No. 18-1267

In the

Supreme Court of the United States

ANGELA RENE LEEMAN,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Arizona, Division Two

BRIEF IN OPPOSITION

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NON-CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. More than two decades after Petitioner Leeman received a total aggregate sentence of 61 years' imprisonment with the possibility of release after 57 years based on 13 repetitive felony child-abuse convictions and two repetitive felony drug convictions, the state court precluded her from challenging the cumulative sentence on the ground that it should be categorically banned as cruel and unusual punishment under the Eighth Amendment. Does this Court have jurisdiction to review the state court's procedural-bar-based denial of relief on collateral review, where this Court has not categorically banned partially discretionary, aggregate term-of-years sentences based on repetitive criminal offenses on which parole is partially available and totaling *less* than the juvenile defendant's average life expectancy?

2. Even had Leeman's convictions and sentences not been final on direct review more than two decades ago, would this case have presented a poor vehicle to address extending current Eighth Amendment jurisprudence in the juvenile context given that it involves a nearly-18-year-old parent's involvement in the repeated bone-fracturing physical torture and sodomization of her months-old infant?

STATEMENT OF RELATED PROCEEDINGS

- *State v. Angela Rene Leeman*, No. 2 CA–CR 1994–0364 (memorandum decision on direct appeal issued March 14, 1996).

- *State v. Angela Rene Leeman*, No. 2 CA–CR 1997–0286–PR (memorandum decision in the first post-conviction-relief proceeding granting review and denying relief issued May 21, 1998).

- Second notice of post-conviction relief summarily dismissed August 16, 1999.

- Third notice of post-conviction relief summarily dismissed August 24, 2004.

- *State v. Angela Rene Leeman*, No. 2 CA–CR 2017–0419–PR (memorandum decision in the fourth post-conviction-relief proceeding granting review and denying relief issued March 9, 2018; review by the Arizona Supreme Court denied October 30, 2018).

- *Angela Rene Leeman v. Charles L. Ryan, et al.*, No. CIV 18–00551–TUC–FRZ (habeas corpus proceeding in federal district court stayed pending the outcome of the present proceeding).

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OPINIONS BELOW

The Arizona Court of Appeals' March 14, 1996, decision affirming Leeman's convictions and sentences on direct appeal is unreported and reproduced as Respondent's Appendix A. The state trial court's November 27, 2017, ruling denying relief on state collateral review is unpublished and reproduced as Petitioner's Appendix B. The Arizona Court of Appeals' March 9, 2018, decision granting review but denying relief is unpublished and reproduced as Petitioner's Appendix A. The Arizona Supreme Court's October 30, 2018, order denying review is unreported and reproduced as Petitioner's Appendix C.

STATEMENT OF JURISDICTION

The Arizona Supreme Court denied review on October 30, 2018. On January 17, 2019, Justice Kagan granted Leeman's request to extend the filing date of the Petition for Writ of Certiorari to and including March 29, 2019. On May 22, 2019, Justice Kagan granted Respondent's request to extend the filing date of the Court-ordered Brief in Opposition to and including July 29, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Rule 32.2(a)(2) of the Arizona Rules of Criminal Procedure (2016) provides:

> A defendant shall be precluded from relief under this rule based upon any ground . . . [f]inally adjudicated on the merits on appeal or in any previous collateral proceeding.

Rule 32.2(b) provides in relevant part:

> Rule 32.2(a) shall not apply to claims for relief based on [*inter alia*] Rule[] 32.1[] . . . (g).

Rule 32.1(g) provides as a ground for post-conviction relief the fact that:

> There has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Angela Leeman gave birth to "Shaun"[1] (S.L.) in October 1992, when she was 17 years old. (Resp. App. A, at 3a; R.T. 5/17/94, at 137–39; R.T. 6/30/94, at 2.[2]) She met Gregory Hatton in early 1993,[3] began a romantic relationship with him, and moved herself and Shaun into his residence by March 1993. (Resp. App. A, at 3a; R.T. 5/17/94, at 114, 145–46.) The couple then began to share in the day-to-day care of Shaun. (R.T. 5/17/94, at 117–18.)

Leeman, Hatton, and a number of the couple's friends regularly engaged in drug use at the couple's residence. (Resp. App. A, at 3a; R.T. 5/12/94, at 126–28, R.T. 5/13/94, at 42–45, 175; R.T. 5/23/94, at 98.) Those same friends watched Leeman's care and apparent concern for Shaun lessen significantly over time. (Resp. App. A, at 3a–4a; R.T. 5/12/94, at 194; R.T. 5/13/94, at 42–44; R.T. 5/17/94, at 114–15, 134; R.T. 5/18/94, at 123; R.T. 5/20/94, at 9, 40.) They also began to notice as early as March 1993 signs of physical abuse of Shaun and general physical decline: including bruising to his face and penis, an eight-inch

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[1] "Shaun" is a pseudonym.

[2] "R.T." refers to the Record Transcript in Arizona Court of Appeals case No. 2 CA–CR 2017–0419.

[3] Because it was undisputed at trial that Leeman first met Hatton when she was 17 years old and that all the charged crimes occurred after she met him, the state trial court erred in stating in its ruling denying relief on collateral review that those events had occurred when Leeman was 15 years old. (Pet. App. B, at 8a.)

long burn on his leg, cuts on the bridge of his nose, what appeared to be a cigarette burn on his face, scabs on his legs, and pus-filled "blisters" around his mouth. (Resp. App. A, at 3a; R.T. 5/12/94, at 130, 133, 177–79, 221–23; R.T. 5/13/94, at 48–49, 54; R.T. 5/17/94, at 120–22; R.T. 5/18/94, at 126; R.T. 5/20/94, at 48–50; R.T. 5/23/94, at 125–26.)

A number of the couple's friends, who were themselves regular drug users, voiced concern about Shaun's injuries and overall condition and recommended that the couple seek medical treatment for him, but each and every time the couple gave identical, innocent explanations for Shaun's various injuries, downplayed his infirmities, and did not otherwise seek medical treatment. (Resp. App. A, at 3a–4a; R.T. 5/11/94, at 146–47, 154; R.T. 5/12/94, at 131–34, 141, 177, 179, 222–23; R.T. 5/17/94, at 121–22; R.T. 5/20/94, at 49–50, 109–12; R.T. 5/23/94, at 105–06.)

On one particular occasion, one of Leeman's closest friends and a fellow drug user asked her why she did not seek medical treatment for Shaun in light of his obvious physical infirmities; Leeman responded that "CPS would get on her butt." (R.T. 5/12/94, at 130–34.) On June 6, 1993, that same close friend called CPS (Child Protective Services) about Shaun's deteriorating condition due to her concern that he was about to die, notwithstanding "her fear of what would happen to Angela [Leeman] and Greg [Hatton]" once CPS became involved. (Resp. App. A, at 3a; R.T. 5/20/94, at 136; R.T. 5/23/94, at 198.)

Less than six days later, in the early morning hours of June 12, 1993, Leeman, who was at that point six weeks away from her eighteenth birthday and legal adulthood, took eight-month-old Shaun to the emergency room of St. Joseph's Hospital in Tucson. (Resp. App. A, at 3a; R.T. 5/23/94, at 167; R.T. 6/30/94, at 2.) She told medical personnel that the infant had been running a consistently high fever for 10 days, had fallen off the couch and hit his eyelid on her high-heeled shoe three days earlier, and had been "dead weight" for the prior two days. (R.T. 5/11/94, at 94, 96, 100.)

Medical personnel quickly determined that the infant had bruising on his right eyebrow and the front and back of his right elbow, his temperature was 104.4 degrees, he had blood in his urine and stool, and he "had eye movements, but really no spontaneous activity [and] no motor movement of his extremities." (R.T. 5/11/94, at 60; R.T. 5/23/94, at 168–79, 174–75.) In short, he was "critically ill" and was immediately administered intravenous fluids and antibiotics and then transferred to the pediatric care unit of the Tucson Medical Center. (R.T. 5/11/94, at 55, 63, 67.) Once there, his condition quickly worsened and he was transferred to the intensive care unit. (R.T. 5/12/94, at 90.)

Over the following hours and days, medical personnel discovered that the infant had a slew of horrific injuries and maladies. He had "very poor rectal tone," indicative of repeated sodomization. (Resp. App. A, at 3a; R.T. 5/12/94, at 57.) Because his

rectum did not fully close, "liquid stool" continually flowed from his anus. (R.T. 5/18/94, at 181–82.)

The infant was also covered "from head to toe" with Herpes Simplex I lesions, including in and around his mouth, on his genitals, and around his rectum. (Resp. App. A, at 3a; R.T. 5/19/94, at 39, 41.) The untreated lesions in his mouth had become septic, causing the tissue to become "dead or necrotic" and "just weep away" if touched. (R.T. 5/11/94, at 84.)

The infant's liver was enlarged, indicating severe malnutrition. (R.T. 5/12/94, at 48.) Due to the raging infection in his mouth, he was unable to orally consume nutrition until eight days after medical treatment began. (R.T. 5/23/94, at 11.) Upon observing that the infant could not move either his arms or his legs, medical personnel X-rayed his body and discovered at least 10 fractures, including fractures to all four extremities, varying in age from a few weeks or months old to only a few days old. (Resp. App. A, at 3a; R.T. 5/12/94, at 45, 96–97; R.T. 5/17/94, at 53–62, 67–72, 97; R.T. 5/18/94, at 104–05, 108–14.) Some of the fractures involved permanent bone-growth distortion that would continue to worsen as the boy aged. (R.T. 5/18/94, at 104–14.)

When a detective asked Leeman during an interview about the infant's significant injuries and maladies, she denied any prior knowledge of them. (State's Exhibit 246, at 88.) She also stated without equivocation that Hatton had never hit or threatened to hit her. (*Id.* at 98.) The detective arrested Leeman at the conclusion of the interview and, during a search incident to the arrest, found in her pants pocket a

baggie containing methamphetamine, a glass straw, and a drug pipe. (R.T. 5/19/94, at 34–35, 68; R.T. 5/24/94, at 34–35.)

Leeman was charged with 13 counts of felony child abuse for her abusive mistreatment of and/or failure to protect or seek medical care for Shaun and with felony possession of methamphetamine and felony possession of drug paraphernalia for the contraband found on her person during her arrest. (Resp. App. A, at 2a; R.T. 6/30/94, at 2–5.) Her boyfriend Gregory Hatton was charged with 12 counts of felony child abuse and one count of sexual conduct with a minor for his abusive mistreatment of and/or failure to protect or get medical treatment for the infant. (Resp. App. A, at 2a; R.T. 6/30/94, at 5–7.)

Because it was impossible to establish whether Leeman or Hatton had caused the various physical injuries (as opposed to the sexual injury), the State argued at the couple's joint trial that "in each instance of abuse, one of them [had] caused the injury and the other [had unlawfully] permitted it to occur." (Resp. App. A, at 3a.) The jury found them both guilty as charged. (*Id.* at 2a, 4a; R.T. 6/30/94, at 2–7.)

All but two of Leeman's 15 felony convictions were repetitive offenses under Arizona law, and parole or any other form of early release was unavailable on the two most serious convictions for class-two-felony child abuse. *See* former A.R.S. § 13–604(C) (1993), and former A.R.S. § 13–604.01(B),(D), and (E) (1992). (*See* R.T. 6/30/94, at 41–44.) The trial court imposed consecutive prison terms on the three convictions that were required to run consecutively under Arizona law:

the two class-two-felony child-abuse convictions and one of the class-four-felony child-abuse convictions. (*Id.*) The total maximum sentence available on those three convictions was 67 years' imprisonment, *see id.*, but in an exercise of its discretion, the trial court imposed only a total sentence of 61 years' imprisonment with the possibility of release after 57.3 years, based, in part, on Leeman's juvenile status when she committed the crimes. (*Id.*)

Specifically, the court imposed a partially aggravated 20-year flat-time prison term on the first-in-time and thus non-repetitive class-two-felony conviction, to be followed by a partially aggravated 11-year prison term with the possibility of parole after serving two-thirds (7.3 years) of the sentence on the repetitive class-four-felony conviction, to be followed by a partially aggravated 30-year flat-time prison term on the other, repetitive class-two-felony conviction.[4] (*Id.*) Accordingly, Leeman received a total sentence of 61 years' imprisonment with a possibility of release after 57.3 years, when she will be 75 (almost 76) years old—a number of years below her current average life expectancy.[5] (Resp. App. A, at 2a.)

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[4] Leeman's parole on the 11-year prison term would not result in her release from prison given that it is followed by the 30-year prison term but it would move up the starting date of the 30-year prison term.

[5] The average life expectancy at birth of a Caucasian female born in 1975 is 77.3 years. *See* U.S. Dep't of Health and Human Servs., Ctrs. for Disease Control and Prevention, Nat'l Ctr. for Health Statistics, *Table 15*, HEALTH, UNITED STATES REPORT (2016), *available at* https://www.cdc.gov/nchs/data/hus/hus16.pdf#015.

The trial court imposed a substantially longer total sentence on Hatton. (R.T. 6/30/94, at 46–47.) Hatton's conviction for sexual conduct with a minor, however, was subsequently vacated on direct appeal for insufficient evidence that he had been the individual who had sexually abused the infant. (*See* Resp. App. A, at 2a.) And, because the vacation of that conviction affected the sentences imposed on other convictions, he was fully resentenced. (*Id.*) His current release date is in July 2038, when he will be 73 years old. *See* Arizona Dep't of Corrections, Inmate Data Search *available at* http://tinyurl.com/AZDOCData. (R.T. 6/30/94, at 5.)

On direct appeal, Leeman challenged her total 61-year sentence with the possibility of release after 57 years on the ground that it is "grossly disproportionate considering the circumstances of the offense[s] and her background" and, thus, violates the Eighth Amendment prohibition against cruel and unusual punishment under *Harmelin v. Michigan*, 501 U.S. 957 (1991). (Resp. App. A, at 19a.) The Arizona Court of Appeals found the claim meritless and, finding her other claims meritless with a single exception, affirmed her convictions and sentences but remanded for resentencing on one count in her presence. (*Id.* at 19a–22a.)

Although no data is available for the average life expectancy of a Caucasian female of Leeman's current age of 45, the average life expectancy of a Caucasian female who is born in 1975 and reaches 65 years of age is 83.2 years. *Id.* Accordingly, Leeman's current average life expectancy is between 77.3 and 83.2 years.

Leeman sought review by the Arizona Supreme Court; that court summarily denied review without comment in October 1996. Leeman's convictions and sentences became final on direct appeal 90 days later, in December 1996.

Because Leeman's Eighth-Amendment-based challenge to her total aggregate sentence was "[f]inally adjudicated on the merits on direct appeal," she is precluded under Arizona Rule of Criminal Procedure 32.2(a)(2) from re-litigating her total sentence on that ground on state post-conviction review unless and until "[t]here has been a significant change in the law that if determined to apply to [her] case would probably overturn [her total] . . . sentence." Rule 32.1(g).

In December 2016—two decades after Leeman's convictions and sentences became final on direct appeal—she filed a (fourth) notice of post-conviction relief (PCR) in the state trial court, requesting the opportunity to re-litigate her Eighth Amendment claim in light of this Court's holdings in, *inter alia*, *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 560 U.S. 48 (2010), and *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718 (2016). (R.O.A. 4.[6]) She made that request notwithstanding that she conceded that *none* of those cases applies to her particular total sentence, as required under Rule 32.2(a)(2), and, thus, that she was seeking to extend the scope of current Supreme Court jurisprudence on state collateral review. (*Id.* at 3.)

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[6] "R.O.A." refers to the Record on Appeal in Arizona Court of Appeals case No. 2 CA–CR 2017–0419.

Specifically, her counsel in that proceeding, who is also counsel of record in the present proceeding, stated:

> Petitioner has previously sought . . . relief from her consecutive sentences on the ground that the cumulative sentence of 61 years was cruel and unusual punishment. In response to the United States Supreme Court's holdings in *Roper v. Simmons*, 543 U.S. 551 (2005) [(categorically banning the execution of juveniles)], *Graham* [], *Miller* [], and *Montgomery* [], state courts throughout the country have been applying *the **logic of** those cases* to cases such as this, where a juvenile was sentenced to consecutive sentences that, when considered, cumulatively, [allegedly] guarantee that the defendant will never be released from prison.
>
> In *State v. Valencia/Healer*, [386 P.3d 392 (Ariz. 2016)], the Arizona Supreme Court recognized that *Montgomery* changes the law in Arizona. *Although none of these United States Supreme Court cases answers the question whether **Petitioner** may be entitled to relief from her 61-year cumulative sentence*, [she] must have an opportunity to seek relief in this Court by filing a petition for post-conviction relief. Petitioner asks this Court to appoint the Public Defender to brief *this **novel** issue.*

(*Id.*, emphasis and alterations added and internal citations omitted.)

The state trial court summarily denied post-conviction relief under Rule 32.2(a)(2) based solely on

its agreement with Leeman that neither of this Court's categorical bans on life-without-the-possibility-of-parole sentences imposed on a juvenile offender for a single criminal offense in *Graham* and *Miller/Montgomery* applied to Leeman's re-challenge to her consecutive term-of-years sentences because her sentences, whether viewed individually or cumulatively, did not amount to a sentence of life without the possibility of parole. (Pet. App. B, at 11a–16a.) Accordingly, the trial court did not reach the merits of Leeman's novel Eighth Amendment claim. (*Id.*)

Leeman sought review by the Arizona Court of Appeals, which granted review but denied relief in a memorandum decision, agreeing with the trial court's procedural-bar-based ruling. (Pet. App. A, at 3a–4a.) Leeman then sought review by the Arizona Supreme Court, which summarily denied review without comment on October 30, 2018. (Pet. App. C.)

REASONS FOR DENYING THE WRIT

1. THIS COURT LACKS JURISDICTION TO REVIEW THE STATE COURT'S PROCEDURAL-BAR-BASED DENIAL OF RELIEF ON COLLATERAL REVIEW.

It is well established that this Court will not review a state court decision if "the decision of that court rests on a state law ground that is independent of the federal question [presented to the Court] and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991). Moreover, "[i]n the context of direct review of a state court judgment, the independent and adequate state ground doctrine is

jurisdictional." *Id.* at 729. That is because, "[w]hen this Court reviews a state court decision on direct review . . ., it is reviewing *the judgment*," and if "resolution of a federal question cannot affect the judgment, there is nothing for the Court to do" and any federal constitutional pronouncements rendered on review would merely "be advisory." *Id.* at 729–30 (emphasis in original).

It is also long-standing and regularly applied Arizona law that a criminal defendant is precluded from post-conviction relief based on any ground "[f]inally adjudicated on the merits on appeal or in any previous collateral proceeding," Rule 32.2(a)(2), unless and until "[t]here has been a significant change in the law that *if determined to apply to defendant's case* would probably overturn the defendant's conviction or sentence." Rule 32.1(g) (emphasis added).

Accordingly, because Leeman unsuccessfully challenged her total aggregate sentence on Eighth Amendment grounds on direct appeal in 1996, she can re-litigate the claim only if the state court finds a significant change in Eighth Amendment jurisprudence that both (1) applies retroactively to a case on collateral review and (2) necessitates overturning her total sentence.

As discussed above, the state trial court agreed with Petitioner Leeman's own concession in her PCR notice that "none of [Petitioner's cited] United States Supreme Court cases answers the question whether *Petitioner* may be entitled to relief from her 61-year cumulative sentence" and that she was asserting a "novel" Eighth Amendment claim simply premised on

the "logic of," and not mandated by, this Court's cases. (Pet. App. B, at 11a–16a; R.O.A. 4, at 3, emphasis added.) In accord with that express concession, the trial court summarily denied post-conviction relief pursuant to Rule 32.2(a)(2) without considering the merits of Leeman's *Graham*/*Miller*/*Montgomery*-extending Eighth Amendment claim. (Pet. App. B., at 11a–16a.)

Leeman now invites this Court to use her case as a vehicle by which to extend this Court's narrow categorical ban on life imprisonment without the possibility of parole for a single non-homicide offense in *Graham* and its narrow categorical ban on mandatory life imprisonment without the possibility of parole for a single homicide offense in *Miller*/*Montgomery* to her specific total sentence without squarely acknowledging that the trial court found her novel categorical-ban-based Eighth Amendment claim precluded on collateral review without reaching its merits because neither of the categorical bans imposed in *Graham* and *Miller*/*Montgomery* applied to Leeman's total aggregate sentence.

Even had Leeman squarely acknowledged the trial court's preclusion ruling and attempted to challenge it, any such attempt would have been unavailing because it is beyond dispute that this Court has not imposed a categorical ban on partially discretionary, consecutive term-of-years sentences based on repetitive criminal offenses on which parole is partially available and totaling *less* than the juvenile's average life expectancy—the latter fact being contrary to Leeman's repeated suggestions in her Petition that she has been

sentenced "to die in prison," is "guarantee[d] a death in prison," and has "no hope of reentering society." (Pet. at 2, 7–10.) *See Graham*, 560 U.S. at 124 (Justice Alito opines without disagreement by the majority that "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole.") (Alito, J., dissenting); *Id.* at 113 n.11 (Justice Thomas opines without disagreement by the majority that "the Court counts only those juveniles sentenced to life without parole and excludes from its analysis all juveniles sentenced to lengthy term-of-years sentences (*e.g.*, 70 or 80 years' imprisonment).") (Thomas, J., dissenting); *see also Willbanks v. Missouri Dep't of Corr.*, 522 S.W.3d 238, 242 (Mo. 2017) ("*Graham* did not address juvenile offenders who, like Willbanks, were sentenced to multiple fixed-term periods of imprisonment for multiple nonhomicide offenses," and "[n]either this Court nor the Supreme Court has ruled on the constitutional impact of consecutive sentences.").[7]

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[7] Leeman also invites this Court to address "whether, in assessing gross disproportionality" on a case-by-case basis under *Harmelin v. Michigan*, 501 U.S. 957 (1991), "a court should review the cumulative effect of the sentence imposed rather than each sentence in isolation." (Pet. at i, 16–23.) This Court lacks jurisdiction to consider that issue because: **(1)** Leeman did not raise it in state court and, thus, there exists no state judgment thereon to review, and **(2)** the state court would otherwise have found the claim precluded under Rule 32.2(a)(2) given that this Court must first decide that issue in Leeman's favor in the appropriate case and deem the new ruling retroactive on collateral review before she can re-litigate her total-sentence claim on that ground.

In sum, in the unlikely event that this Court decides at some future point to impose a categorical ban on partially discretionary, consecutive term-of-years sentences based on repetitive criminal offenses on which parole is partially available and totaling less than the juvenile's average life expectancy and deems that ruling retroactive to cases on collateral review, Leeman would have the opportunity to re-litigate her total-sentence claim under Rule 32.1(g) of the Arizona Rules of Criminal Procedure. In the absence of such a ruling, however, Leeman is precluded under state law from re-litigating her total sentence on collateral review.

2. EVEN HAD LEEMAN'S CONVICTIONS AND SENTENCES NOT BEEN FINAL ON DIRECT APPEAL, THIS CASE PRESENTS A POOR VEHICLE TO ADDRESS EXTENDING CURRENT EIGHTH AMENDMENT JURISPRUDENCE IN THE JUVENILE CONTEXT.

Even had Leeman's sentences not been final on direct appeal, her case presents a poor vehicle to address extending current Eighth Amendment jurisprudence in the juvenile context given the life-threatening, heinous, and repetitious nature of the offenses of which she was convicted.

This Court reasoned in *Graham* that it is defendants "who do not kill, intend to kill, or *foresee that life will be taken*" that are "categorically less deserving of the most serious forms of punishment than are murderers." 560 U.S. at 68 (emphasis added). Even assuming for the sake of argument that Leeman did not personally cause any of her infant's injuries and *merely* permitted her boyfriend or someone else to

continue inflicting the injuries so that "CPS would [not] get on her butt," she waited until her infant was on the brink of death before seeking medical treatment for his readily obvious life-threatening illnesses and injuries—including his prolonged high fever, inability to drink or feed, body-covering and mouth-necrotizing herpes lesions, anal damage and constant stool leakage, and arm-and-leg-disabling-and-distorting bone fractures—and that it was only through extensive emergency medical intervention that her infant did not die.

This Court also reasoned in *Miller* that juveniles are less deserving of the harshest forms of punishment if their crimes reflect mere "transient rashness, proclivity for risk, and inability to assess consequences" due to the still-developing "parts of the brain involved in behavior control." 567 U.S. at 472. Again, even assuming that the nearly-18-year-old Leeman *merely* allowed her boyfriend or others to physically, psychologically, and sexually brutalize her infant over an extended period of time, such depraved indifference was neither merely "transient" nor "rash" in nature, the "risk" for such indifference fell entirely on her helpless infant, and she made the cold calculation or "assessment" that the ongoing and life-altering "consequences" to her infant son did not outweigh her self-focused wish to be free from CPS interference.

CONCLUSION

Based on the foregoing authorities and arguments, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

2 CA-CR 94-0364

Department A

[Filed March 14, 1996]

THE STATE OF ARIZONA,)
)
Appellee/Cross-Appellant,)
)
v.)
)
ANGELA RENEE LEEMAN,)
)
Appellant/Cross-Appellee.)
)

MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT
OF PIMA COUNTY

Cause No. CR-42678

Honorable John S. Leonardo, Judge

AFFIRMED; REMANDED FOR RESENTENCING

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P E L A N D E R, Judge.

After a joint jury trial with co-defendant Gregory Hatton, appellant was found guilty of thirteen counts of child abuse (including two class two felonies and eleven class four felonies), one count of possession of methamphetamine (a class four felony), and one count of possession of drug paraphernalia (a class six felony).[1] She was sentenced to consecutive 20 and 30-year terms of imprisonment, to be served day for day, for the two class two felony convictions. On the remaining thirteen counts, appellant was sentenced to concurrent prison terms, the longest of which was 11 years, to be served consecutively to the class two felony sentences. Therefore, the total sentence was 61 years.

Appellant raises numerous issues on appeal, none of which merits reversal. The state cross-appeals from the trial court's failure to make nine of the sentences consecutive. We affirm appellant's convictions, reject

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[1] This court affirmed Hatton's convictions of multiple counts of child abuse, reversed his conviction of one count of sexual conduct with a minor, and remanded for resentencing in *State v. Hatton*, 2 CA-CR 94-0368 (memorandum decision filed June 6, 1995).

the state's cross-appeal, but remand for resentencing on one count.

Viewing the evidence in the light most favorable to sustaining the verdict, *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989), the facts are as follows. On June 12, 1993, appellant, then seventeen-years-old, took her eight-month-old son S. to a hospital emergency room in Tucson. The child was critically ill and required pediatric intensive care. He had widespread bacterial infection, with Herpes lesions inside and outside his mouth and around his rectum. S. also had recently inflicted bruises on his head and shoulder, and later was found to have at least ten broken bones in both arms and legs and lax rectal tone most probably caused by repeated insertion of some object into his anus.

From sometime in March 1993, appellant and S. had lived with twenty-nine-year-old Greg Hatton. The state could not establish who caused S.'s extensive injuries, but contended that both appellant and Hatton were responsible for S.'s care and that in each instance of abuse, one of them caused the injury and the other permitted it to occur. The evidence in support was strong. Numerous witnesses testified that both appellant and Hatton were consumed with using drugs and frequently ignored S. and his needs. Those witnesses also testified to S.'s declining physical condition and to his obvious need for medical attention which several of them called to appellant's attention. Indeed, one reported the situation to Child Protective Services (CPS). In the last week before S. was taken to the hospital, a period when many of the injuries were

inflicted, appellant and Hatton became reclusive and would not allow their friends to visit. In short, only appellant and Hatton could have caused S.'s injuries, and from their extensiveness the jury could reasonably infer that whoever had caused those injuries, the other had permitted them to occur or knew of them and allowed them to go untreated. Accordingly, both were convicted of multiple counts of child abuse under A.R.S. § 13-3623.[2]

EVIDENTIARY ISSUES

Appellant first asserts that the trial court's exclusion of evidence concerning Hatton's sexual deviance and assaultive behavior unconstitutionally limited her right to present a defense and deprived her of a fair trial. According to appellant, "[e]vidence that Hatton possessed pornography depicting anal sex, dildos, had an interest in anal sex . . . and made sexual comments about an 11-year-old girl, were relevant to establish that Hatton sexually abused [S.]; in addition, this evidence rebutted Hatton's accusations that [appellant] may have committed sexual abuse." The trial court excluded such evidence because it was irrelevant, and because any probative value was substantially outweighed by the danger of unfair

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[2] Under § 13-3623, any person having the care or custody of a child who "causes or permits the person or health of such child . . . to be injured or causes or permits such child . . . to be placed in a situation where its person or health is endangered" is guilty of felony child abuse. The felony classification depends on the perpetrator's mental state and on whether the crime was committed under circumstances "likely to produce death or serious physical injury." § 13-3623(B) and (C).

prejudice to Hatton. The court did not err in that ruling.

As our supreme court has stated: "The test for admissibility of evidence is not different for different parties. The constitution gives defendant the right to have exculpatory evidence admitted, but does not relieve him of the burden of meeting the evidentiary standards set for all parties." *State ex rel. Collins v. Seidel*, 142 Ariz. 587, 589, 691 P.2d 678, 680 (1984). The trial court has considerable discretion in determining the admissibility of evidence, including its relevance. *State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988). We will not disturb a trial court's determination as to relevancy unless a clear abuse of discretion is shown. *State v. Winters*, 160 Ariz. 143, 144, 771 P.2d 468, 469 (App. 1989). "Where the probative value of evidence is slight and is outweighed by danger of prejudice or confusion, the trial court has the discretion to exclude it." *Id.*

Contrary to appellant's assertion, the sexual deviancy evidence was neither exculpatory to her nor necessary to her defense. Although one of the child abuse counts against appellant alleged her failure to protect S. from sexual maltreatment (count two), she was not charged with actually sexually abusing him. Thus, the jury could not convict appellant of sexual conduct with a minor, and she did not need to rebut any accusations Hatton might have made in that regard. Appellant also did not need the evidence to establish that Hatton committed sexual abuse, because the state, not appellant, had the burden of proving that charge against Hatton. In any event, we fail to see how

evidence of Hatton's sexual deviancy would be exculpatory to appellant based on the count two charge against her. The trial court did not err in excluding that evidence.

Appellant next contends that the trial court improperly excluded the following evidence which was necessary to show that Hatton caused S.'s injuries and to rebut evidence that Hatton was nonviolent toward S.: testimony from various witnesses that Hatton was rough with his own daughter, enjoyed inflicting pain, had periods of "blackout" where he could not remember situations involving domestic violence, had hissed at S., recognized no boundaries and had no remorse; testimony from a witness that she was afraid of Hatton; and redacted portions of letters Hatton wrote from jail to various persons, including Hatton's remark in one such letter that appellant would die. The trial court excluded the aforementioned evidence because it was irrelevant, unduly prejudicial or inadmissible character evidence under Ariz. R. Evid. 401,403, 404(a) and (b), 17A A.R.S. There was no error in those evidentiary rulings.

Appellant was bound by the rules of evidence at trial, even if those rules were used to protect Hatton from undue prejudice. *Seidel*, 142 Ariz. at 589, 691 P.2d at 680. Only if the evidence offered by appellant were truly exculpatory in nature would the trial court have been required to admit it and to sever appellant's trial from Hatton's to prevent prejudice to Hatton. *Zafiro v. United States*, 506 U.S. 534, 539, 113 S. Ct. 933, 938, 122 L. Ed. 2d 317, 325 (1993). As noted earlier, however, the jury was not required to find who caused

S.'s injuries, but only that appellant was responsible for causing or allowing them to occur and go untreated. A.R.S. § 13-3623. Therefore, evidence of Hatton's violent character or assaultive behavior would not have exculpated appellant, because the jury still could have found her guilty of permitting S.'s abuse. There was ample evidence to support such a finding in this case.

Appellant also contends that the trial court improperly restricted her cross-examination of a CPS caseworker. On direct examination, the caseworker testified that she witnessed two arguments between appellant and Hatton while interviewing appellant at the hospital. She testified that during the first altercation Hatton appeared to be quite angry and yelled at appellant, using obscenities, and that during the second confrontation Hatton again yelled at appellant and they both argued.

On cross-examination by appellant's counsel, the caseworker acknowledged that Hatton's voice was angry and loud during the first argument, and that Hatton was angry, yelling and physically confrontational towards appellant during the second encounter. She further acknowledged that appellant expressed fear to her at the time. The trial court, however, sustained Hatton's objections to questions relating to the caseworker's impressions and concerns based on the form of those questions. Although the trial court did not specify what was wrong with the form of the questions, the proffered evidence as to the caseworker's concerns that Hatton might hit appellant was irrelevant and its exclusion was harmless. The control of cross-examination is left to the trial court's

sound discretion. *State v. Smith*, 138 Ariz. 79, 81, 673 P.2d 17, 19 (1983), *cert. denied*, 465 U.S. 1074 (1984). Under the circumstances, the court did not improperly limit appellant's cross-examination, let alone abuse its discretion in sustaining objections to questions calling for irrelevant conjecture.

SEVERANCE

Appellant contends that the trial court abused its discretion in denying her motions to sever her trial from Hatton's for the following reasons: the redaction of appellant's tape-recorded statement precluded her right to present a defense, impermissibly interlocked her statement with Hatton's, and violated the "rule of completeness;" appellant's and Hatton's defenses were mutually antagonistic, and the conduct of Hatton's defense during trial as well as the spillover effect of evidence introduced against Hatton prejudiced her.

"In deciding whether to grant a severance the court must balance the possible prejudice to the defendant against interests of judicial economy." *State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983). Severance should be granted where "a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539, 113 S. Ct. at 938, 122 L. Ed. 2d at 325 (1993). Severance may be justified, for example, in situations when evidence admitted against one defendant facially incriminates or "rubs off" on another defendant, when a disparity exists in the amount of evidence introduced against each defendant, when the defendants present mutually antagonistic defenses, or when the actual

conduct of a defense harms the other defendant. *State v. Grannis*, 195 Ariz. Adv. Rep. 3, 6 (July 25, 1995).

We review the decision to grant or deny severance for an abuse of the trial court's discretion. *State v. Superior Court (Ryberg)*, 173 Ariz. 447, 449, 844 P.2d 614, 616 (App. 1992). "In challenging a trial court's failure to sever, a defendant must demonstrate compelling prejudice against which the trial court was unable to protect." *Cruz*, 137 Ariz. at 544, 672 P.2d at 473.

1. *Redaction of Appellant's Statement.*

After waiving her *Miranda*[3] rights, appellant gave a lengthy tape-recorded statement to police on June 17, 1993. She was arrested immediately thereafter. At trial the state offered, and the trial court admitted, a redacted version of appellant's statement. The court ordered most of the redactions so that the statement would not incriminate Hatton or impermissibly corroborate his own statement in violation of his Sixth Amendment right to confrontation. *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); *Cruz v. New York*, 481 U.S. 186, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (1987). On the state's motion, the trial court also redacted portions of appellant's statement that were self-serving and irrelevant.

The redacted portions of appellant's statement which were excluded from evidence concerned her suspicions about Hatton and her failure to act on them;

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[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Hatton's advice not to take S. to the doctor; appellant's mother's abandoning her at an early age; and appellant's sexual abuse by her father and by her doctor. Although appellant did not testify at trial, her defense included claims that Hatton alone caused S.'s injuries, and that she lacked the requisite mental state of intentionally or knowingly causing or permitting the injuries and therefore was guilty, if at all, of a lesser included offense. She contends that the material deleted from her statement contained information necessary to her defense, in that her observations of Hatton and S. were relevant to establishing that Hatton caused the injuries, and that her concerns, suspicions, background and Hatton's explanations were necessary to show that she had no intent or knowledge. According to appellant, exculpatory evidence crucial to her defense was improperly redacted, and the "rule of completeness" required introduction of her unadulterated statement. Ariz. R. Evid. 106, 17A A.R.S. We disagree.

The rule of completeness generally refers to a defendant's right to have all of a confession introduced at trial after the prosecution has introduced portions thereof. *United States v. Kaminski*, 692 F.2d 505, 522 (8th Cir. 1982); *cf. State v. Lovely*, 110 Ariz. 219, 220, 517 P.2d 81, 82 (1973). "The rule of completeness is violated, and severance required, only where admission of the statement in its edited form distorts the meaning of the statement or excludes information substantially exculpatory of the declarant." *Kaminski*, 692 F.2d at 522. *See also United States v. Kershner*, 432 F.2d 1066, 1072 (5th Cir. 1970) ("[T]he admission of an entire confession may be required so that exculpatory and

mitigating parts will be included."); Udall, et al., *Arizona Law of Evidence* § 11 (3d ed. 1991).

Unlike the situation in *State v. Rakestraw*, 871 P.2d 1274 (Kan. 1994), which appellant relies on, this was not a case where "the complete statement is exculpatory and the redacted statement is inculpatory," or where "the redacted statement distorts the meaning of the complete statement." *Id.* at 1281. Under A.R.S. § 13-3623, appellant was criminally responsible for child abuse if she either caused or permitted S.'s injuries. Thus, the redactions indicating that Hatton caused S.'s injuries did not deprive appellant of the use of exculpatory evidence, since the jury could reasonably find appellant guilty of knowingly permitting the abuse under § 13-3623.

Contrary to appellant's contention, the redacted portions of her statement were not "substantially exculpatory." *Kershner*, 432 F.2d at 1072. In fact, appellant's suspicion that Hatton caused injury to S. and her explanations for why she did not question or leave Hatton were more inculpatory than exculpatory. In the unredacted statement, appellant stated that she had suspicions that Hatton was doing something wrong to S.'s anus but had no proof. She also stated that she was concerned about the situation because every time S. was alone with Hatton, he ended up with bruises or other injuries, but that she did not act because she had no proof and did not want to wrongly accuse Hatton. Appellant's alleged uncertainty as to Hatton's complicity in causing S.'s injuries does not negate her awareness of and her knowingly permitting those injuries to occur, regardless of who caused them. In

short, the redacted portions of appellant's statement are more consistent with a knowing mental state than a reckless or negligent one. Furthermore, other redacted statements relating to appellant's prior sexual abuse and abandonment were neither relevant nor substantially exculpatory.

In sum, even if appellant's trial had been severed from Hatton's, we cannot say that appellant would have been entitled to introduce the redacted portions of her statement. Similarly, we cannot say that use of the redacted statement in this joint trial unconstitutionally compromised appellant's defense, distorted the meaning of the complete statement, or was fundamentally unfair or unduly prejudicial to her.

2. *Antagonistic Defenses.*

A defendant seeking severance based upon antagonistic defenses must establish that the defenses are mutually exclusive. *Cruz*, 137 Ariz. at 545, 672 P.2d at 474. "[D]efenses are mutually exclusive within the meaning of this rule if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant." *Id.* Even if the defenses are not so antagonistic to warrant severance, "a defendant may be prejudiced by the actual conduct of his or her co-defendant's defense." *Id.*

In this case we cannot say that appellant's and Hatton's defenses, "at their core, were completely antagonistic." *State v. Kinkade*, 140 Ariz. 91, 94, 680 P.2d 801, 804 (1984). Although appellant and Hatton ultimately accused each other of causing S.'s injuries,

conviction under § 13-3623 was justified if the defendants either caused or permitted injury to occur. Accordingly, the jury was not forced to believe or convict one defendant but not the other. *Kinkade*, 140 Ariz. at 94, 680 P.2d at 804.

Nor did the actual conduct of Hatton's defense unduly prejudice appellant. Unlike the situations presented in *Cruz* and *State v. Fernane*, 202 Ariz. Adv. Rep. 84 (Ct. App. 1995), Hatton did not introduce highly prejudicial evidence of appellant's prior bad acts. Although he elicited negative testimony concerning appellant's drug use and her treatment of S., such evidence would have been admissible against appellant had she been tried separately and was no more prejudicial than evidence presented by the state. The other evidence of which appellant complains[4] also would have been admissible at a separate trial and was not unduly prejudicial.

3. *Spillover Prejudice.*

To determine whether the evidence against Hatton had a negative "spillover" or "rub-off" effect upon appellant, we must "ask whether the jury can 'keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to

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[4] That evidence included testimony that appellant became angry when she did not have child care; that Hatton's roommate did not know who visited appellant when he was not at home; that appellant instructed a witness not to speak with Hatton's investigator; that appellant was calm when she brought S. to the hospital; and that appellant was once seen pulling S. out of a car seat by his arm while yelling at him.

him.'" *Grannis*, 195 Ariz. Adv. Rep. at 6, *quoting State v. Lawson*, 144 Ariz. 547, 555, 698 P.2d 1266, 1274 (1985). Factors to be considered include the complexity of the issues and evidence, the weight of the evidence introduced against each defendant, and the extent of limiting instructions given by the court. *State v. Runningeagle*, 176 Ariz. 59, 68, 859 P.2d 169, 178, *cert. denied*, ___ U.S. ___, 114 S. Ct. 609 (1993).

The evidence presented against Hatton was not substantially greater than that introduced against appellant. All of the medical evidence was presented against both defendants, and their friends testified about both defendants' behavior and statements they made during the time they lived together. Moreover, the trial court instructed the jury many times, including at the beginning and end of trial, to consider separately the evidence against each Defendant. The court carefully instructed the jury on that point before and after it heard each defendant's recorded statements. Jurors are presumed to have followed the instructions given them. *State v. Ramirez*, 178 Ariz. 116, 127, 871 P.2d 237, 238, *cert. denied*, ___ U.S. ___, 115 S. Ct. 435 (1994).

We are unpersuaded by appellant's contention that references to her in Hatton's letters, the lack of a limiting instruction, and the instruction allowing the jury to consider as consciousness of guilt an attempt to persuade a witness to fabricate evidence all resulted in a negative "rub-off" of evidence on appellant. Each time a witness read portions of Hatton's letters, the witness was specifically asked whether Hatton had written them. The letters also referred to harming appellant.

Upon hearing that Hatton "would like [appellant] to have her ass kicked," the jury could hardly have thought that appellant was working with Hatton to persuade others to fabricate evidence. Moreover, the trial court limited Hatton's letters to him, and that sufficiently protected against any unlikely "rub-off" effect the letters may have had upon appellant.

DENIAL OF RIGHT TO RANDOM JURY CHOSEN BY LOT

Appellant next contends that the selection of alternate jurors was not random, thus violating her right to a fair and impartial jury. Specifically, she claims that the selection of four Caucasian women under the age of forty, two of whom were pregnant, denied her a fair trial by eliminating jurors best able to relate to her defense. We find no error.

In a post-trial evidentiary hearing, the trial court's clerk testified that she cut up a list of the jurors' names into individual slips of paper, which she then placed in an envelope. The clerk selected the alternates upon the court's request, but could not recall whether she pulled the slips out of the envelope one at a time or instead pulled out four at once. The clerk did not look in the envelope while selecting the alternates, and did nothing to influence who the alternates would be. The trial court properly denied appellant's motion for new trial on this basis, finding that the selection of alternate jurors complied with Ariz. R. Crim. P. 18.5(h), 17 A.R.S., which provides as follows: "[j]ust before the jury retires to begin deliberations, the clerk shall, by lot, determine the juror or jurors to be designated as alternates."

Appellant failed to show that the procedure here did not comply with the rule. The clerk's lack of memory concerning the exact manner in which she chose the alternates does not establish any violation of the rule. In addition, the clerk's selection of four Caucasian women under age forty does not, in and of itself, indicate that the alternates were not chosen "by lot." As our supreme court noted in *State v. Blackhoop*, 162 Ariz. 121, 122, 781 P.2d 599, 600 (1989), "[a]lthough the random selection of the only two jurors of the same race as the defendant is a statistical improbability, it will occasionally occur." Although a defendant is entitled to a fair jury, "he [or she] is not entitled to be tried by any particular jury." *Id.* Appellant failed to establish any error or prejudice in the selection of the alternate jurors.

PROSECUTORIAL MISCONDUCT

During closing argument, the prosecutor made the following statements:

> He [S.] couldn't even talk. He couldn't even cry. By the time he was taken to the hospital on June 12th, he was too weak and he couldn't even cry.
>
> Ladies and gentlemen, today in court you are [S.'s] voice.
>
> * * * *
>
> Please use that voice to convict both Greg Hatton and Angela Leeman on each and every count.

The trial court overruled appellant's objection to that argument and denied her motion for mistrial. Before instructing the jury the next day, however, the trial court cautioned:

> [D]espite [the prosecutor's] comment yesterday, in closing yesterday, suggesting that your verdict is an opportunity for you to act as the victim's voice in this case, that is not your function as jurors.
>
> Your duty as jurors is to decide the facts in the case and apply my instructions and the law to those facts and during the accomplishment of that task your duty as jurors are not to be influenced by either sympathy or prejudice.

The trial court later denied appellant's motion for new trial, finding that "though the '[S.'s] voice' remarks were inadvisable . . . they do not constitute misconduct."

As she argued below, appellant claims that the prosecutor's comments were calculated to inflame the passions of the jury and therefore were improper and prejudicial. She also contends that the court's curative instruction the next day was too late to remedy the prejudice caused by the statements. We disagree. As our supreme court has stated:

> In determining whether remarks made by counsel in a criminal case are so objectionable as to warrant a new trial, the trial court should consider (1) whether the remarks call to the attention of the jurors matters that they would not be justified in considering in determining

> their verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks . . . . The trial court is in the best position to determine whether an attorney's remarks require a mistrial, and its decision will not be disturbed absent a plain abuse of discretion.

State v. Hansen, 156 Ariz. 291, 296-97, 751 P.2d 951, 956-57 (1983). *See also State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992), *cert. denied,* 506 U.S. 1084 (1993).

In order to prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct 1868, 1871, 40 L. Ed. 2d 431, 437 (1974). Our supreme court has stated that a denial of due process is the denial of "'fundamental fairness, shocking to the universal sense of justice.'" *State v. Velasco*, 165 Ariz. 480, 487, 799 P.2d 821, 828 (1990), *quoting Oshrin v. Coulter*, 142 Ariz. 109, 111, 688 P.2d 1001, 1003 (1984). While the prosecutor's remarks were "inadvisable" for the reasons noted by the trial court, they did not deny appellant her right to a fair trial or affect the result. Moreover, the trial court's curative instruction was sufficient, both in content and timing, to alleviate any impropriety.

SENTENCING ISSUES

1. *Cruel and Unusual Punishment.*

We reject appellant's claim that her 61-year sentence is "grossly disproportionate considering the circumstances of the offense and her background" and therefore constitutes cruel and unusual punishment under the Eighth Amendment to the federal Constitution and Art. 2 § 15 of the Arizona Constitution. Appellant has not established a threshold showing of gross disproportionality. *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991); *State v. Bartlett*, 171 Ariz. 302, 830 P.2d 823, *cert. denied*, 506 U.S. 992 (1992); *State v. Baldrey*, 176 Ariz. 378, 861 P.2d 663 (App. 1993). Indeed, appellant's sentences are not unlike those imposed in other similar cases which were found not to constitute cruel and unusual punishment. *See*, *e.g.*, *State v. Taylor*, 160 Ariz. 415, 773 P.2d 974 (1989); *State v. Zimmer*, 178 Ariz. 407, 874 P.2d 964 (App. 1993).

Factors relevant to the determination of gross disproportionality include: the harm caused to the victim or society, the culpability of the defendant, the level of violence, and the aggravating and mitigating circumstances of the crime. *Bartlett*, 171 Ariz. at 306, 308, 830 P.2d at 827-29. Considering these factors, we conclude that appellant's sentences are not out of proportion to the crimes committed. The medical testimony proved beyond doubt that S. was severely injured and will suffer the ill effects of those injuries for the rest of his life. One physician testified that S. was so dehydrated by the time he entered the hospital that he probably would have lived only one to two more

days in that state. Moreover, the medical experts consistently testified that much force would have been necessary to cause the numerous broken bones in S.'s body. Thus, all of S.'s injuries, except those related to the Herpes infection and malnutrition, were the result of violence.

We reject appellant's contention that she is somehow less culpable because the jury did not determine whether she caused or simply permitted S.'s injuries. First, that there was no such finding does not mean appellant did not actually inflict the injuries. Perhaps more importantly, however, is the fact that whether appellant inflicted the injuries is inconsequential to a finding of guilt under A.R.S. § 13-3623. The trial court properly balanced the mitigating factors of appellant's age, poor family life, lack of a prior felony record, and Hatton's control over her against six aggravating factors, and determined that the latter outweighed the former. The predominance of aggravating factors further supports our conclusion that appellant's sentences are not grossly disproportionate to her convictions.

2. *State's Cross-Appeal: Consecutive Sentences.*

The state contends that nine of appellant's child abuse convictions were dangerous crimes against children caused by different acts, therefore requiring consecutive sentences under A.R.S. § 13-604.01(J). We agree with appellant's contention, however, that only counts one and eight charged dangerous crimes against children as defined in the relevant statutes, A.R.S. §§ 13-604.01(J), 13-604.01(K)(1), 13-3623(B)(1), and the jury's verdict found that only those two counts were

"committed under circumstances likely to produce death or serious physical injury." Therefore, the trial court correctly ordered the sentences for those two counts to run consecutively, but it was not obligated to do so for nine of the other child abuse convictions.

3. *Correction of Sentences Outside Appellant's Presence.*

Appellant contends that the trial court impermissibly corrected and lengthened her sentence outside her presence. The court initially ordered the sentence for count five (class four felony child abuse) to run concurrently with the sentence for count one (class two felony child abuse), contrary to the requirements of A.R.S. § 13-604.01(J). When the Department of Corrections brought the mistake to the court's attention, the court corrected it outside appellant's presence. The correction changed appellant's total sentence time from 50 years to 61 years. She contends that correction was substantive in nature and that she had a right to be present. We agree.

Although Ariz. R. Crim. P. 24.4, 17 A.R.S., allows a trial court to correct clerical mistakes and errors in the record "arising from oversight or omission," we cannot construe this sentencing change as merely clerical. Rule 26.9 requires a defendant's presence at his or her sentencing, and "[i]t has been held that the modification of a judgment (one which purported to change the consecutive nature of sentences) which 'affects substantial rights' of a defendant requires his presence or the modification is invalid." *State v. Pyeatt*, 135 Ariz. 141, 143, 659 P.2d 1286, 1288 (App. 1982), *quoting State v. Davis*, 105 Ariz. 498, 502, 467 P.2d

743, 747 (1970). The trial court's order changing appellant's sentence did affect her "substantial rights," and accordingly she had a right to be present for that change.

CONCLUSION

We have searched the record for fundamental error and have found none. Appellant's convictions are affirmed and the matter is remanded for resentencing on count five for the reasons noted above.

s/____________________________
JOHN PELANDER, Judge

CONCURRING:

s/____________________________
JOSEPH M. LIVERMORE, Presiding Judge

s/____________________________
LLOYD FERNANDEZ, Judge