No. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD JAMES ROSE,

Petitioner,

-v-

STATE OF ARIZONA,

Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

JOHN R. MILLS
Counsel of Record
GENEVIE GOLD
PHILLIPS BLACK, INC.
1721 Broadway, Suite 201
Oakland, CA 94612
(888) 532-0897
j.mills@phillipsblack.org

COUNSEL FOR PETITIONER

No. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD JAMES ROSE,

Petitioner,

-v-

STATE OF ARIZONA,

Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

TO THE HONORABLE ELENA KAGAN, Associate Justice of the Supreme Court of the United States, and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

COMES NOW the Petitioner, Edward James Rose, by and through undersigned counsel, and pursuant to 28 U.S.C. § 1257(a) and Supreme Court Rule 13.5, respectfully requests an extension of time of 30 days within which to file his Petition for Writ of Certiorari to the Supreme Court of Arizona. The decisions he seeks to have reviewed are the decision of the Superior Court of Arizona, Maricopa County, dated August 14, 2020, and the order of the Supreme Court of Arizona denying review, dated November 2, 2021.

The case concerns Mr. Rose's death sentence and whether his conviction complied with the demands of the Sixth, Eighth, and Fourteenth Amendments.

On December 28, 2021, undersigned counsel Mills reached out to Counsel for the State of Arizona, Laura Chiasson. That day, she indicated that the State does not object to the request for an extension in this case.

Mr. Rose's time to petition for a Writ of Certiorari in this Court expires on Monday, January 31, 2022 and requests that this Court extend time to file his petition for thirty days, until Wednesday, March 2, 2022. Petitioner shows the following good cause in support of this request:

1. Counsel for Mr. Rose is concurrently preparing briefing and oral argument related to sentencing-phase issues in his case as requested by the Arizona Superior Court. These issues are factually complex and counsel has been invited to provide comprehensive briefing on those issues, which is due on or before January 18, 2022. Oral argument on those issues is currently set for two hours on February 4, 2022. The demands of this briefing and argument are in direct conflict with petition preparation demands, and additional time, therefore, is required to competently present the petition.

2. Additionally, other matters make competent preparation of the petition impossible under the circumstances. During the pendency of the petition, Mr. Mills, primary counsel for Mr. Rose, has filings due in multiple other death penalty cases, including a petition for writ of certiorari due on the same day the petition is currently due in this case, January 31, 2022. Additionally, he is responsible for the management of the day-to-day operations of his non-profit law practice. Finally, he has had increased time obligations as a result of COVID-related interruptions in child care, with his child's preschool having recently switched to half-time in light of staffing issues. In

combination, these obligations have made it impossible to competently complete the petition by the current due date.

3. Accordingly, counsel respectfully requests that this Court grant an extension of thirty days.

WHEREFORE, undersigned counsel respectfully requests an extension of time of thirty days within which to file the Petition for Writ of Certiorari, up to and including Wednesday, March 2, 2022.

Dated: This the 4th day of January 2022.

Respectfully submitted,

/s/John R. Mills
JOHN R. MILLS
Counsel of Record
GENEVIE GOLD
PHILLIPS BLACK, INC.
1721 Broadway, Suite 201
Oakland, CA 94612
j.mills@phillipsblack.org
888-532-0897
COUNSEL FOR PETITIONER

INDEX TO APPENDICIES

APPENDIX A

Clerk of the Superior Court
*** Electronically Filed ***
08/17/2020 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2007-149013-002 DT

08/14/2020

HONORABLE JOHN R. HANNAH JR

CLERK OF THE COURT
R. Vasquez
Deputy

STATE OF ARIZONA

LAURA PATRICE CHIASSON

v.

EDWARD JAMES ROSE (002)

GENEVIE GOLD
JOHN ROBERT MILLS
JESSICA ANN GATTUSO

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

ORDER GRANTING RELIEF AS TO PENALTY

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

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

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

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

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

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

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

Procedural Background and Facts

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

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

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

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

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

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

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

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

Claims Relating to the Guilty Plea and the Aggravation Phase

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

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

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

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

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

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

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

II. Claim 4.1- Ineffective Assistance During Jury Selection

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

A. Failure to strike Juror J.Q.

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

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

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

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

B. Failure to strike jurors with law enforcement connections

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

C. Failure to move to strike seated jurors for cause

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

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

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

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

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

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

D. Failure to challenge biased prospective jurors for cause

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

E. Inadequate voir dire examination

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

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

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

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

F. Stipulation by the parties to removal of prospective jurors

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

G. Failure to challenge the prosecutor's peremptory challenges

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Penalty-Phase Parole Eligibility Jury Instruction (Claim Three)

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

I. The Simmons Error at Rose's Trial

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

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

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

A. The jury's sentencing options and the instructions

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

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

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

Docket No. 407 at 3, 5.

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

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

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

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

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

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

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

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

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

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

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

B. The issue of future dangerousness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The application of Rule 32.1(g)

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

A. Change in the law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Retroactive applicability of Lynch II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Harmless error

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

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

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

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

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

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

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

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

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

Based on the foregoing,

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

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

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

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

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

/ s / John R. Hannah

THE HON. JOHN HANNAH
JUDGE OF THE SUPERIOR COURT

APPENDIX B

Supreme Court

STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

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

TRACIE K. LINDEMAN
Clerk of the Court

November 3, 2021

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

GREETINGS:

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

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

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

FURTHER ORDERED: Cross-Petition for Review = DENIED.

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

Tracie K. Lindeman, Clerk

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