No. 22–5073

IN THE
SUPREME COURT OF THE UNITED STATES

LEROY MCGILL,
PETITIONER,
-vs-

DAVID SHINN, et al.,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO BRIEF IN OPPOSITION

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1 *:2* IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF NAVAJO

2

STATE OF ARIZONA,)

4)

)

5 Plaintiff,) CASE NO.

)

6)

vs.) CR 2001-0338

7)

)

8 MARK E. ALLRED, SCOTT B.)
BRIAN, AND NICHOLAS)

9 SIZEMORE,)

)

10)

Defendants.)

REPORTER'S TRANSCRIPT OF

13 PROCEEDINGS

15 Proceedings before the Honorable
16 Dale P. Nielson, Judge of the Superior Court of Navajo
17 County, Holbrook, Arizona on July 24, 2002, at about the
18 hour of 1:31 p.m.

REPORTED BY:
JOSIE ROPER, RPR, CSR #50511

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1 P R O C E E D I N G S
2
3
4 THE COURT: This is CR 2001-338, State
5 versus Allred, Brian, and Sizemore. The record will
6 reflect the presence of Joe Duarte on behalf of the State
7 Attorney General's Office.
8 MR. McGILLICUDDY: Good afternoon. Pat
9 McGillicuddy for Mr. Brian, who is the second of the
10 three defendants in the jury box, and I think he wants to
11 stay there, correct, Scott? And we're ready.
12 THE COURT: Mr. Phalen and Mr. Gorman
13 present on behalf of Mr. Sizemore. Mr. Sizemore, do you
14 want to sit with your attorney?
15 DEFENDANT SIZEMORE: Yes.
16 THE COURT: You may do that.
17 MR. PHALEN: Thank you, your Honor.
18 THE COURT: And Conrad Baran and Emery
19 La Barge for Mark Allred, who is present.
20 MR. BARAN: Preliminarily, I wonder if it
21 is okay if Mr. Allred's hand was free so he could write.
22 If it's a problem, that's fine, but...
23 THE COURT: I don't have a problem with
24 the one hand being freed up so you can write.
25 I should probably figure out where we want

1 to proceed. I don't know if counsel have met and
2 discussed or if there's a agreement on what motions you
3 want to be heard today or not.
4 MR. PHALEN: I prepared a list of motions
5 just from my review of the file, and I e-mailed to all
6 counsel.
7 THE COURT: Okay.
8 MR. PHALEN: But I didn't e-mail to you.
9 If I could approach, this is my list, and I think Mr.
10 Gorman has a couple others related specifically to
11 experts. So there would be 12. That's just my
12 suggestion.
13 THE COURT: Okay. You had wanted to get
14 Miss Pineda on the phone for an issue?
15 MR. DUARTE: If I may, your Honor, there
16 are a couple of things that have occurred, and I wanted
17 to set the record -- to make it clear why we're
18 proceeding, addressing some of these motions, perhaps as
19 a priority.
20 THE COURT: Okay.
21 MR. DUARTE: With the Court's permission,
22 we were poised to begin adducing evidence in the panoply
23 of defense motions which are termed as B-yard motions,
24 which are alleging overreaching by the Department of
25 Corrections and interference with different aspects of

1 the attorney/client relationship and other
2 unconstitutionally based conditions. We have concluded

11 at my instruction. I would not be able to address the
12 videotape, because only -- at no point in time have I
13 received any motions detailing that. I have received a
14 letter from Mr. Phalen requesting that. I have
15 respectfully declined, but I have no motions with any
16 case law that he may be citing to be able to contradict
17 at this time.
18 THE COURT: What was the one you could
19 address?
20 MS. PINEDA: There's a motion regarding
21 questioning of Sergeant Peck, where I instructed Sergeant
22 Peck not to answer what I believed to be the ultimate
23 issue before the Court.
24 THE COURT: All right. What would that
25 be? What is that titled, that motion?

1 MR. PHALEN: It's a motion to compel
2 discovery and for evidentiary hearing.
3 THE COURT: All right. That's number
4 three.
5 MR. PHALEN: Right.
6 THE COURT: All right. There's a motion,
7 Mr. Brian's motion for an order releasing DOC files to
8 his attorneys. Mr. McGillicuddy indicated that he
9 thought that was being worked on.
10 MS. PINEDA: That's correct. I am
11 currently working on that for him.
12 THE COURT: All right. Let's take up,
13 then, Mr. Sizemore's motion to compel discovery and for
14 an evidentiary hearing regarding Sergeant Peck's refusal
15 to answer whether he will cease interrogating Mr.
16 Sizemore. That is Mr. Phalen and Mr. Gorman.
17 MR. McGILLICUDDY: Could I speak to Mr.
18 Gorman and Mr. Phalen for just a moment, Judge? It might
19 safe a little time.
20 THE COURT: Sure.
21 MR. McGILLICUDDY: May we go outside?
22 THE COURT: Sure.
23 MR. McGILLICUDDY: Your Honor, Mr. Gorman
24 and Phalen and Branscomb and I and our clients would
25 request a 15- to 20-minute recess. A matter has come up

1 that may affect the outcome of the case, and we will need
2 to discuss with our clients in confidence, but maybe
3 perhaps together.
4 THE COURT: Do you want to meet together
5 as counsel first.
6 MR. McGILLICUDDY: Pardon me?
7 THE COURT: Do you want to meet with your
8 clients or counsel?
9 MR. GORMAN: Counsel briefly. We'd like
10 to meet, but then, yeah, probably with both clients,
11 also.
12 MR. GORMAN: We met in this jury room
13 earlier.
14 THE COURT: However you can work it out

15 with the deputies. Just let me know when you're ready.
16 MR. McGILLICUDDY: Let's all counsel,
17 we'll meet, and then we can meet individually with our
18 clients. That came as a surprise, Judge.
19 (A brief recess was taken.)
20 THE COURT: Back on the record in CR
21 2001-338. All parties are present.
22 MR. GORMAN: We -- your Honor, may I
23 speak? Tom Gorman on behalf of Mr. Sizemore. We're
24 ready to enter a change of plea to the indictment. We're
25 ready to proceed right now if the Court's ready.

1 THE COURT: I'm ready.
2 MR. DUARTE: If I may, your Honor, your
3 Honor, I don't oppose the change of plea, but I do
4 request on behalf of the victim a reasonable time to
5 contact her. She lives in Tucson. I would ask you to
6 schedule this perhaps for Monday or Tuesday of next week.
7 I'll make it my priority, but I do need to observe the
8 victim's rights requirement that I have contact with her.
9 THE COURT: I didn't think the victim's
10 rights applied to inmates.
11 MR. GORMAN: Could I interject something?
12 MR. DUARTE: Please.
13 THE COURT: That was Mr. Brown's position
14 when I asked him about that a long time ago.
15 MR. GORMAN: This is a different point. I
16 understand Mr. Duarte's concern, however, that
17 requirement, I believe, and we can check by looking at a
18 statute, only applies if the State makes an offer of a
19 plea agreement, then they would have to contact the
20 victim. They have not made an offer. We're pleading to
21 the indictment, so there's no notification requirement
22 because there's no State offer.
23 Secondly, I assume that the victims were
24 notified of this proceeding, this Court date, so -- but,
25 in any event, we're prepared to go forward today, and,

1 Judge, I cannot in any way assure that there will be a
2 change of plea if it goes past today.
3 THE COURT: Thank you. Mr. Gorman, Mr.
4 McGillicuddy?
5 MR. McGILLICUDDY: Yes, sir.
6 THE COURT: Where are you at with Mr.
7 Brian?
8 MR. McGILLICUDDY: I've been advised by
9 Mr. Brian that following the proposed change of plea,
10 that he will enter a change of plea, as well.
11 THE COURT: Thank you. Mr. Baran on
12 behalf of Mr. Allred?
13 MR. BARAN: We won't have a change of plea
14 proceedings; we will not.
15 THE COURT: If you look at the definition
16 of victim that's in 13-4401, Paragraph 19, there's a
17 section for a person in custody.
18 MR. DUARTE: Excuse me, Subsection 19.

19 Your Honor, I do read that. Your Honor, let -- if I may
20 just have a moment.
21 THE COURT: Sure.
22 MR. DUARTE: Your Honor, not to try the
23 Court's patience, but in view of the fact that this isn't
24 -- the rarest, counsel may actually be right about this.
25 As a moral imperative, I do have the victim's next of

1 kin's phone number. If I can just call her and tell her
2 what's transpiring, I will be back in the courtroom in,
3 literally, five minutes.
4 MR. GORMAN: I have no objection to that.
5 MR. McGILLICUDDY: No objection.
6 THE COURT: We'll take a brief recess for
7 you to do that.
8 (Whereupon, a brief recess was taken,
9 after which, the following proceedings
10 occurred.)
11 THE COURT: Mr. Baran, are we going to
12 need to go forward? Well, I better wait for Mr. Duarte
13 before I ask you that question.
14 THE COURT: Back on the record in CR
15 2001-338; all parties are present. Mr. Gorman indicated
16 your client is ready to enter a plea. Mr. Duarte, what's
17 your position on this?
18 MR. DUARTE: First of all, I thank the
19 Court for its professionalism. I did contact the
20 victim's next of kin. She is aware of the situation and
21 does not have any other observations to impart to the
22 Court at this time. As far as I'm concerned, your Honor,
23 your Honor has cited to the appropriate chapter and verse
24 in the criminal code regarding the definition of the word
25 victim. The only proviso I have, I'm not in a position

1 to waive it right now. If there is an authority that is
2 interpreted slightly differently, as much as the Miranda
3 warnings, the definition of in custody is a bit different
4 when you're in an institution or penal facility. There
5 may be some authority out there which I am not presently
6 aware of that requires notification of the victim or the
7 victim's next of kin, since he's passed away. If that
8 happens, I will brief that immediately, but if not, I
9 have nothing else.
10 THE COURT: Do you have any objection to
11 the State going forward with the plea?
12 MR. DUARTE: I would note my objection,
13 your Honor, in the absence of the opportunity to
14 determine specifically whether the decedent had forfeited
15 his rights simply by virtue of his status as an inmate.
16 THE COURT: Thank you. Your objection
17 goes to the question of victims rights, notification?
18 MR. DUARTE: Yes, your Honor, that's all.
19 Thank you.
20 THE COURT: Thank you. All right. Are we
21 ready to go forward, then?
22 MR. GORMAN: Where did you want us to

23 stand.
24 THE COURT: Right there is fine.
25 Mr. Sizemore, would you please state your

1 full name and date of birth.
2 THE DEFENDANT: Nicholas Sizemore,
3 10/4/79.
4 THE COURT: Mr. Sizemore, do you read and
5 understand the English language?
6 THE DEFENDANT: Yes, I do.
7 THE COURT: Have you had any drugs,
8 alcohol, or medication in the last 24 hours?
9 THE DEFENDANT: No, I have not.
10 THE COURT: You have had a chance to talk
11 with your attorneys about changing your plea from not
12 guilty to guilty?
13 THE DEFENDANT: Yes, I have.
14 THE COURT: And your counsel have
15 discussed with you all of the ramifications that surround
16 the change of plea from not guilty to guilty?
17 THE DEFENDANT: Yes, they have.
18 THE COURT: Okay. We don't have a written
19 plea agreement; my understanding is that you simply want
20 to change your plea to the indictment from not guilty to
21 guilty, is that correct?
22 THE DEFENDANT: Yes, I do.
23 THE COURT: Okay. Did I ask if you had
24 any drugs, alcohol, or medication in the last 24 hours?
25 THE DEFENDANT: Yes, you did.

1 THE COURT: Okay. I need to get File A.
2 Has anyone forced or threatened you to
3 make this decision to change your plea?
4 THE DEFENDANT: No, they haven't.
5 THE COURT: Have they promised you
6 anything to get you to change your plea?
7 THE DEFENDANT: No, they haven't.
8 THE COURT: You are charged in the
9 indictment with first degree murder, a class 1 felony. I
10 guess this is where I'm going to have a question.
11 Counsel, obviously, the way the indictment was charged, I
12 was given a possible seeking of the death sentence. The
13 decision has come down declaring Arizona's statute
14 unconstitutional. I have to advise Mr. Sizemore of the
15 range of sentence, possible penalty.
16 MR. GORMAN: Correct.
17 THE COURT: So I guess I'd like to hear
18 from counsel.
19 MR. GORMAN: I can address that.
20 THE COURT: What is your position on the
21 range of sentence?
22 MR. GORMAN: I suspect the Court would
23 agree that there's no constitutional death penalty
24 statute presently in Arizona. We certainly have advised
25 Mr. Sizemore there is not. Mr. Sizemore has made his

1 decision to plead guilty with the understanding that his
2 guilty plea and the acceptance of the plea by the Court
3 will result in a penalty of life imprisonment either
4 natural or 25 calendar years patrol eligible; that is
5 all. He is basing his decision on his understanding that
6 no death penalty statute presently applies to him, nor
7 because there is no death penalty statute in Arizona nor
8 will any death penalty statute apply to him should he be
9 sentenced in 60, 90, 120 days; that the only possible
10 penalty he is facing is natural life or 25 calendar
11 years. And that's his understanding, and that is, in
12 large part, the material reason he is pleading guilty.
13 THE COURT: Thank you.
14 MR. GORMAN: And, Judge, if I could also
15 add, it's speculative for any other position at this
16 point, because there's no legislation passed, and et
17 cetera, et cetera.
18 THE COURT: Mr. Duarte, what's your
19 position?
20 MR. DUARTE: There's no way to soften the
21 full implication of Ring's decision, that being that
22 there is not presently a sentence that can implement the
23 taking of a life here in Arizona. So this point, we have
24 a brief that we normally submit that would address
25 categorically the situation that's before the Court, but

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1 that would be -- I don't want to use the word
2 speculative, but that is something that I cannot urge at
3 this particular point in time, because unless there's
4 something that I can put before the Court that is
5 precedent that is on the books or that is case law and
6 has been handed down even and a half emergency posture, I
7 cannot urge a position where there's a void. So at this
8 point, I can't add a whole lot to what counsel has said.
9 Obviously, we are suggesting that I'm sure the
10 legislature will work that out, but today as we stand in
11 court, there does not appear to be a viable death penalty
12 sentence to which Mr. Sizemore would be exposed.
13 Thank you.
14 THE COURT: Mr. Sizemore, the range of
15 sentence for this plea is either natural life, which
16 means that you would not be eligible for parole for any
17 reason, or you could not be released until having
18 served 25 calendar years; so those are the possible.
19 MR. GORMAN: And ,Judge, just so the Court
20 can add, there is a possibly of either concurrent or
21 consecutive sentence on the prison term Mr. Sizemore is
22 presently serving.
23 THE COURT: That is correct. They could
24 also be consecutive. I don't know what your situation
25 is.

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1 MR. GORMAN: Consecutive or concurrent.
2 THE COURT: You understand that?
3 THE DEFENDANT: Yes, I do.
4 THE COURT: These are 25 years or natural
5 life, those are day-for-day sentences. In other words,
6 there is no possibility for parole; you understand that?
7 THE DEFENDANT: Yes, I do.
8 THE COURT: There is a possibility there
9 could be restitution. I don't know if there will be a
10 claim for that, but you understand there is possibility
11 that restitution may be required?
12 THE DEFENDANT: Yes.
13 THE COURT: You understand these
14 sentencing possibilities, then?
15 THE DEFENDANT: Yes.
16 THE COURT: Okay. I want to make sure I
17 -- just so that I cover everything, I know that you're in
18 prison now, that pleading guilty to this offense could
19 possibly have ramifications on your classification status
20 in prison; you understand that?
21 THE DEFENDANT: Yes.
22 THE COURT: You understand once I accept
23 your plea, you cannot change your mind, withdraw from the
24 agreement, get out of it later unless you can show me
25 that it's necessary to correct a manifest injustice?

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1 THE DEFENDANT: Yes, I do.
2 THE COURT: You also understand that if I
3 do not agree with this, I can reject it -- actually, I
4 don't think I could reject it. Well, I could reject the
5 plea if I didn't feel it was in the interest of justice.
6 MR. GORMAN: Judge, I would agree if it
7 was a plea agreement. If it was a plea agreement that
8 the Court had to approve, but in this case when an
9 individual is pleading to the indictment, I believe he
10 has a constitutional right to do so under the Fifth
11 and 14th amendment, and that the Court could not force
12 him to go to a jury trial.
13 THE COURT: All right. Mr. Sizemore, you
14 have the right to have a trial by jury on this charge, to
15 be represented by two attorneys at that trial. You have
16 the right to confront and cross-examine witnesses at that
17 trial, the right to compel the attendance of witnesses,
18 the right to speak if you choose, but if you choose not
19 to, no one can force you to speak, and that cannot be
20 used against you. You are presumed innocent; could not
21 be found guilty unless by unanimous jury beyond a
22 reasonable doubt; you understand that?
23 THE DEFENDANT: Yes.
24 THE COURT: You also have the right to
25 appeal to a higher court. By pleading guilty, you give

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1 up your right to appeal to a higher court; you understand
2 that?
3 THE DEFENDANT: Yes, I do.
4 THE COURT: Your only means of review

5 would be for the filing of a petition for post conviction
6 relief, which would have to be filed with this Court
7 within 90 days of your sentence; do you understand that?
8 THE DEFENDANT: Yes.
9 THE COURT: You give up these rights by
10 pleading guilty. Is that what you want to do?
11 THE DEFENDANT: Yes.
12 THE COURT: All right. You are charged
13 with --
14 MR. GORMAN: Judge, if the court would
15 like --
16 THE COURT: Are you charged with first
17 degree murder, a Class I felony, in that on November 13,
18 2000, acting together or in concert, intending or knowing
19 your conduct would cause death, you caused the death of
20 Carlos Ceniceros with premeditation, a violation of
21 Arizona Revised Statute, Section 13-1105, 1101. Is one
22 of these the Ring?
23 MR. GORMAN: No.
24 THE COURT: 303, 302, 301, 701, and 801,
25 Class I felony. What is your plea?

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1 THE DEFENDANT: Guilty.
2 THE COURT: Factual basis?
3 MR. GORMAN: Well, Judge, the specific
4 factual basis for Mr. Sizemore is that on November 13th
5 of 2000, in Navajo County, with the knowledge that he
6 would kill another human being, Mr. Sizemore stabbed
7 Carlos Ceniceros with a homemade knife known in prison as
8 a shank, and Mr. Ceniceros died as a result of stab
9 wounds on that same date, November 13th, 2000.
10 THE COURT: Do you have anything to add to
11 the factual basis, Mr. Duarte?
12 MR. DUARTE: No, I do not, your Honor.
13 THE COURT: Have I missed anything,
14 counsel?
15 MR. GORMAN: No, your Honor, not that I'm
16 aware of. And, Judge, because this is not a plea
17 agreement, and because he has pled to the charge, we'd
18 ask the Court to accept the plea, which I believe the
19 Court is required to by law, but we'd ask that the court
20 do so, and then we can discuss sentencing.
21 THE COURT: I find the plea is knowingly,
22 intelligently, and voluntarily made; no force, threats,
23 or promises have induced the plea. Your position on
24 acceptance of the plea, Mr. Duarte?
25 MR. DUARTE: I'd urge the Court to defer

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1 acceptance, your Honor. Forgive me, I don't mean to
2 interrupt. Did your Honor include 13-703 in the
3 sentencing?
4 MR. PHALEN: I don't think that was in the
5 indictment.
6 MR. DUARTE: So he pled straight off the
7 indictment? Very well, your Honor.
8 THE COURT: Your reasoning for deferring

9 the plea; do you have any?
10 MR. DUARTE: In case something happens
11 between now and the time of sentencing, other than that,
12 I don't have anything else. Thank you.
13 MR. GORMAN: And, Judge, I don't believe
14 there's any rule, perhaps the Court will find one, but I
15 don't believe there's any rule that would require it or
16 suggest that it should be deferred, and once again, he
17 pled to the charge, so I see no basis to defer
18 acceptance.
19 THE COURT: Let me just look at this real
20 fast. I think I agree with you on that. If I can find
21 my rule. Anybody know what rule that is? There it is.
22 Oh, here it is. All right. Having reviewed Rule 17, it
23 appears to me based upon my reading that I will accept
24 the plea and enter the plea of record and order a
25 presentence report to be prepared.

-24-

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1 MR. GORMAN: Judge, could I make a
2 suggestion that you have the presentence come in, not
3 require Mr. Sizemore to appear, because I don't believe
4 that we would do the sentencing when the presentence came
5 in. We would want to consult with Mr. Phalen, get the
6 presentence and review it, and perhaps do it even
7 telephonically, and tell the court how much time we need
8 to propose for a sentencing. And although Mr. Sizemore
9 is not eligible for the death penalty, the sentencing
10 still is very important to him. In the sentence that
11 he's going to be asking the court for a concurrent
12 sentence and also the 25 calendar years, so we want to
13 prepare for it. To avoid all of us coming out here and
14 bringing him up from the prison, if you could either have
15 it sent to us or if we could just appear by telephone
16 when the presentence comes in. After that, we're going to
17 need time to schedule everything.
18 THE COURT: Is Mr. Sizemore going to
19 present himself to an interview?
20 MR. GORMAN: With the presence of counsel.
21 That would have to be arranged.
22 THE COURT: I don't know if the court's
23 staff would be driving to prison or they would be
24 bringing him here. I don't know the logistics of these
25 things.

-25-

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1 I think I'll order that they conduct the
2 interview at the prison. I think that's probably going
3 to be move efficient.
4 MR. GORMAN: Okay.
5 THE COURT: What I'll do then is direct
6 that the presentence report interview take place at the
7 prison in the accompany of counsel. You might check with
8 the probation department before you leave across the
9 parking lot. I think what I'll do then is it takes them
10 about four weeks, in this case it might take them a
11 little longer. I'll schedule a status conference
12 telephonically in about four weeks. If we have a

13 presentence report, then we can schedule a sentencing.
14 MR. GORMAN: Yes.
15 THE COURT: Status conference, I will
16 schedule for --
17 MR. PHALEN: Judge, we have an August 13th
18 date already. I don't know if that's too soon.
19 MR. GORMAN: That's too soon. I'd like it
20 as far as off as possible.
21 THE COURT: Reschedule it for August 27th.
22 MR. GORMAN: Okay. That's perfect, Judge.
23 THE COURT: August 27th at 9:00 a.m. for
24 the status conference, and you can appear telephonically,
25 if you wish.

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1 MR. DUARTE: I'll be out of the office.
2 I'll make sure somebody is apprised of what's happening
3 on the 27th.
4 THE COURT: I think we'll probably just be
5 scheduling sentencing on that date.
6 MR. DUARTE: Very well.
7 THE COURT: Anything further?
8 MR. GORMAN: No; thank you, Judge.
9 THE COURT: Mr. Brian --
10 MR. DUARTE: Excuse me, your Honor. There
11 is one more thing on Mr. Sizemore. I need to tell the
12 Supreme Court of the State of Arizona what the status is
13 with respect to the motion to remand.
14 THE COURT: The stay.
15 MR. DUARTE: Well, the absence of the
16 stay; they should remove that. I don't know if we need a
17 court order or some recognition of that.
18 THE COURT: I would certainly indicate for
19 the record to Mr. Sizemore that having pled guilty to the
20 indictment, the motion to remand is moot.
21 MR. PHALEN: I would think so. I will
22 have informed the Supreme Court clerk telephonically to
23 that.
24 MR. DUARTE: We'll file a pleading. I'll
25 file it from my side, between the two of us, hopefully,

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1 it will get back.
3 THE COURT: Mr. Brian, would you come
4 forward, please.
5 Mr. Brian, would you state your full name
6 and date of birth?
7 THE DEFENDANT: Scott Bradley Brian,
8 6/12/61.
9 THE COURT: Do you read and understand
10 English?
11 THE DEFENDANT: Yes, I do.
12 THE COURT: What's the last grade you
13 finished in school?
14 THE DEFENDANT: I finished 10th grade and
15 got a GED, correspondence course.
16 THE COURT: Have you had any drug,
17 alcohol, or medication in the last 24 hours?

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF NAVAJO

JUDGE:	DALE P. NIELSON	DIVISION:	II
CLERK:	JUANITA MANN	DATE:	July 24, 2002
DEPUTY CLERK:	Amy Maestas	TIME:	
COURT REPORTER:	Josie Roper		

MINUTE ENTRY

STATE OF ARIZONA,

Plaintiff,

vs.

MARK E. ALLRED
SCOTT BRIAN, and
NICHOLAS SIZEMORE,

Defendants.

Case No. S-0900-CR-0020010338

Attorneys Present

Joseph Duarte, Assistant Attorney General

Conrad Baran, Attorney for defendant Allred

Emery La Barge, Public Defender, Co-counsel for defendant Allred

Thomas Gorman, Attorney for defendant Sizemore

Thomas Phalen, Co-counsel for defendant Sizemore

Patrick McGillicuddy, Attorney for defendant Brian

Monique Branscomb, Co-counsel for defendant Brian

MOTIONS HEARING

This is the date and time set for Motions Hearing. The record may reflect the presence of all defendants, in custody.

Mr. Phalen provided the Court with a list of regarding the order of motions.

Mr. Duarte requested the Court get Susanna Pineda on the telephone as to Department of Corrections motions. Mr. Duarte advised the Court that motions #1, #3, #9, and #10 will need to be addressed by Ms.

Pineda.

Counsel addressed the Court regarding the order of the motions.

The record may now reflect the presence of Susanna Pineda, Assistant Attorney General, appearing telephonically. Ms. Pineda addressed the Court regarding motions.

Mr. McGillicuddy requested that the Court take a fifteen to twenty minute recess due to new information that was received and he needs to discuss with his client.

The Court recessed at 1:45 p.m.

The Court reconvened at 2:12 p.m. The record may reflect the presence of all parties.

Mr. Gorman advised the Court that defendant Sizemore is ready to enter into a change of plea as to the allegations set forth in the indictment.

Mr. Duarte advised the Court that he has no objection but requested time to contact the victim's next of kin. Mr. Duarte addressed the Court regarding State law as to victim's rights.

Mr. Gorman responded and believed case law only applied when the State is making an offer.

Mr. McGillicuddy advised the Court that defendant Brian wishes to enter into an agreement as well.

Mr. Baran advised the Court that defendant Allred does not wish to enter into a plea agreement at this time.

The Court and counsel discussed case law regarding victim(s) rights.

Counsel advised the Court that they have no objection to Mr. Duarte contacting the victim's next of kin.

The Court recessed at 2:16 p.m.

The Court reconvened at 2:30 p.m. The record may reflect the presence of all parties.

Mr. Duarte advised the Court that the victim's family was notified.

The Court advised counsel that it would proceed with change of pleas as to defendants' Sizemore and Brian.

As to defendant Nicholas Sizemore, Mr. Gorman advised the Court that an agreement has been reached wherein the defendant will admit to the allegations as set forth in the Indictment with sentencing at the Court discretion.

The defendant advised the Court that he can read and understand English. The defendant further advised the Court that he has not had any drugs, alcohol, or medication within the last twenty-four (24) hours. The defendant advised the Court that he has discussed the agreement with counsel.

The Court finds that the defendant will be changing his plea from not guilty to guilty to the allegations set forth in the Indictment. The Court advised the defendant of his rights. The Court advised the defendant of possible range of sentence.

Mr. Gorman addressed the Court regarding factual basis.

The Court finds the defendant has knowingly, intelligently, and voluntarily entered into this agreement, and no force, threats, or promises have induced the admission. The Court accepts the agreement and enters it of record.

Mr. Gorman advised the Court that the Ring Decision in Arizona finds death penalty unconstitutional and the defendant entered into the agreement with the outcome being a life sentence or twenty-five (25) calendar years.

Mr. Duarte addressed the Court regarding the death penalty.

The Court orders a presentence report prepared with copies provided to the defendant, Court and counsel

at least five (5) days prior to Sentencing.

The Court orders probation to conduct the presentence interview in the Arizona State Prison in Florence in the company of counsel.

The Court schedules a Status Conference for **August 27, 2002, at 9:00 a.m.** The Court stated that counsel may appear telephonically. The Court advised counsel that it will schedule Sentencing at the time of Status Conference.

The Court finds that due to defendant Sizemore having entered into an agreement, the Motion to Remand is moot.

As to defendant Scott Brian, Mr. McGillicuddy advised the Court that an agreement has been reached wherein the defendant will admit to the allegations as set forth in the Indictment with sentencing at the Court's discretion.

The defendant advised the Court that he can read and understand English. The defendant further advised the Court that he has not had any drugs, alcohol, or medication within the last twenty-four (24) hours. The defendant advised the Court that he has discussed the agreement with his attorney. The Court advised the defendant of the range of sentence. The Court advised the defendant that the sentence may run consecutive or concurrent with his current sentence. The Court advised the defendant of his rights.

The Court finds the defendant is changing his plea from not guilty to guilty, to the allegations set forth in the Indictment.

Mr. McGillicuddy advised the Court that he concurs with Mr. Gorman regarding sentencing.

The Court takes judicial notice of the factual basis already given by Mr. Gorman.

The Court finds the defendant has knowingly, intelligently, and voluntarily entered into this agreement and no force, threats, or promises have induced the admission. The Court accepts the agreement and enters it of record.

Mr. McGillicuddy requested that Sentencing be expedited. Mr. McGillicuddy advised the Court that the defendant does not wish to cooperate in a presentence interview with probation. The defendant advised the Court he waives time.

The Court schedules Sentencing for **September 11, 2002, at 1:30 p.m.**

As to defendant Allred, Mr. Baran requested that the Court schedule the matter for Case Management Conference.

The Court advised counsel that Case Management Conference will be scheduled at the same time as the Status Conference set for August 27, 2002, at 9:00 a.m.

Copies to: Joseph Duarte Susanna Pineda, Emery La Barge; Conrad Baran; Tom Phalen; Thomas Gorman; Monique Branscomb; Patrick McGillicuddy; Galen Wilkes; Cal. II; Probation(2)

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF NAVAJO

JUDGE:	DALE P. NIELSON	DIVISION:	II
CLERK:	JUANITA MANN	DATE:	August 27, 2002
DEPUTY CLERK:	Valerie Wyant	TIME:	
COURT REPORTER:	Josie Roper		

MINUTE ENTRY

STATE OF ARIZONA,

Plaintiff,

vs.

MARK E. ALLRED
SCOTT BRIAN and
NOCHOLAS SIZEMORE

Defendants.

Case No. S -0900 - CR -0020010338

Attorney's Present

Joseph Duarte, Assistant Attorney General, appearing telephonically

Susanna Pineda, Assistant Attorney General

Conrad Baran, Attorney for Defendant Allred

Emery La Barge, Public Defender, Co-Counsel for Defendant Allred

Thomas Gorman, Attorney for defendant Sizemore, appearing telephonically

Thomas Phalen, Co-Counsel for Defendant Sizemore, appearing telephonically

Patrick McGillidcuddy, Attorney for Defendant Brian, appearing telephonically

Status Conference

IN CHAMBERS:

This is the date set for status conference. Record may reflect the absence of the defendant's. Record may further reflect the presence of Bruce Wolfe, Investigator.

The Court indicated that it has received a motion to correct the July 24, 2002 minute entry filed by Mr. Phalen.

The Court believes that the motion is well taken and directed that any notion of there being an agreement should be stricken as the defendant's changed their plea's to guilty and there was no agreement.

The minute entry dated July 24, 2002 is corrected to reflect that the defendant requested to change his plea from not guilty to guilty. The minute entry dated July 24, 2002 is further corrected to reflect that the Court finds the defendant has knowingly, intelligently, and voluntarily changed his plea and no force, threats, or promises have induced the admission. The correction of the minute entry dated July 24, 2002 is as to Defendant Sizemore and Defendant Brian.

The Court indicated that it has a motion to permit defendant's Brian and Sizemore to withdraw from guilty pleas filed by Mr. Duarte.

Mr. Duarte advised the Court that he sent out the motion yesterday and defense counsel should receive it by Thursday.

The Court will allow counsel time to respond to the motion and will then set a hearing on the motion.

Mr. Duarte advised the Court that he has not sent the Probation Department the police reports for the presentence reports yet.

Mr. McGillicuddy objected to the continuance of the sentencing as to his client as he does not believe the State has legal grounds to continue the sentencing.

Mr. Phalen joined in the objection to continue the sentencing even though he has not seen the motion. Mr. Phalen does not believe that the State can withdraw from the plea because there was no agreement. Mr. Phalen objected to the manner in which the motion was filed. Mr. Phalen advised the Court that he may need to refile the special action that was dismissed.

Mr. Mcgillicuddy advised the Court that he believes the motion should be denied as he believes that it is moot as he does not see how the State can make a request on behalf of the defendant.

Mr. Baran advised the Court that the case is greatly complicated in that an interview was conducted with a defendant as a result of the change of plea. Mr. Baran further advised the Court that there is not any confidentiality that attaches to the interview and is not sure what his ethical responsibilities are for the Public Defender's Office to remain on the case if defendant Brian and Defendant Sizemore are forced to withdraw from their guilty pleas. Mr. Baran further advised the Court that the interview is of record at the Arizona Department of Corrections.

Mr. McGillicuddy advised the Court that his client did the interview against his advise and would seek a protective order from the Court to seal that interview until all issues are resolved. Mr. McGillicuddy requested that the Court order Mr. Baran to keep the interview under seal and not disclose it to anyone other than himself.

Mr. Duarte advised the Court that he does not see a need for the interview to be disclosed to him at this time.

Mr. Phalen had no objection.

The Court ordered the tape or the transcript of the interview to be sealed and not to be disclosed without approval of the Court. The Court permitted the interview to be sealed in the Public Defender's safety deposit box. The Court ordered that any mention of the interview or the contents of the interview are precluded.

Copies to: Joseph Duarte, Susanna Pineda, Conrad Baran, Emery La Barge, Thomas Gorman, Thomas Phalen, Patrick McGillicuddy, Monique Branscomb. Galen Wilkes, Probation (2)

JANET NAPOLITANO
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SUPERIOR COURT OF ARIZONA
NAVAJO COUNTY

STATE OF ARIZONA,

Plaintiff,

vs.

SCOTT B. BRIAN and
NICHOLAS S. SIZEMORE,

Defendants.

No. CR2001-0338

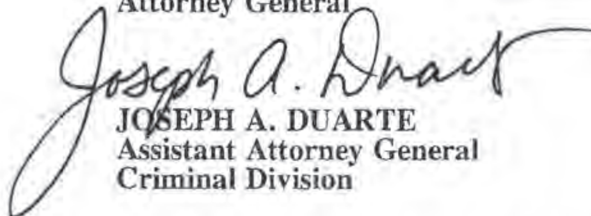
STATE'S MOTION TO PERMIT DEFENDANTS BRIAN AND SIZEMORE TO WITHDRAW FROM GUILTY PLEAS

(Assigned to Hon. Dale P. Nielson)

Comes now the state, through undersigned attorney, and requests that defendants Brian and Sizemore be allowed to withdraw from their pleas of guilty entered July 24, 2002. This motion is proferred pursuant to Rule 17.5, Ariz.R.Crim.P., which allows the court, in its discretion, to consider withdrawal where compelled to correct a manifest injustice. The premise under which both defendants pled was the lack of exposure to the imposition of a death sentence. All parties erroneously believed that *Ring v. Arizona*, 200 Ariz. 267, 25 P.3rd 1139 (2002), precluded the state from seeking the death penalty. Because *Ring* affects solely the procedure under which a defendant is sentenced, not the imposition of the death penalty itself or the state's power to impose it, the maximum punishment for the instant crime remains the imposition of the death penalty. Consequently, the pleas premised upon the lack of exposure to the death penalty are involuntary and each defendant should be allowed to withdraw. The state's position is more fully set out in the following Memorandum of Points and Authorities.

Respectfully submitted this 26 day of August, 2002.

JANET NAPOLITANO
Attorney General



JOSEPH A. DUARTE
Assistant Attorney General
Criminal Division

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On July 24, 2002, defendant Sizemore pled guilty to the first degree murder of inmate Carlos Ceniceros. In the process of entertaining the change of plea the court asked for advisory opinions regarding the range of sentence. (Transcript dated 31 July, 2002) (TR, P. 17). "I have to advise Mr. Sizemore of the range of sentence, possible penalty." Mr. Gorman's response was "I suspect the court would agree that there's no constitutional death penalty statute presently in Arizona. We certainly have advised Mr. Sizemore there is not. Mr. Sizemore has made his decision to plead guilty with the understanding that his guilty plea and the acceptance of the plea by the court will result in a penalty of life imprisonment either natural life or 25 calendar years, parole eligible; that is all. He is basing his decision on his understanding that no death penalty statute presently applies to him, nor because there is no death penalty statute in Arizona nor will any death penalty statute apply to him should he be sentence in 60, 90, 120 days; that the only possible penalty he is facing is natural life for 25 calendar years. And that's his understanding, and that is, in large part, the material reason he is pleading guilty." (TR, P. 17-18).

Undersigned prosecutor stated that "there was not presently a sentence that can implement the taking of a life in Arizona." (TR, P. 18). "That is something I cannot urge at this particular point in time, because unless there's something that I can put before the court that is precedent, that is on the books or that is case law and has been handed down even and a half emergency posture I cannot urge a position where there is a void.

So at this point, I can't add a whole lot to what counsel has said. Obviously, we are suggesting that I'm sure the legislature will work that out but today as we stand in court, there does not appear to be a viable death penalty sentence to which Mr. Sizemore would be exposed." (TR, P. 18-19).

Co-defendant Brian also pled guilty to the murder of Carlos Ceniceros. Mr. McGillicuddy, his lawyer, stated a similar view to that of Mr. Gorman in advising the court of the reason why is client was pleading guilty. "I met with my client today; I told him of the possibilities based on the case of *Ring v. Arizona*, and how it affects his case. I've advised him that my view of the law now is that there is no death penalty statute under which he can be sentenced, but if he enters a guilty plea today to the charges, that the court is prevented from imposing a sentence of death. That is the basis for his guilty plea today, and that is the only basis. It would be my position that if the court doesn't agree with me, and I take it that the court did agree with Mr. Gorman and Phelen, then the plea later would not be found to be knowingly, intelligently and voluntarily made." (TR, P. 31-32). Mr. McGillicuddy went on to state "Obviously, the court realizes that it cannot impose the death penalty on Mr. Brian."

The court advised defendant Sizemore that "the range of sentence for this plea is either natural life, which means that you would not be eligible for parole for any reason, or you could not be released until having served 25 calendar years. . ." (TR, P. 19). With regard to defendant Brian the court advised him "the range of sentence for this plea is 25 years, day for day, and/or actually, release after that. You could also possibly be sentenced for the rest of your natural life, which means that you could not get out of prison." (TR, P. 29). Neither defendant pled pursuant to a formal written plea agreement between the state and the respective defendant. Each defendant pled straight up to the court to avoid the imposition of a death sentence.

In sum, the co-defendants pled guilty to First Degree Murder on the mistaken assumption, endorsed by the state, that they were not subject to the death penalty because Arizona's Capital Sentencing Statute had been declared unconstitutional in *Ring*,

1 *supra.* The state seeks to vacate the guilty pleas on the ground that the defendants can
2 still receive death sentences, notwithstanding *Ring.*
3 LAW:
4 The defendants remain subject to the death penalty for two main reasons. First, the
5 unconstitutional portion of the statute which is responsible for the imposition of the death
6 penalty is severable because *Ring* only affects the procedure under which a defendant is
7 sentenced, not the viability of the death penalty itself or the state's power to impose it.
8 The maximum punishment for the crime of First Degree Premeditated Homicide remains
9 death and that has never changed. The *Ring* decision invalidated Arizona's capital
10 sentencing scheme which violated the 6th Amendment jury trial guarantee by entrusting
11 to a judge the finding of a fact raising the defendant's maximum penalty. *Ring*
12 invalidated the system that allowed a sentencing judge, sitting without a jury, to find an
13 aggravating circumstance necessary for the imposition of the death penalty. *See State v.*
14 *Walton,* 497 U.S. @ 647-649.
15 The question presented was whether an aggravating factor may be found by the
16 judge, as Arizona law specifies, or whether the 6th Amendment jury trial guarantee,
17 made applicable to the states by the 14th Amendment, requires that the aggravating
18 factor determination be entrusted to the jury. Because Arizona's enumerated
19 aggravating factors operate as "the functional equivalent of an element of greater
20 offense," *Apprendi*, 530 U.S., @ 494, n. 19, the 6th Amendment requires that they be
21 found by a jury. Pp. 10-23. Under A.R.S. §13-703(E) it formerly stated:
22
23
24
> In determining whether to impose a sentence of death or life imprisonment, the court shall take into account the aggravating and mitigating circumstances included in Subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in Subsection F of this section and there are no mitigating circumstances sufficiently substantial to call for leniency.

25
26 *Ring* now mandates that the 6th Amendment right to a jury trial applies. The newly
27 amended §13-703.01 states:
28
> In determining whether to impose a sentence of death or life imprisonment, THE TRIER OF FACT shall take into account the aggravating and mitigating

circumstances THAT HAVE BEEN PROVEN. THE TRIER OF FACT shall impose a sentence of death if the TRIER OF FACT finds one or more of the aggravating circumstances enumerated in Subsection F of this section and THEN DETERMINES that there are no mitigating circumstances sufficiently substantial to call for leniency.

In short, the unconstitutional flaw was only as to the state's sentencing scheme and manner of the imposition of the death penalty, namely that the judge alone could determine the aggravating factors resulting in the imposition of the death penalty. The new statute reflects the *Ring* mandate requiring the trier of fact or the jury to take into account the relevant aggravating and mitigating circumstances and then impose the appropriate sentence. It is specifically the sentencing scheme for first degree murders, which was affected by the *Ring* decision. The death penalty itself was never invalidated by the *Ring* decision nor was the state's power to impose it compromised. The only change was the shift from the judge's discretion to the trier of fact's discretion in considering the circumstances which would result in its imposition. The unconstitutional portion of the sentencing statute is severable and has been corrected.

Regarding the issue of severability, the case of *State v. Watson*, 124 Ariz. 441, 586 P.2d 1253 (1978), is instructive. In that case, the Arizona Supreme Court held that Arizona's Death Penalty Statute was unconstitutional to the extent it limited consideration of mitigating circumstances. *Watson* further held that the portion of the statute that limited presentation of mitigation evidence was severable from the rest of the statute, and remanded the case to allow the defendant to present any mitigating circumstances tending to show why the death penalty should not be imposed. In the instant case, the *Ring* situation is analogous because the portion of the statute which is unconstitutional due to the fact it does not allow the jury to consider the aggravation and mitigation during the sentencing phase can be severed out from the rest of the statute. The unconstitutional features contained in the statute can be excised with the amended statute correcting the flaw.

The second reason the defendants remain subject to the death penalty is rooted in the state's position that certain capital cases on direct review are subject to harmless error

1 analysis. The imposition of certain sentences may not have run afoul of *Ring's* mandate.
2 For example, in some cases the court has found the existence of prior convictions to be
3 the factors responsible for the imposition of the death penalty. As such, they would not
4 require the enpanelment of a jury to consider their existence and application. In turn, if
5 death sentence as imposed under the unconstitutional version of A.R.S. §13-703 can
6 stand, then death sentences can continue to be lawfully imposed under that statute
7 provided the trial court's sentencing procedure does not offend *Ring*.

8 It should be reiterated that the defendants pled prior to the time Senate Bill 1001 was
9 enacted in an emergency measure by the state legislature and after the mandate in *Ring*
10 was handed down.

11 The application of the new law to the co-defendants is not a denial of due process
12 where this amended statute was not in effect at the time of the defendants' plea. The
13 instant case differs from the case of *Coleman v. McCormick*, 874 F.2d 1280 (9th Cir.
14 1989). In that case the defendant was convicted of deliberate homicide, rape and
15 aggravated kidnaping in 1976 in Montana. He received a sentence of 100 years for the
16 homicide, 40 years for the rape, and death on the aggravated kidnaping charge under
17 Montana's existing mandatory death penalty statute. On direct appeal the Supreme
18 Court for the State of Montana held that the mandatory death penalty statute was
19 uncostitutional, vacated Coleman's death sentence, and remanded the matter for re-
20 sentencing. 876 F2d @ 1282. The trial court re-sentenced Coleman to death in 1978
21 under a death penalty statute that had been enacted in 1977. Coleman's sentences were
22 upheld again on direct appeal. *Id.* He then sought post-conviction relief in state court
23 and petition for writ of habeas corpus in federal court.

24 One of Coleman's claims in his habeas corpus petition alleged that he had been
25 denied due process of law when the trial court sentenced him to death under a statute
26 that was not in effect at the time of his trial. The 9th Circuit agreed holding that
27 sentencing Coleman to death under Montana's new death penalty statute had deprived
28 him of due process. The holding was based on fundamental changes to the death penalty

1 sentencing procedures brought about by the new sentencing statute and how those
2 changes might have affected Coleman's strategies in trial if he had known about them at
3 the time.

4 Coleman was first convicted and sentenced to death in 1975 under a mandatory
5 death penalty statute which was later held to be unconstitutional because it lacked
6 provisions that would enable the court to consider mitigating circumstances. *Coleman,*
7 874 F2d @ 1285, n. 6. Montana's new death penalty statute, under which Coleman was
8 sentenced the second time, required the judge who had presided over the trial to conduct
9 a sentencing hearing and to determine whether there existed any aggravating or
10 mitigating circumstances for purposes of determining the sentence to be imposed. *Id.,*
11 874 F2d @ 1285. Under the new statutory scheme, the trial court had to impose the
12 death sentence if it found the existence of at least one of the enumerated aggravating
13 circumstances and determined that there were not mitigating circumstances sufficiently
14 substantial to call for leniency. The 9th Circuit held that retroactive application of the
15 new death penalty procedures to Coleman violated his right to due process. That court
16 noted that because the death penalty was no longer mandatory upon a conviction for
17 aggravated kidnaping in Montana, the sentencer who was the trial judge could now
18 weigh the aggravating and mitigating circumstances in order to determine whether a
19 death sentence was appropriate. *Coleman*, 874 F2d @1286. The court acknowledged
20 that if Coleman's counsel had known, at the time of trial, that the trial judge would have
21 sentencing discretion regarding the death penalty, several of his strategic decisions might
22 have been different. Specifically he might not have brought Coleman's prior convictions
23 to the trial court's attention during cross-examination of a co-defendant; he might have
24 advised Coleman not to testify; and he might have elected to challenge the judge without
25 cause before trial. *Id.*, 874 F.2d at 12860-87.

26 The court held that Coleman had a right to make informed decisions in these
27 matters, stating "The defendant is due at least that amount of process which enables him
28 to put on a defense during trial knowing what effect such strategy will have on the

1 subsequent capital sentencing, the results of which may be equally if not more critical to
2 the defendant than the conviction itself." *Id.*, 874 F.2d at 1288. Coleman had no notice
3 whatsoever of the consequences his decisions at trial would have in his capital sentencing
4 proceeding. The court held that this lack of notice with its resultant deprivation of the
5 ability to make informed decisions regarding trial strategy had violated Coleman's right
6 to due process of law.

7 In marked contrast, the recent changes in Arizona's Death Penalty Statute are not of
8 the type that materially affect either co-defendant's strategic decisions at trial. Indeed
9 there has been no trial, there was simply a plea. The principle change in Arizona's
10 procedure merely transfers the sentencing task from the judge to the jurors.
11 Consequently, the defendant cannot allege that application of the new death penalty
12 procedure to him would deprive him or his counsel of the ability to make informed
13 strategic decisions about the conduct of his defense. Unlike the sweeping and
14 fundamental changes to Montana's death penalty procedure that were applied
15 retroactively in Coleman, the recent changes in Arizona's death penalty procedure are
16 not the of the type that alter the manner in which defenses are presented at trial.
17 Retroactive application of A.R.S. §13-703.01, as amended, to the co-defendants does not
18 violate their rights to due process of law.

19 The application of A.R.S. §13-703.01, as amended, to these co-defendants does not
20 violate state or federal prohibitions regarding ex post facto laws. Defendants will
21 undoubtedly contend that the changes to Arizona's capital sentencing scheme mandated
22 by *Ring* and implemented by A.R.S. §13-703.01, as amended, violates their rights under
23 the federal and state constitutions to be free from the application of ex post facto law.
24 Co-defendants will claim that the changes to Arizona's capital sentencing law are
25 substantive rather than procedural and as such cannot be applied retroactively to either.
26 This claim is erroneous.

27 In *Dobbert v. Florida*, 432 U.S.282 (1977), the United States Supreme Court held that
28 when Florida revised its death penalty statute it did not violate the ex post facto

1 prohibition of the Constitution. In *Dobbert,* the defendant was convicted of Murder in
2 the First Degree. Under the death penalty statute in effect at the time of the crimes, a
3 defendant in Florida was sentenced to death by the judge. *Id.*, @ 284. The death penalty
4 statute in effect at that time stated "A person convicted of a capital felony was to be
5 punished by death unless the verdict included a recommendation of mercy by a majority
6 of the jury." *Id.*, @ 288. The United States Supreme Court released its opinion in
7 *Furman v. Georgia*, 408 U.S. 238 (1972), striking down all death penalty statutes -
8 including the one in effect at the time *Dobbert* committed his crime. Florida enacted a
9 new statutory scheme instituting a bifurcated sentencing scheme, with an advisory verdict
10 by the jury, with the judge either following that recommendation or making his own
11 ruling. *Id.*, @ 288-289. (*Dobbert* was given a death sentence under the new law).
12 In the United States Supreme Court, *Dobbert* argued that the change in the role of
13 the judge and the jury "constitutes an ex post facto violation." *Id.*, @ 292. The United
14 States Supreme Court disagreed and held that the change was procedural and there was
15 no ex post facto violation. *Id.*, @ 292. The court reasoned that "Even though it may
16 work to the disadvantage of a defendant, a procedure change is not ex post facto." Id.,
17 @ 293. "The new statute simply altered the methods employed in determining whether
18 the death penalty was to be imposed; there was no change in the quantum of punishment
19 attached to the crime." *Id.*, @ 293-294. Regarding the argument that there was not a
20 constitutional death penalty statute in effect at the time of the murders, the court
21 rejected the claim that there was an ex post facto violation. "But this sophisticated
22 argument mocks the substance of the ex post facto clause. Whether or not the old statute
23 would in the future, withstand constitutional attack, it clearly indicated Florida's view of
24 the severity of murder and of the degree of punishment which the legislature wished to
25 impose upon murderers. The statute was intended to provide maximum deterrents, and
26 its existence on the statute books provided fair warning as to the degree of culpability
27 which the state ascribed to the act of murder." *Id.*, @ 297.
28 The Arizona Supreme Court has also followed the reasoning of *Dobbert* with regard

1 to procedural changes in death penalty law. In *Watson, supra,* the Arizona Supreme
2 Court declared that the restriction regarding mitigating circumstances in the death
3 penalty statute was unconstitutional because it did not allow the sentencing judge to
4 consider all mitigating circumstances. In upholding the application of the new statute to
5 pending cases, the court noted that it was only concerned with a procedure change and
6 one which increases the rights of the defendant in death penalty cases. "We do not
7 believe there is an ex post factor problem. We find no error." *Id.*, @ 454, 586 P2d at
8 1266. In *Knapp v. Cardwell*, 667 F.2d 1253 9th Cir. 1982), the 9th Circuit agreed which
9 the Arizona Supreme Court that the challenge in Arizona's death penalty statute did not
10 violate the ex post facto clause. Citing to *Dobbert* the 9th Circuit held that the change in
11 the law was procedural. The court stated that the "only effect" was to enlarge the ability
12 of defendants to introduce mitigating circumstances at sentencing. Thus, no ex post facto
13 problems arise, even with respect to those appellants tried and sentenced before *Watson*.
14 *Id.*, @ 1263. Under *Dobbert, Watson and Knapp,* it is clear that the state can impose new
15 procedural changes on pending capital cases.

16 More recent cases show that the United States Supreme Court has gone even further
17 in restricting their ex post facto analysis. In *California Department of Corrections v.*
18 *Morales*, 514 U.S. 499, 115 S.Ct. 5097, 131 L. Ed. 2d 588 (1995),
19 the court stated that their ex post facto analysis had changed in focus.

20 Our opinions in *Lindsey v. Washington*, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 182 (1937), *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d, 17 (1981), and *Miller v.*
21 *Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed. 2nd 351 (1987). . . are inconsistent with the framework developed in *Collins v. Youngblood*, 497 U.S. 37, 41, 110 S.Ct. 2715,
22 2718, 111 L.Ed.2d 30 (1990). After *Collins* the focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of "disadvantage", nor.
23 . . whether an amendment affects a prisoner's opportunity to take advantage of provisions for early release, . . . but on whether any such change alters the definition of
24 criminal conduct or increases the penalty by which a crime is punishable.

25 Excerpted from *California Department of Corrections v. Morales*, (514 U.S. 499, 506, 115 S.Ct. 1597, 1602, 131 L.Ed.2d 588, excerpt from n. 3 (1995).
26
27 The amendments to Arizona's Death Penalty Statute do not change the aggravators
28 required to establish imposition of the death penalty. The aggravators still must be proven

by the state, by a standard of beyond a reasonable doubt. Defendants are still entitled to present statutory and non-statutory mitigation. The penalty remains the same, death or life imprisonment. The change is simply one of the jury (rather than the judge) weighing aggravation against mitigation. The definition of the crime and the penalty remain the same. There is adequate "fair notice". Therefore, application of the changes in the death penalty procedures to the co-defendants does not violate ex post facto prohibitions. Application of A.R.S. §13-703.01, as amended, to the case of the co-defendants does not deprive either of his federal or state constitutional rights, nor does it violate the Arizona Rules of Criminal Procedure.

The focus now shifts to whether the court has the discretion to permit the defendants to withdraw. As noted above the trial court can sentence the defendants to death and the state will pursue such sentence. The trial court erroneously informed the defendants that the maximum sentence was natural life and as a consequence the circumstantial context satisfies the "manifest injustice" standard for withdrawal. To enforce the guilty plea in the absence of a plea agreement with the limitation on sentencing to natural life, based on the mistake of law would be manifestly unjust to the victims in the state, and would perpetuate the legal error. Attorney Patrick McGillicuddy implicitly acknowledged the possibility that the death sentence remains viable. After stating the defendant's motivation to avoid the death penalty as a basis for his plea Mr. McGillicuddy stated "It would be my position that if the court doesn't agree with me, and I take it that the court did agree with Mr. Gorman and Phalen, then the plea would not be found to be knowingly, intelligently and voluntarily made." (TR, P. 31-32).

The state's mistaken endorsement of the position that the death penalty was not a viable option should not preclude the state from correcting the record and proceeding in pursuit of the death penalty against defendants Sizemore and Brian. The court is not bound by, nor can the defendants rely upon, the Attorney General's mistaken opinion regrading the state of the law. *See, e.g., Martinez v. State Workers Compensation Insurance Fund,* 163 Ariz. 380, 385, 788 P.2d 113, 118 (App. 1990). (Appellate court rejecting

Attorney General's conclusion in Attorney General Opinion 100-107). Nor is there any estoppel principal preventing the state from changing the position it took on a legal issue at the plea hearing. *Greene v. Osborn*, 157 Ariz. 363, 365, 758 P.2d 138, 140 (1988). *State v. Deddens*, 112, Ariz. 425, 428, 542 P.2d 1124, 1127 (1975), states that "The Attorney General's opinions are advisory only and are not binding on courts of law. They are not a legal determination of what the law is at any certain time." If formal opinions of the Attorney General's Office do not bind the courts, and defendants cannot rely upon them, then informed legal conclusions of an Assistant Attorney General expressed at a hearing are entitled to substantially less authority.

Double jeopardy does not bar trial and re-sentencing if the defendant elects to withdraw from the plea. Instructive is the case of *State v. Hinchey*, 181 Ariz. 307, 313, 890 P.2d 602, 608 (1995): "If there is no trial and no evidence of aggravation, then the trial judge can only sentence the defendant to life imprisonment. Unless sentence pursuant to the plea the defendant has the right to withdraw." If there is a plea agreement with a stipulated life sentence, the defendant cannot be sentenced to death. The 9th Circuit has since acknowledged this in *Clark v. Lewis*, 1 F.3d 814, 823 (9th Cir. 1993). *See, also Lombrano v. Superior Court*, 124 Ariz. 525, 526, 606 P.2d 15, 16 (1980). When a defendant moves to withdraw his guilty plea he waives the double jeopardy defense if his motion is accepted by the court.

Helpful also is consideration of *State v. City Court of Tucson*, 131 Ariz. 236, 640 P.2d 167 (1981), a defendant entered a guilty plea to a wreckless driving charge mistakenly thinking that he wouldn't suffer the sanction of a driver's license revocation. The license was revoked because he was mistaken in his belief that his prior DUI conviction was more than 24 months old. In considering the young man's plight the court stated "A person who pleads guilty without knowledge of the punishment that must be imposed has pled guilty under a mistake and misapprehension. It was therefore no abuse of discretion for the trial judge to have set aside Krist's plea. We have stated:

1 A motion to withdraw a plea of guilty is addressed to the sound discretion of the trial court, 17 A.R.S. R. Crim. P. 188, and in the absence of a clear abuse of that discretion the
2 ruling will not be disturbed on appeal, (citation omitted). However, the discretion of the trial court should be liberally exercised in favor of permitting the withdrawal (citation
3 omitted). Where there is any showing that justice will be served thereby, any doubt should be resolved in favor of withdrawing the plea (citation omitted). *State v. Corvelo*, *supra.*, 91
4 Ariz. @ 54, 369 P.2d @ 904-05 (1962).

5 As addressed earlier the fact that *Ring* error can be harmless implies that a defendant
6 awaiting sentencing remains subject to capital punishment, provided that the procedure
7 under which he is sentenced does not offend the *Ring* holding. *Ring* is neither more or less
8 applicable to convict a defendant on direct appeal than it is to defendants awaiting
9 sentencing.

10 The United States Supreme Court left to the state courts the determination whether *Ring* error is harmless in any particular case. *Ring*, 122 S.Ct. 2243, fn. 7.
11
Because the United States Supreme Court has stated that a judge determination of "prior
12
convictions" does not implicate the 6th Amendment, cases involving the A.R.S. §13-703
13
(F)(1) and (F)(2) aggravators do not involve *Ring* error. In certain cases, a narrow reading
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of *Ring* suggests that error in having a judge determine at least one aggravator that
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subjects the defendant to the death penalty is harmless, either because the jury's verdict
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implicitly establishes an aggravator, or because the evidence overwhelmingly establishes the
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evidence beyond a reasonable doubt. In *U.S. v. Cotton*, 122 S.Ct. 1781, 1786 (2002), the
18
United States Supreme Court held in a related context that *Apprendi* sentencing error did
19
not warrant reversal because "the error did not seriously affect the fairness, integrity, or
20
public reputation of judicial proceedings." Two of the defendants in *Cotton* were sentenced
21
to a term of 30 years and the remaining defendants were sentenced to life imprisonment
22
based upon a trial court finding that their drug offenses involved at least 50 grams of
23
cocaine base. 122 S.Ct. @ 1273. Because the charging documents in the jury verdicts did
24
not reflect the amount of drugs involved, the defendants argued that, under *Apprendi*, their
25
sentences were invalid. *Id.*, @ 1784. The government conceded, and the United States
26
Supreme Court found, that the indictment's failure to allege a fact (drug quantity), that
27
increased the statutory maximum sentence resulted in "plain error" under the reasoning of
28

Apprendi when the trial court enhanced the defendants' sentences. *Id.*, @ 1785-86. The court nevertheless found that the error was harmless because the evidence relating to the quantity of drugs was "overwhelming" and "essentially uncontroverted." *Id.*, @ 1786. After detailing the evidence presented at trial, the court stated "Surely the grand jury, having found that the conspiracy existed, would also have found that the conspiracy involved at least 50 grams of cocaine base." *Id.*, @ 1786. The court thus concluded that the *Apprendi* error was harmless, noting that,

> The real threat then to the "fairness, integrity, and public reputation of judicial proceedings" would be if defendants, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial.

Id., @ 1787.

In the instant case any issues regarding sentencing can be readily addressed because of the juncture at which the legal error can be corrected. The state can now address the proper application of the relevant sentencing provisions both in aggravation and mitigation, under the amended §13-703.01 statute. It simply remains not to offend the sentencing procedures mandated by *Ring*. There is ample opportunity to adduce evidence in the context of at trial and then sentencing to be handled by the trier of fact as prescribed in the relevant statute.

CONCLUSION:

In the absence of a plea agreement signed by the state and the defendants there is no enforceable agreement that precludes the state from seeking the death penalty. The defendants pled due to a misapprehension of law which was the material reason for each co-defendant's plea. Since the defendants were always subject to the imposition of the death penalty they should be allowed the opportunity to withdraw from the plea that was entered and accepted due to a manifest injustice. The state now requests that the court allow defendants Sizemore and Brian to withdraw from their pleas to the court and reinstate the original charges.

1 Respectfully submitted this 26 day of August, 2002.

2 JANET NAPOLITANO
Attorney General

3

4 JOSEPH A. DUARTE
Assistant Attorney General
5 Criminal Division

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NAVAJO COUNTY SUPERIOR COURT

STATE OF ARIZONA

STATE OF ARIZONA,

Plaintiff,

vs.

NICHOLAS S. SIZEMORE,

Defendant.

Case No. CR 2001-338

DEFENDANT SIZEMORE'S RESPONSE TO AND REJECTION OF THE ATTORNEY GENERAL'S INVITATION TO ALLOW THE STATE TO KILL HIM

Defendant Sizemore responds to and rejects the state's cynical and untimely motion to permit defendant Sizemore to "withdraw from his guilty plea." The state is using this phrase as a euphemism to disguise the real goal it seeks - to kill him. The real issue before the Court is whether it should vacate Sizemore's conviction for a non-capital homicide offense in order to allow the state to re-indict him with a capital offense. The remedy sought by the state, as set forth in the accompanying memorandum of points and authorities, violates Sizemore's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

RESPECTFULLY SUBMITTED this 3 day of September, 2002.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The state has filed a cynical and untimely motion styled as a motion to *permit* defendant Sizemore to withdraw from his plea to the charge and a life sentence. As a threshold matter and one that will be discussed more fully below, Sizemore wishes it to be understood clearly that any decision to withdraw from his plea to life to this non-capital offense will be made without the treacherous assistance of the state, which is ghoulishly motivated *not* by a desire to see justice done, but by a desire to kill him. Sizemore is ably assisted by his counsel and any momentous decision to withdraw from his plea will be accomplished without the helpful nudge of the state of Arizona.

The issue here is whether there is legal cause to go behind and excuse the state's stipulations and waivers (either expressly to the trial Court at the time of the change of plea or impliedly by failure to file a notice of appeal of any "adverse" rulings made by this Court) and vacate Sizemore's conviction on a non-capital offense, in order to permit the state the opportunity to re-indict Sizemore on a capital offense. The burden is on the state to demonstrate some on or off the record evidence or subsequent legal authority that compels this Court to grant the mind boggling relief the state seeks. The indictment to which Sizemore pleaded alleged only a non-capital offense. It did not contain an essential element of capital murder. It failed to allege a single aggravating factor.

Moreover, the state lacks standing to be heard on whether Sizemore will withdraw from his plea. Having offered no plea agreement, the state is not a party to the transaction that resulted in Sizemore's plea to the indictment. It therefore can have no say in the withdrawal *of* any agreement nor a withdrawal *from* any agreement. The desperation and plain silliness of the state's position is evident in the tortured styling of its pleading, which purports to be a document designed on its face to "assist" Sizemore out of an "ill-conceived" decision to enter a plea (one that was, the state maintains, not knowingly, intelligently and voluntarily made) when in truth it is a document that seeks to open the door to the death house. The sheer chutzpah of the motion is chilling.

II. ARGUMENTS

Sizemore rejects absolutely the state's "motion for permission" and asks that this court summarily dismiss it for the following reasons: 1) waiver; 2) estoppel, reliance and prejudice; 3)

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judicial estoppel; 4) double jeopardy/collateral estoppel; 5) untimeliness; 6) lack of standing/futility; 7) prosecutorial vindictiveness; 8) acquittal; 9) violation of the due process clause of the Fourteenth Amendment; 10) violation of the *ex post facto* clause of Article I, § 10, of the United States Constitution; 11) violation of due process under the rule in *Santobello v. New York*;12) no manifest injustice; 14) the rule of lenity; and14) response to text of state's motion. Each of these grounds is discussed below.

I. Waiver

If we all had not been in the courtroom when the plea to the non-capital offense charged in the indictment went down on July 24, 2002, the state's motion would not appear so utterly disingenuous and absurd. If we all had not read the transcript of the proceedings from July 24, 2002, the state's latter day re-education about the availability of the death penalty would not strike us as so nakedly self-serving and transparently cynical. But we all were in the courtroom. And most of us have examined the transcript of the proceedings. What is inescapable from a recall of the proceedings and an examination of the record is that the attorney general unequivocally agreed that at the time of the plea to the non-capital offense, there existed no death penalty in the state of Arizona. The Court informed Sizemore that the range of sentence available under his plea to the non-capital indictment was up to natural life in prison, consecutive to the sentence he is presently serving. The trial Court was correct in its recitation of the penalties available for the non-capital offense alleged in the indictment. The state failed to allege an essential element of a capital offense. The indictment therefore alleged a non-capital offense. The trial Court therefore correctly advised Sizemore of the penalties to the non-capital offense to which he he pleaded.

The attorney general did not just ***fail to object*** to this, he ***actively and affirmatively agreed to it.*** The colloquy in court admits of no other conclusion. At the very outset of the proceedings, when Sizemore's counsel announced that he would be entering a plea to the indictment, the prosecutor stated categorically that he had no objection to the change of plea going forward. He merely had a concern for contacting the "victim" prior to the proceeding. As discussed below, that concern was without substance, for by law there is no victim in the case. But in any event, Mr. Duarte did contact the victim, who expressed no objection to the change of plea going forward. The proceedings began thus:

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> MR. GORMAN: We -- your Honor, may I speak? Tom Gorman on behalf of Mr. Sizemore. We're ready to enter a change of plea to the indictment. We're ready to proceed right now if the Court's
> THE COURT: I'm ready.
> MR. DUARTE: If I may, your Honor, your Honor, ***I don't oppose the change of plea.*** but I do request on behalf of the victim a reasonable time to contact her. Transcript, July 24, 2002, pp.11-12 (emphasis added)

Mr. Duarte did not deviate from this limited objection, even later in the hearing. In fact, he reiterated it and stated that but for his concern about "victim" notification, he had no objection to the plea.

> THE COURT: Do you have any objection to the State (*sic*) going forward with the plea?
> MR. DUARTE: I would note my objection, your Honor, in the absence of the opportunity to determine specifically whether the decedent had forfeited his rights simply by virtue of his status as an inmate.
> THE COURT: Thank you. ***Your objection goes to the question of victims rights, notification?***
> MR. DUARTE: ***Yes, your Honor, that's all.***
> *Id.* at 14 (emphasis added)

Later in the proceedings, the state affirmed its own unequivocal position, that there was no death penalty presently available to this pleading defendant, and that the maximum sentence that Mr. Sizemore was facing was natural life in prison.

> THE COURT: You are charged in the indictment with first degree murder, a class 1 felony. I guess this is where I'm going to have a question. Counsel, obviously, the way the indictment was charged, I was given a possible seeking of the death sentence. The decision has come down declaring Arizona's statute unconstitutional. *I have to advise Mr. Sizemore of the range of sentence, possible penalty.*
> MR. GORMAN: Correct.
> THE COURT: So I guess I'd like to hear from counsel.
> MR. GORMAN: I can address that.
> THE COURT: *What is your position on the range of sentence?*
> MR. GORMAN: I suspect the Court would agree that there's no constitutional death penalty statute presently in Arizona. We certainly have advised Mr. Sizemore there is not. Mr. Sizemore has made his decision to plead guilty with the understanding that his guilty plea and the acceptance of the plea by the Court will result in a penalty of life imprisonment, either natural or 25 calendar years parole eligible; that is all. He is basing his decision on his understanding that no death penalty statute presently applies to him, nor because there is no death penalty statute in Arizona nor will any death penalty statute apply to him should he be sentenced in 60, 90, 120 days. That the only possible penalty he is facing is natural life or 25 calendar years. And that's his understanding, and that is, in large part, the material reason he is pleading guilty.
> THE COURT: Thank you.
> MR. GORMAN: And, Judge, if I could also add, it's speculative for any other position at this point, because there's no legislation passed and et cetera, et cetera.
> THE COURT: Mr. Duarte, what's your position?
> MR. DUARTE: There's no way to soften the full implication of Ring's decision, that being that ***there is not presently a sentence that can implement the taking of a life***

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here in Arizona. So this point, we have a brief that we normally submit that would address categorically the situation that's before the Court, but that would be -- I don't want to use the word speculative, but that is something that I cannot urge at this particular point in time, because unless there's something that I can put before the Court that is precedent that is on the books or that is case law and has been handed down even in an emergency posture, I cannot urge a position where there's a void. ***So at this point, I can't add a whole lot to what counsel has said.*** Obviously, we are suggesting that I'm sure the legislature will work that out, ***but today as we stand in court, there does not appear to be a viable death penalty sentence to which Mr. Sizemore would be exposed.*** Thank you.
THE COURT: Mr. Sizemore, *the range of sentence for this plea is either natural life, which means that you would not be eligible for parole for any reason, or you could not be released until having served 25 calendar years . . .*
Id. at 18-19 (emphasis added)

The chimera of a "mistake of law" the state has invented is so much smoke and mirrors. Sizemore did not make a "mistake of law" and neither did this Court, and neither, if the truth be known, did the state, on July 24, 2002. The only "mistake of law" that has been made is the one the state is making now by peddling its tawdry motion to this court. By any standard, it is simply inescapable that the state of Arizona has waived any objection it may have had to the proceedings.

The last slow steps to the guillotine's scaffold are confettied with pages from the cases charging capital defendants and their counsel with waiver of fundamental constitutional rights. *See, e.g., McClesky v. Zant,* 499 U.S. 467 (1991)(despite *acknowledged interference* by state in defendant's investigation of substantial constitutional claim, which resulted in defendant's abandonment of it, failure of defendant to vigorously investigate and present the claim constituted waiver); *Duncan v. Henry*, 513 U.S. 364 (1995)(failure to tell the court *which clause* of a particular constitutional amendment one is arguing constitutes waiver of that claim); *Murch v. Mottram*, 409 U.S. 41 (1972)(decision of lawyer not to include all claims in appellate brief constitutes waiver of the claims); *Estelle v. Williams*, 425 U.S. 501 (1976)(failure to object to trial of defendant in jail clothes constitutes waiver); *Francis v. Henderson*, 425 U.S. 536 (1976)(failure to object to grand jury before trial constitutes waiver); *Gilmore v. Utah*, 429 U.S. 1012 (1976)(defendant waived rights to appeal and right to attack validity of death statute); *Wainwright v. Sykes*, 433 U.S. 72 (1977)(failure to object to introduction of confession on grounds did not understand *Miranda* constitutes waiver); *Engle v. Isaac*, 456 U.S. 107 (1982)(failure to object to instructions that illegally placed burden of proof on defendant to prove self-defense constitutes waiver- mere futility of objecting is not excuse); *Murray v. Carrier*,

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477 U.S. 478 (1986)(failure of otherwise competent counsel to raise a claim on appeal constitutes waiver); *Smith v. Murray*, 477 U.S. 527 (1986)(same); *Dugger v. Adams*, 489 U.S. 401 (1989)(failure to object to jury instruction on role of jury at capital sentencing which misinformed the jury of its proper role constitutes waiver).

These are but a few examples of the hundreds, if not thousands, of similar cases charging defendants and their counsel with waiver in capital cases. Capital litigation is ***deadly serious business*** and the risk of waiver falls equally on both the hapless defendant and the well-tooled state. To apply the rules of waiver asymmetrically or unevenly between the state and the defendant is constitutionally prohibited. *See, e.g., Gray v. Klauser*, 282 F.3d 633 (9th Cir. 2002)(defendant's constitutional right to present a defense arbitrarily violated by trial court in applying different analytical frameworks in considering the admissiblility of prosecution's and defense's evidence.) In fact, the risk of waiver falls even more heavily on the state, for the state is presumed to know the law and will be charged with the consequences of its ignorance.

Without for one moment conceding that there was a "mistake of law" encumbering either the Court or the parties on July 24, 2002, Sizemore points out that the state cannot take umbrage in it *even if* there were. In *Coy v. Fields*, 200 Ariz. 442, 27 P.3d 799 (App. 2001) the Arizona Court of Appeals refused to allow the state to withdraw from a plea agreement when the state sought to do so alleging a "mutual mistake of law."

The *Coy* Court stated as follows:

> ¶ 11 Moreover, although we are not aware of any Arizona case directly on point, we find *State v. Patience*, 944 P.2d 381 (Utah App. 1997), analogous and instructive. There, the defendant, charged with three counts of forgery, had entered into a plea agreement with the state whereby she pled guilty to "three counts of attempted forgery, third degree felonies." *Id.* at 383. The trial court imposed consecutive prison terms for the "three third degree felonies." *Id.* at 384. But, unbeknownst to the court, the prosecutor, and the defendant, the Utah legislature had reduced attempted forgery to a misdemeanor before the parties had negotiated and entered into the plea agreement. Once discovered, the defendant appealed her sentence on the ground that it was illegal. The state sought to rescind the plea agreement on the ground of "mutual mistake of material fact" and asked that the original charges be reinstated. *Id.* at 385.
> ¶ 12 In refusing the state's request to rescind the plea agreement, the *Patience* court noted that, as here, *the defendant had neither breached the agreement nor withdrawn from nor modified the agreement, conditions which generally would have permitted the state to withdraw.* Moreover, the court held that rescission was inappropriate even under a contract law analysis:
>
> > [A] party may not rescind an agreement based on mutual mistake where

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that party bears the risk of mistake. *See* 17A Am. Jur.2d 12 Contracts § 215 (1991). In this case, we conclude ***the State bore the risk of the mistake as to the law in effect at the time the parties entered into the plea agreement. The State is generally in the better position to know the correct law . . . and the State must be deemed to know the law it is enforcing.***

. . . . Under these circumstances, we refuse to relieve the State of what it now considers a bad bargain where the plea agreement was the result of uninduced mistake as to the current provisions of Utah statute.

We conclude that the State may not rescind the plea agreement in this case based on mutual mistake. *Patience*, 944 P.2d at 387-88.

The court thus remanded the case to the trial court for resentencing on the misdemeanors. (citations omitted)

¶ 13 We, too, hold the state accountable for knowing Arizona law. . . *Coy v. Fields, supra* at 446 (emphasis added)

No hay can be made that the *Coy* case is distinguishable from Sizemore's on the ground that the state did not enter into an "agreement" in Sizemore, as it did in *Coy* and *Prentice*. That dog won't hunt.

2. Estoppel, Reliance and Prejudice

At the proceedings on July 24, 2002, the attorney general represented to this Court that because Sizemore's conviction for a non-capital offense was final, Sizemore's petition for special action challenging the indictment, then pending before the Arizona Supreme Court, was now moot. The attorney general further stated that his office would file a motion to dismiss that special action in the Arizona Supreme Court for that very reason. Undersigned counsel also stated that he too would file such a motion. The record reveals the following:

MR. DUARTE: Excuse me, your Honor. There is one more thing on Mr. Sizemore. ***I need to tell the Supreme Court of the State of Arizona what the status is with respect to the motion to remand.***
THE COURT: The stay.
MR. DUARTE: Well, the absence of the stay; they should remove that. I don't know if we need a court order or some recognition of that.
THE COURT: ***I would certainly indicate for the record to Mr. Sizemore, that having pled guilty to the indictment, the motion to remand is moot.***
MR. PHALEN: I would think so. I will have informed the Supreme Court clerk telephonically as to that.
MR. DUARTE: ***We'll file a pleading. I'll file it from my side, between the two of us, hopefully, it will get back.***
Transcript, July 24, 2002, p. 27

The attorney general indeed did file such a pleading, a copy of which is attached to this response as exhibit "A". Relying in good faith on the representations made by the attorney general undersigned similarly filed a motion to dismiss, which is attached as exhibit "B". The state

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affirmatively represented to the state's highest Court that the Sizemore matter was concluded and therefore asked that Sizemore's pending petition for special action be dismissed as moot. The state is therefore estopped to deny or contradict its earlier plainly stated position. It will not be heard in this Court to protest that the case is not final and that the proceedings must march on merrily to the gallows. In short, the state is estopped from re-indicting an already convicted Sizemore with a new and different capital offense and is estopped from bringing this "motion for permission" it has lodged with the Court.

Should this litigation gear back up, Sizemore is prejudiced in the extreme. Sizemore has foregone a fundamental legal right in reliance on the "good faith" representations of the state of Arizona with respect to the finality of this case.[1] It would be a denial of fundamental fairness and due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution, to countenance the shenanigans afoot here.

3. Judicial Estoppel

Related to the concepts of waiver and estoppel discussed above, is the principle of judicial estoppel which must be invoked against the machinations of the attorney general in this case. Judicial estoppel, in simple terms, is an equitable remedy enforced against a litigant who takes ***mutually inconsistent positions on the same issue in the same case.***

The behavior of the attorney general in this case is precisely what judicial estoppel was designed to remedy. Sizemore brings to the Court's attention the case of *Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990). In *Russell*, the Court stated that the doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an

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[1] While Sizemore does not purport to speak for co-defendant Brian, who is ably represented by Patrick McGillicuddy, nevertheless it is also true that in reliance on the finality of the Brian case, Mr. Brian has spoken to *counsel for Mr. Allred*, for purposes of assisting Mr. Allred in the disposition of his case. It will be one tough task to put that cat back in the bag. Moreover, also in reliance on the finality of the Brian case, Ms. Branscomb, co-counsel to Mr. McGillicuddy for Mr. Brian, has taken a position at the Maricopa Legal Defender's Office and is no longer available as counsel to Brian as she had been prior to the change of plea. These are not events of small moment and they are profoundly prejudicial to the orderly administration of justice and fairness in this case.

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1 adverse impact on the judicial process. The policies underlying preclusion of inconsistent positions are
2 general considerations of the orderly administration of justice and regard for the dignity of judicial
3 proceedings. Judicial estoppel is intended to protect against a litigant playing "fast and loose with the
4 courts." *Russell*, 893 F.2d at 1036. It is applied to bar a party from making a factual assertion in a legal
5 proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one.
6 *Id.*

7 In *Russell*, the respondents had alleged that petitioner had available remedies in the Washington
8 state courts and that his earlier filed petition for writ of habeas corpus in federal court should be
9 dismissed to allow petitioner to avail himself of those remedies. Petitioner did just that. Once in state
10 court, respondents ignored their earlier stated position and argued that petitioner was procedurally
11 barred in state court from raising any claims. The court was not impressed with the conduct of counsel
12 for the state of Washington. The *Russell* Court declared it had an independent duty, regardless of the
13 position taken ultimately by the state courts on the issue, to protect its own integrity by "preventing the
14 state from taking advantage of a state decision it secured by telling the state court the opposite of what
15 it told the federal court." *Id.* at 1038.

16 In conclusion, the *Russell* Court noted:

17 Having persuaded the district court to deny appellant federal review on the ground that he had an "adequate and available" state remedy the state cannot now be permitted to
18 oppose appellant's petition for relief on the theory he was actually procedurally barred in state court. Because of the contradictory positions taken by the state, we hold in the
19 alternative that the state is estopped from arguing in federal court that Russell's claims are procedurally barred. The state's attempt to argue that its positions were not
20 contradictory is not persuasive. *Id.*

21 In *State v. Towery*, the Arizona Supreme Court held that judicial estoppel would, "preclude the
22 State from changing its version of the facts in separate proceedings involving the same matter to protect
23 the defendant's right to due process." 186 Ariz. 168, 182 (1996). The Court explained, "[j]udicial
24 estoppel prevents a party from taking an inconsistent position in successive or separate actions." *Id.*
25 Judicial estoppel, "is invoked to protect the integrity of the judicial process by preventing a litigant
26 from using the courts to gain an unfair advantage." *Id.*

27 Precisely the same analysis applies in Sizemore's case before this Court. Under the due process
28 clause of the Fourteenth Amendment, the Court must deny the state's motion to vacate Sizemore's

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1 conviction for a non-capital offense in order to permit the state to re-indict him on a capital charge. For
2 the reasons so well articulated in *Russell*, Sizemore asks this Court to invoke the doctrine of judicial
3 estoppel, deny the attorney general the benefit he would otherwise obtain from "playing fast and loose"
4 with the facts and law of this case, and find that it will not now be heard to take a position diametrically
5 opposed to the one it adopted in open court on the record at the time of the plea.

6 ***4. Double Jeopardy/Collateral Estoppel***

7 As argued below, (*see infra*, argument ***5. Lack of Standing/Futility***) once the court accepts a
8 plea, the state may not withdraw (or attempt to coerce withdrawal) from the agreement because
9 jeopardy has attached. *Dominguez v. Meehan*, 140 Ariz. 329, 681 P.2d 912 (App. 1983), approved, 140
10 Ariz. 328, 681 P.2d 911 (1984). *Coy v. Fields, supra,* at 444. Even assuming what could be considered
11 "manifest injustice," a trial court cannot, *sua sponte*, vacate the acceptance of a guilty plea. *State v. De*
12 *Nistor*, 143 Ariz. 407, 412, 694 P.2d 237, 242 (1985); *State v. Cooper*, 166 Ariz. 126, 131, 800 P.2d
13 992, 997 (App. 1990). To do so would violate the double jeopardy clause. *De Nistor*, 143 Ariz. at 412,
14 694 P.2d at 242. *State v. Djerf*, *supra,* at fnt. 7.

15 The Double Jeopardy clause, of course, prevents the state from twice trying a defendant for the
16 same crime. At its core, the Double Jeopardy Clause affords a defendant protection against a second
17 prosecution for the same offense after acquittal or after conviction and protection against multiple
18 punishments in the same proceeding for the same offense. *Ohio v. Johnson*, 467 U.S. 493, 498 (1984);
19 *United States v. Luskin*, 926 F.2d 372, 377 (4th Cir. 1991). Although this is the "primary purpose of the
20 Double Jeopardy Clause" the Court emphasized that there is "the separate but related interest of a
21 defendant in avoiding multiple prosecutions even where no final determination of guilt or innocence
22 has been made. *United States v. Scott*, 437 U.S. 82, 92 (1978). Underlying this protection is the belief
23 that the government may not repeatedly inflict on the defendant the burden of trial. *Green v. United*
24 *States*, 355 U.S. 184, 187-88 (1957). *Accord, State v. Rumsey*, 136 Ariz. 166, 168-69 (1983), affirmed
25 467 U.S. 203 (1984)(the state with all its resources and power should not be allowed to make repeated
26 attempts to convict). In *Quinton v. Superior Court*, 168 Ariz. 545, 550, 815 P.2d 914 (1992) the Court
27 stated:

28 Such repeated attempts to convict give the state the opportunity to hone the manner in

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> which it will present its proof in order to give it the greatest impact. . . . Even when multiple prosecutions are permitted, such prosecutions place an additional burden upon the defendant to face the charges one at a time.

The Double Jeopardy Clause also "affords a criminal defendant a valued right to have his trial completed by a particular tribunal," although that right is not absolute. *Oregon v. Kennedy*, 456 U.S. 667, 671-72

In this case, during the change of plea of Mr. Brian, Patrick McGillicuddy stated for the record the following with respect to Double Jeopardy:

> THE COURT: What is your plea to the indictment of murder in the first degree.
> MR. McGILLICUDDY: Hold on. Might I be heard before he formally enters a plea?
> THE COURT: Yes.
> MR. McGILLICUDDY: First of all, I would ask that the statements Mr. Phalen and Gorman made with respect to Mr. Sizemore's plea be incorporated into the record on Mr. Brian's change of plea. They are essentially my views, as well. I would like to take this opportunity to express my position, which echoes Mr. Gorman's position.
> THE COURT: With regards to the range of sentence?
> MR. McGILLICUDDY: Yes. I met with my client today; I told him of the possibilities based on the case of Ring versus Arizona, and how it effects his case. I've advised him that my view of the law now is that there is no death penalty statute under which he can be sentenced, but if he enters a guilty plea today to the charges, that the Court is prevented from imposing a sentence of death. That is the basis for his guilty plea today, and that is the only basis. It would be my position that if the Court doesn't agree with me, and I take it that the Court did agree with Mr. Gorman and Phalen, then the plea later would not be found to be knowingly, intelligently, and voluntarily made. Moreover, Judge, I think that you indicated to my client that you may accept or reject the guilty plea. I think that's correct when it comes to a plea agreement, but to a straight up guilty plea to the indictment, ***once a factual basis is laid and my client enters a guilty plea, jeopardy attaches.***
> THE COURT: ***I agree with that; that's just part of my standard –***
> Transcript July 24, 2002 at pp. 31-32 (emphasis added)

The attorney general ***did not object*** to this assertion of the attachment of jeopardy and ***did not challenge*** the Court's agreement with it. In addition to all of the claims that the attorney general waived, as discussed above, he waived also any objection to the finding that jeopardy attached at the time of the taking of these pleas.

In *Ashe v. Swenson*, 397 U.S. 436 (1970) the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment encompasses the doctrine of collateral estoppel. Additionally, collateral estoppel is incorporated in the Fifth Amendment guarantee against double jeopardy binding on the states through the due process clause of the Fourteenth Amendment. *State v. Stauffer*, 112 Ariz. 26, 29, 536 P.2d 1044 (1975). *Ashe* established that collateral estoppel in the criminal context "means simply

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1 that when as issue of ultimate fact has once been determined by a valid and final judgment, that issue
2 cannot again be litigated between the same parties in any future lawsuit. *Ashe, supra*, 397 U.S. at 443;
3 *see also Fernec v. Dugger*, 867 F.2d 1301, 1303 (11th Cir. 1989). *Ashe* requires that a defendant not be
4 forced to defend against charges or factual allegations which he overcame in an earlier trial. *Delap v.*
5 *Dugger*, 890 F.2d 285 (11th Cir. 1989); *Albert v. Montgomery*, 732 F.2d 685 (11th Cir. 1984); *United*
6 *States v. Mock*, 604 F.2d 341, 343-44 (5th Cir. 1979); *United States v. Gortno*, 792 F.2d 1028, 1031
7 (11th Cir. 1986). Cases subsequent to *Ashe* make it clear that collateral estoppel is not limited to
8 "essential" facts (that is, those which are the *sine qua non* of conviction) but also applies to facts
9 necessarily determined at the first trial. *State v. Superior Court of Pima County*, 150 Ariz. 18, 20, 721
10 P.2d 676 (1986).

11 To successfully invoke collateral estoppel, a party must demonstrate: 1) that the issue sought
12 to be relitigated is precisely the same as the issue in the previous litigation; 2) that a final decision on
13 the issue must have been necessary for the judgment in the prior litigation; and 3) there was a mutuality
14 of parties. *State v. Jiminez*, 130 Ariz. 138, 140, 634 P.2d 950 (1981); *Cf. Pettaway v. Plummer*, 943
15 F.2d 1041 (9th Cir. 1991); *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989). Collateral estoppel may
16 apply to a single element of the offense or to a single count. *U.S. v. Aguilar-Aranceta*, 957 F.2d 18, 23
17 (1st Cir. 1992). ***The doctrine embraces an issue even where a decision by a trial court was based on***
18 ***an erroneous ruling of law or fact, or a misrepresentation of law or precedent.*** *United States v. Scott*,
19 437 U.S. 82 (1978); *Sanabria v. U.S.*, 437 U.S. 54 (1978); *Smalis v. Pennsylvania*, 476 U.S. 140
20 (1986)(even where the determination was made in error, an acquittal is final). Collateral estoppel has
21 been held to apply to an aggravating circumstance in a death penalty trial. *See Delap v. Dugger, supra*,
22 890 F.2d 285 (11th Cir. 1989)

23 The *Ashe* principle properly extends to the sentencing phase of a capital trial. *Bullington v.*
24 *Missouri*, 451 U.S. 430 (1981). As the *Ashe* court emphasized, "the rule of collateral estoppel in
25 criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century
26 pleading book, but with realism and rationality." 397 U.S. at 443-44. The inquiry "must be set in a
27 practical frame and viewed with an eye to all the circumstances of the proceedings." *Sealfon v. U.S.*,
28 332 U.S. 575 (1948). *See U.S. v. Larkin*, 605 F.2d 1360, 1369 (5th Cir. 1979)("Collateral estoppel does

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not have a surgical precision found in double jeopardy, for its basics are founded in equity and therefore command some flexibility"). Under the circumstances of this case, the *Ashe* principle of collateral estoppel must be applied.

For example, in *Pettaway v. Plummer*, 943 F.2d 1041 (9th Cir. 1991) the defendant was charged and convicted of one count of murder and one count of attempted murder under an aiding and abetting theory of culpability/jury instruction. The jury was also instructed that it had the "duty" to determine whether Pettaway personally shot the relevant victim and to do so only if the proof established beyond a reasonable doubt that he had done so. At the same time the jury found Pettaway guilty of both substantive counts, it also found in a special verdict that Pettaway did not shoot the relevant victim. Thus the jury rejected the state's sentence enhancement allegation.

Likewise this Court, never even presented with a "sentence enhancement allegation" (aggravating circumstance) for none were ever alleged or noticed by the state, found that Sizemore was only guilty of non-capital homicide and accepted the plea to this non-capital charge without a peep of objection from, indeed with the full cooperation of, the state. Collateral estoppel bars the state's ill-advised scheme to put the wheels of this case in the ditch so it can go back and "do it right" a second time.

The necessary three elements (*see supra*) for the finding of collateral estoppel are clearly present here. First, the issue of the imposition of the death penalty was squarely joined between the parties from the inception of the case. Qualified capital counsel from out of town were appointed to represent Mr. Sizemore precisely because this was a contest for the life of this young man. The questions of whether *Apprendi* and *Ring* demanded that factual allegations qualifying him for death needed to be pled in the indictment and tried to a jury were raised in a pretrial motions and litigated with vigor. That Sizemore *was even death eligible* under the charges alleged in the indictment was squarely raised.

Second, a final decision on the question was reached by a meeting of the minds of the parties and the Court on July 24, 2002. The state unequivocally *agreed* that death was not an available sentence for this non-capital offense. At worst, the state waived any argument to the contrary.

Third, there is plainly a mutuality of the parties. This has always been a battle between Sizemore and the state, regardless of the change of guard after Mr. Brown's untimely passing.

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Thus, all of the requirements of collateral estoppel are met in this case. *Even assuming* that there was an error of law or fact made in the change of plea proceedings (a position Sizemore will ***never*** concede) it matters not a jot. For the case law is clear that even if there was a mistake of fact or law that led to the final determination of the cause, collateral estoppel nevertheless precludes absolutely the relitigation that the attorney general so desperately seeks. Were waiver, simple estoppel, judicial estoppel and the Double Jeopardy Clause of the Fifth Amendment not enough to stop this death train, the homely horn book doctrine of collateral estoppel must.

The pathetic irony of this whole exercise is that *even if* the state succeeds in persuading this Court to upset the settled finality and repose of the case, even then, the state will not legally be allowed to seek the imposition of death on this indictment. Mr. Sizemore is not now and never was charged with a capital offense. If the state wants to pursue this meaningless judicial charade on suspect motives at great expense to the state and Navajo County, so be it. Counsel for Sizemore are in this battle for the long haul and the gloves are off.

5. Untimeliness

The state is guilty of laches and untimely filing of its "motion for permission." Moreover, it is untimely in filing any appeal it may have wanted to lodge from the Court's final order accepting the plea. The Court issued its order accepting the plea and entering it of record on July 24, 2002. It was a final order of the Court. The only objection the state lodged during the plea proceeding was as to the Court's acceptance of the plea *at that time*.

> THE COURT: Have I missed anything, counsel?
> MR. GORMAN: No, your Honor, not that I'm aware of. And, Judge, because this is not a plea agreement, and because he has pled to the charge, we'd ask the Court to accept the plea, which I believe the Court is required to by law, but we'd ask that the court do so, and then we can discuss sentencing.
> THE COURT: I find the plea is knowingly, intelligently, and voluntarily made; no force, threats, or promises have induced the plea. Your position on acceptance of the plea, Mr. Duarte?
> MR. DUARTE: I'd urge the Court to defer acceptance, your Honor.
> MR. DUARTE: In case something happens between now and the time of sentencing, other than that,
> I don't have anything else. Thank you.
> MR. GORMAN: And, Judge, I don't believe there's any rule, perhaps the Court will find one, but I don't believe there's any rule that would require it or suggest that it should be deferred, and once again, he pled to the charge, so I see no basis to defer acceptance.
> THE COURT: Let me just look at this real

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> fast. I think I agree with you on that. If I can find my rule. Anybody know what rule that is? There it is. Oh, here it is. All right. Having reviewed Rule 17, it appears to me based upon my reading that I will accept the plea and enter the plea of record and order a presentence report to be prepared.
> Transcript, July 24, 2002 at 23-24

The Court overruled the state's objection to acceptance and accepted the plea. If the state had "trouble" with this final order of the court, it had twenty days under the Rules (Rule 31.3, Arizona Rules of Criminal Procedure) to appeal that final order. This time for filing a notice of appeal is jurisdictional. *State v. Rasch*, 188 Ariz. 309, 935 P.2d 887 (App. 1996); *State v. Berry*, 133 Ariz. 264, 650 P.2d 1246 (App. 1982) Some ***thirty-three days later and on the very brink of sentencing***, the attorney general, likely under some considerable pressure from his chagrined and disgruntled superiors to reverse the position he took in open court on the record, was persuaded to file this untimely and embarrassingly disingenuous pleading.

By any measure, the attorney general has displayed a reckless and cavalier disregard for the orderly progression of this case, has upset fairly settled legal expectations and has caused counsel and the defendants to change their positions in reliance on finality to their prejudice. The motion should be dismissed summarily for this disruptive untimeliness.

6. Lack of Standing/Futility

The tortured title and stilted analysis in support of the requested relief in the "motion for permission" belies just how nightmarishly nonsensical it is. Underlying this Alice in Wonderland quality of the motion is that the state ***lacks standing*** to bring it and both the state and the Court are ***powerless*** to either force a remedy or give any relief under it. A motion that seeks what cannot be granted as a matter of law is a nullity and a futility and should be dismissed perfunctorily. The motion is remarkable if for no other reason than its preposterousness reveals the cleverness borne of desperation. Here is how the twisted thinking goes:

The state ***unilaterally*** chooses to change its mind with regard to the ***single most central issue*** undergirding the plea proceeding of July 24, 2002, namely, that the statutory range of sentence for this non-capital offense now includes death. Having simply ***unilaterally*** changed its mind (there has been no judicial finding BY ANY COURT IN THE LAND that this new "position" that the state has adopted holds any legal water, by the way) the state argues that this ***imposes*** on the pleading defendant a ***pull***

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1 ***of involuntariness***. In order to "save" the hapless defendant from this unintended (and dangerous?) ***pall***
2 ***of involuntariness***, the state grandiosely comes to the aid of the hapless defendant and offers him the
3 ***salvation*** of allowing him to withdraw from the plea. Heaven forbid the defendant hold onto his plea
4 to life! What can be done to correct this horror? No hapless defendant should be made to suffer such
5 pains of involuntariness. No, the state argues, let him enjoy the benefits of a *voluntary* plea, which the
6 state offers him ***at the cost of his very life***. The twisted ghoulishness of what the state is doing here is
7 truly obscene.

8 The state has no standing to bring this motion because it has no power to force the defendant
9 to exercise his exclusive right to withdraw from the plea. Nor can the state withdraw because it is not
10 a party to the plea and never gave any thing to begin with (other than its waiver, *see supra*). Nor,
11 respectfully, can the Court force the defendant to withdraw from the plea, for having accepted the plea
12 and entered it on the record, and the plea not having been obtained or induced by fraud or
13 misrepresentation, it is a *fait accompli* and jeopardy has attached.

14 The state wants the Court to do this: ***Unilaterally declare that the sentencing range for this***
15 ***non-capital offense now includes death***. If the state succeeds in getting this Court to do this, it will
16 have succeeded in ***imposing*** on the plea the precise ***involuntariness*** it requires in order to argue
17 straight-faced that Sizemore ***ought***, on his own, (for even then the state cannot force him) withdraw
18 from the now ***involuntary*** plea. This twisted plot to jam up Sizemore and monkey-wrench the
19 proceedings in order to sate the blood lust for Sizemore makes Kafka's The Penal Colony look like a
20 Sunday school picnic.

21 But Sizemore ***will not withdraw*** from his plea, for the range of sentence for his non-capital
22 crime is natural life, as the Court told him in open court on the record. Should the Court attempt to
23 sentence Sizemore to death on this non-capital offense plea, having been modified against his will to
24 include a new crime "capital murder" for which he was never charged and which carries a higher and
25 illegal sentence of death, the case will be reversed in a hummingbird's heartbeat and we'll all be back
26 here in several year's time to do it right then.

27 In *Coy v. Fields*, 200 Ariz. 442, 27 P.3d 442 (App. 2001) the Arizona Court of Appeals
28 explained that ***even if the state were empowered (as it is not in this case) to withdraw from a plea***, it

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could not do so, even under those circumstances, because double jeopardy bars such a course. The Court explained the law:

> ¶ 5 We next address whether the respondent judge should have permitted the state to withdraw from the plea. Rule 17.5, Ariz. R. Crim. P., 16A A.R.S., gives a trial court discretion to allow either party to withdraw from a plea and to reinstate the charges in effect before the plea agreement was negotiated to correct a manifest injustice. But, once the court accepts the plea, the state generally may not withdraw from the agreement because jeopardy has attached. *Dominguez v. Meehan*, 140 Ariz. 329, 681 P.2d 912 (App. 1983), approved, 140 Ariz. 328, 681 P.2d 911 (1984). *Coy, supra,* at 444.

But let none of us be fooled, the scenario the state has planned for Sizemore is far more sinister than the one discussed *supra* in *Coy*. The state is not seeking merely to "reinstate" the charges. No, the state is seeking to lethally "up the ante" and to charge him with the capital offense the state did not charge him with the first time. The state can only succeed in this base scheme if it tricks this Court into forcing Sizemore out of his plea to the indictment that failed to allege a capital crime.

But the state is powerless to effectuate its sinister plan and the law prohibits this Court from being party to it. The law is clear. In *State v. Djerf*, 191 Ariz. 583, 959 P.2d 1274 (1998) the Arizona Supreme Court stated:

> Defendant made no motion nor did he indicate at any time a desire to withdraw the pleas. A trial court may allow the withdrawal of a guilty plea "when necessary to correct manifest injustice.' Ariz. R. Crim. P. 17.5. Even assuming that defendant's lack of understanding of a presentence hearing could be considered "manifest injustice," a trial court cannot, *sua sponte*, vacate the acceptance of a guilty plea. *State v. De Nistor*, 143 Ariz. 407, 412, 694 P.2d 237, 242 (1985); *State v. Cooper*, 166 Ariz. 126, 131, 800 P.2d 992, 997 (App. 1990). To do so would violate the double jeopardy clause. *De Nistor*, 143 Ariz. at 412, 694 P.2d at 242. *State v. Djerf, supra,* at fnt. 7

Undersigned learned early that the most expensive thing one can do is change one's mind. The state must be taught that same lesson here. The state lacks standing to be heard and the Court is powerless to effectuate the change the state seeks. The motion is futile and should be summarily dismissed.

7. Prosecutorial Vindictiveness

Sizemore asserts that the state's latter-day decision to stick him with death is a classic case of prosecutorial vindictiveness in violation of his rights under the Due Process Clause of the Fourteenth Amendment. The defendant having availed himself of a legal right which he was entitled to exercise, the state is responding by "upping the ante" and is attempting to charge him with a capital crime and

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punish him with a more severe penalty.

"Prosecutorial vindictiveness" occurs when the government retaliates against a defendant for exercising a constitutional or statutory right. *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987). "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (citations omitted). Despite the broad latitude traditionally afforded prosecutors in this regard, constitutional guarantees of due process protect criminal defendants against prosecutorial action taken to penalize them for invoking legally protected rights. *Blackledge v. Perry*, 417 U.S. 21 (1974). *See also State v. Tsosie*, 171 Ariz. 683, 832 P.2d 700 (App. 1992)("Because the courts have recognized that a showing of actual vindictiveness is "exceedingly difficult to make," a defendant in some circumstances may rely on a presumption of vindictiveness. (citations omitted) That presumption arises when a defendant presents facts that indicate "a realistic likelihood of 'vindictiveness.'" citing *Blackledge.*)

Sizemore cannot say *with certainty* that the decision to reverse the position taken thirty-three days prior and to "up the ante" to death, was motivated by prosecutorial vindictiveness, but he can comfortably invoke the presumption that the law provides. It walks like a duck and it quacks like a duck, that's for sure. What is clear is that the decision to queer the resolution of this case and derail the life plea was made for cynical, venal, political purposes, and most clearly not guided by a fair-minded quest for justice in this particular case. The rules governing the prosecutorial function demand that the state not seek punishment and retribution at all costs. Instead, a prosecutor is duty bound to seek the truth and to do justice. Neither is happening here.

There is no doubt that the principles of and remedies for prosecutorial vindictiveness will lie in the plea context. Discretion over plea bargaining is a core prosecutorial power, but not one without constraints. It is well established, for example, that the courts may intervene to reinstate a plea offer that the State has withdrawn for vindictive reasons. *See Turner v. Tennessee*, 940 F.2d 1000 (6th Cir. 1991); *see also State v. Martin*, 139 Ariz. 466, 481, 679 P.2d 489, 504 (1984). Although not a plea agreement case, Sizemore's is governed by the principles that ensure that vindictiveness is not allowed

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to flower like stinkweed in the Courts of Navajo County.

The remedy for a classic case of prosecutorial vindictiveness in a pretrial setting is ***the dismissal of the charges against the defendant*** for the violation of his fundamental constitutional rights. *State v. Tsosie, supra* at 688. Sizemore asks merely that the state's motion for permission be dismissed summarily.

8. Acquittal

After *Ring v. Arizona*, ___ U.S. ___ (2002) there now exists (perhaps) a new "theoretical" substantive crime in Arizona of "capital murder." It is "theoretical," because it is not clear that the amended Arizona death statute properly defines a new crime at all. *Most* of the elements of the crime of capital murder are codified at 13-1105. The *rest* of the elements are purportedly codified in another section of Chapter 13, at ARS 13-703. Distributing the elements of an offense among or between several statutes may not be legally *prohibited*, but it cannot be gainsaid that Sizemore was ***never charged with those elements*** necessary to make his crime a capital offense. ***From the very inception of this case, it has been clear to the defense and it is now clear beyond peradventure because of the Ring holding, that Sizemore was never death eligible because he was never even charged with capital murder.***

Because *Ring* has declared that an aggravating circumstance operates as "the functional equivalent of an element of a greater offense" there is a new ***substantive crime*** in Arizona, arguably called "capital murder." ***Sizemore was never charged with this crime***. Indeed, he has never received notice ***to this date*** of precisely what "aggravators" or "capital elements" he ***would have been*** or ***might have been*** charged with. This ***failure ever to charge him*** with necessary elements of "capital murder" violated the notice and jury trial provisions of the Sixth Amendment and requires a finding that he is actually innocent of (*i.e.*, never even having been charged with) "capital murder." Having pleaded guilty to the crime for which he was charged, ***i.e., non-capital first degree murder***, he stands now ***acquitted*** of the "theoretical" greater crime of "capital murder," for which, as has been made clear, he was never charged and which did not exist either at the time of the offense or at the time of the change of plea.

More to the point, at the change of plea proceeding, the Court and counsel and Sizemore engaged in the colloquy establishing the factual basis of the plea. Sizemore admitted the crime of first

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1 degree murder as charged in the indictment. Sizemore ***did not*** admit, because there were no allegations
2 of, any "aggravators" or "capital murder elements." Mr. Duarte was then asked whether he had any
3 additions to the factual basis. He did not. The colloquy is as follows:

4 THE COURT: . . . What is your plea?
THE DEFENDANT: Guilty.
5 THE COURT: Factual basis?
MR. GORMAN: Well, Judge, the specific factual basis for Mr. Sizemore is that on
6 November 13th of 2000, in Navajo County, with the knowledge that he would kill
another human being, Mr. Sizemore stabbed Carlos Ceniceros with a homemade knife
7 known in prison as a shank, and Mr. Ceniceros died as a result of stab wounds on that
same date, November 13th, 2000.
8 THE COURT: ***Do you have anything to add to the factual basis***, Mr. Duarte?
MR. DUARTE: ***No, I do not, your Honor.***
9 Transcript, July 24, 2002 at 23 (emphasis added)

10 "Capital elements" necessary to make a crime a capital offense are ***facts***, which if
11 constitutionally alleged and proved, make an individual death eligible. Were there ever a time when
12 such ***facts*** needed to be articulated for the record, it was during the factual basis colloquy. The attorney
13 general did not state any and thereby plainly waived whatever "capital elements" he might otherwise
14 have articulated for the record. The plea colloquy makes it clear that there are no facts in the record on
15 which a finding of "aggravating factors" or "capital elements" can be found. Sizemore is ***acquitted*** of
16 capital murder and is not and cannot ever be made death eligible. As such, the court is compelled to
17 find, as a matter of law, that Sizemore may only receive a maximum sentence of natural life in prison.

18 ***9. Violation of the Due Process Clause of the Fourteenth Amendment***

19 The state goes to great pains to distinguish *Coleman v. McCormick*, 874 F.2d 1280 (9th Cir.
20 1989) from this case and to argue that the imposition of death on Sizemore under the new Arizona
21 death statute would not violate the due process clause of the Fourteenth Amendment. The attorney
22 general is misguided.

23 The Supreme Court in *Dobbert v. Florida* reiterated the "well settled" principle that the *ex post*
24 *facto* clause does not "limit the legislative control of remedies and modes of procedure which do not
25 affect matters of substance.'" *Dobbert*, 432 U.S. at 293 (*quoting Beazell v. Ohio*, 269 U.S. 167, 171
26 (1925)). As a corollary to this principle, the Court noted that "[e]ven though it may work to the
27 disadvantage of a defendant, a procedural change is not *ex post facto*." *Id.* By contrast, the procedural
28 component of the due process clause protects individuals' rights to fundamentally fair procedures before

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1 they are deprived of their liberty rights. *See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S.
2 123, 161 (1951) (Frankfurter, J., concurring). Especially in the capital sentencing arena, a court has an
3 obligation to scrutinize closely the sentencing procedures against "fundamental principles of procedural
4 fairness." *See Presnell v. Georgia*, 439 U.S. 14, 16 (1978); *Gardner v. Florida*, 430 U.S. 349, 357
5 (1977).

6 Sizemore addresses the *ex post facto* issue in argument ***10. Violation of the Ex Post Facto***
7 ***Clause of Article I, § 10, United States Constitution***, *infra*. There Sizemore convincingly demonstrates
8 that the new death statute is not merely a procedural one, but one that created an entirely new
9 substantive crime of capital murder, for which the maximum penalty is now higher than for any
10 constitutional crime previously in existence in Arizona.

11 For the present, Sizemore maintains that the procedural changes wrought by the "new" death
12 statute offend the due process clause of the Fourteenth Amendment, just as Montana's did in *Coleman*
13 *v. McCormick*. Most notably, and just as his first example, the new death statute purports to eviscerate
14 the Arizona Supreme Court's independent review of the propriety of any death sentence and purports
15 to restrict review by the high court to the flaccid "abuse of discretion" standard. The elimination of this
16 substantial procedural right, constitutionally mandated under the due process clause of the Fourteenth
17 Amendment as well as the cruel and unusual punishments clause of the Eighth Amendment, clearly
18 violates Sizemore's right to due process of law.

19 Second, the new statute, which requires that the jury "try" the existence of aggravators and then,
20 if upon a unanimous finding of the aggravators, must then "try" the sentence itself, is being launched
21 without the benefit of constitutionally limited jury instructions, needed to "cure" such facially
22 unconstitutional aggravating factors (capital elements, if you will) such as "especially cruel, heinous
23 or depraved." It is undisputed that this aggravating factor is facially unconstitutionally vague. "[T]here
24 is no serious argument that Arizona's 'especially heinous, cruel or depraved' aggravating factor is not
25 facially vague." *Walton v. Arizona*, 497 U.S. 639 (1990).

26 Third, the new death statute provides for a succession of juries, a maximum possible of five in
27 all, that can theoretically sit in judgment on a capital defendant between his guilt, aggravation and
28 sentencing phases of his trial(s). A defendant has a constitutional right to trial by a jury, which is not

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satisfied by trial by *many* juries.

These are but three of the more glaring procedural dislocations Sizemore would suffer were he exposed to the new death statute in his case. Many more procedural constitutional glitches will emerge as the statute is litigated in the future. But these three are sufficient to sustain a finding that Sizemore's right to due process of law would be violated were the new statute be applied to him at this time. The *Coleman* Court put it as eloquently as one can, when it wrote:

> The finality and severity of a death sentence makes it qualitatively different from all other forms of punishment. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) (plurality opinion). The Supreme Court has stressed the great need for reliability in capital cases requiring that "capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." *Strickland v. Washington*, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part); *see also California v. Ramos*, 463 U.S. 992, 998-99, 103 S.Ct. 3446, 3451-52, 77 L.Ed.2d 1171 (1983) ("the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination") (footnote omitted).
> "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of [the death] sentence . . . ." *Gardner*, 430 U.S. at 358, 97 S.Ct. at 1204. When human life is at stake, the need to ensure that punishment is meted out fairly and in a noncapricious manner is preeminent. (citations omitted).
> *Coleman v. McCormick*, 874 F.2d at 1288

10. Violation of the Ex Post Facto Clause of Article I, § 10, United States Constitution

The *Ex Post Facto* Clause of the United States Constitution is based on the notion that persons have a right to fair warning of that conduct which will give rise to a criminal penalty and of what those penalties are. This principle is fundamental to our concept of ordered constitutional liberty and prevents legislatures from retroactively altering the definition of crimes or increasing the punishment for criminal acts.

In *Collins v. Youngblood*, 497 U.S. 37 (1990) the United States Supreme Court addressed the *Ex Post Facto* Clause and held that a law violates Article 1, section 10 of the Constitution if it punishes as a crime an act previously committed which was innocent when done; makes more burdensome the punishment for a crime after its commission; or deprives one charged with a crime of any defense available under the law in effect when the act was committed. In *Collins*, the Supreme Court noted that labeling a change in the law as "procedural" will not immunize it from scrutiny, because subtle *ex post facto* violations are no more permissible than overt ones. The Supreme Court has stated also that the

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ex post facto prohibition applies equally to increases in punishment for conduct that was already criminal. Even if a statute merely alters penal provisions it violates the *Ex Post Facto* Clause if it is both retrospective and more onerous than the law in effect on the date of the offense. *Weaver v. Graham*, 450 U.S. 24 (1981).

The state has put all its eggs in one basket. It relies solely on the very limited holding of *Dobbert v. Florida*, 432 U.S. 282 (1977), a case whose result is easily distinguishable and can be explained precisely because the change in the Florida statute under discussion was, indeed, purely procedural. Arizona's statutory response to the *Ring* decision, by contrast, could not be more different from Florida's statutory change. The *Ring* holding itself dictates the Arizona result, which was a fundamental alteration, not merely in the procedures for the "delivery" of a death sentence, but in the ***very elemental definition*** of a new crime. ***This is the heart of substantive, not procedural, criminal law.***

Ring holds that aggravating circumstances are the functional equivalent of elements of an offense called capital murder. Elements of a criminal offense must be charged, *i.e.*, the defendant must be given constitutionally sufficient *notice* of them[2] (Sixth Amendment notice requirement), they must be tried to a jury (Sixth Amendment Right to trial by jury) and they must be proved beyond a reasonable doubt (Fourteenth Amendment Due Process Clause; *In re Winship*, 397 U.S. 358 (1970)). Arizona's "old"capital sentencing scheme, which purported to be a "death delivery" statute, ***never*** really was, for it violated these fundamental constitutional precepts in spades. Second only to the failure of the statute to provide for trial of the aggravators to a jury, the most glaring of these constitutional violations was the statute's failure to charge (give notice of) the facts of the capital "elements" prior to trial, thereby

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[2] The Sixth Amendment Provides as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ***by an impartial jury*** of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and ***to be informed of the nature and cause of the accusation***; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." (Emphasis added)

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violating the notice requirement of the Sixth Amendment (*see* text of Sixth Amendment, fnt. 2). In fact, the statute, as written, ***could not be and never was a death delivery statute. There did not exist, in a constitutional sense, a capital criminal statute in the State of Arizona.***

The attorney general's heroic spin on the crippling constitutional handicaps of the recently deceased "death" statute are legally lame at best. The argument that death was always an available sentence, there was merely a hiatus of some theoretical kind in its ability to be meted out, is preposterous. In fact, in a constitutional sense, Arizona has not had a capital crime on the books since the day when Arizona eliminated the jury from the game.

In response to *Ring*, the Arizona legislature drafted a flawed statute which purports to fix the constitutional error identified in *Ring*. In so doing, the legislature purported to create a new criminal offense, that of capital murder. The statute purports to make this new crime by a combining the "elements" of the "old" first degree murder statute codified at ARS 13-1105 with the "death elements", codified at a different statutory section, ARS 13-703. In combination, one must surmise, this bundle of elements, if properly alleged, prior to trial, are to be tried to a jury. If found beyond a reasonable doubt by a jury, the hypothetical defendant is convicted of the crime of capital murder.

It is this new crime that the attorney general asserts Mr. Sizemore is now magically charged with, even though he never really was, because it did not exist at the time of the crime, nor even at the time of his change of plea. Or if he is not charged with this new crime, the attorney general maintains, he damn well will be sentenced under its terms. But this new crime, a new, previously non-existent, capital crime, was one that did not exist before and is one ***whose punishment is in excess of the maximum penalty under the prior non-capital first degree murder statute***. *Ipso facto*, it violates *ex Post Facto*. 'Nuff said.

11. Violation of Due Process under the Rule in Santobello v. New York

The events that took place in this case were a clear violation of the Fourteenth Amendment due process rule laid down in *Santobello v. New York*, 404 U.S. 257 (1971) and its progeny. In *Santobello*, the Supreme Court held that "when a plea rests in any significant degree on a promise ***or agreement*** of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 261-62 (emphasis added). A plea agreement allows the state to induce a

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1 defendant to plead guilty and waive his fundamental rights to a jury trial, to confront his accusers, to
2 present witnesses in his defense and to be convicted by proof beyond a reasonable doubt. To falsely
3 inform a defendant of the consequences of his plea agreement, or to fail to honor the terms of the plea
4 agreement, violates due process. *State v. Ross*, 166 Ariz. 579, 584-85, 804 P.2d 112 (App. 1990), *citing*
5 *Mabry v. Johnson*, 467 U.S. 504 (1984).

6 In *Santobello, supra*, the Supreme Court reversed the defendant's state court conviction. The
7 state had promised to make no recommendation as to sentencing and in return the defendant pled guilty.
8 At sentencing the prosecutor urged the maximum sentence. Defense counsel objected. The judge stated
9 for the record that he was not influenced by what the prosecutor said and then sentenced the defendant
10 to the maximum term. Despite the trial court's statement that it was not influenced by the prosecutor's
11 breach, the Supreme Court reversed stating that although it had no reason to doubt the judge's
12 statement, "the interests of justice and appropriate recognition of the duties of the prosecution in
13 relation to promises made in the negotiation of pleas of guilty" required reversal. 404 U.S. at 262, 92
14 S.Ct. at 499.

15 A breach of the plea agreement occurs not only when the prosecution breaks its promise, but
16 also ***when the spirit of the inducement*** is breached. *State v. Sodders*, 130 Ariz. 23, 633 P.2d 432 (App.
17 1981) (prosecutor's vigorous argument and recommendation for maximum sentence of 38 years in
18 prison breached spirit of agreement not to present any evidence at an aggravation hearing); *State v.*
19 *Davis*, 123 Ariz. 564, 601 P.2d 327 (App. 1979) (after agreeing not to present an aggravation hearing
20 prosecutor breached agreement by making statements to the presentence writer that the defendant was
21 dangerous and should receive a 9 to 10 year sentence); *see also United State v. Shanahan*, 574 F.2d
22 1228 (5th Cir. 1978).

23 ***There can be no dispute*** that the attorney general's agreement that the maximum penalty for
24 Sizemore's plea to the non-capital offense was natural life in prison went to the very core of Sizemore's
25 reason for pleading to the indictment. The transcript of the proceedings speaks with gin clarity:

26 THE COURT: *What is your position on the range of sentence?*
MR. GORMAN: I suspect the Court would agree that there's no constitutional death
27 penalty statute presently in Arizona. We certainly have advised Mr. Sizemore there is
not. Mr. Sizemore has made his decision to plead guilty with the understanding that his
28 guilty plea and the acceptance of the plea by the Court will result in a penalty of life

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imprisonment, either natural or 25 calendar years parole eligible; that is all. He is basing his decision on his understanding that no death penalty statute presently applies to him, nor because there is no death penalty statute in Arizona nor will any death penalty statute apply to him should he be sentenced in 60, 90, 120 days. That the only possible penalty he is facing is natural life or 25 calendar years. ***And that's his understanding, and that is, in large part, the material reason he is pleading guilty.***
THE COURT: Thank you.
MR. GORMAN: And, Judge, if I could also add, it's speculative for any other position at this point, because there's no legislation passed and et cetera, et cetera.
THE COURT: Mr. Duarte, what's your position?
MR. DUARTE: There's no way to soften the full implication of Ring's decision, that being that ***there is not presently a sentence that can implement the taking of a life here in Arizona***. So this point, we have a brief that we normally submit that would address categorically the situation that's before the Court, but that would be -- I don't want to use the word speculative, but that is something that I cannot urge at this particular point in time, because unless there's something that I can put before the Court that is precedent that is on the books or that is case law and has been handed down even in an emergency posture, I cannot urge a position where there's a void. ***So at this point, I can't add a whole lot to what counsel has said***. Obviously, we are suggesting that I'm sure the legislature will work that out, ***but today as we stand in court, there does not appear to be a viable death penalty sentence to which Mr. Sizemore would be exposed.*** Thank you.
THE COURT: Mr. Sizemore, *the range of sentence for this plea is either natural life, which means that you would not be eligible for parole for any reason, or you could not be released until having served 25 calendar years . . .*
Transcript July 24, 2002 at 18-19 (emphasis added)

The attorney general will not be heard to complain that *Santobello* implicates only cases in which a prosecutor makes a plea offer and that Sizemore's case is distinguishable because there was no offer. That position could not be m ore myopic. The heart of *Santobello* is that any statement or promise or ***agreement*** made by the prosecutor that serves as the inducement for a defendant to change his plea and waive a raft of fundamental constitutional trial rights, will be assiduously and strictly enforced in favor of that pleading defendant. The attorney general ***agreed*** that the maximum penalty for this non-capital offense was life. This was the very foundation on which the plea was grounded. The state's belated and suspect attempt to wriggle free of its on the record agreement and inducement violates the Due Process Clause of the Fourteenth Amendment as strongly articulated in *Santobello* and its progeny. *See also State v. Davis, supra; State v. Gayman*, 127 Ariz. 600, 623 P.2d 30 (App. 1981). Moreover, such a breach as occurred here is not considered harmless error. *State v. Ross, supra; State v. Bloom*, 137 Ariz. 250, 669 P.2d 1027 (App. 1983).

Just as the trial judge's protestations in a given case that the breach of the agreement had no effect on his sentencing decision are irrelevant in the *Santobello* analysis, so too are a prosecutor's

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stated motives (*e.g.*, "mistake of law") for breaching the plea agreement irrelevant to the consequences of that breach. Prosecutorial motives and justifications for failure to honor a plea agreement cannot excuse their breach. *State v. Ross, supra*, 166 Ariz. at 583; *State v. Gayman*, 127 Ariz. 600, 623 P.2d 30 (App. 1981); *State v. Warren*, 124 Ariz. 396, 604 P.2d 660 (App. 1979). The remedy for a breach of this type is that the defendant is entitled to specific performance of the agreement. *See State v. Romero, supra; State v. Bloom, supra; State v. Ross, supra; State v. Gayman, supra; State v. Davis, supra; State v. Sodders, supra.*

12. Manifest Injustice?

The state was careful at the plea proceeding to inform the Court that it felt compelled to notify the "victim" prior to Sizemore's going forward with the plea. Despite Sizemore's correct assertion that the victim notification requirements apply only in those situations in which the state *offers* a plea agreement to a defendant and not in a case where the defendant pleads to the indictment, and despite the Court's informing the state that an incarcerated inmate is not by definition a "victim" under the statute, nevertheless, the attorney general took a recess and contacted the victim. The record reveals the following:

> MR. GORMAN: We -- your Honor, may I speak? Tom Gorman on behalf of Mr. Sizemore. We're ready to enter a change of plea to the indictment. We're ready to proceed right now if the Court's ready.
> THE COURT: I'm ready.
> MR. DUARTE: If I may, your Honor, your Honor, ***I don't oppose the change of plea***[3], but I do request on behalf of the victim a reasonable time to contact her. She lives in Tucson. I would ask you to schedule this perhaps for Monday or Tuesday of next week. I'll make it my priority, but I do need to observe the victim's rights requirement that I have contact with her.
> THE COURT: ***I didn't think the victim's rights applied to inmates.***
> MR. GORMAN: Could I interject something?
> MR. DUARTE: Please.
> THE COURT: That was Mr. Brown's position when I asked him about that a long time ago.
> MR. GORMAN: This is a different point. ***I understand Mr. Duarte's concern, however, that requirement, I believe, and we can check by looking at a statute, only applies if the State makes an offer of a plea agreement, then they would have to contact the victim. They have not made an offer. We're pleading to the indictment, so there's no notification requirement because there's no State offer.***
> Secondly, I assume that the victims were notified of this proceeding, this Court date, so -- but, in any event, we're prepared to go forward today, and, Judge, I cannot in any way assure that there will be a change of plea if it goes past today.

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[3] *See supra*, argument ***I. Waiver***

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MR. DUARTE: Your Honor, not to try the Court's patience, but in view of the fact that this isn't -- the rarest, counsel may actually be right about this. As a moral imperative, ***I do have the victim's next of kin's phone number. If I can just call her and tell her what's transpiring, I will be back in the courtroom in, literally, five minutes.***
MR. GORMAN: I have no objection to that.
MR. McGILLICUDDY: No objection.
THE COURT: We'll take a brief recess for you to do that.
MR. DUARTE: First of all, I thank the Court for its professionalism. ***I did contact the victim's next of kin. She is aware of the situation and does not have any other observations to impart to the Court at this time.*** As far as I'm concerned, your Honor, your Honor has cited to the appropriate chapter and verse in the criminal code regarding the definition of the word victim. July 24, 2002 Transcript of Proceedings at pp. 11-15 (emphasis added)

The state now falsely asserts that the "manifest injustice" that it is championing here (for purposes of allowing it to reopen the proceedings so it can get another shot at killing Mr. Sizemore) is that being "perpetrated" ***on the very "victim" with whom it already consulted and from whom it received no objection***. (*See* state's "motion for permission, etc." at 11, lines 14-17: "To enforce the guilty plea in the absence of a plea agreement with the limitation on sentencing to natural life, based on the mistake of law, would be *manifestly unjust to the victims in the state*[4], and would perpetrate legal error.") The premise is vicious and flawed, for it assumes that justice can only be served by the certainty of a grisly execution. It presupposes that natural life in prison serves no retributive goals, is a cheap and inadequate punishment, and cannot serve the need for justice and closure that the criminal law demands. This is, of course, short sighted and nonsensical.

The attorney general's office is charged with knowing that the vast majority of first degree murder cases charged *in this country* result in sentences of life (or less). The attorney general's office is charged with knowing that the vast majority of first degree murder cases charged *in this state* result in sentences of life (or less). The attorney general's office is charged with knowing that the vast

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[4] If the attorney general is invoking his "manifest injustice" argument on behalf of an abstract collection of "victims" unrelated to and having no interest in *this* case, as the text of the sentence implies, then he has no argument whatsoever. Some vague, general, hypothetical victim interest is certainly irrelevant to and cannot have any impact upon the course of *this* case. But even if he is specifically invoking it on behalf of the victim in *this* case, we know, as a matter of law, that there is no "victim" here. *See* ARS 13-4401.19. Finally, if the attorney general is invoking the manifest injustice standard on behalf of the deceased, then that too must be rejected, for even the attorney general's office has not the clairvoyance to communicate beyond the grave.

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majority of ***capital murder*** cases charged *in this state* result in sentences of life (or less). The attorney general's office is charged with knowing that the majority of ***capital murder*** cases charged in this state result in ***plea offer from the state to life (or less)***. For the attorney general to argue, straight-faced, to this Court, that a life sentence in this case constitutes a "manifest injustice" under these facts, which it knows, is hypocrisy of the first order and is an insulting misrepresentation of the truth.

Let us not be deceived by what we are discussing here. The state is arguing that there is a ***manifest injustice*** precisely because and only to the extent that Mr. Sizemore will not be executed. The state impliedly argues that this ***injustice*** is ***manifest*** (which is to say ***obvious, flagrant, self-evident***) because Mr. Sizemore will *only* spend the balance of his life in prison for his offense. What can we do, the state asks, to prevent this calamitous, outrageous result? How can we undo this *injustice* so that Mr. Sizemore can be *killed*? Were we only able to accomplish *this* task, justice indeed would be served. Such single minded viciousness is profoundly disturbing.

Fair minded people, reasonable people, *surviving victims of capital murder, even*, can and do have strongly held beliefs that a sentence of life in prison is a stern and full measure of justice and retribution. The flummery necessary to advocate that a sentence of natural life is the moral equivalent of a slap on the wrist and therefore an insult to the rights of victims, somehow, is mind-boggling. It stretches credulity to think that even the attorney general credits his own argument.

In any case, Sizemore asserts that the state has had no contact whatsoever with the "victim". Sizemore asserts that the state has not asked whether it is her wish that Mr. Sizemore go to the gallows. As such, the attorney general's representation to this Court that it is advancing the interests of the victim and is asserting the manifest injustice banner on her behalf is a lie. But even if the state *has* contacted this undisclosed "victim" and asked her this precise question, it is still stuck with the fact that she once already was contacted and had no objection to the plea to life going forward when it did.

Undersigned will endure the mantle of cynic, if it fits, but it is clear to him that the state is hiding behind a non-existent victim, hypocritically disguising its motives behind a facade of advancing the interests of powerless victims and promoting the public weal, when ***really***, at their core, the state's motives are of the most sordid and ghastly kind. There is no injustice here. Certainly none that is manifest. The only injustice being contemplated is the state's attempt to derail the finality of this case

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for suspect and unspoken ignoble reasons. The motion must be summarily dismissed.

13. The Rule of Lenity

Assuming *arguendo* that there was a misapprehension by the parties regarding the state of the law at the change of plea,[5] nevertheless, the rule of lenity requires that the Court err on the side of finding that Sizemore is not eligible for death as a matter of law. As the Supreme Court succinctly wrote in *United States v. Bass*, 404 U.S. 336 (1971) the rule of lenity requires that any legal ambiguities in the criminal law be resolved in favor of the defendant. As the *Bass* Court stated:

> Given this ambiguity, we adopt the narrower reading: . . . This result is dictated by two wise principles this Court has long followed. First, as we have recently reaffirmed, ***"ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."*** (citations omitted). In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." (citations omitted). This principle is founded on two policies that have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." (citations omitted) Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." (citations omitted). ***Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.***
> *United States v. Bass*, 404 U.S. 336, 348 (1971)(emphasis added)

14. Response to State's Motion

Sizemore has saved for last an analysis of the contents of the state's pleading. The preceding discussion on the specifically applicable principles of law that defeat the state's motion are sufficient to dispose of the attorney general's ill-conceived and untimely attempt to scuttle this case. What follows are observations and comments, not covered by the arguments above, on the specific contents of the state's "motion for permission."

A. "Advisory opinions"

The attorney general misstates the facts for transparently disingenuous purposes when he states at 2 of his motion that "the court asked for *advisory opinions* regarding the range of sentence." The attorney general knows better than this, but he uses this oddball phraseology because he wants to get

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5 A position Sizemore *adamantly* rejects, and only posits for purposes of argument.

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some juice out of it later at pp.11-12, where he spills some ink on the proposition that his (Joe Duarte's) "advisory opinion" is the equivalent of a formal Attorney General Opinion, the likes of which come out from time to time on legal matters affecting the state. This is so much nonsense.

First, lawyers don't express "advisory opinions." Courts do. And when they do they're chastised for it because, as we all know from law school, courts do not render advisory opinions. Lawyers assert legal positions on disputed matters of law and when they fail to assert a position, they waive it. When they affirmatively go along with a particular legal argument in court, as the attorney general did in this case, they do more than just waive whatever argument they may later invent, they are estopped to deny their earlier stated affirmative position.

The ink spilled on pp.11 that "the court is not bound by, nor can the defendants rely upon, the Attorney General's mistaken opinion regarding the state of the law," is so disingenuous it does not pass the snicker test. The statement implies that the Attorney General was somehow running the show, and the Court's and defense counsel's "reliance" on the AG to "get it right" was misplaced. This is sheer nonsense. Neither the Court nor defense counsel were "relying" on the AG to "get it right." The AG, as counsel for a adversarial party, had a duty to assert and substantiate his position on the law, under pain of waiver or estoppel if he failed to do so.

The argument is bizarrely incomprehensible and schizophrenic. On the one hand, Mr. Duarte wants to wrap what he did or did not do in the courtroom on July 24, 2002 in the cloak of an "official" AG Opinion. But having done so, he wants this Court to recognize that such opinions are not worth the paper they're printed on ("The Attorney General's opinions are advisory only and are not binding on courts of law[6]. They are not a legal determination of what the law is at any certain time." Motion at 12) so our "reliance" on Mr. Duarte's position at the hearing was misplaced. It makes the head swim, this kind of thinking, does it not?

We're all just folks and the judge is in charge, bound by no one but the rule of law.

B. Severability

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[6] As if we all were suffering from the misconception that Mr. Duarte's pronouncements in Court on July 24, 2002 *bound* the Court. This is arrogance of a new order.

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1 The attorney general insists we can amputate that rotten portion of the "old" statute and still
2 hobble forward undaunted toward an execution. This "severability" argument is contained at state's
3 Motion at 4-5. This severability argument is based on the false premise that the *Ring* decision merely
4 targeted the "death delivery procedure" and did not have substantive constitutional implications with
5 respect to the necessary elements of a new offense called "capital murder." This has been disposed of
6 above, in this response. The severability argument is inapposite because it misses the point.

7 *C. "Harmless Error"*

8 The state has turned a hope into a rule of law. ***No court has ever held*** that an otherwise *Ring*-
9 flawed capital sentencing will survive harmless error analysis. The state vainly tried to argue this in the
10 United States Supreme Court in the *Ring* case itself. The Court was so impressed by it, it relegated its
11 rejection of it to a forgettable last footnote (footnote7) to the majority opinion. The state of Arizona
12 desperately hopes and wishes that its "position" (*see* motion at 5, line 28) will someday become
13 established law, but it has not.

14 This harmless error argument put forth by the attorney general is perhaps the most bizarre and
15 baffling of all those raised here. The task of unraveling the bizarreness of the argument will take some
16 doing. The principles of harmless error analysis are the following: First, the concept "harmless error"
17 is one used by appellate courts (***not trial courts***) to determine whether a defendant is entitled to relief.
18 Second, "harmless error" analysis ***presumes the existence*** of constitutional error. That is to say, the
19 reviewing Court acknowledges that constitutional error has been committed in the case. Third, typically
20 the defendant has failed to preserve the error by objecting to it. Fourth, the Court then analyzes the error
21 under one of several standards[7] to determine whether, despite the acknowledged error, the Court is
22 going to grant or deny the defendant relief.

23 "Harmless error" analysis in the post-*Ring* Arizona capital landscape actually has a very limited
24 potential application. It has nothing, however, to do with the Sizemore case. The harmless error

25 ---

26 [7] *E.g.*, under *Chapman v. California*, 386 U.S. 18 (1967), for cases on direct review,
the state bears the burden that the error did not contribute to the conviction or
27 sentence on proof beyond a reasonable doubt. For cases on habeas review the test is
less stringent and the petitioner bears the burden. *See, e.g. Brecht v. Abrahamson*,
28 507 U.S. 619 (1993).

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argument being put forth by the state is limited to those cases in which a capital defendant has been found guilty of first degree murder and "guilty" of one of three aggravating circumstances, to wit: (G)(5), the pecuniary gain factor; (G)(8) multiple homicides factor; and (perhaps) (G)(9) victim over 70 factor.

The state's argument is that in cases in which one or all of the above factors are in play, the jury, in coming to their verdict of guilty must have "necessarily"found these aggravating factors as part of their guilt determination and therefore any "error" caused by depriving the defendant of a jury at capital sentencing is "harmless." This "harmless error" argument obviously has no place in the Sizemore case because we have not even gotten to sentencing.

But on its face it is a phantom. Countless capital defendants have argued, for example, that "pecuniary gain" is double-counted in those felony murder cases involving robbery or burglary murder. In order to get around this obvious argument the courts have constructed elaborate byzantine rules that hold that the "pecuniary gain" finding is ***different from*** and ***narrower than*** the mere finding that a murder was committed in the course of a robbery. This is necessary to save the sentence from obvious constitutional problems under the Eighth Amendment's "narrowing" requirement. These byzantine rules establish *ipso facto* that ***the jury determination of guilt is not the equivalent of a finding of a aggravating factor***. So, even if the "harmless error" analysis put forth by the attorney general in his pleading applied in this case, it would fail as a matter of law.

But the real sadness in the argument that "harmless error" will save (or permit) the state to kill Sizemore, even if we do it wrong, is that it is an ***invitation to this Court to commit error***. The attorney general wants this Court to be put at ease because the doctrine of harmless error will fix any constitutional infirmities not only in the statute, but in the way it will be applied to Sizemore. Not to worry, the state is saying, ***do it wrong***, it won't matter, it will all come out in the wash under harmless error. It is sad advocacy, indeed, to invite a Court to put a human being to death in a way that is recognized as constitutionally flawed and then to comfort the sentencer with the palliative that the mistake that was made was "harmless." Harmless to whom?

Poe wrote stories about such horror.

D. Fair Notice

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In its discussion of the *ex post facto* clause, the attorney general tries to persuade the Court that the new statute wrought merely a procedural change. At 11, lines 3-5, of the state's motion the attorney general writes: "The change is simply one of the jury (rather than the judge) weighing aggravation against mitigation. The definition of the crime[8] and the penalty remain the same. There is adequate 'fair notice.'"

One must suppose that the attorney general put "fair notice" in quotation marks to indicate that this was meant to be tongue in cheek. Not only did the old statute violate the Sixth Amendment notice requirement (*see supra*), the fact remains ***in this very case***, there has to date been ***no notice***, despite repeated defense motions demanding it long ago, of the aggravating factors the state would have alleged to secure the killing of Mr. Sizemore. The state's argument is therefore, blatantly untrue and legally unsupportable.

E. Defendant's Withdrawal and the Double Jeopardy Clause

Sizemore wishes to highlight the state's argument regarding withdrawal from the plea and the double jeopardy bar. As if suggesting a helpful solution to an otherwise intractable problem that the defendant is contending with, the state makes the suggestion at p. 12-13, that all that need happen is that the defendant voluntarily withdraw from the plea and *presto!* there will no longer be that pesky double jeopardy problem. Why, in the name of God, would Mr. Sizemore want to withdraw? So that the state can kill him? Can the attorney general really mean what he is arguing here?

F. Incomprehensibility

The state writes at 13 lines 5-9: "As addressed earlier the fact that *Ring* error can be harmless implies that a defendant awaiting sentencing remains subject to capital punishment, provided that the procedure under which he is sentenced does not offend the *Ring* holding. *Ring* is neither more or less applicable to convict a defendant on direct appeal that it is to defendants awaiting sentencing."

What?

III. CONCLUSION

There was no mistake of law made by anyone at the July 24, 2002 change of plea. The state's

---

[8] This is demonstrably untrue.

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1 untimely motion is not well taken and is utterly unsupportable. It is a sad cynical attempt to rewrite the
2 history of this case that all the parties know is simply untrue. Justice has been done in this case. It is
3 in repose. The state's attempt to resuscitate it is an unseemly attempt to kill Mr. Sizemore. Defendant
4 therefore asks, respectfully, that this Court summarily dismiss the motion and proceed forthwith to
5 sentencing on September 6, 2002.

6 RESPECTFULLY SUBMITTED this 3 day of September, 2002 .

7 THOMAS A. GORMAN, ESQ.
THOMAS J. PHALEN, ESQ.
8 Attorneys for Defendant Sizemore

9 By: Thomas J. Phalen
Thomas J. Phalen, Esq.
10 Co-counsel for Defendant Sizemore

11
A copy of the foregoing faxed/mailed/
12 delivered this 3 day of August, 2002, to:

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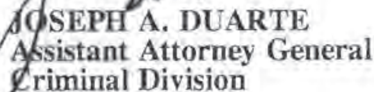
SUPERIOR COURT OF ARIZONA
NAVAJO COUNTY

STATE OF ARIZONA, Plaintiff, vs. NICHOLAS S. SIZEMORE, Defendant.	No. CR2001-338 **STATE'S REPLY TO DEFENSE REJECTION OF WITHDRAWAL OPPORTUNITY** (Assigned to Hon. Dale P. Nielson)

Comes now the state, through attorney undersigned, and replies to defense rejection of withdrawal opportunity as set out below.

Respectfully submitted this 12 day of September, 2002.

JANET NAPOLITANO
Attorney General



JOSEPH A. DUARTE
Assistant Attorney General
Criminal Division

I. WAIVER

In the absence of a written plea agreement setting out specific terms the state cannot be deemed to have legally agreed to remove the allegation of death from the proceeding. The state filed its notice to pursue the death penalty on 5/29/2001. At no time was the allegation withdrawn. Counsel for defense have repeatedly and mistakenly stated that the defendant pled to the indictment. The indictment was amended to include the allegation that the state would seek the death penalty. Thus supplemented the allegation was never modified, altered or withdrawn. The only way to withdraw would be through the proffer of a plea agreement indicating that the allegation of death was withdrawn.

None of counsel's authority under the "waiver" heading is more than minimally relevant. Each involves a habeas petition where after defendants were convicted on the merits. None involved a case where the defendant pled straight to the court. *Coy v. Fields*, 27 P.3d 799, is not on point because the state sought to rescind the plea agreement and withdraw. The instant case has no plea agreement to rescind.

II. ESTOPPEL RELIANCE AND PREJUDICE

Nothing bars the defense from re-urging the petition for special action.

III. JUDICIAL ESTOPPEL

Rolf, 893 F2d 1033 concerns a habeas petition filed in state court that is the direct result of the State Attorney General's Office telling a federal district court that the defendant had an adequate and available remedy in state courts. The *Rolf* decision held that the petitioner was not procedurally barred from asserting his federal habeas corpus petition in the state and, (2) the state was estopped from asserting that he was barred procedurally. The court took pains to note "The duty of state as described in *Granberry* to advise district courts as to whether state remedies have been exhausted is best met with candor, not misdirection." *Rolfs*, @ 1038.

The instant case involves a different factual and legal context. The state is attempting to rectify misstatements made by the prosecutor and provide the court with the correct legal information that would allow defendants to enter an intelligent, knowing plea or withdraw. *State v. Towry*, 905 P.2d 598, is instructive insofar as it held the doctrine of judicial estoppel did not bar a prosecutor from taking a position with regard to witness testimony opposite that taken in a robbery trial. An informant was used to relate the defendant's statement that he had taken advantage of an old man in an armed robbery trial. Later the prosecutor felt that the statement was more relevant and probably more appropriate to a subsequent murder prosecution and elicited that testimony in the murder. Because the earlier robbery verdict did not establish that defendant's admission was a key element to the guilty verdict, the court felt that judicial estoppel should not be applied because the first inconsistent position was not a significant

1 factor in the initial proceeding, the armed robbery guilty verdict.

2 The court did instruct that the prosecutor had a duty to give notice in one case or the
3 other that the admission of a single incident had been used to help convict defendant of
4 unrelated charges.

5 Undersigned prosecutor is attempting to provide the court with the correct legal
6 context in view of the *Ring* decision and is following a duty mandated by the rules of the
7 Supreme Court which will be discussed later.

8 IV. DOUBLE JEOPARDY/COLLATERAL ESTOPPEL

9 The state recognizes that collateral estoppel is appropriate in a case such as *Ash v.*
10 *Swenson*, where the defendant was acquitted on an ID defense of the armed robbery of
11 the first of 6 victims. The state sought to bring him to trial for the armed robbery of the
12 second victim. When all parties were present during the armed robbery (6 victims in
13 all), the court felt that the identification issue resolved in the defendant's favor at the
14 first trial precluded the state from bringing him to trial on charges involving any of the
15 other 5 victims.

16 The second element that a final decision on the issue must have been necessary for
17 the judgment in the prior litigation has not been fulfilled. The state is continuing to
18 litigate the issue because it is based on a materially incorrect point of law. The defense
19 emphasis that the doctrine embraces an issue even where a decision by a trial court was
20 based on an erroneous ruling of law or fact or misrepresentation of law or precedent is
21 not true. In *Sanabria v. U.S.*, 437 U.S. 54 (1978), the court did hold:

22 To the extent district court found the indictment's description of the offense too narrow to warrant admission of certain evidence, ruling was erroneous evidentiary
23 ruling leading to an acquittal for insufficient evidence and, judgment of acquittal even though erroneous, barred further prosecution on any aspect of the count.
24

25 So when a case has been tried and an erroneous ruling has been made by a judge
26 leading to an acquittal the state cannot appeal. No reasonable argument can be made
27 that the state must sit idly by when the court has accepted mistaken representations of
28 counsel and advised the defendant that the death penalty is no longer a possibility when

in fact it is. The defense counsel also mistakenly represents that the court was never presented with a sentence enhancement allegation. Again, this is inaccurate insofar as the state pursuant to Rule 15.1(g) did notice the defense of its intent to seek the death penalty. There is no basis for the assertion that collateral estoppel precludes the correction of the mistake of law leading to the invalid plea. If the defendants wish to pursue sentencing the state still has the option of empaneling a jury and presenting the aggravating factors to the jury pursuant to A.R.S. 13-703.01.

V. UNTIMELINESS

The state is not required to wait until the time when jeopardy would have attached after sentencing to appeal an order of the court. That is erroneous. The state in its discretion may proffer a motion pursuant to Rule 17.5 prior to sentencing or after sentencing to correct a manifest necessity. There is no time frame which would preclude the state from raising the motion after the plea and prior to sentencing.

VI. The state's standing to raise the motion is rooted in E.R. 3.3, Rules of the Supreme Court "Candor Toward the Tribunal." The pertinent parts mandate that:

A. A lawyer shall not knowingly:

1. Make a false statement of material of fact or law to a tribunal.

The comment thereto states "However, an assertion purporting to be on the lawyer's own knowledge as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."

The state's mistake in assertion of the relevant law resulting in the plea must be corrected in the exercise of the duty of candor to the court. It is incumbent upon an attorney to correct a misrepresentation of material law to a tribunal. The state has provided the court with a corrected summation of the applicable law.

The state does not have the luxury of allowing an invalid plea on its face to stand when the prosecutor possesses knowledge that could correct the illegal aspects of the

information responsible for a plea. Defense counsel states "The state wants the court to do this: Unilaterally declare that the sentencing range for the non-capital offense now includes death." While that may be the effect, the cause involves recognition of the facts that no plea agreement existed in the instant offense and never the of death allegation was not withdrawn. It is absolutely imperative at this juncture to inform the defendants of what they truly face and correct the mistake that was made that the defendants were not exposed to the death penalty. Defense counsel urges *Coy, supra.*, which is in opposite as it does not involve a situation where the plea was to the court. The only authority is on point is *State v. Djerf*, 191 Ariz. 583, 959 P.2d 1274 (1998). *Djerf's* holding that the court cannot *sua sponte* vacate the acceptance of a guilty plea is accurate. However, the consequences in the event that defendant Sizemore wishes to proceed to sentencing involves exposure to the death penalty and he will have waived his objection, if he does not exercise his opportunity to withdraw from the plea.

VII. VINDICTIVENESS

Regarding the strident personal attack and allegation of vindictiveness, the state responds by William Shakespear. Counsel's allegations can best be characterized as a tale "full of sound and fury, signifying nothing." *MacBeth,* Act V, Scene V.

VIII. ACQUITTAL

Title 13, Ch. 7, A.R.S. is amended by adding the following new section.

13-703.01.

Sentences of death or life imprisonment; imposition; sentencing proceedings; definitions.

A. If the state has filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder, the trier of fact at the sentencing proceeding shall determine whether to impose a sentence of death. If the state has not filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder the court shall determine whether to impose a sentence of life or natural life.

B. Before trial, the prosecution shall notice one or more of the aggravating circumstances under 13-703(f).

Defendant's assertion that this was never a capital case is news to the state. The state has filed its notice of intent, never withdrawn it and the defendant stands convicted of

1 first degree murder. Therefore, the finder of fact shalldetermine whether to impose the
2 sentence of death. This is precisely why defendants should be allowed to withdraw from
3 their plea. In the event they do not, they will be facing the jury trial described in (c) of
4 the above section wherein the jury will determine what the punishment will be in the
5 aggravation phase of the sentencing proceeding.

6 IX. DUE PROCESS

7 As stated in the state's opening motion, the shift from judicial sentencing to jury
8 sentencing is a procedural change and not ex post facto. Counsel states that "The
9 agreement that death is always an available sentence, there was merely a hiatus of some
10 theoretical kind in its ability to be meted out is preposterous." Drafters of the new
11 sentencing provisions of 13-703.01 in Section 9 entitled "Intent" stated under Subsection
12 A. It is the intent of the legislature that: 1. There be no hiatus in the imposition of the
13 death penalty in this state as a result of the United States Supreme Court decision in *Ring*
14 *v. Arizona,* 530 U.S.___ (2002). Counsel can continue exhibiting hubris in maintaining
15 that the law and the facts do not apply to him nor his client but he would be wrong.

16 XI. DUE PROCESS IN *SANTOBELLO*

17 As noted earlier the *Santobello* court was passing judgment in a situation where there
18 was a written plea agreement with an offer, an inducement and an agreement between the
19 prosecutor and the defendant. The very crux of the state's argument is based in the fact
20 that there was no agreement in the instant case. The defense cannot argue specific
21 performance of any agreement because there was no plea agreement in the instant matter.

22 XII. MANIFEST INJUSTICE

23 There are 2 victims, the first is aware of the situation had no further observations to
24 tell the court, and she is the contact person for the victim's family. The other victim is
25 the one who was murdered, the one whom counsel has ignored throughout the proceeding.
26 It is Mr. Ceniceros. Mr. Sizemore has murdered before and he murdered Mr. Ceniceros.
27 Those are aggravators. In addition, the murder occurred within the grounds of a penal
28 institution. It may be considered unjust that Mr. Sizemore is not exposed to the death

penalty wherein he has been responsible for the demise of 2 individuals at different times.

XIII. THE RULE OF LENITY

The state submits that the Rule of Lenity has to do with ambiguity and not of mistake. Therefore it is not applicable.

XIV. RESPONSE TO STATE'S MOTION

Nothing.

CONCLUSION

In the event the defendant does not wish to withdraw from the case, the state requests the opportunity to proceed forward with the capital sentencing including the empaneling of the jury and the proof of the aggravating factors beyond a reasonable doubt.

Respectfully submitted this 12 day of September, 2002.

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JOSEPH A. DUARTE
Assistant Attorney General
Criminal Division

Copies of the foregoing mailed/delivered
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF NAVAJO

JUDGE: DALE P. NIELSON
CLERK:
DEPUTY CLERK:
COURT REPORTER:

DIVISION: II
DATE: November 15, 2002
TIME:

COURT RULING

STATE OF ARIZONA,

Plaintiff,

vs.

MARK E. ALLRED, SCOTT B. BRIAN AND NICHOLAS SIZEMORE

Defendant.

Case No. S -0900 - CR -0020010338

COURT RULING

The Court having taken the motion to permit the defendants to withdraw from the plea of guilty under advisement rules as follows:

Issue:

Were Mr. Brian and Mr. Sizemore properly advised of the range of sentence at the time they changed their pleas to guilty on July 24, 2002?

Facts:

1. On May 15, 2001 the Navajo County Grand Jury returned an indictment against the defendants for the charge of first degree murder.
2. On May 29, 2001 the State gave timely notice of its intent to seek the death penalty.
3. On June 24, 2002 the United States Supreme Court declared Arizona's death penalty scheme unconstitutional as set forth in A.R.S 13-703 requiring a Jury and not a Judge to find one or more aggravating factors.
4. On July 24, 2002 Mr. Brian and Mr. Sizemore changed their pleas to guilty to the charged offense in the indictment, first degree murder.

5. At the change of plea proceeding the Court inquired of Counsel what the range of sentence would be for the charged offense. All counsel, including the State agreed that it would be twenty five years or natural life.
6. After the plea was entered Governor Hull signed into law the new revisions to A.R.S. 13-703 requiring the Jury and not the Judge to make findings of aggravation.
7. On August 27, 2002 the State filed a motion requesting the Court find a mistake of law had been made in that the defendants were not correctly advised of the sentencing range and were at the time they changed their pleas subject to the death penalty. The defendants should therefore be given the opportunity to withdraw from the pleas after being advised of the possibility of death.

Decision:

The question before the Court is what was the appropriate sentencing range for the crime of first degree murder on July 2, 2002 after Ring, and before the enactment of the revisions to A.R.S. 13-703. The defendant's have also raised the issue of the states conduct at the change of plea proceeding and that by agreeing that death would not apply to the defendants the State effectively withdrew or waived its right to seek the death penalty. It is clear to the Court that Ring did not hold that the death penalty in Arizona was not a viable sentence option. It declared the process by which the penalty was determined unconstitutional and therefore required the State to amend the statute. It is clear to the Court that the range of sentence for the Defendant's on July 24 2002 did include the possibility of a death sentence.

The Court having made this determination must therefore determine whether the State by its conduct at the change of plea waived or conceded that the range of sentence did not include death, thereby effectively withdrawing its notice to seek death. At a scheduled hearing to consider motions previously filed the Court was advised by Counsel for Mr. Brian and Mr. Sizemore that they wished to plead guilty to the charge as alleged in the indictment, namely first degree premeditated murder. The State requested a brief delay to contact the victim. The Court permitted the state the opportunity to call the victims sister in spite of the fact that the definition of a victim does not include persons in custody. Art. 2 sec. 2.1(12)(c) Arizona Constitution. Following this brief delay the Court proceeded with the change of plea. Before proceeding with the plea as to Mr. Sizemore the Court asked the prosecutor if he had any objection to the Court going forward with the plea (p.15 transcript of proceedings). The prosecutor objected based upon victims rights and the possibility that notice would be required to the victims next of kin. During the litany the Court gave the prosecutor the opportunity to state the State's position about the range of sentence. The prosecutor essentially agreed with the defendants position stating that "there does not appear to be a viable death penalty sentence to which Mr. Sizemore would be exposed." P. 15 transcript of proceedings. The prosecutor at the conclusion of the litany requested the Court to defer acceptance of the plea "in case something happens between now and the time of sentencing, . . . (p. 23 transcript of proceedings). The prosecutor made no statements during the change of plea as to Mr. Brian.

The Court has considered the arguments of counsel, pleadings and case law. The Court believes that the conduct of the State at the proceeding is critical to a determination of the issue. The pleas of the Defendants came as a surprise and clearly caught the State off guard. The Court was cognizant of this fact and gave the State every opportunity to object to the proceedings or ask for other consideration. At no time did the State

indicate that it objected to the plea or to the range of sentence given to the Defendants. In fact, the State concurred that death would not apply to these defendants. This view was based on the timing of the pleas in relation to Ring and the creation of the new law that would comport with Ring. As the court has indicated death was within the range of sentence because the State had given notice of it's intent to seek death, however, on this day the State agreed death was not within the range. It wasn't until some thirty days later that the State objected to the proceedings as having involved a mistake of law.

The Court finds that the states failure to object to the range of sentence at the time of the change of plea constituted a waiver of the issue and prohibits the State from raising the issue now. State v. Ebert 192 Ariz. 296, 964 P. 2d 487 (1998). The contemporaneous objection rule applies to both parties and the State having objected some thirty days after the hearing has not complied with this rule. Furthermore, in State v. Palenkas, 188 Ariz. 201, 933 P. 2d 1269 (Ariz. App. I, 1996), footnote 3 addressed the issue regarding the state conceding an issue as follows:

> The state argues on appeal that its' concession was limited to preclusion of reference to defendant's contact with his attorney. Although that is the only issue conceded in the state's written response to defendants motion in limine, the state did not otherwise object to the preclusion of references to defendant's refusal to consent to a warrantless search of his car, and the prosecutor clearly conceded "those issues" in open court when asked if she had any objection to the motion. We therefore reject the state's position that the court's in limine ruling was limited to evidence of defendants contact with his attorney.

The State conceded the issue of the range of sentence including the death penalty at the plea proceeding and cannot now be permitted to argue contrary to a previous concession. The rules of law must be applied equally to both sides. Gray v Klauser, 282 F. 3d 633 (9th Cir. 2002).

The Court, therefore, does not find that a mistake of law occurred during the plea proceedings. The Court schedules a status conference to schedule the sentencings as to Mr. Brian and Mr. Sizemore and for case management conference as to Mr. Allred for November 25th, 2002 at 9:00 a.m. Counsel may appear telephonically. The Court will not at this time order transport of the defendants unless a request is timely made prior to the hearing.

Copies to: Joseph Duarte, Conrad Baran, Emery LaBarge, Thomas Gorman, Thomas Phalen, Patrick McGillicuddy, Monique Branscomb,