
No.

In the
Supreme Court of the United States

SCOTT DRAKE CLABOURNE, Petitioner

v.

ARIZONA, Respondent

On Petition for Writ of Certiorari to the
Arizona Supreme Court

**Appendix to
Petition for Writ of Certiorari
Volume 2 of 3**

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FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SCOTT D. CLABOURNE,
Petitioner-Appellant,

v.

CHARLES L. RYAN,
Respondent-Appellee.

No. 09-99022

D.C. No.
4:03-cv-00542-
RCC

ORDER

Filed August 1, 2017

Before: Marsha S. Berzon, Richard R. Clifton,
and Sandra S. Ikuta, Circuit Judges.

Order;
Concurrence by Judges Clifton and Ikuta;
Dissent by Judge Berzon

SUMMARY*

Habeas Corpus/Death Penalty

The panel filed an order denying a petition for panel rehearing and, on behalf of the court, a petition for rehearing en banc in an appeal from the district court's denial of a 28 U.S.C. § 2254 habeas corpus petition in a death penalty case.

Concurring in the denial of rehearing, Judges Clifton and Ikuta wrote that the panel's assessment of what the Arizona Supreme Court did in resolving the petitioner's appeal remained correct.

Dissenting from the denial of rehearing, Judge Berzon wrote that, in light of *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc) (holding that the Supreme Court of Arizona applied an unconstitutional causal nexus test for nonstatutory mitigation), the panel was obligated to rehear the case and grant the habeas petition with regard to the penalty phase of trial.

COUNSEL

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

CLABOURNE V. RYAN

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ORDER

Judges Clifton and Ikuta have voted to deny the petition for panel rehearing. Judge Berzon has voted to grant the petition for panel rehearing.

Judge Ikuta has voted to deny the petition for rehearing en banc, and Judge Clifton so recommends. Judge Berzon has voted to grant the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are therefore **DENIED**.

CLIFTON and IKUTA, Circuit Judges, concurring in the denial of rehearing:

After careful consideration of this case, including a close review of the decision of the Arizona Supreme Court, *State v. Clabourne*, 194 Ariz. 379, 983 P.2d 748 (1999) (en banc), we entered a unanimous opinion that concluded that the

Arizona court “gave Clabourne’s mental illness some nonstatutory mitigating weight but ultimately held that the mitigating circumstances were insufficient to warrant leniency.” *Clabourne v. Ryan*, 745 F.3d 362, 369–70 (9th Cir. 2014). After explaining the basis for our determination that the Arizona Supreme Court had given mitigating weight to Clabourne’s mental deficiencies, we concluded, at 373:

We cannot construe the court to have violated *Eddings* [v. *Oklahoma*, 455 U.S. 104 (1982)] by giving Clabourne’s mental health issues “no weight by excluding such evidence from their consideration.” *Eddings*, [at 115]. The Arizona Supreme Court’s decision under review was not contrary to federal law, because it considered Clabourne’s mental health condition as mitigating evidence. *Eddings* requires no more.

Although there have been developments in our court’s precedents since we filed our opinion, none alter our assessment of what the Arizona Supreme Court did in resolving Clabourne’s appeal. We do not doubt the sincerity of Judge Berzon’s current view, but we conclude that our previous analysis of that court’s action, which she joined, remains correct.

BERZON, Circuit Judge, dissenting from the denial of rehearing:

I dissent from the denial of rehearing in this case.

We held the rehearing petition in this case for *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc), *cert. denied*, 137 S. Ct. 39 (2016), an en banc opinion of this court issued after our panel opinion, and then ordered supplemental briefing about the impact of *McKinney*. See Order to File Supplemental Briefs, *Clabourne v. Ryan*, 745 F.3d 362, 371 (9th Cir. 2014) (No. 09-99022). Ignoring both that briefing and *McKinney* itself, the panel majority now refuses to rehear the case. I am convinced that we are obligated to do so and, in light of *McKinney*, to grant the petition for habeas corpus with regard to the penalty phase. See, e.g., *Hedlund v. Ryan*, 815 F.3d 1233, 1236 (9th Cir. 2016), *amended and superseded on denial of rehearing en banc*, 854 F.3d 557 (9th Cir. 2017) (withdrawing original panel opinion and reconsidering a petitioner's claim in light of the intervening decision in *McKinney*).

I.

In *McKinney*, an en banc panel of this court stated unequivocally that, from the late 1980s to 2006, the “Supreme Court of Arizona articulated and applied a ‘causal nexus’ test for nonstatutory mitigation that forbade as a matter of law giving weight to mitigating evidence, such as family background or mental condition, unless the background or mental condition was causally connected to the crime.” 813 F.3d at 802. That causal nexus test, we held, violated *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982), which bars a sentencing court in a capital case from refusing as a matter of law to consider any relevant mitigating evidence. *McKinney*, 813 F.3d at 802.

McKinney emphasized repeatedly the consistency with which the Arizona Supreme Court articulated and applied the

unconstitutional causal nexus rule during the relevant period. *Id.* at 824 (“[T]he Arizona Supreme Court, during a period of just over fifteen years, consistently insisted upon and applied its causal nexus test to nonstatutory mitigation. In no case during this period did the court give any indication that the causal nexus test was not the law in Arizona, or any indication that it had the slightest doubt about the constitutionality of the test.”); *see also id.* at 803, 815, 826. It was in 1999 that the Arizona Supreme Court affirmed Clabourne’s death sentence, which, like the timing of the decision in *McKinney*, was “roughly in the middle of the fifteen-year-plus period during which it insisted on its unconstitutional nexus test for nonstatutory mitigation.” *See id.* at 820.

Of course, *McKinney* does not dispose of Clabourne’s petition for rehearing outright. But *McKinney*’s holding that the Arizona Supreme Court consistently applied an unconstitutional rule at the time it reviewed Clabourne’s sentence provides the baseline from which we must review the decision in *State v. Clabourne*, 194 Ariz. 379 (1999) (en banc) (“*Az Clabourne*”), and interpret any ambiguity therein.

Critically, *McKinney* also overruled the requirement established in *Schad v. Ryan*, 671 F.3d 708, 724 (9th Cir. 2011), that a federal habeas court may grant a petitioner relief on an *Eddings* claim only if there is a “clear indication in the record” that a state court refused as a matter of law to consider relevant nonstatutory mitigation evidence. *McKinney*, 813 F.3d at 819. *McKinney* held instead that a federal habeas court examining a claimed *Eddings* error need give a state court decision only the normal deference required under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). *Id.* In adhering to *Schad*’s “clear

indication” test, *see Clabourne v. Ryan*, 745 F.3d 362, 371, 373 (9th Cir. 2014), the panel opinion thus depends upon a standard that an en banc panel of this court expressly rejected as “an inappropriate and unnecessary gloss on the deference already required under” AEDPA, *see McKinney*, 813 F.3d at 819.

In short, by denying Clabourne’s petition for rehearing and leaving the opinion in this case unamended, the panel majority does not grapple with the significance of the intervening decision in *McKinney*, with regard either to its holding that the Arizona Supreme Court consistently applied an unconstitutional causal nexus rule during the relevant period or to its rejection of *Schad*’s heightened standard of review. At a minimum then—whatever the proper outcome—the panel opinion’s reasoning as it stands is inconsistent with the current law of this circuit and should be reconsidered.

But, the problem is not, in my view, one that can be simply papered over by revisions to the existing panel opinion. Rather, if the reliance on *Schad* is eliminated, as it must be, and *McKinney* is properly applied, we must change the outcome of this case by granting the petition for habeas corpus with regard to the penalty phase.

II.

In light of *McKinney*’s review of Arizona case law during the period *Az Clabourne* was decided, and absent the *Schad* mandate that we find a “clear indication in the record” that the state court committed *Eddings* error, I am convinced that *Az Clabourne* applied the unconstitutional causal nexus test identified in *McKinney* by declining to consider evidence of

Clabourne's schizophrenia as a nonstatutory mitigating factor.

The Arizona Supreme Court initially addressed Clabourne's mental health conditions in the context of statutory mitigation under Arizona Revised Statutes § 13-703(G)(1), impaired capacity. *Az Clabourne*, 194 Ariz. at 385. Statutory mitigation based on impaired capacity is available in Arizona only when mental illness is a “*major contributing cause*” of the defendant's conduct *and* the substantive requirements of (G)(1) are met. *Id.* (emphasis in original) (citation omitted). Substantively, “[t]he statute calls for ‘significant’ impairment of one of two specific abilities: (1) the capacity to appreciate the wrongfulness of conduct or (2) the capacity to conform conduct to the requirements of the law.” *Id.*; *see* Ariz. Rev. Stat. § 13-703(G)(1) (current version at Ariz. Rev. Stat. § 13-751(G)(1)).

In considering whether Clabourne was entitled to statutory mitigation for impaired capacity, the Arizona Supreme Court first recounted the evidence related to Clabourne's mental health. Two mental health experts believed Clabourne suffered from mental illness, probably schizophrenia, and another believed he had a personality disorder. *Az Clabourne*, 194 Ariz. at 385. Nevertheless, these experts agreed “that there was no evidence of Clabourne's state of mind at the particular time of the offense.” *Id.* In particular, the experts “could [not] say whether [Clabourne] was ‘psychotic,’” and none had “stated or implied a causal relationship between Clabourne's mental health and the murder.” *Id.* “Neither did any nonexpert party, including Clabourne, indicate that Clabourne had lost contact with reality or acted abnormally when he participated in the crime.” *Id.*

After emphasizing the requirement that mental illness be a “*major contributing cause*” of the defendant’s conduct for a finding of impaired capacity under the statute, the court held Clabourne’s “status of being mentally ill alone [] insufficient to support a (G)(1) finding.” *Id.* (emphasis in original).

The Arizona Supreme Court then proceeded to consider, still in the context of statutory mitigation, Clabourne’s argument that “his mental illness causes a passivity and paranoia that allowed Langston to control him, and therefore he was unable to resist Langston’s pressure to rape and kill Webster.” *Id.* at 386. The court had earlier in its discussion of impaired capacity noted that “[t]he record does demonstrate that Langston was a manipulative and frightening man who, for the most part, choreographed the crime and urged Clabourne to kill Webster.” *Id.* at 385. Accordingly, whereas the court rejected Clabourne’s status of being mentally ill because there was no causal link, the court rejected Clabourne’s passive personality and paranoia as a basis for mitigation under subsection (G)(1) because Clabourne had not satisfied the statute’s *substantive* standard. That is, Clabourne had not demonstrated “that his capacity to conform his conduct to the requirements of the law was significantly impaired” because he had shown neither that “he was passive or paranoid to any degree of impairment [n]or that he had actually lost any control over his conduct when he committed the murder.” *Id.* at 386; *see* Ariz. Rev. Stat. § 13-703(G)(1) (current version at Ariz. Rev. Stat. § 13-751(G)(1)).

When the Arizona Supreme Court turned to Clabourne’s mental health in the context of *nonstatutory* mitigating circumstances, it addressed only the specific fact that

“Clabourne has a passive personality and that he is impulsive and easily manipulated by others.” *Id.* at 387. As the court had indicated earlier, there was a plausible causal connection between *these* personality traits and the crime, given Langston’s manipulative personality and his leadership role in Webster’s murder. *See id.* at 385. So, under the Arizona Supreme Court’s causal nexus standard, those traits required weighing as to nonstatutory mitigation. The court recognized Clabourne’s passive personality and related characteristics to be “rooted to some degree in his mental health problems,” *id.* at 387, but, as I have explained, it considered those problems distinct from his schizophrenia diagnosis. It was thus only as to the specific “mental and personality deficiencies” of passive personality, impulsiveness, and manipulability—which *did* have a connection to the crime—that the court “afford[ed] some nonstatutory mitigating weight.” *Id.*

That the court gave some nonstatutory mitigating weight only to *these* specific mental and personality deficiencies, and *not* to his schizophrenia, is further evidenced by the court’s justification (in the very next sentence) for ultimately granting those characteristics little mitigating weight. *See id.* The court highlighted Clabourne’s “active participation throughout the six-hour ordeal and the fact that he personally strangled and stabbed Webster,” holding that those facts “render[ed] negligible any mitigating effect [of] Clabourne’s problems and the traits they manifest.” *Id.* Clabourne’s active involvement in a lengthy crime was pertinent to weighing the evidence that Clabourne had a passive, impulsive, and manipulable personality, but that active involvement would have no bearing on what mitigating weight to give a schizophrenia diagnosis.

To hold that the Arizona Supreme Court refused to consider Clabourne's schizophrenia at the nonstatutory mitigation phase thus does not, as the panel opinion suggests, require reaching the "illogical [] conclu[sion] that the Arizona Supreme Court considered [Clabourne's schizophrenia] diagnosis and explicitly referenced it in one portion of its opinion but forgot it when considering nonstatutory mitigation, discussed just a few pages later in the opinion." *Clabourne*, 745 F.3d at 374. The better inference, in light of *McKinney* and based on the reasoning and structure of *Az Clabourne*, is that the Arizona Supreme Court applied its causal nexus test—which, *McKinney* held, was its governing standard at the time, consistently applied—to exclude Clabourne's schizophrenia from consideration as a nonstatutory mitigating factor.

This understanding is bolstered by the fact that the Arizona Supreme Court expressly applied the causal nexus standard in the very next subsection of the nonstatutory mitigation discussion. The court rejected Clabourne's evidence of his dysfunctional family background because "[w]hatever the difficulty in Clabourne's family life, he has failed to link his family background to his murderous conduct or to otherwise show how it affected his behavior." *Az Clabourne*, 194 Ariz. at 387 (citing *State v. Spears*, 184 Ariz. 277, 293–94 (1996)).

The conclusion that the Arizona Supreme Court applied the unconstitutional causal nexus test to preclude consideration of Clabourne's schizophrenia diagnosis as a nonstatutory mitigating factor is further supported by the Arizona Supreme Court's citation to its own decision in *Az Clabourne* in later cases when applying the causal nexus standard. See, e.g., *State v. Carlson*, 202 Ariz. 570, 586

(2002) (en banc); *State v. Cañez*, 202 Ariz. 133, 164 (2002) (en banc). Those later citations to *Az Clabourne* for the causal nexus standard are relevant in light of *McKinney*. To the extent *Towery v. Ryan*, 673 F.3d 933, 946 (9th Cir. 2012), limited our review in habeas cases to the record in the case before us, barring consideration of post-hoc characterizations of a decision by a state court, *Towery* is inconsistent with *McKinney* and so does not control. *McKinney* looked freely beyond the record of the case before it, examining Arizona Supreme Court decisions in numerous other cases to establish that court's pattern of applying an unconstitutional rule.¹ Of course, later Arizona Supreme Court citations to *Az Clabourne* for the causal nexus standard are not dispositive, as a federal habeas court may grant relief only based on an error in the decision adjudicating a petitioner's claim. See 28 U.S.C. § 2254(d). But those later decisions do corroborate what a careful reading of the opinion, in light of *McKinney*, demonstrates.²

Again, that *Az Clabourne* applied the unconstitutional nexus test disapproved in *McKinney* is no wonder. As *McKinney* held, the Arizona courts applied the unconstitutional nexus test *consistently* during the period it decided *Az Clabourne*. “A good court [] does not apply an established rule erratically, enforcing it arbitrarily in some cases but not in others. We have great respect for the

¹ *McKinney* also held *Towery* was wrongly decided as to the *Eddings* issue in that case, further undermining *Towery*'s persuasive value. See *McKinney*, 813 F.3d at 824.

² Similarly, the prosecutor's arguments at Clabourne's resentencing hearing regarding a causal nexus confirm that Arizona law required such a nexus at the time Clabourne was resentenced, as *McKinney* held.

Supreme Court of Arizona, whose institutional integrity is demonstrated, *inter alia*, by the consistent application of the causal nexus test during the fifteen-year period it was in effect.” *McKinney*, 813 F.3d at 826. To hold, as does the current panel opinion, that the Arizona Supreme Court for some unexplained reason did not apply its own prior precedents in this case alone is to disregard not only *McKinney* but the Arizona Supreme Court’s own later references to this case as one in which the nexus requirement *was* applied.

In sum, after *McKinney*, I see no choice but to grant Clabourne’s petition and remand this case for resentencing. There is just no principled way to reconcile the panel opinion’s reasoning and holding with this court’s en banc opinion. I would rehear this case and grant the petition for habeas corpus with regard to the penalty phase. I therefore strongly dissent from the panel’s refusal to do either.

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. STEPHEN C. VILLARREAL

CASE NO. CR040238

DATE: December 14, 2015

STATE OF ARIZONA
Plaintiff,

vs.

KEVIN ARTICE MILES
Defendant

UNDER ADVISEMENT RULING

IN CHAMBERS RULING RE: DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF

Findings of Fact

I.

Introduction

This is a capital case. On July 6, 1993, Petitioner Kevin Artice Miles (“Miles”) was sentenced to death for his part in the December 7, 1992 felony murder of Patricia Baeuerlen. Miles instituted these proceedings with the filing of a petition for postconviction relief on January 6, 2014 (the “Successor Petition”). In his Successor Petition, Miles filed a claim under Rule 32.1(h) of the Arizona Rules of Criminal Procedure, which provides that a petitioner may obtain relief from his capital sentence if he “demonstrates by clear and convincing evidence that the facts . . . are sufficient to establish that . . . the court would not have imposed the death penalty.” On March 31, 2014, the Court entered an order rejecting the State’s argument that the Successor Petition was procedurally barred or precluded, and on that basis the Court addressed the Successor Petition on the merits. Order, Mar. 31, 2014 at 2-3. In the March 31 Order, the Court dismissed several claims in the Successor Petition, but it did find one claim colorable. The Court found that, if Miles proved that he was significantly impaired in his capacity to conform to the law due to Cocaine Withdrawal Syndrome, as defined in A.R.S. § 13-751(G)(1) (previously numbered as A.R.S. § 13-703(G)(1)), then “the factfinder may have found that, after weighing the aggravating and mitigating factors, Petitioner was entitled to leniency at sentencing.” *Id.* at 8. The State *unsuccessfully* challenged this finding in a Special Action to the Arizona Supreme Court, and subsequently Miles’ Rule 32.1(h) claim was scheduled for a hearing. Thereafter, on stipulation of the parties,¹

¹ The State entered the stipulation without waiver of its procedural defenses, while reserving the right to argue

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Miles amended his Successor Petition. The Amended Petition alleged in pertinent part, that the claim for relief under Rule 32.1(h) was supported by additional evidence that:

- Miles suffered from brain damage caused by an alcohol related neurodevelopmental disorder (hereafter “ARND”);
- Miles’ untreated ARND was aggravated by numerous damaging childhood experiences, including the pervasive and nearly constant exposure to his adoptive mother’s alcoholism and prostitution;
- Miles’ untreated and aggravated ARND resulted in secondary disabilities, including pathological levels of anxiety, delays in development and maturity, and a severe substance addiction; and in turn, these secondary ARND disabilities bore a causal relation to Miles’ development of a severe crack cocaine addiction during the late fall of 1992.
- The neurocognitive deficits caused by Miles’ cocaine withdrawal were exacerbated by his pre-existing ARND-related brain disorder, thereby strengthening the showing that at the time of the subject felony murder offense, Miles’ “capacity to conform his conduct to the requirements of the law was significantly impaired,” as defined under Arizona’s statutory mitigating circumstance in A.R.S. § 13-703(G)(1); and
- Miles’ pre-existing ARND-related brain disorder, in combination with the neurocognitive impairments produced by cocaine withdrawal, left Miles unable to subjectively appreciate that a loss of life was likely, engendering reasonable doubt with respect to whether Miles was eligible for the death penalty under *Tison v. Arizona*, 481 U.S. 137 (1987).

The Court conducted an evidentiary hearing on April 21-23, 2015. Having considered the testimony presented at the hearing, the exhibits and other documentary evidence in the record, the entire file in this matter, and the briefing and arguments of the parties, the Court now makes the following findings of fact and conclusions of law.

II. Background findings

1. In 1993, Kevin Miles was convicted of first degree felony murder, one count of dangerous kidnapping and one count of dangerous armed robbery. Miles was sentenced to death for the murder, he was sentenced to thirty-five years in prison for the armed robbery to run consecutive to sentence for the murder, and he was sentenced to thirty-five years for the kidnapping to run concurrent to the armed robbery sentence.

after the evidentiary hearing, that the amended petition failed to allege a colorable claim.

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2. The Court adopts the following facts found by the Arizona Supreme Court in its affirmance of Miles' conviction and sentence. *State v. Miles*, 186 Ariz. 10, 12, 918 P.2d 1028, 1030 (1996). "On December 7, 1992, Patricia Baeuerlen drove out of her apartment complex and stopped at the intersection of 24th Street and Columbus Avenue in Tucson. Miles, Levi Jackson, and Ray Hernandez were standing near the stop sign. Jackson approached her car and asked for a light. As she looked away, Jackson pulled out a gun and ordered her to scoot over. Miles, Jackson, and Hernandez then got into the car. Jackson drove to a desert area on the southeast side of Tucson. Miles held the gun on the victim for a time. After they got to the desert, Jackson shot and killed her. See the companion case of *State v. Jackson*, 186 Ariz. 20, 918 P.2d 1038 (1996). Miles then took the car and left for Phoenix the next day. The Chandler Police arrested him in the early hours of December 9, 1993, after a high speed chase. He had the victim's ATM card, credit card, and personal effects in his possession." *Id.* (internal citations and quotations omitted).
3. In the above quoted portion of the Arizona Supreme Court decision in Miles' case, the Court found that it was Jackson alone who shot and killed Ms. Baeuerlen, and it supported the finding of Jackson's culpability as the shooter with a citation to the "companion case" in *State v. Jackson*, which was decided by the Arizona Supreme Court on the same date as its decision in Miles. In its *Miles* decision, the Arizona Supreme Court cited to the facts in the *Jackson* case, in support of its finding that Jackson was solely culpable as the shooter; and accordingly, this Court adopts the following additional facts found by the Arizona Supreme Court in *Jackson*, as relevant to this Court's ultimate assessment of Miles' moral culpability, in light of the new mitigation evidence: "[Jackson] . . . planned the [crime], made all the necessary preparatory steps, and carried it out." *Jackson*, 186 Ariz. at 31, 918 P.2d at 1049. "Moreover, both Miles and Hernandez later urged Jackson to strip the victim and leave her naked in the desert so that she would be embarrassed to walk around or call the cops." *Id.* (internal quotations omitted). After Jackson shot Ms. Baeuerlen, when "Jackson on two separate occasions expressed his desire to repeat the experience," by killing two additional victims, "Miles and Hernandez did not want to do so . . . [and] chose not to do so." *Id.* at 30, 918 P.2d at 1048.
4. In its decision, the Arizona Supreme Court affirmed Miles' eligibility for a death sentence, finding that *Tison*'s twin requirements -- major participation in the underlying felony offenses and exhibition of reckless indifference to human life -- were proven beyond a reasonable doubt. *Miles*, 186 Ariz. at 16, 918 P.2d at 1034.
5. Supporting its finding that Miles was a major participant in commission of the robbery and kidnapping, the Arizona Supreme Court found that "[Miles] admit[ted] he accompanied his co-defendants to steal the gun.

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He waited with them at the street corner while Jackson found a victim. He got into the car after Jackson commandeered it. He admit[ted] he held the gun on the victim while Jackson drove to the desert. He was present when Jackson shot the victim. Later that evening, he took her car and used her ATM and credit cards.” *Id.*

6. Supporting its finding that Miles exhibited a reckless disregard for human life, the Arizona Supreme Court found that “[Miles] admit[ted] that before the car jacking Jackson told him, he was gonna get somebody’s car, take ‘em off in the middle of the desert and shoot ‘em. Miles claims he did not believe Jackson, and therefore he was not reckless. This argument is disingenuous. Miles knew of Jackson’s intentions beforehand. Nevertheless, he went along with Jackson to get the gun. He got in the car after Jackson carjacked the victim and rode along to the desert. For a period of time, he held the gun on the victim. He then watched as Jackson shot the victim.” *Id.* at 16-17, 918 P.2d at 1034-35 (internal citation and quotation marks omitted).
7. In its decision affirming Miles’ death sentence, the Arizona Supreme Court also affirmed that the State had proved the following aggravating circumstances beyond a reasonable doubt:
 - a. Miles had been previously convicted of three separate robberies, crimes involving the use or threatened use of violence under A.R.S. § 13–703(F)(2);
 - b. The murder was committed for pecuniary gain under A.R.S. § 13–703(F)(5); and
 - c. The murder was especially cruel A.R.S. § 13–703(F)(6). However, the Supreme Court overturned the trial court’s unsubstantiated finding that Miles’ participation in the felony murder was especially heinous or depraved.
8. In its decision affirming Miles’ death sentence, the Arizona Supreme Court also made findings regarding the mitigation evidence Miles had offered at sentencing:
 - a. It found that the defense psychologist Dr. Martin Levy “had no basis upon which to render an opinion about the effects of crack cocaine use . . .” *Id.* at 18, 918 P.2d at 1036.
 - b. It specifically rejected Miles’ claim that he was significantly impaired in his capacity to conform his conduct to the requirements of the law under A.R.S. § 13–703(G)(1). *Id.*; and
 - c. It found that “[t]he bald assertion that [Miles] abused drugs the night before the murder [did] not satisfy the § 13–703(G)(1) circumstance.” *Id.*
9. The Arizona Supreme Court found the following mitigating factors did exist:
 - a. Miles was convicted of felony murder;

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- b. He had a prior reputation for nonviolence;
- c. He was remorseful;
- d. His mother died, he became separated from his wife and child and lost his job; and
- e. He used alcohol and drugs.

Id. at 19-20, 918 P.2d at 1037-38.

10. Finally, the Arizona Supreme Court conducted an independent review to decide “if the mitigation [was] sufficiently substantial to warrant leniency,” and the Court held that it was not; finding that “the mitigation [was] insufficiently substantial to call for leniency.” *Id.* at 20, 918 P.2d at 1038.
11. Miles now asks, in light of the evidence presented in support of his Successor Petition, as amended, that this Court grant relief under Rule 32.1(h), because he has now presented “clear and convincing evidence . . . sufficient to establish that . . . [either] the [sentencing] court, [or the Arizona Supreme Court on independent review], would not have imposed the death penalty.” *Id.*

III.

Findings regarding Miles’ biological family

12. Miles has presented evidence in these proceedings regarding his biological family. No material evidence concerning Miles’ biological family was presented to the sentencing court or the Arizona Supreme Court. However, the Court finds that evidence concerning Miles’ biological familial background is now relevant, particularly because such evidence:
- a. Is material to the allegation that Miles suffers from an ARND caused by his biological mother’s ingestion of alcohol during her pregnancy with Miles; and
 - b. Is material to the allegation (i) that genetics is a defined cause of addiction and (ii) that Miles carries this hereditary propensity to addiction, as demonstrated by evidence that his maternal lineage have had serious problems associated with alcoholism and addiction to drugs.
13. In these proceedings, Miles presented evidence regarding his biological familial background (that was neither presented to the sentencing court nor the Arizona Supreme Court) principally through:
- a. The evidentiary hearing testimony of his maternal aunt, Deborah Bradford;
 - b. A Social History Summary admitted in evidence as Exhibit 1 with appended corroborating Exhibits;
 - c. A Declaration dated March 29, 2015, from mitigation investigator Cheryl Fischer admitted in evidence as Exhibit 1.3; and

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- d. A 72-page Mitigation Report dated October 24, 2002, prepared by Cheryl Fischer, admitted in evidence as Exhibit 1.3(b).

14. The Court relies on Exhibits 1, 1.3 and 1.3(b), as well as Ms. Bradford's testimony to find clear and convincing evidence that:

- a. Miles' biological mother, Gloria Chase, was raised in abject poverty with her six siblings in Tulsa, Oklahoma;
- b. Gloria began working as a prostitute and using drugs at age 16 or 17;
- c. Gloria's first child was removed from her custody by Child Protective Services;
- d. Gloria used alcohol and drugs and continued prostituting throughout her pregnancy with Miles; and
- e. Gloria and her siblings suffered from serious, lifelong problems with alcoholism and drug addiction.

IV.

Findings regarding Miles' ARND and brain damage

15. Miles has presented evidence in these proceedings that he suffers from significant ARND related brain damage caused by his mother Gloria's drinking alcohol during her pregnancy. It is undisputed that none of this evidence was presented to the sentencing court or the Arizona Supreme Court. However, the Court finds that the evidence concerning Miles' ARND-related brain damage is relevant. Evidence that Miles suffers from ARND related brain dysfunction is:

- a. Material to the allegation that Miles has lifelong, permanent deficits in his cognitive, emotional and adaptive functioning;
- b. Material to the allegation that there is a causal nexus between these aforementioned deficits in cognitive, emotional and adaptive functioning, and Miles' fall into crack cocaine addiction in late 1992; and
- c. Material to the allegation that Miles' untreated ARND, combined with the symptomatology of Cocaine Withdrawal Syndrome, resulted in significant impairments in his capacity to conform to the law at the time of the November robberies and December 7 offense.

16. In these proceedings, Miles presented evidence demonstrating the existence of his ARND related brain impairments, and the related deficits and disabilities caused thereby, principally through the expert testimony and report of neuropsychologist Dr. Kenneth Benedict. (Ex. 23.) Psychiatrist Dr. Pablo Stewart

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also provided testimony regarding the effects Miles' ARND had on his emotional, cognitive and adaptive functioning.

17. Based on the reports and testimony of Dr. Benedict and Dr. Stewart, the Court finds clear and convincing evidence that:

- a. Consequent to prenatal exposure to alcohol, Miles suffers from ARND related brain damage, which is expressed in significant to severe-level deficits in visuospatial functions and related brain processes, which are associated with posterior, right hemisphere cortical brain dysfunction;
- b. Miles' brain damage results in deficits in organizational skills, synthesizing and integrating information, processing of information, adaptation to novel situations, and deficits in seeing the big picture; i.e., deficits in the ability to discern the most important facts about a situation and the effects of that situation on other things;
- c. People with this neuropsychological profile, including Miles, have significant difficulty functioning independently without support; they tend to be quite immature in relation to their chronological age; they have a great deal of difficulty adapting to change and knowing what to do next; and although they are conversant with details and are very verbal and social, they have deficits in the ability to synthesize and prioritize information, or learn from experience.²; and
- d. In making the above findings, the Court also relies on Dr. Benedict's finding in his report, that "Miles's specific brain damage, represented by a consistent pattern of significant and often severe visuospatial processing deficits, has been identified in the literature as over-represented among individuals exposed to alcohol *in utero*." (Tr. Apr. 21, 2015 at 161-66, 168; Tr. Apr. 22, 2015 at 5-7, 67; Tr. Apr. 23, 2015 at 16, 22-23; Ex. 23 at 21-22.)

18. The undisputed testimony that Miles was exposed to alcohol in utero combined with the organic brain damage consistent with ARND revealed through extensive neuropsychological testing shows by clear and convincing evidence that Miles had an alcohol-related neurodevelopmental disorder at the time of the offense.

² Dr. Benedict's report, (Ex. 23 at 35), lists the Streissguth Study as a reference. See Streissguth et al., *Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE)*, Final Report Aug. 1996 at 51, 56. Streissguth found that that over 80% of adults with fetal alcohol effects had problems with employment and had failed to achieve adult independence.

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V.

Childhood and developmental factors

19. In these proceedings, Miles presented evidence that the disturbing circumstances of his childhood actually worsened his ARND-related brain damage and contributed to adaptive functioning deficits and substance addiction. The sentencing court and the Arizona Supreme Court had little or no accurate evidence concerning Miles' childhood circumstances, and those courts had no evidence that Miles suffered from an ARND. Here, the Court finds that the evidence Miles has presented in these proceedings concerning his childhood is relevant, particularly because:

- a. Such evidence is material to the allegation that Miles' ARND was worsened by his dysfunctional childhood circumstances; principally by the pervasive and nearly constant exposure to his adoptive mother's alcoholism and prostitution; and
- b. Such evidence is material to the allegation that Miles' untreated and aggravated ARND resulted in secondary disabilities, including pathological levels of anxiety, delays in development and maturity, and a severe substance addiction; and in turn, these secondary ARND disabilities bore a causal relation to Miles' development of a severe crack cocaine addiction during the late fall of 1992.

20. In these proceedings, Miles presented evidence regarding his childhood, and the damaging, secondary, disabling effects it had on his ARND principally through:

- a. A Social History Summary admitted in evidence as Exhibit 1 with appended corroborating Exhibits;
- b. A Declaration dated March 29, 2015, from mitigation investigator Cheryl Fischer admitted in evidence as Exhibit 1.3;
- c. A 72-page Mitigation Report dated October 24, 2002, prepared by Cheryl Fischer, admitted in evidence as Exhibit 1.3(b);
- d. Testimony of Elaine Renfro;
- e. Testimony of Tony Bard; and
- f. The expert testimony and reports of Dr. Smith, Dr. Benedict and Dr. Stewart.

21. Based on the evidence identified in finding 19, the Court finds clear and convincing evidence that:

- a. When Miles was several months old, his mother Gloria gave Miles away to Lois and Alfred Miles, the operators of Tulsa, Oklahoma's Blanches Bar and Nightclub. Blanches was an illegal

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enterprise, which featured prostitution, bootlegged corn whiskey, and gambling, as well as frequent gunfights, assaults and domestic violence. Lois and Alfred also lived at Blanches, and Miles was raised inside the Blanches Nightclub until he was nearly two years old. Lois was a frequent victim of Alfred's domestic violence, and for this reason, she left Tulsa with Miles, ultimately moving to the city of Winslow, Arizona when Miles was approximately two years old;

- b. After moving to Winslow, Lois took up bartending and prostitution at the Prairie Moon Bar. Lois was known as the "Queen of the Prostitutes." Lois rented a house next to the Prairie Moon, and later she rented a house behind the Prairie Moon. Lois operated a brothel inside her homes, where she and others performed acts of prostitution. Violence and sex pervaded the area surrounding the Prairie Moon. Miles had early and frequent exposure to prostitution, adult sexual promiscuity, drugs, alcohol and violence. Criminality, principally in the form of prostitution, and evasion of the law, permeated Miles' homelife;
- c. Throughout Miles' childhood, Lois was a severe hard whiskey alcoholic who drank from morning till night. Miles would frequently find Lois passed out in different locations inside and outside the house, and he frequently feared she would die and he'd be left alone. Lois came to Miles' school sporting events staggering drunk; and
- d. There is credible support for Dr. Benedict's finding that Miles' psychosocial history was horrific, and there is credible support for Dr. Smith's finding in his report, that Miles' childhood was so chaotic and unpredictable that it was like a war-zone minefield.

22. The Court finds clear and convincing evidence (based on the testimony and reports of Dr. Benedict, Dr. Smith and Dr. Stewart) that:

- a. Miles' aberrant childhood experiences, particularly the pervasive exposure to his adoptive mother's alcoholism and prostitution worsened and aggravated the cognitive, emotional and adaptive deficits associated with his ARND;
- b. As a result of Miles' worsened ARND, he lacked the emotional, cognitive or adaptive skills to transition to independent adult functioning. The Court credits the report of Dr. Benedict, that children born with an ARND are prone to "significant alcohol and drug dependency problems and adaptive functioning deficits, including problems with independent living and obtaining

gainful employment.” These deficits explain Miles’ failure to successfully complete his Naval enlistment, his failure to transition to successful employment, and his failed marriage.³;

- c. Miles’ worsened ARND was a significant causative factor in Miles’ development of a substance abuse disorder;
- d. Genetics also contributed to Miles’ arc toward addiction. The Court credits Dr. Smith’s testimony that 75% of the patients he has treated carry evidence of inheritance of their addiction, and the Court credits Dr. Stewart’s testimony that addiction has heritable characteristics similar to any other genetically influenced illness. The Court also credits Dr. Smith’s testimony regarding the role that shame plays in the development of substance abuse and addiction, and the Court finds credible Dr. Smith’s conclusion that Miles’ shame over his adoptive mother’s prostitution and alcoholism were also significant causative factors in Miles’ development of substance abuse problems and addiction. What is more, Miles’ adoptive mother modeled substance abuse as a coping mechanism throughout his lifetime; and
- e. The evidence demonstrates to a degree that is clear and convincing, that Miles suffered a number of disabilities, none of his own making, including significant prenatal brain damage, and these deficits eventually combined with genetic and other environmental factors to cause secondary disabilities, including delays in independent adult functioning and a severe substance addiction. Quoting from Dr. Benedict’s report, the Court finds that “Miles’ aberrant and destructive childhood experiences exacerbated his pre-existing brain dysfunction, directly contributing to the secondary disability seen in Miles, including his ultimate addiction to drugs” and “at age 24 Miles was functioning at a significantly younger age.” (Tr. Apr. 22, 2015 at 15, 17-18, 22-25, 28, 30, 32, 88-89, 103-08; Tr. Apr. 23, 2015 at 21, 41; Ex. 1 at 8-9; Ex. 1.3b at 54-57, 60, 62-63; Ex. 1.6 at 3-4; Ex. 1.63 at 78, 83; Ex. 1.65 at 4-7, 11-12, 17; Ex. 23 at 22, 29-31; Ex. 30 at 8-11.)

VI.

Effect of disabilities on crack cocaine use

23. In these proceedings, Miles has presented evidence that his participation in a string of robberies and the instant offense, was precipitated by twin brain impairments caused by Cocaine Withdrawal Syndrome and

³See also the citations in footnote 2 above, identifying other studies confirming that persons suffering from ARND tend to show the most severe secondary disabilities and are unable to function at an age-appropriate level.

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ARND. However, the Court also considers as mitigation, that there were factors leading to his increased use of crack cocaine (and the resultant addiction) that were not within his control.

24. Prior to the offense, Miles' adoptive mother had died and he had become separated from his wife and child, and the Arizona Supreme Court identified this as a mitigating factor. *Miles*, 186 Ariz. at 19-20, 918 P.2d at 1037-38. However, the Arizona Supreme Court did not have evidence Miles has presented in these proceedings demonstrating that Miles' inability to cope with his mother's death and the loss of his wife and child were influenced by factors not within his control.
25. The Court has already found that Miles' untreated ARND resulted in secondary disabilities that predisposed him to substance addiction and left him with adaptive deficits in maturity and independent adult functioning. Dr. Stewart and Dr. Benedict both testified, and this Court now finds, that in the fall of 1992, these same deficits fostered Miles' increased use of crack cocaine, precisely because he lacked the cognitive and emotional tools to deal with the loss of his wife and child and death of his mother. (Tr. Apr. 22, 2015 at 88, 108; Tr. Apr. 23, 2015 at 16-17, 33.)
26. The Court credits Dr. Benedict and Dr. Stewart's testimony that when Miles' wife left him in September 1992, (1) Miles was extremely dependent and lacking in the ability to function independently; (2) his coping skills, limited by ARND, were overwhelmed; (3) Miles' brain impairments would predict a lack of organization and an inability to plan a solution to a novel situation; and (4) these deficits and impairments combined with Miles' predisposition to substance addiction, triggered his increased use of crack cocaine during the fall of 1992. (Tr. Apr. 22, 2015 at 22-25, 28, 30, 32, 103, 105.)⁴
27. The Court finds clear and convincing evidence that Miles' untreated ARND and related deficits and secondary disabilities led to Miles' increased use of crack cocaine after his wife and child left him in

⁴The Court finds based on Dr. Smith's report and testimony that Miles had substance-addiction problems since his graduation from high school, principally with alcohol and marijuana, which contributed to his failure to complete his Naval enlistment and led to problems in his marriage to Tami Miles. (Tr. Apr. 22, 2015 at 105; Ex. 30 at 8-9.) However, the Court finds that as of late summer 1992, although Miles had experimented with crack cocaine, Miles did not yet have an addiction to crack cocaine. Miles' friend Martha Pejka testified that Miles was not obsessed with using crack during the spring of 1992, and she testified that when Miles visited her in Bloomington, Illinois for several weeks that summer he was not using cocaine. (Tr. Apr. 21, 2015 at 33-34, 36, 38-40, 48-51, 53.) The Court thus finds that Miles' increased usage and ultimate addiction to crack cocaine was not triggered until the fall of 1992 after his wife and child left him and his mother died.

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September, and his mother died toward the end of October 1992. Factors not within Miles' control triggered Miles' increased use of crack cocaine and led to his ultimate crack cocaine addiction.⁵

VII.

Findings regarding the neurocognitive/neurobehavioral effects of crack cocaine addiction and withdrawal

28. In these proceedings, Miles has presented scientific evidence regarding the neurocognitive and neurobehavioral effects of drug addiction in general, and cocaine addiction and withdrawal in particular. This evidence was not presented to or considered by the sentencing court or the Arizona Supreme Court. The Court finds this new evidence is relevant to the assessment of whether Miles was significantly impaired in his capacity to conform to the law under A.R.S. § 13-703(G)(1) and/or whether Miles committed the offense while exhibiting a reckless disregard for human life.
29. Since Miles' 1993 sentencing, there have been significant changes in the scientific understanding of the effects of crack cocaine addiction and withdrawal on the brain and on resulting decision-making and behavior. Dr. Levy, who testified at Miles' 1993 sentencing proceeding and again more recently in these proceedings, compared these forensic advancements to those brought about by DNA testing. (Tr. Apr. 21, 2015 at 98.) This new scientific knowledge was not available at the time of sentencing.
30. Dr. Levy testified in these proceedings that when he examined Miles in 1993, he was not expert in the neurocognitive/neurobehavioral effects of crack cocaine withdrawal. Dr. Levy readily conceded he was not able to reliably assess Miles for these neurocognitive/neurobehavioral deficits, (*id.* at 71-72), and as noted above, the Arizona Supreme Court agreed that no reliable assessment was completed, since it found that Dr. Levy "had no basis upon which to render an opinion about the effects of crack cocaine" *Miles*, 186 Ariz. at 18, 918 P.2d at 1036.
31. In these proceedings, Miles presented the testimony and reports of Dr. Smith and Dr. Stewart regarding the effects of cocaine addiction and withdrawal. He also submitted literature published by the National Institute of Drug Abuse. The Court finds all this evidence to be credible and uncontradicted, and the Court finds clear and convincing evidence that:
 - a. Whereas addiction has long been considered to result from moral flaws and lack of willpower, it is now generally accepted that "addiction is a chronic relapsing brain disease that is characterized

⁵The Court makes an independent finding that Miles was addicted to crack cocaine and suffered associated withdrawal symptoms in separate findings below.

by compulsive drug seeking despite harmful consequences.” (Tr. Apr. 22, 2015 at 83-86, 129-30; Ex. 30 at 2; Ex. 31 at 5.);

- b. Addiction is a chronic relapsing brain disease “because drugs change the brain – they change its structure and how it works,” and in turn these “changes in brain structure impair a person’s thinking, judgment, decision-making, perceptions and behavior.” (Tr. Apr. 22, 2015 at 83-88; Ex. 30 at 2; Ex. 31 at 8.) The changes to the addict’s brain are physical not merely psychological. (Tr. Apr. 22, 2015 at 83-88.) “More than physical dependence, addiction represents changes in the brain that lead to . . . diminished capacity for the control of impulses.” See David M. Eagleman et al., *Why Neuroscience Matters for Rational Drug Policy*, 11 Minn. J.L. Sci. & Tech. 7, 26 (2010);
- c. “Brain imaging studies from addicted individuals show physical changes in the areas of the brain that are critical to judgment, decisionmaking, learning and memory and behavior control.” (Ex. 31 at 11.) “Brain areas affected by drug abuse,” include the cerebral cortex, which controls “our ability to think, plan, solve problems and make decisions.” (*Id.* at 19.);
- d. Brain science is also critical to understanding cocaine addiction and withdrawal. Continued and frequent use of cocaine causes severe neurochemical changes in the brain, principally by destruction of the dopamine neurotransmitter system. (Tr. Apr. 22, 2015 at 89-95; Tr. Apr. 23, 2015 at 35-37; Ex. 30 at 3-4.) Cocaine is among the most powerfully addictive drugs. (Tr. Apr. 22, 2015 at 130; Tr. Apr. 23, 2015 at 40.);
- e. Dopamine is a neurotransmitter that functions in the ventral tegmental area of the brain, the nucleus accumbens, and prefrontal cortex—the reward circuit of the brain. Dopamine transmits messages to the receptors. (Tr. Apr. 22, 2015 at 90–91, 97.) In the normal sequence, dopamine is taken back up and recycled. (*Id.* at 92; Tr. Apr. 23, 2015 at 35.) When cocaine is used, however, cocaine blocks the re-uptake of dopamine causing the dopamine to be retained in the space between the transmission and the receptor, the synapse, resulting in a flooding of accumulated dopamine in the space. (Tr. Apr. 22, 2015 at 92–93; Tr. Apr. 23, 2015 at 35–37.) When cocaine is used on a regular basis over a number of days or weeks, the accumulation of dopamine metabolizes, resulting in a net depletion of dopamine available in the body. (Tr. Apr. 22, 2015 at 94, 97.) 78. This process—the depletion of the amount of available dopamine—is the actual physical, neurochemical change in the brain. (*Id.* at 94–95, 97, 125; Tr. Apr. 23, 2015 at 38.)

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This physical change is the principal cause of the withdrawal symptoms that result in behavioral changes in how a person feels. (Tr. Apr. 22, 2015 at 98; Tr. Apr. 23, 2015 at 37.);

- f. These physical changes to the cocaine addict's brain cause a unique form of withdrawal symptomatology, which occurs when the addict is not intoxicated. (Tr. Apr. 22, 2015, at 95, 97-98, 108; Tr. Apr. 23, 2015 at 33, 35-37; Ex. 30 at 3-4; Ex. 32 at 4, 8; Ex. 64.) These symptoms include anxiety, a severe craving for more cocaine, difficulty planning, severely impaired judgment, and inability to foresee consequences. (Tr. Apr. 22, 2015 at 98-102, 110; Ex. 30 at 3-4.) As explained by Dr. Smith, by changing and effectively hijacking the brain chemistry, cocaine tells the person what to do and they are the slave." (Tr. Apr. 22, 2015 at 130; *see also* Ex. 30 at 11.); and
- g. During cocaine withdrawal, the damaged neurotransmitter system in the addict's brain also causes a severe depression, extreme dysphoria, and agitation with significant cognitive impairment. (Tr. Apr. 23, 2015 at 35-37, 41; Ex. 64.) The crack cocaine addict in withdrawal feels like he will die unless he obtains more of the drug. (Tr. Apr. 22, 2015 at 100; Tr. Apr. 23, 2015 at 38, 41-42.).

VIII.

Development of crack cocaine addiction in the fall of 1992

- 32. The Court finds, based on Dr. Smith's report and testimony, that Miles had substance-addiction problems since his graduation from high school, principally with alcohol and marijuana, which contributed to his failure to complete his Naval enlistment and led to problems in his marriage to Tami Miles. (Tr. Apr. 22, 2015 at 105; Ex. 1 at 8-9; Ex. 1.3b at 54-57, 60, 62-63; Ex. 1.6 at 3-4; Ex. 1.63 at 78, 83; Ex. 1.65 at 4-7, 11-12, 17; Ex. 23 at 29-31; Ex. 30 at 8-9.) However, the Court finds that as of late summer 1992, although Miles had experimented with crack cocaine, Miles did not yet have an addiction to crack cocaine. Miles' friend Martha Pejka testified that Miles was not obsessed with using crack during the spring of 1992, and she testified that when Miles visited her in Bloomington, Illinois for several weeks that summer he was not using cocaine. The Court thus finds that Miles' increased usage and ultimate addiction to crack cocaine was not triggered until the fall of 1992 after his wife and child left him and his mother died.
- 33. The Court has made findings above that Miles' escalating use of crack cocaine was causally linked to the deficits and secondary disabilities associated with his untreated ARND, which left him without the cognitive

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or adaptive skills to appropriately address the separation from his wife and child, and the death of his mother in late October 1992.

34. In the weeks preceding the offense, witnesses observed a dramatic change in Miles' demeanor and behavior. Miles' friend, Ed Mazique, described Miles' escalating depression in the weeks and days leading up to the offense, noting that Miles "cried frequently while talking about his mother's death and [his wife] Tami leaving with [his daughter] Raeni." Mazique said that on these occasions "the tears would start rolling down [Miles'] cheeks," and "he seemed to have no control over . . . his life," and "[he] seemed not to know what was going on, he wasn't focusing on anything, and it just didn't seem like Kevin." (Ex. 1.3b at 66, 69.)
35. Another acquaintance described Miles as not eating for several days prior to the offense; all he did was drink alcohol and smoke crack cocaine. (Ex. 1.3b at 68.) Miles reported to friends during this time that he had nothing to live for, and he described himself as a dead man walking. (Ex. 1.3b at 61; Ex. 30 at 10.)
36. Miles used the initial \$100 in cash proceeds from Ms. Beurelen's ATM card on crack cocaine and used it all at once. (Ex. 1.3b at 67-68). And when Miles was arrested in the early hours of December 9, 1992, the arresting officers described Miles as screaming over and over that he "needed a fix," he "needed a \$20" and he "had to have it." (Ex. 8 at 4; Ex. 10 at 3.)
37. Russ Renfro, who saw Miles on the day after the offense on December 8, 1992, said he was shocked when he saw Miles, noting it was "like seeing another person inside Miles' body," and that Miles "even looked different, all twisted like [and] his eyes and expression on his face made him look crazy, like the lights were on but no one was home." He was "not the person they all knew." (Ex. 1.3b at 69.)
38. During the police interrogation that followed his arrest, Miles told the detectives that after his mother died, he had been using as much cocaine as he could get, and that he had been smoking rocks all day long. (Ex. 39 at 17-18, 28.)
39. Miles had used crack cocaine all night prior to the instant December 7 offense and had his last dose in the early morning hours on the day of the instant offense. (Tr. Apr. 23, 2015 at 43; Ex. 30 at 9.)
40. Dr. Smith, who has evaluated and treated over 4,000 patients suffering from cocaine addiction, diagnosed Miles as suffering from cocaine addiction through the period from late September 1992 through the commission of the instant offense on December 7, 1992. Dr. Smith also diagnosed Miles as suffering from Cocaine Withdrawal Syndrome when Miles was not intoxicated by the drug, during Miles' commission of the robberies in November 1992 and on the day of the instant offense on December 7, 1992. (Ex. 30 at 4-5, 9-11; Tr. April 22, 2015 at 109-12.)

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41. Dr. Stewart, who has treated over 10,000 addicts, also diagnosed Miles with crack cocaine addiction during this late 1992 time period, and he, too, diagnosed Miles as suffering from Cocaine Withdrawal Syndrome when Miles was not intoxicated by the drug, during Miles' commission of the robberies in November 1992 and on the day of the instant offense on December 7, 1992.
42. The Court finds clear and convincing evidence that Miles was addicted to crack cocaine and suffering from Cocaine Withdrawal Syndrome during the times he committed the November robberies and on December 7, 1992, at the time of the instant offense.

IX.

Effect of Miles' pre-existing ARND-related brain damage on his Cocaine Withdrawal Syndrome

43. As the Court found above, Miles has significant to severe ARND related brain damage.
44. The question addressed here is whether the deficits associated with Miles' pre-existing ARND related brain impairment would exacerbate his Cocaine Withdrawal Syndrome. Based on evidence presented by Dr. Stewart, Dr. Benedict and Dr. Smith, the Court finds there is clear and convincing evidence that Miles' pre-existing brain impairments did compound and exacerbate his cocaine withdrawal symptoms. (Tr. Apr. 22, 2015 at 25, 27-28; Tr. Apr. 22, 2015 at 112; Tr. Apr. 23, 2015 at 41; Ex. 23 at 33; Ex. 30 at 13.)

X.

Miles' capacity conform his conduct to the requirements of the law

45. The Court finds that there is clear and convincing evidence that during the December 7 felony murder offense, and during the earlier robberies Miles committed in the weeks prior, his capacity to confirm his conduct to the requirements of the law was significantly impaired as defined in A.R.S. § 13-751(G)(1). The Court provides the reasons for this ultimate finding below.
46. There was some evidence presented to the sentencing court suggesting that Miles' participation in the robbery and kidnapping of Ms. Baeuerlen (and the earlier robberies) was totally out of character. The sentencing court received letters from eleven people and testimony from two more attesting to Miles' lifelong reputation and character as good-natured, peaceful, and non-violent. Miles' wife Tami, who had been with him for most of the five years preceding the offense, echoed what many said: that Miles' involvement in the instant offense where a life was taken "is just not something that he [was] capable of doing . . . [h]e has always been fun loving and easy going . . . [and] he is not a violent person or sociopath." (Ex. 21 at 2.)

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47. The sentencing court and Arizona Supreme Court found Miles' pre-offense character was a mitigating factor, and this Court finds that it still is.⁶ However, evidence that Miles underwent a change in his peaceable pre-offense character takes on additional relevance, in light of the new evidence presented in these proceedings that Miles was significantly impaired in his capacity to conform to the law. That is to say, evidence of Miles' peaceable, non-violent character adds weight to this Court's finding that there must have been an intervening force (in this case, the significant brain dysfunction associated with Cocaine Withdrawal Syndrome), which impaired Miles' capacity to conform to the law's requirements.
48. The evidence Miles presented in these proceedings also demonstrates how suddenly Miles' behavior changed during the fall of 1992. Ms. Pejka testified to her frequent contacts with Miles during the first eight months of 1992, and she ratified that Miles had a passive, non-violent character. (Tr. Apr. 21, 2015 at 36, 42.) The Court finds that Ms. Pejka's testimony adds to the already credible showing that Miles had a peaceable, non-violent character all the way through the summer of 1992, and that therefore, the sudden, dramatic change in his behavior is relatable to cocaine withdrawal and its associated neurocognitive/neurobehavioral impairment.
49. Evidence of Miles' sudden change in character only partially supports the Court's finding that Miles was significantly impaired in his capacity to conform to the law. For the remaining support for its conclusion (based on the testimony and reports of Dr. Smith, Dr. Benedict and Dr. Stewart) the Court finds:
- a. Miles' participation in the December 7 offense was inexorably tied to a uniquely severe form of neurochemically induced brain dysfunction, caused by Cocaine Withdrawal Syndrome.
 - b. Miles' cocaine-withdrawal-induced brain dysfunction resulted in an extreme dysphoria and a severe craving for more cocaine, a craving Dr. Stewart described as a feeling of impending death, unless more of the drug is obtained. Accompanying these symptoms, Miles suffered from severely impaired judgment and decision-making and his ability to exercise foresight or foresee the consequences of his actions was significantly impaired.
 - c. The assessment of the degree of Miles' impairment at the time of the offense does not rest on the effects of cocaine withdrawal alone. That is because neurochemical changes induced by cocaine withdrawal were operating on Miles' already compromised brain. Impairments to Miles'

⁶ In these proceedings, Miles presented additional evidence regarding his pre-offense character from additional sources, including Anthony Bard, Martha Pejka and Elaine Renfro. The Court finds Mr. Bard, Ms. Pejka and Ms. Renfro credibly added to the showing that Miles has an underlying good natured, non-violent character.

capacity to conform to the law inextricably intertwine the combined effects of Cocaine Withdrawal Syndrome and his ARND related brain deficits.

- d. The Court credits Dr. Benedict's finding that Miles' ARND related brain disorder, in combination with the subcortical executive functioning brain deficits produced by cocaine withdrawal, left Miles with "two very major brain centers [that were] essentially hijacked . . . [and left in their wake] a perfect storm in terms of ability to conform [his] actions to the law." (Tr. Apr. 22, 2015 at 26-27.) As Dr. Benedict went on to explain: "[w]ith a pre-existing brain disorder and a cognitive baseline such that he has inherent difficulty 'seeing the big picture,' the addition of crack cocaine withdrawal renders it all but impossible that on the day of the offense Mr. Miles would have had anything on his mind other than finding his next fix"
- e. An assessment of Miles' functional age at the time of the offense must also be added to the consideration of the degree of his impairment. During the initial sentencing proceedings, it was assumed that Miles was a normal 24-year-old young man with the maturity to exercise control over himself and his two juvenile companions. But this was not an accurate portraiture. As explained by Dr. Benedict, "Miles was developmentally much younger than his stated 24-year-old chronological age." (Ex. 23 at 31.) Dr. Benedict found Miles suffered from "impairments in cognition and information processing that are constitutional in nature and outside of his control . . . [and that] [t]his unique combination of deficits, under conditions of crack cocaine withdrawal, would leave him functioning at developmental levels ranging from a youngster in terms of the capacity for social relating, to an early teen with respect to leadership skills, planning, and judgment." (*Id.* at 34.) At best, Miles was functioning at an age similar to his juvenile cohorts at the time of the offense.

50. The Court concludes, based on all of the factors in findings 46-49 above, that the evidence clearly and convincingly demonstrates that, on December 7, 1992, Miles was significantly impaired in his capacity to conform to the law within the meaning of A.R.S. § 13-751(G)(1).

XI.

Findings regarding reckless indifference to human life

51. It is Miles who told detectives that Jackson had told him that he planned to carjack and kill someone. (Ex. 41 at 7.) But Miles has consistently explained that he did not believe or anticipate that Jackson would actually commit murder. Miles stated to Detective Clark, "I didn't think he was gonna do that . . . , he said

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he was gonna do it, I didn't think . . ."; "I had no idea he was gonna do that." (Ex. 26 at 1-2, 8; Ex. 41 at 31, 34, 36; Ex. 42 at 2, 4.)

52. There is evidence that the other juvenile, Ray Hernandez, also did not believe Jackson. (Ex. 16, Jackson Transfer Report at 2, 4.)
53. As explained in finding 6 above, when the Arizona Supreme Court affirmed the trial court finding that the State had proven beyond a reasonable doubt that Miles had exhibited a reckless disregard for human life, the Court principally relied on Miles' own admission, that prior to the commission of the offense, Jackson told Miles that "he was gonna get somebody's car, take 'em off in the middle of the desert and shoot 'em." *Miles*, 186 Ariz. at 16-17, 918 P.2d at 1034-35. The Court found Miles' claim that he did not believe Jackson to be "disingenuous." *Id.* at 16, 918 P.2d at 1034. The Court found that Jackson's statements coupled with Miles' actions (e.g., he fully participated in the crime) proved he exhibited the mental state of reckless indifference to human life. *Id.* at 16-17, 918 P.2d at 1034-35.
54. However, the sentencing court and the Arizona Supreme Court made the reckless-indifference mental state finding based on the evidence before them, and pointedly, no evidence was presented during the sentencing proceedings suggesting that, at the time of the offense, Miles suffered from any impairment to his mental functioning, judgment or reasoning ability. Indeed, the Arizona Supreme Court found exactly the opposite to be true, finding that Dr. Levy "had no basis upon which to render an opinion about the effects of crack cocaine use . . . [and that] [t]he bald assertion that [Miles] abused drugs the night before the murder [did] not [prove Miles was impaired at the time of the offense or] satisfy the § 13-703(G)(1) circumstance." *Id.* at 17-18, 918 P.2d at 1035-36.
55. Miles has presented substantial new evidence in these proceedings, unavailable to the sentencing court or Arizona Supreme Court, which demonstrates that he was suffering from substantial mental impairments at the time of offense; so much so that this Court has determined that Miles was significantly impaired in his capacity to conform to the law, in satisfaction of the § 13-703(G)(1) circumstance.
56. If the sentencing court and the Arizona Supreme Court had known of the evidence of Miles' significant mental impairments, it would have affected the reasoning and analysis of those courts on the reckless-indifference mental state question.
57. The Court finds that there is clear and convincing evidence that Miles did not subjectively appreciate that loss of life was likely to result from his participation in the robbery/kidnapping of Ms. Baeuerlen, until Mr. Jackson had already driven out to the desert, he had taken Ms. Baeuerlen out of the car, and pointed the gun

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at her to shoot her. The Court finds that there is clear and convincing evidence that Miles did not *consciously* disregard the risk that his actions could cause Ms. Baeuerlen's death, and the Court finds, therefore, that Miles did not exhibit a reckless indifference to human life. The Court finds support for this ultimate conclusion from the following evidence:

- a. Miles hardly knew Jackson, having been introduced to him once previously. (Ex. 1.3b at 65; Ex. 30 at 9; Ex. 40 at 24.) There is no evidence suggesting that Miles knew that Jackson, who was 16 years 10 months old at the time of the offense, had 11 juvenile referrals and a "history of assaultive and delinquent behavior that escalated in severity." (Ex. 18, *State v. Jackson*, 186 Ariz. 20, 32, 918 P.2d 1038, 1050 (1996); *see also* Ex. 16, Jackson Transfer Report, at 10);
- b. At the terminus of the offense, Miles urged Jackson not to harm Ms. Baeuerlen, and later, Miles urged Jackson not to harm other persons. In combination with other factors, this suggests that Miles' thinking was disordered in that, even if he had a vague understanding that guns may present a risk to life, he did not have the wherewithal to truly understand that Jackson would go through with the shooting. In other words, these facts do not necessarily support an inference that Miles acted with reckless indifference to life, and the Court declines to so conclude. At most, the facts support the inference that upon the realization that Jackson might actually threaten Ms. Baeuerlen's life, Miles attempted to stop the process, but because of his brain impairments, he lacked the ability to effectively deter Jackson or appreciate the consequences of Jackson's actions. In other words, even at the terminus of the offense, Miles lacked the ability to see "the big picture" and comprehend that Ms. Baeuerlen's life was truly in danger. This deficit is well-documented in the record in this case;
- c. The Court has the testimony and reports of three experts, each of whom have determined that Miles' pre-existing ARND brain impairment, when combined with the significant brain dysfunction caused by Cocaine Withdrawal Syndrome, left him unable to subjectively appreciate that loss of life was likely to occur. The Court finds clear and convincing evidence that severe brain dysfunction impaired Miles' ability to appreciate that his participation in the offenses would likely result in the loss of human life. (Tr. Apr. 21, 2015 at 131-34; Tr. Apr. 22, 2015 at 31-32, 61-62, 111; Tr. Apr. 23 at 17-18, 44-45; Ex. 23 at 2, 32-33; Ex. 30 at 5, 10, 12-13; Ex. 37 at 2, 9; Ex. 38 at 1);

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- d. Miles' brain damage leaves him with severe deficits in synthesizing information and "seeing the big picture." (Tr. Apr. 21, 2015 at 131-32, 161-66, 168; Tr. Apr. 22, 2015 at 5, 67; Tr. Apr. 23, 2015 at 23.) Seeing the big picture requires a person to discern "[t]he most important facts about a situation and the effects of that situation on other things." In order for Miles to mentally process the likely potential for loss of life from his participation in the offense, he had to "see the big picture," but this is precisely what Miles' severe pre-existing ARND brain impairments impeded. He could not "prioritiz[e] the importance of information" or "act appropriately or . . . effectively" in response to the information obtained. (Tr. Apr. 21, 2015 at 165.) Here, compounding Miles' pre-existing brain impairments, he was suffering from crack cocaine withdrawal, which added another layer of significant brain impairment with deficits in executive functioning, further eroding his judgment and the ability to foresee the consequences of his actions or the actions of others. (Tr. Apr. 22, 2015 at 25-29, 32, 34, 65, 109-12; Tr. Apr. 23, 2015 at 41; Ex. 23 at 2, 21, 31-33; Ex. 30 at 4-5, 10, 12-13.);
- e. The Court credits Dr. Benedict's findings, which explained that: ". . . [T]he neurodevelopmental brain damage from which Mr. Miles suffers also has relevance to the brain impairment that Mr. Miles was experiencing at the time of the crime. That is, the identified difficulties in organizing and therefore planning behavior, appreciating the 'big picture,' problems with rapid and effective processing of information in novel contexts, and the limited repertoire in adaptive defenses constitute an already vulnerable brain. That is, Mr. Miles' ARND left him more vulnerable to the deleterious effects of withdrawal from crack cocaine. Hence, the evaluator concludes, with a high degree of neuropsychological and psychological certainty that Mr. Miles's pre-existing neurodevelopmental brain disorder would and did leave him even more susceptible to the severe neurobehavioral impairments caused by his Cocaine Withdrawal Syndrome. The evaluator further concurs that at the time of the subject offenses that Mr. Miles was neuropsychologically impaired with respect to judgment and decision-making, [and] he had no appreciation that his participation with his co-defendants would result in the taking of a life . . ." (Ex. 23 at 33-34.)⁷

⁷ And see ABA FASD Report in Appendix A at page 7 (noting that individuals with FASD "have difficulty predicting the consequences of their actions," and because they "do not fully understand the consequences of their actions, defendants with FASD may face diminished capacity issues").

- f. The new evidence presented in these proceedings, which was unavailable during the sentencing proceedings, shows that Miles suffered from significant impairments in his capacity to comprehend the consequences of his own actions and those of Jackson, and that Miles did not subjectively appreciate that his actions would likely result in the loss of human life.

XII.

The evidence presented in these proceedings is not cumulative to that presented during the sentencing proceedings, or any other post-conviction proceeding.

58. When making the assessment required by Rule 32.1(h), with respect to whether the sentencing court or Arizona Supreme Court would have reached a different outcome, the Court finds it relevant that those Courts were not presented with the evidence in these proceedings; e.g., those courts did not receive or consider the clear and convincing evidence that:

- a. Miles was born with significant to severe permanent brain damage caused by an alcohol-related neurodevelopmental disorder (ARND);
- b. Miles' brain impairments were worsened by the circumstances of his childhood, most notably by nearly constant exposure to his adoptive mother's severe alcoholism and her prostitution;
- c. Miles suffered from secondary disabilities concomitant with his aggravated and untreated ARND, including developmental delays that impeded his transition to independent, mature young-adult functioning, and the development of a significant substance addiction disorder, and compounding the foregoing, there is a strong genetic causal component to Miles' substance addiction;
- d. Miles' ARND and associated secondary disabilities, including his lack of adult coping skills, and proneness to addiction, are causally linked to and explain Miles' increased use of and ultimate addiction to crack cocaine during the late fall of 1992 after his wife and child left him, he became homeless, and his adoptive mother passed away;
- e. Crack cocaine addiction resulted in significant neurochemical impairments to Miles' brain, which ultimately led to distinct neurocognitive and neurobehavioral symptoms associated with Cocaine Withdrawal Syndrome;
- f. Miles' pre-existing ARND brain damage resulted in the exacerbation of his Cocaine Withdrawal Syndrome; and
- g. By reason of the exacerbated Cocaine Withdrawal Syndrome, during the December 7, 1992 robbery, kidnapping and felony murder of Patricia Baeuerlen, and during three armed robberies

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committed during November 1992, Miles lacked a subjective appreciation that loss of life was likely to occur, and/or his “capacity to conform his conduct to the requirements of the law was significantly impaired” as defined in 13-751(G)(1).

59. The Court finds that the mitigation case presented by Miles in these proceedings is dramatically different from, and stronger than the mitigation case presented during the sentencing proceedings.
60. The Court further finds that the mitigation case presented by Miles in these proceedings does not merely contradict the Rule 11 evaluation Miles underwent in 1993. Rather, it expands on the Rule 11 evaluator’s finding that Miles cocaine abuse or withdrawal may have affected Miles’ ability to appreciate his actions at the time of the offence. The Rule 11 evaluation could not have uncovered Miles’ ARND, because that was only revealed through understanding of Miles’ biological family, which Miles himself did not know at the time of the Rule 11 evaluation, and extensive neurological testing well beyond the scope of the Rule 11 evaluation.
61. The sentencing court and Arizona Supreme Court did have some evidence that Miles had been using crack cocaine and that he committed the offense to get money for more drugs, but the evidence was determined to be of no practical mitigating value. Further, the evidence presented at sentencing left the Arizona Supreme Court to conclude that the “bald assertion that Miles abused drugs” failed to prove § 13-751(G)(1). Here, in contrast, as explained above, Miles has provided clear and convincing evidence of significant mental impairment in satisfaction of 13-751(G)(1).
62. Similarly, during Miles’ earlier post-conviction proceedings, the state and federal courts were not presented with any of the evidence summarized in findings 58a–g. Those courts did receive some evidence regarding the disturbing circumstances of Miles’ childhood, however, those courts were not presented with evidence of Miles’ ARND-related brain impairments, or how those prenatal brain deficits affected Miles’ development, his compromised adaptive functioning, or his proneness to addiction. What’s more, those courts did not have evidence of the role Miles’ ARND played in his increased use of crack cocaine in late 1992 or how these pre-existing brain impairments affected his mental state at the time of the offense.⁸

⁸ During Miles’ federal habeas proceedings, Dr. Cochran provided some evidence concerning the effects of cocaine withdrawal, but Cochran did not express any opinion with respect to Miles’ mental state, nor was Cochran aware of Miles’ pre-existing ARND. (See Ex. 60.) Further, the Court finds that during the earlier postconviction proceedings, Dr. Geffen did not assess Miles for the presence of an ARND; in fact, in his 2002 report he stated that that additional evaluation was still needed to “[r]ule out Developmental and Congenital Fetal Alcohol Syndrome suggested by history of substance abuse by biological mother.” (Ex. B at 11.)

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63. There was evidence presented in the earlier post-conviction proceedings that Miles was addicted to crack cocaine and that addiction was the contributing factor for Miles' participation in the offense. However, the bald assertion that Miles' had an addiction that motivated him to commit the offense, would not prove (and did not prove) the statutory mitigating circumstance in § 13-751(G)(1). The bald assertion of crack addiction is not an evidentiary substitute for new, scientifically reliable evidence, which shows that Miles was significantly impaired by a form of severe brain dysfunction, resulting from the combined effects of cocaine withdrawal and ARND, as set out in the Court's findings.
64. The Court finds that the mitigation case presented in these proceedings, as summarized above, is not cumulative of evidence presented in any earlier proceeding.

XIII.

Miles' efforts to dissuade Jackson from killing Ms. Baeurlen and others

65. The State posits that Miles' effort to save Ms. Baeuerlen's life, and dissuade Jackson from killing others, proves he had what amounts to a theoretical capacity to conform to the law, thus disproving the (G)(1) statutory mitigating factor. The Court rejects this proposed finding.
66. As the Court determined above, Miles has presented clear and convincing evidence that he suffered a "significant" impairment in his capacity to resist participation in the underlying felonies of robbery/kidnapping. That finding is unaffected by Miles' effort to stop a murder at the terminus of the offense, when Miles was confronted with the reality that Jackson intended to premeditatedly take Ms. Baeuerlen's life. The fact that Miles understood there was risk to Ms. Baeuerlen's life after it was too late to stop Jackson does not show that Miles had the capacity to resist participation prior to that point. The Court's finding that Miles was significantly impaired in his capacity to resist participation in the underlying felonies is supported by clear and convincing evidence, including the testimony of three expert witnesses.
67. Similarly, the State argues that Miles' effort to dissuade Jackson from killing Ms. Baeuerlen proves that he did subjectively appreciate that loss of life was likely. The Court rejects this proposed finding.
68. As the Court determined above, Miles has presented clear and convincing evidence that, as a result of the level of his impairment, he did not consciously disregard the risk that his actions could cause the death of another, and he did not subjectively appreciate that loss of life was likely. It is indeed true, that Miles appears to have *eventually* recognized that loss of life was possible, but in the State's example, this realization occurred at the terminus of the offense, when Jackson was about to kill Ms. Baeuerlen. In other words, Miles realized the potential for loss of life just as Jackson was about to kill. Miles' last-second

realization of the risks posed to Ms. Baeuerlen's life, and his effort to dissuade Jackson from killing her, do not result in a finding by this Court that Miles exhibited a reckless indifference to human life.

XIV.

Miles' behavior in the aftermath of the offense and his statements to police

69. The State posits that Miles' actions after the offense undermine the clear and convincing showing that Miles was significantly impaired in his capacity to conform to the law and resist participation in the robbery/kidnapping. Principally, the State points to Miles' use of Ms. Baeuerlen's credit cards, his travel to Phoenix, where he socialized with friends, and his statements to police after his arrest. The Court finds that none of this evidence undermines the Court's finding that Miles was significantly impaired at the time of the offense.
70. Miles continued to evidence significant impairments in his functioning during the day following the offense, through his arrest after midnight on the early morning of December 9. As noted in finding 37 above, Miles' friend Russ Renfro, who saw Miles on the day after the offense on December 8, 1992, said he was shocked when he saw Miles, noting it was "like seeing another person inside Miles' body," and that Miles "even looked different, all twisted like [and] his eyes and expression on his face made him look crazy, like the lights were on but no one was home." He was "not the person they all knew." (Ex. 1.3b at 69.) And when Miles was arrested in the early hours of December 9, 1992, the arresting officers described Miles as screaming over and over that he "needed a fix," he "needed a \$20" and he "had to have it." (Ex. 8 at 4; Ex 10 at 3.)
71. During the course of his interrogation by police, Miles attempted to disclaim responsibility for the crime by telling a series of lies about where he obtained Ms. Baeuerlen's vehicle and possessions. This shows that, after the shooting and after Miles had re-dosed himself with cocaine, Miles did possess some understanding of the consequences of his actions. However, this does not prove that Miles was not significantly impaired in his capacity to conform his conduct to the law at the time of the offense, or that he was recklessly indifferent to human life.
72. Miles' actions after the offense do not undermine the Court's finding that he was significantly impaired in his capacity to conform to the law at the time of the offense and that he was not recklessly indifferent to human life.

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**XV.
Summary**

73. The Court summarizes its ultimate factual findings:

- a. Miles was born with significant to severe permanent brain damage caused by an alcohol-related neurodevelopmental disorder;
- b. Miles' brain impairments were worsened by the circumstances of his childhood, most notably by nearly constant exposure to his adoptive mother's severe alcoholism and prostitution;
- c. Miles suffered from secondary disabilities caused by his aggravated and untreated ARND, including (i) developmental delays that impeded his transition to independent, mature young-adult functioning, and (ii) the development of a significant substance addiction disorder;
- d. Genetics also contributed to Miles development of a substance abuse disorder;
- e. Prior to the fall of 1992, Miles had substance abuse problems, mostly involving abuse of alcohol and marijuana, and some experimentation with crack cocaine;
- f. Prior to the fall of 1992, the 24-year-old Miles had not exhibited character traits for aggression or violence; to the contrary, he was known for his peaceable character;
- g. During the fall of 1992, Miles developed a severe addiction to crack cocaine after his wife and child left him, he became homeless, and his adoptive mother passed away;
- h. Miles' untreated ARND, and the secondary disabilities caused thereby, resulted in deficits and impairments not within Miles' control; and in turn, these deficits and impairments were significant contributory causes of Miles' development of a crack cocaine addiction in the late fall of 1992. There is, therefore, a direct causal link between Miles' untreated ARND and his crack cocaine addiction;
- i. During the late fall of 1992 and through December 7, 1992, crack cocaine addiction resulted in significant neurochemical, physical impairments to Miles' brain, which ultimately led to distinct neurocognitive and neurobehavioral symptoms associated with Cocaine Withdrawal Syndrome;
- j. Miles' pre-existing ARND brain damage resulted in the exacerbation of his Cocaine Withdrawal Syndrome;
- k. During cocaine withdrawal, the neurochemical, neurocognitive, and neurobehavioral impairments to Miles' brain (as exacerbated by his pre-existing ARND) were capable of significantly impairing Miles' capacity to subjectively or consciously appreciate the risk that his

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participation in the December 7, 1992 robbery/kidnapping of Ms. Baeuerlen would likely result in a loss of life;

- l. Miles was suffering from cocaine withdrawal at the time of the December 7 offense; the withdrawal symptoms were worsened by Miles' pre-existing ARND; and the accompanying neurochemical, neurocognitive, and neurobehavioral brain deficits significantly impaired Miles' capacity to subjectively or consciously appreciate the risk that his participation in the December 7, 1992 robbery/kidnapping of Ms. Baeuerlen would likely result in loss of human life;
- m. Miles did not subjectively appreciate, or consciously disregard, the risk that his actions could contribute to the cause of death of another;
- n. Miles' last-second efforts to convince Jackson not to harm Ms. Baeuerlen add support to the Court's conclusion that severe brain impairments had significantly impaired Miles' capacity to subjectively appreciate that his actions might contribute to loss of human life;
- o. During cocaine withdrawal, the neurochemical, neurocognitive, and neurobehavioral impairments to Miles' brain (as exacerbated by his pre-existing ARND) were capable of significantly impairing Miles' capacity to conform his conduct to the law; that is to say, the brain deficits affecting Miles were fully capable of significantly impairing his capacity to resist participation in the three November robberies and the robbery and kidnapping of Ms. Baeuerlen;
- p. Miles was suffering from cocaine withdrawal at the time of the December 7 offense; the withdrawal symptoms were worsened by Miles' pre-existing ARND; and the accompanying neurochemical, neurocognitive, and neurobehavioral brain deficits significantly impaired Miles' capacity to conform to the law; i.e., he was significantly impaired in his capacity to resist participation in the three November robberies and the robbery and kidnapping of Ms. Baeuerlen;
- q. Miles' last-second efforts to convince Jackson not to harm Ms. Baeuerlen add support to the Court's conclusion that severe brain impairments had up to that moment significantly impaired Miles' capacity to conform his conduct to the law or resist participation in the robbery and kidnapping of Ms. Baeuerlen;
- r. Symptomatic of his untreated ARND, at age 24, Miles was immature in relation to his chronological age; he was functioning at a significantly younger age, and at the time of the instant offense due to the unique combination of brain deficits and impairments, Miles was "functioning at developmental levels ranging from a youngster in terms of the capacity for social

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relating, to an early teen with respect to leadership skills, planning, and judgment” (Ex. 23 at 34); and

- s. The combined, significant neurocognitive, neurobehavioral and functional-age deficits affecting Miles at the time of the December 7, 1992 felony murder were the “but for” causes of his participation in the offense, and absent these significant deficits, Miles would not have participated in the instant offense. Stated somewhat differently, the foregoing deficits were the substantial contributing causes of Miles’ participation in the offense.

Conclusions of Law

I.

Miles’ eligibility for the death penalty under *Tison v. Arizona*

1. When this petition for post-conviction relief was filed, the Court found that Petitioner had not raised a colorable claim for relief under *Tison v. Arizona*, 481 U.S. 137 (1987). The Court found that Miles’ experts’ new diagnosis of Post-Traumatic Stress Disorder based upon expanded reports of Petitioner’s traumatic childhood merely contradicted the findings in the Rule 11 evaluation that Miles had had a normal childhood. The Court also found that Miles’ experts had expressed the wrong standard by stating that Miles did not know or intend that killing should result, when they should have found that Miles did not “subjectively appreciate that [his] acts were likely to result in the taking of innocent life.” *State v. Lynch*, 225 Ariz. 27, 36–37, 234 P.3d 595, 604–05 (2010).
2. Upon stipulation of the parties, Miles expanded his claim under *Tison* to assert that his ARND, combined with childhood factors and Cocaine Withdrawal Syndrome, left him unable to subjectively appreciate that his acts were likely to result in the taking of innocent life at the time of the offense. Unlike his original claim, this claim does not contradict the Rule 11 evaluation, but expands on the findings that cocaine use and depression might have contributed to Miles’ compromised thinking at the time of the offense.
3. As a threshold matter, the Court now finds that the *Tison* death eligibility claim, as alleged in Miles’ Amended Petition, is colorable. A colorable claim is one that has the appearance of validity; that is, if the defendant’s allegations are taken as true, the outcome may have been different. *State v. Adamson*, 136 Ariz. 250, 265, 665 P.2d 972, 987 (1983). Miles’ Amended Petition satisfies this colorability test and the Court, therefore, will proceed to consider the merits.
4. Miles’ eligibility for the death penalty in the felony murder context is prohibited under the Eighth Amendment, unless the State is able to prove beyond a reasonable doubt that Miles was a major participant

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in the underlying felonies and that he was recklessly indifferent to human life. *State v. Garcia*, 224 Ariz. 1, 19 ¶ 83, 226 P.3d 370, 388 (2010) (citing *Tison v. Arizona*, 481 U.S. 137 (1987)). Miles concedes he was a major participant in the underlying felonies, leaving his current challenge to the element of reckless indifference.

5. A finding of reckless indifference requires proof that a defendant *knowingly* engaged in criminal activities carrying a grave risk of death to another person. *State v. Forde*, 233 Ariz. 543, 567 ¶¶ 95-96, 315 P.3d 1200, 1224 (2014).
6. Whether the defendant *knowingly* engaged in such criminal activities depends on proof beyond a reasonable doubt that the defendant consciously disregarded the risk that her actions could cause the death of another. *Forde*, 233 Ariz. at 567 ¶¶ 94-96, 315 P.3d at 1224 (approving jury instruction, which required State to prove defendant's "conscious disregard" of risk that her actions could cause another's death). The inquiry asks "whether [Miles] 'subjectively appreciated that [his] acts were likely to result in the taking of innocent life.'" *State v. Lynch*, 225 Ariz. 27, 36 ¶ 43, 234 P.3d 595, 604 (2010) (second alteration in original) (emphasis added) (quoting *Tison*, 481 U.S. at 152).
7. Miles has presented clear and convincing evidence that at the time of the instant offense, he was suffering from neurochemical, neurocognitive, and neurobehavioral impairments, which were caused by the combined effects of cocaine withdrawal and his pre-existing ARND, and that these impairments were fully capable of significantly impairing Miles' capacity to subjectively or consciously appreciate the risk that his participation in the December 7, 1992 robbery and kidnapping of Ms. Baeuerlen would cause the loss of her life.
8. As the Court's findings of fact make clear, the sentencing court and the Arizona Supreme Court were not presented with evidence suggesting that Miles was suffering from any impairment to his capacity to fully appreciate the risks to Ms. Baeuerlen's life. This is no longer the state of the evidence on the record.
9. Miles presented uncontroverted testimony from three credible experts that the combined neurochemical, neurocognitive and neurobehavioral deficits affecting him at the time of the offense were not only capable of causing impairment in capacity to consciously recognize the risks, but that these deficits did, in fact, impair his capacity to subjectively appreciate that his participation in the offense would place Ms. Baeuerlen's life at risk.
10. Based upon the clear and convincing evidence presented, the Court concludes that Miles did not consciously disregard the risk that his actions could cause Ms. Baeuerlen's death. *Forde, supra*.

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11. The Court concludes that no reasonable factfinder could disagree: based on the current record, the State is unable to prove beyond a reasonable doubt, that Miles exhibited a reckless disregard of human life.
12. Rule 32.1(h) of the Arizona Rules of Criminal Procedure provides that a petitioner may obtain relief from his capital sentence if he “demonstrates by clear and convincing evidence that the facts . . . [are] sufficient to establish that . . . the court would not have imposed the death penalty.” A court may not impose the death penalty unless the State proves beyond a reasonable doubt that the defendant is eligible for the death penalty under *Tison*. Therefore, in a Rule 32.1(h) motion, the petitioner must be afforded relief if he proves by clear and convincing evidence that reasonable doubt exists as to whether he is eligible for death under *Tison*. The Court concludes that Miles has satisfied this burden of proof with respect to the *Tison* claim.
13. The State has argued that the Court’s resolution of the *Tison* claim favorably to Miles mandates commutation to a life sentence. The Court agrees. The Court grants Miles’ Rule 32.1(h) *Tison* claim; the Court hereby orders that Miles’ death sentence be vacated and that the sentence for felony murder be reduced to a life sentence.
14. The State has argued that Miles’ expert testimony is inadmissible to prove that he lacked the mental state of reckless indifference to human life. The Court finds that the State’s cited legal authorities supporting this argument are unpersuasive.
15. Nevertheless, assuming *arguendo*, that expert testimony is inadmissible to disprove the mental state of reckless indifference, then alternatively, the Court finds that the expert evidence that Miles failed to subjectively appreciate the risk to human life shall be considered as additional mitigation evidence supporting the alternate ground for Rule 32.1(h) relief set forth next below.

II.

Mitigating and aggravating evidence

16. At the time of Miles’ 1993 sentencing, Arizona law provided that: “In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances . . . and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.” A.R.S. § 13-703 (revised and renumbered as A.R.S. § 13-751).

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17. The sentencing court and Arizona Supreme Court found, based on the static record before them, that there were no mitigating circumstances sufficiently substantial to call for leniency, and Miles' sentence was imposed and affirmed on that basis.
18. However, Rule 32.1(h) of the Arizona Rules of Criminal Procedure provides that a petitioner may obtain relief from his capital sentence if he "demonstrates by clear and convincing evidence that the facts . . . [are] sufficient to establish that . . . the court would not have imposed the death penalty." The Court finds that Miles has satisfied this burden: there is clear and convincing evidence clearly sufficient to establish that the court would have found mitigating circumstances sufficiently substantial to call for leniency and would not have imposed the death penalty.
19. This Court finds that the "court," referenced in Rule 32.1(h) means either the sentencing court or the Arizona Supreme Court. The Court reaches this conclusion because at the time of the Arizona Supreme Court's review of Miles' sentence, that Court was statutorily required to "independently review the trial court's findings of aggravation and mitigation and the propriety of the death sentence." A.R.S. § 13-703.04 (revised and renumbered as A.R.S. § 13-755). With respect to its independent-review duty, "[t]he question . . . [would not have been] whether the trial court properly imposed the death penalty . . . , [it would have been] whether, based upon the record . . . [the Arizona Supreme Court believed] the death penalty should be imposed." *State v. Trostle*, 191 Ariz. 4, 23, 951 P.2d 869, 888 (1997) (quoting *State v. Watson*, 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981)).
20. In his briefing to this Court, Miles has provided examples in sixteen cases, where the Arizona Supreme Court has reduced death sentences to life imprisonment. *See State v. Bocharski*, 218 Ariz. 476, 498-99 ¶¶ 109-112, 189 P.3d 403, 425-26 (2008); *State v. Roque*, 213 Ariz. 193, 230-31 ¶¶ 168-171, 141 P.3d 368, 405-06 (2006); *State v. Carlson*, 202 Ariz. 570, 586-88 ¶¶ 61-71, 48 P.3d 1180, 1196-98 (2002); *State v. Trostle*, 191 Ariz. 4, 23, 951 P.2d 869, 888 (1997); *State v. Richmond*, 180 Ariz. 573, 582, 886 P.2d 1329, 1338 (1994), *abrogated on other grounds by State v. Mata*, 185 Ariz. 319, 322, 916 P.2d 1035, 1038 (1996); *State v. Herrera*, 174 Ariz. 387, 400-01, 850 P.2d 100, 113-14 (1993); *State v. Stuard*, 176 Ariz. 589, 610, 863 P.2d 881, 902 (1993); *State v. Fierro*, 166 Ariz. 539, 557, 804 P.2d 72, 90 (1990); *State v. Jimenez*, 165 Ariz. 444, 457, 459, 799 P.2d 785, 798, 800 (1990); *State v. Rockwell*, 161 Ariz. 5, 15-16, 775 P.2d 1069, 1079-80 (1989); *State v. Mauro*, 159 Ariz. 186, 208, 766 P.2d 59, 81 (1988); *State v. Stevens*, 158 Ariz. 595, 599-600, 764 P.2d 724, 728-29 (1988); *State v. Graham*, 135 Ariz. 209, 212-13, 660 P.2d 460, 463-64 (1983); *State v. Watson*, 129 Ariz. 60, 63-64, 628 P.2d 943, 946-47 (1981); *State v. Brookover*, 124 Ariz.

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38, 41-42, 601 P.2d 1322, 1325-26 (1979); *State v. Doss*, 116 Ariz. 156, 158, 163, 568 P.2d 1054, 1056, 1061 (1977). These cases are by no means binding precedent, and the Court does not treat them as such. Nevertheless, in making the assessment in this case, whether the courts would have imposed a death sentence on Miles in light of the new evidence, the Court finds the above-cited legal authorities useful in guiding the exercise of its discretion.

21. For example, the Court takes notice of the fact that the Arizona Supreme Court has reduced sentences to life imprisonment, even when defendants have not been able to demonstrate that their capacity to conform to the requirements of the law was significantly impaired under A.R.S. § 13-703(G)(1). See *Bocharski*, 218 Ariz. at 498-99 ¶¶ 109-112, 189 P.3d at 425-26 (evidence that defendant was subjected to significant childhood abuse and neglect and that defendant had history of alcohol abuse at time of crime outweighed aggravating circumstances in homicide which resulted from infliction of 24 overlapping knife injuries to victim's face; despite fact that defendant was 33 years old and had taken purposeful steps to avoid prosecution after crime); *Carlson*, 202 Ariz. at 588, 48 P.3d at 1198 (holding in contract killing that evidence of financial duress, defendant's brain damage, and actual killer's life sentence all weighed in favor of life sentence); *Richmond*, 180 Ariz. at 582, 886 P.2d at 1338 (defendant's change in character since commission of crime cited as principal factor warranting reduction to life sentence); *Herrera*, 174 Ariz. at 400-01, 850 P.2d at 113-14 (defendant's duress, young age, and dysfunctional family background, coupled with additional evidence of his borderline IQ and drinking at time of incident, required leniency in shooting of police officer); *Fierro*, 166 Ariz. at 553-54, 557, 804 P.2d at 86-87, 90 (defendant's history of alcohol and drug abuse and evidence that he was hospitalized for six months *after* his arrest for treatment of psychiatric symptoms warranted reduction to life sentence); *Rockwell*, 161 Ariz. at 15-16, 775 P.2d at 1079-80 (that defendant's violent homicidal behavior followed a serious head injury and amputation of leg, and that he was only 21 when he committed murder justified vacatur of death sentence); *Watson*, 129 Ariz. at 63-64, 628 P.2d at 946-47 (evidence that defendant had become model prisoner and that co-defendant received life sentence tipped scale to warrant sentence reduction to life imprisonment).

22. The Court also takes particular note of the nine cases cited by Miles where the Arizona Supreme Court vacated death sentences in reliance, in part, on the defendant's proof of diminished mental capacity at the time of the offense in satisfaction of A.R.S. § 13-703(G)(1). See *Roque*, 213 Ariz. at 230-31 ¶¶ 168-171, 141 P.3d at 405-06; *Trostle*, 191 Ariz. at 23, 951 P.2d at 888; *Stuard*, 176 Ariz. at 610, 863 P.2d at 902; *Jimenez*, 165 Ariz. at 457, 459, 799 P.2d at 798, 800; *Mauro*, 159 Ariz. at 208, 766 P.2d at 81; *Stevens*, 158

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Ariz. at 599-600, 764 P.2d at 728-29; *Graham*, 135 Ariz. at 212-13, 660 P.2d at 463-64; *Brookover*, 124 Ariz. at 41-42, 601 P.2d at 1325-26; *Doss*, 116 Ariz. at 158, 163, 568 P.2d at 1056, 1061.

23. Here, Miles has satisfied the (G)(1) showing with clear and convincing evidence. What is more, the evidence is compelling that Miles was not possessed of underlying violent or anti-social character traits, and that but for the fact that he was significantly impaired in his capacity to conform to the law, he would not have participated in the felony murder offense or earlier robberies. Miles' organically based brain impairments were the root, substantial contributing causes of his participation in the offense.
24. This Court's finding, based on clear and convincing evidence, that Miles' suffered significant impairments adequate to prove the (G)(1) factor, and that these impairments were the contributing cause of his commission of the offense, amounts to a showing of very substantial mitigation evidence in the capital-sentencing context. The Arizona Supreme Court has consistently identified this strong causation showing as a significant factor in its decision to vacate sentences of death. *See Jimenez*, 165 Ariz. at 457, 459, 799 P.2d at 798, 800 (death sentence reduced to life imprisonment in light of evidence that defendant's diminished capacity was major contributing cause of his commission of offense); *Brookover*, 124 Ariz. at 42, 601 P.2d at 1326 (death sentence reduced to life imprisonment, in light of evidence that defendant's prenatal brain damage was major and contributing cause of his commission of offense); *Doss*, 116 Ariz. at 163, 568 P.2d at 1061 (death sentence reduced to life imprisonment when defendant's diminished mental capacity was substantial factor in causing defendant's commission of offense). In *Stuard*, a case involving three independent premeditated homicides and an attempted fourth homicide, the court determined it "must hold the death penalty inappropriate" where defendant's organically-caused impairment was such a significant causative factor of the offense. 176 Ariz. at 610, 863 P.2d at 902.
25. Here, when seeking relief under Rule 32.1(h), Miles has not exclusively relied on proof of the (G)(1) factor. Instead, Miles relies on additional clear and convincing mitigation evidence, including:
- a. Evidence that he had no pre-offense character for violence;
 - b. Evidence that he was unable to attain independent, functional adult development due to prenatal ARND brain impairment or mental illness;
 - c. Evidence that due to his untreated ARND, at age 24, he was functioning at a significantly younger age, and at the time of the instant offense, he was functioning as an early teen with respect to leadership skills, planning, and judgment; and

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d. Evidence that his crack cocaine addiction substantially resulted from his untreated ARND, as well as genetic and environmental factors, not wholly within his control.

26. It is relevant to this Court's Rule 32.1(h) analysis that when one or more of the categories of additional mitigation evidence that Miles has presented have been offered in combination with proof of the (G)(1) mitigating factor, the Arizona Supreme Court has granted relief from death sentences. *See Trostle*, 191 Ariz. at 21, 23, 951 P.2d at 886, 888 (even though evidence also showed that 20-year-old Trostle had average IQ, because evidence demonstrated "that he was immature and . . . [his] emotional development was at a child-like level and that he "never has had the experience of living as an independent functioning adult"" Court vacated Trostle's death sentence and imposed life sentence);⁹ *Stevens*, 158 Ariz. at 599-600, 764 P.2d at 728-29 (reducing death sentence to life based on defendant's pre-offense non-violent character and evidence that alcohol and amphetamine intoxication significantly impaired defendant's capacity to conform conduct to requirements of law and was major contributing cause of offense); *Graham*, 135 Ariz. at 212-13, 660 P.2d at 463-64 (death sentence vacated, based on evidence that defendant was extremely immature for his age of 21; that defendant had serious drug problem not of his own making; that defendant had no pre-offense character for violence; and that based on defendant's pre-existing brain damage coupled with valium intoxication, defendant's capacity to conform his conduct to law was significantly impaired); *Brookover*, 124 Ariz. at 41-42, 601 P.2d at 1325-26 (sentence reduced to life based on psychiatric testimony that defendant had pre-natal brain damage, which made it difficult for him to undergo normal character development, and that brain damage resulted in significant impairment in defendant's capacity to conform his conduct to requirements of law, and was "major and contributing cause of his conduct").

27. The Court concludes from the foregoing, that Miles' has made a very substantial mitigation showing with clear and convincing proof of categories of mitigation evidence that have repeatedly led to life-sentence outcomes. But that is not all. When deciding a capital sentence, the Court must also consider whether the

⁹ The Court takes note of the fact that in *Trostle*, the Court granted capital sentencing relief in a carjacking homicide case, where Mr. Trostle's level of participation was exceedingly high and much higher than Miles' participation in his case. In 1993, the 20 year-old defendant Trostle and his 14 year-old companion Jack Jewitt carjacked Ellen Knauss from the Tucson Mall parking lot. 191 Ariz. at 10, 951 P.2d at 875. Trostle told the police he knew beforehand that Jewitt planned on killing whoever became the victim of the carjacking. *Id.* Although Trostle did not actually kill Ms. Knauss, it was Trostle who drove the carjacked vehicle and the victim out to a remote desert location; it was Trostle who tied the victim's hands and ankles with her underwear; it was Trostle who kept the victim quiet when a police officer stopped nearby and spoke to Jewitt; and it was Trostle who told the victim to kneel, just prior to being shot in the back of the head by Jewitt. *Id.* at 10, 17, 951 P.2d at 875, 882.

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quality and strength of the aggravating circumstances have been affected by Miles' new mitigating evidence. *Bocharski*, 218 Ariz. at 492 ¶ 79, 189 P.3d at 103 (emphasizing reviewing court must "consider the quality and strength, not simply the number, of aggravating and mitigating factors"); *and see Mauro*, 159 Ariz. at 208, 766 P.2d at 81 (death penalty statute "does not require that the number of aggravating circumstances be weighed against the number of mitigating circumstances . . . [and for example] one mitigating circumstance may be sufficiently substantial to outweigh two aggravating circumstances").

28. The court concludes that the nature of the new mitigating evidence "necessarily impacts the weight of the [aggravating] factor[s] here." *Richmond*, 180 Ariz. at 581, 886 P.2d at 1328. In *Richmond*, the defendant committed a murder about one month prior to his capital crime, which served as an aggravating circumstance under § 13-703(F)(1). In later resentencing proceedings, he presented new evidence mitigating the capital crime. The Supreme Court held that "because the two killings had occurred in close proximity," the new mitigation evidence would also "necessarily impact the weight" of the prior murder aggravating circumstance. *Id.* The same principle applies here. Miles has presented expert testimony that his impaired capacity to conform to the law not only affected him at the time of the felony murder, but also affected him at the time of the three robberies just a few weeks earlier. (Tr. Apr. 22, 2015 at 35, 112; Ex. 23 at 33; Ex. 30 at 5.) Thus, as in *Richmond*, the weight of the prior robberies aggravating circumstance is lessened.
29. The new mitigation evidence also impacts the weight of the other aggravating circumstances. For example, in Miles' case the Arizona Supreme Court found the existence of the cruelty aggravator, after finding that the victim's mental anguish was "reasonably foreseeable." *Miles*, 186 Ariz. at 17, 918 P.2d at 1035. However, as explained above, the multiple brain impairments affecting Miles' mental state at the time of the offense severely diminished his capacity to "foresee" or appreciate the consequences of his actions, and this has a corresponding mitigating effect on the aggravating circumstance. *See Jimenez*, 165 Ariz. at 459-60, 799 P.2d at 800-01 (when reducing the sentence to life, the Court held that ". . . the heinousness and depravity . . . [aggravating circumstances] were directly related to defendant's [mitigating] mental impairment, as was the unfortunate [aggravating] circumstance that the victim was a helpless child under the age of 15") (emphasis added).
30. Similarly, the final aggravating circumstance of pecuniary gain is "directly related to Miles' mitigating brain-based mental impairments," as he has convincingly shown that he would never have participated in such an offense for pecuniary gain absent his diminished mental capacity.
31. Thus, the weight of all three of the aggravating circumstances is lessened by the new mitigation evidence.

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32. Apart from all the foregoing, it is mitigating that Miles was convicted of felony murder. *See Miles*, 186 Ariz. at 20, 918 P.2d at 1038. A sentencing body must examine a defendant's *personal* role in the crimes leading to the victim's death and weigh the defendant's individual responsibility for the loss of life, not just his or her vicarious responsibility for the underlying crime." *People v. Banks*, at 61 Cal. 4th *6, 788, 351 P.3d 330 (Cal. 2015) (citing *Tison*, 481 U.S. at 158). It is, therefore, inconceivable that the aggravation would be applied with equal weight to Jackson and Miles, when: (1) Jackson devised the idea for a carjacking; (2) Jackson stole the gun used during the crime; (3) Jackson held up Ms. Baeuerlen; (4) Jackson drove her car to a remote location; (5) Jackson held her at gunpoint out in the desert; and (6) despite pleas from Miles that Jackson leave Ms. Baeuerlen alone; (7) Jackson shot and killed Ms. Baeuerlen. (*See Ex. 18, Jackson*, 186 Ariz. at 31.)
33. The Court concludes that the cases cited by the State, favoring its argument that Miles should not obtain relief from his capital sentence, are inapposite.
34. For example, the State relied on *State v. Styers*, 227 Ariz. 186, 254 P.3d 1132 (2011); *State v. Sansing*, 206 Ariz. 232, 77 P.3d 30 (2003); *State v. Jones*, 188 Ariz. 388, 937 P.2d 310 (2003); and *State v. Greene*, 192 Ariz. 431, 967 P.2d 106 (1998). Each of these cases carries a notable distinction from Miles' case as presently postured: in each of those cases the defendants failed to present any expert testimony supporting the existence of the (G)(1) factor. In this respect, the State's cited authorities resemble Miles' case at the original sentencing. *See Miles*, at 186 Ariz.18, 918 P.2d at 1036 (noting the complete absence of qualified expert testimony, and explaining that "[t]he bald assertion that [Miles] abused drugs the night before the murder does not satisfy the § 13-703(G)(1) circumstance"); *Sansing*, 206 Ariz. at 239 ¶ 27, 77 P.2d at 37 ("Sansing presented no expert testimony to support his assertion that his use of cocaine impaired . . . his capacity to control his conduct . . . [and] he therefore failed entirely to show any causal nexus between his alleged drug use and impairment."); *Jones*, 188 Ariz. at 400, 937 P.2d at 322 ("[N]o [expert] testimony establishes, either because of his use of drugs or because he was coming down off of the drugs, that defendant could not . . . conform his conduct to the law."); *Styers*, 227 Ariz. at 189 ¶ 13, 254 P.3d at 1135 ("Styers failed to present any evidence that his PTSD affected his conduct at the time of the crime."); *Greene*, 192 Ariz. at 441 ¶ 44, 967 P.2d at 116 ("Greene presented no [expert] evidence of the effect the withdrawal had on his capacity to . . . conform his conduct to the requirements of law").¹⁰

¹⁰ The State also cited *Greene*, for the proposition that a "motivation to kill fueled in part by a desire for drugs" would not be considered sufficiently mitigating. However, unlike Mr. Greene, Miles was not motivated to kill; he

35. The State also relied on *State v. Rossi*, 171 Ariz. 276, 278, 830 P.2d 797, 799 (1992) as an example of a case where the Arizona Supreme Court found the (G)(1) mitigating circumstance but denied relief from the death sentence. However, *Rossi* is also distinguishable. Unlike Miles, Rossi committed a premeditated murder; in fact prior to the killing, Rossi “confided to [a] friend . . . he was going to the victim’s house on the pretext of selling [him] a typewriter, but planned to kill him, take his money and kill anybody who got in his way.” *State v. Rossi*, 146 Ariz. 359, 362-63, 706 P.2d 371, 374-75 (1985). Contrasted with *Rossi*, Miles did not kill or intend to kill, and in fact he tried to convince Jackson not to kill Ms. Baeuerlen.
36. The State also relied on *State v. Medina*, 232 Ariz. 391, 410, 306 P.3d 48, 67 (Ariz.2013); *State v. Ramirez*, 178 Ariz. 116, 131, 871 P.2d 237, 252 (1994); *State v. Hill*, 174 Ariz. 313, 328, 848 P.2d 1375, 1390 (1993); and *State v. Moorman*, 154 Ariz. 578, 587, 744 P.2d 679, 688 (1987). These cases, where the Court found the G(1) factor but imposed the death sentence, are also inapposite to Miles’ case. In *Medina*, the defendant committed two premeditated murders, and in the course of the killings, the defendant inflicted gratuitous physical violence on the victims, and relished the murders. In *Ramirez*, the defendant committed two premeditated murders; he stabbed his victims 15-18 times and sexually assaulted one of the victims. In *Hill*, the defendant committed premeditated first degree murder by setting his live victim on fire with a flammable substance. In *Moorman*, the defendant committed premeditated murder by suffocating and dismembering his mother.
37. In its briefing and arguments to the Court, the State has also pointed to evidence of Miles’ actions during the crime and his reprehensible actions after the offense. The Court agrees that Miles’ actions were reprehensible, and for that reason he is guilty of felony murder. He has received a life sentence for that crime, to be followed by 35 years imprisonment, were he ever granted parole on the murder. The Court finds in light of the mitigation evidence in this case, that these punishments in themselves do not represent leniency. As the Arizona Supreme Court has explained, “[i]n deciding whether a death sentence is appropriate, we must look at more than just the facts of the crime. We must focus on the defendant in order to make an individualized sentencing determination . . . [and] in carrying out this responsibility we are sometimes called upon to reduce a death sentence to life imprisonment even in cases where the facts are

did not kill, and he urged Jackson to spare Ms. Baeuerlen’s life. Further, as noted above, unlike Miles, “Greene presented no [expert] evidence of the effect the withdrawal had on his capacity to . . . conform his conduct to the requirements of law” *Greene*, 192 Ariz. at 441 ¶ 44, 967 P.2d at 116.

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aggravated and the tragedy immense.” *State v. Trostle*, at 191 Ariz. 23, 951 P.2d 888. (internal quotations and citations omitted).

38. The Court is satisfied, based on the factual findings above, and for all the reasons set forth herein, that Miles has demonstrated his entitlement to Rule 32.1(h) relief. This Court concludes based on all of the evidence that Miles has clearly and convincingly demonstrated “that the facts . . . [are] sufficient to establish . . . that the court would not have imposed the death penalty.” *Id.*

39. Apart from the Rule 32.1(h) requirements, which Miles has satisfied, the Court finds it appropriate to recognize a fundamental aspect of capital sentencing jurisprudence. Whenever and for whatever reason the opportunity to present relevant mitigating evidence in a capital sentencing is lost, “[there is a] risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.” *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). The Court finds this is such a case.

40. The appropriate relief for overturning Miles’ sentence on these grounds is a resentencing to allow the factfinder to re-weigh the aggravating and mitigating factors.

Conclusion

Accordingly,

IT IS ORDERED that Miles is granted post-conviction relief on the following grounds:

1. Miles is granted relief based on his Rule 32.1 (h) showing that he is ineligible for the death penalty under *Tison v. Arizona*. On this basis, the Court vacates Miles’ death sentence and imposes a sentence of life imprisonment.
2. In the alternative, if Miles is found to be eligible for the death penalty under *Tison*, Miles is granted relief based on his Rule 32.1(h) showing that in the weighing of the mitigation evidence and aggravating circumstances, the sentencing court would not have imposed the death penalty. On this basis, the Court vacates Miles’ death sentence and the case is remanded for a new sentencing.

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Date: December 14, 2015

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IT IS FURTHER ORDERED that a status conference is set for Tuesday, January 19, 2016 at 11:00 a.m. for 30 minutes in Division 4.



HON. STEPHEN C. VILLARREAL

(ID: 82b18182-85c7-4dad-b12b-0a95681a10ea)

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Clerk of Court - Appeals Unit
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