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 REPLY BRIEF

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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 State misstates the law regarding fundamental error review. Quoting from *State v. Henderson*, 210 Ariz. 568 (2005), the State claims Mr. Montoya must demonstrate "that the error 'goes to the foundation of his case, takes away a right that is essential to his defense, *and* is of such magnitude that he could not have received a fair trial[.]'"[1] However, this Court clarified in *State v. Escalante*, 245 Ariz. 135 (2018), that the standard for fundamental error review is disjunctive, not conjunctive, because "requiring a defendant to establish all three prongs is overkill." 245 Ariz. at 140 ¶16. Further, if the third prong – that the error is of such a magnitude that it made a fair trial impossible – is established, prejudice is presumed. *Id.* Finally, the State fails to acknowledge that a showing of cumulative prosecutorial misconduct satisfies the third prong of *Escalante* and does not require a demonstration of prejudice. *State v. Vargas*, 249 Ariz. 186, 190 ¶13 (2020).

A. Arguing an unalleged, unproven aggravator in closing argument requires reversal.

[1] State's Answering Brief ("AB"), at 21.

1. Defense counsel's objection preserved the issue for harmless error review.

The State argues that because he did not object on the ground of prosecutorial misconduct, Mr. Montoya has not preserved the issue for harmless error review.[2] However, the rule that an objection on one ground does not preserve the issue for appeal on another ground is inapplicable to prosecutorial misconduct for statements made during a prosecutor's opening statement or closing argument.

Rule 103(a) of the Arizona Rules of Evidence sets forth the rule for preserving a claim of error for appeal:

> (a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
>
> (1) if the ruling admits evidence, a party, on the record:
>
> (A) timely objects or moves to strike; and
>
> (B) states the specific ground, *unless it was apparent from the context*. . . .

Ariz. R. Evid. 103(a) (emphasis added). Thus, because it is apparent from the context, it should be presumed that an objection on any ground during a prosecutor's opening or closing argument is also an objection on the ground of prosecutorial misconduct.

[2] AB, at 22.

To support its assertion that the issue was not preserved for harmless error review, the State cites to *State v. Morris*, 215 Ariz. 324 (2007), and *State v. Lopez*, 217 Ariz. 433 (App. 2008). However, neither of these cases support the State's argument. *Morris* only stands for the proposition that failure to object on any ground limits the issue to fundamental error review. 215 Ariz. at 335 ¶47. On appeal, Morris asserted five claims of prosecutorial misconduct. *Id.* ¶46. Defense counsel did not object to four of those claims at trial, so the Court reviewed those claims for fundamental error. *Id.* ¶¶48-64.

Defense counsel timely objected at trial on the fifth claim – that the prosecutor placed an excluded photograph on his table in full view of the jury during the guilt phase proceedings – and this Court reviewed that claim for harmless error. *Id.* ¶¶65-66. The opinion does not mention whether defense counsel's objection on the fifth claim was also made on the ground of prosecutorial misconduct. *Id.*

Although *Lopez* involves objection on one ground but not another (foundation instead of hearsay), it does not involve objections for prosecutorial misconduct. 217 Ariz. at 434-35 ¶4. The *Lopez* Court's ruling makes sense for non-prosecutorial misconduct objections that are not apparent from the context and require different legal determinations for a judge to sufficiently rule on the objections. *Id.* Whether evidence or testimony lacks foundation requires an entirely

different legal analysis than whether it involves inadmissible hearsay. However, objections during a prosecutor's opening statement or closing argument necessarily involve a claim that the prosecutor – by arguing facts not in evidence, for example – made an intentional or inadvertent error. In other words, it is apparent from the context.

The purpose of objecting is to give the trial court an opportunity to correct the error. *State v. Kinney*, 225 Ariz. 550, 554 ¶7 (2010) (citing *State v. Fulminante*, 193 Ariz. 485 ¶64 (1999)). That purpose is fulfilled when an objection on the appropriate ground is made during a prosecutor's opening or closing arguments. Here, the judge was able to make the appropriate ruling by sustaining the objection. Forcing attorneys to object on both the underlying ground and prosecutorial misconduct ground for statements made during a prosecutor's opening and closing argument, just to preserve the issue for appellate review, is exactly the type of hyper-technicality that confounds the administration of justice and undermines public confidence in the legal system.

In any event, this Court may consider unobjected-to errors in its cumulative prosecutorial error analysis. *State v. Hughes*, 193 Ariz. 72, 79 ¶25 (1998) (finding that the "general rule that several non-errors and harmless errors cannot add up to one reversible error" does not apply to cumulative prosecutorial error claims).

2. Sustaining the objection and giving standard jury instructions are insufficient to cure the harm.

The State claims the trial court's jury instructions alleviated any prejudice.[3] In determining whether, "considered in the context of the entire trial, [prosecutorial mis]conduct appears likely to have affected the jury's discharge of its duty to judge the evidence fairly[,]" the Ninth Circuit found that the lack of an objection and curative instruction specifically informing the jury to disregard an improper statement undermined the jury's ability to judge the evidence fairly. *United States v. Sanchez*, 659 F.3d 1252, 1257-58 (9th Cir. 2011). In *Sanchez*, the court noted, "We have held that curative instructions fail to 'neutralize the harm' of improper statements by a prosecutor when '"[t]hey [do] not mention the specific statements of the prosecutor and [are] not given immediately after the damage [is] done."' 659 F.3d at 1258 (quoting *United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005); *United States v. Kerr*, 981 F.2d 1050 (9th Cir. 1992)).

Next, the State cites to *State v. Dunlap*, 187 Ariz. 441 (App. 1996) and *State v. Moody*, 208 Ariz. 424 (2004) to claim that the court minimized the prejudicial impact by sustaining the objection – but both cases are distinguishable.[4] *Dunlap* involves a situation where the court sustained an objection to an improper cross-examination question by the prosecutor. 187 Ariz. at 461. The court found that the improper question to a defense witness about a prior conviction was

[3] AB, at 23, 25.
[4] AB, at 25.

harmless because the witness's "credibility was not significantly affected" by the question. *Id.* No such finding can be made in this case. In addition, the *Dunlap* jury was instructed to "disregard any questions to which objections were sustained."[5] Thus, a sustained objection paired with an instruction that specifically and correctly informed the jury that the *prosecutor's questions* should be disregarded was enough to remedy any prejudice. Here, the State concedes that the court did not instruct the jurors that a prosecutor's *comments during closing argument* should be disregarded after a sustained objection.[6] Thus, the sustained objection alone, absent a specific jury instruction to disregard a portion of the prosecutor's *argument* if an objection is sustained, is insufficient to cure the prejudice to Mr. Montoya.

In *Moody*, the prosecutor's comment during closing argument was sustained and the court *specifically* instructed the jurors to disregard the improper remark: "The court sustained an objection from defense counsel *and instructed the jury to 'disregard the last comments by the prosecutor*.'" 208 Ariz. at 459 ¶148 (emphasis added). Here, the court sustained the objection without specifically telling the

[5] AB, at 25.
[6] AB, at 23 (acknowledging "the trial court did not specifically instruct the jury about objections during argument").

jurors to disregard the prosecutor's last comment.[7] Absent a specific instruction to disregard the improper comments, the trial court's general jury instructions here failed to alleviate the prejudice to Mr. Montoya. *See Sanchez*, 659 F.3d 1252; *Weatherspoon*, 410 F.3d 1142; *Kerr*, 981 F.2d 1050.

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

1. The "horror, shock, and disgust" comment was an improper appeal to passion.

The State's claim that the "horror, shock, and disgust" comment was not an appeal to emotion, but rather a comment on the nature of the murder, defies reason. This argument ignores the fact that the prosecutor asked the jurors to base their verdict on *emotions* (horror, shock, and disgust) they must have *felt* when they heard the details of the murder.[8] This is a direct appeal to the passions and sympathies of the jurors. Moreover, the State's claim that this argument went to the cruel, heinous, or depraved aggravator is unconvincing considering that the prosecutor specifically appealed to the jurors' *feelings* about the murder – not the circumstances of the murder itself. Further, considering Mr. Montoya admitted to the existence of that aggravator in two different ways, the appeal to jurors' passions was unnecessary and prejudicial.

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[7] Tr. 4/11/22, at 140 (showing the court sustained the objection with only the brief statement, "The last comment's sustained.").
[8] AB, at 26.

State v. Moody, 208 Ariz. 424 (2004), the case cited in the Answering Brief to argue the appeal to emotion was not prejudicial, reinforces Mr. Montoya's argument because in *Moody* an objection was made, the court sustained the objection, and the jurors were instructed to disregard the improper comment.[9] Here, no objection was made. The judge, therefore, did not alleviate the harm by instructing the jurors, after a sustained objection, to disregard the last comment in the prosecutor's argument. Thus, the curative measures taken in *Moody* are absent from this record.

The fact that this was an isolated comment does not cure the prejudice.[10] This wasn't an "ambiguous remark" as in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), it was an unambiguous appeal to the passions of the jurors. Further, in *Donnelly*, "the trial judge directed the jury's attention to the remark particularly challenged [], declared it to be unsupported, and admonished the jury to ignore it." 416 U.S. at 644. The judge took no such curative measures in this case.

The court's instruction that lawyers' arguments are not evidence does not cure the prejudice.[11] Essentially, the State's argument would allow any prosecutor to make any improper statements, so long as the statements are preceded or followed by an accurate reference to the instructions. *State v. Murray*, 250 Ariz.

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[9] *See also* Section I(A) *supra*.
[10] AB, at 28 (citing *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)).
[11] AB, at 28.

543, 552-54 ¶¶33-38 (2021) held the opposite, noting that "a proper instruction is not a panacea for error in every case" when holding that the prosecutor's single misstatement of the reasonable doubt standard in closing was prejudicial fundamental error requiring reversal. In *Murray*, this Court acknowledged that the trial court's accurate jury instruction that "'[w]hat the lawyers say is not evidence, but it may help you understand the law and the evidence'" only worked to "'reinforce the prosecutor's error.'" *Murray*, 250 Ariz. at 552 ¶33. A nearly identical instruction was given in Mr. Montoya's case.[12]

Finally, the State again mistakes the proper standard for fundamental error review, claiming Mr. Montoya must show the outcome "would have changed" absent the error.[13] The correct standard is that the jury *could* have reached a different result, not that it *would* have done so. *Murray*, 250 Ariz. at 551-52 ¶30 (noting that the standard for prejudice set forth in *State v. Escalante*, 245 Ariz. 135, 144 ¶31 (2018) is the proper standard to apply when evaluating prejudice for unobjected-to prosecutorial misconduct). Here, in a case with only a penalty phase in which almost no mitigation was presented, the "jury could have plausibly and intelligently returned a different verdict." *Id.*

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[12] R. 411, at 5 ("What the attorneys say in their closing arguments is not evidence, but it may assist you in understanding the law and the evidence.").
[13] AB, at 28-29.

2. The prosecutor improperly used victim impact statements to recommend a death sentence.

A victim impact statement may not contain a sentencing recommendation. *Lynn v. Reinstein*, 205 Ariz. 186, 191 ¶¶16-17 (1991) (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Here, the prosecutor cherry-picked words, phrases, and themes from the victim impact statements and used them to do what the victims cannot – recommend a death sentence. Under *Payne*, "the Eighth Amendment erects no *per se* bar" to victim impact statements and "prosecutorial argument on that subject." 501 U.S. at 827. However, the lack of a *per se* bar does not give prosecutors *carte blanche* to use victim impact evidence in closing. Rather, the prosecutor's argument must be tailored to the State's "'legitimate interest in counteracting the mitigating evidence…by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.'" *Id.* (quoting *Booth v. Maryland*, 482 U.S. 496, 517 (1987)). The prosecutor here overstepped what is within the State's legitimate interest – by repeating specific comments and themes from the impact statements to recommend a death sentence.

As Justice Souter pointed out in his concurrence in *Payne*, "Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation." 501 U.S. at 836 (citation omitted) (Souter, J. concurring). Further,

Justice O'Connor noted that in cases where the State crosses the line and "a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment." *Id.* at 831 (O'Connor, J. concurring). That is precisely what Mr. Montoya seeks here.

The fact that the victim impact statements occurred five days before closing arguments is of little import. Notably, the last thing the jurors heard in this trial prior to jury instructions and closing arguments was the victim impact statements, which occurred at the end of day on April 6, 2022. The jury was not present for oral arguments regarding jury instructions on April 7, 2022. The next time the jury convened was for closing arguments on April 11, 2022. Thus, the impact statements were the last thing the jurors heard prior to closing instructions and arguments.

What's more, the State doesn't address the fact that the victim impact statements were not made after opening statements (but before the presentation of mitigation evidence and rebuttal) as prescribed by Rule 19.1(e) of the Arizona Rules of Criminal Procedure. Because they came after the presentation of mitigation and rebuttal evidence in this case, they were fresh in the jurors' minds when the improper comments were made.

3. The prosecutor's comparative mercy argument was improper.

The State's comment that the Opening Brief's references to "*Payne v. Tennessee*, 501 U.S. 808 (1991), and this Court's precedent applying it, appear misplaced because the statement at issue did not come from a victim impact statement" ignores the issue presented and this Court's rationale in *State v. Roque*, 213 Ariz. 193 (2006).[14] Roque claimed that the following comparison of the defendant and the victim *by the prosecutor* in closing argument constituted prosecutorial misconduct:

> Defendant worked numerous years in the American aircraft industry. That's true. That's true. Balbir Singh Sodhi worked a number of years in this country driving a cab [and] working behind the counter of a store. The defendant is married. Balbir Singh Sodhi was married.

213 Ariz. at 224 ¶131. In evaluating whether the comparison was proper, this Court cited to *Payne* to note that the point of the decision in that case was not to "permit a comparison of the lives of the victim and the defendant." *Id.* at 225 ¶132. The comparison in *Roque*, therefore, also did not derive from victim impact statements, but rather from the prosecutor's statements in closing – just as in this case. Thus, the citation to *Payne* is not misplaced.

The State's assertion that the prosecutor "never argued that Montoya's life was less valuable than A.R.'s life" is disingenuous.[15] By arguing that Mr.

[14] AB, at 33.
[15] AB, at 36.

Montoya's life is less deserving of mercy than A.R.'s, the prosecutor did just that. Further, the State does not address the decision of this Court in *Roque* to decline to decide whether "a prosecutor's statement comparing the value of the life of the defendant with that of the victim is proper because in [*Roque*] the prosecutor stopped before making a value judgment." *Id.* at 225 ¶133. In Mr. Montoya's case, the prosecutor did not stop before making a value judgment; rather, she asked the jury to find that the defendant does not deserve more mercy than he showed A.R.

The prosecutor's statements here were akin to the improper comments in *United States v. Mitchell*, 502 F.3d 931, 995 (9th Cir. 2007), in which the Court found the prosecutor's statements below impermissibly appealed to the passions and fears of the jury:

> Mitchell gets to come before the jury and say "Spare my life." … I suppose that's the beauty of the system. Doesn't work for the victims, but it works for the defendant. And you need to keep that in mind when asking why to spare the life of the defendant.

The Court "disagree[d] with the government that these were fair comments on the evidence and were not, even arguably, calculated to arouse the passions of the jury...." *Id.* Rather, the Court found the comments invited the jury to base its verdict on emotion rather than relevant, admissible evidence. As the State

acknowledges,[16] the word "mercy" was only mentioned three times at the beginning of defense counsel's closing.[17] Defense's entire closing spanned 31 pages.[18] This was hardly an invitation for the prosecutor to improperly compare the value of Mr. Montoya's life with that of A.R. In fact, the prosecutor mentioned the word "mercy" 12 times throughout her closing argument, which spanned 71 pages.[19] Thus, the jury would have been focused on the concept of mercy by the time the improper comment was made.

What the State calls a "fleeting remark" is much more impactful in this case than it was in *State v. (John) Allen*, 248 Ariz. 352 (2020), in which there was a guilt phase, an aggravation phase, and a penalty phase. Thus, the State's claim that the general jury instructions were sufficient to cure the prejudice is unpersuasive. As in *Kerr*, *supra*, the trial court here should have been "alert to deviations from proper argument and take[n] prompt corrective action as appropriate" – even though defense counsel did not object. *Kerr*, 981 F.2d at 1054 (citing *United States v. Roberts*, 618 F.2d 530 (9th Cir. 1980)). Instead, the trial court was silent. Given the short length of this trial and the absence of a guilt or aggravation phase, the standard jury instructions in this case were insufficient to neutralize the prejudice.

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[16] AB, at 34.
[17] Tr. 4/11/22, at 36, 37.
[18] *Id.* at 33-74.
[19] *Id.* at 75-146.

The fact that "immediately preceding" the comment the prosecutor told jurors to evaluate evidence "without sympathy, prejudice, [or] emotion" does not diminish the sting of the comparative mercy argument.[20] If restating a correct jury instruction before making an improper statement was sufficient to prevent a reviewing court from finding prejudice, fundamental error review would be rendered dead letter in Arizona. It would also encourage prosecutors to commit prosecutorial misconduct with impunity, so long as they also cite to the jury instructions when doing so.

4. The prosecutor used the victims' statements to compare the value of A.R.'s life with Mr. Montoya's life.

Contrary to the State's claim, the fact that the victims' statements focused on their loss, not A.R.'s loss, is immaterial.[21] The prosecutor's comments here, like those in *State v. Gallardo*, 225 Ariz. 560 (2010), were improper. In *Gallardo*, the prosecutor argued "that maximum security inmates are allowed to … make phone calls[] and see visitors." 225 Ariz. at 569 ¶¶41-42. After "[n]oting that victim impact statements could rebut mitigation," the prosecutor went on to ask the jury, "Do you think [the victim's father is] going to be able to call his son, Rudy…[?]" *Id.* Defense counsel "objected to the comparison between Gallardo and the victim" and the court sustained the objection. *Id.* ¶41.

[20] AB, at 33-34.
[21] *See* AB, at 39.

This Court did not deem these statements proper, finding instead that because (1) there was a sustained objection, (2) the trial court instructed the jurors not to be swayed by sympathy, and (3) the jurors were instructed to "disregard any question to which the judge sustained an objection[,]" reversal was not required. *Id.* ¶42. In this case, none of these curative measures alleviated "the effect of the prosecutor's statements" as they did in *Gallardo*. Rather, absent a specific instruction to disregard the improper comments, the trial court's general jury instructions failed to neutralize the harm to Mr. Montoya. *See United States v. Sanchez*, 659 F.3d 1252 (9th Cir. 2011); *United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005); *United States v. Kerr*, 981 F.2d 1050 (9th Cir. 1992). In Mr. Montoya's case – where guilt was admitted, aggravators were admitted, and mitigation was severely limited – the comment was likely to affect the jurors' ability to judge the evidence fairly.

Instead of acknowledging that the limitation of mitigation presented in this case makes the effect of the prosecutor's statements more impactful, the State attempts to use the absence of mitigation against Mr. Montoya: "[T]he evidence supporting the death sentence was overwhelming, especially in comparison with the relatively weak mitigation."[22] The State further downplays the effect of the prosecutor's improper comments by arguing that "Montoya cannot show the victim

[22] AB, at 40.

impact comments during closing arguments after nine days of hearing testimony and evidence would have altered the jury's verdicts."[23] However, this is misleading. The jury only heard testimony and evidence for seven days, not nine, after voir dire.[24] Seven days of testimony in a capital case is a scant presentation of evidence – and the odds that the prosecutor's comments affected the jury's verdict is much greater in this case than in other capital cases. *See, e.g., State v. Moody*, 208 Ariz. 424, 437 ¶15 (2004) (15-day guilt phase).

C. The prosecutor improperly used mitigation evidence as non-statutory aggravation.

1. Acceptance of responsibility.

The State argues that the prosecutor's claim that Mr. Montoya accepted responsibility as a calculated and strategic move to argue acceptance of responsibility at sentencing is a reasonable inference from the evidence presented.[25] However, the evidence presented does not support that inference. The State claims that Mr. Montoya "initially denied any involvement in the murder."[26] This is not accurate. Mr. Montoya initially told the interviewing detective he did

[23] AB, at 41.
[24] *See* Tr. 3/21/22 (Motions); Tr. 3/22/22 (Voir Dire); Tr. 3/23/22 (Voir Dire); Tr. 3/24/22 (Motions); Tr. 3/28/22 (Trial); Tr. 3/29/22 (Trial); Tr. 3/30/22 (Trial); Tr. 3/31/22 (Trial); Tr. 4/4/22 (Trial); 4/5/22 (Trial); 4/6/22 (Trial/Victim Impact Statements); 4/7/22 (Oral Argument on Final Jury Instructions and Juror 6); Tr. 4/11/22 (Closing Arguments).
[25] AB, at 45.
[26] AB, at 45.

not remember what had happened over the past week.[27] When asked point blank whether he killed A.R., Mr. Montoya said, "I don't think so." When the question was repeated, he said, "[A.R.]'s dead?"[28] This is hardly the "denial" the State would have this Court believe. Rather, it indicates that because of his Coricidin abuse, his memory of the previous weeks was faulty. Further, Detective Roe also testified during cross-examination that Montoya said in the aforementioned interview: "If I've done something wrong, I am no way special and I deserve to answer for that."[29] Thus, Mr. Montoya's statements actually signified an intent to accept responsibility from the beginning of the case, in direct contrast to the State's claim.

Mitigation rebuttal does not give prosecutors a license to mislead the jury with speculative arguments not supported by the record, as occurred here. This penalty phase was allowed to "devolve into a limitless and standardless assault on the defendant's character and history." *State v. Hampton*, 213 Ariz. 167, 180 ¶51 (2006). Like in *State v. Johnson*, 247 Ariz. 166 (2019), the prosecutor's argument here was mere speculation, not a reasonable interpretation of the evidence presented. Paired with Mr. Montoya's unwillingness to present mitigation because he didn't want to make excuses for his actions, and as argued in section II(C)(1) of

[27] Tr. 4/5/22, at 17.
[28] *Id.* at 22-23.
[29] *Id.* at 97.

the Opening Brief, the prosecutor's accusation that Mr. Montoya pleaded guilty as a tactical strategy is unsupported by the record and resulted in incalculable prejudice in this case.[30]

2. That defendant has a daughter and was abandoned by his father and stepfather.

Mr. Montoya stands by and relies upon the arguments regarding this issue as presented in his Opening Brief.[31]

D. The prosecutor misstated the law and invited jurors to misapply the jury instructions by informing jurors that they could not consider as mitigating any fact they deemed an excuse for the crimes.

Contrary to the State's argument, the prosecutor's comment that if jurors "find a fact or circumstance that was offered to be nothing more than an excuse or justification for the murder, then it isn't mitigating" does not mirror the jury instruction – it turns it on its head.[32] The purpose of the instruction is to ensure that jurors consider all mitigation by letting them know that mitigation is not an excuse or justification and that they may not ignore mitigation simply because they think it is an excuse. *See* RAJI Capital Case 2.3 (5th Ed.) (citing *Coker v. Georgia*, 433 U.S. 584, 590-91 (1977)).

[30] OB, at 39-46.
[31] OB, at 47-49.
[32] AB, at 49.

In *Coker*, mitigating circumstances were defined as "circumstances not constituting justification or excuse for the offense in question, but which, *in fairness and mercy*, may be considered as extenuating or reducing the degree of moral culpability or punishment." 433 U.S. at 590-91 (emphasis added). The prosecutor twisted the wording of the instruction to imply that mitigating circumstances, which must be considered *in fairness and mercy* in order to prevent arbitrary and capricious death sentences, could not be considered as mitigating by individual jurors who found the mitigating circumstances a mere excuse. The likelihood that the prosecutor's improper comment misled and confused the jurors is substantial. At the very least, the misstatement thwarted the intention of the instruction from *Coker*.

This court's decision in *State v. (Sammantha) Allen*, 253 Ariz. 306, 359 ¶¶198-99 (2022), failed to address exactly *how* the prosecutor's similar "rephrasing" of the instruction in that case did not undermine the purpose of the instruction.[33] Further, the rephrasing fails to guarantee the fairness to the accused mandated by United States Supreme Court jurisprudence. *See Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982) (noting that "[b]eginning with *Furman*, the Court has attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the

[33] *See* AB, at 49.

accused."). In *State v. Prince*, 226 Ariz. 516 (2011), this Court found that the prosecutor's misconduct of mislabeling mitigating circumstances as mere excuses and arguing that certain proffered mitigators were aggravating circumstances did not deprive the defendant of a fair trial in large part because "of the trial court's sustaining defense objections and giving curative instructions to the jury." 226 Ariz. at 538-39. There were no objections and no curative instructions in this case.

Finally, jury instructions are not always sufficient to eliminate all prejudice from prosecutorial misconduct. *State v. Leon*, 190 Ariz. 159, 163 (1997) (finding an instruction which told the jury not to interpret counsel's vouching to mean that evidence outside record pointed to guilt was insufficient to eliminate any damage). In a case where so little mitigation was allowed to be presented, the prosecutor's comments undermined Mr. Montoya's defense. *See State v. Murray*, 250 Ariz. 543, 551 ¶25 (2021). Moreover, the prosecutor's characterization of Mr. Montoya's addiction to Coricidin as his "go-to" excuse improperly punishes the defendant for being an addict. *See Robinson v. California*, 370 U.S. 660, 667 (1962) (finding statute making addiction to narcotics a crime constitutes cruel and unusual punishment).

E. The prosecutor's improper vouching through questioning of Detective Hansen and Dr. Fulginiti improperly bolstered the State's case and prejudiced Mr. Montoya.

The State claims that only a prosecutor's *argument* may constitute vouching. However, in *State v. Olaoye*, No. 1 CA-CR 19-0416, 2020 WL 782769 *3-4 ¶¶20-22 (mem. decision) (Ariz.App. Dec. 31, 2020) (rev. denied), the prosecutor's questions to the "lead detective whether every investigation by law enforcement is submitted for prosecution and whether every submission results in criminal charges" was held to be improper vouching because "[t]he only relevance for this line of questioning is to suggest the charges against [the defendant] show the case against him was strong." This is persuasive, not controlling, authority. The same occurred in this case. Further, this Court has recognized comments that "may not have adhered to the typical contours of 'vouching'" may be "nonetheless improper." *State v. Leon*, 190 Ariz. 159, 162 (1997). The prosecutor's questioning of Detective Hansen and Dr. Fulginiti constituted improper vouching in Mr. Montoya's case.

The State's reliance on *State v. Newell*, 212 Ariz. 389 (2006), is misplaced.[34] *Newell* involved statements in rebuttal closing that the case involved "3,000 pages of police reports" and that "[n]ot every witness was called" to testify, which were deemed a direct response to the defense's closing argument. *Newell*, 212 Ariz. at 402 ¶¶62-63. That is not the case here, where the vouching was injected into the proceedings by the State's improper questioning of its own witnesses during the

[34] AB, at 52.

presentation of the State's case. And because there was no objection or curative instruction by the court, the prejudice went unabated. *See Leon*, 190 Ariz. at 163 (noting that "because the record does not reflect a ruling or curative instruction by the court, the potential harm went unmitigated.").

F. The prosecutor erred by questioning Larry Binkley, the victim of prior crimes, about the impact of the prior crimes on Binkley and his wife.

The State's assertion that Binkley was only providing testimony regarding Mr. Montoya's character is patently false. His testimony went well beyond the limited factual testimony of the police officer-victims in *State v. Champagne*, 247 Ariz. 116 (2019). Mr. Binkley told the jury about how the prior crimes affected his wife (forcing her to get rid of her favorite car) and how it affected him (the loss of his family heirloom violin and the fact that the crimes left him feeling betrayed).[35] In addition, he testified as to the financial damages he incurred as a result of the prior crimes.[36] This is the definition of improper victim impact evidence the court was concerned about when making its ruling.

Evidence of the impact of previous crimes on prior victims is irrelevant and highly prejudicial. Questions such as these addressed in *State v. Holsinger*, 124 Ariz. 18, 21 (1979), "can leave in the minds of jurors all kinds of damaging and

[35] Tr. 3/29/22, at 38, 41, 43-44, 91.
[36] *Id.* at 41 (vehicle damage); 44-45 (violin damage); 46-47 (other items for which he was not reimbursed).

prejudicial but false or inadmissible facts, facts which can't be adequately rebutted by witness's testimony or instructions by the court." This Court has held that mitigation rebuttal must address the "thrust" of the mitigation:

> Trial courts can and should exclude evidence that is either irrelevant to the thrust of the defendant's mitigation or otherwise unfairly prejudicial. Nothing in our death penalty statutes strips courts of their authority to exclude evidence in the penalty phase if any probative value is substantially outweighed by the prejudicial nature of the evidence. 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 evaluation the relevance of such bad acts evidence to any mitigation offered.

State v. Hampton, 213 Ariz. 167, 180 ¶51 (2006). More recently, in *State v. Boggs*, 218 Ariz. 325, 339 ¶65 (2008), this Court held that "[e]vidence presented for rebuttal must be relevant to the mitigation proffered."

Further, this Court allowed the victim-officers to testify in *Champagne* as factual witnesses in part because their testimony was not cumulative. 247 Ariz. at 144 ¶96. Here, Binkley's testimony regarding the facts of the prior case was cumulative because a police officer had already so testified. Thus, even absent an objection, the court should have *sua sponte* stricken Binkley's response from the record and ordered the jury to disregard it considering its prior ruling the testimony

must remain "within the confines of *Champagne*."[37] The court clearly knew there was a line that could not be crossed regarding Binkley's testimony, and it had a duty – even absent an objection – to mitigate the harm when that line was crossed. The failure to do so ensured that the prejudice from the prosecutor's improper questioning and Binkley's responses went unaddressed and unabated.

G. The prosecutor's improper comments on Mr. Montoya's failure to testify were adverse and supported an unfavorable inference against him.

Contrary to the State's claims, the prosecutor's indirect comments on Mr. Montoya's failure to testify were adverse and supported an unfavorable inference.[38] *State v. Schrock*, 149 Ariz. 433, 438 (1986). In *State v. Ramos*, 235 Ariz. 330 (App. 2014), the court held that even an unintentional reference to the failure of the defendant to testify can result in fundamental error. Like in *Ramos*, the remarks here "operated as a penalty on [Mr. Montoya's] exercise of his constitutional right to remain silent." 235 Ariz. at 235 ¶14.

Any juror would naturally perceive the prosecutor's arguments to be a comment on Mr. Montoya's failure to testify or allocute. Reviewing courts, in determining whether a jury would perceive the prosecutor's argument as a comment on the failure to testify, generally consider whether the defendant is the

[37] Tr. 3/7/22, at 21.
[38] *See* AB, at 62-64.

only person who could explain or contradict the evidence. *See, e.g., State v. Still*, 119 Ariz. 549, 551 (1978). In this case, as the prosecutor herself pointed out to the jury, Mr. Montoya was the only person who could refute the State's evidence or explain the exact details of the crime.[39]

Mr. Montoya was prejudiced by the comments because the scant mitigation evidence offered in this case made it much more likely the improper comments would further "tip the scales in favor of the State" in the jury's decision on whether to impose death. *See State v. Rhodes*, 110 Ariz. 237, 238 (1973). The fact that these comments came so close in time after the victim impact statements, in which A.R.'s family discussed how painful it was not to know the details of what happened to her, tipped the scales further in the State's favor by encouraging jurors to decide the case based on emotion.

H. The persistent and pervasive misconduct in this case made a fair trial impossible.

As presented in his Opening Brief, the prosecutor's misconduct in this case was so pronounced and pervasive that it permeated the entire atmosphere of Mr. Montoya's penalty phase proceeding.[40] Additionally, the cumulative effect of the prosecutor's persistent and pervasive misconduct so infected Mr. Montoya's

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[39] Tr. 4/11/22, at 140 ("The only witness to him during these moments was [A.R.]....We don't know why he chose to kill in such a manner. Only he does.").
[40] OB, at 67-68.

penalty phase with unfairness, that the resulting convictions and death sentence are a denial of due process under the United States and Arizona Constitutions. U.S. Const. amends. V, VI, XIV; Ariz. Const. Art. II, §§ 4, 24.

Because this issue was adequately presented in his Opening Brief, Mr. Montoya relies on the arguments regarding this issue as presented there, except to point out that even if the State's comment that only one instance of misconduct – "the prosecutor's argument that [Mr.] Montoya relished the murder" – is arguably error, even non-errors count toward cumulative error. *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).

ARGUMENT II

The trial court violated Mr. Montoya's rights under the Sixth and Fourteenth Amendments by improperly limiting the scope of voir dire despite Arizona's abolishment of peremptory strikes and the requirements of *Morgan.*

A. Mr. Montoya adequately preserved his claim of error at trial.

As a preliminary matter, the State's assertion that Mr. Montoya failed to preserve his claim at trial is specious at best. As put forth in detail in the opening brief, defense counsel repeatedly and consistently requested a hypothetical that would allow Mr. Montoya to determine whether prospective jurors were predisposed to vote for death after finding someone guilty of first-degree murder and the existence of an aggravating circumstance but before hearing mitigation.[41] That Mr. Montoya did not repeatedly make the same objections over and over in front of prospective jurors does not negate Mr. Montoya's standing objection to the court's misguided belief that any hypothetical could not parse out the jurors' predisposition towards death at the close of the guilt and aggravation phases but rather must include a reference to mitigation in the same sentence as any question regarding the appropriate punishment for a guilty defendant.

[41] OB, at 70–83.

B. The trial court's actions prevented the empanelment of a properly vetted jury.

The State also dubiously proposes that the requirements of *Morgan v. Illinois*, 504 U.S. 719 (1992), were met because the jury questionnaire contained a question—following a description of mitigation and the penalty phase—that asked, "Will you, for whatever reason, automatically vote for the death penalty for someone convicted of First Degree Murder without considering the evidence about the Defendant's background, propensities, character, criminal record, or the circumstances of the offense?"[42] But *Morgan* dictates that "'defendants 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.'" *State v. Glassel*, 211 Ariz. 33, 45 ¶37 (2005) (quoting *State v. Jones*, 197 Ariz. 290, 303 ¶27 (2000) (construing *Morgan*)).

The wording of the question itself, combined with the fact that it came after a description of the penalty phase, suggests that a juror who refuses to consider mitigation would not be following the law and creates a situation where a law-abiding but nonetheless biased juror would always choose "No." This jury question—identified by the State[43] as *Morgan* compliant—highlights the very problem at issue here: by referring to mitigation in the question itself, there is no

[42] R. 355, at 25–26, 30.
[43] AB, at 75.

opportunity to reveal the prospective jurors' predisposition toward death upon conviction and the finding of an aggravating circumstance but before hearing mitigation.

Similarly, by requiring defense counsel's hypothetical to 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, the trial court eviscerated its own ability to empanel a fair and impartial jury. Of course, the jurors should have been asked if they would consider mitigation before making an ultimate decision on penalty—and in fact they were asked this. But the prospective jurors' predisposition toward a death sentence prior to hearing mitigation is of at least equal, if not greater, import. *See Morgan*, 504 U.S. at 733–34 ("Were *voir dire* not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would never do so.")

The trial court's error in insisting 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 only further compounded by the court's "follow the law" rehabilitation. "[T]he

belief that death should be imposed *ipso facto* upon conviction of a capital offense reflects directly on that individual's inability to follow the law. . . It 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." *Morgan*, 504 U.S. at 735. This is precisely why the comment to Rule 18.5—discouraging the court from using "follow the law" rehabilitation—exists.

Further, contrary to the State's assertion otherwise, *State v. Patterson*, 230 Ariz. 270 (2012), is hardly dispositive to this issue.[44] While certainly relevant, since the *Patterson* court held that "the appropriate inquiry was whether a juror could be impartial at the beginning of the penalty phase," it is unclear from the *Patterson* decision in what way the trial court in that particular case required defense counsel to "mention mitigation" if they were to use a hypothetical. *Patterson*, 230 Ariz. at 274 ¶11. Here, the problem was not that Mr. Montoya was required to mention mitigation—it is abundantly clear that he always intended to do so as part of his hypothetical[45]—but rather the error occurred when the trial court insisted 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

[44] AB, at 77.
[45] Tr. 3/22/22, at 44–48.

penalty for any person convicted of first-degree murder. By doing so, the trial court prevented Mr. Montoya from determining which prospective jurors may have predetermined to impose the death penalty.

More akin to the case at hand is *State v. Thompson*, 252 Ariz. 279, 294 ¶¶48–49 (2022), wherein this Court acknowledged that *Morgan* was the "seminal case governing the scope of voir dire" that must be permitted in order to comply with the Sixth and Fourteenth Amendment right to an impartial jury, including "the right to challenge for cause any prospective juror who would automatically vote to impose the death penalty." This Court found that the trial court did comply with *Morgan* when it cited with approval defense counsel's questioning of jurors about "any predisposition towards imposing the death penalty" by providing individual jurors with "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 guilty murder of that innocent victim?'" *Thompson*, 252 Ariz. at 294–95 ¶¶50, 52. This hypothetical was then followed with questions asking whether the juror would consider all mitigation evidence. *Id.* at 295 ¶52.

The phrasing used by Thompson's counsel is nearly indistinguishable from what Mr. Montoya's counsel proposed using in their hypothetical. Like counsel in *Thompson*, Mr. Montoya's counsel should have been permitted to determine

whether prospective jurors were predisposed toward death after the finding of a guilty verdict and an aggravating circumstance. Instead, the trial court's actions obfuscated counsel's ability to exercise Mr. Montoya's rights to a fair and impartial jury.

C. The trial court's unconstitutional restriction on voir dire requires reversal of Mr. Montoya's death sentence.

"[T]he Sixth and Fourteenth Amendments guarantee a defendant on trial for his life an impartial jury." *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988) (citing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)). "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Morgan*, 504 U.S. at 729. Here, the trial court's unreasonable restrictions on voir dire impeded Mr. Montoya's ability to discern which jurors would be unable to evaluate and determine punishment in a fair and impartial manner and to argue appropriate for-cause strikes of impaired jurors.

The trial court's insistence on a hypothetical that required Mr. Montoya to ask about mitigation in the same breath that 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' biases. Mr. Montoya was entitled to "inquiry discerning those jurors who … had predetermined the terminating issue of his trial, that being whether to impose the death penalty." *Morgan*, 504 U.S. at 736. Because Mr. Montoya was prevented

from effectively making this inquiry, "[t]he risk that such [biased] jurors may have been empaneled in this case and 'infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized.'" *Id.* (quoting *Turner v. Murray*, 476 U.S. 28, 36 (1986) (plurality opinion)).

Where, as here, the "inadequacy of *voir dire*" means the court cannot be sure that Mr. Montoya "was sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment, his sentence cannot stand." *Morgan*, 504 U.S. at 739 (citing *Turner*, 476 U.S. at 37). Accordingly, this Court must vacate Mr. Montoya's death sentence and remand for a new trial.

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. Juror 17's inclination toward the death penalty and disinclination to consider relevant mitigation disqualified him from deciding this case.

Contrary to the State's assertion, Juror 17's answers in the questionnaire do not, in fact, reveal "he was a fair and impartial juror."[46] The court noted that it found the juror's answers during voir dire "troubling," and the court was in the best position to observe Juror 17's demeanor. The court also noted that Juror 17 said "inconsistent things" and that he circled 10 out of 10 in favor of death, which the court states was "[p]retty strong."[47] Undoubtedly, this was a close call for the court. The State's suggestion that Juror 17 was clearly a fair and impartial juror is simply not convincing. As the prosecutor argued when asking the court to remove Juror 6 for cause, "Close calls should be – under these rules, a close call is preponderance of the evidence."[48]

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[46] AB, at 84.
[47] Tr. 3/24/22, at 118.
[48] *Id.* at 97.

In a capital case, in which almost no mitigation would be presented, the court abused its discretion by not striking this juror because of his "troubling" inclination for death and inconsistent statements regarding whether he would consider Mr. Montoya's acceptance of responsibility – the strongest mitigating circumstance defense counsel was allowed to present in this case. Further, the standard for a for-cause strike is a preponderance of the evidence. Ariz. R. Crim. P. 18.5(h) ("The party challenging a juror for cause has the burden to establish by a preponderance of the evidence that the juror cannot render a fair and impartial verdict."). If it was a close call for the court, the ruling should have gone in favor of the party seeking removal given that peremptory strikes are no longer available.

The cases relied upon by the State[49] to argue that the trial court was within its broad discretion to refuse to strike Juror 17 are premised on a defendant's ability to use peremptory challenges to strike potentially biased jurors after a for-cause challenge is denied:

> The rules presume that any unqualified or biased juror will be excused for cause, but they also provide another mechanism in the peremptory challenge to achieve this result. If an unqualified or biased juror remains after the for-cause challenge, that juror can be struck and an impartial jury achieved.

[49] AB, at 83-86 (citing *State v. Johnson*, 247 Ariz. 166 (2019); *State v. Acuna Valenzuela*, 245 Ariz. 197 (2018); *State v. Velazquez*, 216 Ariz. 300 (2007); *State v. Lavers*, 168 Ariz. 376 (1991)).

State v. Rubio, 219 Ariz. 177, 180 ¶9 (App. 2008). Deferring to the court's broad discretion given the unavailability of peremptory strikes fails to ensure that fair and impartial juries are empaneled. Arizona was the first state in the country to eliminate peremptory strikes in January 2022. Ariz. Admin. Order R-21-0020. This Court simultaneously adopted a new comment to Rule 18.5 discouraging judges 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." Ariz. Admin. Order R-21-0045. It is precisely because peremptory strikes are no longer available that for-cause strike requests that are close calls, such as this one, should have been granted. It was an abuse of discretion to fail to do so.

B. The trial court abused its discretion in designating Juror 6 an alternate without reasonable grounds and committed structural error by failing to allow defense counsel further voir dire.

The State's claim that Mr. Montoya conceded the fact that Juror 6 fell asleep "during a 'very significant and important … part of the state's presentation'" is not exactly true.[50] Mr. Montoya acknowledged that the audio recording of his interview was "arguably critical," but also noted that the prosecutor's questioning of the detective about the recording was extensive and thorough, rendering the

[50] AB, at 93.

impact of Juror 6's "nodding off" two or three times during the audio recording minimal.[51]

The judge did "not see evidence that [Juror 6] was actually sleeping" on April 4, 2022.[52] Furthermore, although the judge said he had "observed her jerk three times" the following day, as the State points out, he then said "on two times it was extremely clear. The other time it wasn't quite as clear."[53] Therefore, like in *State v. Prince*, 226 Ariz. 516 (2011), there was no indication that Juror 6 "missed large portions of the trial." 226 Ariz. at 533 ¶58. In addition, there is no evidence that Juror 6 was sleeping at any point during the rest of the trial.[54] If she continued to nod off, either the prosecutor, the judge, or defense counsel would have noted that in their oral arguments, written motions, and ruling on the issue.

Next, the State attempts to refute Mr. Montoya's argument that COVID-19 protocols should limit this Court's deference to the trial judge's observations of Juror 6 by citing to authority that requires deference to the trial judge's observations.[55] This circular logic is unconvincing. This was one of Maricopa County's first capital trials conducted with COVID-19 protocols in place. The trial court's ability to observe jurors for the purpose of determining whether a juror is

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[51] *Id.*
[52] Tr. 4/11/22, at 14.
[53] *Id.* at 15.
[54] *See* Tr. 4/6/22; 4/7/22; 4/11/22.
[55] AB, at 94.

sleeping or experiencing uncontrollable muscle movements caused by prescription medication was limited by the protocols in place at trial. The State cannot refute that fact. Thus, the great deference this Court generally extends to a trial judge's observations should be narrowed in Mr. Montoya's case because of those limitations.

The State does not address the court's denial of defense counsel's request to voir dire Juror 6 further about whether she suffers from tardive dyskinesia.[56] Failure to grant that request and develop the record regarding Juror 6's perceived sleeping further undermines the deference this Court should extend to the trial judge. Moreover, the court's denial of defense counsel's request for additional voir dire was in itself a clearly erroneous decision in a capital case in which the State is seeking to dismiss a life-scrupled juror who would have been the State's first peremptory strike if still available.[57] *State v. Anderson (Anderson I)*, 197 Ariz. 314, 318 ¶23 & n.5 (2000). The failure to allow defense counsel to conduct additional voir dire before the court designated this life-scrupled juror an alternate was structural error requiring reversal. *Id.*

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[56] *See* AB at 91-94. *See also* Tr. 4/7/22, at 45-46.

[57] Tr. 4/7/22, at 43 (noting that the State was so adamant about dismissing this juror "because this was the juror they had identified right from the get-go that they don't like and would have been their first peremptory strike…"); Tr. 4/7/22, at 45 (noting that although Juror 6 would easily have been designated an alternate in a non-capital case, "death cases are different…").

ARGUMENT IV

The trial court's admission of gruesome decomposition 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 at issue were clearly identified in the opening brief.

Mr. Montoya is uncertain upon what basis the State could make the spurious assertion that he did not adequately identify in the opening brief which gruesome photographs were improperly admitted.[58] Mr. Montoya not only stated that there were ten photographs that depicted the decomposition of A.R.'s body that were relevant to the claim and identified these photographs as Exhibits 81–85, 87, and 89–92, but also specified at exactly what point in the testimony of three separate witnesses the photographs were referenced.[59] While Mr. Montoya did describe two of the photographs in greater detail than the other eight, his argument challenging the admission of the gruesome decomposition photographs clearly encompassed all ten referenced photographs identified as Exhibits 81–85, 87, and 89–92.

[58] AB, at 96.
[59] OB, at 107–111.

B. The ten gruesome photographs depicting A.R.'s decomposed body were irrelevant or minimally relevant at most, were unfairly prejudicial, and improperly inflamed the passions of the jury when deliberating Mr. Montoya's sentence.

As discussed in detail in the opening brief, the ten gruesome decomposition photographs were either irrelevant or minimally relevant when considered in context with 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.[60] *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"). Mr. Montoya does not dispute that caselaw holds that the cause of death is relevant in the penalty phase; but here the cause of death was established by Dr. Fulginiti through her testimony wherein she referenced photographs of A.R.'s sanitized cranial vault to detail 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 were consistent with being struck with the type of hammer found at the crime scene.[61] Further, forensic pathologist

[60] OB, at 109–113.
[61] Tr. 4/4/22, at 68–86; Exhibits 95–107, 109, 112–13, 115.

Dr. Bucholtz, when discussing the location and size of injuries to A.R.'s skull, relied upon several diagrams to illustrate her testimony.[62]

The testimony related to Exhibits 82–85, 87, and 89–92, however, involved discussion of the state of decomposition, including discoloration, the sloughing of skin tissue, the extruded decomposition fluid, and bloating caused by released gases.[63] This chemical process of the breakdown of organic matter after death is simply not relevant to the cause of death. Rather, the true purpose of choosing to admit the decomposition photographs was simply to inflame the jury.

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 decomposition photographs did not go to rebut the thrust of mitigation and did nothing to prove or disprove any relevant, uncontested fact. While 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,[64] the error is only

[62] Tr. 4/4/22, at 42–49; Exhibit 451.
[63] Tr. 4/4/22, at 28–38.
[64] Exhibits 90–91.

compounded by the fact that ten photographs depicting decomposition were admitted.

This erroneous admission of unduly prejudicial, gruesome decomposition photographs unfairly inflamed the jurors when they deliberated Mr. Montoya's sentence and permitted the jurors to render a death verdict based not on reason but on emotion. A penalty decision based on passion is arbitrary and capricious, and as such is unconstitutional. *See Gardner v. Florida*, 430 U.S. 349, 358 (1977) (holding an Eighth Amendment compliant decision to impose the death penalty must not only be, but also appear to be, "based on reason rather than caprice or emotion."); *see also*, *State v. Pandeli (Pandeli IV)*, 215 Ariz. 514, 527 ¶43 (2007) (stating the Fourteenth Amendment limits the admission of irrelevant or unduly prejudicial rebuttal evidence). For this reason, Mr. Montoya's death sentence must be vacated.

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 the State's imposition of cruel and unusual punishment, and to the assistance of counsel.

A. Allowing a capital defendant to waive mitigation violates the Eighth Amendment's prohibition on cruel and unusual punishments because it creates too great a risk of an arbitrary and capricious death verdict.

The State relies upon *Schriro v. Landrigan*, 550 U.S. 465 (2007), for the proposition that the United States Supreme Court has never held that a defendant *may not* waive mitigation.[65] While this is true, the Court has also never held that a represented capital defendant *may* waive mitigation. The Court acknowledged this fact in *Landrigan*. 550 U.S. at 478.

The question in *Landrigan* concerned whether the Arizona Supreme Court's decision amounted to an "'unreasonable application of[] clearly established Federal Law, as determined by the Supreme Court of the United States.'" *Id.* (quoting 28 U.S.C. § 2254). Notably, in discussing whether Landrigan could demonstrate prejudice under *Strickland*, the Court acknowledged that it has never addressed "a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court." *Id.* at 478. If the footnote in *Blystone v.*

[65] AB, at 109.

Pennsylvania, 494 U.S. 299 (1990), truly stood for the proposition that a defendant may prevent his attorneys from presenting mitigation, surely the Court would have cited its own 1990 decision as "clearly established Federal Law" on this issue. It did not. In fact, there is no mention of *Blystone* anywhere in the *Landrigan* opinion. This Court's continued insistence that its prior decisions holding that a capital defendant may waive mitigation is supported by a footnote in the *Blystone* decision is error.

Moreover, the standard of review is lower in Mr. Montoya's case. *Landrigan* involved a habeas corpus proceeding in which the Court had to determine whether the lower court's determination that counsel's failure to present mitigation constituted ineffective assistance of counsel was *unreasonable* under the Antiterrorism and Effective Death Penalty Act. This is "a substantially higher threshold" than whether a trial court's decision was *incorrect* in a direct appeal. 550 U.S. at 473.

In addition, Landrigan's objective was death, not life. The Court noted that Landrigan wanted to be put to death, having told the sentencing court: "I think if you want to give me the death penalty, just bring it right on. I'm ready for it."[66] *Id.* at 479-80. The objective of Mr. Montoya's defense, conversely, was life, not death.

[66] *See* OB, at 125 (noting the defendant in *State v. Hausner*, 230 Ariz. 60 (2012) also asked for a death sentence).

Once that fundamental decision was made, it was defense counsel's ultimate prerogative as to how that objective was achieved.

Contrary to the State's assertions, a knowing and intelligent waiver of mitigation by a defendant does not absolve the State from constitutional prohibitions on imposing cruel and unusual punishments.[67] As the United States Supreme Court has noted, "the Eighth Amendment is a restraint upon the exercise of legislative power." *Gregg v. Georgia*, 428 U.S. 153, 174 (1976). A death sentence imposed in an arbitrary and capricious manner constitutes cruel and unusual punishment, which the government is prohibited from imposing – even if a defendant agrees to it.

The State again asserts that constitutional deficiencies in Mr. Montoya's death sentence may be alleviated by jury instructions.[68] This misses the point. Properly instructing the jury to consider all mitigation does nothing to ensure the individualized sentencing required to pass Eighth Amendment muster. When little to no mitigation is presented, the individualized sentencing that is "constitutionally indispensable" is lacking, rendering the sentence arbitrary and capricious under the Eighth Amendment. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

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[67] *See* AB, at 111.
[68] AB, at 112-13.

The State next argues that the "'expressly held' language Montoya argues misapplied *Blystone's* holding in *Riley*, addressed the constitutionality of A.R.S. 13-752(G) and not whether a defendant can waive mitigation."[69] The State then entreats this Court to reject the same argument here. However, Mr. Montoya did not raise the issue that the statute violates the Eighth Amendment. Rather, he claims that when a defendant waives mitigation, the resulting sentence is arbitrary and capricious and constitutes cruel and unusual punishment in violation of the Eighth Amendment.

It is "desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Gregg*, 428 U.S. at 204. As the Court noted in *Gregg*:

> If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.

Id. at 190. Allowing a defendant in a capital case to waive mitigation deprives the sentencing body of the accurate information that is an "indispensable prerequisite" for a capital sentencing procedure that functions in a "consistent and rational

[69] AB, at 113.

manner." *Id.* at 189-90. There can be no consistency or rationality in Arizona's capital sentencing procedure where one jury, charged with the solemn duty of deciding whether to impose a death sentence, is presented with all relevant mitigating information about a defendant, while another is presented with none. This is true regardless of whether the legislature, the court, defense counsel, or the defendant himself is the one who prevents the mitigation from being presented.

B. Allowing a represented defendant to control the presentation of mitigation violates the Sixth Amendment right to competent counsel.

The State cites to *McCoy v. Louisiana*, 584 U.S. 414 (2018), for the notion that the presentation of mitigation "is a fundamental decision within the control of the defendant."[70] However, *McCoy* does not support the State's argument. *McCoy* addressed the issue of whether an attorney may *admit guilt* over a defendant's objection. 584 U.S. at 421-22. The United States Supreme Court had previously held that the decision of whether to plead guilty is a fundamental decision left to defendants. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). The Court has never deemed a defendant's waiver of mitigation to be one of those fundamental decisions. Once a defendant makes the fundamental decision of whether to admit guilt or maintain innocence, the decision regarding which mitigation evidence to present is a strategic choice about how best to achieve that objective. *Cf. McCoy*,

[70] AB, at 116.

584 U.S. at 422 (noting that maintaining innocence is not a "strategic choice[]about how best to *achieve* a client's objectives; [it is a] choice[] about what the client's objectives in fact *are*.") (emphasis in original).

The State next cites Arizona case law recognizing a defendant's freedom to limit mitigation evidence when there is a strong privacy interest involved.[71] However, a substantial amount of the mitigation evidence that would have been presented in Mr. Montoya's case did not involve a strong privacy interest. There is no strong privacy interest in his substance abuse issues and expert testimony related to the effects of Coricidin; testimony of family, friends, and coworkers regarding his character; educational accomplishments; gainful employment on probation; and good behavior in prison, for example.[72]

The State argues that because neither *State v. Pandeli*, 242 Ariz. 175 (2017) nor *Strickland v. Washington*, 466 U.S. 668 (1984) involved a defendant who waived mitigation, they do not support Mr. Montoya's claims.[73] However, this argument completely misses the mark. The point is that this Court and the United States Supreme Court have deemed the presentation of mitigation among the strategy decisions left to counsel, not a fundamental decision reserved solely for

[71] AB, at 115-16 (citing *State v. Roscoe*, 184 Ariz. 484, 499 (1996); *State v. Kayer*, 194 Ariz. 423, 437 ¶46 (1999)).
[72] R. 247.
[73] AB, at 118.

the defendant. Designating mitigation presentation decisions as strategic to deny ineffective assistance of counsel claims, but fundamental for purposes of mitigation waiver, allows the State to enjoy the best of both worlds – at the expense of not only the defendant's rights under the constitution but also the appearance of fairness in the legal system.

The State cites to *State v. Kayer*, 194 Ariz. 423 (1999) for the claim that Arizona has addressed whether the decision to waive mitigation is fundamental or strategic. The State notes the rationale behind this Court's holding in *Kayer* that finding the presentation of mitigation to be a strategy decision would create an anomaly between an unrepresented defendant who would have exclusive control over mitigation and a represented defendant who would have none.[74] However, this Court did not address the fact that the same "anomaly" would – and does – exist for every strategic decision. An unrepresented defendant would also have full control over which witnesses to call and which defense theories to forego, for example. *See, e.g., State v. Bigger*, 251 Ariz. 402, 409 ¶¶17, 19 (2021) (theory of defense); 410 ¶21 (witnesses to call). This "anomaly" has not prevented this Court from deeming other decisions as strategic – even in capital cases. *See, e.g., id.* The Court has offered no justification for designating the decision to waive mitigation in a capital case as fundamental simply because an unrepresented defendant could

[74] AB, at 120.

have waived it. Moreover, just as an attorney's decision not to raise certain defense theories or not to call certain witnesses (even when the defendant disagrees with those decisions) does not violate a defendant's trial autonomy, neither does an attorney's presentation of mitigation evidence over a defendant's objection disrupt that autonomy.

The State claims that *Indiana v. Edwards*, 554 U.S. 164 (2008) does not apply to Mr. Montoya's case because his competency was not at issue.[75] However, the State misunderstands Mr. Montoya's argument. *Edwards* was cited for the proposition that the Sixth Amendment right to trial autonomy must yield to the appearance of fairness in certain situations. 554 U.S. at 177. Mr. Montoya asserts that whether a sentencing body receives constitutionally indispensable mitigation information before determining "whether a defendant shall live or die" is one of those situations. *Gregg*, 428 U.S. at 190.

[75] AB, at 120-21.

ARGUMENT VI

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

Whether victim impact statements are unduly prejudicial and result in a fundamentally unfair trial must be assessed in light of the particular circumstances of each case. *See, e.g., State v. Burns*, 237 Ariz. 1, 30 ¶140-41 (2015) (determining whether victim impact statements were unduly prejudicial and resulted in fundamental unfairness based "[o]n the record before" the Court). The State, with one brief sentence, concludes the victims' statements about the defendant "were not unduly prejudicial."[76]

To support this conclusory assertion, the State cites to *State v. Rose*, 231 Ariz. 500, 513 ¶57 (2013). However, *Rose* involved a robust mitigation presentation. *Id.* ¶77 (noting "Rose presented evidence of alleged mental health problems, multiple head injuries, drug and alcohol addiction, low IQ, use of methamphetamine in the days before the murder, and emotional neglect from his father, among other mitigating factors.") Mr. Montoya's mitigation presentation can hardly be described as robust.

[76] AB, at 125.

The State argues any error in the victims' comments on the crime is harmless because "[t]he admitted aggravation and the circumstances of the offense clearly outweighed Montoya's limited mitigation of acceptance of responsibility and substance abuse."[77] However, it is precisely because the mitigation presentation was so paltry that the error is not harmless in Mr. Montoya's case.

The limitation on mitigation in Mr. Montoya's case rendered the victim impact statements unduly prejudicial for two reasons. First, there was no guilt phase or aggravation phase from which the jury could draw mitigation. *State v. Tucker*, 215 Ariz. 298, 317 ¶72 (2007) (noting jurors could consider any evidence "relevant in determining whether to impose a sentence less than death…."). Second, because the mitigation presentation was so lacking, the danger of undue prejudice was even greater in this case than in *Rose*.

The State does not address the fact that the judge could have easily prevented any errors in the victim impact statements by granting defense counsel's motion. Judges have the discretion *and have been encouraged by this Court* to require victim impact statements to be submitted to the court for review before they were made in open court. *See, e.g., Burns*, 237 Ariz. at 30 ¶139 (noting "a trial judge must take an active role in reviewing victim impact evidence to screen for potential unfair prejudice.") (citing *Rose*, 231 Ariz. at 511 ¶47; *State v. Carlson*,

[77] AB, at 127-28.

237 Ariz. 381, 397 ¶ 61 (2015) ("And we again urge prosecutors and judges to carefully review potential victim impact evidence for compliance with the rules.")). The court's failure to exercise that discretion here, upon request by defense counsel, was an abuse of discretion. *Garcia v. Butler in and for County of Pima*, 251 Ariz. 191, 196 ¶23 (2021) (court's belief that it lacked discretion to deny State's request for SVP screening constituted an abuse of discretion); *State v. McLemore*, 230 Ariz. 571, 575 ¶15 (App. 2012) ("'A court's refusal or failure to exercise its discretion may be treated as an abuse of discretion.'") (quoting *State v. Garza*, 192 Ariz. 171, 175 ¶16 (1998)).

ARGUMENT VII

The trial court's incomplete instruction regarding the especially cruel or heinous aggravator permitted the jury to improperly weigh this aggravator twice when it deliberated Mr. Montoya's sentence.

The State does not contest the fact that the trial court's instruction was incomplete and failed to instruct the jury that Mr. Montoya's especially cruel and especially heinous admissions could only be counted as one aggravating circumstance. This Court presumes that jurors followed the trial court's instructions. *State v. Payne*, 233 Ariz. 484, 518 ¶151 (2013). A verdict based upon jury instructions that mislead the jurors must be vacated. *State v. Doerr*, 193 Ariz. 56, 64–65 ¶35 (1998) (citing *State v. Schrock*, 139 Ariz. 433, 440 (1986). Here, the omission in the jury instructions rendered those instructions misleading.

The State cited to *State v. Felix*, 237 Ariz. 280, 285 ¶18 (App. 2015), in support of the proposition that counsel's arguments can sometimes cure "instructional ambiguity, or error."[78] While this is so, the *Felix* court actually found in that instance that the prosecutor's statements did **not** "render[] the incorrect jury instruction immaterial." *Id.*

Here, the jury instructions—which were both read to the jurors and provided in writing for them to consult during deliberations—omitted the crucial direction to

[78] AB, at 130.

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." Crim. RAJI, Capital Case 1.6(d) (2021). The State asserts that the erroneous instruction was cured by the prosecution's statements in closing argument that although "there are two components to the aggravator proven" that "this is just one aggravating factor."[79] But the prosecutor also told the jurors that both prongs should be considered when determining the "value" given to the aggravator.[80] The connotation is unclear. Does this mean that although it is categorized as only one aggravator that the jurors can "count" the aggravator twice?

If so, this was a misstatement of the law. 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.").

[79] AB, at 131; Tr. 4/11/22, at 87, 98.
[80] Tr. 4/11/22, at 87.

As in *Felix*, here we cannot know that two short, confusing statements in an extensive closing argument were enough to render the incomplete instruction immaterial. If anything, it is more likely that the prosecutor's statements injected even more ambiguity and "cured" nothing.

"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 v. Georgia*, 446 U.S. 420, 428 (1980) (cleaned up)). Where, as here, an instruction 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, that instruction does not properly channel the jury's discretion. Accordingly, Mr. Montoya's death sentence must be vacated.

ARGUMENT VIII

The trial court erred when it failed to properly advise Mr. Montoya as to the waiver of the right to competent post-conviction counsel and this error was fundamental and prejudicial.

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

The State does not contest the fact that the trial court never informed Mr. Montoya that by entering a plea of guilty to both capital and non-capital counts that he would be waiving the right to the effective assistance of counsel in his first post-conviction proceedings. The State, however, without any legal basis, suggests that the right to effective post-conviction counsel in a plea matter is merely a procedural mechanism and that there is no difference in the rights afforded in a direct appeal and in an "of-right" post-conviction proceeding.[81] This ignores well-settled law.

Defendants have a constitutional right to competent counsel in their first of-right review, whether it be on direct appeal after a trial or on post-conviction review 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;

[81] AB, at 136.

Ariz. Const. art. 2, §§ 4, 24. A defendant who pleads guilty to only non-capital offenses would proceed under Rule 33 of the Arizona Rules of Criminal Procedure. Rule 33 simply provides the mechanism by which that defendant can exert his constitutional right to competent counsel in his first of-right review, *i.e.*, in a petition for post-conviction relief. *See Evitts v. Lucey*, 469 U.S. 387, 396 (1985) ("A first appeal as of right [] is not adjudicated in accord with due process of law if the defendant does not have the effective assistance of an attorney.") This proceeding would encompass the review of ineffective assistance of trial counsel claims. *See* Ariz. R. Crim. P. 33.2(2); *Pruett*, 185 Ariz. at 130–31 (noting that because pleading defendants must waive their right to direct appeal, they are "constitutionally entitled to the effective assistance of counsel on [a] first petition for post-conviction relief, the counterpart of a direct appeal.")

On the other hand, a capital defendant who pleads guilty or is found guilty after a trial has their first of-right review through the mechanism of a direct appeal under Rule 31 of the Arizona Rules of Criminal Procedure. This of-right review does not encompass the review of ineffective assistance of counsel claims. *State v. Sprietz*, 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 the appellate courts.") Rather, the defendant must raise any ineffective assistance of counsel claims in the collateral

Rule 32 post-conviction proceedings. But because the Rule 32 proceedings are not a first of-right review, there is no Sixth Amendment right to competent counsel in Rule 32 proceedings. *See State v. Mata*, 185 Ariz. 319, 336–37 (1996) (holding there is no Sixth Amendment right to the effective assistance of counsel in Rule 32 collateral proceedings) (citing *Bonin v. Vasquez*, 999 F.2d 425, 429–30 (9th Cir. 1993)).

Contrary to the State's assertion otherwise, by pleading guilty to both capital and non-capital offenses in the same proceeding, Mr. Montoya essentially lost the right to have competent counsel review the effectiveness of his trial counsel. As such, he should have been advised that he was waiving this constitutional right. Instead, the trial court's plea colloquy failed to meet the minimum requirements of *Boykin v. Alabama*, 395 U.S. 238, 243–44 (1969), that a defendant have "a full understanding of what the plea connotes and of its consequences."

"The requirements of *Boykin* are met when it appears from a consideration of the entire record that the accused was aware that he was waiving [his constitutional] rights and it appears that it was a knowing and voluntary waiver." *State v. Rose*, 231 Ariz. 500, 508 ¶31 (2013) (quoting *State v. Henry*, 114 Ariz. 494 (1977)). It is evident upon this record that Mr. Montoya was neither advised nor aware that he was waiving the right to competent post-conviction counsel to review claims of ineffective assistance of counsel. This resulted in an unknowing

and unintelligent waiver of rights which rendered the guilty pleas to Counts 2 through 8 involuntary. *See McCarthy v. U.S.*, 394 U.S. 459, 466 (1969) (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.'") (quoting *Johnston v. Zerbst*, 304 U.S. 458, 464 (1938)).

B. The trial court's error was fundamental and prejudicial.

As discussed in detail in the opening brief,[82] the trial court's error in failing to properly advise Mr. Montoya was fundamental because it went to the foundation of his case by depriving him of due process of law. *See State v. Escalante*, 245 Ariz. 135, 141 ¶18 (2018) (An error generally goes to the "foundation of a case" if it … deprives the defendant of constitutionally guaranteed procedures.") (citations omitted). Rule 17.2 of the Arizona Rules of Criminal Procedure, which requires the trial court to advise a defendant of constitutional rights waived by pleading guilty, stems from the due process right guaranteed by the Fourteenth Amendment. *See Boykin*, 395 U.S. at 243, n.5 ("A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.'") (quoting

[82] OB, at 155–56.

McCarthy, 394 U.S. at 465 (cleaned up)). Because the court's omission deprived Mr. Montoya of his right to due process—a constitutionally guaranteed right—the error was fundamental.

The error was also fundamental because it deprived Mr. Montoya of the constitutional right essential to his defense on appeal, *i.e.*, the right to competent counsel to review any claims of ineffective assistance of trial counsel.[83] *See Id.* at 141 ¶19 ("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."). This right is also embodied in the Arizona Constitution which grants every pleading defendant the right to appellate review. Ariz. Const. art. 2, § 24. Because the right to competent counsel only extends to the first of-right appeal and is not extended to collateral review under Rule 32 for pleading capital defendants, Mr. Montoya's waiver of this constitutional right was unknowing and involuntary.

Finally, to prove prejudice, Mr. Montoya must establish that absent the error, the outcome could have been different, *i.e.*, he could have decided not to plead guilty to the non-capital counts in the same proceeding as he pleaded guilty to a capital count. Had he been properly advised, Mr. Montoya could have requested that Counts 2 through 8 be severed from Count 1 for the purpose of pleading

[83] OB, at 156.

guilty, thereby ensuring his right to competent counsel on review under Rule 33. Because he was prejudiced by the error, Mr. Montoya should be allowed to withdraw his guilty plea. In the alternative, to the extent that the State argues that Mr. Montoya cannot adequately demonstrate prejudice on this record, this case should be remanded for an evidentiary hearing. *See State v. Carter*, 216 Ariz. 286, 290 ¶21 (App. 2007) ("a defendant who demonstrates a Rule 17 violation on appeal is permitted a hearing on remand to show [] prejudice").

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 March, 2024.

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