Attachment B

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ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. WAYNE E. YEHLING

CASE NO. CR048730 (-001)

DATE: February 02, 2021

STATE OF ARIZONA
Plaintiff,

vs.

BEAU JOHN GREENE (-001)
Defendant.

R U L I N G

IN CHAMBERS RE: POST CONVICTION RELIEF RULING

Defendant filed timely notice, initial, and supplemental petitions for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., asserting claims of an unlawful sentence that violates the Arizona or United States constitutions and is not authorized by law. Defendant also asserts a claim that recent and substantive changes in the law apply herein. The Court has considered the evidence admitted at the evidentiary hearing and reviewed Defendant's opening memoranda, the State's responses, Defendant's replies, and the Court file. For the reasons discussed below, the Court grants Defendant relief.

Facts and Procedural History

Roy Johnson, a music professor at the University of Arizona, was last seen around 9:30 p.m. on February 28, 1995. He was leaving the Green Valley Presbyterian Church where he had just given an organ recital. Although his wife expected him home before 10:00 p.m., the ordinarily punctual Johnson did not make it back that night. Four days later, authorities found his body lying face down in a wash. Defendant admitted at trial that he killed Johnson. *State v. Greene*, 192 Ariz. 431, 967 P.2d 106 (1998). Defendant testified that he had been using methamphetamine continuously for several days preceding the murder and that he had neither slept nor eaten much during that time. He said that he was suffering from withdrawal from drugs when he killed Johnson. *Id.*

The day of the murder, Defendant's friends, Tom Bevan and Loriann Verner, told Defendant he could no longer stay in their trailer located west of the Tucson Mountains. A drug dealer had threatened to shoot Defendant over an outstanding debt and Bevan and Verner feared Defendant's presence in their trailer would

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ruin their relationship with the drug dealer. Defendant stole a truck and drove to Tucson where the truck broke down. Sometime that night, during Johnson's drive home from the concert, Defendant and Johnson crossed paths. *Id.*

Defendant's story, disbelieved by judge and jury, is as follows. Johnson approached Defendant in a park. Defendant claims that Johnson wanted to perform oral sex on him and offered to pay him for it. Defendant accepted, and the two drove to a secluded parking lot in Johnson's car. Defendant says he then changed his mind and told Johnson that he would not follow through. In response, Johnson purportedly smiled and touched Defendant's leg. Defendant claims he "freaked out" at Johnson's touch, and struck him several times in the head with his fist. He moved Johnson's motionless body to the back of the car, drove to a wash, and dumped the body. Next, Defendant claimed he walked back to the car and drove away. He asserted he then realized that he needed money, so he returned to the wash, walked down to the body, and stole Johnson's wallet. *Id.*

Several pieces of evidence undermine Defendant's version of the killing. First, medical testimony indicates that a heavy flat object, not a human fist, damaged Johnson's skull. Fist bones striking a person's head will ordinarily shatter long before the thick bones of the skull, yet neither of Defendant's hands were injured. Second, only one set of tire tracks and footprints entered and left the wash, suggesting that Defendant did not return for the wallet, but had it with him when he left immediately after the murder. Third, Defendant told Bevan he beat someone to death with a club and dumped the body near Gates Pass. *Id.*

After dumping Johnson's body in the wash, Defendant drove Johnson's car directly to the Bevan/Verner trailer. He told Bevan about the killing. Defendant asked Bevan for some clean shoes. He also took a small rug to cover the bloody car seats. *Id.*

Defendant left the trailer and headed for K-mart, the first of several stops he made on a spending spree using Johnson's cash and credit cards. To explain any discrepancies between his signature and those on the credit cards, Defendant wrapped his hand with K-Y jelly and gauze and feigned injury. Among other things, he bought clothes, food, camping gear, a scope and air rifle, and a VCR (which he later traded for methamphetamine). He eventually abandoned Johnson's car in the desert. On March 2, 1995, the police arrested Defendant at a friend's house. *Id.*

On March 15, 1996, Defendant was convicted by a jury of first-degree murder (premeditated and felony murder), robbery, kidnapping, theft, and six counts of forgery. At the aggravation/mitigation hearing, the Court found two aggravating factors, pecuniary gain (A.R.S. § 13-703(F)(5))[1] and that the offense was committed in

[1] The statute has since been amended and renumbered as A.R.S. § 13-751. It is referred to as the "(F)(5) aggravating factor" herein.

an especially heinous, cruel, or depraved manner (A.R.S. § 13-703(F)(6)). *Id.*. Consequently, the Court sentenced the Defendant to death.

The Arizona Supreme Court, upon review, found insufficient evidence to support the A.R.S. § 13-703(F)(6) aggravating factor and reversed this finding. *Id.* However, the Court affirmed the Defendant's death sentence on the only remaining aggravating factor, (F)(5). *Id.*

The Supreme Court has not fixed the time for executing the Defendant's sentence.

On January 31, 2019, Arizona State Senator, Eddie Farnsworth, introduced Senate Bill 1314 initiated by the Maricopa County Attorney's Office (MCAO) during the Fifty-fourth Legislature, First Regular Session. Senate Bill 1314 eliminated the (F)(5) factor from the list of aggravating circumstances necessary for the imposition of the death penalty, thus narrowing its scope of applicability. This Bill was assigned to the Senate Judiciary Committee and was heard on February 7, 2019, receiving a "Do Pass" recommendation on a vote of 7-0. The Bill passed unanimously out of the Senate on the consent calendar and was sent to the Arizona House of Representatives where the Bill was assigned to the House Judiciary Committee. On March 13, 2019, the Judiciary Committee held a hearing on the Bill.

During this hearing, statements were given by Rebecca Baker, Legislative Liaison for the Maricopa County Attorney's Office to the committee regarding the purpose and retroactivity of the Bill. Ms. Baker stated that the Capital Bureau of the MCAO's purpose for sponsoring of the bill was to narrow the application of the death penalty because juries do not find the proposed factors for repeal therein persuasive. She further stated that she had no information about the number of defendants currently subject to the repeal of the aggravating factors, and that the reason for the bill not being retroactive is because they normally are not made retroactive. Consequently, House of Representatives members, Kristen Engel, Diego Rodriguez, and Chairperson John Allen affirmed that the Bill's purpose was to narrow the application of the death penalty and the issue of retroactivity was explicitly the province of the courts to apply in individual cases. The Bill then unanimously passed the House Judiciary Committee. The full House of Representatives took up the bill, passing it by a vote of 46-14. The bill was signed into law by Governor Ducey, on April 10, 2019, going into effect on August 27, 2019.

On May 26, 2020, Defendant timely filed an initial Notice of and Petition for Post-Conviction Relief claiming entitlement to relief from his death sentence pursuant to Rules 32.1(a), (c), (g), and (h). The State timely filed its Response on July 10, 2020. Defendant filed a timely Reply on August 21, 2020.

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The State filed a Motion for Clarification on October 16, 2020, with the Defendant filing a Response on November 2, 2020. On November 25, 2020, the Court, *sua sponte*, held a Status Conference under Rule 32. During the Conference, the Court dismissed the Defendant's claim that the death penalty was unconstitutional in and of itself, and the theories of sentencing and punishment supporting that claim would not be considered. The Court notified the parties that only the issues ruled on herein would be at issue in the Evidentiary Hearing.

The Court held an Evidentiary Hearing on December 4, 2020.

I. Preclusion

A. Timeliness of the Defendant's Petition

A defendant must file the notice for a claim of relief under Rule 32.1(a) within 30 days after the issuance of the mandate in the direct appeal. Ariz. R. Crim. P., Rule 32.4(b)(3)(A). However, the court must excuse an untimely notice requesting post-conviction relief filed under subpart (3)(A) if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault. In a Rule 32 proceeding, counsel must investigate the defendant's case for any colorable claims. Ariz. R. Crim. P. 32.6(a).

In this case, when the death sentence was imposed on the Defendant, it was authorized and lawful. The Legislature's repeal of the (F)(5) aggravating factor became effective on August 27, 2019. Although the defendant should have filed the Notice of Post-Conviction Relief by September 26, 2019, the complexities of the Defendant's case necessitated additional time by counsel to review and investigate the merits to determine whether there were any colorable claims. As such, the Court finds that the Defendant's failure to file a timely notice is excused.

B. Claim

A defendant is precluded from relief under Rule 32.1(a) based on any ground if it is (1) still raiseable on direct appeal, (2) finally adjudicated on the merits in an appeal or in any previous post-conviction proceeding, or (3) waived at trial or on appeal, or in any previous post-conviction proceeding, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant. Ariz. R. Crim. P. 32.2. Conversely, claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion under Rule 32.2(a)(3), but they are subject to preclusion under Rule 32.2(a)(2). However, when a defendant raises a claim that falls under Rule 32.l(b) through (h) in a successive or untimely post-conviction notice, the defendant must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide sufficient reasons why the defendant did not raise the claim in a previous notice or petition, or in a timely manner, the court may

summarily dismiss the notice. At any time, a court may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion. *Id.*

Defendant's claims under Rule 32.1(a) are not precluded as none of the circumstances of Rule 32.2 (1-3) are present in this case. Defendant's claims are based, in principle, on the Arizona State Legislature's repeal of the (F)(5) aggravating factor and the applicability of Rule 32.1(a) to capital cases, respectively. The Defendant's claim is that Arizona adopted a community standard and there is a national consensus regarding said standard as established in *Trop v. Dulles*, 356 U.S. 86 (1958), *Kennedy v. Louisiana*, 554 U.S. 407 (2008), *Roper v. Simmons*, 543 U.S. 551 (2005), *Hall v. Florida*, 572 U.S. 702 (2014), discussed *infra*, when the Legislature repealed the aggravating factor as an unequivocal standard preventing an unconstitutional imposition and execution of the Defendant's death sentence is facially colorable.

Defendant's claims are not precluded due to inapplicability of Rule 32.1(c), (h) to Rule 32.2(b). First, the Court looks to the plain language of Rule 32.1 to determine its applicability to Rule 32.1(c). Here, it states that Rule 32 applies "in any case in which the defendant was sentenced to death." No other specific language exempts the application of Rule 32.1 to Rule 32.1(c). So, the Court need not further inquire into its meaning as it clearly applies in this instance. *State v. Aguilar*, 209 Ariz. 40, 47 (2004), citing *Ariz. Newspapers Ass'n v. Superior Court*, 143 Ariz. 560, 562 (1985*); Parsons v. Ariz. Dep't of Health Serv.*, 242 Ariz. 320, 323 (App. 2017); *Accord Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1737 (2020)(Interpreting Civil Rights Act.).

Additionally, in promulgating Rules 32.1(c), (h), the Rule 32 Task Force, throughout their tenure, as well as Rule 32.1(c)'s plain language, indicate that it is applicable to death sentences. On November 19, 2018, the Attorney General failed, through representation, to amend subsection (c) as to disallow capital cases from its purview.[2] Further, the Task Force sought to prevent an end-run around preclusion for frivolous claims under Rule 32.1(c). *Id.* at 6. However, this case does not involve a term of years sentence as was contemplated in the Task Force discussion. Here, the Defendant is sentenced to death. No computational error or miscalculation has been raised. Further distinguishing, unlike a defendant sentenced to imprisonment, the Defendant in this instance is still awaiting the imposition of his sentence, execution via lethal injection. The Defendant's incarceration is merely incidental to carrying out his sentence. In any event, the question of whether a sentence is not authorized by law or unlawful becomes a distinction without a difference if the death penalty or the sole aggravating factor justifying the imposition of the death penalty in a particular case are repealed.

[2] Defendant's Exhibit A, Rule 32 Task Force Minutes 11/19/2018, at p. 4.

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Moreover, the Attorney General failed to amend subsection (h) to remove the opportunity for relief if no reasonable fact finder would have imposed the death penalty. With Rule 32.1(h) remaining intact, it is self-evident in capital sentencing that a factfinder would not impose such a sentence in a case of a sole aggravating factor repeal because imposition of the death penalty requires a finding of at least one aggravating factor. A.R.S. § 13-751(E). In other words, since a jury must find an aggravating factor to impose a death sentence, if the application of that aggravating factor is repealed by statute, it cannot be reviewed and found by the fact finder. It is irrelevant. Additionally, the failure of the Defendant to raise this issue previously was that it was not ripe for a claim because the legislature had not yet taken up the issue of eliminating the (F)(5) aggravating factor, narrowing the application of the death penalty. *See supra.*

II. Violation of the United States or Arizona Constitutions

A. Applicable Standards

"Death penalty statues must be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." California v. Brown, 479 U.S. 538, 541 (1987)(*citing Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976) and *Furman v. Georgia*, 409 U.S. 238, 92 S.Ct. 2726 (1972)). "The Eight Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency[.]" *Estelle v. Gamble*, 429U.S. 97, 102 (1976)(quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

The State "does not respect human dignity when, without reason, it inflicts upon some people that it does not inflict upon others. A claim that punishment is excessive is judged by the standards that currently prevail. *Atkins v. Virginia*, 536 U.S. 304, 311, 122 S. Ct. 2242, 2247, 153 L. Ed. 2d 335 (2002). The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop,* 356 U.S. at 100 – 101, 78 S.Ct. 590. Proportionality review under those evolving standards should be informed by "'objective factors to the maximum possible extent,'" see *Harmelin v. Michigan,* 501 U.S. 957, 1000, 111 S.Ct. 2680 (1991) (quoting *Rummel v. Estelle,* 445 U.S. 263, 274–275, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980)).

The Court must look to objective indicia to determine a community standard of decency. We [the Courts] have pinpointed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry v. Lynaugh,* 492 U.S. 302, 331, 109 S.Ct. 2934 (1989). "When the questions [is] whether capital punishment for certain crimes violate[s] contemporary values, the

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Court looked for 'objective indicia' derived from history, the action of state legislatures, and the sentencing by juries." *Rhodes v. Chapman,* 142 U.S. 337, 346 – 47 (1981). The evidence carries force when it is noted that the legislatures have recently addressed the issue and have voted overwhelmingly in favor of the prohibition. *Enmund v. Florida,* 458 U.S. 782, 793, 801 (1982). When prosecutors decided not to seek death for certain types of death-eligible crimes, this also acts as an objective indicium of society's values. *Enmund*, 458 U.S. at 796. The jury also is a significant and reliable objective index of contemporary values because it is so directly involved. *Gregg*, 428 U.S. at 181.

The Court may also exercise its judgment to determine the application acceptability of the death penalty in conjunction with objective evidence. Objective evidence, though of great importance, [does] not "wholly determine" the controversy, "for the Constitution contemplates that in the end [the Court's] judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Atkins*, 536 U.S. at 312, 122 S. Ct. 2242, 2247, 153 L. Ed. 2d 335 (2002) citing *Coker v. Georgia*, 433 U.S. 238, 597, 97 S.Ct. 2861 (1977). Thus, in cases involving a consensus, our own judgment is "brought to bear," *Coker,* 433 U.S., at 597, 97 S.Ct. 2861, by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators. *Atkins,* 536 U.S. at 313.

B. Legislative Intent

The legislature's intent, in repealing the (F)(5) aggravating factor was to narrow the application of the death penalty in Arizona and leave the issue of the retroactive applicability of the repeal to the post-conviction relief process under Rule 32. The plain language of the previous statute, "[T]he aggravating factor of pecuniary gain is present when '[t]he defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." A.R.S. § 13-703(F)(5)(Supp.1997). *State v. Greene*, 192 Ariz. 431, 438, ¶ 27, 967 P.2d 106, 113 (1998) was replaced with, "[T]he defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value, or the defendant committed the offense as a result of payment, or a promise of payment, of anything of pecuniary value." A.R.S. § 13-751(F)(3). This changed the aggravating factor from general intent for pecuniary gain to 'murder-for-hire,' removing the class of crime and aggravating factor which the Defendant was convicted.

During the House Judiciary Committee hearing two witnesses testified, Rebecca Baker, Legislative Liaison, Maricopa County Attorney's Office (MCAO), and Susan Corey, J.D. Adjunct Professor, Arizona State University, and death penalty defense attorney. Ms. Baker, representing the bill's sponsor (MCAO) stated that,

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> The drafting of the bill resulted from the ongoing, significant litigation that "sparked a conversation amongst capital litigators about the aggravating factors that currently exist in the statute, and the result of that conversation is the proposal that's before you. The litigators, in that bureau, felt that those factors which we are proposing to eliminate, simply, historically (sic) have not been the most persuasive with juries in capital cases. And so, it's our proposal to remove them from the list of aggravating factors."[3]

The significant, ongoing litigation regarding the State's compliance in narrowing the class of persons eligible for the death penalty is *Hidalgo v. Arizona.* "To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Hidalgo v. Arizona*, 138 S. Ct. 1054, 200 L. Ed. 2d 496 (2018), citing *Lowenfield v. Phelps,* 484 U.S. 231, 244, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (quoting *Zant v. Stephens,* 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)). To satisfy the "narrowing requirement," a state *legislature* must adopt "*statutory factors* which determine death eligibility" and thereby "limit the class of murderers to which the death penalty may be applied." *Brown v. Sanders,* 546 U.S. 212, 216, and n. 2, 126 S.Ct. 884, 163 L.Ed.2d 723 (2006) (emphasis added).

The Legislature and the MCAO clearly intended to narrow the applicability of the (F)(5) aggravating factor as evidenced by their statements.[4,5] The only debate was whether the extent of S.B. 1314 significantly met the requirements of *Hidalgo* to be meaningful.[6] Nonetheless, both witness[7] and members of the legislature[8] agreed that it, "narrows the number of people who would be available for of the penalty, and it's good sentencing reform."[9] Furthermore, the State argues that the Legislature was not concerned with the constitutionality, and argues by inference that it was therefore not concerned with standards of decency, citing Ms. Baker's comments. However, Ms. Baker is not a member of the Legislature, and looking to her comments to the exclusion of the actual members of that body is misguided. The legislative record is clear that the

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[3] *Hearing on S.B. 1314 Before the H. Comm. On the Judiciary,* 54th Leg. 1st Reg. Sess. (Ariz. 2019), at 3:23:02.
[4] *Id.* at 3:28:06, Representative Diego Rodriguez asks, "Eliminating these two aggravating factors, isn't that, in fact, an attempt to narrow the applicability of our death penalty statute, by eliminating these two "non-persuasive" aggravators?" Ms. Baker replies, "Yes, it would narrow the application of the statute."
[5] *Id.* at 3:28:28, Committee Chairman, John Allen then opines to Representative Rodriguez, "To that point, I think this is a good thing."
[6] Id. at 3:30:04, Representative Kristen Engel opines, "So, I guess my concern is, if we are going to narrow the death penalty in order to be responsive to this concern that we've heard from the Supreme Court, is eliminating these particular factors going to do much in terms of narrowing our application […] if they're not really ones that are very persuasive to the jury anyway. I mean, I think it may be an improvement. But does it do very much?"
[7] *Id.* at 3:32:45, Witness Susan Corey, J.D. opines, "I believe actually this [bill] is in reaction to the litigation. I believe this bill is an attempt to narrow because I believe there are serious concerns about the constitutionality of the death penalty statute in Arizona."
[8] *House Third Reading of Bills, S.B. 1314, House Floor Session,* 54th Leg. 1st Reg. Sess. (Ariz. 2019), at 17:04, comments by Representative Diego Rodriguez, 18:20, comments by Representative Kristen Engel.
[9] *Id.* at 17:41, comments by Representative John Allen.

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Members were very concerned, not only about the narrowing and applicability of the death penalty both past and present, but equally, how their actions contributed to complying with the constitutional mandate of *Hidalgo*. The Court finds that the reasoning in the Legislative record including the reasons for the proposed legislation was to narrow the applicability and imposition of the death penalty in which the Defendant, under the Legislature's narrowing, is no longer eligible for the death penalty.

C. Retroactivity

The Legislature intended explicitly for defendants affected by the repeal of the aggravating factors outlined in S.B. 1314 to resolve their claims through the post-conviction relief process. The Arizona House of Representatives, Arizona State Senate, and the Judiciary Committees of both houses maintained the authority to amend and make the application of S.B. 1314 retroactive. None of the above chose to do so. While it is generally true that no statute is retroactive unless expressly declared therein, A.R.S. § 1-244, it can be reasonably assumed that the Legislature's failure to make the effect of the legislation retroactive is evidence of its intent for the law to be prospective. The State contends that this was intentional, again citing as evidence a statement made by Ms. Baker.[10] Again, Ms. Baker is not a member of the Arizona State Legislature and attributing her statements to legislative intent is misguided. In any event, the Court looks to the statements of the Legislature to determine its intent.

In the House Judiciary Committee hearing, the issue of retroactivity was brought to bear by Representative Rodriguez. Representative Rodriguez asked, "If there's a discussion about these not being persuasive, why are we not being asked to make this change retroactive, to eliminate these in past cases where they have been used?" In response to the question, Chairperson John Allen stated, "But Mr. Rodriguez, it doesn't preclude them from suing over it. You know, asking for relief, though usually, the courts don't apply it that way." Upon hearing this statement, Representative Rodriguez pointed to Chairperson Allen and nodded in agreement. The Court agrees with the Defendant and finds, in accordance with *Atkins*, that it is reasonable to assume, in light of the Legislature's statements recognizing the constitutional magnitude of a statutory repeal under the Eight Amendment, the Legislature explicitly intended for the courts to determine which already sentenced defendants should receive relief. The Legislature was only provided a statement from the MCAO that juries did not find the repealed factors persuasive. Lastly, though the plain language of A.R.S. § 1-244 is clear,

[10] *Hearing on S.B. 1314 Before the H. Comm. On the Judiciary,* 54th Leg. 1st Reg. Sess. (Ariz. 2019), at 3:27:10 "But as far as making it retroactive, typically sentencing changes are not made retroactively and people are sentenced according to what the law was at the time they committed their offense."

it does not abrogate the Constitution of the United States nor the holdings of the Supreme Court of the United States. The Court finds that the Legislature explicitly left it to the courts to discern the constitutional application of the aggravating factors repeal to previously sentenced defendants through the post-conviction relief process. The State argues that the Arizona Supreme Court ruled on the repealed (F)(5) aggravating factor in *State v. Smith*, 250 Ariz. 69, 24 – 27, 475 P.3d 558, 581 – 583 (2020). However, this case is distinguishable because the Defendant in *Smith* did not argue the constitutionality of the retroactivity of the application of the repealed (F)(5) aggravating factor, nor did the Court address the issues of constitutionality or retroactivity in its opinion. Further distinguishing, the defendant in *Smith* was convicted of multiple aggravating factors, and the application of a sole, repealed aggravating factor to impose the death penalty on him was not an applicable issue in his case. Instead, the Court deals with the issue of retroactivity of the sole, repealed (F)(5) aggravating factor herein. The Court further finds that the Legislature's repeal of the sole aggravating factor, leading to the imposition of the death penalty, applicable to the Defendant's case is retroactive, and the Defendant may not be executed for lack of any aggravating factors necessary for the imposition of a death sentence.

D. Contemporary Standard of Decency

In evaluating the Legislature's and juries' actions *in toto*, the Court further finds that the State of Arizona established a contemporary community standard and consensus against executing defendants convicted of murder solely for pecuniary gain, except in cases of murder-for-hire. In so finding, the Court looks to objective factors and to its own judgment. The clearest and most reliable is the legislation enacted by Arizona's Legislature. The Legislature overwhelming voted to repeal the (F)(5) aggravating factor to narrow the applicability of the death penalty, intended the courts to determine its retroactivity, and did so because the State's largest county and trier of death penalty cases sponsored the repealing legislation on the grounds that juries, a significant and reliable objective index of contemporary values because of their direct involvement, did not find it persuasive for the imposition of the death penalty in those circumstances. *supra*. The State claims that from 2008 – 2012, the (F)(5) aggravating factor was found in 10 of 65 cases in which the death penalty was imposed. The Defendant introduced evidence showing that from 2002 to present only 2 of 142 death sentences being imposed under the sole aggravating factor in this Defendant's conviction.[11] Moreover, it is unknown how any of the 10 convictions under the pecuniary factor aggravator cited by the State were for murder-for-hire (now A.R.S. § 13-751) activity, neither do we know the number of failed prosecutions under the factor in which juries rejected it as an aggravator. What is known is that the State's largest prosecuting office, in significant

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consultation with capital bureau attorneys, based on the information listed above, found it necessary to sponsor now enacted legislation for the repeal of the (F)(5) aggravating factor due to unpersuasiveness to juries. The Court finds that the community standard of decency exists in Arizona against executing defendants where the sole aggravating factor is repealed. To do so would violate the United States and Arizona Constitutions.

E. Prosecutorial Discretion

Given the limited amount of information, it is difficult to discern the amount of historical prosecutorial discretion utilized in seeking or not seeking the death penalty under the (F)(5) aggravating factor. Absent sufficient evidence, none of which was supplied in the legislative hearings, this petition, and its subsequent pleadings and testimony, the Court makes no inference or findings on this basis. Instead, the Court defers to more reliably objective factors stated above.

F. National Consensus

In addition to this Court's finding of a contemporary standard of decency against execution solely for pecuniary gain when not in a murder-for-hire situation, there is a national consensus against executing defendants for a crime that is no longer eligible for the death penalty. No evidence was presented indicating that any state has ever executed a defendant after a legislative repeal of the death penalty partially or completely, a judicial repeal, a current repeal, or a now-past period of repeal. Regardless of the reason or the totality of the repeal, it is telling that there is no appetite anywhere for executions in these circumstances. Even in this case, it is doubtful that the Defendant will be executed by the State. The Court bases its finding on the impression left it by the attorneys for the State that the State's concern in this case is not whether the death sentence imposed on Defendant will ever be carried out, but whether this Court has the authority to prevent it. In any event, the State does not dispute the facts that no defendant has been executed after any repeal of the death penalty where no aggravating factors still remain even if the repeal was not made retroactive. The Court finds the reason these executions have not taken place, whether by statutory repeal, executive clemency, the judiciary, or mere passage of time are due to a national consensus against such executions. The Legislature, taking its cue from the behavior of juries in cases involving the (F)(5) aggravating factor, has recognized this national consensus.

[11] Exhibit D.

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G. Significant Change in the Law

A defendant may seek post-conviction relief when there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence. Ariz. R. Crim. P. 32.1(g). In this case, the Defendant's sentence at the time of sentencing was indisputably lawful, and the Legislature had not yet repealed the sole (F)(5) aggravating factor necessary for the imposition of his death sentence. Thus, the Defendant could not have raised this claim in any previous post-conviction petition. Once the Legislature repealed the aggravating factor in August 2019, a valid claim under Rule 32.1(a) became new and could not have been previously raised on direct appeal under Rule 31, or post-trial motion under Rule 24, was not previously adjudicated, and was not knowingly waived in any previous proceedings. Indeed, a legislature's repeal of a defendant's sole aggravating factor for which the death penalty is imposed, is a significant change in the law. The Legislature's repeal narrowed the class of defendant's eligible for the death penalty and because this Defendant's sole aggravating factor has been repealed, under the facts of his case, he would not be subject to the death penalty. In other words, if he committed the exact same offense today, he could not be put to death under the same circumstances as his original sentencing.

The Court finds that a significant change in law (repeal of the sole aggravating factor) entitles the Defendant to post-conviction relief and disallows the imposition of the death penalty in his case.

Based on the foregoing:

IT IS ORDERED vacating the Defendant's death sentence.

IT IS ORDERED setting this matter for a Resentencing Hearing the time and date to be determined by the newly assigned judge.

IT IS FURTHER ORDERED referring this case to the Presiding Judge for reassignment.

/s/
HON. WAYNE E. YEHLING
(ID: 9ab6bc66-69e0-4b77-ba00-b360df10884d)

cc: Hon. Kyle Bryson
Ginger Jarvis, Esq.
Todd Jackson, Esq.
Beau John Greene
Arizona State Prison Complex
Attorney General - Victim Notification
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Jason Buckner
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