No. _____

IN THE
Supreme Court of the United States

MANUEL OVANTE, JR.,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF ARIZONA MARICOPA COUNTY

PETITION APPENDIX

GARRETT W. SIMPSON
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APPENDIX

Appendix A

Michael K. Jeanes, Clerk of Court
*** Filed ***
2/25/10 8:00am

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2008-144114-001 DT

02/24/2010

HONORABLE WARREN J. GRANVILLE

CLERK OF THE COURT
B. McDonald
Deputy

STATE OF ARIZONA

JASON KALISH
BELLE WHITNEY

v.

MANUEL OVANTE JR. (001)

DOB: 10/07/1986

GARY L SHRIVER
QUINN T JOLLY

APPEALS-CCC
AZ DOC
CAPITAL CASE MANAGER
CERTIFICATION DESK-CSC
DISPOSITION CLERK-CSC
EXHIBITS-CCC
FILE ROOM-CSC
VICTIM SERVICES DIV-CA-CCC

SENTENCE OF IMPRISONMENT

1:55 p.m.

State's Attorney:	Jason Kalish and Belle Whitney
Defendant's Attorney:	Gary Shriver and Quinn Jolly
Defendant:	Present
Court Reporter:	Elva Cruz-Lauer

The Court finds the following mitigating factor as to Count 3: Defendant's remorse.

Count(s) 1, 2, and 3: WAIVER OF TRIAL: The Defendant knowingly, intelligently and voluntarily waived all pertinent constitutional and appellate rights and entered a plea of guilty.

IT IS THE JUDGMENT of the Court Defendant is guilty of the following:

OFFENSE: Count 1: First Degree Murder
Class 1 Dangerous Felony
A.R.S. § 13-1101, 1105, 702, 702.01, 703, 703.01, 801, 604P
Date of Offense: On or about June 11, 2008
Dangerous pursuant to A.R.S. § 13-604 - Non Repetitive

OFFENSE: Count 2: First Degree Murder
Class 1 Dangerous Felony
A.R.S. § 13-1101, 1105, 702, 702.01, 703, 703.01, 801, 604P
Date of Offense: On or about June 11, 2008
Dangerous pursuant to A.R.S. § 13-604 - Non Repetitive

OFFENSE: Count 3: Aggravated Assault
Class 3 Dangerous Felony
A.R.S. § 13-1203, 1204, 701, 702, 702.01, 801, 604P
Date of Offense: On or about June 11, 2008
Dangerous pursuant to A.R.S. § 13-604 - Non Repetitive

AS PUNISHMENT, IT IS ORDERED Defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

Count 1: Life with possibilty of parole after 25 years from February 24, 2010
Presentence Incarceration Credit: 0 day(s)
This sentence is to be consecutive to Counts 2 and 3.

Count 2: SENTENCED TO DEATH from February 24, 2010
Presentence Incarceration Credit: (moot)

See Jury/Sentencing Verdict
Sentence is concurrent with Counts 3.

Count 3: 6 year(s) from February 24, 2010
Presentence Incarceration Credit: 590 day(s)
Mitigated
Sentence is concurrent with Count 2.

IT IS ORDERED the Defendant shall pay through the Clerk of the Superior Court:

RESTITUTION: Count 2 - $8,045.00 to the following victim(s) in the following amounts:

Denise Martinez (Individual) $8,045.06

No restitution ledger provided.

Restitution shall be paid monthly in an amount to be determined by the Arizona Department of Corrections in compliance with ARS 31-230.

ASSESSMENTS:

Count 2: Time payment fee pursuant to A.R.S. § 12-116 in the amount of $20.00.

Count 2: PROBATION SURCHARGE: $20.00.

The Court retains jurisdiction for any future restitution hearings.

The Arizona Department of Corrections shall notify the Clerk of the Court of Maricopa County of Defendant's release from custody via e-mail cforesponse@mail.maricopa.gov. The Clerk of the Court, upon said notification, shall furnish financial information for a Criminal Restitution Order for Judicial signature for any unpaid monies to date.

Community Supervision: Count 1 and 3 - Imposed pursuant to A.R.S. § 13-603(I).

IT IS FURTHER ORDERED that Defendant must submit to DNA testing for law enforcement identification purposes and pay the applicable fee for the cost of that testing in accordance with A.R.S. § 13-610.

IT IS ORDERED authorizing the Sheriff of Maricopa County to deliver the Defendant to the Arizona Department of Corrections to carry out the term of imprisonment set forth herein.

IT IS ORDERED the Clerk of the Superior Court remit to the Arizona Department of Corrections a copy of this Order or the Order of Confinement together with all presentence reports, probation violation reports, and medical and psychological reports that are not sealed in this cause relating to the Defendant.

Defendant has waived the preparation of a presentence report.

IT IS ORDERED that the Clerk of Court shall file a Notice of Appeal on behalf of the Defendant.

2:07 p.m. Matter concludes.

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

ISSUED: Order of Confinement - Certified Copy to DOC via MCSO

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

HONORABLE WARREN GRANVILLE

Date: 2/24/10

CLERK OF THE COURT

B. McDonald
Deputy

CR 2008-144114-001

STATE v. OVante

Let the record reflect that the Defendant's right index fingerprint is permanently affix[illegible]'s sentencing order in open court.

(right index fingerprint)

Warren J. Granville
JUDGE OF THE SUPERIOR COURT

Page 5

Appendix B

SUPREME COURT OF ARIZONA
En Banc

STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-10-0085-AP
Appellee,	)	
	)	Maricopa County
v.	)	Superior Court
	)	No. CR2008-144114-001 DT
MANUEL OVANTE, JR.,	)	
	)	
Appellant.	)	
	)	**O P I N I O N**

Appeal from the Superior Court in Maricopa County
The Honorable Warren J. Granville, Judge

AFFIRMED AS AMENDED

THOMAS C. HORNE, ARIZONA ATTORNEY GENERAL — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Jeffrey A. Zick, Assistant Attorney General
Ginger Jarvis, Assistant Attorney General
Attorneys for State of Arizona

JAMES J. HAAS, MARICOPA COUNTY PUBLIC DEFENDER — Phoenix
By Thomas K. Baird, Deputy Public Defender
Tennie B. Martin, Deputy Public Defender
Attorneys for Manuel Ovante, Jr.

B A L E S, Vice Chief Justice

¶1 This automatic appeal concerns Manuel Ovante, Jr.'s 2010 death sentence for murdering Damien Vickers. We have jurisdiction under Article 6, Section 5(3) of the Arizona Constitution and A.R.S. §§ 13-4031 and -4033(A)(1) (2010).

FACTS AND PROCEDURAL BACKGROUND

¶2 On June 11, 2008, Ovante and three friends drove to

Jordan Trujillo's house, hoping she would give them methamphetamine. Trujillo refused, but Ovante returned repeatedly that day attempting to obtain drugs. When Ovante and his friends entered Trujillo's home the last time, they encountered Trujillo, who was asleep on a living room couch, Damien Vickers, and Gabriel Valenzuela. Without expressing anger or distress, Ovante suddenly pulled out a gun.

¶3 Ovante pointed the gun at Valenzuela and yelled "[W]ho left the safety on?" Ovante released the safety, pointed the gun again at Valenzuela, and told him not to move. He then shot the sleeping Trujillo twice in the head and began shooting at Valenzuela and Vickers, wounding both of them. Trujillo appeared to die almost instantly, but Vickers begged for help and Valenzuela called the police.

¶4 After the shooting, Ovante and two of his friends got into a truck and tried to convince the third friend, Nathan Duran, to leave Vickers behind. Duran instead dragged Vickers into the back of the truck. Vickers was bleeding from his bullet wounds, holding onto Duran, and asking to be taken to a hospital. Ovante refused to do so. After Vickers died in the truck, Ovante decided to abandon his body in an alley. Valenzuela, who remained in the apartment, survived the attack.

¶5 The State charged Ovante with two counts of first degree murder and one count of aggravated assault. The State

sought the death penalty, alleging as aggravating circumstances that Ovante had been previously convicted of a serious offense (the aggravated assault of Valenzuela), *see* A.R.S. § 13-751(F)(2) (2008), and had been convicted of one or more other homicides committed during the commission of the offense, *see id.* § 13-751(F)(8). Ovante pleaded guilty to all charges and admitted both aggravating circumstances.

¶6 At the conclusion of the penalty phase, the jury determined Ovante should be sentenced to life in prison for the murder of Trujillo and sentenced to death for Vickers' murder. Accordingly, the trial court entered sentences of life with a possibility of parole after twenty-five years for Trujillo's murder, death for Vickers' murder, and a mitigated term of six years in prison for the aggravated assault on Valenzuela.

DISCUSSION

A. Ability to Challenge the Guilty Pleas on Appeal

¶7 The State argues that Ovante cannot challenge the validity of his guilty pleas as part of this Court's mandatory direct review in a capital case, and that he, like a noncapital defendant seeking to challenge a guilty plea, must instead seek post-conviction relief under Rule 32. We reject this argument.

¶8 Our criminal rules expressly provide that a defendant who pleads guilty in a noncapital case waives direct appeal and can seek review only by petitioning for post-conviction relief

under Rule 32. Ariz. R. Crim. P. 17.1(e); *see also id.* 17.2(e) (requiring court to advise defendant that guilty plea will "waive the right to have the appellate courts review the proceedings by way of direct appeal").

¶9 The rules addressing capital cases, in contrast, do not distinguish between capital defendants who plead and those who are convicted after trial. Instead, if a death sentence is imposed, the superior court clerk files an automatic notice of appeal that suffices "with respect to all judgments entered and sentences imposed in the case." *Id.* 31.2(b). Thus, regardless of any plea, this Court automatically reviews a death sentence.

¶10 Accepting the State's argument that any judgment of guilt entered as result of a plea can only be reviewed in a Rule 32 proceeding would unnecessarily bifurcate appellate review in capital cases. The State conceded this point at oral argument. In death penalty cases, consistent with Rule 31.2(b), this Court will review the validity of a plea on direct appeal, before it reviews the capital sentence.

B. Adequate Factual Basis for the Guilty Pleas

¶11 Ovante contends that because he did not understand the difference between first and second degree murder, his statements at the plea hearing did not establish premeditation, and thus there was not an adequate factual basis for his first degree murder guilty pleas.

¶12 We review the trial court's acceptance of a guilty plea for abuse of discretion. *State v. Djerf*, 191 Ariz. 583, 594 ¶ 35, 959 P.2d 1274, 1285 (1998). Before accepting a plea, a court must establish a factual basis for each element of the crime. Ariz. R. Crim. P. 17.3; *State v. Carr*, 112 Ariz. 453, 455, 543 P.2d 441, 443 (1975). This Court may examine the entire record on appeal but must vacate the plea if the record does not support "strong evidence of guilt" for every element. *State v. Wallace*, 151 Ariz. 362, 365, 728 P.2d 232, 235 (1986) (quoting *State v. Hamilton*, 142 Ariz. 91, 93, 688 P.2d 983, 985 (1984)); *State v. Diaz*, 121 Ariz. 16, 18, 588 P.2d 309, 311 (1978) (holding that a reviewing court can consider the record, and not only plea colloquy, to determine if there is a factual basis for a plea).

¶13 To support a plea to first degree, premeditated murder, a court must find that facts support a conclusion that the accused (1) intended to cause the death of another, (2) caused the death of another, and (3) acted with premeditation. *See* A.R.S. § 13-1105(A)(1) (2008). "Premeditation means that the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by any length of time to permit reflection." A.R.S. § 13-1101 (2008).

¶14 There is no prescribed period of time which must

elapse between the formation of the intent to kill and the act of killing, but the record must at least circumstantially support that a defendant considered his act and did not merely react to an instant quarrel or in the heat of passion. *State v. Thompson*, 204 Ariz. 471, 479 ¶¶ 31–32, 65 P.3d 420, 428 (2003). "[T]hreats made by the defendant to the victim, a pattern of escalating violence between the defendant and the victim, or the acquisition of a weapon by the defendant before the killing" are circumstances that can establish premeditation. *Id.* at ¶ 31.

¶15 Ovante argues that the record is ambiguous or leaves to "guesswork" whether he actually reflected before killing. But he acknowledged in the plea colloquy that he had given "some thought to [killing Trujillo] before [he] committed the act." Ovante then agreed with defense counsel's statement that, if the case proceeded to trial, the evidence would show Ovante had pointed the gun at Valenzuela but had to stop and release the safety before he could actually shoot. When the judge asked whether Ovante had given some thought to murdering the second victim, Vickers, Ovante took a moment to confer with his counsel before answering, "Yes." Evidence presented in the penalty phase corroborated Ovante's admissions.

¶16 Circumstantial evidence further shows Ovante's premeditation. Ovante carried a loaded gun into Trujillo's house, paused to disengage the gun's safety, targeted only

persons who had not accompanied him, and shot each murder victim multiple times. Combined with his statements at the plea hearing, this evidence amply supports a finding that Ovante reflected on the killings before pulling the trigger.

¶17 Ovante might not have fully understood that premeditation distinguishes first degree murder from second degree murder, *compare* A.R.S § 13-1104(A) (2008) (second degree murder does not require premeditation), *with id.* § 13-1105(A)(1) (first degree murder is premeditated), but his understanding of the legal terminology is not determinative. "Arizona courts have consistently held that it is sufficient that the court, not the defendant, satisfy itself of the factual basis for the plea." *State v. Herndon*, 109 Ariz. 147, 148, 506 P.2d 1041, 1042 (1973). The trial court was not required to explain the distinction between first and second degree murder and was free to accept the guilty plea if it was satisfied that the record established premeditation. *See State v. DeGrate*, 109 Ariz. 143, 144, 506 P.2d 1037, 1038 (1973).

C. Prosecution's Decision to Seek the Death Penalty

¶18 Ovante next contends that Arizona lacks statewide standards to identify when the death penalty will be sought, leaving the decision to individual county attorneys. He also asserts that he did not have a fair opportunity to enter a plea agreement, alleging that in 2009 he offered to plead guilty in

exchange for life sentences but the Maricopa County Attorney, who allegedly refused to enter plea agreements while seeking reelection in 2008, rejected this offer. This exercise of "[u]nbridled charging discretion," Ovante argues, violates due process, equal protection, and the Eighth Amendment. We review Ovante's developed constitutional claims de novo. *State v. Smith*, 215 Ariz. 221, 228 ¶ 20, 159 P.3d 531, 538 (2007).[1]

¶19 "Arizona's death penalty scheme [is] designed to narrow, in a constitutional manner, the class of first degree murderers who are death-eligible," and prosecutors may seek the death penalty only in the limited cases that qualify under the scheme. *State v. Carlson*, 202 Ariz. 570, 582 ¶ 45, 48 P.3d 1180, 1192 (2002) (quoting *State v. Soto-Fong*, 187 Ariz. 186, 202, 928 P.2d 610, 626 (1996)); *see also State v. Sharp*, 193 Ariz. 414, 426 ¶ 49, 973 P.2d 1171, 1183 (1999) (holding the discretion afforded to prosecutors under Arizona's capital sentencing scheme does not violate the Eighth Amendment).

¶20 We reject Ovante's challenge to the discretion generally afforded prosecutors under Arizona's death penalty statutes. *See State v. Salazar*, 173 Ariz. 399, 411, 844 P.2d 566, 578 (1992); *see also Gregg v. Georgia*, 428 U.S. 153, 199

[1] Although Ovante alleges violations of several federal and state constitutional provisions, he fails to develop arguments for most of them. This Court does not consider or address

(1976) (upholding a statutory scheme that narrows the types of defendants eligible for death and affords a prosecutor the option to seek or not seek the death penalty at various stages in the criminal process). Our holding comports with opinions by many other courts recognizing that prosecutorial discretion is appropriately constrained by death penalty statutes and appellate review. *See, e.g., State v. Rizzo*, 31 A.3d 1094, 1163–64 (Conn. 2011) (citing cases rejecting constitutional challenges); *Wade v. State*, 41 So.3d 857, 875–76 (Fla. 2010); *State v. Banks*, 271 S.W.3d 90, 154–55 (Tenn. 2008); *State v. Yates*, 168 P.3d 359, 400–01 (Wash. 2007).

¶21 The record also does not show that the death penalty was sought in Ovante's case for a discriminatory or otherwise improper reason. Ovante contends that defendants in Maricopa County are more likely to receive the death penalty than defendants similarly situated in other locations. To show a violation of the Equal Protection Clause of the Fourteenth Amendment, however, "the defendant must show purposeful discrimination that had a discriminatory effect on him and in his particular case." *State v. Roque*, 213 Ariz. 193, 226 ¶ 143, 141 P.3d 368, 401 (2006) (citing *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987)). Because our criminal justice system affords

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unsupported constitutional claims. *State v. Hardy*, 230 Ariz. 281, 285 ¶ 12 n.3, 283 P.3d 12, 16 n.3 (2012).

prosecutors wide discretion to decide which crimes to prosecute and which sentences to pursue, "a defendant must show 'exceptionally clear proof' of discrimination for the Court to infer discriminatory purpose. Any legitimate explanation for a state's decision to seek the death penalty precludes a finding of a Fourteenth Amendment violation." *Id.* (internal citations omitted).

¶22 "In Arizona, the state may seek the death penalty if it can prove beyond a reasonable doubt that a defendant committed first degree murder and can also prove the existence of at least one aggravating factor." *Id.* at 227 ¶ 144, 141 P.3d at 402. Ovante committed two murders and admitted two aggravating circumstances, rendering him eligible for a death sentence. That the County Attorney sought this sentence in many qualifying cases in Maricopa County, or rejected Ovante's offers to plead guilty in exchange for a life sentence, does not make the decision to seek death in his case unconstitutional. *See id.* ¶ 143.

D. Prosecutor's Closing Argument

¶23 Ovante argues that, in closing argument, the prosecutor (1) impermissibly suggested that Ovante had failed to take responsibility for his actions by implying Ovante's presentation of mitigation and request for mercy were negative conduct, and (2) made "an overly emotional play coloring Mr.

Ovante as a poisoned seed from a bad family." Because Ovante did not object at trial, we review the statements for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567 ¶ 19, 115 P.3d 601, 607 (2005).

¶24 Prosecutors are given "wide latitude" when presenting arguments. *State v. Morris*, 215 Ariz. 324, 336 ¶ 51, 160 P.3d 203, 215 (2007). They are permitted to suggest reasonable inferences from the facts presented, but their statements should not "call[] the jurors' attention [to] matters [the jury] should not consider." *Id.* Although highly misleading statements might sometimes taint a trial, "cautionary instructions by the court generally cure any possible prejudice" from statements by counsel because juries are presumed to follow the trial court's instructions. *State v. Manuel*, 229 Ariz. 1, 6 ¶ 24, 270 P.3d 828, 833 (2011).

¶25 Here, the trial court instructed the jurors that statements by the lawyers should not be interpreted as evidence and should only be used as tools to help the jury "understand the evidence and apply the law." Given these instructions, we evaluate Ovante's claim presuming that the jury recognized that the lawyers' statements were not evidence and that the jury sought to reach a "reasoned, moral judgment about which sentence [was] justified and appropriate." *See State v. Newell*, 212 Ariz. 389, 403 ¶¶ 67–68, 132 P.3d 833, 847 (2006) (holding that

jury instructions negated improper comments of prosecutor); *State v. Anderson*, 210 Ariz. 327, 342 ¶ 50, 111 P.3d 369, 384 (2005) (holding that jury instructions cured the prosecutor's misstatement of the law).

i. Failure to take responsibility

¶26 Ovante argues that, by telling the jury that Ovante failed to take responsibility for his actions, the prosecutor improperly suggested "that the presentation of mitigation evidence constitutes a failure to own up to the [criminal] conduct." He argues the prosecutor directly attacked the process of mitigation instead of specific mitigating factors, permitting the jury to unfairly conclude that Ovante's "plea for his life [during the mitigation process] was nothing more than a failure to take responsibility."

¶27 The record does not support Ovante's claim that the State improperly argued that the presentation of mitigation was itself a failure to accept responsibility. During the penalty phase, the defense contended that Ovante's negative childhood and background played a large part in his predicament, repeatedly making statements like "our choices are the product of our backgrounds," and "[w]hat goes into the recipe bowl is oftentimes what comes out." In response, the State argued that Ovante had a choice in all of the decisions he made but was attempting to deflect responsibility.

¶28 Although the State is prohibited from telling a capital jury that it cannot consider mitigating evidence, the State may argue that mitigating evidence should not be given much weight. *See State v. Pandeli*, 215 Ariz. 514, 526 ¶¶ 35–36, 161 P.3d 557, 569 (2007). Because the prosecutor was rebutting mitigation evidence presented about Ovante's troubled childhood and dysfunctional family, the prosecutor's comments did not create fundamental error.

ii. Overly Emotional Argument

¶29 Ovante next argues that the prosecutor's closing argument made "an overly emotional play coloring [him] as a poisoned seed from a bad family." He asserts that the prosecutor focused heavily on the "generational violence" present in Ovante's family and allowed the jury to speculate that, if it did not impose the death sentence, other murders could occur during this or future generations.

¶30 The prosecutor's comments about generational violence responded to defense arguments that Ovante's conduct partially resulted from his dysfunctional family. The prosecutor said, "But what happens down the line? When does it stop? When does anyone in the Ovante family have to stand up and say, I made choices? I am responsible for what I did. Instead of poisoning further generations of Ovantes . . . ." Viewed in context, these statements militated against the notion that one

generation of a family "poisons" the next, and did not urge the jury to sentence Ovante to death to prevent such "poisoning." Even if the prosecutor's words were susceptible to misunderstanding, we presume the trial court's admonition negated any improper statements. *See, e.g., Newell,* 212 Ariz. at 403 ¶¶ 67–68, 132 P.3d at 847 (holding that jury instructions negated prosecutor's comments). Ovante has not shown that the prosecutor's closing comments were fundamental error.

E. Evidence of Circumstances of the Murders

¶31 Ovante argues that the trial court abused its discretion by allowing the State, at the beginning of the penalty phase, to present evidence of the circumstances of his crimes. Noting that he pleaded guilty to the charges and stipulated to the alleged aggravating factors, Ovante argues that this evidence was irrelevant to the thrust of his mitigation and unfairly prejudicial.

¶32 This argument is meritless. This Court recently reaffirmed that the State may offer evidence in the penalty phase about the circumstances of the murder regardless of whether the defendant presents any mitigation. *See State v. Nordstrom*, 230 Ariz. 110, 114–115 ¶¶ 10, 13, 280 P.3d 1244, 1248–49 (2012). Ovante has not established that any of the State's evidence regarding the circumstances of the murders and the aggravated assault (or the related (F)(2) and (F)(8)

aggravating circumstances) was unduly prejudicial. *Cf. id.* at 115 ¶ 11, 280 P.3d at 1249 (holding that evidence of circumstances of crime was not unduly prejudicial).

F. Final Jury Instructions

¶33 Ovante argues that the trial court erred in its final jury instructions by stating that Ovante had admitted two statutory aggravating factors and then failing to identify the particular aggravators for the jurors. He contends that the applicable aggravating factors had to be identified in order for jurors to assess whether the mitigating factors called for leniency. Because Ovante did not object to the instructions at trial, we review this claim for fundamental error. *State v. Kuhs*, 223 Ariz. 376, 386 ¶ 52, 224 P.3d 192, 202 (2010).

¶34 In the preliminary instructions before the penalty phase, the trial court explained that Ovante had admitted two aggravating factors and then briefly described those factors. Both parties received a copy of the final jury instructions before they were read to the jury and neither party objected to how the aggravating and mitigating circumstances were handled. In the final jury instructions, the court said, "The defendant has admitted that statutory aggravating circumstances exist, which make the defendant eligible for the death sentence," but the court did not specifically identify which aggravating factors Ovante had admitted. The prosecution, however, did

explain the two aggravating factors in its closing statement.

¶35 "In assessing the adequacy of jury instructions, the instructions must be viewed in their entirety to determine whether they adequately reflect the law." *State v. Garcia*, 224 Ariz. 1, 18 ¶ 75, 226 P.3d 370, 387 (2010). A court is not required to give a separate instruction if its substance has already been covered by other instructions, *id.*, and "[a] conviction will not be reversed based on the instructions unless, taken as a whole, they misled the jurors." *State v. Zaragoza*, 221 Ariz. 49, 53 ¶ 15, 209 P.3d 629, 633 (2009).

¶36 The jury instructions, taken as a whole, were accurate and not misleading. The preliminary instructions specifically identified the applicable aggravating circumstances. At the beginning of the penalty phase, the prosecution presented evidence regarding the crimes and aggravating factors that Ovante had admitted. Although it would have been better practice for the trial court to have again identified the particular aggravating factors in the final instructions, the failure to do so here was not fundamental error.

G. Discrepancy between the Minute Entry and Oral Pronouncement of the Sentence

¶37 Ovante argues his sentence must be remanded for clarification because the trial judge orally pronounced that his sentences would run consecutively but entered a minute entry

ordering two of them to run concurrently. In pronouncing the sentences, the trial court observed that the victims' suffering warranted separate sentences. Accordingly, the court gave Ovante a six-year prison term for the aggravated assault charge, to begin on February 24, 2010, and stated that Ovante would "then be sentenced to life" in prison for count 1 and death for count 2. The court also announced that Ovante's life sentence for count 1 would run consecutively to his death sentence for count 2. Although the corresponding minute entry states that the sentence on count 1 will run consecutively to that for count 2, it states that all sentences will begin on February 24, 2010.

¶38 When a discrepancy between the trial court's oral pronouncement of a sentence and the written minute entry can be clearly resolved by looking at the record, the "[o]ral pronouncement in open court controls over the minute entry." *State v. Whitney*, 159 Ariz. 476, 487, 768 P.2d 638, 649 (1989). This Court can order the minute entry corrected if the record clearly identifies the intended sentence. *Id.* at 487, 768 P.2d at 649.

¶39 Here, the trial court clearly stated its intent that the sentence on the aggravated assault count would begin on February 24, 2010, and the life sentence on count 1 would run consecutively to the death sentence on count 2. By stating that Ovante's death sentence would be concurrent with his sentence

for the aggravated assault, the minute entry is not inconsistent with the oral pronouncement of the sentences. The minute entry, however, incorrectly states that the sentence of life with possible parole after twenty-five years will also begin on February 24, 2010. Accordingly, we correct the minute entry to delete this statement, leaving the sentence on count 1 to run consecutively to the sentence on count 2, and affirm the trial court's oral pronouncement of the sentences.

H. Abuse of Discretion Review

¶40 Because Ovante murdered Vickers after August 1, 2002, we review the jury's imposition of a death sentence for abuse of discretion. A.R.S. § 13-756(A) (2008); *State v. Chappell*, 225 Ariz. 229, 242 ¶ 56, 236 P.3d 1176, 1189 (2010).

1. Aggravating Circumstances

¶41 Ovante admitted the (F)(2) aggravator based on his conviction of aggravated assault with a handgun against Valenzuela and the (F)(8) aggravator based on his premeditated murder of Trujillo. After Ovante pleaded guilty, the court conducted a second colloquy to confirm that he was knowingly, voluntarily, and intelligently admitting the aggravators and that he understood that death was a possible sentence.

¶42 Nothing prevents a defendant from waiving his Sixth Amendment right to have a jury determine aggravating circumstances. *State v. Brown*, 212 Ariz. 225, 231 ¶ 26, 129

P.3d 947, 953 (2006) (citing *Blakely v. Washington*, 542 U.S. 296, 310 (2004)). The record amply supports the (F)(2) and (F)(8) aggravators admitted by Ovante.

2. Mitigating Circumstances

¶43 At the penalty phase, each juror must determine whether mitigating circumstances exist and whether death is the appropriate penalty. *See* A.R.S. § 13-751(C). "The defendant must prove the existence of the mitigating circumstances by a preponderance of the evidence," but "the jurors do not have to agree unanimously that a mitigating circumstance has been proven to exist." *Id.*

¶44 Ovante presented several mitigation witnesses. The days of testimony detailing Ovante's childhood drew a bleak picture of a life filled with poverty, violence, crime, molestation, and drug use. The defense discussed his longstanding substance abuse, and Ovante expressed remorse during allocution, but there was little evidence showing a strong connection between the mitigation and the murders.

3. Propriety of death sentence

¶45 We must uphold a jury's decision that death is appropriate if any "reasonable juror could conclude that the mitigation presented was not sufficiently substantial to call for leniency." *State v. Gallardo*, 225 Ariz. 560, 570 ¶ 52, 242 P.3d 159, 169 (2010). In the context of independent review, the

Court has given "extraordinary weight" to the multiple murders aggravating circumstance. *State v. Hampton*, 213 Ariz. 167, 185 ¶ 90, 140 P.3d 950, 968 (2006). Here, in light of the (F)(2) and (F)(8) aggravators and the mitigation evidence in the record, a reasonable juror could conclude that the mitigating circumstances were not "sufficiently substantial to call for leniency." *Id.*; *see also* A.R.S. § 13-751(C).

I. Additional Issues

¶46 Stating that he seeks to preserve certain issues for federal review, Ovante lists thirty-one additional constitutional claims that he acknowledges have been rejected in previous decisions. We decline to revisit these claims.

CONCLUSION

¶47 We affirm Ovante's convictions and his sentences as corrected.

_____
Scott Bales, Vice Chief Justice

CONCURRING:

_____
Rebecca White Berch, Chief Justice

_____
A. John Pelander, Justice

_____
Robert M. Brutinel, Justice

_____

Ann A. Scott Timmer, Justice

Appendix C

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
03/28/2018 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2008-144114-001 DT 03/26/2018

HONORABLE WARREN J. GRANVILLE

CLERK OF THE COURT
B. Navarro
Deputy

STATE OF ARIZONA

MYLES A BRACCIO
JEFFREY L SPARKS

v.

MANUEL OVANTE JR. (001)

VIKKI M LILES
GARRETT W SIMPSON

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

MINUTE ENTRY (CAPITAL CASE)

8:39 a.m. This is the time set for Oral Argument/Status Conference for submission of findings of fact.

Courtroom 6A SCT

State's Attorney:	Jeffrey Sparks
Defendant's Attorney:	Garrett Simpson
Defendant:	Presence Waived

Court Reporter, Rochelle Dobbins, is present.

A record of the proceedings is also made digitally.

Upon the Court’s inquiry, Defense counsel advises that the Defense has received the State’s Notice withdrawing portions of its Response to the Petition for Post-Conviction Relieve. The Defense accepts that Notice.

State's counsel advises that the State has had an opportunity to review the Defendant's Statements of Facts.

Discussion is held.

This Court has received and reviewed the Defendant's Motion to Strike Response to Petition for Post-Conviction Relief filed February 1, 2018, the State's Response filed February 6, 2018, and the Defendant's Reply filed February 12, 2018; including the official Reporter's Transcript of the December 15, 2009 proceedings in this matter, attached as Exhibit 13 to the Petition and also submitted into evidence at the March 9, 2018 hearing as Exhibit 1.

Based upon the pleadings and arguments of counsel, this Court makes the following findings and rulings:

Without objection, the State withdraws the following portions of its Response to the Petition for Post-Conviction Relief:

Page 24, lines 20–25;

Page 25, lines 1–8 and footnote 5;

Page 26, lines 9–25;

Page 27, lines 3–6;

Page 29, lines 11–24

Without objection, this Court makes the following findings of fact pertaining to the Defendant's pleas of guilty to all charges and to the aggravating factors as set out in the admitted Exhibit 1, the Reporter's Transcript herein of December 15, 2009.

Exhibit 1 is the true and correct record of proceedings herein of December 15, 2009 (Exhibit 1 is also listed as Exhibit 13 to the Petition for Post- Conviction Relief)

In the proceedings set out in Exhibit 1, there was no Plea Agreement. With no promises in return, Mr. Ovante pleaded guilty to all charges, including Counts 1 and 2, both First Degree Murder, one count of Aggravated Assault, dangerous, and the alleged capital aggravating factors.

When Mr. Ovante pled guilty, the Court advised him that he was not sentenced to death as a result of his pleas, he could be sentenced to life in prison, either for his natural life or for life "with the possibility of parole" after 25 years of imprisonment:

> The Court: There is no plea agreement, so under the law if convicted of Count 1 or Count 2, first-degree murder, the sentence for that offense is no less than life without --with the possibility of parole after serving 25 years. Do you understand that, sir?
>
> Mr. Ovante: Yes. (Exhibit 1, p. 7)
>
> The Court: For Counts One and Two, if you got life with a possibility of probation – sorry -- possibility of parole, that still is a service of 25 years. Do you understand that?
>
> Mr. Ovante: Yes. (Exhibit 1, p. 8)

The Court advised Mr. Ovante that these parole-eligible sentences could be ordered served concurrently or consecutively:

> The Court: And it's also possible that those offenses could run concurrent with each other, or stacker on top of the other. Do you understand that that's possible?
> Mr. Ovante: Yes (Ex. 1, p. 7)

During the plea colloquy, the Court did not inform Mr. Ovante that he would be ineligible for parole if he pleaded guilty to first-degree murder;

Mr. Ovante did not state at any point in the proceedings that he understood or agreed that he could not receive a parole-eligible sentence for either count of first-degree murder and,

Upon review of the record herein, the Court also finds that on February 24, 2010 the Court sentenced Mr. Ovante to a parole-eligible sentence, that is, life with the possibility of parole after 25 years on Count 1:

> As punishment, It is Ordered Defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows: Count 1: Life with possibility (sic) of parole after 25 years from February 24, 2010 Presentence Incarceration Credit: 0 day (s) This sentence is to be consecutive to Counts 2 and 3 (Minute Entry of February 24, 2010).

Even though the State has withdrawn those portions of their pleading the Defendant

found objectionable, Defendant has asked to consider whether further sanctions are warranted. This Court does not believe State's counsel's actions rise to a level that requires any formal sanction or admonition from the Court. While the State's semantics were strained, the Response did include reference to the official transcript of the December 15, 2009 proceedings, and so this Court cannot discern any attempt to deceive the Court.

IT IS ORDERED allowing the Defense to file the Motion to Amend Petition for Post-Conviction Relief Re: Supplemental Authority filed January 24, 2018 and the Defendant's Memorandum: The Guilty Pleas are Void as a Matter of Law filed February 1, 2018 as supplemental pleadings and requiring the State to file a response to the supplemental pleadings.

The State requests 60 days to file a response. The Defense does not object.

IT IS ORDERED granting the State's request and the State shall file a response to the Defendant's Motion to Amend Petition for Post-Conviction Relief Re: Supplemental Authority filed January 24, 2018 and the Defendant's Memorandum: The Guilty Pleas are Void as a Matter of Law filed February 1, 2018 no later than **May 25, 2018**.

IT IS FURTHER ORDERED that the Defense shall file a reply to the State's response no later than **July 16, 2018**.

There being no objection by the parties, the Court will enter a ruling no later than **September 17, 2018**.

8:46 a.m. Matter concludes.

Appendix D

Clerk of the Superior Court
*** Electronically Filed ***
06/11/2019 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2008-144114-001 DT 06/10/2019

HONORABLE WARREN J. GRANVILLE

CLERK OF THE COURT
B. Navarro
Deputy

STATE OF ARIZONA

MYLES A BRACCIO

v.

MANUEL OVANTE JR. (001)

VIKKI M LILES
GARRETT W SIMPSON

CAPITAL CASE MANAGER
COURT ADMIN-CRIMINAL-PCR
JUDGE GRANVILLE

MINUTE ENTRY (CAPITAL CASE)

On May 29, 2019, this Court ruled that a Rule 32 evidentiary hearing would be held on one of Defendant's claims for Post-Conviction Relief, one claim had been withdrawn, and the remaining eight claims were dismissed pursuant to Rule 32.6(d).

In recognition of the extensive efforts of counsel and this Court's obligation to provide specific findings and conclusions (*See,* Rule 32.6(d) and 32.8(d)(1)), the following is provided.

The Court has reviewed the Defendant's Petition for Post-Conviction Relief, the State's Response, Defendant's Reply; the Defendant's Supplemental Petition, the State's Response, Defendant's Reply, Defendant's Motion to Amend Petition for Post-Conviction Relief Re: Supplemental Authority, Defendant's Memorandum: the Guilty Pleas are Void as a Matter of Law, the State's Notice (filed March 20, 2018), the State Response to Memorandum: the Guilty Pleas are Void as a Matter of Law, the State's Response to Motion to Amend Petition for Post-Conviction Relief Re: Supplemental Authority, the Defendant's Reply to Response to Motion to Amend Petition for Post-Conviction Relief Re Supplemental Authority, Petitioner's Reply to Response to Memorandum: the Guilty Pleas are Void as a Matter of Law, the State's Notice of Supplemental Authority, and the State's Response to Supplemental Claims, the accompanying

documentary and disc evidence, the arguments of counsel, the court's file and the record in this case, the reporter's transcripts of proceedings, *State v. Ovante*, 231 Ariz. 180, 291 P.3d 974 (2013), and applicable Rules and case law. Based upon the foregoing, this Court makes the following findings of facts and conclusions of law:

Defendant's claims are timely following the Arizona Supreme Court affirming the Defendant's guilty pleas and death sentence in *Ovante*, 231 Ariz. 180.

The findings and rulings herein should be deemed to be in addition to those made by this Court's March 9, 2018 (minute entry docketed on March 13, 2018) and March 26, 2018 (minute entry docketed March 28, 2018) findings and orders related to Defendant's Motion to Strike Response to Petition for Post-Conviction Relief and the Court's rulings, noted above, at the May 29, 2019 Status Conference. The Court, having reviewed all the materials mentioned herein and the applicable statutes, Rules and case law makes findings and rulings, as follows:

PROCEDURAL BACKGROUND

The Defendant pleaded guilty, as charged, to two (2) counts of First Degree Murder (of Jordan Trujillo and Damien Vickers) and one (1) count of Aggravated Assault (of Gabriel Valenzuela). The Defendant also admitted and stipulated to, and the trial court, rather than a jury, found that the Defendant had been previously convicted of a serious offense (the aggravated assault of Valenzuela), A.R.S. § 13-751(F)(2), and that the Defendant had been convicted of one or more other homicides committed during the commission of the offense, A.R.S. § 13-751(F)(8).

At the Penalty Phase, Defendant presented several days of testimony through several mitigation witnesses. The testimony detailed Defendant's life of poverty, violence, crime, molestation and multi-generational drug abuse. Defense counsel presented argument, including about Defendant's long-standing drug abuse beginning at a young age. During his allocution, Defendant expressed remorse and blamed the crimes on his substance abuse.

The Penalty Phase jury considered the mitigation concerning Defendant and the circumstances of the two murders and determined that death was the appropriate sentence for the murder of Vickers, and that life in prison was the appropriate sentence for the murder of Trujillo.

DIRECT APPEAL DECISION

On direct appeal the Arizona Supreme Court upheld the Defendant's guilty pleas and admission of both aggravating circumstances, and his sentences, including the death penalty. The issues raised on appeal and considered by the Arizona Supreme Court were:

(1) The Defendant did not waive right to a direct appeal by pleading guilty;

(2) There was adequate factual basis established to maintain the element of premeditation and maintain the Defendant's guilty pleas;

(3) The discretion accorded to prosecutors in electing to pursue the death penalty does not violate equal protection, due process, or the prohibition against cruel and unusual punishment;

(4) The comments made by the Prosecutor during closing argument were not fundamental error;

(5) The trial court's order permitting the State to present evidence of the circumstances of the crimes during the penalty phase of a capital murder trial where the defendant entered guilty pleas and admitted the aggravating factors was not an abuse of discretion;

(6) The trial court did not mislead the jury by giving jury instructions at the end of the Penalty Phase that only instructed the jury the Defendant had admitted two aggravating factors without identifying the two aggravating factors when the trial court had instructed the jury on the specific aggravating factors at the beginning of the Penalty Phase;

(7) It was not necessary to remand for resentencing to clarify a discrepancy between the sentencing minute entry and the oral pronouncement of sentence by the trial court; and

(8) It was not an abuse of discretion by the jury and death was the appropriate sentence for one count of first-degree murder in the absence of mitigation sufficiently substantial to call for leniency.

SUMMARY OF POST-CONVICTION CLAIMS

The Defendant raises ten (10) claims in this Petition for Post-Conviction Relief. In most instances, the claim alleges a substantive legal error, and a concomitant claim of ineffective assistance of trial counsel and appellate counsel for failing to raise or prevail on the substantive legal issue.

Defendant's *Guilt Phase claims* relate to:

A. Defendant claims his guilty pleas were not voluntary, knowing and intelligent, due to statements regarding defendant's eligibility for parole or release, and therefore are void as a matter of law.

B. Defendant claims he received ineffective assistance of counsel due to counsel's inadequate investigation of his mental status.

Defendant's *Penalty Phase claims* relate to:

C. Defendant claims his rights under the Sixth and Fourteenth Amendments were violated because the jury was not given a *Simmons/Lynch* instruction.

D. Defendant claims he received ineffective assistance of counsel during his trial proceedings due to trial counsel not using admissions by Arizona officials, in the *Crystal Darkness – Arizona* video to argue the Defendant's case for a life sentence.

E. Defendant claims he received ineffective assistance of counsel due to counsel's failure to object to prosecutorial misconduct, during the prosecutor's arguments regarding mitigating factors and rebuttal to mitigation evidence when the prosecutor allegedly misused a portion of Defendant's mitigation evidence as non-statutory aggravation, mitigation rebuttal or a reason not to show leniency.

F. Defendant claims he received ineffective assistance of counsel during his trial proceedings where trial counsel failed to move to recuse the Court and the Maricopa County Attorney's Office.

G. The Arizona death penalty violates federal law and *State v. Hidalgo*, 241 Ariz. 390 P.3d 783 (2017) was wrongly decided.

H. The death penalty is unconstitutional and should be abolished.

I. Defendant claims he received ineffective assistance of counsel during his trial proceedings where trial counsel did not oppose the Court's denial of a mistrial due to a hung jury during the penalty phase.

J. Defendant claims his due process rights were violated when the trial court responded to a jury question regarding the definition of a "life sentence" during the jury's penalty phase deliberations.

CLAIM A

The Defendant challenges the validity of his guilty pleas both on the ground this Court committed legal error, and alternatively, that he received ineffective assistance of counsel, during the change of plea hearing and the Defendant's plea colloquy.

The State has stipulated that Defendant has raised colorable claims regarding the Court's and Defense counsel's advisements regarding his eligibility for parole, and his subjective mindset to decide to change his pleas to guilty.

The focus of the hearing shall be to determine whether Defendant was incorrectly informed he would be eligible for parole, and if that fact was material to his decision to plead guilty. *See State v. Rosario*, 195 Ariz. 264, 268 (App. 1999)

Therefore, based on the above and the stipulation of the parties,

IT IS ORDERED the Court will conduct an evidentiary hearing to determine Defendant's "essential objective" in pleading guilty to the crimes as charged, *State v. Pac*, 165 Ariz. at 295–96 (quoting *Crowder*, 155 Ariz. at 482); *State v. Villegas*, 230 Ariz. 191, 192–93, ¶¶ 5–6 (App. 2012), whether Defendant's guilty pleas were knowing, voluntary, and intelligent, and whether there was any erroneous legal advice provided that was material to Defendant's decision to plead guilty. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397 (1985).

The State has also noted the Court "should also correct the sentence for the First-Degree Murder count for Jordan Trujillo (Count 1). Instead of providing for "life with possibility of parole after 25 years," the sentence should provide for life in prison without the possibility of release on any basis until the completion of twenty-five calendar years, citing A.R.S. §§ 13–751, –752 (2011). (*See* docket #233.)" Response to Memorandum at 7.

IT IS FURTHER ORDERED the Court takes the matter of correcting the sentencing order as to Count 1 under advisement, and the Court will further address the matter in its final ruling, pursuant to Rule 32.8(d), following the evidentiary hearing pursuant to Rule 32.8.

CLAIM B

Defendant alleged that his trial counsel provided ineffective assistance of counsel due to counsel's inadequate investigation of the Defendant's mental status.

At the Informal Conference in this matter on December 12, 2018, Defense counsel withdrew this claim.

Therefore,

IT IS ORDERED that Defendant's claim his trial counsel provided ineffective assistance of counsel due to counsel's inadequate investigation of the Defendant's mental status is dismissed.

CLAIM C

Defendant claims his rights under the Sixth and Fourteenth Amendments to the U.S. Constitution were violated because the jury was not given an instruction pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994) regarding Defendant being ineligible for parole since the Legislature had not enacted enabling legislation to support parole release.

Defendant claims he is, therefore, entitled to a new penalty phase trial under Rule 32.1(a) and/or (g).

Defendant did not raise a *Simmons/Schafer*[1]*/Lynch*[2] error on appeal among his 29 constitutional claims.[3] Thus, the substantive aspect of this claim is precluded under Rule 32.2(a)(2) and (3). *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

Addressing the substantive issues[4] raised by Defendant, this Court finds that Defendant was never entitled to a *Simmons* instruction.

In *Lynch v. Arizona,* the United States Supreme Court held "where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without the possibility of parole," the Due Process Clause "entitles the Defendant to inform the jury of his parole ineligibility, either by a jury instruction or in arguments by counsel." *Lynch*, 136 S.Ct. at 1818 (2016)

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[1] *Shafer v. South Carolina*, 532 U.S. 36 (2001).

[2] *Lynch v. Arizona (Lynch III)*, 578 U.S. ---, 136 S.Ct. 1818 (2016).

[3] *Ovante*, 231 Ariz. at 35, 189 ¶46; (*see also* fn. 1 "Although Ovante alleges violations of several federal and state constitutional provisions, he fails to develop arguments for most of them. This Court does not consider or address unsupported constitutional claims. *State v. Hardy*, 230 Ariz. 281, 285 ¶ 12 n. 3, 283 P.3d 12, 16 n. 3 (2012).").

[4] Defendant claims both that this Court committed legal error in not giving a *Simmons/Lynch* instruction and that "there has been a significant change in the law[;]" namely *Lynch v. Arizona*, 578 U.S. ---, 136 S.Ct. 1818 (2016), *State v. Hulsey*, 243 Ariz. 367 (2018), *State v. Escalante-Orozco*, 241 Ariz. 254 (2017); and *State v. Rushing*, 243 Ariz. 212 (2017), that should overturn the Defendant's sentence.

In Defendant's case, the "possibility of release after 25 years" or "possibility of parole" was never addressed by the Court. The issue was not mentioned with prospective jurors during *voir dire* during jury selection. No mention of the issue was raised in the preliminary instructions for Penalty Phase. No reference was made during the final Penalty Phase instructions. *See,* Jury Instructions, Preliminary Penalty Phase (filed January 21, 2010, docketed March 1, 2010); Final Penalty Phase (filed February 16, 2010, docketed March 1, 2010).

Defendant now claims that the State "put the defendant's future dangerousness at issue in its closing argument, [where] the prosecutor argued that defendant's actions constituted… "evil," that his acts were evil…, emphasized the brutality of the murders, [and presented argument related to] the unpredictability of [defendant's] behavior[,]. It became ineffective assistance at that point when trial counsel did not request a *Simmons/Lynch* instruction.

Hearing it then, and reading it now, this Court does not discern the Prosecutor's argument on a comment of future dangerousness, but rather, as a response to Defense counsel's argument that he is not responsible for the poor choices he made because he grew up in a bad neighborhood:

> There are people who grew up in the same neighborhood, like his friend who came and testified last week, firefighters, police officers, members of the society that the defendant stole from, victimized in that neighborhood.
> …
> [Ovante] chose to use drugs and to carry a gun even though his brother, who is not the brightest bulb, is saying, hey, get that gun away from him when he is on meth. Don't -- hide it when he is asleep. Do something. Get it away from him. Defendant's choice.

RT 2/16/10 at 70-71.

The Prosecutor concluded his closing argument by focusing the jury on the fact that the murders were premeditated, stating:

> You have heard two weeks of mitigating evidence, but in this case, it is not compelling. It doesn't overcome the aggravating factors in this case, the violence, the destruction, the pain the defendant caused killing not just one person in a drunken brawl, not getting into an argument but deciding to pull that trigger over and over and over again.

> When you do that, and you leave that devastation, you kill two people and try to kill a third, shoot a third, you deserve the death penalty. That's the sentence you should impose in this case.

RT 2/16/10 at 86-87.

The only statement argued now by Defendant to place the Defendant's future dangerousness at issue the Supreme Court rejected on appeal. The Court addressed Ovante's argument on appeal that,

> the prosecutor's closing argument made "an overly emotional play coloring [him] as a poisoned seed from a bad family." He asserts that the prosecutor focused heavily on the "generational violence" present in Ovante's family and allowed the jury to speculate that, if it did not impose the death sentence, other murders could occur during this or future generations.

Ovante, 231 Ariz. at 187, ¶29.

Instead, the Court saw the context as "respond[ing] to defense arguments that Ovante's conduct partially resulted from his dysfunctional family." It stated:

> Viewed in context, these statements militated against the notion that one generation of a family "poisons" the next, and did not urge the jury to sentence Ovante to death to prevent such "poisoning."

Id, at 187, ¶30.

The Court concluded that the Prosecution was not "urg[ing] the jury to sentence Ovante to death to prevent [future violence]" finding that "[e]ven if the prosecutor's words were susceptible to misunderstanding, we presume the trial court's admonition negated any improper statements. *See, e.g., Newell*, 212 Ariz. at 403 ¶¶ 67–68, 132 P.3d at 847 (holding that jury instructions negated prosecutor's comments)."

This Court finds that the State never asked the jurors to consider Defendant's future dangerousness.

Instead, this Court finds that Defense counsel advised the jury that Defendant would never be eligible for release.

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

In his initial Penalty Phase closing argument, Defense counsel argued,

> Now, the decision you have to make may be one of the most important decisions that you have to make in your entire life. What becomes of this man? Does Manuel have anything to offer in the future? What can he provide if he spends the rest of his life behind bars?

RT 12/16/2010 at 61.

In his rebuttal closing argument defense counsel argued:

> What we have tried to try to do is to present information to you to allow you to determine whether or not this man should be sentenced to death or sentenced to spend the rest of his life in prison.

RT 2/16/2010 at 88-89.

In his final plea to the jury, immediately before the jury adjourned to begin its deliberations, defense counsel argued,

> In this case, if you do not sentence Manuel Ovante to death, he will not escape punishment. He will be confined in the Arizona state prison for the rest of his life.

RT 2/16/2010 at 103.

Under these facts, even where there is an argument that "future dangerousness" was an issue at sentencing, the Defendant was not entitled to a *Simmons/Lynch* instruction because the requirements of *Simmons*, 512 U.S. 154, 114 S. Ct. 2187 (1994); under the specific facts of this case, were never triggered by the state, and were actually satisfied by Defendant's counsel's arguments to the jury during the penalty phase.

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

Defendant claims ineffective assistance of trial counsel for failure to request a *Simmons* instruction. Counsels' performance is evaluated at the time of trial and not in hindsight. At the time of Defendant's 2010 penalty trial and his appeal decided in 2013, long-established Arizona precedent held that Arizona defendants were not entitled to parole unavailability instructions. *State v. Chappell*, 225 Ariz. 229, 240, ¶43 (2010); *State v. Garcia*, 224 Ariz. 1, 18, ¶¶ 76–77 (2010); *State v. Hargrave*, 225 Ariz. 1, 14, ¶¶ 52–53 (2010); *State v. Cruz*, 218 Ariz. 149, 160, ¶¶ 41–42 (2008). Accordingly, any request for a *Simmons* instruction would have failed, and counsel was not ineffective for failing to make a futile request. *See State v. Pandeli*, 242 Ariz. 175, 185, 394 P.3d 2, 12, ¶ 33 (2017)

Further, neither the United States Supreme Court's subsequent decision in *Lynch*, holding that Arizona defendants are entitled to instructions under *Simmons*, nor the Arizona Supreme Court's decisions in *State v. Escalante-Orozco* (241 Ariz. 254, 386 P.3d 798 (2017); *State v. Hulsey*, 243 Ariz. 367, 408 P.3d 408 (2018); and *State v. Rushing*, 243 Ariz. 212, 404 P.3d 240 (2017), *cert. denied*, 17-1449, 2018 WL 1876897 (U.S. Oct. 1, 2018), retroactively render counsel's performance ineffective. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984) (evaluation of counsel's acts or omissions are judged as of the time counsel was required to act). Counsel's failure to predict *Lynch's* change to then-established Arizona Supreme Court law was not objectively unreasonable. *See Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (finding counsel was not ineffective because a "lawyer cannot be required to anticipate our decision" in a later case); *Bullock v. Carver*, 297 F.3d 1036, 1052 (10th Cir. 2002) (rejecting ineffective assistance claim based upon counsel's failure to predict future changes in the law and stating that "clairvoyance is not a required attribute of effective representation"); *Brown v. United States*, 311 F.3d 875 (8th Cir. 2002) (finding no ineffective assistance of counsel for counsel's failure to raise *Apprendi*-type issue prior to that decision because such issue was "unsupported by then-existing precedent ...").

For the same reasons, appellate counsel was not ineffective for failing to challenge the lack of a parole ineligibility instruction. Any such challenge would have been rejected under then-existing Arizona Supreme Court precedent and the Arizona Supreme Court's finding that the State did not argue the jury should sentence Ovante to death to avoid future violence, and appellate counsel was not ineffective for failing to foresee *Lynch's* future change in the law.

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

weight of the (F)(8) aggravating circumstance when evaluated in connection with the mitigation. *Ovante*, 231 Ariz. at 189, ¶ 45, see also *State v. Hampton*, 213 Ariz. 167, 185 ¶ 90, 140 P.3d 950, 968 (2006).

Further, the Court finds no colorable claim that the jury's unanimous determination to return a verdict for the death penalty was impacted by the variance between "natural life" and "life". On automatic appeal, the Arizona Supreme Court upheld the jury's finding that death was the appropriate sentence finding,

> Here, in light of the (F)(2) and (F)(8) aggravators and the mitigation evidence in the record, a reasonable juror could conclude that the mitigating circumstances were not "sufficiently substantial to call for leniency." *Id.; see also* A.R.S. § 13–751(C).

Ovante, 231 Ariz. at 189, ¶ 45.

This Court may not overrule, modify or disregard the Supreme Court's conclusion on abuse of discretion review that the defendant's mitigation evidence was not sufficiently substantial to call for leniency.

For the reasons stated above,

THE COURT FINDS that the Defendant's claim he suffered from ineffective assistance of counsel's failure to request a *Simmons/Lynch* instruction is not colorable.

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

CLAIM D

Defendant alleges that his trial counsel were ineffective during the Penalty Phase because they did not use statements of various Arizona law enforcement officials, made in a special report television broadcast unrelated to Defendant's case, "that flatly contradicted the State's arguments in sentencing." Petition at 67. Defendant does not point this Court to any specific statements during the program unrelated to Defendant's case; only that several specifically named officials were "on the program" about the negative effects of methamphetamine on the community.

Defendant argues that the statements made during the program about the addictive properties of methamphetamine somehow would have contradicted the State's rebuttal mitigation

argument that Defendant was responsible for his own decisions. Defendant does not present any evidence to support his general blanket assertion. Petition at 67.

Further, Defendant's counsel did present nearly three hours of expert testimony by Dr. James Sullivan, who during his testimony on direct examination, testified that methamphetamine was addictive and that Defendant's dysfunction and "brain damage [were] the direct result of prolonged and extensive methamphetamine use." RT 2/11/10 at 47-49.

Defendant has no support how it was deficient performance for counsel to call an expert witness who offered testimony about the addictiveness and significant harmful effects of methamphetamine – and the specific effects it had on Defendant – but did not offer a television program unrelated to Defendant's case regarding generalized issues of methamphetamine use.

Therefore,

THE COURT FINDS that Defendant's claim of deficient performance by trial counsel for failure to present the documentary video program during the penalty trial is not colorable. *See, State v. Pandeli*, 242 Ariz. 175, 183–84, ¶¶ 21-26, 394 P.3d 2, 10–11 (2017), *cert. denied*, 138 S. Ct. 645 (2018).

Further, this Court finds that Defendant cannot satisfy the prejudice prong of *Strickland*. Defendant offers no showing how the video documentary program would have changed the jury's verdict. A jury that heard three hours of expert testimony, including about the addictiveness of methamphetamine, and that Defendant's dysfunction and "brain damage [were] the direct result of prolonged and extensive methamphetamine use." RT 2/11/10 at 47-49. That jury then arguably found the Defendant – with his addiction to and "dysfunction" and "brain damage" from "prolonged use" of methamphetamine – should still be held responsible for his decisions; even if his addiction may have motivated him to make decisions that led to him committing these premeditated murders.

Therefore,

THE COURT FINDS that Defendant's claim of prejudice due to ineffective assistance of trial counsel for failure to present the documentary video program during the penalty trial is not colorable. *See, State v. Pandeli*, 242 Ariz. 175, 183–84, ¶¶ 21-26, 394 P.3d 2, 10–11 (2017), *cert. denied*, 138 S. Ct. 645 (2018).

CLAIM E

Defendant claims prosecutorial misconduct during his arguments regarding mitigating factors and rebuttal to mitigation evidence. Defendant argues the Prosecutor committed misconduct when he "misused [as] non-statutory aggravation, mitigation rebuttal or a reason not to show leniency" the Defendant's depression, drug addiction, and PTSD.

This claim of prosecutorial misconduct could have been raised on direct appeal, or was raised and decided on the merits on appeal;[5] it is therefore precluded by Rule 32.2(a)(3).

Defendant next alleges that "[t]rial counsel was ineffective in failing to object to prosecutorial misconduct and request relevant curative jury instructions, during his arguments regarding mitigating factors and rebuttal to mitigation evidence.

This Court did not hear then, and does not read now, the Prosecutor's argument as misusing or arguing non-statutory aggravating factors. This Court heard then and discerns now that the Prosecutor was fairly rebutting Defense counsel's proper argument of mitigating circumstances.

The Prosecutor did not ask the jury to draw adverse inferences from Defendant's proffered mitigation (depression, drug addiction, and PTSD) or consider it as additional non-statutory aggravation, but instead, as noted, framed the arguments about Defendant's depression, drug addiction, and PTSD that Defendant now objects to, in the context of rebuttal to the mitigation offered by Defendant. *See,* RT 2/16/2010 at 62-87.

This Court finds no prosecutorial misconduct.

It is also of note, on direct appeal the Arizona Supreme Court found that the Prosecutor's closing arguments in the Penalty Phase were permissible rebuttal, and the Court properly instructed the jury in the Penalty Phase. *Ovante,* 231 Ariz. at 186-87, ¶¶ 23-30, 33-36. Further, the Court found the prosecutor did not commit misconduct by commenting on this evidence in the State's closing argument. *Id.*

For the reasons stated above,

THE COURT FINDS that Defendant's claims relating to prosecutorial misconduct during the Prosecutor's arguments regarding mitigating factors and rebuttal to mitigation evidence and the related claims of ineffective assistance of counsel are meritless.

Therefore,

[5] *Ovante*, 231 Ariz. at 186-87, ¶¶ 23-30, 33-36.

THE COURT FINDS that Claim E is not colorable.

CLAIM F

Defendant claims a due process violation for the Court's failure to secure disqualification of the Maricopa County Attorney's Office (MCAO), or to recuse itself, because former County Attorney Andrew Thomas ("Thomas") waged a campaign of intimidation against the Maricopa County Superior Court. Defendant argues that this attempt must necessarily have tainted the ability of the entire bench, and this Court specifically, to fairly and impartially handle criminal cases.

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

Defendant claims ineffective assistance of trial counsel for failing to seek disqualification of the Maricopa County Attorney's Office (MCAO), or to recusal of this Court because of the former County Attorney's attempt to intimidate the Maricopa County Superior Court in general and this Court in particular.

Defendant cannot satisfy the deficient performance prong of *Strickland*. He does not cite a single case where a motion to disqualify the Maricopa County Attorney's Office was filed and granted on the basis argued by Defendant, during the time his case was pending. He cannot demonstrate any reasonable probability that, even if defense counsel had filed a motion to remove the MCAO, or to recuse the trial court or entire Maricopa County Superior Court, that it would have been granted.

Defendant can make no showing that the result of a motion to disqualify or to recuse would have been different than the holding in *Martinez*, where the Supreme Court considered and rejected the exact argument Defendant asserts here. *State v. Martinez*, 230 Ariz. 208, 282 P.3d 409 (2012) *cert. denied,* 133 S. Ct. 764 (U.S. 2012).

Here, as in *Martinez*, Defendant has alleged no conduct by the Court handling his case sufficient to require its recusal. Defendant provides no basis for concluding that the Court should have recused itself. The Court is presumed to be fair and impartial. *State v. Rossi*, 154 Ariz. 245, 741 P.2d 1223 (1987). In fact, defendant acknowledges that "Mr. Ovante has no evidence that this Court was personally biased against him because of Thomas' regime." Petition at 81. Further, Defendant does not identify a single ruling of the court that was "the product of fear of repercussions from the County Attorney." *Martinez*, 230 Ariz. 208, 220, ¶ 67.

Defendant has failed to support his claim by alleging specific facts sufficient to rebut the presumption of fairness and impartiality. *See*, Rule 10.1, Arizona Rules of Criminal Procedure.

The Court has reviewed Defendant's due process claim pursuant to the standards outlined in *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507 (1948), *See also Morrissey v. Brewer*, 408 U.S. 471, 488—489, 92 S.Ct. 2593, 2603—2604 (1972); *Jenkins v. McKeithen,* 395 U.S. 411, 428—429, 89 S.Ct. 1843, 1852—1853 (1969); *Specht v. Patterson*, 386 U.S. 605, 610, 87 S.Ct. 1209, 1212 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294–95, 93 S. Ct. 1038, 1045 (1973); *State v. Maldonado,* 92 Ariz. 70, 76, 373 P.2d 583, 587 (1962); *Oshrin v. Coulter,* 142 Ariz. 109, 111, 688 P.2d 1001, 1003 (1984) (citations omitted); and *State v. Velasco*, 165 Ariz. 480, 487, 799 P.2d 821, 828 (1990). Such review reflects no basis to support Defendant's claim that disqualification or recusal was warranted.

Defendant cannot satisfy the prejudice prong of *Strickland*. He alleged no conduct by the Court in its handling of this case sufficient to call into question the court's impartiality or to require recusal by the court, nor any evidence that any adverse evidentiary rulings were based on improper application of the law to the facts of his case. Even on automatic appeal, Defendant did not seek review of any discretionary rulings relating to evidentiary matters and continuances before our Supreme Court. *Ovante,* 231 Ariz. 180 (2013).

Defendant alternately argues that his claim for disqualification is supported by facts contained in former County Attorney Thomas' 2012 disciplinary proceedings. Those proceedings occurred after the trial, but they were facts known in 2010, and, therefore, not newly discovered evidence. S*tate v. Amaral*, 239 Ariz. 217, 368 P.3d 925, *cert. denied,* 137 S. Ct. 52 (2016).

More important, Judge Hoggat (in the case subject to the authority of the Special Master pursuant to Supreme Court Administrative Order 2009-124) considered the issue for similarly situated defendants and denied relief:

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

Ruling (Judge Hoggatt) dated 2/22/2010.

Judge Hoggatt's ruling was upheld by the Supreme Court in *State v. Martinez*, 230 Ariz. 208, 282 P.3d 409 (2012) *cert. denied,* 133 S. Ct. 764 (U.S. 2012)

THE COURT FINDS Defendant's claims that the Court should have recused itself or disqualified the Maricopa County Attorney's Office are not colorable.

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

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

CLAIM G

Defendant alleges that Arizona's death penalty scheme violates the Eighth Amendment and Due Process by failing to adequately narrow the defendants eligible for the death penalty.

Constitutional claims were, and this claim could have been, raised on appeal (*see, Ovante,* 231 Ariz. at ¶ 46). Therefore, the claim is precluded by Rule 32.2(a)(3).

Defendant argues that newly discovered evidence related to a report that concludes at least one capital aggravating factor was present in almost every first degree murder case in Maricopa County from 2002 to 2012 supports this PCR claim. Petition at 95-97; PCR Exhibit 47.

This claim, too, is foreclosed by *Hidalgo,* where our supreme court rejected a challenge to Arizona's aggravating factors based on an identical factual assertion that one or more aggravating circumstances were present in 856 of 866 first degree murder cases over an 11–year period. *Hidalgo*, 241 Ariz. at 549, ¶ 17.

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

Defendant alleges ineffective assistance of counsel by counsel's failure to seek to dismiss the Notice of Death Penalty because Arizona's death penalty scheme fails to adequately narrow the defendants eligible for the death penalty, and therefore is unconstitutional.

Defendant cannot satisfy either prong of *Strickland.* The Supreme Court has specifically rejected Defendant's argument in *State v. Hidalgo,* 241 Ariz. 543, 390 P.3d 783(2017). This Court is bound by the decisions of the Arizona Supreme Court. *See, e.g., State v. Cooney,* 233 Ariz. 335, 341, ¶ 18 (App. 2013)

Defendant next argues that "the death penalty is *per se* cruel and unusual punishment in violation of the Eighth Amendment. This claim, too, is foreclosed by binding precedent to the contrary. *See, e.g., Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015) ("it is settled that capital punishment is constitutional"); *State v. Harrod*, 200 Ariz. 309, 320, ¶ 59 (2001) ("The Arizona death penalty is not per se cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."), *vacated on other grounds, Harrod v. Arizona*, 122 S. Ct. 2653 (2002)." Response at 58. Defendant's challenge to the constitutionality of the death penalty, pursuant to current State and federal precedent, is meritless.

The same reasoning applies to appellate counsel.

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

CLAIM H

Defendant raises the claim that "[t]he death penalty itself is unconstitutional and should be abolished." Petition at 109. On appeal defendant raised, but did not argue, 29 constitutional claims the Arizona Supreme Court declined to revisit as previously rejected constitutional claims.[6] This claim was raised on appeal; therefore, it is precluded by Rule 32.2(a)(3).

Further, this Court may not overrule, modify or disregard the Supreme Court's decisions. *See, State v. Sullivan*, 205 Ariz. 285, 288, 69 P.3d 1006 (App. 2003); *Bade v. Arizona Dept. of Transp.*, 150 Ariz. 203, 205, 722 P.2d 371 (App. 1986)

Defendant cannot satisfy either prong of *Strickland* for either trial counsel or appellate counsel on this issue.

THE COURT FINDS Defendant's claim that the death penalty is unconstitutional is meritless and not colorable.

CLAIM I

Defendant claims the Court committed error when it gave the impasse instruction to the jurors and sent them to deliberate further rather than declaring a hung jury and mistrial. Defendant did not raise this "impasse instruction" issue on appeal, and so, it is precluded by Rule 32.2(a)(2) and (3).

[6] *See* footnote 3, *supra*.

Defendant claims ineffective assistance of trial counsel by failing to request a mistrial upon receiving the Jury Foreman's impasse note.

Defendant cannot satisfy either prong of *Strickland* on this issue.

After deliberations had run for only one and one half days, and after several questions having been previously submitted to the Court, the Jury Foreman wrote that the jury was "at an impasse." RT 2/18/2010, at 5. The Court, after discussion with counsel, gave an impasse instruction in conformity with Rule 22.4. The Instruction was provided to the jury immediately prior to the weekend break, and after the weekend break, the jury continued deliberations.

"Jury coercion exists when the trial court's actions or remarks, viewed in the totality of the circumstances, displaced the independent judgment of the jurors or when the trial judge encourages a deadlocked jury to reach a verdict." *Burns*, 237 Ariz. at 33, ¶160, quoting *Davolt,* 207 Ariz. at 213 ¶ 94, 84 P.3d at 478. Coercion occurs when the trial judge focuses jury instructions on a holdout juror in a way that suggests that the juror should reconsider his or her views. *Id*., citing *Huerstel,* 206 Ariz. at 100–01 ¶ 23, 75 P.3d at 705–06.

In this case, the answer to the jury's "impasse" question did not force the jury to come to a consensus. The Court did not "know how near the jury was to reaching a unanimous verdict or whether they were leaning toward a life or death verdict." *See*, *State v. Burns*, 237 Ariz. 1, 33, ¶¶ 161-162, 344 P.3d 303, 35 (2015). The Court also "did not know [if there was a] holdout juror or jurors[, and more importantly,] did nothing to get the holdouts to change their votes." *Id*.

It was proper for the Court to not declare a mistrial and to give and "impasse instruction" to the jury in this case, under the above clearly defined precedent. Counsel was not ineffective for failing to move for a mistrial or for failure to object to the Court's "impasse instruction" based on the clearly established precedent in *Davolt*, *Roberts*, and *Huerstel*.

Therefore,

THE COURT FINDS that the Court did not coerce a jury verdict by giving the "impasse instructions" crafted by the Court and counsels.

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

THE COURT FURTHER FINDS this claim is not colorable.

CLAIM J

Defendant alleges that his due process rights were violated when the trial court committed reversible error in responding to a jury question regarding the definition of a "life sentence" during the jury's penalty phase deliberations.

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

Defendant alleges ineffective assistance of trial and appellate counsel by failing to object to the trial court's alleged erroneous response to the jury's question regarding the definition of a "life sentence."

During deliberations in the Penalty Phase, the jury asked for the definition of "life sentence." Without objection, the Court responded that the jury should rather focus on its discretion – to determine life or death – and that if the jury voted "life," then the Court would determine if Defendant's sentence was with the possibility of release after a term of years or natural life.

Defendant did not object to the answer provided by the Court to the jury's question, therefore, Defendant's claim will is only reviewable for fundamental error (and reversible prejudice under the IAC claim). *State v. Ovante*, 231 Ariz. 180, 187, 291 P.3d 974, 981 (2013) (citing *State v. Kuhs*, 223 Ariz. 376, 386, ¶ 52 (2010)); *see State v. Dann*, 205 Ariz. 557, 565, ¶ 18 (2003) (citing *Neder v. United States*, 527 U.S. 1, 19 (1999) (applying harmless error analysis to jury instruction that omitted an element of the offense)).

The answer given was in line with Revised Arizona Jury Instructions, Standard Criminal 7, which is given in every criminal trial. That Instruction directs the jury to focus on their function to determine whether the state has proven elements of an offense beyond a reasonable doubt, and not on the punishment ramifications of their decision. The answer given was also in line with A.R.S. § 13-703(A)[7] and A.R.S. § 13-703.01[8], which provided that the trial court would determine the nature of a life sentence.

[7] On the date of the crime – June 11, 2008 – in this case, the effective statute was A.R.S. § 13-703(A), which was renumbered as § 13-751(A) and amended by Laws 2008, Ch. 301, §§ 26, 38, eff. Jan. 1, 2009, and was again amended by Laws 2012, Ch. 207, § 2, eff. Aug. 1, 2012.

[8] On the date of the crime – June 11, 2008 – in this case, the effective statute was A.R.S. § 13-703.01, which was renumbered as § 13-752 and amended by Laws 2008, Ch. 301, §§ 26, 39, eff. Jan. 1, 2009, and was again amended by Laws 2012, Ch. 207, § 3, eff. Aug. 2, 2012.

The answer was provided before *Lynch v. Arizona*, 578 U.S. ---, 136 S.Ct. 1818 (2016). The answer may still prove correct, since the Legislature still has decades to enact enabling legislation to support the "possibility of release" provisions of A.R.S. 13-751(A)[9] and 13-752(H).[10] In fact, the Legislature has recently enacted a modifications to Arizona Revised Statutes, Title 13, to provide for eligibility for parole for some felons who were "convicted of first degree murder and who was sentenced to life with the possibility of parole after serving a minimum number of calendar years pursuant to a plea agreement that contained a stipulation to parole eligibility…" *See*, A.R.S. § 13-718 (added as § 13-717 by Laws 2018, Ch. 269, § 1. Renumbered as § 13-718).

Even if the Court's answer to the jury's question was incorrect in light of *Simmons/Lynch*, Defendant suffered no prejudice. The answer provided obviously did not impact the jury's decision that Life was the appropriate penalty for the murder of Mr. Trujillo.

Even an incorrect instruction is not prejudicial where it (1) did not fail to state the correct theory of criminal liability, (2) did not relieve the State of its burden of proving any aspect of the penalty phase, (3) did not fail to instruct on matters vital to the jury's consideration, or (4) did not misled the jury. *See, State v. Karr*, 221 Ariz. 319, 322–23, ¶ 15, 212 P.3d 11, 14– 15 (App. 2008) (quoting *State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996); *State v. Johnson*, 205 Ariz. 413, 417, ¶ 10 (App. 2003).

The Arizona Supreme Court addressed an erroneous jury instruction in *State v. Van Adams*, 194 Ariz. 408, 415, ¶ 18, 984 P.2d 16, 23 (1999):

> [a]ppellant's defense rested solely on his claim of total innocence or mistaken identity, rather than on an assertion that although he committed the murder, he did so mistakenly or without actual reflection. The premeditation instruction therefore neither removed a right from Appellant nor hindered his ability to raise total innocence or mistaken identity as his defense. If the trial court erred, *the error did not take from defendant a right essential to his defense.*

Van Adams, 194 Ariz. at 415, ¶¶ 17–18 (emphasis added).

The essential defense was to avoid a Death verdict. The Court's answer did not impugn that defense in any way, as evidenced by their Life verdict for the murder of Mr. Trujillo. The answer provided to the jury, without objection from the State or Defendant, properly focused the

[9] *See* footnote 7, *supra.*

[10] *See* footnote 8, *supra.*

jury on the decision it was charged to make, and removed from their consideration whether any such sentence would include the possibility of release or parole.

Because the answer provided pre-dated *Simmons/Lynch*, trial counsel' performance cannot be deemed deficient, therefore,

THE COURT FINDS that Defendant cannot satisfy the deficient performance prong of *Strickland*.

Likewise, Defendant cannot prove prejudice regarding counsel's failure to object to the Court's definition, in addition to the Court's answer was not fundamental error, because Defendant's counsel effectively utilized their theme, as discussed above, to focus the jury on its proper decision – to either impose a death or life sentence. *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994); *United States v. Mal*, 942 F.2d 682, 689 (9th Cir. 1991).

As noted herein (*see also*, *Ovante*, 231 Ariz. at ¶ 45), the Court finds no reasonable likelihood the jury would have decided differently regarding Defendant's sentences for the two murders had his counsel objected to the Court's answer to the jury's question. *Strickland*, 466 U.S. at 687, 694; *see James*, 24 F.3d at 27 (holding that counsel may not be found ineffective for failure to request instructions in the absence of prejudice) (citations omitted).

Defendant's speculation that the jury may have voted for a life sentence for murder of Mr. Vickers if the Court had included in its answer to the jury's question that Defendant would not be eligible for parole is insufficient to establish prejudice. *See Cooper v. Calderon*, 255 F.3d 1104, 1109 (9th Cir. 2001) and *Franklin v. Johnson*, 290 F.3d 1223, 1237 (9th Cir. 2002) (*both;* holding that if there is no evidence of prejudice on the record, prejudicial conduct will not be found and that petitioners must demonstrate that the errors actually caused prejudice).

Defendant's appellate counsel was also not ineffective for failing to raise this issue on appeal. *Jones*, 463 U.S. at 751–52; *State v. Bennett*, 213 Ariz. 562, 567, ¶ 21, 25, 146 P.3d 63, 68-69 (2006); *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (citing *Gray*, 800 F.2d at 646). Prejudice only exists if the Arizona Supreme Court would have reversed the conviction or sentence had the unraised appellate issue been raised (*Id*. at 569, ¶ 30, 146 P.3d at 70); and therefore,

THE COURT FINDS that Defendant cannot satisfy the prejudice prong of *Strickland*.

THE COURT FURTHER FINDS that Claim J is not colorable.

CONCLUSION

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

THE COURT FINDS that the Defendant's Claims A (as to the claim of trial court error), B, C (as to the portions of the claim alleging Constitutional violation, trial court error, and "significant change in the law"), E (as discussed herein related to the claim of prosecutorial misconduct), F (as to the claim of trial court error), G, H, I (as to the claim of trial court error), and J (as to the claim of trial court error) are precluded from relief.

THE COURT FURTHER FINDS that the Defendant's Claim A that alleges a due process violation and ineffective assistance of counsel during his change of plea, as discussed herein and based on the stipulation of the State, has raised a colorable claim for relief, and an evidentiary hearing is warranted based upon the material issues of fact presented in the Petition.

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

Based on all of the above, and with the exception of his claim of ineffective assistance of counsel during his change of plea and the related claim of a due process violation,

THE COURT FINDS that Defendant's PCR, including all amendments and supplements thereto, fails to set forth a colorable claim for relief.

Therefore,

IT IS ORDERED that with the exception of his claim of ineffective assistance of counsel during his change of plea and the related claim of a due process violation Defendant's PCR is denied.

IT IS THEREFORE ORDERED any remaining subparts of Claim A not relating to allegations of ineffective assistance of counsel during his change of plea and the alleged related due process violation, and all of Claims B - I, as raised in Defendant's Petition for Post-Conviction Relief and all supplemental pleadings are dismissed.

With respect to the claim of ineffective assistance of counsel during his change of plea and the related due process claim,

IT IS ORDERED granting an evidentiary hearing regarding Defendant's Claims A, as discussed and ordered herein.

At the hearing, the Court will consider both prongs of *Strickland*, deficient performance and prejudice. Specifically, the Court will address whether the defense team provided ineffective assistance of counsel during Defendant's change of plea and acted unreasonably when it represented Defendant during his change of plea, and whether any deficient performance by trial counsels in this respect prejudiced Defendant.

The Court will expect both sides to present whatever evidence they believe supports their position as to both prongs of the *Strickland* test (deficient performance, and prejudice by any such deficiency) as relates to the acceptance of plea stage of the trial and the acceptance of plea hearing and plea colloquy.

The Court having granted an evidentiary hearing in connection with Claim A (due process violation and ineffective assistance of counsel during acceptance of plea and plea colloquy),

IT IS ORDERED that the parties discuss and engage in the appropriate discovery, pursuant to the Court's prior existing orders for disclosure and discovery in this matter. If the Court's assistance is required, after the parties have met, discussed and attempted to resolve any issues on their own, the Court will provide assistance; and

IT IS FURTHER ORDERED affirming the PCR Status Conference set for June 10, 2019 at 8:30 a.m. in this Division to address further scheduling of the evidentiary hearing as ordered herein.

Pursuant to Rule 32.7, the Defendant need not be present at this informal conference as he is represented by counsel, who has waived Defendant's appearance for this conference.

Pursuant to the agreement of the parties, the time for seeking relief from this Court's findings, conclusions, and rulings herein will be tolled until after a ruling on Claim A.

Appendix E

Clerk of the Superior Court
*** Electronically Filed ***
05/20/2020 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2008-144114-001 DT 05/19/2020

HONORABLE WARREN J. GRANVILLE

CLERK OF THE COURT
B. Navarro
Deputy

STATE OF ARIZONA

MYLES A BRACCIO
NATE ANTHONY CURTISI

v.

MANUEL OVANTE JR. (001)

VIKKI M LILES
GARRETT W SIMPSON

CAPITAL CASE MANAGER
COURT ADMIN-CRIMINAL-PCR
EXHIBITS-SCT
JUDGE GRANVILLE
VICTIM WITNESS DIV-AG-CCC

UNDER ADVISEMENT RULING

This Court had found colorable, based on stipulation of the parties, Defendant's claim that his decision to admit guilt and the sufficiency of the death penalty eligibility factors (*e.g.* aggravating factors pursuant to A.R.S. § 13-703(F)) alleged by the State was not voluntary, knowing and intelligent, due to statements regarding Defendant's eligibility for parole or release, and therefore his pleas are void as a matter of law.

Defendant challenges the validity of his guilty pleas both on the ground this Court committed legal error, and alternatively, that he received ineffective assistance of counsel, during the change of plea hearing and the Defendant's plea colloquy.

In its initial ruling on Defendant's PCR claims, issued on June 10, 2019, this Court noted that the focus of the evidentiary hearing would be to determine whether Defendant was incorrectly informed he would be eligible for parole, and if that fact was material to his decision to plead guilty. *See State v. Rosario*, 195 Ariz. 264, 268 (App. 1999). *See* Dkt. #444 and #443.

This Court has considered the pleadings of counsel, the evidence and testimony offered on December 18, 19, and 20, 2019, and the applicable statutes and case law, and makes the following findings and rulings:

On December 15, 2009, during Defendant's change of plea colloquy, this Court advised Defendant that his admission of guilt and admission to specified aggravating factors made him eligible on both Count 1 and Count 2 to a sentence of the death penalty by a jury, or, if the jury returned a verdict of life, to natural life or life with possibility of parole by the court. Defendant responded that he understood these options and was making the decision knowingly and voluntarily. However objectively dim the prospect of concurrent terms of life with possibility of release for killing two people and shooting a third, this Court finds that that prospect of a release before Defendant died was a material factor to him to choose to admit guilt and eligibility factors. This Court finds that there were also other compelling factors, but they do not deprive materiality for this hope.

The Supreme Court has ruled twice that this Court's advisement to Defendant of the prospect of release from a conviction for first degree murder at the time of his crimes was proper based on the appropriate and operative statutory language. *State v. Garcia*, 224 Ariz. 1, 18, ¶ 77 (2010); *State v. Cruz*, 218 Ariz. 149, 160, ¶ 42 (2008); *see also*, A.R.S. § 13-703.[1]

Pursuant to his understanding, Defendant plead guilty as charged, to Count 1 for the first degree murder of Jordan Trujillo, to Count 2 for the first degree murder of Damien Vickers, and to Count 3 for the aggravated assault of Gabriel Valenzuela. Defendant also admitted to the eligibility factors that he had been previously convicted of a serious offense (the aggravated assault of Valenzuela), pursuant to A.R.S. § 13-703(F)(2), and that he had been convicted of one or more other homicides committed during the commission of the offense, pursuant to A.R.S. § 13-703(F)(8).

On February 24, 2010, a trial jury returned a verdict for the death penalty for Count 2 (the murder of Damien Vickers). Dkt. #237. Also on February 24, 2010, this Court sentenced Defendant to life with the possibility of parole for Count 1 (the murder of Jordan Trujillo). Dkt. #234; *see also* Dkt. #227. Thus, Defendant got the benefit of the bargain that he knowingly and voluntarily agreed to on December 15, 2009. *See* Dkt. 169; *see also*, R.T. 12/15/2009.

[1] *See, infra*, the Court's discussion of A.R.S. §13-703 and A.R.S. §13-751, and the operative version of the statute as to Defendant's case based on the date of offenses in this matter.

At the time of the murders in this case (date of offenses is June 11, 2008), A.R.S. § 13-703(A) provided,

> If the state has filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder as defined in section 13–1105, the defendant shall be sentenced to death or imprisonment in the custody of the state department of corrections for life or natural life as determined and in accordance with the procedures provided in section 13–703.01. A defendant who is sentenced to natural life is not eligible *for commutation, parole, work furlough, work release or release from confinement on any basis*. If the defendant is sentenced to life, the defendant *shall not be released on any basis until the completion of the service of twenty-five calendar years if the murdered person was fifteen or more years of age* and thirty-five years if the murdered person was under fifteen years of age or was an unborn child. In this section, for purposes of punishment an unborn child shall be treated like a minor who is under twelve years of age.

A.R.S. § 13-703(A), as amended by Laws 2005, Ch. 188, § 3 and Laws 2005, Ch. 325, § 2 (emphasis added).

In 2008, the Arizona Legislature again amended, and renumbered A.R.S. § 13-703 to A.R.S. § 13-751 (effective date of the renumbering was 1/1/2009). Therefore, at the time of Defendant's change of plea and the time of this Court's sentence for Count 1, A.R.S. § 13-751(A), provided,

> If the state has filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder as defined in section 13–1105, the defendant shall be sentenced to death *or imprisonment in the custody of the state department of corrections for life or natural life* as determined and in accordance with the procedures provided in section 13-752. *A defendant who is sentenced to natural life is not eligible for commutation, parole, work furlough, work release or release from confinement on any basis.* If the *defendant is sentenced to life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years* if the murdered person was fifteen or more years of age and thirty-five years if the murdered person was under fifteen years of age or was an unborn child. In this section, for purposes of punishment an unborn child shall be treated like a minor who is under twelve years of age.

A.R.S. § 13-751(A), renumbered as § 13-751 (from A.R.S. § 13-703) and amended by Laws 2008, Ch. 301, §§ 26, 38, eff. Jan. 1, 2009 (emphasis added). Both versions of the statute provided provisions that the death or life decision was to be determined by a jury, and where the jury

determined life was appropriate, the natural life or life decision was to be determined by a judge. Defendant was sentenced pursuant to A.R.S. § 13-703 (and § 13-703.01) as noted in the sentencing orders entered by this Court. *See* Dt. #227 and #233.

Defendant cites A.R.S. § 41-1604.09 to claim that a sentence of life with the possibility of parole is rendered illegal and unenforceable. A.R.S. § 41-1604.09 was added by Laws 1993, Ch. 255, § 88, with an effective date of January 1, 1994. The section has been amended several times in the years intervening and after the crimes in this matter and twice since Defendant's sentencing. *See*, Laws 1994, Ch. 188, § 4; Laws 2002, Ch. 321, § 4, eff. May 30, 2002; Laws 2014, Ch. 156, § 3; Laws 2018, Ch. 269, § 2; Laws 2019, Ch. 298, § 1. The current version of the operative section of A.R.S. § 41-1604.09 states,

> This section applies to either of the following:
>
> 1. A person who commits a felony offense before January 1, 1994.
>
> 2. A person who is sentenced to life imprisonment and who is eligible for parole pursuant to § 13-716 or 13-718.

A.R.S. § 1-1604.09(I).

A.R.S. § 13-703(A), in effect at the time of the murders in this case, and operative for the sentencing of Defendant, conflicts with A.R.S. § 41-1604.09.

Under the rules governing statutory construction when there is a conflict of statutes, the later enacted provision governs. *Pima County v. Heinford*, 134 Ariz. 133, 136 (1982), citing *Webb v. Dixon*, 104 Ariz. 473 (1969); *Mead, Samuel & Co., Inc. v. Dyar*, 127 Ariz. 565, 622 P.2d 512 (App.1980); *Geiszl v. Town of Gilbert*, 22 Ariz.App. 543, 529 P.2d 255 (1975). At the time of the murders in this case, A.R.S. § 41-1604.09 was most recently amended by Laws 2002, Ch. 321, § 4, eff. May 30, 2002, therefore, as of the date of the murders in this case A.R.S. 13-703(A) was the more recent statute. It was most recent to the date of the murders amended by Laws 2005, Ch. 188, § 3 and Laws 2005, Ch. 325, § 2.

Additionally, under the rules governing statutory construction when there is a conflict of statutes, the more specific provision prevails over the more generalized provision. *State v. Chopra*, 241 Ariz. 353, 355 (2016); *See*, *Pinal Vista Properties v. Turnbull*, 208 Ariz. 188, ¶ 23 (App/ 2004); *see also*, *Mayfair Inc. v. State Dept. Liquor License and Control*, 123 Ariz. 340, 342 (1979). A.R.S. § 41-1604.09 is a statute of State government administration involving provisions of the Department of Corrections and classification of parole eligibility by the director. A.R.S. § 13-703(A) provided, and in its current form as A.R.S. § 13-751(A) provides, a particularized sentence

for a specific crime. Thus, this Court rules, under the jurisprudence of statutory construction, that A.R.S. § 13-703(A) (A.R.S. § 13-751(A)) governs.

The theory behind these statutory construction principles is that the Judicial Branch should presume that the Legislative Branch knows what it is doing when it does it. When the Arizona Legislature amended A.R.S. § 13-703(A) in 2005, it apparently understood that it had twenty-five years to provide enabling legislation. The fact that the Arizona Legislature recently passed A.R.S. § 13-718 (added as § 13-717 by Laws 2018, Ch. 269, § 1 and renumbered as § 13-718) as a partial remedy shows the recognition of its intent. *See also,* A.R.S. § 41-1604.09(I)(2) (as amended also by Laws 2018, Ch. 269, § 2); A.R.S. § 13-716 and A.R.S. § 41-1604.09(I)(2) (as added by Laws 2014, Ch. 156, § 3).

After reviewing the parties' initial pleadings and supplemental briefing, hearing evidence and testimony during the evidentiary hearing on December 18, 19, and 20, 2019, and reading the parties' closing memorandum,

THIS COURT FINDS that Defendant has not proven either prong of *Strickland.*

The counselling of Defendant by trial counsels of the risks of admitting guilt and the existence of eligibility factors is not unique or below standard. Indeed, in *Busso-Esopellan v. Mroz,* 238 Ariz. 553 (2015), the Arizona Supreme Court granted special action relief finding that merely offering to plead guilty in a first-degree murder death penalty case is mitigating evidence. In this case, this Court actually found Defendant's decision to plead guilty mitigation sufficient to impose a life with possibility of parole sentence for Count 1 (the murder of Jordan Trujillo) and a mitigated term of years for Count 3. *See* R.T. 2/24/2010, at 10.

The fact that Defendant was sentenced to life with the possibility of parole by this Court for Count 1 shows that the prejudice prong has not been proven. Based upon this Court's reading of A.R.S. § 13-703(A), § 13-751(A), § 13-718, and § 41-1604.09(I) (specifically § 41-1604.09(I)(2)), this Court found that Defendant's plea was voluntary, knowing and intelligent.

The Court's reading of these statutes and the facts of this matter lend to the statutory interpretation that Defendant's sentence, imposed by this Court, of life with the possibility of parole after 25 years "means the… [Defendant] is eligible for parole after serving 25 years' imprisonment despite § 41-1604.09's prohibition of parole for persons convicted of offenses occurring on or after January 1, 1994." *Chaparro v. Shinn,* 248 Ariz. 138, ¶2, 459 F.3d 50, 51 (2020).

This Court was initially inclined to interpret the relevant statutory provisions and this Court's sentencing order for Count 1 to mean exactly as the Arizona Supreme Court stated in the

Chaparro case based on Defendant having entered a plea agreement that included, in the Court's view, based on the agreement stated by State's counsel to the Court's colloquy with Defendant, a stipulation to a parole eligible sentence. *See*, R.T. 12/15/2009; *see also*, A.R.S. § 13-718. However, that interpretation is no longer of consequence given the Arizona Supreme Court's holdings in *Chaparro v. Shinn*.

The State has requested that this Court "should also correct the sentence for the first-degree murder count for Jordan Trujillo (Count 1). Instead of providing for "life with possibility of parole after 25 years," the State's argument was the sentence should provide for life in prison *without the possibility of release on any basis until the completion of twenty-five calendar years*, citing A.R.S. §§ 13–751, –752 (2011). (*See* Dkt. #233.)" Response to Memorandum: The Guilt Pleas Are Void as a Matter of Law (Dkt. #422), at 7. The Court notes, it appears the State, in the above request, based on the date of the offenses, intended to reference to A.R.S. §§ 13-703 and 13-703.01, the operative versions of the sentencing statutes for the date of Defendant's offenses.

However, the State has withdrawn that request in light of the Arizona Supreme Court's decision and holdings in *Chaparro v. Shinn*, 248 Ariz. 138, 459 P.3d 50 (2020). In *Chaparro*, the Court held,

> that a sentence imposing "life without possibility of parole for 25 years" means the convicted defendant is eligible for parole after serving 25 years' imprisonment despite § 41-1604.09's prohibition of parole for persons convicted of offenses occurring on or after January 1, 1994. Additionally, we hold that a court lacks jurisdiction to correct an illegally lenient sentence absent timely correction or appeal. *State v. Dawson*, 164 Ariz. 278, 286, 792 P.2d 741 (1990).

Chaparro v. Shinn, 248 Ariz. at ¶2, 459 P.3d at 51-2. This holding by the Arizona Supreme Court not only forecloses this Court's ability to correct the sentencing order and Defendant's sentence, it also is dispositive of Defendant's remaining PCR claim.

The Court's findings and holdings herein above regarding Defendant's PCR claim aside, the Arizona Supreme Court's decision in *Chaparro* brings this matter to a close in two distinct and important ways. Pursuant to the Arizona Supreme Court's express holdings in *Chaparro v. Shinn*, Defendant's sentence, as ordered by this Court (*See*, Dkt. #227 and #233; and R.T. 12/15/2009 and 2/24/2010), "means the convicted defendant is eligible for parole after serving 25 years' imprisonment despite § 41-1604.09's prohibition of parole for persons convicted of offenses occurring on or after January 1, 1994." *Chaparro*, 248 Ariz. at ¶ 2.

Second, in addition to this Court's findings that Defendant's trial counsels' performance was not deficient, Defendant cannot now show prejudice in light of the *Chaparro* decision. Under

the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 693–94 (1984) the Defendant must affirmatively prove prejudice. Defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* Defendant, in light of the Arizona Supreme Court's holdings in *Chaparro* cannot make this showing.

For the reasons stated,

IT IS ORDERED denying Defendant's Petition for Post-Conviction Relief.

In the interest of attorney/client confidentiality,

IT IS ORDERED sealing Defendant's Exhibits 1-46, State's Exhibits 48, 49, 52-59, 61-76, 78-81, 83-85, 87, 88, and 92, Defendant's Exhibits 93, 102 and 103 not to be opened until further order of the Court.

Appendix F

Clerk of the Superior Court
*** Electronically Filed ***
09/23/2020 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2008-144114-001 DT 09/22/2020

HON. ROSA MROZ

CLERK OF THE COURT
J. Matlack
Deputy

STATE OF ARIZONA

v.

MANUEL OVANTE JR. (001)

MYLES A BRACCIO

VIKKI M LILES
GARRETT W SIMPSON

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

RULING

MOTION FOR REHEARING – DENIED

The Court received the Defendant's Motion for Rehearing Under Rule Crim. P. 32.14(a) (Dkt. #486, filed 6/3/2020 and docketed by the Clerk on 6/4/20200). In a minute entry order on 6/30/2020 (Dkt. #491, docketed by the Clerk on 7/1/2020), the Court ordered further briefing on defendant's motion. The Court has now received and considered, in addition to defendant's Motion for Rehearing, the State's Response (Dkt. #493, filed 7/10/2020 and docketed by the Clerk on 7/13/2020), the Defendant's Reply (Dkt. #494, filed 7/20/2020 and docketed by the Clerk on 7/21/2020), and any attachments, exhibits, or appendices thereto the parties' briefs.

The Court has also received and considered Defendant's Notice of Supplemental Authority (Dkt. #495, filed and docketed by the Clerk on 8/13/2020), the State's Response to Notice of Supplemental Authority (Dkt. #499, filed 9/1/2020 and docketed by the Clerk on 9/2/2020), the Defendant's Reply to State Response to Notice of Supplemental Authority (Dkt. #500, filed and docketed by the Clerk on 9/3/2020), any attachment, exhibits or appendices thereto the parties' briefs.

Defendant's first argument in his Motion is that the Court's "finding that the availability of parole was a "material factor" in [Defendant's] decision to plead guilty requires rehearing and relief." Motion for Rehearing at page 2. Specifically, Defendant argues that the Court's "finding of materiality alone demands relief as a matter of law under *State v. Rosario*, 195 Ariz. 264, 987 P.2d 226 (App. 1999)." *Id*.

The Court has reviewed Defendant's original claims presented in his Petition and the arguments presented in his Motion, the State's Response, the Defendant's Reply, the record where appropriate and necessary, including the evidence and testimony offered at the evidentiary hearing in this matter on December 18, 19, and 20, 2019, and makes the following additional findings and rulings.

Defendant's reliance on *State v. Rosario* for his contention is misplaced. Defendant argues that *Rosario* is dispositive and holds: "a defendant who pled guilty under the mistaken belief he could be paroled was entitled to a hearing *and relief from his plea if he proved his decision to plead was based on that belief*. Motion for Rehearing at 2, citing *State v. Rosario*, 195 Ariz. 267 (App. 1999) [emphasis added], also citing to *Lee v. U.S.*, 582 U.S. ----, 137 S.Ct. 1958 (2017). However, the Court's holding in *Rosario* was not so broad. The Court of Appeals held that "[i]f [a defendant] based his decision to plead to the offenses based upon his belief that he could be paroled… he has raised a colorable claim. *Rosario*, 195 Ariz. at ¶ 28, citing *Appeal in Yuma County Juvenile Action J–95–63*, 183 Ariz. 228, 902 P.2d 834 (App.1995); *see also State v. Bryant*, 133 Ariz. 298, 650 P.2d 1280 (App.1982).

Here, based, in part upon a stipulation of the parties that Defendant had presented a colorable claim, the Court found Defendant's claim colorable and held an evidentiary hearing. At the hearing, the Court heard testimony and received evidence regarding whether Defendant's decision to plead guilty was voluntary, knowing, and intelligent, and whether eligibility for parole was a "material factor" in the Defendant's decision to plead guilty.

The questions for the Court at the evidentiary hearing, as outlined by the Court on the record on 6/10/2019, and in its 6/10/2019 written ruling (Dkt. #443 and #444, both docketed on 6/11/2019) were to determine Defendant's "essential objective" in pleading guilty to the crimes as charged, *State v. Pac*, 165 Ariz. at 295–96 (quoting *State v. Crowder*, 155 Ariz. 477, 482 (1987); *State v. Villegas*, 230 Ariz. 191, 192–93, ¶¶ 5–6 (App. 2012), and whether Defendant's guilty pleas were knowing, voluntary, and intelligent, and whether there was any erroneous legal advice provided that was material to Defendant's decision to plead guilty. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397 (1985). *See also, State v. Watton,* 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990) ("A defendant is entitled to an evidentiary hearing when he presents a colorable claim, that is a claim which, *if defendant's allegations are true, might have changed the outcome*." [emphasis added].)

In its 5/19/2020 ruling (Dkt. #484, docketed 5/20/2020), the Court found that Defendant's plea, at the time the court accepted the guilty pleas, was voluntary, knowing and intelligent based on its understanding of A.R.S. § 13-703(A), § 13-751(A), § 13-718, and § 41-1604.09(I) in early 2010.

Contrary to statements by both parties in the motion, response, and the pleadings and supplemental notices of authority, the Court did not make any specific findings regarding statutory construction or interpretation, or about legislative intent. The Court outlined its reading of the relevant statutes, both at the time of Defendant's plea and its preliminary thoughts on those same statutes and legislative history today, but did not base its decision on the same. The Court's ruling on the issues at the evidentiary hearing[1], was solely based on the Arizona Supreme Court's holdings in *Chaparro v. Shinn*, 248 Ariz. 138, 459 P.3d 50 (2020), and the Court's analysis of Defendant's claim that his plea was not knowing, voluntary, and intelligent, and that his counsel provided ineffective assistance of counsel.

The Court conducted its analysis pursuant to the standard outlined by *Strickland v. Washington*, 466 U.S. 668 (1984), and the requirements of *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *State v. Stefanovich*, 232 Ariz. 154, 157, ¶ 12 (App. 2013); *State v. Villegas*, 230 Ariz. 191, 192–93, ¶¶ 5–6 (App. 2012); *State v. Brown*, 212 Ariz. 225, ¶ 15, 129 P.3d 947, 951 (2006); *State v. Watton,* 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990); *State v. Pac*, 165 Ariz. at 295–96 (quoting *Crowder*, 155 Ariz. at 482); *State v. Nash*, 143 Ariz. 392, 397 (1985); *see also* Ariz. R. Crim. P. 17.1(b). Specifically, the Court looked to *State v. Stefanovich*, 232 Ariz. 154 (App. 2013) for guidance on its analysis as to whether Defendant's plea was knowing, voluntary, and intelligent.

Prior to accepting a defendant's guilty plea, the trial court, pursuant to Rule 17.2(b), Ariz. R. Crim. P., is required to inform the defendant of "[t]he nature and range of possible sentence for the offense to which the plea is offered, including any special conditions regarding sentence, parole, or commutation imposed by statute." However, in *Stefanovich* the Court of Appeals stated,

> [b]ut, even assuming the plea agreement and colloquy violated Rules 17.2 and 17.6, that alone does not render [defendant's] plea involuntary. For a guilty plea to be

[1] The court conducted an evidentiary hearing to determine Defendant's "essential objective" in pleading guilty to the crimes as charged, *State v. Pac*, 165 Ariz. at 295–96 (quoting *Crowder*, 155 Ariz. at 482); *State v. Villegas*, 230 Ariz. 191, 192–93, ¶¶ 5–6 (App. 2012), whether Defendant's guilty pleas were knowing, voluntary, and intelligent, and whether there was any erroneous legal advice provided that was material to Defendant's decision to plead guilty. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397 (1985).

> valid, it must be knowing and voluntary. *Boykin v. Alabama,* 395 U.S. 238, 243 n. 5, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *see also* Ariz. R.Crim. P. 17.1(b). But "[a] plea will be found involuntary only where a defendant lacks information of 'true importance in the decision-making process.' " *State v. Pac,* 165 Ariz. 294, 295–96, 798 P.2d 1303, 1304–05 (1990), *quoting State v. Crowder,* 155 Ariz. 477, 482, 747 P.2d 1176, 1181 (1987). That is, a plea will be enforced unless the missing information " 'go[es] to [the] defendant's essential objective in making the agreement.' " *Id.* at 296, 798 P.2d at 1305, *quoting Crowder,* 155 Ariz. at 481, 747 P.2d at 1180; *see also State v. Rosario,* 195 Ariz. 264, ¶¶ 24–28 & 28, 987 P.2d 226, 230 (App.1999) (determining plea involuntary if defendant "based his decision to plead to the offenses based upon his [mistaken] belief that he could be paroled at one-half of his incarceration terms").

State v. Stefanovich, 232 Ariz. at ¶ 12; s*ee also*, *State v. Watton,* 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990) ("A defendant is entitled to an evidentiary hearing when he presents a colorable claim, that is a claim which, *if defendant's allegations are true, might have changed the outcome*." [emphasis added].)

On February 24, 2010, the sentencing jury returned a verdict for the death penalty for Count 2 (the murder of Damien Vickers), and the Court sentenced Defendant to life with the possibility of parole for Count 1 (the murder of Jordan Trujillo). Dkt. #234 and #237; *see also* Dkt. #227.

The Court's ruling that Defendant has not proven the deficient performance prong of *Strickland* is sufficiently supported by the evidence and testimony in this matter, and the evidence presented during the 3-day evidentiary hearing (December 18, 19, and 20, 2019). The State's Post-Hearing Closing Memorandum (Dkt. #475, filed and docketed 2/21/20020) thoroughly outlines the evidence from both the record and the evidentiary hearing. *Id*. at 6-15.

Notably, each of Defendant's trial counsel testified at the evidentiary hearing that they had no recollection of any conversations about parole with the Defendant during their representation, and would have told Defendant the correct state of the law in Arizona in 2008. R.T. 12/19/19, a.m., at 31–33, 41; R.T. 12/20/19, a.m., at 5146–57; and R.T. 12/20/19, p.m., at 54–57. Also, counsel Shriver testified he would have advised Defendant about the applicable sentences "in detail," including any possibility of parole, as part of his advice that the Defendant plead guilty to the crimes and aggravating circumstances. R.T. 12/20/19, p.m., at 54–55.)

Further, both counsel Shriver and counsel Jolly testified they understood there was no mechanism for parole in Arizona during 2008, 2009, and 2010, and this understanding included the fact the sentencing statute still provided for the possibility of "parole." R.T. 12/19/19, a.m., at 31–32; R.T. 12/20/19, p.m., at 56. The Court notes that counsel Jolly testified that parole was not

a possibility for Defendant, "not something he was going to get" for two homicides and an aggravated-assault shooting of a third victim. R.T. 12/19/19, a.m., at 32; see R.T. 12/19/19, p.m., at 31; R.T. 12/20/19, p.m., at 56. The Court further notes that both counsel Shriver and counsel Jolly testified to no recollection of Defendant mentioning he wanted parole or ever discussing parole with any of Defendant's family members or friends. R.T. 12/19/19, a.m., at 32–33; R.T. 12/20/19, p.m., at 54–57.

Counsel Shriver and counsel Jolly testified they advised Defendant that he would spend the rest of his life in prison prior to the entry of Defendant's guilty plea. R.T. 12/19/19, a.m., at 31; R.T. 12/20/19, p.m., at 56. Counsel Shriver also testified that Defendant had "agreed to natural life sentences in which there's no ambiguity ... there is no possibility of parole. So, by agreeing to that, he would have understood very well that that's not an option, parole is not going to be a possibility." R.T. 12/20/19, p.m., at 57. The State presented evidence at the evidentiary hearing that Defendant had repeatedly agreed to a settlement offer for a natural life sentence. Exhibit 69, at 1998; Exhibit 71, at 2239, 2241; Exhibit 74; Exhibit 75.

Finally, all three of Defendant's trial counsel testified they would not have submitted a settlement offer or advised the State that Defendant would enter a plea agreement for natural life sentence without Defendant's express consent. R.T. 12/19/19, a.m., at 25–26, 29–30, 47; R.T. 12/20/19, a.m., at 39. Counsel Jolly testified: "we wouldn't approach the State with any kind of offer unless we've already talked to our client about it and he's agreed to it." R.T. 12/19/19, at 26.

The above notwithstanding, the Court did find that the possibility of "release before Defendant died was a material factor to him to choose to admit guilt and eligibility factors… [but] there were also other compelling factors." Dkt. #484 at 2.

The most compelling of these factors is that the Court did in fact sentence Defendant to life with the possibility of parole after 25 years on Count 1, after the jury returned a verdict for the death penalty for Count 2. This is an outcome clearly within the scope of the colloquy the court had with the Defendant when the court accepted Defendant's plea.

After the conclusion of the evidentiary hearing and before the Court's 5/19/2020 ruling (Dkt. #484), the Arizona Supreme Court, in *Chaparro*, held,

> a sentence imposing "life without possibility of parole for 25 years" means the convicted defendant is eligible for parole after serving 25 years' imprisonment despite § 41-1604.09's prohibition of parole for persons convicted of offenses occurring on or after January 1, 1994. Additionally, we hold that a court lacks jurisdiction to correct an illegally lenient sentence absent timely correction or appeal. *State v. Dawson*, 164 Ariz. 278, 286, 792 P.2d 741 (1990).

Chaparro v. Shinn, 248 Ariz. at ¶2, 459 P.3d at 51-2.

The holding by the Arizona Supreme Court forecloses the Court's ability to correct the sentencing order and Defendant's illegally lenient sentence. The *Chaparro* decision is also dispositive of Defendant's claim that his pleas were not knowing, voluntary, and intelligent, and the prejudice prong of the related ineffective assistance of counsel claim.

Based on the totality of the circumstances, the Court finds that Defendant's trial counsels' provided constitutionally effective assistance during the plea negotiations and entry of Defendant's guilty pleas. *See, Andrus v. Texas,* 590 U.S. ----, 140 S.Ct. 1875 (2020).

As noted, the conundrum for the Court given the facts and the court's findings regarding the Defendant's "material objective" was resolved by the fact the Court did sentence Defendant to life without the possibility of parole for twenty-five years, and the Arizona Supreme Court's ruling in *Chapparo*. The court's entry of the "possibility of parole" sentence (Dkt. #234, #237; *see also* Dkt. #227), although an illegally lenient sentence, based on the holding in *Chapparo,* means the Defendant's "material objective" in pleading guilty was satisfied.

In short, the court advised – albeit inaccurately – the Defendant of "[t]he nature and range of possible sentence for the offense to which the plea [was] offered, including any special conditions regarding sentence, parole, or commutation imposed by statute," and the Defendant received sentences from the jury and trial court within the "nature and range" advised by the court.

The fact that the State did not challenge the parole-eligible life sentence entered by the trial court on direct appeal (or by post-judgment motion), means regardless of the Court's error in the sentencing range advisements during the entry of Defendant's guilty pleas, and "[r]egardless of § 41–1604.09, [Defendant] is eligible for parole after serving 25 years pursuant to his sentence, and his illegally lenient sentence is final under Arizona law." *Chaparro*, 248 Ariz. at ¶ 23.

Based on the record in this matter, the Court's on the record rulings on 6/10/2019 and the Court's 6/10/2019 written ruling (Dkt. #443 and #444, both docketed on 6/11/2019), the evidence and argument presented at the evidentiary hearing, the Court's 5/19/2020 ruling (Dkt. #484, docketed 5/20/2020), and the foregoing,

THE COURT FINDS that although the Court has found that the "prospect of a release before Defendant died was a material factor to him to choose to admit guilt and eligibility factors, Defendant has not presented sufficient evidence, in light of the sentence imposed by the trial court and the holding in *Chaparro v. Shinn*, to find Defendant's plea was not voluntary, knowing, and intelligent.

THE COURT FURTHER FINDS that trial counsels' decision to pursue the chosen strategy involving the Defendant admitting guilt and the eligibility factors was not deficient performance.

THE COURT FURTHER FINDS that Defendant has failed to established prejudice based on trial counsels' chosen strategy, particularly in light of the fact that Defendant was sentenced to a "life without the possibility of parole for 25 years" sentence that "means the convicted defendant is eligible for parole after serving 25 years' imprisonment despite § 41-1604.09's prohibition of parole for persons convicted of offenses occurring on or after January 1, 1994."

Accordingly,

IT IS ORDERED denying Defendant's Motion for Rehearing as to his claims that his pleas were not voluntary, knowing, and intelligent.

IT IS FURTHER ORDERED denyng Defendant's Motion for Rehearing as to his claims that his trial counsel provided prejudicial, constitutionally ineffective assistance of counsel.

In his Motion for Rehearing, Defendant also requests that the Court reconsider its rulings on the admissibility of Exhibits 50, 51, and 53-68, because they are not relevant, hearsay, and in violation of *Crawford v. Washington*, 541 U.S. 36 (2004).

The parties extensively briefed and argued these exact issues prior to the hearing. The Court ruled upon Defendant's objections prior to the hearing. At the evidentiary hearing, the Court advised Defendant that his objections were noted, that they would be considered as standing objections throughout the hearing, and that Defendant was free to re-urge his objections in closing argument briefing following the hearing.

IT IS ORDERED overruling Defendant's objections to evidentiary hearing exhibits made prior to the evidentiary hearing, those contained in Defendant's closing memorandum (Dkt. #476) and Motion for Rehearing (Dkt. #486), and otherwise presented to the Court.

IT IS FURTHER ORDERED denying Defendant's Motion for Rehearing as to his objections to the evidentiary hearing exhibits.

Finally, in Defendant's Notice of Supplemental Authority (Dkt. 495), Defendant argues

that *State v. Robertson*, 468 P.3d 1217, 2020 WL 4644634 (Ariz. 2020)[2], requires the Court to re-examine its application of *Chaparro v. Shinn* to Defendant's claim that his pleas were involuntary and that his trial counsels provided ineffective assistance of counsel. The Court disagrees.

Defendant's convictions and sentences are final. It is well settled law that a conviction is final when "a judgment of conviction has rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Chaparro*, 248 Ariz. at --, ¶¶ 18–19 (citing *State v. Dawson*, 164 Ariz. 278, 283–84 (1990); Ariz. R. Crim. P. 24.3; A.R.S. § 13–4032); *State v. Towery*, 204 Ariz. 386, 389–90, ¶ 8 (2003) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987)). Defendant's argument to the contrary based on Rule 32.3(a) is directly contrary to this well settled law of appellate jurisdiction and finality, and is directly contrary to the Arizona Supreme Court's recent statement that "[i]llegally lenient sentences are final under Arizona law absent timely appeal or post-judgment motion. *Chaparro*, 248 Ariz. at ¶ 19 (citing *State v. Dawson*, 164 Ariz. 278, 283–84 (1990); Ariz. R. Crim. P. 24.3 (providing that the trial court may correct an unlawful sentence upon a timely motion)).

IT IS ORDERED denying Defendant's Motion for Rehearing based on *State v. Robertson*, relating to his claims his pleas were involuntary.

IT IS FURTHER ORDERED denying all of the arguments contained in Defendant's Motion for Rehearing and in the subsequent notice of supplemental authority.

[2] The issues in *State v. Robertson* were whether Robertson had the ability to challenge the voluntariness of his guilty pleas based on the procedural posture of the case and the invited error doctrine.

Appendix G

Supreme Court
STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

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

TRACIE K. LINDEMAN
Clerk of the Court

November 8, 2022

RE: STATE OF ARIZONA v MANUEL OVANTE JR
Arizona Supreme Court No. CR-20-0339-PC
Maricopa County Superior Court No. CR2008-144114-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 8, 2022, in regard to the above-referenced cause:

ORDERED: Petition for Review of Manuel Ovante, Jr. = DENIED.

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

Tracie K. Lindeman, Clerk

TO:
Jeffrey L Sparks
Gregory Michael Hazard
Garrett W Simpson
Vikki M Liles
Manuel Ovante Jr., ADOC 251126, Arizona State Prison, Florence - Eyman Complex-Rynning D/Row
Amy Armstrong
Therese Day
Jason Lewis
jd

Appendix H

FILED
2/17/10 2:00 PM
MICHAEL K. JEANES, Clerk
By B. McDonald
B. McDonald, Deputy

MARICOPA COUNTY SUPERIOR COURT
HON. WARREN J. GRANVILLE

JUROR QUESTION

STATE OF ARIZONA

V. **CR2008-144114-001**

MANUEL OVANTE, JR.

QUESTION: Does a life sentence mean a life sentence or would parole be available?

?

DeAlva Ward 2/17/10
PRESIDING JUROR

REPLY: Under Arizona law, a "life sentence" may mean a natural life sentence with no possibility of parole or a life sentence with the possibility to apply for parole after serving 25 calendar years. Whether a "life sentence" is a natural life sentence or a sentence of life with the possibility of parole after 25 years is a decision left to me as the trial judge.

Warren J Granville
JUDGE

Appendix I

FILED
2/17/10 2:00pm
MICHAEL K. JEANES, Clerk
By B. McDonald
B. McDonald, Deputy

MARICOPA COUNTY SUPERIOR COURT
HON. WARREN J. GRANVILLE

JUROR QUESTION

STATE OF ARIZONA

V. **CR2008-144114-001**

MANUEL OVANTE, JR.

QUESTION: IF PAROLE IS AN OPTION what is the MINIMUM SENTENCE? AND ARE THE SENTENCES CONSECUTIVE OR CONCURRENT?

?

DeAlva Ward 2/17/10
PRESIDING JUROR
for Counts 1, 2, & 3

REPLY: Whether the sentences are concurrent or consecutive is a decision that must be made by the trial judge, me or

.

Warren J Granville
JUDGE

Appendix J

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. MANUEL OVANTE, JR., Defendant.	CR-10-0085-AP CR2008-144114-001DT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Phoenix, Arizona
February 17, 2010
10:15 a.m.

Before: The Honorable Warren J. Granville, Judge

PREPARED BY: Elva Cruz-Lauer, RMR
Arizona Certified Reporter No. 50390

APPEARANCES:

For the State: MR. JASON KALISH,
MS. BELLE WHITNEY,
Deputy County Attorney,

For the Defendant: MR. GARY L. SHRIVER,
MR. QUINN T. JOLLY,
Attorney at Law,

(Whereupon, Elva Cruz-Lauer, was first duly sworn to act as the Official Reporter herein.)

THE COURT: Mr. Shriver?

MR. SHRIVER: No, Your Honor.

THE COURT: The juror question: Does a life sentence mean a life sentence or would parole be available?

The Court proposes the following answer: Under Arizona law a, quote, life sentence, closed quote, may mean a natural life sentence with no possibility of parole, or a life sentence with the possibility to apply for parole after serving 25 calendar years. Whether a, quote, life sentence is a natural life sentence or a sentence of life with the possibility of parole after 25 years is a decision left to me as the trial judge.

Any objection to the giving of that answer, Mr. Kalish?

MR. KALISH: No, Your Honor.

THE COURT: Mr. Shriver?

MR. SHRIVER: No, Your Honor.

THE COURT: The juror question: If parole is an option, what's the minimum sentence and are the sentences consecutive or concurrent?

The Court believing it has answered at least part of that question with the previous answer proposes that this question be answered: Whether the sentences are concurrent or consecutive is a decision that must be made by the trial judge.

Any objection to that answer, Mr. Shriver -- sorry, Mr. Kalish?

MR. KALISH: No, Your Honor.

MR. SHRIVER: The only question I had was, I thought you mentioned putting something as to the third count.

THE COURT: We did talk about that. I didn't put any of the counts in. I could insert, whether the sentence, and insert the words, for count 1, 2, or 3. Is that what you prefer, Mr. Shriver?

MR. SHRIVER: Yes.

THE COURT: Mr. Kalish, any objection to that?

MR. KALISH: No.

THE COURT: Whether the sentences for counts 1, 2, or 3 are concurrent or consecutive, is a decision that must be made by the trial judge.

Any objection to the giving of that answer, Mr. Kalish?

MR. KALISH: No, Your Honor.

THE COURT: Mr. Shriver?

MR. SHRIVER: No, Your Honor.

THE COURT: All right. We will give these answers to the jurors and wait their next step.

MR. SHRIVER: Did --

THE COURT: Shawne.

THE BAILIFF: I am right here.

MR. JOLLY: The trial judge meaning you, not meaning the trial judge for the verdict, the jury?

THE COURT: I said that once. I can say that both times. Have added: Whether the sentences for counts 1, 2, or 3 are concurrent or consecutive is a decision that must be made by me as the trial judge.

Those answers will be given and I will keep you informed.

Anything else for now, Mr. Kalish?

MR. KALISH: No, Your Honor.

THE COURT: Mr. Shriver?

MR. SHRIVER: No, Your Honor.

THE COURT: Ms. Whitney?

MS. WHITNEY: No. Thank you, Your Honor.

THE COURT: Mr. Jolly?

MR. JOLLY: No, Your Honor.

Appendix K

2/18/10 4:00pm
MICHAEL K. JEANES, Clerk
By B McDonald
B. McDonald, Deputy

MARICOPA COUNTY SUPERIOR COURT
HON. WARREN J. GRANVILLE

JUROR QUESTION

STATE OF ARIZONA

V. **CR2008-144114-001**

MANUEL OVANTE, JR.

QUESTION: We are at an impass and we need help.

?

DeAlva Ward 8 2/18/10
PRESIDING JUROR

REPLY: see attached

Warren J Granville
JUDGE

It appears from your note that you are at a deadlock in your deliberations. I have some suggestions to help your deliberations, not to force you to reach a verdict. I am merely trying to be responsive to your apparent need for help. I do not wish or intend to force a verdict. Each juror has a duty to consult with one another, to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment. No juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of other jurors or for the purpose of reaching a verdict.

However, you may want to identify areas of agreement and disagreement and discuss the law and the evidence as they relate to the areas of disagreement.

If you still disagree, you may wish to tell the attorneys and me which issues, questions, law, or facts you would like us to assist you with. If you decide to follow this suggestion, please write down the issues, questions, law or facts on which we can possibly help by way of further instruction or further brief argument by the attorneys. Please give your note to the bailiff. We will then discuss your note and try to help.

Appendix L

JUROR

#_____

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

STATE OF ARIZONA, Plaintiff, vs. MANUEL OVANTE JR., Defendant.	CR 2008-144114-001 DT **QUESTIONNAIRE FOR PROSPECTIVE JURORS** (Honorable Warren Granville)

Your answers to the following questions are very important to the proceedings in this case. You have been selected for a pool of prospective jurors for the criminal trial in *State v. Manuel Ovante Jr.*

In order to assist the Court and the parties in selecting a fair and impartial jury, the Court requests that you complete the following questionnaire as completely and accurately as you reasonably can. Please understand that your answers to the questions are under oath, and under penalty of perjury. Everyone has unique life experiences and personal beliefs. You should answer with your true feelings, whatever they may be. Do not assume that any of your answers will qualify you or disqualify you from serving on this jury. Although some of the questions are personal in nature, please be assured that they are necessary to this process, and that the court participants will keep your names confidential.

Please use a pen and do not write on the back side of the questionnaire. Do not discuss the case or contents of the questionnaire with anyone, including your fellow jury candidates, family or friends. The answers must be yours alone. However, if you have questions about the questionnaire itself, please ask the Court to assist you. You will be able to discuss the case and ask questions later when the Judge and the lawyers ask you follow-up questions. Your answers will be viewed only by the Judge, the attorneys involved in the case and the Defendant. They will not be made public. In court we will refer to you only by your juror number. We hope that this procedure will shorten the jury selection process.

STATEMENT OF THE CASE

The defendant, Manuel Ovante Jr., has pled guilty to the first degree murders of Jordan Trujillo and Damien Vickers. This proceeding concerns sentencing only, and you must accept that the Defendant is guilty of these offenses. The State is seeking the death penalty.

PHASES OF THE TRIAL

After the jury is selected, the jury will start the penalty phase of this trial. I will now give you a brief outline of the procedures involving this phase. You will receive further and more detailed instructions, so you do not have to commit them to memory now.

At the "penalty phase" of the trial, the jury will be asked to determine if specified mitigating circumstances exist, and whether or not a death sentence is the appropriate sentence.

In determining whether to impose a sentence of death each individual juror shall take into account the aggravating circumstances that all the jurors have found to be proven and take into account any mitigating circumstances that each individual juror has found to be proven.

Each juror will then have to determine whether there is mitigation that is sufficiently substantial to call for leniency. [This mitigation may include any aspect of the defendant's character, propensities or record, and the circumstances of the offense].

The jury will then decide whether the death penalty is the appropriate sentence. The decision to impose the death penalty is not a recommendation. Your decision will be binding on the judge.

If the jury determines that the death penalty is not the appropriate sentence, then the defendant will be sentenced to life imprisonment and it will be up to the judge to decide whether the sentence of life imprisonment shall be life without parole or life with the possibility of parole after serving 25 years imprisonment.

Appendix M

FILED
2/24/10 2:07 pm
MICHAEL K. JEANES, Clerk
By B. McDonald
Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA

v.

CR2008-144114-001
COUNT 1 VERDICT

MANUEL OVANTE JR.

We, the Jury, duly empanelled and sworn in the above-entitled action, upon our oaths, unanimously find, having considered all the facts and circumstances, as to Count 1 (Jordan Trujillo) that the Defendant should be sentenced to:

__X__ LIFE

_____ DEATH

Foreperson # 8

DeAlva Ward
(Signature)

DeAlva Ward
(Print)

Appendix N

FILED
2/24/10 2:07pm
MICHAEL K. JEANES, Clerk
By B. McDonald
Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA

v.

CR2008-144114-001
COUNT 2 VERDICT

MANUEL OVANTE JR.

We, the Jury, duly empanelled and sworn in the above-entitled action, upon our oaths, unanimously find, having considered all the facts and circumstances, as to Count 2 (Damien Vickers) that the Defendant should be sentenced to:

_____ LIFE

__X__ DEATH

Foreperson # 8

DeAlva Ward
(Signature)

DeAlva Ward
(Print)

Appendix O

DECLARATION OF TONYA J. PETERSON

I, Tonya J. Peterson, declare as follows:

1. I have been appointed by the Office of Public Defense Services at the request of Vikki Liles and Garrett Simpson, attorneys for the Defendant in *State of Arizona v. Manuel Ovante,* to give an opinion regarding the standard of care required of defense counsel in death penalty cases. Specifically, I have been asked to offer my opinion as to whether Mr. Ovante's trial counsel rendered constitutionally effective assistance of counsel in representing him as demanded by the Eighth and Fourteenth Amendments to the United States Constitution, as well as art. 2, § 24 of the Arizona Constitution.

2. My qualifications to give an opinion as to the performance of Mr. Ovante's trial counsel include the following:

   a. I have been licensed to practice law in the State of Arizona since 1988.

   b. I am a sole practitioner and have been since February, 1994. Prior to that, I was an associate attorney with the former law firm of Allen, Kimerer & Lavelle.

   c. My legal career has focused almost exclusively on criminal defense. In 1997, I became certified as a criminal law specialist by the Arizona Board of Legal Specialization, and remain so certified today.

   d. In 1995, I began focusing my practice on representing defendants facing the death penalty, first as second-chair counsel, and then as lead counsel beginning in approximately 1998.

   e. I am qualified for appointment as lead trial counsel in capital cases pursuant to Ariz. R.Crim. P. 6.8(b)(1). In 2013, I was approved to serve as lead trial counsel in capital cases by the Capital Defense Review Committee then-recently established by Maricopa County Superior Court Administrative Order No. 2012-118 (superseded by Administrative Order No. 2014-101).

   f. Since 1996, I have tried five capital cases to verdict – three as second-chair counsel and two as lead counsel. One resulted in acquittal, three resulted in imposition of natural life sentences, and one resulted in a death sentence that was later reversed on appeal pursuant to *Ring v. Arizona.*

g. In total, I have represented clients in more than 25 capital or potentially capital cases, including two presently pending. Dispositions in those cases have included non-capital trials following dismissal of the death notice, plea resolutions to terms of years or life sentences, and dismissals.

h. I have served as a presenter/panel member in a number of continuing legal education courses involving matters relating to representation of capital defendants.

3. I have reviewed the following materials in forming my opinions in this matter:

a. State's Discovery (PCR Exs. 51 and 52);

b. "Teamwork" folder from the Office of the Legal Defender ("OLD") file;

c. Transcripts of defense interviews and free talks of witnesses George Rojas, Richard Fore, and Nathan Duran (PCR Exs. 54-58);

d. Maricopa County Superior Court record, including transcripts of pretrial, change of plea, and penalty phase proceedings; and

e. OLD emails.

4. In my opinion, Mr. Ovante's trial counsel rendered ineffective assistance in a number of respects, as discussed below.

Advice to Plead Guilty to Indictment

5. Under the circumstances of this case, it is my opinion that Mr. Ovante's trial counsel rendered deficient performance in advising him to plead guilty to the indictment, outside the presence of the jury, in the absence of sentencing or other meaningful concessions from the State.

6. Mr. Ovante's trial counsel, like all Arizona attorneys appointed to represent capital defendants, must be familiar with and guided by the performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines"). Ariz. R.Crim. P. Rule 6.8(b)(1)(iii) and (2).

7. The Commentary to ABA Guideline 10.9.2 cautions that: "If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client's trial rights."

   a. "[P]leading guilty without a guarantee that the prosecution will recommend a life sentence holds little if any benefit for the defendant (citing ABA Guideline 10.9.2 cmt.). Pleading guilty not only relinquishes trial rights, it increases the likelihood that the State will introduce aggressive evidence of guilt during the sentencing phase, so that the gruesome details of the crime are fresh in the jurors' minds as they deliberate on the sentence." *Florida v. Nixon,* 543 U.S. 175, 191 n. 6 (2004) (citing Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases,* 58 N.Y.U.L.Rev. 331; 558-561 (1983)).

   b. The Commentary to ABA Guideline 10.9.2 reflects the pervasive conviction and practice of qualified capital defense practitioners. There is a compelling presumption against advising a client to plead guilty to the indictment with a death notice pending, such that the extreme reluctance of competent counsel to participate in such a waiver of his client's trial rights can only be overcome by the likelihood of an identifiable strategic advantage in doing so.

   c. No such identifiable strategic advantage is apparent from the record in Mr. Ovante's case. To the contrary, his counsel's advice to plead guilty placed him at a cousiderable disadvantage to his evident prejudice.

8. By pleading guilty to two counts of First Degree Murder, Mr. Ovante waived a viable defense that he was guilty only of the lesser-included offenses of Second Degree Murder, which if successful, would not have subjected him to the death penalty.

   a. Objective evidence that Mr. Ovante premeditated the murder of either victim Jordan Trujillo or Damien Vickers is far from conclusive.

   b. The homicides occurred in the context of a quest by Ovante and his companions to obtain methamphetamine from Trujillo. On the afternoon prior to the offenses, Ovante had smoked methamphetamine with Co-defendants George Rojas, Richard Fore, and Nathan Duran. (PCR Ex. 23, pp. 68-69). When the meth ran out, the four "went looking for some more" by way of Trujillo's house. (*Id.* at 69-70). When Ovante, Rojas, Fore, and Duran arrived at Trujillo's house, she was there with Vickers and surviving shooting victim Gabriel Valenzuela. (*Id.* at 71-72).

c. When arrested, Ovante denied involvement in the homicides of Trujillo and Vickers. (PCR Ex. 51, Bates ##181-83). Therefore, the only eyewitness accounts that would have been available to the State at trial were those of Rojas, Duran, Fore, and Valenzuela, each of whom gave statements conflicting with other statements he made and with statements made by the others.[1]

d. The State called only Duran and PPD Detective Warren Brewer to testify at the penalty phase of Ovante's trial. Duran testified that Ovante was never angry before they went to Trujillo's house and Duran did not see Ovante with a gun. (PCR Ex. 23, p. 71). Right before the shooting, Ovante "didn't do nothing. Nobody said anything." (*Id.* at 75). There was no sort of argument going on. (*Id.*) Detective Brewer testified that, when interviewed, Rojas and Fore both likewise said that – "there were no arguments, no fights, nobody pointed any weapons. They didn't really know why Manuel pulled out the gun and started shooting." (*Id.* at 54).

e. Duran testified that Ovante pulled out a gun, "screamed out, who left the safety on", "pointed the gun at Gabriel, told him not to move, and then he took the gun, shot Jordan." (*Id.* at 75-76). After that, Ovante "[a]imed at Gabriel and shot him", then "[s]hot Damien." (*Id.* at 76).

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[1] For instance, witness accounts vary as to how many times the four went to Trujillo's house in search of methamphetamine during the hours leading up to the early-morning shootings on June 11, 2008, and whether they were able to obtain any. Duran testified at Ovante's penalty phase trial that the co-defendant entourage went to her house only once. (PCR Ex. 23, pp. 70-71). During a defense interview, Duran also said they went to Trujillo's house only one time that night. (PCR Ex. 56, p. 21). However, during an earlier interview with the Phoenix Police Department ("PPD") on June 12, 2008, Duran stated that "the group left and returned to the residence several times over the span of the next 2 hours. Each time they returned to the residence they tried to get drugs but no one at the residence would share with them." (PCR Ex. 51, Bates #141; *see also* PCR Ex. 23, p. 50 ("They left and they went back approximately two times, two other times, so approximately three times they went to the house. Each time trying to get some drugs and she wouldn't give them to them.")]

During an interview at the hospital on June 11, 2008, Valenzuela made no mention of drugs or the four co-defendants going to Trujillo's house more than once. Instead, he said that "he was at Jordan's house with his friend Damien Vickers and Jordan when the shooting took place. They were 'kicking back' when Gabriel's 'homie' Georgie came in the house with Manuel. Gabriel guessed that Manuel was going to rob Jordan, Manuel pointed a black .45 semi-auto handgun at Gabriel and Damien and told them not to move." (PCR Ex. 51, Bates #133). Eight days later during a telephonic interview with PPD, Valenzuela said that the four co-defendants "stopped by Jordan's house 4 times prior to the shooting." (*Id.* at Bates #136). "They wanted to get high but no one held (sic) any money." (*Id.*) The second time they stopped by, "they all went inside the residence and asked for drugs but they did not have any money so Jordan told them no." (*Id.*) The third time they stopped by, "Jordan was a sleep (sic) so Gabriel told them that he did not have any drugs and none of the stuff was his." (*Id.*) On December 22, 2009, Valenzuela told Deputy County Attorney Jason Kalish "that Jordan gave Ovante's group drugs each of the three times they came over and that the group smoked the meth in front of him." (PCR Ex. 60).

f. Substantial evidence points to a lack of pre-planning or premeditation on Ovante's part:

(1) Rojas has repeatedly said that there was no prior discussion of shooting anyone and he has no idea why Ovante did it. (*See* PCR Ex. 57, p. 26 ("Q So to this day, you have no idea why he fired those shots?"; "A Huh-uh."); *Id.* at 31 ("Q Did he say – when he went back the third time okay, if she doesn't give me – give us any drugs this time I'm going to pull out a gun and –"; "A No, nothing like that."); PCR Ex. 58, pp. 10-11 ("Q So, did you get the impression that shooting Damien was an accident? ..."; "A The whole thing was an accident to tell you the truth."); *Id.* at 24 ("Q2 Okay, and there was not discussion about anyone shooting anyone in that house?"; "A No."); *Id.* at 29 ("Q2 Okay. And you said you don't know why the shooting happened?"; "A No."); *Id.* at 37 ("Q2 What do you think why did, why did Manuel end up shooting this woman twice in the back of the head and then end up shooting all these other shots at Gabriel, hitting him a number of times and then hitting Vickers as well?"; "A I'm thinking maybe it's the drugs maybe, just coming down and I'm not too sure. And that stuff messes, messes with your head I guess."); *Id.* at 38 ("Q2 He never talked about shooting them?"; "A No."); *Id.* ("Q2 There was never a discussion that that's why we're going over there is to get even or do anything?"; "A No."); *Id.* ("Q2 It's just something that, he snapped or something?"; "A That' (sic) what I'm thinking. That would be my opinion."))

(2) Fore has said that Ovante gets violent when coming down from meth[2] and was "kind of upset" or "irritated" because he couldn't get any meth from Trujillo[3], but that there was no prior discussion of retaliation or shooting anyone and that Fore has no idea why Ovante did it. (*See* PCR Ex. 54, p. 33 ("Q Did he prior to going over there at any time, did he say, goddamnit I'm just gonna shoot somebody?"; "A No."); *Id.* at 34 ("Q ... And were there any words between Gabriel and Manuel, or Gabriel and you, or Gabriel and, and..."; "A Words about what?"; "Q Just upset?"; "A No."); *Id.* at 41 ("Q ... Now, since, or at any time during this whole process, before the shooting, after the shooting, since you talked to the county attorney and stuff, have you

[2] PCR Ex. 55, p. 22; PCR Ex. 54, p. 10.

[3] PCR Ex. 55, pp. 18, 20.

heard anybody say that this was a planned deal, that the plan was to go over there and retaliate?"; "A No, but I mean, I don't see how I had, I don't know."); *Id.* at 42 ("Q What do you think caused this whole shooting, three people, two people killed and one injured, what do you think caused this?"; "A Um? To tell you the truth I don't honestly know.")]

(3) During his defense interview, Duran elaborated on the situation at Trujillo's house immediately prior to the shooting: "[W]e were just all hanging out. It was just, it was just normal. It was just, it was like, it was like a normal day like, like if everybody you know just went into, like we just, we went into this room and we just started getting high, you know? And then (inaudible) we're all high and just relaxed and then all of a sudden just some, just he does, he does that." (PCR Ex. 56, p. 24)

g. Only Valenzuela told police that Ovante and his co-defendants were affirmatively "mad" because they could not obtain methamphetamine from Trujillo.[4] But Valenzuela's versions of events are readily impeachable because they are inconsistent with each other and inconsistent with the statements of other eyewitnesses, as the State itself recognized. (*See* PCR Ex. 60 ("I met with Gabriel Valenzuela yesterday for the first time. His version of events ended up differing from everyone else we've talked to.... After talking to him I am probably just going to call Det. Brewer and Nathan Duran at the trial."))[5] Highlights of Valenzuela's discrepant statements follow:

(1) In all three of Valenzuela's versions, Ovante started shooting the moment he came through the door[6], whereas the other eyewitnesses

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[4] *See* PCR Ex. 51, Bates #136 ("Georgie, Manuel, Nathan and Richard returned to Jordan's a house (sic) a third time. They all went inside the residence and again asked for drugs. Jordan was a sleep (sic) so Gabriel told them that he did not have any drugs and none of the stuff was his. Gabriel told them that Jordan invited him to her place to hang out. Georgie, Manuel, Nathan and Richard got mad at Gabriel and called him a liar.")

[5] Of course, this information was not known to Mr. Ovante's trial counsel at the time they advised him to plead guilty, but could have served as a basis to move to withdraw his guilty plea to the extent their advice was induced by Valenzuela's anticipated testimony.

[6] *See* PCR Ex. 51, Bates #133 ("They were 'kicking back' when Gabriel's 'homie' Georgie came in the house with Manuel. Gabriel guessed that Manuel was going to rob Jordan, Manuel pointed a black .45 semi-auto handgun at Gabriel and Damien and told them not to move. Manuel turned the gun and shot Jordan two times in the head, while she slept on the couch."); *Id.* at Bates #136-37 ("Gabriel observed Manuel enter the house shortly after the black Ford arrived. Manuel shot Jordan two times while she slept, then he shot Gabriel and

described a period of time in which those present were hanging out before Ovante began shooting.[7]

(2) In Valenzuela's first statement, he makes no mention of drugs. (PCR Ex. 51, Bates #133). In his second statement, he reports Ovante and his friends having asked for drugs, but not being given any. (*Id.* at Bates ##136-37). And in Valenzuela's third statement, "[h]e said that Jordan gave Ovante's group drugs each of the three times they came over and that the group smoked the meth in front of him." (PCR Ex. 60).

(3) In Valenzuela's first statement, he attributed Ovante's motive as robbery. (PCR Ex. 51, Bates #133). In Valenzuela's second statement, he implied that Ovante's motive was retaliation for not having been given drugs. (*Id.* at Bates ## 136-37). And in Valenzuela's third statement, he does not attribute motive. (PCR Ex. 60).

(4) In contradiction of other witnesses, Valenzuela "denied ever handling Jordan's gun that night. He said Jordan's gun was never out when Ovante was there." (PCR Ex. 60). Rojas and Fore both related that Valenzuela was walking around earlier in the night holding the gun that police later recovered from underneath Trujillo's body.[8]

h. Even if believed, Valenzuela's statement that Ovante was angry may provide a motivation for him to shoot his victims, but not conclusive proof that he, in fact, reflected before shooting as is necessary to prove premeditation. On balance, there is ample evidence from which the inference could be drawn that Ovante did actually reflect before shooting and ample evidence from

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Damien."); PCR Ex. 60 ("He saw them all jump the fence, and then Ovante open the door and start shooting.")

[7] *See, e.g,* PCR Ex. 54, p. 37 ("Q From the time you guys walked in until the time the (sic) shooting, you first heard the shots, how long a time was that at the most?"; "A Um? Say maybe over two hours, maybe an hour?"); *Id.* at 38 ("Q Could you have been there as little as 15 minutes?"; "A May, no it had to have been longer than 15 minutes.")

[8] *See* PCR Ex. 57, p. 29 ("Gabriel he had a black handgun but it was [Trujillo's]. She always has it. But this time when we showed up he had it."); PCR Ex. 54, p. 23 ("Q Okay, did you, when you first went over there that night was there any conversation at all with Gabriel?"; "A No, um yeah I told him what's up. He was kind of acting stupid like he was tweeking.... He was walking around with a gun."); *Id.* ("Q Had you seen that gun before?"; "A Yeah, it was Jordan's. The one that was in the police report that they found under Jordan...Gabriel had that, was walking around with it for her."); *Id.* ("Q So he, he was, he had the gun? Where'd he have it?"; "A Just in his pocket and then he was playing with it.")

which the inference could be drawn that he did not. By advising him to plead guilty to two counts of First Degree Murder, Mr. Ovante's trial counsel deprived him of the right to have his jurors decide this ultimate issue.

9. Importantly, only one of Mr. Ovante's jurors would have to have been convinced that the State had not proven his guilt of First Degree Murder beyond a reasonable doubt, thereby enabling the jury to consider, deliberate on, and render a verdict on the lesser-included offense of Second Degree Murder.[9] Viewing the evidence as a whole, there is a reasonable probability that at least one of Mr. Ovante's jurors would find that the State had not proven beyond a reasonable doubt that he was guilty of First Degree Murder.

10. In my opinion, the above facts alone establish both deficient performance and prejudice sufficient to sustain a finding of ineffective assistance of Mr. Ovante's trial counsel. However, the record in this case reflects even more direct, if anecdotal, evidence that Mr. Ovante was prejudiced by his trial counsel's faulty advice. During deliberations the jury requested "the definition of first degree murder", strongly suggesting that the jurors were understandably uncertain as to what it was specifically that Mr. Ovante had pled guilty to in light of the testimony presented. The jury was able to reach sentencing verdicts only after it was informed that First Degree Murder requires proof that Mr. Ovante "intended to kill another human being or knew that he would kill another human being, and that after forming that intent or knowledge, reflected on the decision before killing." (PCR Ex. 32, p. 3).

11. Even if Mr. Ovante's trial counsel were ultimately unsuccessful in persuading the jury to convict him only of the lesser-included offenses of Second Degree Murder, by advising him to plead guilty, Mr. Ovante's counsel ineffectively advised him to forgo concomitant advantages flowing from the presentation of a second-degree defense in the guilt innocence/phase that would have inured to his benefit in the penalty phase.

12. Pleading guilty to First Degree Murder deprived Mr. Ovante's jurors of the opportunity to give meaningful consideration to "residual" or "lingering" doubt of his degree of legal/moral culpability in deciding the appropriate penalty.

    a. Jurors do not decide discrete phases of a capital trial in a vacuum. Rather, they bring what they have heard and seen in earlier phases to bear on their

[9] *See State v. LeBlanc*, 186 Ariz. 437, 924 P.2d 441 (1996) (directing trial courts to instruct jurors that they may consider lesser included offenses if after reasonable efforts they cannot agree whether to acquit or convict on charged crime).

deliberations in subsequent phases as, indeed, they are instructed to do.[10] It is for this reason that the ABA Guidelines stress that "it is critical that, well before trial, counsel formulate an integrated defense theory that will be reinforced by its presentation at both the guilt and mitigation stages." ABA Guideline 10.10.1 cmt. (footnotes omitted).

b. "Residual doubt over the defendant's guilt is the most powerful mitigating factor. 77% of jurors were less likely to impose death if they had lingering doubts."[11]

c. Although an "all or nothing" denial defense at the guilt/innocence phase increases the likelihood of a death sentence, "[u]nlike the total denial defense cases, a defense that the defendant was involved with the killing but not guilty of capital murder did not appear to invite a backlash if the defense was plausible based upon the facts. Thus doubt as to the perpetrator's intent was more persuasive than doubt as to whether the defendant was the actual perpetrator."[12]

d. The facts of the offenses as they were relayed to the jury by Nathan Duran and Detective Brewer make it flatly impossible to determine precisely what may have been going through Manuel Ovante's head at the time he pulled the trigger. However, any doubt as to Mr. Ovante's intent was removed when his trial counsel advised him to plead guilty to two counts of First Degree Murder and his jurors were accordingly instructed that he acted with premeditation, meaning that he "intended to kill another human being or knew that he would kill another human being, and that after forming that intent or knowledge, reflected on the decision before killing." (PCR Ex. 32, p. 3).

e. In the absence of Mr. Ovante's guilty plea to First Degree Murder, any individual juror would have been fully within his or her rights to determine

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[10] *See* A.R.S. § 13-751(D) ("Evidence that is admitted at the trial and that relates to any aggravating or mitigating circumstances shall be deemed admitted as evidence at a sentencing proceeding if the trier of fact considering that evidence is the same trier of fact that determined the defendant's guilt.")

[11] Blume, J.H., *An Overview of Significant Findings from the Capital Jury Project and Other Empirical Studies of the Death Penalty Relevant to Jury Selection, Presentation of Evidence and Jury Instructions in Capital Cases,* CORNELL LAW SCHOOL (Fall 2008), p. 27 of 66 (citing Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?,* 98 COLUM. L.REV. 1538, 1563 (1998)).

[12] Blume, J.H., *An Overview of Significant Findings from the Capital Jury Project,* at 26-27 of 66 (citing Scott Sundby, *The Capital Jury and Absolution: Trial Tactics, Remorse and the Death Penalty,* 83 CORNELL L.REV. 1557 (1998)).

that "residual" or "lingering" doubt as to Mr. Ovante's intent/degree of culpability, alone or in combination with other mitigation, was sufficiently substantial to call for leniency in that juror's opinion and persuade that juror to vote for a sentence of life in prison.[13]

13. Pleading guilty deprived Mr. Ovante of the extended opportunity for his jury to observe him and his interactions with the defense team over the three phases of trial, thereby humanizing him before the jury.

a. Every competent capital practitioner is acutely aware of the critical importance of the ability to personalize his or her client in a death penalty trial as a means of obtaining an alternative sanction to capital punishment in any given case. Specialized capital defense training is hardly necessary to appreciate that a juror is more likely to impose death on a nameless, faceless, capital defendant and more likely to impose a life sentence on someone he or she has come to see as a living, breathing human being with human complexities and foibles.

b. Unsurprisingly, jury studies have confirmed this common sense reality. "The more a juror reported having felt sympathy or pity for the defendant, having found the defendant likeable as a person, and having imagined being in the defendant's situation, the more likely she was to cast her first vote for a sentence of life imprisonment."[14]

c. The process of client humanization begins early and is reflected in every facial expression and gesture, interaction with the defense team, etc. "[C]ounsel must be aware that the jurors are closely scrutinizing the defendant, how he reacts to the evidence, and his demeanor in assessing remorse and dangerousness; two very important concepts."[15]

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[13] This is true even though Mr. Ovante's trial counsel would not have been permitted to present evidence of, or argue, residual douht as a mitigating circumstance. The jurors were correctly instructed that, "[e]ach of you individually determines whether mitigation exists", including "anything related to the defendant's character, propensity, history or record, or *circumstances of the offense*." (PCR Ex. 30, p. 42) (emphasis added). "A juror may find mitigation and impose a life sentence, even if the defendant does not present any mitigating evidence." (*Id.*)

[14] Blume, J.H., *An Overview of Significant Findings from the Capital Jury Project*, at 29 of 66 (citing Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases*, 98 COLUM. L.REV. 1538).

[15] Blume, J.H., *An Overview of Significant Findings from the Capital Jury Project*, at 42 of 66.

d. It is for this reason, among others, that the Commentary to ABA Guideline 10.9.2 resolutely counsels against advising a capital client to plead guilty without a guarantee that death will not be imposed – because it deprives him of the extended opportunity for his jurors to observe him that can only serve to humanize him in the jurors' eyes and enhance his chances they will vote for a life sentence, as Mr. Ovante's trial counsel deprived him in this case.

14. By advising Mr. Ovante to enter his guilty pleas outside the presence of the jury, his trial counsel gravely undermined the sole potential advantage of entering guilty pleas at all – impressing on his sentencers his personal acceptance of responsibility and remorse.

a. Closely related to humanization are the mitigating factors of acceptance of responsibility and remorse. Indeed, "[l]ack of remorse is highly aggravating. Almost 40% of jurors were more likely to vote for death if the defendant expressed no remorse for his offense."[16]

b. "The earlier in the proceedings the defendant *personally* expresses some type of acceptance, the greater likelihood that the jury will be receptive to later claims of regret for the killing."[17] However, Mr. Ovante's trial counsel deprived him of the undisputed benefit of *personally* expressing his acceptance before the jury early in the proceeding by advising him to plead guilty to the Court before the jury was even selected.

c. Therefore, Mr. Ovante's jury was never presented with the detailed plea colloquy in which he personally admitted his guilt and the factual basis therefor, either live as it occurred or through his trial counsel's introduction of the FTR. Instead, Mr. Ovante's early acceptance of responsibility was first conveyed to his prospective jurors at the outset of *voir dire* by the Court (PCR Ex. 14, p. 4), and later conveyed in a sanitized version to his jurors through his legal mouthpiece during penalty phase opening statements (PCR Ex. 23, pp. 9-10).

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[16] Blume, J.H., *An Overview of Significant Findings from the Capital Jury Project*, at 24 of 66 (citing Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases*, at 1560).

[17] Blume, J.H., *An Overview of Significant Findings from the Capital Jury Project*, at 27 of 66 (citing Scott Sundby, *The Capital Jury and Absolution*, 83 CORNELL L.REV. 1557) (emphasis added).

d. Thus, the method in which Mr. Ovante pled guilty and his pleas of guilty were communicated to the jury severely compromised the very strategic advantage they presumably were calculated to achieve.

Failure to Accurately Advise as to Possible Sentences

15. In my opinion, the performance of Mr. Ovante's trial counsel was deficient in failing to advise him that life with the possibility of parole after serving 25 years was not a legally available sentence (or at least in failing to correct the Court when the Court incorrectly advised him that life with the possibility of parole after serving 25 years *was* a legally available sentence) under Arizona law at the time he entered his guilty pleas on December 15, 2009.

a. When Mr. Ovante entered his guilty pleas to two counts of premeditated murder, the Court advised him that, "under the law if convicted of Count 1 or Count 2, first-degree murder, the sentence for that offense is no less than life without – with the possibility of parole after serving 25 years." (PCR Ex. 13, p. 7). His trial counsel remained silent.

b. The Court subsequently reiterated that, "[f]or Counts 1 and 2, if you got life with a possibility of probation – sorry – possibility of parole, that still is a service of 25 calendar years." (*Id.* at 8). Again, his trial counsel said nothing.

c. Under Arizona law, parole is available only to individuals who committed a felony before January 1, 1994, and therefore is not available to Mr. Ovante whose crimes were committed on June 11, 2008. *See* A.R.S. § 41-1604.09(I).

d. There was a period of time during the late 1990's and early 2000's in which even experienced criminal defense lawyers, including myself, commonly believed that a sentence of life with the possibility of parole after serving 25 calendar years was a legally available sentence for First Degree Murder under Arizona law and so advised our clients.

e. The error in this belief was exposed when an email to that effect from the then Chairman/Executive Director of the Arizona Board of Executive Clemency was widely circulated among Arizona criminal defense lawyers in 2008.

f. Whether or not Mr. Ovante's trial counsel were aware that a sentence of life with the possibility of parole after serving 25 calendar years was not a legally available sentence for his convictions for first degree murder at the time of

his change of plea in 2009, they rendered deficient performance in failing to so inform him.

Failure to Request Continuance to Complete Mitigation Investigation

16. I have received information indicating that Mr. Ovante's trial counsel had not completed their constitutionally-compelled mitigation investigation by the first trial date and were insufficiently prepared to proceed with the penalty phase of trial. Assuming the accuracy of this information, it is my opinion that Mr. Ovante's trial counsel rendered deficient performance in failing to request a continuance, which almost certainly would have been granted under the circumstances of the case, and in failing to make an adequate record to preserve the issue for further review in the highly unlikely event the continuance request was denied.

    a. The ABA Guidelines stress that a thorough pretrial mitigation investigation is paramount in capital cases.[18]

    b. "Counsel at all stages should demand on behalf of the client all resources necessary to provide high quality legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for further review." ABA Guideline 10.4(D).

    c. One such resource critical to a thorough pretrial mitigation investigation is adequate time. "Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and

[18] *See, e.g.*, ABA Guideline 10.7(A) ("Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty."); History of ABA Guideline 10.7 ("Changes in this Guideline clarify that counsel should conduct thorough and independent investigations relating to both guilt and penalty issues regardless of overwhelming evidence of guilt, client statements concerning the facts of the alleged crime, or client statements that counsel should refrain from collecting or presenting evidence bearing upon guilt or penalty."); ABA Guideline 10.7 cmt. ("Counsel's duty to investigate and present mitigating evidence is now well established. The duty to investigate exists regardless of the expressed desires of a client. Nor may counsel 'sit idly by, thinking that investigation would be futile.' Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case." (footnotes omitted)). *Id.* ("Because the sentencer in a capital case must consider in mitigation, 'anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant,' 'penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.' (footnotes omitted)"); ABA Guideline 10.11(A) ("[C]ounsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation."); ABA Guideline 10.11 cmt. ("[a]reas of mitigation are extremely broad and encompass any evidence that tends to lessen the defendant's moral culpability for the offense or otherwise supports a sentence less than death. (footnote omitted)").

expensive process. (footnote omitted).") ABA Guideline 4.1 cmt.

d. Mr. Ovante's case was subject to Rule 8.2(a)'s former 18-month time limit from arraignment to trial in capital cases. Exceedingly rarely, would this 18-month limit allow for the "thorough and independent investigations relating to the issues of both guilt and penalty" contemplated by the ABA Guidelines and required by the Eighth Amendment. Presumably in recognition of this fact, Rule 8.2(a)(4) was amended by Arizona Supreme Court R-10-0012, effective January 1, 2011, to increase the time limit in capital cases to 24 months from the date the state files a notice of intent to seek the death penalty to trial.

e. Mr. Ovante was indicted on July 22, 2008, and arraigned on July 31, 2008. His last day was established as January 22, 2010. (Minute Entry 9/11/08). Approximately 11 months after Mr. Ovante's indictment, his trial was scheduled for December 14, 2009 – within the original last day. (Minute Entry 6/12/09, and *nunc pro tunc* 6/25/09).

f. The record reflects that the parties were attempting to reach a non-trial resolution of the case that would avoid imposition of the death penalty up until the eve of trial.[19] These efforts culminated in an ultimately unsuccessful settlement conference before the Honorable Timothy Ryan on December 8, 2009 – six days before the scheduled trial date.[20]

g. I handled capital cases and participated in capital case settlement conferences during this time period. In general, it was customary and expected that a defense request for continuance would be granted – particularly, on the first trial setting – and particularly, in the context of last-minute failed settlement negotiations. In Mr. Ovante's case specifically, the

[19] *See, e.g.,* PCR Ex. 9, pp. 2-3 ("THE COURT: ... Any chance that this is going to resolve?/MR. JOLLY: Your Honor, we submitted a new proposal this morning. We'll wait and see./MR. KALISH: I'll take that up and try to get an answer as soon as possible.")

[20] *See* PCR Ex. 11, pp. 4-5 ("MR. KALISH: We're back because this was initially set for a settlement conference, and you wanted us to come back. We've talked several times. We met with Judge Granville once in the interim. The State – well, I don't know if it's personally this prosecutor, but someone in the State will not agree to any kind of settlement. We have --/ .../MR. KALISH (sic): Yeah, because we could do a change of plea this afternoon. We've offered two stacked life terms, plus some time if he wanted it. You know, there's not much – there's nothing more we know to do.")

record reflects that neither the Court nor counsel for the State would have been resistant to a trial continuance.[21]

h. Despite the acknowledgment of Mr. Ovante's trial counsel that the case was within its original last day, they made no effort to request a continuance of the trial date when it became apparent that a non-trial resolution that would avoid a possible death sentence would not be reached. Instead, Mr. Ovante's trial counsel immediately switched gears to a contemplated plea to the indictment with the death notice intact.[22]

I. "[T]he ultimate effect [of failure to present reasonably available mitigating evidence] on the sentencer's final decision is absolutely indeterminate and indeterminable." Goodpaster, *The Trial for Life,* at 351. Consequently, when the sentencer in a capital case is deprived of a substantial part of the available evidence in mitigation, "the potential for prejudice is too obvious to require proof." *Id.* at 350. Indeed, "short of substituting a verdict of its own, there is no way for a reviewing court to determine what effect unpresented mitigating evidence might have had on the sentencer's decision." *Id.* at 354.

j. Notwithstanding the near impossibility of definitively demonstrating prejudice as the result of counsel's deficient failure to complete a thorough pretrial mitigation investigation, or to request a trial continuance to enable them to do so, in order to present all reasonably available mitigation evidence to the sentencer, indicia of prejudice are clearly present in Mr. Ovante's case. Even without benefit of a full and complete mitigation presentation, Mr. Ovante's jurors deliberated his fate over the course of three and a half days, at the conclusion of which they returned split verdicts of life as to victim Trujillo and death as to victim Vickers. A reasonable probability that one of Mr. Ovante's jurors would have voted differently as to victim Vickers if presented with the full facts in mitigation is sufficient to undermine confidence in the jury's verdict.

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[21] *See, e.g.,* PCR Ex. 59 ("I ran into Judge Granville and it sounds like we might be before him. He told me to have you put your motion [to continue] in ASAP because they discuss the cases every Tuesday and there are a lot set in January."); PCR Ex. 11, p. 5 ("THE COURT: ... "[W]e're not on any freight train to get this thing to trial./MR. SHRIVER: We're actually under 18 months, I think, on this case./MR. JOLLY: Yes.")

[22] PCR Ex. 11, p. 5 ("The question that has arisen when we were before Judge Granville was if our client were to plead to the guilt phase prior to the start of the trial, does he have authority then to determine scheduling on – as far as when –")

17. In sum, it is my opinion that Mr. Ovante's trial counsel were ineffective:

a. In failing to request a continuance to complete the required mitigation investigation, and in failing to make an adequate record to preserve the issue for future review;

b. In advising him to plead guilty to two counts of First Degree Murder, outside the presence of the jury, in the absence of sentencing or other meaningful concessions from the State, thereby:

(1) waiving a viable Second Degree Murder defense;

(2) forgoing concomitant advantages flowing therefrom that would have inured to his benefit in the penalty phase; and

(3) undermining the sole potential advantage of pleading guilty -- personally expressing his acceptance of responsibility before the jury early in the proceedings; and

c. In failing to advise him that life with the possibility of parole after serving 25 years was not a legally available sentence (or at least in failing to correct the Court when the Court incorrectly advised him that life with the possibility of parole after serving 25 years was a legally available sentence) under Arizona law at the time he entered his guilty pleas on December 15, 2009.

18. Each instance of ineffective assistance of counsel, standing alone, provides an independent ground for relief. Cumulatively, they reflect that trial counsel completely abandoned and abdicated their ethical obligation to effectively represent Mr. Ovante.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 5th day of September, 2017.

Tonya J. Peterson

Appendix P

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. MANUEL ORVANTE, JR., Defendant.	CR-10-0085-AP CR 2008-144114-001 DT

Phoenix, Arizona
December 15, 2009

BEFORE: THE HONORABLE WARREN J. GRANVILLE
SUPERIOR COURT JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Terry Lynn Masciola, RPR
Az. Cert. No. 50445

APPEARANCES

Appearing on behalf of the State:

Mr. Jason Kalish
Deputy County Attorney

Appearing on behalf of the Defendant:

Mr. Gary L. Shriver
Legal Defender's Office

Quinn Jolly
Attorney at Law

December 15, 2009

(The following proceedings were held in open court:)

P R O C E E D I N G S

THE COURT: This is the time set for hearing on various motions today. State of Arizona v. Manuel Orvante, 2008-144114.

Appearances please.

MR. KALISH: Good afternoon. Jason Kalish appearing for the State.

THE COURT: Good afternoon.

MR. SHRIVER: Judge, if I could.

THE COURT: Let's announce yourself first.

MR. SHRIVER: Gary Shriver, Legal Defenders Office on behalf of the defendant, with Quinn Jolly. And the defendant is present in custody, Your Honor.

THE COURT: Good afternoon.

MR. SHRIVER: If I could, what we hope to do, and what Mr. Orvante's desire at this point, is to plead guilty to the charges, admit the aggravating factors, and set this matter over for a jury trial on the sentence. This is given the situation that the State has refused, number one, to drop the death penalty and, number

two, to allow this to be tried to the Court. But given these circumstances, this is what I believe is Mr. Orvante's desire.

I have been over with him to some extent what the Court will be asking, but I haven't talked with him about the likelihood that I would provide the factual basis and he would listen and then express his agreement or disagreement.

THE COURT: Well, I can do it -- since it's a plea to the charge, I would later read the indictment and go through each count separately.

MR. SHRIVER: And I'd have no problem with that, Your Honor.

THE COURT: Good afternoon, Mr. Orvante. Would you please state your true name and date of birth.

MR. ORVANTE: Manuel Orvante, Jr., 10-7-86. 1986.

THE COURT: Thank you.

How far did you get through school?

MR. ORVANTE: I think like a junior in high school. But I dropped out and received my GED.

THE COURT: Do you read and understand English?

MR. ORVANTE: Yes.

THE COURT: Have you had any drugs, alcohol

or medication in the last 24 hours?

MR. ORVANTE: Just some prescription medicine they got me on in there.

THE COURT: Okay. This is medicine that the jail has given you?

MR. ORVANTE: Yes.

THE COURT: Did you have the -- your medicine yesterday?

MR. ORVANTE: Yes.

THE COURT: Have you had your medicine today?

MR. ORVANTE: No.

THE COURT: Have you missed it or do you normally get it later in the day?

MR. ORVANTE: In the evening.

THE COURT: So you haven't missed it for today, is that fair to say?

MR. ORVANTE: Yes.

THE COURT: Anything about how you're feeling or the medicine that they're giving you that you think may affect your ability to understand what we are doing?

MR. ORVANTE: No.

(Mr. Orvante and counsel confer off the record.)

MR. SHRIVER: Judge, if we could, he believes the medication he takes is Zoloft. And he's taking that as an antidepressant.

THE COURT: Okay.

MR. SHRIVER: Is that correct, Mr. Orvante?

MR. ORVANTE: Yes.

THE COURT: Mr. Orvante, before we came out on the record you were talking to your lawyers off the record this afternoon. Did you have any difficulty understanding them?

MR. ORVANTE: No.

THE COURT: Mr. Shriver, any concerns as an officer of the court about proceeding with Mr. Orvante today?

MR. SHRIVER: No, Your Honor.

THE COURT: Mr. Orvante, during the course of our conversation if you have any questions, please stop me and ask those questions, okay?

MR. ORVANTE: Yes.

THE COURT: You're charged with Counts 1 and 2, first-degree murder, and with Count 3, aggravated assault. Your lawyer has advised me that you are going to plead guilty to those charges.

Is that your understanding?

MR. ORVANTE: Yes.

THE COURT: There is no plea agreement, so under the law if convicted of Count 1 or Count 2, first-degree murder, the sentence for that offense is no less than life without -- with the possibility of parole after serving 25 years.

Do you understand that, sir?

MR. ORVANTE: Yes.

THE COURT: It's also possible under the law for that offense that that count could result in a natural life sentence.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: And it's also possible under the law that you could be given the death penalty for that offense.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: And it's also possible that those offenses could run concurrent with each other, or stacked on top of the other.

Do you understand that that's possible?

MR. ORVANTE: Yes.

THE COURT: With respect to aggravated assault, it's a class 3 dangerous offense. Under the law for that offense you cannot get probation.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: For Counts 1 and 2 the first-degree murder cases, under the law there is no possibility of probation.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: With respect to the aggravated assault charge, that crime carries a presumptive term of seven and a half years in prison. That could go up to 15 years and go down as low as five years.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: With respect to the aggravated assault charge, that prison term is an 85 percent time. You could -- so there's a possibility of release after 85 percent of your time.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: For Counts 1 and 2, if you got life with a possibility of probation -- sorry -- possibility of parole, that still is a service of 25 calendar years.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: It's also possible under the law for each of the three counts you can be fined $150,000 plus an 84 percent surcharge.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: Under the law you would be required to pay restitution if it can be proven that the -- as a result of committing Count 1, Count 2, or Count 3.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: To that end, Mr. Kalish, would you have any ballpark idea of what the restitution amounts may be?

MR. KALISH: No, I don't.

THE COURT: Mr. Orvante, we don't know what the restitution amount may be. I will tell you if it can be proven to be as a result of the murder or the aggravated assault, I would be obliged to order that you pay it.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: Knowing that we don't know the number, do you want to proceed with your decision to plead on the three counts?

MR. ORVANTE: Yes.

THE COURT: Has anyone promised you anything to get you to make this decision?

MR. ORVANTE: No.

THE COURT: Has anyone threatened you to make this decision?

MR. ORVANTE: No.

THE COURT: Have you had enough time to talk about this decision with your lawyers?

MR. ORVANTE: Yes.

THE COURT: You understand for Counts 1, 2, and 3, by pleading to the charge you're giving up constitutional rights?

MR. ORVANTE: Yes.

THE COURT: For each of those counts you have the right to remain silent, a privilege against self-incrimination, a right to refuse to testify.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: For each of the counts you have the right to a jury trial where you would be represented by attorneys.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: You would have a right to

cross-examine any witnesses who came and testified against you.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: You'd have a right to call your own witnesses and present evidence on your behalf if you wanted to.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: You'd have a right to testify at your trial if you wanted to.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: You would have the right to have the jury determine your guilt beyond a reasonable doubt.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: With respect to Count 3, you'll have the right to have a jury determine any aggravating sentencing factors beyond a reasonable doubt.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: And you will have a right to file a direct appeal.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: With respect to Counts 3, you'd have a right to file a direct appeal. That would go away if we proceed as you want.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: Knowing that you're going to give up all of those rights, is that what you want to do?

MR. ORVANTE: Yes.

THE COURT: You're charged by Count 1 with first-degree murder, that's the premeditated murder of Jordan Trujillo with the use of a handgun.

Do you understand the charge?

MR. ORVANTE: Yes.

THE COURT: How do you plead to the charge, guilty or not guilty?

MR. ORVANTE: Guilty.

THE COURT: Is it true on June 11, 2008, you killed Mr. Trujillo using a handgun?

MR. KALISH: Ms.

THE COURT: I'm sorry. I apologize. Ms. Trujillo by use of a handgun?

MR. ORVANTE: Yes.

THE COURT: And is it true that there was some thought to it before you committed the act?

MR. ORVANTE: Like, yes, I think so.

THE COURT: Either counsel have any questions on the sufficiency of the factual basis for Count 1?

MR. KALISH: No, Your Honor.

THE COURT: Mr. Shriver.

MR. SHRIVER: I would just add, Your Honor, that the testimony at trial would also include evidence that, in fact, the defendant pointed the gun at one individual, I believe it was the Gabriel Valenzuela, and indicated or looked like to the witness that he attempted to pull the trigger. He then said something to the effect that the safety was on and who put the safety on. He then turned and fired the shots that killed Ms. Trujillo.

THE COURT: Do you agree with that as well, Mr. Orvante?

MR. ORVANTE: Yes.

THE COURT: That said, either counsel have questions on the sufficiency of the factual basis on Count 1?

MR. KALISH: No, Your Honor.

MR. SHRIVER: No, Your Honor.

THE COURT: Mr. Orvante, you're charged with first-degree murder for the handgun death of Damien Vickers.

Do you understand the charge?

MR. ORVANTE: Yes.

THE COURT: How do you plead to that charge, guilty or not guilty?

MR. ORVANTE: Guilty.

THE COURT: Is it true that on June 11, 2008, you shot and killed Damien Vickers?

MR. ORVANTE: Yes.

THE COURT: Is it true there was some thought before you fired the shot?

(Mr. Orvante and counsel confer.)

MR. ORVANTE: Yes.

THE COURT: Either counsel have any questions on the sufficiency of the factual basis for Count 2?

MR. KALISH: No, Your Honor.

MR. SHRIVER: No, Your Honor.

THE COURT: Mr. Orvante, for Count 3 you're charged with the aggravated assault of Gabriel Valenzuela by causing injury, serious physical injury, to Gabriel Valenzuela by use of a gun.

Do you understand the charge?

MR. ORVANTE: Yes.

THE COURT: How do you plead to that charge, guilty or not guilty?

MR. ORVANTE: Guilty.

THE COURT: Is it true on June 11th -- I'll need some help -- that you shot and hit Mr. Valenzuela with a bullet?

MR. KALISH: Several times.

THE COURT: Several times. Is that true, Mr. Valenzuela -- I'm sorry.

Is that true, Mr. Orvante?

MR. ORVANTE: Yes.

THE COURT: As a result, what injuries were sustained?

MR. KALISH: Your Honor, he sustained several life threatening injuries. He was hospitalized for a time for those injuries, although he did make a recovery.

THE COURT: Mr. Orvante, would you agree with those facts as well?

MR. ORVANTE: Yes.

THE COURT: Either counsel have any questions on the sufficiency of the factual basis for Count 3?

MR. KALISH: No, Your Honor.

MR. SHRIVER: No, Your Honor.

THE COURT: Mr. Kalish, as far as you know, have victims rights been afforded for Counts 1, 2, and 3?

MR. KALISH: They have, Your Honor. And I point out that the family of Mr. Vickers is present in the courtroom right now.

THE COURT: Good afternoon.

Either counsel have any questions on the knowing, intelligent and voluntarily nature of Mr. Orvante's decision with respect to Counts 1, 2, or 3?

MR. KALISH: No, Your Honor.

MR. SHRIVER: I just, for the record, Your Honor, I wanted to make sure on the record that Mr. Orvante understands that as to the guilt phase of the trial he is giving up his rights to have the jury make a determination. There would be some petition for post-conviction relief or Rule 32 relief available, but that his actual appeal rights he will be giving up as to the guilt phase.

THE COURT: Well, it becomes an interesting question. If the jury at the penalty phase decides to return a verdict of death for Counts 1 or 2, the law would provide maybe a direct appeal to that. And what the Supreme Court does with that, I don't know the answer to the question.

MR. SHRIVER: To be on the safe side, I have indicated to him there would be an appeal from a death verdict or verdicts; however, there is also the

possibility that the review by the Supreme Court of the guilt issues would be very, very limited at that point. And that they would still thoroughly review the penalty phase issues but, however, he may well be giving up the lion share of his rights as they relate to direct appeal on the case.

THE COURT: Thank you, Mr. Shriver.

Mr. Orvante, on the theory you need to know all of the possibilities can happen, I tell you that as a matter of Arizona law if any jury returns a verdict of death, the law requires that that case be submitted directly to the Supreme Court for an appeal. It is also normal Arizona law that if anybody ever pleads guilty rather than be found guilty by the jury, an appellate court does not have to hear the appeal in that situation.

Do you understand the differences we have just talked about?

(Mr. Orvante and counsel confer.)

MR. ORVANTE: Yes.

THE COURT: In your case, we're sort of blending the two. What the Supreme Court will do with your case, I can't know for sure. Worst case scenario is, as your lawyer indicated, the Supreme Court would only review for appeal purposes the penalty phase and would only review as a discretionary matter the guilt phase.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: Having told you that, does that change your mind about how you want to proceed this afternoon?

MR. ORVANTE: No.

THE COURT: That said, Mr. Shriver, anything on the knowing, intelligent and voluntary nature of Mr. Orvante's decision?

MR. SHRIVER: No, Your Honor.

THE COURT: The Court finds the defendant's decision to plead to Counts 1, 2, and 3 is knowingly, intelligently and voluntarily made; and there is a factual basis for the plea with respect to Counts 1 and 2.

Based upon defendant's pleas to Counts 1 and 2, the Court would also find as an aggravating factor for Count 3, multiple offenses. So based upon the evidence presented, the Court finds that the defendant's plea to Count 3 is knowingly, intelligently and voluntarily made and -- and would also expose Mr. Orvante to the possibility of an aggravated term.

Mr. Shriver, with respect to Counts 1 and 2, what is Mr. Orvante's decision with respect to the right to a jury trial to prove aggravating factors?

MR. SHRIVER: Judge, Mr. Orvante is in the

position to go ahead and admit those aggravating factors.

THE COURT: Mr. Orvante --

MR. SHRIVER: Judge, I would -- this is a point I'm not sure. I don't know if Mr. Kalish knows, but the statute indicates that the defendant has been convicted under both of these aggravating circumstances, so I don't know if the Court needs to actually enter the judgment of conviction prior to the time he is able to admit those priors or not.

THE COURT: Well, even if the case went to trial, we -- are we in the same posture? Normally a conviction means a sentence. But even in the normal flow, you'd have a jury in phase two being asked to make a determination of multiple murders and serious offenses under (F)(2) that would not be in any different posture than we are now. So I understand your point, but under the statutory scheme that's been devised, we may proceed.

Any objection to that, Mr. Kalish?

MR. KALISH: No, Your Honor.

THE COURT: Mr. Shriver.

MR. SHRIVER: Judge, it was more of a point. I certainly don't know the answer for sure. I just could envision somebody at a later time looking at this. But I think that under the circumstances the Arizona courts are going to talk about a conviction arising from a plea. And

in this case the plea has been entered, the Court has found it's knowing, intelligent and voluntary, so I think at this point we here certainly understand how we are proceeding.

THE COURT: And the reason I'm doing the colloquy on the aggravated factors, I maybe tripping over the right answer, but this now puts us in exactly the same posture had the case have gone to trial and there was a determination of guilt and there was a guilty verdict on Counts 1 and 2.

So to that end, Mr. Orvante, the State has filed a notice of death where they are seeking the death penalty for Counts 1 and 2, based upon the fact in part that you were committed Count 3, and then for Count 2 that you committed Count 1, and for Count 1 that you committed Count 2.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: You'd have a right to have the jury determine whether those allegations are proven beyond a reasonable doubt.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: You have a right to remain silent, a privilege against self-incrimination, and a

right to refuse to testify at that stage of the trial.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: You have the right to have your lawyers represent you and cross-examine any witnesses.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: You'd have the right to have witnesses on your behalf or evidence presented if you wanted to.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: You'd have the right to testify if you wanted to.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: As I stated, you'd have the right to have the jury determine whether any of these aggravating factors are proven beyond a reasonable doubt.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: Your attorney advised me that you wish to give up that right. Is that what you want to do?

MR. ORVANTE: Yes.

THE COURT: Has anybody promised you anything for to you make this decision?

MR. ORVANTE: No.

THE COURT: Anyone threaten you to make this decision?

MR. ORVANTE: No.

THE COURT: You understand that by making this decision for Count 1 you would be eligible for the death penalty?

MR. ORVANTE: Yes.

THE COURT: You understand from making this decision for Count 2 you would be eligible for the death penalty?

MR. ORVANTE: Yes.

THE COURT: You understand that the death penalty is not mandatory. It's something that the jurors would decide based upon evidence presented at the penalty phase of the trial.

Do you understand that?

MR. ORVANTE: Yes.

THE COURT: With respect to Count 1, that deals with the murder of Jordan Trujillo.

Is it true that you admitted to the killing of Damien Vickers?

MR. ORVANTE: Yes.

THE COURT: Is it true that you admitted to aggravated assault with a handgun of Gabriel Valenzuela?

MR. ORVANTE: Yes.

THE COURT: With respect to Count 2, is it true that you've admitted to killing with premeditation Jordan Trujillo?

MR. ORVANTE: Yes.

THE COURT: Is it true that you admitted to the aggravated assault with a handgun of Gabriel Valenzuela?

MR. ORVANTE: Yes.

THE COURT: And not to make it more painful, but make sure I cover it, with respect to Count 1 is it true that you admit to the premeditated killing of Damien Vickers?

MR. ORVANTE: Yes.

THE COURT: Either counsel have any questions on the sufficiency of the factual basis on the aggravating factors for either Count 1 or 2?

MR. SHRIVER: No.

MR. KALISH: No.

THE COURT: Either counsel have questions on the knowing, intelligent and voluntarily nature of the decision with respect to Count 1 or 2 of Mr. Orvante?

MR. KALISH: No.

MR. SHRIVER: No, Your Honor.

THE COURT: Before I accept your admission, do you have any questions you want to ask me or either of your lawyers?

MR. ORVANTE: No.

THE COURT: All right.

The Court finds the defendant's decision with respect to Counts 1 and Count 2 is knowingly, intelligently and voluntarily made.

There is a factual basis to support each aggravating factor for each count.

With respect to the penalty phase, it's the State's intention to invoke their right to a jury; is that correct, Mr. Kalish?

MR. KALISH: It is, Your Honor.

THE COURT: We will proceed to a trial with jury.

Mr. Orvante, if you want, if you could have a seat at counsel table.

The Court has reviewed the jury questionnaire that was submitted by both parties and understand that among the 108 questions, the parties had objections to questions 60, 80, 88, 89, 90, 91 and 100, which the Court will rule on.

But otherwise, Mr. Kalish, do you pass the

Appendix Q

DP 2010-0436

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. MANUEL OVANTE, JR., Defendant.	CR-10-0085-AP CR2008-144114-001DT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Phoenix, Arizona
February 3, 2010
10:00 a.m.

Before: The Honorable Warren J. Granville, Judge

COPY

PREPARED BY: Elva Cruz-Lauer, RMR
Arizona Certified Reporter No. 50390

APPEARANCES:

For the State: MR. JASON KALISH,
MS. BELLE WHITNEY,
Deputy County Attorney,

For the Defendant: MR. GARY L. SHRIVER,
MR. QUINN T. JOLLY,
Attorney at Law,

(Whereupon, Elva Cruz-Lauer, was first duly sworn to act as the Official Reporter herein.)

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A Well, she would tell me that he was -- he was bad on them, you know, that he was hallucinating and -- because like I never drink. I don't know what it is. You know, I don't drink. I don't smoke. I don't know what it is to be on -- you know, because I don't do that. You know, so -- and -- but she would tell me he was hallucinating. He was -- always thought somebody was after him.

Q And you heard that he would become violent?

A Well, she didn't tell me that.

Q That he wouldn't go to school, or he quit going to school?

A Yeah, yeah. Well, they all did, you know, so -- and but like I told them, he was always -- he kept to himself, you know, when he was little, you know, he was always -- he had friends, like I told them, but you would never see him like his other brothers. He was always either in the house, watching TV or playing, you know, watching videos or playing the game.

Q But when he was a teenager, and I don't know if you recall meeting with Mr. Kalish and myself, and Mr. Kalish asking you some questions at the end of December. You talked a little bit more about what you heard about Manuel, Jr. on drugs.

A Uh-huh.

Q And that he -- do you recall saying that he became

irresponsible and violent is what you had heard?

A Well, I heard -- like my sister, you could hear things from here to there, because we have got a big family. One would say something, but my sister would tell me that he was, you know, that he did come to one point that he was violent, but I don't know to who, to her or to the kids, or, you know, to his sisters or brothers. She just told me that, but I don't know what she meant by that, because I didn't ask her neither.

Q Now, I just want to finally want to ask you about Alex.

A Uh-huh.

Q And Alex's relationship in the family. Would it be fair to say that you said before that Alex was a positive influence in your sister's life, more positive influence than had been around?

A Well, yeah, because I mean there were times when I would hear him scold the kids, like tell them, don't do this, don't do that, and they would more or less listen to him, even the girls, you know, but --

Q So he would try to discipline the kids?

A Yeah.

Q And he loved the kids?

A Yeah.

Q Loved all of your nieces and nephews?

and my aunts would start complaining that they didn't want them there.

Q Again, your side of the family, correct?

A Yes.

Q When you were available and you could have Manuel at your house, he was welcome in your home?

A Always.

Q You were always available to him to talk to him?

A He wouldn't really confide in me or tell me his problems or things, but I was always there.

Q Okay. And, Gloria, have you ever done meth?

A No.

Q And you, I mean, you disapprove of meth, correct?

A Yes, I do.

Q You said before that you saw Manuel when he was on meth and he acted angry and not happy. Did Helen, Manuel's sister, also tell you that when he was on meth he would throw things and become violent?

A She said when she was younger, she remembers how he would kick her things when she was like playing or things like that.

Q And did you talk to Manuel about his meth use?

A No, I -- I didn't. I talked to his brother Valentine, and I would tell his brother to talk to him and for them not to do it, but I never really -- I couldn't

him in that?

A Yes, yes.

Q And in talking about Bridget, when Manuel wouldn't come home, are there times when you spoke with her and she would cry about that and want him to be home and beg him to come home?

A On one occasion, I did see her be remorseful or cry about it, but the other times she would just be cursing saying she don't give a damn what happened to her kids.

Q Do you also recall saying in the past that she wanted him off drugs? She didn't want him to be doing drugs and hanging out with the people he was hanging out with?

A I don't remember hearing her ever say that.

Q Talking about the drugs, when Manuel was on the drugs, he was a different person?

A Yes.

Q He wasn't -- he was irresponsible?

A Yes.

Q And you heard that he had tendencies to be violent?

A Yes.

Q And that he wanted to quit the drugs?

A Uh-huh, yes.

Q That Manuel knew the drugs were bad for him?

A I am not sure if he knew they were bad for him, he

Appendix R

DP

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff,	)	CR-10-0085-AP
vs.	)	CR2008-144114-001DT
MANUEL OVANTE, JR., Defendant.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Phoenix, Arizona
February 4, 2010
10:30 a.m.

Before: The Honorable Warren J. Granville, Judge

PREPARED BY: Elva Cruz-Lauer, RMR
Arizona Certified Reporter No. 50390

APPEARANCES:

For the State: MR. JASON KALISH,
MS. BELLE WHITNEY,
Deputy County Attorney,

For the Defendant: MR. GARY L. SHRIVER,
MR. QUINN T. JOLLY,
Attorney at Law,

(Whereupon, Elva Cruz-Lauer, was first duly sworn to act as the Official Reporter herein.)

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A Yeah, they were.

Q And I want to talk to you a little bit about Manuel as a child. Isn't it true that you had said that he did have a history of being violent?

A Yeah.

Q And that once he threw a brick at --

A -- the window.

Q -- the window?

A Yeah. That's only when he was on drugs, he would be really violent with my stepdad or us. Like he would get mad at us for anything. He's never really hit me, but he hit my sister Helen.

He did it one time that I know of. He just kicked her because she was playing Barbies and he went in there messing with her toys and she started yelling at him, and he just kicked her, but like when he was off drugs, he never touched us or anything or hit us.

Q And didn't you say at one time he chased you with a gun?

A No, well he had a -- I think it was a rifle or -- no, I think it was a B.B. gun, I think, but I ran to the bar where my mom was at, and I started crying to her about it and they called the cops.

Q And you were aware that after the murders, Manuel went back to using drugs?

CROSS-EXAMINATION

BY MS. WHITNEY:

Q Helen, I just have a couple of questions for you. You said that Manuel was a different person on meth. He was violent, you were scared of him; is that true?

A Yes.

Q And doesn't he have a history of being violent? Didn't you say that he would get violent sometimes with you and your sisters when you were kids?

A There was only like a couple of times. It wasn't like always.

Q He would pull your hair?

A Um, I don't remember.

Q Isn't it true that you said that he would pull your hair when you were a child?

A I don't know. I don't remember.

Q Do you recall talking to Manuel's defense attorneys in this case?

A Yeah.

Q And isn't it true that you told them that he would get violent as a child and he would pull your hair?

A I think so.

Q And that one time --

A That happened one time, and he had -- the drugs

Appendix S

DP 2010-0434 Vidal

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. MANUEL OVANTE, JR., Defendant.	CR-10-0085-AP CR2008-144114-001DT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Phoenix, Arizona
February 8, 2010
10:30 a.m.

Before: The Honorable Warren J. Granville, Judge

COPY

PREPARED BY: Elva Cruz-Lauer, RMR
Arizona Certified Reporter No. 50390

APPEARANCES:

For the State: MR. JASON KALISH,
MS. BELLE WHITNEY,
Deputy County Attorney,

For the Defendant: MR. GARY L. SHRIVER,
MR. QUINN T. JOLLY,
Attorney at Law,

(Whereupon, Elva Cruz-Lauer, was first duly sworn to act as the Official Reporter herein.)

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you were raised, right?

A No.

MR. SHRIVER: Nothing further, Your Honor.

THE COURT: Cross-examine.

MR. KALISH: Thank you, Your Honor.

C R O S S - E X A M I N A T I O N

BY MR. KALISH:

Q Despite the way you were raised, you know the difference between right and wrong?

A Yes, I do.

Q You know it is wrong to kill people?

A Yes.

Q And you haven't done it?

A No.

Q You kind of looked up to Manuel growing up, didn't you?

A Yes, I did.

Q When you were young, were you scared of him?

A Yes.

Q He used to beat you up a lot?

A Yes.

Q When you got older, you would fight back?

A Only fought him back like once.

Q Would he beat up Patrick, too?
A No. I was always the one beating up my little brother.
Q He used to get suspended from school?
A Yes.
Q And your mom would call the police to come take him to school?
A The cops used to come pick him up, take him to school.
Q Your mom would yell at him, would hit him, to get him to do the right thing?
A Yes.
Q And he would just keep doing the same things over and over again?
A Um, yeah, sometimes.
Q Your mom and dad tried to keep him out of gangs?
A Yes.
Q And he never joined a gang?
A No, none of us did.
Q None of you did?
In fact, you talked about when Alex moved in, Alex was actually afraid of your brother Manuel?
A Yes, he was.
Q When you were in jail, before the murders, your family, your sisters, would come visit you in jail?

A Yes.

Q And they talked to you about your brother Manuel and how he was doing, right?

A Yes.

Q And they would tell you that he was on meth and they were scared, right?

A Yes.

Q And they would talk about how he used to carry a gun with him and they were afraid he was going to hurt somebody?

A I think that's what I remember, something like that. I am not real sure though.

Q And you remember telling them, wait until he is asleep or wait until he leaves the room and get that gun away from him?

A Yeah. I told them stuff like that before.

Q You ever talk to your brother about getting off meth?

A No. The reason why, because I was always doing drugs and drinking every day so I can't tell somebody to stop something when I am doing it.

Q Did you do it with him?

A No.

Q You hate your mom, don't you?

A I guess you can say that, yes.

Appendix T

DP

2010 0436 Vidal

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	CR-10-0085-AP
	)	
vs.	)	CR 2008-144114 (001) DT
	)	
MANUEL OVANTE, JR.,	)	
	)	
Defendant.	)	
	)	

BEFORE THE HONORABLE WARREN J. GRANVILLE
SUPERIOR COURT JUDGE

JURY TRIAL

Phoenix, Arizona
February 9, 2010

REPORTED BY:
AMY E. STEWART
Certified Reporter
Certificate No. 50462

PREPARED FOR:
ATTORNEY GENERAL

(**Copy**)

A P P E A R A N C E S

For Plaintiff:

Jason Kalish, Esq.
Belle Whitney, Esq.

For Defendant:

Gary Shriver, Esq.
Quinn Jolly, Esq.

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Q. And you tried to talk to him about how unhealthy it was?
A. Correct.
Q. And you tried to be a positive influence to help him stop doing that, correct?
A. Definitely.
Q. Now, Manuel was not in a gang?
A. No. Not that I know of.
Q. And you're aware of and you had said before that on one particular occasion Manuel and Patrick robbed a cousin because they were mad at him?
A. I believe so.
Q. And you also said that you knew that Manuel used to steal clothes?
A. Correct.
Q. And he used to steal money?
A. Correct.
Q. And even though -- and you knew of and knew Manuel's brothers and sisters?
A. Correct.
Q. And even though they fought sometimes, you had -- you previously said that they were all really there for each other to help out and take care of each other?
A. Yes.
Q. And they would check up on each other, check in

Appendix U

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff,	CR-10-0085-AP
vs.	CR2008-144114-001DT
MANUEL OVANTE, JR., Defendant.	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Phoenix, Arizona
February 16, 2010
10:30 a.m.

Before: The Honorable Warren J. Granville, Judge

PREPARED BY: Elva Cruz-Lauer, RMR
Arizona Certified Reporter No. 50390

APPEARANCES:

For the State: MR. JASON KALISH,
MS. BELLE WHITNEY,
Deputy County Attorney,

For the Defendant: MR. GARY L. SHRIVER,
MR. QUINN T. JOLLY,
Attorney at Law,

(Whereupon, Elva Cruz-Lauer, was first duly sworn to act as the Official Reporter herein.)

he committed another serious offense at the same time. That two people wasn't enough, shooting a third, but certainly could have killed him. That's another aggravating factor in this case.

And when you consider the mitigation, one of the things I am going to talk about is the connection between the mitigation that's presented and how Manuel Ovante ended up where he was on June, 2006.

The law says you are not required to find that there's a connection between the mitigation and the crime committed. You don't have to find he committed the crime because of the mitigation. However, you consider the importance to give the mitigation. You decide how important it is to you in whether or not it calls for a life sentence.

You can find a thousand things in mitigation. You can find the defendant's mom hit him 20 times and consider each one separately to be mitigation, but if you decide it is not very important, then you don't have to give it that much consideration.

So when you have two mitigating (sic) factors, such as that he killed two people and shot a third, consider it against mitigation such as background, drugs, and now he's sorry for what he did. Is that why he's a killer? Is that something you should give importance to? And the State says no.

the name. He made plans to be around, and then chose not to.

He chose to use drugs and to carry a gun, even though his brother, who is not the brightest bulb, is saying, hey, get that gun away from him when he is on meth. Don't -- hide it when he is asleep. Do something. Get it away from him. Defendant's choice. And he chose not to work.

One of the mitigating factors or one of the things that was talked about in opening statement was a lack of positive role. But you have got a great role model coming in with Help For Teens, Carl Portillo, trying to find the defendant work. Reverend Eve or Pastor Eve coming in trying to be positive role models.

The defendant's choice was to ignore them. You can't say there wasn't a positive role model, because there were. There were members of that family who didn't turn out like the defendant or his brothers. There were people at school who could have helped him. There was pastors at his church. There was Carl Portillo. There was his step father in his very own home who was a positive role model. The defendant made the choice to ignore them and that's why he is here.

There was talk about the defendant is a product of his environment. And to a certain extent, we are all

products of our environment. It makes us who we are, but you want to blame who the defendant is on his dad. Let's talk about that argument and just take it to its logical conclusion. Because we talk about whose fault is it the way the dad is? Is it his fault, if he is standing here on trial? No, it is his dad's fault.

And is it his dad's fault for being such a bad dad and grandfather. Well, no, of course not. It is his dad's fault. And all the way along the Ovante line, it is never anyone's fault. No one has to accept personal responsibility because someone that came before them was a bad role model.

But what happens down the line? When does it stop? When does anyone in the Ovante family have to stand up and say, I made choices? I am responsible for what I did. Instead of poisoning further generations of Ovantes and his daughter and his brothers, who he picked on, who he was the role model for, especially when his dad went to prison and can now come to court and say, my dad wasn't around.

My dad was a bad father. My dad has a history of substance abuse. So what chance do I have? But even worse than that, how many people has Manuel Ovante taken away from their kids? Their families. So that they can say, my father wasn't around. I didn't have a chance.

Appendix V

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. MANUEL OVANTE, JR., Defendant.	)	CR2008-144114-001

Phoenix, Arizona
December 18, 2019

BEFORE: THE HONORABLE WARREN J. GRANVILLE, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS
PCR EVIDENTIARY HEARING

TARA L. KRAMER, RPR
Certified Reporter #50439

Prepared for Superior Court
ORIGINAL
COPY

A P P E A R A N C E S

On Behalf of the State:
Myles A. Braccio
Nate Anthony Curtisi
Assistant Attorneys General

On Behalf of the Defendant:
Vikki M. Liles
Garrett W. Simpson
Attorneys at Law

I N D E X

where he testified about you talking with him about your chances for parole. Do you remember that testimony?

A. Yes.

Q. All right. Was that correct?

A. Yes, I -- I do believe I talked to him about that.

Q. Yeah. And would you recall what you said, perhaps?

A. Basically, the same thing, you know, just -- I was thinking about my daughter, that I wanted to get a release date for her because before her, you know, I didn't really care about much.

And once she came along, I realized, you know, whoa, I got to change the way I think, change the way I act, you know, try to do better for her. And I just wanted some kind of release date for that, you know, because I didn't want her to have to deal with her dad dying in prison.

Q. Did you exchange letters with Dominic Leyva?

A. Recently, within the last two years, he reached out to me, and I had responded to him. And I believe I spoke to Lee, my mitigation specialist -- I let him know that, hey, man, an old friend of mine from the County Jail just reached out to me.

And I believe you guys wanted to talk to

Q. All right.
A. I'm not really good at dates, though, because in here there's no calendars, or anything, so it's like every day feels the same.
Q. All right. Do you recall when you actually went up in front of the Judge and changed your plea?
A. I don't know the exact date, but I remember doing that.
Q. You remember being there?
A. Yes.
MR. SIMPSON: All right. May I get an exhibit?
THE COURT: Yes.
MR. SIMPSON: May I approach?
THE COURT: Yes.
Q. BY MR. SIMPSON: Mr. Ovante, I'm going to hand you what's been marked as No. 20 for identification. Do you recognize this at all? Have you ever seen that before? If you haven't, you can say so.
A. I'm not a hundred percent sure.
Q. Okay. It appears to be a transcript of proceedings December 15th, 2009?
A. Okay. Is that the one that I missed?
Q. No, that's the one where you pleaded guilty, I believe.

A. Okay. I thought that was in January.
Q. Do you remember that day?
A. Yes. Not the exact date, but I remember pleading guilty.
Q. And do you remember what the Court told you about the potential sentences for first-degree murder?
A. Yes.
Q. What did the Court tell you?
A. That I could -- there was three sentences available: Death, natural life, and life with the possibility of parole.
Q. In how many years?
A. After 25 years.
Q. And during that proceeding, were you told that the sentences would have to run one after the other, or could they run together?
A. It was up to -- I believe they said it was up to the judge. It can run concurrent or consecutive.
Q. All right. And how did you feel about that when the Judge told you you could get paroled in 25 years?
A. I mean, sounded good to me, you know, because I was arrested when I was 21. I figured I could do 25 years, you know.
Q. Did you believe the Court when the Court told you that?

A. Yes, I did.
Q. Did what the Court told you that day agree with what your lawyers had told you?
A. Yes. It just confirmed what they had already told me, so --
Q. And is that the same thing they told Bianca?
A. Yes.
Q. How did the Court's advice to you, that you could get paroled in 25 years, affect your decision to plead guilty?
A. It just basically just confirmed what my attorneys had already told me. And I was like, okay, this sounds good, you know, I can get 25. My option would be better if I pled guilty.
Q. And your option would be better because it would be --
A. Like --
Q. -- taking responsibility?
A. Yeah, like, basically taking responsibility and that the jury would be more lenient because it was my first time. I didn't have a criminal record, and I -- I guess they said my age, too, or something, and I was on a lot of drugs.
Q. How old were you when the killings happened?
A. 21.

Q. 21. If you had known that parole was not available and that the minimum sentence for each count of first-degree murder was a natural life sentence, would you have gone through with with the plea that day?

A. No.

Q. And why is that?

A. Because like I said earlier, I wanted a release date for my daughter, and natural life and death are the same. You die in prison, so --

Q. When was the first time you remember talking with your lawyers about second degree?

A. I don't recall ever specifically saying second degree. I had just had to bring up that there was no premeditation, no planning. I didn't know what second degree was at the time.

Q. Did they ever follow up on those suggestions?

A. No, they said -- they said they would get back to me on it, but they never did.

Q. Did they tell you that pleading guilty would help you avoid the death penalty?

A. Yes.

Q. Why was that?

A. Well, they said that because pleading guilty was basically like taking responsibility, that the jury would show more leniency because, like I said, my first time,

never been arrested before, because of my age, because of all the drug use and that --

Q. Were these their words or your -- your -- your thinking?

A. Well, they had mentioned that before because I'm so young and because I was on a lot of drugs, that it would be more likely that I'd get parole, so -- and I talked to other inmates in the jail, and they told me the same thing: Yeah, man, it's your first time, you're young, you're on a lot of drugs, there's no way -- that's not a capital case, and --

Q. So if I understand this correctly, the Court told you you could get paroled, and you believed the Court?

A. Yes.

Q. And your lawyers told you you could get parole, and you believed the Court?

A. Yes.

Q. And you believed your lawyers, I beg your pardon.

A. Yes.

Q. When did you finally learn that parole was not an option?

A. Probably about two years ago when you told me.

Q. All right. And so when you went to the prison, you even had a parole-eligible sentence, didn't you?

A. Yes.

put, like, the addresses underneath there, like who they're sent to? Yeah, I seen those, but I never seen that one.

Q. If I can take you back to the day you pled out, changed your plea, that would have been December 15th, 2009. Do you remember that day?

A. Yes.

Q. Exhibit 20 in evidence, you -- you remember -- and you talked to Mr. -- Mr. Braccio about it at some length, as I recall. I had a couple questions about it.

If during the course of the case presented at the change of plea -- the term "parole" was used several times; correct?

A. Correct.

Q. And it was told to you that the sentence could be as low as life with the possibility of parole after 25 years; isn't that correct?

A. Correct.

Q. And that was said to you several times?

A. Correct.

Q. By the Court?

A. Correct.

Q. And also by the Court, you were told that the sentences could be run concurrently; correct?

A. That is correct.

Q. All right. Now, I'm going to ask you to do a little thought experiment with me. If the Court had told you in the middle of the change of plea -- because, you know, at the end -- at the end of your change of plea here on No. 20, before the plea was accepted, the Court asks you if you really wanted to go through with it. Do you remember that?

A. Yes.

Q. All right. And -- and before that happened, let's assume for a second that the Court said, wait a second, I just realized that there hasn't been any parole available in Arizona for 25 years now back to the 1990s.

Given that, that there's no parole available to you and that the minimum sentence actually is, you know, natural life, life without the possibility of parole, would you have gone through with the plea?

A. No.

Q. All right. Would you have gone through the plea at that -- at that critical juncture where you say your last "yes," your last "I do," if you will -- would you have gone through with the plea if your lawyer, Gary Shriver, had stood up and said: Wait a second, Your Honor, I'm confused. I misinformed Mr. Ovante. There is no parole.

Would you have gone through with the plea

then?
A. No.
Q. All right. What if Mr. Kalish, the prosecutor, had said that? Would you have gone through with the plea then?
A. No.
Q. All right. What if Mr. Jolly had done that? Would you have gone through with the plea then?
A. No.
Q. If you had not gone through with the plea, you would have gone to trial, would you have not?
A. Yes.
Q. And would you have contested the statements that Nathan Duran made?
A. Yes.
Q. And the other co-Defendants or people who got deals to testify against you?
A. Yes.
Q. Now, basically, as I understand it, while you were in front of the Judge, Mr. Shriver was essentially whispering, giving you cues to say "yes" to the things the Court was asking you; is that correct?
A. Yes.
Q. And you thought it was all just for form, correct?