained the housing differences in the Arizona Department of Corrections for an inmate serving a life sentence versus an inmate serving a death sentence. (R.T. 6/20/16, at 134–60.) Additionally, the prosecutor stated in closing argument:

And you never heard once, in the mitigation claim or the defendant standing in front of you, that he only made a conditional offer to plead guilty to the crimes. That condition being you give me the sentence I want and I’ll plead guilty.

Nothing stops a defendant from pleading guilty if that’s what they choose. But in this case, the defendant would only plead guilty if he could get the least sentence available. Is that truly admitting guilt and accepting responsibility, to demand he get the least sentence available if convicted of this crime? How worthy is that evidence when the defendant slaps a condition on it?

And you heard from Miss Crabtree the possible benefits he can get with a natural life sentence, that being within the first five years and on a review period thereafter, being reduced all the way down from maximum custody, to closed custody, to medium custody, enjoying all of those privileges, freedoms and benefits. In light of that evidence introduced to solely rebut the defendant’s claims of an offer of responsibility, of an acceptance of responsibility, how mitigating are those facts when compared to

that defendant would only plead guilty if the State gave him what he wanted?

(R.T. 6/27/16, p.m., at 41–42.)

**C. *Law and argument.***

As this Court has repeatedly found, the statutes governing the scope of rebuttal, A.R.S. §§ 13–751(G) and –752(G), taken together “permit jurors to hear evidence relating to circumstances of the crime and the defendant’s character.” *Guarino*, 238 Ariz. at 440, ¶ 13. Indeed, “§ 13–752(G) expressly allows the state to present evidence ‘that demonstrates that the defendant should not be shown leniency.’” *Id.* at ¶ 12 (citing *State v. Carlson*, 237 Ariz. 381, 396 ¶ 54 (2015)).

In other words, to facilitate a meaningful, accurate evaluation of the mitigation evidence, the State is entitled to present any evidence that gives the jury *the entire picture* against which the mitigation evidence must be judged. This is the only way to effect the qualitative evaluation of mitigation evidence required by Arizona’s death penalty statute and by this Court. *See State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468, 473, ¶ 21 (2005) (“each juror must determine whether, in that juror’s individual assessment, the mitigation is of such quality or value that it warrants leniency”).

And, “admission of evidence during the penalty stage of a capital case is not governed by the Arizona Rules of Evidence.” *Chappell*, 225 Ariz. at 239, ¶



35; *see also* A.R.S. §§ 13–751(C), 13–752(G). Rather, the parties may admit “any information that is relevant to any of the mitigating circumstances,” A.R.S. § 13–751(C), and the State may present “any evidence that is relevant to the determination of whether there is mitigation sufficiently substantial to call for leniency” and “any evidence that demonstrates that the defendant should not be shown leniency.” A.R.S. § 13–752(G). Although the relevance standard under these statutes “involves fundamentally the same considerations as does a relevancy determination under Arizona Rule of Evidence 401 or 403,” this Court has explicitly held that Rule 404(b) and related case law does not govern the admission of other acts in the penalty phase. *Chappell*, 225 Ariz. at 239, ¶¶ 36, 37 (citations omitted).

Constitutionally-sound individualized sentencing requires more, not less, information about a death-eligible defendant before imposition of the sentence. The United States Supreme Court has explained:

Our cases indicate, then, that statutory aggravating [i.e., eligibility] circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection [i.e., sentencing] stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.

*Zant v. Stephens*, 462 U.S. 862, 878–79 (1983), (citing *Eddings v. Oklahoma*,

455 U.S. 104, 110–12 (1982)); *see also* *Lockett v. Ohio*, 438 U.S. 586, 601–05 (1978); *Baldwin*, 211 Ariz. at 472, ¶ 17.

As the United States Supreme Court explained in *Zant*, the penalty phase is the proceeding in which a defendant is selected for (or determined to merit) the death penalty from among the class of defendants determined to be eligible for the death penalty. And because a constitutional capital sentencing scheme must be individualized, all information and/or evidence regarding aspects of the crime(s) and the defendant’s character, propensities and/or record should be before the sentencer—in Arizona, a jury.

While Johnson argues that rebuttal evidence of relative confinement conditions for life versus death sentences is relevant if the State showed that he knew of the differences, as set forth above, the statutes and case law are not so narrow. (O.B. 131–32.) The State may present any evidence—including character, propensities, criminal record or other acts—to demonstrate that a defendant should not be shown leniency, even if the defendant presents *no* mitigation. A.R.S. § 13–752(G); *Nordstrom*, 230 Ariz. at 114–15, ¶ 10; *see also* *State v. Leteve*, 237 Ariz. 516, \_\_\_, ¶ 47 (2015) (“Irrespective of the mitigation evidence presented by the defendant, the state may present evidence of the circumstances of the crime.”) Moreover, Johnson was well aware of Arizona Department of Corrections because he had been in prison in Arizona,

as well as Colorado. (R.T. 5/31/16, p.m., at 106; R.T. 6/7/16, as 43–44; R.T. 6/13/16, at 120.) Further, because this Court held in *Busso-Estopellan* that a defendant’s willingness to plead guilty is relevant mitigation “because it tends to make his acceptance of responsibility for the murder[] more probable,” the State is commensurately entitled to rebut the such evidence by showing the defendant is accepting responsibility was calculated to obtain a benefit. 238 Ariz. at 555, ¶ 7.

Additionally, Johnson’s reliance on *Leteve*, 237 Ariz. 516, \_\_\_, ¶¶ 39–40, in support of his claim that “confinement conditions” are not relevant rebuttal evidence is misplaced. (O.B. 131–32.) In *Leteve*, the defendant wanted to present mitigation evidence that he would have experienced a difficult time in prison due to his notorious crimes. 237 Ariz. at \_\_\_, ¶ 39. This Court affirmed the trial court’s preclusion of that proffered testimony because harsh conditions a child-killer may face in prison is “speculative evidence [that] does not constitute a mitigating circumstance because it is not specific to a defendant’s character, propensities, or prior record, nor does it go to the circumstances of his offense.” *Id.* at ¶ 40.

In contrast, in the instant case, the rebuttal evidence regarding differences in housing conditions for an inmate under a life, versus a death, sentence is specific to Johnson’s character and propensities because it exposes

a motivation for his plea offer other than a desire to take responsibility for his crimes. Furthermore, if a defendant is permitted to introduce evidence of a willingness to plead guilty, and the State is not permitted to rebut that evidence, a perverse incentive is created for defendants to offer to plead guilty as a means to simply create unchallengeable mitigation evidence. Moreover, any conceivable error is harmless in light of the significant aggravation in this case relative to the weak mitigation. As such, the trial court did not abuse its discretion by admitting this rebuttal evidence.

## X

### **THE TRIAL COURT DID NOT COMMIT FUNDAMENTAL ERROR IN ITS JURY INSTRUCTIONS REGARDING “PRESUMPTION OF DEATH,” “MERCY,” AND “SYMPATHY.”**

Johnson next contends that the trial court committed fundamental error with its jury instructions regarding the presumption of death, mercy, and sympathy. (O.B. 138–42.) This contention should also be dismissed.

#### **A. *Standard of review.***

As stated previously, because Johnson did not object to the court’s instructions regarding “presumption of death,” “mercy,” and “sympathy,” this Court reviews for fundamental error. (O.B. 124.) *See Henderson*, 210 Ariz. at 567, ¶ 19. In fact, Johnson agreed to the final penalty phase instructions, which included the relevant instructions. (R.T. 6/23/16, at 134.) Further, this

Court has previously rejected Johnson's argument (*Carreon*, 210 Ariz. 54, 70–72, ¶¶ 81–87; *Kuhs*, 223 Ariz. at 386–87, ¶¶ 51–56), and nothing in speculative argument here calls that conclusion into question.

**B.     *Law and argument.***

Johnson speculates that various jury instructions create confusion for the jurors, specifically, the instructions regarding the presumption of death, mercy and sympathy. (O.B. 140–42.) However, Johnson ignores other pertinent instructions. For example, the trial court instructed the jurors in the penalty phase, in pertinent part, as follows:

You must not be influenced at any point in these proceedings by conjecture, passion, prejudice, public opinion or public feeling. You are not to be swayed by mere sympathy not related to the evidence presented during this phase.

You must not be influenced by your personal feelings of bias or prejudice for or against the defendant or any person involved in this case on the basis of anyone's race, color, religion, national ancestry, gender or sexual orientation.

\* \* \*

Evidence. You are to apply the law to the evidence and in this way decide whether the defendant will be sentenced to life imprisonment or death.

The evidence you shall consider consists of the testimony and exhibits the Court admitted in evidence during the trial of this case, during the first part of the sentencing hearing and during the second part of the sentencing hearing.

(R.T. 6/23/16, at 139–40.) In other words, jurors are to consider the *evidence* presented in the penalty phase in mitigation and rebuttal and then make a reasoned determination about the effect of that evidence.

Definitions of “burden of persuasion,” “mercy,” and “sympathy” assist the jurors to focus on the qualitative decision—whether the evidence (as opposed to untethered feelings) is sufficiently substantial to call for leniency.

As this Court has explained:

Once a defendant is “death eligible”—that is, once a jury has found beyond a reasonable doubt that the defendant is guilty of a capital offense and that at least one statutory aggravator exists—the jurors must assess whether to impose the death penalty based upon each juror’s individual, qualitative *evaluation of the facts of the case, the severity of the aggravating factors, and the quality of any mitigating evidence. This assessment is not mathematical, but instead must be made in light of the facts of each case.*

*Baldwin*, 211 Ariz. at 472, ¶ 17 (emphasis added, internal citations omitted).

Thus, although the determination whether mitigation is sufficiently substantial to call for leniency is not a “fact question,” it is reached by a juror’s “assessment of the quality and significance of the mitigating *evidence* that the juror has found to exist.” *Id.* at 473, ¶ 21 (emphasis added). This is why jurors are instructed to refrain from feelings-based decisions. See *Andriano*, 215 Ariz. at 507, ¶ 48 (“Mercy is a concept jurors may apply in evaluating the existence of mitigating circumstances and in deciding whether the death penalty is appropriate in a particular case. In this sense, “mercy” is simply

another word for “compassion” or “leniency.”); *State v. Carreon*, 210 Ariz. 54, 72, ¶ 87 (2005) (additional sympathy instruction did not prevent jury from considering mercy but served “the useful purpose of confining the jury’s imposition of the death sentence by cautioning it against reliance on extraneous emotional factors which . . . would be far more likely to turn the jury against a capital defendant than for him.”) (quoting *California v. Brown*, 479 U.S. 538, 543 (1987)).

**Moreover, as the trial court noted, the given instructions are consistent with this Court’s case law and RAJI Capital Case Sentencing Instructions 2.3 Mitigation and 2.6 Mitigation Assessment and the Sentence Burden of Proof. (R.O.A. 347, at 6.) Johnson cannot show any error, much less fundamental error.**

## **XI**

### **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PRECLUDING ADMISSION OF “EXECUTION IMPACT EVIDENCE.”**

Johnson next argues that the trial court abused its discretion by denying his motion to present execution impact evidence in accordance with this Court’s case law, and further, urges this Court to revisit its decisions on this issue. (O.B. 143–55.) This claim should also be rejected.

#### ***A. Standard of review.***

A trial court’s admission of evidence is reviewed for an abuse of discretion. *See Hardy*, 230 Ariz. at 291, ¶ 49, 283 P.3d at 22 (admission of evidence reviewed for abuse of discretion).

**B. *Pertinent facts.***

Johnson filed a pretrial motion requesting admission of execution impact evidence as mitigation evidence in the penalty phase. (R.O.A. 256.) The State responded and moved to preclude execution impact evidence. (R.O.A. 312.) On February 24, 2016, the trial court ruled:

Defendant asks the Court to present evidence and argument in the penalty phase regarding “the highly negative impact that the State’s execution of Defendant would have on his family and friends.” (Motion at 8). The Arizona Supreme Court has held that the impact of an execution on a defendant’s family is not relevant to mitigation, because it is not related to the defendant, the defendant’s character, or the circumstances of the offense. *State v. Rose*, 230 Ariz. 500, ¶ 64 (2013); *State v. Chappell*, 225 Ariz. 229 (2010); *State v. Roque*, 213 Ariz. 193, 222, ¶ 119 (2006). In so holding the Court noted that “[a]lthough similar evidence has been admitted in some cases, in none of those cases was the admissibility of the execution impact evidence at issue on appeal.” *Rose*, 230 Ariz. at ¶ 65 (citing *Chappell*, 225 Ariz. at 238, ¶ 30 n.8).

This ruling does not preclude the defendant’s family, friends, associates or representatives from expressing support and/or mitigation. This ruling simply restricts anyone on behalf of the family from expressing views regarding the impact upon the family should the defendant be executed. *See, Rose*, 230 Ariz. at ¶ 65 n.3 (“To the extent *Rose* argues that ‘his family ties and the love of a defendant’s family[] has been held by the Court to be mitigation,’ we agree that ‘[t]he existence of family ties is a mitigating factor.’ *Moore*, 222 Ariz. at 22, ¶ 134.”).

(R.O.A. 347, at 2.) The trial court accordingly denied Johnson’s motion to permit execution impact evidence and granted the State’s motion to preclude it. (*Id.*)



### **C. Law and argument.**

As the trial court acknowledged, this Court has previously held that the effect of a defendant's execution on his friends and family is not relevant to any aspect of his character, propensities, record, or circumstances of the offense. A.R.S. § 13-703(G). *Rose*, 231 Ariz. 500, 514, ¶¶ 63-65 (2010); *Chappell*, 225 Ariz. at 238, ¶ 30 n.8; *Roque*, 213 Ariz. at 222, ¶ 119. Moreover, as the trial court further noted, nothing prevented Johnson's family and friends from expressing support and love for Johnson, which is a mitigating factor. See *Rose*, 231 Ariz. at 514, ¶ 65 n.3, quoting *Moore*, 222 Ariz. at 22, ¶ 134. And, in the instant case, numerous members of Johnson's immediate family did just that, repeatedly expressing love and support for Johnson. (See R.T. 5/31/16, p.m., at 17, 26-27, 31, 34-35, 86-88; R.T. 6/1/16, at 34, 86-87, 100, 148-49, 159; R.T. 6/7/16, at 16-19, 36, 90, 113-14, 152, 154; R.T. 6/9/16, at 88, 129; R.T. 6/13/16, at 95-96, 149.) Nothing Johnson asserts changes this.

Johnson argues that *Rose*, *Roque*, and *Chappell* "misread" other case law from this Court. (O.B. 146-49.) However, it is Johnson who misreads the case law. For example, In *State v. Greene*, 192 Ariz. 431, 443, ¶ 58, 967 P.2d 106, 118 (1998), upon which Johnson relies, this Court gave "some mitigating weight" on independent review to "the effect [the defendant's] execution would

have on the emotional well-being of his children.” However, the State did not appear to challenge, and this Court thus did not consider, whether the trial court correctly admitted Greene’s evidence in the first place. *Id.* In *McGill*, 213 Ariz. at 162, ¶ 67, 140 P.3d at 945, which Greene also cites, this Court did not find execution impact evidence as a mitigating factor; rather, it construed testimony from the defendant’s family members as evidence of the “existence of family ties.” And, in *Finch*, 202 Ariz. at 417–18, ¶¶ 38–39, this Court upheld the trial court’s refusal to find execution impact evidence as a non-statutory mitigating factor. Similarly, in other, more recent opinions listed by Johnson, execution impact evidence was either not an issue raised on appeal or was simply listed as family support in this Court’s recitation of the defendant’s mitigation these decisions thus have no precedential value for this issue. *See e.g., Boyston*, 231 Ariz. at 555, ¶ 85; *State v. Manuel*, 229 Ariz. 1, 9, ¶ 46 (2011); *State v. Dann*, 220 Ariz. 351, 377, ¶ 152 (2009).

Moreover, as this Court has recognized, numerous other jurisdictions have determined that execution impact evidence is irrelevant and inadmissible. *See, e.g., Stenson v. Lambert*, 504 F.3d 873, 891–92 (9th Cir. 2007); *Jackson v. Dretke*, 450 F.3d 614, 617 (5th Cir. 2006); *People v. Bennett*, 199 P.3d 535, 552–53 (Cal. 2009); *Williams v. State*, 168 S.W.3d 433, 445 (Mo. 2005) (collecting cases); *Commonwealth v. Harris*, 817 A.2d 1033, 1054 (Pa. 2002)

(collecting cases). While Johnson claims that these cases create other categories of impermissible execution impact evidence distinct from his proffered execution impact evidence—that is, “to prove his life had value to his friends and family and he had his family’s love and support,” (O.B. 150) this is a distinction without a difference. In other words, Johnson *did* present evidence of his value to his family and their love and support, over and over, through the (sometimes emotional) testimony of 11 family members alone, as well friends, who universally expressed love for him and told anecdotes of his positive impact in their lives. (R.T. 5/31/16, p.m., at 24, 29; R.T. 6/1/16, at 33–34, 87, 119–20, 97–100; R.T. 6/7/16, at 17–18, 21, 76–77; R.T. 6/9/16, at 83–85, 90–91, 123–24, 165; R.T. 6/13/16, at 58–59; 114, 147; R.T. 6/14/16, at 11–12.)

This not only illustrates that the trial court did not abuse its discretion by denying Johnson’s motion to permit execution impact evidence, it also illustrates that Johnson did present extensive mitigation evidence regarding his loving and supportive family. Further, the aggravation was overwhelming and any additional mitigation could not have made a difference. As such, any conceivable error is harmless.

## XII

### **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY LIMITING ADMISSION OF MITIGATION EVIDENCE.**

Johnson next contends that the trial court abused its discretion by limiting admission of his “Columbine” mitigation evidence, as well as “Adopted-Child Syndrome, drug-seeking behavior, Posttraumatic Stress, and counseling.” (O.B. 156–59.) This contention should also be rejected.

#### ***A. Standard of review.***

As stated previously, this Court reviews admission of evidence in the penalty phase for an abuse of discretion, *Nordstrom*, 230 Ariz. at 114, ¶ 8, giving “deference to a trial judge’s determination of whether rebuttal evidence offered during the penalty phase is ‘relevant’ within the meaning of the statute.” *McGill*, 213 Ariz. at 157, ¶ 40; *see also Womble*, 225 Ariz. at 103, ¶ 47.

As an initial matter, Johnson does not specify what particular mitigation evidence he wished to present, but was prevented from presenting, and how he was prejudiced by its exclusion from a penalty phase which lasted from May 26, 2016, to June 29, 2016—11 days of which were Johnson’s mitigation presentation of 21 witnesses. Johnson’s lack of legal argument constitutes a waiver. *See State v. Bolton*, 182 Ariz. 290, 298 (1995) (failure to sufficiently argue claim on appeal constitutes waiver of that claim). Nevertheless, despite

being waived, this claim is also meritless.

**B. *Pertinent facts.***

**1. Columbine evidence.**

There were extensive discussions at trial regarding the scope and volume of Johnson’s proffered “Columbine” mitigation, relating to the State’s requests for Johnson to identify what out of approximately 26,000 pages of documents, Johnson intended to use, and what witnesses he intended to call (R.O.A. 207); the State’s request to limit the number and scope of witness so as not to be cumulative and to properly relate to Johnson’s record, character, propensities, and circumstances of the crime pursuant to A.R.S. § 13–751(G) (R.O.A. 350, 365, 389). (R.T. 4/11/14, at 20–30; R.T. 7/11/14, at 14–43; R.T. 3/16/16, at 10–26.) On March 18, 2016, the trial court ruled that the Columbine mitigation testimony could include: (1) Johnson’s memories, observations and experiences regarding the Columbine incident; (2) witness testimony regarding their observations of Johnson before, during and after the incident; and (3) mitigation witness testimony regarding the effects of the incident more generally on the community and school, though at some point that would become cumulative. (R.O.A. 379, at 3; R.T. 3/18/16, at 12–13; R.T. 3/30/16, at 55–59; R.T. 5/4/16, at 33–35.)

On May 23, 2016, citing this Court’s relevant case law and A.R.S. § 13–752(G) the trial court followed up on its previous ruling, in pertinent part:

The defense has proffered wide-ranging statements taken from more than twenty students at the school. The statements describe the students’ personal experiences during the shooting and the effect it had on their own lives and the lives of other students.

\* \* \*

Taken at face value, the defense statements indicate Defendant will be presenting as mitigation the fact that students other than Defendant had difficult lives after the incident—for example, one student became a prostitute and was killed by her pimp, other students were murdered, other students committed suicide, others had early pregnancies and substance abuse problems. Such evidence exceeds the scope of permissible mitigation, in the Court’s view.

(R.O.A. 478, at 2.) The court went on to order that:

(1) The defense may “tell the story” of the Columbine incident—i.e., what happened that day—with approximately three witnesses, and certainly no more than five. Beyond that, such testimony is cumulative, and the risk of unfair prejudice substantially outweighs any probative value.

The Court does not believe mitigation witness testimony regarding the impact of the shooting on their own lives would be relevant, unless they were similarly situated to Defendant during the incident (e.g. other persons in the weight room).

(2) Witnesses may also testify about their observations of Defendant before, during and after the incident. (Most of the statements to which the state objects seem to have nothing to do with Defendant.)

(3) The effect of the incident on the school and the town in a general sense is relevant.

(4) Lay witnesses may not offer opinions to the effect that Defendant would not have committed this offense but for the Columbine shootings.

(5) Lay witness testimony about the impact they believe the incident had on their own lives and on the lives of individuals (other than Defendant) will not be permitted. The Court finds that such testimony does not bear on Defendant's "character, prior record, or the circumstances of his offense." *Chappell*, 225 Ariz. at 238. Additionally, any probative value such testimony would have is substantially outweighed by the danger of confusion, unfair prejudice and waste of time. Indeed, lay witnesses attributing suicides, deaths and other, later life events to Columbine risks a mini-trial on each such student and each such life event, with the State being compelled to present rebuttal evidence that other factors may have caused the life event.

(*Id.* at 2–3.)

## **2. Child Adoption Syndrome/Drug-Seeking Behavior/Post-Traumatic Stress/Counseling.**

Johnson's reference to this "limited" mitigation evidence is merely a string record cite to the following places in Reporter's Transcripts. (O.B. 158, n. 924.) The references to Reporter's Transcript of June 16, 2016, are to objections made during the testimony of defense expert Dr. Kirschner, specifically when regarding Dr. Kirschner's reference to "Child Adoption Syndrome" not being in the Diagnostic and Statistics Manual (DSM) *yet*, as well as the witness's continued overly expressive reactions before the jury. (R.T. 6/16/16, at 76–102.) The trial court struck the witness's references to

Child Adoption Syndrome not being in the DSM yet, but permitted the defense to allow the doctor to explain why his expert opinion was nonetheless valid because of the analysis underlying his opinion, without digressing into whatever politics affect which illnesses are included in the manual. (*Id.* at 91–92.)

The first reference to Reporter’s Transcript June 20, 2016,<sup>13</sup> involved the trial court sustaining the State’s objection to Johnson’s question during cross-examination of the State’s expert that went beyond the scope of the direct examination. (R.T. 6/20/16, at 122–24.) Because the trial court agreed that what the court termed Johnson’s alleged “drug-seeking behavior” was not part of the State’s direct examination, it sustained the objection. (*Id.* at 124.)

The reference to the transcript of June 23, 2016, at pages 35–36 contains no objections during Johnson’s cross-examination of State expert Dr. DeMarte. And, the reference to June 7, 2016, transcript refers to a State “beyond the scope” objection during Johnson’s redirect examination of Johnson’s uncle, Alma Weaver, to a question asking the uncle what he thought caused Johnson’s attitude to “go back to his old [bad] ways.” (R.T. 6/7/16, at 177–80.) The trial

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<sup>13</sup> The second reference to the June 20, 2016, transcript is for page number 177–80, however, the transcript ends on page 166.



court sustained the objection because the question was not “relevant or productive.” (*Id.* at 180.)

**C. *Law and argument.***

Nothing about the trial court’s rulings in these instances illustrates an abuse of discretion. While, as stated previously, the Arizona Rules of Evidence do not govern admission of evidence in the penalty phase of a capital case, relevance and undue prejudice pursuant to Rules 401 and 403 are nonetheless applicable. *Chappell*, 225 Ariz. 239, ¶ 35–37; *see also* A.R.S. §§ 13–751(C), 13–752(G). Constitutionally individualized sentencing is not compromised when a trial court exercises appropriate discretion in its rulings on objections. *See Zant*, 462 U.S. at 878–79, (citing *Eddings*, 455 U.S. at 110–12); *see also Lockett* , 438 U.S. at 601–05); *Baldwin*, 211 Ariz. at 472, ¶ 17. And parties are still required confine questions to not only evidence that is relevant to the defendant’s character, propensities, record, and circumstances of the crime, but also within the boundaries of disclosure and the scope of cross-examination and re-direct. Further, any conceivable error was harmless in the face of the aggravating circumstances.

### XIII

#### **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ORDERING DISCLOSURE OF DEFENSE PENALTY PHASE WITNESS INTERVIEW NOTES.**

Johnson next contends that the trial court abused its discretion by ordering disclosure of defense notes of defense witnesses, as written or recorded statements pursuant to Ariz. R. Crim. P. 15.2 disclosure requirements. (O.B. 160–80.) This contention should also be rejected.

##### ***A. Standard of review.***

A trial court’s ruling on disclosure is reviewed for an abuse of discretion. *State ex rel. Thomas v. Newell (Milagro)*, 221 Ariz. 112, 114, ¶ 6 (2009); *State v. Towery*, 186 Ariz. 168, 186 (1996). An abuse of discretion occurs where the court’s reasons for its action are “clearly untenable, legally incorrect, or amount to a denial of justice.” *Milagro*, 221 Ariz. at 114, ¶ 6 (quoting *State v. Chapple*, 135 Ariz. 281, 297 n. 18 (1983)).

##### ***B. Pertinent facts.***

On January 20, 2016, the State filed a motion to compel the defense to comply with disclosure requirements under Arizona Criminal Rules of Procedure 15.2(c) and 15.2(h). (R.O.A. 304, at 1–2.) Specifically, the defense had previously disclosed “witness statements” that amounted to “written summaries of information” of only what defense counsel chose to include,

rather than the full disclosure required by the rule. (*Id.*) The witness “summaries” made clear that there was vital information missing to which the State was entitled. (*Id.* at 2–3.) Johnson responded on February 1, 2016, claiming broad work product privilege protected disclosure of the written or recorded notes requested by the State. (R.O.A. 327.) The State replied on February 8, 2016. (R.O.A. 337.)

On February 19, 2016, the trial court granted the State’s motion in part, ruling that “defense team notes taken during witness interviews” fell within the broad definition of “statement” articulated in Rule 15.4 of the Arizona Rules of Criminal Procedure, and were thus subject to disclosure pursuant to Rule 15.2. (R.O.A. 344, at 2.) The court further concluded that the work product privilege is more narrow than asserted by Johnson’s counsel, because it protects only the “opinions, theories or conclusions” of counsel, or, in other words, the “mental processes of the attorney.” (*Id.* at 2–3, citing *United States v. Nobles*, 422 U.S. 225, 238 (1975).) Accordingly, the trial court ordered:

1. Granting the State’s motion in part.
2. Defendant shall disclose as soon as possible to the State any and all witness statements not previously disclosed, with defense team opinions, theories and conclusions redacted.
3. If defense counsel in good faith believes disclosure of a specific witness’ statement, as redacted, would violate an ethical obligation, the defense may seek [to] submit the statement for *in camera* review, supported by a specific and detailed written application.

4. If the State wishes to challenge redactions of specific witness statements, it may seek further relief from the Court.

(*Id.* at 3–4.)

Johnson moved to stay the proceedings to file a special action on this ruling. (R.O.A. 346.) The trial court denied the stay. (R.T. 2/26/16, at 10.) On March 7, 2016, following telephonic argument, the court of appeals accepted jurisdiction of Johnson’s special action on this issue, but denied relief, noting that the trial court’s order compels disclosure pursuant to Rule 15, while permitting redaction of attorney work product not subject to disclosure. (R.O.A. 359, at 1–2.)

### **C. *Law and argument.***

The work product doctrine “reflects the strong public policy underlying the orderly prosecution and defense of legal claims.” *Nobles*, 422 U.S. at 236–37 (quoting *Hickman*, 329 U.S. at 510). In *Hickman*, the Supreme Court explained what is included in the “work product doctrine” as follows:

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within

the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in *interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways*—aptly through roughly termed . . . as the work product of the lawyer.

*Hickman*, 329 U.S. at 510-11 (emphasis added). *See also Nobles*, 422 U.S. at 237.

The work product doctrine is thus “distinct from and broader than the attorney-client privilege.” *Nobles*, 422 U.S. at 238, n. 11 (citing *Hickman*, 329 U.S. at 508). The Court further explained:

*At its core, the work-product doctrine shelters the mental processes of the attorney*, providing a privileged area within which he can analyze and prepare this client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

\* \* \*

The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived. . . . Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination.

*Id.* at 238-39 (emphasis added).

Moreover, the Court made clear that, while broader than the attorney-

client privilege, the work product doctrine is still narrow in scope:

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had.

*Hickman*, 329 U.S. at 511.

Further, “Arizona authorities consistently have supported free-ranging, skeptical cross-examination of expert witnesses and open discovery to probe the groundwork for their opinions.” *Emergency Care Dynamics, Ltd. v. Superior Court*, 188 Ariz. 32, 36 (App. 1997); *see also* Ariz. R. Crim. P. 15.2(c)(2) (requiring defense disclosure of names and addresses of testifying expert witnesses together with results of testing, experiments, or comparisons); Ariz. R. Crim. P. 15.2(e)(2) (requiring disclosure, upon request by the prosecution, of any completed expert reports and “statements and examination notes” taken by testifying experts); *Slade v. Schneider*, 212 Ariz. 176, 180, ¶ 22 (App. 2006) (observing Arizona’s “long-favored practice of allowing full cross-examination of expert witnesses” (quoting *Ariz. Indep. Redistricting Comm’n v. Fields*, 206 Ariz. 130, 143–44, ¶¶ 43–44 (App. 2003))).

To adequately cross-examine all witnesses, including defense experts—who base expert opinions in part on statements from other defense witnesses, such as family members—statements by all witness, including as written or

recorded in notes, must be disclosed to the opposing party. This is necessary both for cross-examination of witnesses at trial, but also to ensure that the State's mental health expert had the same information upon which to base an expert opinion as was available to Johnson's experts. See *Green v. Nygaard*, 213 Ariz. 460, 463, ¶ 8 (App. 2006) (party waives work-product privilege by designating expert to testify at trial). "An expert may be either a witness or protected consultant, but not both. Counsel must choose." *Emergency Care Dynamics, Ltd.*, 188 Ariz. 32, 36 (App. 1997). This Court has further explained that "[t]he work product is not absolute. Like any qualified privilege, a defendant may waive all or part of the protection by electing to present the expert as a witness." *State ex rel. Corbin v. Ybarra*, 161 Ariz. 188, 93 (1989) (citing *Nobles*, 422 U.S. at 239–40).

Johnson's reliance on *Ybarra* to support his contention that the trial court's ruling is not supported by the "unequal access" policy that, in part, underlies the work product doctrine is inapposite. (O.B. 172.) In *Ybarra*, this Court concluded:

On any consideration of the work product doctrine, we must consider an additional factor: availability of the item sought in discovery. If the information sought is equally available to both parties, it receives the broadest protection. *However, if the information sought is unavailable to one of the parties, the work product doctrine may not protect it, ensuring that both parties have equal access to all information necessary for a fair determination of the case.*

161 Ariz. at 194 (internal citation omitted; emphasis added). While Johnson correctly notes that both parties can interview the witnesses (O.B. 172), the statements the witnesses made to only one party are not available except by mandatory disclosure—which is precisely why Rule 15 exists. Far from a nefarious “fishing expedition for impeachment material,” (O.B. 172), it is “information necessary for a fair determination of the case.” *Ybarra*, 161 Ariz. at 194.

This concern was reflected in the argument the trial court and counsel had on the motion. (R.T. 2/16/16, at 6–33.) Defense counsel acknowledged only disclosing “a complete summary of the statements we felt we would elicit at trial.” (*Id.* at 8–9.) Prompted by the trial court, defense counsel also acknowledged that *Nobles* holds that the work product privilege is waived when a witness is called to testify. (*Id.* at 15.) The prosecutor clarified that the State’s “narrow request” was not for all defense notes or files, but simply for discovery of statements made by defense witnesses recorded either electronically or in writing, as required per Rule 15.2 and the State agreed that any actual attorney thought processes subject to work product protection could be redacted. (*Id.* at 25–31.)

The trial court in the instant case struck the appropriate balance between disclosure mandated by the rules and protection of any legitimate mental



processes of Johnson’s defense counsel. *See Nobles*, 422 U.S. at 225 (“The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth.”). This is reflected in the instances at trial that Johnson claims the compelled disclosure prejudiced him. Essentially, Johnson claims that he was unable to present half-truths because the testifying witnesses were confronted with the whole of their written or recorded statements, rather than the “summaries” defense counsel preferred to disclose. The trial court did not abuse its discretion.

#### **XIV**

#### **JOHNSON’S ARMED ROBBERY PLEA AGREEMENT IS NOT BEFORE THIS COURT.**

Johnson next argues that the trial court abused its discretion when it denied his motion to withdraw from his plea agreement in the armed robbery case. (O.B. 181–85.) This contention should also be rejected because this is an inappropriate venue to challenge his plea. While the non-capital armed robbery case “trailed” the instant case because Johnson postponed sentencing in that case pending the resolution of the instant case (R.T. 5/24/16, at 24–25), the notice of appeal in this instant case is only for the capital case cause number, CR 2010-048824-002. (R.O.A. 550.) Johnson does not have a right

to appeal his non-capital plea agreement and may only pursue post-conviction relief. *See* A.R.S. § 13-4033 (B). Thus, challenge to the plea in the armed robbery case is not appropriate in this case, in fact, this Court is without jurisdiction to consider that plea. (R.T. 6/29/16, at 21–22.) The fact that trial counsel in this case was appointed as advisory counsel in the armed robbery case does not change that. (*See* R.T. 3/18/16, 42–43.)

## XV

### **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ORDERING JOHNSON TO RELEASE HIS BYU IDAHO SCHOOL RECORDS AS PART OF AUTHORIZED DISCLOSURE.**

Johnson next contends that the trial court abused its discretion by ordering him to disclose his complete college records by signing a release for those records. (O.B. 186–88.) This contention is also without merit.

#### ***A. Standard of review.***

As stated previously, a trial court’s ruling on disclosure is reviewed for an abuse of discretion. *Milagro*, 221 Ariz. at 114, ¶ 6.

#### ***B. Pertinent facts.***

The State alerted the trial court that the release signed by Johnson for his BYU Idaho records had expired, that the *one page* of records Johnson disclosed was not all the records available, and additionally, that Johnson would not sign a new release absent a court order. (R.O.A. 341; R.T. 2/16/16,

at 54–56; R.T. 2/26/16, at 11–13; R.T. 4/21/16, at 86–89.) The trial court ordered Johnson to sign a new release.<sup>14</sup> (R.O.A. 361, at 2; R.T. 2/26/16, at 13.)

### **C. *Law and argument.***

Johnson placed his mental health at issue in the penalty phase. As part of his proffered mitigation, he asserted a lasting effect from the Columbine shooting incident—making his sojourns in college, both at BYU Idaho and at Mesa Community College—relevant to his proffered mitigation and rebuttal of that mitigation. The “waiver” Johnson claims was involuntary (the waiver signed to allow the school to release his records) is not the issue. By placing his mental health at issue, Johnson opened the door to an examination by the State’s expert, and such an examination takes into account records such as school records. *See Phillips v. Araneta*, 208 Ariz. 280, 282, ¶ 8 (2004); *State v. Schackart*, 175 Ariz. 494, 499 (1993). *See also State v. Rushing*, 243 Ariz. 212, 225, ¶ 54 (although the Fifth Amendment applies in penalty phase proceedings in capital cases, a defendant waived the privilege of self-incrimination by placing his mental health as issue as a mitigating factor at sentencing); *State v.*

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<sup>14</sup> Johnson had previously agreed to sign releases from other institutions, such as corrections facilities, and asked only that, if the State obtained records  
(continued ...)

*Fitzgerald*, 232 Ariz. 208, 217, ¶ 44 (2013) (defendant waived privilege against self-incrimination and any protections under Ariz. R. Crim. P. 11.7 by offering evidence relevant to mental health in capital penalty phase).

In *Phillips*, this Court explained that “once a defendant notifies the state that he intends to place his mental condition at issue during the penalty phase of a capital trial, a trial judge has discretion to order the defendant to submit to a mental examination by an expert chosen by the state or the court.” 208 Ariz. at 283, ¶ 9. This necessarily means that the door is also open to a defendant’s school and other records that are necessary to that examination.

Moreover, Arizona statutes permit both the state and the defendant to rebut any information received at the aggravation or penalty phase, as well as to present mitigating evidence. A.R.S. § 13–751(C) and (D). Johnson’s claim that the trial court’s order to release his college records violates his due process rights is thus inaccurate. (O.B. 187.) The trial court did not abuse its discretion.

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( ... continued)

different from, or in addition to, those the defense had, that it disclose them. (R.T. 3/22/16, at 7–8.)

## XVI

### **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONDUCTING VOIR DIRE AND PRECLUDING QUESTIONS REGARDING SPECIFIC TYPES OF MITIGATION EVIDENCE.**

Johnson next argues that the trial court abused its discretion by precluding *voir dire* questions regarding specific types of mitigation evidence. (O.B. 189–94.) This contention should likewise be rejected.

#### ***A. Standard of review.***

This Court reviews rulings on *voir dire* for an abuse of discretion. *State v. Patterson*, 230 Ariz. 270, 273 ¶ 5 (2012). Trial courts have “great latitude in deciding what questions should be asked on *voir dire*.” *State v. Glassel*, 211 Ariz. 33, 46, ¶ 37 (2005) (quoting *Mu’Min v. Virginia*, 500 U.S. 415, 424 (1991)).

#### ***B. Pertinent facts.***

Prior to trial, the State filed a motion requesting that defense counsel be prohibited from asking potential jurors their views on specific types of mitigation or aggravation, or from posing hypotheticals to that effect. (R.O.A. 329.) Johnson opposed this request. (R.O.A. 338.) On February 24, 2016, the trial court issued a minute entry, ruling that it would “allow counsel to examine prospective jurors on their basic beliefs, views, biases and prejudices concerning the death penalty, as well as their general views concerning

aggravating and mitigating circumstances that must be considered in determining whether to impose a sentence of life or death.” (R.O.A. 347, at 8, citing *Morgan v. Illinois*, 504 U.S. 719 (1992); *State v. Glassel*, 211 Ariz. 33 (2005)). However, the court also ruled that it would “not allow questions by counsel that groom or condition prospective jurors regarding evidence that may be presented at trial, or that commit them to taking certain positions depending on actual or hypothetical factual scenarios.” (R.O.A. 347, at 9, citing *State v. Burns*, 237 Ariz. 1, ¶ 21 (2015); *Patterson*, 230 Ariz. at 274, ¶ 9 (2012). The court would, nevertheless, permit the parties to ask case-specific voir dire question if appropriate. (R.O.A. 347, at 9, citing *Patterson*, 230 Ariz. at 274, ¶ 9. Thus, the trial court granted in part, and denied in part, the State’s request. (R.O.A. 347, at 9.)

During voir dire, defense counsel repeatedly butted against the trial court’s ruling by, for example, attempting to ask inappropriate hypothetical questions. (R.T. 4/11/16, at 145–52, 157–63; R.T. 4/12/16, at 201–03, 226–30; R.T. 4/13/16, at 120–21; R.T. 4/14/16, at 37–40.) Specifically, the trial court explained to defense counsel that a hypothetical asking whether, after a guilty verdict, a juror was inclined to impose the death penalty was too broad and misleading given Arizona’s three-phase trial, and to instruct counsel to carefully tailor voir dire questions to this Court’s opinions in *Patterson* and

*Burns*. (R.T. 4/11/16, at 148–49, 152–63; R.T. 4/12/16, at 229–30; R.T. 4/14/16, at 40.) The issue resurfaced in a discussion regarding motions to strike some jurors for cause because the hypothetical asked by defense counsel confused several jurors. (R.T. 4/11/16, at 180–88.) Each time, defense counsel rephrased and continued with voir dire questions for the jurors.

Johnson also filed a motion to “not pass the jury panel,” arguing that he had inadequate “time and opportunity” to “vet” the jury panel pursuant to *Morgan*. (R.O.A. 403.) The trial court denied this motion on the final day of jury selection, finding that “its rulings have all been within its discretion and consistent with Arizona Supreme Court precedent” and further “deemed” that the parties passed the panel for cause. (R.T. 4/19/16, at 68.)

**C. *Law and argument.***

Due process requires trial courts to permit a defendant’s inquiry into whether potential jurors would always impose the death penalty. *Morgan*, 504 U. at 733. This principle does not, however, allow a defendant to “ask a juror to speculate or precommit on how that juror might vote based on any particular facts.” *State v. Smith*, 215 Ariz. 221, 231, ¶ 42 (2007) (quoting *United State v. McVeigh*, 153 F.3d 1166, 1207 (10th Cir. 1998)). See also *State v. Garcia*, 224 Ariz. 1, 9, ¶ 15 (2010) (This Court has consistently “rejected efforts by defense counsel to elicit how prospective jurors will vote based on specific facts.”).

Consequently, trial courts do not abuse their discretion by prohibiting a defendant from asking how prospective jurors would assess specific aggravating circumstances. *Smith*, 215 Ariz. at 231, ¶ 42. *See also Johnson*, 212 Ariz. at 434, ¶ 31 (trial court not required to permit defendant to ask how jurors would assess specific mitigation). Applying this principle in *Smith*, this Court rejected the defendant’s “complain[t] that he was not permitted to ask jurors whether they would automatically impose the death penalty if they found specific aggravators.” 215 Ariz. at 231, ¶ 42, 159 P.3d at 451. This Court affirmed these principles recently in *Patterson*, 230 Ariz. at 273, ¶ 5, and *Burns*, 237 Ariz. at 13–14, ¶¶ 20–21.

Further, while Arizona Criminal Rule of Procedure 18.5(d) allows parties “reasonable time” to conduct further oral examination of potential jurors after the court has conducted initial voir dire examination, it also specifically gives the trial court discretion to “impose reasonable limitations with respect to questions allowed.” The court may also “terminate or limit voir dire on grounds of abuse.” Ariz. R. Crim. P., 18.5(d). *See also, State v. Anderson*, 197 Ariz. 314, 320–21, ¶ 14 (2000).

In the instant case, Johnson was given reasonable time to voir dire potential jurors, as well as to ask potential jurors adequate questions pursuant to *Morgan* and this Court’s case law in a jury selection process that spanned



nine days. The trial court did not abuse its considerable discretion in conducting voir dire.

## XVII

### **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING MOTIONS TO STRIKE THREE JURORS FOR CAUSE.**

Johnson next contends that the trial court abused its discretion by denying motions to strike three jurors for cause. (O.B. 192–94.) This contention is without merit.

#### ***A. Standard of review.***

This Court reviews a trial court’s refusal to strike jurors for cause for an abuse of discretion. *State v. Cruz*, 218 Ariz. 149, 158, ¶ 28 (2008); *Glassel*, 211 Ariz. at 47, ¶ 46. Even if a defendant is forced to use a peremptory challenge to remove a juror who should have been excused for cause, however, an otherwise valid criminal conviction will not be reversed unless prejudice is shown. *Cruz*, 218 Ariz. at 158, ¶ 28; *Hickman*, 205 Ariz. at 196–97, ¶¶ 20–21. A trial judge must consider the entirety of a prospective juror’s demeanor and behavior, and if a juror’s promise to uphold the law is coupled with ambiguity and uncertainty, the trial judge may strike the juror for cause. *Burns*, 237 Ariz. at 13, ¶ 23; *Lynch*, 225 Ariz. at 35, ¶ 28. Further, the trial court’s non-strike of any juror Johnson did not move to strike is reviewed for fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19.

## **B. *Pertinent facts.***

Johnson claims that the trial court should have granted his motion to strike three jurors for cause—though it is unclear which three jurors he mentions—Prospective Jurors 9, 31, and 59 (on whom Johnson used peremptory strikes) or Prospective Jurors 56, 154, and 294 (who Johnson also claims were biased, but were seated and became Jurors 1, 8, and 12, respectively). (O.B. 193.) (R.T. 4/19/16, at 93–94.) Because the argument is underdeveloped, it is waived. *See Bolton*, 182 Ariz. at 298 (failure to sufficiently argue claim on appeal constitutes waiver of that claim). Nevertheless, Johnson’s claim is also without merit.

### **1. Jurors 9, 31, and 59.**

These three jurors were subjected to defense counsel’s misleading hypothetical questions previously discussed, such as this asked to Prospective Juror 9:

But I’m going to start with you, No. 9, again, just because that’s how we work. Just giving you this hypothetical case, let’s say you’re sitting as a juror on a case, and that it’s a first-degree murder case, intentional, premeditated murder; that you and 11 other members of that jury found the defendant, beyond a reasonable doubt, guilty of intentional premeditated killing of an innocent victim; that you and the 11 other jurors considered any defenses that might have been offered, whether it was self-defense, defense of others, heat of passion. For you, in that case, would the death penalty be the only reasonable penalty that you would consider?

(R.T. 4/11/16, at 145–46.) Following argument and discussion with the trial court in which the court told counsel to rephrase and tailor the question to this Court’s case law, defense counsel asked Prospective Juror 9:

Going back to where we were, Juror No. 9, I’m asking you specifically, in this hypothetical situation where you’re a juror in a first-degree murder case, where you and 11 other jurors found beyond a reasonable doubt that the defendant committed a premeditated murder; that you and your fellow jurors heard all the defenses, rejected them all, and returned a verdict of guilt; that you heard about that this wasn’t an accident. The person wasn’t insane. He wasn’t mentally ill. All those things that might have been presented as a defense at the end of that guilt, would you be leaning towards the imposition of [the] death penalty at that point in time?

(*Id.* at 149–50.) Prospective Juror 9 answered, “Yes.” (*Id.* at 150.) An objection from the State prompted the trial court to remind defense counsel to rephrase again. (*Id.*)

Later, Johnson moved to strike for cause Prospective Jurors 9, 31, 40, 42, 58, and 59 because, based on counsel’s questions, the jurors “could not imagine a situation” where they could grant mercy after a finding of first-degree premeditated murder and at least one aggravator. (R.T. 4/11/16, at 180–81.) The prosecutor agreed to strike some jurors, but opposed striking 9, 31, and 59 because the hypotheticals Johnson posed were not consistent with *Patterson* and those jurors were thus not “impaired.” (*Id.* at 181–86.) The court denied the motion to strike these jurors for cause:

I'm going to deny the challenge as to 9, 31, 40, 42, and 59. I permitted the use of the hypothetical, but it is somewhat confusing to the jurors. They have indicated they can consider mitigation. Putting that—and irrespective of how they might be leaning, and what I was trying to emphasize in one of our colloquies up here at the bench—and I mentioned burden of proof, and maybe—I may have been inarticulate in trying to telegraph what the Court would consider disqualifying.

Patterson itself says the real question is can a juror be impartial at the beginning of the penalty phase. On this record, I don't believe—I'm not persuaded that any of those—58, I agree, is going to be excused for cause. But these other folks, you know, I'm just not persuaded that they are mitigation impaired.

When you're going to ask a —I mean, you're right. The defense is right that, yes, we restrict you folks from asking in fact, as a general proposition, questions specific to the case. But then—whatever their predispositions are, the question is will they—when the Court says everybody's equal here, you can't start leaning one way or another, are they going to follow that instruction when we get to the mitigation phase? That's what Patterson says is the million-dollar question, if you will, colloquially.

So, with respect to 9, 31, 40, 42 and 59, given the hypothetical and the totality of their answers to questions, I do not find them to be mitigation impaired. And the challenge is denied.

(*Id.* at 187–88.) Johnson did not renew a motion to strike on any of these jurors during subsequent questioning.

## **2. Prospective Jurors 56, 154, and 294.**

In response to voir dire questioning by defense counsel, Prospective Juror 56 avowed that graphic photos would not affect his or her ability to be fair and impartial and indicated that, after finding guilt and aggravation, he or

she would consider mitigation and be able to grant leniency. (R.T. 4/12/16, at 17–18, 51–52.) Johnson did not challenge Juror 56 for cause. Nor did Johnson challenge for cause Juror 154, who, in response to attorney questioning indicated a desire to be fair and impartial, but, while acknowledging he sees “bad cops,” he may give police officers the “benefit of the doubt.” (*Id.* at 117–20.) Finally, the trial court conducted additional questioning of Juror 294 with regard to her stated strong belief in victim’s rights. (R.T. 4/13/16, at 75–76.) Jurors 294 indicated an ability to put those feelings aside, be fair and impartial, and follow the court’s instructions. (*Id.* at 76, 78.)

### **C. Law and argument.**

Jurors cannot be excluded “simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.” *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968); *See also Burns*, 237 Ariz. at 13, ¶ 22. However, the trial court may remove potential jurors whose views and biases would interfere with the performance of their duties. *Glassel*, 211 Ariz. at 47–48, ¶ 47 (citing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)). And “even if a juror is sincere in his promises to uphold the law, a judge may still reasonably find a juror’s equivocation ‘about whether he would take his personal biases in the jury room’ sufficient to substantially impair his duties as a juror, allowing a strike for cause.” *State v. Ellison*, 213

Ariz. 116, 137 ¶ 89 (2006) (quoting *Glassel*, 211 Ariz. at 48, ¶¶ 49–50). See also *Wainwright*, 469 U.S. at 424 (state need not prove juror’s opposition to the death penalty with “unmistakable clarity”). Further, “a juror need not be against the death penalty in every possible case to warrant dismissal for cause.” *Prince*, 226 Ariz. at 8, ¶ 29.

Nothing in the jurors’ voir dire responses leads to the conclusion that the trial court abused its discretion in refusing to strike for cause Jurors 9, 31, or 59, or Jurors 56, 154, or 294. Further, nothing indicates that Johnson’s jury was not fair or impartial. For example, Juror 9 indicated she could keep an open mind, would not automatically vote for either for or against the death penalty, would follow the law, and would consider mitigation. (Juror 9’s Questionnaire, at 26, 27, 29, 3.) Juror 31 indicated she would make the sentencing decision only after hearing evidence, would “keep an open mind” free from emotions for either side, and would consider mitigation. (Juror 31’s Questionnaire at 26, 29, 31.) Juror 56 indicated that she could keep an open mind, would not automatically vote for or against the death penalty, was neither opposed to nor in favor of the death penalty, and that she believed that “the death penalty can be a consequence for the crime committed, but it may not be necessary,” that “each case is individual,” and that she “could be impartial.” (Juror 56’s Questionnaire at 26–29.) Juror 59 also indicated that the

responsibility of sentencing someone to life or death was weight[y]” and “remarkable,” that she would not automatically vote for or against imposing the death penalty, that imposing the death penalty would be “difficult” but she could do it if supported by the evidence, and that she favors evaluating each case “on the merits,” and that “no matter how damning the evidence” the defendant deserved a “fair trial by a jury of his/her peers. (Juror 59’s Questionnaire, at 26–29.) Juror 154 indicated that he would not automatically vote for or against the death penalty, that he was generally opposed to the death penalty but would impose it in extreme first-degree murder cases, and that the death penalty “if for crimes that are bad and the person seems to not have remorse or could do it again” (Juror 154’s Questionnaire, at 27–29); Juror 294 indicated that she could keep an open mind, would not automatically vote for or against the death penalty, was neither opposed to nor in favor of the death penalty, stated “Death penalty is not the first punishment I think of. I’d have to hear the whole story,” and that the death penalty is “appropriate in certain cases” and she is a “strong believer in victim’s rights.” (Juror 294’s Questionnaire, at 26–29.)

The trial court, who was able to observe the potential jurors, did not abuse its considerable discretion in refusing to strike for cause any of these jurors. *See Burns*, 237 Ariz. at 13, ¶ 22. Moreover, any conceivable error was

harmless based on the impartiality displayed by all the jurors in question, and Johnson cannot show that his jury was not fair and impartial.

## XVIII

### **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING A MOTION TO DISMISS JUROR 6 DURING TRIAL.**

Johnson next argues that the trial court abused its discretion by refusing to dismiss Juror 6 on the penultimate day of the penalty phase. (O.B. 195–97.) This contention lacks merit.

#### ***A. Standard of review.***

As previously stated, this Court reviews dismissal of a juror for an abuse of the trial court’s considerable discretion. *Cruz*, 218 Ariz. at 158, ¶ 28; *Glassel*, 211 Ariz. at 47, ¶ 46.

#### ***B. Pertinent facts.***

On the next-to-last day of the penalty phase, the trial court alerted counsel that the Court had just learned that Juror 6’s daughter was the named victim in a case filed on June 1, 2016, in an incident believed to have occurred in February of 2016, but not reported until May of 2016. (R.T. 6/28/16, at 4–5.) The charges were not related to the prosecutor’s bureau, and the prosecutor was unaware of them. (*Id.* at 5.)

In response to individual questioning from the Court with counsel and Johnson present, Juror 6 reported that she was unaware of the incident when she



filled out the juror questionnaire and participated in voir dire, only becoming aware of it in mid-May. (R.T. 6/28/16, at 7–8.) The juror assured the court and counsel that nothing about the other circumstance, including any contact she may have had with law enforcement or county attorneys affected her ability to be fair and impartial. (*Id.* at 8.) Asked if she tended to identify with the victims in the present case, Juror 6 replied, “No. It’s separate. It had nothing to do with it. I’m 100 percent here.” (*Id.* at 9.) Juror 6 repeatedly avowed that nothing had affected her ability to be fair and impartial, stating she was “good to go.” (*Id.* at 9–10.) After conferring with counsel, the trial court asked a follow-up question at defense counsel’s request, and without objection from the State, regarding whether anything about the new situation would have changed her answers on her jury questionnaire or during voir dire, to which Juror 6 replied, “No.” (*Id.* at 17–18.) Juror 6 again avowed, “I just want to let you know that I’m good. I’m 100 percent here and present.” (*Id.* at 18.)

Johnson then moved to strike Juror 6, arguing that, despite her assurances that she was fair and impartial and her investment of 3 months into the present trial, her fairness and impartiality were in doubt. (R.T. 6/28/16, at 19.) The State responded that Juror 6 had previously been candid, open, and attentive with the court, both in voir dire and in her answers to the questionnaire, and that nothing about the new situation case doubt on her

ability to be fair and impartial. (*Id.* at 19–21.) The trial court denied the motion to strike, explaining that his observations of her answers and mannerisms led to the conclusion that she was “very candid” with court and counsel. (*Id.* at 21.) The court found her “credible” and was “confident she remains fair and impartial.” (*Id.*)

**C. *Law and argument.***

Becoming a relative of a crime victim partway into the trial did not automatically render Juror 6 fair and impartial, particularly in the face of her repeated avowal that the other circumstance did not influence her participation in the instant case at all. The trial court was able to observe her answers to the court’s questions, and it did not abuse its considerable discretion in refusing to strike her on the penultimate day of a 3-month trial. *See Burns*, 237 Ariz. at 13, ¶ 22.

## XIX

### **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN APPLYING ARIZONA RULE OF EVIDENCE 106.**

Johnson next argues that the trial court abused its discretion by applying Rule 106 of the Arizona Rules of Evidence. (O.B. 198.)

#### ***A. Standard of review.***

As stated previously, a trial court’s admission of evidence is reviewed for an abuse of discretion. *See Hardy*, 230 Ariz. at 291, ¶ 49. Further, Johnson’s argument on this issue is so underdeveloped as to make it difficult to discern the precise assignment of error he promotes, and, as such, he has waived this issue on appeal. *See Bolton*, 182 Ariz. at 298.

#### ***B. Pertinent facts.***

During the guilt phase, outside the presence of the jury, the court and parties addressed the State’s foundational and relevance objection to an attempt to impeach a State witness using thousands of pages of proficiency evaluations. (R.T. 5/11/16, at 40–100), Johnson’s cross-examination of that witness then resumed. Counsel immediately began referencing a document referencing a “proficiency discrepancy,” and the trial court sustained the State’s “Rule 106” objection to requires a foundation regarding the documents. Defense counsel resumed cross-examination by asking questions to establish foundation, such as time frame. (*Id.* at 100–02.)

Later, in the penalty phase, during Johnson’s re-direct examination of defense mitigation witness Jonathan Woods, Johnson’s maternal uncle, defense counsel referenced a couple of lines from a letter Woods wrote to the judge on behalf of Johnson in 2009 in another criminal case. (R.T. 6/1/16, at 79.) The State objected, referencing “106.” (*Id.*) Defense counsel noted that he did not intend to have Woods read the whole letter, but also noted that the letter was in evidence. (*Id.*) The State objected to defense counsel choosing only a word or phrase out of the letter that would leave a misleading impression of the whole letter without an ability for the State to re-cross examine the witness to clear up any ambiguity. (*Id.* at 80.) The trial court sustained the objection, and left the availability of re-cross open depending on the ensuing proceedings. (*Id.*) The witness went on to discuss the letter at length, including his motivations for writing it and what he meant by it. (*Id.* at 81–82.)

**C. *Law and argument.***

The stated concern of Rule 106 of the Arizona Rules of Evidence is fairness—that if one party introduces “all or part of a writing or recorded statement,” the opposing party can require introduction of any other part or other writing or recorded statement that should fairly be considered at the same time. The rule requires only introduction of the portion of the statement “necessary to qualify, explain or place into context the portion already

introduced.” *Cruz*, 218 Ariz. at 162, ¶ 58 (quoting *State v. Prasertphong*, 210 Ariz. 496, 499, ¶ 15 (2005)).

In the instant case, Johnson attacks the trial court’s requirement that he ensure his questions regarding written statements did not leave an unfair impression, which resulted in “modified defense questioning.” (O.B. 198.) Johnson’s claim has no merit. A review of the record reveals that Johnson was able to thoroughly conduct the cross and re-direct examinations he claims were curtailed. Moreover, in light of the heavy aggravation in this case, any conceivable error is harmless. The trial court did not abuse its discretion.

## XX

### **THE PROSECUTOR DID NOT COMMIT MISCONDUCT.**

Johnson next contends that the prosecutor committed misconduct by “misstating the DNA evidence” and also committed cumulative misconduct. (O.B. 199–205.) This contention should also be rejected.

#### ***A. Standard of Review.***

Johnson admits he failed to object at trial to the instances of alleged misconduct. (O.B. 199.) This Court should accordingly review for fundamental error alone. *Henderson*, 210 Ariz. at 567, ¶ 19. Moreover, with the exception of the alleged erroneous argument about DNA evidence, to assert cumulative error, Johnson simply employs a bullet-point list of instances of

misconduct—without specifying what the prosecutor said that qualifies as misconduct—and without analysis to any case law. As such, he has waived the cumulative prosecutorial misconduct issue on appeal.<sup>15</sup> See *Bolton*, 182 Ariz. at 298.

**B. Law and argument.**

Prosecutors are given wide latitude in presenting closing argument to the jury.” *State v. Goudeau*, 239 Ariz.421, 466, ¶ 196 (2016). (quotations omitted). They “may summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions.” *Id.* (quotations omitted). “In determining whether an argument is misconduct, [this Court] consider[s] two factors: (1) whether the prosecutor’s statements called to the jury’s attention matters it should not have considered in reaching its decision and (2) the probability that the jurors were in fact influenced by the remarks.” *Id.* (quotations omitted). This Court assesses “the context in which the statements were made as well as the entire record and ... the totality of the circumstances.” *Id.* (quotations omitted).

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<sup>15</sup> As such, the State will respond only to the DNA evidence claim of alleged prosecutorial misconduct. However, the state waives nothing and concedes nothing regarding these allegations, and asks that if the Court finds the cumulative prosecutorial misconduct claim not waived, to order supplemental  
(continued ...)

Here, the prosecutor did not exceed the wide latitude she was given and no error, fundamental or otherwise, occurred. Referencing the testimony of Jodi Legg and Krista Placko, the prosecutor, without objection from Johnson, argued in closing during the guilt phase that the seven pairs of zip ties left behind in the Taiwan Massage had Johnson's DNA on them:

Remember where she focuses where the defendant touched to make them. We know the defendant had to have made these handcuffs before entering Taiwan Massage. He had them ready to use before binding Mrs. Fu. The eight pair of handcuffs, Exhibit 247, has Mrs. Fu's DNA. She's the major. But the defendant's DNA is there. When you remove all of Mrs. Fu's DNA the defendant's DNA remains and up to five locations. His allele is there. His DNA is there and remember where there is. The part he touched, the part he manipulated before the attack and murder and during the attack and murder to ensure her wrists were bound forever.

(R.T. 5/16/16, at 33.) This is a reasonable inference from the evidence presented at trial, that, among other things, on the set of 14 zip ties, Johnson's profile was the "major profile," as well as a lower presence in other areas where he "could not be excluded." (R.T. 5/11/16, at 24–29, 33–34, 148, 155, 170–71.) See *Goudeau*, 239 Ariz. at 466, ¶ 196. Moreover, Johnson's reliance on *Duncan v. Commonwealth*, 322 S.W.3d 81 (Ky. 2010), is inapposite, because that case involved cross-examination of a witness, not closing

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( ... continued)

briefing of the issue and permit the State to respond to a more developed argument.

argument. The prosecutor's argument in the instant case did not call to the jury's attention matters it should not have considered in reaching its decision. *See Goudeau*, 239 Ariz. at 466, ¶ 196. There was no misconduct.

Additionally, even if fundamentally erroneous, the prosecutor's argument was not prejudicial under *Henderson*. Other evidence tied Johnson to the crime scene, including security camera footage of Johnson's white pickup truck rapidly backing out of the Taiwan Massage parking lot as described by the witnesses who saw Johnson leaving Taiwan Massage directly after the murder. (R.T. 4/20/16, at 72; R.T. 4/21/16, at 33–34, 105–07, 124, 130, 150–53, 167–68; R.T. 4/25/16, p.m., at 78–80; R.T. 5/5/16, a.m., at 20–21.)

## XXI

### **THIS COURT SHOULD NOT REVISIT SEVERAL SETTLED ISSUES OF LAW.**

Johnson presents 32 previously settled challenges Arizona's death penalty scheme. (O.B. at 206–09.) He concedes that either this Court or the United States Supreme Court has previously rejected each of his arguments, and cites the case(s) in which each argument was rejected. (*Id.*) Because Johnson provides no reason to reconsider these prior determinations, this Court should reject his claims and reaffirm the cases he cites in his brief.



## **XXII**

### **TO BE FILED SEPARATELY UNDER SEAL.**

See Supplemental Sealed Answering Brief.

### **CONCLUSION**

Based on the foregoing authorities and argument, the State respectfully requests that this Court affirm the judgment and sentences because the jury did not abuse its discretion in its findings of aggravation and imposition of the death penalty. *See* A.R.S. § 13–756(A). The record supports the jurors’ findings of the A.R.S. §§ 13–751(F)(6), as well as the (F)(2) and (F)(7) aggravating factors, which Johnson did not challenge. These aggravating factors are exceptionally weighty and Johnson’s proffered mitigation was weak, thus the jury did not abuse its discretion in imposing the death penalty, and Johnson does not challenge that decision. Moreover, a reasonable juror could easily have determined that the mitigation in the record was not sufficiently substantial to warrant leniency and impose death. *See State v. Naranjo*, 234 Ariz. 333 (2014). This Court should affirm Johnson’s death sentence.

Respectfully submitted,

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# Appendix E

## ARIZONA SUPREME COURT

STATE OF ARIZONA

Appellee,

v.

JAMES CLAYTON JOHNSON,

Appellant.

No. CR 16-0261-AP

Maricopa County Superior Court  
No. CR2010-048824-001 DT

### APPELLANT'S REPLY BRIEF

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## TABLE OF CONTENTS

|                                                                                                                                                                                                                                                     | <u>Page</u> |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| <u>FACTUAL AND PROCEDURAL STATEMENT</u> .....                                                                                                                                                                                                       | 25          |
| <u>ARGUMENT 1</u> .....                                                                                                                                                                                                                             | 26          |
| <p>Arizona has not complied with its constitutional obligation to legislatively narrow which first-degree murders are eligible for the death penalty. Instead, nearly 99% of first-degree murder defendants are eligible for the death penalty.</p> |             |
| <u>ARGUMENT 2</u> .....                                                                                                                                                                                                                             | 32          |
| <p>The trial court denied Jimmy’s rights to due process, a meaningful appeal, and effective assistance of counsel when the court denied his request for an evidentiary hearing on the <i>Furman v. Georgia</i> claim.</p>                           |             |
| <u>ARGUMENT 3</u> .....                                                                                                                                                                                                                             | 38          |
| <p>The (F)(6) Especially Cruel, Heinous, or Depraved Aggravator is unconstitutionally vague.</p>                                                                                                                                                    |             |
| 1. On its face, the cruel, heinous or depraved aggravator is unconstitutionally vague .....                                                                                                                                                         | 38          |
| 2. This Court’s jurisprudence has not adequately narrowed the (F)(6) aggravator .....                                                                                                                                                               | 39          |
| 3. Instead, this Court has improperly broadened the sweep of the (F)(6) and rendered statutory language meaningless .....                                                                                                                           | 40          |
| A. Through its use of the word “especially,” the (F)(6) aggravator requires the government to prove the cruelty, heinousness, or depravity of a given murder set it apart from the norm.....                                                        | 40          |
| B. This Court’s jurisprudence has removed the necessary comparison to the norm.....                                                                                                                                                                 | 41          |

|                                                                                                                                                                                                                                                        |    |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| C. As a result, this Court has broadened the sweep of the (F)(6) and judicially excised the word “especially” from the (F)(6) statute .....                                                                                                            | 42 |
| 4. Even if this Court’s jurisprudence has provided some narrowing, jury instructions cannot adequately communicate the narrowing. This Court’s (F)(6) jurisprudence is inherently descriptive; jury instructions require a prescriptive approach ..... | 43 |
| 5. In light of the issues raised, this Court’s prior precedent can and should be overturned .....                                                                                                                                                      | 44 |
| <u>ARGUMENT 4</u> .....                                                                                                                                                                                                                                | 47 |
| The trial court’s (F)(6) instruction was inaccurate and insufficient.                                                                                                                                                                                  |    |
| 1. The (F)(6) instruction did not communicate the illustrative examples set forth by case law .....                                                                                                                                                    | 48 |
| A. The lower court’s cruelty instruction lacked necessary insight available in this Court’s cases .....                                                                                                                                                | 48 |
| B. The lower court’s heinous or depraved instruction lacked necessary insight .....                                                                                                                                                                    | 50 |
| 2. The (F)(6) instruction failed to set forth the two-step process necessary for heinous and depraved findings.....                                                                                                                                    | 50 |
| 3. The (F)(6) instruction operated as a judicial comment.....                                                                                                                                                                                          | 52 |
| 4. Gratuitous Violence has become a catchall for inadequate cases of mutilation .....                                                                                                                                                                  | 52 |

ARGUMENT 5 .....54

The trial court improperly prevented Jimmy from arguing the state had not proved the murder was committed in an especially cruel, heinous, or depraved manner.

ARGUMENT 6 .....57

Evidence was insufficient to support the (F)(6) verdict.

1. Evidence of cruelty was insufficient. ....57
2. Evidence of heinousness and depravity was insufficient.....58
3. The error harmed Jimmy. ....58

ARGUMENT 7 .....60

The trial court should have granted Jimmy’s Motion for Mistrial when *Lynch v. Arizona* changed Arizona law one day into the mitigation phase and the trial court had incorrectly instructed the jury that parole was available.

1. The trial court should have granted Jimmy’s Motion for Mistrial when *Lynch v. Arizona* was issued just one day into the sentencing phase and held that instructions the trial court had read throughout trial were incorrect.....63
2. The trial court’s subsequent instructions did not cure the error.....63

ARGUMENT 8 .....67

The trial court incorrectly instructed the jury that significant impairment required Jimmy to prove he did not know the difference between right and wrong.

1. The trial court incorrectly instructed the jury that Jimmy had to prove his mental health issues or impairment “prevented” him from knowing right from wrong or conforming his conduct to the law. ....67

|                                                                                                                                                                                                                                            |    |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| 2. The “prevented” instruction constituted fundamental error because the error stripped Jimmy of his right to have the jury consider significant impairment as a mitigating factor.....                                                    | 68 |
| 3. The error prejudiced Jimmy. ....                                                                                                                                                                                                        | 72 |
| <a href="#"><u>ARGUMENT 9</u></a> .....                                                                                                                                                                                                    | 75 |
| The trial court improperly allowed the state to admit evidence and make argument regarding prison housing conditions and Jimmy’s exercise of his right to trial during the sentencing phase.                                               |    |
| 1. The trial court improperly admitted evidence of housing conditions. ....                                                                                                                                                                | 75 |
| A. Confinement conditions are generally irrelevant in sentencing.....                                                                                                                                                                      | 75 |
| B. Here, the state did not present any evidence to prove that its evidence regarding housing conditions was connected to Jimmy or his willingness to accept responsibility. ....                                                           | 76 |
| C. The trial court abused its discretion when it allowed the state to present evidence of confinement conditions.....                                                                                                                      | 77 |
| 2. The trial court improperly allowed the prosecutor to argue that Jimmy could have entered a guilty plea at any point. In doing so, the trial court placed at issue Jimmy’s relationship with his attorneys and their ethical duties..... | 78 |
| <a href="#"><u>ARGUMENT 10</u></a> .....                                                                                                                                                                                                   | 80 |
| Internally inconsistent jury instructions regarding the presumption of death, mercy, and sympathy likely caused juror confusion resulting in an unconstitutional death sentence.                                                           |    |
| <a href="#"><u>ARGUMENT 11</u></a> .....                                                                                                                                                                                                   | 82 |
| The trial court should have allowed Jimmy to present execution impact evidence because it was relevant to his character and family support.                                                                                                |    |



|                                                                                                                                                                                                     |    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| 1. The United States and Arizona Constitutions guaranteed Jimmy the right to present all relevant mitigation to the jury.....                                                                       | 82 |
| 2. This Court has created an absolute bar to execution impact evidence in error.....                                                                                                                | 82 |
| A. This Court’s decisions banning execution impact evidence are premised upon a misreading of Arizona cases.....                                                                                    | 82 |
| B. This Court’s reliance upon cases from other jurisdictions fails to recognize the distinctions underlying execution impact evidence.....                                                          | 85 |
| 3. Execution impact evidence is proper when it relates to a defendant’s character, family support, role in society, or other mitigation.....                                                        | 85 |
| 4. The admission of execution impact evidence that does not recommend a particular sentence aligns the currently disparate treatment of victim impact statements and execution impact evidence..... | 86 |
| <a href="#"><u>ARGUMENT 12</u></a> .....                                                                                                                                                            | 88 |

The court improperly limited mitigation evidence.

|                                                                                         |    |
|-----------------------------------------------------------------------------------------|----|
| 1. The trial court erred by precluding the Columbine evidence on relevance grounds..... | 88 |
| A. The evidence was relevant. ....                                                      | 89 |
| B. The evidence was corroborative, not cumulative. ....                                 | 90 |
| 2. The court erred by limiting re-direct of Dr. Abrams.....                             | 91 |
| A. The state put PTSD at issue during cross-examination of Dr. Abrams. ....             | 91 |

|                                                                                                                                                                                                                 |    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| B. The state put “drug-seeking behavior” at issue during cross-examination of Dr. Abrams.....                                                                                                                   | 91 |
| 3. The court erred by precluding Dr. Abrams’s opinion that the murder was impulsive or reflexive and Dr. Kirschner’s opinion that Jimmy was in a dissociative state during the murder.....                      | 92 |
| 4. The trial court erred by precluding Dr. Kirshner’s expert opinion on why Adopted Child Syndrome is not in the DSM. ....                                                                                      | 93 |
| 5. The errors require resentencing.....                                                                                                                                                                         | 94 |
| <a href="#"><u>ARGUMENT 13</u></a> .....                                                                                                                                                                        | 95 |
| <p>The trial court improperly ordered the production of attorney notes, in violation of work product privilege, and erroneously allowed the prosecutor to use the defense team notes to attack credibility.</p> |    |
| 1. The plain language of Rule 15.2 does not require production of an attorney’s notes of a witness’s oral statement .....                                                                                       | 95 |
| 2. Even if attorney notes could be construed as a statement, attorney notes are protected work product in Arizona .....                                                                                         | 96 |
| 3. Arizona jurisprudence supports protection of attorney notes .....                                                                                                                                            | 96 |
| 4. Public Policy supports protecting attorney notes .....                                                                                                                                                       | 97 |
| 5. The trial court incorrectly overruled Jimmy’s repeated objections to the prosecutor’s impeachment with the notes .....                                                                                       | 98 |
| 6. The errors negatively impacted Jimmy’s rights to due process, effective assistance of counsel, and a fair and reliable sentencing hearing .....                                                              | 98 |
| 7. Dismissal of the death penalty is the only viable remedy .....                                                                                                                                               | 99 |

ARGUMENT 14.....100

The trial court violated Jimmy’s right to be presumed innocent when the court denied Jimmy’s motion to withdraw from his plea agreement in the armed robbery case on the grounds that Jimmy knew he had committed the murder.

ARGUMENT 15.....102

The trial court improperly ordered Jimmy to sign waivers so the prosecutor could obtain documents.

ARGUMENT 16.....105

The court’s rulings prevented the defense from screening and choosing a constitutionally adequate jury.

1. The trial court deprived Jimmy of the opportunity to fully investigate juror bias .....105
2. The trial court allowed the prosecutor to ask fact-intensive questions. This disparate treatment amounts to a denial of due process .....106
3. The trial court abused its discretion by failing to understand the scope of its discretion and premising its orders on an erroneous interpretation of the law .....110
4. The time limitations on individual voir dire were prejudicial here and establish constitutional error .....111

ARGUMENT 17.....112

The trial court incorrectly denied Jimmy’s motion to strike three jurors for cause.

1. The trial court abused its discretion. ....112
  - A. Juror 9 was biased. ....113
  - B. Juror 31 was biased. ....114

|                                                                                                                                                                                   |     |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| C. Juror 59 was biased. ....                                                                                                                                                      | 114 |
| 2. The trial court’s errors prejudiced Jimmy. ....                                                                                                                                | 114 |
| <a href="#"><u>ARGUMENT 18</u></a> .....                                                                                                                                          | 117 |
| The trial court improperly denied Jimmy’s motion to strike Juror 6.                                                                                                               |     |
| 1. The trial court failed to conduct an adequate inquiry into Juror<br>6’s bias. ....                                                                                             | 118 |
| 2. Juror 6 was biased. ....                                                                                                                                                       | 119 |
| <a href="#"><u>ARGUMENT 19</u></a> .....                                                                                                                                          | 120 |
| The lower court improperly gave Rule 106 preclusive effect.                                                                                                                       |     |
| <a href="#"><u>ARGUMENT 20</u></a> .....                                                                                                                                          | 122 |
| Jimmy’s conviction was tainted by prosecutorial misconduct.                                                                                                                       |     |
| 1. The prosecutor repeatedly misstated the DNA evidence. ....                                                                                                                     | 122 |
| A. The prosecutor improperly misrepresented the DNA evidence<br>during examination and closing argument. The state’s brief<br>makes the same error as the improper argument. .... | 122 |
| B. The error harmed Jimmy. ....                                                                                                                                                   | 127 |
| 2. Additional claims allowed in Reply. ....                                                                                                                                       | 128 |
| A. Withholding evidence in violation of <i>Brady v. Maryland</i> . ....                                                                                                           | 128 |
| B. Improperly taking advantage of trial court rulings and arguing<br>no evidence existed where evidence was precluded. ....                                                       | 128 |
| C. Misstating the law. ....                                                                                                                                                       | 129 |
| D. Shifting the burden of proof. ....                                                                                                                                             | 130 |

|                                                                                        |     |
|----------------------------------------------------------------------------------------|-----|
| E. Commenting on Jimmy’s invocation of his right to remain silent. ....                | 130 |
| F. Impugning integrity of defense. ....                                                | 131 |
| G. Improperly arguing inferences and conclusions during openings. ....                 | 131 |
| H. Vouching by placing weight of government behind victims. ....                       | 132 |
| I. Vouching by implying facts not in evidence supported state’s desired verdicts. .... | 133 |
| J. Appealing to fears and sympathy. ....                                               | 134 |
| K. Encouraging jury to use verdict to send message. ....                               | 134 |
| L. Improperly seeking to inflame the jury. ....                                        | 134 |
| 3. Cumulative Error. ....                                                              | 136 |
| <a href="#"><u>ARGUMENT 21</u></a> .....                                               | 137 |
| Issues preserved for Federal review.                                                   |     |
| ARGUMENT 22                                                                            |     |
| UNDER SEAL.                                                                            |     |

## TABLE OF CITATIONS

|                                                                                                     | <u>Page</u>     |
|-----------------------------------------------------------------------------------------------------|-----------------|
| <b>UNITED STATES SUPREME COURT CASES</b>                                                            |                 |
| <i>Abdul-Kabir v. Quarterman</i> , 550 U.S. 233 (2007).....                                         | 81              |
| <i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991).....                                             | 35              |
| <i>Bordenkircher v. Hayes</i> , 434 U.S. 357 (1978).....                                            | 78              |
| <i>Boyde v. California</i> , 494 U.S. 370 (1990) .....                                              | 80, 129         |
| <i>Brady v. Maryland</i> , 373 U.S. 83 (1963) .....                                                 | 128             |
| <i>Clemons v. Mississippi</i> , 494 U.S. 738 (1990).....                                            | 58              |
| <i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579 (1993).....                               | 93              |
| <i>Douglas v. California</i> , 372 U.S. 353 (1963).....                                             | 33, 100         |
| <i>Draper v. Washington</i> , 372 U.S. 487 (1963).....                                              | 33              |
| <i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982).....                                               | 71, 92, 94, 129 |
| <i>Furman v. Georgia</i> , 408 U.S. 238 (1972).....                                                 | 26, 28, 32, 37  |
| <i>Golden v. Zwickler</i> , 394 U.S. 103 (1969) .....                                               | 33              |
| <i>Gonzales v. U.S.</i> , 348 U.S. 407 (1955) .....                                                 | 100             |
| <i>Gregg v. Georgia</i> , 428 U.S. 153 (1976) .....                                                 | 29              |
| <i>Griffin v. California</i> , 380 U.S. 609 (1965) .....                                            | 130             |
| <i>Hickman v. Taylor</i> , 329 U.S. 495 (1947).....                                                 | 96-97           |
| <i>Hidalgo v. Arizona</i> , 138 S.Ct. 1054 (2018) .....                                             | 32-34           |
| <i>Hidalgo v. Arizona</i> , 538 U.S. ___, 2017 WL 3536644, No. 17-251 (Breyer, J., statement) ..... | 30              |
| <i>Hurst v. Florida</i> , 136 S.Ct. 616 (2016).....                                                 | 58              |
| <i>In re Winship</i> , 397 U.S. 358 (1970).....                                                     | 130             |
| <i>Jones v. Barnes</i> , 463 U.S. 745 (1983) .....                                                  | 35              |
| <i>Kelly v. South Carolina</i> , 534 U.S. 246 (2002).....                                           | 62              |
| <i>Kentucky v. Whorton</i> , 441 U.S. 786 (1979).....                                               | 118             |

## TABLE OF CITATIONS Continued

|                                                                                                | <u>Page</u>          |
|------------------------------------------------------------------------------------------------|----------------------|
| <b>UNITED STATES SUPREME COURT CASES continued</b>                                             |                      |
| <i>Lee v. U.S.</i> , 137 S.Ct. 1958 (2017) .....                                               | 36, S-3              |
| <i>Lewis v. U.S.</i> , 146 U.S. 370 (1892).....                                                |                      |
| <i>Lockett v. Ohio</i> , 438 U.S. 586 (1978) .....                                             | 69, 71, 94, 107, 129 |
| <i>Longs Drug Stores v. Howe</i> , 134 Ariz. 424 (1983) .....                                  | 96                   |
| <i>Lynch v. Arizona</i> , 136 S.Ct. 1818 (2016).....                                           | 60, 62-65            |
| <i>McKane v. Durston</i> , 153 U.S. 684 (1894) .....                                           | 35                   |
| <i>McKoy v. North Carolina</i> , 494 U.S. 433 (1990) .....                                     | 89                   |
| <i>Mills v. Maryland</i> , 486 U.S. 367 (1988).....                                            | 88                   |
| <i>Mincey v. Arizona</i> , 437 U.S. 385 (1978) .....                                           | 134                  |
| <i>Morgan v. Illinois</i> ,                                                                    |                      |
| 504 U.S. 719 (1992).....                                                                       | 105-108, 113         |
| <i>New York v. Uplinger</i> , 467 U.S. 246 (1984).....                                         | 34                   |
| <i>Payne v. Tennessee</i> , 501 U.S. 808 (1991) .....                                          | 94                   |
| <i>Planned Parenthood of Southeastern Pennsylvania v. Casey</i> , 505 U.S. 833<br>(1992) ..... | 44-45, 85            |
| <i>Ramdass v. Angelone</i> , 530 U.S. 156 (2000) .....                                         | 65                   |
| <i>Remmer v. U.S.</i> , 350 U.S. 377 (1956).....                                               | 119                  |
| <i>Ristaino v. Ross</i> , 424 U.S. 589 (1976) .....                                            | 106                  |
| <i>Sansing v. Arizona</i> , 536 U.S. 954 (2002).....                                           | 42                   |
| <i>Shafer v. S.C.</i> , 532 U.S. 36 (2001).....                                                | 65                   |
| <i>Simmons v. South Carolina</i> , 512 U.S. 154 (1994).....                                    | 60-62, 65            |
| <i>Smith v. Phillips</i> , 455 U.S. 209 (1982) .....                                           | 117, 119             |
| <i>State of Alabama v. State of Arizona</i> , 291 U.S. 286 (1934) .....                        | 33                   |
| <i>State v. Pandeli</i> , 536 U.S. 953 (2002) .....                                            | 42                   |

## TABLE OF CITATIONS Continued

|                                                                                    | <u>Page</u>  |
|------------------------------------------------------------------------------------|--------------|
| <b>UNITED STATES SUPREME COURT CASES continued</b>                                 |              |
| <i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....                        | 34           |
| <i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993).....                            | 71, 130      |
| <i>Teague v. Lane</i> , 489 U.S. 288 (1989) .....                                  | 45           |
| <i>Tennard v. Dretke</i> , 542 U.S. 274 (2004) .....                               | 89           |
| <i>Tumey v. Ohio</i> , 273 U.S. 510 (1927) .....                                   | 117, 119     |
| <i>Upjohn Company v. U.S.</i> , 449 U.S. 383 (1981).....                           | 96           |
| <i>U.S. v. Gonzalez-Lopez</i> , 548 U.S. 140 (2006) .....                          | S-3          |
| <i>U.S. v. Nobles</i> , 422 U.S. 225 (1975).....                                   | 96           |
| <i>Wainwright v. Witt</i> , 469 U.S. 412 (1985) .....                              | 107, 113     |
| <i>Walton v. Arizona</i> , 497 U.S. 639 (1990).....                                | 38-39, 44-45 |
| <i>Witherspoon v. Illinois</i> , 391 U.S. 510 (1968) .....                         | 107-109      |
| <i>Wolff v. McDonnell</i> , 418 U.S. 539 (1974) .....                              | 111          |
| <i>Zant v. Stephens</i> , 462 U.S. 862 (1983) .....                                | 75           |
| <br><b>ARIZONA SUPREME COURT CASES</b>                                             |              |
| <i>Arizona Public Service Co. v. Brittain</i> , 107 Ariz. 278 (1971).....          | 43           |
| <i>Coulas v. Smith</i> , 96 Ariz. 325 (1964) .....                                 | 33           |
| <i>Dean v. Superior Court</i> , 84 Ariz. 104 (1958).....                           | 96-98        |
| <i>In re Peasley</i> , 208 Ariz. 27 (2004).....                                    | 136          |
| <i>In re Zawada</i> , 208 Ariz. 232 (2004) .....                                   | 128, 136     |
| <i>Krone v. Hotham</i> , 181 Ariz. 364 (1995) .....                                | 101          |
| <i>Miller v. Board of Supervisors of Pinal County</i> , 175 Ariz. 296 (1993) ..... | 33           |
| <i>Newton v. Maine</i> , 96 Ariz. 319 (1964) .....                                 | 43           |
| <i>Phillips v. Araneta</i> , 208 Ariz. 280 (2004).....                             | 102          |



## TABLE OF CITATIONS Continued

|                                                                                   | <u>Page</u>           |
|-----------------------------------------------------------------------------------|-----------------------|
| <b>ARIZONA SUPREME COURT CASES Continued</b>                                      |                       |
| <i>Phoenix Metals Corp. v. Roth</i> , 79 Ariz. 106 (1955).....                    | 33                    |
| <i>Reah v. Jupin</i> , 68 Ariz. 335 (1949).....                                   | 64                    |
| <i>State ex rel. Corbin v. Ybarra</i> , 161 Ariz. 188 (1989) .....                | 96-97                 |
| <i>State ex rel. Thomas v. Granville (Baldwin)</i> ,<br>211 Ariz. 468 (2005)..... | 50, 70, 72, 80-81, 86 |
| <i>State v. Acuna Valenzuela</i> , 245 Ariz. 197 (2018).....                      | 132, 136              |
| <i>State v. Anderson</i> , 210 Ariz. 327 (2005).....                              | 43                    |
| <i>State v. Andriano</i> , 215 Ariz. 497 (2007).....                              | 42                    |
| <i>State v. Barreras</i> , 181 Ariz. 516 (1995) .....                             | 39                    |
| <i>State v. Bennett</i> , 213 Ariz. 562 (2006).....                               | 93                    |
| <i>State v. Bible</i> , 175 Ariz. 549 (1993).....                                 | 60, 131, 136          |
| <i>State v. Bocharski</i> , 218 Ariz. 476 (2008).....                             | 42, 50-51             |
| <i>State v. Boggs</i> , 218 Ariz. 325 (2008).....                                 | 93                    |
| <i>State v. Bolton</i> , 182 Ariz. 290 (1995) .....                               | 104, 120              |
| <i>State v. Bowen</i> , 104 Ariz. 138 (1969).....                                 | 96                    |
| <i>State v. Boyston</i> , 231 Ariz. 539 (2013).....                               | 83                    |
| <i>State v. Brewer</i> , 170 Ariz. 486 (1992).....                                | 57                    |
| <i>State v. Burns</i> , 237 Ariz. 1 (2015) .....                                  | 108, 110              |
| <i>State v. Bush</i> , 244 Ariz. 575 (2018).....                                  | 64-65                 |
| <i>State v. Cannon</i> , 148 Ariz. 72 (1985) .....                                | 128                   |
| <i>State v. Carlson</i> , 237 Ariz. 381 (2015).....                               | 39                    |
| <i>State v. Carreon</i> , 210 Ariz. 54 (2005) .....                               | 80                    |
| <i>State v. Carson</i> , 243 Ariz. 463 (2018).....                                | 25                    |

## TABLE OF CITATIONS Continued

|                                                               | <u>Page</u>    |
|---------------------------------------------------------------|----------------|
| <b>ARIZONA SUPREME COURT CASES Continued</b>                  |                |
| <i>State v. Chappell</i> , 225 Ariz. 229 (2010) .....         | 82, 84-85, 129 |
| <i>State v. Comer</i> , 165 Ariz. 413 (1990) .....            | 134            |
| <i>State v. Cromwell</i> , 211 Ariz. 181 (2005) .....         | 43             |
| <i>State v. Cropper</i> , 223 Ariz. 522 (2010) .....          | 40             |
| <i>State v. Cruz</i> , 218 Ariz. 149 (2008) .....             | 117, 120       |
| <i>State v. Dann</i> , 220 Ariz. 351 (2009) .....             | 83             |
| <i>State v. Daymus</i> , 90 Ariz. 294 (1961) .....            | 129            |
| <i>State v. Deschamps</i> , 105 Ariz. 530 (1970) .....        | 54             |
| <i>State v. Detrich</i> , 178 Ariz. 380 (1994) .....          | 54             |
| <i>State v. Escalante</i> , 245 Ariz. 135 (2018) .....        | 68, 70-72      |
| <i>State v. Escalante-Orozco</i> , 241 Ariz. 254 (2017) ..... | 128            |
| <i>State v. Ethington</i> , 121 Ariz. 572 (1979) .....        | 35             |
| <i>State v. Finch</i> , 202 Ariz. 410 (2002) .....            | 84-85          |
| <i>State v. Fitzgerald</i> , 232 Ariz. 208 (2013) .....       | 102            |
| <i>State v. Fulminante</i> , 193 Ariz. 485 (1999) .....       | 47, 54         |
| <i>State v. Garcia</i> , 224 Ariz. 1 (2010) .....             | 59, 107-108    |
| <i>State v. Glassel</i> , 211 Ariz. 33 (2005) .....           | 108, 117       |
| <i>State v. Greene</i> , 192 Ariz. 431 (1998) .....           | 83-84          |
| <i>State v. Gretzler</i> , 135 Ariz. 42 (1983) .....          | 39, 41-42, 49  |
| <i>State v. Hampton</i> , 213 Ariz. 167 (2006) .....          | 43             |
| <i>State v. Hansen</i> , 156 Ariz. 291 (1988) .....           | 135            |
| <i>State v. Hargrave</i> , 225 Ariz. 1 (2010) .....           | 43             |
| <i>State v. Harrod</i> , 218 Ariz. 268 (2008) .....           | 59, 80, 83, 92 |

## TABLE OF CITATIONS Continued

|                                                        | <u>Page</u>         |
|--------------------------------------------------------|---------------------|
| <b>ARIZONA SUPREME COURT CASES Continued</b>           |                     |
| <i>State v. Haskie</i> , 242 Ariz. 582 (2017).....     | 76-77               |
| <i>State v. Hausner</i> , 230 Ariz. 60 (2012) .....    | 27                  |
| <i>State v. Henderson</i> , 210 Ariz. 561 (2005) ..... | 25, 52, 65, 86, 127 |
| <i>State v. Hickman</i> , 205 Ariz. 192 (2003) .....   | 114-115             |
| <i>State v. Hidalgo</i> , 241 Ariz. 543 (2017).....    | 27-28, 32           |
| <i>State v. Huerta</i> , 175 Ariz. 262 (1993).....     | 114-115             |
| <i>State v. Hughes</i> , 193 Ariz. 72 (1998).....      | 131, 134            |
| <i>State v. Hyde</i> , 186 Ariz. 252 (1996).....       | 42                  |
| <i>State v. Ives</i> , 187 Ariz. 102 (1996).....       | 52, S-3             |
| <i>State v. Johnson</i> , 212 Ariz. 425 (2006).....    | 93, 108, 110        |
| <i>State v. Jones</i> , 197 Ariz. 290 (2000).....      | 135                 |
| <i>State v. Jorgenson</i> , 198 Ariz. 390 (2000) ..... | 136                 |
| <i>State v. King</i> , 180 Ariz. 268 (1994) .....      | 42, 132-133         |
| <i>State v. Knapp</i> , 114 Ariz. 531 (1977) .....     | 49, 57              |
| <i>State v. Koch</i> , 138 Ariz. 99 (1983).....        | 60                  |
| <i>State v. Kuhs</i> , 223 Ariz. 376 (2010).....       | 80                  |
| <i>State v. Lawson</i> , 144 Ariz. 547 (1985) .....    | 63, 93              |
| <i>State v. Leon</i> , 190 Ariz. 159 (1997).....       | 133                 |
| <i>State v. Leteve</i> , 237 Ariz. 516 (2015) .....    | 75-77               |
| <i>State v. Logan</i> , 200 Ariz. 564 (2001).....      | 67                  |
| <i>State v. Lynch</i> , 238 Ariz. 84 (2015) .....      | 70                  |
| <i>State v. Manuel</i> , 229 Ariz. 1 (2011).....       | 83                  |
| <i>State v. Mata</i> , 185 Ariz. 319 (1996) .....      | 43                  |

## TABLE OF CITATIONS Continued

|                                                            | <u>Page</u>                      |
|------------------------------------------------------------|----------------------------------|
| <b>ARIZONA SUPREME COURT CASES Continued</b>               |                                  |
| <i>State v. McGill</i> , 213 Ariz. 147 (2006).....         | 61, 83, 105, S-2                 |
| <i>State v. McLoughlin</i> , 139 Ariz. 481 (1984) .....    | 93                               |
| <i>State v. McMurtrey</i> , 136 Ariz. 93 (1983).....       | 106                              |
| <i>State v. Medina</i> , 232 Ariz. 391 (2013).....         | 93                               |
| <i>State v. Milke</i> , 177 Ariz. 118 (1993).....          | 39                               |
| <i>State v. Miller</i> , 186 Ariz. 314 (1996).....         | 52, 57, 63, 79, 95, 98, 101, S-3 |
| <i>State v. Mincey</i> , 115 Ariz. 472 (1977) .....        | 134                              |
| <i>State v. Minnitt</i> , 203 Ariz. 431 (2002) .....       | 136                              |
| <i>State v. Moody</i> , 208 Ariz. 424 (2004).....          | 61, 134                          |
| <i>State v. Newell</i> , 212 Ariz. 389 (2006).....         | 64, 70, 93                       |
| <i>State v. Nordstrom</i> , 230 Ariz. 110 (2012).....      | 88                               |
| <i>State v. Pandeli</i> , 200 Ariz. 365 (2001) .....       | 42                               |
| <i>State v. Pandeli</i> , 215 Ariz. 514 (2007) .....       | 80                               |
| <i>State v. Patterson</i> , 230 Ariz. 270 (2012) .....     | 105, 108, 110, 136               |
| <i>State v. Peters</i> , 189 Ariz. 216 (1997).....         | 113                              |
| <i>State v. Prasertphong</i> , 210 Ariz. 496 (2005).....   | 120                              |
| <i>State v. Prince</i> , 226 Ariz. 516 (2011) .....        | 42, 55, 106-108, 110             |
| <i>State v. Romero</i> , 239 Ariz. 6 (2016) .....          | 76                               |
| <i>State v. Roque</i> , 213 Ariz. 193 (2006).....          | 82-85, 122, 127-128              |
| <i>State v. Rose</i> , 231 Ariz. 500 (2013) .....          | 82, 84-85                        |
| <i>State v. Ruben Johnson</i> , 212 Ariz. 425 (2006) ..... | 41-42                            |
| <i>State v. Rushing</i> , 243 Ariz. 212 (2017).....        | 61, 102                          |
| <i>State v. Salazar</i> , 173 Ariz. 399 (1992).....        | 41                               |

## TABLE OF CITATIONS Continued

|                                                                                                   | <u>Page</u>                      |
|---------------------------------------------------------------------------------------------------|----------------------------------|
| <b>ARIZONA SUPREME COURT CASES Continued</b>                                                      |                                  |
| <i>State v. Sanders</i> , 245 Ariz. 113 (2018) .....                                              | 64-65                            |
| <i>State v. Sansing</i> , 200 Ariz. 347 (2001) .....                                              | 42                               |
| <i>State v. Schackart</i> , 175 Ariz. 494 (1993) .....                                            | 102                              |
| <i>State v. Schrock</i> , 149 Ariz. 433 (1986) .....                                              | 130                              |
| <i>State v. Serna</i> , 163 Ariz. 260 (1990) .....                                                | 129                              |
| <i>State v. Skaggs</i> , 120 Ariz. 467 (1978) .....                                               | 106                              |
| <i>State v. Smith</i> , 215 Ariz. 221 (2007) .....                                                | 105, 108                         |
| <i>State v. Snelling</i> , 224 Ariz. 182 (2010) .....                                             | 48                               |
| <i>State v. Steinle in and for the County of Maricopa (Moran)</i> ,<br>239 Ariz. 415 (2016) ..... | 120                              |
| <i>State v. Stokley</i> , 182 Ariz. 505 (1995) .....                                              | 57                               |
| <i>State v. Tims</i> , 143 Ariz. 196 (1985) .....                                                 | 129                              |
| <i>State v. Torres</i> , 208 Ariz. 240 (2004) .....                                               | S-2                              |
| <i>State v. Tucker</i> , 215 Ariz. 298 (2007) .....                                               | 48                               |
| <i>State v. Walden</i> , 183 Ariz. 595 (1995) .....                                               | 52, 57, 63, 79, 95, 98, 101, S-3 |
| <i>State v. Wallace (Wallace II)</i> , 229 Ariz. 155 (2012) .....                                 | 58                               |
| <i>State v. Watson</i> , 129 Ariz. 60 (1981) .....                                                | 41                               |
| <i>State v. Williams</i> , 183 Ariz. 368 (1995) .....                                             | 82-83                            |
| <i>Tipton v. Burson</i> , 73 Ariz. 144 (1951) .....                                               | 64                               |
| <i>Twin City Fire Ins. Co. v. Burke</i> ,<br>204 Ariz. 251 (2003) .....                           | 61, S-2                          |

## TABLE OF CITATIONS Continued

### Page

### ARIZONA COURT OF APPEALS CASES

*In re 1996 Nissan Sentra*,

|                                                            |                                  |
|------------------------------------------------------------|----------------------------------|
| 201 Ariz. 114 (App. 2001).....                             | 52, 57, 63, 79, 95, 98, 101, S-3 |
| <i>State v. Turrentine</i> , 152 Ariz. 61 (App. 1986)..... | 134                              |

### FEDERAL CASES

|                                                                                               |          |
|-----------------------------------------------------------------------------------------------|----------|
| <i>Daniels v. Woodford</i> , 428 F.3d 1181 (9th Cir. 2005).....                               | S-2      |
| <i>Dyer v. Calderon</i> , 151 F.3d 970 (9th Cir. 1998) .....                                  | 117      |
| <i>Estrada v. Scribner</i> , 512 F.3d 1227 (9th Cir. 2008).....                               | 117, 119 |
| <i>Knox v. Collins</i> , 928 F.2d 657 (5th Cir. 1991).....                                    | 111      |
| <i>Planned Parenthood of Southern Arizona v. Lawall</i> , 180 F.3d 1022 (9th Cir. 1999) ..... | 30       |
| <i>Sinisterra v. U.S.</i> , 600 F.3d 900 (8th Cir. 2010).....                                 | 134      |
| <i>Smith v. McCormick</i> , 914 F.2d 1153 (9th Cir. 1990) .....                               | 129      |
| <i>U.S. v. Algarate-Valencia</i> , 550 F.3d 1238 (10th Cir. 2008).....                        | 47       |
| <i>U.S. v. Arendale</i> , 444 F.2d 1260 (5th Cir. 1971).....                                  | 130      |
| <i>U.S. v. French</i> , 904 F.3d 111 (1st Cir. 2018).....                                     | 116      |
| <i>U.S. v. Mitchell</i> , 783 F.2d 971 (10th Cir. 1986) .....                                 | 30-31    |
| <i>U.S. v. Pearson</i> , 746 F.2d 787 (11th Cir. 1984) .....                                  | 56       |
| <i>U.S. v. Rabuffo</i> , No. 14-14585, 2017 WL 5565229 (11th Cir. 2017, unpub.) .....         | 63       |
| <i>U.S. v. Ramirez-Rivera</i> , 800 F.3d 1 (1st Cir. 2015).....                               | 117, 119 |
| <i>U.S. v. Roberts</i> , 618 F.2d 530 (9th Cir. 1980) .....                                   | 132-133  |
| <i>U.S. v. Runyon</i> , 707 F.3d 475 (4th Cir. 2013) .....                                    | 134      |
| <i>U.S. v. Smith</i> , 640 F.3d 580 (4th Cir. 2011).....                                      | S-2      |
| <i>U.S. v. Wallace</i> , 753 F.3d 671 (7th Cir. 2014).....                                    | S-2      |

## TABLE OF CITATIONS Continued

|                                                                                                                                                                                                                         | <u>Page</u>  |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| <b>OTHER STATE CASES</b>                                                                                                                                                                                                |              |
| <i>Brooks v. U.S.</i> , 115 A.3d 1217 (D.C.App. 2015) .....                                                                                                                                                             | 98           |
| <i>City of Columbia v. Myers</i> , 294 S.E.2d 787 (S.C. 1982).....                                                                                                                                                      | 47           |
| <i>Com. v. Connolly</i> , 730 N.E.2d 318 (Mass.App. 2000).....                                                                                                                                                          | 47           |
| <i>Courtless v. Jolliffe</i> , 507 S.E.2d 136 (W.Va. 1998) .....                                                                                                                                                        | 33           |
| <i>Duncan v. Commonwealth</i> , 322 S.W.3d 81 (Ky. 2010) .....                                                                                                                                                          | 126-127      |
| <i>Green v. State</i> , 975 So.2d 1081 (Fla. 2008).....                                                                                                                                                                 | 73           |
| <i>Holland v. State</i> , 503 So.2d 1250 (1987).....                                                                                                                                                                    | 36           |
| <i>Matter of Brigham Park Coop. Apts. v. Finance Adm’r of City of N.Y.</i> , 83<br>A.D.2d 551 (N.Y.Super. 1981).....                                                                                                    | 63           |
| <i>People v. Daggett</i> , 225 Cal.App.3d 751 (Cal.App. 1990).....                                                                                                                                                      | 129          |
| <i>People v. Murray</i> , 64 A.D.2d 916 (N.Y. 1978) .....                                                                                                                                                               | 130          |
| <i>People v. Smith</i> , 347 P.3d 530 (Cal. 2015).....                                                                                                                                                                  | 75-76        |
| <i>Sherlock v. Fontainebleau</i> , 229 F.Supp.3d 1277 (S.D.Fla. 2017).....                                                                                                                                              | 102          |
| <i>State v. Bloom</i> , 516 N.W.2d 159 (Minn. 1994) .....                                                                                                                                                               | 126          |
| <i>State v. Bowman</i> , 623 S.E.2d 378 (S.C. 2005) .....                                                                                                                                                               | 75           |
| <i>State v. Evans</i> , 637 S.E.2d 313 (S.C. 2006).....                                                                                                                                                                 | 75           |
| <i>U.S. v. Fell</i> , 372 F.Supp.2d 766 (D.Vt.2005) .....                                                                                                                                                               | 106-107, 110 |
| <i>Whack v. State</i> , 73 A.3d 186 (Md.App. 201).....                                                                                                                                                                  | 126-127      |
| <b>OTHER RESOURCES</b>                                                                                                                                                                                                  |              |
| ABA Guidelines for the Appointment and Performance of Counsel in Death<br>Penalty Cases (2003).....                                                                                                                     | 78, 97, 120  |
| Anna Almendrala & Erin Sschumaker, <i>When The Scars Of A Mass Shooting<br/>Aren’t Left By Bullets</i> , The Huffington Post (Nov. 11, 2017) .....                                                                      | 90           |
| Ann E. Brand & Paul Brinich, <i>Behavior Problems and Mental Health<br/>Contacts in Adopted, Foster, and Nonadopted Children</i> , The Journal of Child<br>Psychology and Psychiatry and Allied Disciplines (1999)..... | 94           |

## TABLE OF CITATIONS Continued

|                                                                                                                                                                                                                      | <u>Page</u> |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| <b>OTHER RESOURCES Continued</b>                                                                                                                                                                                     |             |
| Arash Javanbakhl, <i>What Mass Shootings Do To Those Not Shot: Social Consequences Of Mass Gun Violence</i> , The Conversation (Nov. 9, 2018).....                                                                   | 90          |
| Black’s Law Dictionary (10th ed. 2014) .....                                                                                                                                                                         | 57          |
| Brittany Fowler, <i>A Shortcut to Death: How the Texas Death-Penalty Statute Engages the Jury's Cognitive Heuristics in Favor of Death</i> , 96 Tex.L.Rev. 379 (2017).....                                           | 81          |
| Clint Bolick, <i>The Unused Toolbox: Forging a Dynamic Future for Arizona’s Constitution</i> , Arizona Attorney Magazine (Oct. 2018) .....                                                                           | 115         |
| Gail Slap, et. al, <i>Adoption as a Risk Factor for Attempted Suicide During Adolescence</i> , Pediatrics, 108:2 (2001).....                                                                                         | 94          |
| Gihyum Yoon, et al, <i>Substance Abuse Disorders and Adoptions: Findings from a National Sample</i> , PLOS ONE (2012) .....                                                                                          | 94          |
| Holly Yan & Madison Park, <i>1 week. 3 suicides. 1 tragic connection to school massacres</i> , CNN (Mar. 26, 2019) .....                                                                                             | 90          |
| James Davies, <i>How Voting and Consensus Created the Diagnostic and Statistical Manual of Mental Disorders (DSM-III)</i> , Anthropology & Medicine (2017) .....                                                     | 94          |
| Jeffrey S. Sutton, <i>51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW</i> (Oxford Univ. Press 2018) .....                                                                               | 115         |
| John Blume, Theodore Eisenberg, Stephen P. Garvey, <i>Lessons from the Capital Jury Project</i> , Chapter 5 Beyond Repair? America’s Death Penalty, Duke University Press (2003).....                                | 81          |
| Joel Lieberman, et. al., <i>Gold Versus Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared to Other Types of Forensic Evidence?</i> , 14 Psychol. Pub. Pol’y & L. 27 (2008)..... | 127         |
| John Woodrow Cox & Steven Rich, <i>Scarred By School Shootings</i> , The Washington Post (Mar. 25, 2018).....                                                                                                        | 90          |
| Lissa Griffin, <i>2 Federal Criminal Appeals</i> §8:74 (2018).....                                                                                                                                                   | 34          |
| National Academy of Sciences, <i>Strengthening Forensic Science in the United States</i> , (2009) .....                                                                                                              | 126         |



## TABLE OF CITATIONS Continued

### Page

### OTHER RESOURCES Continued

|                                                                                                                                                                                                                                                               |          |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| President’s Council of Advisors on Science and Technology, <i>Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods</i> , (2016) .....                                                                              | 126      |
| RAJI (Criminal) (4th Ed.) .....                                                                                                                                                                                                                               | 67-68    |
| Shadia Kawa & James Giordano, <i>A Brief Historicity of the Diagnostic and Statistical Manual of Mental Disorders: Issues and Implications for the Future of Psychiatric Canon and Practice</i> , Philosophy, Ethics, and Humanities in Medicine (2012) ..... | 94       |
| <i>State v. Acuna Valenzuela</i> , CR2011-140108-001 ME 8/25/2014 .....                                                                                                                                                                                       | 132, 136 |
| <i>State v. Hidalgo</i> , Corrected OB, 2015 WL 12977498 .....                                                                                                                                                                                                | 27       |
| <i>State v. Hidalgo</i> , Corrected RB, 2015 WL 12977499 .....                                                                                                                                                                                                | 27       |
| <i>State v. Patterson</i> , CR2006-114651-001 ME 11/30/2009 .....                                                                                                                                                                                             | 136      |
| <i>State v. Patterson</i> , <i>Patterson Supp. Br.</i> , 2011 WL 9106033 .....                                                                                                                                                                                | 136      |
| Theodore Eisenberg and Martin T. Wells, <i>Deadly Confusion: Juror Instructions in Capital Cases</i> , 79 Cornell L.Rev. 1 (1992) .....                                                                                                                       | 81       |
| Webster’s Third New International Dictionary .....                                                                                                                                                                                                            | 57       |

### CONSTITUTIONAL PROVISIONS

#### United States Constitution

|                    |                     |
|--------------------|---------------------|
| Amendment 5 .....  | 78, 98, 130         |
| Amendment 6 .....  | 58-59, 98, 111, 115 |
| Amendment 8 .....  | 88-89, 94, 98       |
| Amendment 14 ..... | 78, 98, 111         |

## TABLE OF CITATIONS Continued

### Page

#### **Arizona State Constitution**

|                             |                              |
|-----------------------------|------------------------------|
| Article 2, Section 4 .....  | 78, 98                       |
| Article 2, Section 10 ..... |                              |
| Article 2, Section 15 ..... | 98                           |
| Article 2, Section 23 ..... | 78, 115                      |
| Article 2, Section 24 ..... | 33, 35, 78, 98, 100-101, 115 |
| Article 3, Section 2 .....  |                              |
| Article 6, Section 17 ..... | 78, 115                      |
| Article 6, Section 27 ..... |                              |

#### **STATUTES**

##### **Arizona Revised Statutes**

|                |                                       |
|----------------|---------------------------------------|
| §13-203 .....  | 93                                    |
| §13-751 .....  | 38-49, 52-53, 56-57, 67, 93, 100, 132 |
| §13-4033 ..... | 100-101                               |
| §21-211 .....  | 115                                   |

#### **RULES**

##### **Arizona Rules of Criminal Procedure**

|                  |                   |
|------------------|-------------------|
| Rule 6.3 .....   | 97                |
| Rule 6.8 .....   | 78, 120           |
| Rule 15 .....    | 95, 102-104, 128  |
| Rule 31.10 ..... | 88, 104, 112, 120 |

##### **Arizona Rules of Evidence**

|                |         |
|----------------|---------|
| Rule 104 ..... | 76      |
| Rule 106 ..... | 120-121 |

## TABLE OF CITATIONS Continued

### Page

#### **Arizona Rules of Professional Conduct**

|                |     |
|----------------|-----|
| E.R. 1.2 ..... | S-2 |
| E.R. 1.3 ..... | S-2 |
| E.R. 1.4 ..... | S-2 |

## FACTUAL AND PROCEDURAL STATEMENT

Regarding instructional error and harmlessness, this Court reviews facts in Jimmy's favor.<sup>1</sup> Accordingly, Jimmy relies on the Opening Brief. As needed, facts will be discussed in argument sections.

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<sup>1</sup> *State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005); *see also State v. Carson*, 243 Ariz. 463, ¶ 17 (2018).

## ARGUMENTS

### 1

**Arizona has not complied with its constitutional obligation to legislatively narrow which first-degree murders are eligible for the death penalty. Instead, nearly 99% of first-degree murder defendants are eligible for the death penalty.**

#### ***Factual Background:***

The state points out, “[t]he same judge resolved both rounds of litigation, and stated that his minute entry in *Lopez* should be read in conjunction with his one in *Gittens*.”<sup>2</sup> While correct, this is incomplete.

Judge Kreamer noted: “The difference here is that Defendants now have a statistical analysis regarding the percentage of cases containing at least one aggravating factor, and Defendants have more thoroughly addressed the issue of whether the Arizona statute adequately narrows the class of persons eligible for the death penalty at the ‘definitional’ stage.”<sup>3</sup>

The trial court’s understanding evolved on the *Furman* issue.<sup>4</sup> At the first hearing, Judge Kreamer justified Arizona’s scheme in part on the basis of jury function and ineligibility for the intellectually disabled.<sup>5</sup> During the second hearing,

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<sup>2</sup> AB 49 (citing I.252, 2 fn.2).

<sup>3</sup> I.252, 2 fn.2.

<sup>4</sup> OB 41-42.

<sup>5</sup> RT-5/3/2013, 58.

Judge Kreamer rejected these bases.<sup>6</sup> Instead, Judge Kreamer recognized the narrowing had to be “based entirely on the statutory scheme.”<sup>7</sup>

The only thing that compelled Judge Kreamer’s decision was the holding in *State v. Hausner*.<sup>8</sup> Judge Kreamer was “troubled by what I believe to be a lack of narrowing in the [statutory] scheme,”<sup>9</sup> but concluded “the statute adequately narrows per the [Arizona] Supreme Court[,] they are going to have to be the ones to say otherwise, not me.”<sup>10</sup>

**Discussion:**

Rather than contest Jimmy’s arguments,<sup>11</sup> the state claims *State v. Hidalgo* controls. However, the record was better developed in Jimmy’s case than in *Hidalgo*.<sup>12</sup>

While the defendant in *Hidalgo* “supplemented the record on appeal with an expanded study” offered in the second round of litigation, the transcripts of the second hearing aren’t referenced in the opinion or briefing.<sup>13</sup> This omission is key

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<sup>6</sup> RT-5/8/2015, 15, 25.

<sup>7</sup> *Id.* at 16.

<sup>8</sup> RT-5/8/2016, 25 (relying on *State v. Hausner*, 230 Ariz. 60 (2012)).

<sup>9</sup> *Id.* at 41.

<sup>10</sup> *Id.* at 43.

<sup>11</sup> See AB 48-50.

<sup>12</sup> I.252, 2 fn.2.

<sup>13</sup> See *State v. Hidalgo*, 241 Ariz. 543, ¶17 (2017); *Hidalgo* Corrected OB, 2015 WL 12977498; *Hidalgo* Corrected RB, 2015 WL 12977499.

to this case because there were important developments in the record and Judge Kreamer's decision in the second hearing.

The first difference is the prosecutor's concession that the analysis must be "based entirely on the statutory scheme."<sup>14</sup> This concession eliminates one possible justification provided in *Hidalgo*—prosecutorial discretion.<sup>15</sup>

Second, the concession precludes reliance upon jury function, the source of two justifications in *Hidalgo*.<sup>16</sup> One cannot reasonably contend a death scheme is constitutional because the jury is free to find a defendant innocent of the charged offense. This is because jury function does not rescue an unconstitutional scheme. A jury's ability to conclude aggravating factors weren't proved or the death penalty improper does not support the constitutionality of our death scheme. The lack of guidance in the statutes and infrequency of imposition undermines our scheme.

More to the point, wide discrepancy between eligibility and imposition is the very problem the Supreme Court sought to resolve in *Furman v. Georgia*<sup>17</sup> and its progeny. In *Furman*, Justices Brennan, Stewart, White, and Marshall all noted

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<sup>15</sup> *Hidalgo*, 241 Ariz. 543, ¶29.

<sup>16</sup> *Hidalgo*, 241 Ariz. 543, ¶28.

<sup>17</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

infrequency as proof of arbitrariness.<sup>18</sup> Four years later, in *Gregg v. Georgia*, Justice White noted the aggravator scheme was meant to resolve this infrequency.<sup>19</sup>

Arizona's repeated expansion of aggravating factors has meant that the application of the death penalty has broadened, not narrowed. The conceptual and statistical filling of the field that must be assumed in this case proves death is possible for nearly every murder defendant.<sup>20</sup>

Today in Arizona, just as in Georgia before 1972, jury function is the only real limiting factor. But a scheme isn't constitutional simply because a jury can acquit a defendant, conclude aggravators weren't proved, or impose a life sentence after considering mitigation.

This issue became a point of difference between the first and second hearings. Where Judge Kreamer relied upon jury function as a narrowing factor in the first hearing,<sup>21</sup> he rejected that basis during the second.<sup>22</sup> Similarly, where Judge Kreamer relied upon the constitutional ineligibility of the intellectually disabled in the first hearing,<sup>23</sup> he rejected that basis in the second.<sup>24</sup>

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<sup>18</sup> *Id.* at 276-77 (Brennan, J., concurring), 309 (Stewart, J., concurring), 311-12 (White, J., concurring), 340 (Marshall, J., concurring).

<sup>19</sup> *Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (White, J., concurring).

<sup>20</sup> See OB 52-58.

<sup>21</sup> RT-5/3/2013, 58.

<sup>22</sup> RT-5/8/2015, 25.

<sup>23</sup> RT-5/3/2013, 58,

<sup>24</sup> RT-5/8/2015, 15.



Judge Kreamer’s consistent conclusion was one of deference.<sup>25</sup> Thus, while he was “troubled” by the statutory scheme, Judge Kreamer felt powerless to do anything about it because of this Court’s precedent.<sup>26</sup>

Notably, Judge Kreamer’s developed understanding mirrors Justice Breyer’s statement regarding the denial of certiorari in *Hidalgo v. Arizona*.<sup>27</sup> The state’s only argument against Justice Breyer’s opinion is a single sentence: “This statement, however, is entitled to no precedential or persuasive force.”<sup>28</sup> A lack of precedential value isn’t the same as a lack of persuasive value. In fact, two of the state’s cases suggest there is persuasive value in statements regarding denials of certiorari: *Planned Parenthood of Southern Arizona v. Lawall*<sup>29</sup> and *U.S. v. Mitchell*.<sup>30</sup>

In *Planned Parenthood*, the Ninth Circuit found some value from statements regarding the denial of certiorari “to the extent they help[ed] illuminate the current divide in interpretation.”<sup>31</sup> And the Tenth Circuit found persuasive value in such

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<sup>25</sup> *Id.* at 42-43.

<sup>26</sup> *Id.* at 43.

<sup>27</sup> *Hidalgo v. Arizona*, 538 U.S. \_\_\_, 2017 WL 3536644, \*4, [No. 17-251](#), 7 (Breyer, J., statement).

<sup>28</sup> AB 49-50.

<sup>29</sup> *Planned Parenthood of Southern Arizona v. Lawall*, 180 F.3d 1022, 1025 fn.3 (9th Cir. 1999).

<sup>30</sup> *U.S. v. Mitchell*, 783 F.2d 971, 977 fn.5 (10th Cir. 1986).

<sup>31</sup> *Planned Parenthood*, 180 F.3d at 1025 fn.3.

statements in *Mitchell* because the “activity” suggested one party’s positions were “not without support.”<sup>32</sup>

Justice Breyer’s statement explained this Court’s errors in a clear, concise, and persuasive manner.

***Conclusion:***

Given the persuasiveness of Justice Breyer’s statement in *Hidalgo* and the developed record in this case, this Court should reach a different conclusion than it did in *Hidalgo*. This Court should declare Arizona’s death penalty scheme unconstitutional.

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<sup>32</sup> *Mitchell*, 783 F.2d at 977 fn.5.

**The trial court denied Jimmy’s rights to due process, a meaningful appeal, and effective assistance of counsel when the court denied his request for an evidentiary hearing on the *Furman v. Georgia* claim.**

***Discussion:***

The state first points out that this Court rejected a similar claim in *State v. Hidalgo*.<sup>33</sup> But the subsequent history of *Hidalgo* illustrates why this Court’s ruling was problematic.

This Court’s decision was premised upon two bases: 1) the defendant didn’t identify “evidence that he would have offered that would materially add to the factual record”<sup>34</sup> and 2) the decision didn’t turn on disputed facts.<sup>35</sup> Justice Breyer’s subsequent statement illustrates how this Court’s review was incomplete, particularly as it relates to the right to an appeal.

It is not evidence that is missing from this record, it is factual determinations. What bothered four Supreme Court justices was that factual claims were “largely unexamined by experts and the courts below in the first instance.”<sup>36</sup>

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<sup>33</sup> AB 51 (citing *State v. Hidalgo*, 241 Ariz. 543, ¶¶8-12 (2017)).

<sup>34</sup> *Id.* at ¶9.

<sup>35</sup> *Id.* at ¶11.

<sup>36</sup> *Hidalgo v. Arizona*, 138 S.Ct. 1054, 1058 (2018) (Breyer, J., statement).

Under the Arizona Constitution, Jimmy has a right to appeal.<sup>37</sup> Due process requires an appellate process be meaningful, not just “a meaningless ritual ....”<sup>38</sup> To enable that meaningful process, the parties must have a “record of sufficient completeness ....”<sup>39</sup> This Court noted the interplay between record sufficiency and factual findings in *Miller v. Board of Supervisors of Pinal County*: “the trial court’s failure to make findings of fact, either initially or on remand, precluded any meaningful review ... effectively depriving Harmon of his right of appeal.”<sup>40</sup>

Without a hearing or factual findings in *Hidalgo*, both this Court and the Supreme Court were left to offer only an advisory opinion. The trial court recognized this was the impact of its decision.<sup>41</sup>

But neither this Court nor the Supreme Court issue advisory opinions.<sup>42</sup>

The state further repeats its assertion that Breyer’s statement in *Hidalgo* “is not precedential or persuasive.”<sup>43</sup> As explained in Argument 1, the state has

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<sup>37</sup> *Ariz. Const. Art. 2, § 24.*

<sup>38</sup> *Douglas v. California*, 372 U.S. 353, 358 (1963).

<sup>39</sup> *Draper v. Washington*, 372 U.S. 487, 497 (1963).

<sup>40</sup> *Miller v. Board of Supervisors of Pinal County*, 175 Ariz. 296, 301 (1993); see also *Courtless v. Jolliffe*, 507 S.E.2d 136, 142 (W.Va. 1998) (concluding factual findings were necessary to provide appellate review).

<sup>41</sup> RT-5/3/2013, 18.

<sup>42</sup> *State of Alabama v. State of Arizona*, 291 U.S. 286, 291 (1934); see also *Golden v. Zwickler*, 394 U.S. 103, 108 (1969); *Phoenix Metals Corp. v. Roth*, 79 Ariz. 106, 112 (1955), overruled in part on other grounds by *Coulas v. Smith*, 96 Ariz. 325 (1964).

<sup>43</sup> AB 51.

exaggerated its position.<sup>44</sup> Jimmy agrees Breyer’s statement is not precedential, but it can have persuasive impact.<sup>45</sup> And Breyer’s statement is particularly persuasive when considering whether the right to appeal is meaningful. Breyer and three other justices were bothered by Arizona’s scheme, but agreed review was improper because “the opportunity to develop the record through an evidentiary hearing was denied.”<sup>46</sup> Because only four justices are needed to grant certiorari,<sup>47</sup> Breyer’s statement illustrates that review was denied in *Hidalgo* because the trial court denied the joint request for an evidentiary hearing.

The state next asserts Jimmy didn’t explain the violation of his right to counsel.<sup>48</sup> This is incorrect. Jimmy explained that his attorneys wanted to have a hearing (as did the prosecution), but their ability to make that decision was impeded by the trial court’s refusal to hold a hearing.<sup>49</sup>

The state next claims Jimmy’s argument that the Arizona Constitution provides broader protection for the right to appeal was unsupported.<sup>50</sup> Jimmy made

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<sup>44</sup> See Arg. 1, *supra*.

<sup>45</sup> See *id.*

<sup>46</sup> 138 S.Ct. at 1057.

<sup>47</sup> See [New York v. Uplinger](#), 467 U.S. 246, 249-50 (1984) (Stevens, J., concurring) (explaining the Rule of Four); Lissa Griffin, [2 Federal Criminal Appeals §8:74 \(2018\)](#) (“The unwritten ‘rule of four’ controls the decision whether to grant certiorari. According to this rule, an affirmative vote of four Justices is required for certiorari to be granted.”).

<sup>48</sup> AB 52.

<sup>49</sup> OB 69 (quoting [Strickland v. Washington](#), 466 U.S. 668, 686 (1984)).

<sup>50</sup> AB 52.

this clear when he pointed out that the Arizona Constitution expressly recognizes a right to appeal whereas the federal constitution does not.<sup>51</sup>

The state then argues the independent right to appeal makes no difference “where [Jimmy] was represented by an attorney who requested an evidentiary hearing, and where the trial court created a record for this Court’s review.”<sup>52</sup> But the state’s claim begs the question of whether the record was adequate. This is the nub of the issue. Because of the trial court’s decision not to hold a hearing, the trial court deprived Jimmy of factual findings that are necessary to enable review. Without those factual findings, any decision this Court (or the Supreme Court) would give is merely advisory and subject to subsequent fact-finding. The state also ignores what constitutes a “record of sufficient completeness”—a standard that would have required factual findings.

Finally, the state argues “any error in the denial of an evidentiary hearing was harmless.”<sup>53</sup> The state cites no authority to support its assertion. Harmless-error review isn’t proper for a non-trial error. In *Arizona v. Fulminante*, the Supreme Court distinguished between structural and trial errors.<sup>54</sup> Trial errors “occurred during the

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<sup>51</sup> OB 67 (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (no federal right to appeal); *McKane v. Durston*, 153 U.S. 684, 687 (1894) (same); Ariz.Const.Art. 2, §24 (guaranteeing right to appeal); *State v. Ethington*, 121 Ariz. 572, 573-74 (1979) (recognizing Arizona right to appeal)).

<sup>52</sup> AB 52.

<sup>53</sup> AB 52.

<sup>54</sup> *Arizona v. Fulminante*, 499 U.S. 279, 307-12 (1991).

presentation of the case to the jury” and could “therefore be quantitatively assessed ... to determine whether its admission was harmless beyond a reasonable doubt.”<sup>55</sup> Structural errors “defy analysis by ‘harmless-error’ standards.”<sup>56</sup>

The denial of a hearing defies analysis under the harmless-error standard because no quantitative assessment can be made. Without a hearing, this Court doesn’t know how data would be explained, contested, or resolved. In *Lee v. U.S.*,<sup>57</sup> a defendant argued they would have gone to trial but for their attorney’s deficient advice regarding immigration consequences.<sup>58</sup> The Supreme Court, concluded a harmless error analysis “has no place where, as here, a defendant was deprived of a proceeding altogether.”<sup>59</sup> Similarly, in *Holland v. State*, the Florida Supreme Court concluded “the impact of the error in precluding the presentation of evidence can never be harmless for the self-evident reason that a reviewing court does not know what the evidence would be.”<sup>60</sup>

Finally, the state’s harmlessness pitch misses the point. The problem isn’t that Jimmy wasn’t able to say what he thought his evidence would prove; Jimmy was denied factual findings that would give substance to the appeal. The factual findings

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<sup>55</sup> *Id.* at 307-08.

<sup>56</sup> *Id.* at 309.

<sup>57</sup> *Lee v. U.S.*, 137 S.Ct. 1958 (2017).

<sup>58</sup> *Id.* at 1962.

<sup>59</sup> *Id.* at 1967; *see also Holland v. State*, 503 So.2d 1250, 1251-52 (Fla. 1987).

<sup>60</sup> *Holland v. State*, 503 So.2d 1250, 1252 (1987).

are necessary to empower Jimmy's appeal right, and that right is tied in with Jimmy's due process right and right to counsel.

***Conclusion:***

With neither factual findings nor the ability to obtain an advisory opinion, Jimmy's right to appeal is a nullity. Accordingly, this Court should order a full hearing on the *Furman* claim.



**The (F)(6) Especially Cruel, Heinous, or Depraved Aggravator is unconstitutionally vague.**

***Discussion:***

**1. On its face, the cruel, heinous, or depraved aggravator is unconstitutionally vague.**

The state does not contend the (F)(6) aggravator is, on its face, sufficiently clear.<sup>61</sup> Instead, the state claims “this Court and the United States Supreme Court have repeatedly rejected the argument that the (F)(6) circumstance cannot be constitutionally narrowed through jury instructions.”<sup>62</sup> The U.S. Supreme Court has never reached this conclusion. The state’s only citation regarding the U.S. Supreme Court is [Walton v. Arizona](#).<sup>63</sup> But *Walton* evaluated—and was driven by—Arizona’s prior judicial sentencing scheme.<sup>64</sup>

*Walton* didn’t address whether the (F)(6) could be narrowed by vague jury instructions. This difference illustrates the unreliability of the state’s claim that “this Court is, of course, bound by *Walton* regardless of whether Johnson believes that decision is unsound.”<sup>65</sup> Moreover, *Walton* relied upon this Court’s independent

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<sup>61</sup> See AB 56.

<sup>62</sup> AB 56.

<sup>63</sup> AB 56 (citing [Walton](#), 497 U.S. 639).

<sup>64</sup> [Walton](#), 497 U.S. at 653.

<sup>65</sup> See AB 56.

review function as a second check in support of constitutionality. Neither justification exists today.

**2. This Court’s jurisprudence has not adequately narrowed the (F)(6) aggravator.**

The factors offered in *State v. Gretzler*<sup>66</sup> aren’t static.<sup>67</sup> Since *Walton*, this Court has expanded what satisfies the (F)(6).<sup>68</sup> Thus, the Supreme Court’s reliance upon a narrowed definition,<sup>69</sup> was misplaced.

The state points only to the *Walton* dissent to argue the Supreme Court found the *Gretzler* factors to be non-exhaustive.<sup>70</sup> But the *Walton* majority construed the *Gretzler* factors as an actual limit.<sup>71</sup> Thus, this Court’s post-*Walton* conduct is pertinent.

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<sup>66</sup> *State v. Gretzler*, 135 Ariz. 42, 51 (1983), *superseded by statute on other grounds*, *State v. Carlson*, 237 Ariz. 381, ¶46 (2015).

<sup>67</sup> OB 77-80.

<sup>68</sup> See *State v. Milke*, 177 Ariz. 118, 126 (1993); *State v. Barreras*, 181 Ariz. 516, 522-23 (1995).

<sup>69</sup> *Walton*, 497 U.S. at 653.

<sup>70</sup> AB 57 (citing *Walton*, 497 U.S. at 694-95 (Blackmun, J., dissenting)).

<sup>71</sup> See *Walton*, 497 U.S. at 654-55.

**3. Instead, this Court has improperly broadened the sweep of the (F)(6) and rendered statutory language meaningless.**

**A. Through its use of the word “especially,” the (F)(6) aggravator requires the government to prove the cruelty, heinousness, or depravity of a given murder is set apart from the norm.**

The word “especially” in (F)(6) requires a determination that the murder was set apart from the norm in terms of its cruelty, heinousness, or depravity.<sup>72</sup> This is supported both by the plain meaning of the word “especially” and this Court’s definition requiring proof that the cruelty, heinousness, or depravity is “unusually great or significant.”<sup>73</sup> The state endorses the “unusually great or significant” definition.<sup>74</sup>

When Arizona used judicial sentencing, trial courts had the ability to assess whether the cruelty, heinousness, or depravity of a given murder was “unusually great or significant” because they had the context needed for that comparison. The jury doesn’t.

Thus, the very definition used by the court, and endorsed by the state, proves the problem—the jury cannot perform its function under the definition given.

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<sup>72</sup> OB 81-83.

<sup>73</sup> See OB 81-82; [State v. Cropper](#), 223 Ariz. 522, ¶12 fn.6 (2010).

<sup>74</sup> See AB 57-58.

**B. This Court’s jurisprudence has removed the necessary comparison to the norm.**

While the plain language of the (F)(6) requires a comparison to the norm, this Court removed that component in *State v. Ruben Johnson*.<sup>75</sup> This was because, as the state concedes, the attorney in *Ruben Johnson* confused independent review cases and (F)(6) jurisprudence.<sup>76</sup> Independent review considered a defendant’s sentence to conduct a proportionality review.<sup>77</sup> The (F)(6) compares a defendant’s offense to the typical murder to determine if the offense was committed in an especially cruel, heinous, or depraved manner.<sup>78</sup>

The state argues, “this Court in *Johnson* was addressing the defendant’s argument that a jury must conduct proportionality review.”<sup>79</sup> This confirms the problem Jimmy identified in his Opening Brief: “the defense [in *Ruben Johnson*] made an inaccurate presumption that led this Court down the wrong path to an incorrect conclusion” when the “defense presumed that this Court’s prohibition of proportionality review had something to do with the (F)(6). It did not.”<sup>80</sup>

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<sup>75</sup> *State v. Ruben Johnson*, 212 Ariz. 425, ¶¶19-20 (2006).

<sup>76</sup> AB 58.

<sup>77</sup> See *State v. Salazar*, 173 Ariz. 399, 417 (1992); *State v. Watson*, 129 Ariz. 60, 63 (1981).

<sup>78</sup> *Gretzler*, 135 Ariz. at 51.

<sup>79</sup> AB 58.

<sup>80</sup> OB 84.

The state cites *State v. Prince*<sup>81</sup> as a case that upheld the “unusually great or significant” instruction.<sup>82</sup> But *Prince* was premised<sup>83</sup> upon *State v. Bocharski*,<sup>84</sup> which relied upon *State v. Andriano*.<sup>85</sup> The attorney in *Andriano* made the same mistake as the attorney in *Johnson*.<sup>86</sup>

The state incorrectly asserts *Ruben Johnson* “did not diminish the definition of ‘especially’ this Court has approved.”<sup>87</sup> The misconstruction has led to the abandonment of the comparison to the norm required by the plain language of (F)(6).

**C. As a result, this Court has broadened the sweep of the (F)(6) and judicially excluded the word “especially” from the (F)(6) statute.**

Both parties agree “especially” is defined as “unusually great or significant.” “Unusually,” requires a comparison to the norm; that the murder be set apart from the prototypical murder.<sup>88</sup> But through *Ruben Johnson* and *Prince*, this Court has mistakenly rendered a word in the (F)(6)—“especially”—a nullity.

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<sup>81</sup> *State v. Prince*, 226 Ariz. 516, ¶51 (2011).

<sup>82</sup> AB 57.

<sup>83</sup> *Prince*, 226 Ariz. 516, ¶5.

<sup>84</sup> *State v. Bocharski*, 218 Ariz. 476, ¶48 (2008).

<sup>85</sup> *State v. Andriano*, 215 Ariz. 497, ¶43 (2007).

<sup>86</sup> OB 85 fn.602.

<sup>87</sup> AB 58.

<sup>88</sup> *State v. Gretzler*, 135 Ariz. 42, 51 (1983); *State v. King*, 180 Ariz. 268, 286 (1994); *State v. Hyde*, 186 Ariz. 252, 281 (1996); *State v. Sansing*, 200 Ariz. 347, ¶25 (2001), vacated on other grounds by *Sansing v. Arizona*, 536 U.S. 954 (2002); *State v. Pandeli*, 200 Ariz. 365, ¶34 (2001), vacated on other grounds by *State v. Pandeli*, 536 U.S. 953 (2002).

During her closing argument, the prosecutor agreed “especially” was not defined.<sup>89</sup> Thus, the prosecutor’s argument was premised upon avowal: “but we know from the evidence it was especially painful from the first wound to the last thing she felt before she lost consciousness.”<sup>90</sup> If the (F)(6) is simply left to impressions based upon prosecutorial avowal, there is no guidance.

**4. This Court’s (F)(6) jurisprudence is inherently descriptive; jury instructions require a prescriptive approach.**

The crux of the (F)(6) aggravator is that only murders that are especially cruel, especially heinous, or especially depraved warrant death. In defining the contours of the (F)(6), however, this Court has used an approach that is inconsistent with jury instructions.

As recognized in *State v. Mata*, this Court has used a descriptive process for defining the (F)(6).<sup>91</sup> Jurors, however, need prescriptive instructions.<sup>92</sup> None of the cases in the Answering Brief address this issue.<sup>93</sup>

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<sup>89</sup> RT-5/25/2016, 95.

<sup>90</sup> *Id.*

<sup>91</sup> *State v. Mata*, 185 Ariz. 319, 324 (1996).

<sup>92</sup> *Newton v. Maine*, 96 Ariz. 319, 321 (1964); *see also Arizona Public Service Co. v. Brittain*, 107 Ariz. 278, 281 (1971).

<sup>93</sup> *See State v. Anderson*, 210 Ariz. 327, ¶¶112-114 (2005); *State v. Hargrave*, 225 Ariz. 1, ¶¶42-46 (2010); *State v. Hampton*, 213 Ariz. 167, ¶¶35-42 (2006); *State v. Cromwell*, 211 Ariz. 181, ¶¶38-45 (2005).

Arizona’s scheme was approved in *Walton* because “[t]rial judges are presumed to know the law and to apply it in making their decisions.”<sup>94</sup> A descriptive process for considering whether an offense was “especially” cruel, heinous, or depraved was acceptable because courts could navigate the nuances of this Court’s jurisprudence.<sup>95</sup> But this jury was deprived of that context.

**5. In light of the issues raised, this Court’s prior precedent can and should be overturned.**

Throughout the state’s brief, their response boils down to one claim: this Court previously approved of (F)(6) instructions. The mere existence of prior case law doesn’t end the inquiry. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court set forth four considerations to determine whether a case should be overruled:

- “whether the rule has proven to be intolerable simply in defying practical workability”;<sup>96</sup>
- “whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation”;<sup>97</sup>
- “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine”;<sup>98</sup> and

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<sup>94</sup> *Walton*, 497 U.S. at 653.

<sup>95</sup> See OB 88.

<sup>96</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 855.

- “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification ....”<sup>99</sup>

Jimmy offered ample reason to question this Court’s approval of (F)(6) instructions, all aligning with *Planned Parenthood*:<sup>100</sup>

1. With the shift to jury sentencing and abandonment of independent review, neither justification from *Walton* continues.<sup>101</sup>
2. This Court continues to include more types of murders under the umbrella of the (F)(6).<sup>102</sup>
3. This Court’s case law has abandoned the plain language requirement that a murder be especially cruel, especially heinous, or especially depraved to qualify under the (F)(6).<sup>103</sup>
4. This Court’s descriptive process for evaluating the (F)(6) is inconsistent with the prescriptive approach needed for jury instructions.<sup>104</sup>

First, all arguments show this Court’s rulings authorizing the (F)(6) has proven intolerable because it defies practical workability.

Second, reversal of this Court’s (F)(6) jurisprudence wouldn’t pose a unique hardship because capital cases make up a small minority of the criminal docket and reversal of (F)(6) jurisprudence would have no impact on the larger swath of cases.<sup>105</sup>

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<sup>99</sup> *Id.* at 855.

<sup>100</sup> OB 76-91.

<sup>101</sup> OB 76.

<sup>102</sup> OB 77-80.

<sup>103</sup> OB 81-86.

<sup>104</sup> OB 87-91.

<sup>105</sup> *Teague v. Lane*, 489 U.S. 288 (1989).



Third, Jimmy's arguments show facts have changed so substantially as to have robbed the old rule of justification. The first through third arguments particularly apply.

***Conclusion:***

This Court should recognize the (F)(6) aggravator for the vague and unfair factor it is, declare the factor unconstitutional, vacate Jimmy's sentence, and order a new penalty phase.

**The trial court's (F)(6) instruction was inaccurate and insufficient.**

***Standard of Review:***

The state concedes de novo review applies but argues this Court should nonetheless apply fundamental error review to the heinousness and depravity section, arguing Jimmy didn't object.<sup>106</sup> However, "[a]n objection is sufficiently made if it provides the judge with an opportunity to provide a remedy."<sup>107</sup>

Here, the primary error was the court's refusal to provide an instruction that included the (F)(6) comparison to the norm.<sup>108</sup> That objection was set forth in Jimmy's proposed cruelty instruction.<sup>109</sup> This was sufficient to meet the minimally raised requirement. Further, when the court refused to give the instruction, the court made its position on the comparison to the norm language clear—the court wasn't going to give the requested language. Any further request directed to the heinousness-depravity prong would have been futile. Thus, even if the state were correct, it would not change the review standard.<sup>110</sup>

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<sup>106</sup> AB 59-60.

<sup>107</sup> [State v. Fulminante](#), 193 Ariz. 485, ¶64 (1999).

<sup>108</sup> OB 92-100.

<sup>109</sup> I.470, 2.

<sup>110</sup> *E.g. U.S. v. Algarate-Valencia*, 550 F.3d 1238, 1243 & fn.4 (10th Cir. 2008); *Com. v. Connolly*, 730 N.E.2d 318, 426 fn.2 (Mass.App. 2000); *City of Columbia v. Myers*, 294 S.E.2d 787, 788 (S.C. 1982).

Jimmy adequately preserved his claim. This Court reviews de novo.

***Discussion:***

**1. The (F)(6) instruction did not communicate the illustrative examples set forth by case law.**

The (F)(6) instruction lacked the illustrative examples provided by case law.<sup>111</sup> The state doesn't discuss this failure. Instead, they focus on the cruelty and heinousness instructions individually.

**A. The lower court's cruelty instruction lacked necessary insight available in this Court's cases.**

The state seeks to oversimplify this section to just a question of what this Court has authorized in the past.<sup>112</sup> Jimmy agrees this Court has approved of instructions that set forth the two narrowing factors of 1) victim consciousness and 2) defendant knew or should have known of potential suffering.<sup>113</sup> Although these two prongs are necessary conditions to the (F)(6), they aren't sufficient conditions.

This is where the state misunderstands the importance of *State v. Snelling*.<sup>114</sup> The state cites only a portion of *Snelling* that aligns with its assertion that the two factors are sufficient.<sup>115</sup> But the holding in *Snelling* belies that claim. In *Snelling*,

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<sup>111</sup> OB 92-100.

<sup>112</sup> AB 62.

<sup>113</sup> See *State v. Tucker*, 215 Ariz. 298, ¶¶29, 33 (2007).

<sup>114</sup> *State v. Snelling*, 224 Ariz. 182, ¶¶28, 32 (2010); see AB 63.

<sup>115</sup> See AB 63.

this Court found a strangulation murder wasn't necessarily cruel even though it satisfied both prongs.<sup>116</sup>

The state next argues the evidence here supported the (F)(6).<sup>117</sup> But with proper instruction, the defense attorneys also could have homed in on the fact that Dr. Keen couldn't testify with certainty as to the victim's consciousness or the fact that the wounds suggested an escalating and clumsy attack.<sup>118</sup>

The jury had no context to determine where this murder fit in the vast array of murders. They had no ability to tell if this was a murder, a cruel murder, or an *especially* cruel murder. Instead, the prosecutor was empowered to argue the (F)(6) had been satisfied because "we know from the evidence it was especially painful from the first wound to the last thing she felt before she lost consciousness."<sup>119</sup> An instruction that encourages argument by avowal isn't adequate.

The state's sole answer to this point is to perpetuate the confusion between the (F)(6) and proportionality review.<sup>120</sup> But the (F)(6), by its plain language and this Court's jurisprudence, requires that a murder stand apart from the typical murder in regards to cruelty.<sup>121</sup>

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<sup>116</sup> *Id.* at ¶¶28, 32.

<sup>117</sup> AB 64-65.

<sup>118</sup> See RT-4/27/2016, 19, 39, 49-50, 52-53, 84; RT-5/25/2016, 12-13, 23, 27-29.

<sup>119</sup> RT-5/25/2016, 95.

<sup>120</sup> AB 63.

<sup>121</sup> *State v. Gretzler*, 135 Ariz. 42, 51 (1983); *State v. Knapp*, 114 Ariz. 531, 543 (1977).

**B. The lower court’s heinous or depraved instruction lacked necessary insight.**

The state does not address<sup>122</sup> Jimmy’s point regarding the lack of nuance or example in the heinousness or depravity instruction.<sup>123</sup>

**2. The trial court’s instruction failed to set forth the two-step process necessary for heinousness and depravity findings.**

Heinousness and depravity findings require a two-step process.<sup>124</sup> First, the fact-finder must decide whether a defendant’s conduct aligns with the examples in case law.<sup>125</sup> Second, the fact-finder determines if the conduct proves a vile state of mind.<sup>126</sup>

The state first argues this issue is moot because the jury found both cruelty and heinousness/depravity beyond a reasonable doubt.<sup>127</sup> This ignores that the sentencing decision is also driven by the importance attributed to aggravating factors.<sup>128</sup> Had there been an error on either aspect of the instruction—cruelty or heinousness and depravity—the error threw the jury’s consideration of aggravation and mitigation askew.

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<sup>122</sup> See AB 59-67.

<sup>123</sup> OB 98-100.

<sup>124</sup> See OB 100-01.

<sup>125</sup> *State v. Bocharski*, 218 Ariz. 476, ¶85.

<sup>126</sup> *Id.*

<sup>127</sup> AB 65.

<sup>128</sup> See *State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468, ¶21 (2005).

The state next argues the instructions properly set forth the “knew or should have known” standard.<sup>129</sup> But the “knew or should have known” component goes to just the first prong of the heinousness-depravity section; it doesn’t establish that the defendant acted with a vile or perverse state of mind.<sup>130</sup> The court’s instructions incorrectly combined both factors into one.<sup>131</sup>

Finally, the state argues the instruction “correctly referenced ‘the defendant’s state of mind at the time of the offense as reflected by the defendant’s words and acts.’”<sup>132</sup> But the instructions in this case didn’t tell the jury to go through a two-step process. The court instructed the jury that the state had to prove “beyond a reasonable doubt that the defendant exhibited such a mental state at the time of killing *by* inflicting gratuitous violence on the victim beyond that necessary to kill.”<sup>133</sup>

Put differently, the formula this Court has set forth is:

*Gratuitous Violence + Vile/Perverse Mental State = Heinousness & Depravity*

The court’s instruction, however, set the formula as:

*Gratuitous Violence = Vile/Perverse Mental State = Heinousness & Depravity*

This is incorrect.

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<sup>129</sup> AB 66-67.

<sup>130</sup> See [Bocharski](#), 218 Ariz. 476, ¶85.

<sup>131</sup> RT-5/24/2016, 42-43.

<sup>132</sup> AB 67.

<sup>133</sup> RT-5/24/2016, 42-43 (emphasis added).

**3. The (F)(6) instruction operated as a judicial comment.**

This Court has repeatedly found a party's argument waived when it is not raised in the brief.<sup>134</sup> Because the state does not address Jimmy's argument, the state confesses error.

**4. Gratuitous Violence has become a catchall for inadequate cases of mutilation.**

Regarding Jimmy's point that gratuitous violence has been converted into nothing more than a catchall for inadequate mutilation cases, the state asserts this Court has approved of similar instructions.<sup>135</sup> Jimmy has already addressed this.<sup>136</sup>

The state further claims "there was no prejudice because the evidence that Johnson carved an Asian symbol into [X.F.]'s bare abdomen at or near the time of death 'eliminates the possibility that failing to instruct the jury [properly] contributed to the verdict.'" <sup>137</sup> This incorrectly frames the harmless-error standard. Jimmy is not responsible for showing prejudice; the state must prove beyond a reasonable doubt that the error had no bearing on the result.<sup>138</sup> Additionally, the harmlessness claim is predicated upon the notion that carving the symbol fit gratuitous violence. This

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<sup>134</sup> See *State v. Miller*, 186 Ariz. 314, 323 (1996); *State v. Walden*, 183 Ariz. 595, 605 (1995), distinguished on other grounds by *State v. Ives*, 187 Ariz. 102, 108-09 (1996); *In re Nissan*, 201 Ariz. 114, ¶7 (App. 2001).

<sup>135</sup> AB 66-67.

<sup>136</sup> OB 104-05.

<sup>137</sup> AB 67.

<sup>138</sup> *State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005).

proves Jimmy's point that gratuitous violence has become a catchall for inadequate claims of mutilation.

***Conclusion:***

Because the (F)(6) instructions were inadequate, this Court should order new aggravation and penalty phases.



**The trial court improperly prevented Jimmy from arguing the state had not proved the murder was committed in an especially cruel, heinous, or depraved manner.**

***Standard of Review:***

Jimmy argued this Court should review this error de novo in light of the issue’s constitutional nature.<sup>139</sup> The state argues this Court should review for fundamental error.<sup>140</sup> The state’s fundamental error claim is premised upon its assertion that Jimmy “did not object to the trial court’s handling of the State’s objection requiring defense counsel to conform his closing argument” to the prosecutor’s requested standards.<sup>141</sup>

“An objection is sufficiently made if it provides the judge with an opportunity to provide a remedy.”<sup>142</sup> “The purpose of making a record is to give the trial court an opportunity to consider and rule upon the position advanced by the party.”<sup>143</sup>

Here, Jimmy sought to argue that the prosecution had not met its burden to prove the murder was especially cruel, heinous, or depraved because “[t]here’s

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<sup>139</sup> OB 106.

<sup>140</sup> AB 68.

<sup>141</sup> AB 68.

<sup>142</sup> *State v. Fulminante*, 193 Ariz. 485, ¶64 (1999).

<sup>143</sup> *State v. Detrich*, 178 Ariz. 380, 383 (1994); accord *State v. Deschamps*, 105 Ariz. 530, 533 (1970) (finding purpose of preservation is to give the court “the opportunity to rule on the issue and correct possible errors”).

nothing for you to compare it to.”<sup>144</sup> The record further illustrates that defense counsel argued against the prosecutor’s objection.<sup>145</sup> Notably, the defense did not want to go as far as this Court’s jurisprudence would allow; defense counsel “didn’t ask them to compare something,” they “just said [the jury doesn’t] have any base line to compare it to.”<sup>146</sup> Nonetheless, the court sustained the objection.<sup>147</sup>

Because this claim was preserved, the proper review standard is *de novo*.

***Discussion:***

The state ignores the most crucial portion of Jimmy’s argument:<sup>148</sup> this Court already approved of defense counsel’s desired argument in *State v. Prince*.<sup>149</sup> Contrary to the state’s assertion, the desired argument did not “refer to matters outside the record or encourage jurors to ignore the law.”<sup>150</sup> Nor did it encourage “the jurors to ignore the court’s instructions and speculate about how [X.F.]’s murder compared to others.”<sup>151</sup>

Such an argument seeks to guide the jury in determining whether the murder before them is especially cruel, heinous, or depraved. And it is particularly important

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<sup>144</sup> RT-5/25/2016, 85.

<sup>145</sup> *Id.* at 86.

<sup>146</sup> *Id.* at 87-88.

<sup>147</sup> *Id.* at 88.

<sup>148</sup> OB 107-09.

<sup>149</sup> [State v. Prince](#), 226 Ariz. 516, ¶51 (2011).

<sup>150</sup> Compare AB 71.

<sup>151</sup> Compare *id.*

when the prosecutor is permitted to argue the (F)(6) has been satisfied based upon the avowal that “we know from the evidence it was especially painful from the first wound to the last thing she felt before she lost consciousness.”<sup>152</sup>

Next, the state does not address Jimmy’s point that the trial court’s ruling sustaining the state’s objection incorrectly communicated an instruction to the jury that they couldn’t consider whether the state met its burden without providing context.<sup>153</sup>

Finally, the state does not argue any error was harmless. Jimmy, on the other hand, discussed the inadequacy of the instructions, improper preclusion of the argument, and improper communication created by the court’s ruling.<sup>154</sup>

***Conclusion:***

This error alone warrants new aggravation and sentencing phases.

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<sup>152</sup> RT-5/25/2016, 95.

<sup>153</sup> See OB 108-09 (discussing [U.S. v. Pearson](#), 746 F.2d 787, 796 (11th Cir. 1984)).

<sup>154</sup> OB 108-09.

**Evidence was insufficient to support the (F)(6) verdict.**

***Discussion:***

**1. Evidence of cruelty was insufficient.**

The state does not address Jimmy's second subsection, which discussed the lack of any evidence that proved Jimmy's conduct was done in a wanton, insensitive, or vindictive manner.<sup>155</sup> Cruelty is not satisfied merely by the infliction of pain; that infliction of pain must be performed "in a wanton, insensitive, or vindictive manner."<sup>156</sup> This focuses on the defendant's state of mind.<sup>157</sup>

There was no evidence this murder was committed with a wanton, insensitive, or vindictive state of mind.<sup>158</sup>

Because the state does not contest this point, it confesses error.<sup>159</sup>

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<sup>155</sup> See AB 77-78; OB 112-13.

<sup>156</sup> *State v. Stokley*, 182 Ariz. 505, 517 (1995); accord *State v. Brewer*, 170 Ariz. 486, 501 (1992); *State v. Knapp*, 114 Ariz. 531, 543 (1977) (quoting Webster's Third New International Dictionary).

<sup>157</sup> See *Black's Law Dictionary* (10th ed. 2014), wanton.

<sup>158</sup> See OB 112-13.

<sup>159</sup> See *Miller*, 186 Ariz. at 323; *Walden*, 183 Ariz. at 605; *In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶7.

## **2. Evidence of heinousness and depravity was insufficient.**

In its Answering Brief, the state ignores the two-step process discussed in Argument 4 of the Opening Brief.<sup>160</sup> The state also claims the carving of the Asian symbol established cruelty.<sup>161</sup> But this illustrates Jimmy's point that excessive violence is merely a catchall for inadequate mutilation claims.<sup>162</sup> Finally, the state's reliance upon the multiple wounds and injuries ignores this Court's holdings regarding escalating and clumsy violence.<sup>163</sup>

## **3. The error harmed Jimmy.**

The state's final argument is that any error was harmless. Jimmy recognizes this Court has approved of reviewing penalty phase errors for harmless error. But in [Hurst v. Florida](#), the Supreme Court ruled that defendants like Jimmy have a constitutional right to have a jury make the death decision.<sup>164</sup> The foundation underlying decisions allowing appellate courts to evaluate penalty phase errors for harmlessness was the principle that judicial sentencing comported with the [Sixth Amendment](#).<sup>165</sup> *Hurst* rejected that foundation.<sup>166</sup>

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<sup>160</sup> Compare AB 77 with Argument 4.

<sup>161</sup> AB 77-78

<sup>162</sup> Compare AB 77-78 with Argument 4.

<sup>163</sup> Compare AB 77-78 with [State v. Wallace](#), 229 Ariz. 155, ¶¶18, 27 (2012).

<sup>164</sup> [Hurst v. Florida](#), 136 S.Ct. 616, 619 (2016).

<sup>165</sup> [Clemons v. Mississippi](#), 494 U.S. 738, 748-50 (1990).

<sup>166</sup> [Hurst](#), 136 S.Ct. at 619.

A harmless error review intrinsically involves this Court weighing evidence in a poor position. Moreover, this Court's evaluations are hamstrung by case law in a way that a juror's is not.<sup>167</sup> Because appellate courts operate inconsistently with the sentencing process demanded by the Sixth Amendment, harmless-error review is improper.

Further, the state's harmless-error argument ignores the shifted balance between aggravation and mitigation. Jimmy had a traumatic childhood and his biological parents had mental health and addiction problems. This created a circumstance in which Jimmy started experimenting with substances at a young age. That experimentation lost control when he was a student during the Columbine shooting. His mental health took a turn for the worse and his substance abuse became a real problem. This cycle perpetuated—substance abuse caused life problems which caused substance abuse. If the weight of aggravation had been different, this mitigation would have been comparatively stronger.

***Conclusion:***

This Court should order a new penalty phase.

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<sup>167</sup> *E.g. State v. Garcia*, 224 Ariz. 1, ¶104 (2010) (affording little weight to substance abuse because of a lack of a nexus); *State v. Harrod*, 218 Ariz. 268, ¶60 (2008) (giving little weight to evidence of defendant's parents' divorce, father's alcoholism, and mental abuse).

**The trial court should have granted Jimmy’s Motion for Mistrial when *Lynch v. Arizona* changed Arizona law one day into the mitigation phase and the trial court had incorrectly instructed the jury that parole was available.**

***Standard of Review:***

Both parties agree on abuse of discretion.<sup>168</sup> The parties split on how that standard operates.

Quoting *State v. Bible*,<sup>169</sup> the state asserts deference should be given because the trial court “is in the best position to evaluate ‘the atmosphere of the trial, the manner in which the objectionable statement was made, and the possible effect it had on the jury and the trial.’”<sup>170</sup> But that very language illustrates why this situation is different. The language speaks to an “objectionable statement” and the atmosphere surrounding that statement. But the *Simmons v. South Carolina*<sup>171</sup> error does not revolve around an “objectionable statement”; it was a legal error the court made when instructing the jury through the entire trial.

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<sup>168</sup> AB 81-82; OB 117.

<sup>169</sup> *State v. Bible*, 175 Ariz. 549, 598 (1993) (quoted at AB 81).

<sup>170</sup> AB 81 (quoting *State v. Bible*, 175 Ariz. 549, 598 (1993); *State v. Koch*, 138 Ariz. 99, 101 (1983)).

<sup>171</sup> *Simmons v. South Carolina*, 512 U.S. 154 (1994).

The state also ignores the preceding sentence: “When a motion for mistrial is based on evidentiary concerns, we review for an abuse of discretion.”<sup>172</sup> This motion wasn’t based on an evidentiary concern. This motion was based upon a legal error.

Aside from advancing its flawed interpretation, the state doesn’t offer any reason to reject de novo review of the underlying legal issue. Here, the court repeatedly instructed the jury in a misleading manner that would’ve led the jury to believe parole was available. This Court generally reviews the correctness of instructions de novo.<sup>173</sup> Thus, because the underlying error is instructional, not evidentiary, the question is legal. And because the question is legal, this Court reviews the underlying question de novo.<sup>174</sup>

***Facts:***

Notably, the state doesn’t contest the fundamental facts of this issue:

1. Jimmy asked for a *Simmons* instruction.<sup>175</sup>
2. The court denied that request.<sup>176</sup>
3. The court repeatedly instructed the jury that parole was available.<sup>177</sup>

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<sup>172</sup> *Id.*

<sup>173</sup> [State v. Rushing](#), 243 Ariz. 212, ¶36 (2017) (reviewing de novo a request for *Simmons* instruction).

<sup>174</sup> [Twin City Fire Ins. Co.](#), 204 Ariz. 251, ¶10; [McGill](#), 213 Ariz. 147, ¶45; [Moody](#), 208 Ariz. 424, ¶62.

<sup>175</sup> I.307; *see also* I.254, 3; I.311; RT-2/19/2016, 26-27; RT-5/17/2016, 63.

<sup>176</sup> I.347, 4; *see also* RT-2/19/2016, 26-27; RT-5/17/2016, 63-64.

<sup>177</sup> *See* RT-4/12/2016, 10-11, 106-07, 161-62; RT-4/13/2016, 23, 88; RT-4/14/2016(morning), 7; RT-4/14/2016(afternoon), 8; RT-5/24/2016, 34-36.



4. *Lynch v. Arizona* was issued by the second day of the penalty phase.<sup>178</sup>
5. Because the court had repeatedly instructed the jury that parole was available, in violation of *Simmons* and now *Lynch*, Jimmy moved for mistrial.<sup>179</sup>
6. The trial court didn't give a curative instruction when *Lynch* was decided.<sup>180</sup>
7. The trial court only gave a *Lynch/Simmons* instruction at the end of the penalty phase, more than three weeks later.<sup>181</sup>
8. The court refused to read Jimmy's proposed instruction explaining clemency.<sup>182</sup>
9. The court didn't call the jury's attention to the changed instruction.
10. The instruction was only given at closing, buried in the middle of fourteen other instructions, and placed in a position that didn't relate to mitigation.<sup>183</sup>

The state makes reference to one thing that should be clarified. The state points out the prosecutor claimed she had not put Jimmy's future dangerousness at issue.<sup>184</sup> The state does not develop this into an argument.<sup>185</sup> The lack of any such argument makes sense. The state placed Jimmy's future dangerousness at issue several times when it discussed not just Jimmy's conduct and background but also introduced testimony and argument regarding DOC housing conditions.<sup>186</sup>

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<sup>178</sup> See *Lynch v. Arizona*, 136 S.Ct. 1818 (2016); RT-5/31/2016(afternoon), 129.

<sup>179</sup> I.498; RT-6/1/2016, 4-10.

<sup>180</sup> See generally RT-6/1/2016.

<sup>181</sup> RT-6/23/2016, 151-52.

<sup>182</sup> See I.521; RT-6/21/2016, 96-101; RT-6/23/2016, 151-52.

<sup>183</sup> See I.524; RT-6/23/2016, 140.

<sup>184</sup> AB 82.

<sup>185</sup> See AB 83.

<sup>186</sup> See *Kelly v. South Carolina*, 534 U.S. 246, 252-53 (2002).

### ***Discussion:***

- 1. The trial court should have granted Jimmy's Motion for Mistrial when *Lynch v. Arizona* was issued just one day into the sentencing phase and held that instructions the trial court had read throughout trial were incorrect.**

It is fundamentally unfair to change the rules in the middle of trial.<sup>187</sup> This is a due process concern.<sup>188</sup>

The state does not contest Jimmy's argument; the state focuses solely upon the subsequent instruction.<sup>189</sup> The state's analysis, therefore, concedes error<sup>190</sup> and simply argues the subsequent instruction cured the error.

- 2. The trial court's subsequent instructions did not cure the error.**

The state argues the trial court's subsequent instruction rendered the mistrial unnecessary.<sup>191</sup> The basis for this assertion comes down to the claim that the jury would have followed the final instructions.<sup>192</sup>

But nothing about the instruction suggests the jury would have even noticed the change. There were nine pages of final instructions, amounting to sixteen pages

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<sup>187</sup> OB 118-20; *Matter of Brigham Park Coop. Apts. v. Finance Adm'r of City of N.Y.*, 83 A.D.2d 551, 551 (N.Y.Super. 1981); *U.S. v. Rabuffo*, No. 14-14585, 2017 WL 5565229, \*3-4 (11th Cir. 2017, unpub.).

<sup>188</sup> See *State v. Lawson*, 144 Ariz. 547, 556 (1985).

<sup>189</sup> See AB 83.

<sup>190</sup> See *Miller*, 186 Ariz. at 323; *Walden*, 183 Ariz. at 605; *In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶7.

<sup>191</sup> AB 83.

<sup>192</sup> *Id.*

of transcript.<sup>193</sup> The unavailability of parole instruction was short and buried in the middle of fourteen other instructions. The court did nothing to bring the jury's attention to the change and did nothing to advise the jury that they needed to disregard previous instructions.

The state's citation to *State v. Newell* is unavailing.<sup>194</sup> The presumption that jurors follow their instructions operates in a setting where the jurors have received correct and consistent instructions. It doesn't operate in a setting where the trial court changes instructions mid-trial without notifying the jurors.<sup>195</sup>

The state's last argument is "there can be no prejudice" in this case because the correct instruction was ultimately given<sup>196</sup> and defense counsel said *Lynch* didn't change their penalty phase strategy.<sup>197</sup>

Foremost, the state misstates the applicable standard. The state asserts relief isn't proper because there was no prejudice in this case.<sup>198</sup> The state cites two cases—*State v. Bush*<sup>199</sup> and *State v. Sanders*<sup>200</sup>—to support this assertion.<sup>201</sup> But

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<sup>193</sup> I.524; RT-6/23/2016, 139-54.

<sup>194</sup> AB 83 (citing *State v. Newell*, 212 Ariz. 389, ¶68 (2006)).

<sup>195</sup> *Reah v. Jupin*, 68 Ariz. 335, 339 (1949), *overruled on other grounds in Tipton v. Burson*, 73 Ariz. 144, 150 (1951).

<sup>196</sup> AB 83.

<sup>197</sup> AB 83.

<sup>198</sup> AB 83.

<sup>199</sup> *State v. Bush*, 244 Ariz. 575 (2018).

<sup>200</sup> *State v. Sanders*, 245 Ariz. 113 (2018).

<sup>201</sup> AB 83.

*Bush* was a fundamental error case<sup>202</sup> and *Sanders* considered whether future dangerousness was put at issue, not prejudice.<sup>203</sup>

As the defendant argued in *State v. Bush*, Jimmy asserts *Simmons* error is structural,<sup>204</sup> especially when there has been litigation on the topic, as here. This is further supported by Jimmy's explanation of why harmless-error review is inconsistent with his right to jury on the death determination.<sup>205</sup>

At worst, however, the error in this case is reviewed for harmless error.<sup>206</sup> Thus, the burden is on the state to prove the *Simmons* error was harmless beyond a reasonable doubt.<sup>207</sup> The state hasn't even attempted to do so.<sup>208</sup>

While *Simmons/Lynch* errors can involve the presentation of evidence, the errors are generally instructional in nature.<sup>209</sup> Thus, like this case, the instructional problem would usually have no bearing on a defendant's penalty phase strategy. But that doesn't mean error is harmless. For example, here the error had an impact on voir dire where the court repeatedly instructed the jury parole was available and

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<sup>202</sup> *Bush*, 244 Ariz. 575, ¶68.

<sup>203</sup> *Sanders*, 245 Ariz. 113, ¶¶18-32.

<sup>204</sup> *State v. Bush*, 244 Ariz. 575, ¶¶63-67 (2018).

<sup>205</sup> See Argument 6, Section 3.

<sup>206</sup> *Id.* at ¶67.

<sup>207</sup> *State v. Henderson*, 210 Ariz. 561, ¶18 (2005).

<sup>208</sup> AB 83.

<sup>209</sup> *E.g. Lynch v. Arizona*, 136 S.Ct. 1818, 1818-20; *Shafer v. S.C.*, 532 U.S. 36, 41-42 (2001); *Ramdass v. Angelone*, 530 U.S. 156, 162-63 (2000).

defense counsel were required to question jurors under that incorrect instruction.<sup>210</sup>

Add in the references to parole made by the state and introduced into evidence and the weight of mitigation, and it becomes clear the state didn't carry its burden.

***Conclusion:***

Because the trial court denied the motion for mistrial and failed to give an adequate curative instruction, this Court should order a new penalty phase.

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<sup>210</sup> RT-4/13/2016, 41, 104; RT-4/14/2016 (morning), 25; RT-4/14/2016 (afternoon), 44, 47.

**The trial court incorrectly instructed the jury that significant impairment required Jimmy to prove he did not know the difference between right and wrong.**

***Discussion:***

- 1. The trial court incorrectly instructed the jury that Jimmy had to prove his mental health issues or impairment “prevented” him from knowing right from wrong or conforming his conduct to the law.**

The state does not argue the instruction read to this jury was legally correct. Instead, the state points out the instruction was a RAJI. That does not matter.

In *State v. Logan*, this Court explained RAJIs are not controlling.<sup>211</sup> The warning observed in *Logan* still appears on the State Bar’s Criminal Jury Instructions Committee [webpage](#) and in the [Preface of the Instructions](#).

The state provides no additional argument on the merits of the legal error. This implicit concession makes sense—the RAJI clearly deviated from the statutory language and imposed a harsher burden:

| Statutory Language                                                                                                                                                                     | Instruction                                                                                                                                                                                                                       |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| “The defendant’s capacity to appreciate the wrongfulness of his conduct ... was significantly impaired, but not so impaired as to constitute a defense to prosecution.” <sup>212</sup> | “‘Significantly impaired’ means that the defendant suffered from mental illness, personality disorder, or substance abuse ... that prevented the defendant from appreciating the wrongfulness of the conduct ....” <sup>213</sup> |

<sup>211</sup> *State v. Logan*, 200 Ariz. 564, ¶12 (2001).

<sup>212</sup> A.R.S. §13-751(G)(1).

<sup>213</sup> RT-6/23/2016, 147.

The state also doesn't mention in its brief that the Criminal Jury Instruction Committee has since corrected the instruction.<sup>214</sup>

**2. The “prevented” instruction constituted fundamental error because the error stripped Jimmy of his right to have the jury consider significant impairment as a mitigating factor.**

The bulk of the state's argument focuses upon its claim that the jury would still have considered Jimmy's mental health evidence because of other instructions.<sup>215</sup> But the state incorrectly frames the fundamental error standard and ignores this Court's presumption that jurors follow instructions.

This Court clarified fundamental error in *State v. Escalante*.<sup>216</sup> This Court looks to whether the error went to the foundation of Jimmy's case, stripped from him a right essential to his defense, or was so egregious that Jimmy couldn't have received a fair trial.<sup>217</sup>

**A.** Regarding the first factor, “[a]n error generally goes to the ‘foundation of a case’ if it relieves the prosecution of its burden to prove a crime's elements, directly impacts a key factual dispute, or deprives the defendant of constitutionally guaranteed procedures.”<sup>218</sup>

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<sup>214</sup> See *RAJI (Criminal) (4th Ed.)*, 620, Capital Case 3.2—Significant Impairment.

<sup>215</sup> AB 86-88.

<sup>216</sup> *State v. Escalante*, 245 Ariz. 135, ¶11 (2018).

<sup>217</sup> *Id.*

<sup>218</sup> *Escalante*, 245 Ariz. 135, ¶18.

The jury’s penalty phase determination was whether to sentence Jimmy to death. The instructions are meant to help the jury resolve factual disputes regarding the mitigation evidence. Here, Jimmy’s mental health mitigation was disputed.<sup>219</sup> Thus, the jury would have turned to the instructions to resolve that dispute. This erroneous instruction therefore “directly impact[ed] a key factual dispute ....”<sup>220</sup>

None of the state’s arguments address this class of fundamental error. Accordingly, the error was fundamental on this basis alone. The state’s arguments focus instead on the deprivation of constitutional process prong.

Mitigation has a broad meaning.<sup>221</sup> By instructing the jury that significant impairment only existed if Jimmy was “prevented” from knowing right from wrong—the GEI standard—the court impacted the jury’s ability to consider Jimmy’s mitigation.

Despite the incorrect instruction, the state asserts the jury would have nonetheless considered the mitigation because of additional instructions.<sup>222</sup> This ignores surrounding instructions, this Court’s presumptions, and the nature of the decision.

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<sup>219</sup> See RT-6/14/2016, 121 (Dr. Abrams testimony); RT-6/15/2016(morning), 12 (same); RT-6/15/2016(afternoon), 11 (same); RT-6/20/2016, 22 (same); RT-6/15/2016(afternoon), 79 (Dr. Kirschner testimony); RT-6/16/2016, 5 (same); RT-6/22/2016, 6 (Dr. DeMarte testimony); RT-6/23/2016, 16 (same).

<sup>220</sup> See *id.*

<sup>221</sup> See [Lockett v. Ohio](#), 438 U.S. 586, 604 (1978).

<sup>222</sup> AB 86-88.



The instructions required the jury to 1) follow *all* instructions, whether they agreed or not,<sup>223</sup> and 2) apply the instructions to the evidence.<sup>224</sup> The state’s assertion boils down to an assumption that this jury ignored the significant impairment instruction. But the instructions themselves compelled the jury to follow the instructions. And this Court presumes jurors follow their instructions.<sup>225</sup> Here, the presumption is that this jury followed the significant impairment instruction, which erroneously created a higher burden.

Even if the state’s assertion were correct, the weight given to such mitigation wouldn’t be the same. Because mitigation is a qualitative evaluation,<sup>226</sup> the error was fundamental.

**B.** On the second *Escalante* factor, “[a]n error takes away an ‘essential right’ if it deprives the defendant of a constitutional or statutory right necessary to establish a viable defense or rebut the prosecution’s case.”<sup>227</sup>

As noted above, the incorrect instruction deprived Jimmy of his right to have the jury consider mitigation. The instruction deprived Jimmy of the statutory burden

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<sup>223</sup> RT-6/23/2016, 139.

<sup>224</sup> *Id.* at 140.

<sup>225</sup> *State v. Newell*, 212 Ariz. 389, ¶68 (2006); *State v. Lynch*, 238 Ariz. 84, ¶¶26, 37, 49, 52 (2015).

<sup>226</sup> *State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468, ¶17 (2005); AB 92 (citing *Baldwin*, 211 Ariz. 468, ¶21).

<sup>227</sup> *Escalante*, 245 Ariz. 135, ¶19.

for significant impairment and told the jury they could only find significant impairment if Jimmy met a higher threshold.

C. Under the third *Escalante* factor, “[a]n error is so egregious that a defendant could not possibly have received a fair trial encompasses either or both prongs one and two. But to satisfy prong three, the error must so profoundly distort the trial that injustice is obvious without the need to further consider prejudice.”<sup>228</sup> If Jimmy meets this third prong, “he has shown both fundamental error and prejudice, and a new trial must be granted.”<sup>229</sup>

A fair trial requires that the jury have the opportunity to consider all mitigation.<sup>230</sup> Here, that means the jury must have the opportunity to consider significant impairment as defined in our statutory scheme. An increased burden—especially when the mitigator is contested—distorts fairness so obviously that this Court shouldn’t require proof of prejudice.<sup>231</sup>

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<sup>228</sup> *Escalante*, 245 Ariz. 135, ¶20.

<sup>229</sup> *Id.* at ¶21.

<sup>230</sup> *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978).

<sup>231</sup> See e.g., *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993) (holding deficient reasonable doubt instruction structural error).

### 3. The error prejudiced Jimmy.

If this Court requires proof of prejudice, it is obvious in this case. Under *Escalante*, when deciding if a defendant was prejudiced, “the proper inquiry is whether, without the error, a reasonable jury *could have reached a different result*, even if substantial evidence of guilt exists.”<sup>232</sup> The state misstates the prejudice burden as “a reasonable probability that the jurors *would have sentenced him to life*.”<sup>233</sup> The standard isn’t a would standard, it’s a could standard.

Moreover, the standard is not one of a different verdict, but a different result. This is important because the sentencing decision is “based upon each juror’s individual, qualitative evaluation of the facts of the case, the severity of the aggravating factors, and the quality of any mitigating evidence.”<sup>234</sup> Thus, if any single juror could have weighed mitigation differently, prejudice is established.

The state asserts the jury illustrated its ability to consider evidence when it found one aggravator wasn’t supported by the evidence.<sup>235</sup> The jury’s finding in a separate phase does not speak to whether the mitigation phase instruction was correct. Additionally, the jury’s prior decision shows that the jury followed the

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<sup>232</sup> *Escalante*, 245 Ariz. 135, ¶34 (emphasis added).

<sup>233</sup> AB 88 (emphasis added).

<sup>234</sup> *Baldwin*, 211 Ariz. 468, ¶17.

<sup>235</sup> AB 88-89.

instructions. Thus, when the significant impairment instruction was incorrect, the jury would have followed the incorrect instruction.

Beyond this, the state labels the mitigation weak and aggravation strong in conclusory fashion.<sup>236</sup> But the state's conclusory assertion has no bearing on what a juror could find persuasive.

Significant impairment is amongst the strongest mitigators,<sup>237</sup> as evidenced by its inclusion in the statute. This explains why the prosecutor repeatedly focused on the improperly raised burden during closing.<sup>238</sup> For example: "The defendant didn't retain an expert to tell you he did not know right from wrong or that he was somehow—somehow—impaired from conforming his conduct to law."<sup>239</sup> Aside from this just being wrong—Jimmy hired both Drs. Kirschner and Abrams to testify Jimmy ability to know right from wrong was impaired—the prosecutor's focus on the need to know right from wrong was due to an incorrect instruction. Two pages later, the prosecutor argued, "the defendant wants and needs you to believe he was so high on Xanax... he did not know what he was doing, and he did not know what he was doing was wrong. False. The defendant knew exactly what he was doing."<sup>240</sup>

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<sup>236</sup> AB 89.

<sup>237</sup> See [Green v. State](#), 975 So.2d 1081, 1088 (Fla. 2008).

<sup>238</sup> RT-6/27/2016(afternoon), 5, 7, 8-9, 12-13, 15-16, 18.

<sup>239</sup> RT-6/27/2016(afternoon), 5.

<sup>240</sup> *Id.* at 7.

The only reason Jimmy “needed” the jury to believe “he did not know what he was doing ... was wrong” was because of the incorrect instruction.

The evidence regarding significant impairment was disputed. Not only did the trial court give an incorrect instruction, the prosecutor repeatedly relied upon the incorrect burden to argue against the mitigator.<sup>241</sup> Had the jury been informed correctly, and the prosecutor therefore forced to argue the issue correctly, a juror could have found the significant impairment mitigator proved.

***Conclusion:***

The trial court’s significant impairment instruction was legally incorrect. Had the jury been properly instructed, one or more jurors could have concluded life was proper. Thus, the error was prejudicial. This Court should vacate the sentence and order a new sentencing proceeding.

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<sup>241</sup> See *id.* at 5, 7, 8-9, 12-13, 15-16, 18.

**The trial court improperly allowed the state to admit evidence and make argument regarding prison housing conditions and Jimmy's exercise of his right to trial during the sentencing phase.**

***Discussion:***

Jimmy raised two errors: 1) the court improperly admitted evidence of Jimmy's future incarceration conditions<sup>242</sup> and 2) the court improperly allowed the state to comment on Jimmy's exercise of his right to trial.<sup>243</sup> The state only responds to the first error.<sup>244</sup>

**1. The trial court improperly admitted evidence of housing conditions.**

**A. Confinement conditions are generally irrelevant in sentencing.**

The state correctly concedes rebuttal evidence must be relevant.<sup>245</sup> To qualify, the evidence must be relevant to a defendant's character or the circumstances of his crime.<sup>246</sup>

But the state ignores the general rule that sentencing conditions are not relevant to a defendant's character or the circumstances of his offense.<sup>247</sup> The

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<sup>242</sup> OB 130-34.

<sup>243</sup> OB 134-37.

<sup>244</sup> See AB 90-96.

<sup>245</sup> AB 93.

<sup>246</sup> See *Zant v. Stephens*, 462 U.S. 862, 879 (1983).

<sup>247</sup> See *State v. Leteve*, 237 Ariz. 516, ¶¶39-40 (2015); *People v. Smith*, 347 P.3d 530, 583 (Cal. 2015); *State v. Bowman*, 623 S.E.2d 378, 385 (S.C. 2005), *abrogated on other grounds by State v. Evans*, 637 S.E.2d 313, 314-16 (S.C. 2006);

California Supreme Court recognized it in *People v. Smith*.<sup>248</sup> And this Court endorsed this rule in *State v. Leteve*: “the harsh conditions a child-killer might face in prison ... is not specific to a defendant’s character, propensities, or prior record, nor does it go to the circumstances of the offense.”<sup>249</sup> Thus, the crux of the question is whether the prosecution linked Jimmy’s potential confinement conditions to his plea offer. They did not.

**B. Here, the state did not present any evidence to prove that its evidence regarding housing conditions was connected to Jimmy or his willingness to accept responsibility.**

The offering party bears the burden of proving relevance<sup>250</sup> and assertion is not evidence.<sup>251</sup> The prosecutor was therefore responsible for presenting proof through evidence that Jimmy *knew* of the future housing conditions.

The prosecutor never presented any evidence that Jimmy knew of the potential differences in confinement conditions.<sup>252</sup> Jimmy’s attorneys made clear that Jimmy didn’t know about housing conditions.<sup>253</sup> And the prosecution’s only witness on the topic didn’t know whether Jimmy was aware of the difference.<sup>254</sup>

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<sup>248</sup> *People v. Smith*, 347 P.3d 530, 583 (Cal. 2015).

<sup>249</sup> *State v. Leteve*, 237 Ariz. 516, ¶¶39-40 (2015).

<sup>250</sup> *State v. Haskie*, 242 Ariz. 582, ¶16 (2017); *State v. Romero*, 239 Ariz. 6, ¶11 (2016).

<sup>251</sup> Ariz.R.Evid. 104(b).

<sup>252</sup> See RT-6/20/2016, 6, 10-11; I.15.

<sup>253</sup> RT-6/20/2016, 10.

<sup>254</sup> RT-6/20/2016, 149.

The state presents one conclusory assertion regarding this crux: “Johnson was well aware of Arizona Department of Corrections because he had been in prison in Arizona, as well as Colorado.”<sup>255</sup> But awareness of Arizona DOC isn’t awareness of Arizona DOC housing policies.

This is also where the state’s claimed distinction of *Leteve* falls apart. The state asserts *Leteve* cannot be applied to this case because the housing conditions in this case “expose[d] a motivation for [Jimmy’s] plea offer other than a desire to take responsibility for his crimes.”<sup>256</sup> Again, nowhere in the record is there any evidence that Jimmy knew of the different housing conditions.

**C. The trial court abused its discretion when it allowed the state to present evidence of confinement conditions.**

The court abused its discretion by deferring the relevance determination to the jury.<sup>257</sup> The state ignores this issue. Additionally, the record does not support the court’s factual conclusions.<sup>258</sup> The state does not point to any evidence supporting the court’s conclusions. Accordingly, the court abused its discretion.

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<sup>255</sup> AB 94-95.

<sup>256</sup> AB 95-96.

<sup>257</sup> RT-6/20/2016, 12.

<sup>258</sup> [State v. Haskie](#), 242 Ariz. 582, ¶16 (2017).



**2. The trial court improperly allowed the prosecutor to argue that Jimmy could have entered a guilty plea at any point**

A defendant has a right to go to trial.<sup>259</sup> “To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort ....”<sup>260</sup> The court’s ruling allowed the prosecutor to argue for a harsher penalty based upon Jimmy’s exercise of his right to trial.<sup>261</sup>

Moreover, the [ABA Guidelines](#) require defense counsel to advise defendants consistent with life.<sup>262</sup> The Rules of Criminal Procedure require counsel to be guided by the ABA Guidelines.<sup>263</sup> Because this prosecutor refused to make a plea offer, that meant advising Jimmy not to plead straight up.

If the trial court’s ruling is authorized, defense attorneys are inherently in conflict with their clients. They’re required by the Guidelines to encourage their clients to go to trial if the prosecution doesn’t make an offer that ensures life. Yet, they expose their clients to a prosecutor’s comment on the exercise of the right to trial.

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<sup>259</sup> U.S. Const. Amend. 5, 14; Ariz. Const. Art. 2, §§4, 23, 24; Art. 6, §17.

<sup>260</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

<sup>261</sup> See RT-6/27/2016(afternoon), 41.

<sup>262</sup> [ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases](#), Guideline 10.9.2, Commentary.

<sup>263</sup> Ariz.R.Crim.P. 6.8(a)(5).

Because of the clarity of both issues, the state's failure to respond is a confession of error.<sup>264</sup>

***Conclusion:***

For the reasons stated above, this Court should vacate the death sentence and remand for a new sentencing.

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<sup>264</sup> See *Miller*, 186 Ariz. at 323; *Walden*, 183 Ariz. at 605; *In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶7.

**Internally inconsistent jury instructions regarding the presumption of death, mercy, and sympathy likely caused juror confusion resulting in an unconstitutional death sentence.**

Jimmy's argument is that the totality of the penalty phase instructions concerning the presumption of death, mercy, and sympathy were contradictory and confusing.<sup>265</sup> Contrary to the state's claim,<sup>266</sup> neither *State v. Carreon*<sup>267</sup> nor *State v. Kuhs*<sup>268</sup> addressed Jimmy's argument; both addressed claims solely concerning sympathy instructions.<sup>269</sup> Rather than looking at one instruction, this Court examines instructions in light of the overall charge to the jury.<sup>270</sup>

The overall charge to the jury provided prior to the penalty phase<sup>271</sup> is the product of piecemeal capital litigation and an ever-changing statutory framework. This Court's review has been limited to challenges concerning individual instructions, such as the role of sympathy<sup>272</sup> or burden of persuasion.<sup>273</sup> But even

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<sup>265</sup> OB 138-42.

<sup>266</sup> AB 97.

<sup>267</sup> *State v. Carreon*, 210 Ariz. 54, ¶¶81-87 (2005).

<sup>268</sup> *State v. Kuhs*, 223 Ariz. 376, ¶¶51-56 (2010).

<sup>269</sup> *Carreon*, 210 Ariz. 54, ¶¶81-87; *Kuhs*, 223 Ariz. 376, ¶¶51-58.

<sup>270</sup> *Boyde v. California*, 494 U.S. 370, 378 (1990).

<sup>271</sup> RT-5/26/2016, 21-34.

<sup>272</sup> *Carreon*, 210 Ariz. 54, ¶¶81-87.

<sup>273</sup> See *State v. Pandeli*, 215 Ariz. 514, ¶40 (2007); *State v. Harrod*, 218 Ariz. 268, ¶47 (2008); *State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468, ¶24 (2005).

with similar instructions, numerous studies have shown jurors don't understand the instructions.<sup>274</sup>

Considering the confusing nature of the instructions as a whole, there is a reasonable likelihood the jury applied the penalty phase incorrectly.<sup>275</sup>

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<sup>274</sup> Theodore Eisenberg and Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L.Rev. 1 (1992); John Blume, Theodore Eisenberg, Stephen P. Garvey, *Lessons from the Capital Jury Project*, Chapter 5 in *Beyond Repair? America's Death Penalty*, Duke University Press, 144-77 (2003); Brittany Fowler, *A Shortcut to Death: How the Texas Death-Penalty Statute Engages the Jury's Cognitive Heuristics in Favor of Death*, 96 Tex.L.Rev. 379, 385-87 (2017).

<sup>275</sup> *Baldwin*, 211 Ariz. 468, ¶24; see also *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 262 (2007).

**The trial court should have allowed Jimmy to present execution impact evidence because it was relevant to his character and family support.**

***Discussion:***

- 1. The United States and Arizona constitutions guaranteed Jimmy the right to present all relevant mitigation to the jury.**

The State doesn't dispute this point.<sup>276</sup>

- 2. This Court has created an absolute bar to execution impact evidence in error.**

- A. This Court's decisions banning execution impact evidence are premised upon a misreading of Arizona cases.**

This Court created an absolute bar to EIE in *State v. Rose*,<sup>277</sup> *State v. Chappell*,<sup>278</sup> and *State v. Roque*.<sup>279</sup> *Rose* and *Chappell* were derivative of *Roque*<sup>280</sup> and this Court erred in *Roque*.

*Roque* relied upon *State v. Williams*.<sup>281</sup> But *Williams* was inapposite. In *Williams*, the defendant wanted to present a sentencing recommendation from the

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<sup>276</sup> See AB 99-103.

<sup>277</sup> *State v. Rose*, 231 Ariz. 500 (2013).

<sup>278</sup> *State v. Chappell*, 225 Ariz. 229 (2010).

<sup>279</sup> *State v. Roque*, 213 Ariz. 193 (2006).

<sup>280</sup> See *Rose*, 231 Ariz. 500, ¶64 (relying on *Chappell*); *Chappell*, 225 Ariz. 229, ¶30 (relying on *Roque*).

<sup>281</sup> *Roque*, 213 Ariz. 193, ¶119 (quoting *State v. Williams*, 183 Ariz. 368, 385 (1995)).

victim’s sister.<sup>282</sup> *Williams* didn’t deal with EIE. But in *Roque*, this Court forced the square peg of *Williams* into the round hole of EIE on the basis of sibling relationship.<sup>283</sup>

The state does not address this problem.<sup>284</sup> Instead, they assert undersigned counsel misread other cases.<sup>285</sup>

Jimmy noted this Court “g[a]ve some mitigating weight to the effect [a defendant’s] execution would have on the emotional well-being of his children” in *State v. Greene*.<sup>286</sup> The state asserts the government apparently didn’t challenge the issue there.<sup>287</sup> That’s beside the point. *Greene* illustrates the relationship between EIE and family connection. The same is true for *State v. McGill*,<sup>288</sup> *State v. Boyston*,<sup>289</sup> *State v. Manuel*,<sup>290</sup> *State v. Dann*,<sup>291</sup> and *State v. Harrod*.<sup>292</sup>

The state distinguishes *State v. Finch* on the sole ground that this Court “upheld the trial court’s refusal to find [EIE] evidence as a non-statutory

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<sup>282</sup> *State v. Williams*, 183 Ariz. 368, 385 (1995).

<sup>283</sup> See *Roque*, 213 Ariz. 193, ¶119.

<sup>284</sup> See AB 99-103.

<sup>285</sup> AB 101-02.

<sup>286</sup> OB 147-48 (quoting *State v. Greene*, 192 Ariz. 431, ¶58 (1998)).

<sup>287</sup> AB 101-02.

<sup>288</sup> *State v. McGill*, 213 Ariz. 147, ¶67 (2006).

<sup>289</sup> *State v. Boyston*, 231 Ariz. 539, ¶85 (2013).

<sup>290</sup> *State v. Manuel*, 229 Ariz. 1, ¶46 (2011).

<sup>291</sup> *State v. Dann*, 220 Ariz. 351, ¶152 (2009).

<sup>292</sup> *State v. Harrod*, 218 Ariz. 268, ¶59 (2008).

mitigator.”<sup>293</sup> *Finch* noted, “In [*Greene*] ... [w]e concluded the trial court should have given ‘some mitigating weight to the effect *Greene*’s execution would have on the emotional well-being of his children.’”<sup>294</sup> This belies the state’s claimed distinction of *Greene*.

Second, this Court approved of the trial court’s decision in *Finch* because there was no testimony as to the impact execution would have.<sup>295</sup> But Jimmy wanted to introduce testimony regarding the impact execution would have on family members to prove his life had value and family love and support.<sup>296</sup> He wasn’t allowed to because of *Roque*, *Chappell*, and *Rose*.

Moreover, the state misses the importance of *Finch*, which is how *Finch* related to *Chappell*.<sup>297</sup> In *Chappell*, this Court distinguished a number of cases on the grounds that the admissibility of EIE wasn’t at issue in the cases.<sup>298</sup> But EIE was at issue in *Finch*, decided eight years before *Chappell*.<sup>299</sup> And in *Finch* this Court noted that when there was testimony as to the impact EIE would have on the family,

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<sup>293</sup> AB 102 (discussing *State v. Finch*, 202 Ariz. 410, ¶39 (2002)).

<sup>294</sup> *State v. Finch*, 202 Ariz. 410, ¶39.

<sup>295</sup> *Id.*

<sup>296</sup> I.254, 5-8.

<sup>297</sup> See OB 148-49.

<sup>298</sup> *Chappell*, 225 Ariz. 229, ¶30 fn.8.

<sup>299</sup> *Finch*, 202 Ariz. 410, ¶¶38-39.

it should be admitted.<sup>300</sup> Rather than confront *Finch*, *Chappell* simply ignored it.<sup>301</sup>

So does the state.

**B. This Court’s reliance upon cases from other jurisdictions fails to recognize the distinctions underlying execution impact evidence.**

The state offers nothing against the Opening Brief discussion.

**3. Execution impact evidence is proper when it relates to a defendant’s character, family support, role in society, or other mitigation.**

Under *Planned Parenthood v. Casey*,<sup>302</sup> it is proper to overrule *Rose*, *Chappell*, and *Roque*:

- The *Roque* rule intolerably withholds mitigation;<sup>303</sup>
- There would be no special hardship because only capital cases would be impacted;<sup>304</sup>
- The developed understanding of EIE has rendered *Roque* a remnant of the past,<sup>305</sup> and
- EIE’s evolution has stripped the *Roque* rule of significance and justification.<sup>306</sup>

The state claims this is a “distinction without a difference” because Jimmy presented family support evidence.<sup>307</sup> This illustrates the problem. Jimmy’s family

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<sup>300</sup> *Id.* at ¶39.

<sup>301</sup> *Chappell*, 225 Ariz. 229, ¶30 fn.8.

<sup>302</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. at 854-55.

<sup>303</sup> *Planned Parenthood*, 505 U.S. at 854; OB 143-55.

<sup>304</sup> *Planned Parenthood*, 505 U.S. at 854; OB 143-55.

<sup>305</sup> *Planned Parenthood*, 505 U.S. at 855; OB 143-55.

<sup>306</sup> *Planned Parenthood*, 505 U.S. at 855; OB 143-55.

<sup>307</sup> AB 103.



support evidence lacked context and weight. Because mitigation is an individual, qualitative assessment,<sup>308</sup> stripping away context and weight is important.

The state's harmless error claim also fails. Foremost, harmless-error analysis contradicts Jimmy's right to a jury determination.<sup>309</sup> Additionally, Jimmy was robbed of testimony that would've given family support and character evidence weight. The state hasn't carried its burden to prove harmlessness beyond a reasonable doubt,<sup>310</sup> particularly because sufficiency of mitigation is a qualitative assessment.

**4. The admission of execution impact evidence that does not recommend a particular sentence aligns the currently disparate treatment of victim impact statements and execution impact evidence.**

The state does not address this point.<sup>311</sup> The disparity between EIE and VIE is sufficient to reverse Jimmy's sentence.<sup>312</sup>

***Conclusion:***

As the state explains: "Constitutionally-sound individualized sentencing requires more, not less, information about a death-eligible defendant before imposition of the sentence."<sup>313</sup> While that assertion came in the context of the

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<sup>308</sup> AB 92 (citing *State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468, ¶21 (2005)).

<sup>309</sup> See Arg.6, §3, *supra*.

<sup>310</sup> *State v. Henderson*, 210 Ariz. 561, ¶18 (2005).

<sup>311</sup> See AB 99-103.

<sup>312</sup> See OB 153-55.

<sup>313</sup> AB 93.

admissibility of incarceration conditions, it applies to EIE. Accordingly, this Court should order new aggravation and penalty phases.

**The court improperly limited mitigation evidence.**

***Standard of Review:***

The state cites *State v. Nordstrom*<sup>314</sup> to argue the admission of evidence in penalty phase is reviewed for abuse of discretion.<sup>315</sup> The issue here is preclusion of mitigation evidence, which falls under the *Eighth Amendment*,<sup>316</sup> reviewed de novo.<sup>317</sup>

The state's assertion<sup>318</sup> that this argument is waived should be rejected because Johnson developed the argument<sup>319</sup> and this Court authorized further development.

***Discussion:***

**1. The trial court erred by precluding the Columbine evidence on relevance grounds.**

Prosecutor: "But [Columbine] is not the defendant's personal story to tell. He is not the same as those that saw children dying, those that heard children dying. That wasn't the defendant, and it is not his story to tell."<sup>320</sup>

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<sup>314</sup> *State v. Nordstrom*, 230 Ariz. 110 (2012).

<sup>315</sup> AB 104 (citing *Nordstrom*, 230 Ariz. 110, ¶8).

<sup>316</sup> *Mills v. Maryland*, 486 U.S. 367, 374 (1988).

<sup>317</sup> *Nordstrom*, 230 Ariz. 110, ¶8.

<sup>318</sup> AB 104-05.

<sup>319</sup> OB 156-69; Ariz.R.Crim.P. 31.10.

<sup>320</sup> RT-5/26/2016, 60; *see also id.* at 62; RT-6/27/2016 (afternoon), 31.

Jimmy was a student at Columbine, present in the weight room, on the day of the shooting. He heard gunfire. Explosions. Friends died. Others he helped. He suffered PTSD and was plagued by survivor guilt. It triggered substance abuse problems that haunted him for the rest of his life.

Because the trial court precluded testimony from other victims of the Columbine shootings, the prosecutor was able to credibly argue Columbine wasn't Jimmy's "story to tell" simply because he wasn't in the direct line of fire or didn't see a person actively die.

But that was the very purpose of Jimmy's proposed evidence—to show Columbine was his story, even if he wasn't the direct line of fire.

**A. The evidence was relevant.**

The trial court relied on a restrictive relevance test, which was elevated to whether the evidence was "terribly relevant"<sup>321</sup> or had "a lot of probative value"<sup>322</sup> to preclude testimony from 21 Columbine survivors. This standard contravenes the explicitly "low threshold"<sup>323</sup> of relevance required under the Eighth Amendment.<sup>324</sup>

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<sup>321</sup> RT-3/30/2016(afternoon), 56.

<sup>322</sup> RT-3/18/2016, 14.

<sup>323</sup> *Tennard v. Dretke*, 542 U.S. 274, 285 (2004); *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990).

<sup>324</sup> *McKoy v. North Carolina*, 494 U.S. 433, 440-441 (1990).

The precluded evidence would've proved survivors not in the line of fire—survivors like Jimmy—suffer these tremendous impacts.<sup>325</sup> Had the jury heard reports from other students, they would've better understood Jimmy's trauma.

**B. The evidence was corroborative, not cumulative.**

The prosecutor confused this evidence by arguing Jimmy wasn't in the line of fire and too much time had passed.<sup>326</sup> The prosecutor argued Columbine wasn't Jimmy's "story to tell."<sup>327</sup>

But Jimmy tried to prove he suffered lasting trauma even though the perpetrators never shot at Jimmy and corroborate this with proof that he wasn't alone.<sup>328</sup>

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<sup>325</sup> Arash Javanbakhl, [What Mass Shootings Do To Those Not Shot: Social Consequences Of Mass Gun Violence](#), The Conversation (Nov. 9, 2018); Anna Almendrala & Erin Sschumaker, [When The Scars Of A Mass Shooting Aren't Left By Bullets](#), The Huffington Post (Nov. 11, 2017); see also Holly Yan & Madison Park, [1 week. 3 suicides. 1 tragic connection to school massacres](#), CNN (Mar. 26, 2019); John Woodrow Cox & Steven Rich, [Scarred By School Shootings](#), The Washington Post (Mar. 25, 2018).

<sup>326</sup> RT-5/26/2015, 60-63; RT-6/27/2016(afternoon), 31-35.

<sup>327</sup> RT-5/26/2016, 60, 62; RT-6/27/2016(afternoon), 31.

<sup>328</sup> I.365, 6-7

**2. The court erred by limiting re-direct of Dr. Abrams.**

**A. The state put PTSD at issue during cross-examination of Dr. Abrams.**

When Jimmy questioned Dr. Abrams about the connection between PTSD and substance abuse, the trial court sustained the prosecutor's objection based on the prosecutor's assertion that she "didn't go into PTSD."<sup>329</sup>

However, the prosecutor repeatedly went into PTSD and its symptoms.<sup>330</sup>

**B. The state put "drug-seeking behavior" at issue during cross-examination of Dr. Abrams.**

The prosecution twice asked Dr. Abrams if Jimmy asked for more Xanax in 2008.<sup>331</sup> The prosecutor also asked Abrams about Jimmy's report to Dr. Mansoor that he had "run out of Xanax."<sup>332</sup>

Yet, when Jimmy asked Dr. Abrams on redirect about Jimmy "going to the hospital in order to obtain drugs," the prosecutor objected,<sup>333</sup> and the court sustained.<sup>334</sup>

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<sup>329</sup> RT-6/20/2016, 114.

<sup>330</sup> RT-6/20/2016, 59-61, 63-66.

<sup>331</sup> RT-6/20/2016, 55.

<sup>332</sup> RT-6/20/2016, 57.

<sup>333</sup> RT-6/20/2016, 122.

<sup>334</sup> RT-6/20/2016, 124.

**3. The court erred by precluding testimony regarding significant impairment.**

The prosecutor moved to preclude Dr. Abrams from testifying Jimmy “stabbed [victim] reflexively with a knife” under the premise that it was impermissible “residual doubt” evidence.<sup>335</sup> The prosecution also argued Dr. Kirschner couldn’t opine Jimmy was “in a dissociative state where there was no intent or knowledge because the defendant was found guilty of first-degree murder.”<sup>336</sup> The prosecutor asserted that because “10 [of 12] jurors found premeditated” murder, evidence that the stabbings were “reflexive” was residual doubt.<sup>337</sup> The trial court precluded testimony on these grounds.<sup>338</sup>

“Residual doubt evidence challenges a jury’s finding of guilt”<sup>339</sup> whereas mitigation evidence concerns the circumstances of the crime or the defendant’s character that bears on the defendant’s moral culpability.<sup>340</sup>

Dr. Abrams would’ve said the stabbing was “reflexive” or “impulsive” due to Xanax and cocaine consumption.<sup>341</sup> Dr. Kirschner’s concluded Jimmy was in an adoptee-rage-induced “dissociative” state during the stabbing.<sup>342</sup>

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<sup>335</sup> RT-6/14/2016, 101.

<sup>336</sup> RT-6/14/2016, 101, 107.

<sup>337</sup> RT-6/14/2016, 102.

<sup>338</sup> RT-6/14/2016, 108.

<sup>339</sup> *State v. Harrod*, 218 Ariz. 268, ¶43 (2008).

<sup>340</sup> *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

<sup>341</sup> RT-6/14/2016, 106.

<sup>342</sup> RT-6/14/2016, 102; RT-6/16/2016, 26-28,

Unlike premeditated murder, felony murder “focuses on the result of the criminal conduct rather than on an offender’s state of mind at the time of conduct.”<sup>343</sup> No premeditation or intent is required.<sup>344</sup>

Thus, impulsivity evidence isn’t residual doubt evidence in a felony-murder case because no evidence of premeditation is required to obtain the conviction. Because two jurors only found felony-murder, the contested evidence wasn’t residual doubt evidence. Moreover, the precluded substance abuse evidence would’ve helped establish significant impairment under [A.R.S. §13-751\(G\)\(1\)](#).<sup>345</sup>

Evidence bearing a causal nexus to the crime is valuable.<sup>346</sup> Yet, the trial court precluded such mitigation evidence.<sup>347</sup> This Court should grant relief.<sup>348</sup>

#### **4. The trial court erred by precluding Dr. Kirshner’s expert opinion on why Adopted Child Syndrome is not in the DSM.**

During cross-examination, the prosecution repeatedly questioned Dr. Kirschner about the fact that ACS isn’t listed in the DSM.<sup>349</sup> The prosecutor didn’t file a [Daubert](#)<sup>350</sup> motion, but instead waited until Dr. Kirschner’s testimony to

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<sup>343</sup> [State v. McLoughlin](#), 139 Ariz. 481, 485-86 (1984).

<sup>344</sup> [State v. Bennett](#), 213 Ariz. 562, ¶23 (2006) (citing [A.R.S. §13-203\(A\)\(1\)](#) (1989)); [State v. Lawson](#), 144 Ariz. 547, 559 (1985).

<sup>345</sup> [State v. Medina](#), 232 Ariz. 391, ¶¶100-101 (2013).

<sup>346</sup> [State v. Johnson](#), 212 Ariz. 425, ¶65 (2006); [State v. Newell](#), 212 Ariz. 389, ¶82 (2006).

<sup>347</sup> RT-6/14/2016, 108

<sup>348</sup> See [State v. Boggs](#), 218 Ariz. 325, ¶94 (2008).

<sup>349</sup> RT-6/16/2016, 126-27.

<sup>350</sup> [Daubert v. Merrell Dow Pharm., Inc.](#), 509 U.S. 579 (1993).



object.<sup>351</sup> Although defense counsel summarized Dr. Kirschner's opinion,<sup>352</sup> the court claimed it didn't know what Dr. Kirschner would say regarding the DSM.<sup>353</sup>

## 5. The errors require resentencing.

Resentencing is required because this limit on relevant mitigation evidence violated the Eighth Amendment.<sup>354</sup>

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<sup>351</sup> RT-6/16/2016, 84-85.

<sup>352</sup> RT-6/16/2016, 84; see also James Davies, *How [Voting and Consensus Created the Diagnostic and Statistical Manual of Mental Disorders \(DSM-III\)](#)*, *Anthropology & Medicine*, 24:1, 32-46 (2017); Shadia Kawa & James Giordano, *[A Brief Historicity of the Diagnostic and Statistical Manual of Mental Disorders: Issues and Implications for the Future of Psychiatric Canon and Practice](#)*, *Philosophy, Ethics, and Humanities in Medicine*, 7:2 (2012); Gihyum Yoon, et al, *[Substance Abuse Disorders and Adoptions: Findings from a National Sample](#)*, *PLOS ONE*, 7:11 (2012); Gail Slap, et. al, *[Adoption as a Risk Factor for Attempted Suicide During Adolescence](#)*, *Pediatrics*, 108:2 (2001); Ann E. Brand & Paul Brinich, *[Behavior Problems and Mental Health Contacts in Adopted, Foster, and Nonadopted Children](#)*, *The Journal of Child Psychology and Psychiatry and Allied Disciplines*, 40:8 (1999).

<sup>353</sup> RT-6/16/2016, 88-91.

<sup>354</sup> *Payne v. Tennessee*, 501 U.S. 808, 822 (1991); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978)

**The trial court improperly ordered the production of attorney notes, in violation of work product privilege, and erroneously allowed the prosecutor to use the defense team notes to attack credibility.**

***Discussion:***

- 1. The plain language of Rule 15.2 does not require production of an attorney's notes of a witness's oral statement.**

First, the state claims Rule 15 exists to allow parties to obtain statements made by witnesses to only one party.<sup>355</sup> Second, the state recites the prosecutor's argument that Rule 15.2 required disclosure of statements "made by defense witnesses recorded either electronically or in writing."<sup>356</sup>

The state provides no authority to support its claims and no response to Jimmy's analysis.<sup>357</sup> The state concedes the point.<sup>358</sup>

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<sup>355</sup> AB 116.

<sup>356</sup> AB 116.

<sup>357</sup> See OB 163-64.

<sup>358</sup> See *Miller*, 186 Ariz. at 323; *Walden*, 183 Ariz. at 605; *In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶7.

**2. Even if attorney notes could be construed as a statement, attorney notes are protected work product.**

While the state discusses<sup>359</sup> *Hickman v. Taylor*<sup>360</sup> and *U.S. v. Nobles*,<sup>361</sup> both support Jimmy’s claim.<sup>362</sup> The state also ignores *Upjohn Company v. U.S.*, where the Supreme Court rejected the very argument the state now advances—including reference to the same quotation from *Hickman*—because disclosure of attorney notes “is particularly disfavored because it tends to reveal the attorney’s mental processes.”<sup>363</sup> The state’s argument regarding expert witnesses doesn’t alter this conclusion.<sup>364</sup> This prosecutor sought attorney notes regarding lay witnesses.<sup>365</sup>

**3. Arizona jurisprudence supports protection of attorney notes.**

From 1958 with *Dean v. Superior Court*,<sup>366</sup> through *State v. Bowen* in 1969,<sup>367</sup> *Longs Drug Stores v. Howe* in 1983,<sup>368</sup> and *State ex rel. Corbin v. Ybarra* in 1989,<sup>369</sup> this Court has protected attorney notes

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<sup>359</sup> AB 112-14.

<sup>360</sup> *Hickman v. Taylor*, 329 U.S. 495 (1947).

<sup>361</sup> *U.S. v. Nobles*, 422 U.S. 225 (1975).

<sup>362</sup> See OB 165-70.

<sup>363</sup> *Upjohn Company v. U.S.*, 449 U.S. 383, 399 (1981).

<sup>364</sup> See AB 114-15.

<sup>365</sup> See I.304; I.337; I.344; I.358; RT-2/16/2016, 8, 12-14, 16-19, 23, 29; OB 160-80.

<sup>366</sup> *Dean v. Superior Court*, 84 Ariz. 104, 111-12 (1958).

<sup>367</sup> *State v. Bowen*, 104 Ariz. 138, 142 (1969).

<sup>368</sup> *Longs Drug Stores v. Howe*, 134 Ariz. 424, 426 (1983).

<sup>369</sup> *State ex rel. Corbin v. Ybarra*, 161 Ariz. 188, 194 (1989).

Rather than address this history, the state asserts *Ybarra* supports the lower court's decision because "the statements the witnesses made to only one party are not available except by mandatory disclosure ...."<sup>370</sup>

But *Dean* explained, "the better view is that if the witnesses themselves are available to the party and can be interrogated or examined by him, there will ordinarily be no occasion for ordering production of their statements."<sup>371</sup> *Ybarra* didn't change this standard. And the witnesses here were available for interview.<sup>372</sup> Thus, it was improper to order disclosure of attorney notes.

#### **4. Public policy supports protecting attorney notes.**

The state ignores the policy discussion in the Opening Brief,<sup>373</sup> and instead tries to reframe the issue as the inability "to present half-truths."<sup>374</sup> The state cannot credibly assert Jimmy sought to present half-truths when the attorneys said the notes were inaccurate<sup>375</sup> and the witnesses were available to interview.

To the contrary, *Dean* concluded it is the *disclosure* of attorney notes that "is fraught with an inherently dangerous practice which must by its very nature lead to

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<sup>370</sup> AB 116.

<sup>371</sup> *Dean*, 84 Ariz. at 113.

<sup>372</sup> I.327, 11-12; RT-2/16/2016, 9.

<sup>373</sup> OB 173-76; I.327, 5, 11; RT-2/16/2016, 10, 19-21; *Hickman*, 329 U.S. at 516-17 (White, J., concurring); Ariz.R.Crim.P. 6.3; [ABA Guidelines for The Appointment and Performance of Defense Counsel in Death Penalty Cases](#), Guideline 10.13.

<sup>374</sup> AB 117.

<sup>375</sup> See I.327, 5, 11; RT-2/16/2016, 19-21.

inaccuracies, resulting in confusion and misinterpretation rather than to a presentment of truth.”<sup>376</sup> The state doesn’t dispute *Dean*.

**5. The trial court incorrectly overruled Jimmy’s repeated objections to the prosecutor’s impeachment with the notes.**

The court never should have allowed the prosecutor to conduct “impeachment” as it did.<sup>377</sup> Discussing *Brooks v. U.S.*,<sup>378</sup> Jimmy distinguished the impeachment issue from the disclosure order.<sup>379</sup> The state confesses error by failing to respond.<sup>380</sup>

**6. The errors negatively impacted Jimmy’s rights to due process, effective assistance of counsel, and a fair and reliable sentencing hearing.**

Both the disclosure of attorney notes and authorization of “impeachment” using those notes violated Jimmy’s Constitutional rights.<sup>381</sup> The state doesn’t contest,<sup>382</sup> and therefore concedes,<sup>383</sup> the constitutional dimension.

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<sup>376</sup> *Dean*, 84 Ariz. at 112.

<sup>377</sup> OB 177-78.

<sup>378</sup> *Brooks v. U.S.*, 115 A.3d 1217 (D.C.App. 2015).

<sup>379</sup> See OB 177-78.

<sup>380</sup> See *Miller*, 186 Ariz. at 323; *Walden*, 183 Ariz. at 605; *In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶7.

<sup>381</sup> OB 178-79; U.S.Const. Amend. 5, 6, 8, 14; Ariz.Const.Art. 2, §§4, 15, 24.

<sup>382</sup> See AB 116-17.

<sup>383</sup> See *Miller*, 186 Ariz. at 323; *Walden*, 183 Ariz. at 605; *In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶7.

**7. Dismissal of the death penalty is the only viable remedy.**

Because the error has already occurred and the state already has defense counsel's notes, retrial cannot remediate the error.<sup>384</sup> The state doesn't dispute that dismissal of death is the only viable remedy,<sup>385</sup> and therefore concedes that if the ruling was

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<sup>384</sup> OB 179-80.

<sup>385</sup> See AB 116-17.

**The trial court violated Jimmy’s right to be presumed innocent when the court denied Jimmy’s motion to withdraw from his plea agreement in the armed robbery case on the grounds that Jimmy knew he had committed the murder.**

The state argues only that this is a PCR issue.<sup>386</sup> The state’s reliance on [A.R.S. §13-4033\(B\)](#) is wrong for three reasons.

First, the state incorrectly interprets the issue as an appeal on the burglary case. The trial court’s error was that it presumed guilt of this capital offense, not the robbery.<sup>387</sup> That error violated Jimmy’s right to be presumed innocent in this case, not the robbery. And the impact was felt in this case, not the robbery.<sup>388</sup> This is an appeal under [§13-4033\(A\)](#), not (B).

Second, [Article 2, §24](#) gives Jimmy “the right to appeal in all cases ....”<sup>389</sup> Where a right to appeal exists, the right must be meaningful, not just “a meaningless ritual ....”<sup>390</sup> Jimmy must have the ability to raise claims that impacted this trial. Had the court presumed Jimmy was innocent, the court would have found withdrawal necessary and the government’s (F)(2) evidence in this case would’ve been different.

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<sup>386</sup> AB 117-18.

<sup>387</sup> See RT-8/10/2012, 18.

<sup>388</sup> RT-5/25/2016, 56-57; RT-5/26/2016, 10-11; RT-6/23/2019, 151; RT-6/29/2016, 6; I.492; I.529.

<sup>389</sup> [Ariz. Const. Art. 2, §24](#).

<sup>390</sup> [Douglas v. California](#), 372 U.S. 353, 358 (1963); see also [Gonzales v. U.S.](#), 348 U.S. 407, 415 (1955).

Third, the state ignores how capital cases function. This Court “will rarely, if ever, stay the direct appeal pending resolution of an early post-conviction relief proceeding.”<sup>391</sup> But this disapproved practice is the process the state demands.

Because the error occurred in this case, this Court has jurisdiction under [§13-4033\(A\)](#) and [Art. 2, §24](#). Since the state doesn’t contest the merits, this Court should vacate the death sentence and remand for new aggravation and penalty phases.<sup>392</sup>

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<sup>391</sup> [Krone v. Hotham](#), 181 Ariz. 364, 366 (1995).

<sup>392</sup> [See Miller](#), 186 Ariz. at 323; [Walden](#), 183 Ariz. at 605; [In re 1996 Nissan Sentra](#), 201 Ariz. 114, ¶7.



**The trial court improperly ordered Jimmy to sign waivers so the prosecutor could obtain documents.**

Prosecutor: “Well, Mr. Johnson isn’t going to voluntarily sign over. He will do so if ordered.”<sup>393</sup>

The state argues “[t]he ‘waiver’ Johnson claims was involuntary (the waiver signed to allow the school to release his records) is not the issue.”<sup>394</sup> The state seeks to introduce a different argument by focusing on mental health.<sup>395</sup> But none of the state’s cases discuss whether a defendant can be compelled to sign a waiver—an act that is supposed to be voluntarily done.<sup>396</sup>

Jimmy’s argument centers on process. In *Sherlock v. Fontainebleau*, the Southern District Court of Florida concluded a court order, not compelled signature, was the proper process.<sup>397</sup> This prosecutor should’ve followed the process set forth in Rule 15.2(g)(1), which requires “a substantial need for the material or information,” an inability to otherwise obtain the material and that “the disclosure ... would not violate the defendant’s constitutional rights.”<sup>398</sup>

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<sup>393</sup> RT-2/16/2016, 55-56.

<sup>394</sup> AB 119.

<sup>395</sup> AB 119-20.

<sup>396</sup> See *State v. Rushing*, 243 Ariz. 212, ¶54 (2017); *State v. Fitzgerald*, 232 Ariz. 208, ¶44 (2013); *Phillips v. Araneta*, 208 Ariz. 280, ¶8 (2004); *State v. Schackart*, 175 Ariz. 494, 499 (1993)).

<sup>397</sup> *Sherlock v. Fontainebleau*, 229 F.Supp.3d 1277, 1282-83 (S.D.Fla. 2017).

<sup>398</sup> Ariz.R.Crim.P. 15.2(g)(1).

The record didn't support the 15.2(g) standard on two occasions, but three occasions illustrate the error in full.

1. The prosecutor claimed BYU-Idaho disclosure was incomplete.<sup>399</sup> The defense reported they turned everything over.<sup>400</sup> The prosecution was unsatisfied and indicated its intent to request a court order that Jimmy sign waivers.<sup>401</sup>

Ten days later, the issue came back up.<sup>402</sup> Nothing suggested any reportedly missing documents were material or that the prosecution had a substantial need for it.<sup>403</sup> The prosecutor's request was premised upon its general desire to conduct investigation.<sup>404</sup>

Evading the 15.2(g) process, the court ordered Jimmy to sign.<sup>405</sup>

2. Two months later, during trial, the issue arose again in regards to MCC.<sup>406</sup> Because properly serving a subpoena would delay, the prosecutor asked the court to order Johnson to sign a waiver.<sup>407</sup> Jimmy objected.<sup>408</sup> This time, the court didn't order Jimmy to sign, but issued a court order.<sup>409</sup>

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<sup>399</sup> RT-2/16/2016, 54.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.* at 55.

<sup>402</sup> RT-2/26/2016, 11.

<sup>403</sup> *Id.* at 11-12.

<sup>404</sup> *Id.*

<sup>405</sup> *Id.* at 12-13.

<sup>406</sup> RT-4/21/2016, 86.

<sup>407</sup> *Id.* at 86-87.

<sup>408</sup> *Id.* at 87.

<sup>409</sup> *Id.* at 87-89.

3. Another month into trial the prosecutor hadn't obtained Colorado presentence reports.<sup>410</sup> Although a court order would've allowed access, the prosecutor again asked "that the Court order the defendant to sign" a waiver.<sup>411</sup> Jimmy objected, but the court ordered Jimmy to sign.<sup>412</sup>

Again, the prosecutor presented nothing to indicate the presentence reports were material or that the government had a substantial need for them.

Twice the court ordered Jimmy to sign waivers, undermining the way very voluntariness of the waivers and bypassing Rule 15.2(g). Because the state doesn't raise a harmless error argument,<sup>413</sup> and thereby waives any such claim,<sup>414</sup> this error warrants relief. Accordingly, this Court should order a new penalty phase.

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<sup>410</sup> RT-5/23/2016, 12.

<sup>411</sup> *Id.* at 12-13.

<sup>412</sup> *Id.* at 13-14.

<sup>413</sup> AB 118-20.

<sup>414</sup> *State v. Bolton*, 182 Ariz. 290, 298 (1995); Ariz.R.Crim.P. 31.10(a) & (b).

**The court's rulings prevented the defense from screening and choosing a constitutionally adequate jury.**

***Standard of Review:***

The state's asserts abuse of discretion applies.<sup>415</sup> This assertion relies upon an untested assumption drawn from *State v. Patterson*.<sup>416</sup> Although *Patterson* acknowledged the due process rights announced in *Morgan v. Illinois*, there was no explanation of why an abuse of discretion standard applied to this constitutional issue.<sup>417</sup>

This Court reviews alleged constitutional errors de novo.<sup>418</sup> A *Morgan* claim of inadequate voir dire is a due process issue.<sup>419</sup> Therefore, this Court should conduct a de novo review.<sup>420</sup>

***Discussion:***

**1. The trial court deprived Jimmy of the opportunity to fully investigate juror bias.**

“In conducting voir dire, the trial court is required to ask prospective jurors any question it deems necessary to determine their qualifications and to enable the

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<sup>415</sup> AB 121 (citing *State v. Patterson*, 230 Ariz. 270, ¶5 (2012)).

<sup>416</sup> *State v. Patterson*, 230 Ariz. 270, ¶5 (2012).

<sup>417</sup> *Patterson*, 230 Ariz. 270, ¶5.

<sup>418</sup> *State v. McGill*, 213 Ariz. 147, ¶ 45 (2006).

<sup>419</sup> *Patterson*, 230 Ariz. 270, ¶5.

<sup>420</sup> See also *State v. Smith*, 215 Ariz. 221, ¶20 (2007).

parties to intelligently exercise their peremptory challenges and challenges for cause.”<sup>421</sup> Furthermore, due process “require[s] an examination by the trial judge on an issue if there was a nexus shown between the prejudice feared and the issues of the case.”<sup>422</sup>

“Stakeout questions ‘ask a juror to speculate or precommit to how that juror might vote based on any particular facts.’”<sup>423</sup> Case-specific questions that do not request a commitment are not “stake-out” questions.<sup>424</sup>

The trial ultimately restricted Jimmy from asking “questions specific to the case,”<sup>425</sup> on stake-out grounds.<sup>426</sup> This restriction made it impossible for the trial court or defense counsel to assess the jury’s bias in any meaningful way.

**2. The trial court allowed the prosecutor to ask fact-intensive questions. This disparate treatment amounts to a denial of due process.**

In *U.S. v. Fell*, the Vermont District Court recognized *Morgan* supported case-specific questions because “highly general questions may not be adequate to detect specific forms of juror bias.”<sup>427</sup> Thus, capital defendants should be allowed to ask

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<sup>421</sup> *State v. McMurtrey*, 136 Ariz. 93, 99 (1983)

<sup>422</sup> *State v. Skaggs*, 120 Ariz. 467, 470 (1978) (citing *Ristaino v. Ross*, 424 U.S. 589, 598 (1976)).

<sup>423</sup> *State v. Prince*, 226 Ariz. 516, ¶35 (2011) (citing *U.S. v. Fell*, 372 F.Supp.2d 766, 770 (D.Vt.2005)).

<sup>424</sup> *U.S. v. Fell*, 372 F.Supp.2d at 769, 771-72.

<sup>425</sup> RT-4/11/2016, 188.

<sup>426</sup> RT-4/12/2016, 230

<sup>427</sup> *U.S. v. Fell*, 372 F.Supp.2d at 769 (citing *Morgan*, 504 U.S. at 734-36).

case-specific questions about categories of mitigation and specific facts of the crime.<sup>428</sup>

This Court embraced *Fell* when applied to the prosecution in *State v. Prince*<sup>429</sup> and *State v. Garcia*.<sup>430</sup>

Yet, the same standard wasn't afforded to Jimmy.

The Supreme Court has rejected the application of double-standards during capital jury selection that creates a “tribunal of death” which deliberates as a “hanging jury.”<sup>431</sup> From *Witherspoon v. Illinois*,<sup>432</sup> to *Lockett v. Ohio*,<sup>433</sup> to *Wainwright v. Witt*,<sup>434</sup> to *Morgan v. Illinois*,<sup>435</sup> the Supreme Court has consistently required trial courts to conduct jury selection in a manner which permits both parties to assess juror impartiality.

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<sup>428</sup> *Fell*, 372 F.Supp.2d at 771-72.

<sup>429</sup> *State v. Prince*, 226 Ariz. 516, ¶¶33-35 (2011).

<sup>430</sup> *State v. Garcia*, 224 Ariz. 1, ¶¶12-16 (2010).

<sup>431</sup> *Witherspoon v. Illinois*, 391 U.S. 510, 521-23 (1968).

<sup>432</sup> *Witherspoon*, 391 U.S. at 518-23 (1968).

<sup>433</sup> *Lockett v. Ohio*, 438 U.S. 586, 595-97 (1978).

<sup>434</sup> *Wainwright v. Witt*, 469 U.S. 412, 424-25 (1985).

<sup>435</sup> *Morgan v. Illinois*, 504 U.S. 719, 739 (1992).

Yet, since *Morgan*, this Court has embraced confusion<sup>436</sup> which has led to disparate procedures during jury selection favoring the government’s ability to select a “tribunal organized to return a verdict of death.”<sup>437</sup>

Here, the trial court permitted the prosecutor to:

- Stake-out Juror 125.<sup>438</sup>
- Test the strength of its aggravation.<sup>439</sup>
- Ask a juror whether death could be appropriate “with the facts you have before you.”<sup>440</sup>
- Ask jurors to define “extreme” cases warranting death.<sup>441</sup>
- Tell Juror 57 “children aren’t involved.”<sup>442</sup>
- Ask Juror 311 about relative weight of mitigation.<sup>443</sup>
- Ask whether jurors could impose death for felony murder.<sup>444</sup>

Conversely, the court denied Jimmy any leeway to:

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<sup>436</sup> Compare *State v. Burns*, 237 Ariz. 1, ¶¶19-21 (2015); *Patterson*, 230 Ariz. 270, ¶¶5-13 (2012); *State v. Smith*, 215 Ariz. 221, ¶¶42-43 (2007); *State v. Johnson*, 212 Ariz. 425, ¶¶29-35 (2006); and *State v. Glassel*, 211 Ariz. 33, ¶¶37-46 *opinion corrected on denial of reconsideration*, 211 Ariz. 370, ¶¶37-46 (2005); with *Prince*, 226 Ariz. 516, ¶33; *Garcia*, 224 Ariz. 1, ¶16.

<sup>437</sup> *Witherspoon*, 391 U.S. at 521.

<sup>438</sup> RT-4/13/2016, 134-40, 142-45.

<sup>439</sup> RT-4/13/2016, 165, 171.

<sup>440</sup> RT-4/13/2016, 171.

<sup>441</sup> RT-4/12/2016, 74, 79, 81.

<sup>442</sup> RT-4/12/2016, 73.

<sup>443</sup> RT-4/14/2016 (morning), 39.

<sup>444</sup> RT-4/19/2016, 42-43.

- Ask about the facts of the case.<sup>445</sup>
- Ask what murders were “exceptions.”<sup>446</sup>
- Ask whether juror would impose death if the defendant knew the victim.<sup>447</sup>
- Ask if jurors could “think of any mitigating circumstances that would cause a juror to come off of [the] position” that death was always appropriate.<sup>448</sup>
- Ask whether juror could consider mitigation if the prosecutor introduced evidence of domestic violence.<sup>449</sup>
- Ask if jurors would automatically impose death upon a finding of guilty.<sup>450</sup>

The trial court also relied upon juror “demeanor” to strike jurors for cause despite attestations that they couldn’t be fair.<sup>451</sup>

The trial court didn’t give Jimmy equal opportunities and therefore violated Jimmy’s due process right.<sup>452</sup>

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<sup>445</sup> RT-4/11/2016, 188.

<sup>446</sup> RT-4/14/2016 (afternoon), 37-40.

<sup>447</sup> RT-4/14/2016, 47.

<sup>448</sup> RT-4/14/2016 (afternoon), 43.

<sup>449</sup> RT-4/12/2016, 200-03.

<sup>450</sup> RT-4/11/2016, 146-49; RT-4/12/2016, 228; RT-4/13/2016, 121.

<sup>451</sup> RT-4/12/2016, 92-98 (Juror 134); RT-4/13/2016, 147 (Juror 125).

<sup>452</sup> [Witherspoon](#), 391 U.S. at 523 fn.20.



### 3. The trial court abused its discretion.

Neither *State v. Patterson*,<sup>453</sup> *State v. Burns*,<sup>454</sup> *State v. Johnson*,<sup>455</sup> *State v. Prince*,<sup>456</sup> nor any other case prohibited questions about specific aggravating or mitigating factors to assess juror bias. Yet the court relied on *Patterson* to preclude Jimmy from asking case-specific questions.<sup>457</sup>

*Patterson* said a defense attorney couldn't "ask potential jurors what types of evidence they will consider to be mitigating," but can "ask whether the juror can imagine a situation where the totality of a defendant's character, including things he has endured or accomplished, could warrant mercy despite his crimes."<sup>458</sup>

The difference comes down to staking out. To assess whether a juror is willing to consider certain mitigation, the defendant must be allowed to ask some case-specific questions. This Court's precedent doesn't prohibit such questions. As *Fell* observed, "Generally when an appellate court holds that it was not reversible error to fail to ask a question, the appellate court is *not* holding that a trial court may never ask such questions."<sup>459</sup>

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<sup>453</sup> *Patterson*, 230 Ariz. 270 (cited at RT-4/12/2016, 227-28).

<sup>454</sup> *State v. Burns*, 237 Ariz. 1, ¶¶19-21 (2015) (cited at RT-4/12/2016, 83).

<sup>455</sup> *State v. Johnson*, 212 Ariz. 425, ¶¶29-35 (2006).

<sup>456</sup> *State v. Prince*, 226 Ariz. 516, ¶¶33-35 (cited at RT-4/12/2016, 91).

<sup>457</sup> RT-4/11/2016, 188.

<sup>458</sup> *Patterson*, 230 Ariz. 270, ¶¶8-9.

<sup>459</sup> *Fell*, 372 F.Supp.2d at 769-70.

#### **4. The time limitations were prejudicial and constitutional error.**

Jimmy's entitled to a fair jury regardless of whether there were "some 50 or 60 other capital cases,"<sup>460</sup> or 1,000 cases, pending. The trial court's comment shows these proceedings were rushed based on arbitrary considerations rather than Jimmy's rights.<sup>461</sup> The state's contention that voir dire time was reasonable conflicts with the prosecutor's position during selection.<sup>462</sup> This Court should reject the state's argument.<sup>463</sup>

#### ***Conclusion:***

For the reasons stated above, this Court should order a new trial.

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<sup>460</sup> RT-4/11/2016, 128.

<sup>461</sup> See U.S.Const. Amend. 6, 14; [Wolff v. McDonnell](#), 418 U.S. 539, 558 (1974).

<sup>462</sup> Compare AB 124-25 with RT-4/11/2016, 52, 103-05, 122-23, 127-30.

<sup>463</sup> [Knox v. Collins](#), 928 F.2d 657 (5th Cir. 1991)

**The trial court incorrectly denied Jimmy's motion to strike three jurors for cause.**

***Standard of Review:***

While both parties agree the applicable standard of review here is an abuse of discretion,<sup>464</sup> the state argues fundamental error is proper insofar as this Court looks at Jurors 56/1, 154/8, and 294/12.<sup>465</sup> However, Jimmy argued that because the court refused to strike Jurors 9, 31, and 59, Jimmy was unable to use his peremptory strikes to eliminate Jurors 56/1, 154/8, and 294/12.<sup>466</sup> This was a harm analysis. Abuse of discretion is the only standard.

The state further claims this argument was waived.<sup>467</sup> The argument wasn't waived because Jimmy set forth the review standard, law, and factual background required under Rule 31.10. Regardless, this Court authorized further development on Reply.

***Discussion:***

**1. The trial court abused its discretion.**

In a capital case, the trial court must discern juror bias and strike jurors whose bias “impair[s] the performance of his duties as a juror in accordance with his

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<sup>464</sup> OB 192; AB 125.

<sup>465</sup> AB 125.

<sup>466</sup> OB 193-94.

<sup>467</sup> AB 126.

instructions and his oath.”<sup>468</sup> A trial court abuses its discretion by applying the incorrect standard when assessing bias.<sup>469</sup> This includes relying upon general declarations of “fairness or impartiality.”<sup>470</sup>

Here, Jurors 9, 31, and 59 were biased but the trial court ignored the record and instead improperly relied on general declarations of fairness.<sup>471</sup>

**A. Juror 9 was biased.**

Juror 9 admitted bias favoring death upon a guilty verdict.<sup>472</sup> Juror 9 would also be “leaning” in favor of death during penalty phase.<sup>473</sup> After confirming they believed death was appropriate for “most first-degree murder cases,”<sup>474</sup> Juror 9 said they couldn’t fathom mitigation sufficiently substantial to warrant leniency.<sup>475</sup>

The state’s argument that Juror 9’s questionnaire established neutrality fails for two reasons. First, the questionnaire actually established a deep-rooted bias in favor of death.<sup>476</sup> Second, general assertions of impartiality of death-biased jurors are insufficient to rehabilitate the juror.<sup>477</sup>

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<sup>468</sup> [Wainwright v. Witt](#), 469 U.S. 412, 424 (1985).

<sup>469</sup> *See, e.g., State v. Peters*, 189 Ariz. 216, 218 (1997).

<sup>470</sup> [Morgan v. Illinois](#), 504 U.S. 719, 729, 735 (1992).

<sup>471</sup> RT-4/11/2016, 187.

<sup>472</sup> RT-4/11/2016, 150.

<sup>473</sup> RT-4/11/2016, 155.

<sup>474</sup> RT-4/11/2016, 156.

<sup>475</sup> RT-4/11/2016, 157, 164.

<sup>476</sup> Juror 9 Questionnaire Q77; Q81; Q90.

<sup>477</sup> [Morgan](#), 504 U.S. at 729, 735.

**B. Juror 31 was biased.**

Juror 31 said they would vote for the death penalty in most cases,<sup>478</sup> lean toward death after a guilty verdict,<sup>479</sup> and couldn't fathom mitigation that would warrant life.<sup>480</sup> Juror 31's questionnaire also reflected bias.<sup>481</sup>

**C. Juror 59 was biased.**

Juror 59 also "could not imagine ... a reason to not ... elect for the death penalty."<sup>482</sup> Juror 59's questionnaire also revealed bias.<sup>483</sup>

**2. The trial court's errors prejudiced Jimmy.**

Jimmy was prejudiced by the court's refusal to strike Jurors 9, 31, and 59 because he couldn't strike Jurors 56, 154, and 294.<sup>484</sup>

Prior to 2003, a criminal defendant was entitled to a new trial if the trial court erroneously denied a motion to strike for cause.<sup>485</sup> In *State v. Huerta*, this Court recognized that application of harmless-error review would result in a "Hobson's

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<sup>478</sup> RT-4/11/2016, 167.

<sup>479</sup> RT-4/11/2016, 168.

<sup>480</sup> RT-4/11/2016, 168.

<sup>481</sup> Juror 31 Questionnaire at Q75; Q76; Q77.

<sup>482</sup> RT-4/11/2016, 176.

<sup>483</sup> Juror 59 Questionnaire at Q21; Q33; Q60; Q66; Q75; Q80; Q93.

<sup>484</sup> OB 193.

<sup>485</sup> *State v. Huerta*, 175 Ariz. 262, 265-67 (1993) overruled on these grounds by *State v. Hickman*, 205 Ariz. 192, ¶39 (2003).

choice,” wherein the parties would be incentivized to “place a premium on gamesmanship.”<sup>486</sup>

Ten years later, *State v. Hickman*<sup>487</sup> relied upon a series of false premises to overrule the automatic prejudice rule set forth in *Huerta*.<sup>488</sup>

As Justice Bolick has noted, Arizona’s state constitutional jurisprudence has largely been developed on an ad hoc basis with few guiding principles.<sup>489</sup> In all, *Hickman* is just another example of a state Supreme Court abandoning the diversity of state constitutional law in favor of rigid adherence to non-binding federal authority.<sup>490</sup>

Arizona’s unique constitutional guarantee of the right to a jury supports the *Huerta* standard. While [Article 2, §24](#) contains language similar to the [Sixth Amendment](#), [Article 2, §23](#) provides: “The right of trial by jury shall remain inviolate.”<sup>491</sup> It therefore makes sense that [A.R.S. §21-211](#) mandates dismissal of biased jurors “to promote public confidence in the judicial system.” This isn’t a discretionary choice.

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<sup>486</sup> *Huerta*, 175 Ariz. at 265-67 (citing *Lewis v. U.S.*, 146 U.S. 370, 376 (1892)).

<sup>487</sup> *State v. Hickman*, 205 Ariz. 192, ¶¶9-14, 32, 39-40 (2003).

<sup>488</sup> *Huerta*, 175 Ariz. at 267.

<sup>489</sup> Clint Bolick, [The Unused Toolbox: Forging a Dynamic Future for Arizona’s Constitution](#), Arizona Attorney Magazine (Oct. 2018).

<sup>490</sup> See generally Jeffrey S. Sutton, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (Oxford Univ. Press 2018).

<sup>491</sup> [Ariz.Const. Art. 2, §23](#); see also [Ariz.Const. Art. 6, §17](#).

This Court should recognize that, at least when a defendant's life is at stake,<sup>492</sup> reversal is required under the Arizona Constitution where the trial judge erroneously denies a motion to strike a juror for cause.

***Conclusion:***

Because the trial court errantly denied three of Jimmy's motions to strike jurors (or any one) and those decisions negatively impacted Jimmy's ability to exercise peremptory strikes in a meaningful manner, this Court should order a new trial. Alternatively, this Court should grant relief because Jimmy has established prejudice.

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<sup>492</sup> See *U.S. v. French*, 904 F.3d 111, 120 (1st Cir. 2018).

**The trial court improperly denied Jimmy’s motion to strike Juror 6.**

***Standard of Review:***

**Review:** The state’s argument that an abuse of discretion standard applies should be rejected because the cases the state relies upon are jury selection cases.<sup>493</sup> Because the juror’s bias here was uncovered after the juror had been selected, Jimmy maintains that the presence of a biased fact-finder constitutes structural error.<sup>494</sup>

However, even if this Court applies an abuse of discretion standard, the insufficient investigation warrants relief.<sup>495</sup>

**Deference:** The state argues Juror 6 didn’t become biased by “[b]ecoming a crime victim partway into the trial.”<sup>496</sup>

Due process requires that a trial court undertake an investigation when confronted with a claim of juror bias.<sup>497</sup> Neither the First nor Ninth Circuits afford deference when the inquiry into bias is insufficient.<sup>498</sup>

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<sup>493</sup> AB 132 (citing *State v. Cruz*, 218 Ariz. 149, ¶28 (2008); *State v. Glassel*, 211 Ariz. 33, ¶46 (2005)).

<sup>494</sup> OB 195 (citing *Tumey v. Ohio*, 273 U.S. 510, 535 (1927); *Estrada v. Scribner*, 512 F.3d 1227, 1235 (9th Cir. 2008)).

<sup>495</sup> *U.S. v. Ramirez-Rivera*, 800 F.3d 1, 38 (1st Cir. 2015).

<sup>496</sup> AB 134.

<sup>497</sup> *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

<sup>498</sup> *Ramirez-Rivera*, 800 F.3d at 38; *Dyer v. Calderon*, 151 F.3d 970, 974 (9th Cir. 1998).



Here, the court refused to investigate the relevant background. Therefore, this Court shouldn't afford any deference.

***Discussion:***

**1. The trial court failed to conduct an adequate inquiry into Juror 6's bias.**

The only reason the court became aware of this issue was because Juror 6 asked court staff about her daughter's case.<sup>499</sup> The court never inquired into this exchange beyond a superficial level.<sup>500</sup> The court never asked Juror 6 about:

- the nature of the case;
- the extent of Juror 6's, or her daughter's, contact with law enforcement or the prosecution;
- how or why Juror 6 didn't learn of the case until May.<sup>501</sup>

Rather, the court told the juror she wasn't required to "volunteer" information.<sup>502</sup> The court apologized eight times but didn't explain why apology was necessary.<sup>503</sup> The apology compounded the bias by conveying improper views regarding the presumption of innocence and the impact of the other case. Whomever the accused in the other case is, they are presumed innocent.<sup>504</sup> The apologies reflected a court bias favoring the prosecution.

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<sup>499</sup> RT-6/28/2016, 4.

<sup>500</sup> RT-6/28/2016, 6-11.

<sup>501</sup> RT-6/28/2016, 6-11.

<sup>502</sup> RT-6/28/2016, 7.

<sup>503</sup> RT-6/28/2016, 7-10, 17.

<sup>504</sup> See [Kentucky v. Whorton](#), 441 U.S. 786, 788 (1979).

Instead of inquiring, the court relied upon Juror 6's attestations of impartiality<sup>505</sup> and answers provided in a questionnaire completed months prior.<sup>506</sup> Given the trial court's limited inquiry, this Court shouldn't afford the trial court's ruling any amount of deference.<sup>507</sup>

## **2. Juror 6 was biased.**

Juror 6 didn't tell anyone her daughter was a victim in an open case prosecuted by the MCAO for a month.<sup>508</sup> Juror 6 also implicitly conceded she was getting information about her daughter's case during court and that she left her cell phone in the jury room to avoid distractions.<sup>509</sup>

Despite the juror's attestations of impartiality and attention, the record establishes the juror was concerned about the other case throughout this trial.<sup>510</sup>

### ***Conclusion:***

This Court should reverse the convictions and remand for a new trial.<sup>511</sup>

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<sup>505</sup> RT-6/28/2016, 6-11.

<sup>506</sup> RT-6/28/2016, 4-5.

<sup>507</sup> *Ramirez-Rivera*, 800 F.3d at 38; *Phillips*, 455 U.S. at 217; *Remmer v. U.S.*, 350 U.S. 377, 379 (1956).

<sup>508</sup> RT-6/28/2016, 4, 8.

<sup>509</sup> RT-6/28/2016, 9.

<sup>510</sup> RT-6/28/2016, 9, 10.

<sup>511</sup> See *Tumey v. Ohio*, 273 U.S. 510, 535 (1927); *Estrada v. Scribner*, 512 F.3d 1227, 1235 (9th Cir. 2008).

**The lower court improperly gave Rule 106 preclusive effect.**

***Standard of Review:***

The state argues this issue was waived. While the issue was briefed efficiently, it wasn't underdeveloped under Rule 31.10. Because *State v. Bolton*—which the state relies upon—predated *Ring* and jury sentencing, the bulk of issues that arise in capital appellate practice were nonexistent when *Bolton* was decided.<sup>512</sup> Moreover, *Bolton* predated the 2003 [ABA Guidelines for Capital Defense](#), which changed capital appellate practice relating to winnowing.<sup>513</sup>

Regardless, this Court authorized supplementation.

***Discussion:***

Both parties agree Rule 106 is premised upon fairness and can require the introduction of portions of a statement needed to contextualize other evidence.<sup>514</sup> It is a rule of inclusion, not exclusion.<sup>515</sup>

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<sup>512</sup> See AB 135 (discussing *State v. Bolton*, 182 Ariz. 290, 298 (1995)).

<sup>513</sup> See [ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases](#), Guideline 10.15.1.C and commentary (2003); [Ariz.R.Crim.P. 6.8\(a\)\(5\)](#).

<sup>514</sup> See AB 136-37 (citing *State v. Cruz*, 218 Ariz. 149, ¶58 (2008)).

<sup>515</sup> *State v. Prasertphong*, 210 Ariz. 496, ¶¶14-15 (2005); *State v. Steinle in and for the County of Maricopa (Moran)*, 239 Ariz. 415, ¶6 (2016).

That's not what the court did. For example, defense counsel asked criminalist Legg, "So how long were you not allowed to analyze samples?"<sup>516</sup> The prosecutor didn't like the question and asserted it was misleading.<sup>517</sup>

Later, defense counsel asked Legg, "isn't it true that there was a period of time where you were unable to start any new case work?"<sup>518</sup> After a sustained objection including Rule 106, counsel rephrased the question as, "do you recall that the immediate action taken was that no new case work was to be started by you based on that?"<sup>519</sup> Again, the court sustained a Rule 106 objection.<sup>520</sup>

Counsel hadn't introduced a statement that needed to be completed; they asked a question regarding sanctions. Rule 106 didn't even apply. Because of the court's rulings, defense counsel was never able to ask whether part of Legg's punishment included a prohibition against new work.

### ***Conclusion:***

Because, the error cannot be deemed harmless, this Court should order a new trial.

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<sup>516</sup> RT-5/11/2016, 40-41.

<sup>517</sup> *Id.* at 41.

<sup>518</sup> *Id.* at 100.

<sup>519</sup> *Id.* at 101.

<sup>520</sup> *Id.*

**Jimmy’s conviction was tainted by prosecutorial misconduct.**

***Standard of Review:***

The state claims Jimmy “admits he failed to object at trial to the instances of alleged misconduct.”<sup>521</sup>

An error is preserved when there is an objection; where there is no objection, the claim is reviewed for fundamental error.<sup>522</sup>

Jimmy’s broader standard is proper because several issues were raised in Cumulative Error. For the primary issue—misstatement of DNA evidence—Jimmy “timely objected and the trial court overruled the objections ....”<sup>523</sup> The error was preserved

***Discussion:***

**1. The prosecutor repeatedly misstated the DNA evidence.**

**A. The prosecutor improperly misrepresented the DNA evidence during examination and closing argument. The state’s brief makes the same error as the improper argument.**

Jimmy showed that the prosecutor—Kristin Larish—repeatedly misrepresented the DNA evidence as a “match” and “the Defendant’s DNA” both

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<sup>521</sup> AB 137.

<sup>522</sup> *State v. Roque*, 213 Ariz. 193, ¶154 (2006).

<sup>523</sup> OB 202.

“through two witnesses” and “during closing.”<sup>524</sup> The state addresses only the closing argument,<sup>525</sup> where prosecutors have wide latitude.<sup>526</sup>

The prosecutor’s mischaracterization of DNA evidence persists on appeal, where the state asserts “Johnson’s profile was the ‘major profile’” on the zip ties.<sup>527</sup> But criminalist Placko testified the DNA profile from the zip ties matched Jimmy “at ten loci.”<sup>528</sup> DNA is measured at 16 loci.<sup>529</sup>

Concerning minor contributions, Larish incorrectly asserted “the defendant’s DNA is there. When you remove all of [X.F.]’s DNA the defendant’s DNA remains and up to five locations.”<sup>530</sup>

On cross, criminalist Legg testified she sent a letter to Detective Denning that said it wasn’t possible “to include or exclude [Jimmy] on the second set of zip ties.”<sup>531</sup> On redirect, she explained she needed more information to determine if Jimmy was the minor contributor.<sup>532</sup>

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<sup>524</sup> OB 199-202.

<sup>525</sup> AB 138-40.

<sup>526</sup> *See id.*

<sup>527</sup> AB 139.

<sup>528</sup> RT-5/11/2016, 182.

<sup>529</sup> *Id.* at 10.

<sup>530</sup> RT-5/16/2016, 33 (quoted at AB 139).

<sup>531</sup> RT-5/11/2016, 130-31.

<sup>532</sup> *Id.* at 132.

Larish asked a clarification question, to which Legg answered, “He is a minor contributor in this.”<sup>533</sup> The defense objected and Ms. Legg, seeing the problem, offered to restate.<sup>534</sup> The court, however, didn’t understand the DNA evidence and overruled the objection without explanation.<sup>535</sup>

Larish then asked, “the defendant, at 4 to 5 loci ... can be included as ... the minor contributor; correct?”<sup>536</sup> The defense again objected and the court again overruled.<sup>537</sup> Ms. Legg was careful in her response: “at the locations in question on this set of zip ties, the numbers that remain when we remove the victim’s numbers are numbers that are also in Mr. Johnson’s profile.”<sup>538</sup>

When the defense tried to explain that a match at 4-5 loci is inconclusive, the prosecutor objected and argued, “The defendant’s DNA is at five locations.”<sup>539</sup> Jimmy’s attorneys tried to set right the issue,<sup>540</sup> but the court advised the defense “I think the best you can hope for is—she testified to whatever she testified to.”<sup>541</sup>

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<sup>533</sup> *Id.* at 133.

<sup>534</sup> *Id.*

<sup>535</sup> *Id.*

<sup>536</sup> *Id.*

<sup>537</sup> *Id.* at 133.

<sup>538</sup> *Id.* at 133-34.

<sup>539</sup> *Id.* at 151.

<sup>540</sup> *Id.* at 152-53.

<sup>541</sup> *Id.* at 154.

When the defense clarified their intent, Larish interjected, “But he cannot say that the defendant’s DNA is not on there. His DNA is on there.”<sup>542</sup>

That was the problem identified by the defense: “And she cannot say that it is. Because this witness says if you cannot exclude him or include him, how can you say that his DNA is on those zip ties, if you cannot include him or exclude him as a match?”<sup>543</sup>

The prosecutor claimed this was false and accused defense counsel of “misinterpreting the information to the Court” because the defendant was “at four locations. It’s a fact.”<sup>544</sup>

Again illustrating a misunderstanding of how DNA evidence works, the court sustained the objection but allowed the defense to ask, “just to be clear, Mr. Johnson cannot be included or excluded on the zip ties from the victim’s wrists; correct?”<sup>545</sup> Contrary to Larish’s insistence, the witness answered, “Correct.”<sup>546</sup>

The scene repeated itself with the next witness, criminalist Placko.<sup>547</sup>

Neither Legg nor Placko testified the DNA on the zip ties was Jimmy’s; they testified the DNA profile found on the zip ties was consistent with Jimmy’s profile

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<sup>542</sup> *Id.*

<sup>543</sup> *Id.* at 154-55.

<sup>544</sup> *Id.* at 155.

<sup>545</sup> *Id.*

<sup>546</sup> *Id.*

<sup>547</sup> *Id.* at 182-84.



at a certain number of locations. But with the court’s incorrect ruling, the prosecutor bolstered the weight of the DNA evidence during testimony and closing.<sup>548</sup>

The state’s analysis on this issue is inadequate. Jimmy cited three cases that found this conduct improper:

- Minnesota Supreme Court: [State v. Bloom](#);<sup>549</sup>
- Maryland Court of Appeals: [Whack v. State](#);<sup>550</sup>
- Kentucky Supreme Court: [Duncan v. Commonwealth](#).<sup>551</sup>

The state only addresses *Duncan*.

The state asserts *Duncan* “involved cross-examination, not closing argument.”<sup>552</sup> But *Duncan* dealt with the prosecutor’s closing argument.<sup>553</sup> So did *Whack*,<sup>554</sup> which the state ignores. The concerns in these cases mirror the concerns expressed regarding forensic sciences generally.<sup>555</sup> Moreover, the misconduct here occurred during both examination and argument.

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<sup>548</sup> RT-5/16/2016, 108-09.

<sup>549</sup> [State v. Bloom](#), 516 N.W.2d 159, 169 (Minn. 1994).

<sup>550</sup> [Whack v. State](#), 73 A.3d 186, 195-202 (Md.App. 2013).

<sup>551</sup> [Duncan v. Commonwealth](#), 322 S.W.3d 81 (Ky. 2010).

<sup>552</sup> AB 139-40.

<sup>553</sup> [Duncan](#), 322 S.W.3d at 91-93.

<sup>554</sup> [Whack](#), 73 A.3d at 202.

<sup>555</sup> See National Academy of Sciences, [Strengthening Forensic Science in the United States](#), 4 (2009); President’s Council of Advisors on Science and Technology, [Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods](#), 23, 29 (2016).

**B. The error harmed Jimmy.**

The state next argues the error wasn't prejudicial.<sup>556</sup> Because this error was preserved, prejudice isn't the standard.<sup>557</sup>

*Duncan* observed, "jurors are apt to" give DNA evidence "immense weight."<sup>558</sup> The impact of the misrepresentation was substantial. The "eye witnesses" couldn't make an identification and<sup>559</sup> the only other evidence connecting Jimmy with the scene was circumstantial. There is no way to determine beyond a reasonable doubt that the prosecutor's misstatement had no impact on the guilty verdict.<sup>560</sup>

Prosecutor Larish misrepresented the weight of the DNA evidence by claiming there was a "match" when there wasn't. Because jurors give DNA evidence tremendous weight and the other evidence connecting Jimmy to the murder was weak, the error wasn't harmless. Accordingly, this Court should follow the lead of Minnesota, Maryland, and Kentucky, and find Larish committed harmful misconduct and order a new trial.

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<sup>556</sup> AB 140.

<sup>557</sup> See *Roque*, 213 Ariz. 193, ¶154.

<sup>558</sup> *Duncan*, 322 S.W.3d at 93; accord *Whack*, 73 A.3d at 197-98 (citing Joel Lieberman, et. al., *Gold Versus Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared to Other Types of Forensic Evidence?*, 14 Psychol. Pub. Pol'y & L. 27, 32 (2008)).

<sup>559</sup> RT-4/21/2016, 114, 128 (Weathers), 158-59, 171 (Pearce).

<sup>560</sup> See *State v. Henderson*, 210 Ariz. 561, ¶18 (2005).

## 2. Additional claims allowed in Reply.

### A. Withholding evidence in violation of *Brady v. Maryland*.<sup>561</sup>

The lower court found the prosecutor violated Rule 15.1<sup>562</sup> but awaited trial to determine the sanction.<sup>563</sup> After trial, the court imposed no sanction.<sup>564</sup>

A sanction should have been imposed in light of the misconduct.

### B. Improperly taking advantage of trial court rulings and arguing no evidence existed where evidence was precluded.

It is improper for a prosecutor to misstate the evidence and an intentional misstatement is “a serious breach of the prosecutor’s duty.”<sup>565</sup>

This prosecutor repeatedly suggested the lack of evidence was a shortcoming when, in reality, it was a product of preclusion:

- Larish argued Jimmy’s allocation was inadequate<sup>566</sup> when the prosecution had obtained limits on allocation.<sup>567</sup>
- Larish attacked Jimmy’s Columbine evidence,<sup>568</sup> but Jimmy’s presentation was hamstrung by limitations obtained by the prosecutor.<sup>569</sup>

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<sup>561</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>562</sup> RT-8/10/2012, 19, 21, 26, 27-28, 32, 35-36, 41-43; RT-10/1/2012, 3.

<sup>563</sup> RT-10/1/2012, 1, 6, 9.

<sup>564</sup> RT-6/20/2016, 72-75.

<sup>565</sup> *State v. Cannon*, 148 Ariz. 72, 77 (1985); see also *State v. Roque*, 213 Ariz. 193, ¶161 (2006), abrogated on other grounds by *State v. Escalante-Orozco*, 241 Ariz. 254, ¶¶13-14 (2017); *In re Zawada*, 208 Ariz. 232, ¶14 (2004).

<sup>566</sup> RT-6/27/2016 (morning), 25.

<sup>567</sup> See RT-6/21/2016, 85-88.

<sup>568</sup> RT-5/26/2016, 60; RT-6/27/2016 (morning), 22, 24; RT-6/27/2016 (afternoon), 31, 33.

<sup>569</sup> See I.379; RT-3/30/2016, 55 (precluding personal stories); RT-5/23/2016, 8.

- Larish argued timing of Jimmy’s apology didn’t justify leniency,<sup>570</sup> but timing was due to trial schedule.

In *People v. Daggett*,<sup>571</sup> the California Court of Appeals held it was improper to take advantage of a trial court’s rulings so as to mislead the jury.<sup>572</sup> Like *Daggett*, this prosecutor took advantage of court rulings and the trial schedule to mislead the jury.

### C. Misstating the law.

“The state may not misstate the law to the jury.”<sup>573</sup> Here, Larish incorrectly argued the jury had to determine if a single mitigator was sufficiently substantial to call for leniency.<sup>574</sup> Mitigation is considered in its totality.<sup>575</sup>

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<sup>570</sup> RT-6/27/2016 (morning), 25.

<sup>571</sup> *People v. Daggett*, 225 Cal.App.3d 751 (Cal.App. 1990).

<sup>572</sup> *Id.* at 757-58.

<sup>573</sup> *State v. Serna*, 163 Ariz. 260, 266 (1990) (citing *State v. Tims*, 143 Ariz. 196, 200 (1985) and *State v. Daymus*, 90 Ariz. 294, 303-04 (1961)).

<sup>574</sup> See RT-6/27/2016 (morning), 60-61.

<sup>575</sup> *Boyde v. California*, 494 U.S. 370, 377-78 (1990) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)); *Smith v. McCormick*, 914 F.2d 1153, 1168 (9th Cir. 1990); *State v. Chappell*, 225 Ariz. 229, ¶¶45-46 (2010).

**D. Shifting the burden of proof.**

The prosecution must prove beyond a reasonable doubt every element of the crime.<sup>576</sup> Other courts have reversed when a prosecutor suggests a defendant should have called a witness to prove his innocence.<sup>577</sup>

Here, prosecutor Larish argued without objection “that if what the defense is arguing to you is true there would be evidence to support those claims and there’s an overwhelming lack of any evidence that anyone, other than the defendant, committed these crimes.”<sup>578</sup>

**E. Commenting on Jimmy’s invocation of his right to remain silent.**

“[C]omment on the refusal to testify is a remnant of the ‘inquisitorial system of criminal justice,’ which the [Fifth Amendment](#) outlaws.”<sup>579</sup>

First, prosecutor Larish compared the victim’s statement with Jimmy’s.<sup>580</sup> However, Jimmy’s allocution had to be limited in order to preserve his right to remain silent.<sup>581</sup>

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<sup>576</sup> U.S. Const. Amend. 5; *In re Winship*, 397 U.S. 358, 364 (1970); *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993).

<sup>577</sup> *U.S. v. Arendale*, 444 F.2d 1260, 1266 (5th Cir. 1971); *People v. Murray*, 64 A.D.2d 916, 916-17 (N.Y. 1978).

<sup>578</sup> RT-5/16/2016, 114-15.

<sup>579</sup> *Griffin v. California*, 380 U.S. 609, 614 (1965) (internal quotation omitted); see also *State v. Schrock*, 149 Ariz. 433, 438 (1986).

<sup>580</sup> RT-6/27/2016 (morning), 22.

<sup>581</sup> See *id.* at 85-88.

Second, Larish repeatedly commented on the shortcoming of the allocution.<sup>582</sup> Given the context, Jimmy was the only person who could have filled the gap the prosecutor demanded.

**F. Impugning integrity of defense.**

Impugning defense counsel is improper.<sup>583</sup> Here, Larish baselessly and regularly disparaged defense counsel by accusing them of acting improperly.<sup>584</sup> Larish further assigned false arguments to the defense,<sup>585</sup> lodged ad hominem attacks in their direction,<sup>586</sup> and literally shamed the defense.<sup>587</sup> Defense counsel objected but the court overruled.<sup>588</sup>

**G. Improperly arguing inferences and conclusions during openings.**

“Opening statement is not a time to argue the inferences and conclusions that may be drawn from evidence not yet admitted.”<sup>589</sup> Prosecutor Larish twice argued inferences and conclusions during opening statement.<sup>590</sup> Jimmy objected to both:

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<sup>582</sup> RT-6/27/2016 (afternoon), 26, 33.

<sup>583</sup> [State v. Hughes](#), 193 Ariz. 72, ¶59 (1998).

<sup>584</sup> RT-4/28/2016, 21-23; RT-5/2/2016, 4, 17-18, 22-23; RT-5/11/2016, 41-45, 49, 72-74, 89; RT-5/16/2016, 54-55; RT-5/24/2016, 66-88; 5/25/2016, 4, 62, 73; RT-5/26/2016, 129-31, 134-35; RT-6/2/2016, 118-23.

<sup>585</sup> *Id.* at 67.

<sup>586</sup> RT-5/16/2016, 51-52, 53, 54, 65, 66, 111-13, 16.

<sup>587</sup> *Id.* at 103.

<sup>588</sup> *Id.*

<sup>589</sup> [State v. Bible](#), 175 Ariz. 549, 602 (1993) (internal citation omitted).

<sup>590</sup> RT-4/20/2016, 36, 49.

one was overruled,<sup>591</sup> one was sustained.<sup>592</sup> At least one improper argument<sup>593</sup> had an impact during closing argument.<sup>594</sup>

#### **H. Vouching by placing weight of government behind victims.**

“The first type of vouching involves personal assurances of a witness’s veracity.”<sup>595</sup> Here, prosecutor Larish personally assured witness veracity on at least two occasions.<sup>596</sup> Larish’s vouching through personal assurance also permeated her arguments to the trial court.<sup>597</sup> This was also repeatedly seen in the prosecutor’s use of “we know” statements<sup>598</sup>—a practice Ms. Larish previously engaged in and this Court found “concerning” in [State v. Acuna Valenzuela](#).<sup>599</sup>

This was particularly prevalent during the aggravation phase when the (F)(6) especially cruel, heinous, or depraved argument often devolved into a prosecutorial

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<sup>591</sup> *Id.* at 36.

<sup>592</sup> *Id.* at 49.

<sup>593</sup> *Id.* at 36.

<sup>594</sup> See RT-6/27/2016(morning), 20.

<sup>595</sup> [State v. King](#), 180 Ariz. 268, 277 (1994) (quoting [U.S. v. Roberts](#), 618 F.2d 530, 533 (9th Cir. 1980)).

<sup>596</sup> RT-6/27/2016 (morning), 23; RT-6/27/2016 (morning), 23.

<sup>597</sup> RT-5/10/2016, 7; RT-5/11/2016, 73; RT-6/15/2016 (morning), 38-39, 77; RT-6/21/2016, 99.

<sup>598</sup> See RT-5/16/2016, 6, 8, 16, 26, 28, 29, 31, 32, 35, 36, 37, 38, 39 (also includes a “we said”), 42, 44, 106, 107, 114; RT-5/25/2016, 58, 59, 61, (including using “we know” to place jurors in position of victim), 62, 72, 73, 74, 77, 93, 95, 99; RT-6/27/2016(afternoon), 7, 8, 9, 12, 14, 20.

<sup>599</sup> See [State v. Acuna Valenzuela](#), 245 Ariz. 197, ¶85 (2018); [CR2011-140108-001 ME 8/25/2014](#) (noting Kristin Larish as prosecutor).

assurance that “we know” the murder was especially cruel, heinous, or depraved.<sup>600</sup> And it was present in the mitigation phase when her argument regarding significant impairment devolved into an assurance that “We know the defendant knows right from wrong because look at his criminal history,”<sup>601</sup> or “We know he knew right from wrong because of all that he did once inside the Taiwan Massage to try and cover up the fact that he was there,”<sup>602</sup> or “We know the defendant knew right from wrong at the time of the Christmas tree armed robbery.”<sup>603</sup>

Personal assurance was an ongoing argument strategy for the prosecutor. And that strategy was used to convince the jury to trust her opinion—as an agent of the state—of the victims’ credibility.

**I. Vouching by implying facts not in evidence supported state’s desired verdicts.**

“The second type of vouching involves prosecutorial remarks that bolster a witness’s credibility by reference to matters outside the record.”<sup>604</sup> Here, Larish twice suggested evidence outside the record supported the verdict she requested.<sup>605</sup> The “we know” statements discussed in the prior section also suggest outside

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<sup>600</sup> RT-5/25/2016, 95; *see also id.* at 59, 61, 72, 74, 77, 99.

<sup>601</sup> RT-6/27/2016(afternoon), 8.

<sup>602</sup> RT-6/27/2016(afternoon), 9.

<sup>603</sup> RT-6/27/2016(afternoon), 12.

<sup>604</sup> *King*, 180 Ariz. at 277 (quoting *Roberts*, 618 F.2d at 533); *see also State v. Leon*, 190 Ariz. 159, 161-63 (1997).

<sup>605</sup> RT-5/16/2016, 55 (suggesting process supported conviction); RT-6/27/2016 (morning), 20 (suggesting use of interpreter supported victim credibility).



knowledge. The error was fundamental; each argument encouraged the jury to rest its decisions on government assurances and could've impacted the verdict.

**J. Appealing to fears and sympathy.**

Prosecutors may not “appeal to the passions and fears of the jury.”<sup>606</sup> Here, without objection, Larish repeatedly advanced aggravation phase arguments during the guilt phase.<sup>607</sup>

**K. Encouraging jury to use verdict to send message.**

It is uniquely improper to encourage the jury to use its verdict to send a message or to express societal outrage.<sup>608</sup> Prosecutor Larish linked the jury to their “civic responsibility”<sup>609</sup> and encouraged the jury to express society’s “disgust” and “moral outrage” in its sentence.<sup>610</sup>

**L. Improperly seeking to inflame the jury.**

This Court looks to “(1) whether the remarks call to the attention of the jurors matters that they would not be justified in considering in determining their verdict,

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<sup>606</sup> *State v. Comer*, 165 Ariz. 413, 426 (1990); accord *State v. Moody*, 208 Ariz. 424, ¶¶149-50 (2004); *State v. Hughes*, 193 Ariz. 72, ¶70 (1998); *State v. Mincey*, 115 Ariz. 472, 483-84 (1977), reversed on other grounds by *Mincey v. Arizona*, 437 U.S. 385 (1978).

<sup>607</sup> RT-5/16/2016, 28, 53, 115.

<sup>608</sup> *State v. Turrentine*, 152 Ariz. 61, 67 (App. 1986); see also *U.S. v. Runyon*, 707 F.3d 475, 514 (4th Cir. 2013); *Sinisterra v. U.S.*, 600 F.3d 900, 910 (8th Cir. 2010).

<sup>609</sup> RT-6/27/2016 (morning), 5.

<sup>610</sup> *Id.* at 12 (disgust); RT-6/27/2016 (afternoon), 52 (moral outrage).

and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks.”<sup>611</sup>

Larish repeatedly used inflammatory language designed to taint the jury: “grotesque,”<sup>612</sup> “brutal,”<sup>613</sup> “bizarre” (objection as argumentative denied),<sup>614</sup> “horrific,”<sup>615</sup> “violent,”<sup>616</sup> “severely,”<sup>617</sup> “terribly,”<sup>618</sup> “vicious,”<sup>619</sup> “ceremoniously,”<sup>620</sup> “speeding away.”<sup>621</sup> Larish also sought to inflame the jury when she characterized the defense witnesses as having an agenda and bias.<sup>622</sup>

Larish attempted to tarnish the defense and its witnesses by telling the jury “the problem with all of the evidence the defendant wants and needs you believe is that a lot of it” wasn’t only untrue, but that it was “presented in a way to make you feel responsible that the defendant is now found guilty of first degree murder with circumstances ... that you found ....”<sup>623</sup>

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<sup>611</sup> *State v. Jones*, 197 Ariz. 290, ¶37 (2000) (quoting *State v. Hansen*, 156 Ariz. 291, 296-97 (1988)).

<sup>612</sup> RT-4/20/2016, 35.

<sup>613</sup> *Id.*

<sup>614</sup> *Id.* at 36.

<sup>615</sup> *Id.*

<sup>616</sup> *Id.* at 38, 47, 50.

<sup>617</sup> *Id.* at 39.

<sup>618</sup> *Id.* at 47.

<sup>619</sup> *Id.*

<sup>620</sup> *Id.* at 49.

<sup>621</sup> *Id.* at 52.

<sup>622</sup> RT-5/26/2016, 53.

<sup>623</sup> RT-6/27/2016 (afternoon), 4.

### 3. Cumulative Error.

This Court’s “focus is on the fairness of the trial, not the culpability of the prosecutor.”<sup>624</sup> However, a prosecutor’s intent or indifference is relevant to prove errors weren’t accidental.<sup>625</sup>

Several circumstances support cumulative error:

- Larish committed several instances of misconduct.
- Larish’s misconduct spanned through all phases.
- Larish is an experienced prosecutor. This is particularly important for the DNA issue as an experienced prosecutor would have understood the nature of DNA testing.
- Prosecutor Larish has a history of misconduct, addressed in *State v. Acuna Valenzuela*<sup>626</sup> and *State v. Patterson*.<sup>627</sup>

This Court should reverse the conviction and sentence and order a new trial.

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<sup>624</sup> *State v. Bible*, 175 Ariz. 549, 601 (1993).

<sup>625</sup> See *In re Peasley*, 208 Ariz. 27, ¶40 (2004); *In re Zawada*, 208 Ariz. 232, ¶22 (2004); *State v. Minnitt*, 203 Ariz. 431, ¶37 (2002); *State v. Jorgenson*, 198 Ariz. 390, ¶14 (2000).

<sup>626</sup> See *State v. Acuna Valenzuela*, 245 Ariz. 197, ¶85 (2018); [CR2011-140108-001 ME 8/25/2014](#) (noting Kristin Larish as prosecutor).

<sup>627</sup> *State v. Patterson*, 230 Ariz. 270, ¶¶19-25 (2012); *Patterson* Supp. Br., 2011 WL 9106033, \*27, \*43, \*59 (noting Kristin Larish as prosecutor); [CR2006-114651-001 ME 11/30/2009](#) (same).

**Issues preserved for Federal review.**

Jimmy stands on his Opening Brief.

**Respectfully Submitted** on April 3, 2019.

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# Appendix F

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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**

STATE OF ARIZONA,

No. CR2010-048824-001 DT

Plaintiff,

**MOTION TO DISMISS  
THE DEATH PENALTY  
(*Furman* Motion)**

v.

**(JOINT EVIDENTIARY HEARING  
AND  
ORAL ARGUMENT REQUESTED)**

**JAMES CLAYTON JOHNSON,**

Defendant.

(Honorable Margaret Mahoney)  
(Honorable Joseph Kreamer)

Mr. Johnson, through counsel, moves this Honorable Court to find A.R.S. §13-751 unconstitutional because it permits the state to impose the death penalty in an arbitrary and capricious manner, in violation of the 8<sup>th</sup> and 14<sup>th</sup> Amendments of the United States Constitution and Article II §13 and Article IV Part 2 § 19(7) of the Arizona Constitution. He supports this Motion with the following Memorandum.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of February, 2013.

BRUCE F. PETERSON  
LEGAL ADVOCATE

By /s/ Peter Jones  
Robert E. Reinhardt  
Peter Jones  
Deputies Legal Advocate

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**Executive Summary**

Mr. Johnson is charged with First Degree Murder and the State seeks the death penalty. This motion to Dismiss the death allegation is a challenge directed at the unconstitutionality of A.R.S. 13-751 and is identical in its legal issues with those raised in a similar motion filed by defendant in *State v. Eldridge Gittens*, CR2010-007912-002 and by other similarly-situated defendants, Mr. Johnson wishes to join in this motion which is now being taken under advisement by the Honorable Judge Joseph Kreamer. All exhibits have been admitted into evidence by Judge Kreamer in the above mentioned *State v. Eldridge Gittens* CR2010-007912-002 on January 25, 2013 and copies of the exhibits are attached to this motion in the following form.

- Exhibit 1 – Consists of 15 discs containing the summaries of evidence from all counties in the State of Arizona for the year 2011 and for the years 2010 and 2011 for Maricopa County.
- Exhibit 2 – A.R.S. 13-702, F(2) as originally drafted.
- Exhibit 3 – A.R.S. 13-702, F(2) as it exists presently, drafted to include not only previously committed serious offenses, but contemporaneously charged serious offenses.
- Exhibit 4 – Summary of Out of County First Degree Murder Cases.
- Exhibit 5 – Summary of Maricopa County First Degree Murder Cases.
- Exhibit 6 – Mohave Daily News Article re: Vandergriff and Mohave County Attorney's Pleadings.
- Exhibit 7 – Transcript of Oral Argument before Judge Kreamer on January 25, 2013

MEMORANDUM

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**The Arizona Death Penalty Statute, A.R.S. 13-751, allows the state to impose the death penalty in an arbitrary and capricious manner because it fails to genuinely narrow the class of persons eligible for the death penalty and it allows similarly situated defendants statewide to receive vastly different sentences. As a result, the statute is unconstitutional.**

**I. The statute fails to genuinely narrow the class of persons eligible for the death penalty**

Capital punishment must be reserved for the most egregious crimes. “Since *Gregg*, our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. ”*Atkins v. Virginia*, 536 U.S. 304, 319 (2002). A capital sentencing scheme is designed to identify those defendants deserving the sentence of death. “If a state has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not.” *Spaziano v. Florida*, 468 U.S. 447, 460 (1984). The legislation must narrowly define those defendants eligible for the death penalty. “To pass constitutional muster, a capital sentencing scheme 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.’” *Lownefield v. Phelps*, 484 U.S. 231, 244 (1988). (See also *Zant v. Stephens*, 462 U.S. 862, 876 (1983)).

In Arizona, the purpose of aggravating factors is to determine, among all the defendants charged with first degree murder, those whose crimes are so egregious they can receive the death penalty. “The use of ‘aggravating circumstances’ is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury’s discretion.” *Lowenfeld* at 244. (See also *Ring v. Arizona*, 536 U.S. 584 (2002), where the State concedes and the Court affirms that in the Arizona statute, aggravating factors act to



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1 narrow the scope of the death penalty to minimize the risk of arbitrary and capricious action,  
2 *Ring* at 605-6.)

3 Despite the constitutional mandate that aggravating factors must narrow the class of  
4 defendants eligible for death, a review of all the first degree murder cases in Maricopa County  
5 over the last two years reveals that *every* first degree murder case has at least one aggravating  
6 factor. (See Exhibit One-Maricopa County Disc and Exhibit 5- a summary of the evidence  
7 from Maricopa County admitted into Court) As a result, every first degree murder case is  
8 eligible for the death penalty and the aggravating factors fail to perform their constitutionally  
9 mandated narrowing function. It is the County Attorney alone, not the legislature, who  
10 decides which defendant will be subject to the death penalty.

11 But the Eighth Amendment is intended to be a check on the legislature, not the  
12 prosecutor. *Gregg v. Georgia*, 428 U.S. 153, 174 at fn. 19. It is the *statute* that is supposed to  
13 be narrowly drawn to prevent the arbitrary imposition of capital punishment. That function  
14 cannot be delegated to the prosecutor. “[T]he concerns expressed in *Furman* that the penalty  
15 of death not be imposed in an arbitrary and capricious manner can be met by a carefully  
16 drafted statute that ensures that the sentencing authority is given adequate information and  
17 guidance.” *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). Neither the defendant nor the Court  
18 can question or review the state’s discretionary determination that death is an appropriate  
19 sanction and Mr. Johnson does not question the state’s discretion here. “In *Gregg*, the...Court  
20 very clearly indicated that its constitutional concern regarding the imposition of death is the  
21 judicial process alone, and not the discretionary stages which precede (prosecutorial  
22 discretion) or succeed (clemency) the judicial process of trial and appellate review.” *Sullivan*  
23 *v. Askew*, 348 So.2d 312, 319 (1977). (See also *State v. Ovante, Jr.*, Arizona Supreme Court  
No. CR-10-0085-AP at ¶ 19,20.)

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Aggravating factors that perform no narrowing function allow the death penalty to be imposed in a manner that is arbitrary and capricious. “When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of a lottery system... When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment.” *Furman v. Georgia*, 408 U.S. 238, 294(1972).

A list of aggravating factors that allows the state unfettered discretion in determining which first degree murders to pursue as capital cases allows for the possibility of impermissible discrimination. “It would seem to be uncontestable that the death penalty inflicted on one defendant is ‘unusual’ if it discriminates against him by reason of his race, religion, wealth, social position, or class, *or if it is imposed under a procedure that gives room for the play of such prejudices.*” *Furman* at 242 (emphasis added).

The current sentencing scheme allows no way of separating out the crimes most deserving of capital punishment. Justice White found such a scheme unconstitutional. “[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and there is no meaningful basis for distinguishing the few cases in which it is imposed from the many in which it is not.” *Furman* at 313.

Arizona’s statute was not always so broadly inclusive. Originally the statute consisted of seven narrowly drawn aggravators (See exhibit two), which, coupled with independent review by this Court, allowed for a formidable check on the arbitrary imposition of the death penalty in a manner consistent with *Gregg*.<sup>1</sup> Now, not only does the statute contain fourteen

---

<sup>1</sup>Even when the Supreme Court decided *Ring*, the statute contained only ten aggravating factors and *F* (2) was more narrowly drawn. *Ring* at 593, fnl.

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1 aggravating factors, F(2) is so broadly drawn it applies—or could apply—to nearly every first  
2 degree murder case. (See Exhibit 2, F(2) as originally drafted, and Exhibit 3, F(2) as it exists  
3 presently, drafted to include not only previously committed serious offenses, but  
4 contemporaneously charged serious offenses).

5 The Supreme Court has insisted that capital punishment be imposed fairly and with  
6 reasonable consistency or not at all. *Pulley v. Harris*, 465 U.S. 37, 63 (1984). Here, it is the  
7 whim of the prosecutor, not the legislature, that decides who will face the death penalty. The  
8 statute allows for no measured, consistent application, as required by the Constitution, *Id.*, and  
9 the cases selected for death are a capriciously selected random handful. It fails to genuinely  
10 narrow the defendants eligible for death. The statute is unconstitutional.

11 **II. Mr. Johnson’s evidence will show that the death penalty statute, A.R.S. 13-  
12 751, is not applied equally across the state and violates the Equal Protection  
13 Clause of the Fourteenth Amendment and Article II §13 and Article IV Part 2  
14 §19(7) of the Arizona Constitution.**

15 The Equal Protection Clause of the Fourteenth Amendment requires the law to apply  
16 equally to similarly situated defendants. “[O]ur own constitutional guaranties of due process  
17 and equal protection both call for procedures in criminal trials which allow no invidious  
18 discrimination between persons and different groups of persons. Both equal protection and  
19 due process emphasize the central aim of our entire judicial system—all people charged with  
20 crime must so far as the law is concerned, ‘stand on an equality before the bar of justice in  
21 every American court.’” *Griffin v. Illinois*, 351 U.S. 12, 17 (1956). (See also *In re Kemmler*,  
22 136 U.S. 436, 448-9(1890), “Undoubtedly, the [Fourteenth] Amendment forbids any arbitrary  
23 deprivation of life, liberty, or property and secures equal protection to all under like  
circumstances in the enjoyment of their rights; and in the administration of criminal justice,  
requires that no different or higher punishment shall be imposed upon one than is imposed  
upon all for like offenses.”)

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1 The Arizona Constitution has both an equal privileges and immunities clause, Article  
2 II § 13, and a constitutional provision prohibiting the enactment of special laws regarding the  
3 punishment of crime and misdemeanors. Article IV part 2 § 19(7).

4 Even a statute that applies equally on its face can be discriminatory in its application.  
5 “Any law which is non-discriminatory on its face may be applied in such a way as to violate  
6 the Equal Protection Clause of the Fourteenth Amendment.” *Furman* at 257.

7 A review of the first degree murder cases in every county in Arizona reveals that in the  
8 counties other than Pima County or Maricopa County, prosecutors often fail to notice the  
9 death penalty even in cases where it might arguably be appropriate. The smaller counties  
10 often cannot afford to prosecute a capital case. Mr. Johnson’s evidence will show that in  
11 Mohave County, the prosecutor filed a notice of his intent to seek the death penalty in State v.  
12 Vandergriff, a case involving the rape and murder of a one month old child. (See exhibit 1-  
13 Mohave County Disc, a summary of the out of county evidence admitted by the Court, page  
14 23 and Exhibit 6-Mohave Daily News Article re: Vandergriff and Mohave County Attorney’s  
15 Pleadings) Shortly thereafter, the prosecutor filed a pleading asking to withdraw its request to  
16 seek death, claiming the county could not afford the prosecution of a second capital case.

17 Mr. Johnson’s evidence will show that in Navajo County, the state did not pursue the  
18 death penalty in State v. Wilcox (See Exhibit 1-Navajo County Disc page 28) likely because  
19 of financial concerns. In Wilcox, a disabled Vietnam Veteran, the victim, agreed to assist the  
20 son of a friend who had been kicked out of his home. After the defendant failed to return the  
21 victim’s truck, the victim had to have the truck towed back to his house. He thereafter refused  
22 to help the defendant. The defendant and the co-defendant returned to the victim’s home,  
23 attacked him, ransacked the house, tied up the victim and placed a dresser on top of him,  
poured gasoline on him and around the house and then set the house on fire. The victim lived

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1 for 3-5 minutes in the burning house and managed to crawl to the front door where he finally  
2 died. His leg and both hands and feet were burned off his body. The defendant burned the  
3 victim's truck and stole his dog. The Court sentenced the defendant to Natural Life and the  
4 County Attorney did not pursue the death penalty.

5 In State v. Inmon, a triple homicide in Apache County, the prosecutor told the defense  
6 attorney he could not afford to seek the death penalty and would accept a reasonable offer.

7 The death penalty statute, A.R.S. 13-751 is not applied equally across the state. It  
8 violates the Equal Protection Clause of the United State's Constitution and Article II §13 and  
9 Article IV Part 2 § 19(7) of the Arizona Constitution. The statute is unconstitutional.

10 **III. Conclusion**

11 Aggravating factors are intended to genuinely narrow the class of defendants eligible for  
12 the death penalty and provide a principled basis for distinguishing those defendants who  
13 deserve the death penalty from others who do not. But here, virtually every first degree  
14 murder case has at least one aggravating factor. Aggravating factors, then, perform no  
15 narrowing function and allow for the death penalty to be imposed in an arbitrary and  
16 capricious fashion.

17 Though the Equal Protection Clause requires that the law be applied uniformly to  
18 similarly situated defendants across the state and within each county, poorer counties often  
19 fail to allege the death penalty even in the most egregious cases because of financial concerns,  
20 resulting in disparate treatment that varies by jurisdiction. And even within counties,  
21 similarly situated defendants are treated differently without a principled basis for doing so,  
22 simply at the whim of the prosecutor. The statute as applied violates the Equal Protection  
23 Clause.

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WHEREFORE, for all the foregoing reasons, Mr. Johnson moves this Honorable Court to find A.R.S. 13-751 unconstitutional on its face and as applied because it allows the death penalty to be imposed in an arbitrary and capricious manner.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of February, 2013.

BRUCE F. PETERSON  
LEGAL ADVOCATE

By /s/ Peter Jones  
Robert E. Reinhardt  
Peter Jones  
Deputies Legal Advocate

Copy of the foregoing Electronically file/  
delivered this 22<sup>nd</sup> day of  
February, 2013, to:

Honorable Margaret Mahoney  
Judge of the Superior Court  
South Court Tower  
175 W. Madison Street  
Phoenix, AZ 85003

Honorable Joseph Kreamer  
Judge of the Superior Court  
South Court Tower  
175 E. Madison Street  
Phoenix, Arizona 85003

Kristen Larish  
Deputy County Attorney  
301 West Jefferson Street  
Phoenix, AZ 85003

By /s/ CRF

# Appendix G

# EXHIBIT

## 7

(Transcript of Oral Argument before Judge Kreamer on January 25, 2013)





1 A P P E A R A N C E S

2  
3 For the Plaintiff:

4  
5 JEANETTE GALLAGHER (Noonkester/Rushing)  
6 KIRSTEN VALENZUELA,  
7 HILARY WEINBERG (Gittens/Jackson)  
8 SUSAN SHERMAN (McMahan)  
9 Deputy County Attorneys

10 For the Defendants Noonkester/Gittens:

11 SUSAN L. COREY  
12 PETER JONES,  
13 Office of the Legal Advocate

14 For the Defendant Jackson:

15 ALAN TAVASSOLI  
16 ANDREW CLEMENCY,  
17 Deputy Public Defenders

18 For the Defendant Rushing:

19 TERRY BUBLIK  
20 WESLEY PETERSON,  
21 Deputy Public Defenders

22 For the Defendant McMahan:

23  
24 GARRETT SIMPSON  
25 VICTORIA WASHINGTON,  
Deputy Public Defenders

P R O C E E D I N G S

THE COURT: These are the 2:30 matters, CR 2010-007912-002, State of Arizona versus Eldridge Auzzele Gittens; CR 2010-007912-001, State of Arizona versus Darnell Reuna Jackson; CR 2001-097576-A, CR 2012-139607, and CR 2000-095009-A, State of Arizona versus Justin Otis McMahon; CR 2011-138281, State of Arizona versus Jason Neil Noonkester, and finally, CR 2010-007882, State of Arizona versus Jasper Phillip Rushing, time set for oral argument on defendant's motion to dismiss the death penalty.

Would counsel please state their appearances.

MS. GALLAGHER: Jeannette Gallagher on behalf of the state in the Noonkester and Rushing case.

MS. WEINBERG: Hilary Weinberg appearing for myself and for Kirsten Valenzuela in the matters involving Jackson and Gittens.

MS. SHERMAN: Kristin Sherman on behalf of the state in the McMahan matter.

MR. SIMPSON: Garrett Simpson here for Mr. McMahan on behalf of Ms. Washington. She cannot be here and Mr. McMahan's presence is waived.

MS. COREY: Susan Corey for Mr. Gittens and

1 Noonkester as well as Pete Jones. Your Honor, we would  
2 waive Mr. Noonkester's appearance.

3 MS. BUBLIK: And Terry Bublik here on behalf  
4 of Jasper Rushing. Mr. Peterson is not here today.

5 MR. TAVASSOLI: Alan Tavassoli and Andrew  
6 Clemency, Office of the Public Defender on behalf of  
7 Darnell Jackson. He is present in the courtroom today.

8 THE COURT: Let's first talk about where we  
9 were before we talk about where we're going.

10 When we were last together previously, Miss  
11 Corey and I agreed to continue this oral argument pending  
12 a special action that she intended to file that would  
13 argue that before we got to the legal issues related to  
14 the motion, that I hold an evidentiary hearing on the  
15 facts alleged in the motion. I said then it seemed to me  
16 I didn't need to do that first. I gave the defense time  
17 to raise that with the appellate courts. I believe a  
18 special action was filed, but I think it's been dismissed.

19 MS. COREY: Yes, just -- if you want a  
20 little bit of clarification, we filed a special action in  
21 the Supreme Court. Their feeling was that it was  
22 inappropriately filed in the Supreme Court; that it should  
23 have been filed in Division One. We discussed that with  
24 two very experienced appellate lawyers. Their advice was  
25 to proceed on the record that we have. We felt like the

1 record we had was sufficient to protect our interests;  
2 therefore, we did not file in Division One, but we --  
3 excuse me, Your Honor. We would like to -- I have had the  
4 petition for special action marked. Just as a further  
5 clarification of our argument, we would ask that it be  
6 also included in this record.

7 THE COURT: So it's clear, the position that  
8 I'm proceeding under or the assumptions I am making, I am  
9 assuming for purposes of this argument that the facts you  
10 have alleged are true. The state objects. The state does  
11 not agree, perhaps, any of the facts are true, at least  
12 some of them. I'd note that this is without prejudice for  
13 the state to argue that none of the facts are true.

14 However, I am going to assume all the facts  
15 you are alleging are true for purposes of this argument.  
16 I note you gave me a proposed findings of fact and  
17 conclusions of law. I am not going to sign them because I  
18 am not finding any of the facts. I am essentially  
19 proceeding as if these facts are true, however, but I am  
20 not going to sign these because I would have to conduct an  
21 evidentiary hearing in order to find these facts, and I  
22 have not done that.

23 So we're going to get back to the point we  
24 were before we broke last which is to talk about the legal  
25 issues. In the interim, Mr. McMahan has come into the

1 case. I granted his motion, so Mr. Simpson is here.

2 I read the state's separate response that  
3 was filed in the McMahan case by Miss Sherman so I have  
4 reviewed that. I had already reviewed, but I note that  
5 the state provided the *Ovante* case. I had already read  
6 that going in. So now we're ready to talk about the  
7 issues raised in the motion.

8 I read the motion to raise two main issues,  
9 first, an equal protection argument and second an argument  
10 that the statute -- the Arizona death penalty statute does  
11 not sufficiently narrow the circumstances such that the  
12 death penalty can be alleged. We're going to start with  
13 equal protection, basically because I want to.

14 So let's talk about that and I am fine with  
15 whoever wants to argue as long as you're not stepping over  
16 each other. I am okay with hearing from two over on one  
17 side and two on the other. I am fine with that. Let's  
18 talk about equal protection.

19 MS. COREY: Judge, if I may just ask for a  
20 couple of preliminary things to be done before we get into  
21 the actual argument. First, the bulk of the exhibits have  
22 been -- filed. All the originals have been filed in Mr.  
23 Gittens' case. I don't think Mr. Noonkester was formally  
24 joined in the case, so I'd ask that the Court order that  
25 he be formally joined because we're going to be referring

1 to the originals filed in Mr. Gittens' cases. I think Mr.  
2 Noonkester's will be incomplete if he's not formally  
3 joined.

4 THE COURT: He previously joined for  
5 purposes of this motion only. The motion is granted.

6 MS. COREY: The other thing is, judge,  
7 though we did move into evidence the actual physical  
8 exhibits last time we were in court, I am not clear about  
9 whether the summaries of the evidence -- the summaries of  
10 the out-of-county evidence and summaries for the Maricopa  
11 County evidence were also admitted. I have supplied the  
12 clerk with copies of those, had them marked. I would ask  
13 that those be admitted as well. Just for clarification,  
14 judge, it is just easier to look at a summary than it is  
15 to look at the actual hard copy.

16 In addition, judge, I would ask the Court to  
17 take judicial notice of the 1978 statute which would have  
18 been 13-703. That's the original death penalty statute  
19 that has the seven aggravating factors. We have also  
20 provided that to the clerk. She's marked that, and as  
21 well as taking judicial notice of the current statute  
22 which is 13-751. I have also provided a copy to the clerk  
23 and I believe she has marked that as well.

24 THE COURT: Generally, because it's my view  
25 that I am accepting the facts for purposes of this

1 argument that were being alleged by the defense, my  
2 inclination is don't mark anything. It doesn't matter to  
3 me. We are going to talk about the statute. I am  
4 prepared to talk about both versions of the statute today.  
5 We can mark --

6 Does the state want to be heard on what's  
7 marked or not?

8 MS. GALLAGHER: No.

9 THE COURT: We'll go ahead and mark as  
10 requested.

11 MS. COREY: We would move them into evidence  
12 at this time.

13 THE COURT: The motion is granted. The  
14 exhibits will be considered part of this record.

15 MS. COREY: And, judge, I know you want to  
16 talk about equal protection but I do want to just briefly  
17 address our request for findings of fact. Our position  
18 is, of course, *Fisher* says that the Court is supposed to  
19 either hold a hearing if the facts are in dispute or if  
20 there is a colorable claim or if the Court is not willing  
21 to hold a hearing, the Court has to make certain findings  
22 of fact; otherwise, there is an incomplete record. So we  
23 believe that the Court -- there is an inadequate record  
24 for review if the Court does not make findings of fact or  
25 allow for an evidentiary hearing, just to clarify our



1 position on that.

2 THE COURT: We've talked about this. I  
3 disagree and I am denying that request. Anything else  
4 before we jump into equal protection?

5 MS. COREY: I don't think so.

6 THE COURT: Anything else preliminarily from  
7 the state's perspective?

8 MS. GALLAGHER: No, Your Honor. Thank you.

9 THE COURT: Let's talk equal protection.  
10 All right. Here's my issue with the defense position as  
11 its relates to equal protection: You rely almost entirely  
12 on the language of *Furman* and, in fact, in your reply you  
13 cite the following -- or you say the following: Mr.  
14 Gittens -- and I am reading from page six, line eight.  
15 "Mr. Gittens is not required to provide evidence of  
16 discriminatory application," citing *Furman v. Georgia* and  
17 you state *Furman v. Georgia* found the statute  
18 unconstitutional if it allowed for the possibility of  
19 discriminatory application.

20 Here's my problem: That's not what the law  
21 is. It's not the possibility. You're citing me to  
22 Douglas' concurrence in *Furman*. You haven't cited me to  
23 anything since *Furman* that supports your position in terms  
24 of case law that provides me with anybody concrete, and if  
25 we take the language of *McCleskey v. Kemp* and the cases

1 that follow, including *State v. White*, the Arizona case,  
2 it's hard for me -- first of all, *McCleskey* specifically  
3 says that a defendant must prove the decision makers in  
4 his case acted with discriminatory purpose. It's not  
5 general, number one, and, number two, *State v. White*  
6 essentially and pretty directly held that it doesn't --  
7 that a person convicted of the same crime can be given  
8 different sentences and what *White* essentially tells us  
9 basically as long as you apply it to persons in a like  
10 position, persons convicted of the same crime can be given  
11 different sentences, and to me, that law as it's developed  
12 completely, along with some others -- we haven't even  
13 gotten to the *Ovante* language yet -- completely undercuts  
14 the equal protection argument. I don't see how you get  
15 there because you haven't given me anything since *Furman*  
16 other than the general pronouncements.

17 Is there anything else?

18 MS. COREY: Yeah, there is actually, judge.  
19 When you're talking about life, someone's life, it's  
20 strict scrutiny. This is a fundamental requirement. It  
21 requires a strict scrutiny analysis which means the  
22 government has to show a compelling state interest why one  
23 person is treated differently than the others, and we're  
24 not talking about individual sentencing and individual  
25 considerations and how you have to have made findings of

1 fact in death penalty. We're not talking about that at  
2 all. We're talking about an overall treatment of  
3 similarly situated defendants; that is, people that are  
4 charged with first degree murder. That's what we're  
5 talking about, and if you look in our special action,  
6 judge, we elaborate on that argument a little bit more. I  
7 think the cite is *In re Kemmler* which is a very, very old  
8 case from the 1800's, and basically you have to have --  
9 similarly situated persons have to be treated the same by  
10 the law, and what we're saying is, judge, that what's  
11 happening here is you've got two defendants and they are  
12 similarly situated in they're both charged with first  
13 degree murder, but if you're up in northern Arizona in a  
14 county that's having a tough time financially, you're  
15 likely not to get the death penalty, not because of a  
16 compelling governmental interest, but because they don't  
17 have the money for it. So that guy is being treated and  
18 my client is being treated differently because Maricopa  
19 County is awash, apparently, in money and because he  
20 happens to be down here, Mr. Noonkester and Mr. Gittens  
21 happen to be down here, they're going to be treated  
22 differently just because of that. That's not a compelling  
23 governmental interest.

24 THE COURT: I am sorry to interrupt you, but  
25 didn't that go to the heart of *McCleskey*? The argument

1 was that the defendants could show that certain races were  
2 more likely to receive the death penalty and the Court  
3 rejected that analysis and said we're going to look  
4 individually. Do the factors support, for that  
5 individual, the death penalty and the quote, "The power to  
6 be lenient is the power to discriminate" -- that's a quote  
7 out of that case -- to me, that goes right to what your  
8 argument says here which is just because another county  
9 decides that, for whatever reason, they're not going to  
10 apply or seek the death penalty doesn't mean that Maricopa  
11 can't if it is appropriately supported and it's not done  
12 for a discriminatory purpose as to that defendant. That's  
13 what the law, I think says, and I don't see how you get  
14 around that. I understand strict scrutiny but that's --  
15 essentially it is a variation of the *McCleskey* argument.

16 MS. COREY: Judge, I think we're really  
17 bleeding over into a little bit of -- it needs to be very  
18 clear and I don't think it's been understood and perhaps  
19 it is an inartful pleading on my part. It needs to be  
20 very clear that we are not talking about the state's  
21 ability to exercise its discretion.

22 THE COURT: I understand.

23 MS. COREY: What we're basically saying,  
24 judge, is the manner in which this statute is being  
25 applied in our state, it's being applied in such a way

1 that people in rich counties are facing the death penalty  
2 and people in poor counties aren't and only for that  
3 reason.

4 Now, it's not the state saying, judge, I am  
5 deciding -- I am making a decision based on my discretion  
6 that I am not going to apply the death penalty case. It  
7 was the state saying in Mohave County, I am asking for the  
8 death penalty and then the state saying in Mohave County  
9 in that same case, I am withdrawing the death penalty only  
10 because I can't afford it. That's the only reason I am  
11 withdrawing the death penalty.

12 That's the state saying in Navaho County I  
13 am the prosecutor on this brutal, horrible case where a  
14 veteran, hundred percent disabled veteran, is brutally  
15 murdered and burned to death in his own house and I would  
16 love to seek the death penalty on this case and my boss  
17 won't let me and I think it is because of financial  
18 concerns.

19 It's in Apache County when you've got a  
20 triple homicide on one defendant, a triple homicide. You  
21 have a prosecutor that says to defense counsel I really  
22 want to seek the death penalty but it will break me, you  
23 will break me financially on this case. I can't do it.  
24 Give me an offer I can live with.

25 That's what you've got, judge, and you've

1 got an unequal application of a law that allows the state  
2 to kill a defendant, and the problem is what you also have  
3 to consider here, judge, is super due process. We spend a  
4 lot of time on the special action talking about heightened  
5 due process. You have to be extra careful in capital  
6 cases. Because the penalty is so great, you have to be  
7 extra careful in the way you apply the law, and that's not  
8 happening here, judge.

9               So for that reason, judge, I don't think the  
10 state has shown a compelling state interest. I think that  
11 the facts clearly show that without a state -- compelling  
12 state interest, defendants in this case with regards to  
13 the death penalty are being treated differently only  
14 because of financial concerns and that is not a compelling  
15 state interest.

16               THE COURT: I guess from my view, I think  
17 from my perspective, the law says they can be treated  
18 differently. There is multiple cases that say that under  
19 certain circumstances, as long as it is not being applied  
20 inappropriately to the individual defendant, they can be  
21 treated differently. I think the law is clear.

22               MS. COREY: Let me provide an analogy with  
23 respect to say, for example, plea negotiations, and again,  
24 I don't want to be misconstrued. I'm talking about the  
25 discretion of the prosecutor. I am just make an analogy

1 here. What the law says about plea negotiations is you  
2 know what? The prosecutor can offer a plea or not offer a  
3 plea; it is completely up to the prosecutor, but the  
4 prosecutor can't not offer a plea for the wrong reason.  
5 The prosecutor can't say, you know, I hate that defense  
6 lawyer. I hate that defense lawyer. Because I hate that  
7 defense lawyer, I'm not going to give her defendant a  
8 plea. You can't do that; the case law is pretty clear on  
9 that.

10 THE COURT: I agree that they can't  
11 affirmatively seek the death penalty for the wrong reason,  
12 but somebody can come up and say -- another county can say  
13 we don't want to seek it, and that doesn't mean that  
14 they're wrong in seeking it as long as they have a  
15 non-discriminatory purpose in seeking it.

16 MS. COREY: That's not an accurate portrayal  
17 of the facts, judge. The accurate portrayal of the facts  
18 is I want to seek it. I am a little county; this is a  
19 terrible crime and I want to seek it but I can't because I  
20 don't have the money. That's different, judge. That's  
21 the wrong reason. That is not a compelling state  
22 interest.

23 THE COURT: I don't want to be flip, but  
24 you're arguing almost as if I need to protect the  
25 interests of people who the state's choosing not to allege

1 the death penalty because they're being treated  
2 differently. The cases to me -- again, I understand what  
3 you're saying, but the focus is not on those that are  
4 given leniency and is that fair to them or is it fair that  
5 somebody else was given leniency, as long as your  
6 individual decision is appropriate in that analysis.

7 MS. COREY: That's the problem, though,  
8 judge. They're not being given leniency. That is not the  
9 decision that's being made where they are taking a look at  
10 this and saying, you know what, I don't think the death  
11 penalty is warranted in this case, in the rape-murder of a  
12 one-month-old. I don't think the death penalty is  
13 warranted. That's not the analysis being done here. The  
14 analysis is I sure do want to seek the death penalty in  
15 this rape-murder of a one-month-old, judge, and I would do  
16 it in a heartbeat but I don't have the money. If I was in  
17 Maricopa County, I could apply the law differently and I  
18 could get the death penalty for this case which I think in  
19 my discretion is warranted.

20 That's the difference, judge. It has to be  
21 clear on what exactly they are doing up there. They are  
22 not making a decision based on what their prosecutorial  
23 discretion is; they are making a decision based on the  
24 budget and that's the difference. That means the  
25 defendants down here in Maricopa County are exposed to



1 greater punishment for the only reason, for the only  
2 reason, that Maricopa County has the money for it, and  
3 that's not appropriate, and, judge, there may be a good  
4 way of dealing with this and the legislature could fix  
5 this and the legislature could go back and say what we're  
6 going to do is have a pot of money set aside for death  
7 penalty cases and that's where the money comes from. It  
8 is to be used statewide. I think there has been a push to  
9 do that for that very reason, but in the meantime, judge,  
10 if the law is being unequally applied to the similarly  
11 situated defendants, then that's an equal protection  
12 violation as applied.

13 THE COURT: Does not the *Ovante* language  
14 really undercut what you're telling me? Because the  
15 specific argument there was Maricopa County defendants are  
16 more likely to receive the death penalty than defendants  
17 similarly situated in other locations. At least implicit  
18 in that is the argument that you're making that other  
19 locations can't afford it or whatever the reason is, and  
20 the Court pretty much follows, in my view, the *McCleskey*  
21 line and says the fact that they seek it in Maricopa  
22 County and they don't in others doesn't matter. We look  
23 at whether -- and again, a defendant must show  
24 exceptionally clear proof of discrimination and its  
25 discrimination of this defendant here, and the mere fact

1 that they're not seeking it in others, for whatever  
2 reason, I don't see a case that tells me it ever gets to  
3 the clear discrimination that's required.

4 MS. COREY: I can distinguish *Ovante* very  
5 easily, judge, and I think we did in our special action.

6 THE COURT: You're telling me all these  
7 things you did in a special action. I didn't read the  
8 special action because it wasn't filed with me so --

9 MS. COREY: Neither did the state.

10 THE COURT: -- so we're in the same boat,  
11 but it gives me some great unease when you're telling me  
12 as we argued in the special action and explained in the  
13 special action. It wasn't filed with me. I have to rely  
14 on what you gave me, and that's what I'm going to do. You  
15 didn't -- I am going to let you argue it, but I am telling  
16 you it would have been nice if I would have seen this  
17 before because I will read everything you give me and do  
18 the best I can to understand it and look at the cases, but  
19 you didn't give me that opportunity. If there is  
20 something new in the special action, that's not in front  
21 of me. Go ahead.

22 MS. COREY: Number one, judge, that's one of  
23 the reasons why we admitted it. Number two, judge, I  
24 assumed you read the pleadings because we served them on  
25 you and served them on the state a week ago.

1 THE COURT: Let me stop you. No one handed  
2 me the special action pleadings.

3 MS. COREY: We sent it to your secretary on  
4 Friday evening. We sent it to your secretary and we sent  
5 it to the county attorney on Friday evening of last week.

6 THE COURT: My suggestion in the future if  
7 you really, really want to get it to me, don't just send  
8 it; hand deliver it and say he's got to see it right now  
9 or something along those lines, because I didn't see it.  
10 I would have read it. I didn't get it.

11 MR. SIMPSON: Garrett Simpson here for Mr.  
12 McMahan. We delivered a copy to Ms. Ash who is the  
13 Court's designated person for that service and process  
14 over at the 125 West Washington Building and we were told  
15 that was the appropriate place to take a special action,  
16 and I took it there personally about 10:30 or 11 o'clock  
17 on Tuesday morning. We filed the special action Friday  
18 night with Turbo Court and we weren't advised until  
19 Tuesday morning it had been received and accepted for  
20 filing, and within an hour of being told it was received  
21 and accepted for filing, I hand-delivered -- I personally  
22 delivered a copy to the Court's designated agent for  
23 service, and Friday night when I submitted it to Turbo  
24 Court, we e-mailed a copy to counsel and to Ms. Snyder,  
25 the Court's J A, and so I -- with all respect, sir, I

1 think we did all I thought we could do, that we were  
2 supposed to do to give notice to the Court. Thank you.

3 THE COURT: Whatever happened, I didn't get  
4 it but I am happy to hear you, so go ahead.

5 MS. COREY: As you know, judge, *Ovante* just  
6 came out. It was a new decision from the Supreme Court,  
7 and again, I think what's happened is there is a confusion  
8 of the issue. The issue is not -- *Ovante* addresses the  
9 Court's discretion, the prosecutor's discretion. That's  
10 what the decision is about. That's the only thing the  
11 decision is about. To the extent it discusses anything  
12 else is purely dicta, judge, and even when it talks in the  
13 *Furman* context, judge, looking at paragraph number 19 of  
14 that decision, when it talks about *Furman*, it's  
15 referencing *Sotofong* which is a case that's a 1996 case  
16 with a 1992 date of crime, which is a statute that has ten  
17 aggravating factors and a much more limited F-2, and I do  
18 have a copy of that statute that would reference the  
19 *Sotofong* case, and if I could have that marked and  
20 admitted as well, judge.

21 THE COURT: You may.

22 MS. COREY: Judge, it is a 1994 statute but  
23 it should be applicable to the 1992 crime. That was in  
24 *Sotofong*. Again, judge, the reason why *Ovante* does  
25 nothing for the state's argument is that *Ovante* purely

1 talks about the state's discretion and whether the state  
2 has discretion to charge one person with a death penalty  
3 and another person not with the death penalty. We don't  
4 dispute that at all. It needs to be very clear that  
5 nothing in our pleadings addresses the state's discretion.  
6 We said it in our original pleading; we said it in the  
7 reply; it's said again in the special action: We do not  
8 dispute that the state has discretion. The statute -- the  
9 Eighth Amendment is not a limitation on the state's  
10 discretion. The Eighth Amendment is simply a limitation  
11 on the legislature, and our argument, judge, in the *Furman*  
12 context is that the legislature failed to narrow the  
13 statute enough.

14 THE COURT: Let's not bleed there. We're  
15 going to get there and I understand where you're going,  
16 but the argument about it's not -- you're not challenging  
17 the discretion, well, it is the discretion the other  
18 counties exercise that you're challenging. You're saying  
19 it shows that there is an equal protection violation that  
20 they exercise their discretion. It may be because they  
21 didn't have any money and it may be because they felt  
22 compelled that they had to, but the bottom line, it is  
23 still a discretionary call.

24 MS. COREY: That's like me saying I am  
25 exercising my discretion not to dunk the basketball. I

1 can't dunk a basketball. I don't have those kind of  
2 skills. I could want to dunk the basketball but I can't  
3 do it. That's not exercising discretion on my part. When  
4 I can't do something, it's not a discretionary act. They  
5 don't have the money; that's why they're not seeking the  
6 death penalty. It's very clear, judge, in Vandergriff in  
7 the rape-murder of a one-month-old they wanted to seek the  
8 death penalty. They filed pleading requesting to seek the  
9 death penalty. They withdrew the pleadings -- withdrew  
10 that request based solely on money. That's not a  
11 discretionary act, judge. That's I don't have a choice  
12 here.

13 THE COURT: We can quibble about that. I  
14 think it's still at its heart a discretionary act. They  
15 may say we don't have the money; we can't do it. That's a  
16 choice that they made. I don't think it is akin to being  
17 not physically able to dunk a basketball. I don't think  
18 the analogy is correct. Again, were they -- did they  
19 believe that they were compelled? Okay. But were they  
20 absolutely incapable of it? I don't think that's the  
21 case, but even if the perception was that they were,  
22 again, I keep coming back to the *McCleskey* line and all  
23 the language of those cases to me is more analogous to the  
24 state's position or supports the state's position as equal  
25 protection.

1 MS. COREY: It doesn't, judge, because  
2 *McCleskey* is an imperfect analogy. In *McCleskey*, you are  
3 talking about the state's discretion. I choose to file  
4 against these people and I am choosing to file more  
5 against black people than white people. That's a  
6 discretionary act. That's not what we're talking about  
7 here. We're talking about two people similarly situated  
8 but if you're in Maricopa County on a heinous first degree  
9 murder case, you're going to get the death penalty slapped  
10 against you, but if you're in Mohave County, that's not  
11 going to happen because they can't afford it. That's not  
12 a discretionary act. *McCleskey* is a discretionary act,  
13 judge. That's a prosecutor exercising his discretion. In  
14 Mohave County, in Apache County, in Navajo County, those  
15 aren't discretionary acts. Those are I can't afford it.

16 It is like me saying, judge, I choose not to  
17 live in LaJolla. No, I haven't chosen not to live in  
18 LaJolla. I can't afford to live in LaJolla. I would love  
19 to live in LaJolla. The fact of the matter is that's not  
20 a discretionary on my act; it's I can't do it.

21 In *McCleskey*, the prosecutors were choosing  
22 to file more death cases against black defendants. That's  
23 what they're talking about. That's not what we are  
24 talking about here. What we're saying here is that they  
25 want to file these cases; they can't file them because

1 there's no money which means similarly situated defendants  
2 in this state are being treated differently, and that is  
3 our argument.

4 THE COURT: Let me give the state a chance  
5 to respond should the state want to add anything. My  
6 inclination is on the equal protection -- to deny as to  
7 equal protection, as can you tell from what I am saying.  
8 I will let the state speak.

9 MS. GALLAGHER: I have nothing to add.

10 THE COURT: I just don't think you get there  
11 on equal protection for the reasons set forth. I think  
12 under *McCleskey* and the cases that follow, *State v. White*,  
13 the *Ovante* case, as well as my analysis that it still  
14 relates to the focus needs to be on the decision in this  
15 case, as to this defendant, and another county's choice  
16 not to seek the death penalty does not mean there's a  
17 discriminatory application as to this defendant. That's  
18 what I view the correct result to be.

19 Anything else you want on the equal  
20 protection issue?

21 MS. COREY: Yes, judge, we would also -- I  
22 believe this is in our motion. We will want to make sure  
23 there were all independent state grounds supporting the  
24 state constitution as well.

25 THE COURT: It is so noted. I don't think



1 that changes the analysis for me.

2 Let's talk about the narrowing argument.  
3 That's the second argument. Miss Corey, let me start with  
4 you and maybe we can work backwards. How do we get around  
5 footnote nine in *Hausner* as it relates to the narrowing  
6 argument and specifically footnote nine? Footnote nine  
7 noted the arguments made in *Hausner*, and one of the  
8 arguments was that the broad scope of Arizona's  
9 aggravating factors encompasses nearly anyone involved in  
10 a murder and the *Hausner* court rejected it citing *White*.  
11 How do we get around that?

12 MS. COREY: The problem is, judge, that is  
13 one of those things where it is dicta by the Court. It is  
14 one of the Court's responses to the boilerplate pleadings  
15 that are filed in capital cases of all the different  
16 things they want to argue to preserve the issue only.  
17 It's not argued; it's not discussed, and in the prior  
18 cases where it was discussed, which was quite some time  
19 ago, judge, you have a statute that's completely different  
20 from our statute.

21 I think I addressed this in the reply in  
22 Gittens, judge, and what that's about, Your Honor, is when  
23 the Court -- the last time the Court really analyzed this  
24 statute was when there were ten aggravating factors and  
25 F-2 was narrowly drawn, and I say it is narrowly drawn.

1 It did not include the contemporaneous crimes that it  
2 includes today. F-2 is going to be an aggravator that's  
3 almost always going to exist or could exist in capital  
4 cases for the simple reason that they have expanded the  
5 language so that whenever a defendant commits a crime, if  
6 there is a serious crime that's attached to it, and there  
7 nearly always is, or can be, that's an aggravating factor  
8 right there.

9                   So if you have a simple strangulation  
10 case -- and I had one of these. The client strangled his  
11 girlfriend and had no prior record; he wasn't on  
12 probation. There was nothing in his background. There  
13 was -- the crime was very simple. There was a huge  
14 remorse, but it was a strangulation and because it was a  
15 strangulation, the secondary F-2 was kidnap; it was the  
16 secondary charge, so in that instance, judge, what we have  
17 now -- and that is a relatively recent occurrence, judge.  
18 Even when *Ring* was argued in the Supreme Court, there were  
19 only ten aggravators and the F-2 was narrowly drawn.

20                   The important thing to look at here, judge,  
21 is when we go all the way back to *Gregg*, *Gregg* is the case  
22 that said, look, I know what they said in *Furman*; I know  
23 we found the statute unconstitutional in *Furman* and you  
24 guys have all redrafted your statutes and this is what  
25 they said in *Gregg*. They said, okay, this is why we think

1 it's okay; there's always this review, and remember, we're  
2 operating under super due process here. There has to be a  
3 lot of due process because we have to prevent the  
4 arbitrary imposition of death. It is very, very  
5 important.

6               So in *Gregg*, look at the protections you  
7 have. Number one, you have a narrowly drawn statute, very  
8 few aggravators. Number two, you've got a trial judge  
9 that has to do a six-page memo to the Court saying things  
10 like and it was not racially motivated and all these  
11 different things, making sure that the case was okay; that  
12 it was legitimate. Then you have independent review  
13 directly to the Supreme Court of Georgia where the Supreme  
14 Court did on several occasions say I am looking at this  
15 and I compare it to the rest of the capital cases out  
16 there and I don't see this is a capital case and I am not  
17 doing that. That's not happening anymore.

18               Now, in this state, we used to have that,  
19 too. We had initially seven aggravating factors, and one  
20 of those exhibits will show you the initial statute had  
21 seven aggravating offenses or aggravating circumstances.  
22 Then you don't have the broad inclusive language in F-2.  
23 You don't have somebody that's charged with a  
24 contemporaneous offense having an automatic aggravator.

25               The other thing we don't have anymore,

1 judge, is independent review. So now we have -- in a post  
2 *Ring* world, we have unsophisticated jurors who are looking  
3 at the worst thing they've ever seen and relying very  
4 heavily on the prosecutor's good faith and having to make  
5 a determination and having no Supreme Court looking at  
6 this in anything other than did they abuse their  
7 discretion. That's the standard now. There was none of  
8 those protections that were initially found in *Gregg* that  
9 was so important to the Court when they found that statute  
10 to be constitutional and those have been stripped away and  
11 stripped away and stripped away and, judge, we are not  
12 looking at what we have in footnote nine anymore.

13           We are looking at a statute that's so  
14 broadly drawn, when you look at every first degree murder  
15 case filed in Maricopa County over a two-year period,  
16 every single one of them has an aggravating factor. The  
17 aggravators are not there for window dressing. They are  
18 supposed to perform a function, and the function they are  
19 supposed to perform is a narrowing function. It's to  
20 prevent the arbitrary imposition of the death penalty,  
21 judge. It's not to delegate their responsibility to the  
22 prosecutor's office. The prosecutor's office is supposed  
23 to have their discretion. The statute is supposed to be  
24 narrowly drawn so that you can separate out the worst of  
25 the worst. That's not happening, judge, when every first

1 degree murder case has an aggravating factor; there is no  
2 narrowing basically. Unless the Court wants to concede  
3 that the aggravating factors have no purpose or are a  
4 redundant component, and, of course, in statutory  
5 analysis, you can't do that then the statute is  
6 unconstitutional and a violation of *Furman*.

7 THE COURT: Let's trace back to the genesis  
8 of paragraph nine. I agree to some -- I agree that it is  
9 part of something we see in a lot of death penalty cases  
10 which is we're in the -- noting the following arguments  
11 and we're noting why those arguments are not well taken,  
12 and if you trace it back, I think fairly, you trace it  
13 back to likely *State v. Greenway*, I think, and the statute  
14 as it existed at that point I think is the ten-factor  
15 statute with a different F-2 and now we have four  
16 additional factors.

17 So from your perspective, your argument is  
18 that while -- and I think there was an analysis in  
19 *Greenway* that the statute, as it stood then, did perform  
20 the narrowing function that was necessary; that the  
21 addition of the four, but mostly the broadening of F-2  
22 puts us in a position that there is no longer a narrowing  
23 function in the aggravating circumstances statute,  
24 correct.

25 MS. COREY: Yes, Your Honor.

1                   THE COURT: Let me talk to the state about  
2 that. What if they're right? What if they're right in  
3 their allegation that every single first degree murder  
4 case has an aggravating circumstances? What if they are  
5 correct? And let me also ask you to respond to this:  
6 Because it's language in *State v. Carolson*, 202 Ariz. 570,  
7 and it's not directly addressing this issue but it is just  
8 noting in passing the way the statute is supposed to  
9 perform, and the Arizona Supreme Court said as we have  
10 repeatedly held, the death penalty should not be imposed  
11 in every capital murder case but it should be reserved for  
12 cases in which either the manner of the commission of the  
13 offense or the background of the defendant places the  
14 crime above the norm of first degree murders. And so what  
15 that tells me is there's got to be, doesn't there, some  
16 kind of narrowing function for the aggravating  
17 circumstances? We either have to -- I think the cases say  
18 we either have to narrow how we define the crime or we  
19 have to narrow in the aggravating circumstances. Arizona  
20 law has assumed in all the cases that the aggravating  
21 circumstances do narrow, and now the argument that they're  
22 making is this version of the statute with a broad F-2  
23 doesn't narrow and we can prove it because we can take  
24 every single first degree murder case in Maricopa County  
25 and show that an aggravating circumstance applies. If

1 they really can do it, don't we have an issue with the  
2 statute?

3 MS. GALLAGHER: No, we don't. Because  
4 United States Supreme Court in *Arave v. Creech*, 1993, says  
5 it's an aggravating circumstance, not every one that's in  
6 the statute, but it is if the sentencer fairly could  
7 include that an aggravating circumstance applies to every  
8 defendant eligible for the death penalty the circumstance  
9 is constitutionally infirm and they are citing to *Zant*  
10 which is also a United States Supreme Court says the  
11 fundamental requirement that each statutory aggravating  
12 circumstances must satisfy a constitutional standard. It  
13 is clear what has to narrow is each one, which was  
14 initially the problem with our cruel, heinous and  
15 depraved, the way it was defined, because it could apply  
16 to everyone.

17 When you look -- and you now want to talk  
18 about the expansion of the F-2. What you would have to  
19 find is that in every first degree murder case filed in  
20 Maricopa County during the time that defense counsel has  
21 cited you that there was an F-2. Well, that's not what's  
22 in there. All of those cases do not have an F-2, and  
23 that's not even what she alleged.

24 What the defense is saying is that when you  
25 look at all 14 factors and you look at all first degree

1 murder cases in Maricopa County in those two years that at  
2 least one of those 14 apply. That's a different argument.  
3 I mean, how do you narrow -- let's look at one of them  
4 which is age of the victim. How do you -- if her argument  
5 was right, you could never use age of the victim as an  
6 aggravating circumstance because it would apply to  
7 everybody who killed a child.

8 THE COURT: No. The argument is it can't  
9 apply to everybody who commits generic -- that's a  
10 disrespectful term -- generic first degree murder and so  
11 it does narrow because it narrows down the class. If you  
12 do that, then you are subject to the death penalty. Of  
13 course, there are going to be certain sub classes that  
14 automatically it applies to, and that's fine according to  
15 the law. It's just the argument that every single death  
16 penalty statute can't -- every single first degree murder  
17 case can't justify the death penalty. Isn't that what the  
18 cases say? I understand, you're exactly right, what the  
19 cases say; the individual circumstances have to narrow,  
20 but I don't know of a case that has said that it's okay if  
21 collectively they don't. Did that make sense?

22 MS. GALLAGHER: Yes, and it is up to the  
23 defense to provide the case that says it's the whole  
24 scheme. Now, they tried to claim -- they cited  
25 incorrectly saying that *Arave v. Creech* said that and, in



1 fact, it did not.

2 THE COURT: I agree.

3 MS. GALLAGHER: Because there is no case  
4 that says that if your whole scheme could encompass every  
5 first degree murderer, then your whole scheme has to be  
6 thrown out. There is no such case because that isn't the  
7 law. The law is that each aggravating factor must narrow  
8 it. When you look at this F-2 -- and I just tried a first  
9 degree murder case where that's all that was charged,  
10 first degree murder. There were no other side crimes or  
11 whatever else. I am about to try another one where the  
12 sole crime is murder in the first degree. So how can it  
13 be every single case -- every single first degree murder  
14 case has this associated F-2 when I just told you of two  
15 that don't have it?

16 THE COURT: What I think she's going to say  
17 is you chose not to allege an F-2 or another aggravating  
18 factor that could be there and while she's not challenging  
19 your charging discretion, what she's essentially saying is  
20 that the possibility that every single defendant could be  
21 subject to the death penalty means that the statute where  
22 I think the Court has said the legislature has a  
23 responsibility to somehow narrow it, there is no  
24 narrowing. There has got to be narrowing at the statutory  
25 level. I think the cases say that there's got to be a

1 narrowing, so there is no narrowing at the statutory  
2 level, is what she's saying. You're narrowing based on  
3 your discretion but it doesn't -- what she's saying is by  
4 the time it gets to you, it doesn't matter anymore. It  
5 matters that the legislature has not narrowed the statute  
6 as they are required to do.

7           Now, the issue is I don't know of a case  
8 that directly says what they're saying in terms of, okay,  
9 we're going going to analyze the whole thing and if it  
10 doesn't narrow, then it's unconstitutional. I don't think  
11 there is a case out there, but there's not a case out  
12 there on the other side that says okay collectively if  
13 they don't narrow as long as each individual one narrows.  
14 There are no cases that say that either.

15           MS. GALLAGHER: Okay.

16           THE COURT: All right. So what I am  
17 concerned about is while it's dicta, the language from the  
18 Arizona Supreme Court says the death penalty should not be  
19 imposed in every capital murder case. If that is -- if  
20 that's true and they can prove to me it could be imposed  
21 in every capital murder case, does that mean the statute's  
22 infirm. That's what they're arguing, and I am concerned  
23 about it. Now, I have my doubts whether they could ever  
24 get me there in terms of every single case has an  
25 aggravating factor but what if they could?

1 MS. GALLAGHER: It would have to be every  
2 aggravator applies to every defendant. If you're going  
3 to --

4 THE COURT: Make sure that she doesn't have  
5 to listen to background noise while she's talking.

6 MS. GALLAGHER: It would have to be that all  
7 14 apply to everybody.

8 THE COURT: I am not following you.

9 MS. GALLAGHER: If you're saying that our  
10 aggravators as a whole don't narrow, wouldn't you have to  
11 say that all 14 could apply to all murderers?

12 THE COURT: No. I would have to say for  
13 every murder, at least one of them applies, meaning  
14 everybody who commits a murder under our statute is  
15 eligible for the death penalty. They're saying our  
16 statute does that and you can't do it.

17 MS. GALLAGHER: But it does not?

18 THE COURT: Why.

19 MS. GALLAGHER: Because I just gave you two  
20 cases that I am prosecuting where there is no aggravating  
21 factor.

22 THE COURT: You're doing that at the  
23 prosecutorial level, and the law, at least they're saying,  
24 is that the state has to do it at the statutory level.  
25 They can't hand you a situation where every first degree

1 murder case, should you choose, you could say we're  
2 seeking the death penalty. They have to narrow it for you  
3 so you say, okay, I have got these factors and I apply  
4 those factors and some cases will have it and some won't.  
5 They're saying that that's what the legislature has to  
6 provide to you, and the legislature, not you, the  
7 legislature, is not doing their job because they're giving  
8 you basically a plate that says look at all these factors.  
9 Every single case you got, if you choose, you could put a  
10 factor on it and if that's the case, they're saying that  
11 it's unconstitutional.

12 MS. GALLAGHER: Okay. Let me give you an  
13 example then because all I have to do is come up with one?

14 THE COURT: Yes, probably so.

15 MS. GALLAGHER: Suppose you rule against me  
16 today and I am not happy with you. So you are outside. I  
17 am assuming you're under 70?

18 THE COURT: Ah, yes.

19 MS. GALLAGHER: Okay. You are outside and I  
20 say I am just going to kill him. So I take out my gun and  
21 I shoot you in the back of the head. Where's the  
22 aggravating factor? Oh, and I will avow I have no priors.  
23 I am not in prison. I am not on parole. I am none of  
24 those things. Where is the aggravating factor?

25 THE COURT: You're worrying me using me in

1 that example.

2 MS. COREY: I have an aggravating, factor,  
3 F-13, cold and calculated.

4 MS. GALLAGHER: I have a good reason. He  
5 ruled against me and said I can't seek the death penalty  
6 against these two defendants. That's a good reason. You  
7 have a case where --

8 THE COURT: What you're doing, we're now  
9 moving into the facts as they alleged can't be true and  
10 what I said was I am going to assume that the facts  
11 they're alleging are true. I understand from your  
12 perspective they're not true, whether it's all as charged  
13 or we can come up with scenarios where we can't apply an  
14 aggravating factor to a set of facts. So this is a  
15 theoretical argument. Theoretically, I have a discomfort  
16 if they're right because I think the law says that the  
17 legislature has got to narrow and if the legislature truly  
18 isn't narrowing, then I think there is an issue.

19 I don't want to do what I said a minute ago  
20 we can't do. I am having trouble factually in a situation  
21 where you could never get me there, meaning you couldn't  
22 give me all these possible scenarios where there wouldn't  
23 be an aggravating factor. It is hard for me to see how  
24 you're not right on the facts. I am assuming right now  
25 that they have, and I have got to assume that for purposes

1 of this argument, but I am concerned because if I am  
2 following what I think the cases tell me, if there is no  
3 narrowing function, then there is a problem.

4           There is an Arizona case that says there is  
5 a narrowing function as it relates to the factors as they  
6 existed with *Greenway*, ten of them, and a different F-2.  
7 Maybe there is a reasonable argument to be made that the  
8 change really doesn't do anything to the analysis that the  
9 Court underwent before when it says, hey, these narrow  
10 sufficiently I can hang my hat, I guess, on that, but I do  
11 recognize F-2 has changed quite a bit and opened up more  
12 scenarios through which the state can seek the death  
13 penalty.

14           So as you can tell, I am troubled by the  
15 argument because maybe they're right. Maybe we're in a  
16 different world because of all the new aggravating factors  
17 than there were under 14 when the Court said, hey, that  
18 narrows and a bunch of other cases, by the way, that say  
19 various related statutory screams narrowed. They're not  
20 citing me to any court that's ever come down the way they  
21 want me to; I recognize that, but if they're right as to  
22 the fundamental issue that there is no narrowing, that's a  
23 problem, and that's the issue I've got.

24           Did you want to add anything?

25           MS. COREY: Just a couple of things. She is

1 right insofar as the *Arave v. Creech* was improperly cited  
2 in the original brief, because it was addressing the  
3 fairness of an individual aggravating factor, but she is  
4 wrong insofar as it's both are required. The individual  
5 aggravating factor has to be narrowly drawn because as a  
6 whole, the aggravating factors have to operate. Their  
7 whole purpose --

8 THE COURT: Let me stop you there. What  
9 case says as a whole they have to be?

10 MS. COREY: *Furman* does, *Furman* does and so  
11 does *Lowenfeld v. Phelps*. If you look at *Lowenfeld* -- I  
12 am going refer back to the special action. This is on  
13 page nine. *Lowenfeld* says -- and I am referring to page  
14 eight of my petition for special action. "To pass  
15 constitutional muster, a capital sentencing scheme must  
16 genuinely narrow the class of persons eligible for the  
17 death penalty and must reasonably justify the imposition  
18 of a more severe sentence on the defendant compared to  
19 others found guilty of murder," and then if you go further  
20 down, *Lowenfeld* also says, "The use of aggravating  
21 circumstances is not an end in itself but a means of  
22 genuinely narrowing the class of death-eligible persons  
23 and thereby channeling the jury's discretion," and that is  
24 on page nine of the special action petition.

25 So, judge, basically, if what we're saying

1 is the statute fails to do that, it's not about the county  
2 attorney's discretion. We have no argument that the  
3 county attorney has discretion to do what they want to do,  
4 but the statute is supposed to narrow -- the legislature  
5 is supposed to narrow the statute to separate out the  
6 worst of the worst. That's the whole point of aggravating  
7 factors, and when you have a first degree murder case and  
8 every single one of them over a two-year period has an  
9 aggravating factor. That's not separating out the worst  
10 of the worst. That's aggravating factors as window  
11 dressing and not performing any legitimate constitutional  
12 function which they are supposed to do.

13                   And, judge, I disagree with you if you say  
14 it only takes one; I only have to find one case that maybe  
15 doesn't have an aggravating factor. It's supposed to be  
16 the rare case that's eligible for a capital case. That's  
17 what the aggravators are supposed to do. It is supposed  
18 to put out -- because Justice White's opinion, Your Honor,  
19 in *Furman* was very concerned about the fact if you've got  
20 a whole herd of people eligible for death, a very few of  
21 them get it. It has to be arbitrary, and if you read  
22 *Furman*, if you read the opinions that -- the concurring  
23 opinions in that case and if you look at the purpose of  
24 aggravating factors, what you will see is that this  
25 statute is no longer constitutional.



1                   THE COURT: First of all, I am not in a  
2 position right now to make a call because I want to think  
3 about it. The state hasn't gotten to see some of the  
4 things that they have argued, and I will -- what my  
5 inclination is I want there to be some narrow briefing on  
6 the narrowing issue, and specifically the question, if the  
7 statute -- if it's actually true that every single first  
8 degree murder case has an aggravating factor, does that  
9 mean the statute does not sufficiently narrow? I know it  
10 was discussed and maybe there's no other cases out there  
11 that can help, and I actually want to follow *Lowenfeld*  
12 through to look at it because I am not convinced I have  
13 looked deeply enough at that line of cases to get  
14 comfortable with them. I have looked at the cases  
15 involving the single aggravators but we're not talking a  
16 single aggravator argument here. I expect they're out  
17 there on point. I want to look at it again. I want to  
18 look at what they've written which I haven't and give the  
19 state essentially a chance to tell me anything else it  
20 wants to tell me and perhaps talk again, because I am  
21 troubled by where we are if they're right.

22                   Of course, if I continue to be troubled, the  
23 remedy is let's see if they can prove it before I do  
24 anything, aggravator and aggravating factor should be  
25 distinguished, which I think would be a monumental task.

1 I know the defense thinks it is an easy evidentiary  
2 hearing. I don't agree. To try and prove that as to one  
3 case, we could spend several days, much less every  
4 Maricopa County case, but let me see where I am at on the  
5 legal issue first.

6 So what I want to do, I want to look at the  
7 special action that was filed that apparently addresses  
8 the issue with additional cases I think. Is that correct?

9 MS. COREY: Yes, judge.

10 THE COURT: I want to give the state a  
11 chance to respond, if the state chooses to do so, and then  
12 give some thought to the issue and see what I want to do  
13 going forward.

14 So it is clear, the equal protection  
15 argument you're not moving me. It is the narrowing  
16 argument that I am interested in.

17 MS. COREY: Are you calling for simultaneous  
18 briefing?

19 THE COURT: I guess -- you've already filed  
20 in the special action but I have also defined things a  
21 little more at least in my mind here, so I want to give  
22 you an opportunity to respond. So it is going to be  
23 simultaneous if you want to add anything, and frankly, I  
24 am not going to look at your special action. I will give  
25 you the bite at the apple with that, so it's not a

1 two-for-one situation. So I am not going to look at your  
2 special action. It will be simultaneous briefing and let  
3 me see what I want to do on that.

4 Again, none of the cases are going to get  
5 held up while we do this. How much time do you think you  
6 need?

7 MS. COREY: 30 days, judge.

8 THE COURT: Okay, 30 days. 30 days from  
9 today is -- we'll make it just under 30 days, February  
10 22nd which is a Friday I think, on or before February  
11 22nd.

12 MS. COREY: Is that when the brief is due?

13 THE COURT: Yes, February 22nd.

14 THE COURT: I won't do anything in terms of  
15 setting argument or anything else. I want to see what I  
16 get and decide what I want to do going forward on the  
17 motion to dismiss issue. Anything else we need to talk  
18 about from anybody's perspective?

19 MS. COREY: I don't think so, judge.

20 MR. SIMPSON: Garrett Simpson for Mr.  
21 McMahan. We would like to adopt Miss Corey's argument on  
22 behalf of Mr. McMahan.

23 THE COURT: I am assuming all the defendants  
24 are adopting Miss Corey's argument.

25 MS. COREY: It is joint, judge, so --

1 THE COURT: All right, and then each case  
2 has various scheduling conferences scheduled. I will see  
3 you --

4 MS. GALLAGHER: On Noonkester, our next case  
5 management conference is on the 22nd of February and I  
6 have spoken to Jared's mom. I am asking that you either  
7 move it up a week or push it back a week because I have  
8 something I have to do on that day. The request is either  
9 the 15th or the 29th of February.

10 THE COURT: I am fine with that. 9 o'clock  
11 on the 8th. Anything anybody else needs to talk about  
12 while we're here?

13 MS. SHERMAN: Just for the record, is to ask  
14 that defense counsel in my case provide copies of whatever  
15 has been given to the Court to review. I know there was  
16 one copy of several things given to Miss Gallagher. I  
17 haven't been given copies of anything today. I know there  
18 have been a lot of things filed in the other cases that I  
19 have not been provided by defense counsel. I would ask  
20 anything they provide to the Court to review -- I do have  
21 a copy of the special action, but anything else that they  
22 have provided you, that they go ahead and get me a copy  
23 of.

24 THE COURT: You have seen the original  
25 motion and reply, correct?

1 MS. SHERMAN: Yes.

2 THE COURT: He didn't do anything different  
3 other than that. He basically adopted that. I don't  
4 think there is anything else that has been filed.

5 MS. SHERMAN: There were multiple documents  
6 provided today that I have not been given copies of.

7 MR. SIMPSON: For the special action, on  
8 Tuesday morning when I took the copy over to the  
9 administrator's office, I also dropped a copy off for each  
10 of the prosecutors Tuesday morning as well, so they have  
11 those documents.

12 MS. GALLAGHER: I don't know where they got  
13 dropped off to. I got mine by E --

14 THE COURT: We can do this off the record.  
15 (Sidebar discussion off the record.)  
16

17 (Whereupon, the proceedings in the  
18 above-entitled matter were concluded.)  
19  
20  
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C E R T I F I C A T E

I, LAURA A. ASHBROOK, do hereby certify that the foregoing pages constitute a full, accurate transcribed record of my stenographic notes taken at the aforementioned time and place, all done to the best of my skill and ability.

s/s  
\_\_\_\_\_  
LAURA A. ASHBROOK  
Certified Court Reporter  
Certificate #50360

# Appendix H

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA

--o0o--

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES CLAYTON JOHNSON

Defendant.

CR 2010-048824-001  
CR-16-0261-AP

Phoenix, Arizona

May 3, 2013

BEFORE: The Honorable JOSEPH C. KREAMER, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENT ON MOTION TO DISMISS DEATH PENALTY

PREPARED FOR:  
APPEAL

(ORIGINAL)

Laura Ashbrook, RMR  
Certified Court Reporter  
Cert. No. 50360



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A P P E A R A N C E S

(As announced below)

P R O C E E D I N G S

1  
2  
3 THE COURT: We're here on a motion to  
4 dismiss filed in 17 separate capital cases. What I am  
5 going to do, so the record's clear, I am going to announce  
6 each case and ask counsel to announce for each case. Some  
7 of you may answer more than once. To me, that's the  
8 easiest way to do it.

9 So we're going to start with number one, CR  
10 2011-140108, State of Arizona versus Jose Aljeandro Acuna.  
11 Would counsel please state their appearances?

12 MS. LARISH: Good afternoon. Kristin Larish  
13 on behalf of the state.

14 MR. GLOW: Tom Glow and Steve Koestner for  
15 Mr. Acuna.

16 THE COURT: Number two matter is CR  
17 2012-007399, State of Arizona versus Zachary William  
18 Baxter. Would counsel please state their appearances?

19 MS. GILLA: Marischa Gilla for the state.

20 MS. HINDMARCH: Jamie Hindmarch and  
21 Rosemarie Pena-Lynch on behalf of Mr. Baxter.

22 THE COURT: The third matter is CR  
23 2011-133622, State of Arizona versus Jesus Antonio  
24 Busso-Estopellan. Would counsel please state their  
25 appearances?

1 MR. BASTA: Eric Basta on behalf of the  
2 state, Your Honor.

3 MR. GLOW: Good afternoon. Tom Glow, Jamie  
4 Hindmarch and Mike Terribile for Mr. Busso-Estopellan.

5 THE COURT: Good afternoon. Four, CR  
6 2009-160953, State of Arizona versus Rudolph John Cano,  
7 Jr. Would counsel please state their appearances?

8 MS. GILLA: Marisha Gilla for Jeanine  
9 Sorrentino on behalf of the state.

10 MR. BUCK: Bruce Buck on behalf of Mr. Cano,  
11 Your Honor. He has waived his presence.

12 THE COURT: Good afternoon. The number five  
13 matter is CR 2011-151833, State of Arizona versus Jonathan  
14 Ray Cole. Would counsel please state their appearances?

15 MS. GILLA: Marischa Gilla appearing for  
16 Stephanie Low on behalf of the state.

17 MR. JOLLY: Quinn Jolly and Greg Navazo on  
18 behalf of Mr. Cole who has waived his presence.

19 THE COURT: Number six, CR 2010-168096,  
20 State of Arizona versus Craig Michael Devine. Would  
21 counsel please state their appearances?

22 MS. WEINBERG: Hilary Weinberg appearing for  
23 Vince Imbordino for the state Your Honor.

24 THE COURT: It is Goddard.

25 MR. GODDARD: I am here.

1 MS. WEINBERG: Some guy named Vince.

2 MR. KOESTNER: And Steve Koestner on behalf  
3 of Mr. Devine who is present.

4 MS. SCHMICH: Toby Schmich on behalf of Mr.  
5 Devine who is present.

6 THE COURT: Number seven matter, CR  
7 2011-150239, State of Arizona versus Ryan William Foote.

8 MS. GALLAGHER: Jeannette Gallagher  
9 appearing on behalf of Patty Stevens for the state.

10 MS. SINCLAIR: Good afternoon, Your Honor.  
11 Dawn Sinclair and Eric Crocker representing Mr. Foote who  
12 is present sitting in the jury box.

13 THE COURT: Good afternoon. Next matter,  
14 number eight, CR 2010-007912, State of Arizona versus  
15 Eldridge Auzzele Gittens. Would counsel please state  
16 their appearances?

17 MS. WEINBERG: Hilary Weinberg and Kirsten  
18 Valenzuela for the state.

19 MS. COREY: Susan Corey for Mr. Gittens  
20 along with Mr. Jones.

21 THE COURT: Number nine is CR 2012-154880,  
22 State of Arizona versus Manuel Antonio Gonzalez. Would  
23 counsel please state their appearances?

24 MS. GILLA: Marischa Gilla appearing for  
25 Neha Bhatia behalf of the state.

1 MS. HINDMARCH: Jamie Hindmarch on behalf of  
2 Mr. Gonzalez, and Rosemary Pena-Lynch and Michael  
3 Terribile is also here on behalf of Mr. Gonzalez.

4 THE COURT: Number ten is CR 2011-005473,  
5 State of Arizona versus Able Daniel Hidalgo. Would  
6 counsel please states their appearances.

7 MS. WEINBERG: Hillary Weinberg for the  
8 state.

9 MR. BUCK: Bruce Buck and Toby Schmich on  
10 behalf of Mr. Hidalgo who is present, Your Honor.

11 THE COURT: Number 11 is CR 2010-007912,  
12 State of Arizona versus Darnell Reuna Jackson. Would  
13 counsel please state their appearances?

14 MS. WEINBERG: Hilary Weinberg and Kirsten  
15 Valenzuela for the state.

16 MR. TAVASSOLI: Good afternoon. Alan  
17 Tavassoli and Andrew Clemency on behalf of Mr. Jackson,  
18 present in court, office of the public defender.

19 THE COURT: Number 12, CR 2010-048824, State  
20 of Arizona versus James Clayton Johnson. Would counsel  
21 please state their appearances.

22 MS. LARISH: Kristin Larish for the state,  
23 sir.

24 MR. REINHARDT: Robert Reinhardt and Peter  
25 Jones for Mr. Johnson.

1 THE COURT: Number 13, CR 2011-008004-001,  
2 State of Arizona versus Dennis Michael Levis. Would  
3 counsel please state their appearances?

4 MS. WEINBERG: Hilary Weinberg appearing for  
5 Vince and I am pretty sure it's Imbordino for the state on  
6 this one.

7 MR. KOESTNER: Steve Koestner appearing for  
8 Mr. Levis. He has waived his presence.

9 MR. BUCK: Bruce Buck also on behalf of Mr.  
10 Levis.

11 THE COURT: The 14 matter is no longer on  
12 the calendar. That's Mr. Martinez.

13 The next one is the 15 matter, CR  
14 2012-139607, state versus Justin Otis McMahan.

15 MS. SHERMAN: Kristin Sherman on behalf of  
16 the state.

17 MS. WASHINGTON: Victoria Washington and  
18 Garrett Simpson on behalf of Mr. McMahon who is present in  
19 the jury box.

20 THE COURT: The number 16 matter is CR  
21 2011-138281, Jason Neil Noonkester.

22 MS. GALLAGHER: Jeannette Gallagher on  
23 behalf of the state.

24 MS. COREY: Susan Corey and Pete Jones for  
25 Mr. Noonkester who is present, judge.

1 THE COURT: Number 17 is CR 2011-008004-002,  
2 State of Arizona versus Thomas Michael Riley. Would  
3 counsel please state their appearances?

4 MS. WEINBERG: Hilary Weinberg appearing for  
5 Vince Imbordino for the state.

6 MR. BAILEY: Michael Bailey for Mr. Riley  
7 whose presence is waived, Your Honor.

8 THE COURT: The next matter and the final  
9 one is number 18, CR 2010-007882, State of Arizona versus  
10 Jasper Phillip Rushing. Would counsel please state their  
11 appearances.

12 MS. GALLAGHER: Jeannette Gallagher  
13 appearing on behalf of the state.

14 MS. WASHINGTON: Victoria Washington and  
15 Terry Bublik on behalf of Mr. Rushing who is present in  
16 the jury box.

17 THE COURT: Good afternoon.

18 Okay. We've got some, I think, housekeeping  
19 preliminary matters to talk about before we talk  
20 substantively about where we're at. I have got a list of  
21 things that I think we need to talk about, and obviously,  
22 I will give counsel an opportunity to talk to me about the  
23 things that we need to talk about.

24 First of all, let's talk about the presence  
25 of defendants and make sure we are where we thought we

1 would be. Last time we were here for oral argument two  
2 weeks ago, I had issued a ruling saying that I was  
3 essentially waiving the presence of defendants because I  
4 believed that under the circumstances they need not be  
5 present. I was overruled by acclamation at that point and  
6 so what we did was I confirmed that some of the defendants  
7 still would waive their presence and those that indicated  
8 that they wanted to be present, we arranged that they  
9 would be present.

10 In the interim, we had two more requests  
11 come in where defendants told me or counsel told me the  
12 defendants no longer wanted to waive their presence. I  
13 think we accommodated that. So my belief is right now we  
14 have in the courtroom those defendants that have not  
15 waived their presence that wanted to be here. Does anyone  
16 disagree with that? I don't see any hands, so we're  
17 appropriately situated with respect to the presence of  
18 defendants.

19 I also wanted to confirm for the record my  
20 understanding is that the motion to dismiss the death  
21 penalty along with the supplemental briefing and the  
22 additional requests or motions to submit supplemental  
23 authority are identical as to all the defendants; that is,  
24 there is no unique motion or argument out there that's not  
25 found in all the others. Is that correct?



1 MS. COREY: Yes, Your Honor.

2 THE COURT: And, of course, we have some  
3 unique filings with respect to presence, but I am talking  
4 about the substance of the motion.

5 I want to confirm what's been filed and what  
6 I am considering and I want to make sure that no one  
7 disagrees with this. We obviously have the initial  
8 motion, the response and the reply. On January 25th, I  
9 directed that the parties brief the -- we'll call it the  
10 *Furman* or narrowing issue and I directed that the parties  
11 on or before February 22nd file a brief. The state filed  
12 a brief, I believe, dated February 19th and the defense  
13 filed a brief on February 22nd.

14 Since then, I have received and considered  
15 the following: There is a motion to submit supplemental  
16 authority. There is an amended motion relating to the  
17 same thing that's essentially the Ryan Commission report.  
18 There was a second motion to submit supplemental authority  
19 dated April 30th. That motion concerned a 2011 Harvard  
20 Civil Rights and Civil Liberties *Law Review* article.  
21 Defendant also filed a request for findings of fact and  
22 orders on April 30th, as well.

23 Other than documents relating to appearances  
24 by the defendants, is there anything out there that I have  
25 missed in terms of filings that we ought to be talking

1 about?

2 MS. COREY: Judge, the only other thing is  
3 on the initial motion to submit supplemental pleadings,  
4 there should be two reports in there, one from the  
5 Governor's Commission in Illinois and the other one is  
6 from the Governor's Commission in Massachusetts, so there  
7 should be two reports in that. And in the second  
8 supplemental motion, judge, in addition to the Harvard *Law*  
9 *Review* article that was attached, there is a citation to a  
10 case, *Ballard*, that we talked about which talks about the  
11 only reason that argument failed was because of the  
12 failure to prove it up by virtue of evidence.

13 THE COURT: We will, I am sure, be talking  
14 about that case. Anything else from the state's  
15 perspective that we missed in terms of filings?

16 MS. GALLAGHER: No, Your Honor.

17 THE COURT: A couple other procedural things  
18 from my perspective. On January 25th, I rejected the  
19 defendant's equal protection argument. My ruling remains  
20 the same. I am reaffirming that. I don't believe anybody  
21 intended to discuss that issue again. To the extent they  
22 did, there is really nothing to talk about. I had already  
23 denied the motion on equal protection grounds.

24 With respect to the request for an  
25 evidentiary hearing, we've had extensive discussion about

1 that request. Previously I had denied the request and I  
2 believe defendants filed a special action relating to that  
3 request.

4 Now, there is what I consider to be almost  
5 the same thing, a request for findings of fact and orders  
6 relating to the defense request that I allow the defense  
7 to put on the evidence they say they have regarding first  
8 degree murder cases, I believe, in 2010 and 2011 in  
9 Maricopa County, and you want specific findings to be set  
10 forth on the record.

11 I am not sure -- let me get your view on how  
12 this is substantively a different request. I know it is  
13 technically different, what you're asking for, but you're  
14 still asking me to put on the evidence I wouldn't let you  
15 put on before. Why would I let you do that now when I  
16 didn't let you do that before?

17 MS. COREY: Well, actually, judge, the  
18 evidence is in the record. That's been admitted without  
19 objection from the state so you have evidence. You have  
20 quite a bit of it. It is all sitting right over there.

21 THE COURT: I'm sorry to interrupt you. I  
22 want to make it clear. The state didn't object to putting  
23 that in the record so that it will be part of the record  
24 when this goes to wherever it goes. The state is not  
25 agreeing with the defendant's position as to what that

1 evidence shows, and I took your request to be a request  
2 for me not simply just to note the evidence but to make a  
3 determination whether the evidence shows what you say it  
4 shows, and I haven't made that determination and I am not  
5 going to make it in the context of this motion now for the  
6 reasons I set forth before.

7 MS. COREY: Judge, do you want to argue this  
8 now or do you just want to bring this up to the point  
9 we're going to argue down the road? Because I think there  
10 does need to be argument made on this. We don't have an  
11 appropriate appellate record if you don't make findings of  
12 fact. This is all just -- there is no point in really  
13 doing this if you don't make findings of fact.

14 THE COURT: We had this discussion before  
15 and I am really struggling with the argument that if I  
16 accept your facts as true for purposes of this argument  
17 only and, again, it's for purposes of this argument only,  
18 I am accepting not only the exhibits that you filed but I  
19 am accepting your argument that they say what you say they  
20 say, how can we not be making an appropriate appellate  
21 record?

22 I think the case law is pretty clear when  
23 we're talking about my discretion to have an evidentiary  
24 hearing or a hearing at all, and practically, if there are  
25 no facts that you're urging that I am not accepting, how

1 are we not making an appropriate appellate record.

2 MS. COREY: Here is the problem, judge: If  
3 you look at *Ballard* which is a case in front of the  
4 Illinois Supreme Court, *Ballard* said, look, you're  
5 absolutely right on the law. They made the same argument  
6 that we did. You're absolutely right on the law. There  
7 is a narrowing requirement. It's supposed to be done by  
8 the statute. It has to be both qualitative and  
9 quantitative, but what you didn't do, defense lawyers, is  
10 bring us the evidence that shows that's true. So we don't  
11 have anything before us and we're not going to rule for  
12 you because this has to be an evidentiary-based argument;  
13 it is required to be an evidentiary-based argument.

14 THE COURT: But *Ballard* never made the run  
15 that you made. In other words, they never said we have  
16 it. They never said we can prove it to you. They simply  
17 threw it out there that certainly -- with the number of  
18 aggravators and with the context of the Illinois death  
19 penalty statute, they essentially said, look, the number  
20 of aggravators has swallowed up the whole, and clearly,  
21 from the defense view, very few they said -- in fact, they  
22 didn't make the all argument that you're making. They're  
23 saying very few first degree murder cases would not have  
24 at least one aggravator and the Court noted it. There is  
25 nowhere in that record or that opinion where the Court

1 held it against the defendants or told the defendants that  
2 they -- I take it back -- where the defense offered to  
3 make an offer of proof.

4 MS. COREY: No, but, judge, their holding  
5 was we're not ruling against you as a matter of law.  
6 We're saying you didn't prove your case. That's what they  
7 said. That was the holding of the case. Had you brought  
8 the evidence and proved this up, we would be in a position  
9 to rule for you, but you're just making this theoretical  
10 argument. You didn't present any evidence. Denied.

11 THE COURT: But I am doing exactly what the  
12 *Ballard* court asked or essentially said needed to happen  
13 which is accept that it is true. I am getting there for  
14 purposes of this argument, so you're not in that position.  
15 I am not going to turn around and say, you know what, it  
16 doesn't seem to me like your numbers are correct. I am  
17 accepting that they are and that makes it different. The  
18 Court did not accept them because there wasn't evidence.  
19 Here, I am saying, okay, we'll fight about whether that's  
20 really correct later, but let's resolve the issue of if  
21 you're right, whether it matters, and I think for  
22 appellate purposes, I think that's fine.

23 MS. COREY: Judge, I respectfully disagree  
24 with the Court. I think that we have presented evidence.  
25 The Court has had the evidence. The state has had the

1 evidence for months, nearly a year. In all that time, the  
2 state never objected to the admission of the evidence.  
3 The state never came forward and said, you know what, look  
4 at all these cases that don't have aggravators, judge.  
5 The state has looked at this. We've opened the books.  
6 The state is in a unique position because they create the  
7 records. All that stuff is in their office. They have  
8 better access to the information than we do. Had they  
9 been able to rebut it, they would have rebutted it. They  
10 can't rebut it because what we're saying is true.

11 THE COURT: Well, I'm sorry to interrupt  
12 you. Let's be fair here. I told her she didn't need to.  
13 I told the state they didn't need to. The state made very  
14 clear that they disagreed with the premise. In fact, we  
15 talked about it on January 25th. I remember we argued  
16 about it, and Miss Gallagher had an interesting example of  
17 what would maybe constitute a non-aggravators murder, but  
18 we had that discussion about whether the state accepted  
19 the defendant's position. The state said, number one,  
20 they don't accept it, and I told them because I'm  
21 accepting it for purposes of this argument, I am not  
22 requiring you to controvert it. I am not expecting you  
23 to.

24 So to say that the state's been sitting on  
25 this for a while and hasn't controverted it and they

1 could, I told them that they didn't have to and they can  
2 take that as a statement that they shouldn't. So I think  
3 it's not fair to say that the state is -- could have  
4 controverted and they didn't. I told them not to and  
5 presumably what would happen -- and one of my concerns is  
6 that if we want to go down that road, I think it is a  
7 little more complicated than you think. I know you think  
8 you can prove it up expeditiously. I think it is harder  
9 to prove up what you want to prove up and would require  
10 some time, but right now, from my perspective, that's  
11 neither here nor there because I really do believe that I  
12 can accept the facts that you allege and rule regarding  
13 whether, accepting those facts, the statute is  
14 unconstitutional. I think that's an appropriate  
15 resolution.

16 I respectfully disagree with your position.  
17 I understand your concern. I, too, have a concern to make  
18 sure that whatever court hears this after me gets the best  
19 record possible for both sides and in a way that the case  
20 can be resolved and that is my goal, and I believe that  
21 we're doing that here.

22 I understand your concerns, but I don't  
23 believe an evidentiary hearing -- and therefore, I also do  
24 not believe the findings of fact as requested in the  
25 April 30th filing are appropriate going forward. So I am



1 not going to make findings of fact. I am going to make  
2 findings of law obviously to resolve the motion going  
3 forward.

4 MS. COREY: Again, judge, if the state does  
5 object and does not accept the premise, then really what  
6 we are supposed to get is an evidentiary hearing.

7 THE COURT: So the record's clear, I  
8 understand the state is objecting and disagreeing with the  
9 facts. I have not required them to controvert the facts  
10 or otherwise argue the facts, and from my perspective,  
11 that's why they haven't, and if you're right, if an  
12 appellate court says there needs to be an evidentiary  
13 hearing before they can get to the substance of the  
14 motion, then so be it and I will be happy to conduct it,  
15 but I don't think that that's what they're going to do.  
16 If I felt there was a real chance that an appellate court  
17 would find that an evidentiary hearing was necessary, I  
18 would hold one, but I believe one is not necessary. So I  
19 am accepting your facts going forward.

20 All right. Related to that, though, is a  
21 question I have for you regarding what you allege the  
22 facts to be, because I noted when I was reading your  
23 February 22nd filing, the language -- you changed the  
24 language a little bit as to the allegation of what the  
25 facts show, and what I am specifically talking about is

1 this: On page three and page 14 of the February 22nd  
2 filing, you use the following language: You say virtually  
3 every first degree murder case has at least one  
4 aggravating factor. For purposes of this argument, I  
5 assumed your position is and I have accepted your position  
6 that every first degree murder case has an aggravator.  
7 Now, I know we're talking about a subset, 2010/2011  
8 Maricopa County, but when I read this language, I want to  
9 make sure I understand your position and what you want me  
10 to assume. Do you want me to assume every first degree  
11 murder case in Maricopa County in 2010 and 11 has an  
12 aggravating factor? Is it beyond that or should I stay  
13 with that assumption?

14 MS. COREY: Judge, this goes to what the  
15 state was trying to counter. The state made an assertion  
16 right about the time she was talking about shooting you in  
17 the head that if she could just find one theoretical case  
18 that didn't have an aggravating factor, she wins. That's  
19 not right. That's why I said virtually every case,  
20 because, judge, it doesn't take every case. What is  
21 supposed to be happening here, it is supposed to be the  
22 more unusual first degree murder case that has the  
23 aggravators that make it eligible for the death penalty.  
24 The purpose of the aggravator is to identify those cases,  
25 those first degree murder cases, that are above the norm

1 for either the murders, the defendants or the case  
2 themselves. It is supposed to segregate those cases out.  
3 That's the purpose of the aggravating factors.

4 Does that mean that there may be an unusual  
5 case, that there's one, or two or three here or there  
6 that don't have aggravating factors, first degree murder  
7 cases that don't have aggravating factors, does that  
8 defeat the statute? No, it doesn't. That doesn't defeat  
9 our argument, judge. That doesn't defeat our argument.

10 What we're saying is it's supposed to be --  
11 the aggravating factors, the purpose of that to is  
12 identify the most egregious cases, the ones more deserving  
13 of the death penalty. That means it is going to be the  
14 rare case that comes out. It's not supposed to be every  
15 first degree murder case. So if you have an occasional  
16 first degree murder case that doesn't have an aggravating  
17 factor, that does not defeat our argument.

18 THE COURT: Where then are you asking me or  
19 some other court to draw the line if it is the rare case?  
20 Is it 20 percent, 50 percent, 80 percent? How am I  
21 supposed to make that analysis? Aren't I suppose to  
22 essentially follow along the lines of what *Greenway* talked  
23 about which basically says does the statute narrow and if  
24 the statute collectively narrows, then it passes  
25 constitutional muster. Where do you want me to draw the

1 line?

2 MS. COREY: Well, judge, I think that's why  
3 we need to look at our cases; we need to look at the cases  
4 and what's really going on in this jurisdiction. That's  
5 why the evidence is so important. The cases that we  
6 looked at, we looked at 238 cases. That was all the cases  
7 over a two-year period. Every single one of them had an  
8 aggravating factor and that was based primarily on the  
9 state's own pleadings. And so what I am saying, judge, if  
10 we don't have to make this argument, a lot of courts are  
11 trying to pass this off and trying to pretend like, gee,  
12 this is just an impossible thing to do. This is an  
13 impossible situation to figure out. It's not an  
14 impossible situation to figure out. Courts do this every  
15 day, and what we're saying, judge, is that aggravating  
16 factors have a purpose.

17 What you're supposed to get out of the  
18 narrowing statute is a pyramid. You're supposed to have  
19 at the base all the first degree murder cases. You're  
20 supposed to have at the top the ones that are eligible for  
21 the death penalty. That's the way it's supposed to work.  
22 We don't have a pyramid, judge. We have a rectangle, and  
23 that's the problem. We're not segregating out anybody.

24 I am not going to tell you you need to come  
25 up with a number. I don't think you need to come up with

1 a number. You need to see how the statute is operating in  
2 this county, and what we're telling you, judge, and you  
3 can look at it and you can see -- if you thumb through the  
4 cases that we've pulled for you, you can see that all of  
5 these cases, if you look at the F-2, judge, when it  
6 applies to contemporaneous offenses and that is offenses  
7 that are charged with the first degree murder, then you're  
8 blowing up the barn door, judge, and the courts knew this  
9 was going to happen.

10 If you look at *Rutledge*, Your Honor,  
11 *Rutledge* is 206 Ariz. 172, and this was before they  
12 changed the F-2 statute, and before they changed the F-2  
13 statute, the state was saying, look, you know what, I  
14 think you need to apply this to contemporaneous cases, and  
15 the trial judge below in this case and the Supreme Court  
16 ultimately did not apply it to contemporaneous cases, but  
17 the trial judge below, his concern, why he denied the  
18 state's motion was this: He was afraid that allowing  
19 contemporaneous offenses to apply would be contrary to the  
20 legislative intent to narrow that class of persons. His  
21 fear, the trial judge's fear, was that if you open F-2 to  
22 contemporaneous offenses, then you have defeated the  
23 narrowing purpose of the statute. It's too inclusive. It  
24 is too broad.

25 THE COURT: Let's talk about the pyramid

1    though.  Are we starting out with the correct base if  
2    we're starting out with first degree murder?  Aren't we  
3    starting out with murder on the base, not first degree  
4    murder?

5                   MS. COREY:  No, we're not and the Arizona  
6    Supreme Court --

7                   THE COURT:  Why not?

8                   MS. COREY:  The Arizona Supreme Court makes  
9    that very clear.  I cited it in my argument, Your Honor.  
10   There are five cases that make it clear that what we are  
11   starting from is first degree murder; we are not starting  
12   from all murder cases.  The five cases that make that very  
13   clear are State v. Bocharski, 218 Ariz. 476; State v.  
14   Blazak, 131 Ariz. 598; State v. Watson, 129 Ariz. 60;  
15   State v. Smith; 147 -- 146 Ariz. 491 and State v.  
16   Zaragoza, 135 Ariz. 63.

17                   The Arizona Supreme Court, particularly in  
18   Blazak, judge, says the legislature has made it clear that  
19   the death penalty is not to be imposed in every case of  
20   first degree murder.

21                   THE COURT:  I agree with you that they have  
22   said that and they have said it in multiple cases, and I  
23   think it may be more than five cases in which they've said  
24   it, but they have said it without this question or a  
25   related question directly in front of them.  My concern is

1 this, is that -- and we see it at times with the Supreme  
2 Court and other appellate courts, that they will mention  
3 things in passing but it relates somehow to another topic  
4 and they don't put it together, and what I mean is this:  
5 If we look at *Greenway*, *Greenway* says we also reject  
6 defendant's argument that our legislature has not narrowed  
7 the class of persons eligible for the death penalty. Only  
8 those persons convicted of first degree as defined by ARS  
9 13-1105 are eligible for the death penalty. Right there,  
10 *Greenway* says that's a narrowing factor.

11                   And the reason I am coming back, as you  
12 know, to this is that there are different narrowing  
13 factors relating to the statute, and the question is going  
14 to be if the aggravating circumstances don't do it, but  
15 other factors do it, isn't it still constitutional?  
16 Because *Greenway* seems to say it. *Hausner* says it to some  
17 degree in footnote nine, although I will agree that it  
18 wasn't argued squarely in front of *Hausner* and *Hausner* is  
19 noting the law, but I have in front of me *Greenway*, and I  
20 understand F-2 is different, stating that there is a  
21 narrowing function with respect to the classification and  
22 there are other narrowing functions we can talk about, and  
23 the cases from Illinois, from Delaware and others talk  
24 about other narrowing functions, including the jury.  
25 Doesn't that for constitutional purposes mean the

1 statute's constitutional?

2 MS. COREY: No, judge, it doesn't and here's  
3 why: Here's the problem. The Supreme Court said there is  
4 no catechism for this. We're not going to tell you how to  
5 do it, but they did say you have to narrow it and you have  
6 to narrow it with the legislature, not -- it can't be an  
7 ad hoc basis. They can't funnel this off on to somebody  
8 else, judge. The point is to protect against  
9 arbitrariness. You have to narrow it and you're narrowing  
10 it for a reason, right? What's the reason? The reason  
11 you're narrowing is to prevent arbitrariness and to  
12 identify those cases that are most deserving of death.  
13 That's the whole point and that has to be done  
14 legislatively.

15 It can't be done down the line by the jury.  
16 It has to be done legislatively in the statute. That's  
17 where it has to occur. It can't be done by the state.  
18 The state gets their discretion, judge, but that's not a  
19 narrowing function. That's not what we're talking about.  
20 We're talking about a legislative definition that  
21 circumscribes the people that are eligible for the death  
22 penalty.

23 If you look at the original *Furman*  
24 statute -- and, actually judge, and I want to have it  
25 marked. The original *Furman* statute, judge, had a first



1 degree murder statute. They also had a second degree  
2 murder statute which wasn't eligible for the death  
3 penalty. So we're talking about a first degree murder  
4 statute in *Furman* that was too broad. That's not enough.  
5 That's not enough of a narrowing function. You can narrow  
6 through the definition of first degree murder, you  
7 absolutely can do that. That's what *Lowenfield* was all  
8 about. But look at *Lowenfield*, judge. Look how narrow  
9 that is. You've got, what, five, maybe five different  
10 types of first degree murder, very, very narrow and  
11 they're supposed to be intending to either commit murder  
12 or commit some violence on a person at the same time,  
13 very, very narrow in its application.

14           When you look at Arizona's first degree  
15 murder statute, we have one of the broadest first degree  
16 murder statutes in the country. You've got a huge first  
17 degree murder statute. In some jurisdictions, judge,  
18 felony murder is not even first degree murder; it is  
19 second degree murder. So you've got this enormous first  
20 degree murder statute. The Arizona Supreme Court  
21 recognizes that in their opinion. That's why they say,  
22 look, we've got to have aggravators and the whole point of  
23 the aggravators is to narrow because they sure ain't doing  
24 it in the first degree murder statute. You've got to have  
25 those aggravators to narrow, and if the aggravators aren't

1 narrowing, it's not getting narrowed. That's what makes  
2 you eligible for the death penalty in this state.

3 THE COURT: We have more narrowing though  
4 than just the first degree murder narrowing. We narrow  
5 for intellectual disability under 13-753.

6 MS. COREY: That's not narrowing, and if you  
7 look at *McCleskey* --

8 THE COURT: I'm sorry to interrupt you but  
9 how is that not narrowing? I know it's not an aggravating  
10 circumstance, but the statute overall is narrowing, is it  
11 not, by carving out intellectual disability?

12 MS. COREY: No, the statute doesn't carve  
13 out intellectual disability. The Arizona Supreme Court  
14 carved out intellectual disability, and if you look at  
15 *McCleskey*, judge, and if you look at -- I am trying to  
16 find a page on here, judge -- they distinguish narrowing.  
17 It's subsection 11 and 12, judge. I can't find the page  
18 on here, but they distinguish narrowing from the societal  
19 consensus that the death penalty is disproportionate.

20 So they say, look, here's this group of  
21 things that narrow and here's this group that the societal  
22 consensus says is a disproportionate penalty. That's not  
23 narrowing at all. That's saying we already know these  
24 things are outside. You can't touch these things. The  
25 statute has to narrow besides that, and *McClesky* makes it

1 very clear in their opinion, and I will find you a page,  
2 judge, page 305 in section 11 and 12. It's clear, judge,  
3 they're distinguishing between those things that --  
4 remember when we're talking about the death penalty,  
5 you're also talking about the evolving standard of  
6 decency, right? So as we progress, it's not a static  
7 concept. It's something that changed over time, and over  
8 time, we as a nation have decided people that are under  
9 the age of 18 shouldn't be getting the death penalty;  
10 people that are intellectually disabled shouldn't be  
11 getting the death penalty; people that didn't act in  
12 reckless disregard for human life or were not major  
13 participants shouldn't be getting the death penalty;  
14 people that are committing rape shouldn't be getting the  
15 death penalty; people that are committing child molest  
16 shouldn't be getting the death penalty. Those things are  
17 out, because the evolving standard of decency says that  
18 under all occasions, that is cruel and unusual punishment.  
19 That has nothing to do with narrowing. That is completely  
20 distinct.

21 THE COURT: But don't we -- isn't it really  
22 an issue with respect to if we can theoretically find a  
23 murder that does not include -- a first degree murder that  
24 did not include aggravating circumstances, if we can  
25 theoretically find it, isn't there an argument to be made

1 that that's enough right there?

2 MS. COREY: No, judge. That's exactly the  
3 opposite of what it's supposed to be. What's the purpose  
4 of aggravators, judge? The purpose of aggravators is to  
5 say, you know what, we have got to find some way to figure  
6 out what are the really, really bad cases. What are the  
7 cases that are so bad that they deserve to be put in this  
8 separate category? That is segregating. That's a few.  
9 Judge, when you've got a huge group of first degree  
10 murders, you have got to figure out which ones are going  
11 to be the worst. That presupposes, judge, that there are  
12 going to some left in the pile.

13 THE COURT: Here is the issue I have: What  
14 you are suggesting is consistent with language from *Furman*  
15 forward, worst of the worst and there's about 20 other  
16 quotes that everyone has heard, that can reasonably be  
17 read to suggest that the death penalty needs to be the  
18 exception, not the rule, whether we want to say murder or  
19 first degree murder. That's absolutely true.

20 The problem I have got is this: The cases  
21 going forward on this issue seem to indicate that we can  
22 pass a threshold, whether it is 30 percent, 50 percent,  
23 70 percent or even 90 percent when we're talking about the  
24 percentage of cases, first degree murder with aggravators,  
25 and it does not violate the constitution. From a public

1 policy perspective, is that maybe an issue? Maybe, maybe  
2 yes, but from a constitutional perspective where I have to  
3 go, is that a constitutional violation here and now?

4 Let me tell you my concern: You give me the  
5 governor's -- Governor Ryan's report, his commission  
6 report; you give me the Harvard article, and they both  
7 talk about what should happen and make an argument why all  
8 the cases holding to the contrary of the position that  
9 you're taking are wrong, but those cases are there. I am  
10 not finding any cases that say, you know what, we've hit  
11 that saturation point, whether it is a hundred or 90. I  
12 am not finding anything that says that. I would have to  
13 rely on general standards, and that is disconcerting for  
14 me. While understanding and accepting the premise that  
15 you can reasonably argue that the death cases are supposed  
16 to be the minority, perhaps the great minority, and maybe  
17 they're not if the universe is first degree murder, at  
18 least the eligibility is not the minority, but I have got  
19 cases that say that's okay.

20 MS. COREY: Judge, the problem is you're  
21 asking me to give a bright line and I don't think the  
22 Supreme Court ever drew a bright line on this. What I am  
23 asking you to do -- you're wanting me to talk about the  
24 universe of death penalty law and I am not concerned about  
25 the universe of death penalty law. I am concerned about

1 our statute and whether our statute is doing its job under  
2 the constitution; that is, is our statute doing --  
3 segregating out the worst of the worst. Is our statute  
4 doing what it's constitutionally required to do? That's  
5 the question before the Court, not theoretically what's  
6 the death penalty law all about; what's the number that  
7 the Supreme Court wants. That's not the question before  
8 the Court. The question before the Court is is our  
9 statute doing its job? Is our statute drawing its  
10 aggravators narrow enough to segregate out the worst of  
11 the worst?

12                   And that's why this evidence is so  
13 important, judge. When you look at this evidence, when  
14 you look at the statute itself, when you look at F-2, you  
15 can see it's overly inclusive, judge. It's not doing the  
16 job that it was designed to do. It's not doing the job  
17 that it's constitutionally required to do. I can't give  
18 you a bright line, judge. I can't give you a bright line.  
19 I can't tell you what the world of death penalty law is  
20 supposed to be about, but I can tell you that our statute  
21 isn't doing the job that it's constitutionally supposed to  
22 do.

23                   THE COURT: Let me talk to Miss Gallagher  
24 for a minute. I will certainly come back to you, Miss  
25 Corey. I want to understand the state's position. First

1 of all, and looking at the state's February 19th filing,  
2 what I gleaned from that was that the constitutionally  
3 required narrowing function from the state's perspective  
4 seems to apply only to individual aggravating factors,  
5 not -- I don't know if this is true, but not the  
6 collective scheme. From the state's perspective, as long  
7 as each aggravating factor applies only to a sub class of  
8 first degree murder, there is no constitutional violation.  
9 Is that the state's position?

10 MS. GALLAGHER: Yes, because that would be  
11 the law, judge. Every case from the Supreme Court says --  
12 refers to it as an individual aggravating factor. If an  
13 individual aggravating factor applies to all murders or  
14 it's vague, then it is constitutionally infirm. So they  
15 have found some that weren't. Like our F-6 was found to  
16 be vague, so the Supreme Court of Arizona fixed it. Now  
17 it's not vague anymore, and as long as every first degree  
18 murderer -- which I agree with you, we have carved out an  
19 arena of murders, first degree, which is the first level.  
20 You have to look at each factor by itself and say is  
21 this -- does this factor apply to every person charged  
22 with first degree murder? If the answer is no; that it  
23 only applies to a sub group, then you've passed the first  
24 part of what it's supposed to do.

25 The second part is you look at it and say is

1 it it vague? If it isn't vague, then that aggravating  
2 factor is constitutionally appropriate and you can go  
3 forward.

4 And you keep -- and the defense keeps  
5 focusing on the F-2 contemporaneous offense. Well, first  
6 of all, it doesn't apply just because you commit another  
7 felony at the same time as you commit a first degree  
8 murder. It has to be one of our enumerated ones, and all  
9 of the Supreme Court cases, both Arizona and United States  
10 Supreme Court cases, say that, of course, the person  
11 deciding who gets death and who doesn't should be looking  
12 at the circumstances of the offense. That's what that F-2  
13 contemporaneous is. It's if while you are killing one  
14 person, you do any of the serious offenses like arson,  
15 robbery, burglary. That's a part of the offense and that  
16 absolutely can make someone eligible for the death  
17 penalty.

18 And the California versus -- I can't  
19 pronounce it. T U I L -- *Tuilaepa v. California*. The guy  
20 was eligible for death because he committed a first degree  
21 murder during an armed robbery. That was the sole factor.  
22 So obviously, if the United States Supreme Court wanted  
23 the entire scheme that a state has to not apply to  
24 everybody or whatever, they would have said that, but they  
25 have repeatedly said they're looking at each separate



1   aggravating factor in a particular state scheme.

2                   THE COURT: I agree with you. *Tuilaepa*  
3   focused on the individual aggravating factor and said  
4   exactly what you say it said, but it did not address a  
5   collective argument, and that's what I want to make sure I  
6   understand where you're at. Your position appears to be  
7   that it's okay if every single first degree murder case  
8   has an aggravating factor, right? When I say okay, I mean  
9   constitutional.

10                  MS. GALLAGHER: Yes, it is perfectly  
11   constitutional as long as those each individual  
12   aggravating factors are constitutional.

13                  THE COURT: Then why even have aggravating  
14   factors? If it's not narrowing, why are we having them?  
15   If every murder has an aggravating factor, why are we  
16   having aggravating factors? And isn't it true that we  
17   have statements all over the place from the Arizona  
18   Supreme Court and others that say the scheme's got to  
19   narrow, maybe not aggravating factors, but actually it  
20   does say that; that aggravating factors need to narrow and  
21   it's stated collectively. We are not -- we can't just say  
22   we have to look at the individual aggravators and not look  
23   at the collective impact, do we? I guess your answer is  
24   yes.

25                  MS. GALLAGHER: Yes. I didn't tell the

1 United States Supreme Court how to do this. They told us,  
2 and they said one of the ways you get to the narrowing is  
3 if you have aggravating factors, and you have to go down  
4 to the next level, judge, which is the jury or sentencing  
5 body -- now it has to be a jury -- must find at least one.  
6 That's the further narrowing.

7                   So just because the state alleges there's  
8 one doesn't mean the jury is going to find it and if they  
9 don't find it, at least one, then the person is no longer  
10 death eligible, and then after they get to that, then they  
11 have to look at all the mitigation and decide is this  
12 person deserving of the death penalty.

13                  THE COURT: Is there a single case out there  
14 that you know of where defendants have made the argument  
15 they're making which is we'll show you a body of two years  
16 or a huge collection of first degree murder cases where  
17 every single one has got an aggravating factor? In other  
18 words, they're making what I am calling a hundred percent  
19 argument as to the two years. You would agree with me  
20 there is no case saying that it doesn't matter? There is  
21 no case that says what you just said, specifically, we  
22 don't care that there is no narrowing function  
23 collectively? There is no case that says that, right?

24                  MS. GALLAGHER: I am not agreeing that it's  
25 not narrowing. There is no case that says that if the

1 potential aggravating factors could apply to everyone,  
2 that that is unconstitutional. There is no case that says  
3 that.

4 THE COURT: Do you agree that the statute --  
5 there must be some narrowing function to some degree  
6 within the statute and the scheme?

7 MS. GALLAGHER: Yes.

8 THE COURT: Tell me what the Arizona --  
9 we've talked about all around different factors. From  
10 your perspective, what are the narrowing factors in the  
11 Arizona statute or scheme?

12 MS. GALLAGHER: In 751?

13 THE COURT: Yes.

14 MS. GALLAGHER: Okay. I just want to make  
15 sure so you don't change the rules on me.

16 THE COURT: I am not changing the rules. If  
17 you think we need to go outside of 751, so be it. I want  
18 to get your view, for the sake of the argument about the  
19 constitutionality, what are the narrowing factors of the  
20 statute or otherwise.

21 MS. GALLAGHER: Starting with it only  
22 applies to first degree murder as that's defined; that  
23 there has to be a finding of one aggravating factor that  
24 the jury has to find, and then the jury has to look --  
25 they are not, as in other states, allowed to look at just

1 everything aggravating. You're only allowed to present  
2 the aggravating factors. Then they have to look at the  
3 mitigation in deciding whether or not death is the  
4 appropriate punishment for this person.

5 In looking at our 14 aggravating factors,  
6 every one of them either deals with the circumstances of  
7 the offense or the defendant's history. There isn't one  
8 in there that doesn't relate to that, because if there  
9 was, then that would be a problem because the aggravating  
10 factor must be about the offense or about the offender,  
11 and that's how Arizona has narrowed it, so that only those  
12 people that the legislature has decided have done  
13 something that warrants the extra penalty, those are the  
14 only people who would even be eligible for it.

15 THE COURT: Okay. All right. Don't the  
16 Illinois and Delaware cases -- and I understand the  
17 difference. We're talking about in Delaware I think  
18 it's -- is it *Steckel* (phonetic), the Delaware case? It  
19 is *Steckel*. Don't they essentially say, okay, while on  
20 one hand, kind of punting the question of, oh, you can't  
21 prove it up anyway -- and I recognize there is an element,  
22 especially in the Delaware case, that says how is anybody  
23 ever going to figure this out? I am not going down there  
24 because, again, I am assuming we have figured it out. But  
25 even beyond that, they say we also have narrowing and the

1 narrowing she just pointed out, first degree murder to  
2 murder, and it does note the narrowing of the jury. It  
3 also notes the narrowing of other classifications, and I  
4 disagree with you in terms of some of the other narrowing  
5 either found in the statute or as applied here. There is  
6 other narrowing. Don't those cases say that basically for  
7 constitutional purposes, that's narrowing and that gets us  
8 there?

9 MS. COREY: No, judge. Here's the problem:  
10 There has to be an eligibility factor. You have to have  
11 some sort of scheme in the statute that identifies the  
12 worst of the worst. That's the purpose of aggravators.  
13 When you get to the -- what type of sentence you're going  
14 to get, that's a whole different equation. Then you're  
15 talking about what should the sentence be. Now that  
16 you're eligible for this sentence, what should the  
17 sentence be, that's a different question.

18 THE COURT: Haven't courts blended those to  
19 get narrowing? There is a lot of discussion consistent  
20 with what you just told me, the eligibility versus the  
21 sentencing. There is language that suggests that we're  
22 willing to look over to the sentencing side and call that  
23 a narrowing factor, as Miss Gallagher suggested.

24 MS. COREY: There's a difference between,  
25 judge, protections against arbitrariness and narrowing.

1 So when you're looking at this, narrowing helps to prevent  
2 arbitrariness. That's the point of it. It is not the  
3 only thing in the statute that helps prevent  
4 arbitrariness. There are other things down the road that  
5 help to prevent arbitrariness, but that's not the  
6 narrow -- that's not narrowing.

7           Narrowing is supposed to segregate;  
8 narrowing is supposed to identify, because we don't want  
9 to give all of these murders to the jury and let them  
10 segregate out by listening to mitigation evidence and  
11 hearing about the defendant's background and hearing about  
12 the type of case. That's what *Furman* did. That's what  
13 the situation was when *Furman* existed. That's what they  
14 were talking about.

15           The legislature is supposed to take that  
16 from the jury and take that from the county attorney.  
17 It's not supposed to be decided on an ad hoc basis. It is  
18 supposed to be identified by a clear thinking, not  
19 emotionally involved legislative body.

20           THE COURT: Yeah, but we're talking about  
21 the county attorney or the prosecutorial discretion. They  
22 got a lot of discretion, and it's very clear they do, and  
23 we have a statute that has been challenged repeatedly and  
24 has been affirmed repeatedly when the challenge has been,  
25 hey, this is so broad that they can make any call they

1 want. That ship has sailed.

2 MS. COREY: Remember, judge, it is really  
3 important that we separate out what we're talking about  
4 here. When you're talking about those old statutes, when  
5 you're talking about when the Court said the statute's  
6 okay, when are you talking about? You're talking about  
7 ten aggravators and narrow F-2. That's what you're  
8 talking about. We don't have that anymore. We have an  
9 enormous F-2 and we have 14 aggravating factors.

10 They have never come off the position that  
11 an aggravating factor is designed to narrow, and remember,  
12 we have to really parse this out, judge. We really have  
13 to critically think through this. We're not talking about  
14 other factors that may be within the statute that prevent  
15 arbitrariness because there is stuff in there that helps  
16 prevent arbitrariness. There used to be a whole more in  
17 there to prevent arbitrariness that's not there anymore,  
18 things like independent review and things like  
19 proportionality that are no longer in our statute. We've  
20 gone way over the edge, judge. We've not only broadened  
21 the aggravating factors, but we've also taken out all  
22 those checks that were also there to -- designed to  
23 prevent arbitrariness.

24 The narrowing function is one part of the  
25 statute that is designed to prevent arbitrariness. That

1 is what the aggravating factors in our statute are  
2 designed to do. In *Lowenfield*, it was the definition of  
3 first degree murder. In our statutes, it is the  
4 aggravating factors.

5 Now we're not saying, judge -- and this is  
6 where the issue gets kind of confused. We're not saying  
7 that other things are also true, that each aggravating  
8 factor has to be well-defined so the jury can understand  
9 it. It can't be vague. All those things are true.  
10 That's not what we're talking about here. That's what  
11 *Tuilaepa* or whatever the name of case is -- that's what  
12 that was talking about. California statutes are very  
13 different than ours. They have an eligibility tree and  
14 then after you pass the eligibility tree and you get into  
15 a list of factors that the jury is supposed to consider,  
16 that's where that case is about. They're not talking  
17 about eligibility at all in *Tuilaepa*. They're talking  
18 about, gee, is this little factor too vague for the jury  
19 to get. Is this not going to work for us.

20 THE COURT: But there are several California  
21 cases taking on what appears to be a much broader statute  
22 saying it is still sufficiently narrow. And this gets  
23 back to the fundamental question, and this is a quote from  
24 the Harvard Civil Liberties *Law Review* article you gave me  
25 and it almost sums up where we're at, and it says, state



1 and lower courts have uniformly rejected challenges  
2 arguing that the sheer number of aggravators in a statute  
3 rendered it unconstitutional, so that's the state of the  
4 law.

5 MS. COREY: Wait a minute.

6 THE COURT: That's the state of the law that  
7 I -- that they come to me with, that you come to me with,  
8 at least as noted in the 2011 Harvard -- and that's post  
9 the relevant decisions we're talking about, so we come  
10 with that.

11 MS. COREY: Wait a minute, judge. You got  
12 to read further on. Why are the courts rejecting? Why  
13 did the article say the courts rejected it?

14 THE COURT: Generally the lack of empirical  
15 data.

16 MS. COREY: No.

17 THE COURT: Absolutely, yes.

18 MS. COREY: Here we've got empirical data.  
19 There is another reason, political fear.

20 THE COURT: That takes me to my next point  
21 because this -- and we look at the Ryan report as well.  
22 That was beamed as much to the legislature and potentially  
23 the executive branch as anything else, and in some ways  
24 this discussion, many people would believe has to happen  
25 largely in another forum, at the legislature versus here.

1                   Now, I am not saying the whole discussion,  
2 and I can say, boy, that really looks unconstitutional but  
3 they have to do something about it. I am not taking that  
4 position. I am saying the flavor in which you gave me in  
5 your supplemental filings kind of points to the problem  
6 you've got here in front of me today. This argument may  
7 arguably be different previously, lack of empirical data,  
8 but some may have presented some empirical data. The  
9 courts have said no. For various reasons they have said  
10 no and, in part, they have relied on some of what Miss  
11 Gallagher is telling me which is we've got a narrowing  
12 function at various levels that is sufficient, even if we  
13 assume the aggravators have some incredible number above  
14 90 percent for some of them, the narrowing factor -- and  
15 they do talk about the jury and they do talk about the  
16 individualized decisions and they do talk about the first  
17 degree, and that's what sits in front of me right now.  
18 You're asking me to go somewhere where people haven't  
19 been.

20                   MS. COREY: Judge, I know the Court is  
21 reluctant to do this. I know that. I understand the  
22 Court's position. I know that ruling a death penalty  
23 statute unconstitutional makes everybody nervous; I get  
24 that, but the problem is, judge, that's your role. This  
25 is not a statue that's been ruled on before. This is a

1 much broader version of the statute. It's not been ruled  
2 on.

3 THE COURT: I am not scared about doing  
4 that. I want to get it right. I am not worried --

5 MS. COREY: Well, let me help you get it  
6 right, judge.

7 THE COURT: I want to get it right and right  
8 could be one way or the other. I accept that. I know it.

9 MS. COREY: Well, let's talk about then  
10 what's right. You're giving me these hypothetical cases  
11 where courts aren't there, aren't ruling for the defense.

12 THE COURT: It's not hypothetical.

13 MS. COREY: I understand that, but you're  
14 not giving me the specifics. I can tell you why that  
15 might be happening in other places if you give me the  
16 specifics, but you said one thing: They're not being  
17 presented with empirical data. The first thing we have to  
18 decide is what does our statute require? What's going on  
19 in this statute? What's it supposed to be doing  
20 constitutionally? Is it supposed to be narrowing? Do we  
21 accept the fact that the aggravating factors are there for  
22 a reason?

23 They have to do two things. They have to  
24 numerically separate out some of the first degree murder  
25 cases, right? So we have that quantitative function here,

1 but that's not the only thing they're supposed to be  
2 doing. They're supposed to be identifying those people  
3 most deserving of death. That's what they're supposed to  
4 be doing. Our cases say that. *Zant* says that. *Gregg*  
5 says that. That's what they're supposed to be doing.  
6 They're supposed to be identifying those cases most  
7 deserving of death. That's what our aggravators are  
8 designed to do.

9           Our Arizona Supreme Court said that if we  
10 have a situation where every first degree murder case has  
11 an aggravator -- and she is kind of parsing that. She is  
12 saying, oh, they're narrowing because the jury has to find  
13 it. Judge, then you can have two aggravators; one, the  
14 defendant is a male, one the defendant is a female. That  
15 doesn't do anything. That's busy work. It doesn't do  
16 what it's supposed to do. It's designed to segregate out  
17 those most deserving of death.

18           And the reason, judge, you really need to do  
19 this is this legislature is not going to fix this problem  
20 unless you tell them to, and what's going to happen,  
21 judge, is you're going to get more and more people in this  
22 pipeline and they're not going to fix it and then down the  
23 road, you're going to have a great big mess on your hands,  
24 because we understand what the law is and the law is the  
25 aggravators are there for a reason. They aren't just busy

1 work. They are designed to narrow the statute. The case  
2 law is clear that it's designed to narrow the statute. It  
3 is designed to segregate out of the worst of the worst,  
4 and when you have a statute where every single first  
5 degree murder case has an aggravator, it's not doing its  
6 constitutional job.

7 So really, judge, the question you have to  
8 ask yourself is what are those aggravators for and are  
9 they doing the job that they are supposed to be doing?

10 THE COURT: I am going to ask Miss Gallagher  
11 that question.

12 MS. GALLAGHER: Judge, the bottom line is  
13 that every first degree murder defendant should be  
14 eligible for the death penalty.

15 THE COURT: Wait a minute. Wait a minute.  
16 But that's not the law.

17 MS. GALLAGHER: You heard me correctly.

18 THE COURT: That's not the law, is it?

19 MS. GALLAGHER: Neither is the law that says  
20 this is unconstitutional. So let's talk about --

21 THE COURT: Don't answer that one. That's  
22 not the law, right?

23 MS. GALLAGHER: According to Miss Corey, it  
24 is, because if every single first degree murder case has  
25 an eligibility factor there, then every first degree

1 murderer should be facing the death penalty.

2 THE COURT: Let me ask it this way. That's  
3 not supposed to be the law is it? Is it? Hold on. Is  
4 it?

5 MS. GALLAGHER: I can't answer it the way  
6 you're asking because you and Miss Corey have one opinion  
7 about what this is supposed to do. You are now asking the  
8 state's opinion, and according to *Gregg* and its progeny,  
9 the purpose of aggravating factors is to give the  
10 sentencing body an objective reason to either give or not  
11 give the death penalty, right?

12 THE COURT: In part.

13 MS. GALLAGHER: So that whole premise  
14 starting with *Gregg* is that all people who are convicted  
15 of, guilty of, first degree murder before a jury or a  
16 judge can decide whether death should be the answer. They  
17 have to have an objective reason, and in *Furman* they  
18 didn't. They had nothing to guide them to say this  
19 person, this individual defendant who committed this  
20 individual or multi murder, depending on the  
21 circumstances, should get life or death. They just throw  
22 it in a pile, and that was the problem.

23 So what they said is with the aggravating  
24 factors, that's what channels the jurors' decision making,  
25 and the Supreme Court has pointed out it is not perfect,

1 particularly when juries are doing it, but the state  
2 didn't ask the juries to make that decision, so -- but  
3 they have got to have a reason, and those reasons have to  
4 either relate to the defendant and his propensities; is he  
5 on probation; is he in prison, whatever, or to the murder  
6 itself.

7 THE COURT: Let me interrupt you for just  
8 one second. You used the word guide; it has to guide the  
9 jury.

10 MS. GALLAGHER: Or the sentencing body.

11 THE COURT: The sentencing body. What kind  
12 of guide is it when the answer is if they're right and  
13 that every first degree murder has an aggravating factor,  
14 isn't the guide then something that says you can go any  
15 direction? It's not a guide anymore. It is whatever you  
16 find -- we can, whatever -- well, whatever the murder is,  
17 we can find a place for you; that is, there's no real  
18 channel, there's no path; there is no channel.

19 MS. GALLAGHER: Judge, the Supreme Court has  
20 said that it is up to the legislature to decide what  
21 circumstances of a murder and what circumstances of a  
22 defendant warrant death.

23 THE COURT: Agreed.

24 MS. GALLAGHER: All 14 of ours relate to  
25 either the defendant and his history or her history or the

1 crime.

2 THE COURT: Agreed.

3 MS. GALLAGHER: It would be one thing if we  
4 gave the jury all 14 factors and said go in there and muck  
5 around and see what you find, but we don't do that,  
6 because the factor has to be -- we have to get through the  
7 *Chronis* hearing, which I am assuming is being waived for  
8 all of these people since the defense bar wants us to  
9 believe there is an aggravating factor in every case, so  
10 they have waived that.

11 THE COURT: I don't think that's the case.

12 MS. GALLAGHER: Well, I mean if we're  
13 getting creative here, judge, I like that version, but  
14 anyway, you got to get past the *Chronis* hearing. There  
15 has to be probable cause and then a jury has to decide.  
16 So let's look at one of our aggravating factors; that the  
17 person you murdered is under the age of 12. Obviously,  
18 that doesn't -- it could apply to some of the these  
19 people, but it doesn't apply to every single one, but it  
20 does apply to every single person who dares to commit  
21 first degree murder of a child under 12, and our  
22 legislature says it should do that. They're all included,  
23 anybody who kills a child, same with police officers as  
24 long as you know it is a police officer. You kill a  
25 police officer here, now you're going to be eligible. So



1 where -- those would be the reasons the jury would be  
2 looking at to say was killing this child, when I now have  
3 to look at the mitigating circumstances, is that a reason  
4 to impose death; yes or no and that's a decision that the  
5 jury makes and that's how it works.

6 THE COURT: I agree with you that's how it  
7 works.

8 MS. GALLAGHER: And that's how it should  
9 work.

10 THE COURT: But if collectively there is no  
11 difference between any first degree murder, in terms of  
12 you can find an aggravating circumstances anywhere --  
13 there's language in the Arizona Supreme Court cases and  
14 other places that say not every first degree murder should  
15 be a death penalty case; it says it, and almost by  
16 definition, what you're telling me is -- you just flat out  
17 told me that a few minutes ago: Every first degree murder  
18 case is a capital case and the Arizona cases say that's  
19 not the case.

20 MS. GALLAGHER: No, no, no. What I said,  
21 judge, was every first degree murder defendant should.

22 THE COURT: Okay. You're making a policy  
23 argument. That's fine.

24 MS. GALLAGHER: The sentence is life or  
25 death, but only these of you awful first degree murderers

1 are going to get even a shot at that ultimate shot.

2 THE COURT: And if every single first degree  
3 murderer has an aggravating circumstance, how are we  
4 saying only these. What are these? What are the these?  
5 If we're saying only these, only what? If every case has  
6 an aggravating circumstance, how are we differentiating  
7 anymore?

8 MS. GALLAGHER: You have to remember I don't  
9 agree that every one does. I agree that we have --

10 THE COURT: But you're not the law right  
11 now.

12 MS. GALLAGHER: We live in a very violent  
13 county because if you look at these other counties, we  
14 don't know that every one there has an aggravating factor.  
15 This is limited to Maricopa County.

16 THE COURT: Right.

17 MS. GALLAGHER: But there is not a case that  
18 says that if your scheme has 14 or 13 or 12 or whatever,  
19 that's too many and it's too inclusive, and look at --

20 THE COURT: Agreed.

21 MS. GALLAGHER: Look at, I believe it is  
22 Texas. They do have everybody -- every first degree  
23 murderer is a potential capital case because the jury  
24 has -- looks at the circumstance or whatever, if they find  
25 one of those, you move on. So there is a state with a

1 constitutional death penalty statute where every first  
2 degree murderer is potentially eligible for the death  
3 penalty. So how can that be constitutional, yet not our  
4 statute?

5 Let me ask the defense. That's in my view  
6 her best argument yet.

7 MS. COREY: What's that, judge?

8 MS. GALLAGHER: Thank you very much. You  
9 should have been listening.

10 MS. COREY: I should have been. I'm sorry,  
11 judge. What are you asking me?

12 THE COURT: She says Texas basically has a  
13 scheme that functionally says every first degree murder is  
14 eligible.

15 MS. COREY: Actually, judge, that's not  
16 accurate. If you look at *Jurek*, Your Honor, where the  
17 Texas scheme was analyzed, this is what it says. You've  
18 got narrowing and this is how they did it. These are the  
19 only people that are eligible for death, five different  
20 circumstances: The victim was a police officer, fireman  
21 on duty and the defendant knew it; the defendant committed  
22 the murder while attempting a kidnapping, burglary  
23 robbery, rape or arson; the defendant committed the murder  
24 for pecuniary gain; the defendant was escaping or  
25 attempting to escape from prison; the defendant killed a

1 correctional employee while in prison. That's it. That's  
2 the whole universe of death penalty eligible cases in  
3 Texas that were ruled on the court in *Jurek v. Texas*.

4 THE COURT: When was *Jurek*?

5 MS. COREY: 1976, judge.

6 THE COURT: Okay. She's talking about 2013.

7 MS. COREY: Well, judge, give me the statute  
8 and I will break it out for you, judge. What I am saying  
9 is that all the courts -- all the statutes are supposed to  
10 be -- what Arizona's statute is supposed to be doing, and  
11 it is clear when you look at *Lowenfield* and you look at  
12 *Zant*, is there clearly supposed to be doing something that  
13 segregates out the worst of the worst; that the  
14 legislature makes a legislative determination so it's not  
15 affected by emotion, so it's not affected by political  
16 gain. It is supposed to be narrow, judge, to take it out  
17 of the ability to -- I think Justice White was talking  
18 about this in *Furman*. You have got to foreclose the  
19 ability of prejudice to enter the picture.

20 So that's why the legislative definition  
21 needs to be narrow. That's supposed to be because you've  
22 got death penalty cases that are really emotional, right?  
23 Somebody's died. There is a bad situation, a murder case.  
24 It is supposed to be emotional. People are emotionally  
25 involved in those kind of cases, and so what they want to

1 do is do something to keep this from being an emotional  
2 response or a prejudicial response.

3           So the statutes -- *Lowenfield* said, look,  
4 you can do it this, way, you can narrow it this way. You  
5 don't have to have aggravators like *Gregg* did. That's not  
6 the only way you can do it, but we got to do it. You got  
7 to do it. There has to be some narrowing, to take that  
8 emotional element out of that, to take the political gain  
9 out of it.

10           Look what happened when Andrew Thomas was  
11 head of the office. What happened to the death penalty  
12 rate because he wanted to be governor? It exploded. We  
13 had more death penalty cases in this jurisdiction than  
14 Houston, Las Vegas and Los Angeles combined because he had  
15 political aspirations, and why was that allowed to happen,  
16 judge? Because virtually every first degree murder case  
17 has an aggravating factor. He could do it to promote his  
18 own political aspirations because the statute allowed him  
19 to do it.

20           Now, the statute is supposed to be designed  
21 to narrow in a functional way. It's not just supposed to  
22 narrow. It is supposed to narrow and identify the worst  
23 of the worst. Our statute is not doing it. Our statute  
24 is not doing what it's constitutionally designed to do.

25           THE COURT: Okay. I am going to be issuing

1 a written opinion but I am going to rule right now. I am  
2 going to follow with the written opinion because I think  
3 it is important to have a road map for various reasons,  
4 one, for appellate purposes; two, for other judges in  
5 superior court to see what I did that they think either  
6 made sense or didn't make sense from their perspective  
7 because this will be a recurring issue in other cases,  
8 even though we have captured some of the capital cases  
9 here.

10 Let me start with this: First of all, I am  
11 sympathetic to the position that there is an issue here if  
12 there is not a narrowing function. I think there is an  
13 issue. To say that the aggravating circumstances don't  
14 narrow the class and that's okay, there's something  
15 inherently wrong with that from my perspective. There is.

16 But here's the problem I have: I have  
17 Arizona cases that whether it is in a previous version of  
18 the statute, *Greenway* or *Hausner*, the current version,  
19 tell me that this argument or close to it -- and *Hausner*  
20 may have had a change since, but this version or close to  
21 it passes constitutional muster, and that's what I'm  
22 looking at.

23 MS. COREY: Judge, it is completely  
24 different and the problem is this: All of those statutes,  
25 all of those cases are talking about the statute before

1 there were 14 aggravating factors and before the F-2  
2 broadened.

3 THE COURT: I understand. I understand the  
4 context.

5 MS. COREY: And the problem is, judge,  
6 that's why the evidence is so important. You need to know  
7 is this statute working the way it's supposed to be  
8 working, and what we're saying to you, judge, when we have  
9 238 cases, and that's all the first degree murder cases  
10 over a two-year period, and every single one of them has  
11 an aggravator, then what's that telling you is our statute  
12 is not working the way it constitutionally is supposed to  
13 be working.

14 THE COURT: I understand what your argument  
15 is. I understand what your argument is. I understand  
16 there is a strong argument to be made that it's not  
17 working as it has been designed, whether it is Arizona  
18 Supreme Court cases or other cases; that there's not a  
19 genuine narrowing as envisioned at least by the language  
20 of some cases.

21 However, my analysis needs to be is the  
22 statute constitutional and how much, if any, narrowing is  
23 required at the aggravation or the aggravating factors  
24 phase. That's my analysis.

25 Am I sympathetic to the argument you're

1 making? Yep, I am. Do I have issues with the state's  
2 position that I am only supposed to look at individual  
3 aggravators and make sure that they are appropriate, as  
4 Miss Gallagher set forth. I do have a problem with that  
5 position, and I don't think I really adopt that position.

6           This is what I believe: First of all, there  
7 is a strong presumption that enactments are  
8 constitutional. We're starting with that. I understand  
9 we're in a capital context, but we do start the analysis  
10 with there is a presumption of constitutionality and  
11 that's important from my perspective.

12           The precedent really does not support a  
13 finding of unconstitutionality here except theoretically,  
14 and you're saying we moved from a point and now we've  
15 crossed the line. I don't think that there is enough that  
16 convinces me as a matter of law that we've crossed the  
17 line if I accept your facts as true. Is it an issue?  
18 Yes. Do I think it is a legislative or a policy issue?  
19 Yes. Is it an issue based on the law the way it is in  
20 Arizona that I believe that I would rule the statute  
21 unconstitutional? No. And I am relying on the following:  
22 I recognize *Greenway* is a prior statute. I recognize  
23 *Greenway* didn't have the current F-2. I recognize that  
24 *Hausner's* argument is not an extensive argument, but it is  
25 what the Arizona Supreme Court said about the narrowing



1 argument with a broad scope of Arizona's aggravating  
2 factors, and I feel bound, to a large degree, by their  
3 analysis and for me to now go and make this analysis would  
4 be problematic.

5 I also find it extremely important there is  
6 language in *Greenway* that I read before that does tell me  
7 that despite the fact that there's language talking about  
8 narrowing in first degree cases, that the narrowing from  
9 murder to first degree is an important function and  
10 essentially gives the statute credit for that in a  
11 constitutional analysis, and I think that's important as  
12 well.

13 There are other narrowing functions, and  
14 whether you like it or not, with respect to the jury, with  
15 respect to finding that intellectual disability is another  
16 narrowing factor, I think it has been found and I think,  
17 again, that is a narrowing function and tells me there is  
18 a narrowing function.

19 I also believe it is significant, although  
20 again, a difficult analysis, while it may be correct that  
21 every case in 2010 and '11, every first degree murder  
22 case, had an aggravating circumstance, I know that I can  
23 think of a scenario where a first degree murder case  
24 wouldn't. I understand it is theoretical and you're  
25 living in the present and the reality, and that's what

1 we're looking at, but in terms of constitutionality, I  
2 think that is a factor going forward.

3           There are different levels of narrowing, and  
4 I do think that there are narrowing factors in the  
5 statute. I note that the Ninth Circuit and the District  
6 Court of Arizona have also considered narrowing arguments,  
7 again, I recognize and acknowledge, not based on the  
8 empirical data that you're bringing to the table.

9           I do believe though at the end of the day,  
10 that there is not enough for me to overcome the strong  
11 presumption that the statute's constitutional, and  
12 therefore, I am denying the motion to dismiss for the  
13 reasons that we've discussed.

14           I will say and I want to make it clear for  
15 the record I hope that the Supreme Court looks at it. I  
16 want to make the best record I can for them to look at it,  
17 because I do think this is a unique argument that hasn't  
18 been really directly taken on in the cases that anybody  
19 has cited and it needs to be taken on directly because  
20 from a policy perspective, I get the argument, but my  
21 job -- and I am not afraid of saying I think it is  
22 unconstitutional if it is unconstitutional, but from my  
23 perspective with the Arizona law the way it is, from my  
24 perspective, I think that there's not enough for me to  
25 find the statute unconstitutional.

1 MS. COREY: Is it part of your ruling that  
2 it would only take one theoretical case to make the  
3 statute --

4 THE COURT: I am not saying that. I am  
5 saying I can think of one and perhaps more than one. I  
6 think that there are theoretical possibilities out there.  
7 If that was the only basis, then that may not be enough,  
8 but that's combined with the other narrowing factors I  
9 found.

10 MS. COREY: And can the Court elaborate as  
11 what the Court is finding the narrowing factors in the  
12 statutes?

13 THE COURT: The narrowing from murder to  
14 first degree I think is a narrowing factor. I do think  
15 the jury function has been found to be a narrowing factor.  
16 I think the classification of intellectual disability is a  
17 narrowing factor. I think arguably there are other  
18 narrowing factors, although I understand they may be  
19 directly outside the legislation, meaning age. That  
20 wasn't the Arizona legislature's idea, but that's a  
21 narrowing factor. The classifications of the felony  
22 murder rule really do work as a narrowing factor at times,  
23 and again, those are judicial narrowing; the *Inman/Tison*,  
24 there is narrowing there and it may be as interpreted  
25 versus what's in the statute, but there's narrowing there,

1 and I note it as part of the narrowing analysis.

2 MS. COREY: For purposes of appeal, judge,  
3 when you say jury function, what exactly do you mean by  
4 that?

5 THE COURT: The jury determination, finding  
6 the aggravating factors and then determining whether  
7 there's mitigation sufficient to call for leniency.

8 MS. COREY: Thank you, judge.

9 THE COURT: So for the reasons set forth on  
10 the record, the motions to dismiss are denied. I am going  
11 to issue a minute entry. I am going to lay out what I  
12 just said as best I can. It may take me a little while,  
13 but I want to give you paper that you can show.

14 MS. GALLAGHER: Judge, we do have now the  
15 case management conference for Mr. Noonkester and --

16 THE COURT: I remember we talked about that.  
17 As tired, as I am sure we all are, we are going to do  
18 that. We're going to wait for that. I am going to wait  
19 for everyone to clear out except for Mr. Noonkester.

20 We're adjourned in this matter.

21  
22 (Whereupon, the proceedings in the  
23 above-entitled matter were concluded.)  
24  
25

C E R T I F I C A T E

I, LAURA A. ASHBROOK, do hereby certify that the foregoing pages constitute a full, accurate transcribed record of my stenographic notes taken at the aforementioned time and place, all done to the best of my skill and ability.

s/s  
\_\_\_\_\_  
LAURA A. ASHBROOK  
Certified Court Reporter  
Certificate #50360

# Appendix I

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR2010-048824-001 SE

11/10/2014

HONORABLE JOSEPH KREAMER

CLERK OF THE COURT  
S. Yoder  
Deputy

STATE OF ARIZONA

KRISTIN LARISH

v.

JAMES CLAYTON JOHNSON (001)

ROBERT E REINHARDT  
PETER NMN JONES

CAPITAL CASE MANAGER

ORAL ARGUMENT SET

The Court has considered Defendant's Motion for Joinder and for Omnibus Hearing on Motion to Dismiss Death Penalty. Good cause appearing,

IT IS ORDERED granting the Motion.

IT IS FURTHER ORDERED setting Status Conference re Oral Argument on **January 23, 2015 at 1:30 p.m.** in this Division.

IT IS FURTHER ORDERED setting Oral Argument on the omnibus Motion to Dismiss the Death Penalty on **February 6, 2015 at 1:30 p.m.** in this Division.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

# Appendix J



- - o0o - -

Defendant.

CR 2010-048824  
CR-16-0261-AP

April 24, 2015

## ORAL ARGUMENT

Laura Ashbrook, RMR  
Certified Court Reporter  
Cert. No. 50360

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A P P E A R A N C E S

(As noted below)

P R O C E E D I N G S

1  
2  
3 THE COURT: Thank you. Please be seated.  
4 We are here this afternoon for a hearing on defense motion  
5 for evidentiary hearing in support of motion to strike  
6 notice of intent to seek the death penalty. What I am  
7 going to do is similar to what I did in the last hearing.  
8 I am going to go through each of the cases. I am going to  
9 ask for counsel to state their appearances and then I will  
10 ask defense counsel to please let me know -- defense  
11 counsel to please let us know whether their client is here  
12 or not. So let's do that.

13 Let's start with number one. Number one is  
14 CR 2013-103200, State of Arizona versus Jorge Amaya Acuna.  
15 Appearances, please.

16 MS. WEINBERG: Hillary Weinberg for the  
17 state.

18 MR. STAZZONE: Joseph Stazzone and Jeffrey  
19 Kirchler, public defender's office, for Jorge Amaya Acuna  
20 who is present.

21 THE COURT: Number two is CR 2011-138856,  
22 State of Arizona versus John Michael Allen. Appearances,  
23 please.

24 MS. GALLAGHER. Good afternoon. Jeannette  
25 Gallagher appearing on behalf of the state.

1 MR. REINHARDT: Robert Reinhardt on behalf  
2 of John Allen. He is not present, Your Honor.

3 THE COURT: Number three is  
4 CR 2011-138856-003, State of Arizona versus Samantha  
5 Lucille Rebecca Allen. Appearances, please.

6 MS. GALLAGHER: Jeannette Gallagher  
7 appearing on behalf of the state.

8 MR. CURRY: Jeremy Bogart and John Curry  
9 for Sammantha Allen whose presence has been waived.

10 THE COURT: Number four is  
11 CR 2013-419619-002, State of Arizona versus Darnell Moses  
12 Alvarez. Appearances, please.

13 MS. GILLA: Marischa Gilla appearing for the  
14 state, Your Honor.

15 MR. ZIEMBA: And Michael Ziemba  
16 representing the defendant, Darnell Moses Alvarez, who is  
17 present.

18 THE COURT: Number five is CR 2012-007044,  
19 State of Arizona versus Ashley Denise Buckman.  
20 Appearances, please.

21 MS. WADE: Jesse Wade on behalf of Kirsten  
22 Valenzuela for the state.

23 MR. CROCKER: Eric Crocker appearing for  
24 Jim Cleary and Gary Shriver on behalf Mr. Buckman, and she  
25 has waived her presence.

1 THE COURT: Number six is CR 2011-133622,  
2 State of Arizona versus Jesus Antonio Busso-Estopellan.  
3 Appearances, please.

4 MR. BASTA: Eric Basta on behalf of the  
5 state, Your Honor. Good afternoon.

6 MS. HYDER: Stacy Hyder and Tonya Peterson  
7 on behalf of Mr. Busso-Estopellan who is present, in  
8 custody.

9 THE COURT: Good afternoon. Number seven is  
10 CR 2012-008340, State of Arizona versus Kurt Dustin  
11 Coleman. Appearances, please.

12 MS. GALLAGHER: Jeannette Gallagher  
13 appearing on behalf of Patricia Stevens for the state.

14 MR. NVAZO: Gregory Navazo standing in for  
15 Richard Miller for Mr. Coleman who is in the jury box.

16 THE COURT: Number eight is 2011-155640,  
17 State of Arizona versus Corey Rasean Daniels.  
18 Appearances, please.

19 MS. GILLA: Marischa Gilla for the state.

20 MR. PARKER: R.J. Parker and Alan Tavassoli  
21 for Mr. Daniels. He is present, judge.

22 THE COURT: Good afternoon. Number nine is  
23 CR 2010-168096, State of Arizona versus Craig Michael  
24 Devine. Appearances, please.

25 MR. KOESTNER: Good afternoon. Steve

1 Koestner, Bruce Buck on behalf of Mr. Devine. He has  
2 waived his presence.

3 MS. GALLAGHER: Jeannette Gallagher  
4 appearing on behalf of Vince Goddard for the state.

5 THE COURT: Number ten is 2013-003468, State  
6 of Arizona versus Octavio Garcia. Appearances, please.

7 MS. GALLAGHER: Jeanette Gallagher appearing  
8 on behalf of Laura Reckart for the state.

9 MS. DOMINGUEZ: Alicia Dominguez, Lindsay  
10 Abramson and Cynthia Brubaker on behalf of Mr. Garcia who  
11 is present, in the jury box.

12 THE COURT: Good afternoon. Number 11 is CR  
13 2010-137021, State of Arizona versus Victor Hernandez.  
14 Appearances, please.

15 MS. CHARBEL: Susie Charbel on behalf of the  
16 state.

17 MR. COTTO: Brandon Cotta for Mr. Hernandez  
18 who's present in the jury box, Your Honor.

19 THE COURT: Number 12 is CR 2010-007912,  
20 State of Arizona versus Darnell Reuna Jackson.  
21 Appearances, please.

22 MS. WADE: Jesse Wade on behalf of Kirsten  
23 Valenzuela for the state.

24 MR. TAVASSOLI: Alan Tavassoli, R.J.  
25 Parker, office of the public defender, on behalf of Mr.

1 Jackson who is present, in the courtroom.

2 THE COURT: Number 13, 2010-048824, State of  
3 Arizona versus James Clayton Johnson.

4 MS. LARISH: Good afternoon. Kristen Larish  
5 on behalf of the state.

6 MR. REINHARDT: Robert Reinhardt and Peter  
7 Jones for Mr. Johnson. Mr. Johnson waives his presence.

8 THE COURT: Number 14 is 2013-001614, State  
9 of Arizona versus Moises Hernandez Lagunas. Appearances,  
10 please.

11 MS. CHARBEL: Susie Charbel on behalf of the  
12 state.

13 MS. PETERSON: Tonya Peterson on behalf of  
14 Mr. Hernandez who is present, in custody.

15 THE INTERPRETER: Fabiola Cerezo, court  
16 interpreter.

17 THE COURT: Number 15 is CR 2013-002559,  
18 State of Arizona versus Dennis Michael Levis.

19 MS. GALLAGHER: Jeannette Gallagher on  
20 behalf of Vince Imbordino for the state.

21 MR. KOESTNER: Steve Koestner and Bruce  
22 Buck on behalf of Mr. Levis who has waived his presence.

23 THE COURT: Number 16 is CR 2011-007597,  
24 State of Arizona versus Macario Lopez.

25 MS. GALLAGHER: Jeannette Gallagher

1 appearing on behalf of the state.

2 MR. CROCKER: Eric Crocker and Gary  
3 Bevilacqua for Mr. Lopez who is present in the jury box.

4 THE COURT: Number 17 is CR 2013-110974,  
5 State of Arizona versus Richard Molina Luznia.  
6 Appearances, please.

7 MS. WADE: Jesse Wade on behalf of the  
8 state.

9 MR. REINHARDT: Robert Reinhardt for Mr.  
10 Luzania. He waives his presence, Your Honor.

11 THE COURT: Number 18 is 2013-458974, State  
12 of Arizona versus Alex Anthony Madrid. Appearances,  
13 please.

14 MS. CHARBEL: Susie Charbel on behalf of the  
15 state.

16 MS. FALDUTO: Good afternoon, Your Honor.  
17 Bobbi Falduto and Angela Walker on behalf of Alex Madrid  
18 who is in the box.

19 THE COURT: Number 19 is CR 2012-133415,  
20 State of Arizona versus Joseph Michael Matthews.

21 MS. GALLAGHER: Jeannette Gallagher on  
22 behalf of Juan Martinez for the state.

23 MR. CURRY: Lisa Gray and John Curry for  
24 Mr. Matthews who is in the jury box.

25 THE COURT: Number 20 is CR 2013-004357,



1 State of Arizona versus Robin Leroy McJunkin.

2 Appearances, please.

3 MS. CHARBEL: Susie Charbel on behalf of the  
4 statement.

5 MS. FALDUTO: Jennifer Roach and Bobbi  
6 Falduto standing in for Lawrence Blieden for Robin  
7 McJunkin who waives his presence for this proceeding

8 THE COURT: Number 21 is CR 2014-128973,  
9 State of Arizona versus Gary Michael Moran. Appearances,  
10 please.

11 MS. GALLAGHER: Jeannette Gallagher  
12 appearing on behalf of Patricia Stevens for the state.

13 MS. FALDUTO: Bobbi Falduto and Angela  
14 Walker on behalf of Gary Moran who is in the box.

15 THE COURT: Number 22 is CR 2011-138281,  
16 State of Arizona versus Jason Neil Noonkester.  
17 Appearances, please.

18 MS. GALLAGHER Jeannette Gallagher on behalf  
19 of the state.

20 MS. COREY: Susan Corey and Pete Jones for  
21 Mr. Noonkester. We waive his appearance.

22 THE COURT: Number 23, State of Arizona  
23 versus Ricardo Alejandro Ramirez. Appearances, please.

24 MS. GALLAGHER: Jeannette Gallagher  
25 appearing on behalf of Vince Imbordino.

1 MS. BUBLIK: And Terry Bublik on behalf of  
2 Mr. Ramirez along with Alicia Dominguez who is standing in  
3 for Lawrence Matthews, and he is present, in custody.

4 THE COURT: Number 24 is CR 2013-002559-002,  
5 State of Arizona versus Thomas Michael Riley.  
6 Appearances, please.

7 MS. GALLAGHER: Jeannette Gallagher  
8 appearing on behalf of Vince Imbordino for the state.

9 MR. CRAIG: Randall Craig and Benjamin  
10 Taylor present on behalf of Mr. Riley who is present.

11 THE COURT: Number 25 is CR 2012-138236,  
12 State of Arizona versus Dwandarrius Jamar Robinson.  
13 Appearances, please.

14 MS. GALLAGHER: Jeannette Gallagher  
15 appearing on behalf of Jay Rademacher for the state.

16 MS. HINDMARCH: Jaime Hindmarch on behalf  
17 of Mr. Robinson who is present.

18 THE COURT: Good afternoon. Number 26 is  
19 CR 2012-114731, State of Arizona versus Jarvis Jovan Ross.  
20 Appearances, please.

21 MS. WADE: Jesse Wade on behalf of Ryan  
22 Green for the state.

23 MS. COREY: Susan Corey for Gary Beren. I  
24 don't know if his client is present or not.

25 THE COURT: Mr. Ross, are you here?

1 (There was no response.)

2 MS. COREY: We would waive his presence.

3 THE COURT: Number 27 is CR 2010-007882,  
4 State of Arizona versus Jasper Phillip Rushing.  
5 Appearances, please.

6 MS. GALLAGHER: Jeannette Gallagher  
7 appearing on behalf of the state.

8 MR. CRAIG: Randall Craig and Steve Duncan  
9 on behalf of Mr. Rushing. He is present.

10 THE COURT: Number 28 is 2004-005523, State  
11 of Arizona versus Joshua Idlefonso Villalobos.  
12 Appearances, please.

13 MS. WADE: Jesse Wade on behalf of Ryan  
14 Green and Patricia Stevens for the state.

15 MS. BUBLIK: And Terry Bublik and Alicia  
16 Dominguez on behalf of Mr. Villalobos who I believe  
17 presence was waived.

18 THE COURT: And, finally, number 29,  
19 CR 2014-108856, State of Arizona versus Judith Elaine  
20 Walthers. Appearances, please.

21 MS. GALLAGHER: Jeannette Gallagher  
22 appearing on behalf of Laura Reckart for the state.

23 MR. CANBY: Jeremy Bogart and John Canby  
24 for Miss Walker. She is present, in custody.

25 THE COURT: Thank you. Before we start

1 talking about the substance, we have a request for a  
2 camera in the courtroom, as I understand it. It is a  
3 still camera that's in the back. I received a written  
4 objection this morning from -- or actually just before I  
5 came in from the defense. I think the objection is  
6 essentially that the defense wants me to order that none  
7 of the defendants be photographed; is that correct?

8 MR BEVILACQUA: On behalf of Mr. Lopez. I  
9 don't speak for anyone else.

10 THE COURT: Let me start out with the --  
11 this on the defense. Does anybody have a general  
12 objection? Because I am going to entertain that specific  
13 objection in terms of photographing the individual  
14 defendants. Does anybody have a general objection to a  
15 camera being used to do anything other than photograph the  
16 defendants? In other words, anybody want to make an  
17 objection under Rule 122 and then we'll talk about the  
18 specific request not to photograph the defendants?

19 MR BEVILACQUA: Judge, I do have a general  
20 objection because I was informed today that the cameraman  
21 wants to take photographs of the security with their  
22 machine guns and their weapons and in case this is  
23 specifically linked with our client, Mr. Lopez, we don't  
24 really think it would be fair to have his name out there  
25 and shown photographs of guys with their flack jackets and

1 machine guns as if he's some sort of inordinate threat. I  
2 would object that they take photographs of security and  
3 the clients as well.

4 THE COURT: I don't, under Rule 122, have a  
5 concern about taking photographs of security. I don't  
6 think that creates prejudice. I don't think under the  
7 rule that's a viable objection, but I do think this -- it  
8 is a reasonable objection for this hearing under the  
9 circumstances to limit the media to photographs and not  
10 allow them to take photographs of the defendants.

11 But let me tell you in part my decision is  
12 because the request, at least to me, came pretty late in  
13 time yesterday, so I don't think the defense had fair  
14 time, and the rule contemplates there being a certain  
15 amount of time. In fairness to the media, many of these  
16 cases are already subject to a camera request that's been  
17 granted and the core policy generally is the request is  
18 granted. It follows along and it is a general grant.

19 This is a really unique hearing, and so for  
20 purposes of today, I'm comfortable limiting the still  
21 photography to anywhere other than any of the defendants;  
22 in other words, the -- and I'm directing the  
23 photographer -- and have you taken pictures yet of any of  
24 the defendants?

25 Specifically, what I am directing is that

1 those pictures not be utilized or disseminated outside of  
2 you. Mr. Kiefer is here. Hang on for a second.

3 Then for the time being, I'll allow there to  
4 be media, and this is without prejudice for the media to  
5 come in and argue that they can use them, but I don't  
6 think the defendants have had a fair opportunity to make  
7 the argument yet, and so for the time being at least,  
8 until further order, I'm directing you not to use  
9 photographs of any of the individual defendants.

10 Everything else is fair game in terms of the  
11 photography. And then I'm going to allow the media,  
12 should they want to come in and challenge that, to have an  
13 opportunity because I don't think we are in a position to  
14 have a fair discussion of that.

15 And Mr. Kiefer is here from the media, might  
16 want to say something. I guess I can take the position I  
17 want to hear from counsel, but I am okay since I think you  
18 made the specific request that we're here for.

19 Mr. Kiefer, anything you want to tell me  
20 about that?

21 MR. KEIFER: I'm not sure we'll be making a  
22 request saying we want to take photographs of people  
23 carrying weapons, but we photograph defendants in cases  
24 all the time and I would contend we have a First Amendment  
25 right to do so here.

1                   THE COURT: I don't necessarily disagree  
2 with you. This is more about notice, and the ability --  
3 two things. One, this is really a unique situation but  
4 second, the defense hasn't had the opportunity yet to  
5 really fully argue this, and I am not comfortable making a  
6 final decision. So I am going to err on the side of not  
7 for this hearing.

8                   I note we have a hearing in two weeks, a  
9 hearing coming up where we're going to be, arguably, in  
10 the same position, and I will entertain before that -- if  
11 the media wants to file a motion to expand my order or if  
12 the defense wants to argue there should be nothing, can  
13 always file a motion between now and our next hearing and  
14 I'll hear you on that, but it needs to be filed in the  
15 next week so we can resolve it ahead of time, and I'm not  
16 spending our time here on that issue, but I felt compelled  
17 to address the issue here.

18                  MR. KIEFER: Shall I call my attorney now?

19                  THE COURT: Yes, although we're not going to  
20 resolve it today. I don't think, in fact, I would give  
21 them -- so I am not going to resolve it today. I will  
22 resolve it early next week if that's what you want.

23                  THE COURT: Mr. Curry.

24                  MR. CURRY: Your Honor, if I may, my request  
25 would be that if a decision is made to allow those kind of

1 photographs, that we get word of that decision before any  
2 deadline the Court sets for waiving our client's presence  
3 so we have the option -- if they're going to be  
4 photographed, that they have the option of waiving their  
5 presence.

6 THE COURT: Fair request, and we will make  
7 sure that any resolution of that issue happens before the  
8 deadline to decide whether there's going to be a waiver or  
9 not. We will talk about the mechanics of that at the end  
10 of this hearing after we talk about the issue of the  
11 evidentiary hearing. Okay. I think we have an  
12 understanding what we're doing or not doing.

13 MR. KIEFER: The video would be subject to  
14 the same rules?

15 THE COURT: I am okay with a video  
16 photographer, nothing of the defendants. Everything else  
17 is okay. You can set up in there if you want to set up in  
18 there.

19 MR. KIEFER: Just for clarification, you  
20 said -- before you said individual defendants. Can we  
21 take them as a whole or are we to take no pictures of  
22 defendants at all?

23 THE COURT: Correct. Your last statement is  
24 correct.

25 Okay. All right. Let's talk about what



1 we're here to talk about, and that is the defendant's  
2 motion for evidentiary hearing in support of motion to  
3 strike notice of intent to seek the death penalty.

4           At our last hearing, I directed a briefing  
5 schedule on this issue and I believe the parties have  
6 complied. Specifically, I received on March 25th  
7 defendant's motion for evidentiary hearing in support of  
8 the motion to strike notice of intent to seek the death  
9 penalty. On March 25th, I received what was called an  
10 initial notice of disclosure containing disks. Those  
11 disks contain spread sheets. I will talk in a few minutes  
12 about that. On March 27th, I received the state's  
13 response. On April 17th, I received defendant's reply in  
14 support of the motion.

15           My understanding of Mr. Bevilacqua's filings  
16 is essentially everybody is joining in whatever was filed  
17 by Mr. Bevilacqua and I focused on what he has given me.  
18 I have reviewed the disks, not all of them and not every  
19 page, but the 2011, I reviewed the entire spread sheet I  
20 am aware of what's in the rest of -- on the rest of the  
21 disks.

22           What I want to do first, I want to go  
23 through with the defense side and what I understand you to  
24 be telling me the information on the disks are presenting.  
25 In other words, I want you to tell me what you believe the

1 facts are from the disclosure that you produced. I want  
2 to make sure we're on the same page, and then we will talk  
3 about what we do with that so -- and maybe Miss Corey is  
4 the best person to do this.

5 MR BEVILACQUA: Ms. Corey and Garrett  
6 Simpson are the ones that compiled and led that side of  
7 this, so I am going to let her address the Court on that.

8 THE COURT: Miss Corey, here's what I  
9 understand the initial disclosure to reflect: From  
10 August 2nd, 2002 to December 31st, 2012, there were  
11 870 cases in which an adult was charged with first degree  
12 murder in Maricopa County. You and/or your team could not  
13 get documents for four of those cases. You have analyzed  
14 866 cases. In those 866 cases, there was one at least one  
15 statutory aggravating circumstance pursuant to ARS  
16 13-751(F) present in 856 of the 866 cases. You broke them  
17 down by year. This includes 100 percent of the cases  
18 filed in 2002; 100 percent 2008 and 2009; is that correct?

19 MS. COREY: Yes, Your Honor, that's correct,  
20 and the ones that we did not -- were not able to analyze,  
21 we could not analyze them because they were sealed. I  
22 know at least one of those, possibly two of those were  
23 capital cases so, of course, those would have had  
24 aggravators.

25 THE COURT: You're speaking of the four

1 cases that were identified; is that correct?

2 MS. COREY: Yes, yes, judge. We, Garrett  
3 and I, analyzed, I believe, 11 years of what was excluded  
4 by our expert. From those 11 years, we analyzed all of  
5 those cases that were in the spread sheets, but our expert  
6 only excluded all the juveniles and our expert also  
7 excluded every case that predated the change in the  
8 statute which was August 2nd, 2002. So that's what you  
9 have before you.

10 THE COURT: So it is clear, you're asserting  
11 that 870 -- 870 cases are the entirety of the cases in  
12 which a defendant was charged with first degree murder in  
13 Maricopa County from August 2nd, 2002 to December 31st  
14 2012?

15 MS. COREY: No, we are are not asserting  
16 that. We analyzed every first degree murder case. This  
17 is what happened: We did a public records request through  
18 Rich Robertson to the Maricopa County Attorney's Office  
19 for a list of their first degree murder cases. From that  
20 list -- we're relying on the material that was provided by  
21 the county attorney's office to Rich Robertson. From that  
22 list, we analyzed every first degree murder case, but the  
23 866 cases that comprise the study are the ones that were  
24 without the juveniles and the ones that predated 2002, the  
25 change in the statute.

1           The reason that's significant, judge, is  
2 because some of the cases were cold cases that were  
3 charged 20, 30 years after the event. Those cases were  
4 not included, but we did analyze them and the Court can  
5 see that most of those cases, if not all of those cases,  
6 also had aggravating factors. They were just not analyzed  
7 by our expert. We looked at them; the expert did not.

8           THE COURT: So what number of cases are we  
9 talking about that fall outside of the 870? Do we have an  
10 idea?

11          MS. COREY: What our expert will testify is  
12 that of the 866 cases that she is looking at for her  
13 study, ten of those didn't have aggravating factors. It  
14 is our contention --

15          THE COURT: I know that. I am just -- I  
16 want to make sure I understand what the universe is, and  
17 again, going back to -- I am trying to determine as best I  
18 can how many of the first degree murder cases between  
19 August 2nd, 2002, and December 31st, 2012 are captured by  
20 the 870; that is, are there others out there? And you  
21 seem to suggest that there are, and I am not entirely  
22 clear on how many and how they fall.

23          MS. COREY: Judge, here's the problem:  
24 There are others out there but our expert excluded some of  
25 those. The Court can look at them. They are in both the

1 summaries and in the substantive documents that we  
2 provided to the Court. Both of those things are on those  
3 disks, so the Court can look at those if they want, but  
4 for purposes of our expert, the ones that she looked at  
5 are the 866 cases that we're talking about that excluded  
6 the juveniles, that excluded the ones that predate the  
7 change in the statute.

8 THE COURT: So the only exclusions are  
9 juveniles and the predating the statute?

10 MS. COREY: Yes, Your Honor.

11 THE COURT: That's what I was asking. In a  
12 very important way, that's what I wanted to make sure.  
13 Let me ask you this: If a case was dismissed and then the  
14 defendant re-indicted for the same offense, did you count  
15 it twice? Looks to me like you --

16 MS. COREY: We did not, judge. We tried to  
17 catch those. It may have been they were not caught. We  
18 tried to catch those and our expert did not count the  
19 dismissed cases; that's also true.

20 THE COURT: I will tell you that in looking  
21 at 2011, I see there are at least two errors that do not  
22 go to the essence of your argument for the Franklin case  
23 and the Foote case. The notation is that the plea  
24 stipulations was to natural life and I know in both cases  
25 the plea stipulation was not to natural life. It doesn't

1 affect what we're doing here. I have a note there were a  
2 couple mistakes that I saw in my review. It does not  
3 affect what my determination is going to be here or how I  
4 treat the evidence for now.

5 Okay. Let me shift off from what it says.  
6 Mr. Crocker.

7 MS. COREY: Judge, we do want to point out,  
8 Your Honor, that we are not conceding the ten that the  
9 expert did not find an aggravator because of F-13 and the  
10 breadth of that aggravator.

11 THE COURT: Well, I mean, you're presenting  
12 to me and I am going to accept what Professor Spohn -- the  
13 stat that she provided was 856 out of 866 and there were  
14 four other cases out there. That's what I am working  
15 with, and so that's what I want to talk about.

16 I guess from my perspective, I am struggling  
17 with the argument that was made by the defense that  
18 refusal to allow a hearing, an evidentiary hearing, is  
19 akin to a refusal to allow a hearing on the constitutional  
20 claims. I don't see that, and the cases that you cited  
21 don't say that. None of the cases are even close, as the  
22 state pointed out; they're not, and I have reviewed them  
23 and we can go through them. I am not sure it is a  
24 worthwhile exercise I am giving you a hearing on the claim  
25 if, in fact, I am assuming the facts that you want to

1 present for purposes of this argument only to be true.  
2 From my perspective, there is nothing to be gained by an  
3 evidentiary hearing when I am assuming that the arguments  
4 or the allegations you're going to make in the evidentiary  
5 hearing is true. I am going to adopt at least -- at least  
6 I am planning to adopt for purposes of our argument on the  
7 8th the statistic that is cited by Professor Spohn, and I  
8 am going to assume that to be true.

9 I am specifically, as I did before, allowing  
10 the state to say we object to that; we don't agree, but  
11 that's a dispute that I would resolve later depending on  
12 what would happen down the road.

13 Right now, to me, it makes no sense for me  
14 to have an evidentiary hearing to let you argue facts that  
15 I already accept. In other words -- and, in fact, the  
16 Court of Appeals said this in connection with Mr. Gittens'  
17 appeal in our previous hearing. The Court of Appeals  
18 said, addressing the lack of an evidentiary hearing in  
19 petitioners' claim, appellate review is illusory if there  
20 is no adequate record made in the superior court. The  
21 superior court considered the documents petitioners filed,  
22 both the actual exhibits and summaries of those exhibits,  
23 and assumed as true all of the petitioners' factual  
24 submissions when ruling on the motion. Petitioners have  
25 failed to show how this record would make this appeal

1     illusory. I think we're in the same place.

2                     Tell me how we're not in the same place, I  
3     guess, is my question to Mr. Bevilacqua or anybody who  
4     wants to handle that over there. Mr. Crocker.

5                     MR. CROCKER: Judge, really, assuming it is  
6     one thing, but actually have it as true is another. I  
7     think it is critical that we be allowed to show that our  
8     data is factual in nature. When you read the state's  
9     pleadings, they basically talk out of both sides of their  
10    mouth. What they say is, one, the data is questionable.  
11    In their underlying pleadings, they question it. They  
12    cite a couple of examples where typos were made, the age  
13    of a child, as if that would make some kind of difference;  
14    it does not, but they point out and they say therefore our  
15    data is questionable. So the state's not accepting our  
16    data as being factual to support our constitutional claim.

17                    The other issue we're here for today is  
18    obviously our right to the hearing, the necessity for the  
19    evidentiary hearing. We feel -- the defense feels that  
20    it's necessary to establish the data as factual; not just  
21    assume it is factual, but establish it as factual. If  
22    you're telling us you looked at our data and you find as a  
23    matter of law, the facts have been established as true,  
24    you're not doing that.

25                    THE COURT: No, I am not doing that. I am



1 doing exactly what I did before and the Court of Appeals  
2 agreed with me; that there's no utility to an evidentiary  
3 hearing from a legal perspective when I am assuming, for  
4 purposes of considering the legal argument, that the facts  
5 you're presenting are true; that if I assume those facts  
6 are true and make a legal ruling accordingly, we're not  
7 going to go through an exercise that we need not have to  
8 go through and does not have a utility. That's what I'm  
9 saying, and there's no case -- I don't see a single case  
10 that you cited or I am aware that says you have a right to  
11 an evidentiary hearing to establish facts that the Court  
12 already accepts.

13 Is there a case out there? You didn't cite  
14 one.

15 MR. CROCKER: You're not accepting them.  
16 You're not accepting the facts. You are telling us you're  
17 assuming them to be true. That to me, to the defense, is  
18 not the same as saying they are true. Just assuming  
19 something is true, albeit for argument sake for a  
20 particular hearing which could later be questioned as  
21 being true or not is not the same as saying something is  
22 true. When -- normally when a statute is challenged, the  
23 review at the higher courts is de novo.

24 We all understand that this is a unique  
25 situation in that we have factual data underneath that

1 supports our challenge to the statute, and so if that we  
2 feel that it's necessary to actually have the hearing, it  
3 will only take half an afternoon anyway to actually  
4 establish the factual basis for our hearing.

5 At this time, I would like to ask the state  
6 does the state stipulate to our facts as being true?

7 THE COURT: No. I will ask. You don't ask  
8 the state anything. I --

9 MR. CROCKER: Please ask the state then.

10 THE COURT: I will talk to the state then.  
11 We need to have an understanding of how we're proceeding,  
12 I guess my question and my belief is, and you're not  
13 telling me anything different. There is not a case out  
14 there that says there's a constitutional right to an  
15 evidentiary hearing to establish facts that the Court  
16 already accepts.

17 I get and agree with your concept that it's  
18 different than me saying I accept it for purposes of the  
19 hearing and I am making a legal finding. I am not making  
20 a legal finding. I know you want a legal finding; I  
21 understand that and I am not surprised by that. That  
22 doesn't mean you're constitutionally entitled to it. I  
23 don't think you are. There is not a case that says you  
24 are. The cases you cited aren't even in the ballpark for  
25 saying that, and from my perspective, your assertion that

1 we can do it in half a day does not -- I don't think  
2 you're even close.

3 MR. CROCKER: You want to go through the  
4 three cases that the state cites in their response  
5 pleading saying that we're in error? I can comment on  
6 those.

7 THE COURT: You want to talk about the three  
8 main cases? You rely on *Panetti*, *Hahmdi* (phonetic) and  
9 *Matthews* because they are nowhere on point. If you can  
10 convince me that somehow any of those three cases or any  
11 of the other cases begin to suggest you're entitled to an  
12 evidentiary hearing, I am happy to talk to you about them  
13 but they don't.

14 MR. CROCKER: Well *Matthews v. Eldridge*, the  
15 issue there was that the state alleges they did not  
16 require an evidentiary hearing while respondent was  
17 challenging constitutionality of the determination of  
18 benefits procedure. The facts of that case were benefits,  
19 whether or not there was benefits to be had. Nobody in  
20 that case was challenging that that was a fact that the  
21 Court accepted as true, not for -- didn't assume it was  
22 true for sake of argument was true. What they were  
23 questioning was whether or not there was a procedure to  
24 challenge that.

25 So that case doesn't help the state. That

1 actually helps us because in that situation, the facts of  
2 that case that gave rise to the claim were true. Here we  
3 don't have that concession by the state and we're not  
4 getting that concession from you.

5 THE COURT: I don't think *Matthews* helps  
6 you. *Matthews* simply says in a claim for disability  
7 benefits, a recipient is not entitled to an evidentiary  
8 hearing because the administrative procedures are  
9 adequate. That's what it says. So I don't think that  
10 that helps. It does have some framework for an analysis  
11 of when evidentiary hearings are necessary; it talks about  
12 that, but the resolution of that case doesn't help.

13 MR. CROCKER: They were talking about  
14 whether or not there was adequate procedure to address the  
15 issue of benefits. The benefits were -- the facts -- the  
16 procedure was the process. The facts of benefits was not  
17 in question in that case. The data in our case is in  
18 question because you won't accept them as true and the  
19 state's not stipulating to them as true.

20 THE COURT: I don't think the case says I  
21 can't make a legal determination based on facts I assume  
22 to be true for purposes of this argument. In fact, I  
23 would posit to you that it happens all the time in  
24 courtrooms everywhere that the judge says I will assume  
25 these facts to be true; is there a legal issue I can

1 resolve? And if it becomes relevant, then we go back and  
2 argue about the facts. That happens all the time and it  
3 is a matter of judicial economy.

4 MR. CROCKER: I understand. I don't want to  
5 waste time, but that's -- in my mind, that's circular.  
6 You will assume they are true until we make our argument,  
7 our legal argument attacking the statute, and then if  
8 we're successful there in raising the colorable claim, you  
9 will then go around and go back and look at the facts to  
10 see if they actually are true.

11 THE COURT: Yes.

12 MR. CROCKER: Why don't we do that now?

13 THE COURT: It's not a matter of a half day  
14 hearing. You can say you can do that in a half day. I  
15 don't think in my view we're going to be anywhere near a  
16 half a day, and I don't think we have that hearing to  
17 fight about that until I determine whether it really  
18 matters or not; that is, if what you say is true has any  
19 legal significance. If I say it doesn't, then there is no  
20 need for us to do it, and from my perspective, that  
21 dictates the result that we wait and see if I believe that  
22 there's a legal significance to those numbers.

23 But for purposes of the argument, I assume  
24 that those numbers are true and that's why at the  
25 beginning I wanted to make sure I understand them and I

1 would utilize them.

2                   Now I will talk to Miss Gallagher about the  
3 state's view because I think it needs to be on the record  
4 what the state's view is, and I want to make it clear that  
5 I understand the state is willing to proceed with this  
6 argument, with me assuming those facts to be true, and  
7 we're not going to center the legal argument on whether  
8 those facts are true or not. We're going to assume that  
9 they are true, and I am going to give the state obviously  
10 the ability to then come in and later object or otherwise  
11 argue that they're not. That's what I plan on doing.  
12 That's what we did last time when we had similar issues.  
13 From my perspective, that makes sense. Let me get the  
14 state's view.

15                   Miss Gallagher, do you have any issue  
16 arguing along the lines that I just described?

17                   MS. GALLAGHER: No, Your Honor.

18                   THE COURT: That was fairly succinct.

19                   MR. CROCKER: What was that?

20                   THE COURT: I said do you have any issue  
21 arguing along the lines that I described and the answer  
22 was no.

23                   THE COURT: I think from my perspective,  
24 that's the way to do it. I was open to some case, some  
25 principle that told me that this needed to be resolved now

1 in order to protect a constitutional right, and I am not  
2 seeing a case that tells me that; judicial economy is not  
3 telling me that. I don't agree this is a half day  
4 hearing. Based on what I am seeing, I think it could be  
5 far more, and from my perspective, the Court of Appeals  
6 affirmed that line of thinking last time that we were up  
7 there, and so everything is telling me from my perspective  
8 that we don't have the evidentiary hearing first.

9 MR. CROCKER: Well, in our initial motion  
10 requesting -- addressing this issue, we cited additional  
11 cases, *Fuentes v. Shevin* 407 US 67, a defendant has a  
12 right to be heard even if the Court believes his claim is  
13 invalid, and it seems to me, *Shevin* I think -- it seems to  
14 me you're not there. You're not saying our claim is not  
15 valid yet; you're not stating it is valid. You're  
16 assuming it is for argument's sake. That's not good  
17 enough for the defense because we have to be able to  
18 establish -- in anticipation of you denying our motion, we  
19 have to establish a way of presenting facts to the higher  
20 courts. What's the factual finding that the courts are  
21 going to use that the trial court just merely assumed that  
22 the facts were true?

23 THE COURT: You are going to be in a  
24 position, the position you don't like, where it's possible  
25 that the reviewing authority could come to a conclusion

1 that your argument is valid but say you need to go back  
2 and show that factually, yes, and I know that puts you in  
3 a position you don't want to be in.

4 MR. CROCKER: I guess just addressing the  
5 judicial checkpoint, that's kind of my secondary point or  
6 the third point here. If that's a possibility that they  
7 send it back down for further proceedings and/or you're  
8 telling us that if on May 8th we come back and make  
9 enough -- strong enough oral argument on the legal merits,  
10 you decide you want to hear facts, we're coming back for  
11 facts. I guess for judicial economy, why don't you grant  
12 us the hearing; we will establish the facts and then we  
13 can proceed with a clear-cut record for every single  
14 defendant on up.

15 THE COURT: Because there is a more direct  
16 route to judicial economy and that is determine whether we  
17 need it or not before we have it, and from my perspective,  
18 that's the way we ought to proceed.

19 MR CROCKER: I understand that, Your Honor,  
20 but, then again, when you read *Kessen v. Stewart*, 195  
21 *Ariz.* 488, the Court said as a result, parties must be  
22 permitted to develop both the law and the facts in order  
23 to meet the due process protections, and that's what we're  
24 claiming here, that due process has been violated; our  
25 clients' due process rights are violated because the



1 statute's unconstitutional and we have an absolute right  
2 to establish the underlying facts that establish the  
3 underlying facts, not just say, judge, please assume our  
4 facts are true. We have a right to establish those facts  
5 regardless of judicial economy, and I am -- judicial  
6 economy -- I am not trying to be flippant here, but  
7 whether it takes a day or two hours, whatever, we have an  
8 absolute right to establish those facts so that you can  
9 make the determination for the higher courts these facts  
10 are true; the trial court finds these facts are true or  
11 the trial court finds these facts are not true. Then they  
12 will do the de novo review on the statute challenge and  
13 they will look at the facts that you found to determine  
14 whether or not they support that constitutional challenge,  
15 not the facts that you just assume are true, because  
16 that's not good enough.

17 THE COURT: I respectfully disagree. I  
18 think you've got a right to be heard and I am hearing you  
19 on both the facts -- I am assuming the facts and I am  
20 hearing you on the law. The cases that are cited are  
21 cases in which the Court didn't hear defendants at all.  
22 They didn't give them a hearing. They didn't let them  
23 make any kind of argument or establish the facts for the  
24 law necessary for them to get relief. I am letting you  
25 provide all the facts and all the law necessary to get the

1 relief. I am simply waiting on the proof of those facts  
2 for the legal argument which I, again, believe is  
3 something that occurs frequently and from my perspective  
4 is the appropriate course.

5 MR. CROCKER: Judge, again, I guess I just  
6 disagree with what you're saying about the cases we cited.  
7 The cases we cited establish a couple things: One, that  
8 there was a right to some kind of hearing, but in those  
9 cases cited, the reason they didn't get hearings is  
10 because the underlying facts were not in dispute.

11 THE COURT: That's actually not true.  
12 *Panetti v. Quarterman*, that's completely different. In  
13 the *Panetti* case, the Court failed to hold a competency  
14 hearing and simply ruled that the defendant was competent  
15 to be executed and didn't essentially have a hearing to  
16 receive the information the defense wanted to provide.

17 MR. CROCKER: Wasn't the issue in *Quarterman*  
18 the fact that the evidence was not an issue; it was the  
19 means of presenting that evidence that was at issue?

20 THE COURT: But see the Court didn't even  
21 come close to accepting the evidence that was presented by  
22 the defense, and they did -- the Court didn't follow the  
23 basic procedures mandated by the *Ford* case. That was the  
24 issue that the Supreme Court had in *Panetti*.

25 We can joust about the cases. I don't think

1 you're going to be able to turn me on my view that the  
2 cases don't really get you there. I can't find a case  
3 that says that constitutionally I am required to do what  
4 you want me to do.

5 I get the utility, to some degree, of a  
6 hearing in establishing facts so it is clean going  
7 forward, however far it goes, but from my perspective. I  
8 do think that the appropriate course here is for me to say  
9 I am assuming these facts to be true. If they're true, is  
10 there a constitutional violation or is the statute  
11 constitutionally infirm? And I think I can make that  
12 analysis based on what you have given me. You've given me  
13 enough concrete information that I can do that.

14 MR. CROCKER: So what you're telling us is  
15 the Court, as it sits here today, is going to assume as  
16 true that in 98.8 percent -- and I am not making that  
17 figure up. That's our expert's figure. In 98.8 percent  
18 of cases since 2002, as analyzed, to 2012 -- and there  
19 will be more coming because it is an ongoing process --  
20 98.8 percent of the time, the state could have alleged an  
21 aggravator; that 13-751, et al is so broad, that in  
22 98.8 percent of the cases during that ten-year period,  
23 11-year period, the state could have alleged death in many  
24 of those cases. They did some; many of those cases they  
25 chose not to. That's purely prosecutorial discretion. I

1 am starting to get into the May 8th argument. I want to  
2 make sure that's what you're going to do. You're going to  
3 accept those facts as true to make your ruling?

4 THE COURT: I was with you until the  
5 commentary part. If you want to go back to the facts, the  
6 facts that you just cited and the facts that Professor  
7 Spohn alleges to be true, I am accepting. So when we  
8 argue in two weeks, I will be asking both sides to tell me  
9 why the statute is or is not overly broad, and I am going  
10 to use those statistics, that information, yes, is the  
11 answer to the question.

12 MR. CROCKER: I think we're just -- we're  
13 beating a dead horse here. So just for the record, would  
14 this Court entertain a stay of all these cases so we can  
15 address the issue of whether or not we're entitled to an  
16 evidentiary hearing with the higher courts?

17 THE COURT: I will not. I am denying a  
18 stay. I am taking that as a motion for a stay.

19 MR. CROCKER: I would make that request on  
20 specifically behalf of Macario Lopez and --

21 THE COURT: I am assuming that all  
22 defendants are joining that motion for a stay. Anybody  
23 disagree back there before I lump everything together?  
24 Everyone is requesting a stay and I am denying that as to  
25 all defendants.

1                   So the position this leaves us in we're  
2 coming back in two weeks to argue the merits, and at that  
3 time, I expect to be able to at least tell you what my  
4 ruling's going to be. I will likely follow again with a  
5 minute entry, but let me see how it goes, but I will  
6 likely rule at that time.

7                   Mr. Bevilacqua.

8                   MR BEVILACQUA: With regard to the disks  
9 that you did receive, we're asking you make them a part of  
10 the record in Mr. Lopez's case in the 2011 cause number  
11 and that the Court make some ruling that these are, in  
12 fact, the data that we've submitted upon which the basis  
13 of the evidentiary hearing rests, so that there is a  
14 record going forward at least that the data was submitted.

15                  THE COURT: Did you not file the initial  
16 notice of disclosure? I have got you as filing it.

17                  MR BEVILACQUA: I don't know that we have  
18 specifically filed what would be exhibits. We're asking  
19 the Court to mark those as exhibits so that they are part  
20 of the record of this case. I am not sure how the other  
21 defendants will have to handle their own records. I think  
22 they may need to either join in or do their own filing in  
23 their own cases.

24                  For Mr. Lopez, we want that filed as an  
25 exhibit for this motion and part of the record that will

1 go forward here.

2 THE COURT: I want a process by which these  
3 records are part of the record for each case, and I am  
4 open to the best process to do that, so I will work with  
5 my clerk to make sure that's the case, but I do -- I have  
6 obviously the disks that were submitted and my intent  
7 would be that they would be part of the record in each  
8 case.

9 MR. BEVILACQUA: I am also asking you  
10 specifically approve the filing in that format, that  
11 digital format, otherwise we would have boxes.

12 THE COURT: I am comfortable with the filing  
13 in the digital format. Any reason to disagree from the  
14 state's perspective?

15 MS. GALLAGHER: No, Your Honor.

16 THE COURT: Miss Corey.

17 MS. COREY: I would just move to allow each  
18 one of the joined defendants to submit the disks and the  
19 report of the expert and admit them into evidence in their  
20 own cases.

21 THE COURT: I agree. For appellate  
22 purposes, we need to do that, because each case is going  
23 to have its own course and if we don't do that, it creates  
24 a problem. It is ordered, I think, as to all 29  
25 defendants, and a note to the attorneys: You're going to

1 have to submit them. Some have not, some have, but not  
2 all.

3 I am directing, first of all, if you haven't  
4 already that the defendants all submit the disks that were  
5 attached to defendant's initial notice of disclosure dated  
6 March 25th initially by Mr. Bevilacqua and Mr. Crocker;  
7 that they all be submitted and that they will be  
8 considered part of the record for each case.

9 MS. COREY: They will be admitted into  
10 evidence?

11 THE COURT: And they will be admitted into  
12 evidence subject to, of course, the discussion that we  
13 had.

14 MR BEVILACQUA: I think for the record, too,  
15 we gave each prosecutor one set of the disks, whether they  
16 work on one or three or four cases, and I believe we gave  
17 each defense team a set of disks so they will be  
18 responsible for making copies to submit to the Court in  
19 their own cases.

20 THE COURT: Any issue with production from  
21 the state's perspective?

22 MS. GALLAGHER: No, Your Honor. Can I say  
23 something else besides no, Your Honor?

24 MR. CROCKER: Just as a matter of  
25 housekeeping, we filed an additional pleading, ARS 12-1841

1 notice of claim. Because this is a constitutional  
2 challenge to a statute, we alerted the Speaker of the  
3 House, President of the Senate and the Attorney General's  
4 Office on behalf of Lopez. We filed that with Mr. Lopez's  
5 trial judge, Judge Stephens. I don't know if you've seen  
6 that.

7 Just for the record, we have done that once.  
8 We have all the pleadings. We sent them the entire  
9 packet. We have not heard from the AG's office or -- no.  
10 We have heard from the House or legislature, and I assume  
11 every other defendant's attorney here joins in that  
12 process because the statute requires notice to those  
13 agencies.

14 THE COURT: I assume that all the defendants  
15 are joining in that notice and that you have filed that  
16 notice.

17 So, okay, we're going to come back in two  
18 weeks. Anything else we need to talk about from the  
19 defense perspective before we adjourn for two weeks?

20 MR BEVILACQUA: We have it set for 1:30?

21 THE COURT: We're going to talk in a minute  
22 about appearances. We do need to address that.

23 From the state's perspective, anything we  
24 need to talk about?

25 MS. GALLAGHER: No, Your Honor.



1                   THE COURT: I am anticipating we may have a  
2 hearing regarding camera and the extent of the camera  
3 access. Let's talk about deadlines because there was, I  
4 think, a reasonable request made by Mr. Curry to set a  
5 deadline so that defense counsel will know what the extent  
6 of the media's rights are going to be to photograph and  
7 that may affect whether defendants are at the hearing or  
8 not.

9                   Let's do this: I am going to set some  
10 deadlines for there to be any filing relating to either an  
11 objection from one side or the other to the Court's  
12 standing camera request. And let's make it clear my  
13 standing camera request are that both still photography  
14 and video photography will be permitted, except that none  
15 of the defendants' images are to be shown collectively or  
16 individually. I am willing to have a hearing on that, and  
17 so what I am going to do is set a deadline of Wednesday of  
18 next week to file any brief.

19                  My intent is then either -- I have got to  
20 look at my calendar and I am going to do that after the  
21 hearing either Thursday or Friday of next week, to set a  
22 hearing and make that determination, if I get a brief  
23 arguing that the Court's ruling is in error under Rule 122  
24 or otherwise, and then we'll know at that time the extent  
25 of the photographic access.

1                   So let's set a deadline. I want  
2 specifically all defense counsel to affirmatively inform  
3 the Court no later than Tuesday of next week, which would  
4 be April 28th, by the close of business whether the  
5 defendants wish to be personally present so we have a  
6 running list. If I do not get anything from you -- and I  
7 hope that either when you do determine you want them to be  
8 present or not, you let us know. I am going to default  
9 into they're coming and we're going to make sure they're  
10 transported by any means if I don't get anything from you.

11                   MR. CROCKER: For the record, Mr. Lopez  
12 desires to be present.

13                   THE COURT: Let's not do it here. Let's do  
14 it on paper. It is at least easier for me to keep track.

15                   One more logistical thing for defense  
16 counsel. I know it is hard the way we've got everything  
17 put together, but you can't stop like last time and have  
18 conversations with your clients. We got to get them in  
19 and out, so please respect the deputies moving folks in  
20 and out and don't try and have a discussion that holds up  
21 that process. I would greatly appreciate you cooperating  
22 with that.

23                   Okay. So we're adjourned for a couple of  
24 weeks and I will see everybody on March 8th at 1:30 --  
25 May, May 8th.

C E R T I F I C A T E

I, LAURA A. ASHBROOK, do hereby certify that the foregoing pages constitute a full, accurate transcribed record of my stenographic notes taken at the aforementioned time and place, all done to the best of my skill and ability.

s/s  
\_\_\_\_\_  
LAURA A. ASHBROOK  
Certified Court Reporter  
Certificate #50360

# Appendix K

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Defendant.

CR 2010-048824-001  
CR-16-0261-AP

Laura Ashbrook, RMR  
Certified Court Reporter  
Cert. No. 50360

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A P P E A R A N C E S

(As noted below)

P R O C E E D I N G S

THE COURT: This is the time set for oral argument on defendant's motion to strike notice of intent to seek death penalty. What we're going to do initially is the same thing we've done at previous hearings, going through all the defendants. I am going to ask counsel to state their appearances. For defense counsel, if you would let me know whether your client is here or not, I would appreciate that as well.

So let's start with number three.  
CR 2013-103200, State of Arizona versus Jorge Amaya Acuna.  
Appearances, please.

MR. BIZZOZERO: Greg Bizzozero appearing on behalf of Hilary Weinberg for the state.

MR. KIRCHLER; Jeff Kirchler and Joe Stazzone on behalf of Mr. Acuna who is present, before the Court.

THE COURT: Number four, CR 2011-138856, State of Arizona versus John Michael Allen.

Appearances, please.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of the state.

MR. BEREN: Gary Beren on behalf of Mr. Allen whose presence was waived for purposes of today.

1 THE COURT: Number five, CR 2011-138856-003,  
2 State of Arizona versus Samantha Lucille Rebecca Allen.

3 Appearances, please.

4 MS. GALLAGHER: Jeannette Gallagher  
5 appearing on behalf of the state.

6 MR. BOGART: Jeremy Bogart and John Curry  
7 for Miss Allen who is present.

8 THE COURT: Number six, CR 2013-419619-002,  
9 State of Arizona versus Darnell Moses Alvarez.

10 Appearances, please.

11 MS. GILLA: Marischa Gilla for the state.

12 MR. ZIEMBA: Michael Ziemba and Anna  
13 Unterberger representing the defendant who is present,  
14 standing.

15 THE COURT: Number seven is CR 2012-007044,  
16 State of Arizona versus Ashley Denise Buckman.

17 Appearances, please.

18 MS. VALENZUELA: Kirsten Valenzuela on  
19 behalf of the state.

20 MR. CROCKER: Eric Crocker appearing for  
21 James Cleary and Gary Shriver on behalf of Miss Buckman  
22 who has waived her presence.

23 THE COURT: Eight is CR 2011-133622, State  
24 of Arizona versus Jesus Antonio Busso-Estopellan.

25 Appearances.



1 MR. BASTA: Eric Basta on behalf of the  
2 state.

3 MS. HUDER: Stacy Hyder on behalf of Mr.  
4 Busso-Estopellan, also standing in for Tonya Peterson.

5 THE COURT: Number nine is CR 2012-008340,  
6 State of Arizona versus Kurt Dustin Coleman.

7 Appearances, please.

8 MS. GALLAGHER: Jeannette Gallagher  
9 appearing on behalf of the Patricia Stevens for the state.

10 MR. NAVAZO: Greg Navazo standing in for Rick  
11 Miller. I waived his presence today. He's present  
12 obviously. If cameras are going to be allowed to  
13 photograph him, I would ask he be removed.

14 THE COURT: First of all, my order still  
15 stands that he's not to be photographed. We didn't get  
16 anything that indicated that his appearance was waived.  
17 If you want me to have him taken out, I would be happy to  
18 do that. I don't intend to allow anyone to photograph any  
19 of the defendants, so that's going to be my ruling. We  
20 did have a motion from the media. So in light of that, do  
21 you want me to have him taken out?

22 MR. NAVAZO: He can enjoy the amenities  
23 while he's here.

24 THE COURT: CR 2011-155640, State versus  
25 Corey Rasean Daniels.

1                   Appearances.

2                   MS. GILLA: Marischa Gilla on behalf of the  
3 state.

4                   MR. PARKER: R.J. Parker and Alan Tavassoli  
5 for Mr. Daniels who is present in the jury box. Good  
6 afternoon.

7                   THE COURT: Number 11, CR 2010-168096, State  
8 of Arizona versus Craig Michael Devine.

9                   Appearances please.

10                  MS. GALLAGHER: Jeannette Gallagher on  
11 behalf of Vince Goddard for the state.

12                  MR. KOESTNER: Steve Koestner and Bruce Buck  
13 on behalf of Mr. Devine. He's present, in custody.

14                  THE COURT: Number 12 is CR 2010-137021,  
15 State of Arizona versus Victor Hernandez.

16                  Appearances, please.

17                  MS. GILLA: Marischa Gilla appearing for  
18 Susie Charbel on behalf of the state.

19                  MR. COTTO: Brandon Cotto for the defendant.

20                  THE COURT: Number 13, CR 2010-007912, state  
21 versus Darnell Reuna Jackson.

22                  Appearances, please.

23                  MS. VALENZUELA: Kirsten Valenzuela on  
24 behalf of the state.

25                  MR. TAVASSOLI: Alan Tavassoli and R.J.

1 Parker on behalf of Mr. Jackson who is not present, waived  
2 his presence.

3 THE COURT: Good afternoon. Number 14 is  
4 CR 2010-048824, State of Arizona versus James Clayton  
5 Johnson.

6 Appearances, please.

7 MR. LARISH: Kristen Larish on behalf of the  
8 state.

9 MR. JONES: Peter Jones for Mr. Johnson  
10 who's not present, presence waived.

11 THE COURT: Number 15, CR 2013-001614, State  
12 of Arizona versus Moises Hernandez Lagunas.

13 Appearances, please.

14 MS. GILLA: Marischa Gilla for Susie Charbel  
15 on behalf of the state.

16 MS. HYDER: Stacy Hyder standing in for  
17 Taylor Fox and Tonya Peterson on behalf of Mr. Lagunas  
18 whose presence has been waived.

19 THE COURT: Number 16, 2013-002559, State of  
20 Arizona versus Dennis Michael Levis.

21 Appearances.

22 MS. GALLAGHER: Jeannette Gallagher  
23 appearing on behalf of Vince Imbordino for the state.

24 MR. KOESTNER: Steve Koestner and Bruce Buck  
25 on behalf of Mr. Levis who has waived his presence.

1 THE COURT: Number 17, CR 2011-007597, State  
2 of Arizona versus Macario Lopez, Jr.

3 Appearances, please.

4 MS. GALLAGHER: Jeannette Gallagher  
5 appearing on of behalf of the state.

6 MR. BEVILACQUA: Gary Bevilacqua on behalf  
7 of Mr. Lopez who is present.

8 THE COURT: Number 18, 2013-110974, State of  
9 Arizona versus Richard Molina Luzania.

10 Appearances, please.

11 MS. WADE: Jesse Wade on behalf of the  
12 state.

13 MR. GLOW: Thomas Glow for Mr. Luzania, who  
14 has waived his presence.

15 THE COURT: Number 19 is 2013-458974, State  
16 of Arizona versus Alex Anthony Madrid.

17 Appearances.

18 MS. GILLA: Marischa Gilla for Susie Charbel  
19 on behalf of the state.

20 MS. FALDUTO: Bobbi Falduto and Angela  
21 Walker present for Mr. Madrid who is in the jury box.

22 THE COURT: Good afternoon. Number 20, is  
23 CR 2012-133415, State of Arizona versus Joseph Michael  
24 Matthews.

25 Appearances, please.

1 MS. GALLAGHER: Jeannette Gallagher  
2 appearing on behalf of Juan Martinez for the state.

3 MR. CURRY: Good afternoon. Lisa Gray and  
4 John Curry for Joseph Matthews whose presence has been  
5 waived for purposes of this hearing.

6 THE COURT: Number 21, 2013-004357, State of  
7 Arizona versus Robin Leroy McJunkin.

8 MS. GILLA: Marischa Gilla appearing for  
9 Susie Charbel on behalf of the state.

10 MR. BLIEDEN: Larry Blieden and Jennifer  
11 Roach for Mr. McJunkin who is present.

12 THE COURT: Number 22, CR 2014-128973, State  
13 of Arizona versus Gary Michael Moran.

14 Appearances, please.

15 MS. GALLAGHER: Jeannette Gallagher on  
16 behalf of Patricia Stevens for the state.

17 MS. FALDUTO: Bobby Falduto and Angela  
18 Walker on behalf of Gary Moran who is present in the jury  
19 box.

20 THE COURT: Number 23 is CR 2011-138281,  
21 State of Arizona versus Jason Neil Noonkester.

22 Appearances, please.

23 MS. GALLAGHER: Jeannette Gallagher  
24 appearing on behalf of the state.

25 MS. COREY: Susan Corey and Pete Jones for

1 Mr. Noonkester. We waived his presence.

2 THE COURT: Number 24 is 2013-462024, State  
3 of Arizona versus Ricardo Alejandro Ramirez.

4 Appearances, please.

5 MS. GALLAGHER: Jeannette Gallagher  
6 appearing on behalf of Vince Imbordino for the state.

7 MR. MATTHEWS: Lawrence Matthews and Terry  
8 Bublik on behalf of Mr. Ramirez whose presence has been  
9 waived.

10 THE COURT: Number 25, 2013-002559, State of  
11 Arizona versus Thomas Michael Riley.

12 Appearances, please.

13 MS. GALLAGHER: Jeannette Gallagher  
14 appearing on behalf of Vince Imbordino for the state.

15 MR. CRAIG: Randall Craig and Ben Taylor on  
16 behalf of Mr. Riley who is present.

17 THE COURT: Number 26, CR 2012-138236, State  
18 of Arizona versus Dwandarrius Jamar Robinson.

19 Appearances, please.

20 MS. GALLAGHER: Jeannette Gallagher  
21 appearing on behalf of Jay Rademacher for the state.

22 MS. HINDMARCH: Jamie Hindmarch on behalf of  
23 Mr. Robinson who is present.

24 THE COURT: Number 27, 2012-114731, State of  
25 Arizona versus Jarvis Jovan Ross.

1                   Appearances, please.

2                   MR. GREEN: Ryan Green on behalf of the  
3 state.

4                   MR. BEREN: Gary Beren, Your Honor, on  
5 behalf of Mr. Ross who is present, in custody and standing  
6 in the jury box.

7                   THE COURT: Number 28 is 2010-007882, State  
8 of Arizona versus Jasper Phillip Rushing.

9                   Appearances, please.

10                  MS. GALLAGHER: Jeannette Gallagher  
11 appearing on behalf of the state.

12                  MR. CRAIG: Randall Craig on behalf of Mr.  
13 Rushing who is present in the jury box.

14                  THE COURT: Number 29, CR 2014-005523, State  
15 of Arizona versus Joshua Idlefonso Villalobos.

16                  Appearances, please.

17                  MR. GREEN: Ryan Green on behalf of the  
18 state.

19                  MR. MATTHEW: Lawrence Matthew and Terry  
20 Bublik on behalf of Mr. Villalobos whose presence is  
21 waived.

22                  THE COURT: Number 30, 2014-108856, State of  
23 Arizona versus Judith Elaine Walters.

24                  Appearances, please.

25                  MS. GALLAGHER: Jeannette Gallagher on

1     behalf of Laura Reckart for the state.

2                     MR. BOGART:   Jeremy Bogart and John Canby on  
3     behalf of Miss Walters who is present.

4                     THE COURT:   Good afternoon.   Thank you.  
5     Okay.   Let's talk a few preliminary things before we talk  
6     about the substance of what we're here to talk about.  
7     First of all, with respect to cameras, when we last here  
8     two weeks ago, there had been a camera request.   In my  
9     view, it had been untimely.   However, I allowed the  
10    cameras to photograph and video as long as there was no  
11    one in the box.   I think there was an overall objection  
12    which I overruled, then a specific objection to any  
13    photography of any of the defendants in the box.   I  
14    sustained that objection and told the media, whether it be  
15    still photographs or video, not to photograph anyone in  
16    the box.

17                    I invited anyone, if there was going to be  
18    an objection to that, for the media to file any kind of  
19    motion objecting and ask me to reconsider.   I received no  
20    motion.   We're status quo from my perspective.   Any  
21    cameras that are present are specifically directed that  
22    they are not to capture anyone sitting in the jury box,  
23    and I'm sure they will be able to follow that.   That's my  
24    ruling and that's what I would expect.

25                    Who's going to argue for each side?   Let's



1 start with the state. I assume, Miss Gallagher, it is  
2 you?

3 MS. GALLAGHER: That would be me.

4 THE COURT: How about from the defense  
5 perspective?

6 MR BEVILACQUA: Gary Bevilacqua for Mr.  
7 Lopez.

8 THE COURT: I have obviously reviewed what's  
9 been filed, motion, response, reply. There were multiple  
10 joinders that were filed on behalf of the defendants. I  
11 have obviously considered the information that was  
12 submitted and forms the basis of defendant's request for  
13 an evidentiary hearing and, as I stated at the last  
14 hearing, I am accepting that information to be true for  
15 purposes of this hearing, so we will proceed in that way.  
16 I am mindful of the fact that I considered many of the  
17 same issues or at least the same type of argument in 2013.

18 I think we're in a position where we can get  
19 right to it, so what I intend to do is essentially ask  
20 some questions based on my review of the arguments that  
21 counsel have presented.

22 Miss Gallagher, let me start with you.  
23 First of all, do you agree that to pass constitutional  
24 muster, a capital sentencing scheme must genuinely narrow  
25 the class of persons eligible for the death penalty and

1 must reasonably justify the imposition of a more severe  
2 sentence on the defendant compared to others found guilty  
3 of murder? Do you agree with that?

4 MS. GALLAGHER: Yes.

5 THE COURT: That being the case, tell me  
6 each and every way that the Arizona sentencing scheme  
7 accomplishes this.

8 MS. GALLAGHER: Starting with the  
9 distinction between first degree murder, second degree  
10 murder, manslaughter, negligent homicide. This is the  
11 first narrowing function. Secondly, the state, of course,  
12 has the discretion to file or not file death in  
13 consideration of potential mitigating factors; thirdly,  
14 the fact that the state cannot seek death against someone  
15 who is determined to be -- to have an intellectual  
16 disability narrows; that the state cannot seek death  
17 against someone who commits a murder when they were under  
18 the age of 18 narrows; the statutory scheme itself since  
19 the United States Supreme Court in *Greg* says that each  
20 aggravating factor cannot apply to everyone. Ours does  
21 not. Therein is the narrowing. Each one must either  
22 relate to the defendant or to a circumstance of the crime  
23 which all 14 of ours do.

24 Then the jury provides the final narrowing  
25 function. They have to not only find at least one

1   aggravator, they then have to look at whatever mitigation  
2   is presented and they make the determination as to whether  
3   this particular first degree murderer should be sentenced  
4   to death or not.

5                   THE COURT:  Let's talk about the six things  
6   you just described.  Let's start -- I am going to jump  
7   around a little bit.

8                   MS. GALLAGHER:  To confuse me.

9                   THE COURT:  Sorry?

10                  MS. GALLAGHER:  To confuse you?

11                  THE COURT:  Probably not.  I doubt I am  
12   going to confuse you.  Let's start with the intellectual  
13   disability and under 18.  Those are constitutional  
14   requirements that the courts have imposed on every state,  
15   correct?

16                  MS. GALLAGHER:  Yes.

17                  THE COURT:  So there shouldn't be a  
18   statutory scheme anywhere in the United States that would  
19   allow the death penalty to be assessed on someone with an  
20   intellectual disability or someone who is under 18,  
21   agreed?

22                  MS. GALLAGHER:  True and ours does not.

23                  THE COURT:  Let's talk about -- you told me  
24   that the state's discretion is part of the second one you  
25   identified.  My reading of the case is that the narrowing

1 discussion always talks about the sentencing scheme. In  
2 other words, the sentencing scheme standing alone has to  
3 narrow. I am not disagreeing with you that the prosecutor  
4 has discretion within that scheme to make a decision about  
5 which case is charged, but the narrowing function that's  
6 contemplated, I think, in the cases has to start with and  
7 there has to be an analysis that's based entirely on the  
8 statutory scheme. Is that true?

9 MS. GALLAGHER: Sure.

10 THE COURT: I ask you that because you gave  
11 me that as a reason or ways Arizona narrows. Their  
12 argument is really separate from that. Their argument  
13 is -- and I agree with this part of the premise -- we have  
14 got to first look at the statutory scheme and the scheme  
15 itself has got to narrow, and so when we talk about the  
16 prosecutor's decision, that's not part of this discussion  
17 for me. It is a necessary part of the process, I agree,  
18 but when we're talking about the scheme narrowing, we're  
19 not talking about the prosecutor's decision, in my view.  
20 I know that they argue that the scheme gives the  
21 prosecutor too much discretion, but that's a necessary  
22 part of their argument; that there's not enough narrowing.  
23 From my perspective, that's not part of the discussion.

24 So from my perspective, you identified the  
25 distinction between types of murder as a narrowing

1 process. That, I agree, is clearly one that should be  
2 considered in terms of the narrowing analysis. You  
3 also -- and we're going to talk about that.

4 My perception is that's really -- their  
5 argument this time is really focused on that analysis and  
6 I am going talk to them about that in a minute.

7 I want to talk to you a little bit about the  
8 role of each individual aggravator, because I think from  
9 my perspective, I thought I read your papers to say that  
10 the required narrowing function only applies to individual  
11 aggravation factors, not collective.

12 MS. GALLAGHER: It does, and the state is  
13 unaware of a single case that says it's the whole thing.  
14 When a state chooses to use a sentencing scheme that  
15 identifies aggravating factors -- because not all states  
16 do, but those states that choose to do that, which Arizona  
17 does, the cases all talk about an individual aggravating  
18 factor cannot apply to every murder case.

19 THE COURT: Right.

20 MS. GALLAGHER: There is not a case that  
21 says the entire scheme can't apply to every one, and if  
22 there is such a case, nobody has cited it.

23 THE COURT: I think the language itself,  
24 even the cases you cite, say that, and that results  
25 that -- I will tell you that can't be the winning argument

1 here from my perspective because the cases simply don't  
2 support that. You cited several cases for that  
3 proposition. First of all, I agree with you an individual  
4 aggravating circumstance itself must narrow; there is no  
5 doubt, because by definition, if an individual aggravating  
6 circumstance can be read to incorporate all murders, then  
7 there's no narrowing.

8 But you must then go on to also say there  
9 has to be a collective analysis, because if you read even  
10 the *Lowenfield* language -- and what I read with you is the  
11 the capital sentencing scheme -- clearly, you can't, in  
12 isolation, say, well, one aggravating circumstance narrows  
13 and so the whole statute passes constitutional muster.  
14 That can't be right. I know that there's not a case, I  
15 don't think, that directly takes on that argument, but I  
16 would respectfully tell you I think that that's the case  
17 because it's so obvious that it's got to be a  
18 collective -- there's got to be a collective analysis.  
19 You can't simply say that, okay, one statute narrows and  
20 so the entire statute has a narrowing function. It's got  
21 to be a collective analysis.

22 MS. GALLAGHER: It is collective in that  
23 each one that the legislature decides to enact cannot  
24 apply to every person and it must relate to the specific  
25 defendant.

1 THE COURT: Agreed.

2 MS. GALLAGHER: And/or the circumstances of  
3 the offense.

4 THE COURT: Agreed.

5 MS. GALLAGHER: And all of ours do that.

6 THE COURT: But one of the cases you cite,  
7 in fact -- I think it's *Sands* -- talks about the Court --  
8 it specifically said the Court noted that collective  
9 narrowing of the circumstances, the cases say it's got to  
10 be a collective analysis. I am troubled by the  
11 argument -- if it really is your argument; I think it  
12 is -- that the analysis of the aggravating circumstances  
13 stop when we see the individual circumstance narrows. The  
14 cases you cited were cases involving single circumstances.  
15 So the Court said does this circumstance narrow or not.  
16 If the answer is it narrows, it's okay; if it doesn't,  
17 then it's not, but you cannot leapfrog that into an  
18 argument that you don't have to consider the collective  
19 impact. To me, you have to. I take it you disagree with  
20 that.

21 MS. GALLAGHER: Judge, you're the one who  
22 has to -- I am telling you the state's position.

23 THE COURT: So that it's clear -- for  
24 appellate purposes, I want to make sure it's clear the  
25 state's position here today is I look at the individual

1   aggravating circumstances.  If each individual aggravating  
2   circumstance itself narrows, then the statute passes, at  
3   least in terms of the aggravating circumstances,  
4   constitutional muster because the narrowing relates to  
5   each individual circumstance?

6                   MS. GALLAGHER:  As long as it relates to a  
7   specific defendant charged with first degree murder or it  
8   relates to the circumstances of the offense.  It's not  
9   just one; it's both and that's the case of -- and I never  
10   can pronounce the name of that case correctly --  
11   *T-U-I-L-E-A-E-P-A v. California.*

12                  THE COURT:  And I am I stuck on that  
13   argument, because I just don't think it's right.  I don't  
14   think it is an individual analysis of the individual -- I  
15   take it back.  There is an analysis of the individual but  
16   it moves on to collective.  There's a collective analysis.  
17   So you have look at the individual but then you look at --  
18   and their argument is if you look at them all in totality,  
19   you can't fathom a circumstance where a first degree  
20   murder would not have an aggravating circumstance and  
21   therefore the statute does exactly what *Lowenfield* says  
22   you can't do; it sweeps in everybody who commits a first  
23   degree murder.  And if that was the end of the analysis,  
24   meaning when we're looking in isolation at the aggravating  
25   circumstances and there's no narrowing function



1 collectively, I think in isolation then they win. But  
2 it's not in isolation because you have an additional  
3 argument that the classification of murders is a narrowing  
4 function, and *Lowenfield* makes that clear.

5 So I am going to talk to them about that in  
6 a minute because they spend a lot of time trying to deal  
7 with that in their papers and explain to me that it's not  
8 really a narrowing function, and I am not sure they are  
9 going to get me there on that.

10 MS. GALLAGHER: We have another narrowing  
11 function, judge.

12 THE COURT: What is that?

13 MS. GALLAGHER: The *Enmund/Tison* finding.

14 THE COURT: That's a narrowing circumstance  
15 within the classification of first degree murder. It  
16 is -- it narrows the first degree murder.

17 MS. GALLAGHER: As to who's eligible,  
18 because if you aren't a major participant, under those  
19 requirements, you can't get it.

20 THE COURT: I agree with you, but that isn't  
21 an appropriate way to view the question whether there is a  
22 narrowing. That's why I think I am going to have a  
23 discussion on this side because we have to take that into  
24 account, but I will tell you that as to your argument  
25 relating to the specific aggravating circumstances, you're

1 not getting me there. I think there is a problem if we  
2 say that they're right, collectively, the aggravating  
3 circumstances don't narrow. I don't think I can say okay  
4 that's a narrowing function, because collectively they  
5 don't. What I can say, I'm pretty sure, is that there's a  
6 narrowing function relating to the classification of  
7 murder and then the Enmund/Tison further narrowing down  
8 the first degree murder; that that creates a narrowing  
9 function there.

10 I am going to talk to them about that. Let  
11 me shift over and talk to them about that right now.  
12 Okay. Mr. Bevilacqua, I know you spent a lot of time  
13 telling me about that narrowing and you can already tell  
14 that I essentially agree with part of your argument. And,  
15 again, let's make this clear: I am basing it on the  
16 statistics you gave me. So I am assuming those to be  
17 true, and from those statistics, I am not seeing  
18 meaningful narrowing when we're applying aggravating  
19 circumstances, but sure there is narrowing when it comes  
20 to whether we charge something as a first degree murder,  
21 second degree murder, manslaughter and we conduct the  
22 Enmund/Tison analysis, isn't there?

23 MR. BEVILACQUA: First off, there was first  
24 degree murder and second degree murder designations in the  
25 case -- in *Furman* as well, and although the precise

1 definitions may not be the same, that wasn't really a  
2 factor. We also want to point out that the distinction  
3 between second degree and first degree murder is often  
4 illusory with our fairly broad definition, as, by the case  
5 law, premeditation -- although we have a ruling from the  
6 Supreme Court that there must be actual premeditation, the  
7 time that it takes to premeditate is so short, that  
8 there's nothing that precludes the prosecutor from  
9 charging first degree in good faith.

10 I think that the crux of the motion is that  
11 this statutory -- I think when you were talking to Miss  
12 Gallagher -- the statutory scheme must narrow not each  
13 individual and that's not sufficient that an individual  
14 aggravator in and of itself does.

15 THE COURT: I agree with you.

16 MR. BEVILACQUA: I won't belabor that. Our  
17 statutory scheme doesn't narrow and preclude the  
18 prosecutor from seeking the death penalty. If they choose  
19 to file a first degree murder, there is very little to  
20 stop them from doing so other than their discretion in  
21 filing because the definition is so narrow as far as what  
22 is premeditation. Many second degree cases are filed that  
23 could be filed as first degree. That itself is  
24 discretionary to the state, and maybe that's a fine thing  
25 and there's nothing wrong with having that -- letting the

1 prosecutors have that discretion, but it doesn't narrow  
2 the class for purposes of the *Furman* analysis.

3 THE COURT: We know that *State v. Thompson*  
4 tells us that there has to be a meaningful distinction  
5 between first and second degree murder, and there is --  
6 the case says it, so we know, at least under Arizona law,  
7 there is a meaningful distinction, according to the  
8 Arizona Supreme Court, between at least second degree and  
9 first degree premeditated murder. We know that. So that,  
10 to me, automatically said there is a distinction.

11 You tell me that, okay, if you really look  
12 realistically, they could charge it, but unlike the  
13 empirical data you gave me on the aggravating  
14 circumstances, you're just essentially talking about all  
15 these different situations without any empirical data  
16 telling me that every single second degree or most of the  
17 second degrees or who knows what percentage could be  
18 charged as first degree. To me, that's an unknown.  
19 There's got to be -- there is fairly -- some narrowing.  
20 The question is how much.

21 MR. BEVILACQUA: You can analyze a lot of  
22 this motion based on just looking at the statutory scheme  
23 on its face without even getting to the empirical data at  
24 this point. You can look at the statute itself, and I  
25 think the crux of the motion is that's really the place

1 that the narrowing has to occur. And I know the case law  
2 from the Supreme Court of the United States on down really  
3 doesn't focus on this, but the narrowing really needs to  
4 be at the inception stage of what cases can the  
5 prosecutor, in good faith, even seek the death penalty.  
6 Everything else is all just semantics.

7 By arguing that the government must make the  
8 finding that the person -- that the aggravator exists  
9 beyond a reasonable doubt, that narrows; it really  
10 doesn't.

11 THE COURT: I don't disagree with you. I  
12 believe that the narrowing has to come before the jury  
13 gets it. The jury -- it's got to be narrowed before it  
14 gets to the jury. The meaningful narrowing function we're  
15 talking about occurs before the jury gets it, but the  
16 cases make it clear it can occur at the time that we  
17 define what's a murder or the time we define what the  
18 aggravating circumstances are or a combination of both,  
19 and that's what the state's actually arguing here; that  
20 both essentially, the classification and the aggravating  
21 circumstances themselves, form a narrowing function.

22 What I am troubled by is that -- your --  
23 what I am ultimately troubled by is the state's got a  
24 trump card and, to me, that's the *Hausner* case, and the  
25 Supreme Court has said so. We're going to talk about that

1 in a minute. Right now, we're talking philosophically  
2 about how we get there.

3           You're telling me you don't think there is a  
4 meaningful narrowing function. I know from my own  
5 experiences as a judge how many second degree murder cases  
6 I have had and how many of those second degree murder  
7 cases in my view couldn't have been charged as first  
8 degree, and you're not giving me anything other than  
9 logical arguments on some cross-over but no -- nothing  
10 enough for me to come back and say that there's no -- to  
11 even assess how much narrowing there is.

12           MR. BEVILACQUA: Let me try this approach  
13 then, judge: Would it be sufficient for the legislature  
14 to simply say we don't need to worry about aggravators as  
15 qualifiers because we already have narrowing by simply  
16 designating all first degree murders in Arizona, as the  
17 definitions exist, as eligible for the death penalty? If  
18 that's the Court's position, I would ask the Court to  
19 specifically state that that is sufficient narrowing.

20           Now, if the answer to that question is no,  
21 it's not enough simply to designate first degree and  
22 second degree murders as they're defined, then we must  
23 look at what else does Arizona propose to put forth that  
24 narrows that broad category of first degree murder  
25 sufficiently to meet *Furman*. The scheme they have come up

1 with is 751 aggravators under F-2. So F-1 through 14 are  
2 the aggravators, and as we put forth in the motion, those  
3 do little, if any, actual narrowing of that overly broad  
4 class of first degree murders. So that alone, I think,  
5 is -- second degree doesn't do it. First off, I think it  
6 is illusory. There is too much discretion on what to  
7 file. Even if it did distinguish, the category of first  
8 degree murders is still overly broad and the aggravators  
9 under 751 F don't do sufficient narrowing of that broad  
10 class.

11 THE COURT: My job is to follow the Supreme  
12 Court. I don't rule based on what I think the Supreme  
13 Court might do in terms of changing its opinion. We've  
14 got a footnote 2011 or '12, *Hausner*, that essentially  
15 says -- and I get it's in the footnote, but the footnote  
16 says we have considered it; we're considering that  
17 argument. They're dealing with exactly the same  
18 sentencing scheme, unlike *Greenway* because *Greenway* had  
19 ten. *Hausner*, we had all of them; we had all 14, I think,  
20 and so -- or 15, and the Supreme Court said we have  
21 considered it and we rejected it. They're telling me the  
22 answer is it's constitutional. How do I -- how do you  
23 expect me to go around that and say no; you know, if they  
24 really thought about it a little bit harder, they would  
25 find it's unconstitutional? That's not my job, is it?

1 MR. BEVILACQUA: Judge, I would put this  
2 forth, and what I expect from the trial court maybe isn't  
3 really what's at issue. What is at issue, which is our  
4 argument, for the record -- if I may, a little anecdote.  
5 Before the Supreme Court, there was an issue as to whether  
6 or not the presumption of death on finding an aggravator  
7 was valid to have and the Supreme Court cases throughout  
8 argue we reject that option. We reject that argument that  
9 the defendant claims the presumption, and as I went  
10 through those cases, it never explained why they rejected  
11 that argument. Did they reject it because there was no  
12 presumption or did they reject it because there is a  
13 presumption that it's constitutional? And I told the  
14 Supreme Court I looked at all your cases and you never  
15 defined that.

16 And that's what's happened here with  
17 *Hausner*. In *Hausner*, I think the footnote refers to  
18 *Sansing* which is a 2001 case, all right, and they relied  
19 on *Sansing*. Our complaint isn't about the statutes that  
20 exist in *Sansing*. Our complaint is about the statutes  
21 that existed in 2006 with the last two aggravators under  
22 which Mr. Lopez is charged. The Supreme Court has never  
23 analyzed why the statute as it existed in 2006, other than  
24 referring to *Sansing*, which doesn't apply, why that meets  
25 constitutional muster under *Furman*.



1 I understand the Court's position with  
2 precedent and how it must rule, but for purposes of this  
3 record, the Supreme Court's never ruled if the 2006  
4 statute isn't overly broad on a challenge of the statutory  
5 scheme. We're not challenging individual aggravating  
6 factors.

7 THE COURT: But they have, with challenges  
8 to individual aggravating factors that have wound around  
9 this issue, whether it is the F-2 and 4, because in 4,  
10 they discuss the scheme and some other cases they have  
11 discussed, and I would assume the Supreme Court is aware  
12 of the collective impact when they're talking about  
13 individual aggravators.

14 MR. BEVILACQUA: They have touched on it.  
15 They have never analyzed it, and the challenges were  
16 always, from what I read, individual aggravating factors:  
17 The F-6 is too broad; the F-13 is too broad. They have  
18 said those individually aren't and they have not by dicta  
19 basically done the analysis of the statutory scheme under  
20 751 F.

21 What they haven't had is the data you have  
22 now, and the data shows you that 98.8 percent of the cases  
23 and probably more -- we'll stick with that number because  
24 that's what's stipulated to for purposes of this motion.  
25 1.2 percent of the cases are excluded out or narrowed out

1 by our statutory scheme which clearly doesn't even come  
2 close to *Furman* and what the rest of the cases require.

3 THE COURT: What about the narrowing  
4 function of the *Enmund/Tison* factors? Do you agree there  
5 is a narrowing function?

6 MR. BEVILACQUA: That's judicial, not  
7 statutory and, again, it doesn't preclude the prosecutor  
8 from seeking death. The narrowing function must be to the  
9 prosecution of the state to seek death, and there were  
10 public policy reasons to stop this at the beginning,  
11 obviously costs and so forth. But wherever you put the  
12 narrowing -- and the case that *Lowenfield's* talking about,  
13 the jury finding the aggravating factor, what they are  
14 really talking about is you have to have a narrowing list  
15 of aggravators. If you use the aggravation scheme, you  
16 have to have a narrowing defined to exclude out cases, a  
17 sufficient number of cases. We don't exclude out nearly a  
18 sufficient number. If 1.2 is the number, whether you find  
19 that at the sentencing phase with the jury on phase two or  
20 at the filing phase in phase one, doesn't matter. It  
21 still has to be a narrow group of aggravators and ours is  
22 too broad.

23 THE COURT: Let me shift over to Miss  
24 Gallagher. Number one, I want you to address the argument  
25 if you look at second degree murder cases that could be

1 fairly charged as first degree murders, minimizing the  
2 impact and the related argument that would our scheme  
3 really be constitutional if that's the only narrowing and  
4 then we will talk about the footnote.

5 MS. GALLAGHER: Apparently, defense thinks  
6 it is easy to prove premeditated murder when we have to  
7 prove actual reflection. That is not easy to do, and many  
8 of the cases we deal with, particularly in the domestic  
9 violence arena, have to do with a sudden anger between  
10 spouses and the instant effect of that. That would be  
11 manslaughter, but many of our cases are.

12 There is the drunken argument. Somebody  
13 brings a gun to a knife fight and we end up with someone  
14 who's dead. Those people did not premeditate. They got  
15 angry and they killed someone so --

16 THE COURT: Would you agree that -- I think  
17 you would argue, would you not, that standing alone, the  
18 narrowing function at the charging stage or the definition  
19 stage would be enough of a narrowing function of the  
20 entire scheme, would be constitutional? I assume that's  
21 your position.

22 MS. GALLAGHER: Sure.

23 THE COURT: I know you disagree with me  
24 regarding the analysis as to individual and collective.  
25 So that we're clear, I want to make sure that I am not

1 asking you to abandon your view. So knowing that's your  
2 view, let's say that, surprisingly, at the end of the day,  
3 we can't focus only on individual; we have to look at the  
4 collective, whether the scheme collectively narrows, and  
5 the answer is the scheme does not collectively narrow.  
6 Pretend that's the case and that I am correct that we have  
7 to look there, and any argument that we focus on  
8 individual aggravators is legally incorrect. Let's  
9 pretend that's what actually happens.

10 If that's true, then are you comfortable  
11 telling me that doesn't matter, in terms of the  
12 constitutionality of the statute? At the definition  
13 stage, there is a narrowing and that in and of itself is  
14 sufficient? Is that what you believe?

15 MS. GALLAGHER: No, because then there's the  
16 jury part because the scheme requires them to look at the  
17 aggravating factor or factors that they find, look at any  
18 mitigation presented and make a determination whether the  
19 aggravating factors as far as --

20 THE COURT: Let's keep it down. Even I am  
21 listening to all the chatter over there. She's entitled  
22 to quiet while she argues. Go ahead.

23 MS. GALLAGHER: So they have to decide that  
24 the mitigating factors are sufficiently substantial to  
25 call for leniency. That narrows.

1           THE COURT: It does -- I'm sorry to  
2 interrupt. It does, but the cases are replete with  
3 references that before the jury gets it, there's got to be  
4 some narrowing. I am comfortable saying there's got to be  
5 narrowing. If there's no narrowing before the jury gets  
6 it, then there's not meaningful narrowing for purposes of  
7 our analysis here. I agree the jury has got a narrowing  
8 function. I said it.

9           MS. GALLAGHER: Judge, you want to put me in  
10 a box -- a lot of people would -- but I'm not going to go  
11 in that box because I think you have to look at the whole  
12 thing and that includes the Enmund/Tison part of it.

13          THE COURT: But they're right; that's a  
14 judicially created limitation.

15          MS. GALLAGHER: So is the definition of  
16 cruel, heinous or depraved because as our statute is  
17 written, that is unconstitutional.

18          THE COURT: I agree.

19          MS. GALLAGHER: The Arizona Supreme Court  
20 has said we're making it constitutional if the Court  
21 instructs the jury that it meets X.

22          THE COURT: And they said the same thing for  
23 the F-13, too, that there's got to be a limiting  
24 instruction but the genesis is still the legislature.  
25 It's still the legislature where we started. Yes, the

1 Court has to, for lack of a better term, fix it but it  
2 started by the legislator. There is some language, some  
3 narrowing function that comes from the legislature. So  
4 while I agree with you that the jury ultimately does  
5 narrow, what the cases tell me, I think, is that the  
6 jury's got to be given a class of cases which have already  
7 been narrowed by the legislature.

8 MS. GALLAGHER: And they have been because  
9 the defense has not cited a single case where all of our  
10 aggravating factors apply. So the jury is narrowed by the  
11 allegations in that particular case.

12 THE COURT: To me, that argument is wrong.  
13 They don't have to show me a case where all the  
14 aggravating factors apply. They just have to show me that  
15 an aggravator applies to every single possible case. To  
16 me, that's the way I decide whether there is a narrowing  
17 function. If they show me that in every single murder  
18 case -- or we're talking about first degree murder cases  
19 for purposes of this analysis -- there is a statutory  
20 aggravating factor, then to me, by definition, the  
21 aggravating circumstances collectively don't narrow and  
22 they don't have a narrowing function. That's what they  
23 were saying, I think, and I think if they're right, if  
24 they're right, there's got to be a narrowing function  
25 somewhere else.

1                   I know you disagree with that because you  
2 don't consider the collective. I think -- respectfully, I  
3 think you're flat out wrong on that. I think the Supreme  
4 Court will say it, but I think you're right as to where  
5 the law is right now with respect to narrowing; that there  
6 is a narrowing function and the Arizona Supreme Court has  
7 directly noted, and I agree the reference is a pre 2005  
8 case; that they have considered this and they don't find  
9 the statute to be infirm. To me, that's the guiding star  
10 that I follow.

11                   We can talk about, well, it wasn't quite the  
12 same, but my job is to do what the Supreme Court tells me  
13 to do. So you can see where this is going, but from my  
14 perspective, I am really troubled by a lack of narrowing  
15 in the aggravating circumstances.

16                   MS. GALLAGHER: And you were troubled by  
17 that the last time.

18                   THE COURT: Yes, I was.

19                   MS. GALLAGHER: And it's the same -- it's  
20 basically the same argument. What the Supreme Court is  
21 saying is the jurors have to be able to focus on  
22 something. They can't just go in there and say I don't  
23 like this guy; I am going to give him death. Our  
24 aggravating factors do that because only some of them  
25 apply in the cases, because not every single aggravating

1 factor applies to every defendant. So the jury is told  
2 you can only consider this one aggravating factor that you  
3 found or this two or five, however many the person has, as  
4 long as those factors apply to the circumstances of the  
5 offense or the individual defendant. So there is a  
6 narrowing, what they were requiring, so that the jury is  
7 not in there just arbitrarily saying I don't like you; I  
8 am going to give you death.

9 THE COURT: I agree that's part of it, but I  
10 think you're missing part of it. I think the law also  
11 says that the jury -- before the jury even receives it,  
12 the legislature says that there's a class of people where  
13 you're not even going to have to consider it because  
14 there's no aggravating factor; that there is a class of  
15 first degree murderers that are not subject to the death  
16 penalty. That's what I think has to help, and what they  
17 were saying is the statute doesn't say -- because the  
18 statute is so broad, there is -- there is no such  
19 statement about anybody not being eligible for the death  
20 penalty. In other words, everybody who commits a first  
21 degree murder, you're eligible for the death penalty, and  
22 that can't be the law, at least according to the defense,  
23 and some language in some Arizona cases suggest that.

24 You and I are on different wavelengths  
25 because I think there has to be narrowing somewhere else.



1 I think it is better than last time. Last time I asked  
2 you for an example of a first degree murder that didn't  
3 have an aggravating circumstances and you used me as the  
4 victim so --

5 MS. GALLAGHER: I thought that was quite a  
6 clever argument. As I pointed out to you last time, I had  
7 just finished trying a first degree murder case that had  
8 no aggravating factors because he shot a man in a Home  
9 Depot parking lot and there were --

10 THE COURT: Let's talk about that; this time  
11 not using me as a victim.

12 MS. GALLAGHER: Can I use another judge?

13 THE COURT: Don't use judges or anybody on  
14 that side of the room or anybody in the room as the  
15 victim. Give me a scenario -- we're not going to spend  
16 too much time on this. I do want to go back and talk  
17 about this a little bit. Give me a scenario where we have  
18 a first degree murder where no aggravating circumstances  
19 apply.

20 MS. GALLAGHER: I just gave you one.

21 THE COURT: Give it to me again.

22 MS. GALLAGHER: A man goes up to another man  
23 who he doesn't know in a Home Depot parking lot standing  
24 outside. He shoots him one time in the head. The victim  
25 didn't see it coming. He died. The defendant left.

1 THE COURT: Okay.

2 MS. GALLAGHER: And he wasn't on parole; he  
3 wasn't on release; he wasn't in jail; he wasn't in prison;  
4 he didn't use a stun gun. There were no other  
5 contemporaneous serious felony offenses. The victim was  
6 under 72 and over 12.

7 THE COURT: 12 or 15.

8 MS. GALLAGHER: 12. It narrows, judge.

9 THE COURT: I don't think that's narrow  
10 enough.

11 MS. GALLAGHER: I think I have, and he  
12 invoked, so we don't know what his reason.

13 THE COURT: We don't worry about that. Tell  
14 me where there is an aggravating circumstance in that.

15 MR. BEVILACQUA: I think the pointed -- she  
16 found the one scenario that kind of proves our point.  
17 There are very few of those that apply. We can think of  
18 maybe one or two others, but F-13 would apply, cold  
19 calculating, certainly no moral pretense or legal  
20 justification for shooting a person, and F-13 existed in  
21 2006 as the statute we complain about. That itself may  
22 not be overly broad but in the entire scheme of things,  
23 the 14 aggravating categories -- I point this out --  
24 because they were broad in some facets to each of the  
25 categories that probably wouldn't even apply today.

1                   One thing I'd like to address, if I could,  
2 is the jury function.

3                   THE COURT: Go ahead.

4                   MR. BEVILACQUA: If we have a statute that  
5 does not narrow out sufficient number of first degree  
6 murder cases as eligible for the death penalty and then we  
7 have these list of aggravators as we have, what the  
8 legislature is really saying is that we have first degree  
9 murder and we have what's called a crime of capital  
10 murder. It just happened to -- pretty much capital  
11 murders include just about every possible first degree  
12 murder scenario. To come along and say, well, the jury  
13 has to find that aggravating factor is basically saying,  
14 well, if you win at trial on the charge of capital murder,  
15 that narrows it. Winning at trial can't be a narrowing  
16 function. If the defendants are found not guilty, I would  
17 concede the statute narrows it down because we don't  
18 execute the people found not guilty.

19                   Justice Scalia made the point pretty clear  
20 in *Ring*. Call it aggravating factors, call it whatever,  
21 you're talking about an element of the higher crime,  
22 capital murder. That's why we need to set a narrowing  
23 function to preclude the state categorically from seeking  
24 in good faith the death penalty on a broader category of  
25 the aggravators than we currently have, and under the

1 facts under this motion right now, it only eliminates  
2 1.2 percent, at least by the statistics we have found  
3 which is a great number of cases in the state and most of  
4 the cases in Maricopa County for that given period of  
5 time. So I think that's where we're at.

6           Again, we may be asking the Supreme Court to  
7 change its opinion, if that's what you're going to need,  
8 but I would ask that the Court, when it makes its ruling,  
9 that it sufficiently sets forth why it thinks it is  
10 narrowing or if it doesn't but it is relying on precedent,  
11 so if this thing goes up by one of the many cases here,  
12 that we understand what the issue is, and I ask that the  
13 Court put forth its findings as to what -- if it doesn't  
14 find narrowing but it is relying on the precedent, then  
15 state that or if the Court finds that there is narrowing,  
16 specifically what is the narrowing function and how that  
17 works from the legal standpoint, because under the facts  
18 of this case, 1.2 are only eliminated by the aggravating  
19 factors and, again, I don't think second degree gets us  
20 there. *Furman* had aggravated manslaughter which is the  
21 same as our second degree and that wasn't a factor to save  
22 that statute, judge.

23           THE COURT: Anything else from the state's  
24 perspective before I get to what my ruling's going to be  
25 and how it's going to be published?

1 MS. GALLAGHER: Well, if the Texas statute  
2 is constitutional and in Texas they define capital murder  
3 in such a way that it would encompass our first degree  
4 murder and every single one of those is a capital case and  
5 then they go to the jury and the jury has to decide, if  
6 that's constitutional, then clearly ours is.

7 THE COURT: Okay. All right. I am going to  
8 give you my ruling, but I going to follow with a minute  
9 entry like I did last time because I want the parties to  
10 have what I am thinking and have something for both sides  
11 to use going forward.

12 I am denying the motion. I don't think  
13 that's any mystery. First, you start with the proposition  
14 that statutes are presumed to be constitutional, so I  
15 start with that proposition. When I look at the argument,  
16 the overall argument, let me first say I am troubled by  
17 what I believe to be a lack of narrowing in the statute,  
18 and when I say statute, I mean scheme. The aggravating  
19 circumstances have evolved, especially since the F-2  
20 aggravator was expanded and the addition of several other  
21 ones since the time of *Greenway*, since this issue was  
22 really considered by the Supreme Court to arguably involve  
23 the vast majority, almost all, first degree murders. I  
24 think that's problematic from a constitutional standpoint,  
25 because it is hard to fathom a factual situation in which

1 a first degree murder does not have an aggravating  
2 circumstance, and that's troubling from the Court's  
3 perspective.

4           Respectfully, I think the state's argument  
5 that as long as individual aggravators themselves narrow  
6 the class of persons eligible for the death penalty, then  
7 the statute is constitutional is just wrong. I don't  
8 think it is supported by any of the cases. No cases say  
9 that, and I don't think that that is what the law's going  
10 to be, and so if the state's taking that position, I don't  
11 think the state's right.

12           However, the Arizona Supreme Court has made  
13 it clear when they last considered this that from their  
14 perspective, the statute does perform an adequate  
15 narrowing function. I understand that this footnote cited  
16 a case that came from before recent changes or 2005  
17 changes to the statute. However, my job is to do what the  
18 Supreme Court tells me to do and to follow what they say  
19 the law is and, to me, that's straightforward and that's  
20 what I need to do. Likewise, *Greenway* considered the  
21 issue as well.

22           Importantly for me is there is some  
23 narrowing that goes on at the stage where the case is  
24 either a first degree, second degree or manslaughter case.  
25 There is a narrowing function there. It's not clearly

1 been quantified, and the defense has given me no -- has  
2 not given me enough for me to be able to see there is no  
3 narrowing there. There is clearly some narrowing, and the  
4 Supreme Court is going to have to decide if that's enough  
5 narrowing. If there is more narrowing out there that I  
6 have missed -- and there is from the state's perspective,  
7 but from my perspective, there is some narrowing such that  
8 the statute based on what the Supreme Court has said --  
9 and I note that there were at least two district court  
10 opinions saying the same thing -- that the statute does  
11 adequately narrow the class of defendants who are eligible  
12 for the death penalty.

13 I want to make it clear I am troubled by the  
14 direction we've gone and where we're at; I am, but my job  
15 is to follow what I think the law is and the law is pretty  
16 clear to me that the statute adequately narrows per the  
17 Supreme Court and they are going to have to be the one to  
18 say otherwise, not me.

19 MR. BEVILACQUA: May I ask are you troubled  
20 by the evolution of the statutory aggravating factors, not  
21 by where we've gone?

22 THE COURT: That's correct. I am troubled  
23 by the evolution of the statutory factors, not by where  
24 you've gone, to make that clear. That being said, my job  
25 is clear under the law and so for those reasons, I am

1 denying the motion.

2 I will follow with an opinion that probably  
3 hopefully more artfully states what I just said and it  
4 will come out shortly so that you have it in writing  
5 similar to what I did last time, but for purposes of  
6 today, the motion is denied. With that, what else do we  
7 need to talk about?

8 MR. BEVILACQUA: We would move for a stay  
9 of proceedings so we can appeal your decision, and I think  
10 I can make that.

11 THE COURT: I assume, absent someone telling  
12 me to the contrary, everyone on the defense side is  
13 joining the motion to stay, correct? It is ordered  
14 denying the motion for a stay.

15 Okay. Anything else from the defense  
16 perspective?

17 MR. BEVILACQUA: Nothing, Your Honor.

18 THE COURT: Anything else from the state's  
19 perspective?

20 MS. GALLAGHER: Are you going to more  
21 artfully say the state was wrong?

22 THE COURT: Probably it could be more  
23 artful, but ultimately you're right and you win, but  
24 you're wrong on an issue. I think at least my minute  
25 entry will say that. All right. Thank you, everybody.



1 (Whereupon, the proceedings in the  
2 above-entitled matter were concluded.)

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7 C E R T I F I C A T E

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10  
11 I, LAURA A. ASHBROOK, do hereby certify that the  
12 foregoing pages constitute a full, accurate transcribed  
13 record of my stenographic notes taken at the  
14 aforementioned time and place, all done to the best of my  
15 skill and ability.

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20 s/s  
21 LAURA A. ASHBROOK  
22 Certified Court Reporter  
23 Certificate #50360  
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