ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. DWANDARRIUS JAMAR ROBINSON, Appellant.	CR–18–0284–AP Maricopa County Superior Court No. CR2012–138236–001

APPELLEE'S ANSWERING BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court correctly deny Robinson's *Batson* challenges to four jurors?

2. Was the jury's A.R.S. § 13–751(F)(6) verdict regarding victim S.H. supported by sufficient evidence?

3. Was the jury's A.R.S. § 13–751(F)(6) verdict regarding victim B.H. supported by sufficient evidence?

4. Did the trial court accurately instruct the jury, pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994), that if a life sentence were imposed, the possibility of parole was unavailable under Arizona law?

5. Does the Arizona death penalty statute constitutionally narrow death-eligibility?

6. Did the prosecutor commit error during the guilt or penalty phases of the trial?

7. Should this Court reconsider several constitutional issues it has previously rejected?

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STATEMENT OF THE CASE

On July 24, 2012, the State indicted Appellant, Dwandarrius Robinson [Robinson] for the following offenses: two counts of first degree murder, each a class 1 dangerous felony and a domestic violence offense (Counts 1 and 2); one count of arson, a class 2 dangerous felony (Count 3); and one count of kidnapping, a class 2 dangerous felony and a domestic violence offense (Count 4). Electronic Index of Record on Appeal [R.O.A.], at 2. The State alleged the following death-qualifying aggravating circumstances as to S.H.: (1) Robinson was previously convicted of a serious offense (A.R.S. § 13–751(F)(2)[1]); (2) Robinson was convicted of one or more homicides committed during the commission of the offense (A.R.S. § 13–751(F)(8)); and (3) Robinson killed S.H. in an especially cruel, or heinous or depraved manner (A.R.S. § 13–751(F)(6)). R.O.A. 37. The State alleged the following death-qualifying aggravating circumstances as to B.H.: (1) Robinson was previously convicted of a serious offense (A.R.S. § 13–751(F)(2)); (2) Robinson killed B.H. in an especially heinous or depraved manner (A.R.S. § 13–751(F)(6)); (3) Robinson was convicted of one or more homicides committed during the commission of the offense (A.R.S. § 13–751(F)(8)); and

[1] Unless otherwise noted, Appellees' citations refer to the 2012 version of Arizona's sentencing statutes, in effect at the time of Robinson's offenses.

(4) Robinson was at least eighteen years of age and B.H. was an unborn child when Robinson killed her. (A.R.S. § 13–751(F)(9)). R.O.A. 37. The facts and evidence, viewed in the light most favorable to upholding the verdicts and sentences imposed,[2] reflect the following.

In July of 2012, Robinson and the victim, S.H., who at the time was 9-months pregnant with victim B.H., were involved in a relationship and had a 2-year-old daughter in common. R.T. 2/20/18 at 78. Although they were sharing an apartment, S.H. was ambivalent about remaining in a relationship with Robinson. *Id*. at 120–21. S.H. was scheduled to deliver B.H. within the week, and on July 18, 2012, the day of the murders, had already begun having contractions. *Id*. at 102–03. At approximately 2:00 p.m. that day, S.H.'s mother attempted to contact her daughter to determine if she needed to be taken to the hospital, but the phone call went to S.H.'s voicemail. *Id*. at 106.

That same day, at approximately at 4:25 p.m., Phoenix Police Officer Scott Ferrante responded to a 911 call regarding an apartment located at 1460 East Bell Road in Phoenix, Arizona. R.T. 2/12/18 at 88–89. Upon his arrival, Ferrante proceeded to apartment 2126. *Id*. at 89, 100. As the officer approached the apartment, he heard "a faint alarm sound" and smelled smoke near the second-floor

[2] *State v. Acuna Valenzuela*, 245 Ariz. 197, 224, ¶ 122 (2018).

landing. *Id*. at 103, 147. Ferrante knocked, announced "Phoenix Police," and entered the unlocked door in order to conduct a welfare check. *Id*. at 105–06. Upon entering, Ferrante saw smoke inside the apartment and noted that all the hallway doors were closed. *Id*. at 109. When Ferrante opened the master bedroom door, "a thick, black smoke" was released from inside the room. *Id*. at 113. The thick smoke filled the entire bedroom, making breathing difficult, and because Ferrante "knew fire would be rolling in shortly," he immediately left the apartment. *Id*. at 113.

Phoenix Fire Department personnel soon arrived on scene, entering the apartment and extinguishing the fire in the master bedroom. R.T. 2/13/18 [p.m.] at 14, 18. After the fire was extinguished, S.H.'s body was discovered on the bedroom floor. *Id*. at 20–21. After further investigation, Phoenix Fire Captain James Thomas determined the fire "was an intentionally set arson fire." R.T. 2/22/18 at 121. Arson investigators found that an accelerant had been poured on the bed, as well as "on [S.H.]'s body and the area around her body." *Id.* at 122.

Sometime after Officer Ferrante left apartment 2126, Robinson approached him and asked if anyone was inside the apartment. R.T. 2/12/18 at 117–18, 149. Robinson told Ferrante that he had called 911 and also said that the mother of his daughter that he was holding may have been inside. *Id*. at 126. Robinson also told Ferrante that he had left the apartment at approximately 1:20 p.m. with his

daughter, and went to a grocery store "somewhere in the avenues." *Id*. at 128. Robinson said that when he returned to the apartment complex, he "visited a couple of apartments within the complex before returning to his apartment." *Id*. at 129.

Robinson remained at the complex during law enforcement's initial investigation. R.T. 2/12/18 at 157–58. When asked, Robinson voluntarily went to the Phoenix Police Department for an interview. *Id*. at 142. That evening, Phoenix Police Detective Raymond Roe interviewed Robinson, who denied all involvement in the murders of S.H. and B.H. The interview was video- and audiotaped. Exhibit [Exh.] 250.

Robinson stated that he worked as a public safety officer for Rio Salado College near 19th Avenue and Northern and that he had finished work around 1:00 p.m. that day. Exh. 250; R.T. 3/7/18 at 36. Robinson told Detective Roe that immediately after he left work, he went to an Albertson's grocery store near his employment, where he purchased two rolls of duct tape, one silver and one black roll of duct tape, as well as a container of lighter fluid. Exh. 250. Robinson said he purchased the tape for a "project [he] was going to work on," involving a "soda box," and the lighter fluid was for a "family day" barbecue that he and S.H. were going to have that weekend. *Id*.

Robinson reported that he then left Albertson's and went home to the apartment he shared with S.H. Exh. 250. Robinson said that when he arrived

home, he briefly spoke with S.H. before again leaving the apartment. *Id*. He said he left the apartment with his two-year-old daughter and drove to the "DMV in Goodyear," in order to inquire about taking a "hazmat test" as part of obtaining his "CDL license." *Id*. Robinson said that he never actually made it to the DMV because he had "never been over there before" and ultimately "got lost." *Id*. Robinson said that at some point he went to a Fry's grocery store to determine his whereabouts. *Id*. However, Robinson stated that he remained in the parking lot, and never went inside the grocery store. *Id*.

Robinson said that he then went back to his apartment complex and visited two friends in their respective apartments. Exh. 250. Robinson stated he was at the first apartment only briefly, but visited with his friend in the second apartment for approximately an hour. *Id*. Robinson advised that at approximately 4:00 p.m., he and his daughter left the complex and drove to a Burger King near 7th Street and Bell Road. *Id*. After remaining at the Burger King for a short time, he then "went home," and "discovered" the windows of his apartment were "smoke black," the "alarm was going off," and he could smell smoke. *Id*. Robinson "immediately dialed 911" reporting that he thought his apartment was "on fire." *Id*. Robinson said he did not know if S.H. was still in the apartment at this point, but that she had been there when he had left earlier and that he wasn't aware she was planning on "going anywhere." *Id*.

Detective Roe told Robinson that he believed Robinson was responsible for S.H.'s death. Exh. 250. Robinson repeatedly denied that he had any involvement in the fire or the deaths of S.H. and B.H. *Id*. Robinson was ultimately arrested and taken into custody. *Id*.; R.T. 3/6/18 at 50.

Further police investigation confirmed that the day of the murders, Robinson had purchased two rolls of duct tape as well as charcoal fluid from Albertson's grocery store, a receipt for which was found in his backpack inside the shared apartment. R.T. 3/6/18 at 83-85; Exh. 250. Also located inside Robinson's backpack was a collection of his paycheck stubs, a partially used roll of silver duct tape, an unopened roll of Gorilla-brand duct tape, partial pieces of "crumpled" duct tape, a grocery bag, and a package of matches with at least one match missing. R.T. 2/14/18 at 79–80, 82, 83–84; R.T. 3/1/18 [p.m.] at 92-93; R.T. 3/6/18 at 84–87. Robinson's fingerprints were found on the partial roll of duct tape, the unopened roll of duct tape, and the grocery bag. R.T. 3/1/18 [p.m.] at 69, 71; R.T. 2/26/18 at 122; R.T. 3/1/18 [p.m.] at 94–95; R.T. 3/1/18 [p.m.] at 89, 91.

On the master bedroom floor, S.H. was found with duct tape wrapped around her neck, chin, and mouth area; duct tape had also been applied to cover her eyes. R.T. 2/13/18 [p.m.] at 20-21; R.T. 2/28/18 at 43; R.T. 3/6/18 at 42–43. S.H.'s wrists had been handcuffed behind her back, and ligatures bound her ankles

together. R.T. 2/28/18 at 28, 63. Also, portions of S.H.'s body were burned. *Id*. at 73.

On July 20, 2012, medical examiner Dr. John Hu performed an autopsy on both S.H. and B.H. R.T. 2/28/18 at 16, 18, 28. During S.H.'s autopsy, Dr. Hu removed the duct tape from her face, handcuffs from her wrists, and ligatures from her ankles.[3] *Id*. at 28. S.H. had "duct tape wrap[ped] around her mouth multiple times," encircling her neck and chin area. *Id*. at 43, 53. After the duct tape had been removed from S.H.'s mouth, Dr. Hu discovered a piece of cloth that had been "folded multiple times to fit into [S.H.'s] mouth." *Id*. at 44–45.

Due to the manner in which it "was folded and shoved into her mouth," the cloth blocked or obstructed S.H.'s "nose and mouth passages." R.T. 3/7/18 at 157. As a result, there would have been "two to five minutes where she [was] losing her ability to breathe." *Id*. at 158. Additionally, blood was found on the cloth, which necessarily had to have "occur[red] while the victim [was] alive." R.T. 2/28/18 at 157–58. S.H.'s teeth marks were also found "on the cloth," and "on [her] tongue." *Id*. at 54, 56.

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[3] After Robinson's arrest, a handcuff key was found inside his pants pocket. R.T 3/6/18 at 54. This handcuff key was not used during the autopsy to remove the handcuffs found on S.H., due to concerns of potentially "contaminating the evidence." R.T. 2/28/18 at 24; R.T. 3/6/18 at 55–56.

During the autopsy, Dr. Hu noted "extensive" hemorrhaging in S.H.'s eyes, "likely caused by strangulation." R.T. 2/28/18 at 62. "[M]ultiple areas" of internal hemorrhaging were also found on S.H.'s neck, which had been inflicted while she was still alive. R.T. 2/28/18 at 59–60; R.T. 3/7/18 at 167. S.H. also sustained third- and fourth-degree burns on her body resulting in fire-related injuries, including "skin blistering and some skin slippage associated with the fire." R.T. 2/28/18 at 73; R.T. 3/7/18 at 110–11. S.H. additionally suffered mild blunt force injuries to both sides of her head, as well as her forehead, as the result of "more than one impact to her head." R.T. 3/7/18 at 144, 147, 150. S.H. was alive when these injuries were inflicted. *Id*. at 149–50.

Dr. Hu concluded that S.H.'s cause of death was due to "homicidal violence." R.T. 2/28/18 at 50. Dr. Hu could not determine S.H.'s exact manner of death: "asphyxia due to smothering," "asphyxia due to strangulation," "blunt force trauma," or "ligature restraint." *Id*. at 115, 118–19. However, he noted that "any one of those four mechanisms independently could have killed" S.H. *Id*. at 119.

Dr. Hu also performed an autopsy on B.H. after the baby had been removed from S.H.'s abdominal area. R.T. 2/28/18 at 28–29. The baby's gestational age was 38 weeks, and B.H. was "full term at the time." *Id*. at 31, 167. B.H.'s cause of death was "[i]ntrauterine fetal death due to maternal death." *Id*. at 31. Dr. Hu concluded that B.H. "died because [her] mother died." *Id*.

Guilt-Phase.

Jury trial proceedings began on January 22, 2018. R.O.A. at 382. On March 26, 2018, the jurors convicted Robinson of two counts of first-degree murder (Counts 1 and 2), arson of an occupied structure (Count 3), and kidnapping (Count 4). R.T. 3/26/18 at 21–22; R.O.A. 560, 561, 562, and 563.

Aggravation Phase.

During the aggravation phase, the State relied on the evidence presented during trial. R.T. 3/28/18 at 15. The jurors found proved beyond a reasonable doubt the following death-qualifying aggravating circumstances as to S.H.: (1) Robinson was previously convicted of a serious offense (A.R.S. § 13–751(F)(2)); (2) Robinson was convicted of one or more homicides committed during the commission of the offense (A.R.S. § 13–751(F)(8)); and (3) Robinson killed S.H. in an especially cruel, or heinous or depraved manner (A.R.S. § 13–751(F)(6)). R.O.A. 578; R.T. 4/2/18 at 15–16.

The jurors found proved beyond a reasonable doubt the following death-qualifying aggravating circumstances as to B.H.: (1) Robinson was previously convicted of a serious offense (A.R.S. § 13–751(F)(2)); (2) Robinson killed B.H. in an especially heinous or depraved manner (A.R.S. § 13–751(F)(6)); (3) Robinson was convicted of one or more homicides committed during the commission of the offense (A.R.S. § 13–751(F)(8)); and (4) Robinson was at least eighteen years of

age and B.H. was an unborn child when Robinson killed her. (A.R.S. § 13–751(F)(9)). R.O.A. 579; R.T. 4/2/18 at 16–17.

Penalty Phase.

During the penalty phase, the State presented victim impact statements from S.H.'s stepfather and mother. R.T. 4/3/18, at 26–27, 28–30. The State also presented the video-recorded statement of S.H. and Robinson's 8-year-old daughter. *Id*. at 30, 31.

In mitigation, the defense presented the testimony of Robinson's sister, Kiiesha (R.T. 4/3/18 at 46–158; R.T. 4/4/18 at 7–55, 62–124); Robinson's aunt, Phyllis (R.T. 4/5/18 at 10–66, 69–111); Kathy Humphrey, who was a teacher at Westwind Preparatory Academy, a charter school where Robinson was a student from late 2008 until May 2009 (R.T. 4/5/18 at 112–143); Ricky Riddle, a family friend of Robinson (R.T. 4/9/18 at 22–60); Robinson's uncle, Jerry (R.T. 4/10/18 at 19–164; R.T. 4/11 /18 [a.m.] at 11–61); Robinson's mother, Coretta (R.T. 4/11/18 [p.m.] at 5–48, 50–109); Robinson's younger sister, Jaciah (R.T. 4/12/18 at 8–54, 60–76); Brenda Grover, a teacher from Richwood High School in Louisiana where Robinson attended school (R.T. 4/16/18 at 20–85); Julia Kirby, an employee with the Ouachita Parish Correctional Center in Monroe, Louisiana (R.T. 4/16/18 at 87–122); Matt Allen, an assistant principal at Westwind Preparatory Academy (R.T. 4/17/18 [a.m.] at 5–58); Kris Johnson, a former principal of Westwind Preparatory

Academy (R.T. 4/17/18 [p.m.] at 5–56, 79–92); Dexter Houston, an assistant principal at Ri[ch]wood High School in Monroe, Louisiana (R.T. 4/18/12 at 5–28); Charles Winston, an assistant principal at New Vision Learning Academy in Monroe, Louisiana where Robinson was a student (R.T. 4/18/12 at 30–83); Terraine Dowles, a friend of Robinson's who knew him while attending high school in Monroe, Louisiana (R.T. 4/23/18 at 20–81); Dr. Craig Forsyth, a forensic sociologist called to testify about Robinson's life in Louisiana, and how that life contributed to his criminality, and who also addressed risk factors related to Robinson's upbringing and childhood in Louisiana (R.T. 4/24/18 [a.m.] at 21–67; R.T. 4/24/18 [p.m.] 6–108; R.T. 4/25/18 at 5–36); and Nikki Wade-McFarland, a teacher at Richwood High School in Monroe, Louisiana, who was a mentor to Robinson's sister Kiiesha, and also knew Robinson as a child (R.T. 4/26/18 at 56–116, 117–18).

The majority of the mitigation evidence presented by defense counsel focused on Robinson's impoverished and dysfunctional childhood and upbringing, both as it related to Robinson's own family situation, as well as to the negative cultural environment that existed in Monroe, Louisiana.

Robinson's older sister, Kiiesha, testified extensively concerning Robinson's childhood. Kiiesha explained their mother Coretta was never really involved in their lives as a maternal influence because she spent "most of her life in an out of

prison or on the streets." R.T. 4/3/18 at 48. Consequently, they would generally visit her "in jail or prison." *Id*. Robinson's father also "spent most of his life in prison," and Robinson and his sister were actually raised by their grandmother, Betty. *Id*. at 48-49. Kiiesha described her grandmother Betty as "tough" and as someone who did not "show her emotions." *Id*. at 63-64. Kiiesha testified that Coretta and Betty did not get along, and stated that she had witnessed them "pulling knives and physically fighting each other." *Id*. at 72-73. According to Kiiesha, this family dysfunction was generational, as Coretta also did not get along with one of her other daughters, and they could not be around each other for "more than five minutes." *Id*. at 77.

Kiiesha testified that Robinson's younger sister Jaciah had been molested by one of Betty's live-in boyfriends, and when Betty was informed of this, she ignored it. R.T. 4/3/18 at 80, 82-83. Kiiesha also described herself as having been molested by an older cousin when she was approximately six or seven years of age, but when Betty walked in and observed it, she punished Kiiesha rather than the older cousin. *Id*. at 120.

Betty received government assistance to support herself and the children and would also regularly receive boxes of food from a food pantry or from their church. R.T. 4/3/18 at 66. Kiiesha stated that she and Robinson and other family members lived in numerous residences in Monroe, which were located in very bad areas of

town and were surrounded by violence and crime. *Id*. at 115-20. One of Betty's live-in boyfriends during this time was "Bill," who was "straight mean for no reason," and would be mean or abusive to the children when Betty was not there. *Id*. at 126-28. Bill was a "falling down" drunk, and he and Betty would continually fight. *Id*. at 128. According to Kiiesha, 911 calls were frequently made from the home. *Id*. 128-29.

Kiiesha eventually left Betty's home to live with a mentor. R.T. 4/3/18 at 146-47. Robinson remained in the home until he was approximately 16 years of age, when he moved to Arizona to live with his uncle, Jerry Robinson. *Id*. at 148. Robinson was in the "10th or 11th grade" when he moved in with his uncle Jerry. R.T. 4/10/18 at 99.

Robinson presented Dr. Craig Forsyth, a forensic sociologist, to testify to Robinson's "life in Louisiana, and how that life contributed to his criminality." R.T. 4/24/18 [a.m.] at 22-23. Forsyth testified that Robinson's risk factors included: poor parental maternal self-care; maternal alcohol or drug use during pregnancy; Robinson's disruptive temperament in his early school classes/grades; parental substance abuse or criminal behavior; grandparental criminal behavior; residing in a disorganized neighborhood with criminal and deviant norms; poverty or low social economic status which was likely to lead to high-risk peer associations

and unemployment; and intergenerational poverty. R.T. 4/24/18 [a.m.] at 50-52, 53, 57, 58, 59, 61, 62.

Additional risk factors Dr. Forsyth identified in Robinson's upbringing included: serious discord among the family caretakers; a large-sized family that may have negatively impacted communication and the quality of interactions between the family members; harsh and/or erratic discipline practices with no supervision; and victimization or exposure to violence. R.T. 4/24/18 [p.m.] at 7-8, 8-10, 19. As further mitigation, defense counsel presented the criminal records of Robinson's mother, Coretta, and father, Phillip. R. T. 5/2/18, at 29.

At the conclusion of the mitigation presentation, the State called Candace Jackson in rebuttal, who had recently had a son with Robinson. R.T. 4/30/18 at 59, 61–62. Ms. Jackson testified:

> [PROSECUTOR]. And when you told him that you were pregnant with your son, had you known the sex or the gender of your child at that time?
>
> [CANDACE JACKSON]. No.
>
> Q. So it was very early on in the pregnancy?
>
> A. Yes, sir.
>
> Q. And when you spoke to him about you being pregnant, do you recall what his reaction was?
>
> A. That if it was a girl, I needed to kill it.
>
> Q. And when he said if it was a girl you needed to kill it, what did that mean to you?

A. That he didn't want nothing to do with me or my child.

Q. After he had said that -- previously you said you didn't really kind of take him serious at that time; is that fair?

A. You could say that. Until he left. Then that's when I knew he just didn't want anything to do with us.

Q. Okay. After he had told you that if you were having -- and he said if it was specifically a girl to kill it?

A. Yes.

Q. Did he say why if it was a girl to kill it and not a boy?

A. Because he didn't want anymore [sic] girls.

R.T. 4/30/18 at 76–77.

On May 21, 2018, the jurors returned death verdicts on Counts 1 and 2. R.O.A. 639, 640. The trial court subsequently sentenced Robinson to 15 years imprisonment on Count 3 (arson of an occupied structure) and 15 years imprisonment on Count 4 (kidnapping). R.O.A. 673. Count 3 was ordered to run concurrently with Counts 1 and 2; Count 4 was ordered to run consecutively to Count 3 and concurrently with Counts 1 and 2. *Id*.

On May 31, 2020, the Maricopa County Superior Court Clerk filed a timely notice of appeal from the judgments and sentences on Robinson's behalf. R.O.A. 679. This Court has jurisdiction under Arizona Constitution Article VI, Section 5(3), and Arizona Revised Statutes §§ 13–4031, and -4033(A).

ARGUMENTS

I

THE TRIAL COURT CORRECTLY DENIED ROBINSON'S BATSON CHALLENGES TO FOUR PROSPECTIVE JURORS.

Robinson contends that the trial court abused its discretion when it denied his *Batson*[4] challenges to the State's peremptory strikes of four venire members. O.B. 28–61. Robinson is mistaken.

A. Standard of review.

The exclusion of a potential juror solely on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). This Court reviews a trial court's rejection of a *Batson* challenge for clear error. *State v. Hardy*, 230 Ariz. 281, 285, ¶ 11 (2012). Robinson bears the burden of proving purposeful discrimination, and this Court "will not reverse a trial court's ruling on a *Batson* challenge unless it is clearly erroneous." *State v. Smith*, CR–18–0295–AP, 2020 WL 6478480, at *9, ¶ 62, *10, ¶ 67 (Ariz. Nov. 4, 2020) (*citing Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

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[4] *Batson v. Kentucky*, 476 U.S. 79 (1986).

B. Relevant facts.

During the empanelment proceedings, Robinson's counsel challenged four of the State's peremptory strikes pursuant to *Batson*. R.T. 2/8/18 at 121–22. These challenges were to the prosecution's striking two African-American jurors (Jurors 145 and 358), one Hispanic juror (Juror 260), and one Native American juror (Juror 300) from the panel. *Id*. at 122. The court asked defense counsel to make a general record of the bases for her objections. *Id.* Defense counsel objected based on the fact that four of the State's 10 peremptory strikes were minority venire members. *Id*. The court then asked for the prosecution to provide their race-neutral explanations for each of these strikes. *Id*. at 124.

The prosecution then set forth the following reasons for the peremptory strikes:

1. *Juror 145.*

> [PROSECUTOR]. 145. 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 are 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.

R.T. 2/8/18 at 126. After this explanation, the court asked the prosecutor to address the peremptory strike of the next juror. *Id*.

. . .

. . .

2. *Juror 260.*

> [PROSECUTOR]. Judge, this 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 … [w]as 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.

R.T. 2/8/18 at 127–28. The court then asked if the prospective juror had identified himself as Hispanic in his questionnaire; defense counsel noted he had. *Id*. at 128.

3. *Juror 300.*

> [PROSECUTOR]. 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.

R.T. 2/8/18 at 125. The court then asked the prosecutor to go on to the next juror. *Id*. at 126.

4. *Juror 358.*

> [PROSECUTOR]. Judge, on 358, specifically, she was treated unfairly by the police when they pulled her over.
>
> But the one more concerning for the State is that when 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 a 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.

R.T. 2/8/18 at 126–27. The prosecutor went on to point out that the juror had indicated she had "anxiety attacks in the past," and further appraised the court that he had been counsel in a prior capital prosecution, and in that case the court "had to excuse a juror who was having anxiety issues." *Id*. at 127.

The court found there were "race-neutral reasons" for all of the prosecution's strikes. R.T. 2/8/18 at 128. The court then asked defense counsel for the reasons they believed there had been "purposeful discrimination." *Id*. at 128–29.

> [DEFENSE COUNSEL]. Well, Your Honor, the only thing I would leave the court with is, as far as the numbers that were left with--and that's all I want to finish up the record on--is that we are now left

> with a jury panel of basically only two--one, two--minorities. And that is all that we are left with.
>
> Now--and as far as the strikes, as to No. 300, the only thing I would like to say about that, I believe that the only thing I heard was that this was a juror who just basically said that they believed in people being good and that that was the reason to strike. So I would still say that that was just a pretext.

R.T. 2/8/18 at 129. Defense counsel noted that it appeared the final jury panel would include two Hispanics and one African-American juror.[5] *Id*. The court then asked the prosecution to assess their understanding of who would be left on the panel "in the way of minority jurors," to which the prosecutor replied, "It's going to take a minute, Judge. We didn't look at the race. If you can give us just a moment." *Id*. at 129–30.

In finding no purposeful discrimination and rejecting the *Batson* challenges, the court stated:

> I'm going to reject the Batson challenge. 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.

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[5] Robinson and both victims are African-American. R.T. 2/8/18 at 124. The panel of 36 jurors, prior to each party's peremptory strikes, consisted of "three African-American [ ] one Native American and four Hispanic" jurors. *Id*. at 130. Prospective Juror 215, who was African-American, was released from the panel due to illness without objection from either party, prior to the panel being reduced to 36 prospective jurors. *Id*. at 44–45, 130.

> 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.

R.T. 2/8/18 at 131.

C. The Court correctly denied Robinson's *Batson* challenges.

Peremptory strikes occupy "an important position in our trial procedures" and serve as "a necessary part of trial by jury." *Holland v. Illinois*, 493 U.S. 474, 481 (1990) (citation omitted). By "enabling each side to exclude those jurors it believes will be most partial toward the other side," peremptory challenges "assur[e] the selection of a qualified *and unbiased* jury." *Id*. (citation omitted; emphasis in original). As a result, a peremptory strike does not violate the Fourteenth Amendment's Equal Protection Clause unless the defendant meets the burden of showing that the prosecutor engaged in "purposeful discrimination." *See Batson*, 476 U.S. at 93.

A defendant's challenge to the State's use of a peremptory strike based on alleged racial discrimination involves a three-step inquiry. *Batson*, 476 U.S. at 96–98. First, a trial court must determine whether the defendant has made a prima facie

showing that the prosecutor exercised a peremptory challenge on the basis of race. *Id*. at 96–97. If this showing is made, the burden shifts to the State to present a race-neutral explanation for the strike. *Id*. at 97–98. At this step, the issue is the "facial validity" of the explanation, and, thus, the explanation need not be "persuasive or even plausible," so long as it is facially neutral. *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995) (quotations omitted). Third, the court must then determine whether the opponent of the strike has carried his burden of proving purposeful discrimination. *Id*. at 767; *Batson*, 476 U.S. at 98.

Once the prosecutor offers a race-neutral explanation for exercising the peremptory strike, the defendant has the burden of persuading the trial court that the prosecutor's reason was pretextual and that its true motivation was to purposefully discriminate. *See Purkett*, 514 U.S. at 767; *State v. Gay*, 214 Ariz. 214, 220, ¶ 17 (App. 2007). This fact-intensive analysis requires the trial court to consider the plausibility of the prosecutor's stated reason in light of accepted trial strategy. *See Gay*, 214 Ariz. at 220, ¶ 17. In the third step, the trial court evaluates the striking party's credibility, considering the demeanor of the striking attorney and the excluded juror to determine whether the race-neutral rationale is a pretext for discrimination. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008); *see also State v. Gallardo*, 225 Ariz. 560, 565, ¶ 11 (2010) (step three requires the trial judge to assess the prosecutor's demeanor, which is the best evidence of his or her

credibility). Because the "trial court is in a better position to assess" credibility than an appellate court, its "finding at this step is due much deference." *State v. Newell*, 212 Ariz. 389, 401, ¶ 54 (2006). And, "[a]lthough not dispositive, the fact that the state accepted other minority jurors on the venire is indicative of a nondiscriminatory motive." *Gallardo*, 225 Ariz. at 565, ¶ 13 (internal quotation marks and alterations omitted).

Robinson argues none of the jurors whom the State sought to strike "expressed the view that prevented or substantially impaired the performance of their duty as a juror," and this fact combined with "the fact that all the jurors the State struck were members of a minority should have given the court more concern than it did." O.B. at 60. However, of the State's 10 peremptory strikes, only four were members of a minority. R.T. 2/8/18 at 122. In fact, after the State's peremptory strikes, three minority jurors remained on the panel. *Id*. at 129. It should be noted Robinson's counsel also removed a minority juror from the panel of 36 prospective jurors. *Id*. at 124.

1. *Juror 145.*

The prosecutor's stated reasons for striking Juror 145 related to his acknowledgment that the decision to impose the death penalty "terrifie[d] him." R.T. 2/8/18 at 126. This is a facially race-neutral reason to strike a juror. *See State v. Escalante-Orozco*, 241 Ariz. 254, 271, ¶ 36 (2017) (*abrogated on other grounds*

by State v. Escalante, 245 Ariz. 135 (2018)) (explaining that potential reluctance to impose the death penalty was a race-neutral reason); *State v. Bolton*, 182 Ariz. 290, 302 (1995) (determining that prosecutors may strike jurors "who have expressed reservations about capital punishment" even if they are "not excludable for cause"). The trial court did not commit clear error when finding the prosecutor's rationale for striking Juror 145 was not purposefully discriminatory.

2. *Juror 260.*

The prosecutor's stated reasons for striking Juror 260 included the fact that the juror indicated there was a time he felt the laws in Arizona were too harsh, and that he had problems with people having been sentenced to death, only to find out later the person was innocent of the crime. R.T. 2/8/18 at 127–28. The prosecutor additionally noted that the prospective juror seemed confused about the burden of proof. *Id*. at 128. These are facially race-neutral reasons for striking a juror. As noted above, concern over imposition of the death penalty is a race-neutral reason to strike a prospective juror.

On these facts, there was no *Batson* violation. *Escalante-Orozco*, 241 Ariz. at 271, ¶ 36 (upholding a strike based on perceived "opposition to the death penalty or potential reluctance in imposing the death penalty if warranted"). *Batson* permits prosecutors to strike jurors "who have expressed reservations about capital

punishment" even when they are "not excludable for cause." *Bolton*, 182 Ariz. at 302.

Another basis for the prosecution's peremptory strike of Juror 260 was that the juror had been part of a church program wherein members would write letters to inmates as a way to uplift and encourage them. R.T. 2/8/18 at 127. The prosecution's concern that Juror 260 would be unduly sympathetic to Robinson was a race-neutral reason for the peremptory strike. *See State v. Hernandez*, 170 Ariz. 301, 305–306 (App.1991) ("a prosecutor's belief that certain persons might react sympathetically to a defendant is a legitimate basis for a peremptory strike if the perceived sympathy is not based upon race"); *also cf. United States v. Johnson*, 905 F.2d 222, 223 (8th Cir. 1990) (proper to strike prospective juror who worked with division of family services because of possible sympathy toward defendant).

The prosecution's reasons for its peremptory strike of Juror 260 were appropriate, race-neutral explanations for the strike. The trial court did not commit clear error when finding the prosecutor's reasons for striking Juror 260 were not purposefully discriminatory.

3. *Juror 300.*

During the empanelment proceedings, defense counsel stated its objection to Juror 300 was that the State's challenge was a "pretext" because the juror "just basically said that they believed in people being good and that that was the reason

to strike." R.T. 2/8/18 at 129. Robinson now argues there was nothing in the reasons the State advanced supporting the court's finding "that the strike of Juror 300 was not a pretext for eliminating yet another minority juror." O.B. at 56.

Included in the prosecution's stated reasons for the peremptory strike of Juror 300 was the fact that the juror indicated she believed that "all people are good and have good morals," and further believed "committing crime is not the core of any one of us. You have to be conditioned to do it." R.T. 2/8/18 at 125. The prosecutor's concern that Juror 300 may have difficulty accepting that Robinson could have committed such heinous and shocking crimes, given her fixed belief that all people are good and that people must be conditioned to commit crime, was a race-neutral reason for the State's peremptory strike.

Given Juror 300's belief regarding an individual's inherent goodness, the prosecution could reasonably have been concerned that she would be unduly sympathetic to Robinson's noticed mitigation of his abusive and dysfunctional childhood. This peremptory strike was reasoned trial strategy and not purposeful discrimination. *Hernandez*, 170 Ariz. at 305–306 ("a prosecutor's belief that certain persons might react sympathetically to a defendant is a legitimate basis for a peremptory strike if the perceived sympathy is not based upon race"); *People v. Krebs*, 452 P.3d 609, 633 (2019) (finding no *Batson* error when a juror was struck

"because she may have been 'overly sympathetic' to the defendant's evidence 'of abuse and neglect during his childhood'") (internal citation omitted).

Another of the prosecution's stated reasons for striking Juror 300 was that she had relatives who had been in prison and a stepson who had been charged with a sexual assault-related offense. R.T. 2/8/18 at 125. "Courts throughout the country have accepted as race-neutral reasons the fact that a venireperson's relative has been convicted of a crime." *Edmonds v. State*, 812 A.2d 1034, 1044–45 (2002) (collecting cases). *See also United States v. Johnson*, 941 F.2d 1102, 1109 (10th Cir. 1991) (prosecution's strike of juror whose family member had been convicted of a crime did "not violate equal protection as a matter of law because no discriminatory intent is inherent in the prosecutor's explanation").

An additional rationale provided by the prosecution for the peremptory strike was that Juror 300 had expressed concerns about viewing photographs as part of the trial. R.T. 2/8/18, at 125. On Juror 300's questionnaire, when asked if viewing graphic photographs showing the victim's injuries or autopsy photographs would "affect [her] ability to serve as a fair and impartial juror," Juror 300 responded "Yes." R.O.A. 669, Juror 300 Questionnaire, Question 77, at 23. When asked to explain her answer, Juror 300 wrote, "[P]hotographs do not state the defendant committed the crime." *Id*. Juror 300 acknowledged that viewing graphic photographs would affect her ability to serve as a fair and impartial juror. The

prosecutor's peremptory challenge was race-neutral and not purposefully discriminatory. *See Gay*, 214 Ariz. at 220–21, ¶ 18 (trial court did not err by finding State's explanation facially race-neutral where juror "had problems with graphic details and gruesome photos"). Here, the juror's written response to the question related to graphic photographs was somewhat puzzling. The prosecution's decision to strike this juror was reasonable trial strategy, especially in light of the gruesome nature of the photographs that the jurors would be asked to review in this case.

The prosecution provided numerous race-neutral reasons for its peremptory strike of Juror 300. The trial court did not commit clear error when finding the prosecutor's reasons for striking Juror 300 were not purposefully discriminatory.

4. *Juror 358.*

The prosecutor's stated reasons for striking Juror 358 included that the juror reported she had previously been treated unfairly by the police during a traffic stop. R.T. 2/8/18 at 126. In her questionnaire, Juror 358 described this as "[r]acial profiling by cops pulling over the car assuming we did not own it or live in my area." R.O.A. 653, Juror 358 Questionnaire, Question 67, at 20. Prior negative encounters with police may constitute a valid reason to strike jurors when the State's case relies on police testimony. *State v. Roque*, 213 Ariz. 193, 204, ¶ 14 (2006) (*abrogated on other grounds by Escalante-Orozco*, 241 Ariz. 254) (juror had

"some personal problems with police officers that he attributed to racial motivation").

Additionally, in her questionnaire, Juror 358 disclosed that she had been prescribed medication for anxiety in the past. R.O.A. 653, Juror 358 Questionnaire, Question 70, at 19–20. As support for the prosecution's strike of this juror, the prosecutor pointed out that Juror 358 had "anxiety attacks in the past," and further advised the Court that in a prior capital prosecution where he was counsel, the court "had to excuse a juror who was having anxiety issues." R.T. 2/8/18 at 127. This reason given was facially race-neutral and not purposeful discrimination.

Additional reasons given for the prosecution's strike of Juror 358 related to the juror's responses regarding the amount of evidence the State must produce at trial. The prosecutor stated 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." R.T. 2/8/18 at 127. The prosecutor noted that the State's case was "circumstantial." *Id*.

Robinson asserts the State mischaracterized Juror 358's questionnaire responses regarding the extent of evidence she would require, arguing that Juror 358 actually said that the State did not have to present such evidence as "a video, a witness, or DNA" evidence in order to prove their case. O.B. at 59. However, in her questionnaire related to whether she believed "the State must present scientific evidence," Juror 358 indicated "No," but added, "It would help prove the case

however, if witness saw the crime or there is video this can impact my thoughts." R.O.A. 653, Juror 358 Questionnaire, Question 52, at 16. When providing the rationale for striking Juror 358, the prosecutor noted, "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." R.T. 2/8/18 at 126–27. The prosecutor reasonably had concerns about the level of proof Juror 358 would need in order to convict; these concerns were race-neutral and not purposefully discriminatory. *See Kirkland v. State*, 726 S.E.2d 644, 649 (2012) (finding no *Batson* error where juror stated forensic evidence would be helpful to establish defendant's guilt).

The prosecution provided numerous race-neutral reasons for its peremptory strike of Juror 358. The trial court did not commit clear error when concluding the prosecutor's reasons for striking Juror 358 were not purposefully discriminatory.

In addition to the foregoing, it should be noted that of the State's 10 peremptory strikes, only four were members of a minority. R.T. 2/8/18 at 122. In fact, after both parties exercised their peremptory strikes, three minority jurors remained on the panel. *Id*. at 129. This Court has acknowledged that, "[a]lthough not dispositive, the fact that the state accepted other minority jurors on the venire is indicative of a nondiscriminatory motive." *Gallardo*, 225 Ariz. at 565, ¶ 13 (internal quotation marks and alterations omitted).

Further indicia of the State's lack of purposeful discrimination is shown by the record. When the court asked the prosecution to assess their understanding of who would be left on the panel "in the way of minority jurors," the prosecutor indicated it would take them a moment to provide the court an answer, because they "didn't look at the race." R.T. 2/8/18 at 129–30. The trial court was in a position to assess the prosecutors' demeanor when giving their race-neutral reasons for the State's peremptory strikes, and found no purposeful discrimination. The trial court's assessment "is due much deference." *Newell*, 212 Ariz. at 401, ¶ 54.

Robinson bears the burden of proving purposeful discrimination, and this Court will not reverse the trial court's determination unless the reasons provided by the State are clearly pretextual. The prosecution's explanations for each peremptory strike were credible, race-neutral, and not purposefully discriminatory. The record reflects the absence of discriminatory motive and the State's race-neutral reason for its strikes. The court—which was in the best position to observe the jurors and assess the prosecutors' credibility—did not commit clear error when finding the prosecutors' peremptory challenges were not motivated by purposeful discrimination, and thus not violative of *Batson*. Robinson's *Batson* claims are without merit.

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II

SUFFICIENT EVIDENCE SUPPORTS THE JURY'S FINDINGS THAT THE MURDER OF S.H. WAS COMMITTED IN AN ESPECIALLY CRUEL AND AN ESPECIALLY HEINOUS OR DEPRAVED MANNER.

The jury found that Robinson's murder of S.H. was committed in an especially cruel manner, as well as an especially heinous or depraved manner. Robinson argues the jury's findings of especially cruel, and especially heinous or depraved for purposes of the (F)(6) aggravating circumstance, were not supported by substantial evidence. O.B. at 62–72. In relation to the cruelty aggravator, Robinson specifically argues that because the State could not prove the order of events, it could not be established that S.H. was conscious and experienced physical pain or mental anguish. O.B. at 67–69. In relation to the heinous or depraved aggravator, Robinson argues that because the State failed to present conclusive evidence that S.H. was alive at the time of the fire, it was impossible for a jury to determine whether there was gratuitous violence or needless mutilation. O.B. at 69–72. Robinson's arguments are without merit.

A. Standard of Review.

This Court reviews the sufficiency of the evidence regarding a jury's finding of an aggravating circumstance for an abuse of discretion, viewing the evidence in the light most favorable to sustain the jury's verdict. *Acuna Valenzuela*, 245 Ariz. at 224, ¶ 122. There is no abuse of discretion if "there is any reasonable evidence in

the record" to support the jury's finding. *State v. Gunches*, 240 Ariz. 198, 207, ¶ 41 (2016) (quoting *State v. Delahanty*, 226 Ariz. 502, 508, ¶ 36 (2011) and *State v. Morris*, 215 Ariz. 324, 341, ¶ 77 (2007).

To find that a murder is especially cruel with respect to the (F)(6) aggravating circumstance, jurors must find that the victim consciously suffered physical or mental pain and that the defendant knew or should have known that the victim would suffer. *State v. Sanders*, 245 Ariz. 113, 126, ¶ 42 (2018). "The terms 'heinous' and 'depraved' focus on the defendant's mental state and attitude as reflected by his words and actions." *State v. Brewer*, 170 Ariz. 486, 502 (1992) (citing *State v. Wallace*, 151 Ariz. 362, 367 (1986)). This Court considers "the entire murder transaction, not merely the fatal act, in evaluating whether a murder was committed in an especially cruel manner." *State v. Goudeau*, 239 Ariz. 421, 464, ¶ 184 (2016) (quoting *State v. McCray*, 218 Ariz. 252, 259, ¶ 31 (2008)). "Post-murder behavior is relevant to prove heinousness or depravity when it provides evidence of 'a killer's vile state of mind at the time of the murder ....'" *State v. Greene*, 192 Ariz. 431, 440, ¶ 39 (1998) (quoting *State v. Gretzler*, 135 Ariz. 42, 51 (1983)).

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B. Relevant facts.

During the capital aggravation phase the State relied on the evidence presented during trial. R.T. 3/28/18 at 15. Regarding the "especially cruel" aggravating factor, the jury was instructed:

> Especially cruel. The term cruel focuses on the victim's pain and suffering. To find that the murder was committed in an especially cruel manner, you must find that the victim consciously suffered physical or mental pain, distress or anguish prior to death. The defendant must know or should have known that the victim would suffer.

R.T. 3/28/18 at 11–12.

Regarding the "especially heinous or depraved" aggravating factor, the jury was instructed:

> Inflicted gratuitous violence. To find that the defendant inflicted gratuitous violence, you must find that the defendant intentionally inflicted violence clearly beyond what was necessary to kill the victim, and that the defendant continued to inflict this violence after the defendant knew or should have known that the defendant had inflicted a fatal injury.
>
> Needless mutilation. Needlessly mutilating means that the defendant, apart from the killing, committed acts after the victim's death and separate from the acts that led to the death of the victim, with the intent to disfigure the victim's body. Needlessly mutilating indicates a mental state marked by debasement.

R.T. 3/28/18 at 12, 13.

The jurors then found the following death-qualifying aggravating circumstances as to S.H.: (1) Robinson was previously convicted of a serious offense[6] (A.R.S. § 13–751(F)(2)); (2) Robinson was convicted of one or more homicides committed during the commission of the offense (A.R.S. § 13–751(F)(8));[7] and (3) Robinson killed S.H. in an especially cruel, or heinous or depraved manner (A.R.S. § 13–751(F)(6)).[8] R.O.A. 578; R.T. 4/2/18 at 15–16.

C. Law and argument

Robinson committed the murders after August 1, 2002; therefore, this Court reviews the jury's imposition of the death sentences for an abuse of discretion. A.R.S. § 13–756(A). This Court "will find a jury did not abuse its discretion if reasonable evidence supports the finding of aggravating circumstances and imposition of the death penalty. Evidence is sufficient to support the finding of an aggravating circumstance if reasonable persons could conclude it establishes the

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[6] Counts 3 and 4, arson of an occupied structure and kidnapping. R.O.A. 562, 563, 578, 579.

[7] On 1/16/18, the court entered its *nunc pro tunc* order, correcting the 10/13/17 minute entry to reflect that the (F)(8) aggravating factor as to counts 1 and 2 had not been dismissed. R.O.A. 360.

[8] The jurors unanimously found both the especially cruel and the especially heinous or depraved prongs of the (F)(6) aggravator. R.O.A. 578.

circumstance beyond a reasonable doubt." *State v. Benson*, 232 Ariz. 452, 467, ¶ 65 (2013) (internal citations omitted).

First-degree murder is aggravated when committed in "an especially heinous, cruel or depraved manner." *State v. Lynch*, 225 Ariz. 27, 41, ¶ 77 (2010); A.R.S. § 13–751(F)(6). Although written in the disjunctive, this describes one aggravating circumstance, and this Court will uphold the (F)(6) finding if the evidence supports one of the statutory grounds. *Id*. Here, the jury found that S.H.'s murder was (1) especially cruel, *and* (2) especially heinous or depraved. R.T. 4/2/18 at 15–16; R.O.A. 578. Sufficient evidence supporting one of these findings satisfies the (F)(6) aggravator. *See State v. Villalobos*, 225 Ariz. 74, 84, ¶ 44 (2010) ("A finding of cruelty alone is sufficient to establish the (F)(6) aggravator.") (quotation omitted); *State v. Hausner*, 230 Ariz. 60, 81, ¶ 96 (2012) ((F)(6) aggravator satisfied where jury's heinous or depraved finding supported by the evidence; court need not address whether evidence also supported jury's finding of cruelty).

1. *Sufficient evidence established that S.H.'s murder was especially cruel.*

To find that a murder is especially cruel under the (F)(6) aggravating circumstance, jurors must find that the victim consciously suffered physical or mental pain and that the defendant knew or should have known that the victim would suffer. *Sanders*, 245 Ariz. at 126, ¶ 42; *State v. Tucker*, 215 Ariz. 298, 310, ¶

31 (2007). Mental pain or anguish "includes the victim's uncertainty as to her ultimate fate." *Goudeau*, 239 Ariz. at 463, ¶ 184 (internal citation omitted).

Sufficient evidence established that S.H. suffered physical pain and mental anguish, and that Robinson knew or should have known she would suffer. Robinson restrained nine-month pregnant S.H. by using handcuffs to force her hands behind her back, and he also knotted men's ties together as ligatures which he used along with duct tape to bind her ankles together. R.T. 2/26/18 at 129, 132, 134; R.T. 2/28/18 at 63–64. It is reasonable for the jury to have found that S.H. was alive and conscious when she was restrained, and in fact, Robinson's medical expert agreed that there would be "no need to restrain someone who's unconscious." R.T. 3/7/18 at 152–53. *See State v. Parker*, 231 Ariz. 391, 410, ¶ 88 (2013) (noting "that Faye was bound supports a finding that she was conscious, and so would have suffered mental anguish"); *State v. Hernandez,* 232 Ariz. 313, 325, ¶ 57 (2013) ((F)(6) mental anguish finding supported by fact that victim's hands were bound behind her back); *Gallardo*, 225 Ariz. at 565–66, ¶ 17 ("Rudy almost certainly was conscious when bound, as there is no reason to bind an unconscious person."); *Lynch*, 225 Ariz. at 41, ¶ 79 (finding mental anguish when conscious victim was bound to chair); *State v. Djerf*, 191 Ariz. 583, 596, ¶ 49 (1998) ("There is no reason to bind an unconscious person who offers no resistance."); *State v.*

Bible, 175 Ariz. 549, 604–05 (1993) (noting that "[t]he fact that her hands were bound indicates that she was conscious and tied-up to prevent struggling").

The very fact that S.H. was bound supports the jury's finding that she suffered mental anguish regarding her ultimate fate. This Court has found "[a] murder is especially cruel when 'the victim consciously experienced physical or mental pain prior to death, and the defendant knew or should have known that suffering would occur.'" *Lynch*, 225 Ariz. at 41, ¶ 78 (quoting *State v. Trostle*, 191 Ariz. 4, 18 (1997) (internal citation omitted)). Here, given how long it would have taken Robinson to handcuff S.H., apply ligatures and duct tape to her ankles, repeatedly wrap duct tape around her mouth, chin, and neck, and apply duct tape to obscure her vision, it was reasonable for the jurors to conclude that S.H. experienced significant physical pain and significant mental anguish. *See, e.g.,, Lynch*, 225 Ariz. at 41, ¶ 79 ("the number and complexity of the knots suggest that James had ample time to suffer 'significant uncertainty as to [his] ultimate fate.'" (internal citation omitted)). The jury's finding of cruelty was not an abuse of discretion.

Additionally, the evidence showed Robinson forced a folded cloth down S.H.'s throat, which blocked her throat and nasal passages. R.T. 3/7/18 at 156–58. The State's medical examiner, Dr. Hu, opined that when a person's airway is

completely cut off, the person only has "a few minutes" to live, and would be "struggling for breath" during that time. R.T. 2/28/18 at 79.

Robinson's own expert, forensic pathologist Dr. Phillip Keen, testified regarding S.H.'s injuries and related issues. R.T. 3/7/18 at 102. Dr. Keen acknowledged that S.H. would have been unable to breathe given the way the cloth was inserted into her mouth and throat, explaining the cloth had been inserted in such a way that "both nose and mouth passages" were obstructed. *Id*. at 156–57.

> [PROSECUTOR]. So [S.H.] could not breathe the way that rag was placed in her mouth, correct?
>
> [DR. KEEN]. That is correct.
>
> Q. [S.H.] would have had, you said, two to five minutes where she is losing her ability to breathe, correct?
>
> A. I think so.
>
> Q. For those two to five minutes, even though she couldn't breathe, she was alive, correct?
>
> A. Yes.

R.T. 3/7/18 at 158.

During S.H.'s autopsy, Dr. Hu noted "extensive" hemorrhaging in S.H.'s eyes, and opined that it was "likely caused by strangulation." R.T. 2/28/18 at 62. Dr. Hu further testified that he removed the cloth from S.H.'s mouth and noted that it was wet with her saliva and blood, and teeth marks were found on the cloth. *Id*. at 53–54. S.H. was alive when the bleeding in her oral cavity occurred. *Id*. at 56.

Dr. Hu opined that because S.H.'s hands were handcuffed behind her back, that, in and of itself, was "a significant risk" due to her "nine-month pregnancy." *Id*. at 63. This was compounded by the fact that S.H. had been "placed almost facedown," her feet "were bound together," placing her in a "[v]ery vulnerable" medical condition. *Id*. at 50–51, 63–64. It was not an abuse of discretion for the jurors to find that the above-facts established S.H.'s physical pain and mental anguish as a result of Robinson's actions.

S.H. had duct tape wrapped around her neck, chin, and mouth area and also had a single piece of duct tape covering her eyes. R.T. 2/28/18 at 43; R.T. 3/6/18 at 42–43. Detective Roe testified that, based on his training and experience, the duct tape over a victim's eyes would indicate that "the victim and the perpetrator had a personal relationship of some type." R.T. 3/6/18 at 43. It was reasonable for the jurors to deduce that S.H. was conscious when Robinson obscured her vision. The evidence related to the taping of S.H.'s eyes also supported a finding that she was conscious before her death and experienced both physical pain and mental anguish from uncertainty as to what may happen to her. *Goudeau*, 239 Ariz. at 463, ¶ 184 (Mental pain or anguish "includes the victim's uncertainty as to her ultimate fate.").

Robinson argues that Dr. Hu was unable to establish the order of S.H.'s injuries and it "was possible that just one of the blunt force injuries to the head could have rendered S.H. unconscious." O.B. at 67. Robinson further argues that it

is possible that "S.H. hit her head as she was pushed into the wall and was immediately knocked unconscious … was restrained in case she awoke, and then—still unconscious—was gagged with the cloth that cut ultimately cut off her airway." O.B. at 68. However, both medical experts testified the injuries to S.H.'s head were "mild." R.T. 2/28/18 at 69–70; R.T. 3/7/18 at 150. It was reasonable for the jurors to find that these injuries did not cause S.H. to lose consciousness.

Furthermore, when discussing S.H.'s head injuries, Dr. Hu opined that there was no evidence of a skull fracture, and indicated this was relevant "to the amount of force being used." R.T. 2/28/18 at 69–70, 71. In response to the prosecutor's question as to whether S.H. could have received her "three different injuries to the head" as a result of "a fall," Dr. Hu stated:

> You have to fall three different times to sustain three contusions. If someone drunk [sic] and was a witness to fall multiple time, I wouldn't say it's impossible. I mean, anything's possible.
>
> But in the -- in a setting like this, like each individual contusion, if you ask me, is it possible that this is caused by a fall? I will say yes. If two? Maybe. But three? It's kind of hard to fall three times in different location.

R.T. 2/28/18 at 159. It was not an abuse of discretion for the jurors to find that S.H. remained conscious after she had suffered the three mild injuries to her head. *See Gunches*, 240 Ariz. at 207, ¶ 41 (no abuse of discretion if "there is any reasonable evidence in the record" to support the jury's finding).

Robinson argues that previous cases where the (F)(6) cruelty aggravator had been found involved a struggle or prolonged interaction between the defendant and the victim, and here, there was no evidence of cruelty as S.H. did not have any defensive wounds. O.B. at 68–69. However, because S.H. was restrained with handcuffs and ankle ligatures, it is unlikely that she would have these types of injuries. R.T. 2/28/18 at 153–54.

The evidence established that S.H. consciously suffered physical pain and mental anguish before her death, and that Robinson knew or should have known she would suffer. The jury did not abuse its discretion when it found S.H.'s murder was especially cruel.

2. *Sufficient evidence supported the jury's findings that S.H.'s murder was especially heinous or depraved.*

Robinson argues the evidence indicated that S.H. "was not breathing at the time of the fire," and while S.H.'s thermal burns "may have been sustained while she was alive," the evidence "equally supports a finding that they were sustained after she was already dead." O.B. at 70–71. This, combined with the fact that Robinson could not "have known exactly when death occurred," prevents a finding "of gratuitous violence." O.B. at 71. However, death within minutes was inevitable because S.H. was bound and her airways blocked, so the fire was not necessary to ensure S.H.'s death. Therefore, setting her body on fire necessarily constituted gratuitous violence. Moreover, because Robinson knew or should have

known that his gagging and binding S.H. would lead to her death, his act of setting her body on fire constituted needless mutilation.

As an initial matter, the jury could have found the (F)(6) aggravating circumstance of heinous or depraved was proven beyond a reasonable doubt, based on the court's instructions related to the definitions of "heinous" or "depraved," combined with S.H.'s mother's testimony that S.H. had already been having contractions on the day of the murder. Further, Robinson knew that S.H. may have been in the beginning stages of labor.[9] R.T. 2/20/18 at 102–03; R.T. 3/5/18 at 80. The trial court defined "especially heinous or depraved" for the jurors as follows:

> Especially heinous or depraved. The term especially heinous or depraved focuses upon the defendant's state of mind at the time of the offense, as reflected by the defendant's words and acts. A murder is [] especially heinous if it is hatefully or shockingly evil, in other words, grossly bad. A murder is especially depraved if it is marked by debasement, corruption, perversion or deterioration.

R.T. 3/28/18 at 12.

Robinson's actions reflected an especially heinous or depraved mental state. Robinson handcuffed S.H.'s hands behind her back and bound her ankles, forced a cloth down her throat to block her throat and nasal passages, repeatedly wrapped

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[9] Although Robinson has separated his (F)(6) aggravator arguments as to each victim into separate arguments (Arguments II and III), this analysis is equally applicable to both victims.

duct tape around her mouth, chin and throat area, poured accelerant on her body and lit her and the apartment on fire—while she was nine months pregnant with his child. This was "shockingly evil," and evidenced Robinson's especially heinous or depraved state of mind. *See State v. Milke*, 177 Ariz. 118, 126, (1993) (mother's conspiracy and resultant murder of her child "can be described without reservation as 'hatefully or shockingly evil' and 'marked by debasement, corruption, perversion or deterioration'" (internal citations omitted)).

Robinson's actions were abhorrent and incompatible with a civilized society. *See State v. Roscoe*, 145 Ariz. 212, 226 (1984) ("The senseless killing and the entire nature of the attack are repugnant to a civilized society."). This is especially the case here because S.H. informed Robinson before her death that she may have already been in the beginning stages of labor. The jurors learned of this via text exchanges between Robinson and S.H. that occurred shortly before her murder:[10]

Q. [S.H.] (As read.) … Babe, she might be coming in sooner.

A. [ROBINSON] (As read.) Tell me N-D. Wow, really.

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[10] The prosecutor and a member of his office read a series of text exchanges that had occurred between S.H. and Robinson on or near the day of the murders. R.T. 3/5/18 at 61–62, 70. Exh. 245 (PowerPoint presentation of text message exchanges).

> Q. (As read.) Ugh, I might and it might just be false alarm. I have same stomach pains I had before I went to the hospital for [their 2-year-old child].
>
> A. (As read.) Uh, oh, just maybe then reckon we G-N-E have to see.

R.T. 3/5/18 at 80. On these facts alone, a reasonable jury could have found the aggravating factor of heinous or depraved had been proven.

This Court has previously identified five factors that can lead to a finding of heinous or depraved, including (1) relishing the murder; (2) infliction of gratuitous violence; (3) needless mutilation; (4) the senselessness of the killing; and (5) the helplessness of the victim. *Gretzler*, 135 Ariz. at 52. However, this Court noted that this list is not exclusive. *Milke*, 177 Ariz. at 126. The State submits that on these facts—the shocking evil of the crime and its repugnance to a civilized society—the jury's finding of the (F)(6) aggravating circumstance of heinous or depraved was not an abuse of discretion, notwithstanding the Court's *Gretzler* findings.

Notwithstanding the above analysis, there were additional grounds establishing that the jury's finding of heinous or depraved was not an abuse of their discretion, *e.g.*, gratuitous violence and/or needless mutilation. The prosecutor argued the following in relation to gratuitous violence:

> If [S.H.] was alive, the fire was unnecessary. Why was it unnecessary? She was bound. She was gagged. There's tape around her mouth. She was on her way out. There was no need for the violence of that fire. As Dr. Hu and Dr. Keane [sic] talk about, once that airway is cutoff, it's

> minutes at most that you have to live. If you believe she was alive at the time that this happened, what he did by setting her on fire is by definition gratuitous violence.

R.T. 3/28/18 at 23–24.

In relation to needless mutilation, the prosecutor argued the evidence showed the following:

> So here is where it's kind of a[n] either/or. If you believe that the fire was done or set while [S.H.] was alive, then it's gratuitous violence. If you believe that she was dead when he set the fire, then it's needless mutilation. Either way, it's heinous or depraved or especially heinous or depraved.

R.T. 3/28/18 at 25.

The especially heinous or depraved aspect of the (F)(6) aggravator refers "to a defendant's mental state as reflected in his words and actions at or near the time of the offense." *State v. Gunches*, 225 Ariz. 22, 25, ¶ 15 (2010) (internal citations and quotations omitted); *State v. Bocharski*, 218 Ariz. 476, 493, ¶ 83 (2008) (quotations omitted) ("Heinousness and depravity refer to the mental state and attitude of the perpetrator as reflected in his words and actions."). As previously noted, this Court has identified factors that can lead to a finding of heinousness or depravity, including: (1) relishing the murder; (2) infliction of gratuitous violence; (3) needless mutilation; (4) the senselessness of the killing; and (5) the helplessness of the victim. *Gretzler*, 135 Ariz. at 52.

This Court has recently affirmed that "[g]ratuitous violence can be found if the defendant '(1) inflicted more violence than that necessary to kill, and (2) continued to inflict violence after he knew or should have known that a fatal action had occurred.'" *State v. Rushing*, 243 Ariz. 212, 220, ¶ 33 (2017) (quoting *Gunches*, 225 Ariz. at 25–26, ¶ 16). *See also State v. Pandeli*, 200 Ariz. 365, 375, ¶ 38 (2001), cert. granted, judgment vacated, 536 U.S. 953 (2002) (cause of death a single knife would to throat, but victim also suffered blows to head and chest which fractured sternum, as well as attempt at strangulation); *State v. Lee,* 189 Ariz. 608, 619 (1997) (finding gratuitous violence when, after inflicting a wound to the head that was "unquestionably fatal," the defendant walked around the counter and shot the victim two more times); *State v. Jones*, 185 Ariz. 471, 488–89 (1996) (finding gratuitous violence when the defendant, after inflicting two fatal blows, asphyxiated the victim). A showing that a defendant continued to inflict violence after he knew or should have known that a fatal action had occurred provides essential evidence of the defendant's intent to inflict gratuitous violence. *State v. VanWinkle,* 230 Ariz. 387, 395, ¶ 41 (2012); *Bocharski*, 218 Ariz. at 494, ¶ 87.

As noted above, the jury was instructed that gratuitous violence could be found if Robinson "intentionally inflicted violence clearly beyond what was necessary to kill the victim," and that Robinson "continued to inflict this violence after [he] knew or should have known that [he] had inflicted a fatal injury." R.T.

3/28/18 at 13. The prosecutor argued that if the juror's determination of the order of S.H.'s injuries showed violence beyond what was necessary to kill, that would constitute gratuitous violence. *Id*. at 24. Here, the jurors were informed that once the cloth had been forced into S.H.'s mouth, blocking her throat and nasal passages, she would have asphyxiated within a few minutes. R.T. 2/28/18 at 79. It was reasonable for the jurors to find that Robinson knew or should have known that setting S.H.'s body on fire was unnecessary to achieve her death. This is especially so given that after placing a cloth in S.H.'s mouth that blocked her nasal and throat passages, Robinson repeatedly wrapped duct tape on the top of her mouth. The jurors' finding of gratuitous violence was not an abuse of discretion.

The condition of S.H.'s body when found also supports the jury's finding of needless mutilation. As explained above, Robinson took extensive measures when inserting the cloth in S.H.'s mouth to ensure it would remain in place by repeatedly wrapping duct tape around her mouth and neck area. This was in addition to S.H.'s arms being handcuffed behind her back, and ligatures placed around her ankles. Robinson either knew or should have known this would result in her death, and the fire was unnecessary in order to achieve his goal of murdering S.H. Here, the prosecutor argued that the reason Robinson set the fire was to "erase [S.H.] and to erase all the evidence left behind." R.T. 3/28/18 at 25. The jurors could have reasonably found this was Robinson's motivation for setting the fire, and would

have constituted needless mutilation because the fire was not the cause of S.H.'s death.[11]

The fact that S.H.'s body was set on fire establishes either gratuitous violence—if she was set on fire before her death because she necessarily would have died given how she had been bound with cloth blocking her airways, or needless mutilation—if the fire occurred after she was deceased. Gratuitous violence and needless mutilation are both factors supporting a finding of heinousness or depravity. The jury did not abuse its discretion when it found S.H.'s murder was especially heinous or depraved.

3. *Any theoretical error was harmless.*

Even if this Court were to strike the (F)(6) aggravating factor for insufficient evidence, it should nonetheless affirm Robinson's death sentences. A.R.S. § 13–756(B) provides: "If the supreme court determines that an error occurred in the sentencing proceedings, the supreme court shall determine whether the error was harmless beyond a reasonable doubt …." The jury found the (F)(6) aggravator had been established both due to cruelty, and due to heinousness or depravity. Reasonable evidence supports both these findings. Moreover, if the Court were to

[11] Dr. Hu testified that he could not tell, based on the evidence, whether S.H. was alive when the fire was set. R.T. 2/28/18 at 95–96. Robinson's expert, Dr. Phillip Keen, testified S.H.'s thermal injuries occurred post-mortem. R.T. 3/7/18 at 118.

strike the cruelty aggravator, the heinous or depraved prong of the (F)(6) aggravator would remain. If the Court were to strike the heinous or depraved prong, the cruelty aggravator would remain. *See Djerf*, 191 Ariz. at 595, ¶ 44 (a finding of either cruelty or heinousness/depravity can support the (F)(6) aggravator).

Additionally, the jurors found other death-qualifying aggravating circumstances as to S.H.: (1) Robinson was previously convicted of a serious offense (A.R.S. § 13–751(F)(2)); and (2) Robinson was convicted of one or more homicides committed during the commission of the offense (A.R.S. § 13–751(F)(8)). R.O.A. 578; R.T. 4/2/18 at 15–16. The jurors found the following death-qualifying aggravating circumstances as to B.H.: (1) Robinson was previously convicted of a serious offense (A.R.S. § 13–751(F)(2)); (2) Robinson killed B.H. in an especially heinous or depraved manner (A.R.S. § 13–751(F)(6)); (3) Robinson was convicted of one or more homicides committed during the commission of the offense (A.R.S. § 13–751(F)(8)); and (4) Robinson was at least eighteen years of age and B.H. was an unborn child when Robinson killed her. (A.R.S. § 13–751(F)(9)). R.O.A. 579; R.T. 4/2/18 at 16–17.

Robinson is only contesting the (F)(6) aggravators as to both victims. The uncontested jury findings as to the remaining aggravators qualify him for the death penalty. Moreover, Robinson's mitigation was not particularly persuasive. Balancing Robinson's unpersuasive mitigation against the aggravating

circumstances, the proffered mitigation was not sufficiently substantial to call for leniency. In light of the multiple undisputed aggravators, the facts and circumstances of the crimes, and the unpersuasive mitigation, no reasonable jury could find that the mitigation was sufficiently substantial to call for a life sentence. Any theoretical error, therefore, was harmless beyond a reasonable doubt.

III

SUFFICIENT EVIDENCE SUPPORTS THE JURY'S FINDING THAT THE MURDER OF B.H. WAS COMMITTED IN AN ESPECIALLY HEINOUS OR DEPRAVED MANNER.

The jury found that Robinson's murder of B.H. was committed in an especially heinous or depraved manner. Robinson argues that the State presented insufficient evidence to support this finding and the jury therefore abused its discretion when finding this factor proven. O.B. at 73–83. Specifically, Robinson contends that the evidence was insufficient because the State did not establish a "parental relationship of trust" between Robinson and B.H., nor did the State present any evidence of Robinson's motivation as it would relate to senselessness. O.B. at 73. Robinson's argument is without merit.

A. Standard of review.

This Court reviews the sufficiency of evidence regarding a jury's finding of an aggravating circumstance for an abuse of discretion, viewing the evidence in the light most favorable to sustaining the jury's verdict. *Acuna Valenzuela*, 245 Ariz. at 224, ¶ 122. There is no abuse of discretion if "there is any reasonable evidence in

the record" to support the jury's finding. *Gunches*, 240 Ariz. at 207, ¶ 41 (quoting *Delahanty*, 226 Ariz. at 508, ¶ 36 and *Morris*, 215 Ariz. at 341, ¶ 77).

B. Relevant Facts.

Pre-trial Findings

The court held a *Chronis* hearing to establish whether probable cause supported the capital aggravators alleged by the State. R.O.A. 293. The trial court specifically found that the (F)(6) aggravating factor as to B.H. had been established.

> The evidence presented at the *Chronis* hearing established that Defendant was [B.H.]'s father. No reported decision in Arizona has addressed whether a fetus is a "child" for purposes of the parent/child relationship in this context. As the State's supplemental brief notes, A.R.S. §13-751(F)(9) describes a fetus as "an unborn *child* in the womb" (emphasis added). The Court presumes that the legislature's choice of words was intentional, and that it equates the murder of a fetus with the murder of a child that has been born for purposes of aggravation in a capital case. Following *Stanley*, *supra*, the murder of one's own child is sufficient, with a finding of helplessness, to satisfy the (F)(6) aggravator.

R.O.A. 293 at 4 (emphasis in original). Although not binding on this Court, the trial court's finding illustrates the Arizona Legislature's intent to include a fetus as a child for purposes of the parent/child relationship in this context.

Aggravation Phase Findings

The trial court instructed the jurors regarding the (F)(6) aggravating factor in relation to B.H.:

> … Number one the murder of [B.H.] was senseless and number two, the victim, [B.H.], was helpless, and three there was a parental relationship between the victim, [B.H.], and the defendant.

R.T. 3/28/18 at 12–13.

Regarding the application of the (F)(6) aggravating circumstance to B.H., the prosecutor argued:

> Parental relationship. The defendant was [B.H.]'s dad. That's undisputed in this case. So regarding the first prong or the first thing that the state must prove for that aggravating factor, it has been proven.
>
> The next is that the murder was senseless. And Judge Como had [defined] what senseless means to you in your jury instructions. But essentially, it's unnecessary to achieve the defendant's objectives. That's what senseless means. The defendant had a million other options besides killing [B.H.].
>
> The third and final prong of heinous or depraved regarding [B.H.] deals with whether or not the victim was helpless. Judge Como defined that to you, unable to resist, and here, you cannot consider [B.H.]'s chronological age. That in and of itself as I talked about before is a separate aggravating factor. What you can consider is [B.H.]'s stature. Her situation, where she's at. [B.H.] was 100 percent dependent on her mother; on [S.H.]. You don't get anymore helpless than this. [S.H.], once bound, was then 100 percent dependent on the defendant. He had two lives in his hands at that point. Both [S.H.] and [B.H.] were helpless at that point.

R.T. 3/28/18 at 26–27. The jurors found the (F)(6) aggravator proven as to B.H. R.O.A. 579.

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C. Law and Argument.

1. *Sufficient evidence established that the murder of B.H. was especially heinous or depraved.*

Pursuant to A.R.S. § 13–751(F)(6), a first-degree murder is aggravated if "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner." As previously noted, this Court has identified five factors that can support a finding of heinousness or depravity: (1) relishing the murder; (2) infliction of gratuitous violence; (3) needless mutilation; (4) the senselessness of the killing; and (5) the helplessness of the victim. *Gretzler*, 135 Ariz. at 52. The killing of a child satisfies the senselessness and helplessness factors. *State v. Stanley*, 167 Ariz. 519, 528 (1991). This Court subsequently explained that using a parent-child relationship to support an (F)(6) finding, along with helplessness and senselessness, is constitutionally permissible.

> The killing of a child satisfies the senselessness and helplessness factors. *State v. Stanley*, 167 Ariz. 519, 528, 809 P.2d 944, 953 (1991). But by themselves, these two factors generally will not render a murder especially heinous or depraved. *State v. Wallace*, 219 Ariz. 1, 6 ¶ 25, 191 P.3d 164, 169 (2008).
>
> … But we noted in *Stanley* that the murder was senseless and involved a helpless victim. We have subsequently explained that *using the parent-child relationship as "partial support" for an (F)(6) finding, along with helplessness and senselessness, "is constitutionally permissible*." *See State v. Carlson*, 202 Ariz. 570, 584 ¶ 55, 48 P.3d 1180, 1194 (2002) (observing that *Milke* approved the use of the parent-child relationship "in partial support of a finding of heinousness or depravity").

State v. Leteve, 237 Ariz. 516, ¶¶ 36, 37 (2015) (emphasis added).

This Court has further explained:

> Although the parent/child relationship does not fit neatly within any of the five *Gretzler* factors, *Gretzler* also relied on the *Knapp* language to define "heinous" and "depraved." We have never said that the *Gretzler* factors are exclusive. We hold that the use of the parent/child relationship by the trial court in this case, like the use of similar relationships in *Stanley*, *Fulminante*, and *Wallace*, is permissible and is within the *Gretzler-Knapp* parameters.

Milke, 177 Ariz. at 126.

a. Parental relationship.

Robinson argues that senselessness and helplessness, without more, are insufficient to sustain the heinous or depraved prong of the (F)(6) aggravator, and in this case, because there was no "relationship of trust" between B.H. and Robinson, this aggravator was not proved. O.B. at 75. Robinson further argues that because B.H. was "an unborn child still in the womb," there could be "no bond of trust" between Robinson and B.H. that could satisfy the (F)(6) aggravator. O.B. at 78.

Initially it should be noted that Robinson erroneously couches the issue as one of a "parental relationship of trust," however, the jurors were instructed on the issue of a "parental relationship." R.T. 3/28/18 at 13. The jurors were not required to find that a relationship *of trust* existed in order to find the (F)(6) aggravator of heinous or depraved proved beyond a reasonable doubt.

Robinson contends for the first time on appeal that "the state presented no evidence whatsoever that Mr. Robinson was B.H.'s biological father." O.B. at 79.

This issue was never raised below and is therefore waived. *See State v. Schaaf*, 169 Ariz. 323, 332 (1991) ("In failing to make timely objection, defendant has waived his right to make the objection on appeal."). Moreover, the record is replete with evidence establishing Robinson's paternity of B.H. For example, when Detective Roe interviewed Robinson on the day of the murder, Roe repeatedly brought up the fact that B.H. was Robinson's unborn child, and Robinson never denied this fact. Exh. 250. Further, S.H.'s mother testified at trial, without objection, that Robinson was B.H.'s father. R.T. at 2/20/18 at 101-02.

Notwithstanding waiver, contrary to Robinson's argument, there need not be a "relationship of trust" between an unborn child and its father in order for there to be a finding that the murder of the unborn child was heinous or depraved. Robinson's reliance on *In re Pima County Juvenile Severance Action No. S–114487*, 179 Ariz. 86 (1994), is unavailing. There, this Court addressed the termination of parental rights, noting that "when determining whether an unwed father who has never had a relationship with his child has protected his rights, [the Court] judge[s] abandonment by conduct, not by subjective intent," pointing out that the "termination statute permits [the Court] to consider the needs of the child." *Id*. at 97. This Court's language regarding termination proceedings and the severance of parental rights is inapposite to these capital proceedings.

This Court has generally noted that "senselessness and helplessness, without the presence of other factors, are *usually* insufficient to establish depravity beyond a reasonable doubt." *State v. Prince*, 206 Ariz. 24, 27 (2003) (emphasis added). However, this Court has also recently noted that the factors set out in *Gretzler* are not an exclusive list. *See State v. Riley*, 248 Ariz. 154, 183, ¶ 101 (2020).

Robinson further argues "this case create[s] 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.'" O.B. at 76. As previously noted, the issue is not a "parental relationship of trust," it is merely a parental relationship. Here, the murder of an unborn child by its biological father—certainly where the unborn child is merely days, if not hours, away from delivery—is sufficient to establish heinousness or depravity beyond a reasonable doubt. *See Milke*, 177 Ariz. at 126 ("This court, however, has upheld depravity findings, predicated only on senselessness and helplessness, when a defendant murders a child *with whom he maintains a parent* or caretaker *relationship*.") (emphasis added).

Robinson further argues that "[e]xpanding 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." O.B. at 78–79. However, as seen above, this Court has previously

found the parent/child relationship is a constitutionally-permissible factor in determining whether a murder was heinous or depraved. *Milke*, 177 Ariz. at 126.

Robinson specifically argues 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." O.B. at 76, quoting *State v. Carlson*, 202 Ariz. 570, 584, ¶ 55 (2002). However, the facts in *Carlson* are markedly different and involve a defendant who hired two individuals to kill her mother-in-law. *Id*. at 574-75, ¶¶ 2, 5–9. In that case, this Court found it "unwise to expand the concept of relationship as an aggravating factor" to a "woman and her mother-in-law." *Id*. at ¶ 55. In doing so, the Court noted that this aggravator is limited to those first-degree murders that "can be described without reservation as 'hatefully or shockingly evil' and 'marked by debasement, corruption, perversion or deterioration.'" *Carlson*, 202 Ariz. at 584, ¶ 55 (quoting *Milke*, 177 Ariz. at 126). This Court emphasized that "[t]he parent/child relationship is a circumstance that separates infanticide from the 'norm' of first-degree murders," and "use of *that* relationship in partial support of a finding of heinousness and depravity ... is constitutionally permissible." *Carlson*, 202 Ariz. at 584, ¶ 55 (alterations omitted, emphasis in original) (quoting *Milke*, 177 Ariz. at 126). Robinson's argument regarding improper expansion of the aggravating factor is without merit.

b. The murder of B.H. was senseless.

Robinson contends the State did not "present any evidence of [] Robinson's motivation as it would relate to senselessness" regarding the (F)(6) especially heinous or depraved aggravating circumstance, and therefore this aggravator was not proved. O.B. at 73. Robinson also asserts 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." O.B. at 80. However, this is not an issue of first impression. This Court's earlier jurisprudence supports the conclusion that the jurors' finding of heinous or depraved in relation to B.H.'s murder was not an abuse of discretion.

This Court has recently reaffirmed that "[t]he killing of a child satisfies the senselessness and helplessness factors." *Leteve*, 237 Ariz. at 516, ¶ 36 (citing *Stanley*, 167 Ariz. at 528). In *Stanley*, this Court emphasized the importance of the parental relationship when assessing the (F)(6) aggravating factor:

> When a father kills his own child, his actions cannot be characterized as sensible, nor can his state of mind be considered other than perverted. This fact sets this crime apart from the norm of first-degree murders and warrants a finding that the murder was committed in an especially depraved manner.

Stanley, 167 Ariz. at 529. The Court's reprehension in *Stanley* is no less applicable here. *See also State v. Fulminante*, 161 Ariz. 237, 256 (1988) (record supported

finding of heinous or depraved conduct where defendant "senselessly killed a helpless victim, and as reprehensible as this may be, also violated the special parental relationship"); *Milke* 177 Ariz. at 125 ("… killing her own son so that he would not grow up to be like his father, or killing him so she could be free from parental burdens is, indeed, senseless"). Ultimately, this Court has held that "the use of the parent/child relationship … is permissible and is within the *Gretzler–Knapp*[12] parameters." *Milke*, 177 Ariz. at 126. The jurors' finding of the (F)(6) heinous or depraved aggravating circumstance was not an abuse of discretion.

2. *It was not error for the jury to find both the (F)(6) and (F)(9) aggravators in relation to B.H.*

Robinson argues that if senselessness can be based on the fact B.H. was an unborn child, 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, when sentencing Robinson to death. O.B. at 82. Neither of these jury findings constituted an abuse of discretion.

Although the jury could consider B.H.'s status as an unborn child in finding more than one aggravator, it could not do so in the penalty phase when deciding whether to sentence Robinson to death. *See State v. Velazquez*, 216 Ariz. 300, 307,

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[12] *State v. Knapp*, 114 Ariz. 531 (1977). Knapp was convicted of setting a fire and killing his two- and three-year-old daughters. *Id*. at 533–34.

¶ 22 (2007) ("A jury ... may use one fact to find multiple aggravators, so long as the fact is not weighed twice when the jury assesses aggravation and mitigation."); *see also State v. Styers*, 177 Ariz. 104, 116 (1993) (stating age cannot be weighed twice at the penalty phase consideration of aggravating and mitigating factors).

The trial court instructed the jury to this effect when providing the penalty phase instructions:

> The State may not rely upon a single fact or an aspect of the offense to establish more than one aggravating circumstance. Therefore, if you have found that two or more of the aggravating circumstances were proved beyond a reasonable doubt by a single fact or aspect of the offense, you are to consider that fact or aspect of the offense only once. In other words, you shall not consider twice any fact or aspect of the offense.

R.T. 5/7/12 at 17.

The prosecutor in his penalty phase closing argument pointed out to the jurors:

> The third statutory aggravating factor is the killing of [B.H.] based on her age alone. The law seeks to protect the most vulnerable of our society. It does this by saying: If you kill a child in the womb, at any stage, the law allows for greater punishment than the killing of an adult. Last, he killed in a cruel manner for [S.H.] and a heinous manner for [S.H.] and [B.H].

R.T. 5/8/18 at 35–36.

As illustrated by the above, the jurors were instructed that they could not consider B.H.'s age more than once. This Court presumes jurors follow the trial court's instructions. *See Newell*, 212 Ariz. at 403, ¶ 68. Also, the prosecutor

delineated between the killing of B.H. based on her age alone, and the fact she was killed in a heinous manner. *See State v. Prince*, 226 Ariz. 516, 537, ¶ 83 (2011) (in finding no double-weighing of the victim's age during the penalty phase, this Court noted that the prosecutor did not "suggest that the victim's age is a factor in the (F)(6) analysis"). Here, the jury did not abuse its discretion in finding both the (F)(6) and (F)(9) aggravating factors proven as to B.H.

3. *Any theoretical error was harmless.*

Even if this Court were to strike this (F)(6) aggravating factor for insufficient evidence, it should nonetheless affirm Robinson's death sentences. A.R.S. § 13–756(B) provides: "If the supreme court determines that an error occurred in the sentencing proceedings, the supreme court shall determine whether the error was harmless beyond a reasonable doubt …" The jurors also found the following death-qualifying circumstances as to B.H. (1) Robinson was previously convicted of a serious offense (A.R.S. § 13–751(F)(2)); (2) Robinson was convicted of one or more homicides committed during the commission of the offense (A.R.S. § 13–751(F)(8)); and (3) Robinson was at least eighteen years of age and B.H. was an unborn child when Robinson killed her (A.R.S. § 13–751(F)(9)). R.O.A. 579; R.T. 4/2/18 at 16–17.

The jurors also found the following death-qualifying aggravating circumstances as to S.H.: (1) Robinson was previously convicted of a serious

offense (A.R.S. § 13–751(F)(2)); (2) Robinson was convicted of one or more homicides committed during the commission of the offense (A.R.S. § 13–751(F)(8)); and (3) Robinson killed S.H. in an especially cruel, or heinous or depraved manner (A.R.S. § 13–751(F)(6)). R.O.A. 578; R.T. 4/2/18 at 15–16.

Robinson is only contesting the (F)(6) aggravators as to both victims. The uncontested jury findings on the remaining aggravators qualify him for the death penalty. Moreover, Robinson's mitigation was not particularly persuasive. Balancing Robinson's unpersuasive mitigation against the aggravating circumstances, the proffered mitigation was not sufficiently substantial to call for leniency. In light of the multiple undisputed aggravators, the facts and circumstances of the crimes, and the unpersuasive mitigation, no reasonable jury could find that the mitigation was sufficiently substantial to call for a life sentence. Any theoretical error, therefore, was harmless beyond a reasonable doubt.

IV

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURORS, AND THERE WAS NO *SIMMONS*/*LYNCH* ERROR.

Robinson contends the trial court erred by instructing the jurors 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)," in violation of *Lynch v. Arizona*, ___ U.S. ___, 136 S. Ct. 1818 (2016), and *Simmons*

v. South Carolina, 512 U.S. 154 (1994). O.B. at 84. The trial court correctly instructed the jurors, and no error occurred.

A. Standard of Review.

This Court reviews for abuse of discretion whether the trial court erred in giving or refusing to give a requested jury instruction. *State v. Dann*, 220 Ariz. 351, 363–64, ¶ 51 (2009). This Court reviews *de novo* whether jury instructions correctly state the law, "reading the jury instructions as a whole to ensure that the jury receives the information it needs to arrive at a legally correct decision." *Prince*, 226 Ariz. at 536, ¶ 77 (internal citations and alterations omitted).

B. Relevant facts.

During the course of the trial proceedings, defense counsel requested that, pursuant to *Lynch* and *Simmons*, the jurors be instructed that the only sentencing options were life imprisonment or death. R.T. 5/2/18 at 43. The trial court advised the parties it intended to include language relating to executive clemency in the jurors' instructions because it was a "more complete and accurate statement of what life imprisonment means in Arizona." R.T. 5/2/18 at 47.

During the penalty phase proceedings, the trial court instructed the jurors:

> … If your verdict is that defendant should be sentenced to life, he will be sentenced to life, and the Court will sentence him 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 on 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 possibility of release from prison means the defendant will never be eligible to be released 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 serve 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 released.

R.T. 5/7/18 at 21–22.

Defense counsel informed the jurors that regardless of their sentence, Robinson would never be released from prison. Counsel argued to them that "when we're talking about life, [Robinson], when you sentence him, will serve out his life in prison." R.T. 5/7/18 at 24. Defense counsel continued:

> As the Court just read the instructions, and talked to you about what it is about release -- and he talked about life in prison, and there was language in there about release -- I want to make sure that you as the jury understand what that means. Because what that 25 means is basically in Arizona, there is no parole. There is no option for Darrius to get out on parole.
>
> So what the judge read in the instructions and what that means is basically that the only possibility for any kind of release for Darrius, if you sentence him to life in prison, would be after serving out his entire sentence for the entire crime, so the 25 years for [S.H.], 35 years for

> [B.H.], and that the judge would decide whether it runs consecutive or concurrent. And then only after that, would then he have the opportunity to just apply for that. And the governor would have to approve it.
>
> But wait. That's not even it. Judge Como, before you even get there, decides if that's even an opportunity for him, because Judge Como can decide natural life, period. So when we're talking about life, Darrius, when you sentence him, will serve out his life in prison.

R.T. 5/7/18 at 23–24. Defense counsel repeatedly made clear to the jurors that Robinson would serve the remainder of his life in prison, and the State did not argue otherwise.

C. The jury instructions were not erroneous.

Robinson asserts that the penalty-phase jury instruction regarding life imprisonment was a misleading statement of law. O.B. at 87. This assertion is incorrect, as the trial court correctly instructed the jurors on this issue.

In *Simmons*, the Supreme Court "held that 'where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible.'" *Escalante-Orozco*, 241 Ariz. at 284, ¶ 117 (quoting *Simmons*, 512 U.S. at 156). In *Lynch*, the Supreme Court found that Arizona defendants are ineligible for parole within *Simmons*' meaning and are entitled to inform their juries, when future dangerousness is at issue, of their parole ineligibility. *See Lynch*, 136 S.Ct. at 1818 (citations and internal quotation marks omitted). Future dangerousness is at issue whenever it is "'a logical inference from the evidence' or

is 'injected into the case through the State's closing argument.'"[13] *Escalante-Orozco*, 241 Ariz. at 284, ¶ 119 (quoting *Kelly v. South Carolina*, 534 U.S. 246, 252 (2002)).

The issue presented by *Simmons*/*Lynch* is inapplicable here because the jurors were specifically instructed that parole was unavailable for Robinson. This Court has recently addressed this very issue. In *State v. Johnson*, where the instructions were nearly identical, the following instruction was found to be in compliance with the legal principles espoused in *Simmons* and *Lynch*:

> Defendant ineligible for parole. A defendant sentenced to life without the possibility of release after [sic] 25 years must serve the entire 25 years before the defendant can apply for release. There is no automatic release after 25 years. Arizona law does not provide for parole. The only form of release for which defendant is eligible is executive clemency.

Johnson, 247 Ariz. 166, 184, ¶ 36 (2019). This Court found the trial court had complied with *Lynch* by informing "the jury that Johnson was ineligible for parole and that the only possibility for release was by executive clemency," and the jury "thus 'receive[d] the information it need[ed] to arrive at a legally correct decision.'"

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[13] Robinson contends the State introduced evidence in the penalty phase of Robinson's future dangerousness when the prosecutor questioned a witness relating to an incident where Robinson was found to be holding a knife while in the witness's apartment. O.B. at 94–96. Assuming the issue of future dangerousness was raised, it is irrelevant because the jury instructions were not violative of *Simmons*/*Lynch*.

Johnson, 247 Ariz. at 184, ¶ 37 (quoting *Prince*, 226 Ariz. at 536, ¶ 77). Likewise, Robinson's jury was properly instructed, and no *Simmons*/*Lynch* error occurred.

Furthermore, any claimed error would not have prejudiced Robinson because defense counsel made clear that he would spend the remainder of his life in prison. Counsel explicitly informed the jurors, there was "no option for [Robinson] to get out on parole." R.T. 5/7/18 at 24. In her argument, counsel reiterated: "So when we're talking about life, [Robinson], when you sentence him, will serve out his life in prison." *Id.* Moreover, Robinson cannot show prejudice, given the strength and number of the aggravating factors and his relatively weak mitigation.

V

THE ARIZONA DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL FOR FAILING TO ADEQUATELY NARROW DEATH-ELIGIBILITY.

Robinson contends that 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. O.B. at 98. Robinson's contention is without merit.

A. Standard of Review.

Robinson raised this argument below by challenging the Arizona death penalty statute as unconstitutional and further joining in consolidated proceedings filed under *State v. Lopez, Jr.*, CR 2011–007597–001, requesting that the death

penalty proceedings be dismissed pursuant to *Furman v. Georgia*, 408 U.S. 238 (1972), and its progeny. R.O.A. 84, 164. This Court reviews constitutional claims *de novo*. *State v. Hidalgo*, 241 Ariz. 543, 548, ¶ 7 (2017).

B. Relevant Facts.

On May 2, 2013, Robinson filed a motion to dismiss the death penalty proceedings pursuant to *Furman* and its progeny. R.O.A. 84. On September 3, 2014, the court entered its order denying Robinson's motion to dismiss the death penalty, and further denied the request for an evidentiary hearing. R.O.A. 155. On October 22, 2014, Robinson filed a motion for joinder, seeking to join in the consolidated proceedings filed under *Lopez, Jr.*, arguing the death penalty proceedings must be dismissed pursuant to *Furman* and its progeny. R.O.A. 164. On June 18, 2015, the court denied the defendants' joint motion to dismiss the death penalty. R.O.A. 178.

C. The court did not abuse its discretion.

1. *Arizona's first-degree murder statute constitutionally narrows the class of persons eligible for the death penalty, and is not unconstitutionally broad.*

Robinson asserts that the Arizona death-penalty statute insufficiently narrows the class of persons eligible for the death penalty. O.B. 102. Robinson specifically argues that because "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," it necessarily fails to comply with the

Eighth Amendment's "narrowing" requirement. O.B. 102. This Court has recently rejected this same constitutional challenge to the Arizona death penalty. *See Acuna Valenzuela*, 245 Ariz. at 224, ¶ 121 (citing *Hidalgo*, 241 Ariz. at 551–52, ¶ 28); *Johnson*, 247 Ariz. at 179, ¶ 8; *Riley*, 248 Ariz. at 197, ¶ 180.

The Eighth Amendment's "narrowing requirement" is designed to avoid the "wanton[] and freakish[]" imposition of death sentences by providing objective standards to guide the capital sentencer and to provide a basis for appellate review. *Gregg v. Georgia*, 428 U.S. 153, 207 (1976). In finding Georgia's death penalty scheme constitutional, the Supreme Court explained:

> The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.

Id. at 206–07.

Contrary to Robinson's assertions, the constitutional "narrowing requirement" focuses upon specific aggravators with regard to the case under review; it is not globally focused on all of the aggravators set out in a State's capital sentencing scheme. The Court further explained:

> [U]nder the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. [*Gregg*, 428 U.S. at 162–64] (reviewing Georgia sentencing scheme); *Proffitt v. Florida*, 428 U.S. 242, 247–250, 96 S. Ct. 2960, 2964–2965, 49 L.Ed.2d 913 (1976) (reviewing Florida sentencing scheme). *By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition*. *Zant* [*v. Stephens*, 462 U.S. 862, 878 (1983)] ("[S]tatutory 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 v. Phelps, 484 U.S. 231, 244 (1988) (emphasis added).

Subsequently, the Supreme Court made clear that, with respect to the Constitution's "narrowing" requirement and Arizona's death penalty statute, the proper focus is on whether a *specific* death-qualifying aggravating circumstance with regard to the sentence under review narrows the sentencer's discretion:

> [U]nlike in *Godfrey*,[14] there is no dispute in this case that the Arizona Supreme Court applied its narrowing construction of Arizona's subsection (F)(6) aggravating circumstance to the facts of respondent's case. See *State v. Jeffers*, 135 Ariz., at 429–430, 661 P.2d, at 1130-1131. More important, the Court of Appeals noted that the subsection

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[14] *Godfrey v. Georgia*, 446 U.S. 420 (1980).

> (F)(6) aggravating circumstance, as interpreted by the Arizona courts, was not unconstitutionally vague on its face. See 832 F.2d, at 482 (citing *Chaney v. Lewis*, 801 F.2d, at 1194-1196). "The Arizona Supreme Court appears to have sufficiently channeled sentencing discretion to prevent arbitrary and capricious capital sentencing decisions. The court has defined each of the factors set forth in section 13-703(F)(6). These definitions have been applied consistently." *Chaney*, *supra*, at 1195 (citations and quotations omitted).
>
> * * *
>
> *Walton* therefore squarely forecloses any argument that Arizona's subsection (F)(6) aggravating circumstance, as construed by the Arizona Supreme Court, fails to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Godfrey*, 446 U.S., at 428, 100 S. Ct., at 1764 (footnotes omitted).

Lewis v. Jeffers, 497 U.S. 764, 776–78 (1990).

It should also be noted, in previously rejecting the same argument Robinson raises here, this Court stated:

> In requiring "narrowing" in the eligibility phase of capital proceedings, the United States Supreme Court has focused on whether the sentencer is required to find an aggravating fact beyond the murder itself. The Court has not looked beyond the particular case to consider whether, in aggregate, the statutory scheme limits death-sentence eligibility to a small percentage of first degree murders.

Hidalgo, 241 Ariz. at 551, ¶ 26 (citing *Arave v. Creech*, 507 U.S. 463, 470 (1993)).

Robinson also argues "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." O.B. 105. This argument is unpersuasive. In addition to the use of death-qualifying aggravating factors,

Arizona *further* narrows the application of the death penalty to: (1) a subclass of defendants convicted of first-degree murder; and (2) circumstances where the State has proved at least one defined aggravating factor beyond a reasonable doubt and no mitigating factors exist that are sufficient to call for leniency. *See* A.R.S. § 13–751(A), (E). *See also Hidalgo*, 241 Ariz. at 551–52, ¶ 28 (citing *Bible*, 175 Ariz. at 603–04 and *State v. Greenway*, 170 Ariz. 155, 164 (1991)).

2. *Hidalgo was correctly decided.*

Robinson asserts "the constitutionally required narrowing function for a state to be permitted to impose the death penalty cannot be satisfied at the definition stage." O.B. 102–03, citing to *Hidalgo v. Arizona*, 138 S. Ct. 1054, 1055 (2018) (Mem.). In support of this premise, Robinson relies on Justice Breyer's statement in *Hidalgo v. Arizona*, regarding the denial of certiorari, that Arizona's first-degree murder statute "is so broad at the definition stage that it cannot comply with the Eighth Amendment's narrowing requirement." O.B. 103. Robinson's argument is meritless. Justice Breyer's statement did not overturn or modify controlling case law, nor could it-the Supreme Court itself has held that such statements have no precedential effect and thus are properly recognized as nothing more than dicta. *See Teague v. Lane*, 489 U.S. 288, 296 (1989). Moreover, *Furman, Gregg*, *Zant*, *Lowenfield*, *Jeffers*, and *Creech* all remain good law.

This Court's legal reasoning in *Hidalgo* is correct, and this Court should reject Robinson's argument in its entirety.

VI

THE PROSECUTOR DID NOT COMMIT ERROR DURING THE GUILT OR PENALTY PHASES OF TRIAL.

Robinson contends the prosecutor committed "misconduct"[15] during the guilt phase of the trial during his questioning of the medical examiner, and committed further "misconduct" in the penalty phase closing argument when addressing Robinson's mitigation related to his upbringing in Louisiana. O.B. at 108–23. No prosecutorial error occurred, and Robinson's contentions are without merit.

A. Standard of Review.

This Court will not reverse a conviction for prosecutorial error unless "(1) [error] is indeed present; and (2) a reasonable likelihood exists that the [error] could have affected the jury's verdict, thereby denying the defendant a fair trial." *Gallardo*, 225 Ariz. at 568, ¶ 34 (quotations and alteration omitted). To prevail on a prosecutorial error claim, Robinson must "show that the [alleged error was] so pronounced and persistent that [it] permeated the entire atmosphere of the trial and

[15] This Court has recently stated, "When reviewing the conduct of prosecutors in the context of 'prosecutorial misconduct' claims, courts should differentiate between 'error,' which may not necessarily imply a concurrent ethical rules violation, and 'misconduct,' which may suggest an ethical rule violation." *In re Martinez*, 248 Ariz. 458, 470, ¶ 47 (2020).

so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id*. (quotations and alteration omitted); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). When assessing claims of prosecutorial error, this Court reviews "objected-to claims for harmless error and unobjected-to claims for fundamental error." *Acuna Valenzuela*, 245 Ariz. at 216, ¶ 66 (quoting *State v. Hulsey*, 243 Ariz. 367, 388, ¶ 88 (2018)).

B. The Prosecutor did not Commit Error in the Guilt Phase.

Robinson alleges the prosecutor committed "misconduct" during his examination of the medical examiner, Dr. Hu, by both asking leading questions and "by attempting to demonstrate how the victim may have been restrained." O.B. at 108–11, 116–18. First, Robinson contends that the prosecutor posed leading questions to Dr. Hu in order "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." O.B. at 116. Second, Robinson asserts the prosecutor committed error as a result of his demonstration, which he claims was an effort "to stage S.H.'s death," and to inflame the jurors "by showing his imagined brutality of holding down S.H. while trying to place duct tape on her." O.B. at 117. The prosecutor's actions did not constitute prosecutorial error.

. . .

. . .

1. *Relevant Facts.*

During the guilt phase, the State called Dr. Hu, who had conducted autopsies on both S.H. and B.H. R.T. 2/28/18 at 28. During defense counsel's cross-examination, the following exchange occurred:

> [DEFENSE COUNSEL]. We also discussed and you indicated that you couldn't tell -- and I think on direct you were asked this -- whether it was from a ligature, right? So you couldn't tell if it was a ligature that caused this?
>
> [DR. HU]. That's correct.
>
> Q. And you couldn't tell if it was a hand, right?
>
> So you were asked those questions.
>
> A. That's correct.
>
> Q. But when we talked, you added some other things. You said that you really couldn't tell if maybe perhaps it was done while the person who did the -- was putting the duct tape was stabilizing the body.
>
> Do you remember that, saying it was a possibility that it happened during that period of time?
>
> A. That's also considered applying pressure to the neck. The same thing.
>
> Q. So it could have happened during that, for example?
>
> A. Well, yes, or maybe you try to stabilize the neck, but you didn't know that you were strangling someone.

R.T. 2/28/18 at 116–17.

On redirect-examination, when following up on defense counsel's questioning regarding how the injuries to S.H.'s neck may have occurred, the following exchange took place:

> [PROSECUTOR]. 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.
>
> Q. And she was talking about putting a hand on the neck, is what she was referencing, correct?
>
> A. Yes.
>
> Q. And I believe you had said that your belief was putting a hand on the neck while someone is duct taping the head, correct?

R.T. 2/28/18 at 154–55. In the course of this questioning, the prosecutor gestured as if to demonstrate how the tape may have been applied to S.H.'s face and neck. R.T. 3/1/18 [p.m.] at 128. At this point, defense counsel objected and a bench conference was held. R.T. 2/28/18 at 155. The court informed the prosecutor that his demonstrative actions were "not really appropriate," but after discussion with counsel, did acknowledge that the prosecutor could "ask the witness … if he ha[d] an opinion as to how it happened." *Id.* at 156. The court also instructed the prosecutor that it was "going to continue to sustain leading questions …. I don't care if it's 4:30 or 5:30; you don't get to lead your own witness." *Id.*

Immediately after the bench conference, the prosecutor continued his redirect-examination of Dr. Hu:

> [PROSECUTOR]. Dr. Hu, *can you explain to us what you meant, or can you show us, regarding applying pressure to the neck while duct taping the head.*

> [DR. HU]. Oh, I -- if I mentioned that, that was -- okay. The hemorrhage in the strap muscle, all it indicates is the pressure applied to the neck, commonly seen as someone tried to strangle another individual. But if you said strangulation was not my purpose; I just want to stabilize the body while putting duct tape on it, that's another possibility. But that's -- again, you apply pressure to the neck the same as strangulation. So from that point of view, yes, both scenario possible.

Id. at 156–57 (emphasis added). Defense counsel did not object to this line of questioning. *Id*.

The next day, defense counsel advised the court they were requesting a mistrial due to prosecutorial misconduct based upon an alleged pattern of error, resulting from the prosecutor's comments or questioning of witnesses, beginning in voir dire and culminating with the prosecutor's demonstration during the testimony of Dr. Hu. R.T. 3/1/18 [p.m.] at 127–28. Regarding the demonstration, defense counsel described the prosecutor's actions as "lean[ing] into his left leg" and "leaning in with his left hand, held — sort of like he was holding a neck or a person" and then, with his right hand, repeatedly gesturing in a "wrap[ing] around" manner.[16] *Id*. at 128.

[16] On November 23, 2020, this Court granted Robinson's motion to supplement the record with a copy of the For the Record videotape of the 2/28/18 trial proceedings, which depicts the prosecutor's actions.

After hearing arguments from both parties, the court denied the motion for mistrial, citing the following reasons:

> THE COURT: I'm going to deny the motion for a mistrial. *I do not find any pattern of misconduct*. I believe I've already addressed on the record all of the issues up to the point of the demonstration yesterday. We had some discussion of that at the bench.
>
> As far as that particular demonstration, I do think that that was improper, mainly because there wasn't any evidence of how the duct tape was applied. I don't think it was unfairly prejudicial in the scheme of this case because we do know that the victim had duct tape applied; someone applied it. I think it's fair to assume that it wasn't probably done in a very gentle pattern, and that's really what the demonstration by [the prosecutor] showed.
>
> … *to say something is improper does not equate to prosecutorial misconduct*, which I believe implies an intentional or egregious violation of the attorney's role in a case. And I do not put that demonstration in that category.
>
> *The question itself was on a relevant topic, a topic that had been addressed in cross*. I just believe that the demonstration was not necessary and shouldn't have been done, and that's why I indicated that it shouldn't have gone any further.

R.T. 3/1/18 [p.m.] at 133–34 (emphasis added).

2. *Law and Argument.*

a. Prosecutor's leading questions did not constitute error.

In support of his argument that the prosecutor improperly posed leading questions to Dr. Hu relating to whether S.H. was deceased at the time of the fire,

Robinson directs this Court to four examples in the transcript. O.B. at 116.[17] As will be shown, the trial court sustained three of the four objections based on the leading nature of the question, not the content. The record is unclear as to the court's rationale for sustaining the remaining example that Robinson sets forth.

A review of these citations reflects that only two of the objections raised pertained to the timeline concerning S.H.'s death. R.T. 2/28/18 at 93–94, 151. The third instance involved the prosecutor's attempt to clarify that on cross-examination, defense counsel had misrepresented what the medical examiner's report actually stated regarding when the victim had last been seen on the day of the murder. *Id*. at 149–50. It was after this objection that the prosecutor stated that he was, "trying to be as efficient as possible, Your Honor." *Id*. at 150. The fourth instance related to whether the victim would have had defensive wounds, given that she had been restrained. *Id*. at 154. Defense counsel objected to this question based on "foundation," and also that it did not "call for a medical opinion"; although the court sustained the objection, it did not state its reason for doing so. *Id*. The remaining objection related to the prosecutor's physical demonstration. *Id*. at 155.

[17] The fifth example Robinson cites pertains to the prosecutor's demonstration. O.B. at 116.

Contrary to Robinson's argument, during redirect-examination the prosecutor was not attempting "to get Dr. Hu to explain away his original determination," regarding whether S.H. was alive during the fire. O.B. at 116. Instead, the questioning was in response to issues Robinson's counsel had raised on cross-examination. R.T. 2/28/18 at 155. Further, the redirect-examination occurred at the end of the trial day and the prosecutor specifically noted that he was "trying to be as efficient as possible." *Id*. at 150. As illustrated above, the prosecutor's questioning did not constitute error, nor did it "permeate[] the trial with unfairness as to make the resulting conviction a denial of due process." O.B. at 118. *See also Gallardo*, 225 Ariz. at 568, ¶ 34.

b. The prosecutor's demonstration did not constitute error.

Robinson argues that the prosecutor's demonstration was improper and a staged effort "to inflame the jurors by showing his imagined brutality of holding down S.H. while trying to place duct tape on her," further asserting "[t]here was no evidence of how the crime occurred." O.B. at 117. The record does not support Robinson's argument.

The evidence illustrated that the duct tape had repeatedly been wrapped around S.H.'s face, mouth, jaw, and neck area. R.T. 2/21/18 at 115–16; R.T. 2/28/18 at 4, 19, 22, 25, 26; Exhs. 218, 223, 225. Regarding the tape wrapped around S.H.'s face, Dr. Hu testified he "cut the tape from … the back of the neck

where the tape [was] a lot narrower," and noted the tape was "pretty wide in front, just below the nose to the chin." R.T. 2/28/18 at 43. Dr. Hu stated the duct tape was "wrap[ped] around [S.H.'s] mouth multiple times" and it was approximately "3 1/2 inches wide" on the front of her face and "around 3/4 of an inch" on the back of her neck. *Id*. at 53.

Although the trial court found the prosecutor's brief demonstration to be improper, the court found it did not constitute prosecutorial error. R.T. 3/1/18 [p.m.] at 134. *See Pool v. Superior Court In & For Pima County*, 139 Ariz. 98, 102 (1984) ("Determination of whether a particular action is misconduct depends to some extent on the circumstances of the particular case."). *See also State v. Kemp*, 185 Ariz. 52, 62 (1996) (statement "arguably improper" but nonetheless harmless). The exhibits shown to the jury were consistent with the prosecutor's actions, *i.e.*, that duct tape had been repeatedly wrapped around the victim's face and neck. *See e.g.*, Exh. 218. In fact, the court commented:

> I don't think it was unfairly prejudicial in the scheme of this case because we do know that the victim had duct tape applied; someone applied it. I think it's fair to assume that it wasn't probably done in a very gentle pattern, and that's really what the demonstration by [the prosecutor] showed.

R.T. 3/1/18 [p.m.] at 134.

The trial court did not abuse its discretion by concluding that the demonstration was not unfairly prejudicial in the scheme of the case and did not

warrant a mistrial. The jurors had already seen the photographs of S.H. depicting the duct tape wrapped repeatedly around her face and neck. The court generally noted the prosecutor's demonstration reflected the facts concerning the application of the duct tape. *See Rushing*, 243 Ariz. at 220, ¶ 31 (holding autopsy photos from "a shockingly violent murder, which had been vividly described to jurors by witnesses" were "unlikely" to have "so inflamed jurors that a danger of unfair prejudice existed"). Moreover, the record shows that the evidence overwhelmingly supported the guilty verdicts, and any error that may have occurred as a result of the prosecutor's leading questions or physical demonstration was harmless. *See State v. Davolt*, 207 Ariz. 191, 205, ¶ 39 (2004) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967) ("Error is harmless if the reviewing court can say beyond a reasonable doubt that the error did not contribute to the verdict.")).

As illustrated by the record, the prosecutor's leading questions and brief demonstration did not constitute prosecutorial error. Any arguable error was harmless, and does not warrant reversal.

C. The Prosecutor did not Commit Error in the Penalty Phase.

Robinson argues for the first time on appeal that the prosecutor repeatedly told the jurors that "they had to find a nexus between Mr. Robinson's actions and the mitigation," and that the State's argument, in effect, required the jurors "to find that Monroe provided a rationale for Mr. Robinson's conduct before they could

regard anything Mr. Robinson presented as mitigating." O.B. at 120, 121. The record does not support this contention, and Robinson's argument is meritless.

1. *Relevant Facts.*

In closing argument, the prosecutor did not argue to the jury that they must find a causal nexus between Robinson's mitigation and his offenses. To the contrary, the prosecutor specifically pointed out to the jurors, when referencing Robinson's mitigation related to his upbringing, that "there doesn't have to be a connection to this crime for you to consider it." R.T. 5/8/18 at 7.

Additionally, defense counsel highlighted to the jurors that the prosecutor had repeatedly told them there did not need to be a connection between the murders and the mitigation.

> Well, the State spent a lot of time drawing you in to the connection. And he kept saying: You don't need a connection between the murders for which you have already found [Robinson] guilty for. *You don't need a connection because the law says you don't need one between those murders … and the mitigation*.
>
> You don't need a connection, yet he kept bringing you back to that, back to that. He will be punished. And the thing is, the law says, and again for good reason, you don't need a connection.
>
> So the mitigation we brought to you, the mitigation you heard, the mitigation maybe one of you saw from someplace else, that is all mitigation, even if there is no connection, because that's what the law says.

R.T. 5/8/18 at 84 (emphasis added). Both the prosecutor and defense counsel pointed out that there need not be a causal nexus between Robinson's mitigation and his crimes.

2. *The prosecutor's penalty-phase closing argument did not constitute error.*

Robinson asserts the prosecutor's argument impermissibly caused the jurors to "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." O.B. at 121. Because Robinson did not raise objections on these grounds at trial, this Court reviews for fundamental error. *See Acuna Valenzuela*, 245 Ariz. at 216, ¶ 66.

This Court has recently addressed the issue of prosecutorial error in closing arguments. "In determining whether the State engaged in prosecutorial error during its closing, [this Court] consider[s] two factors: (1) whether the prosecutor's statements called to the jury's attention matters it should not have considered in reaching its decision and (2) the probability that the jurors were in fact influenced by the remarks." *Smith*, 2020 WL 6478480, at *23, ¶ 144 (internal quotation marks and citations omitted).

To determine whether error occurred, the prosecutor's statements must be considered in the context in which they were made. *Sanders*, 245 Ariz. at 131, ¶ 78; *Kemp*, 185 Ariz. at 62. Prosecutors are given wide latitude with regard to

their closing arguments, and may argue all reasonable inferences from the evidence. *Acuna Valenzuela*, 245 Ariz. at 222, ¶ 109; *State v. Hughes*, 193 Ariz. 72, 85, ¶ 59 (1998).

During the penalty phase of a capital sentencing proceeding, the jury must make "a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Kansas v. Marsh*, 548 U.S. 163, 174 (2006); *see also Tuilaepa v. California*, 512 U.S. 967, 972–73 (1994). In doing so, the jury makes a "reasoned moral response" to mitigation evidence and imposes punishment "directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh*, 492 U.S. 302, 319, 328 (1989) (overruled on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002)); *see also Enmund v. Florida*, 458 U.S. 782, 801 (1982) (defendant's punishment "must be tailored to his personal responsibility and moral guilt"); *State v. Anderson*, 210 Ariz. 327, 349, ¶ 92 (2005) (rejecting claim that instruction directing jury not to be "swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling" violated the Eighth Amendment).

Robinson's contention that the prosecutor impermissibly precluded the jurors from considering his mitigation is without merit. The prosecutor explicitly told the jurors they could accept that all of Robinson's proffered mitigation was "true." R.T. 5/8/18 at 36. Nonetheless, he pointed out, it would not reduce Robinson's

"moral culpability for the decisions and actions and consequences of what [Robinson] did in this case."

> 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.

R.T. 5/8/18 at 36.

The prosecutor also acknowledged Robinson's dysfunctional upbringing in Monroe, when referencing Dr. Forsyth's "risk factors" testimony pertaining to Robinson's childhood. R.T. 5/8/18 at 13. However, the prosecutor pointed out that, given the amount of time that had passed since Robinson left that environment, any mitigating effect due to his upbringing was attenuated.

> And there is little to no application to risk factors to adults. Why? Freewill. Choices. You're an adult. You understand the risk associated with making bad choices. Risk factors loses their effect over time. That's the cultural bag that Dr. Forsyth talked about.

R.T. 5/8/18 at 13.

The prosecutor continued his argument:

> Going back to my original question. What kind of mitigation would it take to reduce a man's moral culpability when he has done the things he has done here? You've heard no evidence of mental illness, severe drug impairment or addiction, mental defect. Defendant knew right from wrong. Defendant made choices for selfish, callous, calculated reasons not because he was raised by Ms. Betty, who supports him to this day.
>
> …

> Remember the offense, and put it all together when looking at the mitigation. And ask yourself, is this sufficiently substantial to call for leniency?
>
> Frankly, it's not even close."

R.T. 5/8/18 at 37–39.

Robinson left Monroe, Louisiana, when he was approximately 16 years old, and was 21 years old when he murdered S.H. and B.H.[18] The prosecutor permissibly argued that Robinson's childhood mitigation was not entitled to much weight. *Prince*, 226 Ariz. at 541, ¶ 109 ("Difficult childhood circumstances also receive less weight as more time passes between the defendant's childhood and the offense.")

In this case, the prosecutor's argument did not preclude the jury from considering any possible mitigating evidence, or from making an individualized, reasoned sentencing decision. *See Villalobos*, 225 Ariz. at 82–83, ¶¶ 37–39 (prosecutor's argument to penalty phase jury inquiring "[w]hat about [the defendant's] childhood reduces his moral culpability or blameworthiness for all the decisions he made" not improper); *State v. Kuhs*, 223 Ariz. 376, 386–87, ¶¶ 53–56 (2010) (approving penalty phase jury instruction in which trial court explained, in

[18] Robinson was born in December of 1990. R.T. 3/6/18 at 85; Exh. 251; R.T. 3/28/18 at 20.

part, that "[m]itigating circumstances . . . may be considered by you as extenuating or reducing the degree of defendant's moral culpability or blameworthiness").

The prosecutor's argument did not prevent the jurors from considering any of Robinson's mitigation—it merely pointed out the mitigation was entitled to little weight. "[A] prosecutor does not commit misconduct by arguing that a mitigating factor does not warrant leniency or that jurors should give it little consideration." *State v. Lynch*, 238 Ariz. 84, 98, ¶ 36 (2015), rev'd on other grounds, 136 S. Ct. 1818, (2016). This Court has held that the State may fairly argue that the lack of a nexus to the crime diminishes the weight to be given alleged mitigation. *See, e.g.*, *Anderson*, 210 Ariz. at 350, ¶ 97; *State v. Pandeli*, 215 Ariz. 514, 525–26, ¶ 31 (2007). Accordingly, the prosecutor's arguments regarding the relevance of Robinson's mitigation were not improper because they merely reminded the jury of its obligation to determine the weight of the proffered mitigation. *See Anderson*, 210 Ariz. at 350, ¶ 96–97 (prosecutor's argument to jury that it would have to decide whether any mitigation evidence was relevant was not improper).

Moreover, the jury was correctly instructed that it alone determined whether mitigation existed and whether the mitigation was "of such quality or value that it warrant[ed] leniency. …" R.T. 5/7/18 at 19. *See Villalobos*, 225 Ariz. at 83, ¶ 39 (quoting *Pandeli*, 215 Ariz. at 526, ¶ 36); *Roque*, 213 Ariz. at 224, ¶ 126. Here, any potential error was remedied by the jury instructions, which informed them that

they were "not required to find that there [was] a connection between a mitigating circumstance and a crime committed in order to consider the mitigation evidence." R.T. 5/7/18 at 15; s*ee also Pandeli*, 215 Ariz. at 526, ¶ 33 (finding any potential error cured when the jury instructions informed the jurors that they should consider and give effect to all the mitigation evidence); *Morris*, 215 Ariz. 324, 336–37, ¶ 55 (2007) ("Even if the prosecutor's comments were improper, the judge's instructions negated their effect.").

Robinson has not shown error, much less fundamental error. The prosecutor's statements did not "call[] to the jury's attention matters it should not have considered in reaching its decision." *Smith*, 2020 WL 6478480, at *23, ¶ 144. And, even assuming error, "any prejudice was cured by the court instructing the jury that closing arguments were not evidence." *Id*. Here, the trial court instructed the jury that the arguments of counsel were not evidence, and that it had a duty to consider the aggravating and mitigating circumstances in order to determine whether death was the appropriate sentence. R.T. 5/7/18 at 14, 19. The jurors are presumed to have followed these instructions, and Robinson fails to argue, much less prove, that they did not. *See Newell*, 212 Ariz. at 403, ¶ 68. Additionally, the record reflects that the aggravating evidence was overwhelming, especially in light of the relatively unpersuasive mitigation. The jury instructions "focused the relevant inquiry and helped ensure" that Robinson received a fair trial, and the

instructions, "coupled with the strength of the evidence," show that Robinson was not denied a fair trial. *Bible*, 175 Ariz. at 603 (internal citations omitted).

Robinson fails to show a "reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying [Robinson] a fair trial." *Gallardo*, 225 Ariz. at 568, ¶ 34 (quotations and alteration omitted). The prosecutor's comments did not constitute prosecutorial error. When read in context, the comments merely reminded the jury of their legal duty to assess the aggravating and mitigating factors presented in order to determine whether Robinson was entitled to leniency. The comments neither misstated the law nor improperly prevented the jurors from considering Robinson's proffered mitigation.

In this case, defense counsel extensively argued that Robinson's unfortunate upbringing was grounds for the jury to spare his life and sentence him to life imprisonment. R.T. 5/8/18 at 41–86. The fact that the jury was unpersuaded to do so was not because the prosecutor's argument was improper, but instead, because the jurors did not find the mitigation sufficiently substantial to call for leniency. The prosecutor's penalty phase closing argument did not constitute error.

D. There was no cumulative error.

Robinson further argues that the prosecutor's alleged "misconduct"—the prosecutor's leading questions during re-direct examination of the medical examiner and the brief demonstration during this questioning, along with statements

made during the penalty-phase closing argument—had a cumulative effect, thereby prejudicing him. O.B. at 108–09, 123. This argument is without merit.

"Cumulative error requires reversal only when misconduct is so pronounced and persistent that it permeated the entire atmosphere of the trial, indicating that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant." *Acuna Valenzuela*, 245 Ariz. at 223–24, ¶ 119 (internal citations and quotation marks omitted). This Court "examines whether the cumulative effect of individual allegations so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (internal citations and quotation marks omitted).

Here, even assuming the prosecutor's actions could somehow be considered error, Robinson is not entitled to relief. In light of the trial court's instructions, coupled with the strength of the aggravating factors and the relative weakness of the proffered mitigation, Robinson cannot prove the prosecutor's remarks denied him his right to a fair sentencing proceeding.

Additionally, the court's instructions that the arguments of counsel were not evidence, and that the jury had a duty to consider the aggravating and mitigating circumstances in order to determine whether death was the appropriate sentence, obviated any alleged prosecutorial error. *See Hulsey*, 243 Ariz. at 394, ¶ 123 (instructions "helped mitigate any impact" of cumulative prosecutorial misconduct).

There was no cumulative prosecutorial error, and Robinson is not entitled to reversal of his convictions or sentences.

VII

THIS COURT SHOULD NOT REVISIT ITS MULTIPLE PRIOR DECISIONS FINDING ARIZONA'S DEATH-PENALTY STATUTE CONSTITUTIONAL.

In his brief, Robinson raises 12 sub-arguments contending that Arizona's death penalty sentencing scheme is unconstitutional. *See* O.B. at 124–28. He concedes that this Court has previously rejected each of these sub-arguments, citing this Court's controlling decisions. *Id.* Because Robinson provides no reason to reconsider these prior determinations, this Court should reject these arguments.

CONCLUSION

Based on the foregoing authorities and arguments, Appellee respectfully requests that this Court affirm the judgments and sentences of the trial court.

Respectfully submitted,

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