# Supreme Court

STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

ARIZONA STATE COURTS BUILDING
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PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

JANET JOHNSON
Clerk of the Court

February 2, 2021

**RE: STATE OF ARIZONA v CODY JAMES MARTINEZ**
Arizona Supreme Court No. CR-20-0104-PC
Pima County Superior Court No. CR20031993

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 2, 2021, in regard to the above-referenced cause:

**ORDERED: Petition for Review from Partial Denial of Rule 32 Petition for Postconviction Relief = DENIED.**

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

Janet Johnson, Clerk

TO:
S Jonathan Young
Erin Carrillo
Cody James Martinez, ADOC 151281, Arizona State Prison, Florence
  - Central Unit
Lacey Stover Gard
Dale A Baich
Amy Armstrong
Timothy R Geiger
Mark Brnovich
ga

**Appendix 1**

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FILED
GARY L. HARRISON
CLERK, SUPERIOR COURT

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HON. HOWARD FELL CASE NO. CR20031993-003

[illegible]. ST. GERMAINE, DEPUTY DATE: March 03, 2020

STATE OF ARIZONA
Respondent,

vs.

CODY JAMES MARTINEZ
Petitioner.

## RULING

### CRIMINAL RULING

On November 9, 2005, following a jury trial, Cody James Martinez, the Petitioner, was found guilty of first-degree murder and kidnapping. The jury found two aggravating factors, did not find mitigation sufficiently substantial to warrant leniency, and sentenced Martinez to death. The Arizona Supreme Court affirmed Martinez's convictions and death sentence on direct appeal. Martinez subsequently filed a Petition for Post-Conviction relief alleging ineffective assistance of counsel at virtually every stage of trial.

In January 2015, in reference to Martinez's post-conviction relief claims, this Court ordered an evidentiary hearing and granted limited relief. This Court found trial counsel ineffective for purposes of the penalty phase of the trial and, as such, vacated the death penalty. In the same ruling, this Court found the other claims raised by Martinez in his original Petition for Post-Conviction Relief precluded. In a subsequent order, the Arizona Supreme Court directed this Court to rule on these previously precluded claims on their merits.

This Court is very familiar with the facts of this case. This Court presided over trial, the penalty phase, aggravation phase, and a lengthy evidentiary hearing related to the first Rule 32. This Court has reviewed the pleadings and exhibits submitted by the parties, as well as the records and transcripts from this case and finds that in this the matter record is sufficient for this court to dispose of the petition without an evidentiary hearing. *See State v. Bell*, 23 Ariz.App. 169, 531 P.2d 545 (App. 1975).

**Ineffective Assistance of Counsel Claims**

An allegation of ineffective assistance of counsel is encompassed within Rule 32.1(a) as a claim that a defendant's "conviction or . . . sentence was in violation of the Constitution of the United States or the State of Arizona." *State v. Herrera*, 183 Ariz. 642, 646, 905 P.2d 1377, 1381 (App. 1995); *see also United States v. Pearce*, 992 F.2d 1021, 1023 (9th Cir.1993). The defendant holds the burden of proving ineffective assistance of counsel. *State v. Meeker*, 143 Ariz. 256, 264, 693 P.2d 911, 919 (1984).

R. Alex Coomer
Law Clerk

Appendix 2

In order for a defendant to raise a colorable ineffective assistance of counsel claim, he must fulfill a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (2005); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Failure to prove either one of the prongs renders the claim insufficient. *State v. Salazar*, 146 Ariz. 540, 541 (1985).

First, a defendant must show his counsel's performance fell below objectively reasonable standards of representation measured by prevailing professional norms. *Strickland*, 466 U.S. at 688. Trial counsel is presumed to have acted properly unless the defendant can show "counsel's decision was not a tactical one, but, rather, revealed ineptitude, inexperience, or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586 (1984). In considering counsel's performance, the reviewing court will not question counsel's trial strategy unless it lacks "some reasoned basis." *State v. Gerlaugh*, 144 Ariz. 449, 445, 698 P.2d 694, 700 (1985).

Second, a defendant must demonstrate counsel's poor performance prejudiced him. *Strickland*, 466 U.S. at 692. To establish prejudice, a 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." *State v. Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d 61, 64 (2016) (quoting Strickland, 466 U.S. at 694). "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.*, 367 P.3d at 64 (quoting Strickland, 466 U.S. at 695).

A defendant is not required to provide the court with detailed evidence in his petition. *State v. Donald*, 198 Ariz. 406, ¶ 17, 10 P.3d 1193, 1200 (2000). However, he must "provide specific factual allegations that, if true, would entitle him to relief." *Id.*, 10 P.3d at 1200. "[P]roof of ineffectiveness must be a demonstrable reality and not merely a matter of speculation." *State v. Schultz*, 140 Ariz. 222, 225, 681 P.2d 374, 377 (1984). If a defendant fails to sufficiently establish either element, the reviewing court is not required to determine whether the other element has been established. *Jackson*, 209 Ariz. at 14, ¶ 2, 97 P.3d at 114.

This Rule 32 petition first contends that due to trial counsel's limited time spent with Martinez prior to trial (approximately one hour and eight minutes), he was woefully under-prepared to effectively defend Martinez during the trial, the aggravation phase, and penalty phase. Specifically, Martinez argues that had trial counsel spent more time with him, trial counsel would have: 1) realized that the killing of the victim was due to the victim's own alleged actions of molesting a child; 2) been in a position to rebut the robbery motive for purposes of aggravation; 3) been in a better position to discuss whether Martinez should testify in the aggravation phases of the trial; 4) been prepared to rebut the State's "Cisco's BBQ" argument for purposes of aggravation; 5) realized all of the State's witnesses were housed together, thereby giving them an opportunity to straighten their stories and collectively blame Martinez; 6) realized that the missed shot on the victim was accidental and not an intentional miss for purposes of aggravation.

Here, this Court finds that the Petitioner's argument regarding deficient performance by trial counsel is not entirely baseless. One hour and eight minutes is an unusually little amount of time to meet with a client on a first-degree murder case where the possibility of the death penalty is attached. Relief is not warranted here, however, because Martinez cannot prove he suffered prejudice due to the limited amount of time spent. Martinez can only speculate that the outcome would have been different if trial counsel spent more time with him.

R. Alex Coomer
Law Clerk

**Appendix 3**

In his Petition, to help prove prejudice suffered, Martinez cites the Pima County Superior Court trial case of *State v. Renteria* (CR20100889) for the proposition that "contributory conduct by the victim is not only powerful mitigation, but can be highly exculpatory guilt phase evidence as well." This Court does not find *Renteria* to be controlling authority for this proposition, nor persuasive authority here. Additionally, comparing and/or relying upon the result(s) of an entirely different trial case versus the present matter for purposes of proving prejudice for Rule 32 relief is too speculative for this Court. Finally, even if a trial court case outcome could be used as authority to grant relief, this Court finds the facts of the Renteria case are distinguishable from those of Mr. Martinez's case, and, as such, this Court does not believe the Renteria case to be relevant to the issues presented here.

As to the various issues presented related to trial counsel's ineffectiveness in his lack of time spent with Martinez and his related failure to challenge the F(5)[1] and F(6)[2] aggravating factors, discuss with Martinez if he should testify at his aggravation phase, the possibility that the co-defendants corroborated their statements at jail, and challenge the alleged "unintentional flinch reaction," these arguments also fail due to their speculative nature. This Court cannot find that had trial counsel argued that because robbery was not a predicate felony for felony murder, or that Martinez was not booked for robbery, to be compelling enough evidence to rebut the other evidence presented regarding the F(5) pecuniary gain aggravating factor, especially in light of the copious evidence of a robbery presented at trial. The evidence was clear that Mr. Martinez and his accomplices ransacked the victim's home while he was bound and prior to killing him. Similarly, this Court does not believe that the jury would likely have come to a different result on the F(6) cruelty factor, even if presented with additional mitigation or heard from Mr. Martinez that the missed shot was an unintentional flinch, as there was so much overwhelming and unchallenged evidence of the cruelty and heinousness of this completed offense. Accordingly, this claim is denied.

The second major claim raised by Martinez is that trial counsel was ineffective for failing to object to the use of an erroneous pre-1978 felony murder instruction. Here, this Court cannot grant relief as the jurors in this case unanimously convicted Mr. Martinez under a premeditated theory, in addition to felony murder. As the Arizona Supreme Court explained, and this Court agrees, once the jury found Mr. Martinez guilty under a premeditated theory, any potential error related to the felony murder is of no significance as the result of the proceeding would have been the same had Mr. Martinez hypothetically been acquitted under a felony murder theory. "Because felony murder is an alternate theory of first degree murder, 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." *State v. Martinez*, 218 Ariz. 421, 427, 189 P.3d 348, 354 (2008) (internal citations omitted). Further, even if, hypothetically, this Court did set aside the premeditated murder verdict, Martinez did not successfully argue or present why there would have been a reasonable probability of a not guilty verdict on the felony murder side, if the jury was correctly instructed on felony murder. Therefore, this claim is denied.

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

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[1] Pecuniary gain.

[2] Cruel, Depraved, and Heinous killing.

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 compellingly to acquit on the premediated 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.

This claim also fails for a second reason. Given the evidence presented at trial, this Court is not persuaded that a manslaughter instruction was warranted because an unsubstantiated rumor alone (i.e. mere words) is insufficient to constitute adequate provocation. *State v. Runningeagle*, 176 Ariz. 59, 68 (1993). In this case, there was no evidence of adequate provocation presented at trial, only the unsubstantiated rumor the victim allegedly molested a child, and, accordingly, there was no basis for this Court to provide a manslaughter instruction.

Related to this third claim, the defense further contends trial counsel was ineffective because he did not present admissible behavioral tendency evidence challenging the premeditation element arguing Martinez's lack of impulse control. This Court cannot grant relief here either because the evidence of premeditation and reflection in this case was overwhelming. The evidence at trial was Martinez confined the victim in a trunk of a vehicle, robbed his home, moved the victim to another vehicle, and announced his intentions to kill the victim during the process. Next, Martinez beat, dragged, and stomped on the victim prior to firing a shotgun shot into the ground near his head. Martinez then reloaded the shotgun, unsuccessfully tried to convince an accomplice to kill the victim, and then shot the victim himself a final time ending his life. This Court is not persuaded that there is a reasonable probability of a different outcome at trial, even if expert evidence of lack of impulse control by Martinez was presented. Therefore, this Court finds no basis to grant relief and this claim is denied.

The fourth issue raised is that trial counsel was ineffective for failing to object to an erroneous instruction that a hung jury would result in a life sentence during the aggravating phase. Relief is not warranted here as Martinez suffered no prejudice. As the Arizona Supreme Court opinion explains, this particular instruction favored Martinez by suggesting a single holdout juror could forestall death and, as such, he could not suffer prejudice due to this instruction. *State v. Martinez*, 218 Ariz. 421, 189 P.3d 348 (2008) (holding defendant was not prejudiced by trial court's erroneous instruction that trial court would impose a life sentence if jury was unable to reach a verdict in aggravation phase). Therefore, this claim is denied.

The fifth claim raised is that trial counsel was ineffective because he expressed a degree unawareness that the F(6) cruel, heinous, or depraved aggravator is a multi-pronged disjunctive aggravator during trial. Here, this Court cannot say there is a reasonable probability of a different outcome at trial as to this aggravating factor, even if, for the sake of argument, trial counsel was wholly incorrect and ignorant as to how this aggravating factor operates. This offense perpetrated against the victim contained multiple levels of cruel behavior, heinous activity, and depravity and, as such, the jury was given multiple avenues to find this aggravating factor proven beyond a reasonable doubt. The evidence the jury heard as to the cruelness factor was that the victim was bound in a vehicle for hours during a Pima County summer, tortured along the way after his house was robbed, attacked verbally, kicked, beaten, stabbed, dragged, and shot at multiple times. As to the depravity and heinousness factor, the jury heard the victim's body was set ablaze and abandoned after he was murdered. Put another way, the evidence regarding the F(6) factor was so complete to support this

aggravating factor that no different outcome could reasonably have been expected, even with the most educated and savvy defense attorney on sentencing law handling the aggravation phase.

As to the cumulative error doctrine argued by the defense that trial counsel's mistakes as to F(6) aggravating factor was just one of many errors that collectively renders trial counsel ineffective, this Court cannot grant relief. "[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.

The sixth claim presented is that trial counsel was ineffective for 1) failing to realize that one of the aggravators alleged was for pecuniary gain and 2) failing to use evidence of an alleged child molestation perpetrated by the victim as the motive to rebut the pecuniary gain factor alleged during the aggravation phase. As to the first argument that trial counsel was ineffective because he failed to realize the pecuniary aggravating factor was alleged, this Court does acknowledge that trial counsel expressed uncertainty as to whether this aggravating factor was alleged at trial. This uncertainty, however, was not without cause as this Court forgot to discuss this aggravator with the jury during voir dire and this reasonably could have given the impression to trial counsel the State was not proceeding on this particular aggravator. Nevertheless, the State did ultimately proceed on proving this aggravator and defense trial counsel competently defended Martinez. Trial counsel argued Martinez did not kill the victim for pecuniary gain, but instead was under the effect of drugs and argued to this Court he was further motivated by the alleged act of molestation by the victim. This Court rejected that argument and found that the group may have had two separate motives for killing the victim. To the jury, trial counsel also contended that Martinez was under the influence at the time of the offense to counter the pecuniary gain motive. The jury rejected this argument and found the aggravator proven beyond a reasonable doubt. Trial counsel also filed a written motion to preclude the pecuniary gain factor, which this Court denied. In light of the record and arguments presented by trial counsel during, and after trial, this Court cannot say that either trial counsel was deficient in his defense of this aggravating factor, nor did Martinez suffer prejudice in light of the overwhelming evidence underpinning the robbery motive. Therefore, this claim is denied.

The seventh claim raised is that trial counsel was ineffective for failing to recognize, object to, and/or correct the allegedly misleading characterization from the Prosecutor during the aggravation phase regarding Martinez being in the neighborhood because the group was coming from "Cisco's BBQ". Here, this Court cannot grant relief. This Court cannot find that trial counsel's failure to object to a comment the Arizona Supreme Court determined was "neither false nor a mischaracterization" as deficient performance. *State v. Martinez*, 218 Ariz. 421, 427 (2008). Moreover, as the Arizona Supreme Court explained, "the police interviews and free talks emphasized by Martinez on appeal do *not* rule out the possibility that Martinez, did, in fact, intend the alibi to refer to the crime." (emphasis added). *Id.* Finally, assuming for the sake of argument that the "Cisco's BBQ" statement was objectionable, this Court does not find any correction or objection would have resulted in a different outcome as to whether or not the jury would find this aggravating factor proven. For these reasons, this claim is denied.

The eighth claim raised is that trial counsel was ineffective for failing to present evidence that a necklace identified as being stolen from the victim actually belonged to Martinez to rebut aggravation regarding the F(5) pecuniary gain aggravating factor. Very similar to the previously denied claim above, the evidence to

support the pecuniary gain factor was so clear that this Court cannot say prejudice was suffered by Martinez, even if trial counsel tried to and effectively rebutted the necklace allegation. Specifically, Martinez and his accomplices, after placing the victim in a trunk of a vehicle, ransacked the victim's home a first time, returned to interrogate the victim as to where the "stuff" and "shit" was and, then, proceeded to (re)enter his home and steal items of value. Given this evidence supporting a robbery motive and the F(5) aggravator, this Court cannot find that Martinez suffered prejudice related to the alleged ownership of the necklace during the aggravation phase and this claim is denied.

Finally, the ninth claim raised, is that trial counsel was ineffective by dodging a defense subpoena to the hearing regarding a Rule 24 motion for new trial. The defense argues, "trial counsel's lack of concern and even outright hostility to Martinez's Rule 24 motion for a new trial is below prevailing professional norms and is part of the cumulative ineffectiveness in this case." While this Court does not disagree that trial counsel may have shown an apparent lack of concern or even outright hostility to his client, relief is not warranted here under Rule 32 because this claim is based on an event after representation had ended. At the time when trial counsel was allegedly dodging the subpoena, he was removed from the case and Martinez was appointed new counsel. As such, trial counsel's alleged failure to be present or to appear simply cannot be deemed to be ineffective towards Martinez as he was not being represented at that moment. Therefore, this claim is not a claim upon which relief can be granted and it is denied.

## Conclusion

When a petitioner presents no "material issue of fact or law which would entitle the defendant to relief" and the Court determines that "no purpose would be served by any further proceedings," summary dismissal of a petition for post-conviction relief is appropriate. Ariz. R. Crim. P. 32.11(a). For the reasons discussed above, the Court finds that Petitioner Martinez has failed to present a material issue of fact or law that would entitle him to an evidentiary hearing and failed to state a colorable claim for relief on any basis. Accordingly, **IT IS ORDERED** that the petition for post-conviction relief is **denied**.

HON. HOWARD FELL

cc: Erin M Carrillo, Esq.
Lacey Alexander Stover Gard, Esq.
S Jonathan Young, Esq.
Attorney General – Appeals – Tucson
Clerk of Court – Appeals
Office of Court Appointed Counsel

R. Alex Coomer
Law Clerk

# Supreme Court

STATE OF ARIZONA

**SCOTT BALES**
**Chief Justice**

**ARIZONA STATE COURTS BUILDING**
**1501 WEST WASHINGTON STREET, SUITE 402**
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**JANET JOHNSON**
**Clerk of the Court**

May 1, 2019

**RE: STATE OF ARIZONA v CODY JAMES MARTINEZ**
Arizona Supreme Court No. CR-17-0225-PC
Pima County Superior Court No. CR20031993

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 30, 2019, in regard to the above-referenced cause:

**ORDERED: Petition for Review from Partial Denial of Rule 32 Petition for Post Conviction Relief = GRANTED only as to the superior court's rulings that nine claims of guilt phase and aggravation phase ineffective assistance of counsel are "precluded for various reasons" (the State correctly concedes that these claims are not precluded); vacating the superior court's preclusion rulings as to these claims; and remanding to the superior court to consider the claims on the merits.**

**FURTHER ORDERED: The State of Arizona's Cross-Petition for Review = DENIED.**

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

Janet Johnson, Clerk

**Appendix 8**

TO:
Lacey Stover Gard
S Jonathan Young
Erin Carrillo
Cody James Martinez, ADOC 151281, Arizona State Prison,
Florence - Eyman Complex-Browning Unit (SMU II)
Dale A Baich
Timothy R Geiger
Amy Armstrong
Hon. Danelle Liwski
Hon. Howard J Fell
Hon. Gary Harrison

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FILED
TONI L. HELLON
CLERK, SUPERIOR COURT

ARIZONA SUPERIOR COURT, PIMA COUNTY

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HON. HOWARD FELL CASE NO. CR20031993

BY: R. ST. GERMAINE, DEPUTY DATE: May 18, 2017

STATE OF ARIZONA
Plaintiff,

vs.

CODY JAMES MARTINEZ
Defendant

## UNDER ADVISEMENT RULING

*****AMENDED*** UNDER ADVISEMENT RULING RE: POST-CONVICTION RELIEF (CAPTIAL CASE)**

The Court has reviewed the voluminous pleadings and exhibits, considered the testimony presented at the evidentiary hearing and has considered the relevant case law. Several issues were presented by the Petitioner suggesting that lead trial counsel (Richard Parrish) was ineffective and that his performance fell below objectively reasonable standards thus prejudicing the Petitioner. (Strickland v. Washington, 466 US 668 (1984)).

The Court granted an evidentiary hearing limiting the issues to be presented as articulated in the Court's In Chambers Ruling dated January 27, 2015. All other issues raised by the Petitioner were precluded for various reasons.

The Court heard testimony from several witnesses presented by the Petitioner, some more compelling than others. The State presented no witnesses but effectively cross-examined the witnesses that were presented by the Petitioner. The most compelling witnesses were Dr. Ed French, a pharmacologist from the University of Arizona, Diane Salvestrini (mitigation specialist), Dr. Mark Cunningham, Chris Kimminau (second chair counsel), attorney Larry Hammond (capital litigation specialist), and the Petitioner, Cody Martinez.

Deanna Vazquez
Judicial Administrative Assistant

Dr. French testified concerning the effects of Rohypnol intoxication (rochas), its potency and how, in some instances causes a paradoxical reaction and how such a reaction could cause one to become violent rather than sedated, the desired effect of the drug. This information was not sufficiently imparted to the Jury as a potential mitigating factor. The issue of Rohypnol intoxication was not developed by trial counsel. Similarly, the effect of the drug as a possible reason for Petitioner's behavior during his booking process was not fully developed, thus allowing the State to argue that his behavior during the booking process was as an example of a non-mitigating factor.

THE COURT FINDS that Mr. Parrish's performance fell below objectively reasonable standards and that his poor performance prejudiced the Petitioner to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; that the death penalty would not have been imposed by the Jury.

Diane Salvestrini testified that she spent many hours with the Petitioner as well as having developed mitigation information by interviewing multiple witnesses. She also testified concerning a number of emails between Mr. Parrish and herself which are part of the record and demonstrate, at least, a somewhat difficult relationship with Mr. Parrish.

Dr. Mark Cunningham testified for several hours and informed the Court of, in his opinion, what could have been explored as mitigation, what should have been explored and what was not sufficiently presented to the Jury, all of which, in his opinion, would have provided sufficient information to the Jury upon which they could have found sufficient mitigation to have rejected the death penalty. Dr. Cunningham also testified concerning Dr. Perrin's evaluation (which he opined was insufficient) and which could have enlightened the Jury regarding the Petitioner's mental health problems and thus could have formed a basis for mitigation.

THE COURT FINDS that Mr. Parrish's performance fell below objectively reasonable standards and that his poor performance prejudiced the Petitioner to the extent that there is a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different; that the death penalty would not have been imposed by the Jury.

The defense team provided a notebook to the Jury which summarized, without explanation and without context, information summarizing the Petitioner's life history, some mental health information, as well as additional information. However, both Dr. Cunningham, (and later Larry Hammond), opined that by presenting the notebook to the Jury without explanation of the contents in any meaningful way as follows:

"The defense team, at the hearing presented an abundance of information that, if presented to the jury, could have changed the outcome regarding the imposition of the death penalty."

THE COURT FINDS that Mr. Parrish's performance fell below objectively reasonable standards and that his poor performance prejudiced the Petitioner to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; that the death penalty would not have been imposed by the Jury.

Chris Kimminau, second chair, testified that he presented the mitigation evidence and that he felt he did a professional presentation. However, he testified that the agreement with Mr. Parrish was that Mr. Kimminau would conduct the examination of the mitigation witnesses and the closing and the rebuttal, but that Mr. Parrish "hijacked" the rebuttal. He testified that Mr. Parrish omitted important, informative, compelling and passionate argument that Mr. Kimminau had held back in his closing but fully intended to present in rebuttal. Mr. Kimminau testified that this was detrimental to the mitigation.

Mr. Kimminau testified that by Mr. Parrish presenting the rebuttal and interfering with Mr. Kimminau's proposed presentation that Parrish's performance, under the circumstances, fell below the reasonable objective standards and prejudiced the Petitioner. He said that Mr. Parrish's interference impaired the Jury from making a fully informed decision regarding mitigation.

Deanna Vazquez
Judicial Administrative Assistant

THE COURT FINDS that Mr. Parrish's performance fell below objectively reasonable standards and that his poor performance prejudiced the Petitioner to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; that the death penalty would not have been imposed by the Jury.

Information regarding Mr. Parrish's communication and visitation with the Petitioner was presented by way of jail visitation logs as well as the testimony of the Petitioner. The logs indicated that over a two year period, Mr. Parrish visited with the Petitioner a total of one hour and eight minutes. It was, however, established that other members of the defense team spent considerable time with the Petitioner. It is difficult to understand and conclude that by visiting with a client in a capital case for shortly over one hour could possibly allow a meaningful relationship to develop between counsel and client. This was evidenced by Mr. Martinez's testimony that he had complained regarding his relationship with Mr. Parrish and, at one time Mr. Parrish responded by saying "I am a god in the fucking courtroom," essentially telling the Petitioner that he need not be concerned, that Mr. Parrish had everything under control.

THE COURT FINDS that Mr. Parrish's performance fell below objectively reasonable standards and that his poor performance prejudiced the Petitioner to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; that the death penalty would not have been imposed by the Jury.

Testimony was presented that Petitioner had prepared and intended to read a letter of allocution but that Parrish, without permission, rewrote the letter which omitted expressions of remorse and a request for forgiveness. Mr. Kimminau testified that the letter written by Mr. Parrish was detrimental to mitigation in that it did not express what the Petitioner had intended to impart to the Jury.

THE COURT FINDS that Mr. Parrish's performance fell below objectively reasonable standards and that his poor performance prejudiced the Petitioner to the extent that there is a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different; that the death penalty would not have been imposed by the Jury.

Larry Hammond, a well-respected, well-practiced and nationally recognized capital litigation attorney testified that a capital litigation defense attorney must have a meaningful relationship with the accused and must be an integral part of the defense team. He said that lead counsel not only needs to understand the offense but also the offender. He said that it is critical that there be a relationship of trust between counsel and the accused. It was his opinion that, based upon a review of the record, Mr. Parrish had never established such a relationship. He testified that voluntary intoxication should have been more fully explored and presented and was not sufficiently presented to the Jury. He testified that what occurred regarding the allocution letter removed a fundamental right given to the Petitioner and, in his opinion, was "criminal." He said that it robbed the Petitioner of a sacrosanct/sacred right and that by rewriting the letter without permission was unethical. Mr. Hammond also testified that based on the testimony of several witnesses, both during pre-trial interviews and during the post-conviction proceeding, the "Cisco BBQ" should have been fully developed and would not have had the potential detrimental effect regarding the Petitioner's alleged callousness. Mr. Hammond also testified that Parrish's apparent lack of understanding of Dr. Perrin's diagnosis and his failure to effectively explain it to the Jury fell below a reasonably objective standard.

THE COURT FINDS that Mr. Parrish's performance fell below objectively reasonable standards and that his poor performance prejudiced the Petitioner to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; that the death penalty would not have been imposed by the Jury.

There was much made of the necklace that was purportedly stolen from the victim and whether that necklace issue was a basis for the pecuniary gain aggravator. The testimony is, at best, equivocal but, nevertheless, Mr. Hammond indicated that the defense should have tried to negate the necklace issue (the

necklace apparently belonged to the Petitioner and was not stolen from the victim), in order to reduce the aggravating effect as being weak and unimportant. It should be noted that Mr. Parrish, based upon a conversation with the Court, was unaware that pecuniary gain was being alleged.

THE COURT FINDS that Mr. Parrish's performance fell below objectively reasonable standards and that his poor performance prejudiced the Petitioner to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; that the death penalty would not have been imposed by the Jury.

Mr. Hammond also testified regarding "provocation." He opined that provocation (alleged sexual misconduct by the victim) was not fully presented to the Jury as the Jury may not have been adequately informed of a potential reason for the conduct in the case. The defense did not adequately rebut the argument that the homicide was motivated by anything other than robbery.

THE COURT FINDS that Mr. Parrish's performance fell below objectively reasonable standards and that his poor performance prejudiced the Petitioner to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; that the death penalty would not have been imposed by the Jury.

The ultimate take-away from Mr. Hammond's testimony, uncontroverted by any expert that could have been called by the State, is that "the defense team was dysfunctional" and that based on his review of all the available information, Mr. Parrish's performance, particularly in the penalty phase of the trial, fell below an objectively reasonable standard and significantly prejudiced the Petitioner. The Court agrees.

Based upon all the information presented to the Court, and the specific findings made above,

THE COURT FINDS that Mr. Parrish's performance, as articulated above, fell below objectively reasonable standards and that the poor performance prejudiced the Petitioner.

Deanna Vazquez
Judicial Administrative Assistant

THE COURT FINDS that the confidence in the proceeding was undermined by counsel's deficient performance.

THE COURT FURTHER FINDS, by a preponderance of the evidence, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; that the death penalty would not have been imposed by the Jury.

IT IS THEREFORE ORDERED GRANTING relief and vacating the sentence of death.

IT IS ORDERED that counsel confer and advise the Court regarding a potential retrial of the penalty phase.

HON. HOWARD FELL

cc: Erin M Carrillo, Esq.
Kellie L. Johnson, Esq.
Lacey Alexander Stover Gard, Esq.
Laura P Chiasson, Esq.
S Jonathan Young, Esq.
Capital Litigation Staff Attorney - Diane Alessi, Esq.
Clerk of Court - Criminal Unit
Clerk of Court - Under Advisement Clerk

Deanna Vazquez
Judicial Administrative Assistant

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# State v. Martinez

Supreme Court of Arizona

July 25, 2008, Filed

Arizona Supreme Court No. CR-05-0507-AP

**Reporter**

218 Ariz. 421 *; 189 P.3d 348 **; 2008 Ariz. LEXIS 126 ***

STATE OF ARIZONA, Appellee, v. CODY JAMES MARTINEZ, Appellant.

**Subsequent History:** US Supreme Court certiorari denied by Martinez v. Arizona, 555 U.S. 998, 129 S. Ct. 494, 172 L. Ed. 2d 364, 2008 U.S. LEXIS 8083 (Nov. 3, 2008)

Petition denied by State v. Martinez, 2021 Ariz. LEXIS 61 (Ariz., Feb. 2, 2021)

**Prior History:** [***1] Pima County Superior Court No. CR20031993. Appeal from the Superior Court in Pima County. The Honorable Howard L. Fell, Judge Pro Tempore.

**Disposition:** Appeal from the Superior Court in Pima County, Affirmed.

**Counsel:** For State of Arizona: TERRY GODDARD, ARIZONA ATTORNEY GENERAL, By: Kent E. Cattani, Chief Counsel, Capital Litigation Section, Phoenix; Lacey Alexandra Stover Gard, Assistant Attorney General, Tucson.

For Cody James Martinez: S. Jonathan Young, LAW OFFICES OF WILLIAMSON & YOUNG P.C., Tucson.

**Judges:** Michael D. Ryan, Justice. CONCURRING: Ruth V. McGregor, Chief Justice, Rebecca White Berch, Vice Chief Justice, Andrew D. Hurwitz, Justice, W. Scott Bales, Justice.

**Opinion by:** Michael D. Ryan

## Opinion

[**351] [*424] En Banc

**RYAN**, Justice

**I**

**A** [1]

P1 On June 12, 2003, twenty-one-year-old Cody James Martinez, fifteen-year-old Michael Lopez, and several other adolescents were at a friend's Tucson home smoking marijuana. Johnathon

[1] We review the facts in the "light most favorable to sustaining the verdict[s]." *State v. Tucker (Tucker I)*, 205 Ariz. 157, 160 n.1, 68 P.3d 110, 113 n.1 (2003).

Summey-Montano [**352] [*425] arrived with Francisco Aguilar. Aguilar was sent out with two others to purchase rolling papers for the group.

P2 Summey-Montano described Aguilar to Martinez [***2] as a "baller" (meaning he had money) and suggested that they rob him. Martinez agreed. When Aguilar returned to the house, Martinez first engaged him in a conversation and then punched him in the face. Martinez and Summey-Montano began beating Aguilar, while other members of the group went outside. Martinez and Summey-Montano called Aguilar a child molester. [2] Martinez directed Lopez to join in kicking Aguilar, threatening to kill Lopez if he did not do so. Summey-Montano pointed a shotgun at Aguilar. Martinez took the shotgun and hit Aguilar in the head with it. Martinez and Summey-Montano then bound Aguilar's hands and feet. Aguilar was crying and begging for an explanation for the beating. Martinez and Summey-Montano took valuables from Aguilar: Summey-Montano put on Aguilar's necklace and took two dollars from one of Aguilar's shoes; Martinez put Aguilar's gold bracelet in his own pocket.

P3 Lopez and Summey-Montano then forced Aguilar into the trunk of a car. Martinez, Lopez, Summey-Montano, and at least one other person got into the car. Martinez drove and Summey-Montano [***3] gave directions to Aguilar's home. When they arrived, Martinez instructed one of the others to watch for Aguilar's family. Martinez and Summey-Montano entered the house and returned with beer and liquor. Apparently dissatisfied with the haul, Martinez demanded that Aguilar tell him "where's the stuff; where's the shit?" - a reference to "drugs, money, or whatever." Martinez returned to the house and came back with a computer printer. [3]

P4 When they tried to leave, Martinez could not start the car. The group pushed the car, with Aguilar still in the trunk, to a nearby gas station. They put gas in the car but it still did not start. The group pushed it to a nearby pay telephone and sat there. Aguilar remained in the trunk.

P5 Later, an acquaintance arrived at the gas station. Martinez spoke to this person [***4] and showed him a bag of methamphetamine. The acquaintance used Aguilar's mobile telephone to call Fernando Bedoy, who arrived in a Ford Explorer. Using the Explorer, Martinez and the others pushed their vehicle to a side street. The car still would not start.

P6 Summey-Montano and Martinez then led Aguilar from the trunk of the car to the cargo space of the Explorer, keeping him covered with a blanket. Martinez poked Aguilar with a shotgun when Aguilar did not crawl into the Explorer fast enough.

P7 Martinez, Bedoy, Lopez, and Summey-Montano got into the Explorer, leaving the rest of the group behind. Bedoy drove. After some discussion between Summey-Montano and Martinez, Martinez directed Bedoy to the desert. Martinez announced he intended to kill Aguilar and anyone who tried to stop him.

P8 As Bedoy drove, Martinez and the others were laughing and taunting Aguilar. Summey-Montano stabbed Aguilar in the hand with a knife and hit him with a compact disc he claimed to have stolen from Aguilar. He also mocked Aguilar, asking him to name his favorite track on the disc.

P9 When the group arrived at the desert area, Summey-Montano pulled Aguilar out of the Explorer. Martinez and Summey-Montano [***5] kicked Aguilar. Aguilar was dragged around the truck, making "noises of pain . . . moaning and groaning." Martinez, Summey-Montano, and Lopez continued kicking and stomping on Aguilar, while Aguilar begged for his

[2] Martinez claimed that Summey-Montano had told him that Aguilar had raped Summey-Montafio's eleven-year-old cousin.

[3] Martinez was seen with women's jewelry after leaving Aguilar's house. Fritzie Gonzalez, the woman with whom Aguilar lived, told jurors that her house had been "turned upside down." She was missing beer and liquor, a computer printer, jewelry, and jewelry boxes. Gonzalez identified jewelry found on Martinez as including a bracelet she had given Aguilar and other items that belonged to her.

life. Martinez demanded he shut up and ordered Aguilar to march into the desert at gunpoint and then to lie down.

[**353] [*426] P10 Martinez fired a shot at Aguilar that went "Wight above his head," although Martinez stood directly above the victim. Martinez laughed about having missed. As Martinez reloaded the shotgun, Summey-Montaflo beat Aguilar with a tire iron and stabbed him in the belly. Martinez fired again, this time hitting Aguilar in the collarbone area, "[a] little lower than the neck," but not killing him. Summey-Montano refused Martinez's request that he finish off Aguilar, so Martinez fired one more time, hitting Aguilar in the neck, killing him.

P11 Martinez and Summey-Montaflo ordered Lopez and Bedoy to wipe out the footprints they had left. Trash was piled on Aguilar's body and Martinez lit the pile on fire. The group returned to the Explorer and drove away.

P12 Moments later, a Tucson Airport Authority police officer on patrol noticed smoke in the distance and the Explorer [***6] driving from that direction and initiated a traffic stop. As the police cruiser and the Explorer crossed paths, Martinez hid cocaine and methamphetamine in the vehicle in which he was travelling. He told the group to tell police they were coming from a barbeque at "Cisco's." He told the officer who stopped the Explorer the same. Police detained the group. Tucson firefighters, meanwhile, responded to the blaze and reported that a body had been found. After the body was discovered, Martinez was taken into custody and, incident to that arrest, was searched. Jewelry and marijuana were found in Martinez's possession. Liquor, drugs, and the shotgun were also found in the Explorer.

**B**

P13 In the fall of 2005, a jury found Martinez guilty of premeditated first degree murder, felony murder, and kidnapping. The sentencing proceedings followed, and at the aggravation phase, the jury unanimously found that Martinez murdered Aguilar for pecuniary gain and committed the slaying in an especially cruel, heinous, and depraved manner. *See* Ariz. Rev. Stat. ("A.R.S.") section 13-703(F)(5), (F)(6) (Supp. 2003). At the penalty phase, Martinez put on evidence that he had had a terrible childhood, that he had [***7] been molested as a child, and that those circumstances led him to murder Aguilar. The jury concluded that the mitigation evidence was not sufficiently substantial to call for leniency, determining that Martinez should be sentenced to death.

P14 An automatic notice of appeal and an appeal from post-trial rulings [4] were filed with this Court under Arizona Rules of Criminal Procedure 26.15 and 31.2(b) and A.R.S. §§ 13-4031, - 4033 (2001). We have jurisdiction under the Arizona Constitution, Article 6, Section 5(3), and A.R.S. §§ 13-4031, - 4033.

**II**

**A**

P15 Martinez first argues that prosecutorial misconduct warrants a new trial. This Court will reverse a conviction for prosecutorial misconduct only when "(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying [the] defendant a fair trial." *State v. Velazquez*, 216 Ariz. 300, 311, P 45, 166 P.3d 91, 102 (2007), *cert. denied*, 128 S. Ct. 2078, 170 L. Ed. 2d 811 (2008) [***8] (quoting *State v. Anderson (Anderson II)*, 210 Ariz. 327, 340, P 45, 111 P.3d 369, 382 (2005)). Martinez did not object below to any of the prosecution's allegedly improper statements. Absent a trial objection, we review claims of prosecutorial misconduct for fundamental error. *Id.* at P 47.

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[4] In early 2006, Martinez filed a motion for new trial under Arizona Rule of Criminal Procedure 24.1, raising many of the issues he now advocates on appeal. The superior court denied the motion after a hearing.

P16 Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 567, P 19, 115 P.3d 601, 607 (2005) (citation omitted). "To prevail under this standard of review, a defendant must establish both that fundamental [**354] [*427] error exists and that the error in his case caused him prejudice." *Id.* at P 20 (citation omitted).

**1**

P17 When the police stopped the Explorer, Martinez and his companions told investigators that they had been at a barbeque at "Cisco's." [5] The jury heard that this cover story came from Martinez. In closing arguments at the aggravation phase, the prosecution told jurors that Martinez provided his friends "a sickening excuse to offer up to the police officers - we were at Cisco's barbecue - so [***9] he cannot be connected with this crime."

P18 Martinez claims that the prosecutor knew, based on a series of free talks between the State and other defendants, as well as an interview of Martinez, that the alibi, although a fabrication, was not a "joke" about burning Aguilar because the reference was to another "Cisco."

P19 A prosecutor is entitled to make arguments supported by the record. *State v. Hughes*, 193 Ariz. 72, 85, P 59, 969 P.2d 1184, 1197 (1998). The prosecutor's comment about the alibi was a suggestion that Martinez's reference to "Cisco" could not credibly be called a coincidence. The police interviews and free talks emphasized by Martinez on appeal do not rule out the possibility that Martinez did, in fact, intend the alibi to refer to the crime. The prosecutor's statement was neither false nor a mischaracterization. There was simply no misconduct in this instance.

**2**

P20 Martinez makes several additional attempts to demonstrate prosecutorial misconduct, none of which warrant detailed discussion. He alleges that prosecutors falsely claimed that Martinez "joked" about missing his first shot at Aguilar, wrongly claimed that Martinez [***10] had been accused of committing arson at his elementary school, and fallaciously questioned the veracity of Martinez's claims that he killed Aguilar because he believed Aguilar was a child molester. All of the prosecutors' comments are supported by evidence, including, in some cases, evidence proffered by Martinez himself. [6] These additional allegations, therefore, are meritless.

**B**

P21 The jury returned separate verdicts finding that Martinez committed felony murder and premeditated murder. Martinez argues that there was insufficient evidence to convict him of felony murder. He does not challenge the jury's finding of premeditated murder.

P22 [***11] 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)

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[5] Francisco Aguilar had been called "Cisco."

[6] For example, both Bedoy and Lopez testified that Martinez laughed about missing his first, close-range shot at Aguilar. Evidence of the school arson allegations against him was in the records provided by Martinez to the jury. Further, the prosecutor's comments as to Martinez's motive properly questioned the link between the alleged motive and Martinez's own claim of having been victimized as a child. The prosecution pointed to the absence in the same documents of any complaint by Martinez that when he was a child he had been the victim of molestation.

(declining to address issue with premeditation instruction because defendant failed to challenge conviction for felony murder).

P23 We are, however, concerned about the felony murder instruction in this case. The instruction stated:

> The crime of first degree felony murder requires proof of the following two things:
> The defendant committed or attempted to commit a kidnapping; and
>
> [**355] [*428] In the course of and in furtherance of this crime or immediate flight from this crime, the defendant or another person caused the death of any [***12] person. With respect to the felony murder rule, insofar as it provides the basis for a charge of first degree murder, there is no requirement that the killing occurred "while committing" or "engaged in" the felony, or that the killing be a part of the felony. The homicide need not have been committed to perpetrate the felony.
>
> *It is enough if the felony and the killing were part of the same series of events.*

(Emphasis added.) 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.

**C**

P24 The State granted Lopez and Bedoy testimonial immunity as part of plea agreements under which each was permitted to plead to kidnapping, with a maximum sentence of twelve years. Each testified against Martinez at trial. Summey-Montano pleaded guilty to first degree murder and was sentenced to life imprisonment; his post-conviction relief proceedings, *see* [***13] Ariz. R. Crim. P. 32, were pending at the time of Martinez's trial. Martinez sought to compel Summey-Montaflo to testify. Summey-Montano invoked his Fifth Amendment right against self-incrimination. The trial judge held that Summey-Montano retained that right during the pendency of his initial post-conviction proceedings. *See State v. Rosas-Hernandez*, 202 Ariz. 212, 217, P 14, 42 P.3d 1177, 1182 (App. 2002) ("[I]f a witness' Fifth Amendment privilege survives during a direct appeal, it also survives pending post-conviction relief.").

P25 Martinez now claims that his Sixth Amendment right to compel a witness to testify on his behalf was violated by the trial court's failure to require Summey-Montano to testify. We review the denial of a motion to compel for an abuse of discretion. *State v. Corrales*, 138 Ariz. 583, 588-89, 676 P.2d 615, 620-21 (1983).

P26 A defendant has a right under the Sixth Amendment to compel witness testimony, but the right is "not absolute" and will give way when the witness's preservation of his own Fifth Amendment rights would prevent him from answering relevant questions. *State v. Harrod (Harrod III)*, 218 Ariz. 268 268, PP 20-21, 183 P.3d 519, 527 (2008).

P27 [***14] Citing *Chavez v. Martinez*, 538 U.S. 760, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003), Martinez argues that Summey-Montano enjoyed no Fifth Amendment right to avoid testifying because such a right is implicated only by the *government's* use of, compelled testimony. *Chavez* stands for the proposition that a person subject to interrogation suffers no constitutional injury from the interrogation itself for the purpose of federal civil rights statutes. *Id.* at 766 ("We fail to see how, based on the text of the Fifth Amendment, Martinez can allege a violation of this right, since Martinez was never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case.") (plurality). We do not read *Chavez* as thus requiring the government to compel defense witnesses to testify. Rather, as we recently

reiterated, when a witness has continued reason to fear prosecution, the defendant's Sixth Amendment right to compel that witness's testimony may be properly limited. *Harrod III*, 218 Ariz. at 276, P 23, 183 P.3d at 527; *see also Rosas-Hernandez*, 202 Ariz. at 217, P 16, 42 P.3d at 1182 (stating that a defendant who pleaded guilty "retained the right not to incriminate himself during the . . . period in which a [***15] timely *initial* petition for post-conviction relief may be filed") (emphasis added).

P28 Martinez also claims that the prosecution attempted to skew the jury's understanding of the circumstances of the crimes by failing to offer immunity to Summey-Montano, and therefore his Fourteenth Amendment due process rights were violated. [**356] [*429] This allegation of prosecutorial misconduct is not reflected in the record below; we therefore review for fundamental error. *Velazquez*, 216 Ariz. at 311, P 47, 166 P.3d at 102.

P29 "The state's refusal to grant a particular witness immunity does not violate a defendant's right to due process absent . . . a showing that the witness would present clearly exculpatory evidence and that the state has no strong interest in withholding immunity." *State v. Doody*, 187 Ariz. 363, 376, 930 P.2d 440, 453 (App. 1996). There is no such showing here.

P30 Martinez claims that the prosecution manipulated the sentencing agreements to prevent co-defendant Summey-Montano from testifying to the "real reason" for the murder, which was not to cover up a robbery, but to punish Aguilar for the alleged molestation of Summey-Montaflo's cousin. But that argument is refuted by the record. The [***16] jury heard this information. Both Lopez and Bedoy testified that Martinez knew of the allegations against Aguilar. [7]

**D**

P31 During jury selection, a juror asked the trial judge about the appellate process. The judge described the process, noting that "anybody who is convicted of a crime has various Post-Conviction Relief rights. In other words, they can appeal the conviction. A higher court can review it and see if I did anything wrong, or if I made any improper rulings, if Mr. Martinez's constitutional rights were violated, that kind of thing."

P32 Martinez claims that the trial judge's comments improperly minimized the jury's role in sentencing him to death. In *Caldwell v. Mississippi*, 472 U.S. 320, 333, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), the Supreme Court stated that "[because] the sentence [is] subject to appellate review [only upon] a sentence of death, the chance that an invitation to rely on that review will generate a bias toward returning a death sentence is simply too great."

P33 No *Caldwell* error occurred here. *Caldwell* applies "only [***17] to certain types of comment[s] - those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Romano v. Oklahoma*, 512 U.S. 1, 9, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994); *Anderson II*, 210 Ariz. at 337, P 22, 111 P.3d at 379 (same); *see also Caldwell*, 472 U.S. at 343 (O'Connor, J., concurring in part and concurring in the judgment) (prosecutor's "misleading emphasis on appellate review misinformed the jury . . . creating an unacceptable risk that the death penalty [may have been] meted out arbitrarily or capriciously") (quotation marks omitted).

P34 In contrast, the trial court here properly explained that appellate review largely pertains to the court's legal decisions; further, in preliminary instructions given shortly after the complained-of statement, the court told the jury that the "decision to impose or not impose the death penalty is made by you, the jury, not by the Judge. Your decision to sentence or not sentence the defendant to death is

[7] To the extent that evidence of the "real motive" was relevant as mitigation, Martinez himself told the jury in the penalty phase that this was the reason he killed Aguilar.

not a recommendation. Your decision to sentence or not sentence the defendant to death will be binding."

**E**

P35 Martinez contends that he was improperly forced to use a [***18] peremptory challenge to strike a juror whom the trial court should have struck for cause. We need not address this argument because the juror in question was not seated and Martinez makes no claim that any of the jurors who decided his case should have been struck for cause. *See State v. Glassel*, 211 Ariz. 33, 46-47, P 41, 116 P.3d 1193, 1206-07 (2005); *State v. Hickman*, 205 Ariz. 192, 200-01, P 34-36, P40-41, 68 P.3d 418, 426-27 (2003).

**F**

P36 Defense counsel claimed at trial that he was unaware that the State had alleged the (F)(5) pecuniary gain aggravator. Martinez [**357] [*430] now argues the consequences of trial counsel's apparent lack of preparation. This issue is not appropriate for review on direct appeal. *State v. Spreitz*, 202 Ariz. 1, 3, P 9, 39 P.3d 525, 527 (2002) ("[I]neffective assistance of counsel claims are to be brought in Rule 32 proceedings.").

**G**

P37 Martinez next claims that during the jury's deliberations, the trial judge improperly answered jury questions without notice to him or counsel. This alleged lack of notice was a principal claim in Martinez's motion for a new trial. At the evidentiary hearing on that motion, members of his defense team (but not lead counsel) and Martinez [***19] testified that they had no knowledge, or did not remember, that the jury had posed questions; they also claimed that if they had known, they would have responded. The trial judge found, however, based on his recollection, and the affidavit of his bailiff, that the attorneys had, in fact, been contacted and lodged no objection to the trial court's proposed answers. The trial court rejected Martinez's factual contentions. Because the trial court's conclusion has factual support in the record, we defer to that ruling. [8]

P38 In any event, the trial court committed no error in its responses addressing the jurors' questions. As the questions and answers set out in the footnote indicate, there was simply nothing erroneous or prejudicial in the trial court's responses. [9]

P39 For similar reasons we reject Martinez's additional claim that the judge wrongfully failed to recognize jury confusion from the questions and to clarify the jury instructions. *See State v. Ramirez*, 178 Ariz. 116, 125-27, 871 P.2d 237, 246-48 (1994) ("[W]hen a jury asks a judge about a matter on which it has received adequate instruction, the judge may in his or her discretion refuse to answer, or may refer the jury to the earlier instruction.") [***21] (citation omitted). The trial court acted within its discretion here. It simply referred the jury to the original instructions in two instances and in

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[8] The better practice is to make a contemporaneous record with counsel about any jury questions and proposed responses. *Cf. State v. Mata*, 125 Ariz. 233, 240-41, 609 P.2d 48, 55-56 (1980) (trial court contacted counsel and offered opportunity to make record).

[9] The questions and answers were:

> [Q] Is murder as an attempt to cover up a robbery considered a murder for pecuniary gain?
>
> [A] You must rely on the Court's instructions and [***20] make your determination. No further explanation is appropriate at this time.
>
> [Q] B. If some jurors agree that there are mitigating circumstances must all jurors be in agreement that a mitigating circumstance exists. A. Must we be unamous [sic] to find for life. [It appears from the record that Judge Fell added the letter designations to this jury question, then answered the question correspondingly].
>
> [A] A. See [Instruction] # 1 re: unanimous. B. You must rely on the instructions given. No further instructions will be provided.
>
> [Q] The instructions have confused some. Does the verdict have to be unanimous for death or life? Some think only death sentence has to be unanimous[.]
>
> [A] Your verdict must be unanimous no matter what your decision is.

the third correctly stated the requirement that any verdict be unanimous. The original instructions properly noted that jurors did not have to settle on any single mitigator in order to return a life sentence.

**H**

P40 Martinez argues the trial court committed fundamental error in instructing the jury that, if it was unable to reach a verdict at the aggravation phase, the judge would then impose a life sentence. Martinez argues that this misstatement of the law [10] amounted to coercion of the verdict. Although the State conceded at oral argument that the jury instruction was incorrect, there was no coercion here. Indeed, the mistaken instruction favored Martinez by suggesting a [**358] [*431] single holdout juror could forestall death. *Cf. Mills v. Maryland*, 486 U.S. 367, 375, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988) (death penalty arbitrary when a holdout juror can prevent otherwise unanimous jury from finding *mitigating* factor). The trial court's misstatement of the law did not prejudice Martinez.

**I**

**1**

P41 During the penalty phase of the sentencing proceeding, Martinez introduced numerous documents, including Child Protective Service ("CPS") reports, police reports, and other records. For example, Martinez introduced documents reporting that he had committed arson at his elementary school, including school reports and court records. He also introduced pages of disciplinary records from schools and the juvenile justice system, as well as reports from psychologists and psychiatrists who had interviewed him. Martinez attempted to show that his mother was inattentive and used drugs during pregnancy, that he was of limited intelligence, and that he had been sexually abused. Martinez's expert testified that a combination [***23] of drug use, lack of sleep, and his own unresolved feelings about the molestation, along with Aguilar's refusal to admit his own conduct as an alleged child molester, likely triggered the episode that resulted in Aguilar's death.

P42 The State's rebuttal evidence suggested that Martinez's family life was not as bad as he claimed, that his mother had made efforts to follow up on counseling and control his behavior, and that he exhibited behavior consistent with being a psychopath. The State also argued that in all of the evidence of prior violence by Martinez, nothing indicated a sexual trigger and Martinez himself never reported any sexual abuse until after a half-dozen sessions with his mental health expert in preparation for trial. The State also pointed out that a CPS report submitted as mitigation indicated that a prior suspicion that Martinez had been sexually abused had not been substantiated.

**2**

P43 Martinez argues that the State's efforts to rebut his mitigation evidence in the penalty phase violated his rights under the Sixth Amendment's Confrontation Clause and deprived him of due process. He objects principally to "hearsay" testimony by juvenile probation officers regarding [***24] his behavior, the victim impact statement provided by Aguilar's birth mother, and the claim he committed arson at his elementary school. Because he did not raise these objections at trial, we review for fundamental error. *E.g., State v. Ellison*, 213 Ariz. 116, 132, P 54, 140 P.3d 899, 915 (2006), *cert. denied*, 127 S. Ct. 506, 166 L. Ed. 2d 377 (2006).

P44 As Martinez recognized, we rejected a similar

[10] *Compare* A.R.S. § 13-703.01(E) (Supp. 2007) ("If the trier of fact unanimously finds no aggravating [***22] circumstances, the court shall then determine whether to impose a sentence of life or natural life on the defendant."), *with id.* § 13-703.01(J) ("At the aggravation phase, if the trier of fact is a jury, the jury is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and *shall impanel a new jury*.") (emphasis added).

Confrontation Clause argument in *State v. McGill*, 213 Ariz. 147, 160, PP 54-56, 140 P.3d 930, 943 (2006), *cert. denied*, 127 S. Ct. 1914, 167 L. Ed. 2d 570 (2007) (holding hearsay evidence admissible at the penalty phase, consistent with due process, when the "defendant knew about the statements and had an opportunity to either explain or deny them" and when the testimony has "sufficient indicia of reliability to be responsible evidence") (citation omitted). We decline Martinez's invitation to revisit *McGill*. [11]

P45 Martinez's assertions regarding the victim impact statement compel no different result. The statement, which was unsworn and not subject to cross-examination, explained that Aguilar aspired to make something of his life and was well-loved by his family. Martinez claims that Aguilar's birth mother should have been subjected to cross-examination, that the statement was false, and that the State should have corrected it. [**359] [*432] But victim impact evidence is not put on by the State, nor is cross-examination permitted or placing the victim's mother under oath necessary. *See* A.R.S. § 13-4426.01 (Supp. 2007) ("[T]he victim's right to be heard is exercised not as a witness, the victim's statement is not subject to disclosure to the state or the defendant or submission to the court[,] and the victim is not subject to cross-examination."). [12] Finally, the fact that the [***26] mother gave Aguilar up for adoption is immaterial to her status as a victim by consanguinity. *See* A.R.S. § 13-703.01(S)(2).

**J**

**1**

P46 Martinez raises several arguments relating to jury instructions in the penalty phase. These arguments focus on the trial court's characterization of the role of jurors in assessing the proper penalty.

P47 Martinez requested the following jury instruction about assessing mitigation evidence:

> [I]n this phase, the defendant has got to present any relevant evidence which he and his attorneys believe are mitigating factors which will persuade one or more [of you] that the defendant shall be shown leniency and not receive the death sentence.
> The State may also present evidence to you in an attempt to demonstrate the defendant should not be shown leniency.
>
> Rather than creating the risk of an unguided emotional response against the defendant, full consideration of evidence [***27] that mitigates against the death penalty is essential if you are to give a reasoned moral response to the defendant's background, character and crime.

P48 The trial court rejected this instruction and offered an alternative that did not include the word "moral"; it also precluded the defense from making a "moral judgment" argument in its opening statement.

P49 "A trial court's refusal to give a jury instruction is reviewed for abuse of discretion." *Anderson II*, 210 Ariz. at 343, P 60, 111 P.3d at 385 (citing *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995)). The legal adequacy of an instruction, however, is reviewed de novo. *State v. Johnson*, 212 Ariz. 425, 431, P 15, 133 P.3d 735, 741 (2006), *cert. denied*, 127 S. Ct. 559, 166 L. Ed. 2d 415 (2006).

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[11] Martinez also argues that reports that he committed arson against his elementary school should have been excluded on other evidentiary grounds. His argument that Rule 404(b), Ariz. R. Evid., and this Court's related case law addressing the standard for admitting other acts evidence in criminal trials should preclude [***25] this evidence is misplaced. Section 13-703(C) (Supp. 2007) mandates that "the prosecution . . . may present any information that is relevant to any of the mitigating circumstances . . . regardless of its admissibility under the rules governing admission of evidence at criminal trials" in the penalty phase of a capital proceeding.

[12] Martinez also claims that the falsity of the victim statement is demonstrated by the State's later "disavowal" of it. This is not an accurate statement of the State's position. In post-trial proceedings, the prosecution merely noted that Aguilar's mother's opinions were her own. *See* A.R.S. § 13-4426.01.

P50 Martinez contends that the trial court erred in "convert[ing] a moral decision into a factual decision." He argues that the court misled the jurors in describing their role as reaching a "reasoned" decision, "uninfluenced by sympathy." His argument hinges on the absence of the word "moral" from the instructions.

P51 The Supreme Court has described the capital sentencing decision as a "reasoned moral response" to mitigation evidence. *Penry v. Lynaugh*, 492 U.S. 302, 328, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), [***28] *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

P52 The Supreme Court's use of the phrase a "reasoned moral response" describes the result of individualized sentencing that appropriately considers "any aspect of the defendant's character, propensities or record and any of the circumstances of the offense" relevant to determine whether the defendant should be shown leniency. A.R.S. § 13-703(G); *see also Kansas v. Marsh*, 548 U.S. 163, 173-74, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006) (jury must reach reasoned decision); *Anderson II*, 210 Ariz. at 349, P 92, 111 P.3d at 391 (rejecting claim that instruction that jury should not be "swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling" violated the Eighth Amendment). The superior court here made clear to the jury that it should consider all possible mitigating evidence. The omission of the word "moral" from the final instructions did not render the [**360] [*433] instructions, as a whole, incorrect or misleading.

P53 Likewise, we reject Martinez's claim that the court prevented him from urging the jury to employ "moral judgment" in his favor. As the State notes, Martinez, explicitly asked jurors to consider the case "in [***29] accordance with thousands of years of the Judeo-Christian tradition" and, in fact, traced that tradition from the Exodus to the Sermon on the Mount. Consequently, Martinez was effectively allowed to argue that a death verdict involved a "moral" judgment.

**2**

P54 Martinez also challenges two other jury instructions. First, he contends that the court erred in instructing the jury that the "defendant has the burden of proving any mitigating circumstance by a preponderance of the evidence" and that "[i]f your decision is that there are no mitigating circumstances or that mitigating circumstances are not sufficiently substantial to call for leniency, your verdict must be that the defendant be sentenced to death." He claims that "[b]oth statements are technically accurate, but they leave the impression that the defendant bears the burden of proving that the mitigation is sufficiently substantial to call for leniency," contrary to *State ex rel. Thomas v. Granville (Baldwin*), 211 Ariz. 468, 123 P.3d 662 (2005). [13]

P55 *Baldwin* rejected the state's contention that a jury should be instructed that the defendant bore the burden [***30] of proving that the mitigation was substantial enough to call for leniency, finding that neither the state nor the defendant has such a burden of proof. *Id.* at 472, PP 13-14, 124 P.3d at 666. The rejected instruction dealt with the burden of proof, not the burden of production. Our subsequent cases have held that the jury can properly be told that if it concludes that there is no mitigation or the mitigation is not sufficiently substantial to call for leniency, a death verdict should result. *State v. Tucker* (*Tucker II*), 215 Ariz. 298, 318, P 74, 160 P.3d 177, 197 (2007), *cert. denied*, 128 S. Ct. 296, 169 L. Ed. 2d 211 (2007); *accord Velazquez*, 216 Ariz. at 310, P 43, 166 P.3d at 101 (instruction requiring a verdict of death if jury unanimously finds no mitigating circumstances sufficiently substantial to call for leniency proper "as long as the jury is allowed to consider all relevant mitigating evidence").

[13] The trial here occurred before this Court issued its opinion in *Baldwin*.

P56 Second, Martinez claims that an instruction requiring jurors to "individually weigh . . . mitigating circumstances against the aggravating circumstances" and describing the manner in which such weighing can be performed, was error. We rejected this argument in *Velazquez*. 216 Ariz. at 310, P 39, 166 P.3d at 101 [***31] (noting that term "weigh" may be used to describe juror's decision).

**K**

P57 Having received a note indicating that the jury was at an impasse, the trial judge stated in open court, with only counsel and Martinez present, that he was "going to bring [the jury] in and declare a mistrial." When the jury returned, the court asked if further deliberations would be helpful. The jurors said yes. The court therefore dispatched the jury to continue deliberating. Martinez now argues that the trial had "ended," and the judge erred by allowing further deliberation. As Martinez's brief concedes, however, the judge "announced [the] intention to declare a mistrial"; he never actually granted a mistrial. Because no mistrial had been declared and the jury indicated that further deliberations would be helpful, the superior court did not abuse its discretion in allowing further deliberations.

**L**

P58 Martinez next claims he was entitled to a jury determination of his "defense" of mental retardation. The Eighth Amendment bars the execution of mentally retarded defendants. *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). We noted in *State v. Grell* that Arizona's proceedings for determining mental retardation operate [***32] like an affirmative defense. 212 Ariz. 516, 522, P 26, 135 P.3d 696, 702 (2006), [**361] [*434] *cert. denied*, 127 S. Ct. 2246, 167 L. Ed. 2d 1095 (2007). But our analogy in *Grell* simply illustrated why the burden of proving retardation could be placed on the defendant; no affirmative defense was created. *See State v. Casey*, 205 Ariz. 359, 362, P 10, 71 P.3d 351, 354 (2003) (explaining that the power to create affirmative defenses lies with the legislature).

**M**

P59 Martinez raises several Eighth Amendment and statutory challenges to this Court's review of death penalty verdicts under A.R.S. § 13-703.05. [14] "All legal and constitutional questions are reviewed de novo." *Harrod III*, 218 Ariz. at 279, P 38, 183 P.3d at 530.

**1**

P60 In 2002, the legislature ended our independent review of death penalty verdicts for murders committed after August 1, 2002. *See* 2002 Ariz. Sess. Laws, ch. 1, § 7(B) (5th Spec. Sess.); *see also* A.R.S. § 13-703.04 (Supp. 2003); A.R.S. § 13-703.05. Section 13-703.05 provides that this Court now only determines whether the trier of fact abused its discretion in finding aggravating factors and determining that a death sentence is appropriate.

P61 The Eighth Amendment prohibits cruel and unusual punishment; however, the provision also "guarantees individuals the right not to be subjected to excessive sanctions." *Roper v. Simmons*, 543 U.S. 551, 560, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). [***34] Martinez therefore argues that this

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[14] We decline to consider two of Martinez's Eighth Amendment challenges. The first, that Martinez's sentence is disproportionate compared to the sentences imposed upon other murderers, is settled against him, as his counsel correctly conceded at oral argument. *Pulley v. Harris*, 465 U.S. 37, 50-51, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984) ("There is . . . no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it."); [***33] *State v. Salazar*, 173 Ariz. 399, 417, 844 P.2d 566, 584 (1992) (rejecting proportionality review).

The other, that the Eighth Amendment is violated as applied to his case, is waived for lack of argument. Ariz. R. Crim. P. 31.13(c)(1)(vi) (proper argument "shall contain . . . the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"). In any event, given that the jury properly found aggravating circumstances making Martinez eligible for a capital sentence, the argument is simply another way of arguing proportionality.

Court must review the propriety of death penalty verdicts under a de novo standard, just as he claims the Supreme Court reviews excessive fines and punitive damages de novo.

P62 The Supreme Court, however, has never required de novo review of death sentences; review need only be "meaningful." *Clemons v. Mississippi*, 494 U.S. 738, 749, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990). "It is a routine task of appellate courts to decide whether the evidence supports a jury verdict and in capital cases . . . to consider whether the evidence is such that the sentencer could have arrived at the death sentence that was imposed." *Id.* at 748-49. De novo review of the sentencing decision is not constitutionally required. *See Jurek v. Texas*, 428 U.S. 262, 276, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976) (providing judicial review enough to "promote the evenhanded, rational, and consistent imposition of death sentences under law").

**2**

P63 Martinez also argues that A.R.S § 13-4037(B) (2001), which directs that "[u]pon an appeal . . . from the sentence on the ground that it is excessive, the court shall have the power to reduce the extent or duration of the punishment imposed, if, in its opinion . . . the punishment imposed is greater than under [***35] the circumstances of the case ought to be inflicted" preserves this Court's independent review.

P64 At one time this Court purported to ground its power for independent review of death sentences in this provision's predecessor. *State v. Richmond*, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976), *abrogated in part by State v. Salazar*, 173 Ariz. 399, 417, 844 P.2d 566, 584 (1992). The Court subsequently has relied exclusively on A.R.S § 13-703.04 and its predecessors for such authority. *E.g.,* [**362] [*435] *Velazquez*, 216 Ariz. at 313, P 58, 166 P.3d at 104. Because the legislature expressly abolished independent review for murders committed after August 1, 2002, any reliance on A.R.S § 13-4037 in the context of capital sentencing is misplaced.

**N**

P65 Martinez challenges both the jury's finding of aggravators and its determination that the mitigation evidence presented was not sufficiently substantial to call for leniency. We review to determine whether "the trier of fact abused its discretion in finding aggravating circumstances and imposing a sentence of death." A.R.S. § 13-703.05(A). Consequently, "we uphold a decision if there is any reasonable evidence in the record to sustain it." *State v. Morris*, 215 Ariz. 324, 340-41, P 77, 160 P.3d 203, 219-20 (2007), [***36] *cert. denied*, 128 S. Ct. 887, 169 L. Ed. 2d 742 (2008) (quotation marks and citation omitted).

**1**

P66 Under A.R.S § 13-703(F)(5), a first degree murder is aggravated if the homicide was committed "as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." Martinez argues that the (F)(5) aggravator was not proven as a matter of law because the State failed to establish that "but for" his pecuniary gain motive, the slaying would not have occurred. *See State v. Garza*, 216 Ariz. 56, 68, P 52, 163 P.3d 1006, 1018 (2007), *cert. denied*, 128 S.Ct. 890, 169 L. Ed. 2d 743 (2008) ("To establish the (F)(5) aggravator, 'the state must prove that the murder would not have occurred but for the defendant's pecuniary motive.'") (quoting *State v. Ring* (*Ring III*), 204 Ariz. 534, 560, P 75, 65 P.3d 915, 941 (2003)). Pecuniary gain, however, need only be a motive for the murder, not the sole motive. *See State v. Hyde*, 186 Ariz 252, 280, 921 P.2d 655, 683 (1996) ("Pecuniary gain need not be the exclusive cause for a murder."); accord *State v. Boggs*, 218 Ariz. 325, 340, PP 73-74, 185 P.3d 111, 126 (2008). The notion of a "but for" relationship merely means that "[t]he state must establish the connection [***37] between the murder and motive through direct or strong circumstantial evidence." *Ring III*, 204 Ariz. at 560, P 76, 65 P.3d at 941.

P67 The jury did not abuse its discretion in finding

the (F)(5) aggravator here. It heard substantial evidence that Aguilar was beaten and his jewelry taken. The jury heard that he was ferried, while bound, to his own home where more property was taken and was interrogated about the location of other property. In addition, the jury heard evidence that Martinez agreed to "rob" Aguilar. Martinez and his companions took steps throughout the course of the crime to conceal Aguilar from public view: Martinez kept him hidden in the trunk of a car and helped ensure their broken down car was moved to a side street before transferring Aguilar into the Explorer, which prevented the victim from being seen at the gas station. When Aguilar was .conducted to the Explorer, Martinez parked the Explorer behind the other car to obscure it from view, and Aguilar was covered with a blanket. Finally, Aguilar's body was burned, an attempt to cover up the kidnapping, the robbery, and the murder itself.

P68 These facts support the jury's finding that Aguilar was murdered to allow [***38] Martinez to keep the stolen property and avoid capture. *See Ellison*, 213 Ariz. at 143, PP 124-25, 140 P.3d at 926 (record indicated that the defendant's "motive for the murders was to facilitate the burglary" where the defendant went to the victims' house with the intent to burglarize it, knew the area and the victims, and did not conceal identity).

**2**

P69 Under A.R.S. § 13-703(F)(6), a first degree murder is aggravated when "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner." "The 'heinous, cruel, or depraved' aggravator is written in the disjunctive and the state need prove only one of the three conditions to trigger application of the aggravating circumstance." *Grell*, 212 Ariz. at 519 n.2, P 8, 135 P.3d at 699 n.2. Accordingly, "[a] finding of cruelty alone is sufficient to establish the F(6) aggravator." [**363] [*436] *Morris*, 215 Ariz. at 341, P 80, 160 P.3d at 220.

P70 "Cruelty involves the pain and distress visited upon the victims" and "may be found when the victim consciously experienced physical or mental pain prior to death, and the defendant knew or should have known that suffering would occur." *Anderson II*, 210 Ariz. at 352 n.18, P 109, 111 P.3d at 394 n.18 [***39] (quotation marks, substitution, and citations omitted). Substantial evidence supports the jury's conclusion that the killing was "especially cruel." Martinez was a major participant in beating, kidnapping, and slaying Aguilar. Indeed, he pulled the trigger for the shot that ultimately killed Aguilar.

P71 The State conclusively established that Martinez's ongoing physical violence against Aguilar caused Aguilar mental anguish that Martinez knew or should have known would have occurred. *Ellison*, 213 Ariz. at 142, PP 120-21, 140 P.3d at 925 (mental anguish shown when victims "experienced significant uncertainty as to [their] ultimate fate") (citation omitted). Because the jury heard overwhelming evidence that the slaying was especially cruel, we need not examine "whether the jury abused its discretion in finding that the murders were also heinous or depraved." *Morris*, 215 Ariz. at 341, P 80, 160 P.3d at 220.

P72 Martinez also argues that the (F)(6) aggravator is "inapplicable" because "[e]verything that was cruel was done by Mr. Summey-Montano." The record, however, is replete with evidence of Martinez's cruelty and the superior court expressly instructed the jury not to impute Summey-Montano's [***40] conduct to Martinez. *Id.* at 215 Ariz. at 337, P 55, 160 P.3d at 216 ("Jurors are presumed to follow the judge's instructions.").

**3**

P73 At the penalty phase, Martinez focused on claims of family problems, including parental inattention. He also argued the more lenient sentences given to Lopez, Bedoy, and Summey-Montano were mitigating circumstances and that Summey-Montano was more culpable. Martinez further pointed to the availability of a life sentence, his age, family ties and remorse, his impaired

intelligence, and impairment from the use of drugs and alcohol.

P74 On appeal, however, Martinez focuses almost entirely on his contention that the evidence presented to the jury showed that the victim had committed "contributory conduct" and that Martinez, because he claimed to have been abused as a child, could not control himself when he was informed of Aguilar's alleged molestation of Summey-Montano's cousin.

P75 Martinez's attack on the victim's supposed conduct is not a compelling mitigating factor. Moreover, much of Martinez's argument is not supported by the record. The very foundation of the claim - that Martinez was himself sexually abused - was undermined by the absence of any evidence [***41] that Martinez himself claimed abuse until his life depended on it. The remainder of his mitigation evidence was unfocused and largely rebutted by the State. The jury did not abuse its discretion in finding this evidence not sufficiently substantial to call for leniency.

**O**

P76 The jury also convicted Martinez of kidnapping. *See* A.R.S. § 13-1304(A)(3) (2001). It found that the offense was dangerous and involved the intentional or knowing infliction of serious physical injury. *See* A.R.S. § 13-604(I) (Supp. 2003).

P77 At sentencing, the trial court found aggravating circumstances, including the presence of accomplices, Martinez's criminal history, his use of drugs and alcohol, and "all factors found by the jury that were considered by the jury as aggravating factors including, but not limited to the pecuniary gain" aggravator. The court sentenced Martinez to an aggravated term of twenty years, to be served consecutively to his death sentence. Martinez did not object to the trial judge, rather than the jury, finding factors to justify an aggravated sentence.

P78 In *Blakely v. Washington*, the Supreme Court held that, generally, any fact that increased a defendant's sentence beyond [**364] [*437] a "statutory [***42] maximum" must be proved to the jury beyond a reasonable doubt. 542 U.S. 296, 301-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Martinez now claims his aggravated sentence for kidnapping was error.

P79 Because Martinez did not object, we review this claim for fundamental error and require that the "defendant . . . establish . . . that fundamental error exists and that the error in his case caused him prejudice." *Henderson*, 210 Ariz. at 567, PP 19-20, 115 P.3d at 607 (citation omitted).

P80 The State argues that no reasonable jury could fail to find the aggravators the court identified. We agree. It was uncontested that the kidnapping involved accomplices, a statutory aggravating factor. A.R.S. § 13-702(C)(4) (Supp. 2003). Likewise, overwhelming evidence demonstrates that Martinez and his cohorts restrained Aguilar, took jewelry from him, and took him to his home where other property was taken from him. A.R.S. § 13-702(C)(6). On this record, the trial court did not commit fundamental error in aggravating Martinez's sentence for kidnapping.

**III**

P81 Martinez raises seventeen issues to avoid preclusion for federal review. They are presented as in his opening brief:

> 1. The reasonable doubt instruction of *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), [***43] dilutes and shifts the burden of proof in violation of the Sixth Amendment to the United States Constitution. Rejected in *Ellison*, 213 Ariz. at 133, P 63, 140 P.3d at 916.
>
> 2. The (F)(5) pecuniary gain aggravator is unconstitutionally overbroad and fails to narrow in violation of *Arave v. Creech*, 507 U.S. 463, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993), and the Eighth Amendment to the

United States Constitution. Rejected in *State v. Greenway*, 170 Ariz. 155, 163, 823 P.2d 22, 30 (1991).

3. The (F)(6) cruel, heinous and depraved aggravator is unconstitutionally vague and overbroad because the jury does not have enough experience or guidance to determine when the aggravator is met. The finding of this aggravator by a jury violates the Eighth and Fourteenth Amendments to the United States Constitution because it does not sufficiently place limits on the discretion of the sentencing body, the jury, which has no narrowing constructions to draw from and give substance to the otherwise facially vague law. Rejected in *State v. Cromwell*, 211 Ariz. 181, 188-90, PP 40-45, 119 P.3d 448, 455-57 (2005).

4. Arizona's death penalty statute creates an unconstitutional presumption of death and impermissibly shifts to him the burden of proving [***44] that mitigation is sufficiently substantial to call for leniency in violation the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Section 15, of the Arizona Constitution. Rejected in *Baldwin*, 211 Ariz. at 471-72, PP 9-17, 123 P.3d 665-66.

5. The death penalty is cruel and unusual under any circumstances and violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Section 15, of the Arizona Constitution. Rejected in *Gregg v. Georgia*, 428 U.S. 153, 186-87, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *State v. Harrod*, 200 Ariz. 309, 320, P 59, 26 P.3d 492, 503 (2001), *judgment vacated on other grounds by Harrod v. Arizona*, 536 U.S. 953, 122 S. Ct. 2653, 153 L. Ed. 2d 830 (2002).

6. Execution by lethal injection is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Section 15, of the Arizona Constitution. Rejected in *State v. Van Adams*, 194 Ariz. 408, 422, P 55, 984 P.2d 16, 30 (1999).

7. The prosecutor's discretion to seek the death penalty has no standards and therefore violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Sections 1, 4, and 15, of the Arizona Constitution. [***45] Rejected in *State v. Sansing*, 200 Ariz. 347, 361, P 46, 26 P.3d 1118, 1132 (2001), *judgment vacated on other [**365] [*438] 1grounds by Sansing v. Arizona*, 536 U.S. 954, 122 S. Ct. 2654, 153 L. Ed. 2d 830 (2002).

8. Proportionality review serves to identify which cases are above the norm of first degree murder, thus narrowing the class of defendants who are eligible for the death penalty. The absence of proportionality review of death sentences by Arizona courts denies capital defendants due process of law and equal protection and amounts to cruel and unusual punishment in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 2, Section 15, of the Arizona Constitution. Rejected in *State v. Gulbrandson*, 184 Ariz. 46, 73, 906 P.2d 579, 606 (1995).

9. Arizona's capital sentencing scheme is unconstitutional because it does not require the state to prove the death penalty is appropriate or require the jury to find beyond a reasonable doubt that the aggravating circumstances outweigh the accumulated mitigating circumstances. Instead, Arizona's death penalty statute requires defendants to prove their lives should be spared, in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution [***46] and Article 2, Section 15, of the Arizona Constitution. Rejected in *State v. Fulminante*, 161 Ariz. 237, 258, 778 P.2d 602, 623 (1988).

10. Section 13-703 provides no objective standards to guide the sentencer in weighing

the aggravating and mitigating circumstances in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Section 15, of the Arizona Constitution. Rejected in *State v. Pandeli* (*Pandeli I*), 200 Ariz. 365, 382, P 90, 26 P.3d 1136, 1153 (2001), *judgment vacated on other grounds by Pandeli v. Arizona*, 536 U.S. 953, 122 S. Ct. 2654, 153 L. Ed. 2d 830 (2002).

11. Arizona's death penalty scheme is unconstitutional because it does not require the sentencer to find beyond a reasonable doubt that the aggravating circumstances outweigh the accumulated mitigating circumstances in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Section 15, of the Arizona Constitution. Rejected in *State v. Poyson*, 198 Ariz. 70, 83, P 59, 7 P.3d 79, 92 (2000).

12. Arizona's death penalty scheme does not sufficiently channel the sentencing jury's discretion. Aggravating circumstances should narrow the class of persons eligible for the death penalty [***47] and reasonably justify the imposition of a harsher penalty. Section 13-703.01 is unconstitutional because it provides no objective standards to guide the jury in weighing the aggravating and mitigating circumstances. The broad scope of Arizona's aggravating factors encompasses nearly anyone involved in a murder, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Section 15, of the Arizona Constitution. Rejected in *Pandeli I*, 200 Ariz. at 382, P 90, 26 P.3d at 1153.

13. The fact-finder in capital cases must be able to consider *all* relevant mitigating evidence in deciding whether to give the death penalty. *Woodson v. North Carolina*, 428 U.S. 280, 303-04, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976). The trial court's failure to allow the jury to consider and give effect to *all* mitigating evidence in this case by limiting its consideration to that proven by a preponderance of the evidence is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Section 15, of the Arizona Constitution. *Rejected in McGill*, 213 Ariz. at 161, P 59, 140 P.3d at 944.

14. By allowing victim impact evidence at the penalty phase of the trial, the [***48] trial court violated Defendant's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 2, Sections 1, 4, 13, 15, 23, and 24 of the Arizona Constitution. Rejected in *Lynn v. Reinstein*, 205 Ariz. 186, 191, PP 15-17, 68 P.3d 412, 417 (2003).

[**366] [*439] 15. The trial court improperly omitted from the penalty phase jury instructions language to the effect that the jury may consider mercy or sympathy in deciding the value to assign the mitigation evidence, instead telling the jury to assign whatever value it deemed appropriate. The court also instructed the jury that it must not be influenced by mere sympathy or by prejudice in determining these facts, thus limiting the mitigation the jury could consider in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 2, Sections 1, 4, 13, 15, 23, and 24 of the Arizona Constitution. Rejected in *State v. Carreon*, 210 Ariz. 54, 70-71, 107 P.3d 900, 916-17 (2005).

16. The death penalty is an irreversible denial of human rights and international law. Rejected in *State v. Richmond*, 136 Ariz. 312, 322, 666 P.2d 57, 67 (1983).

17. [***49] Consecutive sentences for the felony murder conviction and the underlying felony of kidnapping violate A.R.S. § 13-116 (2001) and the double jeopardy clause of the Fifth Amendment to the United States Constitution. Rejected in *State v. Girdler*, 138 Ariz. 482, 489, 675 P.2d 1301, 1308 (1983)

(holding that consecutive punishments for felony murder and predicate felony do not violate double jeopardy).

**IV**

P82 For the forgoing reasons, we affirm Martinez's convictions and sentences.

Michael D. Ryan, Justice

CONCURRING:

Ruth V. McGregor, Chief Justice

Rebecca White Berch, Vice Chief Justice

Andrew D. Hurwitz, Justice

W. Scott Bales, Justice

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