No. 21-____

IN THE
Supreme Court of the United States

JOHNATHAN BURNS, STEVE BOGGS, RUBEN GARZA, FABIO GOMEZ, STEVEN NEWELL, and STEPHEN REEVES,

Petitioners,

v.

STATE OF ARIZONA,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of Arizona Maricopa County

APPENDIX TO JOINT PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

APPENDIX A

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

HON. KAREN L. O'CONNOR

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA	JEFFREY L SPARKS
v.	
JONATHAN IAN BURNS (001)	JONATHAN IAN BURNS 144740 ASPC FLORENCE CENTRAL D/RW PO BOX 8200 FLORENCE AZ 85132 GARRETT W SIMPSON VIKKI M LILES CAPITAL CASE MANAGER COURT ADMIN-CRIMINAL-PCR JUDGE O'CONNOR VICTIM WITNESS DIV-AG-CCC

April 4, 2019

CR2007-106833-001 DT

PCR RULING

The Court has received and considered Defendant's[1] Second Amended Petition[2] for Post-Conviction Relief ("Petition") (filed 2/27/2018), the State's Response (filed 5/14/2018), the Defendant's Reply (filed 8/30/2018), and Defendant's Notice of Supplemental Authority (filed 3/26/2019), as well as the court file and the record in this case, including all official reporter's transcripts of proceedings as relevant to the issues and argument presented by the defendant and State; and *State v. Burns*, 237 Ariz. 1, 344 P.3d 303 (2015). This is Defendant's first Rule 32 proceeding.

See *State v. Burns*, 237 Ariz. 1, 10–11, ¶¶ 2-6, 344 P.3d 303, 312–13 (2015) for the factual background.

A jury convicted Defendant of all charges: sexual assault, kidnapping, first-degree murder, and misconduct involving weapons. The jury unanimously

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[1] Because "[a] post-conviction proceeding is part of the original criminal actions and is not a separate action," the court identifies the defendant as "Defendant" rather than "Petitioner." Rule 32.3(a).

[2] Defendant's exhibits are numbered 1-141 and 143-144. Exhibits 1-141 were included and filed with the Petition; the Court located no Exhibit 142. In addition to certain apparently-substitution exhibits, included with the reply were (1) Exhibit 143, referenced in the body of the reply at 29; and (2) Exhibit 144, which was simply identified as being "attached" to the reply, at 36. The Court finds no indication that either was filed with the reply. The Court has nonetheless reviewed and considered the exhibits, as the State does not appear to have filed an objection.

found at the aggravation phase that Defendant (1) had a prior or contemporaneous felony conviction under A.R.S. § 13–751(F)(2); and (2) committed the murder in an especially cruel, heinous, or depraved manner under A.R.S. § 13–751(F)(6). Following the penalty phase, the jury determined that the mitigation presented was not sufficiently substantial to call for leniency and returned a verdict of death, and the court imposed the death sentence as found by the jury. In addition to imposing the death sentence for the murder, the court sentenced Defendant to consecutive prison terms totaling sixty-eight years for the other three convictions. *State v. Burns*, 237 Ariz. 1, ¶¶ 7-8, 344 P.3d 303, 313 (2015).

The Arizona Supreme Court affirmed the Defendant's convictions and death sentence in *State v. Burns*, 237 Ariz. 1, 344 P.3d 303 (2015). The 26 issues raised by the Defendant on direct appeal and considered by the Arizona Supreme Court, *inter alia*, included:

(1) The trial court did not abuse its discretion in denying continuance motions, limiting defendant's *voir dire* of prospective jurors, striking 3 specific prospective jurors for cause, allowing admission of GHB evidence, instructing the jury on the definition of "without consent," admission of Defendant's jail calls, denying Defendant's motion for mistrial, allowing admission of photographs, a ballistics expert, precluding testimony from some of defendant's expert witnesses, not limiting the State's cross-examination of defendant's experts, or denying defendant's

motion for mistrial related to juror safety concerns;

(2) The assault, kidnapping, and first-degree murder charges were properly joined, and there was no prejudice due to the trial court's denial of the defendant's motion to severe the misconduct-involving-weapons charge;

(3) The defendant was not entitled to a unanimous jury finding that the murder furthered a particular felony, only a unanimous agreement that the murder furthered a predicate felony, and this issue was moot in light of the jury unanimously finding the Defendant guilty of premeditated murder;

(4) The admission of evidence the victim had never dated did not violate A.R.S. § 13-1421, did not pose a danger of unfair prejudice under Rule 403, and was not fundamental error.

(5) The testimony that Defendant's fiancé feared him and that he had threatened her was admissible;

(6) The Defendant's statements to police regarding the victim's consent were not admissible pursuant to residual hearsay exception;

(7) There was sufficient evidence to support the Defendant's convictions and the jury's finding of premeditation;

(8) The (F)(2) aggravator was not multiplicitous, and, as the Arizona Supreme Court previously held, an element of a crime may

also be used as a capital aggravator *Cruz,* 218 Ariz. at 169 ¶ 130, 181 P.3d at 216 (citing *State v. Lara,* 171 Ariz. 282, 284–85, 830 P.2d 803, 805–06 (1992));

(9) There was no fundamental error for failure to give a jury instruction that prior convictions counted toward only one aggravating factor;

(10) The juror's investigation into fellow juror's anti-death-penalty activity did not warrant mistrial;

(11) The trial court did not err in refusing to sentence defendant on the non-capital counts within thirty days of his conviction;

(12) The evidence of Defendant's gang affiliation, previous uncharged sexual assaults, previous police contact, and alleged racist attitude was relevant in the penalty phase;

(13) The victim impact evidence was not unfairly prejudicial in the penalty phase;

(14) There was no error in the penalty phase jury instructions given by the trial court;

(15) The prosecutor did not commit prosecutorial misconduct;

(16) The trial court did not coerce a jury verdict in the penalty phase; and

(17) The imposition of death penalty was warranted.

The defendant also raised thirty-two additional constitutional claims that he acknowledged the Arizona Supreme Court has previously rejected but that he raised to preserve for federal review. The

Arizona Supreme Court declined to revisit those claims.

POST-CONVICTION CLAIMS

OVERVIEW OF CLAIMS

Defendant asserts numerous claims for PCR in the guilt and penalty phases of the trial. The *guilt phase claims* relate to: 1) Maricopa County Attorney, Andrew Thomas; 2) Toxicologist Noman Wade's prior convictions; 3) DNA analyst Scott Milne's academic record; 4) Motion to Continue trial date; 5) Failure to object to "first-date" evidence; 6) Opening the door to threats against Mandi Smith; and 7) the denial of the Motion to sever the weapons misconduct charge. The *penalty phase claims* relate to: 8) the constitutionality of Arizona's aggravating factors; 9) preclusion of Dr. Cunningham's rebuttal; 10) preclusion of Dr. Wu's quantitative analysis; 11) failure to present testimony regarding Defendant's MRI and Dr. Bigler's report; 12) alleged ineffective assistance of counsel related to evidence of Defendant's religion and antisocial personality disorder; 13) lack of parole instruction; 14) jury deadlock; 15) new mitigation evidence; 16) *Hurst v. Florida*[3] resentencing; 17) cumulative error; and 18) the trial court's role in ineffective assistance of counsel.

STANDARD OF REVIEW

Pursuant to Rule 32.2(c), the Court first addresses, analyzes and identifies all claims that are procedurally precluded from Rule 32 relief.

In the alternative, the Court addresses whether the otherwise-precluded claims presented by defendant,

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[3] *Hurst v. Florida*, --- U.S. ---, 136 S.Ct. 616 (2016).

on grounds such as "ineffective assistance of counsel" and/or "newly-discovered evidence," may be colorable. Rule 32.1 (a), (e), Arizona Rules of Criminal Procedure.

Preclusion

A claim is precluded, pursuant to Rule 32.2(a), if it could have been raised on direct appeal or certain post-trial motions, was finally adjudicated on the merits on appeal or in any previous collateral proceeding, or has been waived at trial, on direct appeal, or in any previous collateral proceeding Ariz. R. Crim. P 32.2(a); *State v. Towery*, 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

Alternatives to Preclusion

The Court will then, as appropriate, and in the alternative, consider the merits of each claim, except those claims that were finally adjudicated on the merits during the Defendant's direct appeal. The impact of the court's consideration on the merits of each claim will then be applied to the Defendant's Sixth Amendment ineffective assistance of counsel (IAC) claims.

Claims of Ineffective Assistance of Counsel

Claims found meritless will not support a Sixth Amendment IAC claim. See *Kimmelman v. Morrison*, 477 U.S. 365, 382, 106 S.Ct. 2574, 2586 (1986) (meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim). A successful Sixth Amendment IAC claim is rooted in the test adopted by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984).

Claims of ineffective assistance of counsel under Rule 32.1(a), a Sixth Amendment claim, are governed by the principles set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, a Defendant must show that counsel's representation fell below an objective standard of reasonableness and that the deficiency prejudiced the defense. *Id*. at 687–88. The inquiry under *Strickland* is highly deferential, and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689; *see Wong v. Belmontes*, 558 U.S. 15 (2009) (per curiam); *Bobby v. Van Hook*, 558 U.S. 4 (2009) (per curiam); *Cox v. Ayers*, 613 F.3d 883, 893 (9th Cir. 2010). To satisfy *Strickland*'s first prong, a defendant must overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* Courts are required to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. The defendant bears the burden of overcoming the strong presumption that counsel performed adequately. *Id*.

Strickland's second prong requires a defendant must affirmatively prove prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding."

Id. at 693, 104 S.Ct. 2052. As with deficiency, *Strickland* places the burden of proving prejudice on the defendant, not the government. *Wong v. Belmontes*, 558 U.S. 15 (2009) (per curiam).

And the Supreme Court cautioned:

> There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. *See Goodpaster*, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 343 (1983).

Strickland, 466 U.S. at 689–90, 104 S. Ct. at 2065–66.

> ...[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. ..

Id., at 690, 104 S. Ct. at 2066.

Claims of Newly-Discovered Evidence

On claims of newly-discovered evidence, pursuant to Rule 32.1(e), a defendant may seek relief on the grounds that, "...newly discovered material facts probably would have changed the verdict or sentence." Newly discovered material facts exist if:

> (1) the facts were discovered after the trial or sentencing;
>
> (2) the defendant exercised due diligence discovering these facts; and
>
> (3) the newly discovered facts are material and not merely cumulative or used solely for impeachment, unless the impeachment

> evidence substantially undermines testimony that was of critical significance such that the evidence probably would have changed the verdict or sentence.

Ariz. R. Crim. P., Rule 32.1(e).

Evidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial, and neither the defendant nor counsel could have known about its existence by the exercise of due diligence. *State v. Saenz*, 197 Ariz. 487, 4 P.3d 1030 (App. 2000), review denied. The evidence must have been in existence at the time of trial, but not discovered until after trial. *State v. Sanchez*, 200 Ariz. 163, ¶11, 24 P. 3d 610 (App. 2001). "For it to be considered newly discovered, evidence 'must truly be newly discovered, i.e., discovered after the trial.'" *Saenz*, 197 Ariz. at 491 (quoting *State v. Jeffers*, 135 Ariz. 404, 426, 661 P. 2d 1105, 1127 (1983)).

GUILT PHASE CLAIMS

1. FORMER MARICOPA COUNTY ATTORNEY, ANDREW THOMAS

Defendant's claim relates to allegations that former County Attorney Andrew Thomas ("Thomas") **"...**deliberately overloaded the court system with capital cases in a bid to intimidate the Maricopa County Superior Court." Petition at 50. Defendant argues, in addition to caseload/continuances,[4] that

[4] The State noted that defendant does not raise 'excessive caseload' as a separate claim for relief. Response at p. 11, fn. 4. Defendant agreed that "...Rule 32 doesn't provide for excessive caseload as a ground for relief, but cites it to "establish and clarify *why* counsel's performance was deficient." Reply at 23. *See Woods v. Sinclair*, 764 F.3d 1109, 1132 (9th Cir. 2014):

"[t]he proven fact that Thomas was engaged in a conspiracy against the court legally affected the court's impartiality as an institution and this denied Mr. Burns due process of law in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and art. 2 § 4, 15, 23, and 24 of the Arizona Constitution and is remediable under Rule 32.1(a) and (e)." Petition at 55.

Defendant claims a due process violation for the Court's failure to secure disqualification of the Maricopa County Attorney's Office, or to recuse itself, arguing that Andrew Thomas's misconduct must necessarily have tainted the ability of the entire bench to fairly and impartially handle criminal cases.

The Court has reviewed Defendant's due process claim pursuant to the standards outlined in *In re*

> Woods argues that, because his two primary defense attorneys faced unmanageable caseloads and were inexperienced in capital litigation, their performance was deficient. The district court rejected that argument, and so do we.
>
> .... Despite these alleged deficiencies, these circumstances do not, in and of themselves, amount to a *Strickland* violation. Rather, Woods must point to specific acts or omissions that may have resulted from counsel's inexperience and other professional obligations. *See Strickland,* 466 U.S. at 690, 104 S.Ct. 2052. Thus, Woods is not entitled to relief on this sub-claim alone.

Thus, the Court declines to consider the "excessive caseload/lack of continuance" representations as a stand-alone claim. In addition, the Supreme Court addressed a related issue on automatic appeal. *See*, *Burns,* ¶¶ 10-18 (denial of continuance upheld, absent prejudice, specifically refuting claim as to Drs. Wu and Cunningham).

Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507 (1948), *See also Morrissey v. Brewer*, 408 U.S. 471, 488—489, 92 S.Ct. 2593, 2603—2604 (1972); *Jenkins v. McKeithen,* 395 U.S. 411, 428—429, 89 S.Ct. 1843, 1852—1853 (1969); *Specht v. Patterson*, 386 U.S. 605, 610, 87 S.Ct. 1209, 1212 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294–95, 93 S. Ct. 1038, 1045 (1973); *State v. Maldonado*, 92 Ariz. 70, 76, 373 P.2d 583, 587 (1962); *Oshrin v. Coulter,* 142 Ariz. 109, 111, 688 P.2d 1001, 1003 (1984) (citations omitted); and *State v. Velasco*, 165 Ariz. 480, 487, 799 P.2d 821, 828 (1990).

a. Preclusion

A claim is precluded if it was raised, or could have been raised, on direct appeal, or in prior Rule 32 proceedings. Rule 32.2(a)(3), *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

THE COURT FINDS this claim could have been raised on appeal; therefore, it is precluded pursuant to Rule 32.2(a)(3).

b. Rule 32.1(a) claims of ineffective assistance of counsel not colorable

Defendant alleges that "[t]rial counsel were ineffective in failing to adequately raise a claim to recuse the Maricopa County Superior Court and the MCAO on grounds the courts' appearance of impartiality had been prejudicially damaged by Thomas' reign of terror against this Court." Petition at 6. Defendant alleges that due process violations and ineffective assistance of counsel warrant PCR. Defendant argues that counsel's performance was deficient by failing to independently pursue

disqualification of MCAO, the trial judge, and the entire Maricopa County Superior Court.

The record demonstrates, however, Defendant was one of thirty defendants who sought to disqualify the Maricopa County Attorney's Office. The December 31, 2009 Motion to Disqualify Maricopa County Attorney's Office argued that MCAO "be disqualified from this case because of the currently existing conflicts between MCAO and the Court[; specifically,] MCAO's continued presence on this case will deprive [Defendant] of a fair trial before a tribunal that is not intimidated or influenced by the prosecutor." Motion to Disqualify, at 14. The claim was joined with other motions to disqualify MCAO and made subject to the authority of the Special Master (Judge Hoggatt) pursuant to Supreme Court Administrative Order 2009-124. ME dated 1/7/2010; 1/11/2010. The Special Master addressed and rejected the disqualification motions, writing:

> ...This Court has not been cited to a single person involved in any of the cases being dealt with today who has anything to do with the County Attorney's recent behavior. For this Court to accept the defense position, it would have to conclude that *because* Mr. Thomas and one deputy, Ms. Aubuchon, have engaged in improper retaliation against particular judges for particular rulings, *therefore* prosecutors other than Mr. Thomas and Ms. Aubuchon will necessarily engage in retaliation against other judges in unrelated matters. The Court declines the defendants' invitation to leap to such a conclusion.

Ruling (Judge Hoggatt) dated 2/22/2010, in which the Court DENIED each motion to disqualify the MCAO, including Defendant's. In April 2010, County Attorney Andrew Thomas resigned.

On appeal in one of the thirty cases heard by Judge Hoggatt (*State v. Martinez*), the Supreme Court upheld the denial of disqualification. In *Martinez* the Court stated the "thrust of [defendant's] motion concerned Thomas and did not allege any improper conduct by other members of his office;" specifically, the defendant alleged no improper conduct by the prosecutor who handled this defendant's case. *State v. Martinez*, 230 Ariz. 208, 282 P.3d 409 (2012) *cert. denied,* 133 S. Ct. 764 (U.S. 2012).

Defendant alleged no conduct by the trial judge handling his case sufficient to require her recusal. In fact, Defendant himself acknowledges that "Mr. Burns has no evidence that this Court was personally biased against him because of Thomas' reign of terror..." Petition at 55. Further, Defendant provides no basis for concluding that the court should have recused itself. Defendant does not allege any improper conduct by the court as a whole, or by the individual judge who handled his trial, other than speculation and generalities. Rather, defendant alleges that intimidation of one judge constitutes intimidation of the entire bench, citing *City of Tucson*[5]. The argument is inapposite in the context of whether a particular judge should have recused herself in a particular case. A defendant seeking recusal must demonstrate how his proceedings were (or perhaps even appear to have been) rendered biased, unfair, or partial in light of an

[5] *State v. City Court of City of Tucson*, 150 Ariz. 99, 102 (1986).

allegedly improper action. *State v. Carver*, 160 Ariz. 167, 172–73, 771 P.2d 1382, 1387–88 (1989). Defendant fails to do so.

Defendant provides no evidence that "*because* Mr. Thomas and one deputy, Ms. Aubuchon, have engaged in improper retaliation against particular judges for particular rulings, *therefore* [other judges in unrelated matters were necessarily biased, unfair and partial]. The Court declines the defendants' invitation to leap to such a conclusion."[6] Thus, had counsel argued for recusal of the Maricopa bench, as Defendant now suggests, it is probable that request would also have been denied, and would have been upheld had denial been appealed.

Defendant has failed to demonstrate that trial counsel's actions demonstrate deficient performance.

Nor does the Court find prejudice. Defendant's claim that intimidation "may have" or "likely" affected the trial judge's discretionary rulings, as in *Martinez*, "[the defendant] generally alleges that Thomas likely intimidated the other judges involved in his case. However, he provides no support for this allegation..." or evidence that the intimidation affected this Court's discretionary rulings.

Defendant alleged no conduct by the trial judge handling this case sufficient to call into question the judge's impartiality or to require the trial judge's recusal, nor any evidence that any adverse evidentiary rulings were based on improper

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[6] *See Martinez, at* ¶ 67 (generalized allegations of intimidation insufficient to support disqualification; specific bias or partiality resulting from intimidation as to individual complainants not demonstrated); *Carver*, 160 Ariz., at 173.

application of the law to the facts of his case. Further, the defendant sought review of certain discretionary rulings relating to evidentiary matters and continuances, which the Supreme Court upheld. *Burns*, 237 Ariz. 1, ¶¶ 18; 21; 48; 53; 55; 58; 71; 100; 111; 135, 344 P.3d 303. If Defendant believed additional discretionary rulings were erroneous he could have sought Supreme Court review of the trial judge's specific discretionary rulings on appeal, and he did not do so.

THE COURT FINDS this claim has no merit. Defendant fails to show counsel's performance was deficient and/or prejudicial. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). Trial counsel's failure to raise a meritless claim does not constitute deficient performance or prejudice.

THE COURT FURTHER FINDS Defendant's claims that the Court should have recused itself or disqualified the MCAO are not colorable.

THE COURT FURTHER FINDS Defendant's ineffective assistance of counsel claim is not colorable.

Despite actions taken by Mr. Thomas that eventually resulted in his disbarment, Defendant has not identified actions or consequences specific to this defendant (other than claims of "heavy caseloads" such that counsel "needed a continuance") that rendered his trial fundamentally unfair.

The court is presumed to be fair and impartial. *State v. Rossi*, 154 Ariz. 245, 741 P.2d 1223 (1987). The defendant has failed to support his claim by alleging specific facts sufficient to rebut the presumption of fairness and impartiality. *See*, Rule 10.1, Arizona Rules of Criminal Procedure.

The Defendant appeared before a fair and impartial judge.

THE COURT FINDS that mere speculation about the impact of outside influences on "the judges," cumulatively does not constitute a basis for appointment of an out-of-county judge.

THE COURT FURTHER FINDS Defendant's due process violation claims related to Thomas also are not colorable.

c. Rule 32.1(e) claim of newly discovered evidence is not colorable

Defendant claims facts contained in Thomas' 2012 disciplinary proceeding constitute newly discovered evidence which warrants PCR. Defendant argues that "the record of *In re Thomas* and the videotaped testimony given by [former Maricopa County Superior Court judges Mundell and Donahoe relating to the] campaign of intimidation", constitutes newly discovered material facts entitling him to relief.

The facts deduced during the Andrew Thomas disciplinary proceedings occurred after the trial. However, applying the requirements set forth in *State v. Amaral*, 239 Ariz. 217, 368 P.3d 925, *cert. denied,* 137 S. Ct. 52 (2016), the facts are not newly discovered material facts. The particular testimony elicited in *In re Thomas* merely supplements what was known in 2010 about Mr. Thomas's actions, and what was considered at the time of Judge Hoggatt's ruling. Further, the additional testimony from the disbarment proceedings would not "probably ... have altered his [conviction or] sentence." Defendant fails to establish the requirements for a colorable claim under Rule 32.1(e).

THE COURT FINDS Defendant's Rule 32.1(e) claim is not colorable.

Therefore,

Defendant's claim fails to state a colorable claim and is dismissed pursuant to Rule 32.6(c).

2. TOXICOLOGIST NORMAN WADE

a. Brady v. Maryland[7]

Defendant's claim relates to toxicologist, Norman Wade's ("Wade") prior conviction and background information that were not disclosed at the time he testified in Defendant's trial in 2010.

In July 2015, the MCAO initiated a perjury investigation into Wade. This revealed Wade's criminal California convictions. MCAO referred the investigation to DPS. The subsequent disclosure and DPS investigation of Wade's background and criminal history is set forth in PCR Exhibit 90.

Defendant argues that "[Dr.] Wade was … a convicted felon whose crimes were directly related to his purported forensic career. Wade testified … falsely about his credentials as an expert and his professional history, concealing his felony… [H]e had been terminated from MCOME[8] in 1995 when MCOME learned of his felony." Defendant further argues that MCOME knew about Wade's felony [Dr. Keen denied knowledge. Petition Exhibit 90, Bates AG_Burns000036] when he was rehired in 1999 (Ex. 90, p. 13) …[and that] that knowledge must be imputed to the State." Petition at 8.

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[7] *Brady v. Maryland,* 373 U.S. 83 (1963).

[8] MCOME: Maricopa County Office of the Medical Examiner

To prevail on a *Brady* claim, a defendant must prove three elements: "[1] The evidence at issue [is] favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence [was] suppressed by the State, either willfully or inadvertently; and [3] prejudice … ensued." *Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936 (1999); *see Brady,* 373 U.S. at 87, 83 S.Ct. 1194. To establish prejudice, a defendant must demonstrate that "there is a reasonable probability that the result of the trial would have been different if the suppressed [evidence] had been disclosed to the defense." *Strickler,* 527 U.S. at 289, 119 S.Ct. 1936 (internal quotation marks omitted). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Woods v. Sinclair*, 764 F.3d 1109, 1127 (9th Cir. 2014) *cert. denied sub nom. Holbrook v. Woods*, No. 14-931, 2015 WL 435819 (U.S. May 18, 2015), *quoting United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375 (1985).

Regarding the first requirement that the evidence is favorable to the accused, "…*Brady* encompasses impeachment evidence, and evidence that would impeach a central prosecution witness is indisputably favorable to the accused. *See Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763 (1972); *see also, e.g., United States v. Blanco,* 392 F.3d 382, 387 (9th Cir.2004) ('*Brady*/ *Giglio* information includes "material … that bears on the credibility of a significant witness in the case." ')…" *United States v. Price*, 566 F.3d 900, 907 (9th Cir. 2009).

Here, the conviction most likely would have been allowed for impeachment, despite its age, given the context of the entire investigation.

The second *Brady* component is whether the State either willfully or inadvertently failed to disclose the materials.

> The suppression prong of *Brady* may be met … even though a "record is not conclusive as to whether the individual prosecutor [or investigator] … ever actually possessed" the *Brady* material. *Carriger,* 132 F.3d 463 at 479. The proponent of a *Brady* claim-i.e., the defendant-bears the initial burden of producing some evidence to support an inference that the government possessed or knew about material favorable to the defense and failed to disclose it. *Cf. United States v. Lopez,* 534 F.3d 1027, 1034 (9th Cir.2008); *United States v. Brunshtein,* 344 F.3d 91, 101 (2d Cir.2003). Once the defendant produces such evidence, the burden shifts to the government to demonstrate that the prosecutor satisfied his duty to disclose all favorable evidence known to him or that he could have learned from "others acting on the government's behalf." *Kyles,* 514 U.S. at 437, 115 S.Ct. 1555.

Price, 566 F.3d 900, at 910.

Defendant provides sufficient evidence to raise a question about what former Medical Examiner, Dr. Keen knew or should have known about Wade's conviction in the exercise of due diligence during the employment process.

However, Defendant fails to establish the third component of *Brady*, that he was prejudiced. The prosecution's suppression of evidence "favorable to an accused … violates due process where the evidence is material either to guilt or to punishment, irrespective

of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87. "[E]vidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler v. Greene,* 527 U.S. at 280, quoting *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375 (1985). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley,* 473 U.S. at 682.

> As we made clear in *Kyles*[9], the materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. *Id.,* at 434–435, 115 S.Ct. 1555. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.,* at 435, 115 S.Ct. 1555.
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> ** ** **
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> …..As the District Court recognized, however, petitioner's burden is to establish a reasonable *probability* of a different result. *Kyles,* 514 U.S., at 434, 115 S.Ct. 1555.

Strickler v. Greene, 527 U.S. at 290–91 (1999).

Here, Defendant was charged with, and convicted of, sexual assault, kidnapping, first degree murder (premeditated murder; and felony murder with kidnapping and sexual assault as predicate offenses) and misconduct involving weapons. Defendant argues

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[9] *Kyles v. Whitley,* 514 U.S. 419, 115 S.Ct. 1115 (1995)

that had the jury been informed of impeaching evidence relating to the expert's prior felony conviction, the jury would probably have returned a verdict of not guilty of the sexual assault (and of all offenses except the MIW count, in fact) based on the State's inability to prove that the act was "without the consent of the other person." The Court disagrees.

While Defendant asserts that the GHB evidence was critical to the "lack of consent" finding and notes that the Supreme Court referenced GHB in support of the "nonconsensual" finding, the testimony was not the only evidence of lack of consent. The State argued, "Now, what I would say – you know, the biggest and most compelling evidence that the sex they had was nonconsensual was Jacque was murdered, and the only reason to murder her is because he sexual [sic] assaulted her." RT 12/13/2010, at 43. In addition, evidence cited by the prosecutor to support lack of consent included the victim's torn bra; her blouse, torn down the middle; and trauma to her vagina caused by sexual intercourse that the medical examiner described. RT 12/13/2010, at 41-46. Further, impeachment into Wade's background and criminal history would not have changed the verdict. Wade's testimony about the cause and effect of GHB in the victim's body was ambiguous and was only a minimal part of the compelling evidence resulting in guilty jury verdicts.

THE COURT FINDS no *Brady* violation.

b. *Napue v Illinois*[10]

Defendant argues that the State knowingly presented false testimony from Wade. *Napue* establishes the importance of disclosing not only exculpatory but also impeaching evidence.

> To prevail on a *Napue* claim, "the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony [or evidence] was actually false, and (3) that the false testimony [or evidence] was material." *United States v. Zuno–Arce,* 339 F.3d 886, 889 (9th Cir.2003). False evidence is material "if there is any reasonable likelihood that the false [evidence] could have affected the judgment of the jury." *Bagley,* 473 U.S. at 678, 105 S.Ct. 3375 (internal citation and quotation marks omitted).

Hein v. Sullivan, 601 F.3d 897, 908 (9th Cir. 2010).

Here, Wade did not give false testimony at Defendant's trial. Although the DPS investigation revealed that Wade represented on his MCOME employment application that he had not been convicted of "other than a traffic offense" (an inaccurate statement given the license plate and Grand Theft convictions, even though his record relating to the theft had been expunged), there is no assertion that Wade testified at Defendant's trial that he had no arrests or convictions. It appears that he

[10] *Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173 (1959).

first formally[11] disclosed the arrest and conviction in response to a direct question a year after Defendant's trial during a civil deposition in May 2012:

> Wade said during the deposition, he was asked if he had ever been arrested and if he had ever been convicted of a crime. Wade said he answered those two questions by saying, "Those two things are together and I have been advised by my attorney and a superior court judge that I should answer no to those questions."

Exhibit 90 (Interview Summary, at 6 of 6), at Bates #AG_Burns000046.

Defendant does not assert false testimony relating to Dr. Wade's credentials or qualifications, but rather to the failure to disclose a felony conviction relating to events that occurred in 1991 and were charged in 1994, and resulted in a conviction in 1995 that was expunged in 1998. Further, the Court notes that there is no indication - even these years after trial - that the expert's testimony was inaccurate, or that he testified falsely about (1) the drug testing performed; (2) the facts relating to GHB; (3) its presence; or (4) its impact. Dr. Wade testified that the GHB present was a low level, and also that amount of GHB in her system was consistent with a naturally-occurring quantity.

Second, whether the prosecution should have known about the conviction is similar to the *Brady* suppression prong, and is arguably colorable.

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[11] The word "formally" is used to distinguish sworn testimony from a 1999 preemployment discussion with Dr. Keen, which reportedly did not result in investigation or other due diligence.

Third, for the reasons discussed under *Brady*, the Court finds that the conviction as impeaching evidence was not material and would not have probably affected the outcome of the trial.

THE COURT FINDS no *Napue* violation.

c. *Ineffective Assistance of Counsel*

Defendant argues that trial counsel performed deficiently by failing to investigate Wade's background. Petition at 64.

In accordance with *Strickler*, Defendant has not established "materiality" under *Brady*. The nondisclosure of Wade's conviction was not a constitutional violation because it was not "material" under *Brady*, which also defeats the IAC claim related to defendant's *Brady* claim. *"Brady* materiality and *Strickland* prejudice are the same." *Gentry v. Sinclair,* 705 F.3d 884, 906 (9th Cir.2013). Where information about a witness does not constitute a *Brady* violation for lack of materiality, it does not support an IAC claim. *Id.*

Defendant fails to demonstrate the prejudice/materiality prong of *Strickland* to establish a colorable claim. Further, the record does not show counsel's performance was deficient. Counsel secured concessions from the state's expert that were favorable to the defendant; counsel successfully challenged GHB testimony in front of the jury, with the state's expert conceding that a low GHB level was indicative of the naturally occurring chemical. Any impeachment of Wade would unlikely have any effect on the evaluation of his testimony or the verdicts.

THE COURT FINDS Defendant's ineffective assistance of counsel claim not colorable.

Therefore,

THE COURT FINDS Defendant's *Brady* and *Napue* claims related to the testimony of Toxicologist Norman Wade are not colorable.[12]

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[12] The Court notes defendant filed a Notice of Supplemental Authority on March 26, 2019 (docketed by the Clerk on March 26, 2019), while the Court's Rule 32.6(d) ruling was pending, providing the Court notice of a currently unpublished opinion by the Supreme Court of the State of Utah titled *Carter v. State*, 2019 UT 12, --- P.3d ----, 2019 WL 1303942 (March 21, 2019). Based on the Court's review the cited supplemental authority is of little weight and persuasive value in the matter before the Court.

In *Carter,* the court determined the *Brady* and *Napue* violations alleged by *Carter* "demonstrated a genuine dispute of material fact whether [Carter] was prejudiced by [the alleged *Brady* and *Napue* violations]. However, contrary to defendant's assertion, his claims, in the Court's view, are not consistent with the *Brady* and *Napue* claims in the *Carter* case.

The *Brady* and *Napue* claims in *Carter* resulted in the court "finding the existence of genuine disputes of material fact regarding whether the police or prosecution "threatened … the [witnesses]," "coached the [witnesses'] testimony," and suborned perjury by telling [one of the witnesses] "to lie about benefits he received from the State…" The court held "the district court erred in [determining Carter was not prejudiced by this conduct, and] …reverse[ed] and remand[ed] for an evidentiary hearing consistent with [the court's] opinion." The *Brady* and *Napue* evidence in *Carter* goes to the heart of whether perjured inculpatory testimony was presented to the jury during that defendant's guilt and sentencing trials.

Here, the potential *Brady* and *Napue* evidence is possible impeachment evidence of a State's witness, who testified regarding the results of a toxicological analysis (and similarly alleged impeachment evidence in relation to defendant's claims regarding DNA Analyst Scott Milne) completed by another toxicologist; test results defendant, as the Court previously discussed herein, has at no time alleged were faulty or otherwise

3. DNA ANALYST SCOTT MILNE

DNA Analyst Scott Milne testified at Defendant's trial about DNA results tying the victim's blood to Defendant's truck and jeans and tying Defendant to semen taken from the victim's body. Defendant argues that the State violated its obligations under *Brady v. Maryland* by failing to disclose Milne's academic record; and that counsel provided ineffective assistance by failing to conduct an investigation sufficient to discover the information.

To establish a *Brady* violation, Defendant must show that "[t]he evidence at issue [is] favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence [was] suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. *Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936 (1999). "[E]vidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* at 280 (quoting *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375 (1985)). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley,* 473 U.S. at 682.

To prevail on a Sixth Amendment ineffective assistance claim, Defendant must establish the two *Strickland* prongs, as to the second of which a defendant must affirmatively prove prejudice by "show[ing] that there is a reasonable probability that,

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not accurate. Contrary to defendant's assertion, the findings and rulings by the Supreme Court of Utah provide, in the Court's view, no support for Defendant's claim(s), and more importantly, are not binding upon this Court and are of little persuasive value.

but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694.

"Brady materiality and *Strickland* prejudice are the same," (*Gentry v. Sinclair,* 705 F.3d 884, 906 (9th Cir.2013)). Where information about a witness does not constitute a *Brady* violation for lack of materiality, it does not support an IAC claim. *Id.*

At trial[13] DNA Analyst Scott Milne[14] established his professional credentials, describing the "training [he] had in addition to…formal education since you've been with the Arizona Department of Public Safety Crime Laboratory?

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[13] Before DNA Analyst Milne testified (about DNA on Defendant's jeans: 70752A (of 2 individuals); 70752B (of three individuals); on victim's anal swab 73121.6A), the jury heard testimony from --

(1) Tina Gore (who works in the crime lab DNA unit, and testified about the presence of semen) RT 11/29/2010, at 85, 110-141; RT 11/30/2010, at 3 (cross cont'd); 18-25 (redirect); Qs 26-33. [purse; bra; underwear] Vaginal (internal, but not external genitalia) swab positive for semen & sperm (cross- at 126), as well as semen on panties and black stockings (at 124); anal had sperm but no semen (Cross, at126;

(2) ME Stano discussed sexual assault kit.(vaginal discoloration/injuries consistent with consensual sexual intercourse, at 55 (on cross-)); and

(3) Peggy (on the (panties; blouse; RT 11/30/2010, at 116, 140, 152-156; Qs157-158).

[14] Mr. Milne testified on December 6, 2010: RT 12/6/2010. At 16-126. He was the first witness of the day, and testified until just after 2:30.

> A. …I went through our serology training where we've tested many, many, many samples. I also had to do mock cases, mock trials. I had to take a written test. With DNA, same thing, I had to do many samples for DNA analysis to show that I was able to do the DNA extractions. I was able to do the interpretation. I had mock cases, mock trials and then yearly we have continuing education where we have to go to conferences or go to different training …

RT 12/6/2010, at 18-19. Ms. Toporek is a colleague in the lab, who also performed testing. *Id.,* at 30. *See* RT 11/29-30/2010 (Ms. Toporek's testimony).

Mr. Milne testified that he had been a member of the American Academy of Forensic Sciences for 11 years (as of 2010); that he had done a poster presentation at its Atlanta conference in 2000, 2001, as well as several poster and verbal presentations at other conferences; had been "a co-publisher on a couple of papers for YSTRs…basically – we're ignoring the female DNA and looking for just a male DNA" (RT 12/6/2010, at 20); and had testified in court on about 45 previous occasions. *Id*., at 19-20.

Mr. Milne testified that DNA established that the DNA profile from blood taken from the driver's side window came from "female offspring of [victim's parents]" (RT 12/6/2010. at 28), subsequently determined to be Jacque (*Id.,* at 31). The profile also, "cannot be excluded" from blood taken from the driver's door running board, which was a male/female mixture (*id.,* at 29), subsequently determined to "come from the combined DNA profiles of Jacque and Defendant." *Id.,* at 32.

Mr. Milne further testified he then performed a statistical analysis, followed by confirmation of Ms. Jacque Hartman's DNA. He then generated DNA profiles from the jeans, one profile was "a match" to the profile of Defendant; and the other was "consistent with the combined profiles" of Defendant and Ms. Hartman. *Id.,* at 37-38. He testified he secured no results from a bullet. *Id.,* at 40-41.

Further, DNA analysis performed on two anal swabs resulted in a match to Defendant as major component and the victim as minor component. *Id*., at 41-42 ("but I didn't do serology. That was previously done…[by Ms. Gore[15]]. I don't think there was much sperm detected on them in the serology analysis."). He also testified that he tested a tree branch that bore female DNA.

Counsel's cross-examination belies the claim of "deficient performance." On cross-examination, Counsel attacked the DNA evidence related to the tree branch eliciting a conclusion "it's not probative of anything," as well as confirming Mr. Milne's "…understanding the tree branch was found right by the victim." RT 12/6/2010, at 61.

Counsel also established his own familiarity with DNA analysis as he focused on the limited analysis of the tree branch, including Milne's agreement he could not verify visually that blood was on the branch and a laymen's terms exposition and explanation of a 14-loci analysis. *Id*., at 59-62.

Counsel then discussed the meanings of "match" and "consistent with" *(id.,* at 63-64); the results (*id.,* at 65-

[15] RT 11/29/2010, at 85, 110-141; RT 11/30/2010, at 3 (cross); 18-25 (redirect); 26-33 (jury questions).

76; 85-87); emphasized the third contributor on the jeans sample remained unknown (*id.,* at 87-88); and that "you [Milne] can't tell us necessarily how [or even when, any of the DNA material, cellular material] got deposited. *Id.,* at 89-92.

Counsel summed up the discussion of the limited analysis pointing out that while Milne's analysis may help "tell us whether someone's DNA is there… [i]t can't tell us any surrounding circumstances of how it was there or when it was put there and that sort of thing[?]" with Milne's response that "[i]t's just one of many factors that go into a case." *Id.,* at 91.

Counsel cross-examination then delved into an analyst uses controls "to make sure things are working properly" by talking about DNA "alleles and loci or locations. This portion of examination lead into a discussion about the most-recent audit (where trial counsel actually went to the lab and reviewed the logs), raising the issue of cross-contamination. Counsel concluded:

> Q. And, again, regardless of how conscientious, which you've told us your lab is, mistakes of problems can still occur that need corrective action in your lab?
>
> A. I'm not sure if it's necessarily corrective action, but, correct, yes.

Id., at 92-111.

Back tracking a bit, counsel also focused on the items NOT tested (RT 11/30/2010 at 3-10) and the lab's processes and procedures in place to ensure accuracy and to avoid contamination/cross-contamination (RT 11/29 at 141; RT 11/30/2010 at 11-18); *see also* RT 11/29/2010 at 122-124; including

counsel secured agreement that packaging multiple items together, as occurred with the shoes, may result in DNA transfer.

Counsel then used the testimony to argue that the presence of sperm demonstrated only that sperm were present in a particular place, the presence of sperm did not show whether activity was consensual or nonconsensual, or how they got there, or how carefully the State had collected the evidence. RT 12/13/2010, at 81-82.

Although Defendant claims that the Supreme Court opinion relied on Analyst Milne's results relating to DNA on the defendant's jeans and truck to support a finding of harmless error, that evidence is only part of the finding:

> ¶ 38 Nevertheless, on this record we find that the trial court's error was harmless. *See State v. Henderson,* 210 Ariz. 561, 567 ¶ 18, 115 P.3d 601, 607 (2005) ("Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence."). Evidence of Burns' guilt was overwhelming: ***He was the last person seen with Jackie***, *her blood was found in his truck and on a pair of jeans in the trunk of his Honda*, his ***cellphone records indicated he was in the area where Jackie's body was found, his DNA matched sperm found in Jackie's body, and he possessed and disposed of the murder weapon***. Moreover, the State did not emphasize Burns' conviction during closing argument, mentioning it only in the context of the weapons charge. There is nothing to

> indicate that the jury considered his prior convictions in contravention of the guilt-phase jury instructions, and this evidence was properly introduced in the penalty phase. Thus, we are satisfied that the failure to sever the misconduct charge did not affect the jury's verdicts or sentences.

State v. Burns, 237 Ariz. 1, 15, ¶ 38, 344 P.3d 303, 317 (2015) [Emphasis added].

Finally, Defendant in his PCR does not provide evidence that the results obtained by Mr. Milne, or indeed the results obtained by any of the other DNA and body fluid analysts, were inaccurate or are suspect. Further, in light of Milne's post-college professional training, the cross-examination conducted by counsel, the arguments made by counsel as a result of that cross-examination, and the other evidence presented at trial, the Court is unable to find "a probability sufficient to undermine confidence in the outcome."

THE COURT FINDS Defendant's claims relating to DNA Analyst Scott Milne not colorable.[16]

4. "CONFLICT OF INTEREST"

Defendant's claims relate to allegations that counsel created an actual conflict of interest by "blaming" him for their motion to continue the trial date. He asserts that counsels' actions and the Court's failure to appoint new counsel violated his right to effective

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[16] *Supra,* footnote 12. As with the Defendant's claim regarding Toxicologist Norman Wade, Defendant has at no time alleged the test results testified to by Mr. Milne were faulty or otherwise not accurate.

assistance of counsel and his due process rights. Petition at 90-91.

a. Preclusion

This claim could have been raised on appeal, it is therefore precluded by Rule 32.2(a)(3). An issue is precluded if it was raised, or could have been raised, on direct appeal or in prior Rule 32 proceedings. *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996). Alternatively, because Defendant argues that exceptions to preclusion may apply, the Court considers the merits of the claim.

b. Not colorable

Under *Cuyler v. Sullivan,* the mere possibility that a conflict of interest may exist is insufficient to overturn a verdict. Rather, Defendant must demonstrate the presence of an actual conflict of interest:

> We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an **actual conflict of interest adversely affected his lawyer's performance**.

Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719 (1980). [Emphasis added}

Four years later, the *Strickland* court analyzed a conflict of interest claim in the context of an "ineffective assistance" claim, and confirmed that only where an actual conflict of interest exists is prejudice presumed:

> One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler v. Sullivan*, 446 U.S., at 345–350, 100 S.Ct., at 1716–1719, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed.Rule Crim.Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims mentioned above. **Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance**." *Cuyler v. Sullivan, supra,* 446 U.S., at 350, 348, 100 S.Ct., at 1719, 1718 (footnote omitted).

Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). [Emphasis added]

An actual conflict requires Defendant to demonstrate "that some plausible alternative defense

strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *Harvey v. Ayers*, 458 F.3d 892, 908 (9th Cir. 2006); *see Cuyler v. Sullivan*, 446 U.S. 335, 348-349 (1980).

Here, the representations by trial counsel about their client's cooperation, or lack thereof, even if temporary and situational, and precipitated by counsel's actions, was neither inaccurate nor inappropriate to share with the Court in the context of a motion to continue. Counsel's representations presented the *potential* to create a rift between himself and his client, but did not represent an *actual conflict of interest*, such that the interests of counsel and Defendant diverged. Rather, the interests of counsel and their client were joined insofar as the motion to continue was concerned, as presumably both Defendant and counsel wished a full and fair presentation at all phases of the trial.

The Court cannot find counsel "actively represented conflicting interests" such that "an actual conflict of interest adversely affected his lawyer's performance." *Strickland*, 466 U.S. at 692 (1984) quoting *Cuyler v. Sullivan*, 446 U.S. at 350 (1980).

Defendant often references "caseload" and "lack of readiness for trial" in his post-conviction pleadings. The Court has not only reviewed the court file and the trial transcripts, but also was present at trial. Despite whatever "conflict" may have existed, the Court found counsel to be prepared with the facts and the law, making appropriate and lucid arguments on behalf of Defendant.

After reviewing the above, and the post-conviction pleadings, it is the Court's opinion that Defendant received the assistance of competent counsel, who provided him with constitutionally-effective assistance in connection with his trial.

THE COURT FINDS Defendant's claim relating to "conflict of interest" not colorable.

5. "FIRST DATE" EVIDENCE

Defendant claims that trial counsel provided ineffective assistance by raising an "incomplete" objection in which he failed to argue Rule 403 as grounds for preclusion related to evidence the victim was on a first date. Petition at 91-92.

a. Preclusion

Defendant raised this claim on appeal; (*Burns*, at ¶¶ 43-45) therefore, it is precluded by Rule 32.2(a)(2) and (3). An issue is precluded if it was raised, or could have been raised, on direct appeal or in prior Rule 32 proceedings. *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

b. Not Colorable

Defendant faults counsel for failing to move to preclude the evidence under Rule 403. However, the Arizona Supreme Court concluded that the evidence was properly admitted under Rule 403.

Our Supreme Court discussed the "first date" evidence at ¶¶ 42-45 in *State v. Burns*, 237 Ariz. 1 (2015), concluding, on the Rule 403 argument that,

> ...[e]vidence that Jackie's date with Burns was her first date helped to place her actions in

> context and thus was probative. And because Burns has not shown that the evidence posed a danger of unfair prejudice under Rule 403, he cannot show error, much less fundamental error.

Burns, 237 Ariz. at 16, ¶45, 344 P.3d at 18.

Counsel did not perform deficiently by failing to secure preclusion of what would have been determined to be admissible evidence nor was Defendant prejudiced.

THE COURT FINDS Defendant's claim relating to "First Date" evidence is not colorable.

6. INEFFECTIVE ASSISTANCE CLAIM REGARDING WITNESS MANDI SMITH

Defendant argues that counsel provided ineffective assistance by opening the door to testimony that his girlfriend was afraid of him, permitting "specific threats against her to come into evidence." Petition at 92.

Arizona Supreme Court addressed Smith's testimony:

> ¶49 During an interview with the State, Mandi said she feared Burns, and he had previously threatened to kill her. The trial court initially precluded evidence of any specific threats made by Burns. It did, however, allow Mandi to testify on direct examination to her general feelings toward Burns. Burns' counsel spent much of his cross-examination attempting to establish that Mandi, not Burns, had killed Jackie. Burns' counsel also attempted to impeach Mandi's testimony that she feared Burns by eliciting testimony that Mandi never

told the police that she was afraid of Burns. After cross-examination, the State asked the court to reconsider its previous ruling that Mandi could not testify as to specific acts by Burns that caused her to fear him, arguing that Burns had opened the door by implying that Mandi's testimony was recently fabricated. Over Burns' objection, the court allowed the State on redirect to question Mandi about specific threats Burns allegedly made on her life and Mandi's assertions that she planned to remove all the guns from her house because she feared Burns.

…

¶52 Burns' Rule 404 argument also lacks merit. Under Arizona Rule of Evidence 404(b), other wrongs or acts are not admissible to show that a person acted in conformity with his or her character. They may, however, be admissible for other purposes, such as rebutting an attempt to impeach a witness. *See State v. Williams,* 183 Ariz. 368, 376, 904 P.2d 437, 445 (1995) ("Evidence which tests, sustains, or impeaches the credibility or character of a witness is generally admissible, even if it refers to a defendant's prior bad acts.") (internal quotation marks omitted). Rule 404(b) does not apply to Mandi's testimony that she feared Burns or planned to remove guns from their home, because that testimony involves no other *act* by Burns. Mandi's testimony that Burns threatened to kill her before Jackie's murder was inadmissible to show that Burns was more likely to have killed Jackie, because it involved

> a specific threat made by Burns. That evidence, however, was properly admitted to rebut Burns' attempt to show that Mandi was not credible when she testified that she feared Burns. Thus, Burns' 404(b) argument fails.

Burns, 237 Ariz. at 17–18, ¶¶ 49-50, 344 P.3d at 319–20.

The trial record does not establish that counsel performed deficiently. Counsel attempted to have the statements precluded and was successful in securing the preclusion of unduly prejudicial portions of the statements. During cross-examination of Smith, trial counsel strategically attempted to shift the blame for the murder to Smith (suggesting that she was angry and jealous; identifying her whereabouts at the time of the murder; disclosing that she was familiar with the area where the victim's body was found). Further, counsel attempted to undercut Smith's credibility by challenging whether her claims of fearing Defendant had been recently fabricated. Although the cross-examination opened the door to certain adverse testimony, that is the essence of decisions counsel must make: Whether to forego certain evidence due to adverse consequences, or whether to pursue the testimony and focus the jury's attention on the number of times Smith failed to disclose her recent alleged fabrications. RT 10/26/2010, at 17-18; RT 11/10/2010, at 76; s*ee*, *Id.,* at 60-61; RT 11/15/2010, at 22; *see*, RT 11/10/2010, at 60; *Id.,* at 64; *see Id*., at 164-65; *see also, Id*., at 173-75; and RT 11/15/2010, at 46.

Defendant fails to establish that this strategy was outside the range of effective trial strategy. Further, counsel continued to argue in post-trial motions that the statements were improperly admitted.

In addition, Defendant has not established a colorable claim of prejudice. Smith's statements were properly admitted. Other evidence placed Defendant with the victim, at the location where her body was found, and his movements correspond to the murder timeline.

THE COURT FINDS Defendant has not established a colorable ineffective assistance claim relating to Mandi Smith's testimony.

7. FAILURE TO SEVER MIW COUNT

On appeal, the Arizona Supreme Court held that "[b]ecause Burns' prior felony conviction was prejudicial and irrelevant to the other charges, severance 'was necessary to promote a fair determination' of Burns' guilt or innocence under Arizona Rule of Criminal Procedure 13.4(a)." *Burns*, 237 Ariz. at 15, ¶ 37, 344 P.3d at 317. However, the Court found that although it was error to deny Defendant's motion to sever the misconduct involving weapons charge, "on this record we find that the trial court's error was harmless." *Id*. at ¶ 38.

The Arizona Supreme Court concluded:

> We take this opportunity, however, to emphasize that trial courts should prevent this situation. Evidence of prior felony convictions has a potential to create prejudice, which is precisely the reason previous criminal convictions are generally inadmissible under Rule 404(b). Absent an appropriate factual nexus, trial courts generally should not join a misconduct-involving-weapons charge, or any charge that requires evidence of a prior felony conviction, unless the parties have stipulated to

> a defendant's status as a prohibited possessor. Alternatively, the court could conduct a bifurcated trial to adjudicate any charge that requires evidence of a prior felony conviction. Likewise, the State should avoid the risk of reversal by refraining from joining charges that require proof of a defendant's prior convictions. But, for the reasons stated above, we do not find prejudice on this record.

Id., at ¶ 39.

Defendant now argues (1) that failure to secure severance evidences ineffective assistance of counsel, as well as; (2) that newly-discovered facts (the background information relating to Toxicologist Wade and DNA Technician Milne), under Rule 32.1(e), undermine the Supreme Court's determination of "harmless error" and demonstrate prejudice at both the guilt and penalty phases.

Defendant asserts these claims should be considered with the allegations of ineffective assistance of counsel and the State's conduct as addressed above. Further Defendant alleges that the Arizona Supreme Court erred for not considering the impact of the failure to sever the charge in the penalty phase of the trial.

a. Ineffective assistance of counsel

As evidenced by our Supreme Court's decision on appeal, the record demonstrates that trial counsel adequately raised and effectively preserved the MIW issue for appeal. Counsel filed a Motion to Sever; the State objected; the trial court denied. Counsel reargued the MIW issue in his post-trial motion for a new trial. His lack of success does not demonstrate

deficient performance, as he made a record that adequately preserved the issue on appeal. M.E. dated 10/27/2010, at 2; M.E. dated 10/27/2010, at 3-4; RT 11/10/2010, at 74-75; and the trial court's ruling 4/14/2011.

THE COURT FINDS Defendant's ineffective assistance of counsel claim not colorable.

b. Newly Discovered Evidence---impact in the guilt phase

Defendant argues the background information relating to Toxicologist Wade and DNA Technician Milne is newly discovered evidence sufficient to undermine the Supreme Court's "harmless error" determination.

Pursuant to Rule 32.1(e), a defendant may seek relief on the grounds that newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Although the Court has determined no prejudice occurred in the second (Dr. Wade-related) and third (Technician Milne-related) claims, the Court will consider prejudice in connection with the Arizona Supreme Court's "harmless" determination.[17]

The Arizona Supreme Court's "harmless error" analysis:

> ¶ 38 Nevertheless, on this record we find that the trial court's error was harmless. *See State v. Henderson,* 210 Ariz. 561, 567 ¶ 18, 115 P.3d

[17] The Court is not, and cannot, address Defendant's claims that "[i]t was constitutional error [for the Supreme Court] to not reverse on appeal." Petition at 15. That is a claim that could have been the subject of a motion for reconsideration filed with the Supreme Court and is precluded.

> 601, 607 (2005) ("Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence."). Evidence of Burns' guilt was overwhelming: He was the last person seen with Jackie, her blood was found in his truck and on a pair of jeans in the trunk of his Honda, his cellphone records indicated he was in the area where Jackie's body was found, his DNA matched sperm found in Jackie's body, and he possessed and disposed of the murder weapon. Moreover, the State did not emphasize Burns' conviction during closing argument, mentioning it only in the context of the weapons charge. There is nothing to indicate that the jury considered his prior convictions in contravention of the guilt-phase jury instructions, and this evidence was properly introduced in the penalty phase. Thus, we are satisfied that the failure to sever the misconduct charge did not affect the jury's verdicts or sentences.

Burns, 237 Ariz. at 15, ¶ 38, 344 P.3d at 317.

Our Supreme Court's analysis did not include Wade's testimony when listing the "overwhelming" evidence against Defendant. Defendant has not established that Wade's conviction probably would have changed the verdict or sentence pursuant to Rule 32.1(e). Further, the only guilt phase evidence relied on by the Supreme Court in its "harmless error" determination that may have been undermined by the "newly-discovered evidence of Milne's academic shortcomings" relates to the victim's blood that was found in Defendant's truck and jeans. However, as

previously found at the third claim, even in his post-conviction pleadings Defendant provides no evidence that the results obtained were inaccurate. Defendant has not established the "newly discovered evidence", considered separately or cumulatively, would probably change the verdicts or sentences.

THE COURT FINDS Defendant's newly discovered evidence claim relating to the guilt-phase of the trial is not colorable.

c. Newly Discovered Evidence---impact in the penalty phase

Defendant argues that "the crime of MIW is not a part of the penalty phase…" and that the sentencing jury would not have learned of it. Petition at 15-16.

Although Defendant argues that the MIW conviction would otherwise "never have come before the jury had the MIW charge been severed," (Petition at 95), the concern expressed by the Arizona Supreme Court was not with the conviction *per se*. Rather, that Court's concern was that the jury learned the Defendant had previously been convicted of a felony during the guilt phase of the trial, a fact that otherwise would not have been presented, to impeach his credibility, if he testified.

The Court disagrees that the jury would not have learned of Defendant's felony conviction at the penalty phase. Evidence of a felony conviction could – and probably would – properly have come in as rebuttal to mitigation (A.R.S. §§ 13-751(G); -752(G) (evidence relevant to whether leniency should be shown include defendant's character, propensities or record...)).

THE COURT FINDS Defendant's newly discovered evidence claim as it relates to the penalty-phase of his trial is not colorable.

PENALTY PHASE CLAIMS

8. CONSTITUTIONALITY OF ARIZONA'S DEATH PENALTY

Defendant alleges that Arizona's death penalty scheme violates the Eighth Amendment and Due Process by failing to adequately narrow the defendants eligible for the death penalty; that the death penalty is cruel and unusual punishment in violation of the Eighth Amendment; and that trial and appellate counsel provided ineffective assistance by failing to argue accordingly. Petition at 98.

a. Preclusion

Constitutional claims were, and this claim could have been, raised on appeal (*see, Burns,* 237 Ariz. at ¶¶ 83-90). An issue is precluded if it was raised, or could have been raised on direct appeal or in prior Rule 32 proceedings. *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996). Therefore, the claim is precluded by Rule 32.2(a)(3).

Alternatively, because Defendant argues that Rules 32.1(a) and (e) afford him relief, and/or exceptions to preclusion may apply, the Court considers the merits of the claims.

Constitutionality of Arizona's Aggravating Factors Statute

Defendant concedes that, "[i]n *State v. Hidalgo,* 241 Ariz. 543, 390 P.3d 783 (2017), the Arizona Supreme

Court upheld the constitutionality of Arizona's death penalty statute, A.R.S. §§ 13-751, 13-752. Petition at 100. However, Defendant argues:

> This Court should [reject *Hidalgo* and] apply United States Supreme Court authority and strike the death sentence here under *Gregg*, *Furman*, *Zant*, and *Lowenfield*. In the face of directly contradictory U.S. Supreme Court authority, *State v. Hidalgo* is not persuasive.

Petition at 102.

Defendant asks the Court to reject binding precedent established by our Supreme Court in *State v. Hidalgo.* Defendant "…cannot obtain relief on that basis, however, because this Court is bound by the decisions of the Arizona Supreme Court. *See, e.g., State v. Cooney*, 233 Ariz. 335, 341, ¶ 18 (App. 2013) ("Arizona's courts are bound by the decisions of our supreme court and [] have no "'authority to modify or disregard [its] rulings.'") (quoting *State v. Smyers,* 207 Ariz. 314, 318 n. 4, ¶ 15 (2004)). As the State pointed out in its Response, our supreme court's conclusion in *Hidalgo* that Arizona's aggravating factors statute is constitutional binds this Court and forecloses Burns' claim. 241 Ariz. at 549–52, ¶¶ 14–29 (rejecting claim that A.R.S. § 13–751 does not sufficiently narrow the class of defendants eligible for the death penalty)." Response at 40.

Cruel and Unusual

Defendant argues that "the death penalty is *per se* cruel and unusual punishment in violation of the Eighth Amendment. This claim, too, is foreclosed by binding precedent to the contrary. *See, e.g., Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015) ("it is settled that

capital punishment is constitutional"); *State v. Harrod*, 200 Ariz. 309, 320, ¶ 59 (2001) ("The Arizona death penalty is not per se cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."), *vacated on other grounds, Harrod v. Arizona*, 122 S. Ct. 2653 (2002)." Response, at 40-41.

§13-751(F)(6) Aggravating Factor

The Court finds the aggravator constitutional, following precedent. First, the United States Supreme Court has upheld the (F)(6) aggravating factor against allegations that it is vague and overbroad, rejecting a claim that Arizona has not construed it in a "constitutionally narrow manner." *See Lewis v. Jeffers*, 497 U.S. 764, 774–77(1990); *Walton v. Arizona*, 497 U.S. 639, 649–56 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 556 (2002).

However, in *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990), the United States Supreme Court held the "especially heinous, cruel, or depraved" language is facially vague, but stated that the Court had given adequate "substance to the operative terms" for the construction of the aggravating circumstance to meet constitutional requirements. *Id.* at 654, 110 S. Ct. at 3057.

Finally, in *State v. Gretzler*, 135 Ariz. 42, 57 n.2, 659 P.2d 1, 16 n.2 (1983), our supreme court specifically held that the aggravating circumstance of "especially heinous, cruel, or depraved" must separate particular crimes from the "norm" of first degree murders, or the factor will not be upheld. *Gretzler*, 135 Ariz. at 53, 659 P.2d at 12.

In its instructions to the jury about the (F)(6) aggravating circumstance ("Defendant committed the murder in an especially cruel manner"), the Court's instructions constitutionally narrowed the aggravating factor, pursuant to Arizona Supreme Court and United States Supreme Court precedent, and Defendant's challenge to the constitutionality of the (F)(6) factor is meritless.

b. Newly-Discovered Evidence

Defendant asserts a newly discovered evidence PCR claim, related to a report that concludes at least one capital aggravating factor was present in almost every first degree murder case in Maricopa County from 2002 to 2012 (Petition at 98, 102; PCR Exhibit 99.).

This claim, too, is foreclosed by *Hidalgo*, where our supreme court rejected a challenge to Arizona's aggravating factors based on an identical factual assertion that one or more aggravating circumstances were present in 856 of 866 first degree murder cases over an 11–year period. *Hidalgo*, 241 Ariz. at 549, ¶ 17. The study Burns attaches reaches the same conclusion and thus provides no reason why his claim is not governed by *Hidalgo*.

Moreover, since Burns' trial occurred in 2010 and the study he attaches looks at cases beginning in 2002, he has failed to show diligence—these facts and this claim, to the extent any merit may exist – this Court does not believe such merit is present – could have been presented to the trial court, and more importantly, to the Arizona Supreme Court on direct appeal. *See Amaral*, 239 Ariz. at 219, ¶ 9 (newly-discovered evidence claim must show that defendant was diligent in discovering the facts and bringing them to the court's attention). Conversely, to the

extent he relies on data regarding first degree murder cases after his trial, those cannot support a newly-discovered evidence claim since those facts did not exist at the time of trial. *See id.*

The sub-claim fails both on the merits, and because it does not meet the requirements for a claim of newly-discovered evidence.

c. Ineffective Assistance of Counsel

Defendant alleges that "trial and appellate counsel…failed [to] raise an effective claim that the Arizona death penalty's aggravating factors are so broad as to encompass virtually all first-degree murders, thus violating due process of law…." Petition at 9; also, 98.

Defendant faults trial and appellate counsel for "failing to effectively investigate and argue their claim that the Arizona system of aggravating factors violated due process of law. Their pro forma objections (Ex. 16, Constitutional Objections to the Death Penalty) were brushed aside (Ex. 74 ME Pretrial rulings)." Petition at 98.

Counsels' performance is evaluated at the time of trial and not in hindsight. At the time of Defendant's 2010/11 trial and his appeal decided in 2015, established Arizona precedent upheld Arizona's death penalty statute. In fact, this Court determined the adequacy of the statutory narrowing in resolving a motion filed by trial counsel. M.E. dated 10/27/2010, at 4; *see also* Defendant's Constitutional Objections to Arizona's Death Penalty Scheme (filed 9/8/2010).

As of the date of that ruling, both the Arizona Supreme Court and the Ninth Circuit Court of Appeals had rejected Defendant's argument that

Arizona's statutory scheme failed to constitutionally narrow those defendants eligible for the death penalty thereby making Arizona's entire death penalty statute unconstitutional. Contrary to defendant's claim, precedent establishes that Arizona's statute accomplishes the requisite narrowing function. See *State v. Greenway,* 170 Ariz. 155, 823 P.2d 22 (1991), *State v. Hausner*, 230 60, 89, 280 P.3d 604 (2012), and *Smith v. Stewart*, 140 F.3d 1263, 1272 (9th Cir. 1998). And since then, as Defendant acknowledges, *Hidalgo* has upheld the statute's constitutionality.

Accordingly, any argument that Arizona's death penalty statute unconstitutionally failed to narrow would have failed, and counsel would not have been ineffective in failing to make a futile argument. *See State v. Pandeli*, 242 Ariz. 175, __, 394 P.3d 2, 12, ¶ 33 (2017) ("Counsel's failure to make a futile motion does not constitute ineffective assistance of counsel." quoting *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994)). The same reasoning applies to appellate counsel, who was not ineffective for failing to challenge the narrowing on appeal. Any such challenge would have been rejected under then-existing Arizona Supreme Court precedent, as is demonstrated by the Court's decision in *Hidalgo.*

Despite precedent, trial counsel filed a motion challenging the constitutionality of the Arizona death penalty statute on narrowing grounds, which the trial court rejected, and appellate counsel challenged the constitutionality on appeal. Given the existence of precedent rejecting the claim, neither was obligated to do so. The record demonstrates neither deficient performance nor prejudice.

THE COURT FINDS Defendant's claims relating to the constitutionality of Arizona's death penalty statute not colorable.

9. PRECLUDING DR. CUNNINGHAM'S SUR-REBUTTAL

Defendant alleges the Court committed error when it precluded Dr. Cunningham's sur-rebuttal testimony. He also raises a due process violation and ineffective assistance of counsel, due to counsel's failure to disclose Dr. Cunningham as a sur-rebuttal witness, as bases for relief on this claim.

a. Preclusion

This claim was argued and addressed on appeal (*Burns,* ¶¶ 15; 91-92; 96-100); it is therefore precluded by Rule 32.2(a)(3). *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

The Arizona Supreme Court wrote:

> ¶ 96 The court sustained an objection on non-disclosure grounds to Dr. Cunningham's direct examination testimony regarding "the rates of violence in prison, factors that are predictive of violence in prison, and how capital offenders behave in prison." At the conclusion of Dr. Cunningham's testimony, Burns' counsel said he intended to recall Dr. Cunningham as a rebuttal witness. The State objected, arguing that Burns did not disclose to the State that it intended to call Dr. Cunningham as a rebuttal witness and that Dr. Cunningham's purported testimony on the likelihood of violence in prison among capital offenders was not relevant to the

State's rebuttal evidence. **The trial court ruled that if the State presented evidence on the likelihood of violence in prison, "then Dr. Cunningham will be allowed to testify" as a rebuttal witness.**

¶ 97 A few days later, a State expert, Dr. Kirkley, discussed Burns' past misconduct to support her conclusion that Burns exhibited antisocial personality disorder. Burns then moved to recall Dr. Cunningham to address antisocial personality disorder and to explain the statistical analysis on the risk of inmate prison violence based upon his own research and other research presented in Burns' case-in-chief. **The trial court precluded this testimony because it "was not timely disclosed." Further, the court found that the State did not inject the issue by its questioning of Dr. Kirkley and that the offered testimony was not relevant as rebuttal evidence.**

¶ 98 Burns' offer of proof disclosed that Dr. Cunningham would have offered a statistical analysis showing that violent offenders do not necessarily commit acts of violence while incarcerated. Burns argues that this testimony would have rebutted the "[S]tate's position that [Burns] could not be safely housed for life in ADOC" as well as Dr. Kirkley's opinion that Burns' antisocial personality disorder and history meant he had a high probability of future dangerousness in prison. We find no abuse of discretion.

> ¶ 99 Under the *Smith* factors, Dr. Cunningham's testimony that Burns could safely be incarcerated for life was cumulative and therefore not vital to his mitigation evidence. Another defense expert, James Aiken, had already testified that an inmate like Burns could be safely housed in prison. Second, the fact that Dr. Cunningham had testified in other trials does not mean that the State was prepared to effectively deal with his late-disclosed testimony in Burns' case. The fact that the State had virtually no notice that Burns intended to call Dr. Cunningham as a rebuttal witness weighs in favor of preclusion. As with Dr. Wu's testimony, there is no evidence of bad faith in the defense's late disclosure, and so the third *Smith* factor is inapplicable here.
>
> ¶ 100 **Ultimately, Burns cannot establish that he was prejudiced by the preclusion of Dr. Cunningham's testimony because the proffered testimony was largely cumulative**. We find no abuse of discretion in the trial court's refusal to allow Dr. Cunningham's rebuttal testimony.

State v. Burns, 237 Ariz. 1, 23–25, ¶¶ 90-100, 344 P.3d 303, 325–27 (2015) [Emphasis added]. This claim, having been finally adjudicated, including the Court's analysis of the four criteria outlined in *State v. (Joe U.) Smith*, 140 Ariz. 355, 359, 681 P.2d 137, 1378 (1984), on appeal, is precluded. Rule 32.2(a)(2).

However, the Court will consider the merits of Defendant's alleged due process violation and Sixth Amendment claim of ineffective assistance of counsel.

The due process claim regarding Cunningham's testimony is likewise precluded as it was not raised on direct appeal. Rule 32.2(b).

b. Due process

To the extent defendant raises a due process claim related to the preclusion of Dr. Cunningham as rebuttal to State's expert Dr. Kirkley; the claim fails. *State v. Pandeli*, 242 Ariz. 175, 193, ¶ 77, 394 P.3d 2, 20 (2017), *cert. denied,* 138 S. Ct. 645 (2018) ("[due process] argument fails because [defendant] has provided no objective evidence that [expert's] testimony was false or misleading").

Likewise, defendant's precluded claim related to Dr. Cunningham's precluded opinion testimony as rebuttal to the State's cross-examination of defense expert Dr. Aiken fails. Our supreme court addressed an issue related to the propriety of the State's cross-examination of Mr. Aiken. See, *State v. Burns*, 237 Ariz. 1, 25, ¶¶ 100-104, 344 P.3d 303, 327 (2015). Dr. Cunningham's proffered testimony would have been an attempt to bolster the credibility of Aiken's testimony. Our Supreme Court found,

> Under the *Smith* factors, Dr. Cunningham's testimony that Burns could safely be incarcerated for life was cumulative and therefore not vital to his mitigation evidence. Another defense expert, James Aiken, had already testified that an inmate like Burns could be safely housed in prison. …

State v. Burns, 237 Ariz. at 24, ¶ 99 (2015); and

> Ultimately, Burns cannot establish that he was prejudiced by the preclusion of Dr. Cunningham's testimony because the proffered

> testimony was largely cumulative. We find no abuse of discretion in the trial court's refusal to allow Dr. Cunningham's rebuttal testimony.

State v. Burns, 237 Ariz. at 25, ¶ 100 (2015).

Absent prejudice, Defendant is afforded no relief.

c. Ineffective assistance claim

Defendant argues that trial counsel's failure to timely notice Dr. Cunningham as a rebuttal witness amounted to ineffective assistance, resulting in his preclusion. Defendant's claim fails for several reasons.

At trial, the Court ruled, if the State presented evidence on the likelihood of violence in prison, "then Dr. Cunningham will be allowed to testify" as a rebuttal witness. *Burns*, 237 Ariz. at 24, ¶ 96 (2016). If this Court had determined Dr. Cunningham's testimony relevant to rebuttal, it may have permitted the rebuttal testimony, even though it was disclosed late. Notwithstanding Dr. Cunningham's opinion in his post-conviction affidavit that he did so testify, on appeal this Court's determination of "legal relevance" was affirmed and the testimony determined to have been properly precluded at trial.

Defendant has not demonstrated the first *Strickland* prong; deficient performance. The record demonstrates counsel's efforts to secure admission of Dr. Cunningham's testimony. On direct examination, Dr. Cunningham testified about various risk factors. Counsel sought to limit the scope of cross-examination and, when unsuccessful, sought to have Dr. Cunningham testify in rebuttal. The Court determined that the disclosure of the expert as a rebuttal witness was untimely, and was also not

relevant; however, had Dr. Kirkley testified about "violence in prison" the court indicated a willingness to allow the rebuttal testimony. Counsel then supplemented the record with an oral and then a written offer of proof: Dr. Cunningham's detailed, 39-page affidavit. In addition, counsel identified the preclusion of the rebuttal testimony as one of the grounds for Defendant's Motion for New Trial (filed 3/10/2011; denied, 4/14/2011).

Defendant has not demonstrated the second *Strickland* prong; prejudice. Dr. Cunningham's testimony appears to be directed toward supplementing defense prison expert Aiken's testimony with research data, and challenging statements made by State's expert Dr. Kirkley. The Supreme Court has determined that the testimony was either cumulative, or not relevant to rebuttal of the expert's cross-examination testimony.

For the reasons stated above, including the appellate decision in his case,

THE COURT FINDS defendant's claims relating to Dr. Cunningham's proffered sur-rebuttal testimony not colorable.

10. PRECLUSION OF DR. WU'S STATISTICAL ANALYSIS

Defendant alleges that trial counsel provided ineffective assistance by failing to timely notice Dr. Wu, and timely disclose his report, resulting in the Court precluding "his quantitative analysis of [Defendant's] PET scan." Petition at 118.

a. Preclusion

This claim could have been raised on appeal, and a form of the claim was addressed by our supreme court

on appeal (*Burns*, 237 Ariz. at 12, ¶¶ 14-17, *Burns,* 237 Ariz. at 23; ¶¶91-95; *see also*, *Burns*, 237 Ariz. at 25, ¶¶ 103-104); it is therefore precluded by Rule 32.2(a)(3).

b. Ineffective assistance of counsel

Defendant's claim of ineffective assistance here, however, is contradicted by the trial record and our supreme court's opinion on appeal. It is also not a colorable claim under either prong of *Strickland*, for several reasons as to each prong.

Deficient performance

Counsel made various efforts to secure a timely report from Dr. Wu. First, counsel attempted to secure a trial continuance, indicating that it needed to secure and complete certain additional, unidentified testing. Motion to Continue Trial Date of October 7, 2010 (filed 9/2/2010), at 5. The Court denied the continuance request. Counsel identified the testing that needed to be done as having been at least partially accomplished by January 2011. RT 1/10/2011, at 10-11.

Additionally, despite a number of the challenges (see, Defendant's Supplemental Notice of Mitigation Witnesses (filed 1/4/2011) at 1-2; RT 1/10/2011, at 6-7; RT 1/10/2011, at 8; *Burns*, 237 Ariz. at ¶ 93; RT 1/12/2011, at 10; RT 1/12/2011, at 3-13; 51-54; 56-58) including belated disclosure of Dr. Wu and his delayed dissemination of certain imaging, counsel succeeded in his efforts to get Dr. Wu's testimony before the jury. RT 2/1 & 2/2/2011. The jury did learn about a PET scan from Dr. Wu, and that his evaluation suggested that the PET scan served as "clinical corroboration" of a traumatic brain injury ("TBI"). RT 2/1/2011, at 10-11; 60; RT 2/1/1011 at 21; 54; RT 2/1/2011, at 100; *Id.,*

at 125; see also, *Id*. at 54. Counsel also argued at length for admission of Dr. Wu's quantitative analysis testimony. RT 2/1/2011 at 61-73.

Further, before counsel tendered Dr. Wu for cross-examination, counsel reserved his right to question Dr. Wu about the quantitative analysis on redirect (RT 2/1/2011 at 102); attempted, albeit unsuccessfully, to limit cross-examination (RT 2/7/2011 at 4-16); and counsel extensively cross-examined the State's rebuttal expert, Dr. Waxman. RT 2/7/2011 at 88-141. Counsel's Rule 20 motion for new trial included as grounds, "Dr. Wu's statistical analysis precluded: over defense objection…." Defendant's Motion for New Trial (filed 3/10/2011) at 9.

Counsel's efforts to gain admission of the ultimately-precluded statistical analysis and to ameliorate any adverse impact demonstrate not deficient performance, but effective assistance.

Prejudice

First, as outlined by the State, and as testified to by the expert, the jury was presented with concerns about Dr. Wu's methodology and conclusions, rather than his calculations. RT 2/7/2011, at 18 (State's mitigation phase opening); RT 2/7/2011, at 111 (cross examination). Second, because the State focused on undermining Dr. Wu's methodology and the ability of a PET scan to establish TBI, additional testimony from Dr. Wu about his calculations would not have bolstered the overriding issue of the value of a PET scan in connection with TBI corroboration.

Third, in response to the State's request for preclusion of Dr. Wu's quantitative analysis, (RT

2/1/2011, at 61-73), counsel expressed concern that in the past Dr. Waxman has criticized Dr. Wu for performing a visual analysis and not a quantitative analysis; or for performing a quantitative measurement rather than a visual analysis. *Id.,* at 71. Thus, counsel anticipated the belated calculations would rebut that criticism. As a counter-measure, on cross-examination counsel secured Dr. Waxman's agreement that he himself had performed only a visual review of the imaging. RT 2/7/2011 at 112-113; 116 (visual – and not quantitative – analysis).

Fourth, Dr. Bigler's November 14, 2017 evaluation, secured post-conviction, appears to undercut Dr. Wu's trial testimony in significant respects, rendering the preclusion of his quantitative analysis minimally prejudicial. Dr. Bigler discloses that "Mr. Burns also underwent PET imaging on July 27, 2017, which was interpreted as being negative…." Petition Exhibit 100, at 1. Dr. Bigler also discloses that "[a] previous positron emission tomogram was performed and interpreted by Dr. Joseph Wu, M.D. as demonstrating hypofrontality.[18] This was not observed in the current PET imaging, but Mr. Burns is now older. It is also the case that physiological functioning of the brain may vary over time or from setting to setting, even in the presence of underlying brain damage where presence of prior abnormality is still likely reflective that underlying dysfunction is present." *Id.,* at 3. Thus, where post-conviction testing does not appear to have confirmed Dr. Wu's results, it is difficult to

[18] Dr. Waxman testified on cross-examination that "hypofrontality" is a relative decrease in frontal lobe activity, relative to the lower (rear) occipital. *Id.,* at 113.

understand how the preclusion of Dr. Wu's quantitative calculations creates a colorable claim.

Additionally, it is of note that although Defendant claims the Court precluded the quantitative testimony based on belated disclosure, in fact, the Court directed that the analysis be provided to the State's expert for review, the Court withheld its ruling pending review by the State's expert, and ultimately our supreme court found,

> Based on the *Smith* factors, the trial court did not abuse its discretion by precluding Dr. Wu's quantitative analysis. **Dr. Wu's testimony was not critical to Burns' defense. Dr. Wu testified at length that Burns had diminished frontal-lobe activity and explained that this could affect Burns' impulse control, judgment, and emotional regulation. Burns has not identified what the quantitative analysis would have additionally shown.**

Burns, 237 Ariz. at 24, ¶ 95.

THE COURT FINDS Defendant's claims relating to Dr. Wu's statistical analysis not colorable.

11. MRI STUDY AND DR. BIGLER

Defendant alleges that trial counsel provided ineffective assistance by failing to secure certain expert testimony from Dr. Erin Bigler in support of his mitigation; and that the proffered mitigation constitutes newly-discovered facts under Rule 32.1(e). Petition at 118.

In defendant's argument that Dr. Bigler's post-conviction evaluation constitutes newly-discovered evidence, he states:

> Dr. Bigler found that inferences can be drawn from Mr. Burns' history, including his childhood evaluation by Dr. Federici in 1994, that at the cellular level, Mr. Burns was more vulnerable to the effects of injury and stressful environments. "This is an indication from a neurobehavioral standpoint that frontal pathology was present." *Id.*
>
> ** ** **
>
> While Mr. Burns' jury heard Dr. Wu's truncated analysis, it did not hear a direct relation of how a skull fracture in infancy carries through the rest of the child's life, disrupting normal social and emotional development, learning, and critically, impulse control. At the sentencing phase this would have been key mitigation that was missed thought IAC.

Petition at 119-120.

a. Newly-discovered evidence

As the Court has previously noted, evidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence. *State v. Saenz,* 197 Ariz. 487, 4 P.3d 1030 (App. 2000), review denied. The evidence must have been in existence at the time of trial, but not discovered until after trial. *State v. Sanchez*, 200 Ariz. 163, ¶11, 24 P. 3d 610 (App. 2001).

Defendant acknowledges that the jury learned of the childhood skull fracture and heard Dr. Wu's analysis; the evidence was known to him and his counsel before trial and testimony based on that evidence was presented. Therefore, this evidence does not meet the requirements of Rule 32.1(e). *See, State v. Swoopes*, 216 Ariz. 390, ¶18, 166 P.3d 945 (App, 2007)(jury's note and judge's response existed at time of trial and could have been discovered by exercise of due diligence); *State v. Mata*, 185 Ariz. 319, 916 P.2d 1035 (1996).("Defendant has not presented 'newly discovered' facts, as A.R.S. §13-4231 requires, but facts to which he has had access for eighteen years through these protracted proceedings. Simply because defendant presents the court with evidence for the first time does not mean that such evidence is 'newly discovered,'"): *State v. Dogan,* 150 Ariz. 595, 600, 724 P.2d 1264 (App. 1986)("We do not believe that the "discover" by a different attorney that appellant's photograph was the only photograph in the lineup depicting a person in blue denim constitutes newly-discovered material facts within the scope of Rule 32.1.").

In addition, Dr. Bigler's report cannot qualify as "newly-discovered facts," even though it was prepared seven years after the trial. It is the underlying fact (the head injury) and not the report that would have to have been unknown at the time of sentencing:

> …[I]t is the condition, not the scientific understanding of the condition, that needs to exist at the time of sentencing. *See Bilke,* 162 Ariz. at 53, 781 P.2d at 30. Bilke's PTSD qualified as newly discovered evidence because the advancement of knowledge permitted the

> diagnosis of a previously existing—but unrecognized— condition. Like Bilke's PTSD, Amaral's juvenile status existed at the time of sentencing. But the behavioral implications of Amaral's condition, in contrast to Bilke's, were recognized at the time of his sentencing; that our understanding of juvenile mental development has since increased does not mean that the behavioral implications of Amaral's juvenile status are newly discovered.

State v. Amaral, 239 Ariz. 217, 222, ¶ 19, 368 P.3d 925, 930, *cert. denied,* 137 S. Ct. 52 (2016).

THE COURT FINDS that Dr. Bigler's post-conviction evaluation is not newly discovered evidence pursuant to Rule 32.1(e); *State v. Saenz,* 197 Ariz. 487, 4 P.3d 1030 (App. 2000), review denied; *State v. Sanchez*, 200 Ariz. 163, ¶11, 24 P. 3d 610 (App. 2001).

Defendant also argues that Defendant's post-conviction MRI constitutes newly-discovered evidence:

> [T]rial counsel were further ineffective in not obtaining a needed MRI of Mr. Burns' brain, which post-conviction counsel has obtained and which comprises newly discovered mitigation evidence.

Petition at 98-99.

Irrespective of whether the MRI was "discovered" after the trial (Dr. Morenz reviewed an MRI of Defendant's brain; RT 1/18/2011 at 10-11 (direct); 65-66, 67 (cross; MRI of Defendant's brain on October 15, 2010); 129-132 (redirect; established only what an MRI is; "functional MRI" at 132)) or whether the defendant exercised due diligence in securing the

MRI, which are the first two requirements of Rule 32.1(e), the claim fails as to the third requirement; that the MRI results "probably would have changed the verdict or sentence. Rule 32.1(e); *State v. Amaral*, 239 Ariz. 217, 219, ¶ 10, 368 P.3d 925, 927, *cert. denied,* 137 S. Ct. 52 (2016).

In her report, Dr. Bigler concludes that Defendant's MRI is "within normal limits":

> …..The brain MRI w/o contrast was performed on July 19, 2017.
>
> The interpretation of this scan was that it was **within normal limits** from a clinical perspective, as interpreted by the radiologist, Avery Knapp, M.D.; however, as mentioned by Dr. Knapp in his report, the issues with traumatic brain injury and post-concussive syndrome are often not detected by standard clinical MRI, which I will address later in this report. **Mr. Burns also underwent PET imaging on July 27, 2017, which was interpreted as being negative** by John P. Uglietta, M.D.
>
> ** ** ** **
>
> Turning to the current MRI studies, as indicated in the clinical report, there were no gross abnormalities...

Petition Exhibit 100 (Dr. Bigler's evaluation), at 1; 3 [Emphasis added].

Although Dr. Bigler explains the limitations of the post-conviction imaging sequence which prevented "advanced quantitative neuroimaging analysis," she also notes (1) that based on Dr. Ronald Federici's May 1994 report suggesting that "Mr. Burns' brain was

more vulnerable to the effects of injury and stressful environments," suggesting the presence of frontal pathology; and (2) that "there is a slight symmetry in the lateral ventricular size" that is "potentially associated with the history of head injury" and also dyslexia (Dyslexia testified to by Dr. Federici, RT 1/1/02011 at 79-81; 101). Petition Exhibit 100, at 3.

As the Supreme Court noted, Defendant presented – and the jury heard – mitigation evidence that included "his diagnosed learning disabilities [and] his impulsivity." *Burns*, 237 Ariz. at 34, ¶ 169.

THE COURT FURTHER FINDS that the post-conviction 2017 MRI is not newly discovered evidence pursuant to Rule 32.1(e); *State v. Saenz,* 197 Ariz. 487, 4 P.3d 1030 (App. 2000), review denied; *State v. Sanchez*, 200 Ariz. 163, ¶11, 24 P. 3d 610 (App. 2001).

THE COURT FURTHER FINDS that Defendant's post-conviction 2017 MRI imaging was within normal limits, and fails to establish the third requirement that the post-conviction 2017 MRI results "probably would have changed the verdict or sentence." Rule 32.1(e); *State v. Saenz,* 197 Ariz. 487, 4 P.3d 1030 (App. 2000), review denied; *State v. Sanchez*, 200 Ariz. 163, ¶11, 24 P. 3d 610 (App. 2001).

Therefore,

THE COURT FINDS Defendant fails to establish a colorable newly discovered evidence claim, pursuant to Rule 32.1(e), relating to Dr. Bigler's MRI study and analysis.

b. Ineffective assistance

Defendant also argues that trial counsel provided ineffective assistance by failing to secure an MRI of

his brain; and also by failing to secure the testimony of Dr. Bigler. Petition at 119-120.

Prejudice

Initially, although prejudice is normally addressed as the 2nd prong of the *Strickland* analysis, as to IAC for failure to secure a MRI, because the record demonstrates that counsel had an MRI taken in October 2010[19], and also because the 2017 post-conviction MRI results were within normal limits, as discussed immediately above, the prejudice prong of *Strickland* cannot be satisfied, and this aspect of the sub-claim fails.

Deficient performance

As to the alleged deficient performance of counsel, the Court notes, first, at trial numerous mental health experts testified for Defendant: Dr. Federici, a clinical neuropsychologist; Dr. Lanyon, a psychologist; Dr. Morenz, a psychiatrist; Dr. Cunningham, a psychologist; and Dr. Wu, a neuropsychiatrist. Additionally, the State called Dr. Kirkley and Dr. Waxman. Through the experts, Burns' counsel sought to establish:

> The bottom line is that with each of those experts on both sides, [that] the State retained and we retained, … every expert makes bottom-line findings that something is wrong with John, and that there has always been something wrong with John. And that

[19] *See*, counsel's questioning of Dr. Morenz on redirect ("Can an MRI – can there be a difference with a PET scan showing an abnormality and an MRI not – the MRI doesn't show some sort of growth or something like that" "Yes."). RT 1/16/2011 at 131-132.

> something wrong goes back to infancy and childhood. He's a damaged individual who, unfortunately, did not have the proper structure and care in his life early on to manage him. And that's why he is the individual who is sitting before you today about to be sentenced. It's not an excuse. But it explains why.

RT1/10/2011 at 55-56 (defense opening, mitigation phase).

Later, in his penalty phase closing (RT 2/15/2011 at 3- 57), counsel demonstrated familiarity with Defendant's background and the witness's testimony. Counsel argued to the jury that the mitigation evidence demonstrated that (1) the defendant has been a severely damaged individual since infancy, which counsel characterized as "parental malnutrition" (*Id*., at 9, 39); (2) Dr. Cunningham, as the premier expert regarding risk and protection factors, that appeared in the defendant's background; (3) head trauma suffered by the defendant: and (4) discussed the testimony of its experts, including Dr. Wu (*Id*., at 20-24); Dr. Cunningham (*Id.,* at 3-15, 25, 28, 30, 32, 37); Dr. Federici; Dr. Lanyon; and even the State's expert, Dr. Kirkley, as providing mitigation. In his second closing counsel focused on Defendant's background and the risk and protection factors cited by Dr. Cunningham. Id., at 93-107.

The Court likewise disagrees with Defendant's argument that failing to secure an *additional* MRI – as PCR counsel did, securing the 2017 MRI that was "within normal limits" as reported by Dr. Bigler – constituted deficient performance. The record reflects counsel sought to demonstrate Defendant's traumatic brain injury was traceable to a childhood injury and

impacted his behavior, including impulsivity. A normal MRI would not have advanced this theory; in fact, it could have served to undermine it.

To the extent that Defendant argues failing to secure Dr. Bigler's testimony about "how a skull fracture in infancy carries through the rest of the child's life" (Petition at 119-120) constituted prejudicial deficient performance, the Court also disagrees. The jury heard testimony from Dr. Wu that utilized a PET scan of Defendant's brain to visually identify TBI, discussed the defendant's symptoms and behaviors, including impaired impulse control, and linked the skull fracture and impulse control as consistent with TBI. Further, Dr. Cunningham testified about risk and protection factors in an individual's background that the jury could relate to Defendant's background. The decision about what witnesses to call is a strategic decision made by counsel:

> On the other hand, the power to decide questions of trial strategy and tactics rests with counsel, *Henry v. Mississippi,* 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965); *State v. Rodriguez,* 126 Ariz. 28, 612 P.2d 484 (1980), and the decision as to what witnesses to call is a tactical, strategic decision. *Vess v. Peyton, supra;* A.B.A. Standards § 4–5.2 commentary at 4.67. Tactical decisions require the skill, training, and experience of the advocate. A criminal defendant, generally inexperienced in the workings of the adversarial process, may be unaware of the redeeming or devastating effect a proffered witness can have on his or her case.

State v. Lee, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984).

Further, although counsel was faced with what he believed to be a short period of time in which to complete the investigation and prepare for mitigation "Burns was able to present twelve days' worth of mitigation that included much of the information he allege[d] he could not offer because of time constraints…" *State v. Burns*, 237 Ariz. 1, 12, ¶¶ 14-16, 344 P.3d 303, 314 (2015).

While counsel and their team did not have the luxury of the many additional months and years of careful investigation and evaluation that Defendant's team of post-conviction lawyers and experts have had in this case, counsel nevertheless, actively presented and challenged evidence on Defendant's behalf. *See Williams v. Head*, 185 F.3d 1223 (11th cir. 1999)("this squad of [PCR] attorneys has succeeded in proving the obvious: if [petitioner's trial counsel] had their [PCR counsel's] resources and the time they have been able to devote to the case, [trial counsel] could have done better").

Counsel presented 14 days of testimony and multiple lay and expert witnesses following his penalty phase opening that provided an overview and explained to the jury what he hoped to accomplish, with their assistance. (RT 1/10/2011) at 43-56 (defense penalty phase opening)). In fact, our supreme court determined "[t]he jurors did not abuse their discretion in determining that the mitigating evidence was *insufficient to warrant leniency*…" noting that "[d]uring the penalty phase, *Burns presented mitigation evidence regarding his difficult childhood, his dysfunctional family, his diagnosed learning*

disabilities, his impulsivity, the personality disorders from which he suffered, and whether he would be able to be safely housed in prison while serving a life sentence." *State v. Burns*, 237 Ariz. 1, 34, ¶¶ 169-171, 344 P.3d 303, 336 (2015).

Given the experts presented and the testimony elicited, and in light of the post-conviction MRI results,

THE COURT FINDS the IAC for failure to secure Dr. Bigler's report and testimony aspects of this claim are without merit and are not colorable. *See*, *State v. Pandeli*, 242 Ariz. 175, 183–84, ¶¶ 21-26, 394 P.3d 2, 10–11 (2017), *cert. denied,* 138 S. Ct. 645 (2018).

For the reasons stated above, including the lack of materiality/prejudice,

THE COURT FINDS the newly discovered evidence and IAC claims relating to the MRI study and Dr. Bigler are not colorable.

12. RELIGION AND ASPD

Defendant claims ineffective assistance of counsel for counsel's failure to request that the Court preclude references to his religion and to the anti-social personality disorder (ASPD). Defendant argues this was mitigation that the State "misused [as] nonstatutory aggravation, mitigation rebuttal or a reason not to show leniency." Petition at 120.

a. Preclusion

This claim (as to his religious beliefs) was raised and addressed on appeal (*Burns,* ¶¶ 127-135) and (as to ASPD) could have been specifically raised on appeal (*see Burns,* ¶¶ 97-98); it is therefore, in its entirety, precluded by Rule 32.2(a)(3). *State v. Towery,* 204

Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

b. Ineffective assistance

The Arizona Supreme Court found that the evidence of Defendant's religious beliefs and ASPD were properly admitted and permissible rebuttal, and the Court properly instructed the jury in the penalty phase. *Burns*, 237 Ariz. at 29, ¶¶132-135, 143-144. Further, the Court found the prosecutor did not commit misconduct by commenting on this evidence in the State's closing argument. *Id.* at 31, ¶ 149.

Anti-Social Personality Disorder

In connection with the IAC claim related to ASPD, the Court reviews the record and counsel's actions. The record reflects that Dr. Kirkley (the State's expert) diagnosed the defendant with ASPD and not bipolar disorder, and Dr. Kirkley found Dr. Federici's report from defendant's childhood, describing behaviors indicative of conduct disorder, of assistance in making her diagnosis. RT 2/8/2011 at 49-50; 57-62. In addition, Defendant's counsel acknowledged that all the defense experts agreed that the ASPD criteria were present:

> In this case, *defense experts will agree that the criteria for antisocial disorder are met*. The Psychopathy test goes to a subset of that. So, again, regardless of whatever findings may be on this test, it doesn't rebut what defense experts are going to testify to regarding the criteria in that area.

RT 9/15/2010 at 19.

Second, counsel's argument was proper and would not have been upheld had counsel argued to preclude a finding of ASPD. The State in its closing indicates that "Dr. Morenz agreed with Dr. Kirkley that this Defendant has antisocial personality disorder." RT 2/15/2011 at 80. The jurors were properly instructed that what the lawyers say in closing argument is not evidence, and that the law to be applied is set forth in the court's instructions. Final Jury Instructions – Penalty Phase (filed 2/14/2011) at 4. The State properly based its argument on testimony and inferences from the testimony of the State and the defense experts.

Third, counsel made the above statement in connection with efforts to mitigate the impact of the potentially adverse ASPD evidence. Counsel identified a particular diagnostic test he anticipated the State's expert would use in an attempt to identify ASPD; the test, the PCLR, was of concern to the defense. Counsel argued pretrial, and subsequently secured a concession from the State during the penalty phase that the test results would not be presented to the jury. RT 9/15/2010 at 19.

Counsel sought to preclude the State's expert from giving particular psychopathy test, the PCL-R, "because there may be collateral information obtained that can be taken as harmful…." RT 9/15/2010, at 19-22. This Court denied the requested limitation on the State's expert's testing, and deferred decision on admissibility to the scheduled motions hearing. Five months later, during the penalty phase, the issue was again addressed, when the parties advised the Court the admissibility question was "no longer an issue…." RT 2/7/2011, at 148 (Re Dr. Kirkley's PCLR testing).

Defendant now argues that the ASPD evidence was prejudicial and was used as an additional aggravating factor. A diagnosis of ASPD has been determined to be "not substantially prejudicial [as any] psychiatrist…would have ready the same psychological report and likely come to the same conclusion." *Davis v. Woodford*, 384 F.3d 628, 648-649 (9th Cir. 2004). In fact, ASPD evidence has been used affirmatively by the defense in other cases to argue " despite [defendant's] ASPD, he would do well in a prison setting that provided him with some structure…." *Davis v. Woodford*, 384 F.3d 628, 648-649 (9th Cir. 2004); *see also*, *Fairbank v. Ayers*, 650 F.3d 1243, 1254 (9th Cir. 2011).

Religion and beliefs

In connection with the IAC claim related to "religion and beliefs," the Court reviews the record and counsel's actions.

Initially, the Court notes that defendant argues, in addition to IAC related to this issue, that it was error to allow argument by the State invoking Defendant's religion. Petition at 123.

This claim was raised and addressed on appeal; it is therefore, precluded by Rule 32.2(a)(3). *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

While the "[a]dmission of religious information regarding witnesses may in certain circumstances constitute fundamental error [, but] if such information is probative of something other than veracity, it is not inadmissible simply because it may also involve a religious subject as well." S*tate v. Stone,*

151 Ariz. 455, 458, 728 P.2d 674, 677(App. Div.1 1986); *see* Ariz. R. Evid. 610.

Our Supreme Court, however, determined that certain evidence, including defendant's religious beliefs, was "directly relevant to rebut [the prison expert's testimony] suggesting that Burns was not a gang member and that he could be safely controlled in prison." *Burns,* at ¶ 132.

As with the ASPD evidence discussed above, counsel attempted to have evidence related to the defendant's religious beliefs precluded and/or to minimize the potentially adverse evidence. RT 2/8/2011 at 8-10 (admissibility of "die a warrior's death").

Counsel identified and secured agreement that certain other adverse evidence would not be presented via a motion to preclude. *See*, Defendant's Motion *in limine* regarding Trial Evidence and Testimony (filed 9/29/2010), at 3-4. The State conceded that it did not anticipate presenting the evidence in its case in chief, or related to "juvenile convictions"[20] until the penalty phase. M.E. dated 10/27/2010, at 2.

In addition, counsel identified, and again preserved for appeal, the evidence about the defendant's religious beliefs and racial views as one of the grounds in Defendant's Motion for New Trial (filed 3/10/2011), which the Court denied. Ruling, dated 4/14/2011.

Counsel also secured proper jury instructions. *See*, *Burns,* at ¶ 143-144; Preliminary Jury Instructions – Penalty Phase (filed 1/20/2011) at 5 and Final Jury Instructions – Penalty Phase (filed 2/14/2011) at 4

[20] The Court is unclear whether the phrase "juvenile convictions" should actually be "juvenile adjudications."

(defining mitigating circumstances); Preliminary Jury Instructions Penalty Phase (filed 1/10/2011) at 3 (State allowed rebuttal mitigation; it's not new aggravation); and Preliminary Jury Instructions Penalty Phase (filed 1/10/2011) at 3 and Final Jury Instructions Penalty Phase (filed 2/14/2011) at 2-3 (limited purpose evidence). Further, the Court instructed the jury, who are presumed to follow the court's instruction, that "[y]ou shall not consider rebuttal evidence as aggravation." Final Jury Instructions Penalty Phase (filed 2/14/2011) at 5.

Finally, Counsel sufficiently raised this issue – the admissibility of Defendant's religious beliefs (among other evidence) was proper rebuttal) at trial such that, when raised, it was addressed on appeal. *State v. Burns*, 237 Ariz. 1, 29, ¶¶ 132 - 135, 344 P.3d 303, 331 (2015).

For the reasons stated above,

THE COURT FINDS that the claims relating to the admission of evidence of Defendant's religion and religious beliefs and ASPD, and the related claims of IAC, are not colorable.

13. RELATING TO THE *SIMMONS* INSTRUCTION

Defendant claims trial counsel provided ineffective assistance by failing to secure a *Simmons* instruction and, alternatively, that "there has been a significant change in the law[;]" namely, *Lynch v. Arizona*, --- U.S. ---, 136 S.Ct. 1818 (2016), *State v. Escalante-Orozco*, 241 Ariz. 254 (2017; and *State v. Rushing*, 243 Ariz. 212 (2017), that should overturn the Defendant's sentence. Further, defendant claims if it was not IAC or "significant change in the law" it was constitutional error to deny trial counsel's request for a *Simmons*

instruction and the Arizona Supreme Court *decided the issue wrongly on appeal*. Defendant claims any or all of these arguments entitle him to a new penalty phase trial under Rule 32.1(a) and/or (g)." Petition at 128.

a. Preclusion

This claim was raised on appeal and our Supreme Court declined to revisit this – along with 31 other – previously rejected constitutional claims. *Burns*, 237 Ariz. at 35, fn. 8.344 P.3d at 337 (fn. 8 "Burns raises thirty-two additional constitutional claims that he acknowledges this Court has previously rejected but that he wishes to preserve for federal review. We decline to revisit these claims."); it is therefore, precluded by Rule 32.2(a)(3). *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996). Further, this claim could have been raised in a motion for reconsideration to the Supreme Court and as it was not, it has been waived pursuant to Rule 32.2(a)(3).

b. Rule 32.1(a)

In Lynch v. Arizona, the United States Supreme Court held "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 the 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*, 136 S.Ct. at 1818 (2016) (internal citations omitted) (quoting *Shafer v. South Carolina,* 532 U.S. 36, 39, 121 S.Ct. 1263 (2001) (quoting *Ramdass v. Angelone,* 530 U.S. 156, 165, 120 S.Ct. 2113 (2000) (plurality

opinion)). In addition, the Supreme Court, in *Simmons* (and its progeny), the decision on which *Lynch* relies, stated, "due process plainly requires that [defendant] be allowed to bring it to the jury's attention *by way of argument by defense counsel* or an instruction from the court. See *Gardner,* 430 U.S., at 362, 97 S.Ct., at 1206-1207." *Simmons v. South Carolina*, 512 U.S. 154, 168–69, 114 S. Ct. 2187, 2196 (1994). [Emphasis added].

The "possibility of release after 25 years" was mentioned in the preliminary aggravation instructions in December 2010 when providing an overview of the sentencing phases (the aggravation phase and the mitigation phase). The Court finds no indication that the reference was made during the preliminary or final penalty phase instructions. *See*, Jury Instructions, Preliminary Aggravation Phase (filed 12/20/2010) at 2.

The reference to "25 years" was discussed with jurors during *voir dire* three months earlier during jury selection in the fall of 2010. The trial judge sustained the State's objections when counsel stated that Defendant would spend the rest of his natural life in prison. Based on the "25 years" reference, defendant claims that he was entitled to a *Simmons*/*Lynch* instruction.

THE COURT FINDS that Defendant has not established a colorable claim that the State injected "future dangerousness" either as a logical inference from the evidence or by argument.

The State never directly asked the jurors to consider Defendant's future dangerousness. Rather than future dangerousness, the State argued that life in prison was not sufficient punishment:

> That's this, what does it matter? What does it matter? This Defendant has said on a couple of occasions that prison was like home to him. So they're telling you today that this is the worst punishment for him is to sentence him to life. Of course that doesn't say anything about what he did or the character of him. But that's the worst sentence that you could impose. Prison is home to him folks. He said that. It's home to me. If you look at these records he's able to engage in religious activities. At some point he may get to a medium security where he's going to be able to associate with other inmates with like views of his. He'll be at home. What kind of punishment is that? …

RT 2/15/2011 at 89. The State further pointed to Defendant's character and propensities, based on the ASPD characteristics/diagnosis:

> …But if you sentence him to life as he said it I'll be at home. You know I put this up here because it's something I found and I hope I'm not taking it out of context. Very few people see their actions as truly evil. I don't know whether this defendant sees what he did as being evil or not. Likely because of his antisocial disorder he doesn't. He doesn't care. He had to do something. It was necessary for him and he did it and that's all that matters to him....

RT 2/15/2011 at 90. Finally, the (F)(2) aggravating circumstance was found on the basis of "two prior burglary convictions [that] were non-violent offenses," and "… he was contemporaneously convicted of sexual assault and kidnapping. *Burns*, 237 Ariz. at 33, ¶ 168.

However, even where there is an argument that "future dangerousness" was an issue at sentencing, the Defendant was not entitled to a *Simmons/Lynch* instruction because the requirements of *Simmons*, 512 U.S. 154, 114 S. Ct. 2187 (1994); *See also, Shafer v. South Carolina,* 532 U.S. 36, 121 S.Ct. 1263 (2001) and *Ramdass v. Angelone,* 530 U.S. 156, 165, 120 S.Ct. 2113 (2000) (plurality opinion)), were met by Defendant's counsel's arguments to the jury during the penalty phase.

In closing argument to the jury, although the Court precluded such argument and sustained an objection to such argument on one occasion, defendant did on multiple occasions *"bring [defendant's parole ineligibility] to the jury's attention by way of argument by defense counsel." Lynch*, 136 S.Ct. at 1818 (2016) (internal citations omitted) (quoting *Shafer v. South Carolina,* 532 U.S. at 39, (quoting *Ramdass v. Angelone,* 530 U.S. at 165 (plurality opinion)). *See also*, *Simmons*, 512 U.S. at 168–69. [Emphasis added].

In his initial closing argument, in the penalty/mitigation phase, defense counsel argued,

> And finally, there's a notion – in the instructions they refer to leniency. That means a life sentence. …A life sentence is very harsh punishment and in this case based on your verdict and based on what John Burns faces if you want to impose the most harsh punishment you can on John it's a life sentence. That the most severe way he could be punished here. ***The community will be protected. John's never getting out. He's not getting out he will get a natural life sentence.***

RT 2/15/2011 at 54. Later, in his final rebuttal closing argument to the jury (immediately before the jury adjourned to begin its deliberations), without objection or admonition from the Court, defense counsel again argued,

> And, three, the most severe punishment you can give John is a life sentence based on all of the evidence it is. And he will be severely punished ***for every minute of every hour of every day for the rest of his life.*** …the most appropriate sentence that will most severely punish John for what you've convicted him of and ***that will also protect the community because John will never be among the community again and a life sentence does that. A life sentence insures that.***

RT 2/15/2011 at 106-107. As noted above, the Court did sustain an objection to the earlier of the two instances of defense counsel's argument that "John's never getting out he will get a natural life sentence." However, defense counsel's final words to the jury prior to their deliberations on penalty were "John will never be among the community again and. … A life sentence insures that[,]" without objection.

Therefore, even where the State's evidence and argument to rebut defendant's mitigation argument that Burns would not pose a danger in the prison system and could be effectively and safely housed there, and that Burns was not a gang member and could safely be controlled in prison, (*See*, *Burns*, 237 Ariz. at 28-29, ¶¶ 137-135), can be seen as a fleeting argument of or implied presentation of "future dangerousness,"

THE COURT FINDS that the defendant's claim he was entitled to a *Simmons/Lynch* instruction is not colorable because the requirements of *Simmons, Schafer*, and *Lynch* were met by defense counsel "*bring[ing] [defendant's parole ineligibility] to the jury's attention by way of argument*." *Lynch*, --- U.S. ---, 136 S.Ct. 1818 (2016).

c. Rule 32.1(g)

Even were "future dangerousness' an issue at the sentencing phase, this Court finds that *Lynch* is not retroactive. Defendant's conviction became final in 2015,[21] a year before *Lynch* was decided in 2016. As a result, *Lynch* is not applicable to this case. In *O'Dell v. Netherland,* 521 U.S. 151, 167, 117 S.Ct. 1969, 1978 (1997), the United States Supreme Court held that the rule announced in *Simmons v. South Carolina* is not a "watershed rule of criminal procedure," but rather a procedural, non-retroactive rule. *O'Dell,* 521 U.S. at 167-68.

Lynch did not expressly resolve whether its holding was procedural, or whether its holding was substantive and was to be applied retroactively. Arizona courts have adopted and follow federal retroactivity analyses. *State v. Towery,* 204 Ariz. 386, 389, 64 P.3d. 828, 831 (2003) (citing *Slemmer*, 170 Ariz. at 181-82).

Lynch v. Arizona, simply applies the rule announced in *Simmons v. South Carolina*, and so, is neither a "well-established constitutional principle" nor a "watershed rule of criminal procedure," but is a procedural, non-retroactive rule. The Court finds that

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[21] *State v. Burns*, 237 Ariz. 1, 344 P.3d 303 (2015).

Lynch III does not apply retroactively to Defendant's case nor is it a "change in the law" under Rule 32.1(g), applicable to Defendant.

Further, the Court instructed the jury on several occasions during the mitigation penalty phase about the jury's responsibility to sentence the defendant either to life or to death (with no mention of "25 years, parole, or release), including –

> Ladies and Gentlemen: At this phase of the sentencing hearing, you will determine *whether the Defendant will be sentenced to life imprisonment or death*.

Preliminary Jury Instructions Penalty Phase (filed 1/10/2011) at 1. [Emphasis added]

> If you unanimously agree there is mitigation sufficiently substantial to call for leniency, then you shall return a verdict of life. If you unanimously agree there is no mitigation, or the mitigation is not sufficiently substantial to call for leniency, then you shall return a verdict of death.
>
> Your decision is not a recommendation. Your decision is binding. *If you unanimously find that the Defendant should be sentenced to life imprisonment, your foreperson shall sign the verdict form indicating your decision*. If you unanimously find that the defendant should be sentenced to death, your foreperson shall sign the verdict form indicating your decision. If you cannot unanimously agree on the appropriate sentence, your foreperson shall tell the judge.

Preliminary Jury Instructions Penalty Phase (filed 1/10/2011) at 7; Final Jury Instructions Penalty Phase (filed 2/15/2011) at 7.

The Court instructed the jury to consider mitigation in making the decision between life and death. In the mitigation penalty phase instruction, the Court told the jury, after defining what mitigating circumstances are, that

> ** ** **
>
> Mitigating circumstances may be offered by the Defendant or State or be apparent from the evidence presented at any phase.… You are not required to find that there is a connection between a mitigating circumstance and the crime committed in order to consider the mitigation evidence. Any connection or lack of connection may impact the quality and strength of the mitigation evidence. You must disregard any jury instruction given to you at any other phase of this trial that conflicts with this principle.
>
> The fact that the Defendant has been convicted of first-degree murder is unrelated to the existence of mitigating circumstances.…

Preliminary Jury Instructions Penalty Phase (filed 1/10/2011) at 5; Final Penalty Phase at 4-5.

Finally, for reasons set forth in the IAC/trial discussion below,

THE COURT FINDS that the trial court's failure to address the life/natural life distinction did not impact the jury's determination to impose death.

d. Ineffective Assistance of Counsel

Counsels' performance is evaluated at the time of trial and not in hindsight. At the time of Defendant's 2010/11 trial and his appeal decided in 2015, long-established Arizona precedent held that Arizona defendants were not entitled to parole unavailability instructions. *State v. Chappell*, 225 Ariz. 229, 240, ¶43 (2010); *State v. Garcia*, 224 Ariz. 1, 18, ¶¶ 76–77 (2010); *State v. Hargrave*, 225 Ariz. 1, 14, ¶¶ 52–53 (2010); *State v. Cruz*, 218 Ariz. 149, 160, ¶¶ 41–42 (2008). Accordingly, any request for a *Simmons* instruction would have failed, and counsel was not ineffective for failing to make a futile request. *See State v. Pandeli*, 242 Ariz. 175, __, 394 P.3d 2, 12, ¶ 33 (2017) ("Counsel's failure to make a futile motion does not constitute ineffective assistance of counsel.") (quoting *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994)).

Further, neither the United States Supreme Court's subsequent decision in *Lynch,* holding that Arizona defendants are entitled to instructions under *Simmons*, nor the Arizona Supreme Court's decisions in *State v. Escalante-Orozco* (241 Ariz. 254, 386 P.3d 798 (2017); *State v. Hulsey,* 243 Ariz. 367, 408 P.3d 408 (2018); and *State v. Rushing*, 243 Ariz. 212, 404 P.3d 240 (2017), *cert. denied,* 17-1449, 2018 WL 1876897 (U.S. Oct. 1, 2018), retroactively render counsel's performance ineffective. *See Strickland v. Washington,* 466 U.S. 668, 690 (1984) (evaluation of counsel's acts or omissions are judged as of the time counsel was required to act). Counsel's failure to predict *Lynch's* change to then-established Arizona Supreme Court law was not objectively unreasonable. *See Lowry v. Lewis,* 21 F.3d 344, 346 (9th Cir. 1994) (finding counsel was not ineffective because a "lawyer

cannot be required to anticipate our decision" in a later case); *Bullock v. Carver,* 297 F.3d 1036, 1052 (10th Cir. 2002) (rejecting ineffective assistance claim based upon counsel's failure to predict future changes in the law and stating that "clairvoyance is not a required attribute of effective representation"); *Brown v. United States,* 311 F.3d 875 (8th Cir. 2002) (finding no ineffective assistance of counsel for counsel's failure to raise *Apprendi*-type issue prior to that decision because such issue was "unsupported by then-existing precedent …").

For the same reasons, appellate counsel was not ineffective for failing to challenge the lack of a parole ineligibility instruction. Any such challenge would have been rejected under then-existing Arizona Supreme Court precedent and appellate counsel was not ineffective for failing to foresee *Lynch's* future change in the law, even though the claim was preserved by trial counsel.

Finally, Defendant cannot establish prejudice. As previously discussed, trial counsels' failure to secure a *Simmons* instruction or challenge its omission on appeal cannot have prejudiced Defendant because any such effort would have been futile under Arizona Supreme Court precedent. Further, as explained above, there is no reasonable probability that a jury instruction on parole unavailability would have resulted in a life sentence given (1) the lack of suggestion of future dangerousness; (2) that defendant "inform[ed] the jury of [defendant's] parole ineligibility, …in arguments by counsel[,]" (*Lynch*, --- U.S. ---, 136 S.Ct. at 1188) (3) the lack of any emphasis on the possibility of "25 years" or evidence of acceptance of responsibility for the murder; and (4)

the extraordinary weight of the (F)(6) aggravating circumstance when evaluated in connection with the mitigation. *Burns*, 237 Ariz. at 34, ¶ 169-170.

Further, the Court finds no colorable claim that the jury's unanimous determination to return a verdict for the death penalty was impacted by the variance between "natural life" and "life". On automatic appeal, the Arizona Supreme Court upheld the jury's finding that death was the appropriate sentence finding, "[e]ven if we assume that Burns proved all his proffered mitigating factors, we cannot say the jurors abused their discretion in concluding that the mitigation did not warrant leniency." 237 Ariz. at 33–34, ¶¶ 162-170 [quoted language specifically at ¶ 170].

This Court may not overrule, modify or disregard the Supreme Court's conclusion on abuse of discretion review that the defendant's mitigation evidence was not sufficiently substantial to call for leniency. *See, State v. Sullivan*, 205 Ariz. 285, 288, 69 P.3d 1006 (App. 2003); *Bade v. Arizona Dept. of Transp.*, 150 Ariz. 203, 205, 722 P.2d 371 (App. 1986)(lower court has no authority to overrule or disregard express ruling of Arizona Supreme Court).

Deficient performance

In fact, Counsel attempted to avoid the "parole or release" instruction. Defendant moved the Court for an order that the jury not be instructed that if he received a life sentence then "he may receive a sentence that allows him to be paroled or released after serving 25 years in prison." Defendant's Objection to Jurors Being Instructed that Defendant is Eligible for Parole or Release (filed 9/29/2010). In oral argument on the motion, counsel argued 'life means life.' RT 10/26/2010, at 25-33. The State cited,

and the Court ruled it was bound by, existing precedent in *State v. Cruz, 218 Ariz. 149, 160, ¶¶ 41–42 (2008). See also, State v. Chappell, 225 Ariz. 229, 240, ¶43 (2010); State v. Garcia, 224 Ariz. 1, 18, ¶¶ 76–77 (2010); State v. Hargrave, 225 Ariz. 1, 14, ¶¶ 52–53 (2010)*.

Additionally, trial counsel attempted to preserve the issue for appellate review in his aforementioned motion, oral argument, and inquiry with the Court regarding which objections were sustained. Further, counsel identified the "25 year to life" jury instruction as one of the grounds in Defendant's Motion for New Trial (filed 3/10/2011), which the Court denied. Ruling, dated 4/14/2011.

Appellate counsel did present this issue on appeal, recognizing that existing precedent held otherwise. Petition Exhibit 15, at 145. Our Supreme Court declined to revisit this previously-rejected claim. *State v. Burns*, 237 Ariz. at 35, fn. 8.344 P.3d at 337 (fn. 8 "Burns raises thirty-two additional constitutional claims that he acknowledges this Court has previously rejected but that he wishes to preserve for federal review. We decline to revisit these claims.").

Therefore, given that efforts of trial counsel and the then-existing precedent, trial counsel's failure to secure a *Simmons* instruction or successfully challenge the instruction given at trial or on appeal cannot have demonstrated a colorable claim because any such effort would have been futile under Arizona Supreme Court precedent. *See State v. Pandeli*, 242 Ariz. 175, __, 394 P.3d 2, 12, ¶ 33 (2017) ("Counsel's failure to make a futile motion does not constitute ineffective assistance of counsel.") (quoting *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994)).

Prejudice

Finally, defendant cannot show prejudice. There is no reasonable probability that a jury instruction on parole unavailability would probably have resulted in a life sentence by the jury, given the minimal, if any, suggestion of future dangerousness, that defendant "inform[ed] the jury of [defendant's] parole ineligibility, ...in arguments by counsel[,]"(*Lynch*, --- U.S. ---, 136 S.Ct. at 1188), the lack of any reference to parole-eligibility or evidence of acceptance of responsibility for the murders, evaluated in connection with the extraordinary weight of the aggravating circumstances surrounding the five murders Defendant committed. *See*, *Burns*, 237 Ariz. 33-34, ¶¶ 163-170.

For the reasons stated above, including counsel's recognition of the potential issue and concerted efforts to preserve the issue for review, and the then-existing precedent,

THE COURT FINDS the claims relating to the *Simmons*/*Lynch* instruction are not colorable.

14. RELATING TO THE IMPASSE

Defendant claims the Court committed error when it gave the impasse instruction to the jurors and sent them to deliberate further rather than declaring a hung jury prior to a weekend break, and that newly discovered evidence (the affidavit of a juror) and ineffective assistance of trial counsel, by failing to request a mistrial, require post-conviction relief. Petition at 142; *see,* RT 2/24/2011, at 2.

a. Preclusion

This claim was raised and denied on appeal (as jury coercion) (*Burns,* 237 Ariz. at 32-33, ¶¶ 158-162);

therefore, it is precluded by Rule 32.2(a)(3). *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

b. Jury Coercion

Contrary to defendant's claims the Court did not coerce a verdict and did not fail to accept the jurors' verdicts or insist the jury continue without informing them of the potential outcome in the instance of a hung jury. Our Supreme Court concluded,

> [T]he trial court did not coerce a verdict. After it began deliberations anew, the reconstituted jury had deliberated for only one and one half days when it advised the court it was deadlocked. The court gave the impasse instruction after which the jury continued to deliberate. When the jury had not reached a decision by the weekend break, the judge asked if continuing deliberations after the weekend might help. Some jurors thought that taking a break and having the jury reconvene would be helpful.
>
> The court never forced the jury to come to a consensus. The judge never knew how near the jury was to reaching a unanimous verdict or whether they were leaning toward a life or death verdict. The trial judge also did not know who the holdout juror or jurors were and did nothing to get the holdouts to change their votes. We find no coercion.

State v. Burns, 237 Ariz. 1, 33, ¶¶ 161-162, 344 P.3d 303, 35 (2015).

c. IAC Claim

Defendant argues IAC based on counsel's failure to request a mistrial. Counsel did, in fact, recognize the issue and request a mistrial, (RT 2/24/2011, at 12 ("…I believe that Court should declare a mistrial at this point and discharge these jurors, because of what's gone on this afternoon.…)); the Court properly denied the mistrial motion. *Id*. In addition, counsel identified the "denial of an impasse" as one of the grounds in Defendant's Motion for New Trial (filed 3/10/2011), which the Court denied. Ruling dated 4/14/2011. Thus, counsel did not perform deficiently and Defendant's IAC claim is not colorable.

Further, as discussed above, our Supreme Court upheld the Court's actions finding no coercion by the trial court; therefore, the prejudice prong is not colorable.

d. Rule 32.1(e), Newly Discovered Evidence

The Court determines the viability of the Rule 32.1(e) newly discovered facts claim is contingent on the court's ability to consider, and the admissibility of, the proffered juror affidavit as "newly discovered evidence." The Court's consideration of juror testimony follows a long followed general rule, known as Lord Mansfield's Rule, that "a juror's testimony is not admissible to impeach the verdict." *State v. Acuna Valenzuela*, -- Ariz. --, 426 P.3d 1176 (2018), *citing State v. Nelson*, 229 Ariz. 180, 191 ¶ 48, 273 P.3d 632 (2012) (quoting *State v. Dickens*, 187 Ariz. 1, 15, 926 P.2d 468 (1996), abrogated on other grounds by *State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012)).

Lord Mansfield's Rule has further been clarified in Arizona in our Criminal Rules of Procedure. Rule

24.1(d), serves "to protect the process of frank and conscientious jury deliberations and the finality of jury verdicts." *State v. Acuna Valenzuela*, 245 Ariz. 197, ¶59, 426 P.3d 1176, 1194 (2018), *citing State v. Nelson*, 229 Ariz. 180, 191 ¶ 48, 273 P.3d 632 (2012) (quoting *State v. Poland*, 132 Ariz. 269, 282, 645 P.2d 784 (1982)); *see also* Ariz. R. Crim. P. 24.1(d) (providing that "the court may receive the testimony or affidavit of any witness, including members of the jury, that relates to the conduct of a juror, a court official, or a third person," but that "the court may not receive testimony or an affidavit that relates to the subjective motives or mental processes leading a juror to agree or disagree with the verdict").

Our Supreme Court continued its analysis in *State v. Acuna Valenzuela*, 245 Ariz. 197, 426 P.3d 1176 (2018), which this Court is bound to follow, stating,

> **If a verdict could be impeached based on a juror's mental process at the time of deliberation, "no verdict would be safe."** *Nelson*, 229 Ariz. at 191 ¶ 49, 273 P.3d 632.
>
> ¶ 61 Statements by jurors about their own or another's subjective feelings, developed during trial, are not competent evidence to impeach a verdict. *State v. Cruz*, 218 Ariz. 149, 159 ¶ 33, 181 P.3d 196 (2008); *Dickens*, 187 Ariz. at 16, 926 P.2d 468. In *Cruz*, a juror, who disclosed in voir dire that her husband was a policeman, gave a statement to the press following the penalty phase verdict that if the sentence "deters a criminal and saves a peace officer's life in the future, then the message we sent in our decision is positive. The message is, 'It is not OK to take a peace officer's life.' " 218 Ariz.

> at 159 ¶ 32, 181 P.3d 196. This Court declined to consider such evidence in considering whether the trial court properly denied a motion to strike the juror, stating that, "[s]ubject to only a few exceptions, a juror's out of court statement is not admissible to contradict the verdict." *Id.* ¶ 33.
>
> ¶ 62 **A defendant may be entitled to a new trial only if a juror conceals facts pertaining to his qualifications or bias on proper inquiry during voir dire.** *Wilson v. Wiggins*, 54 Ariz. 240, 243, 94 P.2d 870 (1939).

State v. Acuna Valenzuela, 245 Ariz. 197, ¶¶60-62 426 P.3d 1176, 1194 (2018). [Emphasis added]

Rule 24.1(d) permits juror affidavits in connection with allegations of juror misconduct. The juror's affidavit (Exhibit 19) provides no allegations of misconduct and merely speculates about the possible misuse of social media ("one or more jurors *may have abused*…social media"). *See*, *State v. Acuna Valenzuela*, 245 Ariz. at ¶ 62. The Court finds that a statement about what individual jurors "might have done" is speculative. Mere speculation is not competent evidence:

> The slightest *evidence*—not merely an inference making an argument possible—is required because speculation cannot substitute for evidence. *Cf. In re Harber's Estate,* 102 Ariz. 285, 294, 428 P.2d 662, 671 (1967); *State v. Almaguer,* 232 Ariz. 190, ¶ 19, 303 P.3d 84, 91 (App.2013).

State v. Vassell, 238 Ariz. 281, 284, ¶ 9, 359 P.3d 1025, 1028 (App. 2015).

Defendant has provided no competent evidence related to juror misconduct, and has not alleged juror misconduct in his post-conviction petition.

Rule 24.1(d) specifically prohibits "…the court [from receiving] testimony of an affidavit that relates to the subjective motives or mental processes leading a juror to agree or disagree with the verdict. The Rule is supported by public policy considerations. *See Richtmyre v. State*, 175 Ariz. 489, 492–93, 858 P.2d 322, 325–26 (App. 1993), a civil case, that cites *Shillcutt v. Gagnon*, 827 F.2d 1155 (7th Cir. 1987) ("Exclusion of juror testimony fosters the important public policies of discouraging post-verdict harassment of jurors, encouraging open discussion among jurors, reducing incentives for jury tampering, and maintaining the jury as a viable decision-making body.").

In the proffered declaration, the juror provides information including that the juror and others "resisted the death penalty option until the very last minute;" felt a "subtle influence" toward the death penalty; observed a juror who was later dismissed "writing extensively;" recalls the jurors being questioned individually; feels the events were intimidating and led to his "accepting" the death verdict; and felt that "one or more individuals may have abused…social media while participating in the trial." Petition Exhibit 19 (Juror Declaration).

The Court finds that the juror affidavit tendered at Exhibit 19 impermissibly relates to the jury's deliberative process and violates the prohibition of Rule 24.1(d), Arizona Rules of Criminal Procedure, which limits the Court's consideration of juror affidavits to the very limited circumstances

enumerated in the Rule. *See*, Rule 24.1, Arizona Rules of Criminal Procedure.

THE COURT FINDS that Defendant's challenge to the penalty verdict reached by the jury calls into question, and is an attempt to impeach, the sentencing verdict.

THE COURT FURTHER FINDS that the juror statements presented by Defendant impermissibly implicate the subjective motives or thought processes which led – or might have led – a juror to assent or dissent from the verdict.

THE COURT FURTHER FINDS that a juror's consideration of the circumstances surrounding his reasons for joining a verdict necessarily implicates the deliberative processes, which is contrary to the Rule. Rule 24.1, Ariz. R. Crim. P; *see, United States v. Montes*, 628 F.3d 1183, 1188 (9th Cir. 2011) (recognizing that "[j]urors…may not be questioned about their deliberative process or the subjective effects of extraneous information.").

THE COURT FURTHER FINDS the Defendant made no allegations of juror misconduct.

Based on all of the above,

IT IS THEREFORE ORDERED striking the juror statement (Petition Exhibit 19) as not relevant to the claims raised by the Defendant in this the post-conviction proceedings.

As to the post-conviction claim, for the reasons stated above, including the lack of coercion as found by our Supreme Court on appeal,

THE COURT FINDS that all claims relating to the "impasse claim" are not colorable.

15. RELATING TO THE MITIGATION INVESTIGATION

Defendant alleges that "previously undiscovered mitigation in the form of [two out-of-country pen pals[22]]" and the fact that "the Arizona Department of Corrections has *recently* reclassified …and transferred him to the Central Unit from the Maximum Security …Unit" constitute newly discovered facts under Rule 32.1(e)." Petition at 150.

Under Rule 32.1(e), the evidence must have been in existence at the time of trial, but not discovered until after trial. *State v. Sanchez*, 200 Ariz. 163, ¶11, 24 P. 3d 610 (App. 2001). "For it to be considered newly discovered, evidence 'must truly be newly discovered, i.e., discovered after the trial.'" *Saenz*, 197 Ariz. at 491 (quoting *State v. Jeffers*, 135 Ariz. 404, 426, 661 P. 2d 1105, 1127 (1983)).

It appears Defendant was tried, convicted and sentenced before securing either of the two pen pals or before being transferred to Central Unit; therefore,

THE COURT FINDS that the evidence was not in existence at the time of trial and does not qualify as newly-discovered evidence under Rule 32.1(e). It appears defendant anticipated this finding by the Court, arguing:

> The declarations of Ms. Cooper and Ms. Murray are new, and while they may not meet the test for newly discovered evidence under Rule 32.1(e), they should be—along with Mr. Burns'

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[22] *See* Petition Exhibits 121 (corresponding through Death Row Support Project; Defendant sentenced to death/Death Row on 2/28/2011) and 122 (corresponding for 5 years as of 10/2017, or since 2012). Defendant was tried, convicted and sentenced before either event.

> recent placement to Central Unit—considered as grounds for relief under Rule 32.1(a) as Mr. Burns' sentence is in violation of the Sixth, Eighth, and Fourteenth Amendments.

Petition at 150.

In lieu of a valid claim under Rule 32.1(e), Defendant requests that the Court find constitutional error, arguing that the Defendant was;

> …constitutionally entitled to an opportunity to be heard, to effectively present evidence central to his defense, to call-witnesses to testify, to rebut evidence presented by the prosecution and present mitigation pursuant to the Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

Petition at 150-151. The Court agrees that a defendant is afforded each of the enumerated rights. Defendant himself was afforded the opportunity to be heard (He made a statement of allocution.[23]); he presented evidence, called witnesses, cross-examined and rebutted the State's witnesses and evidence, and presented mitigation that was then-in-existence.

THE COURT FINDS that Defendant was afforded each of these rights as to then-available mitigation, which was presented for the jury's consideration and evaluation. The jury's sentence of that death was reviewed and upheld on appeal.

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[23] RT 2/14/2011, at 102-103 (in his allocution statement, Defendant appears to have accepted limited responsibility and expressed what appears to have been remorse, effectively saying "I am responsible.…I'm sorry.").

Further even were Rule 32.1(e) applicable and had the pen pal and DOC transfer evidence been available to present at sentencing, the jury likely would have given little weight, if any, to such evidence because the pen pals knew him only by his writing and both their contacts with Defendant and the DOC decision occurred post-incarceration, and prisoners are expected to behave. *See*, *State v. Harrod ("Harrod III")*, 218 Ariz. 268, ¶62, 183 P.3d. 519 (2008) ("Excellent behavior while incarcerated was not a mitigating circumstance because inmates are expected to behave well in prison.").

Thus, the pen pal and DOC transfer evidence probably would not have changed the verdict or sentence.

For the reasons stated above,

THE COURT FINDS that defendant's claim relating to "new" evidence obtained during his continuing mitigation investigation is not colorable.

16. RELATING TO *HURST V. FLORIDA*

Defendant argues that the decision in *Hurst v. Florida* requires that a jury be instructed "that their finding [that the mitigating circumstances were insufficient to warrant leniency] had to be beyond a reasonable doubt." Petition at 152; 154. On appeal Defendant alleged,

> Arizona's death penalty scheme violates Appellant's rights under the Eighth and Fourteenth Amendments by not requiring that once a defendant proves mitigating circumstances exist that the State prove beyond a reasonable doubt that the mitigation is not sufficiently substantial to call for

> leniency and that death is the appropriate sentence. *Dann III,* 220 Ariz. 351, ¶¶ 94-95.

Petition Exhibit 15, at 146.

a. Preclusion

In its opinion, our Supreme Court declined to revisit this previously-rejected claim. *State v. Burns*, 237 Ariz. at 35, fn. 8.344 P.3d at 337 (fn. 8 "Burns raises thirty-two additional constitutional claims that he acknowledges this Court has previously rejected but that he wishes to preserve for federal review. We decline to revisit these claims.").

Because this claim was raised on appeal, it is therefore precluded by Rule 32.2(a)(3). *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996). Further, this claim could have been raised in a motion for reconsideration to the Supreme Court and as it was not; therefore, it has been waived pursuant to Rule 32.2(a)(3).

Moreover, this Court may not overrule, modify or disregard the Supreme Court's conclusion that *Dann III* forecloses the argument. *See, State v. Sullivan*, 205 Ariz. 285, 288, 69 P.3d 1006 (App. 2003); *Bade v. Arizona Dept. of Transp.*, 150 Ariz. 203, 205, 722 P.2d 371 (App. 1986) (lower court has no authority to overrule or disregard express ruling of Arizona Supreme Court).

Additionally, on appeal Defendant claimed,

> [t]he failure to instruct the jury that the State bore the burden of proving its rebuttal to mitigation evidence beyond a reasonable doubt violated Appellant's rights under the Sixth,

> Eight and Fourteenth Amendments. *Roque,* 213 Ariz. at 225-26, ¶¶138-140.

Petition Exhibit 15, at 145.

As it did with the substantive aspect of defendant's *Hurst v. Florida* claim, our Supreme Court declined to revisit this previously-rejected claim in its opinion on direct appeal. *State v. Burns*, 237 Ariz. at 35, fn. 8.344 P.3d at 337 (fn. 8 "Burns raises thirty-two additional constitutional claims that he acknowledges this Court has previously rejected but that he wishes to preserve for federal review. We decline to revisit these claims.").

Because this claim was raised and rejected on appeal, it is therefore precluded by Rule 32.2(a)(3). *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996). Further, this claim also could have been raised in a motion for reconsideration to the Supreme Court, and as it was not, it has been waived pursuant to Rule 32.2(a)(3).

Defendant further argues that *Hurst v. Florida*, gives rise to claims under Rules 32.1(a), (g), due process, and fundamental fairness that afford him relief and require that mitigation be found beyond a reasonable doubt, and the Court alternatively, addresses the merits of defendant's claim(s).

In *Hurst v. Florida*, the U.S. Supreme Court held that Florida's sentencing scheme, which required that a judge hold a hearing to review a jury's finding of death as the appropriate sentence, was unconstitutional. "A jury's mere recommendation is not enough" to meet the Sixth Amendment

requirement that "…a jury, not a judge, … find each fact [the existence of aggravating circumstances (*Id.,* at 624)] necessary to impose a sentence of death." *Id.*, 136 S. Ct. at 619.[24]

As to his *Hurst* claim, Defendant identifies the applicable exception to preclusion as Rule 32.1(g). To obtain relief under Rule 32.1(g), the defendant is required to show "[t]here has been a significant change in law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence."

Hurst v. Florida applied *Ring v. Arizona* to a capital sentencing in Florida, and may constitute a "significant change in the law" under *Florida* law. The Court, however, finds that *Hurst* is not a significant change or "transformative event" as to Arizona law, as Arizona implemented the strictures of *Ring v. Arizona,* 536 U.S. 584 (2002) (jury must determine aggravating factors that determine death-eligibility) years ago.[25]

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[24] "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016); *see also*, *Hurst v. Florida*, 136 S. Ct. 616, 621–22, (2016).

[25] The Supreme Court held that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). *Padilla v. Kentucky* also was determined to apply a new procedural rule and was held not to be retroactive. *Chaidez v. United States*, 568 U.S. --, (2013).

Moreover, *Hurst* is neither a significant change in the law under Rule 32.1(g), and even if it were, *Hurst* does not apply retroactively. The Supreme Court has held that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). *Hurst*, which applies *Ring* in Florida, is also non-retroactive.

Further, Defendant claims that *Hurst* "…stands for the proposition that the weighing of aggravating and mitigating circumstances *is a factual finding* that must be made beyond a reasonable doubt by a jury." Petition at 17. Defendant also argues that *Hurst* mandates that the penalty-phase finding of the appropriate sentence must be made beyond a reasonable doubt.

Neither is how the Court reads *Hurst*.

Taking the second argument first, the *Hurst* court mentioned "reasonable doubt" only once, in connection with the Due Process Clause's requirement that each element of a crime be proved to a jury beyond a reasonable doubt." *Id*., 136 S.Ct. at 621.

Second, rather than imposing – or even addressing – the burden of proof at the mitigation phase, the *Hurst* court focused on the respective roles of the judge and the jury *at the aggravation phase*, concluding that *Apprendi* [26] and *Alleyne* [27] required that a jury find the fact of an aggravating factor

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[26] *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (Fact increasing penalty beyond statutory maximum must be determined by jury beyond reasonable doubt).

[27] *Alleyne v. United States,* 570 U.S. 99 (2013) (Fact increasing minimum mandatory sentence is 'element" for jury).

(rather than, as Florida's statute provided, that the jury render what amounted to an advisory opinion for a judge to reconsider – and either approve or disapprove – the jury's determination of the relative merits of aggravating factor/mitigating factors):

> The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base [defendant's] death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

Hurst v. Florida, 136 S. Ct. 616, 624 (2016).

Arizona's capital sentencing scheme requires the jury (the "trier of fact") to find at least one aggravating factor beyond a reasonable doubt. A.R.S. §§ 13-751(B), 13-752(E). This comports with *Hurst.* And our Supreme Court has held as to mitigating factors:

> We therefore now clarify that the determination whether mitigation is sufficiently substantial to warrant leniency is not a fact question to be decided based on the weight of the evidence, but rather is a sentencing decision to be made by each juror based upon the juror's assessment of the quality and significance of the mitigating evidence that the juror has found to exist…

State ex rel. Thomas v. Granville, 211 Ariz. 468, 473, ¶ 21, 123 P.3d 662, 667 (2005).[28] Whether to impose

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[28] The full ¶21 in *State ex rel Thomas v. Granville*, stated:

> We therefore now clarify that the determination whether mitigation is sufficiently substantial to

the death penalty is less a question of fact to be proven beyond a reasonable doubt – or by any other standard – than it is "a discretionary, 'reasoned moral response to mitigation evidence.'" *State v. Martinez*, 218 Ariz. 421, 432, ¶ 51 (2008) (quoting *Penry v. Lynaugh,* 492 U.S. 302, 328 (1989)." Response, at 13.

Arizona's statutory death penalty scheme accomplishes just that, a jury tasked with finding any and all aggravating factors beyond a reasonable doubt, and then to consider Defendant's individual situation in imposing the appropriate sentence, by considering mitigating factors that have been proven by a preponderance of evidence. Unlike "facts

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> warrant leniency is not a fact question to be decided based on the weight of the evidence, but rather is a sentencing decision to be made by each juror based upon the juror's assessment of the quality and significance of the mitigating evidence that the juror has found to exist. We conclude that the use of "outweighing" language in jury instructions explaining the evaluation of mitigating circumstances, while technically correct, might confuse or mislead jurors. We thus discourage the use of instructions that inform jurors that they must find that mitigating circumstances outweigh aggravating factors before they can impose a sentence other than death. Instead, jury instructions should focus on the statutory requirement that a juror may not vote to impose the death penalty unless he or she finds, in the juror's individual opinion, that "there are no mitigating circumstances sufficiently substantial to call for leniency." A.R.S. § 13–703(E). In other words, each juror must determine whether, in that juror's individual assessment, the mitigation is of such quality or value that it warrants leniency.

State ex rel. Thomas v. Granville, 211 Ariz. 468, 473, ¶ 21, 123 P.3d 662, 667 (2005).

underlying a finding of guilt" or "facts in support of aggravation" which are either proven unanimously or not, the existence of mitigating factors is determined by each juror, individually. Defendant confuses eligibility factors, to be proven beyond a reasonable doubt, with sentencing considerations presented by a defendant in mitigation, and proven by the lesser "preponderance of the evidence" standard – which are then again evaluated, individually, to ascertain whether a sentence less than death is appropriate as to a particular defendant.

Defendant claims that *Hurst* requires the state to prove, and the jury to find, beyond a reasonable doubt, that the mitigation is not sufficient to outweigh the aggravation. 136 S. Ct. at 622. However, as the U.S. Supreme Court made clear in *Hurst*, its decision in *Ring* required that the jury make a finding and not a recommendation in connection with the existence of aggravating factors.

As it has since *Ring*, an Arizona jury determines the existence of aggravating factors, as it does the elements of a crime, beyond a reasonable doubt; the jury then considers mitigation and determines whether the mitigation is sufficiently substantial to warrant leniency. *Hurst* neither addressed nor imposed the "beyond a reasonable doubt" burden of proof at the mitigation phase.

THE COURT FINDS that Arizona's capital sentencing scheme does not run afoul of *Hurst.*

For the reasons stated above,

THE COURT FINDS that defendant's claims relating to *Hurst v. Florida* are not colorable.

17. RELATING TO CUMULATIVE ERROR

Defendant alleges that cumulative error resulted in cumulative prejudice entitling him to relief. Petition at 97; 155.

Arizona does not recognize the cumulative error rule, other than in the context of prosecutorial misconduct. *See State v. Hughes*, 193 Ariz. 72, 78-79, 969 P.2d 1184, 1190-1191 (1998)(recognizing "the general rule that several non-errors and harmless errors cannot add up to one reversible error").

The Court has not found that any of the seventeen individual claims of error are colorable.

Further, for the reasons set forth above,

THE COURT FINDS that any alleged evidentiary errors and/or deficiencies in trial counsel's performance, whether considered individually or cumulatively, did not result in prejudice sufficient to deprive the Defendant of a fair trial.

Based on the foregoing,

THE COURT FINDS that defendant's cumulative error claim is not colorable.

It is of note: Defendant supports this (his cumulative error) claim, and perhaps others, by arguing that "[for] the reasons explained above and in the Original Petition…." (Petition at 155), and also:

> All facts stated in this Amended Petition are incorporated by this reference in support of each and every claim herein.

Petition at 45; and in his Reply to Discovery, he expounds:

> Petitioner Johnathan Ian Burns Replies to the State's Response to his Second Amended

> Petition for Post-Conviction relief, incorporating by reference as though fully stated herein his Second Amended Petition his First Amended Petition the original Petition and all exhibits to each.

Reply at 2.

Defendant filed a 16-page "First" Petition for Post-Conviction Relief (10/13/2015); a 157-page Amended Petition for Post-Conviction Relief (12/15/2017); and a 157-page Second Amended Petition for Post-Conviction Relief (2/27/2018).

Defendant's attempt to "incorporate by reference" his previous pleadings would, if permitted, effectively permit him to file a 300-page Petition without having sought leave of court or established good cause to do so. In addition, the Court's comparison of the pleadings suggests that the issues in the Amended and the Second Amended petitions appear to be substantially similar, such that the Court's review of both pleadings to tickle out differences would be of limited value.

Counsel is required to set forth in his pleadings all issues and argument in his opening pleading.[29] The

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[29] As the Supreme Court reminded Defendant's appellate counsel:

> Burns also argues that Mandi's testimony was not timely disclosed and should have been precluded, but does not support this claim with any argument or citation to the record. He has, therefore, waived this claim. *See State v. Carver,* 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim

Court presumes that counsel has done so, and simply makes the attempt to "incorporate by reference" previous pleadings out of an abundance of caution. Notwithstanding counsel's caution, the Court declines to consider other than the Second Amended Petition.

The Court follows the line of cases that holds that an "amended" document supersedes its predecessor. *State v. Martin*, 2 Ariz. App. 510, 514, 410 P.2d 132, 136 (1966)("This Court construes an 'amendment to an information' to mean a supplement to an otherwise effective and sufficient information, whereas 'an amended information' constitutes the filing of a new instrument which supersedes its predecessor."); *State v. Tucker*, 124 Ariz. 120, 122, 602 P.2d 501, 503 (App. 1979).

This appears to be consistent with the State's understanding. Response, at 6-7 (in which the State refers to the Supreme Court's notice of post-conviction relief and then to the "second amended petition for post-conviction relief filed February 27, 2018" as the "operative" petition).

Based on all of the above,

The Court has considered only those pleadings beginning with the Second Amended Petition filed on 2/27/2018, and declines to "incorporate by reference" any previous pleadings.

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usually constitutes abandonment and waiver of that claim.").

State v. Burns, 237 Ariz. 1, 17, 344 P.3d 303, 319 (2015).

18. RELATING TO THE COURT'S ROLE IN CLAIMED IAC

Defendant alleges that the Court denied defendant adequate time for the mitigation investigation, which "was a proximate cause of trial counsel's ineffectiveness." Petition at 155-156.

A form of this claim was raised on appeal (*Burns*, ¶¶ 10-18), and this claim could have been raised on appeal; therefore, it is precluded by Rule 32.2(a)(3). *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

Defendant alternatively argues that considerations of due process afford him relief; therefore, the Court considers the merits of the claims.

On direct appeal our Supreme Court determined the Court **did not** abuse its discretion in failing to grant Defendant's final continuance request, from October 7, 2010, and proceeding to trial earlier than the requested January 2011 date. *State v. Burns*, 237 Ariz. 1, 11–12, ¶¶ 10-18, 344 P.3d 303, 313–14 (2015). This Court has no authority to overrule the Supreme Court's determination.

In addition, the Court has reviewed the record and counsel's performance and has determines defendant has not raised a colorable claim that counsel provided ineffective assistance.

ABA Guidelines discussion

Defendant references the ABA Guidelines in connection with this claim. However, simply failing to follow the ABA Guidelines does not establish ineffectiveness by counsel. *See Bobby v. Van Hook*, 558

U.S. 4, 8, 130 S.Ct. 13, 17 (2009). The proper standard for attorney performance is that of reasonably effective assistance. *See Trapnell v. United States*, 725 F.2d 149, 155 (2d Cir. 1983) ("reasonably competent assistance" standard).

As the Supreme Court reminded in *Strickland*: "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." [Citations omitted.] *Strickland* 466 U.S. at 689–90, 104 S. Ct. at 2065–66. The *Strickland* Court stressed, however, that "American Bar Association standards and the like" are "only guides" to what reasonableness means, not its definition. 466 U.S., at 688, 104 S.Ct. 2052." *Bobby v. Van Hook*, 558 U.S. 4, 8, 130 S. Ct. 13, 17 (2009). In the words of the *Strickland* Court:

> Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984).

Therefore,

THE COURT FINDS that defendant's claim of trial court error in denying defendant's final trial

continuance request and the related IAC claim are without merit and not colorable.

THE DISCOVERY REQUEST

Simultaneous with his Reply (filed 8/30/2018), Defendant filed a Renewed Motion for Disclosure and Discovery. In the motion defendant "seeks discovery concerning the state's witnesses, Maricopa County Medical Examiner (MCOME) toxicologist Norman Wade and Arizona Department of Public Safety (DPS) DNA analyst Scott Milne." Reply, at 2.

For reasons stated in its ruling, The Court did not find the claims related to Wade and Milne to be colorable.

CONCLUSION

As more fully set forth in the discussion of each claim,

THE COURT FINDS that the defendant's fourth – tenth; twelfth – fourteenth; and sixteenth claims are precluded from relief.

THE COURT FURTHER FINDS that the Defendant has failed to raise colorable claims for relief in any of his eighteen claims.

A colorable claim for post-conviction relief is "one that, if the allegations are true, might have changed the outcome" of the proceeding. *State v. Runningeagle,* 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993); Ariz. R.Crim.P. 32.6(c) ("court shall order…petition dismissed" if claims present no "no material issue of fact or law which would entitle defendant to relief"); 32.8(a)(evidentiary hearing required "to determine issue of material fact").

Based on all of the above,

IT IS THEREFORE ORDERED dismissing the defendant's Second Amended Petition for Post-Conviction Relief; and

IT IS FURTHER ORDERED denying Defendant's Renewed Motion for Disclosure and Discovery.

APPENDIX B

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

HONORABLE DANIEL G. MARTIN

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA	JEFFREY L SPARKS
v.	
STEVEN ALAN BOGGS (A)	STEVE ALAN BOGGS 195143 ASPC FLORENCE CENTRAL D/RW PO BOX 8200 FLORENCE AZ 85132 SARAH ELIZABETH STONE CAPITAL CASE MANAGER COURT ADMIN-CRIMINAL-PCR JUDGE DANIEL MARTIN VICTIM WITNESS DIV-AG-CCC GREGORY MICHAEL HAZARD

No. CR 2002-009759

November 5, 2018

PETITION FOR POST-CONVICTION RELIEF DISMISSED

Pending before the Court is Defendant Steve Alan Boggs' June 25, 2018 Petition for Post-Conviction Relief, the response and the reply, the exhibits attached to the pleadings, and portions of the record. This is a successive post-conviction petition. Defendant previously filed an amended post-conviction petition on August 21, 2012, which the Court denied by Order dated January 30, 2013 (as clarified, and affirmed, on June 21, 2013).

In his present submission, Defendant raises two claims under Rule 32.1(g), Ariz. R. Crim. P., citing *Simmons*[1] and *Lynch III,*[2] and *Hurst,*[3] arguing that each decision represents a significant change in the law entitling him to relief. Defendant raises a third claim under Rule 32.1(h), Ariz. R. Crim. P., arguing that additional mitigation renders him "innocent of the death penalty."

The Court dismisses Defendant's successive petition and denies relief (1) under Rule 32.1(g) because *Hurst* and *Lynch* are neither significant changes in the law nor retroactively applicable and, even if they were,

[1] *Simmons v. South Carolina,* 512 U.S. 154, 114 S. Ct. 2187 (1994).

[2] *Lynch v. Arizona ("Lynch" or "Lynch III"),* 136 S. Ct. 1818 (2016) *(per curiam)*.

[3] *Hurst v. Florida*, 136 S. Ct. 616 (2016).

would not probably overturn Defendant's three death sentences, and (2) because Boggs' additional, cumulative mitigation does not warrant relief under Rule 32.1(h).

PRECLUSION/TIMELINESS

Initially, the Court finds that the underlying claims related to the "no parole" instruction, the mitigation/death penalty burden of proof, and the newly-proffered mitigation evidence are matters that could have been raised at trial, on appeal, or in a previous collateral proceeding. They were not, and therefore are subject to preclusion. *See* Rule 32.2(a)(3). The Court's finding is corroborated by an unpublished federal court opinion related to a stay request, wherein the United States District Court addressed the issues underlying the Rule 32.1(g) and (h) claims in Defendant's case and found:

> The Court has determined that Boggs is not entitled to a stay, either to exhaust claims based on *Lynch* and *Hurst* or to raise a claim premised on new evidence. Based on that determination, together with the *Harbison* Court's discussion of the parameters of § 3599(e), the Court finds it is not appropriate to authorize the FPD to represent Boggs in state court in this instance.

Boggs v. Ryan, CV-14-02165-PHX-GMS, 2017 WL 67522, at *6 (D. Ariz. Jan. 6, 2017).

The foregoing notwithstanding, claims under Rules 32.1(g) and (h) are generally excepted from preclusion, and to ensure a complete record, the Court will address Defendant's arguments on the merits.

FACTS/BACKGROUND

Defendant sets forth the facts as follows:

> Boggs was convicted of three counts of first-degree murder, offenses that occurred in 2002, approximately nine years after Arizona abolished parole. Nevertheless, . . . the prospective panel of jurors were instructed by the court and counsel that the sentences available to Boggs were death, life without the possibility of parole, and life with the possibility of parole after twenty-five years.
>
> Jurors were specifically questioned on their beliefs and at least one juror believed "that dangerous criminals should be put to death" because "after a certain amount of time dangerous people get paroled."[4] Boggs' own counsel, rather than objecting, or submitting constitutionally sound instructions, compounded the error by arguing in his closing argument that "I mean, minimum, he is looking, on just one count, 25 flat years."[5]
>
> Ultimately, the trial court . . . instructed the jury that if it found mitigation sufficiently substantial to call for leniency, Boggs would be sentenced to "either natural life imprisonment without the possibility of parole, or life in prison

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[4] Defendant provides no evidence that this prospective juror was seated, participated in deliberations, or contributed to the verdict.

[5] And 3 counts would have resulted in 3 times that amount of time (3 counts x 25 years), or 75 years.

> without the possibility of parole until at least 25 years have been served."

Petition, at 6-7. For purposes of analysis, the Court assumes the accuracy of the above representations.

THE TWO RULE 32.1(G) CLAIMS *(LYNCH* AND *HURST)*

To obtain relief under Rule 32.1(g), a defendant is required to show "[t]here has been a significant change in law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence." As set forth below, Defendant does not meet this requirement.

The *Lynch v. Arizona* Claim

In 1994, the United States Supreme Court held in *Simmons v. South Carolina* that "[w]here 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. 154, 156, 114 S. Ct. 2187, 2190 (1994) (plurality opinion).

In 2008, the Arizona Supreme Court distinguished *Simmons* and held that because Arizona law does not prohibit the defendant's release on parole after serving an initial term of years (25) if given a life sentence, the trial court properly instructed the jury of the three possible sentences (life, natural life, death), and further held that defendant was not entitled to a *Simmons* instruction. *State v. Cruz,* 218 Ariz. 149, 160, ¶42, 181 P.3d 196 (2008). In the years between *Simmons* and *Lynch*, no court determined that defendants facing the death penalty in Arizona were entitled to a *Simmons* instruction. In fact, the Arizona Supreme Court consistently distinguished

Arizona law in at least nine opinions, including *Cruz*. *See State v. Garcia*, 224 Ariz. 1, 18 (2010); *State v. Chappell,* 225 Ariz. 229, 240 (2010); *State v. Hargrave*, 225 Ariz. 1, 14 (2010); *State v. Hardy*, 230 Ariz. 281, 293 (2012); *State v. Hausner,* 230 Ariz. 60, 90 (2012); *State v. Benson,* 232 Ariz. 452, 465 (2013); *State v. Boyston*, 231 Ariz. 539, 552-53 (2013); and *State v. Lynch*, 239 Ariz. 84, 103 (2015), *rev'd*, 136 S. Ct. 1818.

In 2016, *Lynch III* applied the holding of *Simmons* to an Arizona capital sentencing: "Under Arizona law, 'parole is available only to defendants who committed a felony before January 1, 1994,' and Lynch committed his crimes in 2001." *Lynch*, 136 S. Ct. at 1819. The Court found that under the law in effect at the time of his trial/sentencing, defendant Lynch was not parole-eligible. *Lynch* held 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 the 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*, 136 S. Ct. at 1818 (internal citations omitted).

Lynch Is Not A Significant Change In The Law

"Rule 32 does not define 'a significant change in the law.' But plainly a 'change in the law' requires some transformative event, a '"clear break" from the past.'" *State v. Shrum*, 220 Ariz. 115, 118, ¶ 15, 203 P.3d 1175, 1178 (2009) (quoting *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991)). A "significant change" occurs "when an appellate court overrules previously binding case law" or when there has been a "statutory or constitutional amendment

representing a definite break from prior law." *Id.* at 118-19; *see also State v. Poblete,* 227 Ariz. 537, ¶ 10, 260 P.3d 1102, 1105 (Ct. App. 2011) (significant change in law occurs when subsequent authority rejects established law).

The Court concludes that although *Lynch* may be a change in the law, *Lynch* is not a "transformative event" under which Defendant can claim relief under Rule 32.1(g). *Compare Ring v. Arizona,* 536 U.S. 584 (2002) (jury must determine aggravating factors that determine death-eligibility) and *Padilla v. Kentucky,* 559 U.S. 356 (2010) (failure to advise defendant that guilty plea rendered him subject to deportation), both of which have been found to constitute significant changes in the law under Rule 32.1(g).

Lynch Is Not Retroactive

Arizona courts follow federal retroactivity analysis, which derives from the United States Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989). *See State v. Towery,* 204 Ariz. 386, 389, 64 P.3d. 828, 831 (2003); *Slemmer*, 170 Ariz. at 181-82, 823 P.2d at 49). *Lynch* did not expressly resolve whether its holding was procedural, or whether its holding was substantive and to be applied retroactively. Defendant argues that because the rule announced in *Lynch* is a "well-established constitutional principle" dictated by *Simmons v. South Carolina,* it should be applied retroactively. However, this contention is answered by the United States Supreme Court's ruling in *O'Dell v. Netherland,* 521 U.S. 151 (1997). There, the Court held that the rule announced in *Simmons* is not a "watershed rule of criminal procedure", but rather a procedural, non-retroactive rule. *O'Dell*, 521 U.S. at

167-68. As *Simmons* was not a watershed case, neither is *Lynch*. Accordingly, even if *Lynch* was a significant change in the law (and the Court concludes it is not), it would not apply retroactively, and thus does not apply to Defendant's case.

Lynch Would Not Have "Probably Overturned" Defendant's Sentence

Finally, even if the rule announced in *Lynch* was a significant change in the law, and retroactive in its application, Defendant still is not entitled to relief. The gravamen of Defendant's argument is that he was prejudiced by argument to the jury that was evocative of future dangerousness. The Court concludes that given the circumstances of the offense coupled with evidence of Defendant's character and propensities, no single reasonable juror would have imposed a life sentence rather than a death sentence. This conclusion is in accord with the Arizona Supreme Court's independent review. *See State v. Boggs*, 218 Ariz. 325, 340–44, ¶¶ 71-95, 185 P.3d 111, 126–30 (2008). The Court further finds, beyond a reasonable doubt, that any error in failing to give a *Lynch III* instruction "did not contribute to or affect the verdict or sentence." *State v. Henderson*, 210 Ariz. 561, 567, 115 P.3d 601, 607 (2005).

The *Hurst v. Florida* Claim

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the United States Supreme Court held that Florida's sentencing scheme, which required that a judge hold a hearing to review a jury's finding of death as the appropriate sentence, was unconstitutional. "A jury's mere recommendation is not enough" to meet the Sixth Amendment requirement that "a jury, not a judge,

. . . find each fact necessary to impose a sentence of death." *Id*. at 619. The Court explained:

> The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt. *Alleyne v. United States,* 570 U.S. __, __, 133 S. Ct. 2151, 2156 (2013). In *Apprendi v. New Jersey,* 530 U.S. 466, 494, 120 S. Ct. 2348 (2000), this Court held that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury. In the years since *Apprendi,* we have applied its rule to instances involving plea bargains, *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531 (2004), sentencing guidelines, *United States v. Booker,* 543 U.S. 220, 125 S. Ct. 738 (2005), criminal fines, *Southern Union Co. v. United States,* 567 U.S. __, 132 S. Ct. 2344 (2012), mandatory minimums, *Alleyne,* 570 U.S., at __, 133 S. Ct., at 2166 and, in *Ring,* 536 U.S. 584, capital punishment.
>
> In *Ring,* we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts necessary to sentence a defendant to death. An Arizona jury had convicted Timothy Ring of felony murder. 536 U.S., at 591, 122 S. Ct. 2428. Under state law, "Ring could not be sentenced to death, the statutory maximum

penalty for first-degree murder, unless further findings were made." *Id.,* at 592, 122 S. Ct. 2428. Specifically, a judge could sentence Ring to death only after independently finding at least one aggravating circumstance. *Id.,* at 592–593, 122 S. Ct. 2428. Ring's judge followed this procedure, found an aggravating circumstance, and sentenced Ring to death.

The Court had little difficulty concluding that "'the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.'" *Id.,* at 604, 122 S. Ct. 2428 (quoting *Apprendi,* 530 U.S., at 494, 120 S. Ct. 2348; alterations omitted). Had Ring's judge not engaged in any factfinding, Ring would have received a life sentence. *Ring,* 536 U.S., at 597, 122 S. Ct. 2428. Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment

The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring,* Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and

> its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona,* 497 U.S. 639, 648, 110 S. Ct. 3047 (1990); accord, *State v. Steele,* 921 So.2d 538, 546 (Fla. 2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").
>
> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring,* we hold that Hurst's sentence violates the Sixth Amendment.

Hurst v. Florida, 136 S. Ct. 616, 621–22 (2016).

Hurst Is Not A Significant Change In The Law

Applying the analysis set forth above as to Defendant's arguments under *Lynch*, the Court concludes that *Hurst* likewise does not constitute a significant change in the law. As the State correctly observes, "the Supreme Court simply applied *Ring* to Florida's capital sentencing procedure." Response, at 10.

Hurst Is Not Retroactive

Even if *Hurst* was a significant change in the law, it does not apply retroactively. In *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004), the Supreme Court held that "*Ring* announced a new procedural rule that does not

apply retroactively to cases already final on direct review." *Hurst*, which applies *Ring* in Florida, is also non-retroactive.

Hurst Would Not Have "Probably Overturned" Defendant's Sentence

Finally, even if the rule announced in *Hurst* was a significant change in the law, and retroactive in its application (which it is not), Defendant still is not entitled to relief because Arizona's sentencing procedure is in accord with *Hurst*.

THE RULE 32.1(H) CLAIM

Under Rule 32.1(h), a defendant may be entitled to relief if the defendant "demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty beyond a reasonable doubt, or that the death penalty would not have been imposed." Here, Defendant claims to be "innocent of the death penalty" based on a proffer of "new mitigation." However, such claim does not withstand scrutiny.

First, as the State correctly observes in its Response, Defendant cannot satisfy Rule 32.1(h) as a matter of law under *Sawyer v. Whitley*, 505 U.S. 333, 112 S. Ct. 2514 (1992). *See* Response, at 12-15. Second, even if the law allowed a defendant to establish, based on mitigation alone, that the death penalty would not have been imposed, Defendant fails to meet that burden on the record presented. Much of Defendant's evidence is cumulative to the mitigation evidence previously considered. But even as to the new information (*see* Petition, at 31-48), Defendant does not establish, by clear and convincing evidence, that

he would not have received the death penalty. *Compare* Response, at 15-20.

CONCLUSION AND DISPOSITION

All of Defendant's claims in the present Petition are subject to preclusion.

On the merits, Defendant has not stated a colorable claim for relief under Rule 32.1(g). *Lynch* and *Hurst* are neither significant changes in the law nor retroactively applicable and, even if they were, would not probably overturn Defendant's three death sentences.

On the merits, Defendant has not stated a colorable claim for relief under Rule 32.1(h). Defendant has not met his burden to demonstrate, by clear and convincing evidence, that the death penalty would not have been imposed.

Pursuant to Rule 32.6(c),

IT IS ORDERED dismissing Defendant's June 25, 2018 Petition for Post-Conviction Relief.

APPENDIX C

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

HON. KAREN L. O'CONNOR

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA	JEFFREY L SPARKS
v.	
RUBEN GARZA	RUBEN GARZA 190487 ASPC EYMAN BROWNING PO BOX 3400 FLORENCE AZ 85132 EMILY SKINNER AMY ARMSTRONG THOMAS J PHALEN CAPITAL CASE MANAGER COURT ADMIN-CRIMINAL-PCR VICTIM WITNESS DIV-AG-CCC ERIC SONNENSCHEIN AND COURTNEY FORREST COVINGTON AND BURLING LLP

1201 PENNSYLVANIA
AVENUE NW
WASHINGTON DC 20004

March 15, 2018

No. CR 1999-017624

RULING

The Court has received and considered the Defendant's Successive Petition for Post-Conviction Relief filed 10/23/2017; the response filed 12/7/2017; the reply filed 1/22/2018, the exhibits attached to the pleadings, and portions of the record.

Case Summary

Defendant was sentenced to death by a jury on September 20, 2004 on one of two first degree murder convictions (ME dated 9/20/2004 (Count 2)), and on the second of the first degree murder convictions was sentenced by the court to natural life (ME dated 11/10/2004 (Count 1)).

The Court instructed the jury on the three possible sentences set forth in A.R.S. § 13-703.01. The Court properly identified the range of sentencing available: life with the possibility of parole/release after 25 years, natural life, or death. *State v. Martinez*, 209 Ariz. 280, 283, ¶ 11, 100 P.3d 30, 33 (App. 2004), *aff'd in part,* 210 Ariz. 578, ¶ 11, 115 P.3d 618 (2005)

("Under A.R.S. § 13–703(A) (2000)[1], a person convicted of first-degree murder may receive a sentence of death, natural life (life in prison without the possibility of release), or life with the possibility of release (life in prison without possibility of release for twenty-five years)."); *see also,* Petition at 7 (refers to "parole"). The Court identified 1,805 days of Presentence Incarceration Credit, which equates to about 5 years of credit. ME dated 11/10/2004 (Count 1). Defendant began serving his time in 2004.

The Arizona Supreme Court affirmed Defendant's convictions and sentences on direct appeal and the Unites States Supreme Court denied the petition for writ of certiorari. *Garza v. Arizona*, 128 S. Ct. 890 (2008).

On July 20, 2013, this Court denied Defendant's post-conviction relief petition. The Arizona Supreme Court denied review and denied the motion to vacate the death sentence based on Hall v. Florida, 134 S.Ct. 1986 (2014). The United States Supreme Court denied Defendant's petition for writ of certiorari. Garza v. Arizona, 135 S.Ct. 1405 (2015).

On October 23, 2017, Defendant filed this successive petition for post-conviction relief. Defendant raises two claims under Rule 32.1(g), Ariz.R.Crim.P., citing *Lynch v. Arizona ("Lynch" or "Lynch III"),* 136 S.Ct. 1818 (2016) *(per curiam)* and *Hurst v. Florida*, 136

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[1] Over the years, the A.R.S. § 13-701 statute has been amended, as A.R.S. § 13-703.01, and is currently re-numbered as A.R.S. § 13-752. *See, State v. Garza*, 216 Ariz. 56, 63, fn 3, 163 P.3d 1006, 1013 (2007) ("Sections 13–703 and –703.01 (Supp.2006) were amended after Garza's trial, but not in any respect material to this case. This opinion therefore cites to the current versions of these statutes.").

S.Ct. 616 (2016) and claims that each decision represents a significant change in the law entitling him to relief. Rule 32.1(g), Ariz.R.Crim.P. Claims under Rule 32.1(g) are generally excepted from preclusion.

On January 11, 2017, the U.S. District Court addressed the applicability of Rule 32.1(g) in an unpublished federal court opinion related to Defendant's stay request.

> Garza is not entitled to a stay. *Lynch* and *Hurst* are not significant changes in the law for purposes of Rule 32.1(g). In addition, the claims are also time-barred, so a stay would be futile.

Garza v. Ryan, CV-14-01901-PHX-SRB, 2017 WL 105983, at *5 (D. Ariz. Jan. 11, 2017).

In any event, the Court addresses Defendant's claims below.

The *Lynch v. Arizona* claim

Pursuant to Rule 32.1(g). post-conviction relief, Defendant is required to show "[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."

a. *Lynch v. Arizona* is not a significant change in law

In 1994 the United States Supreme Court held in *Simmons v. South Carolina* that "[w]here 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.,*

512 U.S. 154, 156, 114 S.Ct. 2187, 2190 (1994) (plurality opinion).

In 2008 the Arizona Supreme Court distinguished *Simmons* and held that because Arizona law does not prohibit the defendant's release on parole after serving an initial term of years (25) if given a life sentence, the trial court properly instructed the jury of the three possible sentences (life, natural life, death), and further held that defendant was not entitled to a *Simmons* instruction. *State v. Cruz,* 218 Ariz. 149, 160, ¶42, 181 P.3d 196 (2008). In the years between *Simmons* and *Lynch*, no court determined that defendants facing the death penalty in Arizona were entitled to a *Simmons* instruction. In fact, the Arizona Supreme Court consistently distinguished Arizona law in at least nine opinions, including *Cruz*. *See State v. Garcia*, 224 Ariz. 1, 18 (2010); *State v. Chappell,* 225 Ariz. 229, 240 (2010); *State v. Hargrave*, 225 Ariz. 1, 14 (2010); *State v. Hardy*, 230 Ariz. 281, 293 (2012); *State v. Hausner,* 230 Ariz. 60, 90 (2012); *State v. Benson,* 232 Ariz. 452, 465 (2013); *State v. Boyston*, 231 Ariz. 539, 552-53 (2013); *State v. Lynch*, 239 Ariz. 84, 103 (2015), *rev'd* 136 S.Ct. 1818.

In 2016 *Lynch III* applied the holding of *Simmons* to an Arizona capital sentencing. "Under Arizona law, parole is available only to defendants who committed a felony before January 1, 1994…Lynch committed his crime in 2001." *Lynch*, 136 S.Ct. at 1819. The Court found that under the law in effect at the time of his trial/sentencing, defendant Lynch was not parole-eligible. *Lynch* held 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 the 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*, 136 S.Ct. at 1818 (internal citations omitted).

Although "Rule 32 does not define 'a significant change in the law' [...] plainly a 'change in the law' requires some transformative event, a ' "clear break" from the past.'" *See State v. Shrum*, 220 Ariz. 115, 118, ¶ 15, 203 P.3d 1175, 1178 (2009). A "significant change" occurs "when an appellate court overrules previously binding case law" or when there has been a "statutory or constitutional amendment representing a definite break from prior law." *Shrum,*.¶¶ 16–17; *see also State v. Poblete,* 227 Ariz. 537, ¶ 10, 260 P.3d 1102, 1105 (App.2011) (significant change in law occurs when subsequent authority rejects established law).

The Court finds that although *Lynch* may be a change in the law, *Lynch* is not a "transformative event" on par with *Ring v. Arizona,* 536 U.S. 584 (2002) (jury must determine aggravating factors that determine death-eligibility)[2] or *Padilla v. Kentucky,* 559 U.S. 356 (2010) (failure to advise defendant that guilty plea rendered him subject to deportation), which have been found to constitute significant changes in the law under Rule 32.1(g).

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[2] The Supreme Court held that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). *Padilla v. Kentucky* also was determined to apply a new procedural rule and was held not to be retroactive. *Chaidez v. United States*, 568 U.S. --, (2013).

b. *Lynch v. Arizona* is not retroactive

Defendant argues that because the rule announced in *Lynch* is a "well-established constitutional principle" dictated by *Simmons v. South Carolina,* it should be applied retroactively. *State v. Slemmer*, 170 Ariz. 174 (1991) (citing *Yates v. Aiken*, 484 U.S. 211, 216, 108 S.Ct. 534, 537 (1988) (internal citations omitted) (on *certiorari* to the United States Supreme Court following state court appeal)). In *O'Dell* the United States Supreme Court held that the rule announced in *Simmons v. South* is not a "watershed rule of criminal procedure" but rather a procedural, non-retroactive rule. *O'Dell v. Netherland,* 521 U.S. 151, 167-68 (1997).

Lynch did not expressly resolve whether its holding was procedural, or whether its holding was substantive and was to be applied retroactively. Arizona courts have adopted and follow federal retroactivity analyses. *State v. Towery,* 204 Ariz. 386, 389, 64 P.3d. 828, 831 (2003) (citing *Slemmer*, 170 Ariz. at 181-82). Consistent with the analysis in *Teague v. Lane*, 489 U.S. 288, 311-12, 109 S. Ct. 1060, 1075–76 (1989), *Lynch III* does not apply retroactively to Defendant's case. Defendant's conviction became final in 2008[3], eight years before *Lynch* was decided in 2016. Further, the rule announced in *Lynch III* is not a well-established constitutional principle. It is a procedural rule that does not apply retroactively. Even if *Lynch v. Arizona* was a significant change in

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[3] [Case below, *State v. Garza*, 216 Ariz. 56, 163 P.3d 1006]

Petition for writ of certiorari to the Supreme Court of Arizona denied.

Garza v. Arizona, 552 U.S. 1107, 128 S. Ct. 890 (Mem) (2008)

the law, it does not apply retroactively – consistent with *Ring*, also held not to be retroactive – and thus does not apply to Defendant's case.

c. *Lynch v. Arizona* would not have "probably overturned" Defendant's sentence

Simmons and *Lynch* held that when a defendant's future dangerousness is at issue and the only sentencing alternative to death is life imprisonment without parole, the defendant has a right to inform the jury of his parole ineligibility through jury instructions or argument by counsel. *Lynch*, 136 S.Ct. at 1818 (quoting *Shafer v. South Carolina,* 532 U.S. 36, 39 (2001)).

The State's arguments may have put Defendant's future dangerousness at issue. There is evidence that Defendant sought to add language to the jury instructions explaining the language "life without the possibility of parole" rather than seeking a "no parole" instruction. Reply, Exhibit 1 at 7. Even if the trial court had included "no parole" language, application of the *Simmons/Lynch* rule would not "probably overturn" his sentence. Rule 32.1(g).

Defendant was convicted of the murder of two people at two separate locations within a residence. The Defendant killed the first victim, Ellen Franco, in the living room; he then – rather than leaving the residence – sought out and killed Lance Rush. The jury, instructed by the court about its obligation to impose a sentence of life or death, and was further instructed that if the jury imposed life, the Court would determine whether the sentence would be life with the possibility of release or natural life. The jury

differentiated between the two murders, imposing life as to the first victim (and leaving it to the Court to determine "life" or "natural life"); the jury imposed death in connection with the death of victim Rush.

On independent review of the death sentence imposed for the second murder, the Arizona Supreme Court determined that the jury properly distinguished between the two murders when it imposed a sentence of life as to one and a sentence of death as to the other –

> …. Our power of independent review extends only to the death sentence imposed for the murder of Lance Rush and not to the life sentence for the murder of Ellen Franco. Garza does not argue that the sentences are inconsistent, nor can we so conclude. Although the aggravating circumstance for each murder was identical, the jury was allowed to consider the circumstances of the crimes in mitigation. A.R.S. § 13–703(G). The *Enmund/Tison* findings indicate that the jury believed that Garza intended to kill Rush but was not convinced beyond a reasonable doubt that he had intended to kill Ellen. There was substantial evidence to support such a distinction. Ellen was shot in the living room and Garza could have easily escaped through the door to that room from which he entered the dwelling. He nonetheless went down the hallway to the bedroom, apparently seeking an encounter with other residents of the house.

Garza, FN 17.

> Even assuming arguendo that Garza proved his prior good character and the existence of some

> difficult situations in his life, given the aggravating circumstance of two murders, we cannot conclude that the mitigation was sufficiently substantial to call for leniency. We therefore affirm the death sentence for the murder of Lance Rush.

State v. Garza, 216 Ariz. at73, ¶ 85, 163 P.3d at 1023.

Defendant claims that had the Court given an instruction in accordance with *Lynch III* – that he would not be eligible for parole after 25 years and that the only form of release available would be executive clemency – it would have caused a single, reasonable juror to impose a life sentence rather than a death sentence for the second of the two murders (Lance's).

The facts of this case demonstrate – despite any "future dangerousness" argument and the lack of a *Lynch* instruction – that the jurors were able to differentiate between the facts of the two murders when considering the *Enmund-Tison*[4] requirement. The murderer was the same as to both victims, yet in making its findings, the jurors individually considered the defendant's actions and mindset with respect to each victim.[5]

The facts of this case further indicate – and again despite any "future dangerousness" argument and the

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[4] *Enmund v. Florida,* 458 U.S. 782, 797 (1982), and *Tison v. Arizona,* 481 U.S. 137, 158 (1987), together establish that the death penalty cannot be imposed unless the defendant either: (1) actually killed, (2) attempted to kill, (3) intended a killing to take place, or (4) was a major participant in the felony committed and acted with reckless indifference to human life.

[5] As to the murder of Ellen Franco (Count 1), the jury found (1) and (3) proven; as to the murder of Lance Rush (Count 2), the jury found (1), (2), (3) and (4) proven.

lack of a *Lynch* instruction – that the jurors were able to differentiate between the facts of the two murders not only for *Enmund-Tison* but also for sentencing purposes. By definition, because the murderer was the same as to both victims, the mitigation was effectively the same. The jurors individually considered the mitigation and imposed different sentences: in Ellen's murder they imposed life (even with the "possibility of parole" language and knowing that the judge would determine "life" or "natural life"); while in Lance's murder they imposed death. By its sentences, this jury demonstrated (1) its understanding of its role and of its willingness to leave to the judge whether to impose life or natural life; and (2) its ability to differentiate between life, imposed for the first murder, and death, which it imposed for the second murder.

Given the evidence presented to, and considered by, the sentencing trier-of-fact, the strength of the aggravating factor and the nature of the mitigation, the Court finds that instructing the jury in accordance with *Lynch III* would not "probably overturn the defendant's conviction or sentence."

The Court further finds, beyond a reasonable doubt, that any error in failing to give a *Lynch III* instruction "did not contribute to or affect the verdict or sentence." *State v. Henderson*, 210 Ariz. 561, 567, 115 P.3d 601, 607 (2005).

d. *Strickland v. Washington* does not provide relief

In his *Lynch* claim, Defendant also alleges that trial and appellate counsel provided ineffective assistance ("IAC") by failing to raise the *Lynch* issue at trial and

on automatic appeal to the Arizona Supreme Court, respectively. The Court finds this *Strickland* claim precluded under Rules 32.2(a)(2) and (3), as Defendant raised ineffective assistance claims in a previous post-conviction pleading, and has waived the claim, which is not covered by a Rule 32.2(b) exception. In the alternative, the Court will address the merits.

To avoid summary dismissal and secure an evidentiary hearing on a post-conviction claim of ineffective assistance of trial counsel, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984). Trial counsel is not ineffective for acting or failing to act in a certain manner unless counsel's "…performance fell outside the acceptable 'range of competence,' and did not meet 'an objective standard of reasonableness.'" *Id.* at 687–88, 104 S.Ct. 2052. Thus, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. ([*Strickland*] at 689, 104 S.Ct. 2052 (citation and internal quotation marks omitted))." *State v. Pandeli*, 242 Ariz. 175, 181, ¶ 7, 394 P.3d 2, 8 (2017), *cert. denied,* 17-5939, 2018 WL 311475 (U.S. Jan. 8, 2018).

Here, Defendant was tried in 2004; the Arizona Supreme Court's appellate decision in this case issued in 2007, and *certiorari* was denied in 2008. *Lynch* was

not decided by the United States Supreme Court until 2016. Defendant faults trial and appellate counsel for failing to anticipate a decision issued in 2016. At the time of trial, *Lynch III* had not been decided. The *Lynch III* decision issued in 2016, twelve years after the trial verdict and nine years after the appellate decision. Defendant claims that trial and appellate counsel "should" have raised the issue because other counsel did so. But that is hindsight, and *Strickland* is adamant: a "fair assessment requires" that hindsight be eliminated.

As emphasized in a 2005 Court of Appeals decision relating to *Blakely/Apprendi* claims, counsel is not required to predict future changes in the law:

> Counsel's failure to predict future changes in the law, and in particular the *Blakely* decision, is not ineffective because "[c]lairvoyance is not a required attribute of effective representation." *United States v. Gonzalez–Lerma,* 71 F.3d 1537, 1541–42 (10th Cir.1995) (citations omitted). There is a difference between ignorance of controlling authority and "the failure of an attorney to foresee future developments in the law." *Id.* at 1542. "We have rejected ineffective assistance claims where a defendant faults his former counsel … for failing to predict future law and have warned that clairvoyance is not a required attribute of effective representation." *Bullock v. Carver,* 297 F.3d 1036, 1052 (10th Cir.2002) (citations omitted).
>
> Febles has not demonstrated either that his appellate counsel was ineffective for failing to raise the *Apprendi* claim or that the outcome of

> his appeal would have been different had the claim been raised. Thus, his claim is not colorable, and the superior court properly denied relief.

State v. Febles, 210 Ariz. 589, 597, ¶¶ 24-25, 115 P.3d 629, 637 (App. 2005). Although *Febles* addressed appellate counsel and a sentencing issue, the rationale is equally applicable to trial counsel and the present issue.

Counsel did not perform deficiently by failing to foresee a future development in the law. Thus, Defendant has failed to establish the first of the two *Strickland* prongs (deficient performance; the second prong is prejudice), and his ineffective assistance claim fails.In addition, Defendant's conviction was affirmed on appeal and is final. The underlying claim is precluded because it could have been raised on appeal and has been waived. Rule 32.2(a)(3). Even had the issue been raised, it is probable that the Court of Appeals would have denied it, as *Lynch III* was not decided until after Defendant's trial.

In light of the law in Arizona as interpreted subsequent to Defendant's trial and appeal, trial and appellate counsel each made a reasonable decision not to pursue a *Simmons* claim. Counsels' decisions were supported by later precedent (established in 2008) that remained unchallenged until 2016. In light of then-existing precedent, at the time of trial and appeal, neither trial nor appellate counsel had reason to anticipate *Lynch III*. It was objectively reasonable for counsel not to raise the claim.

e. The Lynch claim is not ripe.

In addition to the findings above, the Court finds that the *Lynch* issue is premature as to this post-conviction defendant.

The United States Supreme Court has declared that a controversy is a matter:

> …that is appropriate for judicial determination. (Citation omitted.)… The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. (Citations omitted.). It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240-41, 57 S. Ct. 461, 464 (1937) (Citations omitted).

Many years later that Court specifically addressed the ripeness doctrine:

> In our leading case discussing the "ripeness doctrine" we explained that the question whether a controversy is "ripe" for judicial resolution has a "twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148–149, 87 S.Ct. 1507 (1967). Both aspects of the inquiry involve the exercise of judgment, rather than the application of a black-letter rule.

Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 814, 123 S. Ct. 2026, 2033 (2003) (J. Stevens, Concur) (administrative agency).

"The ripeness doctrine prevents a court from rendering a premature judgment or opinion on a situation that may never occur." *Winkle v. City of Tucson*, 190 Ariz. 413, 415, 949 P.2d 502, 504 (1997); *accord Arizona Downs v. Turf Paradise, Inc*., 140 Ariz. 438, 444, 682 P.2d 443, 449 (App. Div. 1, 1984). Generally, a court "will not decide as to future or contingent rights, but will wait until the event giving rise to rights has happened, or, in other words, until rights have become fixed under an existing state of facts," *Moore v. Bolin*, 70 Ariz. 354, 357, 220 P.2d 850, 852 (1950); thereby avoiding resolution of questions of a "hypothetical or abstract nature." *Arizona Downs*, 140 Ariz. at 444, 682 P.2d at 449.

Defendant was sentenced to death by a jury on September 20, 2004 on one of two first degree murder convictions (ME dated 9/20/2004 (Count 2)), and on the second of the first degree murder convictions was sentenced by the court to natural life (ME dated 11/10/2004 (Count 1)). The Court instructed the jury on the three possible sentences set forth in A.R.S. § 13-703.01. The Court properly identified the range of sentencing available: life with the possibility of parole/release after 25 years, natural life, or death. *State v. Martinez*, 209 Ariz. 280, 283, ¶ 11, 100 P.3d 30, 33 (App. 2004), *aff'd in part,* 210 Ariz. 578, ¶ 11, 115 P.3d 618 (2005) ("Under A.R.S. § 13–703(A) (2000)[6], a person convicted of first-degree murder may

[6] Over the years, the A.R.S. § 13-701 statute has been amended, as A.R.S. § 13-703.01, and is currently re-numbered as A.R.S. § 13-752. *See, State v. Garza*, 216 Ariz. 56, 63, fn 3, 163

receive a sentence of death, natural life (life in prison without the possibility of release), or life with the possibility of release (life in prison without possibility of release for twenty-five years)."); *see also,* Petition at 7 (refers to "parole"). The Court identified 1,805 days of Presentence Incarceration Credit, which equates to about 5 years of credit. ME dated 11/10/2004 (Count 1). Defendant began serving his time in 2004.

Had a life sentence with the possibility of parole been imposed pursuant to A.R.S. § 13703.01, Defendant would be eligible for parole in approximately 2024. Defendant has an additional six years until 2024 and has not currently served the minimum term certain that would even make him eligible for parole.

Between now and 2024 our legislature may enact legislation that would render some form of release /in addition to/other than executive clemency, including on parole, a possibility for this defendant. This Court cannot assume that the legislature will not create – in the interim between now and 2024 – a provision for sentencing to effectuate A.R.S. § 13-703.01. Were the legislature to act, the information provided to the jury would be rendered both accurate at the time given in terms of the sentences then-identified in the statute, and also in terms of the sentence available at the time of eligibility. Any *Simmons* issue would then be rendered moot.

P.3d 1006, 1013 (2007) ("Sections 13–703 and –703.01 (Supp.2006) were amended after Garza's trial, but not in any respect material to this case. This opinion therefore cites to the current versions of these statutes.").

Because there is no guarantee as to what Arizona's parole/parole-eligibility protocol will be at the end of 25 years, this issue is not yet in controversy, and is not ripe for determination. until after Defendant has served 25 years, including any credit for time served. Permitting six years to pass allows Defendant to complete the 25-year term and to continue to pursue any colorable claims, simply preserves the *status quo* as to this claim until it either becomes ripe or becomes moot.

For all these reasons,

THE COURT FINDS that the *Lynch* issue is not colorable under Rule 32.1(g) or *Strickland.*

THE COURT FURTHER FINDS that the *Lynch* issue is not ripe for determination.

The *Hurst v. Florida* claim

In *Hurst v. Florida*, 136 S.Ct. 616 (2016) the U.S. Supreme Court held that Florida's sentencing scheme, which required that a judge hold a hearing to review a jury's finding of death as the appropriate sentence, was unconstitutional. "A jury's mere recommendation is not enough" to meet the Sixth Amendment requirement that "…a jury, not a judge, … find each fact necessary to impose a sentence of death." *Id.*, 136 S. Ct. at 619.[7]

[7] The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

Hurst v. Florida, 136 S. Ct. 616, 624 (2016

a. Defendant mischaracterizes the holding in *Hurst*

Defendant claims that *Hurst* "…stands for the proposition that the weighing of aggravating and mitigating circumstances *is a factual finding* that must be made beyond a reasonable doubt by a jury" Petition at 17. Our Supreme Court has held otherwise:

> We therefore now clarify that the determination whether mitigation is sufficiently substantial to warrant leniency is not a fact question to be decided based on the weight of the evidence, but rather is a sentencing decision to be made by each juror based upon the juror's assessment of the quality and significance of the mitigating evidence that the juror has found to exist…

State ex rel. Thomas v. Granville, 211 Ariz. 468, 473, ¶ 21, 123 P.3d 662, 667 (2005).[8]

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[8] We therefore now clarify that the determination whether mitigation is sufficiently substantial to warrant leniency is not a fact question to be decided based on the weight of the evidence, but rather is a sentencing decision to be made by each juror based upon the juror's assessment of the quality and significance of the mitigating evidence that the juror has found to exist. We conclude that the use of "outweighing" language in jury instructions explaining the evaluation of mitigating circumstances, while technically correct, might confuse or mislead jurors. We thus discourage the use of instructions that inform jurors that they must find that mitigating circumstances outweigh aggravating factors before they can impose a sentence other than death. Instead, jury instructions should focus on the statutory requirement that a juror may not vote to impose the death penalty unless he or she finds, in the juror's individual opinion, that "there are no mitigating circumstances sufficiently

Defendant then argues that *Hurst* mandates that the penalty-phase finding of the appropriate sentence must be made beyond a reasonable doubt. That is not the Court's reading of *Hurst*.

The *Hurst* court mentioned "reasonable doubt" only once, in connection with the Due Process Clause's requirement that each element of a crime be proved to a jury beyond a reasonable doubt." *Id*., 136 S.Ct. at 621. Rather than imposing – or even addressing – the burden of proof at the mitigation phase, the *Hurst* court focused on the respective roles of the judge and the jury *at the aggravation phase*, concluding that *Apprendi*[9] and *Alleyne*[10] required that a jury find the fact of an aggravating factor (rather than, as Florida's statute provided, that the jury render what amounted to an advisory opinion for a judge to reconsider - and either approve or disapprove - the jury's determination of the relative merits of aggravating factor/mitigating factors):

> The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base [defendant's] death sentence on a jury's verdict, not a judge's factfinding.

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substantial to call for leniency." A.R.S. § 13–703(E). In other words, each juror must determine whether, in that juror's individual assessment, the mitigation is of such quality or value that it warrants leniency.

State ex rel. Thomas v. Granville, 211 Ariz. 468, 473, ¶ 21, 123 P.3d 662, 667 (2005).

[9] *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (Fact increasing penalty beyond statutory maximum must be determined by jury beyond reasonable doubt).

[10] *Alleyne v. United States,* 570 U.S. 99 (2013) (Fact increasing minimum mandatory sentence is 'element" for jury).

> Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

Hurst v. Florida, 136 S. Ct. 616, 624 (2016).

Arizona's capital sentencing scheme requires the jury (the "trier of fact") to find at least one aggravating factor beyond a reasonable doubt. A.R.S. §§ 13-751(B), 13-752(E). This complies with *Hurst.* The jury then considers mitigation and determines whether the mitigation is sufficiently substantial to warrant leniency; *Hurst* did not address the burden of proof at this phase. Therefore, Arizona's capital sentencing scheme does not run afoul of *Hurst.*

b. Hurst is not a significant change to Arizona law

Hurst v. Florida applied *Ring v. Arizona* to a capital sentencing in Florida, and may constitute a "significant change in the law" as required by Rule 32.1(g) – as to *Florida* law.

The Court, however, finds that *Hurst* is not a significant change or "transformative event" as to Arizona law, as Arizona has implemented the strictures of *Ring v. Arizona,* 536 U.S. 584 (2002) (jury must determine aggravating factors that determine death-eligibility).[11]

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[11] The Supreme Court held that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). *Padilla v. Kentucky* also was determined to apply a new procedural rule and was held not to be retroactive. *Chaidez v. United States*, 568 U.S. --, (2013).

b. *Hurst* is not retroactive

Moreover, even if *Hurst* were a significant change in the law, it does not apply retroactively. The Supreme Court has held that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). *Hurst*, which applies *Ring* in Florida, is also non-retroactive.

In connection with the *Lynch* claim the Court determined that Defendant's conviction is final *See State v. Sepulveda*, 201 Ariz. 158, 159, ¶ 4 n.2, 32 P.3d 1085, 1086 (App. 2001) ("A conviction becomes final upon the issuance of the mandate affirming the conviction on direct appeal and the expiration of the time for seeking certiorari in the United States Supreme Court.") "[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 *Hurst* is a significant change in Arizona law, this does not compel a conclusion that its rule should be applied to [Defendant's] case, because "[t]he Constitution … neither forbids nor demands retroactive application of new rules to cases that have become final." *State v. Towery*, 204 Ariz. 386, 389, ¶ 6, 64 P.3d 828, 831 (2003). [Quoting State's Response, at pp. 2-3].

THE COURT FINDS that Defendant's *Hurst* claim does not meet the Rule 32.1(g) exception to preclusion, and is not colorable under Rule 32.1(g).

Conclusion

Rule 32.6(c)[12] states that if a court, "after identifying all precluded and untimely claims, … determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must order the petition summarily dismissed." The Court finds that Defendant did not present a material issue of fact or law that would entitle him to relief.

Based on all of the above,

THE COURT FINDS that the *Lynch* claim is not ripe for determination and not colorable under *Strickland*; and that neither the *Lynch* nor the *Hurst* claim is colorable under Rule 32.1(g).

IT IS THEREFORE ORDERED dismissing Defendant's Successive Petition for Post-Conviction Relief.

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[12] Before January 1, 2018 the citation was to Rule 32.6(c), which was substantially similar and read:

> "If, after identifying all precluded claims, determines that no remaining claim presents a material issue of fact or law which would entitle the defendant to relief under this rule and that no purpose would be served by any future proceedings, the court shall order the petition dismissed."

APPENDIX D

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

HONORABLE BRADLEY ASTROWSKY

CLERK OF THE COURT
S. Beery
Deputy

STATE OF ARIZONA — LAURA PATRICE CHIASSON

v.

FABIO EVELIO GOMEZ (A) — DAVID ALAN DARBY

COURT ADMIN-CRIMINAL-PCR
JUDGE ASTROWSKY
VICTIM WITNESS DIV-AG-CCC

December 3, 2018

No. CR 2000-090114

MINUTE ENTRY

The Court has reviewed the defendant's Second Amended Petition for Post-Conviction Relief (filed

3/13/2018), the State's Response (filed 4/12/2018), and the Defendant's Reply (filed 5/24/2018), and the Third Amended Petition (adding an IAC/appellate counsel claim, also included in Second Amended as Section D), as well as the court file. This is the defendant's first Rule 32 proceeding following the Arizona Supreme Court's affirmance of his convictions and death sentences PCR Pleadings.

In his supplemental pleadings, Defendant alleges that —

- The trial court erred in failing to instruct the jury of his parole ineligibility in violation of due process;
- Trial counsel was/were ineffective for failing to request a *Simmons* instruction regarding his parole eligibility; and
- Appellate counsel was ineffective by failing to raise trial counsel's failure to request a *Simmons-Kelly* instruction regarding his parole ineligibility.

In *Lynch v. Arizona*, the United States Supreme Court held in 2016 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 the 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*, 136 S.Ct. at 1818 (2016) (internal citations omitted).

In addition, quoting *Simmons*, the decision on which *Lynch* relies:

> But if the State rests its case for imposing the death penalty at least in part on the premise

> that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. Because truthful information of parole ineligibility allows the defendant to "deny or explain" the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court. See *Gardner*, 430 U.S., at 362, 97 S.Ct., at 1206-1207.

Simmons v. South Carolina, 512 U.S. 154, 168–69, 114 S. Ct. 2187, 2196, 129 L. Ed. 2d 133 (1994).

Failing to instruct the jury of his parole ineligibility in violation of due process

Preclusion

Pursuant to Rule 32.6(c), the Court first identifies all claims that are procedurally precluded from Rule 32 relief. An issue is precluded if it was raised, or could have been raised, on direct appeal or in prior Rule 32 proceedings. *State v. Towery*, 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996). Pursuant to this authority and Rule 32.2(a), the Court finds the defendant's claims relating to trial court error to be precluded from relief as it could have been raised on appeal and has been waived. Rule 32.2(a)(3).

Merits

In the alternative, the Court addresses the merits. First, this Court finds that Defendant has not

established a colorable claim that the State injected "future dangerousness" either as a logical inference from the evidence or by argument. The State never asked his jurors to consider his future dangerousness. The rationale of *Lynch* is not applicable here. Thus, a *Lynch* instruction was not warranted.

As in the recently-decided decision of *State v. Sanders*, in addressing the *Simmons* instruction issue, the Court reminded that "[i]n a capital case, placing future dangerousness at issue invites the jury to assess whether the defendant's propensity for violence is so great that imposing death is the only means to protect society, " and then held that "because there are significant factual differences between Sanders' case and those cases where a defendant's future dangerousness was at issue, … trial court's instruction ["eligible for release after serving 35 years"] did not violate Sanders' due process rights." *State v. Sanders*, 245 Ariz. 113, ¶ 18, 425 P.3d 1056, 1065 (2018).

In reaching its decision about whether the State placed "future dangerousness" at issue, the *Sanders* Court considered:

- Whether the circumstances surrounding [the] murder suggested that the death penalty was the only means to protect society. "*See Ramos*, 463 U.S. at 1003. The record shows that Sanders committed this murder in the context of a specific domestic situation that came to a head in the summer of 2009. Specifically, at the time of the murder, Sanders was living in cramped, stressful conditions in his mother's house, where neither Schala nor Susan were welcome; Sanders and Susan were chronically

> unemployed, causing severe financial distress; Susan had abdicated parenting responsibilities, thrusting Sanders into the role of the sole responsible parent; and Sanders was suffering from undiagnosed, untreated PTSD. …. Previously-decided cases before this Court involving future dangerousness have entailed a random or predatory murder involving a stranger who had the misfortune of crossing the defendant's path." (*State v. Sanders*, 245 Ariz. 113, ¶ 20, 425 P.3d 1056, 1065 (2018));
>
> - Whether evidence, extrinsic to the murder, showed the defendant's propensity for violence (*Sanders*, 245 Ariz. at ¶¶ 19, 27-28, 425 P.3d at 1065, 1066); and
> - Whether the State emphasized the brutality of the murder suggested the defendant posed a danger to society. Citing to "*Commonwealth v. Chmiel*, 889 A.2d 501, 537–38 (Pa. 2005) (finding prosecutor's arguments focusing on the brutality of the murders, and imposing death as retribution for the inhumanity of the murders, as opposed to defendant's propensity for violence, did not place future dangerousness at issue)" the Court determined it did not (*Sanders*, 245 Ariz. at ¶ 30, 425 P.3d at 1066–67).

As in *Sanders*, the State rebutted Defendant's mitigation not with "future dangerousness' or prior convictions (of which there appear to have been none); rather, the State argued Defendant's relationships; his drug use and his parenting decisions:

> ¶ 39 The State disputes Gomez's alleged mitigating factors, contending that his family

> members and friends from the Dominican Republic had no significant contact with Gomez in the more than ten years between his move to the United States and Joan's murder. At the penalty phase, to contradict Gomez's claims that he was a productive member of society and caring father, the State introduced testimony from the guilt phase in which Gomez admitted using drugs and said that, on the day of the murder, he had smoked marijuana before driving with his infant son in a car and had later left the baby unattended while he engaged in consensual sexual intercourse in another car.

Similar to Sanders, "future dangerousness" was not placed at issue by the State.

Second, even were "future dangerousness' an issue at the sentencing phase, this Court finds that *Lynch* is not retroactive. Defendant's conviction became final in 2012[1], four years before Lynch was decided in 2016. As a result, Lynch is not applicable to this case. In *O'Dell v. Netherland*, 521 U.S. 151, 167, 117 S.Ct. 1969, 1978 (1997), the United States Supreme Court held that the rule announced in *Simmons v. South Carolina* is not a "watershed rule of criminal procedure," but rather a procedural, non-retroactive rule. *O'Dell*, 521 U.S. at 167-68. *Lynch v. Arizona*, simply applies the rule announced in *Simmons v.*

---

[1] Appeal of 2001 conviction and 2003 sentencing:

State v. Gomez, 211 Ariz. 494, 496–97, ¶¶ 2-6; 498, ¶¶ 12-17, 123 P.3d 1131, 1133–34; 1135 (2005).

Appeal of 2010 death sentence (eligibility & penalty phases:

State v. Gomez, 231 Ariz. 219, 221–22, ¶¶ 1-6, 293 P.3d 495, 497–98 (2012).

South Carolina, and so, is neither a "well-established constitutional principle" nor a "watershed rule of criminal procedure," but is a procedural, non-retroactive rule. The Court finds that *Lynch III* does not apply retroactively to Defendant's case.

Lynch did not expressly resolve whether its holding was procedural, or whether its holding was substantive and was to be applied retroactively. Arizona courts have adopted and follow federal retroactivity analyses. *State v. Towery*, 204 Ariz. 386, 389, 64 P.3d. 828, 831 (2003) (citing *Slemmer*, 170 Ariz. at 181-82).

Third, Defendant was not prejudiced[2] by the lack of a *Lynch* instruction. Even if defense counsel had requested a *Lynch* instruction, he would not have been entitled to one in the absence of any evidence presented regarding Defendant's future dangerousness.

Finally, for reasons set forth in the IAC/trial discussion below, the Court finds that the trial court's failure to address the life/natural life distinction did not impact the jury's determination to impose death.

Ineffective Assistance of Counsel (IAC)/trial and appellate:
Failing to request a *Simmons* instruction regarding parole eligibility

In the next two claims, Defendant alleges that trial and appellate counsel provided ineffective assistance by failing to request a *Simmons* instruction.

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[2] Absent specific authority, the Court declines to "presume prejudice" as requested by Defendant. 2nd Amended Petition, at 2.

Counsels' performance is evaluated at the time of trial and not in hindsight. At the time of Defendant's 2010 trial and his appeal decided in 2012, long-established Arizona precedent held that Arizona defendants were not entitled to parole unavailability instructions. *State v. Chappell*, 225 Ariz. 229, 240, ¶43 (2010); *State v. Garcia*, 224 Ariz. 1, 18, ¶¶ 76–77 (2010); *State v. Hargrave*, 225 Ariz. 1, 14, ¶¶ 52–53 (2010); *State v. Cruz*, 218 Ariz. 149, 160, ¶¶ 41–42 (2008). Accordingly, any request for a *Simmons* instruction would fail, and counsel was not ineffective for failing to make a futile request. *See State v. Pandeli*, 242 Ariz. 175, 185, 394 P.3d 2, 12, ¶ 33 (2017) ("Counsel's failure to make a futile motion does not constitute ineffective assistance of counsel.") (quoting *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994)).

Further, neither the United States Supreme Court's subsequent decision in *Lynch*, holding that Arizona defendants are entitled to instructions under *Simmons*, nor the Arizona Supreme Court's decisions in *State v. Escalante-Orozco* (241 Ariz. 254, 386 P.3d 798 (2017); *State v. Hulsey,* 243 Ariz. 367, 408 P.3d 408 (2018); and *State v. Rushing*, 243 Ariz. 212, 404 P.3d 240 (2017), *cert. denied,* 17-1449, 2018 WL 1876897 (U.S. Oct. 1, 2018), retroactively render counsel's performance ineffective. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984) (evaluation of counsel's acts or omissions are judged as of the time counsel was required to act). Counsel's failure to predict *Lynch's* change to then-established Arizona Supreme Court law was not objectively unreasonable. *See Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (finding counsel was not ineffective because a "lawyer cannot be required to anticipate our decision" in a

later case); *Bullock v. Carver*, 297 F.3d 1036, 1052 (10th Cir. 2002) (rejecting ineffective assistance claim based upon counsel's failure to predict future changes in the law and stating that "clairvoyance is not a required attribute of effective representation"); *Brown v. United States*, 311 F.3d 875 (8th Cir. 2002) (finding no ineffective assistance of counsel for counsel's failure to raise *Apprendi*-type issue prior to that decision because such issue was "unsupported by then-existing precedent …").

For the same reasons, appellate counsel was not ineffective for failing to challenge the lack of a parole ineligibility instruction. Any such challenge would have been rejected under then-existing Arizona Supreme Court precedent and appellate counsel was not ineffective for failing to foresee *Lynch's* future change in the law, especially where the claim was unpreserved since trial counsel did not request a *Simmons* instruction.

Finally, Defendant cannot establish prejudice. As previously discussed, counsels' failure to request a *Simmons* instruction or challenge its omission on appeal cannot have prejudiced Defendant because any such effort would have been futile under Arizona Supreme Court precedent. And finally, Defendant could not show prejudice even if counsel's request for a *Simmons* instruction would have been successful. As explained in detail in the Claim above, there is no reasonable probability that a jury instruction on parole unavailability would have resulted in life sentence given (1) the lack of suggestion of future dangerousness; (2) the lack of any reference to parole-eligibility or evidence of acceptance of responsibility for the murder; and (3) the extraordinary weight of

the (F)(6) aggravating circumstance when evaluated in connection with the relatively minimal mitigation. *Gomez*, at ¶ 40.

There is no evidence to support the argument that the jury's unanimous determination to return a verdict for the Death Penalty was impacted by the variance between "Natural Life" and "Life". As the Supreme Court found on independent review:

> D. Independent Review
>
> ¶ 31 Because Gomez committed the murder before August 1, 2002, we independently review his death sentence. *See* A.R.S. § 13–755(A).
>
> 1. Aggravating Circumstances
>
> ¶ 32 The State alleged that the murder was "especially cruel" for purposes of the (F)(6) aggravating circumstance. To establish especial cruelty, "the state must prove that 'the victim consciously experienced physical or mental pain prior to death, and the defendant knew or should have known that suffering would occur.' " *State v. Prince*, 226 Ariz. 516, 539 ¶ 97, 250 P.3d 1145, 1168 (2011) (quoting *State v. Snelling*, 225 Ariz. 182, 188 ¶ 25, 236 P.3d 409, 415 (2010)). This Court "'examine[s] the entire murder transaction and not simply the final act that killed the victim.'" *Id*. (quoting *State v. Ellison*, 213 Ariz. 116, 142 ¶ 119, 140 P.3d 899, 925 (2006)).
>
> ¶ 33 The record establishes beyond a reasonable doubt that Joan's murder was especially cruel. The medical examiner testified that Joan suffered eighteen or more blows to her head, at least one of which was inflicted

with as much force as that caused by a motor vehicle accident. She also suffered cuts, scrapes, bruises, and bone fractures. Her wounds suggested that Joan was conscious and moving while being beaten. She had defensive wounds and grip marks on her arms indicating that she struggled while being held down with significant force.

¶ 34 The evidence also indicates that a gag-type ligature was placed around Joan's face and across her neck. Although Joan usually kept a neat apartment, after the attack, a glass table top was knocked over and a heavy living room chair displaced. Joan's blood was found in Gomez's apartment, but not in her own. This evidence suggests Joan was abducted in her apartment and then beaten to death in Gomez's apartment.

¶ 35 Gomez argues that especial cruelty was not proven because the medical examiner could not determine the "sequence of blows, the consciousness of the victim, and the nature of the bruising" that Gomez inflicted. This argument fails.

¶ 36 Joan's injuries, her screams, evidence of a struggle in Joan's apartment, and the fact that she had been gagged all indicate Joan was conscious during part of the attack. *Cf. State v. Andriano*, 215 Ariz. 497, 511 ¶ 66, 161 P.3d 540, 554 (2007) (finding cruelty where "[d]efensive wounds on [the victim's] hands and wrists indicate that he was conscious for at least some of the attack and thus knew his wife was attacking him"), *abrogated on other grounds by*

State v. Ferrero, 229 Ariz. 239, 274 P.3d 509 (2012).

¶ 37 Regardless of when Joan lost consciousness as result of the eighteen blows to her head, the State proved beyond a reasonable doubt that she was conscious for part of the attack and suffered physically and mentally. The State also proved beyond a reasonable doubt that Gomez knew or should have known that Joan was suffering physically and mentally. *See*, *e.g.*, *id*. (defendant "knew or should have known that beating her husband with a bar stool would cause him physical pain and mental anguish").

2. Mitigating Circumstances

¶ 38 At the mitigation phase, Gomez presented testimony from family members and others who knew him in the Dominican Republic and established that he had a good upbringing and was treated well by his parents while growing up. During allocution, Gomez asked for an opportunity to obtain an education and to be rehabilitated. On appeal, Gomez states that he had no prior criminal record and that he immigrated to the United States as a self-sufficient professional, sought ways to give back to his adopted country as a coach for young people, cared about his family and community in the Dominican Republic, and was raising an infant son.

¶ 39 The State disputes Gomez's alleged mitigating factors, contending that his family members and friends from the Dominican Republic had no significant contact with Gomez

in the more than ten years between his move to the United States and Joan's murder. At the penalty phase, to contradict Gomez's claims that he was a productive member of society and caring father, the State introduced testimony from the guilt phase in which Gomez admitted using drugs and said that, on the day of the murder, he had smoked marijuana before driving with his infant son in a car and had later left the baby unattended while he engaged in consensual sexual intercourse in another car.

¶ 40 "A defendant's relationship with his or her family and friends may be a mitigating circumstance, yet the Court has often found that this circumstance should be given little weight." *State v. Tucker*, 215 Ariz. 298, 322 ¶ 116, 160 P.3d 177, 201 (2007). Similarly, a defendant's lack of a prior felony conviction "is a mitigating circumstance, but entitled to little weight." *State v. Greene*, 192 Ariz. 431, 442 ¶ 52, 967 P.2d 106, 117 (1998). The mitigating circumstances are not substantial.

3. Propriety of Death Sentence

¶ 41 We consider the quality and the strength, not simply the number, of aggravating and mitigating factors. *Id* at 443 ¶ 60, 967 P.2d at 118. Gomez kidnapped and sexually assaulted Joan and brutally bludgeoned her to death. The record does not reflect significant mitigating circumstances. We conclude that "the mitigation is not sufficiently substantial to warrant leniency." A.R.S. § 13–755(B).

State v. Gomez, 231 Ariz. 219, 226–27,1 30-41, 293 P.3d 495, 502–03 (2012).

On Independent Review, the Supreme Court upheld the death sentence imposed by the jury. This Court may not overrule, modify or disregard the Supreme Court's conclusion on Independent Review that the defendant's mitigation evidence was not sufficiently substantial to call for leniency. *See*, *State v. Sullivan*, 205 Ariz. 285, 288, 69 P.3d 1006 (App. 2003); *Bade v. Arizona Dept. of Transp.*, 150 Ariz. 203, 205, 722 P.2d 371 (App. 1986)(lower court has no authority to overrule or disregard express ruling of Arizona Supreme Court).

CONCLUSION

A colorable claim for post-conviction relief is "one that, if the allegations are true, might have changed the outcome" of the proceeding. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993); Ariz. R.Crim.P. 32.6(c) ("court shall order…petition dismissed" if claims present no "no material issue of fact or law which would entitle defendant to relief"); 32.8(a)(evidentiary hearing required "to determine issue of material fact").

The Court finds that the defendant has failed to raise colorable claims related to the lack of a *Simmons* instruction in his Second Amended Petition; specifically, the Court finds no colorable claim that any error in failing to give a *Lynch III* instruction "contribute[d] to or affect[ed] the verdict or sentence." *State v. Henderson*, 210 Ariz. 561, 567, 115 P.3d 601, 607 (2005).

Based on all of the above,

IT IS THERFORE ORDERED dismissing all other claims, and dismissing the Second Amended Petition.

/s/ Bradley Astrowsky

HONORABLE BRADLEY ASTROWSKY
JUDGE OF THE SUPERIOR COURT

APPENDIX E

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

HONORABLE WARREN J. GRANVILLE

CLERK OF THE COURT
B. Navarro
Deputy

STATE OF ARIZONA	ROBERT E PRATHER
v.	
STEVEN RAY NEWELL (A)	STEVEN RAY NEWELL 183736 PO BOX 8200 FLORENCE AZ 85132 AMY ARMSTRONG KIRSTY DAVIS COURT ADMIN-CRIMINAL-PCR

June 20, 2018

No. CR 2001-009124

PCR DISMISSED

Defendant filed his first Petition for Post-Conviction Relief on May 4, 2009. This Court summarily dismissed certain claims by Ruling dated 3/10/2010, and dismissed the petition in its entirety following a three-day Evidentiary Hearing held in 2011. Ruling dated 1/12/2012.

In this successive petition, Defendant claims that he should be afforded post-conviction relief because he was entitled to a jury instruction in accordance with *Lynch v. Arizona,* 136 S.Ct. 1818 (2016).

For the purpose of this successive petition, this Court has reviewed and considered Defendant's successive Petition for Post-Conviction Relief (filed 1/12/2018), and exhibits including the sealed exhibits (filed simultaneously), Notice of Errata (filed 2/2/2018, with replacement Exhibit 1), the state's Response (filed 3/8/2018), and Reply (filed 4/30/2018). In addition the Court has reviewed the court file, including transcripts provided by the parties on May 31, 2018. Joint Notice of Filing Transcripts. This ruling is intended to supplement the previous rulings, not to modify or detract from either.

The *Lynch v. Arizona* claim

Under the law in effect at the time of Defendant's trial and sentencing, A.R.S. § 13703(A) provided for a "Life" sentence subject to the possibility of release on parole upon completion of a thirty-five year calendar year period as an alternative to "natural life". At the time of Defendant's trial, the Legislature had not enacted any concomitant enabling statute or procedure to support the "release on parole" provision.

In *Lynch*, the United States Supreme Court held in 2016 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 the 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*, 136 S.Ct. at 1818 (internal citations omitted).

In addition, quoting *Simmons,* the decision on which *Lynch* relies:

> But if the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. Because truthful information of parole ineligibility allows the defendant to "deny or explain" the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court. See *Gardner,* 430 U.S., at 362, 97 S.Ct., at 1206-1207.

Simmons v. South Carolina, 512 U.S. 154, 168–69, 114 S. Ct. 2187, 2196, 129 L. Ed. 2d 133 (1994).

Defendant seeks relief under *Lynch v. Arizona* because there is still no enabling legislation to support A.R.S. 13-751(A)(2)'s reference to a "Life" term (parole-eligible after 35 years) rather than a "Natural Life" term.

This Court finds that *Lynch* was not violated in the present case because the issue of future dangerousness was not raised before his jury.

Defendant claims that the State's use of the words "vile" and "worst of the worst" in argument during the aggravation and penalty phases, respectively, referred to his "future dangerousness." Not so. The State argued Defendant's "vile state of mind" at the Aggravation Phase in support of its claims that "this is a heinous or depraved offense." Petition at 8 (quoting RT 2/18/2004 at 65-67). And at the Penalty Phase the State advised the jurors that the crime against the 8 year old child was among the "worst of the worst", focusing on the nature of that crime, not on Defendant's character or as a predictor of future conduct. RT 2/24/2004 at 76-85.

This Court finds that Defendant has not established a colorable claim that the State injected "future dangerousness" either as a logical inference from the evidence or by argument. Thus, a *Lynch* instruction was not warranted.

Alternatively, this Court finds that Defendant lacks standing to make a *Lynch* claim because the State never asked his jurors to consider his future dangerousness. The rationale of *Lynch* is not applicable here.

A second basis to deny Defendant's current claim is that defense counsel's argument at trial would have led the jury to believe that a Life verdict meant "natural life". Defense counsel implored the jury to allow Defendant to spend "the rest of his life in prison" Defense counsel ended his argument with "He was 20 years old at the time of this offense. <u>If you find substantial mitigating factors, he will spend the rest</u>

of his life, as you've been told, in prison." RT 2/24/2004 at 74-75 (end of defense closing #1 [pp. 61-76]). Defense counsel again implied that a Life verdict was natural life when he said, "He can have rules for the rest of his life in the Department of Corrections. That's what I ask you to do." RT 2/24/2004 at 89-90 (defense closing #2 [pp. 85-90]).

The Court finds that the claim is not colorable, as the jury was advised by the defense during first and second penalty phase closings that Defendant would spend the rest of his life in prison by a Life verdict.

Another basis to deny Defendant's claim is that it is not yet ripe. Defendant was sentenced in 2004. The Court instructed the jury on the three possible sentences set forth at that time in A.R.S. § 13-703(A). The Court identified the range of sentencing available as: life with the possibility of parole after 35 years, natural life, or death. Penalty Phase, Final Jury Instructions filed 2/24/2004. Even if the trial jury had returned a Life verdict and this Court had sentenced Defendant to a Life term with the possibility of parole after serving thirty-five years, he would not be eligible for release until 2039.

Defendant has served only fourteen of the thirty-five years; the Legislature still has twenty-one years to enact enabling legislation to provide for the release contemplated by their passage of A.R.S. § 13-703. This Court must presume that the Legislature will provide enabling statutes for the laws it enacts. The 2018 Legislature has recently passed SB 1211. That bill added A.R.S §13-717 to provide a mechanism for release of persons who plead guilty to First Degree Murder pursuant to a plea agreement that stipulated to a sentence of life with the possibility of release.

When the Legislature acts to provide support for its differentiation of a "Life" term from a "Natural Life" term, the information provided to defendant's jury would be rendered both accurate at the time given in terms of the sentences then-identified in the statute, and also in terms of the sentence available at the time of eligibility. Any *Lynch*/*Simmons* issue would then be rendered moot.

The Court finds that Defendant is not yet parole-eligible, but that legislative action may yet render him so, such that the jury was not improperly instructed. Thus, the Court finds that the issue will not be ripe for resolution until after Defendant has served 35 years, including any credit for time served.

Because there is no guarantee as to what Arizona's release eligibility protocol will be by 2039, this issue is not yet in controversy, and is not ripe for determination as to this defendant.

Another basis to deny Defendant relief is that *Lynch* is not retroactive. *Lynch* did not expressly resolve whether its holding was procedural, or whether its holding was substantive and was to be applied retroactively. Arizona courts have adopted and follow federal retroactivity analyses. *State v. Towery,* 204 Ariz. 386, 389, 64 P.3d. 828, 831 (2003) (citing *Slemmer*, 170 Ariz. at 181-82).

Defendant's conviction became final in 2011, five years before *Lynch* was decided in 2016. As a result, *Lynch* is not applicable to this case. In *O'Dell (CITE)* the United States Supreme Court held that the rule announced in *Simmons v. South Carolina* is not a "watershed rule of criminal procedure," but rather a procedural, non-retroactive rule. *O'Dell,* 521 U.S. at 167-68. *Lynch v. Arizona*, simply applies the rule

announced in *Simmons v. South Carolina*, and so, is neither a "well-established constitutional principle" nor a "watershed rule of criminal procedure," but is a procedural, non-retroactive rule. The Court finds that *Lynch III* does not apply retroactively to Defendant's case.

Finally, Defendant was not prejudiced by the lack of a *Lynch* instruction. Even if defense counsel had requested a *Lynch* instruction, he would not have been entitled to one in the absence of any evidence presented regarding his future dangerousness.

There is no evidence to support the argument that the jury's unanimous determination to return a verdict for the Death Penalty was impacted by the variance between "Natural Life" and "Life". As the Supreme Court found on independent review:

> Here, substantial evidence supports the cruelty prong of the (F)(6) aggravator. Cruelty requires proof that the victim "consciously experienced physical or mental pain prior to death and the defendant knew or should have known that suffering would occur." *Trostle,* 191 Ariz. at 18, 951 P.2d at 883 (citation omitted). The evidence—bruising that occurred at or near the time of death consistent with grasping of Elizabeth's arms, sexual assault-related bruises and injuries, testimony that it normally takes two minutes for death by asphyxiation to occur, and marks showing that Elizabeth was grasping at the ligature—all support the conclusion that this murder was especially cruel. Elizabeth suffered serious physical and mental anguish before she died. Newell should have known that such suffering would occur.

> Because we find that compelling evidence supports a finding of cruelty, we need not examine whether the evidence also establishes the heinousness or depravity prongs of (F)(6). *State v. Djerf,* 191 Ariz. 583, 595, ¶ 44, 959 P.2d 1274, 1286 (1998) (noting that "a finding of either cruelty or heinousness/depravity will suffice to establish" the (F)(6) factor).
>
> The bulk of Newell's mitigation evidence related to his unstable childhood and drug use. Newell's witnesses testified that during childhood his home life was unstable. In addition, as a child he was exposed to people with drug addictions who engaged in drug-related activities. Several witnesses testified that Newell had been sexually and physically abused during his childhood. Finally, by all accounts, Newell had an extended history of drug use.
>
> We conclude that Newell's mitigation evidence is not sufficiently substantial to call for leniency. No evidence explains how Newell's drug addiction and unstable childhood led to the sexual assault and murder of eight-year-old Elizabeth. *See Anderson,* 210 Ariz. at 357, ¶¶ 135–37, 111 P.3d at 399. Moreover, in view of the compelling aggravating circumstances, the mitigation evidence simply fails to rise to a level that would call for leniency.

State v. Newell, 212 Ariz. 389, 406, ¶¶ 85-87, 132 P.3d 833, 850 (2006).

The Supreme Court upheld the death sentence imposed by the jury.

The Court finds, beyond a reasonable doubt, that any error in failing to give a *Lynch III* instruction "did not contribute to or affect the verdict or sentence." *State v. Henderson*, 210 Ariz. 561, 567, 115 P.3d 601, 607 (2005).

The Juror Questionnaires

Finally, in support of his claim, Defendant references *voir dire* questioning and has attached excerpts from the questionnaires of four jurors. Sealed Exhibits 1-4. Defendant does so in order to establish that the jurors improperly considered parole eligibility in imposing the death penalty – even though parole was not available to this defendant.

The Court finds the jury questionnaires of little assistance in addressing Defendant's *Lynch* claim. This Court has participated in interviews of over 1500 potential jurors for a capital case. Questionnaires are filled out by folks who have largely never given any thought to death penalty law. When initially asked, many will say that the death penalty is always appropriate for any killing, never appropriate, appropriate only for mass murderers, and appropriate for forcible rapists and child molesters. When educated about the proper scope of the law, and the decisions required to reach a vote to consider whether the death penalty is appropriate, the jurors seated for the trial have all sworn that they understood and swore that they would act according to the law. Jurors are presumed to be fair and impartial, and are presumed to follow the Court's instructions. *See Lockhart v. McCree,* 476 U.S. 162, 184, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); *State v. Payne*, 233 Ariz. 484, 510, ¶ 100, 314 P.3d 1239, 1265 (2013).

Only one of the four jurors Defendant references in his Petition, Juror 212, was actually a deliberating juror (Juror 13). Even there, his answer, written before being given any legal instruction, was ambiguous. He wrote, "don't know if I would rely on the 'without the possibility of parole' clause." Further, the twelve jurors were unanimous in their verdict of death.

Defendant provides no evidence the jurors deliberating at the penalty phase considered parole-eligibility (as opposed to properly considering aggravating and /mitigating factors, as argued by the State and instructed by the Court) in determining the sufficiency of mitigation to support leniency in light of the aggravating factors.

> The record in this case showing affirmatively that the jury which tried the defendant was fair and impartial, and the evidence being conclusive as to his guilt of the crime wherewith he was charged, and it appearing that even if error did occur in the trial of the case it was not such as to affect the verdict in any manner, the judgment is affirmed.

Conner v. State, 54 Ariz. 68, 74–75, 92 P.2d 524, 527 (1939).

Exhibits 5-11

Defendant attaches documentation relating to Defendant's post-conviction and *habeas* investigation "social history, as presented at trial [that] provided a basis on which a juror could have – knowing he would never be released – decided to exercise mercy and vote for a life sentence." Petition at 18; *see, id*. at 20-23.

At this point in the proceedings, with respect to the impact of *Lynch* on his sentencing jury, the pertinent question is not what evidence could have been considered by the sentencing jury had it been presented, but rather what instruction was required and what impact, if any, did the lack of the instruction have on the jury in light of the evidence that it had.

The Court finds these additional mitigation materials of little assistance in resolving the *Lynch* claim. The Court finds certain of the background material to be cumulative of what was presented at trial, and also notes that at trial Defendant effectively waived mental health mitigation based on his decision not to submit to an evaluation by the State's expert.

Based on all of the above,

THE COURT FINDS that Defendant's claim under Rule 32.1(g) is not colorable.

IT IS THEREFORE ORDERED dismissing Defendant's successive Petition for Post-Conviction Relief.

APPENDIX F

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

HONORABLE ARTHUR T. ANDERSON

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA	JASON LEWIS
v.	MYLES A BRACCIO
STEPHEN DOUGLAS REEVES (001)	STEPHEN DOUGLAS REEVES 263041 ASPC FLORENCE KASSON PO BOX 8200 FLORENCE AZ 85132 GILBERT H LEVY CAPITAL CASE MANAGER COURT ADMIN-CRIMINAL-PCR JUDGE ARTHUR ANDERSON VICTIM WITNESS DIV-AG-CCC

March 21, 2019

CR2007-135527-001 DT

DEFENDANT'S PCR PETITION DISMISSED

The Court has considered the Defendant Stephen Reeves's Petition for Post-Conviction Relief (PCR) (filed 11/29/2017), including Appendices 1-24[1], the State's Response and Exhibits A-D (filed 2/20/2018), Defendant's Reply and Supplemental Appendices 1-2 (filed 5/31/2018), and relevant parts of the trial record. This is Defendant's first Rule 32, Ariz. R. Crim P., proceeding following the affirmance of his convictions and death sentence in *State v. Reeves*, 233 Ariz. 182, 310 P.3d 970 (2013).

II. Procedural Background

The Arizona Supreme Court opinion sets forth the relevant facts of the crimes.

> One Saturday morning in June 2007, Reeves entered an office where eighteen-year-old [Norma Gabriella] Contreras was working alone. Reeves asked if the office was hiring; she said no, and he left. About five minutes later, Reeves returned carrying a piece of concrete and demanded her car keys and cell phone. Contreras attempted to push an alarm button. Reeves, who was much larger than Contreras, forced her to the floor and straddled her. For

[1] Appendices 1-24 are on CD and were mailed to the Presiding Criminal Judge; the Appendices were marked as Exhibit 1 to the PCR Petition filed on 11/29/2017. *See* minute entry dated 12/05/2017. IT IS ORDERED that Exhibit 1 is received in evidence as of 6/4/2018, the date the Court received the assignment of this PCR proceeding.

> about eight minutes, while Contreras screamed and struggled, Reeves beat her, hit her with the concrete, wrenched her neck, and attempted to strangle her with his hands and a piece of wood. Finally, he retrieved a box cutter from another room and slit her throat. He turned off the lights and dragged her body into a back room. Meanwhile, people at another office who had heard Contreras scream called 911. Police arrested Reeves shortly after he drove away in Contreras's car. He had her cell phone in his pocket.

On June 12, 2007, a Maricopa County Grand Jury indicted Defendant with first degree premeditated murder and, alternatively, felony murder; armed robbery; burglary; kidnapping; and theft of means of transportation. The State timely noticed its intent to seek the death penalty.

A trial began on November 9, 2009, and the jury convicted Defendant on all the noncapital charges and the first degree murder charge (with eleven jurors finding both premeditated and felony murder, and one juror finding only felony murder). The jury then found proven three aggravating circumstances; that (1) Defendant was previously convicted of a serious offense (F) (2); (2) the murder was especially cruel, heinous, or depraved (F) (6); and (3) Defendant was on release when he committed the murder (F) (7) (a). The jury could not reach a unanimous verdict on the pecuniary gain (F) (5) aggravating circumstance. On January 14, 2010, after the penalty trial, the Court[2]

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[2] The trial case was reassigned to this Court on 5/13/2010. When this ruling refers to "the Court," it encompasses the

declared a mistrial because the jury did not reach a unanimous sentencing verdict.

On September 27, 2010, a retrial on the aggravation and penalty commenced. During jury selection, the Court received information about a potential threat to jurors from the Maricopa County Sheriff's Office. The unsworn jury was released.

On April 11, 2011, a new aggravation trial began, and the jury found the pecuniary-gain aggravating circumstance proven. At the penalty trial, Defendant presented evidence of one statutory mitigating circumstance, significant impairment (A.R.S. § 13-751 (G) (1)), and eleven non-statutory mitigating circumstances, (1) parental alcohol abuse; (2) long-standing substance abuse disorder; (3) co-occurring mental disorders; (4) conditions are treatable; (5) intoxication from drugs and alcohol at the time of the crime; (6) emotional abuse and neglect; (7) good behavior while incarcerated; (8) positive contribution to the community; (9) remorse; (10) love for family; (11) loved by family. (RT 5/13/11 a.m. at 19) The jury returned a death sentence, and the Court imposed the death sentence and sentenced the Defendant on the four noncapital offenses. The Defendant filed a timely appeal. The Arizona Supreme Court affirmed Defendant's convictions and sentence after considering the following issues:

> (1) Whether the trial court abused its discretion in declaring a mistrial after the first jury could not unanimously agree on the sentence, and in later

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previously assigned judges, including Judge Mahoney, who presided over the first capital trial.

denying the Defendant's motion to dismiss the State's death penalty allegation;

(2) Whether Arizona's death penalty statutes are unconstitutionally vague because they failed to provide the second jury with sufficient guidance on the presentation of evidence about the aggravating circumstances found by the first penalty phase jury;

(3) Whether the trial court erroneously failed to preclude the State from presenting any evidence of Defendant's future dangerousness or, alternatively, to allow the presentation of evidence that Defendant likely would not be released if he received a life sentence;

(4) Whether A.R.S. §§ 13-751(C) and (F) create an unconstitutional presumption of death; and

(5) Seventeen other constitutional claims that have been previously rejected but that Defendant listed in order to preserve the claims for federal review.

The Arizona Supreme Court also reviewed the jury's imposition of a death sentence for abuse of discretion, A.R.S § 13-756 (A), and found that, based on the four aggravating circumstances and the mitigation presented, a reasonable juror could have concluded that the mitigating circumstances were not sufficiently substantial to call for leniency. *State v. Reeves*, 233 Ariz. at 188 ¶ 25, 310 P.3d 970. The Court then issued the PCR notice. (PCR App. 7)

II. Legal Discussion

A. Rule 32, Ariz. R. Crim. P.

The Court will evaluate each claim under Rule 32.6 (d) and will identify whether it is precluded from relief under Rule 32.2, Ariz. R. Crim. P. Generally, Rule 32.2 precludes relief for a claim (1) that was finally adjudicated on the merits in an appeal or prior collateral proceeding, or (2) that was raised or could have been raised on appeal. Ariz. R. Crim. P. 32.2 (a) (2), (3); *State v. Towery*, 204 Ariz. 386, 389 ¶ 5, 64 P.3d 828 (2003). The Court reviews claims brought under Rule 32.1 that were previously unavailable during the trial proceedings. *Stewart v. Smith*, 202 Ariz. 446 ¶ 11, 46 P.3d 1067 (2002). "Rule 32.2 is a rule of preclusion designed to limit those reviews, to prevent endless or nearly endless reviews of the same case in the same trial court." *Id.*

After determining whether a claim is subject to preclusion, the Court, where appropriate, will consider whether Defendant has presented a colorable claim that presents "a material issue of fact or law that would entitle the defendant to relief." Ariz. R. Crim. P. 32.6 (d) (1). A PCR claim that fails to state a colorable claim may be summarily dismissed without an evidentiary hearing. Ariz. R. Crim. P. 32.6 (d) (1), (2). "The relevant inquiry for determining whether the defendant is entitled to an evidentiary hearing is whether he has alleged facts which, if true, would *probably* have changed the verdict or sentence." *State v. Kolmann*, 239 Ariz. 157, 160 ¶ 8, 367 P.3d 61 (2016).

B. Ineffective assistance of counsel

The Court evaluates whether Defendant has stated a colorable claim of ineffective assistance of counsel

(IAC) under the two-prong test in *Strickland v. Washington,* 466 U.S. 668 (1984). The failure to establish either prong defeats the IAC claim. *Id.*, at 700. To state a colorable claim, Defendant must demonstrate that (1) trial counsel's representation was objectively unreasonable under all the circumstances; and (2) there is a reasonable probability that but for trial counsel's deficient performance the result of the proceeding would have been different. *Id.,* at 688-90, 694.

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.,* at 694. A showing that counsel's "errors had some conceivable effect on the outcome of the proceeding" is insufficient to prove prejudice. "Virtually every act or omission of counsel would meet that test ..., and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.*, at 693. Instead, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citing *Strickland*, 466 U.S. at 693).

"Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective." *Id*., at 689. Due to the difficulties inherent in this evaluation, a reviewing court must apply a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that,

under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*

III. Post-Conviction Claims

The Defendant's PCR petition raises five claims. Claim one alleges a due process violation, claims two through four allege ineffective assistance of counsel, and claim five urges the Court to order a competency hearing. After reviewing the pleadings and the exhibits presented by the parties, and the record, the Court finds that claim one is precluded, and that there exist no colorable issues warranting an evidentiary hearing or a competency determination. Each claim is discussed below.

A. Claim 1 – Government Misconduct and Tampering With Evidence.

At the resentencing trial the jurors watched exhibit 136, a video that showed Defendant entering and exiting the insurance office two times.[3] The Defendant first entered and asked the victim about a job, and then he left. About five minutes later, Defendant re-entered the office, committed the murder, stole the victim's purse, cell phone and car keys, and he left again. Police arrested Defendant shortly after he left the insurance office.

The Defendant now claims that he entered the insurance office a third time, and that this was recorded on the insurance surveillance system and shows "staggering and impaired behavior." The Defendant further alleges that "investigating officers"

[3] The guilt phase jury also saw this video, admitted into evidence as exhibit 139.

intentionally removed these images, and this, if proven, violates due process. (PCR Pet. at 18-19, 28)

The Defendant, however, has presented no evidence of any tampering with the surveillance recording, and conceded that he has been unable to corroborate that the additional images exist. The Defendant further acknowledged that a retained expert found no evidence to corroborate his claim.

At no time did Defendant raise this claim during either the trial or appellate proceedings, despite multiple opportunities. Shortly after Defendant's arrest, his trial counsel specifically requested disclosure of the surveillance video under Ariz. R. Crim. P. 15. The State responded that the video had been disclosed on July 19, 2007. Trial counsel next moved to preclude the surveillance video or, in the alternative, to redact it in order to eliminate any prejudicial or cumulative evidence on September 29, 2009. This motion described that "within minutes" of finding the victim and "within blocks" of her location, the police stopped Defendant who was driving the victim's car and that he possessed the victim's cell phone and wallet. The motion further described that there were two surveillance cameras, "capturing the activities of the office from two different angles."

> Video 1 is captured by camera A at 10:48 a.m. on June 2, 2007. It shows Ms. Contreras filing papers in the front office. A man enters the office, speaks briefly to her and then leaves. Video 2 is recorded on camera A at 10:53 a.m. on June 2, 2007 and shows a man entering the office while Ms. Contreras is filing papers. Ms. Contreras tries to push past the man to leave the office and a struggle between the two

> ensues, resulting in injuries which caused Ms. Contreras' death. Video 3 is recorded on camera B at 10:53 a.m. on June 2, 2007 and depicts the same activities as are found on Video 2, only from a different angle. Video 3 contains the same information as is found on Video 2.

On October, 26, 2009, the State objected to the preclusion or redaction of the surveillance video. On November 4, 2009, the Court denied the Defendant's motion.

At trial, Shane Taylor, the owner of the insurance company, testified that police contacted him on the day of the murder and requested that he watch the video surveillance. Taylor came to the insurance office, logged into his computer and went to the remote access program to view the recordings from that day. While doing this, he watched the surveillance video involving Norma Contreras's murder "from beginning to end." (RT 12/07/09 at 101-102) Trial counsel raised no objection to the accuracy or completeness of the surveillance video while cross-examining Taylor. (RT 12/07/09 at 105-113) Similarly, trial counsel did not challenge the surveillance video during the testimony of Detective Baranowski and Detective Guzman, who made copies of the surveillance recordings and then later seized the security monitoring system as evidence. Both detectives testified that they made no changes or modifications to the surveillance video. (RT 12/7/09 at 153, 195-196)

In sum, Defendant has not previously claimed that parts of the surveillance video were missing and contained potentially exculpatory evidence, or that the State altered the surveillance video. This claim is

now precluded. Ariz. R. Crim. P. 32.2 (a) (3) (stating that issues waived at trial or on appeal are precluded in post-conviction). The Court now addresses whether Defendant has alleged a colorable claim.

The Defendant argues that the allegedly incomplete surveillance video gave the jury a false impression about his impairment at the time of the crime. As the State pointed out, this evidence would not have been admissible at the guilt or aggravation trials. *See* A.R.S. § 13-503 (stating that evidence of voluntary consumption of alcohol "is not a defense for any criminal act or requisite state of mind"). Additionally, there is nothing to support the video's existence, and the surveillance video established a very short time-period between when Defendant entered and reentered the insurance office. Police then arrested Defendant shortly after he left the crime scene. The Defendant failed to specify, within this timeframe, when he could have reentered the insurance office a third time. Given the short time period established by the evidence, it is not credible that another video exists or that Defendant's intoxication symptoms would have been different.

This evidence also would have been cumulative because both trial counsel and the State presented evidence of Defendant's alcohol use near the time of the murder. First, Dr. Smith, Dr. Bayless, and Dr. Sullivan all agreed that Defendant had a serious alcohol or drug dependence disorder and that he had a type of depressive disorder. The prosecutor's closing argument referred to Defendant as an alcoholic and acknowledged that "one [mitigating] factor that cannot be disputed is the defendant's chronic alcoholism and drug addiction." (RT 5/13/11 a.m., at

82) Additionally, Detective Butcher and Officer Garza testified that Defendant smelled of alcohol, and Detective Butcher also observed that he had bloodshot and watery eyes (although both testified that he exhibited no behaviors that led them to believe that he was impaired). (RT 5/3/11 at 107; 4/25/11 at 196-198; 5/4/11 at 80-82) Dr. Smith testified that he saw cognitive impairment symptoms, including poor decision-making and problem solving and overreaction on the surveillance video, and he testified that chronic alcoholics learn to compensate for alcohol impairment as to physical impairment symptoms but not cognitive impairment. (RT 5/2/11 at 186-87, 180-182) Dr. Sullivan testified that it is not possible to determine a person's level of intoxication by watching a video because "there's a vast difference in individual reactions to alcohol depending on drinking history." (RT 5/11/11 at 170) "[W]hen an individual develops a functional tolerance to alcohol, their blood alcohol level can be elevated to the point where it would put some people completely out of commission and they're not showing any visible signs of alcohol intoxication at all." (*Id.* a 170-71)

The Defendant has failed to state a colorable claim of a due process violation because his allegations are speculative and unsupported by any evidence, and because his allegations lack credibility. *See State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718 (1985) (noting that "Rule 32 does not require the trial court to conduct evidentiary hearings based on mere generalizations and unsubstantiated claims").

Claim 2 – Penalty Phase Ineffective Assistance

The Defendant claims that trial counsel performed deficiently by not obtaining brain scan imaging, and

that this caused prejudice because the post-conviction brain imaging revealed brain abnormality and injury. The Defendant also claims that trial counsel should have impeached Dr. Bayless's interpretation of a psychological test, and that failure to do so caused prejudice. (PCR Pet. at 19-22, 29-33)

1. Brain scanning images evidence obtained in post-conviction

Prior to the first penalty proceeding, trial counsel retained a neuropsychologist, Dr. Sullivan, to evaluate Defendant's cognitive functioning. (RT 5/11/11 at 211-212) Dr. Sullivan conducted a "comprehensive or full-blown neuropsychological evaluation," and he administered between 25 to 35 tests. (RT 5/12/11 at 43-44) Dr. Sullivan testified that each test evaluated the functioning of a specific brain area, and that neuropsychological "tests are developed only for the purpose of identifying the presence or absence of brain damage. And they're very specialized tests." (*Id.* at 44) After nine to ten hours of testing (over three sessions), Dr. Sullivan reported to trial counsel that the testing did not indicate brain damage. (RT 5/12/11 at 46-47; *see also* RT 5/11/11 at 212-214) Specifically, Dr. Sullivan testified that that Defendant had low-average intelligence, processing speeds, and memory functioning, and that there was no evidence of dementia or traumatic brain injury problems. (RT 5/11/11 at 212-213; 5/12/11 at 66)

The Defendant argues that trial counsel performed unreasonably by failing to obtain brain scan imaging because trial counsel knew that he had a history of head injuries from Dr. Smith's report and medical records, and that trial counsel "failed to secure appropriate testing to determine the presence of head

injuries and cognitive impairment." The Defendant further alleges that such testing, for instance the PET scan and the Quantitative Electro Encephalogram (QEEG) obtained in post-conviction, "shows the existence of significant neurological deficits," and are "consistent with brain abnormality and head injuries."

The Defendant, however, has not shown deficient performance because the record demonstrates that trial counsel conducted a reasonable investigation into whether Defendant had impaired cognitive functioning. *See and compare Sears v. Upton*, 561 U.S. 945 (2010) (trial counsel failed to conduct an adequate mitigation investigation and the post-conviction evidence (available to trial counsel) completely changed the sentencing presentation). Here, the trial exhibits evidence the breadth (and reasonableness) of trial counsel's investigation. Moreover, the record demonstrates that trial counsel, in addition to obtaining records and a comprehensive social and medical history, also specifically investigated Defendant's possible brain damage by retaining Dr. Sullivan to conduct comprehensive neuropsychological testing. After talking to Dr. Sullivan, trial counsel reasonably could have concluded that it would be fruitless to obtain brain image scanning because Dr. Sullivan found no evidence of any brain impairment, and, specifically, Dr. Sullivan did not find evidence of any brain impairment that might have impaired Defendant's ability to conform his conduct to the requirements of the law under A.R.S. § 13-703 (G) (1) – the statutory mitigating circumstance noticed and presented by trial counsel. (*See, e.g.*, RT 5/11/11 at 212-214; Dr.

Sullivan testified that he saw no evidence of brain damage that caused him to have any concerns).

Despite finding no deficient performance, the Court now addresses Defendant's allegation that the failure to obtain the brain scan images caused prejudice. First, Defendant alleges that as to the PET scan results,

> Overall, the findings of moderate to severe decreases and increases in specified brain regions are consistent with significant brain dysfunction. Areas of decreased metabolism reflect areas of poor function and may be attributable to a combination of prior head injury, substance abuse, depression, and psychosis.

(PCR Pet. at 20-21, ¶ 4.3)

The Defendant has failed to establish that failure to present this evidence prejudiced his defense. Trial counsel investigated and presented evidence about Defendant's substance abuse and depression. In fact, Defendant's substance abuse history was a central issue at trial, and the jury received substantial testimony and documentary evidence about his prior substance abuse and its impact on his functioning. (*See, e.g.*, RT 5/2/11 at 43-52, 125; Exs. 143, 145-148, 152, 154-55, 185) Moreover, Dr. Smith and Dr. Bayless both agreed that Defendant had a significant substance abuse history and diagnosed Defendant with a substance dependence disorder and a type of depressive disorder (Dr. Smith diagnosed dysthymia and Dr. Bayless diagnosed depressive disorder, not otherwise specified).

Additionally, even if an expert had testified that the brain scan imaging showed injury *possibly* attributable to psychosis, no one that observed Defendant the day of the murder or evaluated him subsequently testified that he was psychotic or showed symptoms of psychosis. (*See, e.g.*, RT 5/4/11 at 78-82 – Officer Garza observed Defendant at arrest; RT 5/4/11 at 7-8, 33-44 – Officers Garcia and Osborne observed Defendant at arrest; RT 5/4/11 at 52-67 – Officer Whittington observed Defendant for approximately eight hours after arrest). Without a correlation to Defendant's behavior, psychosis, as a possible cause of the "areas of decreased metabolism," has little to no weight as a mitigating circumstance because it is speculative, unsupported, and unrelated to Reeves's behavior during the murder. This applies equally to the impact of a prior head injury; without some impact on Defendant's behavior, the mere fact that he may have suffered a head injury has little weight as a mitigating circumstance. A nexus between the two is not required, but the failure to establish a causal connection may be considered in assessing the strength and quality of mitigation evidence. *State v. Anderson,* 210 Ariz. 327, 350 ¶¶ 96-97, 111 P.3d 369 (2005). *See also State v. Pandeli*, 215 Ariz. 514, 532 ¶ 75, 161 P.3d 557 (2007) (finding brain functioning evidence entitled to little weight where defendant failed to show that it contributed to his mental functioning during the murder).

The Defendant next cites to the QEEG report, and argues that the PCR obtained evidence reflects abnormalities at the right side of his brain that are consistent with head trauma. (PCR Pet. at 21, ¶ 4.4) The PCR experts, however, do not opine that the brain

abnormality, as represented on the PET scan or the QEEG, impaired Defendant's functioning during the murder. (App. 18, 19; *see* App. 21 at 13 – PCR expert noting that "the 2016 QEEG data *cannot alone* reveal" brain functioning during the murder) (emphasis in original). Without expert opinion that any one of the potential causes of brain abnormality impaired Defendant's ability to control his behavior, the new evidence does not add anything to the trial presentation and fails to establish prejudice.

In his reply, Defendant cites to a post-trial declaration completed by Dr. Sullivan. In it, Dr. Sullivan notes that two (of the 25 to 35 tests administered) were abnormal, but that he detected no convergent pattern of neuropsychological impairment (which is consistent with his trial testimony). (PCR Supp. App. 1 at ¶ 3) However, Dr. Sullivan now characterizes his test administration as incomplete – "I did not administer a full battery of neuropsychological tests to Mr. Reeves as I was not asked to do so by his counsel." (*Id.*) Dr. Sullivan opined that, given Defendant's history of substance abuse and other brain insults, "there is a reasonable possibility" that additional tests would have shown evidence of cognitive abnormality. (*Id.*)

Dr. Sullivan's declaration does not establish prejudice because it does not change the impact of the brain scans obtained during the PCR investigation and the impairment evidence. Additionally, Defendant does not address what the additional testing would demonstrate about his functioning at the time of the murder. Dr. Sullivan's opinion is therefore speculative. Moreover, Dr. Sullivan's post-trial declaration is at odds with his trial testimony,

and his declaration fails to address this. At trial, Dr. Sullivan testified that he is a forensic neuropsychologist, an area of psychology that is concerned with brain function. (RT 5/11/11 at 148) He has a Ph.D. in clinical psychology, and he is certified by the American Board of Professional Psychology in forensic psychology. (*Id.*at 149-150) Dr. Sullivan also testified about his significant professional experience with brain injury and substance abuse, having worked in a traumatic brain injury unit as a neuropsychologist and at the Veteran's Administration for fifteen years. (*Id.* at 151-152) Dr. Sullivan's trial testimony characterized his testing as a "comprehensive or full-blown neuropsychological evaluation." (RT 5/12/11 at 31) He opined that there were no consistent indications of brain damage, and explained that "you can't have just one or two tests that ... are below average or in the impaired range. You have to have several that point in the same direction, and we didn't have that." (*Id.* at 47, 66) Dr. Sullivan's post-trial statement fails to explain why the same testing now suggests a contrary conclusion – i.e., a "realistic possibility" of cognitive abnormality.

The Court has considered the mitigation evidence presented in post-conviction as well as the mitigation evidence presented at trial and finds no prejudice because it adds nothing of significance to the sentencing presentation. Furthermore, in addition to the mitigation, the jury considered four aggravating circumstances, including the (F) (6) cruel, heinous, or depraved aggravator. The jury found both that (1) the murder was committed in an especially cruel manner, and (2) in an especially heinous or depraved manner after watching the video of Norma Contreras's brutal

murder. The Court finds Defendant has failed to establish prejudice.

2. Dr. Bayless's testimony

The State retained Dr. Bayless to evaluate Defendant's mental status at the time of the offense. (PCR Pet. App. 8 at 1; RT 5/9/11 a.m., at 74) As part of his evaluation, Dr. Bayless administered a psychological test called the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). (RT 5/9/11 p.m. at 44) Dr. Bayless testified that the computer scored testing report contained a significant elevation for psychopathic deviancy. (*Id.* at 64) Dr. Bayless diagnosed Defendant with an antisocial personality disorder (ASPD). Dr. Bayless further testified the MMPI-2 results were only one source of information, and that no decision should be based solely on the MMPI-2, and an evaluating clinician also must review a person's history to see if it validates the MMPI-2 personality traits. If the history does not match the testing, Dr. Bayless testified that the clinician must look further. Here, Dr. Bayless found the MMPI-2 to be consistent with other information he reviewed about Defendant. (*Id*. at 59-63)

Defendant challenges Dr. Bayless's testimony that Defendant was "prone to engage in impulsive, poorly planned acts of violence," and to "lie, cheat and steal," and that the treatment prognosis for ASPD is poor. The Defendant argues that trial counsel performed deficiently by failing to seek "a second expert opinion as to Dr. Bayless' interpretation of the MMPI result." This caused prejudice, according to Defendant, because Dr. Bayless was a "key witness" for the State, and the post-conviction impeachment evidence would

have undercut his credibility. (PCR Pet. at 19-22, 29-33)

Contrary to Defendant's claim, trial counsel did retain an expert to evaluate Dr. Bayless's MMPI interpretation, and presented expert testimony to challenge the reliability of Dr. Bayless's assessment and opinions. First, Dr. Smith disputed Dr. Bayless's ASPD diagnosis and testified that Defendant lied and manipulated for self-gain only when he was using drugs and alcohol. (RT 5/3/11 at 92) Trial counsel also presented Dr. Sullivan as a rebuttal expert to Dr. Bayless. (RT 5/11/11 at 148) Trial counsel retained Dr. Sullivan to review Dr. Bayless's report, the transcript of his interview with Reeves, the MMPI-2 raw testing data, and the MMPI-2 computer-generated report, and to evaluate whether this information supported Dr. Bayless's conclusions. Trial counsel focused their direct-examination of Dr. Sullivan to showing that Dr. Bayless's conclusions and opinions were unsupported. (*Id.* at 157-211)

For instance, Dr. Sullivan testified that if all the symptoms that point to an ASPD diagnosis occurred while Reeves was under the influence of drugs or alcohol, then those symptoms do not provide support for the ASPD diagnosis. (*Id.* at 202, 207) Dr. Sullivan told the jury that a clinician must look to periods when an individual is not using drugs or alcohol to determine whether there is a blatant disregard of the rights of others when the individual is not abusing substances. (Id., at 203) Dr. Sullivan also testified that Defendant's MMPI-2 computerized report listed diagnoses other than ASPD, and that ninety percent of MMPI test takers have a different profile after thirteen months. (Id. at 205, 209)

The record demonstrates that trial counsel reasonably investigated Dr. Bayless's opinions. Trial counsel is entitled to rely on an appropriate expert. *Hendricks v. Calderon*, 70 F.3d 1032, 1038-39 (9th Cir. 1995). Trial counsel presented appropriate expert testimony, following a reasonable investigation, and challenged aspects of Dr. Bayless's conclusions (seeking to undermine his credibility and diagnoses). Defendant's PCR allegations add nothing to the trial presentation. Trial counsel is not ineffective because, in hindsight, another strategy or expert might have been a better choice. *Turner v. Calderon*, 281 F.3d 851, 876 (9th Cir. 2002). *See also State v. Meeker,* 143 Ariz. 256, 262, 143 P.2d 911 (1984) ("[D]isagreements as to trial strategy or errors in trial tactics will not support an ineffectiveness claim so long as the challenged conduct could have some reasoned basis."). This is not a situation in which there was no support for Dr. Bayless's ASPD diagnosis. Neither Dr. Sullivan nor the PCR experts opined that the MMPI-2 testing data did not support Dr. Bayless's ASPD diagnosis. (PCR App. 21, Supp. App. 1 [4]; RT 5/12/11 at 28-29) Defendant has failed to state a colorable claim.

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[4] Dr. Sullivan declared that the MMPI should never be used as a basis for predicting future criminal conduct, and that he would have given this same testimony at trial, if asked. But at trial, Dr. Sullivan testified that he administered an alcohol use inventory test to Defendant and that the interpretative report suggested that Defendant, when drinking, may have a serious problem with aggression and a serious pattern of antisocial, irresponsible, impulsive and acting out behavior. (RT 5/11/11 at 219)

Claim 3 – Ineffective Assistance of Trial and Appellate Counsel

In this claim, Defendant provides an additional basis for challenging Dr. Bayless's credibility, and he argues that trial counsel's failure to investigate Dr. Bayless's background precluded testimony that would have shown Dr. Bayless's bias. Defendant further claims that appellate counsel provided ineffective assistance by failing to raise this issue on appeal. (PCR Pet. at 22-24, 34-38)

The factual basis for this claim is found in Dr. Bayless's direct and cross-examinations. Trial counsel elicited testimony that Dr. Bayless had testified exclusively for the prosecution since 1999, in approximately ten capital cases over the preceding five years. (RT 5/11/11 at 90) Trial counsel then asked Dr. Bayless if he had given the MMPI to another capital defendant named Naranjo. Dr. Bayless testified that he had, and trial counsel asked if the State retained Dr. Bayless and if he had diagnosed Naranjo. Dr. Bayless answered yes to both questions. Trial counsel then asked Dr. Bayless if he also diagnosed Naranjo's with ASPD, and the State and Dr. Bayless objected. (*Id.* at 91) The Court sustained the objection, and trial counsel then reiterated that Dr. Bayless had testified as a State's witness approximately nine times in capital trials, and that, in at least one of those cases, Dr. Bayless testified that "psychological test data in and of themselves have very little predictive value." (Id. at 92)

The Defendant faults trial counsel for not providing the Court with a better argument for allowing cross-examination that Dr. Bayless regularly testified for the State in capital trials and that he often diagnosed

the defendants with ASPD. The Defendant argues that trial counsel should have made an offer of proof similar to the information contained in appendix 22, addressing Dr. Bayless's testimony in prior capital cases.

This claim is without merit. First, trial counsel, during cross-examination, called Dr. Bayless's ASPD diagnosis into question, and he challenged the criteria for conduct disorder (necessary for an ASPD diagnosis) and highlighted all the criteria that Defendant did not meet. (RT 5/10/11 at 53, 125-37) Additionally, there is no deficient performance because trial counsel did elicit testimony that Dr. Bayless testified exclusively for the State, and that he had testified approximately nine to ten times in the past ten years. Trial counsel also informed the Court that he sought to show Dr. Bayless's bias by establishing that Dr. Bayless gave consistent diagnoses to the last nine or ten capital defendants that he evaluated for the State. (RT 5/11/11 at 102) There is no significant difference between what trial counsel told the Court and the relevant information contained in appendix 22. Trial counsel's inability to cross-examine Dr. Bayless on whether he diagnosed 14 other capital defendants with ASPD did not prejudice the defense because trial counsel presented expert testimony that attempted to undercut the foundation for Dr. Bayless's ASPD diagnosis. The Defendant has failed to state a colorable claim that entitles him to an evidentiary hearing.

Appellate counsel also did not perform ineffectively by failing to raise this issue on appeal because there is no reasonable probability the death sentence would have been reversed. *See Smith v. Robbins*, 528 U.S.

259, 285 (2000) (holding that appellate IAC requires a showing that (1) counsel unreasonably failed to discover and raise "nonfrivolous issues" and (2) a reasonable probability exists that, but for counsel's errors, he would have prevailed on appeal). "A defendant's fundamental right to confront and cross-examine adverse witnesses is limited to the presentation of matters admissible under ordinary rules of evidence, including relevance." *State v. Riggs*, 189 Ariz. 327, 333, 942 P.2d 1159 (1997). The trial court can exclude even relevant evidence under Rule 403, Ariz. Crim. P. *Id.*

Trial counsel addressed the reliability of Dr. Bayless's evaluation and opinions during cross-examination. Whether Dr. Bayless previously testified for the State and, more to the point, whether he rendered similar diagnoses was of limited relevance, which was substantially outweighed by a danger of unfair prejudice, and the danger of confusing and misleading the jury because each capital case is substantially different and the question invited testimony about other cases that was unrelated to the issues before Defendant's jury. (RT 5/11/11 at 102-103) The Defendant has failed to state a color claim that warrants an evidentiary hearing.

B. Claim 4 – Parole Ineligibility Jury Instruction

The Defendant argues that the failure to instruct the jury about his parole eligibility under *Simmons v. South Carolina*, 512 U.S. 154 (1994) violated due process because the trial evidence put his future dangerousness at issue. The Defendant contends that this claim is not precluded because it was rejected on appeal, and subsequently there was a significant

change in the law that, if applied to his case, probably would have overturned the sentence. Reeves argues that this significant change in law occurred when the Supreme Court issued *Lynch v. Arizona*, 136 S. Ct. 1818 (2016). (PCR Petition at 24-27, 38-42)

In *Simmons*, the Supreme Court held that "where a 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.*, 512 U.S. at 156. The Arizona Supreme Court addressed the applicability of a parole ineligibility instruction in several opinions, including *State v. Lynch*, 238 Ariz. 84, 103 ¶ 62-66, 357 P.3d 119 (2015). The Arizona Supreme Court distinguished *Simmons*, finding that it only applied where "as a legal matter, there is *no possibility* of parole" if the jury returned a life sentence. *Id.,* at 103, ¶ 65 (emphasis in original). Because a defendant could receive a type of release, such as executive clemency, the Arizona Supreme Court held the parole ineligibility instruction inaccurately stated the law and rejected Lynch's argument on appeal. *Id*. *See also Hargrave*, 225 Ariz. 1, 14 ¶ 53, 234 P.3d 569 (2010) ("[The defendant's] argument that he is not likely to actually be released does not render the instruction legally incorrect.").

The Defendant requested to present parole ineligibility evidence or a jury instruction a number of times before trial. For instance, on October 9 2009, Reeves filed a motion to waive a parole-eligible sentence and requested a jury instruction regarding parole ineligibility. Reeves later amended this motion, arguing that even if he could not waive parole eligibility, the jury should be informed that he is

parole ineligible and could obtain release only by successfully petitioning the Board of Executive Clemency. Alternatively, Reeves sought to present evidence regarding the parole eligibility statute (A.R.S. § 1604.09), which he argued only applied to individuals who committed felony offenses before January 1, 1994 and Reeves committed his crimes on June 2, 2007. The Court ruled on October 29, 2009, and denied the request for a parole ineligibility instruction, but allowed Defendant to re-urge his request at the penalty phase. The Defendant did so, and requested a parole ineligible jury instruction, which the Court denied.

The Defendant unsuccessfully continued to renew his requests, and then, on September 24, 2010, Defendant filed a motion to preclude the State from arguing future dangerousness, and alternatively, sought leave to present evidence that no one had been released on parole. On February 7, 2011, the Court issued a ruling and denied Defendant's request to present evidence about whether any defendants sentenced to life in prison had been released on parole, citing *State v. Cruz*, 218 Ariz. 149, 160 ¶ 44-45, 181 P.3d 196 (2008) (holding the trial court did not abuse its discretion in precluding testimony of Chairman of the Arizona Board of Executive Clemency about how life sentences are handled in Arizona and a defendant's chances of being released on parole because "what the Board might do in a hypothetical future case would have been too speculative to assist the jury"). The Court also denied the request for a parole ineligibility instruction, citing *State v. Garcia*, 224 Ariz. 1, 18 ¶ 77, 226 P.3d 370 (2010) (holding that "the trial court was not required to give an instruction

on parole eligibility because, irrespective of any likelihood that he would die in prison, Garcia was not technically ineligible for parole") and *Cruz*, 218 Ariz. at 160 ¶ 42 ("No state law would have prohibited Cruz's release on parole after serving twenty-five years, had he been given a life sentence."). At trial, the Court instructed the jury that Defendant may be sentenced death, natural life, or to life imprisonment with the possibility of parole after 25 years. (RT 4/25/11 at 5)

The Defendant then raised the issue on appeal. The Arizona Supreme Court found that "Reeves's arguments are foreclosed" by *State v. Benson*, "which held that a trial court did not abuse its discretion by excluding 'evidence of the current mechanism for obtaining parole and past actions by the Board of Executive Clemency as a means of predicting what might happen ... in twenty-five years." *Reeves*, 233 Ariz. at 186 ¶ 15, 310 P.3d 970 (quoting *Benson*, 232 Ariz. 452, 466 ¶ 59, 307 P.3d 19 (2013).

Subsequently, the United Supreme Court issued its decision in *Lynch*, the case upon which Defendant relies. The Court reversed the Arizona Supreme Court's judgment on Lynch's request for a parole ineligibility instruction, finding that the Arizona Supreme Court's analysis conflicted with the Supreme Court ruling in *Simmons*. *Lynch*, 136 S. Ct. at 1819. The Supreme Court disagreed with the Arizona Supreme Court's reliance on the possibility of executive clemency as a type of release that satisfied *Simmons* because *"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.* at 1819-1820.

The Defendant argues that *Lynch* is a significant change in the law that can be raised in PCR proceedings under Ariz. R. Crim. P. 32.1 (g) and that, if applied to his case, it would probably have overturned his sentence. The State responds that *Lynch* does not represent a significant change in the law because it is based on *Simmons,* which was in existence at the time Defendant's conviction became final. The State further argues that Defendant has failed to establish *Lynch* applies retroactively to his post-conviction case, and that the application of *Lynch* probably would not have overturned Defendant's sentence. (State's Response at 25-33)

"[T]o prevent endless or nearly endless reviews of the same case in the same court ... Rule 32.2 (a) precludes collateral relief on a ground that ... could have been raised on direct appeal." *State v. Shrum*, 220 Ariz. 115, 118 ¶ 12, 203 P.3d 1175 (2009). However, Rule 32.1 (g) permits post-conviction review and potential relief "[i]n those rare cases when a "new rule" of law is announced." *Id.* at 118 ¶¶ 13-14. Rule 32.1 (g), however, "requires some transformative event," *id.,* and a "clear break" or "sharp break" from the past. *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41 (1991). "The archetype of such change occurs when an appellate court overrules previously binding case law," such as *Ring v. Arizona,* 536 U.S. 584, 609 (2002), which overruled *Walton v. Arizona*, 497 U.S. 639, 64-49 (1990) and held that a defendant had a constitutional right to a jury trial on capital aggravating factors. *Shrum*, 220 Ariz. at 118 ¶ 16.

Here, the United States Supreme Court applied *Simmons* (existing law) to Lynch's request for a parole ineligibility jury instruction during his capital

sentencing proceeding. Because it is based exclusively on *Simmons,* the Supreme Court decision in *Lynch* is not a "new rule" and it does not represent a significant change in the law. In contrast to the *Ring* opinion, which overruled *Walton* and invalidated Arizona's capital sentencing procedure, *Lynch* is not a "new rule" and "a clear break" from the past. The *Lynch* decision is not a significant change in law under Rule 32.1 (g).

Additionally, even if *Lynch* were a significant change in the law, it would not apply retroactively because it relies on *Simmons*. The Supreme Court held that *Simmons* does not apply retroactively in *O'Dell v. Netherland*, 521 U.S. 151, 167 (1997), reasoning that "the narrow right of rebuttal that *Simmons* affords to defendant in a limited class of capital cases has hardly 'alter[ed] our understanding of *bedrock procedural elements*'" essential to the fairness of a proceeding." *O'Dell*, at 167 (emphasis in original).

The Defendant has failed to state a colorable claim under Rule 32.1 (g).

C. Claim 5 – Competency Determination Request

PCR counsel contends that Defendant's mental condition has deteriorated, and that Defendant cannot confer with PCR counsel with a reasonable degree of rational understanding. PCR counsel further contends that Reeves is incompetent and has a due process right to a competency determination during the PCR proceedings. (PCR Pet. at 27-28, 42-45) Reeves submitted three reports from Dr. Levitt, a

mental health expert to support his incompetency claim. (Apps. 12-14)

Contrary to the argument that Defendant has a due process right to a competency determination that arises out of his statutory right to counsel in PCR, neither the Arizona nor the United States Supreme Court has found such a right in collateral proceedings. The Arizona Supreme Court held that A.R.S. § 13-4041 (B), the statute requiring the appointment of counsel in PCR proceedings, does not require a trial court to determine whether a defendant is competent before proceeding with or ruling on the PCR petition, "nor does it provide any right to effective communication between Rule 32 counsel and the client." *Fitzgerald v. Myers*, 243 Ariz. 84, 89 ¶ 13, 402 P.3d 442 (2017) [5] . The *Fitzgerald* opinion found instructive the United States Supreme Court opinion in *Ryan v. Gonzales,* which held that the federal statute, that provides a statutory right to counsel for capital federal habeas petitioners, does not provide "a statutory right to competence." *Ryan*, 568 U.S. 57, 66, 68, 71 (2013) (citied with approval in *Fitzgerald*, at 90 ¶ 16). *See also Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (noting that the Court "has never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions"). The Supreme Court reasoned that "[g]iven the backward-looking, record-based nature of most federal habeas proceedings, counsel can generally provide effective representation to a habeas petitioner

[5] The Court declined to address the defendant's belatedly raised argument that he had a constitutional right to a competency determination. *Fitzgerald*, at 88 n. 2.

regardless of the petitioner's competence. *Ryan*, 568 U.S. at 68.

The Defendant is correct that *Fitzgerald* noted that a PCR court has inherent authority and discretion to order a competency evaluation for a meaningful resolution of a defendant's claims. *Id.*, 243 Ariz. at 93 ¶¶ 27-28. In urging the Court to order a competency determination, PCR counsel first claims that the "long-term effects of traumatic head injury," require Defendant's "participation and assistance to the extent of describing the circumstances and extent of his injuries." Counsel next claims "the issue of parental neglect" requires Defendant's "ability to recall and describe the circumstances of his childhood."

These allegations do not demonstrate that Defendant's participation is necessary for the Court to rule on the PCR petition. Additionally, the record rebuts Counsel's arguments and establishes that a competency determination is not warranted. The available evidence and records from trial and PCR provide, at a minimum, a solid foundation for the information sought by Counsel. As argued in support of the IAC claim regarding the brain scanning images, Dr. Smith's report and the medical records indicate that Defendant may have sustained a head injury. Specifically, Defendant told Dr. Smith that he had been knocked unconscious twice; (app. 9 at 8); and he told Dr. Bayless that he had been knocked unconscious three or four times, but that he did not believe he suffered any neurological damage. (App. 8 at 3) Defendant also alleged that his medical records and Dr. Smith's report should have put trial counsel

on notice to obtain brain scans, which post-conviction counsel completed and had evaluated by experts.

It is unclear what additional information that Defendant could add to the post-conviction presentation. While Defendant's description of the circumstances and the extent of a head injury may tend to corroborate that it happened, his statements, alone, are insufficient to establish an IAC claim. Instead, to establish deficient performance and prejudice, such claim must be supported by evidence of impairment, which is derived from expert evaluation and not from Defendant's self-reporting.

This applies equally to the issue of a parental neglect investigation. The record contains a broad amount of information about Defendant's family, social, medical, psychological, employment and military history. In a motion to continue, trial counsel described Defendant's family members as talking openly with the trial team, and family members testified at both sentencing trials. (*See* motions filed on 3/3/09 and 7/6/09) Additionally, Dr. Smith's report contains detailed information about Defendant's history (PCR Pet. App. 9).

This evidence leads the Court to conclude that Counsel for Defendant has failed to point to any impeded areas of investigation, given the abundance of available information. The Court therefore finds that Defendant's input is not necessary to the development, investigation, or a meaningful presentation of any PCR claim.

IV. Conclusion

For the reasons discussed above, the Court finds that the PCR Petition fails to state a colorable claim for relief. Therefore,

IT IS ORDERED denying Defendant's claims and dismissing his PCR Petition.

APPENDIX G

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,

Appellee,

v.

JOHNATHAN IAN BURNS,

Appellant.

No. CR-11-0060-AP

March 10, 2015

Mark Brnovich, Arizona Attorney General, John R. Lopez IV, Solicitor General, Jeffrey A. Zick, Chief Counsel, Jeffrey L. Sparks (argued), Assistant Attorney General, Capital Litigation Section, Phoenix, for State of Arizona.

David Goldberg (argued), Attorney at Law, Fort Collins, CO, for Johnathan Ian Burns.

Justice BRUTINEL authored the opinion of the Court, in which Chief Justice BALES, Vice Chief Justice PELANDER, and Justices BERCH and TIMMER joined.

OPINION

Justice BRUTINEL, opinion of the Court.

¶ 1 This automatic appeal arises from Johnathan Ian Burns' conviction and death sentence for the murder of Jackie H. We have jurisdiction under Article 6, Section 5(3) of the Arizona Constitution and A.R.S. § 13–4031.

I. FACTUAL BACKGROUND[1]

¶ 2 On January 27, 2007, Jackie and Burns met at a gas station and went out on a date. Later that evening, Jackie called her sister Randi. Jackie sounded "a little off" and "nervous" and asked Randi to meet her at the gas station as quickly as possible. Randi promptly went to the gas station and waited for Jackie. Two hours later, Jackie called Randi and said she was lost. Jackie sounded confused and could not describe where she was. Burns eventually took the phone and told Randi he was lost, but said he and Jackie would arrive within fifteen minutes. Randi waited for several hours, but Jackie never arrived. Later that day, Randi told her parents that Jackie was missing.

¶ 3 The next day, a maintenance worker found, in an apartment complex dumpster, Jackie's purse and the blouse, bra, panties, and sandals she was wearing the previous evening. The blouse and bra were torn, and the blouse was stained with Jackie's blood and had two bullet holes from a close-range firearm discharge. Semen on the panties matched Burns' DNA.

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[1] The facts are presented in the light most favorable to sustaining the verdict. *State v. Garza*, 216 Ariz. 56, 61 n. 1, 163 P.3d 1006, 1011 n. 1 (2007).

¶ 4 Police arrested Burns and searched his home and vehicles. In the trunk of Burns' Honda Civic, police found a pair of men's jeans stained with Jackie's blood. In Burns' truck, which he was driving the night Jackie disappeared, officers discovered Jackie's blood and an earring she had worn. Inside Burns' home, police found a case for a Springfield 9mm handgun, but no gun. Mandi Smith, Burns' fiancée at the time, had purchased the gun for Burns, who was a prohibited possessor (Smith later pleaded guilty to misconduct involving a weapon based on her purchase of the gun).

¶ 5 Almost three weeks later, Jackie's body was discovered in the Sycamore Creek area. Jackie had suffered two fatal gunshot wounds to her head and several skull fractures from blunt force impacts on her left temple, on top of her head, and under her right eye. She also had vaginal bruising likely caused by blunt force. Sperm on an anal swab taken from Jackie's body matched Burns' DNA. The medical examiner determined that wild animals had severed Jackie's head postmortem. Burns' cellphone records indicated that he drove to the Sycamore Creek area the night Jackie disappeared and stayed there for several hours.

¶ 6 Shortly before his arrest, Burns had disposed of the Springfield 9mm handgun Mandi had purchased for him. Police later located the handgun. A ballistics expert determined that it had fired a bullet found in the sand beneath where Jackie's head had been.

¶ 7 The State charged Burns with sexual assault, kidnapping, first-degree murder, and misconduct involving weapons; a jury found Burns guilty on all counts.

¶ 8 During the aggravation phase of the trial, the jury found two aggravating circumstances: (1) Burns had a prior or contemporaneous felony conviction under A.R.S. § 13–751(F)(2); and (2) the murder was especially cruel, heinous, or depraved under A.R.S. § 13–751(F)(6). After the penalty phase, the jury determined that Burns should be sentenced to death. In addition to imposing the death sentence for the murder, the trial court sentenced Burns to consecutive prison terms totaling sixty-eight years for the other three convictions.

II. ISSUES ON APPEAL

¶ 9 Burns raises twenty-six issues on appeal. For the reasons stated below, we affirm his convictions and sentences.

A. Continuance

¶ 10 Burns contends the trial court abused its discretion by denying his motions to continue the guilt and penalty phases of his trial. We will not find that a trial court abused its discretion in denying a continuance unless the defendant shows prejudice. *State v. Barreras,* 181 Ariz. 516, 520, 892 P.2d 852, 856 (1995); *see also State v. Lamar,* 205 Ariz. 431, 437 ¶ 32, 72 P.3d 831, 837 (2003). Burns argues he was prejudiced because (1) he could not produce the results of a functional MRI exam; (2) Dr. Wu, Burns' neuropsychiatrist, could not analyze Burns' PET scan; (3) Dr. Cunningham, Burns' expert on developmental psychology and prison violence, could not present Burns' risk assessment for violence in prison; and (4) Burns could not rebut the testimony of Dr. Kirkley, the State's psychological expert.

¶ 11 At Burns' request, the superior court continued the guilt phase of the trial three times, adding more than a year to counsel's preparation time. One of these continuances was due to Burns' refusal to cooperate with counsel's efforts to prepare mitigation evidence, while the other two were granted because Burns' counsel needed additional time to prepare. Burns moved to continue the guilt phase three more times, but the trial court denied those motions. After the jury found Burns guilty, Burns asked for a month-long recess, which the court also denied.

¶ 12 Continuances "shall be granted only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice." Ariz. R.Crim. P. 8.5(b). In considering such a request, a trial court must "consider the rights of the defendant and any victim to a speedy disposition of the case." *Id.*

¶ 13 Although denying counsel adequate time to prepare a case for trial may deny the defendant a substantial right, *State v. Narten,* 99 Ariz. 116, 120, 407 P.2d 81, 83 (1965), time constraints by themselves do not create prejudice. *See State v. Salinas,* 129 Ariz. 364, 367, 631 P.2d 519, 522 (1981). In determining whether a defendant's rights were violated, this Court looks to the totality of the circumstances. *See Barreras,* 181 Ariz. at 520, 892 P.2d at 856.

¶ 14 Because Burns has failed to show prejudice, we cannot conclude that the trial court abused its discretion. The court gave defense counsel more than another year to prepare, and Burns' trial did not begin for three-and-a-half years after indictment. Further, all of the evidence Burns claims he was unable to present pertains to the mitigation stage of the trial, which did not commence until four years after

indictment. Despite the trial court's refusal to grant additional continuances, Burns was able to present twelve days' worth of mitigation that included much of the information he alleges he could not offer because of time constraints.

¶ 15 For example, Dr. Wu testified at length about Burns' low frontal-lobe activity and showed Burns' PET scans to the jury. The court precluded only a few portions of Dr. Wu's testimony relating to the analysis Dr. Wu failed to disclose during a pre-trial interview that took place *after* his report was complete and that was disclosed mere days before he testified. Similarly, Dr. Cunningham's rebuttal testimony was not timely disclosed and was therefore precluded, but was also irrelevant for the purpose offered.[2]

¶ 16 Additionally, Burns fails to explain how a functional MRI scan would have aided his mitigation.[3] Because Burns has not provided any basis for this argument, he has failed to demonstrate prejudice.[4] *State v. VanWinkle,* 230 Ariz. 387, 391 ¶¶ 10–13, 285 P.3d 308, 312 (2012). Similarly, Burns was able to

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[2] The preclusion of Dr. Wu's and Dr. Cunningham's testimony is fully discussed in our analysis of a different issue in Section P, *infra*.

[3] We found only one reference to the functional MRI in the more than 10,000–page record. Defense counsel indicated only that, due to time constraints, a functional MRI could not be completed.

[4] Burns argues that, because it is unknown what the functional MRI would have shown, he was prejudiced because he lost his chance to show the jury whatever the MRI might have shown. But to demonstrate prejudice, a defendant must do more than merely speculate that relevant mitigation may have been uncovered with more time. *See State v. VanWinkle*, 230 Ariz. 387, 392 ¶ 12, 285 P.3d 308, 312 (2012).

meaningfully rebut Dr. Kirkley's testimony through his own experts, and thus was not prejudiced.

¶ 17 Notably, Jackie's family repeatedly voiced frustration at the delays in the trial. Under Rule 8.5(b), the trial court must consider the victims' right to a timely resolution of the charges and did not err by proceeding with the trial after three-and-a-half years. Ariz. R.Crim. P. 8.5(b); *State v. Dixon,* 226 Ariz. 545, 555 ¶ 56, 250 P.3d 1174, 1184 (2011).

¶ 18 The trial court did not abuse its discretion in denying the continuance motions.

B. Limitation of Defense Counsel's Voir Dire

¶ 19 Burns contends the trial court erred in preventing defense counsel from asking prospective jurors if they would consider a life sentence for a defendant convicted of sexual assault and kidnapping in addition to murder. "We review a trial court's ruling on voir dire for an abuse of discretion." *State v. Patterson,* 230 Ariz. 270, 273 ¶ 5, 283 P.3d 1, 4 (2012).

¶ 20 In capital cases, a trial court must permit a defendant to ask potential jurors whether they would automatically vote for the death penalty. *Morgan v. Illinois,* 504 U.S. 719, 729–33, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). But we have rejected the argument that *Morgan* entitles a defendant to ask prospective jurors whether they will vote for death based on specific aggravating factors. *State v. (Joe C.) Smith,* 215 Ariz. 221, 231 ¶ 42, 159 P.3d 531, 541 (2007).

¶ 21 The trial court's rulings complied with *Morgan.* Burns was permitted to ask prospective jurors in both the juror questionnaires and during voir dire whether they would automatically vote for the death penalty.

But he was not entitled to ask whether they would impose the death penalty based on the specific facts of his case. Under *Smith,* the trial court properly stopped this line of questioning and did not abuse its discretion. 215 Ariz. at 231 ¶ 42, 159 P.3d at 541.

C. Jurors Struck for Cause

¶ 22 Burns argues the trial court unconstitutionally struck three jurors—68, 186, and 198—for cause because of their views on the death penalty. We review a trial court's rulings on strikes for cause for an abuse of discretion, giving deference to the judge who was able to observe the potential jurors. *State v. Glassel,* 211 Ariz. 33, 47 ¶ 46, 116 P.3d 1193, 1207 (2005).

¶ 23 A court may not strike a juror merely because he or she "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *State v. Prince (Prince II),* 226 Ariz. 516, 528 ¶ 27, 250 P.3d 1145, 1157 (2011) (internal quotation marks omitted). But a judge "may strike a juror whose views about capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* (internal quotation marks omitted). A trial judge must consider the entirety of a prospective juror's demeanor and behavior; if a juror's promise to uphold the law is coupled with ambiguous statements and uncertainty, the trial judge may strike the juror for cause. *State v. Lynch,* 225 Ariz. 27, 35 ¶ 28, 234 P.3d 595, 603 (2010); *State v. Roque,* 213 Ariz. 193, 204–05 ¶¶ 18–20, 141 P.3d 368, 379–80 (2006). A potential juror need not object to the death penalty in every possible case to

warrant a dismissal for cause. *Prince II,* 226 Ariz. at 528 ¶ 29, 250 P.3d at 1157.

1. Juror 68

¶ 24 During voir dire, Juror 68 said she had "mixed feelings" about the death penalty because she felt "that life sentencing is bad enough." She also indicated that her religious beliefs would interfere with her ability to impose the death penalty. Nonetheless, during defense counsel's questioning, Juror 68 said she could vote to impose the death penalty in the proper case. The trial judge struck Juror 68 for cause.

¶ 25 The trial court did not abuse its discretion by striking Juror 68. There was an adequate basis for the trial judge to determine that Juror 68's performance could be substantially impaired by her feelings about capital punishment.

2. Juror 186

¶ 26 During voir dire, Juror 186 said that the death penalty should be reserved for people with a violent criminal history "like serial killers" and that he could not impose the death penalty unless a defendant had a violent criminal past.

¶ 27 The trial court did not abuse its discretion by striking Juror 186. A juror does not have to object to the death penalty in every conceivable case to be excluded for cause. *Id.* The trial court had an adequate basis for determining that Juror 186's feelings about capital punishment would have substantially impaired his ability to serve fairly and impartially.

3. Juror 198

¶ 28 Juror 198's juror questionnaire revealed that she feared dying, could not vote for a death sentence, and could not look at "photos of death." When the State asked if her fear of dying might interfere with her ability to impose the death penalty, Juror 198 replied, "I don't know. It depends how I felt after I've seen all of the evidence." The court struck Juror 198 for cause. Based on Juror 198's inability to say whether she could follow the law notwithstanding her fear of death, the trial court did not abuse its discretion in striking her.

D. Failure to Sever Charges

¶ 29 Burns argues the trial court erred in denying his motion to sever the charges. We review for an abuse of discretion, and reverse only if the defendant can show "compelling prejudice against which the trial court was unable to protect." *State v. Murray,* 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995) (quoting *State v. Cruz,* 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983)).

¶ 30 The State charged Burns with sexual assault, kidnapping, misconduct involving weapons, and first-degree murder under both premeditated- and felony-murder theories. Before trial, Burns moved to sever all charges and proceed to trial only on the premeditated-murder charge. After an evidentiary hearing, the trial court denied the motion, finding the charges sufficiently intertwined and related to consolidate them for trial.

¶ 31 The state may join charges that are of the same or similar character, are based on the same conduct, or are alleged as part of a common scheme or plan. Ariz. R.Crim. P. 13.3(a). But a trial court must grant

a motion to sever charges if "necessary to promote a fair determination of the guilt or innocence of any defendant of any offense...." Ariz. R.Crim. P. 13.4(a).

¶ 32 Joinder is permitted if separate crimes arise from a series of connected acts and are provable by overlapping evidence. *State v. Prince (Prince I),* 204 Ariz. 156, 160 ¶ 17, 61 P.3d 450, 454 (2003); *see also State v. Prion,* 203 Ariz. 157, 162 ¶ 32, 52 P.3d 189, 194 (2002). A common scheme or plan, under Rule 13.3(a)(3), is a "particular plan of which the charged crime is a part." *State v. Hausner,* 230 Ariz. 60, 74 ¶ 45, 280 P.3d 604, 618 (2012) (quoting *State v. Ives,* 187 Ariz. 102, 109, 927 P.2d 762, 769 (1996)).

¶ 33 The sexual assault, kidnapping, and murder were properly joined as part of a "common scheme or plan" under Rule 13.3(a). The State alleged that Burns kidnapped Jackie intending to sexually assault her, sexually assaulted her, and then murdered her to prevent discovery of the kidnapping and sexual assault. Much of the same evidence that proved the murder also proved the sexual assault and kidnapping. The court did not abuse its discretion in consolidating these charges.

¶ 34 We are troubled, however, by the failure to sever the misconduct-involving-weapons charge. The State prosecuted Burns for that charge under A.R.S. § 13–3102(A)(4), alleging that he possessed a firearm the night of the murder and was a prohibited possessor because he had two prior felony convictions for burglary. *See* A.R.S. § 13–3101(A)(7)(b). To prove the misconduct-involving-weapons charge, the State had to introduce evidence of Burns' prior felony convictions. The State notified Burns that, unless he was willing to stipulate to his prohibited-possessor

status, it would introduce evidence of these prior felonies. Burns declined to stipulate, and the State introduced this evidence through a sanitized affidavit from the superior court clerk and testimony from Mandi Smith.

¶ 35 But for joinder of the misconduct-involving-weapons charge, the evidence of Burns' prior felony convictions would not have been admissible during the guilt phase. Burns did not testify at trial, and any attempt to introduce the convictions would have been impermissible character evidence. *See* Ariz. R. Evid. 404(b). Simply put, trying the misconduct charge with the other charges permitted the jury to hear, during the guilt phase of the trial, that Burns was a convicted felon.

¶ 36 We conclude that denial of the motion to sever was an abuse of discretion. Although Burns' possession of the murder weapon was cross-admissible for the murder and the weapons charge, his prior conviction was not and its admission created a serious risk of prejudice. *See United States v. Nguyen,* 88 F.3d 812, 815 (9th Cir.1996) (noting uniform agreement among the federal circuit courts that introduction of prior convictions creates a dangerous potential for misuse of that information by the jury). There was no connection between Burns' illegal possession of the murder weapon and the murder, kidnapping, or sexual assault. That he had a gun was relevant: that it was illegal was not.

¶ 37 Although the trial court instructed the jury that it must consider each offense separately, we are not persuaded that the instruction alone is sufficient in this context. Such an instruction requires the jury to ignore prior felony convictions in a capital criminal

prosecution. We agree with the D.C. Circuit that this asks jurors "to act with a measure of dispassion and exactitude well beyond moral capacities." *United States v. Daniels,* 770 F.2d 1111, 1118 (D.C.Cir.1985). Because Burns' prior felony conviction was prejudicial and irrelevant to the other charges, severance "was necessary to promote a fair determination" of Burns' guilt or innocence under Arizona Rule of Criminal Procedure 13.4(a).

¶ 38 Nevertheless, on this record we find that the trial court's error was harmless. *See State v. Henderson,* 210 Ariz. 561, 567 ¶ 18, 115 P.3d 601, 607 (2005) ("Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence."). Evidence of Burns' guilt was overwhelming: He was the last person seen with Jackie, her blood was found in his truck and on a pair of jeans in the trunk of his Honda, his cellphone records indicated he was in the area where Jackie's body was found, his DNA matched sperm found in Jackie's body, and he possessed and disposed of the murder weapon. Moreover, the State did not emphasize Burns' conviction during closing argument, mentioning it only in the context of the weapons charge. There is nothing to indicate that the jury considered his prior convictions in contravention of the guilt-phase jury instructions, and this evidence was properly introduced in the penalty phase. Thus, we are satisfied that the failure to sever the misconduct charge did not affect the jury's verdicts or sentences.

¶ 39 We take this opportunity, however, to emphasize that trial courts should prevent this

situation. Evidence of prior felony convictions has a potential to create prejudice, which is precisely the reason previous criminal convictions are generally inadmissible under Rule 404(b). Absent an appropriate factual nexus, trial courts generally should not join a misconduct-involving-weapons charge, or any charge that requires evidence of a prior felony conviction, unless the parties have stipulated to a defendant's status as a prohibited possessor. Alternatively, the court could conduct a bifurcated trial to adjudicate any charge that requires evidence of a prior felony conviction. Likewise, the State should avoid the risk of reversal by refraining from joining charges that require proof of a defendant's prior convictions. But, for the reasons stated above, we do not find prejudice on this record.

E. Duplicitous Charges

¶ 40 Burns next contends that, because the felony-murder indictment alleged both kidnapping and sexual assault as predicate felonies, it was duplicitous. Burns argues that this deprived him of a unanimous verdict regarding the felony-murder charge. We disagree.

¶ 41 "An indictment is duplicitous if it charges more than one crime in the same count." *State v. Anderson,* 210 Ariz. 327, 335 ¶ 13, 111 P.3d 369, 377 (2005). Duplicitous indictments are prohibited in part because they present the chance for non-unanimous jury verdicts. *Id.* But, we have held that if substantial evidence supports each alleged predicate offense, a felony-murder conviction should be upheld since a defendant is not entitled to a unanimous verdict on precisely how the murder was committed. *State v.*

Hardy, 230 Ariz. 281, 288 ¶¶ 29–30, 283 P.3d 12, 19 (2012).

¶ 42 Burns was convicted of sexual assault and kidnapping, both of which are predicates for felony murder. *See* A.R.S. § 13–1105(A)(2). Substantial evidence supported his convictions on both charges. Burns was not entitled to a unanimous jury finding that the murder furthered a particular felony, only a unanimous agreement that the murder furthered *a* predicate felony. *See Hardy,* 230 Ariz. at 288 ¶¶ 29–30, 283 P.3d at 19. Moreover, this point is moot because the jury unanimously found Burns guilty of premeditated murder in addition to felony murder. *See Anderson,* 210 Ariz. at 343 ¶ 59, 111 P.3d at 385 (reasoning that when a jury returns guilty verdicts for both felony and premeditated murder, a first-degree murder conviction would stand even absent a felony-murder predicate).

F. First–Date Testimony

¶ 43 Burns contends the trial court erred by allowing the State to elicit, and use in its opening statement and closing argument, testimony that Jackie had never dated anyone before and was on her "first date." Burns argues this testimony violated Arizona's Rape Shield Law, A.R.S. § 13–1421, by impermissibly commenting on Jackie's chastity. This type of evidence, however, is not prohibited by § 13–1421, which states:

> A. Evidence relating to a victim's reputation for chastity and opinion evidence relating to a victim's chastity are not admissible in any prosecution for any offense in this chapter. Evidence of specific instances of the victim's prior sexual conduct may be admitted only if a judge

finds the evidence is relevant and is material to a fact in issue in the case and that the inflammatory or prejudicial nature of the evidence does not outweigh the probative value of the evidence, and if the evidence is one of the following:

1. Evidence of the victim's past sexual conduct with the defendant.
2. Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease or trauma.
3. Evidence that supports a claim that the victim has a motive in accusing the defendant of the crime.
4. Evidence offered for the purpose of impeachment when the prosecutor puts the victim's prior sexual conduct in issue.
5. Evidence of false allegations of sexual misconduct made by the victim against others.

¶ 44 We recognize the potential for misuse of a victim's reputation for chastity in a murder trial. *See* Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law,* 70 Geo. Wash. L.Rev. 51, 104–07 (2002) (detailing studies of juror bias based on perceived promiscuity or virginity of rape victims). But evidence of how many "dates" someone has had does not necessarily reflect on that person's chastity. *See Richardson v. State,* 276 Ga. 639, 640–41, 581 S.E.2d 528 (2003) ("Evidence merely that the victim has or had a romantic relationship with another man does not reflect on her character for sexual behavior.");

Banks v. State, 185 Ga.App. 851, 366 S.E.2d 228, 230 (1988) (holding evidence that victim was "going steady" did not open the door to evidence of sexual experience); *State v. Miller,* 870 S.W.2d 242, 245 (Mo.Ct.App.1994) (refusing to endorse the "cynical notion" that dating is synonymous with sexual activity). While one could infer that a victim who has never gone on a date before is more likely to be a virgin than someone who has, we do not believe that the relationship between the use of the term "first date" in this case and sexual conduct is so close that it falls into the ambit of § 13–1421.

¶ 45 Burns also argues that this testimony warranted a mistrial under Arizona Rule of Evidence 403. Because Burns failed to object on this ground at trial, we review only for fundamental error. *Henderson,* 210 Ariz. at 567 ¶ 19, 115 P.3d at 607. "Fundamental error is error going to the foundation of the case ... of such magnitude that defendant could not possibly have received a fair trial." *State v. Rutledge,* 205 Ariz. 7, 13 ¶ 32, 66 P.3d 50, 56 (2003) (quoting *State v. Hughes,* 193 Ariz. 72, 86 ¶ 62, 969 P.2d 1184, 1198 (1998)). We find no error here. Evidence that Jackie's date with Burns was her first date helped to place her actions in context and thus was probative. And because Burns has not shown that the evidence posed a danger of unfair prejudice under Rule 403, he cannot show error, much less fundamental error.

G. Presence of GHB in the Victim's Organs

¶ 46 Before trial, Burns moved to preclude any evidence regarding the presence of gamma-hydroxybutyric acid ("GHB") in Jackie's liver tissue. At a pretrial hearing, an expert for the State testified that GHB is often used as a date-rape drug that

causes confusion and unconsciousness, but is also produced by the body in small amounts. The expert further testified that the small amount of GHB found in Jackie's liver tissue could have been from natural causes, but it could also have shown that Jackie was drugged with GHB before her death. The trial court found the evidence relevant and that its probative value outweighed any prejudice. The court permitted the State to present essentially the same evidence at trial, although it disallowed use of the term "date-rape drug." Burns contends that the trial court erred in allowing evidence of the GHB in Jackie's liver because its origin was unknown. We review the trial court's ruling for an abuse of discretion. *State v. Dann,* 220 Ariz. 351, 365 ¶ 66, 207 P.3d 604, 618 (2009).

¶ 47 Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence." Ariz. R. Evid. 401(a). The State's theory was that Burns killed Jackie to keep her from telling the police that she was raped. On the night she was murdered, Jackie sounded confused and disoriented when she spoke on the telephone to Randi. Confusion and disorientation are side effects of ingested GHB. Thus, the testimony that the GHB in Jackie's liver tissue could have naturally occurred or resulted from someone giving Jackie a dose of the drug to subdue her was relevant to whether the sexual intercourse between Burns and Jackie was consensual. That the GHB might have been naturally present went to the weight of the evidence rather than its admissibility. *See State v. Lacy,* 187 Ariz. 340, 349, 929 P.2d 1288, 1297 (1996) (holding that a lack of certainty regarding the source of admitted evidence goes to the weight of the evidence, not to its

admissibility). Thus, the trial court did not abuse its discretion in admitting the GHB evidence.

¶ 48 Burns also argues the trial court abused its discretion by instructing the jury that "without consent" means that "the victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep, or any other similar impairment." A party is entitled to any jury instruction reasonably supported by the evidence. *State v. Trostle,* 191 Ariz. 4, 15, 951 P.2d 869, 880 (1997). That GHB was found in Jackie's liver tissue and she sounded confused the night of the murder indicate Jackie might have been drugged with GHB. Because the jury instruction was supported by the evidence, we find no error.

H. Mandi's Testimony that She Feared Burns

¶ 49 During an interview with the State, Mandi said she feared Burns, and he had previously threatened to kill her. The trial court initially precluded evidence of any specific threats made by Burns. It did, however, allow Mandi to testify on direct examination to her general feelings toward Burns. Burns' counsel spent much of his cross-examination attempting to establish that Mandi, not Burns, had killed Jackie. Burns' counsel also attempted to impeach Mandi's testimony that she feared Burns by eliciting testimony that Mandi never told the police that she was afraid of Burns. After cross-examination, the State asked the court to reconsider its previous ruling that Mandi could not testify as to specific acts by Burns that caused her to fear him, arguing that Burns had opened the door by implying that Mandi's testimony was recently fabricated. Over Burns' objection, the court allowed the State on redirect to question Mandi

about specific threats Burns allegedly made on her life and Mandi's assertions that she planned to remove all the guns from her house because she feared Burns.

¶ 50 Burns contends the trial court erred in permitting Mandi's testimony because it was irrelevant, unduly prejudicial, and was other-act evidence prohibited under Rule 404(b).[5] Burns also argues he should have been permitted to re-cross-examine Mandi on certain subjects. We review for an abuse of discretion. *Dann,* 220 Ariz. at 365 ¶ 66, 207 P.3d at 618.

¶ 51 Mandi's testimony that she feared Burns, that she planned to remove all the guns from their shared home, and that Burns threatened to kill her one week before Jackie's murder are all relevant to rebut Burns' contention that her testimony was a recent fabrication. *See* Ariz. R. Evid. 401(a)-(b). The probative value of this evidence was not substantially outweighed by any prejudicial effect. *See State v. Martinez,* 230 Ariz. 208, 213 ¶ 21, 282 P.3d 409, 414 (2012) (noting that not all harmful evidence is unfairly prejudicial, only that evidence which suggests a decision based on an improper basis such as emotion, sympathy, or horror).

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[5] Burns also argues that Mandi's testimony was not timely disclosed and should have been precluded, but does not support this claim with any argument or citation to the record. He has, therefore, waived this claim. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim.").

¶ 52 Burns' Rule 404 argument also lacks merit. Under Arizona Rule of Evidence 404(b), other wrongs or acts are not admissible to show that a person acted in conformity with his or her character. They may, however, be admissible for other purposes, such as rebutting an attempt to impeach a witness. *See State v. Williams,* 183 Ariz. 368, 376, 904 P.2d 437, 445 (1995) ("Evidence which tests, sustains, or impeaches the credibility or character of a witness is generally admissible, even if it refers to a defendant's prior bad acts.") (internal quotation marks omitted). Rule 404(b) does not apply to Mandi's testimony that she feared Burns or planned to remove guns from their home, because that testimony involves no other *act* by Burns. Mandi's testimony that Burns threatened to kill her before Jackie's murder was inadmissible to show that Burns was more likely to have killed Jackie, because it involved a specific threat made by Burns. That evidence, however, was properly admitted to rebut Burns' attempt to show that Mandi was not credible when she testified that she feared Burns. Thus, Burns' 404(b) argument fails.

¶ 53 Burns' argument that he should have been permitted to re-cross-examine Mandi is also without merit. Burns asserts that he should have been allowed to question Mandi about a recorded phone conversation in which Mandi told Burns' coworker that she was not afraid of Burns and that Burns was never violent with women. A trial court may, in its discretion, permit re-cross-examination on any new issue raised on redirect. *State v. (Robert D.) Smith,* 138 Ariz. 79, 81, 673 P.2d 17, 19 (1983). Defense counsel, however, asked about this conversation on cross-examination, and no new issue arose during re-

direct examination that would have warranted recross-examination. Thus, the trial court did not abuse its discretion.

I. Jail Calls

¶ 54 Burns contends the trial court erred in admitting recordings of sixteen "irrelevant and prejudicial" phone calls that he made while in jail. We review the trial court's admission of this evidence for an abuse of discretion. *Dann,* 220 Ariz. at 372 ¶ 117, 207 P.3d at 625. In these calls, Burns spoke with Mandi and asked about the search for Jackie's body, whether his brother had cleaned out Burns' Honda, and whether Mandi would stay with him "no matter what." Over Burns' objection, the trial court allowed the recordings to be played to the jury and permitted testimony about the content of the calls.

¶ 55 The phone calls are clearly relevant. The conversations all tend to show that Burns was involved in Jackie's disappearance. The probative value of the statements is not substantially outweighed by any danger of unfair prejudice. *Martinez,* 230 Ariz. at 213 ¶ 21, 282 P.3d at 414. We find no abuse of discretion.

J. Testimony Regarding Knives in Burns' Home

¶ 56 Burns contends the trial court erred in denying a mistrial after it inappropriately admitted evidence that the police found numerous "folding knives" inside Burns' home. We review the admission of evidence and the denial of a mistrial for an abuse of discretion. *See State v. Villalobos,* 225 Ariz. 74, 80 ¶ 18, 235 P.3d 227, 233 (2010); *State v. Kuhs,* 223 Ariz. 376, 380 ¶ 18, 224 P.3d 192, 196 (2010).

¶ 57 Before trial, Burns moved to exclude evidence of any weapons found in his home besides the murder weapon, a 9mm handgun. The trial court did not rule on the motion, but noted that the State had stipulated not to introduce evidence of any other weapons. But at trial, when asked by the State what was found in Burns' home, a detective testified that several folding knives were found. Burns moved for a mistrial. The prosecutor avowed on the record that the State had intended that the detective testify about the 9mm handgun case and not the knives. The court denied the mistrial motion.

¶ 58 "When unsolicited prejudicial testimony has been admitted, the trial court must decide whether the remarks call attention to information that the jurors would not be justified in considering for their verdict, and whether the jurors in a particular case were influenced by the remarks." *State v. Jones,* 197 Ariz. 290, 304 ¶ 32, 4 P.3d 345, 359 (2000). In this case, the detective briefly remarked that he had found knives, common household items, in Burns' home. These remarks would not have influenced the jury's verdict when viewed in context with the evidence that was properly before the jury. The court, therefore, did not err by denying Burns' request for a mistrial.

K. Photographs of Jackie's Body

¶ 59 Burns contends that the trial court erred when it admitted photographs of Jackie's body as it was discovered in the desert, as well as images of Jackie's skull. Before trial, Burns moved to preclude photographic evidence of Jackie's body. He contended that the photos and descriptions of Jackie's remains were not relevant, were unduly prejudicial, and only served to inflame the jury because Jackie's remains

were in an advanced state of decomposition and wild animals had severed her head. The trial court denied Burns' motion, as well as several objections to specific photographs. The court found that the photographs had probative value, including the photographs of Jackie's skull, which helped explain the testimony of a forensic anthropologist, Dr. Fulginiti, who based her conclusions on an examination of the skull.

¶ 60 Trial courts have broad discretion in admitting photographs. *State v. Spreitz,* 190 Ariz. 129, 141, 945 P.2d 1260, 1272 (1997).

¶ 61 In *State v. Murray,* we set forth a three-part test for determining whether photographs of a murder victim are admissible: whether the photograph is relevant, whether it has "the tendency to incite passion or inflame the jury," and its probative value versus its potential to create unfair prejudice. 184 Ariz. 9, 28, 906 P.2d 542, 561 (1995). The trial court here properly applied this test.

¶ 62 First, the photographs are relevant. A photograph of the deceased in any murder case is relevant to assist a jury in understanding an issue because the fact and cause of death are always relevant in a murder prosecution. *Spreitz,* 190 Ariz. at 142, 945 P.2d at 1273. The photographs show where the body was found and how it was hidden, and they helped the jury understand the expert testimony in the case. Although the photographs are gruesome, and thus had some potential to inflame the jury, their probative value outweighs any danger of unfair prejudice.

L. Ballistic Expert Testimony

¶ 63 Burns contends the trial court erred in admitting the testimony of the State's ballistics expert, Christian Gunsolley, who identified Burns' 9mm handgun as the murder weapon. Because Burns did not object at trial, we review for fundamental error. *State v. Valverde,* 220 Ariz. 582, 585 ¶ 12, 208 P.3d 233, 236 (2009).

¶ 64 Burns contends that *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and amended Rule of Evidence 702 applied to his case and that the trial court erred by not holding a *Daubert* hearing. But, because the current version of Rule 702 is not a new constitutional rule, it does not apply to trials that ended before the new rule became effective on January 1, 2012. *State v. Miller,* 234 Ariz. 31, 41 ¶¶ 28–31, 316 P.3d 1219, 1228 (2013). Because the guilt phase of Burns' trial concluded on December 16, 2010, *Daubert* and new Rule 702 did not apply to his case.

¶ 65 Burns argues that, even if *Daubert* does not apply, Gunsolley's testimony should still have been precluded under *Frye. See Frye v. United States,* 293 F. 1013 (D.C.Cir.1923). But, because Gunsolley's testimony did not rely on any novel theory or process, it was also not subject to *Frye. See Logerquist v. McVey,* 196 Ariz. 470, 480 ¶ 31, 1 P.3d 113, 123 (2000) (holding that *Frye* applies only to expert testimony based on "novel scientific principles"). Thus, Burns has not established that the trial court erred in admitting Gunsolley's testimony, much less that it constituted fundamental error.

M. Burns' Hearsay Statement about Consensual Sex

¶ 66 Burns argues the trial court deprived him of his right to present a complete defense by refusing to allow testimony about his statements to police that he had consensual sex with Jackie. We disagree.

¶ 67 After Jackie's disappearance, Burns told police during an interview that he and Jackie had consensual sex in his truck. At trial, defense counsel asked the court to permit him to elicit testimony about this statement. The trial court refused because Burns' statements were hearsay.

¶ 68 Burns admits that his statements were hearsay but contends that they should have been admitted under the residual hearsay exception, which is now contained in Arizona Rule of Evidence 807. Rule 807 provides that hearsay that does not fall into any other exception may be admitted if (1) the statement has equivalent guarantees of trustworthiness, (2) it is offered as evidence of a material fact, (3) it is more probative than any other evidence that the proponent can obtain through reasonable efforts, and (4) admitting it will best serve the purposes of the rules and the interests of justice.

¶ 69 The residual hearsay exception "require[s] the out of court statement to have equivalent circumstantial guarantees of trustworthiness," and absent such guarantees, self-serving hearsay is inadmissible. (*Robert D.*) *Smith,* 138 Ariz. at 84, 673 P.2d at 22 (internal quotation marks omitted). When deciding if a statement is trustworthy, we consider "the spontaneity, consistency, knowledge, and motives of the declarant ... to speak truthfully," among

other things. *State v. Allen,* 157 Ariz. 165, 174, 755 P.2d 1153, 1162 (1988).

¶ 70 Burns' statements did not have circumstantial guarantees of trustworthiness. The statements were not spontaneous but were made in response to police questioning two days after Jackie's disappearance. Further, Burns was not motivated to speak truthfully. He was at a police station, speaking to police officers in an interview room about a murder investigation, a condition that does not necessarily elicit trustworthy answers. *Cf. United States v. Morgan,* 385 F.3d 196, 209 (2d Cir.2004) (noting statements in response to police questioning and addressed to law enforcement officers lack equivalent guarantees of trustworthiness).

¶ 71 Burns also contends that his testimony was alternatively admissible under Arizona Rule of Evidence 106, which states that "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." But the State did not introduce any writings or recorded statements about Burns and Jackie having non-consensual sex. Burns' statements were therefore not "necessary to qualify, explain or place into context the portion already introduced...." *State v. Cruz,* 218 Ariz. 149, 162 ¶ 58, 181 P.3d 196, 209 (2008) (citation and internal quotation marks omitted). Thus, the trial court did not abuse its discretion by excluding the statements.

N. Evidence Supporting Burns' Convictions

¶ 72 Burns claims (1) there was insufficient evidence to support the finding that he sexually assaulted Jackie; (2) there was insufficient evidence to find that he kidnapped Jackie; (3) sexual assault and kidnapping cannot serve as predicate offenses for felony murder; and (4) there was no evidence of premeditation to support the first-degree murder conviction. We review the facts in the light most favorable to sustaining the verdicts and resolve inferences against the defendant. *State v. Davolt,* 207 Ariz. 191, 212 ¶ 87, 84 P.3d 456, 477 (2004). We determine de novo whether the evidence introduced at trial is sufficient to support a conviction. *State v. West,* 226 Ariz. 559, 562 ¶ 15, 250 P.3d 1188, 1191 (2011). "Substantial evidence" to support a conviction exists when "reasonable persons could accept [it] as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *Id.* at 562 ¶ 16, 250 P.3d at 1191.

1. Evidence that Burns used immediate force to coerce sexual intercourse

¶ 73 The State presented sufficient evidence to support the jury's finding that Burns coerced sexual intercourse with Jackie: Jackie's bra and blouse were ripped, and her blood was found in Burns' truck. Jackie suffered facial and skull fractures, and her vagina was bruised. She had GHB in her system and was confused and disoriented when she spoke to Randi on the phone. This evidence was sufficient for a reasonable person to conclude that Burns sexually assaulted Jackie.

2. Evidence of kidnapping

¶ 74 Sufficient evidence also existed to support the jury's finding that Burns kidnapped Jackie. Kidnapping occurs when a person knowingly restrains another with the intent to inflict death, physical injury, or a sexual offense on the victim. A.R.S. § 13–1304(A)(3). "Restrain" means "to restrict a person's movements without consent, without legal authority, and in a manner which interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person." A.R.S. § 13–1301(2). A person may restrain another by "[p]hysical force, intimidation or deception." *Id.*

¶ 75 Having found sufficient evidence to support the jury's finding that Jackie was sexually assaulted, we look to see if she was restrained against her will for the sexual assault to be accomplished. As noted above, there was evidence that Jackie's clothes were torn and that she was drugged with GHB. Additionally, Burns was carrying a gun that could have been used to confine Jackie in his truck. And Jackie never made it to the gas station where she told Randi to meet her. Accordingly, the State presented sufficient evidence to support Burns' conviction for kidnapping.

3. Evidence of kidnapping or sexual assault as a predicate offense for felony murder

¶ 76 Burns argues that Jackie's murder could not have occurred in furtherance of the sexual assault because the assault, if it occurred, was completed at a time and place remote from Jackie's murder.

¶ 77 For felony murder, the state must prove that the defendant caused the victim's death "in the course

of and in furtherance of ... or immediate flight from" the underlying offense. A.R.S. § 13–1105(A)(2). "A death is in furtherance of an underlying felony if the death resulted from an action taken to facilitate accomplishment of the felony." *State v. Jones,* 188 Ariz. 388, 397, 937 P.2d 310, 319 (1997).

¶ 78 There is sufficient evidence that Burns killed Jackie in furtherance of or during immediate flight from the kidnapping or sexual assault. The evidence that proves the kidnapping and sexual assault also proves the predicate felonies. Even if several hours passed between the attack and the murder, the evidence supports a finding that Burns never let Jackie out of his presence before driving Jackie to the desert and shooting her. The jury could have reasonably found that the murder was perpetrated in order to prevent Jackie from reporting the sexual assault or kidnapping.

¶ 79 Burns' argument that the kidnapping merged into the murder is also without merit. He asserts there is no evidence that Jackie was ever restrained until just before her death; thus, the intent to kill "merged" with the intent to restrain. But Jackie's facial fractures, the GHB in her liver, and her failure to arrive at the gas station where she told Randi to meet her all suggest that Burns restrained Jackie in some manner in the hours proceeding her death. Jackie's body was found face down clutching a tree branch and a bullet was found where her head would have been, suggesting that she was ordered to lie down on her stomach and then shot. We have held that even mere moments between restraint and murder permits a finding that two offenses occurred. *See State v. Herrera,* 176 Ariz. 9, 16, 859 P.2d 119, 126

(1993) (holding kidnapping and murder were two distinct acts and did not merge where victim was ordered to lie on the grounds and then shot moments later).

¶ 80 Moreover, Burns was convicted of premeditated murder, which cannot merge with kidnapping. Two crimes do not merge when "[e]ach of the offenses ... requires proof of a different element." *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *see also Parker v. United States,* 692 A.2d 913, 916 (D.C.1997). Premeditated murder obviously requires proof that the defendant killed with premeditation, whereas kidnapping requires restraining the victim. *See* A.R.S. §§ 13–1105(A)(1), –1304(A). Thus, even if we accept Burns' view of the evidence as true, the kidnapping did not merge with the murder.

4. Evidence of premeditation

¶ 81 Finally, there was sufficient evidence to allow the jury to find Burns guilty of premeditated murder. To establish premeditation, the state must be able to "convince a jury beyond a reasonable doubt that the defendant actually reflected" before the murder. *State v. Thompson,* 204 Ariz. 471, 479 ¶ 31, 65 P.3d 420, 428 (2003).

¶ 82 The State presented evidence that Burns brought a gun on a "date." He picked up Jackie, left Chandler, stopped for gas, and then drove to a remote location in the desert where he shot and killed Jackie. Sometime during the night, he sexually assaulted her. This provides sufficient circumstantial evidence to demonstrate premeditation. *See id.* (noting that the defendant's acquiring of a weapon before the killing is evidence of premeditation); *State v. Grell,* 205 Ariz.

57, 60 ¶ 21, 66 P.3d 1234, 1237 (2003) (holding that "driving to a remote area," among other facts, supported finding of premeditation). Additionally, the fact that Burns positioned Jackie on the ground before shooting her twice in the back of the head and then hid her body shows that Burns actually reflected on whether to kill her.

O. Multiplicity and Double Jeopardy

¶ 83 Burns argues that using his sexual assault and kidnapping convictions both as predicate felonies and to satisfy the (F)(2) aggravator violates the Double Jeopardy Clause. Further, Burns argues the trial court erred by not instructing the jury that his multiple felony convictions only counted as one aggravator. Whether charges are multiplicitous is a matter of law, which we review de novo. *See State v. Boggs,* 218 Ariz. 325, 334 ¶ 38, 185 P.3d 111, 120 (2008) (noting that we review legal issues de novo). We also review de novo whether the trial court properly instructed the jury. *See Glassel,* 211 Ariz. at 53 ¶ 74, 116 P.3d at 1213.

1. Multiplicitous charges

¶ 84 Burns argues that, because the State submitted both his sexual assault and kidnapping convictions as (F)(2) aggravators, the (F)(2) aggravator was multiplicitous and was improperly given additional weight. He did not raise this argument below, so we review for fundamental error. *See Henderson,* 210 Ariz. at 568 ¶ 22, 115 P.3d at 608.

¶ 85 The (F)(2) aggravating factor requires the trier of fact to consider whether a defendant has been previously convicted of a serious offense. A.R.S. § 13–751(F)(2). Convictions for serious offenses committed

at the same time as the homicide, or those consolidated for trial with the homicide, are considered prior convictions. The state may use multiple contemporaneous convictions to prove an (F)(2) aggravator. *Martinez,* 230 Ariz. at 213–214 ¶¶ 16–23, 282 P.3d at 414–15. Burns has not established fundamental error on this point.

2. Double jeopardy

¶ 86 Burns also argues that it was improper for him to be convicted of kidnapping and sexual assault, and then for those offenses to be used to satisfy the serious offense requirement of A.R.S. § 13–751(J)(5) and (10), and to establish the (F)(2) aggravator. He claims that using the convictions in this manner resulted in multiple punishments, since he was sentenced to prison for the same felonies that were used as felony murder predicates and as capital aggravators.

¶ 87 We need not address this claim. Burns' double-jeopardy claims relate only to his conviction for felony murder. But because the jury also unanimously found Burns' first-degree murder conviction supported by a premeditated-murder theory, Burns' first-degree murder charge would stand regardless of whether the felony-murder conviction exists, and the kidnapping and sexual assault charges were independent of the premeditated murder. *Anderson,* 210 Ariz. at 343 ¶ 59, 111 P.3d at 385.

¶ 88 Burns' claim also fails on its merits. We have held, as Burns acknowledges, that an element of a crime may also be used as a capital aggravator. *Cruz,* 218 Ariz. at 169 ¶ 130, 181 P.3d at 216 (citing *State v. Lara,* 171 Ariz. 282, 284–85, 830 P.2d 803, 805–06 (1992)). We decline to overrule these cases.

3. Jury instruction on the (F)(2) aggravator

¶ 89 Burns argues the trial court failed to cure the errors enumerated above by not informing the jury that his prior convictions counted toward only one aggravating factor, the (F)(2) factor requiring proof of conviction of a prior serious offense. It does not appear that Burns requested this instruction below, and so we review for fundamental error. *Henderson,* 210 Ariz. at 568 ¶ 22, 115 P.3d at 608.

¶ 90 A prior conviction may be used to establish more than one aggravating factor, so long as the jury does not consider the conviction more than once in assessing the aggravating and mitigating circumstances. *State v. Chappell,* 225 Ariz. 229, 241 ¶ 48, 236 P.3d 1176, 1188 (2010). The trial court did not instruct the jury during the penalty phase that it could only consider the convictions once, although it did give this instruction in the aggravation phase. However, the instruction was unnecessary. Burns' prior convictions were only used to prove the (F)(2) aggravator. The state may present more than one prior conviction to satisfy the (F)(2) factor. *Martinez,* 230 Ariz. at 213–214 ¶¶ 16–23, 282 P.3d at 414–15. Moreover, the jury was instructed that it could only consider the aggravating factors that it found during the aggravation phase. Thus, Burns has not established fundamental error on this point.

P. Preclusion of Burns' Expert Testimony

¶ 91 Burns asserts that the trial court erred in precluding testimony from some of his expert witnesses. "We review the trial court's decision to exclude evidence for abuse of discretion." *Villalobos,* 225 Ariz. at 82 ¶ 33, 235 P.3d at 235; *State v. Jackson,*

186 Ariz. 20, 24, 918 P.2d 1038, 1042 (1996) (reviewing a court's "imposition and choice of sanction" for an abuse of discretion). While trial courts may preclude or limit a witness' testimony as a sanction for disclosure violations, doing so should be a remedy of last resort. Ariz. R.Crim. P. 15.7(a); *State v. Moody,* 208 Ariz. 424, 454 ¶ 114, 94 P.3d 1119, 1149 (2004).

¶ 92 To determine whether witnesses should be precluded from testifying, courts should assess four criteria: "(1) how vital the witness is to the case, (2) whether the opposing party will be surprised, (3) whether the discovery violation was motivated by bad faith, and (4) any other relevant circumstances." *State v. (Joe U.) Smith,* 140 Ariz. 355, 359, 681 P.2d 1374, 1378 (1984).

1. Dr. Wu

¶ 93 Under Arizona Rule of Criminal Procedure 15.2(d), a defendant must disclose witnesses forty days after arraignment or ten days after the state's disclosure. Parties have an ongoing duty to disclose new information as it is discovered. Ariz. R.Crim. P. 15.6(a). Yet less than one week before the penalty phase began, Burns provided notice that Dr. Joseph Wu, a mitigation witness, would testify regarding results of a PET scan of Burns' brain. In response, the State moved to preclude Dr. Wu's testimony and the results of the PET scan. The trial court ultimately allowed Dr. Wu to testify after Burns disclosed the reports.

¶ 94 The State objected on lack-of-disclosure grounds when Burns' counsel questioned Dr. Wu about a quantitative measurement of Burns' PET scans. One week before he testified, Dr. Wu told the

State he had not performed a quantitative analysis. The court ruled that the State should have the opportunity to have its expert review the PET scan findings and would not allow the line of questioning until it could be determined whether there was adequate time for the results to be examined. Ultimately, Dr. Wu was not allowed to testify about the quantitative analysis. Dr. Wu did testify at length that, in his opinion, Burns had diminished frontal-lobe activity, rendering him less culpable for his actions.

¶ 95 Based on the *Smith* factors, the trial court did not abuse its discretion by precluding Dr. Wu's quantitative analysis. Dr. Wu's testimony was not critical to Burns' defense. Dr. Wu testified at length that Burns had diminished frontal-lobe activity and explained that this could affect Burns' impulse control, judgment, and emotional regulation. Burns has not identified what the quantitative analysis would have additionally shown. Second, the prosecution was unfairly surprised by the evidence, as Dr. Wu had stated just one week earlier that he had not performed a quantitative analysis. There is no indication of bad faith, so the third *Smith* factor is inapplicable. Finally, the trial court did not preclude the testimony entirely, but instead imposed a less-burdensome alternative: it required Burns to wait to delve into the quantitative analysis until the State's expert had a chance to review it. By the conclusion of Dr. Wu's testimony, the State's expert, Dr. Waxman, had not received the data in a useable format. And Burns never attempted to recall Dr. Wu after Dr. Waxman had accessed the files. Under the *Smith* test,

the trial court did not abuse its discretion by precluding the quantitative analysis evidence.

2. Dr. Cunningham

¶ 96 The court sustained an objection on non-disclosure grounds to Dr. Cunningham's direct examination testimony regarding "the rates of violence in prison, factors that are predictive of violence in prison, and how capital offenders behave in prison." At the conclusion of Dr. Cunningham's testimony, Burns' counsel said he intended to recall Dr. Cunningham as a rebuttal witness. The State objected, arguing that Burns did not disclose to the State that it intended to call Dr. Cunningham as a rebuttal witness and that Dr. Cunningham's purported testimony on the likelihood of violence in prison among capital offenders was not relevant to the State's rebuttal evidence. The trial court ruled that if the State presented evidence on the likelihood of violence in prison, "then Dr. Cunningham will be allowed to testify" as a rebuttal witness.

¶ 97 A few days later, a State expert, Dr. Kirkley, discussed Burns' past misconduct to support her conclusion that Burns exhibited antisocial personality disorder. Burns then moved to recall Dr. Cunningham to address antisocial personality disorder and to explain the statistical analysis on the risk of inmate prison violence based upon his own research and other research presented in Burns' case-in-chief. The trial court precluded this testimony because it "was not timely disclosed." Further, the court found that the State did not inject the issue by its questioning of Dr. Kirkley and that the offered testimony was not relevant as rebuttal evidence.

¶ 98 Burns' offer of proof disclosed that Dr. Cunningham would have offered a statistical analysis showing that violent offenders do not necessarily commit acts of violence while incarcerated. Burns argues that this testimony would have rebutted the "[S]tate's position that [Burns] could not be safely housed for life in ADOC" as well as Dr. Kirkley's opinion that Burns' antisocial personality disorder and history meant he had a high probability of future dangerousness in prison. We find no abuse of discretion.

¶ 99 Under the *Smith* factors, Dr. Cunningham's testimony that Burns could safely be incarcerated for life was cumulative and therefore not vital to his mitigation evidence. Another defense expert, James Aiken, had already testified that an inmate like Burns could be safely housed in prison. Second, the fact that Dr. Cunningham had testified in other trials does not mean that the State was prepared to effectively deal with his late-disclosed testimony in Burns' case. The fact that the State had virtually no notice that Burns intended to call Dr. Cunningham as a rebuttal witness weighs in favor of preclusion. As with Dr. Wu's testimony, there is no evidence of bad faith in the defense's late disclosure, and so the third *Smith* factor is inapplicable here.

¶ 100 Ultimately, Burns cannot establish that he was prejudiced by the preclusion of Dr. Cunningham's testimony because the proffered testimony was largely cumulative. We find no abuse of discretion in the trial court's refusal to allow Dr. Cunningham's rebuttal testimony.

Q. Impeachment of Burns' Experts

¶ 101 Burns next argues the trial court erred by not limiting the State's cross-examination of Dr. Wu and Burns' prison expert, James Aiken. We review a trial court's ruling regarding the scope of cross-examination for an abuse of discretion. *State v. Ellison,* 213 Ariz. 116, 132 ¶ 52, 140 P.3d 899, 915 (2006).

¶ 102 On direct examination during the penalty phase, Mr. Aiken testified that Burns could be safely managed in the Arizona prison system. The State then cross-examined Mr. Aiken regarding recent inmate crimes and escape attempts in a private prison facility in Kingman, the murder of a detention officer inside the prison, a hostage crisis at an Arizona prison, and other matters. The trial judge allowed the cross-examination over Burns' objection.

¶ 103 Burns also objected to the State's cross-examination of Dr. Wu regarding his evaluation of the PET scans. Burns again objected when the State asked Dr. Wu about several other cases, listed in his PowerPoint presentation, from other jurisdictions where courts precluded PET scan evidence. The trial court overruled the objection, and Dr. Wu responded that he was unsure what the courts had concluded.

¶ 104 We find nothing improper with the State's cross-examinations of Burns' experts. The cross-examinations were relevant to impeach each expert. *See* Ariz. R. Evid. 401(a) ("Evidence is relevant if [ ] it has any tendency to make a fact more or less probable than it would be without the evidence...."); Ariz. R. Evid. 611(b) ("A witness may be cross-examined on any relevant matter.").

R. Jurors' Concern for Courtroom Safety

¶ 105 Burns contends the trial court violated his right to a fair trial when it denied his motions for a mistrial after the jurors expressed concern about their safety. Trial court rulings on motions for mistrial are reviewed for an abuse of discretion. *State v. Lehr (Lehr III),* 227 Ariz. 140, 150 ¶ 43, 254 P.3d 379, 389 (2011).

¶ 106 During the guilt-phase deliberations, the jury sent the following question to the judge:

> We are concerned about the juror's [sic] safety. In other words, are people going to be able to access our personal information—name, employer, address, etc.? Since [the] foreperson had to sign their actual name[,] will [the] foreperson be safe? Is there a way that we can keep our personal information private/safe from the public? Defendant's family etc.? We are concerned about our safety ... also media etc.

The judge responded that the juror information would be sealed by the court and unavailable to the general public. Burns moved for a mistrial, arguing that the jurors' concern for their safety could have "played a role in [their] deliberative process." The trial court denied Burns' motion for a mistrial.

¶ 107 The next day, defense counsel asked the court to question the jurors individually to ensure that their concerns would not affect their impartiality. Instead of asking each juror individually, the judge asked the jury as a group whether any juror would be unable to keep an open mind during the next phase of the trial. No juror responded.

¶ 108 During the penalty phase, the jurors submitted a written request asking the trial judge to ensure that a guard be posted by Burns at all times because some jurors were feeling "uncomfortable." Burns moved for a mistrial, and the judge asked defense counsel if there was a question he would like the court to ask the jury. Defense counsel responded that the court needed to follow up on the jury's question and ask each juror whether he or she was afraid of Burns and whether the courtroom security was insufficient.

¶ 109 The trial judge denied the mistrial motion. The court noted that one of the deputies who usually sat by Burns had to leave for a personal emergency, leaving only one deputy in the courtroom instead of two. The trial court addressed the jury and asked whether anyone could not keep an open mind based on of anything that occurred in the guilt phase. No juror responded. The trial judge planned to ask any juror who raised a hand additional questions outside the presence of the other jurors. In the penalty-phase jury instructions, the trial judge reminded the jurors that "any belief or feeling you have about courtroom security or other security matters shall not be part of your decision making process."

¶ 110 A trial court must ensure that the jury is capable of rendering a fair and impartial verdict. *See State v. Detrich,* 188 Ariz. 57, 67, 932 P.2d 1328, 1338 (1997). A trial court has broad discretion in selecting methods to detect and protect against potential juror bias. *See Trostle,* 191 Ariz. at 12, 951 P.2d at 877 (finding no abuse of discretion where trial court elected not to conduct individual or small-group voir dire to screen for bias).

¶ 111 Here, the trial court did not abuse its discretion when it denied Burns' motions for a mistrial. When the jurors raised a concern about their personal information becoming public, the court appropriately reassured them that their information would remain sealed. The court then verified that the jurors' concern had not affected their ability to decide the case fairly and impartially. It did so again when the jurors expressed their discomfort during the penalty phase. The trial court did not abuse its discretion in addressing the issue as it did.

S. Juror Misconduct

¶ 112 Burns argues that the trial court erred when it failed to declare a mistrial after Juror 11 investigated a fellow juror's anti-death-penalty political activity and shared this information with other jurors. "A trial court's decision to grant or deny a new trial based on alleged jury misconduct generally will not be reversed absent an abuse of discretion." *State v. Hall,* 204 Ariz. 442, 447 ¶ 16, 65 P.3d 90, 95 (2003). Juror misconduct warrants a new trial only if a defendant shows actual prejudice or if prejudice may be fairly presumed from the facts. *State v. Miller,* 178 Ariz. 555, 558, 875 P.2d 788, 791 (1994). Because Burns failed to raise this issue at trial, however, we review for fundamental error. *Rutledge,* 205 Ariz. at 13 ¶ 29–30, 66 P.3d at 56.

¶ 113 On the second day of jury deliberations in the penalty phase, Juror 11 sent a note to the judge that stated, "I believe we have a stealth juror in the jury." Juror 11 expressed concerns about Juror 2's unwillingness to deliberate and personal feelings about sexual assault. Juror 11 explained how he had taken it upon himself to research Juror 2 on the

Internet and had uncovered contributions to political parties and candidates that oppose the death penalty. Juror 11 attached the results of his various Internet searches to the note he sent to the judge.

¶ 114 Defense counsel asked that the court talk to Juror 11 to see if he had shared the research he had conducted on Juror 2 with the other jury members. The parties and court agreed to release Juror 11 for violating the admonition after he admitted that he told a "couple of the jurors" about the information he had discovered. After dismissing Juror 11, the court called in the remaining jurors and advised them that she had dismissed Juror 11, but not to "question why that happened." The court also asked the jurors if Juror 11 had shared information about any of the other jurors with any of them. No juror responded to the question. The court then replaced Juror 11 with the last remaining alternate, Juror 17.

¶ 115 The next trial day, Juror 8 sent a note to the judge indicating that she had spoken with Juror 11 about the contents of his letter. The court then questioned Juror 8, who confirmed that Juror 11 had told her and other jurors what he discovered on the Internet about the "stealth juror's" views on the death penalty and political contributions. The court asked Juror 8 if she believed that she would be able to put aside that information to deliberate and decide the case solely on the evidence and jury instructions provided. Juror 8 responded, "Absolutely."

¶ 116 The court also questioned Juror 15, who explained that he saw Juror 11 writing his note to the judge. Juror 15 explained that Juror 11 identified the juror who was the subject of his note, but did not indicate what information he possessed. Juror 15

assured the court that he could remain fair and impartial.

¶ 117 The court next questioned Juror 6, who explained that throughout the trial, Jurors 2 and 11 had politically opposite views and argued a lot. Juror 6 thought that Juror 11 "wanted to remove himself from the jury" once the penalty phase began. Juror 6 explained that she did not want to know what Juror 11 told the court and that she could put the incident aside, follow the jury instructions, and decide the issues based on the evidence presented.

¶ 118 The court then questioned Juror 4, who heard Juror 11 explaining that he had "Googled" a member of the jury, discovering political affiliations. Juror 4 explained that he was not paying that much attention to Juror 11, that he was not concerned with what Juror 11 had found, and that he would be able to follow the jury instructions as given.

¶ 119 Finally, the court brought in the entire jury, explained that Juror 11 had been replaced with Juror 17, and told jurors not to worry about the reasons for Juror 11's replacement. The court explained that the jurors were still under the admonitions and that they were not permitted to do any outside research on the Internet or otherwise. The court further explained that the jury must begin the penalty-phase deliberations anew.

¶ 120 Burns asserts the trial court failed to adequately investigate this issue by refusing to question all twelve jurors individually and, because of the limited nature of the court's questioning, it cannot be concluded beyond a reasonable doubt that the prior guilt- and aggravation-phase verdicts in the case were not coerced and were truly unanimous.

¶ 121 Burns, however, failed to object or otherwise raise any concerns to the trial court about its handling of this matter. After receiving Juror 11's note, the trial judge met with Burns' counsel and the prosecutor, and Burns' counsel stated that he agreed with the court's planned response. Burns' counsel only asked that Juror 11 identify which jurors he had shared the information with (Juror 11 was unable to accurately do so without using their names on the record). Counsel did not ask the court to question all jurors individually, object to the court's plan to discuss the situation with the jury as a whole, or move for a mistrial.

¶ 122 Burns has not established error, much less fundamental error. In *State v. Garcia,* a juror told other jurors about alleged improper contact initiated by the defendant's family during the aggravation phase of the trial. 224 Ariz. 1, 11 ¶ 29, 226 P.3d 370, 380 (2010). The trial court interviewed all the jurors, and no juror expressed a concern that the incident would affect his or her deliberations. *Id.* at 11 ¶ 30, 226 P.3d at 380. After the interviews concluded, defense counsel moved for a mistrial of the aggravation phase, which the trial court granted. *Id.* We held that the trial court did not err by failing to grant a mistrial on the already completed guilt phase because "the trial court's decision to grant a mistrial as to the aggravation phase alone was sufficient in light of the limited nature of the potential prejudice." *Id.* at 11 ¶ 31, 226 P.3d at 380. We have explained that when confronting issues of juror misconduct, "the court's response should be commensurate with the severity of the threat posed." *Id.* (quoting *Miller,* 178 Ariz. at 557, 875 P.2d at 790).

¶ 123 Burns cannot show error because the jurors who spoke to Juror 11 about his letter indicated to the judge that they received no specifics from Juror 11 regarding his concerns about Juror 2, and all assured the court that they had no difficulty setting aside what happened and following the jury instructions. Here, unlike the jurors in *Garcia,* the jurors remaining on the jury panel had no information regarding the content of Juror 11's letter to the court. Burns' contention that "it is now unknown" what impact Juror 11's conduct had on the remaining jurors is insufficient to demonstrate fundamental error.

T. Sentencing on the Non–Capital Counts

¶ 124 Burns contends the trial court erred by refusing to sentence him on the non-capital counts within thirty days of his conviction in violation of Arizona Rule of Criminal Procedure 26.3. Burns asserts that, because he was not sentenced on his non-capital convictions, he was deprived of the right to have the jury consider his terms of imprisonment on those charges during the penalty phase. We review a trial court's interpretation of the Arizona Rules of Criminal Procedure de novo. *State v. Manuel,* 229 Ariz. 1, 3 ¶ 5, 270 P.3d 828, 830 (2011).

¶ 125 Under Rule 26.3, a court is obligated to sentence a defendant between fifteen and thirty days after conviction. Ariz. R.Crim. P. 26.3. But "[u]nder both Arizona's superseded and current capital sentencing schemes, a defendant's [capital] trial consists of two phases: a guilt phase and a penalty phase." *State v. Ring,* 204 Ariz. 534, 554 ¶ 50, 65 P.3d 915, 935 (2003). Thus, waiting until the end of the proceeding to determine Burns' sentences for both non-capital and capital convictions is both logical and

within the plain language of Rule 26.3. We hold that, in a capital proceeding, the thirty-day sentencing period does not begin to run until after the conclusion of the penalty phase.

¶ 126 Burns next argues that he should have been permitted to argue to the jury that his consecutive sentences on his non-capital convictions would require him to spend the rest of his life in prison. But Burns had no right to present evidence of his effective life sentence to the jury because it would have been irrelevant as a mitigating factor. *See State v. Benson,* 232 Ariz. 452, 465 ¶¶ 52–57, 307 P.3d 19, 32 (2013) (refusing to allow defendant to present evidence that he was unlikely to be paroled or would stipulate to ineligibility for parole not an abuse of discretion); *Dann,* 220 Ariz. at 372–73 ¶¶ 122–24, 207 P.3d at 625–26 (refusing to instruct jury that defendant would waive parole eligibility if not sentenced to death not an abuse of discretion). The trial court did not err in so ruling.

U. Evidence of Burns' Gang Affiliation, Attitude, and Other Misconduct

¶ 127 Burns argues that evidence of his jail calls, religious beliefs, tattoos, and gang membership were improperly admitted in violation of his First, Eighth, and Fourteenth Amendment rights. This Court reviews the admission of evidence in the penalty phase for an abuse of discretion. *State v. Nordstrom,* 230 Ariz. 110, 114 ¶ 8, 280 P.3d 1244, 1248 (2012). So long as rebuttal evidence is relevant to the thrust of a defendant's mitigation and is not unduly prejudicial, we defer to the trial court's finding of admissibility. *VanWinkle,* 230 Ariz. at 394 ¶ 28, 285 P.3d at 315.

¶ 128 During the penalty phase, the court admitted evidence of Burns' other acts. This included testimony regarding alleged uncharged sexual assaults committed by Burns and testimony about Burns' fifteen prior police reports, beginning when he was thirteen years old and ending with his possession of a homemade handcuff key while awaiting trial in this case. The State also offered testimony about Burns' white-supremacist views, the significance of Burns' tattoos (many of which were connected with white-supremacist gangs or ideology), and Burns' Asatru religion. The court also permitted testimony about letters and jail calls in which Burns described committing acts of racially motivated violence in prison, made derogatory comments about individuals involved in the case, and discussed his former cellmate killing someone to join Burns in prison.

¶ 129 Burns argues this rebuttal evidence was irrelevant to specific mitigation evidence and the trial court erred by failing to analyze this evidence under Rules of Evidence 401–403 or 404(b). We disagree.

¶ 130 The Rules of Evidence do not apply to the admission of evidence during the penalty phase of a capital trial. *Chappell,* 225 Ariz. at 239 ¶ 35, 236 P.3d at 1186; A.R.S. §§ 13–751(C), –752(G). Thus, evidence that is inadmissible during the guilt phase may be admissible during the penalty phase if it rebuts the defendant's mitigation and is not unfairly prejudicial. *See Chappell,* 225 Ariz. at 239¶ ¶ 35–36, 236 P.3d at 1186. Trial courts, however, should exclude evidence that is irrelevant in order to prevent the penalty phase from devolving into a "limitless and standardless assault on the defendant's character and

history." *State v. Hampton,* 213 Ariz. 167, 180 ¶ 51, 140 P.3d 950, 963 (2006).

¶ 131 Burns first contends that evidence of his prior arrests, other criminal acts, and alleged sexual assaults should not have been admitted. This evidence, however, was directly relevant to rebut Mr. Aiken's testimony that Burns would not pose a danger in the prison system and could be effectively and safely housed there. The court did not abuse its discretion in allowing this evidence.

¶ 132 Burns next challenges the admissibility of evidence regarding his white-supremacist beliefs. Mr. Aiken testified that, after reviewing the police reports from the department of corrections, he did not see anything to validate Burns as a gang member. Evidence of Burns' Skinhead affiliation, including his tattoos, statements of his beliefs, interest in the Asatru religion, and documentation by police as a Skinhead member, was directly relevant to rebut Mr. Aiken's testimony suggesting that Burns was not a gang member and that he could safely be controlled in prison.

¶ 133 Burns also contends that his derogatory comments toward the prosecutor and the State's witnesses should not have been admitted into evidence because their only purpose was "to inflame the jury." Burns described the individual who brought Mandi to court to testify as "a big fat Mexican dude," and referred to Mandi as a "race [traitor] bitch." This provides evidence of his Skinhead beliefs and rebuts Mr. Aiken's testimony that Burns could be controlled in prison because he was not a member of a gang. Burns also commented that the assistant prosecutor looked like she had "Down's Syndrome." This was

evidence of Burns' anti-social behavior, supporting the findings of Dr. Kirkley.

¶ 134 Burns finally contends that his calls with his former cellmate were improperly admitted as evidence because the calls injected the cellmate's "behavior and attitudes" into the trial. Again, the calls were relevant because they demonstrated that Burns was involved in misconduct while incarcerated, directly rebutting Mr. Aiken's testimony that Burns could safely be managed in prison.

¶ 135 Because all the proffered evidence was relevant to rebut Burns' mitigation evidence, the trial court did not abuse its discretion by admitting it during the penalty phase.

V. Victim Impact Evidence

¶ 136 Burns contends "[t]he trial court violated Arizona Rule of Criminal Procedure 19.1(d)" and his constitutional rights by admitting more than two hours of victim impact evidence. Burns also argues that the victim impact evidence was not admissible because some of the testimony speculated about what Jackie's final moments were like rather than describing how her murder affected her family. We review the trial court's decision whether to grant a mistrial based on the admission of victim impact testimony for an abuse of discretion. *State v. Gallardo,* 225 Ariz. 560, 567 ¶ 26, 242 P.3d 159, 166 (2010).

¶ 137 During the penalty phase, thirteen family members either presented their own statements or had the victim's advocate read prepared statements. The State also showed an eight-minute video from Jackie's memorial services, which contained approximately 110 pictures of Jackie. The State also

showed the jury Jackie's "senior project," a nine-page PowerPoint presentation containing thirteen photographs of Jackie and her written reflections on growing up. At the end of the presentation, Burns moved for a mistrial, which the trial court denied.

¶ 138 Victim impact evidence is admissible during the penalty phase of a capital trial to rebut a defendant's mitigation evidence. A.R.S. § 13–752(R); Ariz. R.Crim. P. 19.1(d)(3); *Dann,* 220 Ariz. at 369 ¶ 100, 207 P.3d at 622. "Even if victim impact statements are not offered to rebut any specific mitigating fact, they are 'generally relevant to rebut mitigation' and thus admissible in the penalty phase." *Gallardo,* 225 Ariz. at 567 ¶ 28, 242 P.3d at 166 (quoting *Garza,* 216 Ariz. at 69 ¶ 60 n. 12, 163 P.3d at 1019 n. 12). Although victim impact testimony may not request imposition of a particular sentence, it may properly describe the victim and the impact of the murder on family members. *Id.* at 567 ¶ 27, 242 P.3d at 167.

¶ 139 That is not to say, however, that a trial judge must permit all victim impact testimony. A trial court must exclude victim impact evidence if it is so "unduly prejudicial that it renders the trial fundamentally unfair." *Id.* at 567 ¶ 25, 242 P.3d at 166. We have repeatedly recognized the potential "danger that photos of the victims may 'be used to generate sympathy for the victim and his or her family.' " *State v. Rose,* 231 Ariz. 500, 511 ¶ 50, 297 P.3d 906, 917 (2013) (quoting *Ellison,* 213 Ariz. at 141 ¶ 115, 140 P.3d at 924). Nonetheless, we have declined to impose a per se bar on the use of photographs in victim impact presentations, instead relying on trial judges to exercise their discretion to weigh a photograph's

potential for unfair prejudice against its probative value. *See id.; Ellison,* 213 Ariz. at 141 ¶ 115, 140 P.3d at 924. Thus, a trial judge must take an active role in reviewing victim impact evidence to screen for potential unfair prejudice. *See Rose,* 231 Ariz. at 511 ¶ 47, 297 P.3d at 917.

¶ 140 On the record before us, we cannot say that the trial court abused its discretion. The statements from Jackie's family focused on the type of person Jackie was and the family's sense of loss. This is acceptable victim impact evidence. *Gallardo,* 225 Ariz. at 567 ¶ 27, 242 P.3d at 166. Similarly, the photos here were relatively benign, including depictions of graduations, birthdays, and vacations. The photos fell within bounds and did not render the trial "fundamentally unfair." *See id.* at 567 ¶ 28, 242 P.3d at 166. The trial court gave the jury a limiting instruction, cautioning jurors that they could consider the victim impact statements only to the extent that they rebutted mitigation and could not consider the victim impact evidence as an aggravating circumstance. Because the statements and photographs in this case were not unfairly prejudicial, and the trial court gave an appropriate limiting instruction, the court did not abuse its discretion in permitting the victim impact evidence.

¶ 141 Burns' contention that victim impact statements may not speculate about how the victim may have felt during the crime is similarly without merit. We have previously held a family member's brief remarks about the impact of remembering or visualizing a victim's final moments were not unduly prejudicial. *See, e.g., Glassel,* 211 Ariz. at 53 ¶ 79, 116 P.3d at 1193 (holding that victim impact statement

that described how husband felt while victim begged for help was not unduly prejudicial); *Prince II,* 226 Ariz. at 535 ¶¶ 71–73, 250 P.3d at 1164 (mother's victim impact statement that described how she still hears victim crying as she was thrown across the floor not unduly prejudicial). We again caution victims and prosecutors to exercise restraint when presenting this type of victim impact evidence. But, on the record before us, we find no error. The trial court did not abuse its discretion in denying Burns' motion for a mistrial.

¶ 142 Nevertheless, we are troubled with the volume and type of materials presented as victim impact evidence in this case. The jury heard more than a dozen victim impact statements, some of which came from people who had never met Jackie. Jackie's school work was displayed to the jury. While we understand the strong emotions that senseless murders generate in surviving family members and communities, we again caution victims and prosecutors about piling on impact evidence "lest they risk a mistrial." *Rose,* 231 Ariz. at 511 ¶ 47, 297 P.3d at 917. The trial court should take an active role in pre-screening the nature and scope of victim impact evidence to ensure it does not "cross the line." *Cf. id.*

W. Penalty–Phase Jury Instructions

¶ 143 Burns contends that the trial court's penalty-phase jury instructions were erroneous in two respects. First, Burns argues the court instructed the jury to consider in mitigation only evidence presented during the mitigation phase, and not evidence presented during other phases of the trial. This argument is without merit. The thrust of the challenged jury instruction was to prevent sympathy

unrelated to the defendant's character, not to limit the factors that the jury could consider. The jury was instructed that it could consider any facts that it found relevant.

¶ 144 Second, Burns argues that the jury instructions restricted the type of evidence that the jury could consider as mitigating in violation of *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Tennard v. Dretke,* 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004). We disagree. The trial court instructed the jury that it could consider any factors that "relate to any sympathetic or other aspect of the defendant's character, propensity or record, or circumstances of the offense." We have approved similar jury instructions as complying with *Lockett. See State v. Velazquez,* 216 Ariz. 300, 311 ¶ 44, 166 P.3d 91, 102 (2007). The jury instructions in this case allowed the jury to consider any relevant mitigation evidence. We find no error.

X. Prosecutorial Misconduct

¶ 145 Burns contends that the prosecutor engaged in misconduct throughout the trial, which deprived Burns of his right to due process under the Fourteenth Amendment.

¶ 146 We review a trial court's denial of a motion for mistrial for prosecutorial misconduct for an abuse of discretion. *State v. Lehr (Lehr I),* 201 Ariz. 509, 522 ¶ 56, 38 P.3d 1172, 1185 (2002). When a defendant fails to object at trial, however, "we review only for fundamental error." *Roque,* 213 Ariz. at 228 ¶ 154, 141 P.3d at 403. "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct so infected the trial with

unfairness as to make the resulting conviction a denial of due process." *Hughes,* 193 Ariz. at 79 ¶ 26, 969 P.2d at 1191 (internal quotation marks and citation omitted). We look to the "cumulative effect of the misconduct" on the trial. *Id.*

¶ 147 The prosecutorial misconduct that Burns complains of falls into two categories: those actions that he objected to at trial, which we review for an abuse of discretion, and those to which he did not object, which we review only for fundamental error.

1. Conduct objected to during trial

¶ 148 Burns objected to eight actions by the prosecutor at trial that he claims constituted prosecutorial misconduct. He argues that the prosecutor committed misconduct by (1) repeatedly eliciting testimony that this was Jackie's first date after promising to not comment on her chastity; (2) arguing without any evidence that Burns gave Jackie GHB; (3) infecting the entire penalty phase with irrelevant testimony regarding Burns' religion, white supremacist beliefs, Skinhead affiliations, and prior acts of violence and sexual misconduct; (4) showing the jury gruesome photographs of the victim's body for no substantive reason; (5) eliciting testimony that various knives were found at Burns' home despite having promised to not inquire into them; (6) commenting on Burns' refusal to answer police questions; (7) arguing in closing of both trial phases that Burns' motive for killing the victim was to prevent her from reporting him for committing sexual assault and to avoid going back to prison; and (8) arguing several times that to "do justice" required that the jury think about what Burns' conduct did to Jackie's family.

¶ 149 We have already rejected most of Burns' arguments underlying his assertion of prosecutorial misconduct. The trial court did not err in admitting, and the prosecutor therefore did not commit misconduct by commenting upon, evidence concerning Jackie's being on her first date, the presence of GHB in her liver, Burns' religious and white-supremacist beliefs, photographs of Jackie's body, the knives found in Burns' house, and the impact of Jackie's death on her family.[6]

¶ 150 Burns is also unpersuasive in contending that the prosecutor committed misconduct when (1) he elicited testimony that Burns was silent when asked after his arrest about Jackie's body, and (2) argued during closing argument that Burns killed Jackie so she would not report the sexual assault. A prosecutor may not make any comments calculated to point out a defendant's invocation of his Fifth Amendment right. *Id.* at 87 ¶ 64, 969 P.2d at 1199. This Court examines a comment on a defendant's silence in the context of the proceedings as a whole to determine whether the jury would perceive them to be a comment on a defendant's failure to testify. *Id.* But comments and evasive answers made before invoking the right to remain silent are admissible. *See State v. Parker,* 231 Ariz. 391, 406 ¶ 65, 296 P.3d 54, 69 (2013).

¶ 151 Burns objects to a detective's testimony about Burns' conduct during police questioning. The detective stated that, when the police asked for the location of Jackie's body, Burns did not say where Jackie's body was located, but just got "real quiet, clos[ed] his eyes, and just sh[ook] his head." This

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[6] *See supra* Sections F, G, U, K, J, and V.

exchange occurred before Burns invoked his right to remain silent, making the testimony admissible. *See id.*

¶ 152 The prosecutor did not commit misconduct by arguing that Burns murdered Jackie to prevent her from disclosing the sexual assault. A prosecutor may make arguments and may draw inferences that are reasonably supported by the evidence. *Hughes,* 193 Ariz. at 85 ¶ 59, 969 P.2d at 1197. Here, the evidence reasonably supported the prosecutor's arguments.

2. Conduct not objected to during trial

¶ 153 Burns also now claims that the prosecutor committed misconduct by (1) arguing that Jackie did not consent to sexual intercourse, (2) arguing that Burns' allocution should be given little weight because it was not under oath or subject to cross-examination, and (3) "belittl[ing] the integrity of" Dr. Cunningham.

¶ 154 The prosecutor's reference to Jackie's lack of consent during the guilt-phase closing argument was not misconduct because evidence supports this inference. *See supra* Section N. 1. Nor did the prosecutor improperly inflame the jury by commenting in his closing that Burns treated Jackie "like trash" and has a low regard for women. Although the brief comments were unnecessary, they were supported by the evidence and, when viewed in context, were not improperly inflammatory.

¶ 155 Nor did the prosecutor commit misconduct by noting that Burns' allocution was not under oath or subject to cross-examination. A sentencing judge or jury may properly consider the fact that an allocution was not under oath or subject to cross-examination when weighing a defendant's credibility. *State v.*

McCall, 160 Ariz. 119, 124, 770 P.2d 1165, 1170 (1989).

¶ 156 Finally, Burns has not shown that the prosecutor committed misconduct by "belittl[ing]" Dr. Cunningham. It is improper for a prosecutor to argue, without evidentiary support, that an expert acted unethically. *State v. Bailey,* 132 Ariz. 472, 479, 647 P.2d 170, 177 (1982); *see also Hughes,* 193 Ariz. at 86 ¶ 61, 969 P.2d at 1198 (holding that "arguing that all mental health experts are fools or frauds who say whatever they are paid to say" was prosecutorial misconduct). However, a prosecutor may properly inquire into an expert's credentials and employment for impeachment purposes. *Bailey,* 132 Ariz. at 478, 647 P.2d at 176. Here, the State argued that the jury should give little weight to Dr. Cunningham's testimony because he (1) did not interview the defendant, yet was willing to opine as to a causal link between mitigating factors and the murder; and (2) is exclusively employed as an expert witness and does not have a clinical practice. The prosecutor did not impugn Dr. Cunningham's integrity, but merely questioned his credentials and familiarity with this case.

¶ 157 Because we have found no prosecutorial misconduct, we need not analyze whether any errors deprived Burns of a fair trial or whether he suffered any prejudice.

Y. Jury Coercion

¶ 158 Burns contends that the trial court coerced a death verdict when it granted a break over the weekend and required further deliberations after the jury advised the court that it was deadlocked. "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 the totality of the circumstances and attempts to determine if the independent judgment of the jury was displaced." *State v. Huerstel,* 206 Ariz. 93, 97 ¶ 5, 75 P.3d 698, 702 (2003). Improperly coercing a verdict from the jury constitutes reversible error. *State v. McCrimmon,* 187 Ariz. 169, 172, 927 P.2d 1298, 1301 (1996).

¶ 159 On February 15, 2011, at 3:51 p.m., the jury began penalty-phase deliberations. Deliberations continued for approximately a day and a half before the jury had to restart deliberations when the trial judge dismissed Juror 11 and substituted an alternate juror.[7] On February 22, the newly composed jury began deliberations. On the afternoon of February 23, the jury notified the court that it could not reach a unanimous verdict, and the trial court gave an impasse instruction. One juror responded to that instruction by saying that more information would be helpful. Burns moved for a mistrial, and the trial court denied that motion. The jury resumed deliberations. Later in the afternoon, the trial court asked if any of the jurors would object to recessing for the day and returning to deliberate on Monday. Some jurors indicated that they felt it would be pointless, but two responded that taking the weekend to "cool off" would be helpful. The trial court again denied Burns' motion for a mistrial. The following Monday afternoon, the jury returned a death verdict.

¶ 160 We have held that "[j]ury coercion exists when the trial court's actions or remarks, viewed in the

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[7] *See supra* Section S.

totality of the circumstances, displaced the independent judgment of the jurors or when the trial judge encourages a deadlocked jury to reach a verdict." *Davolt,* 207 Ariz. at 213 ¶ 94, 84 P.3d at 478 (internal quotation marks and citations omitted). Whether jury coercion occurs is fact intensive and requires a case-by-case analysis. *State v. Roberts,* 131 Ariz. 513, 515, 642 P.2d 858, 860 (1982) (citations omitted). A trial judge may coerce a verdict by focusing jury instructions on a holdout juror in a way that suggests that the juror should reconsider his or her views. *Huerstel,* 206 Ariz. at 100–01 ¶ 23, 75 P.3d at 705–06.

¶ 161 With these principles in mind, we conclude that the trial court did not coerce a verdict. After it began deliberations anew, the reconstituted jury had deliberated for only one and one half days when it advised the court it was deadlocked. The court gave the impasse instruction after which the jury continued to deliberate. When the jury had not reached a decision by the weekend break, the judge asked if continuing deliberations after the weekend might help. Some jurors thought that taking a break and having the jury reconvene would be helpful.

¶ 162 The court never forced the jury to come to a consensus. The judge never knew how near the jury was to reaching a unanimous verdict or whether they were leaning toward a life or death verdict. The trial judge also did not know who the holdout juror or jurors were and did nothing to get the holdouts to change their votes. We find no coercion.

Z. Death Verdict

¶ 163 The jury found two aggravating circumstances in Burns' case: the murder was especially cruel under

A.R.S. § 13–751(F)(6), and Burns had previously been convicted of a serious offense under A.R.S. § 13–751(F)(2). Regarding the aggravating circumstances, Burns contends that (1) "substantial evidence did not support the jury's verdicts on the (F)(6) aggravating circumstances"; (2) "[t]he (F)(2) aggravator was entitled to minimal weight"; and (3) the jury abused its discretion by imposing a death sentence.

¶ 164 We "review all death sentences to determine whether the trier of fact abused its discretion in finding aggravating circumstances and imposing a sentence of death." A.R.S. § 13–756(A). A jury does not abuse its discretion in reaching a death verdict "if there is 'any reasonable evidence in the record to sustain' those conclusions." *Villalobos,* 225 Ariz. at 83 ¶ 41, 235 P.3d at 236 (quoting *State v. Morris,* 215 Ariz. 324, 341 ¶ 77, 160 P.3d 203, 220 (2007)).

1. The (F)(6) aggravator

¶ 165 Under A.R.S. § 13–751(F)(6), a jury must consider whether the defendant committed the murder in an especially cruel, heinous, or depraved manner. A.R.S. § 13–751(F)(6). We have explained that "[a] murder is especially cruel under A.R.S. § 13–751(F)(6) when the victim consciously 'suffered physical pain or mental anguish during at least some portion of the crime and [ ] the defendant knew or should have known that the victim would suffer.' " *Dixon,* 226 Ariz. at 556 ¶ 61, 250 P.3d at 1185 (quoting *Morris,* 215 Ariz. at 338 ¶ 61, 160 P.3d at 217).

¶ 166 There was substantial evidence supporting a finding that Jackie was conscious and that she suffered mental and physical pain. The skull fractures, blood and earring in Burns' truck, as well as Jackie's ripped bra and top all suggest a struggle

and sexual assault. *See State v. Amaya–Ruiz,* 166 Ariz. 152, 177, 800 P.2d 1260, 1285 (1990); *State v. Schackart,* 190 Ariz. 238, 249, 947 P.2d 315, 326 (1997). The blood spatter and the bullet found in the sand established that Jackie was shot after being taken out of the truck. When her body was found, she appeared to be clutching a branch, which further suggests that she was still conscious when she was shot and would have been aware of what was happening to her. *See Prince II,* 226 Ariz. at 540 ¶ 98 n. 7, 250 P.3d at 1169 n. 7; *State v. Hargrave,* 225 Ariz. 1, 17 ¶ 72, 234 P.3d 569, 585 (2010). Burns knew or should have known that his actions would cause Jackie to suffer. Therefore, reasonable evidence in the record supports the jury's conclusions that the murder was especially cruel. The jury did not abuse its discretion when it found the (F)(6) aggravator.

2. The jury's application of the (F)(2) aggravator

¶ 167 Under A.R.S. § 13–751(F)(2), an aggravating circumstance exists if:

> [T]he defendant has been or was previously convicted of a serious offense, whether preparatory or completed. Convictions for serious offenses committed on the same occasion as the homicide, or not committed on the same occasion but consolidated for trial with the homicide, shall be treated as a serious offense under this paragraph.

Thus, convictions for crimes that occurred contemporaneously with the capital offense may be considered for (F)(2) purposes. *State v. Carreon,* 210 Ariz. 54, 66 ¶ 59, 107 P.3d 900, 912 (2005).

¶ 168 Burns argues that, because his two prior burglary convictions were non-violent offenses, the jurors should have given the (F)(2) aggravator little consideration. Burns does not contend, however, that the State failed to prove that he had two prior convictions for burglary or that he was contemporaneously convicted of sexual assault and kidnapping. The jury found the (F)(2) aggravator. Having made this finding, it was up to each juror to individually consider the aggravator in light of the mitigation presented. *State ex rel. Thomas v. Granville (Baldwin),* 211 Ariz. 468, 472–73 ¶ 17–18, 123 P.3d 662, 666–67 (2005). We do not find an abuse of discretion in applying the aggravator.

3. The death verdict

¶ 169 The jurors did not abuse their discretion in determining that the mitigating evidence was insufficient to warrant leniency. During the penalty phase, Burns presented mitigation evidence regarding his difficult childhood, his dysfunctional family, his diagnosed learning disabilities, his impulsivity, the personality disorders from which he suffered, and whether he would be able to be safely housed in prison while serving a life sentence.

¶ 170 "We must uphold a jury's determination that death is the appropriate sentence if any 'reasonable juror could conclude that the mitigation presented was not sufficiently substantial to call for leniency.' " *State v. Naranjo,* 234 Ariz. 233, 250 ¶ 89, 321 P.3d 398, 415 (2014) (quoting *Gallardo,* 225 Ariz. at 570 ¶ 52, 242 P.3d at 169). Even if we assume that Burns proved all his proffered mitigating factors, we cannot say the jurors abused their discretion in concluding that the mitigation did not warrant leniency.

III. CONCLUSION

¶ 171 For the reasons stated we affirm Burns' convictions and sentences, including his death sentence.[8]

[8] Burns raises thirty-two additional constitutional claims that he acknowledges this Court has previously rejected but that he wishes to preserve for federal review. We decline to revisit these claims.

APPENDIX H

SUPREME COURT OF ARIZONA
EN BANC

STATE OF ARIZONA,

Appellee,

v.

STEVE ALAN BOGGS,

Appellant.

No. CR-05-0174-AP

June 16, 2008

Terry Goddard, Arizona Attorney General by Kent E. Cattani, Chief Counsel, Capital Litigation Section, Jeffrey A. Zick, Assistant Attorney General, Phoenix, Attorneys for State of Arizona.

Bruce Peterson, Acting Legal Advocate by Thomas J. Dennis, Deputy Legal Advocate, Phoenix, Attorneys for Steve Alan Boggs.

AMENDED OPINION

McGREGOR, Chief Justice.

¶ 1 On May 12, 2005, a jury determined that Steve Boggs should receive the death penalty for the May 2002 murders of Beatriz Alvarado, Kenneth Brown,

and Fausto Jimenez. In accordance with Arizona Rule of Criminal Procedure 31.2(b), appeal to this Court is automatic. We exercise jurisdiction pursuant to Article 6, Section 5.3 of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) section 13–4031 (2001).

I.

A.

¶ 2 On May 19, 2002, Alvarado, Brown, and Jimenez were working at a fast-food restaurant in Mesa, Arizona. [1] After ten p.m., only the drive-through window was open. At approximately 11:15 p.m., as Keith Jones drove toward the drive-through speaker to order food, he noticed an SUV in the parking lot behind the restaurant with a male in the driver's seat. Jones saw three uniformed employees inside the store: a Hispanic woman, a Hispanic man, and a Caucasian man.[2]

¶ 3 Luis Vargas arrived at the drive-through window between 11:30 and 11:45. After waiting for ten minutes, Vargas yelled to get the attention of someone working at the restaurant and then heard Alvarado moaning. He approached Alvarado, who was lying on the ground outside the restaurant's back door. She told him in Spanish that "men entered," "they were robbing," and that she thought "they were

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

[2] According to Boggs, Christopher Hargrave, who is Caucasian and was also charged with the murders, was wearing his uniform when he entered the restaurant.

still robbing." Vargas backed away from the restaurant and called 911.

¶ 4 Police Officer Daniel Beutal, who responded to the 911 call, talked with Alvarado and understood her to mean that "bad people" might still be in the restaurant. From outside, Beutal could see Jimenez lying on the restaurant floor. Beutal called for backup and a K-9 unit. After other officers arrived, but before entering the restaurant, Beutal moved Alvarado away from the store to the paramedics. Beutal testified that Alvarado repeatedly asked for help; she subsequently died from two gunshots to her back.

¶ 5 Inside the restaurant, the police found Jimenez's body next to a telephone and found Brown's body in the freezer. Brown had died almost immediately from two gunshot wounds, one of which perforated his heart. Jimenez apparently had escaped from the freezer and, shortly after dialing 911, died from three gunshot wounds to his back.

¶ 6 The police found shell casings and bullet projectiles inside the freezer, evidencing that the perpetrators shot the victims there. Two cash registers were open and contained only coins, while the third register was closed but appeared as if someone had tried to pry it open. Approximately $300 had been taken from the registers. Police found a purse inside the office, but did not find a wallet for either Jimenez or Brown. Just after midnight on May 20, a man, later identified as Christopher Hargrave, tried to use Jimenez's bank card at an ATM.

¶ 7 Hargrave, a friend of Boggs, had worked at the restaurant from April 19 to May 15, 2002. Boggs and Hargrave participated in a militia, the "Imperial Royal Guard," which focused on "uplifting" the white

race and fostered negative views of minority groups. The Imperial Royal Guard consisted entirely of Boggs as Chief of Staff, Hargrave as Assistant Chief of Staff, and their girlfriends, Amy Willet and Gayle Driver.

¶ 8 Before the murders, Hargrave lived in a trailer on land belonging to his girlfriend's parents, Kay and William Driver. The Drivers allowed Hargrave to live there on the condition that he remain employed. In May 2002, Jimenez, an assistant manager in training at the restaurant, reported Hargrave for twice having a short register. When Hargrave subsequently was fired for the shortages, the Drivers asked him to leave their property.

¶ 9 The Drivers also knew Boggs, who often came into their pawn shop. On May 21, two days after the murders, Boggs took two guns, one of them a Taurus handgun, into the pawn shop to trade for a new gun. William Driver cleaned the Taurus, but placed it in his safe because he had a "feeling" about the transaction. Kay Driver later called police and told them about the Taurus that Boggs had pawned. On June 3, Boggs and Hargrave each called the pawn shop and asked to buy back the Taurus.

¶ 10 The police recovered the gun from the Drivers and conducted several test firings. The State's criminalist concluded that all the shell casings and bullet fragments from the scene, as well as fragments removed from the bodies, were fired from the Taurus. DNA found on the Taurus came from at least three sources. The DNA matched Hargrave's profile at 14 locations; the DNA expert could not eliminate Boggs as a source.

¶ 11 On June 5, Mesa Detective Donald Vogel interrogated Boggs for approximately three hours.

Boggs waived his *Miranda* [3] rights and agreed to answer questions. During the interview, Boggs told several versions of what happened on the day of, and the days following, the murders. Information gained in this interview led to the apprehension of Hargrave the following day.

¶ 12 On June 6, Detectives Kaufman and Price took Boggs to obtain his photograph, fingerprints, and DNA, and to transport him to his initial appearance. As the detectives secured the evidence, Boggs asked Kaufman how he could change the story he had told to Detective Vogel the previous day. En route to his initial appearance, Boggs asked Price how he could change his story. At the initial appearance, Boggs requested counsel, which the judge appointed. Subsequently, while returning to jail, Boggs once more asked Kaufman with whom he needed to speak to change his story. Price telephoned Vogel and arranged to take Boggs to the interrogation room for further questioning. Once at the police station, after Boggs informed Detective Vogel that he wished to speak with him, Vogel read Boggs his *Miranda* rights and again interviewed him.

¶ 13 During the June 6 interview, Boggs first claimed that Hargrave committed all the crimes inside the restaurant and denied knowledge of Hargrave's actions at the time. In his next version of events, he admitted helping to plan a nonviolent robbery, but maintained that he remained outside the store as a lookout during the robbery. A short while later, Vogel mentioned Boggs' infant son. When Vogel

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[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

asked his son's name, Boggs repeated, "Just leave me alone," three times. After Vogel twice offered to leave the room, Boggs began discussing suicide.

¶ 14 Boggs then asked to speak with the prosecutor so that "he could assure me that I would at least in some way be able to still be with my son." Vogel responded that no one could make any promises to Boggs. Vogel also assured Boggs that, whether or not Boggs talked with him, Vogel would ask the jail to place Boggs in protective custody. After more than an hour of interrogation, Boggs confessed to playing an active role in the robbery and admitted shooting at the victims.

¶ 15 In January 2004, Boggs sent a letter to Detective Vogel detailing the order and manner in which the deceased employees fell to the ground and stating that he wished to speak with Vogel in person. Boggs also stated that his motivation for the murders was not pecuniary, but rather, based on race.

¶ 16 In June 2004, Boggs moved to represent himself. During the following months, the trial judge discussed several times the repercussions of proceeding in propria persona (pro per) and attempted to dissuade Boggs from doing so. The following September, the court granted his motion and appointed advisory counsel. While acting pro per, Boggs complained to the trial judge of interference by the Maricopa County Sheriff's Office (MCSO) with his self-representation. Specifically, Boggs claimed that the MCSO seized legal documents from his cell and refused to provide him items sent to the jail by his advisory counsel.

¶ 17 Meanwhile, Detective Vogel and the prosecutor received threatening letters, allegedly sent by Boggs.

In response, the MCSO began searching Boggs' cell and confiscating items. After Vogel warned the MCSO employees not to proceed without a warrant, they moved Boggs to a different cell, replaced the items, and waited for a search warrant before resuming the search. A detective took the confiscated materials to a superior court judge who had been appointed as a special master for the purpose of reviewing the items for relevance as to the warrant. The jail staff ultimately confiscated eighteen items and returned those items that the special master deemed improperly seized. The prosecutor did not see any of the privileged items confiscated during the search. Boggs' advisory counsel was informed of the special master's independent review, but declined to participate or review the seized items. Boggs alleged that certain legal documents, including discovery items, were never returned. The trial judge recommended that both parties review the property to determine what items, if any, may have been missing.

¶ 18 On March 23, 2005, Boggs filed a motion to dismiss based on the search and seizure of items from his cell. The trial judge addressed the issue on April 4, 2005, when Boggs told the judge that some items were still missing, including questions he had prepared for a voluntariness hearing scheduled for later that day. Boggs expressed concern that his missing questions could have been used to coach state witnesses. The prosecutor reminded the court that he had not seen any privileged items from the search. The judge concluded that nothing "untoward occurred" and stated that the hearing would continue as scheduled unless Boggs could show that a

"substantial amount of materials were actually taken."

¶ 19 At the voluntariness hearing, the trial court addressed Boggs' motion to suppress all statements made in the June 5 and June 6 interrogations. During the hearing, Boggs appears to have been expressing a *Miranda* objection, claiming that he had requested an attorney, and a voluntariness objection, pointing to the manner in which police detained him and transported him to the police station. Detectives Heivilin, Price, and Vogel testified at the voluntariness hearing. Heivilin testified that during his apprehension on June 5, Boggs did not request an attorney. Price testified next about Boggs' June 6 request to speak with Vogel so that he could change the statements he made during the June 5 interrogation. Vogel then testified regarding the interrogations themselves. As to the June 6 interrogation, Vogel testified that Boggs initiated the contact with the police and that he read Boggs his *Miranda* rights. Vogel also testified that he did not threaten Boggs, make any promises of leniency, or physically abuse Boggs during the ninety-minute interrogation. At the close of the hearing, the trial court ruled that Boggs' statements were voluntary.

¶ 20 Also on April 4, Boggs' advisory counsel asked the trial judge to allow hybrid representation for voir dire. The judge agreed, but warned that he would not permit hybrid representation during the trial. He told Boggs that if he wanted, his advisory counsel could take over the trial, but that "if they take over the trial, they are going to take over the trial." On April 11, 2005, after several days of jury selection, Boggs relinquished his right to proceed pro per. The trial

court responded that this was a "wise move" and stated, "Just so we are clear on this, Mr. Boggs, we are not going [to] go back and forth on this."

B.

¶ 21 The guilt proceeding began on April 11, 2005. During the trial, the prosecution played videotapes of the June 5 and 6 interrogations and gave the jury transcripts to follow as they watched the video. The defense did not object. On May 3, 2005, at the close of the guilt proceeding, the jury found Boggs guilty of three counts of first degree murder.

¶ 22 The sentencing proceeding began on May 4, 2005. At the aggravation phase, the State presented no new evidence and the jury returned its verdicts the same day, finding three aggravating factors for each of the murders: expectation of pecuniary gain, under A.R.S. § 13–703.F.5; murders committed in an especially heinous, cruel or depraved manner, under § 13–703.F.6; and a conviction for one or more other homicides during the commission of the offense, under § 13–703.F.8.

¶ 23 On May 5, before the penalty phase, Boggs again moved to represent himself. The trial judge denied his motion, stating:

> Mr. Boggs, I indicated to you earlier, we're not going to play ping-pong on this. You've indicated that you wanted Mr. Alcantar and Mr. Carr to represent you during the trial. I think that was a wise move. I do not think it would be a wise move to change.
>
> And more importantly, the law indicates that this is not something that we can—we can't be changing horses in the mid-stream here.

When Boggs responded that he wished to "fire" his counsel, the court stated: "We've gone over that. You have a right to counsel. You've got counsel. We're at the very end of a long and difficult trial…. We're not going to be changing counsel here." The penalty phase continued on May 9, 2005.

¶ 24 During the penalty phase, the defense presented mitigation evidence concerning Boggs' troubled childhood and his mental health. At the close of the trial, the jury found Boggs' mitigation not sufficiently substantial to call for leniency and concluded that death was the appropriate sentence for each murder. *See* A.R.S. § 13–703.01.G-H.

II.

A.

¶ 25 Boggs first argues that the trial court violated his right to counsel by admitting the June 6 interview into evidence. We review constitutional issues de novo. *State v. Pandeli,* 215 Ariz. 514, 522 ¶ 11, 161 P.3d 557, 565 (2007).

¶ 26 The right to counsel attaches at " 'critical' stages in the criminal justice process 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.' " *Maine v. Moulton,* 474 U.S. 159, 170, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985) (quoting *United States v. Wade,* 388 U.S. 218, 224, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)). When a defendant asserts this right, the state has an "affirmative obligation to respect and preserve the accused's choice to seek this assistance." *Id.* at 171, 106 S.Ct. 477. The state may not engage in further interrogation unless the accused initiates the communication and makes a voluntary, knowing, and

intelligent waiver of his right to be silent. *See State v. Smith,* 193 Ariz. 452, 459 ¶ 29, 974 P.2d 431, 438 (1999).

¶ 27 Boggs asserted his Sixth Amendment right to counsel at the June 6 initial appearance. Subsequently, however, Boggs asked several times to speak with someone to change the story he had told Detective Vogel during the previous day's interrogation. Importantly, after Boggs asserted his right to counsel at the initial appearance, Boggs asked Detective Kaufman with whom he could speak to change his story and told Detective Vogel that he wanted to speak with him. Finally, at the beginning of the June 6 interrogation, Detective Vogel asked Boggs a series of questions to clarify that Boggs, rather than the detectives, initiated the conversation. Vogel again read Boggs his *Miranda* rights, and Boggs agreed to voluntarily answer Vogel's questions. Boggs thus initiated the communication with the police, and Detective Vogel was not barred from conducting further interrogation.

¶ 28 Boggs argues that although he initiated contact by asking to change his story, the June 6 interview nonetheless violated his right to counsel. He cites *State v. Hackman,* 189 Ariz. 505, 507–08, 943 P.2d 865, 867–68 (App.1997), for the proposition that once counsel is appointed, counsel must be present for an accused to validly waive his Sixth Amendment rights. But *Hackman,* unlike this case, involved contact initiated by the state's investigator rather than by the accused. *Id.* at 506, 943 P.2d at 866. Boggs also relies on a New York case which again involved a police-initiated interview. *See People v. Arthur,* 22 N.Y.2d 325, 292 N.Y.S.2d 663, 239 N.E.2d 537, 537–38 (1968).

We decline to hold that an accused cannot waive the right to counsel unless counsel is present when the accused himself initiates contact with the police. We find no violation of Boggs' Sixth Amendment rights.

B.

¶ 29 Boggs next argues that the trial court violated his right to confront witnesses and his right to a fair trial by admitting that portion of the June 6 interview in which Detective Vogel confronted Boggs with statements allegedly made by Hargrave earlier that day. Specifically, Vogel stated, "Chris told me that you did all the shootin' inside the store" and "I'm just tellin' ya' that Chris told me that you were the one that went in the back cooler with everybody ... and that you did all the shootin'."

¶ 30 Detective Vogel testified more than a week after the jury watched the interrogation video. During Vogel's testimony, both parties elicited statements from him to the effect that he had "more information" about the murders during the June 6 interview than he had during the June 5 interview. Vogel explained that this new information included information he received from Hargrave. On cross-examination, Vogel acknowledged that lying is a permissible interrogation technique. The defense did not request that the court instruct the jury that they could not use the statements attributed to Hargrave to prove the truthfulness of the assertions.

1.

¶ 31 We review de novo challenges to admissibility based on the Confrontation Clause. *State v. Tucker,* 215 Ariz. 298, 315 ¶ 61, 160 P.3d 177, 194 (2007). When a defendant fails to object to error at trial, we

engage in fundamental error review. *State v. Henderson,* 210 Ariz. 561, 567 ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is limited to "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Hunter,* 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). A defendant bears the burden of proving that fundamental error exists and that the error caused him prejudice. *Henderson,* 210 Ariz. at 567 ¶ 20, 115 P.3d at 607. Because Boggs did not object to the admission of the unredacted interview, we are limited to fundamental error review.

¶ 32 The Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause attaches to "testimonial witness statements made to a government officer to establish some fact." *State v. Roque,* 213 Ariz. 193, 214 ¶ 70, 141 P.3d 368, 389 (2006). The right is not violated, however, "by use of a statement to prove something other than the truth of the matter asserted." *State v. Smith,* 215 Ariz. 221, 229 ¶ 26, 159 P.3d 531, 539 (2007); *see also Roque,* 213 Ariz. at 214 ¶ 70, 141 P.3d at 389.

¶ 33 In *Roque,* we addressed a similar situation that involved a trial court's admission of a videotaped interview in which a detective repeated statements allegedly made by a non-testifying witness against the defendant. 213 Ariz. at 213–14 ¶ 69, 141 P.3d at 388–89. There, we recognized the use of such statements as a valid interrogation technique and found no Confrontation Clause violation because the

statements were used merely as a method of interrogation and the jury was instructed that the statements could not be used to establish the truth of the matters asserted. *Id.* at 214 ¶ 70, 141 P.3d at 389.

¶ 34 Boggs attempts to distinguish his case from *Roque,* in which the prosecution did not present any evidence to establish the truth of the out-of-court statements repeated by the detective. *Id.* Here, Boggs argues, Detective Vogel suggested the truthfulness of Hargrave's statements when he testified at trial that he "had more information with which to confront Mr. Boggs" at the June 6 interview, including information from Hargrave. On the other hand, the State did not present the jury with any direct testimony as to the truthfulness of the statements, did not seek to introduce a transcript of Hargrave's interrogation into evidence, and did not rely on the statements as substantive evidence. Furthermore, on cross-examination, Detective Vogel testified that lying is a permissible interrogation technique.

¶ 35 Had Boggs objected at trial, he might well have been entitled to an instruction that the statements attributed to Hargrave were introduced as part of the interrogation and could not be used to prove the truth of the matters asserted. But because the statements were admissible at least for the limited purpose of showing the context of the interrogation, Boggs cannot demonstrate fundamental error.

2.

¶ 36 Boggs also asserts that Vogel's testimony about Hargrave's statements violated his right to a fair trial because the judge did not instruct the jury that the statements were untrue. The defense, however, not only failed to object to the admission of the June 6

interview, but also failed to request that the judge give such a limiting instruction. The trial judge's failure to provide a limiting instruction sua sponte was not fundamental error.

C.

¶ 37 During the June 5 and June 6 interrogations, Detective Vogel repeatedly accused Boggs of lying. The State played the June 5 and 6 interrogation videos for the jury without redacting any portions in which Detective Vogel accused Boggs of lying. Boggs did not object or request a limiting instruction. Boggs now argues that the admission of the unredacted interrogations violated his right to a fair trial.

¶ 38 We review a trial court's evidentiary rulings for abuse of discretion. *Tucker,* 215 Ariz. at 314 ¶ 58, 160 P.3d at 193. When the alleged error is based on a constitutional or legal issue, we review the issue de novo. *Pandeli,* 215 Ariz. at 522 ¶ 11, 161 P.3d at 565. Because Boggs failed to object, our review is limited to fundamental error. *Henderson,* 210 Ariz. at 567 ¶ 19, 115 P.3d at 607.

¶ 39 Arizona prohibits lay and expert testimony concerning the veracity of a statement by another witness. *State v. Moran,* 151 Ariz. 378, 382, 728 P.2d 248, 252 (1986) (expert witness); *State v. Reimer,* 189 Ariz. 239, 240–41, 941 P.2d 912, 913–14 (App.1997) (lay witness). Determining veracity and credibility lies within the province of the jury, and opinions about witness credibility are "nothing more than advice to jurors on how to decide the case." *Moran,* 151 Ariz. at 383, 728 P.2d at 253. The issue of whether a videotaped interrogation that includes accusations of a defendant's untruthfulness can be admitted, however, is one of first impression in Arizona.

¶ 40 Because Vogel's accusations were part of an interrogation technique and were not made for the purpose of giving opinion testimony at trial, we find no fundamental error. Decisions from other states buttress our conclusion. *See State v. Cordova,* 137 Idaho 635, 51 P.3d 449, 455 (Ct.App.2002) (allowing such statements by interrogating officers at trial "to the extent that they provide context to a relevant answer by the suspect"); *Lanham v. Commonwealth,* 171 S.W.3d 14, 27–28 (Ky.2005); *State v. O'Brien,* 857 S.W.2d 212, 221–22 (Mo.1993); *State v. Demery,* 144 Wash.2d 753, 30 P.3d 1278, 1284 (2001) (plurality opinion); *see also Dubria v. Smith,* 224 F.3d 995, 1001 (9th Cir.2000) (concluding, in the context of reviewing a denial of habeas corpus, that an officer's statements simply gave context to the defendant's answers). *But see State v. Elnicki,* 279 Kan. 47, 105 P.3d 1222, 1229 (2005) (holding that an officer's statements in a videotaped interrogation are inadmissible opinion evidence and noting that "context" for a defendant's shifting stories could be shown in other ways); *Commonwealth v. Kitchen,* 730 A.2d 513, 521 (Pa.Super.Ct.1999) (analogizing an interviewer's statements regarding a defendant's truthfulness to a prosecutor's inadmissible personal opinion as to the defendant's guilt).

¶ 41 *Lanham,* one of the most recent cases to address this issue, noted that "[a]lmost all of the courts that have considered the issue recognize that this form of questioning is a legitimate, effective interrogation tool. And because such comments are such an integral part of the interrogation, several courts have noted that they provide a necessary context for the defendant's responses." *Lanham,* 171

S.W.3d at 27. The court concluded that "such recorded statements by the police during an interrogation are a legitimate, even ordinary, interrogation technique, especially when a suspect's story shifts and changes." *Id.* The court also stated that because the statements are not admissible to prove that the suspect was lying, courts should provide the jury with a limiting instruction if one is requested. *Id.* at 27.

¶ 42 We agree that, if Boggs had requested a limiting instruction, one would have been appropriate, but Boggs neither objected to the evidence nor requested a limiting instruction. In addition, Boggs cannot establish prejudice because he did, in fact, provide multiple stories about his involvement; the jury did not need Vogel's comments to know that Boggs lied. Boggs has not established fundamental error.

D.

¶ 43 Boggs next argues that all the statements he made to Detective Vogel after he said "[J]ust leave me alone" and mentioned suicide were involuntary and therefore inadmissible. We review a trial court's ruling on the admissibility of a defendant's confession for abuse of discretion. *State v. Ellison,* 213 Ariz. 116, 126 ¶ 25, 140 P.3d 899, 909 (2006).

¶ 44 Only voluntary statements made to law enforcement officials are admissible at trial. *Id.* at 127 ¶ 30, 140 P.3d at 910. A defendant's statement is presumed involuntary until the state meets its burden of proving that the statement was freely and voluntarily made and was not the product of coercion. *State v. Arnett,* 119 Ariz. 38, 42, 579 P.2d 542, 546 (1978). The state meets its burden "when the officer testifies that the confession was obtained without

threat, coercion or promises of immunity or a lesser penalty." *State v. Jerousek,* 121 Ariz. 420, 424, 590 P.2d 1366, 1370 (1979). In determining whether a confession is voluntary, we consider whether the defendant's will was overcome under the totality of the circumstances. *State v. Newell,* 212 Ariz. 389, 399 ¶ 39, 132 P.3d 833, 843 (2006). To find a confession involuntary, we must find both coercive police behavior and a causal relation between the coercive behavior and the defendant's overborne will. *Colorado v. Connelly,* 479 U.S. 157, 165–66, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). In this case, the court did not abuse its discretion in ruling the statements voluntary.

¶ 45 Boggs alleges that Vogel employed psychological pressure to provoke his confession by preying on his love for his son. He analogizes this case to *United States v. Tingle,* 658 F.2d 1332 (9th Cir.1981), which held that police statements were patently coercive because they implied that a mother might not see her child for a long time unless she cooperated with police. *Id.* at 1336.

¶ 46 Any analogy to *Tingle* is strained. Unlike the agents in *Tingle,* Detective Vogel did not threaten Boggs with the loss of his child. Rather, Vogel attempted to solicit a sense of responsibility for his son to encourage Boggs to "tell the truth," not to intimate that Boggs would never see his son if he did not cooperate. When Boggs was unresponsive to Vogel's question regarding his son's name, Vogel responded, "[Y]ou don't have to talk about the boy," and changed the subject. In fact, although Boggs brought up his son later in the conversation, Vogel refrained from further conversation regarding Boggs'

son. Also, Boggs did not confess in direct response to Vogel's comments about his son, demonstrating that these comments did not overcome his will.

¶ 47 Although his argument is not clear, Boggs also seems to argue that the statements must be excluded because Vogel coerced him when he did not cease questioning after Boggs stated, "Just leave me alone." *Miranda* requires that when an "individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda,* 384 U.S. at 473–74, 86 S.Ct. 1602. If the alleged assertion of the right to silence is ambiguous, or "susceptible to more than one interpretation, the limit of permissible continuing interrogation immediately after the assertion would be for the sole purpose of ascertaining whether the defendant intended to invoke his right to silence." *State v. Finehout,* 136 Ariz. 226, 229, 665 P.2d 570, 573 (1983); *see State v. Flower,* 161 Ariz. 283, 287, 778 P.2d 1179, 1183 (1989) ("[B]y failing to at least clarify [the defendant's] intent, [the detective] did not 'scrupulously honor' [the defendant's] right to silence, and the entire statement was inadmissible as a violation of *Miranda.*").

¶ 48 When Boggs stated, "Just leave me alone," Vogel did not ignore the statement, but instead offered to leave him alone by asking, "Do you want me to walk out for a few minutes?" and stating, "If you want me to leave the room, tell me." These comments attempted to clarify whether Boggs wanted Vogel to end the interrogation or merely to stop discussing his son. Instead of responding in the affirmative, Boggs stated that the police were going to kill him anyway and they "might as well just get it over with now."

Boggs then continued talking with Vogel. Vogel did not engage in coercive behavior by clarifying the meaning of Boggs' statements and responding to Boggs' further comments.

¶ 49 Under the totality of the circumstances, Boggs' statements were voluntary. Vogel neither threatened Boggs nor made him any promises. Indeed, Vogel made clear to Boggs that he could not make any promises and was only looking for the truth. Boggs presented no evidence of coercive behavior.

E.

¶ 50 Boggs next argues that the MCSO's failure to return some of the documents seized from his cell violated his constitutional right to keep confidential pretrial preparations and attorney-client communications and required the court to grant his motion to dismiss. We review de novo alleged violations of a defendant's Sixth Amendment right to counsel, *State v. Glassel,* 211 Ariz. 33, 50 ¶ 59, 116 P.3d 1193, 1210 (2005), but review a ruling on a motion to dismiss for abuse of discretion, *State v. Moody,* 208 Ariz. 424, 448 ¶ 75, 94 P.3d 1119, 1143 (2004).

¶ 51 The Sixth Amendment and Article 2, Section 24 of the Arizona Constitution guarantee criminal defendants the right to counsel, *State v. Warner,* 150 Ariz. 123, 127, 722 P.2d 291, 295 (1986), but "not every intrusion into the attorney-client relationship results in a denial of effective assistance of counsel. Whether a Sixth Amendment violation exists depends on whether the intrusions were purposeful and whether the prosecution, either directly or indirectly, obtained evidence or learned of defense strategy from the intrusions." *State v. Pecard,* 196 Ariz. 371, 377 ¶ 28,

998 P.2d 453, 459 (App.1999) (citing *Weatherford v. Bursey,* 429 U.S. 545, 558, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977)).

¶ 52 In *Warner,* this Court addressed an argument similar to that made by Boggs. *See* 150 Ariz. at 125–28, 722 P.2d at 293–96. Jail personnel had seized all papers from Warner's cell in an attempt to secure evidence of alleged perjury. *Id.* at 125, 722 P.2d at 293. Jail staff returned the seized papers, including transcripts and summaries of conferences between the defendant and his counsel, to the defendant but provided copies to the prosecutor. *Id.* The prosecutor's assistant read the materials, and the prosecutor read some of the materials. *Id.* at 126, 722 P.2d at 294. Because the prosecutor viewed the privileged materials, we found a presumptive violation of the defendant's right to counsel. *Id.* at 127, 722 P.2d at 295.

¶ 53 Boggs' case differs from *Warner,* however, because the prosecutor here never received or reviewed any privileged items. In fact, the State protected the defendant's right to counsel by requesting that a special master review the seized materials and return any privileged items to Boggs. The trial court then held evidentiary hearings to address the alleged violation of Boggs' right to counsel. At the hearings, the court found the testimony of two MCSO officers and Detective Vogel credible and concluded that nothing "untoward occurred."

¶ 54 Thus, unlike the defendant in *Warner,* Boggs failed to show improper interference with his right to counsel. *See Moody,* 208 Ariz. at 448 ¶ 77, 94 P.3d at 1143 ("The defendant bears the initial burden to

establish an interference in the attorney-client relationship.").

F.

¶ 55 At the guilt phase, Luis Vargas and Officer Beutal testified to Alvarado's statements on the night of the murders. Boggs contends that the admission of Alvarado's statements violated his Sixth Amendment right to confrontation. Although we usually review de novo Confrontation Clause challenges, *Tucker,* 215 Ariz. at 315 ¶ 61, 160 P.3d at 194, because Boggs failed to object below, he must show fundamental error, *Henderson,* 210 Ariz. at 567 ¶ 19, 115 P.3d at 607.

¶ 56 The Confrontation Clause applies only to testimonial evidence. *Crawford v. Washington,* 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). *Crawford* defined testimony as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* The Court clarified "testimonial" in *Davis:*

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 2273–74, 165 L.Ed.2d 224 (2006); *see also id.* at 2279

(finding statements non-testimonial when declarant "was seeking aid, not telling a story about the past").

¶ 57 The admission of Alvarado's statements did not violate Boggs' right to confrontation. As she lay dying on the ground just outside the restaurant, Alvarado told Vargas that "men entered," "they were robbing," and that she thought "they were still robbing." When Officer Beutal arrived, she told him that two people were in the store and repeatedly asked him for help.

¶ 58 The circumstances in which Alvarado made the statements indicate that she was seeking aid for herself and the others inside the store to meet an ongoing emergency. Further, the officers' actions, including surrounding the restaurant and sending dogs in to confront anyone still inside the restaurant, demonstrate that they understood the situation to be an ongoing emergency. *See State v. Alvarez,* 213 Ariz. 467, 473 19, 143 P.3d 668, 674 (App.2006) (finding an "ongoing emergency" when facts indicate that " [a]lthough the criminal activity ... had ended, the emergency that those events set in motion was very much ongoing"). Because Alvarado's statements described what appeared to be an ongoing emergency, they were nontestimonial.

G.

¶ 59 Boggs raises two arguments with respect to the sentencing proceeding. First, he argues that the trial court abused its discretion by denying his motion to proceed pro per at the penalty phase.[4] *See State v. De Nistor,* 143 Ariz. 407, 413, 694 P.2d 237, 243 (1985) (stating that a trial court maintains discretion to deny

[4] Boggs moved to proceed pro per in the middle of the sentencing proceeding, before the start of the penalty phase.

an untimely motion for self-representation). The right to proceed without counsel is not unqualified, but must be balanced against the government's right to a " 'fair trial conducted in a judicious, orderly fashion.' " *De Nistor,* 143 Ariz. at 412, 694 P.2d at 242 (quoting *United States v. Dujanovic,* 486 F.2d 182, 186 (9th Cir.1973)).

¶ 60 A defendant who exercises the right to self-representation can subsequently waive that right, either explicitly or implicitly. *See, e.g., McKaskle v. Wiggins,* 465 U.S. 168, 182, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). In this case, Boggs relinquished his right to proceed pro per on April 11, 2005, despite the trial judge's warning that "if [advisory counsel] take over the trial, they are going to take over the trial." The judge further cautioned, "[W]e are not going [to] go back and forth on this."

¶ 61 When a defendant has waived his right to self-representation, the trial court may exercise its discretion in deciding whether to permit or deny a subsequent attempt to proceed pro per. *See United States v. Singleton,* 107 F.3d 1091, 1099 (4th Cir.1997) (stating that if a defendant has waived the right to self-representation, "[t]he decision at that point whether to allow the defendant to proceed *pro se* at all or to impose reasonable conditions on self-representation rests in the sound discretion of the trial court"). The nature of the right to self-representation does not "suggest [ ] that the usual deference to 'judgment calls' ... by the trial judge should not obtain here." *McKaskle,* 465 U.S. at 177 n. 8, 104 S.Ct. 944; *see also State v. Cornell,* 179 Ariz. 314, 326, 878 P.2d 1352, 1364 (1994) (recognizing that self-representation is not an absolute right and

stating that "the court need not stop the trial for the convenience of the defendant each time he changes his mind").

¶ 62 Before Boggs decided to relinquish his right of self-representation, the trial judge cautioned that if Boggs wished to have appointed counsel take over his representation, counsel would remain in that position for the remainder of the trial. When Boggs relinquished his right to self-representation and thereby waived his right to proceed pro per, the judge again gave a similar warning. When the trial court denied Boggs' second motion to represent himself, it reminded Boggs of its previous warnings and stated that it would not go back and forth on the issue. Because Boggs had relinquished the right to self-representation, the trial judge did not abuse his discretion in denying Boggs' second request to represent himself.

H.

¶ 63 Finally, Boggs argues that the trial court violated his due process right to a fair trial by allowing the State to present threatening letters as rebuttal evidence in the penalty phase. We review a trial court's evidentiary rulings at the penalty phase for abuse of discretion, *State v. McGill,* 213 Ariz. 147, 156 ¶ 40, 140 P.3d 930, 939 (2006), but review constitutional issues de novo, *id.* at 159 K 53, 140 P.3d at 942.

1.

¶ 64 Arizona's sentencing scheme provides:

> At the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is

> mitigation that is sufficiently substantial to call for leniency. In order for the trier of fact to make this determination, the state may present any evidence that demonstrates that the defendant should not be shown leniency.

A.R.S. § 13–703.01.G. Relevant information is admissible at sentencing "regardless of its admissibility under the rules governing admission of evidence at criminal trials." A.R.S. § 13–703.C. Both parties are also "permitted to rebut any information received" at the penalty phase. A.R.S. § 13–703.D.

¶ 65 Evidence presented for rebuttal must be relevant to the mitigation proffered. A.R.S. § 13–703.C; *Roque,* 213 Ariz. at 220 ¶ 107, 141 P.3d at 395. Relevant means " 'tending to prove or disprove the matter at issue,' a standard virtually identical to that employed in Rule 401 of the Arizona Rules of Evidence." *Roque,* 213 Ariz. at 220–21 ¶ 107, 141 P.3d at 395–96 (quoting *McGill,* 213 Ariz. at 157 ¶ 40, 140 P.3d at 940). While we give "deference to a trial judge's determination of whether rebuttal evidence offered during the penalty phase is 'relevant' within the meaning of the statute," *McGill,* 213 Ariz. at 156–57 ¶ 40, 140 P.3d at 939–40, "[t]rial courts can and should exclude evidence that is either irrelevant to the thrust of the defendant's mitigation otherwise unfairly prejudicial," *State v. Hampton,* 213 Ariz. 167, 180 ¶ 51, 140 P.3d 950, 963 (2006).

¶ 66 We agree that the threatening letters are relevant to rebut mitigation testimony. The thrust of the mitigation was that Boggs suffers from mental health issues, including bipolar disorder. To support the diagnosis, two mental health experts, Drs. Ruiz and Lanyon, testified about Boggs' delusional

involvement in a militia and suggested that, because the militia was a delusion, Boggs could not cause any harm through the entity. Dr. Ruiz stated that although she had no knowledge to confirm or disaffirm the militia's existence, she believed Boggs' militia activities to be delusional. When the State questioned Dr. Lanyon about the concrete manifestations of the current militia, including uniforms and weapons, he responded: "That to me seemed to support the delusional aspects of this that he was—had a big organization that was going to shake up the world or something, going to put bombs in, you know." Boggs' letters that threatened harm for mistreating the leader of the militia rebut the suggestion that Boggs' militia involvement was benign.

¶ 67 Boggs further argues that even if the letters are relevant, they are too prejudicial, relying on language from *State v. Hampton.* In *Hampton,* the prosecution offered bad acts evidence to rebut mitigation testimony that Hampton was a "caring person who deserved leniency." *Id.* at 179 ¶ 47, 140 P.3d at 962. We concluded that the bad acts evidence was admissible, but recognized that our death penalty statutes do not "strip[ ] courts of their authority to exclude evidence in the penalty phase if any probative value is substantially outweighed by the prejudicial nature of the evidence. Trial courts should not allow the penalty phase to devolve into a limitless and standardless assault on the defendant's character and history." *Id.* at 180 ¶ 51, 140 P.3d at 963. The language that Boggs relies on, however, does not extend to the circumstances before us because here the threatening letters were not offered to show

Boggs' bad character. The trial court therefore did not abuse its discretion in admitting them.

2.

¶ 68 Rebuttal evidence in the mitigation phase must comport not only with Arizona's sentencing scheme, but also with the requirements of the Due Process Clause. *Hampton,* 213 Ariz. at 179 ¶ 48, 140 P.3d at 962. Although the sentencing process does not require the same procedural safeguards as does the guilt phase of a trial, *Gardner v. Florida,* 430 U.S. 349, 358 n. 9, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), testimonial hearsay presented at sentencing must be "accompanied by sufficient indicia of reliability," *McGill,* 213 Ariz. at 160 T 57, 140 P.3d at 943. Boggs asserts that the letters did not contain sufficient indicia of reliability to comply with due process.

¶ 69 Introduction of the letters at the penalty phase did not violate due process. As a primary matter, the threatening letters in this case were neither hearsay nor testimonial. Furthermore, Boggs knew of the threatening letters before the trial started, as he successfully kept them out of the guilt phase. Yet, Boggs failed to object on foundational grounds at the sentencing hearing. When the trial judge specifically asked the defense if it objected to the foundation of the evidence, the defense responded in the negative. On cross-examination, the defense questioned the reliability of the threatening letters by comparing the handwriting with another letter signed by Boggs and noting that one of the letters contained no evidence that it was sent from jail. Thus, the defense did address the letters' reliability before the jury, but did not object to their foundation.

¶ 70 Boggs now asserts that the threatening letters are not reliable because the State provided insufficient proof that he wrote them. This argument is not persuasive. First, nearly identical letters were sent to the lead detective and to the prosecutor. Second, Boggs' militia title was "Chief of Staff," and the letters specifically referred to the "Chief." Third, jail staff intercepted one of the letters, which an inmate stated that Boggs had asked him to mail. Finally, the letters stated, "we know where you live," and Boggs possessed an address for Vogel. The introduction of the threatening letters at the penalty phase did not violate Boggs' due process rights.

III.

¶ 71 Because the murders occurred before August 1, 2002, we independently review the aggravating and mitigating factors and the "propriety of the death sentence." A.R.S. § 13–703.04.A; *see also State v. Roseberry,* 210 Ariz. 360, 373 ¶ 77, 111 P.3d 402, 415 (2005) ("[The Court] independently determines 'if the mitigation is sufficiently substantial to warrant leniency in light of existing aggravation.' " (citation omitted)).

A.

¶ 72 The State alleged the existence of three aggravating factors for each of the murders. We address each in turn.

1.

¶ 73 A defendant convicted of first degree murder is eligible for the death penalty if the state proves beyond a reasonable doubt that he "committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary

value." A.R.S. § 13–703.F.5. This aggravating factor is present "if the expectation of pecuniary gain is a motive, cause, or impetus for the murder and not merely a result of the murder." *State v. Hyde,* 186 Ariz. 252, 280, 921 P.2d 655, 683 (1996).

¶ 74 The evidence allowed the jury to find the pecuniary gain aggravator beyond a reasonable doubt. Boggs' June 6 confession clearly indicated his monetary motivation: Boggs told Detective Vogel that money was his motivation and that the incident happened "[b]ecause of the money." Moreover, the evidence demonstrated that money was taken from two registers; that someone attempted to pry open a third register; that the victims' pockets were emptied and wallets taken; and that one victim's bank card was used in an attempt to withdraw money from an ATM.

¶ 75 Boggs urges that the pecuniary gain aggravating factor is lacking because the evidence indicates multiple motivations for the murders, including a desire to silence witnesses and racist beliefs. Silencing witnesses so that none survive the robbery, however, is an act in furtherance of the robbery and thus supports a finding of the pecuniary gain aggravating factor. *See State v. Hoskins,* 199 Ariz. 127, 147 ¶ 87, 14 P.3d 997, 1017 (2000) ("When a robbery victim is executed to facilitate the killer's escape and hinder detection for the purpose of successfully procuring something of value, the pecuniary gain motive is present."). Moreover, because pecuniary gain need only be a motive or cause of the murder, *see Hyde,* 186 Ariz. at 280, 921 P.2d at 683, the fact that Boggs may have had other motives

does not mean that the State failed to prove this aggravator

¶ 76 A defendant who commits first degree murder in "an especially heinous, cruel or depraved manner," is eligible for the death penalty. A.R.S. § 13–703.F.6. The state need prove the existence of only one of these elements to establish this aggravating factor. *Tucker,* 215 Ariz. at 321 ¶ 103, 160 P.3d at 200. To show that a defendant committed a murder in an especially cruel manner, the state must show beyond a reasonable doubt that the victim suffered mental or physical distress. *Ellison,* 213 Ariz. at 141–42 ¶ 119, 140 P.3d at 924–25. The defendant must also "intend that the victim suffer or reasonably foresee that there is a substantial likelihood that the victim will suffer as a consequence of the defendant's acts." *State v. McCall,* 139 Ariz. 147, 161, 677 P.2d 920, 934 (1983).

¶ 77 We conclude that the State proved beyond a reasonable doubt that the victims suffered mental anguish sufficient to render the murders especially cruel. Mental anguish requires evidence that the victim "was conscious during the infliction of violence." *State v. Van Adams,* 194 Ariz. 408, 420 ¶ 44, 984 P.2d 16, 28–29 (1999). Moreover, the state can prove mental anguish by showing that a victim experienced "significant uncertainty about his or her ultimate fate." *Tucker,* 215 Ariz. at 311 ¶ 33, 160 P.3d at 190.

¶ 78 Boggs unsuccessfully attempts to analogize his case to *State v. Soto-Fong,* which involved the murder of three individuals in a store. 187 Ariz. 186, 190, 928 P.2d 610, 614 (1996). In *Soto-Fong*, the record lacked evidence demonstrating what occurred between the time the defendant entered the store and the time that

he killed the victims. *Id.* at 204–05, 928 P.2d at 628–29. In addition, only inconclusive evidence suggested that the victims suffered. *Id.* at 205, 928 P.2d at 629. In contrast, Boggs described the murders in detail during both the June 5 and June 6 interrogations. Boggs admitted that the victims were forced at gunpoint to lie down in the work area of the restaurant, ordered to remove everything from their pockets, ordered to march through the cooler into the back freezer with their hands interlaced on top of their heads, forced to kneel down, and then shot in rapid succession. Boggs also stated that after he and Hargrave left the victims in the freezer, he heard screaming, at which point he returned to the freezer and shot some more. Physical evidence corroborates Boggs' statements. The State thus presented sufficient evidence to establish the especially cruel aggravator for all three of the victims.[5]

3.

¶ 79 A defendant is death eligible if he "has been convicted of one or more other homicides ... committed during the commission of the offense." A.R.S. § 13.703.F.8. This aggravator applies if "the defendant was found criminally liable, even if he himself did not physically commit the murders." *Ellison,* 213 Ariz. at 143 ¶ 129, 140 P.3d at 926. To establish the aggravator, we evaluate "the temporal, spatial, and motivational relationships between the capital homicide and the collateral [homicide], as well as ...

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[5] Because the especially cruel aggravator requires only mental or physical suffering, see *Ellison*, 213 Ariz. at 141–42 ¶ 119, 140 P.3d at 924–25, we need not determine whether the evidence also shows physical suffering.

the nature of that [homicide] and the identity of its victim." *State v. Lavers,* 168 Ariz. 376, 393–94, 814 P.2d 333, 350–51 (1991) (alterations in original) (citations omitted); *see Ellison,* 213 Ariz. at 143 ¶ 128, 140 P.3d at 926 (requiring the murders be "part of a continuous course of criminal conduct").

¶ 80 Boggs concedes the temporal and spatial relationship among the victims, but argues that the homicides lack a motivational relationship. With regard to the various motivations, Boggs asserts that Hargrave shot one of the victims because he caused Hargrave to lose his job at the restaurant. Boggs also suggests that he participated in the shooting only because he was "flipping out upon seeing the victims after Hargrave shot them." Then he suggests that one of the killings was based on race and another was to eliminate a witness.

¶ 81 Regardless of Boggs' specific motive for committing the murders, all the murders involved a continuous course of criminal conduct. The evidence, including Boggs' admission from his June 6 interrogation, demonstrates that the victims were killed, at least in part, as a means of witness elimination so that they could not identify the perpetrators. Boggs also stated that the victims were shot in the freezer to lessen the gunshot noise and avoid detection. This evidences that the murders were intended to prevent detection of the perpetrators, as part of a continuous course of criminal conduct.

¶ 82 Additionally, other alleged potential motivations apply to all the victims. First, the racial motivation applied to all the victims. Although Kenneth Brown was Native American and Alvarado and Jimenez were Hispanic, Boggs confessed to the

killings in his January 2004 letter to Vogel and stated that his motive was "to rid the world of a few needless, illegals." Because Boggs' confession does not distinguish among the victims based on their race, any attempted distinction now seems disingenuous.

¶ 83 Second, Boggs contends that Hargrave shot one of the victims because he informed the restaurant manager of Hargrave's short drawer, resulting in Hargrave losing his employment. Hargrave, however, was angry not merely about being fired, but also about what he perceived to be disparate treatment between him and the "Mexican" employees with regard to discipline and salary. The record indicates that Hargrave did not distinguish among the employees based on their specific minority heritage. As a result, any race-based motive or motive related to Hargrave's animosity toward the restaurant applies to all the victims. Because the murders were motivationally related and Boggs concedes the temporal and spatial relationship, the State established this aggravator beyond a reasonable doubt.

B.

¶ 84 A capital defendant may present any relevant evidence during the penalty phase so long as it "supports a sentence less than death." *Tucker,* 215 Ariz. at 322 ¶ 106, 160 P.3d at 201. The defendant must prove mitigating circumstances by a preponderance of the evidence. A.R.S. § 13–703.C. Boggs suggests three mitigating circumstances: difficult upbringing; mental illness; and cooperation with the police in apprehending Hargrave.

1.

¶ 85 Boggs presented sufficient evidence during the penalty phase to establish his difficult childhood by a preponderance of the evidence. Boggs' aunt testified that Boggs was born with a cleft palate that required numerous surgeries at an early age and led to emotional problems. Dr. Ruiz explained that constant hospitalizations and numerous surgeries during the developmental stages of Boggs' life affected his later functioning, causing him to be dissociated and delusional.

¶ 86 Boggs' aunt also testified that his mother abused him mentally and practiced "extreme discipline," although she never abused him physically. She explained that Boggs' mother was diagnosed as having mental retardation and did not know how to parent. Boggs developed behavioral problems and, from the ages of ten to fifteen, spent significant time in group homes. Boggs' mitigation testimony also included allegations of sexual abuse between the ages of ten and fourteen, once involving another boy in a group home and once involving a police officer. Additionally, Boggs' aunt recalled him talking of suicide from the age of ten. Boggs was hospitalized for at least one suicidal episode.

¶ 87 Boggs' difficult life extended into his early adulthood, as most of his immediate family died when he was between the ages of sixteen and twenty-one. His maternal grandmother died of liver failure in 1996, his mother died of cancer in 1997, his sister died of an epileptic seizure in 1998, his brother committed suicide in 1998, and his maternal grandfather died of cancer in 1999.

2.

¶ 88 The defense also presented evidence sufficient to establish Boggs' mental health mitigating circumstance by a preponderance of the evidence. Dr. Ruiz testified about his traumatic life events and diagnosed Boggs with post- traumatic stress disorder (PTSD) and bipolar disorder based on his medical records. She explained that, with PTSD, "there are rare instances where somebody ... is reminded of [a past traumatic experience] because of an event that occurs in their lifetime, and they go into a [dissociative] state." Dr. Ruiz also explained that bipolar individuals suffer mood shifts from extremely depressed to manic or hypo-manic states, bypassing "normalcy." In a manic state, she said, "[e]ventually you rev up so fast, that you become psychotic" and disinhibited. Dr. Ruiz could not, however, offer an opinion as to whether Boggs was in a dissociative or manic state at the time of the murders.

¶ 89 Dr. Lanyon, a forensic psychologist, evaluated Boggs several times and concluded that he suffered from chronic bipolar disorder. Dr. Lanyon explained that delusions are a symptom of bipolar disorder and testified that "to a reasonable degree of psychological certainty" Boggs suffered from bipolar disorder at the time of the crimes, but stated: "That doesn't necessarily mean that his behavior on that day was driven by it. That means that his life up to that point ... was heavily colored by it." Like Dr. Ruiz, Dr. Lanyon could not determine whether Boggs was in a manic state when he committed the crimes and even testified that it seemed "reasonably clear" that, at the time of the murders, Boggs was not doing the "out of control impulsive things" typical of a manic state. On

the other hand, Dr. Lanyon testified that he believed Boggs was affected by his disorder at the time, particularly with regard to Boggs' motivations for committing the crimes. In addition, Dr. Lanyon stated that delusions are a symptom of bipolar disorder and that Boggs' belief in his militia supported the delusional aspects of his mental health. He testified that Boggs may have been delusional at the time of the crimes, but not in a manic state.

¶ 90 In rebuttal, the State's expert, Dr. Almer, testified that although Boggs exhibited characteristics of anti-social, narcissistic, and borderline personality disorders, he was not bipolar. Dr. Almer suggested that Boggs was exaggerating his mental illness when Lanyon performed psychological tests on him, but testified that Boggs did have traits typical of a sociopath, which include a lack of "appreciation for the rights of other people [and] empathy for the misery of mankind, except to create [misery] for mankind." The evidence thus conflicts as to whether Boggs was bipolar or only anti-social. Taking all the evidence into account, the defense established that Boggs suffered from mental health issues, but could not establish his mental state at the time of the crimes.

3.

¶ 91 Boggs also argues on appeal that we should consider his voluntary assistance in helping the police capture Hargrave as mitigation. The defense contends that Boggs' assistance led to the peaceful apprehension of a dangerous man in a potentially violent situation.

¶ 92 Boggs did aid in the apprehension of Hargrave, but his motives for doing so are unclear. As the State

points out, Boggs may have provided the police with this information for his own benefit. Indeed, because Boggs then blamed the robbery and murders completely on Hargrave, it was in his best interest for the police to capture Hargrave. Boggs' cooperation with the police to aid in Hargrave's apprehension is entitled to minimal weight. *See State v. Doerr,* 193 Ariz. 56, 70 K 67, 969 P.2d 1168, 1182 (1998) (giving little weight, if any, to cooperation as a mitigating circumstance if defendant is "motivated by self-interest").

C.

¶ 93 After evaluating each aggravating and mitigating factor, we independently review the propriety of the death sentence. A.R.S. § 13–703.04.A. In our independent reweighing of the evidence, we consider the "quality and the strength, not simply the number, of aggravating and mitigating factors *State v. Greene,* 192 Ariz. 431, 443 ¶ 60, 967 P.2d 106, 118 (1998). Because the State proved three aggravating factors, of which the multiple murders aggravating factor receives "extraordinary weight," *Hampton,* 213 Ariz. at 185 ¶ 90, 140 P.3d at 968, we must determine whether Boggs' mitigating evidence is "sufficiently substantial to warrant leniency," A.R.S. § 13–703.04.B.

¶ 94 Boggs' mitigation evidence involves primarily his difficult upbringing and poor mental health. In our reweighing, we consider a difficult childhood and poor mental health as mitigating factors, whether or not they are causally related to the murder. The existence or lack of a causal link, however, aids us in "assessing the quality and strength of the mitigation evidence." *State v. Johnson,* 212 Ariz. 425, 440 ¶ 65, 133 P.3d

735, 750 (2006) (citation omitted). As we recently noted, lack of a causal nexus between a difficult personal life and the murders lessens the effect of this mitigation. *State v. Garza,* 216 Ariz. 56, 73 ¶ 84, 163 P.3d 1006, 1023 (2007). Additionally, we weigh mental health mitigation in proportion to "a defendant's ability to conform or appreciate the wrongfulness of his conduct." *Johnson,* 212 Ariz. at 440 ¶ 65, 133 P.3d at 750 (quoting *State v. Trostle,* 191 Ariz. 4, 21, 951 P.2d 869, 886 (1997)).

¶ 95 In this case, no expert testified that Boggs did not know right from wrong, and none could establish his mental state at the time of the crime. Without a causal link between the murders and his troubled childhood or mental health issues, these mitigating circumstances are entitled to less weight. *See id.* Weighed against three aggravating factors, including one for multiple homicides, the mitigating evidence is not sufficiently substantial to call for leniency.

IV.

¶ 96 For purposes of federal review, Boggs raises the following challenges to the constitutionality of Arizona's death penalty scheme. He concedes that we have previously rejected these arguments.

¶ 97 (1) The fact-finder in capital cases must be able to consider all relevant mitigating evidence in deciding whether to give the death penalty. *See Woodson v. North Carolina,* 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). The trial court's failure to allow the jury to consider and give effect to all mitigating evidence in this case by limiting its consideration to that proven by a preponderance of the evidence is unconstitutional under the Eighth and

Fourteenth Amendments. We rejected this argument in *McGill,* 213 Ariz. at 161 ¶ 59, 140 P.3d at 944.

¶ 98 (2) The State's failure to allege an element of a charged offense in the grand jury indictment—the aggravating factors that made the defendant death eligible—is a fundamental defect that renders the indictment constitutionally defective under the Fifth, Sixth, Eighth, and Fourteenth Amendments and Article 2, Sections 1, 4, 13, 15, 23, and 24 of the Arizona Constitution. *See United States v. Chesney,* 10 F.3d 641, 643 (9th Cir.1993); *see also Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). We rejected this argument in *McKaney v. Foreman ex rel. County of Maricopa,* 209 Ariz. 268, 273 ¶ 23, 100 P.3d 18, 23 (2004).

¶ 99 (3) Both the United States and the Arizona Constitutions prohibit *ex post facto* laws. U.S. Const. Art. 1, § 10, cl. 1; Ariz. Const. art. 2, § 25. Application of the new death penalty law to defendant constitutes an impermissible *ex post facto* application of a new law. We rejected this argument in *State v. Ring,* 204 Ariz. 534, 547 ¶¶ 23–24, 65 P.3d 915, 928 (2003).

¶ 100 (4) The F.6 aggravating factor of "especially cruel, heinous, or depraved" is unconstitutionally vague and overbroad because the jury does not have enough experience or guidance to determine when the aggravator is met. The finding of this aggravator by a jury violates the Eighth and Fourteenth Amendments because it does not sufficiently place limits on the discretion of the sentencing body, the jury, which has no "narrowing construction[s]" to draw from and give "substance" to the otherwise facially vague law. *See Walton v. Arizona,* 497 U.S. 639, 652–54, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), *overruled on other*

grounds by Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Godfrey v. Georgia,* 446 U.S. 420, 428–29, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). We rejected this argument in *State v. Cromwell,* 211 Ariz. 181, 188–90 ¶¶ 39–45, 119 P.3d 448, 455–57 (2005).

¶ 101 (5) By allowing victim impact evidence at the penalty phase of the trial, the trial court violated defendant's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and Article 2, Sections 1, 4, 13, 15, 23, and 24 of the Arizona Constitution. We rejected challenges to the use of victim impact evidence in *Lynn v. Reinstein,* 205 Ariz. 186, 191 ¶ 16, 68 P.3d 412, 417 (2003).

¶ 102 (6) The trial court improperly omitted from the penalty phase jury instructions words to the effect that they may consider mercy or sympathy in deciding the value to assign the mitigation evidence, instead telling them to assign whatever value the jury deemed appropriate. The court also instructed the jury that they "must not be influenced by mere sympathy or by prejudice in determining these facts." These instructions limited the mitigation the jury could consider in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments and Article 2, Sections 1, 4, 15, 23, and 24 of the Arizona Constitution. We rejected this argument in *State v. Carreon,* 210 Ariz. 54, 70–71 ¶¶ 81–87, 107 P.3d 900, 916–917 (2005).

¶ 103 (7) The death penalty is cruel and unusual under any circumstances and violates the Eighth and Fourteenth Amendments, and Article 2, Section 15 of the Arizona Constitution. We rejected this argument in *State v. Harrod,* 200 Ariz. 309, 320 ¶ 59, 26 P.3d

492, 503 (2001), *vacated on other grounds,* 536 U.S. 953, 122 S.Ct. 2653, 153 L.Ed.2d 830 (2002).

¶ 104 (8) The death penalty is irrational and arbitrarily imposed; it serves no purpose that is not adequately addressed by life in prison, in violation of the defendant's right to due process under the Fourteenth Amendment to the United States Constitution and Article 2, Sections 1 and 4 of the Arizona Constitution. We rejected these arguments in *State v. Beaty,* 158 Ariz. 232, 247, 762 P.2d 519, 534 (1988).

¶ 105 (9) The prosecutor's discretion to seek the death penalty lacks standards and therefore violates the Eighth and Fourteenth Amendments, and Article 2, Sections 1, 4, and 15 of the Arizona Constitution. We rejected this argument in *State v. Sansing,* 200 Ariz. 347, 361 ¶ 46, 26 P.3d 1118, 1132 (2001), *vacated on other grounds,* 536 U.S. 954, 122 S.Ct. 2654, 153 L.Ed.2d 830 (2002).

¶ 106 (10) Arizona's death penalty is applied so as to discriminate against poor, young, and male defendants in violation of Article 2, Sections 1, 4, and 13 of the Arizona Constitution. We rejected this argument in *Sansing,* 200 Ariz. at 361 ¶ 46, 26 P.3d at 1132.

¶ 107 (11) Proportionality review serves to identify which cases are above the "norm" of first-degree murder, thus narrowing the class of defendants who are eligible for the death penalty. The absence of proportionality review of death sentences by Arizona courts denies capital defendants due process of law and equal protection and amounts to cruel and unusual punishment in violation of the Fifth, Eighth, and Fourteenth Amendments, and Article 2, Section

15 of the Arizona Constitution. We rejected this argument in *Harrod,* 200 Ariz. at 320 ¶ 65, 26 P.3d at 503.

¶ 108 (12) Arizona's capital sentencing scheme is unconstitutional because it does not require the state to prove the death penalty is appropriate or require the jury to find beyond a reasonable doubt that the aggravating circumstances outweigh the accumulated mitigating circumstances. Instead, Arizona's death penalty statute requires defendants to prove their lives should be spared, in violation of the Fifth, Eighth, and Fourteenth Amendments, and Article 2, Section 15 of the Arizona Constitution. We rejected this argument in *Pandeli,* 200 Ariz. at 382 ¶ 92, 26 P.3d at 1153.

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

¶ 110 (14) Execution by lethal injection is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, and Article 2, Section 15 of the Arizona Constitution. We rejected this argument in *Van Adams,* 194 Ariz. at 422 ¶ 55, 984 P.2d at 30.

¶ 111 (15) Arizona's death penalty unconstitutionally requires imposition of the death penalty whenever at least one aggravating circumstance and no mitigating circumstances exist, in violation of the Eighth and Fourteenth Amendments, and Article 2, Section 15 of the Arizona Constitution. Arizona's death penalty law cannot constitutionally presume that death is the appropriate default sentence. We rejected this argument in *State v. Miles,* 186 Ariz. 10, 19, 918 P.2d 1028, 1037 (1996).

V.

¶ 112 For the foregoing reasons, we affirm Boggs' convictions and sentences.

CONCURRING: REBECCA WHITE BERCH, Vice Chief Justice, MICHAEL D. RYAN, ANDREW D. HURWITZ and W. SCOTT BALES, Justices.

APPENDIX I

SUPREME COURT OF ARIZONA
EN BANC

STATE OF ARIZONA,

Appellee,

v.

RUBEN GARZA,

Appellant.

No. CR-04-0343-AP

June 29, 2007

Terry Goddard, Arizona Attorney General by Kent E. Cattani, Chief Counsel, Capital Litigation Section, Patricia A. Nigro, Assistant Attorney General, Phoenix, Attorneys for the State of Arizona.

Richard D. Gierloff, Phoenix, Attorney for Ruben Garza.

OPINION

HURWITZ, Justice.

¶ 1 A jury convicted Ruben Garza of two counts of first degree murder. The jury then determined that

Garza should be sentenced to life imprisonment for one murder and death for the other.

¶ 2 An automatic notice of appeal was filed pursuant to Arizona Rule of Criminal Procedure 31.2(b). This Court has jurisdiction under Article 6, Section 5(3) of the Arizona Constitution and A.R.S. § 13–4031 (2001).

I. FACTS AND PROCEDURAL BACKGROUND[1]

A.

¶ 3 In September 1999, Ellen Franco moved into a two-bedroom house in Waddell occupied by Jennifer Farley and Farley's boyfriend, Lance Rush. Ellen had recently separated from her husband, Larry Franco.

¶ 4 At approximately 10:30 p.m. on December 1, 1999, Farley heard a knock at the door. Upon opening the door she saw a Hispanic male who was five feet nine or ten inches tall, about 180 to 200 pounds, and had bad acne. He had a large tattoo on his left arm. The visitor pointed at Ellen, who was by then standing behind Farley, and said, "I am here to see her." Ellen identified the visitor as "Ben," whom Farley understood to be Ellen's relative.[2]

¶ 5 Ellen went outside; Farley went to her bedroom and told Rush about the visitor. Farley then heard two gunshots. Rush and Farley scrambled to grab one of

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[1] Except for facts relating to our independent review of the death sentence, *see* A.R.S. § 13–703.04(A) (Supp.2006), the facts are presented in the light most favorable to sustaining the jury's verdict, *State v. Tucker,* 205 Ariz. 157, 160 n. 1, 68 P.3d 110, 113 (2003).

[2] Garza had severe acne in late 1999, has a large tattoo on his left arm, and otherwise fits Farley's description of the visitor. Larry Franco is Garza's uncle.

the guns they kept in their bedroom, and Farley took a pistol from her nightstand. By the time she removed the gun from its holster, the locked door to the bedroom had somehow been opened.

¶ 6 Rush, who had not been able to get one of the other firearms, motioned for Farley to stay in the room and went into the hallway. Farley heard a gunshot almost immediately thereafter and quickly hid in the bedroom closet. After entering the closet, she heard several more shots.

¶ 7 After waiting briefly, Farley came out of the bedroom closet. She saw Ellen lying face down in the living room in a pool of blood. After determining that Ellen was alive, Farley looked for Rush. She found him in the guest bedroom opposite their bedroom. He was conscious but bleeding. Farley dialed 911, and police and paramedics arrived within minutes. Rush was lucid and said, "Someone kicked the door and started shooting."

¶ 8 Ellen never regained consciousness and died at St. Joseph's Hospital shortly after the shooting. Rush died at John C. Lincoln Hospital approximately an hour after the shooting.

B.

¶ 9 Around 12:45 a.m. on December 2, Garza bought bandages, gauze, and hydrogen peroxide from a drugstore in west Phoenix. Later that morning, he was treated at Phoenix Baptist Hospital for a gunshot wound to his left arm. The hospital contacted Phoenix police. Garza told the responding officer that he was walking down the street when an unknown assailant drove by and shot him.

¶ 10 Maricopa County Sheriff's Office ("MCSO") detectives questioned Garza the next morning. Garza first claimed that he had been shot in a drive-by, but changed his story when told that he had been identified by Farley as the visitor to the Waddell house. He then stated that he had gone there to persuade Ellen to reconcile with Larry. Ellen came out and talked to him. When their conversation turned into an argument, Garza pulled out his gun and shot her. Garza said he then "blacked out" and was "in a daze." He told the detectives he did not remember seeing a man at the house, but that the woman who had originally answered the door charged at him with a knife and he shot at her. At some point someone shot at him; he felt a "sting" in his arm and returned fire.

¶ 11 Garza was arrested and on December 2 made two phone calls from jail to Laurel Thompson. In the first conversation, Garza said he was "going to be here [in jail] for a couple years" and that he "did to someone else" what the two had discussed doing to a boyfriend who had assaulted Thompson.

¶ 12 In the second conversation, Thompson told Garza that he was on every newscast. Thompson asked Garza how he got caught; he told her, "I got shot." Garza questioned Thompson about the news coverage and their friends' reaction to it. Garza asked her how many victims were being reported, and she said that he had killed two people. Garza told Thompson that he did not remember whom he shot, and they both chuckled. When asked whether it was self-defense, Garza said, "On one count it was, on one count it wasn't.... The guy shot me, then I shot him."

¶ 13 Garza's car was searched on December 4. Two white cloth gloves were found on the front seat

floorboards. One glove was stained with blood, later identified through DNA testing as Garza's. Under the front seat was a bloodstained green cloth glove. DNA testing also identified that blood as Garza's. Garza's blood was also found on the passenger side of the car and in two locations in the hallway of the Waddell house.

¶ 14 A box of 9 mm ammunition was found under the driver's seat; Garza's fingerprints were on the box. These bullets were the same type as those found at the murder scene. A 9 mm pistol was found in Garza's belongings at his apartment; testing showed that the pistol had fired the bullets found at the murder scene. No bullets fired by any other gun were discovered at the scene, which suggests that Garza's wound came from his own gun.

¶ 15 Farley identified Garza at trial as the intruder. Eric Rodriguez, a longtime friend of Garza's, testified that before the murders he rejected Garza's offer to join him in a venture that would require that they "get a little dirty" in order to make some money. Charles Guest, a more recent acquaintance, testified that two or three weeks before the murders Garza asked if he was interested in helping Garza with some "family problems."

C.

¶ 16 Garza's primary defense at trial was that Larry had committed the murders. He claimed that law enforcement covered up Larry's involvement because Larry was a police informant. The jury found Garza guilty of two counts of first degree murder and one count of first degree burglary, a dangerous offense. The State alleged both felony and premeditated

murder; the jury made no findings as to the theory or theories upon which the murder verdicts were based.

¶ 17 In the aggravation phase, the jury unanimously rejected the A.R.S. § 13–703(F)(5) (Supp.2006) [3] pecuniary gain aggravator, but unanimously found the A.R.S. § 13–703(F)(8) multiple murders aggravator as to both murders. The jury also made *Enmund/Tison* findings in the aggravation phase.[4] The jury found that Garza had attempted to kill Ellen, was a major participant in the burglary, and had acted with reckless indifference for human life in her murder. The jury also found that Garza had killed Rush, had attempted to kill Rush, had intended to kill Rush, was a major participant in the burglary, and had acted with reckless indifference for human life.

¶ 18 In the penalty phase, the jury declined to impose death for the murder of Ellen, but authorized the death penalty for the murder of Rush. The superior court subsequently sentenced Garza to death

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[3] Sections 13–703 and –703.01 (Supp.2006) were amended after Garza's trial, but not in any respect material to this case. This opinion therefore cites to the current versions of these statutes.

[4] "The Eighth Amendment does not allow the death penalty to be imposed on a defendant unless he either himself kills, attempts to kill, or intends that a killing take place ... or is a major participant in the crime and acts with reckless indifference." *State v. Ellison,* 213 Ariz. 116, 134 ¶ 71, 140 P.3d 899, 917 (alterations and quotation marks omitted) (citing *Enmund v. Florida,* 458 U.S. 782, 797, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and *Tison v. Arizona,* 481 U.S. 137, 157-58, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987)), *cert. denied,* 549 U.S. 1000, 127 S.Ct. 506, 166 L.Ed.2d 377 (2006). The trier of fact makes *Enmund/Tison* findings in the aggravation phase. A.R.S. § 13–703.01(P).

for the murder of Rush and to life without possibility of parole for the murder of Ellen.[5]

II. ISSUES ON APPEAL

A. Jury Selection

1. Voir dire.

¶ 19 Garza makes four arguments regarding voir dire: (1) allowing the State to speak first in every voir dire session improperly implied that the prosecutors were the authority figures in the courtroom; (2) the prosecutor's statements unfairly biased the jury pool; (3) questioning whether prospective jurors could "follow the law" improperly signaled that a capital sentence was required upon conviction; and (4) the one-hour time limit initially imposed on defense voir dire of each panel of twenty-four prospective jurors denied Garza due process.

¶ 20 With the exception of the time limit, Garza raised no objections at trial to the voir dire process. We therefore review his other arguments for fundamental error. *State v. Glassel,* 211 Ariz. 33, 53 ¶ 76, 116 P.3d 1193, 1213 (2005), *cert. denied,* 547 U.S. 1024, 126 S.Ct. 1576, 164 L.Ed.2d 308 (2006).[6] To

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[5] Garza was sentenced to twenty-one years in prison for burglary.

[6] Garza claims that the allegedly constitutionally deficient voir dire was structural error. Structural error, however, is limited to error which unfairly "deprive[s] defendants of basic protections," and therefore is limited to such circumstances as denial of counsel or a biased trial judge. *State v. Ring,* 204 Ariz. 534, 552–53 ¶¶ 45–46, 65 P.3d 915, 933–34 (2003) (quotation marks omitted). None of Garza's alleged voir dire errors fall into any recognized structural error category or "infected the entire trial process from beginning to end." *Id.*

establish fundamental error, a defendant must prove "error going to the foundation of the case" and resultant prejudice. *State v. Henderson,* 210 Ariz. 561, 567 ¶¶ 19–20, 115 P.3d 601, 607 (2005) (quotation marks omitted).

a. The State speaking first.

¶ 21 Arizona law does not require that the defense speak before the state in voir dire. Arizona Rule of Criminal Procedure 18.5(d) simply allows for examination of jurors by counsel for both sides after examination by the court. Traditionally prosecutors speak to the panel first during voir dire because the state has the burden of proof and presents its case first during trial. *See* Ariz. R.Crim. P. 19.1(a) (governing order of proof during trial). Garza has not demonstrated that the superior court abused its discretion in following this standard procedure, much less that it committed fundamental error. *See State v. Johnson,* 212 Ariz. 425, 435 ¶ 35, 133 P.3d 735, 745 (noting trial court's discretion in conducting voir dire), *cert. denied,* 549 U.S. 1022, 127 S.Ct. 559, 166 L.Ed.2d 415 (2006); *State v. Clabourne,* 142 Ariz. 335, 344, 690 P.2d 54, 63 (1984) (same).

b. The State's statements.

¶ 22 Garza's arguments about improper statements during the State's voir dire are directed toward comments such as these:

> Mr. Barry: At the outset I want to tell you that as an attorney for the State I have a sworn duty to ensure that the record shows that every juror

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at 552–53 ¶ 46, 65 P.3d at 933–34 (internal quotation marks omitted).

> is fair and impartial. That's our job, and that's what we're here to do. That means that I must ensure that every juror is going to follow the law as Judge Martin instructs you. Now, does everybody agree to be fair?

¶ 23 Garza claims that such comments were "impermissible prosecutorial vouching." Prosecutorial vouching occurs "when the prosecutor places the prestige of the government behind its witness," or "where the prosecutor suggests that information not presented to the jury supports the witness's testimony." *State v. Dumaine,* 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989). The comments cited by Garza do not meet this description, but rather simply describe the role of the prosecutor in jury selection.

c. "Follow the law" questioning.

¶ 24 Garza's argument that the superior court committed fundamental error by allowing the State to pose "follow the law" questions also is without merit. The state may properly inquire if jurors will follow the law. *See, e.g., State v. Roque,* 213 Ariz. 193, 204 ¶ 17, 141 P.3d 368, 379 (2006) (discussing importance of determining whether a prospective juror "will be able to follow the law").

¶ 25 Garza also claims that basic questions posed by the trial court as to whether jurors could be impartial violated the rule of *Morgan v. Illinois,* 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). But *Morgan* contains no prohibition against such questioning; rather, it requires that, in evaluating a prospective juror's ability to be impartial, more detailed questioning of prospective jurors beyond such simple questions must also be allowed. *Id.* at 734–36, 112 S.Ct. 2222; *see also State v. Smith,* 215 Ariz. 221, 231

¶ 43, 159 P.3d 531, 541 (2007); *Johnson,* 212 Ariz. at 435 ¶ 33, 133 P.3d at 745. The voir dire here complied with *Morgan;* Garza was allowed extensive oral questioning and had access to a twenty-four page questionnaire completed by all prospective jurors.

d. One-hour time limit.

¶ 26 Garza objected below to the time limit for voir dire initially imposed by the trial court; we therefore review this claim under a harmless error standard. *Henderson,* 210 Ariz. at 567 ¶ 18, 115 P.3d at 607.

¶ 27 The venire was divided into four panels of twenty-four, with one panel questioned at a time. The parties initially agreed to limit questioning of each panel to one hour per side, but after the first panel was questioned Garza complained about the time limit. The trial court subsequently recalled the first panel for unlimited further questioning and imposed no time limit for the other panels. The trial court thus cured any conceivable error arising from the initial time limit.

2. "Death presumptive" jurors.

¶ 28 Although he did not object to Jurors 4, 7, and 17 at trial, Garza claims that the superior court committed fundamental error in failing to exclude them sua sponte. *See State v. Bible,* 175 Ariz. 549, 573, 858 P.2d 1152, 1176 (1993) (holding that review for failure to exclude a juror is for fundamental error in the absence of objection). Garza claims that each prospective juror was biased in favor of the death penalty.

¶ 29 The record directly contradicts these claims. Indeed, Garza's trial counsel candidly admitted that he could not challenge Juror 4 for cause because the

juror indicated in questioning that he did not believe that the death penalty was always appropriate. Juror 7 similarly indicated he was open-minded about whether to impose the death penalty, depending upon the circumstances of the case. And, Juror 17 stated that his opinion about the death penalty "depends on the facts" of a particular case and "on the individual."[7]

3. The State's peremptory strikes.

¶ 30 Garza argues that the State used peremptory strikes against three jurors because of their religious beliefs, violating the rule of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Under *Batson:* "(1) the party challenging the strikes must make a prima facie showing of discrimination; (2) the striking party must provide a [non-discriminatory] reason for the strike; and (3) if a [non-discriminatory] explanation is provided, the trial court must determine whether the challenger has carried its burden of proving purposeful ... discrimination." *Roque,* 213 Ariz. at 203 ¶ 13, 141 P.3d at 378 (quotation marks omitted).

¶ 31 Garza raised no *Batson* challenge to these three strikes at trial.[8] The State thus had no opportunity to

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[7] Garza also argues that Juror 3 should not have been excused. Defense counsel, however, agreed that this juror should be excused for hardship; the trial court then excused the juror. Any possible objection to the juror was therefore waived. *See State v. Tucker,* 215 Ariz. 298, 308 ¶ 14, 160 P.3d 177, 187 (2007) (finding no fundamental error when juror with qualms about death penalty was excused by agreement of counsel).

[8] Garza made a *Batson* challenge to the striking of another juror. The State articulated several grounds for the strike and the trial court denied the challenge. Garza does not contend on appeal that this ruling was erroneous.

give neutral explanations, and Garza has waived any *Batson* arguments. *State v. Cruz,* 175 Ariz. 395, 398, 857 P.2d 1249, 1252 (1993); *State v. Holder,* 155 Ariz. 83, 85, 745 P.2d 141, 143 (1987).

4. Denial of challenges for cause.

¶ 32 Garza claims that nine jurors against whom he used peremptory strikes should have been dismissed for cause. A defendant's use of peremptory strikes to remove prospective jurors who should have been removed for cause is subject to harmless error review. *State v. Hickman,* 205 Ariz. 192, 197 ¶ 22, 68 P.3d 418, 423 (2003). Reversal is not required if a fair and impartial jury was ultimately empanelled. *Id.* ¶ 23. Garza has not demonstrated that the jury eventually empanelled here was not impartial. Indeed, defense counsel's failure to use his remaining peremptory strike is evidence to the contrary.

B. Guilt Phase Issues

1. Failure to disclose allegedly exculpatory material.

¶ 33 Garza alleges that the State improperly withheld evidence about Larry Franco's history as a confidential informant ("CI") for MCSO and the Arizona Department of Public Safety ("DPS"). "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment…." *Brady v. Maryland,* 373 U.S. 83, 88, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

a. MCSO records.

¶ 34 Garza has not demonstrated that any MCSO records were withheld. After an MCSO deputy testified that forms concerning Larry's service as a CI

in 1994 were not in previously disclosed materials, Garza asked the trial court to order disclosure of all MCSO files. The State replied that everything had already been disclosed and suggested that the missing records may have been purged. The trial court then ordered the State to ensure complete disclosure. The MCSO files were never again discussed on the record. Thus, nothing in the record indicates that additional MCSO documents regarding Larry exist.

b. DPS records.

¶ 35 Larry served as a CI for DPS in undercover drug operations in the early 1990s. Garza moved before trial for discovery of any DPS records on Larry. The superior court denied the motion. We review such discovery rulings for abuse of discretion. *Roque,* 213 Ariz. at 205 ¶ 21, 141 P.3d at 380.

¶ 36 The superior court did not abuse its discretion here. Larry's relationship with DPS had ended years before the murders, and Garza made no showing that DPS was involved in the investigation of the murders. In any event, Garza stablished through the testimony of a DPS detective that Larry was an informant during the early 1990s.

2. Admission of the jailhouse telephone conversations.

¶ 37 Garza argues that one of the taped phone conversations with Laurel Thompson was improper "character evidence." We review evidentiary rulings for abuse of discretion. *State v. Ellison,* 213 Ariz. 116, 129 ¶ 42, 140 P.3d 899, 912, *cert. denied,* 549 U.S. 1000, 127 S.Ct. 506, 166 L.Ed.2d 377 (2006).

¶ 38 In the conversation, Thompson asked Garza what he did to get arrested. Garza replied, "Well,

remember what you wanted me to do when that one guy beat you up? ... Well, I did it to somebody else." Garza alleges that this statement was irrelevant and improperly used to show that he had a propensity for violence. These arguments fail.

¶ 39 The statement is relevant because it is probative of Garza's consciousness of guilt. The statement's probative value is not substantially outweighed by any prejudice that might have resulted from Garza's suggestion that Thompson had previously asked him to engage in similar conduct in the past. By its own terms, the statement implies that no previous assault occurred; Garza merely said that Thompson had once suggested some course of action.

¶ 40 Nor was the statement offered to show Garza's bad character or propensity for violence. The superior court instructed the jury that "[e]vidence of other acts of the defendant" could be considered "only as it relates to the defendant's intent, plan, knowledge, or identity." *See* Ariz. R. Evid. 404(b) (permitting use of prior acts evidence for such purposes).

¶ 41 Garza also argues that the statement should have been excluded because its "trustworthiness" was not independently corroborated. The statement, however, was a *party admission* under Arizona Rule of Evidence 801(d)(2) (A). Party admissions require no external indicia of reliability. *See State v. Nordstrom,* 200 Ariz. 229, 248 T 55, 25 P.3d 717, 736 (2001).[9]

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[9] In contrast, *statements against interest* by unavailable non-party declarants, which are governed by Rule 804(b)(3), are admissible only if there is some external evidence of reliability. *See State v. Tankersley,* 191 Ariz. 359, 370 ¶ 45, 956 P.2d 486, 497 (1998).

3. Jury instructions.

¶ 42 Garza raises three claims as to the guilt phase jury instructions: (1) the court erred in giving the State's requested instruction on accomplice liability both because the State's theory at trial was that Garza acted alone and because the request was untimely; (2) a "mere presence" instruction should have been given; and (3) the standard "absence of other participant" instruction should not have been given. We review these rulings for abuse of discretion. *Johnson,* 212 Ariz. at 431 ¶ 15, 133 P.3d at 741.

¶ 43 Each claim fails to withstand analysis. Contrary to Garza's argument, the accomplice liability instruction was proposed by the court, not the State.[10] Whatever its provenance, the instruction was appropriate. Garza's blood was found on the passenger side of his car, suggesting that someone else drove the car away from the crime scene; the defense argued that this person committed the murders.

¶ 44 Garza's argument that a "mere presence" jury instruction was denied is also not accurate. The jury was so instructed in accordance with Revised Arizona Jury Instruction ("RAJI") (Criminal) 31 (Supp.2000). Nor did the court err in giving an "absence of other participant" instruction. *See* RAJI (Criminal) 12. The charge was appropriate because Garza's counsel claimed that Larry was involved in the murders.

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[10] The State did not submit instructions in the guilt phase. In fact, Garza proposed an accomplice liability instruction, albeit one narrower than that given.

4. Reasonable doubt instruction.

¶ 45 Garza alleges that the court improperly instructed the jury on reasonable doubt. The instruction, however, was consistent with *State v. Portillo,* 182 Ariz. 592, 594–96, 898 P.2d 970, 972–74 (1995). We have "reaffirmed a preference for the *Portillo* instruction" and rejected the invitation to revisit *Portillo*. *Ellison,* 213 Ariz. at 133 ¶ 63, 140 P.3d at 916 (internal quotation marks omitted).

5. *Enmund/Tison* findings.

¶ 46 Garza argues that having the jury make *Enmund/Tison* findings in the aggravation phase rather than the guilt phase violates the Sixth Amendment. We have specifically rejected, however, the argument that the Sixth Amendment requires a jury, rather than a judge, to make such findings. *State v. Ring,* 204 Ariz. 534, 563–65 ¶¶ 97–101, 65 P.3d 915, 944–46 (2003). Thus, there was no Sixth Amendment violation. Nor was there any statutory error. Arizona law specifically requires the trier of fact to make *Enmund/ Tison* findings in the aggravation phase. A.R.S. § 13–703.01(P) (Supp.2006).[11]

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[11] Garza also argues that the jury should have been required to make separate findings as to premeditated and/or felony murder. As we have emphasized, this is the better practice. *State v. Smith,* 160 Ariz. 507, 513, 774 P.2d 811, 817 (1989). But the argument that separate findings are constitutionally required was rejected in *Schad v. Arizona,* 501 U.S. 624, 645, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991). We recently reaffirmed *Schad's* application to Arizona's new jury sentencing scheme. *State v. Gomez,* 211 Ariz. 494, 498 n. 3 ¶ 16, 123 P.3d 1131, 1135 (2005).

C. Sentencing Phase Issues

1. Failure to allege specific aggravating factors in the indictment and notice of intent to seek the death penalty.

¶ 47 Garza contends that the State's failure to allege specific aggravating factors in the indictment deprived him of due process. Garza concedes, however, that *McKaney v. Foreman ex rel. County of Maricopa,* 209 Ariz. 268, 100 P.3d 18 (2004), forecloses this argument.

¶ 48 Approximately one month after the indictment, the State filed a notice simply stating its intent "to prove one or more of the enumerated factors contained in A.R.S. § 13–703(F)." Garza argues that the notice violated Arizona Rule of Criminal Procedure 15.1(i)(2), which now requires notice of specific alleged aggravating circumstances to be provided no later than sixty days after arraignment.

¶ 49 The current version of Rule 15.1, however, applies "only to cases in which the charging document was filed on or after December 1, 2003." *State v. Anderson,* 210 Ariz. 327, 347 n. 13 ¶ 79, 111 P.3d 369, 389 (2005). Garza was indicted in December 1999 and received notice of specific aggravators in 2002, almost two years before his trial began. This complied with the version of Rule 15.1 in effect at the time, *see* Ariz. R.Crim. P. 15.1(g)(2)(a) (1999) (requiring list of alleged aggravating factors no later than ten days after guilty verdict), and Garza has not demonstrated prejudice from the timing of the notice. *See Anderson,* 210 Ariz. at 347 ¶ 80, 111 P.3d at 389 (holding defendant not denied due process when he received

notice of aggravators one year before aggravation phase).

a. Lack of probable cause finding for aggravators.

¶ 50 Garza claims that he was deprived of due process because no finding of probable cause was made with respect to aggravating factors. As Garza acknowledges, we have rejected this argument. *McKaney,* 209 Ariz. at 272 ¶¶ 16–17, 100 P.3d at 22; *see also State v. Hampton,* 213 Ariz. 167, 174 ¶ 26, 140 P.3d 950, 957 (2006), *cert. denied,* 549 U.S. 1132, 127 S.Ct. 972, 166 L.Ed.2d 738 (2007).

b. The (F)(5) aggravator.

¶ 51 The jury was instructed on two aggravating factors: pecuniary gain, A.R.S. § 13–703(F)(5), and multiple homicides, A.R.S. § 13–703(F)(8). The jury did not find the (F)(5) factor, but Garza argues that merely submitting this aggravator to the jury was error because there was no evidence to support it.

¶ 52 It is difficult to see how Garza could have suffered any prejudice from the submission of the (F)(5) aggravator to the jury, given the panel's failure to find the aggravator. In any event, the superior court did not err in denying Garza's motion under Arizona Rule of Criminal Procedure 20 to dismiss the aggravator. A Rule 20 motion must be denied if there is "substantial evidence" to support the alleged aggravator. *Ellison,* 213 Ariz. at 134 ¶ 65, 140 P.3d at 917. To establish the (F)(5) aggravator, "the state must prove that the murder would not have occurred but for the defendant's pecuniary motive." *Ring,* 204 Ariz. at 560 ¶ 75, 65 P.3d at 941. There was evidence here of a financial motive to kill Ellen—a witness

testified that Garza asked him to help with a "dirty job" in return for compensation.

2. Alleged comment on Garza's failure to testify.

¶ 53 Garza accuses the State of improperly commenting on his failure to testify. Because Garza did not object below, we review for fundamental error. *State v. Decello,* 113 Ariz. 255, 258, 550 P.2d 633, 636 (1976).

¶ 54 Garza focuses on two comments in the penalty phase closing arguments. The first described the night in question and the terror that must have been experienced by the victims. In contrast, the prosecutor claimed, "Ruben Garza ... didn't care. He cared only about himself. He didn't call 911." This statement did not relate to Garza's failure to testify at trial, but rather to the events of December 1, 1999, and Garza's inaction on that date.

¶ 55 The second comment came during the State's discussion of the defense theory that Larry committed the murders:

> [Y]ou've listened to the interview of Ruben Garza. We've played that interview for you. If it was Larry Franco, why didn't he tell us that? In fact, he had the opportunity to tell us that back on December 2nd, 1999, while the detectives were investigating this case Why didn't the defendant tell us that back in December when at the moment of truth is so critical, when we had the chance to further investigate[?]

Again, this statement was aimed at Garza's statements to the police, not at his failure to testify at trial. *See State v. Rutledge,* 205 Ariz. 7, 13 ¶ 33, 66 P.3d 50, 56 (2003) (upholding, against Fifth

Amendment attack, comments that did not "naturally and necessarily ... comment on the defendant's failure to testify").

3. Use of 911 recordings in the penalty phase.

56 Garza claims that the 911 tape should not have been admitted in the penalty phase. We review rulings admitting evidence in that phase for abuse of discretion. *State v. McGill,* 213 Ariz. 147, 156 ¶ 40, 140 P.3d 930, 939 (2006), *cert. denied,* 549 U.S. 1324, 127 S.Ct. 1914, 167 L.Ed.2d 570 (2007).

¶ 57 The 911 tape was admitted in the guilt phase without objection. Because the penalty phase jury was the same one that determined guilt, all evidence from the guilt phase was "deemed admitted" in the penalty phase. A.R.S. § 13–703.01(I). In any event, because the jury may consider the circumstances of the crime in its evaluation of mitigation, *see* A.R.S. § 13–703(G), the 911 tape was relevant to the issues faced by the trier of fact in the penalty phase.

4. The penalty phase closing argument.

¶ 58 At the beginning of his closing, the prosecutor argued:

> You know, listening to [counsel for Garza in his closing argument], I want to apologize at the outset, because when he stood up here and tried to in some way insinuate or suggest to you that the suffering of these people over here, the suffering of the victims is somehow comparable to Ruben Garza and the life he's led. That deserves an apology. I was shocked to hear that this morning. There is no way that Ruben Garza and the opportunities he's had in his life is comparable in any way to what these people

> have gone through in the last five years to see that justice is done in this case, the loss of their son, the loss of their daughter. So we want to apologize at the outset. I know [Garza's counsel] really didn't mean to do that.

The State ended its argument on a similar note:

> And in the defense's opening he suggested that it was unfortunate that the victims were here in the courtroom. The families of these victims were here because of the decisions that Ruben made. They seek justice for the brutal murders of their son and daughter, and this case cries out for justice and asks that you follow the law and impose the death penalty in this case.

Garza claims that these comments were improper, but did not object to them below; we therefore review for fundamental error. *Roque,* 213 Ariz. at 228 154, 141 P.3d at 403.

¶ 59 The arguments were not fundamental error. In his argument, defense counsel had sought to compare the suffering of the murder victims with that of Garza and his loved ones. The State's commentary was invited by this argument.

5. Victim impact statements and accompanying photos.

¶ 60 Garza argues that the victim impact evidence was unduly prejudicial in two respects. The admission of victim impact evidence is reviewed for abuse of discretion. *Ellison,* 213 Ariz. at 141 ¶ 115, 140 P.3d at 924; *see also Hampton,* 213 Ariz. at 181 ¶ 58, 140 P.3d at 964 (holding that victim impact evidence cannot be

"so unduly prejudicial that it renders the 12 trial fundamentally unfair" (quotation marks omitted)).[12]

a. Comparison to 9/11 attacks.

¶ 61 Ida LaMere, Ellen's mother, discussed the family's feelings of loss as follows:

> We know death is inevitable, disease, accidents, old age, wars, but not like this. There really aren't any words to express the horror and devastation of a 4:00 a.m. phone call telling me my baby has been shot to death along with her friend. The best I can compare this to is what you all might have felt the day of September 11 when the horrible, devastating attacks to New York and Washington, D.C. happened, and always living in the fear that you just don't know what is going to happen any more.

¶ 62 This statement was not unduly prejudicial. LaMere drew a comparison between an event universally painful for all Americans and the pain she and her family experienced as a result of Ellen's murder. She did not equate Garza to the 9/11 terrorists; rather, her statement properly "focuse[d] on the effect of the crime on the victim and the victim's family." *Roque,* 213 Ariz. at 221 ¶ 114, 141 P.3d at 396.[13]

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[12] Garza also argues that victim impact evidence was improperly admitted because it did not rebut any specific fact in mitigation. Victim impact statements, however, are generally relevant to rebut mitigation. *Hampton,* 213 Ariz. at 181 ¶ 58, 140 P.3d at 964; *Ellison,* 213 Ariz. at 140–41 ¶ 111, 140 P.3d at 923–24.

[13] Garza also claims that it was structural error to permit the victims' statements at the onset of the penalty phase. Arizona Rule of Criminal Procedure 19.1(d), however, expressly provides

b. Photographs of the victims.

¶ 63 LaMere and Brenda Rush, Lance's mother, each displayed photographs of Ellen and Lance during their statements. We have "recognize[d] the danger that photos of victims may be used to generate sympathy for the victim and his or her family," but we have declined to categorically bar their use, relying upon the discretion of the trial court to prevent undue prejudice. *Ellison,* 213 Ariz. at 141 ¶ 115, 140 P.3d at 924. The superior court did not abuse its discretion here. The photographs depicted the lives of the murder victims and thus supported the statutory victims' descriptions of their losses.

6. Allocution.

¶ 64 Garza argues he was denied his right to allocution under Arizona Rule of Criminal Procedure 19.1(d)(7) because the trial court indicated it might allow the State to cross-examine him or comment on any statements he made. When the question of allocution first arose, the State contended that cross-examination or comment should be permitted if allocution statements went beyond a "plea for mercy" to "dispute evidence presented by the State." *State v. Lord,* 117 Wash.2d 829, 822 P.2d 177, 217 (1991) (allowing cross-examination after allocution that disputed guilt). The trial court never ruled on this point, but did suggest that if Garza went "beyond

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for victim impact statements after opening statements and before the defense's mitigation evidence. The State offered to stipulate to the introduction of victim impact statements after Garza's presentation of mitigation evidence, but defense counsel specifically requested that the court follow the order of presentation specified in Rule 19.1(d).

what is contemplated in allocution, he might be subject to cross." Garza did not allocute.

¶ 65 Because Garza declined to allocute or make a record as to what his allocution would have been, he cannot now claim prejudice from the trial court's tentative comments. *See Anderson,* 210 Ariz. at 350 ¶ 100, 111 P.3d at 392 (holding that even when allocution is denied "there is no need for resentencing unless the defendant can show that he would have added something to the mitigating evidence already presented" (quotation marks omitted)); *see also State v. Tucker,* 215 Ariz. 298, 318 K 79, 160 P.3d 177, 197 (2007) (holding that defendant who chose not to allocute could not object on appeal to trial judge's suggestion that cross-examination was possible).

7. Instruction that life is the presumptive sentence.

¶ 66 Garza argues that the trial court should have instructed the jury that the presumptive sentence for Rush's murder was life. Once aggravating circumstances are proved, however, neither the state nor the defendant has the burden of proof with regard to whether the mitigation is sufficiently substantial to call for leniency. *State ex rel. Thomas v. Granville* (*Baldwin*), 211 Ariz. 468, 472 ¶ 17, 123 P.3d 662, 666 (2005) (noting that "neither party bears the burden" of persuasion in the penalty phase). Rather, it is each juror's duty to consider the aggravation and mitigation and make a discretionary sentencing decision. *Id.* ¶ 14; *see also Hampton,* 213 Ariz. at 180 ¶ 54, 140 P.3d at 963.[14]

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[14] The trial court actually erred in Garza's favor by instructing the jury that any doubt as to the appropriate sentence should be

8. Denial of a jury instruction on residual doubt.

¶ 67 Garza contends that the trial court abused its discretion by denying his request for a penalty phase instruction allowing the jury to consider as a mitigating circumstance residual doubt that he committed the murders. There is, however, "no constitutional requirement that the sentencing proceeding jury ... consider[ ] evidence of 'residual doubt.' " *Ellison,* 213 Ariz. at 136 ¶ 82, 140 P.3d at 919 (quoting *Oregon v. Guzek,* 546 U.S. 517, 126 S.Ct. 1226, 1230–32, 163 L.Ed.2d 1112 (2006)). Nor does Arizona law require such an instruction. *See Anderson,* 210 Ariz. at 348 ¶ 86, 111 P.3d at 390 ("During the ... penalty phase[ ], a jury may not revisit its initial guilty verdict.").

9. Denial of a third-party culpability instruction.

¶ 68 Garza claims that the penalty phase jury was improperly instructed on possible third-party culpability. The jury, however, was instructed that it could consider as a mitigating circumstance evidence that "[t]he defendant was legally accountable for the conduct of another as an accomplice but his participation was relatively minor, although not so minor as to constitute a defense to prosecution." This instruction tracks the language of A.R.S. § 13–703(G)(3) and appropriately allowed the jury to consider Garza's level of culpability as mitigation.

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resolved in favor of a life sentence. "[S]uch an instruction is improper." *Baldwin,* 211 Ariz. at 474 ¶ 23, 123 P.3d at 668.

10. Instructing the jury not to consider sympathy or sentiment.

¶ 69 The jury was instructed twice in the penalty phase not to be swayed by sentiment, passion, prejudice, or public feeling or opinion. Although Garza concedes that these instructions were proper under both *California v. Brown,* 479 U.S. 538, 541–43, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987), and *Saffle v. Parks,* 494 U.S. 484, 487-95, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990), he argues that those cases are inapposite because they were decided prior to Arizona jury sentencing in capital cases. We have rejected this argument. *Anderson,* 210 Ariz. at 349 ¶ 92, 111 P.3d at 391; *State v. Carreon,* 210 Ariz. 54, 70–71 ¶ ¶ 81–87, 107 P.3d 900, 916–17 (2005).

11. Instruction that the jury must unanimously determine that mitigation is sufficiently substantial to call for leniency.

¶ 70 Garza argues that requiring the jury to unanimously agree that mitigation is sufficiently substantial to call for leniency violates *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). "*Mills* ... forbids states from imposing a requirement that the jury find a potential mitigating factor unanimously before that factor may be considered in the sentencing decision." *Beard v. Banks,* 542 U.S. 406, 408–09, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004).

¶ 71 The instructions given here—which are consistent with A.R.S. §§ 13–703(C) and—703.01(H)-complied with *Mills.* In contrast to the instructions in *Mills,* the charge here made clear that, although the jury must unanimously determine that the death

penalty is not appropriate, it need not unanimously find the existence of any particular mitigator.[15] *See Anderson,* 210 Ariz. at 350 ¶ 99, 111 P.3d at 392 (upholding similar instructions).

12. A.R.S. § 13-703 creates an unconstitutional presumption of death.

¶ 72 Garza claims that A.R.S. §§ 13–703(E) and –703.01(H) create an unconstitutional presumption of death. We have repeatedly rejected this argument. *See, e.g., Glassel,* 211 Ariz. at 52 ¶ 72, 116 P.3d at 1212; *Anderson,* 210 Ariz. at 346 ¶ 77, 111 P.3d at 388.

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[15] The trial court instructed the jury as follows:

> The determination of what circumstances are mitigating and the weight to be given to any mitigation is for each of you to resolve, individually, based upon all the evidence presented during all phases of this trial.
>
> ….
>
> A finding that a particular mitigating circumstance exists need not be unanimous, that is you all need not agree on what particular mitigation exists.
>
> ….
>
> If you unanimously find that no mitigation exists then you must return a verdict of death. If you unanimously find that mitigation exists, you should weigh the mitigation in light of the aggravating circumstances already found to exist, and if you unanimously find that the mitigation is not sufficiently substantial to call for a sentence of imprisonment for life, you must return-you must return a verdict of death. If you unanimously find that mitigation exists and it is sufficiently substantial to call for a sentence of imprisonment for life, you must return a verdict of life.

D. Constitutional Challenges to the Death Sentence

¶ 73 In order to preserve them for federal review, Garza raises fourteen constitutional claims about the death penalty. These claims, and citations to cases that Garza acknowledges have rejected his arguments, are repeated verbatim in the Appendix.

III. INDEPENDENT REVIEW

¶ 74 Garza did not argue, either in his appellate briefing or at oral argument, that there were "mitigating circumstances sufficiently substantial to call for leniency," A.R.S. § 13–703(E), and that the jury therefore should not have imposed the death penalty for the murder of Rush once it found an aggravating circumstance. Although we should have been aided by argument of counsel on this point,[16] A.R.S. § 13–703.04 (Supp.2006) nevertheless mandates that we review the evidence of aggravating and mitigating circumstances and independently determine whether death is the appropriate penalty.[17]

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[16] Death penalty counsel "at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client," *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* Guideline 10.11(L) (2003), and should not simply rely upon this Court's statutory duty to review the record. *See also id.* 10.15.1(C) (noting duty of defense counsel to "seek to litigate all issues ... that are arguably meritorious"); *id.* 1.1 cmt. ("Appellate counsel must be intimately familiar with ... the substantive state, federal, and international law governing death penalty cases); *State v. Morris,* 215 Ariz. 324, 330 n. 10 ¶ 76, 160 P.3d 203 (2007) (noting counsel's duties under ABA Guidelines).

[17] Because the murders were committed before August 1, 2002, independent review is required. *See* A.R.S. § 13–703.04; Ariz.

State v. Cromwell, 211 Ariz. 181, 191 ¶¶ 52–53, 119 P.3d 448, 458 (2005), *cert. denied,* 547 U.S. 1151, 126 S.Ct. 2291, 164 L.Ed.2d 819 (2006); *Anderson,* 210 Ariz. at 354 n. 21 ¶ 119, 111 P.3d at 396.

A. Aggravation

¶ 75 The jury found that "[t]he defendant has been convicted of one or more other homicides ... that were committed during the commission of the offense." A.R.S. § 13–703(F)(8). The (F)(8) aggravator requires that a first degree murder and at least one other homicide be "temporally, spatially, and motivationally related ... during 'one continuous course of criminal conduct.' " *State v. Prasertphong,* 206 Ariz. 167, 170 ¶ 15, 76 P.3d 438, 441 (2003) (quoting *State v. Rogovich,* 188 Ariz. 38, 45, 932 P.2d 794, 801 (1997)).

¶ 76 The (F)(8) aggravator was correctly found here with respect to Rush's murder. The second victim, Ellen, was in the same house and was shot moments before Rush; the two murders were indisputably

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Sess. Laws, 5th Spec. Sess., ch. 1, § 7(B) (2002). Our power of independent review extends only to the death sentence imposed for the murder of Lance Rush and not to the life sentence for the murder of Ellen Franco. Garza does not argue that the sentences are inconsistent, nor can we so conclude. Although the aggravating circumstance for each murder was identical, the jury was allowed to consider the circumstances of the crimes in mitigation. A.R.S. § 13–703(G). The *Enmund/Tison* findings indicate that the jury believed that Garza intended to kill Rush but was not convinced beyond a reasonable doubt that he had intended to kill Ellen. There was substantial evidence to support such a distinction. Ellen was shot in the living room and Garza could have easily escaped through the door to that room from which he entered the dwelling. He nonetheless went down the hallway to the bedroom, apparently seeking an encounter with other residents of the house.

temporally and spatially related. The two homicides were also motivationally related. *See State v. Dann,* 206 Ariz. 371, 374 ¶ 10, 79 P.3d 58, 61 (2003) ("[I]t was 'difficult to imagine a motive for the killings unrelated to the murder of [the girlfriend].' ") (quoting *State v. Tucker,* 205 Ariz. 157, 169 ¶ 66, 68 P.3d 110, 122 (2003)).

B. Mitigation Evidence

¶ 77 Our review of the record suggests three possible mitigating factors.

¶ 78 First, Garza was nineteen years old at the time of the murders. Under A.R.S. § 13–703(G)(5), the defendant's age is a mitigating circumstance.

¶ 79 Second, Garza called twenty-seven friends and family members to testify in the penalty phase as to his good character and absence of prior criminal behavior. Most of them used some version of the word "shocked" to describe their reaction to finding out that Garza had been arrested for the murders.

¶ 80 Third, Garza presented evidence of alleged stress at the time of the murders. His parents had recently divorced, a baby to whom he was to be the godfather had died in infancy the previous year, he had recently been attacked with a baseball bat for intervening in a dispute between a man and his girlfriend, and he had learned only a week before the murders that a close friend had passed away from cancer. Garza had once attempted suicide by cutting his wrists, he talked of suicide on another occasion, and a suicide note was discovered after the murders.

C. Propriety of the Death Sentence

¶ 81 In exercising our independent review, we must take into account both the aggravating and mitigating

circumstances. A.R.S. § 13–703.04. We start from the premise that a finding of the (F)(8) aggravator, that the defendant has committed more than one murder in the commission of the offense, is entitled to "extraordinary weight." *Hampton,* 213 Ariz. at 185 ¶ 90, 140 P.3d at 968. We then consider whether any proved mitigation is "sufficiently substantial to warrant leniency." A.R.S. § 13–703.04(B).

¶ 82 Age is of diminished significance in mitigation when the defendant is a major participant in the crime, especially when the defendant plans the crime in advance. *State v. Poyson,* 198 Ariz. 70, 80–81 ¶¶ 37–39, 7 P.3d 79, 89–90 (2000); *State v. Jackson,* 186 Ariz. 20, 31, 918 P.2d 1038, 1049 (1996). Garza was a major participant in the murders; the evidence is overwhelming that he personally killed both victims. Moreover, at least the burglary was planned in advance. Garza obtained ammunition, brought gloves to the crime scene, and sought help from at least two potential associates. The crime was thus not simply a case of "juvenile impulsivity," *Jackson,* 186 Ariz. at 31, 918 P.2d at 1049, and we therefore do not afford Garza's age substantial weight in mitigation. *See State v. Clabourne,* 194 Ariz. 379, 386 ¶ 29, 983 P.2d 748, 755 (1999) (holding that planning and major participation "weigh against age as a mitigating circumstance").

¶ 83 Similarly, a defendant's prior good deeds and character are entitled to less weight in mitigation when a crime is planned in advance. *State v. Willoughby,* 181 Ariz. 530, 548–49, 892 P.2d 1319, 1337-38 (1995). Moreover, evidence of family support is given reduced weight in mitigation when, as here, a murder victim was a relative of the defendant's

family. *See State v. Williams,* 183 Ariz. 368, 385, 904 P.2d 437, 454 (1995).

¶ 84 Finally, although it appears that Garza had suffered some personal setbacks before the murders, nothing in the record links the stress from those events to the commission of these crimes. *See Roque,* 213 Ariz. at 230–31 ¶¶ 168, 170, 141 P.3d at 405–06 (reducing death sentence to life imprisonment where murder was committed by a defendant with mental illness distressed by the 9/11 attacks). This lack of a causal nexus diminishes the mitigating effect of this evidence. *See Hampton,* 213 Ariz. at 185 ¶ 89, 140 P.3d at 968; *Johnson, 212* Ariz. at 440 ¶ 65, 133 P.3d at 750; *Anderson,* 210 Ariz. at 349–50 ¶¶ 93–97, 111 P.3d at 391–92.

¶ 85 Even assuming arguendo that Garza proved his prior good character and the existence of some difficult situations in his life, given the aggravating circumstance of two murders, we cannot conclude that the mitigation was sufficiently substantial to call for leniency. We therefore affirm the death sentence for the murder of Lance Rush.

IV. CONCLUSION

¶ 86 For the reasons above, we affirm Garza's convictions and sentences.

CONCURRING: RUTH V. McGREGOR, Chief Justice, REBECCA WHITE BERCH, Vice Chief Justice, MICHAEL D. RYAN and W. SCOTT BALES, Justices.

Appendix

1. The death penalty is *per se* cruel and unusual punishment. Both the United States Supreme Court and this Court have rejected this

argument. *Gregg v. Georgia,* 428 U.S. 153, 207, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *State v. Salazar,* 173 Ariz. 399, 411, 844 P.2d 566, 578 (1992); *State v. Gillies,* 135 Ariz. 500, 507, 662 P.2d 1007, 1014 (1983).

2. Execution by lethal injection is cruel and unusual punishment. This Court has previously determined lethal injection to be constitutional. *State v. Hinchey,* 181 Ariz. 307, 315, 890 P.2d 602, 610 (1994[1995]).

3. The statute unconstitutionally requires imposition of the death penalty whenever at least one aggravating circumstance and no mitigating circumstances exist. This Court has rejected this challenge. *State v. Bolton,* 182 Ariz. 290, 310, 896 P.2d 830, 850 (1995); *State v. Miles,* 186 Ariz. 10, 19, 918 P.2d 1028, 1037 (1996); *see also Walton v. Arizona,* 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990).

4. The death statute is unconstitutional because it fails to guide the sentencing jury. This Court has rejected this claim. *State v. Greenway,* 170 Ariz. 155, 164, 823 P.2d 22, 31 (1991).

5. Arizona's death statute unconstitutionally requires defendants to prove that their lives should be spared. This Court rejected this claim in *State v. Fulminate,* 161 Ariz. 237, 258, 778 P.2d 602, 623 (1988).

6. The statute unconstitutionally fails to require either cumulative consideration of multiple mitigating factors or that the jury make specific findings as to each mitigating factor. This Court has rejected this claim. *State v.*

Gulbrandson, 184 Ariz. 46, 69, 906 P.2d 579, 602 (1995); *State v. Ramirez,* 178 Ariz. 116, 131, 871 P.2d 237, 252 (1994); *State v. Fierro,* 166 Ariz. 539, 551, 804 P.2d 72, 84 (1990).

7. Arizona's statutory scheme for considering mitigating evidence is unconstitutional because it limits full consideration of that evidence. This Court has rejected that contention. *See State v. Mata,* 125 Ariz. 233, 242, 609 P.2d 48, 57 (1980).

8. The statute is unconstitutional because there are no statutory standards for weighing. This was rejected in *State v. Atwood,* 171 Ariz. 576, 645 n. 21, 832 P.2d 593, 662 (1992).

9. Arizona's death statute insufficiently channels the sentencer's discretion in imposing the death sentence. This Court has rejected this. *State v. West,* 176 Ariz. 432, 454, 862 P.2d 192, 214 (1993), *overruled on other grounds by State v. Rodriguez,* 192 Ariz. 58, 961 P.2d 1006 (1998); *Greenway,* 170 Ariz. at 164, 823 P.2d at 31.

10. Arizona's death statute is unconstitutionally defective because it fails to require the state to prove that death is appropriate. This Court rejected this argument in *Gulbrandson,* 184 Ariz. at 72, 906 P.2d at 605.

11. The prosecutor's discretion to seek the death penalty unconstitutionally lacks standards. This Court has rejected a similar claim in *Salazar,* 173 Ariz. at 411, 844 P.2d at 578.

12. Death sentences in Arizona have been applied arbitrarily and irrationally and in a discriminatory manner against impoverished

males whose victims have been Caucasian. This Court rejected the argument that the death penalty has been applied in a discriminatory manner in *West,* 176 Ariz. at 455, 862 P.2d at 214.

13. The Constitution requires a proportionality review of a defendant's death sentence. This Court rejected this argument. *See Salazar,* 173 Ariz. at 411, 844 P.2d at 578; *State v. Serna, 163* Ariz. 260, 269–70, 787 P.2d at 1065–66 (1990).

14. There is no meaningful distinction between capital and non-capital cases. This was rejected in *Salazar,* 173 Ariz. at 416, 844 P.2d at 578.

APPENDIX J

SUPREME COURT OF ARIZONA
EN BANC

STATE OF ARIZONA,

Appellee / Cross–Appellant,

v.

FABIO EVELIO GOMEZ,

Appellant.

No. CR-10-0358-AP

December 7, 2012

Thomas C. Horne, Arizona Attorney General By Kent E. Cattani, Division Chief Counsel, Jeffrey A. Zick, Section Chief Counsel, Capital Litigation Section,

Phoenix, Laura Chiasson, Assistant Attorney General, Tucson, Attorneys for State of Arizona.

Michael J. Dew, Attorney at Law By Michael J. Dew, Phoenix, Attorney for Fabio Evelio Gomez.

OPINION

BALES, Vice Chief Justice.

¶ 1 This automatic appeal concerns Fabio Evelio Gomez's 2010 death sentence for murdering Joan

Morane. We have jurisdiction under Article 6, Section 5(3) of the Arizona Constitution and A.R.S. §§ 13–4031, –4032, and –4033(A) (2011).

FACTS AND PROCEDURAL BACKGROUND

¶ 2 Joan lived in an apartment complex where Gomez also lived with his girlfriend and infant son. In December 1999, a friend found Joan's door unlocked and furniture in disarray. Joan was missing. That same day, a neighbor heard pounding on Gomez's bathroom wall and a woman screaming. When questioned by police, Gomez said he had been home all day and had not seen Joan or heard any screaming. The next day, police saw blood on an inflatable raft that Gomez had placed in his girlfriend's car.

¶ 3 When Gomez allowed police to enter his apartment, they saw blood on the living room carpet and the bathroom walls. Gomez initially told police that his girlfriend had cut her foot, but later said the blood was from a cat he had killed because it had scratched his son's face. Police discovered Joan's body in a dumpster at the apartment complex. DNA testing identified Gomez's semen in Joan's body and Joan's blood in Gomez's apartment.

¶ 4 In 2001, a jury convicted Gomez of first degree murder, kidnapping, and sexual assault. Before he was sentenced, the United States Supreme Court held that Arizona's death penalty statutes were unconstitutional because they allowed a judge, rather than a jury, to find aggravating factors that could result in a death sentence. *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The legislature then amended the death penalty statutes. Based on these amendments, the trial court reset the matter for a jury sentencing hearing.

¶ 5 In 2003, a second jury found that the murder was especially cruel and depraved, *see* A.R.S. § 13–751(F)(6)(2011), and determined that Gomez should be sentenced to death. *State v. Gomez*, 211 Ariz. 494, 498 ¶ 16, 123 P.3d 1131, 1135 (2005). This Court affirmed Gomez's convictions and his sentence for sexual assault. *Id*. at 505 ¶ 53, 123 P.3d at 1142. The Court vacated Gomez's death sentence because he had been shackled in the jury's presence contrary to *Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), and also vacated his aggravated sentence for kidnapping. *Gomez*, 211 Ariz. at 505 ¶¶ 51, 53, 123 P.3d at 1142.

¶ 6 On remand, a third jury found the (F)(6) "especially cruel" aggravator and determined Gomez should be sentenced to death for Joan's murder; the trial court also resentenced him for the kidnapping.

DISCUSSION

A. Revocation of Pro Per Status

¶ 7 Gomez argues that, after the case was remanded for resentencing, the trial court erred by revoking his pro per status and appointing counsel to represent him. At the initial sentencing trial, Gomez represented himself until closing arguments, when he chose to be represented by advisory counsel. *Gomez*, 211 Ariz. at 498 ¶ 16, 123 P.3d at 1135. On remand in 2006, the trial court granted Gomez's request to represent himself in the resentencing and appointed a mitigation expert and advisory counsel to assist him. Nearly three years later, the trial court revoked Gomez's pro per status, noting that Gomez had been unable to comply with the court's deadlines and the disclosure rules for criminal cases.

¶ 8 A trial court's decision to revoke a defendant's self-representation is reviewed for an abuse of discretion. *See State v. Martin*, 102 Ariz. 142, 146, 426 P.2d 639, 643 (1967). "The right to counsel under both the United States and Arizona Constitutions includes an accused's right to proceed without counsel and represent himself," *State v. Lamar*, 205 Ariz. 431, 435 ¶ 22, 72 P.3d 831, 835 (2003), "but only so long as the defendant 'is able and willing to abide by the rules of procedure and courtroom protocol.' " *State v. Whalen*, 192 Ariz. 103, 106, 961 P.2d 1051, 1054 (App.1997) (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 173, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984)).

¶ 9 The trial court revoked Gomez's right to self-representation only after repeatedly admonishing him to comply with court rules and deadlines and that noncompliance could result in the loss of his pro per status. In May 2007, after Gomez had represented himself for ten months, the trial court instructed Gomez, his advisory counsel, and his mitigation consultant that they needed to set a realistic schedule for completing their mitigation investigation so the court could set a trial date. The mitigation specialist responded that he would need time to travel to the Dominican Republic (where Gomez lived until 1987) and elsewhere outside Arizona to interview people. In August 2007, the court set a "firm" trial date for September 2, 2008; set a disclosure deadline; and told Gomez that, if he failed to follow the rules and prepare for the resentencing trial, his pro per status would be revoked.

¶ 10 In May 2008, Gomez told the court that he needed at least another eighteen months to prepare. On the recommendation of a mitigation special

master, the trial court reset the trial for June 1, 2009. The court again warned Gomez to comply with the court rules and that his pro per status would be revoked if he was not prepared on the rescheduled date. After advisory counsel told the court that the defense would get a psychologist expert and complete testing of Gomez by November 2008, the mitigation special master set a deadline of November 15, 2008 for completing all psychological testing. Despite this deadline, Gomez twice failed to meet with defense psychologists who came to interview him.

¶ 11 In November 2008, the trial court denied Gomez's motion to change advisory counsel and again warned Gomez that he would lose the right to represent himself if he did not follow court rules. The next month, the court denied Gomez's request to extend the discovery deadlines; ordered Gomez to make all required disclosures by January 23, 2009; and affirmed the June 1, 2009 trial date. In violation of that order and Rule 15.2 of the Arizona Rules of Criminal Procedure, Gomez, in January 2009, disclosed the names of some 360 witnesses for the resentencing trial, including a neuropsychologist and a psychologist, without also disclosing any expert reports. The listed witnesses included more than 150 "out of state character witnesses," more than 70 police officers, Gomez's former defense attorneys, 2 former Arizona attorneys general, and a former Arizona governor. The disclosure did not include addresses for the witnesses. It suggested that Gomez intended to offer evidence challenging the police investigation of the murder or the validity of his convictions, matters that the trial court had told Gomez were not at issue in the resentencing proceeding.

¶ 12 After the State moved to obtain the required disclosures, the trial court gave Gomez until March 25, 2009 to "fully comply with Rule 15.2" and again warned Gomez that his failure to follow the rules could result in loss of his pro per status. On March 25, Gomez filed a notice again listing hundreds of witnesses; he included telephone numbers or addresses for about eighty. At a hearing on March 30, he told the court that he "still [had] many other things" he needed to do and that the identified neuropsychologist and psychologist experts had not yet examined him. Advisory counsel subsequently disclosed two new psychologist experts and told the court that these experts would examine Gomez in April and their reports would be ready before the June 1, 2009 trial date. Noting that this timetable would allow the State little time to obtain rebuttal evidence, the court set a hearing to show cause why it should not revoke Gomez's pro per status and assign counsel to represent him.

¶ 13 At the April 14, 2009 show cause hearing, Gomez said he had done everything he had been told to do, he wished to continue representing himself, and he was ready to proceed with his resentencing trial. Finding that Gomez had been unable to comply with Rule 15, the trial court revoked his pro per status and reset the trial date for September 2009. The court also appointed the two lawyers who had served as advisory counsel since 2006 (Herman Alcantar, Jr. and Christopher Flores) to represent Gomez. The trial was subsequently postponed due to conflicts in the attorneys' schedules and did not occur until September 2010.

¶ 14 Gomez argues that the trial court erred in revoking his pro per status for several reasons. First, he contends that he complied with Rule 15's disclosure requirements and that, if he failed to do so, the trial court should have precluded his witnesses rather than revoke his pro per status. Second, he states that his appointed counsel did not add to his pro per disclosures and did not ultimately present any experts, and that the trial did not take place until seventeen months after his pro per status was revoked. Finally, he argues that revocation is not appropriate unless a pro per defendant engages in "serious obstructionist conduct" in the courtroom, citing *United States v. Johnson*, 610 F.3d 1138, 1144 (9th Cir.2010).

¶ 15 We disagree. "[A] defendant who proves himself incapable of abiding by the most basic rules of the court is not entitled to defend himself." *Deck*, 544 U.S. at 656, 125 S.Ct. 2007. Accordingly, a trial court "may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Faretta v. California*, 422 U.S. 806, 834 n. 46, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). As *Faretta* acknowledges, a self-represented defendant must not only respect the dignity of the courtroom, but also "comply with relevant rules of procedural and substantive law." *Id*. Thus, a trial court may revoke pro per status for serious violations of court orders and rules even if the conduct occurs outside a courtroom proceeding.

¶ 16 Gomez demonstrated over several years that he could not comply with court deadlines and the disclosure rules. The trial court repeatedly warned Gomez that his noncompliance could result in loss of

pro per status. The trial court revoked that status only after it had become evident that Gomez's continued self-representation would undermine the court's authority and ability to conduct the proceeding in an efficient and orderly manner. *Cf. Whalen*, 192 Ariz. at 107–08, 961 P.2d at 1055–56 (upholding trial court's revocation of pro per status when defendant failed to comply with a court order to conduct defense from the front of courtroom). That the trial court might have precluded witnesses as a sanction for Gomez's violations of Rule 15.2 does not mean that the court was prevented from revoking his pro per status. Gomez's conduct gave the trial court ample grounds to revoke his pro per status in April 2009–a conclusion that is not affected by the later postponement of the trial until September 2010 or by Gomez's assertions that his appointed counsel did not provide any additional disclosures and ultimately did not present expert witnesses.

¶ 17 The trial court did not abuse its discretion by revoking Gomez's pro per status and appointing counsel to represent him.

B. Denial of Requests for Change of Counsel

¶ 18 Gomez argues that the trial court erred by not holding an evidentiary hearing before denying requests by him and his lawyer for the appointment of new counsel. We review a trial court's decision to deny a request for new counsel for abuse of discretion. *State v. Moore*, 222 Ariz. 1, 15 ¶ 77, 213 P.3d 150, 164 (2009).

¶ 19 The Sixth Amendment guarantees criminal defendants the right to representation by counsel, but "an indigent defendant is not 'entitled to counsel of choice, or to a meaningful relationship with his or her

attorney.' " *State v. Torres*, 208 Ariz. 340, 342 ¶ 6, 93 P.3d 1056, 1058 (2004) (quoting *State v. Moody*, 192 Ariz. 505, 507 ¶ 11, 968 P.2d 578, 580 (1998)). A defendant's Sixth Amendment right to counsel is violated "when there is a complete breakdown in communication or an irreconcilable conflict between a defendant and his appointed counsel." *Id*. "Conflict that is less than irreconcilable, however, is only one factor for a court to consider in deciding whether to appoint substitute counsel." *State v. Cromwell*, 211 Ariz. 181, 186 ¶ 29, 119 P.3d 448, 453 (2005).

¶ 20 On December 8, 2009, nearly five weeks before the resentencing trial was then scheduled to begin, Gomez filed a pro per "motion for change of counsel." He alleged that Alcantar, his appointed lead counsel, had not visited him in more than a year, had not devoted enough time to prepare the case, and was unprofessional. Gomez further alleged that he did not trust Alcantar because the lawyer had submitted excessive bills while acting as advisory counsel and had not deposited money into Gomez's account for stamps and supplies. Gomez also asserted that Flores, his other attorney, was not qualified to handle a death penalty case. Finally, Gomez complained that he had "been subjected to the t[y]pical unethical actions of [an] irresponsible Court appointed defense attorney ... with whom [Gomez] has an actual major conflict of interest, and an irredeemable client-attorney relationship."

¶ 21 On December 18, 2009, attorney Christopher Dupont filed a "motion to determine counsel," stating that he was specially appearing because the Consulate of the Dominican Republic intended to retain him to represent Gomez at the resentencing

hearing. This motion criticized Alcantar's representation, asserted that there had been a complete fracture in Gomez's relationship with his counsel, and requested an evidentiary hearing. At two subsequent hearings, however, Dupont said he would not represent Gomez.

¶ 22 On February 4, 2010, Alcantar filed a Motion to Withdraw as Counsel of Record. This motion alleged that Dupont had "broken any confidence Mr. Gomez had in his legal team" and "poisoned" counsel's relationship with Gomez, specifically noting difficulties the defense team had communicating with mitigation witnesses. Alcantar claimed that "the defendant's family in the Dominican Republic will no longer speak to the Mitigation Specialist because she [sic] was informed ... that the defense team was not helping Mr. Gomez."

¶ 23 Three weeks later, the court held a pretrial conference attended by Gomez, Alcantar, and Dupont. The court, without objection, announced that it would decide the pending matters without an evidentiary hearing or oral argument. It struck Dupont's motion to determine counsel and denied Alcantar's motion to withdraw. The court also denied Gomez's motion for change of counsel, finding "an insufficient showing in the motion to demonstrate that a change of counsel is necessary, especially considering the age of the case and the timing of the motion in this matter."

¶ 24 Relying on *Torres*, Gomez now argues that the trial court was required to hold an evidentiary hearing to consider the specific allegations in his motion for change of counsel. He further contends that both his motion and Alcantar's motion to withdraw

alleged "an irretrievable breakdown of the attorney-client relationship."

¶ 25 "[T]o protect a defendant's Sixth Amendment right to counsel, a trial judge has the duty to inquire as to the basis of a defendant's request for substitution of counsel." *Torres*, 208 Ariz. at 343 ¶ 7, 93 P.3d at 1059. But "[t]he nature of the inquiry will depend upon the nature of the defendant's request." *Id*. at ¶ 8. "[G]eneralized complaints about differences in strategy may not require a formal hearing or an evidentiary proceeding." *Id*. Before ruling on a motion for change of counsel, a trial court should consider

> whether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and quality of counsel.

State v. LaGrand, 152 Ariz. 483, 486–87, 733 P.2d 1066, 1069–70 (1987).

¶ 26 In requiring a hearing in *Torres*, the Court noted that the defendant had alleged "that he could no longer speak with his lawyer about the case, he did not trust him, he felt threatened and intimidated by him, there was no confidentiality between them, and his counsel was no longer behaving in a professional manner." *Torres*, 208 Ariz. at 342 ¶ 2, 93 P.3d at 1058. We held that the trial court abused its discretion by summarily denying a motion for change of counsel without inquiring into the "specific factual allegations that raised a colorable claim that he had an

irreconcilable conflict with his appointed counsel." *Id*. at 343 ¶ 9, 93 P.3d at 1059.

¶ 27 The facts of this case are distinguishable from *Torres*. Gomez's motion did not allege facts suggesting that there had been a complete breakdown in communication or an irreconcilable conflict. "A single allegation of lost confidence in counsel does not require the appointment of new counsel, and disagreements over defense strategy do not constitute an irreconcilable conflict." *Cromwell*, 211 Ariz. at 186 ¶ 29, 119 P.3d at 453. Nor did Alcantar's motion to withdraw allege specific facts suggesting a "completely fractured relationship." *Id*. Instead, it contended that Dupont had made it difficult for the defense to communicate with mitigation witnesses and had undermined Gomez's confidence in his legal team.

¶ 28 Moreover, in denying the requests for change of counsel, the trial court considered the *LaGrand* factors and Alcantar's written responses to Gomez's allegations and Dupont's motion. For example, Alcantar discussed interviews done by the mitigation specialist, motions Alcantar intended to file before trial, why he had not more frequently visited Gomez at the jail (Alcantar said that Gomez had imposed restrictions on the visits and persisted in discussing matters not at issue in the resentencing), and his providing stamps to Gomez and depositing money in Gomez's jail account. The State also provided information to the court about the number of times that the mitigation specialist, the defense investigator, or counsel had gone to the jail to visit Gomez. When the trial court announced it intended to decide the matters on the pleadings, neither Gomez

nor any lawyer requested an evidentiary hearing to present additional information.

¶ 29 A trial judge is not required to hold an evidentiary hearing on a motion for change of counsel if the motion fails to allege specific facts suggesting an irreconcilable conflict or a complete breakdown in communication, or if there is no indication that a hearing would elicit additional facts beyond those already before the court. *See LaGrand*, 152 Ariz. at 486, 733 P.2d at 1069 (noting that "a request for new counsel should be examined with the rights and interest of the defendant in mind tempered by exigencies of judicial economy"). The trial court did not abuse its discretion when it denied the requests for change of counsel without holding an evidentiary hearing.

C. Sufficiency of Evidence for (F)(6) Aggravator

¶ 30 Gomez argues that the State did not present sufficient evidence to prove the murder was especially cruel. This argument is subsumed within our independent review, because we determine de novo whether the evidence establishes an aggravating circumstance beyond a reasonable doubt. *See State v. Hargrave*, 225 Ariz. 1, 13 ¶ 41, 234 P.3d 569, 581 (2010).

D. Independent Review

¶ 31 Because Gomez committed the murder before August 1, 2002, we independently review his death sentence. *See* A.R.S. § 13–755(A).

1. Aggravating Circumstances

¶ 32 The State alleged that the murder was "especially cruel" for purposes of the (F)(6)

aggravating circumstance. To establish especial cruelty, "the state must prove that 'the victim consciously experienced physical or mental pain prior to death, and the defendant knew or should have known that suffering would occur.' " *State v. Prince*, 226 Ariz. 516, 539 ¶ 97, 250 P.3d 1145, 1168 (2011) (quoting *State v. Snelling*, 225 Ariz. 182, 188 ¶ 25, 236 P.3d 409, 415 (2010)). This Court " 'examine[s] the entire murder transaction and not simply the final act that killed the victim.' " *Id*. (quoting *State v. Ellison*, 213 Ariz. 116, 142 ¶ 119, 140 P.3d 899, 925 (2006)).

¶ 33 The record establishes beyond a reasonable doubt that Joan's murder was especially cruel. The medical examiner testified that Joan suffered eighteen or more blows to her head, at least one of which was inflicted with as much force as that caused by a motor vehicle accident. She also suffered cuts, scrapes, bruises, and bone fractures. Her wounds suggested that Joan was conscious and moving while being beaten. She had defensive wounds and grip marks on her arms indicating that she struggled while being held down with significant force.

¶ 34 The evidence also indicates that a gag-type ligature was placed around Joan's face and across her neck. Although Joan usually kept a neat apartment, after the attack, a glass table top was knocked over and a heavy living room chair displaced. Joan's blood was found in Gomez's apartment, but not in her own. This evidence suggests Joan was abducted in her apartment and then beaten to death in Gomez's apartment.

¶ 35 Gomez argues that especial cruelty was not proven because the medical examiner could not determine the "sequence of blows, the consciousness

of the victim, and the nature of the bruising" that Gomez inflicted. This argument fails.

¶ 36 Joan's injuries, her screams, evidence of a struggle in Joan's apartment, and the fact that she had been gagged all indicate Joan was conscious during part of the attack. *Cf. State v. Andriano*, 215 Ariz. 497, 511 ¶ 66, 161 P.3d 540, 554 (2007) (finding cruelty where "[d]efensive wounds on [the victim's] hands and wrists indicate that he was conscious for at least some of the attack and thus knew his wife was attacking him"), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012).

¶ 37 Regardless of when Joan lost consciousness as result of the eighteen blows to her head, the State proved beyond a reasonable doubt that she was conscious for part of the attack and suffered physically and mentally. The State also proved beyond a reasonable doubt that Gomez knew or should have known that Joan was suffering physically and mentally. *See*, *e.g.*, *id*. (defendant "knew or should have known that beating her husband with a bar stool would cause him physical pain and mental anguish").

2. Mitigating Circumstances

¶ 38 At the mitigation phase, Gomez presented testimony from family members and others who knew him in the Dominican Republic and established that he had a good upbringing and was treated well by his parents while growing up. During allocution, Gomez asked for an opportunity to obtain an education and to be rehabilitated. On appeal, Gomez states that he had no prior criminal record and that he immigrated to the United States as a self-sufficient professional, sought ways to give back to his adopted country as a coach for young people, cared about his family and

community in the Dominican Republic, and was raising an infant son.

¶ 39 The State disputes Gomez's alleged mitigating factors, contending that his family members and friends from the Dominican Republic had no significant contact with Gomez in the more than ten years between his move to the United States and Joan's murder. At the penalty phase, to contradict Gomez's claims that he was a productive member of society and caring father, the State introduced testimony from the guilt phase in which Gomez admitted using drugs and said that, on the day of the murder, he had smoked marijuana before driving with his infant son in a car and had later left the baby unattended while he engaged in consensual sexual intercourse in another car.

¶ 40 "A defendant's relationship with his or her family and friends may be a mitigating circumstance, yet the Court has often found that this circumstance should be given little weight." *State v. Tucker*, 215 Ariz. 298, 322 ¶ 116, 160 P.3d 177, 201 (2007). Similarly, a defendant's lack of a prior felony conviction "is a mitigating circumstance, but entitled to little weight." *State v. Greene*, 192 Ariz. 431, 442 ¶ 52, 967 P.2d 106, 117 (1998). The mitigating circumstances are not substantial.

3. Propriety of Death Sentence

¶ 41 We consider the quality and the strength, not simply the number, of aggravating and mitigating factors. *Id*. at 443 ¶ 60, 967 P.2d at 118. Gomez kidnapped and sexually assaulted Joan and brutally bludgeoned her to death. The record does not reflect significant mitigating circumstances. We conclude

that "the mitigation is not sufficiently substantial to warrant leniency." A.R.S. § 13–755(B).

E. Additional Issues

¶ 42 Stating that he seeks to preserve certain issues for federal review, Gomez lists eighteen additional constitutional claims that he acknowledges have been rejected in previous decisions. We decline to revisit these claims.

F. State's Cross–Appeal

¶ 43 On cross-appeal, the State argues that the trial court abused its discretion by (1) precluding cross-examination of Gomez after he identified new mitigation and professed his innocence during allocution, and (2) limiting the rebuttal evidence the State presented in response to Gomez's statements during allocution. These issues are moot, however, because we have affirmed Gomez's death sentence, and we accordingly decline to address them. *See*, *e.g.*, *State v. Chappell*, 225 Ariz. 229, 243 ¶ 60, 236 P.3d 1176, 1190 (2010); *State v. McCray*, 218 Ariz. 252, 261 ¶ 46, 183 P.3d 503, 512 (2008).

CONCLUSION

¶ 44 We affirm Gomez's sentences.

CONCURRING: REBECCA WHITE BERCH, Chief Justice, A. JOHN PELANDER and ROBERT M. BRUTINEL, Justices and DONN KESSLER, Judge.*

* Pursuant to Article 6, Section 3 of the Arizona Constitution, the Honorable Donn Kessler, Judge of the Arizona Court of Appeals, Division One, was designated to sit in this matter.

APPENDIX K

SUPREME COURT OF ARIZONA
EN BANC

STATE OF ARIZONA,

Appellee,

v.

STEVEN RAY NEWELL,

Appellant.

No. CR-04-0074-AP

April 26, 2006

Terry Goddard, Arizona Attorney General by Kent E. Cattani, Chief Counsel, Capital Litigation Section, Phoenix, Donna J. Lam, Assistant Attorney General, Tucson, Attorneys for the State of Arizona.

Susan M. Sherwin, Maricopa County Legal Advocate by Ginger Jarvis, Deputy Legal Advocate, Phoenix, Attorneys for Steven Ray Newell.

OPINION

RYAN, Justice.

I

¶ 1 On the morning of May 23, 2001, eight-year-old Elizabeth Byrd left home for school. She was wearing

her school uniform and carrying a purse or knapsack with long straps. Around 7:45 a.m., a neighbor saw Elizabeth walking toward school with Steven Ray Newell following closely behind. Elizabeth knew Newell because he had previously dated her sister, and the neighbor knew both Elizabeth and Newell.

¶ 2 About an hour later, a Salt River Project ("SRP") employee working in a field near the M.C. Cash Elementary School came upon someone standing in an irrigation ditch. Based on past experience, the employee initially thought that the person was using something to back up the water in the ditch so he could bathe. As the employee approached the area, the person in the ditch turned and looked at him for about thirty seconds and then jumped up and ran up the bank, disappearing behind some bushes. The employee noticed a rolled up piece of green indoor-outdoor carpeting in the water near where he had seen the person standing, but he did not retrieve it.

¶ 3 That afternoon, Elizabeth's mother arrived home to find that Elizabeth had not returned from school. This did not concern her, however, because Elizabeth routinely went directly from school to a friend's house, where she would stay until around eight in the evening. When Elizabeth did not come home at eight, her family began to worry. Elizabeth's sisters began looking for her, which is when they learned that she had not been at her friend's house. Around eleven in the evening, because the family still had not found Elizabeth, the police were called.

¶ 4 Phoenix police responded to the family's call. After the officers spoke with Elizabeth's mother, they spoke with two of Elizabeth's friends. The officers

were told that Elizabeth had not been in school that day; a missing persons report was then called in.

¶ 5 The next morning, two members of the Phoenix Police Department were dispatched to search the field near the M.C. Cash Elementary School. The officers discovered a child's denim shoe, a children's book, a black purse or knapsack containing a cherub magnet with the name "Elizabeth" on it, a pair of socks, and a drawstring coin purse. That afternoon, a detective from the Maricopa County Sheriff's Office discovered Elizabeth's body in an irrigation ditch in the field, rolled up in green indoor-outdoor carpeting. Shoe prints were found along the ditch near where Elizabeth's body was found.

¶ 6 Later that day, the SRP employee went to the Sheriff's office after seeing a news report about the investigation. He described the person he had seen in the irrigation ditch. The investigators used that description to create a composite sketch of the suspect. The employee was also shown a photographic lineup, but he did not identify anyone in the lineup as the person he had seen in the ditch.[1]

¶ 7 The Maricopa County Medical Examiner's Office conducted an autopsy on Elizabeth's body the following day. The autopsy revealed bruising on the tops of Elizabeth's hands, wrists, and forearms, which were consistent with an injury caused by her hands being squeezed. A ligature was still tied around Elizabeth's neck. There were small vertical abrasions

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[1] The SRP employee was shown multiple photo-lineups over the next two weeks, with each lineup containing a different suspect. He did not identify anyone in the lineups as the person he had seen in the irrigation ditch until June 5, 2001.

on the left side of Elizabeth's neck, consistent with fingers grasping at the ligature trying to remove it. She had further bruising under her chin and on her left temple, along with an abrasion near her right eye. The injuries that caused these bruises occurred before or around the time of Elizabeth's death.

¶ 8 The autopsy also revealed evidence of penetration of Elizabeth's vulva to the hymen consistent with a sexual assault. Elizabeth's vulva was bruised, and the vaginal tract had abrasions, with a tear on the left side of one of the abrasions. One abrasion in the vaginal tract went right up to the hymen, but the hymen itself was still intact.

¶ 9 The medical examiner concluded that Elizabeth died from asphyxiation due to ligature strangulation. Once the ligature had been tightened, Elizabeth likely died within a minute or two. The medical examiner further determined that it was likely that Elizabeth had stopped breathing before she was placed in the water because his examination did not reveal any "froth or foaminess" in Elizabeth's airways "and the lungs were not excessively heavy" from the presence of water. Elizabeth's stomach also contained no water.

¶ 10 At the time of the autopsy, Elizabeth's underwear, along with blood, bone, and tissue samples from Elizabeth, were collected. These items were subsequently sent to the Department of Public Safety ("DPS") lab for testing.

¶ 11 Because Newell had dated Elizabeth's sister, a detective from the Maricopa County Sheriff's Office contacted Newell on May 27, 2001, to come to the station to be interviewed; Newell agreed. Newell, like the many people from Elizabeth's neighborhood who were interviewed regarding Elizabeth's

disappearance, was not a suspect at the time of the initial interview. During this interview, Newell was asked about the day of Elizabeth's disappearance and if he knew anything that might be helpful to the investigation. Newell described what he did that day but made no incriminating statements; at the end of the interview, the detective told him he was free to leave.

¶ 12 Newell was contacted again by a Sheriff's detective at Elizabeth's funeral on June 2, 2001. The detective went to the funeral to find Newell because he had been told that Newell was wearing Converse All Star shoes, the type of shoes which matched the shoe prints found near Elizabeth's body. Newell voluntarily went to the station and again answered questions related to his activities around the time of Elizabeth's disappearance. During the interview, Newell's shoes were taken to be compared with the footprints observed at the ditch. Again, Newell was permitted to leave. Two days later, an analyst from the Sheriff's office concluded that it was "highly probable" that the footprints at the crime scene had been made by Newell's shoes.

¶ 13 On the evening of June 4, two Maricopa County Sheriff's detectives contacted Newell and asked if he would consent to another interview. Newell agreed, and drove to the station. Shortly after 8:00 p.m., the detectives began questioning Newell. The entire interrogation was videotaped. Fewer than ten minutes into the interview, the detectives advised

Newell of the *Miranda*[2] rights. Newell waived those rights and agreed to speak with the detectives.

¶ 14 The questioning began in a manner similar to the two previous interviews, but became more accusatory after the second hour. The detectives told Newell that they had evidence that proved he had committed the murder. Newell initially denied having anything to do with Elizabeth's death; however, that changed as the interrogation continued.

¶ 15 Eventually, Newell acknowledged that he had been with Elizabeth in the field on the morning of her disappearance. He admitted he had grabbed her and placed her between his legs while he rubbed up against her, causing him to ejaculate. He then acknowledged placing her in the water in the ditch by grabbing her purse strap—which was around her neck—and her feet. When he saw the SRP employee, he covered Elizabeth with the indoor-outdoor carpeting and ran off. Throughout the interrogation he maintained that Elizabeth was alive when he placed her in the ditch and that he did not sexually abuse her. Newell was taken to jail shortly before eleven in the morning on June 5, 2001.

¶ 16 Later that day, the SRP employee was shown another photo lineup, which included a picture of Newell; he identified Newell as the person he had seen in the ditch on May 23, 2001.

¶ 17 Over the next few days, a criminalist with the DPS crime lab conducted an analysis on Elizabeth's underwear. During the analysis, semen was found inside of the central crotch area. The criminalist then

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[2] *See Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

did a deoxyribonucleic acid ("DNA") analysis of sperm that were found. The following week, a DNA analysis was conducted on a blood sample from Newell to see if it matched the DNA from the sperm found in Elizabeth's underwear. Based on this analysis, it was determined that Newell was the likely source of the sperm.[3]

¶ 18 On June 14, 2001, a Maricopa County grand jury indicted Newell on three counts related to the disappearance and death of Elizabeth Byrd: first degree murder, sexual conduct with a minor, and kidnapping. Nearly three years later, after an eleven-day trial, a jury found Newell guilty of all three counts.

¶ 19 In the aggravation phase of the sentencing proceeding on the first degree murder charge, the jury found that the following aggravating circumstances had been proved beyond a reasonable doubt: a previous conviction for a serious offense, Ariz.Rev.Stat. ("A.R.S.") § 13–703(F)(2) (Supp.2003); the murder was committed "in an especially heinous, cruel or depraved manner," § 13–703(F)(6); and at the time of the murder the defendant was an adult and the victim "was under fifteen years of age," § 13–703(F)(9). At the penalty phase of the sentencing proceedings, the jury heard testimony about Newell's childhood, family life, and opportunities to get help for his substance abuse.[4]

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[3] Newell's DNA matched at all 14 loci. The statistical probability of a match for this sperm profile was "one in 860 trillion Caucasians, one in 15 quadrillion of African Americans, and one in 730 trillion Hispanics."

[4] Defense Counsel refers to this phase as the "mitigation phase" of the trial. A capital trial is made up of a guilt proceeding

¶ 20 The jury determined that Newell should be sentenced to death for the first degree murder conviction. For the sexual conduct with a minor and kidnapping convictions, the court sentenced Newell to consecutive aggravated terms of twenty-seven years and twenty-four years respectively. An automatic notice of appeal was filed with this Court under Rules 26.15 and 31.2(b) of the Arizona Rules of Criminal Procedure. We have jurisdiction under Article 6, Section 5(3), of the Arizona Constitution and A.R.S. § 13–4031 (2001).

II

¶ 21 Newell first claims that the trial court abused its discretion by failing to suppress the statements he made to the detectives during the June 4, 2001, interrogation. [5] He argues that these statements should have been suppressed for two reasons. First, he asserts that the detectives violated his right to counsel under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Second, he

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or trial, *see* A.R.S. § 13–703(A), (D), and if necessary a sentencing proceeding consisting of an aggravation phase and a penalty phase, § 13–703(B), (C) and § 13–703.01 (Supp.2003). For purposes of consistency and clarity, we will use, in this opinion and all future opinions, the language found in A.R.S. § 13–703 to refer to the stages of a capital trial. We urge counsel to conform to this convention as well when making submissions to this Court.

[5] Newell concedes that even without these statements, overwhelming evidence establishes his guilt. However, he argues that the admission of the statements affected the jury's determination to impose the death penalty. In particular, he argues that the jury would not have found that the murder was especially heinous or depraved under the A.R.S. § 13–703(F)(6) aggravator if these statements had been excluded.

contends that the inculpatory statements were involuntarily made.

A

¶ 22 When reviewing a trial court's determination on the admissibility of a defendant's statements, this Court must determine whether there has been clear and manifest error.[6] *State v. Jones,* 203 Ariz. 1, 5, ¶ 8, 49 P.3d 273, 277 (2002) (citing *State v. Eastlack,* 180 Ariz. 243, 251, 883 P.2d 999, 1007 (1994)). A trial court's ruling on a motion to suppress is reviewed solely based on the evidence presented at the suppression hearing. *State v. Spears,* 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996) (citing *State v. Flower,* 161 Ariz. 283, 286 n. 1, 778 P.2d 1179, 1182 n. 1 (1989)).

B

¶ 23 Newell claims that his statements must be suppressed because the detectives did not honor his requests for the presence of counsel during questioning.

¶ 24 *Miranda* held that the Fifth Amendment's protection against self-incrimination, as applied to the states through the Fourteenth Amendment, requires procedural safeguards during a custodial interrogation. 384 U.S. at 444, 86 S.Ct. 1602. The prosecution may not use any statement made by the

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[6] This standard applies whether the Court is reviewing the admissibility based on a violation of defendant's right to counsel under *Miranda*, see *State v. Jones*, 203 Ariz. 1, 4–5, ¶¶ 7–8, 49 P.3d 273, 276–77 (2002), or determining whether the confession was voluntary, *see State v. Ross*, 180 Ariz. 598, 603, 886 P.2d 1354, 1359 (1994). We have equated this standard with the abuse of discretion standard. *Jones*, 203 Ariz. at 5, 8, 49 P.3d at 277.

defendant, whether exculpatory or inculpatory, unless those procedural safeguards are provided. *Id.* The right to the presence of an attorney is one of the rights of which a person subject to custodial interrogation must be informed under *Miranda*. *Id.* If the person being interrogated asserts the right to an attorney, all questioning must cease until an attorney is present or the defendant reinitiates communication. *Edwards v. Arizona,* 451 U.S. 477, 484–85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Miranda,* 384 U.S. at 474, 86 S.Ct. 1602.

¶ 25 Before an officer must cease questioning, however, the defendant must unambiguously request the presence of counsel. *Davis v. United States,* 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). A person subject to custodial interrogation "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* If a reasonable officer in the circumstances would have understood only that the defendant *might* want an attorney, then questioning need not cease. *Id.* Although an officer is not required to do so, the Court in *Davis* recommended that a police officer suspend interrogation related to the crime when a suspect makes an ambiguous or equivocal statement relating to the presence of counsel and clarify whether the presence of an attorney indeed has been requested. *Id.* at 461, 114 S.Ct. 2350.

¶ 26 Newell claims that during the interrogation he unequivocally invoked his right to counsel several times. The superior court disagreed and denied Newell's motion to suppress his statements because it

found that Newell's alleged invocations of his right to counsel were, at best, equivocal.

¶ 27 We review the factual findings underlying this determination for abuse of discretion but review the court's legal conclusions de novo. *State v. Moody,* 208 Ariz. 424, 445, ¶ 62, 94 P.3d 1119, 1140 (2004).

¶ 28 Although Newell voluntarily went to the Sheriff's Office, the procedural protections of *Miranda* apply because Newell was subject to custodial interrogation.[7] Therefore, if any of Newell's alleged requests for counsel were unambiguous, the superior court would have been required to suppress the statements. We conclude, however, that Newell did not make any unequivocal requests for counsel.

¶ 29 First, Newell claims that he unambiguously invoked his right to counsel three times during a one-minute colloquy in the interrogation's third hour. Newell argues that he first invoked his right to counsel when he said, "I want to call my lawyer." Without further context, this statement appears to be an unambiguous invocation of the right to counsel.

¶ 30 After reviewing the videotaped interrogation and hearing testimony from the detectives, the trial judge found that this statement was made while Newell and one of the detectives were talking over each other and it was reasonable to believe the

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[7] The State concedes that Newell was subject to custodial interrogation, if not from the beginning of the June 4, 2001, interview, then at least after he was told by one of the detectives that he was not free to leave. *See Miranda*, 384 U.S. at 444, 86 S.Ct. 1602 (stating that custodial interrogation is "questioning initiated by law enforcement officers after a person has been ... deprived of his freedom of action in any significant way").

statement could not be clearly heard. Given these circumstances, the judge found that the detective was free to follow up to determine what Newell had said, because the request was ambiguous. *See Davis,* 512 U.S. at 461, 114 S.Ct. 2350.

¶ 31 During the detective's attempt to clarify Newell's initial request, Newell claims he made two further unequivocal requests for an attorney.[8] The superior court found that both of the alleged requests were ambiguous because they occurred while Newell and the detective were talking over each other. The court further found that one of the alleged requests was ambiguous because it was contradictory. The court held that "in the total context of what is being exchanged, [Newell's requests for an attorney seem] to me not at all clear, and it's appropriate for the detective to ask for clarification."

¶ 32 We conclude that the superior court did not abuse its discretion in making this determination. The entire exchange involving the three supposed requests for counsel occurred within one minute. During this time, Newell and the detective were often speaking simultaneously. As a result, Newell's requests were either not heard or heard in such a way that the detective reasonably found it necessary to ask for clarification. *See id.* Also, some of the alleged

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[8] After the detective asked Newell whether he was requesting a lawyer, Newell first responded "No," and then said, "If I'm getting accused right now, if I'm getting charged for it yeah, I want my lawyer." The detective then further attempted to clarify whether Newell wanted his attorney or whether he wanted to continue talking. Newell responded by making a statement that sounded like "I'm willing" and something unintelligible before stating, "If I'm going to jail, I want to talk to my lawyer."

requests were contradictory; therefore, a reasonable officer would not consider them unequivocal. *See id.* at 459, 114 S.Ct. 2350. The detective was free to continue her questioning to "clarify whether or not [Newell] actually want[ed] an attorney." *Id.* at 461, 114 S.Ct. 2350.

¶ 33 The detective did precisely this. Newell, in response to a clarifying question, stated, "I want to talk to you. I have been down here talking to you guys every time you guys come after me." Once that response was received, further questioning was entirely appropriate.

¶ 34 Newell next claims that approximately twenty minutes after the colloquy discussed above he again asked for an attorney by saying, "Can I have a lawyer?" This supposed request was not asserted by Newell at the suppression hearing. Newell's failure to assert this alleged invocation of the right to counsel normally would preclude appellate review of the claim. *See State v. Tison,* 129 Ariz. 526, 535, 633 P.2d 335, 344 (1981) (stating "[i]ssues concerning the suppression of evidence which were not raised in the trial court are waived on appeal") (citing *State v. Griffin,* 117 Ariz. 54, 570 P.2d 1067 (1977)). We may, however, review a suppression argument that is raised for the first time on appeal for fundamental error. *State v. Cañez,* 202 Ariz. 133, 151, ¶ 51, 42 P.3d 564, 582 (2002). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quoting

State v. Hunter, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)).

¶ 35 We conclude no fundamental error occurred with respect to this alleged request. A review of the videotape does not reflect, as Newell claims, a clear invocation of the right to counsel. This alleged request for counsel was a barely audible, mumbled statement made while Newell and the detective were both talking. It was not a sufficiently clear invocation of the right to counsel under *Miranda. Davis,* 512 U.S. at 459, 114 S.Ct. 2350.

¶ 36 Newell finally argues that he unequivocally requested an attorney five hours into the interrogation by saying, "That's it. I want to talk to a lawyer right now." The superior court found that Newell's statement was unclear and it was reasonable to believe that the detective did not hear a clear request for an attorney.

¶ 37 A review of the videotape supports the superior court's determination. [9] It is nearly impossible to understand Newell's statement. In fact, Newell's trial counsel abandoned this alleged invocation at the suppression hearing because he could not hear the request on the tape. Our review of the videotape supports the same conclusion. Therefore, the superior court did not abuse its discretion by finding that Newell had not clearly invoked his right to counsel as required by *Davis.*

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[9] The determinations of the trial court and this Court were profoundly aided by the fact that the interrogation was recorded in its entirety. It is specifically for this reason that we have, in the past, recommended the use of videotaping during "the entire interrogation process." *Jones*, 203 Ariz. at 7, ¶ 18, 49 P.3d at 279.

C

¶ 38 Newell also argues that even if the statements were not obtained in violation of *Miranda,* they must be suppressed as involuntary. He claims that his statements were rendered involuntary by the length of the interrogation, the inability to get counsel after multiple alleged requests, promises made by the detectives, inappropriate appeals to religious beliefs, and comments related to a woman for whom he cared deeply.

¶ 39 In determining whether a confession is involuntary, the "[court] must look to the totality of the circumstances surrounding the giving of the confession." *State v. Montes,* 136 Ariz. 491, 496, 667 P.2d 191, 196 (1983). Then the court must determine whether, given the totality of the circumstances, the defendant's will was overborne. *State v. Tapia,* 159 Ariz. 284, 287–88, 767 P.2d 5, 8–9 (1988). A confession is "prima facie involuntary and the state must show by a preponderance of the evidence that the confession was freely and voluntarily made." *Montes,* 136 Ariz. at 496, 667 P.2d at 196.

¶ 40 The superior court found, after hearing the testimony presented at the suppression hearing and reviewing the relevant portions of the taped confession, that "considering the totality of the circumstances, defendant's will was not overcome and the statements were voluntary." "A trial court's finding of voluntariness will be sustained absent clear and manifest error." *State v. Poyson,* 198 Ariz. 70, 75, ¶ 10, 7 P.3d 79, 84 (2000).

¶ 41 Newell complains that his will was overborne by the length of the interrogation. The length of the interrogation alone, however, is insufficient to find a

confession involuntary. *State v. Doody,* 187 Ariz. 363, 369, 930 P.2d 440, 446 (App.1996) (stating that a thirteen hour interrogation, without significant breaks, does not prove, by itself, that the defendant's will to resist confessing was overcome). It is merely one factor to be taken into consideration. *See id.*

¶ 42 The interrogation here lasted about fourteen hours, but not all of that time involved questioning. The detectives gave Newell multiple breaks to smoke and use the restroom. He also spent time alone in the room writing letters and sleeping. The videotape of the interrogation supports the trial judge's finding that Newell's will was not overborne because of the length of questioning.

¶ 43 Newell also claims that his confession was involuntary because the detectives repeatedly ignored his unequivocal requests for counsel. As discussed above, we conclude that Newell did not make an unequivocal request for counsel. Even if these requests had been unambiguous, however, they would not necessarily render the confession involuntary; such a circumstance would be one factor to consider in determining whether Newell's will had been overborne. *See, e.g., People v. Bradford,* 14 Cal.4th 1005, 60 Cal.Rptr.2d 225, 929 P.2d 544, 566 (1997). No evidence suggests that the detectives' refusal to honor Newell's ambiguous requests for counsel caused his will to be overborne. Newell continued to deny his involvement in Elizabeth's death for an extended time after his claimed requests for counsel.

¶ 44 Newell next complains that promises made by the detectives rendered his confession involuntary. We have held that a direct or implied promise, however slight, will render a confession involuntary

when it was relied upon by the defendant in making a confession. *State v. Blakley,* 204 Ariz. 429, 436, ¶ 27, 65 P.3d 77, 84 (2003). The superior court, by denying the motion to suppress, implicitly found that there were no promises or, if there were promises, they were not relied upon. In either case, we conclude that there was no abuse of discretion.

¶ 45 The statements about which Newell complains relate to suggestions by the detective that he would feel better if he confessed.[10] Newell also alleges that the detectives' promise to keep him safe while in jail rendered his confession involuntary.[11] We conclude, given the context, that neither of those comments rose to the level of a promise that prompted Newell to confess.

¶ 46 Even if they were promises, however, Newell did not rely upon them when he made his inculpatory statements. Almost immediately after hearing the alleged promises, Newell again denied ever having been in the field with Elizabeth. These denials continued throughout most of the interrogation. Therefore, the alleged promises did not render the confession involuntary.

¶ 47 Newell also claims that one of the detectives made references to religion, which added to the coercive nature of the interrogation and, in addition to everything else, caused his will to be overborne. The

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[10] The detectives told Newell throughout the interrogation that the first step to getting help was to admit that he had done something wrong. They also told Newell that confessing would lift a heavy burden off of his shoulders.

[11] After Newell had expressed concern for his safety in jail, the detectives merely assured Newell that he would be kept safe.

statements about which Newell complains related to "get[ting] right with God," confessing sins, and asking for forgiveness.

¶ 48 Appeals to religion do not render confessions involuntary unless they lead to the suspect's will being overborne. *See, e.g., United States v. Miller,* 984 F.2d 1028, 1031–32 (9th Cir.1993); *Welch v. Butler,* 835 F.2d 92, 95 (5th Cir.1988); *Noble v. State,* 319 Ark. 407, 892 S.W.2d 477, 483 (1995), *overruled on other grounds by Grillot v. State,* 353 Ark. 294, 107 S.W.3d 136 (2003); *Le v. State,* 913 So.2d 913, 933–34, ¶¶ 60–64 (Miss.2005). No evidence indicates that any religious references caused Newell's will to be overborne.

¶ 49 Newell's final complaint concerns statements relating to someone for whom Newell cared. One of the detectives asked Newell whether he would want the woman he cared for to be told that he had been completely honest or that he was a sociopath who was hiding things. He claims that these statements were threats to get him to confess. Taken in context, however, none of these statements rise to the level of a threat, nor did any cause Newell to make incriminatory statements. Newell asked the detectives to talk to this woman because he felt that "she need[ed] to know" what was going on, and at one point he said that it did not matter what the detective told this woman because she was probably not going to be around anyway. We therefore conclude that these alleged threats did not render Newell's statements involuntary.

¶ 50 In sum, the superior court did not abuse its discretion when it found, based on the totality of the circumstances, that Newell's will was not overborne.

Even considering, in the aggregate, all of the conduct about which Newell complains, at no time during the interview did Newell capitulate and say what he thought the detectives wanted to hear. In fact, despite making several incriminating statements, he persistently refused to admit to sexually assaulting Elizabeth or to tying the purse strap around her neck. Accordingly, the totality of the circumstances supports the superior court's conclusion that Newell's statements were voluntarily made. Thus, Newell's argument that the death sentence must be reversed fails on these grounds.

III

¶ 51 Newell next challenges the State's peremptory strike of prospective juror 34, the only remaining African–American on the venire panel, [12] under *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). *Batson* held that using a peremptory strike to exclude a potential juror solely on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 89, 106 S.Ct. 1712. Newell claims that the superior court's denial of his *Batson* challenge was clearly erroneous and, as a result, reversible error.

¶ 52 A denial of a *Batson* challenge will not be reversed unless clearly erroneous. *Miller–El v. Cockrell,* 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); *State v. Cruz,* 175 Ariz. 395, 398, 857 P.2d 1249, 1252 (1993). "We review de novo the trial court's application of the law." *State v. Lucas,* 199 Ariz. 366, 368, ¶ 6, 18 P.3d 160, 162 (App.2001).

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[12] The only other African–American on the jury panel who had completed the questionnaire was excused for hardship reasons.

¶ 53 A *Batson* challenge involves a three-step analysis. First, the defendant must make a prima facie showing that the strike was racially discriminatory. If such a showing is made, the burden then switches to the prosecutor to give a race-neutral explanation for the strike. Finally, if the prosecution offers a facially neutral basis for the strike, the trial court must determine whether "the defendant has established purposeful discrimination." *Batson,* 476 U.S. at 93–94, 97–98, 106 S.Ct. 1712; *see also Cañez,* 202 Ariz. at 146, ¶ 22, 42 P.3d at 577.

¶ 54 The first step of the *Batson* analysis is complete when the trial court requests an explanation for the peremptory strike. *State v. Trostle,* 191 Ariz. 4, 12, 951 P.2d 869, 877 (1997). Here, the trial court made that request of the prosecutor; therefore, the burden shifted to the prosecutor to give a race-neutral basis for the peremptory strike. *Purkett v. Elem,* 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995); *Batson,* 476 U.S. at 97–98, 106 S.Ct. 1712. "Unless a discriminatory intent is inherent in the prosecutors explanation," this burden is satisfied by a facially valid explanation for the peremptory strike. *Hernandez v. New York,* 500 U.S. 352, 360, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion). To pass step two, the explanation need not be "persuasive, or even plausible." *Purkett,* 514 U.S. at 767–68, 115 S.Ct. 1769. "It is not until the *third* step that the persuasiveness of the justification becomes relevant...." *Id.* at 768, 115 S.Ct. 1769. In determining whether the defendant has proven purposeful discrimination, "implausible or fantastic justifications may (and probably will) be found to be pretext[ual]." *Id.; see also Miller–El,* 537 U.S. at 338–39, 123 S.Ct.

1029. This third step is fact intensive and will turn on issues of credibility, which the trial court is in a better position to assess than is this Court. *See Miller–El,* 537 U.S. at 339–40, 123 S.Ct. 1029. Therefore, the trial court's finding at this step is due much deference. *Id.* at 340, 123 S.Ct. 1029.

¶ 55 When asked for an explanation of the peremptory strike, the State stated that it struck the juror because of her answers relating to the imposition of the death penalty, both in her questionnaire and in individual voir dire. On the questionnaire, she stated that she would not be able to vote for the death penalty. Also, during individual voir dire, she told the prosecutor that she would "more than likely not" be able to vote for the death penalty. In response to questions asked by defense counsel, however, the juror answered that she could consider voting for the death penalty if the court instructed that it needed to be considered. The prosecution then asked the juror follow-up questions. In her answers to those questions, she confirmed that her views on the death penalty would not substantially impair her ability to follow the court's instructions and that she could vote for the death penalty.

¶ 56 The trial judge then questioned the juror. When asked whether she would give a life sentence rather than impose the death penalty if the defendant did not present any evidence of mitigation, she responded in the affirmative. Because this answer contradicted her statements to defense counsel—that she could impose the death penalty—the judge said, "I'm confused then under what circumstances you would impose the death penalty." The juror answered, "I'm not sure, actually. Depends on what's presented." After further

explanation of the legal standard related to mitigation, the juror acknowledged that she had not understood the court's question and that she could "[a]bsolutely" impose the death penalty when the defendant did not introduce any mitigating evidence.

¶ 57 After this exchange, the prosecutor stated that he did not believe he had "grounds to strike her for cause." But he subsequently used one of his peremptory strikes to strike the juror from the list of potential jurors.

¶ 58 The prosecutor's reason for striking the juror, which involved the juror's contradictory responses about whether she could vote to impose the death penalty, satisfied step two of *Batson* because it was facially race-neutral. *See Miller–El v. Dretke,* —— U.S. ——, ——, 125 S.Ct. 2317, 2329–30, 162 L.Ed.2d 196 (2005) (discussing the fact that inconsistent responses may be a reasonable race-neutral explanation for a peremptory strike, unless it is undercut by other evidence); *Puckett v. State,* 788 So.2d 752, 761 (Miss.2001). Moreover, Newell offered no evidence, other than inference, to show that the peremptory strike was a result of purposeful racial discrimination. *See Purkett,* 514 U.S. at 768, 115 S.Ct. 1769 (holding that the "opponent of the strike" carries the ultimate burden of persuasion in a *Batson* challenge). We find no error in the superior court's determination that the State's peremptory strike did not violate *Batson.*

IV

¶ 59 Newell contends that the trial court abused its discretion when it denied his motion for a mistrial. Newell argues that statements made by the prosecutor during closing arguments constituted prosecutorial misconduct and warranted a mistrial

because they improperly vouched for the State's evidence and impugned the integrity of defense counsel.

A

¶ 60 To determine if a prosecutor's comments constituted misconduct that warrants a mistrial, a trial court should consider two factors: (1) whether the prosecutor's statements called to the jury's attention matters it should not have considered in reaching its decision and (2) the probability that the jurors were in fact influenced by the remarks. *State v. Atwood,* 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992) (quoting *State v. Hansen,* 156 Ariz. 291, 296–97, 751 P.2d 951, 956–57 (1988)), *disapproved on other grounds by State v. Nordstrom,* 200 Ariz. 229, 241, ¶ 25, 25 P.3d 717, 729 (2001). The defendant must show that the offending statements, in the context of the entire proceeding, "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Hughes,* 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (internal quotation omitted).

¶ 61 Because the trial court is in the best position to determine the effect of a prosecutor's comments on a jury, we will not disturb a trial court's denial of a mistrial for prosecutorial misconduct in the absence of a clear abuse of discretion. *State v. Lee,* 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (citing *State v. White,* 160 Ariz. 24, 33–34, 770 P.2d 328, 337–38 (1989)); *Hansen,* 156 Ariz. at 297, 751 P.2d at 957 (citing *State v. Robles,* 135 Ariz. 92, 94, 659 P.2d 645, 647 (1983)). To warrant reversal, the prosecutorial misconduct must be " 'so pronounced and persistent that it permeates the entire atmosphere of the trial.' " *Lee,*

189 Ariz. at 616, 944 P.2d at 1230 (quoting *Atwood,* 171 Ariz. at 611, 832 P.2d at 628).

B

¶ 62 Newell first claims that the prosecutor improperly vouched for the strength of the State's case when he commented, in rebuttal closing argument, that there were "3,000 pages of police reports" and that "[n]ot every witness was called." Prosecutorial vouching takes two forms: "(1) where the prosecutor places the prestige of the government behind its [evidence] [and] (2) where the prosecutor suggests that information not presented to the jury supports the [evidence]." *State v. Vincent,* 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989). Newell argues that these statements fall into the second category. We disagree.

¶ 63 The prosecutor's statements were not meant to bolster the State's case. Rather, they were an attempt to explain to the jury, in response to statements made in Newell's closing argument, why certain witnesses had not been called to testify. The prosecutor's response merely explained to the jury that there were simply too many documents and witnesses for either side to be able to present them all. The prosecutor did not imply that these police reports and witnesses supported the State's case. Therefore, the trial court did not abuse its discretion by denying the motion for a mistrial on this basis.

¶ 64 The second ground for Newell's prosecutorial misconduct claim relates to the prosecutor's statements, also made during rebuttal closing argument, about the superiority of DNA evidence. First, the prosecutor said, "[N]o matter what defense counsel tells you, we all know that DNA is ... the most powerful investigative tool in law enforcement at this

time." He then went further, after defense counsel's objection to the first statement was overruled, by telling the jury that defense counsel knew this was true. The court sustained Newell's objection to this latter statement. Newell argues that these statements required a mistrial because they improperly vouched for the State's evidence and impugned the integrity of defense counsel.

¶ 65 We agree that both comments were improper. The prosecutor's statement about the superiority of DNA evidence improperly vouched for the State's evidence. No opinions had been elicited about the preeminence of DNA evidence. The prosecutor's comment here—that everyone knows that DNA evidence is the best investigative tool around—did improperly vouch for the strength of the State's evidence against Newell. *Cf. Vincent,* 159 Ariz. at 423, 768 P.2d at 155 (prosecutor improperly vouches by suggesting that evidence not presented to the jury supports the presented evidence).

¶ 66 The prosecutor also improperly commented about what defense counsel knew about the strength of DNA evidence. We have previously stated that it is improper to impugn the integrity or honesty of opposing counsel. *See Hughes,* 193 Ariz. at 86, ¶ 59, 969 P.2d at 1198. The prosecutor, by stating that defense counsel knew that DNA evidence is a compelling investigative tool, was insinuating, if not directly stating, that any argument made to the contrary was disingenuous. Because defense counsel, in his closing argument, had questioned whether the DNA evidence proved anything beyond a reasonable doubt, the prosecutor's response in claiming that defense counsel knew that DNA was superior

evidence called into question the integrity of defense counsel.

¶ 67 Such improper comments by the prosecutor will not require reversal of a defendant's conviction, however, unless it is shown that there is a "reasonable likelihood" that the "misconduct could have affected the jury's verdict." *Atwood,* 171 Ariz. at 606, 832 P.2d at 623. Also, any improper comments must be so serious that they affected the defendant's right to a fair trial. *State v. Dumaine,* 162 Ariz. 392, 403, 783 P.2d 1184, 1195 (1989). Although we find the comments of the prosecutor improper, for several reasons we conclude that the defendant was not convicted on the basis of those comments and they did not deny him a fair trial.

¶ 68 First, as a part of the standard jury instructions, the superior court instructed the jury that anything said in closing arguments was not evidence. We presume that the jurors followed the court's instructions. *See State v. Ramirez,* 178 Ariz. 116, 127, 871 P.2d 237, 248 (1994).

¶ 69 Moreover, defense counsel's objection to the statement impugning his honesty was sustained. We have said, "when counsel's personal beliefs are unfairly attacked, '[t]he proper remedy for such a serious error ... is objection, motion to strike, and an instruction ... that the jury should disregard the improper comment.' " *Vincent,* 159 Ariz. at 424, 768 P.2d at 156 (alterations in original) (quoting *State v. Woods,* 141 Ariz. 446, 455, 687 P.2d 1201, 1210 (1984)). Although no jury instruction immediately followed the sustained objection, the court did instruct the jury at the end of the trial that any sustained objection meant that the information must be

disregarded. Again, because we presume jurors follow the court's instructions, *see Ramirez,* 178 Ariz. at 127, 871 P.2d at 248, we conclude that this comment also did not affect the jury verdict.

¶ 70 Finally, the trial court determined that the statements about which Newell complains were not so prejudicial that they required a mistrial. When considered in the context of the entire trial, we agree that the overwhelming evidence of guilt influenced the jury to convict Newell rather than the prosecutor's statements about the DNA evidence and defense counsel. Moreover, as noted above, *see supra* note 5, Newell concedes the evidence overwhelmingly establishes his guilt. Therefore, despite the fact that these comments were improper, they were not so prejudicial as to deprive Newell of his right to a fair trial.

V

¶ 71 Next, Newell claims that the trial court's failure to preclude the rebuttal testimony of his adult probation officer at the penalty phase of the sentencing proceeding was an abuse of discretion. The testimony about which Newell complains referred to the opportunities Newell was offered to get help for his drug problem. Newell contends that he did not present evidence of his inability to get help for his drug problem as a mitigating factor; consequently, the State was not entitled to present evidence in rebuttal that Newell had had opportunities to get help.

¶ 72 The trial court determined that the probation officer's testimony was admissible to rebut Newell's statements made during the course of the interrogation about needing and being unable to get help for his drug problem. The trial judge believed

that because the jurors had heard these statements during the guilt phase, they could possibly rely on them when deciding whether Newell deserved leniency. Therefore, the court concluded that this was "appropriate grist for the rebuttal mill."

¶ 73 We review a trial court's ruling on the admissibility of evidence for abuse of discretion. *State v. Aguilar,* 209 Ariz. 40, 49, ¶ 29, 97 P.3d 865, 874 (2004). We will review "purely legal issues de novo." *Moody,* 208 Ariz. at 445, ¶ 62, 94 P.3d at 1140.

¶ 74 Newell's objection to the testimony of the probation officer implicates two subsections of A.R.S. § 13–703. Subsection (G) permits a jury to consider any factors that are offered—no matter who offers them—when considering mitigation. § 13–703(G). Subsection (D) provides that any evidence admitted during the guilt phase of the trial is admitted for purposes of the sentencing proceeding. § 13–703(D).

¶ 75 Newell claims that the State's presentation of evidence to rebut statements he made during his interrogation amounted to "an end-run around" his choice not to present evidence of his alleged inability to obtain treatment for his drug addiction. We disagree with this contention for two reasons. First, Newell himself put forth evidence during the guilt and penalty phases of the trial related to his drug use and his desire for help to overcome it. In the guilt phase, on cross-examination of one of the detectives, Newell elicited evidence of his struggle with drug addiction and his attempts to get help. In the penalty phase, witnesses testified about Newell's exposure to drugs at an early age, including the fact that his stepfather used drugs with Newell when he was only in seventh grade. Newell also mentioned his long history of

substance abuse in his allocution. Second, during his interrogation, Newell referred numerous times to his inability to obtain help for his drug problem. For instance, he spoke about wanting to live without drugs and about asking for help when he got out of jail; he stated that no one helped him when he asked for help; and he told the detectives that people with problems like his should receive help.

¶ 76 The evidence presented during the guilt phase of the trial was deemed admitted for purposes of the sentencing proceeding because the same jury that determined Newell's guilt also decided whether he should receive the death penalty. A.R.S. § 13–703(D). Therefore, although Newell did not expressly offer as a mitigating factor his alleged inability to get treatment for his drug addiction, the jury still could have factored his complaints on this topic, along with the other evidence presented during the penalty phase about Newell's drug use, into its consideration of whether the mitigating circumstances were "sufficiently substantial to call for leniency." A.R.S. § 13–703(E), (G).

¶ 77 Thus, the trial court's determination that the State could present testimony from Newell's probation officer in rebuttal was not an abuse of discretion.

VI

¶ 78 Finally, Newell contends that the trial court abused its discretion by precluding the testimony of his mental health expert at the penalty phase as a sanction for refusing to undergo a court-ordered examination by the State's mental health expert. Newell also argues that requiring him to submit to a

mental health examination by the State's expert violates his privilege against self-incrimination.

¶ 79 Newell acknowledges that we have previously held that once a defendant puts his mental heath in issue, "during the penalty phase of a capital trial," a trial court may order the defendant to submit to a mental examination by the State's expert. *Phillips v. Araneta,* 208 Ariz. 280, 283, ¶ 9, 93 P.3d 480, 483 (2004). As long as the order assures the defendant specific protections, we held that this may be done without running afoul of the defendant's privilege against self-incrimination. *Id.* at 284, ¶ 14, 93 P.3d at 484. We further held that if the defendant refuses to submit to a court-ordered examination, the trial court may, as a sanction, preclude a defendant's mental-health related mitigation evidence at the penalty phase. *Id.* at 285, ¶ 16, 93 P.3d at 485.

¶ 80 Newell presents no arguments that would compel us to revisit our decision in *Phillips.* Therefore, the superior court did not err when it precluded the testimony of Newell's mental health expert.

VII

¶ 81 Because Elizabeth's murder occurred before August 1, 2002, we must independently review the jury's findings on "aggravation and mitigation and the propriety of the death sentence." A.R.S. § 13–703.04 (Supp.2003); *see also* 2002 Ariz. Sess. Laws, 5th Spec. Sess., Ch. 1, § 7(B) (eff. Aug. 1, 2002). In our review, if we "determine[ ] that an error was made regarding a finding of aggravation ..., [we] shall independently determine if the mitigation ... is sufficiently substantial to warrant leniency in light of the existing aggravation." A.R.S. § 13–703.04(B). If we "find[ ] that the mitigation is sufficiently substantial to warrant

leniency," then we must impose a life sentence. *Id.* Otherwise, we are required to affirm the death sentence. *Id.*

¶ 82 In conducting our independent review we do not merely consider the quantity of aggravating and mitigating factors which were proven, but we look to the quality and strength of those factors. *State v. Greene,* 192 Ariz. 431, 443, ¶ 60, 967 P.2d 106, 118 (1998) (citing *State v. McKinney,* 185 Ariz. 567, 578, 917 P.2d 1214, 1225 (1996)). We do not require that a nexus between the mitigating factors and the crime be established before we consider the mitigation evidence. *See Tennard v. Dretke,* 542 U.S. 274, 287, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004). But the failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence. *See State v. Anderson,* 210 Ariz. 327, 350, ¶¶ 96–97, 111 P.3d 369, 392 (2005). Finally, "[w]e do not defer to the findings or decision of the jury," with respect to aggravation or mitigation, when "determin[ing] the propriety of the death sentence." *State v. Roseberry,* 210 Ariz. 360, 374, ¶ 77, 111 P.3d 402, 416 (2005).

¶ 83 Undisputed evidence supports the (F)(2) and (F)(9) aggravating circumstances. Newell's prior conviction for attempted kidnapping established that he had a serious prior felony conviction.[13] A.R.S. § 13–

[13] Under A.R.S. § 13–703(H)(10), kidnapping is a "serious offense." The (F)(2) aggravator is established by proof beyond a reasonable doubt of a prior conviction for a serious offense, "whether *preparatory* or completed." A.R.S. § 13–703(F)(2) (emphasis added). Therefore, because attempt is considered a preparatory offense, A.R.S. § 13–1001 (2001), a conviction for attempted kidnapping establishes the (F)(2) aggravator.

703(F)(2). Moreover, Newell was an adult at the time of the murder and Elizabeth was eight years old. A.R.S. § 13–703(F)(9).

¶ 84 An aggravating circumstance is also established when murder is committed in an especially cruel, heinous or depraved manner. A.R.S. § 13–703(F)(6). The cruelty prong of the (F)(6) aggravator focuses on the suffering of the victim, while the heinousness and depravity prongs focus on the state of mind of the defendant. *State v. Clark,* 126 Ariz. 428, 436, 616 P.2d 888, 896 (1980). A determination that the (F)(6) aggravator has been proven can be based on any or all of these prongs, because they are in the disjunctive. *See State v. Gretzler,* 135 Ariz. 42, 51, 659 P.2d 1, 10 (1983) (quoting *Clark,* 126 Ariz. at 436, 616 P.2d at 896); *see also Anderson,* 210 Ariz. at 355–56, ¶ 128, 111 P.3d at 397–98.[14]

¶ 85 Here, substantial evidence supports the cruelty prong of the (F)(6) aggravator. Cruelty requires proof

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[14] We note that the jury verdict form in this case did not require the jury to specify upon which prong, or prongs, its determination with respect to the (F)(6) factor rested. "It is therefore possible the jury was not unanimous as to which prong satisfied the (F)(6) aggravator." *Anderson*, 210 Ariz. at 355, ¶ 126, 111 P.3d at 397. However, Newell, unlike the defendant in *Anderson*, did not raise a claim that he was denied a unanimous verdict on the (F)(6) aggravator. We therefore do not consider that issue. For purposes of our independent review, however, Newell's failure to raise any further grounds upon which the jury's finding with respect to this aggravator can be overturned does not affect our ultimate conclusion. Even if we were to ignore the (F)(6) aggravator, the strength and quality of the (F)(2) and (F)(9) aggravating circumstances alone would support the imposition of the death penalty.

that the victim "consciously experienced physical or mental pain prior to death and the defendant knew or should have known that suffering would occur." *Trostle,* 191 Ariz. at 18, 951 P.2d at 883 (citation omitted). The evidence—bruising that occurred at or near the time of death consistent with grasping of Elizabeth's arms, sexual assault-related bruises and injuries, testimony that it normally takes two minutes for death by asphyxiation to occur, and marks showing that Elizabeth was grasping at the ligature—all support the conclusion that this murder was especially cruel. Elizabeth suffered serious physical and mental anguish before she died. Newell should have known that such suffering would occur. Because we find that compelling evidence supports a finding of cruelty, we need not examine whether the evidence also establishes the heinousness or depravity prongs of (F)(6). *State v. Djerf,* 191 Ariz. 583, 595, ¶ 44, 959 P.2d 1274, 1286 (1998) (noting that "a finding of either cruelty or heinousness/depravity will suffice to establish" the (F)(6) factor).

¶ 86 The bulk of Newell's mitigation evidence related to his unstable childhood and drug use. Newell's witnesses testified that during childhood his home life was unstable. In addition, as a child he was exposed to people with drug addictions who engaged in drug-related activities. Several witnesses testified that Newell had been sexually and physically abused during his childhood. Finally, by all accounts, Newell had an extended history of drug use.

¶ 87 We conclude that Newell's mitigation evidence is not sufficiently substantial to call for leniency. No evidence explains how Newell's drug addiction and unstable childhood led to the sexual assault and

murder of eight-year-old Elizabeth. *See Anderson,* 210 Ariz. at 357, ¶¶ 135–37, 111 P.3d at 399. Moreover, in view of the compelling aggravating circumstances, the mitigation evidence simply fails to rise to a level that would call for leniency.

VIII

¶ 88 For the above reasons, we affirm Newell's convictions and sentences.

Ruth V. McGregor, Chief Justice, Rebecca White Berch, Vice Chief Justice, Andrew D. Hurwitz and W. Scott Bales, JJ., concur.

APPENDIX L

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,

Appellee,

v.

STEPHEN DOUGLAS REEVES,

Appellant.

No. CR-11-0157-AP

October 23, 2013

Thomas C. Horne, Arizona Attorney General, Jeffrey A. Zick, Chief Counsel, Criminal Appeals/Capital Litigation, Matthew H. Binford (argued), Assistant Attorney General, Phoenix, for State of Arizona.

Bruce F. Peterson, Maricopa County Office of the Legal Advocate, Consuelo M. Ohanesian (argued), Deputy Legal Advocate, Phoenix, for Stephen Douglas Reeves.

OPINION

Vice Chief Justice BALES, opinion of the Court.

¶ 1 This automatic appeal arises from Stephen Douglas Reeves's conviction and death sentence for the murder of Norma Gabriella Contreras. We have

jurisdiction under Article 6, Section 5(3) of the Arizona Constitution and A.R.S. §§ 13–4031 and 13–4033(A)(1).

BACKGROUND

¶ 2 One Saturday morning in June 2007, Reeves entered an office where eighteen-year-old Contreras was working alone. Reeves asked if the office was hiring; she said no, and he left. About five minutes later, Reeves returned carrying a piece of concrete and demanded her car keys and cell phone. Contreras attempted to push an alarm button. Reeves, who was much larger than Contreras, forced her to the floor and straddled her. For about eight minutes, while Contreras screamed and struggled, Reeves beat her, hit her with the concrete, wrenched her neck, and attempted to strangle her with his hands and a piece of wood. Finally, he retrieved a box cutter from another room and slit her throat. He turned off the lights and dragged her body into a back room. Meanwhile, people at another office who had heard Contreras scream called 911. Police arrested Reeves shortly after he drove away in Contreras's car. He had her cell phone in his pocket.

¶ 3 Reeves was convicted of first degree murder, armed robbery, first degree burglary, kidnapping, and theft of a means of transportation. The jury found three aggravating circumstances: Reeves had previously been convicted of a serious offense; the murder was especially cruel, heinous, or depraved; and Reeves was on release at the time of the offense. A.R.S. § 13–751(F)(2), (F)(6), (F)(7)(a). The jury could not reach a verdict on a fourth alleged aggravator—that Reeves murdered Contreras for pecuniary gain. *Id.* § 13–751(F)(5). The jury also could not reach a

verdict on the appropriate sentence, and the trial judge declared a mistrial as to the penalty phase. A second jury found the pecuniary gain aggravator and determined that Reeves should be sentenced to death for the murder. In addition to the death sentence, the trial court imposed prison sentences totaling forty-two years for the other convictions.

DISCUSSION

A. Declaration of Mistrial and Denial of Motion to Dismiss

¶ 4 Reeves contends that the trial court abused its discretion in declaring a mistrial and later denying his motion to dismiss the State's allegation that he should be sentenced to death.

¶ 5 We examine the totality of the circumstances to determine whether a trial court abused its discretion in declaring a mistrial. *See State v. Gallardo,* 225 Ariz. 560, 564 ¶ 6, 242 P.3d 159, 163 (2010); *State v. Ramirez,* 111 Ariz. 504, 506, 533 P.2d 671, 673 (1975). Although the Double Jeopardy Clause of the United States Constitution protects a defendant's "valued right to have his trial completed by a particular tribunal," *United States v. Dinitz,* 424 U.S. 600, 606, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976) (quoting *Wade v. Hunter,* 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974 (1949)), it does not prevent the declaration of a mistrial when a jury cannot reach a verdict, *see Yeager v. United States,* 557 U.S. 110, 118, 129 S.Ct. 2360, 174 L.Ed.2d 78 (2009) ("[A] jury's inability to reach a decision is the kind of 'manifest necessity' that permits the declaration of a mistrial").

¶ 6 Here, at the end of the first penalty phase trial, the jury deliberated about forty minutes and then

asked the court what would happen if it could not unanimously agree on the sentence. The court referred the jury to its instructions. The next morning, the jury stated that it was still divided and that "each juror [was] firm in their decision," and asked, "What do we do now?" The court gave an impasse instruction. About an hour later, the jurors sent the judge a "statement" declaring that they had exhausted all discussions, could not be unanimous, and had "nothing further to discuss." The judge recalled the jury, read the statement into the record, and asked the foreperson to confirm its accuracy. The trial court then declared a mistrial without objection.

¶ 7 Reeves does not dispute that the jury was unable to reach a verdict on the appropriate sentence. By declaring a mistrial under these circumstances, the trial court did not abuse its discretion or violate double jeopardy principles. *See Ramirez,* 111 Ariz. at 505–06, 533 P.2d at 672–73.

¶ 8 Nor did the trial court err by denying Reeves's motion to dismiss the death penalty allegation. Reeves argues that retrying the penalty phase violated his rights under the Double Jeopardy Clause and the Eighth Amendment.

¶ 9 Reeves's arguments are foreclosed by our recent decision in *State v. Medina,* 232 Ariz. 391, 306 P.3d 48 (2013). There, we noted that "the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an acquittal." *Id.* at 400 ¶ 20, 306 P.3d at 57 (quoting *Sattazahn v. Pennsylvania,* 537 U.S. 101, 109, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003)) (internal quotation marks omitted). Because a jury's inability to agree on a sentence does not constitute an acquittal, a penalty

phase retrial does not violate the Double Jeopardy Clause. *Id.* at 400–01 ¶¶ 20–23, 306 P.3d at 57–58. In *Medina,* we also rejected the argument that retrial of the penalty phase was disproportionate punishment under the Eighth Amendment. *Id.* at 401–02 ¶¶ 24–28, 306 P.3d at 58–59. Reeves does not identify any persuasive reason for us to reconsider or distinguish *Medina.*

¶ 10 Reeves further asserts that Arizona's capital sentencing statutes are unconstitutional because they permit two retrials after a guilty verdict. *See* A.R.S. § 13–752(J)–(K). We need not reach this argument because Reeves was subject to only one retrial. *See State v. Musser,* 194 Ariz. 31, 32 ¶ 5, 977 P.2d 131, 132 (1999) (noting that, subject to First Amendment exceptions, "a person to whom a statute may constitutionally be applied does not have standing to challenge that statute simply because it conceivably could be applied unconstitutionally in other cases"). We also decline to address Reeves's undeveloped argument that the denial of his motion to dismiss violated the double jeopardy provision in Article 2, Section 10 of the Arizona Constitution. *See State v. Bocharski,* 218 Ariz. 476, 486 ¶ 41 n. 9, 189 P.3d 403, 413 n. 9 (2008).

B. Vagueness Challenge to Death Penalty Statutes

¶ 11 Reeves contends that Arizona's death penalty statutes are unconstitutionally vague because they fail to provide sufficient guidance on the presentation, at retrial, of evidence of the aggravating circumstances found by the first penalty phase jury. Capital sentencing laws that do not adequately limit a sentencer's discretion violate due process and the

Eighth Amendment. *See Gregg v. Georgia,* 428 U.S. 153, 206–07, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *State v. Thompson,* 204 Ariz. 471, 475 ¶ 15, 65 P.3d 420, 424 (2003).

¶ 12 Under Arizona's capital sentencing scheme, "[a]t the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency." A.R.S. § 13–752(G). When a single factfinder is involved in sequential phases of a capital trial, "any evidence that was presented at any prior phase of the trial shall be deemed admitted as evidence at any subsequent phase of the trial." *Id.* § 13–752(I).

¶ 13 "Although no provision ... addresses the admissibility of aggravation-phase evidence during a second penalty phase," we recently held that "during a second penalty phase, the state and the defendant may introduce evidence pertaining to the aggravating circumstances previously found, subject to § 13–752(G)'s general relevance standard." *State v. Prince,* 226 Ariz. 516, 526 ¶¶ 15, 18, 250 P.3d 1145, 1155 (2011). We thus concluded that the "the statutes governing the second penalty phase provide sufficient guidance" to withstand a vagueness challenge. *Id.* at 527 ¶ 20, 250 P.3d at 1156. We accordingly reject Reeves's argument.

C. Exclusion of Evidence of Likelihood of Release

¶ 14 Before retrial of the penalty phase, Reeves moved to preclude the State from presenting any evidence of his future dangerousness or, alternatively, to permit him to present evidence that he likely would

not be released if he received a life sentence. Denying Reeves's motion, the trial court instead granted the State's motion to preclude evidence about the likelihood of release. (The State notes that it did not present evidence at the retrial regarding Reeves's future dangerousness.)

¶ 15 Reeves's arguments are foreclosed by our recent decision in *State v. Benson,* which held that a trial court did not abuse its discretion by excluding "evidence of the current mechanism for obtaining parole and past actions by the Board of Executive Clemency as a means of predicting what might happen ... in twenty-five years." 232 Ariz. 452, 466 ¶ 59, 307 P.3d 19, 33 (2013).

D. No "Presumption of Death" in Death Penalty Statutes

¶ 16 Reeves argues that A.R.S. §§ 13–751(C) and (F) create an unconstitutional presumption of death. The Eighth and Fourteenth Amendments require that the sentencer in a capital case be allowed to consider any relevant mitigating evidence. *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Further, the Eighth Amendment protects a defendant's right to an individualized sentencing determination. *Eddings v. Oklahoma,* 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

¶ 17 Reeves argues that A.R.S. § 13–751(C), which requires the defendant to prove mitigating circumstances by a preponderance of the evidence, improperly precludes consideration of relevant mitigating evidence that is "not mitigating enough." The statute also provides that the jury "shall consider as mitigating circumstances any factors proffered by

the defendant or the state that are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense." A.R.S. § 13–751(G); *State v. Speer,* 221 Ariz. 449, 461 ¶ 61, 212 P.3d 787, 799 (2009).

¶ 18 Under § 13–751(C), a defendant must prove mitigating circumstances by a preponderance of the evidence. But "jurors do not have to agree unanimously that a mitigating circumstance has been proven to exist," and "[e]ach juror may consider any mitigating circumstance found by that juror in determining the appropriate penalty." *Id.* These provisions do not prevent jurors from considering particular types of mitigation evidence, and "it does not follow from *Lockett* and its progeny that a State is precluded from specifying how mitigating circumstances are to be proved." *Walton v. Arizona,* 497 U.S. 639, 649, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), *overruled on other grounds by Ring v. Arizona,* 536 U.S. 584, 608–09, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). We therefore reject Reeves's argument that § 13–751(C) improperly limits any juror's consideration of mitigating evidence. *See Walton,* 497 U.S. at 649–51, 110 S.Ct. 3047 (rejecting similar argument); *id.* at 674, 110 S.Ct. 3047 (Scalia, J., concurring in part and concurring in the judgment).

¶ 19 Reeves also argues that Arizona law "unconstitutionally presumes that death is the appropriate default sentence once the jury finds one aggravating factor." But as he acknowledges, the Court has previously rejected similar arguments.

> [Arizona's] statutory scheme contains no presumption of death. Neither party bears the burden of persuading the jury that the mitigation is sufficiently substantial to call for leniency; that determination "is not a fact question to be decided based on the weight of the evidence, but rather is a sentencing decision to be made by each juror based upon the juror's assessment of the quality and significance of the mitigating evidence that the juror has found to exist."

Speer, 221 Ariz. at 461 ¶ 65, 212 P.3d at 799 (*quoting State ex rel. Thomas v. Granville (Baldwin),* 211 Ariz. 468, 473 ¶ 21, 123 P.3d 662, 667 (2005)). We decline to revisit those decisions.

E. Abuse of Discretion Review

¶ 20 Because Reeves murdered Contreras after August 1, 2002, we review the jury's imposition of a death sentence for abuse of discretion. A.R.S. § 13–756(A). A finding of an aggravating circumstance is not an abuse of discretion if there is reasonable evidence in the record to sustain it. *State v. Manuel,* 229 Ariz. 1, 9 ¶ 42, 270 P.3d 828, 836 (2011). The jury's determination that death is the appropriate sentence will not be reversed "so long as any reasonable jury could have concluded that the mitigation established by the defendant was not sufficiently substantial to call for leniency." *Id.* (quoting *State v. Morris,* 215 Ariz. 324, 341 ¶ 81, 160 P.3d at 203, 220 (2007)).

1. Aggravating Circumstances

¶ 21 Reeves does not contest the sufficiency of the evidence to support three of the aggravators found by the jury—(F)(2) (previous conviction of a serious

offense), (F)(5) (pecuniary gain), and (F)(7)(a) (murder committed while on release). Because the record supports these findings, the jury did not abuse its discretion.

¶ 22 At oral argument in this Court, Reeves's counsel questioned whether sufficient evidence supported a finding of the (F)(6) aggravating factor based on a determination that the murder was especially heinous or depraved. The State argued that this aggravator was established because Contreras was helpless, the murder was senseless, and Reeves relished the murder. *See, e.g., State v. Greene,* 192 Ariz. 431, 439 ¶ 33, 967 P.2d 106, 114 (1998) (discussing circumstances in which murder is especially heinous or depraved). It is unnecessary, however, for us to assess the sufficiency of the evidence to support a finding that the murder was especially heinous or depraved because the jury returned a special verdict finding the murder was also committed in an especially cruel manner. *See Benson,* 232 Ariz. at 464 ¶ 48, 307 P.3d at 31 (recognizing that (F)(6) aggravating circumstance may be based on a finding that murder was especially cruel or that murder was especially heinous or depraved). To prove that a murder was especially cruel, the State had to prove that Contreras experienced physical or mental pain and that Reeves knew or should have known that she would suffer. *See State v. Boyston,* 231 Ariz. 539, 554 ¶ 77, 298 P.3d 887, 902 (2013). The record amply supports the jury's finding that the murder was especially cruel.

2. Mitigating Circumstances

¶ 23 "The defendant must prove the existence of the mitigating circumstances by a preponderance of the

evidence," but "the jurors do not have to agree unanimously that a mitigating circumstance has been proven to exist." A.R.S. § 13–751(C).

¶ 24 During the penalty phase, Reeves allocuted and apologized for the pain he had caused Contreras and her family. As both a statutory and non-statutory mitigating circumstance, he presented evidence in support of his claim that he was intoxicated from drugs and alcohol at the time of the murder. As additional mitigating factors, Reeves offered evidence to support allegations that (1) he suffers from a longstanding substance abuse disorder, (2) he has a co-occurring mental disorder, (3) his conditions are treatable, (4) his parents abused alcohol, (5) he was emotionally abused and neglected as a child, (6) he had made positive contributions to the community through his previous military service and work as an electrician, (7) he behaved well while incarcerated, (8) he was remorseful, and (9) he loves and is loved by his family. In rebuttal, the State offered evidence to dispute many of the claimed mitigating circumstances, including Reeves's alleged intoxication, mental condition, and remorse, and it urged the jurors to give little weight to any mitigation.

3. Propriety of Death Sentence

¶ 25 Given the four aggravating circumstances and the mitigation presented, a reasonable juror could conclude that the mitigating circumstances were not sufficiently substantial to call for leniency.

F. Additional Issues

¶ 26 Stating that he seeks to preserve certain issues for federal review, Reeves lists seventeen other constitutional claims and previous decisions rejecting

them. We decline to revisit these claims. Vice Chief Justice BALES authored the opinion of the Court,

CONCLUSION

¶ 27 We affirm Reeve's convictions and sentences.

Vice Chief Justice BALES authored the opinion of the Court, in which Chief Justice BERCH, Justice PELANDER, Justice BRUTINEL, and Justice TIMMER, joined.

APPENDIX M

SUPREME COURT
STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

Arizona State Courts Building
1501 West Washington Street, Suite 402
Phoenix, Arizona 85007
Telephone: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

STATE OF ARIZONA

v.

JONATHAN IAN BURNS

Arizona Supreme Court No. CR-19-0261-PC

Maricopa County Superior Court
No. CR2007-106833-001

June 30, 2021

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 30, 2021, in regard to the above-referenced cause:

ORDERED: Amendment to Rule 32.9(c) Petition for Review = DENIED.

FURTHER ORDERED: Petition for Review of Order Dismissing Petition for Post-Conviction Relief = DENIED.

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

Tracie K. Lindeman, Clerk

TO:

Lacey Stover Gard

Jason Easterday

Garrett W Simpson

Vikki M Liles

Johnathan Ian Burns, ADOC 144740, Arizona State Prison, Florence Central Unit

Dale A Baich

Amy Armstrong

Michele Lawson

kj

APPENDIX N

SUPREME COURT
STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

Arizona State Courts Building
1501 West Washington Street, Suite 402
Phoenix, Arizona 85007
Telephone: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

STATE OF ARIZONA

v.

STEVE BOGGS

Arizona Supreme Court No. CR-18-0580-PC

Maricopa County Superior Court
No. CR2002-009759-001

June 30, 2021

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 30, 2021, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

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

Tracie K. Lindeman, Clerk

TO:

Lacey Stover Gard

Jeffrey L Sparks

Tamara D Brooks-Primera

Jamie Sparks

Steve Alan Boggs, ADOC 195143, Arizona State Prison, Florence Central Unit

Dale A Baich

Amy Armstrong

Michele Lawson

kj

APPENDIX O

SUPREME COURT
STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

Arizona State Courts Building
1501 West Washington Street, Suite 402
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Telephone: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

STATE OF ARIZONA

v.

RUBEN GARZA

Arizona Supreme Court No. CR-18-0207-PC

Maricopa County Superior Court
No. CR 1999-017624

July 30, 2021

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on July 30, 2021, in regard to the above-referenced cause:

ORDERED: Petition for Review (Capital Case) = DENIED.

Tracie K. Lindeman, Clerk

TO:

Lacey Stover Gard

Emily Skinner

Amy Armstrong

Ruben Garza, ADOC 190487, Arizona State Prison, Florence – Eyman Complex-Browning Unit (SMU II)

Dale A Baich

Michele Lawson

ga

APPENDIX P

SUPREME COURT
STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

Arizona State Courts Building
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Phoenix, Arizona 85007
Telephone: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

STATE OF ARIZONA

v.

FABIO EVELIO GOMEZ

Arizona Supreme Court No. CR-20-0354-PC

Maricopa County Superior Court
No. CR2000-090114

July 30, 2021

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on July 30, 2021, in regard to the above-referenced cause:

ORDERED: Fabio Evelio Gomez's Petition for Review = DENIED.

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

Tracie K. Lindeman, Clerk

TO:
Lacey Stover Gard

Ginger Jarvis

David Alan Darby

Fabio Evelio Gomez, ADOC 177075, Arizona State Prison, Florence – Eyman Complex-Browning Unit (SMU II)

Dale A Baich

Amy Armstrong

Michele Lawson

ga

APPENDIX Q

SUPREME COURT
STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

Arizona State Courts Building
1501 West Washington Street, Suite 402
Phoenix, Arizona 85007
Telephone: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

STATE OF ARIZONA

v.

STEVEN RAY NEWELL

Arizona Supreme Court No. CR-18-0428-PC

Maricopa County Superior Court
No. CR2001-009124

August 30, 2021

AMENDED

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on August 30, 2021, in regard to the above-referenced cause:

ORDERED: Petition for Review (Capital Case) = DENIED.

Justice Montgomery did not participate in the determination of this matter.

Tracie K. Lindeman, Clerk

TO:

Robert E Prather

Amy Armstrong

Kirsty Davis

Steven Ray Newell, ADOC 183736, Arizona State Prison, Florence – Central Unit

Dale A Baich

Michele Lawson

ga

APPENDIX R

SUPREME COURT
STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

Arizona State Courts Building
1501 West Washington Street, Suite 402
Phoenix, Arizona 85007
Telephone: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

STATE OF ARIZONA

v.

STEPHEN DOUGLAS REEVES

Arizona Supreme Court No. CR-19-0182-PC

Maricopa County Superior Court
No. CR2007-135527-001

June 30, 2021

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 30, 2021, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

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

Tracie K. Lindeman, Clerk

TO:

Lacey Stover Gard

Sarah E Heckathorne

Gilbert H Levy

Stephen Douglas Reeves, ADOC 263041, Arizona State Prison, Florence – Central Unit

Dale A Baich

Amy Armstrong

Michele Lawson

kj