No. 19-_____

In the
Supreme Court of the United States

_____

Thomas Michael Riley,

Petitioner,

v.

State of Arizona,

Respondent

_____

On Petition for a Writ of Certiorari to the
Supreme Court of Arizona

_____

Appendix for Petition for a Writ of Certiorari

_____

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CAPITAL CASE

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Appendix A

IN THE

SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA,
Appellee,

v.

THOMAS MICHAEL RILEY,
Appellant,

No. CR-15-0411-AP
Filed March 10, 2020

Appeal from the Superior Court in Maricopa County
The Honorable Peter C. Reinstein, Judge
No. CR2011-008004-002
CR2013-002559-002
AFFIRMED

COUNSEL:

Mark Brnovich, Arizona Attorney General, O.H. Skinner, Solicitor General, Lacey Stover Gard (argued), Chief Counsel, Capital Litigation Section, Tucson, Attorneys for State of Arizona

James J. Haas, Maricopa County Public Defender, Mikel Steinfeld (argued), Deputy Public Defender, Phoenix; Attorneys for Thomas Michael Riley

JUSTICE LOPEZ authored the opinion of the Court, in which CHIEF JUSTICE BRUTINEL, VICE CHIEF JUSTICE TIMMER, AND JUSTICES BOLICK, GOULD, BEENE, and PELANDER (RETIRED)* joined.

JUSTICE LOPEZ, opinion of the Court:

¶1 This automatic appeal arises from Thomas Michael Riley's convictions and death sentence for the murder of Sean Kelly. We have

* Justice William G. Montgomery has recused himself from this case. Pursuant to article 6, section 3 of the Arizona Constitution, the Honorable John Pelander, Justice of the Arizona Supreme Court (Retired), was designated to sit in this matter.

jurisdiction under article 6, section 5(3) of the Arizona Constitution and A.R.S. §§ 13-4031, -4033(A)(1).

BACKGROUND

¶2 In June 2008, Riley and Kelly were inmates at the Arizona State Prison Complex-Lewis in Buckeye. With the intent of gaining full membership into the Aryan Brotherhood ("AB"), a violent prison gang composed of white inmates, Riley requested and received authorization from the AB to assault Kelly. On June 29, after divulging his plan to three other AB prospective members ("probates"), all of whom refused to assist and tried to talk him out of the murder, Riley and two accomplices sneaked into Kelly's cell and stabbed him with homemade prison knives 114 times.[1] Riley then changed into Kelly's clothing from his cell, washed up, and returned to his cell. Kelly was dead by the time correctional officers and medical staff responded to his cell.

¶3 In the subsequent investigation, correctional officers found blood on Riley's elbows and forearm. Inside Kelly's cell, investigators found a bloody pair of pants with Riley's inmate card inside its pocket and a bloody shirt imprinted with Riley's inmate number. Inside Riley's cell, investigators found a pair of socks and a t-shirt with Riley's inmate number, both of which had blood on them. Subsequent DNA testing confirmed that the blood on Riley, as well as the blood on the socks and t-shirt in his cell, matched Kelly's DNA profile.

¶4 An investigator discovered that Riley had sent a change-of-address form to a book publisher listing his new address as a maximum-security facility. The investigator surmised that Riley mailed the form before Kelly's murder because he had been in lockdown since the incident. At the time, Riley had not been scheduled for relocation.

¶5 Nearly two years after Kelly's murder, another inmate gave investigators a letter he had received from Riley, explicitly describing the murder. Handwriting analysis, as well as the identification of Riley's fingerprint on the letter, confirmed that he wrote it. In the letter, Riley

[1] Investigators suspected that one of Riley's accomplices was Eric Olsen, an inmate living in C Pod in a cell immediately above Kelly's, who was affiliated with the AB.

claimed he had stabbed Kelly fifty times and his accomplices had stabbed Kelly twenty times each. He also listed three "defining moments" from the murder: (1) passing a frightened, young inmate on his way into Kelly's housing area; (2) the look on the face of an inmate who had stumbled onto the scene while Riley was washing up; and (3) the sound of Kelly's last breath leaving his limp body. Riley drew a large smiley face after that final sentence and signed the letter "Your hero the butcher" in both German and English.

¶6 A jury found Riley guilty of first degree murder and assisting a criminal street gang. The jury also found five aggravating circumstances: Riley was previously convicted of a serious offense; he committed the murder in an especially heinous, cruel, or depraved manner; he committed the murder while in the custody of the Arizona Department of Corrections ("ADOC"); he committed the murder to promote, further or assist a criminal street gang; and he committed the murder in a cold and calculated manner without pretense of moral or legal justification. A.R.S. §§ 13-751(F)(2), (F)(6), (F)(7)(a), (F)(11), and (F)(13) (2012). Considering these factors and the mitigation evidence, the jury found death was the appropriate sentence for Kelly's murder. The trial court also sentenced Riley to 11.25 years' imprisonment, consecutive to the death sentence, for the criminal street gang offense.

DISCUSSION

A. Denial of Motion to Change Counsel

¶7 Riley argues the trial court erroneously denied his motion to change counsel. We review the court's denial of a request for new counsel for abuse of discretion. *State v. Hernandez*, 232 Ariz. 313, 318 ¶ 11 (2013). An abuse of discretion occurs when "the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Chapple*, 135 Ariz. 281, 297 n.18 (1983), *superseded by statute on other grounds*.

¶8 On August 25, 2013, nearly two years after the initial indictment and two years before trial, Riley filed a motion to change his lead counsel, Randall Craig, on a pre-prepared form that provided no factual basis for the request. Craig responded by informing the court in writing "that communication between Defendant and Counsel now ceases

to exist. Defendant is no longer accepting Counsel's advice." Craig also stated, "A mutual distrust exists between Defendant and Counsel. Counsel has tried to repair the damaged relationship but has been unable to do so." Ultimately, he urged the court to grant the motion to ensure Riley "receive[d] adequate assistance of counsel."

¶9 On September 11, the trial court held a hearing to address Riley's motion. After noting the lack of grounds supporting the motion, the court asked Riley if he had anything to add. Riley made general statements regarding the lack of communication, cooperation, and trust between him and Craig, dating back six to eight months. The court informed Riley he was entitled to competent counsel, not "a great relationship," and observed that both of Riley's attorneys were competent. Riley complained Craig was frequently unreachable and had only spent four hours at the prison discussing Riley's case with him in the preceding year-and-a-half. Riley stated that his relationship with Craig had "clearly deteriorated to where there is no trust at all."

¶10 When questioned by the court, Craig stated, "[W]ith all candor to the court, I must say we aren't communicating. I have to be honest with that fact. We are not. He doesn't seem to like me." After the court noted that Riley did not have to like his attorneys, Craig stated, "I understand. And that's all that I am going to say at this point." The court then informed Riley that it was not inclined to grant the motion "without more." Riley added that Craig had failed to show up to four or five scheduled meetings at the prison, had failed to conduct witness interviews, and had failed to appear at an appointment to view the crime scene. In response to the trial court's observation that Craig appeared to be preparing his defense, as evidenced by his hiring mitigation specialists and an investigator, Riley conceded that "[t]he mitigation aspect is ahead of schedule. I will give him credit." After Riley finished his argument and after a brief recess, the trial court denied Riley's motion to change lead counsel.

¶11 Craig continued as Riley's counsel after the trial court denied the motion to change counsel. Craig served as Riley's advisory counsel during his brief period of self-representation (April 1, 2015–October 5, 2015) and then resumed his role as lead counsel during the trial. Riley did not renew his motion to change counsel.

¶12 The Federal and Arizona Constitutions guarantee criminal defendants the right to representation by competent counsel. *State v. Goudeau*, 239 Ariz. 421, 447 ¶ 77 (2016) (citing U.S. Const. amend. VI; Ariz. Const. art. 2, § 24; A.R.S. § 13-114(2); *State v. LaGrand*, 152 Ariz. 483, 486 (1987)). An indigent defendant, however, is not "entitled to counsel of choice, or to a meaningful relationship with his or her attorney." *State v. Torres*, 208 Ariz. 340, 342 ¶ 6 (2004) (quoting *State v. Moody* ("*Moody I*"), 192 Ariz. 505, 507 ¶ 11 (1998)). "But when there is a complete breakdown in communication or an irreconcilable conflict between a defendant and his appointed counsel, that defendant's Sixth Amendment right to counsel has been violated" and a resulting conviction must be reversed. *Id.*; *accord Moody I*, 192 Ariz. at 509 ¶ 23.

¶13 To preserve a defendant's Sixth Amendment right to counsel, the trial court has a "duty to inquire as to the basis of a defendant's request for substitution of counsel." *Torres*, 208 Ariz. at 343 ¶ 7. During this inquiry, the defendant bears the burden of proving either a "complete breakdown in communication or an irreconcilable conflict." *Id.* at 342 ¶ 6. "To satisfy this burden, the defendant must present evidence of a 'severe and pervasive conflict with his attorney or evidence that he had such minimal contact with the attorney that meaningful communication was not possible.'" *Hernandez*, 232 Ariz. at 318 ¶ 15 (quoting *United States v. Lott*, 310 F.3d 1231, 1249 (10th Cir. 2002)). A defendant must show more than "personality conflicts or disagreements with counsel over trial strategy." *State v. Cromwell*, 211 Ariz. 181, 187 ¶ 30 (2005). A defendant's claims against his attorney of ineffective trial preparation and failure to communicate, when unsupported by the record, are generally characterized as disagreements over trial strategy. *See Hernandez*, 232 Ariz. at 321 ¶ 33.

¶14 In response to Riley's complaints, Craig acknowledged that "communication between Defendant and counsel now ceases to exist," which is precisely the situation that, if true, would entitle Riley to substitution of counsel. Craig added that mutual distrust existed with his client, that efforts to repair the relationship were unsuccessful, and that the motion should be granted to ensure Riley received adequate counsel. But the "mere possibility that the defendant had a fractured relationship with counsel does not amount to structural error." *Torres*, 208 Ariz. at 344 ¶ 12. The trial court was entitled to delve into the substance behind the assertions and, in doing so, it found the basis for substitution wanting.

¶15 At the hearing, Riley alleged that Craig failed to conduct any interviews and failed to appear for an appointment to view the crime scene. We have repeatedly rejected these types of complaints as disagreements over trial strategy, which do not amount to irreconcilable differences. *See Goudeau*, 239 Ariz. at 447 ¶ 76, 448 ¶ 84; *State v. Henry*, 189 Ariz. 542, 547 (1997). Riley's primary complaint against Craig at the hearing, however, was lack of communication. Riley alleged Craig had only met with him for a total of four hours in the preceding year and a half and had missed several appointments to meet with him in prison. Craig agreed in his response to Riley's motion and at the hearing that his communications with Riley had ceased to exist.

¶16 We have historically required "intense acrimony and depth of conflict," *Cromwell*, 211 Ariz. at 188 ¶ 37, or a complete breakdown in communication, *Torres*, 208 Ariz. at 342 ¶ 6, before requiring new counsel. *See also Hernandez*, 232 Ariz. at 318 ¶ 16, 321 ¶ 36 (finding no abuse of discretion even though defendant alleged only four visits with counsel over the course of two years). Riley attempts to compare his minimal interactions with his attorney to those between the defendant and his attorney in *Moody I*. But the *Moody I* record was "replete with examples of a deep and irreconcilable conflict" between the defendant and his attorney. 192 Ariz. at 507 ¶ 13. Moody accused his lawyer and the lead public defender of being "incompetent and crazy." *Id.* at 508 ¶ 16. He developed an "obsessive hatred" for his attorney and the public defender's office and, on at least one occasion, he and his attorney were "almost at blows" with one another. *Id.* Moody believed his lawyers were conspiring with the prosecutor, the court, and the doctor tasked with evaluating his competency to have him declared insane. *Id.* He also threatened to file ethical complaints against his lawyer and the public defender's office. *Id.* ¶ 18. None of these examples of "intense acrimony and depth of conflict" is present here. *See also Torres*, 208 Ariz. at 343 ¶ 9 ("[Defendant] presented specific factual allegations that raised a colorable claim that he had an irreconcilable conflict with his appointed counsel.").

¶17 On the contrary, despite Riley's and Craig's claim of an irreconcilable conflict or a complete breakdown in communications, the record belies their stark characterization of their relationship. Riley gave Craig's defense team "credit" for their efforts in preparing mitigation. Riley's knowledge of the status of his case further demonstrates that he and

Craig were communicating about his defense. In fact, Riley regularly corresponded with Craig in writing before the change of counsel hearing, albeit primarily to complain about the frequency of Craig's visitation and status reports, but their substantive written correspondence continued after denial of his motion. Thus, because Riley failed to demonstrate an irreconcilable conflict or a completely fractured relationship with Craig, the trial court was not required to appoint new counsel. *See Cromwell*, 211 Ariz. at 186 ¶ 29.

¶18 To the extent Riley faults the trial court for failing to conduct further inquiry into the source of his alleged conflict with Craig, Riley and Craig effectively foreclosed further inquiry. For his part, Riley explained the reasons for his dissatisfaction, which the trial court deemed insufficient to require new counsel. Craig simply noted that "[Riley] doesn't seem to like me" and "that's all I'm going to say at this point." Moreover, neither Riley nor Craig requested or intimated that an ex parte hearing was necessary to determine the source of the alleged conflict. Under these circumstances, the record does not support Riley's assertion of an irreconcilable conflict or complete breakdown in communications.

¶19 If the defendant shows "[c]onflict that is less than irreconcilable," a trial court should consider the conflict as a factor among several other factors in determining whether to appoint new counsel. *Id.* ¶ 29. The other factors—often referred to as the *LaGrand* factors—are: (1) "whether new counsel would be confronted with the same conflict;" (2) "the timing of the motion;" (3) "inconvenience to witnesses;" (4) "the time period already elapsed between the alleged offense and trial;" (5) "the proclivity of the defendant to change counsel;" and (6) the "quality of counsel." *Id.* at 187 ¶ 31 (quoting *LaGrand*, 152 Ariz. at 486–87).

¶20 These factors tend to favor substitution here, save the last, given that no dispute exists that Riley's counsel was competent. But "quality of counsel" was the only one of the six factors that the trial court expressly considered. The State acknowledged that different counsel would probably not have the same conflict. Although the request for substitution occurred well into trial preparation, no trial date was yet scheduled, so the case presumably could have proceeded without significant disruption as Riley showed no prior proclivity toward substituting counsel. *See Moody I*, 192 Ariz. at 509–10 ¶ 21.

¶21 Applying the *LaGrand* factors against the backdrop of Craig's avowal of a complete breakdown in communication, there were clear grounds to grant the motion. However, because the trial court conducted a hearing to determine whether there was an actual breakdown in the attorney/client relationship, we review the trial court's decision to deny the request for an abuse of discretion. *Goudeau*, 239 Ariz. at 446 ¶ 68. In denying Riley's motion to change counsel, the trial court did not refer to the *LaGrand* factors and gave no explicit reasons for denying the motion. But this Court may affirm on any basis in the record. *See, e.g.*, *State v. Robinson*, 153 Ariz. 191, 199 (1987).

¶22 Based on the hearing, it appears that the core of Riley's claims against Craig regarding the cause of their asserted breakdown in communication was rooted in disagreements over trial strategy. [2] But "[a] single allegation of lost confidence in counsel does not require the appointment of new counsel, and disagreements over defense strategies do not constitute an irreconcilable conflict." *Cromwell*, 211 Ariz. at 186 ¶ 29; *Hernandez*, 232 Ariz. at 321 ¶ 33. Moreover, the trial court witnessed Riley and Craig interact for more than a year which led to the trial court's conclusion that Riley's lead counsel was providing competent representation. Accordingly, the trial court did not abuse its discretion when it denied Riley's motion to change lead counsel, and Riley is not entitled to relief on this issue.

¶23 Finally, even if the trial court abused its discretion in denying Riley's change of counsel motion, it is subject to harmless error review because Riley failed to prove an irreconcilable conflict or complete breakdown in communication. *Cf. Torres*, 208 Ariz. at 343–44 ¶¶ 11–13 (holding that structural error applies to only a few enumerated situations and the harmless error standard applies to a trial judge's summary denial of a motion to change counsel); *see also State v. Ring (III)*, 204 Ariz. 534, 552–53 ¶ 46 (2003) ("The Supreme Court has defined relatively few instances in

[2] Riley's trial strategy dispute with Craig persisted after the trial court denied his motion for new counsel. On April 1, 2015, when the trial court granted Riley's motion for self-representation, Riley clarified that the basis for his motion was that he and Craig were "at odds with strategy and the direction of the case." But Riley also emphasized the importance of retaining "the same team as [his] legal advisors" because they had been working on the case together for three and a half years.

which we should regard error as structural."). It is difficult to understand how any error caused an unfair trial given that Riley does not contest that his counsel was competent; and indeed, Riley complains here about issues that arose when he self-represented or rejected his attorney's advice. Riley is not foreclosed from raising issues concerning inadequate representation in subsequent proceedings, but we conclude that his Sixth Amendment right to counsel was not violated in light of the evidence before the trial court.

B. Description of Aggravating Factors in Juror Questionnaire

¶24 Riley argues the juror questionnaires erroneously described Arizona's aggravating factors as "very few" and "very specific," which created an illegitimate eligibility factor that the State never proved. Because Riley did not object to the language in the questionnaires at trial, we review for fundamental error. *See State v. Anderson*, 210 Ariz. 327, 341 ¶ 45 (2005). Under fundamental error review, the defendant bears the burden to establish that (1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice. *State v. Escalante*, 245 Ariz. 135, 140 ¶ 21 (2018); *State v. Bearup*, 221 Ariz. 163, 168 ¶ 21 (2009); *see also State v. Henderson*, 210 Ariz. 561, 567–68 ¶¶ 19–20 (2005). An error is fundamental when it "goes to the foundation of [the defendant's] case, takes away a right that is essential to [the defendant's] defense, [or] is of such magnitude that [the defendant] could not have received a fair trial." *Henderson*, 210 Ariz. at 568 ¶ 24 (citing *State v. Hunter*, 142 Ariz. 88, 90 (1984)); *see also Escalante*, 245 Ariz. at 140 ¶ 16 (holding that the three prongs for determining when an error is fundamental are disjunctive).

¶25 At the beginning of jury selection, the trial court provided jurors with written questionnaires. Both Riley (then pro per) and the prosecutor reviewed and approved the questionnaire at a status conference prior to trial. In describing the penalty phase of the trial, the questionnaire stated:

> The penalty phase of the trial may contain two parts. The state must first prove beyond a reasonable doubt that one or more aggravating circumstances exist for a defendant to be eligible for a death sentence. Aggravating circumstances are set forth in the law. *The law*

> *allows only a very few and very specific aggravating circumstances to be used, if proven beyond a reasonable doubt, to make a defendant convicted of Murder in the First Degree eligible for a death sentence*.

(emphasis added). The portion emphasized above was also repeated as an introduction to Question 59 of the questionnaire.

¶26 While questioning one of the jurors during voir dire, Riley highlighted the "very few" and "very specific" language, asking the prospective juror whether he or she agreed with the statement made in the preamble to Question 59. After reading the statement twice verbatim, Riley reworded the statement as follows:

> In layman's terms, there is a [sic] very few criteria that qualify a murder from being a murder to being a capital murder warranting the death penalty, and you would have to agree and follow those rules and not allow other subjectivity to come in to make your decision on that.

Riley then asked the prospective juror whether he or she would follow those instructions.

i. Legal Accuracy of the Statement

¶27 Although the court provided further instructions to the jurors regarding the aggravating factors during both the aggravation and penalty phases of the trial, neither the court nor the parties ever used the "very few" or "very specific" language again during the trial.

¶28 Riley argues (1) the statement in the jury questionnaire describing Arizona's aggravating factors as "very few" and "very specific" misstates the law; (2) that misstatement created an unproven, invalid sentencing factor that constituted fundamental error; and (3) he was prejudiced by this error because it led the jury to believe that he was one of only a "very few" individuals eligible for the death penalty.

¶29 The legal accuracy of the description of Arizona's aggravators as "very few" is debatable. Both Riley and the State recognize that the statement provided a subjective description of the number of statutory aggravating factors in Arizona. But while Riley argues that thirty different aggravating circumstances (ten individual circumstances with a total of twenty sub-parts) cannot reasonably equate to a "very few," the State, ironically, relies solely on the semantic ambiguity of the description to defend the statement's legal accuracy. At most, the description of Arizona's aggravators as "very few" is ambiguous and irrelevant.

¶30 The description of Arizona's aggravators as "very specific," however, likely misstates the law. To pass constitutional muster, aggravators must "not apply to every defendant convicted of a murder, but only to a subclass, and the aggravating circumstance may not be overly vague." *State v. Hausner*, 230 Ariz. 60, 82 ¶ 99 (2012) (citing *Tuilaepa v. California*, 512 U.S. 967, 972 (1994)). We have repeatedly upheld the constitutionality of Arizona's aggravators, especially those deemed facially vague, based on the "adequate specificity" of narrowing constructions in jury instructions. *See, e.g.*, *Anderson*, 210 Ariz. at 352–53 ¶¶ 109–14 (addressing constitutionality of (F)(6) aggravator). Undoubtedly then, Arizona's aggravators must contain *some* specificity to overcome challenges for vagueness. But there is a substantial semantic difference between "not overly vague" and "very specific." More to the point, there is a noteworthy distinction between "adequately specific" and "very specific."

¶31 Accordingly, because all or part of the statement likely misstates the law, Riley has fulfilled the first requirement to prove fundamental error. *See supra* ¶ 24

ii. Fundamental Nature of the Error

¶32 Assuming the statement misstates the law, its single appearance in the jury questionnaire was insufficient to constitute fundamental error. Riley must also prove that the error went to the foundation of his case, took away a right essential to his defense, or was of such magnitude that he could not have received a fair trial. *See Henderson*, 210 Ariz. at 568 ¶ 24 (citing *State v. Hunter*, 142 Ariz. 88, 90 (1984)); *see also Escalante*, 245 Ariz. at 140 ¶ 16 (holding that the three prongs for determining when an error is fundamental are disjunctive).

¶33 Riley contends the error was fundamental as it prevented him from receiving a fair trial because (1) the statement implied that the court had conducted some narrowing function that identified Riley as "one of only 'a very few' individuals that could actually be put to death" and (2) the subjective nature of the statement left its meaning "open to any interpretation each juror wished to assign." According to Riley, this implication—and the jury's acceptance of it—created an unproven eligibility factor or aggravator.

¶34 Riley exaggerates the impact of the statement. Immediately before the statement, the questionnaire stated, "The state must first prove beyond a reasonable doubt that one or more aggravating circumstances exist." This informed the jurors of the proper order of proceedings and the State's burden to prove at least one aggravating factor, rendering the subsequent challenged statement irrelevant. Moreover, during voir dire, after the jurors had completed the questionnaire, Riley explained the statement "in layman's terms," emphasizing that jurors had to rely on the aggravating factors, not "other subjectivity," to impose the death penalty. After voir dire, neither the trial court nor the State ever repeated the statement at issue; instead the trial court reiterated the State's burden of proof in both the aggravation and penalty phases of the trial.

¶35 Contrary to Riley's assertion, the statement did not insert an additional eligibility factor or aggravator. At no point did the trial court or the State assert—or even imply—that Riley's eligibility for the death penalty had been predetermined before trial based on the number or specificity of Arizona's aggravators. In the unlikely event that a juror inferred as much from the jury questionnaire on the first day of trial, the trial court's repeated instructions regarding the State's burden of proof in the subsequent months of trial surely disavowed any such inference by the time the jury found more than a month later that the State had proven all five alleged aggravating circumstances.

¶36 Accordingly, because the misstatement error did not go to the foundation of Riley's case, did not take away a right that was essential to his defense, and was too insignificant to impact the fairness of his trial, Riley has failed to meet his burden to prove fundamental error and is not entitled to relief on this issue.

C. Failure to Question Jurors on Questionnaire Answers Sua Sponte

¶37 Riley argues the trial court erred by failing to question Jurors 1 and 16 sua sponte based upon their answers on the juror questionnaires. Because Riley did not raise a challenge to either of these jurors for cause, we review this claim for fundamental error. *See State v. Bible*, 175 Ariz. 549, 573 (1993).

¶38 On the juror questionnaire, Juror 1 answered "no" to Question 40, which asked whether she agreed that a defendant is not required to present any evidence. In explaining her disagreement on the questionnaire, she asked, "Without being totally familiar with the law—how can a defendant defend themselves without presenting evidence?" In a follow-up question asking whether she could follow this law even if she disagreed with it, Juror 1 answered "yes."

¶39 During voir dire involving Juror 1, the court, the prosecutor, and Riley all explained the State's burden of proving all elements beyond a reasonable doubt and that the defendant had no obligation to testify or present evidence. The prosecutor asked all jurors whether any of them had any questions about the process or any additional information relevant to whether he or she should serve as a juror. No juror replied affirmatively.

¶40 On her questionnaire, Juror 16 answered "yes" to Question 51, which asked whether she believed that a law enforcement officer is always more believable in giving testimony than is a lay person. In answering Question 52, she stated she could follow the court's instruction that a law enforcement officer is not entitled to any greater believability than any other witness by virtue of his or her position as a law enforcement officer. She also disclosed that her father is a retired sheriff's deputy and her sister-in-law is an attorney with the San Francisco District Attorney's Office.

¶41 The prosecutor did not question Juror 16 directly during voir dire. But he questioned two other jurors who also answered affirmatively for Question 51, and he acknowledged there were other jurors who had answered similarly. The prosecutor asked the panel whether they could follow the court's instruction that all witnesses were initially entitled to the same credibility, and all the jurors agreed.

¶42 After several jurors mentioned having family members who worked in law enforcement, the prosecutor asked "everyone who has law enforcement in their family or friends" whether there was "[a]nything about those relationships that would affect your ability to be [a] fair and impartial juror?" All prospective jurors except one—who was not impaneled on the jury—shook their heads in the negative. During the voir dire proceedings involving Jurors 1 and 16, Riley failed to question either of them about their answers at issue here, and he did not move to strike either juror.

i. Failure to Question or Strike Jurors

¶43 Riley argues that the trial court erred by failing to question, sua sponte, Jurors 1 and 16 to determine whether those jurors could render a fair and impartial verdict. By alleging that both jurors had biases that prevented them from rendering such a verdict, Riley necessarily implies that the trial court erred by failing to strike these jurors. *See State v. Velazquez*, 216 Ariz. 300, 306–07 ¶ 18 (2007) ("A defendant is entitled to 'a fair trial by a panel of impartial, indifferent jurors.'" (quoting *Morgan v. Illinois*, 504 U.S. 719, 727 (1992))). Riley's argument is unpersuasive.

¶44 A trial court does not err by failing to question a juror who indicates a disagreement with, or a misunderstanding of, the law if that juror also indicates that he can be fair and impartial, that he will follow the law, and that he has gained understanding of the law he previously misunderstood. *See Bible*, 175 Ariz. at 573. Furthermore, "the trial judge's invitation to counsel to ask follow-up questions mitigates any deficiency in the court's questioning." *State v. Moody* ("*Moody II*"), 208 Ariz. 424, 452 ¶ 98 (2004).

¶45 In *Bible*, one of the seated jurors in a death penalty case indicated on the jury questionnaire that "he would not treat the testimony of police officers as he would other witnesses, did not understand that the State had the burden of proof for each element, and did not agree with the presumption of innocence." 175 Ariz. at 573. Neither the trial court nor the parties conducted follow-up oral inquiry with the juror. *Id.* We held that it was not fundamental error to allow the juror to sit because he subsequently "indicated that he could fairly and impartially listen to and weigh the evidence and render a verdict in accordance with the law," he "understood

that the State had the burden of proof beyond a reasonable doubt," and he "expressed no disagreement with the presumption of innocence, the jury's duty to judge credibility, or the State's burden to prove guilt beyond a reasonable doubt." *Id.* We concluded "follow-up oral inquiry of [the] juror would have been appropriate," but it was "[n]either error [n]or fundamental error for the judge to have failed to sua sponte strike the [juror] for cause." *Id.* at 573–74.

¶46 Here, although Juror 1 initially disagreed that a defendant need not present evidence, she clarified that her disagreement was based on a lack of understanding of the law. Addressing the very next question, the juror indicated affirmatively that she would follow this law even if she did not agree with it. During subsequent voir dire, she gave no indication that she could not or would not hold the State to its burden of proof.

¶47 Juror 16 answered in her questionnaire that a law enforcement officer is more believable than a lay witness. She also indicated that she had family who worked in law enforcement, but unlike the juror in *Bible*, Juror 16 answered affirmatively that she would consider the testimony of law enforcement as she would the testimony of any other witness. Along with other jurors on the panel, she also agreed to follow the court's instructions to gauge the credibility of witnesses equally. When asked whether anything about her relationship with law enforcement would affect her ability to be fair and impartial, she responded "no" with the rest of the panel.

¶48 Furthermore, Riley had full opportunity to question Jurors 1 and 16 regarding their answers on the questionnaire, but he failed to do so. Both jurors gave sufficient indication that they would be fair and impartial, and the trial court did not err by failing to question or strike them from the jury.

¶49 Riley relies on *Morgan v. Illinois*, 504 U.S. 719 (1992) for the proposition that a juror's acknowledgement on a jury form that he could follow the law is insufficient to adequately examine a juror's potential biases. Although the United States Supreme Court held that such an acknowledgement would be insufficient to ascertain a potential juror's beliefs about the death penalty, *Morgan*, 504 U.S. at 734–35, neither of the juror questions at issue queried the jurors' death penalty views. Accordingly, *Morgan* has no bearing on this issue.

¶50 Riley also argues that Arizona Rule of Criminal Procedure 18.5(d) requires trial courts to conduct oral examinations of each juror. Although the rule requires a court to "conduct a thorough oral examination of the prospective jurors and control the voir dire examination," it only requires a court to probe a prospective juror's willingness to follow the law "where the trial judge is left with the *definite impression* that a prospective juror would be unable to faithfully and impartially apply the law" or in cases of "*heightened* danger of juror prejudice or bias" from media exposure. *See Wainright v. Witt*, 469 U.S. 412, 425–26 (1985) (emphasis added); *Bible*, 175 Ariz. at 572 n.12 (emphasis added). These factors are not present here.

ii. Lack of Prejudice

¶51 Even if the trial court erred, Riley "must demonstrate not only that the voir dire examination was inadequate, but also that, as a result of the inadequate questioning, the jury selected was not fair, unbiased, and impartial." *Moody II*, 208 Ariz. at 451 ¶ 95. "Prejudice will not be presumed but must appear affirmatively from the record." *State v. Hoskins*, 199 Ariz. 127, 141 ¶ 48 (2000). Riley fails to meet this burden.

¶52 Riley claims that the record supports a finding of prejudice resulting from Juror 1's response because it indicated that even though she was willing to follow the law, she did not understand or agree with it. This argument is unpersuasive. Juror 1's initial response indicates that she did not understand the law and was, therefore, confused as to how a defendant could win his case without presenting evidence. This confusion was unquestionably dispelled by the trial court's and both parties' repeated reference to the burden of proof. After being informed of this burden, Juror 1—along with the rest of the panel on October 5, 2015—raised no further questions for clarification.

¶53 Riley also claims the prosecutor's rebuttal closing argument in the guilt phase contributed to the prejudice. At that time, the prosecutor stated:

> I have to say, [the defense attorney]'s right. I've got news for you. Every party has the power to subpoena through the Court any witness. He's right. He has subpoena power. Does that mean

> he has to do it? No. Of course not. I have the burden of proof. I always do. But just as we can say no inmates testified to—that Tommy Riley did it, no inmates testified that Tommy Riley wasn't there. No inmates from A Pod testified that, "Hey, you know what? I saw him. He wasn't in C Pod."

According to Riley, these statements were "tailored to appeal to Juror 1's belief" because they insinuated that Riley failed to call witnesses to support his defense. This argument is equally unpersuasive. A prosecutor may properly comment on a defendant's failure to present exculpatory evidence which would substantiate defendant's theory, provided the remark is not a comment on the defendant's silence. *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160 (1987).

¶54 Here, the prosecutor merely commented on Riley's failure to present witnesses to support the theory of his defense. In his closing argument, Riley's attorney stated, "[N]obody came forward to say Riley and [his cellmate Dennis] Levis did this. You heard no eyewitness testimony." Before making the statements at issue, the prosecutor explicitly told the jury, "[A]s the judge told you, [the defendants] are not obligated to put on anything and that never changes. And nothing I say, suggest, it is not a wink and a nod. That never ever changes. We always have the burden." During closing arguments alone, the jury heard numerous times—from the judge, Riley's attorney, and the prosecutor—that the State bore the burden of proof. Nothing in the prosecutor's statements expressly or impliedly directed the jury's attention to Riley's failure to testify. Rather, the prosecutor simply maintained that Riley was free to produce witness testimony favorable to his defense.

¶55 Regarding Juror 16, Riley asserts that he was prejudiced by the juror's bias in favor of law enforcement officers because the "trial court did not ascertain how deeply held her bias was or if she would feel pressured to return a guilty verdict because she was concerned about her deputy father's or her prosecutor sister-in-law's opinion if she did not." But this is not evidence of bias; it is an expression of potential or presumed bias. *See Hoskins*, 199 Ariz. at 141 ¶ 48 ("Prejudice will not be presumed but must appear affirmatively from the record.").

¶56 In sum, Riley has failed to show that he was prejudiced, and he is not entitled to relief.

D. Admission of Alleged Inadmissible Evidence

¶57 Riley argues the trial court erred by admitting evidence in violation of the Arizona Rules of Evidence that, coupled with the prosecutor's arguments, deprived him of a fair trial.

i. Evidence of Kelly's Time in Protective Custody

¶58 The State presented evidence that Kelly was placed in protective custody in 2002, six years before his murder, because he had refused an order to commit violence against another inmate and that his prior protective custody status made him a target of the AB. Riley argues that the trial court erred in admitting this evidence because (1) Kelly's prior custody status was irrelevant; (2) since Kelly's prior protective custody status was irrelevant, the reason given for it—that Kelly was put in protective custody because he "had a target on his back" because he refused to commit a violent act during a previous incarceration—was also irrelevant; and (3) the State failed to establish a foundation that Riley knew that Kelly was previously in protective custody which was a prerequisite to proving Riley's motive. Because Riley did not object to the admission of this evidence at trial, we review these claims for fundamental error. *See Anderson*, 210 Ariz. at 341 ¶ 45.

¶59 Keland Boggs, a special investigator for the ADOC, testified for the State that "the only sure way to gain membership into the [AB] is to commit a homicide of a target of the [AB]." Boggs further explained that inmates who entered an Arizona prison with gang-related "political ink" and who refused to commit an act of violence to earn that tattoo "could be targeted to be killed" and that they commonly requested protective custody.

¶60 Officer William Dziadura, an ADOC criminal investigations manager, testified for the State that Kelly had been in protective custody in 2002 after refusing a request from "influential white inmates to assault another inmate." When Kelly refused the request, he was told "to cover up some lightning bolts tattoo that he had on his person or be injured." Officer

Dziadura also testified that inmates in protective custody were "perceived as being weak."

¶61 During his opening statement, the prosecutor noted that Kelly "had a target on his back" because "he refused to commit an act of violence on another inmate." He declared that "in the world of the [AB], that's weakness. And weak inmates are targets for men who want membership in the [AB]." The prosecutor later stated in his penalty phase rebuttal closing argument that "[y]ou don't have two more different people, Sean Kelly, who had to go to protective custody because he wouldn't be a part of that world, and the defendant, who executed him."

¶62 Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence . . . ." Ariz. R. Evid. 401(a). "[M]otive is relevant in a murder prosecution." *State v. Hargrave*, 225 Ariz. 1, 8 ¶ 14 (2010).

¶63 The State's theory was that Riley targeted Kelly because he had spent time in protective custody, which gangs like the AB viewed as a weakness. In fact, Riley described in a letter to another inmate how he was looking for a "golden goose" before he was segregated and how he had to move fast once he got the "green light." More importantly, the State's theory was that Kelly had been in protective custody for refusing to carry out an order from "influential white inmates" and refusing such an order could get an inmate targeted to be killed. This testimony allowed the State to establish Riley's motive for killing Kelly; therefore, Kelly's prior stay in protective custody was relevant.

¶64 Similarly, Riley's argument that the State failed to lay a proper relevance foundation for motive by not proving that he knew that Kelly was previously held in protective custody is unpersuasive. Motive may be proven by circumstantial evidence. *State v. Parker*, 231 Ariz. 391, 407 ¶ 71 (2013). Here, Officer Dziadura testified that Kelly was previously put into protective custody for refusing an order to assault another inmate from "influential white inmates." This supports an inference that Kelly was an AB target. Further, Riley's own letter said that he was "hunting big time" for his "golden goose" and that he was constantly "sending names" for approval but kept being told "no" before he got the "green light." In this context, Riley's lack of direct knowledge of Kelly's prior protective custody status is irrelevant because Riley killed Kelly not because *he* had previously

targeted him, but because *the AB* sanctioned the murder and rewarded Riley for killing Kelly. In other words, as Riley's letter makes clear, the AB's motive in killing Kelly may be imputed to Riley. This is strong circumstantial evidence of motive that was properly presented for the jury to weigh its merits.

ii. Evidence of Kelly's Character

¶65 Riley also objects to portions of Officer Melissa Vincent's testimony. At one point, Officer Vincent, a Correctional Officer who worked in the control room for Kelly's prison pod, testified regarding Kelly's character, stating "I thought he was one of the better inmates. Always very polite to me, never disrespected me, which a lot of them did. Very easy to get along with, quiet." Riley argues that this testimony regarding Kelly's character was irrelevant. Riley claims this implicitly invited the jury to compare Kelly's character with Riley's.

¶66 Because Riley objected to the relevance of this portion of Officer Vincent's trial testimony, we examine the trial court's decision regarding those statements for abuse of discretion. *See State v. Steinle*, 239 Ariz. 415, 417 ¶ 6 (2016).

¶67 Under Arizona Rule of Evidence 404(a)(2), a victim's character for peacefulness may be presented only to *rebut* a claim that the victim was the first aggressor. If the defendant does not claim self-defense and there is no evidence that the victim was the initial aggressor, the victim's aggressive or peaceful character is irrelevant. *State v. Hicks*, 133 Ariz. 64, 68–69 (1982). Here, Riley never admitted that he killed Kelly, in self-defense or otherwise. Riley's defense was that he found Kelly dead in his cell and tried to revive him. Thus, the trial court erroneously admitted evidence of Kelly's character.

¶68 Because the trial court erred, we must determine if it was harmless error. *State v. Bass*, 198 Ariz. 571, 580 ¶ 39 (2000). As such, the State must show "beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *Escalante*, 245 Ariz. at 144 ¶ 30 (quoting *State v. Escalante-Orozco*, 241 Ariz. 254, 286 ¶ 126 (2017)). "The standard is an objective one, and requires a showing that without the error, a reasonable jury could have plausibly and intelligently returned a different verdict." *Id.* ¶ 31. "The inquiry . . . is not whether, in a trial that occurred

without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Bible*, 175 Ariz. at 588 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).

¶69 Here, a reasonable jury could not have reached a different verdict. The improperly admitted evidence is inconsequential compared to the properly admitted evidence of Riley's guilt, including that (1) Riley was found with Kelly's blood on him; (2) Riley was found with blood on his clothes; (3) Riley's clothes and ID badge were found at the murder scene; (4) an eyewitness saw Riley in Kelly's housing pod the night of the murder; and (5) Riley hand-wrote a letter graphically detailing Kelly's murder and Riley's quest to become a "patched" AB member by looking for a "golden goose." For these reasons, improper admission of two sentences of testimony concerning Kelly's character for peacefulness was harmless error.

iii. Rule 403 Violations

¶70 Riley argues the trial court erred in admitting evidence of Kelly's time in protective custody in violation of Arizona Rule of Evidence 403, which prohibits admission of relevant evidence whose probative value is substantially outweighed by the risk of unfair prejudice. "Unfair prejudice means an undue tendency to suggest decision on an improper basis . . . such as emotion, sympathy or horror." *State v. Schurz*, 176 Ariz. 46, 52 (1993) (internal quotation marks omitted) (quoting Fed. R. Evid. 403).

¶71 Here, Riley's Rule 403 argument is unavailing because the trial court did not abuse its discretion by admitting relevant motive evidence. Although such evidence likely undermined Riley's defense, it was not admitted to evoke "emotion, sympathy, or horror." *Id.* ("[N]ot all harmful evidence is unfairly prejudicial. After all, evidence which is relevant and material will generally be adverse to the opponent."). There was no Rule 403 violation.

iv. Officer Vincent's Testimony Regarding the "Atta-Boy" Gesture

¶72 Officer Vincent also testified that, on the night of the murder, as Riley and Levis were exiting C Pod, she saw Riley pat Levis on the shoulder "kind of atta-boying him" and that Riley looked "happy." Riley

argues that the trial court violated several Arizona Rules of Evidence in admitting this testimony, including Rule 602 because Officer Vincent did not know the significance of Riley's pat on Levis's shoulder; Rule 701(a) because the testimony was not rationally based on Officer Vincent's perception; and Rule 701(b) because the testimony was not helpful to the jury. In sum, Riley contends that Officer Vincent's testimony was not necessary because the jury could determine on its own the significance of Riley's gestures and interactions with Levis.

¶73 Because Riley did not object to the admission of this evidence at trial, we review these claims for fundamental error. *See Anderson*, 210 Ariz. at 341 ¶ 45.

¶74 Riley's argument that Officer Vincent's testimony does not pass muster under Rule 602 is unpersuasive. The rule provides that "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Ariz. R. Evid. 602. In essence, Rule 602 permits a witness's observation testimony. Here, Officer Vincent's testimony was based on her own perception and her characterization of a pat on the back and a smile as a congratulatory gesture is unremarkable.

¶75 Officer Vincent's testimony also did not violate Rule 701, which provides:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
> (a) rationally based on the witness's perception;
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue . . . .

See State v. King, 180 Ariz. 268, 280 (1994) (reasoning that a witness's opinion as to whether a person depicted on video was the defendant was admissible under Rule 701 because it was based on his perception and "assisted the jury in determining a fact in issue—the identity of the person on the videotape"). Officer Vincent's testimony did not violate Rule 701(a) because her opinion was rationally based on her perception that Riley's smile and pat of Levis's back was congratulatory.

¶76 Officer Vincent's testimony was also admissible under Rule 701(b) because it was helpful to aid the jury's understanding of a fact at issue. Riley contends that he was in Kelly's housing pod the night of the murder because he intended to warn him of the murder plot. Upon discovering that Kelly was dead, Riley claimed that he panicked and "took off." The State contested Riley's explanation. Officer Vincent's testimony assisted the jury in determining this fact because her description of Riley's behavior is inconsistent with a panicked man—as Riley claimed to be—and tended to prove the State's theory of the case. Further, contrary to Riley's claim, the jury was not in the same position as Officer Vincent to discern the significance of Riley's "atta-boy" or "happy" expression because she was the only percipient witness to the interaction. Officer Vincent's testimony provided information to assist the jury in determining Riley's role in Kelly's murder. For these reasons, the trial court did not err in admitting Officer Vincent's testimony.

v. Comparison of the Worth of Kelly's Life with Riley's

¶77 Riley argues that when the prosecutor stated in his penalty phase rebuttal closing argument "[y]ou don't have two more different people, Sean Kelly, who had to go to protective custody because he wouldn't be a part of that world, and the defendant, who executed him," he impermissibly compared the value of Riley's and Kelly's lives. Riley did not object so we review for fundamental error. *See Anderson*, 210 Ariz. at 341 ¶ 45.

¶78 This argument is unpersuasive because the statement did not compare the value of Kelly's and Riley's lives. Instead, the prosecutor merely urged the jury to reject Riley's suggestion that it should consider the violent prison environment as mitigation because Riley and others involved in the AB created the "kill-or-be-killed" environment and that, unlike Riley, Kelly had rejected that culture. Likewise, any error was harmless in light of the substantial evidence of Riley's guilt.

E. Inclusion of Duress Defense in Guilt-Phase Jury Instructions

¶79 Riley argues the trial court erred by instructing the jurors that duress is not a defense to first degree murder. Because Riley did not object

to the jury instructions, we review this claim for fundamental error. *See Hunter*, 142 Ariz. at 90.

¶80 On November 2, 2015, during a conference to discuss jury instructions, the prosecutor requested to add an instruction that duress is not a defense to first degree murder. Defense counsel claimed they would not be raising the duress defense, but agreed to the instruction's inclusion. Before the trial court read the final instructions to the jury, defense counsel again approved the instruction. The court instructed the jurors that "[a] person compelled to commit a crime by the threat or use of immediate force against that person is not justified in committing the crime if it involved homicide or serious physical injury."

¶81 Throughout the trial, the State produced evidence that AB probates, like Riley at the time of the murder, were not at liberty to refuse orders and that Kelly had previously been in protective custody after he received threats from "influential white inmates" for refusing to carry out an assault on another inmate. The State argues that the duress instruction "clarified any misconception the jurors may have developed that Riley would not be criminally responsible for killing Kelly if he had acted under threat from the [AB]."

¶82 The State concedes that no reasonable juror would have believed that Riley acted under duress, and neither the State nor Riley relied on a theory of duress. During closing arguments, defense counsel specifically addressed the duress instruction and noted that it would not "come into play" because "nobody has said that Mr. Riley was compelled to commit this crime by threats or use of force. That has never come out ever, not even in the slightest."

¶83 "A party is entitled to any jury instruction reasonably supported by the evidence." *State v. Burns*, 237 Ariz. 1, 17 ¶ 48 (2015). But the giving of an abstract instruction, which "broadens the issues beyond the scope of the evidence and thus impliedly submits to the jury issues and questions not properly before it," constitutes error. *See State v. Willits*, 96 Ariz. 184, 190–91 (1964); *Glenn v. Chenowth*, 71 Ariz. 271, 273–74 (1951) (holding a self-defense instruction was improper in a civil suit where neither party asserted such a claim and "[t]he instruction was susceptible of conveying the impression to the jury that the trial judge may possibly have thought that [the plaintiff] had been attacked by [the defendant]").

¶84 Here, although neither party relied on a theory of duress, the trial court did not err in giving the duress instruction because, without it, the jury could have improperly concluded that Riley killed Kelly to avoid physical harm by the AB. Courts may instruct a jury under these circumstances to minimize the risk that a jury will base its verdict on an erroneous legal assumption. *See, e.g.*, *State v. Champagne*, 247 Ariz. 116, 137 ¶ 60 (2019) (holding the trial court did not commit instructional error when, "without the voluntary intoxication instruction the jury could have rejected [defendant]'s claim of innocence but improperly concluded that his voluntary intoxication prevented him from forming the necessary intent for criminal liability").

¶85 Nevertheless, even if the trial court erred in giving the duress instruction, such error was not fundamental because it did not amount to a comment on the evidence by the trial judge. A judge violates Arizona's constitutional prohibition against commenting on evidence by expressing "an opinion as to what the evidence proves," in a way that interferes "with the jury's independent evaluation of that evidence." *State v. Rodriguez*, 192 Ariz. 58, 63 ¶¶ 28–29 (1998); *see also* Ariz. Const. art. 6, § 27. An abstract instruction may amount to a comment on the evidence if the instruction indicates the trial judge's opinion regarding some evidence of the case. *See Chenowth*, 71 Ariz. at 273–74.

¶86 Contrary to Riley's argument, the duress instruction did not amount to a comment on the evidence. Unlike the instruction in *Chenowth*, where the self-defense instruction could have indicated to the jury that the judge had formed an opinion about who hit whom first, the duress instruction here carried no such implication. Riley asserts that the instruction implied that the judge believed there was evidence of duress, and because Riley's defense that he intended to warn Kelly of an impending attack was the only evidence that came close to the issue of duress, the instruction further implied that the jury should not consider Riley's defense.

¶87 But this argument is unpersuasive for several reasons. First, the trial court expressly informed the jury, prior to closing arguments, that they could disregard inapplicable instructions. Second, the prosecutor did not state or imply that Riley may have acted under duress, and defense counsel expressly informed the jury that the duress instruction did not

apply. Third, Riley's letter discussing Kelly's murder provided overwhelming evidence that Riley did not act under duress. Finally, no reasonable juror would have discounted Riley's defense based on the duress instruction because Riley's entire defense rested on the premise that he did not kill Kelly. The sole purpose of the duress instruction was to accurately inform the jury that a defendant cannot rely on duress to justify a killing. *See* A.R.S. § 13-412(C). Because Riley's defense did not rely on any such justification, the instruction did not impact his defense.

¶88 In any event, even if the error were fundamental because it went to the foundation of the case or deprived him of an essential right, *see Escalante*, 245 Ariz. at 142 ¶ 21, Riley failed to show prejudice. Riley argues that the abstract instruction was prejudicial by misleading and confusing the jury because it raised a significant possibility that jurors believed they could not consider Riley's defense. For the same reasons stated above, this argument is unpersuasive. The trial court informed the jurors that they could—and they presumably did—disregard any inapplicable instructions. Moreover, Riley has pointed to no evidence in the record indicating he was prejudiced by the duress instruction, but rather asks us to speculate that the jurors were misled or confused by the instruction. *See State v. Broughton*, 156 Ariz. 394, 397–98 (1988) (holding that prejudice requires a showing of more than mere speculation); *State v. Munninger*, 213 Ariz. 393, 397 ¶ 14 (App. 2006) (holding that defendant could not show prejudice through speculation). Accordingly, Riley is not entitled to relief on this issue.

F. Sufficiency of the (F)(13) Aggravator Instruction

¶89 Riley argues that the trial court's failure to include, in the § 13-751(F)(13) aggravator jury instruction, a baseline statement that all first degree murders are cold and calculating to some extent rendered the instruction insufficient to narrow the aggravator because it allowed the jury "to begin with the assumption that there are premeditated first degree murders that are not cold and calculating and that any evidence of the cold and calculating component would be sufficient to find the aggravator."

¶90 Although we generally "review de novo whether jury instructions adequately state the law," *State v. Gallardo*, 225 Ariz. 560, 567 ¶ 30 (2010) (quoting *State v. Tucker*, 215 Ariz. 298, 310 ¶ 27 (2007)), "absent an objection by the defendant, we review for fundamental error," *Velazquez*, 216 Ariz. at 309–10. Here, because Riley does not challenge the instruction

as an inadequate statement of the law but rather as an inadequate narrowing of a facially vague aggravator, his failure to object to the instruction means "he is not entitled to relief unless he can show fundamental error." *See Hausner*, 230 Ariz. at 83 ¶ 107.

¶91 Concerning the (F)(13) aggravator, the trial court instructed the jurors as follows:

> The State alleges that the murder was committed in a cold, calculated manner without pretense of moral or legal justification. This aggravating circumstance requires more than the premeditation necessary to find a defendant guilty of first degree murder. This aggravating circumstance cannot be found to exist unless the State has proved beyond a reasonable doubt that the defendant exhibited a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to prove premeditated first degree murder. In other words, a heightened degree of premeditation is required.
>
> "Cold" means the murder was the product of calm and cool reflections.
>
> "Calculated" means having a careful plan or prearranged design to commit murder.
>
> This aggravating circumstance focuses on the defendant's state of mind at the time of the offense, as reflected by the defendant's words and acts. To determine whether a murder was committed in a cold, calculated manner without pretense of moral or legal justification, you must find that the State proved beyond a reasonable doubt that the defendant:

> 1. Had a careful plan or prearranged design to commit murder before the fatal incident; and
>
> 2. Exhibited a cool and calm reflection for a substantial period of time before killing; and
>
> 3. Had no pretense of moral or legal justification or excuse.
>
> A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated nature of the murder.

Thus, the (F)(13) aggravator qualifies a first degree murder for the death penalty if "[t]he offense was committed in a cold, calculated manner without pretense of moral or legal justification." A.R.S. § 13–751(F)(13) (2012). The jury found this aggravator beyond a reasonable doubt.

¶92 We addressed the constitutionality of Arizona's (F)(13) aggravator in *Hausner*. Relying on the rationale of a Florida case that analyzed the constitutionality of a substantially similar aggravator, we held that the (F)(13) aggravator was facially vague. *Hausner*, 230 Ariz. at 82 ¶ 102 (citing *Jackson v. State*, 648 So. 2d 85 (Fla. 1994)). But, like the court in *Jackson*, we subsequently held that the instruction provided to the jury there adequately narrowed the aggravator. *Id.* at 83 ¶ 105. Noting that the trial court provided "narrowing instructions substantially the same as those approved in *Jackson*," we reasoned that the (F)(13) instruction "clarified to the jury that 'all first degree premeditated murders are, to some extent, committed in a cold, calculated manner,' but distinguished this aggravator as one that 'cannot be found to exist unless . . . the defendant exhibited a cold intent to kill and is more contemplative, more methodical, more controlled than that necessary to commit premeditated first degree murder.'" *Id.* ¶ 104 (citation omitted).

¶93 The instruction further defined the terms "cold" and "calculated" and "emphasized that the jury must look to the defendant's

state of mind at the time of the offense to determine whether there exists any pretense of moral or legal justification that rebuts cold and calculated . . . ." *Id.* The instruction also required the jury to "find beyond a reasonable doubt that there is (1) a careful plan or prearranged design before the murder, and (2) a cool and calm reflection for a substantial period of time before the murder." *Id.* We ultimately concluded "[t]his instruction adequately narrowed the aggravator, making it clear that it is not the cold and calculated nature of *every* murder that will satisfy it, but that the jury must find some degree of reflection and planning that goes *beyond* the premeditation required to find first degree murder." *Id.* ¶ 105.

¶94 Here, the (F)(13) instruction provided to Riley's jury was materially identical to the *Hausner* instruction with one exception: the instruction here did not include the baseline statement that all first degree murders are cold and calculating to some extent. Riley's argument that the absence of this statement renders the instruction insufficient to constitutionally narrow the aggravator is unpersuasive for several reasons.

¶95 First, the instruction from the Florida Supreme Court to which we approvingly compared the *Hausner* instruction did not contain any such baseline statement. *See Jackson*, 648 So. 2d at 89–90, 89 n.8. Second, the instruction here expressly stated that the aggravator "require[d] more than the premeditation necessary to find a defendant guilty of first degree murder" and required the jury to find "a heightened degree of premeditation" as compared to first degree murder. Finally, like the instruction in *Hausner*, it expressly defined "cold" and "calculated" and further distinguished the aggravator from other first degree murders by requiring a finding that the murder was "more contemplative, more methodical, [and] more controlled than that necessary to prove premeditated first degree murder." These numerous distinctions between the aggravator and other first degree murders satisfy *Hausner*'s requirement that a proper instruction must inform the jury that it "must find some degree of reflection and planning that goes *beyond* the premeditation required to find first degree murder." *See Hausner*, 230 Ariz. at 83 ¶ 105.

¶96 If we were to determine that the absence of the baseline statement renders the instruction insufficient to narrow the aggravator, such an error would unquestionably be fundamental. *See, e.g.*, *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) ("[C]hanneling and limiting of the

sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."). But because Riley contends that this error went to the foundation of his case or deprived him of a right essential to his defense, it would not require reversal because Riley failed to show prejudice. *Escalante*, 245 Ariz. at 140 ¶ 16; *see also Henderson*, 210 Ariz. at 568 ¶ 24. The evidence produced at trial overwhelmingly established that Riley acted in a cold and calculated manner that exceeded the norm of first degree murders. The contents of his letter, corroborated by the evidence from the night of the murder, show that Riley actively sought out a potential target, requested permission from the AB leadership to kill his target, ignored the advice from other inmates who discouraged his plans, and concocted a plan to get in and out of Kelly's pod and cell. He also packed his belongings and changed his mailing address in anticipation of repercussions from completing the murder.

¶97 In sum, the (F)(13) instruction provided to the jury sufficiently narrowed the facially vague aggravator; therefore, the instruction, as provided, did not constitute error. Even if the lack of a baseline statement did constitute fundamental error, Riley did not suffer prejudice.

G. Constitutionality of the (F)(6) Aggravating Factor

¶98 The § 13-751(F)(6) aggravator provides: "The defendant committed the offense in an especially heinous, cruel or depraved manner." Riley argues that the (F)(6) aggravator is unconstitutional for two reasons: (1) this Court's lack of finite limitations on the (F)(6) aggravator render it unconstitutionally vague; and (2) any meaningful guidance, if it does exist, cannot be adequately conveyed through jury instructions. We review the constitutionality of aggravating factors de novo. *State v. Nelson*, 229 Ariz. 180, 186 ¶ 25 (2012).

¶99 In January 2015, Riley filed a pre-trial motion to strike the (F)(6) aggravator, in part, for the same reasons articulated above. The trial court subsequently rejected Riley's motion. At trial, the jury instructions—approved by Riley—read as follows:

> 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 term "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.
>
> 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.
>
> 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.

The instructions further defined "relishing," "gratuitous violence," and "mutilation." At the end of the aggravation phase, the jury unanimously

found that the State had proved that Riley committed the murder in both an especially cruel manner and an especially heinous or depraved manner.

¶100 In *State v. Gretzler*, this Court described circumstances, or factors, which narrowed the meaning and constitutional application of the "especially heinous, cruel, or depraved" aggravators. 135 Ariz. 42, 50–53 (1983). In *Walton v. Arizona*, the Supreme Court found this aggravating factor facially vague, but it held that *Gretzler*'s definition of the provision rendered it "constitutionally sufficient because it [gave] meaningful guidance to the sentencer." 497 U.S. 639, 654, 655 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002). Although Riley does not argue that *Walton* was wrongly decided, he contends it no longer protects the constitutionality of Arizona's (F)(6) aggravator because "[t]he Supreme Court's . . . justifications for upholding Arizona's vague [(F)(6)] aggravator no longer exist."

¶101 First, Riley contends that our interpretation of the *Gretzler* factors as non-exclusive guides contradicts the Supreme Court's reliance on *Gretzler* as a finite list of limiting factors. *See Walton*, 497 U.S. at 655 (finding this Court's definitions of the (F)(6) aggravators to be constitutionally sufficient). Contrary to Riley's argument, the Supreme Court has noted that this Court did not view the *Gretzler* factors as an exclusive list. Indeed, *Walton* expressly noted the availability of multiple constructions of the (F)(6) aggravator that would be "constitutionally acceptable." *Id.* (citing *Maynard*, 486 U.S. at 365); *id.* at 695 (Blackmun, J., dissenting) ("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."). Our expansion of the *Gretzler* factors, therefore, does not render its guidance—embodied in the jury instructions—any less meaningful.

¶102 Second, Riley contends "[t]his Court has affirmatively created more of a constitutional problem by removing any meaning from the word 'especially.'" He argues the dictionary definition of *especial* and our historical analysis of the (F)(6) aggravator requires that a "jury must be able to compare the factor against the norm" or the "prototypical murder." Although the jury instructions included a definition of "especially," Riley maintains a mere definition of the word "give[s] the jury no way to determine whether the [defendant's] conduct meets this definition." Effectively, Riley is making an argument we rejected in *State v. Johnson*:

"that the term 'especially' in [§ 13-751(F)(6)][3] essentially requires some kind of comparison between death-eligible murder cases and the 'norm.'" 212 Ariz. 425, 431–32 ¶¶ 19–20 (2006) (rejecting that argument based on this Court's prior rejection of proportionality review).

¶103 Riley errs here by patching together a non-existent "above the norm test" that effectively revives proportionality review, which we abandoned in *State v. Salazar*, 173 Ariz. 399, 416–17 (1992). Undoubtedly, as Riley argues, the death penalty "should be reserved for cases in which either the manner of the commission of the offense or the background of the defendant places the crime 'above the norm of first-degree murders.'" *See State v. Carlson*, 202 Ariz. 570, 582 ¶ 45 (2002) (quoting *Hoskins*, 199 Ariz. at 163 ¶ 169); *see also State v. Andriano*, 215 Ariz. 497, 506 ¶ 43 (2007) *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239 (2012) ("[J]urors must assess whether the murder was so cruel that it rose above the norm of first degree murders."). But we have never held that a jury must *compare* one murder to another, and we have expressly rejected the argument that juries must be informed of any comparison to the "norm." *See State v. Bocharski*, 218 Ariz. 476, 487–88 ¶¶ 47–50 (2008).

¶104 Indeed, by providing statutory aggravators and constitutionally acceptable definitions to the terms "especially heinous, cruel, or depraved," the legislature and this Court have provided juries with the means to distinguish a murder that satisfies the (F)(6) aggravator from the "norm." *See Carlson*, 202 Ariz. at 582 ¶ 45; *see also State v. Hidalgo*, 241 Ariz. 543, 551–52 ¶¶ 27–28 (2017) (noting that Arizona's death penalty scheme provides several means of narrowing the class of death-eligible persons). In other words, the specific, thorough definitions as to what constitutes "especially heinous, cruel, or depraved" murder necessarily imply that "normal" murders do not meet these definitions; thus, juries do not require any comparison of the facts before them to other murders. Although Riley may be correct in stating "[t]he 'above the norm' standard in the (F)(6) is not and never has been a proportionality review," the standard to which he is referring has never required juries to compare the facts of one murder against another. This standard is satisfied by constitutionally acceptable jury instructions that provide meaningful guidance to the jury.

[3] Previously A.R.S. § 13-703(F)(6).

¶105 Finally, to the extent that Riley challenges the constitutional sufficiency of the definitions provided in the jury instructions, we have repeatedly upheld jury instructions materially identical to those here. *See, e.g.*, *State v. Medina*, 232 Ariz. 391, 408–09 ¶¶ 74–75 (2013); *State v. Prince*, 226 Ariz. 516, 531–33 ¶¶ 48–54 (2011); *Gallardo*, 225 Ariz. at 566 ¶¶ 21–23; *State v. Chappell*, 225 Ariz. 229, 237–38 ¶ 27 (2010); *State v. Pandeli* ("*Pandeli III*"), 215 Ariz. 514, 523–24 ¶¶ 20–21 (2007).

¶106 Assuming our jurisprudence has provided meaningful guidance, Riley argues that guidance cannot be "adequately reduced to a jury instruction." Although Riley attempts to introduce a novel argument here—contrasting the *descriptive* nature of this guidance against the *prescriptive* nature of jury instructions—we have repeatedly held that the (F)(6) aggravator may be constitutionally applied if given substance and specificity by jury instructions that follow our constructions. *See Anderson*, 210 Ariz. at 352–53 ¶¶ 109–14; *see also Hargrave*, 225 Ariz. at 13 ¶ 44; *Andriano*, 215 Ariz. at 505 ¶ 38; *State v. Tucker*, 215 Ariz. 298, 310 ¶ 28 (2007); *Cromwell*, 211 Ariz. at 188–89 ¶¶ 40–42.

¶107 Riley first posits "[t]he rationale of *Walton* does not apply to jury sentencing" because *Walton* was decided at a time when the sentencers in Arizona were trial judges, who "are presumed to know the law and apply it in making their decisions." He focuses once more on the word "especially," arguing that the descriptive nature of our guidance grants trial judges—but not juries—the necessary context to distinguish between "normal" murders and "especially heinous, cruel, or depraved" murders. But we rejected a similar argument in *Cromwell*, stating "Supreme Court case law . . . dispels that notion because it distinguishes constitutional statutes from unconstitutional statutes on the basis of the clarifying definition, not on the supposition that judges may apply the statute one way and jurors another." 211 Ariz. at 189 ¶ 44 (citing *Maynard*, 486 U.S. at 365). Because the Supreme Court has held constitutional our definitions of the (F)(6) aggravator, jury instructions that convey those definitions with adequate specificity protect the constitutionality of the (F)(6) aggravator when a jury, rather than a judge, conducts the fact-finding.

¶108 Relying on one sentence from *Newton v. Main*, Riley also contends jury instructions must be prescriptive. *See* 96 Ariz. 319, 321 (1964) ("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."). He argues that jury instructions must "establish a formula into which a sentencer might insert facts to determine the existence of an . . . aggravating factor." Therefore, according to Riley, our *descriptive* guidance cannot satisfy this requirement.

¶109 Our discussion on jury instructions in *Newton* does not support this novel proposition. Both *Newton* and the cases upon which it relied examined jury instructions for *correctness*—that is, for correct statements of the law. *See Newton*, 96 Ariz. at 320; *see also Musgrave v. Githens*, 80 Ariz. 188, 192–93 (1956); *Daly v. Williams*, 78 Ariz. 382, 387 (1955). Nothing in *Newton* or any other Arizona case suggests that courts must provide juries with formulaic plug-and-play instructions.

¶110 In sum, Riley has provided no valid arguments challenging the constitutional sufficiency of our guidance regarding Arizona's (F)(6) aggravator or the constitutional applicability of the aggravator by a jury, rather than a judge. Accordingly, Riley is not entitled to relief on this issue.

H. Inclusion of the Accomplice Liability Instruction During Aggravation Phase

¶111 Riley argues that the prosecutor's recitation of the guilt-phase accomplice liability instruction ("accomplice instruction") in the aggravation phase violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because they contradicted the jury instructions for the (F)(6) and (F)(13) aggravators and lessened the State's burden to prove those aggravators beyond a reasonable doubt. Although Riley initially objected to the prosecutor's introduction of the accomplice instruction, he withdrew that objection. Because Riley did not object to the reference to the accomplice jury instruction, we review for fundamental error. *See Anderson*, 210 Ariz. at 341 ¶ 45.

¶112 During the trial's aggravation phase, Riley's attorney made several statements that seemed to contest his guilt. Specifically, Riley's attorney stated:

> Let's look at the evidence. When Dr. Hu testified, he can't say what wounds—or who caused the wound exactly. And he can't say

> when Sean Kelly was unconscious. It could have been the first wound.
> . . . .
> No gratuitous violence. You see [sic] and you heard testimony there were other people involved in this. Other people involved. If there is [sic] other people involved, how do we know beyond a reasonable doubt—which is the law—that Mr. Riley was the one who caused all this infliction or violence to Mr. Riley? [sic] Who can say that? I wasn't there. The State wasn't there.

¶113 To counter these statements, the prosecutor read, on rebuttal, an excerpt from the guilt-phase accomplice instruction, stating:

> The defendant is criminally accountable for the conduct of another if the defendant is an accomplice of such other person in the commission of the offense, including any offense that is a natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice.

Riley initially objected to the prosecutor's statement, but he withdrew his objection once he understood that the prosecutor was reading from the guilt-phase instruction.

¶114 After reading the accomplice instruction, the prosecutor remarked:

> In other words, if you're in for a penny, you're in for a pound. You do not need to know which wound was inflicted by Thomas Riley. That's not the law that the judge gave you.
>
> The law in the state of Arizona is that if you and your accomplices go out and start stabbing somebody, you don't get to run to the jury and say: Oh, I don't know which one I inflicted.

> In for a penny, in for a pound. That is the law. And these guys were working in concert with each other. By the defendant's own admission, he stabbed the most. You do not need to focus on which one did what. The law doesn't make that distinction.
>
> And that makes sense. You don't get the benefit that: I stabbed him too many times. I couldn't keep track.
>
> You don't get that benefit. That is not the law.
>
> So go back and look at your instructions. But on page 29, you will see: If you and your accomplices are—if you're the lookout and they're in there, you are still accountable. That's the law. And it's right there in black and white, page 29.

¶115 Riley argues that the prosecutor's reading of the accomplice instruction, combined with his statements on accountability, amounted to an instruction to the jury about how it should weigh the evidence presented during the aggravation phase. Riley contends this was fundamental error because the accomplice instruction and the aggravation-phase instructions conflict: The accomplice instruction allows for a conviction based on a co-conspirator's actions, but the aggravation instructions require the jury to find that the defendant individually had the requisite mens rea. He further argues that this was fundamental error because it relieved the State of its burden to prove Riley had the requisite mens rea for the (F)(6) and (F)(13) aggravators. Finally, Riley argues that the inclusion of the accomplice instruction was prejudicial because the (F)(6) and (F)(13) aggravators were the "most powerful aggravators" found, and without them a reasonable jury could have sentenced Riley to life, not death.

¶116 The State's introduction of the guilt-phase accomplice instruction in the aggravation phase did not constitute an error, much less a fundamental one. Riley's statements regarding causation could be construed to contest his guilt rather than the aggravating factors. It was

proper, therefore, for the prosecutor to rebut those statements by drawing the jury's attention to the guilt-phase accomplice instruction. *See* A.R.S. § 13-751(D) ("The prosecution and the defendant shall be permitted to rebut any information received at the aggravation or penalty phase of the sentencing proceeding and shall be given fair opportunity to present argument as to whether the information is sufficient to establish the existence of any of the circumstances included in subsections F and G of this section.").

¶117 But even assuming that the introduction of the accomplice instruction constituted fundamental error that went to the foundation of his case or deprived him of a right essential to his defense, Riley failed to show that he was prejudiced. To prove prejudice, he has the burden of showing that a reasonable jury could have come to a different verdict. *See Escalante*, 245 Ariz. at 144 ¶ 29. Riley failed to meet that burden.

¶118 After the aggravation phase, the jury had sufficient evidence to find the State proved the (F)(6) and (F)(13) aggravators beyond a reasonable doubt. No reasonable jury would have found the murder—a stabbing death with over 100 stab wounds inflicted with prison shanks—was not conducted in a cruel, heinous, and depraved manner. Likewise, Riley's letter shows that he planned the murder beforehand and that his motive was to become a patched member of the AB, demonstrating along with other evidence that the murder was "committed in a cold, calculated manner without pretense of moral or legal justification." A.R.S. § 13-751(F)(13) (2012).

¶119 Although Riley asserts that the jury would not have found these aggravators absent the accomplice instruction, nothing in the record supports that assertion. Taken altogether, the evidence discussed above was more than sufficient to allow the jury to find beyond a reasonable doubt—before the prosecutor introduced the accomplice instruction—that the State proved the (F)(6) and (F)(13) aggravators. Even if this Court ignores the fact that the prosecutor read the accomplice instruction to rebut Riley's re-litigation of his guilt during the aggravation phase, Riley's letter served to prove these aggravators regardless of whether the accomplice instruction was presented erroneously.

¶120 Accepting Riley's argument that the jury would not have found the (F)(6) and (F)(13) aggravators absent the accomplice instruction,

Riley still would be unable to prove that the outcome (i.e., the jury's death sentence verdict) could have been different. The jury found the State proved three other aggravators beyond a reasonable doubt, and Riley does not challenge them. Rather, he argues that the remaining aggravators—conviction of a prior serious offense, current offense committed in custody, and current offense committed to promote a criminal street gang—were weaker aggravators and intrinsic to the offense. And according to Riley, a reasonable jury left with only these "weaker" aggravators could have rendered a life sentence rather than a death sentence.

¶121 To support his argument, Riley cites to *State v. Willoughby*, where we stated that the quality of the aggravating factor should be considered when weighing aggravators against mitigation evidence. 181 Ariz. 530, 549 (1995). But against his counsel's advice, Riley waived his right to present mitigation evidence—there was little for the jury to weigh the aggravators against. Under these circumstances, in which Riley committed an in-custody murder to promote a violent gang, even absent the (F)(6) and (F)(13) aggravators, he failed to carry his burden to show that a reasonable jury could have reached a different conclusion. *See Escalante*, 245 Ariz. at 144 ¶ 29; *see also Hausner*, 230 Ariz. at 84 ¶ 114 (finding that even if an (F)(13) aggravator was improperly considered by the jury, the three remaining, proven aggravators were sufficient for the jury to render a death sentence).

¶122 Riley also challenges the prosecutor's statement accompanying his introduction of the guilt-phase accomplice instruction wherein he told the jury that Riley was accountable for the actions of his co-conspirators. As discussed, *supra* ¶ 116, the prosecutor's comments are not improper because they properly rebutted Riley's counsel's statements which addressed Riley's guilt, not his mindset. *See* § 13-751(D). But Riley is correct that his guilty verdict for first degree murder does not relieve the State of its burden of proving, at the aggravation stage, his level of involvement in the murder and his mindset in relation to the (F)(6) and (F)(13) aggravators. *See State v. Garcia*, 224 Ariz. 1, 13 ¶ 44 (2010) (noting that Arizona law "specifically requires the trier of fact to make *Enmund/Tison* findings in the aggravation phase.") (quoting *State v. Garza*, 216 Ariz. 56, 67 ¶ 46 (2007)). However, we find no error, fundamental or otherwise, because Riley does not allege *Enmund/Tison* error and evidence of his involvement in Kelly's murder is overwhelming.

¶123 In sum, the prosecutor's comments were proper to rebut the re-litigation of Riley's guilt. Even if the comments were an error, Riley has failed to carry his burden of proving a reasonable jury could have found a death sentence inappropriate.

I. Prosecutorial Misconduct

¶124 Riley argues that several of the prosecutor's statements constitute misconduct because they deprived him of his due process and fair trial rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and article 2, sections 4 and 24 of the Arizona Constitution.

¶125 "In determining whether an argument is misconduct, we consider 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." *Goudeau*, 239 Ariz. at 466 ¶ 196 (internal quotation marks omitted). Because Riley did not object to the statements below, we review for fundamental error. *See Anderson*, 210 Ariz. at 341¶ 45.

i. Juror Questionnaire's Description of Aggravating Factors and Inclusion of Accomplice Liability Instructions in Aggravation Phase

¶126 Riley contends that the jury questionnaire's description of aggravating factors as "very few" and "very specific" constitutes prosecutorial misconduct. We note this is barren soil for such a claim since the trial court must approve the questionnaire. In any event, as discussed, *supra* ¶¶ 24–36, while there was error in this description of Arizona's aggravating factors, it was not fundamental. Similarly, Riley argues that the prosecutor's inclusion of the accomplice liability instruction during aggravation phase constitutes prosecutorial misconduct. As we explain above, *supra* ¶¶ 111–23, there was no error, and even if there were, it was not fundamental. Accordingly, Riley's argument on this point is unavailing.

ii. Prosecutor's Statements Regarding "Crossing the Line"

¶127 During the defense's penalty-phase closing argument, defense counsel argued that the death penalty is meant for truly heinous

murderers like Ted Bundy, Jeffrey Dahmer, Charles Manson, Timothy McVeigh, etc., stating:

> The worst of the worst. That is what [the death penalty] is reserved for. That is who the death penalty was founded for, the worst of the worst. It was founded for Timothy McVey [sic], the Oklahoma Bomber. You see how the death sentence is applied to the worst of the worst. Mr. Riley is not the worst of the worst for our society.

In rebuttal, the prosecutor stated, "[I]t is standard practice to talk about Jeffrey Dahmer and Charles Manson and everything else, but the law doesn't care how far you cross the line. The law only matters [sic] that you cross it." Riley argues that this comment misstated the law because simply killing another person does not mean that the death penalty is warranted and that the misstatement "so infected the trial with unfairness as to make the resulting conviction a denial of due process" because the trial court did not correct it.

¶128 Riley also argues that these statements constitute fundamental error because they lessened the burden on the State to prove aggravators. However, as the State points out, the statements were made in the penalty phase—after the jury had already found aggravators—so they could not have lessened the burden of proving aggravators.

¶129 "Prosecutors are given 'wide latitude' in presenting closing argument to the jury." *Goudeau*, 239 Ariz. at 466 ¶ 196. "[I]f the prosecutor's remarks were 'invited,' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction." *United States v. Young*, 470 U.S. 1, 12–13 (1985); *see also State v. Alvarez*, 145 Ariz. 370, 373 (1985) ("Prosecutorial comments which are a fair rebuttal to areas opened by the defense are proper.").

¶130 Riley's argument is unpersuasive. Riley's comments that the death penalty is "reserved" for the "worst of the worst" like mass murderers and serial killers is clearly contrary to the law, and those comments could have led the jury to believe that they could not vote for the death penalty because Riley is neither a mass murderer nor a serial killer.

Riley's comments invited the prosecutor to respond to "right the scale." *See Young*, 470 U.S. at 12–13. Thus, the prosecutor's comments did not draw "the jury's attention [to] matters it should not have considered in reaching its decision." *See Goudeau*, 239 Ariz. at 466 ¶ 196 (quoting *Nelson*, 229 Ariz. at 189 ¶ 39). And if the statement influenced the jury, it influenced it to the legally correct conclusion: One does not have to be a mass murderer or serial killer to receive the death penalty. The prosecutor acted well within his "wide latitude" in his response and there is no error here.

iii. Prosecutor's Statements Allegedly Unsupported by Evidence

¶131 Riley contends that the prosecutor engaged in misconduct by making several comments unsupported by the evidence during the guilt and penalty trial phases, resulting in fundamental, prejudicial error. "Specific evidence may be referenced in the opening statement as long as the proponent has a good faith basis for believing the proposed evidence exists and will be admissible." *State v. Pedroza-Perez*, 240 Ariz. 114, 116 ¶ 12 (2016). We address in turn each of the prosecutor's contested statements.

¶132 First, the prosecutor stated in his guilt-phase opening statement, "Now, Sean Kelly was just a guy. He was in prison because he's [sic] a drug addict and he was caught in the revolving door of prison, addiction, prison, even though he had a loving family that cared for him." That Kelly had a loving family was later corroborated by the victim impact statements of his former fiancé and their daughter. Although no evidence was presented to show that Kelly was a drug addict or that he was caught in a "revolving door of prison," no misconduct occurred because there was a very low probability that the prosecutor's statement would improperly influence the jury by characterizing Kelly as a sympathetic victim. *See Goudeau*, 239 Ariz. at 466 ¶ 196. If anything, the statement made Kelly a less-sympathetic victim because it described him as a drug addict and recidivist criminal.

¶133 Second, the prosecutor stated in his guilt-phase opening statement:

> Sean [Kelly] had to go into protective custody because while he was in prison once, he refused

> to commit an act of violence on another inmate, so he was forced to go into PC.
>
> Now in the outside world, that would be normal. But to the world that the defendant lived in and the world of the [AB], that's weakness. And weak inmates are targets for men who want membership in the [AB].

This statement was later corroborated by expert witness testimony on gang culture as well as Riley's letter. The prosecutor's good faith is evinced by this corroboration. There is no misconduct here.

¶134 Third, the prosecutor stated in his guilt-phase opening statement, "[A shank is] designed for one purpose and one purpose only and that is to kill." This statement is corroborated by expert testimony that shanks are weapons. Certainly, the lethal purpose of the shanks in this case is evinced by the fact that Kelly was killed with them. No misconduct occurred here.

¶135 Fourth, the prosecutor stated in his guilt-phase opening statement, "The door to Sean's cell had been left open probably by Sean's cellmate Kenneth Severns who was not inside the cell." Riley interprets this statement as meaning that "[Sean Kelly's] cellmate left open the cell door in order to facilitate the offense." Riley misinterprets the prosecutor's statement. The prosecutor said that Severns probably left the cell door open—he did not assert that Severns did so to facilitate the murder. That Severns probably left the door open was later corroborated by Officer Vincent's testimony that Severns was outside his cell during the time when Kelly was murdered. The statement did not imply that Severns left the door open to facilitate Kelly's murder. No misconduct occurred here.

¶136 Fifth, the prosecutor stated in his guilt-phase opening statement:

> Now Eric Olsen lived in the C Pod so he was able to slither away quickly back to his cell unnoticed. But the defendant and his cellmate and accomplice, Dennis Levis, had farther to go.

> They had to cross from Cell 6 back to Cell A—
> or back from Cell 6 to A Pod to Cell 9.

Riley interprets this statement to mean that Olsen was an accomplice "and was able to get back to his cell without being seen." That Olsen lived in C Pod while Levis and Riley lived in A Pod was later corroborated by Officer Todd Springsteen and Officer Dziadura. Further, the State charged Riley with first degree murder. An element of first degree murder is premeditation. A.R.S. § 13-1105(A)(1). Olsen's alleged participation shows premeditation because it would tend to show that the murder was planned beforehand, so the prosecutor's comments 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 (quoting *Nelson*, 229 Ariz. at 189 ¶ 39). Rather, the comments appropriately drew the jury's attention to an element of the charged crime. No misconduct occurred here.

¶137 Sixth, the prosecutor stated in his guilt-phase closing argument, "Where did they stab? What did Dr. Hu tell you? . . . Where are they stabbing with these knives? The neck, the heart, the kidney. There is nowhere that you can put this in your neck and not be lethal." The last sentence was not supported by Dr. Hu's testimony because he did not testify that every neck stab wound is lethal; however, it is not clear that the prosecutor intended to attribute his comment on the lethality of neck wounds to Dr. Hu. More importantly, the statement was not misconduct because it did not "call[] to the jury's attention matters it should not have considered in reaching its decision." *See id.* Taken in context, this statement was meant to impress upon the jury that stabbing someone in the neck is generally lethal, evincing Riley's intent to murder Kelly. Intent is an element of first degree murder. *See* § 13-1105(A)(1). Further, there is no reasonable probability that the jury was "influenced by the remarks" to find intent where there was none. *See Goudeau*, 239 Ariz. at 466 ¶ 196. Kelly was stabbed 114 times. Even without the prosecutor's characterization of neck wounds as always being fatal, the jury could find intent to murder from the number and location of Kelly's stab wounds. Thus, this statement was well within the "wide latitude" given to parties in closing argument and was not misconduct. *See id.*

¶138 Seventh, the prosecutor stated in his guilt-phase closing argument, "But what Dr. Hu told you is that it's impossible, impossible for blood spatter to get behind your ear and onto—the small little particles onto

your body if the victim is dead." This is a reasonable inference from Dr. Hu's testimony that bleeding does not occur if the heart is not beating. *See id.* No misconduct occurred here.

¶139 Finally, the prosecutor stated in his guilt-phase closing argument:

> So the question is who did it. We constantly heard about cell seven and cell one. Cell seven we can eliminate right off the bat. But the moment CO [correctional officer] Franco—the idea cell seven had anything to do with this crime was blown out the window. It was impossible. CO Franco told you that she stood at that cell, she spoke to the inmates—to those inmates and she shut the door.
>
> So that only leaves whoever was up on the second tier and CO Vincent told you that she had an eye on them. And it's just common sense. There was no way they could rush down, whoever these mystery little inmate ninjas are, completely undetected, stab, stab, stab, rush back up and do this without leaving a lick of blood.

Riley interprets this statement to mean that "[n]o one could come down from the second tier of the cell block without CO Vincent's knowledge." But the prosecutor's statements are "reasonable inferences from the evidence." *See id.* Specifically, Officer Vincent testified that she was watching the area, and Exhibit 14 shows that she had a full vantage point of both tiers of C Pod. No misconduct occurred here.

iv. Consistency of Prosecutor's Remarks During Guilt-Phase Opening Statements and Aggravation-Phase Closing Arguments

¶140 Riley briefly argues that the prosecutor committed misconduct when he made inconsistent statements during guilt-phase opening statements and aggravation-phase closing arguments concerning

whether Riley targeted Kelly or whether Kelly's murder was at random. The guilt-phase opening statements are the following:

> Sean had to go into protective custody because while he was in prison once, he refused to commit an act of violence on another inmate, so he was forced to go into PC.
>
> Now in the outside world, that would be normal. But to the world that the defendant lived in and the world of the [AB], that's weakness. And weak inmates are targets for men who want membership in the [AB].

The aggravation-phase closing statements at issue are the following:

> He [Riley] says—I believe it's on page 2 or 3 [of his letter]—that he is hunting big time. He is hunting. He is not hunting for one person, specifically. He is coldly and dispassionately laying out any target that he can get. It doesn't matter who. Any golden goose.

¶141 These statements are not inconsistent. The prosecutor's statements reflect the State's theory that the AB targeted Kelly because of his previous actions and that Riley did not care who he killed so long as it gained him admission to the AB. Once Riley received AB approval, he killed Kelly not because *he* had previously targeted him, but because *the AB* sanctioned the murder and rewarded Riley for killing Kelly. No error occurred here.

¶142 Riley asserts there was another inconsistency in the guilt-phase opening statement and closing arguments. In the opening statement, the prosecutor told the jury Olsen was able to "slither away quickly back to his cell unnoticed." *See supra* ¶ 136. However, in the closing, the prosecutor stated that CO Vincent had a view of the second tier and none of the prisoners could have rushed down to commit the murder. *See supra* ¶ 139. Because Olsen lived on the second tier, Riley argues the comments were inconsistent.

¶143 These statements may be inconsistent; however, Riley cites to no case law, and we have found none, which holds that inconsistent statements per se constitute misconduct. Rather, the standard for determining misconduct remains the two-prong *Goudeau* test. 239 Ariz. at 466 ¶ 196. Evidence of Olsen's participation, as discussed in the first statement, was proper because it tended to show premeditation, which is an element of first degree murder. *See* § 13-1105(A)(1). As for the second statement, suggestion of Olsen's non-participation did not bring anything to the attention of the jury, for or against Riley. If anything, such an inconsistency likely inured to Riley's benefit to the extent it undermined the State's theory. In any event, any inconsistency in the prosecutor's statements regarding Olsen's participation in Kelly's murder was unlikely to influence the jury as to Riley's guilt given the weight of the evidence. *See Goudeau*, 239 Ariz. at 466 ¶ 196.

¶144 As a final note on the prosecutor's opening statement and closing argument, any prejudice was ameliorated by the trial court's curative instructions. When a trial court instructs the jury that the statements made by the attorneys are not evidence, the instructions "generally cure any possible prejudice from argumentative comments during opening statements." *State v. Manuel*, 229 Ariz. 1, 6 ¶¶ 23–24 (2011). Here, the trial court instructed the jury three times that the statements made by the attorneys were not evidence. Thus, any prejudice that Riley may have suffered due to the prosecutor's comments during opening statement or closing argument is ameliorated by the trial court's curative instructions.

v. Prosecutor's Statements Regarding Lack of Witnesses for Riley

¶145 Riley argues that the prosecutor committed misconduct by asserting that no witnesses had come forward to testify due to AB intimidation. In his guilt-phase closing argument, Riley said, "Now, all of these guys are neighbors. Look at the photo in that exhibit. You're telling me that nobody heard any screaming. Nobody came forward and said that they saw something or heard something. This was an inside-of-C-Pod job, and their silence speaks volumes." On rebuttal, the prosecutor said, "Why wouldn't people testify against Tommy Riley? . . . Maybe because the [AB] did their job that day. What did Keland Boggs tell you? Fear and intimidation is how they run the prisons."

¶146 Here, Riley's closing argument invited the prosecutor's response. *See Young*, 470 U.S. at 12–13; *see also Alvarez*, 145 Ariz. at 373. Riley implied that no witnesses had come forward because the murder was an "inside job," thus evincing Riley's innocence. The prosecutor rebutted that the lack of witnesses was likely due to the AB's intimidation tactics. Further, this statement was a fair inference from the evidence. No misconduct occurred here.

vi. Prosecutor's Statements About Kelly's Time in Protective Custody

¶147 During the guilt-phase of the trial, the following colloquy occurred between the prosecutor and Officer Dziadura:

> Q. With respect to Sean Kelly, what did you learn about the reasons why he had went into protective custody?
>
> A. Well, he was at our Douglas facility. He was asked by influential white inmates to assault another inmate. He refused to do so. They came back to him and told him if he wasn't going to do it he needed to cover up some lightning bolts tattoo that he had on his person or be injured.

In his closing argument in the mitigation phase, the prosecutor said:

> They honestly got up there and asked you about how about it is [sic] the Department of Correction's fault, how they create a kill-or-kill-be killed environment. You want to talk about kill-or-be-killed environment; he [Riley] is the kill-or-get-killed environment.
>
> You don't have two more different people, Sean Kelly, who had to go to protective custody because he wouldn't be a part of that world, and the defendant, who executed him. It is not kill or get killed. It is like that because people like

> Tommy Riley control the prisons. Men like Sean Kelly put their head down and do their time and they won't attack another inmate. People like the defendant prey on that and they show no mercy.

¶148 Riley specifically challenges the statements that Kelly went into protective custody to avoid the "kill-or-get-killed environment." Riley interprets the prosecutor's commentary as asserting that Kelly had renounced violence and argues that the prosecutor intended to portray Kelly in a more positive light. Riley asserts this was intentional misconduct, was fundamental error, and ultimately prejudiced him because Kelly's renunciation of violence was not in evidence, was irrelevant and, thus, called the attention of the jury to matters which it should not have considered.

¶149 Riley's arguments are unpersuasive. First, the evidence of why Kelly went into protective custody is relevant. *See* Ariz. R. Evid. 401. The State's theory was that Kelly was targeted because he entered protective custody to avoid the AB's directive to assault another inmate. The comment, thus, tends to make Riley's guilt more probable because it shows motive which is relevant when determining guilt.

¶150 Second, the prosecutor's commentary in his mitigation-phase closing argument was a reasonable inference from the trial evidence, namely Officer Dziadura's testimony that Kelly went into protective custody because he refused to assault another inmate and Boggs's testimony that refusing to earn a "political tattoo" could result in murder of the refusing party. *See Goudeau*, 239 Ariz. at 466 ¶ 196. Accordingly, no misconduct occurred here, much less fundamental error.

vii. Prosecutor's Statements That Allegedly Inflamed the Jury's Passions

¶151 During the guilt-phase opening statement, the prosecutor stated:

> Now Sean wasn't a child molester, he wasn't a rapist and he wasn't a snitch. Sean had to go into protective custody because while he was in

> prison once, he refused to commit an act of violence on another inmate, so he was forced to go into PC.
> . . .
> The man that the defendant chose to hunt and murder was a man by the name of Sean Kelly. Now, Sean Kelly was just a guy. He was in prison because he's a drug addict and he was caught in the revolving door of prison, addiction, prison, even though he had a loving family that cared for him.

During the penalty-phase closing argument, the prosecutor illustrated the differences between the victim, who went into protective custody to avoid prison violence, and the defendant, who embraced it. *See supra* ¶ 147. Riley argues that the prosecutor improperly intended "to promote a verdict based on sympathy for the victim."

¶152 Riley's argument is unpersuasive. Even if we accept the premise that these statements brought to the jury's attention matters it should not have considered—i.e., sympathy for the victim—there is little-to-no probability that the statements—which characterized Kelly as a drug addict and a recidivist offender—influenced the jury. *See Goudeau*, 239 Ariz. at 466 ¶ 196. The statements were fleeting and unconnected, and the jury was instructed four times to not take sympathy for the victim into account when making its decision. *See Escalante-Orozco*, 241 Ariz. at 282 ¶ 102 (finding that fleeting comments made by the State did not constitute fundamental, reversible error especially because the court instructed the jury to not take sympathy for the victim into consideration).

¶153 Riley also objects to the prosecutor's comments during the penalty-phase closing argument. There, the prosecutor said:

> But he did not die alone. He did not die alone, because the defendant, like a jackal standing over a fresh kill, turned over his dying body and picked him clean from his clothing so that he could get away with this murder. That is how Sean Kelly died.

But unflattering analogies during closing arguments that are supported by facts in common knowledge are permissible. *State v. Jones*, 197 Ariz. 290, 306 ¶ 41 (2000). In *Jones*, the prosecutor told the jury that just because the defendant was a "nice guy" and "polite" did not mean that he could not have committed the charged murders and mentioned that Ted Bundy and John Wayne Gacy were also polite. *Id.* We found these statements to be permissible because "jurors may be reminded of facts that are common knowledge" and because the statement "drew an analogy between Jones's attitude at trial and that of well-known murderers." *Id.*; *see also Goudeau*, 239 Ariz. at 465-66 ¶¶ 195–97 (referring to a defendant as a "wolf in sheep's clothing" during closing argument was not improper). Here, it is common knowledge that jackals are opportunistic, predatory animals. Comparing Riley's cold act of divesting a dying man of his clothing from his cell to a jackal's actions was within the range of permissible argument.

¶154 Finally, Riley contends the prosecutor's comment near the conclusion of the penalty-phase closing argument invited the jury to convict him based on anger rather than on the evidence presented. The prosecutor said:

> You are here to uphold the law, and that is the law that the judge gave you. We can show our outrage at this crime through your verdict. We can show outrage at this crime through the punishment of the defendant.

¶155 First, it is not clear that this statement appealed to the jury's passions at all. The prosecutor urged the jury to express its outrage at the crime for which Riley was already convicted by punishing him. Certainly, it is proper for the State to urge the jury to punish a defendant for his crimes. An invitation to show "outrage" at the crime does not invite the jury to punish the defendant on anything other than the evidence presented at trial.

¶156 Second, even if the statement were misconduct, it did not amount to fundamental error. In *Jones*, the State asked the jury to convict the defendant on behalf of the victim, their families, and the people of Arizona. 197 Ariz. at 307 ¶ 43. Even though we acknowledged that such a statement may have improperly evoked emotion in the jury, we found that any error did not amount to reversible error because it was a single

statement, the evidence against the defendant was substantial, and any error was cured by the trial judge instructing the jury to ignore statements "invoking sympathy." *Id.* at 306–07 ¶¶ 42–43. Here, the prosecutor made a much less provocative statement, and the trial judge instructed the jury to not be influenced by sympathy or passion on four separate occasions. Thus, any error was cured by the trial court's instructions.

viii. Prosecutor's Elicitation of Testimony in Violation of Rules of Evidence

¶157 Riley asserts that the prosecutor improperly elicited testimony regarding Kelly's time in protective custody and other evidence in violation of Arizona's Rules of Evidence. As discussed, *supra* ¶¶ 57–78, any error that may have arisen from the admission of that evidence was not fundamental. For this reason, Riley's argument on this point fails.

ix. Cumulative Effect

¶158 We may reverse a conviction due to prosecutorial misconduct if "the cumulative effect of the alleged acts of misconduct shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant." *Escalante-Orozco*, 241 Ariz. at 280 ¶ 91 (quoting *Bocharski*, 218 Ariz. at 492 ¶ 74). Riley argues that the cumulative effect of the alleged misconduct proves the prosecutor's intent to prejudice him and his conviction should be reversed. For the reasons discussed, we reject Riley's claim; there was no error in the prosecutor's contested statements. Even if there were error, Riley has failed to prove that the prosecutor did so with "indifference" or "specific intent." For these reasons, Riley is not entitled to relief on these grounds.

J. Failure to Instruct Jurors of Ineligibility for Parole

¶159 Riley argues that the trial court committed error by failing to issue a *Simmons* instruction regarding his ineligibility for parole. *See Simmons v. South Carolina*, 512 U.S. 154 (1994). Because Riley failed to object on *Simmons* grounds during his trial, "our review [is limited] to fundamental error." *State v. Bush*, 244 Ariz. 575, 591 ¶¶ 66–68 (2018) (citing *State v. Valverde*, 220 Ariz. 582, 584–85 ¶¶ 9–12 (2009), *abrogated on other grounds by Escalante*, 245 Ariz. 135); *see also Hargrave*, 225 Ariz. at 14 ¶¶ 50–51.

¶160 Riley argues that he sufficiently objected by submitting his own Proposed Preliminary Instructions (guilt phase) that did not "include the objectionable reference to release," which the trial court rejected. This argument is unpersuasive for two reasons. First, neither Riley's nor the trial court's preliminary instructions read to the jury contained the "objectionable reference to release" because the guilt phase instructions did not pertain to the prospective penalty following conviction; thus, Riley's proposed guilt phase jury instructions cannot reasonably be construed as an objection to the reference to release. Second, as discussed below, at no point did Riley object to any reference to the possibility of release nor did he affirmatively request an alternative instruction regarding his ineligibility for parole.[4]

¶161 During jury selection, the trial court provided prospective jurors with written questionnaires. Both Riley and the prosecutor reviewed and approved the questionnaire at a pre-trial status conference. In describing the penalty phase of the trial, the questionnaire stated, in relevant part:

> If you unanimously find the mitigation is sufficiently substantial to call for leniency, the Court will sentence the defendant to either life imprisonment without the possibility of release or *life without release until at least twenty-five years have passed*.

Question 62 substantially reiterated that statement and asked the jurors if they "agree[d] with the law that requires the judge, not the jury, to make the decision about which type of life sentence to impose."

¶162 On September 29, 2015, on the second day of voir dire, the trial court discussed with the parties whether they wanted the trial court to read an overview of the death penalty process to each juror panel before questioning them. Riley stated that he was "comfortable" with the contents

[4] Riley raises several other arguments for de novo or fundamental error review, most of which are based on the proposition that a court must sua sponte issue a *Simmons* instruction. Riley's arguments are unavailing because he fails to distinguish *Bush*, which expressly forecloses his claim in light of his failure to object to his possibility of release. 244 Ariz. at 593 ¶ 75.

of the overview and, along with his counsel, agreed that the trial court should read the overview to each panel. Two days later, during a conference to settle miscellaneous matters, the trial court reiterated its intent to read the overview to the jurors, and neither side objected nor raised any concerns.

¶163 On October 5, before the first juror panel entered the courtroom, the trial judge again reiterated his intent to read the overview to the jurors, and neither side objected. As part of the overview, the trial court informed the first juror panel that:

> If your sentence is death, he will be sentenced to death. If your verdict is that the defendant should be sentenced to life, he will not be sentenced to death, and the Court will sentence him to either *life without the possibility of release until 35 calendar years are served*, or natural life, which means the defendant would never be released from prison.

Later the same day and over the next few days of voir dire, the trial court continued to instruct each juror panel with the same language from the overview.

¶164 On November 4, following Riley's conviction and during a telephonic status conference before the aggravation phase, the trial court stated, "[M]y JA [Judicial Assistant] sent out the instructions and she didn't hear back from either lawyer as far as the eligibility phase instructions that she sent out." In response, both the State and Riley's counsel stated that they had received the instructions and had no corrections.

¶165 On November 5, at the start of the aggravation phase, the trial court informed counsel for both sides that it would begin by reading the instructions. Both parties acknowledged that they had reviewed the instructions, and neither party objected to their contents. The approved instructions the trial court read to the jury expressly stated that Riley could be sentenced to life imprisonment "with the possibility of release after 25 years."

¶166 On November 12, at the end of the penalty phase, the trial court read and explained the verdict form before releasing the jury to deliberate. As part of its explanation, the trial court stated that if the jury found that Riley should be sentenced to life, then Riley could be "sentenced to life in prison with the possibility of release in 25 years." Riley's counsel reviewed and approved the verdict form.

¶167 Riley argues the trial court violated his right to due process by failing to provide the jury with a *Simmons* instruction—one that informed the jury that Riley was ineligible for parole if given a life sentence. Riley's argument, however, is premised on authority that predates our decision in *Bush*, which forecloses his claim. *See* 244 Ariz. at 593 ¶ 74.

¶168 In *Bush*, we adopted a "narrow interpretation of *Simmons*," reasoning that "the due process right under *Simmons* merely affords a parole-ineligible capital defendant the right to 'rebut the State's case' (if future dangerousness is at issue) by informing the jury that 'he will never be released from prison' if sentenced to life." 244 Ariz. at 592–93 ¶¶ 73–74 (quoting *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring in judgment)). We noted that relief under *Simmons* "is foreclosed by [the defendant's] failure to request a parole ineligibility instruction at trial." *Id.* at 593 ¶ 74 (quoting *Campbell v. Polk*, 447 F.3d 270, 289 (4th Cir. 2006)). Ultimately, we held that despite the trial court's repeated instructions to the jury that Bush would be eligible for parole, and defense counsel's brief and "vaguely voiced disagreement before jury selection over whether jurors should 'be advised as to the possibility of release,'" no fundamental *Simmons* error occurred because Bush failed to show "that he was deprived of the right to inform the jury of his parole ineligibility." *Id.* at 590 ¶ 64, 592 ¶ 70, 593 ¶ 75 ("Unlike in the aforementioned cases [in which courts found reversible *Simmons* error], the trial court neither refused to instruct, nor prevented Bush from informing, the jury regarding his parole ineligibility.").

¶169 Here, the trial court afforded Riley numerous opportunities to object to, or modify, the jury questionnaire, the death penalty overview, the eligibility phase jury instructions, and the verdict form, but Riley and his counsel declined. More importantly, at no point did Riley or his counsel offer parole ineligibility instructions orally or in writing. As in *Bush*, Riley "has not shown that he was deprived of the right to inform the jury of his parole ineligibility." 244 Ariz. at 593 ¶ 75. Despite the trial court's numerous references to Riley's release eligibility, "the trial court neither

refused to instruct, nor prevented [him] from informing, the jury regarding his parole ineligibility." *See id.* In fact, Riley's counsel repeatedly informed the jury that Riley would never be released from prison if given a life sentence and the prosecutor never disputed the point. Thus, Riley failed to establish a *Simmons* error and is not entitled to relief on this issue.

¶170 Consequently, because Riley failed to establish error even if he would have been entitled to a requested *Simmons* instruction because future dangerousness was at issue, we need not address that issue. Similarly, we need not address whether Riley "carried his burden of establishing prejudice resulting from any alleged *Simmons* error." *Id.*

K. Request to Revisit Decisions Made in Hidalgo

¶171 Riley argues Arizona's capital punishment scheme is unconstitutional because it fails to legislatively narrow the class of first degree murders eligible for the death penalty and the trial court abused its discretion by refusing to grant an evidentiary hearing on this issue. We recently rejected substantially similar claims in *Hidalgo*. 241 Ariz. at 549–52 ¶¶ 14–29.

¶172 We review constitutional questions de novo, *State v. Smith*, 215 Ariz. 221, 228 ¶ 20 (2007), and a trial court's failure to grant an evidentiary hearing for an abuse of discretion, *State v. Gomez*, 231 Ariz. 219, 226 ¶ 29 (2012).

¶173 In *Hidalgo*, we rejected the argument that Arizona's death penalty scheme does not sufficiently narrow the class of defendants eligible for the death penalty. 241 Ariz. at 549–52 ¶¶ 14–29. That argument was premised, in part, on the same statistical evidence put forth by Riley. *Id.* at 551 ¶ 25. We also rejected the argument that the trial court's refusal to grant an evidentiary hearing when the previous issue was raised below was an abuse of discretion. *Id.* at 548–49 ¶¶ 8–13.

i. Constitutionality of Arizona's Death Penalty Statutes

¶174 We have repeatedly rejected the argument "that our legislature has not narrowed the class of persons eligible for the death penalty." *State v. Greenway*, 170 Ariz. 155, 164 (1991); *see Hidalgo*, 241 Ariz. at 551 ¶ 27. But Riley asks us to reconsider that argument based primarily

on statements by Justice Breyer in the denial for certiorari for *Hidalgo*. *Hidalgo v. Arizona*, 138 S. Ct. 1054, 1057 (2018) (mem.) (Breyer, J., statement). We are not persuaded.

¶175 "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.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens,* 462 U.S. 862, 877 (1983)). State legislatures can provide this narrowing function by either narrowly defining capital offenses "so that the jury finding of guilt responds to this concern," or by "broadly defin[ing] capital offenses and provid[ing] for narrowing by jury findings of aggravating circumstances at the penalty phase." *Id.* at 246.

¶176 Riley first asks us to "review the holistic aggravation scheme." Although this argument is somewhat unclear, Riley appears to be urging us to examine the aggravating factors in their entirety—as opposed to individually—when considering whether the legislature has sufficiently narrowed the class of persons eligible for the death penalty. If that is the case, we rejected a similar argument in *Hidalgo*, noting that Supreme Court precedents undermine such a position. 241 Ariz. at 550–51 ¶¶ 19–20, 26 ("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.").

¶177 Riley next argues that Arizona's broad definition of first degree murder does not satisfy the legislative duty to narrow the class of persons eligible for the death penalty. On this point, Riley is likely correct. In *Hidalgo*, we referenced Arizona's limitation of the death penalty to first degree murder as one of several factors to support our holding. 241 Ariz. at 552 ¶ 28 (citing *Greenway*, 170 Ariz. at 164). But Arizona's definition of first degree murder is overly broad, encompassing all intentional, premeditated murders. *See* § 13-1105(A); *cf. Lowenfield*, 424 U.S. at 245 (discussing, with approval, the constitutionality of the death penalty statutes of Texas and Louisiana which "narrowly defined the categories of murders for which a death sentence could be imposed"). Nevertheless, we expressly rejected that argument in *Greenway*, and the lack of a narrow definition of first degree murder is not dispositive. *See Greenway*, 170 Ariz. at 164; *see also Lowenfield*, 484 U.S. at 246.

¶178 Next, relying on the statistical analysis presented to the trial court, Riley contends those results directly contradict our holding in *Hidalgo* that Arizona's death penalty scheme sufficiently narrows the class of persons eligible for the death penalty. In addressing this argument in *Hidalgo*, we stated:

> The Court has not looked beyond the particular case to consider whether, in aggregate, the statutory scheme limits death-sentence eligibility to a small percentage of first degree murders. Even if Hidalgo is right in his factual assertion that nearly every charged first degree murder could support at least one aggravating circumstance, no defendant will be subject to a death sentence merely by virtue of being found guilty of first degree murder and, as Hidalgo acknowledges, death sentences are in fact not sought in most first degree murder cases. 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.

241 Ariz. at 551 ¶ 26. Justice Breyer interpreted these statements to mean we "assum[ed] that the aggravating circumstances fail to materially narrow the class of death-eligible first-degree murder defendants." *Hidalgo v. Arizona*, 138 S. Ct. at 1056. This suggests that our rejection of the "holistic view" of aggravating circumstances in favor of the narrowing nature of individual aggravating circumstances is contrary to at least four of the Justices' interpretation of Supreme Court precedent. But because we decline to overrule our holding in *Hidalgo* in favor of a minority opinion from the Supreme Court, this argument carries little weight. *See Teague v. Lane*, 489 U.S. 288, 296 (1989) (noting that opinions accompanying certiorari denials have no precedential value).

¶179 Finally, Riley argues we erroneously relied on jury functions (i.e., finding the existence of an alleged aggravating circumstance beyond a reasonable doubt) and individualized sentencing to support our holding in

Hidalgo because the former "do[es] not show the necessary *legislative* narrowing that [U.S. Supreme Court] precedents require" and the latter "concerns an entirely different capital punishment requirement." Both arguments are supported by Supreme Court precedents, which require the legislature to provide the narrowing function within the statutory definitions of the capital offenses or the aggravating circumstances. *See Tuilaepa*, 512 U.S. at 979; *Lowenfield*, 484 U.S. at 246; *Zant*, 462 U.S. at 878. But, as stated previously, we held in *Hidalgo* that the aggravating circumstances set forth by the Arizona Legislature provide the constitutionally required narrowing function, and that holding remains binding precedent. Thus, the fact that some of the arguments put forth to support that holding may be contradicted by some Supreme Court precedents does not invalidate that holding.

¶180 In sum, the arguments and accompanying conclusions of law enunciated by Justice Breyer and embraced by Riley are not mandated by any current, binding precedents. Accordingly, because Riley has not established that *Hidalgo*'s holding is incorrect, he is not entitled to relief on this issue.

ii. Denial of Evidentiary Hearing

¶181 Riley provides three reasons to support his argument that the trial court abused its discretion by failing to grant an evidentiary hearing on the facts supporting his claim that Arizona's death penalty scheme was unconstitutional. None of them is persuasive.

¶182 First, Riley argues the trial court's refusal to conduct an evidentiary hearing infringed his right to a meaningful appeal because the lack of a hearing resulted in a record that was insufficiently complete to allow an adequate appeal of the issue. Riley relies on Justice Breyer's statement respecting denial of certiorari in *Hidalgo* to show the impact the lack of hearing had on his appeal. *See Hidalgo*, 138 S. Ct. at 1056 (Breyer, J., statement) (noting that the trial court's refusal to grant a hearing denied the defendant the opportunity to develop the record). Riley contends that Justice Breyer's statement contradicts our conclusion that Hidalgo was afforded an opportunity to be heard.

¶183 A record that is of "sufficient completeness for adequate consideration of the errors assigned" is "satisfactory to afford [a] defendant

a meaningful right of appeal." *State v. Schackart*, 175 Ariz. 494, 499 (1993) (quoting in part *State v. Moore*, 108 Ariz. 532, 534 (1972)). Because the trial court assumed as true the evidence Riley and the other defendants presented for the constitutional issue, and we addressed the same issue on appeal in *Hidalgo*, there was no error for which the record was lacking.

¶184 Second, Riley argues that the refusal to conduct a hearing violated his right to due process because the right fundamentally requires an opportunity to be heard at a meaningful time and in a meaningful manner. He further contends that capital cases are entitled to a heightened due process protection because they are unique in their finality. Riley also cites the Arizona Constitution, stating that article 2, section 24 "provides broader protections for criminal appeals" than the Federal Constitution, which therefore "carries with it a greater demand for process."

¶185 To support this argument, Riley relies on the same cases relied upon by Hidalgo. In *Hidalgo*, we agreed that "due process entitles parties to notice and a meaningful opportunity to be heard" and "capital defendants are accorded heightened procedural safeguards," but we found the cases upon which Hidalgo relied were inapposite. 241 Ariz. at 548 ¶¶ 9–10. We also "recognized that evidentiary hearings are not required when courts need not resolve factual disputes to decide constitutional issues." *Id.* at 548 ¶ 8. And we rejected the argument "that a capital defendant is entitled to an evidentiary hearing on a pretrial motion even if the court's ruling does not turn on disputed facts." *Id.* ¶ 9. Although Hidalgo may not have relied on the Arizona Constitution to support his arguments, we clearly stated that "[p]rocedural due process does not require an evidentiary hearing on a motion when the legal claims do not turn on disputed facts." *Id.* at 549 ¶ 11. Riley has provided no case law to support his proposition that the Arizona Constitution would contradict this holding. Therefore, the trial court's refusal to conduct an evidentiary hearing did not violate his right to due process.

¶186 Finally, Riley argues under *Strickland v. Washington*, 466 U.S. 668 (1984), that the refusal to conduct a hearing violated his right to effective counsel because it impeded his counsel's ability "to make independent decisions about how to conduct the defense." This argument is likewise unpersuasive. The examples of government interference with a counsel's independent decisions discussed in *Strickland* reflect a direct interference with the rights of a defendant. *See, e.g.*, *Geders v. United States*, 425 U.S. 80,

88–89 (1976) (bar on attorney-client consultation during overnight recess denied defendant his right to confer with counsel); *Herring v. New York*, 422 U.S. 853, 864–65 (1975) (bar on summation at bench trial denied defendant his right to be heard). Here, as discussed previously, Riley did not have a right to an evidentiary hearing. Therefore, the trial court's refusal to conduct one did not violate his right to effective counsel.

¶187 Because the trial court did not abuse its discretion by refusing to grant an evidentiary hearing on the facts supporting Riley's claim that Arizona's death penalty scheme was unconstitutional, Riley is not entitled to relief on this issue.

L. Constitutionality of A.R.S. § 13-752(G) and Defendant's Right to Waive Presentation of Mitigating Evidence

¶188 Riley argues that A.R.S. § 13-752(G) is unconstitutional because it fails to provide a process to allow jurors to consider mitigating evidence when a defendant waives his right to present such evidence. He also argues that the trial court erred by allowing him to waive his right to present mitigating evidence during the penalty phase of the trial.

¶189 We "review constitutional issues de novo, and, when possible, construe statutes to uphold their constitutionality." *Hausner*, 230 Ariz. at 82 ¶ 99. Because Riley failed to raise his second claim below, we review that challenge for fundamental error. *Henderson*, 210 Ariz. at 567 ¶ 19.

¶190 In the aggravation phase, Riley's counsel told the trial court that Riley wanted to waive mitigation, against his counsel's advice. Riley's counsel declared that he had intended to call several witnesses to testify about various mitigating circumstances. The trial court then engaged Riley in a colloquy, and Riley avowed that he understood his right to present mitigation, he was aware of the evidence his attorneys intended to present, he had discussed his waiver with his attorneys, he understood that the State could still argue for the death penalty even if Riley waived his right to present mitigating evidence, and he understood that the jurors would still make the decision on whether death was the appropriate sentence. Riley confirmed his decision to waive mitigation and avowed he was doing so voluntarily.

¶191 The trial court found that Riley's waiver was made knowingly, intelligently, and voluntarily, but it approved Riley's counsel's motion to have Riley prescreened for competency. After receiving the results confirming Riley's competency, the court denied Riley's counsel's request for another competency evaluation, but it reengaged Riley in another mitigation waiver colloquy, which substantially mirrored its previous discussion with him. The court again found that Riley waived his right to present mitigation knowingly, intelligently, and voluntarily.

¶192 During the penalty phase, the court instructed the jury as follows:

> During this part of the sentencing hearing, the defendant and the State may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for a sentence less than death.
> . . .
>
> 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 of 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.
> . . .
>
> Mitigating circumstances may be offered by the defendant or State or be apparent from the evidence presented in any phase of these proceedings. You are not required to find that there is a connection between a 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.
> . . .
>
> The fact that the defendant has been convicted of first degree murder is unrelated to the existence of mitigating circumstances. You must give independent consideration to all of the evidence concerning mitigating circumstances despite the conviction. You may also consider anything related to the defendant's character, propensity, history or record, or circumstances of the offense.
> . . .
>
> You are not limited to 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, record, or circumstances of the offense.

¶193 Riley argues that § 13-752(G) is unconstitutional because the Eighth Amendment requires the sentencer in a capital case to consider all available mitigating evidence, regardless of the defendant's desire to have that information presented, and the statute does not provide a process to allow jurors to consider mitigating evidence when a defendant waives his right to present such evidence. He asserts that a jury cannot perform the requisite individualized determination in a consistent manner if consideration of mitigating circumstances is subject to "the whim of the defendant."

¶194 The cases upon which Riley relies do indeed hold that the Eighth Amendment requires individualized consideration of mitigating factors by the sentencer, but none of them suggests that when a defendant waives his right to present mitigation, the court must provide some other means by which the sentencer can consider that potentially available but unoffered mitigating evidence. *See Tuilaepa*, 512 U.S. at 972–73 (noting the requirement for individualized consideration is satisfied "when the jury *can*

consider relevant mitigating evidence" (emphasis added)); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (holding unconstitutional a statute that limited the "range of mitigating circumstances which *may* be considered by the sentencer" (emphasis added)).

¶195 In fact, the Supreme Court expressly rejected the argument that a jury's failure to consider mitigating circumstances due to the defendant's waiver of his right to present evidence of those circumstances violates the Eighth Amendment. *See Blystone v. Pennsylvania*, 494 U.S. 299, 306–08, 206 n.4 (1990). The Eighth Amendment requires only that juries in capital cases be *allowed* to consider all relevant mitigating evidence, and that requirement is satisfied when the jury "[is] specifically instructed to consider, as mitigating evidence, any matter concerning the character or record of the defendant, or the circumstances of his offense." *Id.* at 307–08 (internal quotations marks omitted). Similarly, relying on *Blystone*, we have repeatedly held that a defendant's knowing, intelligent, and voluntary waiver of his right to present mitigation does not violate the Eighth Amendment even when it precludes a jury from considering all relevant mitigation in determining whether to impose the death penalty. *See Gunches*, 240 Ariz. at 203–04 ¶¶ 15–20; *Goudeau*, 239 Ariz. at 473–74 ¶¶ 244–45; *Hausner*, 230 Ariz. at 85 ¶ 118; *State v. Murdaugh*, 209 Ariz. 19, 33–34 ¶¶ 70–71 (2004).

¶196 Riley attempts to incorporate our analysis in *State v. Prince*, 226 Ariz. 516 (2011), to support his arguments, asserting that juries have a *duty* to consider, and therefore *must* consider, all mitigating evidence. But that case is inapposite. Although we did discuss the jury's "duty" to consider mitigating evidence, it did not suggest in any way that a defendant's waiver of his right to present mitigating evidence impedes that duty. *See id.* at 526–27 ¶¶ 15–20. In discussing the jury's duty, we cited to *State ex rel. Thomas v. Granville*. *Id.* ¶ 16. *Granville* emphasized that any mitigating circumstances to be considered by the jury must be "proved by the defendant or present in the record." 211 Ariz. 468, 472–73 ¶¶ 17–18 (2005); *see also State v. Roscoe*, 184 Ariz. 484, 499 (1996) ("That the burden is on the defendant reinforces the conclusion that his personal decision not to present certain mitigating evidence is within his discretion."). Indeed, this Court impliedly held § 13-752(G) to be constitutionally sound when we ultimately concluded that the "liberal admission of . . . evidence" under § 13-752(G) "preserves the entire statutory scheme's constitutionality." *Prince*, 226 Ariz. at 526 ¶ 16, 527 ¶ 20.

¶197 Riley argues that we should reconsider our numerous holdings on this issue and adopt a procedure from Florida that requires prosecutors to compile comprehensive reports of potentially mitigating evidence when a defendant refuses to present his own mitigation. *See Marquardt v. State*, 156 So. 3d 464, 491 (Fla. 2015). But we rejected a similar argument in *Hausner*, refusing to follow the decisions of a minority of courts that held that mitigation must be presented even over a defendant's objection to satisfy the state's interest in a fair and reliable sentencing determination. 230 Ariz. at 85 ¶ 120 (citing *State v. Koedatich*, 548 A.2d 939, 992–97 (N.J. 1988), which Florida courts relied on to adopt their mitigation procedures).

¶198 In sum, both the Supreme Court and this Court have repeatedly held that the Eighth Amendment requires only that a jury be *allowed* to consider mitigating evidence; it does not require a jury to be presented with that evidence over a defendant's objections. More importantly, we have already implicitly found § 13-752(G) constitutional. Accordingly, the failure of the statute to provide a process for presenting mitigating evidence over a defendant's objections does not render that statute unconstitutional, and Riley is not entitled to relief on this issue.

¶199 Riley's argument that the trial court erred by allowing him to preclude the presentation of mitigating evidence relies on his proposed solution to resolving the potential conflict between a defendant's right to self-representation under the Sixth Amendment and a trial court's authority to "requir[e] the defense to present mitigating evidence over the defendant's opposition." *See Hausner*, 230 Ariz. at 85 ¶ 119. Riley argues that Sixth Amendment rights are not absolute and must give way to the Eighth Amendment requirement for individualized consideration. In the alternative, Riley argues that the trial court should have denied Riley's request to preclude mitigating evidence because he effectively revoked his waiver of self-representation.

¶200 But even accepting Riley's arguments as true, thereby resolving the Sixth Amendment conflict identified in *Hausner*, Riley has failed to provide any persuasive arguments that support his underlying premise—that juries are constitutionally required to consider all mitigating evidence, even if that means presenting such evidence over the defendant's objections. No such constitutional requirement exists, and we expressly

rejected adopting any procedure that would impose such a requirement. *See id.* ¶ 120. In sum, we have repeatedly held that a competent defendant may knowingly, intelligently, and voluntarily waive mitigation. *See, e.g.*, *Gunches*, 240 Ariz. at 203 ¶ 17; *Goudeau*, 239 Ariz. at 473 ¶ 240; *Hausner*, 230 Ariz. at 84 ¶ 116. Absent any constitutional prohibition on defendants waiving their right to present mitigation, Riley is entitled to relief on this issue only if he did not knowingly, intelligently, and voluntarily waive mitigation.

¶201 Here, Riley unquestionably waived his right to present mitigation. After multiple colloquies with Riley, the trial court determined he waived his right knowingly, intelligently, and voluntarily. The court's determination was further supported by the results of a competency evaluation requested by Riley's counsel. Before the jury's deliberations in the penalty phase, the trial court also properly instructed the jury, at length and in various ways, to consider all mitigating evidence from the parties and from the record, regardless of the source.

¶202 The trial court did not err by finding that Riley waived his right to present mitigating evidence, and Riley has not persuaded us to reconsider our numerous precedents supporting a competent defendant's choice to waive mitigation. Accordingly, Riley is not entitled to relief on this issue.

M. Abuse of Discretion in Jury's Imposition of Death Penalty

¶203 Riley argues that the jury abused its discretion in finding he should be sentenced to death because there was no reasonable evidence in the record to sustain that decision. Because Riley committed the murder after August 1, 2002, we must review the jury's findings of aggravating circumstances and the imposition of death sentences for abuse of discretion, A.R.S. § 13-756(A), viewing the facts in the light most favorable to sustaining the verdicts. *State v. Naranjo*, 234 Ariz. 233, 249 ¶ 81 (2014). "A finding of aggravating circumstances or the imposition of a death sentence is not an abuse of discretion if 'there is any reasonable evidence in the record to sustain it.'" *State v. Delahanty*, 226 Ariz. 502, 508 ¶ 36 (2011) (quoting *State v. Morris*, 215 Ariz. 324, 341 ¶ 77 (2007)).

i. Aggravating Circumstances

¶204 As to Kelly's murder, the prosecution alleged, and the jury found beyond a reasonable doubt, five aggravating circumstances: (1) Riley was previously convicted of a serious offense, § 13-751(F)(2); (2) Riley committed the murder in an especially heinous, cruel, or depraved manner, § 13-751(F)(6); (3) Riley committed the murder while in the custody of the ADOC, § 13-751(F)(7)(a); (4) Riley committed the murder to promote, further or assist a criminal street gang, § 13-751(F)(11); and (5) Riley committed the murder in a cold and calculated manner without pretense of moral or legal justification, § 13-751(F)(13).

¶205 For the (F)(2) aggravator, the prosecution provided undisputed evidence that Riley was previously convicted of multiple counts of aggravated assault, kidnapping, and armed robbery. For the (F)(6) aggravator, the prosecution provided sufficient evidence for the jury to determine that Riley murdered Kelly in an especially cruel manner. On the cruelty prong, the prosecution provided evidence of Kelly's defensive wounds and his attempt to flee his attackers by wedging himself under the toilet in his cell. The prosecution also produced evidence of Riley's own written account of the murder, in which he recounted Kelly's final words as he died. On the heinous or depraved prong, the prosecution provided evidence that Riley relished the attack immediately afterwards and engaged in gratuitous violence. The prosecution also relied again on Riley's letter, focusing on Riley's graphic and celebratory account of the murder.

¶206 For the (F)(7)(a) aggravator, the prosecution provided undisputed evidence that Riley was in the custody of the ADOC when he committed the murder. For the (F)(11) aggravator, the prosecution provided evidence of Riley's affiliation with the AB with pictures of his gang tattoos, his own written account of why he committed the murder, and testimony from Boggs—the special investigator—who identified the AB as a criminal street gang and testified that Riley met certain criteria as a member. Finally, for the (F)(13) aggravator, the prosecution relied once more on Riley's written account of the murder, focusing on Riley's lengthy planning and "hunting" for a target.

¶207 In sum, because the record provides substantial, reasonable evidence to support these uncontested findings, the jury did not abuse its discretion in finding the five aggravating circumstances.

ii. Imposition of Death Sentence

¶208 Based on the record, the jury did not abuse its discretion when it sentenced Riley to death for murdering Kelly. Because each juror makes an individual finding of whether any mitigating circumstances were sufficient to warrant leniency, we must uphold a death sentence "if any reasonable juror could conclude that the mitigation presented was not sufficiently substantial to call for leniency." *Naranjo*, 234 Ariz. at 250 ¶ 89 (citation omitted) (internal quotation marks omitted); *see also Morris*, 215 Ariz. at 341 ¶ 81. Riley waived his right to present mitigation during the penalty phase, but "evidence admitted at the guilt phase is admitted for purposes of the sentencing phase, A.R.S. § 13–752(I), and the jury must 'consider the mitigating circumstances, whether proved by the defendant or present in the record, in determining whether death is the appropriate sentence.'" *Hausner*, 230 Ariz. at 87 ¶ 129 (quoting *Granville*, 211 Ariz. at 473 ¶ 18).

¶209 Most of the mitigating evidence upon which Riley relies from the guilt phase of the trial is actually a *lack* of evidence. Riley contends that the lack of evidence of his direct participation in Kelly's murder and general prison gang activity "reduced his moral culpability in the offense" sufficient to constitute an abuse of discretion on the jury's imposition of a death sentence. The core of Riley's argument appears to suggest there may have been residual doubt about his participation in Kelly's murder. But any such "claim[] of . . . residual doubt do[es] not constitute mitigation for sentencing purposes." *State v. Moore*, 222 Ariz. 1, 22 ¶ 133 (2009).

¶210 Riley also argues that the evidence that prison gangs could intimidate other prisoners into committing violent crimes on their behalf "did not support a conclusion that [he] had a 'choice' to refrain from participating in gang activity." But Riley's own written account of the murder conclusively counters this argument. In his letter, Riley explained in detail how he sought to identify and obtain approval to kill a victim to earn full membership with the AB.

¶211 Most importantly, Riley does not challenge the sufficiency of the evidence supporting the jury's finding of any aggravating circumstances, except for a vague reference to the accomplice liability issue. *See State v. Cruz*, 218 Ariz. 149, 170 ¶ 136 (2008) (holding that a jury did not

abuse its discretion by finding a particular aggravator because the defendant did not contest the evidence supporting the existence of that aggravator). Accordingly, because we conclude that a reasonable juror could find that Riley failed to establish sufficient and credible mitigation evidence, the jury did not abuse its discretion in returning a death sentence.

N. Issues Raised to Avoid Preclusion

¶212 Riley identifies thirty-four issues he seeks to preserve for federal review. As he concedes, we have previously rejected each of his claims. We decline to revisit them.

CONCLUSION

¶213 We affirm Riley's convictions and sentences.

Appendix B

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

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STATE OF ARIZONA, Plaintiff, vs. THOMAS MICHAEL RILEY Defendant.	CR 2010-002559-002 CR-15-0411-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

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

THE COURT: We're here on a motion to dismiss filed in 17 separate capital cases. What I am going to do, so the record's clear, I am going to announce each case and ask counsel to announce for each case. Some of you may answer more than once. To me, that's the easiest way to do it.

So we're going to start with number one, CR 2011-140108, State of Arizona versus Jose Aljeandro Acuna. Would counsel please state their appearances?

MS. LARISH: Good afternoon. Kristin Larish on behalf of the state.

MR. GLOW: Tom Glow and Steve Koestner for Mr. Acuna.

THE COURT: Number two matter is CR 2012-007399, State of Arizona versus Zachary William Baxter. Would counsel please state their appearances?

MS. GILLA: Marischa Gilla for the state.

MS. HINDMARCH: Jamie Hindmarch and Rosemarie Pena-Lynch on behalf of Mr. Baxter.

THE COURT: The third matter is CR 2011-133622, State of Arizona versus Jesus Antonio Busso-Estopellan. Would counsel please state their appearances?

MR. BASTA: Eric Basta on behalf of the state, Your Honor.

MR. GLOW: Good afternoon. Tom Glow, Jamie Hindmarch and Mike Terribile for Mr. Busso-Estopellan.

THE COURT: Good afternoon. Four, CR 2009-160953, State of Arizona versus Rudolph John Cano, Jr. Would counsel please state their appearances?

MS. GILLA: Marisha Gilla for Jeanine Sorrentino on behalf of the state.

MR. BUCK: Bruce Buck on behalf of Mr. Cano, Your Honor. He has waived his presence.

THE COURT: Good afternoon. The number five matter is CR 2011-151833, State of Arizona versus Jonathan Ray Cole. Would counsel please state their appearances?

MS. GILLA: Marischa Gilla appearing for Stephanie Low on behalf of the state.

MR. JOLLY: Quinn Jolly and Greg Navazo on behalf of Mr. Cole who has waived his presence.

THE COURT: Number six, CR 2010-168096, State of Arizona versus Craig Michael Devine. Would counsel please state their appearances?

MS. WEINBERG: Hilary Weinberg appearing for Vince Imbordino for the state Your Honor.

THE COURT: It is Goddard.

MR. GODDARD: I am here.

MS. WEINBERG: Some guy named Vince.

MR. KOESTNER: And Steve Koestner on behalf of Mr. Devine who is present.

MS. SCHMICH: Toby Schmich on behalf of Mr. Devine who is present.

THE COURT: Number seven matter, CR 2011-150239, State of Arizona versus Ryan William Foote.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of Patty Stevens for the state.

MS. SINCLAIR: Good afternoon, Your Honor. Dawn Sinclair and Eric Crocker representing Mr. Foote who is present sitting in the jury box.

THE COURT: Good afternoon. Next matter, number eight, CR 2010-007912, State of Arizona versus Eldridge Auzzele Gittens. Would counsel please state their appearances?

MS. WEINBERG: Hilary Weinberg and Kirsten Valenzuela for the state.

MS. COREY: Susan Corey for Mr. Gittens along with Mr. Jones.

THE COURT: Number nine is CR 2012-154880, State of Arizona versus Manuel Antonio Gonzalez. Would counsel please state their appearances?

MS. GILLA: Marischa Gilla appearing for Neha Bhatia behalf of the state.

MS. HINDMARCH: Jamie Hindmarch on behalf of Mr. Gonzalez, and Rosemary Pena-Lynch and Michael Terribile is also here on behalf of Mr. Gonzalez.

THE COURT: Number ten is CR 2011-005473, State of Arizona versus Able Daniel Hidalgo. Would counsel please states their appearances.

MS. WEINBERG: Hillary Weinberg for the state.

MR. BUCK: Bruce Buck and Toby Schmich on behalf of Mr. Hidalgo who is present, Your Honor.

THE COURT: Number 11 is CR 2010-007912, State of Arizona versus Darnell Reuna Jackson. Would counsel please state their appearances?

MS. WEINBERG: Hilary Weinberg and Kirsten Valenzuela for the state.

MR. TAVASSOLI: Good afternoon. Alan Tavassoli and Andrew Clemency on behalf of Mr. Jackson, present in court, office of the public defender.

THE COURT: Number 12, CR 2010-048824, State of Arizona versus James Clayton Johnson. Would counsel please state their appearances.

MS. LARISH: Kristin Larish for the state, sir.

MR. REINHARDT: Robert Reinhardt and Peter Jones for Mr. Johnson.

THE COURT: Number 13, CR 2011-008004-001, State of Arizona versus Dennis Michael Levis. Would counsel pleases state their appearances?

MS. WEINBERG: Hilary Weinberg appearing for Vince and I am pretty sure it's Imbordino for the state on this one.

MR. KOESTNER: Steve Koestner appearing for Mr. Levis. He has waived his presence.

MR. BUCK: Bruce Buck also on behalf of Mr. Levis.

THE COURT: The 14 matter is no longer on the calendar. That's Mr. Martinez.

The next one is the 15 matter, CR 2012-139607, state versus Justin Otis McMahan.

MS. SHERMAN: Kristin Sherman on behalf of the state.

MS. WASHINGTON: Victoria Washington and Garrett Simpson on behalf of Mr. McMahon who is present in the jury box.

THE COURT: The number 16 matter is CR 2011-138281, Jason Neil Noonkester.

MS. GALLAGHER: Jeannette Gallagher on behalf of the state.

MS. COREY: Susan Corey and Pete Jones for Mr. Noonkester who is present, judge.

THE COURT: Number 17 is CR 2011-008004-002, State of Arizona versus Thomas Michael Riley. Would counsel please state their appearances?

MS. WEINBERG: Hilary Weinberg appearing for Vince Imbordino for the state.

MR. BAILEY: Michael Bailey for Mr. Riley whose presence is waived, Your Honor.

THE COURT: The next matter and the final one is number 18, CR 2010-007882, State of Arizona versus Jasper Phillip Rushing. Would counsel please state their appearances.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of the state.

MS. WASHINGTON: Victoria Washington and Terry Bublik on behalf of Mr. Rushing who is present in the jury box.

THE COURT: Good afternoon.

Okay. We've got some, I think, housekeeping preliminary matters to talk about before we talk substantively about where we're at. I have got a list of things that I think we need to talk about, and obviously, I will give counsel an opportunity to talk to me about the things that we need to talk about.

First of all, let's talk about the presence of defendants and make sure we are where we thought we

would be. Last time we were here for oral argument two weeks ago, I had issued a ruling saying that I was essentially waiving the presence of defendants because I believed that under the circumstances they need not be present. I was overruled by acclamation at that point and so what we did was I confirmed that some of the defendants still would waive their presence and those that indicated that they wanted to be present, we arranged that they would be present.

In the interim, we had two more requests come in where defendants told me or counsel told me the defendants no longer wanted to waive their presence. I think we accommodated that. So my belief is right now we have in the courtroom those defendants that have not waived their presence that wanted to be here. Does anyone disagree with that? I don't see any hands, so we're appropriately situated with respect to the presence of defendants.

I also wanted to confirm for the record my understanding is that the motion to dismiss the death penalty along with the supplemental briefing and the additional requests or motions to submit supplemental authority are identical as to all the defendants; that is, there is no unique motion or argument out there that's not found in all the others. Is that correct?

MS. COREY: Yes, Your Honor.

THE COURT: And, of course, we have some unique filings with respect to presence, but I am talking about the substance of the motion.

I want to confirm what's been filed and what I am considering and I want to make sure that no one disagrees with this. We obviously have the initial motion, the response and the reply. On January 25th, I directed that the parties brief the -- we'll call it the *Furman* or narrowing issue and I directed that the parties on or before February 22nd file a brief. The state filed a brief, I believe, dated February 19th and the defense filed a brief on February 22nd.

Since then, I have received and considered the following: There is a motion to submit supplemental authority. There is an amended motion relating to the same thing that's essentially the Ryan Commission report. There was a second motion to submit supplemental authority dated April 30th. That motion concerned a 2011 Harvard Civil Rights and Civil Liberties *Law Review* article. Defendant also filed a request for findings of fact and orders on April 30th, as well.

Other than documents relating to appearances by the defendants, is there anything out there that I have missed in terms of filings that we ought to be talking

about?

MS. COREY: Judge, the only other thing is on the initial motion to submit supplemental pleadings, there should be two reports in there, one from the Governor's Commission in Illinois and the other one is from the Governor's Commission in Massachusetts, so there should be two reports in that. And in the second supplemental motion, judge, in addition to the Harvard *Law Review* article that was attached, there is a citation to a case, *Ballard*, that we talked about which talks about the only reason that argument failed was because of the failure to prove it up by virtue of evidence.

THE COURT: We will, I am sure, be talking about that case. Anything else from the state's perspective that we missed in terms of filings?

MS. GALLAGHER: No, Your Honor.

THE COURT: A couple other procedural things from my perspective. On January 25th, I rejected the defendant's equal protection argument. My ruling remains the same. I am reaffirming that. I don't believe anybody intended to discuss that issue again. To the extent they did, there is really nothing to talk about. I had already denied the motion on equal protection grounds.

With respect to the request for an evidentiary hearing, we've had extensive discussion about

that request. Previously I had denied the request and I believe defendants filed a special action relating to that request.

Now, there is what I consider to be almost the same thing, a request for findings of fact and orders relating to the defense request that I allow the defense to put on the evidence they say they have regarding first degree murder cases, I believe, in 2010 and 2011 in Maricopa County, and you want specific findings to be set forth on the record.

I am not sure -- let me get your view on how this is substantively a different request. I know it is technically different, what you're asking for, but you're still asking me to put on the evidence I wouldn't let you put on before. Why would I let you do that now when I didn't let you do that before?

MS. COREY: Well, actually, judge, the evidence is in the record. That's been admitted without objection from the state so you have evidence. You have quite a bit of it. It is all sitting right over there.

THE COURT: I'm sorry to interrupt you. I want to make it clear. The state didn't object to putting that in the record so that it will be part of the record when this goes to wherever it goes. The state is not agreeing with the defendant's position as to what that

evidence shows, and I took your request to be a request for me not simply just to note the evidence but to make a determination whether the evidence shows what you say it shows, and I haven't made that determination and I am not going to make it in the context of this motion now for the reasons I set forth before.

MS. COREY: Judge, do you want to argue this now or do you just want to bring this up to the point we're going to argue down the road? Because I think there does need to be argument made on this. We don't have an appropriate appellate record if you don't make findings of fact. This is all just -- there is no point in really doing this if you don't make findings of fact.

THE COURT: We had this discussion before and I am really struggling with the argument that if I accept your facts as true for purposes of this argument only and, again, it's for purposes of this argument only, I am accepting not only the exhibits that you filed but I am accepting your argument that they say what you say they say, how can we not be making an appropriate appellate record?

I think the case law is pretty clear when we're talking about my discretion to have an evidentiary hearing or a hearing at all, and practically, if there are no facts that you're urging that I am not accepting, how

are we not making an appropriate appellate record.

MS. COREY: Here is the problem, judge: If you look at *Ballard* which is a case in front of the Illinois Supreme Court, *Ballard* said, look, you're absolutely right on the law. They made the same argument that we did. You're absolutely right on the law. There is a narrowing requirement. It's supposed to be done by the statute. It has to be both qualitative and quantitative, but what you didn't do, defense lawyers, is bring us the evidence that shows that's true. So we don't have anything before us and we're not going to rule for you because this has to be an evidentiary-based argument; it is required to be an evidentiary-based argument.

THE COURT: But *Ballard* never made the run that you made. In other words, they never said we have it. They never said we can prove it to you. They simply threw it out there that certainly -- with the number of aggravators and with the context of the Illinois death penalty statute, they essentially said, look, the number of aggravators has swallowed up the whole, and clearly, from the defense view, very few they said -- in fact, they didn't make the all argument that you're making. They're saying very few first degree murder cases would not have at least one aggravator and the Court noted it. There is nowhere in that record or that opinion where the Court

held it against the defendants or told the defendants that they -- I take it back -- where the defense offered to make an offer of proof.

MS. COREY: No, but, judge, their holding was we're not ruling against you as a matter of law. We're saying you didn't prove your case. That's what they said. That was the holding of the case. Had you brought the evidence and proved this up, we would be in a position to rule for you, but you're just making this theoretical argument. You didn't present any evidence. Denied.

THE COURT: But I am doing exactly what the *Ballard* court asked or essentially said needed to happen which is accept that it is true. I am getting there for purposes of this argument, so you're not in that position. I am not going to turn around and say, you know what, it doesn't seem to me like your numbers are correct. I am accepting that they are and that makes it different. The Court did not accept them because there wasn't evidence. Here, I am saying, okay, we'll fight about whether that's really correct later, but let's resolve the issue of if you're right, whether it matters, and I think for appellate purposes, I think that's fine.

MS. COREY: Judge, I respectfully disagree with the Court. I think that we have presented evidence. The Court has had the evidence. The state has had the

evidence for months, nearly a year. In all that time, the state never objected to the admission of the evidence. The state never came forward and said, you know what, look at all these cases that don't have aggravators, judge. The state has looked at this. We've opened the books. The state is in a unique position because they create the records. All that stuff is in their office. They have better access to the information than we do. Had they been able to rebut it, they would have rebutted it. They can't rebut it because what we're saying is true.

THE COURT: Well, I'm sorry to interrupt you. Let's be fair here. I told her she didn't need to. I told the state they didn't need to. The state made very clear that they disagreed with the premise. In fact, we talked about it on January 25th. I remember we argued about it, and Miss Gallagher had an interesting example of what would maybe constitute a non-aggravators murder, but we had that discussion about whether the state accepted the defendant's position. The state said, number one, they don't accept it, and I told them because I'm accepting it for purposes of this argument, I am not requiring you to controvert it. I am not expecting you to.

So to say that the state's been sitting on this for a while and hasn't controverted it and they

could, I told them that they didn't have to and they can take that as a statement that they shouldn't. So I think it's not fair to say that the state is -- could have controverted and they didn't. I told them not to and presumably what would happen -- and one of my concerns is that if we want to go down that road, I think it is a little more complicated than you think. I know you think you can prove it up expeditiously. I think it is harder to prove up what you want to prove up and would require some time, but right now, from my perspective, that's neither here nor there because I really do believe that I can accept the facts that you allege and rule regarding whether, accepting those facts, the statute is unconstitutional. I think that's an appropriate resolution.

I respectfully disagree with your position. I understand your concern. I, too, have a concern to make sure that whatever court hears this after me gets the best record possible for both sides and in a way that the case can be resolved and that is my goal, and I believe that we're doing that here.

I understand your concerns, but I don't believe an evidentiary hearing -- and therefore, I also do not believe the findings of fact as requested in the April 30th filing are appropriate going forward. So I am

not going to make findings of fact. I am going to make findings of law obviously to resolve the motion going forward.

MS. COREY: Again, judge, if the state does object and does not accept the premise, then really what we are supposed to get is an evidentiary hearing.

THE COURT: So the record's clear, I understand the state is objecting and disagreeing with the facts. I have not required them to controvert the facts or otherwise argue the facts, and from my perspective, that's why they haven't, and if you're right, if an appellate court says there needs to be an evidentiary hearing before they can get to the substance of the motion, then so be it and I will be happy to conduct it, but I don't think that that's what they're going to do. If I felt there was a real chance that an appellate court would find that an evidentiary hearing was necessary, I would hold one, but I believe one is not necessary. So I am accepting your facts going forward.

All right. Related to that, though, is a question I have for you regarding what you allege the facts to be, because I noted when I was reading your February 22nd filing, the language -- you changed the language a little bit as to the allegation of what the facts show, and what I am specifically talking about is

this: On page three and page 14 of the February 22nd filing, you use the following language: You say virtually every first degree murder case has at least one aggravating factor. For purposes of this argument, I assumed your position is and I have accepted your position that every first degree murder case has an aggravator. Now, I know we're talking about a subset, 2010/2011 Maricopa County, but when I read this language, I want to make sure I understand your position and what you want me to assume. Do you want me to assume every first degree murder case in Maricopa County in 2010 and 11 has an aggravating factor? Is it beyond that or should I stay with that assumption?

MS. COREY: Judge, this goes to what the state was trying to counter. The state made an assertion right about the time she was talking about shooting you in the head that if she could just find one theoretical case that didn't have an aggravating factor, she wins. That's not right. That's why I said virtually every case, because, judge, it doesn't take every case. What is supposed to be happening here, it is supposed to be the more unusual first degree murder case that has the aggravators that make it eligible for the death penalty. The purpose of the aggravator is to identify those cases, those first degree murder cases, that are above the norm

for either the murders, the defendants or the case themselves. It is supposed to segregate those cases out. That's the purpose of the aggravating factors.

Does that mean that there may be an unusual case, that there's one, or two or three here or there that don't have aggravating factors, first degree murder cases that don't have aggravating factors, does that defeat the statute? No, it doesn't. That doesn't defeat our argument, judge. That doesn't defeat our argument.

What we're saying is it's supposed to be -- the aggravating factors, the purpose of that to is identify the most egregious cases, the ones more deserving of the death penalty. That means it is going to be the rare case that comes out. It's not supposed to be every first degree murder case. So if you have an occasional first degree murder case that doesn't have an aggravating factor, that does not defeat our argument.

THE COURT: Where then are you asking me or some other court to draw the line if it is the rare case? Is it 20 percent, 50 percent, 80 percent? How am I supposed to make that analysis? Aren't I suppose to essentially follow along the lines of what *Greenway* talked about which basically says does the statute narrow and if the statute collectively narrows, then it passes constitutional muster. Where do you want me to draw the

line?

MS. COREY: Well, judge, I think that's why we need to look at our cases; we need to look at the cases and what's really going on in this jurisdiction. That's why the evidence is so important. The cases that we looked at, we looked at 238 cases. That was all the cases over a two-year period. Every single one of them had an aggravating factor and that was based primarily on the state's own pleadings. And so what I am saying, judge, if we don't have to make this argument, a lot of courts are trying to pass this off and trying to pretend like, gee, this is just an impossible thing to do. This is an impossible situation to figure out. It's not an impossible situation to figure out. Courts do this every day, and what we're saying, judge, is that aggravating factors have a purpose.

What you're supposed to get out of the narrowing statute is a pyramid. You're supposed to have at the base all the first degree murder cases. You're supposed to have at the top the ones that are eligible for the death penalty. That's the way it's supposed to work. We don't have a pyramid, judge. We have a rectangle, and that's the problem. We're not segregating out anybody.

I am not going to tell you you need to come up with a number. I don't think you need to come up with

a number. You need to see how the statute is operating in this county, and what we're telling you, judge, and you can look at it and you can see -- if you thumb through the cases that we've pulled for you, you can see that all of these cases, if you look at the F-2, judge, when it applies to contemporaneous offenses and that is offenses that are charged with the first degree murder, then you're blowing up the barn door, judge, and the courts knew this was going to happen.

If you look at *Rutledge*, Your Honor, *Rutledge* is 206 Ariz. 172, and this was before they changed the F-2 statute, and before they changed the F-2 statute, the state was saying, look, you know what, I think you need to apply this to contemporaneous cases, and the trial judge below in this case and the Supreme Court ultimately did not apply it to contemporaneous cases, but the trial judge below, his concern, why he denied the state's motion was this: He was afraid that allowing contemporaneous offenses to apply would be contrary to the legislative intent to narrow that class of persons. His fear, the trial judge's fear, was that if you open F-2 to contemporaneous offenses, then you have defeated the narrowing purpose of the statute. It's too inclusive. It is too broad.

THE COURT: Let's talk about the pyramid

though. Are we starting out with the correct base if we're starting out with first degree murder? Aren't we starting out with murder on the base, not first degree murder?

MS. COREY: No, we're not and the Arizona Supreme Court --

THE COURT: Why not?

MS. COREY: The Arizona Supreme Court makes that very clear. I cited it in my argument, Your Honor. There are five cases that make it clear that what we are starting from is first degree murder; we are not starting from all murder cases. The five cases that make that very clear are State v. Bocharski, 218 Ariz. 476; State v. Blazak, 131 Ariz. 598; State v. Watson, 129 Ariz. 60; State v. Smith; 147 -- 146 Ariz. 491 and State v. Zaragoza, 135 Ariz. 63.

The Arizona Supreme Court, particularly in Blazak, judge, says the legislature has made it clear that the death penalty is not to be imposed in every case of first degree murder.

THE COURT: I agree with you that they have said that and they have said it in multiple cases, and I think it may be more than five cases in which they've said it, but they have said it without this question or a related question directly in front of them. My concern is

this, is that -- and we see it at times with the Supreme Court and other appellate courts, that they will mention things in passing but it relates somehow to another topic and they don't put it together, and what I mean is this: If we look at *Greenway*, *Greenway* says we also reject defendant's argument that our legislature has not narrowed the class of persons eligible for the death penalty. Only those persons convicted of first degree as defined by ARS 13-1105 are eligible for the death penalty. Right there, *Greenway* says that's a narrowing factor.

And the reason I am coming back, as you know, to this is that there are different narrowing factors relating to the statute, and the question is going to be if the aggravating circumstances don't do it, but other factors do it, isn't it still constitutional? Because *Greenway* seems to say it. *Hausner* says it to some degree in footnote nine, although I will agree that it wasn't argued squarely in front of *Hausner* and *Hausner* is noting the law, but I have in front of me *Greenway,* and I understand F-2 is different, stating that there is a narrowing function with respect to the classification and there are other narrowing functions we can talk about, and the cases from Illinois, from Delaware and others talk about other narrowing functions, including the jury. Doesn't that for constitutional purposes mean the

statute's constitutional?

MS. COREY: No, judge, it doesn't and here's why: Here's the problem. The Supreme Court said there is no catechism for this. We're not going to tell you how to do it, but they did say you have to narrow it and you have to narrow it with the legislature, not -- it can't be an ad hoc basis. They can't funnel this off on to somebody else, judge. The point is to protect against arbitrariness. You have to narrow it and you're narrowing it for a reason, right? What's the reason? The reason you're narrowing is to prevent arbitrariness and to identify those cases that are most deserving of death. That's the whole point and that has to be done legislatively.

It can't be done down the line by the jury. It has to be done legislatively in the statute. That's where it has to occur. It can't be done by the state. The state gets their discretion, judge, but that's not a narrowing function. That's not what we're talking about. We're talking about a legislative definition that circumscribes the people that are eligible for the death penalty.

If you look at the original *Furman* statute -- and, actually judge, and I want to have it marked. The original *Furman* statute, judge, had a first

degree murder statute. They also had a second degree murder statute which wasn't eligible for the death penalty. So we're talking about a first degree murder statute in *Furman* that was too broad. That's not enough. That's not enough of a narrowing function. You can narrow through the definition of first degree murder, you absolutely can do that. That's what *Lowenfield* was all about. But look at *Lowenfield*, judge. Look how narrow that is. You've got, what, five, maybe five different types of first degree murder, very, very narrow and they're supposed to be intending to either commit murder or commit some violence on a person at the same time, very, very narrow in its application.

When you look at Arizona's first degree murder statute, we have one of the broadest first degree murder statutes in the country. You've got a huge first degree murder statute. In some jurisdictions, judge, felony murder is not even first degree murder; it is second degree murder. So you've got this enormous first degree murder statute. The Arizona Supreme Court recognizes that in their opinion. That's why they say, look, we've got to have aggravators and the whole point of the aggravators is to narrow because they sure ain't doing it in the first degree murder statute. You've got to have those aggravators to narrow, and if the aggravators aren't

narrowing, it's not getting narrowed. That's what makes you eligible for the death penalty in this state.

THE COURT: We have more narrowing though than just the first degree murder narrowing. We narrow for intellectual disability under 13-753.

MS. COREY: That's not narrowing, and if you look at *McCleskey* --

THE COURT: I'm sorry to interrupt you but how is that not narrowing? I know it's not an aggravating circumstance, but the statute overall is narrowing, is it not, by carving out intellectual disability?

MS. COREY: No, the statute doesn't carve out intellectual disability. The Arizona Supreme Court carved out intellectual disability, and if you look at *McCleskey*, judge, and if you look at -- I am trying to find a page on here, judge -- they distinguish narrowing. It's subsection 11 and 12, judge. I can't find the page on here, but they distinguish narrowing from the societal consensus that the death penalty is disproportionate.

So they say, look, here's this group of things that narrow and here's this group that the societal consensus says is a disproportionate penalty. That's not narrowing at all. That's saying we already know these things are outside. You can't touch these things. The statute has to narrow besides that, and *McClesky* makes it

very clear in their opinion, and I will find you a page, judge, page 305 in section 11 and 12. It's clear, judge, they're distinguishing between those things that -- remember when we're talking about the death penalty, you're also talking about the evolving standard of decency, right? So as we progress, it's not a static concept. It's something that changed over time, and over time, we as a nation have decided people that are under the age of 18 shouldn't be getting the death penalty; people that are intellectually disabled shouldn't be getting the death penalty; people that didn't act in reckless disregard for human life or were not major participants shouldn't be getting the death penalty; people that are committing rape shouldn't be getting the death penalty; people that are committing child molest shouldn't be getting the death penalty. Those things are out, because the evolving standard of decency says that under all occasions, that is cruel and unusual punishment. That has nothing to do with narrowing. That is completely distinct.

THE COURT: But don't we -- isn't it really an issue with respect to if we can theoretically find a murder that does not include -- a first degree murder that did not include aggravating circumstances, if we can theoretically find it, isn't there an argument to be made

that that's enough right there?

MS. COREY: No, judge. That's exactly the opposite of what it's supposed to be. What's the purpose of aggravators, judge? The purpose of aggravators is to say, you know what, we have got to find some way to figure out what are the really, really bad cases. What are the cases that are so bad that they deserve to be put in this separate category? That is segregating. That's a few. Judge, when you've got a huge group of first degree murders, you have got to figure out which ones are going to be the worst. That presupposes, judge, that there are going to some left in the pile.

THE COURT: Here is the issue I have: What you are suggesting is consistent with language from *Furman* forward, worst of the worst and there's about 20 other quotes that everyone has heard, that can reasonably be read to suggest that the death penalty needs to be the exception, not the rule, whether we want to say murder or first degree murder. That's absolutely true.

The problem I have got is this: The cases going forward on this issue seem to indicate that we can pass a threshold, whether it is 30 percent, 50 percent, 70 percent or even 90 percent when we're talking about the percentage of cases, first degree murder with aggravators, and it does not violate the constitution. From a public

policy perspective, is that maybe an issue? Maybe, maybe yes, but from a constitutional perspective where I have to go, is that a constitutional violation here and now?

Let me tell you my concern: You give me the governor's -- Governor Ryan's report, his commission report; you give me the Harvard article, and they both talk about what should happen and make an argument why all the cases holding to the contrary of the position that you're taking are wrong, but those cases are there. I am not finding any cases that say, you know what, we've hit that saturation point, whether it is a hundred or 90. I am not finding anything that says that. I would have to rely on general standards, and that is disconcerting for me. While understanding and accepting the premise that you can reasonably argue that the death cases are supposed to be the minority, perhaps the great minority, and maybe they're not if the universe is first degree murder, at least the eligibility is not the minority, but I have got cases that say that's okay.

MS. COREY: Judge, the problem is you're asking me to give a bright line and I don't think the Supreme Court ever drew a bright line on this. What I am asking you to do -- you're wanting me to talk about the universe of death penalty law and I am not concerned about the universe of death penalty law. I am concerned about

our statute and whether our statute is doing its job under the constitution; that is, is our statute doing -- segregating out the worst of the worst. Is our statute doing what it's constitutionally required to do? That's the question before the Court, not theoretically what's the death penalty law all about; what's the number that the Supreme Court wants. That's not the question before the Court. The question before the Court is is our statute doing its job? Is our statute drawing its aggravators narrow enough to segregate out the worst of the worst?

And that's why this evidence is so important, judge. When you look at this evidence, when you look at the statute itself, when you look at F-2, you can see it's overly inclusive, judge. It's not doing the job that it was designed to do. It's not doing the job that it's constitutionally required to do. I can't give you a bright line, judge. I can't give you a bright line. I can't tell you what the world of death penalty law is supposed to be about, but I can tell you that our statute isn't doing the job that it's constitutionally supposed to do.

THE COURT: Let me talk to Miss Gallagher for a minute. I will certainly come back to you, Miss Corey. I want to understand the state's position. First

of all, and looking at the state's February 19th filing, what I gleaned from that was that the constitutionally required narrowing function from the state's perspective seems to apply only to individual aggravating factors, not -- I don't know if this is true, but not the collective scheme. From the state's perspective, as long as each aggravating factor applies only to a sub class of first degree murder, there is no constitutional violation. Is that the state's position?

MS. GALLAGHER: Yes, because that would be the law, judge. Every case from the Supreme Court says -- refers to it as an individual aggravating factor. If an individual aggravating factor applies to all murders or it's vague, then it is constitutionally infirm. So they have found some that weren't. Like our F-6 was found to be vague, so the Supreme Court of Arizona fixed it. Now it's not vague anymore, and as long as every first degree murderer -- which I agree with you, we have carved out an arena of murders, first degree, which is the first level. You have to look at each factor by itself and say is this -- does this factor apply to every person charged with first degree murder? If the answer is no; that it only applies to a sub group, then you've passed the first part of what it's supposed to do.

The second part is you look at it and say is

it it vague? If it isn't vague, then that aggravating factor is constitutionally appropriate and you can go forward.

And you keep -- and the defense keeps focusing on the F-2 contemporaneous offense. Well, first of all, it doesn't apply just because you commit another felony at the same time as you commit a first degree murder. It has to be one of our enumerated ones, and all of the Supreme Court cases, both Arizona and United States Supreme Court cases, say that, of course, the person deciding who gets death and who doesn't should be looking at the circumstances of the offense. That's what that F-2 contemporaneous is. It's if while you are killing one person, you do any of the serious offenses like arson, robbery, burglary. That's a part of the offense and that absolutely can make someone eligible for the death penalty.

And the California versus -- I can't pronounce it. T U I L -- *Tuilaepa v. California*. The guy was eligible for death because he committed a first degree murder during an armed robbery. That was the sole factor. So obviously, if the United States Supreme Court wanted the entire scheme that a state has to not apply to everybody or whatever, they would have said that, but they have repeatedly said they're looking at each separate

aggravating factor in a particular state scheme.

THE COURT: I agree with you. *Tuilaepa* focused on the individual aggravating factor and said exactly what you say it said, but it did not address a collective argument, and that's what I want to make sure I understand where you're at. Your position appears to be that it's okay if every single first degree murder case has an aggravating factor, right? When I say okay, I mean constitutional.

MS. GALLAGHER: Yes, it is perfectly constitutional as long as those each individual aggravating factors are constitutional.

THE COURT: Then why even have aggravating factors? If it's not narrowing, why are we having them? If every murder has an aggravating factor, why are we having aggravating factors? And isn't it true that we have statements all over the place from the Arizona Supreme Court and others that say the scheme's got to narrow, maybe not aggravating factors, but actually it does say that; that aggravating factors need to narrow and it's stated collectively. We are not -- we can't just say we have to look at the individual aggravators and not look at the collective impact, do we? I guess your answer is yes.

MS. GALLAGHER: Yes. I didn't tell the

United States Supreme Court how to do this. They told us, and they said one of the ways you get to the narrowing is if you have aggravating factors, and you have to go down to the next level, judge, which is the jury or sentencing body -- now it has to be a jury -- must find at least one. That's the further narrowing.

So just because the state alleges there's one doesn't mean the jury is going to find it and if they don't find it, at least one, then the person is no longer death eligible, and then after they get to that, then they have to look at all the mitigation and decide is this person deserving of the death penalty.

THE COURT: Is there a single case out there that you know of where defendants have made the argument they're making which is we'll show you a body of two years or a huge collection of first degree murder cases where every single one has got an aggravating factor? In other words, they're making what I am calling a hundred percent argument as to the two years. You would agree with me there is no case saying that it doesn't matter? There is no case that says what you just said, specifically, we don't care that there is no narrowing function collectively? There is no case that says that, right?

MS. GALLAGHER: I am not agreeing that it's not narrowing. There is no case that says that if the

potential aggravating factors could apply to everyone, that that is unconstitutional. There is no case that says that.

THE COURT: Do you agree that the statute -- there must be some narrowing function to some degree within the statute and the scheme?

MS. GALLAGHER: Yes.

THE COURT: Tell me what the Arizona -- we've talked about all around different factors. From your perspective, what are the narrowing factors in the Arizona statute or scheme?

MS. GALLAGHER: In 751?

THE COURT: Yes.

MS. GALLAGHER: Okay. I just want to make sure so you don't change the rules on me.

THE COURT: I am not changing the rules. If you think we need to go outside of 751, so be it. I want to get your view, for the sake of the argument about the constitutionality, what are the narrowing factors of the statute or otherwise.

MS. GALLAGHER: Starting with it only applies to first degree murder as that's defined; that there has to be a finding of one aggravating factor that the jury has to find, and then the jury has to look -- they are not, as in other states, allowed to look at just

everything aggravating. You're only allowed to present the aggravating factors. Then they have to look at the mitigation in deciding whether or not death is the appropriate punishment for this person.

In looking at our 14 aggravating factors, every one of them either deals with the circumstances of the offense or the defendant's history. There isn't one in there that doesn't relate to that, because if there was, then that would be a problem because the aggravating factor must be about the offense or about the offender, and that's how Arizona has narrowed it, so that only those people that the legislature has decided have done something that warrants the extra penalty, those are the only people who would even be eligible for it.

THE COURT: Okay. All right. Don't the Illinois and Delaware cases -- and I understand the difference. We're talking about in Delaware I think it's -- is it *Steckel* (phonetic), the Delaware case? It is *Steckel*. Don't they essentially say, okay, while on one hand, kind of punting the question of, oh, you can't prove it up anyway -- and I recognize there is an element, especially in the Delaware case, that says how is anybody ever going to figure this out? I am not going down there because, again, I am assuming we have figured it out. But even beyond that, they say we also have narrowing and the

narrowing she just pointed out, first degree murder to murder, and it does note the narrowing of the jury. It also notes the narrowing of other classifications, and I disagree with you in terms of some of the other narrowing either found in the statute or as applied here. There is other narrowing. Don't those cases say that basically for constitutional purposes, that's narrowing and that gets us there?

MS. COREY: No, judge. Here's the problem: There has to be an eligibility factor. You have to have some sort of scheme in the statute that identifies the worst of the worst. That's the purpose of aggravators. When you get to the -- what type of sentence you're going to get, that's a whole different equation. Then you're talking about what should the sentence be. Now that you're eligible for this sentence, what should the sentence be, that's a different question.

THE COURT: Haven't courts blended those to get narrowing? There is a lot of discussion consistent with what you just told me, the eligibility versus the sentencing. There is language that suggests that we're willing to look over to the sentencing side and call that a narrowing factor, as Miss Gallagher suggested.

MS. COREY: There's a difference between, judge, protections against arbitrariness and narrowing.

So when you're looking at this, narrowing helps to prevent arbitrariness. That's the point of it. It is not the only thing in the statute that helps prevent arbitrariness. There are other things down the road that help to prevent arbitrariness, but that's not the narrow -- that's not narrowing.

Narrowing is supposed to segregate; narrowing is supposed to identify, because we don't want to give all of these murders to the jury and let them segregate out by listening to mitigation evidence and hearing about the defendant's background and hearing about the type of case. That's what *Furman* did. That's what the situation was when *Furman* existed. That's what they were talking about.

The legislature is supposed to take that from the jury and take that from the county attorney. It's not supposed to be decided on an ad hoc basis. It is supposed to be identified by a clear thinking, not emotionally involved legislative body.

THE COURT: Yeah, but we're talking about the county attorney or the prosecutorial discretion. They got a lot of discretion, and it's very clear they do, and we have a statute that has been challenged repeatedly and has been affirmed repeatedly when the challenge has been, hey, this is so broad that they can make any call they

want. That ship has sailed.

MS. COREY: Remember, judge, it is really important that we separate out what we're talking about here. When you're talking about those old statutes, when you're talking about when the Court said the statute's okay, when are you talking about? You're talking about ten aggravators and narrow F-2. That's what you're talking about. We don't have that anymore. We have an enormous F-2 and we have 14 aggravating factors.

They have never come off the position that an aggravating factor is designed to narrow, and remember, we have to really parse this out, judge. We really have to critically think through this. We're not talking about other factors that may be within the statute that prevent arbitrariness because there is stuff in there that helps prevent arbitrariness. There used to be a whole more in there to prevent arbitrariness that's not there anymore, things like independent review and things like proportionality that are no longer in our statute. We've gone way over the edge, judge. We've not only broadened the aggravating factors, but we've also taken out all those checks that were also there to -- designed to prevent arbitrariness.

The narrowing function is one part of the statute that is designed to prevent arbitrariness. That

is what the aggravating factors in our statute are designed to do. In *Lowenfield*, it was the definition of first degree murder. In our statutes, it is the aggravating factors.

Now we're not saying, judge -- and this is where the issue gets kind of confused. We're not saying that other things are also true, that each aggravating factor has to be well-defined so the jury can understand it. It can't be vague. All those things are true. That's not what we're talking about here. That's what *Tuilaepa* or whatever the name of case is -- that's what that was talking about. California statutes are very different than ours. They have an eligibility tree and then after you pass the eligibility tree and you get into a list of factors that the jury is supposed to consider, that's where that case is about. They're not talking about eligibility at all in *Tuilaepa*. They're talking about, gee, is this little factor too vague for the jury to get. Is this not going to work for us.

THE COURT: But there are several California cases taking on what appears to be a much broader statute saying it is still sufficiently narrow. And this gets back to the fundamental question, and this is a quote from the Harvard Civil Liberties *Law Review* article you gave me and it almost sums up where we're at, and it says, state

and lower courts have uniformly rejected challenges arguing that the sheer number of aggravators in a statute rendered it unconstitutional, so that's the state of the law.

MS. COREY: Wait a minute.

THE COURT: That's the state of the law that I -- that they come to me with, that you come to me with, at least as noted in the 2011 Harvard -- and that's post the relevant decisions we're talking about, so we come with that.

MS. COREY: Wait a minute, judge. You got to read further on. Why are the courts rejecting? Why did the article say the courts rejected it?

THE COURT: Generally the lack of empirical data.

MS. COREY: No.

THE COURT: Absolutely, yes.

MS. COREY: Here we've got empirical data. There is another reason, political fear.

THE COURT: That takes me to my next point because this -- and we look at the Ryan report as well. That was beamed as much to the legislature and potentially the executive branch as anything else, and in some ways this discussion, many people would believe has to happen largely in another forum, at the legislature versus here.

Now, I am not saying the whole discussion, and I can say, boy, that really looks unconstitutional but they have to do something about it. I am not taking that position. I am saying the flavor in which you gave me in your supplemental filings kind of points to the problem you've got here in front of me today. This argument may arguably be different previously, lack of empirical data, but some may have presented some empirical data. The courts have said no. For various reasons they have said no and, in part, they have relied on some of what Miss Gallagher is telling me which is we've got a narrowing function at various levels that is sufficient, even if we assume the aggravators have some incredible number above 90 percent for some of them, the narrowing factor -- and they do talk about the jury and they do talk about the individualized decisions and they do talk about the first degree, and that's what sits in front of me right now. You're asking me to go somewhere where people haven't been.

MS. COREY: Judge, I know the Court is reluctant to do this. I know that. I understand the Court's position. I know that ruling a death penalty statute unconstitutional makes everybody nervous; I get that, but the problem is, judge, that's your role. This is not a statue that's been ruled on before. This is a

much broader version of the statute. It's not been ruled on.

THE COURT: I am not scared about doing that. I want to get it right. I am not worried --

MS. COREY: Well, let me help you get it right, judge.

THE COURT: I want to get it right and right could be one way or the other. I accept that. I know it.

MS. COREY: Well, let's talk about then what's right. You're giving me these hypothetical cases where courts aren't there, aren't ruling for the defense.

THE COURT: It's not hypothetical.

MS. COREY: I understand that, but you're not giving me the specifics. I can tell you why that might be happening in other places if you give me the specifics, but you said one thing: They're not being presented with empirical data. The first thing we have to decide is what does our statute require? What's going on in this statue? What's it supposed to be doing constitutionally? Is it supposed to be narrowing? Do we accept the fact that the aggravating factors are there for a reason?

They have to do two things. They have to numerically separate out some of the first degree murder cases, right? So we have that quantitative function here,

but that's not the only thing they're supposed to be doing. They're supposed to be identifying those people most deserving of death. That's what they're supposed to be doing. Our cases say that. *Zant* says that. *Gregg* says that. That's what they're supposed to be doing. They're supposed to be identifying those cases most deserving of death. That's what our aggravators are designed to do.

Our Arizona Supreme Court said that if we have a situation where every first degree murder case has an aggravator -- and she is kind of parsing that. She is saying, oh, they're narrowing because the jury has to find it. Judge, then you can have two aggravators; one, the defendant is a male, one the defendant is a female. That doesn't do anything. That's busy work. It doesn't do what it's supposed to do. It's designed to segregate out those most deserving of death.

And the reason, judge, you really need to do this is this legislature is not going to fix this problem unless you tell them to, and what's going to happen, judge, is you're going to get more and more people in this pipeline and they're not going to fix it and then down the road, you're going to have a great big mess on your hands, because we understand what the law is and the law is the aggravators are there for a reason. They aren't just busy

work. They are designed to narrow the statute. The case law is clear that it's designed to narrow the statute. It is designed to segregate out of the worst of the worst, and when you have a statute where every single first degree murder case has an aggravator, it's not doing its constitutional job.

So really, judge, the question you have to ask yourself is what are those aggravators for and are they doing the job that they are supposed to be doing?

THE COURT: I am going to ask Miss Gallagher that question.

MS. GALLAGHER: Judge, the bottom line is that every first degree murder defendant should be eligible for the death penalty.

THE COURT: Wait a minute. Wait a minute. But that's not the law.

MS. GALLAGHER: You heard me correctly.

THE COURT: That's not the law, is it?

MS. GALLAGHER: Neither is the law that says this is unconstitutional. So let's talk about --

THE COURT: Don't answer that one. That's not the law, right?

MS. GALLAGHER: According to Miss Corey, it is, because if every single first degree murder case has an eligibility factor there, then every first degree

murderer should be facing the death penalty.

THE COURT: Let me ask it this way. That's not supposed to be the law is it? Is it? Hold on. Is it?

MS. GALLAGHER: I can't answer it the way you're asking because you and Miss Corey have one opinion about what this is supposed to do. You are now asking the state's opinion, and according to *Gregg* and its progeny, the purpose of aggravating factors is to give the sentencing body an objective reason to either give or not give the death penalty, right?

THE COURT: In part.

MS. GALLAGHER: So that whole premise starting with *Gregg* is that all people who are convicted of, guilty of, first degree murder before a jury or a judge can decide whether death should be the answer. They have to have an objective reason, and in *Furman* they didn't. They had nothing to guide them to say this person, this individual defendant who committed this individual or multi murder, depending on the circumstances, should get life or death. They just throw it in a pile, and that was the problem.

So what they said is with the aggravating factors, that's what channels the jurors' decision making, and the Supreme Court has pointed out it is not perfect,

particularly when juries are doing it, but the state didn't ask the juries to make that decision, so -- but they have got to have a reason, and those reasons have to either relate to the defendant and his propensities; is he on probation; is he in prison, whatever, or to the murder itself.

THE COURT: Let me interrupt you for just one second. You used the word guide; it has to guide the jury.

MS. GALLAGHER: Or the sentencing body.

THE COURT: The sentencing body. What kind of guide is it when the answer is if they're right and that every first degree murder has an aggravating factor, isn't the guide then something that says you can go any direction? It's not a guide anymore. It is whatever you find -- we can, whatever -- well, whatever the murder is, we can find a place for you; that is, there's no real channel, there's no path; there is no channel.

MS. GALLAGHER: Judge, the Supreme Court has said that it is up to the legislature to decide what circumstances of a murder and what circumstances of a defendant warrant death.

THE COURT: Agreed.

MS. GALLAGHER: All 14 of ours relate to either the defendant and his history or her history or the

crime.

THE COURT: Agreed.

MS. GALLAGHER: It would be one thing if we gave the jury all 14 factors and said go in there and muck around and see what you find, but we don't do that, because the factor has to be -- we have to get through the *Chronis* hearing, which I am assuming is being waived for all of these people since the defense bar wants us to believe there is an aggravating factor in every case, so they have waived that.

THE COURT: I don't think that's the case.

MS. GALLAGHER: Well, I mean if we're getting creative here, judge, I like that version, but anyway, you got to get past the *Chronis* hearing. There has to be probable cause and then a jury has to decide. So let's look at one of our aggravating factors; that the person you murdered is under the age of 12. Obviously, that doesn't -- it could apply to some of the these people, but it doesn't apply to every single one, but it does apply to every single person who dares to commit first degree murder of a child under 12, and our legislature says it should do that. They're all included, anybody who kills a child, same with police officers as long as you know it is a police officer. You kill a police officer here, now you're going to be eligible. So

where -- those would be the reasons the jury would be looking at to say was killing this child, when I now have to look at the mitigating circumstances, is that a reason to impose death; yes or no and that's a decision that the jury makes and that's how it works.

THE COURT: I agree with you that's how it works.

MS. GALLAGHER: And that's how it should work.

THE COURT: But if collectively there is no difference between any first degree murder, in terms of you can find an aggravating circumstances anywhere -- there's language in the Arizona Supreme Court cases and other places that say not every first degree murder should be a death penalty case; it says it, and almost by definition, what you're telling me is -- you just flat out told me that a few minutes ago: Every first degree murder case is a capital case and the Arizona cases say that's not the case.

MS. GALLAGHER: No, no, no. What I said, judge, was every first degree murder defendant should.

THE COURT: Okay. You're making a policy argument. That's fine.

MS. GALLAGHER: The sentence is life or death, but only these of you awful first degree murderers

are going to get even a shot at that ultimate shot.

THE COURT: And if every single first degree murderer has an aggravating circumstance, how are we saying only these. What are these? What are the these? If we're saying only these, only what? If every case has an aggravating circumstance, how are we differentiating anymore?

MS. GALLAGHER: You have to remember I don't agree that every one does. I agree that we have --

THE COURT: But you're not the law right now.

MS. GALLAGHER: We live in a very violent county because if you look at these other counties, we don't know that every one there has an aggravating factor. This is limited to Maricopa County.

THE COURT: Right.

MS. GALLAGHER: But there is not a case that says that if your scheme has 14 or 13 or 12 or whatever, that's too many and it's too inclusive, and look at --

THE COURT: Agreed.

MS. GALLAGHER: Look at, I believe it is Texas. They do have everybody -- every first degree murderer is a potential capital case because the jury has -- looks at the circumstance or whatever, if they find one of those, you move on. So there is a state with a

constitutional death penalty statute where every first degree murderer is potentially eligible for the death penalty. So how can that be constitutional, yet not our statute?

Let me ask the defense. That's in my view her best argument yet.

MS. COREY: What's that, judge?

MS. GALLAGHER: Thank you very much. You should have been listening.

MS. COREY: I should have been. I'm sorry, judge. What are you asking me?

THE COURT: She says Texas basically has a scheme that functionally says every first degree murder is eligible.

MS. COREY: Actually, judge, that's not accurate. If you look at *Jurek*, Your Honor, where the Texas scheme was analyzed, this is what it says. You've got narrowing and this is how they did it. These are the only people that are eligible for death, five different circumstances: The victim was a police officer, fireman on duty and the defendant knew it; the defendant committed the murder while attempting a kidnapping, burglary robbery, rape or arson; the defendant committed the murder for pecuniary gain; the defendant was escaping or attempting to escape from prison; the defendant killed a

correctional employee while in prison. That's it. That's the whole universe of death penalty eligible cases in Texas that were ruled on the court in *Jurek v. Texas*.

THE COURT: When was *Jurek*?

MS. COREY: 1976, judge.

THE COURT: Okay. She's talking about 2013.

MS. COREY: Well, judge, give me the statute and I will break it out for you, judge. What I am saying is that all the courts -- all the statutes are supposed to be -- what Arizona's statute is supposed to be doing, and it is clear when you look at *Lowenfield* and you look at *Zant*, is there clearly supposed to be doing something that segregates out the worst of the worst; that the legislature makes a legislative determination so it's not affected by emotion, so it's not affected by political gain. It is supposed to be narrow, judge, to take it out of the ability to -- I think Justice White was talking about this in *Furman*. You have got to foreclose the ability of prejudice to enter the picture.

So that's why the legislative definition needs to be narrow. That's supposed to be because you've got death penalty cases that are really emotional, right? Somebody's died. There is a bad situation, a murder case. It is supposed to be emotional. People are emotionally involved in those kind of cases, and so what they want to

do is do something to keep this from being an emotional response or a prejudicial response.

So the statutes -- *Lowenfield* said, look, you can do it this, way, you can narrow it this way. You don't have to have aggravators like *Gregg* did. That's not the only way you can do it, but we got to do it. You got to do it. There has to be some narrowing, to take that emotional element out of that, to take the political gain out of it.

Look what happened when Andrew Thomas was head of the office. What happened to the death penalty rate because he wanted to be governor? It exploded. We had more death penalty cases in this jurisdiction than Houston, Las Vegas and Los Angeles combined because he had political aspirations, and why was that allowed to happen, judge? Because virtually every first degree murder case has an aggravating factor. He could do it to promote his own political aspirations because the statute allowed him to do it.

Now, the statute is supposed to be designed to narrow in a functional way. It's not just supposed to narrow. It is supposed to narrow and identify the worst of the worst. Our statute is not doing it. Our statute is not doing what it's constitutionally designed to do.

THE COURT: Okay. I am going to be issuing

a written opinion but I am going to rule right now. I am going to follow with the written opinion because I think it is important to have a road map for various reasons, one, for appellate purposes; two, for other judges in superior court to see what I did that they think either made sense or didn't make sense from their perspective because this will be a recurring issue in other cases, even though we have captured some of the capital cases here.

Let me start with this: First of all, I am sympathetic to the position that there is an issue here if there is not a narrowing function. I think there is an issue. To say that the aggravating circumstances don't narrow the class and that's okay, there's something inherently wrong with that from my perspective. There is.

But here's the problem I have: I have Arizona cases that whether it is in a previous version of the statute, *Greenway* or *Hausner*, the current version, tell me that this argument or close to it -- and *Hausner* may have had a change since, but this version or close to it passes constitutional muster, and that's what I'm looking at.

MS. COREY: Judge, it is completely different and the problem is this: All of those statutes, all of those cases are talking about the statute before

there were 14 aggravating factors and before the F-2 broadened.

THE COURT: I understand. I understand the context.

MS. COREY: And the problem is, judge, that's why the evidence is so important. You need to know is this statute working the way it's supposed to be working, and what we're saying to you, judge, when we have 238 cases, and that's all the first degree murder cases over a two-year period, and every single one of them has an aggravator, then what's that telling you is our statute is not working the way it constitutionally is supposed to be working.

THE COURT: I understand what your argument is. I understand what your argument is. I understand there is a strong argument to be made that it's not working as it has been designed, whether it is Arizona Supreme Court cases or other cases; that there's not a genuine narrowing as envisioned at least by the language of some cases.

However, my analysis needs to be is the statute constitutional and how much, if any, narrowing is required at the aggravation or the aggravating factors phase. That's my analysis.

Am I sympathetic to the argument you're

making? Yep, I am. Do I have issues with the state's position that I am only supposed to look at individual aggravators and make sure that they are appropriate, as Miss Gallagher set forth. I do have a problem with that position, and I don't think I really adopt that position.

This is what I believe: First of all, there is a strong presumption that enactments are constitutional. We're starting with that. I understand we're in a capital context, but we do start the analysis with there is a presumption of constitutionality and that's important from my perspective.

The precedent really does not support a finding of unconstitutionality here except theoretically, and you're saying we moved from a point and now we've crossed the line. I don't think that there is enough that convinces me as a matter of law that we've crossed the line if I accept your facts as true. Is it an issue? Yes. Do I think it is a legislative or a policy issue? Yes. Is it an issue based on the law the way it is in Arizona that I believe that I would rule the statute unconstitutional? No. And I am relying on the following: I recognize *Greenway* is a prior statute. I recognize *Greenway* didn't have the current F-2. I recognize that *Hausner*'s argument is not an extensive argument, but it is what the Arizona Supreme Court said about the narrowing

argument with a broad scope of Arizona's aggravating factors, and I feel bound, to a large degree, by their analysis and for me to now go and make this analysis would be problematic.

I also find it extremely important there is language in *Greenway* that I read before that does tell me that despite the fact that there's language talking about narrowing in first degree cases, that the narrowing from murder to first degree is an important function and essentially gives the statute credit for that in a constitutional analysis, and I think that's important as well.

There are other narrowing functions, and whether you like it or not, with respect to the jury, with respect to finding that intellectual disability is another narrowing factor, I think it has been found and I think, again, that is a narrowing function and tells me there is a narrowing function.

I also believe it is significant, although again, a difficult analysis, while it may be correct that every case in 2010 and '11, every first degree murder case, had an aggravating circumstance, I know that I can think of a scenario where a first degree murder case wouldn't. I understand it is theoretical and you're living in the present and the reality, and that's what

we're looking at, but in terms of constitutionality, I think that is a factor going forward.

There are different levels of narrowing, and I do think that there are narrowing factors in the statute. I note that the Ninth Circuit and the District Court of Arizona have also considered narrowing arguments, again, I recognize and acknowledge, not based on the empirical data that you're bringing to the table.

I do believe though at the end of the day, that there is not enough for me to overcome the strong presumption that the statute's constitutional, and therefore, I am denying the motion to dismiss for the reasons that we've discussed.

I will say and I want to make it clear for the record I hope that the Supreme Court looks at it. I want to make the best record I can for them to look at it, because I do think this is a unique argument that hasn't been really directly taken on in the cases that anybody has cited and it needs to be taken on directly because from a policy perspective, I get the argument, but my job -- and I am not afraid of saying I think it is unconstitutional if it is unconstitutional, but from my perspective with the Arizona law the way it is, from my perspective, I think that there's not enough for me to find the statute unconstitutional.

MS. COREY: Is it part of your ruling that it would only take one theoretical case to make the statute --

THE COURT: I am not saying that. I am saying I can think of one and perhaps more than one. I think that there are theoretical possibilities out there. If that was the only basis, then that may not be enough, but that's combined with the other narrowing factors I found.

MS. COREY: And can the Court elaborate as what the Court is finding the narrowing factors in the statutes?

THE COURT: The narrowing from murder to first degree I think is a narrowing factor. I do think the jury function has been found to be a narrowing factor. I think the classification of intellectual disability is a narrowing factor. I think arguably there are other narrowing factors, although I understand they may be directly outside the legislation, meaning age. That wasn't the Arizona legislature's idea, but that's a narrowing factor. The classifications of the felony murder rule really do work as a narrowing factor at times, and again, those are judicial narrowing; the *Inman/Tison,* there is narrowing there and it may be as interpreted versus what's in the statute, but there's narrowing there,

and I note it as part of the narrowing analysis.

MS. COREY: For purposes of appeal, judge, when you say jury function, what exactly do you mean by that?

THE COURT: The jury determination, finding the aggravating factors and then determining whether there's mitigation sufficient to call for leniency.

MS. COREY: Thank you, judge.

THE COURT: So for the reasons set forth on the record, the motions to dismiss are denied. I am going to issue a minute entry. I am going to lay out what I just said as best I can. It may take me a little while, but I want to give you paper that you can show.

MS. GALLAGHER: Judge, we do have now the case management conference for Mr. Noonkester and --

THE COURT: I remember we talked about that. As tired, as I am sure we all are, we are going to do that. We're going to wait for that. I am going to wait for everyone to clear out except for Mr. Noonkester.

We're adjourned in this matter.

(Whereupon, the proceedings in the above-entitled matter were concluded.)

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 C

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

--oOo--

STATE OF ARIZONA, Plaintiff, vs. THOMAS MICHAEL RILEY, Defendant.	) CR 2013-002559-002) CR-15-0411-AP

Phoenix, Arizona

April 24, 2015

BEFORE: The Honorable JOSEPH C. KREAMER, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENT

PREPARED FOR:
APPEAL

(ORIGINAL)

Laura Ashbrook, RMR
Certified Court Reporter
Cert. No. 50360

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: Thank you. Please be seated. We are here this afternoon for a hearing on defense motion for evidentiary hearing in support of motion to strike notice of intent to seek the death penalty. What I am going to do is similar to what I did in the last hearing. I am going to go through each of the cases. I am going to ask for counsel to state their appearances and then I will ask defense counsel to please let me know -- defense counsel to please let us know whether their client is here or not. So let's do that.

Let's start with number one. Number one is CR 2013-103200, State of Arizona versus Jorge Amaya Acuna. Appearances, please.

MS. WEINBERG: Hillary Weinberg for the state.

MR. STAZZONE: Joseph Stazzone and Jeffrey Kirchler, public defender's office, for Jorge Amaya Acuna who is present.

THE COURT: Number two is CR 2011-138856, State of Arizona versus John Michael Allen. Appearances, please.

MS. GALLAGHER. Good afternoon. Jeannette Gallagher appearing on behalf of the state.

MR. REINHARDT: Robert Reinhardt on behalf of John Allen. He is not present, Your Honor.

THE COURT: Number three is CR 2011-138856-003, State of Arizona versus Samantha Lucille Rebecca Allen. Appearances, please.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of the state.

MR. CURRY: Jeremy Bogart and John Curry for Sammantha Allen whose presence has been waived.

THE COURT: Number four is CR 2013-419619-002, State of Arizona versus Darnell Moses Alvarez. Appearances, please.

MS. GILLA: Marischa Gilla appearing for the state, Your Honor.

MR. ZIEMBA: And Michael Ziemba representing the defendant, Darnell Moses Alvarez, who is present.

THE COURT: Number five is CR 2012-007044, State of Arizona versus Ashley Denise Buckman. Appearances, please.

MS. WADE: Jesse Wade on behalf of Kirsten Valenzuela for the state.

MR. CROCKER: Eric Crocker appearing for Jim Cleary and Gary Shriver on behalf Mr. Buckman, and she has waived her presence.

THE COURT: Number six is CR 2011-133622, State of Arizona versus Jesus Antonio Busso-Estopellan. Appearances, please.

MR. BASTA: Eric Basta on behalf of the state, Your Honor. Good afternoon.

MS. HYDER: Stacy Hyder and Tonya Peterson on behalf of Mr. Busso-Estopellan who is present, in custody.

THE COURT: Good afternoon. Number seven is CR 2012-008340, State of Arizona versus Kurt Dustin Coleman. Appearances, please.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of Patricia Stevens for the state.

MR. NAVAZO: Gregory Navazo standing in for Richard Miller for Mr. Coleman who is in the jury box.

THE COURT: Number eight is 2011-155640, State of Arizona versus Corey Rasean Daniels. Appearances, please.

MS. GILLA: Marischa Gilla for the state.

MR. PARKER: R.J. Parker and Alan Tavassoli for Mr. Daniels. He is present, judge.

THE COURT: Good afternoon. Number nine is CR 2010-168096, State of Arizona versus Craig Michael Devine. Appearances, please.

MR. KOESTNER: Good afternoon. Steve

Koestner, Bruce Buck on behalf of Mr. Devine. He has waived his presence.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of Vince Goddard for the state.

THE COURT: Number ten is 2013-003468, State of Arizona versus Octavio Garcia. Appearances, please.

MS. GALLAGHER: Jeanette Gallagher appearing on behalf of Laura Reckart for the state.

MS. DOMINGUEZ: Alicia Dominguez, Lindsay Abramson and Cynthia Brubaker on behalf of Mr. Garcia who is present, in the jury box.

THE COURT: Good afternoon. Number 11 is CR 2010-137021, State of Arizona versus Victor Hernandez. Appearances, please.

MS. CHARBEL: Susie Charbel on behalf of the state.

MR. COTTO: Brandon Cotta for Mr. Hernandez who's present in the jury box, Your Honor.

THE COURT: Number 12 is CR 2010-007912, State of Arizona versus Darnell Reuna Jackson. Appearances, please.

MS. WADE: Jesse Wade on behalf of Kirsten Valenzuela for the state.

MR. TAVASSOLI: Alan Tavassoli, R.J. Parker, office of the public defender, on behalf of Mr.

Jackson who is present, in the courtroom.

THE COURT: Number 13, 2010-048824, State of Arizona versus James Clayton Johnson.

MS. LARISH: Good afternoon. Kristen Larish on behalf of the state.

MR. REINHARDT: Robert Reinhardt and Peter Jones for Mr. Johnson. Mr. Johnson waives his presence.

THE COURT: Number 14 is 2013-001614, State of Arizona versus Moises Hernandez Lagunas. Appearances, please.

MS. CHARBEL: Susie Charbel on behalf of the state.

MS. PETERSON: Tonya Peterson on behalf of Mr. Hernandez who is present, in custody.

THE INTERPRETER: Fabiola Cerezo, court interpreter.

THE COURT: Number 15 is CR 2013-002559, State of Arizona versus Dennis Michael Levis.

MS. GALLAGHER: Jeannette Gallagher on behalf of Vince Imbordino for the state.

MR. KOESTNER: Steve Koestner and Bruce Buck on behalf of Mr. Levis who has waived his presence.

THE COURT: Number 16 is CR 2011-007597, State of Arizona versus Macario Lopez.

MS. GALLAGHER: Jeannette Gallagher

appearing on behalf of the state.

MR. CROCKER: Eric Crocker and Gary Bevilacqua for Mr. Lopez who is present in the jury box.

THE COURT: Number 17 is CR 2013-110974, State of Arizona versus Richard Molina Luznia. Appearances, please.

MS. WADE: Jesse Wade on behalf of the state.

MR. REINHARDT: Robert Reinhardt for Mr. Luzania. He waives his presence, Your Honor.

THE COURT: Number 18 is 2013-458974, State of Arizona versus Alex Anthony Madrid. Appearances, please.

MS. CHARBEL: Susie Charbel on behalf of the state.

MS. FALDUTO: Good afternoon, Your Honor. Bobbi Falduto and Angela Walker on behalf of Alex Madrid who is in the box.

THE COURT: Number 19 is CR 2012-133415, State of Arizona versus Joseph Michael Matthews.

MS. GALLAGHER: Jeannette Gallagher on behalf of Juan Martinez for the state.

MR. CURRY: Lisa Gray and John Curry for Mr. Matthews who is in the jury box.

THE COURT: Number 20 is CR 2013-004357,

State of Arizona versus Robin Leroy McJunkin. Appearances, please.

MS. CHARBEL: Susie Charbel on behalf of the statement.

MS. FALDUTO: Jennifer Roach and Bobbi Falduto standing in for Lawrence Blieden for Robin McJunkin who waives his presence for this proceeding

THE COURT: Number 21 is CR 2014-128973, State of Arizona versus Gary Michael Moran. Appearances, please.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of Patricia Stevens for the state.

MS. FALDUTO: Bobbi Falduto and Angela Walker on behalf of Gary Moran who is in the box.

THE COURT: Number 22 is CR 2011-138281, State of Arizona versus Jason Neil Noonkester. Appearances, please.

MS. GALLAGHER Jeannette Gallagher on behalf of the state.

MS. COREY: Susan Corey and Pete Jones for Mr. Noonkester. We waive his appearance.

THE COURT: Number 23, State of Arizona versus Ricardo Alejandro Ramirez. Appearances, please.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of Vince Imbordino.

MS. BUBLIK: And Terry Bublik on behalf of Mr. Ramirez along with Alicia Dominguez who is standing in for Lawrence Matthews, and he is present, in custody.

THE COURT: Number 24 is CR 2013-002559-002, State of Arizona versus Thomas Michael Riley. Appearances, please.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of Vince Imbordino for the state.

MR. CRAIG: Randall Craig and Benjamin Taylor present on behalf of Mr. Riley who is present.

THE COURT: Number 25 is CR 2012-138236, State of Arizona versus Dwandarrius Jamar Robinson. Appearances, please.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of Jay Rademacher for the state.

MS. HINDMARCH: Jaime Hindmarch on behalf of Mr. Robinson who is present.

THE COURT: Good afternoon. Number 26 is CR 2012-114731, State of Arizona versus Jarvis Jovan Ross. Appearances, please.

MS. WADE: Jesse Wade on behalf of Ryan Green for the state.

MS. COREY: Susan Corey for Gary Beren. I don't know if his client is present or not.

THE COURT: Mr. Ross, are you here?

(There was no response.)
MS. COREY: We would waive his presence.
THE COURT: Number 27 is CR 2010-007882, State of Arizona versus Jasper Phillip Rushing. Appearances, please.
MS. GALLAGHER: Jeannette Gallagher appearing on behalf of the state.
MR. CRAIG: Randall Craig and Steve Duncan on behalf of Mr. Rushing. He is present.
THE COURT: Number 28 is 2004-005523, State of Arizona versus Joshua Idlefonso Villalobos. Appearances, please.
MS. WADE: Jesse Wade on behalf of Ryan Green and Patricia Stevens for the state.
MS. BUBLIK: And Terry Bublik and Alicia Dominguez on behalf of Mr. Villalobos who I believe presence was waived.
THE COURT: And, finally, number 29, CR 2014-108856, State of Arizona versus Judith Elaine Walthers. Appearances, please.
MS. GALLAGHER: Jeannette Gallagher appearing on behalf of Laura Reckart for the state.
MR. CANBY: Jeremy Bogart and John Canby for Miss Walker. She is present, in custody.
THE COURT: Thank you. Before we start

talking about the substance, we have a request for a camera in the courtroom, as I understand it. It is a still camera that's in the back. I received a written objection this morning from -- or actually just before I came in from the defense. I think the objection is essentially that the defense wants me to order that none of the defendants be photographed; is that correct?

MR BEVILACQUA: On behalf of Mr. Lopez. I don't speak for anyone else.

THE COURT: Let me start out with the -- this on the defense. Does anybody have a general objection? Because I am going to entertain that specific objection in terms of photographing the individual defendants. Does anybody have a general objection to a camera being used to do anything other than photograph the defendants? In other words, anybody want to make an objection under Rule 122 and then we'll talk about the specific request not to photograph the defendants?

MR BEVILACQUA: Judge, I do have a general objection because I was informed today that the cameraman wants to take photographs of the security with their machine guns and their weapons and in case this is specifically linked with our client, Mr. Lopez, we don't really think it would be fair to have his name out there and shown photographs of guys with their flack jackets and

machine guns as if he's some sort of inordinate threat. I would object that they take photographs of security and the clients as well.

THE COURT: I don't, under Rule 122, have a concern about taking photographs of security. I don't think that creates prejudice. I don't think under the rule that's a viable objection, but I do think this -- it is a reasonable objection for this hearing under the circumstances to limit the media to photographs and not allow them to take photographs of the defendants.

But let me tell you in part my decision is because the request, at least to me, came pretty late in time yesterday, so I don't think the defense had fair time, and the rule contemplates there being a certain amount of time. In fairness to the media, many of these cases are already subject to a camera request that's been granted and the core policy generally is the request is granted. It follows along and it is a general grant.

This is a really unique hearing, and so for purposes of today, I'm comfortable limiting the still photography to anywhere other than any of the defendants; in other words, the -- and I'm directing the photographer -- and have you taken pictures yet of any of the defendants?

Specifically, what I am directing is that

those pictures not be utilized or disseminated outside of you. Mr. Kiefer is here. Hang on for a second.

Then for the time being, I'll allow there to be media, and this is without prejudice for the media to come in and argue that they can use them, but I don't think the defendants have had a fair opportunity to make the argument yet, and so for the time being at least, until further order, I'm directing you not to use photographs of any of the individual defendants.

Everything else is fair game in terms of the photography. And then I'm going to allow the media, should they want to come in and challenge that, to have an opportunity because I don't think we are in a position to have a fair discussion of that.

And Mr. Kiefer is here from the media, might want to say something. I guess I can take the position I want to hear from counsel, but I am okay since I think you made the specific request that we're here for.

Mr. Kiefer, anything you want to tell me about that?

MR. KEIFER: I'm not sure we'll be making a request saying we want to take photographs of people carrying weapons, but we photograph defendants in cases all the time and I would contend we have a First Amendment right to do so here.

THE COURT: I don't necessarily disagree with you. This is more about notice, and the ability -- two things. One, this is really a unique situation but second, the defense hasn't had the opportunity yet to really fully argue this, and I am not comfortable making a final decision. So I am going to err on the side of not for this hearing.

I note we have a hearing in two weeks, a hearing coming up where we're going to be, arguably, in the same position, and I will entertain before that -- if the media wants to file a motion to expand my order or if the defense wants to argue there should be nothing, can always file a motion between now and our next hearing and I'll hear you on that, but it needs to be filed in the next week so we can resolve it ahead of time, and I'm not spending our time here on that issue, but I felt compelled to address the issue here.

MR. KIEFER: Shall I call my attorney now?

THE COURT: Yes, although we're not going to resolve it today. I don't think, in fact, I would give them -- so I am not going to resolve it today. I will resolve it early next week if that's what you want.

THE COURT: Mr. Curry.

MR. CURRY: Your Honor, if I may, my request would be that if a decision is made to allow those kind of

photographs, that we get word of that decision before any deadline the Court sets for waiving our client's presence so we have the option -- if they're going to be photographed, that they have the option of waiving their presence.

THE COURT: Fair request, and we will make sure that any resolution of that issue happens before the deadline to decide whether there's going to be a waiver or not. We will talk about the mechanics of that at the end of this hearing after we talk about the issue of the evidentiary hearing. Okay. I think we have an understanding what we're doing or not doing.

MR. KIEFER: The video would be subject to the same rules?

THE COURT: I am okay with a video photographer, nothing of the defendants. Everything else is okay. You can set up in there if you want to set up in there.

MR. KIEFER: Just for clarification, you said -- before you said individual defendants. Can we take them as a whole or are we to take no pictures of defendants at all?

THE COURT: Correct. Your last statement is correct.

Okay. All right. Let's talk about what

we're here to talk about, and that is the defendant's motion for evidentiary hearing in support of motion to strike notice of intent to seek the death penalty.

At our last hearing, I directed a briefing schedule on this issue and I believe the parties have complied. Specifically, I received on March 25th defendant's motion for evidentiary hearing in support of the motion to strike notice of intent to seek the death penalty. On March 25th, I received what was called an initial notice of disclosure containing disks. Those disks contain spread sheets. I will talk in a few minutes about that. On March 27th, I received the state's response. On April 17th, I received defendant's reply in support of the motion.

My understanding of Mr. Bevilacqua's filings is essentially everybody is joining in whatever was filed by Mr. Bevilacqua and I focused on what he has given me. I have reviewed the disks, not all of them and not every page, but the 2011, I reviewed the entire spread sheet I am aware of what's in the rest of -- on the rest of the disks.

What I want to do first, I want to go through with the defense side and what I understand you to be telling me the information on the disks are presenting. In other words, I want you to tell me what you believe the

facts are from the disclosure that you produced. I want to make sure we're on the same page, and then we will talk about what we do with that so -- and maybe Miss Corey is the best person to do this.

MR BEVILACQUA: Ms. Corey and Garrett Simpson are the ones that compiled and led that side of this, so I am going to let her address the Court on that.

THE COURT: Miss Corey, here's what I understand the initial disclosure to reflect: From August 2nd, 2002 to December 31st, 2012, there were 870 cases in which an adult was charged with first degree murder in Maricopa County. You and/or your team could not get documents for four of those cases. You have analyzed 866 cases. In those 866 cases, there was one at least one statutory aggravating circumstance pursuant to ARS 13-751(F) present in 856 of the 866 cases. You broke them down by year. This includes 100 percent of the cases filed in 2002; 100 percent 2008 and 2009; is that correct?

MS. COREY: Yes, Your Honor, that's correct, and the ones that we did not -- were not able to analyze, we could not analyze them because they were sealed. I know at least one of those, possibly two of those were capital cases so, of course, those would have had aggravators.

THE COURT: You're speaking of the four

cases that were identified; is that correct?

MS. COREY: Yes, yes, judge. We, Garrett and I, analyzed, I believe, 11 years of what was excluded by our expert. From those 11 years, we analyzed all of those cases that were in the spread sheets, but our expert only excluded all the juveniles and our expert also excluded every case that predated the change in the statute which was August 2nd, 2002. So that's what you have before you.

THE COURT: So it is clear, you're asserting that 870 -- 870 cases are the entirety of the cases in which a defendant was charged with first degree murder in Maricopa County from August 2nd, 2002 to December 31st 2012?

MS. COREY: No, we are are not asserting that. We analyzed every first degree murder case. This is what happened: We did a public records request through Rich Robertson to the Maricopa County Attorney's Office for a list of their first degree murder cases. From that list -- we're relying on the material that was provided by the county attorney's office to Rich Robertson. From that list, we analyzed every first degree murder case, but the 866 cases that comprise the study are the ones that were without the juveniles and the ones that predated 2002, the change in the statute.

The reason that's significant, judge, is because some of the cases were cold cases that were charged 20, 30 years after the event. Those cases were not included, but we did analyze them and the Court can see that most of those cases, if not all of those cases, also had aggravating factors. They were just not analyzed by our expert. We looked at them; the expert did not.

THE COURT: So what number of cases are we talking about that fall outside of the 870? Do we have an idea?

MS. COREY: What our expert will testify is that of the 866 cases that she is looking at for her study, ten of those didn't have aggravating factors. It is our contention --

THE COURT: I know that. I am just -- I want to make sure I understand what the universe is, and again, going back to -- I am trying to determine as best I can how many of the first degree murder cases between August 2nd, 2002, and December 31st, 2012 are captured by the 870; that is, are there others out there? And you seem to suggest that there are, and I am not entirely clear on how many and how they fall.

MS. COREY: Judge, here's the problem: There are others out there but our expert excluded some of those. The Court can look at them. They are in both the

summaries and in the substantive documents that we provided to the Court. Both of those things are on those disks, so the Court can look at those if they want, but for purposes of our expert, the ones that she looked at are the 866 cases that we're talking about that excluded the juveniles, that excluded the ones that predate the change in the statute.

THE COURT: So the only exclusions are juveniles and the predating the statute?

MS. COREY: Yes, Your Honor.

THE COURT: That's what I was asking. In a very important way, that's what I wanted to make sure. Let me ask you this: If a case was dismissed and then the defendant re-indicted for the same offense, did you count it twice? Looks to me like you --

MS. COREY: We did not, judge. We tried to catch those. It may have been they were not caught. We tried to catch those and our expert did not count the dismissed cases; that's also true.

THE COURT: I will tell you that in looking at 2011, I see there are at least two errors that do not go to the essence of your argument for the Franklin case and the Foote case. The notation is that the plea stipulations was to natural life and I know in both cases the plea stipulation was not to natural life. It doesn't

affect what we're doing here. I have a note there were a couple mistakes that I saw in my review. It does not affect what my determination is going to be here or how I treat the evidence for now.

Okay. Let me shift off from what it says. Mr. Crocker.

MS. COREY: Judge, we do want to point out, Your Honor, that we are not conceding the ten that the expert did not find an aggravator because of F-13 and the breadth of that aggravator.

THE COURT: Well, I mean, you're presenting to me and I am going to accept what Professor Spohn -- the stat that she provided was 856 out of 866 and there were four other cases out there. That's what I am working with, and so that's what I want to talk about.

I guess from my perspective, I am struggling with the argument that was made by the defense that refusal to allow a hearing, an evidentiary hearing, is akin to a refusal to allow a hearing on the constitutional claims. I don't see that, and the cases that you cited don't say that. None of the cases are even close, as the state pointed out; they're not, and I have reviewed them and we can go through them. I am not sure it is a worthwhile exercise I am giving you a hearing on the claim if, in fact, I am assuming the facts that you want to

present for purposes of this argument only to be true. From my perspective, there is nothing to be gained by an evidentiary hearing when I am assuming that the arguments or the allegations you're going to make in the evidentiary hearing is true. I am going to adopt at least -- at least I am planning to adopt for purposes of our argument on the 8th the statistic that is cited by Professor Spohn, and I am going to assume that to be true.

I am specifically, as I did before, allowing the state to say we object to that; we don't agree, but that's a dispute that I would resolve later depending on what would happen down the road.

Right now, to me, it makes no sense for me to have an evidentiary hearing to let you argue facts that I already accept. In other words -- and, in fact, the Court of Appeals said this in connection with Mr. Gittens' appeal in our previous hearing. The Court of Appeals said, addressing the lack of an evidentiary hearing in petitioners' claim, appellate review is illusory if there is no adequate record made in the superior court. The superior court considered the documents petitioners filed, both the actual exhibits and summaries of those exhibits, and assumed as true all of the petitioners' factual submissions when ruling on the motion. Petitioners have failed to show how this record would make this appeal

illusory. I think we're in the same place.

Tell me how we're not in the same place, I guess, is my question to Mr. Bevilacqua or anybody who wants to handle that over there. Mr. Crocker.

MR. CROCKER: Judge, really, assuming it is one thing, but actually have it as true is another. I think it is critical that we be allowed to show that our data is factual in nature. When you read the state's pleadings, they basically talk out of both sides of their mouth. What they say is, one, the data is questionable. In their underlying pleadings, they question it. They cite a couple of examples where typos were made, the age of a child, as if that would make some kind of difference; it does not, but they point out and they say therefore our data is questionable. So the state's not accepting our data as being factual to support our constitutional claim.

The other issue we're here for today is obviously our right to the hearing, the necessity for the evidentiary hearing. We feel -- the defense feels that it's necessary to establish the data as factual; not just assume it is factual, but establish it as factual. If you're telling us you looked at our data and you find as a matter of law, the facts have been established as true, you're not doing that.

THE COURT: No, I am not doing that. I am

doing exactly what I did before and the Court of Appeals agreed with me; that there's no utility to an evidentiary hearing from a legal perspective when I am assuming, for purposes of considering the legal argument, that the facts you're presenting are true; that if I assume those facts are true and make a legal ruling accordingly, we're not going to go through an exercise that we need not have to go through and does not have a utility. That's what I'm saying, and there's no case -- I don't see a single case that you cited or I am aware that says you have a right to an evidentiary hearing to establish facts that the Court already accepts.

Is there a case out there? You didn't cite one.

MR. CROCKER: You're not accepting them. You're not accepting the facts. You are telling us you're assuming them to be true. That to me, to the defense, is not the same as saying they are true. Just assuming something is true, albeit for argument sake for a particular hearing which could later be questioned as being true or not is not the same as saying something is true. When -- normally when a statute is challenged, the review at the higher courts is de novo.

We all understand that this is a unique situation in that we have factual data underneath that

supports our challenge to the statute, and so if that we feel that it's necessary to actually have the hearing, it will only take half an afternoon anyway to actually establish the factual basis for our hearing.

At this time, I would like to ask the state does the state stipulate to our facts as being true?

THE COURT: No. I will ask. You don't ask the state anything. I --

MR. CROCKER: Please ask the state then.

THE COURT: I will talk to the state then. We need to have an understanding of how we're proceeding, I guess my question and my belief is, and you're not telling me anything different. There is not a case out there that says there's a constitutional right to an evidentiary hearing to establish facts that the Court already accepts.

I get and agree with your concept that it's different than me saying I accept it for purposes of the hearing and I am making a legal finding. I am not making a legal finding. I know you want a legal finding; I understand that and I am not surprised by that. That doesn't mean you're constitutionally entitled to it. I don't think you are. There is not a case that says you are. The cases you cited aren't even in the ballpark for saying that, and from my perspective, your assertion that

we can do it in half a day does not -- I don't think you're even close.

MR. CROCKER: You want to go through the three cases that the state cites in their response pleading saying that we're in error? I can comment on those.

THE COURT: You want to talk about the three main cases? You rely on *Panetti*, *Hahmdi* (phonetic) and *Matthews* because they are nowhere on point. If you can convince me that somehow any of those three cases or any of the other cases begin to suggest you're entitled to an evidentiary hearing, I am happy to talk to you about them but they don't.

MR. CROCKER: Well *Matthews v. Eldridge*, the issue there was that the state alleges they did not require an evidentiary hearing while respondent was challenging constitutionality of the determination of benefits procedure. The facts of that case were benefits, whether or not there was benefits to be had. Nobody in that case was challenging that that was a fact that the Court accepted as true, not for -- didn't assume it was true for sake of argument was true. What they were questioning was whether or not there was a procedure to challenge that.

So that case doesn't help the state. That

actually helps us because in that situation, the facts of that case that gave rise to the claim were true. Here we don't have that concession by the state and we're not getting that concession from you.

THE COURT: I don't think *Matthews* helps you. *Matthews* simply says in a claim for disability benefits, a recipient is not entitled to an evidentiary hearing because the administrative procedures are adequate. That's what it says. So I don't think that that helps. It does have some framework for an analysis of when evidentiary hearings are necessary; it talks about that, but the resolution of that case doesn't help.

MR. CROCKER: They were talking about whether or not there was adequate procedure to address the issue of benefits. The benefits were -- the facts -- the procedure was the process. The facts of benefits was not in question in that case. The data in our case is in question because you won't accept them as true and the state's not stipulating to them as true.

THE COURT: I don't think the case says I can't make a legal determination based on facts I assume to be true for purposes of this argument. In fact, I would posit to you that it happens all the time in courtrooms everywhere that the judge says I will assume these facts to be true; is there a legal issue I can

resolve? And if it becomes relevant, then we go back and argue about the facts. That happens all the time and it is a matter of judicial economy.

MR. CROCKER: I understand. I don't want to waste time, but that's -- in my mind, that's circular. You will assume they are true until we make our argument, our legal argument attacking the statute, and then if we're successful there in raising the colorable claim, you will then go around and go back and look at the facts to see if they actually are true.

THE COURT: Yes.

MR. CROCKERL: Why don't we do that now?

THE COURT: It's not a matter of a half day hearing. You can say you can do that in a half day. I don't think in my view we're going to be anywhere near a half a day, and I don't think we have that hearing to fight about that until I determine whether it really matters or not; that is, if what you say is true has any legal significance. If I say it doesn't, then there is no need for us to do it, and from my perspective, that dictates the result that we wait and see if I believe that there's a legal significance to those numbers.

But for purposes of the argument, I assume that those numbers are true and that's why at the beginning I wanted to make sure I understand them and I

would utilize them.

Now I will talk to Miss Gallagher about the state's view because I think it needs to be on the record what the state's view is, and I want to make it clear that I understand the state is willing to proceed with this argument, with me assuming those facts to be true, and we're not going to center the legal argument on whether those facts are true or not. We're going to assume that they are true, and I am going to give the state obviously the ability to then come in and later object or otherwise argue that they're not. That's what I plan on doing. That's what we did last time when we had similar issues. From my perspective, that makes sense. Let me get the state's view.

Miss Gallagher, do you have any issue arguing along the lines that I just described?

MS. GALLAGHER: No, Your Honor.

THE COURT: That was fairly succinct.

MR. CROCKER: What was that?

THE COURT: I said do you have any issue arguing along the lines that I described and the answer was no.

THE COURT: I think from my perspective, that's the way to do it. I was open to some case, some principle that told me that this needed to be resolved now

in order to protect a constitutional right, and I am not seeing a case that tells me that; judicial economy is not telling me that. I don't agree this is a half day hearing. Based on what I am seeing, I think it could be far more, and from my perspective, the Court of Appeals affirmed that line of thinking last time that we were up there, and so everything is telling me from my perspective that we don't have the evidentiary hearing first.

MR. CROCKER: Well, in our initial motion requesting -- addressing this issue, we cited additional cases, *Fuentes v. Shevin* 407 US 67, a defendant has a right to be heard even if the Court believes his claim is invalid, and it seems to me, *Shevin* I think -- it seems to me you're not there. You're not saying our claim is not valid yet; you're not stating it is valid. You're assuming it is for argument's sake. That's not good enough for the defense because we have to be able to establish -- in anticipation of you denying our motion, we have to establish a way of presenting facts to the higher courts. What's the factual finding that the courts are going to use that the trial court just merely assumed that the facts were true?

THE COURT: You are going to be in a position, the position you don't like, where it's possible that the reviewing authority could come to a conclusion

that your argument is valid but say you need to go back and show that factually, yes, and I know that puts you in a position you don't want to be in.

MR. CROCKER: I guess just addressing the judicial checkpoint, that's kind of my secondary point or the third point here. If that's a possibility that they send it back down for further proceedings and/or you're telling us that if on May 8th we come back and make enough -- strong enough oral argument on the legal merits, you decide you want to hear facts, we're coming back for facts. I guess for judicial economy, why don't you grant us the hearing; we will establish the facts and then we can proceed with a clear-cut record for every single defendant on up.

THE COURT: Because there is a more direct route to judicial economy and that is determine whether we need it or not before we have it, and from my perspective, that's the way we ought to proceed.

MR CROCKER: I understand that, Your Honor, but, then again, when you read *Kessen v. Stewart, 195 Ariz. 488,* the Court said as a result, parties must be permitted to develop both the law and the facts in order to meet the due process protections, and that's what we're claiming here, that due process has been violated; our clients' due process rights are violated because the

statute's unconstitutional and we have an absolute right to establish the underlying facts that establish the underlying facts, not just say, judge, please assume our facts are true. We have a right to establish those facts regardless of judicial economy, and I am -- judicial economy -- I am not trying to be flippant here, but whether it takes a day or two hours, whatever, we have an absolute right to establish those facts so that you can make the determination for the higher courts these facts are true; the trial court finds these facts are true or the trial court finds these facts are not true. Then they will do the de novo review on the statute challenge and they will look at the facts that you found to determine whether or not they support that constitutional challenge, not the facts that you just assume are true, because that's not good enough.

THE COURT: I respectfully disagree. I think you've got a right to be heard and I am hearing you on both the facts -- I am assuming the facts and I am hearing you on the law. The cases that are cited are cases in which the Court didn't hear defendants at all. They didn't give them a hearing. They didn't let them make any kind of argument or establish the facts for the law necessary for them to get relief. I am letting you provide all the facts and all the law necessary to get the

relief. I am simply waiting on the proof of those facts for the legal argument which I, again, believe is something that occurs frequently and from my perspective is the appropriate course.

MR. CROCKER: Judge, again, I guess I just disagree with what you're saying about the cases we cited. The cases we cited establish a couple things: One, that there was a right to some kind of hearing, but in those cases cited, the reason they didn't get hearings is because the underlying facts were not in dispute.

THE COURT: That's actually not true. *Panetti v. Quarterman*, that's completely different. In the *Panetti* case, the Court failed to hold a competency hearing and simply ruled that the defendant was competent to be executed and didn't essentially have a hearing to receive the information the defense wanted to provide.

MR. CROCKER: Wasn't the issue in *Quarterman* the fact that the evidence was not an issue; it was the means of presenting that evidence that was at issue?

THE COURT: But see the Court didn't even come close to accepting the evidence that was presented by the defense, and they did -- the Court didn't follow the basic procedures mandated by the *Ford* case. That was the issue that the Supreme Court had in *Panetti.*

We can joust about the cases. I don't think

you're going to be able to turn me on my view that the cases don't really get you there. I can't find a case that says that constitutionally I am required to do what you want me to do.

I get the utility, to some degree, of a hearing in establishing facts so it is clean going forward, however far it goes, but from my perspective. I do think that the appropriate course here is for me to say I am assuming these facts to be true. If they're true, is there a constitutional violation or is the statute constitutionally infirm? And I think I can make that analysis based on what you have given me. You've given me enough concrete information that I can do that.

MR. CROCKER: So what you're telling us is the Court, as it sits here today, is going to assume as true that in 98.8 percent -- and I am not making that figure up. That's our expert's figure. In 98.8 percent of cases since 2002, as analyzed, to 2012 -- and there will be more coming because it is an ongoing process -- 98.8 percent of the time, the state could have alleged an aggravator; that 13-751, et al is so broad, that in 98.8 percent of the cases during that ten-year period, 11-year period, the state could have alleged death in many of those cases. They did some; many of those cases they chose not to. That's purely prosecutorial discretion. I

am starting to get into the May 8th argument. I want to make sure that's what you're going to do. You're going to accept those facts as true to make your ruling?

THE COURT: I was with you until the commentary part. If you want to go back to the facts, the facts that you just cited and the facts that Professor Spohn alleges to be true, I am accepting. So when we argue in two weeks, I will be asking both sides to tell me why the statute is or is not overly broad, and I am going to use those statistics, that information, yes, is the answer to the question.

MR. CROCKER: I think we're just -- we're beating a dead horse here. So just for the record, would this Court entertain a stay of all these cases so we can address the issue of whether or not we're entitled to an evidentiary hearing with the higher courts?

THE COURT: I will not. I am denying a stay. I am taking that as a motion for a stay.

MR. CROCKER: I would make that request on specifically behalf of Macario Lopez and --

THE COURT: I am assuming that all defendants are joining that motion for a stay. Anybody disagree back there before I lump everything together? Everyone is requesting a stay and I am denying that as to all defendants.

So the position this leaves us in we're coming back in two weeks to argue the merits, and at that time, I expect to be able to at least tell you what my ruling's going to be. I will likely follow again with a minute entry, but let me see how it goes, but I will likely rule at that time.

Mr. Bevilacqua.

MR BEVILACQUA: With regard to the disks that you did receive, we're asking you make them a part of the record in Mr. Lopez's case in the 2011 cause number and that the Court make some ruling that these are, in fact, the data that we've submitted upon which the basis of the evidentiary hearing rests, so that there is a record going forward at least that the data was submitted.

THE COURT: Did you not file the initial notice of disclosure? I have got you as filing it.

MR BEVILACQUA: I don't know that we have specifically filed what would be exhibits. We're asking the Court to mark those as exhibits so that they are part of the record of this case. I am not sure how the other defendants will have to handle their own records. I think they may need to either join in or do their own filing in their own cases.

For Mr. Lopez, we want that filed as an exhibit for this motion and part of the record that will

go forward here.

THE COURT: I want a process by which these records are part of the record for each case, and I am open to the best process to do that, so I will work with my clerk to make sure that's the case, but I do -- I have obviously the disks that were submitted and my intent would be that they would be part of the record in each case.

MR. BEVILACQUA: I am also asking you specifically approve the filing in that format, that digital format, otherwise we would have boxes.

THE COURT: I am comfortable with the filing in the digital format. Any reason to disagree from the state's perspective?

MS. GALLAGHER: No, Your Honor.

THE COURT: Miss Corey.

MS. COREY: I would just move to allow each one of the joined defendants to submit the disks and the report of the expert and admit them into evidence in their own cases.

THE COURT: I agree. For appellate purposes, we need to do that, because each case is going to have its own course and if we don't do that, it creates a problem. It is ordered, I think, as to all 29 defendants, and a note to the attorneys: You're going to

have to submit them. Some have not, some have, but not all.

I am directing, first of all, if you haven't already that the defendants all submit the disks that were attached to defendant's initial notice of disclosure dated March 25th initially by Mr. Bevilacqua and Mr. Crocker; that they all be submitted and that they will be considered part of the record for each case.

MS. COREY: They will be admitted into evidence?

THE COURT: And they will be admitted into evidence subject to, of course, the discussion that we had.

MR BEVILACQUA: I think for the record, too, we gave each prosecutor one set of the disks, whether they work on one or three or four cases, and I believe we gave each defense team a set of disks so they will be responsible for making copies to submit to the Court in their own cases.

THE COURT: Any issue with production from the state's perspective?

MS. GALLAGHER: No, Your Honor. Can I say something else besides no, Your Honor?

MR. CROCKER: Just as a matter of housekeeping, we filed an additional pleading, ARS 12-1841

notice of claim. Because this is a constitutional challenge to a statute, we alerted the Speaker of the House, President of the Senate and the Attorney General's Office on behalf of Lopez. We filed that with Mr. Lopez's trial judge, Judge Stephens. I don't know if you've seen that.

Just for the record, we have done that once. We have all the pleadings. We sent them the entire packet. We have not heard from the AG's office or -- no. We have heard from the House or legislature, and I assume every other defendant's attorney here joins in that process because the statute requires notice to those agencies.

THE COURT: I assume that all the defendants are joining in that notice and that you have filed that notice.

So, okay, we're going to come back in two weeks. Anything else we need to talk about from the defense perspective before we adjourn for two weeks?

MR BEVILACQUA: We have it set for 1:30?

THE COURT: We're going to talk in a minute about appearances. We do need to address that.

From the state's perspective, anything we need to talk about?

MS. GALLAGHER: No, Your Honor.

THE COURT: I am anticipating we may have a hearing regarding camera and the extent of the camera access. Let's talk about deadlines because there was, I think, a reasonable request made by Mr. Curry to set a deadline so that defense counsel will know what the extent of the media's rights are going to be to photograph and that may affect whether defendants are at the hearing or not.

Let's do this: I am going to set some deadlines for there to be any filing relating to either an objection from one side or the other to the Court's standing camera request. And let's make it clear my standing camera request are that both still photography and video photography will be permitted, except that none of the defendants' images are to be shown collectively or individually. I am willing to have a hearing on that, and so what I am going to do is set a deadline of Wednesday of next week to file any brief.

My intent is then either -- I have got to look at my calendar and I am going to do that after the hearing either Thursday or Friday of next week, to set a hearing and make that determination, if I get a brief arguing that the Court's ruling is in error under Rule 122 or otherwise, and then we'll know at that time the extent of the photographic access.

So let's set a deadline. I want specifically all defense counsel to affirmatively inform the Court no later than Tuesday of next week, which would be April 28th, by the close of business whether the defendants wish to be personally present so we have a running list. If I do not get anything from you -- and I hope that either when you do determine you want them to be present or not, you let us know. I am going to default into they're coming and we're going to make sure they're transported by any means if I don't get anything from you.

MR. CROCKER: For the record, Mr. Lopez desires to be present.

THE COURT: Let's not do it here. Let's do it on paper. It is at least easier for me to keep track.

One more logistical thing for defense counsel. I know it is hard the way we've got everything put together, but you can't stop like last time and have conversations with your clients. We got to get them in and out, so please respect the deputies moving folks in and out and don't try and have a discussion that holds up that process. I would greatly appreciate you cooperating with that.

Okay. So we're adjourned for a couple of weeks and I will see everybody on March 8th at 1:30 -- 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 D

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

--oOo--

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CR 2011-002559-002
	)	CR-15-0411-AP
THOMAS MICHAEL RILEY,	)	
	)	
Defendant.	)	

Phoenix, Arizona

May 8, 2015

BEFORE: The Honorable JOSEPH C. KREAMER, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENT - MOTION TO STRIKE NOTICE OF INTENT TO SEEK DEATH PENALTY

PREPARED FOR:
APPEAL

(ORIGINAL)

Laura Ashbrook, RMR
Certified Court Reporter
Cert. No. 50360

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.

THE COURT: Number five, CR 2011-138856-003, State of Arizona versus Samantha Lucille Rebecca Allen.

Appearances, please.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of the state.

MR. BOGART: Jeremy Bogart and John Curry for Miss Allen who is present.

THE COURT: Number six, CR 2013-419619-002, State of Arizona versus Darnell Moses Alvarez.

Appearances, please.

MS. GILLA: Marischa Gilla for the state.

MR. ZIEMBA: Michael Ziemba and Anna Unterberger representing the defendant who is present, standing.

THE COURT: Number seven is CR 2012-007044, State of Arizona versus Ashley Denise Buckman.

Appearances, please.

MS. VALENZUELA: Kirsten Valenzuela on behalf of the state.

MR. CROCKER: Eric Crocker appearing for James Cleary and Gary Shriver on behalf of Miss Buckman who has waived her presence.

THE COURT: Eight is CR 2011-133622, State of Arizona versus Jesus Antonio Busso-Estopellan.

Appearances.

MR. BASTA: Eric Basta on behalf of the state.

MS. HUDER: Stacy Hyder on behalf of Mr. Busso-Estopellan, also standing in for Tonya Peterson.

THE COURT: Number nine is CR 2012-008340, State of Arizona versus Kurt Dustin Coleman.

Appearances, please.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of the Patricia Stevens for the state.

MR. NAVAZO: Greg Navazo standing in for Rick Miller. I waived his presence today. He's present obviously. If cameras are going to be allowed to photograph him, I would ask he be removed.

THE COURT: First of all, my order still stands that he's not to be photographed. We didn't get anything that indicated that his appearance was waived. If you want me to have him taken out, I would be happy to do that. I don't intend to allow anyone to photograph any of the defendants, so that's going to be my ruling. We did have a motion from the media. So in light of that, do you want me to have him taken out?

MR. NAVAZO: He can enjoy the amenities while he's here.

THE COURT: CR 2011-155640, State versus Corey Rasean Daniels.

Appearances.

MS. GILLA: Marischa Gilla on behalf of the state.

MR. PARKER: R.J. Parker and Alan Tavassoli for Mr. Daniels who is present in the jury box. Good afternoon.

THE COURT: Number 11, CR 2010-168096, State of Arizona versus Craig Michael Devine.

Appearances please.

MS. GALLAGHER: Jeannette Gallagher on behalf of Vince Goddard for the state.

MR. KOESTNER: Steve Koestner and Bruce Buck on behalf of Mr. Devine. He's present, in custody.

THE COURT: Number 12 is CR 2010-137021, State of Arizona versus Victor Hernandez.

Appearances, please.

MS. GILLA: Marischa Gilla appearing for Susie Charbel on behalf of the state.

MR. COTTO: Brandon Cotto for the defendant.

THE COURT: Number 13, CR 2010-007912, state versus Darnell Reuna Jackson.

Appearances, please.

MS. VALENZUELA: Kirsten Valenzuela on behalf of the state.

MR. TAVASSOLI: Alan Tavassoli and R.J.

Parker on behalf of Mr. Jackson who is not present, waived his presence.

THE COURT: Good afternoon. Number 14 is CR 2010-048824, State of Arizona versus James Clayton Johnson.

Appearances, please.

MR. LARISH: Kristen Larish on behalf of the state.

MR. JONES: Peter Jones for Mr. Johnson who's not present, presence waived.

THE COURT: Number 15, CR 2013-001614, State of Arizona versus Moises Hernandez Lagunas.

Appearances, please.

MS. GILLA: Marischa Gilla for Susie Charbel on behalf of the state.

MS. HYDER: Stacy Hyder standing in for Taylor Fox and Tonya Peterson on behalf of Mr. Lagunas whose presence has been waived.

THE COURT: Number 16, 2013-002559, State of Arizona versus Dennis Michael Levis.

Appearances.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of Vince Imbordino for the state.

MR. KOESTNER: Steve Koestner and Bruce Buck on behalf of Mr. Levis who has waived his presence.

THE COURT: Number 17, CR 2011-007597, State of Arizona versus Macario Lopez, Jr.

Appearances, please.

MS. GALLAGHER: Jeannette Gallagher appearing on of behalf of the state.

MR. BEVILACQUA: Gary Bevilacqua on behalf of Mr. Lopez who is present.

THE COURT: Number 18, 2013-110974, State of Arizona versus Richard Molina Luzania.

Appearances, please.

MS. WADE: Jesse Wade on behalf of the state.

MR. GLOW: Thomas Glow for Mr. Luzania, who has waived his presence.

THE COURT: Number 19 is 2013-458974, State of Arizona versus Alex Anthony Madrid.

Appearances.

MS. GILLA: Marischa Gilla for Susie Charbel on behalf of the state.

MS. FALDUTO: Bobbi Falduto and Angela Walker present for Mr. Madrid who is in the jury box.

THE COURT: Good afternoon. Number 20, is CR 2012-133415, State of Arizona versus Joseph Michael Matthews.

Appearances, please.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of Juan Martinez for the state.

MR. CURRY: Good afternoon. Lisa Gray and John Curry for Joseph Matthews whose presence has been waived for purposes of this hearing.

THE COURT: Number 21, 2013-004357, State of Arizona versus Robin Leroy McJunkin.

MS. GILLA: Marischa Gilla appearing for Susie Charbel on behalf of the state.

MR. BLIEDEN: Larry Blieden and Jennifer Roach for Mr. McJunkin who is present.

THE COURT: Number 22, CR 2014-128973, State of Arizona versus Gary Michael Moran.

Appearances, please.

MS. GALLAGHER: Jeannette Gallagher on behalf of Patricia Stevens for the state.

MS. FALDUTO: Bobby Falduto and Angela Walker on behalf of Gary Moran who is present in the jury box.

THE COURT: Number 23 is CR 2011-138281, State of Arizona versus Jason Neil Noonkester.

Appearances, please.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of the state.

MS. COREY: Susan Corey and Pete Jones for

Mr. Noonkester. We waived his presence.

THE COURT: Number 24 is 2013-462024, State of Arizona versus Ricardo Alejandro Ramirez.

Appearances, please.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of Vince Imbordino for the state.

MR. MATTHEWS: Lawrence Matthews and Terry Bublik on behalf of Mr. Ramirez whose presence has been waived.

THE COURT: Number 25, 2013-002559, State of Arizona versus Thomas Michael Riley.

Appearances, please.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of Vince Imbordino for the state.

MR. CRAIG: Randall Craig and Ben Taylor on behalf of Mr. Riley who is present.

THE COURT: Number 26, CR 2012-138236, State of Arizona versus Dwandarrius Jamar Robinson. Appearances, please.

MS. GALLAGHER: Jeannette Gallagher appearing on behalf of Jay Rademacher for the state.

MS. HINDMARCH: Jamie Hindmarch on behalf of Mr. Robinson who is present.

THE COURT: Number 27, 2012-114731, State of Arizona versus Jarvis Jovan Ross.

Appearances, please.
MR. GREEN: Ryan Green on behalf of the state.
MR. BEREN: Gary Beren, Your Honor, on behalf of Mr. Ross who is present, in custody and standing in the jury box.
THE COURT: Number 28 is 2010-007882, State of Arizona versus Jasper Phillip Rushing.
Appearances, please.
MS. GALLAGHER: Jeannette Gallagher appearing on behalf of the state.
MR. CRAIG: Randall Craig on behalf of Mr. Rushing who is present in the jury box.
THE COURT: Number 29, CR 2014-005523, State of Arizona versus Joshua Idlefonso Villalobos.
Appearances, please.
MR. GREEN: Ryan Green on behalf of the state.
MR. MATTHEW: Lawrence Matthew and Terry Bublik on behalf of Mr. Villalobos whose presence is waived.
THE COURT: Number 30, 2014-108856, State of Arizona versus Judith Elaine Walters.
Appearances, please.
MS. GALLAGHER: Jeannette Gallagher on

behalf of Laura Reckart for the state.

MR. BOGART: Jeremy Bogart and John Canby on behalf of Miss Walters who is present.

THE COURT: Good afternoon. Thank you. Okay. Let's talk a few preliminary things before we talk about the substance of what we're here to talk about. First of all, with respect to cameras, when we last here two weeks ago, there had been a camera request. In my view, it had been untimely. However, I allowed the cameras to photograph and video as long as there was no one in the box. I think there was an overall objection which I overruled, then a specific objection to any photography of any of the defendants in the box. I sustained that objection and told the media, whether it be still photographs or video, not to photograph anyone in the box.

I invited anyone, if there was going to be an objection to that, for the media to file any kind of motion objecting and ask me to reconsider. I received no motion. We're status quo from my perspective. Any cameras that are present are specifically directed that they are not to capture anyone sitting in the jury box, and I'm sure they will be able to follow that. That's my ruling and that's what I would expect.

Who's going to argue for each side? Let's

start with the state. I assume, Miss Gallagher, it is you?

MS. GALLAGHER: That would be me.

THE COURT: How about from the defense perspective?

MR BEVILACQUA: Gary Bevilacqua for Mr. Lopez.

THE COURT: I have obviously reviewed what's been filed, motion, response, reply. There were multiple joinders that were filed on behalf of the defendants. I have obviously considered the information that was submitted and forms the basis of defendant's request for an evidentiary hearing and, as I stated at the last hearing, I am accepting that information to be true for purposes of this hearing, so we will proceed in that way. I am mindful of the fact that I considered many of the same issues or at least the same type of argument in 2013.

I think we're in a position where we can get right to it, so what I intend to do is essentially ask some questions based on my review of the arguments that counsel have presented.

Miss Gallagher, let me start with you. First of all, do you agree that 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? Do you agree with that?

MS. GALLAGHER: Yes.

THE COURT: That being the case, tell me each and every way that the Arizona sentencing scheme accomplishes this.

MS. GALLAGHER: Starting with the distinction between first degree murder, second degree murder, manslaughter, negligent homicide. This is the first narrowing function. Secondly, the state, of course, has the discretion to file or not file death in consideration of potential mitigating factors; thirdly, the fact that the state cannot seek death against someone who is determined to be -- to have an intellectual disability narrows; that the state cannot seek death against someone who commits a murder when they were under the age of 18 narrows; the statutory scheme itself since the United States Supreme Court in *Greg* says that each aggravating factor cannot apply to everyone. Ours does not. Therein is the narrowing. Each one must either relate to the defendant or to a circumstance of the crime which all 14 of ours do.

Then the jury provides the final narrowing function. They have to not only find at least one

aggravator, they then have to look at whatever mitigation is presented and they make the determination as to whether this particular first degree murderer should be sentenced to death or not.

THE COURT: Let's talk about the six things you just described. Let's start -- I am going to jump around a little bit.

MS. GALLAGHER: To confuse me.

THE COURT: Sorry?

MS. GALLAGHER: To confuse you?

THE COURT: Probably not. I doubt I am going to confuse you. Let's start with the intellectual disability and under 18. Those are constitutional requirements that the courts have imposed on every state, correct?

MS. GALLAGHER: Yes.

THE COURT: So there shouldn't be a statutory scheme anywhere in the United States that would allow the death penalty to be assessed on someone with an intellectual disability or someone who is under 18, agreed?

MS. GALLAGHER: True and ours does not.

THE COURT: Let's talk about -- you told me that the state's discretion is part of the second one you identified. My reading of the case is that the narrowing

discussion always talks about the sentencing scheme. In other words, the sentencing scheme standing alone has to narrow. I am not disagreeing with you that the prosecutor has discretion within that scheme to make a decision about which case is charged, but the narrowing function that's contemplated, I think, in the cases has to start with and there has to be an analysis that's based entirely on the statutory scheme. Is that true?

MS. GALLAGHER: Sure.

THE COURT: I ask you that because you gave me that as a reason or ways Arizona narrows. Their argument is really separate from that. Their argument is -- and I agree with this part of the premise -- we have got to first look at the statutory scheme and the scheme itself has got to narrow, and so when we talk about the prosecutor's decision, that's not part of this discussion for me. It is a necessary part of the process, I agree, but when we're talking about the scheme narrowing, we're not talking about the prosecutor's decision, in my view. I know that they argue that the scheme gives the prosecutor too much discretion, but that's a necessary part of their argument; that there's not enough narrowing. From my perspective, that's not part of the discussion.

So from my perspective, you identified the distinction between types of murder as a narrowing

process. That, I agree, is clearly one that should be considered in terms of the narrowing analysis. You also -- and we're going to talk about that.

My perception is that's really -- their argument this time is really focused on that analysis and I am going talk to them about that in a minute.

I want to talk to you a little bit about the role of each individual aggravator, because I think from my perspective, I thought I read your papers to say that the required narrowing function only applies to individual aggravation factors, not collective.

MS. GALLAGHER: It does, and the state is unaware of a single case that says it's the whole thing. When a state chooses to use a sentencing scheme that identifies aggravating factors -- because not all states do, but those states that choose to do that, which Arizona does, the cases all talk about an individual aggravating factor cannot apply to every murder case.

THE COURT: Right.

MS. GALLAGHER: There is not a case that says the entire scheme can't apply to every one, and if there is such a case, nobody has cited it.

THE COURT: I think the language itself, even the cases you cite, say that, and that results that -- I will tell you that can't be the winning argument

here from my perspective because the cases simply don't support that. You cited several cases for that proposition. First of all, I agree with you an individual aggravating circumstance itself must narrow; there is no doubt, because by definition, if an individual aggravating circumstance can be read to incorporate all murders, then there's no narrowing.

But you must then go on to also say there has to be a collective analysis, because if you read even the *Lowenfield* language -- and what I read with you is the the captial sentencing scheme -- clearly, you can't, in isolation, say, well, one aggravating circumstance narrows and so the whole statute passes constitutional muster. That can't be right. I know that there's not a case, I don't think, that directly takes on that argument, but I would respectfully tell you I think that that's the case because it's so obvious that it's got to be a collective -- there's got to be a collective analysis. You can't simply say that, okay, one statute narrows and so the entire statute has a narrowing function. It's got to be a collective analysis.

MS. GALLAGHER: It is collective in that each one that the legislature decides to enact cannot apply to every person and it must relate to the specific defendant.

THE COURT: Agreed.

MS. GALLAGHER: And/or the circumstances of the offense.

THE COURT: Agreed.

MS. GALLAGHER: And all of ours do that.

THE COURT: But one of the cases you cite, in fact -- I think it's *Sands* -- talks about the Court -- it specifically said the Court noted that collective narrowing of the circumstances, the cases say it's got to be a collective analysis. I am troubled by the argument -- if it really is your argument; I think it is -- that the analysis of the aggravating circumstances stop when we see the individual circumstance narrows. The cases you cited were cases involving single circumstances. So the Court said does this circumstance narrow or not. If the answer is it narrows, it's okay; if it doesn't, then it's not, but you cannot leapfrog that into an argument that you don't have to consider the collective impact. To me, you have to. I take it you disagree with that.

MS. GALLAGHER: Judge, you're the one who has to -- I am telling you the state's position.

THE COURT: So that it's clear -- for appellate purposes, I want to make sure it's clear the state's position here today is I look at the individual

aggravating circumstances. If each individual aggravating circumstance itself narrows, then the statute passes, at least in terms of the aggravating circumstances, constitutional muster because the narrowing relates to each individual circumstance?

MS. GALLAGHER: As long as it relates to a specific defendant charged with first degree murder or it relates to the circumstances of the offense. It's not just one; it's both and that's the case of -- and I never can pronounce the name of that case correctly -- *T-U-I-L-E-A-E-P-A v. California.*

THE COURT: And I am I stuck on that argument, because I just don't think it's right. I don't think it is an individual analysis of the individual -- I take it back. There is an analysis of the individual but it moves on to collective. There's a collective analysis. So you have look at the individual but then you look at -- and their argument is if you look at them all in totality, you can't fathom a circumstance where a first degree murder would not have an aggravating circumstance and therefore the statute does exactly what *Lowenfield* says you can't do; it sweeps in everybody who commits a first degree murder. And if that was the end of the analysis, meaning when we're looking in isolation at the aggravating circumstances and there's no narrowing function

collectively, I think in isolation then they win. But it's not in isolation because you have an additional argument that the classification of murders is a narrowing function, and *Lowenfield* makes that clear.

So I am going to talk to them about that in a minute because they spend a lot of time trying to deal with that in their papers and explain to me that it's not really a narrowing function, and I am not sure they are going to get me there on that.

MS. GALLAGHER: We have another narrowing function, judge.

THE COURT: What is that?

MS. GALLAGHER: The *Enmund/Tison* finding.

THE COURT: That's a narrowing circumstance within the classification of first degree murder. It is -- it narrows the first degree murder.

MS. GALLAGHER: As to who's eligible, because if you aren't a major participant, under those requirements, you can't get it.

THE COURT: I agree with you, but that isn't an appropriate way to view the question whether there is a narrowing. That's why I think I am going to have a discussion on this side because we have to take that into account, but I will tell you that as to your argument relating to the specific aggravating circumstances, you're

not getting me there. I think there is a problem if we say that they're right, collectively, the aggravating circumstances don't narrow. I don't think I can say okay that's a narrowing function, because collectively they don't. What I can say, I'm pretty sure, is that there's a narrowing function relating to the classification of murder and then the Enmund/Tison further narrowing down the first degree murder; that that creates a narrowing function there.

I am going to talk to them about that. Let me shift over and talk to them about that right now. Okay. Mr. Bevilacqua, I know you spent a lot of time telling me about that narrowing and you can already tell that I essentially agree with part of your argument. And, again, let's make this clear: I am basing it on the statistics you gave me. So I am assuming those to be true, and from those statistics, I am not seeing meaningful narrowing when we're applying aggravating circumstances, but sure there is narrowing when it comes to whether we charge something as a first degree murder, second degree murder, manslaughter and we conduct the Enmund/Tison analysis, isn't there?

MR. BEVILACQUA: First off, there was first degree murder and second degree murder designations in the case -- in *Furman* as well, and although the precise

definitions may not be the same, that wasn't really a factor. We also want to point out that the distinction between second degree and first degree murder is often illusory with our fairly broad definition, as, by the case law, premeditation -- although we have a ruling from the Supreme Court that there must be actual premeditation, the time that it takes to premeditate is so short, that there's nothing that precludes the prosecutor from charging first degree in good faith.

I think that the crux of the motion is that this statutory -- I think when you were talking to Miss Gallagher -- the statutory scheme must narrow not each individual and that's not sufficient that an individual aggravator in and of itself does.

THE COURT: I agree with you.

MR. BEVILACQUA: I won't belabor that. Our statutory scheme doesn't narrow and preclude the prosecutor from seeking the death penalty. If they choose to file a first degree murder, there is very little to stop them from doing so other than their discretion in filing because the definition is so narrow as far as what is premeditation. Many second degree cases are filed that could be filed as first degree. That itself is discretionary to the state, and maybe that's a fine thing and there's nothing wrong with having that -- letting the

prosecutors have that discretion, but it doesn't narrow the class for purposes of the *Furman* analysis.

THE COURT: We know that *State v. Thompson* tells us that there has to be a meaningful distinction between first and second degree murder, and there is -- the case says it, so we know, at least under Arizona law, there is a meaningful distinction, according to the Arizona Supreme Court, between at least second degree and first degree premeditated murder. We know that. So that, to me, automatically said there is a distinction.

You tell me that, okay, if you really look realistically, they could charge it, but unlike the empirical data you gave me on the aggravating circumstances, you're just essentially talking about all these different situations without any empirical data telling me that every single second degree or most of the second degrees or who knows what percentage could be charged as first degree. To me, that's an unknown. There's got to be -- there is fairly -- some narrowing. The question is how much.

MR. BEVILACQUA: You can analyze a lot of this motion based on just looking at the statutory scheme on its face without even getting to the empirical data at this point. You can look at the statute itself, and I think the crux of the motion is that's really the place

that the narrowing has to occur. And I know the case law from the Supreme Court of the United States on down really doesn't focus on this, but the narrowing really needs to be at the inception stage of what cases can the prosecutor, in good faith, even seek the death penalty. Everything else is all just semantics.

By arguing that the government must make the finding that the person -- that the aggravator exists beyond a reasonable doubt, that narrows; it really doesn't.

THE COURT: I don't disagree with you. I believe that the narrowing has to come before the jury gets it. The jury -- it's got to be narrowed before it gets to the jury. The meaningful narrowing function we're talking about occurs before the jury gets it, but the cases make it clear it can occur at the time that we define what's a murder or the time we define what the aggravating circumstances are or a combination of both, and that's what the state's actually arguing here; that both essentially, the classification and the aggravating circumstances themselves, form a narrowing function.

What I am troubled by is that -- your -- what I am ultimately troubled by is the state's got a trump card and, to me, that's the *Hausner* case, and the Supreme Court has said so. We're going to talk about that

in a minute. Right now, we're talking philosophically about how we get there.

You're telling me you don't think there is a meaningful narrowing function. I know from my own experiences as a judge how many second degree murder cases I have had and how many of those second degree murder cases in my view couldn't have been charged as first degree, and you're not giving me anything other than logical arguments on some cross-over but no -- nothing enough for me to come back and say that there's no -- to even assess how much narrowing there is.

MR. BEVILACQUA: Let me try this approach then, judge: Would it be sufficient for the legislature to simply say we don't need to worry about aggravators as qualifiers because we already have narrowing by simply designating all first degree murders in Arizona, as the definitions exist, as eligible for the death penalty? If that's the Court's position, I would ask the Court to specifically state that that is sufficient narrowing.

Now, if the answer to that question is no, it's not enough simply to designate first degree and second degree murders as they're defined, then we must look at what else does Arizona propose to put forth that narrows that broad category of first degree murder sufficiently to meet *Furman*. The scheme they have come up

with is 751 aggravators under F-2. So F-1 through 14 are the aggravators, and as we put forth in the motion, those do little, if any, actual narrowing of that overly broad class of first degree murders. So that alone, I think, is -- second degree doesn't do it. First off, I think it is illusory. There is too much discretion on what to file. Even if it did distinguish, the category of first degree murders is still overly broad and the aggravators under 751 F don't do sufficient narrowing of that broad class.

THE COURT: My job is to follow the Supreme Court. I don't rule based on what I think the Supreme Court might do in terms of changing its opinion. We've got a footnote 2011 or '12, *Hausner,* that essentially says -- and I get it's in the footnote, but the footnote says we have considered it; we're considering that argument. They're dealing with exactly the same sentencing scheme, unlike *Greenway* because *Greenway* had ten. *Hausner*, we had all of them; we had all 14, I think, and so -- or 15, and the Supreme Court said we have considered it and we rejected it. They're telling me the answer is it's constitutional. How do I -- how do you expect me to go around that and say no; you know, if they really thought about it a little bit harder, they would find it's unconstitutional? That's not my job, is it?

MR. BEVILACQUA: Judge, I would put this forth, and what I expect from the trial court maybe isn't really what's at issue. What is at issue, which is our argument, for the record -- if I may, a little anecdote. Before the Supreme Court, there was an issue as to whether or not the presumption of death on finding an aggravator was valid to have and the Supreme Court cases throughout argue we reject that option. We reject that argument that the defendant claims the presumption, and as I went through those cases, it never explained why they rejected that argument. Did they reject it because there was no presumption or did they reject it because there is a presumption that it's constitutional? And I told the Supreme Court I looked at all your cases and you never defined that.

And that's what's happened here with *Hausner.* In *Hausner*, I think the footnote refers to *Sansing* which is a 2001 case, all right, and they relied on *Sansing*. Our complaint isn't about the statutes that exist in *Sansing*. Our complaint is about the statutes that existed in 2006 with the last two aggravators under which Mr. Lopez is charged. The Supreme Court has never analyzed why the statute as it existed in 2006, other than referring to *Sansing,* which doesn't apply, why that meets constitutional muster under *Furman*.

I understand the Court's position with precedent and how it must rule, but for purposes of this record, the Supreme Court's never ruled if the 2006 statute isn't overly broad on a challenge of the statutory scheme. We're not challenging individual aggravating factors.

THE COURT: But they have, with challenges to individual aggravating factors that have wound around this issue, whether it is the F-2 and 4, because in 4, they discuss the scheme and some other cases they have discussed, and I would assume the Supreme Court is aware of the collective impact when they're talking about individual aggravators.

MR. BEVILACQUA: They have touched on it. They have never analyzed it, and the challenges were always, from what I read, individual aggravating factors: The F-6 is too broad; the F-13 is too broad. They have said those individually aren't and they have not by dicta basically done the analysis of the statutory scheme under 751 F.

What they haven't had is the data you have now, and the data shows you that 98.8 percent of the cases and probably more -- we'll stick with that number because that's what's stipulated to for purposes of this motion. 1.2 percent of the cases are excluded out or narrowed out

by our statutory scheme which clearly doesn't even come close to *Furman* and what the rest of the cases require.

THE COURT: What about the narrowing function of the *Enmund/Tison* factors? Do you agree there is a narrowing function?

MR. BEVILACQUA: That's judicial, not statutory and, again, it doesn't preclude the prosecutor from seeking death. The narrowing function must be to the prosecution of the state to seek death, and there were public policy reasons to stop this at the beginning, obviously costs and so forth. But wherever you put the narrowing -- and the case that *Lowenfield*'s talking about, the jury finding the aggravating factor, what they are really talking about is you have to have a narrowing list of aggravators. If you use the aggravation scheme, you have to have a narrowing defined to exclude out cases, a sufficient number of cases. We don't exclude out nearly a sufficient number. If 1.2 is the number, whether you find that at the sentencing phase with the jury on phase two or at the filing phase in phase one, doesn't matter. It still has to be a narrow group of aggravators and ours is too broad.

THE COURT: Let me shift over to Miss Gallagher. Number one, I want you to address the argument if you look at second degree murder cases that could be

fairly charged as first degree murders, minimizing the impact and the related argument that would our scheme really be constitutional if that's the only narrowing and then we will talk about the footnote.

MS. GALLAGHER: Apparently, defense thinks it is easy to prove premeditated murder when we have to prove actual reflection. That is not easy to do, and many of the cases we deal with, particularly in the domestic violence arena, have to do with a sudden anger between spouses and the instant effect of that. That would be manslaughter, but many of our cases are.

There is the drunken argument. Somebody brings a gun to a knife fight and we end up with someone who's dead. Those people did not premeditate. They got angry and they killed someone so --

THE COURT: Would you agree that -- I think you would argue, would you not, that standing alone, the narrowing function at the charging stage or the definition stage would be enough of a narrowing function of the entire scheme, would be constitutional? I assume that's your position.

MS. GALLAGHER: Sure.

THE COURT: I know you disagree with me regarding the analysis as to individual and collective. So that we're clear, I want to make sure that I am not

asking you to abandon your view. So knowing that's your view, let's say that, surprisingly, at the end of the day, we can't focus only on individual; we have to look at the collective, whether the scheme collectively narrows, and the answer is the scheme does not collectively narrow. Pretend that's the case and that I am correct that we have to look there, and any argument that we focus on individual aggravators is legally incorrect. Let's pretend that's what actually happens.

If that's true, then are you comfortable telling me that doesn't matter, in terms of the constitutionality of the statute? At the definition stage, there is a narrowing and that in and of itself is sufficient? Is that what you believe?

MS. GALLAGHER: No, because then there's the jury part because the scheme requires them to look at the aggravating factor or factors that they find, look at any mitigation presented and make a determination whether the aggravating factors as far as --

THE COURT: Let's keep it down. Even I am listening to all the chatter over there. She's entitled to quiet while she argues. Go ahead.

MS. GALLAGHER: So they have to decide that the mitigating factors are sufficiently substantial to call for leniency. That narrows.

THE COURT: It does -- I'm sorry to interrupt. It does, but the cases are replete with references that before the jury gets it, there's got to be some narrowing. I am comfortable saying there's got to be narrowing. If there's no narrowing before the jury gets it, then there's not meaningful narrowing for purposes of our analysis here. I agree the jury has got a narrowing function. I said it.

MS. GALLAGHER: Judge, you want to put me in a box -- a lot of people would -- but I'm not going to go in that box because I think you have to look at the whole thing and that includes the Enmund/Tison part of it.

THE COURT: But they're right; that's a judicially created limitation.

MS. GALLAGHER: So is the definition of cruel, heinous or depraved because as our statute is written, that is unconstitutional.

THE COURT: I agree.

MS. GALLAGHER: The Arizona Supreme Court has said we're making it constitutional if the Court instructs the jury that it meets X.

THE COURT: And they said the same thing for the F-13, too, that there's got to be a limiting instruction but the genesis is still the legislature. It's still the legislature where we started. Yes, the

Court has to, for lack of a better term, fix it but it started by the legislator. There is some language, some narrowing function that comes from the legislature. So while I agree with you that the jury ultimately does narrow, what the cases tell me, I think, is that the jury's got to be given a class of cases which have already been narrowed by the legislature.

MS. GALLAGHER: And they have been because the defense has not cited a single case where all of our aggravating factors apply. So the jury is narrowed by the allegations in that particular case.

THE COURT: To me, that argument is wrong. They don't have to show me a case where all the aggravating factors apply. They just have to show me that an aggravator applies to every single possible case. To me, that's the way I decide whether there is a narrowing function. If they show me that in every single murder case -- or we're talking about first degree murder cases for purposes of this analysis -- there is a statutory aggravating factor, then to me, by definition, the aggravating circumstances collectively don't narrow and they don't have a narrowing function. That's what they were saying, I think, and I think if they're right, if they're right, there's got to be a narrowing function somewhere else.

I know you disagree with that because you don't consider the collective. I think -- respectfully, I think you're flat out wrong on that. I think the Supreme Court will say it, but I think you're right as to where the law is right now with respect to narrowing; that there is a narrowing function and the Arizona Supreme Court has directly noted, and I agree the reference is a pre 2005 case; that they have considered this and they don't find the statute to be infirm. To me, that's the guiding star that I follow.

We can talk about, well, it wasn't quite the same, but my job is to do what the Supreme Court tells me to do. So you can see where this is going, but from my perspective, I am really troubled by a lack of narrowing in the aggravating circumstances.

MS. GALLAGHER: And you were troubled by that the last time.

THE COURT: Yes, I was.

MS. GALLAGHER: And it's the same -- it's basically the same argument. What the Supreme Court is saying is the jurors have to be able to focus on something. They can't just go in there and say I don't like this guy; I am going to give him death. Our aggravating factors do that because only some of them apply in the cases, because not every single aggravating

factor applies to every defendant. So the jury is told you can only consider this one aggravating factor that you found or this two or five, however many the person has, as long as those factors apply to the circumstances of the offense or the individual defendant. So there is a narrowing, what they were requiring, so that the jury is not in there just arbitrarily saying I don't like you; I am going to give you death.

THE COURT: I agree that's part of it, but I think you're missing part of it. I think the law also says that the jury -- before the jury even receives it, the legislature says that there's a class of people where you're not even going to have to consider it because there's no aggravating factor; that there is a class of first degree murderers that are not subject to the death penalty. That's what I think has to help, and what they were saying is the statute doesn't say -- because the statute is so broad, there is -- there is no such statement about anybody not being eligible for the death penalty. In other words, everybody who commits a first degree murder, you're eligible for the death penalty, and that can't be the law, at least according to the defense, and some language in some Arizona cases suggest that.

You and I are on different wavelengths because I think there has to be narrowing somewhere else.

I think it is better than last time. Last time I asked you for an example of a first degree murder that didn't have an aggravating circumstances and you used me as the victim so --

MS. GALLAGHER: I thought that was quite a clever argument. As I pointed out to you last time, I had just finished trying a first degree murder case that had no aggravating factors because he shot a man in a Home Depot parking lot and there were --

THE COURT: Let's talk about that; this time not using me as a victim.

MS. GALLAGHER: Can I use another judge?

THE COURT: Don't use judges or anybody on that side of the room or anybody in the room as the victim. Give me a scenario -- we're not going to spend too much time on this. I do want to go back and talk about this a little bit. Give me a scenario where we have a first degree murder where no aggravating circumstances apply.

MS. GALLAGHER: I just gave you one.

THE COURT: Give it to me again.

MS. GALLAGHER: A man goes up to another man who he doesn't know in a Home Depot parking lot standing outside. He shoots him one time in the head. The victim didn't see it coming. He died. The defendant left.

THE COURT: Okay.

MS. GALLAGHER: And he wasn't on parole; he wasn't on release; he wasn't in jail; he wasn't in prison; he didn't use a stun gun. There were no other contemporaneous serious felony offenses. The victim was under 72 and over 12.

THE COURT: 12 or 15.

MS. GALLAGHER: 12. It narrows, judge.

THE COURT: I don't think that's narrow enough.

MS. GALLAGHER: I think I have, and he invoked, so we don't know what his reason.

THE COURT: We don't worry about that. Tell me where there is an aggravating circumstance in that.

MR. BEVILACQUA: I think the pointed -- she found the one scenario that kind of proves our point. There are very few of those that apply. We can think of maybe one or two others, but F-13 would apply, cold calculating, certainly no moral pretense or legal justification for shooting a person, and F-13 existed in 2006 as the statute we complain about. That itself may not be overly broad but in the entire scheme of things, the 14 aggravating categories -- I point this out -- because they were broad in some facets to each of the categories that probably wouldn't even apply today.

One thing I'd like to address, if I could, is the jury function.

THE COURT: Go ahead.

MR. BEVILACQUA: If we have a statute that does not narrow out sufficient number of first degree murder cases as eligible for the death penalty and then we have these list of aggravators as we have, what the legislature is really saying is that we have first degree murder and we have what's called a crime of capital murder. It just happened to -- pretty much capital murders include just about every possible first degree murder scenario. To come along and say, well, the jury has to find that aggravating factor is basically saying, well, if you win at trial on the charge of capital murder, that narrows it. Winning at trial can't be a narrowing function. If the defendants are found not guilty, I would concede the statute narrows it down because we don't execute the people found not guilty.

Justice Scalia made the point pretty clear in *Ring*. Call it aggravating factors, call it whatever, you're talking about an element of the higher crime, capital murder. That's why we need to set a narrowing function to preclude the state categorically from seeking in good faith the death penalty on a broader category of the aggravators than we currently have, and under the

facts under this motion right now, it only eliminates 1.2 percent, at least by the statistics we have found which is a great number of cases in the state and most of the cases in Maricopa County for that given period of time. So I think that's where we're at.

Again, we may be asking the Supreme Court to change its opinion, if that's what you're going to need, but I would ask that the Court, when it makes its ruling, that it sufficiently sets forth why it thinks it is narrowing or if it doesn't but it is relying on precedent, so if this thing goes up by one of the many cases here, that we understand what the issue is, and I ask that the Court put forth its findings as to what -- if it doesn't find narrowing but it is relying on the precedent, then state that or if the Court finds that there is narrowing, specifically what is the narrowing function and how that works from the legal standpoint, because under the facts of this case, 1.2 are only eliminated by the aggravating factors and, again, I don't think second degree gets us there. *Furman* had aggravated manslaughter which is the same as our second degree and that wasn't a factor to save that statute, judge.

THE COURT: Anything else from the state's perspective before I get to what my ruling's going to be and how it's going to be published?

MS. GALLAGHER: Well, if the Texas statute is constitutional and in Texas they define capital murder in such a way that it would encompass our first degree murder and every single one of those is a capital case and then they go to the jury and the jury has to decide, if that's constitutional, then clearly ours is.

THE COURT: Okay. All right. I am going to give you my ruling, but I going to follow with a minute entry like I did last time because I want the parties to have what I am thinking and have something for both sides to use going forward.

I am denying the motion. I don't think that's any mystery. First, you start with the proposition that statutes are presumed to be constitutional, so I start with that proposition. When I look at the argument, the overall argument, let me first say I am troubled by what I believe to be a lack of narrowing in the statute, and when I say statute, I mean scheme. The aggravating circumstances have evolved, especially since the F-2 aggravator was expanded and the addition of several other ones since the time of *Greenway*, since this issue was really considered by the Supreme Court to arguably involve the vast majority, almost all, first degree murders. I think that's problematic from a constitutional standpoint, because it is hard to fathom a factual situation in which

a first degree murder does not have an aggravating circumstance, and that's troubling from the Court's perspective.

Respectfully, I think the state's argument that as long as individual aggravators themselves narrow the class of persons eligible for the death penalty, then the statute is constitutional is just wrong. I don't think it is supported by any of the cases. No cases say that, and I don't think that that is what the law's going to be, and so if the state's taking that position, I don't think the state's right.

However, the Arizona Supreme Court has made it clear when they last considered this that from their perspective, the statute does perform an adequate narrowing function. I understand that this footnote cited a case that came from before recent changes or 2005 changes to the statute. However, my job is to do what the Supreme Court tells me to do and to follow what they say the law is and, to me, that's straightforward and that's what I need to do. Likewise, *Greenway* considered the issue as well.

Importantly for me is there is some narrowing that goes on at the stage where the case is either a first degree, second degree or manslaughter case. There is a narrowing function there. It's not clearly

been quantified, and the defense has given me no -- has not given me enough for me to be able to see there is no narrowing there. There is clearly some narrowing, and the Supreme Court is going to have to decide if that's enough narrowing. If there is more narrowing out there that I have missed -- and there is from the state's perspective, but from my perspective, there is some narrowing such that the statute based on what the Supreme Court has said -- and I note that there were at least two district court opinions saying the same thing -- that the statute does adequately narrow the class of defendants who are eligible for the death penalty.

I want to make it clear I am troubled by the direction we've gone and where we're at; I am, but my job is to follow what I think the law is and the law is pretty clear to me that the statute adequately narrows per the Supreme Court and they are going to have to be the one to say otherwise, not me.

MR. BEVILACQUA: May I ask are you troubled by the evolution of the statutory aggravating factors, not by where we've gone?

THE COURT: That's correct. I am troubled by the evolution of the statutory factors, not by where you've gone, to make that clear. That being said, my job is clear under the law and so for those reasons, I am

denying the motion.

I will follow with an opinion that probably hopefully more artfully states what I just said and it will come out shortly so that you have it in writing similar to what I did last time, but for purposes of today, the motion is denied. With that, what else do we need to talk about?

MR. BEVILACQUA: We would move for a stay of proceedings so we can appeal your decision, and I think I can make that.

THE COURT: I assume, absent someone telling me to the contrary, everyone on the defense side is joining the motion to stay, correct? It is ordered denying the motion for a stay.

Okay. Anything else from the defense perspective?

MR. BEVILACQUA: Nothing, Your Honor.

THE COURT: Anything else from the state's perspective?

MS. GALLAGHER: Are you going to more artfully say the state was wrong?

THE COURT: Probably it could be more artful, but ultimately you're right and you win, but you're wrong on an issue. I think at least my minute entry will say that. All right. Thank you, everybody.

(Whereupon, the proceedings in the above-entitled matter were concluded.)

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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