SUPREME COURT OF ARIZONA

STATE OF ARIZONA, APPELLEE, vs. DWANDARRIUS JAMAR ROBINSON, APPELLANT.	ARIZONA SUPREME COURT No. CR 18-0284-AP MARICOPA COUNTY SUPERIOR COURT No. CR 2012-138236-001-DT

APPELLANT'S REPLY BRIEF

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INTRODUCTION

A perpetual cycle of poverty, neglect, violence, abuse, crime, and secrecy spanning multiple generations.[1] This was Dwandarrius Robinson's eventuality. He was born to a drug addicted mother who was in and out of jail and prison for most of his life.[2] Darrius was raised by his grandmother Betty in a series of houses in Monroe, Louisiana, where food was scarce, and dysfunction was rampant.[3]

Darrius was frequently exposed to violence within the home whether it be between Betty and her children or Betty and her various boyfriends—men who thought nothing of abusing the children left in their care, including Darrius.[4] He was also exposed to multiple instances of sexual abuse perpetrated by family and their friends against his young cousins and

[1] Tr. 4/3/18, passim; Tr. 4/4/18, passim; Tr. 4/5/18, passim; Tr. 4/9/18, passim; Tr. 4/10/18, passim; Tr. 4/11/18 am, passim; Tr. 4/11/18 pm, passim; Tr. 4/12/18, passim; Tr. 4/16/18, passim; Tr. 4/17/18 am, passim; Tr. 4/17/18 pm, passim; Tr. 4/18/18, passim; Tr. 4/23/18, passim; Tr. 4/24/18 pm, passim; Tr. 4/25/18, passim; Tr. 4/26/18, passim.
[2] Tr. 4/3/18, at 48; Tr. 4/10/18, at 47–48; Tr. 4/11/18, at 42–43.
[3] Tr. 4/3/18, at 48–49, 65–66, 115–20; Tr. 4/4/18, at 71–75.
[4] Tr. 4/3/18, at 72–73, 77, 122, 126–29, 143; Tr. 4/4/18, at 8, 10–12, 18; Tr. 4/10/18, at 88–91; Tr. 4/23/18, at 37–38.

siblings.[5] From his family, Darrius learned that you did not talk about what happened within the family unless you wanted to be beaten.[6]

As a teen, Darrius took every opportunity to stay away from the violence and disorder at home.[7] Many of the adults in his life were in and out of prison—including his mother and father.[8] At sixteen, Darrius ultimately moved across country, trying to finish high school while living with an uncle for several months before resorting to couch surfing with friends and at times being homeless.[9]

Poor maternal self-care; maternal alcohol and drug use during pregnancy; disruptive temperament in early school years; criminal behavior by parents and grandparents; living in a disorganized neighborhood amidst criminal, deviant norms; intergenerational poverty; family discord; lack of supervision; harsh discipline; and exposure to violence—these are all known risk factors for criminality that Darrius experienced during his childhood.[10]

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[5] Tr. 4/3/18, at 78, 81–83, 120, 130; Tr. 4/4/18, at 78; Tr. 4/10/18, at 63, 75–76; Tr. 4/12/18, at 25, 28.
[6] Tr. 4/3/18, at 120–21; Tr. 4/4/18, at 13, 83; Tr. 4/12/18, at 27.
[7] Tr. 4/23/18, at 30–31, 79.
[8] Tr. 4/3/18, at 48–49, 55; Tr. 4/10/18, at 48; Tr. 4/11/18, at 27, 42; Tr. 4/16/18, at 102–03; Tr. 5/2/18, at 29.
[9] Tr. 4/3/18, at 148; Tr. 4/4/18, at 88; Tr. 4/5/18, at 120; Tr. 4/9/18, at 25; Tr. 4/10/18, at 97, 103–04; Tr. 4/17/18 am, at 13–14; Tr. 4/17/18 pm, at 7–8, 30.
[10] Tr. 4/24/18 am, at 21–67; Tr. 4/24/18 pm, at 7–44, 102-06; Tr. 4/25/18, at 5–29.

And these are the same circumstances that led Darrius to where he was in life in 2012 at the time of the offense.

ARGUMENT I

This Court must vacate Mr. Robinson's convictions and sentences because the trial court's acceptance of the State's pretextual reasons for using four of its peremptory strikes to remove prospective minority jurors violated Mr. Robinson's constitutional rights to due process, equal protection, and a fair trial.

"The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" *Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)). Here, the trial court violated Mr. Robinson's constitutional rights by denying his *Batson* challenges to the State's peremptory strikes of four prospective minority jurors—two African American jurors, one Hispanic juror, and one Native American juror. The State's actions demonstrated a pattern of striking minority jurors that was not overcome by its purported race-neutral explanations. The trial court's failure to find that the State engaged in purposeful and insidious discrimination against minority jurors in the capital case of an African American defendant violated Mr. Robinson's constitutional rights under the Fourteenth Amendment to the United States' Constitution.

A. The trial court committed clear error by finding the State's reasons for striking two of three African American jurors to be racially neutral when the proffered reasons contained substantial misrepresentations of the facts and when the State struck a statistically significant higher percentage of African American jurors versus Caucasian jurors.

Although not conclusive, "disparate impact should be given appropriate weight in determining whether the prosecutor acted with a forbidden intent." *Hernandez v. N.Y.*, 500 U.S. 352, 362 (1991); *see also, Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 331, 343 (2003) (acknowledging statistical analysis relevant to determining prosecutor's intent). Here, at the end of voir dire, after all challenges for cause had been made but before the parties used their peremptory strikes, the panel of 36 potential jurors included 8 members of racial minority groups, or approximately twenty-two percent of the panel.[11] The State used its peremptory strikes to remove half of those jurors that were members of racial minority groups (i.e., four of the eight minority jurors).[12]

With respect to African American jurors specifically, the State struck two of the three African American jurors on the panel leaving only one African American on the selected jury and—after the selection of alternates—zero African American

[11] Tr. 2/8/18, at 123–24.
[12] Id.

jurors on the deliberating jury.[13] Whereas the State used its peremptory strikes to exclude 67% of the eligible African American jurors resulting in zero African American jurors on Mr. Robinson's deliberating jury, the State used its peremptory strikes on only 21% of the eligible Caucasian jurors resulting in a deliberating jury consisting of eleven Caucasian jurors and just one Hispanic juror. As noted by the Court in *Miller-El I*, "Happenstance is unlikely to produce this disparity." 537 U.S. at 342.

1. Juror 145.

The State asserts that the proffered reason for striking African American Juror 145—that he was "terrified" of imposing the death penalty—was "facially race-neutral."[14] But this is not what Juror 145 actually said. In fact, Juror 145 stated that imposing either a life or death sentence were "equal options."[15] He further explained that under the right circumstances he believed imposing a death sentence could be appropriate: "[W]ith aggravation and no mitigation or not enough of preponderance of mitigation, then I think [the death penalty] would be appropriate."[16]

[13] Tr. 2/8/18, at 23–24; Tr. 3/22/18, at 49.
[14] AB at 23.
[15] Tr. 1/30/18, at 47.
[16] Tr. 1/30/18, at 47.

Juror 145 was then asked about a comment made by *another juror* who stated that the death penalty was the "most harsh punishment" and that he could only impose the death penalty if "something that really emotionally affected me to go that way."[17] Juror 145 was very clear that while this was an obviously weighty and difficult decision, he would not let emotion be part of his decision-making process: "I don't know if I would include the emotional aspect of it, although it is terrifying to consider what we're talking about."[18] Juror 145 then stated that the death penalty could be appropriate: "the idea of it just being an option of the two options, then there's the aggravation and then, you know, there's mitigation. So that's what I mean by it could be appropriate."[19] Juror 145 then went on to again confirm that he could impose the death penalty.[20]

While this Court generally gives deference to a trial court's factual findings, it may not do so if the *Batson* determination was clearly erroneous. *Hernandez*, 500 U.S. at 369; *Miller-El I*, 537 U.S. at 340. But deference does not equate to abdication of judicial review; if the factual premise provided by the State is incorrect upon review of the record, then this Court must consider that the trial court's decision was unreasonable. *Miller-El I*, 537 U.S. at 340. "When the prosecutor misstates the

[17] Tr. 1/30/18, at 44.
[18] Tr. 1/30/18, at 47.
[19] Id.
[20] Id.

record in explaining a strike, that misstatement can be another clue showing discriminatory intent." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2250 (2019).

Here, taking the entire exchange into consideration and looking at the context within which the questions were posed to Juror 145, the State's explanation for striking Juror 145 is demonstrably pretextual. The comment in question was merely an acknowledgment of the gravity of a capital case, not an expression of any apprehension in imposing the death penalty if merited under the facts presented at trial. Accordingly, it was error for the trial court to deny Mr. Robinson's *Batson* challenge to Juror 145. *See Johnson v. Vasquez*, 3 F.3d 1327, 1331 (9th Cir. 1993) ("When there is reason to believe that there is a racial motivation for the challenge, neither the trial courts nor we are bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it.").

2. Juror 358.

Here, when asked to provide its reason for using a peremptory to strike African American Juror 358, the State said its most "concerning" reason was because Juror 358 "said that she must have DNA or a witness when it comes to the evidence that she wants. . . . And she also wants video. It was actually, I believe, *video, a witness, or DNA* was what she said kind of the State had to have in its case, *all three*, which we're lacking, which goes heavily towards a guilt determination in

this case, Judge."[21] This might be a valid concern if it were what Juror 358 said or wrote, but it was not. At no point did Juror 358 indicate that the State had to have a video, witness, or DNA—much less all three—to meet its burden of proof.

In response to Question 52 in the questionnaire, "Do you believe that in each case the State must present scientific evidence, such as DNA or fingerprint evidence, to prove guilty beyond a reasonable doubt?", Juror 358 responded "No," and further explained, "It would help prove the case however, if the witness saw the crime or there is video this can impact my thoughts."[22] In response to Question 53, "Do you believe that in each case the State must present eyewitness testimony or a confession to prove guilty beyond a reasonable doubt?", Juror 358 responded "No," and further explained, "If there is video or DNA take [sic] can change by veiw [sic]."[23]

Just as with African American Juror 145, the State misstated the record when explaining its strike of African American Juror 358. "The State's pattern of factually inaccurate statements about black prospective jurors suggests that the State intended to keep black prospective jurors off the jury." *Flowers*, 139 S. Ct. at 2250 (citing *Foster*, 136 S. Ct. at 1754; *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 240, 245

[21] Tr. 2/8/18, at 126–27 (emphasis added).
[22] R. 653.
[23] Id.

(2005)). Juror 358 made it quite clear in her questionnaire that she did not believe the State was required to present such evidence to meet its burden.[24]

The other reason proffered by the State was that Juror 358 had anxiety attacks.[25] What Juror 358 honestly admitted in her questionnaire was that she had one anxiety attack in the past.[26] She also stated that she currently had no emotional problems that would affect her ability to be a juror.[27]

If the State truly was so concerned about these issues, one would expect that the State would follow up on Juror 358's questionnaire answers during voir dire. But the State did not inquire about any of these supposedly concerning answers. "A 'State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.'" *Flowers*, 139 S. Ct. at 2249 (quoting *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 246 (2005)). All of these circumstances lead to the conclusion that the prosecutor's proffered reasons for striking African American Juror 358 were pretextual.

[24] R. 653.
[25] Tr. 2/8/18, at 127.
[26] R. 653.
[27] Id.

B. The State's misrepresentation of the record when providing reasons for its peremptory strikes of other non-African American minority jurors demonstrates the State's discriminatory motive and use of pretext, as well as its lack of credibility.

1. Juror 260.

Though not as blatant as the misrepresentations made regarding African American Jurors 145 and 358, the State nonetheless distorted the record when providing its reasons for striking Hispanic Juror 260, further calling into question the State's credibility. First, while the State cited Juror 260's answer that he felt some laws were too harsh in the past, the State neglected to mention that the juror also stated he currently believed Arizona's criminal laws are appropriate.[28] Second, the State claimed that Juror 260 was confused about the burden of proof.[29] While Juror 260 had initially not understood Question 90 on the juror questionnaire regarding the different burdens of proof for aggravation and mitigation, when the State explained this question during voir dire, Juror 260 said that he agreed with and understood the State's explanation.[30] Finally, the State also claimed that Juror 260 was part of a letter writing program involving inmates and that it was his "mission" to uplift inmates, when actually Juror 260 stated that the extent of his participation

[28] Tr. 2/8/18, at 128; R. 653.
[29] Tr. 2/8/18, at 128.
[30] Tr. 1/31/18, at 217.

was writing two or three relatively banal letters and that he had received one or two letters in response.[31]

2. Juror 300.

With respect to Native American Juror 300, the State conflated her answers regarding two different subjects. While Juror 300 did state that she thought viewing graphic photographs would naturally be hard, she also stated that she could do so.[32] But contrary to what the State claimed, Juror 300 never stated that it would be hard for her to impose the death penalty.[33] In fact, all her responses to questions in the juror questionnaire about imposing the death penalty indicated she could do so and that it would not be a problem for her.[34] This misrepresentation of the record is further evidence of the State's lack of credibility and the trial court's clear error in finding the State's reasons to be race-neutral.

[31] Tr. 1/31/18, at 195–97; Tr. 2/8/18, at 127–28.
[32] Tr. 1/31/18, at 222–23; Tr. 2/8/18, at 125.
[33] Tr. 2/8/18, at 125.
[34] R. 669.

ARGUMENT II

This Court must vacate Mr. Robinson's death sentence on Count 1 and remand for a new penalty phase proceeding because the jury's verdict of proven for the F(6) aggravating circumstance of especially cruel or especially heinous or depraved is not supported by substantial evidence.

The jury's consideration of an aggravator that was not supported by substantial evidence when determining Mr. Robinson's sentence for the death of S.H. violated Mr. Robinson's constitutional rights to due process and to be free from the arbitrary imposition of the death penalty. U.S. Const. Amends. V, VI, VIII, XIV; Ariz. Const. art. 2, §§ 4, 15, 23, 24. Because the jury abused its discretion when finding the especially cruel or especially heinous or depraved aggravator, this Court must vacate Mr. Robinson's death sentence and remand for a new penalty phase proceeding.

A. There is insufficient evidence that S.H. consciously suffered physical or mental pain.

Contrary to the State's suggestion otherwise, that a juror might find it reasonable to assume that a person would only be bound or restrained if conscious, is not proof that the person actually was conscious.[35] While this Court has previously made this assumption, a closer review of those cases indicates that there was evidence in the record of consciousness beyond the mere fact that the victim had

[35] AB at 37–38.

been restrained. The cases cited by the State wherein the Court upheld a finding of especially cruel regarding a victim that had been bound all had records that showed either the victim had struggled or other corroborating evidence existed to establish the consciousness required before a finding of mental and/or physical anguish. *See State v. Parker*, 231 Ariz. 391, 410, ¶ 88 (2013) (evidence of struggle including ligature marks, bruises, and defensive knife wounds); *State v. Hernandez,* 232 Ariz. 313, 325, ¶ 57 (2013) (victim forced through house at gunpoint and heard other victims pleading for their lives) ; *State v. Gallardo*, 225 Ariz. 560, 566, ¶¶ 18–19 (2010) (evidence victim "struggled to free himself"); *State v. Lynch*, 225 Ariz. 27, 41, ¶ 79 (2010) (ligatures, abrasions, and bruising on multiple areas of victim's body "establish that he struggled"); *State v. Djerf*¸191 Ariz. 583, 596, ¶ 51 (1998) (evidence of struggle against restraints); *State v. Bible*, 175 Ariz. 549, 604–05 (1993) (evidence child victim was stripped of her clothes before being bound).

Further, the State erroneously conflates consciousness with breathing.[36] Mr. Robinson does not dispute that the evidence tends to show that S.H. was alive when the rag was placed in her mouth and she was restrained.[37] Nor does Mr. Robinson dispute that asphyxiation by smothering would cause a person to stop breathing in no more than a few minutes.[38] But there is simply no evidence that

[36] AB at 38–40.
[37] AB at 38–39.
[38] Tr. 02/28/18, at 169.

establishes that S.H. was conscious during this time. "Where … there is no evidence that the victims actually suffered physical or mental pain prior to death, or where the evidence is inconclusive, [this Court has] held cruelty was not shown." *State v. Gretzler*, 135 Ariz. 42, 51 (1983) (citing *State v. Ortiz*, 131 Ariz. 195, 210 (1981); *State v. Bishop*, 127 Ariz. 531, 534 (1980); *State v. Clark*, 126 Ariz. 428, 436 (1980); *State v. Ceja*, 126 Ariz. 35, 39 (1980)).

The State's expert Dr. Hu was unable to establish the order of the injuries to S.H.[39] Further, Dr. Hu testified that he could not determine when S.H. lost consciousness but that her pregnancy would have lessened the amount of time before unconsciousness would have occurred and that it could have occurred as a result of just one of the blunt force injuries to her head, or when the cloth was placed in her mouth, or even by the application of pressure to her throat.[40] Where—like here—the medical examiner cannot determine when the victim lost consciousness and when there is no evidence of struggle to support the conclusion that the victim was conscious before binding, this Court has found that there is insufficient evidence to uphold the finding of the especially cruel aggravator. *State v. Jones*, 205 Ariz. 445, 449, ¶¶ 13–14 (2003).

[39] Tr. 02/28/18, at 124.
[40] Tr. 02/28/18, at 64, 70, 119–22.

B. The State relies on assumptions, not evidence, to establish the especially heinous or depraved aggravator.

The especially heinous or depraved aggravator necessarily requires the jury to determine a defendant's state of mind at the time of the offense. *See Gretzler*, 135 Ariz. at 51 ("heinous and depraved go to the mental state and attitude of the perpetrator as reflected in his words and actions"). With respect to S.H., the jury instructions provided in the aggravation phase permitted the jury to find that the defendant exhibited an especially heinous or depraved mental state only if the State proved beyond a reasonable doubt that the defendant inflicted gratuitous violence beyond that necessary to kill or needlessly mutilated the victim's body with the intent to disfigure.[41] Accordingly, the circumstance that S.H. was in the late stage of pregnancy and may or may not have been having contractions the day of the offense was irrelevant to the jury's determination of the especially heinous or depraved aggravator.[42]

That even the State's expert could not testify as to the order of the injuries undermines its assertion that the defendant knew placing a cloth in S.H.'s mouth would do anything more than keep her from making noise.[43]

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[41] R. 567.
[42] AB at 44–45.
[43] AB at 48.

In the aggravation phase closing argument, the State asserted that Mr. Robinson set the fire to "erase all the evidence left behind."[44] If so, then setting the fire demonstrates neither gratuitous violence nor needless mutilation. It is the intent of the defendant in committing the act of setting the fire that is relevant to this aggravator. Here, setting a fire to erase evidence simply demonstrates an intent to evade authorities.

C. This Court must vacate the death sentence on Count 1 and remand for a new penalty phase proceeding.

Because the State could not prove the order of events, they could not establish that S.H. was conscious and experienced physical pain or mental anguish. The State also failed to present any conclusive evidence as to whether S.H. was alive or not at the time of the fire thus making it impossible for a jury to determine whether there was gratuitous violence or needless mutilation. Alternative findings on the F(6) aggravator "are insufficient to support a finding beyond a reasonable doubt." *State Soto-Fong*, 187 Ariz. 186, 201 (1996). The jury abused its discretion when it relied upon an aggravator unsupported by sufficient evidence to make its sentencing decision. Considering the substantial mitigation presented, this error cannot be found harmless. Accordingly, this Court must vacate the aggravation and penalty verdicts and remand for a new penalty phase proceeding.

[44] Tr. 3/28/18, at 25.

ARGUMENT III

This Court must vacate Mr. Robinson's death sentence and remand for a new penalty phase proceeding on Count 2 because the jury's verdict of proven for the F(6) especially heinous or depraved aggravator is not supported by substantial evidence.

The jury's consideration of an aggravator that was not supported by substantial evidence when determining Mr. Robinson's sentence for the death of B.H. violated Mr. Robinson's constitutional rights to due process and to be free from the arbitrary imposition of the death penalty. U.S. Const. Amends. V, VI, VIII, XIV; Ariz. Const. art. 2, §§ 4, 15, 23, 24. Accordingly, this Court must vacate the death sentence and remand for a new penalty proceeding.

A. Waiver does not apply because review by this Court is statutorily mandated.

This Court is statutorily mandated to review whether the trier of fact abused its discretion in finding aggravating circumstances, and if so whether the error was harmless beyond a reasonable doubt. A.R.S. § 13-756. The State asserts that Mr. Robinson has "waived" his right to challenge the sufficiency of the evidence supporting the F(6) aggravator. But the State relies solely on *State v. Schaaf*, 169 Ariz. 323 (1991) for this proposition despite the fact that the finding of waiver in *Schaaf* was narrowly limited to the failure to raise a work-product objection pursuant to Rule 16.1 of the Arizona Rules of Criminal Procedure. Because Mr. Robinson is

not challenging the admissibility of evidence, and because this Court is required to review the finding of aggravators in a capital case, waiver does not apply.

B. There is no evidence in the record that Mr. Robinson was B.H.'s biological father.

Contrary to the State's assertion otherwise, there is absolutely no evidence in the record that establishes B.H.'s paternity. Although S.H.'s mother testified that Mr. Robinson was B.H.'s father, the State failed to establish any foundation for that belief.[45] Accordingly, there is insufficient evidence that there is any type of parental relationship.

C. There was no special parental relationship of trust between B.H. and Mr. Robinson.

As discussed at length in the opening brief, when senselessness and helplessness are used to form the basis for the F(6) especially heinous or depraved aggravator, the constitution requires "something more" which may be satisfied by showing that there is a parental or caregiver relationship of trust between a defendant and a child victim.[46] Mr. Robinson acknowledges that this Court seems to use the phrases "special parental relationship" and "parental relationship of trust" interchangeably when discussing this aggravator. A review of the cases cited by Mr. Robinson and the State indicate that regardless of the terminology used by the Court, it is the

[45] AB at ; Tr. 2/20/18, at 101–02.
[46] OB at 74–81.

underlying control and trust inherent in a parental relationship that forms the basis for this factor. *See State v. Leteve*, 137 Ariz. 516, 403, ¶ 35 (2015) (requiring jury finding of "parental relationship of trust"); *State v. Milke*, 177 Ariz. 118, 125 (1993) (mother controlled child victim and used his trust to deliver him to killer); *State v. Stanley*, 167 Ariz. 519, 529 (1991) (describing relationship between child and father as "completely dependent on him and trusting of his goodwill toward her"); *State v. Fulminante*, 161 Ariz. 237, 256 (1988) (court considered "special relationship of sacred parental trust" and fact that victim was a child "under parental control and capable of manipulation by the Defendant").

These cases support Mr. Robinson's argument that mere biological paternity of an unborn child is insufficient to establish the "more" required by the constitution. It is the relationship between the child and parent—a bond of trust, dependence, and control—not the genetic contribution that is required to establish the especially heinous or depraved aggravator. Where the victim is a fetus still in the womb, there simply is no relationship of trust between the victim and its biological father.

D. There was insufficient evidence that the murder was senseless.

The State ignores a glaring difference between those cases that found the murder of a child by their parent to be necessarily senseless and the present case: the

target of the defendant's acts.[47] Unlike a case involving the murder of an already born child, the killing of a fetus can occur as a collateral result of the death of a pregnant woman without a defendant taking any action directed towards the unborn child. For this reason, the question of whether a victim's status as an unborn child or fetus is automatically determinative of a finding of senselessness that can form the basis for an F(6) especially heinous or depraved aggravating circumstance is an issue of first impression for this Court.

The State does not dispute that B.H. had no external or internal injuries and that there was no evidence of injury to S.H.'s abdominal or uterine area.[48] Dr. Hu testified that B.H.'s cause of death was intrauterine fetal death due to maternal death.[49] Because the F(6) especially heinous and depraved aggravator focuses on the defendant's state of mind as reflected by his actions towards that specific victim, the lack of direct injury to B.H. goes against a finding of senselessness on Count 2.

E. This Court must vacate the death sentence on Count 2 and remand for a new penalty phase proceeding.

Considering the lack of evidence supporting any type of parental relationship between B.H. and Mr. Robinson—much less one of trust—the jury abused its discretion when finding the especially heinous or depraved aggravator. Because the

[47] AB at 59–60.
[48] Tr. 02/28/18, at 30–31.
[49] Tr. 02/28/18, at 31.

jury improperly considered this aggravator when determining the ultimate sentence, and in light of the mitigation presented at trial, this error is not harmless. Accordingly, this Court must vacate the aggravation verdict and the death sentence and remand for a new penalty phase.

ARGUMENT IV

The trial court's failure to provide the jury with the requested *Simmons* instruction was reversible, constitutional error, where the State introduced evidence and made argument that raised the specter of future dangerousness, and where no mechanism for parole existed at the time of Mr. Robinson's trial.

The State does not dispute the fact that it introduced evidence and made argument that raised the specter of future dangerousness.[50] Thus, there is no question that Mr. Robinson was entitled to a *Simmons* instruction. Mr. Robinson does, however, acknowledge that this Court has found an instruction similar to the one given in his case to be sufficient, although in that case—unlike here—the State had not put future dangerousness at issue. *See State v. Johnson*, 247 Ariz. 166, 184–85, ¶¶ 36–40 (2019). Here, such instruction does not adequately differentiate between parole and commutation and can reasonably result in a constitutionally infirm death sentence. U.S. Const. Amends. V, VI, VIII, XIV. Accordingly, this Court must vacate Mr. Robinson's death sentences and remand for a new penalty phase trial.

The instruction provided to the jury here does not mitigate the potential for confusion concerning the differences between parole and commutation, nor does it dispel the notion that there is a real likelihood that a defendant convicted of two

[50] AB at 63–68.

counts of premeditated, first-degree murder would be released after 35 years imprisonment simply by applying for commutation. The trial court's given instruction essentially negated the force of its statement that parole did not currently exist by informing the jury that Mr. Robinson could in fact be released without explaining how that process differs radically from parole. This is exactly what Mr. Robinson sought to avoid by specifically requesting that the jurors be instructed that "'Life in prison' means that the defendant will spend the remainder of his natural life in prison."[51]

As discussed in more detail in the Opening Brief, the difference between parole and clemency is not obviously clear to a layperson and the instruction given here suggests that if the jury did not impose the death penalty, there was a real chance that Mr. Robinson could end up free after only 35 years.[52] Because there was a real possibility that the jury could have been misled by the given instruction, the trial court erred by refusing to provide the requested *Simmons* instruction. *Lynch v. Arizona (Lynch II)*, 136 S. Ct. 1818, 1820 (2016); *Simmons v. South Carolina*, 512 U.S. 154, 171 (1994). Accordingly, this Court must vacate Mr. Robinson's death sentences and remand for a new penalty phase proceeding.

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[51] R. 612.
[52] OB at 87–89.

ARGUMENT V

The Arizona death penalty scheme is unconstitutional because its failure to adequately narrow the class of persons eligible for the death penalty is arbitrary and capricious.

Based upon a review of the Answering Brief and because Mr. Robinson's arguments were adequately presented in the Opening Brief, Mr. Robinson will not further address Argument V. This does not constitute a concession to any of the arguments raised in the Answering Brief.

ARGUMENT VI

This Court must vacate Mr. Robinson's convictions and sentences and remand for a new trial because the prosecutor committed misconduct by seeking to inflame the passions of the jurors and call attention to matters they should not consider by dramatically reenacting the offense while questioning the medical examiner during the guilt phase. The prosecutor committed additional error during the penalty phase closing arguments by improperly suggesting that the jurors must find a nexus between mitigation and the murder.

The prosecutor's dramatic reenactment of the offense during the guilt phase was misconduct intended to inflame the passions of the jury and call attention to matters they should not consider. Further, the prosecutor improperly suggested that the jurors must find a nexus between mitigation and the murder. Because the State's misconduct and errors likely affected the jury's verdicts, this Court must vacate Mr. Robinson's convictions and sentences and remand for a new trial.

A. The prosecutor's reenactment of the murder was misconduct intended to inflame the passions of the jury that ultimately affected the jury's verdicts.

The State significantly downplays the prosecutor's misconduct by describing the impassioned reenactment of the murder as simply a "gesture."[53] A review of the For the Record video recording of the proceedings from that day makes clear that

[53] AB at 77.

the prosecutor's actions were purposeful, dramatic, and intended to inflame the passions of the jury.[54] Further, this purported reenactment was essentially manufactured "testimony" by the prosecutor. And because the testimony was not supported elsewhere in the record, it called the jurors' attention to matters they should not have considered. *See State v. Acuna Valenzuela*, 245 Ariz. 197, 217, ¶ 71 (2018) (A prosecutor is not permitted to allude to evidence outside the record or to effectively "testify" about matters not presented as evidence at trial.) (quoting *State v. Bailey*, 132 Ariz. 472, 477–79 (1982)).

The fact that the jurors had seen photographs showing that S.H. had been bound with duct tape hardly negates the impact of the prosecutor's grandiose reenactment of the murder.[55] During the reenactment, the prosecutor purported to choke the victim with one hand while dramatically winding tape repeatedly around her head with the other hand. This occurred during the State's direct of Dr. Hu. It is not unreasonable to conclude that the jurors believed the prosecutor's reenactment was based upon Dr. Hu's expert opinion.

Further, the State focuses only on the guilt verdict and ignores any impact that the prosecutor's stunt may have had on the jury's determination of the F(6)

[54] Recording 2/28/18, at 4:34:12 pm–4:34:32 pm.
[55] AB at 81–82.

aggravator.[56] Because the aggravator was not supported by substantial evidence, and because how the murder took place was directly at issue, the prosecutor's misconduct cannot be found harmless.

B. The prosecutor's suggestion during penalty phase closing arguments that the jury must find a nexus between mitigation and the murders was fundamental and prejudicial error.

The State argues that the prosecutor's argument did not call the jury's attention to matters it should not consider when making their ultimate decision of life or death.[57] But as argued in the Opening Brief, the State did suggest that the jury must find a nexus between Mr. Robinson's mitigation and the murders.[58]

And, when suggesting that the mitigation should be ignored because Mr. Robinson was supposedly not thinking about his traumatic childhood when he was committing the murders, the prosecutor incorrectly told the jury that the mitigation must "reduce the defendant's understanding from right and wrong."[59] This misstatement of the law could reasonably confuse the jurors and result in their disregarding mitigation that they are required to consider. *See Kansas v. Marsh*, 548 U.S. 163, 174 (2006) ("the Eighth and Fourteenth Amendments require that the

[56] AB at 82–83.
[57] AB at 85–90.
[58] OB at 118–23.
[59] Tr. 5/7/18, at 111.

sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

These improper statements, combined with the prosecutor's egregious and purposeful misconduct in dramatically reenacting the murder during the examination of one of its expert witnesses, deprived Mr. Robinson of a fair trial. *State v. Hughes*, 193 Ariz. 72, 79–80, ¶¶ 25, 32 (1998). Accordingly, this Court should vacate the convictions and sentences and remand for new trial proceedings.

CONCLUSION

For the reasons stated in the Opening Brief and in this Reply, Mr. Robinson's convictions and sentences should be vacated and this matter remanded for new trial proceedings.

Respectfully submitted,

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