SUPREME COURT OF ARIZONA

STATE OF ARIZONA, APPELLEE, vs. CHRISTOPHER MICHAEL MONTOYA, APPELLANT.	ARIZONA SUPREME COURT No. CR-22-0106-AP MARICOPA COUNTY SUPERIOR COURT No. CR 2017-006253-001 DT

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES vi

ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF CASE AND FACTS 2

ARGUMENT I 20

This Court must vacate Mr. Montoya's death sentence and remand for a new penalty phase proceeding because the prosecutor committed persistent and pervasive misconduct which denied Mr. Montoya's rights to due process, to a fair trial, and to be free from arbitrary and capricious imposition of a death sentence.

A. The prosecutor argued an unproven aggravator during closing argument, in violation of Mr. Montoya's due process rights under the United States and Arizona constitutions. 23

B. The prosecutor repeatedly appealed to the passions and sympathies of the jury. 26

C. The prosecutor erred by using the defendant's proffered mitigation of acceptance of responsibility, family ties, and history of substance abuse as non-statutory aggravating circumstances instead of mitigating circumstances. This violated Mr. Montoya's right to due process of law under the Fourteenth Amendment to the United States Constitution and Art. 2, § 4 of the Arizona Constitution and his right to be free from a death sentence arbitrarily and capriciously imposed.............. 39

D. The prosecutor misstated the law by instructing the jury that any mitigation they determined to be a mere excuse for the crime could not be considered as a mitigating factor..........................49

E. The prosecutor facilitated improper vouching by placing the prestige of the government behind the State's evidence and by implying that information not presented at trial supports the State's evidence. 52

F. The prosecutor's improper questioning of witness Larry Binkley about Mr. Montoya's character and the impact of Mr. Montoya's prior conviction on Binkley, who was the victim of the prior crime, violated the trial court's previous ruling and Mr. Montoya's rights under the Eighth and Fourteenth Amendments to the United States Constitution. 59

G. The prosecutor improperly commented on Mr. Montoya's failure to testify, in violation of the United States and Arizona Constitutions. 63

H. The cumulative effect of the persistent and pervasive misconduct so infected Mr. Montoya's penalty phase proceeding that the resulting death verdict violated the Fifth, Sixth, and Eighth Amendments to the United States Constitution. 67

ARGUMENT II 69

The trial court violated Mr. Montoya's constitutional rights to a fair and impartial jury, to due process, to heightened reliability, and to be free from cruel and unusual punishment, by improperly limiting the scope of voir dire and asking rehabilitative and "follow the law" questions despite Arizona's abolishment of peremptory strikes and the requirements of *Morgan v. Illinois*.

A. The trial court violated Mr. Montoya's constitutional rights when it refused to allow Mr. Montoya to inquire whether the prospective jurors were predisposed to impose the death penalty

on someone guilty of first-degree murder and when the court asked rehabilitative and "follow the law" questions 84

B. The trial court's unconstitutional restriction on voir dire resulted in an improperly vetted jury and requires reversal of Mr. Montoya's death sentence 88

ARGUMENT III 90

The trial court abused its discretion by overruling Mr. Montoya's objection to Juror 17 for cause and by designating Juror 6 an alternate without reasonable grounds, in violation of Mr. Montoya's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

A. The trial judge abused his discretion by overruling Mr. Montoya's objection to Juror 17 (then Potential Juror 119) for cause.. 90

B. The court abused its discretion by designating Juror 6 as an alternate absent a reasonable ground to do so. The result is an improper for-cause strike of a qualified juror, in violation of Mr. Montoya's rights under the Sixth and Fourteenth Amendments to the United States Constitution. 95

ARGUMENT IV 104

The trial court's admission of gruesome photographs during the penalty phase that were either irrelevant or marginally relevant but unduly prejudicial was an abuse of discretion and violated Mr. Montoya's constitutional rights to due process, a fair trial, heightened reliability, and freedom from cruel and unusual punishment.

A. The gruesome photographs depicting A.R.'s decomposed body were irrelevant or minimally relevant at most and were unduly prejudicial. 109

B. This Court must vacate the death sentence because the constitutionally deficient especially cruel and especially

heinous instruction prevented the jury from returning a valid verdict.. 112

ARGUMENT V 114

The trial court erred by allowing Mr. Montoya to waive mitigation over his attorneys' objection, in violation of his rights to due process, a fair trial, to be free from cruel and unusual punishment, and to the assistance of counsel under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

A. The trial court erred by permitting Mr. Montoya to prevent the presentation of mitigation, resulting in an unreliable sentence imposed in an arbitrary and capricious manner. 115

B. The trial court erred by permitting a represented defendant to waive mitigation over his attorneys' objection, in violation of the right to effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution.............123

ARGUMENT VI 133

The victim impact statements contained improper opinions about the defendant and the crime and were unduly prejudicial, in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

ARGUMENT VII..139

This Court must vacate Mr. Montoya's death sentence and remand for a new penalty phase proceeding because the trial court committed fundamental error when it gave an incomplete instruction regarding the especially cruel or heinous aggravator that permitted the jury to weigh this aggravator twice when it deliberated Mr. Montoya's sentence.

A. The incomplete especially cruel and especially heinous instruction permitted the jury to double weigh this single aggravating circumstance 142

B. This Court must vacate the death sentence because the constitutionally deficient especially cruel and especially heinous instruction prevented the jury from returning a valid verdict 143

ARGUMENT VIII 145

Mr. Montoya's guilty pleas were not knowing, intelligent, and voluntary because the court failed to inform him that by pleading guilty, he would be waiving his right to competent post-conviction counsel on his noncapital counts.

A. The trial court erred by failing to inform Mr. Montoya that he would be waiving his right to competent post-conviction counsel on his noncapital counts, resulting in guilty pleas that were not knowingly, intelligently, and voluntarily entered. 148

B. The error is fundamental. 154

C. Mr. Montoya was prejudiced by the error. 156

ISSUES PRESERVED FOR FEDERAL REVIEW 158

CONCLUSION 163

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007) ... 42
Arizona v. Gant, 556 U.S. 332 (2009) ... 129
Baze v. Rees, 553 U.S. 35 (2008) ... 162
Berger v. United States, 295 U.S. 78 (1935) ... 21
Blystone v. Pennsylvania, 494 U.S. 299 (1990) ... 118-120, 126-129
Booth v. Maryland, 482 U.S. 496 (1987) ... 37, 136
Boyde v. California, 494 U.S. 370 (1990) ... 50-51
Boykin v. Alabama, 395 U.S. 238 (1969) ... 152-54
Buchanan v. Angelone, 522 U.S. 269 (1998) ... 50-51
California v. Brown, 479 U.S. 538 (1987) ... 28
Coleman v. Thompson, 501 U.S. 722 (1991) ... 149-50
Davis v. Georgia, 429 U.S. 122 (1976) ... 95, 102
Eddings v. Oklahoma, 455 U.S. 104 (1982) ... 40, 116-119
Edwards v. Indiana, 554 U.S. 164 (2008) ... 131-32
Evitts v. Lucey, 469 U.S. 387 (1985) ... 154
Faretta v. California, 422 U.S. 806 (1975) ... 121, 124, 129
Frazier v. United States, 335 U.S. 497 (1948) ... 94
Furman v. Georgia, 408 U.S. 238 (1972) ... 62, 116
Gardner v. Florida, 430 U.S. 349 (1977) ... 112-13
Godfrey v. Georgia, 446 U.S. 420 (1980) ... 26, 144
Gonzalez v. United States, 553 U.S. 242 (2008) ... 124
Gray v. Mississippi, 481 U.S. 648 (1987) ... 95
Gregg v. Georgia, 428 U.S. 153 (1976) ... 115, 131, 158
Illinois v. Gates, 462 U.S. 213 (1983) ... 120
J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 142 (1994) ... 98
Johnston v. Zerbst, 304 U.S. 458 (1938) ... 153
Jones v. Barnes, 463 U.S. 745 (1983) ... 124-25
Lockett v. Ohio, 438 U.S. 586 (1978) ... 40, 116-18
Martinez v. Ryan, 566 U.S. 1 (2012) ... 150
McCleskey v. Kemp, 481 U.S. 279 (1987) ... 116-17
McCoy v. Louisiana, __ U.S. __, 138 S.Ct. 1500 (2018) ... 124-25
Morgan v. Illinois, 504 U.S. 719 (1992) ... 69, 83-86, 88-89, 93, 102
Murray v. Giarratano, 492 U.S. 1 (1989) ... 155

Payne v. Tennessee, 501 U.S. 808 (1991) 30, 34, 61-62, 112, 136-37
Pennsylvania v. Finley, 481 U.S. 551 (1987) 145, 155
Penry v. Lynaugh (Penry I), 492 U.S. 302 (1989).. 50, 117
Roof v. United States, 143 S.Ct. 303 (2022)...125
Roper v. Simmons, 543 U.S. 551 (2005)..115
Rosales-Lopez v. United States, 451 U.S. 182 (1981) 83
Shinn v. Ramirez, __ U.S. __, 142 S.Ct. 1718 (2022) 156
Strickland v. Washington, 466 U.S. 668 (1984) 125-26
Taylor v. Freeland & Kronz, 503 U.S. 638 (1992).. 120-21
Taylor v. Illinois, 484 U.S. 400 (1988)..125
Tennard v. Dretke, 542 U.S. 274 (2004) 50
Trop v. Dulles, 356 U.S. 86 (1958)... 122, 158
Tuilaepa v. California, 512 U.S. 967 (1994)...118
U.S. v. Davila, 569 U.S. 597 (2013) 156
U.S. v. McCarthy, 394 U.S. 459 (1969)...153
Walton v. Arizona, 497 U.S. 639 (1990)..25
Weems v. U.S., 217 U.S. 349 (1910)...121
Wheat v. United States, 486 U.S. 153 (1988) 132
Whitley v. Albers, 475 U.S. 312 (1986) 122
Witherspoon v. Illinois, 391 U.S. 510 (1968) 95, 102
Woodson v. North Carolina, 428 U.S. 280 (1976) 41, 116-17, 161
Zant v. Stephens, 462 U.S. 862 (1983) 42

FEDERAL CASES

Dear Wing Jung v. United States, 312 F.2d 73 (9th Cir. 1962) 122
United States v. Freitag, 230 F.3d 1019 (7th Cir. 2000)..99
United States v. Johnson, 713 F.Supp.2d 595 (E.D. La. 2010)...............................35
United States v. Roof, 10 F.4th 314, 352 (4th Cir. 2021) 125-26

ARIZONA SUPREME COURT CASES

Busso-Estopellan v. Mroz, 238 Ariz. 553 (2015) 40
Lynn v. Reinstein, 205 Ariz. 186 (2003)...161
Matter of Martinez, 248 Ariz. 458 (2020) 20-21
Montgomery v. Sheldon (Montgomery I), 181 Ariz. 256 (1995)...........................145
Pandeli v. Arizona (Pandeli II), 536 U.S. 953 (2002)..158
Pool v. Superior Court, 139 Ariz. 98 (1984)...21
State ex rel. Thomas v. Granville (Baldwin), 211 Ariz. 468 (2005)......................139
State v. Allen, 248 Ariz. 352 (2020)...36

State v. Anderson (Anderson I), 197 Ariz. 314 (2000) 102-103
State v. Anderson (Anderson II), 210 Ariz. 327 (2005) 26
State v. Beaty, 158 Ariz. 232 (1988) 158
State v. Bible, 175 Ariz. 549 (1993) 70, 105
State v. Bocharski, 218 Ariz. 476 (2008) 22, 147, 160-61
State v. Boggs, 218 Ariz. 325 (2008) 109
State v. Brewer, 170 Ariz. 486 (1992) 115
State v. Bush, 244 Ariz. 575 (2018) 136
State v. Carlson, 237 Ariz. 381 (2015) 30
State v. Champagne, 247 Ariz. 116 (2019) 59-60, 62
State v. Chapple, 135 Ariz. 281 (1983) 111, 113
State v. Comer, 165 Ariz. 413 (1990) 26, 28-29
State v. Cota, 229 Ariz. 136 (2012) 24-25, 98, 105, 159
State v. Dann, 220 Ariz. 351 (2009) 48, 105, 139-40, 160
State v. Djerf, 191 Ariz. 583 (1998) 147
State v. Doerr, 193 Ariz. 56 (1998) 143
State v. Escalante, 245 Ariz. 135 (2018) 23, 29, 38, 105, 140, 147, 154-55
State v. Gallardo, 225 Ariz. 560 (2010) 22, 34
State v. Garza, 216 Ariz. 56 (2007) 133
State v. Gerlach, 134 Ariz. 164 (1982) 113
State v. Glassel, 211 Ariz. 33 (2005) 69, 84, 90, 161
State v. Goudeau, 239 Ariz. 421 (2016) 66, 126-27
State v. Greene, 192 Ariz. 431 (1998) 24, 133
State v. Gulbrandson, 184 Ariz. 46 (1995) 160
State v. Hampton, 213 Ariz. 167 (2006) 20, 42, 110, 112, 137, 162
State v. Hausner, 230 Ariz. 60 (2012) 125, 127, 130
State v. Henderson, 210 Ariz. 561 (2005) 23, 25, 69-70, 90, 95-96, 105, 140
State v. Herrera, 174 Ariz. 387 (1993) 27, 34
State v. Hickman, 205 Ariz. 192 (2003) 88
State v. Hidalgo, 241 Ariz. 543 (2017) 70, 90, 158
State v. Hughes, 193 Ariz. 72 (1998) 22, 63-64
State v. Johnson, 212 Ariz. 425 (2006) 161
State v. Johnson, 247 Ariz. 166 (2019) 43
State v. Jones, 197 Ariz. 290 (2000) 84, 94
State v. Kayer, 194 Ariz. 423 (1999) 127, 130
State v. Lavers, 168 Ariz. 376 (1991) 95, 100
State v. Lynch, 238 Ariz. 84 (2015) 27
State v. Mann, 188 Ariz. 220 (1997) 136
State v. Martinez, 230 Ariz. 208 (2012) 35

State v. Mata, 125 Ariz. 233 (1980)......66-67
State v. McCray, 218 Ariz. 252 (2008)......139
State v. McCutcheon, 159 Ariz. 44 (1988)......63
State v. McGill, 213 Ariz. 147 (2006)......109, 112, 162
State v. Medina, 232 Ariz. 391 (2013)......24
State v. Miles, 186 Ariz. 10 (1996)......142, 162
State v. Moody, 208 Ariz. 424 (2004)......133
State v. Moore, 222 Ariz. 1 (2009)......48
State v. Morris, 215 Ariz. 324 (2007)......113
State v. Murray, 250 Ariz. 543 (2021)......68
State v. Newell, 212 Ariz. 389 (2006)......55, 58
State v. Noriega, 187 Ariz. 282 (1996)......143
State v. Ovante, 231 Ariz. 180 (2013)......147
State v. Pandeli (Pandeli I), 200 Ariz. 365 (2001)......158, 160
State v. Pandeli (Pandeli IV), 215 Ariz. 514 (2007)......112, 147
State v. Pandeli, 242 Ariz. 175 (2017)......126
State v. Patterson, 230 Ariz. 270 (2012)......86
State v. Poyson, 198 Ariz. 70 (2000)......159
State v. Prince, 204 Ariz. 156 (2003)......34, 51, 99, 101
State v. Riley, 248 Ariz. 154 (2020)......118, 120, 126-28
State v. Ring (Ring I), 200 Ariz. 229 (2001)......160
State v. Ring (Ring III), 204 Ariz. 534 (2003)......95-96
State v. Robinson, 253 Ariz. 121 (2022)......142
State v. Roque, 213 Ariz. 193 (2006)......21, 34, 50, 159
State v. Roscoe, 184 Ariz. 484 (1996)......127-28
State v. Rose, 231 Ariz. 500 (2013)......133, 148, 153
State v. Ross, 180 Ariz. 598 (1994)......159
State v. Salazar, 173 Ariz. 399 (1992)......158-60
State v. Sanders, 245 Ariz. 113 (2018)......105
State v. Sansing, 200 Ariz. 347 (2001)......137
State v. Schrock, 139 Ariz. 433 (1986)......64, 66-67, 143
State v. Serna, 163 Ariz. 260 (1990)......34, 36, 50
State v. Smith, 101 Ariz. 407 (1966)......64
State v. Smith, 184 Ariz. 456 (1996)......114
State v. Smith, 215 Ariz. 221 (2007)......145
State v. Sorrell, 132 Ariz. 328 (1982)......67
State v. Spreitz, *(Spreitz II)*, 202 Ariz. 1 (2002)......146
State v. Thompson, 252 Ariz. 279 (2022)......70, 72, 86-87
State v. Trostle, 191 Ariz. 4 (1997)......98

State v. Van Adams, 194 Ariz. 408 (1999)....................162
State v. VanWinkle, 230 Ariz. 387 (2012) 104, 109
State v. Velazquez, 216 Ariz. 300 (2007)....................144
Town of Chino Valley v. City of Prescott, 131 Ariz. 78 (1981)....................120
Wilson v. Ellis, 176 Ariz. 121 (1993) 145

ARIZONA COURT OF APPEALS CASES

State v. Carter, 216 Ariz. 286 (App. 2007) 157
Phelps Dodge Corp. v. Ariz. Dep't of Water Res., 211 Ari 146 (App. 2005) 120
State ex re. Thomas v. Foreman, 211 Ariz. 153 (App. 2005)....................161
State v. Just, 138 Ariz. 534 (App.1983)....................42
State v. Munoz, 25 Ariz.App. 350 (1975) 157
State v. Pruett, 185 Ariz. 128 (App. 1995).................... 145, 150
State v. Purcell, 199 Ariz. 319 (App. 2001) 99

OTHER STATE CASES

Cantu v. State, 939 S.W.2d 627 (Tex. 1997)....................62
Hall v. Catoe, 601 S.E.2d 335 (S.C. 2004)....................35
Henry v. State, 280 S.E.2d 536 (S.C. 1981) 122
People v. Hope, 702 N.E.2d 1282 (Ill. 1998) 61-62
Sherman v. State, 965 P.2d 903 (Nev. 1998)....................62
State v. Brown, 326 S.E.2d 410 (S.C. 1985)....................122
State v. Storey, 901 S.W.2d 886 (Mo. 1995) 35

CONSTITUTIONAL PROVISIONS

United States Constitution

Amendment 5 .... *in passim*
Amendment 6 .... *in passim*
Amendment 8 .... *in passim*
Amendment 14 .... *in passim*

Arizona State Constitution

Article 2, Section 4 .... *in passim*
Article 2, Section 10 .... 63, 66
Article 2, Section 15 .... *in passim*
Article 2, Section 23 .... *in passim*
Article 2, Section 24 .... *in passim*
Article 6, § 5(3) 19

STATUTES

Arizona Revised Statutes

§ 13-117 66
§ 13-751 .... 3, 6, 41, 109, 160-61
§ 13-752 .... 38, 128
§ 13-755 19
§ 13-756 159
§ 13-4031 19

RULES

Arizona Rules of Criminal Procedure

Rule 17.2 .... 148-49, 154
Rule 18.4 .... 85, 89, 98, 101
Rule 18.5 .... 84-85, 87
Rule 19.1 .... 30, 32, 38
Rule 26.15 19
Rule 31.2 .... 19, 145, 147, 149, 152

Rule 32.4 152
Rule 33.2 .... 149-50, 156
Rule 33.4 152

Arizona Rules of Evidence

Rule 401 109
Rule 403 109

Arizona Rules of Professional Conduct

Rule 4.4 21

ADMINISTRATIVE ORDERS

Ariz. Admin. Order R-19-0012 148
Ariz. Admin. Order R-21-0020 85
Ariz. Admin. Order R-21-0045 85

OTHER AUTHORITIES

Disgust, *Merriam-Webster Dictionary*, available at https://www.merriam-webster.com/dictionary/disgust (last accessed May 26, 2023) 27-28
Horror, *Merriam-Webster Dictionary*, available at https://www.merriam-webster.com/dictionary/horror (last accessed May 26, 2023) 27-28
Shock, *Merriam-Webster Dictionary*, available at https://www.merriam-webster.com/dictionary/shock (last accessed May 26, 2023) 27-28
The Universal Declaration of Human Rights, GA Res. 217A (III), U.N. GAOR, 3d Sess. Art. 3, U.N. Doc. A/810 (1948) 158-59

ISSUES PRESENTED FOR REVIEW

1. Did the cumulative effect of the prosecutor's persistent and pervasive error so infect the penalty phase with unfairness that the resulting death verdict violated Mr. Montoya's rights to due process and a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 2, Sections 4, 15, and 24 of the Arizona Constitution?

2. Did the trial court's rulings limiting voir dire prevent Mr. Montoya from properly screening and selecting a constitutionally adequate jury?

3. Did the trial court abuse its discretion and commit structural error by refusing to strike a death-leaning juror and by improperly designating a life-scrupled juror as an alternate, in violation of Mr. Montoya's constitutional rights to due process and a fair trial?

4. Did the admission of irrelevant or marginally relevant but unduly prejudicial gruesome decomposition photographs violate Mr. Montoya's constitutional rights to due process, a fair trial, heightened reliability, and freedom from cruel and unusual punishment?

5. Did the trial court err by allowing Mr. Montoya to waive mitigation, over his attorneys' objection, in violation of his constitutional rights to due process, a fair trial, assistance of counsel, and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments?

6. Did the court abuse its discretion by allowing victim impact statements that contained improper opinions about the defendant and the crime?

7. Did the final jury instructions impermissibly allow the jury to weigh the especially cruel and heinous aggravator twice?

8. Were Mr. Montoya's guilty pleas on the noncapital counts knowing, intelligent, and voluntary where the court failed to advise him that pleading guilty would waive his Sixth Amendment right to competent counsel to raise claims of ineffective assistance of trial counsel?

9. Issues preserved for federal review.

STATEMENT OF CASE AND FACTS[1]

Christopher Michael Montoya appeals from his convictions, after pleading to the court on the charges and aggravating circumstances, and from his sentence of death after a jury trial. He has been represented throughout the proceedings, up to and including this appeal, by court-appointed counsel.

Pre-Trial Proceedings

On December 5, 2017, the State charged Mr. Montoya with the first-degree murder of A.R. (Count 1); one count of second-degree burglary, a class 3 dangerous felony (Count 2); one count of kidnapping, a class 2 dangerous felony (Count 3); one count of aggravated taking identity of another, a class 3 felony (Count 4); one count of unlawful use of means of transportation, a class 5 felony (Count 5); one count of theft, a class 5 felony (Count 6); and two counts of cruelty to animals, class 6 felonies (Counts 7–8).[2]

The State also alleged four historical prior felony convictions and that Mr. Montoya was on probation at the time of the current offenses.[3] The State alleged eight non-capital, enumerated aggravating circumstances.[4]

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[1] In the interest of clarity, facts necessary to support argument on the issues are primarily included in the individual argument sections.
[2] R. 1.
[3] R. 30, 31.

The State later noticed its intent to seek the death penalty, alleging four capital aggravating circumstances: defendant previously convicted of a serious offense; offense committed in expectation of pecuniary gain; offense committed in an especially heinous, cruel, or depraved manner; and offense committed while on probation for a felony offense. A.R.S. § 13-751 (F)(2), (5), (6), (7)(b) (2012).[5]

Change of Plea

On February 24, 2021, defense counsel indicated Mr. Montoya wished to plead guilty to the charges in the indictment and to waive mitigation in any penalty phase.[6] Counsel later clarified Mr. Montoya also wished to admit some of the alleged aggravators.[7] The court ordered an evaluation of Mr. Montoya's competency and ultimately found Mr. Montoya competent to enter a guilty plea and to waive mitigation.[8]

On May 14, 2021, the court held a change-of-plea hearing at which it advised Mr. Montoya of the rights he would be waiving by entering guilty pleas and that the State would be providing no benefit to him in return for pleading

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[4] R. 32.
[5] R. 45.
[6] Tr. 2/24/21, at 4.
[7] Tr. 3/19/21, at 4.
[8] *Id*. at 6–7; Tr. 5/14/21, at 4–5.

guilty.[9] The court also advised him of the potential sentencing ranges for each charge.[10]

Mr. Montoya pleaded guilty to Counts 1 through 8 as listed in the indictment and defense counsel provided a factual basis for each count as follows, to which Mr. Montoya agreed:

Count 1: [B]etween October 13 and 24 of 2017, here in Maricopa County, within the jurisdiction of this court, Mr. Montoya thought about – about killing [A.R.]; he went to her home with that intention, and he struck her repeatedly in the head with a hammer, which makes the offense dangerous. And striking her with a hammer is what caused her death. And the two had a prior relationship – they had dated – is what makes this offense a domestic violence.[11]

Count 2: Mr. Montoya … entered the home that belonged to [A.R.] by breaking a sliding glass Arcadia door, with the intent to commit a felony inside, and that being the – the homicide. And he remained unlawfully in the home while using a hammer, as a weapon, making this a dangerous offense.[12]

Count 3: Mr. Montoya restrained [A.R.] by threatening her with a knife … and handcuffing her behind the bathroom, for the purpose of committing the offenses.[13]

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[9] Tr. 5/14/22, at 5, 13–15.
[10] *Id*. at 7–12, 21–22.
[11] *Id*. at 18–19.
[12] *Id*. at 19–20.
[13] *Id*. at 23–24.

Count 4: Mr. Montoya took the USAA debit card belonging to [A.R.], and used it without permission, causing a loss of approximately $13,000.[14]

Count 5: Mr. Montoya, not intending to keep the vehicle for himself and without anyone's permission, took control of the Jeep Cherokee, which belonged to [A.R.].[15]

Count 6: Mr. Montoya took control of [A.R.]'s credit cards, handgun, two Apple laptop computers, safe, numerous medications; all of these items have a value of more than $4,000, and he intended to deprive the victim of these items.[16]

Count 7: Mr. Montoya smothered [A.R.'s dog Spike], leading to its death, and then placed it in the crate.[17]

Count 8: Mr. Montoya locked [A.R.]'s dog[] … Thor in [its] crate[] and neglected [it] for several days, leading to … Thor suffering from severe dehydration.[18]

Mr. Montoya also admitted to two historical prior felony convictions.[19] The court found Mr. Montoya's pleas to be knowingly, intelligently, and voluntarily made.[20]

Mr. Montoya then admitted to both capital and noncapital aggravators after being advised by the court of his rights and the potential effect of his admissions

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[14] *Id*. at 24–25.
[15] *Id*. at 25.
[16] *Id*. at 25–26.
[17] *Id*. at 30.
[18] *Id*. at 26–27.
[19] *Id*. at 22–23.
[20] *Id*. at 28.

on the sentencing ranges.[21] With respect to Count 1, murder in the first degree, he admitted to prior convictions for second-degree burglary, kidnapping, and aggravated assault, all of which he agreed constituted a prior serious offense pursuant to A.R.S. § 13-751(F)(2) (2012).[22]

Mr. Montoya also admitted that the murder was committed in an especially cruel and heinous manner pursuant to A.R.S. § 13-751(F)(6) (2012).[23] Defense counsel provided the following factual basis, with which Mr. Montoya agreed:

> With regard to cruelty, Montoya caused [A.R.] to have suffered mental distress prior to her death by handcuffing her behind the back and scaring her with both the hammer and – with the knife and the hammer, with which he ultimately used to kill her. And in terms of the heinous and depraved, he struck her in the head with the hammer more times than necessary to cause her death. There were eight different wounds on the head noted in the autopsy report.[24]

Regarding the non-capital offenses, Mr. Montoya admitted to the following enumerated aggravating circumstances: infliction of serious physical injury (Counts 2–3); use or threatened use of a deadly weapon or dangerous instrument (Counts 2–3); taking of property in an amount sufficient to be an aggravating circumstance (Counts 2, 4, 6); offenses committed in an especially heinous, cruel, or depraved manner (Counts 2–3); physical, emotional, or financial harm to the

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[21] *Id*. at 34–35, 46–48.
[22] *Id*. at 36–37.
[23] *Id*. at 37–38.
[24] *Id*. at 38.

victim or victim's family (Counts 2–8); and prior felony conviction within the previous 10 years (Counts 2–8).[25] The court found all of Mr. Montoya's admissions to be knowingly, intelligently, and voluntarily made.[26]

Waiver of Presentation of Mitigation

On September 17, 2021, after Mr. Montoya indicated he did not want his attorneys to present any mitigation on his behalf, the court went through an extended colloquy discussing the ramifications of waiving the presentation of mitigation in a capital trial.[27] Mr. Montoya expressed that he felt mitigation was an excuse, that he did not want his family members involved, and that he disagreed with his attorneys' plan to present expert testimony concerning his substance abuse and mental health disorders.[28] Mr. Montoya agreed his attorneys could argue that his pleading guilty to all charges and admitting multiple aggravating circumstances constituted acceptance of responsibility.[29]

The court explained that Mr. Montoya had the right to present any mitigating circumstances to the jury and allowed Mr. Montoya's attorneys to outline what

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[25] *Id*. at 44–46.
[26] *Id*. at 49.
[27] Tr. 9/17/21, at 35–55.
[28] *Id*. at 35–37.
[29] *Id*. at 37–39.

type of mitigation they would present if allowed.[30] The court also informed Mr. Montoya that the consequence of not presenting mitigation would mean the penalty phase would be mostly one-sided and could impact the jurors' sentencing decision.[31]

Mr. Montoya agreed his attorneys could cross-examine witnesses called by the State and argue in closing the existence of mitigation in the form of acceptance of responsibility and any favorable facts that came from the State's witnesses.[32] Mr. Montoya affirmed that his decision to waive all other mitigation was voluntary and not the result of force or threats by anyone.[33] The court found Mr. Montoya knowingly and voluntarily waived his right to present mitigation.[34]

Penalty Phase Proceedings

Prior to the start of jury selection, Mr. Montoya affirmed his intent to waive his presence at trial, and later reaffirmed this waiver on at least three occasions.[35] The court also conducted a second colloquy with Mr. Montoya regarding his waiver of the presentation of mitigation because the first colloquy was not

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[30] *Id*. at 39–43.
[31] *Id*. at 43–44, 47–48.
[32] *Id*. at 53–54.
[33] *Id*. at 48–49.
[34] *Id*. at 54.
[35] Tr. 3/8/22, at 5–6; Tr. 3/22/22, at 4–5; Tr. 3/28/22, at 4–5; Tr. 4/4/22, at 4–5.

recorded on FTR.[36] The court initially empaneled eighteen jurors, with one juror later being excused due to illness.[37] After the court read the preliminary jury instructions, both parties conducted opening statements.[38]

Defense Mitigation Presentation

The defense called no witnesses but submitted into evidence minute entries, transcripts, and video of Mr. Montoya's change of plea proceedings, including the admission of aggravating circumstances, and of Mr. Montoya's waiver of the presentation of mitigation.[39] The defense then rested.

State's Rebuttal Presentation

The State's rebuttal presentation spanned six days and included testimony from 13 witnesses and the admission of hundreds of exhibits. The State presented evidence that Mr. Montoya had juvenile referrals for reckless burning, possession of marijuana and paraphernalia, and unlawful use of a motor vehicle.[40] During this period, Mr. Montoya was abusing marijuana and Coricidin—an over-the-counter cough-and-cold medication.[41]

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[36] *Id*. at 6–21.
[37] Tr. 3/24/22, at 124; Tr. 4/11/22, at 13–14.
[38] Tr. 3/28/22, at 7–72.
[39] *Id*. at 72–84; Exhibits 1–4, 378–78, 385, 387, 389.
[40] Tr. 3/28/22, at 113.
[41] Tr. 3/28/22, at 111–14; Tr. 3/31/22, at 101, 107, 129.

During his childhood, Mr. Montoya primarily lived with his mother Faith Montoya, who herself had a substance abuse problem.[42] It was only when Mr. Montoya went to get his drivers' license and saw his birth certificate, that he learned the man he thought was his birth father—Tony Montoya—was actually his adoptive father.[43] Mr. Montoya's biological father, Mike Auer, had no contact with him past early infancy and provided no financial support.[44] When Mr. Montoya reached out to his birth father as a young adult, Auer wanted nothing to do with him.[45]

As an adult, Mr. Montoya was convicted of unlawful taking of a car, possession of a stolen checkbook, possession of burglary tools, second-degree burglary, and aggravated assault.[46] He was placed on probation numerous times and ultimately served two separate prison terms.[47]

The State presented both law enforcement and victim testimony concerning these prior felonies. Larry Binkley, who was Mr. Montoya's uncle by marriage, reconnected with Mr. Montoya in 2004, when Mr. Montoya had gone in search of

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[42] Tr. 3/28/22, at 111, 115; Tr. 3/29/22, at 51.
[43] *Id*. at 28.
[44] *Id*. at 53–54.
[45] *Id*. at 59.
[46] Tr. 3/28/22, at 118–20.
[47] *Id*.

relatives of his biological father.[48] At that time, Mr. Montoya was frequently arguing with his mother about his Coricidin use and Mr. Montoya briefly went to stay with his aunt Joann, uncle Larry, and cousin Tyler.[49]

Things did not go well and within weeks Mr. Montoya left, stealing the Binkleys' SUV.[50] Tyler later told Larry that Mr. Montoya was using marijuana, abusing Coricidin by taking up to 30 pills at a time, and had been hospitalized for overdosing on Coricidin.[51] Mr. Montoya told Tyler that Coricidin put him in "a psychotic state."[52]

Almost a year later, 20-year-old Mr. Montoya returned to Larry Binkley's house, crawled through the doggy door, and burglarized the house.[53] Mr. Montoya was quickly apprehended by police while hiding fully clothed in a hot tub in a nearby backyard.[54] Mr. Montoya stated he went to his uncle's house to apologize, then "did something stupid" and made a "bad decision."[55]

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[48] Tr. 3/29/22, at 28.
[49] *Id*. at 31.
[50] *Id*. at 36.
[51] *Id*. at 66–67.
[52] *Id*. at 77.
[53] *Id*. at 13, 42.
[54] *Id*. at 11–12, 43.
[55] *Id*. at 12.

A few years later, 66-year-old Ron Tupa was taking an evening walk when 23-year-old Mr. Montoya attacked him.[56] Mr. Montoya used a hammer to hit Tupa—a stranger—over the head.[57] Mr. Montoya ran away, and Tupa called the police who responded immediately.[58] While the police were summoning medical help for Tupa, Mr. Montoya emerged from an alley and approached the police.[59] Mr. Montoya was sweating profusely and said he was high on cough-and-cold medicine.[60]

At first, Mr. Montoya denied involvement in the assault despite having blood on his body and clothing.[61] At the police station, Mr. Montoya began licking his arms and biting skin off his hands and spitting it on the floor.[62] Ultimately, Mr. Montoya pleaded guilty to aggravated assault and was sentenced to 9 years' imprisonment.[63] He was released to probation in November 2016.[64]

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[56] Tr. 3/29/22, at 94–95, 106; Tr. 3/31/22, at 6–7.
[57] Tr. 3/29/22, at 95.
[58] *Id.* at 94; Tr. 3/31/22, at 8.
[59] Tr. 3/29/22, at 97.
[60] *Id*. at 98, 114.
[61] *Id*. at 99–101.
[62] *Id*. at 100.
[63] Tr. 3/28/22, at 120–21.
[64] Tr. 3/31/22, at 77.

Mr. Montoya initially did well on probation.[65] He and A.R. met on the dating app Tinder and began a relationship in April 2017.[66] As the relationship progressed, Mr. Montoya would stay at A.R.'s home overnight.[67] In June 2017, A.R. discovered Mr. Montoya was still active on Tinder.[68] She asked him to move his things out of her home and changed the locks.[69]

Mr. Montoya made attempts to reconcile with A.R., calling her and contacting her online.[70] A.R. told her friends and coworkers that she was concerned he would not leave her alone.[71]

Meanwhile, Mr. Montoya's work performance began to slip, and he was purchasing and using large amounts of Coricidin.[72] In early October, Mr. Montoya was seen by a neighbor waiting outside A.R.'s residence.[73] On October 11th, A.R. texted a friend that Mr. Montoya had shown up at her house late that evening.[74]

When Mr. Montoya's probation officer spoke to him on October 12th, he seemed agitated, panicky, and was speaking in incomplete and nonsensical

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[65] Tr. 3/31/22, at 83, 86.
[66] Tr. 3/30/22, at 22, 46.
[67] Tr. 3/31/22, at 88–89.
[68] Tr. 3/30/22, at 24–25, 49.
[69] *Id.* at 25–28, 86.
[70] Tr. 3/29/22, at 180; Tr. 3/30/22, at 91.
[71] Tr. 3/29/22, at 180.
[72] Tr. 4/5/22, at 116–17.
[73] Tr. 3/29/22, at 169–75.
[74] Tr. 3/30/22, at 92.

sentences.[75] Mr. Montoya's mother later told the probation officer she was worried because Mr. Montoya was using Coricidin again, taking upwards of 25 pills at a time, and that he was hallucinating.[76]

On Friday October 13th, A.R. texted a friend stating Mr. Montoya had shown up at her house in the middle of the day when she would usually be at work.[77] A.R. texted that Mr. Montoya said he wanted closure and for her to explain why she would not give him her phone number, to which A.R. told Mr. Montoya she would get a restraining order if he returned.[78] That evening was the last time A.R. was seen alive.[79]

A.R. failed to show up at work the following Monday.[80] In the next week and a half, A.R.'s coworkers, friends, and family tried to contact her via text, email, and phone, but received only text messages in return that seemed strange, as though written by someone else.[81]

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[75] Tr. 3/31/22, at 92–93.
[76] *Id.* at 96, 126–27.
[77] Tr. 3/30/22, at 29–30, 64.
[78] Exhibit 433.
[79] Tr. 3/29/22, at 181–82.
[80] Tr. 3/30/22, at 68–69.
[81] *Id.* at 67, 71–73, 84.

On October 24, 2017, some of A.R.'s friends went to her home to check on her and found the back arcadia door broken.[82] Upon arrival, police found candles burning by the arcadia door, smelled a strong odor, and discovered A.R.'s body wrapped in a tarp in the master bathroom.[83] There was also a dog kennel inside the bathtub with two dogs inside, one dead and one severely dehydrated.[84]

The police found blood spatter on the wall in the master bedroom and a substantial amount of blood on the bed.[85] They also found a hammer with blood and hair on it and a large knife.[86] The home had been emptied of most personal belongings but numerous receipts were found throughout the house related to purchases police later discovered were made by Mr. Montoya between October 14th and 24th using A.R.'s debit card.[87]

On October 25th, Mr. Montoya was involved in a high-speed chase with police in Mineral County, Nevada.[88] Mr. Montoya crashed his truck in the desert and when the police caught up to him, he was lying on the ground with a strong

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[82] Tr. 3/29/22, at 126; Tr. 3/30/22, at 74–79.
[83] Tr. 3/29/22, at 142; Tr. 3/30/22, at 130–32, 150–53.
[84] Tr. 3/30/22, at 132.
[85] Tr. 3/29/22, at 168; Tr. 3/30/22, at 145, 150–51.
[86] Tr. 3/30/22, at 147–48, 156.
[87] Tr. 3/29/22, at 162, 166–67; Tr. 3/30/22, at 136–51.
[88] Tr. 4/4/22, at 106.

odor of marijuana emanating from his truck.[89] Inside the truck was A.R.'s 9mm handgun, $5,000 cash, camping gear, paperwork from A.R.'s home, A.R.'s debit card, A.R.'s laptop, a handcuff case, numerous gift cards, receipts, A.R.'s keys, prescription bottles belonging to A.R., a notebook containing A.R.'s pin number and computer password, and 22 Coricidin blister packs.[90]

During a police interview, Mr. Montoya admitted to waiting in the dark for A.R. to get home, that she did not want to talk to him, and that he took a lot of pills.[91] Mr. Montoya denied knowing what happened to A.R. and claimed he did not remember much of the past several weeks.[92] He stated, "If I've done something wrong, I am no way special and I deserve to answer for that."[93]

Using the recovered receipts, A.R.'s bank records, surveillance video, and A.R. and Mr. Montoya's cell records, the police were able to trace Mr. Montoya's whereabouts between October 11th and 25th.[94] Cell data showed Mr. Montoya at A.R.'s house on multiple occasions throughout this period.[95]

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[89] *Id*. at 107.
[90] *Id*. at 108–09, 114–43.
[91] Exhibit 457.
[92] *Id*.
[93] *Id*.
[94] Tr. 4/4/22, at 144; Tr. 4/5/22, at 50–70; Tr. 4/6/22, at 24–56.
[95] Tr. 4/6/22, at 25, 27, 37, 40–41, 48–49.

Beginning on October 14th, Mr. Montoya was using A.R.'s debit card to make numerous purchases and to obtain cash totaling over $13,000.[96] Records indicated Mr. Montoya purchased multiple gift cards, lock pick sets, tarps, bungee cords, rope, candles, and a large amount of Coricidin, among other items.[97] Cell records also showed A.R.'s phone was consistently at the same locations at the same times Mr. Montoya was also observed.[98]

Forensic pathologist Dr. Bucholtz testified A.R.'s cause of death was blunt force injury consistent with being hit on the head with a hammer at least 8 times.[99] Dr. Bucholtz also testified that A.R.'s hands had been handcuffed behind her back, her ankles tied with a bungee cord and belt, and her body wrapped in a comforter and tarps.[100] Dr. Bucholtz opined that based upon the stage of decomposition and the environment A.R.'s body was found in, A.R. had been dead between 4 and 10 days when her body was discovered.[101]

Forensic anthropologist Dr. Fulginiti testified there were multiple blunt impact injuries to A.R.'s skull that occurred at or around the time of death.[102]

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[96] Tr. 4/5/22, at 59.
[97] *Id*. at 50–70.
[98] Tr. 4/6/22, at 30–55.
[99] Tr. 4/4/22, at 18, 42–48, 54.
[100] *Id*. at 23, 29, 34.
[101] *Id*. at 61.
[102] *Id*. at 69–70.

Based upon the fracture pattern and rounded defects, Dr. Fulginiti opined there were a minimum of 14 impacts to the skull, consistent with being struck in the head with a hammer.[103]

Defense Rebuttal

The defense rested without introducing any additional evidence.[104]

Statements

At the close of evidence in the penalty phase, the jury heard victim impact statements from A.R.'s family, including an older sister, a younger sister, her mother, and her father.[105]

Mr. Montoya did not allocute.[106]

Verdict and Sentences

After deliberating for approximately two-and-a-half hours, the jury returned a verdict of death.[107] Immediately following the verdict, the court sentenced Mr. Montoya to death by lethal injection.[108]

After excusing the jury, the court proceeded to sentencing on the remaining noncapital counts, all category three convictions.[109] The court imposed

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[103] *Id*. at 77–81.
[104] Tr. 4/6/22, at 60.
[105] *Id*. at 61–84.
[106] Tr. 4/11/22, at 7–8.
[107] Tr. 4/12/22, at 6–7; R 422.
[108] Tr. 4/12/22, at 7.

consecutive, maximum terms of imprisonment as follows:[110] Count 2, 20 years; Count 3, 28 years; Count 4, 20 years; Count 5, 6 years; Count 6, 20 years; Count 7, 4.5 years; and Count 8, 4.5 years.[111]

Appeal

Appeal to this Court is mandatory and automatic, and the Clerk of Court filed a timely Notice of Appeal from the convictions and sentences under Rules 26.15 and 31.2(b) of the Arizona Rules of Criminal Procedure.[112] This Court has jurisdiction under Article 6, § 5(3) of the Arizona Constitution and A.R.S. §§ 13-755 and 13-4031.

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[109] *Id*. at 20.
[110] Counsel notes that although the Order of Confinement is consistent with the trial court's oral pronouncement of sentence, the Minute Entry dated 4/13/22 (R. 424) erroneously lists Count 5 as a category 2 offense instead of a category 3 offense (page 2) and incorrectly designates the 6-year term of imprisonment on Count 5 as a greater than aggravated term instead of a maximum term (page 4).
[111] *Id*. at 20–21.
[112] R. 449.

ARGUMENT I

This Court must vacate Mr. Montoya's death sentence and remand for a new penalty phase because the prosecutor's persistent and pervasive error violated Mr. Montoya's rights to due process, to a fair trial, and to be free from the arbitrary and capricious imposition of a death sentence.

The prosecutor's persistent and pervasive error and misconduct was improper and highly prejudicial in a capital case where the defendant pleaded guilty, admitted statutory aggravators, and waived the presentation of nearly all mitigation. The court's permitting Mr. Montoya to waive mitigation, coupled with the prosecutor's unimpeded error, reduced the penalty phase to "a limitless and standardless assault on the defendant's character and history." *State v. Hampton*, 213 Ariz. 167, 180 ¶51 (2006). The result is an arbitrary and capricious death verdict.

The prosecutor was practically guaranteed a death verdict. Indeed, the court advised Mr. Montoya of that fact more than once.[113] Nonetheless, the State persisted in a pattern of prosecutorial error and misconduct at the penalty phase in an effort to win at all costs. As this Court noted in *Matter of Martinez*, 248 Ariz. 458 (2020), "The role of a prosecutor is not to seek convictions and sentences but

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[113]Tr. 3/19/21, at 5 ("Waiving mitigation practically guarantees a death sentence."); Tr. 9/17/21, at 44 ("…[T]he trial, penalty phase is pretty – going to be pretty much one-sided.").

rather to seek justice[.]" *Martinez*, 248 Ariz. at 463 ¶7. Instead of fulfilling her ethical duty to guarantee Mr. Montoya "procedural justice," *see* Ariz. R. Prof. Cond. 4.4(a), this prosecutor, after being gifted a conviction on the charges and aggravators, struck foul blows in her zeal to obtain an execution. *See Pool v. Superior Court*, 139 Ariz. 98, 103 (1984) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935) ("Thus, 'while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones.'")).

The prosecutor's repeated improper conduct demonstrates an indifference, if not specific intent, to prejudice Mr. Montoya. *See State v. Roque*, 213 Ariz. 193, 228 ¶155 (2006). This undercuts any notion that the conduct was inadvertent or mistaken. Further, this was a seasoned capital prosecutor who should have known this conduct was improper. Because the State's improper argument was reasonably likely to affect the jury's death verdict in a case where scant mitigation was presented, Mr. Montoya was denied his rights to due process, a fair trial, and freedom from the arbitrary imposition of the death penalty under the United States and Arizona constitutions. U.S. Const. amends. V, VI, VIII, XIV; Ariz. Const. art. 2, §§ 4, 15, 24. Accordingly, this Court should vacate Mr. Montoya's death sentence and remand for a new penalty phase.

Standards of Review

This Court must determine whether the prosecutorial errors constituted persistent and pervasive misconduct. *State v. Bocharski*, 218 Ariz. 476, 491-92 (2008). If the cumulative effect of the errors and non-errors infected the trial with unfairness and demonstrates the prosecutor intentionally engaged in improper conduct and did so with indifference, if not specific intent, to prejudice the defendant, this Court must reverse the conviction. *Id. See also State v. Hughes*, 193 Ariz. 72, 79 ¶25 (1998) (finding "general rule that several non-errors and harmless errors cannot add up to one reversible error" does not apply to cumulative prosecutorial error claims). If this Court finds cumulative prosecutorial error, it is harmless only if it did not contribute to or affect the verdict beyond a reasonable doubt. *Hughes*, 193 Ariz. at 80 ¶32.

Reviewing courts will reverse a conviction for distinct instances of prosecutorial error "if: (1) [error] is indeed present; and (2) a reasonable likelihood exists that the [error] could have affected the jury's verdict." *State v. Gallardo,* 225 Ariz. 560, 568 ¶34 (2010). Prosecutorial error is subject to harmless error review when defense counsel objects at trial and fundamental error review absent an objection. *Id.* ¶35.

Fundamental error is error that "goes to the foundation of the defendant's case, takes away a right essential to his defense, or is of such magnitude that it

denied the defendant a fair trial." *State v. Escalante*, 245 Ariz. 135, 138 ¶1 (2018). If the error went to the foundation of the case or deprived the defendant of a right essential to his defense, he must also demonstrate prejudice. *Id.* ¶21. To establish prejudice, the defendant must show that "'a reasonable jury … *could have* reached a different [verdict].'" *Id.* ¶29 (quoting *State v. Henderson*, 210 Ariz. 561, 569 ¶27 (2005) (emphasis in original)).

A. The prosecutor argued an unproven aggravator during closing argument, in violation of Mr. Montoya's rights under the United States and Arizona constitutions.

Relevant Facts

The State noticed the especially heinous aggravator under two theories: needless mutilation of the victim and relishing the murder.[114] Mr. Montoya admitted to the heinous aggravator with a factual basis for gratuitous violence, a theory of the heinousness prong of the (F)(6) aggravator not noticed by the State:[115]

> ...[I]n terms of the heinous or depraved, [Mr. Montoya] struck [A.R.] in the head with the hammer more times than necessary to cause her death. There were eight different wounds on the head noted in the autopsy report.[116]

[114] R. 45.
[115] *See id.*
[116] Tr. 5/14/21, at 38.

During closing, the prosecutor argued the unproven theory of the especially heinous aggravator – that Mr. Montoya relished the murder:

> [A.R.] died a real death. Attacked in her living room. Blood spatter on the wall. A nick in her couch that was not there before, according to Maria. Handcuffed. And a belt around her ankles in her bedroom. ***One can only imagine the control he had over her and how he may have enjoyed it.***[117]

Defense counsel objected, and the objection was sustained.[118] The statement was not stricken from the record.[119]

Argument

In closing, the prosecutor argued an unproven aggravator in violation of Mr. Montoya's rights to due process, a fair trial, and freedom from an arbitrary and capricious death sentence. U.S. Const. amends V, VI, VIII, XIV; Ariz. Const. art. 2, §§ 4, 15, 24. By arguing an unproven aggravating circumstance, the prosecutor impermissibly injected an additional theory of the (F)(6) aggravating factor into the penalty phase: relishing. "To relish a murder, the defendant 'must say or do something that indicates he savored the murder.'" *State v. Medina*, 232 Ariz. 391, 411 ¶91 (2013) (quoting *State v. Greene*, 192 Ariz. 431, 440 ¶34 (1998)). As defense counsel's objection noted, no evidence was presented to support

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[117] Tr. 4/11/22, at 139-40.
[118] *Id.* at 140.
[119] *Id.*

relishing.[120] In the past, this Court has deemed prosecutorial arguments regarding unproven aggravating factors "troubling." *State v. Cota*, 229 Ariz. 136, 151 ¶81 (2012). What is more troubling in this case, unlike in *Cota*, is that the evidence did not support the unproven aggravator. *Id.* ¶80. Here the prosecutor's improper comment encouraged jurors to impose a death sentence based on an aggravating circumstance not proven beyond a reasonable doubt and not supported by evidence. This was error.

The error was not harmless. Harmless error review places the burden on the state to prove beyond a reasonable doubt the error did not contribute to or affect the verdict. *Henderson*, 210 Ariz. at 567 ¶18. The improper argument relieved the state of its burden of proving relishing beyond a reasonable doubt. A jury's failure to find "aggravating factors beyond a reasonable doubt is equivalent to the failure to require a jury to find every element of the offense." *Id.* ¶17. In this case, which only consisted of a penalty phase and in which almost no mitigation was presented, this Court cannot be confident the injection of an unproven aggravator into the trial did not contribute to or affect the jury's verdict. In addition, the court's failure to strike the statement from the record or provide a curative instruction only compounded the harm.

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[120] *Id.* (stating "There's no basis for that.").

Finally, because the (F)(6) aggravator is facially vague, *Walton v. Arizona*, 497 U.S. 639, 654 (1990), *overruled on other grounds by State v. Ring (Ring II)*, 536 U.S. 584 (2002), the prosecutor's argument, coupled with the court's failure to clarify the statute's meaning regarding relishing in the jury instructions,[121] did not narrowly construct the aggravating circumstance to properly give substance to the facially vague aggravator. *See State v. Anderson (Anderson II)*, 210 Ariz. 327, 352 ¶109 (2005). The result is a death verdict imposed in an arbitrary and capricious manner. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). As such, Mr. Montoya is entitled to a new penalty phase in which the jury is not encouraged to impose a death sentence based on an unproven aggravator.

B. The prosecutor repeatedly appealed to the passions and sympathies of the jury.

Prosecutors must refrain from making emotional appeals to the passions, fears, sympathies, or prejudices of the jury during closing argument. *State v. Comer*, 165 Ariz. 413, 426 (1990). Such appeals invite juries to render arbitrary and capricious verdicts. *See* U.S. Const. amends. VIII, XIV; Ariz. Const. art. 2, §§ 4, 24. This prosecutor repeatedly appealed to the passions and fears of the jury, resulting in fundamental, prejudicial error.

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[121] *See* R. 411.

1. The prosecutor invited the jury to impose death based on passion and emotion.

The prosecutor began closing argument by quoting "someone much smarter" than her, who "wrote that a society declares its attitude toward crime by the punishment that it exacts."[122] She continued:

> What is the appropriate punishment for this defendant and this crime?
>
> The punishment in this case should reflect the horror, the shock, and the disgust that all of you must have felt when you learned of the cruel death this defendant chose to impose upon [A.R.].[123]

Defense counsel did not object.[124]

Argument

Prosecutors "may not make arguments that appeal to the jury's fear or passion." *State v. Lynch*, 238 Ariz. 84, 100 ¶48 (2015) (citations omitted). Remarks intended "'to inflame the minds of jurors with passion or prejudice or influence the verdict in any degree'" constitute error. *State v. Herrera*, 174 Ariz. 387, 396 (1993) (citation omitted).

Here, the prosecutor asked the jury to return a verdict of death based on the "horror," "shock," and "disgust" they "must have felt" when they heard testimony about A.R.'s "cruel death." Merriam-Webster defines horror as "painful and

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[122] Tr. 4/11/22, at 77.
[123] *Id.*
[124] *See id.*

intense fear, dread, or dismay" or an "intense aversion or repugnance."[125] Shock is defined as "a sudden or violent mental or emotional disturbance."[126] Disgust is defined as a "marked aversion aroused by something highly distasteful."[127] The use of these words was a blatant appeal to jurors' fears and passions that could only have been intended to inflame the passions of the jurors and coerce them into returning a death verdict. The improper argument exceeded the bounds of appropriate closing argument. *See, e.g., Comer*, 165 Ariz. at 427.

The error was fundamental because it deprived Mr. Montoya of his essential right to due process of law and to a fair trial. Mr. Montoya was entitled to have a jury determine the appropriate sentence based on a reasoned, moral judgment,[128] not based on mere sympathy, passion, or emotion. *See, e.g., California v. Brown*, 479 U.S. 538, 545 (1987) (finding capital sentences "should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion."). By encouraging jurors to render a verdict based on feelings of shock, horror, and disgust at the murder, the prosecutor also invited

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[125] *Horror*, *Merriam-Webster Dictionary*, available at https://www.merriam-webster.com/dictionary/horror (last accessed May 26, 2023).
[126] *Shock*, *Merriam-Webster Dictionary*, available at https://www.merriam-webster.com/dictionary/shock (last accessed May 26, 2023).
[127] *Disgust*, *Merriam-Webster Dictionary*, available at https://www.merriam-webster.com/dictionary/disgust (last accessed May 26, 2023).
[128] R. 411, at 10.

jurors to ignore the instruction that they not be influenced by passion, prejudice, or sympathy.[129]

The fundamental error was prejudicial because it likely affected the jury's verdict. Mr. Montoya prevented presentation of mitigation beyond acceptance of responsibility and the scant testimony that could be drawn from the State's witnesses during cross-examination. The jury, therefore, was prevented from hearing expert and lay witness testimony about a wide swath of relevant mitigation. In short, the deck was already stacked against Mr. Montoya. The risk that the prosecutor's improper appeals to emotion affected the jury's verdict was, therefore, immense. For that reason, unlike in *Comer*, the overwhelming evidence of guilt in this case does nothing to alleviate the prejudice. *Cf.* 165 Ariz. at 427. Because the jury "could have plausibly and intelligently returned a different verdict" absent the error, this Court should vacate the death sentence and grant a new penalty phase proceeding. *Escalante*, 245 Ariz. at 144 ¶31.

2. The prosecutor improperly used victim impact statements to argue for death.

The prosecutor echoed the victim impact statements during closing to improperly use those statements to recommend a death sentence. Victim impact statements must not "offer any opinion or recommendation about an appropriate

[129] *Id.* at 2.

sentence." Ariz. R. Crim. P. 19.1(e)(3); *State v. Carlson*, 237 Ariz. 381, 397 ¶58 (2015). Also prohibited are "opinions of the victim's family about the crime[or] the defendant." *Payne v. Tennessee*, 501 U.S. 808, 832 (1991) (O'Connor, J., concurring). The prosecutor's tactic of repeating phrases from the victim impact statements to argue for death undermines the spirit of *Payne* and contravenes the plain language of Rule 19.1(e)(3), in violation of Mr. Montoya's rights to due process, a fair trial, and to remain free of an arbitrary and capricious death verdict.

i. The prosecutor mirrored the language in the victim impact statements to argue for death based on what Mr. Montoya "stole" and "robbed" from [A.R.] and her family.

The victim impact statements repeatedly referenced the victims' opinions about what Mr. Montoya stole from [A.R.] and her family. Indeed, theft was a running theme in the impact statements, which included repetition of the words "taken," "denied," and "robbed" to describe the effect of the murder on family members:

- "During [our last] conversation, we got into a little tiff and I was mad.... I will never be able to make up with her or let her know that I loved her. This was ***taken*** from me."[130]
- "This crime ***robbed*** [A.R.] of being an aunt and ***robbed*** my two children of having the greatest fun aunt in their life."[131]

[130] Tr. 4/6/22, at 64.

- "[A.R.] was ***denied*** decency in her death being buried in the most basic way."[132]

- "My ability to continue to see [A.R.] grow year after year and have the opportunity to strengthen our relationship was ***taken*** from both her and I."[133]

- "To this day, I refuse to say the defendant's name. He ***took*** dignity from my daughter, and now I refuse to even acknowledge him."[134]

- "[A.R.] was ... an organ donor to include bone marrow, which due to the ugly nature of her death, she was ***robbed*** the ability to donate anything."[135]

- "[A.R.] was ***taken*** from us way too early in a very inhumane manner. It's very heartbreaking for us to think how this fun-loving child was ***taken*** from our world."[136]

The prosecutor carried this theme beyond the impact statements into the State's closing argument for death:

> By choosing to let [A.R.] decompose in her home, what did he choose to ***steal*** from her? What does that tell you about his character? He ***stole*** the ability of her family to have a proper good-bye with an open casket, a time for those to see her face one more time and see the person they knew, not what was left after the defendant was done. A body so unrecognizable that the ME's office had to use dental records to identify her. The ability of her family to donate her organs.
>
> …
>
> Then there's the chilling behavior discussed at length. The total assuming of [A.R.'s] identity. The sheer manipulation of everyone

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[131] *Id.* at 69.
[132] *Id.* at 72.
[133] *Id.* at 76.
[134]*Id.*
[135] *Id.* at 82.
[136] *Id.*

> who loved her to keep his ***stealing*** going. To give him more time to ***take***, ***take***, ***take*** as much as he possibly could before it was over.
>
> …
>
> Not only did he ***steal*** [A.R.'s] life, he ***stole*** her moral constituency and any dignity that was her due when he hammered the life out of her and treated her body with no regard.
>
> So, what does this crime deserve? The minimum under the law or the maximum?
>
> The maximum is what he deserves.[137]

Defense counsel did not object.[138]

Argument

The prosecutor's statements improperly transformed the victim impact statements into recommendations for a death sentence. Although a court may allow victim impact statements "relating to the victim's characteristics and the crime's impact" on survivors, "they may not offer an opinion or recommendation about an appropriate sentence[.]" Ariz. R. Crim. P. 19.1(e)(3). Not only did the prosecutor repeat the theft theme, but she also quoted verbatim from the impact statements to argue for death. The prosecutor parroted [A.R.'s] mother's statement that her daughter was denied "decency in her death" and "dignity." She also mirrored [A.R.'s] father's statement that the defendant "robbed" [A.R.] the ability to

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[137] Tr. 4/11/22, at 142-43.
[138] *See id.*

"donate" her organs. Essentially, this prosecutor morphed the impact statements into sentencing recommendations, in violation of Mr. Montoya's constitutional rights to due process, a fair trial, and to be free from cruel and unusual punishment. U.S. Const. amends. V, VI, VIII, XIV; Ariz. Const. art. 2, §§ 4, 15, 24.

The statements could only have been intentional. The State assured the court it would review the impact statements prior to trial.[139] The prosecutor would have known, therefore, what the victims intended to say before they made those statements in open court.

ii. The prosecutor's comparative-mercy argument was an improper appeal to passion and a misstatement of law.

During the State's penalty phase closing, the prosecutor questioned whether a life sentence was appropriate for Mr. Montoya:

> What does life mean? We know that [A.R.] fought for her life while the defendant chose to inflict exceptional cruelty. There is no doubt that she wanted to live. She had a lot to fight for. Her family. Her friends. Her love of life.[140]

The prosecutor concluded the closing with an improper comparison-of-life argument:

> When you heard the word mercy, think of the mercy that the defendant showed [A.R] in her last moments. How he must have looked down on her with each blow, inflicting pain and death.

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[139] Tr. 3/3/22, at 5-6.
[140] Tr. 4/11/22, at 139.

> There is only one moral punishment in this case that will have any meaning to the defendant and that is the maximum under the law, death.[141]

Defense counsel did not object.[142]

Argument

The prosecutor erred by comparing A.R.'s life with Mr. Montoya's and then urging the jury to return a death verdict to show Mr. Montoya he is not more deserving of mercy than A.R. A prosecutor commits error by presenting arguments designed to inflame the passion or prejudice of the jury or to appeal to jurors' fears and sympathies. *Herrera*, 174 Ariz. at 396. Additionally, prosecutors may not misstate the law. *State v. Serna*, 163 Ariz. 260, 266 (1990). This prosecutor did both.

In *Payne*, the United States Supreme Court held that admission of victim impact statements was not *per se* unconstitutional. 501 U.S. at 831. Since *Payne*, this Court has held that prosecutors may discuss victim impact statements in closing. *See, e.g., Gallardo*, 225 Ariz. at 569 ¶41; *State v. Prince*, 204 Ariz. 156, 161 ¶23 (2003). However, this Court has also recognized that "[w]hen the Supreme Court removed the bar to admission of victims' statements, the point was not ... to permit a comparison of the lives of the victim and the defendant." *Roque*, 213 Ariz.

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[141] *Id.* at 145-46.
[142] *See id.*

at 225 ¶132. In this case, the prosecutor's comparative-mercy argument improperly compared the value of Mr. Montoya's life to that of A.R's, thereby inflaming the passions and sympathies of the jury.

Other jurisdictions have vacated judgments in this very situation, finding similar comparative-value-of-life arguments improper. *See, e.g., Hall v. Catoe*, 601 S.E.2d 335, 361-64 (S.C. 2004) (finding comparative-value-of-life argument was misstatement of law so emotionally inflammatory it affected the jury's death verdict requiring reversal); *State v. Storey,* 901 S.W.2d 886, 902-03 (Mo. 1995) (finding prosecutor misstated the law by arguing that the decision to impose death "comes down to one basic thing. Whose life is more important to you? Whose life has more value? The Defendant's or [the Victim's]?"); *United States v. Johnson*, 713 F.Supp.2d 595, 630-31 (E.D. La. 2010) (finding comparative-value-of-life argument "an improper and inflammatory appeal to juror passion and emotion."). Likewise, this prosecutor's comparative-mercy argument was also a misstatement of law requiring reversal.

A juror's decision to impose the death penalty must be an individual, moral inquiry "based on the 'character and record of the individual offender and the circumstances of the particular offense.'" *State v. Martinez*, 230 Ariz. 208, 214 ¶23 (2012) (citation omitted). That individual, moral inquiry does not include a weighing of whether the defendant is more or less deserving of mercy than the

victim. *See State v. Allen*, 248 Ariz. 352, 366 ¶50 (2020) (noting the prosecutor "skirted the line and arguably crossed it" by asking the jury to impose death to send a message that the defendant's life was not worth more than the victim's). Accordingly, any argument that invites the jury to return a death verdict based on the comparative value of the defendant's life and the victim's life is a misstatement of the law constituting error. *See id.; Serna*, 163 Ariz. at 266.

iii. The prosecutor used victim impact statements to compare A.R. with Mr. Montoya to argue that life was an inappropriate sentence.

The prosecutor used the victim impact statements to argue that life was an inappropriate sentence. The impact statements included the following comments:

- "During [our last] conversation, we got into a little tiff and I was mad. I didn't end our conversation in the traditional way of saying, 'I love you.' The last time I spoke ... to [A.R.] was on October 4th, 2017. I will never be able to make up with her or let her know that I loved her. This was taken from me."[143]

- "In July 2017, [A.R.] and I celebrated her 32nd birthday. She flew to Texas and we floated the river on a tube two days in a row. We had a good time and we were able to start planning on living together. That was the last time I got to be with [A.R.]."[144]

The prosecutor used these statements in closing to argue that the defendant was not deserving of a life sentence: "A life sentence in this case will guarantee

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[143] Tr. 4/6/22, at 64.
[144] *Id.* at 68.

[Mr. Montoya] birthdays, talking to loved ones, having visitations, and resolv[ing] any unresolved issues with family and friends."[145] This was an improper comparison of all that was taken from the victim which Mr. Montoya would still enjoy if spared a death sentence. The prosecutor transformed the impact statements into a sentencing recommendation by arguing to the jury that, unlike the victim, Mr. Montoya would have the ability to celebrate birthdays and "make up" with family members by "resolv[ing] any unresolved issues" if a life sentence was imposed. This was error which likely diverted the jury from returning a verdict based on an individualized determination of Mr. Montoya's moral culpability.

iv. The error was fundamental, and Mr. Montoya was prejudiced.

The error was fundamental. Victim impact statements that offer a recommendation regarding sentencing are irrelevant and "serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." *Booth v. Maryland*, 482 U.S. 496, 508 (1987), *overruled on other grounds as recognized in Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016) (finding that reviewing courts "remain[] bound by *Booth's* prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence[.]"). The prosecutor's

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[145] Tr. 4/11/22, at 143.

comments likely coaxed the jury into returning a death sentence based on inflamed emotions and sympathy for the victim, not on relevant evidence.

The error went to the foundation of Mr. Montoya's case by denying him due process and the right to a fair trial. *Escalante*, 245 Ariz. at 141 ¶18. Further, he was deprived of his right to be free from arbitrary imposition of the death penalty because the comments directed the jury to return a death verdict based on irrelevant evidence and on an arbitrary weighing of the comparative value of A.R.'s life and Mr. Montoya's life. The prosecutorial error likely affected the jury's verdict because the improper arguments diverted the jury from its duty to decide Mr. Montoya's sentence only on relevant evidence. In a case where mitigation was extremely limited and the prosecution was given free reign under Arizona's death penalty scheme to present any evidence that proves the defendant undeserving of leniency, the prejudicial effect of the error is great. *See* A.R.S. § 13-752(G) (allowing State to present evidence demonstrating defendant should not be shown leniency "regardless of whether the defendant presents ... mitigation"). The jury could have reached a different verdict without the error.

The prejudice was exacerbated because of the timing of the impact statements, which were given just before closing arguments instead of before the State's presentation of rebuttal evidence in accordance with Rule 19.1(e)(3). Ariz. R. Crim. P. 19.1(e)(3). The emotional statements, therefore, were fresh in the

juror's minds when the prosecutor used those statements to argue for death. Consequently, Mr. Montoya deserves a new penalty phase proceeding.

C. The prosecutor erred by using proffered mitigation as non-statutory aggravating circumstances in violation of Mr. Montoya's right to due process and to be free from a death sentence arbitrarily and capriciously imposed.

Defense counsel filed a motion *in limine* seeking to limit the State's penalty phase evidence presentation.[146] Specifically, the defense sought to preclude evidence constituting non-statutory aggravation.[147] The State refused to provide notice of the evidence it intended to present at that time, choosing instead to wait until after the defendant's waiver of mitigation.[148] The court denied the motion, informing the parties, "I'll have to weigh in the future when we get specific as to what the State intends to present."[149]

During closing, the prosecutor used factors which are considered *de jure* mitigation – acceptance of responsibility, family ties, and abandonment by parents – as non-statutory aggravation. This was error. Absent the error, the jury could have reached a different verdict.

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[146] R. 226.
[147] *Id.* at 2-3.
[148] Tr. 9/17/21, at 32-33.
[149] *Id.* at 34.

1. The prosecutor committed misconduct by asking the jury not to consider Mr. Montoya's acceptance of responsibility as mitigating.

Acceptance of responsibility is a mitigating factor as a matter of law. This Court has held that "[a]cceptance of responsibility is a non-statutory mitigating circumstance, [citations omitted], and the trial court is constitutionally required in capital cases to admit proffered evidence of this aspect of a defendant's character[.]" *Busso-Estopellan v. Mroz*, 238 Ariz. 553, 554 ¶6 (2015) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982)). Here, the State improperly used Mr. Montoya's proffered mitigation of acceptance of responsibility as a non-statutory aggravating factor, rendering his death verdict a violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

Relevant Facts

Mr. Montoya pleaded guilty to the indictment without the benefit of a plea agreement[150] and admitted two statutory aggravators which made him eligible for the death penalty.[151] He also waived the bulk of the mitigation his attorneys

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[150] Tr. 5/14/21, at 5.
[151] *Id.* at 30-39.

intended to present.[152] The only mitigating circumstance Mr. Montoya allowed defense counsel to proffer in full was acceptance of responsibility.[153]

In closing, the prosecutor asked the jury: “How much value do you give to the acceptance of responsibility when the evidence of the defendant’s guilt in this case was already overwhelming?”[154] After painstakingly enumerating the “overwhelming wealth of evidence” against Mr. Montoya,[155] the prosecutor questioned whether his admission of guilt was mitigating at all:

> So when the state has all of this evidence, how much value – how much value should you give the acceptance of responsibility? ***Is this really a mitigating circumstance? Or was this a calculated decision by the defendant, knowing that it could be argued by his lawyers as mitigating?***[156]

Defense counsel did not object.[157]

Argument

A jury’s meaningful consideration of mitigation is constitutionally indispensable to the imposition of a death sentence. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Mitigation is any reason to impose a life sentence. *See* A.R.S. § 13-751(G). Admission of mitigation evidence is meaningless unless the

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[152] Tr. 9/17/21, at 34-37.
[153] *Id.* at 37-39.
[154] Tr. 4/11/22, at 91.
[155] *Id.* at 91-94.
[156] *Id.* at 95.
[157] *See id.*

jury is able to give it meaningful consideration. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 252 (2007). The due process clause prohibits prosecutors from "attach[ing] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process ... or to conduct that actually should militate in favor of a lesser penalty." *Zant v. Stephens*, 462 U.S. 862 (1983) (citations omitted).

This Court has cautioned that trial courts "should exclude [rebuttal] evidence that is ... irrelevant to the thrust of the defendant's mitigation" and "should not allow the penalty phase to devolve into a limitless and standardless assault on the defendant's character and history." *Hampton*, 213 Ariz. at 180 ¶51. Under the guise of rebutting mitigation and demonstrating that Mr. Montoya was undeserving of leniency, the State improperly urged jurors to regard proffered mitigating factors as non-statutory aggravating factors. *See State v. Just*, 138 Ariz. 534, 551 (App.1983) (reversing because sentencer incorrectly used defendant's "prior exemplary life and clear ability to appreciate the difference between right and wrong as aggravating circumstances[.]").

Not only did the prosecutor argue that acceptance of responsibility is not a mitigating circumstance – which is a misstatement of the law – she also transformed this *de jure* mitigation into a non-statutory aggravating circumstance by suggesting Mr. Montoya's decision to accept responsibility was a strategic ploy

to bolster his mitigation at sentencing. The State presented no evidence that Mr. Montoya strategically pleaded guilty for the purpose of arguing acceptance of responsibility as a mitigating factor at sentencing. The prosecutor's argument, therefore, was error.

Generally, evidence is relevant only if the State can prove "the antecedent fact necessary to make the evidence relevant and thus admissible." *State v. Johnson*, 247 Ariz. 166, 187 ¶54 (2019). In *Johnson*, defense counsel presented mitigation that the defendant had offered to plead guilty in exchange for a life sentence, which the State rejected. *Id.* ¶46. At the penalty phase, a prison administrator testified that inmates sentenced to life enjoy more "privileges, freedoms[,] and benefits" than death row inmates. *Id.* ¶50. This Court found the testimony irrelevant absent evidence that confinement conditions impacted the defendant's decision to make the offer. *Id.* ¶¶53-54. As in *Johnson*, the prosecutor here presented no evidence Mr. Montoya was motivated to plead guilty to gain the benefit of later arguing acceptance of responsibility as mitigation. Indeed, the opposite appears in this record.

Before accepting the mitigation waiver, the court reviewed the mitigation defense counsel intended to present, and Mr. Montoya confirmed he did not want

his attorneys to proffer "any mitigation."[158] He explained, "In my opinion, it's just making excuses for, you know, what happened. ... I don't think that I have the right to do that."[159] Regarding his attorneys' desire to present expert testimony regarding mental health and substance abuse issues, Mr. Montoya said he "disagree[d] with it."[160] The judge advised Mr. Montoya he was "accepting responsibility ... which is another mitigating factor that [his] attorneys could point to," to which Mr. Montoya responded, "No. I see – I could see – I can understand that little bit, you know."[161]

A strategic ploy this is not. Rather, it appears from the record he only decided to allow his attorneys to argue acceptance of responsibility *at the waiver of mitigation hearing* – months after pleading guilty. Further, if Mr. Montoya was motivated to relieve the State of its burden of proving guilt and aggravators beyond a reasonable doubt to strategically gain the advantage of bolstering his mitigation, why would he prevent the presentation of all other mitigation? The State's argument that Mr. Montoya's acceptance of responsibility was a strategic ploy was pure speculation because the State failed to demonstrate that gaining the acceptance-of-responsibility mitigator motivated him to plead guilty. Because the

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[158] Tr. 9/17/21, at 35.
[159] *Id.* at 36.
[160] *Id.* at 37.
[161] *Id.*

State did not present facts to establish the relevance of this rebuttal evidence, the prosecutor's unsupported argument in closing that this was a "calculated decision" was error.

The error was fundamental because it deprived Montoya of a right essential to his defense – the right to present and have the jury fairly consider the acceptance-of-responsibility mitigator. In this case, the prejudice was incalculable, given this was the only mitigating factor Mr. Montoya allowed his attorneys to present in full.

Mr. Montoya was further prejudiced when the prosecutor elicited statements from an officer testifying about the details of a prior crime:[162]

> Q. In this case, Montoya was caught red handed literally, right?
>
> A. Correct.
>
> Q. Is it, based upon your experience, common for people who are caught read [sic] handed to take their case to trial?
>
> …
>
> A. Well, typically, no. They would – depending on the cases or their history from what, you know, I've seen.
>
> Q. So what is your understanding of what a plea agreement offers someone?

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[162] Tr. 3/29/22, at 20-21.

> A. That they usually – when the plea agreement is offered, that they reduce sentence or punishment of what they would receive if they went to trial.
>
> …
>
> Q. And then they are able to argue acceptance of responsibility even though it really is a benefit to them, isn't it?
>
> A. Correct.
>
> Q. Because then they get that leniency argument; is that right?
>
> A. Correct.[163]

This line of leading questions allowed the prosecutor to inject into her evidence presentation a fact she planned on arguing in closing – that defense counsel's suggestion Mr. Montoya always accepts responsibility for his crimes "rings hollow":

> Further, to suggest the defendant always takes responsibilities for his actions rings hollow at best. You have heard testimony when there is a plea, there are benefits for the defendant....[164]

While plea agreements generally confer benefits on pleading defendants, Mr. Montoya pleaded guilty without any benefit in this case. The prosecutor's argument in closing likely misled jurors to believe Mr. Montoya received a benefit for pleading guilty to his capital crime. Here, because acceptance of responsibility

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[163] *Id.*
[164] Tr. 4/11/22, at 101.

was the only mitigator defense counsel could present in full, the prejudice was extreme and created too great a risk of an arbitrary and capricious death verdict.

2. The prosecutor erred by using the proffered mitigation that Mr. Montoya has a daughter and that he was abandoned by his father and stepfather as non-statutory aggravating factors.

Defense counsel requested a jury instruction listing the mitigation Mr. Montoya expected to offer based on cross-examination of the State's witnesses. One of those items was that "Mr. Montoya has a daughter named Alexis who may want to know her father someday."[165] The State objected to the phrase "who may want to know her father someday" as impermissible execution impact evidence, which was previously precluded.[166] The court removed the language from the instruction.[167] The instruction also listed as mitigation that Mr. Montoya was abandoned by his father and stepfather.[168] In closing, the State asked jurors to use this mitigation as non-statutory aggravation:

> How about the fact that the defendant has a daughter named Alexis. That is what the defense has proposed to you as mitigation. Proving, yes, he's the biological father of Alexis. If you find that mitigating, consider what the defendant's relationship with his daughter was according to [her] mother… What value should you give that factor considering this evidence? He has no relationship with her.

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[165] Tr. 4/7/22, at 12-13.
[166] *Id.* at 12.
[167] R. 411, at 3-4; 6-7.
[168] *Id.* at 7.

> Interestingly, the evidence presented during this trial was that he abandoned his daughter, yet he also wants you to find leniency in the abandonment that he experienced of the same thing.
>
> What does his own abandonment of his daughter say about his character? He gave her no support, nothing. Now she becomes a reason why he should get leniency in this case?
>
> This should be given no value at all and should be considered in the context of the defendant's character.[169]

Defense counsel did not object.[170]

Argument

A defendant's family ties is a mitigating circumstance in Arizona. *State v. Moore*, 222 Ariz. 1, 22 ¶134 (2009) (citation omitted). Abandonment is also a mitigating circumstance. *State v. Dann*, 220 Ariz. 351, 374-75 ¶135 (2009). The prosecutor here transformed the mitigating factor of family ties into a non-statutory aggravating factor to argue that Mr. Montoya's abandonment of his daughter negated his proffered mitigation of abandonment by his father and stepfather.

The error deprived Mr. Montoya of his right to have the jury fairly consider his proffered mitigation in violation of his rights to due process, to a fair trial, and to be free from cruel and unusual punishment. The mitigating evidence gleaned from State witnesses on cross-examination regarding these two mitigating factors

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[169] Tr. 4/11/22, at 105-07.
[170] *See id.*

was negligible. The prejudice, therefore, is overwhelming in this case where defense counsel was precluded from presenting independent evidence of family ties and abandonment. Absent the error, the jury could have found leniency appropriate in this case.

D. The prosecutor misstated the law by telling jurors that any proffered mitigation they deemed a mere excuse for the crime was not a mitigating circumstance.

Prosecutors may not misstate the law in closing argument. The prosecutor here misinformed the jury during closing that if they found any proffered mitigation to be an excuse for the crime, they could not consider it a mitigating factor. This is a misstatement of the law, which directly conflicted with the jury instructions and resulted in fundamental, prejudicial error. Accordingly, this Court must vacate Mr. Montoya's death sentence and remand for a new penalty phase.

Relevant Facts

Mr. Montoya waived mitigation because he did not want to make excuses for his crimes.[171] The jury instructions explained:

> Mitigating circumstances are not an excuse or justification for the offense, but are factors that in fairness or mercy may reduce the defendant's moral culpability.[172]

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[171] Tr. 9/17/21, at 36.
[172] R. 411, at 6.

In closing, the prosecutor argued: "If you find a fact or circumstance to be nothing more than an excuse or a justification for the murder, then it isn't mitigating."[173] Defense counsel did not object.[174]

Argument

A prosecutor may not misstate the law or otherwise mislead the jury. *Serna*, 163 Ariz. at 266 (citations omitted). "[A] jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character or the circumstances of the crime." *Penry v. Lynaugh* (*Penry I)*, 492 U.S. 302, 328 (1989). Further, "mitigating evidence should be evaluated in the 'most expansive terms.'" *Roque*, 213 Ariz. at 223 ¶124 (quoting *Tennard v. Dretke*, 542 U.S. 274, 284 (2004)).

The prosecutor's misstatement of law conflicts with the jury instructions and implied that jurors could ignore proven mitigating circumstances they deemed mere excuses. The standard for reviewing jury instructions used during the penalty phase of capital sentencing proceedings is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant [mitigating] evidence.'" *Buchanan v. Angelone*, 522 U.S. 269, 274 (1998) (quoting *Boyde v. California*,

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[173] Tr. 4/11/22, at 82.
[174] *See Id.* at 82.

494 U.S. 370, 380 (1990)). Here, the misstatement invited the jury to misapply that instruction. This was error. Further, unlike the prosecutor's inappropriate questions in *Prince*, 226 Ariz. at 538 ¶¶88-89, the error was not "immediately corrected" by the court.

The error was fundamental because it deprived Mr. Montoya of due process of law and his right to be free from an arbitrary and capricious death verdict. He was entitled to have an impartial jury properly consider proffered mitigation in reaching a reasoned, moral conclusion as to whether a death sentence was appropriate – per the court's instruction. The prosecutor's misstatement invited the jurors to ignore that instruction, or at the very least, likely confused jurors regarding whether they could consider proven mitigation.

The prejudice to Mr. Montoya is extreme. The jury was presented with a transcript and video of his mitigation waiver, where he specifically said he considered mitigating evidence to be "excuses." By informing the jury that if they found proffered mitigation merely an excuse, then it is not mitigating, the jury could have disregarded all of the proffered mitigation, given that the defendant himself referred to the mitigation *in this case* as mere excuses.

Further, the prosecutor argued to the jury that Mr. Montoya's addiction to Coricidin was merely an excuse in the attack on Ronald Tupa:

> Moments after the attack when the defendant is found by the police, the defendant then uses his addiction to cough and cold medicine to justify his violence.
>
> Remember at this point, at 23, has now been to court many times and knows this is something that can explain his choices that he continues to make. [175]

Indeed, the prosecutor referred to his Coricidin addiction as his "go to" excuse when he gets in trouble:

> …[H]e used his substance abuse as a reason why he had no respect for the property of his family and a reason why he committed horrific acts of violence. This was his immediate go to when confronted after he was [] caught for committing crimes.[176]

Similarly, the prosecutor later argued: "That is a man that blames cough and cold medicine every time he gets caught."[177] The prosecutor's arguments, therefore, only compounded the prejudice by labeling this mitigator as an excuse and then telling the jury they couldn't consider excuses as mitigation. The error created an unacceptable risk the jury would impose an arbitrary and capricious death sentence. As such, Mr. Montoya is entitled to a new penalty phase.

E. The prosecutor facilitated improper vouching by placing the prestige of the government behind the State's evidence and by implying information not presented at trial supported the State's evidence.

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[175] Tr. 4/11/22, at 115.
[176] *Id.* at 112-13.
[177] *Id.* at 137.

The prosecutor improperly placed the prestige of the government behind the State's evidence to bolster the credibility of an expert witness and by eliciting testimony that implied evidence not presented at trial supported its case against Mr. Montoya. This was fundamental error, which prejudiced Mr. Montoya.

1. The prosecutor elicited testimony from Detective Hansen that this case involved the largest amount of cellular phone data he had ever seen in any case in 25 years.

The prosecutor engaged in vouching by asking the State's cell phone expert questions suggesting information not presented to the jury supported the State's evidence. The prosecutor then used the elicited testimony to bolster the State's case and argue to the jury that the evidence was overwhelming. The was fundamental, prejudicial error.

Relevant Facts

Detective Hansen of the FBI CAST Task Force testified regarding cell phone data extracted from Mr. Montoya's and A.R.'s phones.[178] During direct examination, the following exchange between the prosecutor and Hansen occurred:

> Q. The ability to have this information for the jury for trial involves multiple investigators going out and talking to who at these locations to gather this type of surveillance information and banking records and cellular records? Talk to us about that process.

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[178] *See* Tr. 4/6/22, at 4-59.

> A. Sure. Well, it depends on what type of information you're looking for. For example, for the cellular data in this case, that would have been obtained by the companies via legal process, generally a search warrant. Identifying the video and going through all the video and identifying the financial records is an extremely lengthy process. It takes a lot of effort. We're looking at a lot of these examples here, and there's actually a total of 30 bank card transactions that were corroborated with video in this case.
>
> Q. Involving Mr. Montoya?
>
> A. Involving Mr. Montoya, yes.
>
> Q. So overwhelming evidence?
>
> A. This is the largest amount that I have seen in 25 years.[179]

Defense counsel did not object.[180] The prosecutor then used this in closing to bolster the strength of the State's case:

> Cell phone evidence? Have that, too. Detective Hansen told you about the overwhelming amount of evidence. He testified that this is the largest amount I have seen in 20 years that he had to use from [A.R.'s] phone activity, the defendant's phone activity, and the corresponding surveillance of the defendant and the other records that he discussed.[181]

Again, the prosecutor reminded the jury of the sheer volume of evidence in the case:

> There is an overwhelming wealth of evidence to establish Christopher Montoya's guilt. Period. That cannot be disputed. You

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[179] Tr. 4/6/22, at 39-40.
[180] *See id.*
[181] Tr. 4/11/22, at 92.

> heard from Detective Hansen regarding his observations about the amount of evidence gathered in this case.[182]

Defense counsel did not object.[183]

Argument

Vouching occurs when a prosecutor's comment (1) places the prestige of the government behind the State's evidence or witnesses or (2) implies information not presented at trial supports the State's evidence. *State v. Newell*, 212 Ariz. 389, 403 ¶62 (2006). The prosecutor's questioning of Hansen suggested that information not presented to the jury supported the State's evidence, thereby improperly bolstering the State's case. The prosecutor elicited the information by asking Hansen to agree that the evidence was "overwhelming." This was improper vouching. It implied that the evidence in Mr. Montoya's case was stronger than evidence in any case Hansen – an expert agent from the FBI – had ever seen in his 25-year career. It invited the jury to assume that if an FBI expert had never seen a case with such overwhelming evidence, it must be a very strong case indeed.

The error was fundamental because it went to the foundation of Mr. Montoya's case. Here, the error interfered with Mr. Montoya's due process right to a fair trial by improperly – and unnecessarily – bolstering the strength of a

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[182] *Id.* at 94-95.
[183] *See id.* at 92; 94-95.

case the State no longer had to prove beyond a reasonable doubt. The prejudice is clear and unmistakable: The prosecutor used this vouching to argue twice in closing that Mr. Montoya's strongest mitigating circumstance – acceptance of responsibility – deserves little weight given the overwhelming evidence of guilt. In a case where the scale was already tilted in the State's favor, the improper vouching rendered the possibility of a fair trial unlikely. Mr. Montoya deserves a new penalty phase trial.

2. The prosecutor elicited testimony bolstering the credibility of expert witness Dr. Laura Fulginiti by questioning the medical examiner about Dr. Fulginiti's credentials.

The prosecutor elicited testimony from the medical examiner bolstering the credibility of its expert witness Laura Fulginiti:

> Q. And you already testified that there was a forensic anthropologist, Dr. Laura Fulginiti, that actually did the reconstruction of [A.R.'s] skull in this case?
>
> A. That's correct.
>
> Q. Is whe – is it your understanding that she would be the person to talk about in terms of the different measurements of the fractures underneath and how they related to each other in terms of [A.R.'s] skull?
>
> A. Yes. That's why we utilize these consultants, their area of expertise. We – I would defer to her ability to talk

> about those as far as the extent and their relationships and her reconstruction process.[184]

The prosecutor continued this line of questioning during direct examination of Dr. Bucholtz:

> Q. Now, you had an opportunity to review Dr. Fulginiti's report?
>
> A. Yes.
>
> Q. In her report, she discusses a minimum of 14 impact sites. And in Dr. Little's report, he lists eight. Can you – do you have any opinions about why there's a difference between those two reports?
>
> A. As I said, Dr. Little and even my way of dealing with this is you try to isolate the actual areas on the skin and give them a number, but as far as how many times that it was used to create that particular injury, we can't always get a good estimate based on just looking at the skin itself, especially when it's not in the best condition to start with.
>
> … And a lot of times the underlying bone can give you a better idea of how many injuries were created in various areas. And Dr. Fulginiti will probably be discussing that with you. How she came up with the number that she came up with versus Dr. Little.
>
> Q. Is that one of the reasons that a case like this with a multitude of fractures that were seen would be referred to Dr. Fulginiti?
>
> A. Yes, Dr. Fulginiti is a forensic bone doctor. That's her area of specialty. She's been trained in trauma of bone impacts and what kinds of instruments can create various injuries on bone themselves. And it's a useful consultation to have.[185]

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[184] Tr. 4/4/22, at 42-43.
[185] *Id.* at 53-55.

Defense counsel did not object.[186]

Argument

A prosecutor improperly vouches by making comments that place the prestige of the government behind the State's evidence or witnesses. *Newell*, 212 Ariz. at 403 ¶62. The prosecutor's questioning of the medical examiner was improper because it was designed to elicit testimony boosting the credibility of another expert witness as a "specialist" who is "trained in trauma of bone impacts" and can provide a "useful consultation". The error was fundamental because it interfered with Mr. Montoya's due process right to a fair trial. Every capital defendant is entitled to have an impartial jury evaluate the credibility of witnesses at trial. In this case, if jurors had questioned Dr. Fulginiti's credibility, it could have impacted their verdicts. Given that her testimony regarding the number of blows inflicted to the skull conflicted with the number listed in the medical examiner's report, Dr. Fulginiti's testimony likely impacted the jury's weighing of the especially cruel aggravator. Mr. Montoya, therefore, should be granted a new penalty phase.

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[186] *See id.*

F. The prosecutor's improper questioning of Larry Binkley about Mr. Montoya's character and the impact of Mr. Montoya's prior crime violated a previous ruling of the court and Mr. Montoya's rights under the Eighth and Fourteenth Amendments to the United States Constitution.

Prior to trial, defense counsel filed a motion to preclude the testimony of Larry Binkley and Ronald Tupa – both victims of Mr. Montoya's prior criminal acts – and specifically sought to preclude statements about Mr. Montoya's character and about the impact of the prior crimes on the victims.[187] At oral argument, the prosecutor informed the court, "We don't plan on … talking about unrelated things, what do you know about his character, to Larry Binkley."[188] After the court expressed concern the testimony would venture beyond the type of factual statements approved of by this Court in *State v. Champagne*, 247 Ariz. 116 (2019), and constitute "impermissible victim impact statements," the prosecutor further assured the court Binkley would "specifically talk about the facts and circumstances of the defendant's act or criminal act and what he knows."[189] However, the prosecutor warned:

> …[I]f they want to use Mr. Binkley as a conduit into his family background and doesn't he have a sad this, that, and the other thing, I'd be very careful because I think that will open the door to, all right, well, then let's talk about his character, shall we. What do you know

[187] R. 343.
[188] Tr. 3/7/22, at 15.
[189] *Id.* at 16.

about his character? And because he lived with the defendant, it may not be a good path to go down.[190]

The court ruled that Binkley was permitted "within the confines of *Champagne*" to testify "about the facts of the case and what factually happened[.]"[191] The court further instructed it was impossible to "rule in a vacuum[,]" informing the parties it would have to wait until the State's examination to determine whether a particular question was improper; but the court cautioned the State to "keep it narrow."[192]

On *direct* examination, the prosecutor told Binkley, "One of the things I want to talk to you about is character. Mr. Montoya's character."[193] The State then asked, "What are your thoughts on his character?"[194] Defense counsel did not object.[195] Binkley responded to this question at length, saying Mr. Montoya "wasn't trying very hard, if, in fact he was trying at all."[196] He continued, "...I saw a kid that didn't have a lot of substance. He was just a shadow of a person with not much inside."[197] He testified that his wife had to sell her "favorite" vehicle after

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[190] *Id.* at 18.
[191] *Id.* at 21.
[192] *Id.*
[193] Tr. 3/29/22, at 47.
[194] *Id.*
[195] *See id.*
[196] *Id.* at 48.
[197] *Id.*

Mr. Montoya stole it because "it just brought back too much disappointment."[198] He also testified on redirect that Mr. Montoya betrayed his trust.[199] Defense counsel did not object.

In closing, the prosecutor repeatedly referenced Binkley's testimony to argue for a death verdict.[200] Again, defense counsel did not object.

Argument

Not only did the prosecutor's improper questioning of Binkley violate the court's ruling and disregard her own avowal to the court, but it also elicited irrelevant and prejudicial victim impact testimony from a victim of a prior crime unrelated to the present offenses, in violation of Mr. Montoya's rights under the United States and Arizona constitutions. U.S. Const. amends. V, VI, VIII, XIV; Ariz. Const. art. 2, §§ 4, 15, 24.

Under *Payne*, the State may present victim impact evidence at the penalty phase of a capital trial. 501 U.S. at 825. However, the statements must be made by victims of the crimes for which the defendant is presently on trial. Other states have found victim impact evidence of unrelated crimes irrelevant, prejudicial, and inadmissible. *See, e.g., People v. Hope*, 702 N.E.2d 1282, 1289 (Ill. 1998) (finding

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[198] *Id.* at 38, 41.
[199] *Id.* at 91.
[200] Tr. 4/11/22, at, 81, 104-04, 113-14, 137.

"evidence about victims of other, unrelated offenses is irrelevant and therefore inadmissible" under *Payne*); *Sherman v. State*, 965 P.2d 903, 914 (Nev. 1998) (holding "the impact of a prior murder is not relevant to the sentencing decision in a current case and is therefore inadmissible during the penalty phase."); *Cantu v. State*, 939 S.W.2d 627, 637 (Tex. 1997) (finding that victim of prior crime "is not the 'victim' for whose death appellant has been indicted and tried, and *Payne* does not contemplate admission of such evidence as permissible under the Eighth Amendment.").

In *Champagne*, this Court held that a victim police officer who witnessed the defendant's unrelated prior "shootout" with police could testify regarding the facts and circumstances of the prior crime. *Champagne*, 247 Ariz. at 325 ¶96. The Court held that "their testimonies were not impermissible victim impact statements but rather statements as factual witnesses." *Id.* In this case, however, Binkley was not a police officer trained to provide unemotional testimony, and he did not testify only to facts and circumstances of the prior crimes. Binkley's testimony in this case was not proper under *Payne* and violated Mr. Montoya's rights to due process of law and freedom from cruel and unusual punishment.

The death penalty may not be imposed under sentencing procedures that produce a substantial risk the punishment will be inflicted arbitrarily and capriciously. *Furman v. Georgia*, 408 U.S. 238, 256 (1972). Allowing emotional,

irrelevant, and prejudicial testimony about other crime victims regarding a prior conviction was error, which likely affected the jury's death verdict. Binkley's assessment of Mr. Montoya's character was completely irrelevant, as was his testimony of the impact of the prior crime on Binkley. Further, it was unnecessary, as a police officer testified as to the facts and circumstances of the prior offense. This Court should remand Mr. Montoya's case for a new penalty phase.

G. The prosecutor improperly commented on Mr. Montoya's failure to testify, in violation of the United States and Arizona Constitutions.

The prosecutor improperly called the jurors' attention to Mr. Montoya's decision not to allocute. Every criminal defendant has the right to refuse to incriminate himself by choosing not to testify at trial. U.S. Const. amend. V, XIV; Ariz. Const. art. 2, § 10. A prosecutor errs by commenting on this constitutional right during trial, thereby directing "'the jurors' attention to the defendant's exercise of his fifth amendment privilege.'" *Hughes*, 193 Ariz. at 87 ¶65 (quoting *State v. McCutcheon*, 159 Ariz. 44, 45 (1988)). The prosecutor's statements in opening and closing arguments constituted improper commentary on Mr. Montoya's refusal to allocute. This was fundamental error. Because the prosecutor's fundamental error likely affected the jury's verdict, this Court must vacate Mr. Montoya's sentence on all counts and remand for a new penalty phase trial.

Standards of Review

Reviewing courts will find fundamental error for improper comments on a defendant's decision not to testify if "the general conduct of the prosecuting counsel was such that it must be presumed to have resulted in a miscarriage of justice." *See State v. Smith*, 101 Ariz. 407, 410 (1966) (citation omitted). "The error can be fundamental whether the comment is direct or indirect." *Hughes*, 193 Ariz. at 86 ¶63 (citation omitted). Appellate courts examine a prosecutor's statements in context of the entire record to determine if a reasonable juror would have perceived the statements as commentary on the defendant's failure to testify. *State v. Schrock*, 149 Ariz. 433, 438 (1986) (citation omitted).

Relevant Facts

The victim impact statements were rife with emotional pleas by family members regarding their devastation at not knowing what happened to [A.R.]:

> Even as we finally got to properly lay her to rest, I still had so many questions about the murder, about her murder, and not many answers.[201]
>
> Why did this happen to her? What exactly happened to her? That's sheer torture for a mother not to know that.[202]
>
> We do not know which day [A.R.] died, which is painful. Her death certificate has a found-on date.[203]

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[201] Tr. 4/6/22, at 72.
[202] *Id.* at 74.

> We often wondered what her last moments on Earth were like. It was admitted she was threatened with a hammer and a knife and Spike was killed in front of her – or was Spike killed in front of her while she was still alive? We don't know. Simply gruesome. We have no idea what her last moments were like. We can only assume they were tragic based on what we know. This is very heartbreaking to her friends and her family. This brutal murder continues to torment us all.[204]

In closing, the prosecutor reminded the jury that many things about the murder remain unknown, improperly calling the jury's attention to Mr. Montoya's exercise of the right not to incriminate himself:

> We also know that [A.R.'s] phone code, debit pin, and password were on a sheet of paper found in the defendant's truck in Mineral County. When [A.R.] had to give those up, any threats that went along with that, whether smothering Spike, her beloved puppy, had anything to do with giving up that information, we will never know.[205]
>
> He then chose to get all of her passwords. We don't know how he got them from her. The only witness to him during these moments was [A.R.]. Then the brutal death with the hammer to her head over and over and over again. We don't know why he chose to kill in such a manner. Only he does.[206]
>
> We don't know if she pled for mercy or leniency. We don't know what he said to her. We don't know a lot because he did

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[203] *Id.* at 81.
[204] *Id.* at 82.
[205] Tr. 4/11/22, at 98.
[206] *Id.* at 140.

everything he could to get away with this crime and go on living his life.[207]

Defense counsel did not object.[208]

Argument

A prosecutor improperly comments on a defendant's Fifth Amendment right not to testify by "bringing to the jury's attention *either directly or indirectly* the fact a defendant did not testify." *Schrock*, 149 Ariz. at 438 (citations omitted) (emphasis added). Although comments on the decision not to testify may be appropriate rebuttal to a defendant's denial of responsibility during allocution, *State v. Goudeau*, 239 Ariz. 421, 467-68 ¶¶205-09 (2016), it is improper in this case because Mr. Montoya did not deny responsibility. Indeed, he accepted responsibility by pleading guilty and admitting aggravators.

A prosecutor's comments on a defendant's failure to allocute violates both constitutional and statutory law. *See* U.S. Const. amends. V, XIV; Ariz. Const. art. 2, § 10; A.R.S. § 13–117(B). Prosecutorial comments are improper if they (1) are "adverse; that is [they] support an unfavorable inference against the defendant" and (2) "operate as a penalty imposed for exercising a constitutional privilege." *State v. Mata*, 125 Ariz. 233, 238 (1980). The comments here did both.

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[207] *Id.* at 141.
[208] *See id.* at 140-41.

The prosecutor's comments in closing were adverse because they reminded the jury that Mr. Montoya, by not allocuting, was withholding valuable information from the court, the jury, and A.R.'s family. The prosecutor used this adverse inference to argue to the jury that Mr. Montoya does not deserve leniency. The comments also operated as a penalty for exercising his protected constitutional right to remain silent. A comment on a defendant's invocation of his right to remain silent is not only improper, but it also constitutes fundamental error. *See State v. Sorrell*, 132 Ariz. 328, 329 (1982) (comments on silence are fundamental error). Further, unlike in *Mata*, the court did not take any curative measures to ensure the improper remarks were "immediately corrected" in this case. *Mata*, 125 Ariz. at 238.

The prejudice to Mr. Montoya cannot be overstated. The comments improperly directed the jury's attention to his decision not to allocute. *Schrock*, 149 Ariz. at 438. Further, the prejudice was exacerbated by the victim impact statements, which appealed to the jurors' emotions by conveying how painful it was for the family not to have answers about A.R.'s death. Consequently Mr. Montoya must be granted a new penalty phase.

H. The cumulative effect of the persistent and pervasive misconduct so infected Mr. Montoya's penalty phase with unfairness that the resulting death verdict violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Even if this Court finds the individual instances of prosecutorial error are not, standing alone, reversible error, or are non-errors, the cumulative effect of the error, non-error, and misconduct denied Mr. Montoya due process of law under the United States and Arizona Constitutions. U.S. Const. amends. V, VI, VIII, XIV; Ariz. Const. art. 2, §§ 4, 15, 24. This case involved only a penalty phase. Given the pervasive nature of the prosecutor's improper argument in closing, the court's final jury instruction that lawyers' comments are not evidence did little to cure the error. Instead, by instructing jurors that the lawyers' closing arguments "may assist [the jury] in understanding the law and evidence[,]" the jury instructions only exacerbated the error. *See State v. Murray*, 250 Ariz. 543, 554 ¶39 (2021).

The prosecutor's error in this case was so persistent and pervasive it denied Mr. Montoya a right to a fair trial. Further, the prosecutor committed the error with a disregard, if not specific intent, to prejudice Mr. Montoya. As such, this Court must vacate the death sentence and remand for a new penalty phase.

ARGUMENT II

The trial court violated Mr. Montoya's constitutional rights to a fair and impartial jury, to due process, to heightened reliability, and to be free from cruel and unusual punishment, by improperly limiting the scope of voir dire and asking rehabilitative and "follow the law" questions despite Arizona's abolishment of peremptory strikes and the requirements of *Morgan v. Illinois*.

The trial court's limitations on voir dire, including those on Mr. Montoya's use of a hypothetical, as well as the trial court's use of rehabilitative and "follow the law" questions, prevented Mr. Montoya from determining whether the prospective jurors were predisposed to impose the death penalty on someone guilty of first-degree murder. The seating of improperly vetted jurors violated Mr. Montoya's constitutional rights to a fair and impartial jury, to due process, to heightened reliability, and to be free from cruel and unusual punishment. Because this was reversible error, this Court must vacate Mr. Montoya's death sentence and remand for a new penalty proceeding.

Standard of Review

This Court reviews the trial court's rulings on the voir dire of prospective jurors for an abuse of discretion. *State v. Glassel*, 211 Ariz. 33, 45 ¶36 (2005). Error to which a defendant objects at trial is subject to harmless error analysis. *Henderson*, 210 Ariz. at 564–65 ¶8. "Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or

affect the verdict or sentence." *Henderson*, 210 Ariz. at 566 ¶18 (citing *State v. Bible*, 175 Ariz. 549, 588 (1993)). Finally, this Court reviews constitutional issues de novo. *State v. Hidalgo*, 241 Ariz. 543, 548 ¶7 (2017) (citation omitted).

Relevant Facts

Prior to jury selection, Mr. Montoya filed a Memorandum on Jury Selection and Hypothetical Question.[209] The pleading set forth several premises, including that counsel should be allowed to inquire about the prospective jurors' personal feelings about imposing a death sentence by using case-specific questions, as well as, hypothetical and open-ended questions.[210] In his memorandum, Mr. Montoya provided the court with its proposed hypothetical question to be used in jury selection.[211]

Mr. Montoya subsequently filed a supplement to his jury selection memorandum based upon the then-recently issued opinion in *State v. Thompson*, 252 Ariz. 279 (2022), and asserting in part that defense should be permitted to use a hypothetical scenario "asking jurors how they feel about the death penalty being

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[209] R. 313.
[210] *Id.*
[211] *Id.*

the only appropriate penalty for an unjustified premeditated murder of an innocent victim."[212]

On February 3, 2010, the trial court held a status conference at which the parties presented argument concerning Mr. Montoya's memorandum on jury selection and the use of a hypothetical.[213] Defense counsel noted that their proposed hypothetical was one which had "been used, if not verbatim pretty darn close, in this very courtroom in your division previously by other attorneys, and you allowed that without the mention of mitigation, Your Honor."[214] The court acknowledged that it previously allowed a similar hypothetical in the Noonkester case but that "they hung both times so it never went to appeal."[215]

Defense counsel noted that the trial court had not required a reference to mitigation as part of the hypothetical used in previous cases.[216] Defense counsel emphasized that the purpose of the hypothetical was "just how do you feel about the death penalty" and that it was not asking the jurors to commit to a position.[217] The court then stated it was going to take the matter under advisement because it

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[212] R. 317.
[213] Tr. 2/3/22, at 5–27
[214] *Id*., at 12–13.
[215] *Id*., at 13.
[216] *Id*.
[217] *Id*., at 14.

wanted to read the *Thompson* case before ruling.[218] The court also asked that defense counsel submit a shorter hypothetical for consideration.[219]

Later that day, Mr. Montoya filed a pleading with the following modified hypothetical:

> Imagine that you have been selected to be on a jury for another case where you and your follow jurors listened to all the evidence and decided that the defendant was guilty of first-degree premeditated murder of an innocent victim. The evidence showed the defendant decided to kill the victim and did so. He wasn't intoxicated, insane or intellectually disabled. This wasn't self-defense, in the heat of passion or duress. There was no legal justification. This was a meant to do it, cold blooded killing of an innocent victim and you and the jury found him guilty. How then do you feel about the death penalty as the only appropriate punishment for this guilty murderer?[220]

On February 10, 2022, the trial court held a status conference at which it again addressed this issue and stated, "you can ask this hypothetical but it must include a discussion and address mitigation."[221] Defense counsel noted that the intent of using the hypothetical was to "gauge the jurors' opinions of the death penalty at the moment of conviction, which is where we start in this case" and that the discussion of mitigation generally flows from the jurors' answers to the

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[218] *Id*., at 15, 24, 27.
[219] *Id*., at 27–28.
[220] R. 327.
[221] Tr. 2/10/22, at 8.

hypothetical.[222] The trial court replied that it believed "it's appropriate if you give that hypothetical that you do have to discuss mitigation."[223] Defense counsel then asked for additional clarification regarding how mitigation needed to be discussed in relationship to the hypothetical:

> Can I – well, let me ask this. I have a hypothetical question that has been submitted. I do not intend to simply stand up in front of the jury and dive right into the hypothetical. I intend to explain a little bit of the process to the jurors. In that process, may I define mitigation as per the – as per what the jury instructions say and then move on to the hypothetical because then I have included the definition of mitigation?[224]

The trial court answered, "If it is clear that that is part of your discussion and if it's clear that you lay out the law correctly with mitigation and then ask the hypothetical, yeah."[225]

Over the course of two days, the trial court screened the prospective jurors for hardship, and those jurors who were not excused were released to complete a questionnaire. The questionnaire contained a lengthy explanation of mitigation, the jurors' roles in considering mitigation, and a summary of how the jurors were to determine the appropriate sentence.[226] After excusing prospective jurors based

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[222] *Id.*, at 9–10.
[223] *Id.*, at 11.
[224] *Id.*, at, 13.
[225] *Id.*, at 14.
[226] R. 355.

upon stipulation, the trial court continued jury selection over the course of an additional two days, conducting the voir dire of two panels each day, for a total of four panels.

During the parties' voir dire of Panel 1, after a short introduction by the trial court, the State questioned the jurors first.[227] As part of the State's voir dire, they discussed in depth the concept of mitigation, the jurors' duties and instructions during the deliberation of sentence, the jurors' views on capital punishment versus natural life imprisonment, and whether the jurors would consider the aggravating circumstances, mitigation, and the defendant's background, criminal history, and propensities when deliberating sentence.[228]

Defense counsel then addressed the prospective jury panel, informing them that, as stated in the questionnaire, Mr. Montoya pleaded guilty to all charges and admitted aggravating circumstances that made him eligible for the death penalty.[229] Defense counsel continued that the choice of sentence was an individual, moral decision for the jury.[230]

Referring to a graphic that defense counsel had displayed on the overhead screen, defense counsel then informed the prospective jurors about mitigation:

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[227] Tr. 3/22/22, at 12–31.
[228] *Id*.
[229] *Id*. at 32–33.
[230] *Id*. at 33.

[T]his phase is called the mitigation phase. And in this phase, the jury considers all the evidence about the crime and about mitigation. As you can see on the board – hope you can read that okay – mitigating circumstances are any factors that are a basis for a life sentence instead of a death sentence so long as they relate to any sympathetic or other aspect of the defendant's character, propensity, history, or record or circumstances of the offense.

Mitigation is anything that you deem relevant that can be a basis for a life sentence. Mitigation is a reason to give life.

I'll come back to that one in a few minutes.

But this is an individual, moral decision for or everybody to make.

There's no set formula for this. Ms. Dahl was correct that everybody must deliberate. Get together and talk about it. Everyone must deliberate for themselves on what they find to be mitigating and what's not. This is an individual, moral decision. And you don't all have to agree on what you find to be mitigating. If one juror thinks, I think this, this, this is mitigating and another juror thinks I don't agree with that, that's okay. Not everyone can agree.

But something for you all to understand is that as a juror, after deliberating, if you find that there are mitigating circumstances sufficiently substantial to call for a life sentence, you are obligated to vote for a life sentence and the law will be satisfied with that result. No one will overrule you or tell you that you're wrong.

This, folks, is an individual decision because it's a moral decision. Everyone has their own set of morals like what religion do you want to practice. How you want to raise your kids. What politics that you enjoy.

Only you can decide what you find to be mitigating. And you don't all have to agree.

Now, Ms. Dahl said something else that I very much agree with is that this may not be the right kind of case for you. Everyone can be a juror. The question is, is this the right kind of case, the kind of case determines who the right kind of jurors are.

> So in asking you some questions and following up on some things from your questionnaires, I first wanted to ask you folks a hypothetical question. There are no right answers. There are no wrong answers. All we're looking for are honest answers, please. And I promise, everyone's answers in this courtroom will be perfectly respected, so please feel free to speak your mind.[231]

Defense counsel then went on to provide the prospective jurors with the following hypothetical:

> So imagine that you have been selected to be on a jury. Different case. Another courtroom down the hall. And you and your fellow jurors found in that case – you listened to all the evidence, heard all the testimony and all the witnesses and you found that the defendant in that case was guilty of a first degree, premeditated murder.
>
> Now, when I say premeditated murder, I mean, the defendant thought about it, planned it, went and he did it. This was not a case where he was claiming I acted in self-defense or I was defending someone else or my property. This was not a matter of him being under duress of any kind. Nothing like that. The defendant was not insane or having some mental health issue that prevented him from forming the requisite intent to commit that type of a murder. None of that either.
>
> The defendant also wasn't drunk or high on something that they didn't really know what they were doing. None of that either.
>
> Talking about a cold blooded, meant-to-do-it killing of an innocent victim.

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[231] *Id*. at 33–35.

> So I want to ask, then, how do you feel about the death penalty as the only appropriate punishment for that guilty murderer of an innocent victim?[232]

Defense counsel then questioned Prospective Juror #32, asking them how they felt about the death penalty under those circumstances.[233] Prospective Juror #32 responded, "I think if they – it was planned like you said, thought of it, it was planned to do he – he or she set to do it, yeah, I agree, probably should."[234] Defense counsel clarified, "You think the death penalty is appropriate … under those circumstances?"[235] Prospective Juror #23 replied, "Yes."[236]

At that point the State asked to approach.[237] Instead of allowing the parties to approach, the trial court interjected with a series of rehabilitative questions:

> Would you still consider – given the facts that you've just been told, would you also consider the mitigation and consider whether or not you find the mitigation sufficiently substantial to call for leniency?
>
> …
>
> Okay, so you would consider – you would have to consider the mitigation and you would consider the mitigation in determining whether it was sufficient to overcome the death sentence given those facts?[238]

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[232] *Id*. at 35–36.
[233] *Id*. at 36.
[234] *Id*. at 37.
[235] *Id*.
[236] *Id*.
[237] *Id*.
[238] *Id*.

To which Prospective Juror #23 affirmed that they would.[239]

During defense counsel's questioning of Prospective Juror #7 from Panel 1, he again began with attempting to restate the first part of the hypothetical:

> I want – same hypothetical. Going back to it. As I said before, you're on a jury in another case. Meant to do it. Cold blooded murder of an innocent victim. No excuses. No defenses. No justifications. How do you feel –[240]

The State immediately objected and without ruling or discussing the matter with the parties, the trial court again interjected with multiple rehabilitative questions:

> Let me interject. Given those facts, if you found this person guilty, would you still be able to consider the mitigation and determine whether it would be sufficiently substantial to call for leniency? Could you still consider the mitigation?[241]

Before the prospective juror could answer, defense counsel requested that the parties approach, which the trial court permitted.[242]

Outside the presence of the jury panel, defense counsel argued that it had been following the trial court's previous ruling about the use of hypothetical by discussing mitigation just prior to posing the hypothetical and then following up with questions about the jurors' consideration of mitigation right after they

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[239] *Id*.
[240] *Id*. at 43.
[241] *Id*.
[242] *Id*.

answered whether they were automatically inclined to impose the death penalty where a defendant had been found guilty of first-degree murder:

> All right. My memory, Judge, when we were litigating the issue of the hypothetical question was that, yes, I had to – we had to talk about mitigation, I asked the court and I clarified with the court saying I have a little speech that I'm going to say prior to my actual question, the actual hypothetical question where I intend to mention mitigation and I have done that and the definition of mitigation is up on the board as we speak. And the court said that's fine. That I don't have to mention it every single time I ask the question.
>
> I understand that's why Ms. Dahl is objecting at this point, but that's not consistent with the court's ruling.
>
> The definition of mitigation is on the board. After the juror answers the question, the question – the issues of mitigation come up. That's part of the discussion process going on here.
>
> But the question itself has to still be as it is – as was outlined before. And the court ruled that I can mention mitigation. Give the definition. Like I said, it's up there on the document cam for them to see every single time. It's not – I'm not talking about it in mitigation. That's part of my entire colloquy with each and every one of these jurors. But it is important for me to ask the question as stated out in this hypothetical. I want to get their answer first on that and then see where they go from there. And that was the court's ruling that I could do that.[243]

The trial court indicated it was not sure that defense counsel's understanding was consistent with its ruling and that "you have to mention mitigation when you ask these hypothetical questions."[244]

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[243] *Id*. at 44–45.
[244] *Id*. at 45.

Defense counsel countered that not only had it prefaced its hypothetical with a discussion of mitigation, but also that if a prospective juror responded to the hypothetical by indicating they felt the death penalty was an appropriate sentence for anyone convicted of premeditated, first-degree murder, counsel would then follow up with a conversation about "mitigation and what they can and cannot consider."[245] Defense counsel also reiterated that the purpose of counsel's questions "is I'm trying to get from these jurors to determine any biases or prejudices that they have."[246]

The trial court concluded defense counsel must "mention in some meaningful way when you are presenting the hypothetical that they would consider mitigation."[247] Based upon the court's new ruling about the use of a hypothetical, defense counsel added the following statement (or its equivalent) every time the hypothetical was posed to a prospective juror but before asking about the juror's opinion about whether the death penalty was the only appropriate penalty: "You listened to all the evidence. You heard all the mitigation as defined for you right there."[248]

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[245] *Id*. at 47–48.
[246] *Id*. at 48.
[247] *Id*. at 49.
[248] *Id*. at 49–50, 58, 62, 64, 67, 69.

At the outset of the voir dire of Panel 2, the trial court posed a "follow the law" question to all the prospective jurors asking, "is there anyone who feels that they cannot be open-minded and will prejudge any aggravation or mitigation that you will hear and that you could not be fair and impartial? Is there anybody that feels that way now and you feel strongly that you just couldn't be fair and impartial in this case or that you would not keep an open mind and consider all mitigation and all the aggravation that will be presented?"[249]

Defense counsel then began its voir dire of Panel 2 by reminding the prospective jurors that Mr. Montoya pleaded guilty to all charges and admitted aggravating circumstances that made him eligible for the death penalty.[250] Defense counsel then referred to the graphic posted on the overhead screen that provided a legal definition of mitigating circumstances, went over that definition, and then continued that the choice of sentence was an individual, moral decision for the jury.[251]

Finally, defense counsel posed the following hypothetical:

> So how I want to do this is I would like you to pretend that you're down the hall in another courtroom, not this courtroom, and you and 11 other jurors just listened to a case and you all decided beyond a reasonable doubt that the defendant in that other

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[249] *Id*. at 89–90.
[250] *Id*. at 90.
[251] *Id*. at 91–92.

> hypothetical case was guilty of first degree, premeditated murder. And what do I mean by that? I mean, he thought about killing, he planned to kill, and he intentionally and deliberately killed a completely innocent victim. This wasn't a case where the defendant was mistaken. Okay. This wasn't an accident. This wasn't a choice of two equals. No one forced the defendant to commit this murder of this innocent victim. This was not a case where the defendant was defending himself or his loved ones. He knew what he was doing when he killed that innocent victim. This is also not a case where the defendant was mentally insane, intellectually disabled or he didn't know right from wrong. He knew what he was doing when he planned to kill the innocent victim.
>
> And the question to you – that I want to pose to all of you is what are your feelings about the death penalty after hearing mitigating circumstances? What is your opinion about the death penalty being the only appropriate punishment of that guilty murder of that innocent victim?[252]

After the State again objected despite defense counsel's inclusion of the juror's consideration of mitigation, the court again interjected its own rehabilitative phrasing:

> Well, the question has to be couched in that you have to consider mitigation and whether or not mitigation would be sufficiently substantial to call for leniency. So that's part of the hypothetical, too. All right. If you consider mitigation that's presented to you, what do you feel about the death penalty?[253]

Defense subsequently altered its hypothetical and ultimate question to: "What are your feelings about the death penalty after considering mitigation?"[254]

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[252] *Id*. at 92–93.
[253] *Id*. at 93–94.
[254] *Id*. at 96, 102, 106, 118.

The next day, during voir dire of Panels 3 and 4, defense counsel again began by reminding prospective jurors that Mr. Montoya pleaded guilty to all charges and admitted aggravating circumstances that made him eligible for the death penalty.[255] Defense counsel then referred to the graphic posted on the overhead screen that provided a legal definition of mitigating circumstances, went over that definition, and continued that the choice of sentence was an individual, moral decision for the jury.[256] Next, defense counsel posed a hypothetical to the prospective jurors which included the language that the jury first consider mitigating circumstances and then immediately posed the question as to whether the death penalty was the only appropriate penalty.[257]

Argument

The United States and Arizona Constitutions guarantee a defendant the right to a fair and impartial jury. U.S. Const. amends. V, VI, VIII, XIV; Ariz. Const. art. 2, §§ 4, 15, 23, 24; *Morgan v. Illinois*, 504 U.S. 719, 728 (1992). Voir dire plays a critical role in assuring the right to a fair and impartial jury. *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). It is not enough to simply ask prospective

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[255] Tr. 3/23/22., at 14–15, 18.
[256] *Id*. at 15–18.
[257] *Id*. at 17–19, 20, 31, 37, 44, 51, 58, 61, 66, 71, 155–56, 167, 174, 180.

jurors whether they can follow the law and be fair and impartial. *Morgan,* 504 U.S. at 735–36.

Rather, the trial court has a responsibility to conduct "adequate voir dire to identify unqualified jurors." *Morgan*, 504 U.S. at 729. "'[D]efendants have the right to know whether a potential juror will automatically impose the death penalty once guilt is found, regardless of the law,' and '[t]hus, defendants are entitled to address that issue during voir dire.'" *Glassel*, 211 Ariz. at 45 ¶37 (2005) (quoting *State v. Jones*, 197 Ariz. 290, 303 ¶27 (2000) (construing *Morgan*)).

A. The trial court violated Mr. Montoya's constitutional rights by refusing to allow Mr. Montoya to inquire whether prospective jurors were predisposed to impose the death penalty on someone guilty of first-degree murder and by asking rehabilitative and "follow the law" questions.

As a defendant facing the ultimate punishment of death, Mr. Montoya was constitutionally entitled to a fair and impartial jury, to due process, to heightened reliability, and to be free from cruel and unusual punishment. By refusing to allow Mr. Montoya to determine whether the prospective jurors were predisposed to impose the death penalty on someone convicted of first-degree murder at the start of the penalty phase, the trial court violated *Morgan* and ran afoul of Rule 18.5 of the Arizona Rules of Criminal Procedure.

This Court amended Rule 18.4 of the Arizona Rules of Criminal Procedure to eliminate peremptory strikes in capital cases effective January 1, 2022.[258] Based upon Task Force recommendations, the Court further amended Rule 18.5 to require oral voir dire and to allow the parties "sufficient" time to conduct further oral examination of the prospective jurors. The Court also adopted a new comment, expanding the scope of permissible voir dire by the parties and curtailing the trial court's ability to rehabilitate prospective jurors:

> When feasible, the court should permit liberal and comprehensive examination by the parties, refrain from imposing inflexible time limits, and use open-ended questions that elicit prospective jurors' views narratively. The court should refrain from attempting to rehabilitate prospective jurors by asking leading, conclusory questions that encourage prospective jurors to affirm that they can set aside their opinions and neutrally apply the law.[259]

The instructions to the court in this comment are consistent with the mandates of *Morgan*, and with a defendant's constitutional entitlements to a fair and impartial jury, to due process, to heightened reliability, and to be free from cruel and unusual punishment.

"[I]t may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so," the United States Supreme Court in

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[258] Ariz. Admin. Order R-21-0020.
[259] Ariz. Admin. Order R-21-0045.

Morgan stated, holding: "A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception." *Morgan*, 504 U.S. at 735–36. This is consistent with this Court's approval in *Patterson*, that "the appropriate inquiry was whether a juror could be impartial at the beginning of the penalty phase. [The trial court] did not curtail questions tending to reveal a prospective juror's predisposition to vote for death after finding guilty and an aggravator, but before hearing mitigation." *State v. Patterson*, 230 Ariz. 270, 274 ¶13 (2012).

Here, the trial court's insistence that counsel include the consideration of mitigation as part of the same question where it asked the jury if they were inclined to impose the death penalty for any person convicted of first-degree murder was an end run around *Morgan* and eviscerated the import of defense counsel's inquiry. This is especially true since before providing its hypothetical, defense counsel thoroughly informed the jury of the definition of mitigation and the jurors' role in considering and evaluating that mitigation. The use of a hypothetical like that proposed by defense counsel reveals whether the juror truly understands that the inquiry concerns the juror's views about the death penalty for any person convicted of premeditated, first-degree murder under Arizona law—not someone who acted in self-defense or who had a valid legal justification, and not some sensationalized murderer they have read about or watched on television. *See Thompson*, 252 Ariz.

at 295 ¶52 (approving defense counsel questioning jurors about "any predisposition towards imposing the death penalty" by providing individual jurors "a hypothetical scenario of an unjustified, premeditated murder and then ask[ing] each prospective juror, 'what are your feelings about the death penalty being the only appropriate penalty for that guilt murder of that innocent victim?'").

And there was no reason the court here could not have required defense counsel to follow up their proposed hypothetical with a question about the juror's thoughts about the death penalty after being presented with mitigation—in fact, that was defense counsel's stated intention. Discovering a prospective juror's bias towards imposing the death penalty on all first-degree murderers is just as important as discovering whether a juror will fairly consider all presented mitigation before coming to a final decision as to the ultimate penalty. These are both important and necessary questions but neither the trial court nor the parties can ascertain a juror's true answers to both these questions without separating them.

None of the trial court's concerns here negate Mr. Montoya's right to ascertain a prospective juror's predisposition toward the death penalty at the start of the penalty phase. Arguably, the trial court's own actions to rehabilitate prospective jurors by asking "follow the law" questions—in direct contradiction to the comment on Rule 18.5 adopted by this Court—went even further to prejudice

Mr. Montoya by obfuscating the prospective jurors' true feelings about the death penalty in violation of *Morgan*.

B. The trial court's unconstitutional restriction on voir dire resulted in an improperly vetted jury and requires reversal of Mr. Montoya's death sentence.

The trial court unconstitutionally restricted voir dire by precluding Mr. Montoya from assessing whether the prospective jurors would be predisposed to impose a death sentence on someone convicted of first-degree murder. *See Morgan*, 504 U.S. at 729 ("[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors.") A defendant cannot use for-cause strikes to remove biased jurors if those biases are not revealed. *State v. Hickman*, 205 Ariz. 192, 195 ¶11 (2003).

Here, the trial court's unreasonable restrictions on voir dire impeded Mr. Montoya's ability to discern which jurors would be able to evaluate and determine punishment in a fair and impartial manner and to argue appropriate for-cause strikes of impaired jurors. The court's insistence on a hypothetical that required Mr. Montoya to ask about mitigation in the same breath he asked the jurors their views of capital punishment at the start of the penalty phase resulted in a compound and confusing question that did nothing to unearth the prospective jurors' improper biases.

Mr. Montoya had the right to know whether the crime of premeditated murder alone would cause a prospective juror to vote for the death penalty. *Morgan*, 504 U.S. at 729 ("a capital defendant may challenge for cause any prospective juror" who would impose the death penalty based on the offense alone). This Court's amendment of Rule 18.4 removing the ability to exercise peremptory challenges in capital cases makes this question even more essential to ensuring a fair and impartial jury. Because the trial court's rulings and actions during voir dire tainted the entire capital proceeding, Mr. Montoya is entitled to a new penalty phase proceeding where the prospective jurors are questioned regarding any predisposition to impose the death penalty simply on the basis that a defendant has been convicted of first-degree murder.

ARGUMENT III

The trial court abused its discretion by failing to strike Juror 17 for cause and by designating Juror 6 an alternate without reasonable grounds, in violation of Mr. Montoya's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

A. The trial judge abused his discretion by overruling Mr. Montoya's objection to Juror 17 for cause.

Juror 17 (then Prospective Juror 119) was inclined to impose death and disinclined to consider mitigation. Failure to strike Juror 17 was a violation of Mr. Montoya's rights to due process, a fair trial, and to be free of cruel and unusual punishment under the Arizona and United States constitutions. As such, Mr. Montoya deserves a new penalty phase proceeding.

Standard of Review

A trial court's decision whether to dismiss a juror for cause is reviewed for an abuse of discretion. *Glassel*, 211 Ariz. at 45 ¶36. Because defense counsel objected, this Court reviews for harmless error. *Henderson*, 210 Ariz. at 565-66 ¶8. Under harmless error review, once a defendant demonstrates error, the burden shifts to the State to "prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *Id.* ¶18 (citation omitted). Finally, constitutional issues are reviewed de novo. *Hidalgo*, 241 Ariz. at 548 ¶7 (citation omitted).

Relevant Facts

During voir dire, Juror 17 (Prospective Juror 119) said, in response to the defense hypothetical of a "[c]old-blooded" murder "of an innocent victim," that "everything was pretty clear, cut, and dry" and that he would "definitely lean toward the death penalty in that case."[260] He also expressed that the severity of the crime would be more important to him than surrounding circumstances, and he showed hesitation whether substance abuse issues and acceptance of responsibility would be of any great importance to him:

> MR. BOGART: The question that you answered in the – in the questionnaire was about the fact that the defendant accepted responsibility. How do you feel about that?
>
> PROSPECTIVE JUROR: Well, I mean, if he did accept responsibility, then all of the circumstances or information leading up to it, yeah, you would definitely – what's the word I want to use – not favor but, you know, lean towards he accepted it. Based on what I've read, it was a pretty heinous crime, but I don't know all the answers or all the circumstances around it.
>
> MR. BOGART: Okay. But does his acceptance of responsibility, what does that mean to you?
>
> PROSPECTIVE JUROR: Acceptance of responsibility is that he admitted he's wrong, but in the case that he mentioned too, just because he admitted responsibility, I mean, like does he have, like he said, remorse? I mean, is there other circumstances? He just wanted to be done with it?…

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[260] Tr. 3/23/22, at 37-38.

…

> PROSPECTIVE JUROR: … P]eople that use hard drugs, like meth and everything like that, they do a lot of hideous things in order to keep that habit going, whether to rob a store, whether it's to rob someone and kill them, you know, and, at the same time, they're doing that, I mean, you have to take that into a factor, too, is his background, was how many times has he been incarcerated before, you know.
>
> MR. BOGART: So you're kind of talking about the vicious cycle that goes into that?
>
> PROSPECTIVE JUROR: Correct, yes.[261]

The State made no attempt to rehabilitate Juror 17 regarding his comments to defense counsel.[262]

Defense counsel objected to Juror 17 as having a presumption of death and asked the court to strike him for cause.[263] Defense counsel expressed concern that Juror 17 would weigh the severity of the crime more heavily than the "surrounding circumstances" and would treat substance abuse as an aggravating circumstance.[264] The court overruled the objection, granting leave for defense counsel to "re-raise" the issue "at a later time."[265]

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[261] *Id.* at 37-42.
[262] *See id.* at 99.
[263] Tr. 3/23/22, at107.
[264] *Id.* at 108-09.
[265] *Id.* at 111.

The next day, defense counsel re-raised the objection, noting that Juror 17 circled 10 out of 10 on the juror questionnaire, indicating he strongly agreed with the death penalty.[266] Defense counsel also argued Juror 17's answers in voir dire indicated he would view the few mitigators to be presented in this case as aggravating factors.[267] The prosecutor noted that Juror 17 also stated "over and over and over again" that he would consider the circumstances surrounding the crime.[268] The court overruled defense counsel's objection,[269] and Juror 17 was one of the deliberating jurors who returned a verdict of death.

Argument

A defendant is entitled to "a fair trial by a panel of impartial, 'indifferent' jurors." *Morgan*, 504 U.S. at 727 (citations omitted). "A juror who will automatically vote for the death penalty" without considering mitigating circumstances fails to meet this threshold requirement of impartiality. *Id.* at 729. Under the due process guarantees of the Sixth and Fourteenth Amendments, "[i]f even one such juror is empaneled and the death sentence is imposed," the conviction must be vacated. *Morgan*, 504 U.S. at 729.

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[266] Tr. 3/24/22, at 115.
[267] *Id.* at 116-17.
[268] *Id.* at 119.
[269] *Id.* at 123.

A trial court has a duty "to decide whether a venire person's views would actually impair his ability to apply the law." *Jones*, 197 Ariz. at 302; *see also Frazier v. United States*, 335 U.S. 497, 511 (1948) (noting a court's "broad discretion and duty" to ensure an impartial jury). The trial court here abused its discretion by failing to fulfill that duty. As a result, Juror 17 was never questioned regarding whether he could set aside his pro-death, anti-mitigation leanings and fairly decide this case.

Because Juror 17 made death-presumptive and mitigation-averse statements and was never rehabilitated, the court failed in its duty to ascertain whether he could remain impartial. Moreover, the types of mitigation Juror 17 stated he would be inclined to disregard – substance abuse and acceptance of responsibility – constituted the only types of mitigation likely to be presented in this case. When coupled with the trial court's improper limitations on defense counsel's hypothetical question, *see* Argument II(A), *infra*, the court's ruling declining to strike Juror 17 for cause was not harmless beyond a reasonable doubt.

Juror 17 was empaneled, deliberated, and rendered a verdict of death. Because Juror 17's impartiality was impaired, he should have been stricken for cause, especially given the absence of peremptory strikes. Failure to do so was error entitling Mr. Montoya to a new penalty phase before an impartial jury.

B. The court abused its discretion by designating Juror 6 as an alternate absent a reasonable ground, resulting in an improper for-cause strike of a qualified juror in violation of Mr. Montoya's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

The trial court abused its discretion by dismissing Juror 6 absent a reasonable ground that she could not render a fair and impartial verdict. The error was not harmless. Alternatively, the designation of Juror 6 as an alternate, absent a valid reasonable ground, was effectively a for-cause strike in violation of Mr. Montoya's rights under the Sixth and Fourteenth Amendments to the United States Constitution. U.S. Const. amends VI, XIV. *See Gray v. Mississippi*, 481 U.S. 648 (1987); *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The error, therefore, is structural. *Davis v. Georgia*, 429 U.S. 122, 123 (1976). The death sentence must be vacated and a new penalty phase granted.

Standard of Review

A trial court's decision to dismiss a sitting juror is reviewed for an abuse of discretion. *State v. Lavers*, 168 Ariz. 376, 390 (1991). Because defense counsel objected, this Court reviews for harmless error. *Henderson*, 210 Ariz. at 565-65 ¶8.

If a potential juror who is not irrevocably committed to vote against the death penalty is dismissed for cause, the error is structural, and this Court must reverse. *State v. Ring (Ring III)*, 204 Ariz. 534, 552-53 ¶46 (2003) (noting the

United States Supreme Court has found "excusing a juror because of his views on capital punishment" to be structural error requiring reversal).

Relevant Facts

During voir dire, the State sought to strike Juror 6 (then Prospective Juror 30) for cause because of her life-scrupled answers on the jury questionnaire and statements during voir dire, as well as concerns about mental health issues and potential side effects of prescribed medications.[270] The court denied the State's motion.[271] On day 12 of trial, the State informed the court that Juror 6 appeared to be asleep during direct examination of Detective Martin.[272] Defense counsel advised the court he had witnessed Juror 6 closing her eyes, but not sleeping.[273] Defense counsel also noted this was the same juror the State wanted to strike for cause during voir dire.[274] The following day, the court advised it would not question Juror 6 separately;[275] instead, the court would remind the entire panel of the importance of paying attention during trial.[276] The trial resumed, and the State played a 53-minute audio recording of Detective Roe's interview with

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[270] R. 391. *See* Tr. 3/24/22, at 87-90.
[271] Tr. 3/24/22, at 93-94.
[272] Tr. 4/4/22, at 154.
[273] *Id.* at 155.
[274] *Id.*
[275] Tr. 4/5/22, at 4-8.
[276] *Id.* at 8-9.

Mr. Montoya and followed up with extensive questioning about the recording.[277] At the next recess, the court informed the parties that it had noticed Juror 6 had "very heavy eyelids" and seemed to be "nodding" off.[278] Given this, the court questioned Juror 6.[279]

Juror 6 denied falling asleep.[280] She said that for "over two years" she had been taking two medications for a mental health issue: Seroquel and Lamictal.[281] However, she assured the court that neither medication caused daytime drowsiness.[282] Juror 6 affirmed she was experiencing some issues sleeping at night, but noted that was usual for her and unrelated to the trial.[283] Juror 6 also informed the court she had no physical issues affecting her ability to stay awake.[284] The court allowed Juror 6 to remain on the jury, and the trial proceeded.[285]

After the State rested and victim impact statements were presented,[286] the court heard oral argument regarding Juror 6.[287] The State asked the court to

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[277] *Id.* at 9-26. *See* Tr. 4/4/22, at 152.
[278] Tr. 4/5/22, at 26-27.
[279] *Id.* at 27.
[280] *Id.* at 28-29.
[281] *Id.* at 29-31.
[282] *Id.* at 29-31.
[283] Tr. 4/5/22, at 32.
[284] *Id.* at 32.
[285] *Id.* at 33.
[286] *See* Tr. 4/6/22.
[287] Tr. 4/7/22, at 30-46.

designate Juror 6 an alternate, while defense counsel argued it would be error to do so because no reasonable grounds existed to suggest her ability to remain fair and impartial was compromised.[288] The court considered the parties memoranda of law before it ruled on the issue.[289] The court designated Juror 6 an alternate over defense counsel's objection.[290]

1. There was no reasonable ground to dismiss Juror 6 or designate her as an alternate.

Dismissal is appropriate "[w]hen there is reasonable ground to believe that a juror cannot render a fair and impartial verdict." Ariz. R. Crim. P. 18.4(b). The reasonable ground may arise during trial. *State v. Trostle*, 191 Ariz. 4, 13 (1997). Here, the trial court's voir dire of Juror 6 did not uncover any reasonable ground to designate her an alternate.[291] She assured the court that she was not feeling drowsy and that she could continue to pay attention to the trial. Although cause may exist if a juror appears to be sleeping, *see, e.g., Cota*, 229 Ariz. at 150 ¶73, "if the juror ultimately assures the court that he or she can be fair and impartial, the juror need

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[288] *Id.*
[289] *Id.* at 44-45. *See* R. 409, 410.
[290] Tr. 4/11/22, at 14-17. *See* R. 416.
[291] Indeed, the court's designation of Juror 6 as an alternate may well have run afoul of her constitutional rights. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994).

not be excused." *State v. Purcell*, 199 Ariz. 319, 323 ¶8 (App. 2001) (citation omitted).

This Court has noted that "[a] juror's 'mere falling asleep for a short time'" is not necessarily reversible error. *Prince*, 226 Ariz. at 533 ¶57 (citation omitted)). Where it appears a sleeping juror did not miss major portions of the trial or crucial evidence, dismissal is unnecessary. *Id.* (quoting *United States v. Freitag*, 230 F.3d 1019, 1023 (7th Cir. 2000)). Here, Juror 6 was observed "sleeping" for mere minutes on only two days of trial. On one of those days, evidence was presented regarding items found in Mr. Montoya's truck upon his arrest in Nevada.[292] This can hardly be classified as crucial to the State's case. The second day involved an arguably critical audio recording, but the State followed up with an onslaught of questions – essentially rehashing most of the interview. Thus, unless Juror 6 slept through the entirety of this testimony, which is not evident from this record, it is unlikely she missed much, if any, evidence at all – let alone crucial evidence.

Finally, Juror 6 offered assurances that she was able to pay attention to the evidence and to fairly and impartially deliberate the case. After these assurances, the judge had no reasonable ground to designate her an alternate. Because Juror 6

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[292] Tr. 4/4/22, at 104-51.

could have voted for a life verdict, the error was not harmless beyond a reasonable doubt.

2. Little deference should be given to the trial judge's observations, which were impeded by this Court's COVID-19 protocols.

Generally, appellate courts grant great deference to the trial court when reviewing juror dismissals for abuse of discretion because the trial court is in the best position to "observe the potential juror's demeanor and credibility." *Lavers*, 168 Ariz. at 390. Here, the court's ability to observe Juror 6 was impeded by the COVID-19 protocols in place during trial.[293] Everyone was required to wear a mask unless they were speaking.[294] As such, Juror 6 would have been wearing a mask covering her nose and mouth. When the judge observed her "sleeping," he could only have observed that her eyes were closed, as the rest of her face was covered.

What's more, the court's observation occurred during the State's presentation of a low-quality audio recording, which the prosecutor herself acknowledged was "hard to hear."[295] It is not unusual for people to close their eyes while attempting to focus their attention while listening to something difficult to hear. The court also failed to conduct additional voir dire to ascertain whether

[293] Tr. 3/8/22, at 25-26.
[294] *Id.*
[295] Tr. 4/11/22, at 121.

Juror 6 missed any evidence presented on the two days she was observed allegedly sleeping. *See Prince*, 226 Ariz. at 533 ¶57 (citation omitted). Given the impediments to the trial judge's observation of Juror 6 due to COVID-19 protocols, the trial court's ability to observe the juror and gauge her credibility should be given little deference.

3. Absent a reasonable ground required by Rule 18.4(b), the court's designation of Juror 6 as an alternate was a *de facto* for-cause strike in violation of Mr. Montoya's constitutional rights.

Juror 6 would generally be considered, based upon her views on the death penalty, a life-scrupled juror. The State clearly recognized this fact when it moved to strike her for cause.[296] The prosecutor noted Juror 6's stated belief that the death penalty should be the last resort after other alternatives have been "thoroughly exhausted."[297] The State considered this life-scrupled juror impaired: "She has stated that the only condition to apply [the death penalty] is after a life sentence has been exhausted – the only way to exhaust it is by applying it."[298] The prosecutor also informed the court that this juror would have been the State's first peremptory strike before this Court amended the criminal rules to eliminate peremptory strikes. *Compare* Ariz. R. Crim. P. 18.4 (2021) *with* Ariz. R. Crim. P. 18.4 (2020).

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[296] R. 391.
[297] *Id.* at 3.
[298] *Id.* at 4.

Absent a reasonable ground to strike Juror 6, the court's designating her an alternate was a *de facto* for-cause strike of a life-scrupled juror in violation of *Witherspoon*. 391 U.S. 510 (1968). The United States Supreme Court has since held that *Witherspoon* error requires reversal:

> Unless a venireman is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," ... he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.

Davis, 429 U.S. at 123 (quoting *Witherspoon*, 391 U.S. at 522 n.21)). The trial court had already deemed Juror 6's mental health issues insufficient as a reasonable ground to strike her for cause. Once Juror 6 assured the court that she could pay attention to and fairly consider the evidence, and that the medications she took did not make her drowsy, the only ground left was that Juror 6 was life scrupled. Life-scrupled prospective jurors may be stricken for cause only when they "state unequivocally that they could never impose the death penalty regardless of the facts of the particular case." *State v. Anderson (Anderson I)*, 197 Ariz. 314, 318 ¶7 (2000) (citing *Witherspoon*, 391 U.S. at 513; *Morgan*, 504 U.S. at 734 n.7).

The court's error is structural. First, contrary to this Court's mandate in *Anderson I*, the trial court effectively dismissed Juror 6 without affording defense counsel an opportunity to rehabilitate her. *Anderson I*, 197 Ariz. at 324 ¶23 & n.5. Further, the court refused to further question Juror 6, as defense counsel requested,

to ascertain whether her medication caused tardive dyskinesia, a condition which causes excessive eye blinking.[299] As in *Anderson I*, the error is structural and requires reversal of Mr. Montoya's case because the court's dismissal of Juror 6 "without further questioning for clarification, [] violate[d] the Sixth Amendment and due process." 197 Ariz. at 319 ¶10.

For the reasons set forth above, Mr. Montoya's death sentence must be vacated and the case remanded for a new penalty phase.

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[299] Tr. 4/7/22, at 45.

ARGUMENT IV

The trial court's admission of gruesome photographs during the penalty phase that were either irrelevant or marginally relevant but unduly prejudicial was an abuse of discretion and violated Mr. Montoya's constitutional rights to due process, a fair trial, heightened reliability, and freedom from cruel and unusual punishment.

Mr. Montoya waived the presentation of all mitigation save his acceptance of responsibility by entering a guilty plea to the indictment and admitting two aggravating circumstances. The trial court erroneously permitted the admission of multiple gruesome photographs in the penalty phase that were either irrelevant or marginally relevant but unduly prejudicial.[300] Because this error violated Mr. Montoya's constitutional rights to due process, a fair trial, heightened reliability, and freedom from cruel and unusual punishment, this Court must vacate Mr. Montoya's death sentence and remand for a new penalty proceeding.

Standard of Review

This Court reviews the trial court's admission of rebuttal evidence in the penalty phase for an abuse of discretion. *State v. VanWinkle*, 230 Ariz. 387, 394 ¶28 (2012). Whether the trial court abused its discretion in admitting gruesome photographs during the penalty phase "turns on (1) the photograph's relevance, (2)

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[300] See Exhibits 81–85, 87, 89–92.

its tendency to inflame the jury, and (3) its probative value compared to its potential to cause unfair prejudice." *State v. Sanders*, 245 Ariz. 113, 127 ¶51 (2018) (quoting *Cota*, 229 Ariz. at 147 ¶46). Error to which a defendant objects at trial is subject to harmless error analysis. *Henderson*, 210 Ariz. at 564–65 ¶8. "Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *Id.* ¶18 (citing *Bible*, 175 Ariz. at 588).

An issue raised for the first time on appeal is reviewed for fundamental error. *Dann*, 220 Ariz. at 364 ¶51 (citing *Henderson*, 210 Ariz. at 567 ¶19). An error is fundamental if it goes to the foundation of the case by "depriv[ing] the defendant of constitutionally guaranteed procedures." *Escalante*, 245 Ariz. at 141 ¶18 (2018) (citations omitted). Fundamental errors that are "of such a magnitude that a defendant could not have possibly received a fair trial" are "always prejudicial and require[] a new trial." *Id.* ¶16.

Relevant Facts

Here, Mr. Montoya pleaded guilty to all charges in the indictment, including the first-degree murder of A.R., and admitted to the capital aggravating circumstances of prior serious offenses and offense committed in an especially

cruel and heinous manner.[301] During the penalty phase proceedings, the State introduced a total of six photographs depicting A.R.'s decomposed body at the crime scene[302] and four of the decomposed body at autopsy.[303]

Prior to the penalty phase trial, Mr. Montoya filed a motion in limine to preclude the admission of gruesome photographs in the penalty phase.[304] At the time, the State had yet to identify which specific photographs of the victim at the crime scene and from the autopsy it would seek to admit.[305] Mr. Montoya requested that the court: "(1) order that the State identify the specific photographs it will seek to introduce and (2) preclude any photographs that are (a) not relevant, or (b) if relevant, whose relevance is marginal compared to the danger or unfair prejudice or confusing or misleading to jury, and or (c) are duplicative and thus will cause undue delay, waste time or result in the presentation of cumulative evidence."[306]

At a status conference on February 3, 2022, the trial court and the parties briefly discussed the motion to preclude gruesome photographs.[307] The State

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[301] Tr. 5/14/21, at 18-30, 36–38.
[302] Exhibits 81–85, 87.
[303] Exhibits 89–92.
[304] R. 293.
[305] *Id*.
[306] *Id*.
[307] Tr. 2/3/22, at 35–36.

indicated that it had narrowed the number of photographs it was seeking to admit from those originally disclosed and provided those to defense counsel.[308] Defense counsel stated they had reviewed the photographs provided and would soon be filing a supplemental objection as requested by the court.[309]

Mr. Montoya subsequently filed a pleading entitled "Defendant's Objections to Photographs," which, in addition to incorporating its previous motion in limine regarding gruesome photographs, also provided additional objections to nine specified photographs.[310] The ten gruesome photographs of A.R.'s decomposing body that were admitted during the penalty phase were not among the nine photographs specified in Mr. Montoya's second motion.[311] But the ten gruesome photographs were encompassed by Mr. Montoya's original motion in limine though they were never specifically ruled upon by the trial court.[312]

During testimony from scene investigator Miner, the State introduced twelve other photographs that included A.R.'s wrapped body at the crime scene, but which did not reveal the decomposed state of A.R.'s body.[313] At that time, the State also

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[308] *Id.*
[309] *Id.*, at 36.
[310] R. 334.
[311] *Id.*
[312] R. 293, 334.
[313] Tr. 3/30/22, at 151–53; Exhibits 170–181.

introduced one photograph that showed A.R.'s back from the waist to the top of her head with her partially decomposed head, lower arms, and hands visible.[314]

During testimony from forensic pathologist Dr. Bucholtz—who did not actually perform the autopsy—the State re-introduced the previously mentioned photograph, as well as nine additional photographs that depicted portions of A.R.'s decomposed body at either the crime scene or at autopsy.[315] Much of the testimony related to these photographs involved discussion of the state of decomposition, including discoloration, the sloughing of skin tissue, the extruded decomposition fluid, and bloating caused by released gases.[316] With respect to her discussion of the location and size of injuries to A.R.'s skull, Dr. Bucholtz relied upon several diagrams.[317]

Forensic anthropologist Dr. Fulginiti testified in detail about the number of blunt force impacts, the type of strikes, the number and types of fractures to A.R.'s skull, and that the injuries to A.R.'s skull were consistent with being struck with

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[314] Tr. 3/30/22, at 155–56; Exhibit 81.
[315] Tr. 4/4/22, at 28–40; Exhibits 82–85, 87, 89–92.
[316] Tr. 4/4/22, at 28–38.
[317] Tr. 4/4/22, at 42–49; Exhibit 451.

the type of hammer found at the crime scene.[318] She relied on photographs of the sanitized cranial vault to illustrate her testimony.[319]

Argument

The trial court committed error by admitting irrelevant or minimally relevant but highly inflammatory gruesome photographs in a penalty phase proceeding where Mr. Montoya waived the presentation of almost all mitigation. Because the erroneous admission of these gruesome photographs permitted the jury to return a verdict based on passion rather than reason, this Court must vacate Mr. Montoya's unconstitutional death sentence and remand for a new penalty phase proceeding.

A. The gruesome photographs depicting A.R.'s decomposed body were irrelevant or minimally relevant at most and were unduly prejudicial.

Pursuant to A.R.S. § 13-751, for evidence to be admissible during the penalty phase of a capital trial, it must be relevant to show "that the defendant should not be shown leniency." *VanWinkle*, 230 Ariz. at 394 ¶28 (citing *State v. Boggs,* 218 Ariz. 325, 339 ¶65 (2008)). The analysis for determining the relevance of rebuttal evidence "involves fundamentally the same considerations as does a relevancy determination under Arizona Rule of Evidence 401 or 403." *McGill*, 213 Ariz. at 157 ¶40.

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[318] Tr. 4/4/22, at 68–86.
[319] *Id.*; Exhibits 95–107, 109, 112–13, 115.

Here, Mr. Montoya had pleaded guilty to the first-degree murder of A.R. and seven other felony counts. Mr. Montoya also admitted two aggravating circumstances, including that the murder was committed in an especially cruel and heinous manner. Finally, Mr. Montoya waived the presentation of all mitigation save the acceptance of responsibility by pleading guilty and admitting aggravating circumstances.

In rebuttal to this minimal presentation of mitigation, the State presented evidence over the course of six days that included testimony from 13 witnesses and the admission of hundreds of exhibits. In the context of a capital penalty phase proceeding, evidence that is "either irrelevant to the thrust of the defendant's mitigation or otherwise unfairly prejudicial" is properly excluded. *Hampton*, 213 Ariz. at 180 ¶51. The ten gruesome photographs depicting the decomposition of A.R.'s body were irrelevant to the thrust of Mr. Montoya's minimal presentation of mitigation. The State, through its many witnesses and other exhibits, thoroughly and repeatedly addressed the circumstances of the offense in a case where Mr. Montoya had already admitted guilt and the existence of aggravating circumstances.

Dr. Fulginiti, through her testimony and the photographs of A.R.'s sanitized cranial vault, thoroughly explained the extent of A.R.'s injuries and the cause of death. She detailed the number of blunt force impacts, the type of strikes, and the

number and types of fractures to A.R.'s skull. She also testified that the injuries to A.R.'s skull were consistent with being struck with the type of hammer found at the crime scene just like Mr. Montoya admitted in his change of plea.

The irrelevance or minimal relevance of the ten gruesome decomposition photographs is readily apparent when considering Mr. Montoya's guilty pleas, his admission of the aggravating circumstances, his waiver of mitigation presentation, and the wide scope of the State's rebuttal presentation. *See State v. Chapple*, 135 Ariz. 281, 289 (1983) (finding the admission of gruesome photographs of victim's charred body and skull erroneous where gruesome photographs had little probative value, were cumulative of uncontradicted and undisputed testimony, and their admission "could have almost no value or result except to inflame the jury"). This is most directly illustrated by Exhibits 90 and 91, which showed A.R.'s shaved and highly decomposed head with holes through which one can see her liquified brain; these photographs proved no fact other than those that were uncontested, otherwise established through testimony, and illustrated through other properly admitted exhibits. In this context, the admission of the gruesome photographs depicting decomposition were so highly inflammatory as to be unduly prejudicial.

B. This Court must vacate Mr. Montoya's death sentence because admission of gruesome photographs constituted reversible error.

The erroneous admission of irrelevant or marginally relevant but unduly prejudicial gruesome decomposition photographs unfairly inflamed the passion of the jurors when they deliberated Mr. Montoya's sentence. Because this permitted the jurors to render a death verdict based not on reason but on emotion, the admission of these photographs constituted reversible error.

"The Due Process Clause of the Fourteenth Amendment … places limitations on rebuttal evidence." *State v. Pandeli (Pandeli IV)*, 215 Ariz. 514, 527 ¶43 (2007) (citing *Hampton*, 213 Ariz. at 179 ¶48; *Payne*, 501 U.S. at 825 (finding unfairly prejudicial evidence may be excluded if it renders the proceeding "fundamentally unfair")). The Constitution mandates that irrelevant or unfairly prejudicial evidence be excluded from the penalty phase of a capital proceeding:

> Trial courts should not allow the penalty phase to devolve into a limitless and standardless assault on the defendant's character and history. Rather, trial judges should exercise their broad discretion in evaluating the relevance of such ... evidence to any mitigation evidence offered.

Hampton, 213 Ariz. at 180 ¶51 (citing *McGill*, 213 Ariz. at 156–57 ¶40).

The Eighth Amendment also requires increased scrutiny of evidence on which a death sentence may rest; the imposition of the death penalty cannot rely upon arbitrary and capricious action. *See Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("It is of vital importance to the defendant and the community that any

decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.") The admission of gruesome photographs with "no tendency to prove or disprove any question which is actually contested" that are "admitted for the sole purpose of inflaming the jury" constitutes reversible error. *State v. Morris*, 215 Ariz. 324, 339 ¶70 (2007) (quoting *Chapple*, 135 Ariz. at 169; *State v. Gerlach*, 134 Ariz. 164, 169 (1982)).

Here, the erroneously admitted gruesome photographs did not go to rebut the thrust of mitigation and did nothing to prove or disprove any uncontested fact. This is especially true of the two photographs of A.R.'s shaved and highly decomposed head with holes through which one can see her liquified brain.[320] Because the admission of these gruesome decomposition photographs simply served to inflame the juror's passions, their erroneous admission was unduly prejudicial and caused the penalty deliberation to become arbitrary and capricious.

Under any error analysis—harmless or fundamental—Mr. Montoya is entitled to relief because the error implicated his constitutional rights to due process and to be free from the arbitrary imposition of the death penalty. U.S. Const. amends. V, VI, VIII, XIV; Ariz. Const. art. 2, §§ 4, 15, 23, 24. For these reasons, Mr. Montoya's death sentence must be vacated.

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[320] Exhibits 90–91.

ARGUMENT V

The trial court erred by allowing Mr. Montoya to waive mitigation over his attorneys' objection, in violation of his rights to due process, a fair trial, to be free from cruel and unusual punishment, and to the assistance of counsel under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The trial court erred by granting Mr. Montoya's request to waive mitigation, which resulted in an arbitrary and capricious death verdict which violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The trial court also violated Mr. Montoya's Sixth Amendment right to counsel by allowing him to waive mitigation. Presentation of mitigation in the penalty phase of a capital case constitutes a trial strategy decision within defense counsel's control, not a fundamental decision regarding the objective of the litigation within the client's exclusive control. Consequently, Mr. Montoya's death verdict must be vacated, and the case remanded for a new penalty phase.

Standard of Review

Issues of constitutional law are reviewed *de novo*. *State v. Smith*, 215 Ariz. 221 (2007).

A. The trial court erred by permitting Mr. Montoya to waive the presentation of mitigation, resulting in an unreliable death sentence imposed in an arbitrary and capricious manner.

The Eighth Amendment to the United States Constitution and Article 2, Section 15 of the Arizona Constitution require that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." To pass Eighth Amendment muster, a sentencer must *consider and give effect* to all available mitigating evidence to ensure that a death sentence is not "inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *State v. Brewer*, 170 Ariz. 486, 493 (1992) ("[T]he eighth and fourteenth amendments prohibit all sentencing procedures creating a substantial risk that the death penalty is inflicted in an arbitrary and capricious manner." (citing *Gregg*, 428 U.S. at 188)). Further, "[b]ecause the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (citation omitted). Allowing Mr. Montoya to waive mitigation in this case created too grave a risk that the death sentence was imposed arbitrarily and capriciously.

1. Individualized sentencing is required in capital cases.

"[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a

constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304. In *Lockett* and *Eddings*, the United States Supreme Court emphasized the necessity of an unconstrained review of all relevant mitigating evidence by a sentencing body when it struck down limitations – whether imposed by statute or by a judge – on mitigating evidence. The *Eddings* Court reaffirmed that individualized consideration is essential to safeguarding the reliability of a death sentence and crucial to ensuring *Furman's* mandate that the death penalty be consistently imposed:

> By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.

455 U.S. at 112.

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Court stressed the importance of individualized sentencing in ensuring proportionality. Notably, the Court reiterated that sentencing procedures that focus jurors' discretion "on the particularized nature of the crime and the particularized characteristics of the individual defendant" are essential to comply with Eighth Amendment demands. *See id.* at 308, 311-12.

2. The demand for individualized sentencing precludes a court from allowing waiver of mitigation.

In *McCleskey*, the Court noted that "[a]ny exclusion of the 'compassionate or mitigating factors stemming from the diverse frailties of humankind' that are relevant to the sentencer's decision would fail to treat all persons as 'uniquely individual human beings.'" 481 U.S. at 304 (quoting *Woodson*, 428 U.S. at 304). In *Penry*, the Court elaborated on the holdings of *Eddings* and *Lockett*: "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer[; t]he sentencer must also be able to consider and give effect to that evidence in imposing sentence." 492 U.S. at 319. Thus, regardless of whether a statute allows for individualized sentencing through the presentation of relevant mitigation, the sentencer must also be able to give effect to mitigation in order for the death penalty to be imposed in compliance with the Eighth Amendment. This is true even when a capital defendant does not wish to present mitigation.

A death sentence cannot stand if the sentencing procedures created a risk that the sentencer did not fully consider mitigation. *Lockett*, 438 U.S. at 605. By allowing Mr. Montoya to waive mitigation, the court here all but guaranteed a death sentence imposed pursuant to a "false consistency." *Eddings*, 455 U.S. at 112. Because the jury was prevented from considering relevant mitigating circumstances, thereby precluding consideration of Mr. Montoya's "individual differences[,]" the sentence is unreliable in violation of the Eighth Amendment.

The Supreme Court's jurisprudence is clear: any death sentence imposed without the individualized consideration required to ensure consistency and reliability violates the Eighth Amendment. Just like the sentencing statute in *Lockett* and the judge's ruling in *Eddings*, the trial court's ruling allowing Mr. Montoya to waive mitigation prevented individualized sentencing and created the "risk that the death penalty [was] imposed in spite of factors which may [have] call[ed] for a less severe penalty." *Lockett*, 438 U.S. at 605. As in *Lockett*, "[w]hen the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.*

3. The United States Supreme Court has never held that allowing a capital defendant to waive mitigation complies with the Eighth Amendment because the question has never been raised before the Court.

In *State v. Riley*, 248 Ariz. 154 (2020), this Court relied upon *Tuilaepa v. California*, 512 U.S. 967 (1994), and *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), for the proposition that the United States Supreme Court has explicitly held that a death sentence imposed absent individualized sentencing due to a waiver of mitigation comports with the Eighth Amendment. This reliance is misplaced. In both cases, the question the Court was asked to consider was whether the respective state statutes were constitutional. The Court held that constitutionality of a statute for Eighth Amendment purposes "is satisfied by *allowing* the jury to consider all relevant mitigating evidence." *Blystone*, 494 U.S. at 307 (emphasis

added). However, even if a death penalty statute is constitutional because it *allows* – and does not prohibit – consideration of mitigation, a death sentence may still violate the Eighth Amendment if the jury is in fact *prevented* from considering relevant mitigation. *Eddings*, 455 U.S. 112-14. The court here abused its discretion by allowing Mr. Montoya to prevent the jury from considering relevant mitigation. The resultant sentence violates the Eighth Amendment.

The *Blystone* Court was not presented with, and therefore never considered, whether a capital defendant's waiver of mitigation violated the Sixth, Eighth, or Fourteenth amendments. The only mention of the defendant's waiver of mitigation was confined to footnote 4, which was unrelated to the issue raised in that case. *See id.* The footnote states:

> After receiving repeated warnings from the trial judge, and contrary advice from his counsel, petitioner decided not to present any proof of mitigating evidence during his sentencing proceedings. Asked to explain this decision by the trial judge, petitioner responded: "I don't want anybody else brought into it." Nonetheless, the jury was specifically instructed that it should consider any mitigating circumstances which petitioner had proved by a preponderance of the evidence, and in making this determination the jury should consider any mitigating evidence presented at trial, including that presented by either side during the guilt phase of the proceedings.

Blystone, 494 U.S. at 306 n.4. (citations omitted). *Blystone* did not involve the issue of whether a capital defendant's waiver of mitigation violates the Eighth Amendment by preventing the individualized sentencing essential for reliable death verdicts – and the Court, as is the common practice, did not address it. *See,*

e.g., *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) ("'[O]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s].'") (citation omitted); *Illinois v. Gates*, 462 U.S. 213, 217-24 (1983) (declining to address issue not "raised and decided in the state court below" despite requesting supplemental briefing on the issue).

Further, the footnote in *Blystone* is obiter dictum, not controlling precedent. Indeed, the fact that the defendant prevented his attorneys from presenting mitigation was so inconsequential to the Court's decision that it appears only in footnote 4. *Blystone*, 494 U.S. at 306 n.4. This Court has defined obiter dictum as: "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." *Phelps Dodge Corp. v. Ariz. Dep't of Water Res.*, 211 Ariz. 146, 152 ¶22 n.9 (App. 2005) (quoting Black's Law Dictionary 490–91 (2d Pocket Ed. 2001)). Indeed, this Court has acknowledged that dictum "is not controlling as precedent." *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 81 (1981). Therefore, this Court's reliance on *Blystone* for the proposition that the United States Supreme Court has "expressly held" that a capital defendant may waive mitigation is incorrect. *Riley*, 248 Ariz. at 200 ¶195.

4. The Eighth Amendment protection against cruel and unusual punishments may not be waived, and a defendant may not voluntarily submit to imposition of cruel or unusual punishments.

Unlike the Sixth Amendment, which grants specified rights to criminal defendants, the Eighth Amendment restricts the action of the government. The Eighth Amendment's prohibition on cruel or unusual punishments was intended as a check on the government's power to enact laws imposing punishments for crimes. The Supreme Court has opined that because "power might be tempted to cruelty[,]" limitation on legislative power is essential to avoid the risk that "[c]ruelty might become an instrument of tyranny…." *Weems v. U.S.*, 217 U.S. 349, 373 (1910).

The "personal" nature of Sixth Amendment rights is outlined in *Faretta v. California*, 422 U.S. 806 (1975). *Faretta* illustrates an implicit distinction between constitutional grants of individual rights and constitutional limitations on government conduct by emphasizing the personal nature of Sixth Amendment rights:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.

Faretta, 422 U.S. at 819-820.

In contrast, the Eighth Amendment does not contain the same personal language found in the Sixth Amendment. Rather, it prohibits the government from taking certain actions – requiring excessive bail, imposing excessive fines, and inflicting cruel and unusual punishments. Indeed, the Supreme Court has noted that the Eighth Amendment's language denotes an intent "'to limit the power of those entrusted with the criminal-law function of government.'" *Whitley v. Albers*, 475 U.S. 312, 318 (1986) (citation omitted); *see also Trop v. Dulles*, 356 U.S. 86, 100 (1958) ("While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."). Thus, the privilege against being subjected to cruel and unusual punishments may not be waived by a defendant, as the Eighth Amendment restricts government power rather than grants personal rights to criminal defendants.

Nor may the government inflict cruel and unusual punishment on defendants who voluntarily submit to it. Indeed, American courts have long held that cruel and unusual punishment may not be imposed – even on defendants who willingly agree to it. *See, e.g.*, *Dear Wing Jung v. United States*, 312 F.2d 73, 75-76 (9th Cir. 1962) (banishment agreed to by defendant violated Eighth Amendment); *Henry v. State*, 280 S.E.2d 536, 536 (S.C. 1981) (same); *State v. Brown*, 326 S.E.2d 410, 411-12 (S.C. 1985) (castration agreed to by defendant violated Eighth Amendment). Thus, Mr. Montoya did not have the power to waive the "right" to be

free from cruel and unusual punishment because that was not his "right" to waive. Rather, it is the government that is prohibited from inflicting cruel and unusual punishment on him. By allowing Mr. Montoya to waive mitigation, thereby preventing the jury from considering relevant mitigation and resulting in an unreliable death verdict, the State of Arizona inflicted cruel and unusual punishment in this case.

The trial court here confused Mr. Montoya's Sixth Amendment right, a personal right which he has the power to waive, with the Eighth Amendment prohibition against imposing cruel and unusual punishments, which is not a personal right and cannot be waived. By allowing Mr. Montoya to waive mitigation, the court ensured an arbitrary and capricious verdict in violation of the Eighth Amendment. As such, the death sentence must be vacated, and the case remanded for a new penalty phase.

B. The court erred by permitting a represented defendant to waive mitigation over his attorneys' objection, in violation of the right to effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution.

The trial court erred by allowing Mr. Montoya, who was represented by counsel at all stages of the trial, to waive mitigation over his attorneys' objection. The error deprived him of his constitutional rights to effective assistance of counsel and to due process of law. Because the objective of the litigation was not to achieve a death sentence, Mr. Montoya's attorneys should have controlled the

presentation of mitigation, not Mr. Montoya. He is entitled to a new penalty phase at which his attorneys, with his input, determine which mitigation to present.

1. Presentation of mitigation in the penalty phase of a capital case constitutes a trial strategy decision within defense counsel's control, not a fundamental decision regarding the objective of the litigation within the client's exclusive control.

The Sixth Amendment guarantees criminal defendants the right to assistance of counsel and the right to control their defense. U.S. Const. amend. VI. *See Faretta*, 422 U.S. at 819 (noting the Sixth Amendment affords not "merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."). In some cases, however, a lawyer's assistance conflicts with the defendant's wishes as to how the defense should be presented. In resolving this issue, the Supreme Court has designated certain fundamental decisions within the sole control of the defendant, while reserving other strategic decisions for counsel. Indeed, the Court has deemed counsel's control over strategic decisions "a practical necessity" because the "adversary process could not function effectively if every tactical decision required client approval." *Gonzalez v. United States*, 553 U.S. 242, 249 (2008).

The "fundamental decisions" the Supreme Court has deemed reserved for the defendant are very few: the decision to plead guilty, to waive a jury trial, to testify, and to appeal. *Jones v. Barnes*, 463 U.S. 745 (1983); *see McCoy v. Louisiana*, __ U.S. __, 138 S.Ct. 1500, 1508 (2018) ("Some decisions … are

reserved for the client – notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal."). In contrast, strategic decisions reserved for counsel include which witnesses to call, how and whether to cross-examine witnesses, and whether to disclose witness identities before trial. *State v. Lee*, 142 Ariz. 210, 215 (1984); *Strickland*, 466 U.S. at 676; *Taylor v. Illinois*, 484 U.S. 400, 418 (1988). Thus, the law recognizes certain decisions as within the exclusive control of counsel, after consultation with the defendant. Which mitigation evidence to present and which mitigation witnesses to call are among those decisions.

The objective of Mr. Montoya's defense was not to be put to death. Unlike other represented Arizona defendants who waived mitigation, Mr. Montoya did not express a wish to die; nor did he ask for a death sentence. *Cf. State v. Hausner*, 230 Ariz. 60, 85 ¶117 (2012) (noting Hausner asked for the death penalty). When Mr. Montoya accepted representation and chose the objective of life over death, he yielded control of the mitigation presentation to counsel to achieve that objective. *United States v. Roof*, 10 F.4th 314, 352 (4th Cir. 2021) (citation omitted) *cert. denied*, 143 S.Ct. 303 (2022). Essentially, the court classified Mr. Montoya's desire not to "make excuses" as an objective of the representation within his sole control, instead of a tactical decision within counsel's control, which was error. As

noted in *Roof*, "allowing defendants to define their objectives too specifically" would "leave little remaining in the tactics category[.]" *Id.* at 353.

Moreover, this Court has recognized that decisions regarding presentation of mitigation are strategy decisions within counsel's purview. In *State v. Pandeli*, 242 Ariz. 175 (2017), for example, this Court held that defense counsel's "decision not to present further documentation of brain injury and disfunction was a strategic choice and did not constitute [ineffective assistance of counsel]." *Pandeli*, 242 Ariz. at 184. Likewise, in *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court deemed counsel's choice to forgo a complete mitigation investigation a "strategy choice ... well within the range of professionally reasonable judgments." *Strickland*, 466 U.S. at 699. Because Mr. Montoya was represented by counsel throughout the trial, it was error for the court to allow him to waive mitigation over his attorneys' objections.

2. Although prior Arizona decisions have upheld a represented defendant's right to waive mitigation, those cases misinterpreted precedent and conflated the right of self-represented defendants to control their defense with the right of represented defendants to waive mitigation.

This Court's continued reliance on a footnote in *Blystone* for the proposition that a represented capital defendant may waive mitigation over his attorney's objection misinterprets the holding in *Blystone* and improperly construes mere dictum as controlling precedent. *See Riley,* 248 Ariz. 154 (2020); *Goudeau*, 239

Ariz. 421 (2016); *Hausner*, 230 Ariz. 60 (2012); *State v. Murdaugh*, 209 Ariz. 19 (2004); *State v. Kayer*, 194 Ariz. 423 (1999); *State v. Roscoe*, 184 Ariz. 484 (1996). *See also* subsection (A)(3), *supra*. In addition, this Court's decisions conflate the right of self-represented defendants to control their own defense with the right of represented defendants to waive mitigation.

i. This Court's continued reliance on *Blystone* is misplaced.

This Court first addressed the issue of a capital defendant's waiver of mitigation in *Roscoe*. 184 Ariz. at 498-500. Roscoe, a represented defendant, filed a *pro per* motion to waive mitigation regarding his two suicide attempts while incarcerated, which the trial court granted. *Id.* at 498. His attorneys presented "substantial other mitigating evidence, including another doctor's psychological report." *Id.* On appeal, Roscoe argued that granting his *pro per* motion "interfered with his right to counsel by interfering with his counsel's mitigation strategy." *Id.*

Finding that "[n]o authority supports Roscoe's view that the procedure here resulted in ineffective assistance or an invalid waiver", this Court noted that the *Blystone* opinion suggests that a defendant may waive mitigation. *Id.* (citing *Blystone*, 494 U.S. at 306 n.4.). This Court has cited to *Blystone* in several mitigation-waiver cases involving represented defendants since *Roscoe*. *See, e.g., Riley*, 248 Ariz. at 200 ¶195; *Goudeau*, 239 Ariz. at 474 ¶245; *Hausner*, 230 Ariz. at 85 ¶118, *Kayer*, 194 Ariz. at 436 ¶45. And like a schoolyard game of telephone,

this Court's arguably correct interpretation in *Roscoe* has morphed beyond recognition upon repetition. In 1996, this Court acknowledged in *Roscoe*:

> [T]he Supreme Court has ***suggested*** that there is no constitutional violation when a defendant chooses to put on no mitigating evidence.

184 Ariz. at 459. In 1999, this Court expanded its interpretation of *Blystone*:

> The United States Supreme Court ***has upheld*** a defendant's right to waive all mitigating evidence.

194 Ariz. at 436 ¶45. By 2020, this Court claimed in *Riley*:

> In fact, the Supreme Court ***expressly rejected*** the argument that a jury's failure to consider mitigating circumstances due to the defendant's waiver of his right to present evidence of those circumstances violates the Eighth Amendment.

248 Ariz. at 200 ¶195 (citing *Blystone*, 494 U.S. at 306 n.4.). Thus, by the time of *Riley*, this Court declared that the Supreme Court had "expressly" done what the *Roscoe* Court correctly acknowledged was only "suggested" by *Blystone*.

The misinterpretation is most stark in *Riley*, a decision that not only conflates two distinct issues raised in the opening brief (whether A.R.S. § 13-752(G) violates the Eighth Amendment by not providing a procedure for individualized sentencing when a defendant waives mitigation and whether a represented defendant's waiver of mitigation violates the Sixth Amendment), but also misinterprets footnote 4 in *Blystone* as imputing the case's limited holding regarding the constitutionality of Pennsylvania's death penalty statute to extend to

the constitutionality of any death sentence imposed on a defendant who waives mitigation.

This Court has entangled the holding of *Blystone* with the dictum in footnote 4 to establish a new rule of law that has never been considered nor adopted by the United States Supreme Court. It is time for this to Court acknowledge the misinterpretation and to finally consider the Sixth Amendment issue presented: whether the presentation of mitigation in capital cases is a strategy decision reserved for counsel or a fundamental decision regarding the objective of the defense reserved for defendants. *See Arizona v. Gant*, 556 U.S. 332, 348 (2009) ("The doctrine of stare decisis ... does not compel [the Court] to follow a past decision when its rationale no longer withstands 'careful analysis.'") (citation omitted).

ii. This Court has routinely conflated a defendant's right to waive counsel and represent himself with a represented defendant's right to control his defense by waiving mitigation.

The Sixth Amendment allows a defendant to waive counsel and represent himself, regardless of whether that decision is in the defendant's best interest. *Faretta*, 422 U.S. at 819-20. The Sixth Amendment demands that a self-represented defendant, who knowingly and voluntarily waives the right to assistance of counsel, is free to make all strategic and fundamental decisions in a case. *Id.* However, a represented defendant, by choosing to accept counsel for his

defense, does not have the right to make strategy decisions over his attorneys' objections.

In *Kayer*, a represented defendant argued on appeal that the court erred by allowing him to decide not to cooperate with a mitigation specialist. 194 Ariz. at 434 ¶36. However, this Court failed to address the pertinent question at issue: whether the decision to waive mitigation is fundamental or strategic. Instead, the court posited a hypothetical "anomaly" involving a defendant's right to represent himself, which was wholly unrelated to the facts of the case, to justify its decision that a represented defendant may waive mitigation. *See Kayer*, 194 Ariz. at 436-37.

The hypothetical was inappropriate in *Kayer* because Kayer was represented by counsel. Likewise, in *Hausner*, the Court opined that "requiring the defense to present mitigating evidence over the defendant's opposition arguably would conflict with the defendant's Sixth Amendment right to self-representation." 230 Ariz. at 85 ¶119. However, Hausner, too, was represented by counsel. Thus, this Court's precedent confuses the Sixth Amendment right to control one's defense when represented by counsel and the Sixth Amendment right to represent oneself, while failing to address whether the decision to present mitigation is a strategic or fundamental decision.

This Court has deemed the decision to present mitigation as *strategic* for the purposes of ineffective assistance of counsel claims under the Sixth Amendment;

this Court would create a legal anomaly if it deemed the decision *not strategic* for the purposes of allowing a represented defendant to waive mitigation. Because the Sixth Amendment right to control one's defense only grants a represented defendant control over fundamental decisions regarding the objective of the defense, a represented capital defendant who chooses life over death as the objective of his defense may not control the presentation of mitigation. Mr. Montoya, therefore, should not have been permitted to waive mitigation. He deserves a new penalty phase.

3. Society's interest in the appearance of fairness in capital proceedings outweighs a represented defendant's right to control his own defense by waiving mitigation.

Even if the presentation of mitigation were a fundamental decision, which Mr. Montoya does not concede, society's interest in the appearance of fairness in capital proceedings outweighs a represented capital defendant's right to control his own defense by waiving mitigation. Allowing a defendant to waive mitigation deprives the jury of "sentencing information" that is considered "an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die…." *Gregg*, 428 U.S. at 190. In *Edwards v. Indiana*, 554 U.S. 164 (2008), the Supreme Court opined that the need to prevent public perception of impropriety and unfairness in the American judicial system justified a denial of the constitutional right to self-representation when a defendant's competency makes

carrying out the duties of self-representation impractical. *Edwards*, 554 U.S. at 177 ("[P]roceedings must not only be fair, they must 'appear fair to all who observe them.'") (quoting *Wheat v. United States*, 486 U.S. 153, 160 (1988)).

Likewise, to protect the appearance of fairness in Arizona's death penalty scheme and ensure the individualized sentencing necessary to safeguard against an arbitrary and capricious death sentence, the trial court should have refused Mr. Montoya's mitigation waiver. The court's error prevented the jury from considering the very same information the Supreme Court has deemed constitutionally indispensable to a reliable capital verdict.

ARGUMENT VI

The victim impact statements contained improper opinions about the defendant and the crime, in violation of the Fifth, Eighth, and Fourteenth Amendments.

The victim impact statements improperly included repeated references to the defendant and the crime. By declining the State's offer to review the victim impact statements prior to trial, the court gave the State free reign to introduce irrelevant and unduly prejudicial evidence that did not counter any mitigation presented and was established by no burden of proof. Consequently, Mr. Montoya deserves a new penalty phase trial.

Standard of Review

This Court reviews the admission of victim impact statements for an abuse of discretion. *State v. Garza*, 216 Ariz. 56, 69 ¶60 (2007). An abuse of discretion occurs when the superior court refuses or fails to exercise its discretion in ruling on a matter. *Greene*, 192 Ariz. at 175 ¶16. Because defense counsel objected, this Court reviews for harmless error. *State v. Rose*, 231 Ariz. 500, 511 ¶48 (2013). Constitutional issues are reviewed de novo. *State v. Moody*, 208 Ariz. 424, 445, ¶62 (2004).

Relevant Facts

On February 10, 2022, the State asked the court if it should submit the victim impact statements for the court's review, and the court declined, saying,

"Not unless there's a concern that they're not going to follow the parameters, which I'm sure you've advised them."[321] The State promised to review the statements, noting, "If we have any concerns, we'll address it with the court."[322] Defense counsel informed the court he would be filing a motion regarding the "parameters" of the victim impact statements.[323] A week later, defense counsel filed a motion to limit victim impact evidence at the penalty phase.[324] The motion sought to require disclosure of victim impact evidence and to limit the scope of the evidence to prevent overly emotional and otherwise improper statements.[325] The court denied the motion.[326]

The victims' families provided impact statements which included improper opinions about the defendant and the crime. The comments regarding the defendant included:

- "Even the ***worst kind of person*** knows the difference between right and wrong."[327]
- "At times it seems like the only person in this – ***the only person remembered in this court is the defendant***, a focus on him."[328]

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[321] Tr. 2/10/2022, at 21.
[322] *Id.*
[323] *Id.* at 22.
[324] R. 345.
[325] *Id.*
[326] R. 362.
[327] Tr. 4/6/2022, at 72.

- "But even with her doors locked, ***the bad guy*** still managed to get her."[329]

- "To this day, ***I refuse to say the defendant's name. He took dignity from my daughter, and now I refuse to even acknowledge him***."[330]

The victim impact statements also commented on the crime:

- "[My dad] told me that I need to start praying because they found a body in her home and it had ***not been able to be ID'd because of how decomposed the body was***. At this point my heart sunk."[331]

- "We often wondered what her last moments on Earth were like. ***It was admitted she was threatened with a hammer and a knife and Spike was killed in front of her – or was Spike killed in front of her while she was still alive***. We don't know. ***Simply gruesome***. We have no idea what her last moments were like. We can only assume they were tragic based on what we know. This is very heartbreaking to her friends and her family. This ***brutal murder*** continues to torment us all."[332]

- "As I sit in my living room, I look at a flag that was given to me at [A.R.'s] funeral. The thing freaks me out because there are two stars looking out at it – looking out of the plastic. I see them as her eyes looking up saying, 'Someone please save me.' ***I see her lying in her bed with her hands bound, looking up, pleading somebody please help me***. And it makes me cry every time."[333]

- "[T]his ***brutal murder*** of my sister has caused me a lot of trauma."[334]

- "...[M]ost of her personal belongings were gone, very sad to see ***her belongings seemed to vanish during this horrific event***."[335]

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[328] *Id.* at 68.
[329] *Id.* at 73.
[330] *Id.* at 76.
[331] *Id.* at 66.
[332] *Id.* at 82.
[333] *Id.* at 74.
[334] *Id.* at 68.

[335] *Id.* at 82.

Argument

In *Payne*, the United States Supreme Court held that there is no *per se* bar to victim impact evidence in capital cases. However, the Court made clear that its decision did not affect its previous holding in *Booth* "that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." *Id.* at 830 n.2. Here, the court's admission of improper victim impact testimony by A.R.'s family members as to the defendant and the crime was error.

Victim impact evidence is permissible to rebut a defendant's mitigation evidence. *State v. Mann*, 188 Ariz. 220, 228 (1997). However, victim impact statements are subject to constitutional limitations. The Eighth Amendment prohibits impact statements from containing any "victim's family member's characterizations and opinions about the crime, the defendant, and the appropriate sentence." *State v. Bush*, 244 Ariz. 575, 594 (2018).

Victims' opinions regarding the defendant, the crime, and the appropriate sentence "can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." *Booth*, 482 U.S. at 508. *Payne* overruled *Booth's per se* ban on victims' statements regarding the victim and the impact of the crime on the victim's family, but it did not find the victims' opinions about the defendant, the

crime, and the appropriate punishment relevant. *Id.* at 827, 830, n.2; *accord State v. Sansing*, 200 Ariz. 347, 358 ¶¶35-37 (2001) (affirming the trial court's refusal to consider the victim's 10-year-old daughter's request for mercy because it was not relevant to mitigation), *vacated on other grounds by* 536 U.S. 954 (2002).

Here, the victim impact statements improperly commented on the defendant and the crime. The court abused its discretion by allowing the irrelevant portions of the victim impact statements. Moreover, the trial court, by refusing to review the statements prior to trial and by denying defense counsel's motion to limit the victim impact evidence, failed to exercise its discretion. *Cf. Hampton*, 213 Ariz. at 181 ¶59 (finding no abuse of discretion where "the superior court carefully reviewed the victims' statements prior to their submission to the penalty phase jury" and "excluded a portion" of the statement.). The introduction of this irrelevant and overly prejudicial evidence was error.

The error was not harmless beyond a reasonable doubt. Because this Court cannot be assured the jurors were not affected by the improper statements in this case, where very little mitigating evidence was presented that required rebuttal, the harm to Mr. Montoya is extensive. The harm was compounded by the prosecutor's echoing the language in these statements in closing to argue for death. *See* Argument I(B), *supra*. The improper statements created a grave risk that

Mr. Montoya's death sentence was imposed arbitrarily and capriciously. Mr. Montoya deserves a new penalty phase trial.

ARGUMENT VII

This Court must vacate Mr. Montoya's death sentence and remand for a new penalty phase proceeding because the trial court committed fundamental error when it gave an incomplete instruction regarding the especially cruel or heinous aggravator that permitted the jury to weigh this aggravator twice when it deliberated Mr. Montoya's sentence.

Mr. Montoya's rights to due process and to be free from the arbitrary imposition of the death penalty were violated when the trial court provided the jury with a constitutionally deficient especially cruel or heinous penalty phase instruction that permitted the jury to weigh this aggravating circumstance twice when deliberating the sentence. U.S. Const. amends. V, VI, VIII, XIV; Ariz. Const. art. 2, §§ 4, 15, 23, 24. This error prejudiced Mr. Montoya and requires this Court to vacate his death sentence and remand for a new penalty phase.

Standard of Review

This Court reviews de novo whether the jurors were properly instructed. *State v. McCray*, 218 Ariz. 252, 258 ¶25 (2008). The Court must "consider the jury instructions as a whole to determine whether the jury received the information necessary to arrive at a legally correct decision." *Dann*, 220 Ariz. at 363 ¶51 (quoting *State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468, 471 ¶8 (2005)).

An issue raised for the first time on appeal is reviewed for fundamental error. *Dann*, 220 Ariz. at 364 ¶51 (citing *Henderson*, 210 Ariz. at 567 ¶19). An error is fundamental if it goes to the foundation of the case by "depriv[ing] the defendant of constitutionally guaranteed procedures." *Escalante*, 245 Ariz. at 141 ¶18 (2018) (citations omitted). Fundamental errors that are "of such a magnitude that a defendant could not have possibly received a fair trial" are "always prejudicial and require[] a new trial." *Id.* ¶16.

Relevant Facts

Prior to the penalty phase, Mr. Montoya admitted to two aggravating circumstances including the especially cruel or heinous aggravator.[336] When settling final jury instructions, the judge provided the parties with a draft form of the instructions which omitted a definition of the two admitted aggravating circumstances.[337] The State argued that the final instructions should contain a definition of the admitted aggravators.[338] Defendant agreed that aggravating circumstance definitions could be included if a list of proposed mitigating circumstances was also included in the final instructions.[339] The trial court initially

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[336] Tr. 5/14/21, at 34–39.
[337] Tr. 4/7/22, at 4.
[338] *Id*. at 5.
[339] *Id*. at 8.

was against including either but ultimately provided the jury with an instruction that included both.[340]

The jury was instructed as follows:

> [T]he Defendant admitted to the existence of the following two aggravating circumstances that make the Defendant eligible for the death penalty: (1) the murder was committed in an especially cruel or heinous manner; and (2) the defendant has been convicted of a serious offense. You must accept his admission.
>
> "Especially" means "unusually great or significant."
>
> The term "especially cruel" focuses on the victim's pain and suffering. The defendant admitted that the murder was committed in an "especially cruel" manner and that the victim consciously suffered physical or mental pain, distress or anguish prior to death, and the defendant knew or should have known that the victim would suffer.
>
> "Especially heinous" is used to describe the defendant's state of mind by looking to the defendant's words and actions at or near the time of the offense. A murder is especially heinous if it is hatefully or shockingly evil, in other words, grossly bad. The defendant admitted the murder was especially heinous and that he exhibited such a mental state at the time of the killing by inflicting gratuitous violence on the victim beyond that necessary to kill. The defendant "inflicted gratuitous violence" by intentionally inflicting 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.
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> "A serious offense," as referred to in these instructions, includes the offenses of burglary, kidnapping, and aggravated assault.[341]

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[340] *Id*. at 10–11; R. 411.
[341] R 411.

Argument

The jury's finding of death must be vacated because the trial court committed fundamental error when it failed to properly instruct the jury that Mr. Montoya's especially cruel and especially heinous admissions could only be counted as one aggravating circumstance. Because the faulty instruction permitted the jury the weigh this aggravator twice when it imposed the death sentence, this Court must vacate the sentence and remand for a new penalty phase proceeding.

A. The incomplete especially cruel and especially heinous instruction permitted the jury to double weigh this single aggravating circumstance.

The "especially heinous, cruel or depraved" capital aggravating circumstance is a single aggravator with disjunctive elements. *State v. Robinson*, 253 Ariz. 121, 134 ¶31 (2022). Though it may be established under more than one prong, it is improper for the fact-finder to double count this aggravating circumstance when determining a defendant's sentence. *State v. Miles*, 186 Ariz. 10, 19 (1996) (holding that a finding of especially cruel, heinous or depraved, "is a single (F)(6) factor, and the trial judge erred when he characterized them as two separate (F)(6) factors.").

Here, the instruction given on this aggravating circumstance generally tracked that of Criminal Revised Arizona Jury Instruction, Capital Case 1.6(d) (2021). The given instruction, however, crucially omitted the direction to the jury

that "Even if … "especially cruel" and "especially heinous …" have been [admitted by the defendant], you can only consider this as one aggravating circumstance." By providing two separate definitions for this aggravator but not clarifying that Mr. Montoya's admissions may only be counted as one aggravating circumstance, the jury could have illegally double weighed this aggravator when deliberating the penalty.

B. This Court must vacate the death sentence because the constitutionally deficient especially cruel and especially heinous instruction prevented the jury from returning a valid verdict.

The incomplete especially cruel and especially heinous instruction allowed the jury to double weigh Mr. Montoya's admission of this single aggravator. Because the instruction did not properly channel the jury's discretion when deliberating the sentence, this constituted fundamental error.

"The purpose of jury instructions is to inform the jury of the applicable law in understandable terms." *State v. Noriega*, 187 Ariz. 282, 284 (1996). When evaluating the clarity of a jury instruction, the relevant standard of comprehension is not that of lawyers or judges but rather that of a lay person. *Id.* Verdicts based on instructions that mislead the jury must be vacated. *State v. Doerr*, 193 Ariz. 56, 64–65 ¶¶35 (1998) (citing *Schrock*, 139 Ariz. at 440).

"To comport with the Eighth Amendment, a capital sentencing system 'must 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.'" *State v. Velazquez*, 216 Ariz. 300, 308 ¶27 (2007) (quoting *Godfrey*, 446 U.S. at 428 (internal quotations and footnotes omitted)). Like the instruction given here, an instruction that informs the jury that a defendant has admitted that the offense was committed in both an especially cruel manner and in an especially heinous manner—but does not tell the jury that this constitutes a single aggravating circumstance that may only be weighed once in deliberating the sentence—does not properly channel the jury's discretion.

Here, the incomplete instruction concerning Mr. Montoya's admission that the offense was committed in an especially cruel manner and in an especially heinous manner prevented the jury from properly weighing this single aggravator when it deliberated Mr. Montoya's sentence. And because this error implicated Mr. Montoya's constitutional rights to due process and to be free from the arbitrary imposition of the death penalty, the error was fundamental and prejudicial. U.S. Const. amends. V, VI, VIII, XIV; Ariz. Const. art. 2, §§ 4, 15, 23, 24. For these reasons, Mr. Montoya's death sentence must be vacated.

ARGUMENT VIII

Mr. Montoya's guilty pleas on the noncapital counts were not knowing, intelligent, and voluntary because the court failed to inform him that by pleading guilty, he would be waiving his right to competent post-conviction counsel.

The Arizona Constitution guarantees criminal defendants appellate review in all cases. Ariz. Const. art 2, § 24. "That right cannot be waived merely by a plea or admission." *Wilson v. Ellis*, 176 Ariz. 121, 123 (1993) (citation omitted). A post-conviction relief proceeding "in the trial court is 'analogous to a direct appeal for a pleading defendant.'" *State v. Smith*, 184 Ariz. 456, 458 (1996) (*quoting Montgomery v. Sheldon (Montgomery I)*, 181 Ariz. 256, 260 n.5 (1995)). Defendants have a constitutional right to competent counsel in their first "of right" appellate review, whether it be on direct appeal after trial or post-conviction relief after pleading guilty. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *State v. Pruett*, 185 Ariz. 128, 130-31 (App. 1995); U.S. Const. amends. VI, XIV; Ariz. Const. art. 2, §§ 4, 24.

Rule 31.2(b) requires an automatic direct appeal to be filed by the clerk of court in all capital cases. Ariz. R. Crim. P. 31.2(b). "That notice constitutes a notice of appeal by the defendant with respect to all judgments entered and sentences imposed in that case." *Id.* Thus, even noncapital counts will be reviewed on direct appeal in capital cases. Ineffective assistance of counsel claims may not

be raised on direct appeal in Arizona. *State v. Spreitz (Spreitz II)*, 190 Ariz. 129, 146 (1997) ("ineffective assistance of counsel claims are to be brought in Rule 32 proceedings. Any such claims improvidently raised in a direct appeal ... will not be addressed by appellate courts"). Therefore, a pleading capital defendant loses the right to competent post-conviction counsel to raise ineffective assistance of counsel claims on all noncapital counts. In this case, the trial court committed fundamental error by failing to fully advise Mr. Montoya that he was waiving his right to competent post-conviction counsel by pleading guilty. Consequently, Mr. Montoya's guilty pleas were not knowingly, intelligently, and voluntarily entered.

Relevant Facts

Mr. Montoya pleaded guilty to the indictment, which included one capital and seven noncapital counts.[342] The court advised Mr. Montoya of the constitutional rights he would be waiving by pleading guilty, including the following advisement regarding his right to appeal:

> Do you also understand that if you go ahead and plead guilty on counts 2 through 8, you give up your right to direct appeal, and the only way you could have the matter reviewed would be to file a notice of postconviction relief within 90 days of sentencing?
>
> …

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[342] *See* R. 1; 242.

You retain your right to direct appeal on count 1.[343]

Mr. Montoya acknowledged that he understood his rights and wished to waive them and plead guilty.[344] Defense counsel did not object.[345]

Standard of Review

This Court must consider the validity of guilty pleas on noncapital counts in a capital appeal. *State v. Ovante*, 231 Ariz. 180, 184 ¶¶9-10 (2013) ("In death penalty cases, consistent with Rule 31.2(b), this Court will review the validity of a plea on direct appeal, before it reviews the capital sentence."). Appellate courts review a trial court's acceptance of a guilty plea for an abuse of discretion. *State v. Djerf*, 191 Ariz. 583, 594 ¶35 (1998). Constitutional issues are reviewed *de novo*. *Bocharski*, 218 Ariz. at 483 ¶17 (citing *Pandeli IV*, 215 Ariz. at 522 ¶11). Because the defense did not object, Mr. Montoya must demonstrate that the error is fundamental and that he was prejudiced by the error. *Escalante*, 245 Ariz. at 138 ¶1.

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[343] Tr. 5/14/21, at 13-14.
[344] *Id.*
[345] *See id.*

Argument

A judge accepting a guilty plea must ensure the plea is entered knowingly, intelligently, and voluntarily. *Rose*, 231 Ariz. at ¶12. Rule 17.2 mandates that the judge "address the defendant personally in open court" and inform him of "the constitutional rights that the defendant foregoes by pleading guilty[.]" Ariz. R. Crim. P. 17.2(a)(3). The trial court here did not properly advise Mr. Montoya of the rights he would be waiving, resulting in unknowing, unintelligent, and involuntary guilty pleas.

A. The trial court erred by failing to inform Mr. Montoya that he would be waiving his right to have competent counsel raise ineffective assistance of counsel claims on his noncapital counts, resulting in guilty pleas that were not knowing, intelligent, and voluntary.

Effective January 2020, the Arizona Rules of Criminal Procedure were amended to differentiate the guidelines for post-conviction proceedings following a direct appeal after trial from post-conviction proceedings following a guilty plea.[346] As a result, pleading noncapital defendants are entitled to competent counsel in post-conviction proceedings pursuant to Rule 33, whereas pleading capital defendants are not entitled to competent post-conviction counsel pursuant to Rule 32. *See* Ariz. R. Crim. P. 32, 33. Rule 32.3(c) mandates:

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[346] Ariz. Admin. Order R-19-0012.

> A defendant sentenced to death in a capital case must proceed under Rule 32 rather than Rule 33 for all post-conviction issues, even if the defendant pled guilty to first-degree murder or other crimes.

Ariz. R. Crim. P. 32.3(c). Rule 33.2(2) specifically grants pleading noncapital defendants the right to file "a timely second notice requesting post-conviction relief claiming ineffective assistance of counsel in the first Rule 33 post-conviction proceeding." Ariz. R. Crim. P. 33.2(2). No such provision appears in Rule 32. Thus, a pleading capital defendant necessarily waives his Sixth Amendment right to effective assistance of competent counsel to raise claims of ineffective assistance of trial counsel on his noncapital counts.

In noncapital cases, the court must inform a defendant that a guilty plea will "waive the right to appellate court review of the proceedings on a direct appeal and that the defendant may seek review only by filing a petition for post-conviction relief under Rule 33[.]" Ariz. R. Crim. P. 17.2(a)(5). However, because Rule 31.2(b) requires noncapital counts to be included in an automatic capital appeal, a pleading capital defendant waives the right to have his noncapital convictions reviewed under Rule 33 – a proceeding in which he would be entitled both to competent counsel and to file a second petition for post-conviction relief claiming ineffective assistance of post-conviction counsel.

Although the United States Constitution generally does not guarantee the right to competent counsel on collateral review, *see Coleman v. Thompson*, 501

U.S. 722, 752 (1991), the Supreme Court has recognized "a key difference between initial-review collateral proceedings and other kinds of collateral proceedings" in the context of whether ineffective assistance of trial counsel claims not raised in state post-conviction proceedings were procedurally defaulted on federal habeas review. *Martinez v. Ryan*, 566 U.S. 1, 10 (2012) (citing *Coleman,* 510 U.S. 722). In *Martinez*, the Court found a narrow exception to the *Coleman* rule that failure to raise a claim in state post-conviction proceedings due to ineffective assistance of post-conviction counsel does not excuse procedural default of that claim because there is no constitutional right to an attorney in collateral proceedings. That narrow exception occurs when a State prohibits presentation of ineffective assistance of counsel claims on direct appeal. *Id.* at 10-11 (citing *Coleman,* 510 U.S. at 756). Thus, in states, like Arizona, which require ineffective assistance of trial counsel claims to be raised for the first time in an initial-review collateral proceeding rather than on direct appeal, the failure of post-conviction counsel to raise those claims will be sufficient to excuse procedural default. *Id.*

Rule 33 provides pleading noncapital defendants a statutory and constitutional right to competent counsel on a first of-right post-conviction review. *See* Ariz. R. Crim. P. 33.2(2); *Pruett*, 185 Ariz. at 130-31 (Noting that pleading defendants must waive a direct appeal and are therefore "constitutionally entitled

to the effective assistance of counsel on [a] first petition for post-conviction relief, the counterpart of a direct appeal."). By pleading guilty to noncapital offenses in a capital case, however, a pleading capital defendant must forego that right. Therefore, the first time a pleading capital defendant may raise ineffective assistance of trial counsel claims for noncapital counts is in a Rule 32 post-conviction proceeding, which is an initial-review collateral proceeding for ineffective assistance of trial counsel claims. The result is that pleading capital defendants are deprived of the right to competent counsel on a first of-right post-conviction review of ineffective assistance of trial counsel claims related to noncapital counts.

Here, the court failed to adequately canvass the matter with Mr. Montoya to ensure he understood the rights he was waiving by pleading guilty to the noncapital counts. Specifically, the court failed to inform Mr. Montoya that he would be waiving his right to counsel on his first "of right" post-conviction review of ineffective assistance of trial counsel claims because Rule 32.3(c) prohibits post-conviction relief under Rule 33 on the noncapital counts. This was error.

The court compounded its error of omission by actively misadvising Mr. Montoya regarding the rights he would be waiving on his noncapital counts. First, the court improperly advised Mr. Montoya that he would lose his right to direct appeal on the noncapital matters, and that his only review on those counts

would be post-conviction relief.[347] However, pursuant to Rule 31.2(b), he is entitled to direct appeal on the noncapital counts. Ariz. R. Crim. P. 31.2(b).

The court further misadvised Mr. Montoya that he must seek post-conviction relief on the noncapital offenses within 90 days of sentencing. However, this is the time frame for filing a notice under Rule 33, an avenue of review which would be unavailable to Mr. Montoya after contemporaneously pleading guilty to a capital offense. *See* Ariz. R. Crim. P. 33.4(b)(3)(A). In capital cases, the Clerk of the Supreme Court must file the notice requesting post-conviction relief "upon the issuance of the mandate affirming the defendant's conviction and sentence on direct appeal." Ariz. R. Crim. P. 32.4(B)(3)(C). Thus, not only did the court err by omitting from the plea colloquy an advisement that Mr. Montoya would be waiving his right to competent post-conviction counsel on his noncapital counts, but it also erred by misinforming him regarding his right to review of those counts.

The court's plea colloquy failed to meet the minimum requirements of *Boykin v. Alabama*, 395 U.S. 238 (1969):

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.

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[347] Tr. 5/14/21, at 14.

Boykin, 395 U.S. at 243-44. Reviewing courts must consider the entire record to ascertain whether a defendant understood the consequences of the plea and knowingly waived constitutional rights. *Rose*, 231 Ariz. at 508 ¶31 (citation omitted). The court here was clearly uncertain as to the rights Mr. Montoya would be waiving by pleading guilty to his noncapital offenses.[348] Thus, the court could not possibly have properly advised him.

Upon consideration of this record, it is evident that Mr. Montoya was not advised that he was waiving the right to competent post-conviction counsel to raise ineffective assistance of trial counsel claims on his noncapital counts. Further, there is no indication in the record that he was aware he was waiving this right. *See U.S. v. McCarthy*, 394 U.S. 459, 466 (1969) (quoting *Johnston v. Zerbst*, 304 U.S. 458, 464 (1938)) (noting that for a constitutional waiver to "be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.'"). The result is an unknowing and unintelligent waiver of rights which renders the guilty pleas to Counts 2 through 8 involuntary. Mr. Montoya must be allowed to withdraw his guilty pleas, and his case must be remanded for further proceedings.

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[348] *Id.* at 14.

B. The error is fundamental.

1. The error is fundamental because it goes to the foundation of Mr. Montoya's case by depriving him of constitutionally guaranteed procedures.

In *Escalante*, this Court instructed that "[a]n error generally goes to the 'foundation of a case' if it ... deprives the defendant of constitutionally guaranteed procedures." *Escalante*, 245 Ariz. at 141 ¶18 (citations omitted). Rule 17.2 requires a court to advise a defendant of constitutional rights waived by pleading guilty. Ariz. R. Crim. P. 17.2. This right is rooted in the United States Constitution and applicable to the states by the Fourteenth Amendment. *See Boykin*, 395 U.S. at 243. Here, Mr. Montoya was deprived of his right to due process of law – a constitutionally guaranteed procedure.

Mr. Montoya is essentially denied counsel on direct appeal regarding ineffective assistance of trial counsel claims because this Court prohibits ineffective assistance claims on direct appeal – the only post-conviction proceeding in which a capital defendant has the right to effective assistance of counsel. "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). An attorney failing to raise a nonfrivolous claim in a first "of right" appeal would be *per se* ineffective. The Court's preclusion of ineffective assistance of trial counsel claims on direct appeal,

therefore, guarantees that a pleading capital defendant's appellate counsel will be ineffective. Ineffective counsel is the equivalent of "no counsel at all." *Id.* The error, therefore, is fundamental.

2. The error is fundamental because it deprives Mr. Montoya of constitutional right essential to his defense on appeal.

"An error takes away an 'essential right' if it deprives the defendant of a constitutional or statutory right necessary to establish a viable defense or rebut the prosecution's case." *Escalante*, 245 Ariz. at 141 ¶19. The Arizona Constitution grants every pleading defendant the right to appellate review. Ariz. Const. art. II, § 24. The error in this case deprived Mr. Montoya of his constitutional right to appellate review by competent counsel on his ineffective assistance of trial counsel claims on his noncapital counts.

Generally, the right to competent counsel "'extends to the first appeal of right, and no further.'" *Id.* (quoting *Finley*, 481 U.S. at 555). The same is true in capital cases. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989). However, there is no right to competent counsel on collateral relief pursuant to Rule 32 for pleading capital defendants. Thus, Mr. Montoya was deprived of his constitutional right to due process when the court failed to advise him he was waiving his right to competent post-conviction counsel for ineffective assistance of trial counsel claims by pleading guilty to noncapital counts in a capital case. Mr. Montoya unknowingly and involuntarily waived this important constitutional right.

C. Mr. Montoya was prejudiced by the error.

When evaluating whether error is prejudicial, reviewing courts must assess not just the plea colloquy, but the full record. *U.S. v. Davila,* 569 U.S. 597, 611-12 (2013). To prove prejudice, Mr. Montoya must demonstrate that, absent the error, the outcome *could* have been different – *i.e.*, he *could* have decided not to plead guilty to the noncapital counts simultaneously with the capital count. If Mr. Montoya's noncapital counts were governed by Rule 33, he would have had the right to effective assistance of counsel on post-conviction review. *See* Ariz. R. Crim. P. 33.2(2). However, because ineffective assistance of trial counsel claims may not be raised on direct appeal, his first opportunity to raise those claims is on post-conviction review under Rule 32. If post-conviction counsel is ineffective by failing to raise claims related to trial and appellate counsel's effectiveness and develop a record to support those claims, Mr. Montoya will have no legal recourse. *See Shinn v. Ramirez*, __ U.S. __, 142 S.Ct. 1718, 1734 (2022) ("[A] federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel.").

Had Mr. Montoya been properly advised, the outcome could have been different. For example, Mr. Montoya could have requested that Counts 2-8 be severed from Count 1 for the purposes of pleading guilty, thereby ensuring his

right to review under Rule 33 for those counts. Because Mr. Montoya was prejudiced by the error, he must be allowed to withdraw his guilty pleas.

In the alternative, the case should be remanded for an evidentiary hearing. Generally, "a defendant who demonstrates a Rule 17 violation on appeal is permitted a hearing on remand to show the prejudice that would require resentencing." *State v. Carter*, 216 Ariz. 286, 290 ¶21 (App. 2007); *State v. Munoz*, 25 Ariz. App. 350, 352 (1975) (remanding to "trial court for further hearing to determine if, at the time the guilty plea was entered, the defendant in fact knew of his privilege against self-incrimination.").

ISSUES PRESERVED FOR FEDERAL REVIEW

1. The death penalty is cruel and unusual under any circumstances and violates the Eighth and Fourteenth Amendments to the United States Constitution. *Gregg*, 428 U.S. at 186-87.

2. The death penalty is imposed arbitrarily and capriciously in Arizona in violation of the Eighth and Fourteenth Amendments to the United States Constitution. *State v. Beaty*, 158 Ariz. 232, 246-48 (1988); *contra State v. Pandeli (Pandeli I)*, 200 Ariz. 365, 382 ¶87 (2001), *vacated on other grounds*, 536 U.S. 953 (2002).

3. There is no meaningful distinction between capital and non-capital murder cases, making each crime the product of an unconstitutionally vague statute. *Hidalgo*, 241 Ariz. 543; *State v. Salazar*, 173 Ariz. 399, 411 (1992).

4. The death penalty is the irreversible denial of human rights. The Eighth Amendment "draw'[s] its meaning from evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101; *see also Roper*, 543 U.S. 551. The international community of nations has evolved to a state of maturity that abolishes the death penalty. The Universal Declaration of Human Rights, GA Res. 217A (III), U.N. GAOR, 3d Sess. Art. 3, U.N. Doc. A/810 (1948) provides that "Everyone has the right to life, liberty, and security of person." The death penalty violates the Universal Declaration of

Human Rights. Mr. Montoya's death sentence not only violates the Eighth and Fourteenth Amendments of the United States Constitution, but international law as most civilized nations bar the death penalty. *Contra State v. Ross*, 180 Ariz. 598, 602 (1994).

5. The prosecutor's discretion to seek death is standardless in violation of the Eighth and Fourteenth Amendments to the United States Constitution. *Salazar*, 173 Ariz. at 411.

6. Arizona's death penalty scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it does not require the sentencer to find beyond a reasonable doubt that the aggravating circumstances outweigh the cumulative mitigating circumstances but instead mandates defendants prove their lives should be spared. *Roque*, 213 Ariz. at 225-26 ¶¶138–41; *State v. Poyson*, 198 Ariz. 70, 83 ¶59 (2000).

7. Arizona's abuse-of-discretion standard of review of death sentences under A.R.S. § 13-756(A) is not "meaningful" because it fails to genuinely narrow those sentenced to death and violates the Eighth and Fourteenth Amendments. *Cota*, 229 Ariz. at 153 ¶¶91–92.

8. The absence of proportionality review of death sentences by Arizona courts denies capital defendants due process of law and equal protection and amounts to cruel and unusual punishment in violation of the Fifth, Eighth, and

Fourteenth Amendments to the United States Constitution. *Salazar*, 173 Ariz. at 416. Proportionality review serves to identify which cases are "above the norm" of first-degree murder thus narrowing the class of defendants who are eligible for death. *Bocharski*, 218 Ariz. at 487-88 ¶¶47–50.

9. The failure of Arizona's capital sentencing scheme to require the State to prove the death penalty is appropriate violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. *State v. Ring (Ring I)*, 200 Ariz. 267, 284 ¶64 (2001), *rev'd on other grounds*, 536 U.S. 584; *State v. Gulbrandson*, 184 Ariz. 46, 72 (1995); *Dann*, 220 Ariz. 351.

10. A.R.S. § 13-751 provides no objective standards to guide the sentencer in weighing the aggravating and mitigating circumstances and therefore violates the Eighth and Fourteenth Amendments of the United States Constitution. *Pandeli I*, 200 Ariz. at 382.

11. Arizona's death statute unconstitutionally fails to require the cumulative consideration of multiple mitigating factors or require that the jury make specific findings as to each mitigator. *Gulbrandson*, 184 Ariz. at 69-71 (1995).

12. Arizona's death statute creates an unconstitutional presumption of death and places an unconstitutional burden on defendants to prove mitigation is "sufficiently substantial to call for leniency." *Glassel*, 211 Ariz. at 51-52 ¶¶66-68.

13. A.R.S. § 13-751 does not sufficiently channel the sentencer's discretion. Aggravating circumstances should narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a harsher penalty. The broad scope of Arizona's aggravating factors encompasses nearly anyone involved in a murder, in violation of the Eighth and Fourteenth Amendments to the United States Constitution. *Bocharski*, 218 Ariz. at 488 ¶49.

14. Victim impact evidence admitted at the penalty phase of the trial violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. *Lynn v. Reinstein*, 205 Ariz. 186, 191 (2003); *State ex rel. Thomas v. Foreman*, 211 Ariz. 153, 157–58 (App. 2005).

15. The refusal to permit voir dire of prospective jurors regarding their views on specific aggravating and mitigating circumstances violates Mr. Montoya's rights under the Sixth and Fourteenth Amendments. *State v. Johnson*, 212 Ariz. 425, 434 ¶¶29–35 (2006).

16. The factfinder in capital cases must be able to consider all relevant mitigating evidence in deciding whether to give the death penalty. *See Woodson*, 428 U.S. at 304. The failure to allow this jury to consider and give effect to all mitigating evidence in this case by limiting its consideration to that proven by a preponderance of the evidence is unconstitutional. U.S. Const. amends. VIII, XIV; *contra McGill*, 213 Ariz. at 161 ¶59.

17. Arizona's death penalty unconstitutionally requires imposition of the death penalty whenever at least one aggravating circumstance and no mitigating circumstances exist, in violation of the Eighth and Fourteenth Amendments to the United States Constitution. *Miles*, 186 Ariz. at 19.
18. Arizona's sentencing statutes allow for unrestrained mitigation rebuttal that violates a defendant's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. *Contra Hampton*, 213 Ariz. at 179 ¶48 (holding rebuttal testimony in penalty phase "is ultimately constrained by the Due Process Clause of the Fourteenth Amendment.").
19. Arizona's method of execution by lethal injection is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. *State v. Van Adams*, 194 Ariz. 408, 422-23 ¶55 (1999); *Baze v. Rees*, 553 U.S. 35 (2008).

CONCLUSION

This Court should vacate Mr. Montoya's convictions and death sentence and remand for a new penalty phase proceeding on the capital count remand to the trial court for further proceedings on the noncapital counts.

Respectfully submitted this 8th day of August, 2023.

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