

Exhibit B

Application for Extension of Time

MICHAEL JONATHON CARLSON,

Applicant/Petitioner

v.

STATE OF ARIZONA,

Respondent.

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. RENEE T BENNETT

CASE NO. CR20093544-001

DATE: August 23, 2021

STATE OF ARIZONA
Plaintiff,
vs.

MICHAEL JONATHAN CARLSON (-001)
Defendant.

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PETITION FOR POST-CONVICTION RELIEF

PROCEDURAL BACKGROUND

Pending before the Court is Michael Carlson's Petition for Post-Conviction Relief. Carlson was convicted after trial by jury of two counts of kidnapping and two counts of first-degree felony murder.

The jury found the following three aggravating circumstances had been proven: (1) conviction of a prior serious offense; (2) murders committed while on release from custody; and (3) committed one or more other murders during the commission of the offense. The jury also found Carlson was eligible for the death penalty under *Enmund/Tison*.¹

During the penalty phase, the jury determined Carlson should be sentenced to death for murdering KR and Becky. On October 29, 2012, the trial court entered judgments and sentenced Carlson to death on each count of murder and to consecutive terms of twenty-one years imprisonment for each kidnapping.

Carlson's convictions and sentences were affirmed on direct appeal. Carlson timely filed his Petition for Post-Conviction Relief, and his memorandum in support thereof. The Court also

Laura Vincent
Judicial Administrative Assistant

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granted Carlson's request to amend his petition and deemed his First Amendment to Petition for Post-Conviction Relief to be incorporated into the petition.

THE PETITION

Carlson claims ineffective assistance of trial counsel during the guilt, aggravation and penalty phases of trial as well as ineffective assistance of appellate counsel. Additionally, he claims actual innocence and, that A.R.S. § 13-751 and the Arizona capital sentencing scheme are unconstitutional. In his Amendment, Carlson claims the court violated his constitutional rights by denying him the ability to interview jurors without first demonstrating good cause.

This Court has now read the records and transcripts pertaining to this case as well as the pleadings and exhibits filed by counsel. Additionally, the Court has heard oral argument regarding the claims relating to mental illness or brain damage. The Court finds as follows.

PRECLUDED CLAIMS

A defendant is precluded from post-conviction relief under Rule 32.1(a) based on any ground: (1) still raiseable on direct appeal or in a post-trial motion; (2) finally adjudicated on the merits in an appeal or in any previous collateral proceeding; or (3) waived at trial, on appeal, or in any previous collateral proceeding except when the claim raises a constitutional violation that can only be waived knowingly, voluntarily and personally by the defendant. Ariz. R. Crim. P. 32.2(a).

¹ *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987).

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Carlson's claim that he was denied the ability to interview jurors as well as his claims that A.R.S. § 13-751 and the Arizona capital sentencing scheme are unconstitutional fall within Rule 32.1(a).

THE COURT FINDS these claims are precluded pursuant to Rule 32.2(a) because they were finally adjudicated on the merits in an appeal or were waived at trial or on appeal.

THE COURT FURTHER FINDS summary dismissal as to those claims is appropriate.

Carlson's claims of ineffective assistance of counsel implicate the Sixth Amendment and, as such, also fall within Rule 32.1(a). *State v. Petty*, 225 Ariz. 369, 373 ¶ 11 (App.2010) (citation omitted). However, such claims are properly raised in Rule 32 proceedings, not on appeal. *State v. Spreitz*, 202 Ariz. 1, 3 ¶ 9 (2002).

Carlson's claim of actual innocence under Rule 32.1(h) is also not precluded. Ariz. R. Crim. P. 32.2(b).

INEFFECTIVE ASSISTANCE OF COUNSEL

To prevail on an ineffective assistance of counsel claim, a defendant must satisfy the highly deferential standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984).

First, the defendant must show the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

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The defendant bears the burden of proof by a preponderance of the evidence. *State v. Gerlaugh*, 144 Ariz. 449, 455 (1985) (citation omitted). To satisfy the first prong, the defendant must establish counsel’s representation “fell below an objective standard of reasonableness.” *State v. Pandeli*, 242 Ariz. 175, 180 ¶ 5 (2017) (citing *Hinton v. Alabama*, 571 U.S. 263, 273 (2014)). “This inquiry focuses on the practices and expectations of the legal community and whether, considering all of the circumstances, counsel’s performance was reasonable under prevailing professional norms.” *Id.* “A defendant’s lawyers are not deficient merely for making errors.” *State v. Miller*, 251 Ariz. 99, 102 ¶ 10 (2021).

The American Bar Association’s Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases (ABA Guidelines) are merely “guidelines and not requirements.” *Fitzgerald v. Myers*, 243 Ariz. 84, 90 ¶ 15 (2017)(citing *State v. Hausner*, 230 Ariz. 60 (2012)). A deviation from the ABA Guidelines “is not per se ineffective assistance of counsel.” *Id.* (citations omitted.) *Strickland* remains the standard for evaluating counsel’s performance. *Id.*

Further, “a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689.

There is a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. *Pandeli*, 242 Ariz. at 181 ¶ 7 (citations omitted). “[R]eviewing courts must be very cautious in deeming trial counsel’s assistance ineffective

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when counsel’s challenged acts or omissions might have a reasonable explanation.” *Id.* On matters of strategy, a defendant must show that “counsel’s decision was not a tactical one, but rather, revealed ineptitude, inexperience or lack of preparation.” *State v. Goswick*, 142 Ariz. 582, 586 (1984).

Disagreeing with trial strategy does not support a claim of ineffective assistance of counsel if the challenged conduct could have some reasoned basis. *State v. Meeker*, 143 Ariz. 256, 260 (1984) (citations omitted). The court should not second guess counsel’s strategic decisions but should apply the deferential standard of review. *Pandeli*, 242 Ariz. at 181 ¶ 8 (citing *Strickland*, 466 U.S. at 689).

Strategic choices generally include decisions to hire experts or call certain witnesses. *State v. Denz*, 232 Ariz. 441, 445 ¶ 11(App. 2013)(citations omitted). A decision not to consult with an expert qualifies as sound trial strategy only if counsel had a reasoned basis justifying the decision. *Id.* at 445 ¶ 12.

The method and manner of cross-examining witnesses is likewise a strategic decision for counsel to make. *State v. Stone*, 151 Ariz. 455, 461 (App. 1986) (citing *State v. Tison*, 129 Ariz. 546 (1981)). The decision to allow a jury to hear about a defendant’s prior convictions is also tactical and left to counsel. *See State v. Meeker*, 143 Ariz. 256, 260–61 (1984).

“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Strickland*, 466 U.S. at 690–91. “[A]

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particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.” *Id.*

To satisfy the second prong, the defendant must demonstrate there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Pandeli*, 242 Ariz. at 180 ¶ 6. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* (citation omitted). It is not enough for a defendant to show that the error had some conceivable effect on the outcome of the proceeding. *Id.* at 181 ¶ 6 (citation omitted).

The standard when a defendant challenges a conviction is whether there is a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt as to guilt. *State v. Kolmann*, 239 Ariz. 157, 160 ¶ 9 (2016) (citations omitted).

“When a defendant challenges a death sentence..., the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695.

To demonstrate deficient performance of appellate counsel, a defendant must establish counsel “unreasonably failed to discover nonfrivolous issues and to file a merits brief addressing them.” *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Counsel is not ineffective for failing to raise meritless claims. *Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002). To establish prejudice, a defendant must show a reasonable probability that, but for his counsel’s

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unreasonable failure to raise specific claims, he would have prevailed on appeal. *Robbins*, 528 U.S. at 285-86.

If a defendant fails to make a sufficient showing on either prong of the *Strickland* test, the court need not determine whether the other prong was satisfied. *State v. Salazar*, 146 Ariz. 540, 541 (1985).

COLORABLE CLAIM

Arizona Rule of Criminal Procedure 32.11(a), formerly Rule 32.6(c), provides: “[i]f, after identifying all precluded and untimely claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must summarily dismiss the petition.”

Consistent with that standard, our courts have held a defendant is entitled to an evidentiary hearing only if he presents a “colorable claim.” *State v. Amaral*, 239 Ariz. 217, 219 ¶ 9 (2016) (citation omitted). A claim is colorable if the defendant has “alleged facts which, if true, would *probably* have changed the verdict or sentence.” *Kolmann*, 239 Ariz. at 160 ¶ 8 (quoting *Amaral*, 239 Ariz. at 220 ¶ 11.)

As stated in *Amaral*,

“an evidentiary hearing is useful only to the extent relief would be available under Rule 32—that is, the defendant presents a colorable claim. If the alleged facts, assumed to be true, would not provide grounds for relief, the court need not conduct an evidentiary hearing because those facts would not have changed the outcome.”

239 Ariz. at 220 ¶ 12 (citations omitted)

The Court must generally accept as true a defendant’s factual allegations when evaluating whether the claim is colorable. *State v. Watton*, 164 Ariz. 323, 328 (1990). However, the claims must rest on a reliable factual foundation, and not merely conclusory allegations. *See State v. Krum*, 183 Ariz. 288, 294–95 (1995); *State v. Donald*, 198 Ariz. 406, 414 ¶ 21 (App. 2000). The court is not required “to conduct evidentiary hearings based on mere generalizations and unsubstantiated claims.” *State v. Borbon*, 146 Ariz. 392, 399-400 (1985).

INEFFECTIVE ASSISTANCE OF COUNSEL THAT AFFECTED BOTH PHASES

The relevant facts and arguments raised in Carlson’s “Claims of Ineffective Assistance of Counsel that Affected Both Phases of the Trial Proceedings” will be addressed in the specific claims to which they relate.

INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE

1. Mental Health Issues

Carlson claims the defense team failed to consult with, retain and effectively use mental health experts. Regarding the guilt phase, Carlson asserts counsel provided ineffective assistance because they did not challenge his competency and did not admit evidence of his mental illness or brain damage to explain why he falsely confessed. Arguments pertaining to the aggravation and penalty phase are discussed in those sections below.

Reasonableness of the Investigation

Intertwined with Carlson’s mental health claims is his assertion that defense counsel unreasonably failed to investigate his mental status and potential brain damage prior to making strategic decisions. Strategic choices made after less than a complete investigation are

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reasonable only to the extent that reasonable professional judgment supported the limitations on the investigation. *Strickland*, 466 U.S. at 690–91.

Thus, the Court must determine whether counsel failed to investigate Carlson’s mental and brain health, and, if so, whether their decision not to investigate was reasonable under the circumstances, “applying a heavy measure of deference to counsel’s judgments.” *Id.*

Investigation Prior to Trial

Prior to trial, the defense team gathered Carlson’s available mental health records, primarily from the military and the prison systems in which Carlson spent most of his adult life. Despite making follow-up requests, the team was unable to obtain the detailed psychological records referenced in Carlson’s prison records. The records obtained revealed Carlson had a long history of mental health issues.

Counsel also consulted with and retained four mental health experts: (1) Dr. William Logan, a psychiatrist with extensive experience in capital case litigation; (2) Dr. John Toma, a psychologist who conducted neuropsychological testing on Carlson (3) Dr. Craig Haney, a social psychologist with expertise in the Texas prison systems; and (4) Dr. Mark Cunningham, a clinical psychologist with experience in capital mitigation.

Dr. Logan, Psychiatrist

Dr. Logan was hired in May 2010 as an expert in a separate case in which Carlson was accused of murdering his sister. Carlson had contemporaneously confessed to killing his sister, KR and Becky, and a variety of other people. Dr. Logan testified at Carlson’s voluntariness hearing in that case in September 2010.

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Counsel subsequently hired Dr. Logan to address Carlson's purported false confession in this case. Although Dr. Logan was not primarily a false confession expert, he had read literature about false confessions and examined the issue in several cases. Dr. Logan provided counsel with resources for understanding the psychology of false confessions.

Dr. Logan spent approximately 100 hours on the case, traveled to Tucson three times and had multiple conversations with the trial team. He reviewed various records gathered by the defense team that reflected Carlson had a long history of mental illness, childhood trauma and head injuries. Dr. Logan interviewed Carlson over two days for approximately seven hours, prior to the voluntariness hearing. Dr. Logan's 2010 report did not contain a mental health diagnosis, but described Carlson as reacting impulsively to stress.

During their meetings, Carlson made admissions to Dr. Logan about the alleged crimes and changed his story about who was the actual killer. Carlson's statements to Dr. Logan were inconsistent with statements he made in letters he sent to various people.

In April 2012, approximately four months prior to trial, the defense team dismissed Dr. Logan as a consultant or witness. They did not hire a second psychiatrist.

Dr. Toma, Psychologist

Dr. Toma conducted IQ and neuropsychological testing on Carlson in May 2012, three months prior to trial. After having spent approximately eight hours with Carlson, Dr. Toma informed the defense team Carlson was mentally ill and "possibly presently psychotic." In his affidavit, Dr. Toma states no one asked him for details or an explanation of these statements. Rather, lead counsel said something to the effect of we're "not changing the defense."

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The team paralegal and mitigation specialist recalls that Dr. Toma indicated Carlson had a viable insanity defense. She agrees lead counsel responded that they would not be changing the defense.

Approximately a week after this meeting, the team informed Dr. Toma he need not write a report and his services were no longer needed. No other neuropsychological testing was conducted.

In his PCR affidavit, Dr. Toma provides no factual basis for his statement that Carlson was mentally ill and “possibly presently psychotic.” Dr. Toma didn’t score Carlson’s neuropsychological tests.

Dr. Toma notes he thought the defense team should monitor Carlson for competency because his mental status could decompensate prior to trial, leading to a lack of competency. However, he did not express that opinion to the defense team.

Dr. Haney, Social Psychologist

The defense team also retained Dr. Craig Haney, a psychologist and lawyer. He had extensively studied how exposure to trauma and other risk factors influence a person’s psychological development and trajectory. His area of focus was on those convicted of capital crimes. Additionally, Dr. Haney was an expert on the Texas prison system.

Dr. Haney began working on the case in December 2009. He testified in Carlson’s other murder case regarding the voluntariness of Carlson’s confessions. The mitigation specialist requested he develop social history mitigation for Carlson in this case.

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Judicial Administrative Assistant

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In March 2010, Dr. Haney met with Carlson to begin that process. Thereafter, he assisted the mitigation specialist in attempting to obtain a more complete set of records, including medical and psychological, from the Texas prison system. Dr. Haney again interviewed Carlson in April 2011 to focus on social history mitigation.

The trial team directed Dr. Haney to prepare to “front load” mitigation regarding Carlson’s during the guilt phase, in addressing the false confession claim. Specifically, counsel asked Dr. Haney to prepare to address Carlson’s psychological vulnerability to falsely confessing based on his childhood trauma and desire to protect those he perceived as family. The defense team also wanted Dr. Haney to testify about the brutality within Texas prisons, bolstering Carlson’s stated motive to falsely confess – to avoid returning there.

When Dr. Haney agreed to take on this role in the guilt phase, he told counsel he would not testify about mitigation in the penalty phase.

Dr. Haney subsequently reviewed additional materials and met with Carlson to discuss his social history and factors that might have led to him falsely confessing, including fear of violence in Texas prisons and his bond to the Menden family. Dr. Haney issued an opinion prior to trial regarding Carlson’s behavioral traits and personality characteristics that were consistent with the false confession defense.

In his PCR affidavit, Dr. Haney provides no facts or opinion indicating Carlson was incompetent to stand trial or psychotic. He believed Carlson had unusual thought patterns that may have manifested some type of mental illness. Dr. Haney also thought a mental health evaluation was needed, even if the evidence was ultimately not presented at trial.

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Judicial Administrative Assistant

Dr. Cunningham, Psychologist

Dr. Cunningham, a clinical and forensic psychology expert, was retained in April 2011 to replace Dr. Haney and provide a mitigation evaluation during the penalty phase. Dr. Cunningham's role was to identify adverse developmental factors that contributed to Carlson committing the charged crimes and lowered his moral culpability. Dr. Cunningham spent over 50 hours reviewing Carlson's records, interview notes, witness summaries and other materials gathered by the defense team. He did not interview Carlson or his family members.

Dr. Cunningham closed his practice in the summer of 2012 to provide his wife's end-of-life care. Trial began on August 6, 2012. He notified the defense team in mid-August 2012 that he was unwilling to travel to Tucson. Thus, Dr. Cunningham testified via video during the penalty phase. The details of his testimony are summarized later in section addressing penalty phase claims.

Evidence Uncovered During the PCR Investigation

Additional evidence regarding Carlson's mental status and brain damage was uncovered during the PCR investigation. However, significant portions thereof would not have been available at trial, even if counsel had further investigated.

Evidence That Would Have Been Available Prior to Trial

Computerized Tomography and Magnetic Resonance Imaging

The PCR team obtained a report interpreting Carlson's computerized tomography (CT) scan² from March 2009. They also obtained the reports and images from the CT scan and

²The actual images were not available.

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Magnetic Resonance Imaging (MRI) completed in November 2011. The trial defense team was aware of that neuroimaging conducted in 2011 and discussed potential use at trial.

In his PCR affidavit, Dr. Erin Bigler, PhD, summarizes the findings from the 2009 and 2011 scans. The 2009 CT scan indicated the smallest capillaries in Carlson's brain were damaged, affecting blood flow and integrity of the deepest areas of the brain within the white matter. The 2011 CT scan was interpreted as within normal limits.

Carlson's 2011 MRI revealed brain abnormalities including white matter hyperintensities which are known to affect processing speed, memory and executive functioning. The image also revealed thinning of the corpus callosum. Without images from childhood, Dr. Bigler could not conclude whether the thinning was related to abnormal prenatal growth, subsequent traumatic brain injury, substances abuse or cardiovascular disease.

In her PCR affidavit, Dr. Marisa Menchola, PhD, noted Carlson's 2011 MRI was "reportedly normal." However, she agrees the MRI reflected white matter hypersensitivities.

Neuropsychological Testing

Dr. Menchola analyzed the results from Dr. Toma's 2012 neuropsychological tests. Carlson's processing speed, memory, executive functions and intellectual abilities were all average or above average. Those results refute the possibility that the observed brain damage was affecting Carlson in these areas.

Mental Health Diagnoses

In his PCR affidavit, Dr. Logan states in 2012, he would have diagnosed Carlson as suffering from hypomania and Post Traumatic Stress Disorder, or an anxiety disorder. Neither

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Dr. Logan nor other experts provide insight into how these diagnoses would have been relevant to the alleged false confession.

Dr. Toma stated in his affidavit, that he believes Carlson “likely suffers from bipolar disorder with psychotic features, or he has schizoaffective disorder.” Dr. Toma provide no additional information on how these disorders might render Carlson susceptible to falsely confessing.

Evidence That Would Not Have Been Available at Trial

To fairly assess the reasonableness of counsels’ decisions, the Court must reconstruct the circumstances at the time of counsels’ challenged conduct. *Strickland*, 466 U.S. at 689. Thus, in determining whether counsel unreasonably failed to investigate possible mental illness or brain damage, or present evidence thereof, only evidence that could have been obtained prior to trial is relevant. That evidence includes the following:

Scan and Test Results

The PCR and exhibits reference considerable mental and brain health evidence that would not have been available prior to the 2012 trial, even if counsel had further investigated. This evidence includes: (1) 2018 neuroimaging; (2) quantitative measurements based on 2018 imaging; (3) 2017 and 2019 neuropsychological testing; and (4) 2018 neuropsychiatric evaluations.

In those scans, tests and evaluations, Carlson’s mental and brain health had degraded significantly compared to results from 2011 and 2012 testing.

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Opinions

Carlson also provided expert opinions from four doctors regarding his mental illnesses and brain damage. Their interpretations of evidence that would have been available prior to trial, and related opinions, are relevant and were summarized above.

The remaining expert interpretations and opinions rely on the scans, tests and evaluations conducted several years after Carlson's trial. These interpretations and opinions would not have been available prior to trial, even if counsel had further investigated Carlson's mental health. Thus, they have no bearing on the reasonableness of counsels' decisions prior to trial.

Carlson attempts to overcome this crucial fact by pointing out Dr. Woods' opinion that Carlson's brain damage was present from birth, and he suffered from Alcohol Related Neurodevelopmental Disorder, Temporal Lobe Syndrome and Complex Post-Traumatic Stress Disorder at the time of the offenses and at trial. However, that does not change the fact those diagnoses were based on new information – scans, tests and evaluations reflecting Carlson's degraded mental and brain health years reflecting Carlson' condition after trial.

Additionally, the PCR experts' key diagnoses and opinions are dependent upon purported evidence that Carlson's mother consumed large amounts of alcohol while pregnant with Carlson. The record is utterly devoid of evidence to establish Carlson's mother consumed alcohol frequently or in large amounts when pregnant.

Counsel had no factual basis prior to trial to investigate fetal alcohol brain damage or disorders. Further, there is no evidence to now support this aspect of the PCR experts' diagnoses or opinions.

Laura Vincent
Judicial Administrative Assistant

Report of Hallucinations

The petition also cites Carlson’s claim that he had “pretty constant” visual and auditory hallucinations since childhood, including during trial. He made these statements in a clinic interview in 2017.

Mental health records available to the trial team established Carlson had denied experiencing hallucinations in 1975 and 1983. Then, in 2010 during his pretrial intellectual evaluation, Carlson noted a history of delusions or hallucinations but stated it had been more than twenty years since he had experienced them. Carlson attributed the hallucinations to serious substance abuse. Carlson’s subsequent claims of experiencing hallucinations were not available prior to trial and could not have formed a basis for further investigating that issue.

In summary, medical and neuropsychological test results reflecting Carlson’s status years after trial, statements made post-trial and the expert opinions that rely on that data, do not bear on the reasonableness of counsels’ decisions prior to trial.

Competency

Trial counsel did not request an examination to determine whether Carlson was competent to stand trial, nor did they specifically investigate that issue. Carlson asserts counsel was ineffective by failing to do so. He cites his history of mental illness, the fact he was prescribed anti-psychotic medications approximately thirty-six years prior to trial, and Dr. Toma’s statement in May 2012 that Carlson “might be” actively psychotic.

Contemporaneously with the statement above, Dr. Toma thought the defense team should monitor Carlson for competency because his mental status could decompensate prior to trial,

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Judicial Administrative Assistant

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leading to a lack of competency. Thus, Dr. Toma did not believe Carlson was incompetent at that time. The neuropsychological tests he administered reflect Carlson's mental status was within normal limits in every respect.

Carlson now speculates that he "could have been" in and out of psychosis during the trial, hearing voices, delusional, paranoid, in need of psychotropic medications, or unable to adequately assist counsel. These generalized, hypothetical claims are not supported by the record.

Carlson's mental status leading up to trial in 2012 indicated he had the ability to understand the proceedings or assist in his defense. None of the members of the defense team – who routinely interacted with Carlson – questioned, before or during trial, his ability to understand the proceedings or assist in his defense. Likewise, neither Dr. Logan nor Dr. Haney, mental health experts who interacted with Carlson, raised concerns regarding Carlson's competence. None of their PCR affidavits assert an opinion that Carlson was unable to understand the proceedings or assist in his defense, nor do they provide any factual basis to support such an opinion.

The record reflects Carlson understood the proceedings and was highly engaged with counsel throughout. After Carlson was found guilty, he drafted several *pro se* motions, demonstrating a detailed understanding of the proceedings.

THE COURT FINDS Carlson has not established counsels' failure to request a competency examination or further investigate his competency was unreasonable considering the circumstances.

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Judicial Administrative Assistant

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Regarding counsels' decision not to contest Carlson's competency to stand trial,

THE COURT FINDS Carlson has not presented a colorable claim. Even if the alleged facts are true, they would not probably have resulted in Carlson being found incompetent to stand trial.

THE COURT FINDS Carlson has not established that his counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the result of the proceeding would have been different.

Guilt Phase/Mental Health Evidence Relevant to Falsely Confessing

Carlson next asserts counsel was ineffective by failing to properly investigate and present evidence of mental disease or defect, including brain damage, to support his contention that he false confessed to the crimes.

Counsel did not request a psychiatric diagnosis or psychological evaluation prior to trial. They did not pursue medical or neuropsychological testing, or expert opinions, other than as previously described.

During the guilt phase, counsel did not seek to admit into evidence Carlson's past or present mental health diagnoses, or evidence of brain damage. Rather, counsel attempted to demonstrate Carlson had character traits or behavioral tendencies that made him more susceptible to falsely confessing, e.g. he had a propensity to lie.

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Regarding the guilt phase, did counsel reasonably limit the mental health investigation? If so, counsels' strategic decision not to admit evidence regarding Carlson's mental disease or defect is entitled to great deference and is "virtually unchallengeable." *Strickland*, 466 U.S. at 690-91. Specifically, if counsel could have had some reasoned basis, the decision will not support a finding of ineffective assistance of counsel. *Meeker*, 143 Ariz. at 260. Disagreement with trial strategy will not satisfy the standard. *Id.*

Reasonableness of Counsels' Decision Based on the Facts

The trial team could have sought to admit a psychiatric diagnosis through Dr. Logan. However, that decision would have had significant consequences. Counsel would have been required to disclose Dr. Logan's records – including Carlson's statements about how Becky and KR were murdered – and Dr. Logan would have been subject to cross-examination by the State. Hypothetically, this problem could have been solved by procuring and calling a different psychiatrist or psychologist. However, with Carlson's proclivity to confess, the results would likely have been the same.

Further, had any expert testified that the defendant's admissions to KVOA were a figment of damaged brain, and not his recollection of the crimes, they may well have opened the door for the State to offer details from Carlson's suppressed statements, and additional evidence that Carlson's various statements were grounded in reality.

Counsels' strategic decision to not admit evidence regarding Carlson's psychiatric diagnosis or brain damage during the guilt phase, and potentially open the door to highly inculpatory evidence, was reasonable based on the surrounding facts and circumstances.

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Judicial Administrative Assistant

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Having made the decision not to admit such information during the guilt phase, there was no practical purpose for obtaining that information. Thus, the defense team's decision to forgo further investigation into Carlson psychiatric diagnosis or evidence of brain damage was reasonable.

Reasonableness of Counsels' Decisions Based on the Law

Counsels' strategic decision to not admit Carlson's psychiatric diagnosis, and to therefore limit the investigation into his mental status, was also supported by the law. Further, their decision to attempt to admit character evidence, rather than mental disease or defect, evidence was reasonable.

Although the law pertaining to diminished capacity and character evidence under *Christensen*³ is not directly at issue, the law in this area is relevant in assessing counsels' state of mind and the reasonableness of their choices.

It was well established that evidence of a **mental disease or defect**, short of insanity, offered to demonstrate a defendant lacked the capacity to form the requisite mental state, was inadmissible. *State v. Mott*, 187 Ariz. 536, 544 (1997). Such evidence was prohibited, either to establish an affirmative defense or to negate the *mens rea* element of a crime. *Id.*

A defendant charged with premeditated murder could, however, present evidence of a **character trait** for acting impulsively. *Christensen*, 129 Ariz. at 35. Such evidence was and is admissible, not as evidence of diminished capacity, but as a character trait under Rule 404 relevant to the jury's determination of whether the defendant premeditated the homicide. *Id.*

³ *State v. Christensen*, 129 Ariz. 32 (1981).

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Admissible character trait evidence was limited to behavioral tendencies based on observations and psychological testing. *See Christensen, Id.* at 34; *Clark v. Arizona*, 548 U.S. 735, 760 (2006). Thus, an expert could express an opinion about the defendant's tendency to act a certain way and his behavioral characteristics but could not testify that the defendant suffered from a mental disease with features described by the witness. *Id.* at 760.

At that time of trial, there were no Arizona cases directly addressing the admissibility of either mental disease/defect or character evidence during the guilt phase, to demonstrate the defendant falsely confessed based on propensity to lie rather than voluntariness.

The defense team cited Arizona Rule of Evidence 702 and relevant case law in arguing expert testimony regarding Carlson's character traits and behavioral tendencies that render him more susceptible to confessing was admissible.

Counsel relied primarily on the *Hyde* case, an analogous case addressing admissibility in traditional voluntariness of confession cases. *State v. Hyde*, 186 Ariz. 252 (1996). In *Hyde*, the Arizona Supreme Court had held that expert psychological testimony is admissible to demonstrate relevant **character traits**, such as being overly protective, if probative of a material issue in dispute. *Id.* at 276 (emphasis added).

Regarding the guilt phase, the defense team's decision to attempt to admit character traits or behavioral tendencies, rather than evidence of mental disease or defect, was reasonable based on the state of the law. Likewise, their decision to forgo further investigation into Carlson psychiatric diagnosis or evidence of brain damage was reasonable.

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Prejudice

Even if the trial team had presented evidence of a psychiatric disorder and brain abnormalities in 2012, the result would not have changed.

Carlson could not tell the jury he falsely confessed without opening the door to his prior statements about the crimes. The expert was prohibited from relaying Carlson's hearsay statements that his confession was not true. Thus, the jury would never have heard Carlson's claim that he falsely confessed. Further, the expert would have been prohibited from opining on whether Carlson's confession was, in fact, false.

Even if the available psychiatric diagnosis and test results could have established a propensity to lie, that evidence would have done little to persuade the jury Carlson falsely confessed. The evidence admitted at trial well established Carlson had a propensity to falsely confess. Specifically, the parties stipulated that despite thorough investigations, there was no evidence that Carlson committed any of the other eight murders to which his confessed contemporaneously with confessing to kill KR and Becky.

Finally, Carlson's dishonesty about KR and Becky's whereabouts, his opportunity and motive to kill them, the corroborative DNA in his vehicle and the victims' burned remains found on the property taken together would have negated the value of the proposed expert testimony.

THE COURT FINDS, with regard to the guilt phase, Carlson has not established counsels' failure to obtain a psychiatric diagnosis or further investigate his mental or brain health was unreasonable considering the circumstances. As a result, counsels' strategic decision

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not to attempt to present evidence of mental disease or defect during the guilt phase is entitled to great deference.

THE COURT FINDS counsel could have had reasonable basis for this strategic decision.

THE COURT FINDS Carlson has not presented a colorable claim. Even if the alleged facts are true, they would not probably have resulted in a different verdict.

THE COURT FINDS Carlson has not established that his counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the result of the proceeding would have been different.

2. Admitting Prior Conviction, Sentence and Parole Status

Carlson asserts trial counsel was ineffective because they admitted highly prejudicial evidence about Carlson's prior conviction and sentence.

Facts

During the guilt phase, counsel stipulated that Carlson: had been convicted of aggravated robbery in Texas; had served more than twenty-five years of a ninety-nine-year sentence; was on parole at the time of the charged offenses; and had violated his parole. They did not reveal Carlson had used a firearm in the commission of that offense. The facts admitted were used to establish Carlson's motive for falsely confessing he committed the kidnappings and murders.

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The defense team requested and received a limiting instruction stating the evidence concerning Carlson's criminal history could only be considered in evaluating the reasons why he may have falsely confessed and not for any other reason.

The decision challenged here – admission of this evidence – was predicated on counsels' decision to assert Carlson falsely confessed to avoid returning to a Texas prison and to protect the Menden family. Thus, both decisions must be assessed for reasonableness. In reconstructing the circumstances surrounding these decisions, it is apparent Carlson's confessions and admissions played the pivotal role.

Carlson's Confessions and Admissions

Carlson made dozens of statements to police about killing the victims and the burning of their corpses. Those statements were suppressed prior to trial because the detectives failed to fully advise Carlson of his *Miranda* rights.

Carlson also sent letters about the crimes to various people. The State agreed not to admit those statements in its case-in-chief.

Finally, Carlson admitted to kidnapping and killing Becky and KR in a videotaped interview with a television reporter. Because that statement was not suppressed, the recording of the television interview was the centerpiece of the State's case. The defense team was faced the daunting task of convincing the jury to disregard Carlson's own videotaped statements establishing his guilt.

Carlson requested the television interview and voluntarily participated in it. A reporter, not a law enforcement official, questioned Carlson throughout. Thus, voluntariness was not a

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viable issue and the traditional methods of attacking the reliability of a confession were not available.

The defense team decided to attack the confession as falsely made. However, the lynchpin of such a defense – the defendant’s claim that he falsely confessed and why – was not reasonable available. Had Carlson testified, his incriminating statements to police, and potentially to others, would likely have been admissible in rebuttal. Thus, counsel had no means of directly admitting Carlson’s claim that he falsely confessed or his explanation for doing so.

The Decision to Admit Portions of Carlson’s Television Interview

Prior to trial, Carlson told Dr. Haney that falsely confessed because he wanted to: avoid being returned to Texas prisons and the brutality therein; and protect the Menden family.

Counsel attempted to admit Carlson’s claim he falsely confessed, and his purported rationale for doing so, through Dr. Haney as a basis for his expert opinion. However, the trial court declined to admit these hearsay statements.

Carlson had generally expressed similar thoughts about the Texas prisons and loyalty to the Menden family during his television interview. Ergo, the trial team had one slim avenue to present some factual basis for a false confession.

Counsel admitted into evidence additional portions of Carlson’s television interview, specifically, his statements about the Texas prisons and Menden family. They then used these facts to argue Carlson had motives to falsely confess.

The Decision to Admit Evidence of Carlson’s Prior Crime and Impending Sentence

At issue here is the trial team’s related decision to corroborate Carlson’s motive to avoid returning to a Texas prison, by admitting evidence of his aggravated robbery conviction, ninety-nine-year sentence of which he had served twenty-five years and status of being in violation of his parole.

Analysis

The evidence in question was inarguably prejudicial. Had counsel not requested its admission, the evidence would have been precluded during the guilt phase. It would, however, have been admitted during the aggravation and/or penalty phases.

Whether PCR counsel or the Court disagree with counsels’ strategic decision to admit this evidence is irrelevant. Rather than second guessing counsels’ strategic decision, the Court will apply the deferential standard of review. *See Pandeli*, 242 Ariz. at 181 ¶ 8 (citation omitted).

Attempting to factually corroborate Carlson’s stated motives for falsely confessing was a reasoned basis for the decision. Because counsel could have had some reasoned basis for the decision to admit this evidence, the decision does not support a finding of ineffective assistance. *See Meeker*, 143 Ariz. at 260.

The trial team minimized the impact of this evidence by the limiting instruction and by excluding the use of a deadly weapon in the commission of the prior offense.

Once counsel made the decision to admit this evidence, they elected to reveal these facts to potential jurors in the juror questionnaire and to address it during voir dire. Counsel noted at

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a pretrial hearing that their rationale was to assess potential juror attitudes about the death sentence given Carlson's background and criminal history. Attempting to assess potential jurors' attitudes toward the death penalty, given Carlson's criminal history, was also reasonable.

Prejudice

Even if the information regarding Carlson's prior conviction, sentence and parole status had not been admitted, the jurors would have been convinced beyond a reasonable doubt of his guilt based on his admissions and other evidence of the charged crimes.

Regarding the admission of evidence of Carlson's prior conviction, sentence and parole status during the guilt phase,

THE COURT FINDS Carlson has not presented a colorable claim, in that even if the alleged facts are true, they would not probably have changed the verdicts or sentence.

THE COURT FINDS Carlson has not established that his counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the results of the proceeding would have been different.

3. Jury Selection

Carlson next asserts his defense team was ineffective in jury selection, and thereby prevented the intelligent exercise of challenges for cause. The crux of Carlson's argument is that Mr. Schaye's role in voir dire was limited and "Colorado Method" of conducting voir dire was abandoned.

Facts

Counsel properly planned and prepared for the voir dire process. Before trial, they filed eight motions or notices⁴ relating to jury selection and voir dire. The defense team successfully advocated for several potential jurors not being summoned to court for voir dire, based on their answers to the questionnaire. Counsel professionally conducted voir dire over a period of several days, addressing all phases of trial, drawing out potential biases and asserting challenges for cause where appropriate.

Mr. Schaye, who is a recognized expert in the Colorado Method, was added to the defense team in approximately one year before trial. Counsel participated in an extensive, detailed discussion about the jury questionnaire and voir dire process at a hearing held nearly 11 months before trial. Ms. Schaye advocated for certain questions including hypotheticals and scaled responses, as well as additional time for individual voir dire consistent with the Colorado Method. The trial judge declined to adopt all of Mr. Schaye's recommendations.

On the day prior to beginning voir dire, Mr. Schaye again made a lengthy, detailed argument to the court advocating for extended individual voir dire, open-ended questions to elicit juror's feelings about the death penalty, and the impropriety of rehabilitating jurors by asking them if they will follow the law.

⁴ Motions and notices included the following: detailed procedures for conducting voir dire; an extensive juror questionnaire containing numerous questions eliciting attitudes toward the death penalty; requests for individual voir dire; proposed questions based on *Witherspoon v. Illinois* and *Morgan v. Illinois*; a request to disqualify any potential juror exposed to relevant media; a request not to automatically strike jurors who express opposition to the death penalty; and a request to disallow traditional rehabilitation of jurors who initially exhibit an inherent bias for the death penalty.

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During individual voir dire, the trial court repeatedly expressed displeasure with the confusing nature of the hypothetical questions asked by the defense team and the length of time taken to question each potential juror. The judge was particularly displeased with Mr. Schaye's performance.

The trial court ultimately prohibited the defense from asking long, convoluted hypothetical questions, restricted which counsel could conduct individual voir dire (not Mr. Schaye), and rehabilitated potential jurors based on their ability to follow the law. The trial team continued to professionally represent Carlson's interests within the bounds of those rulings. If anything, the limitations imposed enhanced their performance.

Counsel lodged objections to the trial court's rulings during the voir dire process, cited relevant case law and constitutional provisions and thereby preserved the issues for appeal.

Analysis/Prejudice

The defense team effectively represented Carlson's interests prior to trial and throughout the jury selection process. Counsels' performance fell well within the wide range of reasonable professional assistance.

Further, Carlson has failed to demonstrate how counsels' alleged deficient performance during the jury selection process deprived him of his right to an impartial jury.

Regarding counsels' performance during the jury selection process,

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

THE COURT FINDS Carlson has not established that his counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the result of the proceeding would have been different.

4. Demonstrating Carlson's Confession Was False

Carlson argues the trial team was ineffective in demonstrating his admissions to KVOA were false. He cites their failure to: (1) argue the internal inconsistencies of Carlson's statements; (2) establish a mental illness was a cause of false confessions; and (3) demonstrate Carlson's admissions were contrary to the physical evidence.

Internal Inconsistency of Statements

At trial, counsel failed to point out inconsistent statements he made concerning the location of the bodies and his reasons for killing the victims. The inconsistent statements cited in the petition are contained in Carlson's confessions that were suppressed.

The defense team wisely chose not to cross-examine witnesses on, or attempt to admit, portions of the suppressed statements. Eliciting the referenced inconsistent statements would have potentially opened the door for the State to admit additional, highly prejudicial, inculpatory statements.

Counsel provided reasonable professional assistance in this area.

Establish Mental Illness as Cause of False Confession

Carlson asserts counsel were ineffective for failing to establish his mental illness caused him to falsely confess. He argues a qualified expert could have educated the jury on psychological vulnerabilities that render a person more susceptible to offering a false confession.

The Court has previously addressed the reasonableness of counsels' decision not to attempt to admit a psychiatric diagnosis. Thus, the issue here is whether counsel was ineffective for failing to call a blind expert to address how mental illness may make a person more susceptible to falsely confessing.

Facts

The trial team intended to call Dr. Haney to address Carlson's susceptibility to falsely confessing. Specifically, Dr. Haney would testify that: (1) Carlson told him he falsely confessed and why; (2) Carlson's behavioral characteristics and personality traits, stemming from childhood and prison experiences, that made him more susceptible to falsely confessing; and (3) Dr. Haney's knowledge of the brutality within the Texas prison system, bolstering Carlson's stated fear of returning there.

However, the trial court ruled Carlson's statements to Dr. Haney that he falsely confessed, and why, were inadmissible hearsay and not properly admitted as a basis for Haney's expert opinion. The court also precluded Dr. Haney from opining on how Carlson's characteristics and traits would make his susceptible to making false admissions to a reporter.

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The trial judge noted the unique circumstances in that Carlson requested the media interview and participated in it voluntarily. The court expressed its belief there was insufficient data or studies to establish a pattern in such a situation, and rather than reliably applying a scientific process, an expert would be rendering subjective opinions based on what Carlson told him. As such, Dr. Haney was not allowed to testify as a false confession expert.

Dr. Haney educated the jury about the brutality within the Texas prison system, Carlson's experiences therein, and the consistency between the two. He testified that while in prison in Texas, Carlson had been diagnosed with conversion disorder and psychogenic paralysis. However, he did not testify as to a current mental health diagnosis. No expert or blind expert was called to address false confessions.

Carlson submitted a PCR affidavit from a psychologist who specialized in interrogation techniques and false confessions. The affidavit references studies that demonstrate people falsely confess and that certain types of individuals are more likely to do so. He notes a correlation between mental illness and falsely confessing.

The psychologist opines that Carlson's admissions "could be" the product of serious mental illness or mental impairment. He states his role would have been to inform the trier of fact about the research of false confessions and factors that increase the risk of a false confession.

Analysis

The trial team's strategic decision to attempt to admit expert testimony regarding false confessions through Dr. Haney was reasonable. The fact the trial court ruled against them does

Laura Vincent
Judicial Administrative Assistant

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not render that decision unreasonable or their assistance ineffective. Counsels' performance should not be assessed using the benefit of hindsight. *Strickland*, 466 U.S. at 689.

Prejudice

Even if the defense team had proffered a blind expert had been called to testify generally about psychological vulnerabilities that render an individual more susceptible to offering false confessions, the result of the proceeding would not have changed.

Carlson confessed to killing several other people contemporaneously with confessing to killing KR and Becky. The State conceded at trial that after thorough investigations, there was no evidence to establish any of those murders actually occurred. Thus, the jury was well aware of Carlson's propensity to falsely confess.

Carlson's Admissions Inconsistent with Physical Evidence

Carlson contends the defense team failed to effectively demonstrate the inconsistencies between his admissions and the physical evidence from his vehicle, relevant weapons, and casings found in the burn pits. Carlson believes counsel should have presented testimony from a forensic crime scene expert to do so.

The Vehicle

Facts

Carlson admitted tying up his victims and placing them in the truck of the car. Becky was apparently able to free her hands and began moving forward from the trunk into the rear passenger compartment. Carlson shot her and then shot KR.

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Carlson admitted to subsequently cleaning the car and disposing of a bloody mat from the truck. Witnesses testified that Carlson borrowed cleaning supplies like window cleaner and paper towels, swept out his trunk and burned a bloody mat.

The vehicle was seized six days after the murders. Investigators did not observe overt blood or biological material in it. Carlson's clothing, bedding and other personal items were stacked on the right rear seat.

After removing those items, officers observed stains on the rear passenger seatbelt. They also observed stains on the felt covering on the interior roof of the vehicle. These items were admitted into evidence.

After making general observations, investigators applied BlueStar luminol to identify areas that potentially contained human blood. They then photographed blood spatter in the trunk and rear passenger area as well as pooling in the area between the trunk and rear passenger seats. These photographs were also admitted into evidence. Officers testified that the luminescence was consistent with blood, not cleaning solutions, based on the color and persistence.

After applying BlueStar, officers tested with Hexagon OBTI strips two of the areas that were presumptively positive for human blood. These sample areas tested positive for human blood. Investigators then collected swabs and cut out relevant portions of the seat belt and felt covering on the seats, ceiling, and trunk.

Although investigators swabbed several areas within the car and seized numerous materials, they only submitted seven items from the vehicle for testing. That testing detected

Laura Vincent
Judicial Administrative Assistant

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Becky's blood on a fragment near a speaker in the trunk, Becky's DNA on the stained, rear-passenger seatbelt, and KR's blood on the plastic of the left, rear seat. No blood was detected in the other samples.

The defense team elicited testimony in cross-examination regarding: the likelihood of blood and biological materials being expelled from a gunshot wound, including "blowback"; the absence of overt blood or biological material in the vehicle; the superficial nature of Carlson's alleged cleaning; the minimal findings of blood or DNA from test samples taken from the vehicle; the potential for DNA transfer when Becky and KR rode as passengers in the vehicle, and the reactivity of BlueStar to materials other than blood.

The defense team included an investigator with 25 years of police experience. He reviewed the pictures of the search of the vehicle and the vehicle itself. He had discussions with counsel about the lack of physical evidence in the vehicle. He met with Carlson many times and accepted Carlson's statements that he had cleaned the car.

Analysis

Counsel decision not to pursue further investigation or consult another investigative with extensive crime scene experience was reasonable. Their decisions about how to attack the State's physical evidence, highlight the lack of evidence and present favorable evidence were strategic. Having found the investigation into said evidence reasonable, these decisions are entitled to great deference. *See Strickland*, 466 U.S. at 690-91.

Counsel addressed most of the facts and arguments raised in Carlson's petition and his crime scene expert's affidavit. The proposed expert testimony would have been largely

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Judicial Administrative Assistant

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cumulative with evidence presented. The non-cumulative evidence would have been of minimal value. For example, Carlson argues counsel should have highlighted the lack of observable blood or DNA evidence on Carlson's voluminous clothing, bedding and other personal items found in the vehicle.

These items were found on the rear passenger seat, stacked up to the headrest, six days after the murders. They seem to comprise much of Carlson's personal belongings, consistent with someone preparing to flee. Carlson's description of the murders and configuration of the vehicle at that time are inconsistent with the back, passenger seat being piled with clothes preventing the rear seat from inclining. Additionally, the passenger seat belt which had stains consistent with blood and Becky's DNA, would have been underneath that pile.

Thus, the circumstantial evidence strongly suggested the personal items were not in the vehicle at the time Carlson shot KR and Becky. Based on these facts, it was reasonable for counsel not to argue the absence of blood on the clothes and bedding.

Carlson also asserts his counsel should have argued the victim's DNA was present in the vehicle due to innocent transfer, touch transfer from others, or should have asserted the dead bodies were placed in the vehicle after someone else shot them.

Becky's blood was found in a fragment next to a speaker in the trunk. Based on its location and the method used to recover that and other samples, counsel did not have facts to support an argument of innocent or touch transfer. It was reasonable for counsel to forgo these arguments and maintain credibility. They had no evidence available to establish someone else killed KR and Becky, then loaded the bodies in Carlson's car trunk.

Laura Vincent
Judicial Administrative Assistant

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In summary, the trial team included an investigator with substantial experience in police investigations and evidence collection. Counsel established key discrepancies between Carlson's description of the murders and the lack of physical evidence in the vehicle. They elicited the necessary facts and argued logical conclusions without the need for expert testimony.

Counsel's strategic choices about were reasonable and their performance fell well within the wide range of reasonable professional assistance.

Collection of the Evidence

Carlson alleges counsel erred in not presenting expert testimony to establish investigators: failed to properly document their vehicle searches; perform tests in the incorrect sequence; and improperly placed evidentiary seals on the vehicle destroying potential latent prints or touch DNA.

Carlson's PCR expert asserts generally that performing procedures in the wrong order "potentially contaminates the scene, may compromise existing evidence and may destroy physical evidence." He provides no factual basis to conclude spaying BlueStar prior to swabbing or vacuuming impacted the evidence available or presented.

Additionally, he provides no explanation of how potential loss of fingerprints or touch DNA on portions of the vehicle sealed with evidence tape could have effectively been used at trial.

As noted above, counsel's decision not to engage another crime scene expert to review the evidence seized from the vehicle was reasonable. The non-cumulative testimony of a crime

Laura Vincent
Judicial Administrative Assistant

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scene expert would have been of minimal value based on the facts and circumstances of the case. The defense team's strategic decision not to call a crime scene expert had a reasoned basis.

Efficacy of Cleaning the Vehicle

Carlson asserts the defense team failed to rebut, through expert testimony, the State's claim that Carlson effectively removed blood and biological evidence by cleaning his car. Additionally, he notes an expert could have testified the BlueStar photographs don't establish whether the reaction was to bleach, food, metal or blood.

As previously described, he suggested expert testimony would be largely cumulative with what counsel elicited through other witnesses at trial. The trial team also highlighted through testimony the potential for BlueStar to react to cleaning solutions and metal. However, the technician who performed the BlueStar test specifically testified that he observed first-hand the blue color and persistent nature of the BlueStar reactions, which were indicative of blood. Reactions to cleaning solutions appear white and dissipate quickly.

Carlson's PCR expert does not contradict that testimony. Rather, the expert notes he cannot tell from the pictures whether the reaction indicated blood or another substance. That testimony would have been of no value at trial as it would not have effectively countered the officers' in-person observations.

Counsels' strategic decision not to call an expert to address the lack of physical evidence in the car and BlueStar results was well within the wide range of reasonable professional assistance.

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The Weapons and Casings

Carlson claims counsel were ineffective because they failed to demonstrate the physical evidence did not establish Carlson's weapon was the one used to kill KR and Becky.

Carlson admitted shooting the victims with a sawed-off shotgun. Approximately three weeks after the shooting, investigators seized the shotgun from the recreational vehicle in which Carlson had been residing. The interior of the barrel was swabbed and tested negative for blood. They did not test the weapon for fingerprints, operability or luminescence.

A variety of other weapons, including shotguns belonging to Larry and Charlie, were seized at the property in late June, approximately a month after the murders. None of those weapons were fingerprinted, checked for operability, or tested for blood. The case detective testified about seizing each of these weapons and the lack of testing thereof. The weapons were admitted into evidence.

Because the victim's bodies were thoroughly burned, there was no physical evidence of gunshot wounds. Additionally, no spent bullets or casings were tied directly to the shootings.

Several casings were found in the garbage pits in which the victims were burned. No test firings were completed to match the casings to a weapon. The State conceded at trial that those casing could have been completely unrelated to the case.

The defense team elicited testimony during cross-examination: the absence of blood or biological materials on Carlson's weapon or in its barrel; the State's failure to prove that weapon was operable; other residents had never seen Carlson with a gun; and the casings in the firepit could not be tied to the weapon or the murders.

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Additionally, the defense established through testimony that a bolt-action rifle seized from Larry's trailer could have been used to kill the victims, could have fired the casings found in the garbage pit and was never tested for blood or biological material.

The expert testimony referenced in the petition is largely cumulative with testimony elicited at trial. Counsels' strategic decision not a present expert testimony on the weapons and/or casings was reasonable.

Regarding counsels' performance in demonstrating Carlson falsely confessed,

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

THE COURT FINDS Carlson has not established that his counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the result of the proceeding would have been different.

5. *Corpus Delicti* and the Trustworthiness Doctrine

Carlson asserts his trial and appellate counsel were ineffective in litigating the lack of *corpus delicti* for his admissions that he kidnapped the victims. Specifically, Carlson argues counsel should have asserted the trustworthiness doctrine developed by *Opper v. United States*, 348 U.S. 84 (1954) and its progeny.⁵

⁵To the extent Carlson is substantively challenging whether the trustworthy doctrine applies or whether there was sufficient evidence to satisfy the corpus delicti rule, those issues are precluded as addressed on the merits on appeal.

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Under Arizona law, to introduce a defendant's confession, the State must present corroborating evidence from which jurors could reasonably infer that the crime charged actually occurred. *State v. Hall*, 204 Ariz. 442, 453 ¶ 43 (2003).

Facts

The defense team challenged the admissibility of Carlson's admission that he kidnapped KR and Becky based on lack of *corpus delicti*. At a pretrial hearing, they asserted the State had not established a reasonable inference that the kidnappings occurred through evidence independent of Carlson's admissions. Counsel did not raise the trustworthiness doctrine at that hearing. The trial court found the State had sufficiently established the corpus of the alleged kidnappings to allow the admission of Carlson's statements.

Counsel also raised the *corpus delicti* issue in their trial memorandum, arguing the statements regarding kidnapping were not admissible at trial. They again cited the correct legal standard.

The day before trial, defense reasserted the *corpus delicti* argument, contesting the admissibility of the statements related to kidnapping based on the lack of corroborating evidence regarding restraint. The trial court ruled, consistent with *Morgan*,⁶ that the corpus for the homicide provided a sufficient basis for admitting the statements regarding kidnapping as well.

On appeal, the Arizona Supreme Court found there was sufficient evidence to support the inference that Carlson kidnapped Becky and that the combination of Becky's kidnapping and KR's murder was sufficient evidence of the corpus delicti for KR's kidnapping. *State v.*

⁶ *State v. Morgan*, 204 Ariz. 166, 172-73 ¶ 23 (App.2002).

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Carlson, 237 Ariz. 381, 388-89 ¶¶ 13-15 (2015). In their discussion, the court noted they had never adopted the trustworthiness doctrine. *Id.* at 389 ¶ 15.

Analysis

The defense team properly and professionally challenged the admissibility of Carlson's statements about kidnapping the victims, based on a lack of *corpus delicti*. In doing so, they cited the applicable law and correct legal standard under Arizona law. Not arguing the trustworthiness doctrine – an evidentiary standard that did not apply in Arizona – was reasonable.

Further, had counsel asserted the trustworthiness doctrine, the result would have been the same. Very modest corroboration is required under either *corpus delicti* or the trustworthiness doctrine. Such corroboration existed in this case.

Appellate counsel did not unreasonably fail to discover and brief a nonfrivolous issue. They were not ineffective in not raising this meritless claim.

Regarding counsels' litigation of *corpus delicti*,

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

THE COURT FINDS Carlson has not established that either his trial or appellate counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the result of the proceeding would have been different, or he would have prevailed on appeal.

6. Evidence regarding Third Party Culpability

Carlson argues counsel were ineffective in attempting to demonstrate that Larry, not Carlson, had killed KR and Becky. He identifies eight bases for this claim.

Disproving Larry's Alibi for Memorial Day

Carlson first claims that counsel failed to effectively demonstrate the falsity of Larry's alibi for Memorial Day and failed to establish the Menden family, except Larry, left on Memorial Day for a camping trip to Cochise County.

Before trial, Carlson admitted he killed the victims on Monday, May 25, 2009, Memorial Day, while the Menden family was away from the Trico property. Larry, Charlie and Mae, the three adult members of the Menden family who were living on the property, all corroborated their absence on Memorial Day. They claimed they were visiting Dave in Tucson and had decided to spend the night.

At trial, the defense team asserted Larry had killed the victims. There was no direct evidence to support that claim, only circumstantial evidence regarding motive, opportunity, and consciousness of guilt.

Counsel established Larry was present on the property, and angry with the victims, on Memorial Day morning. They also introduced evidence to suggest the overnight trip to Tucson on Memorial Day never happened.

The defense admitted evidence that Mae's mother was not in Tucson on Memorial Day and the family never visited Dave when she wasn't present. Another witness testified that

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Larry and Charlie visited him on Memorial Day morning, were drinking alcohol, and did not mention any plans to visit Tucson.

Yet another witness testified that Larry purchased a bucket of lye, which is typically used to reduce the smell of dead animals, from her on either the Friday before Memorial Day or on Memorial Day.

The defense team also attacked Larry's, Charlie's and Mae's credibility on cross-examination including their alibi for Memorial Day. Counsel highlighted each of their prior inconsistent statements, pointing out how they contradicted themselves, each other, and other evidence. In fact, the defense thoroughly impeached their overall credibility. Counsels' performance in attacking Larry alibi for Memorial Day was more than reasonable.

Carlson also claims counsel should have established the Mender family, except Larry, left on a camping trip on Memorial Day. However, counsel had reasoned basis for their strategic decision not to do so.

Specifically, the defense team accepted that Charlie, Mae and TH were present on the property on May 26. Counsel elicited their observations on that date to establish they didn't smell smoke or see a fire burning. Additionally, they established TH watched movies in Carlson's vehicle on the evening of May 26 and noted no physical evidence of a murder occurring therein.

In addition to having a reasonable, strategic basis for not pursuing evidence that the camping trip began on Memorial Day, the evidence described in the petition was not available.

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In a pretrial interview, TH, Mae's minor daughter, said she "didn't remember" going to Tucson on Memorial Day, then returning to the property before leaving for Cochise County. Her more definitive statement made years after trial has no bearing on the reasonableness of trial teams decisions.

AC and MC were teenagers in 2009. They were interviewed by the PCR team seven and ten years after the murders, respectively. Each stated the Menden family, except Larry, was at their home in Cochise County on Memorial Day.

These recent statements directly contradict their mother's statement, taken four months after the murders. She stated the family arrived later in the week. AC also contradicts her own statement in 2010, noting she was at the picnic in Cochise "after Memorial Day."

Based on the facts known prior to trial, it was reasonable for counsel not to further investigate these witnesses' recollection or to call them to testify on the issue.

Finally, Carlson asserts counsel should have identified Joseph M. as a potential witness and called him to testify. In his petition, Carlson asserts, Larry "told Joseph...that no bodies were burned on the property because he was there on Memorial Day, being unable to leave because he was "laid up" due to his bad back." Joseph M.'s affidavit does not support this statement.

Larry's statement to Joseph did not reference Memorial Day. Rather, it generally referenced the time the bodies would have been burning. That testimony would not have established Larry's presence on the property on May 25.

Carlson's claim that counsel unreasonably failed to discover and call witnesses on this issue is also without merit. The trial team's investigation into this issue was reasonable as was their decision not to pursue these facts at trial.

Larry Lied to Authorities

Carlson asserts counsel failed to emphasize Larry's inconsistent statements to authorities. This claim is also without merit. Not only did the defense team elicit testimony regarding Larry's inconsistent statements, they used a poster board to further emphasize different statements made on different dates. Larry's inconsistent and improbable statements were well highlighted, and his credibility destroyed.

Larry Had Motive to Kill

Carlson claims the defense team failed to emphasize Larry, not Carlson, had a motive to kill the victims. Contrary to these assertions, Larry's possible motives to kill the victims, his anger with them on Memorial Day and his threatening statements were all admitted into evidence. Carlson's positive relationship with the victims was also highlighted. This claim is without merit.

Inconsistent Statements Regarding Cleaning Products

Carlson next asserts counsel was ineffective in addressing inconsistent statements made regarding Carlson cleaning his car after killing KR and Becky.

Carlson admitted he cleaned the car and threw away a bloody mat from which the blood couldn't be removed. The other residents of the Trico property partially corroborated this statement.

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Prior to trial, Mae said gave bleach to Carlson on May 26. At trial, she did not mention the bleach or Carlson’s efforts to clean his car. Defense wisely did not pursue the matter.

Larry testified that Carlson asked for items to clean his car. He further testified that he told Carlson the bleach was at Charlie and Mae’s house, the paper towels were in his house and “I think the Windex is in my house.” Larry also testified Carlson asked about cleaning blood from a mat and observed a plate-size stain consistent with blood.

Larry was effectively cross-examined about his inconsistent statements to police, specifically, not mentioning anything about the blood stain or cleaning the car until pressured by police in a follow-up interview. The defense team effectively impeached Larry’s credibility.

Charlie testified he gave Carlson window cleaner and paper towels on May 26, and after his memory was refreshed, that he had seen Carlson sweeping out his car with a hand broom. Rather than attack Charlie’s testimony corroborating Carlson’s statement that he cleaned his car, counsel argued these minimal efforts at cleaning would be ineffective in removing blood and biological evidence. This strategic decision was reasonable.

TH, a minor, was not called to testify. She stated in a pretrial interview that she thought she remembered Carlson asking Charlie for bleach but may have just heard about it from someone else. She went on to state, “as far as I know, we didn’t have any.” The strategic decision not to call TH to testify on this issue was reasonable. Her statements had no weight or value.

The Court finds this aspect of Carlson’s claim to be without merit.

Observations regarding Burning Bodies

Carlson claims the defense team was ineffective for failing to present expert testimony regarding the length of time necessary to completely burn the bodies and the need to tend the fire.

Additionally, he claims counsel failed to establish Charlie, Mae, TH and James T. did not see smoke or fire on May 26 and 27. That testimony would have contradicted Carlson's statements that he killed the victims on May 25 and burned their bodies over the following days.

At trial, the State's expert testified the victim's bodies would have to burn for days to reduce them to state in which they were recovered. Additionally, the expert testified that someone would have to tend the fire to keep it burning. Carlson's proposed expert testimony is cumulative with the evidence presented. This portion of Carlson's claim is without merit.

His claim regarding counsels' failure to elicit testimony from witnesses who did not see or smell a fire on May 26 and 27 is also not supported by the record. Charlie testified that he did not see or smell a fire burning on May 26 or 27. Mae testified she didn't smell smoke until she returned from TH's doctor's appointment on the afternoon of May 26. Defense elicited through Detective Crehen that TH also did not see or smell smoke or fire on the relevant days. James T. testified about visiting the property in that time frame and not seeing a fire or smelling smoke.

Larry's testimony regarding his observations of, and involvement in, the burning was internally inconsistent and contradicted several statements he made in interviews. The net result of Larry's testimony was that he utterly lacked credibility but had first-hand knowledge of the bodies being burned on the property.

Laura Vincent
Judicial Administrative Assistant

The defense team performance fell well within the wide range of reasonable professional assistance in this area.

The “Take Out the Trash” Text Message

Carlson claims the defense team was ineffective in failing to demonstrate the forensic examination of seized phones definitively disproved Mae’s claim that Carlson sent a text message stating that he had “taken out the trash” on the evening of May 25. Carlson also critiques trial counsel for dedicating time and attention to pursuing a *Willits* instruction.

Mae testified that Carlson sent a text message on the evening of May 25 stating he had “taken out the trash,” presumably referring to KR and Becky. Mae stated the message was received on one of three phones belonging to her, Charlie and Larry, respectively. Charlie and Larry were purportedly passed out drunk at the time.

Police seized one phone from Carlson’s RV on June 17, 2009. They seized four phones during the search of the Trico property on June 23, 2009: one from Charlie, one from TH, and two from the trailer in which Charlie and Mae resided. Larry’s phone was not seized but left on his bed after the search.

An analysis of the five phones seized revealed no “taken out the trash” message. During Detective Crehen’s defense interview on May 24, 2011, she confirmed the forensic analysis revealed no such message was located. Defense elicited that information from Detective Crehen at trial, establishing none of the seized phones contained the “taken out the trash” message.

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That evidence was of limited value because Larry's phone was not seized, and the remaining phones were seized weeks after the murders. Nothing prevented the individuals from deleting the text during the interim.

The defense admitted the critical, available evidence – no “taken out the trash” message was found on the seized phones. However, the facts surrounding the seizure and analysis did not support an argument that said evidence definitively disproved Mae's testimony that Carlson sent the text message.

Regarding the *Willits* instruction, the defense team properly advocated for said instruction. As noted above, police failed to seize Larry's phone. Also, Detective Crehen asked the prosecutor to obtain the relevant phone records, but she failed to do so.

Although the records would not have reflected the substance or content of text messages, they would have established a timeline of text messages sent, and by whom, during the relevant time frame.

The defense had a good faith basis for requesting the instruction, in that the evidence could have established Carlson did not use the phone seized from his RV to text any of the Menden family members on the evening of May 25. Additionally, those phone records would have been relevant to Larry's statements that one of the victims, KR, sent him four or five texts on May 25 or May 26. For these reasons, it was reasonable for the defense to pursue the *Willits* instruction.

The defense team elicited the best evidence available, that the “take out the trash” text message was not found on any of the seized phones. Their performance in this area was well within the wide range of reasonable professional assistance.

Larry Observed Wearing Victim KR’s Watch

Carlson asserts the defense team was ineffective for failing to call one of two witnesses to testify that they saw Larry wearing victim KR’s watch a few days after Memorial Day.

The defense demonstrated Larry knew KR and Becky were dead on May 26 and that their remains were being burned in his firepit. Larry admitted seeing a cinder block holding down a limb on one of the bodies. He helped transfer the materials from the fire pit to the deeper trash pit.

Counsel also established Larry believed KR and Becky were stealing from him. After their disappearance, he looked through their possessions and recovered some of his property.

Defense elicited from Detective Crehen that a witness told her that in late May he had seen KR’s watch was in his trailer, then a couple days later Larry was wearing KR’s watch. Although this testimony was purportedly not offered “for the truth,” there was no limiting instruction on the use of that evidence. Thus, the jury was aware Larry had KR’s watch sometime after Memorial Day.

Counsels’ decision not to call the proposed witnesses was reasonable.

Larry’s Violent and Volatile Background

Carlson asserts his defense team failed to investigate Larry’s history of violence and volatility, and to present that evidence to bolster the third-party culpability defense. Specifically,

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two of Larry's ex-wives and an ex-girlfriend would have testified he was physically abusive toward them, especially while intoxicated. A friend of KR, Gilbert R., would have testified that Larry "had disputes with neighbors that involved him shooting a gun." Finally, Andrew B. would have testified that a couple weeks after the murders Larry told him to get off the property or he'd shoot him.

In assessing a decision not to investigate, the court must determine whether the decision was reasonable under the circumstances and must apply "a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 690-91.

Counsel's decision not to interview Larry's ex-wives or girlfriends to determine whether he engaged in domestic violence was reasonable. Their failure to identify and interview Gilbert R. was also reasonable. He had no ties to the case and counsel had no information indicating he had any relevant information.

Even if the defense team had obtained this evidence, there is no reasonable probability that the trial court would have admitted it. The admissibility of third-party culpability evidence is governed by Arizona Rules of Evidence 401, 402 and 403. *State v. Gibson*, 202 Ariz. 321, 323-24, ¶¶ 11-19 (2002); *State v. Prion*, 203 Ariz. 157, 161-62, ¶¶ 19-27 (2002). Rule 404(b) is not applicable. *State v. Machado*, 226 Ariz. 281, 283, ¶ 16 (2011). To be relevant, the evidence need only tend to create a reasonable doubt as to the defendant's guilt. *Gibson*, 202 Ariz. at 321 ¶ 16.

The acts of domestic violence uncovered during the PCR investigation have nothing to do with Larry's relationship to the victims. The threats and physical abuse described by two wives

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and a girlfriend are not similar in character to the alleged offenses. The offenses are also remote in time.

The proposed testimony lacks probative value in that it would not tend to create a reasonable doubt as to Carlson's guilt. Any probative value would have been substantially outweighed by the danger of confusing the issues and wasting time.

Gilbert R.'s vague proffered testimony, that Larry "had disputes with neighbors that involved him shooting a gun" is also not relevant in that it would not tend to create a reasonable doubt as to Carlson's guilt. It has nothing to do with Larry's relationship with the victims nor are the allegations similar to charged offenses. The evidence also would not have satisfied the Rule 403 balancing test and would likely not have been admitted.

Counsel also made a reasonable, strategic decision in not calling Andrew B. to testify. The testimony would also have been excluded. Andrew B. stated that a couple weeks after the victims went missing, Larry told him to get off the property or he was going to shoot him.

In the same interview, Andrew B. stated Larry reacted that way because Andrew B. had called CPS on him. The incident has nothing to do with the charged offenses, and Andrew B. does not allege Larry was not in possession of or threatened him with a weapon when the statement was made.

The proffered evidence would not tend to create a reasonable doubt as to Carlson's guilt. Further, any minimal probative value would have been outweighed by the dangers articulated in Rule 403.

Laura Vincent
Judicial Administrative Assistant

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Analysis

The defense team presented substantial third-party culpability evidence demonstrating Larry's opportunity and motive to kill the victims, questionable alibi, knowledge of the crimes, inconsistent statements, and subsequent behaviors consistent with consciousness of guilt.

Counsel elicited testimony establishing Larry: was angry with the victims on Memorial Day, the day of the murders; wanted them off the property that day; and stated that very morning, that he'd, "like to take them out and break their hands and kill them." They also called a witness to testify about an instance in which Larry threatened KR, one of the victims, with a handgun.

The trial team's investigation into possible third-party culpability evidence was reasonable. Their strategic decisions regarding which witnesses to call and questions to be asked were likewise reasonable. Their performance in investigation and presenting the third-party culpability defense fell well within the wide range of reasonable professional assistance.

The third-party culpability evidence admitted strongly suggests Larry set the crimes in motion by suggesting the victims should disappear, knew the victims had been killed, assisted in burning the bodies and hiding the evidence thereof, lied to the victims' family members and police to conceal the crime, and attempted to get Carlson off the property and out of Tucson. While that evidence raised questions about Larry's participation in the murders, it did not tend to create reasonable doubt as to Carlson's guilt. The additional evidence referenced in the petition wouldn't have changed that result.

Regarding the investigation and presentation of the third-party culpability defense,

Laura Vincent
Judicial Administrative Assistant

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

THE COURT FINDS Carlson has not established that his trial counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the result of the proceeding would have been different.

7. Jury Instruction on Third-Party Culpability

The defense team presented a variety of third-party culpability evidence and argued Larry, and possibly Charlie, killed the victims. They did not request an instruction on third-party culpability. Carlson asserts counsel were ineffective in failing to request the instruction. He cites *Gibson* and *Prion* in support of his position. *See Gibson*, 202 Ariz. at 323-24, ¶¶ 11-19 (2002); *State v. Prion*, 203 Ariz. 157, 161-62, ¶¶ 19-27 (2002). Those cases, however, govern the admission of third-party culpability evidence, not a jury instruction thereon.

Carlson asserts the trial court would have been required to instruct on third-party culpability had counsel so requested because the theory was “reasonably supported by the evidence. *See State v. Moody*, 208 Ariz. 424, 467 ¶ 197 (2004). However, a trial judge need not give a jury instruction when its substance is adequately covered by other instructions. *State v. Parker*, 231 Ariz. 391, 404 ¶ 52 (2013)(citing *State v. Rodriguez*, 192 Ariz. 58, 61 ¶ 16 (1998)).

In this case, the trial court instructed on presumption of innocence and the State's burden of proving beyond a reasonable doubt all elements of the crimes charged. A third-party

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culpability instruction was unnecessary and not required under Arizona law. *See Parker*, 213 Ariz. at ¶ 55. A request for such an instruction would likely have been rejected by the trial court.

Regarding counsel not requesting a jury instruction on third-party culpability,

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

THE COURT FINDS Carlson has not established that either his trial counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the result of the proceeding would have been different.

8. Guilt Phase Closing Arguments

Carlson claims the trial team was ineffective in failing to object to portions of the State's guilt phase argument and in presenting his closing argument. Almost all of Carlson's contentions are derivative of other claims like counsels' handling of the "took out the trash" text message, Larry's alibi on May 25, and Carlson's prior conviction and sentence. Those claims will not be readdressed here.

Carlson asserts counsel should have objected to the State's argument regarding the eight other murders to which he confessed and for which no evidence was found. The prosecutor argued these purported murders demonstrated Carlson fantasized about killing and protecting others.

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The prosecutor did not argue facts not in evidence. Rather, she made reasonable comments on the evidence presented. The trial team's failure to object to those statements was reasonable. Counsel elected to use that statement against the prosecution, arguing Carlson's statements that he killed KR and Becky were also fantasy.

Carlson next asserts counsel's closing argument failed to emphasize evidence demonstrating Larry's culpability as well as critical exculpatory evidence. In closing, counsel addressed third-party culpability in detail. Counsel emphasized Larry's motive and opportunity to commit the offenses, purchase of lye, flimsy and contradicted alibi for May 25, inconsistent statements to police, and actions more consistent with guilt than fear of Carlson.

Counsel also highlighted how other evidence contradicted Carlson confession, such as the lack of blood or biological material on Carlson's weapon, and testimony that no bodies were burning on May 26. They also described Carlson's desire to protect the protect the Menden family led to him falsely confessing.

The defense closing argument was hampered primarily by the evidence, specifically Carlson's detailed account of kidnapping and killing KR and Becky, and the evidence that directly corroborated those statements. Counsel's performance in closing arguments was not ideal, but it does falls within the wide range of reasonable professional assistance.

Regarding closing arguments,

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

Laura Vincent
Judicial Administrative Assistant

THE COURT FINDS Carlson has not established that either his counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the result of the proceeding would have been different.

INEFFECTIVE ASSISTANCE OF COUNSEL IN THE AGGRAVATION PHASE

Carlson asserts counsel were ineffective by failing to: (1) effectively challenge the aggravators alleged by the State; and (2) present evidence of mental illness and brain damage in connection with the *Enmund/Tison* inquiry.

1. Challenge to Alleged Aggravators

The State had initially alleged four aggravating factors under A.R.S. § 13-751, specifically: convicted of a prior serious offense under (F)(2); committed the murders while on release from custody under (F)(7); committed multiple murders during the commission of the offense (F)(8); and, committed murder in a cold, calculating manner under (F)(13).

Before trial, the defense team filed a motion challenging the sufficiency of the aggravating factors based on lack of probable cause and requested a *Chronis*⁷ hearing. Thereafter, the State withdrew the allegation the murders were committed in a cold, calculating manner.

The defense team did not contest that Carlson was on release from custody at the time of the alleged offenses. Their decision not to challenge that aggravating factor was reasonable.

⁷ *Chronis v. Steinle*, 220 Ariz. 559 (2009).

Carlson's status at the time of the murders was not subject to dispute and could easily be proven by the State.

Counsel argued the State had not met its burden regarding the two remaining aggravating factors, convicted of a prior serious offense and multiple murders. However, the trial court ultimately found probable cause for these aggravating factors as well.

The jury subsequently found Carlson guilty of two counts of kidnapping and two murders, occurring contemporaneously. Self-authenticating documents established Carlson's prior out-of-state convictions and his status as on parole at the time the offenses were committed. Thus, counsel had no viable evidence or arguments to counter the alleged aggravators. Counsel cannot be ineffective for failing to take futile actions. *See State v. Noleen*, 142 Ariz. 101, 106 (1984).

Even if counsel had contested other factors or made additional arguments, the result would have been the same. The aggravating factors were easily proven. The defense team's decisions performance was in this area was well within the range of reasonable professional assistance.

2. Mental Health Evidence and the *Enmund/Tison* Inquiry

Facts

During the guilt phase, eight jurors found Carlson guilty of both premeditated murder and felony murder, and four jurors found him guilty only of felony murder. Under *Enmund/Tison*, a defendant convicted of felony murder is eligible for the death penalty only if he killed, attempted to kill, intended that a killing occur or that lethal force be used, or was a major

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participant in a felony and acted with reckless indifference to human life. *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

During the aggravation phase, counsel did not present evidence regarding Carlson's mental health, brain damage or his subjective awareness or belief that the acts were likely to result in the death of a person. Rather, they argued degree of participation and third-party culpability.

The Court instructed on the *Enmund/Tison* standard and submitted degree of participation verdict forms to the jury. Eight jurors found Carlson was eligible for the death penalty because he killed the victims. Four jurors found he was a major participant in kidnapping Becky and was recklessly indifferent regarding her life. Three found Carlson was a major participant in kidnapping KR and was recklessly indifferent regarding his life. One juror found Carlson intended KR's killing take place.

On appeal, the Arizona Supreme Court held the *Enmund/Tison* instruction and findings were unnecessary because no evidence of an accomplice was admitted.

Carlson now argues counsel should have admitted evidence of diminished capacity, e.g. that he did not subjectively appreciate his conduct would lead to the victims' deaths. Carlson asserts that had this evidence been admitted, at least one juror would have found he did not act with reckless indifference, rendering him ineligible for the death penalty.

Carlson cites a case decided in 2018 for the proposition that a defendant's diminished capacity was admissible because it was relevant to determining under *Tison* whether he acted

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with reckless indifference. See *State v. Miles*, 243 Ariz. 511 (2018). He does not address the prevailing understanding of the law regarding diminished capacity in 2012.

Analysis

The defense team's decision not to offer evidence of diminished capacity during the aggravation phase is supported by the relevant facts and circumstances. First, presenting evidence that Carlson participated in the murders but did not possess the culpable reckless state of mind under *Tison* was inconsistent with the defense presented during the guilt phase.

Second, Carlson could not testify as to his state of mind without opening the door to suppressed statements relevant to his state of mind. It was a strategic necessity to keep Carlson off the witness stand. Without such evidence, expert testimony that he had a mental disease or defect would have done little to overcome other relevant evidence, including Carlson's detailed admissions which contained no express or implied statements that he did not subjectively appreciate that his actions – shooting the victims – were likely to result in their deaths.

Third, had Carlson provided notice he intended to present evidence regarding his mental state at the time he committed the murders, the State's expert would have been allowed to examine Carlson. Counsel wisely sought to avoid such an examination given Carlson proclivity to make admissions regarding the offenses.

Counsel's failure to offer evidence of Carlson's diminished capacity during the aggravation phase was also reasonable based on the state of the law. In 2012, it was well established that mental health evidence falling short of insanity negating mens rea or presenting an affirmative defense was not admissible. *Mott*, 187 Ariz. at 544. Of course, *Mott* and its

progeny focused on mental state evidence relating to elements of the crime during the guilt phase. Arizona courts did not hold that mental health evidence was admissible during the aggravation phase until *Miles* was decided in 2018.

The defense team’s failure to offer evidence of Carlson’s diminished capacity during the aggravation phase was well within the wide range of reasonable professional assistance.

Regarding counsels’ performance in the aggravation phase,

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

THE COURT FINDS Carlson has not established that his trial counsels’ performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the result would have been different.

IT IS ORDERED summarily dismissing Carlson’s claim of ineffective assistance of counsel during the aggravation phase of trial.

INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE

1. Mitigation Specialist: Failure to Conduct a Thorough Mitigation Investigation

Carlson claims that the mitigation specialist: (1) was not qualified based on the ABA Guidelines; (2) failed to establish rapport with Carlson because she distained him; (3) dedicated her time to paralegal duties rather than focusing on mitigation; and (4) failed to discover important mitigating circumstances.

Facts

The mitigation specialist was a trained paralegal, had attended professional seminars on death penalty cases, and had previously served as the mitigation specialist in other capital cases. She gathered available records to be used in mitigation, interviewed family members who were willing to participate⁸ and meet with Carlson throughout the course of the representation.

Substantial mitigation evidence, including most that which Carlson alleges was lacking, was gathered and presented. During the guilt phase, the defense team elicited testimony about Carlson's community service at a food bank, work ethic around the Trico property, protective nature toward children and women, respect for others and positive relationship with KR and Becky.

They also admitted Carlson's statements to KVOA about exposure to violence in the family home, abuse he suffered as a child and in prison, the absence of friends, abandonment of family except his mother, how he enjoyed working as a cook and his desire to protect animals and children.

In the penalty phase, counsel admitted detailed information about Carlson's life experiences from childhood through the offenses which is described in the following sections. They presented, through the mitigation expert, an extensive analysis of how those experiences impacted Carlson's decision making and moral culpability. Additionally, expert testimony established Carlson had a very low risk of violence in prison.

Analysis

The determination of whether counsel was ineffective counsel during the penalty phase will not turn on whether the mitigation specialist was deemed qualified under the ABA Guidelines, spent more time on paralegal duties than mitigation, or disliked Carlson. Rather, the inquiry will focus on whether counsel reasonably investigated and presented available mitigation evidence. Those allegations are addressed in the following sections.

2. Failure to Investigate Family and Social History, Mental Illness and Brain Damage

Carlson claims the trial team failed to reasonably investigate potential mitigation evidence concerning Carlson's: family history of alcoholism and mental illness; social history of neglect and abuse; mental illness; and brain damage.

Family History of Alcoholism and Mental Illness

Grandparents

The defense team did not present information concerning Carlson's grandparents. PCR affidavits indicate Carlson's paternal grandfather was an alcoholic and a "mean drunk," and his paternal grandmother was hospitalized for mental illness. She reportedly heard internal voices prior to her death.

There is no evidence that Carlson was exposed to his grandfather's alcoholism or temper. Thus, the relevance of this evidence is limited to corroborating Carlson's hereditary predisposition to alcohol or drug abuse, and to psychological disorders.

⁸ Carlson confessed to killing his sister contemporaneously with confessing to killing KR and Becky. Thus, not all family members were willing to fully participate.

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The defense team presented testimony establishing Carlson's father was a sadistic, violent drunk and had significant mental health issues. The mitigation specialist, mitigation expert, and Skip and Wanda Carlson, all provided vivid descriptions of Alexander Carlson's behavior fueled by alcoholism and mental illness. The mitigation expert used those facts to establish hereditary predisposition to alcohol or drug abuse, and hereditary predisposition to psychological disorders, as factors reducing Carlson's moral culpability.

Because this mitigating factor was well supported at trial, the additional evidence regarding the grandparents would not likely have had an impact on the jury finding that the mitigation was not sufficiently substantial to call for leniency.

Father

The defense team elicited testimony regarding Alexander Carlson's disturbed behavior such as beating his wife and children, repeatedly firing a weapon within the house to include shooting at one of the children, threatening to kill his wife and children, sexually abusing one of the children, and attempting suicide in front of the children. Testimony also established Alexander Carlson had been hospitalized on several occasions for mental illness.

The relevant, non-cumulative information discovered during the PCR investigation establishes Alexander Carlson experienced delusional ideas and auditory hallucinations. In 1963, his doctor noted a diagnostic impression of schizophrenic reaction, paranoid type, chronic. The records obtained also indicate Alexander Carlson had experienced homicidal ideation in the past, and the doctor feared he could be homicidally dangerous without treatment.

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Counsel's performance must be evaluated based on the circumstances surrounding that conduct. Prior to trial, Carlson had denied hallucinating in the twenty years preceding trial and had attributed his past hallucinations to serious drug use. Failing to actively investigate a family history of hallucinations was reasonable.

The additional detail regarding Alexander Carlson's mental health obtained by PCR counsel would have further supported Carlson's hereditary predisposition to alcohol and drug abuse, and to mental illness, both of which was well established at trial. This evidence would not likely have had an impact on the jury finding that the mitigation was not sufficiently substantial to call for leniency.

Mother

At trial, Carlson's mother, Beverly, was described as a mother without resources doing her best in a very stressful, chaotic situation. Testimony suggested she was emotionally neglectful and failed to protect her children from the dangerous environment in the family home. However, Carlson considered her one of few people who loved him and the only one who stood by him.

The information discovered during the PCR investigation does little to change that picture, confirming Beverly Carlson was indifferent toward her children and failed to show them affection.

Carlson alleges in his petition that Beverly Carlson was mentally ill, and that she used liquor and tobacco excessively. That claim lacks a factual basis.

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First, the document upon which Carlson relies states the defendant's grandmother was mentally ill and that his father used liquor and tobacco excessively. The referenced entries have nothing to do with Beverly Carlson.

Second, although the record demonstrates Beverly Carlson made one suicide attempt in 1949 – well prior to Carlson's birth – it does not establish any ongoing or pervasive mental illness that could have been uncovered prior to trial. Rather, the same document establishes that after the one suicide attempt, Beverly Carlson concluded suicide wasn't the answer and sought other avenues to deal with her stress, like participating in Al-anon.

Finally, Robert Carlson's statement that Beverly Carlson "always had a drink when she listened to music" fails to support an assertion that she used liquor excessively. Further, his observations were made while Beverly Carlson was living with Maria, sometime after 1987, years after Carlson left her home.

The information uncovered regarding Beverly Carlson during the PCR process adds very little or nothing to the mitigation case. It would have had no impact on the result of the penalty phase.

Uncle and Siblings

The defense team elicited testimony that Carlson's uncle had committed suicide and that Skip and Jerry, two of Carlson's siblings, had attempted suicide. They also admitted some evidence of dysfunction in the other sibling's lives, that Skip Carlson had abandoned his children and Jerry Carlson had stolen from someone.

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Carlson now asserts the defense team should have admitted evidence demonstrating his siblings experienced greater dysfunction in their lives. The admissible, non-cumulative evidence demonstrates that: Skip was unfaithful to his wives and didn't voluntarily pay child support; Jerry Carlson had poor interpersonal skills and bad hygiene; and Matthew Carlson did not talk about his childhood or have relationships with his siblings.

The mitigation expert described in detail why some siblings are more affected by childhood trauma than others. Further, the proffered evidence would have done little to counter the argument that other children experienced childhood trauma similar to that Carlson's endured, and they didn't subsequently murder people.

Regarding Carlson's sister, the defense team made a strategic decision not to admit evidence regarding Maria Carlson. Carlson had confessed to killing her at the same time he admitted killing KR and Becky. The defense was successful in suppressing those statements to police. Counsels' decision to forgo any evidence regarding Maria Carlson was a reasonable strategy.

Analysis/Prejudice

The defense team interviewed, and reinterviewed, family members who were willing to participate at that time. They reasonably investigated and developed potential mitigation evidence regarding Carlson's family history of alcoholism and mental illness. The deficits in this investigation were insubstantial.

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Further, even if they had obtained a more complete, multigenerational history, conducted additional family interviews, and admitted the new evidence referenced in the PCR investigation, it would not have changed the result of the penalty phase.

Regarding counsels' performance in investigating and presenting a multigenerational history of alcoholism and mental illness,

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

THE COURT FINDS Carlson has not established that his trial counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the jury or the appellate court would have concluded the death penalty was not warranted.

Social History Including Poverty, Neglect and Chaos

Carlson next asserts counsel failed to properly investigation and present evidence of his social history establishing his childhood of poverty, neglect and chaos.

Facts

Counsel admitted substantial evidence describing Carlson's social history and life experiences, from childhood through the offenses. They established Carlson's father was a violent, mentally ill, alcoholic who created chaos within the home, as well as the significant impact he had on the children. For example, testimony described how the children would huddle together, trembling with fear, when Alexander Carlson's fired weapons in the home.

Laura Vincent
Judicial Administrative Assistant

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The defense team presented evidence regarding the family's abject poverty, living in a one-room hotel room, on skid row and in projects. They elicited testimony about the family's frequent moves, which prevented Carlson from forming relationship and disrupted his education.

They admitted evidence of Carlson's immaturity and the absence of any girlfriends or special friends in his life. Evidence established Carlson was abandoned by his father and older brothers, and rejected by his stepfather.

Counsel also admitted evidence regarding Carlson's lack of guidance and difficulties adjusting to military service. They provided substantial detail about his mental health struggles, self-harm and inability to succeed in that environment. The defense team elicited testimony establishing the harsh conditions Carlson experienced in prison, injuries he sustained, as well as mental health episodes, diagnosis and treatment.

During the guilt phase, counsel admitted evidence about Carlson's life after being released from Texas prisons including work ethic, positive relationships, community service and a desire to help and protect others.

Finally, the defense team presented extensive expert testimony explaining how Carlson's social history affected his choices as an adult and lessened his moral culpability.

Generally, the new information referenced in the petition describes Carlson as strange, sad, non-violent, gullible, and desperate to have friends and fit in.

Analysis

The defense team's ability to gather social history evidence was hampered by Carlson's age and chaotic upbringing. He did not stay in places long enough to form enduring relationships with friends, teachers or others. His adult life, a series of crimes and resulting incarceration in different institutions, also did not easily lend itself to the development of favorable mitigation evidence.

Counsel used the information available to humanize Carlson and to demonstrate how those life experiences impacted his ability to make good decisions.

The investigation into Carlson's social history was not ideal, but that is not the applicable standard. The trial team's investigation and presentation of Carlson's social history was reasonable.

Although the new, non-cumulative social history information and analogies would have helped humanize the defendant, based on the totality of the evidence, that evidence would not have changed the result of the penalty phase.

Regarding counsels' performance in investigating and presenting Carlson's social history,

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

THE COURT FINDS Carlson has not established that his trial counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the jury or the appellate court would have concluded the death penalty was not warranted.

Carlson’s Mental Health

Carlson next claims his counsel were ineffective for failing to investigate and present evidence concerning his mental health during the penalty phase. Specifically, he asserts counsel did not obtain a complete mental health evaluation or psychiatric profile prior to trial, and disregarded Dr. Toma’s concern that Carlson had serious mental health issues.

Reasonableness of Performance

Facts

Carlson asserts the trial team had no reasoned basis for failing to investigate his current mental health, and that their strategic decision not to present such evidence in mitigation was likewise unreasonable.

The investigation into Carlson mental status was addressed in Guilt Phase, Section 1, “Mental Health Issues.” The trial team did not complete a mental health evaluation or psychiatric profile prior to trial. Counsel also did not discuss with experts how Carlson’s mental status could be used in mitigation. They did not present evidence concerning Carlson’s mental health at the time of the offenses or at trial.

Lead counsel did not provide information during the PCR process. In her affidavit, co-counsel asserts she expressed her belief that it was critical Carlson undergo a psychiatric

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evaluation and neuropsychological examination prior to trial. A neuropsychologist, Dr. Toma, was hired at her request.

As previously described, when Dr. Toma indicated Carlson might be “actively psychotic,” lead counsel stated the defense wouldn’t change and discharged Dr. Toma without obtaining a report, test results or follow-up information.

Co-counsel and experts consulted on the case state lead counsel was not open to discussion on presenting mental health information as mitigation. The paralegal and mitigation specialist, who did not cooperate with PCR counsel in finalizing her affidavit, “did not remember” why they did not hire declined to a psychologist to examine Carlson.

Analysis

Information and expert testimony regarding Carlson’s past and present mental health was clearly admissible during the penalty phase. A defendant’s mental health issues or cognitive defects are important mitigation evidence and could have a significant impact on a juror’s deciding whether a defendant’s life should be spared. Carlson had a known history of mental disorders.

There is a strong presumption that counsels’ actions fall within the wide range of reasonable profession assistance. *Pandeli*, 242 Ariz. at 181 ¶ 7 (citation omitted). However, counsel must have a reasoned basis for deciding not to investigate Carlson’s mental health at the time of the offense. Strategic choices, including the admission of mitigating evidence, made after less than a complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitation on the investigation. *Strickland*, 466 U.S. at 691.

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The Court can identify no reasoned basis for forgoing a thorough investigation into Carlson mental health. After assessing the evidence obtained and the risks inherent in presenting that evidence in mitigation, counsel could have elected not to present it and would have had a reasoned basis for doing so.

Even applying a heavy measure of deference to counsels' judgment,

THE COURT FINDS that, if the alleged facts are true, counsels' performance in failing to investigate Carlson's mental health to identify potential mitigation evidence fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS, based on the unreasonable limitation on the investigation, the defense team's strategic choices regarding the presentation of Carlson's mental health during the penalty phase was likewise not reasonable.

Prejudice

Facts

The trial team admitted evidence of Carlson's past mental health issues such as suicide attempts, self-harm, extended psychogenic paralysis on two occasions, prior finding of incompetency and bizarre statements and beliefs. They also admitted past diagnoses or findings of depression with a hysterical overlay, borderline characteristics, paranoid personality disorder, conversion disorder, and antisocial personality disorder.

Information that was not presented but would have been available if counsel had pursued an investigation includes the following:

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- Dr. Logan, the psychiatrist who was discharged in 2012 prior to providing a report or diagnosis, would have diagnosed Carlson was suffering from hypomania and Post Traumatic Stress Disorder, or an anxiety disorder.
- Dr. Toma, the neuropsychologist who was discharged in 2012 prior to providing a report and testing results, would have opined that Carlson likely suffered from bipolar disorder with psychotic features, or had schizoaffective disorder.
- Carlson’s 2012 neuropsychological tests would have established Carlson’s mental abilities were average or above average.

Carlson’s recent diagnoses of Alcohol Related Neurodevelopmental Disorder and Temporal Lobe Syndrome would not have been available at trial, even if counsel had further investigated Carlson’s mental health. The basis for this conclusion is described in greater detail in Guilt Phase, Section 1, “Evidence That Would Not Have Been Available.”

Analysis

To establish ineffective assistance of counsel, Carlson must prove by a preponderance of the evidence not only that counsels’ performance was deficient, but that counsels’ errors prejudiced him. *Strickland*, 466 U.S. at 687. To satisfy the second prong, he must demonstrate there is a “reasonable probability that, absent the errors, the sentencer – including the appellate court, to the extent it independently reweighs the evidence – would have concluded that balance of aggravating and mitigating circumstances did not warrant death.” *Id.* at 695.

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The defense team admitted significant mitigation related to Carlson's mental health struggles. Carlson's 2012 diagnoses and neuropsychological test results would have added little to that element of the mitigation case.

At a previous hearing, the Court stated its belief that Carlson had presented a colorable claim with regard to the investigation and presentation of mental health evidence in the penalty phase. Having now completed its analysis, the Court concludes that based on a totality of the evidence, the mental health evidence that would have been available prior to trial would have been insufficient to change the result of the penalty phase.

THE COURT FINDS Carlson has not demonstrated there is a reasonable probability that but for this alleged error, the jury or the appellate court would have concluded the death penalty was not warranted.

Having determined Carlson failed to satisfy the second prong of *Strickland* ineffective assistance of counsel test,

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

Carlson's Brain Damage

Carlson claims counsel failed to reasonably investigate brain damage. Specifically, they highlight Carlson's current diagnoses relating to Fetal Alcohol Spectrum Disorder, specifically Alcohol Related Neurodevelopmental Disorder and Temporal Lobe Syndrome.

Facts

Counsel did not investigate potential brain damage. They attempted to obtain information regarding a CT scan completed in March 2009 but were unsuccessful. The defense team was aware of and discussed the CT scan and MRI scans completed in 2011. That CT scan was within normal limits and the MRI was “reportedly normal.”

Analysis

To fairly assess the reasonableness of counsels’ decisions, the Court must reconstruct the circumstances at the time of counsels’ challenged conduct. *Strickland*, 466 U.S. at 689. A decision not to investigate must be assessed for reasonableness considering all of the circumstances, applying a heavy measure of deference to counsel’s judgment. *Id.* at 691.

Based on the information counsel had prior to trial, their decision not to further investigate brain damage was reasonable.

Prejudice

Even if counsel had further investigated possible brain damage, little additional information could have been discovered prior to trial.

- 2009 CT scan reflecting the smallest capillaries in Carlson’s brain were damaged, affecting blood flow and integrity of the deepest areas of the brain within the white matter.
- 2011 CT scan interpreted as within normal limits.
- 2011 MRI which was “reportedly normal” but revealed:
 - brain abnormalities including white matter hyperintensities which are known to affect processing speed, memory and executive functioning.

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○ Thinning of the corpus callosum that could have been related to abnormal prenatal growth including fetal alcohol spectrum disorders, subsequent traumatic brain injury, substances abuse or cardiovascular disease. There was no evidence at the time of trial (and there is no evidence now) that Carlson's mother abused alcohol.

• 2012 neuropsychological tests that demonstrate Carlson's processing speed, memory, executive functions and intellectual abilities were all average or above average. These findings would have negated any argument that the white matter hyperintensities had significantly degraded Carlson's mental functioning.

As described above, the information relied upon by Carlson in his petition would not have been available.

The additional evidence regarding brain damage that would have been available at trial was minimal. Based on a totality of the evidence, that evidence would have been insufficient to change the result of the penalty phase.

Regarding counsels' performance in investigating potential brain damage,

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

THE COURT FINDS Carlson has not established that his trial counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the jury or the appellate court would have concluded the death penalty was not warranted.

Laura Vincent
Judicial Administrative Assistant

3. Failure to Establish Mitigating Factor A.R.S. § 13-751(G)(1)

Carlson claims his defense team failed to present evidence of mental illness and brain damage during the penalty phase to establish his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, but not so impaired as to constitute a defense. A.R.S. § 13-751(G)(1).

Reasonableness of Performance

This claim is closely related to the claims addressed in Penalty Phase, Section 2, “Carlson’s Mental Health” and “Carlson’s Brain Damage” above. Even applying a heavy measure of deference to counsels’ judgment,

THE COURT FINDS that, if the alleged facts are true, counsels’ performance in failing to investigate Carlson’s mental health fell below the objective standard of reasonableness.

Prejudice

Carlson has failed to demonstrate how the diagnoses, brain abnormalities and/or neuropsychological test results available in 2012 would have established his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired.

For the reasons stated in Penalty Phase, Section 2, regarding counsels’ failure to investigate and present evidence of mental illness such as a current psychiatric diagnosis, psychological profile, and/or expert testimony as a basis for the (G)(1) aggravator,

THE COURT FINDS Carlson has not demonstrated there is a reasonable probability that but for this alleged error, the jury or the appellate court would have concluded the death penalty was not warranted.

Having determined Carlson failed to satisfy the second prong of *Strickland* ineffective assistance of counsel test,

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

4. Failure to Investigate and Effectively Present Mitigation

Here, Carlson alleges additional failures to present mitigation evidence. Many of these claims overlap with issues presented in the preceding paragraphs and will not be readdressed here.

Dr. Logan

Carlson claims Dr. Logan should have testified in the penalty phase to establish Carlson's psychiatric diagnosis as well as other mental health issues.

Dr. Logan's participation in the case was previously summarized. He was not called as a witness at trial. For the reasons described in Guilt Phase, Section 1, it was reasonable for counsel to release Dr. Logan, cease efforts to investigate Carlson's mental health through Dr. Logan, and to decline to call Dr. Logan as an expert witness.

Carlson made admissions to Dr. Logan regarding the crimes. Had the defense team called Dr. Logan to provide a psychiatric diagnosis, the State would have been privy to Carlson inculpatory statements.

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Dr. Logan's diagnosis of hypomania, post-traumatic stress disorder and/or anxiety disorder would have added to the picture of Carlson's mental health. However, compared with the serious and dramatic evidence already admitted – suicide attempts, self-harm, psychogenic paralysis, incompetency – it would have had little impact.

With regard to the decision not to further investigate Carlson's mental health through Dr. Logan and not to call Dr. Logan to present a psychiatric diagnosis in the penalty phase,

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

THE COURT FINDS Carlson has not established that his trial counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the jury or the appellate court would have concluded the death penalty was not warranted.

Dr. Haney

Carlson asserts counsel was ineffective for asking Dr. Haney to testify during the guilt phase in support of the false confession theory rather than reserving him to testify as a mitigation expert during the penalty phase.

Facts

Dr. Haney's participation in the case was previously summarized. Although he was initially hired as a mitigation expert, the trial team decided he should testify in the guilt phase to establish: Carlson's statements that he falsely confessed and why; Carlson's personality and

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behavioral traits that made him more susceptible to falsely confessing; and the brutality of the Texas prison systems, consistent with Carlson's stated fears of returning there. Prior to trial, the trial judge prohibited Dr. Haney from testifying to anything other than the brutality of the Texas prison systems.

Dr. Haney authored a letter that was admitted during the penalty phase in which he briefly addressed the Carlson's traumatic childhood as well as the impact of those experiences. Dr. Haney stated these experiences may have made Carlson susceptible to increased anxiety and fear of the Texas prison system, and to being loyal to and protective of those he reviewed as surrogate family. He referenced Carlson's hearsay statements that supported these opinions.

Analysis/Prejudice

The Court has previously found counsels' strategic decision to have Dr. Haney testify during the guilt phase, in support of the false confession theory, was reasonable. See, Guilt Phase, Section 4, "Establish Mental Illness as Cause of False Confession." Dr. Haney had unique expertise in the Texas prison system that corroborated Carlson's claims of brutality therein.

Dr. Haney was unwilling to testify both in the guilt phase and as a mitigation expert. Counsel did not have the option of calling him to testify during the penalty phase. Replacing Dr. Haney with another mitigation expert was reasonable.

Counsels' performance must be judged based on the circumstances surrounding that conduct and their perspective at that time, eliminating the distorting effect of hindsight. *Strickland*, 466 U.S. at 689. Counsel did not know until immediately prior to trial that the trial

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court was not going to allow Dr. Haney to testify as desired during the guilt phase. *Id.* At that point, it was too late to reinstate Dr. Haney as the mitigation expert.

The decision to call, or not call, an expert witness is strategic. *Denz*, 232 Ariz. at 445 ¶ 11. The decision here was reasonable. PCR counsels' disagreement with that trial strategy is insufficient to establish ineffective assistance of counsel. *See Meeker*, 143 Ariz. at 260. Further, Carlson has not demonstrated how calling Dr. Haney as a mitigation expert would have resulted in a juror or the appellate court deciding his life should be spared.

With regard to the decision to call Dr. Haney during the guilt phase rather than as a mitigation expert in the penalty phase,

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

THE COURT FINDS Carlson has not established that his trial counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the jury or the appellate court would have concluded the death penalty was not warranted.

Dr. Cunningham

Carlson claims counsel was ineffective in their use of Dr. Cunningham as a mitigation expert. Specifically, Carlson asserts Dr. Cunningham: failed to interview him to develop potential areas of mitigation; failed to interview family members or other potential sources of mitigation evidence; and presented sterile and ineffective testimony at trial.

Facts

Dr. Cunningham's participation in the case was partially summarized previously in Guilt Phase, Section 1. Dr. Cunningham did not interview Carlson or other potential mitigation witnesses. He spent over 50 hours reviewing Carlson's records, interview summaries, and other materials provided by the defense team.

Dr. Cunningham's presented extensive testimony addressing Carlson's violence risk assessment and moral culpability. He analyzed twenty-one different damaging or impairing factors relating to neurodevelopment, family/parenting, community and disturbed trajectory, each of which affected the Carlson's choices and reduced his moral culpability.

Dr. Cunningham provided detailed factual bases – Carlson's life experiences – to support his conclusions. These included: maternal stress during pregnancy; hereditary predisposition for alcohol or drug abuse and dependence; hereditary predisposition to psychological and personality disorders; chronic trauma in childhood; father's alcoholism; poverty; observed domestic violence; observed child abuse; frequent moves; frequent school changes; emotional neglect; incarceration at a young age; early onset of alcohol or drug abuse; dropping out of school; teen onset delinquency; failure in the military; psychological disorders and personality disturbances; maltreatment in Texas prisons; methamphetamine abuse near the time of the offense; and inter-relational dynamics at the compound.

Dr. Cunningham testified about Carlson's mental health while in the military including repeated self-injury. He also addressed Carlson's mental illness while in the Kansas and Texas Departments of Corrections including self-injury, two instances of conversion disorder

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(paralysis induced by psychological rather than physical issues), a finding from 1975 that Carlson was incompetent to stand trial, mental health diagnoses and suicide attempts.

Dr. Cunningham effectively educated the jury about how these factors impacted Carlson's ability to make good choices and his moral culpability. Dr. Cunningham testified via video because he was providing hospice care for his wife. He did not notify the defense team of his unwillingness to travel until early August, when trial was already underway.

Analysis

The investigation into Carlson's history was previously addressed. The defense team gathered the available records, interviewed Carlson on several occasions and interviewed family members who were willing to cooperate. The investigation was reasonable; thus, strategic decision about how to present the evidence available are entitled to great deference. *Strickland*, 466 U.S. at 690-91. If the challenged decision could have some reasoned basis, it will not support a claim of ineffective assistance of counsel. *Meeker*, 143 Ariz. at 260.

The preparation for and presentation of this mitigation evidence was far from ideal. The mitigation expert should have been personally involved in interviewing Carlson, family members and others who may have insight into Carlson's life experiences. Had he done so, Dr. Cunningham's presentation may well have been more personal and less a recitation of facts. However, Dr. Cunningham did acquire a good understanding of Carlson's life and challenges. He provided the jury a professional opinion of Carlson's reduced moral culpability and an expansive factual basis to support his opinion.

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The defense team’s presentation of mitigation evidence through Dr. Cunningham was reasonable.

With regard to the presentation of mitigation evidence through Dr. Cunningham,

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

THE COURT FINDS Carlson has not established that his trial counsels’ performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the jury or the appellate court would have concluded the death penalty was not warranted.

Dr. Toma

Carlson asserts Dr. Toma could have testified about the mental illness he observed prior to trial. This claim is encompassed within Penalty Phase, Section 2, “Carlson’s Mental Health.” Thus, it is not separately analyzed here.

Attachment Disorder

Carlson claims counsel should have obtained and presented evidence of attachment disorder prior to trial. This claim is encompassed within Penalty Phase, Section 2, “Carlson’s Mental Health.” Thus, it is not separately analyzed here.

The Mitigation Specialist’s Testimony

Carlson asserts the testimony presented by mitigation specialist was inadequate and ineffective. The portion of this claim relating to failure to call family members to testify first-hand is address in the paragraph below.

Facts

The mitigation specialist testified during the penalty phase to information contained in Carlson’s records and obtained from family members who were unwilling or unable to appear at trial. She addressed: poverty; homelessness; living in low-income projects, skid row and a motel room; Carlson’s fathers alcoholism; discharge of weapons in the home; spousal and child abuse; attempted suicide in the presence of at least one child; Carlson’s older brothers’ departure from the family home, leaving Carlson without guidance or protection; the devastating effect of Carlson’s stepfather refusing to adopt him; family suicides and attempts; lack of direction and family support; abandonment; drug use; and immaturity.

Carlson criticizes the manner in which the mitigation specialist relayed Carlson’s life experiences and that she did not highlight certain aspects of the testimony.

Analysis

The defense team’s presentation of mitigation investigation through the mitigation specialist was not ideal. Although the Court is limited to the transcript, it appears the mitigation specialist’s testimony was merely a recitation of relevant facts without emotion, sympathy or detailed descriptions that would better humanize Carlson. Testimony from those with first-hand knowledge and an affinity for Carlson would likely have had greater impact.

However, it was reasonable to rely on the mitigation specialist to convey relevant information extracted from voluminous records and statements of family members who were unwilling or unable to participate in the trial. The defense team supplemented the mitigation specialist's testimony with a variety of other mitigating evidence through exhibits, expert witnesses and a recorded interview with Carlson's oldest brother and his wife.

Counsels' performance in presenting mitigation evidence in part through the mitigation specialist fell within the wide range of reasonable professional assistance. As such,

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

THE COURT FINDS Carlson has not established that his trial counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the jury or the appellate court would have concluded the death penalty was not warranted.

No One Who Knew and Loved Carlson Testified

Carlson claims the defense team was ineffective because Skip and Wanda Carlson did not testify at trial, but instead a video recorded interview was played for the jury. Additionally, the defense team didn't interview two cousins who could have testified during the penalty phase.

Facts

Skip and Wanda lived in Kansas. Skip was experiencing significant medical issues prior to trial. On the first day of the penalty phase, counsel stated on the record that Skip was ill and

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unable to come. In her testimony, the mitigation specialist confirmed the video recording was completed because Skip had recently undergone open heart surgery and would not be able to travel from Kansas. She contradicts that statement in her unsigned PCR affidavit, indicating she thought Skip was unable to travel but didn't ask them.

Carlson lived in the same home for a few months when Rebecca Wintz and Calvin Mysinger were children. In their PCR affidavits, both provided insight into Carlson's personality as an adolescent and the difficulties he faced fitting in with others and understanding relationships. This information would have helped humanize Carlson.

The defense team interviewed Paul Mysinger, Rebecca and Calvin's brother, prior to trial, and incorporated his statements into the mitigation specialist's testimony. However, many of Rebecca and Calvin's observations are not cumulative with Paul's statements.

Analysis/Prejudice

In person testimony from Skip and Wanda Carlson would have been more impactful. However, it appears their ability to travel to Tucson was, at best, in question. It was reasonable to secure and present their testimony in a video-recorded interview.

Skip and Wanda described: the poverty and chaos of Carlson's family home; the fear the children experienced during their father's frequent rages; the older brothers' abandonment of Carlson when they left home to save themselves; Carlson's affinity for Wanda, that he was "really good" to her and helped around the house; Carlson's stepfathers poor treatment of him; the lack of direction and guidance provided; his lack of a girlfriend or special friend; that they

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believe something happened to his as teenager that cause his change of behavior; and they loved and cared about him.

The record is silent as to why the trial team did not interview Rebecca and Calvin. A decision not to investigate must be reasonable under the circumstances and the Court must apply a heavy measure of deference to counsels' judgments." *Strickland*, 466 U.S. at 690–91.

The trial team interviewed one of the three siblings who lived in the home with Carlson as children. It was reasonable for counsel to conclude information provided by the other two would have been similar and cumulative.

Further, considering the totality of the evidence, this additional mitigation evidence would not have resulted in a juror or the appellate court deciding his life should be spared.

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

THE COURT FINDS Carlson has not established that his trial counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the jury or the appellate court would have concluded the death penalty was not warranted.

5. Defense Counsel's Closing Argument

Carlson argues counsel provided ineffective assistance in his penalty phase argument. Generally, Carlson asserts counsel: (1) was unprepared; (2) misstated the law by inviting the jury to weigh mitigation against aggravation; (3) argued mental illness without admitting

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supporting evidence; (4) denigrated his client; (5) wrongfully compared Carlson to his siblings based on failure to investigate the family members' history; (6) argued remorse for killing one victim thereby highlighting the lack of remorse for killing the second victim; (7) argued Carlson wasn't the "worst of the worst" which was not an applicable legal standard; and (8) stating, "I'm not going to say Michael Carlson deserves life. That is not the issue here..."

The alleged failure to argue Carlson's mental illness and neurological disorders, as well as the dysfunction of other family members are derivative of the failure to investigate or present evidence on these issues addressed previously. As such, they will not be addressed here.

The Court agrees the penalty phase argument is not a model of clarity and persuasion. However, the argument, taken as a whole, did not mislead the jury regarding the law nor did it unnecessarily denigrate or attack Carlson. Further, the argument is the product of a reasonable, discernable strategy.

Defense counsel argued, and the trial court instructed on, 21 mitigating factors: circumstances of the crime – role, motive, lack of premeditation; failure to prosecute another who is legally responsible for these crimes; protective of those he care about, who care about him; desire to be part of a family always wants to be helpful and accepted; remorse for Becky; the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; dysfunctional family; upbringing in poverty; child abuse; sexual abuse in family and father's friends; father abusive to mother, seen by children; transient childhood; fear of abandonment; substance abuse; abuse in Texas prison system; lack of future dangerousness in

Laura Vincent
Judicial Administrative Assistant

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prison; assistance rendered to previous fellow inmates and expectance he will assist future fellow inmates; volunteer at community center in Avra Valley; will be in prison the rest of his life; present family support, brother Skip and his wife Wanda; and effect of execution on family members.

The defense admitted evidence during the guilt and penalty phases to support each of these arguments. They were hampered by the facts. For example, Carlson expressed remorse only for killing Becky, not KR. Also, much of the mitigating evidence was a double-edged sword and the admission of related derogatory information was unavoidable. The defense could not hide the fact Carlson had committed serious crimes in the past, had spent most of his adult life in prison and had little evidence of redeeming characteristics or behavior. The defense attempted to place the negative aspects of Carlson's history or character in context and to minimize their impact. This was a reasonable strategy.

Counsel's penalty argument, while not ideal, falls within the wide range of reasonable professional assistance. Further, even if counsel had not made the alleged errors in penalty phase argument, Carlson would have been sentenced to death based on the evidence admitted.

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

THE COURT FINDS Carlson has not established that his trial counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the jury or the appellate court would have concluded the death penalty was not warranted.

6. Failure to Object to Prosecutor’s Closing Argument

Carlson argues his counsel were ineffective for failing to object to the prosecutor’s penalty argument. Specifically, the State noted the lack of direct evidence that Carlson was physically or sexually abused as a child, and that his other siblings who were targets of abuse did not subsequently commit murder but went on to live normal lives.

Carlson asserts the defense team should have objected because the prosecutor essentially argued that the jury could not consider his difficult childhood or child abuse which is a legitimate mitigating factor.

Carlson’s claim is without merit. The prosecutor did not argue that the jury could not consider the evidence concerning childhood abuse and family dysfunction as a mitigating factor. Rather, her comments rebutted Carlson’s plea for leniency based on these factors and highlighted circumstances which could bear upon the weight the jury should give that mitigating evidence. Such comment is proper. *See Pandeli*, 242 Ariz. at 256 ¶ 31; *Sims v. Brown*, 425 F.3d 560, 580 (9th Cir. 2005).

Had the defense team objected, the objection would have been overruled. At most, the trial court would have re-instructed the jury that counsel’s arguments were not evidence, and the court’s instructions on the law must be applied.

Regarding counsel not objecting to the prosecutor’s penalty phase argument,

Laura Vincent
Judicial Administrative Assistant

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

THE COURT FINDS Carlson has not established that his trial counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the jury or the appellate court would have concluded the death penalty was not warranted.

7. Failure to Challenge Jury Instruction

Carlson argues trial and appellate counsel were ineffective for failing to object to the court's penalty instructions. Specifically, he believes the trial court wrongfully limited the consideration of mitigation evidence to evidence presented during the aggravation and penalty phases.

The penalty phase preliminary and final instructions properly advised the jury they could consider the evidence presented throughout the trial in assessing mitigation. These instructions included a statement that the evidence the jury was to consider consisted of testimony of witnesses and exhibits the court admitted in evidence during the trial of this case, during the first part of the sentencing hearing and during the second part of the sentencing hearing.

Additionally, the court instructed members they were not limited to these proposed mitigation circumstances but could consider anything related to the defendant's character, propensity, history or record or circumstances of the offense. Jurors were repeatedly advised they must each individually determine whether mitigation circumstances exist. Finally, the

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court advised the jurors that the law did not presume what is the appropriate sentence and that the defendant did not have the burden of proving that life was the appropriate sentence.

In summary, the court correctly instructed the jury on applicable law. Objecting to those instructions at trial and raising this claim on appeal would have been futile.

Regarding counsels' failure to contest penalty phase instructions,

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

THE COURT FINDS Carlson has not established that either his trial or appellate counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the result of the proceeding would have been different, or he would have prevailed on appeal.

8. Failure to Request *Simmons* Instruction

Carlson argues trial and appellate counsel were ineffective for failing to request a *Simmons* instruction. Under *Simmons v. South Carolina*,⁹ and its progeny, if a capital defendant's future dangerousness is placed at issue and the only available alternative to death is life imprisonment without possibility of parole, the Due Process Clause entitles him to inform the jury of his parole ineligibility, either by a jury instruction or in arguments by counsel.

⁹ 512 U.S. 154, 168-69 (1994).

Facts

Carlson’s future dangerousness was placed at issue through the admission of evidence regarding his prior convictions, a victim impact statement and penalty argument of the State. He was not eligible for parole. The defense team did not request a *Simmons* instruction, nor did they address the unavailability of parole in Arizona. The issue was not raised on appeal.

Analysis

In assessing counsels’ performance, the court must make every effort “to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsels’ challenged conduct, and to evaluate the conduct from counsels’ perspective at the time.” *Strickland*, 466 U.S. at 689.

Prior to trial, the Arizona Supreme Court had ruled *Simmons* did not apply in Arizona because the law provided for a possibility of release after 25 years. *See State v. Cruz*, 218 Ariz. 149, 160, ¶ 42, 181 P.3d 196, 207 (2008); *State v. Hargrave*, 225 Ariz. 1, 15, ¶ 53, 234 P.3d 569, 582-83 (2010); *State v. Hardy*, 230 Ariz. 281, 293, ¶ 58, 283 P.3d 12, 24 (2012). Thus, it was reasonable for counsel not to request a *Simmons* instruction. Had the defense team done so, the trial court would have denied the request based on controlling caselaw.

The United States Supreme Court decision reversing the Arizona Supreme Court and ruling the *Simmons* ruling and its progeny must be applied in Arizona was not issued until 2016. *See Lynch v. Arizona*, 578 U.S. 1154 (2016).

Because the appeal in this case preceded that ruling, appellate counsel’s failure to assert the issue was likewise reasonable. Had they included this claim, the Arizona Supreme Court would not have found fundamental error.

Prejudice

The Court further notes Carlson was not prejudiced by the failure to request an instruction or present evidence establishing parole was not available in Arizona. The evidence presented established Carlson would never be released from prison.

The defense team admitted evidence demonstrating Carlson had been sentenced to 99 years in prison in Texas, had violated the highest level of parole, and would be returned to prison for the rest of his natural life if returned to Texas.

Additionally, they established the defendant would serve the rest of his life in prison in Arizona if not sentenced to death. Both defense experts who testified in the penalty phase stated Carlson would spend the rest of his life in prison. One expert's sole purpose was to demonstrate lack of future dangerousness to the jury, specifically that Carlson could be housed in Arizona prisons for the rest of his life without endangering staff or other inmates.

Regarding counsel's failure to request a *Simmons* instruction,

THE COURT FINDS Carlson has not presented a colorable claim in that even if the alleged facts are true, they would not probably have changed the verdict or sentence.

THE COURT FINDS Carlson has not established that either his trial or appellate counsels' performance in this area fell below the objective standard of reasonableness.

THE COURT FURTHER FINDS Carlson has not demonstrated there is a reasonable probability that but for these alleged errors, the result of the proceeding would have been different, or he would have prevailed on appeal.

CUMULATIVE EFFECT OF ERRORS

THE COURT FINDS Carlson has not demonstrated there is a reasonable probability that but for the cumulative effect of counsels’ errors, the result of the proceeding would have been different.

ACTUAL INNOCENCE

Carlson also claimed actual innocence under Rule 32.1(h) based on the facts and arguments presented in his petition. The current Rule 32.1(h) provides a ground for post-conviction relief when:

“the 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 guilty of the offense beyond a reasonable doubt, or 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.*”

The amendment became effective on January 1, 2020, and applies to all actions pending on that date, except to the extent the Court determines that applying the amendment would work an injustice. In that case, the former rule applies.

The former version of Rule 32.1(h), rather than the language italicized above, stated, “or that the death penalty would not have been imposed.” Because the former rule provides a broader scope of relief, the Court applies it in this case.

THE COURT FINDS Carlson has not demonstrated by clear and convincing evidence that the facts underlying his claim would be sufficient to establish that no reasonable fact finder would find him guilty of the offenses beyond a reasonable doubt.

RULING

THE COURT FINDS Carlson has not demonstrated 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.

THE COURT FURTHER FINDS Carlson has not demonstrated by clear and convincing evidence that the facts underlying the claim would be sufficient to establish the death penalty would not have been imposed.

CONCLUSION

Having identified all precluded claims, and having determined that no remaining claims present a material issue of fact of law that would entitle the defendant to relief under this rule,

IT IS ORDERED summarily dismissing the Petition of Post-Conviction Relief under Arizona Rule of Criminal Procedure 32.11(a).

IT IS FURTHER ORDERED vacating the status conference set for August 30, 2021, at 10:00 AM.


HON. RENEE T. BENNETT
(ID: 0faf9c8c-58ec-43bc-86bd-bb1d87c619c2)

cc: Amy B Krauss, Esq.
Daniel H. Cooper, Esq.
Lacey Alexander Stover Gard, Esq.
Attorney General - Criminal - Tucson
Clerk of Court - Appeals Unit
Clerk of Court - Criminal Unit
Office of Court-Appointed Counsel

Laura Vincent
Judicial Administrative Assistant