AARON GUNCHES #145371
ASPC-EYMAN/RYNNING
P.O. BOX 3100
FLORENCE, AZ. 85132

ARIZONA SUPREME COURT

STATE OF ARIZONA,

VS.

AARON GUNCHES,

PETITIONER,

CR-08-0038-AP, CR-13-0282-AP

MOTION:
ISSUANCE OF DEATH WARRANT
(5 EXHIBITS ATTACHED)

PRO SE PETITIONER, AARON GUNCHES, APPROACHES THE AZ SUPREME COURT, AND REQUESTS THIS COURT ISSUE A DEATH WARRANT FOR HIM SO HIS SENTENCE OF DEATH MAY BE CARRIED OUT IMMEDIATELY.

HISTORY

IN 2003, AARON GUNCHES PLED "NO CONTEST" IN LA PAZ COUNTY SUPERIOR COURT TO THE CHARGE OF ATTEMPTED MURDER OF A POLICE OFFICER AND RECEIVED A 21 YEAR SENTENCE; A DEATH ELIGIBLE DANGEROUS PRIOR.

IN 2004, AARON GUNCHES WAS TRANSPORTED TO MARICOPA COUNTY SUPERIOR COURT, PLED GUILTY AFTER WAIVING COUNCIL, WAIVED MITIGATION, AND RECEIVED DEATH PENALTY. THROUGH AUTOMATIC APPEAL, WAS GRANTED RETRIAL WHERE HE AGAIN WAIVED COUNSEL, WAIVED MITIGATION, AND AGAIN RECEIVED THE DEATH PENALTY. HE THEN WAIVED COUNSEL ON PCR AND REQUESTED, AND WAS GRANTED, A DISMISSAL OF PCR. HE THE WAIVED HABEAS CORPUS REVIEW.

IN 2018, AARON GUNCHES "VOLUNTEERED" TO HAVE HIS SENTENCE CARRIED OUT BUT HAS EFFECTIVELY BEEN IGNORED, AND IN LIMBO EVER SINCE.

PRO SE PETITIONER AARON GUNCHES HEARBY REQUESTS THE AZ SUPREME COURT ISSUE A IMMEDIATE DEATH WARRANT FOR HIS EXECUTION, SO THAT JUSTICE MAY BE LAWFULLY SERVED AND GIVE CLOSURE TO THE VICTIMS FAMILY.

RESPECTIVELY SUBMITTED, NOVEMBER 22, 2022.

Gunches

EXHIBIT ONE

SUPREME COURT OF ARIZONA
En Banc

STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-08-0038-AP
Appellee,	)	
	)	Maricopa County
v.	)	Superior Court
	)	No. CR2003-038541
AARON BRIAN GUNCHES,	)	
	)	
Appellant.	)	
	)	**O P I N I O N**

Appeal from the Superior Court in Maricopa County
The Honorable Rosa Mroz, Judge

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

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

MARICOPA COUNTY LEGAL DEFENDER'S OFFICE — Phoenix
By Brent E. Graham, Legal Defender
Attorney for Aaron Brian Gunches

B A L E S, Justice

¶1 Aaron Brian Gunches pleaded guilty to kidnapping and first degree murder and was sentenced to death for the murder. We have jurisdiction over this mandatory appeal under Article 6, Section 5(3) of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 13-4031 and 13-4033(A)(1) (2010).

FACTUAL AND PROCEDURAL BACKGROUND[1]

¶2 In November 2002, Ted Price visited his ex-wife, Katherine Lecher, in Mesa, Arizona. Price planned to stay at Lecher's apartment while waiting for a school grant. After about ten days, the two began fighting and Lecher told Price to leave. The argument became increasingly heated and Lecher hit Price in the face with a telephone. Price remained conscious but appeared dazed and unresponsive.

¶3 Gunches came to the apartment that evening. After talking with Lecher, he asked her two roommates, Michelle Beck and Jennifer Garcia, to put Price and his belongings into Lecher's car so Gunches could take him to the bus station. Gunches told Garcia to drive. Once at the station, Gunches said he did not have enough money for a bus ticket. He ordered Garcia to drive out of Mesa. Soon thereafter, he told her to turn onto a dirt path and to drive toward a dark, isolated desert area.

¶4 Garcia stopped the car. While Gunches was looking in the trunk, Price got out. Garcia then heard three popping sounds and saw Price fall to the ground; after hearing another popping sound, she saw Gunches standing by Price's body with a

---

[1] We view the facts in the light most favorable to sustaining the jury's verdicts. *See State v. Garza*, 216 Ariz. 56, 61 n.1, 163 P.3d 1006, 1011 n.1 (2007).

gun at his side. Gunches got into the car, and Garcia drove back to Mesa, stopping once to dispose of Price's belongings in a dumpster.

¶5 Price's body was discovered several days later. After Price was identified, detectives interviewed Lecher, Beck, and Garcia. Beck said that Gunches told her that he had killed Price. While the investigation continued, Gunches was arrested in La Paz County for shooting at a law enforcement officer. He later pleaded guilty to attempted murder for that incident. The authorities matched the weapon used in the La Paz County shooting with projectiles recovered from Price's body and projectiles and a shell casing recovered from the murder scene.

¶6 In October 2003, Gunches was indicted for the first degree murder and kidnapping of Price. Gunches was found competent to stand trial in November 2005 and competent to waive his right to counsel in November 2007. He subsequently pleaded guilty to both counts. Based on the La Paz County conviction, Gunches stipulated during the aggravation phase that he had previously been convicted of a serious offense under A.R.S. § 13-751(F)(2) (2010). The jury also found that Price's murder was committed in an especially heinous or depraved manner, *see id.* § 13-751(F)(6). Gunches presented virtually no mitigation evidence during the penalty phase (an objection was sustained to the only question he asked his one mitigation witness), but

requested leniency in allocution. The jury determined that he should be sentenced to death.

DISCUSSION

¶7 Gunches raises nine issues on appeal and also lists twenty-two other constitutional challenges to Arizona's death penalty that he acknowledges this Court has previously rejected. As explained below, we reject Gunches's argument that the trial court erred in finding him competent to waive counsel. Because we conclude that the jury's erroneous finding of an aggravating circumstance requires retrial of the penalty phase, we do not address Gunches's other arguments regarding the death penalty.

I. Competency to Waive Counsel

¶8 Gunches argues that the trial court violated his due process rights by finding him competent to waive counsel and allowing him to represent himself. We review a trial court's determination that a defendant has knowingly, intelligently, and voluntarily waived counsel for an abuse of discretion. *State v. Dann*, 220 Ariz. 351, 360 ¶ 25, 207 P.3d 604, 613 (2009).

¶9 Although "[t]he federal and state constitutions guarantee [a defendant] the right to waive counsel and to represent [him]self," *id.* at 359 ¶ 16, 207 P.3d at 612, a mentally incompetent defendant cannot validly waive the right to counsel, *State v. Djerf*, 191 Ariz. 583, 591 ¶ 21, 959 P.2d 1274, 1282 (1998). Under the Due Process Clause of the Fourteenth

Amendment, the competency standard for waiving the right to counsel is the same as the competency standard for standing trial. *See Godinez v. Moran*, 509 U.S. 389, 399 (1993). A defendant is competent to stand trial if he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (internal quotation marks omitted).

¶10 Gunches does not claim that the trial court erred in finding him competent to stand trial. He instead relies on *Indiana v. Edwards*, 128 S. Ct. 2379, 2388 (2008), in which the Supreme Court held that "the Constitution permits [s]tates to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Edwards* recognized that some "gray-area" defendants may be competent to stand trial but "unable to carry out the basic tasks needed to present [their] own defense[s] without the help of counsel." *Id.* at 2386.

¶11 *Edwards*, however, does not suggest the trial court erred by allowing Gunches to represent himself. *Edwards* allows, but does not require, states to insist upon representation by

counsel for certain "gray-area" defendants. It does not give such a defendant a constitutional right to have his request for self-representation denied. Moreover, even assuming that Arizona courts would apply a heightened standard of competency for such defendants to waive counsel (an issue we need not decide here), we find no error in the trial court's allowing Gunches to represent himself.

¶12 Gunches was not a "gray-area" defendant "unable to carry out the basic tasks needed to present his own defense without the help of counsel." *Id.* Three doctors found Gunches competent to stand trial, and another specifically found him competent to waive counsel. The trial court engaged Gunches in several colloquies regarding his choice to represent himself, and Gunches was assisted by advisory counsel. Although Gunches pleaded guilty, admitted one aggravator, and did not introduce mitigation evidence, he made a coherent opening statement and closing argument during the aggravation phase, cross-examined all of the State's witnesses, made objections, and made a Rule 20 motion as to the (F)(6) aggravator. Thus, even under the heightened competency standard allowed by *Edwards*, the trial court did not abuse its discretion in finding Gunches competent to waive counsel and represent himself.

II. Sufficiency of Evidence to Support (F)(6) Aggravator

¶13 Gunches argues that the State failed to prove the

(F)(6) aggravator beyond a reasonable doubt. Because Price's murder occurred after August 1, 2002, we do not independently review the jury's finding of this aggravator, but instead consider whether the jury abused its discretion. *See* A.R.S. § 13-756(A) (2010).

¶14 In reviewing a sufficiency of the evidence claim under the abuse of discretion standard, we "review[] the record to determine whether substantial evidence supports the jury's finding, viewing the facts in the light most favorable to sustaining the jury verdict." *State v. Roque*, 213 Ariz. 193, 218 ¶ 93, 141 P.3d 368, 393 (2006). "Substantial evidence is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of [the] defendant's guilt beyond a reasonable doubt." *Id.* (internal quotation marks omitted).

¶15 Under A.R.S. § 13-751(F)(6), a first degree murder is aggravated when "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner." The jury here did not find the murder especially cruel, but did find it especially heinous or depraved. "Heinousness and depravity go to a defendant's mental state as reflected in his words and actions at or near the time of the offense." *State v. Johnson*, 212 Ariz. 425, 439 ¶ 55, 133 P.3d 735, 749 (2006). Five factors are generally relevant in determining "whether a killing was

especially heinous or depraved: (1) relishing the murder, (2) infliction of gratuitous violence, (3) needless mutilation of the victim, (4) senselessness of the crime, and (5) helplessness of the victim." *State v. Bocharski*, 218 Ariz. 476, 493 ¶ 83, 189 P.3d 403, 420 (2008) (citing *State v. Gretzler*, 135 Ariz. 42, 51-52, 659 P.2d 1, 10-11 (1983)).

¶16 The State alleged three factors: (1) Gunches inflicted gratuitous violence beyond that necessary to kill; (2) Price's murder was senseless; and (3) Price was helpless. Gunches does not seriously contest the jury's findings of senselessness or helplessness. However, "senselessness and helplessness, without more, generally do not render a killing especially heinous or depraved." *State v. Wallace*, 219 Ariz. 1, 6 ¶ 25, 191 P.3d 164, 169 (2008). Thus, the State here must also prove gratuitous violence. To do so, the State must establish that 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.*" *Bocharski*, 218 Ariz. at 494 ¶¶ 86-87, 189 P.3d at 421.

¶17 The record contains substantial evidence that Gunches inflicted more violence than was necessary to kill. The medical examiner testified that Price was shot four times, suffering three gunshot wounds to the chest and one to the back of the head. Each wound, the examiner concluded, ultimately would have

been fatal.

¶18 The record, however, does not support the jury's finding that Gunches acted with the "necessary vile state of mind." *Id.* at 494 ¶ 85, 189 P.3d at 421. Garcia testified that on the night of the murder, she heard three popping sounds before seeing Price fall to the ground, and then heard a fourth popping sound and saw Gunches standing by Price's body. She said that these events "happened . . . fast." Garcia also testified that the murder occurred after dark, that she had turned off the car's headlights, and that she could "[b]arely [see] at all."

¶19 Detectives found Price laying on his right side, and photographs taken of Price's body suggest that the draping of his left arm may have obscured the gunshot wounds to his chest. The medical examiner testified that there was no evidence of "gunpowder, stippling or soot deposit" on Price's body to suggest close-range firing, and concluded that the shots came from a distance of at least two feet. Garcia testified that Gunches was even further away from Price when the first three shots occurred.

¶20 Given these circumstances, there is insufficient evidence to establish beyond a reasonable doubt that Gunches knew or should have known that he had fired a fatal shot and yet continued to inflict violence. Instead, the more plausible

inference is that after firing three shots in quick succession from a distance of several feet, Gunches was unable, given Price's body position and the darkness of the night, to discern whether Price was dead or dying before he shortly thereafter fired the final shot to Price's head.

¶21 Indeed, Garcia testified that she heard Price breathing after he fell to the ground, and the investigating detective found evidence of aspiration around Price's mouth, suggesting that he continued to "breathe a couple of times" while on the ground. The medical examiner also testified that he found a liter of blood inside Price's chest and abdominal cavities, indicating that his heart continued "[to beat] for a while" after the shooting.

¶22 Even when viewed in the light most favorable to sustaining the verdict, the evidence suggests that Price's final shot "came in an attempt . . . to kill the victim, not to engage in violence beyond that necessary to kill." *Wallace*, 219 Ariz. at 8 ¶ 37, 191 P.3d at 171 (quoting *State v. Anderson*, 210 Ariz. 327, 355 ¶ 123, 111 P.3d 369, 397 (2005)); *see, e.g., State v. Cañez*, 202 Ariz. 133, 161-62 ¶ 106, 42 P.3d 564, 592-93 (2002) (finding no gratuitous violence because defendant "merely escalated his attacks until he succeeded in killing [victim]").

¶23 The jury's verdict on the (F)(6) aggravator was therefore in error. The State, however, argues that any error

was harmless because Gunches stipulated that he had previously been convicted of a serious offense under A.R.S. § 13-751(F)(2) and he presented virtually no mitigation in the penalty phase.

¶24 We disagree. For an error to be harmless, the State must establish beyond a reasonable doubt that the error did not contribute to or affect the verdict. "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *State v. Anthony*, 218 Ariz. 439, 446 ¶ 39, 189 P.3d 366, 373 (2008) (internal quotation marks omitted).

¶25 The State cannot discharge its burden here. In its penalty phase opening statement and closing argument, the State reminded the jury of its aggravation phase verdict that Price's murder was heinous or depraved and called attention to the fact that the jury had previously found gratuitous violence. It further emphasized that in some cases, the "aggravating circumstances . . . are so heinous and so outrageous that the ultimate penalty is warranted," and argued that "[t]his case is one of them." Thus, even with the (F)(2) aggravator, we cannot conclude beyond a reasonable doubt that the jury's flawed (F)(6) finding did not contribute to or affect its ultimate conclusion that Gunches deserved death. Accordingly, we vacate Gunches's

death sentence and remand for a new penalty phase proceeding. *See* A.R.S. § 13-756(B) (requiring remand for resentencing when an error is made in capital sentencing proceedings "[i]f the supreme court cannot determine whether the error was harmless beyond a reasonable doubt").

CONCLUSION

¶26 For the foregoing reasons, we affirm Gunches's convictions for kidnapping and first degree murder and the presumptive sentence imposed on the kidnapping charge. We vacate the sentence of death for first degree murder and remand for a new penalty phase proceeding.

W. Scott Bales, Justice

CONCURRING:

Rebecca White Berch, Chief Justice

Andrew D. Hurwitz, Vice Chief Justice

Michael D. Ryan, Justice

A. John Pelander, Justice

EXHIBIT TWO

Rec: 9-6-16

IN THE

SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA,
Appellee,

v.

AARON BRIAN GUNCHES,
Appellant.

No. CR-13-0282-AP
Filed September 1, 2016

Appeal from the Superior Court in Maricopa County
The Honorable Joseph Kreamer, Judge
No. CR2003-038541
AFFIRMED

COUNSEL:

Mark Brnovich, Arizona Attorney General, John R. Lopez IV, Solicitor General, Lacey Stover Gard, Chief Counsel, Capital Litigation Section, John Pressley Todd (argued), Special Assistant Attorney General, Phoenix, Attorneys for State of Arizona

Stephen J. Whelihan (argued), Deputy Public Advocate, Maricopa County Office of the Public Advocate, Phoenix; and Louise Stark, Deputy Public Defender, Maricopa County Office of the Public Defender, Phoenix, Attorneys for Aaron Brian Gunches

---

VICE CHIEF JUSTICE PELANDER authored the opinion of the Court, in which CHIEF JUSTICE BALES and JUSTICES BRUTINEL, TIMMER, and BOLICK joined.

VICE CHIEF JUSTICE PELANDER, opinion of the Court:

¶1 Aaron Brian Gunches was convicted of first degree murder and kidnapping and was sentenced to death. On appeal, we remanded for a new penalty phase trial on the murder conviction. *State v. Gunches* (*Gunches I*), 225 Ariz. 22, 27 ¶ 26, 234 P.3d 590, 595 (2010). A jury again returned a death verdict. This Court has jurisdiction over this automatic appeal pursuant to article 6, section 5(3), of the Arizona Constitution and A.R.S. §§ 13-755 and 13-4031. We affirm.

I. BACKGROUND

¶2 Gunches was charged with the first degree murder and kidnapping of Ted Price committed in late 2002. The State noticed its intent to seek the death penalty. After the trial court found Gunches competent to stand trial and to waive his right to counsel, Gunches chose to represent himself. He later pleaded guilty to both counts.

¶3 During the aggravation phase, Gunches stipulated that he had been convicted of a serious offense (attempted murder), which is an aggravating circumstance under A.R.S. § 13-751(F)(2). The jury also found as an aggravating circumstance under § 13-751(F)(6) that Gunches committed the murder in an especially heinous or depraved manner. Gunches presented virtually no mitigation evidence in the penalty phase, but he did request leniency in allocution. The jury determined that he should be sentenced to death.

¶4 On direct appeal, this Court affirmed Gunches's convictions and the kidnapping sentence. *Gunches I*, 225 Ariz. at 27 ¶ 26, 234 P.3d at 595. Concluding that the jury's finding of the (F)(6) aggravating factor was error, however, we vacated Gunches's death sentence and remanded for a new penalty phase proceeding. *Id.* On remand, Gunches again waived his right to counsel and decided to not present any mitigation evidence. He did not request leniency in allocution. Again, the jury determined that

Gunches should be sentenced to death. His automatic appeal to this Court followed.[1]

II. DISCUSSION

A. Self-Representation in the Penalty Phase

¶5 Gunches argues that the trial court fundamentally erred in allowing him to represent himself during the penalty phase on remand. We are unpersuaded and find no error, let alone fundamental error. *See State v. Henderson*, 210 Ariz. 561, 568 ¶ 23, 115 P.3d 601, 608 (2005) (under fundamental error standard of review, defendant "must first prove error").

¶6 The Sixth Amendment to the United States Constitution states, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." Under both the federal and Arizona constitutions, a defendant has a right to waive representation by counsel. *State v. Dann*, 220 Ariz. 351, 359 ¶ 13, 207 P.3d 604, 612 (2009) (citing U.S. Const. amends. VI, XIV; Ariz. Const. art. 2, § 24); *see also Faretta v. California*, 422 U.S. 806 (1975) (recognizing a defendant's Sixth Amendment right to conduct his own defense). In *Faretta*, the Court held that the Sixth Amendment grants the concomitant right to self-representation in a state criminal trial. 422 U.S. at 807. It noted that the amendment's "language and spirit" implied a right to self-representation, and that counsel was to "be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to

---

[1] Gunches is represented by counsel in this automatic appeal from his death sentence. Although some of counsel's arguments are inconsistent with the positions Gunches took in the trial court, we are statutorily obligated to review the death sentence by considering the arguments now made in this Court. *See* A.R.S. § 13-755(A) ("The supreme court shall review all death sentences."); *cf. State v. Brewer*, 170 Ariz. 486, 494, 826 P.2d 783, 791 (1992) (holding that a capital defendant "may neither circumvent nor restrict the mandatory appeal to this court provided for him pursuant to the state's capital-sentencing procedures").

defend himself personally." *Id.* at 819–20. Further, the Court pointed out that "the colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an 'assistance' for the accused, to be used at his option, in defending himself." *Id.* at 832.

¶7 This Court has repeatedly recognized a competent capital defendant's Sixth Amendment right to self-representation during the sentencing phase. *See, e.g., State v. Dixon*, 226 Ariz. 545, 556 ¶ 62, 250 P.3d 1174, 1185 (2011); *State v. Bearup*, 221 Ariz. 163, 173 ¶ 56, 211 P.3d 684, 694 (2009); *Dann*, 220 Ariz. at 358 ¶ 10, 207 P.3d at 611; *State v. Kayer*, 194 Ariz. 423, 436 ¶ 44, 984 P.2d 31, 44 (1999); *State v. Henry* (*Henry II*), 189 Ariz. 542, 550, 944 P.2d 57, 65 (1997); *State v. Henry* (*Henry I*), 176 Ariz. 569, 585, 863 P.2d 861, 877 (1993); *State v. Williams*, 166 Ariz. 132, 134, 800 P.2d 1240, 1242 (1987); *State v. Harding*, 137 Ariz. 278, 291, 670 P.2d 383, 396 (1983). Our position is consistent with that of the United States Supreme Court and several other jurisdictions. *See, e.g., Price v. Johnston*, 334 U.S. 266, 285 (1948), abrogated in part by *McCleskey v. Zant*, 499 U.S. 467 (1991); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279–80 (1942); *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934); *United States v. Davis*, 285 F.3d 378, 384 (5th Cir. 2002); *Silagy v. Peters*, 905 F.2d 986, 1007 (7th Cir. 1990); *United States v. Plattner*, 330 F.2d 271, 274 (2d Cir. 1964); *California v. Blair*, 115 P.3d 1145, 1177 (Cal. 2005); *Illinois v. Coleman*, 660 N.E.2d 919, 937 (Ill. 1995); *Sherwood v. Indiana*, 717 N.E.2d 131, 135 (Ind. 1999); *South Carolina v. Brewer*, 492 S.E.2d 97, 99 (S.C. 1997).

¶8 As long as the defendant "knowingly, intelligently, and voluntarily waived his right to counsel," he may properly "represent[] himself during the penalty phase." *Bearup*, 221 Ariz. at 173 ¶ 56 n.3, 211 P.3d at 694 n.3. These conditions were met at Gunches's first trial, *Gunches I*, 225 Ariz. at 24-25 ¶¶ 8-12, 234 P.3d at 592-93, and again at his penalty phase retrial.

¶9 After repeatedly finding Gunches competent, the trial court granted his request to represent himself during the penalty phase. (Gunches has not challenged the trial court's competency findings.) The court, however, expressed its concern that Gunches was not attempting to

avoid the death penalty. Against the strong advice of the court and counsel, Gunches nonetheless insisted on representing himself.

¶10 Gunches first argues that a capital case's penalty phase is not a "criminal prosecution," and therefore the Sixth Amendment right to self-representation does not apply during that phase. We disagree. The Sixth Amendment right to counsel extends to all critical stages of the criminal process. *Iowa v. Tovar*, 541 U.S. 77, 80–81 (2004); *State v. Moody*, 208 Ariz. 424, 445 ¶ 65, 94 P.3d 1119, 1140 (2004). And "[a] capital trial comprises just one trial, divided into guilt and sentencing phases, and has always been understood as such, by this court and by the U.S. Supreme Court." *State v. Ring*, 204 Ariz. 534, 554 ¶ 50 n.19, 65 P.3d 915, 935 n.19 (2003). Conversely, a capital defendant's right to self-representation exists from arraignment through the direct appeal. *See State v. Lamar*, 205 Ariz. 431, 435-36 ¶ 22, 72 P.3d 831, 835-36 (2003) (acknowledging a defendant's right to self-representation under the Arizona Constitution as beginning before the jury is empaneled); *see also Coleman v. Johnsen*, 235 Ariz. 195, 196 ¶ 1, 330 P.3d 952, 953 (2014) (recognizing a defendant's right to self-representation on appeal pursuant to the Arizona Constitution).

¶11 Gunches's reliance on *State v. McGill* is misplaced because there, this Court narrowly and specifically held that the Sixth Amendment's Confrontation Clause does not apply to rebuttal testimony at a capital sentencing hearing. 213 Ariz. 147, 158-59 ¶¶ 47-52, 140 P.3d 930, 941-42 (2006); *see Crawford v. Washington*, 541 U.S. 36 (2004) (interpreting the Confrontation Clause). Our reasoning that "the penalty phase is not a criminal prosecution," *McGill*, 213 Ariz. at 159 ¶ 52, 140 P.3d at 942, did not involve or address the well-established right to self-representation during sentencing. Since *McGill*, this Court (including in *Gunches I*) has upheld a capital defendant's waiver of counsel for his resentencing proceeding, noting that "[s]elf-representation is a 'fundamental constitutional right.'" *Dann*, 220 Ariz. at 359 ¶ 16, 207 P.3d at 612 (quoting *Montgomery v. Sheldon*, 181 Ariz. 256, 259, 889 P.2d 614, 617 (1995)); *see also Dixon*, 226 Ariz. at 556 ¶ 62, 250 P.3d at 1185; *Bearup*, 221 Ariz. at 173 ¶ 56, 211 P.3d at 694. *McGill* does not alter our conclusion that the Sixth Amendment right to have or waive counsel applies to capital sentencing proceedings. *Cf. Betterman v. Montana*, 136 S. Ct. 1609, 1613 & n.2 (2016) (holding that the Sixth

Amendment's Speedy Trial Clause "detaches upon conviction," but reserving the question of whether that clause "applies to bifurcated proceedings" such as capital cases, and not addressing a defendant's constitutional right to waive counsel).

¶12 Gunches also asserts that the State's interest in the fairness and reliability of the penalty phase precluded his self-representation. He argues "the independent societal interest in the fair administration of justice has been found to outweigh even the right of the accused to counsel of his choice enshrined in the Sixth Amendment," citing *Wheat v. United States*, 486 U.S. 153 (1988). But *Wheat* dealt with a defendant's attempt to circumvent a bright-line rule: he attempted to waive a conflict of interest in order to be represented by the same counsel who represented a co-defendant. *Id.* at 154–55. We have no such issue here.

¶13 Additionally, Gunches argues the trial court granted his motion on its mistaken belief that the reason for Gunches's request to self-represent was immaterial to the court's exercise of discretion. In support, he cites *State v. De Nistor*, 143 Ariz. 407, 412-13, 694 P.2d 237, 242-43 (1985) (including "the reasons for the defendant's request" among factors trial court should consider in ruling on untimely request to waive counsel during trial). But unlike the defendant's untimely request in *De Nistor*, Gunches's timely, valid waiver of counsel, though certainly ill-advised, did not disrupt "the orderly administration of the judicial process." *Id.* at 413, 694 P.2d at 243. Gunches's known or unknown motives for self-representation did not preclude the court from constitutionally accepting his waiver of counsel. *See Barker v. Wingo*, 407 U.S. 514, 525 (1972) (describing waiver as "an intentional relinquishment or abandonment of a known right or privilege") (internal quotations omitted).

¶14 Other Arizona capital defendants have exercised their fundamental constitutional right to self-representation in capital sentencing proceedings. *See supra*, ¶ 7. Recognizing and honoring that right, this Court has upheld a capital defendant's waiver of counsel even when, as here, the defendant "presented no mitigating evidence." *State v. Cook*, 170 Ariz. 40, 46-47, 48, 63, 821 P.2d 731, 737-38, 739, 754 (1991). So too have other courts. *See Blair*, 115 P.3d at 1177; *Ohio v. Jordan*, 804 N.E.2d 1, 13-14 (Ohio 2004);

Utah v. Arguelles, 63 P.3d 731, 752-53 (Utah 2003). Accordingly, we find unpersuasive Gunches's argument that *Faretta* only "pertains to the 'right to make a defense'" and does not compel a trial court to accept a capital defendant's waiver of counsel for the penalty phase, particularly when the defendant plans to present no mitigation evidence or argument. But even if the trial court was not required to allow Gunches to represent himself, the court did not err in accepting his knowing and voluntary waiver of representation by counsel.

B. Waiver of Mitigation Evidence

¶15 Gunches argues the trial court erred by permitting him to waive the presentation of mitigation evidence. We review this claim for fundamental error and find none. *Henderson*, 210 Ariz. at 567 ¶ 19, 115 P.3d at 607.

¶16 Despite concerns raised by the trial court, advisory counsel, and the prosecutor, Gunches chose to not call any witnesses or present any mitigation evidence. In his closing argument, Gunches acknowledged that he had pleaded guilty in this case, had a prior felony conviction for "attempted murder on a cop," and did not "have any mitigation." He asked the jury only to base its decision on the evidence presented, follow the court's instructions, and not delay in reaching a verdict.

¶17 "A defendant may waive mitigation if he is competent and makes the decision knowingly, intelligently, and voluntarily." *State v. Hausner*, 230 Ariz. 60, 84 ¶ 116, 280 P.3d 604, 628 (2012); *see also State v. Goudeau*, 239 Ariz. 421, 473 ¶ 240, 372 P.3d 945, 997 (2016). It is undisputed that Gunches was competent and knowingly and voluntarily waived his right to present mitigation. Before accepting the waiver, the trial court correctly followed the procedures prescribed in *Hausner*, 230 Ariz. at 86 ¶ 122, 280 P.3d at 630. *See also State v. Joseph*, 230 Ariz. 296, 300 ¶¶ 20-21, 283 P.3d 27, 31 (2012) (reiterating the *Hausner* requirements for a defendant's waiver of the right to present mitigation evidence: that the defendant "(1) understands what mitigation is, the right to present mitigation evidence, and the consequences of waiving that right, and (2) makes the decision voluntarily"); *cf. Blystone v. Pennsylvania*, 494 U.S.

299, 306-08 & n.4 (1990) (finding defendant's death sentence constitutional despite his having presented no mitigation evidence).

¶18 In addition, having voluntarily chosen to "present[] virtually no mitigation evidence during the penalty phase" at his first trial, *Gunches I*, 225 Ariz. at 24 ¶ 6, 234 P.3d at 592, Gunches was familiar with the process, yet voluntarily made that same choice at his sentencing retrial. He was well aware of the penalty phase process, his constitutional right and opportunity to present mitigation, and the adverse consequences of foregoing that right. Before trial, advisory counsel outlined in open court the mitigation evidence they would have presented had Gunches not waived counsel. During trial, Gunches specifically acknowledged and reaffirmed that he chose to waive mitigation.

¶19 The trial judge specifically explained the possible consequences of Gunches's failure to inform the jurors (either in Gunches's closing arguments or by objecting to the prosecutor's statement in closing that there was no mitigation) that his earlier guilty plea in this case could be deemed mitigation evidence. Nonetheless, the retrial jury was aware of Gunches's prior guilty plea, inasmuch as the prosecutor told the jurors in his opening statement that Gunches had pleaded guilty, a fact Gunches acknowledged in his closing argument. In addition, the Juror Questionnaire given to each potential juror before trial stated that, "[i]n this case, the Defendant has pled guilty to the crime of First Degree Murder."

¶20 Gunches essentially asks us to revisit and overturn our prior decisions permitting competent capital defendants to knowingly and voluntarily waive or otherwise control the presentation of mitigation. *See, e.g.*, *Goudeau*, 239 Ariz. at 473-74 ¶¶ 240-46, 372 P.3d at 997-98; *Joseph*, 230 Ariz. at 300 ¶ 20, 283 P.3d at 31; *Hausner*, 230 Ariz. at 84-85 ¶ 116, 280 P.3d at 628-29; *State v. Murdaugh*, 209 Ariz. 19, 33 ¶ 70, 97 P.3d 844, 858 (2004) (stating that "[a] defendant may waive the presentation of mitigation if he is legally competent to do so"); *Kayer*, 194 Ariz. at 437 ¶ 46, 984 P.2d at 45 (stating that a defendant has the "freedom not to cooperate with a mitigation specialist and thereby potentially limit the mitigation evidence that is offered"); *State v. Roscoe*, 184 Ariz. 484, 499, 910 P.2d 635, 650 (1996) (stating that it is the defendant's "personal decision not to present certain

mitigating evidence"). He presents no compelling reason for this Court to do so. The trial court did not err in accepting Gunches's valid waiver of mitigation.

C. Legal Sufficiency of the (F)(2) Aggravator

¶21 After murdering the victim in November 2002, Gunches was arrested in La Paz County for shooting at a Department of Public Safety ("DPS") officer in January 2003. A year later, before the first trial in this case, Gunches pleaded no contest to the charge of attempted murder in the La Paz case (the "La Paz conviction"). In the aggravation phase of the first trial in this case, Gunches stipulated that he had previously been convicted of a serious offense (the La Paz conviction), which the jury then found to be an aggravating circumstance under § 13-751(F)(2).

¶22 Gunches first raised the issue concerning the legal sufficiency of his prior conviction as an (F)(2) aggravator before the resentencing proceeding ordered in *Gunches I* began. On remand, before Gunches waived his right to counsel, his then-counsel moved to strike the State's allegation that Gunches had been previously convicted of a serious offense, arguing that the La Paz no contest plea was obtained in violation of Gunches's constitutional rights. In an affidavit supporting the motion, the attorney who represented Gunches in the La Paz case averred that when advising Gunches on the proposed plea agreement, he incorrectly told Gunches that the State would not be able to use a conviction in that case to render him eligible for the death penalty in this case.

¶23 The trial court denied Gunches's motion to strike, reasoning that although a defendant may attack the validity of a prior conviction, he must do so in the action that resulted in the allegedly infirm conviction, not via collateral attack in a separate case. The court of appeals declined jurisdiction over Gunches's special action petition challenging that ruling. After waiving counsel and representing himself in the penalty phase retrial, Gunches again stipulated to his La Paz conviction as an (F)(2) aggravating factor. The prosecutor told the jurors, without objection, that the parties had stipulated to the (F)(2) aggravator, and a trial exhibit confirmed that stipulation.

¶24 Gunches argues that the trial court erred in refusing to address his challenge to the legal sufficiency of the (F)(2) aggravating circumstance found by the jury in his first trial, the sole aggravator (after *Gunches I*) that rendered him eligible for the death sentence. For several reasons, we find no error.

¶25 First, this issue is procedurally defaulted. Gunches did not challenge or otherwise object to the validity of the La Paz conviction before or during his first trial; in fact, he stipulated to it. *Gunches I*, 225 Ariz. at 24 ¶ 6, 234 P.3d at 592. Nor did Gunches raise this issue in his first direct appeal to this Court, which resulted in our remand of the case solely for a new penalty phase trial, not to revisit issues relating to the aggravation phase or the (F)(2) aggravator. *Id* at 27 ¶ 26, 234 P.3d at 595.

¶26 The pretrial motion of Gunches's former counsel on remand to strike the noticed (F)(2) aggravator did not negate Gunches's prior stipulation. And after waiving counsel on remand, Gunches again stipulated to the prior conviction without challenging its validity. *See State v. Sorrell*, 109 Ariz. 171, 173, 506 P.2d 1065, 1067 (1973) (noting that stipulations are binding on the parties); *cf. State v. Allen*, 223 Ariz. 125, 127 ¶ 11, 220 P.3d 245, 247 (2009) ("Although stipulations may bind the parties and relieve them of the burden of establishing the stipulated facts, stipulations do not bind the jury, and jurors may accept or reject them."). By stipulating to the La Paz conviction and confirming its use as an (F)(2) aggravator for sentencing purposes, Gunches is foreclosed from now challenging in this case that prior conviction's validity or the jury's finding of that aggravating circumstance in the first trial. *United States v. Laslie*, 716 F.3d 612, 615 (D.C. Cir. 2013) (citing *United States v. Harrison*, 204 F.3d 236, 240 (D.C. Cir. 2000), for the proposition that a court "will not review a belated challenge on an issue a party agreed not to dispute in sentencing proceedings below"); *see United States v. Jackson*, 346 F.3d 22, 24 (D.C. Cir. 2003) (holding that the defendant waived his challenge to a four-level enhancement by expressly conceding that it applied to his offense).

¶27 Second, Gunches's argument is untimely. In a capital case, "[a] defendant may challenge the legal sufficiency of an alleged aggravating circumstance by motion filed pursuant to Rule 16." Ariz. R. Crim. P. 13.5(c);

see also Chronis v. Steinle, 220 Ariz. 559, 208 P.3d 210 (2009). Rule 16 authorizes pretrial motions, which "shall be made no later than 20 days prior to trial, or at such other time as the court may direct." Ariz. R. Crim. P. 16.1(b). Although the State timely and properly noticed the (F)(2) aggravator (based on the La Paz conviction) before the first trial, Gunches did not challenge that under Rule 13.5(c) or otherwise. Rather, he first moved to strike the (F)(2) aggravator before the penalty phase retrial, long after the State had noticed that aggravator, and well after Gunches knew of any infirmities in the prior conviction. Thus, that motion was untimely.

¶28 Even if the motion to strike was not procedurally defaulted and time barred, however, the trial court did not err in denying it. The court correctly reasoned that Gunches could not contest in this case the legal sufficiency of his prior conviction; rather, Gunches must dispute the validity of that conviction via a Rule 32 claim of ineffective assistance of counsel in the La Paz case. *State v. Cropper*, 205 Ariz. 181, 185 ¶¶ 19-20, 68 P.3d 407, 411 (2003) (holding that a capital defendant cannot collaterally attack in the capital case the validity of a prior conviction from another case, but rather must do so directly through post-conviction relief procedures in the other case). *Cropper* is not materially distinguishable and controls here.

¶29 Nor do the cases on which Gunches relies support his position. Although *Chronis* held that a defendant is entitled to request a probable cause hearing and determination regarding an alleged aggravating factor, 220 Ariz. at 562 ¶¶ 15, 18, 208 P.3d at 213, *Chronis* does not authorize a post-trial, collateral attack on a prior, unchallenged conviction entered in another case, after it has been found by the jury to be an aggravating factor. *Cf. State v. Nordstrom*, 230 Ariz. 110, 117 ¶ 28, 280 P.3d 1244, 1251 (2012) (noting that Rule 13.5(c) does not entitle a capital case defendant to an adjudication and determination of the "'legal sufficiency'" of an aggravator under A.R.S. § 13-751(F)(1)).

¶30 *State v. Cornell*, 179 Ariz. 314, 878 P.2d 1352 (1994), also does not help Gunches. There, this Court recognized the longstanding principle that constitutionally infirm convictions cannot be used to enhance charges or sentences in later proceedings. *Id.* at 334, 878 P.2d at 1372. In *Cornell*, however, the prior conviction that served as an aggravator was reversed in

a proceeding in the other (aggravated assault) case, so it was necessary to reweigh the death sentence in light of the reversal of the prior conviction. *Id.* That is not the situation here.

¶31 Gunches also cites *State v. McCann*, in which this Court held that "a rebuttable presumption of regularity attaches to prior convictions used to enhance a sentence or as an element of a crime." 200 Ariz. 27, 28 ¶ 1, 21 P.3d 845, 846 (2001). In our "limited" holding in that case, *id.* at 31 ¶ 16, we determined that the state must first prove the existence of a prior conviction that it plans to use as a sentence enhancer or as an element of the crime, and if the defendant presents credible evidence to overcome the presumption of regularity attached to the final judgment, the state must prove that the prior conviction was constitutionally obtained. *Id.* at 31 ¶ 15, 21 P.3d at 849. *McCann* does not procedurally authorize Gunches's challenge in this case to his La Paz conviction, and to the extent it suggests he could do so, that language in *McCann* is dicta. In addition, after *McCann*, *Cropper* specifically rejected the type of collateral attack Gunches makes here. *Cropper*, 205 Ariz. at 185 ¶¶ 18-20, 68 P.3d at 411.

¶32 In sum, the trial court's denial of Gunches's motion to strike the (F)(2) aggravator is consistent with *Cropper*, *Cornell*, and Rule 13.5(c). The court did not err in that ruling.

D. Response to Jury Question During Deliberations

¶33 During its penalty phase deliberations, the jury sent the following question to the trial court:

> If the two cases were tried in reverse order, i.e., the Ted Price murder first, then the attempted murder of the DPS officer, would the state still be seeking the death penalty?

Without objection, the trial court answered that the order of the cases has no legal significance.

¶34 Gunches argues that the trial court fundamentally erred by responding to the jurors' question with an incorrect statement of the law that prohibited them from considering a circumstance that was a valid basis

for leniency. Gunches has not established error, let alone fundamental error. *Henderson*, 210 Ariz. at 567 ¶ 19, 115 P.3d at 607.

¶35 After *Gunches I*, the (F)(2) prior conviction was the only aggravating factor that rendered Gunches eligible for the death penalty. He argues that the trial court's response to the jury's question was legally incorrect because the State could not have sought the death penalty under § 13-751(F)(2) had this case been tried before his conviction in the La Paz case, that is, had the cases been tried in the chronological order of the charged offenses in each case.

¶36 The trial court's answer, although somewhat unresponsive to the jury's question, did not misstate the law. The order of the cases was not legally relevant because, at the time of the penalty phase, Gunches had stipulated to the La Paz conviction. The jury's question necessarily required the trial court to either reject it as irrelevant (as the court did), or entertain a hypothetical scenario (a reversal of the order of the cases) that was factually incorrect and could not come to pass. Thus, the court correctly answered that the order of the cases was not relevant, as the inquiry should not have factored into the jury's deliberations. In addition, to the extent the jurors' question implicitly inquired whether the State would have sought the death penalty absent the La Paz conviction, that too was irrelevant and would have called for speculation.

¶37 Even if the trial court's response misstated the law, however, it would not be grounds to vacate Gunches's death sentence because he has not shown prejudice. *Henderson*, 210 Ariz. at 567 ¶ 20, 115 P.3d at 607 (defendant asserting fundamental error must establish that error "caused him prejudice"). The jurors were not prohibited from considering as a mitigating factor the order of the offenses in determining an appropriate sentence. The court instructed the jury:

> In reaching a reasoned, moral judgment about which sentence is justified and appropriate, you must decide how compelling or persuasive the totality of the mitigation is when compared against the totality of the aggravating factor and the facts and circumstances of the case. This assessment is not a mathematical one, but instead must be made in light of each

> juror's individual, qualitative evaluation of the facts of the case, the severity of the aggravating factor, and the quality of the mitigating factors found by each juror.

In sum, Gunches has not carried his burden of establishing that the trial court's response to the jurors' question resulted in fundamental error.

E. Prosecutorial Misconduct

¶38 In his closing argument, Gunches told the jury, "I don't have any mitigation. I am not going to present any." The prosecutor then told the jury in his closing:

> You know also from your instructions the burden to prove the existence of mitigating circumstances is the defendant's. There has been no mitigation presented to you. There's no mitigation as to the defendant's character, propensity, history, record and there is certainly no mitigation in the awful and ugly circumstances of Ted Price's death.

Gunches's rebuttal closing argument did not suggest any mitigation. Later, when discussing (outside of the jury's presence) his failure to tell the jurors that they could consider his guilty plea as evidence that he accepted responsibility, Gunches told the court, "I don't feel it [the guilty plea] is a mitigating factor. . . . I didn't do it as a mitigating factor but it has been considered as a mitigating factor."

¶39 Gunches argues that his guilty plea is evidence of acceptance of responsibility, a recognized mitigating circumstance, and therefore the prosecutor's assertion during closing argument constituted a misstatement of law, *Busso-Estopellan v. Mroz*, 238 Ariz. 553, 554 ¶ 6, 364 P.3d 472, 473 (2015), and fundamental error as it deprived Gunches of a fair trial.

¶40 "A prosecutor may make arguments and may draw inferences that are reasonably supported by the evidence." *State v. Burns*, 237 Ariz. 1, 32 ¶ 152, 344 P.3d 303, 334 (2015). Gunches neither objected to nor rebutted the prosecutor's statement that no mitigation evidence was presented. That was not a misstatement inasmuch as Gunches expressly

acknowledged that fact in his closing and chose to not present any mitigation evidence. Gunches also declined to accept responsibility during his allocution. We find no error.

III. ABUSE OF DISCRETION REVIEW

¶41 Because Gunches committed the murder after August 1, 2002, we must review the jury's finding of aggravating circumstances and the imposition of a death sentence for abuse of discretion, A.R.S. § 13-756(A), viewing the facts in the light most favorable to sustaining the verdict, *State v. Naranjo*, 234 Ariz. 233, 249 ¶ 81, 321 P.3d 398, 414 (2014). We must conduct this review even if, as here, the defendant does not argue that the jury's verdict was an abuse of discretion. *State v. Morris*, 215 Ariz. 324, 340 ¶ 76, 160 P.3d 203, 219 (2007). "A finding of aggravating circumstances or the imposition of a death sentence is not an abuse of discretion if 'there is any reasonable evidence in the record to sustain it.'" *State v. Delahanty*, 226 Ariz. 502, 508 ¶ 36, 250 P.3d 1131, 1137 (2011) (quoting *Morris*, 215 Ariz. at 341 ¶ 77, 160 P.3d at 220). Given the established aggravating circumstance under § 13-751(F)(2) based on Gunches's uncontested prior conviction, the jury did not abuse its discretion in determining that there was no mitigation sufficiently substantial to call for leniency. *See* A.R.S. §§ 13-751(C), (E), -752(G).

IV. CONCLUSION

¶42 We affirm Gunches's death sentence.[2]

---

[2] Stating that he wishes to preserve certain issues for federal review, Gunches lists twenty-six constitutional claims and previous decisions rejecting them. We decline to revisit those claims.

EXHIBIT THREE

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-13-0282-AP
Appellee,	)	
	)	Maricopa County
v.	)	Superior Court
	)	No. CR2003-038541-001
AARON BRIAN GUNCHES,	)	
	)	
Appellant.	)	
	)	
	)	

NOTICE FOR POST-CONVICTION RELIEF (Death Penalty)

TO: Maricopa County Superior Court

CLERK: Michael K Jeanes

This Notice for Post-Conviction Relief is presented for filing pursuant to Rule 32.4(a), Arizona Rules of Criminal Procedure.

Date of sentence according to the Superior Court Record: **August 1, 2013**

Defendant's Trial Court Advisory Counsel: **Rena Glitsos and Marci Kratter**

Date of Mandate of the Arizona Supreme Court affirming the defendant's conviction and sentence of death: **March 16, 2017**

Defendant's Appellate Court Attorneys: **Stephen Whelihan and Louise Stark**

DATED this 16th day of March, 2017.

Janet Johnson
Clerk of the Court

cc:
Dominic Emil Draye
Lacey Stover Gard
John Pressley Todd
Stephen Whelihan
Sarah E Stone
Aaron Brian Gunches, ADOC 145371, Arizona State Prison,
Florence - Eyman Complex-Browning Unit (SMU II)
William G Montgomery
V George Gialketsis
Rena P Glitsos
Marci A Kratter
Dale A Baich
Diane Alessi
Amy Armstrong
Hon. Janet E Barton
Hon. Sam J Myers
Hon. Joseph C Kreamer
Raymond L Billotte
Christina M Phillis
bp

EXHIBIT FOUR

Aaron Gunches
#145371
P.O. Box 8200
Florence, AZ. 85132

STATE OF ARIZONA
MARICOPA COUNTY SUPERIOR COURT

MICHAEL K JEANES, CLERK
BY J Hardaway DEP
FILED
17 OCT 25 PM 4:44

STATE OF AZ.
PLAINTIFF/RESPONDENT
V.
AARON GUNCHES,
DEFENDANT/PETITIONER,

CR2003-038591-001 SE

WAIVER OF COUNSEL
(CAPITAL CASE)
(TELEPHONIC HEARING REQUESTED)
HON. SAM MYERS

COMES NOW, AARON GUNCHES, CAPITAL DEFENDANT/PETITIONER HEREBY ASSERTS WAIVER OF COUNSELS ASSISTANCE AND NOTICE OF INTENT TO PROCEED IN PRO SE FOR HIS POST-CONVICTION RELIEF ("PCR") PROCEEDINGS. THIS MOTION INCORPORATES THE DOCTRINE OF LIBERAL CONSTRUCTION APPLIED TO PRO SE FILINGS, AND IS SUPPORTED BY USCA 6 AND 14; ART. II §24, ARIZ. CONSTIT., AND THE MEMORANDUM OF POINTS AND AUTHORITIES ATTACHED.

RESPECTFULLY SUBMITTED THIS DAY OCTOBER 22, 2017.

Gunches

Memorandum of Points and Authorities

I. Relevant Facts and Procedural History

At Defendants first proceedings, he was determined by multiple experts for both Defense and State to be mentally competant to stand jury trial before ultimately being sentenced to Death. On subsequent Direct Appeal, the Arizona Supreme Court ("ASC") affirmed Defendants convictions, reversed his Capital Sentence, and Remanded the case to the Superior Court for Penalty Phase Retrial. (State v. Gunches I, 225 Ariz. 22 (2010)).

Prior to Retrial, the Trial Court additionally determined the Defendant Competent to both Waive Counsels assistance and to conduct his own Defense. When the jury reissued a Capital Sentence, the ASC affirmed (State v. Gunches II, 240 Ariz. 198 (2016)) issuing a March 16, 2017 mandate and Notice of PCR with this Court pursuant to §13-4234 (D); Rule 32.4 (a), Arizona Rules Criminal Procedure, and appointed Defense Counsel pursuant to §13-4041 (B).

No Petition has been submitted, as case development has just begun. The Petitions current filing deadline is March 16, 2018.

II. Relevant Facts and Law

It is well settled that a defendant has both the state and federal[1] constitutional right to waive counsels assistance and conduct his own defense in a criminal proceeding (see Gunches II at ¶6; State v. Dann III, 220 Ariz. 351, 359 ¶¶ 16, 24 (2009)). In Arizona, this right is extended to collateral appeal by Rule 32.3, ARCP, which construes PCR as part of the trials original proceeding.

A prospective Pro Se litigant must not only understand the nature of the charges against him, the dangers and also disadvantages of self-representation, and the range of punishment at stake (Dann III at ¶¶ 23-25), he must also have the mental competancy to conduct his defense without counsels assistance (Indiana v. Edwards, 554 U.S. 164, 173-178 (2008)). To ensure a valid waiver, a judge should make inquiry into a defendants understanding of the above, either at a hearing pursuant to Faretta v. California, 422 U.S. 806 (1975), or by examining whether the record otherwise demonstrates a knowing and intelligent waiver (see State v. Cornell, 179 Ariz 314, 322 (1994)), (see also McCormick v. Adams, 621 F.3d 970, 979 (9th Cir 2010) (Validity

[1] While there is no federal right to counsels assistance in capital state collateral review proceedings (Martinez v. Schriro, 623 F.3d 731, 736 (9th Cir. 2010)), Arizona state courts will typically follow federal constitutional standards when adjudicating a waiver of statutory and procedural-rule rights.

OF WAIVER UPHELD ON HABEAS REVIEW BECAUSE TRIAL COURT CAN DETERMINE SUFFICIENCY OF WAIVER FROM THE RECORD AS A WHOLE RATHER THAN FROM FORMALISTIC, DELIBERATE, AND SEARCHING INQUIRY).

HERE, THE TRIAL COURT TWICE FOUND DEFENDANTS WAIVER VALID DURING TRIAL PROCEEDINGS. NOW, AND WITH THE MAJOR COMPLEXITY OF CHOICES AND RISKS PAST, A SIMPLE CONSENT TO PROCEED WITHOUT COUNSEL SHOULD BE SUFFICIENT (SEE SPEIGHTS V. FRANK, 361 F.3d 962, 965 (7TH CIR 2004)). ACCORDINGLY, AND FOLLOWING THOSE PREVIOUS WAIVER COLLOQUIES WITH THE SUPERIOR COURT, DEFENDANT OFFERS THE FOLLOWING:

1. AARON BRIAN GUNCHES IS MY TRUE NAME; AND
2. MY DATE OF BIRTH IS JUNE 30, 1971; AND
3. I COMPLETED HIGH SCHOOL; AND
4. I READ AND UNDERSTAND ENGLISH; AND
5. I HAVE TAKEN NO DRUGS OR ALCOHOL WITHIN 24 HOURS OF THIS ARGUMENT;
6. I HAVE NO CURRENT OR PAST MENTAL PROBLEMS; AND
7. I WANT TO GIVE UP MY RIGHT TO COUNSEL AND REPRESENT MYSELF IN THIS CASE, INCLUDING AT CURRENT STAGE OF PCR; AND
8. I HAVE REPRESENTED MYSELF BEFORE IN THIS CAPITAL CASE; AND
9. I HAVE READ SEVERAL VARIATIONS OF THE WAIVER FORMS; AND
10. I UNDERSTAND ATTORNEYS CAN BE OF ASSISTANCE IN CRIMINAL PROCEEDINGS, AND THAT THERE ARE SERIOUS DANGERS AND DISADVANTAGES TO REPRESENTING MYSELF AT PCR, INCLUDING THAT WHICHEVER RULE 32.1 CLAIMS I MAY OMIT FROM MY ULTIMATE PETITION MAY BE WAIVED AND/OR PRECLUDED FROM FURTHER APPELLATE REVIEW,

WITH THE ULTIMATE RESULT OF HAVING THE JURY'S VERDICT OF CAPITAL SENTENCE BEING CARRIED OUT BY ARIZONA DEPARTMENT OF CORRECTIONS.

(11) I AM WAIVING COUNSELS ASSISTANCE AS I HAVE VERY SPECIFIC OBJECTIONS AT PCR WHICH ONLY I CAN PRESENT AND DEFEND TO MY SATISFACTION. I HAVE NO CONFLICT WITH CURRENT COUNSEL, WHO HAS BEEN PROFESSIONAL AND COURTEOUS TO DATE, BUT I PERSONALLY AM COMPELLED TO CONDUCT MY OWN DEFENSE AGAINST THE ULTIMATE PENALTY; AND

(12) FINALLY, I UNDERSTAND THAT, PURSUANT TO RULE 32.4(c), ARCP, I HAVE 120 DAYS FROM THE MARCH 16, 2017 FILING OF NOTICE DATE TO PRESENT MY PETITION FOR REVIEW, AND THAT EXTENSIONS TO THIS DATE ARE AUTHORIZED AND STANDARD UPON REQUEST AND SHOWING OF GOOD CAUSE.

III. CONCLUSION

DEFENDANT REQUESTS THIS COURT GRANT HIS WAIVER OF COUNSEL REQUEST ON THE GROUNDS ABOVE. SHOULD THE COURT REQUIRE MORE, THE DEFENDANT CAN, UPON THIS COURT'S ORDERS, BE MADE TELEPHONICALLY AND/OR "SKYPE" PRESENT BY CONTACTING ADOC AT (520) 868-4011 OR AZ.CORRECTIONS.COM, AND ARRANGING PROCEEDINGS AS APPROPRIATE AS THE DEFENDANT WOULD REQUEST/PREFER TO REMAIN IN THE CUSTODY OF ADOC, IF AT ALL POSSIBLE. PLEASE DIRECT CLERK TO COPY DEFENDANT ANY ORDERS OR OTHER RESPONSE GENERATED.

RESPECTFULLY SUBMITTED THIS 4TH OF OCTOBER 22, 2017.

Dunches

CC:

CLERK OF THE COURT, MARICOPA COUNTY SUPERIOR COURT
MICHAEL K. JEANES
101 W. JEFFERSON ST.
PHX, AZ. 85003

CRIMINAL PRESIDING JUDGE, MARICOPA COUNTY SUPERIOR COURT
HON. SAM MYERS
175 W. MADISON ST. (SCT)
PHX, AZ. 85003

OFFICE OF THE ATTORNEY GENERAL
ASST AG MYLES BRACCIO
1275 W. WASHINGTON
PHX, AZ. 85007

PCR COUNSEL
SARAH STONE
24 W. CAMELBACK RD. #A458
PHX, AZ. 85013

PCR DEFENDANT/PETITIONER
AARON GUNCHES #145371
ASPC-FLORENCE/CENTRAL
P.O. BOX 8200
FLORENCE, AZ. 85132

EXHIBIT FIVE

Chris DeRose, Clerk of Court
*** Electronically Filed ***
06/08/2018 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2003-038541-001 SE

06/04/2018

HON. SAM J. MYERS

CLERK OF THE COURT
O. Hernandez
Deputy

STATE OF ARIZONA

MYLES A BRACCIO

v.

AARON BRIAN GUNCHES (001)

AARON BRIAN GUNCHES
#145371 ASPC FLORENCE/CENTRAL
P O BOX 8200
FLORENCE AZ 85132
SARAH ELIZABETH STONE

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

MINUTE ENTRY

9:18 a.m.

Courtroom SCT 5A

State's Attorney:	Myles Braccio
Advisory Attorney:	Sarah Stone
Defendant:	Present appears telephonically

Court Reporter, Dalia Ambriz, is present.

A record of the proceedings is also made digitally.

The Court has received Defendant's Waiver of State Collateral Review (Post-Conviction Relief) filed 5/23/2018 and State's Response.

CR2003-038541-001 SE 06/04/2018

Discussion is held regarding the document filed.

The Court and Defendant engage in a colloquy regarding Defendant's requested waiver. Defendant acknowledges understanding his rights to Rule 32 review and the consequences of waiving those rights.

Based on the matters discussed,

The Court finds that Defendant is competent to waive his right to Rule 32 review. Defendant has knowingly, intelligently, and voluntarily waived his right to Rule 32 review, and the Court finds no basis upon which to deny Defendant's request.

IT IS ORDERED granting defendant's request to waive his PCR rights and dismissing the Notice of PCR at this time.

Advisory counsel is permitted to file any document she may want to supplement the record.

9:35 a.m. Matter concludes.