APPENDIX A

Order Granting Relief as to Penalty, Superior Court of Arizona, Maricopa County (Aug. 17, 2020)

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2007-149013-002 DT

08/14/2020

HONORABLE JOHN R. HANNAH JR

CLERK OF THE COURT
R. Vasquez
Deputy

STATE OF ARIZONA

LAURA PATRICE CHIASSON

v.

EDWARD JAMES ROSE (002)

GENEVIE GOLD
JOHN ROBERT MILLS
JESSICA ANN GATTUSO

CAPITAL CASE MANAGER
COURT ADMIN-CRIMINAL-PCR
JUDGE HANNAH
VICTIM WITNESS DIV-AG-CCC

ORDER GRANTING RELIEF AS TO PENALTY

The Court has had under advisement the question whether defendant Rose's claims for post-conviction relief present material issues of fact or law that would entitle the defendant to relief. *See* Ariz. R. Crim. P. 32.11(a). The Court has read and considered the Rule 32 Petition for Post-Conviction Relief (6/29/17) (hereinafter "Petition"), State's Response to Petition for Post-Conviction Release (8/20/18) (hereinafter "Response"), and the Reply to State's Response (1/4/19), as well as both Bench Memoranda (11/22/19), the oral arguments of counsel (12/6/20), and Rose's Amended Petition (1/30/20), the Response (4/9/20), and the Reply (5/1/20). This is Rose's first post-conviction petition.

After due consideration, the Court has decided that relief must be granted on Claim Three: the defendant's right to due process of law was violated when the trial judge instructed the sentencing jury that "the Court will decide whether the sentence shall be with or without the possibility of parole" instead of giving the defendant's requested instruction that the defendant would be "sentenced to life imprisonment without possibility of parole." The parties have briefed and argued all of the relevant issues, including whether the instructions violated the principles laid

down in *Lynch v. Arizona,* 136 S.Ct. 1818 (2018) *(Lynch II)* and *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187 (1994); whether the claim is cognizable under Criminal Rule 32.1(g); the retroactive application of *Lynch II;* and whether the harmless error doctrine applies. In the Bench Memoranda filed before oral argument and at the oral argument itself, both the State and the defense confirmed that Claim Three could be decided on the existing record without an evidentiary hearing. No purpose would be served by further proceedings on Claim Three. *See State v. Gutierrez*, 229 Ariz. 573 ¶ 32, 278 P.3d 1276 (2012) ("when there are no material facts in dispute and the only issue the legal consequence of undisputed material facts, the superior court need not hold an evidentiary hearing.") (citation omitted).

Aside from Claim Three, this ruling addresses all claims that, if upheld, would require retrial of the guilt phase or the eligibility phase or both. Those claims include Claim 2.3 (juror misconduct during *voir dire* in the form of an allegedly false statement); Claim 4.1 (ineffective assistance of counsel at jury selection); Claim 4.2 (ineffective assistance of counsel in connection with guilty plea); Claim 4.7 (ineffective assistance of counsel for failure to object to stun belt); and Claim 11 (Arizona statute does not meaningfully narrow class of death-eligible offenders). None of those claims is colorable on its merits.

This ruling does not address penalty-phase issues other than the *Simmons/Lynch* jury instruction issue. The ruling on the *Simmons/Lynch* issue moots the other issues. Though those issues could have been addressed immediately in order to obviate the need for further proceedings in the event of an appellate reversal, that approach would delay the proceedings because several of the defendant's claims (including intellectual disability and some of the juror misconduct and ineffective assistance claims) will need an evidentiary hearing.

In addition, the key legal issues in Count Three are currently before the Arizona Supreme Court as a matter of first impression in *Cruz v. State*, CR-17-0567-PC.[1] The Supreme Court held oral argument in *Cruz* on June 2, 2020. Since those issues are decided here in the defendant's favor, the most expeditious way to proceed is to enable the parties to seek immediate review. If the Supreme Court agrees that *Lynch II* warrants relief under Rule 32.1(g), preparations for a new penalty hearing can begin promptly. If the Supreme Court disagrees, on the other hand, this Court and the parties will know that relatively soon, and the litigation on the rest of the petition can go forward without any further delay.

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[1] The issues presented in *Cruz,* as framed by the Arizona Supreme Court in the order granting review, are (1) was *Lynch v. Arizona*, 136 S.Ct. 1818 (2016) (*Lynch II*) a significant change in the law for purposes of Ariz. R. Crim. P. 32.1(g)?, (2) is *Lynch II* retroactively applicable to petitioner on review?, and (3) if *Lynch II* applies retroactively, would its application have probably overturned petitioner's sentence under Rule 32.1(g)?

Procedural Background and Facts

The Arizona Supreme Court summarized the facts presented at Rose's trial as follows:

> On July 25, 2007, Rose stole a truck that contained a company's checkbook. Over the next three days, Rose conspired with others to forge and cash checks from the checkbook.
>
> On July 27, Rose and his girlfriend smoked methamphetamine and drank beer most of the day. That night, they went out to cash forged checks. Rose had said earlier that day he would shoot anyone who tried to stop him. Armed with a gun, Rose entered a check-cashing store and presented one of the company's checks to the cashier. She discovered the check was forged and called the police.
>
> Shortly thereafter, Officer George Cortez, Jr. of the Phoenix Police Department arrived. The officer entered the store, approached Rose, and began to handcuff him. After his left hand was cuffed, Rose pulled out his gun and shot the officer twice, killing him. Rose ran from the store with the handcuffs dangling from his wrist. Surveillance cameras captured the shooting.
>
> Early the next morning, officers went to a house where they suspected Rose was hiding. They eventually entered the house, discovered Rose hiding in a closet, and arrested him.

State v. Rose, 231 Ariz. 500 ¶¶ 2-5, 297 P.3d 906 (2013).

On August 7, 2007, the State charged Rose with the first-degree murder of a law enforcement officer, first-degree felony murder, burglary, and three counts of forgery. Docket No. 10. The State noticed its intent to seek the death penalty and alleged aggravating circumstances pursuant to A.R.S. section 13-703(F) (now A.R.S. § 13-751(F)).

On August 9, 2010, jury selection commenced. On August 20, 2010, the first day of trial, Rose pleaded guilty to all charges and admitted to prior convictions for armed robbery, a class 2 dangerous felony (CR2006-137612), and endangerment, a class 6 felony (CR2008-006363).

The trial proceeded to an aggravation phase, at which the State presented comprehensive evidence about the offenses to which Rose pleaded guilty. The jury found proven beyond a reasonable doubt four aggravating circumstances: (1) Rose has been convicted of a serious offense, (F)(2); (2) Rose committed the offense as consideration for receipt or in expectation of pecuniary gain, (F)(5); (3) Rose was on probation when the murder occurred, (F)(7)(b); and (4) the murder

victim was a police officer killed while performing his official duties, and Rose knew, or should have known, the murder victim was a peace officer, (F)(10). After receiving Rose's mitigation and the State's rebuttal in the penalty phase, the jury returned a death sentence.

On direct appeal, the Arizona Supreme Court affirmed Rose's conviction and death sentence. *State v. Rose*, 231 Ariz. 500, 297 P.3d 906 (2013). Rose then filed this timely Petition for Post-Conviction Relief.

Claims Relating to the Guilty Plea and the Aggravation Phase

I. Claim 2.3 - Juror J.Q.'s Jury Questionnaire Response

In response to a written *voir dire* question about membership in clubs and organizations, Juror J.Q. listed several organizations including the "FBI Agents Associations." Petition, Sealed Ex. 14 at 4. The questionnaire later inquired: "Are you a member of any group, organization, or association, which advocates a particular position or encourages the adoption of a particular agenda related to the criminal justice system (e.g., victim's rights or defendant's rights)?" Juror J.Q. answered "no." *Id.* Relying on exhibits about the activities of "Federal Bureau of Investigation Agents Association (FBIAA)," Rose argues that Juror J.Q.'s response was materially dishonest because the FBIAA has supported victims' rights legislation. Petition, Ex. 59-64.

A juror commits misconduct by "perjuring himself or herself, or willfully failing to respond fully to a direct question posed during the *voir dire* examination." Ariz. Crim. P. 24.1(c)(3)(C)(2018); *see also McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984) (holding that a party must show that "a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause").

Rose has not shown that Juror J.Q.'s response on the jury questionnaire constitutes misconduct. It is not clear that J.Q.'s answer to the question was willfully dishonest. The question can fairly be read as asking about organizations for which victims' rights advocacy is a primary mission. Rose offers no information suggesting that the FBIAA is that kind of organization. The information before the Court indicates that it is a fraternal and professional organization for FBI agents. Consistent with that, the purported victims' rights' legislation that the organization supported was for the benefit of FBI agents and their families, including some who were not crime victims. Petition, Ex. 60-64.

Furthermore, the undisclosed information would not likely have made any difference on a challenge for cause. J.Q. had disclosed that he was a career law enforcement professional with 23 years of service as an FBI agent. Petition, Sealed Ex. 14. He had also disclosed that a robbery

suspect had killed one of his FBI colleagues in the line of duty. R.T. 8/17/10 at 28-29. Assuming for the sake of argument that those facts made a case for JQ's disqualification, the facts concerning J.Q.'s professional organization added little if anything.

Juror J.Q.s answer to the question about organization membership does not support a colorable juror misconduct claim.

II. Claim 4.1- Ineffective Assistance During Jury Selection

A colorable claim of ineffective assistance of counsel requires the defendant to show that counsel's performance fell below an objective standard of reasonableness and that this deficient performance caused prejudice. *Strickland v. Washington*, 466 U.S. 668, 688-90, 694 (1984). The failure to establish either prong defeats the claim. *Id.* at 700. But a court need not address both performance and prejudice if a defendant makes an insufficient showing on either one. *Id.* at 697.

A. Failure to strike Juror J.Q.

Rose argues that trial counsel's failure to remove Juror J.Q. was objectively unreasonable because Juror J.Q. held biases related to his law enforcement experiences. Rose contends that this caused prejudice because Juror J.Q. voted for a death sentence and he persuaded other jurors to vote for a death sentence.

To prevail on this claim, Rose must show that there were reasonable grounds to believe that Juror J.Q. could not "render a fair and impartial verdict." *State v. Blackman,* 201 Ariz. 527 ¶ 12, 38 P.3d 1192 (App. 2002) (quoting Ariz. R. Crim. P. 18.4(b). Juror prejudice must be demonstrated by objective evidence. *State v. Doerr,* 193 Ariz. 56 ¶ 18, 969 P.2d 1168 (1998). "Actual bias is typically found when a prospective juror states that he cannot be impartial, or expresses a view adverse to one party's position and responds equivocally as to whether he could be fair and impartial despite that view." *Fields v. Brown*, 503 F.3d 755, 767 (9th Cir. 2007).

Rose has not shown reason to believe that Juror J.Q. was not a fair juror. J.Q.'s experience as a law enforcement officer, standing alone, does not show bias. *See State v. Johnson*, 247 Ariz. 166 ¶ 126, 447 P.3d 783 (2019) ("Even though a juror may have an experience with law enforcement or as a victim of a crime, such experience alone is not disqualifying."); *Tinsley v. Borg*, 895 F.2d 520, 529 (9th Cir. 1990) (prejudice is not presumed "merely because a juror works in law enforcement"). J.Q. indicated that he could be fair and impartial, and that the incident involving his murdered colleague killed would not affect his ability to serve as an impartial juror. Petition, Sealed Ex. 14; R.T. 8/17/10 at 15, 25, 26-28.

Rose has failed to allege a colorable claim of prejudice arising from his attorneys' decision not to strike Juror J.Q. *Strickland v. Washington*, 466 U.S. at 697.

B. Failure to strike jurors with law enforcement connections

Rose next alleges that trial counsel unreasonably failed to strike four other jurors with law enforcement ties, identified as seated Jurors 13, 4, 2, 5. This claim also relies solely on each juror's law enforcement connections. Rose argues that failure to remove these jurors caused prejudice because each juror was more likely to be sympathetic to the prosecution and each juror voted for a death sentence. A juror's law enforcement connections are insufficient to show bias. *State v. Johnson*, 247 Ariz. 166 ¶ 126, 447 P.3d 783. Rose therefore cannot show prejudice for purposes of this ineffective assistance claim. *Strickland v. Washington*, 466 U.S. at 697.

C. Failure to move to strike seated jurors for cause

Rose faults trial counsel for failing to challenge for cause prospective jurors A.S., M.J., and E.B.

A court must excuse a prospective juror "if there is a reasonable ground to believe that the juror ... cannot render a fair and impartial verdict." Ariz. R. Crim. P. 18.4(b). "The party making a challenge has the burden," *State v. Medina,* 193 Ariz. 504 ¶ 18, 975 P.2d 94 (1999), and juror prejudice must be demonstrated by objective evidence. *State v. Doerr*, 193 Ariz. 56 ¶ 18, 969 P.2d 1168.

Rose's challenge to Juror A.S. arises from her responses on the written questionnaire. During *voir dire*, Juror A.S. clarified her questionnaire responses. R.T. 8/16/10 at 113. Rose has not pointed to any other evidence that Juror A.S. could not return a fair and impartial verdict.

Similarly, Juror M.J. said that he could follow the law, despite having had a family member murdered and having himself been the victim of other crimes. R.T. 8/17/10 at 42. The record therefore does not establish that Juror M.S. was biased. *State v. Rose,* 121 Ariz. 131, 139, 589 P.2d 5, 13 (1978) ("Having been the victim of a crime similar to the one with which the defendant is changed does not mandate a venireman's dismissal).

Finally, Rose has not shown reasonable grounds to believe Juror E.B. could not be fair and impartial. Juror E.B. stated that she could impose a life sentence on someone who murdered a police officer, and that she could follow the law and consider mitigation. R.T. 8/17/10 at 32, 41.

This ineffective assistance claim fails on the prejudice prong as a matter of law. *Strickland v. Washington*, 466 U.S. at 697.

D. Failure to challenge biased prospective jurors for cause

Rose alleges that trial counsel unreasonably used peremptory challenges on Jurors 15 and 144, and that counsel should have moved to dismiss these jurors for cause instead. This claim is without merit because these jurors were not seated. The failure to remove jurors who did not deliberate is harmless error. *State v. Glassel*, 211 Ariz. 33 ¶ 57, 116 P.3d 1193 (2005).

E. Inadequate voir dire examination

Rose alleges that trial counsel inadequately questioned the jury panel, and Jurors 126 and 144 in particular. To establish a colorable claim, Rose must demonstrate an inadequate *voir dire and* that the faulty process resulted in the selection of a biased or partial jury. *State v. Moody*, 208 Ariz. 424 ¶ 95, 94 P.3d 1119 (2005).

The record does not support this claim. Each juror filled out a questionnaire. Then small panels of jurors came into the courtroom and were questioned by trial counsel and the prosecution. The *voir dire* transcript shows that trial counsel followed up on specific questionnaire responses and focused on views about the death penalty. Trial counsel operated under trial limits set by the trial judge. They made a record and requested additional time to question the prospective jurors, but the request was denied. R.T. 8/17/10 at 3-4. Rose does not specify what other action trial counsel should have taken, or how any alleged *voir dire* inadequacies resulted in a biased jury or otherwise caused prejudice.

With respect to Jurors 126 and 144, trial counsel exercised peremptory challenges after the trial judge had denied counsel's challenges for cause. Rose has not shown a reasonable probability that additional *voir dire* would have caused the trial court to grant a challenge for cause, or that the jury was unable to render a fair and impartial verdict.

This claim does not colorably establish either deficient performance or prejudice.

F. Stipulation by the parties to removal of prospective jurors

Rose faults trial counsel for stipulating to the release of 35 prospective jurors based solely on their responses to the jury questionnaire. This claim does not show that the seated jury was biased. "Replacement of one unbiased juror with another unbiased juror should not alter the outcome" of the trial. *Fields v. Brown*, 503 F.3d 755, 776 (9th Cir. 2007). Rose fails to establish either deficient performance or prejudice.

G. Failure to challenge the prosecutor's peremptory challenges

The prosecutor used nine of ten peremptory challenges to remove prospective jurors who were female. Rose argues these strikes establish a *prima facie* case of gender discrimination. *J.E.B. v. Alabama,* 511 U.S. 127, 114 S.Ct. 1419 (1994).

Even assuming that trial counsel unreasonably failed to raise a *Batson* change, the prosecutor had readily available information that would have provided obvious non-discriminatory explanations for most of the State's strikes. The explanations would have been fatal to a *Batson* challenge. *State v. Newell,* 212 Ariz. 389 ¶¶ 53-54, 132 P.3d 833 (2006) (citing *Batson v. Kentucky,* 476 U.S. 79, 93-94 (1986)).

- Juror 115 wrote, "I'm not quite sure how I feel about the death penalty. I guess I'm somewhat against it ... [I'm] not sure if I could vote for the death penalty." Petition, Sealed Ex. at 33 at 19. Juror 115 said that she could not personally enter a death verdict or be fair and impartial "[b]ecause of the possibility of deciding on the death penalty." *Id.* at 23. The prosecutor moved to strike Juror 115 based on her questionnaire responses, but the trial court denied the request. R.T. 8/16/10 at 200-201.

- Juror 181 responded "[d]isagree" and "thou shall not kill" to a question about her death penalty views. Petition, Sealed Ex. 34 at 19. During voir dire, Juror 181 said she "would have a hard time deciding death." R.T. 8/17/10 at 167. The prosecutor unsuccessful sought her removal for cause, *id.* at 185-86, before striking her.

- Juror 12 wrote, "I believe that people like serial killers deserve the death penalty. But it's hard to say for one-time killers. You have to consider what lead up to it." Petition, Sealed Ex. 28 at 19.

- Juror 62 discussed that two of her children had been diagnosed with ADHD and Bipolar Disorder, and one of them had been diagnosed with PTSD. Both children were on medication. R.T. 8/16/10 at 122-23. During *voir dire* the prosecutor addressed with Juror 62 that there would be expert testimony about mental health diagnosis, and that some of the diagnoses might be the same as her children's diagnoses. At trial, the prosecution challenged Rose's mental health diagnoses, one of which was PTSD.

- Juror 27 expressed that she "would never want to be responsible for someone's death. I would really have to be convinced it was right" and "It seems wrong to me that a sentence can be death. It seems like another murder. Why is that legal?" Petition, Sealed Ex. 31 at 19-20.

- Juror 18 expressed agreement with the death penalty but wrote that she "would have many sleepless nights if it were up to me to decide a person's fate." She provided an equivocal answer to the question whether she personally could enter a death verdict. Petition, Sealed Ex. 29 at 19-20.

- Juror 243 wrote that a death sentence is "a tremendous financial burden on our state," and "Who's to decide the fate of another's life." Petition, Sealed Ex. 36 at 19.

- Juror 21 wrote in the questionnaire "I wonder if [the death penalty] really works as a deterrent. Seems more like ultimate punishment. It is the penalty assigned for a heinous crime and, therefore, if the circumstances fit then the death penalty should apply." Petition, Sealed Ex. 30 at 19.

- Juror 222 wrote in the questionnaire that both of her sons had taken medication for depression, and that she worked as a lawyer for hospitals utilizing a nursing background. Petition, Sealed Ex. at 4, 12. During *voir dire* the prosecutor asked Juror 222 about the effect of the psychological or mental health education she received as a nurse, and Juror 222 responded, "I think it makes me more empathetic to medical conditions ... and my legal background makes me very analytical." *Id.* Juror 222 further responded that she would base her decision on the evidence, but she also could not ignore her knowledge and experiences. *Id.*

Relying on *Ex Parte Yelder*, 575 So. 2d 137, 138 (Ala. 1991), Rose argues that prejudice should be presumed from a *prima facie* case of purposeful discrimination by the prosecutor and counsel's failure to make a *Batson* challenge. *Yelder* is not the standard in Arizona. The defendant must show a reasonable probability of a different result. Here it does not because the record does not support a finding that the prosecutor's strikes were made for discriminatory reasons. *Batson,* 476 U.S. at 97.

For those reasons, Rose cannot show prejudice, and the IAC claim fails.

III. Claim 4.2- Ineffective assistance based on advice to plead guilty

Prior to opening statements, counsel advised the trial judge that Rose wanted "to take responsibility and plead guilty to all the charges that are in the indictment." R.T. 8/20/10 at 3. Rose pled guilty, the trial judged accepted his pleas, and the case proceeded to the aggravation phase. *Id.* at 4-29. The jury later watched a video of the plea colloquy. Petition, Ex. 320.

Rose now argues that trial counsel unreasonably advised him to plead guilty and to waive a meritorious guilty except insane (GEI) defense, despite receiving no benefit from the prosecution. The State responds that trial counsel made a reasonable strategic decision to use

Rose's guilty plea as evidence of remorse and acceptance of responsibility, given that the State's evidence overwhelmingly established guilt and effectively rebutted the GEI defense.

The record demonstrates that trial counsel reasonably investigated Rose's psychiatric history, as well as the viability of a GEI defense. The depth of the investigation is evident from the presentation of testimony and the admission of exhibits that comprehensively detailed Rose's mental health history. Counsel also retained Dr. Stewart to review Rose's psychiatric history from childhood through arrest, to summarize Rose's psychological and psychiatric assessments, and to give an opinion about Rose's criminal responsibility at the time of the crime. Petition, Ex. 250 at 1. Dr. Stewart opined that Rose suffered from severe mental illness and that, though he may have been aware that he was shooting the victim, Rose was unable to appreciate the wrongfulness of his actions because of the mental illness. *Id.* at 26.

The record also shows that trial counsel made a reasonable tactical decision to withdraw a defense that demonstrably lacked credibility, in favor of focusing on evidence that supported a life sentence. The lack of support for the GEI defense became evident after the trial judge appointed a mental health expert, Dr. Gulino, to evaluate Rose's sanity at the time of the crime pursuant to A.R.S. § 13-502(B). Docket No. 292. Dr. Gulino's initial report, dated April 27, 2010, opined that Rose did not have the ability to appreciate the wrongfulness of his conduct due to a psychotic disorder and possibility methamphetamine induced psychosis. Petition, Ex. 319 at 30. However, Dr. Gulino revised her opinion in a report dated June 17, 2010. At that point she concluded that Rose suffered from symptomology associated with amphetamine intoxication and possibly an amphetamine induced psychotic disorder. *Id.* at 36.

Trial counsel then interviewed Dr. Gulino to learn why she submitted the revised the GEI report and changed her opinion. Dr. Gulino explained that she read the definition of insanity (in A.R.S. § 13-502) after submitting the report, and she "realized that if there is any type of substance induced behaviors going on or any kind of characterological disturbance" than GEI is not available under the law. *Id.* at 34. This assessment was legally correct. *See* A.R.S. § 13-502(A) ("A mental disease or defect constituting legal insanity is an affirmative defense. Mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects ...") Dr. Gulino further explained that, during the clinical interview, Rose said that he had been using methamphetamine the night of the murder and every day for the prior five days. Petition, Ex. 319 at 32. Trial counsel also knew that the prosecution's rebuttal witnesses had diagnosed Rose with polysubstance abuse/dependence and antisocial personality disorder; and that they were going to opine that Rose understood the nature of his actions and that he was violating the law when he murdered Officer Cortez. Response to Petition, Exs. 10 & 11.

In addition to evidence that Rose used methamphetamine the day of the murder, Rose's interactions with his friends, participation in the check cashing scheme, and his actions inside the

check-cashing store undercut the credibility of the GEI defense by showing Rose's purpose-driven actions. The prosecution first called the store clerk who interacted with Rose prior to Officer Cortez's arrival. The clerk's interactions with Rose were recorded by video surveillance cameras and shown to the jury. R.T. 8/25/20 at 9-10. The prosecution then presented Rose's co-defendant, Gilbert Rodriguez, who testified that Rose and others were involved in a check fraud scheme. R.T. 8/26/10 at 24-25. That, Rodriguez said, was why they were at the Southwest Check Cashing store. *Id.* at 45-48. Rodriguez saw Rose "pull out a gun from his backside and turn around real quick and shoot twice," then run out of the store. *Id.* at 55.

In the face of all this evidence, Rose cannot show that trial counsel failed to render appropriate professional assistance when they advised him about the guilty plea. The advice may or may not have been correct in hindsight, but it was not uninformed or unreasonable in the circumstances. "[I]f counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain." *Florida v. Nixon,* 543 U.S. 175, 192, 125 S.Ct. 551 (2004)

Lastly, Rose has not made a plausible case that a better effort at negotiation by his attorneys would have yielded a better outcome. Trial counsel "wanted to resolve Mr. Rose's case without a trial and to have meaningful plea negotiations." Petition, Ex. 303 at ¶ 10. The prosecutor, however, declined to negotiate. He stated that because the victim was a police officer, "there would be no offer for anything less than a death sentence." *Id.*, Ex. 297 at ¶ 17. When the trial judge inquired whether a "resolution management conference" would serve any purpose, the prosecutor responded, "No, sir." R.T. 6/29/10 at 14-15. Defense counsel then added that a natural life resolution had been proposed, and the prosecutor responded that this settlement offer had been rejected. *Id.* at 15. Nothing in the record suggests that the prosecutor could have been persuaded to change his mind.

For all these reasons, Rose cannot show a Sixth Amendment violation arising from trial counsel's advice to plead guilty. The advice does not constitute ineffective assistance of counsel notwithstanding the absence of concessions from the State.

IV. Claim 4.7 – Ineffective assistance based on failure to object to restraints

Rose argues that trial counsel unreasonably failed to object to the "unjustified and routine" use of restraints during his trial proceedings. Trial counsel did file a pretrial motion objecting to the use of any restraint before the jury," arguing that the MCSO "blanket policy that requires an in-custody inmate to appear at trial ... wearing a leg brace and electronic restraint" is unconstitutional. Response to Petition, Ex. 21. But the trial judge did not rule on this motion or make formal findings; and counsel did not object to the use of restraints during trial.

Though the Constitution prohibits the routine use of restraints, courts can order restraints when necessary because of special circumstances such as courtroom security or escape risks that relate to the defendant on trial. *Deck v. Missouri,* 544 U.S. 622, 629, 633 (2005). Such concerns existed in Rose's case because of two specific pretrial incidents. In the first, Rose was found to have attempted an escape from the jail based on his possession of a "fabricated handcuff key that was stuffed inside" one of his handcuffs. R.T. 10/6/10 at 61-62. In the second, Rose refused to obey directives to stop talking to his co-defendant, Norma Lopez, during transportation from the court building to the jail. He then committed an assault when he "tried to duck his head into" the detention officer's chest. *Id.* at 76-85.

Rose's conduct made it unlikely that he would have prevailed on a request to attend his trial without restraints. The two pretrial incidents created a legitimate concern for courtroom security and escape risk. The use of restraints was appropriate to address those risks. *State v. Cruz,* 218 Ariz. 149 ¶ 117-118, 181 P.3d 196 (2008). To the extent the ineffective assistance claim presumes otherwise, the claim fails.

Rose also argues, however, that the restraints were visible beneath his clothing. A restraint worn under clothing, such as a leg brace, is treated as nonvisible in the absence of evidence that the jury either saw the brace or inferred that the defendant was wearing one. *State v. Dixon,* 226 Ariz. 545 ¶ 29, 250 P.3d 1174 (2011). Relying on juror declarations, Rose alleges that the jury inferred the existence of the restraints because the "stun belt" protruded from his back, and because it was apparent that he could not move naturally when he was seated and when he walked to the podium to offer his allocution.

Even assuming for the sake of discussion that counsel should have pursued this issue more vigorously, the ineffective assistance claim cannot succeed because Rose cannot show prejudice in relation to the trial's eligibility phase. Even when visible restraints are improperly imposed, "[w]hen it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error, the error is harmless." *State v. Dixon,* 226 Ariz. at 552 ¶ 32, 250 P.3d 545. The evidence at the eligibility phase was so strong that the presence or absence of visible restraints would not have made any difference. Prejudice at the penalty phase is a closer question, but it is unnecessary to decide that issue if the penalty phase will be retried anyway.

Rose also asserts that the remote-controlled "stun belt" interfered with his ability to meaningfully interact with counsel. *See United States v. Durham,* 287 F.3d 1297, 1309 (11th Cir. 2002). Trial counsel state in their declarations that the courtroom deputies would remind Rose "he needed to follow their orders, but never informed him what might cause them to use the belt to shock him." Petition, Ex. 303 at ¶ 27. The declarations express concern that the restraints had an impact on Rose's ability to allocute persuasively. *Id.,* Ex. 303 at ¶ 28; *id.,* Ex. 297 at ¶ 21.

According to counsel, Rose also expressed feeling anxious knowing that the deputies could activate the shock belt at any time. *Id.*, Ex. 297 at ¶ 22.

The problem is that counsel failed to make a record of any of this at trial. Had they thought the stun belt was affecting their presentation substantially, they presumably would have said something at the time. Their after-the-fact declarations alone do not warrant a hearing

V. Claim 11 – Death penalty statute does not narrow eligibility

In Claim 11 Rose raises the issue that the Arizona Supreme Court decided adversely to the defendant in State v. *Hildago*, 241 Ariz. 543, 390 P.3d 783 (2017), concerning the broad sweep of the aggravating factors listed in A.R.S. section 13-751(F). The parties debate whether Rose adequately presented this issue in his appellate briefs, but that debate need not be settled here. Either the issue was presented and decided, resulting in preclusion under Rule 32.2(a)(2); or the defendant failed to present it adequately, in which case is precluded under Rule 32.2(a)(3). This Court does not have authority to revisit *Hildago* in any event.

Penalty-Phase Parole Eligibility Jury Instruction (Claim Three)

More than once at the trial, Rose requested an instruction informing the jury that if it did not impose the death penalty the court would impose a true "life sentence." The trial court refused, instructing the jury instead that Rose could receive a life sentence with the possibility of parole after 25 years. Claim Three is that these decisions violated the due process right established in *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187 (1994).

I. The Simmons Error at Rose's Trial

Under *Simmons* and its progeny, "where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, the Due Process Clause entitles the defendant to inform the jury of his parole ineligibility, either by a jury instruction or in arguments by counsel." *Shafer v. South Carolina*, 532 U.S. 36, 39, 121 S.Ct. 1263 (2001) (citations and internal punctuation omitted). The *Simmons* rule guards against imposition of the death penalty by a jury laboring under the misperception that a dangerous defendant sentenced to life in prison may be eligible for parole after a limited period of incarceration. 512 U.S. at 161-162, 114 S. Ct. at 2193.

The defendant must affirmatively request an appropriate instruction or the opportunity to present evidence. "The defendant's right under *Simmons* is one of opportunity, not of result." *State v. Bush*, 244 Ariz. 575 ¶ 74, 423 P.3d 70, *quoting Townes v. Murray*, 68 F.3d 840, 850 (4th

Cir. 1995). In other words, *Simmons* relief is foreclosed when a defendant fails to request the parole ineligibility instruction. *Id., quoting Campbell v. Polk*, 447 F.3d 270, 289 (4th Cir. 2006).

A. The jury's sentencing options and the instructions

The first precondition for the application of *Simmons*, that "the only sentencing alternative to death available to the jury [was] life imprisonment without possibility of parole," was plainly met in this case. The relevant sentencing statutes said that a person convicted of first degree murder "shall be sentenced to death or imprisonment in the custody of the state department of corrections for life or natural life," A.R.S. § 13-751(A), and that a person sentenced to "life" "shall not be released on any basis" until the completion of the service of either twenty-five or thirty-five calendar years depending on the victim's age," A.R.S. § 13-752(A). But the Legislature had abolished parole for adult defendants effective January 1, 1994. A.R.S. § 41-1604.09(I)(1); *see Chaparro v. Shinn*, 248 Ariz. 138 ¶ 2, 459 P.3d 50 (2020) (discussing court's authority to correct "illegally lenient sentence," imposed in 1996, of "life without possibility of parole for 25 years"). Rose committed his offense after January 1, 1994. A jury verdict in Rose's favor, at either the eligibility phase or the penalty phase, therefore would have resulted in a life sentence from which Rose could not have been paroled -- after twenty-five years or thirty-five years or ever -- even if the sentence had technically allowed for the possibility of "release."

Rose proposed a jury instruction that would have straightforwardly told the jury, at outset of the eligibility phase, how its decision would play out under the relevant statutes. The proffered instruction said:

> If the State does not prove beyond a reasonable doubt that an aggravating circumstance exists, then the defendant is not eligible for the death sentence and the trial will end. I will then sentence Edward Rose to life imprisonment.

Docket No. 407 at 3, 5.

The trial judge rejected the defendant's proposed instruction. Instead, the jury got an instruction that described the sentencing statutes but not the status of parole.

> Defendant in this case has been convicted of the crime of First Degree Murder. Under Arizona law, every person guilty of First Degree Murder shall be punished by death, or imprisonment for life without the possibility of release from prison, or imprisonment for life with the possibility of release after 25 years.

. . .

> If the State does not prove beyond a reasonable doubt that an aggravating circumstance exists, the Court will sentence Defendant to either life imprisonment without the possibility of release, or life imprisonment with the possibility of release after 25 years. If the jury unanimously decides beyond a reasonable doubt that an aggravating circumstance does exist, each juror will decide if mitigating circumstances exist and then, as a jury, you will decide whether to sentence Defendant to life imprisonment or death.

Docket No. 411 at 1; R.T. 8/23/10 at 15-16. Thus, the jury was given what *Simmons* described as "a false choice between sentencing [the defendant] to death and sentencing him to a limited period of incarceration." 512 U.S. at 161, 114 S.Ct. at 2193.

The defendant tried to fix the problem at the close of the penalty phase. This time the proposed instruction explained the legal consequences of a "life" verdict in more specific terms.

> If your verdict is that death is not the appropriate sentence for Edward Rose, then he will be sentenced to life imprisonment without possibility of parole.

Docket No. 628 ("Motion for *Simmons* Instruction"). As authority for this proposal, the defendant expressly relied on *Simmons*. *Id.* at 3-4. The motion said, accurately, "a *Simmons* instruction is mandatory to ensure due process rights. A denial of the *Simmons* instruction would violate Defendant's due process rights under federal and state constitutions by refusing to instruct the jury that, as an alternative to the death sentence, sentence of life imprisonment carries with it no possibility of parole." *Id.*

The trial judge nevertheless denied the request, on the ground that "the law is adequately covered in the RAJI instruction given." R.T. 10/13/10 at 3. The instruction given instead not only reinforced the earlier misleading instruction, but also made it worse by referring expressly to the non-existent "possibility of parole."

> Members of the jury, as I told you at the beginning of this phase of the sentencing hearing, you will determine whether Defendant will be sentenced to life imprisonment or death. If you determine that a life sentence is appropriate, the Court will decide whether the sentence shall be with or without the possibility of parole. If you determine that a death sentence is appropriate, the defendant's sentence will be death.

Docket No. 631 at 1; R.T. 10/14/10 at 40.

The State does not even argue that the instructions fairly described the jury's sentencing choices. By its silence, the State implicitly concedes that the instructions cannot be squared with *Simmons*.

B. The issue of future dangerousness

The State does contest Rose's contention that its evidence put his future dangerousness at issue. The State argues that the evidence of antisocial personality disorder and misconduct in jail (including assaultive behavior and an alleged escape attempt) "merely rebutted Rose's claim that his ability to function appropriately and productively in a structured environment was mitigating." Response at 43 (internal punctuation omitted); *see also* State's Bench Memo at 16-17 (*Simmons* error, if any, was harmless because the prosecutor did not argue that Rose would be dangerous if released from prison). The State's argument fails because the United States Supreme Court squarely rejected it in *Kelly v. South Carolina,* 534 U.S. 246, 122 S.Ct. 726 (2002).

In *Kelly*, as here, the prosecution presented correctional officers who testified about violent behavior in jail and an escape attempt, and testimony of a psychologist who described violent personality traits. *Id.* at 248-249, 122 S.Ct. at 729. Based on this evidence, the prosecutor argued in closing that "murderers will be murderers, and he is the cold-blooded one right over there," *id.* at 250, 122 S.Ct. at 730, an argument echoed by the prosecutor here when he said "the nature of this defendant" is "not going to go away." R.T.10/13/10 at 86-87. The state court ruled, as the State urges here, that the evidence "did not implicate future dangerousness" because "it was designed to show that Kelly would not adapt to prison life." *Id.* at 251, 122 S.Ct. at 730.

Reversing the state court, the Supreme Court observed that "[t]he error in trying to distinguish *Simmons* this way lies in failing to recognize that evidence of dangerous `character' may show `characteristic' future dangerousness, as it did here. *Id.* at 254, 122 S.Ct. at 732. Accordingly, *Simmons* applies whenever the State's evidence supports a "logical inference" of future dangerousness even if State avoids using those terms or articulating that inference. *Id.*

The Arizona Supreme Court has followed *Kelly* in a series of cases decided in the wake of *Lynch II*. In those cases, the Court found that the State had implicitly suggested future dangerousness by presenting evidence of past violence, association with violent street gangs, misbehavior while incarcerated, and negative personality traits suggesting a propensity for violent or sadistic behavior. *State v. Hulsey*, 243 Ariz. 367 ¶¶ 129-132, 408 P.3d 408 (2018); *State v. Rushing*, 243 Ariz. 212 ¶¶ 40-41, 404 P.3d 240 (2017); *State v. Escalante-Orozco*, 241 Ariz. 254 ¶¶ 119-122, 386 P.2d 798 (2017); *compare State v. Sanders*, 245 Ariz. 113 ¶¶ 18-32, 425 P.3d 1056 (2018) (future dangerousness held not at issue where person with no violent history charged with beating death of toddler in stressful "domestic situation"). *Hulsey* is especially similar on its facts to this case. *See* 243 Ariz. at 375 ¶¶ 2-7, 408 P.3d 408.

Future dangerousness was so clearly at issue here that parties began addressing it well before trial. Rose moved *in limine* for an order preventing the State from arguing future dangerousness. Docket No. 183 ("Motion to Preclude and Pretrial Objections to Improper Prosecutorial Arguments That Advance Improper Grounds for the Imposition of the Death Penalty") at 7-8. The motion was denied as premature. Dkt No. 293 (Minute Entry) at 9-10.

During *voir dire*, the possibility of the defendant's release was a particular focus. Question no. 66 on the written jury questionnaire was, "If you determine that the appropriate sentence is life, the judge will determine if the sentence will be life without the possibility of release, or life with the possibility of release only after at least 25 years have been served. Do you agree with the law that requires the judge, not the jury, to make the decision about which type of life sentence to impose?" R.T. 8/16/10 at 58. Each juror then was asked, in group *voir dire*, a question to the effect of "would you consider a life sentence if you knew the defendant could be released after 25 years?" or "can you set aside the fact that if the defendant is sentenced to death he may be eligible for release in 25 years?" R.T. 8/16/10 at 57, 102, 139-140, 179-180; R.T. 8/17/10 at 18-19, 49, 118; RT 8/18/10 at 24. Numerous jurors gave answers that led to follow-up exchanges with the defense lawyers, the prosecutors and the judge. *E.g.* R.T. 8/16/10 at 58-60, 102, 103-104, 107, 133-134; R.T. 8/17/10 at 26-27, 32, 37, 55-59, 99, 120-121, 128-129, 131-132, 156, 161.[2]

The evidence and argument presented at trial showed why counsel were so concerned about the jurors' perception of the prospect of release on parole. As the defendant put it, "the State's presentation was pervaded by future dangerousness." Docket No. 857 (Notice of Putting Future Dangerousness at Issue). The State addressed Rose's "character and penchant for violence, prior violent and criminal acts, including acts while incarcerated, and his involvement in a violent street gang" literally dozens of times. *Id.*

The State responds to Rose's record citations mainly by focusing on the points other than future dangerousness that were being made. Docket 860 (State's Response to Notice of Putting Future Dangerousness at Issue). But *Kelly* teaches that evidence with a tendency to prove dangerousness in the future still proves that point even if the State draws other inferences from it or describes it in other terms. 534 U.S. at 254, 122 S.Ct. at 732. Thus, it does not matter whether the State was the party that first put future dangerousness at issue. *State v. Rushing*, 243 Ariz. 212 ¶ 38-39, 404 P.3d 240. It does not matter why the State offered the evidence, or whether it focused

[2] At one point one of the defense attorneys went further, telling the jurors that they could not even consider whether the judge would give the defendant "twenty-five to life" or "natural life" and asking the jurors if they could "accept that." RT 8/17/10 at 143-144, 152-153. But the legal instructions given by the trial judge never said that; and it is not the law in any event.

on past events as opposed to the future. *State v. Escalante-Orozco*, 241 Ariz. 254 ¶¶ 123-124, 386 P.2d 798. Due process requires accurate parole-eligibility instructions in every case in which the specter of future dangerousness hangs over the proceeding. This was plainly one of those cases.

Moreover, the record casts doubt on the State's assertion that it never intended for the jury to consider the defendant's possible release from prison as a reason for the imposition of the death penalty. During the defense closing, when counsel tried to tell the jury that if they did not return a death verdict the defendant would spend the rest of his life in prison, the State successfully objected. Here is the exchange:

> [MS. GARCIA:] We know there is an alternative to death. We know that a sentence in prison, a life sentence in prison, is exactly that. It is a sentence, it is a penalty, and its one that he will live out the rest of his life in prison.
>
> MS. RECKART: Objection, Your Honor, that misstates the law.
>
> THE COURT: Sustained.
>
> MS. GARCIA: And let me explain that. I'm not talking about the sentence for death, I'm talking about the non-murder charges. He will spend the rest of his life in prison.
>
> MS. RECKART: Again, Your Honor, I'm going to object that misstates the law.
>
> THE COURT: Please approach.

R.T. 10/13/10 at 103. A sidebar discussion ensued, with the trial judge concluding that the defendant could receive a prison sentence of as little as 16.75 years on the "non-death cases." R.T. 10/13/10 at 104-105. The prosecutor confirmed that this was the basis of the objection. *Id.* When the argument resumed, the defense moved on to something else. *Id.* Thus, the objection reinforced, for the jury, the false prospect of the defendant's possible release from prison. It is difficult to discern any other purpose that the objection might have had.

Because the defendant's future dangerousness was at issue and the only available alternative to a death sentence was life in prison without parole, the defendant's case met the criteria for the application of the *Simmons* due process rule. The Arizona courts did not begin to acknowledge and apply *Simmons*, however, until several years after this case was tried. Criminal Rule 32.1(g) determines how those circumstances will play out.

II. The application of Rule 32.1(g)

Criminal Rule 32.1(g) affords post-conviction relief when "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence." The question here is whether defendant Rose is entitled to relief under Rule 32.1(g) because of *Lynch v. Arizona*, 136 S.Ct. 1818 (2016) (*Lynch II*). *Lynch II*, decided several years after Rose's trial, held that the due process rule established in *Simmons v. South Carolina* applies in Arizona. Whether the *Lynch II* decision was a "change in the law" and whether that change was "applicable to the defendant's case" are both at issue here.

A. Change in the law

A "change in the law" requires some transformative event, a "clear break from the past." *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991). The archetype of such a change occurs when an appellate court overrules previously binding case law. *State v. Shrum*, 220 Ariz. 115 ¶16, 203 P.3d 1175 (2009). That is what happened when the United States Supreme Court decided *Lynch II*.

Though the jury instructions at Rose's trial incorrectly described the defendant's parole eligibility in the event of a life sentence, they were faithful to Arizona precedent on the *Simmons* line of due process cases. Two years before Rose's trial, the Arizona Supreme Court had held that *Simmons* did not apply to an Arizona defendant because "no [Arizona] state law would have prohibited [the defendant's] release on parole after serving twenty-five years, had he been given a life sentence. *See* A.R.S. § 13–703(A) (2004)." *State v. Cruz*, 218 Ariz. 149 ¶ 42, 181 P.3d 196 (2008).[3] In another ruling that preceded Rose's trial, the Court had found that instructions like those in this case "correctly reflected the statutory potential for [the defendant's] release" after twenty-five years or thirty-five years. *State* v. *Hargrave*, 225 Ariz. 1 ¶ 53, 234 P.3d 56 (2010) (citation omitted). "Hargrave's argument that he is not likely to actually be released does not render the instruction legally incorrect. The jury instructions correctly stated the law, did not mislead the jurors about Hargrave's possible penalties, or deny Hargrave the benefit of mitigating evidence." *Id.* (citations omitted).

After Rose's trial, our Supreme Court continued consistently to hold that *Simmons* did not apply in Arizona. Some of those rulings preceded the April 2013 decision on Rose's appeal. *State v. Hardy*, 230 Ariz. 281 ¶ 58, 283 P.3d 12 (2012); *State v. Cota*, 229 Ariz. 136 ¶¶ 75-76, 272 P.3d 1027 (2012). Others followed soon after. *State v. Benson*, 232 Ariz. 452 ¶ 56-57, 307 P.3d 19

[3] This is the same case now pending review in the Arizona Supreme Court on the *Simmons* issue, following the trial court's denial of post-conviction relief.

(2013); *State v. Boyston*, 231 Ariz. 539 ¶¶ 67-68, 298 P.3d 887 (2013). Always the rationale was either that no state law "prohibits" release on parole, or that a life-sentenced defendant could be released through executive clemency, or both.

State v. Lynch, 238 Ariz. 84, 357 P.3d 119 (2015) (*Lynch I*) was the last in the *Cruz* line of cases. In *Lynch I*, the Court reiterated what it had first said in *Cruz*: that *Simmons* did not apply because A.R.S. § 13-703(A) (now section 13-751(A)) "permitted the possibility of Lynch obtaining release," *id.* ¶ 65, albeit only if the Legislature reinstated parole. *Id.* ("an instruction that parole is not currently available would be correct"). The Court also reasoned, as it had before, that a *Simmons* instruction was "overbroad" because a defendant in Lynch's position "could have received another form of release, such as executive clemency. *Id.* ¶ 66.

Lynch I was summarily reversed by the United States Supreme Court in *Lynch II*. *Lynch II* rejected the notion that "Arizona's sentencing law [is] sufficiently different from the others this Court had considered that *Simmons* did not apply." 136 S.Ct. at 1819. Because parole was unavailable to Lynch under Arizona law, *Lynch II* held, "*Simmons* and its progeny establish Lynch's right to inform his jury of that fact." *Id.* at 1820.

The impact of *Lynch II* in Arizona demonstrates the "transformative" nature of that ruling with respect to the due process rule of *Simmons*. The *Simmons* rule did not apply in Arizona at the time of Rose's trial. The consistent line of Arizona Supreme Court cases beginning with *Cruz* established that. *Lynch* II overruled those cases. Arizona now follows the *Simmons* rule. As a result, Arizona Supreme Court cases starting with *Escalante-Orozco* analyze the issue differently than the pre-*Lynch* cases, and, often, arrive at a different outcome. *Lynch II* therefore qualifies as a "change in the law" for purposes of Rule 32.1(g).

The State argues that Rose is precluded from raising the *Simmons* issue because his appellate lawyer misframed it in the briefs (by presenting it as though the trial court had excluded evidence of parole ineligibility), and then failed to argue it.[4] But even if the issue was not properly raised on appeal, preclusion does not apply to a request for relief under Rule 32.1(g). Ariz. R. Crim. P. 32.2(b); *State v. Slemmer*, 170 Ariz. 174, 179, 823 P.2d 41, 46 (1991). Preclusion does not apply because "[a] defendant is not expected to anticipate significant future changes of the law .... Nor should PCR rules encourage defendants to raise a litany of claims clearly foreclosed by existing law in the faint hope that an appellate court will embrace one of those theories." *State v.*

[4] Claim Seven presents a colorable claim of ineffective assistance of appellate counsel based on counsel's handling of the *Simmons* issue. The petition cites evidence that Rose's appellate attorney sloppily cut and pasted the relevant text from another brief, inadvertently omitting the passage that described the issue in Rose's case. Petition at 72-74. Rule 32.1(g) makes it unnecessary to explore that issue.

Shrum, 220 Ariz. 115 ¶ 14, 203 P.3d 1175. In those "rare cases" in which a change in the law has been announced, "Rule 32.1(g) provides a potential avenue for relief." *Id.* This is one of those "rare cases."

It is important to note, for the sake of clarity, that a "change in the law" under Rule 32.1(g) is not the same thing as a "new rule" for purposes of *Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060 (1989). Although *Shrum* does not address *Teague* (or, perhaps, *because Shrum* does not address *Teague*), *Shrum* uses "new rule" as a synonym for "change in the law" in a way that is confusing. Specifically, *Shrum* cites *State v. Towery*, 204 Ariz. 386 ¶ 9, 64 P.3d 828 (2003) for the proposition that *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002) worked "a significant change in the law" (because *Ring* overruled *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (1990)). 220 Ariz.115 ¶ 16, 203 P.3d 1175. *Shrum* then goes on, in the same paragraph, to say that *Towery* held *Ring's* "new rule" non-retroactive. *Id.*

Towery, however, does not stand for the proposition that *Ring* announced a "new rule" because it "changed the law." *Towery* took as a given that *Ring* had changed the law. *Towery* focused instead on the second, separate Rule 32.1(g) question whether *Ring* "applies retroactively" to cases that preceded it. 204 Ariz. 386 ¶ 5, 64 P.3d 828. Undertaking a lengthy *Teague* retroactivity analysis, *Towery* concluded that *Teague's* general rule of non-retroactivity for "new" procedural rules applied to *Ring*. *Id.* ¶¶ 6-30.

Pursuant to *Towery*, then, the "change in the law" wrought by *Lynch II* may or may not open Rule 32.1(g)'s "potential avenue for relief" for this defendant. It depends on whether *Lynch II* is retroactive and, therefore, "applicable to" this case. That issue is tackled next.

B. Retroactive applicability of Lynch II

State v. Towery announced that Arizona follows the three-part retroactivity analysis set out in *Teague v. Lane*. *State v. Towery*, 204 Ariz. 386, 64 P.3d 828 (2003). The first question is whether the petitioner's direct appeal has concluded, making his conviction "final." Id. ¶ 8. The second is whether the rule on which the petitioner is relying is a "new rule," in that it was not "dictated by prior precedent," *Id.* ¶ 9, and whether the rule is "procedural" rather than "substantive." *Id.* ¶¶ 10-13. If the conviction is final and a new procedural rule is at issue, the third question is the applicability of two exceptions to the general rule of non-retroactivity -- for rules that forbid "the criminalization of conduct" and "watershed rules . . . implicit in the concept of ordered liberty." *Id.* ¶¶ 14-25.

The dispositive issue here is whether *Lynch II* established a "new rule" subject to *Teague*'s general rule of non-retroactivity.[5] The test is whether a court considering a defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule was required by the Constitution. *State v. Poblete,* 227 Ariz. 537 ¶ 13, 260 P.3d 1102 (App. 2011).

The *Teague* definition of "new rule" makes sense as a matter of principle, for if "existing precedent" at the time of the defendant's trial "compelled" the conclusion that the rule was "required by the Constitution," then the defendant should have gotten the benefit of the rule. The framing is awkward, however, for a trial court addressing the retroactivity of a United States Supreme Court decision that overruled a decision of the highest state court. This Court is reluctant to say whether the Arizona Supreme Court should have felt "compelled" to decide a case differently than it actually did.

What this Court can say, however, is that *Lynch II* is the kind of decision that the United States Supreme Court issues when that Court thinks precedent "dictates" a constitutionally mandated result. The *Lynch II* opinion was issued *per curiam,* without full briefing or oral argument. 136 S.Ct. 1818, 1822 (Thomas, J., dissenting). The text is only two pages long. The gist of the opinion is that *Simmons* expressly addressed Arizona's reasons for refusing a parole-ineligibility instruction -- the possibility of clemency and the Legislature's authority to reinstate parole – and rejected them. *Id.* at 1819-1820. Two justices dissented, but even they did not try very hard to distinguish *Simmons.* Mostly the dissent criticized *Simmons* and the "micromanagement" of state sentencing proceedings that (in the dissenters' view) *Simmons* spawned. *Id.* at 1822 (Thomas, J.). These markers, taken together, indicate objectively that *Lynch II* did not establish a "new rule" but instead merely applied the rule of *Simmons.*

The reasoning rejected in *Lynch II* underpinned all of the pre-*Lynch* cases in which the Arizona Supreme Court distinguished *Simmons.* That means *Simmons* should have supplied the rule of decision in those cases too. Arizona's trial courts likewise should have applied *Simmons,* by giving an accurate parole eligibility instruction when, as in this case, the facts called for it and the defendant requested it. In other words, *Lynch II* applies retroactively to this case. *Cf. Yates v. Aiken,* 484 U.S. 211, 215-216, 108 S.Ct. 534, 537-538 (1988) (Constitution requires state court,

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[5] It is clear that *Simmons* created a "new rule" for purposes of the *Teague* analysis, and that *Simmons* therefore is not retroactive, *O'Dell v. Netherland,* 521 U.S. 151, 117 S.Ct. 1969 (1997), but the retroactivity of *Simmons* is not at issue now. Rose's trial took place long after *Simmons* was decided in 1994, and well after the 2002 decision in *Kelly,* the last of the United States Supreme Court cases that fleshed out *Simmons.*

on collateral review, to follow a Supreme Court decision applying a constitutional principle that was "well-established" or "well-settled" at the time of the defendant's conviction, even if the decision was not rendered until after the conviction became final).

In sum, the defendant here was entitled to the benefit of the *Simmons* due process rule. He asked for the necessary instruction, as he was required to do, but his request was erroneously denied. The remaining question is whether, because of that error, the law now requires a new penalty phase trial.

C. Whether application of Lynch II "would probably overturn the sentence"

The harmless error doctrine probably applies to *Simmons* error, although, notably, our Supreme Court has never actually reached that issue because they have never found a *Simmons* error harmless. *See State v. Hulsey*, 243 Ariz. 367 ¶¶ 141-144, 408 P.3d 408; *State v. Rushing*, 243 Ariz. 212 ¶¶ 42-44, 404 P.3d 240; *State v. Escalante-Orozco*, 241 Ariz. 254 ¶¶ 125-126, 386 P.3d 798. The State suggests, however, that Rule 32.1(g) places on Rose the higher burden of showing the likelihood of a different outcome. *See* State's Bench Memo at 16. The State points to the language in Rule 32.1(g) that says the defendant gets relief when a significant change in the law "would probably overturn the defendant's . . . sentence."

The language of Rule 32.1(g) does not support the State's position. Rule 32.1(g) does not say that the defendant must show the jury probably would not have imposed a death sentence had a constitutional violation not occurred. It does not require the court to find that compliance with the law (here, accurate parole-eligibility instructions) "probably would have changed the . . . sentence," as Rule 32.1(e) does when the issue is newly discovered facts. It is not keyed to the fact-finder's decision to impose the death penalty or to find the defendant eligible for the death penalty, as are the pre-2018 and post 2018 versions of Rule 32.1(h) that apply when a defendant tries to show "factual innocence." It says nothing at all about a burden of proof or burden of persuasion on either party.

What Rule 32.1(g) does say is that the court must determine whether a change in the law, if applied to the defendant's case, would probably "overturn" the verdict or sentence. The word "overturn" typically appears in connection with legal rulings that invalidate convictions or sentences, as in "the appellate court *overturned* the defendant's conviction because the jury instructions were faulty." To say that a change in the law "would probably overturn the defendant's sentence," then, is to say that the change probably invalidates the sentence and requires a new proceeding.

The Arizona Supreme Court's application of Rule 32.1(g) in *State v. Valencia*, 241 Ariz. 206, 386 P.3d 392 (2016) is consistent with the foregoing analysis. *Valencia* decided that *Miller*

v. Alabama, 567 U.S. 460, 132 S.Ct. 2455 (2012) and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), which changed the law regarding imposition of natural-life sentences on juveniles, apply retroactively. *Miller* and *Montgomery* were read as holding that "life without parole is an excessive sentence for children whose crimes reflect transient immaturity." 241 Ariz. 206 ¶ 14, 386 P.3d 392. But relief was not conditioned on a showing by the petitioners that they "probably" would have received life sentences had *Miller* and *Montgomery* been applied in their cases. Instead, *Valencia* held that the petitioners were entitled to evidentiary hearings "at which they [would] have an opportunity to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity. *See* Ariz. R. Crim. P. 32.8(c) [now 32.13(c)]." *Id.* ¶ 18. A petitioner who made that showing would have the right to be resentenced.

Valencia stands for the proposition that a change in the law "would probably overturn the defendant's . . . sentence," within the meaning of Rule 32.1(g), when, as a consequence of the change, an error of constitutional magnitude occurred at the sentencing and a new sentencing hearing will be necessary to rectify the error. As previously discussed, the existing record in this case establishes that the petitioner was denied a right of constitutional magnitude at the penalty phase of his sentencing trial. No evidentiary hearing is needed, unlike in *Valencia*. The only issue is whether the error was harmless in that it did not contribute to or affect the sentence. *See State v. Hulsey*, 243 Ariz. 367 ¶ 141, 408 P.3d 408; *see* Ariz. R. Crim. P. 32.13(c). The State has the burden of proving beyond a reasonable doubt that the violation was harmless. *Id.* If the State cannot make that showing, the defendant is entitled to a new penalty phase hearing unless

The harmless error standard is fair in a case like this one. The fundamental principle that drives the result, underneath all the complicated legal analysis, is that the defendant should get the benefit of a constitutional rule meant to ensure the fairness of his sentencing hearing, even though his conviction is final, where in hindsight the rule was clearly established and obviously applicable at the time of the sentencing, and the defendant asked the court to follow the rule, but the court mistakenly refused to do so. The harmless error doctrine is an integral part of a constitutional rule like the one announced in *Simmons*, an integral part of the constitutional guarantee of fairness. If the circumstances warrant giving the defendant the benefit of the *Simmons* rule in post-conviction proceedings, he should get the benefit of all of it, including the harmless error part, not just an abridged version. To hold otherwise would be to disadvantage him, to treat him less fairly than he should have been treated, because of a serious and consequential mistake to which he objected and which, by hypothesis, the court should never have made in the first place.

D. Harmless error

The record in this case does not demonstrate beyond a reasonable doubt that the failure to give accurate parole eligibility instructions was harmless error. As on the future dangerousness

issue, the best guidance is *State v. Hulsey*. The Arizona Supreme Court's finding that the *Simmons* error in *Hulsey* was not harmless compels that same result here.

Hulsey, like this case, arose from the shooting death of a police officer who had the misfortune of encountering the defendant in the course of his routine law enforcement duties. 243 Ariz. 367 ¶¶ 2-4, 408 P.3d 408. The aggravating circumstances in *Hulsey* were the killing of an on-duty officer and a prior serious offense, *id.*, the same as what the Court regards as the two most serious aggravating factors here. Hulsey presented "considerable mitigation evidence including evidence regarding his mental health and testimony from six family members," *id.* ¶ 142, but Rose appears to have presented even more, twelve trial days' worth, including three expert witnesses addressing neurological and psychiatric issues, and testimony and related records from drug treatment counselors, a juvenile probation officer, teachers, and family members, detailing Rose's background and struggles, his severe substance abuse and his mental health impairments. The State's rebuttal evidence in *Hulsey*, as here, emphasized prior violent behavior, misconduct in custody and a tendency to resort to violence in conflict situation. *Id.* ¶ 130-131.

In some ways, *Hulsey* presented a better case for harmless error than this case does. The possibility of release on parole was mentioned to the Hulsey jury only in the preliminary aggravation phase instructions. *Id.* ¶ 134. At this trial, by contrast, the judge and the attorneys hammered the point during *voir dire*, the judge repeated it in the penalty phase instructions, and the State highlighted it again by objecting when the defense said something different in closing. *See supra* at 14, 16-17. The *Hulsey* jury deliberated for eight hours. 243 Ariz. 367 ¶ 142, 408 P.3d 408. Here the jury deliberated for somewhere between thirteen and fifteen hours. Docket Nos. 633, 635 and 646 (minute entries of 10/14/10, 10/15/10 and 10/18/10). The Court in *Hulsey* observed that the circumstances "may have caused some jurors to fear that [Hulsey] might be released from prison some day" because he was 33 years old at the time of trial. 243 Ariz. 367 ¶ 142, 408 P.3d 408. The circumstances here would have caused even more worry, because Rose was only 22 when he was convicted and sentenced.

The State points to the plea colloquy that was played for the jury, and specifically the discussion of the prison sentences on the charges other than first-degree murder, as a basis for a harmless error finding. Response at 44. That argument is unpersuasive for at least two reasons.

First, during the plea colloquy the trial judge gave Rose another version of the same bad information that the jury was getting about the sentencing options in the event of a "life sentence." The defendant was told that he could receive a sentence of life with the right to request parole after twenty-five years. R.T. 8/20/10 at 7-8. The jury watched the video recording conveying this information near the end of the trial, just two or three days before deliberations began. R.T. 10/12/10 at 97.

Second, the judge did *not* tell the defendant that the sentences were going to result in imprisonment for the rest of his life. The judge said the sentences "*could* run consecutive to each other so that the Court in sentencing you could sentence you to well over hundreds -- a hundred years . . . So even if -- even if discounting even the murder convictions altogether, the Court *can* impose a sentence on you that would extend past your natural life . . ." *Id.* at 13 (emphasis added). These were accurate statements of Arizona law. *See* A.R.S. § 13-711(a) (when multiple sentences are imposed court may order them served concurrently or consecutively). These advisements would have not conveyed, to a careful juror, that the defendant was going to be sentenced to "a hundred years" in prison. It is more likely that they would have conveyed the opposite: that the defendant might be returned to the community in as little as twenty-five years.

The State also argues that defense counsel "effectively rebutted" any suggestion that the defendant might be released from prison, by tallying the defendant's potential sentences into a total far beyond his life span. But *Kelly v. South Carolina* rejected the idea that argument of counsel can satisfactorily substitute for proper jury instructions. 534 U.S. at 257, 122 S.Ct. at 733.

Finally, the State argues that the due process violation was harmless because the thrust of the prosecution's rebuttal argument was that Rose would be dangerous in a controlled setting, not that that he would pose a threat in the community. That position is inconsistent with the way the courts have framed the *Simmons* due process right, making evidence of future dangerousness a prerequisite to the existence of the right instead of treating the absence of such evidence as a basis for finding harmless error. *State v. Sanders*, 245 Ariz. 113, 425 P.3d 1056 (2018) (jury instruction that erroneously said the defendant would be eligible for parole after thirty-five years was did not violate the defendant's due process right because future dangerousness was not at issue). In any event, even if it is theoretically possible that misleading parole-eligibility instructions could be harmless in a case in which the evidence suggested future dangerous, it is clear from *Hulsey*, *Rushing* and *Escalante-Orozco* that this is not that case. *See supra* at 15-16, 21.

Based on the foregoing,

IT IS ORDERED denying the Rule 32 Petition for Post-Conviction Relief as to Claim 2.3 (juror misconduct in the form of a false response during *voir dire*), Claim 4.1 (ineffective assistance of counsel at jury selection), Claim 4.2 (ineffective assistance of counsel in connection with guilty plea), Claim 4.7 (ineffective assistance of counsel for failure to object to stun belt) and Claim 11 (statute unconstitutional for failure to narrow class of death-eligible offenders). The defendant is not entitled to relief from the verdict(s) of guilt based on his guilty plea or from the aggravation-phase jury verdict finding the existence of aggravating factors that make the defendant eligible for the death penalty.

IT IS FURTHER ORDERED granting the Rule 32 Petition for Post-Conviction relief as to Claim Three (due process violation arising from erroneous penalty-phase instructions on parole eligibility). The defendant is entitled to relief from the sentence of death imposed at the penalty phase.

IT IS FURTHER ORDERED that, if the State elects to continue to pursue the death penalty in this case, a new penalty-phase trial shall be held. The defendant shall be held without bond pending that proceeding.

IT IS FURTHER ORDERED the remaining claims in the Rule 32 Petition for Post-Conviction Relief are moot, because all of those claims relate to the previous penalty-phase proceeding.

This is a final order in connection with the post-conviction proceeding initiated by the Notice of Post-Conviction relief filed December 11, 2013.

/ s / John R. Hannah

THE HON. JOHN HANNAH
JUDGE OF THE SUPERIOR COURT

APPENDIX B

Order Denying Review, Supreme Court of Arizona (Nov. 3, 2021)

Supreme Court
STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

November 3, 2021

RE: STATE OF ARIZONA v EDWARD JAMES ROSE
Arizona Supreme Court No. CR-20-0299-PC
Maricopa County Superior Court No. CR2007-149013-002

GREETINGS:

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

ORDERED: The State of Arizona's Petition for Review = GRANTED.

FURTHER ORDERED: Remanding this case to the superior court for reconsideration pursuant to this Court's decision in State v. Cruz, 251 Ariz. 203 (2021).

FURTHER ORDERED: Cross-Petition for Review = DENIED.

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

Tracie K. Lindeman, Clerk

TO:
Mark Brnovich
Laura P Chiasson
John R Mills
Genevie Gold
Edward James Rose, ADOC 257667, Arizona State Prison, Florence - Central Unit
Dale A Baich
Amy Armstrong
Michele Lawson
Jeffrey L Sparks
Hon. John R Hannah Jr
Hon. Jeff Fine
Hon. Patricia A Starr
Hon. Joseph C Welty
Thomson Reuters
Lexis Nexis
West Publishing Company
jd

Appendix C

Excerpts of voir dire transcript [pp. 135, 201] (Aug. 16, 2010)

the microphone so the court reporter can hear you.

It would be my intention to excuse Juror 59.

Any objection?

MR. IMBORDINO: None from the State.

MS. GARCIA: None from the defense, Judge.

THE COURT: All right. Juror 59 is excused. Any motions for cause on the remaining five individuals?

MR. IMBORDINO: The State -- Judge, do you have the questionnaires?

THE COURT: I do.

MR. IMBORDINO: Despite his answers, I believe that Juror 108 should be struck for cause. The only other one I have, Judge, is Juror 62. Given the mental health issues related to her daughter and her son with conditions that they certainly are going to hear about in this case, I know she said she could set it aside, but I just -- I'm not convinced of that.

MS. CENTENO-FEQUIERE: She went to get her notes.

THE COURT: Just so I make sure we can hear, I believe that the jurors have indicated willingness to follow the law and have not indicated that they should be removed. So without a stipulation, I'm denying the motion to remove for cause for Juror 62 and Juror 108.

Any stipulation?

MS. GARCIA: The defense agrees with the Court.

while and said she wasn't sure if she could impose death. So I just think that it would be appropriate to excuse her.

THE COURT: Well, I will say that her answers in the questionnaire were definitely different than the answers she gave here in court. But the answers she gave here in court she seemed to be pretty straightforward to me. I will deny the motion for cause as it relates to Juror 115 on that basis.

MR. IMBORDINO: In addition, she has a prior felony conviction. I understand her rights have been restored, but it dealt directly with the drugs that are going to be the subject of this trial, and that is meth. And I think that in conjunction with a difference in her answers with respect to the death penalty, combined, would support excusing her for cause.

THE COURT: Well, I would like to hear some -- because she did say that she would relate her own feelings about the drug usage. I was waiting for some follow-up questions on those because now we've got an expert witness testifying in the back. And I don't think meth use is something that's recognized by everyone.

MS. GARCIA: Judge, as I even said to the jury themselves, they come into this courtroom with their own life experiences. I mean, I don't think it's physically any way possible to separate any of your life experiences with

little office back there, they go in and sit on the nice sofa and they can watch it. We can put another 10 or 15 people in my office.

MS. GARCIA: Maybe you can bring a pot of coffee -- no, I'm just being snide.

THE COURT: We want to make sure that we -- anything else on that issue, because I will let people go in to chambers and watch it on T.V. So if they don't physically fit in the courtroom, they can watch it closed circuit.

We wanted to make sure we had all of the right numbers for jurors, so I'm going to have the clerk read off the numbers of who we believe are coming back tomorrow at 2:00.

THE CLERK: Eight, 12, 15, 18, 21, 23, 24, 27, 37, 41, 62, 70, 79, 108, 110, 115, 122, 126, 132, 135, 144, 149, 158, 159, 163, 166, 181, 193, 194, 207, 219, 222, 227, 236, 237, 241, 243, 247, 252, 255, and 258.

THE COURT: I don't know if you have your sheets from the selection process, but if those numbers differ in any way, could you let us know as soon as possible?

MS. GARCIA: You bet.

MS. RECKART: Yes, Your Honor.

THE COURT: Anything else you want to take up this morning?

MS. CENTENO-FEQUIERE: No, Your Honor.

and told me that your business is basically going to go out of business if you didn't come to work, or something to that effect.

PROSPECTIVE JUROR: Basically two of the people that are developing with us went to Australia for a month, and so I'm the last one that's actually able to do what I do, and so without my skills, that pretty much --

THE COURT: All right. Any objection from the State?

MS. RECKART: No objection, Judge.

THE COURT: Any from the defense?

MS. GARCIA: None from the defense, Your Honor.

THE COURT: Thank you very much. Juror No. 158, you are excused. Thank you for your participation. I'm sorry you don't get to be a juror on this case.

(Whereupon, Prospective Juror No. 158 was excused from the courtroom.)

THE COURT: If you are selected to sit on this case, you have to be content to decide this case based solely on the evidence presented here in this courtroom and the law that I give you in the instructions.

Is there anyone of you that would be unable or unwilling to render a verdict based solely on the evidence presented and the instructions I give you?

THE COURT: Any objection?

MR. IMBORDINO: No objection.

MS. GARCIA: No.

THE COURT: Juror No. 110, you are excused. Thank you for your willingness to participate.

Anyone else?

I take it from your silence that the rest of you are willing to commit for the time and effort it will take to complete the task at hand.

Ladies and gentlemen, it seems you just got seated, but guess what's going to happen now? We have another courtroom on this floor, so you don't have to go too far -- you don't have to go through security again -- where you can go and sit and relax while we make the final determination of who's going to be seated on this jury.

In a moment, I'm going to excuse you from the courtroom. But, first, an advisement. It is not inappropriate for you to discuss this case with anyone, including amongst yourselves. We have gone through this lengthy process to find your views, but you have to now be content to listen to the evidence and the instructions and talk about this case only in the jury room during deliberations at the end of the trial. And, most importantly, it would be inappropriate for you to discuss this case with family, friends, your neighbors. We have

THE COURT: I just don't see a lesser at this point in time of this charge.

MR. IMBORDINO: Correct.

THE COURT: I mean, if we start giving a lesser, then at the end, if there's a lesser for Count 8, then we can address whether or not we need to give a dangerous allegation instruction on a lesser charge, but I'm not going to make that determination now. It's nothing the jury needs to hear.

Anything else on those?

MS. GARCIA: That's it, judge.

THE COURT: Preliminary instructions -- and I really apologize. I don't know what it was I sent you, but it wasn't --

MS. GARCIA: It looked like something for a civil matter, actually.

THE COURT: Okay. Any objections to these instructions?

MR. IMBORDINO: None from the State.

MS. GARCIA: No. We went through them, and we didn't see anything, Judge.

THE COURT: Okay. And I was told that there is in fact statements in the e-mail response Mr. Imbordino, so I will give the voluntariness instruction.

All right. We'll make copies of these and

have those available in the jurors' chairs when they come back. Go ahead and begin alternating your strikes.

Do you want to have them sit in the jury room? Is that all right?

THE DEPUTY: Yes.

(Whereupon, a recess was had.)

(Whereupon, the following proceedings were held in the presence of the prospective jury:)

THE COURT: Let the record reflect the presence of the ladies and gentlemen of our jury panel, counsel, and the defendant.

Ladies and gentlemen, the clerk is now going to read the number of those jurors that were selected to try this case. If your number is read, please step forward. Please stay in the order in which your number is read.

Madam Clerk.

THE CLERK: Juror No. 8, Juror No. 24, Juror No. 41, Juror No. 70, Juror No. 79, Juror No. 149, Juror No. 163, Juror No. 166, Juror No. 193, Juror No. 194, Juror No. 207, Juror No. 227, Juror No. 236, Juror No. 237, and Juror No. 241.

THE COURT: To those of you who were not selected, thank you very much for your willingness to participate. It's because people like yourselves are

APPENDIX F

Excerpts of voir dire of prospective juror nos. 62, 115, [pp. 121–23; 135; 147–152; 201–202] (Aug. 16, 2010)

your mind. I want to make sure I understand. Is your answer -- are you telling us that simply because a police officer was -- if you find the defendant guilty of murdering a police officer, you're going to always impose death regardless of anything else?

PROSPECTIVE JUROR: Yes, I believe it's a deterrent.

MR. IMBORDINO: Okay. Now, I'm going to ask the question a little bit differently. Because all of us know here that it's alleged that this defendant shot and killed a police officer. Anybody here have experiences with police officers or thoughts about their jobs, such that you would never consider imposing the death penalty simply because it was a police officer who was killed?

Maybe you had -- maybe you don't like police officers. Maybe they've done something to you or to your family. Maybe you think that you feel badly that they were killed, but it's a part of their job. And so you don't think that the death penalty is appropriate. Anybody think that way?

I don't see any hands.

Juror No. 62. And I apologize if you think I'm asking you the same questions that you've already been asked. When you said with respect to the death penalty that you think you should do what is right, did you -- was your explanation that what you meant was as a juror you should do

whatever the evidence leads you to do?

PROSPECTIVE JUROR: Yes. And my beliefs as well.

MR. IMBORDINO: Ultimately, do you understand there could be a circumstance where you determine that there are no mitigating circumstances proven, do you understand that?

PROSPECTIVE JUROR: Yes.

MR. IMBORDINO: And if that's the case, the law says you have to vote for death. Can you do that?

PROSPECTIVE JUROR: Yes.

MR. IMBORDINO: You indicated -- and, ma'am, again, I apologize if I'm getting too personal here. But you told us that your daughter takes some medication?

PROSPECTIVE JUROR: My son and my daughter.

MR. IMBORDINO: I'm sorry?

PROSPECTIVE JUROR: My son and my daughter.

MR. IMBORDINO: Both, yes. And if you want to answer these questions without everybody else here, that's fine. But in terms of your daughter, the medication that she takes, can you tell us anything about why she's taking it, if you know?

PROSPECTIVE JUROR: She's ADHD and bipolar.

MR. IMBORDINO: Okay. What about your son?

PROSPECTIVE JUROR: Also.

MR. IMBORDINO: Same difficulties?

PROSPECTIVE JUROR: Yes.

MR. IMBORDINO: And --

PROSPECTIVE JUROR: I'm sorry, my daughter also has post-traumatic stress disorder too.

MR. IMBORDINO: Okay. How old is your daughter?

PROSPECTIVE JUROR: Fourteen.

MR. IMBORDINO: And your son?

PROSPECTIVE JUROR: Twelve.

MR. IMBORDINO: And did I understand you to say that your daughter had been diagnosed with post-traumatic stress?

PROSPECTIVE JUROR: I just found out, yes.

MR. IMBORDINO: Okay. Let me ask you to assume something. Assume for me that there will be testimony in this case about mental health and about diagnoses of mental health conditions. Some of them may even be the same that your children are experiencing. Is there -- are you going to be able to set aside what it is you and your children are dealing with from the evidence in this case and reach a decision based solely on the evidence in this case?

PROSPECTIVE JUROR: Yes.

MR. IMBORDINO: Juror No. 70.

PROSPECTIVE JUROR: Hi.

MR. IMBORDINO: Good afternoon. You told us that -- well, in your answer to question 55 on page 19 you said, again, "I feel at times the guilty person doesn't have to live with what they have done." I took that to mean, and I

the microphone so the court reporter can hear you.

It would be my intention to excuse Juror 59.

Any objection?

MR. IMBORDINO: None from the State.

MS. GARCIA: None from the defense, Judge.

THE COURT: All right. Juror 59 is excused. Any motions for cause on the remaining five individuals?

MR. IMBORDINO: The State -- Judge, do you have the questionnaires?

THE COURT: I do.

MR. IMBORDINO: Despite his answers, I believe that Juror 108 should be struck for cause. The only other one I have, Judge, is Juror 62. Given the mental health issues related to her daughter and her son with conditions that they certainly are going to hear about in this case, I know she said she could set it aside, but I just -- I'm not convinced of that.

MS. CENTENO-FEQUIERE: She went to get her notes.

THE COURT: Just so I make sure we can hear, I believe that the jurors have indicated willingness to follow the law and have not indicated that they should be removed. So without a stipulation, I'm denying the motion to remove for cause for Juror 62 and Juror 108.

Any stipulation?

MS. GARCIA: The defense agrees with the Court.

you know, what you meant by certain compelling situations.

PROSPECTIVE JUROR: Basically just the fact that I understand that it's not necessarily just a black or white situation, and that there's certain factors. I'm not an attorney or have never studied law, so I don't know how to phrase it exactly. But based on the facts and such that...

MR. IMBORDINO: You'd want to hear everything before you decide?

PROSPECTIVE JUROR: Yes.

MR. IMBORDINO: That's what I assume you meant.

Juror 115?

PROSPECTIVE JUROR: Yes, sir.

MR. IMBORDINO: Good afternoon.

PROSPECTIVE JUROR: Good afternoon.

MR. IMBORDINO: I almost said good morning. All right. Let's -- on page 10, question 28. You let me know when you're there.

PROSPECTIVE JUROR: Okay. Found it.

MR. IMBORDINO: This description that you gave here, is that something that happened to you? It wasn't clear to me whether you were talking about yourself or a member of your family or friend.

PROSPECTIVE JUROR: Yeah, that was myself.

MR. IMBORDINO: Okay. And that was in 1995?

PROSPECTIVE JUROR: Yes, sir.

MR. IMBORDINO: Let's talk about page 19, Question No. 55. The question's about the death penalty. You said first of all that you're not quite sure how you feel about it. Well, let me just tell you that there are a lot of people that tell us that. You said that, "I guess I'm somewhat against it, people do change."

And then you said that you have personal, moral, religious, philosophical or conscientious objections to the imposition of the death penalty. You checked, "Yes," and you said, "I'm not sure it's right to kill another for a mistake that they've made."

And then the next question you said, "I could say or vote guilty, but not sure if I could vote on the death penalty."

Do you remember all those answers?

PROSPECTIVE JUROR: Yes.

MR. IMBORDINO: All right. Are you telling me that while you understand that it's the law, that your personal feelings are that the death penalty is -- should not be imposed?

PROSPECTIVE JUROR: That's why I said I wasn't really sure of how I felt about it. Now that you've explain it a little bit more, I didn't realize there was a law to it. I don't know, I guess I'm still just iffy about it because I've seen where people, after so many years have been

released because they were wrongly convicted and I wouldn't want to be a part of a wrong conviction type thing.

MR. IMBORDINO: Okay. Well, let me ask a couple questions. First of all, your decision in this case, if you're a juror, has to be based on the evidence presented in this case.

PROSPECTIVE JUROR: Right.

MR. IMBORDINO: And while all of us may have read about other cases, including yourself, the rules say you're not supposed to consider those other cases in reaching your decision.

Now, sometimes that's like saying, you know, don't think about the elephant in the room, so to speak. But that's what we ask you to do, and that is set aside other things that you've heard about other cases and strictly decide based on the evidence in this case. Can you do that?

PROSPECTIVE JUROR: Yes.

MR. IMBORDINO: And I can't see inside your head, and so, you know, we have to rely on what you tell us. The question is -- and you've told us you're not sure if you could vote on the death penalty. That's what you said when you filled out the questionnaire.

PROSPECTIVE JUROR: Right.

MR. IMBORDINO: Do you still feel that way?

PROSPECTIVE JUROR: Well, like the other gentleman had said, I guess it would be, you know, what the evidence is that would, you know, have to be the deciding factors is the evidence and the evidence only.

MR. IMBORDINO: Okay. So have you changed your mind then? I mean, are you telling us that you now believe you can vote for the death penalty if it's -- if the facts compel that decision? And for the record this young lady paused a little while.

PROSPECTIVE JUROR: Yeah, I guess I could.

MR. IMBORDINO: Okay. You guess, you're not sure. I'm not trying to put words in your mouth.

PROSPECTIVE JUROR: Well, I'm just not sure about it all. I guess if it came down to it, and I had to, with the evidence, you know, if the evidence proved that way, then, yes, I guess I could do that.

MR. IMBORDINO: Can we approach just a moment?

(Bench conference as follows:)

MR. IMBORDINO: Judge, this particular juror apparently has a prior conviction and I really would prefer to ask her by herself if her rights have been restored.

MS. GARCIA: They have been. If you look at the bio, she indicated they were.

THE COURT: Her rights have been restored?

MS. GARCIA: Yes.

MR. IMBORDINO: Well, I didn't see the bio.

THE COURT: I think the jury commissioner screens for that too. So I'm assuming that that was the case.

MR. IMBORDINO: Okay. All right.

THE COURT: I do want you to ask her about her answer to 60. 60 A. All right?

MR. IMBORDINO: Yes, sir.

(The following proceedings were held in open court:)

MR. IMBORDINO: Ma'am, you also -- I'm sorry I don't mean to pick on you. In Question No. 60 A, which is on Page 22, you were asked: Is there a question in the questionnaire that you did not understand? And you said, "Okay." You said, "No." I'm sorry.

Question No. 70 on page 23. You were asked, "After considering all of the questions asked of you and your answers, do you feel you could be fair and impartial to both the State and the defendant?"

And you said, "No." Correct?

PROSPECTIVE JUROR: Yeah, I guess I did say no.

MR. IMBORDINO: Okay.

PROSPECTIVE JUROR: I'm sorry, I should have said yes. Yes, I could be fair on which side. I guess I misunderstood it at the time that I read it.

MR. IMBORDINO: Because there's no right or wrong

answer, it's just --

PROSPECTIVE JUROR: Right.

MR. IMBORDINO: So even though you said no, you're saying you meant to say yes?

PROSPECTIVE JUROR: Right. Yeah, I can be fair about it. Yes.

MR. IMBORDINO: Juror No. 122.

PROSPECTIVE JUROR: Hello.

MR. IMBORDINO: Hi. You told us that you had, you know, there might be some work issues for you. I take it you didn't think it would be a hardship. I mean have you been able to work that out?

PROSPECTIVE JUROR: I've talked to both my bosses and they're willing -- well, obviously they don't really have a choice, but I can work around it. I can work a little bit before court time and work in the evening, but it should work out.

MR. IMBORDINO: All right, I want to ask you about -- turn to page 7 for me. Questions 21 and 21 A. The first one, 21 has to do with testimony of a police officer. The second part of the question had to do with potential witnesses who might have entered into a plea agreement. Do you remember those questions?

PROSPECTIVE JUROR: Yes.

MR. IMBORDINO: Now, at some point, Judge McMurdie will

while and said she wasn't sure if she could impose death. So I just think that it would be appropriate to excuse her.

THE COURT: Well, I will say that her answers in the questionnaire were definitely different than the answers she gave here in court. But the answers she gave here in court she seemed to be pretty straightforward to me. I will deny the motion for cause as it relates to Juror 115 on that basis.

MR. IMBORDINO: In addition, she has a prior felony conviction. I understand her rights have been restored, but it dealt directly with the drugs that are going to be the subject of this trial, and that is meth. And I think that in conjunction with a difference in her answers with respect to the death penalty, combined, would support excusing her for cause.

THE COURT: Well, I would like to hear some -- because she did say that she would relate her own feelings about the drug usage. I was waiting for some follow-up questions on those because now we've got an expert witness testifying in the back. And I don't think meth use is something that's recognized by everyone.

MS. GARCIA: Judge, as I even said to the jury themselves, they come into this courtroom with their own life experiences. I mean, I don't think it's physically any way possible to separate any of your life experiences with

anything in life. She did tell us several times that she would, even though that's part of her life experience, she would base her decision solely on what she heard in this courtroom.

THE COURT: She said she would disagree if it was different than her own personal life experiences.

All right, well, any others?

MR. IMBORDINO: No, sir.

THE COURT: Ms. Garcia, Ms. Centeno-Fequiere, whoever, for the defense.

MS. CENTENO-FEQUIERE: Your Honor, the defense would move for Juror 126. When she was questioned, she seemed to be substantially impaired as far as being able to vote for life when she was questioned by Ms. Garcia. She initially had said proven beyond a shadow of a doubt. Ms. Garcia explained to her it's beyond a reasonable doubt. And even based on that burden, she seemed that she was substantially impaired from being able to vote for a life penalty.

THE COURT: I'm going to deny the motion. She's the one who also said when you were questioning her about would she automatically impose the death penalty, and could you talk -- could you talk her out of you, she said, "Well, you can't, but the facts could."

And she seemed to me like she was going to try very hard to impose the -- to follow the law.

And we need to make sure that, again, we get a fair and impartial jury who will follow the law, listen to the evidence, and apply that law, and be able to render the decisions that you will be asked to be made in this case.

And that's going to take me directly right to Juror No. 181, I guess it is. I'm a little confused. Question number 56 on page 19, you said, "Thou shall not kill," which tells me that you would not be able, and that you have strong moral, religious, philosophical objections to imposing the death penalty.

PROSPECTIVE JUROR: Yes, ma'am.

MS. RECKART: And so you would not be able to impose a verdict of guilty -- excuse me -- of death?

PROSPECTIVE JUROR: I would have a hard time deciding death, yes.

MS. RECKART: And as I just said a few minutes ago, it is a serious decision. I believe Ms. Garcia said the same thing.

PROSPECTIVE JUROR: Yes.

MS. RECKART: So I need you, as much as possible --

PROSPECTIVE JUROR: To clarify it more?

MS. RECKART: -- to look deep into your conscience. Would you be able to impose a death penalty if the evidence called for it?

PROSPECTIVE JUROR: Yes. And that has to be convinced.

MS. RECKART: And, well -- you're telling us in this questionnaire -- and, again, I'm not trying to -- believe me, my parents think a lot differently than I do on a lot of issues, and my husband, the same thing as Ms. Garcia said. And so I'm not trying to render any kind of judgment, but we need to know again.

PROSPECTIVE JUROR: Yes.

MS. RECKART: Because we're for the State of Arizona, it's not an easy decision, and the law is that if you got to that aggravation phase or -- excuse me, the mitigation phase, the third phase of this trial, if the mitigation that was presented, should they choose to present any, was not sufficient to call for leniency, then you would have to impose death. There is no choice about it. So by answering question 56, "Thou shall not kill," and you have strong moral, religious, whatever it might be, position on the death penalty, would you, if they did not provide sufficient mitigation?

PROSPECTIVE JUROR: Yes.

MS. RECKART: You would be able to do that?

PROSPECTIVE JUROR: Yes. I guess the only way I can easily justify for myself -- I don't believe an eye for eye; I just -- that isn't part of my verbiage. I

tend to hang closer to "Thou shall not kill." Does that make sense?

MS. RECKART: I understand what you're saying, but you're the only one who knows. There are people that walk in and say, "I couldn't do it, I just can't for moral reasons, for personal reasons, whatever reasons," and there's nothing wrong with that.

PROSPECTIVE JUROR: Yeah.

MS. RECKART: And you said, "It wouldn't be easy." Of course, we agree. That's a difficult decision.

PROSPECTIVE JUROR: Yes.

MS. RECKART: And maybe this isn't the type of case for you to sit on because of your strong convictions, and so that's what I'm trying to find from you, because I'm kind of getting two different answers here.

PROSPECTIVE JUROR: Yes.

MS. RECKART: Thou shall not kill and then -- but you say you could impose the death penalty.

Do you want to have the record reflect that Juror No. 181 is nodding her head?

THE COURT: The record will so reflect.

MS. RECKART: So I'm just trying to get an answer.

PROSPECTIVE JUROR: Uh-huh.

MS. RECKART: Because I'm kind of getting some conflicting information, I guess, from you.

PROSPECTIVE JUROR: Well, it's not black and it's not white until it's been presented. That's how I feel.

MS. RECKART: Okay. Let me go to another question. You mentioned on question number 4, there might be some health issues.

PROSPECTIVE JUROR: Yes.

MS. RECKART: And anything more about that -- and I don't want you to elaborate any more than you have in your thing. Have you thought about that some more?

PROSPECTIVE JUROR: Well, I can sit for extended periods of time, but I -- it's more aggravation on my back than if I've got to get up and move around a little bit.

MS. RECKART: And how often might you have to get up and move around a little bit?

PROSPECTIVE JUROR: Well, I don't know. I have never sat for six hours at a time, so I have -- I flew somewhere one time, but I got up out of the plane and moved around. I'm not sure if that's what we will be doing is sitting for six hours.

MS. RECKART: What you would have to do is

APPENDIX H

Trial Minute Entry (Aug. 23, 2010)

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
08/23/2010 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2007-149013-002 DT
CR2007-007509-004 DT

08/19/2010

HONORABLE PAUL J. MCMURDIE

CLERK OF THE COURT
S. LaMarsh
Deputy

STATE OF ARIZONA

LAURA M RECKART
VINCE H IMBORDINO
SHAWN CLAYTON FULLER

v.

EDWARD JAMES ROSE (002)

JOANN P GARCIA
RAQUEL CENTENO-FEQUIERE

CAPITAL CASE MANAGER
VICTIM SERVICES DIV-CA-CCC

TRIAL MINUTE ENTRY
DAY SEVEN

Courtroom ECB 413

State's Attorney:	Vince Imbordino and Laura Reckart
Defendant's Attorney:	Joann Garcia and Raquel Centeno-Fequiere
Defendant:	Present
Court Reporter:	Cindy Benner

2:00 p.m. Trial to Jury continues from August 18, 2010.

The jury is present.

Final voir dire.

Juror #158 and #110 is excused for cause.

2:17 p.m. The potential jurors are excused from the courtroom.

Court and counsel discuss the reading of the Indictment.

2:30 p.m. Court stands at recess.

Counsel exercise their peremptory challenges.

3:23 p.m. Court reconvenes with respective counsel and Defendant present.

The prospective jurors are present.

Court Reporter, Cindy Benner, is present.

Fifteen (15) persons are selected and sworn to act as trial jurors in this cause.

FILED: Jury List.

The Amended/Consolidated Indictment is read to the jury by the Court.

FILED: Amended/Consolidated Indictment.

The Preliminary Instructions are read to the jury by the Court.

FILED: Preliminary Instructions.

4:00 p.m. The jurors are given the admonition and are excused from the courtroom to return on August 20, 2010 at 10:30 a.m. Court stands at recess.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
10/18/2010 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2007-149013-002 DT
CR2007-007509-004 DT

10/14/2010

HONORABLE PAUL J. MCMURDIE

CLERK OF THE COURT
S. LaMarsh
Deputy

STATE OF ARIZONA

LAURA M RECKART
VINCE H IMBORDINO
SHAWN CLAYTON FULLER

v.

EDWARD JAMES ROSE (002)

JOANN P GARCIA
RAQUEL CENTENO-FEQUIERE

CAPITAL CASE MANAGER
VICTIM SERVICES DIV-CA-CCC

TRIAL MINUTE ENTRY
DAY 37

Courtroom ECB 413

State's Attorney:	Vince Imbordino and Shawn Fuller
Defendant's Attorney:	Joann Garcia and Raquel Centeno-Fequiere
Defendant:	Present
Court Reporter:	Cindy Benner

10:35 a.m. Trial to Jury continues from October 13, 2010.

The jury is present.

Closing arguments continue.

The jury is instructed by the Court as to the law applicable to this cause.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2007-149013-002 DT
CR2007-007509-004 DT

10/14/2010

FILED: Penalty Phase Final Instructions.

Juror #13 is designated as a deliberating juror.

The jury retires in charge of sworn bailiffs to consider their verdict.

The two (2) remaining alternate jurors are in the courtroom and are reminded of the admonition. The alternate jurors are now excused from the courtroom. Court remains in session.

LET THE RECORD REFLECT that the Defendant requests to be sentenced on all his pending matters at the same time.

The Defendant waives the preparation of a Presentence Report.

The Defendant waives his presence for any juror questions.

Court and counsel discuss the location of where the verdict will be read due to the number of spectators who wish to be present.

Court and counsel discuss the State's objections to the affidavits that were admitted into evidence.

12:17 p.m. Court stands at recess.

2:16 p.m. Court reconvenes in chambers. Shawn Fuller is appearing telephonically on behalf of the State; Joann Garcia and Raquel Centeno-Fequiere are appearing telephonically on behalf of the Defendant. Defendant's presence is waived.

Court Reporter, Cindy Benner, is present.

The Court has received a deliberation jury question. The question is read to counsel telephonically and answered by the Court. Juror Question #1 with answer given to the jurors.

FILED: Juror Question #1.

2:22 p.m. Court stands at recess.

CR2007-149013-002 DT
CR2007-007509-004 DT

10/14/2010

4:30 p.m. The jury having not reached a verdict at this time will resume their deliberations on October 15, 2010 at 10:30 a.m.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
10/19/2010 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2007-149013-002 DT
CR2007-007509-004 DT

10/15/2010

HONORABLE PAUL J. MCMURDIE

CLERK OF THE COURT
S. LaMarsh
Deputy

STATE OF ARIZONA

LAURA M RECKART
VINCE H IMBORDINO
SHAWN CLAYTON FULLER

v.

EDWARD JAMES ROSE (002)

JOANN P GARCIA
RAQUEL CENTENO-FEQUIERE

CAPITAL CASE MANAGER
VICTIM SERVICES DIV-CA-CCC

TRIAL MINUTE ENTRY
DAY 38

Courtroom ECB 413

State's Attorney: Not Present
Defendant's Attorney: Not Present
Defendant: Not Present

Court Reporter is not present.

10:30 a.m. Deliberations resume from October 14, 2010.

3:45 p.m. The Court has received a jury question. Due to the Court's schedule, the question will not be answered at this time and will be addressed when the jurors resume their

deliberations.

4:30 p.m. The jury having not reached a verdict at this time will resume their deliberations on October 18, 2010 at 10:30 a.m.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp

APPENDIX K

Trial Minute Entry (Oct. 21 2010)

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
10/21/2010 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2007-149013-002 DT
CR2007-007509-004 DT

10/18/2010

HONORABLE PAUL J. MCMURDIE

CLERK OF THE COURT
S. LaMarsh
Deputy

STATE OF ARIZONA

LAURA M RECKART
VINCE H IMBORDINO
SHAWN CLAYTON FULLER

v.

EDWARD JAMES ROSE (002)

JOANN P GARCIA
RAQUEL CENTENO-FEQUIERE

CAPITAL CASE MANAGER
VICTIM SERVICES DIV-CA-CCC

TRIAL MINUTE ENTRY
DAY 39

Courtroom ECB 413

State's Attorney:	Not Present
Defendant's Attorney:	Not Present
Defendant:	Not Present
Court Reporter:	Cindy Lineburg

10:00 a.m. Court and counsel reconvene in chambers. Shawn Fuller and Vince Imbordino are appearing telephonically on behalf of the State; Joann Garcia and Raquel Centeno-Fequiere are appearing telephonically on behalf of the Defendant. Defendant's presence is waived. The jury is not present.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2007-149013-002 DT
CR2007-007509-004 DT

10/18/2010

Court Reporter, Cindy Lineburg, is present.

The Court received a deliberating jury question on October 15, 2010.

Court and counsel discuss the question and the answer will be given to the jurors.

FILED: Jury Deliberation Question #2.

10:15 a.m. Court stands at recess.

10:30 a.m. Deliberations resume from October 15, 2010.

3:30 p.m. LET THE RECORD REFLECT that the jury has reached a verdict at this time. Due to the Court's scheduling, the Court will take the verdict on October 19, 2010 at 10:30 a.m. in Judge Granville's courtroom in CCB904. The jurors are reminded of the admonition and are excused to return on October 19, 2010 at 10:30 a.m.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
10/21/2010 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2007-149013-002 DT
CR2007-007509-004 DT

10/19/2010

HONORABLE PAUL J. MCMURDIE

CLERK OF THE COURT
S. LaMarsh
Deputy

STATE OF ARIZONA

LAURA M RECKART
VINCE H IMBORDINO
SHAWN CLAYTON FULLER

v.

EDWARD JAMES ROSE (002)

JOANN P GARCIA
RAQUEL CENTENO-FEQUIERE

CAPITAL CASE MANAGER
VICTIM SERVICES DIV-CA-CCC

TRIAL MINUTE ENTRY
DAY 40 - Verdict

State's Attorney:	Vince Imbordino and Shawn Fuller
Defendant's Attorney:	Joann Garcia
Defendant:	Present
Court Reporter:	Cindy Lineburg

10:30 a.m. Trial to Jury continues from October 18, 2010.

The jury is all present in the jury box and by their Foreperson return into Court their verdict, which is read and recorded by the Clerk and is as follows:

As to Counts 1 and 2 (Counts 7 and 8 for trial purposes),

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2007-149013-002 DT
CR2007-007509-004 DT

10/19/2010

We, the Jury, duly empanelled and sworn in the above-entitled action, upon our oaths, unanimously find, having considered all of the facts and circumstances that the Defendant should be sentenced to:

X DEATH

Signed Foreperson.

The jurors reply that this is their true verdict.

The jury is polled. Each juror replies that this is his/her true verdict.

FILED: Sentencing Verdict.

The jury is thanked by the Court and excused from further consideration of this cause.

Sentencing proceeds at this time on a separate minute entry.

11:00 a.m. Court stands at recess.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp

APPENDIX M

Ex. 303, Declaration of Raquel Centeo-Fequiere (April 6, 2017)

DECLARATION OF RAQUEL CENTENO-FEQUIERE

I, Raquel Centeno-Fequiere, declare as follows:

1. I was appointed to represent Mr. Edward James Rose in *State v. Edward James Rose*, CR2007-149013-002 (Maricopa County) related to the homicide of Phoenix Police Officer George Cortez. I was designated as the second chair attorney. Ms. JoAnn Garcia Cruz[1] was the lead attorney. Ms. Anna Gadberry served as our mitigation specialist.

2. Ms. Gadberry, Mrs. Cruz, and I were all working for the Office of the Legal Advocate ("OLA") at the time. At the time I was appointed on Mr. Rose's case, the office, like all of the defender organizations in Maricopa County, was inundated with cases. Mrs. Cruz and I also worked on Mr. Christopher Lamar's case together: *State v. Lamar*, CR1996-011714 (Maricopa County).[2]

3. Although I did not fully appreciate it at the time, our office was forced to cut corners at it responded to the workload crisis Thomas created. Mrs. Cruz had sought special permission to work as lead counsel. Despite her lack of experience in capital cases, the sheer number of cases being pushed through our office and the courts required more attorneys than were available to handle them. Mrs. Cruz's obtaining permission to serve as lead counsel was part of that response. In light of the crisis, waivers to the basic requirements of Rule 6.8 of the Arizona Rules of Criminal Procedure were frequently being granted in Maricopa County at that time.

[1] At the time of Mr. Rose's trial, JoAnn Cruz went by her prior name JoAnn Garcia.
[2] Mr. Lamar's case was the first capital trial I was involved in. Mr. Rose was the second client I represented in a capital trial.

4. Although Mr. Rose's case was only the second capital trial I had ever been involved in, I was representing over twenty other clients with serious felony charges, ranging from assault to homicide.

5. OLA was a hierarchical place to work. It was the expectation that Mrs. Cruz would make the final decisions. Although Mrs. Cruz did not have significant capital experience, she had much more courtroom experience than I did, so I would defer to her. Ms. Gadberry took a similar tack. Unfortunately, Ms. Cruz had never tried a capital case before, not as a second or first chair. Anna and I were "learning" from someone who did not have experience doing this type of work.

6. I left OLA in 2013, when I took a job at Office of the Public Advocate primarily doing post-conviction work in capital cases. In March of 2015, I moved to Office of the Legal Defender in Maricopa County, where I am again primarily representing inmates in capital trial cases. Since working on Mr. Rose's case, I have attended trainings and worked with attorneys experienced in capital representation.

7. I now know that the conditions we were forced to work in for Mr. Rose's case were wholly inconsistent with providing the level of representation demanded in capital cases. I had too many cases, and none of us had the level of training and experience that would have empowered us to competently represent Mr. Rose.

8. We did the best that we could for Mr. Rose, but our efforts fell short of the representation required. We were not able to prepare to the extent required. We did understand the extent of the investigation required. We did not understand the

importance of conducting mitigation investigation the manner described in the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* and *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty* Cases. As outlined in more detail below, we did not provide the representation required by the standard of care for competent capital counsel in death penalty cases in Maricopa County and the State of Arizona at the time of Mr. Rose's trial.

9. The entire trial team was very fond of Mr. Rose. We called him Eddie. Ms. Gadberry met with Mr. Rose the most. It was important to have a mitigation specialist involved because Mr. Rose had substantial mental health problems and intellectual limitations. We suspected that Mr. Rose's family was not very adept at handling Mr. Rose's mental health problems because of their own problems. We also suspected that there was a genetic component to Mr. Rose's limitations, which also made it important for Ms. Gadberry to be involved and to undertake a comprehensive mitigation investigation.

10. I wanted to resolve Mr. Rose's case without a trial and to have meaningful plea negotiations. However, we never brought a mitigation presentation to the state prior to trial because they were very clear: because the victim in this case was a police officer, there would be no offer for anything less than a death sentence. We did not consider seeking concessions other than a life sentence from the state. We had no strategic reason for not requesting that the state dismiss some charges, drop one or more aggravating circumstances, or forgo the presentation of some items of evidence.

11. The trial team met with Mr. Rose at the Fourth Avenue Jail. Sometimes I would meet with him one-on-one. Other times Mrs. Cruz or Ms. Gadberry would join me. We would meet with Mr. Rose either at the door of his cell or in the contact visitation room. In the visitation room, there was a television. The TV was also connected to the radio, and during our visits, I would often play music for Mr. Rose. He enjoyed listening to the music.

12. Mr. Rose never had much to say about his case. Most of my clients have a great deal to say about their cases. They want to know the state's theory, to review the police reports, and to have any input in the investigation. But Mr. Rose was not like that. He did not ask for material to review or make suggestions about trial or investigation strategy, and he never pointed to or offered his own versions of the information we'd tell him the state had provided. He'd just say, "okay," and we would move on. Mr. Rose's total lack of interest in the case, the case where he'd be on trial for his life, was astounding and I suspect reflects his low intellectual functioning.

13. Getting information from Mr. Rose about his life or his family was very difficult. It was not that Mr. Rose was withholding or obstructing. He simply had very little information that he could give us and did not seem to understand what might be important for us to know. Getting Mr. Rose to tell us any story about his life was like pulling teeth. We would have to ask follow-up questions at every step in order to get details from him. He was very limited in his capacity to provide us with information helpful to his case or provide us with meaningful leads for our investigation.

14. Mr. Rose lacked basic information like addresses and phone numbers for even his closest family members and friends. He did not seem to understand the importance of our investigation and his case, and he was a passive participant in it. Usually if my clients do not know a piece of information, they offer to obtain it either during a family visit or from information they have in their cell. Mr. Rose was different—as if he had no experience taking care of or advocating for himself in even the most basic ways. He would go along with whatever we wanted to do, but he never seemed to have ideas of his own or to be thinking about how he could help his own interests. It was apparent to everyone on the team that Mr. Rose was slow.

15. Mr. Rose had an especially hard time understanding legal concepts. We would have to go over a topic with him several times before he appeared to understand what we were talking about. We would have to get him to parrot back what we just told him to be sure he was listening to us and not just going along with whatever we said. He often could not repeat what we had just told him, even if we had gone over the subject many times. Mr. Rose's intelligence meant it took special effort to make sure he was aware of what was going on.

16. One way his limitations were manifest in his case (and in a way that hurt his likelihood for a life sentence) was in his allocution to the jury. It is my practice to ask my clients what they'd like to say to the jury and what they'd like the victim's family to know. It was clear to us that Mr. Rose was remorseful and that he was especially troubled by the pain he caused Mr. Cortez's children. But when I asked him what he wanted the jury know, what he wanted to tell them before they

decided whether he would live or die, he had almost nothing to say. To prepare for it, we had to have him practice in front of us numerous times. We would have to make him practice pausing at the end of each sentence. We would encourage him to pause and look up, so he could connect with the jury and appear natural. But it was a struggle for Mr. Rose to make an even natural sounding allocution, and in the end I do not think it was successful in communicating the sincerity of his remorse to the jury. I remember that the State was particularly harsh on Mr. Rose for failing to take responsibility for his actions in closing, and I do not think that our presentation adequately rebutted that.

17. We knew that Mr. Rose had significant cognitive limitations, including a low IQ score. However, at the time, Arizona had a strict "cutoff" for excluding persons who are intellectually disabled from death eligibility. That is, if a capital defendant had an IQ score above seventy (even if their true IQ might be below seventy), they could not be considered intellectually disabled. For this reason alone we did not pursue a claim that Mr. Rose was ineligible for the death penalty under section 13-753(K)(3) of the Arizona Revised Statutes or *Atkins v. Virginia*, 536 U.S. 304 (2002). We had no other reason for not presenting this claim.

18. Arizona's strict IQ cutoff rule was the only reason we had for not conducting a mitigation investigation (and presentation) focused on Mr. Rose's deficits in adaptive functioning. Those deficits on their own, and independent of a diagnosis of intellectual disability, would have been important sources of mitigating information for the jury to learn before sentencing Mr. Rose.

19. Our investigation was primarily focused on mitigation short of an intellectual disability claim. This was the second capital trial for Anna Gadberry, the mitigation specialist. She took over the case from Linda Thomas. Linda Thomas stopped working reassigned the case to focus on another capital client that was set for trial sooner.

20. It was important for us to speak with neighbors, school teachers, friends, and family members of Mr. Rose. Ms. Gadberry was able to make a visit to California, where much of Mr. Rose's maternal family lived. We, unfortunately, did not learn much about Mr. Rose's paternal family. That is information we would have wanted to have. We had no strategic reason for not conducting a complete investigation into both sides of Mr. Rose's family. Specifically, we had no strategic reason for not interviewing any paternal family member other than Earl Rose III and no strategic reason for failing to obtain court, education, military, employment, social security, medical, and mental health records related to members of Mr. Rose's paternal and maternal family members.

21. To the contrary, it would have been very helpful for us to have learned about both families' histories, including history of mental illness, cognitive impairment, substance abuse, poverty, and criminality. We would have wanted to present an intergenerational history of each of these problems, and if we had obtained records indicating such a history, which would have greatly strengthened our case.

22. For example, if we could have shown a family history of low intellectual functioning and/or mental illness, which would have helped us explain to the jury

that Mr. Rose's symptoms were not an aberration. We would have been less reliant on the credibility of our experts, something we knew would be at issue in light of the state hiring their own group of experts. Likewise, it would have been helpful to have a family history linking mental health, substance abuse disorders, and criminality. If we had that information, we could have argued that Mr. Rose was following a well-established family pattern of pre-existing mental illness that was self-medicated with substances and often lead to criminal activity. The family history, in particular, would have rebutted the state's repeated suggestion that Mr. Rose chose the life he led.

23. We knew that mental illness and substance abuse ran in Mr. Rose's family. We knew from anecdotal evidence that our client's father, Earl Rose III, is the child of an alcoholic and that his parents abandoned him. We also knew that Mr. Rose's paternal aunt had a mental illness of some kind that resulted in her being institutionalized. We had no strategic reason for failing to meaningfully corroborate these accounts or for failing look further into this part of his family. We had no strategic reason for failing to obtain the records related to Mr. Rose's paternal aunt's institutionalization.

24. We also had no reason for failing to investigate further into Mr. Rose's maternal family. We knew that one of Mr. Rose's maternal aunts had a nervous breakdown and that several family members on that side of the family may have suffered from addiction disorders. This should have made us aware of the need to obtain medical and mental health records for this side of the family (of course, the standard of care, *supra*, requires the same regardless of this additional red flag).

Moreover, the very fact that Dolores married, and then returned to Earl Rose III after divorcing him, raises some questions about her judgment and own limitations.

25. Based on his medical records as well as conversations with Mr. Rose's teachers and family members, we were aware that he suffered from chronic, severe asthma, which resulted in numerous hospitalizations, affected his school attendance, and limited his ability to participate in other activities as a child. We did not seek an independent medical review of these records by a pediatrician or pulmonologist, child development expert, or any other medical expert. We had no strategic reason for this omission. As noted above, Ms. Gadberry, Mrs. Cruz, and I were inexperienced in conducting capital trials, and we did not consider that there may have been a connection between Mr. Rose's childhood asthma and his cognitive development, mental health, and behavioral and social outcomes. Such information would have been valuable for helping the jury to understand the nature, cause, and seriousness of Mr. Rose's limitations. Our inexperience in capital trials pervaded many aspects of the case, including not understanding the potential significance of Mr. Rose's asthma.

26. While Mr. Rose's trial was pending, he was held at the Fourth Avenue Detention Center in their most secure unit. He reported that Detention Officers would bring other officers by to look at him and harass him.

27. The leg brace and stun belt that Mr. Rose had to wear during the trial was frequently a source of discomfort and distress for Mr. Rose. He had to wear it because of a routine policy imposed by the Maricopa County Sheriff's

Department. Mr. Rose told us that the belt was often too tight and that the leg brace made him uncomfortable. The stun belt was about six inches wide and went around Mr. Rose's waist. It was often so tight that he could not bend forward at the waist. It also protruded from the back of his shirt. They'd also remind Mr. Rose he needed to follow their orders, but never informed him what might cause them to use the belt to shock him. The leg brace was also stiff and would make a loud clicking sound if Mr. Rose straightened his leg.

28. It was clear to us that the stun belt and leg brace distracted Mr. Rose from the trial, and he complained about how they bothered him. He could not move naturally while seated, and every time he stood, he risked making a loud clink by straightening his leg too much. We were also concerned about their effect on Mr. Rose's his ability to offer a persuasive allocution. His intellectual impairments made it difficult for him to prepare and offer the allocution in the first instance, and the stun belt and leg brace did not help. We were also worried they would affect his posture and gait in a way that the jury would notice. We were also worried because the bulge from the belt and leg brace were substantial enough for the jurors to notice, and the jurors would walk by counsel table as they entered the courtroom. Our concern was that the jurors would see it and think that he posed a danger to them, causing them to be biased against a life sentence.

29. It is my understanding that we did not object to the leg brace or stun belt. I had no strategic reason for failing to do so. To the contrary, I knew that the Sheriff's office's routine policy of requiring stun belts and leg braces was unconstitutional, and I knew that it was affecting Mr. Rose's ability to participate in his defense. It

was my goal to help him participate as fully as possible, and removing the belt and leg brace would have helped in that regard. I was aware of the issue at the time of Mr. Rose's trial. Competent representation in Maricopa County at the time of Mr. Rose's trial demanded making an objection to this unconstitutional practice, and I had no strategic reason for failing to do so.

30. Mrs. Cruz and I discussed Mr. Rose's pleading guilty with him in advance of the trial. We spoke with him about it several times before we had him enter the plea. Our hope was to show the jury that Mr. Rose was remorseful for his actions and that he was taking responsibility for them. Mr. Rose pleaded guilty because it was our advice that he do so in order to demonstrate his remorse. He would have done whatever we told him to do. He had almost no independent ideas about the case, other than that he wanted it to be over. Based on my other interactions with Mr. Rose, I strongly suspect that if we had told him to stand by his guilty except insane plea, he would have. But because we advised him to plead guilty, he did.

31. We did not consider requesting concessions from the state (other than a sentence less than death) in exchange for a guilty plea. We had no strategic reason for not requesting other concessions from the state including dismissing some of the counts in the indictment, dismissing some aggravating factors, or forgoing presentation of some if its evidence.

32. We also lacked any strategic reason for not presenting evidence of Mr. Rose's remorse from other sources. We knew family members and friends had contacted him at the jail and knew that he had expressed the same remorse to them that he shared with us. We lacked any strategic reason for failing to present their

observations of Mr. Rose's remorse. To the contrary, having independent accounts of it, rather than relying so heavily on Mr. Roe's plea and allocution, would have provided powerful corroborative evidence of his regret for the pain he caused.

33. I attended Norma Lopez's sentencing hearing. At the sentencing I was hoping to learn what type of presentation we could expect in Mr. Rose's case. We wanted to be prepared to either limit or counter the presentation to the greatest extent possible. Specifically, we wanted to be prepared to make appropriate objections to the testimony. For the same reason, we had a copy of the transcript transcribed. To prepare for trial, we reviewed the transcript of that proceeding.

34. I had no strategic reason for not objecting to the victim impact evidence as overly emotional and inflammatory, as inappropriately asking for a particular sentence, or for its inappropriate, inaccurate, and inflammatory characterizations of Mr. Rose and the crime. Indeed, it was my strategy to limit the admission of just that sort of evidence. If that sort of information had been presented at Ms. Lopez's sentencing, I should have used it as a basis to prepare objections in Mr. Rose's case. I had no strategic reason not to raise an objection and specifically cite the Eighth and Fourteenth Amendments to the U.S. Constitution as the basis for that objection. Further, I had no strategic reason for failing to ask for a mistrial at the close of the victim impact evidence. That request would have been on the same basis.

35. For me, 2010, the year of Mr. Rose's trial was the year from hell. In addition to Mr. Rose's case, I had to retry Mr. Christopher Lamar's sentencing proceeding. I

also went through a difficult divorce that year. During Mr. Rose's trial, I suffered from migraines and at one point had to wear sunglasses in the courtroom and ultimately excuse myself from trial even though I was the one who had prepared to cross an important state witness.

36. On October 19, 2010, I was not present for Mr. Rose's sentencing. I had previously arranged to travel to the east coast to be with my family. It was a much needed respite, and I did not work on Mr. Rose's case while I was there. I had access to neither a computer nor materials from my office while I was away. I spent at least two weeks there, well beyond the October 30 deadline for filing a Rule 24.1 motion, and I was wholly unavailable to conduct legal work during this time.

37. Sometime after the trial, Lisa Donsker provided me with a letter from her file. The letter should have been turned over pursuant to a subpoena we filed with her office. The letter documents Mr. Rose's history of major depression. Having the letter from her would have been helpful to make the case that Mr. Rose had a pre-existing diagnosis of depression. The state had strenuously argued that Dr. Stewart's diagnosis was flawed because of a lack of history of depression, and having documentation in the form of that letter would have gone a long ways to counter their argument. Nonetheless, we did not receive that letter until after Mr. Rose had been sentenced to death.

38. It was also only after the trial that we learned that the victim's widow had been arrested for a DUI shortly before the trial. It was only after she was indicted that we learned of the DUI, and her indictment did not occur until after Mr. Rose was

sentenced to death. We did not learn for the DUI until after the trial. I personally learned about it from Ms. Gadberry. The pending criminal case may have explained why the victim impact presentation was so over the top: Ms. Cortez may have felt motivated to do everything she could to help secure a death sentence to help avoid criminal charges.

39. During trial, juror misconduct occurred, resulting in the dismissal of one of the jurors. It was my impression that the misconduct was not limited to this juror, but the judge did not allow us to individually ask question of all of the jurors to assess the extent of the misconduct. Doing so would have been helpful for understanding the true extent of the misconduct.

40. Current counsel for Mr. Rose have informed me that one of the jurors failed to disclose that he was a member of an organization that lobbies for legislation providing special benefits to family members of law enforcement who are killed in the line of duty. The juror questionnaires we used specifically asked for this kind of information because it could provide the basis for a for-cause challenge and/or the basis for questions leading to such a challenge. In light of the facts of this case, had I realized that one of the jurors was a member of such an organization, I would have made a for-cause challenge to that juror.

41. Current counsel for Mr. Rose has informed me that during selection, the state used nine out of ten of its strikes to remove potential female jurors from the juror pool. I did not recognize that the state was engaging in that practice. Had I realized it, I would have compared the jurors the State struck to others in the pool. Unless the stricken female jurors were uncharacteristically unfit, I would have

raised an equal protection challenge to the prosecutor's practice, citing the state and federal constitutional protections prohibiting gender-discrimination.

42. I have also been informed that one of the prospective jurors stated during voir dire that "if a subject is in custody most likely some crime was committed." I have also been informed that another prospective juror testified in voir dire that she would give the testimony of law enforcement officers more weight because of their service and oath to the community. The same prospective juror testified that she thought the death penalty is appropriate if a person purposefully kills another human being. I have likewise been informed that another prospective juror testified in voir dire that a person "should be able, or willing, to explain himself or herself especially in court" if they are charged with a crime. Each of these statements provided a basis for a for-cause challenge, and I lacked any strategic reason for failing to bring one.

43. I have been informed that one of the jurors on whom we used a preemptory strike disclosed on her questionnaire that she was a family member of one of the investigating officers in this case. We had no strategic reason for neglecting to ask about the nature of this relationship on voir dire or for exercising a peremptory strike on this juror, rather than raising a challenge for cause based on this relationship.

44. Current counsel have also informed me that five seated jurors had close ties to law enforcement or had themselves been either law enforcement agents or first responders. We lacked a strategic reason for having so many persons with close ties to law enforcement on the jury.

45. A problem we had throughout voir dire was not having enough time to ask the questions. The judge limited our time for questioning, and we felt pressured to wrap up. Another problem we had was that Mrs. Cruz took the lead in conducting voir dire. In Mr. Lamar's case, where I took the lead, we asked more open-ended questions focused on the potential jurors' ability to consider a life verdict. I frequently felt that we did not follow up on potential problems raised in prospective jurors' voir dire testimony. We did not have a strategic reason for not following up. If we had, as I was able to do in the *Lamar* case, we likely would have been able to obtain a jury more able to impose a life verdict.

46. Current counsel has also reminded me that Dr. Pablo Stewart, who was a critical mental health witness for us, did not respond to juror questions as part of his testimony. Dr. Stewart provided testimony about Mr. Rose's substantial psychological impairments and was our most important witness. Juror questions present an opportunity for witnesses to address the concerns the jury may have with their testimony. Dr. Stewart's testimony was lengthy, and it was not surprising that they had a number of questions for him, given the importance of his testimony to our case.

47. However, Dr. Stewart had a flight scheduled at the end of what turned out to be his last day of testimony. The judge said that he was not inclined to permit some of the jury questions if we would not get through them all that day and that he would just provide copies of the questions to counsel so we would know what was on the jurors' minds. The judge's approach forced us to truncate our presentation of Stewart's testimony, adversely affecting our trial strategy. I do not recall

consulting with Dr. Stewart about his willingness to change his flight or to stay to answer the jurors' questions. We had no strategic reason for not objecting to the court's dismissal of Dr. Stewart before the completion of his testimony.

48. I remember Mr. Rose fondly. I think of him as someone who had significant intellectual limitations who had gone through a very difficult period in his life that caused him to badly relapse and spiral into drug use, which, in turn, led to the tragic events in his case. I saw kindness in him that demonstrated to me his actions were in large part the product of his inability to cope with a difficult set of circumstances, and not a general disregard for the wellbeing of others.

49. The State, however, presented a very different portrait of our client to the jury. Despite some objections on our part, the prosecution again and again used their questioning of witnesses for both parties to paint Mr. Rose as a gang member, a ruthless and habitual violent criminal, and a danger both to those around him and to society at large.

50. With regard to the gang evidence in particular, we did not introduce any independent evidence to refute Mr. Rose's gang affiliation or provide the jury with any context for the State's aggravating evidence on that front. We had no strategic reason for failing to engage our own expert on the subject of Phoenix gangs in general or Mr. Rose's gang involvement in particular or to question lay witnesses from Mr. Rose's life about his attenuated connection to that lifestyle and his reliance on the gang for drugs.

51. We also lacked a strategic reason for failing to engage and present an expert who could opine on Mr. Rose's substance abuse. It was important for us to understand

how his long history of substance abuse, and presenting someone with particular expertise in substance abuse could have helped us contextualize his substance abuse in his other cognitive impairments, mental health problems, and substantial social stressors. Relatedly, we would have wanted to the jury to know about Mr. Rose's family members' history of substance abuse, cognitive impairment, and mental illness, both to corroborate the reliability of our experts' conclusions, but also to explain to the jury that Mr. Rose was the product of an environment pervaded by persons with their own significant limitations.

52. Mr. Rose's case was during a difficult period in Maricopa County and in my personal and professional life. Based on the experience and training I gained after Mr. Rose's case, I now understand that there is much that we should have done differently in Mr. Rose's case.

I have had the opportunity to review and correct the foregoing. The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of Arizona on April 6, 2017.

Raquel Centeno-Fequiere

DECLARATION OF NATMAN SCHAYE

1. My name is Natman Schaye, and I serve as Senior Trial Counsel at the Arizona Capital Representation Project ("Project"). I am a licensed lawyer in good standing in the State of Arizona, where I have practiced law full-time since my graduation from the University of Arizona College of Law with distinction in 1981. I was in private practice as a criminal defense lawyer until April 1, 2010. On that date, I took my current position with the Project, a non-profit organization in Tucson that provides direct representation to capital defendants and provides consultation and training for defense teams representing capital clients throughout the State of Arizona. My responsibilities include direct representation of capital clients, as well as providing training and consultation to capital defenders in Arizona and across the country.

2. I began representing capital clients in 1984 and have been representing capital clients in state trial and appellate courts in Arizona and New Mexico since. From 1984 until 2010, most of my practice was devoted to representing clients charged with capital crimes or sentenced to die. Since joining the Project, I have focused almost exclusively on capital defense work. In the past thirty-three years, I have represented capital clients in state and federal courts in pretrial proceedings, at trial, on direct appeal, and in state and federal post-conviction proceedings.

3. In addition to my state court and federal habeas work, starting in 1995, I was appointed as "learned counsel" pursuant to 18 U.S.C. §3005 in federal capital prosecutions for the following clients in the following Districts Courts: Jason DeLaTorre (D. N.M.), Robert Panaro (D. Nev.), Michael Waggoner (D. Az.), Jose Sanchez-Meraz (D. Az.), Jamal Shakir (M.D. Tenn.), Paul Eppinger (D. N.M & D. Az.), and Jonathan Toliver (D. Nev.). I have also represented capital clients in the United States Courts of Appeal for the Ninth and Tenth Circuits.

4. I am a charter and life member of the Arizona Attorneys for Criminal Justice ("AACJ"), a non-profit association of criminal defense lawyers and other members of the criminal defense community founded in 1986. I am a life member of the National Association of Criminal Defense Lawyers ("NACDL"). I served on NACDL's Board of Directors from 1994-2000 and 2001-2003. I served as either co-chair or vice-chair of NACDL's Death Penalty Committee from 1995-2001 and 2004-2013. In that capacity and otherwise, I have consulted with capital defense counsel, judges, mitigation and guilt/innocence investigators, and forensic experts throughout the United States regarding capital defense standards and practices. I have served as co-chair of *The Champion* Advisory Board, which oversees the magazine published ten times per year by NACDL, since 1992. In that capacity, I have reviewed and edited many articles discussing criminal defense practices and techniques, many of which focus on capital defense. I have authored *amicus curiae* briefs on behalf of NACDL and AACJ, including in capital cases, in the United States and Arizona Supreme Courts.

5. I served on the Arizona Supreme Court committee charged with revising Rule 32 of Criminal Procedure from 1996 to 1997, the Arizona Supreme Court Committee on the Appointment of Counsel in Capital Cases from 1996 to 2002, the Arizona Criminal Rules Committee from 1995 to 2000, the Arizona Supreme Court Capital Case Oversight Committee from 2013 to present, and the Arizona Supreme Court Criminal Rules Task Force from 2016 to present.

6. I have served as an instructor at criminal defense seminars, particularly focusing on effective representation in capital cases, throughout the United States for more than twenty-seven years. These include seminars in Arizona, Hawaii, California, Washington, Oregon, Idaho, Montana, Utah, Colorado, New Mexico, Texas, Kansas, Missouri, Arkansas, Louisiana, Mississippi, Alabama, Tennessee, Illinois, Kentucky, Indiana, Ohio, Michigan, Florida, Georgia, South Carolina, North Carolina, Virginia, Pennsylvania, and New York. These include seminars sponsored by the America Bar Association ("ABA"), the National Institute for Trial Advocacy, the National Consortium for Capital Defense Training, the Arizona Supreme Court, the Southern Center for Human Rights ("SCHR"), NACDL, AACJ and numerous state and local bar associations, criminal defense offices and organizations. I have written articles focusing on the duties of competent capital defense counsel that were published in *The Champion*, AACJ's *The Defender*, and other periodicals.

7. I have written articles and taught at numerous seminars regarding effective representation in capital cases, effective mitigation investigations, and application of the ABA "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" (2003) ("ABA Guidelines") and "Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases" (2008) ("Supplementary Guidelines"). I was one of the founders of "Making the Case for Life" in 1997, an annual mitigation seminar co-sponsored by NACDL and SCHR. I continue to serve as a faculty member. Since 2002, I have been on the faculty of the Clarence Darrow Death Penalty College, an annual bring-your-own-case training program for capital defense lawyers, mitigation specialists, and investigators. I have served as faculty in capital bring-your-own-case seminars for the past thirteen years in Arizona and other states. Bring-your-own-case seminars involve faculty meeting with defense teams with active cases to strategize regarding their cases, particularly concerning the development and presentation of mitigation. In addition to direct representation, I have consulted with and learned from defense lawyers, mitigation specialists, investigators, jurists, and experts throughout the country who have been involved in capital litigation for more than thirty years.

8. I have served as a trainer in the *Morgan v. Illinois* or Colorado Method of jury selection in capital cases since 2002, as well as studied jurors' understanding of the capital trial process and capital jury instructions. I have taught this method to defense lawyers at seminars conducted in California, Oregon, Idaho, Nevada, Utah, Arkansas, Michigan, Iowa, Colorado, Arizona, Texas, Louisiana, Mississippi,

Tennessee, Kentucky, Georgia, Illinois, Pennsylvania, South Carolina, and Florida. The seminars typically last for three days and include lectures, demonstrations, and participant exercises. I recently published a related article entitled *Capital Jury Selection: The Minimum Standards for Effective Counsel*, for the February 2017 issue of *The Champion*. I have served as an expert witness on the standard of practice of competent capital defense counsel at trial and during jury voir dire in Arizona, Colorado and Mississippi.

9. I have been asked by counsel for Mr. Edward Rose to discuss the standard of care used by capital defense lawyers representing defendants facing capital charges in Arizona generally and in Maricopa County between 2007 and 2010, when Mr. Rose's trial case was pending. Based on my above-listed experience, I am familiar with the standard of care that a defense lawyer had to meet in order to provide effective representation in capital trial proceedings during that time. I am also familiar with the unique climate under which the capital defense bar in Maricopa County was working during the time period in question. Unless otherwise indicated, the following opinions and information relates to the standard of practice in Arizona generally and Maricopa County from 2007 to 2010.[1]

10. At the time that Mr. Rose's case was pending trial, the criminal defense bar in Maricopa County—and those charged with representing capital defendants in particular—were facing an unprecedented crisis in resources and available competent counsel. This was the result of a shift in policy enacted by Maricopa County Attorney Andrew Thomas, who took office in 2004 and began pursuing capital charges at a far higher rate than his predecessor. In 2008, at the high water mark, there were 149 active death penalty cases pending trial or in trial in Maricopa County.[2]

11. As a result of these circumstances, Maricopa County suffered a calamitous shortage of competent capital defense counsel and mitigation specialists. Capital cases were assigned to defense counsel and mitigation specialists who did not have adequate capabilities, training or experience. Capital defense counsel and mitigation specialists were suddenly and routinely faced with the near-impossible challenge of preparing the cases and defending the lives of several clients simultaneously—a virtually impossible task even for the most capable and experienced capital defense counsel and mitigation specialists.

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[1] Throughout this declaration I refer to "competent counsel" and "effective counsel." With these terms, I am referring to counsel that meets the standard of care constitutionally required in capital cases in Maricopa County and the State of Arizona between 2007 and 2010. I have also chosen the term because it reflects the Supreme Court's usage in reference to constitutionally effective representation. *See generally Strickland v. Washington*, 466 U.S. 668, 690 (1984) (referring to "professionally competent assistance" and "competent counsel" throughout).

[2] Christopher Dupont and Larry Hammond, *Capital Case Crisis in Maricopa County, Arizona: A Response from the Defense*, 95 JUDICATURE 216, 216 (2012).

12. One of the first critical duties of competent capital representation is assembling a qualified trial team. The core members of a trial team include, at minimum, two lawyers, an investigator, and a mitigation specialist. A by-product of Mr. Thomas's charging practices was that trial teams often fell below the level of training and experience required for competent representation. There were simply too few qualified lawyers and mitigation specialists to work on the cases for the many defendants facing potential death sentences.

13. Jury selection is an especially crucial phase of any capital trial. Competent voir dire is necessary to overcome the bias inherent in death juror qualification, as well as to seat jurors who will meaningfully consider a verdict less than death and respect the personal moral judgments of other jurors. Many, if not most, prospective jurors are confused about the capital trial process and rules. Competent counsel ensured during voir dire that potential jurors understood this process, as well as jurors' roles and responsibilities.

14. Competent counsel sought to identify potential jurors who were not qualified to serve and used every opportunity to eliminate potential jurors who should be disqualified.

15. Usually, the first opportunity to do this is after counsel received and reviewed juror questionnaires. As a general matter, competent counsel would not stipulate to the dismissal of jurors whose questionnaires indicated only generalized objections to the death penalty, but who also indicated that they could otherwise follow the law and hear all the evidence with an open mind.

16. Competent counsel elicited prospective jurors' sources of bias through questionnaires and voir dire. Competent counsel raised appropriate cause challenges when potential jurors demonstrated impermissible bias or an inability to follow the law. Common areas where competent defense counsel questioned panel members about potential bias included exposure to media about the case and the status of the victim. For example, if the victim was a law enforcement officer, competent counsel would explore potential jurors' ties to law enforcement and related potential bias. Where bias against the defendant was indicated, competent counsel raised a cause challenge to that potential juror and, if the challenge was denied, used a peremptory strike as a tool to eliminate this source of bias.

17. Counsel seriously undermine their credibility by making promises to potential jurors during voir dire that they fail to live up to during trial. Repeatedly stating, for example, that counsel will present a particular defense and then failing to do so needlessly jeopardizes the defense at all phases of the trial.

18. During jury selection and throughout trial, competent counsel raised available objections and preserved constitutional bases for those objections for review. In jury selection, this included making constitutionalized for-cause challenges to

jurors who were substantially impaired in considering a sentence less than death, as well as raising colorable *Batson/J.E.B.*[3] objections. Doing so protected a client's constitutional rights and helped ensure that a qualified jury decided his or her fate.

19. Competent counsel strongly encouraged their clients to accept pursuit of the best defense available. A critical goal in selecting a guilt-phase defense was presenting one that was plausible and provided an opportunity to expose the jurors to mitigating evidence at an early stage and helped them understand mitigating reasons why the client committed the offense. Such a defense enables counsel to foreshadow in the guilt phase the mitigation themes they will present in the potential penalty phase. Providing jurors with this information in a guilt phase is referred to as "frontloading" and improves a defendant's chance at a life verdict. Frontloading mitigation evidence, where possible, was required by the standard of care.

20. Competent counsel would not advise a client to enter a guilty plea to the capital charge without receiving substantial concessions from the prosecution, usually a sentence less than death. This was particularly so when a potentially complete defense was available that would enable the defense to frontload mitigating evidence. Concessions in addition to a non-death sentence that competent counsel would consider requesting included having the prosecution dismiss some or all non-capital charges, dismissing certain aggravators, forgoing the presentation of certain aggravating evidence, or agreeing not to counter certain evidence. Advising a client to plead guilty to the capital charge without obtaining any concession fell below the standard of care.

21. Counsel have a duty to ensure that a client's guilty plea is knowingly and voluntarily entered. If counsel knew or should have known that a client suffered from mental health problems, cognitive limitations, or was being medicated with drugs that might impair the client's competence at the time of his or her guilty plea, it was incumbent on counsel to seek assistance from an expert to determine whether the client possessed sufficient capacity to understand what rights he would be giving up by pleading guilty, what defenses he was waiving, and the other strategic implications of forgoing the presentation of available guilt-phase defenses.

22. It was the standard practice of competent counsel in Arizona to make a pretrial presentation of mitigation evidence to the prosecution as part of their advocacy efforts to obtain a non-death settlement offer. Making such a presentation was standard practice even when the prosecution initially stated that no such offer would be made.

23. Competent counsel ensured that the defense team undertook an exhaustive investigation into a client's social history, including discovering readily available records, going back at least three generations and out to first cousins on both the

[3] *Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

maternal and paternal sides of the client's family. Records typically collected and relied on as part of this investigation included medical and mental health records, birth and death records, education and employment records, military records, criminal records, and court records. Likewise, the standard of care required counsel to ensure that social history interviews were conducted of all such family members that could be located. Such interviews and records provide important information, insight and context for the client's own history and disorders, and help explain how the client came to commit the offense. Failing to conduct such investigation falls below the standard of care.

24. Competent counsel presented such evidence at trial to describe their client's social history, including evidence of multigenerational poverty, substance abuse, and mental illness, as well as how such issues in a defendant's family tree bear on the defendant himself or herself. Failing to do so falls below the standard of care.

25. Competent counsel knew that evidence of mental illness, cognitive impairment, and substance abuse on either side of the family tree constituted admissible, relevant, and compelling mitigating evidence. This is especially true where the defendant suffered from the same conditions as those in past generations of the family and there was a heritable component to such disorders.

26. Counsel had a duty to assure the professional competency of all team members, including investigators and mitigation specialists, and to supervise and direct their work throughout the case. The standard of care for mitigation and social history investigation dictated that qualified defense team members conducted multiple, in-person interviews with social history witnesses.

27. Competent counsel also ensured that defense team members did not unnecessarily create evidence that the state could use in aggravation or to rebut mitigation. For example, competent counsel would ensure that team members refrained from speaking with the client on the jail's recorded line, to which the prosecution had access.

28. Because Arizona courts observed a strict statutory cut-off for prerequisite IQ scores prior to the United States Supreme Court decision in *Hall v. Florida*,[4] it was not standard practice of capital defense counsel at the time of Mr. Rose's trial to mount a full presentation of a defendant's intellectual disabilities for the trial court absent at least one IQ test result below 70. The standard of care nonetheless dictated that, where evidence indicated that a defendant's intelligence and adaptive functioning were significantly below average, such evidence be investigated and developed as part of a comprehensive mitigation investigation.

29. Evidence of a defendant's uncharged criminal acts or gang ties is often introduced by prosecutors at the aggravation or penalty phase of trial. Upon receiving

[4] __ U.S. __, 134 S.Ct. 1986 (2014).

discovery of such evidence from the prosecution, competent counsel prepared to counter the evidence through cross-examination or through the presentation of evidence that countered or mitigated the prosecution's evidence.

30. It was common practice for prosecutors to facilitate presentations of "victim impact' evidence for penalty phase proceedings. Competent counsel raised constitutional objections to the extraordinarily broad latitude granted the prosecution and victims to present victim impact evidence in Arizona, as well as restrictions on defendants' ability to meaningfully confront or rebut such presentations.

31. I have been advised by counsel for Mr. Rose that his trial counsel attended his co-defendant's sentencing proceeding months before Mr. Rose's trial. Thus, trial counsel were on notice of the victim impact evidence that would very likely be presented during Mr. Rose's trial. Such a preview would have been particularly helpful to their development and presentation of case-specific, constitutionalized objections to that evidence. A failure to be prepared with such objections would fall below the standard of care for competent counsel in any case, but particularly where counsel was on notice of that evidence.

32. Competent counsel would have informed testifying experts of changes in trial strategy that were inconsistent with the experts' conclusions or diagnoses. For example, if a testifying expert offered a clinical diagnosis that a client's psychological impairments supported a complete defense to the charges, competent counsel would inform the expert of changes in trial strategy that conflicted with this diagnosis and would have conferred with the expert to minimize any resulting prejudice to the client. If this inconsistency could not be effectively resolved to avoid such prejudice, competent counsel would have consulted with another expert or experts in an effort to present expert testimony consistent with the trial strategy. Competent counsel would not call an expert who had opined that the defendant was guilty except insane where the defendant had entered a plea that contradicted that opinion.

33. The opportunity for jurors to ask questions of witnesses is an important feature of the Arizona trial process. In my experience, particularly where expert testimony is concerned, the juror questions are often an invaluable opportunity for witnesses to address any lingering questions or confusion that jurors have about their testimony and conclusions. Where the credibility of an expert is at issue, it is all the more important to have the expert available to respond to jury questions. Competent counsel would ensure that a key defense witness was available to answer juror questions or, at the very least, object to the trial court foreclosing such questions. Complying with this duty would be particularly important when the key defense witness was the only witness for either party who was not available to answer juror questions.

34. During the penalty phase of capital cases, a defendant's remorse, or lack thereof, almost invariably becomes a focal point for capital jurors. Competent counsel not only prepared to demonstrate their client's remorse, but also investigated and prepared to rebut the prosecution's evidence that tended to refute the client's remorse.

35. A guilty plea, does not, in itself, sufficiently convey a defendant's remorse to a jury. Even the most heartfelt expressions of remorse, when coming only in a defendant's allocution, are viewed by many jurors with some skepticism. This problem is of particular concern where the defendant is of low intelligence. Such defendants are at a disadvantage because they are less able to express genuinely held feelings of remorse. Competent counsel investigated and sought independent evidence of their client's remorse. Competent counsel would have investigated and interviewed persons who visited the client at the jail, including friends and family members. Competent counsel would have presented credible, independent evidence of remorse during the penalty phase.

36. Competent counsel objected to a client being required to wear a stun belt and leg brace during trial absent a showing by the prosecution that the client presented a substantial security or escape risk. It was particularly important to raise such an objection to the client being required to wear such devices during allocution to the jury.

37. Competent counsel's objection to the stun belt and leg brace would have included several grounds. First, such devices likely distract the client, particularly while pleading for his or her life. Not knowing when or if he or she may be subjected to an extremely painful electrical shock would impair their ability to concentrate and communicate effectively. Counsel would also object because even if the client was able to deliver the words he or she intended (or wrote), their delivery would likely be unduly wooden, creating an impression of callousness and a lack of remorse. This problem would be exacerbated if the stun belt or leg brace was uncomfortable.

38. Second, a stun belt or leg brace may be apparent to jurors, either because they can see the devices or because the defendant moves awkwardly while wearing them. Competent counsel would have pointed out that it was important that the jury be unaware that the defendant was wearing such devices because this information would likely cause them to fear the person whose fate they were deciding. Knowing the defendant was in such devices would give jurors cause to believe that the defendant posed a risk in the courtroom and an ongoing safety risk. Such beliefs made it significantly more likely that the jury would impose a sentence of death.

39. If objections to the devices were overruled, competent counsel would ask the court to take measures to minimize the risk that the jury became aware of the devices. For example, competent counsel would request that the client be seated on the witness stand when the jury arrived (instead of having to walk from counsel table while wearing the devices).

40. Third, competent counsel would argue that the discomfort of such devices or the threat of a severe electric shock would impair the defendant's ability to pay attention to the court proceedings and assist counsel. Defense counsel relied on their client's insights about witnesses and events in the courtroom. Competent counsel would have argued that a stun belt or leg brace would impair the client's ability to meaningfully participate in the proceedings.

41. Competent appellate counsel would have conducted a comprehensive and thorough review of the record on appeal and ensured that all claims in their briefs accurately reflected the record. Appellate counsel's failure to accurately tailor a constitutional claim to the facts in the record constituted ineffective assistance of counsel. Competent appellate lawyers commonly included "preservation issues," claims that arguably violated the United States Constitution, but had been rejected by the Arizona Supreme Court. Competent counsel would not present a constitutional claim based on something that did not actually occur in the trial court. For example, if the constitutional claim was based on the failure to give a jury instruction, competent counsel would not base the claim on the exclusion of evidence. A jury instruction is not evidence. Confusing the two, including in a "preservation" claim, fell below the standard of care for competent counsel.

I have had the opportunity to review and correct the foregoing 9 pages. The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of Arizona on April 12, 2017.

NATMAN SCHAYE

ARM YOURSELF TO WIN THE *BATSON* CHALLENGE

By Lawrence Matthews
Defender Attorney – Appeals

The "*Batson* Checklist" will increase your chances of succeeding when making a *Batson* challenge. The checklist is designed specifically to aid you in showing disparate treatment between the juror(s) the prosecutor seeks to strike and the remaining jurors on the panel.

To win a *Batson* challenge one of two things will have to happen. Either the prosecutor will have to give a gender related or race related reason for the strike (which is an impermissible basis for a peremptory strike), or you will have to be able to convince the judge that he should not believe the gender/ race neutral reason given by the prosecutor. Since most prosecutors will be smart enough to hide their true intentions, you will nearly always have to attack and destroy the prosecutor's credibility to win. Here is where the checklist comes in.

Most prosecutors are not very creative when it comes to offering a pretextual reason for a strike. Most justify the strike on the basis of education, employment, personal or family contact with the criminal justice system, age, prior jury service, special knowledge, etc. Upon viewing the checklist, you will see these categories and others across the top of the checklist. During and prior to *voir dire* you can record a lot of this information as it relates to each of the jurors. Then, when the prosecutor is told to provide a reason for striking a particular juror, the odds are very good that you will have at your fingertips information on other jurors relating to that same fact with which you can undermine the prosecutor's credibility.

To understand how this works you need to be aware that the law recognizes that a reason given for a strike becomes highly questionable when other similarly situated jurors are not struck by the prosecutor. For example, in *United States v. Chinchilla,* 874 F.2d 695, 698-99 (9th Cir. 1989), the court held that because the prosecutor struck the only prospective Hispanic juror purportedly due to the location of his residence, but did not strike non-Hispanic jurors who lived in the same neighborhood, such disparate treatment was strongly suggestive of a discriminatory intent. Thus, discrimination may be shown when jurors with the same or similar characteristics as the stricken jurors still remain on the panel. *See, State v. Eagle,* 265 Ariz. Adv. Rep. 28, (App. 1998), and *Turner v. Marshall,* 121 F.3d 1248, 1254 (9th Cir. 1997).

A survey of case law from many jurisdictions reveals that disparate treatment of

potential jurors belonging to a protected group (racial minority or gender) is by far the most prevalent reason for rejecting proffered neutral explanations in *Batson* challenges. With the help of the checklist, you will be in a position to identify most if not all other jurors with the shared characteristic who have been left on the panel by the prosecutor. This will greatly enhance your chances of successfully retaining the challenged juror.

Copies of the *Batson* Checklist may be obtained from Keely Reynolds, Debbie Rosiek, or from any of the other Legal Assistants in the office. Please submit comments or suggestions about improving the checklist to the author.