No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Beau John Greene, Petitioner,

vs.

State of Arizona, Respondent.

****CAPITAL CASE****

ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION APPENDIX

Julie Hall
Counsel of Record

779 S. Cody Loop Rd
Oracle, AZ 85623-6121

(520) 609-2415
JulieSHall@hotmail.com

Counsel for Petitioner Greene

PETITION APPENDIX

255 Ariz. 37
Supreme Court of Arizona.

STATE of Arizona, Plaintiff/Petitioner,
v.
Beau John GREENE, Defendant/Respondent.

No. CR-21-0082-PC
|
Filed April 14, 2023

Synopsis

Background: After convictions and death sentence for first-degree murder, robbery, and related crimes were affirmed in relevant on direct appeal, 192 Ariz. 431, 967 P.2d 106, Supreme Court review of denial of first petition for postconviction relief was denied, defendant filed successive petition for postconviction, challenging constitutionality of death sentence in light of amendment to statutory aggravating factor found by jury that he committed murder for pecuniary gain, which limited its application to cases involving murder-for-hire, without consideration of defendant's subjective intent. The Superior Court, Pima County, No. CR048730-001, Wayne E. Yehling, J., granted petition and vacated death sentence. State's petition for review was granted.

Holdings: The Supreme Court, Montgomery, J., held that:

[1] amendment to statutory aggravating factor for murder committed for pecuniary gain did not apply retroactively on postconviction review;

[2] conviction for robbery committed contemporaneously with killing fell within scope of statutory aggravating factor when "defendant was previously convicted … for serious offenses committed on the same occasion as the homicide";

[3] defendant failed to demonstrate evolving community standards of decency precluding imposition of death penalty in such cases;

[4] death penalty for first-degree murder still served penological goal of deterrence after amendment;

[5] death penalty advanced penological goal of retribution after amendment;

[6] death sentence was not disproportionate to crime, and thus did not violate Eighth Amendment prohibition against excessive punishments;

[7] defendant was not entitled to relief from death sentence under rule authorizing relief when sentence "as imposed is not authorized by law";

[8] defendant was not entitled to relief under provision of rule 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"; and

[9] defendant did not show by clear and convincing evidence that no reasonable jury would find him to be death-eligible in aggravation phase of trial, as basis for relief.

Reversed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (35)

[1] Criminal Law Post-conviction relief

An appellate court reviews a superior court's ruling on a postconviction relief petition for an abuse of discretion, which occurs if the postconviction court makes an error of law.

[2] Criminal Law Review De Novo

On appeal from the superior court's ruling on a petition for postconviction relief, the superior court's legal conclusions are reviewed de novo.

[3] Criminal Law Change in the law
Sentencing and Punishment Effect of amendment or other modification

Legislative amendment to statutory aggravating factor for murder committed for pecuniary gain, which effectively limited jury's consideration of pecuniary gain factor to cases involving murder-for-hire and did not encompass defendant's subjective intent, did not apply retroactively on

postconviction review of death sentence based on jury's finding of "murder for pecuniary gain" aggravator, under statute in effect at time of crime, where amended statute contained no explicit language indicating retroactivity, and retroactivity was not referenced in any bill draft, summary, or analysis. Ariz. Rev. Stat. Ann. § 13-751(F)(3); Ariz. Rev. Stat. Ann. § 13-703(F)(5) (1995).

[4] **Criminal Law** Sentence and punishment

A death-sentenced defendant's argument that his conduct is no longer subject to the death penalty based on the legislative elimination of the statutory aggravating factor upon which the death sentence is based necessitates consideration of the entirety of the aggravating circumstances. Ariz. Rev. Stat. Ann. § 13-751(F).

[5] **Sentencing and Punishment** Personal or pecuniary gain

Amendment to statutory aggravating factor for murder committed with expectation of pecuniary gain, as ground for imposition of death penalty, essentially limited jury's consideration of aggravating factor to cases involving murder-for-hire and did not encompass defendant's own subjective intent for killing. Ariz. Rev. Stat. Ann. § 13-751(F)(3).

[6] **Sentencing and Punishment** Killing while committing other offense or in course of criminal conduct

Defendant's conviction for robbery committed contemporaneously with killing fell within scope of statutory aggravating factor that supported imposition of death sentence when "defendant was previously convicted … for serious offenses committed on the same occasion as the homicide." Ariz. Rev. Stat. Ann. § 13-751(F)(2).

[7] **Sentencing and Punishment** Excessiveness and Proportionality of Sentence

Sentencing and Punishment Proportionality

The Eighth Amendment, applicable to the states through the Fourteenth Amendment, proscribes all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive, and punishment for the crime must be proportionate to the offense to comport with this constitutional guarantee. U.S. Const. Amends. 8, 14.

[8] **Sentencing and Punishment** Proportionality

Whether punishment is excessive and disproportionate to the offense, in violation of the Eighth Amendment, is determined not by standards that prevailed when Eighth Amendment was adopted in 1791 but by norms that currently prevail; such norms are derived from evolving standards of decency that mark progress of maturing society. U.S. Const. Amend. 8.

[9] **Sentencing and Punishment** Scope of Prohibition

An assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment's prohibition against cruel and unusual punishment, and these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices, but should be informed by objective factors to the maximum possible extent. U.S. Const. Amend. 8.

[10] **Sentencing and Punishment** Proportionality

Whether punishment is disproportionate to the offense, in violation of the Eighth Amendment, ultimately depends on court's own understanding of sentence's purpose, which includes death sentence's purpose. U.S. Const. Amend. 8.

[11] **Sentencing and Punishment** Proportionality in general

Death sentence is unconstitutional under Eighth Amendment if both evolved societal standards of decency demonstrate consensus against punishment and court's independent judgment concludes that sentence is not proportionate to crime. U.S. Const. Amend. 8.

[12] **Sentencing and Punishment** Effect of amendment or other modification

Sentencing and Punishment Personal or pecuniary gain

Sentencing and Punishment Killing while committing other offense or in course of criminal conduct

Postconviction amendment to statutory aggravating factor for murder committed with expectation of pecuniary gain, which essentially limited jury's consideration of aggravating factor to cases involving murder-for-hire and did not consider defendant's own subjective intent for killing, did not reflect evolving community standard of decency precluding imposition of death penalty, in violation of Eighth Amendment prohibition against excessive punishments, for defendant whose conduct also fell within scope of statutory aggravating factor if defendant was also convicted of serious offense committed contemporaneously with murder, specifically robbery. U.S. Const. Amend. 8; Ariz. Rev. Stat. Ann. § 13-751(F)(2), (3); Ariz. Rev. Stat. Ann. § 13-703(F)(5) (1995).

[13] **Sentencing and Punishment** Death penalty as cruel or unusual punishment

The clearest and most reliable objective indication of a national consensus concerning imposition of the death penalty, for purposes of determining whether a particular defendant's death sentence violates the Eighth Amendment, is the legislation enacted by the country's legislatures. U.S. Const. Amend. 8.

[14] **Sentencing and Punishment** Effect of amendment or other modification

Sentencing and Punishment Personal or pecuniary gain

Number of jury decisions in past 20 years considering pre-amended statutory aggravating factor of murder for pecuniary gain did not show evolving community standard of decency that jury considered death penalty based on aggravator to violate Eighth Amendment prohibition against excessive punishment, in light of amendment that limited aggravator to cases involving murder for hire and did not consider defendant's subjective intent at time of killing; neither defendant nor State presented evidence of capital cases based solely on "pecuniary gain" aggravator when jury did not impose death sentence, there was no evidence regarding number of failed prosecutions under circumstances in which juries rejected "murder for pecuniary gain" aggravator, and other valid reasons existed to explain why there limited number of death sentences based on "murder for pecuniary gain" aggravator. U.S. Const. Amend. 8; Ariz. Rev. Stat. Ann. § 13-751(F)(3); Ariz. Rev. Stat. Ann. § 13-703(F)(5) (1995).

[15] **Sentencing and Punishment** Death penalty as cruel or unusual punishment

When considering evolving standards of decency and constitutionality of imposing death sentence, response of juries reflected in their sentencing decisions in capital cases are to be consulted. U.S. Const. Amend. 8.

[16] **Sentencing and Punishment** Effect of amendment or other modification

Sentencing and Punishment Personal or pecuniary gain

Judgment of prosecutors on pre-amended version of statutory aggravating factor found by jury when murder was committed with expectation of pecuniary gain did not demonstrate evolving standards of decency precluding imposition death penalty based on aggravator, in violation of Eighth Amendment prohibition against excessive punishment, after aggravator was amended to limit its application to cases involving murder-for-hire and did not consider defendant's subjective intent, absent any evidence on views of prosecutors or amount of prosecutorial discretion in seeking death penalty based on aggravator. U.S. Const. Amend. 8; Ariz. Rev. Stat. Ann. § 13-751(F)(3); Ariz. Rev. Stat. Ann. § 13-703(F)(5) (1995).

[17] **Sentencing and Punishment** Effect of amendment or other modification

Sentencing and Punishment Personal or pecuniary gain

Other states' repeals or restrictions on imposition of death penalty did not demonstrate evolving standards of decency precluding imposition death penalty in Arizona cases involving murder committed for pecuniary gain, in alleged violation of Eighth Amendment prohibition against excessive punishment, based on pre-amended version of statutory "murder for pecuniary gain" aggravating factor in effect at time of killing, after aggravator was amended to limit its application to cases involving murder-for-hire without consideration of defendant's subjective intent; Arizona legislature did not repeal death penalty for murders committed in manner similar to defendant's killing of victim, i.e., in course of robbery. U.S. Const. Amend. 8; Ariz. Rev. Stat. Ann. § 13-751(F)(2), (3); Ariz. Rev. Stat. Ann. § 13-703(F)(5) (1995).

[18] **Sentencing and Punishment** Effect of amendment or other modification

Sentencing and Punishment Personal or pecuniary gain

Judicial decisions in states where death penalty or statutory aggravating factors were repealed, holding that execution of sentence imposed pre-repeal would violate Eighth Amendment prohibition against excessive punishment or analogous state laws did not reflect evolving community standard of decency to prohibit imposition of death sentence based on pre-amended version of statutory aggravating factor that murder was committed for pecuniary gain, after statute was amended to limit its application to cases involving murder-for-hire and eliminated consideration of defendant's subjective intent, where state legislature did not outright repeal death penalty or preclude its application in cases involving same conduct as defendant's, and some states had affirmed death sentences imposed pre-repeal of aggravating factors. U.S. Const. Amend. 8; Ariz. Rev. Stat. Ann. § 13-751(F)(3); Ariz. Rev. Stat. Ann. § 13-703(F)(5) (1995).

[19] **Sentencing and Punishment** Death penalty as cruel or unusual punishment

Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance as to whether evolving community standards precludes application of the death penalty, in alleged violation of the Eighth Amendment prohibition against excessive punishment it is for the Supreme Court ultimately to judge whether the Eighth Amendment permits imposition of the death penalty. U.S. Const. Amend. 8.

[20] **Sentencing and Punishment** Proportionality in general

In exercising its independent judgment on the issue whether the imposition of the death penalty is disproportionate to the offense, and therefore impermissibly excessive, in violation of the Eighth Amendment, the Supreme Court considers whether the defendant's sentence

serves the penological purposes of the death penalty. U.S. Const. Amend. 8.

[21] **Sentencing and Punishment** Death penalty as cruel or unusual punishment
Sentencing and Punishment Deterrence
Sentencing and Punishment Retribution

Death penalty is appropriate sanction when it advances penological goals of deterrence and retribution; otherwise, it is nothing more than purposeless and needless imposition of pain and suffering, in violation of Eighth Amendment prohibition against cruel and unusual punishment. U.S. Const. Amend. 8.

[22] **Sentencing and Punishment** Effect of amendment or other modification
Sentencing and Punishment Personal or pecuniary gain

Death penalty for first-degree murder still served penological goal of deterrence after amendment to statutory aggravating factor that murder was committed for pecuniary gain, which limited its application to cases involving murder-for-hire and did not encompass consideration of defendant's subjective intent, for purposes of determining whether death sentence imposed based on jury's finding of murder for pecuniary gain under pre-amended version of aggravator violated Eighth Amendment prohibition against excessive punishments, where legislature did not repeal statutory aggravator when "defendant was previously convicted … for serious offenses committed on the same occasion as the homicide," specifically, in defendant's case, murder committed in course of robbery. U.S. Const. Amend. 8; Ariz. Rev. Stat. Ann. § 13-751(F)(2), (3); Ariz. Rev. Stat. Ann. § 13-703(F)(5) (1995).

[23] **Sentencing and Punishment** Deterrence
Sentencing and Punishment Proportionality in general

Death sentence has deterrent value, for purposes of determining whether it advances penological goals, and therefore whether it is disproportionate to offense, in alleged violation of Eighth Amendment prohibition against excessive punishments, if it would deter other persons from committing same crime as one defendant committed. U.S. Const. Amend. 8.

[24] **Sentencing and Punishment** Retribution

Retribution, as a penological goal, serves to punish perpetrator and gives voice to moral outrage experienced by victim and society at large; it reflects society's and victim's interests in seeing that offender is repaid for hurt he caused.

[25] **Sentencing and Punishment** Death penalty as cruel or unusual punishment
Sentencing and Punishment Aggravating circumstances in general

Penological goal of retribution does not necessarily justify imposition of the death penalty for every first degree murder, for purposes of determining whether death sentence would violate Eighth Amendment prohibition against cruel and unusual punishment; rather, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death, and therefore, the death penalty must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution. U.S. Const. Amend. 8.

[26] **Sentencing and Punishment** Effect of amendment or other modification
Sentencing and Punishment Retribution
Sentencing and Punishment Personal or pecuniary gain

Death penalty for first-degree murder advanced penological goal of retribution following amendment to statutory aggravating factor that murder was committed for pecuniary gain, which limited its application to cases involving murder-for-hire and did not encompass consideration of defendant's subjective intent, for purposes of determining whether death sentence imposed based on jury's finding of murder for pecuniary gain under pre-amended version of aggravator violated Eighth Amendment prohibition against excessive punishments, where, aside from defendant's motive for killing, he remained subject to death penalty based on statutory aggravator for murder committed when "defendant was previously convicted … for serious offenses committed on the same occasion as the homicide," specifically, in defendant's case, murder committed in course of robbery. U.S. Const. Amend. 8; Ariz. Rev. Stat. Ann. § 13-751(F)(2), (3); Ariz. Rev. Stat. Ann. § 13-703(F)(5) (1995).

[27] **Sentencing and Punishment** Effect of amendment or other modification

Sentencing and Punishment Personal or pecuniary gain

Sentencing and Punishment Killing while committing other offense or in course of criminal conduct

Sentence of death for first-degree murder committed during course of robbery was not disproportionate to crime, and thus did not violate Eighth Amendment prohibition against excessive punishments, based on finding by jury of statutory aggravating factor that murder was committed for pecuniary gain, after statutory aggravator was amended to limited its application to cases involving murder-for-hire and did not encompass consideration of defendant's subjective intent, where murder was committed during course of robbery, and thus, facts of killing would support finding on statutory aggravator that killing was committed when "defendant was previously convicted … for serious offenses committed on the same occasion as the homicide." U.S. Const. Amend. 8; Ariz. Rev. Stat. Ann. § 13-751(F)(2), (3); Ariz. Rev. Stat. Ann. § 13-703(F)(5) (1995).

[28] **Courts** Construction and application of rules in general

The Supreme Court interprets court rules according to the principles of statutory construction.

[29] **Courts** Construction and application of rules in general

The court interprets rules of procedure by their plain meaning and reads them in conjunction with each other and harmonize them whenever possible.

[30] **Criminal Law** Sentence and punishment

Defendant was not entitled to relief from death sentence under rule authorizing relief when sentence violated United States or Arizona constitutions, after statutory aggravating factor found by jury, that murder was committed for pecuniary gain, was amended to limit its application to cases involving murder-for-hire and did not consider defendant's subjective intent, where sentence imposed based on statutory aggravator in effect at time of crime was constitutional under both federal and Arizona constitutions. U.S. Const. Amend. 8; Ariz. Const. art. 2, § 15; Ariz. Rev. Stat. Ann. § 13-751(F)(3); Ariz. Rev. Stat. Ann. § 13-703(F)(5) (1995); Ariz. R. Crim. P. 32.1(a).

[31] **Criminal Law** Sentence and punishment

Defendant was not entitled to relief from imposition of death sentence under criminal rule authorizing relief when sentence "as imposed is not authorized by law," based on defendant's assertion that death sentence was no longer authorized by law after statutory aggravating factor found by jury that murder was committed for pecuniary gain was amended to limit its

application to cases involving murder-for-hire and did not consider defendant's subjective intent, where defendant's death sentence was lawful under statutory scheme in effect at time of killing. Ariz. Rev. Stat. Ann. § 13-751(F)(3); Ariz. Rev. Stat. Ann. § 13-703(F)(5) (1995); Ariz. R. Crim. P. 32.1(c).

[32] **Criminal Law** Sentence and punishment

Criminal rule authorizing relief from sentence imposed that was "not authorized by law" was not limited to sentences imposed for term of years, but encompassed defendant's challenge to death sentence; rule explicitly stated that defendant could file notice of request for postconviction relief "in any case in which the defendant was sentenced to death." Ariz. R. Crim. P. 32.1(c).

[33] **Criminal Law** Change in the law

Criminal Law Sentence and punishment

Defendant was not entitled to relief from death sentence for first-degree murder under criminal rule authorizing relief from sentence 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," based on postconviction amendment to statutory aggravating factor that jury had found, that murder was committed for pecuniary gain, which amendment limited application of aggravator to cases involving murder-for-hire and did not consider defendant's subjective intent; amended aggravator did not apply retroactively, and therefore, was not "applicable to the defendant's case," and in any case, death sentence remained constitutional under both Eighth Amendment and Arizona Constitution, given that murder committed during course of robbery satisfied statutory aggravator that he was convicted of serious crime committed at same time of murder. U.S. Const. Amend. 8; Ariz. Const. art. 2, § 15; Ariz. Rev. Stat. Ann. § 13-751(F)(2), (3); Ariz. Rev. Stat. Ann. § 13-703(F)(5) (1995); Ariz. R. Crim. P. 32.1(g).

[34] **Criminal Law** Change in the law

Criminal Law Sentence and punishment

Defendant was not entitled relief from death sentence for first-degree murder under criminal rule authorizing relief upon showing "by clear and convincing evidence that the facts underlying the claim would be sufficient to establish … that no reasonable fact-finder would find the defendant eligible for the death penalty in an aggravation phase" of trial, based on postconviction amendment to statutory aggravating factor found by jury that murder was committed for pecuniary gain, which amendment limited application of aggravator to cases involving murder-for-hire and did not consider defendant's subjective intent, where amendment did not apply retroactively to defendant's sentence, and therefore, any jury considering defendant's eligibility for death penalty would do so under statutes in effect at time of crime, and defendant did not present clear and convincing evidence addressing sufficiency of facts to support aggravator. Ariz. Rev. Stat. Ann. § 13-751(F)(3); Ariz. Rev. Stat. Ann. § 13-703(F)(5) (1995); Ariz. R. Crim. P. 32.1(h).

[35] **Criminal Law** Sentence and punishment

Under rule authorizing relief from death sentence when defendant demonstrates "by clear and convincing evidence that facts underlying the claim would be sufficient to establish … that no reasonable jury would find the defendant eligible for the death penalty in an aggravation phase," "clear and convincing evidence" concerned facts that addressed proof of aggravating circumstance; relief could not be based on legal insufficiency concerning imposition of sentence of death in general. Ariz. R. Crim. P. 32.1(h).

***327** On Review from the Superior Court in Pima County, The Honorable Wayne E. Yehling, Judge, No. CR048730-001. **REVERSED**

Attorneys and Law Firms

Kristin K. Mayes, Arizona Attorney General, Jeffrey L. Sparks, Chief Counsel, Ginger Jarvis (argued), Assistant Attorney General, Phoenix, Attorneys for State of Arizona

Todd Jackson (argued), Meighan LaFata, Jackson & Oden, PLLC, Tucson, Attorneys for Beau John Greene

Mikel Steinfeld, Arizona Attorneys for Criminal Justice, Phoenix, Attorney for Amicus Curiae Arizona Attorneys for Criminal Justice

JUSTICE MONTGOMERY authored the Opinion of the Court, in which CHIEF JUSTICE BRUTINEL, VICE CHIEF JUSTICE TIMMER, and JUSTICES BOLICK and KING joined. *

* Justices John R. Lopez IV and James P. Beene are recused from this case.

Opinion

JUSTICE MONTGOMERY, Opinion of the Court:

***328** ¶1 We consider in this case whether legislative amendments to A.R.S. § 13-751(F)(5), enacted in 2019, provide a basis for post-conviction relief ("PCR") under Arizona Rule of Criminal Procedure 32.1(a), (c), (g), and (h) for a sentence of death imposed in 1996. Because the amendments are prospective only and the 1996 sentence is constitutional under the United States and Arizona Constitutions, we hold they do not provide a basis for relief.

I. HISTORICAL BACKGROUND

A. Murder, Conviction, and Sentence

¶2 Beau John Greene murdered University of Arizona music professor Roy Johnson on February 28, 1995, beating him to death in Johnson's car and then abandoning his body in the desert. *State v. Greene*, 192 Ariz. 431, 435 ¶¶ 2, 5, 967 P.2d 106 (1998). Johnson's wife had expected him home before 10:00 p.m., but he never returned. *Id.* ¶ 2. He was last seen the evening of the 28th leaving the Green Valley Presbyterian Church, where he had given an organ recital. *Id.* On the night of the murder, "Greene and Johnson crossed paths, but the record does not tell us how." *Id.* ¶ 4. Four days later, Johnson's body was discovered "lying face down in a wash." *Id.* ¶ 2.

¶3 After dumping Johnson's body in the wash, Greene stole his car and wallet and embarked on a "spending spree using Johnson's cash and credit cards." *Id.* ¶ 8. Greene purchased "clothes, food, camping gear, a scope and air rifle, and a VCR (which he later traded for methamphetamine)" while feigning injury to his hand to "explain any discrepancies between his signature and those on the credit cards." *Id.*

¶4 A jury convicted Greene of first degree murder—felony and premeditated—robbery, kidnapping, theft, and six counts of forgery. *Id.* at 434–35 ¶ 1, 967 P.2d at 109-10. The trial court sentenced him to death for the murder of Johnson based on two aggravating circumstances: (1) the murder was committed for pecuniary gain, A.R.S. § 13–703(F)(5) (1996); and (2) the murder was committed in an especially heinous or depraved manner, § 13–703(F)(6) (1996). [1] *Id.* at 439 ¶¶ 32–33, 967 P.2d at 114.

1 Citations to statutes and rules are to current versions that have not been materially altered unless otherwise noted. In 2008, § 13-703 was amended and renumbered as § 13-751. 2008 Ariz. Sess. Laws ch. 301, §§ 26, 38 (2d Reg. Sess.).

B. Direct Appeal

¶5 This Court affirmed Greene's convictions on direct appeal for first degree murder, robbery, theft, and forgery, and affirmed his death sentence. *Id.* at 435 ¶ 1, 967 P.2d at 110. As to the robbery count, the Court considered whether the trial court erred in denying Greene's motion for a directed verdict. *Id.* at 436 ¶ 12, 967 P.2d at 111-12. Greene argued there was "no direct evidence that he intended to take the victim's property at the time he used force." *Id.* at 437 ¶ 13, 967 P.2d at 112. This Court noted, though, that "[a]fter stealing Johnson's car, and within hours after killing him, he began spending Johnson's money and using his credit cards." *Id.*

¶ 14. Therefore, in conjunction with the evidence at the crime scene, the Court concluded that "[a] rational trier of fact could have found beyond a reasonable doubt that Greene's use of force against Johnson was accompanied by an intent to take Johnson's property." *Id.* ¶ 15.

¶6 The Court reversed the kidnapping conviction because there was no evidence that ***329** "Greene, while in the car, knowingly restrained Johnson before bludgeoning him, or whether he simply chose to strike him at an opportune moment." *Id.* ¶¶ 17–18; A.R.S. § 13-1304(A)(3) (requiring that a defendant knowingly restrain a victim with intent to "[i]nflict death, physical injury or a sexual offense ..., or to otherwise aid in the commission of a felony" for a kidnapping conviction).

¶7 The Court likewise reversed the trial court's finding that the murder was especially heinous or depraved under the (F)(6) aggravating circumstance based on "relishing, senselessness, and helplessness" because there was insufficient evidence that "Greene relished the murder beyond a reasonable doubt" at the exact moment he murdered Johnson. *Id.* at 440–41 ¶¶ 33, 42, 967 P.2d at 114-16. The Court therefore concluded that "[a]bsent a finding of relishing, the (F)(6) aggravator cannot stand, because senselessness and helplessness, without more, are ordinarily insufficient to prove heinousness or depravity." *Id.* at 441 ¶ 42, 967 P.2d at 116.

¶8 With respect to the (F)(5) pecuniary gain aggravating circumstance, the Court observed that "Greene's actions after the murder also demonstrate[d] a pecuniary motive." *Id.* at 439 ¶ 30, 967 P.2d at 114. The Court recounted evidence of "Greene's admitted need for money, drugs, and transportation." *Id.* ¶ 29. Combined with the evidence that Greene "had [Johnson's] wallet with him when he left the wash immediately following the murder," it was clear that Greene "intended to profit from the murder no later than the moment he picked up the object to kill Johnson." *Id.* ¶¶ 28–29, 32. Therefore, "[t]he evidence support[ed] beyond a reasonable doubt a finding that Greene, coming off of methamphetamine and penniless, killed Johnson to obtain cash or credit cards." *Id.* ¶ 32.

C. First PCR Petition

¶9 Greene filed his first PCR petition in August 2000. He raised several claims of ineffective assistance of counsel, sought reevaluation of his death sentence, presented impeachment evidence regarding Johnson's wife, and argued that he was entitled to have a jury sentence him. The superior court held an evidentiary hearing. Greene recounted that after Johnson drove them to a church parking lot, Greene left the car and put on a lead-lined "handmade 'sap' glove,"[2] before returning to the car and beating Johnson to death with it, rather than his fists as he testified at trial. The court denied the PCR petition in January of 2003.

2 According to Greene, the glove was "[a] thinner glove inside a larger welding-type glove, a great big glove. And inside was [sic] little pouches of lead shot that had been sewn into the back of the smaller leather glove, and then the larger glove was sewn over that to hold everything into place."

¶10 This Court denied Greene's petition for review of that decision on December 5, 2003, and issued a warrant for his execution on January 14, 2004. Greene's execution was subsequently stayed on December 8, 2008, pending federal habeas review.[3]

3 Greene's habeas proceedings continue in federal court. *See Greene v. Shinn*, No. CV-03-00605-TUC-JCH, 2021 WL 3602857, at *28 (D. Ariz. Aug. 13, 2021) (denying relief in part and granting relief in part based on finding that Arizona Supreme Court used an unconstitutional causal nexus test to assess Greene's mitigation evidence) (appeal stayed pending these proceedings).

D. Successive PCR Petition

¶11 On May 26, 2020, Greene filed this successive PCR petition in the superior court. Greene argued that he was entitled to relief under Rule 32.1(a), (c), (g), and (h) because his death sentence was now unconstitutional under the United States and Arizona Constitutions as a consequence of the 2019 legislative amendments to the (F)(5) aggravating circumstance. The State argued in response that Greene was not entitled to any relief because the amendments were prospective only and therefore inapplicable to his sentence and that no legal basis existed to render his sentence unconstitutional.[4] Following ***330** an evidentiary hearing, the superior court granted Greene the relief he sought for each claim under Rule 32.1 and vacated his sentence of death.

4 The State also offered arguments concerning timeliness and preclusion. However, at oral argument the State acknowledged, without conceding the point, that it was not challenging the superior court's rulings concerning the timeliness or preclusion of Greene's claims. As the State has abandoned this argument, we do not address it further.

¶12 We granted review to address whether Rule 32.1(a), (c), (g) or (h) permit relief when the legislature made a prospective change to the definition of a capital aggravating circumstance. We have jurisdiction pursuant to article 6, section 5(3) of the Arizona Constitution and A.R.S. §§ 13-4031 and 13-4239.

II. ANALYSIS

¶13 The State argues that because the (F)(5) amendments are not retroactive and there is no basis on which to find Greene's sentence is unconstitutional, he is not entitled to any of the relief he seeks and the superior court erred in ruling otherwise. Greene argues that the superior court was correct in granting relief under Rule 32.1(a), (c), (g), and (h) because the (F)(5) amendments reflect a determination by the legislature that a murder committed for pecuniary gain does not demonstrate the extreme culpability justifying the imposition of a death sentence. Therefore, he argues that to carry out his sentence now when his criminal conduct is no longer subject to capital punishment would violate the United States and Arizona Constitutions pursuant to the Eighth Amendment and article 2, section 15, respectively. Thus, Greene asserts that the amendments to (F)(5) are applicable to his sentence.

[1] **[2]** ¶14 We review a superior court's ruling on a PCR petition for an abuse of discretion, which occurs if the court makes an error of law. *State v. Pandeli*, 242 Ariz. 175, 180 ¶ 4, 394 P.3d 2, 7 (2017). A superior court's legal conclusions are reviewed de novo. *State v. Miller*, 251 Ariz. 99, 102 ¶ 8, 485 P.3d 554, 557 (2021).

¶15 Because each party's arguments and the analysis of the superior court are premised on the legislature's amendment of the former (F)(5) aggravating circumstance, we begin by reviewing the role of aggravating circumstances in capital cases and the specific amendments in question.

A. Aggravating Circumstances And The 2019 Amendments To (F)(5)

¶16 For a defendant to qualify for capital punishment, a jury must unanimously find that the state has established the existence of one or more aggravating circumstances listed at § 13-751(F) during the aggravation phase of a capital trial. A.R.S. § 13-752(E) ("If the trier of fact unanimously finds no aggravating circumstances, the court shall then determine whether to impose a sentence of life or natural life ...."); *State v. Thompson*, 252 Ariz. 279, 295 ¶ 53, 502 P.3d 437, 453 (2022) ("[T]he death penalty cannot be imposed in the absence of aggravating circumstances."). The state must prove the existence of an aggravating circumstance beyond a reasonable doubt. A.R.S. § 13-751(B). If one or more aggravating circumstances are proven, the matter proceeds to the penalty phase. A.R.S. § 13-752(F).

¶17 During the penalty phase, the jury "shall take into account the aggravating and mitigating circumstances that have been proven, and if it unanimously determines that there are no mitigating circumstances sufficiently substantial to call for leniency," the jury "shall impose a sentence of death."[5] A.R.S. §§ 13-751(E), -752(H); *see also* *State v. Prince*, 226 Ariz. 516, 526 ¶ 16, 250 P.3d 1145, 1155 (2011) (discussing the "jury's duty to 'assess whether to impose the death penalty based upon each juror's individual, qualitative evaluation of the facts of the case, the severity of the aggravating factors, and the quality of any mitigating evidence.' " (quoting *State ex rel. Thomas v. Granville,* 211 Ariz. 468, 472 ¶ 17, 123 P.3d 662, 666 (2005)).

5 If the jury unanimously determines that a sentence of death is not appropriate, the court imposes a sentence of either life or natural life. A.R.S. § 13-752(H).

¶18 In 2019, the Arizona Legislature narrowed the statutory aggravating circumstances that a jury may consider in determining whether to impose a sentence of death by amending several provisions of § 13-751(F). 2019 Ariz. Sess. Laws ch. 63, § 1 (1st Reg. Sess.). The amendments did not alter the first two aggravating circumstances, § 13-751(F)(1) (prior conviction of another offense punishable by life imprisonment or death) ***331** and § 13-751(F)(2) (serious offense). However, three were completely

eliminated: § 13-751(F)(3) (grave risk of death to another person); § 13-751(F)(13) (murder committed in cold and calculated manner); and § 13-751(F)(14) (use of a stun gun). *Id.* With respect to § 13-751(F)(5), the legislature amended its language, combined it with the § 13-751(F)(4) aggravating circumstance, and renumbered the new provision as § 13-751(F)(3). *Id.* The remaining aggravating circumstances were only renumbered. *Id.*

¶19 Before 2019, (F)(4) read: "The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value." A.R.S. § 13-751(F)(4) (2018). The (F)(5) aggravating circumstance read: "The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." § 13-751(F)(5) (2018). The new (F)(3) reads: "The 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." Thus, the legislature effectively limited a jury's consideration of a pecuniary gain motive for murder to circumstances of a murder-for-hire.

B. Retroactivity Of (F)(5) Amendments And Greene's Conduct

1. Retroactivity [6]

[6] Greene does not directly challenge the lack of an express statement of retroactivity but rather argues that the amendments are retroactive based on a violation of the Eighth Amendment. We address this argument at Part II.C.

[3] ¶20 The State argues that the legislature did not make the amendments to (F)(5) retroactive. Statutes are retroactive only if "expressly declared therein," subject to an exception for procedural changes not applicable here. A.R.S. § 1-244; *State v. Fell*, 210 Ariz. 554, 560 ¶¶ 21–23, 115 P.3d 594, 600 (2005) (finding changes to sentencing circumstances a substantive change to the law requiring an express declaration of retroactivity). While acknowledging this requirement, the superior court nevertheless concluded that "[t]he [l]egislature intended explicitly for defendants affected by the repeal of the aggravating circumstances outlined in S.B. 1314 to resolve their claims through the post-conviction relief process."

¶21 The court based this conclusion on the following exchange between legislators:

> 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.

Hearing on S.B. 1314 Before the H. Comm. on the Judiciary, 54th Leg., 1st Reg. Sess. (Ariz. 2019). However, such a limited exchange between two representatives in a committee hearing is not sufficient to establish that the legislature intended to make the amendments retroactive. *See Barlow v. Jones*, 37 Ariz. 396, 399, 294 P. 1106 (1930) ("A legislative enactment cannot be amended or changed either by the insertion or the elimination of words to conform with an intent proven by the testimony of the members of the enacting body."); *see also* *Tucson Gas & Elec. Co. v. Schantz*, 5 Ariz. App. 511, 514, 428 P.2d 686 (1967) (stating that "the testimony or opinions of individual members of the legislative body are not admissible" for discerning legislative intent); *Arizona Citizens Clean Elections Comm'n v. Brain*, 234 Ariz. 322, 325 ¶ 12, 322 P.3d 139, 142 (2014) (observing that "a legislator, lobbyist, or other interested party lacks competence to testify about legislative intent in passing a law").

¶22 Significantly, the bill as signed into law does not contain a retroactive-application clause—nor was there any effort to add one at any step in the legislative process. Furthermore, retroactivity is not referenced in any bill draft, summary, or analysis for § 13-751(F). *Compare* 2009 Ariz. Sess. Laws, ch. ***332** 190, § 1 (1st Reg. Sess.) (providing that the law "applies retroactively to all cases in which the defendant did not plead guilty or no contest and that, as of April 24, 2006, had not been submitted to the fact finder to render a verdict"), *with* 2019 Ariz. Sess. Laws ch. 63, § 1 (1st Reg. Sess.) (lacking any retroactivity clause). Thus, despite the colloquy relied on by the superior court, the amendments to (F)(5) are not retroactively applicable to cases preceding the

2019 enactment. *See, e.g.*, *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 270, 872 P.2d 668, 674 (1994) (declining to find a preemptive intent in the absence of explicit language required for preemption given that "the legislature is well aware of the words of art that should be used to accomplish such a result"). The court erred in concluding otherwise.

2. The (F)(5) amendments, Greene's motive, and his criminal conduct

[4] ¶23 The State argues that because the (F)(3) aggravating circumstance still addresses pecuniary gain, the amendments to (F)(5) did not eliminate pecuniary gain from consideration as to whether to impose a sentence of death. The State also observes that Greene's criminal conduct remains subject to the (F)(2) (serious offense) aggravating circumstance, which the superior court did not consider in its analysis. [7] Regardless of any express statement of retroactivity, Greene argues that because the amendment to the former (F)(5) aggravating circumstance eliminated the basis for which his sentence of death was imposed, the legislature "abolished" the application of the death penalty to his criminal conduct. The superior court agreed with Greene and found "that the reasoning in the [l]egislative record including the reasons for the proposed legislation was to narrow the applicability and imposition of the death penalty in which [Greene], under the [l]egislature's narrowing, is no longer eligible for the death penalty." [8]

7 The State did not raise this particular point until its response to an amicus brief before this Court. Nonetheless, Greene's broad argument that his conduct is no longer subject to the death penalty necessitates consideration of the entirety of the aggravating circumstances in § 13-751(F).

8 The superior court also considered what it characterized as legislators' concerns about "how their actions contributed to complying with the constitutional mandate of *Hidalgo*." However, there is no such "constitutional mandate" provided by *Hidalgo*. The language cited by the court is in a dissent to a denial by the Supreme Court of a writ of certiorari. *Hidalgo v. Arizona*, —— U.S. ——, 138 S. Ct. 1054, 200 L.Ed.2d 496 (2018).

[5] **[6]** ¶24 Greene's argument requires us to carefully evaluate what the legislature did and did not do in amending § 13-751(F) as a whole. *See State v. Ewer*, 254 Ariz. 326, 523 P.3d 393, 397 ¶ 13 (2023) ("[W]e 'interpret statutory language in view of the entire text, considering the context and related statutes on the same subject' " (quoting *Molera v. Hobbs*, 250 Ariz. 13, 24 ¶ 34, 474 P.3d 667, 678 (2020)). As discussed, the amendments to (F)(5) narrowed a jury's consideration of a murder motivated by the expectation of pecuniary gain to murder-for-hire scenarios. *See* Part II.A ¶ 19. Thus, although the State accurately notes that the legislature did not completely eliminate the consideration of pecuniary gain from Arizona's set of aggravating circumstances, Greene is correct that the legislature did eliminate a jury's ability to consider his own motive for murdering Johnson. However, the 2019 amendments did not change the (F)(2) aggravating circumstance, which considers whether "[t]he defendant has been or was previously convicted ... for serious offenses committed on the same occasion as the homicide." Thus, a robbery committed contemporaneously with a murder—the exact criminal conduct Greene engaged in—remains subject to a jury's consideration of whether to impose the death penalty.

¶25 Informing our analysis of the nature and effect of the (F)(5) amendments with respect to Greene's sentence of death is the fact that the legislature amended (F)(2) in 2003 to address the use of contemporaneous serious offenses effected by this Court's ruling in *State v. Rutledge*, 205 Ariz. 7, 66 P.3d 50 (2003), *supplemented* *State v. Rutledge*, 206 Ariz. 172, 76 P.3d 443, *superseded by statute*, 2003 Ariz. Sess. Laws ch. 255, § 1 (1st Reg. Sess.), *as recognized in* ***333** *State v. Nordstrom*, 230 Ariz. 110, 118 ¶ 35, 280 P.3d 1244, 1252 (2012) (observing that amendment to (F)(2) aggravating circumstance "evidently was intended to displace our ruling in *State v. Rutledge*"). In the supplemental opinion, this Court stated that a "conviction for a 'serious offense' occurring simultaneously with a murder conviction cannot be used for (F)(2) purposes under the [pre-2003] version of [§] 13-703(F)(2)." *Rutledge*, 206 Ariz. at 178 ¶ 25, 76 P.3d at 449. In amending (F)(2), the legislature made it explicitly clear that contemporaneous serious offenses could be considered, providing that: "The defendant *has been* or was previously convicted of a serious offense, whether preparatory or completed. *Convictions for serious offenses committed on the same occasion as the homicide, ... shall be treated as a serious offense* ...." 2003 Ariz. Sess. Laws ch. 255, § 1 (1st Reg. Sess.) (emphasis added). Thus, after the 2003 amendment to (F)(2) until the 2019 amendments

to (F)(5), the state could allege as aggravating circumstances a murder committed contemporaneously with a robbery and a murder motivated by the expectation of pecuniary gain for murders committed like Greene's.

¶26 Consequently, the overall effect of the 2019 amendments to (F)(5) with respect to Greene's criminal conduct is that although a jury can no longer consider Greene's *motive* for robbing and murdering Johnson, a jury can still consider his actual *conduct* of robbing and murdering Johnson. So, if Greene committed the same murder today, he would still be eligible for the death penalty, albeit under a different aggravating circumstance. Greene is therefore incorrect in concluding that the legislature "abolished" the death penalty for his criminal conduct and the superior court erred in concluding likewise.

C. Eighth Amendment

¶27 The State argues that Greene's sentence was constitutional when imposed and there is no basis for concluding today that it violates the Eighth Amendment. Greene argues, and the superior court found, that his sentence is unconstitutional under the Eighth Amendment because the legislature's narrowing of the pecuniary gain aggravating circumstance demonstrates a judgment that his criminal conduct is no longer deserving of capital punishment. Therefore, he asserts that his sentence is in violation of contemporary standards of decency and to carry it out would also be contrary to a national consensus against imposing punishment after a repeal of the death penalty.

[7] ¶28 "The Eighth Amendment, applicable to the states through the Fourteenth Amendment ... proscribes 'all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.' " *Kennedy v. Louisiana*, 554 U.S. 407, 419, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 n.7, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)). Punishment for the crime must be proportionate to the offense to comport with this constitutional guarantee. *Montgomery v. Louisiana*, 577 U.S. 190, 206, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016) ("Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment ...."); *see also* *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910) ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.").

[8] **[9]** ¶29 Under the Supreme Court's Eighth Amendment jurisprudence, whether a punishment is excessive and disproportionate is "determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that 'currently prevail.' " *Kennedy*, 554 U.S. at 419, 128 S.Ct. 2641 (quoting *Atkins*, 536 U.S. at 311, 122 S.Ct. 2242). Such norms are derived from "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 99–101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (considering "whether denationalization is a cruel and unusual punishment within the meaning of the Eighth Amendment" in case involving desertion during wartime). "Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment." *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). "Furthermore, these Eighth Amendment judgments should ***334** not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent." *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977).

[10] ¶30 In previous cases, the Supreme Court has considered four categories of data for Eighth Amendment consensus assessments: (1) legislative actions; (2) opinions of juries; (3) judgment of prosecutors; and (4) historical practice. *See, e.g.*, *id.* at 593–97, 97 S.Ct. 2861 (legislatures and juries); *Enmund v. Florida*, 458 U.S. 782, 789–96, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (legislatures, juries, and prosecutors); *Atkins*, 536 U.S. at 313–17, 122 S.Ct. 2242 (legislatures); *Roper v. Simmons*, 543 U.S. 551, 560–68, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (legislatures and historical practice); *Kennedy*, 554 U.S. at 422-34, 128 S.Ct. 2641 (legislatures, juries, and historical practice). Nonetheless, any consensus demonstrated by the preceding is not necessarily controlling. *Kennedy*, 554 U.S. at 421, 128 S.Ct. 2641 (stating that "[c]onsensus is not dispositive"). Whether a punishment is disproportionate ultimately depends on "the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," which includes whether the death sentence would fulfill a penological purpose. *Id.* at 421, 441, 128 S.Ct. 2641.

[11] ¶31 In sum, a death sentence is unconstitutional under the Eighth Amendment if both (1) evolved societal standards of decency demonstrate a consensus against the punishment and (2) the court's independent judgment concludes that the sentence is not proportionate to the crime. *Id.* at 446, 128 S.Ct. 2641.

1. Consensus against Greene's punishment

¶32 The State argues no consensus exists against executing a defendant for the (F)(5) aggravating circumstance. Greene's argument, though, is that there is a consensus against executing a defendant whose criminal conduct no longer justifies the imposition of the death penalty. In granting Greene the relief he sought, the superior court concluded that "there is a national consensus against executing defendants for a crime that is no longer eligible of the death penalty." We consider each category of information set forth by Greene and the sources of information relied on by the superior court in turn.

a. *Legislative action*

[12] ¶33 The State argues that because the legislature retained consideration of pecuniary gain in the current (F)(3) aggravating circumstance and that Greene's conduct is still subject to capital punishment under the (F)(2) aggravating circumstance, the legislature's actions do not establish an evolved community standard against Greene's punishment. Greene argues that the repeal of the pecuniary gain circumstance as applicable to his crime reflects a judgment by the legislature that his criminal conduct does not demonstrate the extreme culpability justifying the imposition of a sentence of death. Greene therefore argues that this judgment reflects a standard of decency precluding his punishment. The superior court likewise found that the actions of the legislature, combined with information about juries, established a community standard against executing a defendant "convicted of murder solely for pecuniary gain, except in cases of murder-for-hire."

[13] ¶34 As reiterated in *Atkins*, the "clearest and most reliable" objective indication of a national consensus concerning imposition of the death penalty is "the legislation enacted by the country's legislatures." 536 U.S. at 312, 122 S.Ct. 2242 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)). In cases where the Supreme Court concluded that legislative action established a standard of decency precluding capital punishment, legislatures categorically limited the imposition of the death penalty for defendants who lacked the requisite intent to kill their victim or who had specific physical or mental characteristics that diminished their moral culpability. *See* *Coker*, 433 U.S. at 592–93, 97 S.Ct. 2861 (finding that "[a]t no time in the last 50 years have a majority of the States authorized death as a punishment for rape" to conclude ***335** that death penalty for rape of an adult woman where victim is not killed is "forbidden by the Eighth Amendment as cruel and unusual punishment"); *Enmund*, 458 U.S. at 792, 801, 102 S.Ct. 3368 (finding that "only a small minority of jurisdictions—eight—allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed" to hold the Eighth Amendment prohibited sentence of death for a defendant who "did not commit and had no intention of committing or causing" deaths of robbery victims); *Atkins*, 536 U.S. at 317–21, 122 S.Ct. 2242 (concluding there was a "consensus unquestionably reflect[ing] widespread judgment about the relative culpability of mentally retarded offenders" and therefore the Eighth Amendment prohibited the death penalty for such defendants); *Roper*, 543 U.S. at 568, 125 S.Ct. 1183 (holding that because "[a] majority of States have rejected the imposition of the death penalty on juvenile offenders under 18," the Eighth Amendment now prohibits it, as well); *Kennedy*, 554 U.S. at 413, 423, 128 S.Ct. 2641 (noting that forty-four states did not provide for capital punishment in cases of rape to hold the Eighth Amendment prohibited sentence of death for raping a child under twelve because defendant did not kill nor intend to kill the victim); *see also* *State v. Nelson*, 229 Ariz. 180, 188 ¶ 33, 273 P.3d 632 (2012) (noting the cases of *Atkins*, *Roper,* and *Kennedy* "turned on the characteristics of the defendant or the nature of the crime"). Importantly for our assessment, after enactment of the legislation considered in each case there was no longer a basis upon which any other defendant who committed a similar crime under similar circumstances could be subjected to capital punishment.

¶35 Here though, the Arizona Legislature did not enact similar legislation that categorically exempts Greene from a sentence of death based on any lack of intent to kill or physical or mental characteristic diminishing his moral

culpability. Nor did the legislature foreclose imposition of a death sentence for a defendant who commits a similar crime under similar circumstances as Greene. Again, while Greene's pecuniary gain *motive* for murdering Johnson may no longer be considered by a jury in determining whether to impose a death sentence, the legislature did not eliminate consideration of his *conduct* in murdering Johnson.

¶36 Greene's argument overstates the effect of the legislature's amendments of (F)(5) and incorrectly equates the actions of the Arizona Legislature with those of legislatures relied on by the Supreme Court to find a death sentence unconstitutional under the Eighth Amendment.[9] Anyone who robs and kills in 2023 as Greene did in 1995 is still subject to the imposition of a death sentence regardless of the 2019 amendments. Therefore, Greene's reliance on legislative action to support his argument of a consensus against his punishment is misplaced and the superior court erred in concluding that the legislature established a "community standard of decency" in determining the constitutionality of Greene's sentence.

9 Notably, the former version of (F)(5) remains an aggravating factor for consideration in federal death penalty cases. *See* 18 U.S.C. § 3592(C)(8).

b. *Jury opinions*

[14] ¶37 The State argues that jury sentencing decisions concerning the (F)(5) aggravating circumstance do not establish a community standard precluding Greene's sentence. Greene argues that the limited number of times the (F)(5) circumstance has served as the basis for a sentence of death since 2002 is evidence that juries do not find the aggravating circumstance persuasive and therefore establishes a community standard precluding his punishment. The superior court likewise concluded a community standard existed, in conjunction with the actions of the legislature, to render Greene's sentence unconstitutional.

[15] ¶38 When considering evolving standards of decency and the constitutionality of imposing a death sentence, "the response of juries reflected in their sentencing decisions are to be consulted." *Coker*, 433 U.S. at 592, 97 S.Ct. 2861.

***336** ¶39 The jury information Greene presents consists of the fact that out of 142 capital cases reviewed by this Court on direct appeal since 2002, only three defendants were sentenced to death based solely on the (F)(5) aggravating circumstance for a murder motivated by pecuniary gain, though one involved a murder-for-hire circumstance. He also cites a prosecutor's legislative testimony before the House Judiciary Committee that juries did not find the (F)(5) aggravating circumstance persuasive. The State presented data that juries have actually sentenced defendants to death while also finding the (F)(5) aggravating circumstance proven in ten out of sixty-five cases between 2008 and 2012.

¶40 The limited information provided by Greene, as well as the State, regarding the sentencing decisions of juries makes discerning a particular community standard on this basis tenuous. Jury sentencing data reviewed by the Supreme Court in *Coker* encompassed *all* cases reviewed by the Georgia Supreme Court involving rape from 1973 to when the case came before the Supreme Court in 1977. *Id.* at 596, 97 S.Ct. 2861. The evidence presented showed that Georgia juries had sentenced a defendant to death for rape only six times out of the sixty-three cases. *Id.* at 596–97, 97 S.Ct. 2861.

¶41 In *Enmund*, the evidence demonstrated that among defendants executed in the United States since 1954, in only six executions out of 362 was "a nontriggerman felony murderer"—like Enmund—executed. 458 U.S. at 794–95, 102 S.Ct. 3368. Enmund also presented information regarding the number of defendants on death row whose sentencing information reflected that they intended to kill the victim. *Id.* at 795, 102 S.Ct. 3368.

¶42 Where the information was sufficient for review, out of 739 defendants, "only [forty-one] did not participate in the fatal assault on the victim." *Id.* at 795, 102 S.Ct. 3368. Furthermore, where sufficient data was available, "only [sixteen] were not physically present when the fatal assault was committed." *Id.* Among that number, thirteen were sentenced to death with "a finding that they hired or solicited someone else to kill the victim or participated in a scheme designed to kill the victim." *Id.* Enmund was one of only three who did not fall into any of the other categories. *Id.* Among forty-five felony murderers then on death row just in Florida, "[i]n only one case—Enmund's—there was no finding of an intent to kill and the defendant was not the

triggerman." *Id.* The Supreme Court therefore concluded that "the statistics [Enmund] cites are adequately tailored to demonstrate that juries—and perhaps prosecutors as well—consider death a disproportionate penalty for those who fall within his category." *Id.* at 796, 102 S.Ct. 3368.

¶43 In contrast to the data presented in *Coker* and *Enmund*, Greene's information is limited, at best. Neither Greene nor the State presented evidence of the number of murders where the only aggravating circumstance alleged and proven was (F)(5) and a jury did *not* impose a death sentence, making the imposition of a sentence of death an impossibility. *See* A.R.S. § 13-752(E) (requiring the imposition of a life sentence "[i]f the trier of fact unanimously finds no aggravating circumstances" proven). Additionally, as the superior court noted in considering the jury information presented by the State, "neither do we know the number of failed prosecutions under the circumstance in which juries rejected it as an aggravator." And in contrast to the more robust comparative information provided in *Enmund*, Greene has not presented any data offering a relative comparison with other defendants on death row in other states, let alone in Arizona.

¶44 With respect to the prosecutor's comment concerning the lack of persuasiveness for juries of the aggravating circumstances in the proposed legislation, Greene overstates its significance. The prosecutor never discussed the narrowing effect of the proposed amendments to (F)(5). Rather, she specifically referred to aggravating circumstances proposed for *elimination* stating: "those factors which we are proposing to eliminate, simply, historically 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." *Hearing on S.B. 1314 Before the H. Comm. on the Judiciary*, 54th Leg., 1st Reg. Sess. (Ariz. 2019). Although the pecuniary gain aggravating circumstance ***337** was narrowed to murder-for-hire cases, the only aggravating circumstances that were eliminated and removed were (F)(3), (F)(13), and (F)(14). *See* Part II.A ¶ 18. Additionally, no supporting information was ever presented concerning (F)(5) and the view of juries from the prosecutor's perspective at the legislative committee hearing, or in the course of Greene's PCR briefing, or in the evidentiary hearing.

¶45 We also observe that Greene's argument based on the purported evidence of juries' sentencing decisions concerning the (F)(5) aggravating circumstance illustrates a fallacy of weak induction—the logical fallacy of false cause. This type of fallacy occurs where the link between a premise and a conclusion ignores other factors. *The Fallacy of False Cause*, The Cambridge Dictionary of Philosophy 515 (Robert Audi ed., 3d ed. 2015).

¶46 Even accepting the assertion that the (F)(5) aggravating circumstance was among those the prosecutor referenced as not "persuasive" for juries, other valid reasons exist to explain why there are a limited number of jury-imposed death sentences based solely on (F)(5) since 2002. For example, the limited number of cases could be due to the limited number of murders that are committed solely for pecuniary gain without the application of other statutory aggravating circumstances. It could also be due to charging decisions made in light of evidentiary considerations. *See* A.R.S. § 13-751(B) ("The prosecution must prove the existence of the aggravating circumstances beyond a reasonable doubt."). Given that any aggravating circumstance must be proven beyond a reasonable doubt, there may be relatively few cases where the evidence is sufficient to prove that pecuniary gain was a motive for a murder or, relatedly, it may be that the state just failed to meet its evidentiary burden in those particular cases. In that instance, a jury verdict would provide no basis for a conclusion that it actually reflected a jury's assessment of the moral culpability of a murderer motivated by the expectation of pecuniary gain. And, even if there are cases where (F)(5) was alleged as the sole aggravating circumstance and a jury determined a life sentence was the appropriate punishment, it is just as reasonable a possibility that a defendant presented strong mitigation evidence. *See* § 13-751(E) ("The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances ... and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.").

¶47 Thus, a limited number of jury verdicts alone does not necessarily reflect a jury opinion that the (F)(5) aggravating circumstance was not a proper basis for imposing a sentence of death. That a sentence is infrequently imposed does not necessarily establish the conclusion that a jury frequently rejects it based on disapproval of the aggravating circumstance in question. Concluding otherwise is sheer speculation.

¶48 The limited information offered by Greene, in contrast to the nature and extent of the data relied on by the Supreme Court in *Coker* and *Enmund*, and other potential causes for the alleged infrequent imposition of a sentence of death based on the (F)(5) aggravating circumstance is inadequate "to demonstrate that juries ... consider death a disproportionate penalty" for a murder motivated by the expectation of pecuniary gain. *See* *Enmund*, 458 U.S. at 796, 102 S.Ct. 3368. The superior court erred in relying on this data, along with legislative action, to conclude there was an evolved standard of decency against Greene's punishment.

c. *Judgment of prosecutors*

[16] ¶49 Greene argues that the views of prosecutors provide further evidence of an evolved standard of decency. However, we concur with the superior court's assessment that "[a]bsent sufficient evidence, none of which was supplied in the legislative hearings, [the PCR] petition, and ... subsequent pleadings and testimony," the record makes it "difficult to discern the amount of historical prosecutorial discretion utilized in seeking or not seeking the death penalty under the (F)(5) aggravating circumstance." Given the need for objective data upon which to establish a contemporary standard for purposes of making a constitutional determination, the lack of evidence of the judgment of prosecutors ***338** concerning use of the previous (F)(5) aggravating circumstance provides no basis upon which to discern a community standard.

d. *Historical development*

¶50 The State argues that no such consensus exists against carrying out Greene's sentence under the circumstances of his case. Greene argues that evidence in the form of state and international data and actions of state courts establish that a consensus exists that no one should be executed where their crime is no longer eligible for the death penalty.

i. *State practice and international opinion*

[17] ¶51 In prior cases concerning review of capital punishment under the Eighth Amendment, "the Court has been guided by ... 'state practice with respect to executions.' " *Kennedy*, 554 U.S. at 421, 128 S.Ct. 2641 (quoting *Roper*, 543 U.S. at 563, 125 S.Ct. 1183). The Supreme Court has also referenced international views. *See, e.g.*, *Coker*, 433 U.S. at 596 n.10, 97 S.Ct. 2861 ("In [*Trop*, 356 U.S. at 102, 78 S.Ct. 590], the plurality took pains to note the climate of international opinion concerning the acceptability of a particular punishment."); *Thompson v. Oklahoma*, 487 U.S. 815, 830, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (referencing the views of "other nations that share our Anglo-American heritage" and of "the leading members of the Western European community"); *Enmund*, 458 U.S. at 796 n.22, 102 S.Ct. 3368 (stating "[i]t is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe"); *Roper*, 543 U.S. at 578, 125 S.Ct. 1183 (noting that "the overwhelming weight of international opinion against the juvenile death penalty" is not controlling but "does provide respected and significant confirmation" for the Court's determination that the penalty is disproportionate punishment for offenders under eighteen).

¶52 Greene relies on two sources detailing the dates of a full or partial repeal and the date of the last execution to illustrate state practices and international views. *See* James R. Acker & Brian W. Stull, *Life After Sentence of Death: What Becomes of Individuals Under Sentence of Death After Capital Punishment Legislation Is Repealed or Invalidated*, 54 Akron L. Rev. 268, 276 (2021) ("Acker and Stull"); Declaration of John Ortiz Smykla. The Acker and Stull article details the dates of state repeals of the death penalty and the dates of the last execution, respectively. Acker & Stull, *supra* at 275–319. The comparison of the two dates reflects a conclusion that no state has carried out an execution following the repeal of the death penalty. John Smykla reached a similar conclusion based on his review of an extensive database of execution data from 1608 to 2002. *See* M. Watt Espy & John Ortiz Smykla, *Executions in the United States, 1608–2002: The ESPY File (ICPSR 8451)*, National Archive of Criminal Justice Data (Jul 20, 2016), https://doi.org/10.3886/ICPSR08451.v5.

¶53 However, the utility of this information rests on Greene's misunderstanding of the nature of the 2019 amendments and his conclusion that his criminal conduct is no longer subject to capital punishment. As discussed, the Arizona Legislature did not "repeal" the death penalty for murders committed under

circumstances like Greene's crime. *See* Part II.B.2 ¶¶ 23–26. Therefore, whatever evidence of a consensus that might be derived from the data provided by Greene is inapposite to his case.

¶54 Furthermore, we take note of Justice O'Connor's observations in her concurrence in *Thompson v. Oklahoma*:

> In the 1950's and 1960's, more States abolished or radically restricted capital punishment, and executions ceased completely for several years beginning in 1968. H. Bedau, The Death Penalty in America 23, 25 (3d ed. 1982).
>
> In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus. Indeed, counsel urged the Court to conclude that "the number of cases in which the death penalty is imposed, as compared with the number of cases in which it is statutorily available, ***339** reflects a general revulsion toward the penalty that would lead to its repeal if only it were more generally and widely enforced." *Furman v. Georgia*, 408 U.S. 238, 386 [92 S.Ct. 2726, 33 L.Ed.2d 346] (1972) (Burger, C.J., dissenting). We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.

487 U.S. at 855, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988).

ii. *Judicial action*

[18] ¶55 Greene also argues that judicial actions demonstrate a consensus regarding a standard of decency concerning the imposition of the death penalty in his case. He notes that in some states where legislative action repealed the imposition of the death penalty, state courts have found that carrying out a sentence imposed pre-repeal would violate the Eighth Amendment or corollary state provisions. *See* *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339, 343 (1989); *Van Tran v. State*, 66 S.W.3d 790, 812 (Tenn. 2001); *State v. Santiago*, 318 Conn. 1, 122 A.3d 1, 85 (2015); *Fry v. Lopez*, 447 P.3d 1086, 1121–22 (N.M. 2019); *State v. Bartol*, 368 Or. 598, 496 P.3d 1013, 1028–29 (2021). However, the nature of the legislative action at issue before the courts in those cases is distinguishable from Arizona's legislative action here.

¶56 Because Arizona did not enact legislation outright repealing the death penalty or preclude its imposition for the same conduct as Greene's, we focus our review of judicial action on states, like Arizona, who have amended their statutes addressing aggravating circumstances without completely eliminating imposition of capital punishment. These states include Indiana, Nevada, and Oregon.[10] *See* 2014 Ind. Acts 136 (repealing Ind. Code § 35-50-2-9(b)(1)(D) (statutory aggravating circumstance of "criminal deviate conduct" and (H) (statutory aggravating circumstance of "carjacking")); 1997 Nev. Stat. Ch. 356 (removing "sexual assault" from Nev. Rev. Stat. § 200.033(4)); 2019 Or. Laws, ch. 635, § 1 (redefining and severely limiting capital-sentence eligible "aggravated murder" in Or. Rev. Stat. § 163.095). Among these states, the supreme courts of Indiana and Nevada affirmed capital sentences imposed prior to the repeal of applicable statutory aggravating circumstances. *See* *Gibson v. State*, 51 N.E.3d 204, 211 (Ind. 2016); *Hill v. State*, 114 Nev. 169, 953 P.2d 1077, 1086 (1998); *Bolin v. State*, 114 Nev. 503, 960 P.2d 784, 801 (Nev. 1998), *abrogated on other grounds by* *Richmond v. State*, 118 Nev. 924, 59 P.3d 1249 (2002).

10 South Dakota's legislature repealed a provision permitting use of impact testimony from the victim's family as an aggravating circumstance. 1994 S.D. Sess. Laws ch. 178 § 1 (repealing S.D. Codified Laws § 23A-27A 1(11)). However, no cases have been found which relied on that aggravating circumstance to impose a capital sentence. Further, there is some question about whether placing victim impact testimony in § 23A-27A 1(11) meant it could be used as a capital aggravating circumstance. *See* *Rhines v. Young*, No. 5:00-CV-05020-KES, 2016 WL 615421, at *18 (D.S.D. Feb. 16, 2016), aff'd, 899 F.3d 482 (8th Cir. 2018) ("[N]o plausible reading of the statute

supports a conclusion that victim impact evidence was itself a statutory aggravating circumstance.").

¶57 In Indiana, the repeal of § 35-50-2-9(b)(1)(D) and (H) applied prospectively based on the express terms of the statute. Specifically, the statute stated that "criminal deviate conduct" and "carjacking" aggravating circumstances are only applicable to crimes committed "before [their] repeal." *See* Ind. Code § 35-50-2-9(b)(1)(D); (H). In 2016, the Indiana Supreme Court upheld the use of the "criminal deviate conduct" aggravating circumstance, (b)(1)(D), for a crime committed in 2012. [11] *Gibson*, 51 N.E.3d at 211.

11 We note that the Indiana Supreme Court did retroactively vacate a sentence of death on the basis of legislative action in the case of *Saylor v. Indiana*, 808 N.E.2d 646, 648–51 (Ind. 2004). The Indiana court therein concluded "it is not appropriate to execute a person who was convicted and sentenced through a procedure that has now been substantially revised so the same trial today would no longer render the defendant eligible for the death penalty." *Id.* at 647. We do not have similar procedural differences here.

***340** ¶58 Before 1997, Nev. Rev. Stat. § 200.033(4) provided as an aggravating circumstance:

> The murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit, any robbery, sexual assault, arson in the first degree, burglary, invasion of the home or kidnapping in the first degree, and the person charged:
>
> (a) Killed or attempted to kill the person murdered; or
>
> (b) Knew or had reason to know that life would be taken or lethal force used.

¶59 The Nevada legislature removed the words "sexual assault" in 1997. 1997 Nev. Stat. Ch. 356. In 1998, the Nevada Supreme Court affirmed two capital sentences that were imposed based on the "sexual assault" language prior to the amendment of § 200.033(4). *Hill*, 953 P.2d at 1085 (denying defendant's PCR claims and affirming capital sentence for 1983 murder of victim who died from injuries sustained from sexual assault); *Bolin*, 960 P.2d at 801 (1998), *abrogated on other grounds by* *Richmond v. State*, 118 Nev. 924, 59 P.3d 1249 (2002) (affirming capital sentence for 1995 murder committed during sexual assault). Both cases simply applied the version of § 200.033(4) in effect at the time each defendant committed murder after sexually assaulting their victims.

¶60 The Oregon Supreme Court reached a different conclusion in *Bartol*. 496 P.3d 1013. While the case seems at first glance to be similar to Greene's, there are two key differences. First, the Oregon state legislature reclassified the criminal conduct "that ... constituted 'aggravated murder,' which can be punished by death, to 'murder in the first degree,' which cannot be punished by death." *Id.* at 1015.

¶61 At hearings on the proposed amendments, proponents and opponents asked the Oregon legislature to "make an assessment regarding the relative gravity of the conduct that was classified as 'aggravated murder' at the time[,]" and to determine that such conduct was not the " 'worst of the worst' and to reclassify it as 'murder in the first degree,' the maximum sentence for which would be life in prison without parole." *Id.* at 1027–28. Legislators in both chambers of the Oregon legislature repeated these concerns. *Id.* at 1028.

¶62 Based on this extensive legislative history—and second key difference—the court concluded that the very amendment of the statute, although prospective only, reflected a "legislative determination that the *conduct* that was classified as 'aggravated murder' before [the amendments] does not fall within the narrow category of conduct for which the death penalty can be imposed." *Id.* (emphasis added). Therefore, "[m]aintaining [Bartol's] death sentence would allow the execution of a person for conduct that the legislature has determined no longer justifies that unique and ultimate punishment." *Id.* at 1029; *see also* *State v. Rogers*, 368 Or. 695, 499 P.3d 45, 48 (2021) (finding legislative amendments "create[d] a proportionality problem" by allowing "the execution of persons whose conduct the legislature has determined is *not* the worst of the worst and whose culpability is *no different* from those who cannot be executed" (quoting *Bartol*, 496 P.3d at 1028)).

¶63 The Arizona Legislature, however, has not redefined or reclassified what constitutes a capital-eligible homicide.

In fact, the definition of first degree murder applicable to Greene's murder of Johnson in 1995 is substantively the same for murders today.[12] And ***341** even under *Bartol*'s reasoning, because Greene's criminal conduct remains subject to capital punishment, the Arizona Legislature has not created the proportionality issue raised by Oregon's legislation. Furthermore, our legislative record contains nowhere near the same degree of information to support the conclusion reached by the Oregon court. Therefore, *Bartol* is distinguishable based on its facts and the law.

12 The definition of first degree murder in 1995 provided that:

> A person commits first degree murder if ... [i]ntending or knowing that his conduct will cause death, such person causes the death of another with premeditation; or .... Acting either alone or with one or more other persons such person commits or attempts to commit ... robbery under section 13–1902 ... and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person.

§ 13-1105(A) (1995). The current version reads:

> A person commits first degree murder if ... [i]ntending or knowing that the person's conduct will cause death, the person causes the death of another person ... with premeditation or .... Acting either alone or with one or more other persons the person commits or attempts to commit ... robbery under § 13-1902 ... and, in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person.

§ 13-1105(A) (2022).

¶64 Thus, among states that have prospectively repealed aggravating circumstances considered for imposing the death penalty, state supreme courts have affirmed capital sentences based on a subsequently repealed aggravating circumstance where it was lawful when first imposed. Therefore, Greene's argument that judicial action supports a consensus against carrying out his sentence is misplaced.

¶65 Overall, Greene's argument that a consensus exists against carrying out a capital sentence where the criminal conduct is no longer subject to the death penalty is unavailing. The Arizona Legislature did not eliminate the imposition of capital punishment for his criminal conduct. Hence, evidence of the outright repeal of the death penalty by other state legislatures or by foreign countries is of little utility in discerning a consensus on our facts. Likewise, the limited information regarding jury sentencing decisions does not serve to establish a community standard that renders Greene's sentence disproportionate to his crime. Finally, the actions by state supreme courts in affirming capital sentences based on prospectively repealed aggravating circumstances reveals, if anything, a consensus that such sentences are lawful.

2. Independent judgment

[19] ¶66 "Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty." *Enmund*, 458 U.S. at 797, 102 S.Ct. 3368.

[20] ¶67 We consider whether Greene's sentence serves the penological purposes of the death penalty in exercising our independent judgment. *Atkins*, 536 U.S. at 317–21, 122 S.Ct. 2242 (evaluating penological purposes of death penalty in light of defendant's particular culpability); *Kennedy*, 554 U.S. at 441–42, 128 S.Ct. 2641 (analyzing penological purposes in light of defendant's crime of rape). Greene argues that to carry out his sentence would be arbitrary given that it could not possibly serve a constitutionally cognizable penological purpose.

[21] ¶68 The death penalty is an appropriate sanction when it advances the penological goals of deterrence and retribution. *See* *Enmund*, 458 U.S. at 798, 102 S.Ct. 3368. Otherwise, it "is nothing more than the purposeless and needless imposition of pain and suffering." *Id.* (quoting *Coker*, 433 U.S. at 592, 97 S.Ct. 2861).

[22] **[23]** ¶69 A death sentence has deterrent value if it would deter other persons from committing the same crime as the one the defendant committed. *See, e.g.*, *Kennedy*, 554 U.S. at 445, 128 S.Ct. 2641; *Atkins*, 536 U.S. at 320, 122 S.Ct. 2242. Accordingly, Greene argues that "[w]hen the Legislature repeals the death penalty for a class of crimes, executing a defendant under facts that would no longer qualify for the death penalty cannot possibly deter future murders of any kind." Regardless of their motive, those who commit the same crime as Greene—killing in the course of a robbery—are still subject to the continuing applicability of

the (F)(2) aggravating circumstance. Therefore, the deterrent value of Greene's sentence remains.

[24] **[25]** ¶70 Retribution serves to punish the perpetrator and gives voice to the moral outrage experienced by the victim and society at large. *Santiago*, 122 A.3d at 56. It "reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused." *Kennedy*, 554 U.S. at 442, 128 S.Ct. 2641; *see also* Ariz. Const. art. II, § 2.1 (listing specific enumerated rights "[t]o ***342** preserve and protect victims' rights to justice and due process"). But, as Greene accurately notes, retribution does not necessarily justify imposition of the death penalty for every first degree murder. "[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg*, 428 U.S. at 184, 96 S.Ct. 2909. The death penalty "must [therefore] 'be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.' " *Kennedy*, 554 U.S. at 420, 128 S.Ct. 2641 (quoting *Roper*, 543 U.S. at 568, 125 S.Ct. 1183).

[26] ¶71 The conduct Greene engaged in, aside from his motive to murder, remains subject to a sentence of death and his actions in murdering Johnson continue to fall within that narrow category of the most serious crimes. Therefore, the retributive purpose served by his sentence in 1996 is still reflected in and served by Arizona law today. Given that Greene's sentence fulfills the penological goals of deterrence and retribution, it is our considered judgment that his sentence is proportionate to his murder of Johnson.

[27] ¶72 Based on the lack of a consensus against Greene's punishment and our judgment that his sentence is not disproportionate to his crime, we conclude that Greene's sentence of death does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

D. Article 2, Section 15

¶73 The State argues that because we previously affirmed Greene's sentence and no holding since has found the (F)(5) aggravating circumstance unlawful, the sentence also does not violate article 2, section 15 of the Arizona Constitution. Greene asserts that because this Court interprets our constitutional ban on cruel and unusual punishment according to federal Eighth Amendment jurisprudence, we should take guidance from clearly established United States Supreme Court caselaw explaining how to determine contemporary standards of decency and find his sentence unconstitutional under the Arizona Constitution. *See* *State v. Jackson*, 186 Ariz. 20, 25, 918 P.2d 1038, 1043 (1996) ("Arizona's constitutional prohibition against cruel and unusual punishment is identically worded to its federal counterpart, and ... we give them the same meaning." (quoting *State v. Bartlett*, 164 Ariz. 229, 240, 792 P.2d 692, 703 (1990))).

¶74 However, as this Court remarked in *State v. Bush,* 244 Ariz. 575, 423 P.3d 370 (2018), we have "not yet expressly embraced as a matter of state constitutional law" the notion of "the evolving standards of decency in our maturing society" as part of our death penalty jurisprudence under article 2, section 15 of the Arizona Constitution. *Id.* at 599 ¶ 108, 423 P.3d at 394; *see also State v. Soto-Fong,* 250 Ariz. 1, 5-6 ¶¶ 10–13, 474 P.3d 34, 38-39 (2020) (expressing concerns over the Supreme Court's Eighth Amendment analysis). Regardless, for the reasons explained regarding Greene's sentence and the Eighth Amendment, we would not reach a different result.

¶75 Therefore, Greene's argument and the superior court's conclusion that "evolving standards of decency" render his sentence unconstitutional pursuant to article 2, section 15 of the Arizona Constitution is incorrect. Instead, we conclude that Greene's sentence was lawfully imposed and is not in violation of article 2, section 15 of the Arizona Constitution. *Greene*, 192 Ariz. at 444, 967 P.2d at 119.

E. Claims For Relief Under Rule 32.1

[28] **[29]** ¶76 "We interpret court rules according to the principles of statutory construction." *Phillips v. O'Neil*, 243 Ariz. 299, 301 ¶ 8, 407 P.3d 71, 73 (2017) (quoting *State v. Aguilar*, 209 Ariz. 40, 47 ¶ 23, 97 P.3d 865, 872 (2004)). Thus, we "interpret rules of procedure by their plain meaning and we read them in conjunction with each other and harmonize them whenever possible." *State v. Tillmon*, 222 Ariz. 452, 454 ¶ 8, 216 P.3d 1198, 1200 (App. 2009) (internal alterations omitted) (quoting ***343** *Groat v. Equity Am. Ins. Co.,* 180 Ariz. 342, 347, 884 P.2d 228, 231 (App. 1994)).

1. Rule 32.1(a)

[30] ¶77 Rule 32.1(a) permits relief when "the defendant's ... sentence was imposed ... in violation of the United States or Arizona constitutions." The State argues that the plain language of the rule precludes consideration of Greene's claim because the amendments to (F)(5) are prospective only and Greene's sentence, as previously upheld by this Court, did not violate either the United States or Arizona Constitutions at the time it was imposed. Greene's argument focuses on the alleged current illegality of his sentence due to the (F)(5) amendments.

¶78 We agree with the State that the wording of Rule 32.1(a) applies to addressing whether a sentence violated the United States or Arizona Constitutions at the time it was imposed. Given that the amendments are not retroactive, Greene's sentence based on the (F)(5) aggravating circumstance is reviewed under the capital sentencing scheme in effect at the time he killed Johnson. A.R.S. § 1-246 ("[O]ffender[s] shall be punished under the law in force when the offense was committed."); *see also* *State v. Superior Court,* 139 Ariz. 422, 427, 678 P.2d 1386, 1391 (1984) ("Unless a statute is expressly declared to be retroactive, it will not govern events that occurred before its effective date."); *State v. Morales*, 129 Ariz. 283, 286, 630 P.2d 1015, 1018 (1981) (applying statute "in effect at the time" the crime was committed).

¶79 As the State correctly notes, Greene's sentence was constitutional when imposed. *Greene*, 192 Ariz. at 444, 967 P.2d at 119; *see also* *State v. Hidalgo*, 241 Ariz. 543, 550–51 ¶¶ 23–29, 390 P.3d 783, 790-91 (2017). Furthermore, we have affirmed two capital sentences based on repealed or amended statutory aggravating circumstances since the 2019 amendments, although in each case juries also found other aggravating circumstances. *See State v. Smith*, 250 Ariz. 69, 93 ¶ 106 n.6, 475 P.3d 558, 582 n.6 (2020) (acknowledging amendment of (F)(5) but the former "version of the pecuniary gain statute applie[d]" in case where jury also found state proved (F)(2) serious offense aggravating circumstance); *Thompson*, 252 Ariz. at 289 ¶ 16 n.4, 502 P.3d 437, 447 n.4 (2022) (acknowledging amendments but citing "the version of § 13-751 in effect at the time of sentencing" that included the (F)(13) aggravating circumstance where jury also found state proved four others, (F)(2), (F)(6), (F)(7), and (F)(8)). Therefore, the superior court erred in concluding otherwise and Greene is not entitled to relief under Rule 32.1(a).

2. Rule 32.1(c)

¶80 Rule 32.1(c) permits relief where "the sentence as imposed is not authorized by law."

[31] ¶81 The State argues that Greene is not entitled to relief because 32.1(c) only applies to cases in which a term-of-years sentence is imposed and not a death sentence. Furthermore, the State observes that Greene's sentence was "authorized by law" at the time he was sentenced, as the superior court also acknowledged. Greene argues that the plain language and history of Rule 32.1(c) demonstrate it applies to capital sentences that become illegal after sentencing and reiterates his argument that the 2019 Amendments render his sentence unconstitutional under the Eighth Amendment to the United States and article 2, section 15 of the Arizona Constitutions. Therefore, pursuant to Rule 32.1(c), his "sentence as imposed is not authorized by law."

[32] ¶82 With respect to the applicability of Rule 32.1(c) to Greene's capital case, we find, as did the superior court, that it unambiguously applies. Rule 32.1 clearly states that "[a] defendant may file a notice requesting post-conviction relief under this rule ... in any case in which the defendant was sentenced to death." Nonetheless, because Greene's sentence was lawful when imposed and we have concluded that it is not now unlawful under either the United States or Arizona Constitutions, he is not entitled to relief. The superior court erred in concluding otherwise.

***344** 3. Rule 32.1(g)

[33] ¶83 Rule 32.1(g) provides grounds for relief when "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence." The State argues that the phrase "if applicable" is dispositive because the 2019 amendments to (F)(5) were prospective only. Greene argues that the amendments to (F)(5) are retroactively applicable to his case under the United States and Arizona Constitutions because they demonstrate an evolved standard of decency against carrying out his sentence. Because we have concluded that the amendments are not retroactively applicable either because they lack an express retroactive statement or because his sentence does not violate the Eighth Amendment nor article 2, section 15, Greene is not entitled to relief under Rule 32.1(g).

4. Rule 32.1(h)

¶84 Rule 32.1(h) provides relief where: "[T]he defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish ... that no reasonable fact-finder would find the defendant eligible for the death penalty in an aggravation phase held pursuant to A.R.S. § 13-752."

¶85 The State essentially argues that a claim pursuant to 32.1(h) must present clear and convincing evidence addressing facts related to aggravating circumstances presented in the aggravation phase of a capital trial and not based on an argument of legal insufficiency concerning the imposition of a sentence of death in general. Greene argues that "[i]n light of the legislative repeal ..., no jury could *today* find Greene eligible for the death penalty based on the facts underlying his claim" and he is therefore entitled to relief under Rule 32.1(h). (Emphasis added.)

[34] **[35]** ¶86 We agree with the State that relief pursuant to Rule 32.1(h) is dependent on the presentation of clear and convincing evidence concerning facts that address the proof of an aggravating circumstance. The very terms of the rule dictate as much by addressing "the facts underlying the claim" in reference to the aggravation phase in § 13-752, wherein "the trier of fact shall make a special finding on whether each alleged aggravating circumstance has been proven based on the evidence that was presented at the trial or at the aggravation phase." A.R.S. § 13-752(E).

¶87 Greene's argument is unavailing because it assumes that the amendments to (F)(5) are retroactive to his case, which under his Eighth Amendment argument would render his sentence unlawful. Accordingly, there would never be an aggravation phase in which a trier of fact could consider whether an aggravating circumstance was proven. Thus, this argument is more properly presented under Rule 32.1(c).

¶88 Also problematic for his argument is our conclusion that the amendments to (F)(5) are not retroactive. Therefore, any jury considering Greene's eligibility for the death penalty today would make their determination under the statutes applicable to his crime in 1995, and a jury would be able to consider the (F)(5) aggravating circumstance. *See State v. Stine*, 184 Ariz. 1, 3, 906 P.2d 58, 60 (App. 1995) ("[I]n the context of criminal law, an offender must be punished under the law in force when the offense was committed and is not exempted from punishment by a subsequent amendment to the applicable statutory provision." (quoting *State v. Hamilton*, 177 Ariz. 403, 406, 868 P.2d 986, 989 (App. 1993))).

¶89 Finally, his argument for relief under Rule 32.1(h) fails to present any evidence, let alone clear and convincing evidence, addressing the sufficiency of the facts that established the (F)(5) pecuniary gain aggravating circumstance which this Court upheld on direct appeal. Thus, Greene has not demonstrated a basis for relief under Rule 32.1(h) and the superior court erred in concluding otherwise.

III. CONCLUSION

¶90 For the reasons stated, we reverse the superior court's ruling granting Greene post-conviction relief and affirm his sentence.

All Citations

255 Ariz. 37, 94 Arizona Cases Digest 22, 527 P.3d 322

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ARIZONA SUPREME COURT

STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-21-0082-PC
Plaintiff/Petitioner,	)	
	)	Pima County
v.	)	Superior Court
	)	No. CR48730
BEAU JOHN GREENE,	)	
	)	
Defendant/Respondent.	)	
	)	**FILED: 02/28/2022**
	)	

O R D E R

On January 25, 2022, Respondent Greene filed a "Notice of Conflict of Interest." Pursuant to an order of this Court, the State of Arizona filed a "Response to Notice of Conflict." Having carefully and thoroughly considered the notice of conflict and the response,

I find that recusal is not required and therefore decline to do so.

DATED this 28th day of February, 2022.

/s/
WILLIAM G. MONTGOMERY
Duty Justice

TO:
Jeffrey L Sparks
Ginger Jarvis
G Todd Jackson
Meighan N LaFata
Beau John Greene, ADOC 123048, Arizona State Prison,
Florence - Eyman Complex-Browning Unit (SMU II)
Dale A Baich
Amy Armstrong
Michele Lawson
Mikel Steinfeld
ar

ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. BEAU JOHN GREENE, Appellant.	CR–21–0082–PC Pima County Superior Court CR–48730 **RESPONSE TO NOTICE OF CONFLICT OF INTEREST**

Pursuant to this Court's January 28, 2022, order, Appellee, State of Arizona, hereby responds to Greene's "Notice of Conflict of Interest." Greene's "Notice" is without support, and this Court should decline Greene's submission "that Justice Montgomery's recusal is appropriate and required in this matter." (Notice, at 5.)

Greene notices a "conflict" he argues warrants "Justice Montgomery's recusal from further participation in these proceedings." (Notice, at 2.) The basis of Greene's alleged "conflict" is that Justice Montgomery was serving as the elected Maricopa County Attorney at the time that office approached the Arizona Legislature with suggestions for changes to the statutory capital aggravating factors in Arizona's death penalty scheme. (*Id.* at 2–4.) Greene alleges that this places Justice Montgomery in the "untenable position of rendering an assessment of the constitutional import . . . of those who acted under his authority and on his behalf," thus posing an "objective risk of pre-consideration or pre-judgment" on the "issues and arguments" raised by the State's Petition for Review. (*Id.* at 3, 5.)

However, this Court presumes that a judge is impartial, and "the party seeking recusal must prove bias or prejudice by a preponderance of the evidence." *In Re Aubuchon*, 233 Ariz. 62, 66, ¶ 14 (2013) (quoting *State v. Carver*, 160 Ariz. 167, 172 (1989)). Greene has not overcome the "strong presumption" that judges are "free of bias and prejudice." *See State v. Cropper*, 205 Ariz. 181, 185 ¶ 22 (2003); *State v. Medina*, 193 Ariz. 504, 510, ¶ 11 (1999). To overcome this burden, Greene must prove by a preponderance of the evidence that Justice Montgomery harbors a "hostile feeling or spirit of ill-will, or undue friendship or favoritism" toward either side. *Medina*, 193 Ariz. at 510, ¶ 11; *In re Guardianship of Styer*, 24 Ariz. App. 148, 151 (1975). Justice Montgomery's "capacity for fairness and impartiality should not be questioned for mere speculation, suspicion, apprehension, or imagination." *Medina*, 193 Ariz. at 510, ¶ 12 (cleaned up). Greene fails to overcome the presumption.

First, the issue before this Court is one of straightforward interpretation of Arizona Criminal Rule 32.1 and whether subsections (a), (c), (g), or (h) permit relief when the Legislature has made a prospective change to the definition of a capital aggravating factor. (Petition, at 3.) This also involves simple statutory interpretation, specifically, A.R.S. § 1–244, which states that no statute is applied retroactively, unless it explicitly expresses otherwise. Greene knows this, which is why he posits that "factors such as statutory interpretation, legislative intent, or the

effective date of the statute which prospectively abolished capital punishment" for some pecuniary-gain motivated first-degree murderers are "irrelevant." (Greene's Supplemental Brief, at 2.) He admits that legislative intent and the effective date of the change to the pecuniary gain aggravator are "irrelevant," yet nevertheless seeks to remove Justice Montgomery from the panel because of the timing of the legislative change. That does not constitute a "conflict" requiring recusal.

Second, the implications Greene asserts from this timing do not amount to a "conflict" nor any kind of bias or prejudice warranting Justice Montgomery's recusal. Bias and prejudice are evidenced by "a hostile feeling or spirit of ill-will, or undue friendship or favoritism, towards one of the litigants." *Aubuchon*, 233 Ariz. at 66, ¶ 14 (quoting *State v. Myers*, 117 Ariz. 79, 86 (1977)). This Court has explained that "[b]ias and prejudice means a hostile feeling of spirit or ill-will towards one of the litigants. The fact that a judge may have an opinion as to the merits of the cause or a strong feeling about the type of litigation involved, does *not* make the judge biased or prejudiced." *Scheele v. Justices of the Supreme Court of the State of Arizona*, 211 Ariz. 282, 299 (2005) (emphasis added) (cleaned up). Greene's assertion that Justice Montgomery may already have an opinion about the subject matter does not qualify as a conflict, nor can he know which party that opinion may or may not favor.

In *Scheele*, this Court was tasked by the United States District Court for the District of Arizona to answer a certified question regarding this Court's procedural rule-making authority in relation to an Arizona statute. *Scheehle*, 211 Ariz. at 285, ¶ 1. When this Court answered that question, it also ruled on Scheehle's challenge to the impartiality of four siting justices who did not recuse themselves from addressing the certified question, treating it as a motion to disqualify. *Id.* at 293, 295. This Court dismissed Scheele's challenges to the justices based on named party status and bias and prejudice, concluding that just because a judge had been sued for his or her rulings, recusal was not called for, else a "weapon for disqualification [is placed] in the hands of the unscrupulous." *Id.* at 295 (quoting *In re Ronwin*, 139 Ariz. 576, 586 (1983)).

Applying the "rule of necessity," this Court noted that justices performing their duties in an official capacity are not required to recuse when those rulings are challenged, and, further, that this Court is "regularly called upon to interpret or decide the validity of its own rules." *Scheehle*, 211 Ariz. at 296–98. *See, e.g., Fay v. Fox, in and For the County of Maricopa (Hanson)*, 251 Ariz. 537 (2021) (finding victim permitted to be heard in Rule 32.1(f) request for a delayed appeal to contest a restitution award); *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 342, ¶¶ 6–8 (1999) (rule granting 120 days to file a petition for post-conviction relief upheld); *In re Smith*, 189 Ariz. 144, 146 (1997) (upholding rule imposing

mandatory continuing legal education); *Stapleford v. Houghton*, 185 Ariz. 560, 562 (1996) (finding provision of Rules of Criminal Procedure superseded by Victim's Bill of Rights); *State v. Roscoe*, 185 Ariz. 68 (1996) (same).

Further, as this Court noted, the "adoption of a rule does not constitute a prior determination that the rule is valid and constitutional against any challenge." *Scheele*, 211 Ariz. at 298. In other words, action in an official capacity does not automatically call for recusal in matters that later analyze that action, even when the officials are nominally named in a subsequent challenge. Similarly, Justice Montgomery's service in an official capacity as the elected Maricopa County Attorney at the time the Legislature made a prospective change to the definition of the pecuniary gain aggravator does not call for his recusal in this case involving interpretation of Arizona Criminal Rule 32.1 (a), (c), (g), and (h) and whether any of those subsections provides Greene relief from his decades-final death sentence for his 1995 murder of Professor Roy Johnson.

Next, this Court rejected Scheele's allegation of bias and prejudice based on his contention that the justices had already formed a view on the certified question. This Court reasoned that, even if Scheele could establish that the challenged justices had a view on the question at issue, under the applicable judicial canons, that did not establish bias or prejudice. *Scheele*, 211 Ariz. at 299. As such, while each justice has the "continuing individual responsibility to exercise considerable

introspection and intellectual honesty in determining whether he or she may appropriately sit on any matter that comes before the Court," nothing Greene asserts calls into question Justice Montgomery's ability to sit on this matter. *Id.* at 301.

While a fair tribunal is a basic requirement of due process, as Greene points out (Notice, at 2, 5), the Supreme Court has also stated that "most matters relating to judicial disqualification do not arise to a constitutional level." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (cleaned up). *See also In re Murchison*, 349 U.S. 133, 136 (1955). The Court explained that "the question is an objective one"—would the average judge in Justice Montgomery's position be "'likely' to be neutral" or is there an "unconstitutional 'potential for bias.'" *Caperton*, 556 U.S. at 881. In *Caperton*, a narrow majority of the Court concluded that, based on "objective and reasonable perceptions," there was a "serious risk of actual bias" where a person with a stake in a case had a "significant and disproportionate" role in raising the funds and directing the campaign that put the judge presiding over the case on the bench. 556 U.S. at 884. The majority concluded that this led to an "objective risk of actual bias" requiring recusal of that judge. *Id.* at 886. However, the majority also noted that similar circumstances would not be present in other judicial campaigns presenting a "potential for bias

comparable to the circumstances" in *Caperton*. *Id.* at 887. Put differently, *Caperton* is limited to its unique facts.

Just so, as *Caperton* is easily distinguished from Greene's allegation against Justice Montgomery here—which amount to bare allegations of bias or prejudice. *See Carver*, 160 Ariz. at 173 (bare allegations of bias and prejudice, unsupported by factual evidence, are insufficient to overcome the presumption of impartiality and do not require recusal); *State v. Myers*, 117 Ariz. 79 (1977) (absent proof of bias and prejudice, allegation that trial judge felt criminals were being treated too leniently was insufficient to require disqualification); *State v. Foggy*, 107 Ariz. 307 (1971) (improper sentence originally imposed and case remanded to same judge for resentencing insufficient to establish bias and prejudice so as to warrant disqualification); *State v. Menard*, 135 Ariz. 385 (Ct. App. 1982) (judge's expression of strong personal feelings against arson insufficient to establish bias and prejudice to establish bias and prejudice so as to warrant disqualification).

Greene has presented no facts that meet these high burdens in state and federal law that would require Justice Montgomery's recusal due to bias and/or prejudice, or any question of his impartiality to address the straightforward interpretation of state criminal rules and statutes presented by the State's Petition for Review. Nor are any of Arizona's judicial canons implicated by Justice

Montgomery sitting on this case. *See* Rule 81, Arizona Rules of the Supreme Court (Arizona Code of Judicial Conduct).

Nor, as Greene suggests (Notice, at 4), is there a danger of the situation presented in *Williams v. Pennsylvania*, 579 U.S. 1 (2016), where one of the justices of the Pennsylvania Supreme Court who participated in vacating a post-conviction court's grant of relief to a capital defendant had been the district attorney who gave official approval to seek the death penalty against the defendant in the first instance. 579 U.S. at 4. There, "the judge's own personal knowledge and impression of the case, acquired through his or her role in the prosecution," could lead to a due process violation caused by a tribunal more influenced by that experience than by the "parties' arguments to the court." *Id.* at 9–10. However, contrary to *Williams*, Justice Montgomery, who had a prosecutorial role in Maricopa County, has no independent knowledge of Greene's case, which was prosecuted by Pima County.[1]

For the foregoing reasons, Justice Montgomery's recusal is neither "appropriate" nor "required in this matter." (Notice, at 5.)

[1] Moreover, the two justices to whom this situation would apply already recused themselves from consideration of the grant of the State's Petition for Review, given their former prosecutorial roles at the Office of the Arizona Attorney General. (Minute Letter, dated January 5, 2022, indicating "Justice Lopez and Justice Beene did not participate in the determination of this matter.")

Respectfully submitted this 10th day of February, 2022.

Mark Brnovich
Attorney General
(Firm State Bar No. 14000)

Jeffrey Sparks
Acting Chief Counsel
Capital Litigation Section

/s/
Ginger Jarvis
Assistant Attorney General
Capital Litigation Section
2005 N. Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542–4686
CLDocket@azag.gov
(State Bar Number 014487)

Attorneys for Appellee

SJ7D9BKN0ERAOF

JACKSON & ODEN, PLLC
1670 East River Road, Suite 260
Tucson, Arizona 85718
Telephone: (520) 884-0024
Fax: (520) 884-0025
TODD JACKSON ASB NO. 012202
TJACKSON@JACKSONODENLAW.COM

Attorney for Defendant

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA, Petitioner, vs. BEAU JOHN GREENE, Defendant.	CR-21-0082-PC Pima County Superior Court No. CR04830(-001) **NOTICE OF CONFLICT OF INTEREST**

This Court will decide the constitutional implications of a legislative amendment to Arizona's death penalty law, which changed the definition of the pecuniary gain aggravating factor.[1] Preceding this legislative act, Respondent Beau John Greene ("Greene") was sentenced to death for criminal conduct not currently punishable by a death sentence. Under applicable federal and state constitutional principles, his execution now would constitute cruel and unusual punishment. No

[1] The legislative amendment essentially defined the pecuniary gain aggravating factor as applying only to "murderers for hire." Hereafter, all references to repeal of the pecuniary gain factor are exclusive of murders for hire.

jurisdiction has ever executed a person like Greene, whose criminal conduct is no longer punishable by death.

The presented legal question of such consequence must be decided by an impartial tribunal, which is an elementary requirement of due process. *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) (accord). For the reasons explained below, Greene respectfully submits that the unique context and issues presented by this case give rise to circumstances and a conflict of interest that warrant Justice Montgomery's recusal from further participation in these proceedings.

The elected Maricopa County Attorney (at that time Mr. Montgomery), acting through his representatives under his authority, conceived of and drafted the statutory amendment and repeal bill at issue (SB 1314), and then supported the repeal of the pecuniary gain factor, among others, in hearings before the Arizona State Legislature.[2] Greene has argued in his briefing below and to this Court that the positions and testimony of the Maricopa County Attorney's Office during Justice

[2] *Ruling (Record on Appeal ("ROA") 21) at 3, 7–11*; *Hearing on S.B. 1314 before the H. Comm. on the Judiciary*, 54th Leg., 1st Reg. Sess. (Ariz. 2019), *available at* https://www.azleg.gov/videoplayer/?eventID=2019031400&startStreamAt=12102 (hereinafter "*House Hearing*"), at 3:23:00–3:23:19 ("[L]itigation that's been ongoing sparked a conversation internally in our office 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.").

Montgomery's tenure weigh in favor of a finding that carrying out capital punishment on an individual responsible for a pecuniary-gain motivated murder would run contrary to contemporary standards of decency.[3] The Superior Court's Ruling under review likewise referred to such considerations.[4] Similarly, the State has cited testimony of the Maricopa County Attorney's Office to the legislature as support of the State's position in this appeal, which Greene disputes.[5] Thus, the Maricopa County Attorney's actions and official public statements during Justice Montgomery's tenure are relevant and their constitutional significance is at issue in this case. As a result, this Court is now tasked, in part, with taking measure of the constitutional implications of such official actions.

Accordingly, if Justice Montgomery further participates in the case, he would be placed in the untenable position of rendering an assessment of the constitutional import of such official actions of the County Attorney, and of those who acted under his authority and on his behalf. These circumstances warrant recusal. *See, e.g.,* Comment 7 to Rule 2.11(A) Arizona Code of Judicial Conduct (hereinafter "ACJC").

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[3] *E.g.,* Defendant's Response to Petition for Review at 5, 12, 15, 17-18.

[4] Ruling (ROA 21) at pgs. 3, 7-11.

[5] Petition for Review at 13; Defendant's Response at 5-6.

Further, were Justice Montgomery to participate in the Court's assessment of the constitutional relevance or effect of the Maricopa County Office's actions, he will be called upon to consider facts for which he may have acquired personal knowledge as County Attorney, undermining the impartiality which due process requires. *In re Murchison*, 349 U.S. at 138. And, absent recusal, this Court will be required to render an assessment of the constitutional implications of the actions of persons acting on behalf of one its own members, further supporting recusal. *See Williams v. Pennsylvania*, 579 U.S. 1, 15–16 (2016); *see also* ACJC Rule 1.2.

Beyond the foregoing, the Maricopa County Attorney's advocacy for the repeal of capital punishment in cases of murder for pecuniary gain results in an inference that in conceiving and drafting the repeal bill and then promoting its passage, the Maricopa County Attorney's Office may have considered, discussed, or reached its own decisions as to the impact that the repeal would have on prisoners already sentenced to death. This question was a subject commented upon at the legislative hearing, and is addressed in the Ruling under review and the parties' pending briefing.[6]

Consequently, judged under objective standards, there is an inference and appearance that the leadership in the Maricopa County Attorney's Office may have

[6] Ruling at 9; State's Petition for Review at 13; Defendant's Response to Petition for Review at 5-6.

discussed and made their own judgments as to how the statutory repeal could affect those who were previously sentenced to death. Respectfully, this objective risk of pre-consideration or pre-judgment, on issues and arguments raised in this appeal, presents another reason why recusal is necessary. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009) (due process requires recusal when, by objective standards, there is actual risk of prejudgment).

For all the reasons stated and authority cited above, Greene therefore gives notice of the foregoing circumstances and, with respect, submits that Justice Montgomery's recusal is appropriate and required in this matter. *Williams*, 579 U.S. at 8.

Respectfully submitted this 25th day of January, 2022.

JACKSON & ODEN, PLLC

By: /s/ Todd Jackson
Todd Jackson
Attorney for Defendant

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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.

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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

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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

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
Clerk of Court - Criminal Unit

Jason Buckner
Law Clerk

Clerk of Court - Under Advisement Clerk
Dept. of Corrections

Jason Buckner
Law Clerk

119 S.Ct. 1772
Supreme Court of the United States

Beau John GREENE, petitioner,
v.
ARIZONA.

No. 98-8454.
|
May 17, 1999.

Synopsis

Case below, 192 Ariz. 431, 967 P.2d 106.

Opinion

Petition for writ of certiorari to the Supreme Court of Arizona denied.

All Citations

526 U.S. 1120, 119 S.Ct. 1772 (Mem), 143 L.Ed.2d 802, 67 USLW 3706

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KeyCite Yellow Flag - Negative Treatment
Abrogation Recognized by State v. Martinez, Ariz.App. Div. 1, July 21, 2016

192 Ariz. 431
Supreme Court of Arizona,
En Banc.

STATE of Arizona, Appellee.
v.
Beau John GREENE, Appellant.

No. CR–96–0502–AP.
|
Oct. 20, 1998.

Synopsis
Defendant was convicted in the Superior Court, Pima County, No. CR–48730, Bernardo P. Velasco, J., of first-degree murder, robbery, kidnapping, theft, and six counts of forgery, and sentenced to death on murder conviction. Defendant appealed. The Supreme Court, Martone, J., held that: (1) testimony concerning victim's moral character was admissible rebuttal evidence; (2) issue of whether defendant's use of force against victim was accompanied by intent to take victim's property was for jury; (3) evidence was insufficient to sustain kidnapping conviction; (4) finding that defendant murdered victim for pecuniary gain was not offset by minimal mitigating evidence; and (5) imposition of aggravated sentences on defendant's noncapital convictions for robbery, kidnapping, and theft-by-control was warranted.

Affirmed in part and reversed in part.

Zlaket, C.J. filed a dissenting opinion in which Kleinschmidt, J., joined.

West Headnotes (39)

[1] **Criminal Law** Scope of Evidence in Rebuttal

Testimony of victim's widow that he was devoted and faithful to her was admissible in murder prosecution to rebut defendant's claim that he killed victim in response to victim's homosexual advance. 17A A.R.S. Rules of Evid., Rule 404(a)(2).

[2] **Sentencing and Punishment** Nature and circumstances of offense

Testimony of friend of victim's family that victim "was a decent family man" was admissible at aggravation/mitigation phase of murder prosecution to rebut defendant's claim that he killed victim after victim made homosexual advance. 17A A.R.S. Rules of Evid., Rule 404(a)(2); 17 A.R.S. Rules Crim.Proc., Rule 26.7, subd. b.

[3] **Criminal Law** Degree of proof

"Substantial evidence" is proof that a rational trier of fact could find sufficient to support a conclusion of guilt beyond a reasonable doubt.

6 Cases that cite this headnote

[4] **Criminal Law** Construction of Evidence
Criminal Law Inferences or deductions from evidence

Supreme Court construes the evidence in a criminal prosecution in the light most favorable to sustaining the verdict, and resolves all reasonable inferences against the defendant.

253 Cases that cite this headnote

[5] **Robbery** Nature and elements in general

Person commits "robbery" if, in the course of taking property of another from his person or immediate presence and against his will, he or she uses force with the intent to coerce the surrender of property or to prevent resistance. A.R.S. § 13–1902, subd. A.

[6] **Robbery** Questions for jury

Issue of whether defendant's use of force against victim was accompanied by intent to take victim's property was for jury in robbery

prosecution. A.R.S. § 13–1902, subd. A; 17 A.R.S. Rules Crim.Proc., Rule 20(a).

[7] **Kidnapping** Weight and sufficiency

Evidence was insufficient to support defendant's kidnapping conviction, where, although defendant eventually killed victim and stole his wallet and his automobile, there was no indication as to how defendant and victim met, no indication as to whether defendant brought murder weapon with him or found it in victim's automobile, and no indication that defendant knowingly restrained victim before bludgeoning him to death. A.R.S. § 13–1304, subd. A, par. 3.

[8] **Homicide** Predicate offenses or conduct

Defendant's conviction for felony murder was supported by conviction for predicate offense of robbery, even though conviction for predicate offense of kidnapping was not supported by evidence. A.R.S. § 13–1105, subd. A, par. 2.

[9] **Witnesses** Documents

Postarrest letter written by defendant, in which defendant expressed concern over recipient making statement to authorities, could be used during cross-examination of defendant in murder prosecution to show defendant's consciousness of guilt, where defendant's letter did not challenge truth of recipient's statement to police. 17A A.R.S. Rules of Evid., Rule 401.

2 Cases that cite this headnote

[10] **Witnesses** Documents

Postarrest letter written by defendant, in which defendant boasted about killing victim and alluded to fact that victim had been bludgeoned to death, could be used during cross-examination of defendant in murder prosecution to rebut defendant's claims that he felt remorse for his actions and that he hit victim only with his fists.

1 Case that cites this headnote

[11] **Sentencing and Punishment** Admissibility

Threatening letter written by defendant to another inmate, in which defendant displayed callous attitude toward murder and fascination with being "convicted murderer" apparently headed for death row, was relevant to finding of especially heinous or depraved state of mind, and thus was admissible at sentencing phase of murder prosecution. A.R.S. § 13–703, subd. F, par. 6; 17A A.R.S. Rules of Evid., Rules 401, 402.

1 Case that cites this headnote

[12] **Sentencing and Punishment** Questions of fact

In capital cases, the Supreme Court independently reviews the trial court's findings of aggravating and mitigating circumstances to determine if the death penalty is appropriate. A.R.S. § 13–703.01, subd. A.

9 Cases that cite this headnote

[13] **Sentencing and Punishment** Personal or pecuniary gain

Aggravating factor of pecuniary gain, supporting imposition of the death penalty, is present when the defendant committed the murder as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value; the evidence must show that financial gain was a motive for the murder. A.R.S. § 13–703, subd. F, par. 5.

7 Cases that cite this headnote

[14] **Sentencing and Punishment** Personal or pecuniary gain

Finding that defendant murdered victim for pecuniary gain was supported by evidence that, at time defendant encountered victim he was homeless, hungry, tired, craving drugs, in need of transportation, and attempting to evade drug dealer who wanted to kill him, that defendant

took victim's wallet before dumping his body in isolated area and leaving scene in victim's automobile, that defendant made several large purchases using victim's credit cards within hours of murder, and that defendant's version of events conflicted substantially with physical evidence found at crime scene. A.R.S. § 13–703, subd. F, par. 5.

1 Case that cites this headnote

[15] **Sentencing and Punishment** Vileness, heinousness, or atrocity

In determining whether to impose the death penalty for murder, the "especially heinous, cruel, or depraved" aggravating circumstance is phrased in the disjunctive, so if any one factor is found, the circumstance is satisfied.

1 Case that cites this headnote

[16] **Sentencing and Punishment** Vileness, heinousness, or atrocity

Factors which the Supreme Court considers in determining whether a murder was especially heinous or depraved, and thus whether imposition of the death penalty is warranted, include: (1) relishing of the murder; (2) gratuitous violence; (3) mutilation; (4) senselessness; (5) helplessness; and (6) witness elimination.

[17] **Sentencing and Punishment** Vileness, heinousness, or atrocity

For purposes of determining, at sentencing phase of capital murder prosecution, whether defendant relished the commission of the offense, so as to indicate that murder was especially heinous or depraved, "relishing" refers to words or actions that show debasement or perversion; the defendant must say or do something that indicates he savored the murder.

3 Cases that cite this headnote

[18] **Sentencing and Punishment** Vileness, heinousness, or atrocity

Defendant's statement to his friend that he had "clubbed a faggot" did not reach level necessary to support finding of relishing, and thus did not support finding that murder was "especially heinous or depraved."

1 Case that cites this headnote

[19] **Sentencing and Punishment** Vileness, heinousness, or atrocity

Souvenir taken from a crime may constitute evidence of "relishing," and may support imposition of death penalty for murder. A.R.S. § 13–703, subd. F, par. 6.

[20] **Sentencing and Punishment** Vileness, heinousness, or atrocity

Defendant did not display murder victim's driver's license to his friend as trophy or as indication that he relished commission of offense, and thus that act did not support finding that murder was especially heinous or depraved and warranted imposition of death penalty.

[21] **Criminal Law** Intent

Defendant's state of mind may be inferred from behavior at or near the time of the offense.

7 Cases that cite this headnote

[22] **Sentencing and Punishment** Nature and circumstances of offense

Postmurder behavior is relevant to prove heinousness or depravity when it provides evidence of a killer's vile state of mind at the time of the murder. A.R.S. § 13–703, subd. F, par. 6.

2 Cases that cite this headnote

[23] **Sentencing and Punishment** Vileness, heinousness, or atrocity

Postmurder statements suggesting indifference, callousness, or a lack of remorse constitute "relishing" only when they indicate, beyond a reasonable doubt, that the killer savored or enjoyed the murder at or near the time of the murder. A.R.S. § 13–703, subd. F, par. 6.

6 Cases that cite this headnote

[24] **Sentencing and Punishment** Sufficiency

Defendant's statements in postarrest letter to friend, in which defendant bragged about bludgeoning victim to death, did not show beyond a reasonable doubt that defendant enjoyed killing victim or reveal defendant's state of mind at time of murder, and thus did not constitute sufficient proof of relishing to establish heinous or depraved aggravating circumstance in support of death penalty. A.R.S. § 13–703, subd. F, par. 6.

1 Case that cites this headnote

[25] **Sentencing and Punishment** Sufficiency

Threatening letter written by defendant to another inmate, in which defendant displayed callous attitude toward murder and fascination with being "convicted murderer" apparently headed for death row, although reflective of extraordinary callousness and lack of remorse and reflective of defendant's vile state of mind, did not show beyond a reasonable doubt that defendant relished victim's murder, and thus did not establish heinous or depraved aggravating circumstance in capital murder prosecution. A.R.S. § 13–703, subd. F, par. 6.

3 Cases that cite this headnote

[26] **Sentencing and Punishment** Vileness, heinousness, or atrocity

Defendant did not relish murder of victim, and thus there could be no finding of "especially heinous, cruel, or depraved" aggravating circumstance in prosecution for capital murder, where, although defendant's statements and conduct evinced vile state of mind and callous attitude, there was no indication that defendant savored or enjoyed murder near time of offense. A.R.S. § 13–703, subd. F, par. 6.

7 Cases that cite this headnote

[27] **Sentencing and Punishment** Sufficiency

Defendant failed to establish statutory mitigating circumstance that, due to his drug use, his capacity to appreciate wrongfulness of his conduct or to conform his conduct to requirements of law was significantly impaired, where defendant presented no evidence on issue other than his statement that he was in withdrawal from drugs at time he encountered and murdered victim, and, following murder, defendant attempted to conceal evidence of crime. A.R.S. § 13–703, subd. G.

1 Case that cites this headnote

[28] **Sentencing and Punishment** Substance abuse and addiction

Defendant's use of drugs every day for several days prior to murder was not mitigating circumstance in determination as to whether to impose death penalty, where defendant was not under influence of drugs at time he killed victim, and defendant offered no expert testimony concerning alleged causal connection between defendant's drug use and offense.

[29] **Sentencing and Punishment** Childhood or familial background

Family background may be a substantial mitigating circumstance in determination as to whether to impose death penalty for murder, when it is shown to have some connection with the defendant's offense-related conduct.

3 Cases that cite this headnote

[30] **Sentencing and Punishment** Childhood or familial background

Conduct of defendant's mother in introducing him to drug use and in flagrantly using drugs herself while he lived with her as teenager was insufficient to constitute dysfunctional family history mitigating circumstance in prosecution of defendant for capital murder, where defendant was 29 years old at time he killed victim, and had had little or no contact with his mother in years.

3 Cases that cite this headnote

[31] **Sentencing and Punishment** Lack of significant prior record

Murder defendant's lack of felony criminal record was mitigating circumstance entitled to little weight during sentencing phase of capital murder prosecution.

2 Cases that cite this headnote

[32] **Sentencing and Punishment** Other matters related to offender

Defendant's attainment of his high school equivalency diploma and his degree in motorcycle repair were slightly mitigating factors in sentencing phase of capital murder prosecution.

[33] **Sentencing and Punishment** Existing social ties and responsibilities

Defendant failed to show "good marriage and healthy family life" mitigating factor in sentencing phase of capital murder prosecution, where defendant had divorced his wife, his parental rights to his two children had been terminated, and defendant provided little or no financial support for children.

[34] **Sentencing and Punishment** Offender's character in general

Defendant failed to show "productive life" mitigating factor in sentencing phase of capital murder prosecution, where defendant was unemployed at time of murder, and had not been gainfully employed for previous five years.

1 Case that cites this headnote

[35] **Sentencing and Punishment** Offender's character in general

Although past good conduct and character is a relevant mitigating circumstance in the penalty phase of a capital murder prosecution, a single good deed, removed in time from the crime, does not rise to that level and is not mitigating.

2 Cases that cite this headnote

[36] **Sentencing and Punishment** Existing social ties and responsibilities

Effect which defendant's execution would have on his two children was entitled to some mitigating weight in penalty phase of capital murder prosecution.

2 Cases that cite this headnote

[37] **Sentencing and Punishment** Scope of review

Supreme Court independently reviews the trial court's findings of aggravation and mitigation during sentencing phase of capital murder trial, and if an error is made, the Supreme Court independently determines if the mitigation is sufficiently substantial to warrant leniency in light of existing aggravation; in weighing, the Supreme Court considers the quality and the strength, not simply the number, of aggravating and mitigating factors. A.R.S. § 13–703.01.

31 Cases that cite this headnote

[38] **Sentencing and Punishment** Determinations based on multiple factors

Sentencing and Punishment Personal or pecuniary gain

Sentencing and Punishment Existing social ties and responsibilities

Finding that defendant murdered victim for pecuniary gain was not offset by minimal mitigating evidence that defendant had two children, that he had made some modest educational achievements, and that his mother had introduced him to drug use and abuse during his teen-age years, and thus leniency was not warranted in capital murder prosecution.

A.R.S. § 13–703.01.

[39] Sentencing and Punishment Pecuniary motive

Imposition of aggravated sentences on defendant's noncapital convictions for robbery, kidnapping, and theft-by-control was warranted by finding, during sentencing phase on capital murder charge, that defendant murdered victim for pecuniary gain. A.R.S. § 13–702, subd. C.

2 Cases that cite this headnote

Attorneys and Law Firms

****109 *434** Grant Woods, Attorney General, by Paul J. McMurdie, Chief Counsel, Criminal Appeals Section, Dawn Northup, Assistant Attorney General, Phoenix, for the State of Arizona.

Harriette P. Levitt, Tucson, for Beau John Greene.

OPINION

MARTONE, Justice.

¶ 1 A jury convicted Beau John Greene of first degree murder (both premeditated and felony murder), robbery, kidnapping, theft, ****110 *435** and six counts of forgery. The trial court sentenced him to death for the murder conviction, and to terms of imprisonment for the noncapital crimes. Appeal to this court is automatic under Rules 26.15 and 31.2(b), Ariz. R.Crim. P., and direct under A.R.S. § 13–4031. We affirm except as to the kidnapping conviction.

I. BACKGROUND

¶ 2 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. Greene admitted at trial that he killed Johnson.

¶ 3 Greene 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.

¶ 4 The day of the murder, Greene's friends, Tom Bevan and Loriann Verner, told Greene he could no longer stay in their trailer located west of the Tucson Mountains. A drug dealer had threatened to shoot Greene over an outstanding debt and Bevan and Verner feared Greene's presence in their trailer would ruin their relationship with the drug dealer. Greene stole a truck and drove to Tucson where the truck broke down. Sometime that night, during Johnson's drive home from the concert, Greene and Johnson crossed paths, but the record does not tell us how.

¶ 5 Greene's story, disbelieved by judge and jury, is as follows. Johnson approached Greene in a park. Greene claims that Johnson wanted to perform oral sex on him, and offered to pay him for it. Greene accepted, and the two drove to a secluded parking lot in Johnson's car. Greene says he then changed his mind and told Johnson that he would not follow through. In response, Johnson purportedly smiled and touched Greene's leg. Greene 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, Greene says, he walked back to the car and drove away. He claims he then realized that he needed money so he returned to the wash, walked down to the body, and stole Johnson's wallet.

¶ 6 Several pieces of evidence undermine Greene'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 Greene's

hands were injured. Second, only one set of tire tracks and footprints entered and left the wash, suggesting that Greene did not return for the wallet, but had it with him when he left immediately after the murder. Third, Greene told Bevan he beat someone to death with a club and dumped the body near Gates pass.

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

¶ 8 Greene 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, Greene 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 2nd, the police arrested Greene at a friend's house.

II. ISSUES

Greene raises the following issues:

****111 *436 A. Trial Issues**

1. Whether the trial court committed reversible error by allowing Johnson's wife to testify regarding Johnson's moral values;

2. Whether the trial court committed reversible error in denying appellant's motion for a directed verdict as to count three, robbery;

3. Whether the evidence was sufficient to sustain a conviction for kidnapping;

4. Whether the felony murder conviction cannot stand because the predicate felony convictions are invalid;

5. Whether the trial court committed reversible error by allowing the state to elicit testimony concerning letters Greene wrote after his arrest to Tom Bevan and Joseph Fausto (a.k.a."Dr.G.Jones").

B. Sentencing Issues

1. Whether the trial court committed reversible error by admitting into evidence and relying upon in the aggravation/mitigation hearing a letter Greene wrote to Christina George after his conviction;

2. Whether the imposition of the death penalty was improper;

3. Whether the trial court committed reversible error by imposing aggravated consecutive sentences on the noncapital offenses;

III. ANALYSIS

A. Trial Issues

1. WIDOW'S TESTIMONY

[1] ¶ 9 Greene claims the trial court erred by failing to limit Johnson's widow's testimony to the specific character trait of heterosexuality. The state recalled Mrs. Johnson to rebut the testimony of Greene's former girlfriend who testified that Greene had told her that he killed Johnson in response to a homosexual advance. Mrs. Johnson testified that Greene's claim "was preposterous....[Johnson] was a man of great honor and integrity, of great moral principle, of deep, abiding faith. And most importantly, he was devoted to me as I was to him." Tr. of Mar. 12, 1996, at 92.

¶ 10 Greene agrees that once a victim's sexual preference is put in issue, the state may offer rebuttal evidence regarding the victim's heterosexuality. *See* *State v. Rivera,* 152 Ariz. 507, 518, 733 P.2d 1090, 1101 (1987); *see also* Rule 404(a)(2), Ariz. R. Evid. But accusing a married person of making a nonspousal sexual advance places far more than sexual preference in issue. All sorts of character issues are implicated, such as fidelity, integrity, honesty, trustworthiness, and loyalty. Thus, for purposes of rebuttal, Greene's accusation implicated all of these.

[2] ¶ 11 Mrs. Johnson's testimony that her husband was devoted and faithful to her tends to show that the victim would not have made sexual advances toward Greene. Her testimony that he was a man of honor, integrity, and good moral character directly rebuts Greene's accusations of Johnson's infidelity. [1] Admission of the testimony in question was proper rebuttal evidence. Rule 404(a)(2), Ariz. R. Evid. There was no error.

1 Greene also argues that the trial court erred by allowing a friend of the Johnson family to testify at the aggravation/mitigation hearing that Johnson "was a decent family man." Tr. of Aug. 22, 1996, at 34. This testimony was relevant to rebut Greene's continued accusations of Johnson's infidelity and homosexuality. There was no error. *See* Rule 404(a)(2), Ariz. R. Evid.; Rule 26.7(b), Ariz. R.Crim. P. ("[A]ny party may introduce any reliable, relevant evidence, including hearsay, in order to show aggravating or mitigating circumstances....").

2. SUFFICIENCY OF THE EVIDENCE–ROBBERY

[3] **[4]** ¶ 12 Greene moved for a directed verdict arguing that there was "no substantial evidence to warrant a conviction" on the robbery count. Rule 20(a), Ariz. R.Crim. P. Substantial evidence is proof that a rational trier of fact could find sufficient to support a conclusion of guilt beyond a reasonable doubt. *State v. Murray,* 184 Ariz. 9, 31, 906 P.2d 542, 564 (1995). We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant. *State v. Gallegos,* 178 Ariz. 1, 9, 870 P.2d 1097, 1105 (1994). ****112** ***437**

[5] ¶ 13 A person commits robbery if, in the course of taking property of another from his person or immediate presence and against his will, he or she uses force with the intent to coerce the surrender of property or to prevent resistance. A.R.S. § 13–1902(A)(1989). Greene argues that there is no direct evidence that he intended to take the victim's property at the time he used force. He argues that he killed Johnson in response to the homosexual overture, dumped the body, and only then decided to steal his car and wallet. For these reasons, Greene claims his circumstances were similar to those in *State v. Lopez,* 158 Ariz. 258, 762 P.2d 545 (1988), where this court overturned a robbery conviction because of insufficient evidence.

[6] ¶ 14 Greene's reliance on *Lopez* is misplaced. Unlike Greene, the *Lopez* defendants discarded the victim's wallet and burned his car after the murder "for the purpose of removing themselves from the scene, to attempt to prevent or delay identification of the body, and to destroy evidence." *Id.* at 264, 762 P.2d at 551. Thus, there was no evidence that the earlier use of force against the victim was accompanied by an intent to commit a robbery. *Id.* Here, Greene was hungry, tired, and craving methamphetamine when he encountered Johnson. He had been thrown out of his temporary residence, had no transportation, and was seeking to avoid a drug dealer who had threatened to shoot him. After stealing Johnson's car, and within hours after killing him, he began spending Johnson's money and using his credit cards.

¶ 15 The examination of the crime scene revealed only one set of tire tracks and footprints to and from the wash. A rational trier of fact could have found beyond a reasonable doubt that Greene's use of force against Johnson was accompanied by an intent to take Johnson's property. The Rule 20 motion was properly denied.

3. SUFFICIENCY OF THE EVIDENCE–KIDNAPPING

[7] ¶ 16 Greene next argues that a rational trier of fact could not have found beyond a reasonable doubt that he knowingly restrained Johnson with the intent to inflict death, physical injury, or a sexual offense on the victim, or to otherwise aid in the commission of a felony. *See* A.R.S. § 13–1304(A)(3)(1989).

¶ 17 Nothing in the record tells us how Greene got into Johnson's car. The car was not damaged in any way. Although Greene apparently used a heavy flat object to kill Johnson, nothing indicates whether he found this object in the car, or carried it with him. Moreover, no evidence demonstrates that Greene, while in the car, knowingly restrained Johnson before bludgeoning him, or whether he simply chose to strike him at an opportune moment.

¶ 18 Although it seems highly probable that at some point Johnson was restrained before death, the evidence is insufficient to support such a finding beyond a reasonable doubt. Thus, we reverse the kidnapping conviction and order the entry of a judgment of acquittal on the kidnapping charge.

4. FELONY MURDER

[8] ¶ 19 Greene argues that we must reverse the felony murder conviction because the convictions for robbery and kidnapping cannot stand. Although we reverse the kidnapping conviction, the robbery conviction remains as a sufficient predicate crime to affirm Greene's felony murder conviction. *See* A.R.S. § 13–1105(A)(2)(Supp.1997). Because Greene admitted that he killed Johnson, *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L. Ed.2d 1140 (1982) and

Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), are satisfied. In addition, we note that Greene was also convicted of premeditated murder.

5. POST–ARREST LETTERS

¶ 20 Greene argues that the court erred when it permitted the state to cross-examine him about two letters he wrote after his arrest: one to Joseph Fausto (a.k.a."Dr.G.Jones")")")") ****113** ***438** and the other to Tom Bevan. Greene claims the contents of the letters amounted to irrelevant and impermissible " other acts" evidence under Rule 404(b), Ariz. R. Evid.

[9] ¶ 21 Greene's argument fails because the letter to Bevan was relevant to show Greene's consciousness of guilt. *See* Rule 401, Ariz. R. Evid. In the letter, Greene indicated that he had reviewed Bevan's recorded statement to authorities, yet nowhere in the letter did Greene challenge the truth of Bevan's statement. Greene was concerned only about Bevan informing on him.

[10] ¶ 22 The letter to Fausto is also relevant because it rebuts claims that Greene felt remorse for committing the charged offenses: "Looks like I been a baaaad boy. Fuck it! I always did like to stir shit! The fucker wanted to pay me to have sex with him ... Oops ... sorry faggot, wrong white boy!" Tr. of Mar. 13, 1996, at 155. In addition, the letter contains statements relevant to Greene's claim that he hit Johnson with only his fists: "Coroner's report said multiple skull fractures, and cause of death blunt force trauma. Sounds to me like he got his fuckin' skull caved in!" *Id.* at 156, 107 S.Ct. 1676.

¶ 23 Moreover, the letters were not "other acts" evidence introduced for the purpose of proving that Greene acted in conformity with them. *See* Rule 404(b), Ariz. R. Evid. The letters were direct evidence that Greene committed the charged offense. There was no error.

B. SENTENCING ISSUES

1. GEORGE LETTER

[11] ¶ 24 Approximately two weeks after his convictions, Greene, at the request of another inmate, wrote a threatening letter to an inmate named Christina George. Greene argues that the court erred in admitting this letter at sentencing because it was not relevant, or, if relevant, its probative value was substantially outweighed by the danger of unfair prejudice. *See* Rules 401, 402, 403, Ariz. R. Evid.

¶ 25 Although the court admitted the entire letter, it relied on only the following:

> Mother fuckin' snitch's rank right up there with child molesters & homosexuals. And if you have seen the news lately then you probably got a pretty good idea as to how I feel about faggots!
>
> ....
>
> Very sincerely yours,
>
> Beau Greene
>
> convicted murderer
>
> death row alley
>
> 4–D–25

State's Ex. 1. These statements create inferences relevant to a finding of an especially heinous or depraved state of mind. *See* A.R.S. § 13–703(F)(6)(Supp.1997); *State v. Salazar,* 173 Ariz. 399, 412, 844 P.2d 566, 579 (1992)("In determining whether a crime is heinous or depraved we focus on the defendant's mental state and attitude as evidenced by his words and actions."). The letter was probative of Greene's attitude about the murder and provides insight into his callous fascination with being a "convicted murderer," apparently headed for death row. Moreover, the probative value of these statements is not substantially outweighed by the danger of unfair prejudice. *See* Rule 403, Ariz. R. Evid. There was no error.

2. PROPRIETY OF THE DEATH SENTENCE

[12] ¶ 26 In capital cases, we independently review the trial court's findings of aggravating and mitigating circumstances to determine if the death penalty is appropriate. A.R.S. § 13–703.01(A)(Supp.1997). The trial court found that the murder was committed for pecuniary gain, A.R.S. § 13–703(F)(5)(Supp.1997), and in an especially heinous, cruel or depraved manner, A.R.S. § 13–703(F)(6)(Supp.1997).

a. Pecuniary Gain

[13] ¶ 27 The 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). The evidence ****114** ***439** must show that financial gain was a motive for the murder. *State v. Soto–Fong,* 187 Ariz. 186, 208, 928 P.2d 610, 632 (1996), *cert. denied,* 520 U.S. 1231, 117 S.Ct. 1826, 137 L.Ed.2d 1033 (1997).

¶ 28 The trial court found that the medical testimony and the crime scene evidence completely negated Greene's version of the killing. According to the medical examiner, Greene could not have fractured Johnson's skull with his fists. Further, the medical examiner testified that a heavy flat object was used to kill Johnson. The use of an instrument implies premeditation. It also undermines Greene's account, and, therefore, his credibility. Likewise, evidence at the crime scene reveals the falsity of Greene's proffered motivation for the killing. The single set of tire tracks and footprints near the wash indicates that Greene did not return for Johnson's wallet as he claims, but instead had the wallet with him when he left the wash immediately following the murder.

¶ 29 The trial court's finding that Greene intended to profit from the murder was also supported by Greene's admitted need for money, drugs, and transportation. Greene testified that he was hungry, tired, and craving methamphetamine when he encountered Johnson. He was homeless, had no transportation, and was attempting to avoid a drug dealer who had threatened to shoot him over an outstanding debt. Greene testified that the two most important things in his life at the time were to get more drugs and to win back his girlfriend.

¶ 30 Greene's actions after the murder also demonstrate a pecuniary motive. Driving Johnson's car, and within hours of the murder, Greene began using Johnson's credit cards. Greene wrapped his hand in K–Y jelly and gauze and feigned injury to explain any discrepancy in credit card signatures. With the stolen credit cards, he purchased camping equipment, food, and electronic equipment that he later traded for drugs. He also bought food and took it to his girlfriend's house for her son.

¶ 31 Greene argues the court failed to properly consider the effect of his methamphetamine use on his ability to accurately perceive and recall the events that night. But if Greene's memory is suspect, all that remains is uncontradicted evidence offered by the state. Moreover, during trial, Greene recalled, in great detail, events both before and after the murder. On cross examination, he stated unequivocally that neither usage nor withdrawal from methamphetamine had ever affected his memory.

[14] ¶ 32 We have held that when one comes to rob, the accused expects pecuniary gain and this desire infects all other conduct. *See* *State v. Landrigan,* 176 Ariz. 1, 6, 859 P.2d 111, 116 (1993). The evidence supports beyond a reasonable doubt a finding that Greene, coming off of methamphetamine and penniless, killed Johnson to obtain cash or credit cards so that he could make fraudulent purchases to exchange for money or drugs. Thus, the trial court found that Greene's admitted need for money, drugs, and transportation in combination with the crime scene evidence showed that Greene intended to profit from the murder no later than the moment he picked up the object to kill Johnson. We agree. Greene murdered Johnson for pecuniary gain.

b. Especially Heinous or Depraved

[15] **[16]** ¶ 33 The trial court also found that the murder was especially heinous or depraved under the (F)(6) aggravating circumstance. The terms "heinous" and "depraved" focus on the defendant's state of mind at the time of the offense. *See* *State v. Amaya–Ruiz,* 166 Ariz. 152, 178, 800 P.2d 1260, 1286 (1990). We have said that "[t]he especially heinous, cruel, or depraved circumstance is phrased in the disjunctive, so if any one of the three factors is found, the circumstance is satisfied." *State v. Murray,* 184 Ariz. 9, 37, 906 P.2d 542, 570 (1995). Factors we consider in determining whether a murder was especially heinous or depraved include: (1) relishing of the murder; (2) gratuitous violence; (3) mutilation; (4) senselessness; (5) helplessness; and (6) witness elimination. *See* *State v. Ross,* 180 Ariz. 598, 605, 886 P.2d 1354, 1361 (1994); *see also* *State v. Gretzler,* 135 Ariz. 42, 51–52, 659 P.2d 1, 10–11 (1983). In this case, the trial ****115** ***440** court found relishing, senselessness, and helplessness.

[17] ¶ 34 "Relishing" refers to words or actions "that show debasement or perversion." *State v. Roscoe,* 184 Ariz. 484, 500, 910 P.2d 635, 651 (1996). The defendant must say or do something that indicates he savored the murder. *Id.* The court found relishing based on a statement Greene made to Tom Bevan along with Greene's later display of the victim's license to Bevan, and letters he wrote while incarcerated.

(1) Statement to Bevan

[18] ¶ 35 When Greene arrived at Bevan's trailer, he told Bevan that he had "clubbed" a "faggot." The court conceded that Greene may simply have been "relating, in perhaps his vulgar vernacular, an explanation of his conduct." Tr. of Aug. 26, 1996, at 7. The state argues, however, that this language is enough like the language used in *State v. West,* 176 Ariz. 432, 862 P.2d 192 (1993), to support a finding of relishing. We disagree.

¶ 36 West told people he "beat the fuck out of some old man." *Id.* at 448, 862 P.2d at 208. He "bragged about cuts and bruises on his hand coming from beating up 'the old man he ripped off.' " *Id.* Moreover, West boasted of the murder repeatedly and to different friends in detail. He told one friend that " 'he had beat this old man up and tied his arms and legs behind his back and threw him in the closet and then he ripped his stuff off and the car.' " *Id.* at 437, 862 P.2d at 197. While the facts of the instant case are close to those in *West,* they do not reach the level necessary to support a finding of relishing.

(2) Display of Driver's License

[19] **[20]** ¶ 37 The trial court also gave weight to the fact that Greene "displayed" Johnson's driver's license to Bevan. The court believed that Greene was exhibiting a "trophy souvenir of Roy Johnson's murder" amounting to "proof of his kill." Tr. of Aug. 26, 1996, at 7. A souvenir taken from a crime may constitute relishing. *See, e.g., State v. Clark,* 126 Ariz. 428, 437, 616 P.2d 888, 897 (1980)(saving spent bullet from crime); *State v. Lambright,* 138 Ariz. 63, 75, 673 P.2d 1, 13 (1983) (wearing a necklace with a charm that had belonged to victim), *overruled on other grounds by Hedlund v. Sheldon,* 173 Ariz. 143, 840 P.2d 1008 (1992). These facts, however, do not support such a conclusion.

¶ 38 Greene claims he "displayed" the license to counter Bevan's disbelief. Bevan's trial testimony is consistent with this account:

> Q: What was your reaction when he said [he may have killed a guy] to you?
>
> A: I did not really believe it at the time, no.
>
> ....
>
> Q: You indicated to us, sir, that you had actually held the driver's license. Was there a reason that you picked that up and held it?
>
> A: No, he just handed it to me so I looked at it.
>
> Q: Did he tell you why he was handing it to you?
>
> A: No.
>
> Q: Did he make any statements to you while he handed you the driver's license?
>
> A: No.

Based on this testimony, we are not convinced that Greene was displaying the license as a trophy or indicating his enjoyment of the crime.

(3) Post–Arrest Letters

[21] **[22]** **[23]** ¶ 39 The trial court believed that letters Greene wrote following his arrest demonstrate relishing. The general rule is that a "[d]efendant's state of mind may be inferred from behavior at or near the time of the offense." *State v. Martinez–Villareal,* 145 Ariz. 441, 451, 702 P.2d 670, 680 (1985). Post-murder behavior is relevant to prove heinousness or depravity when it provides evidence of "a killer's vile state of mind *at the time of the murder* ...." *State v. Gretzler,* 135 Ariz. 42, 51, 659 P.2d 1, 10 (1983)(emphasis added). Thus, post-murder statements suggesting indifference, callousness, or a lack of remorse constitute "relishing," only when they indicate, beyond a reasonable doubt, ****116** ***441** that the killer savored or enjoyed the murder at or near the time of the murder.

(a) Fausto Letter

[24] ¶ 40 About one month after his arrest, Greene wrote to his friend Joseph Fausto (a.k.a."Dr.G.Jones"). The trial court noted that in the letter Greene had "no qualms about stating that he is the 'wrong white boy' to be picked up by a 'faggot' who ended up with 'his fuckin' skull caved

in.' " Tr. of Aug. 26, 1996, at 7. The court concluded that Greene was "brag[ging] about his conduct because he enjoyed caving in the victim's skull." *Id.* We agree that the statements constitute bragging and show a tremendous lack of remorse. In some cases, bragging about a crime is sufficient proof of relishing where the defendant's statements provide clear insight into his state of mind at the time of the killing. *See, e.g.,* *State v. West,* 176 Ariz. 432, 862 P.2d 192 (1993); *State v. Runningeagle,* 176 Ariz. 59, 65, 859 P.2d 169, 175 (1993) (finding relishing where defendant laughed as he returned to the car after the murder and bragged that he had been in a "good fight"). We do not believe, however, that Greene's statements show beyond a reasonable doubt that he actually enjoyed the killing, or reveal his state of mind at or near the time of the killing.

(b) George Letter

[25] ¶ 41 The court also relied upon a letter Greene wrote to Christina George, an inmate, about two weeks after he was convicted, but before sentencing. In its finding, the court noted that Greene placed the words "convicted murderer" and "death row alley" on the lines below his signature, and concluded that because he was "look[ing] forward to the notoriety of his death, there is no doubt he relished Roy Johnson's." Tr. of Aug. 26, 1996, at 8. Although Greene's anticipation that he would be sentenced to death reflects extraordinary callousness and lack of remorse, it does not provide sufficient insight as to whether he relished the killing at or near the time he killed. Moreover, the relative remoteness of the George letter persuades us that the state did not prove relishing beyond a reasonable doubt.

[26] ¶ 42 We find that the statement and letters certainly demonstrate Greene's vile state of mind and callous attitude toward the murder. Nevertheless, they do not show that Greene relished the murder beyond a reasonable doubt. Absent a finding of relishing, the (F)(6) aggravator cannot stand, because senselessness and helplessness, without more, are ordinarily insufficient to prove heinousness or depravity. *See* *State v. Ross,* 180 Ariz. 598, 607, 886 P.2d 1354, 1363 (1994).

c. Statutory Mitigation

[27] ¶ 43 The trial court did not find any of the mitigating factors set forth in A.R.S. § 13–703(G) (Supp.1997). Greene disputes only the trial court's (G)(1) finding. Greene argues that the trial court erred by failing to find that due to his drug use, his "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired."

¶ 44 Greene testified that at the time of the murder he was withdrawing from drugs. Other than his own statement, Greene presented no evidence of the effect the withdrawal had on his capacity to appreciate the wrongfulness of his conduct or his ability to conform his conduct to the requirements of the law at the time of the offense.

¶ 45 To the contrary, Greene's behavior shows that he did appreciate the wrongfulness of his conduct. After the murder, Greene asked Bevan for clean pants and shoes. Because Bevan did not have pants for him, Greene rubbed dirt on the bloodstains, "trying to be as inconspicuous as possible." Tr. of Mar. 13, 1996, at 104. Greene also took a small rug to cover the bloody car seats. In addition, he feigned injury to his hand in order to use Johnson's stolen credit cards. We agree with the trial court that the evidence is insufficient to establish the existence of the (G)(1) mitigating circumstance. Furthermore, we agree that Greene failed to establish any of the mitigating factors in A.R.S. § 13–703(G).

d. Nonstatutory Mitigation

¶ 46 The trial court considered the following offered mitigation and found it insufficiently ****117** ***442** substantial to call for leniency: drug use and withdrawal; dysfunctional family history; lack of felony criminal record; educational achievement; ability to provide for himself and his family, and to have a good marriage and productive life; positive influence on step-brother; and the effect that the execution would have on his children.

(1) Drug Use and Withdrawal

[28] ¶ 47 Evidence showed that Greene had a history of substance abuse dating back to 1983. Despite occasional periods of sobriety, Greene always reverted to heavy use.

¶ 48 In *State v. Jones,* 185 Ariz. 471, 491, 917 P.2d 200, 220 (1996), this court gave "some weight" to evidence of that defendant's history of alcoholism and drug abuse, and his own statement that on the night of the murder he had not

slept for three or four days and was under the influence of methamphetamine and alcohol.

¶ 49 Greene's drug use on the days before the murder is undisputed. From Friday, February 24, 1995, until Tuesday, February 28, 1995 (the date of the murder), Greene used methamphetamine every day. During this time he ate very little and did not sleep. Unlike the defendant in *Jones,* however, Greene testified that he was not under the influence of drugs at the time he killed. Nor was there expert testimony of any causal connection between drug use or withdrawal and the offense. *See* *State v. Rienhardt,* 190 Ariz. 579, 592, 951 P.2d 454, 467 (1997)(rejecting history of substance abuse as a mitigating circumstance when no evidence establishes a causal connection between the drug abuse and the crime). While it is true that Greene killed to get money to buy drugs, this is not the sort of causal connection that would support a claim of mitigation. To hold that a motivation to kill fueled in part by a desire for drugs is mitigating would be anomalous indeed. We reject this claimed mitigating circumstance.

(2) Dysfunctional Family History

¶ 50 Greene's parents separated when he was thirteen, and Greene lived primarily with his father, a trapper, who migrated between Arizona and Washington. During this time, he had little formal education. In 1983, when he turned seventeen, he moved back to Washington to live with his mother. Greene's mother testified that she was "hog wild" and "into the drugs and the drinking and the partying" when Greene returned. Tr. of July 29, 1996, at 47. She admitted contributing to Greene's problems with methamphetamine.

[29] **[30]** ¶ 51 This court has held that "family background may be a substantial mitigating circumstance when it is shown to have some connection with the defendant's offense-related conduct." *State v. Towery,* 186 Ariz. 168, 189, 920 P.2d 290, 311 (1996), *cert. denied,* 519 U.S. 1128, 117 S.Ct. 985, 136 L.Ed.2d 867 (1997). Greene's mother introduced him to methamphetamine, and encouraged, or at least failed to discourage, his use through her own open and flagrant use. But because adults have personal responsibility for their actions, adult offenders have a difficult burden of proving a connection between family background and offense-related conduct. *See* *State v. Stokley,* 182 Ariz. 505, 524, 898 P.2d 454, 473 (1995). At the time of the murder, Greene was 29 years old; he had had little or no contact with his mother in years. Greene's mother may have introduced him to drugs, but Greene failed to show how this influenced his behavior on the night of the murder. *See* *Towery,* 186 Ariz. at 189, 920 P.2d at 311. Thus, we do not find Greene's dysfunctional family history to be a mitigating circumstance.

(3) Lack of Felony Criminal Record

[31] ¶ 52 We have said that the "[L]ack of prior felony convictions may constitute a nonstatutory mitigating circumstance." *Stokley,* 182 Ariz. at 523, 898 P.2d at 472. Although Greene has no prior felony convictions, he has a 1986 misdemeanor conviction for theft. We agree with the trial court that Greene's lack of a felony conviction is a mitigating circumstance, but entitled to little weight.

(4) Educational Achievement

[32] ¶ 53 Greene received his G.E.D. in 1985. In 1989, he obtained a degree from ****118** ***443** the Motorcycle Mechanics Institute, specializing in Harley–Davidson repair. Although we find this educational achievement to be slightly mitigating, *see* *State v. Hensley,* 142 Ariz. 598, 604, 691 P.2d 689, 695 (1984)(obtaining G.E.D. is mitigation), it is not sufficiently substantial to overcome the aggravator in this case. *See id.; see also* *Murray,* 184 Ariz. 9, 45, 906 P.2d 542, 578 (1995) (earning high school diploma and becoming a paralegal was not sufficiently substantial mitigation to overcome aggravator).

(5) Good Marriage and Productive Life

¶ 54 Greene met his ex-wife in January of 1989, and married her in November of that same year. From 1989 until sometime in 1993, he fathered two children, completed trade school, and was employed.

[33] ¶ 55 We have found mitigation where the defendant was an adequate family member, *see* *State v. Stanley,* 167 Ariz. 519, 529, 809 P.2d 944, 954 (1991), but refused to find mitigation where the defendant had maintained minimal contact with his child. *See* *State v. West,* 176 Ariz. 432, 451, 862 P.2d 192, 211 (1993). Sometime after his marriage

ended in 1994, Greene's parental rights to his children were severed and his financial support for his children was minimal to nonexistent. He thus did not have a good marriage or healthy family life. We reject this claim of mitigation.

[34] ¶ 56 As for leading a productive life, we have found mitigation where the defendant had for some periods been gainfully employed, *State v. Soto–Fong,* 187 Ariz. 186, 211, 928 P.2d 610, 635 (1996), *cert. denied,* 520 U.S. 1231, 117 S.Ct. 1826, 137 L.Ed.2d 1033 (1997), and refused to find mitigation where the defendant was unable to hold down a job for any significant period and was frequently unemployed, *State v. Spears,* 184 Ariz. 277, 294, 908 P.2d 1062, 1079 (1996). Greene was unemployed at the time of the murder and failed to provide evidence of gainful employment after trade school in 1990. We reject this mitigating circumstance.

(6) Positive Influence on Step–Brother

[35] ¶ 57 Greene's step-brother, a middle school teacher, testified that Greene taught him new perspectives and self-reliance. Although past good conduct and character is a relevant mitigating circumstance, *see State v. Williams,* 183 Ariz. 368, 384, 904 P.2d 437, 454 (1995), a single good deed, removed in time from the crime, does not rise to that level and is not mitigating. *See State v. Willoughby,* 181 Ariz. 530, 549, 892 P.2d 1319, 1338 (1995) (finding a "great number" of past good deeds to have mitigating value).

(7) Effect of Execution on Greene's Children

[36] ¶ 58 Greene's ex-wife testified that she was concerned about the effect Greene's execution would have on her children. We give some mitigating weight to the effect Greene's execution would have on the emotional well-being of his children. *See State v. Maturana,* 180 Ariz. 126, 135, 882 P.2d 933, 942 (1994).

(8) Additional Arguments

¶ 59 Greene submits two additional mitigating factors not found by the trial court: (1) Greene is remorseful, and (2) Greene is capable of rehabilitation. Any claims of remorse are completely negated by Greene's vile state of mind, as shown by letters Greene wrote long after the offense, and at a time when he was not using drugs. Nor has Greene presented any evidence that he is capable of rehabilitation. We reject both of these factors.

e. Independent Reweighing

[37] **[38]** ¶ 60 We independently review the trial court's findings of aggravation and mitigation, and if an error is made, we independently determine if the mitigation is sufficiently substantial to warrant leniency in light of existing aggravation. A.R.S. § 13–703.01 (Supp.1997). In weighing, we consider the quality and the strength, not simply the number, of aggravating and mitigating factors. *See State v. McKinney,* 185 Ariz. 567, 578, 917 P.2d 1214, 1225 (1996). Although we have rejected the (F)(6) finding, ****119** ***444** leaving pecuniary gain as the sole aggravator, upon independent reweighing we conclude that the mitigation, considered individually and collectively, is not sufficiently substantial to warrant leniency. We have a very strong (F)(5) here, with relatively trivial nonstatutory mitigation.

3. IMPOSITION OF AGGRAVATED SENTENCES

[39] ¶ 61 Based on findings of "pecuniary gain" and a "heinous or depraved" state of mind, the trial court imposed aggravated sentences on the robbery, kidnapping, and theft-by-control convictions. Greene claims that because these findings are either an essential element of, or irrelevant to, the offenses in question, the trial court erred in relying upon them.

¶ 62 But an element of a crime can also be used for enhancement and aggravation purposes. *See State v. Lee,* 189 Ariz. 608, 620, 944 P.2d 1222, 1234 (1997), *cert. denied,* 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 321 (1998) (citing *State v. Lara,* 171 Ariz. 282, 285, 830 P.2d 803, 806 (1992)). Pecuniary gain is an aggravating circumstance in determining a robbery sentence. *See id.* at 620–21, 944 P.2d at 1234–35. A.R.S. sections 13–702(C)(5) (heinous, cruel or depraved), and (C)(6) (pecuniary gain) require the trial court to consider these factors in sentencing on the noncapital convictions. There is no error here.

IV. DISPOSITION

¶ 63 We affirm Greene's convictions and sentences for first degree murder, robbery, theft, and forgery,[2] including the sentence of death. We reverse the conviction for kidnapping and order that a judgment of acquittal be entered on that count.

[2] An automatic notice of appeal in a capital case is sufficient as a notice of appeal with respect to all judgments entered in the case. Rule 31.2(b), Ariz. R.Crim. P. Greene does not contest the theft and forgery convictions on appeal, and thus they are automatically affirmed.

JONES, V.C.J., and MOELLER, J. (retired), concur.

ZLAKET, Chief Justice, dissenting.

¶ 64 In *State v. Watson,* 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981), this court plainly stated:

> We believe *Godfrey v. Georgia,* [446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)], mandates that the death penalty should be reserved for only the most aggravating of circumstances, circumstances that are so shocking or repugnant that the murder stands out above the norm of first degree murders, or the background of the defendant sets him apart from the usual murderer.

In my opinion, there is nothing about Beau John Greene or his crime that meets this constitutional standard.

¶ 65 It is sad, but true, that the tragic and reprehensible killing of Professor Johnson is not much different from other "robbery gone awry" murders that come to us. Moreover, there has been no clear showing that the defendant rises above "the norm" of other similarly convicted offenders. I am persuaded that had this court not so ill-advisedly elected to abandon proportionality reviews in capital cases, *see State v. Salazar,* 173 Ariz. 399, 417, 844 P.2d 566, 584 (1992), the inconsistency and arbitrariness of this death penalty would instantly become obvious.

¶ 66 "The United States Constitution demands that imposition of a death sentence be based upon some principled distinction." *State v. Mata,* 185 Ariz. 319, 323, 916 P.2d 1035, 1039 (1996), *cert. denied,* 518 U.S. 1045, 117 S.Ct. 20, 135 L.Ed.2d 1114 (1996). Aggravating circumstances must "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida,* 468 U.S. 447, 460, 104 S.Ct. 3154, 3162, 82 L.Ed.2d 340 (1984); *see also Arave v. Creech,* 507 U.S. 463, 474, 113 S.Ct. 1534, 1542, 123 L.Ed.2d 188 (1993) ("[A] State's capital sentencing scheme also must 'genuinely narrow the class of persons eligible for the death penalty.' ") (quoting ****120 *444** *Zant v. Stephens,* 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983)). Put differently, constitutionally permissible aggravators must "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant,* 462 U.S. at 877, 103 S.Ct. at 2742 (1983), *quoted in Romano v. Oklahoma,* 512 U.S. 1, 7, 114 S.Ct. 2004, 2009, 129 L.Ed.2d 1 (1994).

¶ 67 The majority admits that the trial court's (F)(6) finding is unsustainable. That leaves (F)(5), "pecuniary gain," as the sole aggravator in this matter. In recent years, we have acknowledged that statutory aggravating factors are not entitled to the same weight in every case. For example, we have stated that because there are varying degrees of cruelty, heinousness and depravity, the (F)(6) aggravator may be accorded greater or lesser significance when weighed against available mitigation in a given situation. *See, e.g., State v. Miller,* 186 Ariz. 314, 327–28, 921 P.2d 1151, 1164–65 (1996) (affirming the trial court's holding that four mitigators were outweighed by a single aggravator of heinous, cruel or depraved), *cert. denied,* 519 U.S. 1152, 117 S.Ct. 1088, 137 L.Ed.2d 221 (1997); *State v. Barreras,* 181 Ariz. 516, 521, 892 P.2d 852, 857 (1995) (stating that the weighing process "requires an evaluation of the strength and quality of both the aggravating and mitigating evidence"); *State v. Gulbrandson,* 184 Ariz. 46, 71, 906 P.2d 579, 604 (1995) (holding that, because the killing was "particularly gruesome, brutal, and protracted," the "finding of gratuitous violence [was] entitled to great weight"). While the foregoing principle is logical, the subjectivity inherent in its application tends to expose the fragile constitutional underpinnings of our capital sentencing scheme. Nowhere is this more obvious than in our treatment of the "pecuniary gain" aggravator.

¶ 68 The details of murder are never pleasant. Most, in fact, are quite detestable. It cannot be doubted, however, that some homicides are worse than others. The same may be said of killers—as with all human beings, no two are exactly alike. The determination of who shall live and who shall die must be based on something more definite and predictable than the visceral reaction to a particular crime and/or defendant. Viewing the facts of the instant case in the context of our capital jurisprudence, I struggle to make sense of this death sentence. I worry that it may have been precipitated in part by the prominence of the victim in his community, as well as insulting and inflammatory remarks made by the defendant long after the crime. These are matters that do not constitute aggravating circumstances under our capital sentencing laws.

¶ 69 I agree that the facts here support the (F)(5) aggravator as we now interpret it, even though there was once considerable disagreement as to its meaning. [1] However, just as there are varying degrees of cruelty, heinousness and depravity, not all killings for pecuniary gain are the same. Consequently, they should not be given the same weight in the sentencing calculus. I believe our case law plainly reflects this principle.

[1] Former Chief Justice Frank X. Gordon believed that the legislature "intended [(F)(5)] only to include the situation where defendant is a hired killer." *State v. Clark,* 126 Ariz. 428, 437, 616 P.2d 888, 897 (1980) (Gordon, J., concurring). Thus, "[b]y extending the meaning of [(F)(5)] to the instant case, the majority has included a killing in the perpetration of a robbery as an aggravating circumstance. The Legislature, had it so intended, could have accomplished this result with more precise, specific language." *Id.; see also State v. Willoughby,* 181 Ariz. 530, 549, 892 P.2d 1319, 1338 (1995) (noting that a concern for contract killings "may have prompted the promulgation of § 13–703(F)(5)").

¶ 70 Although (F)(5) is present in many capital sentencings, it is uncommonly seen as the sole aggravator. An examination of those few instances where trial courts have sentenced defendants to death based on this solitary factor is instructive. In *State v. Stevens,* 158 Ariz. 595, 764 P.2d 724 (1988), having found that drugs and alcohol contributed to the defendant's conduct, we reduced his sentence to life. In three other cases, where we affirmed the death sentences, there are striking similarities. In *State v. White,* 168 Ariz. 500, 503–04, 815 P.2d 869, 872–73 (1991) the defendant and his girlfriend conspired to kill her husband to obtain life insurance proceeds. At a predetermined time, the defendant drove to the victim's ****121** ***446** house and, using a potato-silencer on his gun, shot and killed him. *Id.* The Defendant and his girlfriend later discussed collecting the insurance money. In *State v. Willoughby,* 181 Ariz. 530, 533–34, 892 P.2d 1319, 1322–23 (1995), the defendant convinced his wife to take out large insurance policies naming him as the beneficiary. After numerous meetings, he and his girlfriend agreed upon an elaborate and detailed murder plan that they later executed. *Id.* at 534, 892 P.2d at 1323. Shortly after killing his wife, the defendant filed insurance claims. In *State v. Spears,* 184 Ariz. 277, 908 P.2d 1062 (1996),*cert. denied,* 519 U.S. 967, 117 S.Ct. 393, 136 L.Ed.2d 308 (1996), the victim considered the defendant to be her boyfriend. Relying on this, he devised a plan to take her money and vehicle. *Id.* at 282, 908 P.2d at 1067. The victim took a leave of absence from work, apparently believing she was taking a trip with the defendant. During this "trip," she obtained substantial cash advances, purchased things for him, and signed over her vehicle title. Her body was found in the desert with a gunshot wound to the back of the head. *Id.* at 283, 908 P.2d at 1068.

¶ 71 In affirming the sentences in these cases, we emphasized the carefully conceived and meticulously prepared plans. For example, in *Willoughby* we said:

> This killing was not just the result of momentary premeditation but of Defendant's deliberate, carefully conceived, meticulously planned, and cold-blooded scheme to kill, rather than divorce, his unsuspecting wife. In this respect it was very much like the cold and callous contract killing that may have prompted the promulgation of § 13–703(F)(5).

181 Ariz. at 549, 892 P.2d at 1338; *see also White,* 168 Ariz. at 516, 815 P.2d at 885 (stating that "there is a difference

between the taking of human life with exacting, premeditated coolness, as here, and the hasty, impulsive taking of life that evolves from other criminal activity"); *Spears,* 184 Ariz. at 295, 908 P.2d at 1080 ("This premeditated murder of the prey was carefully planned and calculated for the lucre which resulted.").

¶ 72 In the present matter, there is no evidence of substantial planning. Greene's decision to kill may have been "as instantaneous as successive thoughts of the mind," *State v. Eastlack,* 180 Ariz. 243, 259, 883 P.2d 999, 1015 (1994), or it may have developed over the course of an hour or two. We simply cannot know. It is clear, however, that even the most generous reading of the state's evidence fails to uncover planning or scheming remotely comparable to that in the above cases.

¶ 73 We have at times reduced death sentences to life where, as here, the trial court identified multiple aggravators, but on review all were eliminated except the pecuniary gain factor. *See State v. Rockwell,* 161 Ariz. 5, 775 P.2d 1069 (1989) (defendant killed an employee at a truck stop during a robbery); *State v. Graham,* 135 Ariz. 209, 660 P.2d 460 (1983) (defendant took a rifle to victim's house intending to rob, and killed victim when he answered the door). In *State v. Marlow,* 163 Ariz. 65, 72, 786 P.2d 395, 402 (1989), we upheld two of three aggravators, including pecuniary gain, but weighed them only once because they were based on the same facts. We then reduced the sentence.

¶ 74 Where death sentences have been affirmed, the facts are generally worse than those presented here. As we noted in *State v. McKinney,* "[w]e have encountered pecuniary gain as the sole aggravator in other cases in which the death penalty was not imposed, but the quality of [Defendant] Hedlund's conduct in this case certainly gives great weight to the aggravating circumstance." 185 Ariz. 567, 584, 917 P.2d 1214, 1231 (1996) (citations omitted), *cert. denied,* 519 U.S. 934, 117 S.Ct. 310, 136 L.Ed.2d 226 (1996). That conduct involved two murders committed during a carefully planned burglary spree in which "[t]he possibility of murder was discussed and recognized as being a fully acceptable contingency." *Id.; see also State v. Hensley,* 142 Ariz. 598, 691 P.2d 689 (1984) (planned robbery involving a double murder to eliminate witnesses).

¶ 75 Once the weight of each aggravator and mitigator has been assessed, we are obligated to balance the factors against each other to decide whether leniency is appropriate. *See* Karen L. Hinse, Note, *Appellate Review of Death Sentences: An Analysis of* **122 *447 *the Impact of Clemons v. Mississippi in Arizona,* 34 Ariz. L.Rev. 141, 142 n. 11 (1992). As previously indicated, our cases have stated unequivocally that "[w]e will not uphold imposition of the death penalty unless either the murder or the defendant differs from the norm of first degree murders or defendants." *State v. Fierro,* 166 Ariz. 539, 548, 804 P.2d 72, 81 (1990); *see also Spears,* 184 Ariz. at 295, 908 P.2d at 1080. Furthermore, we have long " adhere[d] to the principle that 'where there is a doubt whether the death penalty should be imposed, we will resolve that doubt in favor of a life sentence.' " *Marlow,* 163 Ariz. at 72, 786 P.2d at 402 (quoting *Rockwell,* 161 Ariz. at 16, 775 P.2d at 1080). In the present case, it seems to me that these principles are honored only in their breach.

¶ 76 In *Gregg v. Georgia,* the Supreme Court noted the two social purposes purportedly served by capital punishment: "retribution and deterrence of capital crimes by prospective offenders." 428 U.S. 153, 183, 96 S.Ct. 2909, 2929–30, 49 L.Ed.2d 859 (1976). In *Enmund v. Florida,* the Court stated that unless the death penalty "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." 458 U.S. 782, 798, 102 S.Ct. 3368, 3377, 73 L.Ed.2d 1140 (1982) (quoting *Coker v. Georgia,* 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977)). Stated differently, "[w]hat 'reasonably justif[ies]' selection of a particular subgroup of defendants is that these defendants, or their crimes, are the 'worst' murderers or murders, meaning the most deserving of retribution, or the most deterrable." Bruce S. Ledewitz, *The New Role of Statutory Aggravating Circumstances in American Death Penalty Law,* 22 Duq. L.Rev. 317, 355 (1984) (alteration in original) (citing *Zant v. Stephens,* 462 U.S. 862, 877 n. 15, 103 S.Ct. 2733, 2742 n. 15, 77 L.Ed.2d 235 (1983)).

¶ 77 Arizona's F(5) aggravator arguably reflects both "a concern with retribution" and "a deterrence rationale." Charles A. Pulaski, Jr., *Capital Sentencing in Arizona: A Critical Evaluation,* 1984 Ariz. St. L.J. 1, 47. But what is it about Defendant Greene or this crime that makes him, among

all murderers, "most deserving of retribution?" Ledewitz, *supra,* at 355. The majority does not tell us. It merely asserts, without support in my opinion, that "[w]e have a very strong (F)(5) here." *Supra,* at ¶ 60. As previously noted, trial court sentencing practices over the last decade, as well as our own precedent, suggest the contrary. Because we have no indication that substantial planning was involved in this case, no relationship of trust or confidence between the perpetrator and his victim, and few other details surrounding the crime that were proven beyond a reasonable doubt, I conclude that this aggravator must lie toward the weaker end of the spectrum.

¶ 78 As for deterrence, the majority admits that Greene was hungry, without a place to stay, and withdrawing from a recent methamphetamine binge when he killed Mr. Johnson. It is difficult to imagine the death penalty having much deterrent effect on someone so situated. *See* Pulaski, *supra,* at 47 (arguing that judges should assess whether "imposing the death penalty would significantly advance the legislative goals implicit in those statutory aggravating circumstances present in the defendant's case"); *Gregg,* 428 U.S. at 185, 96 S.Ct. at 2931 (noting "that there are murderers ... for whom the threat of death has little or no deterrent effect").

¶ 79 The majority considers nine circumstances as possible nonstatutory mitigation: 1) drug use and withdrawal, 2) dysfunctional family history, 3) lack of felony criminal record, 4) educational achievement, 5) good marriage and productive life, 6) positive influence on step-brother, 7) the effect of execution on Greene's children, 8) remorse, and 9) capability for rehabilitation. It rejects items 1, 2, 5, 6, 8 and 9 altogether, despite the fact that the trial judge expressly found at least two of them (1 and 6) to be mitigating. It acknowledges the presence of items 3, 4 and 7, but describes them as "relatively trivial." *Supra,* at ¶ 60. It accords "little weight" to Greene's criminal history, which is innocuous compared to that of most capital defendants. *Supra,* at ¶ 52.

¶ 80 In contrast, I agree with the trial judge that items 1 and 6 have been proven. ****123** ***448** I share the majority's conclusion that items 3, 4 and 7 are present, but place considerably more weight on the defendant's lack of a serious criminal record. In my mind, when this mitigation is collectively considered and balanced against the solitary, relatively weak (F)(5) aggravator, there is considerable doubt as to whether a death sentence is appropriate. *See* *Marlow,* 163 Ariz. at 72, 786 P.2d at 402.

¶ 81 While I am offended by Greene's letters and agree that they do not support his claim of remorse, I choose not to overemphasize them. Experience and common sense tell us that attitudes expressed in prison may be precipitated by a panoply of motives, influences, pressures and circumstances foreign to the outside world. While we might hope that incarceration spurs killers to openly express remorse, we ought not be shocked when it fails to do so.

¶ 82 No one can deny that evaluating the quality and strength of aggravation and mitigation involves a degree of subjectivity. *See* *State v. Barreras,* 181 Ariz. 516, 521, 892 P.2d 852, 857 (1995). However, in order to protect the weighing process from "the same unguided, emotional results denounced since *Furman* [*v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)], " *State v. White,* 168 Ariz. 500, 524, 815 P.2d 869, 893 (1991) (Corcoran, J., concurring), we must attempt to manage our subjective inclinations so that arbitrary rulings are avoided. *See* *id.* at 523, 815 P.2d at 892 ("If the sentencing judge has no right ... to consider his or her own subjective belief as to the appropriateness of a penalty, we have no greater authority to do so on appeal."). Our precedent is indispensable in this regard, *see* Pulaski, *supra,* at 46 ("One source of guidance is the prior decisions of the Arizona Supreme Court."), and I believe it compels only one result. Although I feel the utmost compassion for the victim and his survivors, and genuinely despise the crime committed by this defendant, I honestly do not believe there is any principled basis under our law upon which to execute him. I would reduce his sentence to life without any possibility of parole.

KLEINSCHMIDT, J., concurs.

Justice Stanley G. Feldman did not participate in the determination of this matter. Pursuant to Ariz. Const. art. VI, 3, the Honorable Thomas C. Kleinschmidt, Judge of the Arizona Court of Appeals, Division One, was designated to sit in his stead.

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