No.

In the

Supreme Court of the United States

CODY JAMES MARTINEZ, Petitioner

v.

STATE OF ARIZONA, Respondent

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

Petition for Writ of Certiorari

Dated March 22, 2021.

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CAPITAL CASE

Questions Presented For Review

I. Trial counsel only ever met with Mr. Martinez for a total of 1:08 in the 2-½ years preceding this capital trial.

II. Arizona used a flawed premeditated-murder verdict to render a flawed felony-murder verdict harmless, then used the flawed felony-murder verdict to render the flawed premeditated-murder verdict harmless.

III. Trial counsel was unaware at trial that pecuniary gain was one of the statutory aggravating factors that the State had alleged until after it was proven.

IV. Arizona has flatly rejected the well-established *Wiggins v. Smith*, 539 U.S. 510 (2003), *Williams v. Taylor*, 529 U.S. 362 (2000), *Kyles v. Whitley*, 514 U.S. 419 (1995), *Strickland v. Washington*, 466 U.S. 668 (1984), standard of cumulative error for ineffective assistance of counsel claims.

Table of Contents

Question Presented For Review i

Table of Contents ii

Table of Cited Authorities iii

Citations of the Official and Unofficial Reports of the Opinions and Orders Entered In The Case by Lower Courts 1

Statement of the Basis for Jurisdiction 1

Constitutional and Federal Provisions Involved 2

Statement of the Case 2

Argument

I. 1:08 of Total Time Meeting With a Capital Defendant Is a Complete Abdication of Trial Counsel's Responsibilities 4

II. Two Flawed Convictions Do Not Render Each Other Harmless 8

III. Trial Counsel Was Unaware That A.R.S. §13-703(F)(5) Pecuniary Gain Was One of The Aggravators 12

IV. Arizona Has Rejected The Strickland Standard of Cumulative Error Consideration of Ineffectiveness Claims 21

Table of Cited Authorities

CASES

Brown v. United States, 411 U.S. 223 (1973) 11

Frett v. State, 378 S.E.2d 249 (S.C. 1988) 20

Harrington v. California, 395 U.S. 250 (1969) 11

Herring v. New York, 422 U.S. 853 (1975) 20

Kyles v. Whitley, 514 U.S. 419 (1995).....22

Lockhart v. Fretwell, 506 U.S. 364 (1993).....22

Phoenix Metals Corp. v. Roth, 79 Ariz. 106 (1955) 9

Pizzuto v. Arave, 385 F.3d 1247 (9th Cir. 2004).....22

Schneble v. Florida, 405 U.S. 427 (1972) 1

State v. Armstrong, 208 Ariz. 360 (2004) 18

State v. Bennett, 213 Ariz. 562 (2006).....18

State v. Ellison, 213 Ariz. 116 (2006).....21

State v. Gendron, 168 Ariz. 153 (1991).....9

State v. Hughes, 193 Ariz.72 (1998).....21

State v. Lamar, 210 Ariz. 571 (2005) 18

State v. Martinez, 218 Ariz. 421 (2008) 9, 10

State v. Moody, 208 Ariz. 424 (2004) 18

State v. Prasertphong, 206 Ariz. 167 (2003) 19

State v. Rose, 231 Ariz. 500 (2013) 9, 18

State v. Sansing, 200 Ariz. 347 (2001) 19

State v. Spreitz, 202 Ariz. 1 (2002) 10

Strickland v. Washington, 466 U.S. 668 (1984) 4, 20, 23-24

United States v. Bagley, 473 U.S. 667 (1985) 22

Wiggins v. Smith, 539 U.S. 510 (2003) 22

Williams v. Taylor, 529 U.S. 362 (2000) 22

Yarborough v. Gentry, 540 U.S. 1 (2003) 20

STATUTES

A.R.S. §13-703 (F)(5) 3, 5, 12

A.R.S. § 13-751(F)(5) 3

Citations of the Official and Unofficial Reports of the Opinions and Orders Entered In The Case by Lower Courts

State v. Martinez, CR-20-0104-PC, (Ariz. Supreme Court, February 2, 2021) (order denying review from partial denial of Rule 32 Petition for Postconviction Relief);

State v. Martinez, CR-20031993, (Pima Co. Superior Court, March 3, 2020) (order denying guilt and aggravation phase postconviction claims);

State v. Martinez, CR-17-0225-PC (Ariz. Supreme Court, May 1, 2019) (postconviction order granting relief from preclusion of guilt and aggravation phase postconviction claims and denying State's petition for review of sentencing relief);

State v. Martinez, CR-20031993, (Pima Co. Superior Court, May 18, 2017) (order granting sentencing phase relief but precluding guilt and aggravation phase relief);

State v. Martinez, 218 Ariz. 421 (2008) (opinion on direct appeal).

Statement of the Basis for Jurisdiction

The order of the Arizona Supreme Court denying Petitioner's petition for review was entered on February 2, 2021. This Petition for Writ of Certiorari is timely filed within 90 days of that date, pursuant to Supreme Court Rule 13. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Pursuant to Rule 29.4, service has been made on the Arizona Attorney General.

Constitutional and Federal Provisions Involved

U.S. CONST. amend. XIV, § 1, provides in pertinent part:

> "… nor shall any State deprive any person of life, liberty, or property, without due process of law …"

U.S. CONST. amend. VI provides in pertinent part:

> "… nor shall any State deprive any person of life, liberty, or property, without due process of law …"

Statement of the Case

On May 9, 2017, the trial court granted postconviction relief on grounds of penalty phase ineffectiveness of trial counsel. On March 3, 2020, the trial court denied the guilt phase and aggravation phase claims. The total time of 1:08 minutes that trial counsel Richard Parrish ever spent with Mr. Martinez, however, left Mr. Parrish just as unprepared and uninformed for the guilt and aggravation phases as it left him unprepared for the penalty phase.

The underlying facts were that, on June 12, 2003, Mr. Martinez and the victim, Francisco Aguilar, attended an otherwise peaceable small gathering at a friend's house in South Tucson. Although it was very poorly developed at trial and was glossed over by the prosecution, the disclosure and interviews made it clear that Mr. Aguilar had earned the animosity of a

number of party goers, in particular codefendant Johnathon Summey-Montano, by drugging and raping Summey-Montano's eleven-year-old cousin.

After the ensuing beating, Summey-Montano produced a shotgun, and the very highly provocative circumstances combined with Mr. Martinez's generally poor frontal lobe function, history of childhood molestation, neglect and victimization, and a lifelong lack of parental guidance and role-modeling, contributed to a series of bad decisions by Mr. Martinez and his highly disinhibited friends which resulted in Mr. Aguilar's death.

Prior to trial, trial counsel met with Mr. Martinez almost not at all – for a total of 1:08 over 2 ½ years. At trial, trial counsel overlooked an obvious provocation defense based on the victim's contributory conduct in raping codefendant Summey-Montano's eleven-year-old cousin. Trial counsel overlooked an erroneous pre-1978 felony murder instruction. Trial counsel presented no cogent argument for lesser-included offenses and, in fact, made no request for lesser-included offenses until they were suggested by the trial court. Trial counsel advanced no defense at all and, in guilt phase closing argument, stated his expectation that he would be continuing to represent Mr. Martinez in the aggravation and penalty phases.

In the aggravation phase, trial counsel expressed his surprise that A.R.S. § 13-703 (F)(5) pecuniary gain (renumbered as 13-751(F)(5) and

subsequently deleted) was one of the aggravators. The State rested in the aggravation phase without presenting any additional evidence and trial counsel made no attempt to rebut F(5), in either the guilt or penalty phases, with what would have been abundant evidence that the victim was killed for having molested Summey-Montano's eleven-year-old cousin.

ARGUMENT

I
1:08 of Total Time Meeting With a Capital Defendant Is a Complete Abdication of Trial Counsel's Responsibilities

This decision of Arizona Supreme Court upholding a capital conviction in which trial counsel spent a total of 1:08 meeting with the client has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power.

Strickland v. Washington, 466 U.S. 668 (1984), may carry with it a presumption of effectiveness, but it is a rebuttable presumption and trial counsel's track record in this and other cases rebuts that presumption.

Pima County Jail visitation logs reveal that, in the 2 ½ years before trial in this case, Richard Parrish met with Mr. Martinez for a total of 1:08, the longest meeting being 0:17.

DATE	TIME OF VISIT	LENGTH OF VISIT
6/16/03	11:33-11:50	0:17
6/23/03	10:46-10:50	0:04
8/5/03	Unknown-8:59	
8/11/03	8:42-8:43	0:01
10/1/03	8:37-8:45	0:08
2/23/04	8:55-9:00	0:05
7/1/04	8:28-8:41	0:13
12/28/04	8:25-8:30	0:05
7/6/05	7:55-8:05	0:10
7/15/05	8:33-8:38	0:05
9/13/05	Unknown-8:50	
TOTAL TIME SPENT WITH CLIENT IN 2 ½ YEARS		1:08

(Evidentiary Hearing Exhibit G8; Appendix 3565-3600.) In the three-and-a-half months before the November 1, 2005, trial, during the trial, after the trial and while the sentencing on the non-capital charges was pending, Mr. Parrish visited Mr. Martinez not at all. Second chair counsel visited Mr. Martinez one additional time, on March 22, 2005, more than seven months before trial for fourteen minutes.

On November 8, 2005, in the middle of trial in this case, Mr. Parrish expressed his complete surprise upon learning that A.R.S. § 703(F)(5) pecuniary gain was one of the aggravators. (RT November 8, 2005, pp.88,

150-151.) Inconceivable, except that Mr. Parrish already had a recent history of not knowing the charges against another of his clients in the case of *State v. Eva Mayfield*, CR 2002 1963. On May 18, 2004, in the *Mayfield* case, Mr. Parrish was held in contempt when he showed up for a first-degree murder trial completely unaware that an unrelated home invasion charge against his client had been consolidated for trial, despite the fact that he was present at the motion to consolidate and stated that he had no objection. (Appendix 122-126.)

On March 12, 2007, in this case, completely contrary to 2003 ABA Standards for the Performance of Counsel in Death Penalty Cases, Guideline 10.13 – Duty to Facilitate the Work of Successor Counsel, Mr. Parrish actively dodged service of process and refused, by written letter no less, to appear at a hearing on the Rule 24 motion for a new trial as a witness for his own client (Appendix 127), resulting in the trial court's observation that Mr. Parrish "is a little different." (RT March 12, 2007, p.3-4.)

On May 28, 2009, in the former death penalty case of *State v. Soto-Fong*, CR-39599, Mr. Parrish never met with his client, only ever corresponded with him once, and neglected to file a petition for review or to even notify Mr. Soto-Fong that his PCR had been denied. (Appendix 128-131.)

On October 20-21, 2011, witnessed by FPD-CHU attorney Jennifer Garcia, PCPD attorney David Euchner, and undersigned counsel, Mr. Parrish showed up briefly in Phoenix for the Capital Direct Appeal and PCR/Habeas Training cosponsored by the MCPD and the FPD-CHU, in order to qualify for the Arizona Supreme Court's list of counsel in capital PCR cases. The first day he signed in and attended for approximately an hour. The second day he left with his CLE certificate before the seminar even began. He fraudulently signed the CLE certificate, provided it to the Arizona Supreme Court, and was added to the list of Death Penalty PCR counsel. (Appendix 132-146.) That matter was referred to the State Bar as part of the investigation in State Bar No. 12-1420 after the investigation began in the *Hargrave* matter.

On April 6, 2012, in the death penalty case of *State v. Hargrave*, CR 2002-009759, Mr. Parrish filed a Rule 32 PCR that was so badly deficient that the trial court struck the petition and referred Mr. Parrish to the State Bar. (Appendix 147-186.)

On January 12, 2013, while the State Bar investigation was pending in *Hargrave*, Mr. Parrish was ordered to show cause in the case of *State v. Robert Moody* as to why he should not be held in contempt for billing over $77,000.00 as PCR counsel in the *Moody* case despite never even having received the transcripts (120 volumes) from appellate counsel in the *Moody*

case. (Appendix 187-263.) His explanation that he had read the transcripts online on the court's AGAVE database was quickly rebutted by the fact that AGAVE does not contain transcripts, a fact well known to any attorney who has ever looked up a case in the clerk's office. (Appendix 232.) His subsequent (ludicrous) claim that he had read the hard copies in the clerk's office was rebutted by the clerk's office itself, which stated that transcripts are stored offsite and require a written request, and that their records would have shown if Parrish had requested them. Furthermore, those transcripts cannot leave the clerk's office without a court order. (Appendix 232.)

Trial counsel provided many instances of ineffective assistance in Mr. Martinez's case. Failing to object to a pre-1978 felony-murder instruction (below) and failing to advance a provocation defense (below) with no other defense in mind were two of them. All of them, however, were rooted in trial counsel's failure to discuss the case with his client and in a concomitant lack of interest in representing Mr. Martinez or, really, in representing anybody else.

II
Two Flawed Convictions Do Not Render Each Other Harmless

Mr. Martinez was convicted of first-degree murder on a felony-murder theory and also on a premeditated-murder theory. It is beyond frustrating

that Arizona used the premeditated-murder conviction to find the felony-murder conviction harmless, then used the felony-murder conviction to find the premeditated-murder conviction harmless. Both theories of conviction were flawed.

On direct appeal the Arizona Supreme Court reached the pre-1978 felony-murder instruction, even though it went unobjected to at trial, on fundamental error review.[1]

> "The instruction used language long absent from Arizona's felony murder statute. We have discouraged the use of this instruction because the emphasized sentence is not an accurate description of Arizona's felony murder statute. *State v. Miles*, 186 Ariz. 10, 15, 918 P.2d 1028, 1033 (1996). Although Martinez cannot show prejudice, the instruction does not accurately state the law and we disapprove of its future use."

State v. Martinez, 218 Ariz. 421, 428 (2008).

On direct appeal the Arizona Supreme Court relied upon the premeditated-murder conviction to find the felony-murder error harmless.

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[1] *State v. Rose*, 231 Ariz. 500, 504 (2013) ("Because Rose did not object below, we review for fundamental error."); *Phoenix Metals Corp. v. Roth*, 79 Ariz. 106, 112 (1955) ("It is elementary that this court will not render advisory opinions**,** nor settle questions not necessary to the determination of the issues as framed by the assignments of error."); *State v. Gendron*, 168 Ariz. 153, 155 (1991) ("To qualify as "fundamental error," however, the error must be clear, egregious, and curable only via a new trial. We have held: Fundamental error is error of such dimensions that it cannot be said it is possible for a defendant to have had a fair trial. It usually, if not always, involves the loss of federal constitutional rights. A claim of fundamental error is not a springboard to reversal where present counsel is simply second-guessing trial counsel.).

> "Because felony murder is an alternate theory of first degree murder, *State v. Tucker* (*Tucker I*), 205 Ariz. 157, 167, P 50, 68 P.3d 110, 120 (2003), this Court need not consider a challenge to the sufficiency of the evidence of felony murder when the jury also returns a separate verdict of guilt for premeditated murder. *Anderson II*, 210 Ariz. at 343, P 59, 111 P.3d at 385 ('In any event, the jury returned separate guilty verdicts for both felony murder and premeditated murder as to each victim; therefore, the first-degree murder convictions would stand even absent a felony murder predicate.'); cf. *State v. Smith* (*Todd*), 193 Ariz. 452, 460, PP 34-36, 974 P.2d 431, 439 (1999) (declining to address issue with premeditation instruction because defendant failed to challenge conviction for felony murder)."

State v. Martinez, 218 Ariz. 421, 427 (2008).

Then, on postconviction relief, when ineffectiveness claims could finally be raised,[2] the trial court turned around and found the premeditated-murder claim to be harmless due to the felony-murder conviction.

> "The third claim presented is trial counsel was ineffective for overlooking and failing to raise an adequate provocation defense in the guilt phase of trial. The argument continues that had trial counsel raised an adequate provocation defense properly, he could have argued more strenuously to the jury in his closing argument that they should find the Defendant guilty of a lesser included charge of manslaughter. This claim does not warrant relief because the jury found Martinez guilty of first-degree murder under both a premeditated and a felony murder theory. Manslaughter is not a lesser included offense of felony murder. *State v. Cota*, 229 Ariz.136, 150(2012). Therefore, even if trial counsel raised and argued a provocation defense consistent with manslaughter, and argued this theory

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[2] *State v. Spreitz*, 202 Ariz. 1, 3 (2002) ("We reiterate that ineffective assistance of counsel claims are to be brought during Rule 32 [PCR] proceedings.").

> compellingly to acquit on the premediated (sic) murder theory, there is no evidence the result would have changed because the jury would not have even reached or considered guilt on a lesser charge."

(March 4, 2020, minute entry ruling on guilt-phase postconviction relief.)

The Arizona Supreme Court denied review of the trial court's decision on postconviction relief. Every step of the way, beginning with the opening brief on direct appeal, undersigned counsel complained that the State was hopping back and forth, from one leg to the other, depending upon which leg was being examined. Both legs are flawed and both legs have been kicked out from under the first-degree murder conviction, which can be proven either of two ways, but which must be proven at least one of the two ways. *Brown v. United States*, 411 U.S. 223, 231 (1973) ("The testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury. In this case, as in *Harrington v. California*, 395 U.S. 250 (1969), the independent evidence 'is so overwhelming that unless we say that no violation of Bruton can constitute harmless error, we must leave this . . . conviction undisturbed,' id., at 254." [Emphasis added.]); *Schneble v. Florida*, 405 U.S. 427, 430 (1972) ("In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper

use of the admission was harmless error." [Emphasis added.]). One flawed theory of conviction that stands only because of another flawed theory of conviction is neither proper nor independent.

This decision by a state court has decided an important issue of federal law in a way that conflicts with relevant decisions of this Court, twisting the harmless error doctrine to incorporate improper and interdependent theories of conviction to deprive Mr. Martinez of his right to effective assistance of counsel.

III
Trial Counsel Was Unaware That A.R.S. § 13-703(F)(5) Pecuniary Gain Was One of The Aggravators

Trial counsel flatly stated, during the trial's aggravation phase, that he did not realize that he was supposed to be defending an A.R.S. § 13-703(F)(5) pecuniary gain aggravator.

> MR. PARRISH: You know, let me point out that you, in this instruction on the alleged aggravating factors, did what I thought was going on here, that the aggravating factor was especially heinous, cruel or depraved. Where was I when the other aggravating factor of pecuniary gain –
>
> THE COURT: The pecuniary gain I missed. Actually when I was – this afternoon my colleague and I were talking and he noticed that it was alleged, the pecuniary gain was alleged, and you had. It's just that we never really talked about that. Since we – I mean even – I don't remember ever talking about it, but that doesn't mean it wasn't allege, it was.

MR. PARRISH: I thought it was removed.

MS. GODOY: No, not at all. During the voir dire phase you asked – I think there was some individual voir dire and you asked what our aggravating factors were, and I think one of us said – started to say especially cruel, heinous and depraved, and we didn't get a chance to say the second one. I think you picked up on that and started to question the juror about that. I think it might have been Mr. Guillen, maybe.

(RT 11/8/05 pp.150-151.) Earlier that same day, the defense was confused as to the relevance of witness Fritzie Gonzalez's testimony about items stolen from her apartment.

MR. PARRISH: May we approach for a moment, Your Honor?

THE COURT: Sure.

(At the bench, on the record.)

MR. PARRISH: I confess that I am perplexed, if there is no robbery allegation and there is no pecuniary gain allegation, I don't know what the relevancy is.

THE COURT: It corroborates what Lopez – what Lopez said, they went to the house, they came back with items and so forth.

MS. GODOY: There is a pecuniary gain aggravating circumstance.

THE COURT: Yeah, I just noticed that at lunch time that they did allege that. We'll talk about that, but they mentioned it as well.

MR. PARRISH: I thought you said there wasn't a pecuniary gain.

MS. GODOY: No, we did.

(RT 11/8/05 p.88.) [3]

After that, all of the evidence was in. The State presented no evidence in the aggravation phase, relying instead on the evidence offered in the guilt phase. By the time defense counsel realized that pecuniary gain was an issue, the State had already proved pecuniary gain during the guilt phase with no defense investigation, no cross-examination on the pecuniary gain issue and no appreciation by the defense of its relevance. Voir dire was conducted with a total lack of awareness of the pecuniary gain aggravator. During the guilt phase, because it had no idea that it was fighting a pecuniary gain motive, the defense made no serious attempt to investigate or present evidence of the real motive these young men had for killing the victim. If the defense had realized that pecuniary gain was emerging as a motive for the killing and would serve as an aggravator to justify a death sentence, it might have worked to establish the victim's contributory conduct in molesting codefendant Summey-Montano's eleven-year-old cousin, rather than robbery, as the true motive for the killing.

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[3] Mr. Parrish had a similar incident in *State v. Eva Mayfield*, CR 2002 1963, a first degree murder trial for which Mr. Parrish showed up unaware that an unrelated home invasion charge against his client had been consolidated for trial, despite the fact that he was present at the motion to consolidate and stated no objection. Exhibits relating to a mistrial and continuance in that matter were attached to the Rule 24 motion for a new trial. (Supplemental ROA 13; Appendix 120-126.)

The trial court found, at p.6 of its order granting resentencing, that trial counsel was unaware that pecuniary gain was being alleged.

> "It should be noted that Mr. Parrish, based upon a conversation with the court, was unaware that pecuniary gain was being alleged."

(Under Advisement Ruling, May 18, 2017, p.6; Appendix 15.)

Two-and-a-half years previously, on July 28, 2003, the State had filed its death notice in this case alleging both F(5) and F(6) as aggravators. (ROA 65.) On August 28, 2003, the State disclosed its list of witnesses and exhibits it intended to use to prove both F(5) and F(6). (ROA 74.) On September 16, 2003, counsel for codefendant Summey-Montano filed a motion to strike the death notice, attacking the applicability of both F(5) and F(6). (ROA 84.) Over two years later, after all the evidence was in, while the jury was deliberating the guilt phase and jury instructions were being settled for the aggravation phase, counsel for Mr. Martinez realized that F(5) pecuniary gain was one of two aggravators that the state already proved and intended to argue. Two days later, on Day 7 of Trial, November 10, 2005, two days <u>after</u> the trial court told trial counsel about the F(5) pecuniary gain aggravator, trial counsel filed an unsuccessful motion to preclude the aggravator. (ROA 327.)

Had trial counsel realized that he was faced with an F(5) pecuniary gain aggravator, he might have moved witnesses Paul Kelso and Dr. Perrin

up from the penalty phase to the aggravation phase. There would have been different preparation required to proceed under different evidentiary rules and with different foundational requirements, but it would have made much more sense to establish Mr. Martinez's motivation before the State asked the jury to find, beyond a reasonable doubt, that his motivation was pecuniary gain.

And, had trial counsel realized he was faced with an F(5) pecuniary gain aggravator, he might have worked to prevent Mr. Martinez from being aggravated with his own necklace. Chief among the items identified by Fritzie Gonzales as having been taken from the victim, or from the apartment from where the victim was staying with Ms. Gonzales, was a gold necklace in Trial Exhibit 56 that had belonged to Mr. Martinez for years. Trial Exhibit 56 was represented by the State to the trial court as having been identified by Fritzie Gonzales as her property and was admitted as such with no defense objection. (RT November 8, 2005, pp.101-102.). The necklace was the only item of any value and was a substantial part of the State's deeply flawed theory that the robbery had motivated the killing rather than was incidental to the killing. Robbery was never charged, indicted, alleged or even included as a basis for the felony murder instruction. Mr. Martinez had photographs, at the defense table, of himself wearing the necklace long before the offense date. (PCR Exhibits K7, K8, K10, Q.). There can be no

confidence in the outcome of any sentencing that will be based, in large part, upon a necklace that already belonged to Mr. Martinez. The fact that Mr. Martinez is to be executed for, in part, supposedly stealing his own necklace, is exactly the sort of misapprehension that competent trial counsel is there to prevent.

Trial counsel also might have handled jury selection differently. He could have tried harder to seat more parents of children on the jury – they might better understand Mr. Martinez's motivation. He could have seated more abuse victims and less theft victims on the jury – they might better understand feelings of frustration and powerlessness and be less swayed by pecuniary motives. Mr. Martinez could have planned on taking the stand in the aggravation phase, rather than in the penalty phase, to testify to the victim's contributory conduct in molesting Summey-Montano's cousin and the degree to which any violent crime against children affected him emotionally. Trial counsel's cross-examination of the cooperating codefendants and of Detective Schultz might have more effectively probed the name-calling and the statements by Mr. Martinez and Mr. Summey-Montano about the victim being a child molester.

Mr. Martinez had an alternative reason to kill the victim – the victim had just drugged and raped the eleven-year-old cousin of one of the codefendants. And Mr. Martinez was sensitized to that kind of

victimization. And, had the jury known about that during the aggravation phase, they might well have acquitted him on at least one of the aggravators. See, *State v. Lamar*, 210 Ariz. 571, 574 (2005), where, on substantially identical, or worse, facts, the victim was ambushed pursuant to a plan to kidnap and rob him, was beaten, taped up and driven around before he was eventually killed. The state in *Lamar* conceded, and the Arizona Supreme Court agreed, that a reasonable jury could well have failed to find a pecuniary gain motive. See also, *State v. Moody*, 208 Ariz. 424, 471 (2004) (Drug intoxicated defendant bound then robbed murder victims before killing them. Because a reasonable jury could differently assess evidence, *Ring* error not harmless.); *State v. Armstrong*, 208 Ariz. 360, 363 (2004) (Armstrong's statements before the murders about taking the victim's property could have been assessed differently by the jury. *Ring* error therefore not harmless.). If those juries could have found no pecuniary gain on those facts, so could have Mr. Martinez's jury – if there had been a contested trial on the issue with both sides presented.

The evidence of a robbery motivation was far from overwhelming. An incidental robbery, by itself, is insufficient to support either a felony-murder conviction or a pecuniary gain aggravator. *State v. Bennett*, 213 Ariz. 562, 568 (2006) ("Conviction for the underlying felony does not automatically support a conviction for first degree murder."); *State v. Rose*,

231 Ariz. 500, 516 (2013) ("This Court has repeatedly held that a conviction for felony murder predicated on robbery or armed robbery does not automatically prove the (F)(5) aggravator."); *State v. Prasertphong*, 206 Ariz. 167, 169 (2003) ("Proving a taking in a robbery or the existence of some economic motive at some point during the events surrounding a murder does not necessarily prove the motivation for a murder."); *State v. Sansing*, 200 Ariz. 347, 354 (2001) ("the sole fact that a defendant takes items or money from the victim does not establish pecuniary gain as a motive for the murder").

Mr. Martinez was booked into the jail on kidnapping and murder, but not robbery. (ROA 28; Exhibit J10; Appendix 3890.) The grand jury indicted Mr. Martinez for kidnapping and murder, but not robbery. (ROA 1; Appendix J11; Appendix 3891.) Felony murder was predicated on kidnapping, but not robbery. (RT November 9, 2005, p.24.) In fact, the State declined a robbery predicate for the felony murder charge. (RT November 5, 2005, p.5.) Kidnapping was overwhelming, but not robbery and not a robbery motive.

Unaware that the State was proving an aggravator, the defense ignored the real motive for this murder and let the State prove a pecuniary gain motive unhindered. During the entire aggravation phase – openings, evidence and closings – the defense made no mention of the victim's

contributory conduct in having molested Summey-Montano's cousin. Counsel's lack of awareness of the F(5) pecuniary gain aggravator is below prevailing professional norms. *Frett v. State*, 378 S.E.2d 249 (S.C. 1988) (counsel ineffective for, among other reasons, not being aware of all the pending charges).

Trial counsel's failures in this regard denied Mr. Martinez the right, recognized in *Strickland v. Washington*, 466 U.S. 668 (1984), to be represented by a competent attorney pursuant to the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Provocation should have been presented, both as a defense to premeditated murder and also to rebut the F(5) pecuniary gain aggravator. *Yarborough v. Gentry*, 540 U.S. 1, 5, 124 S. Ct. 1, 4 (2003) ("The right to effective assistance extends to closing arguments."); *Herring v. New York*, 422 U.S. 853, 864 (1975) ("the appellant, through counsel, had a right to be heard in summation of the evidence from the point of view most favorable to him."); (1998) ("We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard.").

A jury trial of a capital sentencing aggravator, by trial counsel who is unaware that the aggravator even exists is an important issue of federal law

that conflicts with relevant decisions of this Court in that it is completely lacking any semblance of due process.

IV
Arizona Has Rejected The *Strickland* Standard of Cumulative Error Consideration of Ineffectiveness Claims

At p.5 of its March 3, 2020 ruling, the trial court explicitly employed an erroneous standard for IAC claims, refusing cumulative error review.

> "'[T]his court does not recognize the so-called cumulative error doctrine.' *State v. Hughes*, 193 Ariz.72, 78, 969 P.2d 1184, 1190 (1998); see also *State v. Ellison*, 213 Ariz. 116, 133 (2006). Here, there is no legal basis to grant relief under this argument as the cumulative error doctrine is not recognized in Arizona law outside of the context of prosecutorial misconduct. For these reasons, Martinez cannot prove he suffered prejudice and this claim is denied."

State v. Martinez, CR-20031993, p.5 (Pima Co. Superior Court, March 3, 2020) (order denying guilt and aggravation phase postconviction claims). Under the trial court's formulation, even if the cumulative effect of trial counsel's unprofessional errors is sufficient to undermine confidence in the outcome of the trial, the defendant still somehow received constitutionally adequate representation. But confidence in the outcome of the trial is how *Strickland* error is defined. The prejudice test of *Strickland* "focuses on the question whether counsel's deficient performance renders the result of the

trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

Prejudice from counsel's errors must be "considered collectively, not item-by-item." *Kyles v. Whitley*, 514 U.S. 419, 436 (1995)[4]; *Pizzuto v. Arave*, 385 F.3d 1247 (9th Cir. 2004) ("individual deficiencies in representation which may not by themselves meet the *Strickland* standard may, when considered cumulatively, constitute sufficient prejudice to justify issuing the writ"). When the United States Supreme Court considers prejudice in IAC cases, it definitely considers the cumulative prejudice resulting from trial counsel's deficiencies:

> "the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised "a reasonable probability that the result of the sentencing proceeding would have been different" if competent counsel had presented and explained the significance of all the available evidence."

Williams v. Taylor, 529 U.S. 362, 399 (2000).

> "We thus conclude that the available mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of Wiggins' moral culpability. "

Wiggins v. Smith, 539 U.S. 510, 538 (2003).

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[4] *Kyles v. Whitley*, 514 U.S. 419 (1995), was a *Brady* claim. In *United States v. Bagley*, 473 U.S. 667, 682 (1985), however, this Court held that the "materiality" test under *Brady* was the same as the prejudice test espoused in *Strickland* for determining ineffectiveness of counsel cases.

A simpler analysis of just *Strickland* reveals that *Strickland* entailed six different categories of errors in which trial counsel was alleged to be deficient and reveals that the Supreme Court in *Strickland* repeatedly analyzed the prejudice stemming from trial counsel's "errors" plural:

> "the Court of Appeals turned its attention to the question of the prejudice to the defense that must be shown before counsel's errors justify reversal of the judgment."

Strickland v. Washington, 466 U.S. 668, 681-682 (1984).

> "Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Strickland v. Washington, 466 U.S. 668, 687 (1984).

> "Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense."

Strickland v. Washington, 466 U.S. 668, 693 (1984).

> "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."

Strickland v. Washington, 466 U.S. 668, 694 (1984).

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Strickland v. Washington, 466 U.S. 668, 694 (1984).

> "In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law."

Strickland v. Washington, 466 U.S. 668, 694 (1984).

> "The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.
>
> "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors."

Strickland v. Washington, 466 U.S. 668, 695-696 (1984).

This decision by a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a court of appeals and in a way that conflicts with relevant decisions of this Court.

Dated March 22, 2021.

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Appendix

State v. Martinez, CR-20-0104-PC, (Ariz. Supreme Court, February 2, 2021) (order denying review from partial denial of Rule 32 Petition for Postconviction Relief).....1

State v. Martinez, CR-20031993, (Pima Co. Superior Court, March 3, 2020) (order denying guilt and aggravation phase postconviction claims) 2

State v. Martinez, CR-17-0225-PC (Ariz. Supreme Court, May 1, 2019) (postconviction order granting relief from preclusion of guilt and aggravation phase postconviction claims and denying State's petition for review of sentencing relief) 8

State v. Martinez, CR-20031993, (Pima Co. Superior Court, May 18, 2017) (order granting sentencing phase relief but precluding guilt and aggravation phase relief).....10

State v. Martinez, 218 Ariz. 421 (2008) (opinion on direct appeal).....17