No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JULIUS JARREAU MOORE,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

PETITION APPENDIX
(Volume 1)

PATRICK C. COPPEN
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APPENDIX
(Volume 1)

Appendix A

Michael K. Jeanes, Clerk of Court
*** Filed ***
06/07/2007 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1999-016742

06/06/2007

HONORABLE NORMAN D. HALL

CLERK OF THE COURT
T. Pavia
Deputy

STATE OF ARIZONA

WILLIAM W CLAYTON

v.

JULIUS JARREAU MOORE (A)
DOB: 4/18/1981

DENNIS C JONES

APPEALS-CCC
AZ DOC
CERTIFICATION DESK-CSC
DISPOSITION CLERK-CSC
EXHIBITS-CCC
FILE ROOM-CSC
VICTIM SERVICES DIV-CA-CCC

SENTENCE OF IMPRISONMENT
DEATH BY LETHAL INJECTION
COUNTS 2 AND 3

State's Attorney:	William W. Clayton/Elizabeth Gilbert
Defendant's Attorney:	Dennis Jones/John Canby
Defendant:	Present
Court Reporter:	Michael Babicky

Count(s) 2:The Defendant was found guilty after a trial by jury.

Count(s) 3:The Defendant was found guilty after a trial by jury.

The jury having returned its verdicts fixing punishment as death, the Court now enters judgment and sentences the Defendant.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1999-016742 06/06/2007

IT IS THE JUDGMENT of the Court Defendant is guilty of the following:

OFFENSE: Count 2 - First Degree Murder of Guadalupe Ramos
Class 1 Felony
A.R.S. § 13-1101, 1105, 703, 801, 604(P)
Date of Offense: November 16, 1999

OFFENSE: Count 3 - First Degree Murder of Delia Marie Ramos
Class 1 Felony
A.R.S. § 13-1101, 1105, 703, 801, 604(P)
Date of Offense: November 16, 1999

AS PUNISHMENT, IT IS ORDERED Defendant is sentenced to a term of imprisonment or executed according to the law of Arizona and is committed to the Arizona Department of Corrections as follows:

Count 2: DEATH BY LETHAL INJECTION

See Jury/Sentencing Verdict

Count 3: DEATH BY LETHAL INJECTION

See Jury/Sentencing Verdict

IT IS FURTHER ORDERED Restitution to be held open for a period of thirty days. Defendant waives his presence at any Restitution Hearing.

IT IS ORDERED authorizing the Sheriff of Maricopa County to deliver the Defendant to the Arizona Department of Corrections to carry out the term of imprisonment/sentence set forth herein.

IT IS ORDERED the Clerk of the Superior Court remit to the Arizona Department of Corrections a copy of this Order or the Order of Confinement together with all presentence reports, probation violation reports, and medical and psychological reports that are not sealed in this cause relating to the Defendant.

Previously prepared presentence report.

IT IS ORDERED that the Clerk of the Court file a Notice of Appeal on behalf of the Defendant.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1999-016742 06/06/2007

Upon Motion of Defendant,

IT IS ORDERED releasing the Office of Legal Defender for the purposes of appeal.

2:50 p.m. Matter concludes.

ISSUED: Order of Confinement - Certified Copy to DOC via MCSO

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1999-016742 06/06/2007

Defendant's thumbprint is permanently affixed to this sentencing order in open court.

/s/ HONORABLE NORMAN D. HALL
JUDGE OF THE SUPERIOR COURT

(thumbprint)

Michael K. Jeanes, Clerk of Court
*** Filed ***
06/07/2007 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1999-016742

06/06/2007

HONORABLE NORMAN D. HALL

CLERK OF THE COURT
T. Pavia
Deputy

STATE OF ARIZONA

WILLIAM W CLAYTON

v.

JULIUS JARREAU MOORE (A)
DOB: 4/18/1981

DENNIS C JONES

APO-SENTENCE IMPRISON-CCC
APPEALS-CCC
AZ DEPT OF CORRECTIONS-PHOENIX
AZ DOC
DISPOSITION CLERK-CSC
VICTIM SERVICES DIV-CA-CCC

SENTENCE OF IMPRISONMENT
COUNTS 1, 4 AND 5

State's Attorney:	William W. Clayton/Elizabeth Gilbert
Defendant's Attorney:	Dennis Jones/John Canby
Defendant:	Present
Court Reporter:	Michael Babicky

2:25 p.m.
Count(s) 1:The Defendant was found guilty after a trial by jury.

Count(s) 4:The Defendant was found guilty after a trial by jury.

Count(s) 5:The Defendant was found guilty after a trial by jury.

IT IS THE JUDGMENT of the Court Defendant is guilty of the following:

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1999-016742 06/06/2007

OFFENSE: Count 1 First Degree Murder of Sergio Mata
Class 1 dangerous Felony
A.R.S. § 13-1101, 1105, 703, 801, 604(P)
Date of Offense: November 16, 1999

OFFENSE: Count 4 Attempt to Commit Murder in First Degree
Class 2 dangerous Felony
A.R.S. § 13-1101, 1105, 703, 801 and 1001, 604 (P)
Date of Offense: November 16, 1999

OFFENSE: Count 5 Burglary in First Degree
Class 2 dangerous Felony
A.R.S. §13-1501, 1508, 1507, 701, 702, 801, 604(P)
Date of Offense: November 16, 1999

AS PUNISHMENT, IT IS ORDERED Defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

Count 1: Natural Lifetime without parole from June 6, 2007
Presentence Incarceration Credit: 0
Aggravated

This sentence is to be consecutive to Counts 4 and 5 of this cause and CR1999-002811, CR1999-002812.

Community Supervision is waived for Count I.

Count 4: 21 Years from June 6, 2007
Presentence Incarceration Credit: 0
Aggravated

This sentence is to be consecutive to Counts 1 and 5 of this cause and CR1999-002811, CR1999-002812

Count 4:Community Supervision: Imposed pursuant to A.R.S. 13-603(I).

Count 5: 21 Years from June 6, 2007
Presentence Incarceration Credit: 0
Aggravated

This sentence is to be consecutive to Counts 1 and 4 of this cause and CR1999-002811, CR1999-002812

Count 5: Community Supervision: Imposed pursuant to A.R.S. 13-603(I).

Restitution shall remain open for a period of thirty (30) days. Defendant waives appearance at any Restitution Hearing.

On Motion of Defendant's counsel,

IT IS ORDERED permitting Office of Legal Defender to withdraw from this case on all Counts.

IT IS ORDERED authorizing the Sheriff of Maricopa County to deliver the Defendant to the Arizona Department of Corrections to carry out the term of imprisonment set forth herein.

IT IS ORDERED the Clerk of the Superior Court remit to the Arizona Department of Corrections a copy of this Order or the Order of Confinement together with all presentence reports, probation violation reports, and medical and psychological reports that are not sealed in this cause relating to the Defendant.

A presentence report has previously been prepared.

2:50 p.m. Matter concludes.

ISSUED: Order of Confinement - Certified Copy to DOC via MCSO

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1999-016742 06/06/2007

Defendant's thumbprint is permanently affixed to this sentencing order in open court.

/s/ HONORABLE NORMAN D. HALL
JUDGE OF THE SUPERIOR COURT

(thumbprint)

Appendix B

SUPREME COURT OF ARIZONA
En Banc

STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-07-0164-AP
Appellee,	)	
	)	Maricopa County
v.	)	Superior Court
	)	No. CR1999-016742-001 DT
JULIUS JARREAU MOORE,	)	
	)	
Appellant.	)	
	)	**O P I N I O N**

Appeal from the Superior Court in Maricopa County
The Honorable Norman D. Hall, Judge (Deceased)

CONVICTIONS OTHER THAN FIRST-DEGREE PREMEDITATED MURDER AFFIRMED; FIRST-DEGREE PREMEDITATED MURDER CONVICTIONS AFFIRMED IN PART, REVERSED IN PART; SENTENCES AFFIRMED

TERRY GODDARD, ARIZONA ATTORNEY GENERAL — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Lacey Stover Gard, Assistant Attorney General — Tucson
Attorneys for State of Arizona

DAVID GOLDBERG, ATTORNEY AT LAW — Fort Collins, CO
By David Goldberg
Attorney for Julius Jarreau Moore

B A L E S, Justice

¶1 This mandatory appeal is from a jury's determination that Julius Jarreau Moore should be sentenced to death for two of the three murders for which he was convicted. We have jurisdiction under Article 6, Section 5(3), of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 13-4031 (2001).

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In November 1999, Delia Ramos and Sergio Mata were selling crack cocaine from a small rental house in which they lived on East Yale Street in Phoenix.[1] Delia's brother Guadalupe Ramos lived with the couple.

¶3 On November 15, Debra Ford came to the house around 5:30 p.m., bought $30 to $40 of crack cocaine, and began smoking it. After Ford ran out of money and drugs, she remained at the house hoping Delia would give her more crack. Later that evening, Ford sat outside the house smoking crack with Moore and Sarry Ortiz. At some point, Moore left and Ford went with Ortiz to drive around and smoke more crack. Ford again smoked crack when she later returned to the Yale Street house.

¶4 While Ford was away with Ortiz, Moore went to his mother's house, where he lived with his girlfriend, Jessica Borghetti. Moore told Borghetti that he had seen a person who had tried to run him over and he was not going to stand for it. He took a 9 mm pistol and drew a map for Borghetti of where he was going in case something happened to him. The map showed a destination other than the Yale Street house.

¶5 Tony Brown, an acquaintance of Ford, stopped by the

---

[1] Except in our independent review of the death sentence, A.R.S. § 13-755(A) (Supp. 2008), we view the facts in the light most favorable to sustaining the jury's verdict. *See State v. Garza*, 216 Ariz. 56, 61 n.1, 163 P.3d 1006, 1011 n.1 (2007).

Yale Street house at about 4:00 a.m. on November 16, looking for his girlfriend. Brown saw Mata outside and offered him cash if he would tell Brown's girlfriend to come out. When Mata tried to take the cash, Brown hit Mata and threatened him. Mata ran inside and Brown decided to leave.

¶6 As he was leaving, Brown saw a man, whom he later identified as Moore, hiding in oleander bushes near the house. Brown had seen Moore earlier that evening at a different crack house. Brown testified that Moore called him over to the bushes, flashed a gun, and asked if Brown wanted to help Moore "get" Mata. Brown declined and left on his bicycle.

¶7 After Brown left, Moore sat outside the Yale Street house smoking cigarettes with Ford and Guadalupe. Moore went inside, obtained a small amount of crack, and then came back outside to smoke it. Guadalupe and Ford went back inside the house. While inside, Ford could hear Moore repeatedly knocking on the door and calling for her. Delia gave Ford some crack and asked her to leave.

¶8 When Ford went outside, Moore asked if she got more crack and offered to let her use his pipe. Mata then came outside. Moore asked whether Mata had a problem with him. Ford heard no response; instead, she saw Moore shoot Mata and then turn and shoot her. Ford fell to the ground and heard several more gunshots in quick succession.

¶9 Shortly afterward, Ortiz picked up Moore near the Yale Street house and drove him to his mother's house. When he went inside, his mother began yelling at him. Moore told Borghetti he did not "need that right now" because he had just shot four people. Upon learning that Moore had been out all night, his mother kicked him and Borghetti out of the house. Moore and Borghetti left with Ortiz. Moore gave Ortiz some crack while they drove around.

¶10 While driving, Ortiz saw Ford lying in the front yard of the Yale Street house. Ortiz got out of her car and flagged down a taxi driver who called 911. Ortiz noticed Moore trying to "take off in [her] car." She got back in her car and they drove around the neighborhood, picked up Ortiz's friend, stopped at another crack house to smoke crack, and then drove past the crime scene again. After seeing the police had arrived, Ortiz took Moore and Borghetti back to his mother's house. As he got out of the car, Moore gave Ortiz and her friend some crack.

¶11 Moore and Borghetti packed some belongings, including Moore's gun and the clothes he had worn the previous night, and went to some friends' apartment. After his photo appeared in the newspaper, Moore cut off his braids in an effort to alter his appearance. On November 23, 1999, Phoenix police officers arrested Moore and Borghetti at the apartment. A firearms examiner later concluded that bullets found at the crime scene

had been fired from Moore's gun.

¶12 Moore was indicted for and convicted of two counts of premeditated and felony murder for the murders of Delia and Guadalupe, one count of premeditated murder for the murder of Mata, one count of attempted first-degree murder for the injuries to Ford, and one count of first-degree burglary. The trial court was to sentence Moore in August 2002, but the hearing was vacated after the Supreme Court held that Arizona's capital sentencing scheme was unconstitutional. *See Arizona v. Ring* (*Ring II*), 536 U.S. 584, 609 (2002).

¶13 In November 2004, the trial court empanelled a jury to determine Moore's sentence. The State alleged two aggravators: that Moore murdered Delia in an especially cruel manner, *see* A.R.S. § 13-703(F)(6) (Supp. 1999), and that Moore murdered multiple persons on the same occasion, *see id.* § 13-703(F)(8). The jury did not reach a verdict on the (F)(6) aggravator, but did find the (F)(8) aggravator. Before the penalty phase concluded, the court declared a mistrial because Moore's medical expert suffered a heart attack.

¶14 In May 2007, the trial court empanelled a second jury to determine Moore's sentence. The court allowed the State to retry the (F)(6) aggravator, and the second jury also failed to reach a verdict on this aggravator. The court instructed the jury that the (F)(8) aggravator had been established. The jury

determined that Moore should be sentenced to death for the murders of Delia and Guadalupe, but should serve life imprisonment for the murder of Mata.

DISCUSSION

A. Suggestive Identification

1. Pretrial Identification Procedures

¶15 Moore challenges the trial court's denial of his motions to suppress Ford's pretrial and in-court identifications. He argues that the court correctly concluded that the pretrial identification procedures were unduly suggestive, but erroneously found that Ford's identification of Moore was nonetheless reliable and therefore admissible under *Neil v. Biggers*, 409 U.S. 188, 199-201 (1972).

¶16 Even if a pretrial identification procedure was impermissibly suggestive, a subsequent identification is admissible if it is nonetheless reliable. *See State v. Lehr*, 201 Ariz. 509, 520 ¶ 46, 38 P.3d 1172, 1183 (2002). To determine reliability, Arizona courts consider the *Biggers* factors. *Id.* at 521 ¶ 48, 38 P.3d at 1184.

> [T]he factors to be considered [in evaluating the likelihood of misidentification] include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.

Id. (alterations in original) (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)).

¶17 This Court reviews trial court rulings on pretrial identifications for abuse of discretion. *Id.* at 520 ¶ 46, 38 P.3d at 1183. We defer to a trial court's factual findings that are supported by the record and are not clearly erroneous. *See State v. Grell*, 212 Ariz. 516, 528 ¶ 58, 135 P.3d 696, 708 (2006). The ultimate question of the constitutionality of a pretrial identification is, however, a mixed question of law and fact. *Sumner v. Mata*, 455 U.S. 591, 597 & n.10 (1982) (discussing difference between factual findings on particular *Biggers* factors and ultimate conclusion whether facts state a constitutional violation). This Court reviews de novo such mixed questions of law and fact. *See State v. Altieri*, 191 Ariz. 1, 2 ¶ 7, 951 P.2d 866, 867 (1997) (applying de novo review to ultimate legal determination of whether facts supported investigatory stop). A trial court ruling on a motion to suppress is reviewed based solely on the evidence presented at the suppression hearing. *State v. Newell*, 212 Ariz. 389, 396 ¶ 22, 132 P.3d 833, 840 (2006); *State v. Dessureault*, 104 Ariz. 380, 384, 453 P.2d 951, 955 (1969) (outlining procedures for hearing).

¶18 On the morning of the shooting, Detective Tim Cooning questioned Ford at the hospital. Ford described her assailant

as "Jay," a "black male, approximately twenty-one years of age." She also said that she had not seen Jay before the shooting. In the days that followed, Cooning showed Ford a photo of another suspect - Tony Brown. Ford indicated that Brown was not the shooter and that the shooter was "smaller in size and thinner than [Brown]."

¶19 On November 20, 1999, four days after the shootings, Cooning questioned Ford again at the hospital. Lying in a hospital bed, Ford could not easily speak because she had a tracheotomy and tubes in her nose. Cooning showed Ford a photo lineup of six African-American males that included Moore. Asked if she recognized anyone, Ford shook her head no. Cooning then asked Ford if she had any doubt that it was "Jay" who shot her and she again shook her head no. She nodded in assent when asked to confirm that she had previously said that Jay acted alone, that he was smaller and skinnier than Brown, and that he was a black male, approximately twenty-one years of age, who wore braids. Cooning also showed Ford two composite sketches, which she indicated looked a bit like the shooter.

¶20 Ford was deposed on videotape on April 28, 2000. Although Ford was in a wheelchair and paralyzed from the neck down, she was able to speak and appeared alert. At the deposition Ford testified that Jay, the man who shot her, had medium-size braids and was wearing a stocking cap and hooded

shirt. Ford also testified that she had met Jay three years earlier while using crack and hanging out near 23rd Avenue and Indian School and that she had not seen him again until the night before the shootings. She stated that her shooter was eighteen years old and about 6'1". The prosecutor showed Ford a video lineup comprised of short video clips of seven African-American men, including Moore. Ford was again unable to identify Moore.

¶21 On cross-examination defense counsel asked Ford to confirm that she had previously been shown pictures to see if she could identify the shooter. Ford said that while she was in the hospital an unidentified policeman had shown her a picture of the person who shot her. On redirect, the prosecutor showed Ford the video of the November 20, 1999 interview in which Cooning showed her the six-person photo lineup and the two composite sketches. The prosecutor then asked if the composite in the video looked like someone she knew. Ford instead focused on the photo lineup and said: "That looked like – one of them – it's two of them in the middle, right? Looked more like him – more like him than the picture I just seen just now." The prosecutor then showed her the original photo lineup and she immediately identified Moore as the shooter.

¶22 Before trial, Moore moved to suppress Ford's out-of-court identification and any prospective in-court

identification. Moore argued that the identification was unduly suggestive because Moore was the only common subject in the six-person photo lineup and the seven-person video lineup and Ford had identified him only upon the fourth showing of a lineup that included his picture. After conducting a *Dessureault* hearing, the court found that the State had failed to establish that the deposition identification procedures were not unduly suggestive, but the State had established that Ford's "in-court identification could be reliable, independent of and untainted by the April 28, 2000 identification."

¶23 Because the State does not challenge on appeal the trial court's conclusion that the identification procedures at the April deposition were unduly suggestive, we must apply the *Biggers* factors to determine whether the trial court erred in concluding that Ford's identification was nevertheless reliable. *See Lehr*, 201 Ariz. at 521 ¶ 48, 38 P.3d at 1183-84.

a. Opportunity to view the criminal at the time of the crime

¶24 The trial court found, with support in the record, that Ford had an adequate opportunity to view Moore. Although the shootings occurred in the darkness of early morning, and Ford had been consuming crack throughout the night, Ford testified that thirty seconds before Mata came outside she talked with Moore from a distance of six to seven feet. She

also had spent time with Moore earlier that evening when they had smoked crack together, and she had heard him calling for her several times during a fifteen minute period before she went outside.

b. Witness's degree of attention

¶25 Although the trial court did not make an explicit finding on this factor, the record shows that Ford's attention was directed to Moore when the shootings began. She went outside in response to his persistent calling for her, and when she emerged they talked about whether she had more crack. Within seconds Mata came outside and the encounter between the two men occurred.

c. Accuracy of the witness's prior description of the criminal

¶26 Under *Biggers*, we assess the accuracy of a witness's *prior* description, i.e., before the unduly suggestive procedure. *See* 409 U.S. at 199-200. Moore did not argue below, and we do not find, that the initial showing of the six-person photo lineup to Ford in November 1999 was unduly suggestive. In that interview, Ford confirmed an earlier description of her assailant as a black male, twenty-one years old, named Jay, who wore braids, and who was smaller and thinner than Tony Brown. The record supports the trial court's finding that Ford's prior description of the shooter coincided with Moore's appearance.

d. Level of certainty demonstrated by the witness at the confrontation

¶27 Although the prosecution did not ask Ford about her level of certainty in identifying Moore, the video deposition reflects that she was certain that the person she identified in the photo lineup shot her. Before seeing the photo lineup again, she testified, "I know who shot me." After watching the video of her November 1999 interview, she said that one of photos "looked more like him" than the composite sketches. When she was then shown the actual photo lineup, she immediately identified Moore.

e. Length of time between the crime and the confrontation

¶28 The deposition took place nearly six months after Ford witnessed the shooting. This passage of time does not in itself defeat the reliability of the identification. *See, e.g., id.* at 201 (finding identification made seven months after crime reliable); *Lehr*, 201 Ariz. at 521 ¶ 51, 38 P.3d at 1184 (stating passage of four months gives pause but ultimately does not threaten reliability).

f. Weighing of factors and conclusion

¶29 Whether a pretrial identification is reliable is based on the "totality of the circumstances." *Biggers*, 409 U.S. at 199. We find that the State established a reliable basis for Ford's identification independent of any suggestive procedures

used at the April 2000 deposition. Ford's use of crack cocaine, her failure to identify Moore in her November 1999 interview, and any inconsistencies in her account affect the weight, rather than the admissibility, of her identification and were appropriately the subject of cross-examination. The trial court did not err in admitting Ford's pretrial and in-court identifications.

2. The Prosecution's Opening Statement Comment

¶30 During opening statements, the prosecutor told the jury, "Debra . . . knew Julius Moore, Jay. She described him. She recognized him from the night of the shooting from seeing him before, and she recognized him sometime later as well." Toward the end of his remarks, the prosecutor again emphasized Ford's identification. While the prosecutor spoke, Ford sat in the courtroom without objection from Moore.

¶31 After opening statements, defense counsel renewed the *Dessureault* objection. Counsel asserted that Ford had not previously been told that the person she identified in the photo lineup was indeed Moore, and therefore any in-court identification by Ford would be "even more suggestive, and less likely to have a source independent of the previous unduly suggestive out-of-court identification."

¶32 "[I]f [a] pretrial identification comports with due process, subsequent identification at trial does not violate a

defendant's rights merely by following on the heels of the earlier confrontation." *Lehr*, 201 Ariz. at 521 ¶ 52, 38 P.3d at 1184. Because Ford's pretrial identification was otherwise reliable, and therefore did not violate due process, the prosecutor's reference to it in his opening statement does not render inadmissible either the pretrial identification or the later in-court identification.

B. Guilt-Phase Jury Selection Issues

1. *Morgan v. Illinois* Challenge

¶33 In *Morgan v. Illinois*, the Supreme Court held that a capital defendant is entitled, upon request, to inquire whether prospective jurors believe death should always be imposed for the conviction of a capital offense. 504 U.S. 719, 735-36 (1992). Failure to permit such questioning is structural error. *Id.* at 729-30.

¶34 Moore argues that the trial court committed structural error by not asking jurors if they thought the death penalty should be imposed in all cases in which a person knowingly or intentionally kills another, even though counsel had specifically requested a jury questionnaire including such "life-qualifying" questions.

¶35 There was no *Morgan* error here. The trial court declined to use a written juror questionnaire and instead told counsel: "[T]hat is not to suggest that these questions can't

and won't be asked." After conducting oral voir dire, the trial court allowed the prosecutors and defense counsel to question the panel. Among other questions, Moore's counsel asked: "Is there anyone on the panel here that thinks the death penalty is not given enough in the United States, or this state, for that matter?" Defense counsel did not ask other life-qualifying questions.

¶36 Because Moore was allowed to question the jurors, he cannot complain that the trial court did not itself ask life-qualifying questions. *See State v. Moody* (*Moody II*), 208 Ariz. 424, 452 ¶ 98, 94 P.3d 1119, 1147 (2004) ("[A] defendant who believes a trial court's voir dire to be deficient cannot sit on his rights and bypass the opportunity to cure the error . . . ."). The trial court did not prevent defense counsel from asking life-qualifying questions, but instead refused to ask them in a written questionnaire and invited counsel to ask such questions in oral voir dire.

2. *Witherspoon v. Illinois* Challenge

¶37 Moore argues that the trial court erroneously struck three jurors for cause in violation of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). We review a trial court's decision to strike a potential juror for cause for abuse of discretion. *State v. Jones*, 197 Ariz. 290, 302 ¶ 24, 4 P.3d 345, 357 (2000).

¶38 "A death sentence cannot be upheld if the jury was

selected by striking for cause those who 'voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.'" *State v. Ellison*, 213 Ariz. 116, 137 ¶ 88, 140 P.3d 899, 920 (2006) (quoting *Witherspoon*, 391 U.S. at 522). A judge, however, is required to question jurors regarding their opinions on the death penalty, *see, e.g.*, *State v. Anderson* (*Anderson I*), 197 Ariz. 314, 318-19 ¶¶ 7-10, 4 P.3d 369, 373-74 (2000), and, after attempting rehabilitation, must remove a potential juror from the jury pool if the juror's personal views may "prevent or substantially impair the performance of [the juror's] duties." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (internal quotation marks omitted). We defer to the trial judge and a juror's bias need not be proved with unmistakable clarity. *Id.* at 424-25. Instead, "even if a juror is sincere in his promises to uphold the law, a judge may still reasonably find a juror's equivocation 'about whether he would take his personal biases in the jury room' sufficient to substantially impair his duties as a juror, allowing a strike for cause." *Ellison*, 213 Ariz. at 137 ¶ 89, 140 P.3d at 920 (quoting *State v. Glassel*, 211 Ariz. 33, 48 ¶¶ 49-50, 116 P.3d 1193, 1208 (2005)).

¶39 Moore makes two arguments with regard to the striking of the three potential jurors. He primarily argues that the trial court committed structural error under *Anderson I* by

striking jurors who had expressed general reservations about the death penalty without specifically asking if they could set aside their beliefs and follow the law. He also suggests that the trial judge abused his discretion in excluding these jurors given their responses to the questions asked.

¶40 During jury selection, the court informed the prospective jurors that if they were selected they would be instructed not to consider the possible punishment in determining guilt or innocence; that if the defendant were found guilty of first-degree murder, the court may impose a sentence of either life imprisonment or death; and that the jury would not determine the sentence. The court then asked the potential jurors: "Do any of you have any conscientious or religious scruples or feeling that would prevent you from voting for first degree murder because of the possible imposition of the death penalty?" In response, three jurors responded affirmatively. After briefly questioning these jurors, the court dismissed each for cause.

¶41 Moore relies on *Anderson I* to argue that the trial court's failure to ask prospective jurors if they could set aside their beliefs and follow the law is itself a structural error that requires reversal. We reject this argument. *Anderson I* held that structural error results if jurors are dismissed based on their generalized answers to a written

questionnaire without any opportunity to rehabilitate them through oral voir dire. *Ellison*, 213 Ariz. at 137 ¶ 87, 140 P.3d at 920.

¶42 The court's failure here to specifically ask jurors if they could set aside their beliefs is not analogous to the trial court's refusal in *Anderson I* to allow any oral voir dire after jurors voiced general objections. The Federal Constitution does not dictate a "catechism" for voir dire, and we have recognized that jurors may be excluded for cause even if they affirm that they can set aside their beliefs and follow the law. *Id.* at ¶ 89.

¶43 The issue thus becomes whether, given the questions that were asked and the responses, the trial judge abused his discretion in dismissing Jurors M., S., and G. for cause. These jurors did not merely state general objections to the death penalty. Instead, after the judge explained that the jury would not determine, and should not consider, sentencing, they each stated that their views on the death penalty could affect their ability to decide the merits. Juror M. said that even though the jury was not going to decide punishment, she was so strongly opposed to the death penalty that it *might* affect her ability to decide the case on its own merits. Juror S. said that his feelings about the death penalty would *probably* interfere with how he would decide the case. Finally, Juror G. said there was

a *pretty good chance* that her strong feelings about the death penalty would "come into play" in her decision on guilt or innocence.

¶44 Although the trial court asked less extensive follow-up questions than trial courts in many other cases we have considered, *cf. Uttecht v. Brown*, 551 U.S. 1 (2007) (noting that deference to trial court's assessment of prospective demeanor of juror is appropriate when trial court "has supervised a diligent and thoughtful *voir dire*"), given the trial court's prefatory statement that the court and not the jury would decide sentencing, as well as the individual juror's responses, the trial court could reasonably conclude that the views of these prospective jurors might substantially impair the performance of their duties as jurors.

C. Refusal to Order Drug Test of State's Witness

¶45 Moore asserts that the trial court abused its discretion by refusing to order Ortiz to undergo a drug test to determine if she was under the influence of drugs while testifying. "We review a trial court's ruling on the competency of a witness for an abuse of discretion." *State v. Cruz*, 218 Ariz. 149, 166 ¶ 105, 181 P.3d 196, 213 (2008). A trial court's refusal to order a witness to submit to a drug test is also reviewed for abuse of discretion. *See State v. Apodaca*, 166 Ariz. 274, 276, 801 P.2d 1177, 1179 (App. 1990).

¶46 A witness under the influence of drugs is not necessarily incompetent to testify. *See State v. Ballesteros*, 100 Ariz. 262, 265, 413 P.2d 739, 741 (1966). A witness is competent unless she is so impaired that she cannot coherently respond to questioning. *See Cruz*, 218 Ariz. at 166 ¶ 106, 181 P.3d at 213.

¶47 Ortiz testified during the guilt phase trial; among other things, her testimony placed Moore near the scene of the murders. After her redirect examination, defense counsel asked the trial court to order Ortiz to submit to a urinalysis test to determine whether she was under the influence of drugs. Counsel said that Ortiz was acting strangely because she was talking rapidly and got "off track" during questioning. The court denied the request because it did not view Ortiz's behavior as atypical of a witness. The court stated that Ortiz was coherent, quick to respond to questions, and not slurring her speech.

¶48 The trial court did not abuse its discretion in refusing to order a drug test. The transcript and partial video recording of Ortiz's testimony show that Ortiz was coherent and responded appropriately to questioning, even though she had a tendency to ramble and interrupt counsel. *Cf. id.* ("Although [witness's] testimony was somewhat rambling, it was coherent."). The trial court therefore did not abuse its discretion in

finding her competent to testify. Moreover, defense counsel was not prevented from cross-examining Ortiz regarding her drug history or whether she was under the influence of drugs while testifying. *Cf. State v. Orantez*, 183 Ariz. 218, 222-23, 902 P.2d 824, 828-29 (1995) (discussing impeachment of witness based on drug use).

D. Notice and Sufficiency of Evidence of Burglary and Felony Murder Charges

¶49 With regard to the deaths of Delia and Guadalupe, the indictment charged that Moore had committed first-degree premeditated murder or, in the alternative, had committed first-degree felony murder with a predicate felony of first-degree burglary. The indictment also charged Moore with first-degree burglary, alleging that he, while possessing a handgun, had "with the intent to commit a theft or a felony therein, entered or remained unlawfully in or on the residential structure of Delia Ramos" at East Yale Street. Arizona statutes identify burglary as one of the predicates for felony murder, A.R.S. § 13-1105(A)(2) (Supp. 1999), and define burglary to include unlawfully entering or remaining in a residence with the intent to commit "theft or any felony therein." *Id.* §§ 13-1506, -1507, -1508 (1989).

¶50 Moore argues that he was denied due process because the State did not provide notice until the settling of jury

instructions, and after the close of evidence, that it intended to establish burglary based on Moore's entering the house with the intent to commit murder rather than theft. Moore further argues that burglary based on a defendant's intent to murder cannot validly serve as a predicate for felony murder and accordingly there was insufficient evidence to support his felony-murder convictions.

1. Notice

¶51 This Court reviews constitutional issues and purely legal issues de novo. *Moody II*, 208 Ariz. at 445 ¶ 62, 94 P.3d at 1140. The Sixth Amendment and due process require that a defendant be given "notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). Similarly, Arizona Rule of Criminal Procedure 13.2 provides that an "indictment or information shall be a plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged."

¶52 Moore chiefly relies on *State v. Blakley*, 204 Ariz. 429, 65 P.3d 77 (2003). In *Blakley*, the state initially disclosed sexual assault as the predicate offense for felony murder; at the close of evidence and before closing arguments, however, the state requested a jury instruction that added child abuse as an alternative predicate offense. *Id.* at 439 ¶ 46, 65

P.3d at 87. Blakley had defended the case assuming that sexual assault was the sole predicate felony and had presented evidence suggesting that the victim died of injuries consistent with child abuse rather than sexual assault. *Id.* at 440 ¶ 54. He also identified other evidence he would have presented had he known child abuse was also alleged. *Id.*

¶53 *Blakley* concluded that "[t]he insertion of a new predicate felony after all the evidence was in and the defense had rested constitutes reversible error. The prejudice caused by such late notice was obvious. The defendant was deprived of his constitutional right to a fair trial." *Id.* at ¶ 55. We further noted, "[i]n order to avoid injustice and to ensure that proper notice has been given in a felony murder case, we believe the state should include the predicate felony in the original or an amended indictment." *Id.* at ¶ 56.

¶54 Moore's case is distinguishable from *Blakley*. Moore does not argue that the State charged or argued one theory and then attempted to adopt another after the close of evidence. Instead, Moore complains that the State, while charging felony murder based on burglary, did not specify until the settling of jury instructions, and after the close of evidence, that burglary would be defined by his intent to commit murder rather than theft.

¶55 We agree with Moore that *Blakley* implies that the

state should identify before trial the particular felony that will be used to define burglary when the latter crime is the predicate for felony murder. But *Blakley* itself recognizes that the state's failure to specify the predicate felony before trial will not be reversible error if the defendant otherwise has notice and an opportunity to respond to the accusations. *See id.* at 439-40 ¶¶ 50, 52, 65 P.3d at 87-88. *Blakley* explained that in *State v. Arnett*, 158 Ariz. 15, 18, 760 P.2d 1064, 1067 (1988), the Court found adequate notice when the state mentioned the predicate felony on the first day of trial, "giving defense counsel a reasonable chance to rebut the allegation." *Blakley*, 204 Ariz. at 439 ¶ 50, 65 P.3d at 87. Similarly, in *State v. Eastlack*, 180 Ariz. 243, 258, 883 P.2d 999, 1014 (1994), the Court rejected the defendant's argument that he had received inadequate notice that kidnapping would be used as a predicate felony when the defendant failed to show either prejudice or unfair surprise.

¶56 Like the defendants in *Eastlack* and *Arnett*, Moore was not denied notice of the predicate felony in a way that violates due process or otherwise constitutes reversible error. Although the State did not specifically identify until after the close of evidence that the predicate burglary would itself be based on Moore's intent to murder, he had both notice and an opportunity to defend against the underlying accusations. Moore had notice

he was accused of entering or remaining in the Yale Street house with the intent to murder because he was charged with the premeditated murders of Guadalupe and Delia and with first-degree burglary of the house.

2. Felony Murder and the Merger Doctrine

¶57 Relying on *State v. Essman*, 98 Ariz. 228, 403 P.2d 540 (1965), Moore also argues that under the merger doctrine, felony murder cannot be predicated upon a burglary that is itself based on the intent to murder.

¶58 In *Essman*, the Court held that the trial court had erred by instructing the jury that the felony-murder doctrine could apply based on assault with a deadly weapon. *Id.* at 235, 403 P.2d at 545. Although Arizona statutes did not identify assault as a predicate for felony murder, the Court reasoned more generally that allowing assault to serve as a predicate would eliminate any requirement of proof of premeditation for nearly all first-degree murders. *See id.* at 235-36, 403 P.2d at 545. Quoting Judge Cardozo, the Court observed:

> "The felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein, as e.g., robbery or larceny or burglary or rape."

Id. (quoting *People v. Moran*, 158 N.E. 35, 36 (1927)).

¶59 Later Arizona cases implicitly rejected the broad language in *Essman* suggesting that the predicate felony must be

"independent of the homicide." For example, in *State v. Miniefield*, the defendant argued that it was fundamental error to charge him with felony murder by arson because "the arson was merely the use of fire to attempt to kill the victim." 110 Ariz. 599, 601, 522 P.2d 25, 27 (1974). The Court rejected this argument by noting that the felony murder statute provided that when a person commits arson and the arson results in death it is first-degree murder. *Id.* at 602, 522 P.2d at 28. "The statute does not draw a distinction between a person who intends to kill another by fire and one who only intends to burn down a dwelling house and accidentally kills one of the occupants." *Id.*; *see also State v. Lopez*, 174 Ariz. 131, 141-42, 847 P.2d 1078, 1088-89 (1992) (distinguishing *Essman*).

¶60 Most recently, the Court distinguished *Essman* in *State v. Dann* (*Dann I*), 205 Ariz. 557, 74 P.3d 231 (2003). There, the defendant argued that because he intended to murder a victim rather than assault him, he could not be convicted of felony murder. *Id.* at 567 ¶ 29, 74 P.3d at 241. Noting that the defendant did not dispute that felony murder could be predicated on burglary based on intent to commit assault, the Court held that sufficient evidence supported the finding of the predicate offense. *Id.* at 567-68 ¶¶ 27-29, 74 P.3d at 241-42. The Court further observed that "[m]erger does not apply in cases in which

the separate crime of burglary is alleged and established." *Id.* at 568 n.7 ¶ 29, 74 P.3d at 242 n.7.

¶61 *Dann I* and *Miniefield* defeat Moore's argument that felony murder cannot be predicated on a burglary that is based on the intent to murder. The felony murder statute, A.R.S. § 13-1105(A)(2), does not distinguish between burglaries defined by intent to commit assault versus intent to murder. It would, moreover, be anomalous to conclude that first-degree murder occurs if a burglary with intent to assault results in death but not if the burglary is based on the more culpable intent to murder.

¶62 Moore notes that courts in several other states have held that a felony-murder conviction cannot be based on a burglary intended solely to murder the victim. *See Parker v. State*, 731 S.W.2d 756, 758-59 (Ark. 1987); *People v. Garrison*, 765 P.2d 419, 435 (Cal. 1989); *People v. Wilson*, 462 P.2d 22, 27-28 (Cal. 1969); *Williams v. State*, 818 A.2d 906, 910-13 (Del. 2002); *People v. Cahill*, 809 N.E.2d 561, 588-89 (N.Y. 2003). We find these cases unpersuasive because we have already recognized that Arizona's felony-murder statute identifies burglary based on assault as a valid predicate offense; these out-of-state cases conflict with *Miniefield* and *Lopez* insofar as they require the predicate offense to be separate or independent from the homicide, and our Court in *Lopez* distinguished Arizona's felony

murder scheme from that of California. 174 Ariz. at 142, 847 P.2d at 1089. *Cf. People v. Farley*, 2009 WL 1886072, No. S024833 (Cal. July 2, 2009) (overruling *Wilson* and holding merger doctrine does not apply to first-degree felony murder).

¶63 We therefore reject Moore's use of the merger doctrine to challenge his convictions for felony murder.

E. Definition of Premeditation

¶64 Moore argues that the trial court incorrectly instructed the jury that "proof of actual reflection is not required" to establish premeditation and the prosecutor's closing argument compounded this error.

¶65 The use of the phrase "proof of actual reflection is not required" is an erroneous instruction on premeditation if given in a jury instruction "without further clarification." *State v. Thompson*, 204 Ariz. 471, 480 ¶ 34, 65 P.3d 420, 429 (2003); *accord Dann I*, 205 Ariz. at 565 ¶ 16, 74 P.3d at 239.

¶66 Here, the court instructed the jury that

> "[p]remeditation" means that a person acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by a length of time to permit reflection. Proof of actual reflection is not required, but an act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.

During closing arguments the prosecutor reinforced the court's instruction by repeatedly telling the jury that Moore "had time to reflect" with respect to the murders.

¶67 Moore properly objected to the instruction, and the State correctly concedes that it was erroneous. Accordingly, we must determine if the error was harmless. *Dann I*, 205 Ariz. at 565 ¶ 18, 74 P.3d at 239. "An error is harmless if it appears beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained." *Id.* (alteration in original) (internal quotation marks omitted).

¶68 The State argues that Moore was not prejudiced by the erroneous premeditation instruction because he pursued a mistaken identity offense. We have previously rejected a similar argument in the context of harmless error review. *See State v. Gomez*, 211 Ariz. 494, 499-500, 123 P.3d 1131, 1136-37 (2005); *Dann I*, 205 Ariz. at 566 & n.3 ¶¶ 19-20, 74 P.3d at 240 & n.3.

¶69 There was, however, overwhelming evidence of Moore's premeditation with respect to the murder of Mata. Before leaving his mother's house with his gun, Moore told his girlfriend that he had seen the person who had tried to run him over and he was not going to stand for it. He later told Brown that he was going to "smoke" Mata and asked if Brown wanted to "get" Mata with him. When Mata came outside, Moore confronted

him by asking if Mata had a problem with him and then began shooting. Moore told Borghetti after the shootings that he had shot the person who had tried to run him over and he was sorry about the other victims who "didn't have anything to do with it." Given this evidence, the error in the premeditation instruction was harmless beyond a reasonable doubt with regard to the murder of Mata.

¶70 In contrast, the evidence of premeditation is less compelling with regard to the other victims. The State argues that premeditation was established because Moore, after shooting Mata and Ford, "entered the house and hunted for Guadalupe and Delia." The State's assertion that Moore "hunted" for the victims is based on the fact that Moore entered the house, shot Guadalupe in his sleep, and then immediately shot Delia as she hid behind a pillow in the closet of another room.

¶71 In *Dann I*, the Court did not find overwhelming evidence of premeditation based on the defendant's killing the victims by placing his gun muzzle against their heads or his later making incriminating statements about his motives for these shootings. *See Dann I*, 205 Ariz. at 566 ¶ 20, 74 P.3d at 240. This Court also noted that this evidence had to be considered in light of the court's erroneous instruction and the prosecutor's statements in closing that the passage of time alone would support a finding of first-degree murder. *See id.*

at 565 ¶ 16, 74 P.3d at 239.

¶72 Consistent with *Dann I*, the evidence here is not so overwhelming that this Court can conclude, beyond a reasonable doubt, that the error in the premeditation instruction did not affect the verdicts as to Delia and Guadalupe. We therefore reverse the convictions for the premeditated murders of Delia and Guadalupe. Because Moore remains convicted of felony murder for their deaths, however, remand is unnecessary.

F. Lesser-Included Offense Instruction

¶73 Moore argues that the trial court committed fundamental error by instructing the jury that it could find the defendant guilty of second-degree murder only if it unanimously found that the State had failed to prove first-degree murder beyond a reasonable doubt, but did prove the less serious crime beyond a reasonable doubt.

¶74 This Court disapproved such an "acquittal-first" instruction in *State v. LeBlanc*, 186 Ariz. 437, 438-39, 924 P.2d 441, 442-43 (1996). Because Moore's counsel did not object to the instruction at trial, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567 ¶ 19, 115 P.3d 601, 607 (2005).

¶75 The use of the instruction, although erroneous in light of *LeBlanc*, does not constitute fundamental error. The error is not fundamental in nature because Moore has not shown

that it denied him a fair trial or deprived him of a right essential to his defense. *See id.* at 567 ¶ 19, 115 P.3d at 607. Although *LeBlanc* disapproved of the instruction's prospective use, the Court expressly noted that the instruction does not violate the state or federal constitutions, that its use is not fundamental error, and that the adoption of a new instruction was a procedural change made for purposes of judicial administration. *See LeBlanc*, 186 Ariz. at 439-40, 924 P.2d at 443-44. We reject Moore's argument that once *LeBlanc* disapproved the instruction, its subsequent use necessarily makes the error fundamental.

G. Right to Conflict-Free Counsel

¶76 Moore argues that he was denied his Sixth Amendment right to conflict-free counsel when, after he had been convicted in his first trial, the trial court denied two motions for substitute counsel before the sentencing trials.

¶77 A trial court's decision to deny a request for new counsel will not be disturbed absent an abuse of discretion. *State v. Cromwell*, 211 Ariz. 181, 186 ¶ 27, 119 P.3d 448, 453 (2005). "The presence of an irreconcilable conflict or a completely fractured relationship between counsel and the accused ordinarily requires the appointment of new counsel." *Id.* at ¶ 29. Disagreements over defense strategy do not constitute an irreconcilable conflict. *Id.*

¶78 In 2002, Moore's counsel moved to withdraw on the grounds that there was an irreconcilable conflict between them and Moore. The identified conflict concerned the evidence to be presented at sentencing. Moore desired to maintain his innocence and to offer testimony by an alibi witness (whom counsel, with Moore's agreement, decided not to call at the guilt trial) and also to inform the jury, in allocution, that he had passed a polygraph examination after his convictions. Moore's counsel instead wanted to present Moore's drug use as mitigation. The trial court denied the motion to withdraw on the grounds that the conflict concerned sentencing strategy.

¶79 Moore contends that determining what evidence to present at a capital sentencing trial is a "fundamental decision" that must be made by the defendant himself, and not merely a strategic decision to be made by his lawyers. *Cf. Jones v. Barnes*, 463 U.S. 745, 751 (1983) (recognizing that defendant has "ultimate authority" over certain "fundamental decisions regarding the case" including whether to plead guilty, waive a jury trial, testify on his own behalf, or take an appeal).

¶80 The trial court did not abuse its discretion in denying the motion to withdraw. Recognizing that certain decisions during the sentencing phase of a capital case may be fundamental, we do not regard Moore's desire to present evidence

of actual innocence to be such a decision. The trial court properly precluded evidence of actual innocence from the sentencing phase. *See* infra ¶¶ 107-09. A defendant's desire to present inadmissible evidence contrary to counsel's sentencing strategy does not give rise to an irreconcilable conflict.

¶81 Moore's counsel again sought to withdraw in 2003, this time arguing that they had an actual conflict because their office had previously represented a statutory victim in the case who did not want to testify. This victim, counsel avowed, knew that other persons wanted to kill the victims, which would be relevant to residual doubt, and that the victims were drug dealers, which could rebut any victim impact evidence the State might present. Moore's counsel argued that new counsel could call the witness in question without violating any ethical rules. After a hearing, the trial court denied the motion because Moore had failed to show the witness could offer any relevant, noncumulative information.

¶82 To succeed on a conflict of interest claim, a defendant must prove the existence of an actual conflict that adversely affected counsel's representation. *State v. Jenkins*, 148 Ariz. 463, 465-66, 715 P.2d 716, 718-19 (1986). To establish an actual conflict, a defendant must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. *Id.* at 466 n.1, 715 P.2d at 719 n.1.

¶83 The trial court correctly denied the second motion to withdraw. Moore has not shown that there was a plausible alternative defense strategy that could have been pursued absent the alleged conflict. Moore argues that a conflict-free lawyer could have subpoenaed the former client and forced him to testify. This possibility, however, was not a plausible alternative strategy because the witness's contemplated testimony concerned either residual doubt, which would not have been admissible at sentencing, or rebuttal of victim impact evidence, which the State did not introduce. Moore has not shown that the identified conflict adversely affected his counsel's representation.

H. (F)(8) Aggravator

¶84 Moore contends that trial court erroneously failed to completely instruct the jury on the elements of the (F)(8) aggravator at the first sentencing trial, that the instruction given was unconstitutionally vague, and that structural error occurred.

¶85 This Court reviews de novo whether "instructions to the jury properly state the law." *See Glassel*, 211 Ariz. at 53 ¶ 74, 116 P.3d at 1213. Because Moore did not object to the jury instruction at the first sentencing trial, we review for fundamental error. *See Henderson*, 210 Ariz. at 567 ¶ 19, 115 P.3d at 607.

¶86 To prove the (F)(8) aggravator, the State must establish beyond a reasonable doubt that the murders took place during a "continuous course of criminal conduct" and were "temporally, spatially, and motivationally related." *State v. Armstrong* (*Armstrong III*), 218 Ariz. 451, 464 ¶ 67, 189 P.3d 378, 391 (2008). The instruction here instead required only a finding that the homicides were "committed on the same occasion," and was therefore erroneous, which the State concedes. *See State v. Ring* (*Ring III*), 204 Ariz. 534, 560-61 ¶¶ 80-81, 65 P.3d 915, 941-42 (2003).

¶87 Moore must also show prejudice to establish that the incomplete instruction was fundamental error. He cannot meet this burden because the record of Moore's first sentencing trial demonstrates a temporal, spatial, and motivational relationship substantial enough that no reasonable jury could fail to find the (F)(8) aggravator beyond a reasonable doubt. *See State v. Armstrong* (*Armstrong II*), 208 Ariz. 360, 364-65 ¶ 11, 93 P.3d 1076, 1080-81 (2004). Ford's uncontroverted testimony established the temporal element because within seconds, she saw Moore shoot Mata and her and then heard multiple gunshots. *See State v. Dann* (*Dann II*), 206 Ariz. 371, 373 ¶ 9, 79 P.3d 58, 60 (2003) (finding temporal element established when murders occurred in a "short, uninterrupted span of time"). The spatial element was established by the uncontested evidence that

Guadalupe and Delia were shot inside the Yale Street house, while Mata was shot just outside the front door. *See State v. Tucker* (*Tucker I*), 205 Ariz. 157, 169 ¶ 66, 68 P.3d 110, 122 (2003) (noting that spatial relationship was established when victims were in different rooms of an apartment). Finally, no reasonable jury could fail to find the motivational element because the murders involved a continuous course of criminal conduct and "it is difficult to imagine a motive for the killings unrelated to the murder of [Mata]." *See id.*; *see also State v. Boggs*, 218 Ariz. 325, 342 ¶ 81, 185 P.3d 111, 128 (2008) (upholding (F)(8) aggravator where "all the murders involved a continuous course of criminal conduct").

¶88 We also reject Moore's arguments that the (F)(8) instruction here was facially vague or that we should reconsider *Ring III* and hold that a jury finding of an aggravator based on an incomplete instruction is structural error.

I. Sentencing Jury Did Not Decide Guilt or Aggravating Circumstance

¶89 Moore argues that his death sentences must be reversed because the second sentencing jury did not itself find the (F)(8) aggravator. He contends that because the first sentencing jury invalidly found the (F)(8) aggravator based on a flawed jury instruction, the State should have been required to reprove this aggravator. He argues that this situation is

analogous to *State v. Pandeli* (*Pandeli IV*), 215 Ariz. 514, 522 ¶ 15, 161 P.3d 557, 565 (2007), which recognizes that when a capital sentence is vacated and remanded for resentencing, the State must reprove the aggravating circumstances. *Pandeli IV* is inapposite because neither Moore's capital sentence nor the first jury's finding of the (F)(8) aggravator was vacated.

¶90 We also reject Moore's related argument that the second sentencing jury could not properly determine his sentence in a "vacuum." Substantially the same evidence was introduced at the second sentencing trial as at the guilt phase trial and the first sentencing trial. There was extensive presentation of mitigation evidence. The second sentencing jury was therefore able to make an individualized determination of Moore's sentence consistent with the case law of the Supreme Court and this Court. *See Tuilaepa v. California*, 512 U.S. 967, 972 (1994); *State ex rel. Thomas v. Granville* (*Baldwin*), 211 Ariz. 468, 472 ¶ 17, 123 P.3d 662, 666 (2005).

¶91 Moore also argues that notwithstanding *Lockhart v. McCree*, 476 U.S. 162 (1986), juries should no longer be death qualified because "they unconstitutionally stack the deck against a capital defendant." We have previously upheld death qualification of jurors. *See, e.g., State v. Dann* (*Dann III*), 220 Ariz. 351, ___ ¶ 28, 207 P.3d 604, 613 (2009); *State v. Bocharski*, 218 Ariz. 476, 483 ¶ 18, 189 P.3d 403, 410 (2008).

¶92 Finally, Moore argues that permitting a jury to impose a death sentence when it did not determine his guilt or the (F)(8) aggravator violates the Sixth and Eighth Amendments because the jury that sentenced him to death was able to abdicate its responsibility to the other juries. Under *Caldwell v. Mississippi*, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. 320, 328-29 (1985).

¶93 We have previously concluded that *Caldwell*'s dictate is not violated when different juries determine guilt and sentence if the sentencing jury is not misled as to its role. *Dann III*, 220 Ariz. at ___ ¶¶ 29-30, 207 P.3d at 613-14; *Bocharski*, 218 Ariz. at 483 ¶ 20, 189 P.3d at 410; *State v. Anderson (Anderson II)*, 210 Ariz. 327, 337 ¶¶ 21-23, 111 P.3d 369, 379 (2005). Moore argues, however, that this Court has never sanctioned a bifurcation of the aggravation phase and penalty phase juries. But this kind of bifurcation is not substantively different from the bifurcation sanctioned under our prior cases, and it did not mislead the sentencing jury to believe that the responsibility for determining Moore's sentence would rest elsewhere. Moore's sentencing jury received clear instruction that it alone was responsible for the sentencing

decision. Therefore, *Caldwell* was not violated.

J. Sentencing Jury Voir Dire

¶94 Moore argues that the trial court deprived him of his right to a fair and impartial sentencing jury by refusing to strike pro-death jurors and restricting his questions to potential jurors about their views on mitigation.

¶95 *Morgan* requires that defendants be afforded an opportunity during voir dire to identify, and to strike for cause, prospective jurors who would automatically impose the death penalty once guilt is found. *See Glassel*, 211 Ariz. at 45-46 ¶¶ 37-41, 116 P.3d at 1205-06. *Morgan* does not, however, entitle defendants to ask prospective jurors to identify circumstances they would find mitigating or to answer open-ended questions about their views on mitigation. *See id.* at 45-47 ¶¶ 37, 42-44, 116 P.3d at 1205-07.

¶96 Trial court rulings on the scope of voir dire and whether to strike jurors for cause are reviewed for abuse of discretion. *State v. Smith*, 215 Ariz. 221, 230 ¶ 37, 159 P.3d 531, 540 (2007); *Ellison*, 213 Ariz. at 137 ¶ 88, 140 P.3d at 920. If a defendant is forced to use a peremptory challenge to remove a juror who should have been excused for cause, an otherwise valid conviction will not be reversed unless the defendant shows prejudice. *State v. Hickman*, 205 Ariz. 192, 198 ¶ 28, 68 P.3d 418, 424 (2003).

1. Denial of the Motions to Strike

¶97 Moore contends that the trial court misapplied *Morgan* and improperly denied his motions to strike prospective Jurors 4, 9, 22, 61, 62, and 122.

¶98 Only one of these six jurors - Juror 9 - was selected for the jury. In her responses during voir dire, Juror 9 indicated that she would listen to all of the evidence and the instructions and could decide between a sentence of life or death depending on the facts. Defense counsel did not object that Juror 9 would automatically vote for a death sentence. Instead, counsel argued that she should be disqualified because she had said, in response to a question from defense counsel, that she did not think age would make a difference to her as a mitigating factor. As the trial court noted, the juror had not been instructed on the law and was being posed the question in a vacuum. Given Juror 9's other responses to the voir dire questions, the trial court did not abuse its discretion in denying the motion to strike.

¶99 Jurors 4, 22, 61, 62 and 122 did not sit on the jury. Thus, under *Hickman*, any error by the trial court in refusing to strike them was not reversible error absent prejudice to Moore. *See Glassel*, 211 Ariz. at 50 ¶ 56-57, 116 P.3d at 1210. No evidence suggests that the sentencing jury was not fair and impartial. We reject Moore's argument that *Hickman* should not

apply because the trial court systematically misapplied *Morgan*. Consistent with *Morgan*'s requirements, prospective jurors were asked questions in both a twelve-page jury questionnaire and in oral voir dire aimed at identifying those who would automatically impose the death penalty.

2. Restrictions on voir dire regarding mitigation

¶100 Moore argues that the trial court refused to allow him to "meaningfully" question "many additional" jurors on "whether they were open to considering *any* evidence of mitigation." In this regard, Moore cites to the transcripts of the oral voir dire of eleven prospective jurors, but five were not empanelled and two were designated as alternates and did not deliberate. Any error in the voir dire of these seven jurors was harmless. *See Glassel*, 211 Ariz. at 46 ¶ 41, 116 P.3d at 1206 (stating that alleged error in restricting voir dire was harmless as to jurors that did not participate in deliberations).

¶101 With regard to the remaining jurors who were empanelled - Jurors 27, 77, 196, and 210 - Moore sought to strike for cause all but Juror 77. The question becomes whether the court abused its discretion in restricting Moore's voir dire or denying his motions to strike these jurors.

¶102 The four identified jurors each completed a written questionnaire and answered questions in oral voir dire. None indicated that they would automatically impose the death

penalty. We are not persuaded by Moore's arguments that the trial court's restrictions on voir dire regarding mitigation violated *Morgan*.

¶103 The trial court refused to allow Moore to ask Juror 27 what things she would or would not consider mitigating. The trial court also sustained an objection when Moore asked Juror 77 if there were particular areas the juror would want to hear about. With respect to Juror 196, the trial court sustained the State's objection when counsel asked "how can you tell us that you'd be open minded to consider all mitigation without knowing anything about what might be out there?" Defense counsel was allowed, however, to ask this juror if she was open minded and if "there [were] some things that you're not open minded about?" With regard to Juror 210, the trial court sustained objections to open-ended questions asking the juror to identify what she thought were "good reasons" for having or not having a death penalty. The trial court did allow Moore to ask this juror whether "there [are] some cases in particular in which you think the death penalty would be justified, some cases where you would be less open minded?"

¶104 The trial court's restrictions on voir dire were consistent with this Court's decisions. We have repeatedly rejected arguments that *Morgan* requires courts to allow defendants to ask prospective jurors to identify circumstances

that they would find mitigating or to respond to open-ended questions on this topic. For example, in *Glassel*, this Court held that *Morgan* does not require that courts permit defendants to question prospective jurors as to their understanding of the phrase "sufficiently substantial to call for leniency." 211 Ariz. at 46 ¶ 40, 116 P.3d at 1206. The Court also rejected the use of open-ended questions about the mitigating circumstances a juror would consider important in deciding whether to impose death. *Id.* at ¶ 44.

¶105 The Court further narrowed the scope of sentencing jury voir dire in *State v. Johnson*, 212 Ariz. 425, 435 ¶ 33, 133 P.3d 735, 745 (2006). In that case, the Court held that *Morgan* does not require courts to allow defendants to ask prospective jurors about their views on specific mitigating circumstances. *Id.* In *Smith*, the Court held that trial courts may prohibit open-ended questions seeking to determine a juror's views "about the best reason for having or not having the death penalty, the importance of considering mitigation, and the type of offense for which the juror would consider death to be appropriate." 215 Ariz. at 231 ¶ 41, 159 P.3d at 541.

¶106 Under these precedents, the questions that Moore sought to ask prospective jurors about their views on mitigation were not required by *Morgan*. Accordingly, the trial court did

not abuse its discretion in limiting voir dire or denying Moore's related motions to strike Jurors 27, 196 and 210.

K. Preclusion of Actual Innocence Evidence and Argument

¶107 Moore next asserts that the trial court's preclusion of evidence and argument regarding actual innocence violates his rights to due process, to present a complete defense, and to have his sentencer consider all relevant mitigation, as well as the prohibition against ex post facto laws. Moore sought at sentencing to introduce expert testimony on eyewitness identification and evidence that he passed a polygraph examination after the jury found him guilty, and to argue residual doubt as a mitigating factor. On the State's motion, the trial court precluded all evidence on residual doubt from both the aggravation and penalty phases.

¶108 We have previously rejected the argument that trial courts are constitutionally or statutorily required to admit evidence or permit argument regarding residual doubt at a sentencing trial. *See State v. Harrod* (*Harrod III*), 218 Ariz. 268, 281 ¶ 46, 183 P.3d 519, 532 (2008); *State v. Garza*, 216 Ariz. 56, 70 ¶ 67, 163 P.3d 1006, 1020 (2007); *see also Oregon v. Guzek*, 546 U.S. 517, 523 (2006) ("We can find nothing in the Eighth or Fourteenth Amendments that provides a capital defendant a right to introduce new evidence of this kind at sentencing."). Moore attempts to distinguish his situation by

arguing that actual innocence evidence should be admitted because the (F)(8) aggravator focuses on the defendant's role in the murders. However, in *Dann III* we specifically rejected using residual doubt evidence at the aggravation phase to disprove the (F)(8) aggravator when the evidence is to be used only to disprove guilt. *See Dann III*, 220 Ariz. at ___ ¶¶ 66-69, 207 P.3d at 618-19.

¶109 In *Dann III*, we also rejected the claim that preclusion of residual doubt evidence is an ex post facto law. *Id.* at ___ ¶¶ 119-20, 207 P.3d at 625. Moore also argues that the preclusion of residual doubt evidence violated his right to due process because his trial strategies assumed that the judge presiding over his guilt trial could consider residual doubt in determining the sentence. This argument, however, mistakenly presumes that, before jury sentencing, Moore had a right to have residual doubt considered as mitigation. This Court had never recognized such a right and more recent cases have clarified that a defendant has no constitutional right to present residual doubt evidence at sentencing. *See Harrod III*, 218 Ariz. at 278-81 ¶¶ 37-46, 183 P.3d at 528-31.

L. Constitutionality of Burden of Proof at Sentencing

¶110 Moore argues that Arizona's death penalty scheme is unconstitutional under the Eighth and Fourteenth Amendments because it does not require the State to prove beyond a

reasonable doubt that mitigating circumstances are not "sufficiently substantial to call for leniency."

¶111 This Court, as Moore acknowledges, has previously rejected this argument. *See, e.g., Glassel*, 211 Ariz. at 52 ¶ 70, 116 P.3d at 1212. Moore argues, however, that under *Kansas v. Marsh*, 548 U.S. 163 (2006), when a state allows the jury to decide whether the death penalty is appropriate, the issue is an element of the offense of capital murder that must be proven by the state beyond a reasonable doubt.

¶112 We have rejected this reading of *Marsh*. That opinion does not hold that the Federal Constitution requires the state to prove that mitigating circumstances do not warrant leniency; instead, as we noted in *State v. Tucker (Tucker II)*, the Supreme Court held that so long as the state is required to prove the elements of the offense and aggravating circumstances, the state may place on the defendant "the burden of proving mitigating circumstances sufficiently substantial to call for leniency." 215 Ariz. 298, 316 ¶ 67, 160 P.3d 177, 195 (2007) (internal quotation marks omitted). For this reason, we held that instructing a jury that the defendant had the burden of proving mitigation was sufficiently substantial to warrant leniency, although contrary to our decision in *Baldwin*, did not constitute fundamental error. *See id.* at 316-17 ¶ 69, 160 P.3d at 195-96.

¶113 The trial court here did not err by instructing the jury, consistent with *Baldwin*, that the determination of the appropriate sentence is not a fact question on which either side has a burden of proof.

M. Independent Review

¶114 Because the murders occurred before August 1, 2002, this Court must "independently review the trial court's findings of aggravation and mitigation and the propriety of the death sentence." A.R.S. § 13-755 (Supp. 2009); *see* 2002 Ariz. Sess. Laws, ch. 1, § 7 (5th Spec. Sess.).

1. Aggravating Circumstance - (F)(8)

¶115 As discussed in Part H above, the evidence presented during aggravation establishes beyond a reasonable doubt that the murders were temporally, spatially, and motivationally related as required for the (F)(8) aggravator.

2. Mitigating Circumstances

¶116 Moore presented evidence related to two statutory mitigating factors and several non-statutory mitigating factors.

a. Statutory Mitigation

i. Intoxication

¶117 To establish intoxication as a statutory mitigator, a defendant must prove by a preponderance of the evidence that "[t]he 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." A.R.S. § 13-703(G)(1) (Supp. 1999).

¶118 Moore established that he used crack cocaine in the days and hours leading up to the murders. Dr. Stan Cabanski, who performed a juvenile court psychological evaluation on Moore when he was seventeen years, eight months old, concluded Moore was abusing several street drugs. Moore also offered the expert testimony of Dr. Alex Stalcup, a doctor specializing in addiction medicine. Stalcup concluded that Moore had been addicted to crack since age fifteen, that Moore's drug use had impaired his brain development and impulse control, and that Moore had committed the murders in an explosive rage caused by his craving for cocaine. He further opined that Moore's irritability would have been enhanced by his diabetes if his blood sugar was low because he had not eaten.

¶119 To rebut Moore's evidence, the State offered testimony by Dr. Eugene Almer, who acknowledged that Moore had a cocaine habit and had smoked crack before the murders, but opined that Moore's acts the morning of the shooting were volitional. He noted that although Moore showed signs of anger or rage earlier in the evening when he informed his girlfriend that he intended to confront the person who tried to run him over, there were no signs of rage immediately before the shooting. Dr. Almer also noted that Moore made efforts to avoid detection by not leaving

behind fingerprints or cigarette butts. Neither Dr. Stalcup nor Dr. Almer interviewed or otherwise examined Moore; they based their conclusions on reviewing trial evidence and other information.

¶120 Based on our review of the record, we do not find that Moore has established the statutory mitigator of intoxication. "[A] defendant's claim of alcohol or drug impairment fails when there is evidence that the defendant took steps to avoid prosecution shortly after the murder, or when it appears that intoxication did not overwhelm the defendant's ability to control his physical behavior." *State v. Reinhardt*, 190 Ariz. 579, 591-92, 951 P.2d 454, 466-67 (1997). Moore took steps to avoid prosecution and we do not find that his use of crack cocaine overwhelmed his ability to control his behavior.

¶121 Although Moore's evidence of impairment from his crack cocaine use does not satisfy the statutory mitigation requirements, we will consider such evidence as non-statutory mitigation. *See State v. Gallegos* (*Gallegos I*), 178 Ariz. 1, 17-18, 870 P.2d 1097, 1113-14 (1994).

ii. Age

¶122 In assessing age as a mitigating circumstance, the Court considers the defendant's chronological age, as well as "his level of intelligence, maturity, past experience, and level

of participation in the killings." *State v. Poyson*, 198 Ariz. 70, 80 ¶ 37, 7 P.3d 79, 89 (2000).

¶123 Moore was eighteen years, seven months old at the time of the murders. Although his teachers testified that he was intelligent, Moore was held back a year in elementary school. Further, Moore stopped attending school in the ninth grade. He appears to have lacked maturity, possibly due to his crack cocaine use, which the experts agreed stunted his emotional development. Although Moore had a child, he lived with his mother and never consistently held a job.

¶124 Moore also had extensive experience with the juvenile justice system. By the time he became an adult, he had twelve referrals to juvenile court. Although criminal history typically lessens the mitigating weight assigned to age, *see id.*, we do not believe Moore's juvenile record should have a similar effect because he was never adjudicated delinquent and the offenses were all non-violent. That is not to say, as Moore argues, that the failure of the criminal justice system to hold him accountable as a juvenile itself qualifies as mitigation.

¶125 Moore was the sole participant in the murders, a fact that tends to reduce any mitigating significance of his age.

¶126 On balance, we conclude that Moore's age deserves some weight as a mitigating factor.

b. Non-Statutory Mitigation

i. Appellant's addiction to crack cocaine

¶127 Moore has clearly established his use of crack cocaine, both habitually and on the night of the shootings, and this factor combined with Moore's relative youth and early-onset drug use, which likely impacted his mental development, deserves some mitigating weight.

ii. Appellant's dysfunctional childhood

¶128 A difficult family background may be a mitigating circumstance in determining whether a death sentence is appropriate; however, we give this factor little weight absent a showing that it affected the defendant's conduct in committing the crime. *State v. Sansing* (*Sansing II*), 206 Ariz. 232, 240-41 ¶¶ 34-36, 77 P.3d 30, 38-39 (2003).

¶129 Moore established that he had a dysfunctional childhood. His father suffered from depression and flashbacks related to his service in the Vietnam War. He testified that he was a chronic alcoholic and that his children grew up watching him kill himself by drinking. Before the murders, Moore's father had stopped communicating with his family.

¶130 As a child, Moore was often depressed and kept to himself. His mother filed for divorce when he was in eighth grade, and Moore soon thereafter began running away from home. Approximately one month before Moore's eighth grade graduation,

and weeks after his fifteenth birthday, police stopped Moore in an area known for drug activity. Moore skipped his graduation and was arrested that day for consumption of alcohol as a minor.

¶131 On several occasions, Moore's mother kicked Moore out of the house. Because he was a minor, the police made her take him back. Ultimately she filed papers with the courts unsuccessfully seeking to have Moore declared incorrigible. Moore's twelve referrals to juvenile court included several involving possession of drug paraphernalia.

¶132 Moore has offered sufficient evidence to prove that he was raised in a dysfunctional environment, but we do not find that it merits significant weight as a mitigating factor independent of his drug use as a youth.

iii. Residual doubt

¶133 Once a person is found guilty beyond a reasonable doubt, claims of innocence or residual doubt do not constitute mitigation for sentencing purposes. *See Dann III*, 220 Ariz. at ___ ¶ 136, 207 P.3d at 628; *Harrod III*, 218 Ariz. at 280 ¶¶ 42-43, 183 P.3d at 531.

iv. Appellant's family support and impact on his family

¶134 "The existence of family ties is a mitigating factor." *State v. McGill*, 213 Ariz. 147, 162 ¶ 67, 140 P.3d 930, 945 (2006). During the penalty phase, Moore's mother, father,

sisters, and grandmother provided testimony or interviews expressing their love for Moore and indicating that his family, including his daughter who was eighteen months old at the time of the murders, would be negatively impacted by his execution. Although Moore established this mitigating factor, we give it minimal weight. *See Poyson*, 198 Ariz. at 82 ¶ 47, 7 P.3d at 91.

v. Appellant has expressed remorse

¶135 Remorse may be a non-statutory mitigating circumstance, but we give this factor little weight when a defendant denies responsibility for his or her conduct. *See Dann III*, 220 Ariz. at ___ ¶ 150, 207 P.3d at 629; *State v. Andriano*, 215 Ariz. 497, 512 ¶ 76, 161 P.3d 540, 555 (2007).

¶136 Although Moore points to statements he made to Borghetti and his sister as indicating remorse, these statements carry little weight given that Moore continues to deny responsibility for the murders. His comments to his sister express regret about the impact on his family rather than remorse about the murders. Moore has not established remorse by a preponderance of the evidence.

3. Propriety of Death Sentence

¶137 In reviewing the propriety of the death sentence, "'we consider the quality and the strength, not simply the number, of aggravating and mitigating factors.'" *State v. Roque*, 213 Ariz. 193, 230 ¶ 166, 141 P.3d 368, 405 (2006) (quoting *State v.*

Greene, 192 Ariz. 431, 443 ¶ 60, 967 P.2d 106, 118 (1998)). We give the multiple murders aggravator extraordinary weight. *Garza*, 216 Ariz. at 72 ¶ 81, 163 P.3d at 1022. In light of this significant aggravator, we must determine whether Moore's mitigating evidence is "sufficiently substantial to warrant leniency." *See* A.R.S. § 13-755(B).

¶138 Although Moore presented significant mitigating evidence based on his age and the impact of his extensive use of crack cocaine both habitually and on the night of the murders, this evidence is not sufficiently substantial to warrant leniency.

N. Issues Preserved for Federal Review

¶139 To avoid preclusion, Moore raises twenty-six other constitutional challenges that he states have been rejected by the Supreme Court or this Court. These claims and the decisions Moore identifies as rejecting them are set forth verbatim in the Appendix.

CONCLUSION

¶140 For the foregoing reasons, we affirm Moore's convictions for the first-degree felony murders of Delia Ramos and Guadalupe Ramos, for the first-degree premeditated murder of Sergio Mata, for the attempted first-degree murder of Debra Ford, and for first-degree burglary, and affirm Moore's death

sentences. We reverse Moore's convictions for the first-degree premeditated murders of Delia Ramos and Guadalupe Ramos.

W. Scott Bales, Justice

CONCURRING:

Rebecca White Berch, Chief Justice

Michael D. Ryan, Justice

Ruth V. McGregor, Justice (Retired)

Daniel A. Barker, Judge*

*Vice Chief Justice Andrew D. Hurwitz has recused himself from this case. Pursuant to Article 6, Section 3 of the Arizona Constitution, the Honorable Daniel A. Barker, Judge of the Arizona Court of Appeals, Division One, was designated to sit in this matter.

66a

APPENDIX

(1) The death penalty is *per se* cruel and unusual punishment. *Gregg v. Georgia*, 428 U.S. 153, 186-87 (1976); *State v. Salazar*, 173 Ariz. 399, 411, 844 P.2d 566, 578 (1992).

(2) Execution by lethal injection is *per se* cruel and unusual punishment. *State v. Hinchey*, 181 Ariz. 307, 315, 890 P.2d 602, 610 (1995).

(3) The statute unconstitutionally requires imposition of the death penalty whenever at least one aggravating circumstance and *no* mitigating circumstances exist. *Walton v. Arizona*, 497 U.S. 639, 648 (1990); *State v. Miles*, 186 Ariz. 10, 19, 918 P.2d 1028, 1037 (1996);

(4) The death penalty is unconstitutional because it permits jurors unfettered discretion to impose death without adequate guidelines to weigh and consider appropriate factors and fails to provide principled means to distinguish between those who deserve to die or live. *State v. Johnson*, 212 Ariz. 425, 440 ¶ 69, 133 P.3d 735, 750 (2006).

(5) Arizona's death statute unconstitutionally requires defendants to prove that their lives should be spared. *State v. Fulminante*, 161 Ariz. 237, 258, 778 P.2d 602, 623 (1988).

(6) The statute unconstitutionally fails to require the cumulative consideration of multiple mitigating factors or require that the jury make specific findings as to each mitigating factor. *State v. Gulbrandson*, 184 Ariz. 46, 69, 906 P.2d 579, 602 (1995).

(7) Arizona's statutory scheme for considering mitigating evidence is unconstitutional because it limits full consideration of that evidence. *State v. Mata*, 125 Ariz. 233, 242, 609 P.2d 48, 57 (1980).

(8) The statute is unconstitutional because there are no statutory standards for weighing. *State v. Atwood*, 171 Ariz. 576, 645-46 n.21(4), 832 P.2d 593, 662-63 n.21(4) (1992).

(9) Arizona's death statute insufficiently channels the sentencer's discretion in imposing the death sentence. *State v. Greenway*, 170 Ariz. 151, 164, 823 P.2d 22, 31 (1991).

(10) The prosecutor's discretion to seek the death penalty unconstitutionally lacks standards. *State v. Cromwell*, 211 Ariz. at 181, 192 ¶ 58, 119 P.3d 448, 459 (2005).

(11) Death sentences in Arizona have been applied arbitrarily and irrationally and in a discriminatory manner against impoverished males whose victims have been Caucasian. *State v. West*, 176 Ariz. 432, 455, 862 P.2d 192, 215 (1993).

(12) The Constitution requires a proportionality review of a defendant's death sentence. *State v. Gulbrandson*, 184 Ariz. 46, 73, 906 P.2d 579, 606 (1995).

(13) Subjecting Appellant to a second trial on the issue of aggravation and punishment before a new jury violates the double jeopardy clause of the Fifth Amendment. *State v. Ring (Ring III)*, 204 Ariz. 534, 550-51 ¶ 39, 65 P.3d 915, 931-32 (2003).

(14) Appellant's death sentence is in violation of his rights to a jury trial, notice and due process under the Fifth, Sixth, and Fourteenth Amendments since he was not indicted for a capital crime. *McKaney v. Foreman*, 209 Ariz. 268, 271 ¶ 13, 100 P.3d 18, 21 (2004).

(15) Imposition of a death sentence under a statute not in effect at the time of Appellant's trial violates due process under the Fourteenth Amendment. *State v. Ellison*, 213 Ariz. 116, 137 ¶ 85, 140 P.3d 899, 920 (2006).

(16) The absence of notice of aggravating circumstance prior to Appellant's guilt phase trial violated the Sixth, Eighth and Fourteenth Amendments. *State v. Anderson (Anderson II)*, 210 Ariz. 327, 347 ¶¶ 79-80, 82, 111 P.3d 369, 389 (2005).

(17) The reasonable doubt jury instruction at the aggravation trial lowered the state's burden of proof and deprived Appellant of his right to a jury trial and due process under the Sixth and Fourteenth Amendments. *State v. Dann (Dann I)*, 205 Ariz. 557, 575-76 ¶ 74, 74 P.3d 231, 249-50 (2003).

(18) Arizona's death statute creates an unconstitutional presumption of death and places an unconstitutional burden on Appellant to prove mitigation is "sufficiently substantial to call for leniency." *State v. Glassel*, 211 Ariz. 33, 52 ¶ 72, 116 P.3d 1193, 1212 (2005).

(19) The failure to provide the jury with a special verdict on Appellant's proffered mitigation deprived him of his rights to not be subject to ex post facto legislation and right to meaningful appellate review. *State v. Roseberry*, 210 Ariz. 360, 373 ¶ 74 & n.12, 111 P.3d 402, 415 (2005).

(20) The trial court improperly omitted penalty phase instructions that the jury could consider mercy or sympathy in evaluating the mitigation evidence and determining whether to sentence the defendant to death. *State v. Carreon*, 210 Ariz. 54, 70-71 ¶¶ 81-87, 107 P.3d 900, 916-17 (2005).

(21) Arizona's *current* protocols and procedures for execution by lethal injection constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *State v. Andriano*, 215 Ariz. 497, 510 ¶¶ 61-62, 161 P.3d 540, 553 (2007).

(22) The jury instruction that required the jury to unanimously determine that the mitigating circumstances were "sufficiently substantial to call for leniency" violated the Eighth Amendment. *State v. Ellison*, 213 Ariz. 116, 139 ¶¶ 101-102, 140 P.3d 899, 922 (2006).

(23) The failure to instruct the jury that only murders that are "above the norm" may qualify for the death penalty violates the Sixth, Eighth and Fourteenth Amendments. *State v. Bocharski*, 218 Ariz. 476, 487-88 ¶¶ 47-50, 189 P.3d 403, 414-15 (2008).

(24) The State's introduction of unsworn rebuttal testimony violated Appellant's rights to confrontation and cross examination under the Sixth Amendment. *State v. McGill*, 213 Ariz. 147, 158-59, 140 P. 3d 930, 941-42 (2006).

(25) The refusal to permit voir dire of prospective jurors regarding their views on specific aggravating and mitigating circumstances violates Appellant's rights under the Sixth and Fourteenth Amendments. *State v. Johnson*, 212 Ariz. 425, 440 ¶¶ 29-35, 133 P.3d 735, 750 (2006).

(26) Refusing to instruct the jury or permit the introduction of evidence and argument regarding residual doubt violated Appellant's rights under the Sixth, Eighth and Fourteenth Amendments and Arizona law. *State v. Harrod* (*Harrod III*), 218 Ariz. 268, 278-79 ¶¶ 37-39, 183 P.3d 519, 529-30 (2008); *State v. Garza*, 216 Ariz. 56, 70 ¶ 67, 163 P.3d 1006, 1020 (2007).

Appendix C

Clerk of the Superior Court
*** Electronically Filed ***
09/27/2021 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1999-016742

09/23/2021

HONORABLE FRANK W. MOSKOWITZ

CLERK OF THE COURT
B. Navarro
Deputy

STATE OF ARIZONA

LACEY ALEXANDRA STOVER GARD
GREGORY MICHAEL HAZARD

v.

JULIUS JARREAU MOORE (A)

JULIUS JARREAU MOORE
218107
PO BOX 8200
FLORENCE AZ 85132
PATRICK C COPPEN

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

UNDER ADVISEMENT RULING;
PCR DISMISSED

This is the first post-conviction relief proceeding ("PCR") after the Arizona Supreme Court affirmed the convictions and sentences of Julius Jarreau Moore ("Moore") on appeal. *State v. Moore*, 222 Ariz. 1 (2009).[1] The Court has reviewed Moore's Amended Unified Brief ("Petition") filed on 9/13/19, the State's Amended Response ("Response") filed on 10/21/19, the Substitute Reply ("Reply") filed on 12/4/19, the State's Memorandum Addressing Court's Questions filed on 2/26/21, and the Defendant's Oral Argument Memorandum Answering Court's Inquiries Regarding Post Conviction Claims ("Defendant's Oral Argument Memo") filed on 2/26/21.

[1] The Arizona Supreme Court reversed the first-degree premeditated murder convictions related to Delia and Guadalupe Ramos, but affirmed the related first-degree felony murder convictions. *Id.* at 14-15 ¶¶64-72.

Moore challenges the jury's guilt-phase verdicts, claiming that (1) he is "actually innocent;" (2) law enforcement and the prosecution committed misconduct; (3) appellate and trial counsel provided ineffective assistance; (4) he was incompetent during the guilt phase; and (5) structural error occurred when the trial commenced on September 11, 2001, and when the trial court provided the *Portillo* reasonable-doubt jury-instruction. After considering the briefing and exhibits, oral argument, the record, and the applicable legal standards, the Court finds no colorable claim that entitles Moore to relief or an evidentiary hearing.

I. Procedural and Factual Background

On November 30, 1999, a Maricopa County Grand Jury indicted Moore for (1) burglary; (2) two counts of premeditated and felony murder for the murders of Delia Ramos and Guadalupe Ramos; (3) the premeditated murder of Sergio Mata; and (4) the attempted premeditated murder of Debra Ford. Moore's trial commenced in 2001, and the jury convicted Moore on the charged offenses, unanimously finding both felony and premeditated murder on the first-degree murder counts related to Delia and Guadalupe Ramos. The jury returned death sentence verdicts for the murders of Delia and Guadalupe, and a life sentence for the murder of Mata. The trial court imposed the death sentences, and sentenced Moore to a term of natural life in prison for Mata's murder, and to consecutive, aggravated sentences of 21 years each for the attempted murder of Ford and the Burglary. (Dkt. 722-723)

Although lengthy, the Court believes the following summary of the trial testimony and other overwhelming evidence of guilt is necessary for a thorough analysis and perspective of Moore's claims under the legal standards that the Court must apply.

A. Summary of the trial testimony and other evidence presented at trial

On November 16, 1999, around 7:13 a.m., Phoenix Police received a call of "subjects down" and police officers responded to 1808 E. Yale Street. (R.T. 9/12/01 (a.m.) at 20-22) When Officer Elting arrived around 7:17 a.m., emergency personnel already were on scene treating Ford, who had life threatening injuries from a gunshot wound to her neck. (*Id.* at 22, 29-31, 78-81) Police officers found Mata outside the apartment shot to death. (*Id.* at 29-31) Inside the apartment, police found Delia and Guadalupe shot to death. (*Id.* at 37-59)

Debra Ford's Trial Testimony

Ford survived the shooting, and she testified at trial. Ford briefly described her past-history of drug use, and testified that she stopped using drugs after going to jail in February of

1999. (R.T. 9/12/01 (p.m.) at 6-9) After her release from jail, Ford stayed with friends and began using drugs again. (*Id.*)

A couple weeks before the shooting, Ford met Delia and her boyfriend, Mata. (*Id.* at 8-10) The couple lived at 1808 E. Yale Street, Apartment A ("Yale Street apartment"), and Ford had visited the apartment about four or five times. (R.T. 9/13/01 at 75). Ford described Mata as rude, mean, and under the influence of drugs. (R.T. 9/12 (p.m.) at 10-11) Ford also testified that Delia sold small amounts of crack cocaine and used drugs. People bought drugs from Delia and sometimes traded stolen items for drugs. (*Id.* at 77-78)

On November 15, 1999, Ford went to the Yale Street apartment to buy drugs. She arrived around 5:30 p.m., and Mata, Delia, and Guadalupe were at the apartment. (R.T. 9/12/01 (p.m.) at 14-15) Ford gave Delia money to buy crack cocaine, and she used Delia's pipe to smoke the drugs. (*Id.* at 16-17, 21-23). Ford described the effect of the drugs on her, and explained that someone who smokes crack always is thinking of ways to get more and "[t]hat's what is so bad about it." (*Id.* at 17-21)

Ford stayed after she ran out of money to buy more drugs, and she saw other people come to the apartment to buy drugs. (*Id.* at 23; R.T. 9/13/01 at 58-61). When asked if she knew someone named Tony Brown, Ford testified that she knew Brown and that he lived in the same apartment complex as her mother. (R.T. 9/12/01 (p.m.) at 23) Ford also met Brown's girlfriend, Collette O'Neil, while the two were in jail together, and Ford previously had taken Brown to the Yale Street apartment to find O'Neil. (*Id.* at 24-25)

Sometime before midnight, while Debra Ford was standing outside the apartment, she heard someone say, "What's up Debra." (*Id.* at 25-28; R.T. 9/13/01 at 71-72) Ford recognized the person as someone named Jay. Ford met Jay three years earlier in the area of 23rd Avenue and Indian School Road, and the two smoked crack cocaine and hung out together. (*Id.* at 26-27; R.T. 9/17/01 at 32-39) Ford described Jay as a slim Black male, about six-foot tall, and approximately 15-years-old when they met. (R.T. 9/12/01 (p.m.) at 26-27)

After Ford saw Jay, she left the apartment and drove around with a female in a red car. (*Id.* at 28-29) When Ford returned to the apartment, Jay was gone (R.T. 9/13/01 at 72), and Ford went inside the apartment to get more drugs. (R.T. 9/12/01 (p.m.) at 29) Delia gave Ford a small amount of crack cocaine, and because Delia and Mata were fighting, Ford and Guadalupe went outside and sat together. (*Id.* at 30) Sometime later, Jay "popped up again," and sat outside with Guadalupe and Ford. They all wanted more crack cocaine. (*Id.* at 31; R.T. 9/17/01 at 17-22)

At some point, Jay went into the apartment and came out with some "crumbs" of crack cocaine in his hand. Jay offered to share the drugs with Ford, and, although she felt it was a

good gesture, Ford believed the amount of crack cocaine was an insult to Jay. (R.T. 9/12/01 (p.m.) at 31-32) Jay went to the side of the apartment and smoked the crack cocaine. Afterward, Jay, Ford, and Guadalupe sat outside talking. They were angry that they could not get in the house for more drugs. (*Id.* at 32)

When Ford later went into the apartment to buy drugs from Delia, she heard someone knocking on the door and asking for her. (*Id.* at 32-33; R.T. 9/17/01 at 27-29) Delia responded that Ford would be right out, and Ford again heard knocking and knew it was Jay. (R.T. 9/13/01 at 19-21) Delia sold Ford a small piece of crack cocaine, unlike the crumbs given to Jay, but Delia would not let Ford use her pipe. (*Id.* at 20-21) Ford put the crack cocaine under her tongue and went outside. Jay asked if Ford had any drugs or if she wanted to use his marijuana pipe. Ford responded that she did not want to use the pipe. (*Id.* at 22; R.T. 9/17/01 at 26-29)

Ford testified that Mata came out of the apartment a short time later, and she described where everyone was standing. (R.T. 9/13/01 at 23-25; R.T. 9/17/01 at 29) Jay stood directly in front of Mata and asked, "Do you have a problem with me?" Ford did not hear Mata respond; she only heard gunshots. (R.T. 9/13/01 at 24-28) Jay had the gun in his left hand and immediately after shooting Mata, Jay shot Ford. (*Id.* at 27-38) Ford fell to the ground, and she heard more gunshots. (*Id.* at 28, 39-40) Although conscious, Ford could not move, and she remained on the ground around "three to four hours." (*Id.* at 39-40). Ford testified that help arrived after the sun came up, and she remembered emergency personnel transporting her to the hospital. (*Id.* at 41-43)

While in the hospital, Ford spoke with Detective Cooning and viewed a "group of photos." (*Id.* at 43-44) On cross-examination, Ford could not remember whether she identified anyone in the photo lineup as the shooter. (R.T. 9/17/01 at 41; *see also* R.T. 9/24/01 (a.m.) at 30-38) Ford also did not remember viewing a line up during a pretrial deposition, but then testified that she identified Moore during the deposition. (*Id.* at 41-42, 50, 55-56) Ford further described the shooter as having braids, but testified that Moore had a lighter complexion at trial than the person she saw during the shooting. (*Id.* at 56-58)

Ford made an in-court identification of Moore as the person who shot her, and testified that she knew him as Jay. (R.T. 9/13/01 at 55-56) Jessica Borghetti, Moore's girlfriend, later testified that Moore went by the names Jarreau, James, and Jay. (R.T. 9/18/01 at 175) Officer Staples testified that he made contact with a male identified as Julius Jarreau Moore in the area of 23rd Avenue and Indian School approximately two and a half years before the shooting. (R.T. 9/24/01 (a.m.) at 3-6) Officer Staples filled out a "field interrogation card," describing the male as six-foot tall, 133 pounds, a thin build, a dark skin complexion, braided hair, and that he resided at 1833 E. Coronado. (*Id.* at 6-8)

Officer Katherine Ford's Trial Testimony

In the early morning of November 16, 1999, Officer Ford spoke with Debra Ford in the trauma room of the hospital for approximately twenty minutes. (R.T. 9/17/01 at 68-72) When asked who shot her, Ford "said that she didn't know him by his name, but that she knew he went by the street name of Jay." (*Id.* at 72, 75-76) She further described Jay as a Black male, approximately 21 to 22 years old. (*Id.* at 73) Ford also said that she knew the people inside the apartment, and that she believed the shooting took place around 6:00 a.m. (*Id.* at 74)

Tony Brown's Trial Testimony

Brown appeared at trial in prison clothing, and testified that he was serving a prison sentence for the crime of prohibited possession of a firearm. (R.T. 9/13/01 at 84-86)

In 1999, Brown lived with his fiancé Collette O'Neil, and he met Ford at their apartment complex. (*Id.* at 87-88) O'Neil and Ford became friends and used drugs, and Brown learned they went to the Yale Street apartment to hang out. (*Id.* at 90-92) The night of the shooting, Brown went to the apartment and got into an argument with Mata. (*Id.* at 94-95) Brown asked if O'Neil was in the apartment and offered Mata cash to bring her outside. After Mata ripped the bill while trying to grab it, Brown yelled at Mata "at the top of [his] lungs," and hit him. (*Id.* at 98-99) Brown threatened Mata, and when Mata ran in the house Brown believed he was going to get a gun. (*Id.* at 99)

Brown waited for Mata to return and left when he did not come back out of the house. Brown went to get his bike, and a "young man" in the bushes was trying to get his attention. (*Id.* at 99-100) Brown later gave Detective Cooning a description of this male, and at trial Brown testified that the male had a baby face and braided hair, wore a black-knit cap, and resembled Brown a little bit. (*Id.* at 100-101)

Brown had on a knit cap with a Dallas Cowboys emblem, but the male's cap had no emblem. (*Id.* at 101) Brown further testified that the male was younger and shorter than Brown, weighed approximately 140-150 pounds, and had a light complexion. (*Id.* at 102-103) The male was holding a big handgun, and told Brown that the people in the apartment had taken his money and suggested that he and Brown take revenge. (*Id.* at 103-105, 114) Brown left the area, returned to his apartment, and told O'Neil everything that had happened. (*Id.* at 104-105) Brown testified he did not see Ford or O'Neil at the Yale Street apartment that night. (*Id.* at 105-106)

Police and Brown's probation officer later took Brown into custody, and Detective Cooning interviewed Brown. (*Id.* at 107, 116-118) While at the police station, Brown viewed a

composite drawing and helped with the creation of a composite drawing. (*Id.* at 119-123) On another date, Brown picked out Moore's photograph in a photo line-up. (*Id.* at 123-129)

During cross-examination, Brown agreed that he could not make an in-court identification of the shooter, and testified that Moore had a much lighter complexion, was a lot taller, and looked a lot different from the person at the Yale Street apartment. (*Id.* at 117-118, 129-130) Brown further testified that the photo shown to him by Detective Cooning looked like the male that Brown saw near the Yale Street apartment. (*Id.* at 130) Brown testified that he stood next to Moore while in custody, and Moore was "almost" Brown's height. (*Id.* at 140-141)

Sarry Ortiz's Trial Testimony

At the time of the shooting, Ortiz lived at her brother's house across the street from the Yale Street apartment, and Ortiz knew Ford from this area. (R.T. 9/18/01 at 5-7) Ortiz also knew Delia, Mata, and Guadalupe. (*Id.* at 11-12) Ortiz testified that Delia and Mata sold and used crack cocaine, and that she did not get along with Mata. (*Id.* at 11-15, 20-21)

Around the time of the shooting, Ortiz was driving a 1994 red Nissan, and she was in the area of the Yale Street apartment in the afternoon, throughout the evening, and into the early hours of the next morning. (*Id.* at 18-19) That night, Ortiz saw Mata get into a "fist fight" with a Black male. (*Id.* at 61-62) Ortiz was sitting in her car, and between 9:00 and 10:00 p.m., she saw the fight through oleander bushes. After the fight, Mata went back in the apartment, and the other male walked away from the apartment through the oleander bushes. (*Id.* at 62, 89-90) Ortiz testified that she did not hear any gunshots. (*Id.* at 90) Ortiz also acknowledged that she was using crack cocaine that night. (*Id.* at 21, 63)

Ortiz further described that she saw Ford and a few other people at the apartment in the early afternoon and throughout the evening. (*Id.* at 26-27) In the early morning hours of the next day, near 17th Way and Yale Street, a Black male flagged down Ortiz and asked for a ride. (*Id.* at 27, 32) Ortiz described the male as thin, "kind of tall," around 20-23 years old, wearing long shorts, a T-shirt, and a Dallas Cowboy beanie. (*Id.* at 28, 69) Ortiz described seeing the male at the Yale Street apartment a few days earlier, and she remembered talking with him. (*Id.* at 29-30) During her testimony, Ortiz identified Moore as the male she encountered the morning of the shooting. (*Id.* at 51-52)

Ortiz also identified Moore during a police interview with Detective Cooning and took Detective Cooning to the location where she dropped off Moore. (*Id.* at 48-52, 55, 78-80). At trial, Ortiz described her encounter with Moore, and testified that Moore flagged her down and asked for a ride. (*Id.* at 31-33) After they drove around, Moore asked Ortiz to take him to his

girlfriend's house. Moore gave directions to a house near 18th Street and Coronado. After they arrived, Moore went into this house and came out with his girlfriend. (*Id.* at 33-36)

Ortiz testified that they drove around for a period, and then she drove back toward the Yale Street apartment. While in this area, Ortiz saw Ford on the ground and told Ford that she would get help. (*Id.* at 36-42, 91) Ortiz contacted a passing taxi driver, and the driver called 911. (*Id.* at 43) When Ortiz saw that Moore was trying to drive away in her car, she ran and told Moore to get out of the driver's seat. (*Id.* at 44-47) Moore later told Ortiz that the ride to his girlfriend's house would be his alibi. (R.T. 9/18/01 at 84)

Jessica Borghetti's Trial Testimony

Borghetti met Moore while she was in the eighth grade, and the two dated on and off since that time. (R.T. 9/18/01 at 106-108) Three months prior to the shooting, Borghetti and Moore moved into his mother's house located at 1833 E. Coronado Street. (*Id.* at 109)

Borghetti testified that Moore left his mother's house twice the night of the shooting. (*Id.* at 115) Before he left the second time, Moore told Borghetti that he was going to confront a person who tried to run him over and drew her a map of the area near "17th and Palm in case anything happened to him." (*Id.* at 116, 128, 164) Moore also took the couple's loaded Makarov firearm. (*Id.*at 118) Borghetti and Moore bought the firearm for protection, and Borghetti identified exhibit 87 as the firearm that she and Moore both carried and that he possessed the night of the shooting. (*Id.* at 119-122)

After Moore left the house, Borghetti went back to sleep and woke up around 4:00 a.m. Moore had not returned, and Borghetti was upset because she believed that something had happened to him. (*Id.* at 131) She then went back to sleep, and Moore returned home as his mother was getting ready to go to work. (*Id.* at 132) Borghetti was angry that Moore had been out so late, but before she could say anything Moore told Borghetti "he just shot four people, so he doesn't need that right now." (*Id.* at 133)

Moore and Borghetti left the house and got into a small red car with a woman driver. (*Id.* at 134) After driving around, the woman drove to the area of the Yale Street apartment and quickly got out of the car. Borghetti started to get out of the car, but Moore told her "to get back in the car" because "[t]hose were the people he shot." The driver of the car returned and appeared "frantic." After the driver asked a taxi driver to call 911, they drove away. (*Id.* at 135-136, 198) The woman later dropped off Borghetti and Moore at his mother's house. (*Id.* at 136-137)

Later that day, Borghetti saw a news report about a shooting near 17th and Yale. (*Id.* at 138-139) Borghetti and Moore packed up the Makrov firearm and Moore's clothing, and Borghetti went to the apartment of her friends Megan Lockwood and Sam Derby. (*Id.* at 113, 140) Borghetti immediately told Lockwood and Derby what had happened. (*Id.* at 140-141) Moore later arrived at the apartment. (*Id.* at 141)

Borghetti further testified that Moore gave Derby the Makarov firearm in exchange for firearms belonging to Derby. (*Id.* at 154) Borghetti also testified that Moore attempted to change his appearance by cutting off his braids after a newspaper published Moore's name and his picture. (*Id.* at 154-158) Several days later, police called the apartment and left a message on the answering machine, telling Moore and Borghetti to come out of the apartment. (*Id.* at 152-153)

Additionally, Moore told Borghetti that he was careful not to leave any fingerprints or cigarette butts at the scene, and that he shot the person who tried to run him over but was sorry that he shot the other victims because "they didn't have anything to do with it." (*Id.* at 168-172)

Trial Testimony Regarding Evidence Collected by the Police

While Moore and Borghetti were staying with Derby and Lockwood, police contacted Derby's mother and asked her to arrange a lunch date with her son. (R.T. 9/19/01 at 5-7) On November 23, 1999, while Derby and Lockwood were on their way to the lunch date, police conducted a traffic stop. (*Id.* at 7-8; R.T. 9/18/01 at 98-100) Police searched Derby's car and found exhibit 87, a nine-millimeter Makarov firearm, under the front passenger seat. (R.T. 9/13/01 at 153-156) The parties stipulated that police officers seized exhibit 87 during the service of a search warrant on Derby's car. (R.T. 9/24/01 (p.m.) at 40) Police next executed a search warrant on Derby's apartment, and found braided hair, a set of hair clippers, and a knit cap. (R.T. 9/13/01 at 165-169)

Dr. Archiaus Mosley performed autopsies on Mata, and Delia and Guadalupe. (R.T. 9/17/01 at 86-87) Mata died from a gunshot wound near his right ear, and there was an exit wound on the left side of his jaw. (*Id.* at 87-90) Dr. Mosley did not recover a projectile or any fragments from Mata's body. (*Id.* at 90-91) Guadalupe suffered three gunshot wounds. (*Id.* at 101) Dr. Moseley recovered two projectiles from Guadalupe's body and testified that one of the gunshot wounds likely had an exit wound. (*Id.* at 103-106, 113) Delia suffered three gunshot wounds, and Dr. Moseley recovered three projectiles from her body. (*Id.* at 114-117)

After receiving the autopsy-projectiles, Criminalist Leister evaluated the evidence and identified that exhibit 87, the Makarov firearm seized from Derby's car, fired the projectiles recovered during the autopsies of Delia and Guadalupe. (R.T. 9/20/01 at 82-92) Criminalist

Leister identified that the Makarov fired Item 26B, the projectile seized from Moore's bedroom. (*Id.* at 92) Criminalist Leister also conducted an examination of shell casings, but could not exclude or identify those casing as being fired from the Makarov firearm. (*Id.* at 93-94; R.T. 9/19/01 at 27, 44-47, 54, 56, 61-62)

B. Trial and appellate procedural history

After the guilt-phase verdicts, but prior to sentencing, the United States Supreme Court held that Arizona's capital sentencing scheme violated the Sixth Amendment right to a jury trial. *Arizona v. Ring*, 536 U.S. 584, 608-609 (2002). Subsequently, in November of 2004, the trial court empaneled a new jury for the aggravation and penalty trials. This jury found beyond a reasonable doubt that Moore murdered multiple victims on the same occasion (A.R.S. § 13-703(F)(8)), but it could not reach a unanimous verdict on whether Moore committed Delia's murder in an especially cruel manner, A.R.S. § 13-703(F)(6). (Dkt. 424-427)

Prior to the penalty phase, a mitigation expert suffered a heart attack and the trial court granted a mistrial. (R.T. 1/6/05 at 11) In 2007, the trial court empaneled a new jury and permitted the State to retry the especially cruel aggravating circumstance. This jury also could not reach a unanimous verdict on the especially cruel aggravator. (Dkt. 678)

During the penalty phase, trial counsel presented evidence and argued for leniency based on two statutory mitigating factors and several non-statutory mitigating factors. *Moore*, 222 Ariz. at ¶116. "Moore clearly established his use of crack cocaine, both habitually and on the night of the shootings, and [that] this factor combined with Moore's relative youth and early-onset drug use ... likely impacted his mental development ..." *Id.* at ¶127. Moore also presented mitigation evidence of a difficult childhood, family support and the love of his family, and argued remorse based on his statements to Borghetti and his sister. *Id.* at ¶¶128-136.

The trial court instructed the jury that the existence of the multiple homicides aggravating circumstance "ha[d] already been proved beyond a reasonable doubt" and could be considered in deciding the appropriate penalty for each count. (R.T. 5/9/07 at 26) The jury returned two death-sentence verdicts for the murders of Guadalupe and Delia and a life-sentence verdict for Mata's murder. (Dkt. 708-710) The trial court imposed the death sentences, and sentenced Moore to a term of natural life in prison for Mata's murder, and to consecutive, aggravated sentences of 21 years each for the attempted murder of Ford and the Burglary. (Dkt. 722-723)

Moore raised numerous issues on direct appeal, and the Arizona Supreme Court addressed those claims and concluded that:

- The State established a reliable basis for Ford's identification, independent of any suggestive procedures used during the deposition identification, *Moore*, 222 Ariz. at ¶¶ 15-29;

- There was no error during jury selection with respect to jurors' death penalty views or any restriction of trial counsel's mitigation *voir dire*, *id.* at ¶¶ 34-44, 94-106;

- There was no error in denying trial counsel's request for a drug test of Ortiz, *id.* at ¶¶45-48;

- There was no due process violation when the State untimely specified the intent to commit murder (rather than theft) as the basis for the burglary and the felony-murder predicate offense, *id.* at ¶¶ 49-63;

- An erroneous definition of premeditation was harmless with respect to Mata's murder given overwhelming evidence of Moore's premeditation, but it was reversible error with respect to the premeditated murder convictions for Delia and Guadalupe Ramos, *id.* at ¶¶64-72;

- There was no fundamental error with respect to the "acquittal-first" second-degree murder lesser-included jury instruction, *id.* at ¶¶73-75;

- There was no error in denying the requests for new counsel, *id.* at ¶¶ 76-83;

- There was no reversible error in the missing temporal element of the (F)(8) instruction, *id.* at ¶¶84-88, 115;

- There was no reversible error regarding the newly empaneled jury for the penalty phase, *id.* at ¶¶89-93;

- The trial court properly precluded residual doubt and an actual innocence presentation in the aggravation and penalty phases, *id.* at ¶¶107-109;

- The State was not constitutionally required to prove the mitigating circumstances were not "sufficiently substantial" beyond a reasonable doubt, *id.* at ¶¶110-113; and

- The mitigation evidence was not sufficiently substantial to warrant leniency, *id.* at ¶¶137-138.

II. PCR Claims

Arizona Criminal "Rule 32 is separate and apart from the right to appeal ... and it is not designed to afford a second appeal." *State v. Carringer,* 143 Ariz. 142, 145 (1984). To be

eligible for relief, a defendant "must strictly comply with Rule 32" and bears the burden "to assert grounds that bring him within the provisions of the Rule." *Id.* at 146.

In reviewing a Rule 32 petition, the court first must identify all precluded and untimely claims. Ariz. R. Crim. P. 32.11(a)(2020). If, "no remaining claim presents a material issue of fact or law that would entitle the defendant to relief," the court must summarily dismiss the petition. *Id.* A claim is colorable and entitled to an evidentiary hearing when it "allege[s] facts which, if true, would *probably* have changed the verdict or sentence." *State v. Amaral*, 239 Ariz. 217, 220 ¶ 11 (2016) (emphasis in original). "If the alleged facts would not have probably changed the verdict or sentence, then the claim is subject to summary dismissal." *Id.*

A. Actual Innocence (Claim B)

Moore contends he is innocent of the murders of Mata, Delia and Guadalupe, and that this claim is cognizable under Rule 32.1 (e) and (h). (Petition at 127-133) Moore discusses the supporting evidence throughout the Petition. This evidence primarily relates to: (1) witness statements that Brown committed the murders; (2) Brown's criminal history and conduct around the time of the murders; (3) alibi evidence; (4) trial witnesses who identified Moore; (5) allegations that law enforcement planted and tampered with material evidence; and (4) a lack of physical evidence linking Moore to the crimes.

In its response, the State argues that Moore has failed to undermine the evidence of guilt presented at trial and state a colorable claim. (Response at 20)

1. Preclusion

"A defendant is precluded from relief under Rule 32.1(a) based on any ground ... waived at trial or on appeal ... except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant." Ariz. R. Crim. P. 32.2(a)(3)(2020). Generally, waiver simply requires a showing "that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding." *Stewart v. Smith*, 202 Ariz. 446, 449 ¶9 (2002)(quoting comment to Ariz. R. Crim. P. 32.2).

However, claims for relief under "Rule 32.1(b) through (h) are not subject to preclusion under Rule 32.2(a)(3)." Ariz. R. Crim. P. 32.2(b). Accordingly, Moore's claims brought under Rule 32.1(e) and (h) are not subject to preclusion.

2. Analysis of "Actual Innocence" Claim

Acknowledging that the United States Supreme Court has not recognized a freestanding constitutional claim of "actual innocence," Moore seeks to preserve this claim for federal review and argues that it is cognizable under the Eighth and Fourteenth Amendment. (Petition at 128-129)

"[I]n state criminal proceedings the trial is the paramount event for determining the guilt or innocence" of the defendant, and the Supreme Court has limited federal habeas review of state convictions to constitutional violations that occurred during the underlying state criminal proceedings. *Herrera v. Collins*, 506 U.S. 390, 416 (1993). The Supreme Court has not treated "actual innocence" as "an independent constitutional claim, but as a basis upon which a federal habeas petitioner may have an independent constitutional claim considered on the merits, even though his habeas petition would otherwise be regarded as successive or abusive." *Id.* at 416-417.

While Rule 32.1(h) provides for a freestanding claim of "actual innocence," there is no corresponding constitutional or statutory ground for relief. Ariz. R. Crim. P. 32.1(h) (2000); *State v. Miles*, 243 Ariz. 511, 517 ¶27 (2018) (Pelander, J., concurring). Instead, Rule 32.1(h) provides for relief only where "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." This standard requires a defendant to "conclusively demonstrate his innocence." Allegations that merely contradict evidence presented at trial do not establish grounds for relief under Rule 32.1(h). *State v. Denz*, 232 Ariz. 441, 448 ¶22 (App. 2013).

a. Moore's Claim that Tony Brown Committed the Charged Offenses

Moore claims that Brown committed the murders, and that police failed to investigate Brown despite substantial evidence of his guilt. (Petition at 2, 42) Moore supports this claim with allegations that: (1) Brown matched Moore's description, and witness statements placed Brown at the crime scene; (2) other evidence incriminates Brown; (3) Ford misidentified Moore; and (4) Borghetti lied during her trial testimony and falsely incriminated Moore.

1. Witness Statements

Moore contends that on November 16, 1999 around 4:00 a.m., witnesses saw an African America male wearing a Dallas Cowboys cap get into a fight with Mata. Moore further argues that the following witnesses establish his innocence because their statements demonstrate that Brown committed the murders.

Alejandro Rios Barrios

Moore first points to a police report, which provides that Alejandro Rios Barrios told police that he saw an African American male wearing a Dallas Cowboy cap fighting with Mata in front of the Yale Street apartment. (Petition at 29; Ex. 11) Rios Barrios also participated in the creation of a composite drawing of this person. (Petition at 31, Ex. 20) As further evidence of his innocence, Moore submits that Brown testified that he wore a cap with a Dallas Cowboy emblem (Ex. 12), and that Rios Barrio identified Brown as the shooter and knew more than he told police. (Petition at 29, 45, 122)

This allegation is not colorable. There is no affidavit from Rios Barrios recounting what he knew and did not tell police, and Moore acknowledges that Rio Barrios could not be located. (Ex. 16 ¶¶ 11-12). Thus, Moore's claim that Rios Barrios possessed additional information is speculative and unsubstantiated. An evidentiary hearing is not required for "mere generalizations and unsubstantiated claims," which are unsupported by affidavits that contain the testimony the witness would have offered. *State v. Borbon*, 146 Ariz. 392, 399 (1985).

The proffered evidence is also cumulative. The jury heard Brown's testimony that he was at the Yale Street apartment near the time of the shooting, was wearing a Dallas Cowboy cap, and fought with Mata – yelling at, hitting, and threatening him. (R.T. 9/13/01 at 98-99, 101) Detective Cooning testified that he spoke with Rios Barrios, "a transient individual who was living behind apartment B on the sofa." (R.T. 9/24/01 (p.m.) at 21) Rios Barrios helped police complete a composite drawing of the suspect who was wearing a cap with a Dallas Cowboy emblem. (*Id.* at 21-22; Ex. 20) Rios Barrios then identified Brown as the shooter during a photographic line-up identification procedure. (*Id.* at 22; Ex. 92 at 000033-34)

Sarry Ortiz

Moore next contends that trial counsel failed to investigate and present Sylvia and Pedro Villegas's statements that Ortiz, while parked behind the Yale Street apartment, heard gunshots and saw an African American male wearing a Dallas Cowboys cap run past her. (Petition at 30; Ex. 14, 15, 19) Moore further supports his innocence claim with a statement from Brown's fiancé, Collette O'Neil, who told police that Brown was sweating when he arrived home around 4:00 a.m. (Petition at 30; Ex. 18)

Moore's claim relies on Sylvia Villegas's affidavit, which provides that a man ran past Ortiz while she was walking to the Yale Street apartment to buy drugs. Ortiz then found the deceased victims upon her arrival at the apartment, and an unidentified person told Ortiz that the

shooter was an African American male wearing a baseball cap with a star on it. (Exhibit 14 at 10)

Villegas's affidavit is unreliable. It is inconsistent with Ortiz's affidavits (discussed below), and it relies on an unidentified witness.

Villegas's affidavit is also cumulative to the evidence presented at trial. As discussed above, the jury heard that Brown wore a Dallas Cowboy cap, and that Rios Barrios identified Brown as the shooter and told police the shooter wore a Dallas Cowboy cap.

Additionally, Collette O'Neil's statement that Brown was sweating when he returned home is consistent with Brown's testimony that he rode his bicycle home. (R.T. 9/13/01 at 105-106) O'Neil's statement does demonstrate a colorable claim under Rule 32.1(h).

Moore also claims that post-trial affidavits from Ortiz demonstrate his innocence and implicate Brown as the shooter. (Petition at 74-75; 119) One affidavit provides that Ortiz was sleeping in her car behind the Yale Street apartment in the early morning hours of November 16, 1999. (Ex. 51 at ¶¶ 1-2) After hearing "backfires," which she believes may have been the sound of gunshots, Ortiz saw a truck "doing a Brodie" in front of the apartment and then saw an African American male wearing a Dallas Cowboy cap run past her. (*Id.* at ¶¶ 6-10) Ortiz previously saw this male at the Yale Street apartment. Ortiz says she may not have provided this information to the police because she was afraid and believed the shooter was dangerous. (*Id.* at ¶¶ 13-15)

Another supplemental affidavit provides that she saw Brown around 4:00 a.m., and that Brown fought with Mata and threatened him. (Ex. 90 at ¶¶ 3-4) Ortiz later saw Brown "go by her car" back to the Yale Street apartment. Ortiz then heard gunshots and saw Brown ran past her car. (*Id.* at ¶¶ 5-7) Ortiz did not see Moore until approximately an hour and half later, and he "never acted like someone who had done anything wrong." (*Id.* at ¶¶ 8, 10)

Ortiz's affidavits are cumulative to the evidence presented at trial. For example, Brown testified that he wore a Dallas Cowboy cap and fought with Mata. Detective Cooning testified that Rios Barrios identified Brown as the shooter and described him as the male wearing a Dallas Cowboy cap.

Her affidavits differ in some respects from her trial testimony. For instance, Ortiz testified at trial that she did not hear any gunshots, and that Moore was wearing a Dallas Cowboy cap when he flagged her down for a ride.

That said, Ortiz does not fully recant her trial testimony. Her affidavits confirm her trial testimony that she picked up Moore that morning. (Ex. 51 at ¶ 17; Ex. 99 at ¶¶ 6 and 7) Her supplemental affidavit also confirms her trial testimony that she, Moore, and his girlfriend (Borghetti) "had driven over to the Yale Crackhouse ...." (Ex. 90 at ¶10) While Ortiz may no longer remember, she also does not recant the remainder of her inculpatory trial testimony discussed above, including Moore attempting to drive off with her vehicle and his statement that Ortiz driving him to his girlfriend's home would be his alibi. (See Exs. 51, 90, and 99) Ortiz's affirmation that she drove with Moore and Borghetti to the crime scene that morning is consistent with and corroborates Borghetti's inculpatory trial testimony on that same subject; namely, that she and Moore left the house and got into a small red car with a woman driver. (R.T. 9/18/01 at 134) After driving around, the woman drove to the area of the Yale Street apartment and quickly got out of the car. Borghetti started to get out of the car, but Moore told her "to get back in the car" because "[t]hose were the people he shot." The driver of the car returned and appeared "frantic." After the driver asked a taxi driver to call 911, they drove away. (*Id.* at 135-136, 198) The woman later dropped off Borghetti and Moore at his mother's house. (*Id.* at 136-137)

Ortiz's affidavits also do not call into question the other substantial evidence of Moore's guilt, as discussed above. For example, Borghetti testified that Moore admitted to shooting the victims, and she identified the Makarov firearm as the gun that Moore possessed the night of the shooting. (R.T. 9/18/01 at 119-122, 133-135) Borghetti further told the jury that Moore and Derby traded guns (*Id.* at 154), and police found the Makarov firearm in Derby's car. (R.T. 9/13/01 at 153-156; R.T. 9/24/01 (p.m.) at 40) Criminalist Leister testified that he received projectiles recovered from the victims' autopsies, and he identified the Makarov firearm seized from Derby's car as the weapon that fired the autopsy projectiles. (R.T. 9/20/01 at 82-92) Borghetti also testified that Moore attempted to change his appearance by cutting off his braids after a newspaper published Moore's name and his picture. (R.T. 9/18/01 at 154-158) Additionally, Moore told Borghetti that he was careful not to leave any fingerprints or cigarette butts at the scene, and that he shot the person who tried to run him over but was sorry that he shot the other victims because "they didn't have anything to do with it." (*Id.* at 168-172)

Certain of Ortiz's post-trial statements merely contradict other evidence. For instance, Debra Ford told Officer Ford that the shooting happened around 6:00 a.m. (R.T. 9/17/01 at 74; State's Exhibit A at 000050). Additionally, a neighbor reported hearing gunshots around 5:40 a.m., (*id.* at 000051), and Janel Early told PCR counsel that the shooting took place around 6:00 a.m. (Ex. 22 at 6-7)

The proffered evidence fails to undermine the evidence presented at trial and it is not credible in light of the trial record. *See State v. Krum*, 183 Ariz. 288, 294-295 (1995) (observing

that courts generally view recanted testimony claims as unreliable and untrustworthy, and finding that other evidence in the record suggested the crime actually occurred).

Janel Early

Moore next argues that statements from Janel Early constitute evidence of his innocence. On November 17, 1999, police arrested Early for disorderly conduct. (Ex. 23 at 1) The police report notes that Early was very intoxicated, and she was upset about the murder of her friend Delia Ramos. (*Id.*) Early told police that a Hispanic man named "Gordo" supplied Delia with drugs and murdered Delia after the two had problems related to drugs. (*Id.*) The police report questions Early's credibility and provides that the interviewing officer gave Early's statements to Detective Cooning. (*Id.* at 2)

Early's post-trial statement provides that she worked for Gordo and brought drugs to Delia. (Ex. 22 at 2) On the day of the shooting, Delia was upset because her boyfriend had taken some of the drugs, and Delia believed that Gordo would kill her. (*Id.* at 3-4) Around 6:00 a.m., Early returned to Delia's apartment, and Gordo's car was there. (*Id.* at 6) Early parked her car, heard gunshots and saw four men run out of the apartment, including Gordo and a man named Tony. (*Id.* at 7, 9, 14) Early specified that she did not see Moore at the apartment. (*Id.* at 12) When Early approached the apartment, she found the shooting victims. (*Id.* at 10-11)

Early's statements fail to demonstrate a colorable claim under Rule 32.1(h). The police officer who interviewed Early questioned her credibility, and the presence of multiple assailants and Early's crime scene descriptions are grossly inconsistent with the material witness accounts of Ford, Ortiz, Borghetti, and Brown, and fail to undermine the other substantial evidence of Moore's guilt discussed above. *Cf. Taylor v. Illinois,* 484 U.S. 400, 414 (1988) ("[I]t is … reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed."). *See also Krum*, 183 Ariz. at 294-295(concluding the trial court properly discounted a third-party affidavit that lacked any "reliable factual foundation" and substantial evidence in record contradicted the affidavit statements)

A.C. Ford

Ford's eleven-year-old son, A.C., told police that Brown threatened to kill his mother "before the shooting," and A.C. believed that Brown was the person who shot his mother. (Ex. 21 at ¶¶4-8) Moore claims that police failed to disclose this information to him, and that it is compelling evidence against Brown because A.C. made the statement days before the shooting. (Petition at 109-110)

A.C.'s statement, however, does not show that Brown actually committed the murders and fails to allege a colorable claim. Additionally, the record demonstrates that the prosecution disclosed the statement to Moore. During opening statement, trial counsel told the jury that Brown would testify to fighting with Mata before the shooting, and he was upset with Ford for smoking crack with his girlfriend and had threatened Ford before the shooting. (R.T. 9/12/01 at 9) Moreover, as discussed above, the jury heard testimony that Brown fought with and threatened Mata, and other substantial evidence shows Moore's guilt.

1. Additional Allegations of Evidence Incriminating Brown

Moore further argues that Brown made admissions to Detective Cooning, which show Moore's innocence. These statements are contained in the interview conducted by Detective Cooning after someone identified Brown as being involved in the shooting. (Ex. 88 at 7) Moore argues it is "highly relevant" that Brown described riding around in a truck just before the shooting because Detective Dillian testified that a truck sped away after the shooting, ran over a shell casing, and left tire tracks. (Petition at 117-118)

While Detective Dillian and Ortiz testified about a truck at the crime scene, Brown's statement to Detective Cooning does not demonstrate that Brown was in that specific truck. Moore's argument is speculative, and Brown's statement to Detective Cooning does not allege a colorable claim under Rule 32.1(h).

Moore next points out that Brown has a violent criminal history and argues that Brown was involved with a violent criminal street gang tied to the crimes at issue. Moore offers these allegations as support for his actual innocence claim. (Petition at 43-44, 46)

While it is undisputed that the presentence report demonstrates Brown has a violent criminal history and probation violations, that does not show that Brown committed the murders. Brown's criminal history is also somewhat cumulative. Brown appeared at trial in prison clothing and testified that he was serving a prison sentence for "prohibited possession of a firearm." (R.T. 9/13/01 at 84-86)

Additionally, Moore's allegations related to Brown's ties to a violent street gang are speculative. For instance, Alan Feliciano has no personal knowledge of what took place when the shootings occurred and relies solely on "the word on the street" that Brown committed the murders. (Ex. 26 at ¶¶13-16) Feliciano's statement is not reliable evidence and it fails to allege a colorable claim under Rule 32.1(h).

Moore further claims that on November 16, 1999, Brown failed to appear for a scheduled probation department appointment and falsely claimed that he went to the hospital due to food

poisoning. (Petition at 3, 121) Moore contends that hospital records demonstrate that Brown was treated for a stab wound to his foot (not food poisoning), and that the medical examiner opined that Brown's foot wound is consistent with "a defensive knife wound inflicted" by Mata. (*Id.*) Moore argues that Brown's false statement demonstrates "consciousness of guilt" and is probative evidence that Brown committed the murders. (*Id.*)

Exhibit 92 rebuts Moore's allegation. While the exhibit provides that the hospital verified Brown received medical treatment "on 11-15-99 at approximately 1900 hours for an injured toe," this injury "occurred on 11-2-99." (Ex. 92 at 000032-33) It is undisputed that the murders were committed in the morning hours of November 16, 1999, and Brown's toe injury occurred approximately two weeks prior. Moreover, Mata could not have caused Brown's toe injury because Brown sought treatment around 7:00 p.m. on November 15, 1999, *before* the shootings took place.

Moore last contends that he could not have committed the murders because he is right-handed, and Ford testified that she saw the gun in the shooter's left hand. (R.T. 9/13/01 at 27-28) Moore submitted an opinion from a handwriting expert that "there are indications to suggest" that Brown wrote the submitted documents with his left hand. (Petition 104; Ex. 71 at 2)

Assuming the truth of Moore's allegation that Brown is left-handed, that does not demonstrate a colorable claim under Rule 32.1(h). Additionally, in response to a jury question about which hand Moore used "to eat, throw or catch a ball," Borghetti testified that Moore was able to use both hands, and she agreed that he was "ambidextrous." (R.T. 9/18/01 at 197)

2. Challenge to Credibility of Trial Testimony

Debra Ford's Testimony and In Court-Identification

Moore next challenges the credibility of Ford's identification during trial and a pretrial deposition. (Petition at 8, 12-13; Ex. 77)

This allegation does not demonstrate a colorable claim and it is cumulative. During trial, counsel challenged Moore's guilt and argued that Ford's identification was not credible. For instance, in opening statement, trial counsel outlined the evidence suggesting that Brown committed the murders, and told the jury that Ford did not know who shot her and could not identify Moore from a photograph. (R.T. 9/12/01 at 9)

As discussed previously, the prosecution presented overwhelming evidence of Moore's guilt: Borghetti testified that Moore admitted to shooting the victims and possessed the Makarov firearm the night of the shooting, and Criminalist Leister identified this firearm to projectiles

recovered from two murder victims. Police found the Makarov firearm in Derby's car, and Borghetti testified that Moore had given it to Derby. Borghetti has not recanted these statements, and Derby failed to appear at trial after service of a prosecution subpoena[2]. (R.T. 9/19/01 at 138)

Jessica Borghetti's Trial Testimony

Moore next claims that Borghetti was not truthful, and that she admitted to falsely implicating him "because the police 'scared the pee' out of her by threating to send her to prison for 15 years if she did not 'cooperate.'" (Petition at 8, 121) Moore supports this claim with Borghetti's affidavit and a transcript of her pretrial interview with trial counsel. (Ex. 49; Ex. 91)

Borghetti's affidavit fails to undermine material aspects of her trial testimony. While Borghetti initially did not tell police that Moore admitted to shooting four people or that the couple had a gun, Borghetti later explained that she was scared and did not want to get anyone in trouble. (R.T. 9/18/01 at 170-71, 189-90) After speaking with her mother, Borghetti told police what happened, and she later entered an immunity agreement with the prosecution. (*Id.* at 173-74, 186, 190-91)

Borghetti also did not recant her inculpatory trial testimony discussed above. Instead, her affidavit merely provides that she falsely testified to Moore's bad temper when in fact the opposite was true. (Ex. 49 at ¶ at 4) The affidavit also merely provides that Moore "exhibited behaviors that were not consistent with having perpetrated the crime," but again, she limited these circumstances to Moore's failure to dispose of his gun quickly or to obtain money by force, and Moore's statement that he would be exonerated. (*Id.* at ¶¶ 6-7) This claim as to Borghetti's testimony is simply not colorable.

a. Evidence Proffered to Establish Factual Innocence

2. Alibi

Moore claims that when the shooting took place, he was five miles away from the crime scene at Alan Feliciano's apartment. (Petition at 34, 130) Feliciano's affidavit provides that he and Moore were together from approximately 9:30 on the evening of November 15, 1999 until approximately 5:00 a.m. the next morning. (Ex. 26 at ¶6)

[2] Derby provided a post-trial affidavit that he received a 40-caliber revolver from Moore, and that the 9mm Makarov firearm recovered from his car was a different weapon. (Petition at 40; Ex. 38) Derby did not appear at trial, and his post-trial statement fails to undermine either Borghetti's testimony that Moore gave Derby the murder weapon or Derby's statements to police that implicated Moore as the shooter.

This proffered alibi does not rely on new evidence. As Moore acknowledges, trial counsel and their investigator interviewed Feliciano, and counsel did not believe Feliciano (a convicted felon) and declined to present the alibi evidence at trial. (Ex. 26 at ¶¶19-20) While Moore argues that trial counsel inadequately investigated his alibi, he fails to provide any additional information that trial counsel should have uncovered. (*See* Petition at 130)

Based on the substantial evidence of guilt discussed above, and the circumstances undermining Feliciano's credibility, the Court does not find that his proffered alibi alleges a colorable claim under Rule 32.1(h).

Moore nevertheless argues that Officer Elting corroborated this alibi when he testified that emergency personnel "said that the cold weather that night probably kept [Ford] alive because it appeared she had been there a long time." (Petition at 86-87; R.T. 9/12/01 at 31) Moore also relies on Ford's testimony that she was on the ground for "a long time" approximately "three to four hours." (R.T. 9/13/01 at 40) Moore contends that this testimony strongly suggests that the shooting occurred around 4:00 a.m. rather than 5:30 or 6:00 a.m. as argued at trial. (Petition at 86-87)

The foregoing testimony does not show when the shooting occurred, and other evidence contradicts Moore's claim about when the shooting took place. For instance, on cross-examination, counsel asked Ford "Do you have any idea what time [the shooting] was?" Ford replied, "I can guess. I'm not sure. I didn't have no – I mean, I had a watch on, but I wasn't paying attention. I don't know." (R.T. 9/17/01 at 13)

Captain Tobin, who responded to the scene with the Phoenix Fire Department, testified that although Ford was conscious and responsive to questions, she was in extremely critical condition. (R.T. 9/12/01 at 84) When asked if he could determine the amount of time between the shooting and the arrival of emergency personnel, Captain Tobin responded: "I wouldn't be able to do that." (R.T. 9/12/01 at 80)

It is also important to keep in mind that Olga Gomez told police "that she heard some shots at 0540, but as this was not unusual she did not even look out to see what was going on." (Response Ex. A at 000051) Another neighbor named Leno Soto told police that nothing unusual happened before he left for work at 5:20 a.m. (*Id.* at 000059) Sylvia Villegas reported hearing gunshots around 5:15 to 5:20 a.m. (*Id.* at 000048) While in the hospital, Debra Ford told Officer Ford that the shooting happened around 6:00 a.m. (*Id.* at 000050, 000060) When interviewed by police, Rios Barrios estimated that the shooting took place around 5:30; however, Rios Barrios did not hear the gunshots. (*Id.* at 000072)

3. *Polygraph*

While acknowledging that the results of a polygraph examination are not admissible, Moore claims that retired Detective Tom Ezell administered a polygraph and opined that Moore truthfully said that he was never at the Yale Street apartment and instead was with Feliciano at the time of the murders. (Petition at 37-38)

Assuming that Moore passed a polygraph examination, this is insufficient to establish a colorable claim under Rule 32.1(h). Polygraph results are "unreliable and admission of their results risks usurping the role of the jury." *State v. Perez*, 233 Ariz. 38, 43 ¶18 (2013). In Arizona, "all references to polygraph tests, absent stipulation, are inadmissible for any purpose." *State v. Hoskins*, 199 Ariz. 127, 144 ¶69 (2000).

c. Evidence of Moore's Good Character and Nonviolent Nature

Relying on affidavits from family, friends, and neighbors, Moore argues this evidence demonstrates that he is a caring, non-violent, and law-abiding person, and that he could not have shot the victims. (Petition at 24-28) The State responds that Moore's lengthy juvenile and adult criminal history, documented gang affiliation and illicit drug use, as well as evidence that Moore encouraged others to assault Brown in jail, rebut the good character evidence. (Response at 41-42)

The proffered good character evidence does not meet the standard for establishing a colorable claim under Rule 32.1(h). None of the witnesses had first-hand knowledge of what took place during the shooting, and their affidavits do not undermine the substantial evidence of guilt presented at trial. *See Denz*, 232 Ariz. at 448 ¶22 (finding that identified evidence, a "pathologist's report and various proposed character witnesses–does nothing more than contradict some of the evidence presented at trial, it does not conclusively demonstrate [defendant's] innocence").

d. Physical Evidence

Moore argues that the following evidence supports his innocence claim: (1) the trial mitigation specialist questioned his guilt; (2) Moore wears a size thirteen shoe and this excludes him from crime scene evidence; and (3) Brown's skin complexion is consistent with witness descriptions of the shooter. (Petition at 85-87)

Moore further argues that (1) post-trial forensic testing conducted by Bode Technology did not find his DNA on the murder weapon or at the crime scene; (2) none of the more than 100 latent prints obtained from the crime scene were a match to him; and (3) PCR analysis excluded

him from footprints at the crime scene. (Petition at 38-39) The State does not dispute that no DNA testing or other trace evidence confirmed Moore's presence at the crime scene and argues that "[i]n DNA as in other areas, an absence of evidence is not evidence of absence," citing *Comm. v. Heilman*, 867 A.2d 542, 547 ¶8 (Pa. 2005). (Response at 35)

This claim is not colorable. For instance, during opening statement, trial counsel recounted the evidence collected by police from the crime scene, and told the jury that none of it came from Moore. (R.T. 9/12/01 at 8-9) Detective Dillian later testified that police collected different types of evidence from the crime scene in order to compare it to potential suspects. (R.T. 9/19/01 at 78-82) There was no subsequent testimony that any of the collected evidence came from Moore, and counsel argued in closing that the "physical evidence did not establish that Jarreau Moore was ever at 1808 E. Yale." (R.T. 9/25/01 at 76-77)

Moore also told Borghetti that he was careful not to leave any fingerprints or cigarette butts at the scene, and that he shot the person who tried to run him over but was sorry that he shot the other victims because "they didn't have anything to do with it." (R.T. 9/18/01 at 168-172)

e. Police Misconduct

Moore contends that the PCR investigation uncovered "a previously unknown pattern of egregious and intentional police conduct," which provides additional support for his actual innocence claim. (Petition at 20-21) Moore alleges that there were "discrepancies or improprieties" involving material pieces of evidence (Items 26A, 45, and 22). (Petition at 77-80)

Item 26A

Moore first addresses Item 26, a plastic bag containing a shell casing (Item 26A) and a projectile (Item 26B). During the execution of a search warrant, police found Item 26 on Moore's bed under the comforter. (R.T. 9/19/01 at 91-92, 98-101, 126; R.T. 9/24/01 (p.m.) at 10-11) Relying on expert opinion, Moore alleges that police planted Item 26A "in order to falsely tie him to the Yale Crackhouse homicides." (Petition at 4) Moore also claims that police either destroyed or removed Item 26A from evidence. (*Id.* at 5) Moore claims that (1) police did not follow protocol; (2) a pictured dent in Item 26A later was not visible to the PCR expert; and (3) no other shell casing taken from the crime scene has a visible dent. (*Id.* at 77-78)

Contrary to Moore's argument, Item 26A did not play "a prominent role" in his conviction. While Detective Femenia gave a brief description of the evidence seized from Moore's bedroom, he did not link Item 26 to the crime scene or the Makarov firearm. (R.T.

9/19/01 at 90-101) Instead, Detective Femenia merely provided a foundation for the admission of Item 26. (*Id.* at 100-101)

Criminalist Leister then identified Item 26B as having been fired from the Makarov firearm, and he observed "a trace amount of blood and tissue" on Item 26B. (R.T. 9/20/01 at 93) Criminalist Leister also compared other expended shell casings with "test-fires" from the Makarov firearm (Items 45, 46, 54, 56, 66, 70, 77, 79), and concluded that these casings "could not be excluded or identified as having been fired from" the Makarov. (*Id.* at 93-94) A review of the record does not show that Criminalist Leister identified the Makarov as having fired Item 26A, or that he gave any opinion linking Item 26A to the murders.

During closing argument, the prosecutor argued that Item 26B matched the Makarov firearm, and that the Makarov firearm "matches not only the bullets and the shell casings at the scene, but also back at [Moore's] house." (R.T. 9/25/01 at 47-48, 51, 53-54, 64) In response, defense counsel argued that other people passed around the Makarov firearm and someone else possessed it at the time of the shooting, and that any rebuttal argument concerning trace evidence on Item 26B is not proof of Moore's guilt because the prosecution did not analyze the trace evidence to determine its source. (*Id.* at 80-81) The prosecutor clarified in rebuttal that Item 26B matched the Makarov firearm, but that the prosecution was not arguing Item 26B came from the crime scene. (*Id.* at 100) There was no reference to Item 26A.

The record refutes Moore's argument that Item 26A was material evidence relied on by the prosecution. Additionally, as the State points out, Moore has not alleged any impropriety or tampering with respect to Item 26B, and Moore's claim does not undermine Criminalist Leister's testimony identifying the autopsy projectiles to the Makarov firearm. Moreover, as discussed previously, other substantial evidence supports Moore's guilt, and any abnormalities associated with Item 26A fail to allege a colorable claim.

Item 45

Moore's next claim involves Item 45, a shell casing recovered from a tire track at the crime scene. Moore alleges that police removed Item 45 from the crime scene and planted it on his bed. (Petition at 81-82, 92-94) Moore further claims that the firearm seized from Derby's car was a 40-caliber firearm[3], rather than the 9-mm Makarov firearm, and that police substituted shell casings to cover up the planting of Item 26A. (*Id.* at 82)

[3] Derby's affidavit provides that the gun seized by police is a 9mm firearm, and Derby received a 40-caliber firearm from Moore. (Petition at 40; Ex. 38 at ¶¶8-10)

This claim is not colorable for the reasons related to Item 26A (discussed above). Moreover, Derby refused to come to trial and his post-trial affidavit is not credible, particularly in light of Borghetti's identification of the Makarov firearm as the weapon Moore possessed the night of the shooting and the one he traded with Derby. Additionally, Derby told police that Moore expressed regret to Borghetti for the murders. (Response Exhibit, at 4) Moore told Derby that if he could change, he "wouldn't have done it," and that "somebody tried to hit him with a car." (*Id.* at 5-6)

Although Derby did not testify at trial, the law allows consideration of his statements to evaluate Moore's actual innocence claim. "It is important to note ... that 'actual innocence' means factual innocence, not mere legal insufficiency." *State v. Pineda-Navarro*, 2017 WL 4927692 at 2 ¶5 (App. 2017)(citing with approval, *United States v. Bousley*, 523 U.S. 614, 624 (1998))("In other words, the Government is not limited to the existing record to rebut any showing that petitioner might make. Rather, on remand, the Government should be permitted to present any admissible evidence of petitioner's guilt ....") The evidence at trial overwhelmingly established Moore's guilt, and Moore's statements to Derby and Lockwood,[4] in addition to the trial evidence, demonstrate that the actual innocence claim is not colorable under the Rule 32.1(h) standard.

Item 22

Item 22 is a knife found at the crime scene near Mata's body. Relying on expert opinions and crime scene photos, Moore claims that police destroyed exculpatory blood on the knife and that this blood came from Brown's foot injury. (Petition at 40-41, 90) On cross-examination, Dr. Moseley acknowledged that Mata could have been holding the knife found near his body, and Dr. Moseley could not rule out self-defense. (R.T. 9/17/01 at 136)

Moore's claim that Item 22 contained untested blood belonging to Brown or someone other than Moore is speculative. As the State points out, the police reports and the scene detective's testimony refute this claim. (See Amended Response, Exs. A at 21, 37 & J-V; R.T. 9/19/01 at 30-31) Additionally, as discussed previously, Moore's Exhibit 92 refutes the allegation that Brown's foot injury was caused from being stabbed with Item 22 during the murder. Thus, Moore has not shown a connection between "the actual perpetrator" and the alleged evidence on Item 22. Moore's allegation that a latent print on Item 22 may belong to Gordo is speculative, and Moore has not alleged credible evidence showing Gordo committed the murders.

[4] Moore told Lockwood: (1) he did not plan to kill the victims but "things just got out of hand;" (2) Ford was a "crackhead" who was friends with the other victims; and (3) he let Sarry Ortiz go because she was frightened. (Response exhibit B at 000224) Moore also asked Lockwood and Derby to dispose of the Makarov firearm. (*Id.* at 000222)

Moore's allegations are also cumulative and fail to undermine the substantial evidence of guilt presented at trial. As discussed previously, trial counsel argued that Moore was not at the crime scene, and Brown acknowledged that he fought with and threatened Mata. Thus, even assuming that Brown's DNA was on Item 22, this does not allege a colorable claim. The presence of any such DNA on Item 22 may have been the result of Brown and Mata's fight and had nothing to do with Mata's shooting. Moore even maintains that Brown essentially admitted that Mata had used a knife during their fight. (Defendant's Oral Argument Memo, at p. 22) That said, the jury nevertheless heard that Rios Barrios identified Brown as the shooter. The jury still found Moore guilty of Mata's murder, but did not sentence him to death for that murder.

f. Expert opinion regarding police misconduct

Moore next argues that the police misconduct allegations related to the investigation and prosecution of Ray Krone and Mark Goudeau bolster the credibility of the foregoing police misconduct claims. (Pet. at 113-117) Moore supports this claim with affidavits from two experts, who heard that former Detective David Barnes accused Detective Femenia of planting evidence, and Moore argues that this is relevant because Detective Femenia "discovered the plastic baggie containing Item#26A." (Petition at 111-12)

Moore's allegations do not demonstrate a colorable claim. Former Detective Barnes did not provide an affidavit. Additionally, the misconduct allegations fail to address what actually took place in the investigation of Moore's case and it relies on hearsay. (Ex. 101; Ex. 81 at ¶¶7-11; Ex. 82 at ¶¶ 9-11)

Affidavit of Ray Krone Implicating Detective Olson

Moore also claims that there exists a strong connection between his innocence and Ray Krone's exoneration because Detective Olson ordered the destruction of evidence on Item 22 and committed similar misconduct while investigating Ray Krone's case. (Petition at 113-115)

Moore has not shown that Detective Olson ordered the destruction of evidence on Item 22, and this allegation is not colorable. One notable distinction is the DNA testing in Ray Krone's case showed that biological evidence came from another man. Another notable distinction is the substantial evidence of Moore's guilt, discussed in detail above, which includes Borghetti's testimony that Moore admitted to shooting the victims and possessed the Makarov firearm, the inculpatory testimony of Ford and Ortiz, and the forensic identification of the Makarov as having fired the projectiles recovered from Guadalupe and Delia.

Larry Hammond

Moore provided an affidavit from Larry Hammond, a respected attorney in Maricopa County and founder of the Arizona Justice Project. Hammond questioned the reliability of the State's evidence, and opined that the PCR experts are credible and the alleged police misconduct demonstrates Moore's innocence. (Ex. 84 at 6-15)

There is no dispute that Larry Hammond's opinions are highly respected in this legal community. However, his opinion that the evidence demonstrates Moore's actual innocence under Rule 32.1(h) is simply his opinion. With all due respect, it does not allege a colorable claim under Rule 32.1(h).

g. Witness statements offered to corroborate police misconduct

Moore contends that the following witness statements further support the police misconduct allegations: (1) Deborah Hole and Marianne Lupikas heard police officers state they were searching Moore's bedroom "to find the murder weapon;" (2) police did not allow Moore's mother to view the search of his bedroom; and (3) Derby's post-trial statement. (Petition at 80-81)

The statements made by Deborah Hole and Marianne Lupikas do not demonstrate police misconduct or allege a colorable claim. Police obtained a search warrant supported by probable cause to search Moore's home for a firearm or related evidence. Additionally, Moore has not shown any improper police action in prohibiting his mother from viewing the search of the bedroom. As discussed above, the record demonstrates that Derby's affidavit is not credible.

Conclusion

After carefully considering Moore's arguments and exhibits in light of the trial record, the Court concludes that Moore 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" Moore guilty of the murders "beyond a reasonable doubt." Ariz. R. Crim. P. 32.1(h). Moore's allegations primarily present cumulative evidence or evidence that merely contradicts or impeaches aspects of the evidence presented at trial. However, Moore's evidence and allegations fail to undermine the most compelling evidence of his guilt, such as the inculpatory testimony of Ford, Ortiz, and Borghetti, the recovery of the Makarov firearm from Derby's car, and Criminal Leister's testimony identifying autopsy projectiles to the Makarov firearm.

Additionally, for all of the foregoing reasons, Moore has not shown that any of the proffered evidence, even if true, would have probably changed the verdict if known at trial. *See Amaral, 239 Ariz. at 220; State v. Bilke*, 162 Ariz. 51, 52-53 (1989).

B. Police and Prosecutorial Misconduct (Claim C)

Relying on the foregoing allegations, Moore next raises a freestanding claim of prosecutorial and police misconduct under Rule 32.1(a) (conviction violates constitution) and a claim under Rule 32.1(e) (newly discovered evidence). (Petition at 133-134)

1. Preclusion

The State responds that these claims are without merit, and that the facts underlying the Rule 32.1(a) claim were available at trial and are subject to preclusion under Rule 32.2(a)(3). (Response at 43) Moore appears to argue that the Rule 32.1(a) claim is not subject to preclusion because the "bad faith or intentional/purposeful destruction of evidence" results in a "more beneficial remedy to a capital defendant," namely dismissal with prejudice. (Petition at 97)

Moore has cited no authority to support this argument, nor has he shown that there is an established exception to the preclusion rule. The claim that police and prosecutorial misconduct violated Moore's right to due process is subject to preclusion due to waiver at trial and on appeal. Ariz. R. Crim. P. 32.2(a)(3). However, the newly discovered evidence claim is not subject to prelusion under Rule 32.2(a)(3). *See* Ariz. R. Crim. P. 32.2(b)(claims raised under Rule 32.1(b) through (h) are not subject to preclusion). The Court will address the merits of both claims.

2. Rule 32.1(a) Claim–Due Process Violation

Moore argues that the police and prosecutorial misconduct allegations discussed in the previous section violated his right to due process and entitle him to relief under Rule 32.1(a). (Petition 134-144) In support of this claim, Moore alleges that law enforcement and the prosecution: (1) made misrepresentations to the grand jury; (2) failed to disclose exculpatory evidence; (3) tampered with witnesses and evidence during the trial and PCR proceedings; and (4) planted evidence. (Petition at 59-61)

a. *Grand Jury Testimony*

Moore first claims that Detective Cooning committed perjury during his grand jury testimony, and that this entitles Moore to relief under *United States v. Basurto*, 47 F.2d 781 (9th Cir. 1984). (Petition at 59) However, as the State argues: "An error–even one with the potential

to affect a grand jury's charging decision–is rendered harmless by the trial jury's subsequent guilty verdict." *State v. Atwood*, 171 Ariz. 576, 601 (1999), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229 (2001). (Response at 70)

The only exception to this rule is set forth in *Basurto,* which held that "the Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material." *Id.* at 785. *See also State v. Gortarez*, 141 Ariz. 254, 258 (1984)(finding the *Basurto* exception inapplicable because the detective's misstatement was not material, intentional, or motivated by malice). "Perjury is a 'false sworn statement [a witness makes regarding] a material issue, believing [the statement] to be false.'" *State v. Moody*, 208 Ariz. 424, 440 ¶32 (2004)(quoting A.R.S. § 13-2702(A)(1)(2001)).

Moore claims that Detective Cooning committed perjury by misstating what Rios Barrios and a neighbor told police. Specifically, Moore contends that Detective Cooning testified that Rios Barrios saw two African American males at the crime scene, when in fact Rios Barrios only saw one African American male, who was wearing a Dallas Cowboy cap and fought with Mata. (Petition at 59)

Moore has not shown that Detective Cooning provided perjured testimony on a material issue. Rios Barrios told police that a tall and thin Black male initially accompanied Brown. This second male stood by and swore at Mata, while Brown fought with Mata. Rios Barrios believed the second male may have participated in the homicide, but he was not sure. (Response Ex. A at 000072-73) Detective Cooning's grand jury testimony is consistent with the police report.

Moore also claims Detective Cooning gave inaccurate testimony that unnamed neighbors told police that they heard gunshots between 5:40 to 6:00 a.m. (Petition at 59) As support for this claim, Moore argues that the police reports and the evidence do not support Detective Cooning's testimony. (*Id.)*

The police reports refute this claim and demonstrate that Detective Cooning did not provide perjured testimony on a material issue. Olga Gomez told police "that she heard some shots at 0540, but as this was not unusual she did not even look out to see what was going on." (Response Ex. A at 000051) Another neighbor named Leno Soto told police that nothing unusual happened before he left for work at 5:20 a.m. (*Id.* at 000059) Sylvia Villegas reported hearing gunshots around 5:15 to 5:20 a.m. (*Id.* at 000048) While in the hospital, Debra Ford told Officer Ford that the shooting happened around 6:00 a.m. (*Id.* at 000050, 000060) When interviewed by police, Rios Barrios estimated that the shooting took place around 5:30; however, Rios Barrios did not hear the gunshots. (*Id.* at 000072)

b. Police interview with A.C., Debra Ford's son

Moore claims that law enforcement and the prosecution withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) by failing to disclose a police interview conducted with Debra Ford's son, A.C. (Petition at 59-60) Relying on an affidavit from Christopher Ford, A.C.'s father, Moore contends A.C. told police that Brown threatened to kill Ford within a week of the shooting.

This claim is not colorable. For the reasons discussed previously above, Moore has not shown that the police withheld A.C.'s statement, or that the statement was material evidence. *See State v. Benson*, 232 Ariz. 452, 460 ¶24 (2013)(explaining that a due process violation under *Brady* requires the State to withhold evidence that is material to guilt. "Evidence is material for purposes of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.")

c. Jessica Borghetti's Police Interview and Trial Testimony

Moore further claims that law enforcement and the prosecution failed to disclose that Detective Femenia threatened Borghetti by telling her that she would go to prison for fifteen years if she did not cooperate with police. (Petition at 60) Relying on Borghetti's affidavit, Moore also claims that she falsely testified that Moore had a bad temper to help him obtain an insanity defense. (*Id.*)

As discussed above, Borghetti testified at trial that Moore admitted to shooting the victims, and that he possessed the Makarov firearm on the night of the shootings and later traded this weapon to Derby. Moore has not shown that this testimony was false, and Borghetti has not recanted this testimony. Additionally, during cross-examination counsel elicited testimony that Detective Cooning told Borghetti that she could get in trouble and Borghetti then entered into an immunity agreement with the prosecution. (R.T. 9/18/01 at 186)

In sum, this claim is not colorable because Moore has not shown that the statement attributed to Detective Femenia had any impact on Borghetti's trial testimony, or that any material aspects of Borghetti's testimony were false or coerced.

d. *Evidence Item 22*

This claim relies on Moore's allegation that police destroyed blood evidence on Item 22, and that this evidence came from the actual perpetrator of the homicides. Moore argues this evidence was exculpatory, and its destruction demonstrates bad faith and requires dismissal of his case. (Petition at 60; 140-144)

This claim is not colorable. Moore has not shown that there was blood evidence on Item 22, or that the alleged blood evidence related to the crimes at issue. As discussed previously, Moore's own exhibit refutes the claim that Mata stabbed Brown and caused a foot injury with Item 22.

Moreover, Moore has not shown that Detective Olson ordered the destruction of evidence. Instead, the record shows that police prioritized the testing, as demonstrated by Detective Cooning's testimony during cross-examination. Trial counsel questioned the failure to test evidentiary items, and Detective Cooning responded that the police department prioritized the laboratory forensic testing in relation to what police learned during the investigation. (R.T. 9/24/01 (p.m.) at 17, 34)

e. Evidence Item 26A

Moore further claims that police planted Item 26A in order to frame him for the murders. (Petition at 60) Relying on expert opinion, Moore contends that a picture of Item 26A is "wholly different" from the item in evidence. (*Id.* at 61) Moore argues that this allegation demonstrates outrageous government conduct and requires dismissal of his case with prejudice. (*Id.* at 138-140)

This claim is not colorable. As discussed above, Criminalist Leister did not identify the Makarov as having fired Item 26A. The prosecution did not rely on Item 26A. Additionally, Moore argues that police planted Item 26A after Ford failed to identify him. However, the record demonstrates that Ortiz took Detective Cooning to the location where she dropped off Moore. Detective Cooning then spoke to neighbors and gained a description of Moore, identified Moore, and eventually obtained a search warrant supported by probable cause. Thus, at the time of the search warrant, police had evidence that linked Moore to the murders independent of Ford's identification.

f. Debra Ford's deposition

Moore broadly claims that the prosecutor committed misconduct by tampering with Ford's deposition identification, which took place after Ford failed to identify Moore "in multiple line-ups." (Petition 61) In support of this claim, Moore's eyewitness identification expert opined that the police procedures fell short of best practices, and that a suggestive circumstance resulted in Ford's identification of Moore. (Ex. 45 ¶¶ 20, 33) Trial counsel also provided an affidavit, which provides that the prosecutor used an "overly suggestive identification process," which enabled Ford to identify Moore. (Ex. 32 ¶9)

This claim is not colorable. Other than arguing that the prosecutor utilized a suggestive identification procedure, Moore fails to specify what facts support this claim. *See State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718 (1985) ("Rule 32 does not require the trial court to conduct evidentiary hearings based on mere generalizations and unsubstantiated claims.")

Additionally, Moore raised this claim in a pretrial motion to suppress Ford's identification at a pretrial video-deposition, which took place on April 28, 2000. The trial court denied the motion, and Moore then challenged the denial of this motion and Ford's in-court identification on appeal. The Arizona Supreme Court rejected the merits of Moore's claim.

Specifically, Moore challenged Ford's identification during the pretrial deposition. The prosecutor showed Ford a video lineup, and she was unable to make an identification. *Moore,* 222 Ariz. at 8 ¶20. In response to a question from defense counsel, Ford then testified that an unidentified police officer showed her a picture of the shooter. *Id.* at ¶21. On redirect, the prosecutor played the video from the November 20, 1999 police interview and asked if a composite drawing shown to Ford in the video looked like someone she knew. Ford responded: "That looked like–one of them–it's two of them in the middle right? Looked more like him–more like him than the picture I just seen just now." The prosecutor then showed Ford the original photo lineup, and she identified Moore as the shooter. (*Id.*)

After a *Dessureault* hearing, the trial court found the identification procedure was unduly suggestive, but concluded that the State established that Ford's "in-court identification could be reliable, independent of and untainted by the April 28, 2000 identification." *Id.* at ¶22. The Arizona Supreme Court upheld this ruling, finding that under the "totality of the circumstances," the State established a reliable basis for Ford's in court-identification independent of any suggestive procedures used at the deposition. *Id.* at ¶29.

The Arizona Supreme Court rejected the identification claim at issue here and found that the deposition identification procedure did not taint Ford's in-court identification. Moore has raised no new facts or shown that the suggestive identification procedure during the deposition constitutes prosecutorial misconduct. Additionally, as discussed previously, other evidence tied Moore to the offenses, and other witnesses identified Moore as the shooter.

g. Sam Derby's pretrial interview with the prosecution and defense counsel

Relying on Derby's post-trial affidavit, Moore alleges that the prosecutor committed misconduct by advising Derby that he did not need to appear at trial. (Petition at 61) Derby's affidavit provides that during a pretrial interview with defense counsel, the prosecutor told Derby that he did not have to come to trial. (Ex. 38 at ¶12) However, the affidavit also acknowledges that police arrested Derby pursuant to a warrant issued during Moore's trial. (*Id.* at ¶13)

Derby's affidavit is not credible in light of the record. At trial, the prosecutor asked the court to issue an arrest warrant because Derby failed to appear after the service of a prosecution subpoena. (R.T. 9/19/01 at 138) The prosecutor told the court that his office coordinated the scheduling of Derby's testimony through his attorney, and that during a pretrial defense interview Derby agreed to appear in court to testify. (*Id.* at 138-40; R.T. 9/20/01 at 60-63) Additionally, although Moore submitted an affidavit from defense counsel, this affidavit does not corroborate, or even mention, the pretrial interview and the prosecutorial misconduct allegation related to Derby.

h. Debra Ford's trial identification of Moore

Moore claims the prosecutor failed to disclose that Ford was unable to identify him when she arrived in court, and that Ford asked the prosecutor "Who's that?" after seeing Moore. Moore further alleges that the prosecutor then told Ford that "black people lighten up in jail," and Ford repeated this statement while testifying. (Petition at 61)

This claim relies on hearsay and is not reliable. The sole support for this claim is PCR counsel's affidavit, which provides that Christopher Ford told counsel about this alleged conversation between the prosecutor and Debra Ford. However, Christopher Ford did not hear this conversation personally. (Ex. 50 at ¶7) Additionally, as discussed previously, witnesses other than Ford identified Moore and provided evidence of his guilt.

Relying on "a sound enhanced video," Moore further claims that Ford was unable to identify Moore during a photo lineup on November 20, 1999. Moore contends that Ford instead identified Brown, and Detective Cooning violated *Brady* by failing to memorialize this identification. (Petition at 108)

This claim is not colorable. Moore does not dispute that the prosecution disclosed to trial counsel both the audio recorded interview and the police supplement detailing the interview. Additionally, Moore does not dispute that Ford identified the man who shot her as "Jay," and that Borghetti testified that Moore goes by the name "Jay." Moore has not shown a *Brady* violation because the State disclosed the recorded interview, and Moore's allegation fails to show a reasonable probability of a different result even if the jury had received the proffered evidence.

i. Christopher Ford

Moore alleges that the prosecutor improperly pressured Christopher Ford, and that Ford then cancelled an appointment with PCR counsel to provide an affidavit concerning Debra Ford's inability to identify Moore. (Petition at 61)

This claim is unsupported. The only support for this claim is PCR counsel's affidavit, which provides that Christopher Ford's family pressured him not to provide further assistance with the case. (Ex. 50 ¶8) It also provides that Ford was willing to participate in a deposition where he would be required to attend, and his family could not object. (*Id.* at ¶9) Additionally, the PCR petition demonstrates that this claim is speculative and that Ford cancelled the appointment "when **pressured** by family and possibly the State not to assist further." (Petition at 61) (Emphasis in original).

j. Sarry Ortiz

Based on Ortiz's post-trial affidavit, Moore claims that the prosecutor failed to disclose exculpatory evidence related to Ortiz's statement that she was present when the shooting occurred, and that she saw a man in a Dallas Cowboys cap run past her and a truck doing "donuts" while leaving the scene. (Petition at 73-77)

This claim is not colorable. Ortiz's affidavit is equivocal. For instance, Ortiz was not sure whether she heard gunshots or "backfires" from a loud car. (Ex. 51 at ¶¶ 6-9; 14-15) Additionally, as discussed previously, Detective Cooning testified that Rios Barrios reported that the shooter wore a Dallas Cowboy cap and identified Brown as the shooter. (R.T. 9/24/01 (p.m.) at 21-22) Brown also testified that he wore a Dallas Cowboy cap. (R.T. 9/13/01 at 101) Moore has not shown that the prosecution withheld material information.

Conclusion

After careful consideration of Moore's police misconduct allegations and the evidence presented at trial, the Court concludes that Moore has not shown a colorable claim of police and prosecutorial misconduct, or that police destroyed, planted, or withheld evidence.

3. Rule 32.1(e) Claim–Newly Discovered Evidence

Moore also claims that the allegations of "egregious police and prosecutorial misconduct" constitute newly discovered evidence. (Petition at 134) To be entitled to relief under Rule 32.1(e), Moore must demonstrate that "newly discovered facts probably exist" that probably would have changed the judgment of guilt. "Newly discovered material facts exist if:

(1) the facts were discovered after trial or sentencing;
(2) the defendant exercised due diligence in discovering these facts; and
(3) the newly discovered facts are material and not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines the testimony that was of such critical significant that the impeachment evidence probably would have changed the judgement or sentence."

Ariz. R. Crim. P. 32.1(e)(1)–(3). The Arizona Supreme Court has further explained that the following five requirements are required to raise a colorable claim of newly discovered evidence:

(1) The evidence must appear on its face to have existed at the time of trial but be discovered after trial;
(2) The petition must allege facts from which the court can conclude that Moore was diligent in discovering the facts and bringing them to the court's attention;
(3) The evidence must not be simply cumulative or impeaching;
(4) The evidence must be relevant to the case;
(5) The evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

Amaral, 239 Ariz. at 219 ¶9 (citing *Bilke*, 162 Ariz. at 52-53).

Moore has not alleged a colorable claim under Rule 32.1(e). For the reasons discussed previously, Moore's allegations primarily impeach the evidence presented at trial, and the evidence was available at trial with the exercise of due diligence.

Additionally, the allegations are cumulative to the evidence heard by the jury, and it is not likely the evidence would have altered the guilt phase verdicts if presented at trial. *See State v. Mann*, 117 Ariz. 517, 520 (App. 1977)("It is not enough that newly discovered evidence merely bolsters, impeaches or contradicts the testimony given at trial; it must appear probable that the admission of the new evidence would have changed the result of the trial.") *See also Strickland v. Washington*, 466 U.S. 668, 694 (1984)("The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged.")

C. Ineffective Assistance of Trial Counsel[5] (Claim D)

Generally, an ineffective assistance of counsel claim, cognizable under Rule 32.1(a)(conviction or sentence violates constitute) is not subject to preclusion. *State v. Spreitz*, 202 Ariz. 1, 3 ¶9 (2002). Moore's claim is not subject to preclusion under Rule 32.2(a)(3).

Moore alleges that trial counsel performed deficiently and caused prejudice by failing to: (1) investigate and present available evidence of his alibi and the polygraph examination; (2) present evidence of his good character and non-violent nature, and (3) present compelling evidence that implicated Brown. (Petition at 6-7, 47-53) Moore also faults trial counsel for an inadequate cross-examination of witnesses and for not calling an eyewitness-identification expert.[6] (Petition at 153)

1. Legal Standard

A colorable ineffective-assistance-of-counsel claim requires a showing that counsel's performance fell below an objective standard of reasonableness and caused prejudice. *Strickland*, 466 U.S. at 694. The performance prong requires that "a court indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that under the circumstances `the challenged action might be considered sound trial strategy.'" *Id.* at 687-88.

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

In assessing prejudice, "it is necessary [for the court] to consider *all* the relevant evidence that the jury would have had before it" if counsel had pursued a different path. *Wong v. Belmontes*, 558 U.S 15, 20 (2009) (emphasis in original). *See also Strickland*, 466 U.S. at 695 (the reviewing court "must consider the totality of the evidence before the judge or jury").

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[5] Claim F addresses the claim of ineffective assistance of appellate counsel.

[6] In the Reply and Defendant's Oral Argument Memo, Moore withdrew all penalty phase ineffective assistance of counsel claims. At the second oral argument, the Court conducted a colloquy with Moore and determined that he knowingly, intelligently, and voluntarily waived any such claims. The Court therefore does not address those claims.

2. *Analysis of Ineffective Assistance of Trial Counsel Claim*

a. Investigation of guilt phase defenses

Moore has not shown that trial counsel unreasonably failed to investigate or present Moore's alibi or evidence of third party culpability. To the contrary, the record demonstrates that trial counsel: (1) investigated the alibi defense and found it was not credible, and (2) challenged the State's evidence and affirmatively argued and presented evidence that someone other than Moore committed the offenses.

The record demonstrates that trial counsel made a reasonable decision to forego presentation of the guilt phase defenses proffered by Moore. For instance, Feliciano's post-trial affidavit shows that trial counsel investigated the alibi defense. The affidavit provides that an investigator from Moore's trial team met with Feliciano twice, and Feliciano met with both trial counsel briefly. (Ex. 26 at ¶¶19-20) The affidavit further provides that trial counsel told Feliciano that they did not believe him, and the investigator told Feliciano that he would not testify due to his felony conviction. (*Id.*)

Moore has not shown why trial counsel's conclusion about Feliciano's credibility was unreasonable. Accordingly, because trial counsel investigated the alibi defense and the record supports the reasonableness of trial counsel's investigation, Moore has not overcome *Strickland's* strong presumption that under the circumstances counsel's "challenged action might be considered sound trial strategy." 466 U.S. at 687-88.

Moore also has not shown prejudice. In light of the inculpatory testimony of Ford, Ortiz, and Borghetti, and the other substantial evidence of Moore's guilt discussed above, there is no reasonable probability of a different guilt phase verdict even if trial counsel had presented Feliciano's testimony and the alibi defense.

The record also refutes Moore's claim that trial counsel failed to investigate and present evidence that someone else committed the offenses. Prior to opening statement, trial counsel advised the court that the only defense would be whether there was a reasonable doubt about whether Moore committed the charged offenses and not any "defenses as to intent or premeditation." (R.T. 9/11/01 at 3-4) In support of this defense theory, trial counsel elicited testimony from Officer Elting and Officer Jarvis that the Yale Street apartment and the surrounding area had a high incidence of drugs sales and crime, and that neighbors said many people came in and out of Delia Ramos's apartment to buy drugs. (R.T. 9/12/01 at 50-51, 65-66) Counsel introduced this testimony in order to show that others had the means and motive to commit the murders.

On cross-examination, trial counsel elicited testimony that Detective Cooning spoke with neighbor Mario Antonio Sanchez and took his shoe imprint, and he spoke with Rios Barrios, who completed a composite drawing of a male wearing a cap with a Dallas Cowboy emblem and identified Brown as the shooter. (R.T. 9/24/01 (p.m.) at 19-22) Trial counsel also elicited testimony that Ford said Rios Barrios would have seen the shooter. (R.T. 9/24/01 (p.m.) at 22-23) Trial counsel further inquired about the requests for scientific analysis, and gained Detective Cooning's testimony that he requested a comparison of Moore's shoes and fingerprints to compare against footprints and latent prints obtained from the crime scene. (*Id.* at 26-27)

During summation, trial counsel argued that the trial evidence established a "real possibility" that someone other than Moore committed the crimes. (R.T. 9/25/01 at 70) Counsel told the jurors that the murders happened at a "crack house," and that all the prosecution's witnesses are drug users and desperate for drugs, which made them less reliable witnesses. (*Id.* at 71-73)

Trial counsel further challenged the witness identifications as tainted, arguing that Ford only identified Moore in the courtroom after hearing the evidence and seeing only Moore sitting at the defense table. (*Id.* at 74-75) Counsel suggested that maybe Ford made a mistake, and that drugs can cause problems with hallucinations. Counsel supported this argument with Ford's inability to identify Moore in the photo line-up procedure conducted at the hospital, and her inaccurate statement that Brown was shorter, when both men were approximately the same height. (*Id.* at 83-85) Counsel further argued that law enforcement did not evaluate all available evidence and potential suspects, and that the physical evidence did not establish that Moore was ever at the Yale Street apartment. (*Id.* 75-79)

Given the strength of the prosecution's evidence and the available defenses, Moore has not shown deficient performance or prejudice. Trial counsel investigated and made a reasoned strategic decision not to present the alibi defense, which counsel believed was not credible. Trial counsel challenged the evidence of guilt and presented a guilt-phase defense-strategy centered on the theory that Brown or someone else committed the murders. Moore's allegations are largely cumulative to the arguments made by trial counsel and the testimony elicited at trial.

Moreover, and as discussed above, even if trial counsel failed to conduct an adequate investigation into Moore's good character and reputation for non-violence, there is no reasonable probability of a different guilt phase verdict. *See Strickland*, 466 U.S. at 697(explaining that a court's inquiry need not address both deficient performance and prejudice if a defendant makes an inadequate showing on either one).

b. Trial counsel's cross-examination of the State's witnesses

Debra Ford

Moore next faults trial counsel for inadequately challenging the basis of Ford's in-court identification. As discussed previously, Ford testified that she was able to identify Moore because she met him approximately three years before the shooting. (R.T. 9/17/01 at 30-39) Moore contends that trial counsel provided ineffective assistance by failing to present testimony from a witness-identification expert and confirm Ford's inability to identify Moore in photo line-ups, and explain the suggestive nature of the out-of-court identification procedures. (Petition at 52)

As discussed above, the record demonstrates that trial counsel adequately challenged Ford's in-court identification and emphasized Ford's inability to identify Moore in the prior photo-line ups. Moore has not shown a reasonable probability of a different result even if an expert had presented the proffered testimony. For the reasons discussed above, the State presented overwhelming evidence of Moore's identity as the shooter and additional challenges to Ford's in-court identification would not have rebutted this evidence.

Tony Brown

Moore next contends that trial counsel did not properly cross-examine Brown about his fight with Mata. Moore argues that trial counsel should have argued that the fight provided motive for Brown to commit the murders, and that Brown matched the description of the actual assailant and was the original suspect. (Petition at 52-53)

For the reasons discussed previously, this claim is not colorable because the record demonstrates that the jury heard considerable testimony and argument about Brown's fight with Mata, and asked specific questions about this fight following the medical examiner's testimony. Trial counsel adequately challenged this evidence and argued that it established another person committed the murders. There is no reasonable probability of a different guilt phase result if trial counsel had offered the additional arguments suggested by Moore.

c. *Frontloading mitigation*

Moore argues that trial counsel used the guilt phase trial to front load mitigation and effectively pleaded Moore guilty to the charged offenses. (Petition at 50)

As the State points out, frontloading mitigation is a common defense strategy in a capital case. *See, e.g. Florida v. Nixon,* 543 U.S. 175, 191 (2004)(observing that where there is

overwhelming evidence of guilt, "avoiding execution [may be] the best and only realistic result possible ... and [c]ounsel therefore may reasonably decide to focus on the trial's penalty phase").

However, the Court does not share Moore's conclusion that trial counsel effectively pleaded him guilty. Instead, the record demonstrates that trial counsel challenged the State's evidence of guilt and argued that Moore did not commit the murders. Moore has not shown that counsel performed unreasonably by previewing mitigation evidence during the guilt trial. Moore also has not shown a reasonable probability of a different guilt phase result even if trial counsel had not elicited any testimony or presented any evidence concerning the mitigating circumstances in the guilt trial.

D. Moore's Claim of Incompetency During the Guilt Phase (Claim E)

Moore alleges that he was mentally incompetent during the guilt-phase "due to diabetes related ketoacidosis." (Petition at 55, 155) Moore raises this claim under Rule 32.1(a)(conviction violates constitution), arguing that a defendant cannot waive the due process right to be competent by failing to assert it, citing *Pate v. Robinson,* 383 U.S. 375 (1966) and *State v. Tramble,* 116 Ariz. 249 (App. 1977), overruled on other grounds by *State v. Bishop,* 139 Ariz. 567 (1984). (Petition at 157, 159)

The State responds that the competency claim is subject to preclusion because Moore failed to raise it at trial or on appeal. The State further argues that a due process violation is not a constitutional right that generally requires a defendant's personal waiver, citing *State v. Swoopes,* 216 Ariz. 390, 399 ¶27 (App. 2007). (Response at 100)

By failing to raise the competency claim at trial or on appeal, Moore has waived the claim and it is subject to preclusion under Rule 32.2(a)(3). For the following reason, the Court also finds that the competency claim is not colorable.

Relying on expert opinion, Moore submits that jail medical providers diagnosed him with Type I Diabetes in June 1999. Moore contends that he developed the diabetic disorder after these providers believed the diabetes was under control, and discontinued medication and other treatment. (Petition at 8-9, 55; Ex. 48 at ¶¶7-8)

Due to the discontinuation of treatment and infrequent meals during trial, Moore claims that he suffered from "ketoacidosis," and experienced various symptoms, including lethargy, inattention, and significant fatigue, substantial weight loss, and "[n]ot being cognizant during witness testimony." (Petition at 56-57; Ex. 48 at ¶¶15-16) Based on Moore's symptoms and medical condition, and review of records and interviews, a PCR expert concluded that Moore "was unable during these episodes to appreciate the nature of proceedings and was unable to

assist his attorney in his defense because the diabetic ketoacidosis had impaired his mental faculties to a grave extent." (Ex. 48 at ¶17; Petition at 58)

Moore argues that the foregoing facts establish that he was unable to understand the nature of the proceedings or to assist in his defense, as constitutionally required by *Dusky v. U.S.*, 362 U.S. 402, 402 (1960) and statutorily required by Arizona Criminal Rule 11.1. (Petition at 156, 159) The State responds that even assuming Moore established "diabetic ketoacidosis during trial," standing alone this condition is insufficient to support a competency claim. (Response at 102)

Moore has alleged expert medical opinion that he suffers a medical condition that "impaired his mental faculties to a grave extent." (Ex. 48 at ¶17) However, Moore "is not incompetent to stand trial merely because he has a mental illness, defect, or disability." Ariz. R. Crim. P. 11.1(b). Instead, under Arizona and federal law, incompetence means that a defendant "is unable to understand the nature and objective of a proceeding or to assist in his or her defense because of a mental illness, defect, or illness." Ariz. R. Crim. P. 11.1(a); *Dusky,* at 402.

The record rebuts Moore's incompetency claim, and it is not colorable. The PCR expert did not observe Moore during trial or base the incompetency opinion on contemporaneous observations. Additionally, Moore has not alleged that the trial court ignored evidence of his incompetency, and the record provides no support for Moore's claim that he was unable to understand the proceedings or assist in his defense. *See State v. Steelman*, 120 Ariz. 301, 315 (1978)("Competency focuses on an extremely narrow issue: whether whatever is afflicting the defendant has so affected his present capacity that he is unable to appreciate the nature of the proceedings or to assist his counsel in conducting his defense.")

While Moore correctly points out that trial counsel's doubt regarding a defendant's competency is only one factor courts consider, Moore has not supported this claim with any concerns contained in the trial record. Trial counsel did not make a record about Moore's inability to stay awake, focus, or assist with his defense, and the trial court did not express any concerns during the long trial days. *See State v. Moody*, 208 Ariz. 424, 443 ¶48 (2004) ("In determining whether reasonable grounds exist, a judge may rely, among other factors, on his observations of the defendant's demeanor and ability to answer question.") In sum, Moore has not shown any indicia of incompetency in the record to demonstrate that he was unable to understand the proceedings or assist in his defense.

E. Moore's Claim of Structural Error During the Guilt Phase (Claim F)

Moore argues that the trial court caused structural error by providing the jury a constitutionally flawed reasonable doubt jury instruction and by commencing the guilt trial on September 11, 2001. (Petition at 161)

1. "Portillo" Jury Instruction

Moore first raises a freestanding claim that the trial court violated the United States and Arizona Constitutions and caused structural error by providing the *Portillo* jury instruction. (Petition at 161-162) Moore further claims that appellate counsel provided ineffective assistance by failing to raise this issue on appeal. (Petition at 154) The State responds that Moore waived the structural error claim by failing to raise it on appeal, and that both claims are without merit. (Response at 106)

Moore's free-standing claim is precluded under Rule 32.1(a)(3) for failure to raise this record based claim at trial or on appeal. However, Moore's ineffective assistance of appellate counsel claim is not subject to preclusion. *State v. Bennett*, 213 Ariz. 562, 566 ¶14 (2006). The Court now addresses the merits of Moore's claim regarding the *Portillo* jury instruction.

Moore argues that the reasonable doubt instruction lowered the State's burden of proof and improperly shifted the burden. (Petition at 163-165) Over trial counsel's objection, the trial court gave the following reasonable doubt jury instruction:

> There are very few things in this world that we know with absolute certainty, and in criminal case, the law does not require proof that overcomes every doubt. If based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there's a real possibility he is not guilty, you must give the defendant the benefit of the doubt and find him not guilty.

(Petition at 15, quoting R.T. 9/11/01 at 21; *see also* Dkt. 142 at 3-4 (final guilt-phase jury-instructions)

The State does not contest that in certain instances a reasonable doubt instruction can be structural error, *State v. Ring*, 204 Ariz. 534, 552-53 ¶46 (2003), but points out that the Arizona Supreme Court has specifically addressed and found no error with the *Portillo* jury instruction given during Moore's trial. (Response at 106)

This claim is not colorable. Moore cites no authority that calls into question the judgment of the Arizona Supreme Court in *State v. Portillo,* 182 Ariz. 592, 596 (1995). Arizona trial courts are bound to follow precedent established by the Arizona Supreme Court and have no authority to modify or disregard those decisions. "Any other rule would lead to chaos in our judicial system." *State v. Smyers*, 207 Ariz. 314, 318 ¶15, n. 4 (2004).

2. Ineffective Assistance of Appellate Counsel (Claim D Sub-Claim)

Moore further faults appellate counsel for failing to raise on appeal that the *Portillo* instruction erroneously lowered the State's burden of proof to clear and convincing evidence and improperly shifted the burden. (Petition at 154) To support this claim, Moore relies on opinions from appellate counsel, and Larry Hammond. (Petition at 53; Ex. 47; Ex. 44 at ¶¶58-59)

This claim is not colorable. As appellate counsel provides in his declaration, the appellate brief listed a challenge to the *"Portillo"* instruction to avoid preclusion in federal court. Appellate counsel also provided a citation to an Arizona Supreme Court opinion that previously rejected the same challenge to the instruction raised by Moore.

Appellate counsel's citation to *State v. Dann,* 205 Ariz. 557, 575-76 ¶74 (2003) demonstrates that counsel considered the issue and made a reasoned decision not to raise it on appeal. *See Smith v. Robbins,* 528 U.S. 259, 285 (2000)(explaining that a defendant must show that appellate counsel "was objectively unreasonable in failing to find arguable issues to appeal" and must demonstrate prejudice). Given that the Arizona Supreme Court had rejected the same challenge to the *Portillo* instruction, Moore has not shown prejudice because there is no reasonable probability that Arizona Supreme Court would have granted relief on this claim.

3. Proceeding with Trial on September 11, 2001

Moore argues that the trial court committed structural error by commencing with the guilt-phase trial on September 11, 2001, hours after "terrorists ... hijacked various American airliners" and flew the airplanes into buildings in New York and Washington D.C. (Petition at 54-55, 162) Moore claims that no other felony cases proceeded to trial in Maricopa County Superior Court on that day. (Petition at 55)

In its response, the State argues that Moore waived this record based claim by failing to raise it on appeal, and that no exception to preclusion applies. The State further contends that the trial court committed no error, and that any hypothetical error was not structural. (Response at 103-04)

This claim is precluded under Rule 32.2(a)(3). Moore waived this claim by failing to raise it on appeal, and Moore has not shown that the claim is exempt from preclusion under Rule 32.2(a)(3).

This claim also is not colorable. Moore has not shown that the trial court erred or caused prejudice by holding trial on September 11, 2001. To the contrary, the record demonstrates that trial counsel raised a concern that jurors would not be able to focus due to the events that morning, and the trial court agreed to address the jurors and inquire if any of them were concerned about proceeding that day. (R.T. 9/11/01 at 8-9)

The trial court then addressed the jury and, out of concern for the jurors and due to the tragic events, inquired whether any juror would find it difficult to focus or would prefer not to proceed with trial on September 11. (*Id.* at 9-10) One juror stated a preference to proceed, out of respect for everyone. (*Id.* at 10) After opening statement, the trial court read an email from the Presiding Judge, which provided that "[i]n light of the national tragedy the court will close at noon today except for critical criminal court functions." (*Id.* at 47) The trial proceedings then recessed until September 12, 2001, when defense counsel gave an opening statement. (R.T. 9/12/01)

In sum, after an inquiry by the trial court, no juror indicated any difficulty or a preference to continue the trial to another day. The trial court agreed to proceed but told the jurors, "if you have any personal distress for any reason, raise your hand." (R.T. 9/11/10 at 14) The record does not reflect that any juror indicated any distress or difficulty.

Additionally, Moore has not shown that proceeding on September 11 prejudiced his defense. Instead, Moore broadly argues that proceeding with trial on "one of the most tumultuous or disturbing times in our county's history" deprived him "the basic protections of an unbiased and impartial jury and caused prejudice" and caused structural error. (Petition at 162)

Moore is correct that structural error infects "the entire criminal process," defies harmless-error analysis, *Brecht v. Abrahamson,* 507 U.S. 619, 629 (1993), and "deprives defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" *Ring*, 204 Ariz. at 552 ¶45.

However, the United Supreme Court has defined error as structural in limited circumstances. These include a biased trial judge, a complete denial of counsel or access to counsel during an overnight recess, denial of self-representation, a defective reasonable doubt instruction, exclusion of jurors of the defendant's race from grand jury selection, excusing a juror because of his views on capital punishment, and denial of a public criminal trial. *Id.* at 552 ¶46

(citations omitted). Moore has not shown how proceeding with trial, after the trial court's colloquy with the jurors, caused any prejudice or error.

Conclusion

Based on the foregoing factual findings and legal authority,

THE COURT FINDS no material issue of fact or law that would entitle Moore to relief under Rule 32.1. Ariz. R. Crim. P. 32.11(a).

IT IS THEREFORE ORDERED summarily dismissing the Petition for Post-Conviction Relief filed on September 13, 2019.

Appendix D

Supreme Court
STATE OF ARIZONA

ANN A. SCOTT TIMMER
Chief Justice

ARIZONA STATE COURTS BUILDING
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PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

AARON C. NASH
Clerk of the Court

September 9, 2025

RE: STATE OF ARIZONA v JULIUS JARREAU MOORE
Arizona Supreme Court No. CR-23-0199-PC
Maricopa County Superior Court No. CR1999-016742

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 9, 2025, regarding to the above-referenced cause:

ORDERED: Motion for Procedural Order to Allow Oral Argument Regarding Defendant's Petition for Review in a Death Penalty Case Involving Manifest Injustice = DENIED.

FURTHER ORDERED: Amended Petition for Review of Summary Dismissal of Post Conviction Relief in Death Penalty Case = DENIED.

Vice Chief Justice Lopez and Justice Beene did not participate in the determination of this matter.

Aaron C. Nash, Clerk

TO:
Jason Lewis
Gregory Michael Hazard
Patrick C Coppen
Julius Jarreau Moore, ADOC 218107, Arizona State Prison, Tucson - Rincon Unit
Therese Day
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Appendix E

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Attorney for Capital Defendant Julius Jarreau Moore

IN THE SUPREME COURT

IN AND FOR THE STATE OF ARIZONA

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	ARIZONA SUPREME COURT NO.:
	)	CR23-0199 PC
v.	)	
	)	Maricopa County Court No.:
JULIUS JARREAU MOORE,	)	CR1999-016742
	)	
Defendant,	)	

AMENDED PETITION FOR REVIEW OF SUMMARY DISMISSAL OF POST CONVICTION RELIEF IN *DEATH PENALTY* CASE

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Statutory Authority:

Rules of Procedure:

Treatises, National Authorities/Guidelines & Websites:

INTRODUCTION

Having been wrongfully charged/convicted, Petitioner Julius Jarreau Moore has been in custody 23 years. A perfect storm of misconduct assured the actual murderer was never brought to justice while Petitioner suffers.[1] For example, trial counsel's failure to investigate/develop/present readily available third-party culpability evidence resulted in conviction and sentencing proceedings unable to meet the constitutionally mandated reliability standard. However, the fault does not lie solely with counsel. The actions of police/prosecutor camouflaged weakness in the State's case, misdirecting defense efforts from discovering and presenting the truth.

Sadly, counsel ignored the constitutional presumption, as well as Moore's ongoing professions of innocence, resulting in guilt phase evidence never being challenged. Because counsel failed to properly investigate, *Strickland,* 466 U.S. 668, 691, [Defense counsel must properly investigate available defenses, or conduct reasonable investigations to make informed decisions about representing client], their decisions were not defense strategies, yet abdication of advocacy. *See Phillips v. White*, 851 F.3d 567 (6thCir.2017); *Dugas v. Coplan*, 428 F.3d @p.331,n.19(1stCir.2005).

For example, substantial third party culpability evidence involving original

[1] Moore's case is not unique. "Since 1973, 192 former death-row prisoners have been exonerated of all charges related to the wrongful convictions that had put them on death row." *See* https://deathpenaltyinfo.org/policy-issues/innocence

suspect, Tony Brown, was never properly investigated by police nor counsel having an overriding duty to do so. Such evidence was never presented at trial that would have created reasonable doubt as to Petitioner's guilt, as occurs when third party culpability evidence is presented. *State v. Prion. Id.*, 203Ariz. 157, 52P.3d189 (Ariz. 2002).

At the time of trial, original suspect Brown admitted that *he and the Defendant look a lot alike*, and that on the morning of the Yale Crackhouse (YCH) shooting, which occurred at 4:00am on 11/16/1999[2], Brown was wearing a *Dallas Cowboys* cap. This admission is key because Brown was identified by *multiple* witnesses as being at *the YCH shooting*, with **two** witnesses confirming he was wearing a *Dallas Cowboys cap*. While the lower court erroneously suggested that a State's police gave hearsay evidence Brown was the "shooter" suggesting the jury had rejected this evidence in favor of convicting Defendant, making third party culpability (TPC) evidence as to Brown cumulative[3], such evidence was ***never*** presented at any phase of trial, with TPC evidence being highly probative, creating reasonable doubt.

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[2]Although the lower court found at p. 15 of its 9/23/21 Summary Dismissal Order (SDO) that the homicides occurred at a different time, such a finding is not supported by the trial/PCR record which confirms the 4:00am shooting through witnesses Ford (TR9/13/01@p. 40, lines 17-18), PPD Officer Ellington (TR 9/12/01, p. 31, lines 20-22), Sarry Ortiz (Exhibit#51, Affidavit of S. Ortiz at pp. 2-3), Collette O'Neil (Exhibit #18, PPD Interview of Collette Oneil at p. 2) and Alejandro Rios Barrios (Exhibit #11, PPD Interview of A. Barrios at p. 1). Tragically, the court erred in its finding, given that *State v. Amaral* required the court to presume the truth of Petitioner's claims/evidence presented. *Infra*.

[3] Summary dismissal at p. 13, Para. 3, TR 9/24/01 (PM) referencing pp. 22-23.

Therefore, this evidence was critical to understanding Petitioner's wrongful conviction—it was never presented to the jury due to counsel's lack of investigation/failure to call *any* witnesses.

First, *eye*witness Barrios saw Brown fighting victim Mata just before shooting occurred wearing a *Dallas Cowboy's cap*, with Barrios making the original composite drawing for police showing him wearing a Dallas Cowboys cap. *See* Petitioner's Appendix of Exhibits (PAE), Exhibit#11, PPD Reports from Interview of witness Barrios@p. 1, Exhibit #20, PPD Artist's Conception of Perpetrator.

Secondly, witness Early saw Brown with a gun at the YCH shooting following hearing shots, yet did ***not*** see Moore at any time. *See* PAE, Exhibit #22, Affidavit of J.Early at pp. 6-13 and Exhibit #23, PPD Report Re: J.Early dated 11/17/99.

Third, witness Ortiz then saw Brown *running from the YCH* shooting while wearing the *Dallas Cowboy's cap*. *See* PAE, Exhibit #51, Affidavit of Sarry Ortiz at pp. 1-3.

Fourth, witness Villegas said Ortiz told her the morning of the shooting while in an excited/agitated state she saw a black individual wearing a *Dallas Cowboy's cap running from the shooting* immediately after the shooting. *See* PAE, Exhibit #14, Affidavit of S.Villegas at pp. 9-11.

It is noteworthy that *none* of these witnesses ever saw Petitioner at the YCH shooting. However, original murder suspect Brown, and Palm Lane Crackhouse dealers supplying the Yale Crackhouse, were seen *at the time* of the homicides. *See* PAE, Exhibit #22, Affidavit of Janel Early at pp. 6-13 and Exhibit #23, PPD Report Re: Janel Early dated 11/17/99.

Former counsel admitted he failed to investigate Petitioner's case, and none of the referenced TPC evidence strongly implicating original murder suspect Brown was ever investigated or presented in Moore's defense. PAE, Exhibit #32, Affidavit of J. Canby at pp. 5-6.

Subsequently, additional TPC evidence was discovered in post conviction establishing *Brown had threatened to "kill" victim Ford,* in front of her children AC and Daphne *just 2 days before the YCH homicides*. PAE, Exhibit #22, Affidavit of Christopher Ford, p. 2. At the time of this death threat, Brown was on intensive probation.

Also discovered was the fact that the only eyewitness to the shooting (D.Ford) could *not* identify Petitioner on *multiple* occasions, including just 4 days after the YCH shooting. Ironically, though Petitioner was depicted in the six pack line-up, it did *not* contain a picture of original suspect Brown. *See* PAE, Exhibit #77, Sound Enhanced Video of 11/20/99 Interview of D. Ford; Exhibit #78, Police Supplemental Report Pertaining to Ford Interview at pp. 2-6.

Further, Ford could *not* identify Petitioner in a later video line-up, nor recognize him on the first day of trial, when she specifically asked the Prosecutor/Case Detective just before trial: "Who's that?", after seeing Petitioner in Court. PAE, Exhibit #50, Affidavit of P. Coppen at pp. 2-3.

Moreover, consistent with the TPC evidence, there was ***zero*** forensic evidence tying Petitioner to the crimes. This was apparent until rogue police officers surreptitiously planted evidence in Moore's bed. This *planted evidence* came just 4 hours *after* Ford *could **not** identify Moore* on 11/20/99.

This police misconduct was discovered during post conviction by former Assistant Directors of the PPD Crime Lab, Richard Watkins and Frank Rodgers. Both Experts confirmed *a purposeful pattern of police misconduct* in this case including the planting of, tampering with and destruction of evidence based upon their examination of both compelling/uncontradicted physical and testimonial evidence, as well as all related PPD reports and chain of custody records. Petitioner's UAE, Exhibit #85; 6th Suppl.Declaration of Ballistics/Firearms Expert Watkins at pp. 2-6; Petitioner's Exhibit #86; 6th Suppl.Declaration of Crimescene Rodgers at pp. 2-6.

Each expert found the police misconduct had not only involved the initial *planting of a zip lock baggy of ballistics evidence* matching the murder weapon into Petitioner's bed [ie. Items 26A (shell casing) and 26B (projectile)], yet

included *tampering* with and *replacement of* critical ballistics evidence from the homicide investigation, meant to cover up the misconduct in planting evidence from the Crimescene.

We know this to be true based upon the *present* condition of purported Items 26A, 66 and 45, which, according to Experts Watkins/Rodgers, are *not* the original items of evidence collected. Most remarkably, PPD Detective Sally Dillian, who had collected a shell casing denominated "Item #45" at the YCH crimescene, testified at trial it was damaged from being run over by a vehicle present at the time of the shooting, specifically stating during testimony that Item #45 was "compressed and/or crushed with other damage". When later examined by Experts Watkins/Rodgers, Item #45 was found in "pristine" condition with *no* damage/defect and no apparent break in the chain of custody("COC"), establishing police had tampered with the evidence.

Likewise, Items 26A/66, appeared from evidence photographs to be the same evidence, with Item 26A *purportedly* collected from the top of Defendant's bed on 11/20/99 w/ obvious dent in same location as that observable on Item 66 collected 4 days earlier on 11/16/99, with both unexplainably found in "pristine" condition.

In fact, Experts Watkins/Rodgers, also found police bad actors had *purposely destroyed exculpatory DNA evidence* related to blood on the tip of a

knife found near victim Mata's foot which went "out of pocket" for approximately 2 months before it was ever scientifically tested for fingerprints. Petitioner's UAE, Exhibit #85; 6th Suppl.Declaration of Ballistics/Firearms Expert Watkins at pp. 2-6; Petitioner's Exhibit #86; 6th Suppl.Declaration of Crimescene Rodgers at pp. 2-6. Later, Presiding Judges Rayes and Welty ordered DNA testing completed thru Virginia based Bode Technology Laboratories led to discovery of said misconduct by police. Petitioner's UAE, Exhibit #85; 6th Suppl.Declaration of Ballistics/Firearms Expert Watkins at pp. 2-6; Petitioner's Exhibit #86; 6th Suppl.Declaration of Crimescene Rodgers at pp. 2-6

This evidence confirms police bad actors purposely destroyed this DNA evidence to not only further *hide the truth* of their misconduct and to destroy exculpatory evidence identifying the actual perpetrator of the YCH homicides. Such misconduct strengthened the State's case against Moore by preventing him from ever being able to prove his innocence.

This is a *prima facie* actual innocence case because honest police officers would not have had to plant evidence in Moore's bed if he was truly guilty. Moreover, police officers wouldn't have had to purposely destroy exculpatory DNA evidence unless Moore was *actually innocent*.

This misconduct was further confirmed by evidence discovered in post conviction that the same bad actors who committed the misconduct in *this* case,

had committed misconduct in other *capital* cases involving critical forensic evidence. This included misconduct in the 1991/1995 *Krone* exoneration case in which Ray Krone was tried/convicted twice due to contemporary police misconduct of a common detective to both the *Krone* and *Moore* cases, namely, former PPD Detective Olson, who not only hid exculpatory evidence in the *Krone* case, yet DNA evidence as well. PAE, Exhibit #84, Declaration of R. Krone. *Infra*.

Had this exculpatory evidence been presented at trial, which *former counsel John Canby admits* should have occurred if he had properly examined/investigated it before trial, PAE, Exhibit #70 at p. 2, Para. 5, the outcome of Petitioner's case would have been different.

As to counsel's overall ineffective assistance of counsel(IAC), he readily admits he *failed to properly investigate Petitioner's case*, as required by Arizona/federal law in *State v. Denz*[4] and *Strickland v. Washington*[5]. PAE, Exhibit #32, Affidavit of J. Canby at pp. 5-6. When Canby was named lead counsel, it was his *first capital* case, at a time when he was carrying a full caseload, including more than 40 other felony cases. PAE, Exhibit #32, Affidavit of J. Canby at p. 2.

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[4] *State v. Denz*, 232 Ariz. 441, 306 P3d 98 (Ariz. App. 2013).
[5] *Strickland v. Washington*, 466 U.S. 668, 104 SCt. 2052 (1984).

According to Defendant's Standard of Care Expert Larry Hammond, Esq., former counsel failed to investigate/discover/present *any* defense evidence, including readily available TPC witnesses as to original suspect Brown, and compelling alibi/good character witnesses. PAE, Exhibit #44; Affidavit of CRLE Hammond, Esq. at pp. 9- 17.

Expert Hammond found trial counsel failed to consult with/retain appropriate experts. Id. at pp. 13-16. By inexcusably *failing to call a single fact/ expert witness in his defense at trial*, PAE, Exhibit #44; Affidavit of CRLE Hammond at pp. 7-9, counsel effectively *pled Petitioner guilty* without consent, arguably approaching *McCoy*[6] error. In fact, by primarily cross examining State's witnesses about Petitioner's drug use contemporaneous to the homicides to "frontload" a drug induced rage mitigation theory, counsel *prejudiced* the jury by introducing a false narrative suggesting guilt.

Moreover, Petitioner had consistently claimed *innocence*, refusing to take a State's proffered plea guaranteeing a life sentence if he admitted his guilt at sentencing. PAE, Exhibit #32, Affidavit of J. Canby at pp. 3-4. In fact, Moore asked repeatedly to receive a polygraph since 1999, ultimately passing a 2003 polygraph administered by highly respected former PPD homicide Detective Tom Ezell given as a ploy to force admission of guilt to ask for leniency, with the

[6] *McCoy v. Louisiana*, 584 U.S. ___, 138 SCt 1500 (2018).

polygraph confirming Petitioner was *not* involved in the shooting nor had he ever been to the Yale Crackhouse. Id.

In a further miscarriage of justice, the postconviction court failed to follow applicable law in both *State v. Amaral*[7] and *State v. Kolmann*[8], as well as federal law in *Townsend v. Sain*[9], respectively *requiring the Court to presume the truth* of the evidence supporting Petitioner's claims in its colorable claim analysis[10], and further requiring the Superior Court to order an Evidentiary Hearing because if such evidence *must be considered as true for PCR purposes*, Moore's evidence undermines confidence in the outcome of his case. This is especially true given the referenced evidence discovered/presented in post conviction highlighted egregious violations of his Sixth Amendment right to fair trial.

First, in making its decision, the lower court rather than presuming the truth of the evidence, systematically dismissed each item of evidence, finding the evidence unavailing or cumulative, effectively rejecting each item of evidence when it was bound by Arizona law to accept the evidence as true for its colorable claim analysis. *See* Summary Dismissal dated 09/23/21 at pp. 12-39. Thus, the lower court gave the new evidence no weight, and improperly made credibility findings regarding Defendant's claims and witnesses without the benefit of an

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[7] *Amaral*, 239 Ariz. 217, 368 P.3d 925 (Ariz. 02/04/16).
[8] *Kolmann*, 239 Ariz. 157, 367 P.3d 61 (Ariz. 03/16/16).
[9] *Townsend*, 372 U.S. 293, ___ S.Ct. ___ (1963).
[10] *See* Summary Dismissal dated 09/23/21 at pp. 12-39.

evidentiary hearing. Id.

If the new evidence presented by Petitioner is in fact true, it clearly undermines confidence in the outcome of his case. Regrettably, this is the part of the analysis the post conviction court missed. I nstead, the lower court went right to testing the evidence in its own mind and comparing each item of evidence on an individual basis with the trial record, rather than comparing the evidence in its totality or considering it on a cumulative basis, as required by the United States Supreme Court's decision in *Kyles v. Whitley* when considering whether new evidence discovered in post conviction supports a constitutional claim and undermines confidence in the outcome of a given case. *Kyles*, 514 U.S. 419, 115 SCt. 1555, 1569-75 (1994). The lower court's error is exemplified by its own language from the summary dismissal as to Defendant's actual innocence claim in which it effectively stated: "Even if *any* of the evidence were true, it does not undermine confidence in the outcome of Defendant's case." *See* Summary Dismissal dated 09/23/21 at p. 27, Para. 1. This statement confirms the lower court did not believe the new evidence presented in post conviction as true for colorable claim analysis purposes, or it would have properly stated: "Even if *all* of the evidence presented by Defendant is true, it would not undermine confidence in the outcome of his case."

Secondly, if the new evidence taken together as true causes concern about

the reliability of Petitioner Moore's convictions and death sentence, then there needed to be adversarial testing of the new evidence at a hearing. Instead of ordering an evidentiary hearing, the lower court determined each item of evidence as not being colorable/true or stated it was merely cumulative to other evidence presented at trial. Summary Dismissal dated 09/23/21 at pp. 12-39. The question remains in the present appeal as to when may a trial judge make evidentiary decisions without a hearing involving adversarial testing.

Given the foregoing referenced evidence, and the legal duty of the Court to believe the truth of the evidence presented, which was uncontradicted by the State, the Superior Court *erred* by systematically dismissing without hearing every item of evidence submitted to support Petitioner's claims, which included eighty-four (84) fact and expert witness affidavits/declarations supporting his claims and 101 exhibits[11] altogether. *Supra.*

The Court's *carte blanche* summary dismissal of Petitioner's claims was also in direct contravention of the *mandatory* language of Rule 32.9 (a)(2) ARCrimP requiring that the State "*must attach* any affidavits, records, or other evidence that contradicts the petition's allegations." Given the State was unable to provide *any* new or contradictory evidence in the present case as to Moore's

[11] It is noteworthy that for the purposes of the present Petition for Review, Moore's Exhibits are numbered in Petitoner's Appendix of Exhibits(PAE) exactly the same as said Exhibits were numbered when considered by the post conviction court.

allegations supporting his IAC, PPM/C, AI, and Mental Incompetence at Guilt Phase trial due to Diabetic Ketoacidosis (MIDK) and other constitutional claims, he is also entitled to an Evidentiary Hearing because material issues of fact remain.

Based upon the description of Petitioner's trial and post conviction history, it may be most aptly described by the following words of "Mark Twain":

"A lie goes half-way around the world in the time that it takes truth to put its boots on."

Petitioner therefore respectfully requests that this most honored Arizona Supreme Court accept review, and that after an appropriate consideration of the truth coming to light in post conviction, it remand this case to the Maricopa County Superior Court for an Evidentiary Hearing consistent with recent 9th Circuit *post-Shinn* authority in *Jones v. Ryan*[12]. Specifically in *Jones*, the *capital* post conviction case was remanded because the PCR judge made factual findings regarding the necessity of neuropsychological testing, not on the basis of the evidence presented by the petitioner, but rather on the basis of his own personal conduct, untested memory and understanding of events without the benefit of an evidentiary hearing. *Jones*, 52 F.4th 1104, 1135 (9th Cir. 2022).

Such a hearing is also mandated by both applicable State law in *Amaral*,

[12] *Jones v. Ryan*, 52 F.4th 1104 (9th Cir. 2022).

Kohlmann and *Denz* as well as federal law in *Townsend*, *Pinholster*[13], *Shinn*[14] and *Strickland/Hinton*[15] because at this procedural juncture, all of Petitioner's post conviction evidence must be considered as true warranting an evidentiary hearing at the State level, because the uncontradicted evidence substantially "undermines confidence in the outcome of his case." Given the United States Supreme Court's decision in *Strickland v. Washington*, which held a petitioning criminal defendant *is entitled to relief* if the claim submitted *is proven true at hearing* and undermines confidence in the outcome of her/his case, *Id.*, 466 U.S. 668, ___, 104 SCt 2052, ___ (1984), Arizona Courts may not deny an evidentiary hearing at the State level in *capital* cases where the proffered evidence presumed true for colorable claim analysis purposes, wholly undermines confidence in the outcome of a particular case.

For example, while some Arizona authority suggests that the across the board legal standard in post conviction cases for obtaining an evidentiary hearing is whether the evidence presented by petitioner supporting a particular claim *would probably have changed the outcome* of the case, *Amaral*, such a heightened standard for obtaining an evidentiary hearing as to an IAC claim would exceed the reasonable probability standard required under State and federal law.[16]

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[13] *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388 (2011).
[14] *Shinn v. Martinez Ramirez*, 596 U.S. ___, ___ S/Ct. ___ (2022).
[15] *Hinton v. Alabama*, 571 U.S. 263, 134 S.Ct. 1031 (2014).
[16] *See State v. Kolmann*, 239 Ariz. 157, ___, 367 P.3d 61, ___ (Ariz. 2016) and *Hinton v.*

Simply put, Arizona law may not be interpreted as requiring a higher legal standard for a defendant to obtain an evidentiary hearing in a post conviction case than that which is required under federal law for the same defendant to obtain post conviction relief. Moreover, given that under United States Supreme Court authority in *Pinholster* and *Shinn*, which respectively held the factual record in post conviction ***must*** be developed at the State level[17] and evidentiary hearings to develop the factual record cannot be held in federal habeas[18], both State and federal law compel not only accepting review and finding error, yet remanding this case for such a hearing in order that Mr. Moore may finally receive ***justice***.

Alabama, 571 U.S. 263, ___, 134 S.Ct. 1031 ___ (2014).
[17] *Cullen v. Pinholster*, 563 U.S. 170, ___, 131 S.Ct. 1388, ___ (2011).
[18] *Shinn v. Martinez Ramirez*, 596 U.S. at ___, ___ S/Ct. ___ (2022).

STATEMENT OF ISSUES DECIDED BY THE SUPERIOR COURT

1) Whether Petitioner presented a colorable IAC claim based upon former counsel's failure to investigate/present third party culpability and other compelling evidence?

2) Whether Petitioner presented a colorable Police and Prosecutorial Misconduct (PPM/C) which included the planting of evidence, tampering with forensic evidence and trial witnesses, and the destruction of evidence, including exculpatory DNA?

3) Whether Petitioner presented a *prima facie* Actual Innocence claim under Rule 32.1 (h) ARCrimP and the Arizona Court of Appeals decision in ***State of Arizona v. Denz*** based upon compelling third party culpability and police and prosecutorial misconduct evidence?

4) Whether the lower court misapplied the ***Bilke*** cumulative evidence element from a newly discovered evidence claim in conducting its colorable claim analysis as to Defendant's AI claim?

5) If notwithstanding Arizona law which recognizing a state claim of Actual Innocence by which such a defendant is entitled to dismissal of his case and release from prison upon proof by clear and convincing evidence, for the purposes of federalizing Petitioner's Actual Innocence claim, does both the 8th Amendment prohibition against cruel and unusual punishment as well as the United States Supreme Court's recent decision in ***Shinn/ADCRR v. Rodriguez/Martinez*** preclude the administration of the death penalty?

6) Whether Petitioner presented a colorable claim of Mental Incompetency (MIDK) at the time of his 2001 guilt phase trial based upon his contemporaneous Type I Diabetes diagnosis and the Maricopa County Jail's failure to provide prescription medication or properly feed him during trial causing Moore to suffer from Diabetic Ketoacidosis during trial?

7) Whether the State failed to prove preclusion of Petitioner's MIDK claim pursuant to Rule 32.2 Ariz.R.Crim.P. by a preponderance of the evidence, because Moore never knowingly, intelligently and voluntarily waived the competency issue as required by ***Stewart v. Smith***?

8) Whether the Superior Court erred under applicable State and federal law in ***State v. Amaral/Kolmann*** and ***Townsend v. Sain***, requiring the Court to accept the truth of all evidence as to each of Petitioner's claims in conducting its colorable claim analysis?

9) Whether the lower Court erred by failing to hold an Evidentiary Hearing as to Petitioner's claims to properly/correctly develop the factual record at the State level as required by the 9th Circuit's recent post ***Shinn*** decision in ***Jones v. Ryan***?

10) Whether the lower court erred by violating the basic principles of recent *post* ***Shinn*** 9th Circuit authority in ***Jones v. Ryan*** by incorrectly *injecting plainly erroneous facts or previously non-existent evidence* wrongly found by the Court to have *already* been presented at trial in support of its summary dismissal of Petitioner's IAC, PPM/C, AI, MIDC and other claims, requiring remand for an evidentiary hearing to properly develop the factual record at the State level?

11) Whether uncontradicted fact/expert witness evidence supporting Petitioner's claims established material issues of fact under ***State v. Amaral***, ***State v. Kolmann*** and ***Townsend v. Sain*** entitling him to an Evidentiary Hearing under Rule 32.13 (a) ArizRCrimP, especially given the mandatory language of Rule 32.9 (a)(2) requiring the State "***must*** attach any affidavits, records, or other evidence that contradicts the petition's allegations"?

12) Whether structural error occurred at Petitioner's trial based upon the following: 1) the trial was held on "***911***" totally undermining his 6th Amendment right to a fair trial, and b) the court's use of the *Portillo* burden of proof instruction lowered the burden of proof from the reasonable doubt standard to clear and convincing evidence, and improperly shifted the burden of proof?

13) Whether the United States Supreme Court decisions in ***Townsend v. Sain***, ***Cullen v. Pinholster***, ***Rose v. Lindy*** and ***Shinn/ADCRR v. Rodriguez/Martinez*** collectively hold that the importance of developing the factual record in a post conviction case at the State level for later appellate

review compel that Petitioner's case be remanded for an evidentiary hearing?

14) Whether the Superior Court further erred by failing to investigate Defendant's claims as required by applicable State law in ***State v. Pandeli*** and federal law in both ***Townsend v. Sain*** and ***Jones v. Ryan*** by ordering evidentiary hearing?

15) Whether structural or other error occurred in Petitioner's case based upon former counsel's failure to call a single witness for the defense at trial and substantially only cross examine the State's witnesses about Defendant's drug use in order to "frontload" a drug induced rage mitigation theory effectively resulting in pleading him guilty, prejudicing the jury against him?

STATEMENT OF MATERAL FACTS

The following material facts were presented in Petitioner's Opening Rule 32 Petition and five (5) Supplemental Petitions filed from 2014 to 2019, consolidated in Unified Briefing, with a multi-volume Unified Appendices of Exhibits (hereafter "UAE") containing 92 exhibits filed between September/October, 2019.[19] Petitioner's Reply Briefing with additional exhibits being filed in November/December, 2019, controverting the State's Amended Responsive Brief. An additional exhibit was filed at Oral Argument in August, 2021 related to granting an Evidentiary Hearing. This evidence was meant to *"Tell the Story"* in the case at bar. It included third party culpability (TPC) evidence related to original suspect Brown, evidence of police and prosecutorial misconduct(PPM/C), and other evidence including good character/non-violent nature evidence supporting Petitioner's actual innocence(AI) and ineffective assistance of counsel(IAC) claims, as well as evidence establishing Moore's incompetency at the time of his 2001 trial. This evidence was *never* properly investigated by the police nor defense *though discoverable,* and *never* offered at trial, proving to be antithetical to the one sided evidence presented by the State given former counsel's *failure to call a single witness in his defense* and as memorialized in *State v. Moore*, 222 Ariz. 1 (2009).

[19] It is noteworthy that Petitioner's Appendix of Exhibits (PAE) contains the same exhibits as those presented to the lower court in his Unified Appendices of Exhibits (UAE), employing the same Exhibit Numbers as those filed in post conviction.

A. THE ORIGINAL POST CONVICTION INVESTIGATION AND OPENING PETITION

In contrast to the State's essentially *unopposed* evidence presented at trial wrongfully implicating Petitioner's guilt, the post conviction investigation provided material evidence regarding Moore's innocence through TPC evidence, police and prosecutorial misconduct(PPM/C) and ineffective assistance of counsel(IAC) for failing to investigate and present the readily available TPC evidence, as well as other defense and good character/non-violent nature evidence going to his actual innocence(AI), and other constitutional claims, including his mental incompetency(MIDK) at the time of the 2001 trial, presented in his Opening Petition(OP) and later in Unified Briefing(UB). RA 989, OP dated 8/15/14 at pp. 18-62, 73-75, 89, 91, 94; RA 1293, Amended Unified Brief(AUB) dated 9/13/21 at pp. 26-122, 127-33, 144-65.

1. Third Party Culpability Evidence as to Original Suspect Brown and Other Initial Evidence Supported Petitioner's AI, PPM/C and IAC Claims.

The post conviction investigation yielded highly engaging evidence never presented at trial supporting Petitioner's AI, PPM/C and IAC, raising serious questions regarding the third party culpability of original suspect Tony Brown. RA 989, OP at pp. 17-36; RA 1293, AUB at pp. 30-40.

First, it was presented in briefing that on 11/16/99 at approximately 4:00am a Black male wearing a ***Dallas Cowboys knit cap*** fought with Crack Dealer/victim Sergio Mata at the Crackhouse located at 1808 E. Yale, Apt. A, in Phoenix, Arizona. RA 1293, AUB@p. 30 *citing* Petitioner's UAE, Exhibit #11, PPD Reports from interview of witness Alejandro Rios Barrios dated 11/16/99; Petitioner's Exhibit #12, TR 9/13/01, pp. 84, 100-01. As explained to the lower court, Barrios knew more about the shooting than he had told police. Id. As further suggested in briefing, Barrios was *never* properly investigated nor called to testify at Petitioner's 2001 trial by State/defense, despite his identification/composite drawing of a *single* Black suspect wearing a ***Dallas Cowboys cap***, whom others implicated as being the actual perpetrator of the homicides. RA 989, OP@pp. 24-36; RA 1293, AUB@pp. 30-40.

Secondly, Petitioner presented that following the fight/shooting, neighbor/ former State's witness Sarry Ortiz saw an Black male wearing a ***Dallas Cowboys cap*** running past her from the Yale Crackhouse(YCH). RA 989, OP@p. 25; RA 1293, AUB@pp. 30-31 both *citing* Petitioner's UAE, Exhibit #14, Affidavit of Ms. Sylvia Villegas@pp. 3-6, 9-12; Exhibit #15, Affidavit of Pedro Villegas@pp. 2-3; Exhibit #16, Affidavit of Private Investigator Steve Bakos@pp. 6-7, Paras. 18-19; and Exhibit #17; Google Map of Yale Crackhouse Area.

Brown's girlfriend, Collette O'Neil, confirmed Brown had come back to their nearby apartment just after 4:00am, and was *"sweating"* when he arrived, consistent with running from the YCH evidencing a consciousness of guilt. RA 989, OP@pp. 25-26 and RA 1293, AUB@pp. 31-32 both *citing* Petitioner's UAE, Exhibit #14, Affidavit of Ms. Sylvia Villegas@pp. 3-6, 9-12; Exhibit #17; Google Map Yale Crackhouse Area; Exhibit #18, PPD Interview of Collette Oneil@pp. 1-2; and Exhibit #21, Affidavit of Chris Ford.

It was also explained to the PCR court that upon going to the Yale Crackhouse, Ortiz found the bodies of victims Mata and Ford lying on the ground, and later realized she had witnessed the perpetrator of the homicides running past her. RA 989, OP@p. 26 and AUB@p. 31 both *citing* Petitioner's UAE, Exhibit #14, Affidavit of S. Villegas@pp. 5-6, 11-12; Exhibit #15, Affidavit of P. Villegas @pp. 2-3; and Exhibit #19, Affidavit of Marlene Villegas@pp. 1-2, Paras. 3-8. Finding Ford was alive, Ortiz asked her who had shot her. Petitioner's Exhibit #14, Affidavit of S. Villegas@pp. 5-6, 11-12. Ford responded *without* referencing a name, age or other descriptor, other than stating that a "Black" male committed the shooting. Id.@ pp. 6, 12.

It was further discovered/submitted in briefing that Brown had threatened to kill victim Ford in the presence of her eleven (11) year old son, AC Ford, just *2 days before* the shooting. RA 989, OP@p. 27 and RA 1293, AUB@ p. 32 *citing*

Petitioner's UAE, Exhibit #20; PPD Artist's Conception of Perpetrator of Crime, Exhibit #12, TR 9/13/01@pp. 100-01; Exhibit #21, Affidavit of Christopher A. Ford@pp. 1-2.

It was also presented that a third witness, Janel Early saw Brown leaving the Yale Crackhouse *armed with a gun immediately after* the shooting on 11/16/99. RA 989, OP@pp. 28-29 and RA 1293, AUB@pp. 32-33 both *citing* Petitioner's UAE, Exhibit #22, Affidavit of Janel Early@pp. 6-7, 9, 14-15. In Early's affidavit she testified that at the time of the homicides she was parked on Yale Street, just in front of the Yale Crackhouse, that she heard shots coming from that location, had saw *Brown brandishing a firearm coming out of the Crackhouse* and stated that at the time he was leaving, Brown was accompanied by the Crackhouse supplier Gordo. Id.@pp. 2, 6-9, 14-15. Early further stated she had witnessed 2 other Hispanic males leaving with Brown along with "Gordo", yet Petitioner Moore was *not* present. Id.@pp. 6-7, 12-15.

In Petitioner's briefing, it was explained Early had originally given similar information to police following the homicides, RA 989, OP @p. 28 and RA 1293, AUB@p. 33 *citing* Petitioner's UAE, Exhibit #23, PPD Report Re: Janel Early, yet she further expounded:

> 1) That she was a courier for the Palm Lane Crackhouse(PLC) and would deliver drugs to the Yale Crackhouse;

2) That the Crack dealers at the Yale Crackhouse had fallen out of favor with Palm Lane suppliers because Sergio Mata would *use* the drugs received himself, and then there would be insufficient funds to pay for them;

3) That Tony Brown worked as the "enforcer" for the Palm Lane Crackhouse; and

4) That she had been present at the time Gordo had threatened victim Delia Ramos a month prior to the shooting, stating if the Yale Crackhouse was unable to pay for the crack, Gordo would have them "killed".

See Petitioner's UAE, Exhibit #22, Affidavit of Janel Early@pp. 3-5, 8-9.

It was further explained that Early's testimony regarding the existence of the Palm Lane Crackhouse contemporaneous to the shooting, as well as the existence of Crack Dealer/Distributor "Gordo" (Jorge Hernandez) and co-distributor "Juero" was verified by witness Allen Perez, a former U.S. Marine who lived in the PLC neighborhood at the time of the 1999 YCH shooting. RA 989, OP dated 8/15/14@p. 28-29 and RA 1293, AUB@ pp. 33-34 *citing* Petitioner's UAE, Petitioner's Exhibit #22, Affidavit of J. Early@pp. 2, 4-5,17-18; Petitioner's Exhibit #24, Affidavit of Allen Perez@ pp. 1-2.

It was further alleged this compelling TPC evidence was <u>never</u> *previously investigated by the State nor defense*, nor was it <u>ever</u> presented in evidence at trials[20] RA 989, OP@pp. 17-35; RA 1293, AUB@pp. 30-38.

[20] A review of the appellate decision in *State v. Moore*, 222 Ariz. 1, 213 P.3d 150 (2009) confirms that none of the referenced TPC evidence was ever presented. *Id.* at pp. 8-11.

Moreover, it was presented that at the trial, suspect Brown, testified as a State's witness, and couldn't identify Moore as the perpetrator of the homicides whom Brown claimed was hiding in the bushes, TR 9/13/01, pp. 129-30, though Brown did testify as follows: 1) he and the person he claimed to have seen in the bushes "looked a lot alike", 2) Brown was "dressed better" than the alleged "perpetrator", and 3) that he, Brown, *was* the person wearing the *Dallas Cowboys cap* at the time of the YCH shooting. Id. at pp. 100-01. *See also* RA 989, OP@p. 30 and RA 1293, AUB@p.34 both *citing* Petitioner's UAE, Exhibit #25, Trial Testimony of S. Ortiz referencing *Dallas Cowboys cap* [TR9/18/01, pp. 28, 69; and TR11/10/04, pp. 68, 94-95.

Also, it was presented that State's witness Ortiz kept referring to Petitioner Moore as wearing *a "Dallas Cowboys cap"* on the morning of the homicides, when it was obviously Brown she was referring to given she had seen him run by her vehicle immediately following the shooting as affirmed by her post conviction affidavit, for in her mind the person who committed the YCH homicides was wearing a *Dallas Cowboys cap*. *Supra*.

In further briefing proving suspect Brown's culpability, Petitioner was *1.5-2.0 hours and five (5) miles removed from the YCH shooting*. RA 989, OP@p. 31 and RA 1293, AUB@p. 35 both *citing* Petitioner's UAE, Exhibit #26, Affidavit of Alan Feliciano, at pp. 1-2; Exhibit #27, Affidavit of Petitioner Moore@pp. 3-4.

Consistent with this evidence, it was presented that Ortiz testified in 2007 she was driving around *for two (2) hours **after** the shooting, before picking up Petitioner at 6:00am.* RA 989, OP@ pp. 31-32 and RA 1293, AUB@pp. 35-36 *citing* Petitioner's UAE, Exhibit #29, TR 5/22/07@pp. 163, 169-70.

It was further argued that true to Moore's alibi, victim Ford also testified she laid on the ground for *3-4 hours after the shooting* before the police arrived at 7:17 am. RA 989, OP@p. 32 and RA 1293, AUB@pp. 36 both *citing* Petitioner's UAE, Exhibit #30, TR 9/13/01 (2001 Guilt Phase testimony of D. Ford), pp. 40 (lines 14-18) to 42; Exhibit #31, PPD Report Supplement #17 at pp. 1-2.[21] Moreover, as previously alleged, Officer Elting, who was first on the scene also confirmed the *4:00am* Yale Crackhouse ("YCH") Shooting time frame.[22]

As a result of the foregoing TPC and alibi evidence involving multiple witnesses never testifying in Moore's case, Petitioner argued in briefing to the court that the totality of the evidence pointed to suspect Brown. RA 989, OP@ pp. 28-30; RA 1293, AUB/@ pp. 32-34.

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[21] Deborah Ford's ex-husband Christopher Ford also confirmed the following: 1) that doctors treating D. Ford following the shooting advised the only reason she survived was due to *hypothermia* from laying on the cold ground *for so long*, and 2) that she told her ex-husband after being shot she laid in the dark looking at the stars for several hours. *See* UAE, Exhibit 50, Affidavit of P. Coppen at pp. 2-3. .

[22] Petitioner's UAE, Exhibit #57, Portions of Transcript from Petitioner's Guilt Phase Trial TR9/12/01@pp. 18, 22, 30-31.

For the purpose of proving Petitioner's AI and IAC claims he presented the following.

After conviction, former counsel Canby told Petitioner he could obtain a "Life Sentence Plea" by admitting responsibility for the homicides. RA 989, OP@p. 33-34 and RA 1293, AUB@p. 37 both *citing* UAE, Exhibit #32, Affidavit of Former Counsel J. Canby@p. 3, Para. 12; Exhibit #33; Affidavit of Former Mitigation Specialist Bollinger@ p. 4, Para. 16. Moore could *not* admit to committing these crimes because he was *innocent* and asked for a polygraph. RA 989, OP@pp. 33-34 and RA 1293, AUB@p. 37 both *citing* Petitioner's UAE, Exhibit #33; Affidavit of Former Mitigation Specialist Bollinger@p. 4, Para. 17; Exhibit #27, Affidavit of J. Moore@pp. 1, 4.

Counsel advised Petitioner he must show remorse to obtain a life sentence, yet Moore insisted on his innocence, wanting a polygraph. RA 989, OP@ pp. 33-34 and RA 1293, AUB@pp. 37-38 both *citing* Petitioner's UAE, Exhibit #33; Affidavit of Former Mitigation Specialist Lisa Bollinger at p. 4; Exhibit #32, Affidavit of J. Canby at p. 4, Para. 13. Counsel acquiesced, believing Moore would fail it. RA 989, OP@p. 34 and RA 1293, AUB@pp. 37-38 both *citing* Exhibit #32, Affidavit of J. Canby@p. 4, Para. 14. Petitioner *passed* the polygraph confirming *never* being at the Yale Crackhouse in support of his alibi.

RA 989, OP@pp. 34-35 and RA 1293, AUB@p. 38 both *citing* Petitioner' UAE, Exhibit #32, Affidavit of J. Canby@ p. 4, Para. 14; TR 9/3/@ pp. 5-21.

This evidence was *never* properly presented at trial, though admissible at the penalty phase under applicable federal law. RA 989, OP@pp. 33-35; RA 1293, AUB@ pp. 37-38.

2. Further Discoveries Supported Petitioner's Actual Innocence as the Forensic Evidence Began to Tell the True Story.

Further Discoveries Supported Petitioner's Actual Innocence as the Forensic Evidence Began to Tell the True Story including the following:

1. Court Ordered DNA testing by Bode Technology [Moore was excluded from alleged murder weapon/ holster, with no DNA from crime scene matching Petitioner][23];
2. Court Ordered fingerprint testing [none of 100+ latent prints from crime scene match Moore's finger/palm prints][24];
3. Court Ordered footprint/tiretrack testing results [Moore *excluded* from crimescene footprints (ie. size 13 shoe vs. size 10 and ½ crimescene][25];
4. Court Ordered ballistics testing suggested evidence planted in Moore's bed [ie. shell casing (Item 26A) and projectile or expended bullet (Item 26B) purportedly found in ziplock plastic bag (Item 26)] and later

[23] *See* Petitioner's UAE, Exhibit #34; Affidavit of M.Donohue, Bode Technology at pp. 5-6.

[24] *See* Petitioner's UAE, Exhibit #35; Fingerprint Related Testing Reports of Fingerprint Expert F.Rogers.

[25] *Compare* UAE Exhibit #27, Affidavit of Petitioner Moore and Exhibit #36; Forensic Report of R.Watkins, Ballistics/Footprint/Tiretrack Expert at p. 2.

tampered with, as present day items *not* the same as the original crimescene evidence scene given different physical characteristics which would violate the Law of Entropy (ie. damaged shell casing unable to become pristine)[26]; and

5. Ballistics evidence called into question by witness S.Derby, testifying by affidavit that Moore's firearm was a 40 caliber revolver (and not a 9 mm Makerov).[27]

It was discovered and presented there was a knife from the YCH crimescene (Item #22) found next to victim Mata's foot with blood on tip, with blood destroyed by the PPD before testing by defense. RA 989, OP@pp. 36-38; RA 1293, AUB@pp. 37-40. *See also* Petitioner's UAE, Exhibit #39; State's Exhibits #'s 109 and 110, Pictures from Crime Scene.

As discussed in briefing, although Presiding Judges Rayes/Welty ordered post conviction DNA testing pursuant to ARS Sec. 13-4240, specifically ordering testing of the knife, *supra,* the 1.25 inch blood stain that was readily apparent on blade in crimecene photos from shooting (*see* State's Exhibit #110 attached to Petitioner's Exhibit #39), was ***no longer present on the knife*** when was received by Bode Technology for DNA testing purposes, with Bode photo documentation showing buffed out shiny surface. *Compare* Petitioner's UAE, Exhibit #39; State's Exhibits #'s 109 and 110, Pictures from Crimescene with Petitioner's

[26]Petitioner's UAE, Exhibit #36; Forensic Report of R.Watkins at p. 1. Paras. 3-5.
[27] Petitioner's UAE, Exhibit #38; Affidavit of S. Derby at pp. 2-3, Paras. 8-10.

Exhibit #34, Affidavit of Bode Technology Scientist M. Donohue@p. 4, Para. 14 and attached photo-documentation Item #22 at time received. *Supra.*

As explained in briefing, Dr. Mosely, the assigned case Medical Examiner had reviewed the Mata autopsy, as well as the crime scene photos involving Item #22, found the knife not only appeared to have blood, yet DNA testing may have yielded evidence of *actual perpetrator* because said stain was consistent with defensive wound inflicted by victim upon his assailant. RA 989, OP@pp. 36-38; RA 1293, AUB@pp. 37-40 *citing* Petitioner's UAE, Exhibit #40, Affidavit of former Maricopa County Medical Examiner Dr. Archilaus Mosley, pp. 2-3.

This evidence was *never previously investigated/tested though readily available to the State/Defense*, nor was it *ever* presented at trial supporting Moore's AI, PPM/C and IAC claims. RA 989, OP@ p. 38; RA 1293, AUB@ pp. 41-42 .

This evidence, presented in Moore's Opening Petition, suggested a *rush to judgment* in Mr. Moore's case, and foreshadowed the ultimate discovery of a *contrived* conviction. *Infra.* Until this evidence was uncovered, Moore suffered through a "perfect storm" of unfiltered/unfettered events leading to his wrongful convictions/death sentences.

3. Perfect Storm Adds to Defendant's Wrongful Convictions

The first storm included PPD's failure to properly investigate suspect Brown despite substantial evidence supporting his culpability. RA 989, OP@pp. 39-40; RA 1293, AUBpp. 42-43.

It was presented if the police had *properly* investigated witness Early, *supra*, they would have learned about the PLC drug supplier connection, and suspect Brown as their "enforcer". RA 989, OP@ p. 40; RA 1293, AUB@p. 43 *both citing* Petitioner's UAE, Exhibit #22, Affidavit of J. Early at pp. 2-4, 6-9, Exhibit #23, PPD Incident Report dated 11/17/99 at p. 1, Exhibit #26, Affidavit of A. Feliciano at p. 3, Para. 15. According to alibi witness Feliciano, the PLC Supplier was associated with the Garfield Gang/Mexican Mafia of America (MMA). Id. at p. 2.

Second, it was submitted police should ***not*** have dismissed suspect Brown given they knew from the *undisclosed* interview with victim Ford's son AC, that Brown threatened to kill victim D.Ford *just two (2) days before* the homicides, not merely "sometime in the past" as suggested. RA 989, OP@pp. 41-42; RA 1293, AUB@p. 40, *both citing* Petitioner's UAE Exhibit #21, Affidavit of C.Ford, p. 2. *See also* Petitioner's UAE, Exhibit #93, PPD Global Report, T.Cooning.

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It was explained that considering the fight between Brown and Mata, a motive obviously existed for investigative purposes, *see* Petitioner's UAE, Exhibit #16, Affidavit of CI S.Bakos, pp. 1-3, Paras. 1-7, and Exhibit #20 PPD's Artist Conception of Original Suspect, whereby police should have further questioned witnesses in the neighborhood such as Rios Barrios, who was the creator of the composite drawing implicating Brown wearing the ***Dallas Cowboys cap***. *Supra.* Furthermore, Petitioner submitted police should have themselves tested the blood/DNA found on Item #22, rather than destroying the DNA evidence within 30 days of the homicides at the direction of PPD Detective Dennis Olson on 12/15/99, RA 989, OP@p. 43; RA 1293, AUB@p. 45, with Olson, giving three (3) separate orders to first preserve, then test, and then to not preserve ***or to destroy*** the evidence. This same detective was the Case Detective in the *Ray Krone* Capital Exoneration case in which similar police misconduct was discovered related to Krone's wrongful convictions. *Infra.*

Third, it was communicated in briefing that Brown's police record had grown since the YCH homicides to include 10 known felonies involving drugs, guns (ie. 9 mm firearm) and violence under 7 case numbers. RA 989, OP@pp. 43-44; RA 1293, AUB@p. 46, both *citing* Petitioner's UAE, Exhibit #41; PSR of T. Brown dated 12/9/11. Additionally, it was alleged that suspect Brown was likely involved in a different Crackhouse homicide a few years later at 1748 E. Yale

involving a victim named "Gordo"/Jorge Hernandez (ie. the same "Gordo" identified by Early as being at the YCH shooting, *supra*) when Brown had just been released from prison, and Petitioner had been incarcerated for 5 years. RA 989, OP@ p. 44; RA 1293, AUB@p. 46, both *citing* Petitioner's UAE, Exhibit #15, Affidavit of Pedro Villegas at pp. 2-3 and Exhibit #42, Redacted PPD Reports, and Exhibit #43; ADC Incarceration Record of Brown, ADC #143721.

It was also shared with the PCR court that this evidence was never presented at trial yet discovered in post conviction. RA 989, OP@ pp. 40-44; RA 1293, AUB@ pp. 42-46.

4. Storm Two: Pervasive Ineffective Assistance of Counsel

The second storm included former counsels' pervasive ineffective assistance of counsel (IAC) argued in briefing which included the failure to investigate available defenses, including Third Party Culpability (TPC) evidence involving suspect Brown, Moore's *alibi*, as well as *good character/non-violent nature* evidence. RA 1293, AUB@ pp. 47-53.

It was presented that former counsel admitted failing to investigate/present *any* defense evidence at trial, including TPC evidence Brown. Id. at 47-48 *citing* Petitioner's UAE, Exhibit #32, Affidavit of J.Canby at pp. 5-6. Petitioner argued this evidence was discoverable from State's disclosed police reports, or could have

been obtained by going back to the YCH neighborhood. RA 1293, AUB@pp. 47-48 *citing* Petitioner's UAE, Exhibit #11, PPD Reports re: A. Barrios; Exhibit #23, PPD Report re: J. Early; Exhibit #14, Affidavit of S.Villegas; Exhibit #15, Affidavit of P.Villegas; Exhibit #19, Affidavit of M.Villegas; and Exhibit #22, Affidavit of J.Early.

It was further argued the TPC evidence complimented Moore's alibi. RA 1293, AUB@p. 48. *citing* Petitioner's UAE, Exhibit #26, Affidavit of A.Feliciano at pp. 1-3; Exhibit #27, Affidavit of Petitioner Moore. This was supported by the testimony of State's witness Ortiz, which confirmed Petitioner was not in the area until 5:30/6:00am. *Supra.* Former counsel *never called a single witness* at the 2001 trial, effectively pleading Moore guilty. Petitioner's UAE, Exhibit #32, Affidavit of J.Canby at p. 3, Para.11; Petitioner's Exhibit #26, Affidavit of A.Feliciano at pp. 1-3

It was presented to the court the defense ***admitted*** failing to investigate good character/non-violent evidence. Ibid. at p. 6, Paras. 26-27; Exhibit #33; Affidavit of Mitig.Specialist Bollinger, at pp. 4-5. This evidence included that Moore was a nice/trustworthy young man in his family, at school and with neighbors who included that he was *kind and non-violent*, incapable of committing such crimes. *Infra.*

a. Petitioner's Good Character and Non-Violent Nature Evidence

First, substantial evidence was discovered in post conviction supporting Petitioner's good character/non-violent nature, whereby he could ***not*** have committed the YCH homicides. This evidence was presented in briefing to not only further establish that the convictions were highly questionable, yet that Moore's AI and IAC claims were supported by such evidence. RA 989, Petitioner's OP@pp. 18-20 and RA 1293, AUB@ pp. 25-28.

For example, it was submitted that Petitioner's Grandma Vera, a person of substance and good character testified by affidavit Moore *is a good and kind young person* who was *always* helpful to his family, a good son/brother, and very respectful to his elders. RA 1293, AUB at p. 25 *citing* Petitioner's UAE, Exhibit #1, Affidavit of V.Randolph at pp. 1-3.

Moore's sixth and eighth grade teachers echoed he was one of their *best* students, a person of *good character* and *respectful*. RA 1293, AUB@ pp. 25-26 *citing* Petitioner's UAE, Exhibit #2, Affidavit of 6th Grade Teacher, Pauline Rudloff, at pp. 1-2; Exhibit #3, Affidavit of 8th Grade Teacher Erin Luft Jenkins at pp. 1-2. It was further highlighted that Petitioner's neighbors, who knew him well testified by affidavit Moore is a person of good character, helpful and trustworthy. RA 1293, AUB@pp. 26-27 *citing* Petitioner's UAE, Exhibit #4, Affidavit of

L.Friday at pp. 1-3; Exhibit #5, Affidavit of F.Sanchez at pp. 1-3; Exhibit #6, Affidavit of D.Hole at pp. 1-3; Exhibit #7, Affidavit of C.Graham at pp. 1-3; and Exhibit #8, Affidavit of M.Lapikas at pp. 1-3.

Furthermore, the lower court was made aware the foregoing witnesses would have testified on Petitioner Moore's behalf. RA 1293, AUB@p. 27 *citing* Petitioner's UAE, Exhibit #1, Affidavit of V.Randolph at pp. 3-4; Exhibit #2, Affidavit of 6th Grade Teacher, P.Rudloff, at pp. 2-3; Exhibit #3, Affidavit of 8th Grade Teacher E.Jenkins at p. 3; Exhibit #4, Affidavit of L.Friday at pp. 3-4; Exhibit #5, Affidavit of F.Sanchez at p. 3; Exhibit #6, Affidavit of D.Hole at p. 4; Exhibit #7, Affidavit of C.Graham at p. 3; and Exhibit #8, Affidavit of M.Lapikas at pp. 2-3.

It was also pointed out that mitigation expert Dr. A.Stalcup came to question if Petitioner may be truly innocent of these crimes. RA 1293, AUB@pp. 27-28 *citing* Petitioner's UAE, Exhibit #9; Affidavit of Dr. Alex Stalcup at p. 3.

Finally, even while incarcerated Petitioner had ***no*** write-ups whatsoever since his imprisonment at both Eyman and Florence State Prisons. RA 1293, AUB@p. 28 *citing* Petitioner's UAE, ADC Inmate Datasearch Records for Petitioner Moore, ADC #218107.

b. IAC Confirmed by Standard of Care (SOC) Expert Larry Hammond and the Post Conviction Record.

The IAC claim was presented to the court and confirmed by SOC Expert Hammond. RA 1293, AUB@pp. 47-52 *citing* Petitioner's UAE, Exhibit #44; Affidavit of Capital Representation Expert L.Hammond@pp. 7-22.

First, it was pointed out to the court that former counsel Canby was *not* qualified to represent him Petitioner. RA 1293, AUB@p. 49 *citing* Petitioner's UAE, Exhibit #32, Affidavit of J.Canby@pp. 1-2; and Exhibit #44; Affidavit of Capital Representation Expert L.Hammond. at p. 10, Para. 27. Moreover, according to Canby he was assigned forty (40) other felony cases, and was so busy he did *not* have time to adequately investigate/prepare Moore's case. RA 1293, AUB@ pp. 49-50 *citing* Petitioner's UAE Exhibit #32, Affidavit of J. Canby at pp. 1-2; Exhibit #44; Ibid. at p. 10; and Exhibit #33; Affidavit of Mitig.Specialist L.Bollinger, at pp. 2-3.

Secondly, it was submitted Canby admitted in failing to investigate he did not challenge the State's prosecution, effectively pleading Moore guilty at trial *without consent*, and merely frontloaded "drug induced rage" mitigation. RA 1293, AUB at p. 50 *citing* Petitioner's UAE, Exhibit #32, Affidavit of J. Canby at p. 3; TR 9/13/001, pp. 61, 79-81, 137-38; TR 9/17/01, pp. 4-11, 24-25; TR 9/18/01, pp. 60, 63-70, 74-77. Canby admitted if he had investigated the TPC evidence

concerning suspect Brown, he would have put on a TPC defense with Moore's good character and non-violent nature evidence.[28] RA 1293, AUB@pp. 50-51 *citing* Exhibit #32, Affidavit of J. Canby@pp. 5-6.

Additionally, it was shown counsel's admitted failures prejudiced Moore at penalty phase as he not receive an *Enmund/Tison* instruction, nor use the polygraph results in his defense. RA 1293, AUB@p. 51 *citing* Petitioner's UAE, Exhibit #32, Affidavit of J. Canby at pp. 5-6, Para. 24.

It was also presented in briefing that Canby fell below the standard of care by failing to properly cross examine or challenge the State's witnesses, and never calling a single witness to testify for the defense. RA 1293, AUB at pp. 47-53.

Although the trial record concerning victim Ford showed the lower court how former counsel attempted to cross examine her regarding "identification" of Moore, confirming she had only met him three (3) years prior when he was fifteen (15) years old without seeing him for three (3) years until the night of the shooting, TR 9/17/01, pp. 30-39, Canby did not bring out Ford could not identify Moore on multiple occassions. Id. at pp. 41-44. While the record established former

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[28] Due to lack of investigation, the defense team insulted Petitioner's Grandma Vera when questioning why her grandson did not have a jury of his peers (ie. include people of color), when MS Bollinger egregiously responded her grandson ***"would have to have a jury of felons or criminals*** expressing their disbelief as to his innocence in a case never investigated. Petitioner's Exhibit #1, Affidavit of Ms. Vera Randolph.

counsel disclosed an identification expert who would testify at the guilt phase trial, *supra*, he failed to retain an identification expert witness who would have confirmed Ford's *inability* to identify Moore on multiple occasions. RA 1293, AUB@pp. 52-53 *citing* Petitioner's UAE, Exhibit #45, Affidavit of EPI Expert D.Davis at Paras. 139-52.

With respect to alleged IAC of former appellate counsel in failing to raise structural error related to the *Portillo* burden of proof instruction, such error was confirmed by both former counsel and SOC Expert Hammond. RA 989, OP@p. 53; RA 1293, AUB@p. 53 *both citing* Petitioner's UAE, Exhibit #47; Declaration of Appellate Attorney David Goldberg, Esq.; Exhibit #44; Affidavit of Capital Representation Legal Expert; L.Hammond@pp. 23-24, Paras. 58-59.

5. Other "Storms" Petitioner was Unable to Escape.

Other "storms" Petitioner was unable to escape and presented in briefing included: 1) the fact trial proceeded on 9/11/01 or ***"9/11"***, 2) that Petitioner was mentally incompetent at the time of trial due to diabetic ketoacidosis, 3) the ongoing revelation of additional PPM/C permeating Moore's case, and 4) structural error at the guilt phase trial. RA 989, OP@pp. 54-63; RA 1293, AUB@pp. 54-63.

First, in briefing Moore submitted that trial proceeded on ***"911"***. RA 989,

OP@pp. 54-55; RA 1293, AUB@pp. 54-55 *citing* TR 9/11/01, pp. 8-10. In fact, the swearing in of jury, preliminary instructions, and State's Opening Statement occurred on the morning of ***"911"***. RA 989, OP @p. 55; RA 1293, AUB@p. 55 *citing* TR 9/11/01, pp. 8-47.

Second, it was discovered/presented that evidence supported Petitioner was mentally incompetent at the time of his 2001 trial due to diabetic ketoacidosis. RA 989, OP/@pp. 55-59; RA 1293, AUB@pp. 55-58.

According to Moore's Medical Records he was diagnosed with *Type I* Diabetes in June, 1999. Petitioner's UAE Exhibit #48; Affidavit of Dr. S.Williams @pp. 3-4. Petitioner was then treated with insulin for 1 year, and prescribed a diabetic diet/diabetes medication. Id. at p. 4, Para. 8.b. The records confirmed that 6 months prior to trial the Maricopa County Jail suddenly stopped Moore's diabetic medication/diabetic diet and stopped monitoring blood sugars due to a mistaken idea that he was no longer diabetic. Id. at p.4, Para. 8.c. This mistake was not discovered until 2 months *after* trial, when medical records confirmed Moore was having problems with his vision, his blood sugar level *was over 300* and *ketones were found in his urine*, at which time he restarted his diabetic diet/ diabetic medication.[29] Id. at p. 4, Para. 8.d.

[29] That except for 6 month period prior to the 2001 trial, and 2-3 month period afterward, Petitioner continually been treated for diabetes. Id.

It was further conveyed to the court that at the time of trial Moore was *only* fed at 4:00am and was not fed until 6:00pm. RA 989, OP@p. 56; RA 1293, AUB@p. 57 *citing* Petitioner's UAE, Exhibit #48 at pp. 2-3; Petitioner's Exhibit #27; Affidavit of Petitioner J.Moore. Moreover, a granted pretrial motion requesting Moore be fed lunch during trial was ignored, whereby Judge Cates sent an e-mail to the parties regarding the issue. RA 989, OP@ p. 57; RA 1293, AUB@p. 56 *citing* RA 76; Petitioner's UAE, Exhibit #48; Affidavit of Dr. Stephen Williams at p. 3, Para. 7.f. As the result of not being fed lunch or prescribed medications Petitioner suffered from diabetic ketoacidosis during trial. Id. at p. 7. Moore's symptoms included the following:

1) Appearing to be *drugged*/lethargic/inattentive during the afternoon sessions of trial;

2) Suffering a substantial weight loss during relevant period (reflecting his body burning fat rather than blood sugars w/o necessary insulin to absorb normal blood sugars from food);

3) Experiencing a fruity taste in mouth, as well as hunger/thirst/polyuria;

4) Being fatigued/sleepy to the point of difficulty keeping head up; and

5) Not being cognizant during trial.

RA 989, OP@ pp. 57-58; RA 1293, AUB@pp. 56-57 *citing* Petitioner's UAE, Exhibit #48; Affidavit of Dr. S. Williams at pp. 5-6.

Moore's 2001 symptoms were similar to those observed by ADC Eyman

Visitation Officer Molina in 2013 when his diabetes medications were suspended when other inmates overdosed on prescribed medications. Petitioner's UAE, Exhibit #48 at p. 6. CO2 Molina noted during this ten (10) day period that Petitioner had the following symptoms:

1. That he looked pale, tired and groggy;

2. That his speech was slow; and

3. That he not only had glassy eyes, yet bags under his eyes.

RA 989, OP@pp. 58-59; RA 1293, AUB@ pp. 57-58 *citing* Petitioner's UAE, Exhibit #48; Affidavit of Dr. S. Williams @pp. 5-6.

That as the result of clinical review of the evidence, including a review of 2001 guilt phase trial video, Dr. Williams concluded as follows:

"to a reasonable degree of medical probability Petitioner Moore was suffering from diabetic ketoacidosis during the afternoons of his 2001 guilt phase trial, and that as the result, was unable during these episodes, to appreciate the nature of the proceedings, and was unable to assist his attorney in his defense because the diabetic ketoacidosis had impaired his mental faculties to a grave extent." (Emphasis added)

Petitioner's UAE, Exhibit #48; Affidavit of Dr. S. Williams @p. 7, Para. 17.

That although the foregoing evidence supporting Defendant's trial incompetency claim was submitted, RA 989, OP@pp. 55-59; RA 1293, AUB@pp. 55-58, the lower court deemed it to be "insufficient" for either constitutional error,

or to grant Evidentiary Hearing. *Infra.*

Third, it was alleged in Opening Petition there was series of known police and prosecutorial actions that were questionable, and collectively egregious. RA 989, OP@ pp. 55-59; RA 1293, AUB@pp. 58-61. It was shown in briefing that the following series police/prosecutorial actions suggested Moore's convictions were *contrived*, wholly undermining his ability to receive a fair trial, including the following:

1. Case Detective Cooning misstates facts before the Grand Jury at the time of Petitioner's indictment, stating contrary to his original statement to police, that he had seen 2 Black males at YCH at the time of the homicides, when he had only seen 1 Black male with a ***Dallas Cowboys*** PPD Reports from interview of Barrios dated 11/16/99 and Petitioner's Exhibit #13; Grand Jury Testimony of PPD Det. T. Cooning at pp. 13-14.

2. Detective Cooning misstates facts before Grand Jury at indictment alleging statements of unnamed neighbor purportedly hearing gunshots between 5:40 and 6:00am in contradiction of other evidence and testimony of victim Ford who testified she "laid on the ground for 3-4 hours after the shooting" until police arrived at 7:11am. *Compare* Petitioner's UAE, Exhibit #30, TR 9/13/01 (2001 Guilt Phase testimony of D. Ford), pp. 40 (lines 14-18)-42; Petitioner's Exhibit #31, PPD Report Supplement #17 at pp. 1-2.

3. The police fail to disclose Deborah Ford's 11 year old son "AC" giving exculpatory evidence to the police concerning Moore's case that including AC was present when original suspect Brown threatened to kill his Mother, Deborah Ford just two (2) days before the YCH shooting. Petitioner's UAE, Exhibit #21, Affidavit of Chris Ford, pp. 1-2;

4. The prosecution failed to properly disclose PPD Detective Femenia *threatened* Petitioner's sixteen (16) year old girlfriend Jessica Borghetti during interrogation following the YCH shooting, stating if she did not

"cooperate" in their investigation she would be going to go to prison for fifteen (15) years, with Ms. Borghetti later admitting that she lied during testimony. Petitioner's UAE, Exhibit #49; Affidavit of Ms. Jessica Borghetti at pp. 1-2.

5. Police destroy evidence gathered at YCH crimescene related to knife (Item #22) found by first chronological victim's foot (ie. Crack dealer Sergio Mata) having blood on tip of knife believed to be that of actual perpetrator of homicides. Petitioner's UAE, Exhibit #40, Affidavit of former Maricopa County Medical Examiner Dr. Archilaus Mosley, pp. 2-3; Petitioner's Exhibit #39; State's Exhibits #'s 109 and 110, Pictures from Crime Scene; Petitioner's Exhibit #34, Affidavit of Bode Technology Scientist M. Donohue at p. 4, Para. 14.

6. Evidence gathered by police during a warrant search of Moore's house, purportedly including shell casing with obvious "dent" (Item #26A), and a projectile or bullet (Item #26B) found in plastic ziploc baggy (Item #26) tampered with or removed by police (ie. dented shell casing or Item #26A is found to no longer have a dent during ballistics testing by former PPD Crime Lab Criminalist Richard Watkins). Petitioner's UAE, Exhibit #36; Affidavit/Report of R. Watkins, Ballistics and Footprint/Tiretrack Expert at p. 1, Para. 5.

7. Prosecutor Clayton tampers with State's only eye witness Deborah Ford at time of her deposition before trial, after she had repeatedly fails to identify Petitioner Moore in multiple line-ups. Petitioner's UAE, Exhibit #32; Affidavit of J. Canby, Esq. at pp. 2-3; Petitioner's Exhibit #45, Affidavit of Eyewitness & Police Interrogation Expert Dr. Deborah Davis at Paras. 38, 68, 74; and TR 4/28/00 (Transcript of Deposition of D. Ford).

8. Prosecutor present at interview of witness Sam Derby advises Mr. Derby that he need *not* be present to testify at Petitioner Moore's guilt phase trial. Petitioner's UAE, Exhibit #38; Affidavit of S. Derby at pp. 3-4, Paras. 12-14.

9. State's eyewitness Ford unable to identify/recognize Moore in photo lineup, video line-up and later on first day of trial as perpetrator of crime when she arrives at Court with daughter and asks: "Who's that?!", whereafter prosecutor tells her that "black people lighten up in jail", with

Deborah Ford later testifying to this very same information, Petitioner's UAE, Exhibit #50; Affidavit of P. Coppen at pp. 2-3.

10. Rule 32 defense witness Chris Ford gives affidavit supporting Petitioner Moore's case regarding exculpatory evidence from previously undisclosed police interview of his son AC (ie. Petitioner's Exhibit #21, Affidavit of Chris Ford), yet suddenly cancels appointment with Rule 32 counsel to do supplemental affidavit regarding ex-wife's inability to identify/recognize Mr. Moore at time of trial when pressured by family and possibly State not to assist Rule 32 counsel with this case. Petitioner's UAE, Exhibit #50; Affidavit of P. Coppen at 3-4, Paras. 8-10.

OP@ pp. 55-59; RA 1293, AUB@pp. 58-61.

While the foregoing evidence was submitted to the lower court for consideration of the PPM/C claim, RA 989, OP@pp. 59-63; RA 1293, AUB@pp. 58-62, the lower court incorrectly found the evidence did not create a material issue of fact, even if it was presumed to be true that PPD had planted evidence in Defendant's bed, tampered with evidence, and destroyed DNA evidence that inferentially would have exonerated Petitioner. *Infra*.

An additional "storm" that occurred in Petitioner Moore's case, and which had fueled the earlier "storms" or contributed to his conviction at the guilt phase trial, was the trial Court's use of the *Portillo* burden of proof instruction which both lowered the burden of proof to the clear and convincing evidence standard, and improperly shifted the burden of proof to the defendant to prove that a ***real***

possibility that he was innocent:

> *"Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every doubt. If based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there's a real possibility he is not guilty, you must give the defendant the benefit of the doubt and find him not guilty." (Emphasis added.)* TR 9/11/01, p. 21 (Preliminary Jury Instructions); RA 151, pp. 3-4 (Final Jury Instructions).

It was argued to the lower post conviction court given this language the instruction lowers the State's burden of proof from "proof beyond a reasonable doubt" to evidence which "firmly convinces" the jury, or the clear and convincing evidence standard by which the instruction violates applicable federal law. It was further argued the instruction improperly shifted the burden of proof to the defendant to prove that there was a *real possibility* that he was innocent in further violation of ***In re Winship*** and its progeny. RA 989, OP@pp. 63-64; RA 1293, AUB dated 9/13/21@pp. 62-63.

While Petitioner's alleged structural error in briefing regarding his trial going forward on "9/11" and being subject to an erroneous burden of proof instruction, RA 989, OP dated 8/15/14@pp. 54-55 and 63-64; RA 1293, AUB@pp. 54-55 62-63, the lower Court ultimately denied the claims without hearing. *Infra.*

B. LATER DISCOVERIES IN PETITIONER'S CASE FOLLOWING THE FILING OF HIS OPENING PETITION PROVIDED SUBSTANTIAL ADDITIONAL EVIDENCE SUPPORTING HIS AI, PPM/C AND IAC CLAIMS.

Later discoveries in Petitioner's case following the filing of his Opening Petition provided additional evidence to the PCR court supporting his AI, PPM/C and IAC claims. As the result of the continued investigation into Petitioner Moore's case, caused and especially motivated by the State's *purposeful* destruction of DNA evidence which inferentially would have exonerated Moore, both substantial evidence supporting Petitioner's claims came to light, requiring supplementation to the Superior Court, and resulting in the both filing of Supplemental Briefs #'s1-5, and Unified Briefing.

1. The New Evidence Discovered After Filing the 8/15/14 Opening Petition.

New evidence discovered after the 8/15/14 filing of Mr. Moore's Opening Petition required preparation/filing of five (5) Supplemental Briefs supporting 3 of 4 of his primary claims of and leading to their ultimate presentation in his Unified Briefing as follows. The initial new evidence included the submission of the affidavit of *State's witness* Sarry Ortiz, whose eyewitness account of the YCH homicides, it was argued in PCR briefing, had been previously *unknown*, as she was on felony drug diversion and did not want to get in trouble for being at a

Crackhouse related shooting. RA 1293, AUB@ pp. 72-74.

Moreover, it was submitted that it was Ms. Ortiz's affidavit that not only provided additional support for Petitioner's AI claim related to a *third party culpability defense* as to original suspect Brown, PLC Supplier/Dealer Jorge "Gordo" Hernandez and two (2) other Hispanics who were reported as being armed and present at the YCH shooting by witness Janel Early[30], yet supported Petitioner Moore's alibi as well, given when Petitioner was first picked up by Ms. Ortiz 1.5-2 hrs. *after* the shooting he was "walking" (notably, not "running" from the scene or riding in a vehicle away from it). Id. *citing* Petitioner's UAE, Exhibit #51, Affidavit of S. Ortiz, pp. 1-3

As presented to the PCR court through her affidavit, Ms. Ortiz specifically recounted:

1) That she was present at the Yale Crackhouse on Virginia Street just behind the Yale Crackhouse) at the time of the shooting and was parked in her car adjacent to the Crackhouse in the middle of the night or early morning hours of 11/16/99 (Id. at pp. 1-2);

2) That at that time Ortiz was awakened what sounded like loud backfires from a vehicle (Id. at p. 2);

3) That she then saw headlights from a medium sized red/black or red/gray truck suddenly come on, with the truck immediately doing a "Brodie" or "donut" and throwing dirt in the air as it fled the Yale Crackhouse, with African American male wearing a ***Dallas Cowboys*** hat (Tony Brown) running past her vehicle within seconds of hearing the backfires that she

[30] *See* OP@pp. 28-29 *citing* Exhibits #22 (Affidavit of J.Early at 6-7, 12-15) and #23 (PPD Report re: J.Early dated 11/17/99).

later realized was gunfire from the shooting (Id. at pp. 2-3);

4) That after the truck left the front of the Yale Crackhouse, Ortiz then saw the truck as it drove rapidly around corner down Virginia, driving past her vehicle as she tried to crouch down to not be seen as she was parked on Virginia just behind a different truck (Id. at p. 2);

5) That Ortiz then drove around *"for quite a while"* after the YCH shooting *because she was afraid of the perpetrators knowing where she lived* (ie. across the street from YCH) before she eventually picked up Moore while he was on foot or walking at approximately 5:30am. (Id. at p. 3, Para. 17); and

6) That although Ortiz did not tell the police about seeing the African American male wearing a ***Dallas Cowboys*** hat (Tony Brown) running past her vehicle, she did tell them about hearing the backfires or gunshots and seeing the truck doing a "Brodie" or "donut" throwing dirt up in the air while fleeing immediately after the shooting. Id. at p. 3, Paras. 9 and 15.

RA 1293, AUB@pp. 73-74.

Secondly, other evidence confirming the veracity of Ms. Ortiz's eyewitness account was also submitted in briefing supporting the presence of a truck at the YCH shooting which ran over one of the shell casings from the shooting itself or Item #45. Id. at pp. 74-76 *citing* Petitioner's UAE, Exhibit #52, Affidavit of R. Watkins at p. 3 [Review of evidence/original photographs from Yale Crackhouse crime scene definitely supports reported vehicle rapidly leaving scene]; and Exhibit #53, Affidavit of Crime Scene Expert F. Rodgers at pp. 5-6 [Original pictures from YCH crimescene show tire tracks from a vehicle that ran over shell casings from the shooting or Item #45 as it was leaving area or turning around);

and Petitioner's UAE, Exhibit 54, Affidavit of ASE Certified Master Auto/Truck Mechanic D. Meeker at pp. 2-3 [Pictures reviewed from Yale Crackhouse crime scene show a visibly prominent *single* tire track not only evidencing vehicle doing "brodie" or "donut" as the result of vehicle having differential rear end rather than positraction with a single rapidly moving power wheel effectively erasing itself or its own tire track by throwing dirt up in the air while the non-power or free spinning wheel leaving noticeable tire track, with vehicle also running over shell casing with photograph of tire track over shell casing or Item #45 ***being definitely that of a highway truck tire***), yet additional evidence from the 2001 trial record testimony of PPD Detective Dillian showing Ortiz accurately described truck leaving YCH immediately after the shooting given Dillian testified at trial she had taken pictures of tire tracks from a vehicle doing a U-turn and running over a shell casing or Item #45. RA 1293, AUB @ pp. 74-76 *citing* Petitioner's UAE, Exhibit #58, Partial Transcript from Petitioner's Guilt Phase Trial dated 9/19/01 at pp. 13, 27-29, 37, 72-75.

Third, the lower court learned that evidence discovered during *capital* Petitioner's ongoing investigation had prompted further review of forensic evidence by retained experts Watkins and Rodgers[31] concerning discrepancies and

[31] Petitioner's retained Firearms/Ballistics expert Richard Watkins and Fingerprints/Crime Scene expert Frank Rodgers respectively served as Assistant Directors of the PPD Crime Lab in 1997 and 1998-2001 *See* Petitioner's Unified Appendix of Exhibits, Petitioner's Exhibit #52 (Affidavit of R. Watkins at. pp. 1-2) and Exhibit #53 (Affidavit of F.

improprieties they had found related to three (3) different items of highly material evidence as follows:

1) That regarding Item #26A purportedly collected by police from 1833 E. Coronado or Petitioner's residence, the proper collection protocols were *not* followed by police requiring that evidence be *photographed in place* where it was purportedly first discovered (under the bedspread), *not moved* from location of discovery (to the top of the bed spread with items in bag perfectly lined up), and that a numbered placard also be used or placed with the evidence before being photographed[32] [Petitioner's UAE, Exhibit #53 (Affidavit of F.Rodgers at pp. 2, 4-5)];

2) That the picture of Item #26A taken at the time of its purported collection definitely shows an obvious or *plainly visible* "dent" in the side of the cartridge casing [Petitioner's UAE, Exhibit #52 (Affidavit of R.Watkins at pp. 3-4, Para. 12) and Exhibit #53 (Affidavit of F.Rodgers at p. 5, Para. 16)];

3) That the "dent" in the side of original Item #26A is now *no* longer present in existing Item #26A [Petitioner's UAE, Exhibit #52 (Affidavit of R.Watkins at pp. 3-4, Para. 12) and Petitioner's Exhibit #53 (Affidavit of F.Rodgers at p. 5, Para. 16-17)];

4) That inspection of other cartridge casings related to the present case to determine if original Item #26A had been lost or misplaced among the other cartridge casings has yielded a determination that original Item #26A was ***not*** lost or misplaced among the other case related cartridge casings given none of them have such a dent, yet *purposely removed from the present case* [Petitioner's UAE, Exhibit #52 (Affidavit of R.Watkins at pp. 4-5, Paras. 14-16) and Exhibit #53 (Affidavit of F.Rodgers at p. 5, Paras. 16-18)];

5) That Item #45 consists of a cartridge casing found in tire track at the YCH crimescene by PPD Detective Dillian, with Item #45 found on the

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Rodgers at p. 1)

[32] The photograph of Item #26A which is part of the 2001 Guilt Phase Trial Record (State's Exhibit #83) appears to have been "staged" given the fact that shell casing itself was *perfectly* lined up with the projectile inside the plastic bag thus supporting that it had been planted by police.

ground inside tire track immediately after shooting having been run over by vehicle [Petitioner's UAE, Exhibit #52 (Affidavit of R.Watkins at p. 3, Para. 10) and Exhibit #53 (Affidavit of F.Rodgers at pp. 5-6, Para. 19)];

6) That a vivid description of Item #45 at the time of its collection from the YCH crimescene was given by PPD Det. Sally Dillian during Moore's trial in which Item #45 was "compressed" or "crushed", "and" having other "damage" [*See* Petitioner's UAE, Exhibit #59 (Supplemental Affidavit of R.Watkins at p. 3, Paras. 10-11) and Exhibit #60 (Supplemental Affidavit of F.Rodgers at pp. 2-3)];

7) That a visual inspection or analysis of Item #45 at the *present* time has resulted in a finding that the Item #45 currently in existence in Moore's case has absolutely ***no*** visible damage whatsoever, whereby original Item #45 has also been removed or taken out of the present case, with a wholly different cartridge casing replacing it [*See* Petitioner's UAE Exhibit #59 (Supplemental Affidavit of R. Watkins at pp. 3-4, Paras. 110-14) and Exhibit #60 (Supplemental Affidavit of F.Rodgers at p. 3, Para. 11)];

8) That the destruction of blood on the tip of YCH crimescene Item #22 or State's Exhibit #130 (knife found near foot of first chronological victim Sergio Mata) *pursuant to State agent's order* causing destruction of the evidence before any DNA testing could be performed under the Superior Court DNA testing Order and said destruction is "unprecedented" and greatly calls into question the integrity of the State's case [Petitioner's UAE, Exhibit #52 (Affidavit of R.Watkins at p. 5-6, Paras. 17-19)];

9) That a review of the *Chain of Custody* documents related to Exhibit #130 or Yale Crackhouse crime scene Item #22 (knife with blood stain found near foot of first chronological victim Sergio Mata) shows after that PPD Detective Olson had ordered that the evidence ***not*** *be preserved* for DNA testing on 12/15/99, and that it was immediately checked out of evidence by Evidence Technician C.Westbrooks for over 60 days from 12/17/99 thru 2/24/00 without any testing taking place until it was forwarded to Latent Print Examiner J.Cynowa on 2/24/00 [Petitioner's UAE, Exhibit #53 (Affidavit of F.Rodgers at p. 3, Para. 11.c)]

10) That the latent fingerprint recovered from the knife blade of Item #22 may be a good source of biological material for supplemental DNA testing [Petitioner's UAE, Exhibit #53 (Affidavit of F.Rodgers at p. 4, Para. 12)]; and

11) That given the discrepancies or improprieties involving not just one (1), yet three (3) different items of material evidence in the present *capital* case (ie. Items 26a, 45 and 22), the integrity of the State's investigation/prosecution of Petitioner is *gravely suspect*. [*See* Petitioner's UAE, Exhibit #59 (Supplemental Affidavit of R.Watkins at p. 4, Para. 15) and Petitioner's Exhibit #60 (Supplemental Affidavit of F.Rodgers at pp. 3-4, Para. 12)].

RA 1293, AUB@pp. 76-80.

The foregoing three (3) categories of new evidence supporting Petitioner Moore's AI, PPM/C and IAC claims were submitted to the Superior Court in briefing as Petitioner endeavored to explain how additional evidence supporting his claims continued to unfold during the PCR investigation. *See* Petitioner's AUB@pp. 72-80.

It was argued to the lower Court that these additional findings submitted with Petitioner's 1st Supplemental Brief (SB) and his Amended Unified Brief (AUB) at pp. 72-80, when considering earlier testimony by affidavit of other fact witnesses, including that of Petitioner's neighbors Hole and Lupikas who have sworn that police specifically advised them of searching Moore's home to *find the murder weapon*[33], the sworn affidavit testimony of D.Moore in which she relates

[33] *See* Petitioner's UAE, Exhibit #6 (Affidavit of D. Hole) at p. 3, Para. 16 and Exhibit #8

having to leave her home for a substantial period (45 minutes) to pick-up her daughters from the Colannade Mall and that police refused to allow her to observe what they were doing in her son's bedroom[34], as well as the sworn testimony of Sam Derby that Petitioner's firearm was definitely a 40 caliber firearm and not a 9mm Makerov[35] (ie. not 9mm murder weapon), not only suggested police had motive/opportunity to shape the evidence against Petitioner's interests, yet provided a substantial basis from which additional facts were logically inferred and submitted to the lower court:

(1) Item #45 from YCH crimescene may have been planted by police on the top of Petitioner's bed as Item 26A given both the improprieties in evidence collection found by Crime Scene Expert Rodgers (picture of purported evidence appears to have been "staged" as not taken *in place* with evidence placard missing required per evidence collection protocols, *supra*), and similarities in both the picture of Item 26A (showing obvious dent in side of cartridge casing) and the description of Item 45 by Det. Dillian (which she described as being compressed w/ other "damage"), yet the fact that both former Item 26A and 45 now no longer exist in this case, and with neither present items having *any* damage whatsoever, *supra*;

(2) That following the suspected planting of evidence to the top of Petitioner's bed as Item 26A to implicate Petitioner in the shooting with a cartridge casing from said crime scene (at time police had *not* recovered murder weapon), upon police recovering Moore's firearm from Derby and discovering it was a 40 caliber firearm that was obviously *not* the murder weapon, a wholesale substitution of the shell or cartridge casings would have become necessary; and

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(Affidavit of M.Lapikas) at pp. 2-3, Paras. 12-14.

[34] *See* Petitioner's UAE, Exhibit #55 (Affidavit of D.Moore) at pp. 2-3, Paras. 7-10, 13-14.

[35] *See* Petitioner's UAE, Exhibit #38 (Affidavit of S.Derby) at pp. 2-3, Paras. 7-11. and Exhibit #8 (Affidavit of M.Lapikas) at pp. 2-3, Paras. 12-14.

(3) That given unexplained discrepancies/improprieties related to YCH Item #45 and purported Item #26A, the destruction of evidence related to Item #22 or State's Trial Exhibit #130 (knife found at crime scene next to victim Mata) which **destruction** occurred in a *capital* case in regards to readily apparent blood on the knife tip at the time of the initial police investigation as shown in State's Exhibit 110 (which former assigned Maricopa County Medical Examiner Dr. Archilaus Mosley may have identified assailant[36]) said destruction **was *not* routine or accidental**, yet done to eliminate any possible evidence undermining State's theory that the shooting was committed by Moore.[37]

See Petitioner's AUB@pp. 80-82

It was further argued that based upon the ongoing post-conviction investigation that, regrettably, these items of evidence, especially Item 26A or State's Trial Exhibit 83 (subsequently State's Exhibit #73 at the 2007 penalty phase trial) played a prominent role in. Moore's indictment/conviction/death sentence as herein described.

First, Item 26A was used or specifically referenced by the State and against Petitioner's interest at the Grand Jury on 11/30/99 to tie him to the Yale Crackhouse homicides. Detective Cooning testified as follows before the Grand Jury:

"One of the things that we found inside Mr. Moore's bedroom was a

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[36] *See* Petitioner's Unified Appendix of Exhibits ("UAE"), Exhibit #40 (Affidavit of former Maricopa County Medical Examiner Dr. A.Mosley) at p. 2, Paras. 4-9.

[37] It is highly questionable why, in the present *capital* case, such evidence destruction as to Item #22 would have occurred in the first place, let alone, why it would have occurred in conjunction with the destruction of other material items of the State's evidence discovered during the present collateral appeal as to Items #45 and #26A. It is especially telling that *none* of these discrepancies were ever favorable to Moore, for if they were merely happenstance or just coincidental, the law of averages would suggest at least one (1) favorable occurrence.

cartridge casing, which was identical to the cartridge casings we found at the scene of the homicide. So we felt like that evidence was, in fact, tied to Mr. Moore."

Secondly, at Petitioner's guilt phase jury trial, a *picture* of the same shell casing, or Item #26A, purportedly found in Petitioner's bed was both shown to the jury and admitted at trial as State's Exhibit #60, along with the purported shell casing itself (State's Exhibit #83) for the same purpose, the purpose of tying Moore to the YCH homicides. TR 9/19/01, pp. 90-99.

Third, Item #45 was specifically referenced and admitted at Petitioner's guilt phase trial as well, TR 9/19/01, pp. 27-29, with Detective Dillian later referencing it along with the other Yale Crackhouse shooting case related projectiles/shell casings during Petitioner's penalty phase trial on 5/2/07 (see TR 5/2/07@ pp. 22-24, 30-31, 34-36, 43, 49-50), with the State's ballistics expert R.Leister effectively testifying at both Petitioner's guilt and penalty phase trials that both Item #26A and Item 45 came from the same Makarov firearm (or could not be excluded as being fired from same) that the State claimed to have recovered from Sam Derby.

See TR 9/22/01 and TR 5/2/07, pp. 73-100.[38]

Finally, pictures of Item #22 (knife at foot of first chronological victim S.

[38] In sharp contrast, Mr. Derby actually testified by affidavit that: 1) Petitioner's firearm was not a 9 mm Makarov, yet a 40 caliber revolver, and 2) Mr. Derby was surprisingly told by the State's representative immediately prior to trial *not* to appear to testify at the 2001 guilt phase trial, and has never previously testified at either the 2001 guilt or 2004/2007 penalty phase trials. *See* Petitioner's UAE, Exhibit #38 (Affidavit of S.Derby)@ pp. 2-4.

Mata) were reviewed and admitted at Petitioner's guilt phase trial as State's Exhibits #134 & 135, with the knife itself referenced and/or admitted in evidence on 9/19/01 (see TR 9/19/01 at pp. 29-30), as well as at Petitioner's penalty phase trial in 2007 per defense request on 5/2/07 (see TR 5/2/07 at pp. 22, 51-52).

Based upon these salient points, Petitioner suggested to the lower court that there was no question that referenced Items 26A and 45, which were the subject of Petitioner Moore's ever-growing evidentiary discrepancies and improprieties alleged, *supra*, were used by the State to ultimately obtain Petitioner's conviction/sentence, and that Item 22 was definitely considered by the jury in evidence at Petitioner's 2001 guilt phase trial. *See* RA 1289, Petitioner's AUB@ pp. 82-84.

It is also noteworthy that other additional evidence was discovered *post* filing of Defendant's Opening Petition (OP) and submitted with Petitioner Moore's 1st Supplemental Brief (SB) which was subsequently consolidated into his Unified or Amended Unified Brief (AUB), giving more strength to his actual innocence and other previously alleged claims, in the form of affidavits of Petitioner's Mother, D. Moore and Mitigation Specialist Nancy Garcia, as well as from portions of the trial, Rule 32 and police record in this case, and included the following.

First, Petitioner submitted to the post conviction court that both Ms. Moore

and Garcia's affidavits provided additional evidence to the fact that *Moore has consistently maintained his innocence from the beginning of the present case*.[39]

Ms. Moore's affidavit provided complimentary factual support as to both his actual innocence and diabetes related ketoacidosis induced incompetency claims by respectively testifying that Petitioner's shoe size is substantial and is a Size 13 (rather than a size 10 or 8 ½ shoe which size footprints were found at the murder scene by police, *supra*) and her son had been diagnosed with diabetes at age 17, that he did not look well during his 2001 guilt phase trial, and he was not cognizant during trial because he looked "out of it", having complained about "going all day without eating" during trial.[40] RA 1293, AUB@p. 85

Moreover, Garcia suggested that after reviewing police reports in Moore's case as a Mitigation Specialist and meeting with him at length to discuss them at which time he strongly professed his innocence, she questioned whether Moore may actually be innocent and specifically asked that *more investigation* be done in his case, both *before* his 2001 guilt phase trial and *after* he passed a polygraph examination supporting his innocence prior to his penalty phase trials, only to be respectively ignored by former counsel and his Mitigation Supervisor,

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[39] *See* Petitioner's UAE, Exhibit #55 (Affidavit of D.Moore) at p. 2, Para. 6; and Exhibit #56 (Affidavit of N.Garcia) at pp. 2-3.

[40] Id at p. 3, Para. 17-19.

L.Bollinger.[41] It is noteworthy that by trusting her instincts in later cases, she was able to help exonerate other defendants whom she believed innocent.[42]

Petitioner pointed out to the lower court in post conviction that such information was relevant to both Petitioner's AI and IAC claims. *See* RA 1293, Petitioner's AUB@pp. 84-87.

Additionally, Officer Elting's trial testimony was also very important to Petitioner Moore's actual innocence claim because it confirmed that the emergency personnel who attended to surviving victim Ford had stated her survival was due to being on the cold ground *for so long*, strongly suggested the time of the shooting was near 4:00 am, given that police responded to the shooting at 7:17am.[43] Such, it was argued, would be consistent with Moore's alibi that at the time of the shooting he was five (5) miles and 1 hour and ½ removed from the homicides in issue, and former State's witness Ortiz's trial and post-trial revelations that following the YCH shooting, she drove around for approximately 1.5-2 hours before picking up Moore who was walking in the neighborhood area in which she was driving. *See* RA 1293, Petitioner's AUB@ pp. 84-86.

In further support of Moore's innocence and the TPC of original suspect Brown, Petitioner respectfully submitted both the testimony of his close neighbors

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[41] *See* Petitioner's UAE, Exhibit #56 (Affidavit of N. Garcia) at pp. 2-3.

[42] *Id.* at p. 3, Para. 13.

[43] *See* Petitioner's UAE, Exhibit #57, TR 9/12/01 (Partial Trial Testimony of PPD Officer Elting at pp. 18-23, 28-31.

Deborah Hole and Marianne Lapikas, in which they specifically state that their neighbor Moore was/is a lighter complected or lighter skinned African American[44], in contrast with Brown, whose picture at the time of the shooting in issue (which was entered as State's 2001 Trial Exhibit #29) shows the original suspect was a medium to darker skinned African American at the time of the shooting[45], or, perhaps the actual person with a darker skin tone Ms. Ford was somehow expecting to the see at the 2001 guilt phase trial when the prosecution told her that "black people lighten up in jail" and then called her to testify to such "witness tampered facts" when the original suspect, Tony Brown could not identify Moore as the purported assailant waiting in the bushes, whom he estimated was 5'9" tall, the same height at the first chronological victim Mata, not 6'1", which was the height of both Petitioner and original suspect Brown. *Supra.*

Based upon this new evidence, Moore argued in briefing he had provided additional support for his previously raised AI, PPM/C, and IAC claims. *See* Petitioner's AUB@pp. 84-87.

However, soon after the filing of Petitioner's 1st Supplemental Brief (SB), even more evidence would be discovered during the PCR investigation and presented in Petitioner's 2nd Supplemental Brief (SB) to confirm that the

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[44] *See* Petitioner's UAE, Exhibit #6 (Affidavit of D.Hole) at p. 3, Para. 17 and Exhibit #8 (Affidavit of M.Lapikas) at p. 3, Para. 15.

[45] *See* Petitioner's UAE, Exhibit #62, PPD Photo of Suspect Brown

Petitioner's forensic experts were totally correct in opining that the shell casing evidence had been switched out by police for some purpose, namely to cover up the planting of evidence [ie. Items 26 (ziplock baggy), 26A (shell casing) and 26B (projectile)] Moore's bed just four (4) hours after the State's only eyewitness, D.Ford, was unable to identify him as the perpetrator of the YCH homicides. *Infra.*

2. Ongoing Discoveries Support Petitioner's Actual Innocence (AI), Police and Prosecutorial Misconduct (PPM/C) and Ineffective Assistance of Counsel (IAC) Claims.

Following the filing of Petitioner's 1st Supplemental Petition, additional new evidence was discovered through the ongoing Rule 32 case investigation supporting his AI, PPM/C and IAC claims.

First, given the State could argue Forensic Experts Watkins and Rodgers were incorrect in their analyses of definite changes in Items 26A and 45[46] by specifically detailing their original identifying marks/damage and comparing the original items of evidence to their present day condition, Petitioner Moore requested said findings be verified/confirmed through said experts, and properly submitted with both his 2nd Supplemental Brief, Amended Unified Petition and Unified Appendix of Exhibits both *Color* Quadrant and Top view photographs of

[46]For example, the State incorrectly suggested such expert error in briefing/oral argument without the benefit of any contradicting expert opinion as required by Rule 32.9 (a) (2) ARCrimP.

all the shell casings known to be in existence related to the present case and had been released and inspected through the PCR court's order by Petitioner's retained Criminalist/Firearms Expert Richard Watkins. This was to assure that no such error had occurred with regard to Petitioner's factual submission that Item 26A and Item 45 are *no longer the same* items of evidence as those originally collected by police at the YCH crimescene, yet had apparently been replaced/switched out with other 9 mm Makerov shell casings, as the Quadrant and Top view photographs displayed shell casings which had *neither* any kind of dent (as is prominent in Superior Court Exhibit #53, which is a color photograph of original Item #26A submitted at trial) or a visible compression/crushed surface or other damage (as original Item #45 was described during sworn testimony by PPD Detective Dillian as memorialized in TR 9/19/01@pp. 13, 27-29, 37, 72-75). *See* Petitioner's AUB@pp. 87-89 and 91-93 *citing* Petitioner's UAE, Exhibit #63, 2nd Supplemental Affidavit of R.Watkins at pp. 2-3 with attached Quadrant and Top View Photographs of the shell casings collected at the YCH crimescene, including Items 26A, 45, 46, 54, 56, 66, 70, 77 and 79.

Secondly, Petitioner submitted in his 2nd Supplemental Brief and Unified Briefing the additional opinions of forensic experts Watkins and Rogers who examined the original crime scene photographs of Item 26A and Item 45 under magnification, and confirmed both pictured items appeared to be similarly

compressed.[47] *See* Petitioner's AUB@pp. 92-93 *citing See* Petitioner's UAE, Exhibit #63, 2nd Supplemental Affidavit of R.Watkins at pp. 3-4, and Exhibit #64, 2nd Supplemental Affidavit of F.Rogers at pp. 2-3.

Finally, it was submitted Petitioner's retained Crimescene Expert F.Rogers had discovered an additional shell casing, Item #46, had been also switched out. *See* Petitioner's AUB@pp. 93-94 *citing* Petitioner's UAE, Exhibit #64, 2nd Supplemental Affidavit of F.Rogers at pp. 3-4 with photographs of Item #46. Such a finding supported the PPM/C claim included replacement of the original shell casings by police to cover up the planting of evidence in Petitioner's bed, especially given his firearm was *not* the 9 mm Makarov murder weapon, yet merely a 40 caliber firearm. Petitioner's AUB@ 94 *citing* Petitioner's UAE, Exhibit #38, Affidavit of S.Derby at pp. 1-4.

In presenting the new factual allegations in Petitioner's 2nd Supplemental Brief and later Unified Briefing to the PCR court, Petitioner asserted that the supplemental affidavits of Forensic Experts Watkins/Rogers (Exhibit 63, 2nd Supplemental Affidavit of R.Watkins, and Exhibit 64, 2nd Supplemental Affidavit of F.Rogers) referencing Items 26(A) and 45, as well as the copy of the Grand Jury

[47] It is submitted that the similar compression was reported to the lower court as being first noted as to Item #26A when Rule 32 counsel was sharing progress in case with Petitioner's 6th grade teacher, Ms. Rudloff, who was shown a black/white copy of State's Exhibit #53 or Item #26A. It is noteworthy that Ms. Rudloff, who is a Master Teacher and Education Consultant, not only continues to firmly believe in Petitioner's innocence and good nature (*See* Petitioner's Exhibit # 2, Affidavit of P. Rudloff. *See* Petitioner's AUB@pp. 92-93.

Transcript in the present case (Exhibit 65) in which the police testified that Item 26(A) had been found in Petitioner's bed tying him to the homicides[48], not only helped support his claim of PPM/C, yet his AI claim as well because police would not have to plant, tamper with and destroy evidence in a case involving a truly guilty person, as such misconduct would result in a grave injustice. *See* Petitioner's AUB@p. 94. Further, it was also brought to the lower court's attention that the shell casings in issue, Items 26A, 45 and 46, especially Item 26A, were not only submitted in evidence to Petitioner's detriment during his 2001 guilt phase trial and 2007 penalty phase, yet were also specifically referenced by the State in both Opening/Closing argument at Petitioner's 2001 Guilt and Penalty Phase Trials contrary to the State's assertions in briefing otherwise. See Petitioner's AUB@p. 95 *citing* Petitioner's 2001 Guilt Phase Trial at TR 9/11/01 at pp. 32, 34-35, 38-39 and TR 9/25/01 at pp.45-48, 51-54, 64, as well as at Petitioner's 2007 penalty phase trial (TR 5/1/07 at pp. 34-35 and TR 5/29/07).

3. More Compelling Evidence was Found during the Ongoing Post Conviction Investigation Supporting Petitioner's PCR Claims.

More evidence was discovered after the filing of Defendant Moore's Opening Petition and 1st and 2nd Supplemental Briefs requiring the preparation and filing of additional Supplemental Briefing, and ultimately, Unified Briefing giving

[48] *See* Petitioner's UAE, Exhibit 65, Grand Jury Transcript at pp. 10, 18-19.

additional evidentiary support to multiple post conviction relief claims.

As discussed in Unified Briefing to the lower court, Petitioner had determined that although he had properly raised issues concerning his Actual or Factual Innocence (AI) under Rule 32.1 (h) ARCrimP and alleged Police and Prosecutorial Misconduct (PPM/C) in the referenced earlier briefing which included[49] the suggested planting, tampering with and/or destruction of highly material ballistics and other exculpatory DNA evidence through a newly discovered evidence claim under Rule 32.1 (e) Ariz.R.Crim.P., applicable law required that he also raise separate State and/or federal constitutional due process claims related to *the planting, tampering with* and *destruction of evidence* under Rule 32.1 (a) because if such error was not raised in Petitioner's first post conviction or collateral appeal, it may have been waived or precluded under Rule 32.2 Ariz.R.Crim.P. *See* Petitioner's AUB@pp. 96-97.

Further, given the remedy under applicable law for outrageous governmental conduct and bad faith destruction of evidence (ie. dismissal *with* prejudice), *infra*, is a more beneficial remedy to a *capital* defendant than the remedy for newly discovered evidence (ie. obtaining a new trial), it was submitted that the failure to

[49] It is noteworthy that Petitioner's original PPM/C claim also included multiple *Brady* violations, as well as alleged witness tampering/misconduct by the State involving key State's witnesses Deborah Ford and Jessica Borghetti. RA 989, OP dated 8/15/14@pp. 61-62 and pp. 102-09; RA 1293, AUB@pp. 60-61 both *citing* Petitioner's UAE, Exhibit #26, Affidavit of Alan Feliciano, at pp. 1-2; Exhibit #49, Affidavit of Jessica Borghetti at pp. 1-2 and Exhibit #50, Affidavit of P. Coppen at pp. 2-3.

raise such factual issues as due process violations would have been ineffective under applicable law in *State v. Bennett*, 213 Ariz. 562, 567-68, 146 P3d 63, *en banc*, (2006) [Appellate counsel ineffective for failing to argue stronger issue on appeal.] *See* Petitioner's AUB@pp. 96-97.

As the result of these realizations, Petitioner's Rule 32 counsel advised the lower court in briefing that he had submitted a simple question to his retained forensic experts regarding the destruction of material evidence alleged in earlier briefing. *See* Petitioner's AUB@p. 97. He inquired of both experts whether the destruction of evidence discovered in this case[50] may have been intentional or purposeful (ie. in "bad faith"), rather than merely negligent. *See* Petitioner's AUB@pp. 97-98.

Thereafter, the lower court was advised that Crimescene Expert Roger was

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[50] The alleged destruction of evidence included *not only* the tampering with and destruction of both the multiple cartridge or shell casings related to the subject shooting which are now no longer the same casings and definitely had to have been switched out and destroyed by police given the chain of custody (ie. Items 26A, 45 and 46) to allegedly hide the planting of a *highly portable and/or convenient* baggy of evidence (Item 26) surreptitiously placed by police in Petitioner Moore's bed (containing both shell casing 26A and projectile 26B matching murder weapon) in order to improperly tie Mr. Moore to the Yale Crackhouse homicides *just 3-4 hours after the State's only eyewitness Deborah Ford* ***could not*** *identify the Petitioner in a six pack line-up* as the perpetrator of the homicides within just days of the homicides, yet the destruction of DNA evidence found on Item 22 with the apparent 1.0-1.5 inch blood stain on end of the knife (Item #22) blade that was found at the crimescene in close proximity to the first chronological victim or Crack Dealer Sergio Mata's foot (and was believed by the assigned Maricopa County Medical Examiner Dr. Archilaus Mosely to have come from a defensive wound inflicted upon the actual perpetrator by victim Mata), which blood stain was later found to have been destroyed by police given the chain of custody leaving only a distinctive shiny surface exactly where the blood stain was plainly visible in crimescene photographs (State's guilt phase trial exhibits #109 and 110), with said destruction being discovered for the first time at the time of Court ordered post conviction DNA testing related to the Yale Crackhouse homicides in issue.

led to re-examine the crimescene photos in this case and made additional discoveries.

> *See* Petitioner's AUB@p. 98 *citing* Petitioner's UAE, Exhibit #66 (3rd Supplemental Affidavit of F. Rodgers) at pp. 1-3.

Based on his review, Petitioner then submitted to the PCR court that Expert Rodgers had discovered that State's Exhibit #35[51], which was a picture of Item #66, a shell casing found at the YCH homicides crime scene and photographed on a shelf inside the crackhouse on *11/16/99*, actually ***had the same dent*** as that observed on Item #26A, which was the shell casing purportedly found by police in Petitioner Moore's bed and presented at trial as State's Exhibit #53.[52] *Supra.*

See AUB@pp. 98-99 *citing* Petitioner's UAE; Petitioner's Exhibit #66 (3rd Supplemental Affidavit of F. Rogers)@pp. 3-5.

It was further presented that Expert Rodgers also discovered upon magnified inspection of the crime scene photographs that another shell casing found on the carpet inside the Yale Crackhouse following the 11/16/99 shooting, Item #70, previously submitted at trial by the State as State's Exhibit #36, had also been

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[51] It is noteworthy that Item 66 was previously marked and admitted as State's Exhibit #41 at Petitioner's 2001 guilt phase trial and at his 2004 penalty phase trial.

[52] Item 26A was previously marked/admitted as State's Exhibit #60 at both Petitioner's 2001 guilt phase trial and 2004 penalty phase trial and specifically referenced by the State during Grand Jury proceedings. *See* Petitioner's Exhibit #61 (TR 11/30/99 at p. 19) and during other parts of the 2001guilt phase trial as previously discussed. *Supra.* Similarities were also noted between both Item 26A and Item #45 (shell casing found in tire track at Yale Crackhouse crime scene) as both Exhibits 53 and 107 respectively depicted shell casings that were similarly compressed.

switched out because neither present day Items 66 nor 70 were the same as those depicted in the 1999 photographic record of each item respectively submitted into evidence as State's Guilt Phase Trial Exhibits 35 and 36.

See Petitioner's AUB@p. 99 *citing* Petitioner's UAE; Petitioner's Exhibit #66 (3rd Supplemental Affidavit of F.Rogers) at pp. 5-6.

All told, Expert Rodgers had not only determined to a reasonable degree of certainty that at least five (5) of the cartridge casings allegedly recovered from or related to the YCH shooting had been switched out (including Item 26A purportedly recovered from Petitioner's bedroom/bed, and Items 45, 46, 66 and 70 recovered from Yale Crackhouse crime scene).

See AUB@pp. 99-100 *citing* Petitioner's UAE; Petitioner's Exhibit #66 (3rd Supplemental Affidavit of F.Rogers) at pp. 5-6.

Expert Watkins also reviewed YCH Crimescene photographs coming to the same conclusion regarding Item #66 as depicted in State's Exhibit 35; confirming the same *dent* in size, shape and location was present on both Items 66 (gathered by police on 11/16/99) and 26A (purportedly gathered by police after search Petitioner's residence on 11/19/99) as respectively depicted in present State's Exhibits 35 and 53.[53]

[53] As explained in Petitioner's AUB at p. 101, footnote 47, State's Exhibit #35 (a crime scene photograph depicting Item #66 or a shell casing from inside the YCH crimescene) had been previously admitted at Petitioner's 2001 guilt phase trial and 2004 penalty phase trial as State's Exhibit #41, while State's Exhibit #53 had been previously admitted at Petitioner's 2001

See Petitioner's aub@pp. 100-01, *citing* Petitioner's UAE, Exhibit #67, 3rd Supplemental Affidavit of R.Watkins at pp. 6-7.

It was further explained to the court that Criminalist Watkins confirmed that neither original Items 66 nor 26A, respectively depicted in present State's Exhibits #35 and #53, are actually the same as *present day* Items 66 and 26A which he had personally inspected, photographed and submitted to the Court. *See* Petitioner's AUB@p. 101.

With regard to a *Youngblood* destruction of evidence analysis, both experts opined that the destruction of forensic evidence discovered in this case during post conviction as to the referenced shell casings, was done in bad faith reflecting a conscious effort to hide the truth, namely that Item 26A was ***planted*** by police in Petitioner's bed to improperly tie him to the Yale Crackhouse homicides, and later removed from the case or destroyed to cover up the impropriety.

> *See* Petitioner's AUB@p. 102 *citing* UAE, Petitioner's Exhibit #66 (3rd Supplemental Affidavit of F.Rogers) at pp. 2-4; and Exhibit #67 (3rd Supplemental Affidavit of R.Watkins) at pp. 2-7.

Additionally, Petitioner submitted to the court in briefing further powerful evidence filed with Petitioner's 3rd Supplemental Brief, supporting his AI, PPM/C and IAC claims as follows:

> 1. Petitioner's UAE, Exhibit 68, MCSC Trial Exhibit Worksheets for Petitioner's trials confirming the relevant penalty and guilt phase exhibit numbers for Items 26A, 45 and 66 used by

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guilt phase trial and 2004 penalty phase trial as State's Exhibit #60.

the State to convict Mr. Moore;

2. Petitioner's UAE, Exhibit #69, Declaration of retained Forensic Engineer Dr. D.Bosch, confirming findings of forensic experts Watkins and Rogers, yet specially concurred with or provided additional compelling scientific evidence that Item #26A was *definitely dented* at the time it was originally photographed given his area of expertise in lighting and materials, and provided evidence that Item #26A may have also originally been item #45. (Id.@pp. 2-4);

3. Petitioner's UAE, Exhibit #70, consisted of Counsel J. Canby, Esq. confirming additional failure of former counsel to properly investigate the available forensic evidence (Id.@pp. 2-4); and

4. Petitioner's UAE, Exhibit #71, Report of Handwriting Expert, H. Harralson, Establishing for both actual innocence and ineffective assistance of counsel claim purposes that Mr. Brown's handwriting is consistent with being *left handed* – just as that of the actual perpetrator of the 1999 Yale Crackhouse homicides per trial testimony of D. Ford (Id.@pp. 2-3)[54]

See Petitioner's AUB@pp. 102-03 specifically addressing new evidence and Petitioner's UAE Exhibits #68-71.

4. Petitioner Submitted Ever-Mounting New Evidence to the Post Conviction Court in Briefing Strongly Supporting his Actual Innocence (AI) and Police and Prosecutorial Misconduct (PPM/C) Post Conviction Relief Claims.

Petitioner submitted ever-mounting evidence to the PCR court strongly supporting his AI and PPM/C claims, establishing that a definite *pattern of bad faith misconduct by police* had occurred in this case.

[54] *See also* TR 9/13/01.

See Petitioner's AUB@pp. 105-110.

First, Petitioner submitted with his 4th Supplemental Brief and later filed Unified Briefing Petitioner's Exhibit #77, which exhibit memorialized the PPD interview of D.Ford, the State's only eyewitness to the YCH homicides in this case, who was both *unable* to identify Moore in a six-pack lineup just 4 days after the shooting on 11/20/99[55], yet had identified the artist's conception drawing of Brown *wearing a Dallas Cowboys cap* as looking somewhat like the perpetrator.

> *See* Petitioner's AUB@pp. 107-08 *citing* Petitioner's UAE, Exhibit #77, 11/20/99 PPD Interview of D. Ford.

In sharp contrast, Petitioner also presented a related exhibit, Petitioner's Exhibit #78, the specific police supplemental report pertaining to the Ford 11/20/99 PPD video-taped interview which surprisingly left out important exculpatory facts plainly evident from the video including: 1) that Ms. Ford could *not* identify Petitioner from the six pack line-up, and 2) that Ford implicated the original suspect Brown after being shown the artist's conception of original suspect Brown depicted as wearing a *Dallas Cowboys Cap*.[56]

> *See* Petitioner's AUB@pp. 107-08 *citing for comparison* Petitioner's UAE, Exhibit #77 (11/20/99 Video Interview of Yale Crackhouse victim Deborah Ford) and Exhibit #78 (Supplemental PPD Report re: 11/20/99 Interview of D. Ford).

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[55] The referenced 6 pack line-up was devoid of having included a picture of original suspect Brown. Petitioner was picture #5 in the six-pack lineup. *Infra.*

[56] *See* Petitioner's UAE, Exhibit #20, PPD Artist's Conception of Original Suspect.

Petitioner also established that the PPD interview of Ms. Ford, or Exhibit#77 was *never* shown to the 2001 guilt phase jury by the defense supporting his innocence based upon third party culpability. *See* Petitioner's AUB@pp. 107-08. It was also pointed out to the lower court that the search of Petitioner's bedroom, at which time Item #26A was *planted* in Petitioner's bed, occurred at 8pm on 11/20/99, just a few hours after Ford could *not* identify him. *See* Petitioner's AUB@p. 108.

Secondly, Petitioner presented Exhibit #79 with briefing as it contained pages from case Detective Cooning's YCH Global Report pertaining to the police interview of another important witness, Ford's son, AC, who had told the police Brown was the perpetrator of the homicides because Brown had threatened to kill his Mother victim Ford. Although the pages of this police report suggest that AC reported that Brown had merely threatened to kill Ms. Ford, *"at some time in the past"*, the affidavit of Ford's ex-husband C.Ford confirms that Brown had threatened to kill D.Ford, in AC's physical presence, *just a couple of days* ***before*** *the YCH homicides* occurred.[57]

[57] Such exculpatory evidence was critical to the defense in this case, yet was never appropriately disclosed because the timing of the threat was recorded as "in the past" and it was *conveniently* left out of former PPD Detective Cooning's report that the threat was just 2-3 days before the shooting. C.Ford's affidavit, previously numbered as UAE Exhibit #21, was purposely resubmitted as Petitioner's Exhibit #80 to allow a better side by side comparison of both Christopher Ford's sworn affidavit about his son AC's statements to police that the original suspect Brown had threatened his Mother just a few days before the Yale Crackhouse homicides.

See Petitioner's AUB@pp. 108-09.

It was further explained to PCR court that this new evidence, which was *never* presented at Petitioner's trial, not only supported Moore's AI claim, yet established the pattern of misconduct by police did not begin with planting/destruction of evidence as to Item 26(A), or with the destruction of the DNA or blood evidence on Item# 22, yet had begun much earlier, permeating the police investigation in this case. *See* Petitioner's AUB@p. 109.

Moreover, it was argued that had this evidence would have undermined confidence in its outcome. Id.

Third, Petitioner presented with his 4th Supplemental Brief/Unified Briefing Petitioner's Exhibits #81 and 82 which were supplemental affidavits of forensic experts Rodgers and Watkins regarding statements made by former PPD Homicide Detective Barnes in their presence that he had personally witnessed former PPD Detective Femenia, the detective in the YCH homicide investigation who "found" the referenced baggy of evidence in Moore's bed, planting evidence in another multiple homicide case by using a plastic baggy.

See Petitioner's AUB@p. 110 *citing* Petitioner's UAE, Exhibit #81, Supplemental Affidavit of F.Rogers@pp. 2-4 and Exhibit #82, Supplemental Affidavit of R.Watkins@pp. 2-3.

As to this intriguing new evidence Petitioner submitted it was especially important for the purposes of his AI and PPM/C claims to realize that Femenia was

not only the detective that purportedly "discovered" the plastic baggy containing Item #26A and other "incriminating" ballistics evidence in Moore's bed, yet that Crimescene Expert Rogers had previously reported *grave* improprieties with Femenia's collection/photographing of said evidence.*Supra.*

See Petitioner's AUB@p. 110 *citing* Petitioner's UAE, Exhibit #81, Supplemental Affidavit of Crimescene Expert F.Rogers at p. 3.

Finally, Petitioner submitted in briefing that the foregoing new evidence was promptly submitted in briefing when discovered to augment his AI and PPM/C claims. *See* Petitioner's AUB@pp. 109-10.

5. Petitioner Ultimately Found Evidence of Such Weight/Authority *After* Filing his Opening Petition, and 1st-4th Supplemental Briefs that it not only Required both the Preparation and Filing of a Fifth Supplemental Brief Supporting his PCR Claims, yet the Dismissal of his Case.

Petitioner ultimately found evidence of such weight/authority after filing his Opening Petition and 1st-4th Supplemental Briefs, that it required both the preparation and filing of Petitioner's final or 5th Supplemental Brief and subsequent Unified Briefing supporting his PCR claims, and dismissal of his case *with prejudice*. *See* Petitioner's AUB@p. 111. This evidence strongly supported not only Petitioner's AI and PPM/C claims by confirming a definite pattern of bad faith misconduct by police who not only hid or suppressed the truth as to Petitioner's innocence, yet brought about his wrongful conviction by planting

evidence to falsely incriminate him and destroyed exculpatory evidence preventing his exoneration in violation of his constitutional rights. Id.

Petitioner's final briefing submitted the following: 1) new evidence of a *strong connection between this case and the Ray Krone 2002 actual innocence/exoneration case* as both cases involved police misconduct, and common police bad actor PPD Det. Dennis Olson, 2) new/powerful evidence supporting police misconduct in the case at bar through multiple expert witnesses, including Experts Rodgers/Watkins, two (2) former Assistant Directors of the PPD Crime Lab, who confirmed after thorough review of all related forensic evidence that a definite pattern of police misconduct existed in this case, and 3) additional evidence supporting Brown's culpability and Petitioner's innocence, including a) admissions by Brown to police suggesting responsibility for the homicides, b) a Supplemental Declaration by State's key witness Ortiz, providing additional eyewitness testimony not only supporting the culpability of original suspect Brown, yet showing Petitioner was *never* present at the YCH homicides, and c) compelling evidence outlined by Legal Expert Hammond establishing that a ***manifest injustice*** had occurred in this case based upon substantial police and prosecutorial misconduct that framed evidence against the innocent Petitioner and deflected evidence away from Brown, which misconduct resulted in a grave miscarriage of justice. *See* Petitioner's AUB@pp. 112-13.

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Thus, Petitioner presented to the PCR court the following additional items of evidence supporting both his AI and PPMC claims.

First, Petitioner presented compelling evidence confirmed by Legal Expert Hammond of a close/unusual connection between the present 1999 actual innocence case and the 2002 *Krone* exoneration, as each case involved similar misconduct by PPD Detective Olson who, it is alleged, personally misrepresented facts in an effort to win/preserve Ray Krone's conviction at all costs (fabricating false evidence to tie defendant Krone to crime and hiding exculpatory evidence, including DNA).

See Petitioner's AUB@p3.113-14 *citing* Petitioner's UAE, Exhibit #83, Declaration and Sworn Interview Transcript of R.Krone at pp. 7-10, 21, 24-29, 32-37, 39, 43-44, 47-52, 68, 73; and Exhibit #84; 2nd Suppl. Declaration of L.Hammond, pp. 9-10.

Secondly, Petitioner presented multiple expert affidavits confirming the alleged pattern of police misconduct in this case as *firmly established based* by experts Watkins/Rodgers as including the 11/20/99 *planting of incriminating ballistics evidence by police* in Petitioner's bed via a baggy (Item #26) containing a shell casing (Item #26A) and a projectile (Item #26B), the subsequent *switching out of evidence* or shell casings, including Item #26A [having noticeable dent in its side markedly similar to damage previously reported at trial by PPD Det. Sally Dillian and observed as to Item #45 (being compressed and/or crushed and having other damage), and a dent later discovered by expert Rodgers to be present on Item

#66 which was a shell casing found on a shelf taken into evidence at the YCH Crimescene on 11/16/99, which, remarkably, the presently existing Items, ie. Item #45 and Item #66, no longer have, and in fact appear to have, no damage whatsoever)][58], and the *destruction of exculpatory DNA/blood evidence* collected from the Crimescene on a blood stained knife or Item #22. *See* Petitioner's AUB@p. 114-15 *citing* Petitioner's UAE, Exhibit #85; 6th Supplemental Declaration of Ballistics/Firearms Expert R.Watkins at pp. 2-6; Petitioner's Exhibit #86; 6th Supplemental Declaration of Crimescene Expert F.Rodgers at pp. 2-6.

The *uncontradicted* affidavits of Experts Rodgers/Watkins, as well as the sworn declarations of renowned Exoneration/Legal Expert Hammond and former PPD Homicide Detective Petrosino provided compelling support in briefing to the PCR court for its consideration of Petitioner's claim that blatant police misconduct occurred throughout this case, with Expert Hammond describing the foregoing referenced forensic opinions of Watkins/Rodgers as "unassailable", especially given said experts vast law enforcement and criminal investigation experience (almost exclusively prosecutorial in nature) and painstaking work in case (*See* Petitioner's AUB@p. 115 *citing* Petitioner's UAE, Exhibit #84; 2nd Suppl.Decl. of L.Hammond, pp. 6-10), and Homicide Investigative Expert J.Petrosino, who both

[58] This, according forensic experts Watkins and Rodgers was necessary in order to cover up the original planted evidence [ie. taking an item of evidence from the Crimescene evidence, namely a shell casing, and then having to replace all of the shell casings in the case itself in order for them to all match the same firearm used to generate the new replacement casing, given that the planted evidence – taken from the Yale Crimescene evidence-- had to be replaced.]

deferred to the forensic experts' findings, yet confirmed particular aspects of their opinions by the application of his 25 years experience in homicide investigation, especially regarding switching out casing evidence to cover-up the planting of evidence to incriminate Moore, and the wholly egregious nature of purposely destroying evidence in an active death penalty case. *See* Petitioner's AUB@pp. 115-16 *citing* Petitioner's Exhibit #87; Affidavit of Former PPD Homicide Detective J.Petrosino@pp. 2-6.

Third, Petitioner presented more evidence supporting Brown's third party culpability, as well as both Petitioner's AI and PPM/C claims. This evidence included Brown's admissions to police just two (2) days after the YCH Homicides when interviewed on 11/18/99[59] in which he admitted borrowing/riding around in *a truck* close in time to the YCH homicides, which admission was highly relevant due to trial testimony of former PPD Det. Dillian regarding presence of vehicle at the time of homicides leaving substantial tire tracks and running over ejected shell casing (ie. Item #45) from homicides in issue, as well as the Original Declaration of former State's witness Ortiz (previously filed as Petitioner's Exhibit #51) who had confirmed ***a "truck"*** was present at the time of the shooting, and immediately after the shots were fired the truck's lights came on and it did a "donut" as it turned around and sped away from the YCH Crimescene. Id. In fact, the tire track in

[59] Petitioner's AUB at pp. 116 *citing* Petitioner's UAE, Exhibit #88, 11/18/99 PPD Interview of Original Suspect T.Brown at p. 6.

which Item #45 was found came from a truck tire, as supported by the previously submitted affidavit of Automotive/Truck Expert Meeker. *See* Petitioner's AUB@pp. 116-17 *citing* Petitioner's UAE, Exhibit #89, TR 9/19/01 (Testimony of Det. S.Dillian)@pp. 1-2, 13-29, 35, 37-38, 70-15, 79, Exhibit 51, Affidavit of S.Ortiz at pp. 2-3, and Exhibit 54, Affidavit of ASE Certified Master Auto/Truck Mechanic D.Meeker at pp. 2-3.

Furthermore, Petitioner submitted in PCR briefing that original suspect Brown's 11/18/99 interview with police implicated Brown given he tells police victim Mata had "pulled a knife" on him during their fight, putting police on notice that any evidence on Mata's knife or Item #22, especially biological evidence/blood, would need to be preserved for DNA testing. *See* Petitioner's AUB@p. 117 *citing* Petitioner's UAE, Exhibit #88, 11/18/99 PPD Interview of Original Suspect Brown@p. 3, Para. 5, Line 2). As the result, it was argued that the destruction of the DNA evidence in issue was arguably the most egregious incident of police misconduct in the case at bar, given that any chance of Petitioner exonerating himself by DNA testing was purposely destroyed by the police, and that police would have tested the evidence, rather than destroying it, if they believed he was the actual perpetrator of the homicides. *See* Petitioner's AUB@p. 117.

Moreover, Petitioner further argued in briefing that the Supplemental

Declaration of *former State's witness* S.Ortiz further implicating original suspect Brown given that she not only heard him make threats against victim Mata as he left following their fight on 11/16/99, yet that Brown subsequently returned *just before* the YCH shooting and then was seen running away from the Yale Crackhouse immediately *after* the gunshots were fired. *See* Petitioner's AUB@pp. 117-18 *citing* Exhibit #90; Suppl. Declaration of S.Ortiz@ pp. 2-3. In sharp contrast, Ortiz not only swears Moore was *never* present before or after the YCH shooting, yet that she had picked up Moore as he walking on a street w/o access to the YCH homicides 1.5 hours *after* the shooting, that he was a courteous/good young man, that police had tried to confuse her to name Petitioner as the perpetrator when it was Brown whom she believed had committed the murders, and Petitioner had *never* smoked a crack pipe with both victim Deborah Ford and Sarry Ortiz.[60] *See* Petitioner's AUB@pp. 117-18 *citing* Exhibit #90; Suppl. Declaration of Sarry Ortiz at pp. 3-4.

Finally, regarding Mr. Moore's AI claim which he has consistently maintained for 23 years ago, he also submitted the 2nd Supplemental Declaration of

[60] It is especially noteworthy that Deborah Ford's trial testimony in which she claimed that Petitioner had been present at the Yale Crackhouse and had actually smoked a Crackpipe with both she and Sarry Ortiz prior to the shooting, has been totally disproven by not only Ms. Ortiz's Suppl. Declaration, yet arguably by Court ordered Post Conviction DNA testing in this case which found that the DNA of two (2) women (presumably Ms. Ford's and Ms. Ortiz's) was found on a crackpipe recovered at the scene, and that Mr. Moore's DNA was not present on *any* of the evidence tested, including the crackpipe. *See* Petitioner's UAE, Exhibit #34, Affidavit of Bode Technology Scientist M.Donohue at pp. 1-4.

Exonerations/Legal Expert Larry Hammond in which the founder of the Arizona Justice Project questions the reliability of the State's evidence supporting Petitioner's convictions, concluding that the evidence is now discredited based on police misconduct in this case, and given the wrongful conviction in this case, Moore is a victim of a *manifest injustice*, given the post conviction evidence has certainly established a "reasonable likelihood" that he is actually innocent. *See* Petitioner's AUB@pp. 118-19 *citing* Petitioner's UAE, Exhibit #84; 2nd Suppl. Declaration of L.Hammond, pp. 10-15.) Therefore, he was entitled to post conviction relief.

6. Petitioner Substantially Undermined the Validity of the State's Convictions in his Case by Calling into Serious Question through Post Conviction Briefing the Legitimacy of the State's Witnesses/Evidence Against him at Trial.

Petitioner substantially undermined the validity of the State's convictions in his case by calling into serious question through post conviction briefing the legitimacy of the State's witnesses/evidence against him at his trial, especially State's witnesses Ford, Borghetti, and Ortiz, as well as the ballistics evidence now discredited by Petitioner's forensic and other experts.

First of all, while the State's case against Petitioner substantially hinged upon the identification of eyewitness D.Ford, the State was unable to contradict

Petitioner's evidence that Ford was unable to identify Petitioner as the perpetrator of the YCH homicides on *multiple* occasions, including just 4 days after the shooting, in a later video deposition, and on the first day of his trial. *Supra.*

Secondly, a close review of the 1999-2001 pretrial interview tapes had revealed that State's key witness J.Borghetti *admitted* during a pretrial interview that she *had lied to the police to **falsely implicate** Petitioner in the homicide*. *See* Petitioner's AUB@p. 119 *citing* attached Petitioner's UAE, Exhibit #91; Transcript of Interview by Counsel of J.Borghetti dated 1/17/0@pp. 3-11.

Third, State's witness Ortiz has specifically exonerated Moore by categorically stating that he was ***not** present* at the Yale Crackhouse at the time of the shootings, and that she never saw him at the Crackhouse, actually picking him up on the road 1.5 hours ***after*** the homicides had occurred. *Supra.*

Finally, the credibility of the State's ballistics evidence has been substantially undermined by the uncontradicted post conviction evidence of former PPD Crimelab Assistant Directors Rodgers/Watkins and S.Derby, who respectively testified by affidavit that police had planted ballistics evidence in Moore's bed and tampered/destroyed evidence to cover up the planting of evidence, and that Petitioner's firearm was not a 9 mm. Makerov, yet a 40 caliber handgun. *Supra.*

Also, Petitioner submitted for the lower court's consideration that a review

of the relevant police reports in his case further revealed additional evidence concerning the fact that essential witness Barrios, a reasonably believed *eye witness* to the Yale Crackhouse homicides, specifically referred to the original suspect Tony Brown (when shown the original suspect's photograph) as *"It's this Mother Fucker, I'm sure man, I'm sure"*, suggesting by the overt and negative connotation related to Brown that he was, in fact, the "MF'er" who had committed the homicides. *See* Petitioner's AUB@p. 120 *citing* attached Petitioner's UAE, Exhibit #92; Supplemental PPD Report dated 11/18/99@pp. 2, 13,14.

In sharp contrast to Petitioner's four (4) major claims which included his AI, PPM/C, IAC and his mental incompetency due to diabetic ketoacidosis (MIDK) at the time of his 2001 guilt phase trial, all of which were based upon substantial evidence presented in briefing, including sworn affidavits and declarations by fact and expert witnesses and relevant records, documents and trial transcripts/exhibits, the State, in effect argued that Mr. Moore's convictions should be upheld merely based upon the evidence presented at the time of his 2001 guilt phase trial, without providing *any* contradictory evidence. Petitioner's main argument in his Reply briefing was that analogous to a civil summary judgment, material issues of fact existed as to his major claims because the State was unable to contradict the affidavits and other evidence presented in Petitioner's post conviction briefing with their own affidavits, as mandated or required by the plain language of Rule 32.9 (a)

(2) ARCrimP which states as follows as to the contents of the State's responsive brief:

> (2) *Contents.* The State's response *must* include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities, and ***must attach*** *any affidavits, records, or other evidence that contradicts the petition's allegations.* The State must plead and prove any ground of preclusion by a preponderance of the evidence.

Petitioner therefore respectfully submits this Statement of Material Facts as supportive of this most honored Arizona Supreme Court's review in the present case, and prays that it may not turn a blind eye to the highly compelling and *uncontradicted* evidence presented supporting his post conviction claims.

ARIZONA SUPREME COURT
SHOULD GRANT REVIEW

I. INTRODUCTION:

The Arizona Supreme Court should grant review for multiple reasons.

First, under Arizona Supreme Court's decision in *State v. Carriger*:

> "It is true that the court may hold a prehearing conference, (citations omitted), and the court may dispose of the matter summarily ... if the court determines that "no material issue of fact or law exists" which would entitle the petitioner to relief under the rule, and that no purpose would be served by any further proceedings. However, these are *exceptions* to the general rule.
>
> ...
>
> If in doubt, a hearing should be held to allow the defendant to raise all relevant issues, to resolve the matters finally, and to make a record for review.
>
> Rule 32's purpose, in part, is to provide a record by which the court's disposition of defendant's allegations may undergo state and federal appellate review. *See Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L. Ed. 2d 379 (1982)." (Emphasis added.)
>
> *Id.* at 132 Ariz. 301, 645 P.2d 816 (1982).

Therefore, summary dismissal in a *death penalty* case is not appropriate where new evidence has been discovered. An evidentiary hearing must be held to develop the factual record for appellate review. *Carriger, Rose, supra.*

Second, this case involves substantive claims. Specifically:

1) Ineffective assistance of trial counsel occurred involving counsels' *failure to properly investigate* and present defense witnesses, including *third party culpability*, forensic, alibi, and good character/non-violent nature evidence. *See Strickland v. Washington*, 466 U.S. 668 (1984), and *State v. Denz*, 232 Ariz. 441, 306 P.3d 98 (2013).

2) Police and prosecutorial misconduct is evident based upon incriminating evidence being planted in Petitioner's bed. *See United States v. Russel*, 411 U.S. 423, 431–432 (1973) [Outrageous government conduct occurs when the actions of law enforcement officers … are "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction"]; *see also Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785 (1967) ["the Fourteenth Amendment cannot tolerate a … conviction obtained by the knowing use of false evidence" *citing Mooney v. Holohan*, 294 U.S. 103 (1935)[61]. Police tampering with critical evidence, multiple witnesses, and intentionally destroying exculpatory evidence, including *critical* DNA evidence, requires review. *See Russel, supra; see also Arizona v. Youngblood*, 488 U.S. 51 [Purposeful … destruction of evidence by police creates inference that evidence purposely destroyed was exculpatory entitling

[61] *See also Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256 (2004); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972).

defendant to dismissal of case.].

3) Petitioner's actual innocence as supported by clear and convincing evidence warrants review. Rule 32.1 (h) Ariz. R. Crim. P.; *see also Schulp v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 867 (1995) [...when it is "more likely than not that no reasonable juror would have convicted the defendant in the light of the new evidence]; *Herrera v. Collins*, 506 U.S. 390, 427, 113 S.Ct. 853, 874 (1993) [Assuming a truly persuasive demonstration of actual innocence renders execution of *capital* defendant unconstitutional]. Additionally, review is supported by third party culpability evidence, police and prosecutorial misconduct, and other new evidence. And finally,

4) The Petitioner's medically induced mental incompetence during the trial's guilt phase due to diabetic ketoacidosis caused by the State's misconduct in failing to properly feed Petitioner during trial or to give him required diabetes medication rendering Petitioner both unable to understand the nature of his case, nor be able to assist in his defense. *See Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 903 (1975) ["a person whose mental condition is such that he *lacks the capacity* to understand the nature of the proceedings against him, to consult with counsel and *to assist in preparing his defense* may not be subjected to a

trial.]

Third, review is appropriate because the lower Court abused its discretion by failing to presume the truth of the claims and related evidence presented, and by entering summary dismissal of Petitioner's post-conviction appeal despite material issues of fact presented regarding each claim. Given the State failed to controvert Defendant's numerous fact and expert witness affidavits provided wherein "the State's response must include a memorandum … and ***must*** include any affidavits, records or other evidence that contradicts the petition's allegations". Rule 32.9(a)(2) Ariz. R. Crim. P. In its failure to follow *State v. Amaral and State v. Kolmann,*[62] and federal law in *Townsend v. Sain,* in determining whether an evidentiary hearing should be ordered is to first consider the evidence supporting Petitioner's claims ***as true*** when conducting its colorable claim analysis. Next, determining whether, if such evidence was true, does Petitioner's case appear valid, such that, when considered true, such evidence would have changed the outcome of the case by creating a reasonable doubt as to its result, thus undermining confidence in the outcome of Petitioner's case. *See Hinton v.*

[62] *See both State v. Amaral*, 239 Ariz. 217, 220, 368 P3d 925 (2016) ["The relevant inquiry for determining whether the petitioner is entitled to an evidentiary hearing in newly discovered evidence case is whether he has alleged facts which, if true, would probably have changed the verdict or sentence] and *State v. Kolmann*, 239 Ariz. 157, 367 P.d 61 [The relevant inquiry … in an ineffective assistance of counsel case is whether the facts alleged supporting attorney's deficient conduct undermines confidence in the outcome of the case, such that there is a reasonable probability that, but for the alleged deficient performance confidence in the outcome of the case is undermined.]

Alabama, 571 U.S. 263, 275, 134 S.Ct. 1081 (2014) citing *Strickland v. Washington* at 695, 104 S.Ct. 2052 (1984) ["When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."]

Fourth, the lower court determined some erroneous facts existed, despite them being absent from the Court record and trial transcripts. Specifically regarding finding third-party culpability evidence was presented at trial concerning the original suspect, Mr. Brown. In the summary dismissal, the court suggested that PPD Detective Cooning testified in the 2001 guilt phase that Mr. Barrios had told Detective Cooning that Mr. Brown was the shooter. *See* Superior Court Summary Dismissal at pp. 26-27 citing TR 9/24/01 at pp. 134-36. This finding is not supported by the record. No such evidence was ever presented at Defendant's trial according to the trial transcripts. In fact, the third-party culpability evidence regarding Mr. Brown was not raised until mentioned in the Petitioner's post-conviction Opening Petition. RA 989, Opening Petition dated 8/15/14.

Therefore, the court improperly concluded the jury found Petitioner guilty despite such evidence, incorrectly suggesting third-party culpability evidence presented by Petitioner in post-conviction could not undermine confidence in the outcome of his case. However, as shown here, that evidence was not presented during trial. This is precisely the type of evidence considered by the Arizona

Supreme Court as most capable of creating reasonable doubt. *See State v. Prion*, 203 Ariz. 157, 52 P.3d 189 (2002).

When a post-conviction court abuses its discretion by failing to follow clearly established state and federal law as outlined herein, review is required.

The lower court dismissed each claim Petitioner asserted, including the supporting evidence submitted as being invalid without benefit of discovery or holding an evidentiary hearing for Petitioner's claims to be examined. Apparently this was because they conflicted with the 2001 guilt phase trial record. This is precisely why an evidentiary hearing is warranted – to develop the issues presented in the brief because they necessarily conflict with the trial record. *See* Summary Dismissal dated 9/23/21. The mandatory post-conviction relief requirements direct that "the State's response must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities, and *must* attach any affidavits, records or other evidence that contradicts the petition's allegations, which the State did not meet". Rule 32.9(a)(2) Ariz. R. Crim. P.

Notwithstanding Petitioner's declarations/affidavits supporting the Ineffective Assistance of Counsel, Police Misconduct, and Mental Incompetency claims, the State failed to submit *any* evidence whatsoever. Without appropriately addressing each material issue of fact by the State, each claim remained uncontroverted, requiring an evidentiary hearing.

As applicable State and federal law require the post-conviction court to believe the claim's truth and supporting evidence, especially when not contradicted by the State, were it able to as required under the Rules, when making its determination not to conduct an evidentiary hearing is error that should be corrected.

Finally, the lower Court abused its discretion by failing to follow applicable Arizona law regarding the colorable claim analysis. As asserted, Petitioner's claims, if taken as true, not only had the appearance of validity to undermine confidence in the outcome of his case requiring an evidentiary hearing, it is contrasted even more sharply against the unchallenged facts presented at trial by the State and on appeal. *State of Arizona v. Moore*, 222 Ariz. 1, 5-8, 11, 15-16, 213 P.3d 150 (Ariz. 2009). Especially given compelling and uncontradicted evidence that trial counsel was ineffective for failing to properly investigate or present *any* evidence at trial as strongly supported not only by trial counsel's own admissions, but by Mitigation Specialist Garcia's affidavits/declarations and Legal Standard of Care Expert Hammond's findings. *See* Petitioner's Exhibit #32, Declaration of Former Counsel John Canby at pp. 5-6; Petitioner's Exhibit 56, Affidavit of Former Mitigation Specialist Nancy Garcia at pp. 2-3; Petitioner's Exhibit #43, Declaration of Legal Standard of Care Expert Larry Hammond at pp. 7-18. Such limited "facts" as those presented at trial or referenced in the Supreme Court's

opinion that were arguably based upon the unchallenged evidence presentation by the State are substantially undermined given the new evidence discovered in post-conviction. The required elements of each claim are summarized here:

1) Ineffective Assistance of Counsel. Analysis regarding trial counsel, when presumed to fall below the standard of care, results in a reasonable probability that the outcome of the present case would have been different.

2) Newly Discovered Evidence. When analyzing police/prosecutorial misconduct, looking at the evidence that was planted, the evidence and witness tampering that took place, and critical DNA evidence having been destroyed, when each are presumed to be true, and whether taken individually or concomitantly, the outcome of Defendant's case would either probably have been different, or there is a reasonable probability that the outcome of his case would have been different.

3) Actual or Factual Innocence. It is probable that when analyzing the uncontroverted third-party culpability claim, the police misconduct issues, and good character/non-violent nature evidence, no reasonable juror would have found Petitioner guilty beyond a reasonable doubt. And

4) Mental Incompetence During Trial's Guilt Phase. Evaluating the facts and circumstances surrounding Petitioner's medical issues giving rise to his mental incompetence claim will show the issue was not waived and it is colorable. Therefore, there is a reasonable probability that the outcome of Petitioner's case would have been different when the mental incompetence issue is resolved in his favor.

Irrespective of the foregoing, review should be granted because Petitioner's case involves issues of statewide importance that are likely to reoccur in the future. It is noteworthy that the United States Supreme Court recognized, and the Arizona Supreme Court adopted the position that death penalty cases are entitled to a

heightened level of due process, which should include granting post-conviction evidentiary hearings to assure furtherance of the interests of justice. *See State of Arizona v. Hidalgo*, 241 Ariz. 543, 390 P3d. 783 at Para. 9, *citing Monge v. California*, 524 U.S. 721, 732–33 (1998).

II. STANDARD OF REVIEW

The standard of review for a lower court's Rule 32 denial due to a lack of colorable claim is an abuse of discretion; reviews regarding the interpretation or application of relevant court rules or statutes is *de novo*. *State v. Gutierrez*, 229 Ariz. 573, 577 at ¶19, 278 P.3d 1276, 1280 (2012*); State v. Bennett*, 213 Ariz. 562, 146 P.3d 63 (2006). Absent an abuse of discretion or error of law, an Appellate Court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012).

Although it is Petitioner's burden to show the Superior Court abused its discretion by denying a petition for post-conviction relief in a particular case, the decision as to whether a colorable claim is presented in a particular case and an evidentiary hearing is warranted, is, to some extent, discretionary with a trial court. *State v. Poblete*, 227 Ariz. 537, ¶ 1 (App. 2011) (petitioner has burden of establishing abuse of discretion on review). The Arizona Supreme Court recognized that *outer limits to that discretion exist*, whereby it is implicit that the

failure to grant an evidentiary hearing in a particular case may be clearly erroneous based upon the weight and credibility of evidence presented in post-conviction proceedings. *State of Arizona v. Bilke*, 162 Ariz. 51, 781 P2d 28 (Ariz. 1989) citing *State v. Adamson*, 136 Ariz. 250, 265, 665 P.2d 972, 987 (1983). An abuse of discretion occurs requiring review and reversal when a trial court fails to follow applicable law in rendering its decision in a particular case, affecting or prejudicing its outcome, or when a post-conviction court fails to properly investigate a Rule 32 defendant's claims by ordering an evidentiary hearing. *See State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012); *State of Arizona v. Pandeli*, 242 Ariz.175, 394 P. 3d 2 (Ariz. 2017).

III.

LEGAL ARGUMENT REGARDING LOWER COURT'S COLORABLE CLAIM ANALYSIS

Petitioner should have been granted an evidentiary hearing because his ineffective assistance of counsel (IAC), police and prosecutorial misconduct (PPM/C), actual innocence (AI), and mental incompetency at the trial's guilt phase due to diabetic ketoacidosis (MIDK) claims were supported by compelling, substantial evidence, which the post-conviction Court was required to believe as part of its colorable claim analysis.[63] *See Amaral, Kolmann*, and *Townsend, supra.*

[63]In determining whether a pleading Rule 32 defendant's claims are colorable, Arizona Courts have long recognized that a trial court is obligated to treat their factual allegations as true.

Presuming assertions *true* for colorable claims analysis, next the Court's duty is determining if any of these claims undermined confidence in the outcome of his case. *Id.*[64]

The test for Petitioner's actual innocence claim (AI) is whether clear and convincing evidence existed as to AI where no reasonable juror would have found him guilty as defined by the original language of Rule 32.1(h) Ariz. R. Crim. P.

Rule 32.1(a) & (d), Ariz. R. Crim. P. provide that post-conviction relief may be afforded based upon ineffective assistance of counsel, newly discovered police and prosecutorial misconduct which may be considered constitutional in nature, mental incompetence at trial, and other constitutional error.[65]

Petitioner submits that blatant and pervasive IAC occurred at the pretrial, guilt, and penalty trial phases, especially regarding the failure to investigate and present readily available evidence of third-party culpability, good character/non-violent nature, and alibi defenses supporting innocence. Further, egregious police and prosecutorial misconduct occurred not only supporting innocence, but the related constitutional claims warrant review. Finally, review is appropriate not

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State v. Jackson, 209 Ariz. 13, 15-16, 97 P.3d 113, 115-16 (App.2004) *citing State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

[64] Similarly, under federal habeas law, in 1963 the United States Supreme Court held in *Townsend v. Sain* that a post-conviction defendant is entitled to an evidentiary hearing if the evidence presented supporting his claims, if true, has the appearance of validity such that the outcome of his case would have been different. *Id.*, 372 U.S. 293 (1963).

[65] Pursuant to Rule 32.1 (a) "... any person who has been convicted of, or sentenced for, a criminal offense" may "secure appropriate relief" on the ground that the "conviction or the sentence was in violation of the Constitution of the U.S. or of the State of Arizona".

only due to Petitioner's incompetence during the guilt phase but for other constitutional error shown elsewhere herein – including structural error, both by conducting trial during "9/11" and, through the 2001 guilt phase, the Court's use of the *Portillo* burden of proof instruction.

Petitioner respectfully requests this Court grant appropriate relief either by vacating his convictions and death sentences and ordering a new trial, or by remand for an evidentiary hearing. Under applicable Arizona and federal law Petitioner's claims must be considered true and, when so considered, the claims significantly undermine confidence in the case's outcome.

A. PETITIONER'S PERVASIVE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Petitioner submitted applicable federal and Arizona law supporting allegations of pervasively ineffective counsel at the guilt and penalty trial phases, and on direct appeal that there was a reasonable probability that the outcome would have been quite different as shown in *Kolmann*. *See* Petitioner's Amended Unified Brief at pp. 143-53. Trial counsel's deficient performance was especially related to a failure to properly investigate and present readily available evidence supporting Petitioner's consistent claims of innocence, including compelling evidence supporting third-party culpability as to Mr. Brown. Petitioner's alibi that

he was 1.5 hours and five (5) miles removed from the crimes at the time they were committed, and compelling evidence of his good character and non-violent nature, all would likely have created a reasonable doubt as to his guilt. *Id.* at pp. 148-51.

Petitioner made the following arguments related to the IAC claim in his Amended Unified Brief Supporting Post Conviction Relief at pp. 143-48.

The right to effective counsel is a well-established fundamental tenant in criminal cases. *Gideon v. Wainwright*, 372 U.S. 335, 350 (1963); *U.S. v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984). Although generally a presumption that counsel was effective for 6th Amendment purposes, in some cases a presumption of ineffectiveness may arise. If so, it is not necessary to inquire as to counsel's actual performance. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574 (1986); *Cronic, supra.* In *Cronic*, ineffective assistance will be presumed under the following pertinent circumstances:

> 1) ...
> 2) Where defense counsel fails to subject the prosecution's case to *meaningful adversarial testing*;
> 3) Where *surrounding circumstances* may *justify* such presumption of ineffectiveness; and
>
> 4) ... . *Cronic* at 2045-49.

If not presumed, a successful claim requires finding the attorney's conduct was both deficient and sufficiently prejudicial so as "to undermine confidence in

the outcome" of the case, creating the current standard two-part showing.[66] *Strickland v. Washington*, 446 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).[67]

First, Petitioner must show that counsel made errors so serious that he [] was not functioning pursuant to the 6th Amendment guarantee.[68] *Strickland, supra.* The 6th Amendment right to counsel envisions counsel playing a role *critical to the ability of the adversarial system to produce a just and fair result.*[69] *Id.*

Next, the term "deficient performance" has been generally defined as counsel's actions falling below objective standards of reasonable representation measured by the prevailing professional "norms" which would unquestionably include the duty to fully investigate a case.[70] *Strickland, supra* at 691; *see also* The American Bar Association standards.[71]

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[66] The Arizona Supreme Court in *State v. Lee* defined the *Strickland* prejudice aspect being met if a claim of prejudice is such that there is a reasonable probability that the outcome of his trial would have been different, with a reasonable probability being further defined as *more than mere speculation, yet less than a preponderance of the evidence. Infra.*

[67] In its recent decision in *Hinton v. Alabama*, involving an African American death penalty inmate who had similarly and consistently as Petitioner has, maintained his innocence, the United States Supreme Court reaffirmed its decision in *Strickland* and found that former counsel had essentially failed to properly investigate and present evidence in his case undermining the State's ballistics evidence used to convict Mr. Hinton.

[68] The Sixth Amendment provides in relevant part that:

"In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense."

[69] Justice Stevens, in his opinion in *Strickland,* noted that the "purpose of the effective assistance guarantee of the 6th Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system", but that "[t]he purpose is simply to ensure that criminal defendants receive a fair trial" or related proceeding. *Id.*

[70] Under the *Strickland* holding, "[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary". *Id.*

[71] The applicable "norms" for counsel's performance at the time of Petitioner's

The general presumption that counsel's performance fell within the wide range of reasonable professional assistance and/or trial strategy may be overcome by showing that the decisions were *not* tactical in nature, but instead were the result of "ineptitude, inexperience, or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). Here, Petitioner presents exactly that.

In a 2013 Arizona Court of Appeals case involving both actual innocence and IAC claims, the Court found that while defendant had not presented clear and convincing evidence of his actual innocence, he *had* presented substantial evidence supporting the IAC claim - entitling him to a new trial. *State v. Denz*, 232 Ariz. 441, 444-47, 306 P.3d 98, 101-04 (App. 2013). Specifically, and very pertinently finding that the *duty to investigate* in a criminal case also includes the duty to properly consult and retain appropriate experts, rather than merely cross examine the State's witnesses. *Id.* In reversing those convictions for child abuse and aggravated assault, the Court further held that in the IAC claim context, such a purportedly strategic decision is not objectively reasonable when an attorney with limited experience *has failed to investigate* either the State's evidence or his options and then make a reasonable choice between them. *Id.* at 447, 306 P.3d at 104.

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indictment in November 1999 were the American Bar Association (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989), which specifically stated in their Introduction Section that they were "national guidelines on the assignment and performance of counsel in capital cases."

Second, Petitioner must also show trial counsel's performance *prejudiced* him such that the errors deprived him of a fair disposition. *Strickland* at 691. Recently affirming that prejudice in the Rule 32 context is established if the facts presented on collateral appeal *undermine confidence in the outcome* of the case. *Hinton v. Alabama*, 571 U.S. 170, 134 S.Ct. 1081 (2014) *citing Strickland, supra.* The Supreme Court also held that prejudice from the *Strickland* test is met if deficient performance or error by counsel leads to *any* deprivation of a substantive or procedural right, and would include "[a]ny amount of [additional] actual jail time" caused by the deficient performance. *Glover v. United States*, 531 U.S. 198 at 203 (2001).

When proving IAC, the Arizona Supreme Court held that prejudice exists in post-conviction relief if there is a *reasonable probability*, but for counsel's unprofessional errors, that the result of the original proceedings would have been different. *State v. Lee*, 142 Ariz. 210, 689 P.2d 153, (1984). *Lee* specifically defined when alleging and proving IAC what the phrase *"reasonable probability* the outcome would have been different" means. Specifically,

> *"...less than 'more likely than not' but more than 'a mere possibility'."* (Emphasis added.) *Id.* at 214.

This standard therefore would include evidence that undermined confidence in the outcome of a case.

In this case, Petitioner submitted in post-conviction that his 6th Amendment

right to effective assistance of counsel during the guilt, penalty, and appellate phases of the proceedings had been violated. This included both former counsels' failures to investigate and present readily available evidence supporting innocence (including compelling third-party culpability regarding original suspect Mr. Brown, substantial evidence supporting Petitioner's alibi defense, and Petitioner's good character/non-violent nature). Additionally, other highly prejudicial deficient performance at trial, including 'frontloading mitigation' for a drug-induced rage theory that may have prejudiced the jury against Petitioner. *See* Petitioner's Amended Unified Brief at pp. 43-57, 148-51.

Notwithstanding ample IAC evidence, the post-conviction court found that former counsel's performance was not prejudicially deficient despite the fact he failed to properly investigate and present readily available third-party culpability[72],

[72] The post-conviction court erroneously suggests that Det. Cooning testified that witness Barrios told him the original suspect, Mr. Brown, was the "shooter". Summary Dismissal dated 9/23/21 at p. 37, line 1. However, this apparent factual finding by the lower court was not supported by the trial record cited. *See* TR 9/24/01 (PM), pp. 19-22. Even if arguably that inference in the record exists, the previously referenced new third-party culpability evidence of *multiple* witnesses (Janel Early, Sarry Ortiz, and AC Ford) strongly implicating Mr. Brown as the actual perpetrator of the 'Yale Crackhouse Homicides' would definitely have created a reasonable doubt as to Petitioner's guilt under the principles recognized by the Arizona Supreme Court in *State v. Prion*, 203 Ariz. 157, 52 P.3d 189 (2002) [Third party culpability evidence recognized as creating reasonable doubt in homicide case requiring reversal and remand.] While the lower court suggests that given the testimony of Deborah Ford, Jessica Borghetti, and Sarry Ortiz that even if former counsel had called alibi witness Alan Feliciano, the trial outcome would not have been different. Summary Dismissal dated 9/23/21 at p. 36, Para. 4. The court apparently failed to consider that Defendant had presented substantial evidence which wholly undermined or diffused each witness' trial testimony and failed to consider all of the new evidence presented post-conviction, which the State failed to contradict as the Rules require. Rule 32.9(a)(2) Ariz. R. Crim. P. This includes all the third party culpability witnesses and 2001 guilt phase juror questions suggesting that multiple jurors had lingering questions or concerns in their belief that

alibi, and good character witnesses evidence because former counsel - though failing to call a single witness in Petitioner's defense - had cross examined the State's witnesses somewhat as to identification, and had used the defense cross examination to frontload mitigation. Summary Dismissal dated 9/23/21 at pp. 35-38. Despite submitting uncontroverted IAC evidence as the Rules require, the Court improperly did not lend credence to the claim. Rule 32.9 (a)(2) Ariz. R. Crim. P.

Trial counsel *admittedly* failed to properly investigate evidence supporting Petitioner's innocence and three (3) compelling, complimentary defenses (*E.g.*, third-party culpability, alibi, and good character/non-violent nature). This decision was made even before deciding upon a trial strategy that essentially abdicated counsel's duty to properly challenge the State's case by effectively pleading Petitioner guilty. *Supra*. These failures by counsel may have been, in part, due to his admitted inexperience and heavy caseload, and is strongly supported by other evidence submitted to the lower court confirming the factual basis for each defense and included in affidavits of both Expert Hammond, Esq.[73] and Investigator Bakos.[74]

Mr. Brown may have been the perpetrator. The United States Supreme Court holding in *Kyles v. Whitley* held that evidence supporting a post-conviction constitutional claim must be considered cumulatively. *Kyles*, 514 U.S. 419, 115 S.Ct. 1555, 1569-75 (1994).

[73] Petitioner's Exhibit #43, Declaration of Capital Legal Expert L. Hammond at pp. 7-18.

[74] Petitioner's Exhibit #16, Affidavit of Private Investigator Steve Bakos, pp. 3-5.

The applicable 1989 ABA Guidelines in Death Penalty Cases[75] specifically outlined counsel's duty at Petitioner's trial/guilt phase, including a duty to investigate.

> "The investigation for preparation of the guilt/innocence phase of the trial should be conducted *regardless* of any admission or statement by the client concerning facts constituting guilt." (Emphasis added.) *1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases,* Guideline 11.4.1 (B).

As Petitioner's expert, Mr. Hammond opined, counsel had the duty to investigate the guilt phase, which was *never* properly conducted. He stated:

> "First, it is my opinion that [Petitioner] did not have constitutionally effective representation in connection with the guilt/innocence phase of his trial. In large measure, defense counsel and the team appointed to assist in [Petitioner's] representation failed adequately to conduct a constitutionally appropriate investigation of the facts and circumstances relevant to the guilt/innocence phase of this case." Petitioner's Exhibit #44, Declaration of Capital Legal Expert L. Hammond at pp. 7-9, Paras. 22-24.

Petitioner submitted in post-conviction that this specific aspect of counsel's performance - the failure to investigate - renders the performance *per se* prejudicially ineffective under *Cronic*, *supra*, or at least showed, given the Supreme Court's emphasis in *Strickland* regarding the specific duty to investigate, that counsel's performance did *not* fall within the wide range of reasonable professional assistance and/or trial strategy. Therefore, the presumption of

[75] The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases was subsequently amended in 2003.

effectiveness was overcome by showing counsel's decisions were *not* tactical, but instead were the result of counsel's "ineptitude, inexperience, or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). Under applicable federal law in *Strickland* and *Sanders,* counsel had a duty to properly investigate Petitioner's case, or conduct a reasonable investigation enabling counsel to make informed decisions about how to best represent him.[76] *Strickland* at 691; *Sanders v. Ratelle*, 21 F.3d 1466, 1456 (9th Cir.1994). No proper - or even sufficiently reasonable - investigation was ever conducted from which counsel could make an informed decision. *Id.* This substantial failure to investigate, considered in light of the strength of the evidence discovered through the Rule 32 investigation, has met both prongs of the applicable test: the performance was both deficient and sufficiently prejudicial "to undermine confidence in the outcome" of the case. *Strickland*, *Hinton*, *supra*. Moreover, had counsel properly investigated as required, and presented the available and compelling evidence supporting Petitioner's actual innocence,[77] there is more than a *reasonable probability* that the outcome of his guilt phase trial would have been different. *Lee* at 214, 689 P.2d at 157.

It is noteworthy that Petitioner's retained Capital Standard of Care Expert, Hammond, opined that counsel was substantially deficient at the trial's guilt phase

[76] *See* Petitioner's Amended Unified Petition at pp. 150-51.
[77] *See* Petitioner's Amended Unified Petition at p. 151.

in failing to investigate and present the complimentary defenses shown above. Hammond further opined that counsel failed to not only challenge the State's eyewitness testimony by offering expert testimony at trial, counsel failed to properly investigate and test available biological evidence that would have identified the homicides' actual perpetrator. Counsel also failed to anticipate or recognize Petitioner's non-competence during the guilt phase trial rendering Petitioner unable to assist in his own defense nor appreciate events that occurred during the guilt phase trial, according to Hammond.[78] Petitioner's UAE, Exhibit #4, Declaration of Capital Legal Expert, L. Hammond, at pp. 10-17 (Paras. 27-43), and p. 23, (Para. 47).

Essentially, counsel not only effectively pled Petitioner guilty without his consent at the guilt phase trial by failing to present a defense or any defense witnesses (including related to his alibi defense), he failed to properly challenge the State's evidence through appropriate cross examination, and he used that cross examination to "front load" mitigation.[79] *See* Petitioner's Amended Unified Petition at p. 152.

Petitioner's legal representation fell below objective standards of reasonable

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[78] *See* Petitioner's Amended Unified Petition at pp. 151-52.

[79] It is noteworthy that counsel proceeded with trial at "***9/11***" despite his concern over the safety of a family member he believed may have been in one of the buildings that went down during the time our Nation was under attack, the actual defense trial strategy - notwithstanding Petitioner's ongoing and consistent claims of innocence, and his attorneys' failure to investigate exculpatory evidence and complimentary defense theories - was merely that the offenses were due to a "drug induced rage". TR 1/6/05, p. 8.

representation pretrial and at the guilt phase as measured by the prevailing professional "norms".[80] *Strickland* at 691. Petitioner showed trial counsel's performance prejudiced his case to the point that the errors deprived him of a fair disposition.[81] *Id.* The combination of failures to investigate and present a defense, with the additional deficient performance, was fatal to Petitioner's case and his ability to present a defense that properly challenged the State's evidence as contemplated in *Strickland*.[82] *Supra.*

From the totality of counsel's deficient performance at the guilt phase, Petitioner has shown there was a reasonable probability that the outcome would have been different. *Lee* at 214, 689 P.2d at 157. Because the lower court failed to apply applicable federal and state law to the facts presented, no evidentiary hearing was held to properly determine the issue. If the IAC evidence Petitioner presented was presumed true, Petitioner established a reasonable probability - more than a mere possibility, yet less than a preponderance of the evidence - that the outcome of his case would have been different, especially given that questions posed by the guilt phase jury suggesting they suspected the original suspect, Mr. Brown, may have been responsible for the homicides. *Lee, supra.*

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[80] *See* Petitioner's Amended Unified Petition at p. 152.
[81] *Id.*
[82] *See* Petitioner's Amended Unified Petition at pp. 153.

B. PETITIONER'S NEWLY DISCOVERED OR NEVER BEFORE KNOWN EVIDENCE COLORABLE CLAIM REGARDING POLICE & PROSECUTORIAL MISCONDUCT ENTITLING HIM TO AN EVIDENTIARY HEARING.

Petitioner's claim related to newly discovered or never before known evidence of both police and prosecutorial misconduct, violating his constitutional rights was colorable, entitling him to an evidentiary hearing. The post-conviction court erred entering summary dismissal because such evidence, if true, would probably have changed the outcome of the case, and undermines confidence in its outcome.

The misconduct presented in post-conviction briefing included:

1) The police planted evidence in Petitioner's bed to falsely tie him to the 'Yale Crackhouse Homicides' (when no eyewitness nor forensic evidence had tied him to the crime).

2) The police and prosecution tampered with evidence, influenced witnesses, and made false representations to the Grand Jury. And

3) The police purposefully destroyed DNA evidence that would have likely identified the actual perpetrator of the crimes. *See* Amended Unified Petition at pp. 58-62, 64-69, 76-84, 88-95, 97-102, 104-07, 110-17.

Petitioner alleged that evidence of such egregious police and prosecutorial misconduct not only constituted newly discovered or new evidence and egregious

due process rights' violation. But the purposeful destruction of DNA evidence must be viewed as inferentially exculpatory to Petitioner under applicable State and federal law. *Id.* at 132-43.

It was first presented in his post-conviction petition that, under Rule 32.1 (e) Ariz. R. Crim. P., a pleading defendant may request post-conviction relief based upon newly discovered evidence if facts in existence at the time of the original trial or sentencing were not adduced and if the newly discovered facts would probably have changed the original finding, verdict, or sentence. *State v. Guthrie*, 111 Ariz. 471, 473, 532 P.2d 862 (1975). Before post-conviction relief can be granted based on newly discovered evidence, the material presented must be discovered after the proceedings and allege facts not only establishing due diligence in its discovery, but also that such facts are material to an issue which may have been decided differently if a new trial is ordered or new proceedings are held. *State v. Fisher*, 141 Ariz. 227, 250-51, 686 P.2d 750, *cert. denied*, 469 U.S. 1066, 105 S.Ct. 548 (1984).[83]

Newly discovered evidence of a defendant's HIV positive diagnosis provided an appropriate basis for re-sentencing after it was established at hearing by a preponderance of the evidence that defendant's medical condition existed at the time of his original plea and sentence. *State v. Ellevan*, 179 Ariz. 382, 382-85,

[83] Petitioner's Amended Unified Brief at pp. 132-33.

880 P.2d 139 (Ariz.App.1994).[84]

Police and prosecutorial misconduct involving the misrepresentation, concealment, and tampering with evidence, had to be applied to the facts presented establishing that a colorable claim existed because if such misconduct were true, there was a reasonable probability the outcome of Petitioner's case would have been different. Petitioner's Amended Unified Brief at pp. 133-34.

Evidence suppression by the prosecution when the evidence is favorable to an accused and previously requested by the defense violates Due Process where the evidence is material to guilt or punishment, irrespective of the prosecution's good- or bad-faith. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196 (1963). The Court first extended the *Brady* rule beyond exculpatory evidence to include impeachment material in *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972). Under *Giglio*, a new trial is required if the testimony could, in "any reasonable likelihood," have affected the judgment of the jury. Later in *United States v. Agurs*, the Court identified three situations involving post-trial discovery regarding information favorable to the accused that had been known to the prosecution but unknown to the defense. *Agurs* 427 U.S. 97, 96 S.Ct 2392 (1976). The first situation involves the prosecution's knowing use of perjured testimony where the verdict must be set aside if there is "any reasonable likelihood that the

[84] *See* Amended Unified Petition at p. 133.

false testimony would have affected the judgment of the jury." *Id.* at 112 The second involves the situation when defendant submits either a "general" or "no" request for information. *Id.* A reversal in that circumstance requires defendant show the omitted evidence "creates a reasonable doubt that did not otherwise exist." *Id.* The third situation occurs when the defense makes a specific request for information and the prosecution fails to disclose it. *Id.* In that situation a reversal is warranted if the omitted evidence "might have affected" the outcome of trial. *Id.* at 104.

If it was discovered for the first time on appeal that a witness had perjured himself before the grand jury, a defendant's convictions may be reversed if it was established the defendant had to stand trial on an indictment which the government knew was partially based upon perjury. Petitioner's Amended Unified Brief at pp. 134-35; see also, *U.S. v. Basurto*, 497 F.2d 781, 785-87 (9th Cir. 1984).[85] In *Basurto*, the Ninth Circuit Court of Appeals held that due process is violated when a defendant had to stand trial on an indictment which the State knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not yet attached. *Id.* at 785. In discussing its holding, the Court cited the United States Supreme Court's decision in *Napue*, where the Court reaffirmed the principle applicable to Petitioner's case:

[85] The Arizona Supreme Court first adopted the *Basurto* doctrine in *State v. Gortarez*, 141 Ariz. 254, 258, 686 P.2d 1224 (1984).

"[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." ... and

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, [is] implicit in any concept of ordered liberty. *Basurto* at 786, citing *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173.

In discussing the issue of prosecutorial misconduct, Petitioner submitted that a reviewing Court considers alleged acts of prosecutorial misconduct to determine whether they may have affected the proceedings in such a way as to deny the defendant a fair trial. Amended Unified Brief at pp. 135-36; *see also*, *State v. Hughes*, 193 Ariz. 72, 78, 969 P.2d 1184, 1190 (1998). Prosecutorial misconduct may constitute a due process violation if it is of "sufficient significance to result in the denial of the defendant's right to fair trial." *Donnelly v. DeChristofono*, 416 U.S. 637, 642 (1974). The knowing use by the prosecution of perjured testimony violates due process. *Moody v. Hollohan*, 294 U.S. 103, 112-13 (1935). Such alleged misconduct being reviewed in light "of the entire trial" with appropriate relief granted if the misconduct "by itself ... infected the trial with unfairness." *Donnelly* at 639 and 643; *see also*, Petitioner's post-conviction briefing at pp. 135-36. Petitioner submitted at p. 136 of his Amended Unified Brief that in evaluating alleged prosecutorial misconduct the correct inquiry is whether the improper comments or actions so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Darden v. Wainwright*, 477 U.S. 168, 181

(1986).

Petitioner discovered and presented a series of events that raised the issue of whether police and prosecutorial misconduct occurred which improperly resulted in or contributed to his convictions and sentences. These included: alleged tampering with State's witnesses; misrepresentations to the Grand Jury leading to his indictment in violation of *Basurto; Brady* violations related to the failure to disclose both exculpatory evidence related to original suspect Brown's threats to kill one of the victims (Deborah Ford) earlier in the week of the homicides, and destroying valuable evidence material to Petitioner's case (E.g., Item #22 - knife at crime scene showing blood on end of knife); and tampering with witnesses and evidence at both the pretrial, trial, and post-conviction levels. This evidence now discovered could *not* have been previously discovered with reasonable diligence , implicates the "truth" of the State's case and how it affected the outcome of Petitioner's trials, and begs the question 'if such evidence would probably have changed the outcome of his case had it been known at the time of trial?'; it would have under Arizona law in *Guthrie* and *Fisher*, *supra*.

The cumulative effect of the constitutional violations in Petitioner's case before the grand jury (which in itself requires a new trial), and at trial in failing to disclose valuable exculpatory and rebuttal *Brady* evidence (requiring a new trial if there is a reasonable probability that the jury's judgment would have been different

given proper disclosure), and the impropriety related to tampering with and destroying evidence constituting both police and prosecutorial misconduct under *Napue*, *Hughes*, and *Donnelly*, *supra*, cannot be tolerated. Petitioner respectfully requested the lower court grant him a new trial based upon these referenced improprieties alone, which was denied. *See* Petitioner's Amended Unified Brief at pp. 136-37.

As to the specific allegations of police misconduct related to the planting, tampering with, and destruction of DNA evidence, Petitioner submitted the following in post-conviction consideration. Petitioner's Amended Unified Brief, pp. 137-43.

Due to the grave nature of the compelling evidence, a definite pattern of purposeful police misconduct discovered by retained forensic experts and former Assistant Directors of the PPD Crime Lab, Watkins and Rodgers included both actually planting incriminating evidence by police in the first instance (E.g., Items 26, 26A, and 26B) meant to falsely implicate Petitioner, and destruction of physical or ballistics evidence from the Yale Crackhouse Homicides' crime scene to cover-up the wrongdoing in planting the evidence, including the purposeful destruction of DNA evidence, which likely would have exonerated Petitioner. For each of these issues, the law required the lower court dismiss his underlying case with prejudice or grant him an evidentiary hearing in post-conviction.

First, the evidence planting here constituted outrageous governmental conduct requiring dismissal of Petitioner's case with prejudice, or at a minimum, grant an evidentiary hearing, given that the gravity of such misconduct when, if true, undermined confidence in the outcome of his case. *United States v. Russell*, 93 S.Ct 1637, 1641-43, 411 U.S. 429, 430-32 (1973).

The Court essentially held that, although entrapment by police in a criminal case may not constitute "outrageous governmental conduct" barring prosecution, there was such a defense that could be raised if the question presented constituted "whether the police conduct falls below standards ... for the proper use of governmental power." *Id.* The Supreme Court suggested that although such a threshold may be elusive, the Court "may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.*, at 43; *see also, Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785 (1967) ["the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence" *citing Mooney v. Holoh*an, 294 U.S. 103 (1935)][86]; *Russel, supra*, [tampering with both critical evidence and multiple witnesses, and the purposeful destruction of exculpatory evidence by police, including <u>critical</u> DNA evidence]; *Arizona v. Youngblood*, 488 U.S. 51

[86] *See also Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256 (2004); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972).

[Purposeful or bad faith destruction of evidence by police creates the inference that evidence when purposely destroyed is exculpatory, entitling a defendant to dismissal in such a case].

In Petitioner's case, he submitted to the lower court that the government's egregious misconduct in planting evidence in his bed in order to falsely tie him to a crime for which the State lacked both physical and eyewitness related evidence, constituted outrageous governmental conduct whereby the principles of due process would absolutely bar the government from benefitting from such misconduct in a resultant death penalty conviction, and mandates vacating such conviction or related convictions, and the dismissal with prejudice of the underlying case or prosecution. *See* Petitioner's Amended Unified Brief at p. 138. Unlike the defendant in *Russell,* in which a predisposition to commit a crime by a particular defendant barred such an outrageous governmental conduct finding - despite that defendant being effectively 'aided and/or abetted' by the State to commit the crime - the government did not act to promote criminality; here, the government committed a criminal act to falsely convict an innocent individual, one for whom the government lacked the requisite probable cause to arrest, and literally "created" the evidence used to effect the arrest in the first place. *Id.* at pp. 138-39. As described by Legal/Exonerations Expert Hammond, the police and prosecution basically "rode" their own criminal misconduct in planting the

evidence and repeatedly raised its egregious head throughout Petitioner's case, from the time of his indictment by the grand jury through conviction, then the jury's death penalty imposition. *See* Petitioner's Exhibit #84; 2nd Suppl. Declaration of Larry A. Hammond, pp. 10-12.

Second, the purposeful destruction of both ballistics evidence (to cover up the police's evidence planting), as well as the DNA evidence (which plainly was present on Item #22) which the original Medical Examiner, Dr. Mosely, opined likely contained the blood of the actual perpetrator, required Petitioner's case be dismissed with prejudice. This is the only remedy available for the egregious *Brady* due process violations and the principles of fundamental fairness. *See* Petitioner's Amended Unified Brief at pp. 139-43; *Youngblood v. Arizona*, 488 U.S. 51, 109 S.Ct. 333, 335-38 (1988).

Evidence destruction by the State in a criminal case constitutes a due process violation entitling him to a constitutional remedy. Petitioner's post-conviction briefing, pp. 139-40; *Trombetta v. California*, 467 U.S. 479, 104 S. Ct. 2528 (1984). In holding that the State of California's failure to preserve DUI-related Intoxilyzer breath samples was *not* a violation of due process because the State was merely following its normal practice , it was pointed out that the Supreme Court nonetheless recognized that a conscious or calculated effort to circumvent disclosure requirements related to exculpatory *Brady* evidence may result in a

violation of due process.[87] *Id.* at 2532-35.

Thereafter, Petitioner argued that absent bad faith evidence destruction (distinguished from merely negligent evidence destruction) by the State, no due process violation occurs when the State or police merely fail to properly preserve evidence. *Youngblood, supra.*[88] The *Youngblood* holding recognized that the actual badfaith evidence destruction, such as occurred in this case, implies the evidence purposely destroyed was, in fact, exculpatory, providing the most drastic remedy: dismissal. *Id.* At 58. For this most egregious due process *Brady* violation (*i.e.*, the actual destruction of exculpatory evidence), given that the evidence will never again be available due to such inexcusable police misconduct, the remedy: dismissal. *Youngblood*, Brady, supra.

Petitioner argued in his Amended Unified Brief at p. 141, that under Article 2, Sec. 4 of the Arizona Constitution, state due process is offended only when the destruction of evidence is in bad faith, such that the test was found to be the same as that enunciated in *Arizona v. Youngblood. State v. Youngblood*, 173 Ariz. 502, 505-08, 844 P. 2d 1152, *En Banc* (1993).

Petitioner argued that for the purpose of defining "bad-faith", especially given the nature of the new police misconduct evidence presented Petitioner's case, it was most aptly defined in Black's Law Dictionary as "the conscious doing

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[87] *See* Petitioner's Amended Unified Brief at pp. 139-40.
[88] *Id.* at p. 140.

of a wrong because of dishonest purpose ...." *Black's Law Dictionary, 6th Edition,* at p. 158. Given this additional evidence of wrongdoing by police in planting, tampering with, and destroying evidence in order to wrongly implicate Petitioner and hide the truth, the United States Supreme Court held in *The Chesire* that "concealment of the truth" was "prima facie evidence of fraudulent intention." *Id.*, 70 U.S. 231, 233-35 (1865); *see* Petitioner's Amended Unified Brief at pp. 141-42. While the mere failure to disclose material exculpatory *Brady* evidence may carry with it a new trial remedy in order to put the parties in the same relative position as had the disclosure been properly made from the beginning, the purposeful evidence destruction results in a total lack of fundamental fairness. *Id.* The parties may never be returned to their original positions since the exculpatory evidence no longer exists, and the defendant is unable to ever benefit from such evidence due to the State's misconduct. *Id.* at 142.

Combining the police and prosecutorial misconduct allegations and applicable law previously referenced in post-conviction briefing, the outcome of Defendant's case would probably have been different. *Amaral, supra.* Additionally, a reasonable probability exists that the outcome would have been different under *Kolmann, supra.* Disappointingly, the lower court failed to presume the truth of the evidence presented and ignored or overlooked Petitioner's uncontradicted evidence of a purposeful pattern of police misconduct as discovered

by Criminalist Watkins, Crime Scene Expert Rodgers, two (2) former Phoenix Police Department Crime Lab Assistant Directors; dismissing Petitioner's arguments without referencing the evidence presented to the lower court or specifically identifying the experts. Summary Dismissal dated 9/23/21 at pp. 26-33.

Obviously, had such evidence been available at the time of Petitioner's guilt phase trial, a finding of outrageous governmental conduct in planting evidence in Petitioner's bed, as well as finding bad faith destruction of DNA evidence, would have required outright dismissal of his case or would have guaranteed acquittal, had the case gone to the jury with such unfavorable evidence of police misconduct. Moreover, it may not be overlooked during the Arizona Supreme Court's review that the conscious destruction of the dried blood on the tip of Item #22 was an obvious and purposeful effort to keep DNA evidence out of the case that would have undermined the State's theory (or chosen suspect). According to the assigned Medical Examiner, DNA results from that knife tip likely would have established the identity of the actual perpetrator of the homicides. *Supra*.

For all the foregoing compelling reasons, Petitioner respectfully requests his case be remanded due to the lower court having abused its discretion when it failed to follow applicable Arizona and federal law requiring it presume the truth of the evidence presented. Specifically, as it relates to the egregious police and

prosecutorial misconduct allegations, and direct the post-conviction court to conduct an evidentiary hearing as to each issue. *Amaral*, *Kolmann*, and *Townsend*, *supra.* If the uncontradicted evidence of police misconduct is true, then the outcome of Petitioner's case would have been substantially different, or a reasonable probability exists that a different outcome would have occurred. *Id.*

C. PETITIONER'S ACTUAL INNOCENCE CLAIM

Petitioner's actual innocence claim as presented in post-conviction was supported by clear and convincing evidence by which, if true, no reasonable jury or juror would have either found him guilty beyond a reasonable doubt, or sentenced him to death. *See* Petitioner's Amended Unified Brief at pp. 125-32.

This included compelling evidence that the original suspect (Mr. Brown) committed the crimes after getting in a fight with Sergio Mata at approximately 4:00A.M., The original suspect had vehemently threatened to kill victim Deborah Ford shortly before the Yale Crackhouse Homicides; Petitioner was five (5) miles and an 1.5 hours removed from the area in which the homicides occurred; and substantial evidence of Petitioner's good character and non-violent nature. *Id.* at 126.

Compelling evidence was also presented in post-conviction concerning egregious police and prosecutorial misconduct related to planting ballistics evidence in Petitioner's bed (E.g., Items 26, 26A, and 26B) to falsely tie him to the

crimes. This occurred just four (4) hours after the State's only eyewitness, D. Ford, was unable to identify Petitioner in a six-pack photo line-up. Additionally, presenting powerful evidence established through multiple forensic experts (Rogers, Watkins, and Bosch) that evidence had not only been tampered with to cover-up the initial evidence planting, but a lack of DNA evidence testing from a blood stained knife (Item #22) found near the first chronological victim's foot (Sergio Mata) which was purposely ordered to *not* be preserved (or was purposely destroyed) by police within 30 days after it was collected. That evidence destruction precluded DNA evidence testing by the defense eliminating Petitioner's exoneration opportunity. These assertions are supportable since Medical Examiner Mosely opined that the blood was likely from a defensive wound inflicted by the victim on the actual perpetrator. *See* Petitioner's Amended Unified Brief at p. 126.

Petitioner argued that under the specific language of Rule 32.1(h), Ariz. R. Crim. P. applicable in Petitioner's case a criminal defendant in Arizona is entitled to post conviction relief if:

"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 have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty." *Id.* at 127.

At the federal level, Petitioner submitted that while the United States

Supreme Court has not yet recognized actual innocence as a cognizable claim for federal habeas purposes, its discussion of the issue reflects the language of Rule 32.1(h) as follows:

"To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence [or evidence newly presented]." *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 867, 130 L.Ed.2d 808 (1995).

See Petitioner's Amended Unified Brief at p. 127.

For the purposes of preserving the issue for federal review, Petitioner respectfully submitted that the issue of actual innocence in a *capital* case falls within the guaranteed protections of the United States Constitution under both the 'Cruel and Unusual Punishment Clause' of the Eighth Amendment, as well as the 'Due Process Clause' of the Fourteenth Amendment. First, the Eighth Amendment specifically prohibits cruel and unusual punishments in criminal cases. It states very simply:

> "Excessive bail shall not be required, nor excessive fines imposed *nor cruel and unusual punishment inflicted*." (Emphasis added.)

Although the death penalty has been Constitutionally upheld pursuant to the Eighth Amendment for a person found guilty beyond a reasonable doubt with competent evidence, clear and convincing or competent evidence of a condemned individual's actual innocence must make the death penalty for such an individual wholly cruel and unusual punishment, and therefore unconstitutional under the plain language of

the Eighth Amendment.

Second, the Fourteenth Amendment specifically proscribes that "no state deprive any person of life, liberty, or property, without due process of law." Such due process in a *capital* case must include not merely that process which convicted and condemned an individual for murder(s) that they were alleged to have committed yet must also include that process necessary to correct a grave mistake, especially where it is not just that individual's liberty or property at stake, but their very life. Further, it is highly questionable whether the phrase "no state [shall] deprive any person of life, liberty, or property, without due process of law" may especially apply to individual states who have incorporated as part of their due process in criminal cases both direct and collateral appeals. Especially given that the Fourteenth Amendment was specifically designed as a federal safeguard against states disallowing their own citizens either the due process or equal protection of their own laws. *See* Petitioner's Amended Unified Brief at pp. 127-28.

In the present case, Petitioner argued in post-conviction that he presented clear and convincing evidence of his actual innocence including these compelling facts:

1. Multiple witnesses, who were never properly investigated by either police or the defense, nor presented at Petitioner's original guilt phase trial on his behalf, have stated to police or testified by affidavit that they

saw original suspect Mr. Brown getting into a fight with the Crack Dealer victim, Mr. Mata, at approximately 4:00 A.M., and that Mr. Brown was present at the time of the shooting while armed, and was seen running from the scene of the crime immediately thereafter.

2. Substantial evidence concerning Petitioner's alibi that was never properly investigated nor presented at trial, supports the fact that at the time of the homicides, Petitioner was 1.5 hours and five (5) miles removed from the scene of the crime.

3. Substantial evidence shows that at the time of the Yale Crackhouse Homicides, Petitioner was a person of good character and was non-violent, while original suspect Mr. Brown had not only threatened to kill victim Deborah Ford earlier in the week of the homicides, Mr. Brown incurred a large number of felony convictions over the years including armed sexual assaults, and may have been involved in a very similar crackhouse homicide in 2004 after he was released from prison.

4. Forensic and other scientific evidence support Petitioner's innocence, including DNA testing, fingerprint testing, ballistics testing, and Polygraph results.

5. Police and prosecutorial misconduct allegations in this case establish that incriminating ballistics evidence (Items 26, 26A, and 26 B) was not only wrongly planted in Petitioner's bed to falsely tie him to the Yale Crackhouse Homicides in the first instance, when the State's only eyewitness could not identify Petitioner Moore in a six-pack line-up. Exculpatory evidence was either withheld or destroyed (*i.e.*, Blood on tip of knife found by first chronological victim's foot: Item #22) supporting Petitioner's claimed innocence, and that purported evidence of his guilt may have also been improperly manipulated and tampered with.

See Petitioner's Amended Unified Brief at pp. 129-30.

Additional evidence provided in later briefing also supported Petitioner's actual innocence including: 1) newly discovered eye witness account of Sarry

Ortiz; 2) newly discovered evidence of police and prosecutorial misconduct related to both a fourth alleged *Brady* violation and unexplained discrepancies/improprieties regarding three (3) different items of material evidence resulting in false evidence being presented in Petitioner's case at grand jury, guilt phase trial, and penalty phase trial; 3) new affidavits of Petitioner's Mother Ms. Damita Moore and former Mitigation Specialist Assistant Ms. Nancy Garcia; and 4) other new evidence, including previously unrecognized evidence in the trial record itself related to the 2001 trial testimony of PPD Officer Elting and Det. Sally Dillian, which respectively provide additional confirmation that the time of the shooting was most likely much earlier at around *4:00 A.M.* (the time of the fight between victim Sergio Mata and original suspect Mr. Brown) rather than at 5:30 A.M. or 6:00 A.M. when Petitioner established he was picked up by Sarry Ortiz when he was merely walking in the area, and that a third-party vehicle was present at the time of the shooting as suggested by Ms. Ortiz that drove in the 'dramatic fashion' she described. *See* Petitioner's Amended Unified Brief at p. 130.

Given that no DNA evidence was ever found tying Petitioner to the Makarov firearm (purported to be the murder weapon), and the outrageous discrepancies/improprieties discovered involving Items 22, 26A, and 45, including tremendous chain of custody problems and related evidence tampering/destruction

allegations, Petitioner suggested that police may have introduced a new and foreign Makarov firearm into the case (after it was discovered that the firearm recovered from Sam Derby – purportedly Petitioner's firearm) was actually a .40 caliber revolver, and that significant forensic support from which positive evidentiary inferences may be derived further support Petitioner's actual innocence claim. *See* Petitioner's Amended Unified Brief at p. 130.

As presented in Petitioner's Opening Petition, a criminal defendant is entitled to post conviction relief in Arizona under Rule 32.1(h), Ariz. R. Crim. P., if he is able to "demonstrate[] by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty." *Id.* at 131.

Just as the United States Supreme Court stated in *Schlup v. Delo*, given the totality of the evidence presented in post-conviction, it was highly arguable that "more likely than not that no reasonable juror would have convicted Petitioner in the light of the new evidence [or evidence newly presented]." *Id.*, 115 S.Ct. 851, 867, (1995); *see,* Petitioner's Amended Unified Brief at p. 131. As discussed herein, the post-conviction court failed to follow applicable State and federal law requiring that it presume the truth of Petitioner's actual innocence claim, but systematically dismissed all of the evidence presented. *See* Summary Dismissal at

pp. 12-27; *see* also, *Amaral*, *Kolmann,* and *Townsend, supra.*

Based upon the totality of the foregoing facts and legal argument, Petitioner respectfully requested the lower court find that he had presented clear and convincing evidence of his actual innocence, whereby a jury of his peers would not have convicted him considering all the evidence presented in briefing, entitling him to having his convictions and sentences set aside. As discussed previously, the PCR court apparently chose not to believe any of Petitioner's evidence supporting his actual innocence claim and rejecting the claim without holding an evidentiary hearing to properly develop the factual record at the State level. *See* Amended Unified Brief. at pp. 131-32.

Petitioner respectfully requests his case be remanded for an Evidentiary Hearing under the plain language of Rule 32.1(h) because when the evidence presented supporting his actual innocence is presumed to be true, no reasonable juror would have found him guilty, let alone imposed the death penalty. Ariz. R. Crim. P.

D. PETITIONER'S DIABETES/KETOACIDOSIS MEDICALLY INDUCED MENTAL INCOMPETENCY CLAIM

It is respectfully submitted that the lower court erred in failing to presume the truth of Petitioner's evidence supporting his incompetency claim at the time of trial, and order an Evidentiary Hearing. This is required because if true, there is a

reasonable probability that the outcome of his case would have been quite different. In Petitioner's Amended Unified Briefing, he presented his guilt phase Mental Incompetency Claim at pp. 54-58 and pp. 153-58.

Under Arizona law, a criminal defendant may not be tried, convicted, sentenced, or punished while he is incompetent. *State v. Tramble*, 110 Ariz. 249, 252, 568 P2d 1153, 1156 (Ariz.App.1977).

It is noteworthy that a defendant has a similar federal due process right not to be tried or sentenced while incompetent and unable to properly assist in their own defense. *Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 838 (1966). The prohibition against such violation of a defendant's rights "is fundamental to an adversary system of justice" which requires a vigorous defense. *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896, 904 (1975).

In a *per curium* opinion, the United States Supreme Court held that the standard for competence to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788 (1960). Later, the U.S. Supreme Court confirmed that "a person whose mental condition is such that he lacks the capacity to understand the nature of the proceedings against him, to consult with counsel, and to assist in preparing his

defense may not be subjected to a trial. *Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 903 (1975).

Pursuant to Rule 11.1, Ariz. R. Crim. P., the *Dusky/Drope* competency standard has been memorialized and applied in Arizona criminal proceedings:

> "A person shall not be tried, convicted, sentenced, or punished for a public offense, except for proceedings pursuant to A.R.S.§ 36-3707(D), while, as a result of mental illness, defect, or disability, the person is unable to understand the proceedings against him or her or to assist in his or her own defense. Mental Illness, defect, or disability means a psychiatric or neurological disorder that is evidenced by behavioral or emotional symptoms, including congenital mental conditions, conditions resulting from injury or disease and developmental disabilities as defined by A.R.S.§ 36-551." (Emphasis added.)

When the issue of competency arises, a defendant has the right to a hearing to determine their competence where reasonable grounds exist to believe they may be [or may have been] incompetent during criminal proceedings. *Tramble, supra.* "The right of a defendant not to be tried and convicted while incompetent and his right to a competency hearing are guaranteed by due process. *Id.,* citing *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836 (1966). Moreover, the right to a competency hearing is not waived by the failure to assert it. *Ibid., citing Pate* at 841, 86 S.Ct. at 841. It is a violation of due process "to prosecute a defendant who was incompetent to stand trial, or to fail to conduct an evidentiary hearing where evidence before the trial court raises a *bona fide* doubt concerning competency. *Blazak v. Ricketts*, 1 F.3d 891, 893 (9th Cir. 1993).

Rule 11.3, Ariz. R. Crim. P., states in relevant part:

"If the court determines that reasonable grounds for an examination exist, it shall appoint at least two mental health experts, at least one of whom must be a medical doctor, to examine a defendant and testify regarding his mental condition."

Pursuant to Rule 11, Ariz. R. Crim. P., if a trial court has reasonable grounds to question competency when presented with evidence which creates a reasonable doubt as to the defendant's competency to assist in their defense, the procedures required by Rule 11 should be followed. *State v. Williams*, 166 Ariz. 132, 800 P.2d 1240 (1987), *State v. Borbon*, 146 Ariz. 392, 706 P.2d 718 (1985). Doubt regarding a defendant's competency, if expressed by the defendant's counsel, is only one factor that should be considered by a trial court in determining a competency issue, and the views of counsel may be sufficient as to the issue. *Drope* at pp. 177 (footnote 3), 180. However, the failure of a trial court to hold an appropriate competency hearing at which expert testimony and medical evaluations must be presented is fundamental error, even when it is not requested by a defendant or defense counsel because a trial court has an implicit duty to safeguard a defendant's due process right to be competent for trial and should order an evaluation *sua sponte*. *State v. Sanders*, 110 Ariz. 502, 505, 520 P.2d 1127 (1974). Should a Court find that competency related proceedings are appropriate a Court may not require that incompetence be proven by clear and convincing evidence but

may require a defendant to prove the issue by a preponderance of the evidence. *Cooper v. Okla.*, 517 U.S. 348 (1966), *Medina v. Calif.*, 505 U.S. 437, 445-48 (1992).

Petitioner argued that when a court finds that a defendant was improperly denied a competency hearing, or that a competency hearing should have been ordered *sua sponte*, it may grant a particular defendant a new trial, or order a retrospective hearing to determine the defendant's competency at the time of trial. *See, Drope*, 420 U.S. 162, 183 [Weighing whether to permit retrospective competency hearing or to require retrial of defendant if incompetent due to fact that retrospective hearings are often inadequate, and ordering new trial.]; *U.S. v. Pope*, 841 F.2d 954, 958 (9th Cir. 1988) [Ninth Circuit Court of appeals granted new trial when trial court had previously refused to grant third continuance to permit psychiatric evaluation of defendant's competence and sufficient evidence of incompetence presented on appeal, with retrospective competence evaluation deemed problematic.]; *James v. Singletary*, 957 F.2d 1562, 1572-74 (11th Cir. 1992) [Remanding case to conduct retrospective evidentiary hearing on competency to stand trial because federal *habeas* petition presented substantial evidence regarding alleged incompetency of defendant at time of trial.]. Where a retroactive competency evaluation is ordered rather than a new trial, a defendant still bears the burden of proving his incompetence by a preponderance of the

evidence. *Moran v. Godinez*, 57 F.3d 690, 697 (9th Cir. 1994); *see* Petitioner's Amended Unified Brief at pp. 157-58.

In the present case, Petitioner had the fundamental right not to be convicted, sentenced, or punished while he was incompetent. *Tramble*, *Drope*, *Pate*, *supra*. As such, the lower court erred in failing to find that Petitioner's due process rights may have been violated for proceeding while incompetent or may be further violated through a failure to conduct an evidentiary hearing at the present time when evidence, either known at the time of the proceedings or discovered thereafter, raised a good faith doubt concerning his competence. *Blazak*, *supra*. Given the foregoing compelling facts revealed during the present Rule 32 investigation strongly evidencing Petitioner's incompetence at the guilt phase trial due to the Maricopa County Jail's failure to provide both required diabetic medication and appropriate food during arguably the most important aspect of his case. It is highly questionable, especially given the medical opinion of Dr. Williams, whether Petitioner possessed the constitutionally required ability to fully understand the nature of the proceedings against him or to assist in his defense. *Dusky*, *Drope*, and *Tramble*, *supra*. The procedures required by Rule 11 should now be followed because evidence exists creating a reasonable doubt or raising a question as to Petitioner's competency at the time of the proceedings. *Williams*, *Borbon*, and *Drope*, *supra*. Even though a Rule 11 evaluation was not previously

requested, the issue as to Petitioner's competence may not be waived. *Tramble*, and *Pate*, *supra*, It is respectfully submitted that the trial Court erred in finding that the claim was precluded because it had not been previously raised. Thus, it was argued that it was appropriate for the lower court to order those retrospective psychological evaluations be conducted and that a competency hearing be held, at which expert testimony and medical evaluations may be presented by appointed psychological/psychiatric experts as to the issue. *Drope*, *Pope*, *Singletary*, and *Sanders*, *supra*. Once again, the lower court failed to presume the truth of the Petitioner's claim as required by State and federal law. *Amaral*, *Kolmann*, and *Townsend*, *supra*. That court dismissed Petitioner's claim even though, if true, the outcome of his case would have been different. *See* Summary Dismissal dated 9/23/21 at pp. 39-40.

Additionally, such a finding violated the Supreme Court's holding because Petitioner never knowingly, intelligently, nor voluntarily waived the issue in any way, and which issue he would not have been aware of due to that very incompetence. *Stewart v. Smith*, 202 Ariz.446, 46 P.3d 1067 (Ariz. 2002).

Based on the foregoing facts and legal argument, Petitioner respectfully requests his case be remanded for an evidentiary hearing because, if the evidence presented in post-conviction related to the incompetency issue were properly presumed to be true, there is a reasonable probability that the outcome of his case

would have been different. *Amaral* and *Kolmann, supra*. For example, had Petitioner's incompetence during the guilt phase trial been known, the outcome of Petitioner's case would have been different, or reasonable probability exists he would have not gone forward to trial, as such would have been unconstitutional under applicable law.

E. STRUCTURAL ERROR OCCURRED AT THE GUILT PHASE TRIAL DUE TO THE COURT PROCEEDING WITH TRIAL AT THE TIME OF *"9/11"*, AS WELL AS ITS USE OF THE *PORTILLO* BURDEN OF PROOF INSTRUCTION.

Notwithstanding the post-conviction court's findings otherwise, the trial court erred at the guilt phase trial when it continued proceedings at the time of *"9/11"* because the jury could not be impartial or properly focused under such circumstances, as well as it's the court's use of the *Portillo* burden of proof instruction. *Portillo* improperly defines "reasonable doubt" and shifts the burden of proof to a defendant to prove there is a real possibility that they are innocent.

It was argued in post-conviction that structural errors not only deprive criminal defendants of basic protections, without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence. *State v. Ring*, 204 Ariz. 534, 552 ¶ 45, 65 P.3d 915, 933 (2003). These are errors that have infected 'the entire trial process' from beginning to end." *Brecht v.*

Abrahamson, 507 U.S. 619, 629 (1993). Further, Petitioner suggested that Arizona Courts follow the United States Supreme Court's decisions regarding structural error and hold that "[a] criminal trial undermined by structural error 'cannot reliably serve its function as a vehicle for determination of guilt or innocence[.]'" *State v. Garcia-Contreras*, 191 Ariz. 144, 148, ¶15, 953 P.2d 536, 540 (1998), *quoting Arizona v. Fulimante*, 499 U.S. 279, 310 (1991). Structural error requires reversal in every case. *State v. Ring*, 204 Ariz. 534, 552 ¶ 45, 65 P.3d 915, 933 (2003).

Finally, Petitioner submitted both that structural error may be found to have occurred when the arbiter of fact (a judge or jury) is prejudiced from the outset of the trial. *Id.* at 552, 65 P.3d at 933; *Arizona v. Fulimante*, 499 U.S. 279, 310. The United States Supreme Court has also held that a constitutionally deficient reasonable doubt instruction is structural error. *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993). The 'Due Process Clause' of the 14th Amendment to the U.S. Constitution protects a criminal defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 365, 90 S. Ct. 1068, 1073 (1970).

In the present case, Petitioner respectfully submitted to the lower court that structural error occurred in his case in two ways.

First, it was argued due to the fact that Petitioner's trial was conducted

during one of the most tumultuous and disturbing times in our country's history: on "9/11." Because of this, Petitioner was deprived of the basic protections of an unbiased and impartial jury, whereby it could not have reliably served its function as a vehicle for determination of his guilt or innocence. *Ring*, and *Garcia-Contreras*, *supra*. It was error that infected 'the entire trial process' from beginning to end." *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993). As the result of this error Petitioner was entitled to an evidentiary hearing to determine if structural error occurred because the arbiter of fact (the jury) was obviously prejudiced from the outset of the trial due to the "9/11" national tragedy, rather than to properly attend to the facts, weigh the evidence, and render a just verdict. *Id.* at 552, 65 P.3d at 933, *Arizona v. Fulimante*, and *Ring*, *supra*. 204 Ariz. 534, 552 ¶ 45, 65 P.3d 915, 933 (2003).

Second, Petitioner submitted the following language contained in the *Portillo* 'burden of proof' instruction used at the jury trial in this matter violated his due process rights to a fair trial under the U.S. Constitution as interpreted by the U.S. Supreme Court in *In re Winship* and *Victor v. Nebraska*.

> *"There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every doubt. If based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there's a real possibility he is not guilty, you must give the defendant the benefit of the doubt and find him not guilty."* (Emphasis added.)

TR 9/11/01, p. 21 (Preliminary Jury Instructions); RA 151, pp.3-4 (Final Jury Instructions).

He further argued that in *In re Winship*, the U. S. Supreme Court gave an historical overview of the development of the "reasonable doubt" standard, and held that due process requires that the reasonable doubt standard apply in all criminal proceedings. *Id.*, 397 U.S. 358, 365 and 368, 90 S.Ct.1068, 1073, 1075 (1970). In essence, Petitioner suggested that the U.S. Supreme Court stated that the reasonable doubt standard, while dating or finding its genesis from the early years of our nation, requires that before an individual may be deprived of their liberty, a jury of his peers must be able, "*upon their consciences*", to find that the State, in a specific criminal proceeding, has proven all of the elements of the crime charged beyond a reasonable doubt. *Id.* at 362-63, 90 S.Ct. at 1071-72. Furthermore, it was submitted that this Court clearly stated that the reasonable doubt standard include the following level of certainty:

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact-finder of his guilt with utmost certainty." (Emphasis added.) *Id.* at 364, 90 S.Ct. 1073.

In a more recent case, Petitioning Defendant argued that the U.S. Supreme Court, in affirming its prior decision in *Winship*, specifically held that while states

were neither required to nor prohibited from defining what "reasonable doubt" means, when a definition is given, the definition must avoid defining "reasonable doubt" in a manner that would lead the jury to convict an individual on a lesser showing than due process requires as defined by *Winship*. *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 1243 and 1251 (1994). It was also noted to the PCR court that in a case pre-dating *Victor*, the U.S. Supreme Court had held that any definition given for "reasonable doubt" must "impress upon the fact-finder the need to reach a subjective state of near certitude of the guilt of the accused." *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 2786 (1979).

It is respectfully submitted that notwithstanding the lower court's post-conviction findings otherwise, the trial court's use of the *Portillo* instruction violated Petitioner Moore's federal due process rights delineated under *Winship*, *Victor* and *Jackson*, *supra*, constituting structural error requiring reversal under *Sullivian*, *Brecht*, *Garcia-Contreras*, and *Ring*, *supra*, as it improperly defined "reasonable doubt" as requiring less than "utmost certainty" or "near certitude" on the part of a jury in assessing his guilt and actually lowered the reasonable doubt standard in Arizona to the clear and convincing evidence standard used in civil cases (due to the employment of the "firmly convinced" wording) in violation of *Victor v. Nebraska, Supra*. Therefore, it is respectfully submitted and requested that the Supreme Court remand this case for an evidentiary hearing as to this issue.

CONCLUSION

It is respectfully submitted that Petitioner raised colorable claims before the lower court under the Arizona Supreme Court's decisions in *Amaral* and *Kolmann* in his Petition for Post Conviction Relief. This is requested based on pervasive ineffective assistance of counsel at guilt phase, egregious police and prosecutorial misconduct, actual or factual innocence, incompetency due to diabetes related ketoacidosis during his guilt phase trial, as well as other constitutional error, such that the outcome of his case would probably have been different but for this error.

Based upon the foregoing facts and legal argument, Petitioner respectfully requests that the Arizona Supreme Court grant review in this case and remand for an evidentiary hearing pursuant to the Arizona Supreme Court's decision in *State v. Amaral*, and *State v. Kolmann*, *supra*, because if his allegations are true, which this Court is obligated to treat as such under *State v. Jackson*, *supra*, they would probably have changed the outcome of his case or there is a reasonable probability that the outcome of his case would have been different.

RESPECTFULLY SUBMITTED this 6th day of October, 2023.

/s/
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Copy of the foregoing
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