ARIZONA SUPREME COURT

STATE OF ARIZONA, APPELLEE, vs. DWANDARRIUS JAMAR ROBINSON, APPELLANT.	Supreme Court No. CR-18-0284-AP MARICOPA COUNTY SUPERIOR COURT NO. CR2012-138236-001 DT

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

On July 24, 2012, the State charged Mr. Robinson with Count 1, First-Degree Murder (Victim S.H.), a Class 1 Dangerous Felony and Domestic Violence Offense, Count 2, First-Degree Murder (Victim B.H.), a Class 1 Dangerous Felony and Domestic Violence Offense, Count 2, Arson of an Occupied Structure, a Class 2 Dangerous Felony, and Count 4, Kidnapping, a Class 2 Dangerous Felony and Domestic Violence Offense.[1] On August 1, 2012, the court arraigned Mr. Robinson on the charges.[2]

On August 23, 2012, the State filed allegations of aggravating circumstances other than prior convictions and that Mr. Robinson knew the victim was pregnant, pursuant to A.R.S. §§ 13–3601 and 13–3601 (L).[3] On September 10, 2012, the State filed a notice of intention to seek the death penalty and of aggravating factors.[4]

That same day, Mr. Robinson filed a motion to dismiss the indictment based on Maricopa County's failure to collect or track the racial or ethnic makeup of the county grand juries as is constitutionally required.[5] On September 25, 2012, the State filed its

[1] Record on Appeal (R.) at 1.
[2] *Id*. at 18.
[3] *Id*. at 20, 22.
[4] *Id*. at 37.
[5] *Id*. at 38.

response.[6] On October 1, 2012, Mr. Robinson filed his reply.[7]

On September 20, 2012, Mr. Robinson filed an objection to the court-ordered I.Q., competence, and sanity testing (the "testing").[8]

At the October 2, 2012 capital case/trial management conference, the court reset the date for argument on the motion to dismiss and objection to the testing to November 2, 2012.[9]

On November 2, 2012, the court heard argument on the motion to dismiss and objection to the testing and took the matter under advisement.[10] On November 9, 2012, the court issued a minute entry ruling sustaining Mr. Robinson's objection to the testing, finding that Mr. Robinson waived his right to a pretrial determination of intellectual disability status.[11] The court noted that, as provided in A.R.S. §13–753, Mr. Robinson could offer evidence of intellectual disability in the penalty phase.[12]

On May 2, 2013, Mr. Robinson filed a motion to dismiss the death penalty based on the death penalty's being imposed in an arbitrary and capricious manner and

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[6] *Id*. at 42.
[7] *Id*. at 46.
[8] *Id*. at 41.
[9] *Id*. at 47.
[10] *Id*. at 65.
[11] *Id*. at 66.
[12] *Id*.

in violation of *Furman v. Georgia*.[13] The State filed its response.[14] Mr. Robinson filed his reply on May 23, 2013.[15] Mr. Robinson filed supplemental authority on August 19, 2013.[16]

On May 13, 2013, Mr. Robinson filed a motion to reconsider his motion to dismiss the indictment, which original motion the court had dismissed in its April 24, 2013 minute entry.[17] On June 6, 2013, the court denied the motion.[18]

On September 5, 2013, Mr. Robinson filed a special action based on his motion to dismiss the indictment and motion to reconsider the denial of that motion.[19] The special action was based on Maricopa County's failure to collect and retain grand jury data and ex parte jury selection process, contending that the failure violated Mr. Robinson's Equal Protection and Due Process rights under Arizona and Federal Law.[20] On August 8, 2014, the Court of Appeals declined jurisdiction.[21]

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[13] *Id.* at 84.
[14] *Id.* at 85.
[15] *Id.* at 90.
[16] *Id.* at 105.
[17] *Id.* at 88.
[18] *Id.* at 94.
[19] *Id.* at 110.
[20] *Id.*
[21] *Id.* at 129.

During the capital/complex case management conference on September 3, 2014, the court took Mr. Robinson's motion to dismiss the death penalty under advisement.[22] Later that day, the court denied the motion, finding that Mr. Robinson's *Furman* argument was rejected by this Court, which decision bound the superior court.[23] The court also rejected Mr. Robinson's Equal Protection argument because an "inconsistent application of the Arizona statute from county to county, including the decision of one county not to seek the death penalty for economic reasons or otherwise, is not an Equal Protection violation.[24]

On September 5, 2014, Mr. Robinson filed a motion for change of counsel.[25] On September 19, 2014, the court granted Mr. Robinson's motion and, on September 24, 2014, the court noted the appointment of new counsel.[26] On September 30, 2014, after a hearing on their qualifications, the appointment of new counsel was affirmed.[27]

On October 22, 2014, Mr. Robinson filed a motion for joinder and for omnibus hearing on the motion to dismiss the death penalty filed in *State v. Macario Lopez*,

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[22] *Id.* at 154.
[23] *Id.* at 155.
[24] *Id.*
[25] *Id.* at 158.
[26] *Id.* at 160, 161.
[27] *Id.* at 163.

CR2011-007597-001 on March 6, 2014.[28] The motion was "primarily based upon the assertion that the Arizona Statue which provides for capital punishment violates the United States Constitution in that it runs afoul of the holdings of *Furman v. Georgia*, 408 U.S. 238 (1972) and its progeny."[29] On January 5, the court granted the motion.[30]

On May 8, 2015, the court conducted a hearing on the motion to strike notice of intent to seek the death penalty, after which it denied the motion.[31] On June 18, 2015, the court issued its ruling, rejected Mr. Robinson's argument.[32]

On March 30, 2017, the State filed a motion to preclude Appellant's DNA expert, Blaine Kern, from testifying about his opinion.[33] The defense filed its response on June 1, 2017, notifying the court and State that it would be using Michael Spence as their DNA expert, and formally noticed him as a witness.[34]

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[28] *Id.* at 164.
[29] *Id.*
[30] *Id.* at 166.
[31] *Id.* at 177.
[32] *Id.* at 178.
[33] *Id.* at 219.
[34] *Id.* at 235.

On June 5, 2017, the State filed a motion to preclude Mr. Robinson from asserting a third-party defense based on a Phoenix PoliceReport.[35] On July 14, 2017, Mr. Robinson filed his response.[36] On July 19, 2017, the State filed its reply.[37]

On August 29, 2017, the court held a *Daubert* hearing on the State's motion to preclude Mr. Robinson's DNA expert, Blaine Kern, from testifying about his opinion and the State's motion to preclude Mr. Robinson from asserting a third-party defense.[38] The court found the motion to preclude the testimony was mooted by Mr. Robinson's withdrawal of Kern as a witness.[39] The State moved to preclude the opinions of Michael Spence, who testified at the hearing.[40] The court set argument on that motion and the motion to preclude Mr. Robinson from asserting a third-party defense at the next court setting.[41] On October 10, 2017, the court heard argument on the State's motion to preclude opinions offered by Michael Spence.[42] The court found

[35] *Id.* at 238.
[36] *Id.* at 246.
[37] *Id.* at 247.
[38] *Id.* at 257.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 274.

that some of Dr. Spence's opinions were inconsistent with scientific consensus and therefore inadmissible.[43]

On September 26, 2017, Mr. Robinson filed for a *Chronis* hearing on the aggravating factors.[44] On October 3, 2017, Mr. Robinson moved for a continuance of the hearing based on the unavailability of supplemental disclosure by Dr. Hu (that the court ordered due on or before September 27, 2017) and the consequent unavailability of Dr. Keen's opinion based on the disclosure (that the court ordered due on or before October 9, 2017).[45] The court had set the deadlines on September 7, 2017 so that the State and Mr. Robinson would have the disclosures before the *Chronis* hearing.[46] The State filed its response, objecting to the motion based on Dr. Hu's continuing to contemplate his opinion regarding the cruelty aggravator because "his out of the country vacation interfered with his ability to finalize his opinion prior to the court ordered deadline," and Dr. Keen's already having the information that Dr. Hu would rely on to render any opinion.[47] On October 9, 2017, Mr. Robinson filed a motion to reconsider the motion to continue the *Chronis* hearing, or in the alternative, if the

[43] *Id.*
[44] *Id.* at 267.
[45] *Id.* at 269.
[46] *Id.* at 274.
[47] *Id.* at 270.

court were inclined to deny the motion to reconsider, grant leave to withdraw its motion and allow him to re-file the request after the he re-interviewed Dr. Hu concerning his changed opinions and findings.[48]

On October 9, 2017, Mr. Robinson filed a motion to dismiss the State's aggravating factors, A.R.S. §13-751(F)(1) and/or (F)(8), based on their constituting "double counting," were multiplicitous, and violative of double jeopardy, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Art. 2, §§ 4, 10, 15, and 24 of the Arizona Constitution.[49]

On October 10, 2017, the court denied Mr. Robinson's motion to continue because there were many ways the State could show probable cause that the aggravating factors existed, whether relating to the fire, noting that Dr. Hu's opinion was disclosed.[50] The court also denied Mr. Robinson's motion to interview Dr. Hu.[51]

On October 13, 2017, the court held a *Chronis* Hearing and heard argument on State's motion to preclude third-party evidence.[52] The court granted Mr. Robinson's motion to dismiss aggravating factors (F)(1) and/or (F)(8), and dismissing the (F)(8)

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[48] *Id.* at 273.
[49] *Id.* at 272.
[50] Reporter's Transcript (Tr.) 10/10/17 at 11.
[51] *Id.* at 279
[52] *Id*. at 281.

aggravating factor as to both Counts 1 and 2.[53] The court also granted the State's motion to preclude third-party evidence, but deferred ruling on Mr. Robinson's oral motion regarding admissibility of a specific call log on the date of offense until further argument was presented.[54] On October 26, 2017, the court issued its ruling that the State had shown probable cause for the following aggravators: two (F)(6) aggravators on Count 1 (victim S.H.); and the (F)(6) and (F)(9) aggravators on Count 2 (victim B.H.).[55]

On October 19, 2017, the State filed motions to preclude questions to Dr. Hu or any witness regarding their opinion on Mr. Robinson's intentions, preclude residual doubt as a mitigating circumstance, and preclude argument that mercy is a mitigating circumstance.[56] On October 23, 2017, the State filed a motion to preclude Dr. Forsyth or order immediate disclosure of his opinions. [57]

On October 30, 2017, Mr. Robinson filed his responses to the motions to preclude residual doubt as a mitigating circumstance, and to preclude argument that

[53] *Id.*
[54] *Id.*
[55] *Id.* at 293.
[56] *Id.* at 285, 286, 287.
[57] *Id.* at 292.

mercy is a mitigating circumstance.[58] On October 31, 2017, Mr. Robinson filed his response to the motion to preclude Dr. Forsyth or order immediate disclosure of his opinions.[59]

On November 15, 2017, the court granted the motion for further disclosure of Dr. Forsyth's opinions.[60] The court denied Mr. Robinson's motion for a stay of proceedings while the he pursued a special action on the court's ruling on the aggravating circumstances.[61]

On December 20, 2017, the court heard argument on the State's motion to compel a mental health evaluation of Mr. Robinson and then denied it.[62] However, the court precluded Mr. Robinson from offering evidence that he suffers from "Fetal Alcohol Syndrome or any related or synonymous medical diagnosis" through Dr. Forsyth.[63]

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[58] *Id.* at 295, 296, 298.
[59] *Id.* at 299.
[60] *Id.* at 304.
[61] *Id.*
[62] *Id.* at 310.
[63] *Id.*

On December 13, 2017, the State filed a motion to define the scope of Dr. Spence's testimony pursuant to *Daubert.*[64] On January 4, 2018, Mr. Robinson filed his response.[65]

On December 20, 2017, Mr. Robinson filed motions to suppress the evidence as an unlawful seizure, suppress his statements pursuant to *Miranda*, to preclude certain opinions offered by the State's witness Kyle Mueller, a request for a voluntariness hearing, to preclude James Thomas from testifying as an expert, a motion in limine regarding photographs, and to strike the allegation of especially cruel, heinous, or depraved.[66] He also filed a request for case-specific voir dire and a request for the State's requested case-specific voir dire.[67]

On December 28, 2017, the State filed responses to Mr. Robinson's motion to dismiss the notice of intention to seek the death penalty and the motion to strike the allegation of especially cruel, heinous, or depraved.[68]

On January 4, 2018, the State filed responses to Mr. Robinson's motion regarding the photographs, to suppress the evidence, suppress his statements pursuant

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[64] *Id.* at 311.
[65] *Id.* at 336.
[66] *Id.* at 314, 315, 316, 317, 319, 321, 322
[67] *Id.* at 318.
[68] *Id.* at 331, 332.

to *Miranda*, and request for a voluntariness hearing.[69] That same day Mr. Robinson filed his reply to the State's motion to preclude questions to Dr. Hu or any witness regarding their opinion on Mr. Robinson's intentions.[70]

On January 8, 2018, the State filed its response to the motion to preclude James Thomas from testifying as an expert.[71]

On January 9, 2018, Mr. Robinson filed his to reply to his motion to suppress the evidence, suppress his statements pursuant to *Miranda*, and request for a voluntariness hearing.[72] That same day the State filed its response to Mr. Robinson's request for case-specific voir dire and a request for the State's requested case-specific voir dire.[73]

The court held a pretrial conference on January 5, 2018.[74] The court issued an order extending the deadline to complete witness interviews to January 19, 2018, with the exception of Dr. Hu, who may be interviewed by telephone after that date but prior to opening statements.[75] The court noted that there were six pending motions for

[69] *Id.* at 338.
[70] *Id*. at 339.
[71] *Id.* at 343.
[72] *Id*. at 347.
[73] *Id*. at 349.
[74] *Id*. at 351.
[75] *Id*.

which the Court will decide whether an evidentiary hearing is necessary.[76] The court affirmed the oral Argument on January 12, 2018 at which counsel was to be prepared to address the motions regarding voir dire, the Court's proposed jury questionnaire, and all pending motions other than the six that may require an evidentiary hearing.[77] The court also affirmed the trial date of January 22, 2018.[78]

On January 12, 2018, Judge Myers heard argument on Mr. Robinson's motion to continue trial date of January 22, 2018 (filed on January 4, 2018) and the State's Response to Motion to Continue (filed on January 4, 2018).[79] The court took the matter under advisement then denied the motion, stating it found "no good cause exists to continue the case."[80] That same day the court heard argument on the voir dire motions, granting in part the State's motion to define scope of voir dire under Rule 18.5(e), and denied to the extent it seeks to preclude all case specific voir dire.[81] Both Mr. Robinson and the State are entitled to ask at least one case specific question and related follow up questions, but the substance of any question shall be approved

[76] *Id*.
[77] *Id*.
[78] *Id*.
[79] *Id*. at 378.
[80] *Id*.
[81] *Id*. at 381.

by the Court prior to the small group voir dire.[82] After the court informed Mr. Robinson and the State that the motion to continue the trial was denied, and Mr. Robinson moved for a motion to continue the trial, which the court denied.[83]

The court received and reviewed State's motion to preclude argument that mercy is a mitigating circumstance (filed on October 19, 2017), which it granted.[84]

The court received and reviewed the State's motion to preclude residual doubt as a mitigating circumstance (filed on October 19, 2017) and Mr. Robinson's response, and then granted the motion.[85] The court received and reviewed Mr. Robinson's motion to dismiss the State's notice of intention to seek the death penalty and the State's response, and then denied the motion.[86]

On January 16, 2018, the court issued a *nunc pro tunc* order correcting the minute enter of October 13, 2017 to reflect that it had dismissed the (F)(1) aggravating factor as to both Counts 1 and 2, instead of dismissing the (F)(8) aggravating factor as to both Counts 1 and 2.[87]

On January 18, 2018, Mr. Robinson filed voir dire questions, supplemental

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[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*

questionnaire inquiries, and a supporting memorandum on the law of jury selection and a motion to preclude the State's newly disclosed theory based on the State's proposed evidence at trial that the victim was alive at the time of the fire, which differed from Dr. Hu's original opinion issued five years earlier.[88] That same day the State file its group voir dire questions and a motion to strike and objection to Mr. Robinson's voir dire questions and supplemental questionnaire inquiries.[89] The court then ruled on the State's motion in limine to preclude questions to Dr. Hu or any witness regarding their opinion on the Mr. Robinson's intentions (filed October 19, 2017) and Mr. Robinson's response (filed January 4, 2018), holding that it would not permit speculative testimony from witnesses about Mr. Robinson's intent.[90]

On January 19, 2018, Mr. Robinson filed his response to the State's motion to strike and objection to Mr. Robinson's voir dire questions and supplemental questionnaire inquiries.[91]

The guilt phase of the trial began on January 22, 2018.[92] The court set an evidentiary hearing on Mr. Robinson's motion to suppress: *Miranda* (filed on

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[87] *Id*. at 360.
[88] *Id*. at 363, 366.
[89] *Id*. at 364, 365.
[90] *Id*. at 367.
[91] *Id*. at 370.

December 20, 2017), Mr. Robinson's request for voluntariness hearing (filed on December 20, 2017), and Mr. Robinson's motion to suppress evidence: unlawful seizure (filed 12/20/2017) for February 6, 2018.[93] That same day, the court issued its ruling on Mr. Robinson's motion to strike the allegation of especially cruel, heinous or depraved, A.R.S 13-751(F)(6) (filed on December 20, 2017) and the State's response (filed December 28, 2017), denying the motion.[94] The State filed a motion to strike or in the alternative response to preclude the State's newly disclosed theory.[95]

On January 25, 2018, the court denied Mr. Robinson's motion to preclude State's newly disclosed theory (filed January 17, 2018).[96]

On January 29, 2018, after jury selection concluded for the day, Court sets evidentiary hearings on February 6, 2018, February 7, 2018, and February 8, 2018.[97]

On February 6, 2018, the court held an evidentiary hearing on Mr. Robinson's motion to suppress: *Miranda* (filed on December 20, 2017), Mr. Robinson's request for voluntariness hearing (filed on December 20, 2017), and Mr. Robinson's motion to

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[92] *Id*. at 382.
[93] Tr. 01/22/18 at 106.
[94] R. at 382.
[95] *Id*. at 372.
[96] *Id*. at 385.
[97] *Id*. at 392.

suppress evidence: unlawful seizure (filed December 20, 2017).[98] The court denied Mr. Robinson's motion to suppress: *Miranda* and Mr. Robinson's request for voluntariness and then took Mr. Robinson's motion to suppress evidence: unlawful seizure under advisement.[99]

On February 8, 2018, jury selection continued, and Mr. Robinson moved for a *Batson* challenge to the State's striking jurors 300, 145, 358, and 260.[100] The court denied the motion finding that the State had stated race-neutral reasons for the strikes, which it found to be reasonable.[101]

The trial resumed on February 12, 2018.[102] The court denied Mr. Robinson's Motion in Limine (filed on February 5, 2018) regarding evidence that there was sexual activity.[103] The court did rule regarding whether the evidence was intrinsic.[104] The court also continued the evidentiary hearing on the State's motion to define the scope of Dr. Spence's testimony pursuant to *Daubert* (filed December 13, 2017) to February

[98] *Id*. at 422.
[99] *Id*.
[100] *Id*. at 438.
[101] *Id*.
[102] *Id*. at 457.
[103] *Id*.
[104] *Id*.

15, 2018.[105] The jurors heard opening statements.[106]

On February 13, 2018, the court issued the bases for its February 6, 2018 denials of Mr. Robinson's request for voluntariness hearing and motion to suppress *Miranda*.[107]

On February 15, 2018, the court held an evidentiary hearing on the State's motion to define the scope of Dr. Spence's testimony pursuant to *Daubert*.[108] The court ordered the motion held in abeyance.[109]

On March 7, 2018, the State rested its case.[110] The court denied Mr. Robinson's motion for acquittal.[111]

On March 20, 2018, the court and counsel discussed Mr. Robinson's motion to dismiss the notice of intent to seek the death penalty due to Mr. Robinson's age (filed March 16, 2018) and Mr. Robinson's motion to strike A.R.S. § 13-751(F)(6) as to Count 2 of the indictment (filed March 16, 2018).[112]

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[105] *Id.*
[106] *Id.*
[107] *Id.* at 426.
[108] *Id.* at 460.
[109] *Id.*
[110] *Id.* at 534.
[111] *Id.*
[112] *Id.* at 571.

The jury heard closing arguments on March 21 and March 22, 2018.[113] The court denied Mr. Robinson's motion for a mistrial.[114]

On March 26, 2018, the court denied Mr. Robinson's motion to dismiss the notice of intent to seek the death penalty due to Mr. Robinson's age (filed March 16, 2018) and Mr. Robinson's motion to strike A.R.S. § 13-751(F)(6) as to Count 2 of the indictment (filed March 16, 2018).[115] The court and counsel discussed Mr. Robinson's objection to the State's request to include non-capital aggravators in the capital eligibility phase of trial (filed March 26, 2018).[116] The jurors returned their verdicts, finding Mr. Robinson guilty on all counts.[117]

On March 27, 2018, the court heard argument and reserved ruling on Argument is presented regarding State's motion to define the parameters of mitigation (filed March 23, 2018).[118]

The aggravation phase began on March 28, 2018.[119] The court denied the State's motion to define the parameters of mitigation (filed March 23, 2018).[120] The

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[113] *Id*. at 572, 573.
[114] *Id*. at 573.
[115] *Id*. at 574.
[116] *Id*.
[117] *Id*.
[118] *Id*. at 568.
[119] *Id*. at 583.

court deferred ruling on Mr. Robinson's oral motion for the court to screen the victim impact statement presentations.[121]

On April 2, 2018, the court denied Mr. Robinson's motion to supplement requested preliminary jury instructions (filed March 29, 2018).[122] The jurors found the following aggravating circumstances as to Count 1: that he was previously convicted of a serious offense, that he had been convicted of one or more other homicides, and those homicides were committed during the commission of the offense, that he committed the offense in an especially cruel, heinous or depraved manner, that the murder was committed in an especially cruel manner, and that the murder was committed in an especially heinous or depraved manner.[123]

The jurors found the following aggravating circumstances as to Count 2: that Mr. Robinson was previously convicted of a serious offense, that he committed the offense in an especially heinous or depraved manner, that he had been convicted of one or more other homicides, and those homicides were committed during the commission of the offense, that Mr. Robinson was at least eighteen years of age, and

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[120] *Id.*
[121] *Id.*
[122] *Id.* at 588.
[123] *Id.*

the murdered person was an unborn child at any stage of its development.[124] The penalty phase then began with opening statements.[125]

On April 3, 2018, the court and counsel discussed the victim impact statements.[126] The court sustained Mr. Robinson's objection to portions of Laticea Nuels' statement.[127] The court overruled in part and sustained in part Mr. Robinson's objections to portions of Jeffrey Nuels' statement.[128] The court overruled Mr. Robinson's objections to the photographs marked for identification to be used during victim impact statements and to the victim impact video of the victim's daughter.[129] The court reserved ruling on Mr. Robinson's objections to the audio recording of the victim and the victim's daughter speaking to the baby in utero.[130]

Mr. Robinson's penalty-phase presentation ended on April 30, 2018.[131] On May 1, 2018, the court denied Mr. Robinson's motion to excuse Juror 2 for a violation of the admonition, ordering the parties not make any further social media investigation or monitoring of jurors until such time as they can provide the Court with authority

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[124] *Id.*
[125] *Id.*
[126] *Id.* at 589.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*

that it does not constitute a violation of their ethical responsibility.[132] After further discussion with counsel, the court ordered no monitoring of the jury on social media from that time forward.[133] On May 2, 2018, Mr. Robinson presented his allocution.[134] Mr. Robinson and the State presented closing arguments on May 7 and May 8, 2018.[135]

On May 21, 2018, the jurors returned sentences of death on Counts 1 and 2.[136] That same day the jurors found the following aggravating circumstance as to Count 3: the offense was dangerous because it involved the use of a dangerous instrument (fire), and that the victim and/or the immediate family suffered physical, emotional or financial harm.[137] The jurors found the following aggravating circumstance as to Count 4: the offense was dangerous because it involved the intentional or knowing infliction of serious physical injury on another person, and the offense was committed in an especially cruel manner.[138]

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[131] *Id.* at 630.
[132] *Id.* at 632.
[133] *Id.*
[134] *Id.* at 633.
[135] *Id.* at 677.
[136] *Id.*
[137] *Id.*
[138] *Id.*

That same day, the court sentenced Mr. Robinson to death on Counts 1 and 2 and to aggravated sentences of 15 years' imprisonment each on Counts 3 and 4.[139] The sentence on Count 3 is concurrent with the sentence on Counts 1 and 2, and the sentence on Count 4 is consecutive to the sentence on Count 3 and concurrent with Counts 1 and 2.[140] The court applied presentence incarceration credit of 2,133 days to the sentence on Count 3.[141]

On May 31, 2018, Appellant filed a timely notice of appeal.[142] This court has jurisdiction under Article 6, § 5(3), of the Arizona Constitution, as well as A.R.S. § 13-4031, and Rule 31.2(b), Arizona Rules of Criminal Procedure.

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[139] *Id*. at 672.
[140] *Id*.
[141] *Id*.
[142] *Id*. at 679.

STATEMENT OF THE FACTS[143]

On July 18, 2012, at approximately 4:25 p.m., Phoenix Police Officer Scott Ferrante responded to Mr. Robinson's 911 call to go to a specific apartment at the complex at the 1400 block of East Bell Road.[144] When he arrived at the scene, the officer heard a faint alarm, but did not smell any smoke.[145] Officer Ferrante knocked on the door, received no answer, then tried the door handle, which was unlocked.[146]

Officer Ferrante noticed a "light, white smoke" in the apartment, but when he checked the master bedroom, he noted "thick, black smoke" as he opened the door.[147] The whole room was engulfed in smoke and the officer could not breath, so he left.[148] At around 4:35 p.m., a firefighter and Mr. Robinson, holding his little girl, began walking toward the officer.[149]

Once the fire was out, a firefighter found the victim S.H. lying on the floor.[150] She was bound at the feet and hands, handcuffed, had duct tape covering her mouth

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[143] The facts are presented in the light most favorable to the jury's verdict. *State v. Tucker*, 205 Ariz. 157, n. 1, 68 P.3d 110 (2003).
[144] Tr. 02/12/18 at 88, 126.
[145] *Id*. at 104–05.
[146] *Id*. at 105.
[147] *Id*. at 106, 113.
[148] *Id*. at 113.
[149] *Id*. at 117, 121.
[150] Tr. 02/13/18 at 20–21.

and eyes, and a cloth in her mouth.[151] S.H. was pregnant with the second victim.[152]

The police found a receipt indicating that Mr. Robinson had purchased duct tape and charcoal lighter fluid that day.[153] Mr. Robinson's fingerprints were on some of the duct tape.[154] The police found a handcuff key in Mr. Robinson's pocket.[155]

Dr. Hu, the medical examiner, determined that S.H.'s death was the result of homicidal violence and death was a combination of multiple possible causes, such as force, asphyxia, and S.H.'s almost facedown position while nine months pregnant.[156] Dr. Hu could not definitively say if S.H. was alive or dead at the time of the fire.[157] Once S.H.'s heartbeat stopped and B.H.'s supply of blood ceased, B.H. died.[158]

On March 26, 2018, the jurors found Mr. Robinson guilty on all counts.[159] At the end of the aggravation phase, on Count 1, he jurors found the aggravating circumstances that was previously convicted of a serious offense, that he been convicted of one or more other homicides, and those homicides were committed during the commission of

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[151] Tr. 02/28/18 at 24, 25, 27, 53, 64.
[152] *Id*. at 28.
[153] Tr. 03/06/18 at 85.
[154] Tr. 03/01/18 at 69.
[155] Tr. 03/06/18 at 54.
[156] Tr. 02/28/18 at 50–51
[157] *Id*. at 152.
[158] *Id*. at 167.
[159] Tr. 3/26, 2018

the offense, that he committed the offense in an especially cruel, heinous or depraved manner, that the murder was committed in an especially cruel manner, and that the murder was committed in an especially heinous or depraved manner.[160]

The jurors found the following aggravating circumstances as to Count 2: that Mr. Robinson was previously convicted of a serious offense, that he committed the offense in an especially heinous or depraved manner, that he had been convicted of one or more other homicides, and those homicides were committed during the commission of the offense, that Mr. Robinson was at least eighteen years of age, and the murdered person was an unborn child at any stage of its development.[161] The penalty phase then began with opening statements.[162]

During the penalty phase, the jurors heard about the cycle of violence and cycle of poverty in Mr. Robinson's life, how Mr. Robinson and his siblings were subjected to physical and sexual abuse while children.[163]

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[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] Tr. 4/3/18, passim; 4/4/18, passim; 4/5/18, passim; 4/9/18, passim; 4/11/18, passim; 4/12/18, passim; 4/16/18, passim; 4/17/18, passim; 4/23/18, passim; 4/25/18, passim; 4/26/18, passim; 4/30/18 passim.

ISSUES PRESENTED FOR REVIEW

I. The trial court abused its discretion by overruling Mr. Robinson's *Batson* challenges to the State's striking of Juror 145, an African American, Juror 260, a Hispanic, Juror 300, a Native American, and Juror 358, an African American.

II. Whether 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.

III. Whether 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) aggravating circumstance of especially heinous or depraved is not supported by substantial evidence.

VI. Whether the trial court's failure to provide the jury with a *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.

V. Whether 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.

VI. There was persistent and pervasive misconduct during the prosecutor's questioning of Dr. Hu during the guilt phase and his penalty phase closing argument and the cumulative effect of the incidents shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice Mr. Robinson, adversely contributing to and affecting the verdicts of guilt and death.

ARGUMENT I

The trial court abused its discretion by overruling Mr. Robinson's *Batson* challenges to the State's striking of Juror 145, an African American, Juror 260, a Hispanic, Juror 300, a Native American, and Juror 358, an African American.

Racial discrimination in the jury selection process "is at war with our basic concepts of a democratic society and a representative government." *Johnson v. California*, 545 U.S. 162, 172, 125 S. Ct. 2410, 2418 (2005) (citation omitted). The four jurors the State proposed to strike from the remaining jurors were members of a minority: two were African American, as is Mr. Robinson, one was a Native American, and the fourth was Hispanic. Despite this pattern of peremptory strikes involving jurors of racial and ethnic groups, the trial court abused its discretion by making only the most perfunctory inquiry into the reasons the State had singled out those jurors for elimination.

Standard of Review

The trial court's ultimate finding regarding an objection based on *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712 (1986) is entitled to great deference. *Hernandez v. New York*, 500 U.S. 352, 366–69, 111 S. Ct. 1859, 1869–71 (1991) (plurality opinion). The appellate court will not reverse the denial of a *Batson* challenge absent clear error. *State v. Newell*, 212 Ariz. 389, ¶ 52, 132 P.3d 833,

834 (2006). The appellate court reviews the trial court's application of the law de novo. *State v. Lucas*, 199 Ariz. 366, 368, ¶ 6, 18 P.3d 160, 162 (App. 2001).

"Deference does not by definition preclude relief." *Miller-El v. Cockrell ("Miller-El I")*, 537 U.S. 322, 340, 123 S. Ct. 1029 (2003). The appellate court must ensure that the *Batson* framework is "vigorously enforced" to serve its goals. *Flowers v. Mississippi*, ___ U.S. ___, 139 S. Ct. 2228, 2243 (2019). The *Batson* framework contemplates meaningful appellate review, not blind assent by "abandonment or abdication of judicial review." See *Miller-El I*, 537 U.S. at 340, 123 S. Ct. at 1041.

The trial court "need not make detailed findings addressing all the evidence before it," *Miller-El I*, 537 U.S. at 347, 123 S. Ct. at 1045. In Arizona, the trial court may even conduct the entire step-three analysis implicitly in some cases. *State v. Canez*, 202 Ariz. 133, 147, ¶ 28, 42 P.3d 564, 578 (2002), *abrogated on other grounds by State v. Valenzuela*, 239 Ariz. 299, 302–03, 371 P.3d 627, 630–31 (2016).

Pertinent Facts

On February 8, 2018, the State exercised its peremptory strikes and struck Juror 145, an African American, Juror 260, a Hispanic, Juror 300, a Native

American, and Juror 358, an African American.[164]

A. Juror 145

Just before addressing Juror 145, the defense counsel had asked Juror 64 for their thoughts on the death penalty, focusing on the responses to Question 80, "How do you feel about the death penalty?"[165] Juror 64 commented that "It's probably the most harsh punishment you could give anybody and it would have to be really – I don't know the right word, but something that really emotionally affected me to go that way."[166]

The defense counsel then asked Juror 145 about the comment in his questionnaire that the death penalty can be an "appropriate sentence."[167] Juror 145 replied:

> Well, the whole idea here are [sic] the two options of death penalty or life. And so if it's appropriate, it would be with aggravation and no mitigation or not enough of preponderance of mitigation, then I think it would be appropriate. But if you don't know – so for me sitting in this early part of it all, I think right now they're equally – equal options."

The defense counsel asked if Juror 145 felt the same as Juror 64 did, to

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[164] Tr. 02/08/18 at 122.
[165] Tr. 01/30/18 at 44.
[166] *Id*. at 47.
[167] *Id.*

which Juror 145 replied:

> I don't know if I would include the emotional aspect of it, although it is terrifying to consider what we're talking about, but – but the idea of it just being an option of the two options, then there's the aggravation and then, you know, there's the mitigation. So that's what I mean by it could be appropriate.[168]

Defense counsel then asked, "Okay. So do you both – on a balance, you could impose either one?"[169] Juror 145 replied, "Sure."[170]

The State did not challenge Juror 145 for cause.[171]

The State's reason for using a peremptory strike of Juror 145 was:

> He indicated – when he was being questioned about the ability to impose the death penalty, he said: It is terrifying for me to consider what we're even talking about.
>
> That alone was of concern to the State. He did indicate that he did feel the death penalty could be appropriate, but that this decision terrifies him. And that is of great concern to the State.[172]

B. Juror 260

Juror 260 responded "No" to Question 73, "Have you, a member of your family or a close friend ever worked with any program dedicated to rehabilitating

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[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.* at 106.
[172] *Id.* at 126.

persons convicted of a crime?" The juror added, "I will say that I did participate via my church in a writing inmate program. Letters to share gospel messages and provide support in 2016."

The court conducted the colloquy with Juror 260 on his letter writing:

> [JUROR 260]: As part of my church, I do write an inmate – or I was writing an inmate and got out of the program. But during the time that I left, I received a letter from somebody that is in prison. I'm out of the program, yet somehow that letter got routed to me.
>
> THE COURT: Okay, so is this – I'm sorry, go ahead, sir.
>
> [JUROR 260]: That wasn't – I didn't put that in there.
>
> THE COURT: Thank you. I appreciate you bringing that to our attention. So is that something that you had participated in that – is it kind of like a – they used to call it pen pal kind of thing?
>
> [JUROR 260]: Exactly, yes. Just try to write somebody uplifting stuff, kind of keep them positive.
>
> THE COURT: Had you done that for an extended period of time?
>
> [JUROR 260]: I did it for about – the way the program was supposed to work is I was supposed to write this person. This person was supposed to put me on their list, so I could eventually go to prison and visit with this person.
>
> THE COURT: Okay.
>
> [JUROR 260]: This person later got transferred, it never worked out and I got pulled out of the program and so it never materialized to anything.

THE COURT: So there was just the one inmate that you had had this –

[JUROR 260]: That's correct.

THE COURT: And how many correspondences altogether?

[JUROR 260]: I would say two to three. So at first, I was writing him. I wasn't getting anything. They said maybe he doesn't have money for stamps or things like that. Eventually, I got a letter out of the blue – I think I've only gotten two, and then he got transferred to a different prison way up north and then I – he's like, Hey, I found your address, which is not my address, but the address where all these letters were coming to. They forwarded it me and said if you want to continue to do this, do it on your own, but you're no longer part of this thing.

THE COURT: All right. I appreciate that. Do you know by the way what he was convicted of?

[JUROR 260]: No. No.

THE COURT: Do you think there's anything about that experience of corresponding with that inmate that would influence you at all in this trial?

[JUROR 260]: No, not at all.[173]

The State made further inquiries:

[THE STATE]: Your interactions with inmates besides writing to them, is your writing to them more of guiding them in a spiritual sense or is it forming more personal connections.

[JUROR 260]: Nope, try not to do that. We're instructed, Hey, this

[173] Tr. 01/31/18 at 195–97.

> person needs a friend. Don't even ask anything about them or you don't want to know anything about them, you just want to send something to make sure they're uplifted and so we just say hello, how are you doing, here's a message you might like. That's it.
>
> [THE STATE]: All right.
>
> [JUROR 260]: That's the extent of it.[174]

Juror 260 checked the option, "Too lenient," adding the comment "(Most often) in response to Question 66, which asked the juror's belief about Arizona criminal laws.[175] Juror 260 explained: "This is such a broad question some/most are appropriate. There was a time where I felt that some of the laws/interpretations of the law were a bit harsh."[176]

In response to Question 85, whether the juror felt there are problems with how the death penalty is imposed on different groups of people (for example: certain races, people with low social economic background etc.), Juror 260 checked "Yes."[177] The juror added, "To some degree, I do have a problem w/ people being sentenced to the death penalty only to find out later that the person

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[174] *Id*. at 217–18.
[175] Juror 260, Questionnaire, Question 66 at 19.
[176] *Id.*
[177] Juror 260, Questionnaire, Question 85 at 26.

was innocent of the crime."[178]

The State did not ask Juror 260 for any further clarification of the remark.

Juror 260 did not respond to Question 90, "The law requires that aggravating circumstances be proven beyond a reasonable doubt. Mitigation, on the other hand, need only be proven by a preponderance of the evidence. These terms are defined on page 24."[179] In response to Question 110, which asked if there was any question the juror did not understand, Juror 260 responded "Question 90."[180]

The following colloquy took place between the State and Juror 260:

> [STATE]: Okay. And question 90, can you explain that one to me a little?
>
> [JUROR 260]: So, again, you guys just went through that so on the third phase, basically as you were explaining it is bringing forward the evidence or the situations based on this person's life and forming an opinion based an [sic] that. So correct me if I'm wrong, this is new to me so.
>
> [STATE]: Yes, I mean, at the end of the day when it comes down to just that final question of life or death, you will only be asked by the Court to make that determination after you found him guilty, after there's been aggravation, and then after both sides had the opportunity to present mitigation or whatever evidence they wanted at that point relating to the defendant's character, background, and such.

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[178] *Id.*
[179] Juror 260, Questionnaire, Question 90 at 27–28.
[180] *Id*. at 32.

[JUROR 260]: And I agree with that.

[STATE]: And you understand that?

[JUROR 260]: Yes.[181]

The State did not challenge Juror 260 for cause.[182]

The State's reason for using a peremptory strike on Juror 260 was because he:

> was the individual who indicated that he was writing letters through a letter program, sharing the gospel with individuals in church. He had indicated he wasn't getting responses until, I think he indicated, either since the time he filled out the questionnaire – he said something about receiving a letter in response recently.
>
> But he indicated it was his mission – or part of that mission to give inmates uplift, to say hello, to share the message of the gospel and the messages they might like.
>
> He felt time – he said he felt the laws – wow. Was a time he felt laws were too harsh in this state. He indicated he has problems with people sentenced to the death penalty, only to find out later a person was innocent of the crime. He had some confusion regarding the burden of proof.[183]

C. Juror 300

Juror 300 responded "Yes" to Question 40, 'Have you, your spouse/partner, your child or any other family member, or a close personal friend ever been arrested

[181] Tr. 01/31/18 at 217.
[182] *Id*. at 246.

for, charged with, or convicted of any crime other than minor traffic violations? This includes driving under the influence."[184] The juror explained that a brother had been convicted of assault, a stepdaughter of DUI, and a stepson of sexual assault.[185] In response to Question 41, whether the juror had personally known anyone who was in jail or prison, or communicated with anyone who was in jail or prison, the juror responded "Yes," and "Brother in the early 1970's."[186]

The following colloquy took place between the court and Juror 300 concerning relatives who had been convicted of crimes:

> THE COURT: We're going to be speaking with all the jurors as a group here in a moment, but there was – there were one or two questions or responses on your questionnaire that I thought you might prefer to speak to us privately about because of the nature of the topic.
>
> [JUROR 300]: Okay.
>
> THE COURT: In question number 40, regarding whether anyone had been convicted of any crime, you indicated on that one, looks like you have a stepson that was – was it accused of or convicted of a sexual assault?
>
> [JUROR 300]: Convicted.

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[183] Tr. 02/08/18 at 127–28.
[184] Juror 300, Questionnaire, Question 40 at 13.
[185] *Id.*
[186] Juror 300, Questionnaire, Question 41 at 14.

THE COURT: Convicted. Was that here in Maricopa County –

[JUROR 300]: Yes.

THE COURT: – Superior Court?

[JUROR 300]: Yes.

THE COURT: And how long was that?

[JUROR 300]: Twenty years ago.

THE COURT: All right, and is he still incarcerated?

[JUROR 300]: No.

THE COURT: No. All right, and did you – how old was he at the time of that case? Was it a plea negotiation or a trial?

[JUROR 300]: Trial. I want to say he was 19, 20.

THE COURT: Nineteen or twenty? Okay. And did he go to prison for some time?

[JUROR 300]: Yes.

THE COURT: For how long?

[JUROR 300]: Seven years.

THE COURT: Okay. And was it the Maricopa County Attorney's office that prosecuted the case?

[JUROR 300]: Yes.

THE COURT: And do you know which police agency investigated the

case?

[JUROR 300]: I do not.

THE COURT: Did you attend parts of the trial?

[JUROR 300]: No.

THE COURT: Did you follow the trial as it was going along? In other words, just kind of keep abreast of –

[JUROR 300]: My husband did. I did not.

THE COURT: Did you form any strong opinions about the way his case was handled or how he was treated by the justice system?

[JUROR 300]: No, I wasn't aware of the process.

THE COURT: And then this one looks like it may be fairly old, but you had a brother that was convicted of an assault charge?

[JUROR 300]: Yes, early '60s.

THE COURT: And that was also tried here in Maricopa County?

[JUROR 300]: Yes.

THE COURT: And did you follow his case at all?

[JUROR 300]: No, I was too young.

THE COURT: You ended up, sounds like, communicating with him while he was in prison for that?

[JUROR 300]: Yes.

THE COURT: And did you form any opinions at all as a result of his incarceration the fact that he was in prison and his life in prison or anything like that about the criminal justice system?

[JUROR 300]: No.[187]

The State asked some follow up questions:

[THE STATE]: Yes, Judge. You said you were not aware of the proceedings or –

[JUROR 300]: You're talking about my stepson?

[THE STATE]: Yes.

[JUROR 300]: I didn't follow it. I knew he was being tried and my husband is the one that followed it.

[THE STATE]: Why?

[JUROR 300]: I just didn't want to take part in it. I felt it was too close to home so I didn't take part.

[THE STATE]: Okay.

[JUROR 300]: Because he has his mom that was there.

[THE STATE]: Okay. And did you feel the jury came to the appropriate decision in that case?

[JUROR 300]: I don't know the whole story.

[THE STATE]: Thank you, very much.[188]

[187] Tr. 01/31/18 at 184–86.
[188] *Id.* at 186–87.

In response to Question 77, "You may be asked to view graphic photographs, including autopsy photographs, which show some of the victim's injuries.[189] Will viewing these photographs affect your ability to sit as a fair and impartial juror?" Juror 300 responded "Yes," and explained "Photographs do not state that the defendant committed the crime."[190]

The State questioned Juror 300 about any issues the juror had about the nature of the photographs, but not about the juror's comment about their relating to proof of guilt:

> [THE STATE]: When it comes to graphic photographs, I understand that – what is your feeling on graphic photographs that depict individuals that are deceased?
>
> [JUROR 300]: Natural reaction, it's going to be hard, but maybe necessary to be able to come to a conclusion effectively.
>
> [THE STATE]: I know when – and when it comes to individuals that are Native American that there are some tribes that say you're not allowed to look at these type of things and there's like a religious type of component.
>
> [JUROR 300]: Correct.
>
> [THE STATE]: I don't know what tribe you're in or anything like that. Is that something that you have or is that something you follow or –

[189] Juror 300, Questionnaire, Question 77 at 23.
[190] *Id.*

> [JUROR 300]: Not that I follow. I don't make a practice of looking at pictures like that but, for example, my daughter is a massage therapist and part of that is researching with cadavers and, of course, after when she is done, we smudge her and bless her, but it's not forbidden.[191]

Juror 300 checked "No" in response to Question 85, whether the juror felt there are problems with how the death penalty is imposed on different groups of people (for example: certain races, people with low social economic background etc.).[192] The juror added, "We are all ingrained to do morally good even in the worst of conditions."[193]

The following colloquy took place between the defense counsel and Juror 300:

> [DEFENSE COUNSEL]: Okay. Juror number 300, you said on your questionnaire, number 85, you said when you were asked to explain, you said all are ingrained to be morally good even in the worst of conditions. Can you just explain what you meant by that?
>
> [JUROR 300]: Even though a crime may have been committed, I don't believe that that is really the core of any of us, is that we – it may be something that has been conditioned. But I think deep down inside, all of us have good morals.[194]

The State did not question Juror 300 any further about that point.

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[191] Tr. 01/31/18 at 222–23.
[192] Juror 300, Questionnaire, Question 85 at 26.
[193] *Id.*
[194] Tr. 01/31/18 at 241–42.

In response to Question 83, "Which of the following statements reflects your view on the death penalty the closest?" Juror 300 selected, "I am neither opposed nor in favor of the death penalty."[195] To Question 84, "Do you have any personal, moral, religious, philosophical or conscientious objections to the imposition of the death penalty?" the jurors responded "No."[196]

In response to Question 95, "If after hearing the evidence, reviewing the instructions, and deliberating with your fellow jurors, you believe that death is the appropriate sentence, would you personally be able to enter a death verdict?" the juror responded "Yes."[197] In response to Question 96, "If after hearing the evidence, reviewing the instructions, and deliberating with your fellow jurors, you believe that life is the appropriate sentence, would you personally be able to enter a death verdict?" the juror responded "Yes."[198] In response to Question 105, "If you ascribe to a particular religion, does that religion have a view on the death penalty?" Juror 300 responded "No."[199]

The State questioned Juror 300 about Native American traditions and the juror's

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[195] Juror 300, Questionnaire, Question 83 at 25–26.
[196] Juror 300, Questionnaire, Question 84 at 26.
[197] Juror 300, Questionnaire, Question 95 at 29.
[198] Juror 300, Questionnaire, Question 96 at 29.
[199] Juror 300, Questionnaire, Question 105 at 31.

feelings about the death penalty:

> [THE STATE]: Kind of along those same lines when it comes to the death penalty. Certain tribes have certain stances on that. Sounds like at least when it comes to graphic photos, it's something that you guys address or talk about but it's not something that you follow to the letter of the – I don't say the law – but regarding the death penalty, what are your feelings on that?
>
> [JUROR 300]: I don't have an issue with that. Again, all evidence. It is customary, if you will, and handed down for many generations that when there were wars, there was always – you always have to have that measure of balance. So if – culturally if something was removed from this group of war years, let's say over to those that they fought against, if there was an imbalance due to the war, due to death, there was a position to have it go back to – what word am I looking for – to reestablish that balance which is part of an act of war between the tribes. So death incurred, right?
>
> [THE STATE]: Yes.
>
> [JUROR 300]: So I don't have an issue with it but it's not something that I practice.
>
> [THE STATE]: At the end of the day after the third and final phase, would you be able to enter a death verdict?
>
> [JUROR 300]: I could.
>
> [THE STATE]: Would you be able to enter a life verdict?
>
> [JUROR 300]: I could.[200]

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[200] Tr. 01/31/18 at 223–225.

The State did not challenge Juror 300 for cause.[201]

The State's reason for striking Juror 300 was:

> She was similar to another juror that says she believes that all people are good and have good morals, and that's her starting point. She indicated that life – she had some issues with life in prison, that it should not be a way of life, but that some people can make a life in prison.
>
> But she clearly had issues, indicating that we are all ingrained – and this is her words – we are all ingrained to do morally good, even in the worst conditions. And that is her starting belief.
>
> She has relatives who have been in prison, she said in the '60s at one point and at the '70s on another point. She – I believe she had a stepson who was charged with a sexual assault-related offense. She said the photos may be an issue for her, under Question 77. She indicated that it would be hard for her. She did say that she felt it was a necessity, but it would be a hard decision for her whether or not she could impose the death penalty.
>
> She said that crime is – committing crime is not the core of any one of us. You have to be conditioned to do it.[202]

D. Juror 358

In response to Question 27, "Are you now or have you in the past suffered from any emotional conditions (depression, anxiety, PTSD)?" Juror 258 responded, "I have had an anxiety attack in the past."[203]

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[201] *Id*. at 249–50
[202] Tr. 03/08/18 at 125.
[203] Juror 358, Questionnaire, Question 27 at 11.

In response to Question 52, "Do you believe that in each case the State must present scientific evidence, such as DNA or fingerprint evidence, to prove guilt beyond reasonable doubt?" Juror 358 responded "No," and explained, "It would help prove the case however, if witness saw the crime or there is video this can impact my thoughts."[204] In response to Question 53, "Do you believe that in each case the State must present eyewitness testimony or a confession to prove guilt beyond a reasonable doubt?" Juror 358 responded "No," and explained "If there is video or DNA take [sic] can change my veiw [sic]."[205]

In response to Question 67, "Have you or someone else close to you been treated unfairly in the past by someone in law enforcement, or by a prosecutor, or by a criminal defense attorney, or by a court?" Juror 358 replied "Yes," and explained, "Racial profiling by cops pulling over the car assuming we did not own it or live in my area."[206]

Neither the defense nor the State asked Juror 358 for any further explanation of any responses on the jury questionnaire.

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[204] Juror 358, Questionnaire, Question 52 at 16.
[205] Juror 358, Questionnaire, Question 53 at 17.
[206] Juror 358, Questionnaire, Question 67 at 19–20.

The State did not move to excuse Juror 358 for cause.[207]

The State used a peremptory strike on Juror 358 because the juror said that:

> [S]he was treated unfairly by the police when they pulled her over.
>
> But the one more concerning for the State is that she said that she must have DNA or a witness when it comes to the evidence that she wants. And in our case, as the Court knows, the DNA is really hit or miss. And we don't have an eyewitness. It's a circumstantial case.
>
> 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.[208]

After a discussion of Juror 358's age, the court asked about her occupation, and the State responded:

> Her occupation was a case manager at McKesson. She also indicated that she does have anxiety attacks in the past. I can tell this Court that in John Allen's case, I believe it was John – excuse me, it was in – we had to excuse a juror who was having anxiety issues. So that is something that I've seen before in capital cases. And if she's having anxiety attacks, it creates a lot of issues, Judge.[209]

The court found the State's reasons for all its strikes were race-neutral.[210] It then asked the defense why it believed that there was purposeful discrimination in the

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[207] Tr. 02/01/18 at 259.
[208] *Id.* at 126-27.
[209] *Id.* at 127.
[210] *Id.* at 128.

State's strikes.[211] The defense pointed out that there were just two minority jurors left among remaining members of the pool.[212]

With regard to Juror 300, the defense stated that the only thing it had heard was that the juror said that she believed in people being good and that that was the reason to strike, contending that the offer given for the strike was just a pretext.[213] The defense added that there were only two Hispanics and one African-American on the jury panel, and because there were going to be four alternates, it would be possible that Mr. Robinson's jury would ultimately be composed of only white people.[214]

The court confirmed that there were four African-Americans, four Hispanics, and one Native American in the original 36-member pool; Jurors 145, 215, 217, and 358 were African-American.[215] Juror 215 had been previously excused for illness, and the State's proposed strikes involved two of the remaining three African-Americans.[216] The defense had stricken Juror 217, one of the Hispanics.[217]

The court rejected Mr. Robinson's *Batson* challenge, stating:

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[211] *Id.* at 128-29.
[212] *Id.* at 129.
[213] *Id.*
[214] *Id.*
[215] *Id.* at 130.
[216] *Id.* at 122, 130.
[217] *Id.* at 129.

> I find no evidence of purposeful discrimination. The State has offered reasonable and logical race-neutral explanations for each of the strikes. Also, there are additional minority jurors that were not struck by the State.
>
> This comes down to essentially a credibility call. I will add that we've been at this for approximately two weeks. I've observed throughout this process, I think both parties – all of the attorneys have, I believe, exercised good faith in their cause challenges, as well as their peremptory challenges, and not singling out any members based on race.
>
> There were a number of jurors that could have potentially been challenged for cause, minority jurors, that were not challenged for cause by the State or, for that matter, by the defense. So I'm comfortable with the panel that we have is a – is not tainted by any kind of racial discrimination.[218]

On March 22, 2018, Juror 1 (Trial Juror 1), ethnicity unknown, Juror 217 (Trial Juror 8), the only African American on the trial jury, and Juror 335 (Trial Juror 15), a Hispanic, were designated as alternate jurors.[219]

Discussion

A. BATSON AND ITS PROGENY

In *Batson*, the United States Supreme Court held that the use of peremptory strikes to exclude potential jurors on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. When a

[218] *Id.* at 131.
[219] Tr. 03/22/18 at 49.

constitutional violation is alleged, *Batson* and its progeny require a three-step inquiry by the trial court: first, the party challenging the strike must make a prima facie showing of discrimination; second, the striking party must provide a race-neutral reason for the strike; and third, if a race-neutral explanation is provided, the trial court must determine whether the challenger has carried its burden of proving purposeful racial discrimination. *State v. Garcia*, 224 Ariz. ¶ 21, 226 P.3d 370, 379 (2010).

Although "[s]tates do have flexibility in formulating appropriate procedures to comply with *Batson*," Arizona has not elaborated on the basic framework. *Johnson*, 545 U.S. at 168, 125 S. Ct. at 2416, see, *e.g.*, *State v. Urrea*, 244 Ariz. 443, ¶ 9, 421 P.3d 153, 155 (2018).

Step one of the *Batson* framework may be satisfied by a pattern of strikes against minority jurors. *Batson*, 476 U.S. at 97, 106 S. Ct. at 1723. Step two may be satisfied by the striking party's offer of any facially race-neutral explanation for the strikes. *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 1771 (1995); *Hernandez*, 500 U.S. at 360, 111 S. Ct. at 1866. At step two, even a "silly or superstitious" race-neutral reason will suffice, because the ultimate burden of persuasion never shifts from the opponent of the strikes. *Purkett*, 514 U.S. at 768, 115 S. Ct. at 1771. It is at step three that the trial court must determinate whether the proffered reasons are

pretexts for purposeful discrimination. *Id.*

A prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives "rise to an inference of discriminatory purpose." *Batson*, 476 U.S., at 94, 106 S. Ct. at 1721. The *Batson* court stated:

> [A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

476 U.S. at 96, 106 S. Ct. at 1723.

Step three is the critical part of the inquiry. "If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than [its ineffective predecessor case]." *Miller-El v. Dretke ("Miller-El II")*, 545 U.S. 231, 240, 125 S. Ct. 2317, 2323 (2005). The prosecutor's demeanor often is "the best evidence" in step three, but it is not the only evidence. *Snyder v. Louisiana*, 552 U.S.

472, 477, 128 S. Ct. 1203, 1207 (2008).

The trial court must "consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties." *Flowers*, 139 S. Ct. at 2243 (emphasis added); *accord, Foster v. Chatman*, ___ U.S. ___, 136 S. Ct. 1737, 1748 (2016), *Snyder*, 552 U.S. at 478, 128 S. Ct. at 1207, *Miller-El II*, 545 U.S. at 252, 125 S. Ct. at 2331.

To serve as a basis for exclusion, the juror's views must "prevent or substantially impair the performance of his duties as a juror." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 852 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S. Ct. 2521, 2526 (1980)); see also *State v. Anderson (Anderson I)*, 197 Ariz. 314, ¶ 9, 4 P.3d 369, 373–74 (2000). The State need not prove a juror's opposition to the death penalty with "unmistakable clarity," but follow-up questions should be asked if written responses do not show that the juror will be able to follow the law. *Wainwright*, 469 U.S. at 424, 105 S. Ct. at 852; *Anderson I*, 197 Ariz. at 319, ¶ 10, 4 P.3d at 374.

B. The trial court abused its discretion when it found no discriminatory purpose behind the State's striking of the four jurors because the State's reasons for striking Juror 145, Juror 260, Juror 300, and Juror 358 were pretext.

The *Batson* framework is not pro forma. Rather, it "is designed to produce

actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson*, 545 U.S. at 172, 125 S. Ct. 2410.

The State's reason for striking Juror 145 was that the juror said talking about the death penalty was "terrifying," but that he did feel the death penalty could be appropriate. This was a misrepresentation of the juror's remark.

Just before addressing Juror 145 on the topic, the defense counsel had asked Juror 64 for their thoughts on the death penalty, and the juror replied that it evoked an emotional response."[220] The defense counsel asked if Juror 145 felt the same as Juror 64 did, to which Juror 145 replied:

> I don't know if I would include the emotional aspect of it, although it is terrifying to consider what we're talking about, but – but the idea of it just being an option of the two options, then there's the aggravation and then, you know, there's the mitigation. So that's what I mean by it could be appropriate.[221]

Juror 145 then responded "Sure" when asked if he could impose either life or death.[222] The State did not challenge Juror 145 for cause.[223]

Taken in context, the "terrifying" comment was Juror 145's acknowledgment of the seriousness of a capital case and the imposition of the death penalty, and not an

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[220] *Id.* at 47.
[221] *Id.*
[222] *Id.*

expression of any hesitancy in his willingness to impose it, if merited. Thus, Juror 145's remark did not provide a basis for exclusion from the jury and the State's reason based on that remark was pretext for eliminating a minority juror.

The State next sought to strike Juror 260 because it was part of his mission to communicate with inmates. The court had rehabilitated Juror 260 by eliciting the information that the juror had written to one inmate, had received two or three letters, was not part of the letter-writing program any longer, knew nothing about the inmate or the circumstances of his crime, and that there was nothing about the experience with the inmate that would influence the juror at all in this trial. The State's striking of Juror 260 based on the letter writing was again pretext to eliminate a minority juror.

The State also struck Juror 260 on the basis that the juror once believed that state laws were too harsh. Juror 260 had indicated in response to Question 66 that Arizona criminal laws were "Too lenient." The juror commented, "This is such a broad question some/most are appropriate." The juror added that there was a time when he felt that the laws or their interpretation was "a bit harsh," but he no longer held that belief. The State's offered basis was pretext.

The last reason the State offered for striking Juror 260 was that he had problems

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[223] *Id*. at 106.

with people being sentenced to death only to find later they were innocent of the offense. In response to Question 85, whether the juror felt there are problems with how the death penalty is imposed on different groups of people (for example: certain races, people with low social economic background etc.), Juror 260 had checked "Yes," adding "To some degree, I do have a problem w/ people being sentenced to the death penalty only to find out later that the person was innocent of the crime."

Although the State did not ask for any clarification of that comment, it did review whether Juror 260 understood the standards of proof of mitigation and aggravation, and how the jury would be asked to determine whether to impose a sentence of death or life only after finding proof of the defendant's guilt beyond a reasonable doubt. The State explained:

> [STATE]: Yes, I mean, at the end of the day when it comes down to just that final question of life or death, you will only be asked by the Court to make that determination after you found him guilty, after there's been aggravation, and then after both sides had the opportunity to present mitigation or whatever evidence they wanted at that point relating to the defendant's character, background, and such.
>
> [JUROR 260]: And I agree with that.
>
> [STATE]: And you understand that?
>
> [JUROR 260]: Yes.[224]

[224] Tr. 01/31/18 at 217.

The State did not challenge Juror 260 for cause based on any of these responses.[225] The State's striking of Juror 260 based on those responses was pretext.

Similarly, there is nothing in the reasons the State advanced that support the court's finding that the strike of Juror 300 was not a pretext for eliminating yet another minority juror. The State told the court that Juror 300 had a positive view of people, a view shared by another juror. The comment arose in connection with Question 85, which asked whether the juror felt there are problems with how the death penalty is imposed on different groups of people. The juror commented, "We are all ingrained to do morally good even in the worst of conditions."

The State also sought to strike the juror because "she had some issues with life in prison. Question 81 asked, "If a defendant is convicted of first-degree murder, there are only two permissible punishments: life without the possibility of release or death. What are your feelings about whether life in prison is ever a harsh enough sentence for the crime of intentional, premeditated first degree murder?"[226] Juror 300 responded, "I don't believe that prison should be a way of life. But I do believe that

[225] *Id*. at 246.
[226] Juror 300, Questionnaire, Question 81 at 25.

one can make a life in prison."[227] Juror 300 had not indicated any "issues" with life in prison and had only offered a comment that some people can get used to it. The State's offered basis for striking Juror 300 was pretext.

The State also based its strike on Juror 300's stating that it would be a "hard decision" whether to impose a death sentence. Juror 300 had answered "Yes" to both Questions 95 and 96, which asked if after hearing the evidence, reviewing the instructions, and deliberating she believed that death or life, respectively, was the appropriate sentence, that she personally would be able to enter the appropriate verdict. The State questioned Juror 300 about Native American traditions and the juror's feelings about the death penalty, concluding with the questions:

> [THE STATE]: At the end of the day after the third and final phase, would you be able to enter a death verdict?
>
> [JUROR 300]: I could.
>
> [THE STATE]: Would you be able to enter a life verdict?
>
> [JUROR 300]: I could.[228]

The State also based its strike on Juror 300 because of the imprisonment of relatives 50 to 60 years before, yet did not argue that the juror harbored any animosity

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[227] *Id*.
[228] Tr. 01/31/18 at 223–225.

against law enforcement, had any adverse opinion based on the charges against relatives, or had indicated in any way that anything would cause the juror not follow the court's instructions as to the law. Again, the State's offered basis was pretext.

The State also based its strike on Juror 300's saying that the photographs "may be an issue for her." In response to Question 77, Juror 300 stated photographs would be an issue to the extent that "Photographs do not state that the defendant committed the crime." The State questioned Juror 300 about any issues the juror had about the graphic nature of the photographs *vis a vis* the juror's ethnic background, but not about the juror's comment about tying the photographs to proof of guilt. Again, Juror 300 had answered "Yes" to both Questions 95 and 96, which asked if after hearing the evidence, reviewing the instructions, and deliberating she believed that death or life, respectively, was the appropriate sentence, that she personally would be able to enter the appropriate verdict. The State's basis for striking Juror 300 was pretext.

Finally, the State's first basis for striking Juror 358 was because the juror said that her fellow passengers had been treated unfairly by the police when they pulled over their car in response to Question 67, "Have you or someone else close to you been treated unfairly in the past by someone in law enforcement, or by a prosecutor, or by a criminal defense attorney, or by a court?" However, Juror 358 responded

"No" to Question 79, "Do you or anyone close to you have any hostility, bitterness, frustration, or negative feelings towards the criminal justice system (i.e. police, prosecutors, defense attorneys, or the courts)?" The State did not ask the juror any follow up questions about either response, nor did it draw the court's attention to the contradictory response to Question 79, casting doubt on the basis of the strike as being anything but pretext.

The State also based its strike on the juror's expecting to see the State present video, a witness, or DNA. In fact, this is not what Juror 358 had stated in those responses. Juror 358's responses to Questions 52 and 53 that the State *did not* have to present such evidence to prove guilt beyond reasonable doubt. Juror 358 did add comments that such scientific evidence would help prove the case and that eyewitness testimony or a confession might change her view but did not state that the State had to adduce such evidence.

The State's final basis for striking the juror was because she had anxiety attacks in the past. Juror 358 indicated that she had been prescribed medication that had stopped the attack.[229] The juror answered "No" to Question 25, whether she was taking any medication that might affect her ability to listen to and evaluate the

[229] Juror 358, Questionnaire, Question 70, at 20.

evidence, and "No" to Question 26, whether the juror had any emotional health problem that she felt might affect her ability to listen to and evaluate the evidence.[230] Juror 300 was apparently no longer taking medication for that past incident.

None of the jurors whom the State sought to strike expressed a view that prevented or substantially impaired the performance of their duty as a juror. This fact and the fact that all the jurors the State struck were members of a minority should have given the court more concern than it did. No juror that the State sought to strike indicated they could not or would not follow the law, expressed any concerns about their role as a juror in a capital case except to say that they would take their role as the serious endeavor that it is, nor did they say that they would not or could not follow the court's instructions.

The salient fact here is that the State sought to strike four potential jurors who were members of minority groups although none of them disclosed anything that would prevent or substantially impair the performance of their duties as a juror. The potential jurors acknowledged the seriousness of the imposition of the death penalty, a belief in the general goodness of people, communicated the comfort of religion through letters, whether to people in one's church or in jail, an unpleasant encounter

[230] *Id*. at Question 25 and Question 26, at 11.

with police that did not bias them against any member of the criminal justice systems, or past health problems. These activities do not constitute real bases to exclude them from serving on a capital jury if there is no accompanying indication that any of these activities would prevent or substantially impair the performance of their duties as a juror.

The court abused its discretion when it found that the State had offered race-neutral explanations for the strikes because they were obviously pretextual reasons. None of the jurors disclosed anything that would prevent or substantially impair the performance of their duties as a juror. A close examination of the State's reasons for striking the jurors demonstrates that the jurors' responses to questions from Mr. Robinson, the State, and even the court, shows that it mischaracterized the responses as somehow impairing the jurors' ability to sit in this matter. For these reasons, this court should find that the trial court abused its discretion when it found the State's proffered reasons were race-neutral and should grant Mr. Robinson a new trial.

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.

Mr. Robinson's rights to due process and to be free from arbitrary imposition of the death penalty were violated when the jury considered an aggravator that was not supported by substantial evidence in determining Mr. Robinson's sentence for the death of S.H. on Count 1. U.S. Const. Amends. V, VI, VIII, XIV; Ariz. Const. art. 2, §§ 4, 15, 23, 24. 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. Because the jury abused its discretion when finding the F(6) especially cruel or especially heinous or depraved aggravating circumstance, this Court must vacate Mr. Robinson's death sentence on Count 1 and remand for a new penalty phase.

Standard of Review

This Court reviews a jury's finding of a capital aggravating circumstance for

substantial evidence, viewing the evidence in a light most favorable to sustaining the verdict. *State v. Gunches*, 225 Ariz. 22, 25 ¶ 14, 234 P.3d 590, 593 (2010). "Substantial evidence is such proof that reasonable persons could accept as adequate and sufficient to support [the finding of the aggravator] beyond a reasonable doubt." *State v. Johnson*, 247 Ariz. 166, 183 ¶ 26, 447 P.3d 783, 797 (2019) (quoting *State v. Roque*, 213 Ariz. 193, 218 ¶ 93, 141 P.3d 368, 393 (2006)).

Pertinent Facts

In its notice of intent to seek the death penalty, the State alleged that S.H.'s murder was both especially cruel and especially heinous or depraved pursuant to A.R.S. § 13-751(F)(6).[231] The trial court instructed the jury that in order to find that the murder of S.H. was especially cruel, the State must prove the following beyond a reasonable doubt: "the victim suffered physical or mental pain, distress or anguish prior to death. The defendant must know or should have known that the victim would suffer."[232] The trial court instructed the jury that to find that the murder of S.H. was especially heinous or depraved, they must find that the State proved beyond a reasonable doubt that "the defendant exhibited such mental state at the time of the killing by engaging in at least one of the following actions: … (1) [i]nflicted

[231] R. 37.

gratuitous violence on the victim ([S.H.]) beyond that necessary to kill; or (2) [n]eedlessly mutilated the victim's ([S.H.]) body."[233]

The State's expert witness, medical examiner Dr. John Hu, testified that S.H.'s cause of death was "homicidal violence."[234] Dr. Hu testified that there were several different modalities of injury: asphyxiation due to smothering; asphyxiation due to strangulation; mechanical restraint and positioning; blunt force trauma; and thermal burns.

The smothering asphyxiation occurred when a cloth was placed in S.H.'s mouth and throat and held in place with duct tape, thereby completely blocking the airway.[235] Internal contusions to some of the neck muscles indicated that at some point force was applied to S.H.'s neck, but neither the thyroid cartilage nor hyoid bone were broken and Dr. Hu could not quantify the amount of pressure that had been applied.[236] Contusions on S.H.'s scalp indicated three impacts with a flat surface, most likely the wall or floor.[237] There were no defensive wounds or other blunt force trauma to S.H.'s

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[232] R. 567.
[233] *Id.*
[234] Tr. 02/28/18, at 50.
[235] Tr. 02/28/18, at 52–56.
[236] Tr. 02/28/18, at 59–60.
[237] Tr. 02/28/18, at 125.

body.[238] In addition to the tape around her mouth, S.H.'s wrists were handcuffed behind her back and her feet had been tied together with neckties.[239] S.H also sustained third and fourth-degree burns from the fire.[240] There was no evidence of soot in any of S.H.'s mucous membranes, indicating that she was not breathing at the time of the fire.[241]

During aggravation phase closing arguments, the State argued that the murder was especially cruel because S.H. experienced both mental anguish about her fate and physical pain when she was restrained with her arms behind her back.[242] The State also asserted that if S.H. was alive when the fire was set that she would have suffered additional physical pain.[243] As for the especially heinous or depraved aggravator, the State argued that depending on whether the jury believed S.H. was alive or not at the time the fire started, the fire constituted either gratuitous violence (antemortem) or needless mutilation (postmortem).[244]

After deliberating, the jury returned a verdict on Count 1 of proven beyond a

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[238] Tr. 02/28/18, at 127–28.
[239] Tr. 02/28/18, at 20, 24–27.
[240] Tr. 02/28/18, at 50, 73.
[241] Tr. 02/28/18, at 48.
[242] Tr. 03/28/18, at 28–31.
[243] Tr. 03/28/18, at 31–33.
[244] Tr. 03/28/18, at 23–25.

reasonable doubt on the F(6) aggravator.[245] On the interrogatories contained on the verdict form, the jury further indicated that they had unanimously found that the murder was especially cruel and that it was especially heinous or depraved.[246]

Discussion

The F(6) aggravator is a single aggravating circumstance that may be proven by showing that the murder was either (1) especially cruel or (2) especially heinous or depraved. *Johnson*, 247 Ariz. at 182 ¶ 26, 447 P.3d at 799. Whereas a finding of cruelty focuses on the victim, a finding of heinous or depraved focuses on the mental state of the defendant. *Johnson*, at 183 ¶ 29 (citing *State v. Stockley*, 182 Ariz. 505, 517, 898 P.2d 454, 466 (1995)). While this aggravator can be established in multiple ways, the F(6) aggravator cannot be proved beyond a reasonable doubt by simply showing that the evidence must support either one prong or the other:

> The circumstance is not proven if none of the individual component parts has been proven beyond a reasonable doubt. To conclude that a murder would be especially cruel or heinous if committed in an assumed manner, without evidence that it was committed in that manner, falls short of the mark. To say that the murder must have been either physically cruel or gratuitously violent involves … a different and lesser burden than does proof that the murder *was* physically cruel or was gratuitously violent. Approval of alternative, hypothetical findings might jeopardize the constitutionality of Arizona's death penalty scheme and

[245] R. 578.
[246] *Id*.

would set a most unfortunate precedent.

State v. Soto-Fong, 187 Ariz. 186, 202, 928 P.2d 610, 626 (1996).

A. S.H.'s murder was not especially cruel.

"To show that a murder is especially cruel, the state must prove that 'the victim consciously experienced physical or mental pain prior to death, and the defendant knew or should have known that suffering would occur.'" *State v. Prince*, 226 Ariz. 516, 539 ¶ 97, 250 P.3d 1145, 1168 (2011) (quoting *State v. Snelling*, 225 Ariz. 182, 188 ¶ 25, 236 P.3d 409, 415 (2010)). The length of time during which the victim contemplates their fate goes to the sufficiency of evidence supporting an especially cruel finding. *Prince*, 226 Ariz. at 540 ¶ 98, 250 P.3d at 1169.

Here, Dr. Hu was unable to establish the order of the injuries.[247] He testified that it was possible that just one of the blunt force injuries to the head could have rendered S.H. unconscious.[248] Dr. Hu also testified that asphyxiation by smothering and by strangulation could both independently cause unconsciousness.[249] Dr. Hu did not testify as to how long S.H. may have been conscious but did state that S.H. being nine months pregnant and restrained would have reduced the amount of time it would

[247] Tr. 02/28/18, at 124.
[248] Tr. 02/28/18, at 70.

take before she became unconscious.[250] In addition, Dr. Hu testified that he could not tell how long S.H. was alive once the first injury was incurred, but that the asphyxiation by smothering would have killed S.H. in "not more than a few minutes."[251]

Because there is no proof as to the order of injuries or whether S.H. was even conscious when she sustained any of the injuries, the State cannot establish beyond a reasonable doubt that the murder was especially cruel. The State hypothesized in its closing as to how the murder may have occurred, but that is simply speculation. The State's own expert testified that he could not establish the order of injuries. It is just as possible that S.H. hit her head as she was pushed into the wall and was immediately knocked unconscious, fell to the floor hitting her head again, was restrained in case she awoke, and then—still unconscious—was gagged with the cloth that cut ultimately cut off her airway.

In most cases where this Court has found the existence of the F(6) especially cruel aggravator, there was often evidence of a struggle or a prolonged interaction between the defendant and victim. *See Prince*, 226 Ariz. at 540 ¶¶ 99–101, 250 P.3d at

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[249] Tr. 02/28/18, at 119.
[250] Tr. 02/28/18, at 64, 120–22.
[251] Tr. 02/28/18, at 169.

1169 (where defendant repeatedly pointed gun at victim and her mother and threatened to kill them and victim was crying and cowering, finding murder especially cruel because victim "had significant time to contemplate her fate"). Here, there was no such evidence. In fact, Dr. Hu testified that there was no evidence of defensive wounds or other blunt force injury to S.H.'s body. Because the State could not affirmatively establish how long or even if S.H. was conscious during the infliction of any of her injuries, there is insufficient proof upon which to base the especially cruel aggravator.

B. S.H.'s murder was not especially heinous or depraved.

This Court has set out the following factors that the trier-of-fact may consider when determining whether a murder occurred in an especially heinous or depraved manner: (1) whether the defendant relished the murder; (2) whether the defendant inflicted gratuitous violence on the victim beyond that necessary to kill; (3) whether the defendant needlessly mutilated the victim; (4) the senselessness of the crime; and (5) the helplessness of the victim. *State v. Gretzler*, 135 Ariz. 42, 52–53, 659 P.2d 1, 11–12 (1983). Here, the State asserted that S.H.'s murder was especially heinous or depraved because depending on whether the jury believed she was alive or not during the fire, the burns constituted either gratuitous violence or needless mutilation.

This Court has defined gratuitous violence as violence inflicted upon a victim clearly beyond that necessary to kill. *Gretzler*, 247 Ariz. at 52, 659 P.2d at ll. To prove gratuitous violence, the "state must show 'the defendant continued to inflict violence after he knew or should have known that a fatal action had occurred.'" *Johnson*, 247 Ariz. at 184 ¶ 30, 447 P.3d at 783 (quoting *State v. Bocharski*, 218 Ariz. 476, 494 ¶ 87, 189 P.3d 403, 421 (2008)). Finally, "the fact finder must consider the killer's intentional actions to determine whether he acted with the necessary vile mind." *Bocharski*, 218 Ariz. at 494 ¶ 85, 189 P.3d at 421.

Needless mutilation, on the other hand, requires proof of "an act separate and distinct from the killing itself, committed with the intent to mutilate the victim's corpse." *Bocharski*, 218 Ariz. at 493 ¶ 84, 189 P.3d at 420. The kind of actions this Court has deemed needless mutilation include excising body parts after death and carving a word into the victim's back after killing him. *See, e.g., State v. Pandeli (Pandeli I)*, 200 Ariz. 365, 376 ¶ 41, 26 P.3d 1136, 1147 (2001); *State v. Vickers*, 129 Ariz. 506, 515, 633 P.2d, 315, 324 (1981).

Here, Dr. Hu testified that he was unsure whether the thermal burns were sustained antemortem or postmortem, but that the evidence did indicate that S.H. was

not breathing at the time of the fire.[252] The State's witness Captain James Thomas of the Phoenix Fire Department testified that the condition of the protected area on the carpet near S.H.'s legs indicated that she did not move during the fire and that any possible movement occurred after the fire had already burned out.[253] As the fire was still burning when the fire department arrived on scene, and they immediately determined that S.H. was already deceased at that point in time, the only logical conclusion is that S.H.'s leg was inadvertently moved by fire or police personnel.

While the thermal burns sustained by S.H. may have been sustained while she was alive, the evidence presented by the State equally supports a finding that they were sustained after she was already dead. Further, the State presented no evidence as to the state of Mr. Robinson's mind at the time the fire was set, and the setting of the fire itself—unlike removing a body part or carving a word into the victim's body—does not indicate a specific intent to mutilate. And because none of the actions before the fire were so obviously fatal that Mr. Robinson should have known when exactly death occurred—even the State's expert could not opine to that fact—there can be no finding of gratuitous violence.

Finally, the State's argument that setting the fire was either gratuitous violence

[252] Tr. 02/28/18, at 48, 93.

or needless mutilation—one of two possible alternatives—does not constitute proof beyond a reasonable doubt as to either alternative. Such a finding would be arbitrary and capricious and violate Mr. Robinson's right to due process. U.S. Const. Amends. V, VI, VIII, XIV. Accordingly, this Court must vacate Mr. Robinson's death sentence on Count 1 and remand for a new penalty proceeding.

[253] Tr. 02/22/18, at 102–07.

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) aggravating circumstance of especially heinous or depraved is not supported by substantial evidence.

Mr. Robinson's rights to due process and to be free from arbitrary imposition of the death penalty were violated when the jury considered an aggravator that was not supported by substantial evidence in determining Mr. Robinson's sentence on Count 2 for the death of B.H. U.S. Const. Amends. V, VI, VIII, XIV; Ariz. Const. art. 2, §§ 4, 15, 23, 24. The State produced no evidence to establish a parental relationship of trust between Mr. Robinson and B.H. Nor did the State present any evidence of Mr. Robinson's motivation as it would relate to senselessness. Because the jury abused its discretion when finding the F(6) especially heinous or depraved aggravating circumstance, this Court must vacate Mr. Robinson's death sentence on Count 2 and remand for a new penalty phase proceeding.

Standard of Review

This Court reviews a jury's finding of a capital aggravating circumstance for substantial evidence. *State v. Gunches*, 225 Ariz. 22, 25 ¶ 14, 234 P.3d 590, 593 (2010). "Substantial evidence is such proof that reasonable persons could accept as

adequate and sufficient to support [the finding of the aggravator] beyond a reasonable doubt." *State v. Johnson*, 247 Ariz. 166, 183 ¶ 26, 447 P.3d 783, 797 (2019) (quoting *State v. Roque*, 213 Ariz. 193, 218 ¶ 93, 141 P.3d 368, 393 (2006)). The interpretation of a statute and its constitutionality, however, are reviewed de novo. *Johnson*, 247 Ariz. at 180 ¶ 14, 447 P.3d at 797.

Pertinent Facts

The State alleged that B.H.'s murder was especially heinous or depraved pursuant to A.R.S. § 13-751(F)(6).[254] The trial court instructed the jury that in order to find that the murder of B.H. was especially heinous or depraved, the State must prove the following beyond a reasonable doubt: (1) the murder of B.H. was senseless, and (2) B.H. was helpless; and (3) there was a parental relationship between B.H. and the defendant.[255] After deliberation, the jury returned a verdict on Count 2 of proven beyond a reasonable doubt on the F(6) aggravator.[256]

Discussion

The F(6) aggravating circumstance of especially heinous or depraved focuses on the defendant's state of mind at the time of the killing as reflected in his words and

[254] R. 37.
[255] R. 567.
[256] R. 579.

actions. In order to determine whether a murder is especially heinous or depraved, this Court has instructed that the trier-of-fact may consider the following factors: (1) whether the defendant relished the murder; (2) whether the defendant inflicted gratuitous violence on the victim beyond that necessary to kill; (3) whether the defendant needlessly mutilated the victim; (4) the senselessness of the crime; and (5) the helplessness of the victim. *State v. Gretzler*, 135 Ariz. 42, 52–53, 659 P.2d 1, 11–12 (1983). Senselessness and helplessness without more are insufficient for a finding of especially heinous or depraved. *State v. Brewer*, 170 Ariz. 486, 502, 826 P.2d 783, 799 (1992) (citing *State v. Correll*, 144 Ariz. 468, 481, 715 P.2d 721, 734 (1986)).

A. There was no parental/caregiver relationship of trust between B.H. and Mr. Robinson.

This Court has held that the "more" required in addition to helplessness and senselessness may be established by showing that there is a parental or caregiver relationship of trust between the defendant and a child victim. In *Milke*, this Court found that when combined with helplessness and senselessness, the parent/child relationship between the defendant and her four-year-old son raised the first-degree murder beyond the norm, constituting a crime that was "hatefully or shockingly evil" and "marked by debasement, corruption, perversion or deterioration." *State v. Milke*,

177 Ariz. 118, 126, 865 P.2d 779, 787 (1993) (quoting *Gretzler*, 135 Ariz. at 51, 659 P.2d at 10). A legal parent/child relationship is not required; this factor can be established through proof of a special relationship of trust, such as that of a full-time caregiver upon which a child is dependent. *State v. Styers*, 177 Ariz. 104, 115–16, 865 P.2d 765, 776–77 (1993) (citing *State v. Wallace*, 151 Ariz. 362, 368, 728 P.2d 232, 238 (1986)).

There are limits, however, to the type of relationship that this Court has held can be used to demonstrate heinousness and depravity without unconstitutionally broadening the F(6) aggravating circumstance. This Court rejected an attempt to expand this factor to include a familial relationship between a defendant and her mother-in-law. *State v. Carlson*, 202 Ariz. 570, 584–85 ¶ 55, 48 P.3d 1180, 1194–95 (2002). The Court noted that "continual case-by-case expansion of these factors would lead to serious constitutional problems in view of the constitutional mandate to avoid arbitrary imposition of the death penalty." *Id.*

The facts of this case create an issue of first-impression: whether mere biological paternity is sufficient to establish a "parental relationship of trust" under the F(6) especially heinous or depraved aggravator when the victim is an unborn child.

In the capital cases where this Court has found the murder of a child by a parent

or caregiver to be especially heinous or depraved based upon senselessness and helplessness there was a pre-existing relationship hallmarked by the child's reliance upon, and trust in, the defendant for their care. *See e.g., Milke*, 177 Ariz. at 125–26, 865 P.2d at 786–87 (finding parental relationship of trust where defendant used four-year-old son's trust in her to facilitate his murder by manipulating him into leaving with the actual killer); *State v. Stanley*, 167 Ariz. 519, 529, 809 P.2d 944, 954 (1991) (finding especially depraved aggravator where defendant killed his five-year-old child who was "completely dependent on him and trusting of his goodwill toward her"); *State v. Fulminante*, 161 Ariz. 237, 256, 778 P.2d 602, 621 (1988) (finding special relationship of parental trust where 11-year-old stepdaughter was under defendant's control and capable of manipulation by defendant).

On the other hand, this Court has found that a familial or marital connection to a child without proof of the existence of an actual relationship involving trust and control will not support an especially heinous or depraved finding. In *State v. Prince*, this Court found there was insufficient evidence of a parental/caregiver relationship of trust where the defendant killed his thirteen-year-old step-daughter with whom he had been living for a little over a year:

> The record includes sparse evidence of the relationship between Prince and Cassandra. A jury could find, as did the judge, that Prince had

> established and maintained a parent-like status with Cassandra, but the evidence before us of their relationship does not mandate that finding. Therefore, we cannot conclude beyond a reasonable doubt that a jury would have assessed the evidence as did the judge and found that Prince's state of mind was especially depraved.

State v. Prince, 206 Ariz. 24, 28 ¶ 12, 75 P.3d 114, 118 (2003).

Here, B.H. was an unborn child still in the womb. Whereas an unborn child is dependent upon and under the complete control of their pregnant mother, there is no bond of trust between a male defendant and a fetus or unborn child, and no possibility of manipulation of that fetus or unborn child by a male defendant. A genetic contribution to the creation of a fetus is not equitable to a relationship of trust.

This Court has previously acknowledged this dichotomy when determining whether a parental relationship exists within the context of severance proceedings involving an unwed father who had never met his child. *In re Pima County Juvenile Severance Action No. S-114487*, 179 Ariz. 86, 94–96, 876 P.2d 1121, 1129–31 (1994). The Court held that biological paternity alone was insufficient to establish a parental relationship; in other words, a parental relationship does not come into existence upon conception, but only occurs when the unwed father "takes significant steps to create a parental relationship." *Id.*

Expanding the scope of the parental/caregiver relationship of trust to encompass

mere biological paternity of an unborn child would unconstitutionally broaden the F(6) especially heinous or depraved aggravator. The Supreme Court of the United States previously held that the *Gretzler* factors provide a constitutionally sufficient narrowing of the facially vague F(6) aggravating circumstance. *Lewis v. Jeffers*, 497 U.S. 764, 784, 110 S. Ct. 3092, 3104 (1990). But "[c]ontinual case-by-case expansion of these factors would lead to serious constitutional problems in view of the constitutional mandate to avoid arbitrary imposition of the death penalty."

Even if biological paternity alone could support the finding of this factor, there must still be proof of that paternity in order to make that finding. Here, the State argued that "The defendant was [B.H.]'s dad. That's undisputed in this case."[257] In fact, however, the State presented no evidence whatsoever that Mr. Robinson was B.H.'s biological father. Mr. Robinson and S.H. were not married and their relationship was described by multiple witnesses as off and on. While there was testimony implying that several witnesses believed Mr. Robinson to be B.H.'s biological father, the State introduced no evidence to establish paternity beyond a reasonable doubt.

B. The murder of B.H. was not senseless.

[257] Tr. 03/28/18, at 26.

"A murder is senseless only if it is unrelated to the defendant's goal." *Carlson*, 202 Ariz. at 584 ¶ 52, 48 P.3d at 1194 (citing *State v. West*, 176 Ariz. 432, 448, 862 P.2d 192, 208 (1993), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, 961P.2d 1006 (1998)). In *Carlson*, this Court held that where "the killing was central to the criminal objective" of inheriting the victim's money, the record could not establish senselessness. *Id.*, *but see Milke*, 177 Ariz. at 124–25, 865 P.2d at 785–86 (finding killing was not senseless where purported goal was to be free from parental burdens and to prevent son from growing up to be like his father, when there was evidence that both the father and defendant's parents were willing to take over care and custody of the victim).

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. 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.

In fact, that is exactly what happened here. According to the State's expert

witness, medical examiner Dr. John Hu, B.H. had no external or internal injuries.[258] Nor was there any evidence of injury to S.H.'s abdominal or uterine area. Dr. Hu testified that B.H.'s cause of death was intrauterine fetal death due to maternal death.[259] 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.

Here, the State argued that the killing was motivated by Mr. Robinson's objective of avoiding "responsibility and accountability" for B.H. and that there "were millions of other things he could have done."[260] But this conclusion is speculative at best; the State presented no direct or circumstantial evidence to establish Mr. Robinson's objective in committing the murder. Thus, a finding of senselessness is completely unsupported by the record.

Finally, in a capital sentencing proceeding, the jury is prohibited from double weighing a single fact that establishes multiple aggravating circumstances when it deliberates a defendant's sentence. *State v. Velazquez*, 216 Ariz. 300, 307 ¶ 21, 166 P.3d 91, 98 (2007) (citing *State v. Medina*, 193 Ariz. 504, 512 ¶ 19, 975 P.2d 94, 102

[258] Tr. 02/28/18, at 30–31.
[259] Tr. 02/28/18, at 31.
[260] Tr. 03/28/18, at 26.

(1999)). While the jury was instructed that the victim's age could not be considered in deciding whether the murder was committed in an especially heinous or depraved manner, no such instruction was given regarding the status of the victim as an unborn child still in the womb.[261] If senselessness can be based on the mere fact that the victim was a fetus, then it was error for the jury to consider both the F(6) especially heinous or depraved aggravator and the F(9) aggravator that B.H. was an unborn child in the womb when determining whether Mr. Robinson's should be put to death.

The facts of this case lead to one of two conclusions regarding the jury's finding of senselessness: either the jury based its decision on mere supposition regarding Mr. Robinson's motivations, or they based their decision on the sole fact that B.H. was an unborn child still in the womb. The imposition of the death penalty under either scenario is reversible error.

C. This Court should vacate the F(6) especially heinous or depraved verdict.

In determining whether the especially heinous or depraved aggravator exists, the focus must be on Mr. Robinson's state of mind at the time of the murder as reflected through his actions toward B.H. While Mr. Robinson does not dispute the finding that B.H. was helpless, there is a lack of substantial evidence to support a

[261] R. 567.

finding of senselessness or any actual relationship of trust between Mr. Robinson and the unborn child B.H. Accordingly, the finding of the F(6) especially heinous or depraved aggravating circumstance and the subsequent imposition of death on Count 2 was arbitrary and capricious and violated Mr. Robinson's right to due process. Consequently, this Court should vacate Mr. Robinson's death sentence and remand for a new sentencing proceeding.

ARGUMENT IV

The trial court's failure to provide the jury with a *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.

At the time of Mr. Robinson's trial, Arizona's capital sentencing scheme had no mechanism for release on parole. Accordingly, once the State introduced evidence that could be interpreted as raising the specter of future dangerousness, it became reversible, constitutional error for the trial court to refuse Mr. Robinson's requested *Simmons* instruction and to instead instruct the jury that if they did not return a verdict of death, the court could impose a sentence of either natural life or life with the possibility of release after 25 (Count 1) or 35 years (Count 2). U.S. Const. Amends. V, VI, VIII, XIV; Ariz. Const., Art. 2, §§ 4, 23, 24. Accordingly, this Court must vacate Mr. Robinson's death sentences and remand for a new penalty phase trial. *Lynch v. Arizona (Lynch II)*, 136 S. Ct. 1818, 1820 (2016); *Simmons v. South Carolina*, 512 U.S. 154, 171, 114 S. Ct. 2187, 2198 (1994).

Standard of Review

This Court reviews jury instructions de novo, taking the instructions "as a whole to ensure that the jury receives the information it needs to arrive at a legally

correct decision." *State v. Johnson*, 247 Ariz. 166, 184 ¶ 33, 447 P.3d 783, 801 (2019) (quoting *State v. Prince*, 226 Ariz. 516, 536 ¶ 77, 250 P.3d 1145, 1165 (2011)). This Court also reviews allegations of constitutional violations de novo. *State v. McGill*, 213 Ariz. 147, 157–58 ¶ 45, 140 P.3d 930, 940–41 (2006) (citing *State v. Glassel*, 211 Ariz. 33, 50 ¶ 59, 116 P.3d 1193, 1210 (2005)).

Pertinent Facts

Mr. Robinson was charged with and found guilty of two counts of premeditated, first-degree murder. Mr. Robinson filed a request for a penalty phase, final jury instruction pursuant to *Simmons* and *Lynch II* that "'Life in prison' means that the defendant will spend the remainder of his natural life in prison."[262] When settling the final jury instructions, defense counsel objected to any reference to the possibility of release, again citing *Simmons* and *Lynch II*.[263] The trial court overruled the objection and declined the request for a *Simmons* instruction.[264]

At the end of the penalty phase, the trial court instructed the jurors that if they did not return a death verdict, that the court could sentence Mr. Robinson to either natural life or life in prison with the possibility of release:

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[262] R. 612.
[263] Tr. 05/02/18, at 42–43.
[264] Tr. 05/02/18, at 56–57.

DEFINITION OF LIFE IMPRISONMENT

> Any verdict of life imprisonment or death must be unanimous. Your decision is not a recommendation. If your verdict is that Defendant should be sentenced to death, he will be sentenced to death. If your verdict is that Defendant should be sentenced to life, he will be sentenced to life, and the Court will sentence either to life in prison without the possibility of release or life in prison with the possibility of release after 25 years for Count 1 and 35 years for Count 2. The Court will make the decision of whether Defendant will receive life in prison without the possibility of release or life in prison with the possibility of release after 25 years or 35 years, respectively.
>
> "Life without the possibility of release" means exactly what it says. The sentence of life without the possibility of release from prison means the Defendant will never be eligible to be release from prison for any reason for the rest of the Defendant's life.
>
> A defendant sentenced to life with the possibility of release after 25 years for Count 1 and/or 35 years for Count 2 must served the entire 25 years before applying for release on Count 1 and must serve the entire 35 years before applying for release on Count 2. There is no automatic release after 25 years or 35 years. Arizona law no longer provides for parole. Defendant's only option is to petition the Board of Executive Clemency for release. If that Board recommends to the Governor that the Defendant should be released, then the Governor would make the final decision regarding whether Defendant would be release.[265]

During the settling of instructions, the trial court made the following comment about the above instruction: "This, I think, correctly defines what life imprisonment means in Arizona under the current state of the law."[266]

[265] R. 635.
[266] Tr. 05/02/18, at 47.

The jurors returned verdicts of death on Counts 1 and 2.[267]

Discussion

"[W]hen the instructions taken as a whole are such that it is reasonable to suppose the jury would be misled thereby that a case should be reversed for error therein." *State v. Schrock*, 149 Ariz. 433, 440, 719 P.2d 1049, 1056 (1986). Erroneous and misleading instruction deprives a defendant of his constitutional rights to a jury trial under both the state and federal constitutions. U.S. Const. Amends. VI, XIV; Ariz. Const. Art. 2, § 23. They also violate due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article 2, section 4 of the Arizona Constitution. *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 2313 (1995). Finally, an inaccurate instruction regarding sentencing when a jury is making a life or death decision violates the Eighth Amendment to the United States Constitution. *Gregg v. Georgia*, 428 U.S. 153, 190, 96 S. Ct. 2909, 2933 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

A. The penalty phase jury instruction defining "life imprisonment" was a misleading statement of the law.

At the time of the offenses in July 2012, two different types of life sentences were available to an adult defendant who was convicted of premeditated, first-degree

[267] R. 639, 640.

murder: natural life and life with the possibility of release. A.R.S. §§ 13-751(A) (2008), 13-752(A) (2008). As the opportunity for parole did not exist at the time nor since, the only type of release available to a capital defendant sentenced to life would be commutation. *Id.*

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 counts of premeditated, first-degree murder would be released after 35 years imprisonment. Yes, the jury was informed that Arizona no longer provides for something called "parole", but they were also told that Mr. Robinson could still be released simply by applying to the Board of Executive Clemency. To a lay person, how does this differ from parole? The given instructions do not adequately provide the answer.

Whereas parole generally gives a defendant the opportunity on a regular basis to a full hearing where they can present a parole board with evidence and argument supporting their release to a consecutive sentence or less restrictive confinement, that is not true of clemency/commutation. An application to the Board of Executive Clemency merely entitles the applicant to a Phase I in-absentia hearing where no

testimony or argument are taken; rather, the board members discuss the application to determine if the matter will then move to a Phase II hearing.[268] The possibility of actually being granted clemency is practically non-existent when considering all felons, much less adult defendants convicted of multiple counts of first-degree, premeditated murder.

The instruction given here gives rise to the strong probability that the jury was misled into believing that if they did not impose the death penalty, then there was a real chance that Mr. Robinson could end up free after only 35 years. Because there was no real likelihood of Mr. Robinson's release if he were to receive a life sentence and the jury was not adequately informed about the difference between parole and clemency/commutation, the "life imprisonment" instruction given at the conclusion of the penalty phase informing the jurors that if they did not return a death verdict, Mr. Robinson could be released after 25 or 35 years, was erroneous.

B. The erroneous instruction deprived Mr. Robinson of his right to due process.

In *Simmons*, the United States Supreme Court held that it was a violation of a capital defendant's right to due process for a court to provide a misleading jury

[268] https://boec.az.gov/helpful-information/frequently-asked-questions (May 28, 2020).

instruction regarding the possibility of the defendant's release when the defendant's future dangerousness was at issue and when there was no real possibility that the defendant would be released. *Simmons*, 512 U.S. at 171, 114 S. Ct. at 2198. The Court made this holding after considering the country's history, where "parole was a mainstay of state and federal sentencing regimes, and every term (whether a term of life or a term of years) in practice was understood to be shorter than the stated term." *Simmons*, 512 U.S. at 169, 114 S. Ct. at 2197 (citing Lowenthal, Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform, 81 Calif. L. Rev. 61 (1993)).

The Court noted that the "Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.'" *Simmons*, 512 U.S. at 161, 114 S. Ct. at 2193 (quoting *Gardner v. Florida*, 430 U.S. 349, 362, 97 S. Ct. 1197, 207 (1977)). The Court recognized that "a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system." *Simmons*, 512 U.S. at 162, 114 S. Ct. at 2193 (citing *Jurek v. Texas*, 428 U.S. 262, 275, 96 S. Ct. 2950, 2958 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (noting that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to

impose").

As a matter of due process, a capital defendant must be allowed to address the specter of future dangerousness by ensuring the jury is not misled to believe that if they do not impose a death sentence, then there is a real possibility of the defendant being released after some term of years. *Simmons*, 512 U.S. at 170, 114 S. Ct. at 2197 (citing *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 1198 (1990) (if there is a "reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evident," then the defendant is denied due process)).

More than a decade later, the Supreme Court of the United States in *Lynch II* specifically addressed the necessity of a *Simmons* instruction within the construct of Arizona's capital sentencing scheme. 136 S. Ct. 1818. The Court held that where a capital defendant establishes parole ineligibility at the time of trial, *Simmons* and its progeny establish the defendant's right to inform the jury of that fact. *Lynch II*, 136 S. Ct. at 1820 (citing *Ramdass v. Angelone*, 530 U.S. 156, 171, 120 S. Ct. 2113 (2000) (plurality opinion)).

Like the capital defendants in both *Simmons* and *Lynch II*, Mr. Robinson was ineligible for parole under state law at the time of his trial. *Lynch II*, 136 S. Ct. at

1819. And like the defendants in *Simmons* and *Lynch II*, Mr. Robinson was entitled to inform the jury of that fact. Unfortunately, here 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. Accordingly, the trial court's refusal to provide the requested *Simmons* instruction violated Mr. Robinson's constitutional right to due process.

C. The State's introduction of evidence regarding a previous knife incident and its reference to that incident in closing arguments raised the specter of future dangerousness.

Post-*Lynch II*, the Arizona Supreme Court has examined on multiple occasions the issue of whether evidence introduced for another purpose but which nonetheless indirectly leads the jury to consider future dangerousness can form the basis for a *Simmons* instruction. In *Escalante-Orozco*, this Court held it was reversible error for the trial court to refuse to give the defendant's requested *Simmons* instruction when the specter of future dangerousness was raised indirectly by the introduction of a prior violent incident. *State v. Escalante-Orozco*, 241 Ariz. 254, 286 ¶ 127, 386 P.3d 798, 830 (2017). This Court made clear that "[t]he prosecutor did not have to explicitly argue future dangerousness for it to be at issue; instead, it is sufficient if future

dangerousness is 'a logical inference from the evidence' or is 'injected into the case through the State's closing argument.'" *Escalante-Orozco*, 241 Ariz. at 285 ¶ 119, 386 P.3d at 829 (quoting *Kelly v. South Carolina*, 534 U.S. 246, 252, 122 S. Ct. 726 (2002)). This Court further clarified that evidence of other past acts can put future dangerousness at issue even if they are offered to rebut mitigation evidence:

> "Evidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms." … Past instances of violent behavior [] can "raise a strong implication of 'generalized … future dangerousness.'"

Id. at 286 ¶¶ 123–24 (quoting *Kelly*, 534 U.S. at 253–54, 114 (quoting *Simmons*, 512 U.S. at 171)); *see also State v. Hulsey*, 243 Ariz. 367, 395 ¶ 132, 398 ¶ 144, 408 P.3d 408, 437, 439 (2018) (where the State does not specifically argue the issue but does introduce evidence that suggests future dangerousness, the failure to give a *Simmons* instruction violates due process and dictates that the defendant receive a new penalty phase).

Likewise, in *State v. Rushing*, this Court found that the failure to give a *Simmons* instruction was reversible error where the State introduced evidence of the defendant's past violent acts and his associations with violent groups. *State v. Rushing*, 243 Ariz. 212, 222–23 ¶¶ 41, 44, 404 P.3d 240, 250–51 (2017). Further,

even though the jury was aware that the defendant was already serving a life sentence for a different offense, the Court concluded that it could not find the error harmless because "it [was] not possible to know whether even the remote prospect of release affected any juror's decision to impose the death penalty." *Rushing*, 243 Ariz. at 222–23, ¶ 43, 404 P.3d 240, 250–51 (citing *Escalante-Orozco*, 241 Ariz. at 286 ¶ 126, 386 P.3d at 830 ("We cannot know what role the possibility of release played in the jurors minds as they decided the propriety of the death penalty."), *Andres v. United States*, 333 U.S. 740, 752, 68 S. Ct. 880 (1948) ("In death cases doubts such as those presented here should be resolved in favor of the accused.")).

As in *Escalante-Orozco*, here the State introduced evidence in rebuttal to mitigation that created a "logical inference" of future dangerousness. During the rebuttal portion of the penalty phase, the State called Susan Copeland, a former co-worker of Mr. Robinson from Rio Salado College.[269] In the summer of 2010, Mr. Robinson stayed in a spare bedroom of Copeland's for approximately a month and a half after his lease ran out and he needed somewhere to stay before he travelled to California to be with his girlfriend Candace Jackson.[270]

One morning several months after Mr. Robinson went to California, he showed

[269] Tr. 05/01/18, at 21.

up unannounced at Copeland's door.[271] He was "jumpy" and "agitated" and wearing black latex gloves.[272] Copeland was on her way out, so she let Mr. Robinson wait at her house for a couple hours until she got back.[273]

When she returned, she offered to make Mr. Robinson something to eat.[274] Copeland had a very small kitchen—about 5 by 7 feet—and while she was preparing the food, she felt Mr. Robinson squeeze behind her.[275] From the corner of her eye, she realized that Mr. Robinson was holding her butcher's knife.[276] When she asked him what he was doing, he shrugged, reached around her, and put the knife back in the drawer.[277] Mr. Robinson left shortly thereafter.[278]

Copeland testified that there was no reason for him to have taken the knife in the first place, and that Mr. Robinson had worn the black latex gloves the entire time he was in the house.[279] While she initially thought it just a "weird incident," later she

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[270] Tr. 05/01/18, at 23–24.
[271] Tr. 05/01/18, at 30.
[272] Tr. 05/01/18, at 30–31, 33–34.
[273] Tr. 05/01/18, at 31.
[274] Tr. 05/01/18, at 31.
[275] Tr. 05/01/18, at 31, 56.
[276] Tr. 05/01/18, at 31, 37–38; Ex. 264.
[277] Tr. 05/01/18, at 31, 66.
[278] Tr. 05/01/18, at 39.
[279] Tr. 05/01/18, at 33–34, 66.

felt threatened.[280]

During the penalty phase closing arguments, the State referred to the knife incident involving Mr. Robinson and Copeland:

> And then the knife incident. Black Latex gloves in her house for hours? She comes home, he is standing behind her with a large rusty butcher knife? No reason to have it. No reason to even be in that kitchen.
>
> She made him food. Thought he wasn't there, for some reason. Didn't even eat the meal. Wearing black Latex gloves the entire time. Defense counsel asked her, "Well, wasn't it cold out?" Hours within the home?
>
> What did he try to do in this case? He tried to burn all the evidence. Why was he wearing Latex gloves? That is for you to decide.[281]

The State's introduction of this evidence and discussion during closing arguments leads to an inference that Mr. Robinson's questionable behavior in the past was another example of Mr. Robinson's danger to others—a danger that might occur again in the future. Whether the State used the specific phrase "future dangerousness" is irrelevant. *Kelly*, 534 U.S. at 254, 122 S. Ct. at 732. "A jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior, whether locked up or free, and whether free … as a

[280] Tr. 05/01/18, at 66.

parolee." *Escalante-Orozco*, 241 Ariz. at 286 ¶ 124, 386 P.3d at 830 (quoting *Kelly*, 534 U.S. at 253–54, 122 S. Ct. at 731).

D. The trial court's failure to give a *Simmons* instruction was reversible, constitutional error mandating that this Court vacate the death sentences and remand for a new penalty phase.

The State, through the introduction of rebuttal testimony by Copeland and by its closing argument questioning why Mr. Robinson snuck up behind Copeland wearing black latex gloves and holding a large butcher knife for no apparent non-nefarious reason, raised the specter of future dangerousness in this case. Future dangerousness was a "logical inference from the evidence" that was "injected into the case" by the State. *Kelly*, 534 U.S. at 252, 122 S. Ct. at 731 (2002). Because there was no mechanism for release on parole at the time of Mr. Robinson's trial, he was entitled to a *Simmons* instruction. *Simmons*, 512 U.S. at 171, 114 S. Ct. at 2198. The trial court's subsequent failure to provide such an instruction violated Mr. Robinson's right to due process and is reversible error. *Lynch II*, 136 S. Ct. at 1820. Accordingly, this Court must vacate Mr. Robinson's death sentences and remand for a new penalty phase proceeding.

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[281] Tr. 05/08/18, at 29.

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.

Arizona's capital sentencing scheme fails to adequately narrow the class of defendants eligible for the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, §§ 3, 4, 15, 23, and 32 of the Arizona Constitution.

Standard of Review

This Court reviews de novo whether a constitutional violation has occurred. *State v. McGill*, 213 Ariz. 147, 157–58 ¶ 45, 140 P.3d 930, 940–41 (2006).

Pertinent Facts

In May 2013, Mr. Robinson filed a motion to dismiss the death penalty notice requesting that the death penalty proceedings be dismissed pursuant to *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972), and its progeny; the Eighth and Fourteenth Amendments to the United States Constitution; and Article 2, § 13 and Article 4 part 2 § 19(7) of the Arizona Constitution.[282] As noted by defense counsel, an almost identical motion was concurrently before Judge Kreamer of the Maricopa

County Superior Court in *State of Arizona v. Eldridge Gittens*, in CR 2010-007912-002. On September 3, 2014, Judge Mroz issued a ruling in the present case denying the request for an evidentiary hearing and denying the motion to dismiss the death penalty notice.[283]

In October 2014, Mr. Robinson filed a motion for joinder and for omnibus hearing seeking to join in the consolidated proceedings filed under *State v. Macario Lopez, Jr.*, CR 2011-007597-001, and requesting that the death penalty proceedings be dismissed pursuant to *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972), and its progeny; the Eighth and Fourteenth Amendments to the United States Constitution; and Article 2, §§ 3, 4, 15, 23, and 32 of the Arizona State Constitution.[284] In particular, the joined defendants argued that A.R.S. § 13-751 is unconstitutional because it allows the State to impose the death penalty in an arbitrary and capricious manner by failing to adequately narrow the class of persons eligible for the death penalty.

At a status conference on the joined defendants' motion for an evidentiary hearing in support of the motion to strike the notice of intent to seek the death penalty,

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[282] R. 84.
[283] R. 155.
[284] R 164.

the trial court denied defendants' request for an evidentiary hearing but noted that it was accepting the extensive data and statistical analysis provided by the defendants as true for purposes of oral argument.[285] More specifically, the court accepted as true that over an eleven-year period spanning 2002 through 2012, almost 99 percent of every adult-offender, first-degree murder case filed in Maricopa County had at least one allegeable aggravating factor under A.R.S. § 13-751(F).[286]

Despite the concerning "breadth of cases in which defendants are death-eligible in Arizona," the trial court denied defendants' motion to strike the notice of intent to seek the death penalty.[287] The trial court relied on this Court's precedent in *State v. Greenway*, 170 Ariz. 155, 164, 823 P.2d 22, 31 (1991), and *State v. Hausner*, 230 Ariz. 60, 89, 280 P.3d 604, 633 (2012), which found that Arizona's death penalty scheme was constitutional because it narrowed the class of death-eligible persons at both the definitional stage—i.e., only adults convicted of first-degree murder are eligible for the death penalty—and at the aggravation stage.[288] The trial court found itself compelled by *Greenway* and *Hausner* to deny defendants' motion while at the same time recognizing that the extent of the statute's narrowing function was

[285] Tr. 4/24/15, at 23.
[286] Exhibit 1, Hearing Date 6/19/15.
[287] R. 178.

"debatable" in light of the utter lack of any "appreciable narrowing" from the aggravating factors.[289]

Discussion

The Eighth and Fourteenth Amendments to the United States Constitution require that a capital sentencing scheme "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared with others found guilty of murder." *Lowenfield v. Phelps*, 484 U.S. 231, 244, 108 S. Ct. 546, 554 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742 (1983)). If a state's death penalty scheme offers "no principled way," *Godfrey v. Georgia*, 446 U.S. 420, 433, 108 S. Ct. 1759, 1767 (1980) (plurality opinion), of "rationally distinguish[ing] between those individuals for whom death is an appropriate sanction and those for whom it is not," *Spaziano v. Florida*, 468 U.S. 447, 460, 104 S. Ct. 3154, 3162 (1984) (citations omitted), *overruled on other grounds, Hurst v. Florida*, 136 S. Ct. 616 (2016), then the death penalty is "cruel and unusual in the same way that being struck by lightening is cruel and unusual." *Furman*, 408 U.S. 238, 309, 92 S. Ct. 2726, 2762 (1972) (per

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[288] Id.
[289] Id.

curiam) (Stewart, J., concurring). Arizona's death penalty scheme is the equivalent of a lightening field.

A. Arizona's vastly inclusive first-degree murder statute fails to constitutionally narrow the class of persons eligible for the death penalty at the definition stage.

The narrowing required by the Eighth Amendment can occur at the guilt phase if the legislature limits the definition of capital offenses to such an extent that it "genuinely narrows" the class of persons eligible for the death penalty based solely upon a jury's finding of guilt. *Lowenfield*, 484 U.S. at 245–46, 108 S. Ct. at 554–55. The United States Supreme Court has previously found that death penalty statutes that narrowly define the categories of murders for which a death sentence may be imposed essentially integrate their aggravating circumstances into the definition of the offense itself. *Id.* Under those statutes, the jury's finding of death eligibility is inherent in the guilty verdict. *Id.*

Here, Arizona's first-degree murder statute includes not only premeditated murder, but also the intentional killing of a police officer and felony murder for more than 21 different felonies. A.R.S. § 13-1105. Under these circumstances, the constitutionally required narrowing function for a state to be permitted to impose the death penalty cannot be satisfied at the definition stage. *Zant*, 462 U.S. at 879, 103 S.

Ct. at 2744; *see Hidalgo v. Arizona*, 138 S. Ct. 1054, 1055 (2018) (Mem.) (acknowledging that Arizona's first-degree murder statute, under which all adults who commit first-degree murder are eligible for death, is so broad at the definition stage that it cannot comply with the Eighth Amendment's narrowing requirement).

B. Arizona's death penalty scheme is unconstitutionally broad because the circumstances of almost all first-degree murders encompass at least one of the legislatively defined aggravating circumstances.

If a defendant's eligibility for the death penalty is not mandatory based solely on a guilt finding, then the legislature must provide "clear and objective" standards by which a sentence can meaningfully distinguish between those few cases where the death penalty can be imposed and the many cases where it cannot. *Godfrey*, 446 U.S. at 428, 108 S. Ct. at 1765; *Furman*, 408 U.S. at 313, 92 S. Ct. at 2764 (White, J., concurring). A jury finding of one or more legislatively defined aggravating factors to determine eligibility for the death penalty can satisfy this constitutionally mandated narrowing function. *Lowenfield*, 484 U.S. at 244, 105 S. Ct. at 544 (citing *Gregg v. Georgia*, 428 U.S. 153, 1632–64, 96 S. Ct. 2909, 2920–21 (1976)); *Proffit v. Florida*, 428 U.S. 242, 247–50, 96 S. Ct. 2960, 2964–65 (1976); *Zant*, 462 U.S. at 878, 103 S. Ct. at 2743; *Carlson*, 202 Ariz. at 582 ¶ 45, 48 P.3d at 1192 (quoting *State v. Soto-Fong*, 187 Ariz. 186, 202, 928 P.2d 610, 626 (1996)). In Arizona, however, the

aggravation phase of the death penalty scheme now effectively encompasses almost all first-degree murders. A review of 11 years of adult-offender, first-degree murder cases filed in Maricopa County indicates that almost 99 percent had at least one aggravating factor under A.R.S. § 13-751.[290]

The aggravating factors in the Arizona capital sentencing scheme were initially designed to narrow the class of first-degree murder cases eligible for the death penalty. *State v. Bocharski*, 218 Ariz. 476, 488 ¶ 49, 189 P.3d 403, 415 (2008) (citing *Carlson*, 202 Ariz. at 582 ¶ 45, 48 P.3d at 1192). Prior to this Court's decision in *State v. Hidalgo*, 241 Ariz. 543, 549–52 ¶¶ 14–29, 390 P.3d 783, 789–92 (2017), the last time this Court substantively reviewed the constitutionality of Arizona's death penalty sentencing scheme was in *Greenway*, 170 Ariz. at 160, 823 P.2d at 27. But the 1988 death penalty statute at issue in *Greenway* had only 10 enumerated aggravating factors. Taking into consideration all its subparts, the current statute effectively encompasses more than 75 aggravating factors. Whereas previous iterations of the Arizona death penalty scheme may have adequately narrowed the class of persons eligible to receive the death penalty, that is no longer true under the current statute.

This Court recently examined whether Arizona's death penalty scheme meets

[290] Exhibit 1, HD 6/19/15.

the constitutional narrowing requirement in *Hidalgo*. As with the trial court below, this Court assumed as true for the purpose of legal analysis the same supporting data and conclusion admitted here showing that "nearly every charged first-degree murder could support at least one aggravating circumstance." *Hidalgo*, 241 Ariz. at 551 ¶ 26, 390 P.3d at 791. Based upon this assumption, the legislatively enacted aggravating factors as they currently exist perform no real narrowing function at all and cannot be relied upon to meet the Constitution's narrowing requirement. *Zant*, 462 U.S. at 877, 103 S. Ct. at 2742.

C. *Hidalgo* was incorrectly decided.

The Supreme Court of the United States has already found that Arizona death penalty scheme fails at the definition phase. And this Court has already acknowledged that if taking the defendants' data and analysis as true, then Arizona's scheme must fail if based only upon the narrowing that occurs as a result of the "legislatively defined aggravating circumstances." *Hidalgo*, 241 Ariz. at 551–52 ¶ 28, 390 P.3d at 791–92. Accordingly, this Court must conclude that *Hidalgo* was incorrectly decided because the Court improperly relied upon narrowing that occurs outside of the constitutionally required, legislatively-derived narrowing. *Zant*, 462 U.S. at 878, 103 S. Ct. at 2743; *Tuilaepa v. California*, 512 U.S. 967, 979, 114 S. Ct. 2630, 2638

(1994); *Lowenfield*, 484 U.S. at 246, 108 S. Ct. at 555; *California v. Ramos*, 463 U.S. 992, 1008, 103 S. Ct. 3446, 3457 (1983).

In particular, the *Hidalgo* Court's reliance on the State's burden of proof, the jury's consideration of mitigating factors, the existence of mandatory appellate review, and the use of prosecutorial charging discretion to perform the constitutionally required narrowing function, runs contrary to the Supreme Court of the United States' precedent requiring that this narrowing occur as a result of legislative action. *Brown v. Sanders*, 546 U.S. 212, 216 S. Ct. 884, 889 (2006) (to satisfy the constitutional narrowing requirement, legislature must enact statutory factors which determine death penalty eligibility); *Tuilaepa*, 512 U.S. at 979, 114 S. Ct. at 2639 (legislature must define the category of persons eligible for the death penalty); *Zant*, 462 U.S. at 878, 103 S. Ct. at 2743 ("statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition; they circumscribe the class of persons eligible for the death penalty"); *Lowenfield*, 484 U.S. at 264, 108 S. Ct. at 555 ("the legislature" must provide means of "narrow[ing] the class of death-eligible murderers").

Without the ability to effectively narrow a defendant's eligibility for death through legislatively determined factors, the Arizona capital sentencing scheme runs

afoul of the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, §§ 3, 4, 15, 23, and 32 of the Arizona Constitution. Accordingly, Mr. Robinson's death sentences are constitutionally infirm and should be vacated.

ARGUMENT VI

There was persistent and pervasive misconduct during the prosecutor's questioning of Dr. Hu during the guilt phase and his penalty phase closing argument and the cumulative effect of the incidents shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice Mr. Robinson, adversely contributing to and affecting the verdicts of guilt and death.

The prosecutor's behavior during the penalty phase closing argument crossed the line between a fair representation of how the jurors were to regard the mitigation evidence Mr. Robinson presented and the sort of conduct this Court has condemned. His persistent and pervasive misconduct had a cumulative effect, demonstrating that the prosecutor intentionally engaged in improper conduct with indifference, if not a specific intent, to prejudice Mr. Robinson by attempting to demonstrate how the victim was restrained and later arguing that the jurors must find a nexus between the evidence of Mr. Robinson's tragic childhood in Monroe and the offenses before they could impose a sentence other than death.

Standard of Review

"To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz.

72, ¶26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 1871 (1974)). The misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial. *Id.*

Prosecutorial misconduct constitutes reversible error only if (1) misconduct exists and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial. *State v. Anderson* (*Anderson II*), 210 Ariz. 327, ¶45, 111 P.3d 369, 382 (2005).

Even if there was no error or an error was harmless and so by itself does not warrant reversal, an incident may nonetheless contribute to a finding of persistent and pervasive misconduct if the cumulative effect of the incidents shows that the prosecutor intentionally engaged in improper conduct and "did so with indifference, if not a specific intent, to prejudice the defendant." *Hughes*, at ¶¶ 25, 31.

Pertinent Facts

A. The demonstration while questioning Dr. Hu.

> [THE STATE]: Defense counsel asked you about the strangulation or that the injuries to the neck or strap muscles could have been caused by some other force of pressure.
> You just don't know, correct?
>
> [DR. HU]: Correct.
>
> [THE STATE]: And she was talking about putting a hand on the neck,

is what she was referencing, correct?

[DR. HU]: Yes.

[THE STATE]: And I believe you had said that your belief was putting a hand on the neck while someone is duct taping the head, correct?

[DEFENSE COUNSEL]: Objection, Your Honor. Can we approach?

THE COURT: The objection is sustained.
Counsel, can you wrap this up, please?
Approach, counsel.

(Whereupon, the following bench conference was held.)

THE COURT: First of all, it's not really appropriate for you to be doing a demonstrative exhibit like that display of how you think the crime may have occurred. There's really no evidence of exactly that, so, you know, you're bordering on being very argumentative with that type of a question.

And you're continually leading the witness. He is your witness. You need to ask him open-ended questions or stop questioning him, one of the two.

[DEFENSE COUNSEL]: Your Honor, I will make a further record outside the presence of the jury.

[THE STATE]: Judge, she specifically asked him about holding the victim down with a hand while duct taping.

THE COURT: That doesn't mean that you get to demonstrate –

[DEFENSE COUNSEL]: Demonstrate.

THE COURT: – demonstrate. It doesn't mean you get to demonstrate how you think the crime may have occurred or whatever to the jury. The question on cross didn't open up to a demonstration.

[DEFENSE COUNSEL]: And, Your Honor –

[THE STATE]: Can I have the witness, then, do it, Judge?

THE COURT: You can ask the witness as to how he thinks – if he has an opinion as to how it happened, sure.

[DEFENSE COUNSEL]: Your Honor, now that there's a demonstration, I object to anything further because what do we think the witness is going to do?

THE COURT: Well, you can ask the question, open-ended question, non-leading question. I'm going to continue to sustain leading questions, [THE STATE]. I don't care if it's 4:30 or 5:30; you don't get to lead your own witness.

[THE STATE]: Yes, Judge.

(Whereupon, the bench conference was concluded.)[291]

B. The misconduct during the State's closing argument

Before closing arguments, the court instructed the jurors:

> The attorneys' remarks, statements and arguments are not evidence, but are intended to help you understand the evidence and apply the law.[292]
>
> . . . . .

[291] Tr. 2/28/18 at 155–56.
[292] Tr. 05/07/18 at 14.

Mitigating circumstances are any factors that are a basis for a life sentence instead of a death sentence, so long as they relate to any sympathetic or other aspect of the defendant's character, propensity, history or record, or circumstances of the offense.

Mitigating circumstances are not an excuse or justification for the offense, but are factors that in fairness or mercy may reduce the defendant's moral culpability.[293]

. . . . .

You are not required to find that there is a connection between a mitigating circumstance and a crime committed in order to consider the mitigation evidence. Any connection or lack of connection may impact the quality and strength of the mitigation evidence.[294]

. . . . .

In reaching a reasoned, moral judgment about which sentence is justified and appropriate, you must decide how compelling or persuasive the totality of the mitigating factors are when evaluated in connection with the totality of the aggravating factors and the facts and circumstances of the case. This assessment is not a mathematical one, but instead must be made in light of each juror's individual, qualitative evaluation of the facts of the case, the severity of the aggravating factors, and the quality of the mitigating factors found by each juror.[295]

The State presented the following closing argument over two days:

There is a four-step process when you look at your jury instructions, when it comes to looking at mitigation. The first, is it

[293] *Id*. at 14–15.
[294] *Id*. at 15.
[295] *Id*. at 19–20.

proven? The second, is it relevant? The third, is it value or the connection to give it? And the last is, is it sufficiently substantial to call for leniency?

"Is it proven?" essentially means is the fact or whatever it is that they are putting forward true? More probably than not?

Is it relevant? Is it about this defendant?

Value or connection? What does it have to do with or – with the murders or not? It can be either.

Last, "sufficiently substantial" really means is it enough?[296]

. . . . .

Page 4 of your jury instructions tells you about value or connection. Above what I have highlighted there it says: You are not required to find that there is a connection between mitigating circumstance and the crime committed in order to consider the mitigation evidence. Any connection or lack of connection may impact the quality and strength of the mitigation evidence.

What that means is whatever you determine at all to be proven relevant, if you determine it to be mitigation, there can or there cannot be a link to the crime. If there isn't a link to the offense or the crime, that can affect the quality and strength of the mitigation evidence.

General mitigation, or "one size fits all" type of mitigation, usually doesn't carry much quality or much strength because it does lack the connection to the crime.

For instance, you heard a lot about Monroe. You heard about the culture of Monroe. You heard about a bunch of different things regarding

[296] *Id*. at 106.

Monroe. This is general type of mitigation. Everyone comes from a place. Every place that they come from probably has violence, probably has some crime. It's general. It lacks a connection to the crime.

You are to consider either/or. It does not – again, it does not have to have a connection to the crime. But if it doesn't have a connection to the crime, it can affect its quality and the strength that you use for it.

Why, when you look at Monroe, why do – the State submits to you that that's general type of mitigation, a "one size fits all"? Because this is not a gang shooting. This is not a drung [sic] deal – excuse me – a drug deal gone wrong. This is not a botched burglary. Everything you heard about in Monroe has nothing to do with this case. Has nothing to do with the impact on the defendant when he decided to do what he did. Monroe does not answer why he killed. Monroe is an excuse.

Again, the culture of Monroe may be mitigation for someone who turns to the streets for things lacking in the home. The defendant didn't do that. The defendant turned to church, band, baseball, school in Monroe, school in Arizona, Matt Allen, Susan Copeland.

Everything that Dr. Forsyth talked about regarding trajectory, the defendant did none of that. That's general type of mitigation.

The other aspect is mitigation that may be unique to this defendant. That type of mitigation, again, it cannot be an excuse or justification. But the bottom part of that instruction talks about not an excuse or justification for the offense, but are factors that in fairness or mercy may reduce the defendant's moral culpability.

What does that mean? "Moral" means right or wrong. You heard the State in many of its questions of these witnesses, ask these witnesses: Did he know right or wrong?

That's what "moral" means.

"Culpability" means blameworthiness. Is it worthy to blame? Does the mitigation reduce the defendant's understanding from right and wrong and is it blameworthy? That's what that means.

And not only that, when you look at the mitigation circumstance, does it reduce his moral culpability? Is it worthy of blame?

Then – you then get to use the impact and quality of it. What impact did it have on the defendant when he decided to kill two people? Do you really think he was thinking about Monroe when he was buying his murder kit? Do you really think any of those thoughts about Miss Betty or Mr. Bill were going through his mind as he stopped at every stoplight driving home? Do you really think he was thinking about all of that stuff when he was having sex with [S.H.] before he knew what he was about to do to her?

Absolutely not. Nothing presented to you reduces his moral culpability. Nothing is worthy of blame in this case when he decided to kill two innocent people.[297]

The State continued its presentation the next day:

Let's assume that everything presented by the defense is true. Every story, every act of abuse, and every neighborhood was bad. Assume it all true. Now ask yourself, what kind of mitigation would it take to reduce a man's moral culpability for the decisions and actions and consequences of what this defendant did in this case and the impact on the victim.

Being raised by a poor family isn't just an insult on every poor person. This reduces nothing. Your siblings were abused in the home. Not him. Let's be frank. If he killed Coretta's boyfriend who raped her, or if he killed Bill for what Bill was doing, maybe you could be talking about mitigation and reducing his moral culpability for the act, but not in

[297] *Id*. at 109–12.

this case.

> Raised by his grandmother who never said she loved him? Really? How does that explain what he did? How does that explain the suffering that he made [S.H.] go through?
>
> Parents not around, his grandparents raising him, some domestic violence in the home, all of these kids coming out – excuse me – all of these different stories about other murders, other things that were in his family background, what does that have to do?
>
> I'm sure defense counsel will stand up here after me and tell you it's a cumulative effect of all of this. The problem, though, is that there is nothing that the defendant did in this case is related to Monroe or his background or his culture.[298]

Discussion

A. The demonstration while questioning Dr. Hu.

Despite being repeatedly admonished by the trial court, the prosecutor continued to pose leading questions to the medical examiner, Dr. Hu. The purpose in posing leading questions was obvious: to get Dr. Hu to explain away his original determination that S.H. was dead before the fire started and to testify instead that S.H. was still alive during the fire.[299] Each time he did so, the defense objected and those objections were sustained.[300]

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[298] Tr. 05/08/18 at 36–37
[299] *Id*. at 94, 149–50, 151, 154, 155.
[300] *Id*.

The prosecutor apparently next gave a demonstration of how the crime may have been committed, which caused the court to admonish him: "it's not really appropriate for you to be doing a demonstrative exhibit like that display of how you think the crime may have occurred. There's really no evidence of exactly that, so, you know, you're bordering on being very argumentative with that type of a question."

The reason for the demonstration was clear: to inflame the jurors by showing his imagined brutality of holding down S.H. while trying to place duct tape on her. There was no evidence of how the crime occurred. Dr. Hu could determine the cause of death but could not testify about how that death was accomplished.

The only facts supported by the testimony were that S.H. had died, that the cause of her death was homicidal violence.[301] The prosecutor's efforts to stage S.H.'s death was grossly improper, and there is nothing to indicate that after repeated admonishments by the court, he could have believed that he was acting properly.

Dr. Hu's testimony was crucial to the State's case. His testimony would support or destroy the bases for the facts surrounding S.H.'s death and, eventually, whether the State had proved the aggravating factors it had alleged. The prosecutor's repeatedly leading questions attempted to steer Dr. Hu's testimony toward supporting

[301] Tr. 2/28/18 at 50.

the State's theory of the case and he made his demonstration for the same purpose. The prosecutor's words and actions with regard to the crucial witness permeated the trial with unfairness as to make the resulting conviction a denial of due process

B. The misconduct during the State's closing argument

The United States Supreme Court has described the capital sentencing decision as a "reasoned moral response" to mitigation evidence. *Penry v. Lynaugh*, 492 U.S. 302, 328, 109 S. Ct. 2934, 2951 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002), accord *State v. Carreon*, 210 Ariz. 54, ¶84–87, 107 P.3d 900, 916–17 (2005).

The Supreme Court's use of the phrase a "reasoned moral response" describes the result of individualized sentencing that appropriately considers "any aspect of the defendant's character, propensities or record and any of the circumstances of the offense" relevant to determine whether the defendant should be shown leniency. See also *Kansas v. Marsh*, 548 U.S. 163, 173–74, 126 S. Ct. 2516, 2524 (2006) (jury must reach reasoned decision); *Anderson II*, 210 Ariz. at ¶ 92 (rejecting claim that instruction that jury should not be "swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling" violated the Eighth Amendment).

In *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954 (1978), the United States

Supreme Court held that the Eighth and Fourteenth Amendments of the United States Constitution require that sentencer in a capital case must be given a full opportunity to consider, as a mitigating factor, "any aspect of a defendant's character or record," in addition to "*any* of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." U.S. at 604, 98 S. Ct. at 2964–65 (plurality opinion) (emphasis added). The court emphasized the "need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual." U.S. at 605, 98 S. Ct. at 2965.

This rule "recognizes that 'justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender,'" as part of deciding whether the defendant is to live or die. *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S. Ct. 869, 875 (1982) (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55, 58 S. Ct. 59, 60 (1937)). And it ensures that "'the sentence imposed at the penalty stage . . . reflect[s] a reasoned moral response to the defendant's background, character, and crime.'" *Abdul–Kabir v. Quarterman*, 550 U.S. 233, 252, 127 S. Ct. 1654, 1667 (2007) (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring)).

The court has consistently rejected States' attempts to limit as irrelevant

evidence of a defendant's background or character that he wishes to offer in mitigation. *Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S. Ct. 1669, 1670 (1986) (exclusion of evidence regarding defendant's good behavior in jail while awaiting trial deprived him of "his right to place before the sentencer relevant evidence in mitigation of punishment.") The court explained although "any such inferences would not relate specifically to [the defendant's] culpability for the crime he committed, . . . such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'" U.S. at 4–5, 106 S. Ct. (quoting *Lockett*, 438 U.S., at 604, 98 S. Ct. at 2954 (plurality opinion)).

Here, Mr. Robinson did not offer evidence of his brutal upbringing as an excuse for the murders he committed. He offered it to show that, because of his tragic past, the jury's "reasoned moral response" should be to spare his life and sentence him to life imprisonment.

In his closing argument, the prosecutor repeatedly told the jurors that they had to find a nexus between Mr. Robinson's actions and the mitigation. The prosecutor told the jurors that they should limit their consideration of the evidence of Mr. Robinson's heartbreaking childhood, not because it was irrelevant, but because it was entitled to little or no weight as it was not in Mr. Robinson's mind while he was

committing the offenses.

Requiring a jury to find a causal nexus between mitigating circumstances and the crime may prevent jurors from considering all relevant mitigation evidence, in violation of the Eighth Amendment. *Tennard v. Dretke*, 542 U.S. 274, 285, 124 S. Ct. 2562, 2570 (2004); *accord State v. Sanders*, 245 Ariz. 113, ¶83, 425 P.3d 1056, 1074 (2018).

The law does not require a nexus between mitigation and a capital offense, but jurors require an explanation in the face of the horrific tragedy a capital case presents. Mitigation strives to provide that explanation, to make some sense of what has happened and give jurors what they require as they struggle with life and death decisions.

The State's closing argument, which the court had instructed the jurors was intended to help them understand the evidence and apply the law, put forth that the jurors had to find that Monroe provided a rationale for Mr. Robinson's conduct before they could regard anything Mr. Robinson presented as mitigating. The State's argument that the jurors regard as irrelevant any evidence of Mr. Robinson's tragic childhood because he was not thinking of those deprivations when he committed the instant offenses was contrary to the holdings of the Supreme Court, which has

consistently rejected any such attempts to place a limitation on such evidence.

Although the "Monroe evidence" did not relate specifically to Mr. Robinson's culpability for the offenses, the evidence was mitigating because it served as a basis for a sentence less than death, had the State not consistently argued that Monroe was not on Mr. Robinson's mind as he committed the offenses. See *Skipper*, 476 U.S. at 4.

By consistently arguing that the jurors must find that the "Monroe evidence" played some part in Mr. Robinson's actions, it impermissibly told them that there must be a connection between that evidence and the offenses, and that in that absence of that, they were not to regard the evidence as mitigating. The Supreme Court has consistently rejected this nexus requirement and has repeatedly held that the only relevant question is whether the proposed mitigation evidence would give the jurors a "reason to impose a sentence more lenient than death." *Smith v. Texas*, 543 U.S. 37, 44–45, 125 S. Ct. 400, 404–05 (2004)(per curiam); *accord Anderson II*, at ¶93 ("a jury cannot be prevented from giving effect to mitigating evidence solely because the evidence has no causal 'nexus' to a defendant's crimes," quoting *Tennard*, 542 U.S. at 282–87, 124 S. Ct. 2562).

The State's argument was contrary to Supreme Court precedents and this Court's precedents. The "Monroe evidence" did not have to offer any explanation for

the offenses Mr. Robinson committed for the jurors to have considered it as weighty mitigation. There only had to be a reasonable probability that, because of Mr. Robinson's tragic past, the jurors' reasoned moral response would have been to spare his life and sentence him to life imprisonment instead.

The prosecutor's behavior crossed the line between a fair representation of the evidence against Mr. Robinson and the sort of conduct this Court condemned in *Hughes*. His persistent and pervasive misconduct in arguing that the jurors had to find a nexus between the Monroe evidence and Mr. Robinson's actions in committing the offenses was contrary to Supreme Court precedents and this Court's precedents. Because the trial court instructed the jurors that the attorneys' arguments were intended to help them understand the evidence and apply the law, the prosecutor intentionally engaged in improper conduct and "did so with indifference, if not a specific intent, to prejudice" Mr. Robinson by repeatedly stressing that the jurors had to find a nexus between the Monroe evidence and Mr. Robinson's actions. In a capital case such as this one, clear errors of law such committed here must be redressed. For this reason, this Court should reverse Mr. Robinson's convictions and sentences.

Additional Issues Raised to Avoid Preclusion

Mr. Robinson raises the following issues to avoid procedural default and preserve them for further review. Mr. Robinson recognizes that this Court has issued contrary holdings regarding these claims and has cited those cases where applicable. Nonetheless, Mr. Robinson requests that this Court re-examine the constitutionality of the death penalty, particularly in light of the issues enumerated below.

1. The death penalty is cruel and unusual under any circumstances and violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, § 15 of the Arizona Constitution. Contra, *State v. Harrod*, 200 Ariz. 309, 320 ¶ 59, 26 P.3d 492, 503 (2001), *vacated on other grounds*, 536 U.S. 953, 122 S. Ct. 2653 (2002); *State v. Blazak*, 131 Ariz. 598, 601, 643 P.2d 694, 697 (1982).

2. Arizona's death penalty scheme is imposed in such a manner as to discriminate against poor, young, and male defendants in violation of the Eight and Fourteenth Amendments to the United States Constitution and Article 2, §§ 1, 4, 13, and 15 of the Arizona Constitution. Contra, *State v. Sansing*, 200 Ariz. 347, 361 ¶46, 26 P.3d 1118, 1132 (2001), *vacated on other grounds*, 536 U.S. 954, 122 S. Ct. 2654 (2002).

3. The prosecutor's discretion to seek the death penalty has no standards and

therefore violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, §§ 1, 4, and 15 of the Arizona Constitution. *Contra, Sansing*, 200 Ariz. 347, 361 ¶ 46; State v. Rossi, 146 Ariz. 359, 366, 706 P.2d 371, 378 (1985).

4. The absence of proportionality review of death sentences by the Arizona courts denies capital defendants due process of law and equal protection, and amounts to cruel and unusual punishment in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States and Article 2, §§ 4, 13, and 15. *Contra*, *Harrod*, 200 Ariz. at 320 ¶ 65.

5. Arizona's capital sentencing scheme is unconstitutional because it does not require that the State prove that the death penalty is appropriate. Failure to require this proof violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 2, §§ 4 and 15 of the Arizona Constitution. *Contra*, *State v. Ring*, 200 Ariz. 267, 284 ¶ 64, 25 P.3d 1139, 1156 (2001), *rev'd on other grounds*, 536 U.S. 584, 122 S. Ct. 2428 (2002).

6. The death penalty is cruel and unusual because it is irrationally and arbitrarily imposed. The statute requires imposition of a death sentence if the jurors find one or more aggravating circumstances and no mitigating circumstances sufficiently

substantial to call for life imprisonment. Furthermore, the death penalty serves no purpose that is not adequately addressed by a sentence of life imprisonment. Therefore, it violates a defendant's right to due process and to be free from cruel and unusual punishment under the Fifth and Fourteenth Amendments to the United States Constitution and Article 2, §§ 1, 4, and 15 of the Arizona Constitution. Contra, *State v. Pandeli*, 200 Ariz. 365, 382 ¶ 88, 26 P.3d 1136, 1153 (2001), *vacated on other grounds*, 536 U.S. 953, 122 S. Ct. 2654 (2002); *State v. Beaty*, 158 Ariz. 232, 246–47, 762 P.2d 519, 533–34 (1988).

7. The Arizona capital sentencing scheme provides no objective standards to guide the jurors in weighing the aggravating and mitigating circumstances and therefore violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, § 15 of the Arizona Constitution. *Contra, Pandeli*, 200 Ariz. at 382 ¶ 90.

8. Execution by lethal injection is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, § 15 of the Arizona Constitution. *Contra, State v. Lynch*, 238 Ariz. 84, 105 ¶ 77, 357 P.3d 119, 140 (2015), *rev'd on other grounds*, 578 U.S. — , 2016 WL 3041088 (2016).

9. The refusal to permit voir dire of prospective jurors regarding their views on specific aggravating and mitigating factors violates a capital defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article 2, §§ 4 and 24 of the Arizona Constitution. *Contra, State v. Johnson*, 212 Ariz. 425, 434–35 ¶¶ 29–35, 133 P.3d 735, 744–745 (2006).

10. Victim impact evidence admitted at the penalty phase of the trial violated Appellant's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 2, §§ 1, 4, and 15 of the Arizona Constitution. *Contra, Lynn v. Reinstein*, 205 Ariz. 186, 191 ¶¶ 16–17, 68 P.3d 412, 417 (2003).

11. Arizona's death penalty statutory scheme violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, §§ 4 and 15 of the Arizona Constitution because it does not require multiple mitigating factors to be considered cumulatively or require the fact-finder to make specific findings as to each mitigating factor. *Contra, State v. Van Adams*, 194 Ariz. 408, 423 ¶55, 984 P.2d 16, 31 (1999).

12. Evolving standards of decency worldwide require the abolishment of the death penalty pursuant to the Eighth and Fourteenth Amendments to the United States

Constitution, Article 2, §§ 4 and 15 of the Arizona Constitution. contra, *State v. Ross*, 180 Ariz. 598, 602, 886 P.2d 1354, 1358 (1994).

Respectfully submitted,

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