No. 21-846

IN THE
Supreme Court of the United States

JOHN MONTENEGRO CRUZ,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Writ of Certiorari to the Arizona Supreme Court

JOINT APPENDIX

NEAL KUMAR KATYAL
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel of Record for Petitioner

JEFFREY L. SPARKS
Acting Chief Counsel for the Capital Litigation Section
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Avenue
Phoenix, AZ 85004
(602) 542-4686
CLDocket@azag.gov

Counsel of Record for Respondent

PETITION FOR WRIT OF CERTIORARI FILED: NOVEMBER 22, 2021
CERTIORARI GRANTED: MARCH 28, 2022

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ARIZONA SUPREME COURT

Criminal Post Conviction
No. CR-17-0567-PC

STATE OF ARIZONA,
Plaintiff/Respondent,
v.

JOHN MONTENEGRO CRUZ,
Defendant/Petitioner.

DOCKET ENTRIES

DOCKET NUMBER	**DATE**	**PROCEEDINGS**
1.	4-Dec-2017	FILED: John Montenegro Cruz's Petition for Review; Certificate of Service; Certificate of Compliance; Index of Appendix to Petition for Review (Defendant/Petitioner Cruz)
		* * *
3.	8-Jan-2018	FILED: The State of Arizona's Response to Petition for Review; Certificate of Service; Certificate of Compliance (Plaintiff/Respondent State)

DOCKET NUMBER	DATE	PROCEEDINGS
4.	18-Jan-2018	FILED: John Montenegro Cruz's Reply to Response to Petition for Review; Certificate of Service; Certificate of Compliance (Defendant/Petitioner Cruz)
		* * *
8.	31-Mar-2020	ORDERED: John Montenegro Cruz's Petition for Review = GRANTED as to these issues as rephrased: 1. Was Lynch v. Arizona, 136 S. Ct. 1818 (2016) (Lynch II) a significant change in the law for purposes of Ariz. R. Cr. P. 32.1(g)? 2. Is Lynch II retroactively applicable to petitioner on collateral review? 3. If Lynch II applies retroactively, would its application have probably overturned petitioner's sentence per Rule 32.1(g)? FURTHER ORDERED: The case shall be set for oral argument.

DOCKET NUMBER	DATE	PROCEEDINGS
		FURTHER ORDERED: The parties may file simultaneous supplemental briefs, not to exceed 20 pages in length, no later than 20 days from the date of the Court's Minute Letter. Any amicus briefs are due on or before May 4, 2020, and any responses to amicus briefs are due on or before May 18, 2020. Any amicus briefs or responses may not exceed 20 pages in length.
9.	3-Apr-2020	NOTICE OF ORAL ARGUMENT: Set for Tuesday, June 2, 2020 at 10:25 A.M. [twenty minutes (20) per side]
		* * *
14.	24-Apr-2020	FILED: John Montenegro Cruz's Supplemental Brief; Certificate of Service; Certificate of Compliance (Defendant/Petitioner Cruz)
15.	24-Apr-2020	FILED: State's Supplemental Brief; Certificate of Service; Certificate of

DOCKET NUMBER	DATE	PROCEEDINGS
		Compliance (Plaintiff/Respondent State)
		* * *
19.	6-May-2020	FILED: Motion for Leave to File Addendum to Supplemental Brief; Certificate of Service; Exhibit 1 (Defendant/Petitioner Cruz)
20.	6-May-2020	On May 6, 2020, Petitioner Cruz filed "John Montenegro Cruz's Motion for Leave to File Addendum to Petitioner's Supplemental Brief." Upon consideration, IT IS ORDERED granting the motion. (Hon. Robert Brutinel)
		* * *
24.	28-May-2020	FILED: Notice of Supplemental Authority; Certificate of Service (Defendant/Petitioner Cruz)
		* * *
26.	31-Mar-2021	FILED: Notice from United States District Court -

DOCKET NUMBER	DATE	PROCEEDINGS
		Petition for Writ of Habeas Corpus is Denied (No. CV-13-000389-TUC-JGZ) (Hon. Jennifer G. Zipps) (Rec'd from USDC on 04/05/2021)
27.	4-Jun-2021	OPINION - Because Lynch II is not a significant change in the law, Cruz is not entitled to relief under Rule 32.1(g). Accordingly, we need not determine whether Lynch II applies retroactively to his case or would probably overturn his sentence. We affirm the trial court's order denying post-conviction relief. (Hon. William G. Montgomery - Author; Hon. Robert Brutinel - Concur; Hon. Ann A. Scott Timmer - Concur; Hon. Clint Bolick - Concur; Hon. John R. Lopez IV - Concur; Hon James P. Beene - Concur)
28.	21-Jun-2021	FILED: John Montenegro Cruz's Motion for Reconsideration; Certificate of Service; Certificate of

DOCKET NUMBER	DATE	PROCEEDINGS
		Compliance (Defendant/Petitioner Cruz) ----------------CASE STATISTICALLY TERMINATED----------------
29.	23-Jun-2021	On June 21, 2021, Defendant/Petitioner Cruz filed "John Montenegro Cruz's Motion for Reconsideration." Upon consideration by the full Court, IT IS ORDERED denying the motion. (Hon William G. Montgomery)
30.	9-Jul-2021	MANDATE TO THE SUPERIOR COURT Issued Mandate and copy of Opinion together to the trial court. No record to return. * * *
32.	31-Mar-2022	Notice from USSC (Petition for Writ of Cert Granted on 3/28/2022 in USSC Case No. 21-846) (Rec'd on 3/31/22) (Scott S. Harris, Clerk)

ARIZONA SUPREME COURT

Criminal Post Conviction
No. CR-12-0529-PC

STATE OF ARIZONA,
Plaintiff,

v.

JOHN MONTENEGRO CRUZ,
Defendant.

DOCKET ENTRIES

DOCKET NUMBER	**DATE**	**PROCEEDINGS**
1.	28-Dec-2012	FILED: Petition for Review (On Denial of Post-Conviction Relief); Certificate of Service; Certificate of Compliance (Defendant Cruz)
		* * *
13.	28-Jan-2013	FILED: The State of Arizona's Opposition to Petition for Review; Certificate of Service (Plaintiff State)
14.	11-Feb-2013	FILED: Reply to State's Opposition to Petition for

DOCKET NUMBER	DATE	PROCEEDINGS
		Review; Certificate of Service (Defendant Cruz)
15.	29-May-2013	ORDERED: Petition for Review (On Denial of Post-Conviction Relief) = DENIED. FURTHER ORDERED: The Warrant of Execution shall issue forthwith.
16.	29-May-2013	FILED: (Copy of) (filed in CR-05-0163-AP): WARRANT OF EXECUTION - Execution set for Wednesday, July 10, 2013
		* * *
19.	30-May-2013	FILED: TELEPHONIC NOTIFICATION by United District Court: Stay of Execution pending filing of Habeas Corpus (Hon. Cindy Jorgenson)

ARIZONA SUPREME COURT

Criminal Death Penalty Appeal
No. CR-05-0163-AP

STATE OF ARIZONA,

Appellee,

v.

JOHN MONTENEGRO CRUZ,

Appellant.

DOCKET ENTRIES

DOCKET NUMBER	DATE	PROCEEDINGS
1.	5-May-2005	FILED: Notification of Appeal [Clerk, PCSC] [Judgment filed in PCSC on 3/10/05]
		* * *
51.	7-Mar-2007	FILED: APPELLANT'S OPENING BRIEF [Cruz]
		* * *
60.	12-Oct-2007	FILED: APPELLEE'S ANSWERING BRIEF [State]
		* * *

DOCKET NUMBER	DATE	PROCEEDINGS
71.	26-Dec-2007	FILED: APPELLANT'S REPLY BRIEF [Cruz] AT ISSUE * * *
75.	21-Apr-2008	OPINION - Cruz's conviction and death sentence are affirmed [Hon Rebecca White Berch - Author] * * *
78.	14-May-2008	FILED: Motion for Reconsideration [Appellant Cruz] * * *
80.	5-Jun-2008	The Court has received Appellant's Motion for Reconsideration filed May 14, 2008. A Response to the Motion for Reconsideration was not ordered. After consideration, IT IS ORDERED denying the Appellant's Motion for Reconsideration. [Hon Rebecca White Berch] --------------------CASE STATISTICALLY

DOCKET NUMBER	DATE	PROCEEDINGS
		TERMINATED---------------- **Mandate Automatically Stayed Ninety (90) days pursuant to Rule 31.23(b)(1)**
81.	29-Aug-2008	FILED: Notice from USSC - Petition for Writ of Certiorari filed on 8/29/08 [No 08-6083] [Rec'd from USSC on 9/8/08]
82.	12-Jan-2009	FILED: Notice from USSC - Petition for Writ of Certiorari is denied on January 12, 2009 [No. 08-6083] [Received from USSC on 1/20/2009]
83.	3-Feb-2009	MANDATE (Affirming the judgment of conviction and sentence of death) Issued Mandate and copy of the Opinion along with Exhibits to the trial court.
84.	5-Feb-2009	FILED: Notice of Post-Conviction Relief sent to Patricia A Noland, Clerk, PCSC

* * *

DOCKET NUMBER	DATE	PROCEEDINGS
86.	29-Jun-2010	Upon the Court's own motion, IT IS ORDERED that Gilbert Levy is appointed to represent John Montenegro Cruz in post-conviction proceedings pursuant to A.R.S. § 13-4041 and Rule 6.8(c), Ariz. R. Crim. P. IT IS FURTHER ORDERED lifting the stay on the time limit in Rule 32.4(c)(1), Ariz. R. Crim. P., imposed by the Court's order dated February 3, 2009. IT IS FURTHER ORDERED that counsel shall be compensated at the rate of $100.00 per hour plus reasonable costs incurred in the representation. If counsel's work hours are over two hundred hours, the superior court shall review and approve additional reasonable fees and costs pursuant to A.R.S. § 13-4041(G). The superior court shall

DOCKET NUMBER	DATE	PROCEEDINGS
		allow interim payments of compensation to counsel prior to the filing of the petition. IT IS FURTHER ORDERED that Mr. Cruz's prior counsel shall provide his or her case file to Mr. Levy or allow him to have a copy made of the case file upon request. [Hon W. Scott Bales]
87.	29-May-2013	(Copy of) Minute Letter (filed in CR-12-0529-PC) ORDERED: Petition for Review (On Denial of Post-Conviction Relief) = DENIED. FURTHER ORDERED: The Warrant of Execution shall issue forthwith.
88.	29-May-2013	FILED: WARRANT OF EXECUTION - Execution set for Wednesday, July 10, 2013
89.	30-May-2013	FILED: (Faxed Copy of) Order for Stay of Execution Pending HC (CV-13-00389-TUC-CKJ) (Hon. C.

DOCKET NUMBER	DATE	PROCEEDINGS
		Jorgenson, USDC) (Original Rec'd 6/4/2013)

*   *   *

PIMA COUNTY SUPERIOR COURT

Case No. CR20031740

STATE OF ARIZONA

Plaintiff,

v.

JOHN MONTENEGRO CRUZ

Defendant.

Judge: Ted B. Borek

DOCKET ENTRIES

DOCUMENT CAPTION	**FILE DATE**
NOTICE OF SUPERVENING INDICTMENT	6/5/2003
INDICTMENT	6/5/2003
* * *	
MOTION FOR THE COURT TO DETERMINE SENTENCE OF LIFE OR NATURAL LIFE OR, TO STRIKE DEATH PENALTY	9/17/2003
* * *	
AMENDED MOTION FOR DETERMINATION OF LIFE BEFORE JURY DELIBERATES OR TO STRIKE DEATH PENALTY	9/26/2003

DOCUMENT CAPTION	FILE DATE
* * *	
RESPONSE TO MOTION FOR COURT TO DETERMINE WHETHER IT WILL SENTENCE DEFENDANT TO LIFE OR NATURAL LIFE	10/27/2003
* * *	
REPLY TO STATE'S RESPONSE TO DEFNT'S AMENDED MOTION FOR COURT DETERMINATION	1/5/2004
* * *	
UNDER ADVISEMENT RULING	3/9/2004
* * *	
SUPPLEMENTAL DISCLOSURE RE: MITIGATION	12/3/2004
* * *	
MOTION TO PRECLUDE DEFENSE FROM PRESENTING EVIDENCE OF FUTURE PRISON CONDITIONS OR LIFE IN PRISON OF	12/9/2004
* * *	
RESPONSE TO MOTION TO PRECLUDE EVIDENCE OF FUTURE PRISON CONDITIONS OR PRISON LIFE OF LIFE SENTENCE	12/13/2004
* * *	

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REPLY TO RESPONSE RE: ADMISSIBILITY OF PRISON CONDITIONS	12/16/2004
* * *	
NOTICE RE: ANTICIPATED TESTIMONY	1/12/2005
* * *	
STATUS CONFERENCE RE: JURY SELECTION	1/18/2005
* * *	
VERDICT	2/25/2005
VERDICT – AGGRAVATION PHASE	2/25/2005
* * *	
MOTION FOR RECONSIDERATION AND REQUEST FOR ADDITIONAL JURY INQUIRY	3/2/2005
* * *	
JURY TRIAL – DAY 23	3/3/2005
* * *	
OBJECTIONS & PROPOSED MODIFICATIONS TO THE COURT'S INSTRUCTIONS RE: PHASE THREE	3/7/2005
* * *	

DOCUMENT CAPTION	FILE DATE
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JURY TRIAL – DAY 26	3/8/2005
* * *	
VERDICT	3/10/2005
* * *	
FINAL INSTRUCTIONS TO THE JURY – PHASE THREE	3/10/2005
* * *	
FINAL INSTRUCTIONS TO THE JURY – PHASE TWO	3/10/2005
FINAL INSTRUCTIONS TO THE JURY – PHASE ONE	3/10/2005
* * *	
JURY TRIAL – DAY 29 AND SENTENCING	3/18/2005
* * *	
MOTION FOR NEW TRIAL	3/21/2005
* * *	
RESPONSE TO MOTION FOR A NEW TRIAL	3/28/2005
* * *	
REPLY TO STATE'S RESPONSE TO MOTION FOR NEW TRIAL	4/20/2005

DOCUMENT CAPTION	FILE DATE
* * *	
NOTICE OF APPEAL	5/2/2005
* * *	
RE: MOTION FOR NEW TRIAL	5/3/2005
* * *	
NOTIFICATION OF APPEAL	5/3/2005
* * *	
MANDATE	5/13/2005
* * *	
UNDER ADVISEMENT	5/23/2005
* * *	
CLERKS CERTIFICATE OF RECORD ON APPEAL	6/9/2005
* * *	
LETTER FROM SUPREME COURT RE OPINION FILED 4/21/2008	6/10/2008
MANDATE	2/13/2009
* * *	
FIRST PETITION FOR POST-CONVICTION RELIEF	12/10/2010
* * *	

DOCUMENT CAPTION	FILE DATE
AMENDED PETITION FOR POST-CONVICTION RELIEF	1/27/2012
* * *	
IN CHAMBERS RULING:	10/31/2012
* * *	
WARRANT OF EXECUTION	5/29/2013
* * *	
SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF	3/9/2017
* * *	
RESPONSE TO SUCCESSIVE PETITION FOR POST CONVICTION RELIEF	4/21/2017
* * *	
REPLY TO STATE'S RESPONSE TO SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF	5/12/2017
IN CHAMBERS ORDER	6/1/2017
SUPPLEMENTAL BRIEF	7/3/2017
STATES SUPPLEMENTAL BRIEF	8/2/2017
PETITIONERS SUPPLEMENTAL REPLY BRIEF	8/7/2017
UNDER ADVISEMENT RULING	8/24/2017

DOCUMENT CAPTION	FILE DATE
MOTION FOR REHEARING	9/8/2017
IN CHAMBERS ORDER	9/28/2017
* * *	
NOTICE OF FILING PETITION FOR REVIEW	12/5/2017
* * *	

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

Case No. CR-2003-1740

Hon. Patricia Escher

Division 13

MOTION FOR THE COURT TO DETERMINE WHETHER IT WILL SENTENCE THE ACCUSED TO LIFE OR NATURAL LIFE BEFORE THE JURY DELIBERATES ON THE SENTENCE, OR ALTERNATIVELY, TO STRIKE THE DEATH PENALTY

COMES NOW THE ACCUSED, JOHN MONTENEGRO CRUZ, by and through counsel, Brick P. Storts, III, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United Stats Constitution, as well as article 2 §§ 4, 10, 15, 23, and 24 of the Arizona Constitution, and moves this Court to enter an Order that it will determine before the jury deliberates on the sentencing issue in

John Montenegro Cruz' case, whether the Court will sentence the accused to life or natural life in the event that a death sentence is not imposed, or, alternatively, to strike the death penalty from consideration in the instant case.

In support of this motion, counsel state the following:

1. A.R.S. § 13-703 and § 13-703.01 provide that if a death sentence is not imposed this Court will choose between sentences of life and natural life in the event of a conviction for first degree murder under A.R.S. § 13-1105.

2. The accused moves pursuant to the due process and cruel and unusual punishment clauses of the United States and Arizona Constitutions for the Court to determine which sentence it will impose before the jurors make the decisions set forth in A.R.S. § 13-703 and § 13-703.01.

3. If the Court does not make that determination in advance of the jurors' decisions whether to impose a sentence of death, the accused will be deprived of a fair trial by impartial jury under the united States and Arizona Constitutions and his rights under the due process and cruel and unusual punishment clauses of the United States and Arizona Constitutions.

4. The accused will be deprived the opportunity to present the mitigating factor that he will not be released from prison. *Simmons v. South Carolina*, 512 U.S. 154 (1994) (Due Process requires that sentencing jury be informed that capital defendant will be ineligible for parole). This violates the fundamental Eighth Amendment precept that the accused must be allowed to present, and the sen-

tencers must actually consider, all reasons for a sentence less than death offered by the accused. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (sentencers in capital cases must be allowed to consider "as a mitigating factor, any aspect of the defendant's character or record and a circumstance of the offense that the defendant proffers as a basis for a sentence less than death."); and *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, **as a matter of law**, any relevant mitigating evidence.") (emphasis added).

5. The jurors will be forced, and will likely be encouraged by the state, to speculate about what the possibilities for parole would be for John Montenegro Cruz in the event a life sentence is imposed. Such speculation is inherently prejudicial to the accused. *See Simmons, supra.* It is also contrary to the requirement of extra reliability is capital sentencing proceedings under the due process and cruel and unusual punishment clauses. *See, e.g., Mills v. Maryland*, 486 U.S. 367, 376 (1988); *California v. Ramos*, 463 U.S. 992, 998-99 (1983); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978);

> From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and the community that any decision to impose the death sentence

> be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 357-58 (1977).

6. Jury selection will undoubtedly reveal what the Court in *Simmons* recognized - that jurors frequently give considerable mitigating weight to the fact that a person convicted or murder cannot be released from prison on parole or otherwise. *See* Death Penalty Information Center, "*Sentencing for Life: American Embrace Alternatives to the Death Penalty*," April, 1993 (when presented with a choice between the death penalty and life imprisonment without the possibility of parole, 44% of Americans favored life imprisonment, 41% favored the death penalty).

7. The Court will have more sentencing information by and the end of the presentation of evidence and arguments at the "penalty hearing" than it normally would if the state were not seeking to kill the accused. If the Court requires additional information or inquiry, it can undertake to obtain that information before the jurors begin their deliberations.

8. The state will argue for a natural life sentence if it is unsuccessful executing the accused. John Montenegro Cruz has not, and will not, argue for a sentence of less than natural life.

9. If the Court does not grant this request, it should strike the death penalty from consideration in this case due to the violation of the accused's fundamental rights as noted herein.

10. The accused cites as authority for this motion [and all other motions and objections now filed or to

be filed during proceedings in this case, whether or not explicitly stated at the time of the making of the motion or objection] federal and state constitutional rights to due process of law, effective assistance of counsel, confrontation, equal protection, trial by jury, compulsory process, privilege against self-incrimination, appeal of any conviction, protection from *ex post facto* legislation, and protection from cruel and unusual punishment.

WHEREFORE, for all of the foregoing reasons, John Montenegro Cruz, respectfully requests that this Court enter an Order that it will determine before the jury deliberates on the sentencing issue, whether the Court will sentence the accused to life or natural life in the event that a death sentence is not imposed.

DATED this 17 day of September, 2003.

BARTON & STORTS, P.C.

/s/ Brick P. Storts, III

Brick P. Storts, III

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

Case No. CR-2003-1740

Hon. Patricia Escher

Division 13

AMENDED MOTION FOR THE COURT TO DETERMINE WHETHER IT WILL SENTENCE THE DEFENDANT TO LIFE OR NATURAL LIFE BEFORE THE JURY DELIBERATES ON THE SENTENCE, OR ALTERNATIVELY, TO STRIKE THE DEATH PENALTY

COMES NOW the Defendant, JOHN MONTENEGRO CRUZ, by and through counsel, Brick P. Storts, III, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, as well as article 2 §§ 4, 10, 15, 23, and 24 of the Arizona Constitution, and moves this Court to enter an order that it will determine before the jury deliberates on the sentencing issue in

the Defendant's case, whether the Court will sentence the accused to life or natural life in the event that a death sentence is not imposed, or, alternatively, to strike the death penalty from consideration in the instant case.

In support of this motion, counsel state the following:

1. A.R.S. § 13-703 and § 13-703.01 provide that if a death sentence is not imposed this Court will choose between sentences of life and natural life in the event of a conviction for first degree murder under A.R.S. § 13-1105.

2. The Defendant moves pursuant to the due process and cruel and unusual punishment clauses of the United States and Arizona Constitutions for the Court to determine which sentence it will impose before the jurors make the decision set forth in A.R.S. § 13-703 and § 13-703.01.

3. If the Court does not make that determination in advance of the jurors' decisions whether to impose a sentence of death, the accused will be deprived of a fair trial by impartial jury under the United States and Arizona Constitutions and his rights under the due process and cruel and unusual punishment clauses of the United States and Arizona Constitutions.

4. The Defendant will be deprived of the opportunity to present the mitigating factor that he will not be released from prison. *Simmons v. South Carolina*, 512 U.S. 154 (1994) (Due Process requires that sentencing jury be informed that capital defendant will be ineligible for parole). This violates the fundamental Eighth Amendment precept that the accused must be allowed to present, and the sen-

tencers must actually consider, all reasons for a sentence less than death offered by the Defendant. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (sentencers in capital cases must be allowed to consider "as a mitigating factor, any aspect of the Defendant's character or record and a circumstance of the offense that the Defendant proffers as a basis for a sentence less than death."); and *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, **as a matter of law**, any relevant mitigating evidence.") (emphasis added).

5. The jurors will be forced, and will likely be encouraged by the state, to speculate about what the possibilities for parole would be for the Defendant in the event a life sentence is imposed. Such speculation is inherently prejudicial to the accused. *See Simmons, supra*. It is also contrary to the requirement of extra reliability is capital sentencing proceedings under the due process and cruel and unusual punishment clauses. *See e.g., Mills v. Maryland*, 486 U.S. 367, 376 (1988); *California v. Ramos*, 463 U.S. 993, 998-99 (1983); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978);

> From the point of view of the Defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the Defendant and the community that any decision to impose the death sentence

> be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 357-58 (1977);.

6. Jury selection will undoubtedly reveal what the Court in *Simmons* recognized - that jurors frequently given considerable mitigating weight to the fact that a person convicted of murder cannot be released from prison on parole or otherwise. See Death Penalty Information Center, "*Sentencing for Life: Americans Embrace Alternatives to the Death Penalty*," April, 1993 (when presented with a choice between the death penalty and life imprisonment without the possibility of parole, 44% of Americans favored life imprisonment, 41% favored the death penalty).

7. The Court will have more sentencing information by the end of the presentation of evidence and arguments at the "penalty hearing" than it normally would if the state were not seeking to kill the Defendant. If the Court requires additional information or inquiry, it can undertake to obtain that information before the jurors begin their deliberations.

8. If the Court does not grant this request, it should strike the death penalty from consideration in this case due to the violation of the Defendant's fundamental rights as noted herein.

WHEREFORE, for all of the foregoing reasons, the Defendant respectfully requests that this Court enter an Order that it will determine before the jury deliberates on the sentencing issue, whether the Court will sentence the Defendant to life or natural life in the event that a death sentence is not imposed. The

Defendant respectfully requests an opportunity to argue this motion to the Court.

RESPECTFULLY SUBMITTED this 26 day of September, 2003

BARTON & STORTS, P.C.

/s/ Brick P. Storts, III

Brick P. Storts, III
Attorney for Defendant

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

No. CR-2003-1740

(Judge Escher, Div. 13)

RESPONSE TO MOTION FOR THE COURT TO DETERMINE WHETHER IT WILL SENTENCE THE DEFENDANT TO LIFE OR NATURAL LIFE, OR ALTERNATIVELY TO STRIKE THE DEATH PENALTY NOTICE

COMES NOW, the State of Arizona, by and through the Pima County Attorney, BARBARA LAWALL, and her Deputies, RICK UNKLESBAY AND KELLIE JOHNSON, and opposes the Defendant's motion for the reasons set forth below.

RESPECTFULLY submitted this 27th day of October, 2003.

BARBARA LAWALL
PIMA COUNTY ATTORNEY

/s/ Kellie Johnson
RICK UNKLESBAY, #58692
Deputy County Attorney

/s/ Kellie Johnson
KELLIE JOHNSON, #65150
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

The defendant has filed a motion requesting that this Court determine, before the jury begins to deliberate, whether it will sentence the defendant to life with the possibility of release in 25 years or natural life. The defendant claims that this is required because he may be deprived of the opportunity to present that he will not be released from prison as a mitigating factor to the jury.

In support of his motion, the Defendant cites *Simmons v. South Carolina*, 512 U.S. 154 (1994). The Court in *Simmons* held that when a defendant's future dangerousness is an issue, ***and when state law makes a defendant ineligible for parole,*** due process requires that the jury be informed that such a defendant is ineligible for parole. *Simmons* is not controlling under these circumstances. In *Simmons,* the defendant was ineligible for parole due to prior convictions he had.

Here, the defendant is not ineligible for parole should the jury not return a death sentence. Therefore, *Simmons* is distinguishable. Moreover, A.R.S. 13-703.01 states that the Court will determine its sentence only if a jury decides that death is not appropriate.

For the foregoing reasons, the State urges this Court to deny the defendant's motion.

RESPECTFULLY submitted this 27th day of October, 2003.

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BARBARA LAWALL
PIMA COUNTY ATTORNEY

/s/ Kellie Johnson
RICK UNKLESBAY, #58692
Deputy County Attorney

/s/ Kellie Johnson
KELLIE JOHNSON, #65150
Deputy County Attorney

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

No. CR-2003-1740

Hon. Patricia G. Escher

Div. 13

REPLY TO STATE'S RESPONSE TO DEFENDANT'S AMENDED MOTION FOR THE COURT TO DETERMINE WHETHER IT WILL SENTENCE THE DEFENDANT TO LIFE BEFORE THE JURY DELIBERATES ON THE SENTENCE, OR ALTERNATIVELY, TO STRIKE THE DEATH PENALTY

COMES NOW defendant, by and through his counsel undersigned, and makes the following reply to state's response to defendant's amended motion for the Court to determine whether it will sentence the defendant to life before the jury deliberates on the sentence, or alternatively, to strike the death penal-

ty. the death penalty on the basis of the unconstitutionality of the death penalty statute.

Defendant based his motion and argument on the following:

A.R.S. 13-701.01 (G) provides that the defendant may present any evidence that is relevant to the determination of whether there is mitigation in this cause.

The jury charged with the responsibility of rendering the ultimate verdict in a capital case should be informed about all potential mitigation evidence. The fact that the Court has the option of sentencing the defendant to prison for natural life, without the possibility of parole, is a fundamental and critical fact the jury is entitled to consider before making a decision on capital punishment. The case law cited in defendant's initial motion support this request.

The State responds that *Simmons v. South Carolina*, 512 U.S. 154 (1994) is distinguishable. It is not. If convicted of this homicide and sentenced by this court, the defendant in this case will not be eligible for parole, nor will he receive nothing less than a natural life sentence. It is a fact which should be presented to the jury. Defendant's position is also supported by *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)., *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 (1982); *Mills v. Maryland*, 486 U.S. 367, 376 (1988); *California v. Ramos*, 463 U.S. 993, 998-99 (1983); and *Gardner v. Florida* 430 U.S. 349, 357-58 (1977), all cited in defendant's previous motion.

RESPECTFULLY SUBMITTED this 5 day of January, 2004.

By *<u>/s/ Brick P. Storts, III</u>*
Brick P. Storts, III
Counsel for defendant John Cruz

By *<u>/s/ David W. Basham</u>*
David W. Basham
Co-counsel for defendant John Cruz

ARIZONA SUPERIOR COURT,

PIMA COUNTY

STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

No. CR-2003-1740

Hon. Ted B. Borek

Date: March 8, 2004

MINUTE ENTRY

UNDER ADVISEMENT RULING:

Defendant has filed an Amended Motion (# 17) for the Court to Determine Whether It Will Sentence the Defendant to Life or Natural Life Before the Jury Deliberates on the Sentence, or Alternatively, to Strike the Death Penalty. The Court has considered the motion, the response of the State, the defendant's reply, and oral argument.

The heart of defendant's motion is that, unless the Court makes a determination of a sentence to life or natural life before the jury deliberates on whether to impose death, the defendant will be deprived of the

opportunity to present the mitigation fact that he will not be released from prison, citing *Simmons v. South Carolina*, 512 U.S. 154 (1994). Noting the jury would have to speculate about the sentence the judge may impose if not death, defendant claims such speculation would be inconsistent with the requirements of extra reliability in capital sentencing proceedings under *Mills v. Maryland*, 481 U.S. 367, 376 (1988). The State opposes the motion arguing that *Simmons* is distinguishable and that A.R.S. § 13-703.01 provides for the Court to determine sentence only if the jury determines death is not appropriate.

Simmons held "that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." 512 U.S. at 156. The concern of the Court in *Simmons* was that by failing to instruct the jury of his ineligibility for parole the jury may have believed that defendant could be released on parole if he was not executed. *Id.* at 161. Accordingly, the Court reasoned that such misunderstanding had the effect of creating a false choice between a sentence of death and a limited period of incarceration. *Id.*

Imposing the sentence of death after conviction of first degree murder in Arizona is now a matter for the jury. See A.R.S. § 13-703.01. After trial on the issue of guilt or innocence, upon conviction the trier of fact proceeds to an aggravation phase and then a penalty phase if aggravating circumstances have been proven. If the jury determines either no aggravating circumstances exist or that the death penalty is not appropriate, the Court shall determine wheth-

er to impose a sentence of "life" or "natural life." See A.R.S. § 13-703.01(E), (F), (G), (H).

Defendant's request that the Court make the determination of life or natural life before the jury determines whether the sentence of death is appropriate is inconsistent with the language of the statute. The Court must presume constitutionality of the statute. The defendant's argument at this time is speculative in part because it is unknown what the State may argue or what the jury may find. Also, if the Court were to follow defendant's proposal and then impose a sentence of life, might not the defense be adding an aggravating matter? This Court concludes that *Simmons* is distinguishable; nothing has been presented to suggest that the defendant would not be eligible for release if a life sentence was imposed, and the State has agreed that instructions to the jury may include information about the consequences of the sentence if death is not imposed. Thus, defendant will not be deprived of any mitigating factors. See *Mills, supra*, 481 U.S. at 375.

Therefore,

IT IS ORDERED that defendant's amended motion (# 17) is denied.

cc:

County Attorney - Rick Unklesbay, Esq., and Kellie Johnson, Esq.

Brick Storts, Esq.

David Basham, Esq.

Ian Tomlinson, Esq.

Under Advisement Clerk

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Linda Brown

Deputy Clerk

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

Case No. CR-2003-1740

Hon. Ted B. Borek

Division 24

SUPPLEMENTAL DISCLOSURE RE: MITIGATION

COMES NOW, the Defendant, JOHN MONTENEGRO CRUZ, by and through counsel undersigned and hereby discloses Wayne Belcher as a mitigation witness in this case. Mr. Belcher is the chairman of the Arizona Board of Executive Clemency and he will be asked to testify that the board will not even entertain an application for commutation or any other form of release if filed by an inmate convicted of First Degree Murder and sentenced to natural life in prison.

Moreover, he will testify that if an inmate is convicted of First Degree Murder and sentenced to 25 years to life in prison, after January, 1994, the board can only recommend a commutation after the inmate serves 25 years in prison. The board has no independent authority to parole or release such an individual.

The Defendant previously disclosed his intent to rely upon various records from the Department of Corrections or the Arizona Board of Executive Clemency. Mr. Belcher's testimony will make it unnecessary for the Defendant to independently rely upon what the available records might demonstrate.

RESPECTFULLY SUBMITTED this 3 day of December, 2004.

BARTON & STORTS, P.C.

/s/ Brick P. Storts, III

Brick P. Storts, III

Attorney for Defendant CRUZ

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

No. CR-2003-1740

(Honorable Theodore Borek, Division 024)

MOTION TO PRECLUDE DEFENSE FROM PRESENTING EVIDENCE OF FUTURE PRISON CONDITIONS OR THE PRISON LIFE OF A PERSON SENTENCED TO LIFE

COMES NOW the State of Arizona, by and through the Pima County Attorney, BARBARA LAWALL, and her Deputy, RICK UNKLESBAY, and hereby moves for an order from the court declaring that evidence of future prison life, or the prospects of parole for an inmate sentenced to life imprisonment are irrelevant to mitigation and to preclude the defense from offering such evidence in the penalty phase of the trial as it does not relate to the character of the defendant or the circumstances of the offense.

Skipper v. South Carolina, 476 U.S. 1, V 106 S. CT.1669 (1986), held that a capital defendant is entitled to have the jury consider any relevant mitigating evidence. The defendant here has noticed that he intends to call Department of Corrections personnel to present evidence about what his life would be like if the jury returned a no-death verdict and he were sentenced to life imprisonment. The State objects to the admission of such evidence and asks this Court to enter an order excluding any such evidence.

Many states' courts have addressed the question whether evidence of what a defendant's prison life would be like in the future is admissible at a capital sentencing. Every court that has addressed this question has ruled that such evidence is not admissible as mitigation evidence because such evidence is not relevant, either to the history or experience of the defendant or to the nature of his crime. In Cherrix v. Commonwealth, 257 Va. 292, 513 S.E.2d 642 (1999), Cherrix was convicted of capital murder and other crimes. During the sentencing phase, "Cherrix sought to present evidence regarding prison life and its effect on his 'future dangerousness' through the testimony of an expert penologist, several Virginia corrections officials, a criminologist, a sociologist, and an individual serving a life sentence in the custody of the Virginia Department of Corrections." Cherrix, 257 Va. at 309, 513 S.E.2d at 653. The trial court heard Cherrix's offer of proof and then "determined that Cherrix's evidence was immaterial as mitigation evidence." Id. After the jury heard evidence on the punishment issue, the jury sentenced Cherrix to death for the murder and imposed life imprisonment

and shorter terms for the other crimes. One of the aggravating circumstances the jury found justifying the death penalty was "future dangerousness." 257 Va. at 298, 513 S.E.2d at 647. On appeal, Cherrix argued that excluding his proffered "mitigation evidence" violated his constitutional rights as established in Skipper v. South Carolina, 476 U.S. 1 (1986) and Eddings v. Oklahoma, 455 U.S. 104 (1982). The Virginia Supreme Court disagreed, finding that Cherrix had sought to introduce evidence about "the general nature of prison life," none of which concerned the history or experience of this defendant. Cherrix, 257 Va. at 309, 513 S.E.2d at 653. The Virginia Court stated, "We agree with the conclusion of the trial court that 'what a person may expect in the penal system' is not relevant mitigation evidence," and held that the trial court properly excluded the evidence as irrelevant. Id. at 310, 513 S.E.2d at 653.

The Virginia courts followed Cherrix in Bell v. Commonwealth, 264 Va. 172, 563 S.E.2d 695, (Va. 2002) and in Burns v. Commonwealth, 261 Va. 307, 541 S.E.2d 872 (Va. 2001). In Burns, the defendant attempted to introduce evidence about prison conditions in two "super-max" prisons, not as mitigating evidence, but to rebut the prosecution's evidence concerning his "future dangerousness;" "to dispel the misconception that prison life includes such features as weekend furloughs, conjugal visits, and unrestricted work privileges;" and to show that "his opportunities to commit criminal acts of violence in the future would be severely limited in a maximum security prison." Burns, 261 Va. at 339, 541 S.E.2d at 893. The trial court refused to allow him to pre-

sent such evidence and on appeal, Burns argued that he was denied his rights. The Virginia Supreme Court disagreed. The Court found that, because the prosecution had not introduced any evidence regarding the nature of prison life, crimes committed in prison, or the possibility of escape, Burns's proffered evidence was not proper rebuttal. The Court held that the United States Constitution does not limit a trial court's "traditional authority ... to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense" during a capital sentencing hearing. Burns v. Commonwealth, 261 Va. 307, 339, 541 S.E.2d 872, 893 (2001), quoting Cherrix v. Commonwealth, 257 Va. 292, 309, 513 S.E.2d 642, 653 (1999).

Further, in Bell v. Commonwealth, 264 Va. 172, 563 S.E.2d 695 (Va. 2002), supra, the defendant argued that "evidence concerning the prison conditions in which he would serve a life sentence is relevant not only in mitigation and in rebuttal to the Commonwealth's evidence of future dangerousness, but also to his 'future adaptability' to prison life." Bell, 264 Va. at 199-200, 563 S.E.2d at 713. The Virginia Supreme Court disagreed after reviewing federal and state cases on the issue, stating that the "common thread" in the cases was that "evidence peculiar to a defendant's character, history and background is relevant to the future dangerousness inquiry and should not be excluded from a jury's consideration." Id., 264 Va. at 201, 563 S.E.2d at 714. While evidence as to a defendant's "current adjustment to the conditions of confinement" is relevant to a "future dangerousness" inquiry, "[e]vidence regarding the general nature of prison

life in a maximum security facility is not relevant to that inquiry, even when offered in rebuttal to evidence of future dangerousness." Bell, id., quoting Burns v. Commonwealth, 261 Va. 307, 340, 541 S.E.2d 872, 893 (2001) [emphasis added]. Accord, Schmitt v. Commonwealth, 262 Va. 127, 146, 547 S.E.2d 186, 199 (2001).

The California courts have followed the same approach. In People v. Quartermain, 16 Cal. 4th 600, 66 Cal. Rptr. 2d 609, 941 P.2d 788 (1997), the defendant sought to introduce "the testimony of an expert on prisons regarding the prison conditions he would experience if he were sentenced to life without parole instead of receiving the death penalty," but the trial court excluded it as irrelevant. 16 Cal. 4th at 632, 66 Cal. Rptr. 2d at 628, 941 P.2d at 807. The California Supreme Court noted that evidence as to the prison conditions a defendant serving a life term would experience "is irrelevant to the jury's penalty determination because it does not relate to the defendant's character, culpability, or the circumstances of the offense." Id. Accord, People v. Ramos, 15 Cal. 4th 1133, 1183, 64 Cal. Rptr. 2d 892, 927, 938 P.2d 950, 983 (1997); People v. Zapien, 4 Cal. 4th 929, 989, 17 Cal. Rptr. 2d 122, 846 P.2d 704 (1993); People v. Daniels, 52 Cal. 3d 815, 876, 277 Cal. Rptr. 122, 154-55, 802 P.2d 906, 938-39(1991).

Similarly, in State v. Kleypas, 40 P.3d 139, 264-269 (Ks. 2001), the defendant argued that the trial court erred in refusing to allow him to present "mitigating evidence by showing that prison would be a highly structured environment" in which he would have little opportunity to reoffend. Kleypas, 40 P.3d at 264. Citing Cherrix, supra, the Kansas Supreme

Court rejected Kleypas's argument that evidence of prison conditions was "necessary to allow him to establish the mitigating circumstance that he would do well in prison," reasoning, "the evidence that Kleypas sought to present, the general conditions of prison life, is too far removed to be relevant as a mitigating circumstance." Id. at 265.

The Louisiana Supreme Court followed the same reasoning in State v. Taylor, 669 So. 2d 364, 381 (La. 1996), stating, "Although the defense may introduce any mitigating circumstances relevant to the defendant's character and propensities, [citations omitted], facts relating to extraneous circumstances about prison conditions bear no relevance to the sentencing hearing and are properly excluded."

In Wilcher v. State, 697 So. 2d 1087, 1104 (Miss. 1997), the Mississippi Supreme Court followed the same reasoning, noting that "[t]he harshness of a life sentence ... in no way relates to Witcher's character, his record, or the circumstances of the crime. Therefore, it was properly excluded."

The courts have also noted the speculative nature of any evidence as to future prison conditions. In particular, in State v. Hanna, 95 Ohio St. 3d 285, 306, 767 N.E.2d 678, 702 (2002), the Ohio Supreme Court noted that testimony about prison conditions was "of questionable relevance, since evidence about future conditions of confinement involves speculation as to what future officials in the penal system will or will not do. Such evidence did not relate to appellant, his background or the nature and circumstances of the crime and therefore is not mitigating."

In this case, the State submits that no one knows what prison conditions will be like in the next ten, twenty, or thirty years. Just as prison conditions have evolved and changed in the past, so can it be expected that they will do so in the future. Further, the type of classification an inmate receives today is based on how that inmate conducts himself. If such a system remains in place, then it would materially mislead the jury to say that if all individuals sentenced to life are treated the same. That is simply not true.

In short, evidence of future prison conditions should not be admitted in a capital sentencing proceeding for mitigation purposes because such evidence is irrelevant, speculative, and misleading. This Court should follow the lead of the other state supreme courts cited above and exclude such evidence.

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RESPECTFULLY submitted this 9th day of December, 2004.

BARBARA LAWALL
PIMA COUNTY ATTORNEY

/s/ Rick Unklesbay
RICK UNKLESBAY, #58692
Deputy County Attorney

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

Case No. CR-2003-1740

Hon. Ted B. Borek
Division 24

RESPONSE TO STATE'S MOTION TO PRECLUDE EVIDENCE OF FUTURE PRISON CONDITIONS OR THE PRISON LIFE OF A PERSON SENTENCED TO LIFE

COMES NOW, the Defendant, JOHN MONTENEGRO CRUZ, by and through counsel undersigned and responds to the State's motion as is more fully set forth in the attached memorandum which is, by reference, hereby incorporated and made part of this response.

RESPECTFULLY SUBMITTED this 13 day of December, 2004.

BARTON & STORTS, P.C.

<u>/s/ Brick P. Storts, III</u>
Brick P. Storts, III
Attorney for Defendant CRUZ

MEMORANDUM

The State has filed a motion to preclude the defense from introducing any evidence concerning prison conditions as they relate to an inmate's sentence to life. The State relies upon any number of cases, mostly from Virginia where the proposition that prison conditions, are not relevant mitigating evidence.

In a minute entry dated March 8, 2004, this court said as follows:

> This court concludes that SIMMONS is distinguishable; nothing has been presented to suggest that the Defendant would not be eligible for release if a life sentence was imposed, and the State has agreed that instructions to the jury may include information about the consequences of the sentence if death is not imposed.

Two things are important. First, the court made an observation that nothing had been presented to suggest that the Defendant would not be eligible for release if a life sentence was imposed. In fact, Dwayne Belcher, Chairman of the Board of Executive Clemency, will be called as a witness on behalf of the Defendant during the aggravation/mitigation phase of this case. Mr. Belcher will testify that the board will not even consideran application filed by a natural life inmate. That is, a natural life inmate will never be released from prison. Moreover, Mr. Belcher will testify that in cases after 1994, the board has no authority beyond recommending parole for any inmate sentenced to a term of 25 to life. Therefore, the court's observation that nothing has been or will

be presented to suggest that the Defendant would not be eligible for release is in error.

Second, has already agreed that the jury can be instructed concerning information about the consequences of the sentence if death is not imposed. Wherefore, the Defendant is entitled to present this evidence based upon the State's earlier agreement. The Defendant has spent a fair amount of time and investigation based upon the State's agreement. The State should not be allowed to change its position now and oppose the introduction of the evidence concerning conditions at the State prison for life inmates.

Moreover, the Defendant respectfully submits that juries should be entitled, during the weighing phase, to consider prison conditions and/or the possibility of release in deciding whether or not to impose the death penalty. Even if this factor is not seen as relevant mitigating evidence, it certainly constitutes evidence which can be appropriately considered in deciding whether or not the mitigation is sufficiently substantial to call for leniency. This is particularly true since some suggest that a natural life sentence is, in many respects, even more severe than a death penalty, given the length of time involved in the average death penalty appellate process.

RESPECTFULLY SUBMITTED this 13 day of December, 2004.

BARTON & STORTS, P.C.

/s/ Brick P. Storts, III

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Brick P. Storts, III
Attorney for Defendant CRUZ

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

No. CR-2003-1740

(Honorable Theodore Borek, Division 024)

STATE'S REPLY TO DFENDANT'S RESPONSE REGARDING ADMISSIBILITY OF PRISON CONDITIONS

COMES NOW the State of Arizona, by and through the Pima County Attorney, BARBARA LAWALL, and her Deputy, RICK UNKLESBAY, and hereby replies to the defendant's response regarding the admissibility of the evidence of prison conditions or prison life of a person sentenced to life. For the reasons set forth herein, the State asks the court to grant its motion.

The defendant indicates that he should be allowed to admit irrelevant evidence to the jury about what his future prison life would be should he be granted a life sentence. While the defendant claims that the

State relies "mostly" on Virginia cases, the State actually cited cases from Virginia, California, Kansas, Louisiana, Mississippi and Ohio for support in the argument that such evidence is inadmissible. The defendant cited no cases in rebuttal.

Instead, the defendant relies on a March 8, 2004 minute entry ruling for a motion in which the defendant's request was denied. That motion dealt with the defendant's request that the court decide, before hearing any evidence, what sentence the court would impose if the jury failed to sentence the defendant to death. The court correctly ruled that there would be no such ruling. From that ruling the defendant argues that the State somehow conceded that evidence of prison life would be admissible before the jury, and that the defendant relied upon this concession spending a "fair" amount of time and investigation based on that agreement. He argues the State should not be allowed to change its position.

The State's position is now, and has been, that the jury would be instructed that if the defendant was not sentenced to death that the court would decide between life and natural life. No more, no less. That the defendant spent a "fair" amount of time and investigation listing an employee of the department of corrections as a witness is irrelevant. The evidence of what life is like in prison has no bearing on the defendant's character and nothing to do with what a jury would decide is an appropriate sentence.

While the defendant argues that even if such evidence may not be seen as relevant mitigating evidence, the jury should hear it to decide whether mitigation is sufficiently substantial to call for leniency. The fallacy, of course, is that the jury is limited

to mitigating factors in determining whether leniency should be granted, not extrinsic evidence that is inadmissible.

Based on the fact that prison life has no relevant connection to this defendant, his crime, his character or what sentence is appropriate, the court should preclude the defense from eliciting such testimony.

RESPECTFULLY submitted this 16th day of December, 2004.

BARBARA LAWALL
PIMA COUNTY ATTORNEY

/s/ Rick Unklesbay

RICK UNKLESBAY, #58692
Deputy County Attorney

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

Case No. CR-2003-1740

Hon. Ted B. Borek
Division 24

NOTICE RE: ANTICIPATED TESTIMONY

COMES NOW the Defendant, JOHN MONTENEGRO CRUZ, by and through counsel undersigned, and respectfully provides court and counsel with a summary of the anticipated testimony of Mr. Duane Belcher, Chairman of the Arizona Board of Executive Clemency as related to Mr. Kenneth Peasley. The indicated testimony will be supplied by Mr. Belcher and Mr. Peasley is avowing to the contents of this pleading, as being a complete rendition of the testimony of Mr. Belcher.

RESPECTFULLY SUBMITTED this 12 day of January, 2005.

BARTON & STORTS, P.C.

/s/ Brick P. Storts, III
Brick P. Storts, III
Attorney for Defendant CRUZ

MEMORANDUM

In anticipation of trial and in order to prepare for various pretrial motions, undersigned counsel had Ken Peasley contact Mr. Duane Belcher, the Chairman of the Arizona Board of Executive Clemency, in order to ascertain what action, if any, the board would take on applications for parole or early release filed by inmates serving 25 to life in the natural life sentences.

Mr. Belcher informed Mr. Peasley that since 1994, the board could only recommend parole for inmates serving sentences of 25 years to life sentence. The board does not have the authority after 1994, to order a 25 year to life inmate be paroled.

Mr. Belcher also informed Mr. Peasley that applications for parole or release, filed by inmates serving the natural life sentences, will not be entertained since the statute specifically provides that release, on any basis, is unavailable.

In other words, an inmate serving a natural life sentence will not ever be released from prison. Moreover, the board cannot parole inmates serving 25 years to life sentences after 1994.

This will be the testimony of Mr. Duane Belcher. The defense will subpoena Mr. Belcher to testify during the penalty phase of the proceedings in this case as this information is critical and should be made available to the jury in order for them to decide or weigh the appropriate sentence for the Defendant. This information is, at the very least, relevant to the weighing process that the jury will undertake if the Defendant is convicted of First Degree Murder and the State establishes the existence of at least one aggravating circumstance.

RESPECTFULLY SUBMITTED this 12 day of January, 2005.

BARTON & STORTS, P.C.

/s/ Brick P. Storts, III
Brick P. Storts, III
Attorney for Defendant CRUZ

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

Case No. CR-2003-1740

Hon. Ted B. Borek
Division 24

MOTION FOR RECONSIDERATION AND REQUEST FOR ADDITIONAL JURY INQUIRY

COMES NOW, the Defendant, JOHN MONTENEGRO CRUZ, by and through counsel undersigned, and respectfully urges this court to reconsider its earlier ruling precluding the testimony of Duane Belcher, Chairman of the Arizona Board of Executive Clemency. Moreover, the Defendant also asks this court to conduct further jury inquiry in order to determine whether or not one or more jurors may have seen or have been exposed to media accounts having to do with the most recent United States Supreme Court case concerning the death

penalty. Reasons and authority for this motion are set forth more fully in the attached memorandum which is, by reference, hereby incorporated and made part of this motion.

RESPECTFULLY SUBMITTED this 2 day of March, 2005.

BARTON & STORTS, P.C.

/s/ Brick P. Storts, III

Brick P. Storts, III

Attorney for Defendant CRUZ

MEMORANDUM

The Defendant, by this motion, is seeking to separate remedies. First, the Defendant respectfully urges this court to reconsider its order precluding the testimony of Duane Belcher. Second, the Defendant respectfully urges this court to make further inquiry of the Jury concerning whether or not anyone or more jurors have seen or been exposed to media accounts of a recent United States Supreme Court case having to do with the death penalty and juvenile defendants.

DUANE BELCHER

The court previously precluded the Defendant from being able to call Duane Belcher as a witness during the mitigation and sentencing portion of these proceedings. Mr. Belcher is the chairman of the Arizona Board of Executive Clemency. If allowed to testify, he would inform the Jury that the board is without authority to order or recommend the release of any person who is sentenced to a natural life sentence. Moreover, Mr. Belcher would testify that after 1994, the board is also powerless to parole any person sentenced to a life sentence without the possibility of release until the service of twenty-five years. The board can only make recommendations on the latter category of cases.

The Defendant respectfully submits that Mr. Belcher's testimony would not only constitute a mitigating circumstance, it would, even more importantly, constitute a factor or circumstance that the Jury is entitled to consider during the weighing process when they are deciding what the appropriate penalty should be. Obviously, trial courts were able to consider the consequences of a natural life or

twenty-five to life sentence in deciding whether or not to impose the death penalty in any given case. Juries should be entitled to the same information when asked to decide whether or not to spare another person's life.

On March 1 and March 2, 2005, there have been media accounts about a recent United States Supreme Court decision holding that persons eighteen years of age and under cannot be sentenced to death. These same media accounts also suggest that several inmates who had received the death penalty and whose death sentence was reduced to life imprisonment, might be eligible for parole at some later point in time. If one or more jurors were exposed to media accounts about this case, they may have an altogether inaccurate and faulty impression about what would happen with Mr. Cruz if they did not impose the death penalty. A sentence based upon faulty and inaccurate information can hardly be characterized as fair or just.

Based upon those grounds previously argued, as well as the media accounts of the most recent United States Supreme Court decision, the Defendant respectfully urges this court to reconsider its earlier ruling and allow the Defendant to call Mr. Duane Belcher for the limited purpose of describing the limitations placed upon the board when considering applications by inmates who have been sentenced to either natural life in prison or, in the alternative, life without the possibility of parole or release until the service of twenty-five years. Our criminal justice system cannot call upon people, as jurors, to make life and death decisions and then deprive them of

information which is and should be an important consideration.

FURTHER JURY INQUIRY

Although the court has suggested that jurors should disregard any information they may have gained as a result of being exposed to media accounts having to do with the recent United States Supreme Court decision, this is something not enough. The Defendant respectfully urges this court to inquire, directly and individually, whether jurors have been exposed to media coverage of this most recent decision and how, if at all, this will affect or impact their consideration of the Defendant's case.

There have been all sorts of problems and red flags raised concerning whether this Jury is tainted and incapable of rendering a fair verdict to either side. This is but one more circumstance that should prompt additional inquiry. Burying ones head in the sand does not make the problem go away. If Jurors have been exposed to media accounts about this most recent decision, the Defendant is entitled to know what each saw and heard and how this information may impact upon their decision concerning whether to spare Mr. Cruz's life. Given what is at stake, it seems very little to ask that the court make these direct and probing inquiries. The circumstances of this case call for additional investigation. Failure to do so will deprive the Defendant of his right to a fair trial under both the State and Federal constitutions.

RESPECTFULLY SUBMITTED this 2 day of March, 2005.

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BARTON & STORTS, P.C.

/s/ Brick P. Storts, III

Brick P. Storts, III

Attorney for Defendant CRUZ

ARIZONA SUPERIOR COURT,

PIMA COUNTY

STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

Case No. CR2003-1740

Hon. Ted B. Borek

Date: March 1, 2005

MINUTE ENTRY

JURY TRIAL - DAY 23:

10:41 a.m. In the absence of the jury:

Defendant's exhibits FX and FY, each being a black and white copy of 8 x 10" photo, are identified.

Defendant's exhibits FZ and GA, each being color copy of 8 x 10" photo, are identified.

Defendant's exhibit GB, being 7 x 10-1/2" chart board with color photo, is identified.

Defendant's exhibit GC, being 8 x 10" chart board with color photo, is identified.

Defendant's exhibits GD and GE, each being 10-1/2 x 8" chart board with color photo, are identified.

Defendant is present, in custody. Detective James Filippelli is present at the State's table.

The Court informs the defendant that several motions were addressed at a hearing on February 28th, and the defendant's presence was waived for that hearing.

Concerning motions still pending:

As to (#79) the State's motion to preclude the defense from presenting evidence of future prison conditions, the Court is informed that neither side has anything additional to present.

IT IS ORDERED granting the motion in limine. Mr. Belcher may not talk about what has happened to others or what may happen to a defendant sentenced to natural life but an instruction may be given of the consequences of life or natural life sentence if the defense requests it.

Mr. Storts states his belief that there is a proposed instruction concerning this issue in the packet of defendant's proposed instructions.

As to the defendant's motion for mistrial or additional jury inquiry or, in the alternative, motion for additional juror inquiry and motion to have jury sequestered, which includes a videotape, Mr. Unklesbay states that he did not receive a copy of the tape, so he therefore is not aware of the contents of the tape. He requests that a ruling be deferred.

Mr. Storts states that the only copy of the tape is now in the possession of the Court (submitted as an attachment to the motion); however a verbatim transcript of the tape is attached to all copies of the

motion. He believes now that there may be another copy, and if the State requests that copy, he will bring it. Mr. Unklesbay states that if the transcript is attached to the motion, he will not need to view the tape.

The Court states that because the motion deals with sequestering the jury and, alternatively, additional inquiry of the jury, it should be taken up now. The motion for mistrial can be addressed after the noon recess.

Mr. Unklesbay states that the issue of sequestration was previously argued and the State has nothing additional to add. He requests that the motion be denied.

Mr. Storts state that he has nothing additional to present.

For reasons set forth on the record,

IT IS ORDERED denying the motion for sequestration and the motion for a mistrial. The Court states that it does not have the transcript defense counsel has indicated is attached to the motion although it has viewed the videotape.

Court's exhibit 9, being envelope containing videotape entitled "Cruz found guilty", is identified.

Mr. Storts submits a copy of the transcript.

The Court states that it has a procedural matter to address with the jury, after which time the Court will read the preliminary instructions to the jury for Phase III.

10:50 a.m. In the presence of all 14 jurors:

The Court refers to a telephone message received from the Jury Commissioner concerning juror #6

(also known by his prospective juror number of 87), whereupon juror #6 is excused with the thanks of the Court. Juror #16 (also known by his prospective juror number of 201) is called to serve in place of juror #6.

The Court gives the jurors preliminary instructions to follow for this phase of the trial, a copy of which is provided to each juror.

Messrs. Basham and Unklesbay make opening statements to the jury.

Mickie Hardesty reads a statement to the jury.

11:57 p.m. The jury is admonished and excused until 1:30 p.m. this date.

Court stands at recess.

1:40 p.m. In the presence of all 13 jurors:

Defendant is present. Same counsel and court reporter are present. Detective Filippelli is also present.

The jurors are instructed to make a pen-and-ink change to correct a typographical error on page two of the instructions provided to them this morning for this phase of the trial; the Court reads the affected portion of the instruction, stating that the last line should read "... read with the parties present."

Demetra Hardesty reads a statement to the jury.

For the defendant:

Father Ricardo Elford is sworn, examined by Mr. Basham and cross-examined by Mr. Weaver.

Defendant's exhibit GF, being report of custody / visitation counseling and/or study, is identified.

Juliette Lingenfelter is sworn, examined by Mr. Basham and cross-examined by Mr. Weaver.

Defendant's exhibits FX, FY, GA and FZ are admitted.

Susan Alcaraz is sworn, examined by Mr. Storts and cross-examined by Mr. Weaver.

4:34 p.m. The jury is admonished and excused until 10:30 a.m. on March 2, 2005.

Court stands at recess.

Linda McCormick

Deputy Clerk

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

CR-05-0163 AP

CR-2003-1740

BEFORE: THE HONORABLE TED BOREK
Division 24

APPEARANCES: RICK UNKLESBAY and TOM WEAVER
on behalf of the State

BRICK STORTS AND DAVID BASHAM
on behalf of the Defendant

JURY TRIAL DAY 23

March 1, 2005

Michael A. Bouley, RDR
Certified Court Reporter
CCR No. 50235

* * *

[pp. 3:1-3, 5:17-7:2]

* * *

THE COURT: We are here on the record here with counsel and the defendant, but I'm just talking at the bench with Mr. Unklesbay and Mr. Storts.

* * *

THE COURT: This was the prior motion on -- well, let's go the record on these. We have --

That's going to pick it up. That's what they told me.

There are a couple things that I just want to take up now. One is we have had pending, we did a number of motions yesterday, Mr. Cruz, that we went over. I'm sure your counsel will tell you about that. I know he waived your presence but we dealt with a number of issues yesterday. I made rulings on a number of motions that were filed by your counsel, and I have a couple that were left over from that.

One was what I have numbered number 79, it was a motion, State's motion to preclude defense from presenting evidence of future prison conditions or the prison life of a person sentenced to life. And I think you have had all argument on this that we want to have. If anybody wants to say anything about that at this point, Mr. Basham, do you have any additional argument on that?

MR. BASHAM: No, Your Honor.

THE COURT: Okay. Well, this is my ruling, I'm going to grant the motion in limine. Mr. Belcher is not to testify about what has happened to others or what may happen for a defendant sentenced to life or natural life. However, I will give an instruction of the consequences of a life or natural life sentence as an instruction if the defendant so requests. And --

MR. STORTS: I think we have one that is in our packet that we submitted to you.

THE COURT: I think so. I think this would be duplicative, not evidence that goes to the defendant's character or offense or anything of that nature yet. It is something that's appropriate. I think it is the statutory background is sufficient basis to provide an instruction to the jury.

* * *

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

Case No. CR-2003-1740

Hon. Ted B. Borek
Division 24

OBJECTIONS AND PROPOSED MODIFICATIONS TO THE COURT'S INSTRUCTIONS RE: PHASE THREE

COMES NOW, the Defendant, JOHN MONTENEGRO CRUZ, by and through counsel undersigned and respectfully submits the following objections and proposed modifications to the court's instructions concerning phase three of these proceedings.

RESPECTFULLY SUBMITTED this 7 day of March, 2005.

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BARTON & STORTS, P.C.

/s/ Brick P. Storts, III

Brick P. Storts, III

Attorney for Defendant CRUZ

MEMORANDUM

The Defendant has had an opportunity to review the court's instructions concerning phase three of these proceedings. The Defendant respectfully submits the following objections and/or proposed modifications to these instructions:

1. On page 2 of the court's instructions, the Defendant respectfully urges this court to delete the second sentence of the first full paragraph which reads as follows:

   "You must disregard instructions from the previous two phases".

2. The Defendant respectfully submits that some instruction from the previous two phases may well apply. If this sentence is left in the court's instructions, the Jury may well erroneously conclude that they are not to follow these earlier instructions.

3. As to page 7 of the court's instructions, the Defendant has made several modifications. A separate, substitute page 7 is attached and contained each of these suggested modifications. The Defendant has simply listed all of those mitigating circumstances being relied upon in the place numbers 1 through 5 which appear in the court's instruction. Additionally, the Defendant has added a final paragraph to this particular instruction.

4. As to page 8 of the court's instructions to the Jury, the Defendant has made suggested changes to the third full paragraph. With the suggested changes, this paragraph would read as follows:

> "If you decision is that that mitigating circumstance or circumstances are sufficiently substantial to call for leniency in light of the aggravating circumstance, then your verdict VOTE shall be that the Defendant is not sentenced to death. Do not surrender this vote or change it simply in order to arrive at a verdict or because one or more Jurors may disagree."

The Defendant has no other suggested changes to the court's instructions. However, the Defendant is filing a separate motion urging the court to reconsider its previous ruling and provide the Jury with instructions on reasonable doubt. The Defendant is also submitting a separate instruction concerning the standard that should be applied in deciding whether or not the Defendant should be sentenced to death.

RESPECTFULLY SUBMITTED this 7 day of March, 2005.

BARTON & STORTS, P.C.

/s/ Brick P. Storts, III
Brick P. Storts, III
Attorney for Defendant CRUZ

PROPOSED PAGE 7 RE: COURT'S INSTRUCTIONS

The Jurors do not have to all agree that a mitigating circumstance has been proven to exist. In other words, the determination of whether a mitigating circumstance has bee proven by a preponderance of the evidence need not be unanimous. Each juror must rely on his or her own judgment in determining the existence of a particular mitigating circumstance.

The Defendant has alleged the following mitigating circumstances:

1. The Defendant's capacity to appreciate the wrongfulness of his conduct was significantly impaired.
2. The Defendant's capacity to conform his conduct to the requirements of law was significantly impaired.
3. The Defendant was under unusual and substantial duress.
4. The Defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense would cause or create a grave risk of causing death to another person.
5. The Defendant comes from a dysfunctional family.
6. The Defendant was deprived of necessary nurturing and love from his mother and other family members.
7. The Defendant's family background concludes serious mental disorders amongst various fam-

ily members which contributed to the Defendant's character and history.

8. The Defendant himself suffers from Post Traumatic Stress Disorder.
9. The Defendant suffers from drug addiction.
10. The Defendant's mental state at the time of the offense was affected by numerous factors, including his dysfunctional family, serious mental disorders within the family, his diagnosis of Post Traumatic Stress Disorder and his drug addiction.
11. The Defendant's execution will have an unfavorable impact upon various family members, including his son, Jonathan.
12. The Defendant does, at least at this point in time, have a certain amount of family support.
13. The Defendant does have a record of being able to perform and adapt well to the rules and regulations having to do with being an inmate in jail or prison.
14. The evidence establishes that the Defendant has no propensity towards future violence.
15. The Defendant's character and history indicate that he is capable of adapting to life in prison and adhering to rules and regulations concerning his behavior while an inmate.
16. That no evidence has been presented to suggest that the killing of Officer Hardesty was a planned or premeditated act.
17. That the Defendant's upbringing, life-style and subculture all made it far more likely that he would find himself in this position.

You are not limited to these mitigating circumstances. You must also consider any other information admitted as evidence that is relevant in determining whether to impose a sentence less than death so long as it relates to an aspect of the Defendant's character, propensities, history, record or circumstances of the offense.

Even if you do not find that a circumstance constitutes a mitigating factor, you are still entitled to consider this circumstance in deciding whether to return a verdict of death.

ARIZONA SUPERIOR COURT,

PIMA COUNTY

STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

Case No. CR2003-1740

Hon. Ted B. Borek

Date: March 3, 2005

MINUTE ENTRY

JURY TRIAL - DAY 25:

10:51 a.m. In the absence of the jury:

Defendant is present, in custody. Detective James Filippelli is present at the State's table.

Defendant's exhibit GL, being curriculum vitae of Hector J. Fernandez-Barillas, Ph.D., is identified.

Defendant's exhibit GM, being neuropsychological evaluation, is identified.

The Court states that it has received an additional motion for a mistrial and the State's response thereto. The Court has not yet read the State's

response. This morning's session will proceed with testimony.

Mr. Storts states that prior to the Court's ruling, he wishes to hear testimony from John Gustafson, the Capital Litigation Staff Attorney serving as one of the co-bailiffs, concerning anything he may have overheard while sitting in one of the jury chairs in the courtroom while the jury was in the deliberations room at one point.

10:54 a.m. In the presence of all 13 jurors:

Dr. Mark Austein is sworn, examined by Mr. Storts and cross-examined by Mr. Weaver.

State's exhibit 74, being transcript of interview of Dr. Austein, is identified.

Dr. Hector J.F. Barillas is sworn and examined by Mr. Basham.

Defendant's exhibit GN, being report of Hector J.F. Barillas, Ph.D., P.C., is identified.

Defendant's exhibit GO, being documents entitled "interview guide of Cruz, John Montenegro", is identified.

Defendant's exhibits GP and GQ, each being records from Illinois Department of Corrections, are identified.

Defendant's exhibit GR, being documents pertaining to Tucson District #1 High School report card, is identified.

12:03 p.m. The jury is admonished and excused until 1:30 p.m. this date.

In the absence of the jury:

The Court states that it will hear factual information from Mr. Gustafson prior to addressing pending motions.

Court stands at recess.

1:30 p.m. In the presence of all 13 jurors:

Defendant is present. Same counsel and court reporter are present.

Dr. Barillas resumes the stand and is further examined by Mr. Basham and cross-examined by Mr. Unklesbay.

Defendant's exhibit GS, being Tucson Heart Hospital medical records, is identified.

Defendant's exhibit GT, being certificate of baptism, is identified.

Lora Galioto is sworn, examined by Mr. Storts and cross-examined by Mr Weaver.

In the absence of the jury:

Regarding the pending issue concerning Mr. Gustafson's observatins while sitting in one of the jury chairs while the jury was in the deliberations room,

John Gustafson is questioned by Messrs. Storts and Unklesbay.

Mr. Storts makes a record regarding the design of this particular courtroom, in that it is known for people in the courtroom being able to listen or hear what is coming out of the jury room.

The Court states that it has received two defense motions for mistrial: one concerns two issues, those being (1) a request for reconsideration of the ruling as to Mr. Belcher's testimony and (2) a request for the Court to make additional inquiry of the jurors

concerning possible media exposure to a recent U.S. Supreme Court ruling. The Court has also received the State's response. It appears that the other motion for mistrial, which concerns several issues, does not request additional inquiry of the jurors.

Mr. Storts addresses the Court regarding the filing of the two motions and the ruling denying inquiry of the jurors regarding the article in the newspaper.

Mr. Storts addresses the Court regarding the motion concerning Mr. Belcher.

IT IS ORDERED the motion for reconsideration concerning Dr. Belcher is denied based on reasons previously stated. Additionally, the issue concerning further inquiry of the jury has been resolved with the Court's instruction to them.

As to the motion for mistrial which addresses several issues, including an issue regarding Tara White, the Court states that an interrogatory has been prepared to present to the jurors when they return to the courtroom. A copy of the written interrogatory is provided to both sides.

Messrs. Storts and Unklesbay state their respective positions regarding the interrogatory.

In the presence of all 13 jurors:

The Court states that it has an interrogatory to give each juror. They are reminded of the oath they were previously given and instructed to mark their answer, indicate their juror number on the form, fold the paper and return it to Mr. Gustafson.

The jurors accomplish this task and at 4:25 p.m., they are admonished and excused until 10:30 a.m. on March 4, 2005.

In the absence of the jury:

The Court states that all jurors have responded to the interrogatory with “no”.

Court’s exhibit 10, being packet of 13 completed juror interrogatories, is identified.

FILED IN COURT: Juror Interrogatory Form.

For reasons set forth on the record concerning each issue raised,

IT IS ORDERED the motion for mistrial is denied.

The Court and counsel address scheduling for March 4th.

Court stands at recess.

Linda McCormick
Deputy Clerk

FINAL INSTRUCTIONS TO THE JURY
PHASE THREE

STATE V. CRUZ

CR20031740

Judge Ted B. Borek
Division 24
January 19, 2005

Members of the jury, the evidence and arguments have been completed in this case, and I will now instruct you as to the law as it pertains to the penalty phase. The law that applies to the penalty phase is as stated in these instructions and it is your duty to follow all of them. You must not single out certain instructions and disregard others. As you determine the facts, however, you may find that some instructions no longer apply.

EVIDENCE TO BE CONSIDERED IN PENALTY PHASE

The evidence from all three phases must be considered. Evidence consists of the testimony of witnesses, any documents and other things received into evidence as exhibits, and any facts stipulated to by the parties or which you were instructed to accept in any of the three phases.

MATTERS NOT TO BE CONSIDERED

You must not consider anything that is not evidence as just defined by this Court. You are to de-

termine the facts from the evidence produced in court. In the event you were exposed to something other than evidence then you must disregard it and you must not let it affect your deliberations in any way.

If an objection to a question was sustained at any phase of these proceedings, you must disregard the question and you must not guess what the answer might have been. If at any phase of these proceedings, an exhibit was offered into evidence and an objection was sustained, you must not consider that exhibit as evidence. If testimony was stricken from the record at any phase of these proceedings, you must not consider that testimony for any purpose. If any evidence was received for a limited purpose you must consider that evidence only for the limited purpose.

You must not be influenced by prejudice towards any person involved in this case. Any person's race, color, religion, national ancestry or sexual orientation must not influence you.

You cannot be governed or influenced by sentiment, passion or prejudice. However, you may consider grounds for leniency and decline to impose the death penalty after a thoughtful consideration of the evidence.

Your verdict, whatever it may be, must be based upon reason rather than emotion.

Faithful performance by you of your duties as jurors is vital to the administration of justice.

LAWYERS' COMMENTS ARE NOT EVIDENCE

In their opening statements and closing arguments, the lawyers have talked to you about the law and the

evidence. What the lawyers said is not evidence, but it may help you to understand the law and the evidence.

LAWYERS' OBJECTIONS

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections bythe attorneys. If the Court sustained an objection to a lawyer's question, you must disregard it and any answer given.

JUDGE'S COMMENTS

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, bywords or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during these proceedings or in giving these instructions, you must disregard the apparent comment entirely.

CREDIBILITY OF WITNESSES

It is your duty to determine the facts and to determine them onlyfrom the evidence in this case. You are to apply the law to the facts and in this way decide whether the Defendant will or will not be sentenced to death. You are the sole judges of the credibility of the witnesses and what weight is to be given the testimony of each. In considering the testimony of any witness you may take into account the opportunity and ability of the witness to observe the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have,

the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

EXPERT TESTIMONY

A witness may give an opinion on a subject upon which the witness has become an expert because of education, study, or experience. You should consider the opinion of an expert and the reasons, if any, given for it. However, you are not bound by any expert opinion. Give the expert opinion the importance that you believe it deserves.

TESTIMONY OF LAW ENFORCEMENT OFFICERS

The testimony of a law enforcement officer is not entitled to any greater or lesser importance or believability merely because of the fact that the witness is a law enforcement officer. You are to consider the testimony of a police officer just as you would the testimony of any other witness.

PRODUCTION OF EVIDENCE

Neither side is required to call as witnesses all persons who may have been present at the time of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence.

DEFENDANT'S STATEMENT IN ALLOCUTION

You are advised that the Defendant is permitted to make a statement to bring information to the attention of the jury, and it must be given appropriate consideration. The Defendant cannot be cross-examined by the prosecution or questioned by jury members upon such a statement.

The weight and significance to be attached to such a statement rests within the sound discretion of each juror.

DEATH PENALTY

It is the law of this state that there are three possible penalties for first degree murder. These three possible penalties are:

1. Death by lethal injection.
2. Life imprisonment with no possibility of parole or release from imprisonment on any basis.
3. Life imprisonment with a possibility of parole or release from imprisonment but only after twenty-five calendar years of incarceration have been served.

In determining whether to impose the death penalty for each conviction of first degree murder you must base your decision solely on an evaluation of the aggravating circumstance and any mitigating circumstances. An aggravating circumstance is a factor which weighs toward imposing the death penalty. A mitigating circumstance is a factor which weighs against imposing the death penalty and relates to an aspect of the Defendant's character, propensities, history, record or circumstances of the offense.

In this case you have unanimously found a single aggravating circumstance in the aggravation phase of this trial. This single aggravating circumstance was that the murdered person was an on-duty peace officer who was killed in the course of performing the officer's official duty and the Defendant knew or should have known that the murdered person was a peace officer. This is the only aggravating circum-

stance that may be considered by you during this penalty phase. The murder itself is not an aggravating circumstance. The absence of any particular mitigating factor is not an aggravating factor.

At the penalty phase, family members of a murder victim have presented information about the murder victim and the impact of the murder on the family. Just as the law requires you to see the Defendant as a unique person and to see the loss that would result from his execution, the law also allows you to see the murder victim as a unique person and to see the loss resulting from the murder. You may only consider the information about the murder victim and the impact of the murder on the victim's family for this limited purpose.

The information presented about the murder victim and the impact of the murder on the murder victim's family is not an aggravating circumstance and must not be considered by you as an aggravating circumstance. The law does not deem the life of one person more valuable than that of another person. You shall not consider the relative worth of human beings in making your penalty phase decision. You must make your penalty phase decision based solely upon your evaluation of the aggravating circumstance and any mitigating circumstances.

You must consider any evidence presented in the penalty phase-- as well as any evidence you heard at the previous two phases that relates to any mitigating circumstance -- to decide whether there are any mitigating circumstances and to assess what weight to give to any mitigating circumstance. A mitigating circumstance is any factor that is relevant in determining whether to impose a sentence less than death

that relates to any aspect of the defendant's character, propensities, history, record or circumstances of the offense.

The Defendant has the burden of proving the existence of a mitigating circumstance by a preponderance of the evidence. A fact is proven by a preponderance of evidence if it is shown to be more likely so than not so. This is a lesser burden of proof than beyond a reasonable doubt.

The jurors do not have to all agree that a mitigating circumstance has been proven to exist. In other words, the determination of whether a mitigating circumstance has been proven by a preponderance of the evidence need not be unanimous. Each juror must rely on his or her own judgment in determining the existence of a particular mitigating circumstance.

The Defendant has alleged the following mitigating circumstances:

1. The Defendant's capacity to appreciate the wrongfulness of his conduct was significantly impaired.
2. The Defendant's capacity to conform his conduct to the requirements of law was significantly impaired.
3. The Defendant was under unusual and substantial duress.
4. The Defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense would cause or create a grave risk of causing death to another person.
5. The Defendant comes from a dysfunctional family.

6. The Defendant was deprived of necessary nurturing and love from his mother and other family members.
7. The Defendant's family background includes serious mental disorders amongst various family members which contributed to the Defendant's character and history.
8. The Defendant himself suffers from Post-Traumatic Stress Disorder.
9. The Defendant suffers from drug addiction.
10. The Defendant's mental state at the time of the offense was affected by numerous factors, including his dysfunctional family, serious mental disorders within the family, his diagnosis of Post-Traumatic Stress Disorder and his drug addiction.
11. The Defendant's execution will have an unfavorable impact upon various family members.
12. The Defendant does, at least at this point in time, have a certain amount of family support.
13. The Defendant does have a record of being able to perform and adapt well to the rules and regulations having to do with being an inmate in jail or prison.
14. The Defendant has no propensity towards future violence.
15. The Defendant's character and history indicate that he is capable of adapting to life in prison and adhering to rules and regulations concerning his behavior while an inmate.
16. The killing of Officer Hardesty was not planned.

17. That the Defendant's upbringing, life-style and subculture all made it far more likely that he would find himself in this position.

You are not limited to these mitigating circumstances. You must also consider any other information admitted as evidence that is relevant in determining whether to impose a sentence less than death so long as it relates to an aspect of the Defendant's character, propensities, history, record or circumstances of the offense.

If you find a mitigating circumstance to exist, you must individually weigh that mitigating circumstance against the one aggravating circumstance you have already found. If you find more than one mitigating circumstance you must weigh all of the mitigating circumstances together against the aggravating circumstance. The weighing between the aggravating circumstance and the mitigating circumstance or circumstances does not mean a mere mathematical counting of factors on each side, or the arbitrary assignment of weights to any of them. You are free to assign whatever weight you deem appropriate to each and all of the circumstances whether it be a mitigating or an aggravating circumstance.

Once you have weighed the aggravating circumstance against any mitigating circumstance or circumstances, you must each determine whether the mitigation you have individually found is sufficiently substantial to call for leniency in light of the aggravating circumstance. The law does not define what is "sufficiently substantial to call for leniency." Each juror must determine for him or herself what is "sufficiently substantial to call for leniency."

If your decision is that the mitigating circumstance or circumstances are sufficiently substantial to call for leniency in light of the aggravating circumstance, then your verdict shall be that the Defendant is not sentenced to death.

If your decision is that the mitigating circumstance or circumstances are not sufficiently substantial to call for leniency, then your verdict shall be that the Defendant is sentenced to death.

Your decision on whether or not the death sentence should or should not be imposed must be unanimous, which means it must be the verdict of each and every one of you.

Your decision to sentence or not sentence the Defendant to death is not a recommendation. Your decision will be binding. If your verdict is that the Defendant should be sentenced to death, the Defendant will be sentenced to death. If your verdict is that the Defendant should not be sentenced to death, the Defendant will not be sentenced to death.

In the event you decide that the Defendant should not be sentenced to death, this court will impose one of the other two possible punishments for first degree murder. In that event, it will solely be the responsibility of this court to decide which one of these two possible punishments for first degree murder to impose. The jury would not decide that question.

DUTY TO CONFER WITH OTHER JURORS

The verdict must represent the considered judgment of each juror. In order to return a verdict it is necessary that each juror agree thereto. In other words, ladies and gentlemen, your verdict in this case, if you return a verdict, must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching a verdict if you can do so without violence to your individual judgment.

Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with the other jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced that it is erroneous. But do not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

JUROR DELIBERATIONS

You are to discuss the case and deliberate only when all jurors are together in the jury room. You are not to discuss the case with each other or anyone else during breaks or recesses.

I suggest that you review the written jury instructions and verdict form. It may be helpful for you to discuss the instructions and form to make sure that you understand them. During your deliberations you must follow the instructions and refer to them to answer any questions about applicable law, procedure, definitions, etc.

Should any of you, or the jury as a whole, have a question for the court during your deliberation or wish to communicate with me on any other matter, please utilize the jury question form that we will provide you. Your question or message must be communicated to the court in writing and must be signed by you or the foreperson. The court will consider your question or note and, if necessary, consult with counsel before answering it in writing.

While the court is considering your letter or note, please continue your deliberations, if possible.

No member of the jury should ever attempt to communicate with me except in writing, and I will communicate with you on anything concerning the case only in writing, or orally on the record.

Remember that you are not to tell anyone, including me, how the jury stands, numerically or otherwise, until after you have reached a verdict or been discharged.

The admonition I have given you during the trial remains in effect when you are not deliberating.

Throughout the trial, you have been advised to avoid media coverage and to avoid discussing the case. In the event you inadvertently encountered something in the media during the trial I instruct you that you must disregard anything you may have seen or heard and that you must make your decision in this case only from the evidence admitted during the trial and these jury instructions.

The case is now submitted to you for decision. Your selected presiding juror will preside over your deliberations. You will now decide a single question. That question is whether or not the Defendant should be sentenced to death for committing first degree murder.

All twelve of you must agree before you may find that the defendant should be sentence to death or should not be sentenced to death.

Please mark your findings on the verdict form provided. Once you have reached a verdict, your presiding juror must sign it.

You will be given one form of verdict. Omitting the caption, the verdict form reads as follows:

[Verdict form read]

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

Case No. CR-2003-1740

Hon. Ted B. Borek
Division 24

MOTION FOR NEW TRIAL

COMES NOW, the Defendant, JOHN MONTENEGRO CRUZ, by and through counsel undersigned, and, pursuant to Rule 24.1(c)(1), (3), (4) and (5) of the Arizona Rules of Criminal Procedure respectfully urges this court to enter an order granting the Defendant a new trial and/or sentencing in this case. Reasons and authority for this motion are set forth more fully in the attached memorandum which is, by reference, hereby incorporated and made part of this motion.

RESPECTFULLY SUBMITTED this 21 day of March, 2005.

BARTON & STORTS, P.C.

/s/ Brick P. Storts, III
Brick P. Storts, III
Attorney for Defendant CRUZ

MEMORANDUM

Numerous motions, objections and issues have been raised prior to and during the course of these proceedings. This motion will focus on some of those issues without waiving any others which have been argued and decided unfavorably to the Defendant. With respect to each of those issues raised herein, the Defendant specifically incorporates, by reference, all prior motions, objections, pleadings or supplemental pleadings previously filed. Based more upon the taint created by media, than upon compelling and persuasive evidence, the Defendant was convicted of First Degree Murder and sentenced to death. Patrick Hardesty was the first police officer killed in the line of duty, in this community in (21) years. The media coverage was continuous and prejudicial. This media frenzy continued throughout the course of the trial and tainted the Jury and the ultimate outcome. If not designed to bring about a conviction and sentence of death, the media coverage certainly paved the way for that result. This culminated in a final failure as to the Defendant with the published comments by some four of the fourteen jurors, after the verdict was rendered.

I.

MOTION FOR CHANGE OF VENUE/ MOTION TO SEQUESTER THE JURY

Prior to trial, the Defendant urged this court to grant his motion for a change of venue and move the trial to some other location in order to ensure that the Defendant's rights to a fair trial were adequately protected. The court refused on three separate occasions. The motion for change of venue was thereafter supplemented almost daily with the latest media

accounts concerning this case. Once the trial was in progress, the media continued to bombard the citizens of this community with accounts about the day's events. These accounts included information which had not and would not be presented to the Jury in the courtroom.

The media reported the on-going battle involving the Defendant's expert witness, Mr. Brian Wraxall. The State presented evidence that there was no DNA connection between the Defendant and the gun in this case. The media, however, reported that Mr. Wraxall was expected to testify that a DNA connection existed, if the State was allowed to call him as a rebuttal witness. The court's decision concerning the State's attempt to call Mr. Wraxall as a rebuttal witness came about in an excruciatingly painful and slow manner. This fed into the media hype surrounding his anticipated testimony.

To suggest that the Jury in this case was not exposed to these media accounts, including those taking place after trial had commenced, either directly or indirectly defies belief. If jurors were not exposed to media accounts directly, they were, almost assuredly, exposed indirectly through family and/or friends. Indeed, Juror number 118 provided a tape-recorded statement wherein she indicates that at least one male juror had a newspaper, was aware of its contents and was attempting to relay the media information to herself and, perhaps, others. Juror number 118 also stated that Juror number 7, who was excused had improperly disclosed numerous facts about the case to other jurors. Both Jurors number 7 and 118, were excused.

In *State v. Atwood,* 171 Ariz. 576, 832 P.2d 593 (1992), the court addressed change of venue and jury sequestration issues.[1] The court said:

> "Rather, we must determine whether, under the totality of the circumstances, the publicity relative to the defendant's trial was so pervasive that it caused the proceedings to be fundamentally unfair."

As in *Atwood,* the media attention to this case in Tucson, and Pima County was significant and continuing. Even though the court in *Atwood* found that prospective jurors' exposure to media accounts was not necessarily dispositive, it also indicated that pre-selection exposure was "troublesome". This court adopted the attitude of "let us try to pick a jury." The Defendant consistently argued that logic was faulty as discussed in the motions previously cited to this court when the venue motion was re-urged on two occasions.

Courts, do, as a general rule, follow the language in *State v. George,* 413 Ariz.Adv.Rpts. 3, 79 P.3d 1050 (2003). In that case, the motion for change of venue of Defendant George was denied and the court stated:

> "the only way to find out if you can pick a fair and impartial jury is to try to do it."

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[1] It should be noted in *Atwood,* the trial was moved out of Pima County and the venue and sequestration motions were filed prior to and during that Defendant's trial in Maricopa County.

In the instant case that was the court's position, however, the court's logic proved to be faulty as the jury selection appears to have been tainted by the publicity.

The court in *George,* however, went on to say a motion for change of venue will only be granted if there is either presumed prejudice shown and/or actual prejudice established. The presumed prejudice standard develops when a defendant can show jurors were exposed to pretrial publicity that was so outrageous that it would turn the trial into a mockery of justice or a mere formality. Pretrial publicity, however, only meets that threshold when it is so unfairly prejudicial and pervasive that no credibility can be given to the jurors' answers during voir dire affirming their ability to decide the case fairly. The publicity in this case was so pervasive and continual that presumed prejudice should have been found.

The second standard that can be found by the court is that of actual prejudice. To show actual prejudice, a defendant must demonstrate that pretrial publicity caused a juror to form preconceived notions about the case and that a juror would be unable to set aside those preconceived notions. *See, State v. Trostle,* 191 Ariz. 4, 951 P.2d 869 (1997) The issue of actual prejudice was emphasized at the time jury questionnaires were answered by the prospective jurors on January 12, 2005.

It is inconceivable to believe, with the amount and type of media coverage, that a court could not have determined that predicated on that publicity that the Defendant had any real hope of obtaining a jury that did not evidence presumed prejudice or actual prejudice.

The Defendant's motion for change of venue should have been granted. Had the court simply moved the trial to some other location, many of the problems which occurred during the course of trial could have been avoided.

A. <u>Jury Poll</u>

The result of the jury poll that was made available to this court at the second hearing on the motion for change of venue was born out of at the Defendant's trial. The poll indicated not one member of the group of citizens of Pima County polled had any belief in the Defendant's innocence. The Jury in the Defendant's case deliberated less than one and one-half hours to reach a guilty verdict, this after five weeks of trial and numerous issues raised by the Defendant as to reasonable doubt.

The Jury poll predicated the trial's outcome. **(Exhibit 1)**

B. <u>Specific Jury Misconduct re: Sequestration</u>

The court did not sequester the Jury as requested by this Defendant on three separate occasions. If the Jury had been sequestered, the likelihood of additional media exposure during the course of trial could have been minimized. It was not. In *Atwood,* the defendant suggested that the jury was also tainted by media exposure which took place during the proceedings. The *Atwood* court said as follows:

> Again, Defendant has failed to demonstrate that the jury was exposed to publicity during the trial. The trial court gave the jury repeated admonitions, both oral and written, to avoid media coverage of the case. Defendant does

> not allege "juror misconduct or disobedience to the court's admonitions". ...

Unlike *Atwood,* the Defendant not only alleges but presented evidence that one or more jurors were exposed to media accounts during the course of trial and attempted to and did relate the substance and content of these accounts to one or more other jurors. Additionally, the Defendant established that the Jury was violating the court's admonition not to discuss the case prior to deliberations. The individualized voir dire conducted on February 3, 2005, as well as the statements of Juror number 118, established jury violations of the court's admonition and media exposure as to one or more jurors.

Additional evidence of this Jury's inability or unwillingness to follow the court's admonitions and instructions can be found by looking in the Juror note that was provided to the court on the first day of deliberations. The court specifically instructed the Jury not to indicate to the court or anyone else their numerical division, the Jury Foreperson did exactly that. It became apparent that at the end of the first day of deliberations, the Jury was split 11-1. The State and the court argued that the note or question was simply hypothetical in nature. As argued previously, how could anyone suggest, with a straight face, that this note was hypothetical in nature. It was one more evidenced violation of the court's instructions and admonition. **(Exhibit 2)**

The court in effect based on the admitted conduct of jury members on February 3, 2005, and comments by Juror number 118 on February 3, 2005 to KVOA News-Channel 4, agreed that misconduct had occurred. As argued by the Defendant, however, in

Defendant's motion for mistrial, the court apparently determined it was acceptable for the Jury to violate the admonition if they did not do it too much. What is wrong with that approach is, once the court determines jurors have violated their oath, a defendant would wonder what other violations by the jury took place and were not reported.

C. Sequestration

Although the decision of whether or not to sequester a jury is discretionary, the court clearly has the authority to order that a jury be sequestered pursuant to Rule 19.4 of the Arizona Rules of Criminal Procedure. *See, State v. Bible,* 175 Ariz. 549, 858 P.2d 1152 (1993). Pretrial publicity is the primary factor the court should consider in determining whether to sequester a jury. *State v. Gretzler,* 126 Ariz. 60, 612 P.2d 1023 (1980). When the publicity is sensational and inflammatory, the jury should be sequestered. *Id.* quoting *Collins v. State,* 589 P.2d 1283 (Wyo. 1979). The court even commented that sequestration was a possibility on February 2, 2005, when a juror was allegedly seen on television.

Courts have repeatedly recognized the gravity and immeasurable solemnity of a jury's deliberations during the sentencing phase of a capital murder trial. Distractions and outside influences cannot be allowed to infect the jury's thoughts at this critical juncture, even if these distractions and/or outside influences are unconscious in nature. *See, Fuselier v. State,* 468 S.2nd 45 (Miss. 1985); *State v. Parker,* 372 S.2d 1037 (La. 1979).

At the very least, the Jury in this case should have been sequestered once the sentencing phase began. The Defendant had renewed his motion to sequester

the jury prior to the deliberative process when news articles were printed after the Defendant's guilty verdict with family members demanding the death penalty. After the first day of deliberations, the court allowed the Jury to leave the courthouse and go home without prior notification to counsel. If counsel had known that the Jury was going to be deliberating overnight, the motion to sequester would have been renewed, for a fourth time. The Defendant was deprived of this opportunity to seek jury sequestration during this critical phase.

In summary, the Defendant's motions for change of venue should have been granted. This Jury was exposed to pretrial publicity and this exposure continued, according to the statements of Juror number 118, during the proceedings themselves along with the acknowledged misdeeds of Juror number 7. When the court decided that it was going to allow this trial to take place in Tucson with its attendant atmosphere this also fed into the predictable media frenzy. Indeed, cameras which were initially allowed into the courtroom were ultimately banished. At the very least, the tainted Tucson Jury should have been sequestered. The Defendant should be granted a new trial based upon the court's denial of his motions for change of venue and failure to sequester the Jury.

II.

JURY SELECTION

There were a number of problems associated with jury selection in this case.

A. State's Use Of Peremptory Strikes

The State violated the extension of the *Batson* rule and denied the Defendant a fundamentally fair trial

presided over by an impartial jury by excluding Jurors number 12, 68, 148, 171, 189, simply because these jurors expressed reservations about the death penalty or indicated that even though they were not opposed to the death penalty, they felt it should only be used in "very special cases".

At the conclusion of both the State and the Defendant having made their respective jury strikes, the Defendant objected to the peremptory challenges of the above numbered jurors by the State. The Defendant pointed out that his constitutional right to an impartial jury would be violated if the State accomplished, as it did in this case, through its use of peremptory strikes what it could not constitutionally do through juror challenges for cause. In other words, it stacked the deck against the Defendant.

The Defendant referred the court to *Brown v. North Carolina,* 479 U.S. 940 (1989) which quoted *Witherspoon v. Illinois,* 391 U.S. at 523. The Defendant argued the State had consciously struck the above five jurors, as to four of the five jurors, the State had previously requested be stricken for cause due to their comments about the imposition of the death penalty which this court had denied.

State v. Purcell, 199 Ariz. 319, 18 P.3d 113 (2002) extended *Batson* to a peremptory strike based on religious affiliation. The court commented that ones religious beliefs may render a prospective juror unsuitable for service in a particular case. One's religious affiliation, like one's race or gender bears no relation to that person's ability to serve as a juror. The State in *Purcell* used a peremptory strike against a female who was a Catholic and was opposed to the death penalty but had stated she could

set aside her religious views if selected as a juror. The prosecutor in that case offered the two explanations for the peremptory strike. One, she was a Catholic and, two, she was against the death penalty. The court in that case held that the State's peremptory strike did not violate *Batson* because it was based on the juror's personal belief, not her religious affiliation.

The holding, however, in *Purcell* was inconsistent with the holding in *State v. Lucas,* also 199 Ariz. 366, 18 P.3d 160 (2001). In that case, the court held that if one of the State's reasons is unconstitutional, any other explanation is tainted. That would be true under the circumstances in *Purcell,* because the jurors views on the death penalty which she clearly stated she could set aside to serve as a juror were due to her being a Catholic.

In the instant case, the State was not required nor did the State offer any explanation as to why the five named jurors were stricken, except as to one. As to Juror number 12, the State attempted to make the argument that that juror was unqualified to serve as a juror due to the fact that in question number 43 of the Juror Questionnaire, the Juror checked no, "that juror would personally be unable to enter a verdict that would cause the Defendant to die, even if instructed to do so by this court." That Juror had been extensively questioned about that answer and it was adequately explained to this court's satisfaction. That was not a valid basis by the State to strike the Juror, because if correct, the Juror never would have been on the final panel and would have been stricken for cause by this court. The court would not have allowed a juror to remain on the panel that stated

that under no circumstances would they vote for the death penalty.

What the State simply did in striking these five jurors was to take off five jurors that had expressed reservations about what would be required for them to impose the death penalty. They also expressed reservations regarding other aspects of the case and factors dealing with the publicity that had taken place prior to the Defendant's trial.

In short, the State exercised its peremptory strikes in such a manner as to violate *Batson* and deprived the Defendant of a fair cross-section of jurors simply because some jurors expressed concerns about the death penalty. None of these jurors suggested that they would not follow the law. The State simply struck these jurors because of their legally permissible views concerning the imposition of the death penalty.

B. <u>Defendant's Use of Peremptory Strikes</u>

Additionally, the Defendant was forced to use peremptory strikes on jurors that he had been requested to be stricken for cause. The court's refusal to strike these jurors for cause infringed upon the Defendant's right to exercise peremptory strikes and constituted reversible error as these jurors should never have survived a challenge for cause. These jurors are numbers 136, 150, 169, and 178. The Defendant incorporates, by reference, the record made with respect to his challenge for cause concerning each of these jurors.

The court in *State v. Whitley,* 420 Ariz.Adv.Rep. 3, 85 P.3d 116 (App.2004)(D) commented that erroneous exclusion of potential juror for views regarding capital punishment is structural error, *citing Gray v.*

Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987). The opinion in *Whitley,* along with the opinion in *State v. Ring,* 204 Ariz. 534, 65 P.3d 915 (2003), make the ruling in *State v. Hickman,* 205 Ariz. 192, 68 P.3d 418 (2003) (automatic reversal not required when a defendant is forced to use a peremptory strike to remove a prospective juror who should have been excused for cause) inapplicable to capital cases. As the court in *Hickman* noted, "in contrast, structural errors require automatic reversal." *Id.,* 205 Ariz. At 199.

Even in death-prone Texas, this issue was addressed in *Graham v. State,* 643 S.W.2d 920, 924 (Tex.Cr.App. 1983) ("The death penalty may not be imposed if even one prospective juror has been excluded in violation of *Witherspoon* and the judgment of guilt must be reversed.") *State v. Maxie,* 653 So.2d 526, 538 (La. 1995); and *State v. Williams,* 113 N.J. 393, 550 A.2d 1172, 1179 (1988).

C. Jurors not stricken - in place of 136, 150, 169, 178

Finally, other jurors would have been stricken except that the Defendant had no remaining available peremptory strikes because he was required to utilize these peremptory strikes on jurors that should have been stricken for cause. The jurors that would have been stricken had the court properly stricken other jurors for cause, were Jurors numbered 62, 123, 127 and 193. Once again, the Defendant incorporates, by reference, the previous record made with respect to each one of these jurors.

Causing the Defendant to have to use peremptory strikes in order to remove jurors which should have been stricken for cause also impacted upon the

Defendant's right to exercise peremptory challenges since peremptory strikes had to be utilized to remove jurors that should have been stricken for cause and, in turn, this process resulted in the Defendant having an inadequate number of peremptory strikes to exercise on other jurors which he should have removed. (*See, Hichman, supra*)

This becomes ever more telling when one evaluates those four jurors that Defendant was required to leave on the panel. Juror number 193 was selected the Jury Foreperson and apparently was the driving force behind the Defendant's conviction and sentence of death. What is more troubling about the lack of impartiality of Juror #193, is contained in the statement she gave to the press for the reason she imposed the death penalty.[2] The reason that juror gave for her imposition of the death penalty was not given in any instruction by this court and most certainly was not listed as an aggravating circumstance or a basis for imposing the death penalty. The reason the Juror gave is indicative of Juror bias and clearly contrary to the instructions of this court. The court stated, at page 3 of the penalty phase final instructions:

> "You cannot be governed or influenced by sentiment, passion or prejudice. However, you

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[2] Juror number 193's husband is a retired police sergeant from N.J. yet she stated she did not favor the death penalty nor would her husband's prior profession influence her to vote for the death penalty. One may only assume she answered in such a manner to be give herself every chance to be on this jury. (See, Death Penalty Questions and Answers, pages 15 through 18.)

> may consider grounds for leniency and decline to impose the death penalty after a thoughtful consideration of the evidence.
>
> Your verdict, whatever it may be, must be based upon reason rather than emotion.
>
> Faithful performance by you of your duties as jurors is vital to the administration of justice."

The Jury Foreperson in her statement to the press violated that oath and urged that the death penalty be imposed on the Defendant for a purely vindictive and improper reason. **(Exhibit 3)**

III.

JUROR MISCONDUCT

During the course of trial, it was brought to the court's attention that one or more jurors may have been conversing with one another in direct violation of the court's admonition. The sixteen original jurors were individually questioned and two were excused, including Juror number 118 who had committed no misconduct. Thereafter, Juror number 118 participated in an interview with KVOA News. She also gave a tape-recorded statement to a defense investigator. Although the original individualized voir dire suggested that the only matters being discussed were possibly somewhat innocuous two things remain true. First, there were discussions in violation of the court's admonition. Second, additional evidence became available which suggests that the conversations may have included more than originally thought and that one or more jurors may have been exposed to media accounts of the case during trial and may have attempted to repeat the substance of these reports to one or more other jurors. Also juror

number 7, did not tell the court the truth, in chambers, as to what she had revealed to the other jurors. The court refused to conduct additional inquiry which the Defendant requested and supplied to the court in the form of an interrogatory. **(Exhibit 4)**

A. <u>Tara White</u>

On March 2, 2005, Tara White testified under oath that she had heard comments coming from the Jury Room to the effect that the Jurors could not understand why they were being kept so long because "they" (the Defendant) did not have a chance. In an attempt to "clean up the record", the court finally made an additional inquiry. This inquiry was inadequate and was also too little too late. The damage had already been done. The court then found that Ms. White was not credible, yet the court itself heard at the very least laughter and comments coming from the jury room and so acknowledged this to Ms. White when she raised the issue to the court while on the witness stand. **(Exhibits 5 and 6)**

Rule 19.4 of the Arizona Rules of Criminal Procedure provides as follows:

> The court should admonish the jurors not to converse among themselves or with anyone else on any subject connected with the trial, nor permit themselves to be exposed to news accounts of the proceeding, or to form or express any opinion thereon until the action is finally submitted to them.

This is the admonition that was provided at the beginning of the trial. This is the same admonition that was violated repeatedly. A violation of the court's admonition undermines the integrity of the

process and any confidence that might otherwise attach to the final outcome.

In *State v. Miller*, 178 Ariz. 555, 875 P.2d 788 (1994), the court had before it a case in which an alternate juror had left a note on a deliberating juror's car saying that either the defendant was guilty or that the alternate juror's vote would be guilty. The Arizona Supreme Court said that the trial court had failed to make proper inquiry into the circumstances surrounding the alternate juror's comments in the extent to which these comments may have influenced other jurors. The court said as follows:

> We therefore see no reason to distinguish between alternates from other outsiders for purposes of applying Renner. Whether contact by an alternate is more or less egregious will ultimately turn on a particular circumstances of the case.

In *Miller,* a significant period of time had elapsed between the trial and the appellate court decision. Nevertheless, the Arizona Supreme Court remanded the matter to the trial court to hold a hearing to determine whether or not the jurors could be reassembled and their memories would be adequate for purposes of deciding whether or not the Defendant was prejudiced in any way by the alternate juror's comment.

In *State v. Rojas*, 177 Ariz. 454, 868 P.2d 1037 (1993), prior to deliberations a juror asked a court staff member whether the judge would sentence the defendant immediately after the verdict or wait some period of time. The same juror, again, prior to deliberations, gave the bailiff a note to give to the victims,

along with a $20.00 bill and applauded their courage in testifying. The trial court made an inadequate inquiry into the circumstances surrounding the note and the impact that it might have had on the jury's deliberations. The Arizona Court of Appeals, Division One, said as follows:

> When events occur that cast an irrevocable cloud over the jury's fairness and impartiality, it is far better to grant the motion for mistrial and start over again. (citation omitted) The motion for mistrial should have been granted in this case. Therefore, we reverse and remand for a new trial.

An improper taint, even if accomplished with an innocent purpose, brings into question the fairness and impartiality of a juror. This simply cannot be allowed to take place in a first degree murder capital case. And yet, it has. The court should have conducted additional jury inquiry immediately after Juror number 118's media interview. It did not. It should also have conducted additional investigation after being provided with Juror number 118's interview with the defense investigator. It did not. Blame was instead focused on the Defendant for his alleged inaction, when he believed no action was required.

B. <u>KVOA - Notes</u>

This court then attempted to lay the blame on the Defendant for not disclosing the interview of Juror 118 taken on February 10, 2005, and disclosed on February 23, 2005. When was it ever the obligation of a defendant to insure he is receiving a fair trial. Should that not be the duty of the court and the State? This entire issue was compounded as a result of the inaction of Mr. David Berkman, Chief Crimi-

nal Deputy for the State, when he did not obtain the KVOA-Channel 4 reporter's notes which would have made the court aware of the comments contained in Juror number 118's interview given to Defendant's investigation. Mr. Berkman said he would, by whatever means necessary, obtain the reported notes. He did not. The record on this issue speaks for itself. **(Exhibit 7)**

C. <u>Court's comments</u>

The situation only worsened at the end of the trial. In fact, the court's final comments to the Jury have made it all but impossible for anyone to ascertain, at any point in the future, the nature and extent of the jury taint in this case. After the Jury returned its death verdict, the court essentially told the Jurors that there had been controversy surrounding their service and suggested that they should retire to the Jury Room and decide, collectively, how to answer or respond to this controversy. **(Exhibit 8)**

Obviously, the Defendant is paraphrasing the court's remarks. However, as counsel for Defendant pointed out at the bench immediately after these comments were made, the court effectively told these Jurors to come up with a story and stick to it because their fairness and impartiality was being challenged. All Jurors were aware that Jurors number 7 and 118 had been discharged. From the individualized voir dire, it did not take much for the Jury to conclude that problems had arisen because of conversations they had taken place between and amongst themselves. The court's parting remarks were, with all due respect, totally improper and have effectively and completely deprived this Defendant of the opportunity to ever be able to demonstrate the extent and

impact of the taint on this jury. These issues, in and of themselves, require that the Defendant be granted a new trial.

IV.

THIRD-PARTY CULPABILITY

The Jury was deprived of other evidence which may well have changed the outcome in this case. The Defendant was taken into custody by Officer Waters at approximately 4:03 p.m. He was moved to another location at approximately 4:44 p.m. He came into contact with a paramedic by the name of Rand Tavel at approximately 4:44 p.m. and had continuous contact with Mr. Tavel until approximately 5:30 p.m. During his contact with Mr. Tavel, the Defendant was rambling and making various comments or statements. The events surrounding the shooting death of Officer Hardesty and the Defendant's arrest are inextricably intertwined. While still under the stress of these combined events, the Defendant told Mr. Tavel that Arturo Sandoval was probably the individual who shot and killed Officer Patrick Hardesty. This evidence was immediately available to the State and throughout the course of these proceedings. The State did virtually nothing in terms of investigating Arturo Sandoval or his possible involvement. Instead, the police, and afterwards the prosecutor, focused completely upon Mr. Cruz and abdicated their responsibility to fairly and objectively evaluate and investigate a capital murder case. Mr. Cruz's fate was all but sealed. investigate a capital murder case. Mr. Cruz's fate was all but sealed.

The Defendant's statements to Mr. Tavel should have been admitted into evidence. Rule 803(2) of the Arizona Rules of Evidence provides that an excited

utterance is admissible if it relates "to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition". Clearly, the Defendant was under stress directly related to the startling events surrounding the shooting death of Officer Hardesty and his subsequent arrest. While the length of time between the startling event and the utterance is one factor to consider, the time between the shooting death of Officer Hardesty, the Defendant's arrest and his statements to Mr. Tavel is relatively short. The statements should have been admitted. *See, State v. Taylor*, 196 Ariz. 584 2 P.3d 674 (App. 1999)

This statement clearly established a third-party culpability defense. The Defendant was deprived of the opportunity to present a third-party defense based upon the court's ruling that his statements to Mr. Tavel were not admissible and the State's failure to adequately investigate Mr. Sandoval and his possible involvement. In *State v. Prion,* 203 Ariz. 157, 52 P.3d 189 (2002), the court said as follows:

> In our recent opinion in State v. Gibson, (citation omitted), we clarified the rule, holding that a special, higher standard of admissibility for third party culpability evidence was not the intention of Fulminante. The proper standard regarding third party culpability evidence is found in Rules 401, 402, and 403 of the Arizona Rules of Evidence. Any such evidence must simply be relevant and then subjected to the normal 403 weighing analysis between relevance, on the one hand, and prejudice or confusion on the other.

The *Prion* court went on to say:

> We explained in Gibson that the "proper focus in determining relevancy is the effect the evidence has upon the defendant's culpability. To be relevant, the evidence need only tend to create a reasonable doubt about the defendant's guilt. (emphasis added) *Id.* at 161.

In short, the Defendant should have been allowed to present a third-party culpability defense and was deprived of this opportunity by virtue of the court's ruling that his statements to Mr. Tavel were inadmissible. This constituted reversible error and mandates that this court grant the Defendant a new trial.

V.

CHALLENGE TO RULE 20-
REQUEST FOR ADVISORY VERDICT

Prior to the trial, the Defendant filed a motion challenging the constitutionality of Rule 20 of the Arizona Rules of Criminal Procedure and asking that the court require the Jury to deliberate on the question of whether the State's evidence, and only the State's evidence, established his guilt beyond a reasonable doubt. The court denied this motion. *Apprendi v. New Jersey,* 530 U.S. 466 (2000), *Ring v. Arizona,* 122 S.Ct. 2426, 153 L.Ed.2d 556 (2002) and *Blakely v. Washington,* 124 S.Ct. 2531 (2004), when read together all make it clear that a defendant's jury trial rights include the right to have a jury, rather than a trial judge, make decisions concerning aggravators or enhancement factors when it comes to sentencing. If a defendant is entitled to have a jury make these decisions, how can anyone argue that a defendant is not entitled to have a jury, rather than a trial judge,

determine the all-important question of whether the State's evidence, and only the State's evidence, is sufficient to support a finding that the Defendant is guilty beyond a reasonable doubt.

To the extent that Rule 20 of the Arizona Rules of Criminal Procedure allows a trial judge to make this determination, rather than a jury, and provides that the standard is "substantial evidence" rather than proof beyond a reasonable doubt, Rule 20 is unconstitutional.

In State *v. Tucker*, 26 Ariz. App. 376, 448 P.2d 1188 (1976), the court pointed out that the purpose of Rule 20 is to avoid forcing a defendant to go forward with his own evidence when the State's case is insufficient, thus, risking convicting himself.

In State *v. Nunez,* 167 Ariz. 272, 806 P.2d 861 (1991), the court said that if a defendant goes forward and presents his own evidence, after a motion for directed verdict has been denied, he waives any error if his case supplies the evidence missing from the State's case.

In short, the Defendant is seriously disadvantaged if he is forced to make a decision concerning whether or not to go forward with his own case if he does not know whether or not the State's evidence, and only the State's evidence, is sufficient to support a finding that he is guilty beyond a reasonable doubt. The Defendant should not be forced to make this choice.

Although this maybe a new and unusual suggested procedure, applying the reasoning of *Apprendi, Ring* and *Blakely,* leads to the inescapable conclusion that the Defendant's jury trial rights should include the right to have a jury, rather than a judge, make the determination of whether or not the State's evidence,

and only the State's evidence, is sufficient to support a finding that he is guilty beyond a reasonable doubt before having to decide whether or not to present his own evidence or testify in his own behalf.

The Defendant respectfully submits that it was error for the court not to proceed as suggested.

VI.

WRAXALL AND COLLIER

Prior to the trial, the State provided disclosure on July 22, 2003, which stated that Nora Rankin of the Tucson Police Department Crime Lab would testify that the Defendant had been excluded as a DNA source donor on the weapon in this case. Ms. Rankin testified consistently with this initial disclosure. Moreover, Ms. Rankin was interviewed by the defense and continued to maintain that Mr. Cruz had been excluded. The State in October, 2004, for the first time, indicated that Ms. Rankin's bench notes were in conflict with her original opinion. Indeed, the State maintained that Ms. Rankin would testify that based upon the lab notes, Mr. Cruz was not excluded as a possible DNA source donor. Then, the day prior to opening statements being made January 31, 2005, the State informed counsel for the Defendant that the State would not be attempting to elicit testimony from Ms. Rankin, or otherwise, that Mr. Cruz was not excluded as a DNA source donor.[3] That notice on

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[3] In effect the State stated Ms. Rankin was sticking by her opinion of July 22, 2003, contrary to possible pressure being applied from her superiors to modify that opinion. The court should note that Ms. Rankin testified under oath on August 23, 2004, that the Defendant was excluded.

the eve of trial and changed completely the defense approach to this case.

A. Wraxall

The defense had, for three months, prepared its case based upon a belief that it would be necessary to impeach Nora Rankin's testimony that Mr. Cruz was not excluded with her prior report, statements and testimony that he was, the Defendant was then forced to readjust to the State's evidence and changing theory. As part of the pretrial preparation to meet Ms. Rankin's testimony that the Defendant was not excluded as a possible DNA source donor, the Defendant retained the services of Mr. Brian Wraxall as an expert witness with respect to the DNA findings.[4] Ultimately, Mr. Wraxall concluded that Mr. Cruz could not be positively excluded nor could two T.P.D. police detectives. Mr. Wraxall also concluded Myra Moore was the primary source of the DNA on the gun grip evidence item 1KK-1, which clearly was critical evidence as Ms. Moore had also been named as a third-party culpability possibility.

After Ms. Rankin testify that Mr. Cruz was excluded, the Defendant notified the State that he would not be calling Mr. Wraxall as a witness as to that issue but would call Mr. Wraxall as to the other DNA conclusions specifically as Ms. Moore's DNA on the gun grip.

The State then immediately informed the court and counsel that the State would call Mr. Wraxall as a

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[4] Mr. Wraxall had been previously retained by the Defendant in June, 2004, but only in a consultant capacity as the Defendant did not dispute the disclosed DNA testimony of Ms. Rankin.

witness in its case in chief or if need be as a rebuttal witness. Of course, there was nothing about the defense case that would in anyway entitle the State to call Mr. Wraxall as a rebuttal witness. Nevertheless, the court agonized over this issue before it finally correctly concluded that the State should not be allowed to call Mr. Wraxall.

The State then offered not to cross-examine Mr. Wraxall concerning his DNA findings as to the Defendant if he were to be called as a witness by the Defendant. The State indicated that it would only cross-examine Mr. Wraxall in a couple areas, including some explanation about "shedders" versus "non-shedders" and the possible transfer of DNA evidence which made Ms. Moore the primary contributor to the gun grip. In other words, the State was inviting the Defendant to walk through a mine field in the hope and with the expectation that the Defendant would, somehow, open a door and allow additional cross-examination. The Defendant declined this invitation, understandably.

B. Collier

The Defendant had also intended to call Mr. Collier as an expert witness as a criminalist. Concerned that the calling of Mr. Collier might be used by the State as an opportunity to back-door in the testimony of Mr. Wraxall concerning whether or not the Defendant could be excluded as a possible DNA source donor concerning the weapon in this case, the Defendant filed a providential motion in limine. The court's ruling allowed the State to maintain this position and placed the Defendant in an absolutely untenable situation as the State had planned that very tactic and this court's ruling allowed the State

to follow that prejudicial course of action. Neither witness was called. It should be noted Mr. Collier was and is a criminalist and was not to be called as a DNA expert as he is not so stated to the State in his interview.

In *State v. Blakely*, 204 Ariz. 429, 65 P.3d 77 (2003), the court had before it a felony murder case and an issue concerning underlying predicate felonies. The *Blakely* court said as follows:

> Blakely's entire defense rested on the reasonable assumption that sexual assault was the sole predicate felony.
>
> ***
>
> The insertion of a new predicate felony after all the evidence was in and the defense had rested constitutes reversible error. The prejudice caused by such late notice is obvious. The defendant was deprived of his constitutional right to a fair trial. Moreover the State has failed to show how or why it would be unduly burdensome to require disclosure of a predicate felony early in the proceedings.

Although *Blakely* is distinguishable in some respects, the underlying legal theory is not. The Arizona Supreme Court expressed its concerns and concluded that the defendant was denied his right to a fair trial based upon the late notice and changing of theories having to do with the underlying predicate felony. In the present case, the State's changing theories made it impossible for the Defendant to adequately prepare. Moreover, the State was allowed to benefit from its changing theories inasmuch as it attempted to get into evidence indirectly what it specifically promised it would not do directly.

That is, the State, in effect, attempted to violated its pretrial promise not to establish or seek to establish that the Defendant was excluded as a potential DNA source donor by utilizing one of the defense experts to accomplish the same result. This tactic of changing theories in order to attempt to obtain the desired testimony in an direct way cannot and should not be tolerated.

The State's not-so-subtle threats that the Defendant might "open the door" to testimony concerning whether or not Mr. Cruz had been excluded as a DNA source donor were encouraged and supported by painstakingly slow, however, ultimately correct ruling as to Mr. Wraxall and incorrect ruling as to Mr. Collier, by this court.[5] As a result, the Defendant was deprived of his opportunity to present two expert witnesses which would have offered favorable testimony. The State should have been precluded from making any inquiry that would violate its last minute promise not to attempt to establish that Mr. Cruz had not been excluded as a DNA source donor. The Defendant should have been allowed to call these two witnesses without the threat or possibility of opening a door that was firmly shut by the State prior to the commencement of these proceedings.

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[5] This does not in any way mitigate the amount of time and effort this issue took away from meaningful representation of the Defendant at the very height of his trial, that being the Defendant's defense portion of the trial in the pursuit of his defense. Apparently the distraction was more pronounced than the Defendant thought as the jury took little time in completely discounting the Defendant's defense.

The State's tactical vacillations concerning its theory of prosecution denied this Defendant his right to a fair trial. The only appropriate remedy is to grant the Defendant's motion for new trial and preclude the State from repeatedly changing theories simply in order to obtain a dramatic tactical advantage. What is very troubling to counsel for Defendant is that he believed in the sincerity of the State's attorney and to his dismay, discovered that his sincerity was misplaced.

VII.

RESIDUAL DOUBT

Although the trial court suggested that the Defendant was free to argue residual doubt, it refused to instruct the Jury concerning how it might utilize this issue or concept during the sentencing phase and deliberative process. The Defendant specifically requested this court to instruct the Jury that residual doubt can be considered a mitigating factor. Moreover, the Defendant requested the court to instruct the Jury that residual doubt could be considered by the Jury during the weighing process, even if not found to be an appropriate mitigating circumstance. The court's refusal to give proper residual doubt jury instructions deprived the Defendant of his right to a fair trial during the sentencing phase of this proceeding.

As previously pointed out, judges who previously made the decisions concerning whether a person should live or die were allowed to consider residual doubt both as a mitigating circumstance and a reason not to impose the death penalty. Indeed, in a footnote in *State v. Harrod,* 200 Ariz. 309, 26 P.3d 492 (2001) (vacated pursuant to *Ring* in *Harrod v.*

Arizona, 536 U.S. 953, on remand, 204 Ariz. 567) the court made the following observation:

> As a practical matter, any trial judge who entertains any doubt about the defendant's guilt, even though not sufficient to warrant a new trial under Rule 24.1, Ariz. R. Crim. P., is likely to sentence to death or a life term under A.R.S. § 13-703(A) *Id.* at 317.

Clearly, the *Harrod* court recognized that a trial judge, in deciding whether to impose a life term or the death penalty, could impose a life term if it entertained "any doubt" about the defendant's guilt, even if that doubt was not sufficient to warrant a new trial. If trial judges were properly allowed to consider residual doubt as a mitigating factor and a reason not to impose the death penalty, juries should certainly be allowed to engage in the same or similar analysis. The State has cited absolutely no authority that would in any way suggest that this is untrue. In fact, a review of Arizona appellate decisions demonstrate that there is no case which suggests that residual doubt is not a proper mitigating circumstance. Nor is there any case law which suggests that residual doubt cannot be properly considered by a jury in deciding or weighing whether or not the death penalty should be imposed in fact the contrary is true.

In *State v. Pandeli,* 200 Ariz. 365 (2001), the court said:

> "Defendant contends residual doubt exists as to the jury's finding of premeditation and that the trial court erred in refusing to invoke residual doubt as a mitigating factor. We have previously explained our approach to this is-

> sue, holding that when a jury verdict "finding defendant guilty beyond a reasonable doubt is supported by very strong evidence, the trial court properly refused to find the non-statutory mitigating circumstnce of residual doubt". (citation omitted) The same is true, even where the verdict is grounded in circumstnatial evidence.

Paneli does not reject residual doubt as a mitigating circumstance. In fact, residual doubt was referred to as a "non-statutory mitigating circumstance." *Pandeli* simply stands for the proposition thta if a verdict finding the defendant guilty beyond a reasonable doubt is supported by "very strong evidence", the refusal to find residual doubt as a non-statutory mitigating circumstance is proper. A review of the Arizona cases dealing with "residual doubt" demonstrates that this factor has never been rejected as a mitigating circumstance. Rather, the court has simply found, in various cases, that residual doubt did not exist. There is significant difference between saying that residual doubt is not a recognized mitigating circumstance on the one hand, and finding that it does not exist on the other. (emphasis added)

Because the court refused to instruct the Jury concerning residual doubt and how this might constitute a separate mitigating factor and, further, refused to instruct the Jury that it could consider residual doubt during the weighing process of the sentencing proceedings, the Defendant was denied his right to a fair trial and the death penalty imposed should be vacated. This court should order that the Defendant receive a new trial with respect to the sentence imposed.

VIII.

DUANE BELCHER

The Defendant noticed his intent to call Duane Belcher, the Chairman of the Arizona Board of Executive Clemency, as a witness during the sentencing phase of this case. Mr. Belcher would have testified that the Board no longer has the authority to parole an individual sentenced to serve a life sentence without possibility of parole for twenty-five years. Mr. Belcher would have also testified that if a person was sentenced to serve a natural life prison term, the Board would be without authority to even entertain an application for release or commutation. Mr. Belcher's testimony was precluded by this court upon motion by the State and over objection of the Defendant.

Previously, judges decided whether or not to impose the death penalty. Judges were well aware that a life or natural life sentence would almost assuredly result in the Defendant's continued incarceration. He would not be released. The Defendant respectfully submits that juries, now charged with responsibility of deciding whether to impose a life term or the death penalty, should be no less knowledgeable about the consequences of non-death verdict than judges were previously.

In a minute entry dated March 8, 2004, this court said as follows:

> "This court concludes that SIMMONS is distinguishable; nothing has been presented to suggest that the Defendant would not be eligible for release if a life sentence was imposed, and the State has agreed that instructions to the jury may include information about the

consequences of the sentence if death is not imposed."

Two things are important. First, the court, in denying Mr. Belcher's testimony, made an observation that nothing had been presented to suggest that the Defendant would not be eligible for release if a life sentence was imposed. Dwayne Belcher, Chairman of the Board of executive Clemency would have been called as a witness on behalf of the Defendant during the aggravation/mitigation phase of this case. Mr. Belcher will testify that the board will not even consider an application filed by a natural life inmate. That is, a natural life inmate will never released from prison. Therefore, the court's observation that nothing had been presented to suggest that the Defendant would not be eligible for release, was in error.

Second, this court and the State had already agreed that the jury could be instructed concerning information about the consequences of the sentence if death is not imposed. The Defendant was, thus, entitled to present this evidence based upon the State's earlier agreement. The State should not have been allowed to change its position and oppose the introduction of the evidence concerning conditions at the State prison for life inmates. Juries should be entitled, during the weighing phase, to consider prison conditions and/or the possibility of release in deciding whether or not to impose the death penalty. Even if this factor is not seen as relevant mitigating evidence, it certainly constitutes evidence which can be appropriately considered in deciding whether or not the mitigation is sufficiently substantial to call for leniency.

Mr. Belcher's testimony was relevant and admissible insofar as it directly related to the weighing process on the ultimate question of whether the death penalty should be imposed. The Jury was deprived of this critical information. As a result, the Defendant's right to a fair trial and an appropriate consideration of whether the death penalty should be imposed was violated. *See,* generally, *State v. Harrod, supra.*

The Jury should have had an accurate and complete understanding of the consequences of a non-death verdict. This was a fact that the jurors themselves acknowledged would have been a factor for them to weigh in determining whether life or death was the appropriate sentence of the Defendant. In a press release to the media, three jurors stated in the last line of their release, "we were not given the option to vote for life in prison without the possibility of parole". Mr. Belcher's testimony would have given the Jury that information and resulting option in the death sentence weighing process.

(Exhibit 9)

IX.

DOUBLE JEOPARDY-TRIPLE COUNTING

The Defendant respectfully submits that the imposition of the death penalty in this case violates the double jeopardy provisions of both the State and Federal constitutions. Art. II, §10 of the Arizona Constitution provides, in part, as follows:

> "No person shall ... be twice put in jeopardy for the same offense."

The prohibition against placing a defendant in double jeopardy applies to the State through the Four-

teenth Amendment of the United States Constitution. *State v. Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied 435 U.S. 909. The double jeopardy clause also affords protection against efforts to impose punishment for the same offense in two or more proceedings. *See, Brooks v. United States,* 437 U.S. 1 (1978). One is placed in jeopardy twice when a factual determination is re-litigated. *See, State v. Hopson*, 112 Ariz. 497, 543 P.2d 1126 (1975).

The State in this case relied upon a single factor no less than three times in order to bring about the Defendant's execution. First, the State was allowed to prove that the Defendant was guilty of First Degree Murder, without presenting any evidence of premeditation, by relying on the fact that Patrick Hardesty was an on-duty police officer at the time of his death. Second, the State relied upon the fact that Patrick Hardesty was an on-duty police officer in order to make the Defendant "death eligible".

The State relied upon the fact that Patrick Hardesty was an on-duty police officer during the weighing process of the sentencing stage of these proceedings in order to argue that the Defendant should be executed. If Patrick Hardesty had not been a police officer, this would have been a second degree murder case. While the Defendant can certainly understand the legislature's desire and intent to punish an individual more severely for killing a police officer, he cannot, under any stretch of the imagination believe that the legislature intended that this single factor could transform a second degree murder case into one in which the death penalty should almost automatically be imposed.

Although this appears to be an issue of first impression, at least in Arizona, the Defendant respectfully submits that this "triple-counting" violates the double jeopardy provisions of both the State and Federal constitutions. For that reason, the Defendant respectfully urges this court to enter an order granting him a new trial, with respect to the sentencing phase.

The Defendant also asks this court to order that the Defendant is not death eligible based upon double jeopardy considerations since the State relied upon a single fact on three separate occasions in order to bring about the desired result.

X.

APPROPRIATE STANDARD RE: SENTENCING

The Defendant previously asked the court to instruct the Jury that before they could return a death verdict they had to find to an absolute certainty that such a punishment was warranted. To the extent that A.R.S. §13-703 provides that the burden on the sentencing phase should be beyond a reasonable doubt, the Defendant respectfully submits this statute is unconstitutional. More should be required before a person is sentenced to death than that which is required for a conviction. Indeed, in *State v. Harrod*, *supra,* the court made the following observation:

> "While beyond a reasonable doubt maybe an adequate standard for the guilt phase for a capital case, absolute certainty maybe a more appropriate standard for the imposition of the death penalty." (emphasis added)

Although this was not the holding of the *Harrod* court, it should have been. If society and the law are

going to allow for the execution of persons convicted of First Degree Murder, both should at least require that there be no doubt whatsoever about the Defendant's guilt before this punishment is imposed. Make no mistake about it, there is a significant difference between being satisfied beyond a reasonable doubt and being persuaded to an absolute certainty. The Defendant recognizes that this court is required to follow existing law, even if that case law or statute is subsequently declared to be unconstitutional. The Defendant is preserving his right to challenge the constitutionality of A.R.S. §13-703 and/or any other law which suggests that proof beyond a reasonable doubt is an acceptable burden when it comes to the imposition of the death penalty. Instead, the Defendant respectfully submits that absolute certainty should be required.

XI.

COERCED VERDICT

After deliberating for some period of time, the Jury sent a note to the court indicating that it was deadlocked 11-1 and asking whether or not this constituted a hung jury. The court did not bring the Jury into the courtroom in order to make further inquiry. Instead, the court told the Jury to continue deliberating. Everyone knew that this was simply an opportunity being provided to eleven jurors to browbeat and persuade the twelfth to change his or her vote. This juror's note did not constitute a hypothetical question. It was a statement of how the Jury was divided at the end of the first day of deliberations.

In *State v. Huerstel*, 206 Ariz. 93, 75 P.3d 698 (2003), the court said as follows:

> In determining whether a trial court has coerced the jury's verdict, this court views the actions of the judge and the comments made to the jury based on a totality of the circumstances and attempts to determine if the independent judgment of the jury was displaced.

In the present case, the totality of the circumstances clearly indicates that the Jury's verdict was coerced. Contrary to the court's instructions, the Jury informed the court concerning its numerical division. Without further inquiry, the court told the Jury to continue deliberating. After the verdict was returned, the court effectively told the Jury that there had been controversy concerning their service as jurors and that they should get together and formulate a response to this controversy. The Jury verdict in this case was coerced. A single juror had his or her will overborne by a process which was facilitated by the court. This would be wrong in any case. It is unacceptable in a capital murder case.

CONCLUSION

Based upon the totality of the circumstances, the Defendant respectfully submits that the Jury's verdict was coerced and he should be awarded a new trial, at least with respect to the sentencing phase of these proceedings. The Defendant specifically incorporates the record, motions and pleadings filed with respect to juror misconduct.

Based upon the foregoing, the Defendant respectfully urges this court to enter an order granting the Defendant's motion for a new trial. Justice requires nothing less.

RESPECTFULLY SUBMITTED this 21 day of March, 2005.

BARTON & STORTS, P.C.

/s/ Brick P. Storts, III
Brick P. Storts, III
Attorney for Defendant CRUZ

MOTION FOR NEW TRIAL – EXHIBIT 9

Jury Letter to the Media

March 11, 2005

There is no doubt in our minds that John Montenegro Cruz is guilty of killing Officer Patrick Hardesty. The evidence was overwhelming.

There is also no doubt in our minds that this is a tragedy for all involved. We feel for both Officer Hardesty's family, friends and fellow officers as well as for the family, friends and children of John Cruz. There are no winners here; only losers. Children have lost parents; mothers have lost sons; wives have lost husbands, and we grieve for all of you.

We were given a very difficult task. First, in order to convict John Montenegro Cruz of 1st degree murder we had to decide on only two things: (1) Was he guilty beyond a reasonable doubt; and (2) Did he shoot a police officer in the line of duty. Our answer was yes to both. The evidence was overwhelming, and because of this it did not take long to reach a verdict.

We listened - many of us tearfully - to the testimony from John Cruz's family. Many of us wanted a chance to talk to the family and tell them that we did not blame them for what has happened. We could see that the Cruz family are good and decent people. We could understand the pain of John's childhood and feel very sorry for that as well.

The jury was not comprised of uncaring people not wanting to see the truth. Some people on this jury

were former drug addicts; some once had family members in prison for drugs. Others had suffered sexual abuse. Three people lost parents as teenagers when their parents died from brain aneurisms. One person had lost a son. From our own losses and pasts, we did understand the pain that both families were going through.

This was a gut-wrenching decision. There was not one person on the jury who did not cry. The trial was very hard. When we left the courtroom yesterday and went back to the jury room, we all hugged each other and cried for the terrible loss all have suffered. There was absolutely no joy in our verdict.

We are disgusted by some of the comments that are being made. These comments are very hurtful. As jurors, we took our duties very seriously. Many of us had lunch together several times and never once discussed anything about the proceedings. We didn't listen to the news, talk to people, or research on the internet. We are just now finding out more details and are very concerned.

The idea that everyone's mind was made up for the death penalty is also false. What it boiled down to in the end is that we had to follow the law. The law states that if mitigating circumstances outweigh the aggravating circumstance - that a police officer was killed in the line of duty - then we had to vote for life. We WANTED to find a reason to be lenient. Who in their right mind wants to decide to put someone to death? Many of us would rather have voted for life if there was one mitigating circumstance that warranted it. In our minds there wasn't. We were not given an option to vote for life in prison without the possibility of parole.

We hope and pray that all involved in this terrible event will find peace one day, including John Montenegro Cruz.

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

Case No. CR-2003-1740

Hon. Ted B. Borek
Division 24

REPLY TO STATE'S RESPONSE TO DEFENDANT'S MOTION FOR NEW TRIAL

COMES NOW, the Defendant, JOHN MONTENEGRO CRUZ, by and through counsel undersigned and replies to the State's response to the Defendant's motion for new trial as is more fully set forth in the attached memorandum which is, by reference, hereby incorporated and made part of this reply.

RESPECTFULLY SUBMITTED this 20 day of April, 2005.

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BARTON & STORTS, P.C.

/s/ Brick P. Storts, III

Brick P. Storts, III

Attorney for Defendant CRUZ

MEMORANDUM

The Defendant filed his motion for new trial based upon several different grounds. The State filed a response. Conspicuous by its absence from this response is the citation to any legal authority whatsoever. The State simply relies upon pleadings previously filed and arguments previously made.

CHANGE OF VENUE AND SEQUESTRATION

The State argues that the Defendant's position is based "solely on speculation and conjecture". This is simply not so. The State fails to deal at all where the statement provided by Juror number 118 wherein she indicates, very clearly, that at least one male juror had a newspaper, was aware of its contents and was attempting to relay the media information to herself and, perhaps, others. Incredibly, the State argues that after "careful court scrutiny, it turned out that Juror number 118 had provided no basis at all to believe that juror misconduct had occurred." The record demonstrates actions to the contrary. The court refused to conduct any inquiry that was necessary to determine whether or not the allegations made by Juror number 118 were, in fact, true and correct. The original individual voir dire was inadequate as the information given to KVOA Channel 4 was not known to the Defendant. This is particularly true given the fact that Juror number 118 related additional information, concerning media exposure during her tape-recorded statement. At the very least, the court should have conducted additional inquiry. Its failure to investigate further constitutes reversible error. *See, State v. Rojas,* 177 Ariz. 454, 868 P.2d 1037 (1993).

Juror number 118's allegations, when considered together with the media account, including those during the course of trial itself, clearly establish that the Jury in this case was tainted. The court should have granted one of the Defendant's four motions for change of venue and, at the very least, should have ordered the Jury sequestered. The State also failed to address the Defendant's argument concerning the court allowing the Jury to retire for the evening before beginning their second day of deliberations. This is also reversible inasmuch as the court failed to advise defense counsel that the Jury was being sent home in order to allow counsel to renew his request that the Jury be sequestered during the deliberative proves.

The court's denial of the Defendant's Motion for Change of Venue, together with the court's failure to sequester the Jury, or even provide the Defendant with an opportunity to ask that the Jury be sequestered, constitutes error and entitles the Defendant to a new trial. *See, generally, State v. Atwood*, 171 Ariz. 576, 832 P.2d 593 (1992).

JURY SELECTION

In essence, the State argues that it should have the right to strike any juror who expresses reservation about the imposition of the death penalty. *State v. Purcell,* 199 Ariz. 319, 18 P.3d 113 (2002) extended *Baston* two peremptory strikes based upon a religious affiliation. The Defendant in this case correctly argued that the State should not be allowed to strike persons simply based upon moral, religious or philosophical reservations about the death penalty. If these people were otherwise qualified to serve as jurors, the State's exercise of its peremptory strikes

to remove those persons who expressed reservations of the death penalty, is directly violative of the principles enunciated in *Baston*.

The State then suggests that an adequate record has been made concerning the Defendant's request that other prospective jurors be stricken for cause. The Defendant established that several jurors should have been stricken for cause.

They were not. The Defendant also made a record concerning additional jurors who would have been stricken except that the Defendant had no remaining strikes because he was forced to exercise peremptory strikes on persons who should have been removed for cause.

Based upon the State's improper utilization of peremptory strikes, the court's failure to excuse for cause those persons whose answers indicated they could not be fair and impartial and the Defendant's forced utilization of peremptory strikes on persons who should have been removed for cause, the Jury selection in this case can fairly characterized as a "how not to" lesson in jury selection.

JUROR MISCONDUCT

Once again, the State ignores entirely the tape-recorded statement of Juror number 118. Her statement clearly indicates that the Jury was tainted and that at least one juror was attempting to relay information to others concerning media accounts of the trial.

Moreover, the testimony of Tara White demonstrates that the Jury in this case was tainted and anything other than fair and impartial. The court simply dismissed Ms. White's testimony even though

she was in the best position to hear what was going on in the Jury Room. With all due respects, the court's inquiry was simply too little, too late. The court's "warning" to the Jury at the end of the case, has made it impossible to ascertain the nature and extent of the Juror misconduct in this case. The court failed to conduct an adequate investigation in a timely manner. The failure to adequately investigate allegations of juror misconduct has, in and of itself, resulted in reversal and remand. *See, State v. Miller*, 178 Ariz. 555, 875 P.2d 788 (1994).

ADVISORY RULE 20 VERDICT

The State suggests that the Defendant has offered no legal support for his position that the Jury, rather than the court, should make a determination of whether or not the State's evidence, and only the State's evidence, is sufficient to support a finding of the Defendant's guilt, beyond a reasonable doubt. Obviously, the State failed to read the Defendant's memorandum and is, apparently, unaware of the support that the Defendant's position finds in *Ring, Apprendi,* and *Blakely.* Although this appears to be an issue of first impression, it cannot be anymore clear that the United States Supreme Court will not look favorably upon any denial of a criminal defendant's right to have a jury determine issues of consequence. There is nothing more basic than a defendant's right to have a jury, not the court, determine whether or not the State's evidence, and only the State's evidence, is sufficient to support a finding of guilt beyond a reasonable doubt.

THIRD-PARTY CULPABILITY

The State's answer to the Defendant's third-party culpability argument is to suggest that the Defend-

ant should have or could have testified himself concerning who might have been responsible for the murder of Officer Patrick Hardesty. The Defendant is not required to testify. His statements to Rand Tavel were properly admissible pursuant to recognized hearsay exception. The court's refusal to allow these statements into evidence effectively deprived the Defendant of his right to present evidence concerning third-party culpability. *See, State v. Prion*, 203 Ariz. 157, 52 P.3d 189 (2002); *Rule 803 of the Arizona Rules of Evidence.*

WRAXALL AND COLLIER

Contrary to the State's assertions in its response, the State did change its position concerning the anticipated testimony of Nora Rankin. First, she was going to testify that the Defendant had been excluded as a possible DNA source donor. Then, the defense was advised that she would testify that the Defendant had not been excluded as a possible DNA source donor. Then, the defense was told that Nora Rankin would not offer any testimony that the Defendant was not excluded as a possible DNA source donor. Up until the eve of trial, the Defendant believed that Ms. Rankin would be testifying that the Defendant was not excluded. Initially, the defense retained Mr. Wraxall as a possible witness in order to meet the ever-changing testimony of Nora Rankin. The never-ending story of Nora Rankin and what she might or might not testify about definitely deprived the Defendant of an opportunity to know and meet the evidence the State would be presenting. The State's last-minute position that it would not have Ms. Rankin testify that the Defendant was not excluded as a possible DNA source donor was followed quickly

by the State's superficial attempts to utilize Mr. Wraxall to prove exactly what the State had just agreed not to attempt to prove. This placed the Defendant in a position of having to adjust his entire defense at the eleventh hour. This issue also unfairly detracted from the trial of the Defendant as the defense wasted many hours meeting this new threat by the State. The Defendant was denied his right to a fundamentally fair trial. *See, State v. Blakely,* 204 Ariz. 429, 65 P.3d 77 (2003).

The State also utilized the threat of back-dooring in Nora Rankin's testimony that the Defendant could not be excluded in order to place the Defendant in the position of not calling Mr. Collier. The State never agreed that it would not ask Mr. Collier questions that would provide the Jury with information that Mr. Wraxall and/or Ms. Rankin may not have been able to exclude Mr. Cruz as a possible DNA source donor. The State's arguments, in its response, are unpersuasive and ingenuous. To suggest that Mr. Collier was withdrawn because he was not a credible witness ignores reality. The only reason that Mr. Collier was withdrawn and not called as a witness was because the court's ruling allowed the State to leave open the question concerning whether it would cross examine Mr. Collier in such a way as to bring before the Jury the very evidence that the State had previously agreed not to present. This was error.

RESIDUAL DOUBT

The State asserts that the Defendant was permitted to raise residual doubt. The State ignores the fact that the court refused to instruct the Jury concerning residual doubt. To argue residual doubt without a proper jury instruction, is very much like tilting at

windmills. Without a proper instruction, the Jury would have no idea about how or why it was allowed to consider this evidence and what effect, if any, it should have upon their findings and verdict.

DUANE BELCHER/ DOUBLE JEOPARDY/ APPROPRIATE SENTENCING STANDARD

On these issues, the State relies upon arguments previously made and pleadings previously filed. The Defendant should have been allowed to call Duane Belcher as a witness in this case. His testimony would have demonstrated that the Board of Executive Clemency is not empowered to grant paroles or other releases. As the ultimate decision maker, the Jury should have been allowed to consider this information in arriving at a verdict in this case.

Allowing the State to rely upon the very same factor at three different stages of the proceedings in order to have the Defendant executed, is a violation of the double jeopardy clause of both State and Federal constitutions. The Defendant was convicted of First Degree Murder because the alleged victim was a police officer. The Defendant was rendered death eligible because the alleged victim was a police officer. The State argued that the death penalty should be imposed in this case because the alleged victim was a police officer. At some point, more should be required. The State simply cannot be allowed to use a single factor to turn an otherwise Second Degree Murder case into a case in which the death penalty should be imposed.

The Defendant certainly hopes that the appellate court will agree that “absolute certainty” should be

the standard in deciding death penalty cases. A civilized society should require nothing less.

COERCED VERDICT

The Jury in this case reported that it was deadlocked 11 to 1. The court did not bring the Jury into the courtroom in order to make further inquiry. Instead, the court told the Jury to continue deliberating. As indicated previously, everyone knew that this was simply an opportunity being provided to eleven jurors to browbeat and persuade the twelfth to change his or her vote. The note from the Jury was not a hypothetical question. It was a statement of how the Jury was divided at the end of the first day of deliberation.

The court's response, given the circumstances of this case, coerced a verdict and deprived the Defendant of his right to a fair trial under the State and Federal constitutions. The totality of the circumstances demonstrate that eleven jurors were able to coerce the twelfth into agreeing with them by relying upon the court's instruction that they should continue deliberating. *See, State v. Huerstel*, 206 Ariz. 93, 75 P.3d 698 (2003).

CONCLUSION

Based upon the foregoing, as well as the motion for new trial previously filed and any and all prior pleadings and arguments, the Defendant respectfully urges this court to order that he be granted a new trial for each and every of those reasons stated. Certainly, if not entitled to a new trial on one of these grounds, the Defendant is absolutely entitled to a new trial wherein these errors are considered collectively.

RESPECTFULLY SUBMITTED this 20 day of April, 2005.

BARTON & STORTS, P.C.

/s/ Brick P. Storts, III

Brick P. Storts, III

Attorney for Defendant CRUZ

ARIZONA SUPERIOR COURT,

PIMA COUNTY

STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

Case No. CR-20031740

Hon. Ted B. Borek

Date: May 20, 2005

RULING

UNDER ADVISEMENT

On May 2, 2005 this Court heard oral argument on Defendant's Motion for New Trial and took the matter under advisement. For the following reasons, the Court now denies the Motion for New Trial in its entirety.

Residual Doubt and Third-Party Culpability

In oral argument, the defense cited to State v. Carreon, 210 Ariz. 54, 107 P.3d 900 (2005), on the residual doubt issue. In Carreon, the Arizona Supreme Court, in discussing another issue, quoted part of the trial judge's instructions that listed

residual doubt as one of the potential mitigating factors. 107 P.3d at 915. The Arizona Supreme Court itself did not make any pronouncements on residual doubt. 107 P.3d at 915-16. Neither a majority of the United States Supreme Court nor a majority of the Arizona Supreme Court has ever held that a residual doubt instruction is proper. See Franklin v. Lynaugh, 487 U.S. 164 (1988); State v. Harrod, 200 Ariz. 301, 26 P.3d 492 (2001). Carreon did not change the legal landscape and a residual doubt instruction was not legally proper.

Moreover, a residual doubt instruction was not factually warranted. In Harrod, supra, the justices were sharply split on the legal analysis. However, all five justices found that the facts did not support a residual doubt instruction. 200 Ariz. at 317 (Justices Martone joined by McGregor); 200 Ariz. at 320 (Justice Jones); 200 Ariz. at 322 (Justices Feldman joined by Zlaket). In State v. Pandeli, 200 Ariz. 365, 380, 26 P.3d 1136 (2001) the instruction was also factually unsupported.

In the instant case, as in Harrod and Pandeli, there is no factual basis for a residual doubt instruction. The evidence reflects that the Defendant fled from Officer Hardesty and Officer Waters by running through a hole in the fence into a vacant lot. Officer Hardesty pursued on foot while Officer Waters drove his patrol car around the block to cut off the Defendant's escape route. Defendant, with Hardesty in close foot pursuit, then scaled a fence into a neighboring residential yard. Although no witness saw the actual shooting, the evidence considered in its entirety, establishes beyond any doubt that it was the Defend-

ant who, once in the yard, fired five shots from his five shot revolver into the pursuing Officer Hardesty.

Immediately after the shooting, Officer Waters arrived in front of the yard and exited his patrol car and aimed his service weapon at the Defendant. Waters saw Defendant holding the revolver and saw the Defendant throw the revolver down. Defendant asked Waters to shoot him and get it over with it. Waters attempted to physically restrain the Defendant but the Defendant managed to escape. Waters was ultimately able to apprehend Defendant a short distance away following another foot pursuit that led over two more fences.

Later found in the Defendant's pocket were five bullets of the same type used to kill Officer Hardesty. Later testing found gun shot residue on the Defendant's clothing. Ballistic testing confirmed the revolver the Defendant threw down was the murder weapon. Stippling evidence showed the fatal shots were fired at close range. Recordings of police radio transmissions as well as the accounts of civilian witnesses in the area further supported the State's case. The jurors were taken to the crime scene and allowed to view all the relevant areas.

A defense expert on eyewitness testimony was called in an attempt to undermine Officer Waters's testimony, and in particular, raise doubt about Waters's description of the Defendant discarding the revolver. Waters's testimony was supported by police radio tapes wherein Waters is heard contemporaneously radioing that the suspect had a gun. At the time of that transmission, Waters did not know that Hardesty had been killed. This transmission was intended to alert Hardesty and other officers that the

Defendant had been armed. Officer Waters's testimony was credible and corroborated and not seriously called into question in any manner.

Similarly unavailing were defense efforts to blame the gun residue results on contamination. The chain of custody and other evidence clearly showed that the gunshot residue was properly attributable to the Defendant having recently fired a gun.

Also unavailing was the defense's attempt to inject doubt by pointing out that the Defendant's DNA was not found on the murder weapon.[1] Although the jury heard that Defendant's DNA was not on the weapon, the jury also learned that Myra Moore was a possible contributor of DNA on the murder weapon. The Defendant spent the night before the murder with Ms. Moore. Ms. Moore's apartment was where Officers Hardesty and Waters discovered the Defendant and where the foot chase began. Ms. Moore testified the Defendant had a gun with him and that she touched the gun when knocking it off the bed. The DNA evidence did not exculpate the Defendant but potentially corroborated Defendant's link to the murder weapon via Ms. Moore's DNA.

The Motion for New Trial refers to third-party culpability evidence. In the context of this case, "third-party culpability evidence" necessarily means evidence that some other human being murdered Of-

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[1] On this point, the Court is not considering the additional incriminating evidence the jury did not hear. The jury was not aware of Wraxall's opinion that the Defendant' could <u>not</u> be excluded as a DNA source on the gun. This Court granted the defense motion to preclude the State from calling Wraxall, the defense expert, to establish that point.

ficer Hardesty. Officer Hardesty was last seen alive chasing the Defendant on foot. The Defendant was next seen, soon thereafter, throwing down the murder weapon a short distance away from Hardesty's body. There was no other human being in the immediate vicinity that could have possibly inflicted these close range wounds with the murder weapon the Defendant threw down.

The defense refers to Arturo Sandoval as being a third-party culpability possibility. Motion at 19-21. After being arrested and while being treated by a paramedic, the Defendant gave the paramedic a false name and also said Arturo Sandoval was involved in the crime. The Defendant's statements were properly excluded as hearsay without exception. The Defendant's statements were not excited utterances that stilled the powers of deception because the Defendant was deliberately deceiving by giving a false name.

The defense also alludes to Myra Moore as being "named as a third-party culpability possibility." Motion for New Trial at page 24. Ms. Moore was present at the apartment when the Defendant fled. After Defendant was arrested, police returned to the apartment to obtain statements from Ms. Moore and her mother. The Defendant, by running from Ms. Moore's location, was necessarily leading the murder victim away from Moore. Ms. Moore could not have possibly murdered Officer Hardesty.

There was no evidence of any human being, by any name, being in a position to murder Officer Hardesty except the Defendant. In light of all the evidence, a third person's involvement in the shooting is not even a remote possibility. The crime scene visit was

particularly instructive to this Court, and presumably, to the jurors as well. The short distances traveled and the need to hurdle fenced areas precluded another human from being involved in this brief foot pursuit and this murder. The evidence created no doubt- residual, lingering or of any other type- about guilt. This Court concludes that a residual doubt instruction was not factually warranted and would not have affected this jury's resolution of this case.

Alleged Juror Misconduct

The primary claim of juror misconduct is that the jury received "evidence not properly admitted during the trial or aggravation or penalty hearing." Rule 24.1(c)(3)(I). In particular, the motion incorrectly claims the jurors heard media accounts and were "tainted" by the "media frenzy." Motion at 3.

Claims that this jury was tainted by publicity are simply false. There was an innocuous contact revealed on February 8, 2005, when Juror #195 volunteered a comment she overheard on television. She was questioned and no prejudicial information was received.

Another contact was revealed by excused Juror #118 after she had been excused early in the trial. The defense claims excused Juror #118 should have been reexamined after her media account was disclosed. However, her media account was the same as the account she gave the court at a hearing when she was a juror. There was no need to have Juror #118 reiterate what she had previously told the court. The defense had its investigator also interview excused Juror #118. The defense did not timely present the results of this interview to the Court. When ultimately provided, the only new information in the defense

interview of excused Juror #118 was that another juror had said he saw a newspaper article about the case but did not read the article. Television news accounts not heard and newspaper articles not read are not prejudicial. See State v. Schackart, 175 Ariz. 494, 502-03, 858 P.2d 639 (1993)(newspaper article not read).

The admonition tells the jurors that if they are exposed to media accounts to end their exposure and inform the court. These jurors did exactly what was expected of them. These jurors were very conscientious and took the admonition very seriously. This jury was not exposed to extraneous prejudicial information.

There are two exhibits appended to the Motion for New Trial that have not been previously considered by this Court. Exhibit #3 purports to be a handwritten letter of the presiding juror dated March 10, 2005. Exhibit #9 purports to be an e-mail string sent to KGUN news and an attached letter from some jurors purporting to speak for the whole jury. For purposes of the new trial motion, this Court accepts Exhibits #3 and #9 as an authentic offer of proof of what the juror(s)'s testimony would be if an evidentiary hearing were held under Rule 24.2.

Arizona follows the general rule, historically known as Lord Mansfield's rule, that a juror's testimony is not admissible to impeach the verdict. State v. Dickens, 187 Ariz. 1, 15, 926 P.2d 468 (1996). Under Rule 24.1(d), no testimony is admissible "which inquires into the subjective motives or mental processes which led a juror to assent or dissent from the verdict." Therefore, the use of Exhibit #3 at pages 14-15 of the Motion for New Trial is improper. No testimo-

ny is admissible on the presiding jurors "subjective motives or mental processes" in reaching her verdict. Although inadmissible on the mental processes of the jurors, Exhibit #3 and #9 are admissible on whether jurors were exposed to extraneous matters. Dickens, 187 Ariz. at 15-16. In their post-verdict account, the jurors wrote: "We didn't listen to the news, talk to people or research on the Internet. We are just now finding out more details and we are very concerned." Exhibit #9. The claim that jurors were exposed to media accounts is unsupported by both the trial record and the post-trial exhibits.

The issue of Tara White's allegations is raised again. The jurors's were queried in open court without warning and all jurors wrote that they did not hear or speak the words alleged. This Court's own observations, being seated next to the witness stand throughout the trial, buttress the unanimous account of the jurors. In this Court's view, Ms. White's account of what she claimed to hear is not credible.

Change of Venue and Sequestration.

These issues were addressed before trial. The new aspect is that the defense relies on publicity during the trial. However, trial publicity is irrelevant to the fairness of the trial because the jurors followed the admonition and were not exposed to any prejudicial publicity during the trial. As was explained above, the trial jurors actual exposure to publicity consisted of a television broadcast not seen and a newspaper article not read.

The screening of the venire focused heavily on pretrial publicity and whether any known publicity could be set aside. The written questionnaire and voir dire processes were exceptionally thorough and

produced fair jurors. Pre-trial publicity did not create presumed prejudice or actual prejudice. Sequestration and venue change were not necessary. Trial publicity that did not reach the sitting jury does not change that result.

Directed Verdict by Jury

The argument is that a jury must decide a directed verdict motion and is unsupported by any pertinent authority. Because this jury found guilt beyond a reasonable doubt, the issue is moot. Moreover, the question of the legal sufficiency of the evidence is obviously a question of law for "the court". Rule 20, Arizona Rules of Criminal Procedure.

Prosecution Peremptory Challenges

The defense argues the prosecution acted improperly by allegedly using its peremptory strikes based on the venire person's views on the death penalty. Motion for New Trial at 10-12. No law is cited that suggests this is an improper motive. Both sides use peremptory strikes in that manner. The defense did not make a *prima facie* case of race, religious or gender discrimination by the prosecution under Batson and its progeny.

Defense Peremptory Challenges

The Court disagrees that the rulings on the "for cause" challenges were incorrect for the reasons previously set forth on the record. In addition, no biased juror sat on this trial. The defense claims that the rule of State v. Hickman, 205 Ariz. 192 (2003) is inapplicable to capital cases. Motion at 12-13. This is incorrect. See State v. Frank Winfield Anderson, 2005 WL 1027175, Arizona Supreme Court, filed

May 4, 2005, Slip Opinion at pages 13-16; Ross v. Oklahoma, 487 U.S. 81 (1988).

Allegedly Coerced Verdict

After a few hours of penalty phase deliberations, the jurors adjourned for the day at 4:20 p.m. Minute entry of March 8, 2005. The Presiding Juror remained behind and wrote the following note:

> "If one person's decision remains unchanged against the other 11 jurors - - Is this a hung jury? If so what happens next?"

The time of the note was 16:30 or 4:30 p.m.

After receiving the note, this Court contacted both counsel and in the presence of both bailiffs held a telephone conference call on speakerphone. Both parties agreed to the response the Court would give. The Court wrote out the response and wrote down the time, which was 17:00 hours or 5:00 p.m.

The next morning, the defense retracted its position and objected to the written response. After hearing defense objections and arguments from both sides, this Court gave the jury the written response agreed to the evening before.

Citing to State v. Huerstel, 206 Ariz. 93, 75 P.3d 698 (2003), the defense argues the verdict was coerced and that "Everyone knew that this was simply an opportunity being provided to eleven jurors to browbeat" the twelfth. Motion at 35; Reply at 9. This Court finds the argument is incorrect on both the facts and the law.

The allegations are contrary to fact. The juror note said: "If one person's decision remains unchanged . . . If so what happens . . ." The initial interpretation, which this Court still believes correct, was that the

note was a general inquiry from the Presiding Juror about possibilities and not a pronouncement from a deadlocked jury. "Everyone" did not read the note as the defense later did. Indeed the parties initially read the note as not announcing an impasse and agreed it was too early coming the first afternoon of deliberations to inquire about jury impasse. There is simply no evidence of, and no reasonable inference of, a deadlock jury or of browbeating.

The reliance on State v. Huerstel is misplaced. The initial error in Huerstel was that the trial judge prematurely assumed the jury was at an impasse. 206 Ariz. at 99-100. Rule 22.4 states that "If the jury advises the court that it has reached an impasse in its deliberations," the court may ask if the court or counsel can assist them. The Huerstel trial judge erred by giving an impasse instruction "without any clear indication the jury needed help." 206 Ariz. at 99. In this case, there was no clear indication the jurors needed help and it would have been improper for the Court to pretend otherwise. The many additional coercive circumstances present in Huerstel are simply absent here.

Alleged Double Jeopardy- Triple Counting

The defense has never cited any relevant authority that suggests the prohibition against double jeopardy is implicated in this case. The jury did not acquit this Defendant of any factual allegation and he has not twice been placed in jeopardy. It is constitutional for a capital aggravating circumstance to duplicate an element of the offense. Lowenfield v. Phillips, 484 U.S. 231, 246 (1988); See Also Jurek v. Texas, 428 U.S. 262 (1976).

Appropriate Standard Re: Sentencing

Previously the defense sought a residual doubt instruction. The defense argued that before a jury could impose a death sentence it must be convinced of guilt with absolute certainty. The defense now makes a different argument. The defense now claims that the jury "had to find to an absolute certainty that such a punishment was warranted." Motion at 34. The defense reliance on Harrod is misplaced. Motion at 34. Harrod dealt with doubt as to guilt, not doubt as to the penalty. This Court gave precisely the penalty phase instructions the defense requested. Compare the "Defendant's Requested Jury Instructions" dated January 17, 2005 with the Court's Instructions filed March 10, 2005. The defense cannot now be heard to complain about the instructions it offered. See State v. Logan, 200 Ariz. 564, 565-66, 30 P.3d 631, 632-33 (2001).

Wraxall and Collier

The Court granted the defense motion to preclude the prosecution from calling Brian Wraxall. Mr. Wraxall was the defense's own DNA expert who was of the opinion that the Defendant's DNA was not excluded from DNA on the murder weapon. The State had agreed to not question Wraxall about this opinion after the Court precluded his opinion. The defense could have called Mr. Wraxall or Mr. Collier but choose not to do so, notably after the state presented prior testimony of Collier it could have used to impeach him. There was no prosecutorial misconduct involved. The defense was in no way prejudiced by the Court's rulings on Wraxall and Collier.

Duane Belcher

The defense claims that the testimony of Duane Belcher, Chairman of Board of Executive Clemency, would have enlightened the jury on the possible punishments. The Court instructed the jury on the possible punishments exactly as the defense requested. The jurors were told that there were three possible sentences:

1. Death by Lethal Injection.
2. Life Imprisonment with no possibility of parole or release from imprisonment on any basis.
3. Life Imprisonment with a possibility of parole or release from imprisonment but only after twenty-five calendar years have been served.

Court's Instructions filed March 10, 2005 at 7. Defense Instructions filed January 18, 2005 at page i.

The jury was also instructed, at the Defendant's request, that:

> In the event you decide that the Defendant should not be sentenced to death, this court will impose one of the other two possible punishments for first degree murder. In that event, it will solely be the responsibility of this court to decide which one of these two possible punishments for first degree murder to impose. The jury would not decide that question.

Court's Instructions filed March 10, 2005 at 13. Defense Instructions filed January 18, 2005 at page v.

Contrary to the defense assertions, the jury knew a possible sentence was "life imprisonment with no possibility of parole or release from imprisonment on

any basis" because they were so instructed. Whether this Court would impose a parole eligible sentence and how a future Board of Executive Clemency might evaluate a parole request in the year 2028 is entirely speculative. The jury was correctly instructed on the law and the defense has failed to show how Belcher's testimony was proper or even relevant.

IT IS ORDERED that the Motion for New Trial is denied in its entirety.

cc:

County Attorney - Rick Unklesbay

County Attorney – Thomas Weaver

Brick P. Storts, III, Esq.

David W. Basham, Esq.

David Alan Darby, Esq.

Capital Staff Attorney - John Gustafson

Under Advisement Clerk

Joyce Burbridge

Judicial Administrative Assistant

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,

Respondent,

v.

JOHN MONTENEGRO CRUZ,

Petitioner.

Cause No. CR2003-1740

(The Honorable Theodore B. Borek)

AMENDED PETITION FOR POST CONVICTION RELIEF

CAPITAL CASE PCR

Petitioner John Montenegro Cruz by and through his attorney, Gilbert H. Levy, respectfully files his First Petition for post conviction relief as follows:

I. PROCEDURAL HISTORY OF THE CASE

1.1 Petitioner was charged by indictment with one count of first degree murder pursuant to A.R.S. § 13-l 105(A)(3). The State alleged that Petitioner intentionally caused the death of Patrick Hardesty, a Tucson Police Office. The State filed notice of intent to seek the death penalty. The only aggravating

circumstance alleged in the notice was murder of a peace officer pursuant to A.R.S. § 13-703(F)(l0).

1.2 Petitioner's jury trial commenced on January 19, 2005 before the Honorable Theodore Borek. 1TR3.[1]

1.3 On February 25, 2005, the jury returned a guilty verdict on the single count of first degree murder. 24TR21. On the same day, the jury made an affirmative finding on the single statutory aggravating factor that Petitioner killed a peace officer in the line of duty. *Id.* at 49.

1.4 The mitigation hearing commenced on March 1, 2005. 25TR 3. On March 8, 2005, the jury returned a verdict in which it found that the mitigation presented by the Petitioner was not sufficiently substantial to outweigh the statutory aggravating factor and it voted to impose a sentence of death. 32TR2.

1.5 Petitioner appealed his conviction and sentence to the Arizona Supreme Court. The Court issued an opinion in which it affirmed the conviction and sentence. *State v. John Montenegro Cruz,* 218 Ariz. 149, 181 P. 3d 196 (2007).

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[1] For the sake of convenience, volumes of the trial transcript are referred to herein as follows:

1/19/05: 1 TR, 1/21/05:2TR, 1/25/05:3TR, 1/26/06:4TR, 1/27/05:5TR,2/28/05:6TR, 1/31/05: 7TR, 2/2/05:8TR, 2/3/05:9TR,2/4/05:10TR,2/8/05:11TR,2/9/05-Part 1: 12TR,2/9/05-Part 2:13TR,2/10/05:14TR, 2/11/05:15TR,2/15/05:16TR,2/16/05:17TR,2/17/05:18TR 2/18/05:19TR,2/19/05:20TR2/22/05:21TR,2/23/05:22TR,2/24/05:23TR,2/25/05:24TR, 3/1/05:25TR, 3/2/05:26TR,3/3/05,:27TR,3/4/05:28TR, 3/5/05:29TR, 3/8/05:30TR 3/9/05:31TR,3/10/05:32TR

1.6 Petitioner filed a petition for writ of certiorari with the United States Supreme Court and it was denied. *Cruz v. Arizona*, 173 L. Ed. 2d 118 (2009).

1.7 The Clerk of the Arizona Supreme Court filed a notice of post conviction relief as provided in Criminal Rule 32.4. On June 29, 2010 the Arizona Supreme Court issued an order lifting the stay on the time limit provided in Criminal Rule 32.4(c)(1) and appointed the undersigned to represent the Petitioner in Criminal Rule 32 proceedings.

1.8 On September 28, 2010 this Court entered an order on stipulation of the parties providing that Petitioner shall file his First Petition for Post Conviction Relief on or before October 28, 2010. The order furthermore provides that Petitioner is granted leave to file an Amended Petition for Post Conviction Relief. The State's obligation to file a response will not arise until the Amended Petition is filed.

II. SUMMARY OF FACTS PERTAINING TO GUILT PHASE

2.1 On May 26, 2003, Tucson Police Officers Ben Waters and Patrick Hardesty were called to the scene of a hit and run accident at Ft. Lowell and First. 7TR97-98. They arrived in separate vehicles. At the scene, they contacted an individual named Charles Bevilacqua, who directed them to an apartment at 1002 East Navajo. *Id.* at 102-103.

2.2 Hardesty and Waters arrived at a small apartment. *Id.* at 104. A woman answered the door. A man, later identified as the Petitioner, was lying on a mattress in the apartment. *Id.* at p. 104. He identified himself as Frank White. *Id.* at 107-108. The officers had previously been given a description of the man who fled from the scene of the accident.

He was described as wearing a white shirt and dark pants. The man on the mattress matched the description. *Id.* at 106-107.

2.3 Waters testified that the man provided a date of birth, which turned out to be false. *Id.* at 107-108. The suspect told officers that he left his identification in the car and left the apartment to get it. Waters saw him lean into the center console of a car, look back at Officer Hardesty, and suddenly begin running through a hole in the gate. *Id.* at 110-112.

2.4 Hardesty began to pursue the suspect on foot. Waters headed east in his patrol car in an effort to cut him off. As Waters was doing so, he saw Petitioner in the front yard of a home running south. *Id.* at 112-113. He saw Petitioner throw down a gun. *Id.*. 114-115. He radioed Hardesty that Petitioner had a gun, but Hardesty did not respond. *Id.* at 116-117. Waters exited his patrol car and gave chase to Petitioner on foot. *Id.* at 117. When he trapped Petitioner in a front yard, Petitioner purportedly stated, "Just go ahead and kill me now. Get it over with. Kill me now." *Id.* at 120. After wrestling with him, Waters was ultimately able to subdue Petitioner in handcuffs. *Id.* at 121-123 Waters was later informed that Officer Hardesty had been killed. *Id.* at 124-125.

2.5 The hit and run vehicle was a red Mustang. 8TR68-69. Witnesses involved in the hit and run accident testified that the man who ran from the scene was wearing a white t-shirt. *Id.* at 78, 119. One witness testified that the man who was taken into custody resembled the man who ran from the scene. *Id.* at 122. Petitioner was arrested wearing blue jeans and a white t-shirt. *Id.* at 172-173. The t shirt had been torn and was hanging around his waist.

Three latent prints recovered from the Mustang were identified as belonging to the Petitioner. 14TR51-52, 68-70.

2.6 Following his arrest, Petitioner was searched by TPD Officers Rocha and Merrill. Rocha testified that he received the cartridges from Officer Maish and put them in his pocket. 12TR50 Merrill testified that he recovered the cartridges from Petitioner's pocket and placed them in evidence. 10TR102-103.

2.7 The State called Myra Moore. 10TR181. Moore was the occupant of the premises at 1002 E. Navajo along with her mother, Laura Cook. *Id.* at 181-182. Moore testified that she spent the night before the shooting with a man named Frank. *Id.* at 198. Frank was with a "white guy" who owned a Mustang. *Id.* at 200-201. Moore had sex with Frank. *Id.* at 201-202. At one point she saw a gun on the bed and moved it. *Id.* at 202-203. Frank and the "white guy" left the apartment to go to Food City to get something to eat. *Id.* at 205. Frank came back later and appeared to be injured. *Id.* at 208-210. When police came to the door, Frank said he had to go get his identification. *Id.* at 214. After he left, she heard shots. *Id.* Frank never came back to the apartment. *Id.* at 220. In Court, she identified the Petitioner as the person she knew as Frank.

2.8 Petitioner was taken to the hospital following his arrest after he complained of chest pains. 10TR110-111. At some point, his hands were swabbed for the presence of gun powder residue. 11TR24. The State called an expert from a private laboratory in Texas. Id. at 61. The expert conducted a microscopic analysis for the presence of gun powder particles on Petitioner's t-shirt. *Id.* at 66. There was

a concentration of particles on the back of the t-shirt but none on the front. *Id.* at 93-94. The hand swabs were negative for the presence of gun powder residue. *Id.* at 104-105.

2.9 The pathologist, Cynthia Porterfield, testified that Officer Hardesty perished from three penetrating gun shot wounds. 12TR120,121. One was a gun shot wound to the head entering at the lower left eye lid. Id. There was stippling in the vicinity of the eye indicating that the weapon was fired from approximately one foot away. *Id.* at 125. The other two wounds were to the abdomen. *Id.* at 132-133, 136. Porterfield recovered the slugs and turned them over to the police. *Id.* at 135-136.

2.10 When the body of Officer Hardesty was discovered at the scene, his gun was still in his belt. The weapon was found in a locked position and the magazine was full. There was no indication that the weapon had been fired. 8TR37.

2.11 The State's DNA expert, Nora Rankin, testified that Hardesty and the Petitioner were excluded from a DNA sample found on the gun. 14TR162-164, 170. She testified that Myra Moore could not be excluded from the sample. *Id.* at 149-152. A defense expert who analyzed the data took issue with Rankin's conclusion. His conclusion was that the Petitioner could not be excluded from the sample. The defense expert was never called to testify.

2.12 The gun recovered from the scene was a five shot revolver. 14TR199. The State's firearms expert testified that there were five spent cartridges in the cylinder. *Id.* at 199-200. A ballistics comparison established that the bullets recovered from Hardesty's body were fired by the gun recovered at the

scene. *Id.* at 205. The expert testified that the unspent cartridges recovered from Petitioner by Officer Merrill were the same make and manufacture as the spent cartridges found in the gun. *Id.* at 211.

2.13 The defense offered evidence that the red Mustang involved in the accident was registered to Charles Bevilacqua. 17TR97-98. A bag recovered from the Mustang contained Bevilacqua's identification and an empty holster. *Id.* at 97. A defense firearms expert test fired the gun recovered from the scene and testified that it was highly likely that the shooter would have gun shot residue on his hands. 18TR112. Myra Moore's mother Laura Cook testified that there were no police at the door when Petitioner left the apartment. *Id.* at 187.

III. SUMMARY OF FACTS PERTAINING TO THE PENALTY PHASE

3.1 The State presented no additional evidence in the aggravation phase and relied on the facts presented in the guilt phase. 24TR42.

3.2 In the mitigation phase, the State called Officer Hardesty's mother and widow who testified about their loss. 25TR41, 49.

3.3 The defense called a number of lay witnesses including the Petitioner's mother, aunt, uncle, cousin and ex-wife. 25TR, 26TR. Petitioner's mother testified that Petitioner's father was verbally and physically abusive.25TR101 He beat Petitioner with a belt for no reason. *Id.* at 101-102 She testified that she had been sexually abused by her father and suffered from PTSD and bi-polar disorder. *Id.* at 80, 105-106.

3.4 Relatives testified that Petitioner was nevertheless close to his father. *Id.* at 138. He went to live

with his father after his mother remarried. His father's new wife was cruel and abusive. *Id.* at 148. Petitioner was devastated by his parents' divorce and his father's death. *Id.* at 143. Petitioner began using illegal drugs at an early age. *Id.* at 144-145.

3.5 Petitioner's ex-wife, Tara White, testified about Petitioner's drug use. They were both smoking marijuana when they met but he progressed to cocaine. 26TR111. Petitioner always had mood swings but his drug use caused him to "go nuts." *Id.* at 111-112. Petitioner's cousin testified that Petitioner was smoking methamphetamine shortly before the incident. *Id.* at 151. It made him paranoid. *Id.* Drug tests were performed at the hospital following Petitioner's arrest. He tested positive for cocaine and methamphetamine. 27TR51-52.

3.6 The defense called Hector Barillas, a clinical psychologist. 27TR36. Dr. Barillas interviewed Petitioner and reviewed documents including school records, jail records, records of court proceedings and a report of another psychologist. *Id.* at 38-44. He opined that Petitioner suffered from addictive drug disorder and post-traumatic stress disorder. *Id.* at 67-68. He testified that Petitioner's ability to conform his conduct was impaired. *Id.* at 82. He did not render an opinion on Petitioner's mental state at the time of the offense. *Id.* at 83.

3.7 The defense called Laura McCloskey, a developmental psychologist whose work focuses on child abuse, molestation and domestic violence. 28TR18. McCloskey formed an opinion that Petitioner was abused as a child. He was abused psychologically and physically, as well as neglected. *Id.* at 25-27. He was

exposed to chronic and severe domestic violence. *Id.* at 57.

3.8 The defense called Sean Stewart, who was employed by Pima County Corrections. 26TR61. Stewart testified that according to the records of Petitioner's recent incarceration, there was nothing to indicate that he would be a danger to guards or other inmates. *Id.* at 69.

3.9 The defense called James Aiken, a former warden and prison consultant. 28TR136. Aiken testified that Petitioner would be housed in close custody because of the nature of his conviction. *Id.* at 146-148. Based on his records, there was nothing to indicate that Petitioner would be a predator or a danger to others. *Id.* at 160-162.

3.10 The defense called Edward French, a Doctor of Pharmacology. 28TR106. Dr. French reviewed Petitioner's medical record, which indicated a high level of methamphetamine and cocaine in Petitioner's body at the time of the incident. *Id.* at 119. Dr. French described the effects of long term use of methamphetamine. He described "tweaking" or methamphetamine withdrawal, which can cause users to be irritable, paranoid, and unpredictably violent. *Id.* at 130. French was not asked to render an opinion on the Petitioner's use of methamphetamine at the time of the offense. *Id.* at 131.

IV. FIRST CLAIM – CONFLICT OF INTEREST

4.1 Former Deputy County Attorney Kenneth Peasley, who is now deceased, began working in the Pima County Attorney's Office in 1978. *In Re Peasley,* 208 Ariz. 27, 30, 90 P. 3d 764, 767 (2004). By 1992, he had conducted approximately 250 felony trials, 140 of which were homicide cases. Id. Of the

homicide trials, about 60 were capital cases. Id. Peasley served as a legal advisor to the Pima County Sheriff's Office in 2002 and 2003. Exhibit 1.[2] Peasley was an instructor at the Federal Law Enforcement Training Academy and regularly taught law enforcement agencies on various topics including Miranda rights, defenses, criminal procedure and statutory offenses. Id. Peasley resigned from the County Attorney's Office in 2003, shortly after the State Bar Disciplinary Commission recommended that he be disbarred for eliciting false testimony in a high profile murder case. Exhibit 2.

4.2 Peasley was ordered disbarred by the Arizona Supreme Court on May 28, 2004. *In Re Peasley, supra.* The basis of the disbarment order was that Peasley knowingly presented false testimony in capital murder trials that he handled in 1993 and 1997. The Disciplinary Commission found that Peasley knowingly permitted Tucson homicide detective Joe Godoy to testify falsely. Godoy falsely claimed in sworn testimony that he was unaware of the identity of the defendants as possible suspects when he interviewed the informant and that the informant was the first person in the case to identify the defendants. In concluding that the disbarment was the appropriate sanction, the Arizona Supreme Court agreed with the Disciplinary Commission that Peasley acted with a dishonest motive. 208 Ariz. at 37. In reaching its decision, the Arizona Supreme Court referred to two other reported cases where

[2] Numbered exhibits are attached to the accompanying pleadings entitled Petitioner's Exhibits in Support of Amended PCR.

convictions were reversed because of Peasley's misconduct: *State v. Rodriguez,* 192 Ariz. 58, 64, 961 P. 2d 1006 (1998), (Peasley violated discovery rules, failing to insure that the defendant received a fair trial); *State v. Trostle* 191 Ariz. 4, 951 P. 2d 869, 881 (1997), (Peasley made inflammatory comments about the defendant and made impermissible comments on the defendant's failure to testify).

4.3 Petitioner was represented in this case by attorney Brick Storts. Following his disbarment, Peasley began working for Storts as a legal assistant in several cases including this case. Exhibits 3 and 4. In working for Storts in this case, Peasley drafted pleadings, attended team meetings, and drafted the Petitioner's allocution statement. Exhibits 4 and 5.

4.4 Joe Godoy, the Tucson Police Detective who gave perjured testimony in the case that led to Peasley's disbarment, also worked for Storts as an investigator. Exhibit 4. Godoy had some responsibilities on Petitioner's case. Exhibits 4 and 5. Godoy was married to Teresa Godoy, a Deputy County Attorney. Exhibit 6.

4.5 Rick Unklesbay was the lead prosecutor in Petitioner's case. Peasley taught Unklesby how to try a case when both were employed by the County Attorney's Office Exhibit 7. In 1995, Peasley and Unklesby received special recognition awards from the Pima County Sheriff's Office. Exhibit 8. During the disbarment hearings, Unklesby wrote a letter of support on Peasley's behalf. Exhibit 7. In the letter he stated, "Ken's honesty and integrity in his dealing with the criminal justice system have always been without question." Id. Unklesby was listed as a potential witness who would testify to Peasley's good

character in a pleading that Peasley's attorney filed in the disbarment proceedings. Exhibit 9.

4.6 Pima County Attorney Barbara Lawall and Richard Anemone, President of the Tucson Police Officer's Association, also provided letters of support in Peasley's disbarment proceeding. Exhibits 10 and 11. In his letter, Anemone stated, "Many of our members have called or made contact with our office requesting our association support Mr. Peasley in this most difficult time." Id.

4.7 James Fillipelli was the lead Detective in Petitioner's case. Fillipelli was involved in the El Grande Market case with former Detective Joe Godoy. Exhibit 9, p. 13. He was listed as a potential witness on Peasley's behalf in a pleading that Peasley's attorney filed in the disbarment proceeding. Id.

4.6 After he resigned from the County Attorney's Office, Peasley continued to have many friends in the Sheriff's Department. Exhibit 12.

4.7 TPD Officer Ben Waters was the State's primary witness against the Petitioner. In his summation, Storts referred to Waters as an "excellent police officer". 23TR31. In his summation, Storts also referred to lead investigator Fillipelli as an "excellent detective". Id. While Storts disputed Waters' testimony that he saw Petitioner drop a gun, he argued only that he was mistaken. Id. at 58. He argued that Waters saw a gun later in the investigation but then imagined that he had seen a gun when he first encountered the Petitioner. Id. Waters' testimony was contradicted by defense witness, Dr. Harmon Harrison, who testified that he did not see Petitioner holding a gun when Waters first halted his patrol car to interdict the Petitioner. 16TR60-77. Waters would

have had a motive to testify falsely in favor of the State since Petitioner was alleged to be responsible for the death of his partner. Storts had a basis for challenging Waters' credibility but failed to do so.

4.8 TPD Officer Jose Rocha was called as a witness for the State. 12TR 45. He testified on direct that he assisted Officer Waters in gaining control of the Petitioner. Id. at 49. He testified that he released the Defendant to Officer Maish and observed him conduct a search of the Defendant. Id. at 50. He testified that he observed Officer Maish remove live ammunition from the Defendant's pocket and hand the ammunition to him. Id. He then put the rounds into his back pocket to make sure that he had both hands free. Id. He testified that he then took the rounds of ammunition from his back pocket and gave them back to Officer Maish. Id. Officer Rocha failed to mention this information in his police report. Exhibit 13. In a pre-trial interview with the defense investigator, he stated that Officer Merrill was the one who found the cartridges in the Defendant's pockets. Exhibit 14. In his cross examination of Rocha, Storts failed to impeach him with the discrepancy between his trial testimony and his report, or the discrepancy between his testimony and the pre-trial interview with the defense investigator. 12TR 52-61.

4.9 In his direct examination testimony, TPD Officer Michael Merrill testified that he was the one who searched the Defendant and found the live rounds. 8TR 102. The crime occurred on March 26, 2003. Rocha responded to the scene at 1900 hours. Exhibit 13. The unspent bullets were not checked

into TPD property room until 10:00 a.m. the next day. Exhibit 15.

4.10 Although Storts had a basis for challenging the credibility of Officers Rocha and Merrill, and to suggest that evidence had been planted by the police, he elected not to do so. His final argument on this topic was devoted to showing the jury that he would never cast aspersions on a police officer. Thus he stated:

> They-they-the State made - - a question to Officer Merrill, you know, let's get right to it did you plant these five casings in - bullets in Mr. Cruz' pocket? I never said that, folks, I challenge one of you to find where I ever made an inference, an implication that a police officer, a lead police officer planted evidence. I didn't say that. But what I did say, is what the evidence can't refute, and what the State can't deny and what did or did not happen. We had in fact, Officer Rocha say, I escorted Mr. Cruz out to Officer Merrill's car. Officer Merrill, he then began his search of officer - of Mr. Cruz after I had patted him down. And when I patted him, around the waist, and he didn't discovery anything. But he says then Officer Merrill searched him and found five bullets in his pocket. I put them in my back pocket, then he said he eventually gave them back to Officer Merrill.
>
> The same story, then we heard from Officer Merrill. He says, well, no, I took the bullets out and I put the bullets in my right, front pocket, and then I found the other items, put them in an envelope and then carried the bul-

lets around with me until I finally had them put into evidence later on that evening down at the police station.

Officer Dobell says none of that happened. He said, I took control of Mr. Cruz, put him in Officer Merrill's patrol car, I believe that he had already been searched. And at the same time, Officer Merrill was behind the wheel. **You know, I'm not implying or saying anybody did anything.** All I'm saying is, you as jurors, are entitled to the facts and those are the facts that came out on the stand.

Now, the State wants to try and make an inference that I'm saying that somebody planted evidenced. **Well, I've been doing this a long time, I've never made that inference and I'm certainly not doing it now to an officer like Officer Merrill.** All I'm saying is, those are the facts, you make what ever inferences you want from them because that's what your job as jurors are [sic].

23TR 62-64, (emphasis supplied).

4.11 Petitioner chose not to testify in trial. However, before final arguments in the penalty phase, he gave an unsworn statement to the jury. 30TR 26-31. In his statement, Petitioner expressed sympathy for the Hardesty family but repeatedly denied committing the crime. Id. Petitioner decided to exercise his right of allocution because either Storts or Peasley advised that he needed to make a statement to the jury. Exhibit 5. Peasley wrote the allocution statement and Petitioner read what Peasley had written. Id. Neither Storts nor Peasley advised Petitioner that Peasley had conflicting loyalties. Id. Petitioner

never waived the conflict. Id. Storts and Peasley never advised Petitioner of the potential adverse consequences of making an allocution statement in which he failed to take responsibility for the crime. As experienced capital practitioners, Storts and Peasley knew or should have known of the likely adverse consequences of Petitoner's failure to take responsibility. Petitioner's failure to take responsibility for the crime in his allocution statement substantially increased the likelihood that the jury would vote to impose a death sentence.[3] Based upon his extensive capital litigation experience and his close professional relationship with lead prosecutor Unklesby, Peasley knew or should have known that Unklesby would exploit Petitioner's failure to take responsibility for the crime.

4.12 Not surprisingly, Unklesby argued in his final summation as follows:

> I suggest to you, ladies and gentlemen, that the evidence that you've heard in mitigation is insufficient in this case **starting with the defendant's statement this morning.** Because his words rang absolutely hollow. **The defendant could not even accept responsibility for what he did in this case.** And he said he wanted to somehow perpetuate the myth that somehow, someone else must have

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[3] As Teresa McMahill points out in her affidavit, "Almost 40% of the jurors interviewed by the Capital Jury Project stated that they were more likely to vote for death if the defendant expressed no remorse for his offense, which is second only to the aggravating weight jurors gave to a violent prior record." Exhibit 16, p.

> come in from somewhere and committed this murder. They didn't, he did.
>
> But his failure to accept responsibility for what he did is shown throughout his life and is shown throughout every bit of testimony that you heard over the last week when mitigation started. He has failed to accept responsibility for his own actions repeatedly throughout his life. He has failed to accept responsibility for his own children. He has failed to accept responsibility for his wife. He has simply failed to accept responsibility for anything because he made choices to do what he wanted to do.

30TR 50, 51, (emphasis supplied).

4.12 Peaseley acted as an attorney while working under the supervision of Storts in Petitioner's case. While he was no longer employed by the County Attorney's Office, Peasley continued to have strong ties and loyalties to the Count Attorney's Office and the law enforcement community. The prosecutor and lead detective in Petitioner's case, the County Attorney, and the President of the Police Officer's Association all supported Peasley in his State Bar disciplinary proceedings. Storts through his connections to Peasley and Godoy had similar ties to the County Attorney's Office and the law enforcement community. Both Storts and Peasley had a personal interest in the case which diverged from that of their client. As described above, their personal interests affected the manner in which they handled the case. Petitioner was thereby deprived of his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

V. SECOND CLAIM INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

5.1 Petitioner repeats and re-alleges the factual allegations in Paragraphs 4.1 through 4.12.

5.2 Petitioner was deprived of effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

V. THIRD CLAIM - INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

6.1 Petitioner repeats and re-alleges the allegations in paragraphs 4.1 through 4.12.

6.2 Petitioner was arrested on May 26. Mary Durand was appointed as the mitigation specialist for the trial team on October 27, 2003. Exhibit 17. Durand resigned from the trial team on June 28, 2004, claiming that she had objections to Ken Peasley's involvement in the case. Exhibit 18. At the time of her resignation, Durand had conducted no interviews of mitigation witnesses and had collected only a limited number of records. Exhibits 4 and 19. As a result of Durand's dereliction, lead counsel Storts later recommended to the Office of Court Appointed Counsel that she not be paid for her work. Exhibit 19.

6.3 Following Durand's resignation, Margaret DiFrank was assigned the responsibility of interviewing potential mitigation witnesses. Exhibit 4. DiFrank had previously worked on the case as the guilt phase investigator. Id. She had no prior training and experience as a mitigation specialist. Id. She had attended no seminars, and was unfamiliar with

the ABA mitigation guidelines or the relevant case law. Id. She was merely given a copy of the Arizona capital punishment statute and a list of witnesses to interview. Id. DiFrank had no training in recognizing potential mental illness or in making recommendations to counsel as to appropriate mental health experts. Id. DiFrank had no training in the importance of gathering documents or in integrating documents with information gathered from potential mitigation witnesses. Id. DiFrank was afforded inadequate time to complete her assignments. Id. She brought this problem to the attention of trial counsel and her concerns were ignored. Id.

6.4 DiFrank had no responsibilities in the penalty phase other than to interview potential mitigation witnesses. Id. Another member of the team was assigned to gather records. Exhibit 4. DiFrank had no access to any of the records gathered by others. Id. DiFrank was not involved in the selection of experts or in preparation for their testimony. Id. Trial began on January 19, 2005. 1TER 1. The mitigation portion of the penalty phase began on March 1, 2005 and culminated in a verdict in favor of the death penalty on March 8, 2005. 25TR, 30TR. Between the time of Durand's resignation and the verdict in favor of the death penalty, there was no mitigation specialist on the team.

6.5 During the penalty phase, the defense called the following experts:

- Dr. Barillas - a clinical psychologist
- Dr. Laura McCloskey - a child abuse expert
- Dr. Austein - an addiction expert

- Dr. French - an expert on the effects of cocaine and methamphetamine.

According to several of the lay witnesses called by the defense, Petitioner had a long history of drug abuse. 26TR 99, 132, 151. In the days leading up to the offense, Petitioner was using methamphetamine, which made him paranoid. Id. at 151. According Dr. French, Petitioner had a high level of methamphetamine and cocaine in his system at the time of the offense. 28TR 119. None of the above named experts was asked to render an opinion on Petitioner's mental state at the time of the offense. 27TR 33-34, 83, 28TR 18-53, 131. None of the experts was asked to render an opinion as to the causal connection between the Petitioner's social history and the crime.

6.6 When she testified, child abuse expert Dr. McCloskey was unaware of the extent of the physical abuse that Petitioner suffered at the hands of his father, John Cruz, Sr. On cross examination, she testified as follows:

> I'm not saying Mr. Cruz routinely beat his child. I don't know that. I don't know that at all.

28TR 56.

6.7 In its decision to uphold the death sentence, the Arizona Supreme Court faulted Petitioner for his weak mitigation evidence and his failure to demonstrate a causal between the mitigation evidenced at the crime. It stated as follows:

> Although Cruz's early life was certainly not ideal, absent the type of horrible abuse often found in our capital jurisprudence. Cruz was neither suffering from any significant mental

> illness nor under the influence of drugs at the time of the crime. The evidence presented on most of these mitigating circumstances was weak, and Cruz established little or no causal relationship between the mitigating circumstances and the crime. Moreover, much of the mitigating evidence offered by Cruz was effectively rebutted by the State. The jury did not abuse its discretion by determining that Cruz should be sentenced to death.

State v. Cruz, 218 Ariz. 149, 171, 181 P. 3d 196, 218 (2008).

6.8 Since her participation in *State v. Cruz,* Margaret DiFrank has undergone considerable training as a mitigation specialist. Exhibit 4. She has handled three capital cases as the mitigation specialist and her credentials as a mitigation specialist are recognized by the Pima County Office of Court Appointed Counsel. Id. In February 2011, she was retained by PCR counsel to re-investigate the mitigation case and to complete the work that she previously did not have time to complete. Id. Since beginning her work with PCR counsel, DiFrank has interviewed the following witnesses and was able to derive the following information:

Anna Montenegro: She provided information corroborating the physical and emotional abuse suffered by the Petitioner and his mother at the hands of the Petitioner's father, John Valencia Cruz. In addition, she recounted how Petitioner was abandoned by his mother. Exhibit 20.

Albert Montenegro: He provided information similar to that of his wife, Anna Montenegro. In addition, he provided information about John Valencia Cruz's

explosive temper and propensity for violence. Exhibit 21.

Daniel Montenegro: He provided information about additional acts of molestation committed by his father, Albert Montenegro Sr., information about drug dealing on the part of family members, information about drug use on the part of the Petitioner's mother, Julie Lingenfelter, and information about past instances of police brutality suffered by his family. Exhibits 22 and 23.

Edward Montenegro: He provided information about Julie Lingenfelter' drug use, Petitioner's drug use, and information about past instances of police brutality suffered by the Montenegro family. Exhibits 24 and 25.

Luis Montenegro: He provided information about Petitioner's early exposure to drug use and about past instances of police brutality suffered by the Montenegro family. Exhibits 26 and 27.

Lori Galioto: She provided information about the family history of drug dealing and drug use, about Petitioner's use of drugs, about Petitioner's mental state while under the influence of drugs, and about his mother's failure to provide anything but financial support. Exhibit 28.

Susan Alcaraz: She provided information about the extent of the abuse and violence engaged in by her father, Albert Montenegro, Sr., about the extreme poverty suffered by the Montenegro family, about the sexual molestation suffered by the Petitioner's mother, about the domestic violence witnessed by the Petitioner, about the Petitioner's abandonment by his mother, about his mother's drug use, about his mother's mental illness, about the Petitioner's early

exposure to drugs and alcohol, and about his being shunted from caretaker to caretaker while growing up. Exhibits 29 and 30.

Henry Cruz: He is the brother of the Defendant's deceased father, John Valencia Cruz. He provided information about alcoholism and violent child abuse on the part of his father, Rogelio Cruz. This information was never presented to the jury and tends to explain why John Valencia Cruz acted out violently against Julie Lingenfelter and the Petitioner. Exhibit 31.

Julie Lingenfelter: She provided information about her mental illness, about sexual and physical abuse that she suffered at the hands of her father, about extreme and repeated physical abuse that the Petitioner suffered at the hands of his father, about the physical abuse that she suffered at the hands of her second husband, about Petitioner's untreated learning disability, and about her own neglect of the Petitioner. Exhibit 32.

Tara White: She provided information about the Petitioner's depression and previous suicide attempts, about the abuse and neglect that Petitioner suffered at the hands of his parents, about his previous unsuccessful attempts at drug rehabilitation, about his abstinence from drugs while working for her family, about his loving and gentle nature toward their son. She provided further information about the extent of Petitioner's drug use and his bizarre, paranoid behavior. This included remaining at home for long periods with the curtains drawn, sleeping for days, remaining awake for days, and being constantly anxious and withdrawn. Exhibit 33.

Jennifer Morse: She was the Petitioner's main love interest at the time of the offense. She provided information on his escalating pattern of methamphetamine use and paranoid behavior while under the influence. She provided information on the Petitioner's attentive and loving behavior when he was not high on drugs. She provided examples of Petitioner's extreme paranoid behavior, which included mounting surveillance cameras on their rented apartment and watching the video transmission from inside. Exhibits 34 and 35.

Romelia Holguin: She is the Petitioner's aunt on his father's side. According to Holguin, Petitioner visited her at home in May 2003 shortly before his arrest for the Hardesty murder. He informed her that he had recently been beaten up by the police and he showed her bruises on his abdomen. During the visit, he appeared to be anxious and paranoid. Exhibits 36 and 37.

6.9 In addition to the above, DiFrank has obtained previously undiscovered records highly relevant to the mitigation case. These include Julie Lingenfelter's mental health records, which disclose a long history of psychiatric treatment and reliance on prescription drugs. Exhibit 4. They included the criminal histories of the Petitioner's uncles. Id.

6.10 PCR counsel retained Teresa McMahill, an experienced mitigation specialist, to review the case and render opinions as to whether the trial team's failure to retain a mitigation specialist following Durand's departure from the case violated then prevailing professional norms. Exhibit 16. Based upon her investigation and review of the records, the trial team's performance failed to comply with then

prevailing professional standards in the following respects:

The trial team failed to have a qualified mitigation specialist on the team equipped with the skills for which mitigation specialists are uniquely trained. Id.

The trial team failed to obtain relevant records, including the mental health records of Petitioner's mother. Id.

The trial team failed to obtain information that the experts needed to render complete opinions. Id.

The trial team failed to present the testimony of qualified mental health experts who could render opinions on the causal connection between the Petitioner's mitigation evidence and the crime. A qualified mitigation specialist would have recognized the necessity of presenting such testimony and would have advised trial counsel in the selection of appropriate experts. Id.

The trial team failed to present testimony on the Petitioner's mental status at the time of the offense. A qualified mitigation expert would have recognized the importance of such testimony and would have advised the trial team accordingly. Id.

The trial team failed to consider the effects of culture in presenting the mitigation case. A qualified mitigation specialist would have recognized the importance of presenting such testimony and would have advised the trial team accordingly. Id.

The trial team did not have sufficient time to do a thorough and complete mitigation investigation. Id.

6.11 Child abuse expert Laura McCloskey was provided with inadequate information upon which to render full and complete opinions. She was later

provided with additional evidence developed in the course of the PCR investigation. Exhibit 38. This information included the mother's more complete description of physical abuse suffered by the Petitioner. Id. It included corroboration that the abuse had taken place. Id. It included information regarding the mother's drug abuse and promiscuity. Id. It included information on the mother's mental health history. Id. It included information regarding Petitioner's abandonment by his mother. Id. It included information regarding Petitioner's early exposure to illegal activity and drug abuse. Id. Based upon this information, McCloskey was able to render more thorough and complete opinions. Id. She was able to render an opinion that Petitioner suffered long terms effects of child abuse and exposure to drugs and that it affected behavior and predisposed him to criminal conduct as an adult. Id. Had this evidence been presented to the jury at the time of Petitioner's sentencing hearing, it would have undermined the State's argument that the crime was the product of Petitioner's choice and free will.

6.12 Clinical psychologist Hector Barillas was provided with inadequate information upon which to render full and complete opinions. The additional information developed in the course of the PCR investigation included evidence of a learning disability. Id. The new information enabled Dr. Barillas to render an additional diagnosis of possible hyperactivity/attention deficit disorder. Exhibit 39. According to Dr. Barillas, this condition would have predisposed the Petitioner to intoxicant abuse as an adolescent. Id. Dr. Barillas was furthermore asked by PCR counsel to render an opinion on Petitioner's mental state at the time of the offense. According to

Dr. Barillas, "it is my opinion now, to a high degree of psychological certainty that he was probably under the influence of at least cocaine and amphetamine at or shortly before the time of his arrest for the instant offense. Thus his judgment was probably impaired to conform his conduct to the requirement of the law." Id.

6.13 PCR counsel provided forensic psychologist Mark Cunningham with the trial transcript, documents obtained as a result of the original mitigation investigation, and documents and witness statements obtained in the course of the PCR investigation. Based upon this material, Dr. Cunningham was able to render an opinion that Petitioner was exposed to a large number of risk factors that predisposed him to mental illness and drug dependence. Id. As a result, Petitioner's choices as an adult were extremely limited and therefore his criminal conduct was not simply the product of choice and free will, as argued by the State in its closing remarks to the jury. Id. Dr. Cunningham identified the following risk factors in Petitioner's background:

- Trans generational family dysfunction
- Hereditary predisposition to psychological disorder
- Hereditary predisposition to abuse of alcohol and drugs
- Probable fetal substance exposure
- Learning problems in school
- Chronic stress in childhood
- Head injuries
- Mother's psychological disorders

- Mother's substance abuse
- Chronic marital conflict and observed domestic violence
- Emotional and supervisory neglect
- Inadequate maternal bonding
- Physical and psychological abuse
- Father's modeling of aggression and weapons encouragement
- Household and caretaker instability
- Post divorce absence of father
- Rejection by step parents
- Death of father
- Criminal modeling of maternal uncles
- Corruptive community
- Availability of alcohol and drugs
- Childhood onset of alcohol and drug abuse
- Pathological grief response to father's death
- Anticipation of premature morbidity
- Teen onset of psychological disorders
- Cocaine and methamphetamine abuse

6.14 In his report, Dr. Cunningham concluded:

> The jury was deprived of critically important information regarding 27 damaging or limiting developmental factors and the nexus of these factors to Johnny's substance dependence, associated criminal offending, and the drug-related capital offense. The absence of such critically important evidence and associated perspectives fundamentally diminished the mitigation history and factors that were

> brought to the attention of the jury and the court at Johnny's capital sentencing phase, and further significantly diminished the ability of the jury to give these factors proper weight in determining his death worthiness. There is a logical nexus between the adverse developmental factors and Mr. Cruz's background and the capital offense. All of these pathological experiences and influences formed the person who engaged in this murderous conduct. To capsule, the transgenerational disturbance and disruption in Mr. Cruz's family system undermined the psychological resources and parenting capabilities of Mr. Cruz's parents, as well as subjecting him to inherited predispositions for psychological disorder, personality pathology, and substance abuse and dependence.

6.15 The trial lawyers were ineffective in failing to have a qualified mitigation specialist on the team after Durand withdrew from the case. The trial lawyers were ineffective in failing to provide Margaret DiFrank with sufficient time to do a thorough and complete investigation. The trial lawyers were ineffective in failing to discover relevant mitigation information and in failing to provide that information to the testifying experts. The trial lawyers were ineffective in failing to have their mental health expert render an opinion on Petitioner's mental status at the time of the offense. The trial lawyers were ineffective in failing to present expert testimony establishing a causal connection between Petitioner's social history and the crime. The trial lawyers were ineffective in failing to properly advise the Petitioner of the dangers and disadvantages of

making an unsworn statement to the jury in the penalty phase, in which he denied commission of the crime. But for these deficiencies, there is a reasonable probability that Petitioner would have received a sentence of less than death. Petitioner was thereby deprived of his right to the effective assistance of counsel at sentencing in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

VII. PRAYER FOR RELIEF

7.1 Petitioner should be afforded an evidentiary hearing.

7.2 Following the hearing, the conviction and death sentence should be reversed.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PETITIONER WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO CONFLICT FREE COUNSEL

In the relevant part, ER 1.7(a) provides:

> A current conflict of interest exists if:
>
> (2) there is a significant risk that the representation of one or more client's will be materially limited by the lawyers's responsibility to another client, a former client, or a third person or by a personal interest of the lawyer.

ER 1.10(a) provides:

> While lawyers are associated in a firm, none of them shall knowingly represent a client, when any one of the practicing alone would be prohibited from doing so by ERs 1.7 or 1.9, unless the prohibition is based on a personal interest

> of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

In *Manhalt v. Reed,* 847 F. 2d 576. 579, 580, (9th Cir. 1988), the Court of Appeals stated:

> The sixth amendment guarantee of effective assistance of counsel comprises two correlative rights: the right to counsel of reasonable competence, (cite omitted), and the right to counsel's undivided loyalty, (cite omitted). The Supreme Court has articulated the different standards by which to judge the violation of these rights. To establish a sixth amendment violation based on conflict of interest the defendant must show 1) that counsel actively represented conflicting interests, and 2) that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan,* 446 U.S. 668, 692, 104 S. Ct. 1708, 1719, 80 L. Ed. 2d 674 (1984). **Unlike a challenge to counsel's competency, prejudice is presumed if the defendant makes such a showing.** (cite omitted). Although *Cuyler* involved a conflict of interest between clients, the presumption of prejudice **extends to a conflict between a client and his lawyer's personal interest.** (Emphasis supplied).

In *Manhalt,* the lawyer, Kempton, represented Manhalt who was charged with robbery and receiving stolen property. The main witness against Manhalt was Morris, a former associate of Manhalt. Prior to trial, Kempton became aware that Morris was accusing him of buying stolen property from Man-

halt. In spite of this accusation, Kempton made no effort to inform his client of the conflict or withdraw from the case. The Ninth Circuit granted the habeas petition and reversed the conviction, finding that Kempton had an actual conflict, namely a personal interest in the case that affected his performance. The Court observed that, "Kempton's personal interest in preserving his reputation and avoiding criminal prosecution may have impacted the manner of cross examination." Id. at 582.

In *Maiden v. Bunnell,* 35 F. 3d 477 (9th Cir. 1994), the defendant was represented by a former prosecutor who had prosecuted the defendant when he was employed by the District Attorney's Office. The defendant was made aware of the potential conflict at the outset of the trial and waived it. The Court of Appeals held that under the facts presented, there was no actual conflict of interest. There was no evidence that the attorney had any present connection with the District Attorney's Office or that he provided confidential information to his adversary. The defendant presented no evidence that the alleged conflict had affected his lawyer's performance. The Court observed, "We by no means endorse the practice of switching sides in criminal cases. We merely hold that it does not necessarily create a conflict of interests for constitutional purposes, and that it did not in fact do so here. The practice may well raise ethical problems for practitioners." Id. at 481, FN4.

Kenneth Peasley was a former Deputy County Attorney who was disbarred in 2004 for suborning perjury in capital murder cases which he tried in 1993 and 1997. In its decision upholding the disbar-

ment recommendation of the State Bar Disciplinary Commission, the Arizona Supreme Court found that Peasley acted with a dishonest motive. *In Re Peasley,* 208 Ariz. 27, 37, 90 P. 3d 764, 774 (2004). While at the County Attorney's Office, Peasley handled homicide cases, including a number of cases in which the death penalty was sought. While at the County Attorney's Office, Peasley was a mentor to Rick Unklesby, the lead prosecutor in Petitioner's case. Unklesby wrote a letter on on Peasley's behalf in the disbarment proceedings, testifying to his good character. Pima County Attorney Barbara LaWall and the President of the Police Officer's Association also submitted letters on Peasley's behalf. James Filipelli was the lead detective in Petitioner's case. Prior to the disbarment hearing, Peasley's lawyer submitted a pleading in which Unklesby and Filipelli were listed as potential witnesses for Peasley. Peasley resigned from the County Attorney's Office in 2003 while the disciplinary proceedings were pending. Prior to his resignation, Peasley served as a legal advisor to the Pima County Sheriff's Office. Peasley continued to have many friends in the Sheriff's Office after he resigned from the County Attorney's Office.

After Peasley resigned from the County Attorney's Office, he worked as a "paralegal" for Petitioner's counsel Brick Storts. Joe Godoy was the Tucson Police Detective who was found to have given perjured testimony in the cases which led to Peasley's disbarment. After he left the Police Department, Godoy worked for Storts and an investigator. Godoy was married to Teresa Godoy, a Deputy County Attorney. Peasley worked as a paralegal on Petitioner's case. He attended team meetings, drafted pleadings, and wrote the allocution statement that Peti-

tioner read to the jury at the commencement of the Penalty phase. Working in this capacity, Peasley was functioning as an attorney although he had been disbarred. Godoy performed some investigative tasks on Petitioner's case, although he was not the lead investigator. Godoy knew the State's main witness, Officer Ben Waters and the victim, Officer Patrick Hardesty. Although he was no longer employed by the County Attorney's Office, Peasley continue to have ties to many in the law enforcement community and enjoy their support. Lead counsel Storts had similar ties, as shown by his willingness to retain Peasley and Godoy.

The issue in this case is not one of successive representation. Petitioner maintains that Peasley and Storts had a personal interest in the case which diverged from that of their client. Prior to his resignation, Peasley had a long career at the County Attorney's Office during which time he formed close personal relationships with many in the law enforcement community. These ties lasted beyond his departure from that office. Those personal relationships included County Attorney Lawall and Deputy County Attorney Rick Unklesby, both of whom supported Peasley in his disbarment proceeding. Peasley undoubtedly had a strong sense of loyalty to LaWall, Unklesby and others in the law enforcement community who supported him through what must have been a difficult time in his life. That sense of loyalty would have been particularly acute in a case such as this one involving the highly publicized murder of a police officer. The picture that emerges from Peasley's disbarment is one of an overzealous prosecutor. It seems most unlikely in a case such as

this one that Peasley would have ignored his past ties.

Peasley's conflict infected Storts, who was Peasley's supervisor and responsible for his actions. Peasley and Storts worked together closely on Petitioner's case. This was not like a large firm where a "Great Wall of China" could have been erected to insulate Storts from Peasley. It is also apparent that Storts had his own interest to protect. Why did Storts hire Peasley and Godoy if not to curry favor with individuals in the prosecutor's office and law enforcement, many of whom felt that Peasley and Godoy had been wrongly accused? In the final analysis, Storts was more concerned about his relationship with the police and the prosecutor's office than he was about his client. If that were not so, he would never have allowed conflicted individuals like Peasley and Godoy to work on this case.

This case is not like *Maiden v. Bunnell,* supra, where there was no evidence of an actual conflict. Based upon the foregoing, Petitioner maintains that Peasley and Storts had an actual conflict—namely a personal interest in the outcome of the case that diverged from that of their client. Moreover, the conflict affected their performance. Assuming for the sake of argument that Storts had a legitimate tactical reason for not directly attacking the credibility of police witnesses so as to avoid offending the jury, he would have had no reason other than personal interest to vouch for them as he did when he referred to Waters and Fillipelli as "excellent" officers, or when he suggested, based upon his years of experience, that an officer like Merrill would never plant evi-

dence. His vouching for the honor and integrity of his adversaries had no legitimate tactical justification.

Peasley's personal interest affected the manner in which he composed Petitioner's allocution statement and the manner in which he advised Petitioner on what to say. Given his long experience as a capital litigator, it is inconceivable that Peasley would not have known what the likely effect would be of Petitioner's failure to take responsibility for the crime in front of the jury. It is just as unlikely that Peasley would not have known what Unklesby was going to say in his summation, once Petitioner unwittingly provided the basis of the prosecutor's closing. Assuming for the sake of argument that the idea for denying the crime in the allocution statement came from Petitioner rather than Peasley, Peasely and Storts should have done everything possible to dissuade Petitioner from saying what he said. Peasley either encouraged Petitioner to deny the crime in front of the jury, or he did nothing to prevent Petitioner from do so, knowing what the likely effect would be. Furthermore, Peasley's actions in composing the allocution statement are unlikely to have been the product of mere incompetence or neglect. By all accounts, Peasley was a competent and highly skilled practitioner during his years at the County Attorney's office. The only reasonable explanation is that Peasley wanted to assist his former colleague Rick Unklesby to obtain a death sentence in a case involving the murder of a police officer.

With the case in its present posture, the issue is not whether Petitioner should be granted relief but whether he has raised a "colorable claim" that would entitle him to an evidentiary hearing. A court may

summarily dismiss a petition for post conviction relief only if "there is no material issue of fact or law which would entitle the defendant to relief..." See Criminal Rule 32.6(c). In order to receive an evidentiary hearing, the Petitioner must present a "colorable claim" — one which, if true, would have changed the outcome of the proceeding. *State v. Bowers,* 192 Ariz.419, 422, 966 P. 2d 1023 (1998), citing *State v. Watton,* 164 Ariz. 323, 328, 793 P. 2d 80 (1990). A decision as to whether petitioner presents a colorable claim is "to some extent, a discretionary decision with the trial court." Id. "The trial court must be mindful, however that, when doubt exists, a hearing should be held to allow the defendant to raise relevant issues and make a record for review." Id., quoting from *State v. D'Ambrosio,* 156 Ariz. 71, 71, 750 P. 2d 714 (1988). The standard is similar to that for granting summary judgment under Civil Rule 56, wherein facts presented by the non-moving party are assumed to be true. The federal standard for granting an evidentiary hearing is incorporated into Criminal Rule 32.6. The official commentary states, "...if the court finds any colorable claim, it is required by *Townsend v. Sain,* 83 S. Ct. 745, 372 U.S. 293, 9. L. Ed. 2d 770 (1960), to make a full factual determination before deciding it [the PCR] on its merits." Under the federal standard, unless patently false, the facts alleged in the petition must be assumed to be true for summary dismissal purposes. *Blackledge v. Allison,* 431 U.S. 63, 76 (1977).

Based on the foregoing, Petitioner maintains that he has presented a colorable claim and is entitled to an evidentiary hearing.

II. PETITIONER WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Officers Waters, Rocha and Merrill were the key witnesses in the States' case. They connected Petitioner to the murder weapon and to the unspent cartridges that were allegedly found in his pocket. Trial counsel had evidence upon which to challenge their credibility but failed to do so. This dereliction fell below prevailing professional norms. *Strickland v. Washington,* 466 U.S. 668, 80 L. Ed. 2d 674. 104 S. Ct. 2052 (1984). But for this failure there is a reasonable probability that Petitioner would have acquitted of the single count of first degree murder. As a result of this failure, the results of the trial were unreliable and fundamentally unfair. *Lockhart v. Fretwell,* 506 U.S. 364, 122 L. Ed. 2d 180, 113 S.Ct.838 (1993).

III. PETITIONER WAS DEPRIVED OF EFFECTIVE COUNSEL AT SENTENCING

The Supreme Court has provided specific guidance with respect to reasonable professional assistance in the sentencing phase of a capital case. *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L. Ed. 2d 389 (2000); *Wiggins v. Smith,* 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Rompilla v. Beard,* 545 U.S. 374, 125 S.Ct. 2456, 162 L. Ed. 2d 360 (2005). In particular, the Court has recognized that counsel in a capital case has "an obligation to conduct a thorough investigation of the defendant's background" to determine the availability of mitigating evidence. *Williams,* 529 U.S. at 396. Counsel's "investigation into mitigating evidence should comprise efforts to discover all reasonably available

mitigating evidence and evidence to rebut an aggravating evidence that may be introduced." *Wiggins,* 539 U.S. at 524. In this line of cases, the Court emphasized that in analyzing a claim that capital defense counsel provided ineffective assistance by failing to investigate mitigating evidence, the "principal concern....is not whether counsel should have presented a mitigation case. Rather the Court's focus is on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background was itself reasonable." *Wiggins* 539 U.S. at 522-523. Likewise, the Supreme Court has instructed that "[i]n assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins* at 527. The Court in *Wiggins* held that ABA Standards may serve as guides in determining what is reasonable representation in a capital case. 539 U.S. at 524

In *Bobby v. Van Hook,* ___ U.S. ___, , 130 S. Ct. 13, 175 L. Ed. 2d 255 (2009), the Supreme Court held that ABA standards may be useful guides in determining reasonableness of counsel's conduct, but only to the extent that they describe professional norms at the time that the representation took place. In *Sears v. Upton,* the Court held that one cannot assess the reasonableness of counsel's theory without considering whether counsel conducted a reasonable investigation. ___ U. S. ___, 130 S. Ct. 3259, 177 L. Ed. 2d 1025 (2010). The reasonableness of trial counsel's theory is irrelevant in assessing the impact of evidence that would have been available if counsel had conducted a reasonable investigation. Id. The

fact that trial counsel presented some evidence does not preclude a determination of prejudice. Id. In assessing prejudice the reviewing court must consider the evidence developed in post conviction, as well as the evidence presented at trial. Id.

"Counsel should choose experts who are tailored to the needs of the case, rather than an "all-purpose" expert who may have insufficient knowledge or expertise to testify persuasively." American Bar Association Guidelines for the Appointment and Retention of Counsel in Death Penalty Cases. 2003 Edition, Commentary to Guideline 10.11, p. 1061. The obligation to select an appropriate expert is part and parcel of the duty of capital defense counsel to discover "all reasonably available mitigating evidence." *Wiggins v. Smith,* 539 U.S. at 524.

In *Caro v. Calderon,* 165 F. 3d 1223 (9th Cir. 1999) four different experts, including a medical doctor, a psychologist and a psychiatrist examined the defendant and none determined that he had an impairment sufficient enough to constitute diminished capacity. The Petitioner had a long history of child abuse, head injury, and exposure to toxic chemicals, which was never brought to the attention of the experts. In addition, trial counsel failed to seek an evaluation by a neurologist or a toxicologist, whose expertise dealt with the specific medical and mental health problems suffered by the petitioner. In remanding for an evidentiary hearing, the Court of Appeals faulted trial counsel for failing to bring relevant information to the attention of the experts and for failing to consult with suitably qualified experts. The Court stated:

> Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult with. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert. Counsel in this case was aware of Caro's extraordinary acute and chronic exposure to neurotoxicants, and yet failed to consult either a neurologist or a toxicologist on the effects of chemical poisoning. In addition, he failed to provide those experts who did examine Caro with the information necessary to make an accurate evaluation of Caro's neurological system.

Id. at 1226, 1227.

On appeal to the Ninth Circuit in *Caro,* the State argued that the petitioner suffered no prejudice because the evidence of guilt was overwhelming and the jury had the benefit of some mitigation evidence including child abuse, head injuries, and exposure to toxic chemicals. In response to this argument, the Court observed:

> The government argues that Caro suffered no prejudice because the jury was presented with extensive mitigating evidence; there was overwhelming evidence of Caro's guilt and aggravating factors weighed against him. The sentencing jury was aware that Caro was beaten and suffered head injuries as a child. The jury also knew that Caro worked as a flagger in high school and at an agricultural chemical company as an adult. The jury did not, however, have the benefit of expert testimony to explain the ramification of these ex-

> periences in Caro's behavior. **Expert testimony is necessary on such issues when lay people are unable to make a reasoned judgment alone.**

Id. at 1227.

In *Bean v. Calderon,* 163 F. 3d 1073 (9th Cir. 1998), trial counsel failed to follow the experts' recommendation as to the need for additional testing, failed to prepare the experts' testimony and failed to provide the experts with accurate and complete information. In reversing the death sentence, the Court of Appeals stated, "When experts request necessary information and are denied it, when testing requested by experts is not performed, and when experts are placed on the stand with virtually no preparation or foundation, a capital defendant has not received effective assistance of counsel." Id. at 1079. In *Wallace v. Stewart,* 184 F. 3d 1112 (9th Cir. 1999), trial counsel failed to investigate the Defendant's background and failed to bring relevant information to the attention of the experts. In reversing the death sentence, the Court of Appeals stated, "Does an attorney have a professional responsibility to investigate and bring to the attention of mental health experts who are examining is client, facts that the experts do not request? The answer, at least at the sentencing phase of a capital case, is yes." Id. at 1116.

In this case, trial counsel failed to conduct an adequate mitigation investigation and thereby failed to bring relevant information to the attention of the mental health experts. This was due to the failure to have a trained mitigation specialist on the team before trial and failure to provide Margaret DiFrank

with adequate time to conduct the investigation. Information that trial counsel's investigation failed to discover included the following:

- The full extent of the physical abuse witnessed and suffered by the Petitioner
- Corroboration that the abuse did in fact occur
- Abandonment by his mother and emotional neglect
- His mother's history of mental illness
- The full extent of the family's history of substance abuse and physical abuse including information of this occurring on the father's side of the family
- Petitioner's early exposure to drug use, including substance abuse on the part of his mother.
- Petitioner's early exposure to illegal activity on the part of family members.
- Petitioner's untreated learning disability and possible diagnosis of ADHD.
- Past instances of police brutality experienced by the family.
- Petitioner's escalating pattern of cocaine and methamphetamine abuse and his bizarre and paranoid behavior while under the influence.

The effects of the trial lawyers' failure to gather the above information and bring it to the attention of the experts was evident in the trial testimony of the child abuse expert, Dr. McCloskey, who was unable to state with certainty whether Petitioner had personally suffered abuse at the hands of his father. As a result, when she testified, McCloskey was unable to render a complete opinion and her testimony was

insufficiently prepared. As a result of now having been provided with information that she should have been provided with before trial, McCloskey is now able to conclude:

> The child abuse descriptions in the current report add different perpetrators and different types of maltreatment; the severity and duration are also worse than revealed several years ago. In my opinion these subsequent disclosures draw a darker picture of Mr. Cruz's early life than was discernable from the available evidence six years ago.

Exhibit 38.

The trial lawyers failed to present a full and complete picture of the Petitioner's drug use in terms of how he came to be drug dependent, how his drug use affected his behavior, and how it would have affected his mental state at the time of the offense. The trial lawyers presented evidence of Petitioner's drug use but none of it was connected to the crime. Due to the absence of appropriate expert testimony such as that now provided by Drs. McCloskey and Cunningham, the trial lawyers failed to explain how Petitioner came to be an addict and how his addiction was not a matter of free will and personal choice. Exhibits 38 and 41.[4] Teresa McMahill explains in her affidavit

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[4] According to Dr. Cunningham,"Drug dependence is not simply "bad conduct". Rather, the drug dependent individual often has inherited a metabolic preference for the effects of such substances that fundamentally alter the experience of "choice". Johnny's genetic predisposition to alcohol and drug dependence, including stimulant abuse and dependence, had a specific nexus to his capital conduct - as this occurred in the midst of a period

that jurors tend to regard drug use as a moral defect unless it is explained in terms of the defendant's comprehensive life story. Exhibit 16.[5] Several lay witnesses – White and Morse – described Petitioner's history of escalating stimulant abuse and his bizarre, paranoid behavior while under the influence. Exhibits 33 and 34. Both Dr. Cunningham and Dr. Barillas now opine that "Petitioner was under the influence at the time of the offense and therefore prone to be "impulsive". Exhibits 39 and 41. Dr. Barillas is now able to conclude that due to drug use and possibly other factors that, "... his judgment was probably impaired to conform his conduct to the requirement of the law." Exhibit 39. None of this testimony was presented to the jury at the time of Petitioner's trial. As a result of their failure, the defense attorneys had no rejoinder to the prosecutor's closing argument that Petitioner's drug use was simply a lifestyle choice.[6] As a result of their failure, the Arizona

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of very heavy stimulant abuse and was characterized by the impulsive aggression that is often displayed in persons with histories of chronic stimulant (i.e., cocaine and methamphetamine) abuse. Exhibit 41, P. 21.

[5] "lf the jury learned more about Mr. Cruz's difficult childhood and how these experiences laid the foundation for his mental disorders, they would have understood how these deficits led him to use drugs." Exhibit 16, page 11.

[6] Prosecutor Unklesby argued in closing, "We all do what's expected of us because it's the right thing to do. But John Cruz didn't do that because it was easier to go back to the drug lifestyle and live with the people he wanted to live with and simply make his living selling drugs, using drugs, and doing what he wanted to do. He fails to accept the responsibility that all of us have to live with, and for that we are supposed to show him leniency because he made the choices to do something in

Supreme Court concluded that Petitioner was not under the influence of drugs at the time he committed the crime. *State v. Cruz,* 218 Ariz. at 171.

Trial counsel failed to present appropriate expert testimony. Dr. Barillas was not asked to render an opinion on Petitioner's mental state at the time of the offense. No expert testimony was presented to demonstrate a nexus between Petitioner's dysfunctional family background and the crime. Drs. Cunningham and McCloskey have now provided reports concluding that Petitioner's choices as an adult were severely limited by the adverse circumstances that he was exposed to in his formative years. As Teresa McMahill points out in her affidavit:

> Psychologist Mark Cunningham has testified in capital trials for decades using what is commonly known as risk-factor analysis. In risk-factor analysis, adverse development factors are identified and weighed in a somewhat formulaic way: the more risk factors one has, the more likelihood he or she will engage in criminal activity. Presenting a defendant's history in this way helps jurors understand the logical connection between background and behavior, and it mitigates the clichéd "abuse excuse".

Exhibit 16, P. 10.

Had such testimony been presented at trial, the defense would have had a rejoinder to the prosecutor's argument that there was no connection between

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his life because it was easier. It was easier to go be a druggy. It was easier to go sell drugs. 30TR 53, 54.

the Petitioner's dysfunctional family background and the crime.[7] Had such testimony been presented at trial, the Arizona Supreme Court would not have been able to conclude as it did that there was no "nexus" between Petitioner's mitigation evidence and the crime. *State v. Cruz,* 218 Ariz. at 171. As the Court pointed out in *Caro v. Calderon, supra,* expert testimony is necessary when lay persons are unable to make a reasoned judgment alone. 165 F. 3d at 1227. Lay persons have a tendency to assume that people outgrow the emotional scars of their childhoods and that a background of child abuse and neglect has little to do with the choices one makes as an adult. Expert testimony is necessary to point out that this assumption simply isn't true.

To summarize, the trial lawyers failed to conduct an adequate mitigation investigation, failed to provide their experts with highly relevant mitigation evidence, failed to present a comprehensive history of drug abuse, failed to show how Petitioner's drug abuse was related to the crime, failed to have mental

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[7] In his closing in the penalty phase, Prosecutor Unklesby argued, "And ladies and gentlemen, it was almost two decades before this man shot and killed Patrick Hardesty that his father died and his parents divorced, and we're still using that as an excuse? We're still using that as an excuse to show this man leniency? He doesn't want to accept responsibility for anything in his life. He wants us to feel sorry for him and show him leniency because 20 years ago his father died and his mother divorced his father. And what does that have to do with what he did on May 26th of 2003? It has absolutely nothing to do with him killing Patrick Hardesty. It's an excuse that he wants you to look at and feel sorry for him because his father died 20 years ago and his mother wasn't a nurturing mother." 30TR 54, 55.

health experts opine on Petitioner's mental state at the time of the offense, failed to present appropriate expert testimony to explain the causal connection between Petitioner's social history and the crime, and failed to prevent their client from denying responsibility for the crime in front of the jury at sentencing. These factors taken together prevented the jury from making a fair and accurate assessment of the penalty. Had these deficiencies not occurred, there is a reasonable probability that the Petitioner would not have been sentenced to death. Petitioner has therefore presented a colorable claim and is entitled to an evidentiary hearing.

III. CONCLUSION

The Court should grant the relief requested herein.

DATED: January 25, 2012

/s/ Gilbert H. Levy

Gilbert H. Levy

Attorney for Petitioner

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,

Respondent,

v.

JOHN MONTENEGRO CRUZ,

Petitioner.

No. CR-2003-1740

Hon. Joan Wagener
Division 24

DEATH PENALTY CASE

SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF

RULE 32, ARIZONA RULES OF CRIMINAL PROCEDURE
FORM 25 DATA

1. Petitioner's name: John Montenegro Cruz

   Petitioner's prison number: #194940

2. Petitioner is now confined in: ASPC-Eyman, Browning Unit

   PO Box 3400

Florence, Arizona 85132

3. Petitioner is eligible for relief because: *See* Claims set forth below.

4. The facts in support of the alleged errors upon which the Petition is based are set forth with respect to the Claims below.

5. Supporting Exhibits are attached as an Appendix to this Petition and referenced in the text of this Petition.

6. Petitioner has taken the following action to secure relief from his conviction or sentence:

   a. Direct Appeal [X] Yes [ ] No

      Direct appeal was taken to the Arizona Supreme Court: *State v. Cruz,* No. CR-05-0163-AP; the conviction and death sentence were affirmed, *State v. Cruz,* 218 Ariz. 149 (1995).

   b. Previous Rule 32 Proceedings:
      [X] Yes [ ] No

      Superior Court of Pima County, Arizona; Petition for Post-Conviction Relief, *State v. Cruz,* Pima Co. No. CR-2003-1740, filed October 27, 2010; relief denied, October 31, 2012; Petition for Review in the Arizona Supreme Court, *State v. Cruz,* Arizona Supreme Court No. CR-12-0529-PC, filed on December 28, 2012; review denied May 29, 2013.

   c. Previous Habeas Corpus or Special Action Proceedings in the Courts of Arizona:

      [ ] Yes [X] No

d. Habeas Corpus or Other Petitions in Federal Courts: [X] Yes [ ] No

Mr. Cruz filed a Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the District of Arizona, on May, 1, 2014 in Case No.CV-13-389-TUC-JGZ. (A copy of the federal habeas petition is attached as Exhibit 16 to this Petition. The case remains pending before the U.S. District Judge Jennifer G. Zipps. On September 28, 2016, Judge Zipps entered an Order permitting undersigned counsel to represent Mr. Cruz in a successive state-postconviction proceeding

7. The issues that are raised in this petition have not been finally decided nor raised in the initial petition for postconviction relief because : The claims are derived from the United States Supreme Court's decision in *Lynch v. Arizona,* 136 S. Ct. 1818 (May 31, 2016) which overruled the Arizona Supreme Court's longstanding, well-established refusal to permit death penalty jurors from being informed that *if* they refused to impose a death-sentence, the defendant would serve a life sentence *without the possibility of parole.* Further, explanation is given below.

8. Because of the foregoing reasons, the relief the petitioner desires is:

   A. [ ] Release from custody and discharge.

   B. [X] A new capital sentencing proceeding.

C. [ ] Correction of sentence.

D. [ ] The right to file a delayed appeal.

E. [ ] Other relief (specify):

Certification Pursuant to Rule 32.5

I swear that this Petition includes all the claims and grounds for post-conviction relief that are known to me, that I understand that no further petitions concerning this conviction may be filed on any ground of which I am aware but do not raise at this time, and that the information contained in this form and any attachments is true to the best of my knowledge or belief.

Dated this 9th day of March, 2017.

Jon Sands
FEDERAL PUBLIC DEFENDER

By: /s/ Cary Sandman
Cary Sandman
Assistant Federal Public Defender
407 W. Congress Street, Suite 501
Tucson, AZ 85701
Tel. (520) 879-7540
Fax (520) 622-6844
cary_sandman@fd.org

Counsel for Petitioner

SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF

I. Introduction

John Montenegro Cruz ("Cruz"), an Arizona prisoner sentenced to death, moves for post-conviction relief pursuant to Rules 32.1(g) of the Arizona Rules of Criminal Procedure. Rule 32.1(g) provides for relief, when the defendant demonstrates "[t]here has been a significant change in the law that . . . would probably overturn defendant's conviction or sentence." Because Cruz relies on a significant change in the law for his successive petition for postconviction relief, the ordinary grounds of preclusion on successor petitions do apply. *See* Rule 32.2(b). Here, the significant change in law results from the decision of the United States Supreme Court in *Lynch v. Arizona,* 136 S. Ct. 1818 (2016) (per curiam).

In *Lynch,* the Supreme Court reversed the Arizona Supreme Court's affirmance of Lynch's death sentence, after finding he had been denied due process, when the trial court prohibited Lynch from informing his jury, that Lynch would serve a life sentence *without the possibility of parole,* if the jury did *not* impose a death sentence. *Id.* at 1818-19. The Supreme Court grounded its *Lynch* decision on its earlier decision in *Simmons v. South Carolina,* 512 U.S. 154 (1994) "Under *Simmons,* . . . 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." *Lynch* at 1819 (internal quotations and

citations omitted). We next address how it was that the Arizona Supreme Court consistently ignored and misapplied the constitutional commands of *Simmons* during a period spanning fourteen years.

In 1994, Arizona abolished parole. This fact was undisputed in *Lynch Id.* at 1819. *See* A.R.S. §41-1604.09 (I) 1994) (abolishing parole for a person who commits a felony after January 1, 1994). Nevertheless, despite its abolition of parole, after the United States Supreme Court's decision in *Ring v. Arizona,* 536 U.S. 584, 608-09 (2002), when the Arizona legislature first adopted jury sentencing for capital cases, it provided that a first degree murder defendant *not* sentenced to death could be either be: (1) sentenced to life, with the possibility of release after twenty-five years; or (2) sentenced to natural life, without the possibility for release on any basis. *See* A.R.S. §13-703 (A) amended by Laws, 2002, 5th S.S., Ch. 1, § 1, eff. Aug. 1, 2002, renumbered as A.R.S. §13-751(A).[1]

Thus juxtaposed, the Arizona Supreme Court repeatedly [and erroneously] relied on §13-703(A) [later renumbered §13-751(A)] to distinguish *Simmons* and to prohibit capital defendants from informing juries of their parole ineligibility. Why? Because, according to the Arizona Supreme Court, defendants *might* still be released; e.g., be released based onexecutive clemency, or be released as a result of future

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[1] Although not material here, in 2102, the statute was amended to provide natural life sentences for all first degree murderers not sentenced to death. *See* A.R.S. §13-751(A) amended by laws 2012, Ch. 207, § 2.

amendment to the state's parole laws. *See, State v. Cruz,* 218 Ariz. 149, ¶40-45 (2008); *State v. Dann,* 220 Ariz. 351, 373 ¶¶ 123-24 (2009) *State v. Chappell,* 225 Ariz. 229, 240, ¶ 42 (2010); *State v. Benson,* 232 Ariz. 452, 465-66, ¶ 58-59 (2013); *State v. Hardy,* 230 Ariz. 281, 293, ¶ 58 (2012); *State v. Hargrave,* 225 Ariz. 1, 14-15, ¶¶ 50-53 (2010); *State v. Hausner,* 230 Ariz. 60, 90, 280 P.3d 604, 634 (2012); *State v. Lynch,* 238 Ariz. 84, ¶62-66 (2015); *rev'd, Lynch v. Arizona* at 136 S. Ct. 1818.

Arizona's misapplication of *Simmons* was finally exposed and corrected by the Supreme Court in *Lynch,* 136 S. Ct. at 1819-20. There, the Supreme Court expressly rejected the Arizona Supreme Court's rationale for failing to apply *Simmons*; explaining that neither the possibility of receiving executive clemency, nor future amendment to the parole laws would distinguish *Simmons. Id.* "Simmons expressly rejected the argument that the possibility of clemency diminishes a capital defendant's right to inform a jury of his parole ineligibility. . ." *Id. Simmons* "also foreclose[d] the argument that the potential for future 'legislative reform' could not justify refusing a parole ineligibility instruction." *Id.,* quoting, *Simmons,* 512 U.S. at 166. The Supreme Court concluded that because ". . . parole was unavailable to Lynch under [Arizona] law . . . *Simmons* and its progeny establish Lynch's right to inform his jury of that fact." *Id.* at 1820.

II. Statement of the case and factual background.

Cruz was convicted for the 2003 first degree murder of Tucson police officer, Patrick Hardesty. *State v. Cruz,* 218 Ariz. 149, ¶ 1-8.[2] Therefore, the offense occurred long after Arizona had abolished parole for Cruz's offense. *Lynch,* 136 S. Ct. at 1819. Cruz became eligible for a death sentence on the basis of the jury's finding of a sole aggravating factor: that Cruz had killed a police officer in the course of that officer performing official duties when Cruz "knew, or should have known that the murdered person was a peace officer." *Id.* at ¶8-9; quoting, A.R.S. §13-703(F)(10) (2003) [renumbered as A.R.S. § 13-751 (F)(10) (2009)]. During his sentencing proceedings, Cruz presented evidence supporting an instruction given to the jury that identified seventeen independent mitigating factors. *Cruz,* at ¶137. Nevertheless, the jury did not find the mitigation sufficiently substantial and it sentenced Cruz to death. *Id.*

Prior to Cruz's sentencing, he proffered evidence from the Chairman of the Arizona Board of Executive Clemency, that after 1994, the Board lacked authority to grant parole to a prisoner sentenced to twenty-five years to life. (Exhibit 1.) This was obviously a correct statement of the law regarding parole ineligibility. *See, Lynch,* 136 S. Ct. at 1819. Nevertheless, after sustaining the prosecution's objection

[2] Cruz was indicted under A.R.S. §1105 (A)(3), which requires proof of killing of a law enforcement officer who is in the line of duty when the defendant intends of knows his/her conduct will cause death. *Id.* at ¶ 128-129.

to Cruz's proffer, the trial court prohibited Cruz from informing his jury that he was ineligible for parole. (Exs. 2, 3, 4, 5, 6, 7 at 8.) Instead, in accordance with A.R.S. 13-703(A), the trial court provided instructions which materially *misinformed* the jurors that if they declined to sentence Cruz to death, the court could impose a sentence of "life imprisonment ***with a possibility of parole . . .*** after twenty-five calendar years of incarceration have been served." (Ex. 8 at 7.) (emphasis added). Later in the instructions, the court reinforced the misrepresentation of Arizona law, reminding the jury that if they did not impose a death sentence, the court could impose one of the two other available punishments; one of which — according the court's earlier instruction — included the possibility of Cruz's release on parole. *(Id.* at 13).

On direct appeal, the Arizona Supreme Court relied on A.R.S. §13-703(A) in support of its conclusion that Cruz's case "differ[ed]" from *Simmons v. South Carolina* because "[n]o state law would have prohibited Cruz's release on parole after serving twenty-five years, had he been given a life sentence." *Cruz,* 218 Ariz. at ¶42. As *Lynch* now demonstrates, this conclusion was clearly erroneous. *See, Lynch,* 136 S. Ct. at 1819 (under Arizona law, parole was abrogated for felonies committed after January 1, 1994). The Arizona Supreme Court also affirmed the trial court's rejection of Cruz's proffer of parole-ineligibility because it was speculative as to what the Board might do in twenty-five years. *Cruz,* 218 Ariz. at ¶ 44-45. This conclusion of the Arizona Supreme Court was constitutionally flawed. *See Lynch,* 136 S. Ct. at 1820 (the speculative potential for future modification of parole eligibility laws "could not

justify refusing parole-ineligibility instruction" required by *Simmons*).

The failure to instruct the jury on Cruz's parole ineligibility, and instead providing the jury with a false and misleading instruction that Cruz was parole-eligible, decidedly prejudiced the outcome of Cruz's sentencing proceeding. For example, after the jury rendered its death verdict, several of the jurors issued a letter bemoaning the fact that they wanted to find a reason to recommend leniency [not impose a death sentence] but they "were not given an option to vote for life in prison without the possibility of parole." (Exhibit 9 to Motion for New Trial filed March 21, 2005, attached as Ex. 9.) Later, M.H., another member of Cruz's jury signed a sworn declaration that "if [she] could have voted for life without parole [she] would have voted for that option." (Ex. 10.) Now, however, because there has been significant change in the law, Rule 32.1(g) provides Cruz with a postconviction remedy affording him a new sentencing, where his jury can be properly instructed that he is not eligible for parole. Therefore, we next demonstrate that there has been a significant change in law, as defined under Rule 32.1(g).

III. Claim for Relief

Cruz satisfies the required showing that "there has been a significant change in the law that . . . would probably overturn [his] sentence" and therefore he is entitled to a new sentencing.

A. There has been a significant change in the law.

After the Supreme Court's reversal in *Lynch,* the Arizona Supreme Court revisited the requirements of *Simmons* in *State v. Escalante-Orozco,* 241 Ariz. 254, ¶116-127 (January 12, 2017). In *Escalante-Orozco,* the Court acknowledged its prior misinterpretation of the due process requirements of *Simmons,* recognizing that in *Lynch,* the United States Supreme Court held that "the possibilities of executive clemency or a future statute authorizing parole '[does not] diminish a capital defendant's right to inform a jury of his parole ineligibility.'" *Id.*at ¶ 117, quoting, *Lynch,* 136 S. Ct. at 1819. As explained below, together, *Lynch* and *Escalante-Orozco* have fashioned a "significant change in the law" within the meaning of Rule 32.1(g).

A "significant change in the law" within the meaning of Rule 32.1(g) "requires some transformative event, a 'clear break from the past.'" *State v. Shrum,* 220 Ariz. 115, ¶15 (2009), quoting, *State v. Slemmer,* 170 Ariz. 174, 182, (1991). "The archetype of such a change occurs when an appellate court overrules previously binding case law." *Id.* at ¶16. Here, the United States Supreme Court's decision in *Lynch* resulted in a significant change in the Arizona Supreme Court's application of federal law; it completely transformed Arizona jurisprudence for instructing

jurors on parole-ineligibility in capital cases, clearly breaking from prior law. The Arizona Supreme Court recently recognized the transformative nature of *Lynch* in *Escalante-Orozco.*

In *Escalante-Orozco* – the Arizona Supreme Court's first *post-Lynch* decision – the jury [like Cruz's jury] had been instructed that Escalante-Orozco could be released after serving twenty-five years in prison. 241 Ariz. at ¶116. However, the Arizona Supreme Court readily acknowledged, its prior decisions relying on this jury instruction to distinguish *Simmons v. South Carolina* had been abrogated by the United States Supreme Court in *Lynch.* As explained by the Arizona High Court; "[t]his court has ***repeatedly*** held that . . . the type of [jury] instruction given by the trial court here does not violate *Simmons* because future release is possible . . . [b]ut the Supreme Court recently rejected this holding . . . [in] *Lynch v. Arizona,* __ U.S. __, 136 S. Ct. 1818 (2016)" *Id.* at ¶117 (emphasis added). Signaling its recognition that its holdings in prior capital cases had been abrogated, the Arizona Supreme Court explained that in *Lynch,* the Supreme Court held that "the possibility of clemency or a future statute authorizing parole "[does not] diminish[ ] a capital defendant's right to inform a jury of his parole ineligibility.'" *Id.,* quoting *Lynch,* 136 S. Ct. at 1819. Accordingly, in *Escalante-Orozco,* the Arizona Supreme Court made a "clear break" from its prior jurisprudence and held that "[i]n light of *Lynch,* the trial court erred by refusing to tell the jury that Escalante-Orozco was ineligible for parole." 241 Ariz. at ¶127.

If there was any doubt about the transformative nature of *Lynch* (and Cruz insists there can be no doubt in the first instance) such doubt is completely erased by the remedy imposed in *Escalante-Orozco.* The Court found the constitutional error "was not harmless" and held "the trial court must conduct new penalty phase proceedings." *Id.* at ¶127. Under the Arizona Supreme Court's prior application of *Simmons, Escalante-Orozco* had no entitlement to relief from his sentencing, but in a "clear break from the past," fairly characterized as a "transformative event," *Escalante-Orozco* will receive a new sentencing proceeding, where a jury – accurately instructed on Escalante-Orozco's parole-ineligibility – may impose a life sentence.

Finally, there is no question but that *Lynch* and *Escalante-Orozco* apply retroactively to Cruz on collateral review. This is so because *Lynch* and ultimately *Escalante-Orozco* rely on *Simmons v. South Carolina,* a 1994 decision that was final prior to Cruz's capital sentencing. " . . . [N]ew decisions [such as *Lynch* and *Escalante-Orozco*] applying 'well established constitutional principle[s] to govern a case which is closely analogous to those which have been previously considered in the prior case law' should generally be applied retroactively, even to cases that have become final and are therefore before the court on collateral proceedings." *State v. Slemmer,* 170 Ariz. at 179-80, quoting *Yates v. Aiken,* 484 U.S. 211, 216 (1988) (recognizing that new decisions relying on earlier established constitutional rule will be retroactively applied to post-conviction claims brought under the "significant change of the law" provisions of Rule 32.1(g). Accordingly, because *Lynch* and *Escalante-Orozco* rely on *Simmons,* the

significant change in the Arizona Supreme Court's application of federal law as generated by those cases accrues to Cruz under Rule 32.

B. Cruz was entitled to inform his jury of his parole-ineligibility because his future dangerousness was at issue.

In *Escalante-Orozco,* the Arizona Supreme Court finally addressed a defendant's due process right to inform a jury of his parole-ineligibility in a manner consistent with *Simmons v. South Carolina,* 241 Ariz. at ¶117-127. "In *Simmons,* the Court held that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires the sentencing jury be informed that the defendant is parole ineligible." *Id.* at ¶117, quoting, *Simmons,* 512 U.S. at 156. As Cruz has already demonstrated above that he was parole-ineligible, the only remaining question is whether Cruz's "future dangerousness [was] at issue." *Id.* Next we show that it was.

"The prosecutor [need] not have to explicitly argue future dangerousness for it to be at issue; instead it is sufficient if future dangerousness is a 'logical inference from the evidence' or is 'injected into the case through the state's closing argument.'" *Id.* at ¶119, quoting, *Kelly v. South Carolina,* 534 U.S. 246, 252 (2002). Dissenting from *Kelly,* Justice Rehnquist accurately defined the elements of proof of future dangerousness: "it is enough if the evidence introduced to prove the other elements of the case has a tendency to prove future dangerousness as well." 534 U.S. at 260 (Rehnquist, C.J., dissenting). "The *Simmons* rule is invoked . . . [merely] by the existence of evidence from which the jury might infer future

dangerousness." *Id.* (Rehnquist, C.J., dissenting). Applying the above criteria, Cruz satisfies the showing that his future dangerousness was at issue during his sentencing proceeding.

The shooting of officer Patrick Hardesty took place in broad daylight on Memorial Day 2003 after Cruz took flight during questioning by officer Hardesty, and his companion officer Ben Waters, about Cruz's alleged involvement in a hit and run accident a bit earlier that afternoon. (Ex. 11 at 89, 93, 97, 102-112.) Cruz ran from the officers. Officer Hardesty chased Cruz on foot and officer Waters used his patrol vehicle in an attempt to drive around and head Cruz off. (*Id.* at 112, 132, 134.) Area residents heard four or five gunshots and observed Cruz running away. (Ex. 12 at 108, 111-12, 170, 214, 218.) Once officer Waters drove his car around, he saw Cruz drop a handgun, and upon Waters exiting his vehicle, Cruz was apprehended. (Ex. 11 at 114-15, 119, 121-23, 126, 172, 206.) Officer Hardesty's body was located nearby with his unfired handgun still holstered. (Ex. 13 at 2128.) Officer Hardesty suffered three gunshot wounds to his body, from a shooting that took place at close range; with one shot into his left eye, one located to the left side of his abdomen and one located to the left side his abdomen, but closer to the midline. (Ex. 14 at 116-129)[3] The handgun that Officer Waters saw Cruz drop to the ground was identified as the murder weapon. (Ex. 15 at 25-27.)

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[3] Two additional bullets struck officer Hardesty's bullet-proof vest. (Ex. 14 at 123.)

Future dangerousness is a "logical inference from the [above] evidence." *Kelly,* 534 U.S. at 252. And Cruz's future dangerousness was substantially intensified, when, despite overwhelming evidence of Cruz's guilt, his counsel adopted a pathetically far-fetched, implausible and constitutionally ineffective trial strategy, which had Cruz denying any responsibility or involvement in the offense. (Ex. 16 at 25-57, 147-188.)[4] Despite their inadequate performance (described in detail in Ex. 16) Cruz's counsel did call an expert witness, to address the issue of future dangerousness. Former warden James Aiken testified that Cruz would be confined in a maximum security prison and that Cruz, who he characterized as not sharing characteristics of a dangerous predator, would not present a future danger to other prisoners or corrections officers. (Ex. 17 at 147-62.) The prosecutor did not accept Cruz's non-dangerousness evidence as true. Instead, the prosecutor impeached Aiken's testimony by eliciting admissions that Aiken had offered lack of future dangerousness testimony on behalf of another capital defendant, who actually assaulted guards and prisoners while in prison. (*Id.* at 163-64). The State effectively impeached Aiken, leaving inferences regarding Cruz's potential future dangerousness

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[4] In his federal habeas proceedings, Cruz (who – unknown to the jury – suffers from significant brain impairment from fetal alcohol spectrum disorder, and who had total amnesia for the offense due to constant amphetamine use and lack of sleep over many days) presents the claim that his trial attorneys were constitutionally ineffective for, *inter alia,* arguing Cruz's lack of criminal responsibility for the offense. (Ex.16 at 147-188.)

intact. *See, State v. Lynch,* 238 Ariz. at ¶23-24; *rev'd on other grounds,* in *Lynch v. Arizona* (prosecutor's impeachment of expert James Aiken with questions about actions of *other* convicted murderers—designed to show future dangerousness of convicted murderers to corrections officers—was proper to rebut evidence that defendant could be safely confined in prison).

Moreover, while Aiken's testimony was material to considerations of Cruz's future dangerousness while confined inside prison, his testimony did absolutely nothing to counter concerns about Cruz's future dangerousness in society, in the event he was granted parole; a possibility that the jury instructions fully embraced. (See instructions at Ex. 8 at 7, which informed jury Cruz could be paroled after serving twenty-five years).

In addition to the foregoing, future dangerousness was "injected into the case through the state's closing argument." *Kelly,* 534 U.S. at 252. During closing argument, the prosecutor vividly described the brutal manner in which officer Hardesty was killed stressing that the manner of the killing: "five shots, two of them hitting the vest, two others hitting his torso, and an execution to the head." (Ex. 18 at 58.) The prosecutor emphasized the crime was extremely violent, that Cruz had "engaged in such a violent act that even he was affected by it", and consequently he suffers posttraumatic stress disorder. *(Id.* at 57.)

The prosecutor also underscored that Cruz had threatened the safety of everyone; he killed someone whose job it was to protect the entire community. *(Id.* at 58-59.) The ultimate inference from the state's argument was that if Cruz could murder officer

Hardesty – someone who protects us and keeps us all safe – then no one will be safe in the future unless Cruz is put to death.

Cruz satisfied the showing that his future dangerousness was a "logical inference from the evidence" or "the state's closing argument." *Escalante-Orozco* at ¶119, quoting, *Kelly v. South Carolina,* 534 U.S. at 252. Therefore, Cruz was denied due process when the court refused to allow him to inform the jury that he was ineligible for parole under Arizona law. *Escalante-Orozco* at ¶127. This caused prejudice within the meaning of Rule 32.1(g).

C. Cruz satisfied the showing of prejudice within Rule 32.1(g).

(1) Failure to instruct on parole ineligibility dramatically increases the potential for a sentence of death.

Substantial research into jury decision-making demonstrates that, where jurors are uninformed about death sentence alternatives, they drastically underestimate the length of time a defendant sentenced to life will serve, thereby increasing the likelihood that they will sentence a defendant to death. The bulk of this research was performed by the Capital Jury Project (CJP), a long-term research project that began in 1991 with support from the National Science Foundation. Over the last 25 years, the CJP has conducted 1198 in-depth interviews with jurors from 353 capital trials over 14 states. "[T]he CJP was designed to: (1) systematically describe jurors' exercise of capital sentencing discretion; (2) assess the extent of arbitrariness in jurors' exercise of such discretion; and (3) evaluate the efficacy of capital statutes in controlling such arbi-

trariness." University at Albany School of Criminal Justice, *What is the Capital Jury Project,* http://www.albany.edu/sci/13189.php (last visited November 3, 2016).

CJP's research "shows that capital jurors believe murderers are back on the streets "far too soon." William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605, 645-46 (1999). Typically, capital jurors believe that capital defendants not sentenced to death will be released in about 15 years. *Id.* at 648; Benjamin D. Steiner, William J. Bowers, Austin Sarat, *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness,* 33 Law & Soc'y Rev. 461, 476 (1999) ("Across states, jurors seem to have roughly similar ideas about how long [capital defendants not sentenced to death] usually spend in prison, quite apart from the wide variation in statutory minimums for parole eligibility in their states. For the five states that have mandatory minimums of 20 to 40 years and the four life-without-parole states, the median estimates of years usually served all fall within the range 15-20 years.").[5] The data consistently shows a lack of accurate parole information *even among jurors in states where there is no*

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[5] Jurors' estimate of how long a defendant serving life will spend in prison is even lower in some jurisdictions. In Georgia, the median estimate among jurors of how long a defendant would serve a life sentence was seven years. *Pope v. State,* 345 S.E.2d 831 (Ga. 1986). In Virginia, the median estimate was 10 years. *Turner v. Commonwealth,* 364 S.E.2d 483 (Va. 1988).

parole. "In Alabama, Missouri, and Pennsylvania, a total of only three jurors [surveyed] affirmatively indicated that their state's death penalty alternative is LWOP; in California, fewer than one in five jurors identified this alternative." 77 Tex. L. Rev. at 670.

Jurors' mistaken beliefs about parole eligibility made them more likely to vote to impose a death sentence. 77 Tex. L. Rev. at 660 ("mistaken estimates of early release appear to be decisive in the decision making of jurors who have not made up their minds before deliberations begin or by the time of the jury's first vote on punishment"); *see also* J. Mark Lane, *"Is there Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence,* 26 Loy. L.A. L. Rev. 327, 334 (1993) ("Juries frequently choose death, not because they think it is the appropriate sentence, but because they do not believe that the life-sentence alternative will adequately ensure the defendant's incarceration.") "The shorter the period of time a juror thinks the defendant will be imprisoned, the more likely he or she is to vote for death on the final ballot." John H. Blume, Stephen P. Garvey, Sheri Lynn Johnson, *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 Cornell L. Rev. 397, 404 (2001).

Jurors' misunderstanding about the prospect of the defendant's release is critical during deliberations. A CJP study in Georgia showed that between 1973 and 1990, 25% of juries deliberating at the capital sentencing phase asked the judge questions about parole. William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing,* 77 Tex. L. Rev. 605, 629 (1999). Up to 32% of surveyed

CJP jurors report that penalty-phase deliberations "focused 'a great deal' on a variety of topics related to worries about the defendant's future dangerousness" and up to 66% "report that the jury's discussions focused at least a 'fair amount' on topics related to the defendant's future dangerousness." 86 Cornell L. Rev. at 406-07. Ultimately, it is clear that when making a determination between life and death, the availability of parole carries significant weight with jurors. "The available sociological evidence suggests that juries are less likely to impose the death penalty when life without parole is available as a sentence." *Baze v. Rees,* 553 U.S. 35, 78-79 (2008) (Stevens, J., concurring) (citing *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment,* 119 Harv. L. Rev. 1838 (2006)).

Further, future dangerousness is at issue even where the prosecution does not specifically introduce evidence or argue it. Research shows that even where "the prosecution made no effort whatsoever to emphasize the defendant's future dangerousness," a majority of jurors focused "a fair amount" or "a great deal" on the defendant's future dangerousness in deliberations. 86 Cornell L. Rev. at 406-07. Indeed, based on the data, CJP researchers have hypothesized that it is a juror's underestimate of prison terms that feeds the perception of the defendant as a future danger. 77 Tex. L. Rev. at 667-68. Notably, even jurors who responded that they were not concerned about the defendant's potential for return to society were more likely to vote for a death sentence when they underestimated the sentencing alternatives. *Id.* This indicates that failure to accurately instruct jurors on the lack of parole availability renders a capital sentencing proceeding unreliable,

even where the state does not formally allege or even argue the defendant is a future danger and where the jurors do not claim to be concerned about future dangerousness.

The CJP research affirms the reasoning underlying the Supreme Court's decision in *Simmons.* Justice Blackman, writing for the plurality, recognized that "[f]or much of our country's history, parole was a mainstay of state and federal sentencing regimes...." 512 U.S. at 169. Thus, Simmons' jury was likely to mistakenly believe that the defendant could be released on parole if not sentenced to death. Justice Blackman relied on a South Carolina public opinion survey conducted before Simmons' trial, which showed only 7.1% of South Carolina residents eligible to serve on a jury believed that a capital defendant sentenced to life imprisonment would actually serve his life in prison. *Id.* at 162. Further, Blackmun noted:

> Almost half of those surveyed believed that a convicted murderer might be paroled within 20 years; nearly three-quarters thought that release would certainly occur in less than 30 years...More than 75 percent of those surveyed indicated that if they were called upon to make a capital sentencing decision as jurors, the amount of time the convicted murderer actually would have to spend in prison would be an 'extremely important' or a 'very important' factor in choosing between life and death.

512 U.S. at 159 (citation omitted). Jurors laboring under such a mistaken belief face the "false choice between sentencing [a defendant] to death and sentencing him to a limited period of incarceration."

Id. at 161. The sociological research undertaken in the 25 years since *Simmons* affirms and extends this concern. The data consistently shows across jurisdictions that the odds of a death sentence increase when capital jurors do not possess accurate information about what a life sentence means.

(2) *Simmons* error is never harmless.

As the data discussed above demonstrates, jurors are concerned about future dangerousness, and when uninformed about the length of life terms, impose death at a higher rate. Given the consist sociological findings across decades and jurisdictions, there is simply too great a risk that jurors uninformed about parole ineligibility made their sentencing decisions on the basis of the false belief that the defendant will eventually be released and re-offend. In this situation, the specter of future dangerousness "infect[s] the entire trial process." *Brecht v. Abrahamson,* 507 U.S. 619, 630 (1993). In light of the empirical research, this Court cannot find *Simmons* error harmless in this case, or any case. The knowledge that jurors, when not properly instructed, are voting for death out of fear of release and recidivism renders such a sentencing unconstitutionally unreliable. *Simmons,* 512 U.S. at 161 ("The Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain'"); *Woodson v. North Carolina,* 428 U.S. 280 (1976) (the death penalty requires heightened reliability).

Cruz submits that the *Simmons* error in his case was structural, requiring automatic reversal of his sentence. Whether an error is structural or subject to harmless error review, depends on "the nature of the

right at issue and the effect of an error upon the trial." *Arizona v. Fulminante,* 499 U.S. 279, 291 (1991). Structural defects "defy analysis by 'harmless-error' standards" because "[w]ithout these basic protections, a criminal trial cannot reliably serve its function... and no criminal punishment may be regarded as fundamentally fair." *Id.* at 309-10 (citation omitted). Where, as here, the error invites jurors to set aside the evidence before them and instead focus on their mistaken beliefs and fears, such error is structural.

(3) Even if not structural error, the error was not harmless.

In *Escalante-Orozco,* the Arizona Supreme Court said that "it [was] not clear whether *Simmons* error was structural, or subject to harmless error analysis." 241 Ariz. at ¶125 (observing that the United States Supreme Court had not conducted harmless error analysis in the three cases addressing *Simmons* error). In the end, the Court determined that it did "not have to decide whether a *Simmons* error could ever be harmless . . . [because] even if we assume such errors can be harmless, the State has not proven 'beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence.'" *Id.* at ¶126, quoting, *State v. Henderson,* 210 Ariz. 561, 587, ¶17 (2010). A comparison between the *Escalante-Orozco* case and the *Cruz* case is helpful in demonstrating that like the error in Escalante-Orozco's case, the *Simmons* error in Cruz's case was *not* harmless beyond a reasonable doubt.

The homicide in *Escalante-Orozco* was particularly aggravated, when contrasted with *Cruz.* Escalante-Orozco's victim Maria R. was beaten, sexually as-

saulted and stabbed until she bled to death. 241 Ariz. at ¶3. "Maria suffered fourteen stab wound on her face, neck, left shoulder, arms and hands." *Id.* at ¶173. She also had lacerations in her genital area. *Id.* The medical examiner concluded that it would have taken Maria up to an hour to die. *Id.* at ¶172. Based on the circumstances of Escalante-Orozco's crime, the jury found the murder was "especially cruel" under A.R.S. §13-751(F)(6). *Id.* at ¶170. The Arizona Supreme Court sustained this cruelty finding based on evidence that Maria consciously suffered both physical pain and mental anguish, and that Escalante-Orozco knew or should have known she was suffering. *Id.* at ¶172. Nevertheless, despite the cruel nature of Escalante-Orozco's crime, the Arizona Supreme Court found the failure to instruct the jury that Escalante-Orozco was parole-ineligible was not harmless error. *Id.* at ¶126-27.

All homicides are tragic, and officer Hardesty's death is not less so. However, contrasted with Escalante-Orozco's brutal murder, sexual assault and shear torture of Maria, officer Hardesty suffered a fatal gunshot to his head which was lethal; he would have stopped breathing immediately, and died within approximately one minute. (Ex. 14 at 129.)

In both the *Cruz* case and the *Escalante-Orozco* cases the Arizona Supreme Court gave short thrift to the defendant's proffered mitigation evidence; finding in both cases that the mitigation had no explanatory causal connection the crime. *See, Cruz* 218 Ariz. at ¶138; *Escalante-Orozco,* 241 Ariz. at ¶183. Nevertheless, despite the aggravated nature of Escalante-Orozco's murder and the "little weight" afforded to his mitigation evidence, the Court noted that in

Escalante-Orozco's case only one aggravating factor was found and "a great deal of mitigation evidence was introduced." 241 Ariz. at ¶126. This parallels Cruz's case, where there was only one aggravator, 218 Ariz. at ¶136, and he presented sixteen mitigation witnesses, including five expert witnesses over four days. (Ex. 19 at 52-155, Ex. 20 at 11-152, Ex. 21 at 5-134, Ex. 17.) Further comparisons between the two cases are helpful.

For instance in the *Escalante-Orozco* case the Court observed that Escalante-Orozco was "in his forties, and the jury could have believed he would live to see his release." 241 Ariz. at ¶126. Cruz was even younger than Escalante-Orozco; just 35 years old at the time of his sentencing proceeding. (Ex. 17 at 156.) What's more, in *Escalante-Orozco,* the Court noted that the "jury deliberated for about thirteen hours, which suggests it gave careful consideration to the sentencing options." 241 Ariz. at ¶126. The Cruz jury also engaged in a lengthy deliberation, exceeding nine hours. (Exs. 18 at 89, 22, 23, 24.) And we know, from post-verdict statements of several Cruz's jurors, that the absence of a parole ineligibility instruction was a major factor in the decision to impose death. (Ex. 9-10.)In *Escalante-Orozco,* the Court expressed some doubt about whether or not the "possibility of release played [a role] in the jurors' minds' as they decided the propriety of the death penalty," 241 Ariz. at ¶126, but the Court resolved that doubt favorably to the Escalante-Orozco, citing, *Andres v. United States,* 333 U.S. 740 (1948) for the proposition that "[i]n death cases, doubts with regard to the prejudicial effect of trial error should be resolved in favor of the accused." *Id.* After observing the United States Supreme Court's admonition in

Zant v. Stephens, 462 U.S. 862, 884-85 (1983) that "'there is a corresponding *difference in the need for reliability* in the determination that death is the appropriate punishment in a specific case,'" the Court found the *Simmons* error prejudicial, reversed Escalante-Orozco's death sentence and remanded for a new sentencing proceeding. 241 Ariz. at ¶126-27.

Analytically, there is no basis to distinguish the prejudice finding in *Escalante-Orozco* from the prejudice finding which now must accrue to Cruz. This is particularly so, given the fact that the murder in *Escalante-Orozco* was found to be "especially cruel," and the *Simmons* error was still determined not to be harmless. Thus, had *Simmons* been properly applied to Cruz's case in the first instance on his Arizona Supreme Court direct appeal, he too would have been granted a new sentencing proceeding. There is however an additional factor in play, not addressed in *Escalante-Orozco* which adds substantially to the demonstration of prejudice in Cruz's case: the jury was actively misled when the instructions stated that Cruz could receive a sentence under which he would be eligible for parole after serving twenty-five years.

In *Simmons,* the jury submitted a written question during deliberation asking whether "imposition of a life sentence carries with it the possibility of parole." 512 U.S. at 161. The trial court instructed the jury not to consider parole eligibility, *id.,* and the Supreme Court found that "[t]he jury was left to speculate about petitioner's parole eligibility . . ." Here, however, the jury was not left to speculate. Instead, the Cruz jury was explicitly instructed that if it did not sentence Cruz to death, then Cruz could receive a

parole-eligible sentence. (Ex. 8 at 7.) This was a false and misleading statement of Arizona law, as Cruz was parole ineligible. *See Lynch,* 136 S. Ct. at 1819. The additional showing that Cruz's jury was actively misled about his parole-eligibility, measurably adds to the showing that he was prejudiced by his *Simmons* error, but that is not all. As explained below, the misleading instruction results in an independent due process and Eighth Amendment violation, without regard to the element of Cruz's future dangerousness.

"The purpose of jury instructions is to inform the jury of the applicable law...." *State v. Noriega,* 187 Ariz. 282, 284 (App.1996). While the "instructions need not be faultless ... they must not mislead the jury in any way ..." *Id.* An instruction which explicitly misleads a jury about the potential for a capital defendant's release, if he is not sentenced to death, violates the Eighth and Fourteenth Amendments. *See, Coleman v. Calderon,* 210 F.3d 1047, 1049-51 (9th Cir. 2009) (jury instruction, which misled jury as to Governor's power to commute death sentence, was unconstitutional in violation of Eighth Amendment because "there was a reasonable likelihood that jury applied the instruction in a way that prevent[ed] the consideration of constitutionally relevant mitigation evidence); *Sechrest v. Ignacio,* 549 F.3d 789, 811 (9th Cir. 2008) (jury instruction was unconstitutional because it validated false impression that defendant could be released by the Board of Pardons if the jury did not impose the death sentence). "An instruction . . . can nonetheless violate the constitution if it inaccurately describes the possibility of clemency on the facts of the defendant's case." *Id.* Thus, independent of any *Simmons* error, the *Lynch* decision

reveals an independent constitutional error resulting from the misleading instruction (that Cruz could receive a parole-eligible sentence) and for that additional reason he is entitled to a new sentencing proceeding.

IV. Reason for not raising the claim in an earlier Rule 32 proceeding.

Rule 32.2(b) exempts Rule 32.1(g) claims from the ordinary rules of waiver and preclusion under Rule 32.2 (a). However Rule 32.2(b) does require a statement with respect to "the reasons for not raising the claim in the previous petition or in a timely manner." Here the reason is obvious. The *Lynch* case was just decided in May 31, 2016, and the Arizona Supreme Court decision in *Escalante-Orozco,* which provides Arizona's first application of *Lynch* was just decided on January 12, 2017. Under these circumstances Cruz's current petition is not untimely.

V. Conclusion

For the reasons set forth, John Montenegro Cruz requests that the Court vacate his death sentence and order that Cruz shall be entitled to a new sentencing proceeding.

DATED this 9th day of March, 2017.

Jon M. Sands, Federal Public Defender
Cary Sandman, Assistant Federal Public Defender

By: /s/ Cary Sandman
Counsel for Petitioner

SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF – EXHIBIT 2

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR PIMA COUNTY

STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

CR-05-0163 AP

CR2003-1740

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION TO PRECLUDE NON-VICTIM TESTIMONY

January 18, 2005

BEFORE THE HONORABLE TED B. BOREK

TUCSON, ARIZONA

Appearances:

For the Plaintiff: R. UNKLESBAY, DCA

For the Defendant: B. STORTS & D. BASHAM, Attorneys at Law

Reported by: KATHRYN ANDREW, RPR
Certified Court Reporter # 50231

JANUARY 18, 2005

BEFORE THE HONORABLE TED BOREK

* * *

[pp. 1:4-12, 13:7-19:8]

* * *

THE COURT: State of Arizona vs. John Montenegro Cruz, 20031740. Appearances.

MR. UNKLESBAY: Rick Unklesbay for the State.

MR. STORTS: Rick Storts and David Basham for Mr. Cruz, presently in custody.

THE COURT: This is the defendant's motion to preclude non-victim testimony, number 85 in the motion.

This is my only record and log of things. It is the defendant's motion. I have read the motions.

* * *

MR. UNKLESBAY: In the minute entry that you just gave, you indicated that you had taken under advisement about Mr. Belcher's testimony and I think defense motion, I saw that today on that. I can address that.

THE COURT: I had taken that under advisement even though, and the reason I took it under advisement because you hadn't had an opportunity to look at what Mr. Belcher's proposed testimony would be, but I think in Mr. Storts' case, as to Number 79, I believe it is having to do with future prison conditions.

MR. UNKLESBAY: As I understand, they would like to call Mr. Belcher to testify as to what is stated in the document entitled Notice Re. Anticipated Testimony, dated January 12.

Mr. Belcher would testify that the Board can only recommend parole for inmates sentenced to do 25 years to life, and can't do anything before those that have been sentenced to do natural life.

From the beginning, my position has been that the jury is going to be told by the court that if they do not impose a death sentence that the court is going to choose between a sentence of natural life in prison which means there is no possibility of parole and a sentence of 25 to life in prison, which provides for an opportunity of parole after serving 25 calendar years.

I still think it's appropriate for the court to give that type of notice or instruction to the jury. I don't think Mr. Belcher's testimony is relevant. It is not relevant to mitigation because it doesn't again go to the character and the background of the defendant or circumstances of the offense of the crime charged.

It goes to what currently might be the practice in DOC as to the obligations and duties of the Parole Board, but it speaks nothing about this defendant's background, this defendant's character or how any mitigation might be offered balancing against the aggravation that might be proven.

I submit Mr. Belcher's testimony is irrelevant. I am not objecting again, so the record is very, very clear, I am not objecting to the jury having that information. I just think that the presentation of that information as mitigation is irrelevant.

So I would object to Mr. Belcher testifying.

MR. STORTS: I thought I made it abundantly clear when we argued it last time we are not offering it for mitigation but for the jury weighing it on whether they will give Mr. Cruz natural life or whether they will give him a life sentence with the opportunity for the court to impose natural life to 25 years to life or give him the death penalty.

To imply it is okay for the court to notify them, which you are required to do, if they give him the death penalty that is imposed. The court has no option.

At the same time to tell them with the testimony of Mr. Belcher, that if they give the gentleman life, natural life, he will never be considered for parole and if he is getting 25 to life, all that could be done by the Board is make a recommendation to the governor and it's up to the governor to determine whether or not somebody would ever be paroled after the period of the 25 years.

It seems to me that certainly it's relevant and is a critical issue in the weighing process for the jury to make that determination, if we get to that point as to the issue of what happens if they impose the death penalty.

The State -- I can almost envision the argument -- how do we know that if Mr. Cruz doesn't get the

death penalty he may not be released in some capacity in the future.

That is exactly what this testimony is and that's exactly what it relates to and that's exactly what it closes the door on. And the State certainly can always feel free if he only gets a sentence of 25 to life, somewhere down the line it would be a different situation.

But that is a fact that the jury wants to know about and it is not a question of mitigation. We didn't offer it for that. I made it clear to the court. It was offered for the purpose of weighing.

I also pointed out to the court if you were in the process of doing the sentencing as previously had been done it's a fact you would have been aware of.

Why can it be any less for a jury that is imposing the same sentence. You would have been obligated to impose also not be aware of that fact, and that's the purpose we are offering it for.

THE COURT: Before both of you can address this, what is the difference between what you will see in the testimony as opposed to what a jury instruction would be to the court?

MR. STORTS: I don't know what the jury instruction is going to be and the difference is that a jury instruction says one thing whereas the testimony of the head of the Board of Executive Clemency is quite another. To say that doesn't have more impact rather than reading something sterile on a piece of paper doesn't make sense.

A jury is going to take, be more consciously aware of what Mr. Belcher would say about the issue than something the court would give to them and that is

the purpose behind it and it isn't offered to mitigate anything.

It's offered simply to give the jury the full picture of what they are dealing with when they deliberate and begin to weigh whether or not this is a case that would lead to a death penalty being imposed or whether or not they would go for a life sentence. And that's exactly what it is being offered for.

THE COURT: Mr. Unklesbay.

MR. UNKLESBAY: I would suggest that counsel's argument about how this would weigh into the jury's decision is exactly the point because what they weigh is whether there is sufficiently substantial mitigation to call for leniency. They don't weigh what the future sentence might be.

This jury's only job is to, one, after the guilt phase, if there is a finding of guilt of first degree murder, the jury's finding is to find whether there is an aggravation and find whether there is mitigation sufficiently substantial as to call for leniency, weigh that against the aggravating and decide what the appropriate penalty would be.

This idea that what the current status of the law is in regard to what the Parole Board might do doesn't fit anywhere in there. This idea that the jury would be weighing a life sentence or 25 to life as to whether it is appropriate or not isn't the point. It isn't the job of the jury.

That is the job of the court to make a decision as to what of the two life sentences would be appropriate if the defendant is convicted and doesn't face death but it is not the job of the jury to weigh the idea of 25 to life or natural life to determine if that's the appro-

priate sentence because their job is to determine if there's sufficient evidence to call for leniency. So that's my argument.

MR. STORTS: Briefly. I am glad counsel said what he said because fortunately that is exactly what the job of the jury is. It is to weigh exactly what he said and, if the court will recall, the jury will be told they can find a mitigator that is something other than what we even presented.

And how much more of a mitigator could there be if you want to take it in their weighing process that they have the opportunity to do to know if they give somebody a life sentence, he will never be released. That is the very core of a weighing process.

THE COURT: I will take that under advisement. And it's a little premature now, so I will defer ruling on it until it becomes relevant. Those are the two issues we had right now.

* * *

SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF – EXHIBIT 3

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

CR-05-0163 AP

CR-2003-1740

BEFORE: THE HONORABLE TED BOREK
Division 24

APPEARANCES: RICK UNKLESBAY and TOM WEAVER
on behalf of the State

BRICK STORTS AND DAVID BASHAM
on behalf of the Defendant

HEARING ON PENDING MATTERS AND MOTIONS

February 28, 2005

Michael A. Bouley, RDR
Certified Court Reporter
CCR No. 50235

[pp. 2:1-11, 35:19-39:21]

* * *

THE COURT: This is State of Arizona versus John Montenegro Cruz, CR-20031749. This is a hearing on several motions. We have got trial in progress.

Counsel, appearance, please.

MR. UNKLESBAY: Rick Unklesbay, Tom Weaver for the State.

MR. STORTS: Brick Storts, David Basham for Mr. Cruz, who is not present. I waive his presence. I told the Court on Friday that he would not be over here today, didn't want to be transported. So we are ready to proceed.

* * *

[THE COURT:]

The final thing I have, I think there may be one other I don't have, is trial memorandum with regard to residual doubt. Really an instruction matter. I think we can probably --

MR. STORTS: We will have that and offering testimony of Mr. Belcher.

THE COURT: Right, and what was the date that you filed the Belcher matter?

MR. STORTS: It was actually State filed objection to it.

MR. UNKLESBAY: December.

MR. STORTS: 9th when you filed yours.

MR. UNKLESBAY: December 9th is mine.

MR. STORTS: We responded on the 13th of December. And again, Judge, if you want to deal with that after you look at your motion again, I don't care. We won't get into it in opening tomorrow in any event, so.

THE COURT: You know, I have looked at it but I haven't looked at it immediately because quite honestly gotten put some place, it wasn't with the one I have that's open. I need to look at that again. I do recall looking at the, whatever it's worth, it's his testimony would just duplicate what would go in an instruction. Wasn't anything more than what could be dealt with an instruction. My reaction was why do we need to do it in addition to an instruction. So but I'm looking at it and --

MR. STORTS: And I don't know what instruction the Court is referring to, any Court instruction tell the jury if they don't give him the death penalty he gets natural life nor from this Court he will ever, ever be considered for any type of kind, I don't know of any instruction like that Court is planning to give. I don't know if there is.

THE COURT: State?

MR. UNKLESBAY: State had agreed that we would certainly not object to an instruction by the

Court that if a death sentence was not imposed that the Court would be choosing between a life sentence with the possibility of parole and life sentence with not a possibility of parole. And I think that was -- I think our argument, our position stated the same thing.

And I guess just briefly reiterate why we feel that way. Mr. Belcher took the stand, he could say that's the current state of the situation Department of Corrections. He doesn't know what laws may come about next year or year after or five years from now or 10 years from now, and it would be pretty speculative.

Seems to me, I'm certainly not trying to argue defense position, I will argue because the Court could then choose between sentence of life without possibility of parole or life with the possibility of parole is even stronger than Mr. Belcher, who I'm quite certain would say he didn't know what the law might be next year. He can tell you right now if there is a life without parole sentence those folks aren't getting out. But I'm pretty certain he would testify that he doesn't know what the future may hold for any of those folks.

So, I would state again certainly amenable to instruction by the Court that if it's not death sentence, Court would choose from one of those two options.

MR. STORTS: We had filed an additional pleading, Judge, back on January the 12th with the anticipated testimony of Mr. Belcher. The argument behind putting him on is simply I can envision the State saying just exactly what it says, how do we know what's going to happen in some point in time and Mr. Cruz conceivably could be released under some set of

circumstances. The testimony of Mr. Belcher that isn't, won't and can't happen. And another thing that the State is totally aware of if Mr. Cruz were to be sentenced as to a natural life sentence by this Court, there is no way any court can come in or the legislature can then reamend the law to have come back be an ex post facto law that would apply to him that would suddenly allow him to be released under some set of circumstances. That just isn't the way it works.

I think Court is well aware that I just felt the Court would agree, it isn't necessarily a mitigating factor at all. I'd like to argue that as a weighing factor. Jury is entitled to know what does it actually mean. I'm quite sure the State will make some inference that if you don't give this gentleman the death penalty there is a possibility that some day he could be released for whatever reason. That just isn't going to happen. Frankly under even a 25 to life sentence. Mr. Belcher would point out since 1994 the Board will not even entertain a commutation. Simply take the information, then goes to the jury. I think you said there's been three that have actually gone to the governor since 1994. None have been approved.

So just seems to me that it is relevant, it is a weighing process for the jury to be able to understand if that they are not going to vote for the death penalty what's going to happen to Mr. Cruz. And this is a witness that can and will tell at this stage what would happen to Mr. Cruz if he receives one of those two sentences and that is not something that can be changed or made easier at some point in time, just not the way the law works.

THE COURT: I will look at that one again. Sorry, just didn't get in today.

* * *

SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF – EXHIBIT 6

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR PIMA COUNTY

STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

CR-05-0163 AP

CR2003-1740

REPORTER'S TRANSCRIPT OF PROCEEDINGS

DEFENDANT'S MOTION FOR NEW TRIAL

May 2, 2005

BEFORE THE HONORABLE TED B. BOREK

TUCSON, ARIZONA

Appearances:

For the Plaintiff: R. UNKLESBAY, DCA

For the Defendant: B. STORTS & D. BASHAM, Attorneys at Law

Reported by: KATHRYN ANDREW, RPR
Certified Court Reporter # 50231

MAY 2, 2005

BEFORE THE HONORABLE TED BOREK

* * *

[pp. 1:4-10, 30:20-36:20]

* * *

THE COURT: State vs. John Montenegro Cruz, CR-20031740.

Counsel state their appearance.

MR. UNKLESBAY: Rick Unklesbay for the State.

MR. STORTS: Brick Storts and David Basham on behalf of Mr. Cruz who is present in custody and here for the purposes of this motion for a new trial.

* * *

THE COURT: Next one is the joint voucher issue.

MR. STORTS: The court may recall we were wishing we wanted to call Mr. Belcher as a witness to let the jury have the same information and knowledge that the court would have had, and that is if Mr. Cruz had received a sentence of life without parole he would have never been considered for any type of release.

And if he received a petition for 25 years to life, that the best he could hope for at the end of 25 years the Board of Executive Clemency would have determined it was appropriate to pass that onto the governor, but there would be nothing done unless the governor had actually executed an order giving a basis of a commutation or whatever it would be called as far as a defendant is concerned.

Mr. Belcher, we made this as an offer of proof, indicated to the best of his knowledge since that law was in place since 1994 that might have happened at least once maybe twice since that period of time.

We felt and I still do that this is law that the jury should be entitled to. The court clearly, under the old sentencing scheme, would have been aware of this information and we felt the jury should have been entitled to it also.

It becomes exceedingly critical when you look at the press release prepared by the three jurors that were sending in their press release to Jim Becker at Channel 13 and their last sentence in the press release of the last paragraph in exhibit 9, they state, "Many of us would have rather voted for life if there was one mitigating circumstance awarded. In our minds there wasn't."

However they go on to say, "We were not given an option to vote for life in prison without the possibility of parole." And that's true. They weren't given that option, but had Mr. Belcher been able to testify, he could have then given them the option to be made aware of the fact that that is a, if the court imposed a situation of life without parole, that is something that the court is basically, the gentleman involved is going to be dying in prison.

And to make the superfluous argument that I have heard in the past, the laws could change 25 years from now. The world could blow up 25 years from now. Anything is possible, but that is not the issue.

The issue is now that if a person gets life without the possibility of parole they will die in prison and that's a given, that this jury didn't get the fact of this knowledge. And I think that is a reason that a motion for a new trial should be granted in light of their comments and if you dovetail that into why a juror, number 193, the foreperson, talks about the message and how all of that impacts together.

It may very well have been with that type of testimony, the message could have been different if we had been dealing with the fact they had actual testimony that I could have argued in the penalty phase that a life sentence which would be the option of the court naturally -- and there is no guarantee what the court would do -- but a life sentence if it's going to be imposed is something that entails the possibility that that would have been reduced.

MR. UNKLESBAY: As I said then and repeat now, Mr. Belcher was not mitigation, he had nothing to offer in terms of mitigation. It didn't go to any aspects of the defendant's character. It went to no aspects of the circumstances of the offense.

And with all respect to Mr. Storts, we don't know what will happen in five years with the Board of Pardons and Paroles. They may say that everybody with 25 years will get out. It simply would have been misleading for the jury. It was not an issue for their concern.

We told them in the instructions it is the court that determines whether there is natural life. They knew

about that possibility. They knew they didn't make that decision but the court would make that decision if they didn't vote for the death penalty, or the court could impose 25 to life. That is up to the court. The jury wasn't given that option because that is what the law is.

So this kind of testimony simply was not relevant in any aspect of Mr. Belcher's expertise and it was not mitigation in any aspect of wanting to bring out that there's a lot of people serving 25 to life that have served more than 25 years. That's why it's called 25 to life.

And there is no guarantee one way or the other but it simply does not go to this defendant's character, propensity, history and the circumstances of the offense. So it was not admissible.

MR. STORTS: That sounds fine, but it does go to, in effect, the offense and the circumstances surrounding it and the ultimate punishment that the juries are now in our state are being forced to do what the judges in this state used to do and especially this is true in this particular case, especially when you talk about the foreperson's jury's comment to the media as to why the death penalty was imposed on Mr. Cruz.

If those issues were a supporting basis for the death penalty then the whole process we are doing and the whole process we are going through is flawed.

If a case like this can stand when you have the foreperson stating they were doing it to send a message to inform the lawbreakers that this conduct is what will happen to them if they do something of this nature, notwithstanding what may have hap-

pened out there at that time, notwithstanding whether people were under the influence of drugs, notwithstanding all the other mitigator factors involved. But we'll say let's hide the fact about what ultimately happens to somebody if they don't get the death penalty.

It's an argument that will be dealt with in the appellate court and I would venture to say that is an argument that is going to come down on the side of disclosure because how can we then say a jury should know less than a sentencing judge. Because the idea was taking it away from the sentence judge, and I don't know that that was a good idea or a bad idea. I wish people would have talked to us and maybe try cases before they decided that's what they thought was the appropriate way to do it.

To digest for one second to do this, as far as the State is concerned or as far as the defense is concerned, to be looking at this kind of a trial to have to try this case and immediately go into the aggravation phase and penalty phase, it's not only tantamount to cruel and unusual punishment as far as the various attorneys are involved, as far as the court is concerned and as far as the jury is concerned. It is a horrendous way to have to get to the solution we are at this point in time.

And even to the stage where we have to deal with the same jury through this whole phase, if we are going to do that, the least we can do is let the jury have the privilege of the same knowledge that you as a judge would have had three years ago if you would have been faced with this same decision.

And that's why I feel the Belcher issue is the one that should have been given to the jury and the court

would have erred on the side of safety and the results may have been totally the same but at least the jury would have had a full and clear picture of what is going to take place when they deliberate on the issue of life or death. I think that brings us --

THE COURT: Sounds like you are going to be in the legislature making some arguments.

MR. STORTS: No one wants to ask me about it because it was decided before.

THE COURT: I understand. The military does it that way all the time. They get right into the mitigation phase, but that is another matter. Your final argument, you had one more.

* * *

SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF – EXHIBIT 10

DECLARATION OF MARY HURST

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1. My name is Mary Hurst. I served as a juror in the case State v. John Montenegro Cruz.

2. The evidence against John Cruz was overwhelming as to his guilt. There is no question in my mind he shot and killed Officer Hardesty.

3. I do not ever want to see John Cruz leave prison. I do not want anything I say be used to get Mr. Cruz a new trial relative to his guilt or innocence.

4. The defense as presented by Mr. Cruz's lawyers was insulting to my intelligence. The evidence of guilt was clear – two men went into a yard, one man came out with a gun. It was that simple. The defense attorneys were so disingenuous and dishonest in their presentation during the guilt phase, that it was difficult for me to take them seriously going into the penalty phase.

5. If I could have voted for a life sentence without parole, I would have voted for that option. However, I did not know if Mr. Cruz might someday be released if we did not vote for death. A death sentence was the only way to assure that Mr. Cruz would never be released from prison.

DATED this 30 day of April, 2014.

/s/ Mary Hurst
Mary Hurst

SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF – EXHIBIT 17

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

Case No. CR2003-1740

CR-05-0163 AP

Tucson, Arizona

March 4, 2005

JURY TRIAL-DAY TWENTY-SIX

BEFORE: THE HON. TED B. BOREK, JUDGE
Division 24

APPEARANCES: Rick Unklesbay and Thomas Weaver, Esq.,
appearing for the State;

Brick Storts III and David Basham, Esq.,

appearing for the Defendant.

KRISTINE B. VALDEZ, RPR

CERTIFIED COURT REPORTER #50182

Pima County Superior Court

Tucson, Arizona 85701

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* * *

[Testimony of James Evans Aiken, pp. 136:18-173:25]

* * *

JAMES EVANS AIKEN,

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STORTS:

Q. State your name, sir?

A. My name the James Evans Aiken, A-I-K-E-N.

Q. Where do you reside, Mr. Aiken?

A. I reside in North Carolina.

Q. You at the present time are employed doing what exactly, Mr. Aiken?

A. I'm president of James Aiken Associates Inc. which is a correctional consulting firm.

Q. And correctional consulting firm, who do you consult with?

A. I consult with prison systems, prison officials as well as attorneys, anyone that has a relationship with the operation and the management of prison systems.

Q. Is that state and federal?

A. That's local, state, federal, as well as international.

Q. And in fact, you have testified on three different occasions I believe here in Tucson, Arizona as a defense witness in cases of this similar nature, is that true?

A. That is correct, sir.

Q. Let's go back a little bit to your background, Mr. Aiken. What is your degrees and undergraduate background and your professional background?

A. I have a BA degree from Benedict College, Columbia, South Carolina, and I have a masters degree in Criminal Justice from the University of South Carolina.

Q. And you were raised in South Carolina, is that -- is that right?

A. That is correct, sir.

Q. And after you got your -- your BA and prior to your masters there in conjunction with it, where did you get your first job, what was your first employment?

A. All of my employment history has to do with prisons. I started in 1971 upon leaving college working with the South Carolina Department of Corrections in the capacity of a counselor or social worker

in the substance abuse program in a medium security prison that we had maximum security fencing on the outside, with the gun towers and dogs because this population could not be exposed to the community safely, but inside the institution was not as hard as some other maximum security prisons.

Q. Where was that located, sir?

A. That was in Columbia, South Carolina.

Q. And you initially went there as a drug counselor, is that in that capacity?

A. That is correct, sir.

Q. And then you moved onto other capacities within the prison system, is that true, sir?

A. That is correct, sir.

Q. And would you give the jury a synopsis of that?

A. Just briefly. I was promoted to administrative assistant to the warden at the same medium security prison which meant, back in those days, you got to do everything everyone else had to do. I fed inmates, I broke up fights, I worked on gun towers, worked escape contraband control, as well as other security-related matters within that facility as well as to assist the warden.

From there I was promoted to deputy warden of that same facility.

Q. What year was this?

A. I started in '71, I was promoted to administrative assistant in '72, and then promoted to deputy warden in '74.

Q. And did you ultimately -- as deputy warden, what was your functions in that capacity?

A. I was second in command of that facility.

Q. We're talking about the same facility?

A. Yeah, the Manning Correctional institute which was a medium prison and housed, at that particular time, approximately 350 inmates that were too dangerous to be exposed to the community.

Q. What were these inmates in this prison for, sir, were there a whole variety of charges?

A. A chart of charged serious acts of violence in the community to include manslaughter and murder as well as individuals that were involved in trafficking with drugs as well as being disruptive within the prison system, but not disruptive enough to be sent to maximum security.

Q. And what did you move on to after that, sir?

A. From there I moved to the state penitentiary in South Carolina.

Q. What was this exactly, this penitentiary, it wasn't a state facility?

A. It was a state facility, it housed approximately 1800, 2000 inmates. It housed the most dangerous predators, violent inmates in criminals within the South Carolina criminal justice system.

Q. You had about 1800 inmates there?

A. Yes, sir. And that included death row population as well as population that was receiving psychiatric evaluation as well as the population that was too dangerous to be kept in a county facility.

Q. What -- what capacity were you at that facility?

A. I was deputy warden at that particular time.

Q. And what -- where was your next prison, what time -- what year was that, sir, approximately?

A. I think I took over there in '76 and then I was promoted to warden of the women prison in 1979 and that was the facility that housed all classification of female -- female inmates from maximum security all the way down to minimum security.

Q. And then what was what was your career after that, sir, then?

A. Then I was promoted back to the state penitentiary as a warden to the chief executive officer of that facility. I was in charge of all aspects of security as well as the administrative and policy development of that facility. I was assigned to these facilities basically because I was somewhat of the clean-up person. I was the person that made sure that the institutions that were not running properly begin to work more efficiently.

Also at this facility, as I stated to you before, housed death row inmates, and I was responsibility for executing inmates.

Q. Is it true, sir, that at that point in time when you came back as warden the South Carolina prison system was having some problems?

A. Yes, they were having some problems. We were transitioning as all prison systems were from.

Q. Explain exactly what you mean by that to these folks.

A. Yes, sir. We were moving from rehabilitation to public safety.

Q. And explain what your meaning to rehabilitation to public safety, what are the two aspects of that?

A. On one side of the fence you had people with the emphasis of preparing inmates for return to society and sometimes back in those days that went over to the point that it endangered the public and and what was happening in the 80's and 70's, late 70's was that we started -- correctional system, the prison systems were moving from rehabilitation towards public protection, that is, prisons are not luxury places anymore, prisons are not just an appendage of a school, you are there because you violated the law and you are not supposed to be in the community.

Q. Now, they -- actually, Mr. Aiken, your wording in that was from rehabilitation to incarceration so to speak, is that correct?

A. Yes, sir. What we did was to expand from rehabilitation to incapacitation.

Q. And basically, meaning, they are there -- they don't get out and that's the capacity you're treating them in?

A. That's correct, sir, and I was responsible to shore up security as we went through this transition.

Q. Now, how long did you stay with the South Carolina Department of Corrections?

A. Well, I was warden there, performed two executions personally, then I was promoted to deputy regional administrator where I managed 16 prisons and then that was in '89 was when I left the South Carolina system.

Q. And where did you go then, sir?

A. I became Commissioner of Corrections for United States -- in the United States in the State of Indiana.

Q. And that was for the State Government?

A. No, sir, that was for the State of Indiana a member of Governor's Cabinet and the Chief Executive Officer over adult prisons, juvenile prisons as well as parole services.

Q. Is it safe to say in Arizona what we would have -- you were the head of the Department of Corrections in the State of Indiana?

A. That is correct, only difference is that I had juveniles as well as parole all under my -- my responsibility.

Q. And how long did you have that job, sir?

A. I stayed there for from '89 to 1992.

Q. And what did you do after that, sir?

A. I became Director of Prisons for United States Virgin Islands which comprises of adult corrections, juvenile corrections as well as jail operations.

Q. And how long did you stay in that capacity?

A. I stayed there from 1992 to 1994 when I created James Aiken and Associates.

Q. That brings you up to date?

A. Well, sort of. Back in '86 I started consulting with the Justice Department.

Q. All right. Now I want to talk a little bit about that. You belong to what, some professional associations that are dealing with the corrections field?

A. Well, professional association are -- yes, am currently a member of a congressional, a joint con-

gressional presidential commission that was -- was a law passed by Congress in 2003. I understand it was a unanimous vote of the house and senate and the law was signed, the bill was signed into law by President George W. Bush and it is the prison rape elimination act of 2003 where it governs -- a nine-member commission, the authority to evaluate, investigate, to include subpoena powers and to any correctional system in the United States in relationship to eliminating prison rape.

And the purpose of it is because prisons have become so dangerous in that inmates use sexual aggression upon other inmates for control and intimidation and we found both the liberals and the conservatives all agree that that cannot continue to exist within the United States prison systems and jail systems.

Q. That is the commission you're presently on, is that true?

A. That is correct.

Q. And as a matter of interest to -- for the jury, there's no question we have retained you to come here and testify in this case, did we not?

A. That is correct, sir.

Q. The business of the prison system, your involvement in it, you have in the past worked with the Department of Corrections here in Arizona, is that true?

A. I have trained individuals that were employed with the Arizona Department of Corrections in relationship to managing prison security.

Q. And part of what you've done in the prison system, we'll ask you to explain this to the jury in a

minute, is dealing with how inmates are classified, is that correct?

A. That is correct, sir.

Q. Is there an actual numerical score that is used on those type of in that classification?

A. Yes, sir.

Q. In the area of that or the way -- every state obviously is a little different maybe, but is there a general overall way that this classification functions?

A. Yes, sir.

Q. Could you explain that to the jury a little bit and possibly, I could make some notes for them, do you have two classifications, Mr. Aiken?

A. Well, I don't want to confuse everyone so I'll just talk in laymen terms if it's all right.

First classification, what is classification? It's putting the right inmate in the right level of security for protection of the public to include other inmates, staff and the general community. And what we usually do in every state is to have a numerical score.

Now, for example, like in Arizona you will have a score of one through five.

Q. All right. Should we go -- first, how about first to the public score, is that -- that's one side of the scoring, correct?

A. That is correct. The public, that is what level of threat or what level of security is required because of what this person did in the community.

Q. So that's the score -- score he gets based on the crime he committed for which he is serving time in prison?

A. That is correct. And -- and obviously it goes from a one to five, number one is the low, five is the highest.

Q. Mr. Cruz has been convicted of first degree murder. Based on your understanding of the prison system, where would he be scored in this state or frankly in any state?

A. Five.

Q. So he would be under a five system dealing all the way down to one. And if I understand five is the public score, and that means in one sense, the -- obviously, what the number -- the five inmates do not mix by and large, with the ones, the one or two level, is that a fair statement?

A. Not necessarily so what that five tells you is what he did in the community no matter how bad he is in the prison or how good he is in the prison he's always going to be under the gun. He is always going to be in a situation where maximum security is present to protect the public.

Q. And that score can never, ever change, is that true?

A. Not as long as he's alive.

Q. So as long as he's ever in a prison system, he's going to always have this classification of five?

A. Of five.

Q. Now, the other side is the prison side, is that right?

A. Yes.

Q. And let's talk little bit about that. The prison side is a scoring on that, is what, how does that go?

A. It's the same, it's the one through five.

Q. Okay. What does that mean, what's the one level at?

A. One means the lowest level of problems a person has in the prison. What we have found over -- and I've classified thousands and thousands of inmates as well as implementing classification systems, what we have found is your community behavior is a better predictor of future community behavior. Your prison or jail behavior is a better predictor of future jail or confinement history.

So a five, he's convicted, that will never change. Now on the other side, one through five, that can change in relationship to his behavior and adjustments to the prison, five being the highest, one being the lowest.

Q. But is it also safe to say, sir, if you have a five you'll never be at any kind of a medium or minimum security prison where a one or two level would be?

A. You will always be under the gun as -- as I stated before, and nothing can change that.

Q. So five is basically a category on down to -- for people that -- suppose somebody just explained to the jury, was a five, five -- what would you classify them at?

A. He's a disruptive, predator inmate in prison. He's raping people. He's taking hostages. He's hitting officers. He's inflicting all types of a gang activity within the prison. He's a kingpin of the drug operation. He's a kingpin of a gang operation. He's intimidating staff, trying to control the institution. That's a five.

Q. Now, how can that inmate in prison have that degree of authority?

A. They're always trying.

Q. That's something that the prison officials have to continually be dealing with, is that true?

A. Yes, sir, prisons are very dangerous places, they contain very violent people. I can choose to call them predators.

Q. And if somebody then would be a five, five or say a four, five, would be somebody be that would be a predator-type that you could construe as being a danger to others within the prison system, is that a fair statement?

A. That is correct, sir and, therefore, you have to make a judgment, community behavior, prison behavior, can this system contain them being a five. We got to decide what type of management this individual should be on.

Q. So if somebody is a five, five or a four five, he certainly can be put in such a prison setting where he can be managed, is that not true?

A. That is correct. If you have to tie them down on a bed, we'll do it. If we have to give him electrical shocks from a stun belt, we'll do it. If we have to kill them, we'll do it.

Q. The picture that is painted in that regard, it is basically a system wherein the prison system is going to control the inmates, is that a fair statement?

A. We're going to control and we're going to manage this inmate. If we have to tie them to a bed to keep him from throwing urine and feces on staff, we'll tie them to a bed. If we want to put him into a special chair where he cannot move and put a spit mask -- spit mask over him where he can't spit, we'll

do that. If we have to apply gas or tasers to control that behavior, we'll do that.

Q. Mr. Aiken, is it fair to say we touched briefly on it, this prison class rating system is something that's universally used pretty much throughout the United States, is that true?

A. That's correct, it's called objective.

Q. Both in the state and federal system?

A. State and federal system, yes.

Q. Now, talk about the county jail. So the jail system is there a functioning system as far as how they deal with inmates a little different?

A. Yes, they have what is known as a jail classification system, but the purpose is still the same, protection of the public as well as the people confined there, that work there.

Q. Of course it's true, sir, the inmates in the jail haven't been convicted of anything, some of them at least, is that a fair statement?

A. That is correct, they are in pre-djudicated status.

Q. Now, we had some testimony from Sergeant Sean Stewart who has a job similar to controlling all the aspects of the jail and he reviewed some records of Mr. Cruz. By the way, you reviewed extensive amounts of records on behalf of my office for Mr. Cruz, is that true?

A. That is correct, sir.

Q. I think you reviewed what, jail records from the Pima County Jail, you reviewed the Department of Corrections of Illinois records?

A. That is correct, sir.

Q. What other documents did you review, if you can recall?

A. Some presentence reports that were involved in there as well as the usual convictions that he had. I just approached this as a prison warden, it's about one foot thick of materials that I reviewed.

Q. And the purpose of reviewing those was -- which we'll come to in a bit, was to formulate an idea as to Mr. Cruz' future danger as far as inside the prison itself is that true?

A. That is correct, sir.

Q. We had some testimony from Mr. -- or Sergeant Stewart, he indicated because -- you never met or talked to Mr. Cruz, is that true?

A. That is correct, sir.

Q. And Mr. -- Sergeant Stewart indicated that he felt that that was something that was important because they did interview inmates when they came into the jail to determine what level they would be classified on, and I think you and I talked a little bit about that today, did we not?

A. That's correct, sir.

Q. And in your -- in your understanding, in your expertise, is talking to an inmate when you're dealing with your classification something that you felt was in -- has to be done at this point in time?

A. No, sir.

Q. But clearly when -- when some inmates are brought into the prison system, he would be interviewed by your staff, could raise or lower where he's placed is that true?

A. That's correct, sir.

Q. You -- in looking at the records were you able -- when you did -- you evaluate him because the prison records, is it not true sir, are the history of the inmate that you're going to be evaluating?

A. That's correct sir, it's the official record. When I say "official record," what am I talking about? I'm talking about years of constant supervision and documenting that supervision. Everything that he did and everything that he did not do is contained in that record and you get a complete overall evaluation of that individual's adjustment in a prison system and so, therefore, I place more value on what the official record reveals over an extended period of time of incarceration and making the decision.

Yes, people interview and that's important and sometimes I interview to further validate what's already in the record, but my -- and I don't know exactly what Mr. Stewart does, but in my capacity, the buck stops with me. The decision and the final decision is made when I put my signature on it.

Q. Now, Mr. Aiken, as far as reviewing the records on Mr. Cruz, did you -- when you -- you reviewed them, also review other aspects of how he -- his behavior in prison, how he got along both in the prison and in the Pima County jail?

A. Yes, sir. I looked at the totality of it; yes, sir. That's a very important aspect in relationship. For example, as we just discussed with you, the crime that he has committed now that puts a five there, that's it. I don't care how good or how bad he is in prison, he's going to stay a five. He's going to always be under a gun.

Q. Now, did you -- Mr. Aiken, in reviewing his files, you were also able to gather additional infor-

mation about Mr. Cruz such as a gang activity, things of that nature?

A. Yes, sir. One of the things about prison confinement period, you get to know that person better than you did in the community and, why, because you have the police watching 24 hours a day and documenting everything, and you know a person can be a member of a gang, but I'm talking about the behaviors of being a member of a gang. That's very important. Are you demonstrating a gang behaviors and how are we managing that or preventing that from happening in the first place.

Q. In somebody has been a member, hard as this may be to explain, a member of a gang, we're talking about a prison a gang, is there likelihood of getting along better in prison, better or worse because of gang-related connections and activity?

A. As I stated previously, gangs in prison are very dangerous people and places, people invoke violence on other people in order to exert power and control. People that have a reputation of a gang leader in our prison environment, especially prison, a gang, their probability of being victimized is greatly diminished. An individual who has no -- a gang -- concrete history of gang behaviors within the correctional environment, they're probability for victimization is much higher.

Q. What about ages of inmates? In this case, you determined Mr. Cruz was 35. How does he stack up age-wise in the prison system?

A. Old. What I mean by that, and I'm speaking for myself here, as you get older you become weaker, you become less aggressive, physically aggressive than the younger population. The younger popula-

tion today is much more aggressive, you see much more aggression and violence.

And what we have found that anyone over 30, 32 years old years of age is a major drop-off where this person, even if he had -- which I didn't find in his record where he was a predator in the prison system, the probability of him demonstrating the predator behaviors have dropped off tremendously.

Number two, something I have learned in the prison environment, you get older faster. Thirty-five years of age in a prison environment, you are an old person. And if you got someone in there 21, 22 years of age, and all that individual knows is violence and breeds violence, they see you as a victim, a potential victim because you have no gang membership or at least you're not demonstrating the behaviors of a gang membership.

Yeah, there could be notes in the record, but I'm looking for the behavior, what clique do you belong to collectively in order to survive.

Q. So it's safe to say somebody that could have a five public score, be in a prison system, actually could become, not a predator, but somebody that's preyed upon so to speak?

A. Very definitely, and this certainly is the case here.

Q. You also pointed out some other things you observed about Mr. Cruz, and that goes into his -- his overall family background and some of those things that you factored in and due consideration on his overall potential score?

A. That is correct.

Q. Would you explain those, sir?

A. I looked at his extensive history of abuse. I looked at his extensive history in relationship to substance abuse, and what that does when a person comes into the correctional system is increases the probability of victimization. Now, why? I talk about age, how is it inner-related?

If you are out there on drugs, continuously taking drugs there's a major indicator from a prison warden's perspective that you are not keeping health habits, you're not getting your yearly check-up, you are not demonstrating behaviors that will make you healthier. In fact, you involved yourself in at risk behaviors to your health. So you become weaker. You look at the psychological, slash, emotional aspect of the abuse and the whole prison system is filled with people like this.

Q. Also, I noticed sir, that you had some thoughts based on the class of the family, coming from like a middle class family more to lower to middle class also creates a problem for him in prison, is that true?

A. Very definitely. What that does very simply, is that it says, you don't belong. You come from a middle class family, you're not a hoodlum on the street, if you know what I'm saying. So therefore, that increases your probability of victimization.

Q. When you reviewed all the records for Mr. Cruz, starting with the Illinois prison system, what did you -- what was your conclusions as far as his behavior while he was a prison in the State of Illinois?

A. Acceptable behavior.

Q. Might have had some minor write-ups, but nothing of any consequence?

A. He had a contraband write-up for a ring, if I remember, which is considered to be -- be very -- very -- even though you may say major on the write-up, I have to interpret that and, as a warden, I have to interpret that, and that's not the worse breach of security. And if I remember correctly, he got a verbal reprimand for that.

Q. How about the records you reviewed from the Pima County jail?

A. Yes, sir.

Q. What did you find in those records, sir?

A. I found write-ups where he was sanctioned for violations, nothing that the correctional system of the jail could not manage and nothing that would indicate to me that he was demonstrating behaviors of a predator.

Q. Based on all your experience, Mr. Aiken, the -- do you have a position as to what the warden of an institution where Mr. Cruz would be housed, what's the primary thing he would be dealing with as far as Mr. Cruz is concerned?

A. Keeping him alive.

Q. Because obviously, if he's an inmate under his control he's doesn't want him killed?

A. That's correct.

Q. Go ahead.

A. I'm just saying, the point is, is that he's not going to get out of jail, he's going to always be under the gun.

Number two, is that his adjustment to the prison system, jail system confinement has been satisfactory.

Number three, which I think is very important, he's going to be with the most dangerous predator, violent people that you have in the state for the remainder of his life.

Q. Where did your ultimately come in as far as his prison score is concerned, where would you classify him in that regard?

A. Well, just take away this and I have a score of one to -- 10 being the worse of the worse, one being the least worse, and I would say he would come in, using all the inmates between, a three, very, very, very low four, but mostly a three.

Q. And so in this capacity prison inmates, he maybe classified in the area of a two or three or something?

A. Initially, yes, then he'll go -- go down to a one.

Q. That still doesn't move him from anything other than strict confinement?

A. That is correct.

Q. And then in the -- really the idea of the institutional score is -- is whether or not Mr. Cruz would be a danger to other inmates and staff, is that what we're really talking about?

A. Yes, can he assist and manage this individual.

Q. Did you have an opinion, based on what you feel, as far as Mr. Cruz is concerned?

A. Yes, he can be adequately managed in a proper security system such as Arizona Department of Corrections for the remainder of his life without causing undue risk of harm to staff, inmates or the general community.

Q. You certainly managed, in your course of your long history of inmates with the same type and character and basically prison background as Mr. Cruz, is that true?

A. Many, many, many inmates to include inmates that are much -- that Mr. Cruz doesn't even come close to in relationship to being a predator, he's nowhere on that radar screen at all.

Q. But there, again, sir, he's still going to be housed with the people like that?

A. That is, correct, sir.

MR. STORTS: I believe that's all I have right now.

THE COURT: Cross?

CROSS EXAMINATION

BY MR. UNKLESBAY:

Q. Good afternoon sir?

A. Good afternoon, sir.

Q. You and I have been in this position before where we discussed these very same issues, have we not?

A. Yes, we have.

Q. You've been out to Pima County, fourth trip out here in the last year, plus or year and a half?

A. I don't know how many times, it's been three or four times.

Q. Okay. And it would be accurate to say on each of the occasions that you been out here to testify, your testimony has been similar in the sense that each of the defendants that have retained you to come and testify on their behalf, you have stated that

they can be adequately controlled and managed in the State -- in the Arizona State prison system?

A. That is correct, sir.

Q. And that included at least one individual that you came out and testified on last year who had actually been on death row previously, had assaulted other inmates while he was on death row, had assaulted guards in the Pima County Jail, and your testimony in that case was that he was somebody that could be adequately managed even though he had managed to assault people while he was on death row?

A. That is correct, sir. As I explained earlier, prisons are not safe places.

Q. Yet -- yet, even though those folks who continue to be assaultive, once they have been placed in the Department of Corrections, you have testified in the past even in Pima County that those folks can be adequately managed in the Department of Corrections?

A. That is correct, sir.

Q. And you would agree with me, as well, would you not, Mr. Aiken, that -- that is the job of the Arizona Department of Corrections to adequately manage and control the inmates that are sentenced to that facility?

A. Primarily, yes, sir.

Q. All right. And would you also agree with me, Mr. Aiken, that the fact that an inmate can be adequately managed has nothing to do with what sentence might be appropriate for the crime that they've committed?

A. I don't understand that, sir.

Q. Well, any inmate, whether they are sentenced to the Department of Corrections for a car burglary or a residential burglary or an assault, a knifing or a murder, first of all, it's the job of the prison to manage them?

A. I believe that, yes.

Q. The fact they can be managed has nothing to do with whether or not they should get two years for a car burglary or five years for a stabbing, those are separate issues, are they not?

A. I'm not qualified to even address that sir, I never sentenced anyone.

Q. All right, sir. Let me ask you, Mr. Aiken, you had indicated just a couple minutes ago that there are things that you evaluate in classifications of inmates that are not in the record, what did you mean by that or did I misunderstand what you said?

A. No, I -- when I say not in the record, I'm talking about hostage situation is not in his record, him having lethal force against staff and other inmates is not in his record, and other behavior disorders that are related to predator inmate behavior is not in his record.

Q. When you were evaluating folks, when you were working for the prison system and it is your job to classify inmates as you indicated, you would interview those inmates so that you could get an accurate classification of them, would you not?

A. No, sir.

Q. You did not?

A. I interviewed just a small amount of inmate population. What I'm more concerned about is what people that have to manage that inmate have to say about him in writing so that I can make --

Q. Okay.

A. -- an adequate decision.

Q. And when you say the folks that have managed him, what they have to say in writing, does that mean that you have no concern about what these folks might say about a particular inmate that may not be in the record?

A. Sir, one of the things that we know about prisons is that you document everything. One saying we have, if it's not documented, it didn't happen. And officers know that they have to document because it means for the welfare and the safety of inmate populations. Yes, I've interviewed inmates to only further validate what was already if the record. They might -- the inmate may be able to tell me everything. Well, I didn't do this, all of this. I want to listen to what the people who have to manage him have to say.

Q. Well -- and you didn't do that in this case at least verbally or orally with any of the people that have managed Mr. Cruz in the past?

A. I did -- like I did with the thousands and thousands of other cases, I read what they wrote, some of the documents in there about what he did between minutes and I can listen to those documents, I lived and breathed those documents.

Q. You don't think there's any value in speaking to someone like Sergeant Stewart who knows the

inner workings of the jail what goes on in there to find out anything more about Mr. Cruz?

A. I would never say that it would not be of any value. Like I stated, one value is to further validate what's in the record, especially if there's something that -- that causes me to have some confusion. The records were very clear. The records stated very well about his behavior and -- and measures they took to make sure that the public is adequately protected.

Q. The same is true with the folks in Illinois that managed Mr. Cruz for a couple of years I guess, you didn't speak to any of those folks either, is that is that correct?

A. No, sir, I followed it the same way as a prison warden.

Q. I take it, obviously, you never worked in the Arizona prison system?

A. That's, correct sir.

Q. And you don't know if there are first degree murder defendants who are housed in Douglas or Florence or Winslow or Yuma or Picacho or any other facilities in the State?

A. Well, as for relationship to the name, sir, Florence obviously, but the point is, is that people that have inflicted violence to cause death in the community are not exposed back to that community because of that five.

Q. All right, sir. And when you indicated that you were involved in training some people at the Arizona Department of Corrections, I think the last time we chatted about this, that was some folks from the Arizona Department of Corrections attended a seminar which you were a speaker?

A. I was a consultant and technical assistance provider, yes.

Q. All right, sir. And this is something in your consulting business, much like the retainer agreement that you had with the defense on this case, is that you get paid to do?

A. Yes, sir.

Q. All right. And in this particular case, can you tell us what your retainer agreement was, how much you billed in this case?

A. Which case are you talking about?

Q. This case now.

A. I don't know right off, sir. I think I sent one bill in for $5,000, don't quote me on that but --

Q. Around that. And that was for some preliminary work?

A. That was -- that was a lot of the work, I would say half of it, maybe.

Q. All right?

A. Maybe a little less than half.

Q. So maybe we're talking $10 -- $12,000 the agreement would be the final bill, something like that?

A. I'm just guessing.

Q. All right. And -- and essentially, your testimony is that based on Mr. Cruz' prior prison history, his prior stay at the jail, it is your opinion that Mr. Cruz is someone who can be managed at the Department of Corrections?

A. Yes, sir in relationship to public protection that has a relationship to his behavior in the community.

MR. UNKLESBAY: Thank you.

THE COURT: Redirect?

MR. STORTS: Just briefly.

REDIRECT EXAMINATION

BY MR. STORTS:

Q. Mr. Aiken, counsel was asking you about the money, I guess whatever implication you make of that, but, is it true, sir, that there is consulting cases that you won't take because of the nature of the individual that's involved the defendant?

A. Yes, sir. I have reviewed the records just like I have in this case and told counsel, quite frankly, what my objective opinion was, and they said, thank you, sir, we don't need to talk to you anymore.

Q. So it isn't just a question of you taking every case by every defense lawyer that happens to offer you the money to come testify?

A. That is correct, sir.

Q. And you also, as you pointed out to the jury, are now doing consulting work for both the federal government and other state government, too, is that true?

A. I have provided that in my history, yes, sir as well as as international.

Q. You -- you get paid for that, don't you?

A. Yes, sir, I do.

Q. Are you getting paid for being on President Bush's congressional --

A. I did that as a freebee.

Q. Okay. But you -- at least you get your expenses, is that correct?

A. Yes.

Q. A dollar a year or something like that?

A. Yes, sir.

Q. All right. You didn't find any assaultive behavior in any of Mr. Cruz' file anyplace, did you?

A. No, sir.

Q. And that's when counsel was talking to you about this other gentleman that you came in and reviewed and you found that there was some assaultive behavior in his background, wasn't it also true that assaultive behavior surrounded somebody else attempting to attack him or something of that nature?

A. I don't know, I don't remember the particulars. The only thing I do remember about it, is the fact that I explained to counsel that I have been in the management of inmates for a very long time, and I have been in the situation where I have had to order an inmate killed, I'm not talking about execution. I executed two of them, but I'm talking about telling a sniper to blow an inmate away and kill him.

Q. Because of what was going on in the prison?

A. Because of his behavior, and he was killed.

Q. The business about the other cases that they were referring to there, again, that has absolutely nothing whatsoever to do with your conclusions or findings in Mr. Cruz' case, is that true?

A. That is correct. And if he was not manageable, I would have told counsel that.

Q. And is it safe to say, sir, that you indicated that you have on -- on occasion, you had two occasions where you actually performed injections or executions?

A. Electricity, yes, executions.

Q. They were electrocuted?

A. That's correct, sir.

Q. And brought you obviously in a good deal of contact with people on death row, is that true?

A. That's correct.

Q. You did that during the entire time you were, what, in the prison system, certainly almost a hands-on basis in South Carolina, is that true?

A. All during my career, sir.

Q. You talked to a lot of death row inmates, is that correct?

A. Many, many death row inmates.

Q. Also talked to number of inmates that are doing life without the possibility of ever being paroled, is that true?

A. I had interactions with them as well as the people that manage them.

Q. Is it -- is it true, sir, that the death row inmates are actually viewed with some degree of relief by an inmate that is serving life without the possibility of ever being paroled?

A. Yes, sir.

Q. Why?

A. They have a date.

Q. They know when they are going to die?

A. They know when they are going die, even though they have appeals, they know that they have a date compared with the inmates that are out there with the people in the population that you are dealing with dangerous, predator people that don't value life.

Q. They could be killed at any time?

A. For no reason.

Q. And they are always in fear?

A. Yes, sir,

MR. STORTS: Thank you.

THE COURT: Do any of the jurors have any questions for Mr. Aiken? Okay, apparently not.

Sir, thank you very much for your time and testimony.

THE WITNESS: Thank you very much.

* * *

SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF – EXHIBIT 26

IN THE SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA,

Appellee,

v.

JOHN MONTENEGRO CRUZ,

Appellant.

CR-05-0163-AP

Pima County CR-2003-1740

APPELLANT'S REPLY BRIEF

[pp. 10-11, 20]

* * *

II. PRETRIAL ISSUES

a. The Trial Court Erred By Excluding Mitigation Evidence By Refusing To Make A Pretrial Determination Concerning Whether Cruz Would Receive A Life Or Natural Life Sentence Should He Be Convicted And Not Sentenced To Death By The Jury.

Cruz sought to inform the jury as mitigation that there was in practical application no possibility he

would ever be released from prison should they render a life verdict. To this end Cruz sought to present testimony of Duane Belcher of the Arizona Board of Executive Clemency to provide expert testimony on how the State handles natural life and life sentences. [RA 427; TT 01/10/05 p. 62.].

Cruz also requested the trial court to render a pre-trial determination of what sentence it would impose should he receive a life verdict from the jury. This request was not unreasonable, illegal, or otherwise improper. It is patently obvious that any clear thinking person would conclude the only verdict the trial court would impose had the jury pronounced a life verdict would have been life without the possibility of parole. Any exercise in semantics wherein the state and the trial court postulate that the court couldn't know what it was going to do in that circumstance is for lack of a better word, "silly" due to the fact the murder dealt with a police officer.

Both of the above were gauged for presentation to the jury to provide them with a reason to impose a sentence of less than death. See *Simmons v. South Carolina*, 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994) [due process requires the sentencing jury be instructed a capital defendant will not be eligible for parole].

Cruz's requests were prophetic in that the jury wanted a reason to impose leniency. The record notes:

> We WANTED to find a reason to be lenient. Who in their right mind wants to decide to put someone to death? Many of us would rather have voted for life if there was mitigating circumstance that warranted it. In our minds

> their wasn't. We were not given the option to vote for life in prison without the possibility of parole.

[RA 644, Exhibit 9, emphasis in original].

At a minimum it was an abuse of discretion and error for the trial judge to deny the Belcher testimony. Belcher could have explained to the jury what life with out parole for 25 years and natural life meant in practical application. Had the jury been provided this information it would have provided them meaningful information, that in their individual determination of what the appropriate sentence should have been, given each juror a reason to impose a sentence of less than death. However, the trial court chose to merely recite the statutes without any guidance or understanding as to what they really meant. [RA 625 p. 7].

* * *

V. CONCLUSION

Based on the foregoing, as well as the arguments presented in his opening brief, Appellant requests this Court to reverse his conviction and/or sentence and remand to the trial court for a new trial.

RESPECTFULLY SUBMITTED THIS 21st day of December, 2007.

LAW OFFICE OF DAVID ALAN DARBY

____

DAVID ALAN DARBY

Attorney for Appellant

* * *

SUPERIOR COURT OF ARIZONA

COUNTY OF PIMA

STATE OF ARIZONA,

Plaintiff,

v.

JOHN MONTENEGRO CRUZ,

Defendant.

No. CR 2003-1740

RESPONSE TO SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF

Hon. Joan Wagener

Division 24

Pursuant to Rule 32.6(a) of the Arizona Rules of Criminal Procedure, the State responds to Defendant John Montenegro Cruz's successive petition for post-conviction relief.

RESPECTFULLY SUBMITTED this 20th day of April, 2017.

Mark Brnovich
Attorney General

Lacey Stover Gard
Chief Counsel

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/s/ Jeffrey L. Sparks
Jeffrey L. Sparks

Assistant Attorney General
Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant John Montenegro Cruz seeks relief from his death sentence imposed for the 2003 murder of Tucson Police Officer Patrick Hardesty, arguing that *Lynch v. Arizona,* 136 S. Ct. 1818 (2016), is a significant change in the law that is retroactively applicable to his case and would probably overturn his sentence. *See* Ariz. R. Crim. P. 32.1(g). This Court should dismiss Cruz's successive petition and deny relief because *Lynch* is not retroactively applicable to Cruz's case and, even if it was, it would not probably overturn his death sentence for shooting to death a police officer in the line of duty.

A. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND.

Cruz was convicted and sentenced to death in this Court for the 2003 murder of Tucson Police Officer Patrick Hardesty. *State v. Cruz,* 218 Ariz. 149, 181 P.3d 196 (2008). Cruz ran from Officer Hardesty while the officer was questioning him about a hit-and-run collision. *Id.* at 155-56, ¶¶ 2-4, 181 P.3d at 202-03. Officer Hardesty chased Cruz on foot and, during the chase, Cruz shot the officer five times, emptying the five-shot revolver he was carrying—two shots struck Officer Hardesty's protective vest, two others struck him in the abdomen below the vest, and one entered his left eye, killing him almost instantly. *Id.* at 156, ¶¶ 5-7, 181 P.3d at 203. Four of the shots were fired from no more than a foot away. *Id.* at 156, ¶6, 181 P.3d at 203.

The Arizona Supreme Court affirmed Cruz's conviction and sentence on direct appeal, concluding that the jury did not abuse its discretion by sentencing

Cruz to death. *Id.* at 171, ¶ 138, 181 P.3d at 218. This Court denied his petition for post-conviction relief in 2012, and the Arizona Supreme Court declined to review that decision. (*See* Successive Petition for Post-Conviction Relief ("Successive Petition") at ii.) In 2014, Cruz filed a petition for writ of habeas corpus in the federal district court, which is still pending. (Successive Petition at ii–iii.) On March 9, 2017, Cruz filed this successive petition for post-conviction relief, arguing that *Lynch* entitles him to a new capital sentencing trial under Arizona Rule of Criminal Procedure 32.1(g).

B. ARGUMENT.

In *Lynch,* the Supreme Court held that, because Arizona does not have parole for crimes committed since 1994, a defendant whose future dangerousness the State puts at issue during his capital sentencing proceeding has a due process right under *Simmons v. South Carolina,* 512 U.S. 154 (1994), to inform the jury of his parole ineligibility, either through a jury instruction or argument by counsel. *Lynch,* 136 S. Ct. at 1818, 1820. *Lynch* overruled a well-established line of Arizona Supreme Court opinions holding that *Simmons* did not entitle capital defendants to inform juries of the lack of parole. *See, e.g., State v. Benson,* 232 Ariz. 452, 465, ¶ 56, 307 P.3d 19, 32 (2013); *State v. Chappell,* 225 Ariz. 229, 240, ¶ 43, 236 P.3d 1176, 1187 (2010).

Normally, a claim that the trial court erred in instructing the jury is precluded from relief under Rule 32 because it could have been raised on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3). However, Rule 32.2(b) permits an otherwise-precluded claim to be raised in a post-conviction petition if the claim relies on, as

asserted here, Rule 32.1(g). This Rule permits a claim to be presented if "[t]here has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence." "The archetype of such a change occurs when an appellate court overrules previously binding case law." *State v. Shrum,* 220 Ariz. 115, 118, ¶ 16, 203 P.3d 1175, 1178 (2009). Rule 32.1(g) "encompasses all claims for retroactive application of new constitutional and nonconstitutional legal principles." Ariz. R. Crim. P. 32.1(g) cmt. Cruz contends that *Lynch* meets these requirements.

Even if *Lynch* represents a "significant change in the law" under Rule 32.1(g), however, Cruz cannot obtain relief because he cannot establish that *Lynch* (1) applies retroactively to his case, and (2) would probably overturn his sentence.

1. Lynch *does not apply retroactively.*

Assuming *Lynch* represents a significant change in the law, Cruz has not established that it applies retroactively to his conviction, which is final. *See Cruz v. Arizona,* 555 U.S. 1104 (2009) (denying certiorari); *see also State v. Towery,* 204 Ariz. 386, 389-90, ¶ 8, 64 P.3d 828, 831-32 (2003) (a case becomes final when "a petition for certiorari [is] finally denied"). "[D]ecisions overruling precedent and establishing a new rule are 'almost automatically nonretroactive' to cases that are final and are before the court only on collateral attack." *State v. Slemmer,* 170 Ariz. 174, 180, 823 P.2d 41, 47 (1991). "This retroactivity principle applies even when the new rule constitutes a 'clear break' with the past and . . . overrules past precedent of the court." *Id.* Therefore, even if *Lynch* is a significant change in Arizona law,

this does not compel a conclusion that its rule should be applied to Cruz's case, because "[t]he Constitution . . . neither forbids nor demands retroactive application of new rules to cases that have become final." *Towery,* 204 Ariz. at 389, ¶ 6, 64 P.3d at 831.

In *Towery,* the Arizona Supreme Court held that, although *Ring v. Arizona (Ring II),* 536 U.S. 584 (2002), "announced a new rule" requiring juries to find the existence of aggravating factors beyond a reasonable doubt, the new rule did not apply retroactively to defendants whose convictions were final. 204 Ariz. at 390, 10, 64 P.3d at 832. Instead, "determining whether [*Ring II*] applies retroactively largely turns on whether *Ring II* established a substantive or procedural rule." *Id.* "Petitioners whose cases have become final may seek the benefit of new substantive rules. A new constitutional rule of criminal procedure, however, usually does not apply retroactively to collateral proceedings." *Id.* at 389, ¶ 7, 64 P.3d at 831 (internal citations omitted). The *Towery* court concluded that "[t]he new rule of criminal procedure announced in *Ring II* . . . does not meet either of the exceptions to [the] general rule that new rules do not apply retroactively to cases that have become final." *Id.* at 393, ¶ 25, 64 P.3d at 835.

To apply retroactively, a procedural rule must be "a watershed rule of criminal procedure." *Id.* at 391, ¶¶ 16-18, 64 P.3d at 833 (citing *Teague v. Lane,* 489 U.S. 288 (1989)).[1] The Supreme Court has held that

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[1] Arizona has "adopt[ed] and appl[ied] the federal retroactivity analysis to decisions of state constitutional law." *Slemmer*, 170 Ariz. At 182, 823 P.2d at 49.

Simmons—the foundation for the Supreme Court's decision in *Lynch*—establishes a procedural rule that does not meet this high bar:

> Unlike the sweeping rule of *Gideon,* which established an affirmative right to counsel in all felony cases, the narrow right of rebuttal that *Simmons* affords to defendants in a limited class of capital cases has hardly altered our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding. *Simmons* possesses little of the "watershed" character envisioned by *Teague's* second exception.

O'Dell v. Netherland, 521 U.S. 151, 167 (1997) (emphasis in original; internal quotation marks and citations omitted). "Logic dictates that if [*Simmons*] announced a procedural rule, then, by extension, [*Lynch*] did also." *Towery,* 204 Ariz. at 391, ¶ 12, 64 P.3d at 833 (concluding that since *Apprendi* announced a procedural rule, then so did *Ring II,* which applied *Apprendi).* Necessarily then, *Lynch,* which merely applies *Simmons* in Arizona, must also be procedural and non-retroactive. Therefore, Cruz is not entitled to retroactive application of *Lynch.*

Cruz contends that *Lynch* should apply retroactively to his case because, in relying on *Simmons,* it merely applies a "well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." (Successive Petition at 8 (quoting *Slemmer,* 170 Ariz. at 179-80 (quoting *Yates v. Aiken,* 484 U.S. 211, 216 (1988))).) If Cruz were correct in characterizing *Lynch* in this manner, then *Lynch* would fail to meet Rule 32.1(g)'s requirements for

relief because it would not constitute a significant change in the law; *i.e.,* it would not be a "transformative event, a 'clear break from the past.'" *Shrum,* 220 Ariz. at 118, ¶ 15, 203 P.3d at 1178 (quoting *Slemmer,* 170 Ariz. at 182, 823 P.2d at 49). His argument fails, however, because Cruz's contention is undermined by his own assertion that *Lynch* is a significant change in the law (Successive Petition at 6-8), and he also does not accurately characterize *Lynch.*

In the 22 years between *Simmons* and *Lynch,* no court concluded that Arizona defendants were entitled to parole unavailability instructions under *Simmons.* In fact, until *Lynch,* the Arizona Supreme Court uniformly held the opposite in a series of nine opinions. *See State v. Lynch,* 238 Ariz. 84, 103, ¶¶ 62-66, 357 P.3d 119, 138 (2015); *Benson,* 232 Ariz. at 465, ¶ 56, 307 P.3d at 32; *State v. Boyston,* 231 Ariz. 539, 552-53, ¶ 68, 298 P.3d 887, 900-01 (2013); *State v. Hardy,* 230 Ariz. 281, 293, ¶ 58, 283 P.3d 12, 24 (2012); *State v. Hausner,* 230 Ariz. 60, 90, 280 P.3d 604, 634 (2012); *Chappell,* 225 Ariz. at 240, ¶ 43, 236 P.3d at 1187; *State v. Hargrave,* 225 Ariz. 1, 14, ¶¶ 52-53, 234 P.3d 569, 582 (2010); *State v. Garcia,* 224 Ariz. 1, 18, ¶¶ 76-77, 226 P.3d 370, 387 (2010); *Cruz,* 218 Ariz. at 160, ¶¶ 41-42, 181 P.3d at 207 (addressing Cruz's reliance on *Simmons* in support of claim that trial court should have made pretrial ruling on whether it would sentence him to life or natural life). In Arizona, therefore, the unambiguous rule was that defendants were not entitled to *Simmons* instructions.

A decision applying an established principle does not create a "new rule," and thus may be applied retroactively, if a "court considering [a defendant's]

claim at the time of 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, 541, ¶ 13, 260 P.3d 1102, 1106 (App. 2011) (quoting *Saffle v. Parks,* 494 U.S. 484, 488 (1990) and citing *Teague,* 489 U.S. at 301). But the nine decisions cited above make abundantly clear that the Arizona Supreme Court did not feel "compelled to reach the same conclusion as did the [Supreme] Court in [*Lynch*]." *Poblete,* 227 Ariz. at 541, ¶ 14, 260 P.3d at 1106. Indeed, in Cruz's own case, the Arizona Supreme Court concluded that *Simmons* did not support his claim that this Court erred by declining to choose before trial which type of life sentence it would impose if the jury voted for life. *Cruz,* 218 Ariz. at 160, ¶ 41, 181 P.3d at 207. The court noted that, unlike in *Simmons,* "no state law would have prohibited Cruz's release on parole after serving twenty-five years, had he been given a life sentence." *Id.* at 160, ¶ 42, 181 P.3d at 207.

Thus, because in *Lynch*, *Benson*, *Boyston*, *Hardy*, *Hausner*, *Chappell*, *Hargave*, *Garcia*, and *Cruz* the Arizona Supreme Court did not feel compelled to reach the same conclusion as did the U.S. Supreme Court in *Lynch*, that decision introduced a new, procedural rule that is not retroactive. *See Poblete*, 227 Ariz. at 541, ¶ 14, 260 P.3d at 1106 (case introduced a new rule where courts had not felt compelled to reach the same conclusion) (citing *Teague*, 489 U.S. at 301.) Consequently, *Lynch* does not apply retroactively to Cruz's case and his claim under Rule 32.1(g) fails.

2. *Even applying* Lynch *retroactively would not "probably overturn" Cruz's sentence.*

Even if Lynch applied retroactively to Cruz's case, it would not "probably overturn" his death sentence because: (1) Cruz did not request the relief *Lynch* affords, which is to inform the jury of parole unavailability through an instruction or counsel's argument; (2) the State did not put Cruz's future dangerousness at issue; and (3) even if the jury was instructed on the unavailability of parole, Cruz would not probably have received a life sentence.

The Supreme Court reiterated in *Lynch* that a defendant whose future dangerousness is at issue and for whom the only sentencing alternative to death is life imprisonment without the possibility of parole is entitled "to inform the jury of his parole ineligibility, either by a jury instruction or in arguments by counsel." 136 S. Ct. at 1818 (quoting *Shafer v. South Carolina*, 532 U.S. 36, 39 (2001)). Here, however, Cruz never requested to inform the jury that parole was unavailable through a jury instruction or argument. Instead, as he points out, he asked this Court to determine before trial whether it would sentence him to natural life or life with the possibility of release if the jury did not sentence him to death (Attachment A [R.O.A. 65], Attachment B [R.O.A. 77]), and proffered mitigation testimony from the Chairman of the Arizona Board of Executive Clemency that the Board could only recommend, and lacked the authority to grant, parole for prisoners sentenced to life with the possibility of release after 25 years. (Successive Petition at Ex. 1.) This Court

denied Cruz's presentencing request and precluded the Chairman's testimony.

When the Court precluded the Board Chairman's testimony, it stated that it would "give an instruction of the consequences of a life or natural life sentence as an instruction if the defendant so requests." (Attachment C [R.T. 3/1/05, at 6].) But although defense counsel responded, "I think we have one that is in our packet that we submitted to you" (*id.*), the record does not reflect that Cruz ever requested a jury instruction explaining that Arizona law did not provide for parole. His written objections and requested instructions for the penalty phase do not include a parole unavailability instruction or an objection to the court's proposed (and given) instruction that if the jury chose life, the Court would choose between natural life and life with the possibility of parole or release after 25 years. (Attachment D [R.O.A. 606, "Objections and Proposed Modifications to the Court's Instructions Re: Phase Three"].) *See* Ariz. R. Crim. P. 21.2 ("counsel for each party shall submit to the court counsel's written requests for instructions").

In sum, Cruz did not request the relief *Lynch* affords—to either instruct the jury or argue in closing that Arizona law did not provide parole. 136 S. Ct. at 1818. And with respect to what Cruz did request, *Lynch* is silent—it does not require this Court to decide before trial what type of life sentence it would impose or entitle a defendant to present testimony that the Board of Clemency could recommend, but not grant, parole. Consequently, even if *Lynch* applied retroactively to Cruz's case, he cannot establish

that it "would probably overturn" his death sentence. *See* Ariz. R. Crim. P. 32.1(g).

Second, the State did not put Cruz's future dangerousness at issue, a requirement for *Lynch*'s application. *See* 136 S. Ct. at 1818 (right to inform jury of parole ineligibility applies "where a capital defendant's future dangerousness is at issue"). Future dangerousness is at issue if it is "a logical inference from the evidence" or is "injected into the case through the State's closing argument." *State v. Escalante-Orozco*, 241 Ariz. 254, __, ¶ 119, 386 P.3d 798, 829 (2017) (quoting *Kelly v. South Carolina*, 534 U.S. 246, 252 (2002)). In *Escalante-Orozco*, for example, the State put future dangerousness at issue by presenting evidence in the penalty phase that the defendant had choked his ex-wife, yelled at her, held a knife to her throat and threatened her life, bit off part of someone's finger in a fight, and on another occasion tore off his wife's clothes, dragged her outside by the hair while she was naked, and threatened her with a knife. *Id.* at ___, ¶121, 386 P.3d at 829. The State also introduced "graphic photographs of the crime scene and autopsy photos" and emphasized the murder's brutality. *Id.*; *see also id.* at ___, ¶¶ 170-180, 386 P.3d at 836-38 (discussing sole aggravating factor, that murder was cruel, heinous, or depraved). In addition, the prosecutor highlighted the additional acts of violence in closing argument and argued that the defendant had "done so much evil that he has given up his right to live." *Id.* at ___, ¶ 122, 386 P.3d at 829-30.

Cruz argues that his future dangerousness was put at issue by the facts of Officer Hardesty's murder, the prosecutor's penalty-phase cross-examination of

Cruz's prison expert, James Aiken, and the prosecutor's closing argument. Unlike in *Escalante-Orozco*, however, the State did not present evidence of any violent incidents other than Officer Hardesty's murder. The murder did not involve a random attack on a stranger, which might suggest future dangerousness, but was occasioned by Cruz's attempt to evade arrest. Nor did the prosecutor emphasize the murder's brutality as it had in *Escalante-Orozco*—here, the State did not allege as an aggravating circumstance that the murder was cruel, heinous, and depraved. *See* A.R.S. § 13-751(F)(6). Furthermore, nothing in the State's cross-examination of Aiken suggested that Cruz was a dangerous person. (Successive Petition at 11 (citing R.T. 3/4/05, at 163-64).)

Nor did the prosecutor's closing argument suggest that Cruz was dangerous. Instead, the prosecutor simply reminded the jurors that Cruz shot Officer Hardesty five times, pointed out that the post-traumatic stress disorder an expert diagnosed him with could have resulted from the murder (and thus was not a reason to show him leniency), and argued that Cruz deserved a death sentence for murdering a police officer in the line of duty. (Successive Petition at 12 (citing R.T. 3/8/05, at 57-59).) In sum, nothing about the evidence created a "logical inference" that Cruz posed a risk of future dangerousness and the State's closing argument did not imply that conclusion. Consequently, *Lynch* would not "probably overturn" his sentence even if it applied retroactively to his case because the State did not place Cruz's future dangerousness at issue and, in any event, Cruz did not request a parole unavailability instruction.

Lastly, even had a parole unavailability instruction been requested and given, Cruz cannot establish that it probably would have resulted in a life sentence. If Cruz were correct that the State's closing argument suggested future dangerousness, those remarks were exceedingly brief. (*See* Successive Petition at 12 (citing R.T. 3/8/05, at 57, 58-59).) Given that the overwhelming majority of the State's closing argument focused on disputing the mitigating value of Cruz's penalty phase evidence, any rebuttal of the "future dangerousness" argument accomplished by a *Simmons* instruction would not have had a significant effect on the jury's consideration of the appropriate sentence. *See O'Dell*, 521 U.S. at 167 (*Simmons* provides a "narrow right of rebuttal" to some capital defendants).

Cruz makes several arguments for why he should receive a new sentencing. First, he is incorrect that error under *Lynch* is structural. Such an error does not "deprive defendants of basic protections," *Valverde,* 220 Ariz. at 584, ¶ 10, 208 P.3d at 235, or "infect[] the entire trial process," *Ring III,* 204 Ariz. at 552, ¶ 46, 63 P.3d at 933 (quotation omitted). Instead, it is trial error reviewable for harmlessness because it goes to the process—*i.e.*, the presentation of the case to the jury—not the framework, of a trial. *See Fulminante*, 499 U.S. at 310. In any event, the Arizona Supreme Court will decide whether *Simmons* error is structural in *State v. Lynch*, No. CR-12-0359-AP, where that very question is pending before the court. Moreover, structural error or not, Rule 32.1(g) nonetheless requires a defendant to establish that retroactive application would "probably overturn" their sentence.

Second, Cruz's reliance on *Escalante-Orozco* is misplaced. There, the Arizona Supreme Court concluded that on that particular record, the State failed to prove that the trial court's failure to instruct the jury on parole unavailability was harmless beyond a reasonable doubt. That is not the standard here. Here, it is Cruz's burden to show that, had the jury been instructed on parole unavailability, he probably would have received a life sentence. *See* Ariz. R. Crim. P. 32.1(g) (providing for relief where retroactive application of new rule "would probably overturn" the sentence).

Cruz has failed to meet that burden. As previously discussed, even accepting Cruz's arguments that future dangerousness was at issue, there was very little for a parole unavailability instruction to rebut. Cruz's contention that the jury was "misled" regarding the possible sentences he could receive (Successive Petition at 21-22) falls flat since his right to a parole unavailability instruction is triggered by the prosecution's suggestion of his future dangerousness (which it did not do in this case), not by the court instructing the jurors that he could receive a release eligible life sentence. *See Lynch,* 136 S. Ct. at 1818 (defendant entitled to instruction where future dangerousness is at issue and parole is unavailable). Moreover, the purpose of a *Simmons* instruction is to rebut an allegation of future dangerousness, not to correct the jury instructions regarding potential sentencing options. *See O'Dell*, 521 U.S. at 167 (*Simmons* provides a "narrow right of rebuttal"); *see also Lynch*, 136 S. Ct. at 1819 (*Simmons* recognized

due process right "to rebut the prosecution's argument that he posed a future danger").[2] And the jury here was accurately instructed on the possible sentences Cruz could receive. *Cruz*, 218 Ariz. at 160, ¶ 42, 181 P.3d at 207.

Next, this Court should not consider Exhibit 9, a letter from a juror which states, "We were not given an option to vote for life in prison without the possibility of parole," and Exhibit 10, a declaration by juror Mary Hurst, dated 9 years after the trial, claiming that, "If I could have voted for a life sentence without parole, I would have voted for that option." These two exhibits fall squarely within the prohibition against any "testimony or affidavit ... which inquires into the subjective motives or mental processes which led a juror to assent or dissent from the verdict." Ariz. R. Crim. P. 24.1(d); *see also State v. Snowden*, 138 Ariz. 402, 404, 675 P.2d 289, 291 (App. 1983) (courts are not "permitted to consider any inquiry into the subjective motives or mental processes leading a jury to assent or dissent from the

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[2] For the same reason, Cruz is wrong that "the *Lynch* decision reveals an independent constitutional error resulting from the misleading instruction (that Cruz could receive a parole-eligible sentence) . . . ." (Successive Petition at 22.) To the contrary, *Lynch* reaffirmed *Simmons*' specific holding that a capital defendant has a due process right to inform the jury of parole ineligibility when his future dangerousness is at issue and the only available sentencing alternative to the death penalty is life without the possibility of release. *Lynch*, 136 S. Ct. at 1818 (citing *Simmons*, 512 U.S. 154 (1994)). *Lynch* makes no mention of correcting allegedly misleading jury instructions and thus, even if retroactively applicable, would afford Cruz no relief on that basis.

verdict"). The general rule barring juror testimony is supported by "strong public policy against any post-verdict inquiry into a juror's state of mind." *Tanner v. United States*, 483 U.S. 107, 118 (1987) (quoting *United States v. Diogurardi*, 492 F.2d 70, 79 (2nd Cir. 1974)). This Court therefore should strike Exhibits 9 and 10 and not consider them in determining whether a parole unavailability instruction probably would have resulted in a life sentence.

Finally, Cruz relies heavily on studies purporting to show that jurors tend to believe that murderers not sentenced to death will eventually be released and that this belief makes jurors more likely to impose death sentences. (Successive Petition at 13-17.) Even if true, these studies do not address the purpose of a *Simmons* instruction—to permit a capital defendant to rebut the State's argument that he should receive the death penalty because he poses a threat of future dangerousness.—or the requirement that the defendant request such an instruction. 512 U.S. at 165-66 ("petitioner was prevented from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death"); *see also O'Dell*, 521 U.S. at 167. In other words, jurors may hold these same beliefs even where the State does not assert future dangerousness, yet the defendant in such a case has no right under *Lynch* or *Simmons* to inform the jury that parole is unavailable. Cruz's proffered studies therefore do not change the fact that Cruz did not request a parole unavailability instruction or that such an instruction would have been unlikely to change the sentence, since even if the State had raised future dangerousness, its focus on that topic

was so minimal that there was little for the instruction to rebut.

Because Cruz has failed to establish that *Lynch* would probably overturn his death sentence even if it did apply retroactively to his case, his claim under Rule 32.1(g) fails.

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C. CONCLUSION.

Cruz's claim under Rule 32.1(g) fails because Lynch is not retroactively applicable and, even if it was, it would not probably overturn his death sentence. The State therefore requests that this Court dismiss Cruz's successive post-conviction relief petition and deny relief.

RESPECTFULLY SUBMITTED this 20th day of April, 2017.

Mark Brnovich
Attorney General

Lacey Stover Gard
Chief Counsel

/s/ Jeffrey L. Sparks

Jeffrey L. Sparks
Assistant Attorney General

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,

Respondent,

v.

JOHN MONTENEGRO CRUZ,

Petitioner.

No. CR-2003-1740

MOTION FOR REHEARING

Hon. Joan Wagener
Division 24

DEATH PENALTY CASE

In accordance with the provisions in Rule 32.9(a) of the Arizona Rules of Criminal Procedure, Defendant John Montenegro Cruz requests that the Court grant rehearing of the Court's decision filed on August 24, 2017. The request for rehearing is supported by the attached memorandum.

Dated this 8th day of September, 2017.

Jon M. Sands, Federal Public Defender

Cary Sandman
Assistant Federal Public Defender

By: /s/ Cary Sandman

Cary Sandman

Counsel for Petitioner

MEMORANDUM

Rule 32.9 affords a defendant "aggrieved" by a court's final decision an opportunity to seek rehearing "setting forth in detail the grounds where in it is believed the court erred." *Id.* In accord with the requirements of the Rule, Cruz respectfully provides the Court with the specific grounds for rehearing.

A. The Court erred in holding that *Lynch v. Arizona*, 136 S. Ct. 1818 (2016) has not resulted in a significant change in the law.

A "significant change in the law within the meaning of Rule 32.1(g) requires some transformative event, a clear break from the past." *State v. Shrum*, 220 Ariz. 115, ¶ 15 (2008) (internal quotations and citations omitted). In *Shrum*, the Arizona Supreme Court provided an explicit definition of a "significant change in the law" for this Court to apply: "[t]he *archetype* of . . . a change [in the law under Rule 32.1(g)] occurs when an appellate court *overrules* previously binding case law." *Id.* (emphasis added). *Lynch* satisfies this "archetype" litmus test for identifying transformative events within the meaning of Rule 32.1(g), because — as already conceded by the State in these proceedings — *Lynch* "*overruled* a well-established line of Arizona Supreme Court opinions . . ." (State's Resp. Mem. at 3:9-10.) (emphasis added). *See, e.g.*, *State v. Escalante-Orozco*, 241 Ariz. 254, ¶ 117, 127 (2017) (vacating death sentence and remanding for new sentencing, after recognizing that Arizona Supreme Court's long-established application of Simmons v. South Carolina, 512 U.S. 154 (1994) had been found unconstitutional in Lynch). In sum then, *Lynch* represents "[t]he archetype of . . . a change [in the law because it occur[red]

when [the United States Supreme Court] overrule[d] previously binding case law [in Arizona].” *Shrum*, 220 Ariz. at 118, ¶ 16. This Court reached the opposite conclusion in its final decision, but respectfully, this was in error.

The Court’s error rests on its decision to conduct a *comparative analysis* of the transformative nature of *Lynch* as compared to several other cases where Arizona courts have previously found significant changes in the law. No Arizona appellate case countenances a *comparative analysis* route to determining whether there has been a significant change in the law; in its own briefing, the State has not urged the Court to embark on such an analysis; nor is such a comparative examination merited, given the definitive test the appellate courts have directed that this Court apply when deciding whether a significant change in the law has emerged. As already explained, “a change [in the law under Rule 32.1(g)] occurs when an appellate court *overrules* previously binding case law.” *Shrum,* 220 Ariz. at 115, ¶ 15 (emphasis added). For the reasons already explained above, Cruz has satisfied this test.

B. The Court erred when it decided that retroactivity principles barred application of *Simmons v. South Carolina* and its progeny *Lynch v. Arizona.*

In its decision, the Court held that the “rule announced in *Simmons* and *Lynch* is not a well-established constitutional principle. It is a procedural rule that does not apply retroactively.” (Decision at 2, citing *O’Dell v. Netherland*, 521 U.S. 151 (1997).) Respectfully, the Court’s reliance on *O’Dell* was misplaced. *O’Dell* only applies to petitioners whose

cases became final before the constitutional rule in *Simmons* was announced in 1994. In *O'Dell,* the petitioner's death sentence became final in 1988, but he sought to retroactively apply *Simmons,* which was ***not*** decided until six years later in 1994. 521 U.S. at 152, 156-157. It was only because O'Dell's death sentence became final *before* the decision in *Simmons* that he was required to demonstrate an exception to the retroactivity bar by showing that *Simmons* was a watershed rule of criminal procedure[1]; a demonstration he failed to make. *Id.* at 156-67. O'Dell does not apply to a petitioner like Cruz, whose sentencing proceeding concluded well after *Simmons* was decided. Thus, this Court erred when it applied *O'Dell* to decide Cruz's case.

Further illustrating these retroactivity principles, in *State v. Towery*, 204 Ariz. 386 (2003) the Arizona Supreme Court refused to retroactively extend the United States Supreme Court decision in *Ring v. Arizona*, 536 U.S. 584 (2002) to cases which were ***final before*** *Ring* was decided because *inter alia*, the defendants were unable to show that *Ring* was a watershed rule of criminal procedure. *Towery,* 204 Ariz. at 390-91, ¶¶ 8-17. On the other hand, *Ring* was retroactively extended by the Arizona Supreme Court to all thirty one defendants whose cases were

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[1] The United States Supreme Court has narrowly defined watershed rules of criminal procedure to reach only sweeping rules like the right to counsel guaranteed by *Gideon v. Wainright*, 372 U.S. 335 (1963). *See O'Dell*, 521 U.S. at 167 (affirming that the right to counsel afforded by *Gideon* is an example of the watershed rule exception to the retroactivity bar).

not final when *Ring* was decided. *See State v. Ring*, 204 Ariz. 534 (2003).

Based on the preceding discussion, Cruz is not barred by the retroactivity principles which governed the outcome in *O'Dell.* Rather, *Simmons* applies prospectively to Cruz's case because it was the law of the land long before Cruz's case began in 2003. This conclusion was endorsed by the Arizona Supreme Court in Cruz's direct appeal. Why? Because when the Arizona Supreme Court decided Cruz's direct appeal in 2008, the court was squarely presented with a claim under *Simmons.* The Arizona Supreme Court did not declare *Simmons* [as this Court recently has in its decision] as "a procedural rule that does not apply retroactively." Instead, the Arizona Supreme Court recognized *Simmons* as binding constitutional precedent, but distinguished *Simmons,* finding that "Cruz case differs from *Simmons,"* and it went on to affirm the trial court's ruling preventing the jury from receiving evidence "about . . . a defendant's chances of receiving parole," because that would require "speculat[ion] about what the Board might do in twenty-five years." *State v. Cruz*, 218 Ariz. 149, ¶¶ 41-45 (2008). The Arizona Supreme Court's latter conclusion, concerning the *speculative* possibility of future parole, was found to violate *Simmons* in *Lynch. See Lynch,* 136 S. Ct. at 1820 (Simmons held that a jury is entitled to learn of the defendant's parole ineligibility despite the potential for future legislative reform). Since *Simmons* does not present a retroactivity question, the ultimate issue goes to whether the significant change in Arizona law resulting from the Supreme Court's decision in *Lynch v. Arizona*, must apply retroactively to Cruz's case. The answer is that it does. "[N]ew decisions [such as

Lynch] applying 'well established constitutional principle[s] to govern a case which is closely analogous to those which have been previously considered in the prior case law' should generally be applied retroactively, even to cases that have become final and are before the court on collateral proceedings." *State v. Slemmer*, 170 Ariz. 174,179-80 (1991) (quoting *Yates v. Aiken*, 484 U.S. 211, 216 (1988)) (recognizing that new decisions relying on earlier established constitutional rule will be retroactively applied to post-conviction claims brought under the "significant change of the law" provisions of Rule 32.1(g)).

As explained in section A above, the *Lynch* decision has caused a significant change in the administration of Arizona's death sentencing proceedings; so much so, that at least one defendant had his death sentence vacated and remanded for a new sentencing proceeding. *See*, *Escalante-Orozco*, *supra.* However, because *Lynch* relied on *Simmons* to effectuate this significant change in the law it must be applied retroactively to Cruz's case. *Slemmer*, 170 Ariz. at 179-80.[2] Respectfully then, this Court erred in find-

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[2] The Court's decision cites nine cases where the Arizona Supreme Court rejected application of *Simmons,* as evidence that *Simmons* was not binding federal law. (Decision at 2-3.) Respectfully, under the Supremacy Clause this cannot be correct. These nine decisions were wrongly decided and have been effectively overruled. *(See, e.g.*, State's Resp. Mem. at 3:9-10), where the State conceded that *Lynch* "overruled a well-established line of Arizona Supreme Court opinions. . . ." The Court is correct that in each of these cases, the Arizona Supreme Court held that *Simmons* did not apply in Arizona. However, the holding in *Lynch v. Arizona* has exposed that

ing that retroactivity proscriptions bar consideration of *Simmons* and *Lynch* in support of Cruz's claim for relief in these proceedings.

C. The Court erred when it decided Cruz failed to demonstrate that the significant change in the law wrought by *Lynch v. Arizona* would probably overturn his sentence.

1. Cruz adequately presented his *Simmons* claim during the trial proceedings and direct appeal to the Arizona Supreme Court and the claim was adjudicated by the Arizona Supreme Court, absent any finding that the claim was *inadequately* presented.

Simmons grants the right to inform the jury of a defendant's parole ineligibility through argument of counsel or jury instruction. Here, Cruz proffered testimony that Arizona had abolished parole. In light of the foregoing, in its decision, the Court found that Cruz had failed to show a probability for sentencing relief because "there is no evidence Mr. Cruz sought the relief that *Simmons v. South Carolina* and *Lynch v. Arizona* provides at his trial." (Decision at 3.) Respectfully, the Court should reconsider this conclusion. Cruz's presentation of the *Simmons* claim was adequate.

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these nine earlier decisions misapplied the *Simmons* rule and were constitutionally flawed. Arizona courts were duty bound to follow *Simmons* from the date it was decided; the fact that they failed to do so may not be converted into a conclusion that *Simmons* was not binding federal law.

Prior to Cruz's sentencing, he proffered evidence from the Chairman of the Arizona Board of Executive Clemency, that after 1994, the Board lacked authority to grant parole to a prisoner sentenced to twenty-five years to life. (Ex. 1.) This was obviously a correct statement of the law regarding Cruz's parole ineligibility, since Arizona had abolished parole in 1994. *See Lynch*, 136 S. Ct. at 1819. Nevertheless, after sustaining the prosecution's objection to Cruz's proffer, the trial court prohibited Cruz from informing his jury that he was ineligible for parole. However, as explained below, it was implicit in the trial court's ruling proscribing the jury from learning that Cruz was parole ineligible, that Cruz would *not* be permitted to argue his parole ineligibility or obtain a jury instruction to the same effect, because to do so would conflict with the trial court's evidentiary ruling. The record makes the foregoing conclusion clear.

Once Cruz made the proffer from the Chairman of the Arizona Board of Executive Clemency, which would have informed the jury that he was parole ineligible, the prosecutor objected, arguing that it would be speculative to suggest that the laws would not change during the ensuing years. (Ex. 3 at 37-38.) The prosecutor stated that he would be amenable to an instruction informing the jury that if Cruz was not sentenced to death the court could choose to sentence him to life with parole or natural life. *(Id.* at 37:5-11, 38:3-5.) The trial court adopted the State's argument that it would be speculative to permit the jury to hear testimony about "what ***may*** happen to someone sentenced to life or natural life." (Ex. 19 at 6.) But, the trial court did agree to provide an instruction on the consequences of the life and natural

life sentences, and this was ultimately done, in the jury instructions, when the jury was instructed that if the death penalty was not imposed, the trial court: (1) could impose a natural life sentence with no possibility for release from prison on any basis, or (2) it could impose a "life imprisonment with a possibility of parole after twenty-five years." (Ex. 8 at 7.)

It is undeniable, that once the trial court entered a ruling prohibiting Cruz from informing his jury that he was parole ineligible because the proffered testimony was speculative, the same trial court was *not* going to permit defense counsel to get up in front of the jury, as *Simmons* allows, and argue to the jury that Cruz was nonetheless ineligible for parole as a matter of law. Indeed, such an argument would have violated the trial court's order proscribing such evidence and would have been contemptible under the circumstances.

In the end, the trial court was squarely confronted with the *Simmons* claim and it determined that Cruz's jury wound not learn of his parole ineligibility through testimony, and logically, the jury would not be permitted to learn of Cruz's ineligibility for parole through argument or an instruction. Under these circumstances, Cruz adequately presented the *Simmons* claim. *See, Escalante-Orozco*, 241 Ariz. at 254, ¶ 118 (although the defendant never argued that the State had placed his future dangerousness in issue — which is an explicit element of a *Simmons* claim — "Escalante-Orozco did not need to explicitly contend that his future dangerousness was at issue for the judge to comprehend the nature of the objection and fashion a remedy"). Here, the trial court had the ability to comprehend the nature of Cruz's objection

and to fashion a remedy by allowing Cruz's lawyer the ability to argue Cruz's parole ineligibility or to so instruct the jury. That opportunity was denied on the grounds that Cruz's parole ineligibility in the future was too speculative. The trial court's decision on this ground violated *Simmons. See, Lynch*, 136 S. Ct. at 1820 (a jury is entitled to learn of the defendant's parole ineligibility despite the potential for future legislative reform of parole laws).

As explained below, the Arizona Supreme Court repeated the error of the trial court. In the appellate briefing, Cruz cited *Simmons* in support of his contention that his jury should have been informed of his parole ineligibility. (*See* Ex. 25 at 64-65; Ex. 26 at 10-11.) The Arizona Supreme Court did *not* find, as this Court has, that "there is no evidence that Cruz sought relief under *Simmons."* (Decision at 3.) To the contrary, the Arizona Supreme Court well-understood that Cruz had made a *Simmons* claim and it rejected the claim by affirming the trial court ruling that evidence of Cruz's parole ineligibility was "too speculative to assist the jury." *Cruz,* 218 Ariz. at 160, ¶¶ 44-45. As already noted, this resulted in a misapplication of *Simmons. See, Lynch*, 136 S. Ct. at 1820.

Nonetheless, even if there was evidence supporting this Court's finding that there was a defect in the presentation of the *Simmons* claim, that would not provide a valid ground for denying relief sought under Rule 32.1(g). The Arizona Supreme Court has held that a claim under Rule 32.1(g) will *not* be precluded for failure to raise it in earlier proceedings. *Slemmer,* 170 Ariz. at 179. Accordingly, there is no basis to conclude that Cruz's earlier presentation of

his *Simmons* claim was fatally defective or grounds to dismiss the pending petition.

2. Application of the *Simmons/Lynch* rule would probably overturn the sentence.

The Court found that "nothing in the record nor the exhibits submitted suggest that had Mr. Cruz' jury been informed of his parole ineligibility, his sentence would have probably been overturned." (Decision at 4.) Cruz respectfully submits that the Court's finding in this respect was made in error.

When determining whether there is a probability that Cruz's sentence may be overturned from "a significant change in the law", the State must prove the error is harmless; i.e., it must prove beyond a reasonable doubt that the error did not contribute to or affect sentence. The harmless error test applies to assessment of a *Simmons* error; *see, e.g.*, *Escalante-Orozco*, 241 Ariz. at 286, ¶ 126, and if Cruz is to receive the full benefit of a change in the law, then the harmless error test must extend to him under Rule 32.1(g). Decisions of the Arizona Supreme Court require this conclusion.

For example, in *State v. Rendon*, 161 Ariz. 102, 104 (1989), when the Court undertook the assessment of whether the application of the significant law change would probably overturn the verdict under the Rule 32.1(g), the Court applied the harmless error rule. *Id.* ("Because we cannot say that the jury would have, beyond a reasonable doubt, found the defendant guilty of first degree burglary without the incorrect instruction, the error was not harmless"). Similarly, in *Slemmer*, the Court found that the instructional error raised in the context of a Rule 32.1(g) petition

resulted in fundamental error. 170 Ariz. at 179. ("[W]e conclude that the trial court's self-defense instruction constituted fundamental error").[3] And of course fundamental error is adjudged under the harmless error standard which requires the court to find the error harmless beyond a reasonable doubt. *See State v. Sorrell,* 132 Ariz. 328, 330 (1982) (harmless error doctrine applies to fundamental error).

Here, the State has made no attempt to argue the *Simmons* error was harmless, or to prove beyond a reasonable doubt that the error had no effect on the sentencing verdict. Nor did this Court apply the required harmless error standard in its decision. In *Escalante-Orozco,* the Arizona Supreme Court settled the harmless error question after making the following relevant observations. First, the Court noted that the jury deliberated for about thirteen hours, "which suggests it gave careful consideration to the sentencing options." 241 Ariz. at 286, ¶ 126. After making this observation, the Court stated that it "[could] not know what role the possibility of release played in the jurors' minds as they decided the propriety of the death penalty," and thus it found the error — in a case involving a brutal murder and sexual assault — was not harmless. *Id.* at 286, ¶¶ 126-27.

The factors leading to the harmless error finding in *Escalante-Orozco* apply with equal weight here. Cruz's jury also engaged in a lengthy deliberation,

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[3] In *Slemmer,* however, the Court found this serious fundamental error lacked a remedy because the significant change in the law did not apply retroactively. 170 Ariz. at 182-83.

over portions of three days, exceeding nine hours[4], "which suggests it gave careful consideration to the sentencing options" and it is "[un]know[n] what role the possibility of release played in the jurors' minds as they decided the propriety of the death penalty." *Id.* at 286, ¶ 126. Under these circumstances, as in *Escalante-Orozco,* the State has not shown beyond a reasonable doubt that the error did not contribute to the sentence. That said, there is an additional compelling factor which must be considered.

In *Simmons,* the jury requested information about the defendant's parole eligibility, but the judge instructed them not to consider the issue during their deliberations. 512 U.S. at 165-66. ("The jury was left to speculate about petitioner's parole eligibility when evaluating petitioner's future dangerousness, and was denied a straight answer about petitioner's parole eligibility even when it was requested"). Ultimately, the Supreme Court concluded that allowing the jury to speculate and depriving the jury of accurate information concerning the defendant's eligibility for parole violated due process because "the jury reasonably *may* have believed that petitioner could be released on parole if he were not executed. To the extent this *misunderstanding* pervaded the jury's deliberations, it had the effect of creating a *false choice* between sentencing petitioner to death and sentencing him to a limited period of incarceration. This [is a] grievous misperception." *Id.* at 161-62. (emphasis added).

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[4] See Exs. 18 at 89; 22-24.

Here, the effect of the error was much more "grievous" than in *Simmons.* As just quoted above, in *Simmons*, "[t]he jury was left to speculate about petitioner's parole eligibility," *id.* at 165-66, and "the jury reasonably *may* have believed that petitioner could be released on parole if he were not executed." *Id.* at 161-62. (emphasis added). In the Cruz case, the jury was *not* left to speculate; rather they were instructed that if he was not executed, Cruz could be released on parole. (Ex. 8 at 7.) Since Arizona had abolished parole, the Cruz jury was actively misled to believe that he *could* be released on parole after serving twenty-five years, when in fact such release was prohibited by law. On these facts, it would be impossible to say beyond a reasonable doubt that the jury's decision was not influenced by a materially false jury instruction and that the error had no effect on the sentencing verdict. Therefore, the Court should grant rehearing to correct its decision to reflect that the error was not harmless.

Conclusion

For all of the reasons stated, the Court should grant the motion for rehearing.

DATED this 8th day of September, 2017.

Jon M. Sands
Federal Public Defender

Cary Sandman
Assistant Federal Public Defender

By: /s/ Cary Sandman
Counsel for Petitioner

IN THE SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA,

Appellee,

v.

JOHN MONTENEGRO CRUZ,

Appellant.

CR-05-0163-AP
Pima County CR-2003-1740

APPELLANT'S OPENING BRIEF

[pp. 64-67, 116]

* * *

b. The Trial Court Erred By Not Making A Pretrial Determination Whether It Would Sentence Appellant to Life or Natural Life.

Appellant argued below he was entitled to present to the jury the mitigating factor that there was no possibility he would ever be released from prison. See. *Simmons v. South Carolina*, 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994) [due process requires the sentencing jury be instructed a capital defendant will not be eligible for parole].

With a view towards this result, Appellant moved the trial court to make a pretrial determination

whether it would sentence Appellant to natural life or life in the event the jury does not return a death sentence. [RA 65, 77]. The trial court denied the motion.

By denying the motion, the trial court deprived the jury of a reason to impose a sentence other than death. This was important in this case as one of the jurors indicated post trial they had no choice but to sentence Appellant to death, as there was no assurance he would never be released from prison. The juror's comment was telling:

> We WANTED to find a reason to be lenient. Who in their right mind wants to decided to put someone to death? Many of us would rather have voted for life if there was mitigating circumstance that warranted it. In our minds their wasn't. We were not given the option to vote for life in prison without the possibility of parole.

[RA 644, Exhibit 9, emphasis in original].

Further, Appellant notified the state that he would be calling Duane Belcher, the Chairman of the Arizona Board of Executive Clemency to provide expert testimony on how the state handles natural life and life sentences. [RA 427; TT 01/10/05 p. 62, 65-66]. The trial court precluded the testimony from Belcher who would have provided information as wells as the assurance sought by the jury which would have given them a reason to impose a sentence of less than death, and thus violated Appellant's United States Constitution 6th and 8th Amendment rights as well as A.R.S. § 13-703(G). [RA 601 p.2, TT 03/01/05 p. 6]. See *State v. Johnson*, 212 Ariz. 425, ¶45, 133 P.3d 735 (2006) citing *Buchanan v. Angelo-*

ne, 522 U.S. 269, 274, 118 S. Ct. 757, 139 L. Ed. 2d 702 (1998)[mitigating circumstances may be any factors presented that are relevant in determining whether to impose a sentence of less than the death]; A.R.S. § 13-703(G)[trier of fact shall consider as mitigating circumstances any factors proffered that are relevant in determining whether to impose a sentence less than death].

The trial court instead elected to instruct the jury regarding the possible sentences for first degree murder, including natural life and life without parole for 25 years. [RA 625 p. 7]. This was a futile and irrelevant act under the circumstances.

The trial court did not instruct the jury on the mitigating circumstance regarding the possibility of life without parole, thus the jury had no guidance in which to arrive at a sentence of less than death as they indicated they may have done.

In Arizona a defendant has the burden to prove mitigation to a preponderance of the evidence. See A.R.S. § 13-703(C). Here, Appellant sought to establish and present evidence of the mitigating circumstance that he would never be released from prison on any basis [TT 01/18/05 p. 14-19], but was unconstitutionally precluded by the trial court from doing so.

Defense counsel's argument the Belcher testimony was presented for weighing purposes rather than mitigation is an argument in form over substance. In this the prosecution agreed. [TT 01/10/05 p. 68-69]. Arizona is a weighing state. See *Richmond v. Lewis,* 506 U.S. 40, 113 S. Ct. 528, 121 L. Ed. 2d 411 (1992); *State v. Canez,* 205 Ariz. 620 ¶22, 74 P.3d 932 (2003); A.R.S. § 13-703(E).

An Arizona capital jury is required by statute to always engage in "weighing" in making a determination of whether to impose a death sentence. A.R.S. § 13-703(E). In that regard an Arizona capital jury can consider or weigh any circumstance against any proven aggravators to determine whether to impose a sentence less than death. *Johnson, Id.*

Accordingly, the trial court denied the jury of information to which it could have used to impose a sentence of less than death. At a minimum, Appellant's death sentence must be vacated and remanded for a new sentencing trial.

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RESPECTFULLY SUBMITTED THIS 5th day of March, 2007.

LAW OFFICE OF DAVID ALAN DARBY

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DAVID ALAN DARBY
Attorney for Appellant

* * *

ARIZONA SUPREME COURT

JOHN MONTENEGRO CRUZ,

Petitioner,

v.

THE STATE OF ARIZONA,

Respondent.

Arizona Supreme Court
No. CR-17-0567-PC

Pima County Superior Court
Case No. CR-2003-1740

JOHN MONTENEGRO CRUZ'S PETITION FOR REVIEW

I. Introduction

In *State v. Cruz*, 218 Ariz. 149, 155-56, ¶¶ 1, 8-9 (2008), this Court affirmed Petitioner Cruz's conviction and resulting death sentence for the 2003 first degree murder of Tucson police officer, Patrick Hardesty. Subsequently, on May 29, 2013, this Court denied Cruz's Petition for Review from the superior court's denial of his petition for Rule 32 post-conviction relief. (Arizona Supreme Court, No. CR-12-0529-PC, Docket 15.) The current proceedings were commenced on March 9, 2017, when Cruz filed a successive post-conviction petition under Rule 32.1(g), Ariz. R. Crim. P., which affords relief when "[t]here has been a significant change in the law that

if determined to apply to defendant's case would probably overturn defendant's . . . sentence." Cruz premised his successor petition on *Lynch v. Arizona*, 136 S. Ct. 1818 (2016) (per curiam) and the significant changes in Arizona law which have ensued thereafter.

In *Lynch*, the Supreme Court reversed this Court's affirmance of Lynch's death sentence, after finding he had been denied due process when the trial court prohibited Lynch from informing his jury, that if the jury did not impose a death sentence, Lynch would serve a life sentence without the possibility of parole. *Id*. at 1818-19. The Supreme Court's *Lynch* decision was dictated by its earlier decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994). "Under *Simmons*, . . . 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. . . ." *Lynch*, 136 S. Ct. at 1819 (internal quotations and citations omitted). The *Lynch* decision was grounded on the undisputed fact that Arizona had abolished parole for adult felony offenders whose offenses were committed after January 1, 1994. *Id.*; *see* Ariz. Rev. Stat. § 41-1604.09(I) (1994).

The *Lynch* decision engendered a significant change in this Court's application of federal constitutional law. Since the Supreme Court's decision in *Lynch*, this Court has twice recognized its misapplication of *Simmons* in prior Arizona capital cases, and it has vacated death sentences in those two recent cases accordingly. *State v. Escalante-Orozco*, 241

Ariz. 254, 284-86, ¶¶ 117, 126-27 (2017); *State v. Rushing*, 243 Ariz. 212, 404 P.3d 240, 249-51, ¶¶ 37, 43 (2017).

Cruz seeks relief in accord with this significant change in the law. As explained below, over Cruz's objection, the trial court refused to inform Cruz's jury that he was ineligible for parole, and instead his jury was instructed — and explicitly misled to believe — that if a sentence of death was not imposed, Cruz *could* receive a sentence authorizing his possible release on parole after serving 25 years in prison. (Pet. App. J at Ex. 1; Pet. App. J at Ex. 3 at 37-38; Pet. App. K at 6; Pet. App. J at Ex. 8 at 7.) Cruz renewed his objections on appeal, but this Court affirmed the trial court's decision. *Cruz*, 218 Ariz. at 160, ¶¶ 42-45. The end result is that Cruz's Eighth and Fourteenth Amendment rights were violated. Cruz now seeks redress under subsection (g) of Rule 32.1.

The superior court denied Cruz's successive Rule 32 petition because: (1) *Lynch* did not result in a significant change in Arizona law; (2) if *Lynch* did result in a significant change in the law, then neither *Lynch* nor *Simmons* retroactively applied to Cruz's case; and (3) even if *Lynch* applied retroactively, Cruz failed to show that its application would probably result in the overturning of his sentence. (Pet. App. C.) Cruz submits that the superior court erred on all counts. This Court should accept review and reverse.

II. Issues Presented for Review

1. Whether Cruz's death sentence was obtained in violation of the Eighth and Fourteenth Amendments, when the trial court refused Cruz's request to inform his jury

that he was parole ineligible and instead instructed the jury, and explicitly misled it to believe, that if not sentenced to death, Cruz could receive a sentence rendering him eligible for parole after serving twenty-five years.

2. Whether in light of *Lynch* (and its progeny; i.e., *Escalante-Orozco* and *Rushing*) "there has been a significant change in the law" within the meaning of Rule 32.1(g).
3. Whether *Lynch* (and its progeny; i.e., *Escalante-Orozco* and *Rushing*) must apply retroactively to afford relief under Rule 32.1(g) because those decisions rely on the Supreme Court's 1994 decision in *Simmons v. South Carolina* and *Simmons* was decided before Cruz's 2005 death sentence became final.
4. Whether the significant changes in the law, when applied to Cruz's case, would "probably overturn [his] sentence," under Rule 32.1(g).

III. Facts Material to the Issues Presented

At the time of Cruz's 2005 sentencing proceeding, Arizona law provided that a defendant guilty of murdering a person over the age of fifteen, who was not sentenced to death, could be (1) sentenced to life, with the possibility of release after twenty-five years; or (2) sentenced to natural life, without the possibility for release on any basis. *See* A.R.S. § 13-703(A) (2004) renumbered as A.R.S. § 13-751(A) (2008). In light of these statutory provisions, prior to sentencing, Cruz took steps to insure that his jury understood the significant legal obstacles constraining the

possibility of his release from prison, should the jury elect not to impose a sentence of death.

Accordingly, he proffered evidence from the Chairman of the Arizona Board of Executive Clemency, that after 1994 the Board lacked authority to grant parole to a prisoner sentenced to twenty-five years to life in prison. (Pet. App. J at Ex. 1.) This was obviously a correct statement of the law regarding Cruz's parole ineligibility, since Arizona had abolished parole in 1994. *See Escalante-Orozco*, 241 Ariz. at 284, ¶ 117. The prosecutor objected to Cruz's proffer of parole ineligibility, arguing that it would be speculative to suggest to the jury that the parole laws would not change during the ensuing years. (Pet. App. J at Ex. 3 at 37-38.) The prosecutor urged the trial court to instruct the jury that if Cruz was not sentenced to death the court could choose to sentence him to life with parole or natural life. (*Id*. at 37:5-11, 38:3-5.) The trial court adopted the State's argument that it would be speculative to permit the jury to hear testimony about "what may happen for a defendant sentenced to life or natural life." (Pet. App. K at 6.) Consistent with the trial court's ruling, the jury was instructed that if the death penalty was not imposed, the trial court: (1) could impose a natural life sentence with no possibility for release from prison on any basis, or (2) it could impose "life imprisonment with a possibility of parole . . . after twenty-five calendar years." (Pet. App. J at Ex. 8 at 7.)

In his direct appeal briefing to this Court, Cruz cited *Simmons* in support of his contention that his jury should have been informed of his parole ineligibility. (*See* Pet. App. B at Ex. 25 at 64-65 and Ex. 26

at 10-11.) This Court rejected the *Simmons* claim. The Court held *Simmons* did not apply in Arizona because no law would prevent Cruz from being released on parole after serving twenty-five years, and therefore Cruz's jury had been properly instructed in accord with A.R.S. § 13-703(A). *See Cruz*, 218 Ariz. at 160, ¶ 42. The Court also affirmed the trial court's ruling barring evidence of Cruz's parole ineligibility, because whether he would be eligible for parole in twenty five years was "too speculative to assist the jury." *Id.* ¶¶ 44-45. It was not until *Escalante-Orozco,* 241Ariz. at 284, ¶ 117, that this Court confessed that its reasoning, as expressed in Cruz's case and many others, was contrary to *Simmons*, and it finally held that "'[t]he possibilities of clemency *or a future statute authorizing parole* "'[does not] diminish [ ] a capital defendant's right to inform a jury of his parole ineligibility.'" *Id*. (quoting *Lynch v. Arizona*, 136 S. Ct. 1818, 1819). (emphasis added).

IV. Reasons this Court Should Grant Review

This Court reviews a decision denying post-conviction relief for an abuse of discretion. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012). "[A] trial court's erroneous ruling on a question of law . . . constitutes an abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, 393, ¶ 4 (2007). As demonstrated below, the superior court made serious legal errors and therefore abused its discretion. Further, the issues presented here have state-wide importance and potential to impact and recur in numerous

capital cases,[1] where there is a heightened need for reliability in the deciding whether death is an appropriate punishment. *Escalante-Orozco*, 241 Ariz. at 286, ¶ 126. For all the reasons presented the Court should grant review.

A. Cruz's death sentence was obtained in violation of the Eighth and Fourteenth Amendments.

Cruz had a due process right to inform his jury that he was ineligible for parole, if (1) his future dangerousness was at issue and (2) state law prohibited his release on parole. *See Escalante-Orozco,* 241 Ariz. 284, ¶117, citing *Simmons*, 512 U.S. at 156. It is undisputed that Cruz was not eligible for parole at the time of his 2005 sentencing. The element of future dangerousness was not litigated during the sentencing proceedings or on direct appeal, but as explained below, it was nevertheless at issue before the jury.[2]

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[1] *See State v. Lynch*, 238 Ariz. 84, ¶ 62-66 (2015), *rev'd*, 136 S. Ct. 1818 (2016); *State v. Benson*, 232 Ariz. 452, 465–66, ¶ 58-59 (2013); *State v. Boyston*, 231 Ariz. 539, 552-53 ¶¶ 67-68 (2013); *State v. Hardy*, 230 Ariz. 281, 293, ¶ 58 (2012); *State v. Hausner*, 230 Ariz. 60, 90 (2012); *State v. Chappell*, 225 Ariz. 229, 240, ¶ 42 (2010); *State v. Garcia*, 224 Ariz. 1, 18 ¶¶ 76-78 (2010); *State v. Hargrave*, 225 Ariz. 1, 14–15, ¶¶ 50–53 (2010); *State v. Dann*, 220 Ariz. 351, 373, ¶¶ 123–24 (2009).

[2] The absence of argument on the issue of future dangerousness in the earlier proceedings is immaterial in light of Cruz's request that his jury be informed of his parole ineligibility. *See Escalante-Orozco*, 241 Ariz. at 285, ¶ 118 (after requesting that his jury be informed of his parole ineligibility, "Escalante-Orozco did not need to explicitly contend that his future dan-

To begin with, unlike *Simmons*, 512 U.S. at 165-66, where the jury was only left to speculate about the defendant's parole eligibility, in Cruz's case the jury was *not* left to speculate; instead, it was instructed that if not sentenced to death Cruz could receive a parole eligible sentence and be released on parole in twenty-five years. (Pet. App. J at Ex. 8.) This instruction implicitly put Cruz's future dangerousness at issue. When a jury is explicitly instructed that a capital defendant is eligible for release, if not sentenced to death, such an instruction "focuses the jury on the defendant's probable future dangerousness" . . . and "invites the jury to predict . . . what the defendant himself might do if released into society". *California v. Ramos*, 463 U.S. 992, 1003 (1983); *id*. at 1008 (the effect of an instruction informing the jury of a capital defendant's potential release, "inject[s] into the sentencing calculus a consideration akin to the aggravating factor of future dangerousness . . ."). By reason of the instruction alone, Cruz's future dangerousness was at issue before his jury. *Id.*

Independent of the noted jury instruction, Cruz's future dangerousness was at issue because it was a "logical inference from the evidence." *Kelly v. South Carolina*, 534 U.S. 246, 252 (2002). For example, during the sentencing proceedings, Cruz called James Aiken as an expert witness to testify that Cruz would not pose a future danger if housed in prison, but the State did not concede to Aiken's expectation that Cruz would not present as a future danger. Instead, the prosecutor invited the jury to

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gerousness was at issue for the judge to comprehend the nature of the objection and fashion a remedy").

completely discredit Aiken's opinion on Cruz's future dangerousness. (Pet. App. J at Ex. 17 at 163-64.) As this Court has explained in a related context, the prosecutor's impeachment intended to rebut the showing that a prisoner can be safely housed in prison is relevant. *See State v. Lynch*, 238 Ariz. at 96, ¶ 23-24, 103, ¶ 64, *rev'd on other grounds*, 136 S. Ct. 1818 (impeachment of expert James Aiken was permissible to demonstrate Lynch could not be safely housed in prison). Moreover, the nature of Cruz's offense, an unprovoked impulsive shooting of a police officer in order to evade questioning for a simple traffic stop, satisfies the showing that Cruz's future dangerousness was a "logical inference from the evidence." *Kelly*, 534 U.S. at 252.

Because Cruz's future dangerousness was at issue and state law prohibited his release on parole, due process required that his jury be informed that he was ineligible for parole. *Escalante-Orozco*, 241 Ariz. at 284, ¶ 117; *Rushing*, 243 Ariz. 212, 404 P.3d at 250, ¶ 41 (the "[trial] court was required to either instruct that [defendant] would not be eligible for parole or permit [defendant] to introduce evidence to that effect"). The refusal to inform Cruz's jury that he was ineligible for parole, in combination with the jury instruction misleading the jury to believe that Cruz was parole eligible, also violated the Eighth Amendment. *See Boyde v. California*, 494 U.S. 370, 380 (1990) (Eighth Amendment is violated when there is a reasonable likelihood that a jury instruction has been applied to prevent consideration of constitutionally relevant evidence).

B. *Lynch* resulted in a significant change in the law.

A "significant change in the law within the meaning of Rule 32.1(g) requires some transformative event, a clear break from the past." *State v. Shrum*, 220 Ariz. 115, ¶ 15 (2008) (internal quotations and citations omitted). In *Shrum*, this Court held that "[t]he archetype of . . . a change [in the law under Rule 32.1(g)] occurs when an appellate court overrules previously binding case law." *Id.* ¶ 16 Previously in these proceedings, the State conceded that the Supreme Court's decision in *Lynch* satisfied this "archetype" litmus test for identifying transformative events within the meaning of Rule 32.1(g), when it asserted that *Lynch* "overruled a well-established line of Arizona Supreme Court opinions . . ." (Pet. App. I at 3:9-10.) What's more, this Court's recent jurisprudence signals the transformative nature of the Supreme Court's *Lynch* decision. The Court has vacated and remanded death sentences in two cases, where the death sentences would have otherwise been affirmed. *State v. Escalante-Orozco*, 241 Ariz. 254, 284-86, ¶ 117, ¶¶ 126-27 (vacating death sentence and remanding for new sentencing in light of *Lynch*, after recognizing that it had "repeatedly" misapplied the constitutional rule in *Simmons*); *State v. Rushing*, 243 Ariz. 212, 404 P.3d 240, 249-51, ¶¶ 37, 43. *Lynch* resulted in significant changes in Arizona's application of federal constitutional law. Below, the superior court reached the opposite conclusion, but this was in error.

The superior court's error rests on its decision to conduct a comparative analysis of the transformative nature of the Supreme Court's *Lynch* decision as

compared to several other cases where Arizona courts have previously found significant changes in the law. (Pet. App. C at 2.) No Arizona appellate case countenances such an ill-defined, vague comparative analysis route to determining whether there has been a significant change in the law; nor is such a comparative examination merited, given the definitive test this Court has established. *See, e.g., Shrum*, 220 Ariz. at 118, ¶¶ 15-16 (a "significant change in the law" within the meaning of Rule 32.1(g) "requires some transformative event, a clear break from the past . . . [as when] an appellate court overrules previously binding case law"). Cruz satisfied the showing that the Supreme Court's decision in *Lynch* has had a transformative effect on this Court's death sentencing jurisprudence, and that consequently there has been a significant change in the law within the meaning of Rule 32.1(g).

C. *Lynch* and its progeny apply retroactively.

There are 3 distinct elements of proof required under Rule 32.1(g): "[1] There has been a significant change in the law; [2] *that if determined to apply to defendant's case* would [3] probably overturn the defendant's conviction or sentence." *Id*. (emphasis added). Step 2 in the analysis goes to the retroactivity question.

The Arizona appellate courts treat the question of whether there is a significant change in the law as distinct from the separate question whether the change can be applied retroactively. *See State v. Poblete*, 227 Ariz. 537, ¶¶ 8-11 (2011) (recognizing that the United States Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010) " [did]

constitute a significant change in the law" under Rule 32.1(g), and then separately examining whether that change would apply to defendant's case under applicable retroactivity principles); *State v. Rendon*, 161 Ariz. 102, 104-05 (1989)(recognizing that the narrowing definition of first degree burglary adopted by the court in *State v. Befford*, 148 Ariz. 508 (1986) did constitute a significant change in the law and then separately examining whether that change would apply to defendant's case under applicable retroactivity principles); and see *id*., at 104 (applying changed definition of first degree burglary retroactively); *State v. Slemmer*, 170 Ariz. 174, 179-84 (1991) (first finding that its decision in *State v. Hunter*, 142 Ariz. 88 (1984) was a significant change in the law and then separately finding that change would not apply to defendant's case under applicable retroactivity principles).

As explained above, the Supreme Court's *Lynch* decision has had a transformative effect on Arizona's application of federal constitutional law, resulting in a significant change in the law. *See Rushing* and *Escalante-Orozco.* The wholly distinct question is whether that change is retroactive to Mr. Cruz's case.

There is more than one gateway to retroactivity. (1) A court decision is retroactive if the decision "was dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 301(1989)[3]; *Slemmer*, 170 Ariz. at 179-

[3] This Court adheres to the *Teague* retroactivity framework. *See State v. Towery*, 204 Ariz. 386, 389, ¶ 6 (2003).

80 (1991) (2) A significant change in the law is not retroactive — unless other exceptions apply — if the decision creates a new rule not dictated by precedent at the time the defendant's conviction became final. *Id*. (3) There is a subset test which applies in cases where there is any question about whether a decision actually states a new rule: in such cases the Court must ask "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." *Poblet*e, 227 Ariz. at 541, ¶ 13-14, quoting, *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

We next apply these retroactivity rules and demonstrate that Cruz's case is controlled by point (1) above: significant changes in the law are retroactive if the decision "was dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. at 301; *Poblete*, 227 Ariz. at 540, ¶ 12; *Slemmer*, 170 Ariz. at 179 ("new decisions applying well established constitutional principle[s] . . . should generally be applied retroactively, even to cases that have become final and are before the court on collateral proceedings"). The Supreme Court's decision in *Lynch* and this Court's more recent decisions in *Rushing* and *Escalante-Orozco* incontrovertibly fall into this category and therefore those decisions must be applied retroactively to Cruz's case. Why? Because these decisions are ultimately dictated by *Simmons*, a 1994 precedent existing at the time Cruz's conviction became final in 2009. *See Lynch*, 136 S. Ct. at 819 (determining that the Arizona Supreme Court's application of federal law was in clear conflict with *Simmons*); *Escalante-Orozco,* 241 Ariz. at 284, ¶ 117 (finding *Simmons* error in

light of *Lynch*) Accordingly, because *Lynch* "was dictated by precedent existing at the time the defendant's conviction became final," *Teague* 489 U.S. at 301; *Poblete*, 227 Ariz. at 540, ¶ 12, the significant changes in Arizona's application of federal law must be applied retroactively in Cruz's case.

The State has previously argued that if Cruz passes through the retroactivity gateway as a result of the fact that *Lynch* relied on *Simmons* that this must mean that there was not a significant change in the law under Rule 32.1(g). (Pet. App. I at 5:16-25.) However, for the reasons already explained — and quoting the State's earlier contention in these proceedings — *Lynch* "overruled a well-established line of Arizona Supreme Court opinions . . . ," (Pet. App. I at 3:9-13, and 3:20-23) and "[t]he archetype of a change [in the law under Rule 32.1(g)] occurs when an appellate court overrules previously binding case law." There has been a significant change in the law, and under *Teague* the decisions in *Lynch, Rushing* and *Escalante-Orozco* apply retroactively.

In its decision, the superior court relied on *O'Dell v. Netherland*, 521 U.S. 151 (1997) to hold that the "rule announced in *Simmons* and *Lynch* is not a well-established constitutional principle. It is a procedural rule that does not apply retroactively." (Pet. App. C at 2.) The superior court's reliance on *O'Dell* was plainly erroneous. *O'Dell* did decide that *Simmons* was not retroactive, but its holding only applied to petitioners whose cases became final *before* the constitutional rule in *Simmons* was announced in 1994. In *O'Dell*, the petitioner's death sentence became final in 1988, but he sought to retroactively apply *Simmons*, which was not decided until six

years later in 1994. 521 U.S. at 152, 156-57. *O'Dell* does not apply to a petitioner like Cruz, whose sentencing proceeding concluded well after *Simmons* was decided. Thus, the superior court erred when it applied *O'Dell* to decide Cruz's case.

Finally, the superior court's decision cites nine earlier cases where this Court misapplied *Simmons*, as evidence that *Simmons* was not binding federal law until *Lynch* was decided. (Pet. App. C at 2-3.) Respectfully, under the Supremacy Clause this cannot be correct. All state courts were duty bound to follow *Simmons* from the date it was decided. Cruz has demonstrated the significant change in the law must be applied to his case.

D. The significant change in the law engendered by *Lynch* — and its progeny *Escalante-Orozco* and *Rushing* — when applied to Cruz's case, would probably overturn his sentence.

The superior court decided that even if the change in the law applied to Cruz's case, he could not obtain relief because: (1) ". . . there is no evidence that Cruz sought relief that *Simmons v. South Carolina and Lynch v. Arizona* provides at his trial;" and (2) "[n]othing in the record nor the exhibits submitted suggest that had Mr. Cruz's jury been informed of his parole ineligibility, his sentence would have 'probably' been overturned." (App C at 3-4.) The superior court reached these conclusions in error.

1. The claim was adequately presented

As demonstrated above, Cruz did present a *Simmons* claim in the trial court when he sought to

inform the jury of his ineligibility for parole. *See* facts and record citations at pp. 4-5 above; *see also* *Rushing*, 243 Ariz. 212, 404 P.3d at 250, ¶ 41 (the "[trial] court was required to either instruct that [defendant] would not be eligible for parole *or permit [defendant] to introduce evidence to that effect"*) (emphasis added). The claim was adjudicated on appeal. *Cruz*, 218 Ariz. at 160, ¶¶ 44-45. *See* facts and record citations at p. 5 above. The *Simmons* claim was adequately presented.[4]

2. Cruz satisfied the showing of prejudice under Rule 32.1(g)

The superior court erred because it failed to apply the harmless error test in its decision.[5] This Court applies the harmless error test to the assessment of a *Simmons* error. *See Rushing*, 243 Ariz. 212, 404 P.3d at 250-51, ¶¶ 42-44 (State must prove beyond a reasonable doubt that error did not contribute to or affect the sentence). If Cruz is to receive the full benefit of a change in the law, then consistent with

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[4] Even if there was evidence supporting a finding that there was a defect in the earlier presentation of the claim, that would not provide a valid ground for denying relief sought under Rule 32.1(g). This Court has held that a claim under Rule 32.1(g) will *not* be precluded for failure to raise it in earlier proceedings. *Slemmer*, 170 Ariz. at 179. Accordingly, there is no basis to conclude that Cruz's earlier presentation of his claim was fatally defective.

[5] Below, Cruz also argued the error was structural and he reiterates that argument here. *See* App. J at 12-18. The Court need not reach the question because the error is not harmless. *See Escalante-Orozco*, 241 Ariz. at 286, ¶ 126.

this Court's disposition in other cases, the harmless error test must extend to him under Rule 32.1(g).

For example, in *State v. Rendon*, 161 Ariz. 102, 104 (1989), when the Court undertook the assessment of whether the application of the significant law change would probably overturn the verdict under the Rule 32.1(g), the Court applied the harmless error rule. *Id*. ("Because we cannot say that the jury would have, beyond a reasonable doubt, found the defendant guilty of first degree burglary without the incorrect instruction, the error was not harmless"). Similarly, in *Slemmer*, the Court found that the instructional error raised in the context of a Rule 32.1(g) petition resulted in fundamental error. 170 Ariz. at 179. ("[W]e conclude that the trial court's self-defense instruction constituted fundamental error . . . .") And of course fundamental error is adjudged under the harmless error standard which requires the court to find the error harmless beyond a reasonable doubt. *See State v. Sorrell*, 132 Ariz. 328, 330 (1982).

In *Escalante-Orozco* and *Rushing* — cases involving extremely violent murders — the Court held the constitutional error was not harmless. *Escalante-Orozco*, 241 Ariz. at 286, ¶ 126-27; *Rushing*, 243 Ariz. 212, 404 P.3d at 250-51, ¶ 43. By analogy the Court is compelled to reach the same result here.

In the Cruz case the jury found a single aggravating factor that Cruz had knowingly killed a police officer.[6] *State v. Cruz*, 218 Ariz. 149, 159, ¶ 136. Cruz was only thirty-five years old at the time of his

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[6] See A.R.S. § 13-703(F)(10) (2003) [renumbered as A.R.S. § 13-751 (F)(10) (2009)].

sentencing (Pet. App. J at Ex. 17 at 156), and "some jurors might have believed [Cruz] could be released after serving twenty-five years . . ." *Rushing*, 243 Ariz. 212, 404 P.3d at 250, ¶ 43. After hearing sixteen mitigation witnesses, including five experts, the jury deliberated over nine hours during portions of three days before returning a death verdict. (Pet. App. J at Ex. 19 at 52-155, Ex. 20 at 11-152, Ex. 21 at 5-134, Exs. 17, 22, 23, 24). The Court relied on the extent of the jury deliberations, thirteen hours in the *Escalante-Orozco* case, 241 Ariz. at 286, ¶ 126, and most of a day in *Rushing*, 243 Ariz. 212, 404 P.3d at 250, ¶ 43, to support an ultimate conclusion that the jurors gave careful consideration to the sentencing options and that it was not possible to know whether the prospect of the defendant's release affected any juror's decision to impose the death sentence. The same considerations apply here to compel the conclusion that the error in the Cruz case was not harmless beyond a reasonable doubt.

V. Conclusion

For all the reasons stated, the Court should grant the petition for review.

RESPECTFULLY SUBMITTED this 4th day of December, 2017.

Jon Sands
Federal Public Defender

Cary Sandman
Assistant Federal Public Defender

/s/Cary Sandman
Counsel for Petitioner, John M. Cruz

ARIZONA SUPREME COURT

JOHN MONTENEGRO CRUZ,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

CR-17-0567-PC

Pima County Superior Court
No. CR-2003-1740

THE STATE OF ARIZONA'S RESPONSE TO PETITION FOR REVIEW

I. ISSUE PRESENTED FOR REVIEW.

Did the trial court err in concluding that *Lynch v. Arizona*, 136 S. Ct. 1818 (2016), was not a significant change in the law that, if applied to Cruz's case, would probably overturn his death sentence under Rule 32.1(g)?

II. FACTS MATERIAL TO THE ISSUE PRESENTED.

Petitioner John Montenegro Cruz was convicted and sentenced to death in the Pima County Superior Court for the 2003 murder of Tucson Police Officer Patrick Hardesty. *State v. Cruz*, 218 Ariz. 149 (2008). Cruz ran from Officer Hardesty while being questioned about a hit-and-run collision. *Id.* at 155–56,

¶¶ 2–4. Officer Hardesty chased Cruz on foot and, during the chase, Cruz shot the officer five times, emptying the five-shot revolver he was carrying—two shots struck Officer Hardesty's protective vest, two others struck him in the abdomen below the vest, and one entered his left eye, killing him almost instantly. *Id.* at 156, ¶¶ 5–7. Four of the shots were fired from no more than a foot away. *Id.* at 156, ¶ 6.

This Court affirmed Cruz's conviction and sentence on direct appeal, concluding that the jury did not abuse its discretion by sentencing Cruz to death. *Id.* at 171, ¶ 138. Later, this Court denied review of the superior court's denial of Cruz's petition for post-conviction relief. (Pet. App. C, at 1.) In 2014, Cruz filed a petition for writ of habeas corpus in the federal district court, which is still pending. (*Id.*)

On March 9, 2017, Cruz filed a successive petition for post-conviction relief in Pima County Superior Court, arguing that *Lynch v. Arizona*, 136 S. Ct. 1818 (2016), entitles him to a new capital sentencing trial under Arizona Rule of Criminal Procedure 32.1(g). The superior court denied relief because *Lynch* was neither a significant change in the law nor retroactively applicable, and, even if applicable to Cruz's case, would not have "probably overturned" his sentence. (Pet. Appx. C.) The court also denied Cruz's motion for rehearing. (Pet. Appx. A.) Cruz petitioned this Court to review the superior court's order denying relief. This Court should deny review because the superior correctly denied relief under Rule 32.1(g).

III. REASONS THIS COURT SHOULD DENY REVIEW.

Rules 32.1(g) provides that a defendant may obtain post-conviction relief if "[t]here has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence." Ariz. R. Crim. P. 32.1(g). This Court has described a qualifying "significant change in the law" as a "transformative event," *State v. Shrum*, 220 Ariz. 115, 118, ¶ 15 (2009), and a "clear break" or "sharp break" with the past, *State v. Slemmer*, 170 Ariz. 174, 182 (1991). "The archetype of such a change occurs when an appellate court overrules previously binding case law." *Shrum*, 220 Ariz. at 118, ¶ 16.

In *Lynch*, this Court had held that the failure to give an instruction on parole unavailability under *Simmons v. South Carolina*, 512 U.S. 154 (1994), was not error because the defendant could have received a life sentence with the possibility of release after 25 years, although the only type of release available would have been executive clemency. *Lynch*, 136 S. Ct. at 1819. The Supreme Court reversed, stating that, because Arizona does not have parole for crimes committed since 1994, a defendant whose future dangerousness the State puts at issue during a capital sentencing proceeding has a due process right under *Simmons* to inform the jury of the unavailability of parole. *Lynch*, 136 S. Ct. at 1818, 1820. The Court explained that neither the possibility of executive clemency nor the possibility that state parole statutes will be amended justify refusing a parole-ineligibility instruction. *Id.* at 1820.

The superior court here correctly denied relief under Rule 32.1(g) because (1) *Lynch* was not a significant change in the law, (2) it is not retroactively applicable to cases final when it was decided, and (3) even if it is applicable, Cruz failed to establish that it would probably overturn his death sentence.

A. Lynch *was not a significant change in the law.*

Lynch was not a "significant change in the law" under Rule 32.1(g) because it was not "transformative" or a "clear break" with the past. *See Shrum*, 220 Ariz. at 118; *Slemmer*, 170 Ariz. at 182. Examples of decisions that Arizona courts have found to be significant changes in the law include *Ring v. Arizona*, 536 U.S. 584, 609 (2002), which "transformed existing Sixth Amendment law" by expressly overruling *Walton v. Arizona* and finding a right to trial by jury on capital aggravating factors, *Shrum*, 220 Ariz. at 118–19, ¶ 16; and *Padilla v. Kentucky*, 559 U.S. 356 (2010), which rejected the rule applied by the majority of states and every federal circuit to consider the issue by holding that an attorney's failure to advise a defendant that pleading guilty to an offense would result in his removal from the country constituted ineffective assistance of counsel, *State v. Poblete*, 227 Ariz. 537, 540, ¶¶ 9–10 (App. 2011).

Lynch, in contrast, did not represent a change in the law like *Ring* or *Padilla*. *See Boggs v. Ryan*, No. CV-14-02165-PHX-GMS, 2017 WL 67522, *3 (D. Ariz. Jan. 6, 2017) ("*Lynch* does not represent a change in the law."); *Garcia v. Ryan*, No. CV-15-000250PHX-DGC, 2017 WL 1550419, *3 (D. Ariz. May 1, 2017) (same); *Garza v. Ryan*, No. CV-14-01901-PHX-SRB, 2017 WL 105983, *3 (D. Ariz. Jan.

11, 2017) (same). Unlike *Ring*, which expressly overruled existing precedent and invalidated Arizona's capital sentencing procedures, *Lynch* did not transform the law. The Supreme Court made clear that it was simply applying its existing precedent to find that this Court erroneously affirmed the denial of a *Simmons* instruction. *Lynch* did not overrule existing Supreme Court precedent like *Ring*, nor create a new rule like *Padilla*. It simply applied existing precedent to Arizona's sentencing practices. Consequently, *Lynch* is not a significant change in the law and the superior court correctly denied relief under Rule 32.1(g). *See Shrum*, 220 Ariz. at 120, ¶ 23 (relief in successive post-conviction proceeding is precluded under Rule 32.2(a) if claim asserted under Rule 32.1(g) is not based on a "significant change in the law").

B. *Even if it significantly change the law,* Lynch *is not retroactively applicable.*

Even if *Lynch* significantly changed the law, the superior court correctly concluded that it is not retroactively applicable to cases (like Cruz's) already final on direct appeal. To apply retroactively, a procedural rule must be "a watershed rule of criminal procedure." *State v. Towery*, 204 Ariz. 386, 391, ¶¶ 16–18 (2003) (citing *Teague v. Lane*, 489 U.S. 288 (1989)). The Supreme Court has held, however, that *Simmons*—which it applied in *Lynch*—establishes a procedural rule that does not meet this high bar for retroactivity:

> Unlike the sweeping rule of *Gideon*, which established an affirmative right to counsel in all felony cases, the narrow right of rebuttal that

> *Simmons* affords to defendants in a limited class of capital cases has hardly altered our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding. *Simmons* possesses little of the "watershed" character envisioned by *Teague's* second exception.

O'Dell v. Netherland, 521 U.S. 151, 167 (1997) (emphasis in original; internal quotation marks and citations omitted). *Lynch*, too, which simply applied *Simmons*, is thus procedural and non-retroactive. *See Boggs*, 2017 WL 67522, *3; *Garcia*, 2017 WL 1550419, *3; *Garza*, 2017 WL 105983, *3.

Cruz argues that the superior court incorrectly relied on *O'Dell* because that case merely held that *Simmons* was not retroactively applicable to a case that, unlike his case, was already final on direct appeal when *Simmons* was decided. (Pet. at 14–15.) His argument misunderstands the import of the court's reliance on *O'Dell*. *O'Dell* is significant here because if *Simmons* itself was not the kind of watershed rule that applies retroactively, then *Lynch*, which simply applied *Simmons'* rule, necessarily must also be non-retroactive.

Cruz also argues that *Lynch* applies retroactively because its result "was dictated by precedent existing at the time the defendant's conviction became final." (Pet. at 13 (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989)).) That language, however, comes from the Supreme Court's analysis of whether a case established a "new rule," which are only retroactively applicable under narrow circumstances. *See Teague*, 489 U.S. at 301. If Cruz were correct that *Lynch's* result was "dictated" by *Simmons*, then it could not

"transformative" and thus not a significant change in the law under Rule 32.1(g).

Because Lynch is not retroactively applicable, the superior court correctly denied Rule 32.1(g) relief.

C. *Application of* Lynch *would not probably overturn Cruz's sentence.*

Even if *Lynch* were a significant change in the law, and applied retroactively to Cruz's case, it still would not "probably overturn" the death sentence because the State did not put Cruz's future dangerousness at issue and, even if the jury had been instructed on the unavailability of parole, Cruz would not probably have received a life sentence.

First, the State did not put Cruz's future dangerousness at issue, which must occur before a defendant is entitled to inform the jury of parole unavailability. *See Lynch*, 136 S. Ct. at 1818 (right to inform jury of parole ineligibility applies "where a capital defendant's future dangerousness is at issue"). Future dangerousness is at issue if it is "a logical inference from the evidence" or is "injected into the case through the State's closing argument." *State v. Escalante-Orozco*, 241 Ariz. 254, 285, ¶ 119 (2017) (quoting *Kelly v. South Carolina*, 534 U.S. 246, 252 (2002)). In *Escalante-Orozco*, for example, the State put future dangerousness at issue by presenting evidence that the defendant had choked his ex-wife, yelled at her, held a knife to her throat and threatened her life, bit off part of someone's finger in a fight, and on another occasion tore off his wife's clothes, dragged her outside by the hair while she was naked, and threatened her with a knife. *Id.* at 285, ¶ 121. The State also introduced "graphic photographs of the crime scene and autopsy photos" and

emphasized the murder's brutality. *Id.*; *see also id*. at 293–94, ¶¶ 170–180 (discussing sole aggravating factor, that murder was cruel, heinous, or depraved). And the prosecutor highlighted the additional acts of violence in closing argument and argued that the defendant had "done so much evil that he has given up his right to live." *Id.* at 285, ¶ 122. In another recent case, this Court held that the State placed a defendant's future dangerousness at issue by "introducing evidence of [the defendant's] past violent acts, his associations with violent groups, and his plans [to form a Skinhead group] upon release from prison. *State v. Rushing*, 243 Ariz. 212, ___, ¶ 41 (2017).

In contrast, the State presented nothing of the sort in Cruz's case. Cruz argues, nonetheless, that his future dangerousness was a logical inference from the prosecutor's penalty-phase cross-examination of prison expert James Aiken and the nature of the murder itself. Unlike in *Escalante-Orozco* or *Rushing*, however, the State did not present evidence of any violent incidents other than Officer Hardesty's murder. The murder did not involve a random attack on a stranger, which might suggest future dangerousness, but was committed during Cruz's attempt to evade arrest. Nor did the prosecutor emphasize the murder's brutality as it had in *Escalante-Orozco*—here, the State did not allege as an aggravating circumstance that the murder was cruel, heinous, and depraved. *See* A.R.S. § 13–751(F)(6). Furthermore, nothing in the State's cross-examination of Aiken suggested that Cruz was a dangerous person. (Pet. App. J, Ex. 17 at 163–64.)

Relying on *California v. Ramos*, 463 U.S. 992, 1003 (1983), Cruz also contends that the trial court inject-

ed his future dangerousness into the trial by instructing the jury that he could receive a parole eligible sentence. (Pet. at 7.) *Ramos*, however, held that an instruction informing a capital jury that the Governor could commute a sentence of life without the possibility of parole was constitutional—it did not address whether future dangerousness was at issue thus warranting a *Simmons* instruction. Further, *Ramos'* holding—a State may inform a capital sentencing jury that, even if sentenced to natural life, the defendant could be released from prison—undermines *Simmons'* rationale that a defendant should be able to tell the jury that he is not eligible for parole.

Moreover, even if Cruz's jury had been instructed that parole would be unavailable to him, Cruz cannot establish that it probably would have resulted in a life sentence. Cruz makes several arguments for why he should receive a new sentencing. First, he incorrectly asserts that error under *Lynch* is structural. Such an error, however, does not "deprive defendants of basic protections," *Valverde*, 220 Ariz. at 584, ¶ 10, or "infect[] the entire trial process," *Ring III*, 204 Ariz. at 552, ¶ 46 (quotation omitted). Instead, it is trial error reviewable for harmlessness because it goes to the process—*i.e.*, the presentation of the case to the jury—not the framework of a trial. *See Fulminante*, 499 U.S. at 310.

Second, Cruz argues that the State must show that the lack of a *Simmons* instruction was harmless. His argument ignores Rule 32.1(g)'s express language, which places the burden on the defendant "to establish that [*Lynch*] 'if determined to apply ... would

probably overturn' [his] sentence." *State v. Valencia*, 241 Ariz. 206, 209, ¶ 17 (2016).

The trial court correctly determined that Cruz failed to meet that burden. Even if Cruz were correct that future dangerousness was at issue, there was very little for a parole unavailability instruction to rebut, since the State never argued that his future dangerousness was a reason to impose a death sentence. *See O'Dell*, 521 U.S. at 167 (*Simmons* provides a "narrow right of rebuttal" of assertion of future dangerousness). In fact, Cruz relies solely on the existence of a single aggravating factor (murder of a police officer in the line of duty, A.R.S. 13–751(F)(10)) and the fact that the jury deliberated for 9 hours on the sentence to attempt to meet his burden. The aggravating factor found here, however, should be afforded great weight because of the important societal interest in protecting police officers whose duty it is to protect the public. And although this Court has looked to the length of deliberations when determining that the lack of a *Simmons* instruction was not harmless, the 9-hour deliberation here does nothing to meet Cruz's burden of showing that a parole instruction would probably overturn his sentence, especially when there is nothing in the record to indicate the jury was concerned with the possibility Cruz may one day be released. Given this Court's prior finding that the mitigation evidence was "weak," *Cruz*, 218 Ariz. at 170, ¶ 138, and the weighty aggravating factor, the trial court correctly concluded that Cruz failed to show that a parole unavailability instruction probably would have resulted in the jury giving him a life sentence.

Because Cruz failed to establish that *Lynch* would probably overturn his death sentence even if it did apply retroactively to his case, his claim under Rule 32.1(g) fails and the trial court correctly denied relief.

IV. CONCLUSION.

For all the foregoing reasons, this Court should deny review.

RESPECTFULLY SUBMITTED this 8th day of January, 2018.

Mark Brnovich
Attorney General

Dominic Draye
Solicitor General

Lacey Stover Gard
Chief Counsel

/s/

Jeffrey L. Sparks
Assistant Attorney General
Attorneys for Respondent

ARIZONA SUPREME COURT

JOHN MONTENEGRO CRUZ,

Petitioner,

v.

THE STATE OF ARIZONA,

Respondent.

Arizona Supreme Court
No. CR-17-0567-PC

Pima County Superior Court
Case No. CR-2003-1740

JOHN MONTENEGRO CRUZ'S REPLY TO RESPONSE TO PETITION FOR REVIEW

I. Introduction

Cruz's petition raises the specter of significant constitutional error infecting not only his case, but a slew of others. The serious question whether the Court's longstanding misapplication of *Simmons v. South Carolina, infra,* can be remediated in a successive collateral review Rule 32 proceeding is an important question that will repeat itself and should be decided. What is more, as explained below, the State has not raised valid objections to the merits of Cruz's petition. Therefore, there are strong grounds favoring the grant of review.

II. *Lynch v. Arizona* resulted in a significant change in the law within the meaning of Rule 32.1(g)

Over the course of seven years, beginning with its decision in Cruz's case, and then extending to at least nine other cases, this Court erroneously distinguished *Simmons v. South Carolina,* 512 U.S. 154 (1994) thereby proscribing the application of *Simmons* and its attendant due process protections in Arizona death sentencing proceedings. *See State v. Lynch*, 238 Ariz. 84, 103, ¶ 62-66 (2015) ("*Lynch I"*), *rev'd*, *Lynch v. Arizona*, __, U.S. __,136 S. Ct. 1818 (2016) ("*Lynch II"*); *State v. Benson*, 232 Ariz. 452, 465–66, ¶ 58-59 (2013); *State v. Boyston*, 231 Ariz. 539, 552-53, ¶¶ 67-68 (2013); *State v. Hardy*, 230 Ariz. 281, 293, ¶ 58 (2012); *State v. Hausner*, 230 Ariz. 60, 90 (2012); *State v. Chappell*, 225 Ariz. 229, 240, ¶ 42 (2010); *State v. Garcia*, 224 Ariz. 1, 18 ¶¶ 76-78 (2010); *State v. Hargrave*, 225 Ariz. 1, 14–15, ¶¶ 50–53 (2010); *State v. Dann*, 220 Ariz. 351, 373, ¶¶ 123–24 (2009); *State v. Cruz*, 218 Ariz. 149, 160 ¶¶ 42, 44-45 (2008).

To be clear, as the State correctly observes, *Lynch II* did not create new federal constitutional law, it relied on *Simmons*. The State argues that this settles the presented question. Not so, says Cruz.

The "archetype" of a significant change in the law under Rule 32.1(g) "occurs when an appellate court overrules previously binding case law." *State v. Shrum*, 220 Ariz. 115, 118, ¶ 16 (2008). *Lynch II* produced this exact result: this Court's previously binding case law, holding that the *Simmons* rule would not apply in Arizona, has now been overruled by an appellate court. Previously in these proceed-

ings, the State agreed with this proposition, acknowledging the obvious: that *Lynch II* "overruled a well-established line of Arizona Supreme Court opinions . . ." (Pet. App. I at 3:9-13.) *Lynch* produced the "archetype" change in the law described in *Shrum*.

Apart from the above, by definition, significant changes in the law . . . "require[] some transformative event, a clear break from the past." *Shrum*, 220 Ariz. at 115, ¶15, (quoting *State v. Slemmer,* 170 Ariz. 174, 182 (1991)). *Lynch II* imposed such a transformation. *See State v. Escalante-Orozco*, 241 Ariz. 254, 284-86, ¶¶ 117, 126-27 (2017) (vacating death sentence and remanding for new sentencing in light of *Lynch*, after recognizing that it had "repeatedly" misapplied the constitutional rule in *Simmons*); *State v. Rushing*, 243 Ariz. 212, 404 P.3d 240, 24951, ¶¶ 37, 43 (2017) (applying *Simmons* in light of *Lynch II*); *State v. Hulsey*, ___ Ariz. ___, 2018 WL 455394, at *25, ¶144 (Ariz. Jan. 18, 2018)). As a consequence of *Lynch II*, Arizona now affords due process protections in capital sentencing proceedings that were previously absent. This is a clear break from the past, just as described in *Shrum.*

Cruz has demonstrated that *Lynch II* compelled Arizona's courts to refashion their capital sentencing procedures to comply with *Simmons*. And even though *Lynch II* relied on *Simmons, Lynch II's* overruling of this Court's longstanding precedents have produced significant changes in the law affecting Arizona capital sentencing proceedings, as evidenced by the resentencings ordered in *Escalante-Orozco*, *Rushing* and *Hulsey*.

III. The changes in the law are retroactive.

The significant changes in the law regulating Arizona capital sentencing proceedings attendant to the *Lynch II* decision must be applied retroactively under Rule 32.1(g). This is because *Lynch II* relied on the clearly established rule announced in *Simmons.* As this Court explained in *Slemmer,* "new decisions [here the *Lynch II* decision] applying well established constitutional principle[s] . . . should generally be applied retroactively, even to cases that have become final and are before the court on collateral proceedings." 170 Ariz. at 179 (internal quotations omitted), *citing, Yates v. Aiken,* 484 U.S. 211, 216 (1988). The *Yates* case cited in *Slemmer* controls the disposition of the retroactivity issue in Cruz's case.

Yates presented the question whether the South Carolina Supreme Court was compelled to apply the United States Supreme Court's decision in *Francis v. Franklin*, 471 U.S. 307 (1985) to Yates's case pending on state court collateral review. Despite the fact that Yates's direct appeal was decided in 1982, *before Franklin* was decided, the Supreme Court held that the state appellate court was compelled to apply the *Franklin* decision to petitioner Yates on collateral review, because *Franklin* relied on *Sandstrom v. Montana,* 442 U.S. 510 (1979) and *Sandstrom* was decided before Yates's trial took place. *See Yates*, 484 U.S. at 21617. By analogy to the *Yates* decision, *Lynch II*, relied on *Simmons*, a 1994 decision, which predated Cruz's 2005 trial. Therefore, the transformative events wrought by *Lynch II* on Arizona's capital sentencing procedures must be applied retroactively to Cruz.

The State's reliance on *O'Dell v. Netherland,* 521 U.S. 151(1997) is misplaced. *O'Dell* held the *Simmons* rule would not be applied to petitioners (like O'Dell) whose convictions were final *before Simmons* was decided.[1] 521 U.S. at 156-57. As noted, however, Cruz's case was decided well after *Simmons* and therefore *O'Dell* does not apply to him. Instead, Cruz's case is regulated by the rule in *Yates*, and therefore *Lynch II* applies retroactively because as this Court said in *Slemmer,* "new decisions [here *Lynch II*] applying well established constitutional principle[s] . . . [here *Simmons*] should generally be applied retroactively, even to cases that have become final and are before the court on collateral proceedings". *Slemmer*, 170 Ariz. at 179 (internal quotations omitted), *citing Yates v. Aiken,* 484 U.S. 211, 216 (1988).

IV. Cruz's future dangerousness was at issue at this trial.

The State argues that Cruz's future dangerousness was not in issue, principally supporting this contention by distinguishing the Cruz case from those in *Escalante-Orozco* and *Rushing*. (Response at 7-8.) Even if the evidence of future dangerousness was stronger in those cases than in Cruz, this distinction does not eliminate the element of future dangerousness from Cruz's case. After all, ". . . it is sufficient if future dangerousness is a 'logical inference from the evidence . . .'" *Escalante-Orozco*, 241 Ariz. at ¶119, quoting, *Kelly v. South Carolina*, 534 U.S. 246, 252

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[1] O'Dell's conviction became final in 1988. *O'Dell*, 521 U.S. at 152.

(2002) "[I]t is enough if the evidence introduced to prove the other elements of the case has a tendency to prove future dangerousness as well." *Kelly,* 534 U.S. at 260 (Rehnquist, C.J., dissenting). Cruz's case satisfies this aspect of the *Kelly* test.

The shooting of officer Patrick Hardesty took place in broad daylight on Memorial Day 2003 after Cruz took flight during questioning by officer Hardesty, and his companion officer Ben Waters, about Cruz's alleged involvement in a *minor* hit and run accident a bit earlier that afternoon. (Pet. App. J2 at Ex. 11 at 89, 93, 97, 102-112.) Cruz ran from the officers. Officer Hardesty chased Cruz on foot and officer Waters used his patrol vehicle in an attempt to drive around and head Cruz off. (Pet. App. J2 at Ex. 11 at 112, 132, 134.) Area residents heard four or five gunshots and observed Cruz running away. (Pet. App. J2 at Ex. 12 at 108-12, 170, 214, 218.) Once officer Waters drove his car around, he saw Cruz drop a handgun, and upon Waters exiting his vehicle, Cruz was apprehended. (Pet. App. J2 at Ex. 11 at 114-15, 119, 121-23, 126, 172, 206.) Officer Hardesty's body was located nearby with his unfired handgun still holstered. (Pet. App. J2 at Ex. 13 at 21-28.) Officer Hardesty suffered three gunshot wounds to his body, from a shooting that took place at close range; with one shot into his left eye, one located to the left side of his abdomen and one located to the left side his abdomen, but closer to the midline. (Pet. App. J2 at Ex. 14 at 116-129.) The handgun that officer Waters saw Cruz drop to the ground was identified as the murder weapon. (Pet. App. J2 at Ex. 15 at 25-27.) Moreover, apart from the unprovoked nature of the offense, the crime bore signs of violent overreaction and impulsiveness, which would have

led the jury to be concerned about the unpredictability of Cruz's future behavior. Therefore, it is inarguable that Cruz satisfies the showing that his future dangerousness was a "logical inference from the evidence." *Kelly*, 534 U.S. at 252. *And see, Murphy v. Com.*, 246 Va. 431 S.E.2d 48, 53 (Va.1993) (rejecting defendant's argument that absence of any felony record and lack of any prior history of violence disproved element of future dangerousness required for imposition of death penalty, in light of evidence that defendant entered into contract to kill the victim and then he premeditatedly carried out the murder by stabbing the sleeping victim).

In addition to the foregoing, while the State's comparisons to *Escalante-Orozco* and *Rushing* are inapt, Cruz submits that comparisons to the adjudication of the future dangerousness issue in *Lynch I* case are fitting. In *Lynch I*, this Court found without elaboration that "[t]he State suggested at trial that Lynch could be dangerous." *Lynch I*, 238 Ariz. at 103, ¶ 64. Following reversal of *Lynch I* by the Supreme Court, on remand to this Court, oral argument was held on December 6, 2016. (See streaming media archive of oral arguments at https://www.azcourts.gov/AZ-Supreme-Court/Live-Archived-Video). During the argument, the State's counsel admitted that satisfying the showing of a suggestion of future dangerousness was "a fairly low bar." *Id*. at 26:55-27:46. State's counsel also stated that there was a single question interposed to Lynch's prison adjustment expert James Aiken which suggested future dangerousness in that case. *Id*., at 23:56-24:25 and 25:39-25:55. Elucidation of the State's cross-examination of Aiken in the *Lynch I* case, where this suggestion of future danger was triggered, is addressed in *Lynch I* at 238

Ariz. At 95, ¶ 23-24. It is noted there, that Lynch "elicited from Aiken testimony that Lynch could be safely housed in prison", *id*., at ¶ 24, and that the State could properly rebut this testimony by suggesting that other prisoners (not Lynch) had escaped from prison and that it was possible (against Aiken's opinion that such probability was miniscule) that Lynch could theoretically harm a corrections officer. *Id*., at ¶ 23-24. The State's impeachment of Aiken was apparently the sole evidence upon which this Court made its finding that the State had placed Lynch's future danger at issue. (December 6, 2016 oral argument at https://www.azcourts.gov/AZ-Supreme-Court/Live-Archived-Video at 23:56-24:25)

Mr. Cruz also called the same James Aiken as an expert witness to testify that he would not be a future danger if housed in prison, but like in *Lynch I*, the State did not concede to Aiken's expectation that Cruz would not present as a future danger. Instead, the State invited the jury to completely discredit Aiken's opinions. (Pet. App. J2 at Ex. 17 at 163-64.) Impeachment of Aiken's testimony, that Cruz could be safely housed in prison, suggested Cruz could be a future danger. *Lynch I*, 238 Ariz. at 95, ¶ 23-24, 103, ¶ 64; (December 6, 2016 oral argument at https://www.azcourts.gov/AZ-Supreme-Court/Live-Archived-Video at 23:56-24:25)

Added to this, Cruz's jury was given the patently false and misleading instruction that Cruz might be released on parole, when that was legally impossible.

(Ex. 8 at 7.); *and see Lynch,* 136 S. Ct. at 1819.[2] When a jury is explicitly instructed that a capital defendant is eligible for release, if not sentenced to death, such an instruction "focuses the jury on the defendant's probable future dangerousness" . . . and "invites the jury to predict . . . what the defendant himself might do if released into society". *California v. Ramos*, 463 U.S. 992, 1003 (1983); *id*. at 1008 (the effect of an instruction informing the jury of a capital defendant's potential release, "inject[s] into the sentencing calculus a consideration akin to the aggravating factor of future dangerousness . . ."). By reason of the instruction alone, Cruz's future dangerousness was at issue before his jury. *Id.*[3]

Cruz recognizes, as the State points out, that the *Ramos* holding did not address a *Simmons* issue. Rather, *Ramos* held that an instruction *truthfully* informing a jury that a governor could commute a death sentence was constitutional in part because it "invite[d] the jury to predict not so much what some future Governor might do, but more what the defendant himself might do if released into society." *Id.*, 463 U.S. at 1005. Cruz cites *Ramos* simply to forcefully demonstrate that it blinks reality to suggest that Cruz's jury did not consider his potential

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[2] In *Simmons,* the jury was not given any instruction on Simmon's parole eligibility and it was left to speculate on the issue. *Simmons,* 512 U.S. at 165-66.

[3] *See also, Future Dangerousness in Capital Cases*, 80 Cornell L. Rev. 397, 409 (2001) (empirical data from the capital jury project show that "future dangerousness is on the minds of most capital jurors and thus 'at issue' in virtually all capital trials, even if the prosecutor says nothing about it").

future dangerousness when it was misled to believe that Cruz could be released on parole, if not sentenced to death. (Pet. App. J1 at Ex. 8 at 7.)

V. The significant change in the law engendered by *Lynch II* — and its progeny *Escalante-Orozco*, *Rushing* and *Hulsey* — when applied to Cruz's case, would probably overturn his sentence.

The State argues Cruz must show that the constitutional error would probably overturn his sentence. Cruz agrees that Rule 32.1(g) expressly requires that he make this showing. But Cruz gets there by taking a different road than the State. If Cruz is entitled to the application of *Lynch II*/*Simmons* to his case, and then he demonstrates (as he has done) that an error of constitutional magnitude occurred at his trial, then the State must prove the error was harmless beyond a reasonable doubt. This is of course how constitutional errors are measured. If the State fails to meet its burden, then Cruz will have demonstrated that the error would probably overturn his sentence. If Cruz is to receive the full benefit of a change in the law, then consistent with this Court's disposition in other cases, the harmless error test must extend to him under Rule 32.1(g). *See State v. Rendon*, 161 Ariz. 102, 104 (1989) (granting Rule 32.(g) relief "[b]ecause we cannot say that the jury would have, beyond a reasonable doubt, found the defendant guilty of first degree burglary without the incorrect instruction, the error was not harmless"). Similarly, in *Slemmer*, the Court found that the instructional error raised in the context of a Rule 32.1(g)

petition resulted in fundamental error. *Slemmer*, 170 Ariz. at 179.[4]

The State fails to address the above authorities, which are discussed in Cruz's petition, in its Response. Instead, it cites *State v. Valencia*, 241 Ariz. 206, 209, ¶17 (2016). But *Valencia* did not hold that the harmless error would not be applied to constitutional errors identified under Rule 32.1(g). In the cited portion of *Valencia,* the Court simply held that relief depended on facts that needed to be developed at a hearing. *Id.* ("At these hearings, they will have an opportunity to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity . . . [and] [o]nly if they meet this burden will they establish that their natural life sentences are unconstitutional, thus entitling them to resentencing").

The single aggravator in Cruz's case, "killing an on duty officer, was an element of the crime itself." *Hulsey*, at *24, ¶142. Moreover, Cruz was just 35 years old (Pet. App. J4 at Ex. 17 at 156) and "[t]his may have caused some jurors to fear that he might be released from prison someday." *Hulsey*, at *24, ¶142. Cruz presented sixteen mitigation witnesses, including five expert witnesses over four days. (Pet. App. J4 Ex. 19 at 52-155, Pet. App. J7 at Ex. 20 at 11-152, Pet. App. J8 at Ex. 21 at 5-134, Pet. App. J4 at Ex. 17.) Added to this, Cruz's jury was explicitly instructed and misled to believe he could be released on parole if not sentenced to death. (Pet. App. J1 at

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[4] The Court ultimately denied relief because the change in the law was not retroactive. *Slemmer*, 170 Ariz. at 183-84.

Ex. 8 at 7.) *See Hulsey,* at *23, ¶137 (misperception that Hulsey could be released was never rectified). It is not possible to say beyond a reasonable doubt that this materially false instruction did not affect the verdict in Cruz's case.[5]

For the reasons stated above and in the Petition, the State is unable to demonstrate that the error was harmless beyond a reasonable doubt.

VI. Conclusion

For all the reasons stated, Cruz requests that the Court grant his petition for review.

RESPECTFULLY SUBMITTED this 18th day of January, 2018.

Jon Sands
Federal Public Defender

Cary Sandman
Assistant Federal Public Defender

/s/Cary Sandman
Counsel for Petitioner, John M. Cruz

[5] The State supports its argument Cruz cannot meet his burden "especially when there is nothing in the record to indicate the jury was concerned with the possibility Cruz may one day be released." (Response at 11.) Cruz submits this is not a fair representation of the record. After the trial, some jurors lamented that they were not given the option of sentencing Cruz to life without parole. (Pet. App. J2 at Ex. 9 at 7-9.)

SUPREME COURT

STATE OF ARIZONA

April 1, 2020

RE: STATE OF ARIZONA v JOHN MONTENEGRO CRUZ
Arizona Supreme Court No. CR-17-0567-PC
Pima County Superior Court No. CR2003-1740

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 31, 2020, in regard to the above-referenced cause:

ORDERED: John Montenegro Cruz's Petition for Review = GRANTED as to these issues as rephrased:

1. Was Lynch v. Arizona, 136 S. Ct. 1818 (2016) (Lynch II) a significant change in the law for purposes of Ariz. R. Cr. P. 32.1(g)?

2. Is Lynch II retroactively applicable to petitioner on collateral review?

3. If Lynch II applies retroactively, would its application have probably overturned petitioner's sentence per Rule 32.1(g)?

FURTHER ORDERED: The case shall be set for oral argument.

FURTHER ORDERED: The parties may file simultaneous supplemental briefs, not to ex-

ceed 20 pages in length, no later than 20 days from the date of the Court's Minute Letter. Any amicus briefs are due on or before May 4, 2020, and any responses to amicus briefs are due on or before May 18, 2020. Any amicus briefs or responses may not exceed 20 pages in length.

Filing of a supplemental brief is permissive rather than mandatory. This order should not be construed as an invitation to repeat the contents of the Petition for Review, the Response, or any Reply. Lack of a supplemental brief shall not be considered an admission that the position of the opposing party or parties should prevail.

Counsel shall be advised of the date and time of oral argument at such time as the hearing date is determined.

Pursuant to Rule 32.9(e), Ariz. R. Crim. P., the Clerk of the Pima County Superior Court shall forward to the Clerk of this Court the entire superior court record (including the trial and the Rule 32 post-conviction proceedings) in STATE v CRUZ, case number CR2003-1740. At this time, the Court is requesting paper records only — no exhibits.

Janet Johnson, Clerk

ARIZONA SUPREME COURT

JOHN MONTENEGRO CRUZ,

Petitioner,

v.

THE STATE OF ARIZONA,

Respondent.

Arizona Supreme Court
No. CR-17-0567-PC

Pima County Superior Court
Case No. CR-2003-1740

JOHN MONTENEGRO CRUZ'S SUPPLEMENTAL BRIEF

I. Introduction

Under *Simmons v. South Carolina*, 512 U.S. 154 (1994), "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[.]" *Lynch v. Arizona*, — U.S.—, 136 S. Ct. 1818, 1818 (2016) (*Lynch II)* (internal quotations and citations omitted).

Like the defendant in *Simmons*, "[t]hree times [John Cruz] asked to inform the jury that he was ineligible for parole under state law; three times his request was denied." *Simmons*, 512 U.S. at 162

(plurality). (Pet. App. J, Ex. 1; Pet. App. J, Ex. 3, at 37–38; Pet. App. K at 6.) Instead, although Cruz was parole-ineligible and his future dangerousness was at issue (Pet. at 7–9; Rep. at 5–10), the trial court instructed his jury that if not sentenced to death, Cruz could receive a sentence "with the possibility of parole." (Pet. App. J, Ex. 8 at 7.) This instruction imparted a materially false narrative and fostered a "grievous misperception." *Simmons*, 512 U.S. at 162. Then, this Court affirmed the trial court's mistakes on appeal. *State v. Cruz*, 218 Ariz. 149, 160, ¶¶ 42–45 (2008).

"The State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole." *Simmons*, 512 U.S. at 162. Consequently, Cruz's death sentence is firmly rooted in a violation of his constitutional right to due process. *Id*. at 178 (O'Connor, J., concurring).

The Supreme Court's decision in *Lynch II* rested on *Simmons* and its progeny, *Shafer v. South Carolina*, 532 U.S. 36 (2001), and *Kelly v. South Carolina*, 534 U.S. 246 (2002). Notwithstanding these established precedents, over the course of nearly eight years, beginning with its 2008 decision in *Cruz*, this Court erroneously distinguished *Simmons* in at least nine other cases.[1] Beginning with *Cruz*, this Court inad-

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[1] See *State v. Lynch*, 238 Ariz. 84, 103, ¶¶ 62–66 (2015) ("*Lynch I*"), rev'd, *Lynch*, 136 S. Ct. 1818; *State v. Benson*, 232 Ariz. 452, 465–66, ¶¶ 58–59 (2013); *State v. Boyston*, 231 Ariz.

vertently instituted a systemic, statewide framework for sentencing prisoners to death in violation of the Due Process Clause—barring the *Simmons* protections in Arizona capital proceedings. In what can be described only as a transformational event, this unconstitutional regime abruptly ended with *Lynch II* in 2016.

Here, the ultimate question is whether the transformative changes wrought by *Lynch II* apply to postconviction defendants like Cruz—who tried to inform his jury he was ineligible for parole—and whose death sentences did not become final until *after* the Supreme Court decided *Simmons*, *Shafer*, and *Kelly*. The answer to the question is dictated by both the Supremacy Clause of the United States Constitution and Arizona Rule of Criminal Procedure 32.1(g), which require that *Lynch II* be applied to this category of defendants. Under these circumstances, the greater interests in constitutional justice call for the State's interest in finality to yield.

II. *Lynch II* resulted in a significant change in the law within the meaning and purposes of Rule 32.1(g).

A significant change in the law within the meaning of Rule 32.1(g) "requires some transformative event, a clear break from the past." *State v. Shrum*, 220 Ariz. 115, 118, ¶ 15 (2008) (internal quotations and

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539, 552–53, ¶¶ 67–68 (2013); *State v. Hardy*, 230 Ariz. 281, 293, ¶ 58 (2012); *State v. Hausner*, 230 Ariz. 60, 90 (2012); *State v. Chappell*, 225 Ariz. 229, 240, ¶ 42 (2010); *State v. Garcia*, 224 Ariz. 1, 18 ¶¶ 76–78 (2010); *State v. Hargrave*, 225 Ariz. 1, 14–15, ¶¶ 50–53 (2010); *State v. Dann*, 220 Ariz. 351, 373, ¶¶ 123–24 (2009); *Cruz*, 218 Ariz. at 149, 160 ¶¶ 42, 44–45.

citations omitted). In *Shrum*, this Court held that "[t]he archetype of . . . a change [in the law under Rule 32.1(g)] occurs when an appellate court overrules previously binding case law." *Id*. at 118, ¶ 16.

Cruz has satisfied this test. All sides agree that the Supreme Court's decision in *Lynch II* has had transformative effects on previously binding Arizona law. As the State argued in its prior briefing: "[*Lynch II*] overruled a well-established line of [Arizona] Supreme Court opinions." (Pet. App. I at 3:9–10.)

The State got it right. Whereas this Court had repeatedly held that Arizona's capital sentencing proceedings were exempt from the constitutionally mandated due process protections set out in *Simmons*, the Court has since acknowledged that *Lynch II* overruled those previously binding precedents. *See State v. Escalante-Orozco*, 241 Ariz. 254, 284–86, ¶¶ 117, 126–27 (2017) (vacating death sentence and remanding for new sentencing in light of *Lynch*, after recognizing that it had "repeatedly" misapplied the constitutional rule in *Simmons*); *see also State v. Rushing*, 243 Ariz. 212, 221–23, ¶¶ 36–43 (2017) (applying *Simmons* in light of *Lynch II*); *State v. Hulsey*, 243 Ariz. 367, 397–98, ¶¶ 141–44 (2018) (same). Thus, as reflected in this Court's post-*Lynch II* decisions, *Lynch II* transformed Arizona law and constituted a significant change for purposes of Rule 32.1(g). *See Shrum*, 220 Ariz. at 115, ¶ 15.

The State counters that *Lynch II* did not significantly change the law because it did not overrule U.S. Supreme Court precedent as did *Ring v. Arizona*, 536 U.S. 584 (2002), or announce a new federal constitutional rule as did *Padilla v. Kentucky*, 559 U.S. 356 (2010). (Resp. at 3–5.) The State errs,

however, in extrapolating from these two *examples* of significant changes in the law that they mark the *outer limits* of what may constitute such a change.

There is no requirement in Rule 32.1(g) that all "significant change[s]" must overrule prior U.S. Supreme Court precedent or announce a new federal constitutional rule.[2] Arizona case law is replete with examples of "significant changes" that do neither. *See Shrum*, 220 Ariz. at 119, ¶ 17; *State v. Jensen*, 193 Ariz. 105, 107, ¶ 13 (App. 1998) (mere state law statutory change can cause significant change in the law, without showing the necessity of new constitutional rule); *State v. Rendon*, 161 Ariz. 102, 103 (1989) (court's modified statutory construction of Arizona burglary statute and corresponding changes to jury instruction qualified as a significant change in the law).

For example, in *Taylor v. Sherrill*, 166 Ariz. 359, 361 (App. 1990), *opinion vacated in part*, 169 Ariz. 335 (1991), the court of appeals determined that *State v. Juarez*, 161 Ariz. 76, 81 (1989), was a significant change in the law under Rule 32.1(g). However, *Juarez* was not decided based on a new constitutional rule, and of course it overruled no federal law. 161 Ariz. at 81. Instead, after finding that DUI defendants had been uniformly denied access to counsel before deciding whether to submit to breathalyzer tests, this Court applied settled Sixth Amendment

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[2] The comment to Rule 32.1(g) states, "Paragraph (g) encompasses all claims for retroactive application of new constitutional and nonconstitutional legal principles...." Rule 32.1(g), 2007 Comment.

law to find that these law enforcement procedures denied defendants their right to counsel. *Id.* This Court later declined to review the court of appeals decision in *Taylor* finding *Juarez* to constitute a significant change in the law. 169 Ariz. at 338.

In support of its novel and restrictive definition, the State relied on three federal district court cases, which ruled that *Lynch* did not constitute a significant change in law for purposes of Rule 32.1(g).[3] (Resp. at 4.) For the reasons just discussed, the federal district court decisions are wrongly decided; they read *Shrum* too narrowly, and like the State perceived that *Lynch* had no transformative effects on Arizona law because it was not on par with *Ring*.[4] However, as already explained, *Lynch II* had decidedly transformative effects on Arizona law, requiring this Court to overrule its own longstanding precedents. Few cases present universal transformational changes such as these. In any event, the federal

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[3] *Boggs v. Ryan*, No. CV-14-02165-PHX-GMS, 2017 WL 67522, at *3 (D. Ariz. Jan. 6, 2017); *Garcia v. Ryan*, No. CV-15-00025-PHX-DGC, 2017 WL 1550419, at *3 (D. Ariz. May 1, 2017); *Garza v. Ryan*, No. CV-14-01901-PHX-SRB, 2017 WL 105983, at *3 (D. Ariz. Jan. 11, 2017). Notably, the *Garcia* and *Garza* decisions repeat the relevant *Boggs* analysis nearly verbatim.

[4] *Boggs*, 2017 WL 67522, at *3 ("In *Shrum*, for example, the Arizona Supreme Court cited *Ring v. Arizona*, 536 U.S. 584 (2002), as a 'significant change' in the law . . . . In contrast to the holding in *Ring*, which expressly overruled precedent and invalidated Arizona's capital sentencing scheme, *Lynch* did not transform Arizona law." (citation omitted)); *see also Garcia*, 2017 WL 1550419, at *3 (same); *Garza*, 2017 WL 105983, at *3 (same).

district court rulings are not binding on this Court. It is the province of Arizona's High Court—not a federal trial court—to interpret Rule 32.1(g) in conformity with Arizona law.

Cruz has demonstrated that *Lynch II* was a significant change in the law for Rule 32.1(g). When, as here, a state appellate court has erected a systemic, statewide framework for sentencing fellow citizens to death in violation of the Due Process Clause, and that statewide unconstitutional system is later abolished as the result of a decision of the U.S. Supreme Court, there has been a significant change in the law under Rule 32.1(g).

III. *Lynch II* is retroactively applicable to Cruz on collateral review.

"Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the constitution." *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016). "If a state collateral proceeding is open to a claim controlled by federal law, the state court 'has a duty to grant the relief that federal law requires.'" *Id*. (quoting *Yates v. Aiken*, 484 U.S. 211, 218 (1988)).

Here *Yates* is the controlling authority. *See State v. Slemmer*, 170 Ariz. 174, 179–80 & n.6 (1991). The issue in *Yates* was whether the South Carolina Supreme Court was compelled to apply the U.S. Supreme Court's decision in *Francis v. Franklin*, 471 U.S. 307 (1985), in Yates's state court collateral review proceeding. Although Yates's direct appeal was decided in 1982, before the *Franklin* decision, the Supreme Court held that the state appellate

court was compelled to apply *Franklin* to Yates on collateral review because *Franklin* relied on *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Sandstrom* was decided before Yates's trial. *See Yates*, 484 U.S. at 216–17.

By analogy to the *Yates* decision, *Lynch II* relied on *Simmons*, a 1994 decision, which predated Cruz's 2005 trial. As Respondent admits, *Lynch* "simply applied *Simmons*." (Resp. at 5–6.) Therefore, *Lynch II* applies retroactively here for the same reason *Franklin* applied retroactively in *Yates*. As Justice Scalia explained in *Montgomery*, the *Yates* decision requires that "when state courts provide a forum for postconviction relief, they need to play by the 'old rules' announced *before* the date on which a defendant's conviction and sentence became final." *Montgomery*, 136 S. Ct. at 740 (Scalia, J., dissenting).

This Court acknowledged the applicability of the *Yates* retroactivity rule in *Slemmer*. As this Court explained, "new decisions [here the *Lynch II* decision] applying well established constitutional principle[s] [like those in *Simmons*] . . . should generally be applied retroactively, *even to cases that have become final and are before the court on collateral proceedings*." *Slemmer*, 170 Ariz. at 179 (citing *Yates*, 484 U.S. at 216) (internal quotations omitted) (emphasis added). Accordingly, the failure to apply *Lynch II* retroactively to Cruz will result in a recurrence of the constitutional error that infected Cruz's sentencing proceeding. *Yates*, 484 U.S. at 217–18; *Montgomery*, 136 S. Ct. at 731–32.

The State's reliance on *O'Dell v. Netherland*, 521 U.S. 151 (1997), is misplaced. (Resp. at 5–6.) *O'Dell* held that *Simmons* is not retroactive to petitioners

whose convictions were final before the decision in *Simmons*. 521 U.S. at 156–57. Because Cruz's case post-dates *Simmons*, and *Lynch* did not create a new rule of constitutional law, *O'Dell* does not apply to him. Instead, the retroactivity rule in *Yates* applies. 484 U.S. at 216; *Slemmer*, 170 Ariz. at 179. In other words, because *Simmons* rather than *Lynch* provides the "well established constitutional principle" at issue, there is no question but that *Lynch* applies to cases like Cruz that became final after *Simmons*. *Slemmer*, 170 Ariz. at 179.

Finally, the State has argued that if "*Lynch's* result was 'dictated' by *Simmons*, then it could not be 'transformative' and thus not a significant change in the law under Rule 32.1(g)." (Resp. at 6.) The State improperly conflates the two inquiries. *Lynch* is a significant change for purposes of Rule 32.1(g) because it transformed Arizona law, causing this Court to overrule binding precedents. However, because *Lynch* was dictated by *Simmons*, there is also not a "new rule" of federal constitutional law requiring that it come within the relevant retroactivity exceptions in *Teague v. Lane*, 489 U.S. 288, 301 (1989), before it can be applied here. *Slemmer*, 170 Ariz. at 179. There is nothing incoherent about these two independent propositions, and the State's misperception that there is flows from its cramped view of Rule 32.1(g), which Cruz corrects above.

IV. Application of the change in the law would probably overturn Cruz's sentence.

Rule 32.1(g) requires Cruz to demonstrate that if the change in the law now applies to him, then the corresponding constitutional error would probably

require overturning his death sentence. Cruz satisfies this test by showing the error is not harmless, in that the State cannot prove beyond a reasonable doubt that the constitutional error did not contribute to or affect the sentence.[5] *See Rushing*, 243 Ariz. at 222–23, ¶¶ 42-44; *Rendon*, 161 Ariz. at 104 (granting relief under Rule 32.1(g) "because we cannot say that the jury would have, beyond a reasonable doubt, found the defendant guilty of first degree burglary without the incorrect instruction, the error was not harmless"); *see also Slemmer*, 170 Ariz. at 179 (finding instructional error raised in a Rule 32.1(g) petition resulted in fundamental error), *and State v. Sorrell*, 132 Ariz. 328, 330 (1982) (applying the harmless error test to determine presence of fundamental error).

Recognizing the seriousness of the error, the State has waived any claim that it can demonstrate beyond a reasonable doubt that the error is harmless. (Resp. at 10–11.) The State's waiver is understandable. Providing false or inaccurate evidence to a jury regarding a defendant's parole ineligibility has pernicious consequences and places the thumb on the scale for death. *See* William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605, 660 (1999) ("Mistak-

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[5] This Court held that *Simmons* error may be reviewed for harmlessness. *State v. Bush*, 244 Ariz. 575, 591 ¶ 67 (2018). To preserve the issue for federal review, Cruz still maintains the error here was structural as a matter of federal constitutional law and reasserts arguments made earlier. (App. J at 12–18.) *See Mollet v. Mullen*, 348 F.3d 902, 921 n.6 (10th Cir. 2003).

en estimates of early release appear to be decisive in the decision making of jurors who have not made up their minds before deliberations begin or by the time of the jury's first vote on punishment."); J. Mark Lane, *"Is there Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence*, 26 Loy. L.A. L. Rev. 327, 334 (1993) ("Juries frequently choose death, not because they think it is the appropriate sentence, but because they do not believe that the life-sentence alternative will adequately ensure the defendant's incarceration."). Indeed, studies of capital juries reveal that "[t]he shorter the period of time a juror thinks the defendant will be imprisoned, the more likely he or she is to vote for death on the final ballot." John H. Blume, Stephen P. Garvey & Sheri Lynn Johnson, *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 Cornell L. Rev. 397, 404 (2001).

Cruz has fully briefed the harmfulness of the error. (Pet. at 16–20, Reply at 10–12.) He relies on the arguments made there, except to add that the errors in *Simmons* and the Supreme Court cases that followed were largely errors of omission. Absent information about parole, jurors were "left to speculate about petitioner's parole eligibility." *Simmons*, 512 U.S. at 165 (plurality). Here, by contrast, the jury was affirmatively misled that Cruz *could* be released on parole if not sentenced to death. If the error arising from the jury's mere speculation requires reversal, as in *Simmons* and its progeny, then almost by necessity the more egregious error here calls for relief.

V. Conclusion

Providing a jury with "accurate sentencing information [is] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.). These indispensable constitutional protections were absent from Cruz's sentencing proceeding, when the court told his jury he was parole-eligible, when in fact the opposite was true—a sentence to life imprisonment meant he would die behind bars.

Although the Court has previously denied relief on this claim, it must take a second look in light of *Lynch II*. The U.S. Supreme Court belatedly, but unqualifiedly, corrected this Court's misperception that *Simmons* did not apply in Arizona. The Court must now ensure that Cruz is not denied the benefit of *Simmons*, which he sought over a decade ago, simply because it took the Supreme Court so long to intervene. *See, e.g.*, *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016) (granting postconviction relief for previously denied *Ring* claim after *Hurst v. Florida*, —U.S.—, 136 S. Ct. 616 (2016), because "[d]efendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after *Ring* should not suffer due to the United States Supreme Court's fourteen-year delay in applying *Ring* to Florida"); *Ex parte Guevara*, No. WR-63,926-03, 2018 WL 2717041, at *1–2 (Tex. Crim. App. Jun. 6, 2018) (unpublished) (permitting successive postconviction petition to challenge the previous denial of *Atkins* intellectual-disability claim after the Supreme Court disapproved of Texas's

peculiar mode of evaluating *Atkins* claims in *Moore v. Texas*, —U.S.—, 137 S. Ct. 1039 (2017)).

For all the preceding reasons, and those in the petition for review and supporting reply, Cruz respectfully requests that the Court grant relief and order resentencing.

RESPECTFULLY SUBMITTED this 24th day of April, 2020.

Jon Sands
Federal Public Defender

Cary Sandman
Assistant Federal Public Defender

/s/Cary Sandman
Counsel for Petitioner, John M. Cruz

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Respondent,

v.

JOHN MONTENEGRO CRUZ,

Petitioner.

CR-17-0567-PC

Pima County Superior Court
No. CR-2003-1740

STATE'S SUPPLEMENTAL BRIEF

STATEMENT OF THE CASE

Almost 17 years ago, Petitioner John Montenegro Cruz ran from Tucson Police Officer Patrick Hardesty when the officer asked Cruz for identification while investigating a hit-and-run collision. During the foot pursuit, Cruz shot Officer Hardesty five times at close range, killing him. *State v. Cruz*, 218 Ariz. 149, 155-56, ¶¶ 2-7 (2008).

The State indicted Cruz on one count of first-degree murder and filed a notice of intent to seek the death penalty based on the aggravating factor that he murdered a police officer in the line of duty. *Id.* at 156, ¶ 8. A jury convicted Cruz of first-degree murder, found the aggravating factor proven, and determined that the mitigation was insufficient to call for

leniency and that Cruz should be sentenced to death. *Id.* at 156, ¶ 9.

Before trial, Cruz asked the judge to decide whether, if the jury voted against the death penalty, the court would sentence him to natural life in prison or life with the possibility of release after 25 years. The trial judge declined to do so. On direct appeal, Cruz argued that the court erred. In support of his argument, he cited *Simmons v. South Carolina*, 512 U.S. 154 (1994), in which the Supreme Court stated that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Id.* at 156. This Court denied relief, concluding that Cruz's case differed from *Simmons* because no state law would have prohibited his release on parole after 25 years if he had received a life sentence and because he "failed to explain how the trial court could opine on a defendant's sentence before any evidence is offered or a verdict is rendered." *Cruz*, 218 Ariz. at 160, ¶ 42.

Also before trial, Cruz stated that he intended to present testimony in the penalty phase from Duane Belcher, Chairman of the Board of Executive Clemency. Belcher would testify that, if Cruz received a natural life sentence, he would never be eligible for any type of parole and that if he received a sentence of life with the possibility of release after twenty-five years, the Clemency Board could only recommend Cruz's release, but could not order him paroled. (R.T. 1/10/05, at 62; R.O.A. 427, at 3.) The trial judge precluded Belcher's testimony but stated that he would instruct the jury regarding parole if Cruz

requested it. (R.T. 3/1/05, at 6.) Cruz did not request an instruction.

Cruz challenged the preclusion of Belcher's testimony on direct appeal, again relying on *Simmons*. This Court concluded that the trial judge did not abuse his discretion in part because "testimony on what the Board might do in a hypothetical future case would have been too speculative to assist the jury." *Cruz*, 218 Ariz. at 160, ¶ 45.

In 2016, years after Cruz's case became final, the Supreme Court decided *Lynch v. Arizona*, 136 S. Ct. 1818 (2016) (*Lynch II*). The Court held that, because under Arizona law parole is only available to individuals who committed a felony before January 1, 1994, a capital defendant whose future dangerousness at issue has a due process right to inform the jury of his parole ineligibility either by a jury instruction or in argument by counsel. *Id.* at 1818-19. Cruz filed a successive petition for postconviction relief arguing that *Lynch II* affords him relief under Rule 32.1(g) because it is a significant change in the law that if applied retroactively to his case would probably overturn his death sentence. After the trial court denied relief, this Court granted Cruz's petition for review.

ARGUMENTS

I

LYNCH II DID NOT SIGNIFICANTLY CHANGE FEDERAL LAW.

A "significant change in the law" for purposes of Rule 32.1(g) "requires some transformative event, a 'clear break from the past.'" *State v. Shrum*, 220 Ariz. 115, 118, ¶ 15 (2009) (quoting *State v. Slemmer*,

170 Ariz. 174, 182 (1991)). "The archetype of such a change occurs when an appellate court overrules previously binding case law." *Shrum*, 220 Ariz. at 118, ¶ 16. For example, this Court determined that *Ring v. Arizona*, 536 U.S. 584 (2002), was a significant change in the law because it expressly overruled *Walton v. Arizona*, 497 U.S. 639 (1990), in holding that the Sixth Amendment requires a jury to find the aggravating circumstances authorizing imposition of the death penalty. *Shrum*, 220 Ariz. at 118-19, ¶ 16.

Granted, *Lynch II* invalidated a line of decisions from this Court, beginning with the direct appeal decision in this case and continuing to *Lynch I*, all of which had held that Arizona's sentencing laws were distinguishable from those at issue in *Simmons* and, thus, that Arizona capital defendants were not entitled to inform their juries of the unavailability of parole. *See State v. Lynch*, 238 Ariz. 84, 103, ¶¶ 64-65 (2015) (*Lynch I*), *rev'd* 136 S. Ct. 1818; *State v. Benson*, 232 Ariz. 452, 465, ¶ 56 (2013); *State v. Boyston*, 231 Ariz. 539, 552-53, ¶ 68 (2013); *State v. Cota*, 229 Ariz. 136, 151, ¶ 75 (2012); *State v. Hardy*, 230 Ariz. 281, 293, ¶ 58 (2012); *State v. Hausner*, 230 Ariz. 60, 90 (2012); *State v. Chappell*, 225 Ariz. 229, 240, ¶ 43 (2010); *State v. Hargrave*, 225 Ariz. 1, 14-15, ¶¶ 52-53 (2010); *State v. Garcia*, 224 Ariz. 1, 18, ¶ 77 (2010); *Cruz*, 218 Ariz. at 160, ¶¶ 40-45. But despite invalidating those decisions, *Lynch II* was not a transformative event or clear break from the past.

In *Lynch II* the Supreme Court did not overrule any of its precedent. Instead, the Court applied *Simmons* to capital sentencing in Arizona and reiterated that "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." *Lynch II*, 136 S. Ct. at 1818 (internal quotations omitted). *Lynch II* did not change the law, it applied existing law to an Arizona case. Thus, it was not a transformative event or break with past precedent. Because *Lynch II* is not a significant change in the law, Cruz is not entitled to relief and it is not necessary to evaluate whether *Lynch II* should apply retroactively. *See State v. Werderman*, 237 Ariz. 342, 343, ¶ 6 (App. 2015) (relief foreclosed under Rule 32.1(g) if there is no significant change in the law).

II

LYNCH II IS NOT RETROACTIVELY APPLICABLE.

Even if *Lynch II* is a significant change in the law, Cruz can obtain relief only if it is retroactively applicable to his case on collateral review. *See State v. Poblete*, 227 Ariz. 537, 540, ¶¶ 10-11 (App. 2011). If *Lynch II* announced a new rule, then it may be applied retroactively only if one of *Teague's*[1] two narrow exceptions applies. *Stringer v. Black*, 503 U.S. 222, 227 (1992). If, on the other hand, its result "was dictated by precedent existing when [Cruz's judgment] became final," then it is not a new rule for retroactivity purposes. *Id.* at 228.

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[1] *Teague v. Lane*, 489 U.S. 288 (1989).

Cruz argues that *Lynch II* did not announce a "new rule" and applies retroactively to his case because its conclusion was "dictated" by *Simmons*, which existed when his conviction became final. Granted, the Supreme Court in *Lynch II* held that *Simmons* entitles Arizona defendants to inform the jury of parole ineligibility if their future dangerousness is at issue. But the numerous opinions of this Court which concluded that *Simmons* did not apply to Arizona's sentencing system provide strong evidence that *Lynch II* created a new Arizona rule and was not "dictated" by *Simmons*.

The principle that a "new rule" does not apply retroactively absent narrow exceptions exists to "validate[] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Saffle v. Parks*, 494 U.S. 484, 488 (1990). "Under this functional view of what constitutes a new rule, [a court's] task is to determine whether a state court considering [the 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." *Id.*; *see also State v. Poblete*, 227 Ariz. 537, 541, ¶ 13 (App. 2011). For example, a decision issued after the defendant's case became final is considered to be "dictated" by existing precedent-and thus retroactively applicable-when "the unlawfulness of [the defendant's] conviction was apparent to all reasonable jurists." *Beard v. Banks*, 542 U.S. 406, 413 (2004) (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997)).

This Court's decisions in *Cruz*, *Garcia*, *Hargrave*, *Chappell*, *Hausner*, *Hardy*, *Cota*, *Boyston*, *Benson*, and *Lynch* preclude a finding that *Lynch II*'s result was dictated by *Simmons*. Their existence demonstrates that this Court did not feel "compelled to reach the same conclusion as" *Lynch II*, *see Poblete*, 227 Ariz. at 541, ¶ 14, and that *Simmons'* application to Arizona's sentencing structure was not "apparent to all reasonable jurists," *see Beard*, 542 U.S. at 413. Had *Lynch II*'s result been "dictated" by *Simmons*, this Court would not have concluded on nine separate occasions that capital defendants in Arizona were not entitled to inform juries of parole's unavailability. The *Lynch II* dissent also shows that this Court's prior applications of *Simmons* were reasonable—the dissenting justices faulted the majority for holding that "*Simmons* requires more" "[e]ven though the trial court's instruction was a correct recitation of Arizona law." *Lynch II*, 136 S. Ct. at 1822 (Thomas, J., dissenting).

In a similar situation, the Supreme Court of Pennsylvania concluded that *Kelly v. South Carolina*, 534 U.S. 246 (2002), which addressed the test for determining when future dangerousness is at issue under *Simmons*, was not dictated by *Simmons* but instead constituted a new rule of law that was not retroactively applicable. *Commonwealth v. Spotz*, 896 A.2d 1191, 1245 (Pa. 2006). The court noted that, before *Kelly*, it had consistently denied claims where the prosecutor's arguments "echoed" those which the Supreme Court found raised the issue of future dangerousness in *Kelly*. *Spotz*, 896 A.2d at 1245. The Pennsylvania court's previous decisions therefore showed that *Kelly's* result was "not dictated by precedent existing at the time the defendant's con-

viction became final" and that it therefore constituted a new rule of law for retroactivity purposes. *Id.* at 1245-46.

This Court's decisions predating *Lynch II* likewise make clear that *Lynch II*'s result was not dictated by *Simmons*. For example, in the first decision in which it addressed *Simmons*, this Court noted that the defendant in *Simmons* was specifically ineligible for parole under South Carolina law "because of his previous convictions for violent offenses." *Cruz*, 218 Ariz. at 160, ¶ 41 (citing *Simmons*, 512 U.S. at 156).[2] Accordingly, the Supreme Court had held that a capital defendant whose future dangerousness was at issue could inform the jury of his ineligibility for parole when "'state law *prohibits the defendant's release* on parole.'" *Id.* (quoting *Simmons*, 512 U.S. at 156) (emphasis added). This Court reasonably concluded that, unlike the defendant in *Simmons*, if parole existed, "[n]o state law would have prohibited Cruz's release on parole after serving twenty-five years, had he been given a life sentence." *Id.* at 160, ¶ 42; *see also* A.R.S. § 13-703(A) ("A defendant who is sentenced to natural life is not eligible for commutation, parole, work furlough, work release or release from confinement on any basis. If the defendant is sentenced to life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the murdered person

[2] Simmons' previous guilty pleas to first-degree burglary and two counts of criminal sexual conduct rendered him "ineligible for parole" under S. C. Code Ann. § 24-21-640 (Supp. 1993) "if convicted of any subsequent violent-crime offense." *Simmons*, 512 U.S. at 156.

was fifteen or more years of age and thirty-five years if the murdered person was under fifteen years of age."). In other words, no state law specifically made Cruz ineligible for parole based on his circumstances, notwithstanding that at the time Arizona did not have parole for any defendant.

Of course, *Lynch II* repudiated this Court's conclusion that Arizona was distinguishable from *Simmons* because, even without parole, its capital defendants could potentially receive a release-eligible sentence. But this Court's reasonable, good-faith interpretation of what *Simmons* required should not be upended in cases already final on direct review when *Lynch II* was decided. Thus, because *Lynch II*'s conclusion was not readily apparent to all reasonable jurists, the Supreme Court announced a new rule for retroactivity purposes when it concluded that Arizona defendants are entitled to parole ineligibility instructions though they still may receive a release-eligible sentence. *See Poblete*, 227 Ariz. at 541, ¶ 14 ("new rule" introduced where courts had not previously felt compelled to reach its conclusion).

Because it announced a new rule in Arizona, *Lynch II* is not applicable to Cruz's case unless it falls with the narrow exceptions established by Teague. *See State v. Febles*, 210 Ariz. 589, 592, ¶ 8 (App. 2005). The first exception does not apply because *Lynch II* does not "forbid punishment of certain conduct" or "prohibit a certain category of punishment for a class of defendants because of their status offense." *Id.* at 594, ¶ 14. Nor does the second exception because *Lynch II* did not create a "watershed rule[] of criminal procedure that implicate[s] the fundamental fairness and accuracy of the proceeding." *Id.* at 594,

¶ 14. *Simmons* itself was not a retroactive watershed rule of criminal procedure, *O'Dell v. Netherland*, 521 U.S. 151, 167-68 (1997), and thus by extension, *Lynch II*, which applies *Simmons* in Arizona, also is not. As a new rule that does not meet either of *Teague's* exceptions, *Lynch II* is not retroactively applicable to cases, like Cruz's, that were final on direct appeal when it was decided.

III

APPLICATION OF *LYNCH II* TO CRUZ'S CASE WOULD NOT PROBABLY OVERTURN HIS DEATH SENTENCE.

The State stands by the arguments in its response to the petition for review which demonstrated that *Lynch II* would not probably overturn Cruz's sentence if applied to his case because his future dangerousness was not at issue, *Simmons/Lynch* error is not structural, and Cruz cannot demonstrate that his sentence probably would have been different if the trial court had informed the jury of his parole ineligibility. Moreover, as demonstrated below, recent decisions further establish that future dangerousness was not at issue in Cruz's case, no error occurred because Cruz did not request either a jury instruction or the ability to raise parole ineligibility in closing argument, and a parole ineligibility instruction would not probably have resulted in a life sentence.

When the defendant's future dangerousness is not at issue, the trial court's failure to inform the jury of parole ineligibility does not violate the defendant's due process rights. *State v. Sanders*, 245 Ariz. 113, 122, ¶ 18 (2018). Future dangerousness is generally put at issue when the jury hears evidence about the

defendant's "propensity for violence and unlawful behavior." *Sanders*, 245 Ariz. at 122, ¶ 19.

Here, as in *Sanders*, the jury heard no evidence that Cruz had "prior arrests or convictions for violent acts, and there [was] no evidence that he had a history of violent or assaultive behavior." 245 Ariz. at 122, ¶ 19. In fact, Cruz alleged as a mitigating circumstance his lack of propensity for future violence. (Appendix O to Petition for Review (R.T. 3/8/05, at 81).) The State did not contest Cruz's allegation—it presented no rebuttal evidence and did not discuss that mitigating factor in closing argument. Instead, the State's closing argument focused on Cruz's failure to accept responsibility for Officer Hardesty's murder and why Cruz's drug use, dysfunctional family, and mental health evidence were not sufficiently substantial to warrant leniency. (*See id.* at 50-60.) The State thus did not place Cruz's future dangerousness at issue.

Nor did the circumstances of the offense put Cruz's future dangerousness at issue. Although this Court found future dangerousness at issue in *State v. Hulsey*, 243 Ariz. 367 (2018), another case involving the murder of a police officer, that conclusion was not based on the nature of the offense. Instead, the State's actions during trial put future dangerousness at issue by "repeatedly referring to Hulsey's dangerous proclivities," discussing his propensity for starting fights, recounting testimony that Hulsey liked to blow up cats with firecrackers, mentioning that an expert who contacted Hulsey was afraid of him and felt threatened, eliciting testimony that Hulsey choked a fellow inmate and then threatened witnesses to the attack, and telling the jurors that when

someone disagreed with Hulsey "there's problems; there is a consequence." *Hulsey*, 243 Ariz. at 395, ¶¶ 129-32. Here, in contrast, where the State presented no evidence or argument of past violent behavior or dangerous proclivities, Cruz's future dangerousness was not at issue. Because of that, the trial court's failure to inform the jury that Cruz was not eligible for parole did not violate his due process rights. *Sanders*, 245 Ariz. at 122, ¶ 18.

Lynch II also would not probably overturn Cruz's sentence because the trial court did not deprive him of the right to inform the jury of his parole ineligibility through a jury instruction or argument of counsel. *Simmons* affords a parole-ineligible capital defendant the narrow right to "'rebut the State's case' (if future dangerousness is at issue)" by informing "'the capital sentencing jury—by either argument or instruction—that he is parole ineligible.'" *State v. Bush*, 244 Ariz. 575, 592, ¶¶ 72, 73 (2018) (quoting *Simmons*, 512 U.S. at 177, 178 (O'Connor, J., concurring in the judgment)).[3] Accordingly, "in every case in which the Supreme Court or this Court has found reversible *Simmons* error, the trial court either rejected the defendant's proposed jury instruction regarding his ineligibility for parole, prevented defense counsel 'from saying anything to the jury about parole ineligibility,' or both." *Bush*, 244 Ariz. at 593, ¶ 74 (quoting *Simmons*, 512 U.S. at 175).

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[3] *Bush* also rejects Cruz's argument, made in his petition for review, that *Simmons/Lynch* error is structural. *Bush*, 244 Ariz. at 591, ¶ 67 ("We therefore hold that *Simmons* error is not structural.").

Here, however, the trial court did neither. Cruz did not request a jury instruction on parole ineligibility even though the trial court suggested it would give one if asked. And the court never prevented counsel from arguing parole ineligibility to the jury because he did not request or attempt to do so. Instead, the trial judge denied Cruz's request to "make a pretrial ruling on whether, if the jury decided against the death penalty, the court would sentence him to life or natural life in prison" and precluded testimony by the Chairman of the Arizona Board of Executive Clemency, "who would have testified about how life sentences are handled in Arizona and a defendant's chances of being released on parole." *Cruz*, 218 Ariz. at 160, ¶¶ 40-45. *Simmons* (and *Lynch II*) do not afford a defendant the right to receive a pretrial ruling on which type of life sentence they will receive if the jury does not impose death or to present witness testimony about parole. Consequently, "*Simmons* 'relief is foreclosed by [Cruz's] failure to request a parole ineligibility instruction at trial.'" *Bush*, 244 Ariz. 593, ¶ 74 (quoting *Campbell v. Polk*, 447 F.3d 270, 289 (4th Cir. 2006)).

Finally, even if the jury had been instructed that Cruz could not be paroled it would not probably have returned a verdict for a life sentence. In addressing the jury's sentencing verdict, this Court noted that Cruz's mitigation evidence did not make a compelling case for leniency:

> Although Cruz's early life was certainly not ideal, absent is the type of horrible abuse often found in our capital jurisprudence. Cruz was neither suffering from any significant mental illness nor under the influence of drugs at the

> time of the crime. The evidence presented on most of these mitigating circumstances was weak, and Cruz established little or no causal relationship between the mitigating circumstances and the crime. Moreover, much of the mitigating evidence offered by Cruz was effectively rebutted by the State.

Cruz, 218 Ariz. at 170-71, ¶ 138.

Balanced against that weak mitigation was the weighty aggravating circumstance established by Cruz's murder of a police officer in the line of duty. In a recent opinion in another Arizona capital case, the Ninth Circuit Court of Appeals explained why this aggravating circumstance carries such great weight:

> We also note that this case involves an aggravating factor absent from cases in which we have found *Eddings* error: The murder of an on-duty peace officer. *See* A.R.S. § 13-703(F)(10). That factor, as the sentencing court noted, "carries significant weight. The unprovoked murder of a peace officer, so the defendant can avoid his obligation under the law, is really no less than a personal declaration of war against a civilized society." The substantial weight of that aggravating factor leads us to believe that Martinez's family history, had it been considered a mitigating factor, would not have affected his death sentence.

Martinez v. Ryan, 926 F.3d 1215, 1237 (9th Cir. 2019). Given the contrast between the strong aggravating factor and the weak mitigation, Cruz cannot show that the jury probably would have found the

mitigation sufficiently substantial to call for leniency had it been instructed that parole was unavailable, especially where the State did not assert future dangerousness.

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CONCLUSION

Based on the foregoing authorities and arguments, the State of Arizona respectfully requests that this Court affirm the judgment of the trial court.

Respectfully submitted,

Mark Brnovich
Attorney General

Lacey Stover Gard
Chief Counsel

s/Jeffrey Sparks
Assistant Attorney General

Attorneys for Respondent

ARIZONA SUPREME COURT

JOHN MONTENEGRO CRUZ,

Petitioner,

v.

THE STATE OF ARIZONA,

Respondent.

Arizona Supreme Court
No. CR-17-0567-PC

Pima County Superior Court
Case No. CR-2003-1740

JOHN MONTENEGRO CRUZ'S ADDENDUM TO PETITIONER'S SUPPLEMENTAL BRIEF

I. *Simmons* and its progeny compelled the decision in *Lynch II*.

Previously, the State argued that *Lynch v. Arizona*, 136 S. Ct. 1818 (2016) (*Lynch II*), was not retroactively applicable to cases pending on collateral review because it did not announce "a watershed rule of criminal procedure." (Resp. at 5.) In his Supplemental Brief, Cruz addressed this argument. (Pet. Suppl. Br. at 8–9.) However, in its Supplemental Brief, the State offered a new argument: that "the numerous opinions of this Court which concluded that *Simmons* did not apply to Arizona's sentencing system provide strong evidence that *Lynch II* created a new Arizona rule and was not 'dictated' by *Sim-*

mons" *v. South Carolina*, 512 U.S. 154 (1994). (State's Suppl. Br. at 6.)

The State's most recent invention is deeply flawed. Contrary to the State's misunderstanding, "the *existence of conflicting authority in state or lower federal courts*[] does not establish that a rule is new for purposes of retroactivity analysis." *Chaidez v. United States*, 568 U.S. 342, 353 n.11 (2013) (emphasis added). "Even though [the Supreme Court has] characterized the new rule inquiry as whether 'reasonable jurists' could disagree as to whether a result is dictated by precedent, the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new." *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring) (citation omitted). Therefore, the State's overly simplistic argument—that this Court's pre-*Lynch II* decisions "preclude a finding that *Lynch II*'s result was dictated by *Simmons*" (State's Suppl. Br. at 7)—is plainly deficient.[1]

When the Supreme Court *has* looked to the existence of conflicting authority to establish that a rule is new, it has been on facts far different from those presented here. In *Chaidez*, for example, the Court

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[1] Similarly, that *Lynch II* drew a two-justice dissent also does not disprove that the decision was compelled by *Simmons*, contrary to the State's argument. (State's Suppl. Brief at 7.) "Dissents have been known to exaggerate the novelty of majority opinions; and the mere existence of a dissent . . . does not establish that a rule is new" for purposes of *Teague* retroactivity analysis. *Chaidez*, 568 U.S. at 353 n.11; *Beard v. Banks*, 542 U.S. 406, 416 n.5 (2004) (same).

held that *Padilla v. Kentucky*, 559 U.S. 356 (2010), announced a new rule—that the Sixth Amendment as interpreted by *Strickland v. Washington*, 466 U.S. 668 (1984), requires counsel to advise pleading defendants about the risk of deportation—because before *Padilla* "the state and lower federal courts . . . *almost unanimously* concluded that" *Strickland* did not apply at all under such circumstances. *Chaidez*, 568 U.S. at 350 (emphasis added); *see also Saffle v. Parks*, 494 U.S. 484, 490 (1990) (concluding that a rule prohibiting anti-sympathy jury instructions in capital cases would be new for retroactivity purposes where "*the large majority* of federal and state courts" had declined to impose the prohibition the petitioner advocated (emphasis added)).

Here, the State does not offer even a single example of another court taking this Court's pre-*Lynch II* approach to *Simmons* to demonstrate that reasonable jurists could conclude that *Simmons* was inapplicable in Arizona. That is unsurprising. Under objective standards, it would have been apparent to all reasonable jurists that the decision in *Lynch II* was dictated by precedent, and therefore, this Court is bound to apply *Lynch II* on collateral review. *Yates v. Aiken*, 484 U.S. 211, 218 (1988).

At the time of Cruz's 2005 sentencing, as a matter of Arizona law, Cruz and all other capital defendants sentenced after 1994 were parole ineligible. *Lynch II*, 136 S. Ct. at 1819 (citing *State v. Lynch*, 238 Ariz. 84, 103 (2015) (*Lynch I*)). As the Court held in *Lynch II*, long before Cruz's sentencing, the Supreme Court had clearly established in *Simmons* and a string of other cases an unambiguous rule. When future dangerousness is at issue, and the only sentencing

alternative is life without parole, a defendant has the right to inform his jury of his parole ineligibility. *Lynch II*, 136 S. Ct. at 1818–19. This should end the debate, as it would have been "apparent to all reasonable jurists" that the decision in *Lynch II* was dictated by precedent. *Chaidez*, 568 U.S. at 347.

The State's arguments to the contrary are unavailing. The State argues "no state law specifically made Cruz ineligible for parole based on his circumstances, notwithstanding that at the time Arizona did not have parole for any defendant." (State's Suppl. Br. at 9.) This argument is foreclosed by the *Simmons* line of cases predating *Lynch*. *See Lynch II*, 136 S. Ct. at 1820 (holding that the "Court's precedents also foreclose" this same argument). Because it is "conclusively established" that parole was unavailable to Cruz "at the time of his trial," "*Simmons* and its progeny establish [Cruz's] right to inform his jury of that fact." *Lynch II*, 136 S. Ct. at 1820 (citations omitted).

The State further suggests that all reasonable jurists would *not* have understood that *Simmons* applied because an Arizona defendant could receive executive clemency, "the only kind of release for which [Cruz] would have been eligible." *Id.* at 1819–20. Again, the Supreme Court forcefully rejected this suggestion, explaining that the *Simmons* four-judge plurality along with Justice O'Connor had "expressly rejected" the State's argument. *Id*.

Unable to demonstrate that *Lynch II* broke any new ground, the State offers *Commonwealth v. Spotz*, 896 A.2d 1191, 1245 (Pa. 2006), in which the Pennsylvania Supreme Court held that *Kelly v. South Carolina*, 534 U.S. 246 (2002), relaxed the

conditions under which future dangerousness is at issue so substantially as to announce a new rule. (State's Suppl. Br. at 8.) Even accepting the Pennsylvania Supreme Court's interpretation of *Kelly*, it is not helpful to the State. Assuming questions remained after *Simmons* and *Shafer* about what was required to place future dangerousness at issue, for the reasons just discussed no reasonable jurist could similarly conclude that questions remained after those cases—plus *Kelly* and *Ramdass*—about whether the possibility of future legislative reform or executive clemency disposed of the need for an instruction on parole ineligibility.

At bottom, *Lynch II* was a per curiam decision issued without briefing or argument—so clear was it to the Supreme Court that *Simmons* and its progeny "dictated" the result. *Beard*, 542 U.S. at 413. It held in the most explicit terms that its decision was squarely controlled by *Simmons* and its progeny. Because *Lynch II* was decided on "settled rule[s]," *Chaidez*, 568 U.S. at 347, and its result would have been apparent to all reasonable jurists, the decision applies to capital defendants on collateral review.

II. Cruz was unable to inform the jury of his parole ineligibility.

It is undisputed that Cruz sought to inform the jury that he was statutorily ineligible for parole. (Pet. App. J, Ex. 1, at 3.) Throughout the trial proceedings, however, the State disagreed and argued to the trial court that Cruz was in fact eligible for parole. (Tr. Mar. 1, 2004 at 16–17.) The trial court agreed with the State, distinguishing *Simmons* and finding Cruz would be eligible for release if he received a life sentence. Subsequently, this Court

affirmed the trial court's finding that *Simmons* did not apply in Arizona because Cruz was eligible for parole. *State v. Cruz*, 218 Ariz. 149, 160, ¶ 42 (2008).[2] (Dkt. No. 75 at 16, ¶ 42.)

On this record, where the trial court found Cruz parole-eligible, the State cannot credibly argue that the trial court would have given an instruction informing the jury of Cruz's parole ineligibility, if asked. (State's Suppl. Br. at 14.) Rather than offering to give an instruction informing the jury of Cruz's parole ineligibility– –as the State now claims—the trial court only offered to "give an instruction of the consequences of a life or natural life sentence . . . ." (Pet. App. I, Attach. C.) That instruction informed the jury that Cruz would be eligible for parole after twenty-five years. (Pet. App. J, Ex. 8, at 7.)

Nevertheless, the State argues *Simmons* only entitles a defendant to receive an instruction informing the jury of his parole ineligibility or the opportunity to argue the same, and Cruz requested neither. (State's Suppl. Br. at 13–15 (citing *State v. Bush*, 244 Ariz. 575, 592–93, ¶ 69–75 (2018)).) *Cruz* is distinguishable from *Bush*, a case where "the trial court did not "prevent [] Bush from informing the jury of his parole ineligibility." *Id*. at 593, ¶ 75. In *Cruz* the opposite is true: the trial court did "prevent [] [Cruz]

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[2] Later decisions relied on *Cruz* to distinguish *Simmons*. *See State v. Hargrave*, 225 Ariz. 1, 15, ¶ 53 (2010) (citing *Cruz*, 218 Ariz. at 160, ¶¶ 41–42); *State v. Benson*, 232 Ariz. 452, 465–66, ¶¶ 58–59 (2013) (citing *Cruz*, 218 Ariz. at 160, ¶ 42); *State v. Hardy*, 230 Ariz. 281, 293, ¶ 58 (2012) (citing *Cruz*, 218 Ariz. at 160, ¶ 42).

from informing the jury of his parole ineligibility." *Id*.

While it is true that Cruz did not ask for an instruction or permission to argue his parole ineligibility to the jury, it would have made no difference. Both the trial court and this Court on direct appeal found Cruz was parole eligible and therefore distinguishable from *Simmons.* Cruz's insistence on informing the jury he was parole-ineligible, albeit from the Chairman's testimony, provided a mechanism for the trial court to provide a remedy and allow Cruz to inform the jury he was parole-ineligible via instruction or argument to the jury. *State v. Escalante-Orozco*, 241 Ariz. 254, ¶ 118 (2017) (an issue is preserved if it provided the court an opportunity to provide a remedy). Indeed this Court has now countenanced permitting a defendant to provide "evidence" of parole ineligibility to the jury—as Cruz tried to do. *State v. Rushing,* 243 Ariz. 212, 222, ¶ 41 (2017) (trial "court was required to either instruct that Rushing would not be eligible for parole or permit Rushing to introduce evidence to that effect").

RESPECTFULLY SUBMITTED this 6th day of May, 2020.

Jon Sands
Federal Public Defender

Cary Sandman
Assistant Federal Public Defender

/s/Cary Sandman
Counsel for Petitioner, John M. Cruz