Attachment B

Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 2001-095438 09/04/2020

HON. TERESA SANDERS

CLERK OF THE COURT
I. Huerta
Deputy

STATE OF ARIZONA

v.

ROBERT LOUIS CROMWELL (A)

JASON DALE LEWIS

JOHN L SACCOMAN
GILBERT H LEVY

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

MINUTE ENTRY

The Court has considered Robert Cromwell's (defendant) Petition for Post-Conviction Relief (8/17/18), the State's Response (3/11/19), and the Reply (7/6/20). This is the first post-conviction petition following the affirmance of defendant's convictions and death sentence by the Arizona Supreme Court in *State v. Cromwell*, 211 Ariz. 181, 119 P.3d 448 (2005).

Procedural Background

On February 19, 2003, a jury convicted defendant of first-degree murder, unanimously finding premeditated and felony murder, and the sexual assault of a ten-year-old victim. The jury also convicted defendant of two aggravated assaults committed against the victim's mother, Ella Michelle Speaks, and her friend, Kim Jensen.

During the aggravation proceeding, the jury found proven beyond a reasonable doubt that (1) defendant committed the murder in an especially cruel manner and (2) in an especially heinous or especially depraved manner; and (3) at the time of the murder, defendant was an adult and the

murdered person was under fifteen years of age. Finding the mitigation insufficiently substantial to call for leniency, the jury returned a death sentence. On March 6, 2003, the trial court[1] sentenced defendant to death by lethal injection for the murder, life without the possibility of parole for thirty-five years on the sexual assault, and ten years for each aggravated assault.

Factual Background

The victim, Stephanie S, lived with her mother Ella, and two younger sisters, Amanda and Heather, in a one-bedroom apartment. Ella testified that in the early evening of October 7, 2001, she encountered defendant while walking to a nearby store to buy transmission fluid. Defendant yelled out to Ella, "Hey, are you a prostitute or a police officer." Ella replied, "Listen. I'm neither one. I'm a mother and I'm having a bad day. Leave me alone." Riding a bicycle, defendant caught up with Ella and said, "I just want to apologize to you. That was a very rude thing I said. In this area, there's a lot of prostitutes. I can't believe that I disrespected you that way and I want to give you my fullest apology." Ella told defendant, "It's okay. I'm just having a bad day. I don't mean to lash out at you, but I'm not in the mood for those kind of comments." Defendant offered to walk with Ella to the store, and she agreed.

Defendant and Ella later returned to her apartment, and defendant helped Ella put the transmission fluid in the car. Ella invited defendant to go to McDonald's, and he agreed. Ella and her three children followed defendant to his nearby residence to return his bicycle. All five then went to McDonald's and afterward returned to Ella's apartment. While the children ate their meals and watched television, Ella and defendant talked in the bedroom and Ella smoked methamphetamine. About an hour later, defendant agreed to accompany Ella to several bars where she inquired about a job and they played pool.

Ella and defendant returned to the apartment around 1:00 a.m. The three children were in the living room on a mattress, and Ella told them to go to sleep. Ella and defendant then played cards in the bedroom, and police later found a pad of paper on which Ella had written their names and kept score. Around 2:00 a.m., Ella received a telephone call from an acquaintance named Kelly Lancaster, who requested that Ella come to his house and help resolve a problem with their mutual friend, Kim Jensen. Defendant offered to watch the children, and Ella went to Lancaster's house.

Ella's second oldest child, nine-year-old Amanda, testified at trial. While her mother was gone, Amanda fell asleep on the living room mattress with her two sisters, Stephanie and Heather. Amanda kept waking up and going back to sleep, and she heard sounds that sounded like Stephanie

[1] Judge Aceto presided over defendant's trial and imposed judgment, and sentenced defendant on the noncapital offenses.

was hurt "lots of times." Two or three times, Amanda tried to get up but defendant would say, "Go back to bed, and get really mad." One time Amanda heard Stephanie making sounds as if "she was like really hurt," and Amanda got up and saw Stephanie in the bathtub. Defendant was washing Stephanie with socks on his hands, and Amanda described hearing "a shocking noise" that sounded like something hitting the bathtub. Amanda also heard the "[s]ame noise … that sounds like somebody was getting hurt." Amanda further testified that she saw defendant go into the bedroom, and she saw Stephanie standing unclothed in an area between the bathroom and bedroom. Amanda testified that defendant kept "coming out of the bedroom and back and forth, back and forth. And finally he went in the kitchen" and Amanda heard "silverware shatter." Before falling back to sleep, Amanda heard "a bang."

When Ella returned to the apartment complex, she saw defendant standing at the bedroom window, looking into the parking lot. Ella waved, and defendant waved back at her. Ella and Jensen walked to the apartment, and defendant opened the door. After the two women were inside the apartment, defendant started hitting Jensen over the head. He then turned and hit Ella with a pool stick that broke on her arm. Defendant ran out of the apartment, and unable to locate Stephanie, Ella began screaming and ran after defendant. Ella drove to defendant's residence and called 9-1-1. Police found Ella near defendant's residence in a hysterical emotional state, and subsequently took defendant into custody.

Amanda awoke during the attack on her mother, and she and Heather then went into the bedroom to find Stephanie. Amanda felt Stephanie's legs on the bed and saw that a television sat on her head. Amanda and Heather ran downstairs to their landlord's apartment, and the landlord called 9-1-1. Police responded to Ella's apartment and found Jensen on the floor with a head injury. A police officer went into the dark bedroom, and saw a large pool of blood beneath Stephanie's head and shoulders, wounds on her face, and blood coming from her nose, lips, and mouth. A police detective, who later processed the apartment, documented blood on multiple surfaces in the bathroom, the bedroom, and the area between the two rooms.

Paramedics arrived at the apartment, and they treated Stephanie and rushed her to Good Samaritan Hospital. Due to the severity of Stephanie's head wounds, Dr. Lucid, the treating emergency room physician, testified that she stopped all life support efforts and pronounced Stephanie dead at 4:34 a.m. Dr. Keen, the medical examiner, performed an autopsy and testified at trial. Dr. Keen described a cluster of blunt force injuries to Stephanie's head, neck, and face, and possible defensive wounds on her hands and knee area. Dr. Keen concluded that Stephanie's facial injuries resulted from a minimum of five different blows, inflicted with different instruments. Dr. Keen found 13 stab wounds to Stephanie's back and severe vaginal injuries, and he testified that Stephanie's death resulted from multiple blunt force and stab wounds.

Legal Standards

In reviewing a post-conviction petition, a court first must identify all precluded and untimely claims. Ariz. R. Crim. P. 32.11(a)(2020). If "no remaining claim presents a material issue of fact or law that would entitle the defendant to relief," a court must summarily dismiss the petition. *Id.* A colorable claim that "allege[s] facts which, if true, would probably have changed the verdict or sentence" is entitled to an evidentiary hearing. *State v. Amaral*, 239 Ariz. 217, 220 ¶ 11 (2016) (emphasis in original).

Ineffective assistance of counsel claims are not subject to the preclusion rule set forth in Rule 32.2(a), Ariz. R. Crim. P. *State v. Spreitz,* 202 Ariz. 1, 3 ¶9 (2002). To establish an ineffective assistance claim under *Strickland*'s two-prong test, a defendant must show that counsel's performance fell below an objective standard of reasonableness and caused prejudice. *Strickland v. Washington*, 466 U.S. 668, 688-90, 694 (1984). The performance prong requires that "a court indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that under the circumstances `the challenged action might be considered sound trial strategy.'" *Id.* at 687-88.

To establish prejudice, a defendant "must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* 466 U.S. at 694. It is insufficient for a defendant to show "that an error by counsel had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test … and not every error that conceivably could have influenced the outcome undermines the reliability of the proceeding." *Id.,* 466 U.S. at 693.

Post-Conviction Claims

I. Claim (A)(1) & (2). Ineffective Assistance of Trial Counsel in the Penalty Phase

As a preliminary matter, defendant has relied on juror statements to show prejudice. The state objected, arguing that defendant impermissibly utilized the statements to impeach the jury's verdict.

"[T]he near universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict." *Tanner v. U.S.,* 483 U.S. 107, 117 (1987). In Arizona, a court may receive a juror's testimony or affidavit "that relates to the conduct of a juror, a court official or a third person. But the court may not receive testimony or an affidavit that relates to the subjective motives or mental processes leading a juror to agree or

disagree with the verdict." Ariz. R. Crim. P. 24.1(d); *see also State v. Nelson*, 229 Ariz. 180, 191 ¶ 48 (2012)("If a verdict could be impeached based on a juror's mental process at the time of deliberation," any verdict would be subject to challenge.) Based on the foregoing authority, with the exception of claims involving misconduct of a juror or another person, the Court did not consider any of the declaration statements that describe a juror's "subjective motives or mental processes" concerning the defendant's trial or the jury's verdict.

A. Trial counsel's mitigation investigation and consultation with expert witnesses

Defendant alleges that trial counsel conducted an unreasonably limited mitigation investigation, and failed to follow up with appropriate experts partly due to an office policy that required the use of "a single, in-state expert." Defendant argues that these alleged deficiencies caused prejudice by preventing the jury from learning about defendant's "genetic predisposition to serious mental illness," a schizophrenia diagnosis, and frontal lobe and executive functioning impairment, as well as the extent of childhood trauma and abuse presented at trial. The State responds that defendant's proffered evidence is cumulative, that counsel presented the results of a reasonable investigation to a qualified expert, that lead counsel, James Logan, has previously testified he did not have a problem getting funding for experts (exhibits B-D), and no pre-trial evidence raised a reasonable belief that defendant had schizophrenia or brain impairment.

In a capital case, trial counsel has an obligation to conduct a thorough investigation of a defendant's background. *Williams v. Taylor*, 529 U.S. 362, 393, 396 (2000). *See also Porter v. McCollum*, 558 U.S. 30, 39 (2009) ("It is unquestioned that under the prevailing professional norms …, counsel had an `obligation to conduct a thorough investigation of the defendant's background".) In analyzing the reasonableness of counsel's failure to present proffered mitigation, the focus is "whether the investigation supporting trial counsel's decision not to introduce mitigating evidence of [defendant's] background was *itself reasonable*." *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003)(emphasis in original). Additionally, professional standards require that a mitigation investigation "should comprise efforts to discover *all reasonably available* mitigating evidence". *Id.* at 524 (citation omitted)(emphasis in original).

1. Summary of mitigation evidence

During defendant's penalty proceeding, trial counsel presented testimony from two witnesses, Dr. Rosengard, a psychiatrist, and mitigation specialist Lisa Christianson. Dr. Rosengard met with defendant two times for approximately 60 to 90 minutes, and conducted a forensic interview and a mini-mental examination. Dr. Rosengard also reviewed summaries of interviews of defendant's family members, defendant's records from McDowell Health Care Center and Correctional Health Services, and a transcript of defendant's police interview. Based on the records reviewed, and Dr. Rosengard's interviews with defendant and the summaries of

family interviews, Dr. Rosengard diagnosed defendant with major depression, post-traumatic stress disorder, a generalized anxiety disorder, a panic disorder, and attention deficit disorder. Dr. Rosengard further testified that doctors had prescribed testosterone as a treatment for defendant's acquired human immunodeficiency virus (HIV) and explained that testosterone is a steroid with negative side effects, which may include an increased level of anger and violent reactions.

Dr. Rosengard's testimony included information about defendant's background and his opinion that the emotional trauma and neglect in defendant's background contributed to the development of the diagnosed mental illnesses. Christianson then provided the jury with a background about defendant's chaotic and unstable living situations throughout his younger years, and defendant's institutional placements that resulted from inappropriate parenting and juvenile referrals. Christianson also recounted family descriptions of sexual abuse committed by defendant's maternal grandfather against defendant's mother and aunt, and defendant and his sister. Family members also told Christiansen that a maternal uncle sexually abused defendant, and that his mother neglected her children and abused them physically and emotionally. Not all of the information provided by family members was mitigating, and trial counsel argued to the jury that Christianson's willingness to testify fully about the statements made by family members demonstrated her credibility.

2. Analysis of defendant's claim

The foregoing testimony demonstrates that trial counsel conducted an investigation into defendant's background and retained Dr. Rosengard to conduct a mental health evaluation. Specifically, mitigation specialist Christianson obtained juvenile and medical records, and she interviewed a number of defendant's family members and told the jury about instability, neglect, and abuse experienced by the defendant, including sexual abuse.

Defendant argues, however, that counsel failed to consider additional information that was reasonably available. Specifically, defendant contends that counsel failed to follow up with witnesses provided by the former mitigation specialist Melissa Kupferberg[2], and failed to provide these witness statements to the jury and Dr. Rosengard. Defendant further points to medical and military records from defendant's grandfather, Hershel Wooley, and argues that these records and witness declarations demonstrate a genetic disposition to serious mental illness. Additionally, defendant presented opinions from defense and state experts who diagnosed him with

[2] Kupferberg met with defendant two times before her office withdrew from the representation and wrote a letter to Lisa Christianson, providing information about defendant and the names of people in contact with him prior to the offense. (PCR Ex. 45)

schizophrenia and cognitive disorder during a post-conviction competency evaluation, and defendant presented expert diagnoses of frontal lobe and executive functioning impairment.

Defendant has not shown that trial counsel conducted an unreasonable investigation or failed to follow up on reasonably available mitigating evidence. First, Christianson interviewed most of the family members who provided post-conviction declarations, and defendant has not shown that trial counsel failed to obtain reasonably available information during these interviews concerning defendant's background. Additionally, Christianson testified about defendant's juvenile records, which provided documentation about defendant's unstable and abusive home environment.

With respect to the witnesses listed by Kupferberg, Christianson did interview Jacqueline Snowden, the case manager of A Place Called Home, defendant's residence at the time of the offense. (Ex. 30) Nonetheless, even assuming that counsel conducted an inadequate investigation concerning the witnesses listed by Kupferberg, defendant has not shown why this was unreasonable or how such investigation would have changed the direction of the mitigation investigation. For instance, in her post-trial declaration, Snowden wrote that defendant stared off into space, had glassy eyes and talked to himself. Snowden further believed that defendant experienced auditory hallucinations and had a serious mental illness. (Ex. 30) Zane Williams, a resident at A Place Called Home, described defendant as childlike, and that he had bizarre ideas and believed in conspiracy theories. (Ex. 31)

This information reasonably should have pointed counsel to a mental health evaluation and a review of defendant's medical records. However, counsel completed such an investigation by retaining Dr. Rosengard, a psychiatrist, to assess defendant for mental illness, and by obtaining defendant's medical records from McDowell Health Care Center. Consistent with the obtained medical records and the other witness statements, Dr. Rosengard diagnosed defendant with major depression, post-traumatic stress disorder, a generalized anxiety disorder, a panic disorder, and attention deficit disorder.

Thus, while the evidence reasonably available to trial counsel suggested that defendant may have a mental illness, defendant has not shown that counsel unreasonably failed to uncover evidence that required a neuropsychological evaluation or brain scanning. Instead, the record supports the conclusion that defendant obtained additional information in 2010, during the post-conviction proceeding, when mental health staff at the prison advised counsel that defendant underwent a "recent and sudden change in behavior." (Dkt. 246 at 2). Considering the evidence available to trial counsel, defendant has not made the required factual showing that similar information was available to counsel prior to defendant's trial in 2003.

Defendant also has not overcome *Strickland*'s strong presumption that under the circumstances of this case, counsel's challenged decision to have Christianson testify was not sound trial strategy. The fact that family members revealed unfavorable information about defendant does not demonstrate the unreasonableness of counsel's decision. Whether the family members testified themselves or Christianson revealed the substance of their statements, the jury would have learned the information challenged by defendant. Additionally, Christianson's testimony demonstrates that family members were difficult to contact and suspicious about the mitigation investigation. Counsel may have decided the better path was to present defendant's background through Christianson rather than undependable family members, as portrayed by the trial testimony.

In addition to failing to show deficient performance, defendant has not demonstrated prejudice. Considering the totality of the mitigation presented in post-conviction and the totality of mitigation presented at trial, defendant has not shown a reasonable probability of a different penalty phase verdict. Even if the jury heard defendant's additional evidence, the especially cruel aggravator and the brutal attack against the young victim were substantial aggravating evidence. Additionally, defendant's behavior during the entire evening spent with the victim and Ella undercuts defendant's presentation of schizophrenia and cognitive impairment.

For all of the foregoing reasons, defendant has not met his burden to show ineffective assistance of trial counsel relating to the mitigation investigation and presentation of evidence during the penalty phase.

II. Claim (A)(3)&(4). Ineffective Assistance of Trial Counsel in the Guilt Phase

Defendant alleges that trial counsel failed to investigate and present evidence to rebut premeditation with a "*Christensen* defense." Defendant further faults counsel for failing to object to the premeditation jury instruction and the prosecutor's closing argument.

A. Christensen Impulsivity Defense

In *State v. Christensen,* 129 Ariz. 32, 34 (1991), the trial court precluded psychiatric testimony that, based on expert's assessment and testing, the defendant had difficulty dealing with stress and tended to act more reflexively than reflectively. The Arizona Supreme Court reversed, finding that "[t]he establishment of the character trait of acting without reflection tends to establish that the appellant acted impulsively" and could have rebutted premeditation. *Id.* at 35. The Court also imposed a limitation on this rule, and explained an "expert witness may not testify specifically as to whether a defendant was or was not acting reflectively at the time of a killing." *Id.*

Additionally, "apart from insanity, Arizona does not permit a defendant to introduce evidence of a mental disease or defect as either an affirmative defense or to negate the mens rea element of a crime." *State v. Malone,* 247 Ariz. 29, 31 ¶8 (2019)(citing *State v. Mott*, 187 Ariz. 536, 540-41 (1997). However, *Mott* does not restrict the introduction of "observation evidence" to rebut mens reas, which consists of testimony from individuals who observed the defendant and expert testimony about the defendant's "tendency to think in a certain way and his behavioral characteristics." *Clark v. Arizona*, 548 U.S. 735, 757, 760 (2006); *Malone*, at ¶¶ 10-12.

Defendant relies on two categories of evidence. He first cites to Dr. Woods' medical opinion that frontal lobe and executive functioning impairment resulted in "deficits in planning, understanding, and predicting consequences, and behavioral controls, consistent with Mr. Cromwell's tendency to act impulsively." (Ex. 22 at 33-34) Defendant next contends that Dr. Woods and lay witnesses could have testified to "observational evidence" about defendant's "behavioral tendencies" or "character traits" of impulsivity to rebut premeditation.

This claim is not colorable. Even assuming the truth of defendant's allegations, there is no reasonable probability of a different sentencing result, but for counsel's failure to present a "*Christensen* defense." First, defendant has not shown a reasonable probability that the trial court would have allowed counsel to introduce Dr. Woods' medical opinion about defendant's brain impairment to establish impulsivity because *Mott* prohibits such evidence. Additionally, "a tendency to act impulsively in no way precludes a finding of legal premeditation," *State v. Wood,* 180 Ariz. 53, 64 (1994), and *Christensen* does not apply to the jury's unanimous felony murder verdict. *See State v. Lopez*, 234 Ariz. 465, 469 ¶¶ 20-23 (App. 2014)(*Christensen's* rule is applied only to rebut premeditation).

Moreover, the State's evidence rebuts defendant's claim. Defendant spent the evening with Ella and her three daughters, and he volunteered to stay with the children. While the children were alone with defendant, Amanda heard the victim making noises as through she was hurt "lots of time," and defendant stopped Amanda from getting up two to three times. Amanda saw defendant washing the victim in the bathtub with socks on his hands. Amanda also saw defendant go back and forth from the bedroom into the kitchen, and Amanda heard "silverware shatter." Additionally, defendant told Amanda that he spoke with Ella about the victim's "privates" and defendant touched Amanda to show her where he had touched the victim. Defendant then remained in the apartment, and Ella saw defendant standing at the bedroom window, looking into the parking lot. After opening the door, defendant attacked both Jenson and Ella with a pool cue.

In sum, the duration of the murder event, and the totality of defendant's actions that evening and night, overwhelmingly establishes reflective, rather than impulsive behavior. Defendant has not alleged the existence of an unreasonable decision to forego the presentation of a "*Christenson* defense," or that this alleged deficiency caused prejudice.

B. Premeditation Jury Instruction and Closing Argument

At the conclusion of the guilt phase, the trial court read the following premeditation definition to the jury:

> Premeditation means that the defendant's intention or knowledge existed before the killing long enough to permit reflection; however, the reflection differs from the intent or knowledge that conduct will cause death. The mental state of premeditation is distinct from the mental state required for intentional or knowing Second Degree Murder. It may be proven by circumstantial evidence. It is this period of reflection, regardless of its length, which differentiates First Degree Murder from intentional or knowing Second Degree Murder. An act is not done with premeditation, if it is the instant effect of a sudden quarrel or heat of passion.

(R.T. 2/13/02 at 35-36) Defendant argues that this jury instruction impermissibly highlights the passage of time to establish reflection, and that counsel unreasonably failed to object to the instruction and the prosecutor's reliance on it in closing argument.

The year after defendant's trial, the Arizona Supreme Court addressed the statutory definition of premeditation. The Court disapproved of jury instructions that used the language "actual reflection is not required," and discouraged use of the phrase "as instantaneous as successive thoughts of the mind." *State v. Thompson*, 204 Ariz. 471, 480 ¶ 33 (2003). The premeditation instruction provided to defendant's jury did not contain the foregoing language, and it did not improperly relieve the State of its obligation to prove the element of premeditation. To the contrary, the instruction explicitly states that reflection must exist before the act of killing, and that reflection differs from knowledge or intent that an act will cause death.

Defendant argues, however, that the instruction improperly relied on the passage of time to establish reflection with the language that the "period of reflection, regardless of its length" differentiates first and second-degree murder, and that the prosecutor repeated this erroneous definition in closing argument:

> The opportunity to reflect, and this man did reflect on what he did. Opportunity to reflect. That's all the State has to prove and we have overwhelming [sic] proved that in this case.

(R.T. 2/13/03 at 71-72)

Viewed in totality, the prosecutor did not argue that proof of actual reflection was not required. In *Thompson,* the Court noted that the "state may argue that the passage of time *suggests* premeditation, but it may not argue that the passage of time *is* premeditation." *Id.* at 480 ¶33 (emphasis in original). "In short, the passage of time is but one factor that can show that the defendant actually reflected. The key is that the evidence, whether direct or circumstantial, must convince a jury beyond a reasonable doubt that the defendant actually reflected." *Id.* at 479 ¶32.

The prosecutor's argument reasonably can be interpreted to argue that the passage of time suggests premeditation because the prosecutor next recounted the circumstantial evidence that established premeditation. *See State v. Boyston*, 231 Ariz. 539, 551 ¶ 60 (2013)("To prove premeditation, the state must establish actual reflection and more than the passage of time, but it may do so with all the circumstance evidence at its disposal in a case.")

As defendant notes, the prosecutor argued that defendant used different weapons, one type to inflict blunt force trauma and a knife to inflict the stab wounds, and that Amanda heard defendant in the kitchen and the sound of "silverware shatter." Defendant also stabbed the ten-year-old victim 13 times, delivered at least five blows to her face and head, and these actions took place in three different locations in the apartment. The Arizona Supreme Court has found substantial evidence of premeditation from a "prolonged, brutal attack," *State v. VanWinkle,* 230 Ariz. 387, 392 ¶16 (2012).

Additionally, the Court has explained that "[c]arrying the murder weapon to the scene is strong evidence of premeditation … Leaving the scene to retrieve a weapon is even stronger evidence of premeditation because it suggests [the defendant] had formed a plan for committing the murder[] and then set about carrying it out." *State v. Nelson*, 229 Ariz. 180, 185 ¶16 (2012). Police found the blade and handle of a kitchen knife used to stab the victim, and Amanda's testimony provided circumstantial evidence that defendant retrieved the knife from the kitchen during his attack on the victim.

In sum, defendant has not shown deficient performance or prejudice. It is noteworthy that defendant insisted on and did present a mistaken identity defense, and defendant told the jury that another man entered the apartment with the victim as defendant was departing. The prosecutor also did not argue that proof of reflection was not required, and he did not use the phrase "as instantaneous as successive thoughts of the mind." Finally, the prosecutor presented substantial evidence of premeditation, and there is no reasonable probability of a different verdict with a modified jury instruction or prosecutorial argument.

III. Claim (4)(A). Ineffective Assistance of Trial Counsel in the Aggravation Phase

In this claim, defendant alleges that trial counsel unreasonably failed to investigate and challenge the especially heinous, cruel, or depraved aggravating factor, A.R.S. § 13-751[3](F)(6). Defendant alleges trial counsel's deficiencies caused prejudice, because the State's evidence was insufficient to prove the (F)(6), and the (F)(9) aggravator (age of the victim), standing alone, would not have supported a death sentence.

The especially heinous, cruel, and depraved aggravator is stated in the disjunctive, and evidence of an individual prong supports a finding of the (F)(6) aggravator. *Cromwell*, 211 Ariz. at 189 ¶43. Defendant's jury separately found proven beyond a reasonable doubt that defendant committed the murder in an especially cruel manner (Dkt. 135) and in an especially heinous or depraved manner (Dkt. 136).

A. Background

On appeal, defendant challenged the (F)(6) cruelty prong as unconstitutionally vague. *Id.* at 188 ¶40. The Arizona Supreme Court rejected this argument, finding that the following jury instruction provided sufficient narrowing and specificity to overcome defendant's constitutional vagueness challenge:

> Cruelty goes to mental and physical anguish suffered by the victim. Mental anguish occurs when the victim experiences significant uncertainty about her fate. In order to constitute cruelty, conduct must occur before death and while a victim is conscious. Conduct occurring after death or while a victim is unconscious does not constitute cruelty. Before conduct can be found cruel, the State must prove that the defendant knew or should have known that the conduct would cause suffering to the victim.

Id. at 189 ¶42. The Court also independently reviewed the (F)(6) aggravating factor. The Court noted that the aggravating factors were uncontested and that defendant only argued that he did not kill the victim. The Court also found that the record was "replete with cruelty" and that the ten-year-old victim, "unquestionably suffered unspeakable mental anguish, given the medical examiner's finding that she was still alive at the time of the stabbing injuries and the sexual assault. The crimes committed … against the child bespeak horrific cruelty … and given her tender age [the victim] was made to suffer pre-death anguish by conduct indescribable except in the most repulsive terms." *Id.* at 191 ¶55.

B. Claim (A)(4)(a). Evidence of Consciousness to Support Especially Cruel

[3] A.R.S. § 13-703(F)(6) was renumbered after trial. The language of the statute remains the same, and this ruling cites to the current statute.

Defendant first contends that counsel's failure to move for a directed verdict or to cross-examine Dr. Keen caused prejudice, because "[i]f the evidence is inconclusive on consciousness, the factor of cruelty cannot exist." *State v. Fulminante,* 161 Ariz. 237, 255 (1988). Defendant argues that the State's evidence did not establish the (F)(6) cruelty prong because Dr. Keen testified that the victim was unconscious after the blunt force injuries to her head, and that the stabbing and vaginal injuries occurred after the head injuries. To demonstrate the victim was unconscious after the head injuries, defendant quotes Dr. Keen's testimony that "the two lacerations above the ear would like cause unconscious [sic] and certainly the one to the forehead zapped her into unconscious." (R.T. 2/11/03 at 59)

The especially cruel aggravator does not require "the victim's suffering [to] have lasted for any specific length of time." *State v. Goudeau,* 239 Ariz. 421, 463 ¶184 (2016). Nor must the State prove that the victim was conscious for every wound inflicted. *State v. Lopez*, 163 Ariz. 108, 115 (1990). Instead, courts "consider the entire murder transaction, not merely the fatal act, in evaluating whether a murder was committed in an especially cruel manner." *Goudeau*, at 464 ¶184.

The totality of the murder event, based on the physical evidence and testimony from Dr. Keen, Detective Femenia, and Amanda, establishes substantial evidence of an especially cruel killing. Additionally, the evidence rebuts defendant's argument that the injuries suffered by the victim were "inflicted in quick succession, one of them leading rapidly to unconsciousness." *State v. Soto-Fong,* 187 Ariz. 186, 204 (1996). As discussed above, multiple times Amanda heard sounds as though the victim was hurt, and Amanda saw the victim unclothed in the bathtub and standing outside of the bedroom. Amanda also heard something hit the bathtub, and she testified that the victim walked slowly and looked hurt. After the victim went into the bedroom, Amanda heard a "bang."

Amanda's testimony corresponds with the physical evidence. Specifically, Detective Femenia found "a broken section to a wood handle, to a hammer," "a section of a metal, black flashlight" and a broken kitchen knife in the bedroom area. (R.T. 2/4/03 at 171, 176, 180, 182) Detective Femenia also noted "a blood drop dripping down the wall in "the entryway from the hallway into the bedroom." (*Id.* at 184) In the bedroom area, Detective Femenia observed "blood spatter[] and possibly blood castoff" and "small blood stains" on a cabinet, and "blood spatter" on the wall. A full-length mirror had "blood spatter," and there was a "little blood spatter" on a window. (*Id.* at 184-85) In the bathroom, Detective Femenia noted "blood spatter" on "the back wall of the shower tub … on the inside of the tub, on the surface of the tub." (*Id.* at 185)

The foregoing evidence established that defendant forcefully struck the victim numerous times, and Amanda heard the victim's expressions of pain. Amanda also saw the victim unclothed

and conscious, in the bathroom and bedroom entry area, and Detective Femenia documented blood in both of these locations (in addition to the bedroom).

Moreover, Dr. Keen's testimony does not support a conclusion that a rapid series of blows rendered the victim unconscious. Instead, Dr. Keen's testimony also established that the victim consciously suffered physical pain. Dr. Keen testified that multiple blunt force trauma and stabbing injuries caused the victim's death. (R.T. 2/11/03 at 71-72) He opined that all of the victim's injuries occurred before death, and most of them occurred around the time of death. (*Id.* at 65-66) In reaching these conclusions, Dr. Keen discussed three major types of injuries. (1) Blunt force trauma, bruising, and lacerations, (2) thirteen stab wounds to the back, and (3) severe vaginal tearing and injury.

With respect to the stab wounds, Dr. Keen found no basis to exclude the knife blade in evidence as the instrument that caused the wounds. (*Id.* at 56) Dr. Keen testified that the victim was alive when stabbed, but defendant is correct that Dr. Keen was uncertain whether the victim was conscious during the entire stabbing due to some of the head wounds. (*Id.* at 58) Dr. Keen also opined that a small amount of bleeding around the lungs, "suggests that the damage to the lungs is rather late in the course of the assault, probably among the last injuries sustained and she did not live for a long period of time after the insult of the stabbing wounds." (*Id.* at 65) Similarly, Dr. Keen found the least amount of hemorrhaging in the vaginal area, but the hemorrhaging indicated the victim was still alive when the vaginal injuries began. (*Id.* at 63, 66)

With regard to the head wounds, contrary to defendant's argument, Dr. Keen did not testify that the victim was unconscious for all of the head wounds. Instead, Dr. Keen testified that two lacerations above the ear, and a forehead injury fracturing the skull, caused Stephanie to lose consciousness. (*Id.* at 59) Dr. Keen also testified that other severe injuries occurred when the victim was conscious. Specifically, Dr. Keen documented a large bruise to the victim's shoulder and other wounds that resulted from a minimum of five different blows to the head. (*Id.* at 51) The bruise measured five by four inches and extended from the left forehead down to the maxilla (jaw) area. (*Id.* at 45) Dr. Keen opined that a large flat surface, such as the floor or a cabinet, could cause this type of injury. (*Id.* at 46) Dr. Keen further documented mouth injury that caused a tear to the lip and gums, and a missing tooth, (*id.* at 50), and testified these injuries were neither "life threatening" nor "conscious impairing." (*Id.* at 59) Dr. Keen also opined that a fracture in the orbital area and a severe injury to the ear would not necessarily cause loss of consciousness. (*Id.*) Dr. Keen documented defensive wounds on both hands, testifying that the victim very likely received the associated bruising while conscious and trying to block a blow with her hands or by trying to steady herself from a push. (*Id.* at 43, 52-54)

In sum, the foregoing evidence refutes defendant's claim that trial counsel unreasonably failed to make a Rule 20 motion and to cross-examine Dr. Keen based on the evidence presented

at trial. Substantial evidence established that the victim consciously suffered physical pain and experienced mental anguish. *See, e.g., State v. Snelling*, 225 Ariz. 182, 188 ¶27 (2010)("Evidence of a victim's pleas and defensive injuries can show that she suffered mental anguish."). Defendant has not shown that counsel's professional performance was unreasonable or that there is a reasonable probability of a different result, but for the alleged deficiencies.

C. Claim (A)(4)(b). Especially Cruel Aggravator Did Not Establish Defendant's Requisite State of Mind

This claim faults trial counsel for failing to hold the State to its burden to prove that "defendant knew or should have known that the conduct would cause suffering to the victim," and for failing to present evidence that mental illness, and frontal lobe and executive functioning impairment prevented the formation of this requisite state of mind.

As discussed above, the injuries described by Dr. Keen, the blood spatter evidence, and the victim's expressions of pain, are substantial evidence that defendant knew or should have known his conduct would cause suffering. Additionally, the newly proffered evidence of defendant's mental illness and brain impairment does not show a reasonable probability of a different result because courts analyze the requisite mental state under an objective standard. *See State v. Bolton,* 182 Ariz. 290, 311 (1995)(explaining that a victim's "suffering must have been objectively foreseeable … A defendant's subjective intent to cause suffering … [is] irrelevant"). Defendant has not shown deficient performance or prejudice.

D. Claim (A)(4)(c). Especially Heinous or Depraved Aggravator

Defendant next faults trial counsel for failing to challenge whether defendant "continued to inflict violence after he knew or should have known that a fatal action had occurred", for failing to present evidence related to defendant's mental illness and brain impairment, and because counsel did not present mental health evidence to unify the trial phases.

The trial court provided the following jury instruction on the especially heinous or depraved prong of the (F)(6) aggravator:

> A murder is heinous if it is "hatefully" or "shockingly evil." A murder is depraved if "marked by debasement, corruption, perversion or deterioration." The terms "heinous" and "depraved" focus upon a defendant's state of mind at the time of the offense, as reflected by his words and/or acts. In order to find heinousness or depravity, you must find that the defendant had such a mental state as exhibited by the infliction of gratuitous violence on the victim beyond that necessary to kill.

> To assist you in determining whether a crime is heinous or depraved, you [may] consider whether: One, the murder was senseless; or, two, helplessness of the victim.
>
> All murders are "senseless" because of their brutality and finality. Yet not all are senseless as the term is used to distinguish first degree murders that warrant a death sentence and those that do not. Rather, a "senseless" murder is one that is unnecessary to achieve the defendant's criminal purpose. "Helplessness" is proven when the victim is unable to resist.
>
> Neither "senseless" nor "helplessness" standing alone are sufficient to prove that this murder is heinous or depraved."

(R.T. 2/20/02 at 55-56)

Evidence shows gratuitous violence when a defendant continues to inflict violence after he knew or should have known that a fatal action occurred. *State v. Benson,* 232 Ariz. 452, 464 ¶49 (2013)(citation omitted). "[T]he inquiry is not whether the victim was dead before further injury was inflicted, but rather whether more injury was inflicted than necessary to kill." *Id.* The evidence at trial, discussed above, demonstrates that the State presented substantial evidence of violence beyond that necessary to kill.

For instance, Dr. Keen testified that blunt force trauma and the stabbing wounds caused death. Dr. Keen testified that "certainly" the blunt force injury to the victim's forehead caused her to become unconscious. (R.T. 2/11/03 at 59) Dr. Lucid testified that this forehead laceration was quite large, and she was able to feel the fractured skull underneath the wound. (*Id.* at 15. *See also id.* at 49–Dr. Keen pulled apart "a gaping area of the skin and described a linear fraction across the skull bone"). Dr. Lucid further observed brain matter coming through the wound, which indicated it was very severe. (*Id.* at 15) Dr. Lucid also observed blood coming out of the ear canal, a sign of a skull fracture, and she felt a facial fracture and noted "an unstable fracture of the alveolar ridge or upper jaw." (*Id.* at 15-16) In addition to these severe and life-threatening injuries, defendant sexually assaulted the child and stabbed her thirteen times with a coarsely serrated kitchen knife. Dr. Keen testified that the pattern of ten of the stab wounds likely meant the victim was either nonresponsive or could not move. (*Id.* at 57, 60-61)

In sum, defendant has not shown deficient performance arising from trial counsel's failure to challenge the heinous or depraved prong of the (F)(6) aggravator or by failing to present evidence of defendant's proffered mental illness or brain impairment evidence. Given the totality of the trial evidence, showing the duration of the murder event, the severity and number of the injuries inflicted on the victim, and that defendant went into the kitchen to obtain a knife during the murder event, there is no reasonable probability of a different result.

E. Claim (A)(5). Requested Relief Based on Cumulative Deficient Performance

Defendant raises a separate claim for relief, arguing that cumulative prejudice resulted from multiple instances of alleged deficient performance by trial counsel. The Arizona Supreme Court addressed this argument in *State v. Pandeli*, 242 Ariz. 175, 192 ¶69 (2017), and "reiterate[d] the general rule that several non-errors and harmless errors cannot add up to one reversible error." However, the Court also noted that the Ninth Circuit has found prejudice based on the cumulative impact of multiple deficiencies, and left the door for such an analysis in a future case if warranted. Because trial counsel's decisions and performance related to the foregoing claims were within the bounds of professional competence, there is no cumulative impact of multiple deficiencies.

IV. Claim (B). Ineffective Assistance of Trial Counsel in Jury Selection

This claim alleges that trial counsel failed to question and to remove biased jurors for cause, and that post-trial juror declarations constitute newly discovered evidence of juror misconduct.

To the extent these allegations assert a stand-alone constitutional claim under Rule 32.1(a)(conviction or sentence unconstitutionally obtained), they are precluded under Rule 32.2(a)(3)(waived at trial or on appeal).

A. Claim (B)(1), (2). Juror Bias

Defendant first alleges that trial counsel was ineffective for failing to challenge or prevent "two automatic-death jurors" from serving on the jury. Based on their questionnaire responses, defendant contends that Jurors 3 and 7 demonstrated a bias in favor of the death penalty and an unwillingness to consider and give effect to mitigation.

The "proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment … is whether the juror's views would `prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). "A juror who would automatically vote for the death penalty without considering the presence of mitigating circumstances does not meet th[e] threshold requirement of impartiality." *State v. Johnson*, 247 Ariz. 166, 197 ¶ 109 (2019); *Morgan v. Illinois*, 504 U.S. 719, 733 (1992). But a prospective juror is not precluded from serving on the jury simply because he favors the death penalty." A juror may serve, if "the juror is willing to set aside his opinions and base his decisions solely on the evidence." *Id.*

Prior to voir dire, a prescreen jury questionnaire asked each prospective juror, "What is your opinion of the death penalty." Juror 3 wrote, "If an individual is guilty with no possibility of innocence they intentionally killed someone the death penalty is appropriate." (Ex. 74 at 12) On

the same question, Juror 7 wrote, "I think it's fair if (sic) person is found guilty of the crime." (Ex. 76 at 12) On question 57, both jurors endorsed the response that, "My decision on whether to impose the death penalty would depend upon the facts and circumstances of the case." Neither juror endorsed the response that, "I would vote to impose the death penalty in every case where I could." Additionally, on question 65, both jurors checked yes, that "it would be wrong … for the first time, to state during deliberations that regardless of the facts [a juror] would never vote for the death penalty …" (Ex. 74 & 76 at 13)

However, Defendant contends that these Jurors demonstrated a disqualifying bias toward the death penalty in their questionnaire responses. Defendant argues that both questionnaire responses reflect a belief that guilt is the only factor in deciding whether a life sentence is appropriate and demonstrates a disqualifying bias in favor of a death sentence. Defendant argues that Juror 7's failure to answer questions 66 and 67 demonstrates bias. Defendant also points to Juror 3's declaration, that "where the murder was planned and deliberate, and there are no doubts about guilt or any defenses proved like self-defense or insanity, death is the only appropriate sentence." (Ex. 50 at ¶ 10)

While it does not appear trial counsel directly questioned either Juror about their death penalty views, the trial court asked whether any of the jurors would vote in favor of the death penalty in every case in which a defendant was convicted of premeditated or first-degree murder. (R.T. 1/30/03 at 31-36). Neither Juror 3 nor Juror 7 responded affirmatively. Defendant has not shown these jurors were substantially impaired or unable to perform their duties in accordance with the jury instructions due to their views about the death penalty. Juror 3's declaration pertains to mental processes bearing on the penalty phase deliberations, and it is not considered. Ariz. R. 24.1(d). Additionally, the prescreen questionnaire responses do not demonstrate bias, and defendant has not shown a reasonable probability that the trial court would have granted counsel's request to challenge these jurors for cause, under Rule 18.4(b), Ariz. R. Crim. P., or that the result of the trial would have been different. "Speculation as to juror bias is insufficient to establish that [a] defendant is denied a fair trial." *State v. Soule*, 164 Ariz. 165, 169 (App. 1989). "[S]o long as the jury that sits is impartial," then there is no Sixth Amendment violation. *Ross v. Oklahoma,* 487 U.S. 81, 88 (1988).

B. Claim (B)(3). Juror Misconduct

Defendant argues that Jurors 1, 3, 5, 7, 9, 10 were "mitigation impaired," and that these jurors committed misconduct by failing to reveal their biases during voir dire. Defendant relies on post-trial declarations executed by the foregoing jurors. Defendant contends that these declarations constitute newly discovered evidence under Rule 32.1(e), and are admissible under Rule 24.1 because the statements address each juror's lack of qualification. This claim is not colorable.

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

In *State v. Acuna Valenzuela*, 245 Ariz. 197 ¶ 62 (2018), the Arizona Supreme Court explained that juror declarations are admissible evidence "to prove that one or more of the jurors intentionally concealed bias or prejudice on proper voir dire examination" or to determine whether "racial animus" was a "significant motivating factor" in the juror's verdict. Defendant has not satisfied this standard and shown that the post-trial declarations constitute newly discovered evidence of *intentional* concealment of bias or prejudice in response to a question posed during voir dire examination. Additionally, the declarations do not constitute evidence the Jurors were not qualified to serve.

C. Claim (B)(4). Penalty Phase Jury Instructions and Prosecutorial Argument

Defendant next alleges that jury instructions and prosecutorial argument improperly "reinforce[ed] the biases of automatic-death and mitigation-impaired jurors by giving their biases the imprimatur of law." (Pet. at 84) Specifically, defendant contends the prosecutor improperly argued defendant was required to overcome the substantial aggravating factors and the "four point" jury instruction defined a death sentence as the "presumptive" verdict, by listing three scenarios in which the jurors must return a death sentence and providing no option for a non-unanimous finding.

To the extent that defendant's allegations raise a stand-alone claim under Rule 32.1(a), this claim is precluded under Rule 32.2(a)(3) for failure to object at trial or raise the issue on appeal. This claim also is not colorable on the merits because the jury instructions correctly stated the law. In addition to the portion of the instructions cited by defendant, the trial court provided the following instruction to the jury:

> If you unanimously find no mitigation exists, you must impose the death penalty. A finding some mitigation exits need not be unanimous and you all need not agree on what particular mitigation exists. If you find mitigation exists, you must weigh it against the aggravating factors you have found to determine whether the mitigation is sufficiently substantial to call for leniency. You alone decide whether the mitigation is sufficiently substantial to call for leniency.

(R.T. 3/4/03 at 139, 140-41) The instruction and the prosecutor's argument did not mandate a sentence of death, and the trial court properly instructed the jury. *See State v. Ellison*, 213 Ariz. 116, 139 ¶¶ 101-02 (2006) (finding no error because jury instruction did not "require the jurors to unanimously find the existence of any individual mitigating circumstance before it could be considered")(citations omitted). *See also State v. Tucker*, 215 Ariz. 298, 317 ¶¶ 70-74 (2007)(the "four-point" instruction did not create an impermissible "presumption" of death). The United States Supreme Court has held "that, as a requirement of individualized sentencing, a jury must have the opportunity to consider all evidence relevant to mitigation, and a state statute that permits a jury to consider mitigating evidence comports with that requirement." *Kansas v. Marsh*, 548 U.S. 163, 170 (2006). Additionally, provided that "a State's method of allocating the burdens of proof doesn't lessen the State's burden to prove … the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances are sufficiently substantial to call for leniency." *Id.* at 170-71.

The foregoing authority defeats defendant's claim that counsel unreasonably failed to object to the prosecutorial argument and the jury instruction. Additionally, *Baldwin* was decided after defendant's trial, and defendant has not shown why trial counsel unreasonably failed to object or that there is reasonable probability of a different result if counsel had objected.

V. Claim C. Parole Eligibility Jury Instruction in the Penalty Phase

This claim relates to *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994), which held that "where the defendant's future dangerousness is at issue, and state law prohibits defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." Defendant contends that he was parole ineligible and the trial placed his future dangerousness at issue. Defendant therefore argues that the trial court erroneously instructed the jury that he would be eligible for parole after serving 35 years in prison. (R.T. 3/4/03 at 140)

Defendant seeks relief under Rule 32.1(a), arguing ineffective assistance because trial counsel failed to request a *Simmons* parole-ineligibility instruction, and appellate counsel failed to raise the issue on appeal. Defendant also contends that *Lynch v. Arizona (Lynch II)*, 136 S. Ct. 1818 (2016) is a significant change in the law that entitles him to relief under Rule 32.1(g). To the extent defendant raises a stand-alone due process violation under Rule 32.1(a), such claim is precluded under Rule 32.2(a)(3) due to counsel's failure to challenge the parole eligibility instruction at trial or on appeal.

A. Claim (C (1)(2). Significant change in the law under Rule 32.1(g)

A defendant is entitled to relief under Rule 32.1(g) where "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence." A claim raised under Rule 32.1(g) is exempt from the rule of

preclusion stated in Rule 32.2(a)(3). Ariz. R. Crim. P. 32.2(b)("Claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion under Rule 32.2(b)(3)."

Beginning in 2008, the Arizona Supreme Court rejected arguments that a *Simmons* parole-ineligibility instruction applied to Arizona law. *See, e.g., State v. Cruz,* 218 Ariz. 149, 160 ¶ 42 (2008)(distinguishing *Simmons* on the grounds that"[n]o [Arizona] law would have prohibited Cruz's release on parole after serving twenty-five years, had he been given a life sentence", citing A.R.S. § 13-703(A)(2004)."). Subsequently, in *State v. Lynch (Lynch I),* 238 Ariz. 84, 103 ¶ 65 (2015), the Court upheld an instructed that the defendant was eligible for "release" if not sentenced to death. The Court again distinguished *Simmons,* concluding it "applies only to instances where, as a legal matter, there is no possibility of release."

The United States Supreme Court reversed the Arizona Supreme Court's judgment that Lynch had no right to inform the jury of his parole ineligibility, clarifying that "*Simmons* expressly rejected the argument that the possibility of clemency diminishes a defendant's right to inform a jury of his parole ineligibility." *Lynch II,* 136 S. Ct. at 1818. Defendant now relies on *Lynch II,* arguing it constitutes a significant change in law that applies to him and warrants relief.

This claim is not colorable because there are not "sufficient reasons to allow retroactive application of the changed legal standard" to defendant." *State v. Slemmer*, 170 Ariz. 174, 179 (1991). First, defendant has not shown that the rule stated in *Lynch II* is applicable to his case. While *Lynch II* changed the rule that *Simmons* did not apply in Arizona because defendants were eligible for release or executive clemency, the Arizona Supreme Court did not announce this rule until 2008, three years *after* deciding defendant's appeal. *See Cruz*, 218 Ariz. at 160 ¶ 42. Thus, at the time of defendant's trial and appeal, the applicable rule came directly from *Simmons*, and defendant has not shown that the Arizona Supreme Court's rule distinguishing *Simmons* was in existence at the time of his trial and appeal.

Additionally, the new rule stated in *Lynch II* is not a significant change in the law, and it is not retroactive to defendant's collateral proceedings. Rule 32.1 (g) provides for relief "[i]n those rare cases when a "new rule" of law is announced." *State v. Shrum*, 220 Ariz. 115, 118 ¶¶ 13-14 (2009). This "requires some transformative event," *id.,* and a "clear break" or "sharp break" from the past. *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41 (1991). "The archetype of such change occurs when an appellate court overrules previously binding case law," such as *Ring v. Arizona,* 536 U.S. 584, 609 (2002), which overruled *Walton v. Arizona*, 497 U.S. 639, 64-49 (1990) and held that a defendant had a constitutional right to a jury trial on capital aggravating factors. *Shrum,* 220 Ariz. at 118 ¶ 16. *Lynch II* is not a "new rule" or significant change in law under Rule 32.1 (g).

Even if *Lynch II* were a significant change in the law, it would not apply retroactively to defendant's conviction, which became final in 2006 when the Supreme Court denied certiorari in *Cromwell v. Arizona,* 547 U.S. 1151 (2006). *State v. Towery,* 204 Ariz. 386, 389-90 ¶ 8 (2003). "[D]ecisions overruling precedent and establishing a new rule are `almost automatically nonretroactive' to cases that are final and are before the court only on collateral attack." *Slemmer,* 170 Ariz. 174, 180 (1991). Only "a watershed rule of criminal procedure," applies retroactively. *State v.* Towery, 204 Ariz. 386, 391 ¶ 16-18 (2003)(citing *Teague v. Lane,* 489 U.S. 288 (1989). *Lynch II* relies on *Simmons,* and the Supreme Court held that *Simmons* does not apply retroactively. *O'Dell v. Netherland*, 521 U.S. 151, 167 (1997). The Court reasoned "the narrow right of rebuttal that *Simmons* affords to defendant in a limited class of capital cases has hardly `alter[ed] our understanding of *bedrock procedural elements*'" essential to the fairness of a proceeding. *Simmons* possesses little of the `watershed' character envisioned by *Teague's* second exception." *Id.* at 167 (emphasis in original). Similarly, *Lynch* is procedural and does not apply retroactively.

In sum, defendant has not shown that *Lynch II* is applicable to his case, that it is a significant change in the law, or that it is retroactive to these collateral proceedings. Defendant has not stated a colorable claim under Rule 32.1(g).

B. Claim (C)(3). Ineffective Assistance of Trial and Appellate Counsel

Defendant next argues that the failure to challenge the parole eligibility instruction at trial and on appeal constitutes ineffective assistance, and that counsel fell below the applicable standard of care because competent capital defense practitioners knew the parole-eligibility instruction was at odds with *Simmons*. (Ex. 46 at ¶ 70)

To receive an evidentiary hearing, defendant must show a reasonable probability of a different result at trial or on appeal. Defendant argues that the failure to give a parole eligibility argument caused prejudice at trial, citing to questionnaire responses given by Jurors 1, 5, 8, and 14. Specifically, defendant argues that all of these jurors "stated in their screening questionnaires that the possibility of release was an important consideration for them, with future danger to society being among those concerns." (Pet. at 94) Defendant is referring to question 57 of the jury questionnaire, which asked, "What is your opinion about a sentence of life without the possibility of parole?" Defendant quotes the following responses:

> Juror 1: "If as an alternative to death penalty, acceptable." (Ex. 77)
> Juror 5: "If the person is found to be guilty there's no reason for the possibility of parole." (Ex. 82)
> Juror 14: "Depending on the crime, I believe the possibility of no parole would be appropriate." (Ex. 83)

> Juror 8: "I would rather see someone serve a life sentence w/o parole rather than see them get out and hurt someone else." (Ex. 84)

Defendant's interpretation of the juror responses is overly broad, and these responses do not demonstrate an opinion about future dangerousness and the possibility of parole. Instead, jurors provided a general opinion about a sentence of life without the possibility of parole in a prescreening questionnaire. Additionally, in *State v. Bush*, 244 Ariz. 575, 591 ¶ 67 (2018), the Court held that *Simmons* error is not structural:

> *Simmons* error … occurs only "whenever future dangerousness is at issue in a capital *sentencing* proceeding," *Shafer v. South Carolina*, 532 U.S. 36, 51 … (2001)(emphasis added), and neither "deprive[s] defendants of `basic protections' not infects "`the entire trial process' from beginning to end,' [citations omitted] *cf. O'Dell v. Netherland*, 521 U.S. 151, 167 … (1997)(describing Simmons as a "narrow right of rebuttal" available "in a limited class of capital cases" and rejecting argument that *Simmons* embodied a watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" (internal quotation marks and citations omitted)).

Id. at ¶ 67. Here, the jury convicted defendant of sexually assaulting, and beating and stabbing to death a ten-year-old victim. The jury further found defendant committed these crimes in an especially cruel *and* especially heinous or depraved manner. Given the jury's findings and the evidence that overwhelmingly supports these findings, there is no reasonable probability of a different sentencing result, but for the parole eligibility instruction. Defendant has not shown that counsel's failure to raise the *Simmons* error at trial caused prejudice. *See Strickland*, 466 U.S. at 697 ("[There is no reason for a court deciding an ineffectiveness claim … to address both components of the inquiry if the defendant makes an insufficient showing on one.")

With respect to appeal, defendant has not shown a reasonable probability of a different appellate decision, and legal authority defeats defendant's claim. As discussed above, counsel did not raise the *Simmons* error at trial or otherwise request a parole-eligibility jury instruction. In *Bush*, the Arizona Supreme Court found that "*Simmons* `relief is foreclosed by [the defendant]'s failure to request a parole ineligibility instruction at trial." *Id*. at 593 ¶ 74. The Court explained that "in every case in which the [United States] Supreme Court or [Arizona Supreme] Court has found reversible *Simmons* error, the trial court either rejected the defendant's proposed jury instruction regarding his ineligibility for parole, prevented defense counsel `from saying anything to the jury about parole ineligibility,' or both." *Id.* (citations omitted).

In sum, defendant has not stated a colorable claim under Rule 32.1(g). Defendant also has not shown that counsel's failure to request a parole ineligibility instruction or raise *Simmons* error at trial or on appeal caused prejudice.

VI. Claim D. Defendant's Competency to Stand Trial

This claim alleges that defendant's trial occurred while he was incompetent, violating his substantive and procedural due process rights. Defendant further alleges ineffective assistance of counsel arising from trial counsel's failure to investigate and assert defendant's incompetence to proceed to trial.

A. Relevant background from trial proceedings

Counsel did not request a competency evaluation during defendant's trial proceedings, nor did a competency evaluation take place. It appears that the only information concerning defendant's competence came from Dr. Rosengard's testimony in the penalty proceeding. During direct-examination, Dr. Rosengard testified that he reviewed defendant's jail records and went to the jail three times to conduct a psychiatric evaluation. (R.T. 2/24/03 at 41-43) The first visit took place on November 3, 2002, and defendant pleasantly and firmly stated that he did not want to have any contact with Dr. Rosengard. (*Id.* at 43) Dr. Rosengard returned to the jail on December 24, 2002 and "spent a good deal of time" with defendant "obtaining information," asking defendant whether he experienced symptoms for different diagnoses, conducting an "objective" evaluation, and reading additional information, such as "the records in the jail." (*Id.*)

While recounting his professional background, Dr. Rosengard explained that 25 percent of his practice is forensic-related, and that he conducts competency evaluations. (*Id.* at 39) Referring to "Arizona State Statutes," Dr. Rosengard explained the legal requirements for a competency evaluation, and testified that he was on the County's list of mental health experts who are qualified to conduct competency evaluations. (*Id.* at 39-40)

During cross-examination, the prosecutor referred to this prior testimony and clarified with Dr. Rosengard that he "didn't do a competency evaluation in this case." (*Id.* at 77) The prosecutor then asked, "But being aware of the competency evaluations and what you have to do for competency evaluations, you didn't see anything during your contact with Mr. Cromwell here that would indicate to you that he was not competent to stand trial?" Dr. Rosengard responded, "That's right." (*Id.*)

B. Relevant background from post-conviction proceedings

The Arizona Supreme Court filed the Notice of Post-Conviction Relief and later, on March 31, 2008, appointed counsel to represent defendant. (Dkt. 223, 226) On May 1, 2009, counsel

requested a competency determination and a stay of the post-conviction proceedings. (Dkt. 246) The motion explained that defendant "was placed on death row on March 7, 2003," and on January 2, 2009, "a Psychologist Associate II at the Arizona Department of Corrections ("ADOC") reported that Mr. Cromwell had undergone a "recent and sudden change in behavior." (*Id.* at 2) The motion further described this behavior.

Counsel also presented the opinion of Dr. Weller, a clinical psychologist. Dr. Weller evaluated defendant and concluded that, due to mental illness and a serious thought disorder, defendant was "presently incapable of meaningfully participating in or contributing to the preparation and management of his case." (*Id.* at 3) Counsel also noted that defendant had been filing "incoherent pro per pleadings in the Arizona Supreme Court." (*Id.*)

The parties thereafter filed pleadings and addressed issues related to a post-conviction competency determination, and the State's expert evaluated defendant. On April 30, 2014, the trial court held a competency hearing, ruling the defense failed to prove by a preponderance of the evidence that defendant was not competent. (Dkt. 382, 383, 386). The post-conviction proceedings continued, and defendant ultimately filed his petition seeking relief.

C. Claims (D)(1),(2). Due Process Right to Competency Determination

Defendant alleges that the totality of circumstances raise a substantial doubt about his competency during the trial proceedings, and that the trial court should have ordered a competency evaluation pursuant to Rule 11, Ariz. R. Crim. P. In response, the State argues that defendant's due process claims, raised under Rule 32.1(a)(conviction or sentence unconstitutionally obtained), are precluded under Rule 32.2(a)(3) because defendant could have raised this issue on appeal. The State further argues that this claim is not colorable and that defendant has presented no evidence that he was incompetent during the trial proceedings or that the trial judge should have had a bona fide doubt about his competence. In reply, defendant argues that he is entitled to an evidentiary hearing under "the identical facts" of *State v. Martinez*, 243 Ariz. 110 (2017).

In *Martinez*, the defendant filed a petition for post-conviction relief and raised due process claims under Rule 32.1(a), arguing that he was not competent during change of plea and sentencing proceedings. Defendant also alleged a related ineffective assistance claim, arguing trial counsel failed to "reinvestigate his competence and to request another competency determination before the plea and sentencing." *Id.* at 111.

The trial court denied relief without holding an evidentiary hearing. The Arizona Supreme Court granted relief on the defendant's "core due process claim—that he was not competent at the time of his guilty plea or sentencing." *Id.* ("Criminal defendant are constitutionally entitled to be competent at the time of trial, change of plea, and sentencing.")(citing *Pate v. Robinson*, 383 U.S.

375, 378 (1966)("the conviction of an accused person while he is legally incompetent violates due process"); Ariz. R. Crim. P. 11.1.

Nonetheless, contrary to defendant's argument, the evidence presented by defendant is distinguishable from *Martinez*. In that case, the Arizona Supreme Court relied on evidence presented "from a doctor who had reviewed medical and jail records and interviewed [the defendant] *ten days* after sentencing," opining that defendant "was not competent at the time of the interview," and that defendant more likely than not "was incompetent at the time of his plea and later sentencing." *Id.* (emphasis added). Conversely the indicia of incompetence relied on by defendant is based on events that took place in 2010, nearly seven years after the trial concluded. (*See* Pet. at 97-98) Additionally, defendant's evidence documents that prison mental health staff observed a "recent and sudden change" in defendant's behavior in 2010. (Dkt. 246 at 2)

To determine a defendant's competency to stand trial, the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding–and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960). In Arizona, "[i]f the court determines that reasonable grounds" exist, the court should order a mental health examination. Ariz. R. Crim. P. 11.3 & 11.4. Reasonable grounds "exist when `there is sufficient evidence to indicate that the defendant is not able to understand the nature of the proceedings against him and to assist in his defense.'" *State v. Kuhs*, 223 Ariz. 376, 380 ¶ 13 (2010).

Assuming the truth of defendant's allegations, the evidence does not demonstrate that defendant did not understand the nature of the proceedings against him or that he was unable to assist in his defense. As discussed above, a "sudden change" in behavior many years after trial does not demonstrate defendant's incompetence, nor does a mental health diagnosis. Ariz. R. Crim. P. 11.1 ("The presence of a mental illness, defect or disability alone is not grounds for finding a defendant incompetent to stand trial.").

1. Defendant's Substantive Due Process Claim

Defendant's evidence demonstrates that defendant displayed a few instances of unusual facial expressions and behaviors in court, sometimes declined visits from experts and counsel, and expressed strong disagreement with trial counsel's professional judgment concerning the strength of the State's evidence. However, the evidence does not demonstrate that these behaviors and actions were the result of a mental disorder that affected defendant's competency. Instead, the totality of the trial record strongly demonstrates that defendant understood the nature of the trial proceeding and the evidence against him, and that defendant could control his behavior when he decided to do so.

Specifically, the evidence demonstrates that defendant directly and intelligently participated in colloquies with the court and answered questions during his trial testimony. Additionally, defendant did not display erratic or inappropriate behavior in court, and Dr. Rosengard has not pointed to any information in the jail records describing such behavior. *See State v. Delahanty*, 226 Ariz. 502, 505 ¶ 9 (2011)(considering defendant's testimony at pretrial hearing, colloquy with trial judge, and appropriate behavior in court, and finding trial record "replete with evidence' that defendant was competent); *see also State v. Tramble*, 116 Ariz. 249, 253 (App. 1977)("We will not equate a defendant's refusal to cooperate" with incompetence).

In conclusion, a strict application of Rule 32.2(a)(3) requires a finding that this claim is precluded because defendant could have raised his competence to stand trial on appeal. Defendant, however, cites *Martinez*, where the Arizona Supreme Court remanded a substantive due process competency claim for an evidentiary hearing in a post-conviction proceeding. *See also Riggins v. Nevada*, 504 U.S. 127, 139 (1992)(Kennedy, J., concurring)("[T]hose rights deemed essential to a fair trial, including the right to effective assistance of counsel … and the right to testify on one's own behalf or to remain silent" depend on the defendant's competence to stand trial.) Even if defendant's Rule 32.1(a) due process claim is not subject to preclusion, it is without merit. Defendant's evidence does not raise a colorable claim that he was incompetent during his trial proceedings. Defendant therefore has not demonstrated a material issue of fact or law to support an evidentiary hearing on this claim. Ariz. R. Crim. P. 32.11 (a).

2. *Defendant's Procedural Due Process Claim*

A trial court is required to hold a competency hearing if "on the basis of the facts and circumstances known to the trial judge, there was or should have been a good faith doubt about the defendant's ability … to participate intelligently in the proceedings." *Delahanty*, 226 Ariz. at 505 ¶ 8. In making this determination, courts may rely on observations of the defendant's demeanor and his ability to answer questions." *State v. Moody*, 208 Ariz. 424, 443 (2004).

As discussed above, defendant has not shown reasonable grounds or a good faith doubt about his competence during the trial proceedings. The trial record documents defendant's behavior and ability to express himself during pretrial proceedings, including a determination of counsel, and while defendant testified at trial. These prior proceedings present no evidence to support defendant's claim. Defendant has not shown a due process violation due to the trial court's failure to inquire into his competency.

D. Claim (D)(3). Ineffective Assistance of Trial Counsel

Defendant next alleges that trial counsel unreasonably failed to pursue "obvious red flags," and this caused prejudice. This claim is not colorable because defendant has not shown that trial counsel unreasonably failed to investigate and pursue a competency evaluation.

As discussed above, even if Dr. Rosengard had diagnosed defendant with schizophrenia with auditory hallucinations, the record does not demonstrate that defendant was "actively psychotic," or that mental illness interfered with defendant's ability to assist counsel or meaningfully understand and participate in the trial proceedings. Defendant's disagreements with counsel about the strength of the State's evidence do not demonstrate incompetence or otherwise rebut the evidence of defendant's appropriate behavior in court. *See, e.g., State v. Contreras*, 2015 WL 6696905 at 4 (Ariz. Ct. App. Nov. 3, 2015)(finding that defendant's "disagreements with his lawyer about whether or not he should take the deal is not … evidence that he's struggling or that he's incompetent. It means that he wants to defend himself in a different way.") While defendant unquestionably had strong opinions about the evidence and the presentation of his defense, defendant did not testify in an erratic or inappropriate manner, and he directly answered questions posed to him during direct and cross-examination.

Additionally, defendant makes no showing that counsel had concerns about his competence. To the contrary, the evidence demonstrates otherwise. For instance, during a post-trial interview, mitigation specialist Christianson explained that she saw no evidence of any kind of psychosis and that defendant was oriented. *See Bishop v. Superior Court*, 150 Ariz. 404, 408 (1986)(observing that generally defense counsel is the most knowledgeable witness at competency hearing). Instead, Christianson believed defendant was a little angry about what people were saying about him. (Ex. 56 at 8) Lead counsel James Logan provided the following explanation, which plainly demonstrates that counsel knew the standard for a competency finding:

> I always looked at [Rule 11] as rather narrow. Does he understand the nature of the proceedings? Is he able to assist in his defense? Nothing to do with his mental state at the time of the offense, nothing to do with guilty except insane. He knew what the proceedings were. And he went through those proceedings with us, he understood them. He knew those things. Able to assist? He did everything that he thought he could do to assist. I mean he was telling us his version of the facts and doing what he thought had, you know, we talked about lots of things.

(Ex. 73 at 24)

In sum, the defendant has not shown evidence that raises a reasonable concern about his competency during the trial proceedings. Given the evidence discussed above and that trial counsel retained Dr. Rosengard, who opined at trial that no evidence indicated defendant was incompetent, counsel did not fall below a reasonable standard of care in failing to request a competency evaluation. Additionally, defendant has not shown a reasonable probability of a different result, but for counsel's failure to pursue a competency determination.

VII. Claim E. Counsel's Conflict of Interest at Trial and on Appeal

This claim alleges that trial and appellate counsel had an actual conflict that adversely affected their representation and prejudiced the defense. The State responds that defendant's claims are precluded under Rule 32.2(a)(3). Specifically, the State argues that the Arizona Supreme Court finally adjudicated the merits of the conflict claim on appeal, and that appellate counsel could have raised that she and trial counsel had a conflict of interest. Preclusion aside, the State further contends that the claims are not colorable.

The Arizona Supreme Court has addressed conflict of interest claims as a component of the Sixth Amendment right to effective assistance of counsel. *State v. Jenkins*, 148 Ariz. 463 (1986); *State v. Martinez-Serna*, 166 Ariz. 423, 425 (1990). The Supreme Court also has "reiterate[d] that ineffective assistance of counsel claims are to be brought in Rule 32 proceedings." *State v. Spreitz*, 202 Ariz. 1, 3 ¶ 9 (2002). Nonetheless, this claim is precluded under Rule 32.2(a)(3), because the Arizona Supreme Court finally adjudicated on the merits the substance of defendant's claim that trial counsel had a conflict of interest that adversely affected the representation. For the reasons discussed below, this claim also fails on the merits.

With respect to appellate counsel, defendant's conflict of interest claim is not precluded under Rule 32.2(a)(3), as a Sixth Amendment claim alleging ineffective assistance of counsel. Additionally, the Arizona Supreme Court has observed that it generally is inappropriate for counsel to argue her own ineffectiveness because "it is difficult for counsel to objectively review her own performance and zealously argue any inadequacies in that performance on behalf" of the client. *State v. Bennett*, 213 Ariz. 562, 566 ¶ 14 (2006). For the reasons discussed below, this claim fails on its merits.

A. Factual Background

Several months prior to trial, counsel filed a motion to withdraw and argued there existed an irreconcilable conflict and a breakdown in communication with defendant. The trial judge held a hearing on November 20, 2002. During the ex-parte portion of the hearing, counsel described that defendant did not believe the State had evidence "of any sort." Defendant explained his view of the evidence, and told the trial judge that he did not trust trial counsel and needed new counsel. The trial judge denied the request for new counsel.

Defendant thereafter refused to speak with trial counsel and defendant filed a bar complaint, both of which were brought to the trial court's attention. After the trial concluded, the State disclosed an amended DNA report, which recalculated the "likelihood ration" related to DNA profiles obtained from a "penile swab" taken from defendant. Trial counsel filed a motion to vacate judgment and moved to withdraw, stating that the ethics committee of his office determined

that "it would be inappropriate" to represent defendant at the hearing on the motion to vacate judgment.

Contract counsel, Robert Doyle, represented defendant in the post-verdict hearing. After the trial court denied relief, Doyle filed a notice of appeal and withdrew from the representation. Defendant's case then returned to trial counsel's agency, and an appellate attorney with that agency represented defendant on appeal.

B. Legal Analysis

The Sixth Amendment ensures the right to representation that is free from conflicts of interest and the assistance of counsel with undivided loyalty. *Woods v. Georgia*, 450 U.S. 261, 271 (1981). To obtain relief, a defendant, who does not object to a potential conflict of interest at trial, must show that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). *See also Jensen,* 148 Ariz. at 466 (defendant first must show an actual conflict and next that the conflict had an adversely affected the representation).

"The central question [courts] consider in assessing a conflict's adverse affect is `what the advocate [found] himself compelled to refrain from doing' because of the conflict." *Lockhart v. Terhune*, 250 F.3d 1223, 1231 (9th Cir. 2001)(citations omitted). *See State v. Moore*, 222 Ariz. 1, 16 ¶ 82 (2009)(citing *Jenkins*, at 466 n.1)("a defendant must demonstrate that some plausible alternative defense strategy or tactic might have been pursed.")

1. Trial Counsel's Representation and Alleged Conflict of Interest

Defendant first contends that trial counsel's failure to investigate and understand the proffered cognitive impairment and mental illness evidence, and a "hostile" and "edgy" attorney-client relationship, demonstrates an actual conflict existed. Additionally, relying on juror declarations and expert opinions, defendant alleges that the professional attorney-client relationship was dysfunctional and lacked loyalty.

Defendant has not demonstrated an actual conflict of interest, and the Arizona Supreme Court's opinion addresses defendant's allegations about the nature of the attorney-client relationship. At trial, defendant filed a *pro se* motion for new counsel, and then trial counsel filed a "Motion to Withdraw or in the Alternative Motion to Determine Counsel." *Cromwell*, 211 Ariz. at 185 ¶ 19. At the hearing, defendant explained why he wanted lead counsel removed from the case:

> Mr. Logan and I are on differences [sic] on key points of my defense. I'm in left field and he's in right field. He informed me about DNA information at one point

> in the case and come [sic] back three months later to find out that it was completely false.
> At the–I'm not sure that I want to continue to say what he said to me in private and in open court, and what he has also said in court to indicate that Mr. Logan has no intention of defending me zealously. He has much said in court and on the record that there would be a guilt phase during the trial and he quickly corrected himself in front of you last time I was here, but Mr. Logan said in no uncertain terms that not only would I be found guilty, but I will die. Those were his exact words to me. That's all, your honor.

Id. Trial counsel gave the following response to defendant's characterization of his professional advice:

> I believe I was absolutely required to give him my opinion of the case by the Code of Ethics and to tell him what I thought of it and give him what I thought were potential viable alternatives to what could be a worse situation.
> ***
> Mr. Cromwell tends to reject anything that I tell him that is not in line with his theory that he be found not guilty and there really is no evidence against him of any sort. He has instead vastly maintained that there is no evidence against him. He wanted to go to trial on the first trial setting, because there was no evidence against him. When I point out to him evidence that is clearly damaging evidence and clearly evidence that would support a conviction, he becomes upset. He becomes angry with me and I am not asserting him.

Id. at 186 ¶ 25.

The Arizona Supreme Court found that the "friction between [defendant and counsel] stemmed strictly from disagreement as to their respective assessments of the facts and the trial strategy." *Id.* at 187 ¶ 35. The evidence proffered in post-conviction does not shed new light on this finding, and defendant has not shown an actual conflict of interest. *See United States v. Leggett*, 162 F.3d 237, 247 (3d Cir. 1998)(The Sixth Amendment does not provide the right to be "represented by a lawyer who agrees with the defendant's trial strategy.")

This record demonstrates shows that trial counsel provided his professional opinion to defendant about the strength of the State's evidence, but ultimately counsel pursued and presented the evidence and defense requested by defendant, *id.* at ¶¶ 21-25. While defendant faults trial counsel's statements in court and challenges whether there exists loyalty, defendant does not demonstrate that counsel's failure to investigate competence resulted in prejudice. Additionally, defendant does not allege an alternative defensive strategy that counsel failed to pursue. Finally, the record from the hearing concerning the conflict and the trial demonstrate that trial counsel

advised defendant about the evidence and his right to testify and present statements of allocution to the jury. Defendant insisted on exercising his constitutional right to testify, and defendant decided not to allocute after a colloquy with the trial judge. Defendant presents no evidence that the State offered a plea agreement, and this record calls into serious question that defendant was willing to admit guilt and enter into a plea agreement.

In conclusion, the Arizona Supreme Court finally adjudicated whether a conflict of interest existed between defendant and trial counsel, and defendant raised similar allegations here. Additionally, the record refutes defendant's allegation that an actual conflict existed, and defendant failed to show a plausible alternative defense that trial counsel failed to pursue.

2. Appellate Counsel's Representation and Alleged Conflict of Interest

Defendant next contends that appellate counsel labored under the same conflict as trial counsel, failed to fulfill an ethical duty to establish a working relationship with defendant, and did not competently present available appellate issues because defendant refused to assist in the preparation of his appeal.

Defendant's allegations fail to show an actual conflict during the appellate representation. Appellate counsel communicated with defendant, advised him on the status of the case, requested his input on the appellate issues, and incorporated defendant's suggestions. (Ex. 87, 88–appellate counsel responding, "I paid particular attention to your letters detailing your thoughts about the case" and that she incorporated the conflict argument raised by defendant.) Defendant has not presented evidence to demonstrate an irreconcilable conflict with either trial or appellate counsel, and defendant fails to show that a conflict hindered appellate counsel from pursuing a plausible defense strategy on appeal.

Defendant also faults appellate counsel for not expanding the record on appeal to include a memorandum in trial counsel's file, arguing this information would have supported the conflict of interest argument on appeal. However, trial counsel did not present this memorandum to the trial court, and an appellate court's review is limited to the record before the trial court. *State v. Carter,* 216 Ariz. 286, 291 ¶ 24 (App. 2007). Inadmissible evidence does not demonstrate counsel failed to pursue an alternative strategy. *Moore* at 16 ¶ 83. Additionally, given that appellate counsel solicited and incorporated defendant's input and that appellate claims are limited to issues contained in the trial record, the disagreements and potential animosity between defendant and trial counsel do not demonstrate that appellate counsel operated under a conflict of interest. *See State v. Bennett*, 213 Ariz. 562, 567 ¶ 22 (2006)("Appellate counsel is responsible for reviewing the record and selecting the most promising issues to raise on appeal.")

This claim is not colorable. Defendant has not shown an actual conflict of interest with respect to the trial or appellate representation, or that a conflict adversely affected trial or appellate counsel from pursuing a plausible alternative defense strategy.

VIII. Claim (F). Ineffective Assistance of Appellate Counsel

Courts analyze ineffective assistance of appellate counsel under the two prong *Strickland* standard. *Bennett*, 213 Ariz. at 567 ¶ 21. To prevail a defendant must show counsel was objectively unreasonable in failing to raise an issue on appeal, and a reasonable probability that, but for counsel's unreasonable professional decision, he would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Where appellate counsel "ignores issues that are clearly stronger than those selected for appeal, a defendant can overcome the presumption of effective assistance of appellate counsel." *Bennett*, at ¶ 22.

A. Claim (F)(1). Expansion of Appellate Record Regarding Conflict of Interest

Defendant has not shown deficient performance or prejudice based on counsel's failure to supplement the record on appeal. First, appellate review is limited to the evidence before the trial court. Additionally, there is no reasonable probability that the additional evidence would have shown a complete breakdown in communication or irreconcilable differences.

Claim (F)(2),(3). Appellate Claim of Juror Bias

Defendant has not shown that Jurors 3, 7, and 45 were biased. Defendant therefore has not demonstrated that appellate counsel was deficient or caused prejudice by failing to raise these issues on appeal.

B. Claim (F)(4). Denial of Motion to Vacate Judgment

This claim addresses a DNA related disclosure made approximately two months after defendant's trial. As background, on May 6, 2003, the State disclosed an amended DNA report (dated May 1, 2003), which recalculated the "likelihood ratio" related to whether the contributor of a "penile swab" (Item 2902943-1.1,2,3) came from defendant and the victim, or from defendant and an unidentified person. At trial, the analysist testified that the probability or "likelihood ratio" that the mixture came from defendant and the victim was **100 billion to 1** times more likely in the Caucasian population. (R.T. 2/6/03 at 50)

In the amended report, the analyst recalculated the "likelihood ratio," as "**1 billion** times more likely in the Caucasian population if it is a mixture of Item 2902943-2.1 (Robert Cromwell) and 2903058-3 (Stephanie []) than if it is a mixture of Item 2902943-2.1 (Robert Cromwell) and an unidentified person." (Dkt. 177)

One-week after receiving the amended report, trial counsel filed a Rule 24.2 motion to vacate the judgment entered on March 6, 2003, arguing that amended report contained newly discovered evidence and warranted a new trial because "defendant was sentenced to death on the basis of DNA probabilities that were mistakenly overstated by 100 times." (Dkt. 178) The trial court set an evidentiary hearing, and counsel moved to withdraw after determining "it would be inappropriate for [his] office to represent this defendant at the hearing on this motion." (Dkt. 186) The trial court granted the request, and appointed new counsel. After an evidentiary hearing, the trial court found it "clear" that "the new evidence would not have changed the verdict" and denied the Rule 24.2 motion on its merits. (Dkt. 208) Counsel filed a notice of appeal and moved to withdraw.

Defendant now contends appellate counsel unreasonably failed to raise on appeal that "erroneous DNA probability calculations" deprived defendant the right to present a defense, constituted a *Brady* violation, deprived defendant the ability to raise this issue under Rule 24.1, and that the trial court abused its discretion in denying the Rule 24.2 motion to vacate judgment.

The issue addressed is whether Defendant has shown ineffective assistance of appellate counsel under *Strickland.* Defendant's stand-alone claims, such as whether the State's disclosure violated *Brady* or whether the trial court abused its discretion, could have been raised on appeal and are precluded under Rule 32.2(a)(3). Contrary to defendant's argument, these claims are not "of sufficient constitutional magnitude to require a personal waiver by defendant." *State v. Swoopes,* 216 Ariz. 390, 399 (2007); Ariz. R. Crim. P. 32.2(a)(3)(2020).

Defendant also has not shown deficient performance or prejudice. Putting aside the DNA evidence obtained from defendant's "penile swabs," the jury heard overwhelming evidence of defendant's guilt as outlined in prior sections of this ruling. For instance, Ella and Amanda identified defendant, and Ella testified that defendant assaulted her. The jury further heard evidence that a DNA analyst obtained defendant's DNA profile from a vaginal swab taken from the victim, and on a pair of pants and a shirt found in the bedroom.

Defendant's claims are without merit, and defendant has not shown that appellate counsel unreasonably failed to raise these claims on appeal or a reasonable probability the claims would have prevailed on appeal.

C. Claim (F)(5). Appellate Argument on Supreme Court's Independent Review

At the time of defendant's appeal, the Arizona Supreme Court conducted an independent review of an imposed death sentence, and each aggravating factor and any mitigating evidence. *Cromwell,* 211 Ariz. at 191 ¶ 52. The Court found the trial "record is replete with evidence of

cruelty," *id.* at ¶ 54. Additionally, defendant did not show that trial counsel unreasonably failed to challenge the especially cruel aggravator. (*See, supra,* Claim (A)(4)(a),(b)) In sum, substantial evidence supports the especially cruel aggravator, and appellate counsel did not render ineffective assistance in failing to raise a non-meritorious issue on appeal.

D. Claim (F)(6). List of Multiple Appellate Issues

In this claim, defendant listed eleven legal principles addressed by either the Arizona or the United States Supreme Court, and defendant, without analysis, summarily faults appellate counsel for failing to raise these issues as fundamental or structural error in order to preserve them for federal review. Because defendant fails to show both that counsel performed deficiently and a reasonable probability that any of these claims would have prevailed on appeal, defendant has not shown ineffective assistance under *Strickland*.

IX. Claim G. Eighth Amendment Challenge to Method of Execution and Defendant's Competency

Defendant challenges the constitutionality of his death sentence, arguing that he is not competent and that his death sentence is cruel and unusual punishment due to multiple medical and mental diagnoses.

The Eighth Amendment prohibits a State from carrying out a death sentence on a defendant who is incompetent, and this requires a defendant to make the "requisite preliminary showing that current mental state would bar his execution." *Panetti v. Quarterman*, 551 U.S. 930, 934 (2007). Arizona has not set an execution date, and defendant's claim is premature and, therefore, dismissed without prejudice.

Defendant's argument that the death penalty is cruel and unusual punishment under the Arizona and federal constitutions could have been raised on appeal, and it is precluded under Rule 32.2(a)(3). It also is unsupported by binding case law. Defendant's mental illness, brain impairment and medical conditions do not qualify as death penalty exemptions, which are limited to intellectual disability and a defendant's age at the time of the offense. *State v. Hulsey*, 243 Ariz. 367, 386 ¶ 73 (2018). Additionally, the Supreme Court recently reaffirmed that the Eighth Amendment "prohibits the execution of a prisoner whose mental illness prevents him from "rational[ly] understanding" why the State seeks to impose that punishment." *Madison v. Alabama*, 139 S. Ct. 718, 722 (2019)(citing *Panetti*, at 959). The Court has not found a death penalty exemption due to other physical or mental conditions.

X. Claim H. Narrowing Function of Arizona's Death Penalty Scheme

Defendant argues that Arizona's capital sentencing scheme and the Arizona Supreme Court's decision in *State v. Hidalgo* fail to meet the constitutional narrowing requirement.

Defendant did not present this claim at trial or on appeal and it is precluded Rule 32.2(a)(3). Moreover, the Arizona Supreme Court has found that Arizona's capital sentencing scheme constitutionally narrows the class of defendants eligible for the death penalty. *State v. Hidalgo*, 241 Ariz. 543, 549-52 ¶¶ 14-29 (2017), *cert. denied* 138 S. Ct. 1054 (2018). Defendant argues that *Hidalgo* "runs afoul of constitutional prosecutions," but Arizona trial courts have no authority to "overrule, modify, or disregard" Arizona Supreme Court decisions. *State v. Smyers*, 207 Ariz. 314, 318 ¶ 15, n.4 (2004).

XI. Claim I. Cumulative Error Review to Determine Prejudice

Defendant argues that multiple trial errors violated due process and rendered his criminal proceeding fundamentally unfair, and that this constitutes an independent basis for post-conviction relief. Defendant is not entitled to relief because there are no findings that any trial error violated due process and thus there are no errors to aggregate.

CONCLUSION

Based on all of the foregoing reasons,

IT IS ORDERED granting the State's request to strike juror declaration statements that relate to the subjective motives or mental processes leading a juror to agree or disagree with the verdict in any phase of the trial.

IT IS FURTHER ORDERED denying relief and summarily dismissing defendant's Petition for Post-Conviction Relief.

/s/

HONORABLE TERESA SANDERS