APPENDIX A

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

HON. KAREN L. O'CONNOR

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA	JEFFREY L SPARKS
v.	
JONATHAN IAN BURNS (001)	JONATHAN IAN BURNS 144740 ASPC FLORENCE CENTRAL D/RW PO BOX 8200 FLORENCE AZ 85132 GARRETT W SIMPSON VIKKI M LILES CAPITAL CASE MANAGER COURT ADMIN-CRIMINAL-PCR JUDGE O'CONNOR VICTIM WITNESS DIV-AG-CCC

April 4, 2019

CR2007-106833-001 DT

PCR RULING

The Court has received and considered Defendant's[1] Second Amended Petition[2] for Post-Conviction Relief ("Petition") (filed 2/27/2018), the State's Response (filed 5/14/2018), the Defendant's Reply (filed 8/30/2018), and Defendant's Notice of Supplemental Authority (filed 3/26/2019), as well as the court file and the record in this case, including all official reporter's transcripts of proceedings as relevant to the issues and argument presented by the defendant and State; and *State v. Burns*, 237 Ariz. 1, 344 P.3d 303 (2015). This is Defendant's first Rule 32 proceeding.

See *State v. Burns*, 237 Ariz. 1, 10–11, ¶¶ 2-6, 344 P.3d 303, 312–13 (2015) for the factual background.

A jury convicted Defendant of all charges: sexual assault, kidnapping, first-degree murder, and misconduct involving weapons. The jury unanimously

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[1] Because "[a] post-conviction proceeding is part of the original criminal actions and is not a separate action," the court identifies the defendant as "Defendant" rather than "Petitioner." Rule 32.3(a).

[2] Defendant's exhibits are numbered 1-141 and 143-144. Exhibits 1-141 were included and filed with the Petition; the Court located no Exhibit 142. In addition to certain apparently-substitution exhibits, included with the reply were (1) Exhibit 143, referenced in the body of the reply at 29; and (2) Exhibit 144, which was simply identified as being "attached" to the reply, at 36. The Court finds no indication that either was filed with the reply. The Court has nonetheless reviewed and considered the exhibits, as the State does not appear to have filed an objection.

found at the aggravation phase that Defendant (1) had a prior or contemporaneous felony conviction under A.R.S. § 13–751(F)(2); and (2) committed the murder in an especially cruel, heinous, or depraved manner under A.R.S. § 13–751(F)(6). Following the penalty phase, the jury determined that the mitigation presented was not sufficiently substantial to call for leniency and returned a verdict of death, and the court imposed the death sentence as found by the jury. In addition to imposing the death sentence for the murder, the court sentenced Defendant to consecutive prison terms totaling sixty-eight years for the other three convictions. *State v. Burns*, 237 Ariz. 1, ¶¶ 7-8, 344 P.3d 303, 313 (2015).

The Arizona Supreme Court affirmed the Defendant's convictions and death sentence in *State v. Burns*, 237 Ariz. 1, 344 P.3d 303 (2015). The 26 issues raised by the Defendant on direct appeal and considered by the Arizona Supreme Court, *inter alia*, included:

(1) The trial court did not abuse its discretion in denying continuance motions, limiting defendant's *voir dire* of prospective jurors, striking 3 specific prospective jurors for cause, allowing admission of GHB evidence, instructing the jury on the definition of "without consent," admission of Defendant's jail calls, denying Defendant's motion for mistrial, allowing admission of photographs, a ballistics expert, precluding testimony from some of defendant's expert witnesses, not limiting the State's cross-examination of defendant's experts, or denying defendant's

motion for mistrial related to juror safety concerns;

(2) The assault, kidnapping, and first-degree murder charges were properly joined, and there was no prejudice due to the trial court's denial of the defendant's motion to severe the misconduct-involving-weapons charge;

(3) The defendant was not entitled to a unanimous jury finding that the murder furthered a particular felony, only a unanimous agreement that the murder furthered a predicate felony, and this issue was moot in light of the jury unanimously finding the Defendant guilty of premeditated murder;

(4) The admission of evidence the victim had never dated did not violate A.R.S. § 13-1421, did not pose a danger of unfair prejudice under Rule 403, and was not fundamental error.

(5) The testimony that Defendant's fiancé feared him and that he had threatened her was admissible;

(6) The Defendant's statements to police regarding the victim's consent were not admissible pursuant to residual hearsay exception;

(7) There was sufficient evidence to support the Defendant's convictions and the jury's finding of premeditation;

(8) The (F)(2) aggravator was not multiplicitous, and, as the Arizona Supreme Court previously held, an element of a crime may

also be used as a capital aggravator *Cruz,* 218 Ariz. at 169 ¶ 130, 181 P.3d at 216 (citing *State v. Lara,* 171 Ariz. 282, 284–85, 830 P.2d 803, 805–06 (1992));

(9) There was no fundamental error for failure to give a jury instruction that prior convictions counted toward only one aggravating factor;

(10) The juror's investigation into fellow juror's anti-death-penalty activity did not warrant mistrial;

(11) The trial court did not err in refusing to sentence defendant on the non-capital counts within thirty days of his conviction;

(12) The evidence of Defendant's gang affiliation, previous uncharged sexual assaults, previous police contact, and alleged racist attitude was relevant in the penalty phase;

(13) The victim impact evidence was not unfairly prejudicial in the penalty phase;

(14) There was no error in the penalty phase jury instructions given by the trial court;

(15) The prosecutor did not commit prosecutorial misconduct;

(16) The trial court did not coerce a jury verdict in the penalty phase; and

(17) The imposition of death penalty was warranted.

The defendant also raised thirty-two additional constitutional claims that he acknowledged the Arizona Supreme Court has previously rejected but that he raised to preserve for federal review. The

Arizona Supreme Court declined to revisit those claims.

POST-CONVICTION CLAIMS

OVERVIEW OF CLAIMS

Defendant asserts numerous claims for PCR in the guilt and penalty phases of the trial. The *guilt phase claims* relate to: 1) Maricopa County Attorney, Andrew Thomas; 2) Toxicologist Noman Wade's prior convictions; 3) DNA analyst Scott Milne's academic record; 4) Motion to Continue trial date; 5) Failure to object to "first-date" evidence; 6) Opening the door to threats against Mandi Smith; and 7) the denial of the Motion to sever the weapons misconduct charge. The *penalty phase claims* relate to: 8) the constitutionality of Arizona's aggravating factors; 9) preclusion of Dr. Cunningham's rebuttal; 10) preclusion of Dr. Wu's quantitative analysis; 11) failure to present testimony regarding Defendant's MRI and Dr. Bigler's report; 12) alleged ineffective assistance of counsel related to evidence of Defendant's religion and antisocial personality disorder; 13) lack of parole instruction; 14) jury deadlock; 15) new mitigation evidence; 16) *Hurst v. Florida*[3] resentencing; 17) cumulative error; and 18) the trial court's role in ineffective assistance of counsel.

STANDARD OF REVIEW

Pursuant to Rule 32.2(c), the Court first addresses, analyzes and identifies all claims that are procedurally precluded from Rule 32 relief.

In the alternative, the Court addresses whether the otherwise-precluded claims presented by defendant,

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[3] *Hurst v. Florida*, --- U.S. ---, 136 S.Ct. 616 (2016).

on grounds such as "ineffective assistance of counsel" and/or "newly-discovered evidence," may be colorable. Rule 32.1 (a), (e), Arizona Rules of Criminal Procedure.

Preclusion

A claim is precluded, pursuant to Rule 32.2(a), if it could have been raised on direct appeal or certain post-trial motions, was finally adjudicated on the merits on appeal or in any previous collateral proceeding, or has been waived at trial, on direct appeal, or in any previous collateral proceeding Ariz. R. Crim. P 32.2(a); *State v. Towery*, 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

Alternatives to Preclusion

The Court will then, as appropriate, and in the alternative, consider the merits of each claim, except those claims that were finally adjudicated on the merits during the Defendant's direct appeal. The impact of the court's consideration on the merits of each claim will then be applied to the Defendant's Sixth Amendment ineffective assistance of counsel (IAC) claims.

Claims of Ineffective Assistance of Counsel

Claims found meritless will not support a Sixth Amendment IAC claim. See *Kimmelman v. Morrison*, 477 U.S. 365, 382, 106 S.Ct. 2574, 2586 (1986) (meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim). A successful Sixth Amendment IAC claim is rooted in the test adopted by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984).

Claims of ineffective assistance of counsel under Rule 32.1(a), a Sixth Amendment claim, are governed by the principles set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, a Defendant must show that counsel's representation fell below an objective standard of reasonableness and that the deficiency prejudiced the defense. *Id*. at 687–88. The inquiry under *Strickland* is highly deferential, and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689; *see Wong v. Belmontes*, 558 U.S. 15 (2009) (per curiam); *Bobby v. Van Hook*, 558 U.S. 4 (2009) (per curiam); *Cox v. Ayers*, 613 F.3d 883, 893 (9th Cir. 2010). To satisfy *Strickland*'s first prong, a defendant must overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* Courts are required to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. The defendant bears the burden of overcoming the strong presumption that counsel performed adequately. *Id*.

Strickland's second prong requires a defendant must affirmatively prove prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding."

Id. at 693, 104 S.Ct. 2052. As with deficiency, *Strickland* places the burden of proving prejudice on the defendant, not the government. *Wong v. Belmontes*, 558 U.S. 15 (2009) (per curiam).

And the Supreme Court cautioned:

> There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. *See Goodpaster*, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 343 (1983).

Strickland, 466 U.S. at 689–90, 104 S. Ct. at 2065–66.

> ...[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. ..

Id., at 690, 104 S. Ct. at 2066.

Claims of Newly-Discovered Evidence

On claims of newly-discovered evidence, pursuant to Rule 32.1(e), a defendant may seek relief on the grounds that, "...newly discovered material facts probably would have changed the verdict or sentence." Newly discovered material facts exist if:

> (1) the facts were discovered after the trial or sentencing;
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> (2) the defendant exercised due diligence discovering these facts; and
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> (3) the newly discovered facts are material and not merely cumulative or used solely for impeachment, unless the impeachment

> evidence substantially undermines testimony that was of critical significance such that the evidence probably would have changed the verdict or sentence.

Ariz. R. Crim. P., Rule 32.1(e).

Evidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial, and neither the defendant nor counsel could have known about its existence by the exercise of due diligence. *State v. Saenz*, 197 Ariz. 487, 4 P.3d 1030 (App. 2000), review denied. The evidence must have been in existence at the time of trial, but not discovered until after trial. *State v. Sanchez*, 200 Ariz. 163, ¶11, 24 P. 3d 610 (App. 2001). "For it to be considered newly discovered, evidence 'must truly be newly discovered, i.e., discovered after the trial.'" *Saenz*, 197 Ariz. at 491 (quoting *State v. Jeffers*, 135 Ariz. 404, 426, 661 P. 2d 1105, 1127 (1983)).

GUILT PHASE CLAIMS

1. FORMER MARICOPA COUNTY ATTORNEY, ANDREW THOMAS

Defendant's claim relates to allegations that former County Attorney Andrew Thomas ("Thomas") **"...**deliberately overloaded the court system with capital cases in a bid to intimidate the Maricopa County Superior Court." Petition at 50. Defendant argues, in addition to caseload/continuances,[4] that

[4] The State noted that defendant does not raise 'excessive caseload' as a separate claim for relief. Response at p. 11, fn. 4. Defendant agreed that "...Rule 32 doesn't provide for excessive caseload as a ground for relief, but cites it to "establish and clarify *why* counsel's performance was deficient." Reply at 23. *See Woods v. Sinclair*, 764 F.3d 1109, 1132 (9th Cir. 2014):

"[t]he proven fact that Thomas was engaged in a conspiracy against the court legally affected the court's impartiality as an institution and this denied Mr. Burns due process of law in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and art. 2 § 4, 15, 23, and 24 of the Arizona Constitution and is remediable under Rule 32.1(a) and (e)." Petition at 55.

Defendant claims a due process violation for the Court's failure to secure disqualification of the Maricopa County Attorney's Office, or to recuse itself, arguing that Andrew Thomas's misconduct must necessarily have tainted the ability of the entire bench to fairly and impartially handle criminal cases.

The Court has reviewed Defendant's due process claim pursuant to the standards outlined in *In re*

> Woods argues that, because his two primary defense attorneys faced unmanageable caseloads and were inexperienced in capital litigation, their performance was deficient. The district court rejected that argument, and so do we.
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> .... Despite these alleged deficiencies, these circumstances do not, in and of themselves, amount to a *Strickland* violation. Rather, Woods must point to specific acts or omissions that may have resulted from counsel's inexperience and other professional obligations. *See Strickland,* 466 U.S. at 690, 104 S.Ct. 2052. Thus, Woods is not entitled to relief on this sub-claim alone.

Thus, the Court declines to consider the "excessive caseload/lack of continuance" representations as a stand-alone claim. In addition, the Supreme Court addressed a related issue on automatic appeal. *See*, *Burns,* ¶¶ 10-18 (denial of continuance upheld, absent prejudice, specifically refuting claim as to Drs. Wu and Cunningham).

Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507 (1948), *See also Morrissey v. Brewer*, 408 U.S. 471, 488—489, 92 S.Ct. 2593, 2603—2604 (1972); *Jenkins v. McKeithen,* 395 U.S. 411, 428—429, 89 S.Ct. 1843, 1852—1853 (1969); *Specht v. Patterson*, 386 U.S. 605, 610, 87 S.Ct. 1209, 1212 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294–95, 93 S. Ct. 1038, 1045 (1973); *State v. Maldonado*, 92 Ariz. 70, 76, 373 P.2d 583, 587 (1962); *Oshrin v. Coulter,* 142 Ariz. 109, 111, 688 P.2d 1001, 1003 (1984) (citations omitted); and *State v. Velasco*, 165 Ariz. 480, 487, 799 P.2d 821, 828 (1990).

a. Preclusion

A claim is precluded if it was raised, or could have been raised, on direct appeal, or in prior Rule 32 proceedings. Rule 32.2(a)(3), *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

THE COURT FINDS this claim could have been raised on appeal; therefore, it is precluded pursuant to Rule 32.2(a)(3).

b. Rule 32.1(a) claims of ineffective assistance of counsel not colorable

Defendant alleges that "[t]rial counsel were ineffective in failing to adequately raise a claim to recuse the Maricopa County Superior Court and the MCAO on grounds the courts' appearance of impartiality had been prejudicially damaged by Thomas' reign of terror against this Court." Petition at 6. Defendant alleges that due process violations and ineffective assistance of counsel warrant PCR. Defendant argues that counsel's performance was deficient by failing to independently pursue

disqualification of MCAO, the trial judge, and the entire Maricopa County Superior Court.

The record demonstrates, however, Defendant was one of thirty defendants who sought to disqualify the Maricopa County Attorney's Office. The December 31, 2009 Motion to Disqualify Maricopa County Attorney's Office argued that MCAO "be disqualified from this case because of the currently existing conflicts between MCAO and the Court[; specifically,] MCAO's continued presence on this case will deprive [Defendant] of a fair trial before a tribunal that is not intimidated or influenced by the prosecutor." Motion to Disqualify, at 14. The claim was joined with other motions to disqualify MCAO and made subject to the authority of the Special Master (Judge Hoggatt) pursuant to Supreme Court Administrative Order 2009-124. ME dated 1/7/2010; 1/11/2010. The Special Master addressed and rejected the disqualification motions, writing:

> ...This Court has not been cited to a single person involved in any of the cases being dealt with today who has anything to do with the County Attorney's recent behavior. For this Court to accept the defense position, it would have to conclude that *because* Mr. Thomas and one deputy, Ms. Aubuchon, have engaged in improper retaliation against particular judges for particular rulings, *therefore* prosecutors other than Mr. Thomas and Ms. Aubuchon will necessarily engage in retaliation against other judges in unrelated matters. The Court declines the defendants' invitation to leap to such a conclusion.

Ruling (Judge Hoggatt) dated 2/22/2010, in which the Court DENIED each motion to disqualify the MCAO, including Defendant's. In April 2010, County Attorney Andrew Thomas resigned.

On appeal in one of the thirty cases heard by Judge Hoggatt (*State v. Martinez*), the Supreme Court upheld the denial of disqualification. In *Martinez* the Court stated the "thrust of [defendant's] motion concerned Thomas and did not allege any improper conduct by other members of his office;" specifically, the defendant alleged no improper conduct by the prosecutor who handled this defendant's case. *State v. Martinez*, 230 Ariz. 208, 282 P.3d 409 (2012) *cert. denied,* 133 S. Ct. 764 (U.S. 2012).

Defendant alleged no conduct by the trial judge handling his case sufficient to require her recusal. In fact, Defendant himself acknowledges that "Mr. Burns has no evidence that this Court was personally biased against him because of Thomas' reign of terror..." Petition at 55. Further, Defendant provides no basis for concluding that the court should have recused itself. Defendant does not allege any improper conduct by the court as a whole, or by the individual judge who handled his trial, other than speculation and generalities. Rather, defendant alleges that intimidation of one judge constitutes intimidation of the entire bench, citing *City of Tucson*[5]. The argument is inapposite in the context of whether a particular judge should have recused herself in a particular case. A defendant seeking recusal must demonstrate how his proceedings were (or perhaps even appear to have been) rendered biased, unfair, or partial in light of an

[5] *State v. City Court of City of Tucson*, 150 Ariz. 99, 102 (1986).

allegedly improper action. *State v. Carver*, 160 Ariz. 167, 172–73, 771 P.2d 1382, 1387–88 (1989). Defendant fails to do so.

Defendant provides no evidence that "*because* Mr. Thomas and one deputy, Ms. Aubuchon, have engaged in improper retaliation against particular judges for particular rulings, *therefore* [other judges in unrelated matters were necessarily biased, unfair and partial]. The Court declines the defendants' invitation to leap to such a conclusion."[6] Thus, had counsel argued for recusal of the Maricopa bench, as Defendant now suggests, it is probable that request would also have been denied, and would have been upheld had denial been appealed.

Defendant has failed to demonstrate that trial counsel's actions demonstrate deficient performance.

Nor does the Court find prejudice. Defendant's claim that intimidation "may have" or "likely" affected the trial judge's discretionary rulings, as in *Martinez*, "[the defendant] generally alleges that Thomas likely intimidated the other judges involved in his case. However, he provides no support for this allegation..." or evidence that the intimidation affected this Court's discretionary rulings.

Defendant alleged no conduct by the trial judge handling this case sufficient to call into question the judge's impartiality or to require the trial judge's recusal, nor any evidence that any adverse evidentiary rulings were based on improper

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[6] *See Martinez, at* ¶ 67 (generalized allegations of intimidation insufficient to support disqualification; specific bias or partiality resulting from intimidation as to individual complainants not demonstrated); *Carver*, 160 Ariz., at 173.

application of the law to the facts of his case. Further, the defendant sought review of certain discretionary rulings relating to evidentiary matters and continuances, which the Supreme Court upheld. *Burns*, 237 Ariz. 1, ¶¶ 18; 21; 48; 53; 55; 58; 71; 100; 111; 135, 344 P.3d 303. If Defendant believed additional discretionary rulings were erroneous he could have sought Supreme Court review of the trial judge's specific discretionary rulings on appeal, and he did not do so.

THE COURT FINDS this claim has no merit. Defendant fails to show counsel's performance was deficient and/or prejudicial. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). Trial counsel's failure to raise a meritless claim does not constitute deficient performance or prejudice.

THE COURT FURTHER FINDS Defendant's claims that the Court should have recused itself or disqualified the MCAO are not colorable.

THE COURT FURTHER FINDS Defendant's ineffective assistance of counsel claim is not colorable.

Despite actions taken by Mr. Thomas that eventually resulted in his disbarment, Defendant has not identified actions or consequences specific to this defendant (other than claims of "heavy caseloads" such that counsel "needed a continuance") that rendered his trial fundamentally unfair.

The court is presumed to be fair and impartial. *State v. Rossi*, 154 Ariz. 245, 741 P.2d 1223 (1987). The defendant has failed to support his claim by alleging specific facts sufficient to rebut the presumption of fairness and impartiality. *See*, Rule 10.1, Arizona Rules of Criminal Procedure.

The Defendant appeared before a fair and impartial judge.

THE COURT FINDS that mere speculation about the impact of outside influences on "the judges," cumulatively does not constitute a basis for appointment of an out-of-county judge.

THE COURT FURTHER FINDS Defendant's due process violation claims related to Thomas also are not colorable.

c. Rule 32.1(e) claim of newly discovered evidence is not colorable

Defendant claims facts contained in Thomas' 2012 disciplinary proceeding constitute newly discovered evidence which warrants PCR. Defendant argues that "the record of *In re Thomas* and the videotaped testimony given by [former Maricopa County Superior Court judges Mundell and Donahoe relating to the] campaign of intimidation", constitutes newly discovered material facts entitling him to relief.

The facts deduced during the Andrew Thomas disciplinary proceedings occurred after the trial. However, applying the requirements set forth in *State v. Amaral*, 239 Ariz. 217, 368 P.3d 925, *cert. denied,* 137 S. Ct. 52 (2016), the facts are not newly discovered material facts. The particular testimony elicited in *In re Thomas* merely supplements what was known in 2010 about Mr. Thomas's actions, and what was considered at the time of Judge Hoggatt's ruling. Further, the additional testimony from the disbarment proceedings would not "probably ... have altered his [conviction or] sentence." Defendant fails to establish the requirements for a colorable claim under Rule 32.1(e).

THE COURT FINDS Defendant's Rule 32.1(e) claim is not colorable.

Therefore,

Defendant's claim fails to state a colorable claim and is dismissed pursuant to Rule 32.6(c).

2. TOXICOLOGIST NORMAN WADE

a. Brady v. Maryland[7]

Defendant's claim relates to toxicologist, Norman Wade's ("Wade") prior conviction and background information that were not disclosed at the time he testified in Defendant's trial in 2010.

In July 2015, the MCAO initiated a perjury investigation into Wade. This revealed Wade's criminal California convictions. MCAO referred the investigation to DPS. The subsequent disclosure and DPS investigation of Wade's background and criminal history is set forth in PCR Exhibit 90.

Defendant argues that "[Dr.] Wade was … a convicted felon whose crimes were directly related to his purported forensic career. Wade testified … falsely about his credentials as an expert and his professional history, concealing his felony… [H]e had been terminated from MCOME[8] in 1995 when MCOME learned of his felony." Defendant further argues that MCOME knew about Wade's felony [Dr. Keen denied knowledge. Petition Exhibit 90, Bates AG_Burns000036] when he was rehired in 1999 (Ex. 90, p. 13) …[and that] that knowledge must be imputed to the State." Petition at 8.

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[7] *Brady v. Maryland,* 373 U.S. 83 (1963).

[8] MCOME: Maricopa County Office of the Medical Examiner

To prevail on a *Brady* claim, a defendant must prove three elements: "[1] The evidence at issue [is] favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence [was] suppressed by the State, either willfully or inadvertently; and [3] prejudice … ensued." *Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936 (1999); *see Brady,* 373 U.S. at 87, 83 S.Ct. 1194. To establish prejudice, a defendant must demonstrate that "there is a reasonable probability that the result of the trial would have been different if the suppressed [evidence] had been disclosed to the defense." *Strickler,* 527 U.S. at 289, 119 S.Ct. 1936 (internal quotation marks omitted). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Woods v. Sinclair*, 764 F.3d 1109, 1127 (9th Cir. 2014) *cert. denied sub nom. Holbrook v. Woods*, No. 14-931, 2015 WL 435819 (U.S. May 18, 2015), *quoting United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375 (1985).

Regarding the first requirement that the evidence is favorable to the accused, "…*Brady* encompasses impeachment evidence, and evidence that would impeach a central prosecution witness is indisputably favorable to the accused. *See Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763 (1972); *see also, e.g., United States v. Blanco,* 392 F.3d 382, 387 (9th Cir.2004) ('*Brady*/ *Giglio* information includes "material … that bears on the credibility of a significant witness in the case." ')…" *United States v. Price*, 566 F.3d 900, 907 (9th Cir. 2009).

Here, the conviction most likely would have been allowed for impeachment, despite its age, given the context of the entire investigation.

The second *Brady* component is whether the State either willfully or inadvertently failed to disclose the materials.

> The suppression prong of *Brady* may be met … even though a "record is not conclusive as to whether the individual prosecutor [or investigator] … ever actually possessed" the *Brady* material. *Carriger,* 132 F.3d 463 at 479. The proponent of a *Brady* claim-i.e., the defendant-bears the initial burden of producing some evidence to support an inference that the government possessed or knew about material favorable to the defense and failed to disclose it. *Cf. United States v. Lopez,* 534 F.3d 1027, 1034 (9th Cir.2008); *United States v. Brunshtein,* 344 F.3d 91, 101 (2d Cir.2003). Once the defendant produces such evidence, the burden shifts to the government to demonstrate that the prosecutor satisfied his duty to disclose all favorable evidence known to him or that he could have learned from "others acting on the government's behalf." *Kyles,* 514 U.S. at 437, 115 S.Ct. 1555.

Price, 566 F.3d 900, at 910.

Defendant provides sufficient evidence to raise a question about what former Medical Examiner, Dr. Keen knew or should have known about Wade's conviction in the exercise of due diligence during the employment process.

However, Defendant fails to establish the third component of *Brady*, that he was prejudiced. The prosecution's suppression of evidence "favorable to an accused … violates due process where the evidence is material either to guilt or to punishment, irrespective

of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87. "[E]vidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler v. Greene,* 527 U.S. at 280, quoting *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375 (1985). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley,* 473 U.S. at 682.

> As we made clear in *Kyles*[9], the materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. *Id.,* at 434–435, 115 S.Ct. 1555. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.,* at 435, 115 S.Ct. 1555.
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> ** ** **
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> …..As the District Court recognized, however, petitioner's burden is to establish a reasonable *probability* of a different result. *Kyles,* 514 U.S., at 434, 115 S.Ct. 1555.

Strickler v. Greene, 527 U.S. at 290–91 (1999).

Here, Defendant was charged with, and convicted of, sexual assault, kidnapping, first degree murder (premeditated murder; and felony murder with kidnapping and sexual assault as predicate offenses) and misconduct involving weapons. Defendant argues

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[9] *Kyles v. Whitley,* 514 U.S. 419, 115 S.Ct. 1115 (1995)

that had the jury been informed of impeaching evidence relating to the expert's prior felony conviction, the jury would probably have returned a verdict of not guilty of the sexual assault (and of all offenses except the MIW count, in fact) based on the State's inability to prove that the act was "without the consent of the other person." The Court disagrees.

While Defendant asserts that the GHB evidence was critical to the "lack of consent" finding and notes that the Supreme Court referenced GHB in support of the "nonconsensual" finding, the testimony was not the only evidence of lack of consent. The State argued, "Now, what I would say – you know, the biggest and most compelling evidence that the sex they had was nonconsensual was Jacque was murdered, and the only reason to murder her is because he sexual [sic] assaulted her." RT 12/13/2010, at 43. In addition, evidence cited by the prosecutor to support lack of consent included the victim's torn bra; her blouse, torn down the middle; and trauma to her vagina caused by sexual intercourse that the medical examiner described. RT 12/13/2010, at 41-46. Further, impeachment into Wade's background and criminal history would not have changed the verdict. Wade's testimony about the cause and effect of GHB in the victim's body was ambiguous and was only a minimal part of the compelling evidence resulting in guilty jury verdicts.

THE COURT FINDS no *Brady* violation.

b. *Napue v Illinois*[10]

Defendant argues that the State knowingly presented false testimony from Wade. *Napue* establishes the importance of disclosing not only exculpatory but also impeaching evidence.

> To prevail on a *Napue* claim, "the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony [or evidence] was actually false, and (3) that the false testimony [or evidence] was material." *United States v. Zuno–Arce,* 339 F.3d 886, 889 (9th Cir.2003). False evidence is material "if there is any reasonable likelihood that the false [evidence] could have affected the judgment of the jury." *Bagley,* 473 U.S. at 678, 105 S.Ct. 3375 (internal citation and quotation marks omitted).

Hein v. Sullivan, 601 F.3d 897, 908 (9th Cir. 2010).

Here, Wade did not give false testimony at Defendant's trial. Although the DPS investigation revealed that Wade represented on his MCOME employment application that he had not been convicted of "other than a traffic offense" (an inaccurate statement given the license plate and Grand Theft convictions, even though his record relating to the theft had been expunged), there is no assertion that Wade testified at Defendant's trial that he had no arrests or convictions. It appears that he

[10] *Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173 (1959).

first formally[11] disclosed the arrest and conviction in response to a direct question a year after Defendant's trial during a civil deposition in May 2012:

> Wade said during the deposition, he was asked if he had ever been arrested and if he had ever been convicted of a crime. Wade said he answered those two questions by saying, "Those two things are together and I have been advised by my attorney and a superior court judge that I should answer no to those questions."

Exhibit 90 (Interview Summary, at 6 of 6), at Bates #AG_Burns000046.

Defendant does not assert false testimony relating to Dr. Wade's credentials or qualifications, but rather to the failure to disclose a felony conviction relating to events that occurred in 1991 and were charged in 1994, and resulted in a conviction in 1995 that was expunged in 1998. Further, the Court notes that there is no indication - even these years after trial - that the expert's testimony was inaccurate, or that he testified falsely about (1) the drug testing performed; (2) the facts relating to GHB; (3) its presence; or (4) its impact. Dr. Wade testified that the GHB present was a low level, and also that amount of GHB in her system was consistent with a naturally-occurring quantity.

Second, whether the prosecution should have known about the conviction is similar to the *Brady* suppression prong, and is arguably colorable.

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[11] The word "formally" is used to distinguish sworn testimony from a 1999 preemployment discussion with Dr. Keen, which reportedly did not result in investigation or other due diligence.

Third, for the reasons discussed under *Brady*, the Court finds that the conviction as impeaching evidence was not material and would not have probably affected the outcome of the trial.

THE COURT FINDS no *Napue* violation.

c. *Ineffective Assistance of Counsel*

Defendant argues that trial counsel performed deficiently by failing to investigate Wade's background. Petition at 64.

In accordance with *Strickler*, Defendant has not established "materiality" under *Brady*. The nondisclosure of Wade's conviction was not a constitutional violation because it was not "material" under *Brady*, which also defeats the IAC claim related to defendant's *Brady* claim. *"Brady* materiality and *Strickland* prejudice are the same." *Gentry v. Sinclair,* 705 F.3d 884, 906 (9th Cir.2013). Where information about a witness does not constitute a *Brady* violation for lack of materiality, it does not support an IAC claim. *Id.*

Defendant fails to demonstrate the prejudice/materiality prong of *Strickland* to establish a colorable claim. Further, the record does not show counsel's performance was deficient. Counsel secured concessions from the state's expert that were favorable to the defendant; counsel successfully challenged GHB testimony in front of the jury, with the state's expert conceding that a low GHB level was indicative of the naturally occurring chemical. Any impeachment of Wade would unlikely have any effect on the evaluation of his testimony or the verdicts.

THE COURT FINDS Defendant's ineffective assistance of counsel claim not colorable.

Therefore,

THE COURT FINDS Defendant's *Brady* and *Napue* claims related to the testimony of Toxicologist Norman Wade are not colorable.[12]

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[12] The Court notes defendant filed a Notice of Supplemental Authority on March 26, 2019 (docketed by the Clerk on March 26, 2019), while the Court's Rule 32.6(d) ruling was pending, providing the Court notice of a currently unpublished opinion by the Supreme Court of the State of Utah titled *Carter v. State*, 2019 UT 12, --- P.3d ----, 2019 WL 1303942 (March 21, 2019). Based on the Court's review the cited supplemental authority is of little weight and persuasive value in the matter before the Court.

In *Carter,* the court determined the *Brady* and *Napue* violations alleged by *Carter* "demonstrated a genuine dispute of material fact whether [Carter] was prejudiced by [the alleged *Brady* and *Napue* violations]. However, contrary to defendant's assertion, his claims, in the Court's view, are not consistent with the *Brady* and *Napue* claims in the *Carter* case.

The *Brady* and *Napue* claims in *Carter* resulted in the court "finding the existence of genuine disputes of material fact regarding whether the police or prosecution "threatened … the [witnesses]," "coached the [witnesses'] testimony," and suborned perjury by telling [one of the witnesses] "to lie about benefits he received from the State…" The court held "the district court erred in [determining Carter was not prejudiced by this conduct, and] …reverse[ed] and remand[ed] for an evidentiary hearing consistent with [the court's] opinion." The *Brady* and *Napue* evidence in *Carter* goes to the heart of whether perjured inculpatory testimony was presented to the jury during that defendant's guilt and sentencing trials.

Here, the potential *Brady* and *Napue* evidence is possible impeachment evidence of a State's witness, who testified regarding the results of a toxicological analysis (and similarly alleged impeachment evidence in relation to defendant's claims regarding DNA Analyst Scott Milne) completed by another toxicologist; test results defendant, as the Court previously discussed herein, has at no time alleged were faulty or otherwise

3. DNA ANALYST SCOTT MILNE

DNA Analyst Scott Milne testified at Defendant's trial about DNA results tying the victim's blood to Defendant's truck and jeans and tying Defendant to semen taken from the victim's body. Defendant argues that the State violated its obligations under *Brady v. Maryland* by failing to disclose Milne's academic record; and that counsel provided ineffective assistance by failing to conduct an investigation sufficient to discover the information.

To establish a *Brady* violation, Defendant must show that "[t]he evidence at issue [is] favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence [was] suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. *Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936 (1999). "[E]vidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* at 280 (quoting *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375 (1985)). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley,* 473 U.S. at 682.

To prevail on a Sixth Amendment ineffective assistance claim, Defendant must establish the two *Strickland* prongs, as to the second of which a defendant must affirmatively prove prejudice by "show[ing] that there is a reasonable probability that,

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not accurate. Contrary to defendant's assertion, the findings and rulings by the Supreme Court of Utah provide, in the Court's view, no support for Defendant's claim(s), and more importantly, are not binding upon this Court and are of little persuasive value.

but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694.

"Brady materiality and *Strickland* prejudice are the same," (*Gentry v. Sinclair,* 705 F.3d 884, 906 (9th Cir.2013)). Where information about a witness does not constitute a *Brady* violation for lack of materiality, it does not support an IAC claim. *Id.*

At trial[13] DNA Analyst Scott Milne[14] established his professional credentials, describing the "training [he] had in addition to…formal education since you've been with the Arizona Department of Public Safety Crime Laboratory?

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[13] Before DNA Analyst Milne testified (about DNA on Defendant's jeans: 70752A (of 2 individuals); 70752B (of three individuals); on victim's anal swab 73121.6A), the jury heard testimony from --

(1) Tina Gore (who works in the crime lab DNA unit, and testified about the presence of semen) RT 11/29/2010, at 85, 110-141; RT 11/30/2010, at 3 (cross cont'd); 18-25 (redirect); Qs 26-33. [purse; bra; underwear] Vaginal (internal, but not external genitalia) swab positive for semen & sperm (cross- at 126), as well as semen on panties and black stockings (at 124); anal had sperm but no semen (Cross, at126;

(2) ME Stano discussed sexual assault kit.(vaginal discoloration/injuries consistent with consensual sexual intercourse, at 55 (on cross-)); and

(3) Peggy (on the (panties; blouse; RT 11/30/2010, at 116, 140, 152-156; Qs157-158).

[14] Mr. Milne testified on December 6, 2010: RT 12/6/2010. At 16-126. He was the first witness of the day, and testified until just after 2:30.

> A. …I went through our serology training where we've tested many, many, many samples. I also had to do mock cases, mock trials. I had to take a written test. With DNA, same thing, I had to do many samples for DNA analysis to show that I was able to do the DNA extractions. I was able to do the interpretation. I had mock cases, mock trials and then yearly we have continuing education where we have to go to conferences or go to different training …

RT 12/6/2010, at 18-19. Ms. Toporek is a colleague in the lab, who also performed testing. *Id.,* at 30. *See* RT 11/29-30/2010 (Ms. Toporek's testimony).

Mr. Milne testified that he had been a member of the American Academy of Forensic Sciences for 11 years (as of 2010); that he had done a poster presentation at its Atlanta conference in 2000, 2001, as well as several poster and verbal presentations at other conferences; had been "a co-publisher on a couple of papers for YSTRs…basically – we're ignoring the female DNA and looking for just a male DNA" (RT 12/6/2010, at 20); and had testified in court on about 45 previous occasions. *Id*., at 19-20.

Mr. Milne testified that DNA established that the DNA profile from blood taken from the driver's side window came from "female offspring of [victim's parents]" (RT 12/6/2010. at 28), subsequently determined to be Jacque (*Id.,* at 31). The profile also, "cannot be excluded" from blood taken from the driver's door running board, which was a male/female mixture (*id.,* at 29), subsequently determined to "come from the combined DNA profiles of Jacque and Defendant." *Id.,* at 32.

Mr. Milne further testified he then performed a statistical analysis, followed by confirmation of Ms. Jacque Hartman's DNA. He then generated DNA profiles from the jeans, one profile was "a match" to the profile of Defendant; and the other was "consistent with the combined profiles" of Defendant and Ms. Hartman. *Id.,* at 37-38. He testified he secured no results from a bullet. *Id.,* at 40-41.

Further, DNA analysis performed on two anal swabs resulted in a match to Defendant as major component and the victim as minor component. *Id*., at 41-42 ("but I didn't do serology. That was previously done…[by Ms. Gore[15]]. I don't think there was much sperm detected on them in the serology analysis."). He also testified that he tested a tree branch that bore female DNA.

Counsel's cross-examination belies the claim of "deficient performance." On cross-examination, Counsel attacked the DNA evidence related to the tree branch eliciting a conclusion "it's not probative of anything," as well as confirming Mr. Milne's "…understanding the tree branch was found right by the victim." RT 12/6/2010, at 61.

Counsel also established his own familiarity with DNA analysis as he focused on the limited analysis of the tree branch, including Milne's agreement he could not verify visually that blood was on the branch and a laymen's terms exposition and explanation of a 14-loci analysis. *Id*., at 59-62.

Counsel then discussed the meanings of "match" and "consistent with" *(id.,* at 63-64); the results (*id.,* at 65-

[15] RT 11/29/2010, at 85, 110-141; RT 11/30/2010, at 3 (cross); 18-25 (redirect); 26-33 (jury questions).

76; 85-87); emphasized the third contributor on the jeans sample remained unknown (*id.,* at 87-88); and that "you [Milne] can't tell us necessarily how [or even when, any of the DNA material, cellular material] got deposited. *Id.,* at 89-92.

Counsel summed up the discussion of the limited analysis pointing out that while Milne's analysis may help "tell us whether someone's DNA is there… [i]t can't tell us any surrounding circumstances of how it was there or when it was put there and that sort of thing[?]" with Milne's response that "[i]t's just one of many factors that go into a case." *Id.,* at 91.

Counsel cross-examination then delved into an analyst uses controls "to make sure things are working properly" by talking about DNA "alleles and loci or locations. This portion of examination lead into a discussion about the most-recent audit (where trial counsel actually went to the lab and reviewed the logs), raising the issue of cross-contamination. Counsel concluded:

> Q. And, again, regardless of how conscientious, which you've told us your lab is, mistakes of problems can still occur that need corrective action in your lab?
>
> A. I'm not sure if it's necessarily corrective action, but, correct, yes.

Id., at 92-111.

Back tracking a bit, counsel also focused on the items NOT tested (RT 11/30/2010 at 3-10) and the lab's processes and procedures in place to ensure accuracy and to avoid contamination/cross-contamination (RT 11/29 at 141; RT 11/30/2010 at 11-18); *see also* RT 11/29/2010 at 122-124; including

counsel secured agreement that packaging multiple items together, as occurred with the shoes, may result in DNA transfer.

Counsel then used the testimony to argue that the presence of sperm demonstrated only that sperm were present in a particular place, the presence of sperm did not show whether activity was consensual or nonconsensual, or how they got there, or how carefully the State had collected the evidence. RT 12/13/2010, at 81-82.

Although Defendant claims that the Supreme Court opinion relied on Analyst Milne's results relating to DNA on the defendant's jeans and truck to support a finding of harmless error, that evidence is only part of the finding:

> ¶ 38 Nevertheless, on this record we find that the trial court's error was harmless. *See State v. Henderson,* 210 Ariz. 561, 567 ¶ 18, 115 P.3d 601, 607 (2005) ("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."). Evidence of Burns' guilt was overwhelming: ***He was the last person seen with Jackie***, *her blood was found in his truck and on a pair of jeans in the trunk of his Honda*, his ***cellphone records indicated he was in the area where Jackie's body was found, his DNA matched sperm found in Jackie's body, and he possessed and disposed of the murder weapon***. Moreover, the State did not emphasize Burns' conviction during closing argument, mentioning it only in the context of the weapons charge. There is nothing to

> indicate that the jury considered his prior convictions in contravention of the guilt-phase jury instructions, and this evidence was properly introduced in the penalty phase. Thus, we are satisfied that the failure to sever the misconduct charge did not affect the jury's verdicts or sentences.

State v. Burns, 237 Ariz. 1, 15, ¶ 38, 344 P.3d 303, 317 (2015) [Emphasis added].

Finally, Defendant in his PCR does not provide evidence that the results obtained by Mr. Milne, or indeed the results obtained by any of the other DNA and body fluid analysts, were inaccurate or are suspect. Further, in light of Milne's post-college professional training, the cross-examination conducted by counsel, the arguments made by counsel as a result of that cross-examination, and the other evidence presented at trial, the Court is unable to find "a probability sufficient to undermine confidence in the outcome."

THE COURT FINDS Defendant's claims relating to DNA Analyst Scott Milne not colorable.[16]

4. "CONFLICT OF INTEREST"

Defendant's claims relate to allegations that counsel created an actual conflict of interest by "blaming" him for their motion to continue the trial date. He asserts that counsels' actions and the Court's failure to appoint new counsel violated his right to effective

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[16] *Supra,* footnote 12. As with the Defendant's claim regarding Toxicologist Norman Wade, Defendant has at no time alleged the test results testified to by Mr. Milne were faulty or otherwise not accurate.

assistance of counsel and his due process rights. Petition at 90-91.

a. Preclusion

This claim could have been raised on appeal, it is therefore precluded by Rule 32.2(a)(3). An issue is precluded if it was raised, or could have been raised, on direct appeal or in prior Rule 32 proceedings. *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996). Alternatively, because Defendant argues that exceptions to preclusion may apply, the Court considers the merits of the claim.

b. Not colorable

Under *Cuyler v. Sullivan,* the mere possibility that a conflict of interest may exist is insufficient to overturn a verdict. Rather, Defendant must demonstrate the presence of an actual conflict of interest:

> We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an **actual conflict of interest adversely affected his lawyer's performance**.

Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719 (1980). [Emphasis added}

Four years later, the *Strickland* court analyzed a conflict of interest claim in the context of an "ineffective assistance" claim, and confirmed that only where an actual conflict of interest exists is prejudice presumed:

> One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler v. Sullivan*, 446 U.S., at 345–350, 100 S.Ct., at 1716–1719, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed.Rule Crim.Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims mentioned above. **Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance**." *Cuyler v. Sullivan, supra,* 446 U.S., at 350, 348, 100 S.Ct., at 1719, 1718 (footnote omitted).

Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). [Emphasis added]

An actual conflict requires Defendant to demonstrate "that some plausible alternative defense

strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *Harvey v. Ayers*, 458 F.3d 892, 908 (9th Cir. 2006); *see Cuyler v. Sullivan*, 446 U.S. 335, 348-349 (1980).

Here, the representations by trial counsel about their client's cooperation, or lack thereof, even if temporary and situational, and precipitated by counsel's actions, was neither inaccurate nor inappropriate to share with the Court in the context of a motion to continue. Counsel's representations presented the *potential* to create a rift between himself and his client, but did not represent an *actual conflict of interest*, such that the interests of counsel and Defendant diverged. Rather, the interests of counsel and their client were joined insofar as the motion to continue was concerned, as presumably both Defendant and counsel wished a full and fair presentation at all phases of the trial.

The Court cannot find counsel "actively represented conflicting interests" such that "an actual conflict of interest adversely affected his lawyer's performance." *Strickland*, 466 U.S. at 692 (1984) quoting *Cuyler v. Sullivan*, 446 U.S. at 350 (1980).

Defendant often references "caseload" and "lack of readiness for trial" in his post-conviction pleadings. The Court has not only reviewed the court file and the trial transcripts, but also was present at trial. Despite whatever "conflict" may have existed, the Court found counsel to be prepared with the facts and the law, making appropriate and lucid arguments on behalf of Defendant.

After reviewing the above, and the post-conviction pleadings, it is the Court's opinion that Defendant received the assistance of competent counsel, who provided him with constitutionally-effective assistance in connection with his trial.

THE COURT FINDS Defendant's claim relating to "conflict of interest" not colorable.

5. "FIRST DATE" EVIDENCE

Defendant claims that trial counsel provided ineffective assistance by raising an "incomplete" objection in which he failed to argue Rule 403 as grounds for preclusion related to evidence the victim was on a first date. Petition at 91-92.

a. Preclusion

Defendant raised this claim on appeal; (*Burns*, at ¶¶ 43-45) therefore, it is precluded by Rule 32.2(a)(2) and (3). An issue is precluded if it was raised, or could have been raised, on direct appeal or in prior Rule 32 proceedings. *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

b. Not Colorable

Defendant faults counsel for failing to move to preclude the evidence under Rule 403. However, the Arizona Supreme Court concluded that the evidence was properly admitted under Rule 403.

Our Supreme Court discussed the "first date" evidence at ¶¶ 42-45 in *State v. Burns*, 237 Ariz. 1 (2015), concluding, on the Rule 403 argument that,

> ...[e]vidence that Jackie's date with Burns was her first date helped to place her actions in

> context and thus was probative. And because Burns has not shown that the evidence posed a danger of unfair prejudice under Rule 403, he cannot show error, much less fundamental error.

Burns, 237 Ariz. at 16, ¶45, 344 P.3d at 18.

Counsel did not perform deficiently by failing to secure preclusion of what would have been determined to be admissible evidence nor was Defendant prejudiced.

THE COURT FINDS Defendant's claim relating to "First Date" evidence is not colorable.

6. INEFFECTIVE ASSISTANCE CLAIM REGARDING WITNESS MANDI SMITH

Defendant argues that counsel provided ineffective assistance by opening the door to testimony that his girlfriend was afraid of him, permitting "specific threats against her to come into evidence." Petition at 92.

Arizona Supreme Court addressed Smith's testimony:

> ¶49 During an interview with the State, Mandi said she feared Burns, and he had previously threatened to kill her. The trial court initially precluded evidence of any specific threats made by Burns. It did, however, allow Mandi to testify on direct examination to her general feelings toward Burns. Burns' counsel spent much of his cross-examination attempting to establish that Mandi, not Burns, had killed Jackie. Burns' counsel also attempted to impeach Mandi's testimony that she feared Burns by eliciting testimony that Mandi never

told the police that she was afraid of Burns. After cross-examination, the State asked the court to reconsider its previous ruling that Mandi could not testify as to specific acts by Burns that caused her to fear him, arguing that Burns had opened the door by implying that Mandi's testimony was recently fabricated. Over Burns' objection, the court allowed the State on redirect to question Mandi about specific threats Burns allegedly made on her life and Mandi's assertions that she planned to remove all the guns from her house because she feared Burns.

…

¶52 Burns' Rule 404 argument also lacks merit. Under Arizona Rule of Evidence 404(b), other wrongs or acts are not admissible to show that a person acted in conformity with his or her character. They may, however, be admissible for other purposes, such as rebutting an attempt to impeach a witness. *See State v. Williams,* 183 Ariz. 368, 376, 904 P.2d 437, 445 (1995) ("Evidence which tests, sustains, or impeaches the credibility or character of a witness is generally admissible, even if it refers to a defendant's prior bad acts.") (internal quotation marks omitted). Rule 404(b) does not apply to Mandi's testimony that she feared Burns or planned to remove guns from their home, because that testimony involves no other *act* by Burns. Mandi's testimony that Burns threatened to kill her before Jackie's murder was inadmissible to show that Burns was more likely to have killed Jackie, because it involved

> a specific threat made by Burns. That evidence, however, was properly admitted to rebut Burns' attempt to show that Mandi was not credible when she testified that she feared Burns. Thus, Burns' 404(b) argument fails.

Burns, 237 Ariz. at 17–18, ¶¶ 49-50, 344 P.3d at 319–20.

The trial record does not establish that counsel performed deficiently. Counsel attempted to have the statements precluded and was successful in securing the preclusion of unduly prejudicial portions of the statements. During cross-examination of Smith, trial counsel strategically attempted to shift the blame for the murder to Smith (suggesting that she was angry and jealous; identifying her whereabouts at the time of the murder; disclosing that she was familiar with the area where the victim's body was found). Further, counsel attempted to undercut Smith's credibility by challenging whether her claims of fearing Defendant had been recently fabricated. Although the cross-examination opened the door to certain adverse testimony, that is the essence of decisions counsel must make: Whether to forego certain evidence due to adverse consequences, or whether to pursue the testimony and focus the jury's attention on the number of times Smith failed to disclose her recent alleged fabrications. RT 10/26/2010, at 17-18; RT 11/10/2010, at 76; s*ee*, *Id.,* at 60-61; RT 11/15/2010, at 22; *see*, RT 11/10/2010, at 60; *Id.,* at 64; *see Id*., at 164-65; *see also, Id*., at 173-75; and RT 11/15/2010, at 46.

Defendant fails to establish that this strategy was outside the range of effective trial strategy. Further, counsel continued to argue in post-trial motions that the statements were improperly admitted.

In addition, Defendant has not established a colorable claim of prejudice. Smith's statements were properly admitted. Other evidence placed Defendant with the victim, at the location where her body was found, and his movements correspond to the murder timeline.

THE COURT FINDS Defendant has not established a colorable ineffective assistance claim relating to Mandi Smith's testimony.

7. FAILURE TO SEVER MIW COUNT

On appeal, the Arizona Supreme Court held that "[b]ecause Burns' prior felony conviction was prejudicial and irrelevant to the other charges, severance 'was necessary to promote a fair determination' of Burns' guilt or innocence under Arizona Rule of Criminal Procedure 13.4(a)." *Burns*, 237 Ariz. at 15, ¶ 37, 344 P.3d at 317. However, the Court found that although it was error to deny Defendant's motion to sever the misconduct involving weapons charge, "on this record we find that the trial court's error was harmless." *Id*. at ¶ 38.

The Arizona Supreme Court concluded:

> We take this opportunity, however, to emphasize that trial courts should prevent this situation. Evidence of prior felony convictions has a potential to create prejudice, which is precisely the reason previous criminal convictions are generally inadmissible under Rule 404(b). Absent an appropriate factual nexus, trial courts generally should not join a misconduct-involving-weapons charge, or any charge that requires evidence of a prior felony conviction, unless the parties have stipulated to

> a defendant's status as a prohibited possessor. Alternatively, the court could conduct a bifurcated trial to adjudicate any charge that requires evidence of a prior felony conviction. Likewise, the State should avoid the risk of reversal by refraining from joining charges that require proof of a defendant's prior convictions. But, for the reasons stated above, we do not find prejudice on this record.

Id., at ¶ 39.

Defendant now argues (1) that failure to secure severance evidences ineffective assistance of counsel, as well as; (2) that newly-discovered facts (the background information relating to Toxicologist Wade and DNA Technician Milne), under Rule 32.1(e), undermine the Supreme Court's determination of "harmless error" and demonstrate prejudice at both the guilt and penalty phases.

Defendant asserts these claims should be considered with the allegations of ineffective assistance of counsel and the State's conduct as addressed above. Further Defendant alleges that the Arizona Supreme Court erred for not considering the impact of the failure to sever the charge in the penalty phase of the trial.

a. Ineffective assistance of counsel

As evidenced by our Supreme Court's decision on appeal, the record demonstrates that trial counsel adequately raised and effectively preserved the MIW issue for appeal. Counsel filed a Motion to Sever; the State objected; the trial court denied. Counsel reargued the MIW issue in his post-trial motion for a new trial. His lack of success does not demonstrate

deficient performance, as he made a record that adequately preserved the issue on appeal. M.E. dated 10/27/2010, at 2; M.E. dated 10/27/2010, at 3-4; RT 11/10/2010, at 74-75; and the trial court's ruling 4/14/2011.

THE COURT FINDS Defendant's ineffective assistance of counsel claim not colorable.

b. Newly Discovered Evidence---impact in the guilt phase

Defendant argues the background information relating to Toxicologist Wade and DNA Technician Milne is newly discovered evidence sufficient to undermine the Supreme Court's "harmless error" determination.

Pursuant to Rule 32.1(e), a defendant may seek relief on the grounds that newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Although the Court has determined no prejudice occurred in the second (Dr. Wade-related) and third (Technician Milne-related) claims, the Court will consider prejudice in connection with the Arizona Supreme Court's "harmless" determination.[17]

The Arizona Supreme Court's "harmless error" analysis:

> ¶ 38 Nevertheless, on this record we find that the trial court's error was harmless. *See State v. Henderson,* 210 Ariz. 561, 567 ¶ 18, 115 P.3d

[17] The Court is not, and cannot, address Defendant's claims that "[i]t was constitutional error [for the Supreme Court] to not reverse on appeal." Petition at 15. That is a claim that could have been the subject of a motion for reconsideration filed with the Supreme Court and is precluded.

> 601, 607 (2005) ("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."). Evidence of Burns' guilt was overwhelming: He was the last person seen with Jackie, her blood was found in his truck and on a pair of jeans in the trunk of his Honda, his cellphone records indicated he was in the area where Jackie's body was found, his DNA matched sperm found in Jackie's body, and he possessed and disposed of the murder weapon. Moreover, the State did not emphasize Burns' conviction during closing argument, mentioning it only in the context of the weapons charge. There is nothing to indicate that the jury considered his prior convictions in contravention of the guilt-phase jury instructions, and this evidence was properly introduced in the penalty phase. Thus, we are satisfied that the failure to sever the misconduct charge did not affect the jury's verdicts or sentences.

Burns, 237 Ariz. at 15, ¶ 38, 344 P.3d at 317.

Our Supreme Court's analysis did not include Wade's testimony when listing the "overwhelming" evidence against Defendant. Defendant has not established that Wade's conviction probably would have changed the verdict or sentence pursuant to Rule 32.1(e). Further, the only guilt phase evidence relied on by the Supreme Court in its "harmless error" determination that may have been undermined by the "newly-discovered evidence of Milne's academic shortcomings" relates to the victim's blood that was found in Defendant's truck and jeans. However, as

previously found at the third claim, even in his post-conviction pleadings Defendant provides no evidence that the results obtained were inaccurate. Defendant has not established the "newly discovered evidence", considered separately or cumulatively, would probably change the verdicts or sentences.

THE COURT FINDS Defendant's newly discovered evidence claim relating to the guilt-phase of the trial is not colorable.

c. Newly Discovered Evidence---impact in the penalty phase

Defendant argues that "the crime of MIW is not a part of the penalty phase…" and that the sentencing jury would not have learned of it. Petition at 15-16.

Although Defendant argues that the MIW conviction would otherwise "never have come before the jury had the MIW charge been severed," (Petition at 95), the concern expressed by the Arizona Supreme Court was not with the conviction *per se*. Rather, that Court's concern was that the jury learned the Defendant had previously been convicted of a felony during the guilt phase of the trial, a fact that otherwise would not have been presented, to impeach his credibility, if he testified.

The Court disagrees that the jury would not have learned of Defendant's felony conviction at the penalty phase. Evidence of a felony conviction could – and probably would – properly have come in as rebuttal to mitigation (A.R.S. §§ 13-751(G); -752(G) (evidence relevant to whether leniency should be shown include defendant's character, propensities or record...)).

THE COURT FINDS Defendant's newly discovered evidence claim as it relates to the penalty-phase of his trial is not colorable.

PENALTY PHASE CLAIMS

8. CONSTITUTIONALITY OF ARIZONA'S DEATH PENALTY

Defendant alleges that Arizona's death penalty scheme violates the Eighth Amendment and Due Process by failing to adequately narrow the defendants eligible for the death penalty; that the death penalty is cruel and unusual punishment in violation of the Eighth Amendment; and that trial and appellate counsel provided ineffective assistance by failing to argue accordingly. Petition at 98.

a. Preclusion

Constitutional claims were, and this claim could have been, raised on appeal (*see, Burns,* 237 Ariz. at ¶¶ 83-90). An issue is precluded if it was raised, or could have been raised on direct appeal or in prior Rule 32 proceedings. *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996). Therefore, the claim is precluded by Rule 32.2(a)(3).

Alternatively, because Defendant argues that Rules 32.1(a) and (e) afford him relief, and/or exceptions to preclusion may apply, the Court considers the merits of the claims.

Constitutionality of Arizona's Aggravating Factors Statute

Defendant concedes that, "[i]n *State v. Hidalgo,* 241 Ariz. 543, 390 P.3d 783 (2017), the Arizona Supreme

Court upheld the constitutionality of Arizona's death penalty statute, A.R.S. §§ 13-751, 13-752. Petition at 100. However, Defendant argues:

> This Court should [reject *Hidalgo* and] apply United States Supreme Court authority and strike the death sentence here under *Gregg*, *Furman*, *Zant*, and *Lowenfield*. In the face of directly contradictory U.S. Supreme Court authority, *State v. Hidalgo* is not persuasive.

Petition at 102.

Defendant asks the Court to reject binding precedent established by our Supreme Court in *State v. Hidalgo.* Defendant "…cannot obtain relief on that basis, however, because this Court is bound by the decisions of the Arizona Supreme Court. *See, e.g., State v. Cooney*, 233 Ariz. 335, 341, ¶ 18 (App. 2013) ("Arizona's courts are bound by the decisions of our supreme court and [] have no "'authority to modify or disregard [its] rulings.'") (quoting *State v. Smyers,* 207 Ariz. 314, 318 n. 4, ¶ 15 (2004)). As the State pointed out in its Response, our supreme court's conclusion in *Hidalgo* that Arizona's aggravating factors statute is constitutional binds this Court and forecloses Burns' claim. 241 Ariz. at 549–52, ¶¶ 14–29 (rejecting claim that A.R.S. § 13–751 does not sufficiently narrow the class of defendants eligible for the death penalty)." Response at 40.

Cruel and Unusual

Defendant argues that "the death penalty is *per se* cruel and unusual punishment in violation of the Eighth Amendment. This claim, too, is foreclosed by binding precedent to the contrary. *See, e.g., Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015) ("it is settled that

capital punishment is constitutional"); *State v. Harrod*, 200 Ariz. 309, 320, ¶ 59 (2001) ("The Arizona death penalty is not per se cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."), *vacated on other grounds, Harrod v. Arizona*, 122 S. Ct. 2653 (2002)." Response, at 40-41.

§13-751(F)(6) Aggravating Factor

The Court finds the aggravator constitutional, following precedent. First, the United States Supreme Court has upheld the (F)(6) aggravating factor against allegations that it is vague and overbroad, rejecting a claim that Arizona has not construed it in a "constitutionally narrow manner." *See Lewis v. Jeffers*, 497 U.S. 764, 774–77(1990); *Walton v. Arizona*, 497 U.S. 639, 649–56 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 556 (2002).

However, in *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990), the United States Supreme Court held the "especially heinous, cruel, or depraved" language is facially vague, but stated that the Court had given adequate "substance to the operative terms" for the construction of the aggravating circumstance to meet constitutional requirements. *Id.* at 654, 110 S. Ct. at 3057.

Finally, in *State v. Gretzler*, 135 Ariz. 42, 57 n.2, 659 P.2d 1, 16 n.2 (1983), our supreme court specifically held that the aggravating circumstance of "especially heinous, cruel, or depraved" must separate particular crimes from the "norm" of first degree murders, or the factor will not be upheld. *Gretzler*, 135 Ariz. at 53, 659 P.2d at 12.

In its instructions to the jury about the (F)(6) aggravating circumstance ("Defendant committed the murder in an especially cruel manner"), the Court's instructions constitutionally narrowed the aggravating factor, pursuant to Arizona Supreme Court and United States Supreme Court precedent, and Defendant's challenge to the constitutionality of the (F)(6) factor is meritless.

b. Newly-Discovered Evidence

Defendant asserts a newly discovered evidence PCR claim, related to a report that concludes at least one capital aggravating factor was present in almost every first degree murder case in Maricopa County from 2002 to 2012 (Petition at 98, 102; PCR Exhibit 99.).

This claim, too, is foreclosed by *Hidalgo*, where our supreme court rejected a challenge to Arizona's aggravating factors based on an identical factual assertion that one or more aggravating circumstances were present in 856 of 866 first degree murder cases over an 11–year period. *Hidalgo*, 241 Ariz. at 549, ¶ 17. The study Burns attaches reaches the same conclusion and thus provides no reason why his claim is not governed by *Hidalgo*.

Moreover, since Burns' trial occurred in 2010 and the study he attaches looks at cases beginning in 2002, he has failed to show diligence—these facts and this claim, to the extent any merit may exist – this Court does not believe such merit is present – could have been presented to the trial court, and more importantly, to the Arizona Supreme Court on direct appeal. *See Amaral*, 239 Ariz. at 219, ¶ 9 (newly-discovered evidence claim must show that defendant was diligent in discovering the facts and bringing them to the court's attention). Conversely, to the

extent he relies on data regarding first degree murder cases after his trial, those cannot support a newly-discovered evidence claim since those facts did not exist at the time of trial. *See id.*

The sub-claim fails both on the merits, and because it does not meet the requirements for a claim of newly-discovered evidence.

c. Ineffective Assistance of Counsel

Defendant alleges that "trial and appellate counsel…failed [to] raise an effective claim that the Arizona death penalty's aggravating factors are so broad as to encompass virtually all first-degree murders, thus violating due process of law…." Petition at 9; also, 98.

Defendant faults trial and appellate counsel for "failing to effectively investigate and argue their claim that the Arizona system of aggravating factors violated due process of law. Their pro forma objections (Ex. 16, Constitutional Objections to the Death Penalty) were brushed aside (Ex. 74 ME Pretrial rulings)." Petition at 98.

Counsels' performance is evaluated at the time of trial and not in hindsight. At the time of Defendant's 2010/11 trial and his appeal decided in 2015, established Arizona precedent upheld Arizona's death penalty statute. In fact, this Court determined the adequacy of the statutory narrowing in resolving a motion filed by trial counsel. M.E. dated 10/27/2010, at 4; *see also* Defendant's Constitutional Objections to Arizona's Death Penalty Scheme (filed 9/8/2010).

As of the date of that ruling, both the Arizona Supreme Court and the Ninth Circuit Court of Appeals had rejected Defendant's argument that

Arizona's statutory scheme failed to constitutionally narrow those defendants eligible for the death penalty thereby making Arizona's entire death penalty statute unconstitutional. Contrary to defendant's claim, precedent establishes that Arizona's statute accomplishes the requisite narrowing function. See *State v. Greenway,* 170 Ariz. 155, 823 P.2d 22 (1991), *State v. Hausner*, 230 60, 89, 280 P.3d 604 (2012), and *Smith v. Stewart*, 140 F.3d 1263, 1272 (9th Cir. 1998). And since then, as Defendant acknowledges, *Hidalgo* has upheld the statute's constitutionality.

Accordingly, any argument that Arizona's death penalty statute unconstitutionally failed to narrow would have failed, and counsel would not have been ineffective in failing to make a futile argument. *See State v. Pandeli*, 242 Ariz. 175, __, 394 P.3d 2, 12, ¶ 33 (2017) ("Counsel's failure to make a futile motion does not constitute ineffective assistance of counsel." quoting *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994)). The same reasoning applies to appellate counsel, who was not ineffective for failing to challenge the narrowing on appeal. Any such challenge would have been rejected under then-existing Arizona Supreme Court precedent, as is demonstrated by the Court's decision in *Hidalgo.*

Despite precedent, trial counsel filed a motion challenging the constitutionality of the Arizona death penalty statute on narrowing grounds, which the trial court rejected, and appellate counsel challenged the constitutionality on appeal. Given the existence of precedent rejecting the claim, neither was obligated to do so. The record demonstrates neither deficient performance nor prejudice.

THE COURT FINDS Defendant's claims relating to the constitutionality of Arizona's death penalty statute not colorable.

9. PRECLUDING DR. CUNNINGHAM'S SUR-REBUTTAL

Defendant alleges the Court committed error when it precluded Dr. Cunningham's sur-rebuttal testimony. He also raises a due process violation and ineffective assistance of counsel, due to counsel's failure to disclose Dr. Cunningham as a sur-rebuttal witness, as bases for relief on this claim.

a. Preclusion

This claim was argued and addressed on appeal (*Burns,* ¶¶ 15; 91-92; 96-100); it is therefore precluded by Rule 32.2(a)(3). *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

The Arizona Supreme Court wrote:

> ¶ 96 The court sustained an objection on non-disclosure grounds to Dr. Cunningham's direct examination testimony regarding "the rates of violence in prison, factors that are predictive of violence in prison, and how capital offenders behave in prison." At the conclusion of Dr. Cunningham's testimony, Burns' counsel said he intended to recall Dr. Cunningham as a rebuttal witness. The State objected, arguing that Burns did not disclose to the State that it intended to call Dr. Cunningham as a rebuttal witness and that Dr. Cunningham's purported testimony on the likelihood of violence in prison among capital offenders was not relevant to the

State's rebuttal evidence. **The trial court ruled that if the State presented evidence on the likelihood of violence in prison, "then Dr. Cunningham will be allowed to testify" as a rebuttal witness.**

¶ 97 A few days later, a State expert, Dr. Kirkley, discussed Burns' past misconduct to support her conclusion that Burns exhibited antisocial personality disorder. Burns then moved to recall Dr. Cunningham to address antisocial personality disorder and to explain the statistical analysis on the risk of inmate prison violence based upon his own research and other research presented in Burns' case-in-chief. **The trial court precluded this testimony because it "was not timely disclosed." Further, the court found that the State did not inject the issue by its questioning of Dr. Kirkley and that the offered testimony was not relevant as rebuttal evidence.**

¶ 98 Burns' offer of proof disclosed that Dr. Cunningham would have offered a statistical analysis showing that violent offenders do not necessarily commit acts of violence while incarcerated. Burns argues that this testimony would have rebutted the "[S]tate's position that [Burns] could not be safely housed for life in ADOC" as well as Dr. Kirkley's opinion that Burns' antisocial personality disorder and history meant he had a high probability of future dangerousness in prison. We find no abuse of discretion.

> ¶ 99 Under the *Smith* factors, Dr. Cunningham's testimony that Burns could safely be incarcerated for life was cumulative and therefore not vital to his mitigation evidence. Another defense expert, James Aiken, had already testified that an inmate like Burns could be safely housed in prison. Second, the fact that Dr. Cunningham had testified in other trials does not mean that the State was prepared to effectively deal with his late-disclosed testimony in Burns' case. The fact that the State had virtually no notice that Burns intended to call Dr. Cunningham as a rebuttal witness weighs in favor of preclusion. As with Dr. Wu's testimony, there is no evidence of bad faith in the defense's late disclosure, and so the third *Smith* factor is inapplicable here.
>
> ¶ 100 **Ultimately, Burns cannot establish that he was prejudiced by the preclusion of Dr. Cunningham's testimony because the proffered testimony was largely cumulative**. We find no abuse of discretion in the trial court's refusal to allow Dr. Cunningham's rebuttal testimony.

State v. Burns, 237 Ariz. 1, 23–25, ¶¶ 90-100, 344 P.3d 303, 325–27 (2015) [Emphasis added]. This claim, having been finally adjudicated, including the Court's analysis of the four criteria outlined in *State v. (Joe U.) Smith*, 140 Ariz. 355, 359, 681 P.2d 137, 1378 (1984), on appeal, is precluded. Rule 32.2(a)(2).

However, the Court will consider the merits of Defendant's alleged due process violation and Sixth Amendment claim of ineffective assistance of counsel.

The due process claim regarding Cunningham's testimony is likewise precluded as it was not raised on direct appeal. Rule 32.2(b).

b. Due process

To the extent defendant raises a due process claim related to the preclusion of Dr. Cunningham as rebuttal to State's expert Dr. Kirkley; the claim fails. *State v. Pandeli*, 242 Ariz. 175, 193, ¶ 77, 394 P.3d 2, 20 (2017), *cert. denied,* 138 S. Ct. 645 (2018) ("[due process] argument fails because [defendant] has provided no objective evidence that [expert's] testimony was false or misleading").

Likewise, defendant's precluded claim related to Dr. Cunningham's precluded opinion testimony as rebuttal to the State's cross-examination of defense expert Dr. Aiken fails. Our supreme court addressed an issue related to the propriety of the State's cross-examination of Mr. Aiken. See, *State v. Burns*, 237 Ariz. 1, 25, ¶¶ 100-104, 344 P.3d 303, 327 (2015). Dr. Cunningham's proffered testimony would have been an attempt to bolster the credibility of Aiken's testimony. Our Supreme Court found,

> Under the *Smith* factors, Dr. Cunningham's testimony that Burns could safely be incarcerated for life was cumulative and therefore not vital to his mitigation evidence. Another defense expert, James Aiken, had already testified that an inmate like Burns could be safely housed in prison. …

State v. Burns, 237 Ariz. at 24, ¶ 99 (2015); and

> Ultimately, Burns cannot establish that he was prejudiced by the preclusion of Dr. Cunningham's testimony because the proffered

> testimony was largely cumulative. We find no abuse of discretion in the trial court's refusal to allow Dr. Cunningham's rebuttal testimony.

State v. Burns, 237 Ariz. at 25, ¶ 100 (2015).

Absent prejudice, Defendant is afforded no relief.

c. Ineffective assistance claim

Defendant argues that trial counsel's failure to timely notice Dr. Cunningham as a rebuttal witness amounted to ineffective assistance, resulting in his preclusion. Defendant's claim fails for several reasons.

At trial, the Court ruled, if the State presented evidence on the likelihood of violence in prison, "then Dr. Cunningham will be allowed to testify" as a rebuttal witness. *Burns*, 237 Ariz. at 24, ¶ 96 (2016). If this Court had determined Dr. Cunningham's testimony relevant to rebuttal, it may have permitted the rebuttal testimony, even though it was disclosed late. Notwithstanding Dr. Cunningham's opinion in his post-conviction affidavit that he did so testify, on appeal this Court's determination of "legal relevance" was affirmed and the testimony determined to have been properly precluded at trial.

Defendant has not demonstrated the first *Strickland* prong; deficient performance. The record demonstrates counsel's efforts to secure admission of Dr. Cunningham's testimony. On direct examination, Dr. Cunningham testified about various risk factors. Counsel sought to limit the scope of cross-examination and, when unsuccessful, sought to have Dr. Cunningham testify in rebuttal. The Court determined that the disclosure of the expert as a rebuttal witness was untimely, and was also not

relevant; however, had Dr. Kirkley testified about "violence in prison" the court indicated a willingness to allow the rebuttal testimony. Counsel then supplemented the record with an oral and then a written offer of proof: Dr. Cunningham's detailed, 39-page affidavit. In addition, counsel identified the preclusion of the rebuttal testimony as one of the grounds for Defendant's Motion for New Trial (filed 3/10/2011; denied, 4/14/2011).

Defendant has not demonstrated the second *Strickland* prong; prejudice. Dr. Cunningham's testimony appears to be directed toward supplementing defense prison expert Aiken's testimony with research data, and challenging statements made by State's expert Dr. Kirkley. The Supreme Court has determined that the testimony was either cumulative, or not relevant to rebuttal of the expert's cross-examination testimony.

For the reasons stated above, including the appellate decision in his case,

THE COURT FINDS defendant's claims relating to Dr. Cunningham's proffered sur-rebuttal testimony not colorable.

10. PRECLUSION OF DR. WU'S STATISTICAL ANALYSIS

Defendant alleges that trial counsel provided ineffective assistance by failing to timely notice Dr. Wu, and timely disclose his report, resulting in the Court precluding "his quantitative analysis of [Defendant's] PET scan." Petition at 118.

a. Preclusion

This claim could have been raised on appeal, and a form of the claim was addressed by our supreme court

on appeal (*Burns*, 237 Ariz. at 12, ¶¶ 14-17, *Burns,* 237 Ariz. at 23; ¶¶91-95; *see also*, *Burns*, 237 Ariz. at 25, ¶¶ 103-104); it is therefore precluded by Rule 32.2(a)(3).

b. Ineffective assistance of counsel

Defendant's claim of ineffective assistance here, however, is contradicted by the trial record and our supreme court's opinion on appeal. It is also not a colorable claim under either prong of *Strickland*, for several reasons as to each prong.

Deficient performance

Counsel made various efforts to secure a timely report from Dr. Wu. First, counsel attempted to secure a trial continuance, indicating that it needed to secure and complete certain additional, unidentified testing. Motion to Continue Trial Date of October 7, 2010 (filed 9/2/2010), at 5. The Court denied the continuance request. Counsel identified the testing that needed to be done as having been at least partially accomplished by January 2011. RT 1/10/2011, at 10-11.

Additionally, despite a number of the challenges (see, Defendant's Supplemental Notice of Mitigation Witnesses (filed 1/4/2011) at 1-2; RT 1/10/2011, at 6-7; RT 1/10/2011, at 8; *Burns*, 237 Ariz. at ¶ 93; RT 1/12/2011, at 10; RT 1/12/2011, at 3-13; 51-54; 56-58) including belated disclosure of Dr. Wu and his delayed dissemination of certain imaging, counsel succeeded in his efforts to get Dr. Wu's testimony before the jury. RT 2/1 & 2/2/2011. The jury did learn about a PET scan from Dr. Wu, and that his evaluation suggested that the PET scan served as "clinical corroboration" of a traumatic brain injury ("TBI"). RT 2/1/2011, at 10-11; 60; RT 2/1/1011 at 21; 54; RT 2/1/2011, at 100; *Id.,*

at 125; see also, *Id*. at 54. Counsel also argued at length for admission of Dr. Wu's quantitative analysis testimony. RT 2/1/2011 at 61-73.

Further, before counsel tendered Dr. Wu for cross-examination, counsel reserved his right to question Dr. Wu about the quantitative analysis on redirect (RT 2/1/2011 at 102); attempted, albeit unsuccessfully, to limit cross-examination (RT 2/7/2011 at 4-16); and counsel extensively cross-examined the State's rebuttal expert, Dr. Waxman. RT 2/7/2011 at 88-141. Counsel's Rule 20 motion for new trial included as grounds, "Dr. Wu's statistical analysis precluded: over defense objection…." Defendant's Motion for New Trial (filed 3/10/2011) at 9.

Counsel's efforts to gain admission of the ultimately-precluded statistical analysis and to ameliorate any adverse impact demonstrate not deficient performance, but effective assistance.

Prejudice

First, as outlined by the State, and as testified to by the expert, the jury was presented with concerns about Dr. Wu's methodology and conclusions, rather than his calculations. RT 2/7/2011, at 18 (State's mitigation phase opening); RT 2/7/2011, at 111 (cross examination). Second, because the State focused on undermining Dr. Wu's methodology and the ability of a PET scan to establish TBI, additional testimony from Dr. Wu about his calculations would not have bolstered the overriding issue of the value of a PET scan in connection with TBI corroboration.

Third, in response to the State's request for preclusion of Dr. Wu's quantitative analysis, (RT

2/1/2011, at 61-73), counsel expressed concern that in the past Dr. Waxman has criticized Dr. Wu for performing a visual analysis and not a quantitative analysis; or for performing a quantitative measurement rather than a visual analysis. *Id.,* at 71. Thus, counsel anticipated the belated calculations would rebut that criticism. As a counter-measure, on cross-examination counsel secured Dr. Waxman's agreement that he himself had performed only a visual review of the imaging. RT 2/7/2011 at 112-113; 116 (visual – and not quantitative – analysis).

Fourth, Dr. Bigler's November 14, 2017 evaluation, secured post-conviction, appears to undercut Dr. Wu's trial testimony in significant respects, rendering the preclusion of his quantitative analysis minimally prejudicial. Dr. Bigler discloses that "Mr. Burns also underwent PET imaging on July 27, 2017, which was interpreted as being negative…." Petition Exhibit 100, at 1. Dr. Bigler also discloses that "[a] previous positron emission tomogram was performed and interpreted by Dr. Joseph Wu, M.D. as demonstrating hypofrontality.[18] This was not observed in the current PET imaging, but Mr. Burns is now older. It is also the case that physiological functioning of the brain may vary over time or from setting to setting, even in the presence of underlying brain damage where presence of prior abnormality is still likely reflective that underlying dysfunction is present." *Id.,* at 3. Thus, where post-conviction testing does not appear to have confirmed Dr. Wu's results, it is difficult to

[18] Dr. Waxman testified on cross-examination that "hypofrontality" is a relative decrease in frontal lobe activity, relative to the lower (rear) occipital. *Id.,* at 113.

understand how the preclusion of Dr. Wu's quantitative calculations creates a colorable claim.

Additionally, it is of note that although Defendant claims the Court precluded the quantitative testimony based on belated disclosure, in fact, the Court directed that the analysis be provided to the State's expert for review, the Court withheld its ruling pending review by the State's expert, and ultimately our supreme court found,

> Based on the *Smith* factors, the trial court did not abuse its discretion by precluding Dr. Wu's quantitative analysis. **Dr. Wu's testimony was not critical to Burns' defense. Dr. Wu testified at length that Burns had diminished frontal-lobe activity and explained that this could affect Burns' impulse control, judgment, and emotional regulation. Burns has not identified what the quantitative analysis would have additionally shown.**

Burns, 237 Ariz. at 24, ¶ 95.

THE COURT FINDS Defendant's claims relating to Dr. Wu's statistical analysis not colorable.

11. MRI STUDY AND DR. BIGLER

Defendant alleges that trial counsel provided ineffective assistance by failing to secure certain expert testimony from Dr. Erin Bigler in support of his mitigation; and that the proffered mitigation constitutes newly-discovered facts under Rule 32.1(e). Petition at 118.

In defendant's argument that Dr. Bigler's post-conviction evaluation constitutes newly-discovered evidence, he states:

> Dr. Bigler found that inferences can be drawn from Mr. Burns' history, including his childhood evaluation by Dr. Federici in 1994, that at the cellular level, Mr. Burns was more vulnerable to the effects of injury and stressful environments. "This is an indication from a neurobehavioral standpoint that frontal pathology was present." *Id.*
>
> ** ** **
>
> While Mr. Burns' jury heard Dr. Wu's truncated analysis, it did not hear a direct relation of how a skull fracture in infancy carries through the rest of the child's life, disrupting normal social and emotional development, learning, and critically, impulse control. At the sentencing phase this would have been key mitigation that was missed thought IAC.

Petition at 119-120.

a. Newly-discovered evidence

As the Court has previously noted, evidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence. *State v. Saenz,* 197 Ariz. 487, 4 P.3d 1030 (App. 2000), review denied. The evidence must have been in existence at the time of trial, but not discovered until after trial. *State v. Sanchez*, 200 Ariz. 163, ¶11, 24 P. 3d 610 (App. 2001).

Defendant acknowledges that the jury learned of the childhood skull fracture and heard Dr. Wu's analysis; the evidence was known to him and his counsel before trial and testimony based on that evidence was presented. Therefore, this evidence does not meet the requirements of Rule 32.1(e). *See, State v. Swoopes*, 216 Ariz. 390, ¶18, 166 P.3d 945 (App, 2007)(jury's note and judge's response existed at time of trial and could have been discovered by exercise of due diligence); *State v. Mata*, 185 Ariz. 319, 916 P.2d 1035 (1996).("Defendant has not presented 'newly discovered' facts, as A.R.S. §13-4231 requires, but facts to which he has had access for eighteen years through these protracted proceedings. Simply because defendant presents the court with evidence for the first time does not mean that such evidence is 'newly discovered,'"): *State v. Dogan,* 150 Ariz. 595, 600, 724 P.2d 1264 (App. 1986)("We do not believe that the "discover" by a different attorney that appellant's photograph was the only photograph in the lineup depicting a person in blue denim constitutes newly-discovered material facts within the scope of Rule 32.1.").

In addition, Dr. Bigler's report cannot qualify as "newly-discovered facts," even though it was prepared seven years after the trial. It is the underlying fact (the head injury) and not the report that would have to have been unknown at the time of sentencing:

> …[I]t is the condition, not the scientific understanding of the condition, that needs to exist at the time of sentencing. *See Bilke,* 162 Ariz. at 53, 781 P.2d at 30. Bilke's PTSD qualified as newly discovered evidence because the advancement of knowledge permitted the

> diagnosis of a previously existing—but unrecognized— condition. Like Bilke's PTSD, Amaral's juvenile status existed at the time of sentencing. But the behavioral implications of Amaral's condition, in contrast to Bilke's, were recognized at the time of his sentencing; that our understanding of juvenile mental development has since increased does not mean that the behavioral implications of Amaral's juvenile status are newly discovered.

State v. Amaral, 239 Ariz. 217, 222, ¶ 19, 368 P.3d 925, 930, *cert. denied,* 137 S. Ct. 52 (2016).

THE COURT FINDS that Dr. Bigler's post-conviction evaluation is not newly discovered evidence pursuant to Rule 32.1(e); *State v. Saenz,* 197 Ariz. 487, 4 P.3d 1030 (App. 2000), review denied; *State v. Sanchez*, 200 Ariz. 163, ¶11, 24 P. 3d 610 (App. 2001).

Defendant also argues that Defendant's post-conviction MRI constitutes newly-discovered evidence:

> [T]rial counsel were further ineffective in not obtaining a needed MRI of Mr. Burns' brain, which post-conviction counsel has obtained and which comprises newly discovered mitigation evidence.

Petition at 98-99.

Irrespective of whether the MRI was "discovered" after the trial (Dr. Morenz reviewed an MRI of Defendant's brain; RT 1/18/2011 at 10-11 (direct); 65-66, 67 (cross; MRI of Defendant's brain on October 15, 2010); 129-132 (redirect; established only what an MRI is; "functional MRI" at 132)) or whether the defendant exercised due diligence in securing the

MRI, which are the first two requirements of Rule 32.1(e), the claim fails as to the third requirement; that the MRI results "probably would have changed the verdict or sentence. Rule 32.1(e); *State v. Amaral*, 239 Ariz. 217, 219, ¶ 10, 368 P.3d 925, 927, *cert. denied,* 137 S. Ct. 52 (2016).

In her report, Dr. Bigler concludes that Defendant's MRI is "within normal limits":

> …..The brain MRI w/o contrast was performed on July 19, 2017.
>
> The interpretation of this scan was that it was **within normal limits** from a clinical perspective, as interpreted by the radiologist, Avery Knapp, M.D.; however, as mentioned by Dr. Knapp in his report, the issues with traumatic brain injury and post-concussive syndrome are often not detected by standard clinical MRI, which I will address later in this report. **Mr. Burns also underwent PET imaging on July 27, 2017, which was interpreted as being negative** by John P. Uglietta, M.D.
>
> ** ** ** **
>
> Turning to the current MRI studies, as indicated in the clinical report, there were no gross abnormalities...

Petition Exhibit 100 (Dr. Bigler's evaluation), at 1; 3 [Emphasis added].

Although Dr. Bigler explains the limitations of the post-conviction imaging sequence which prevented "advanced quantitative neuroimaging analysis," she also notes (1) that based on Dr. Ronald Federici's May 1994 report suggesting that "Mr. Burns' brain was

more vulnerable to the effects of injury and stressful environments," suggesting the presence of frontal pathology; and (2) that "there is a slight symmetry in the lateral ventricular size" that is "potentially associated with the history of head injury" and also dyslexia (Dyslexia testified to by Dr. Federici, RT 1/1/02011 at 79-81; 101). Petition Exhibit 100, at 3.

As the Supreme Court noted, Defendant presented – and the jury heard – mitigation evidence that included "his diagnosed learning disabilities [and] his impulsivity." *Burns*, 237 Ariz. at 34, ¶ 169.

THE COURT FURTHER FINDS that the post-conviction 2017 MRI is not newly discovered evidence pursuant to Rule 32.1(e); *State v. Saenz,* 197 Ariz. 487, 4 P.3d 1030 (App. 2000), review denied; *State v. Sanchez*, 200 Ariz. 163, ¶11, 24 P. 3d 610 (App. 2001).

THE COURT FURTHER FINDS that Defendant's post-conviction 2017 MRI imaging was within normal limits, and fails to establish the third requirement that the post-conviction 2017 MRI results "probably would have changed the verdict or sentence." Rule 32.1(e); *State v. Saenz,* 197 Ariz. 487, 4 P.3d 1030 (App. 2000), review denied; *State v. Sanchez*, 200 Ariz. 163, ¶11, 24 P. 3d 610 (App. 2001).

Therefore,

THE COURT FINDS Defendant fails to establish a colorable newly discovered evidence claim, pursuant to Rule 32.1(e), relating to Dr. Bigler's MRI study and analysis.

b. Ineffective assistance

Defendant also argues that trial counsel provided ineffective assistance by failing to secure an MRI of

his brain; and also by failing to secure the testimony of Dr. Bigler. Petition at 119-120.

Prejudice

Initially, although prejudice is normally addressed as the 2nd prong of the *Strickland* analysis, as to IAC for failure to secure a MRI, because the record demonstrates that counsel had an MRI taken in October 2010[19], and also because the 2017 post-conviction MRI results were within normal limits, as discussed immediately above, the prejudice prong of *Strickland* cannot be satisfied, and this aspect of the sub-claim fails.

Deficient performance

As to the alleged deficient performance of counsel, the Court notes, first, at trial numerous mental health experts testified for Defendant: Dr. Federici, a clinical neuropsychologist; Dr. Lanyon, a psychologist; Dr. Morenz, a psychiatrist; Dr. Cunningham, a psychologist; and Dr. Wu, a neuropsychiatrist. Additionally, the State called Dr. Kirkley and Dr. Waxman. Through the experts, Burns' counsel sought to establish:

> The bottom line is that with each of those experts on both sides, [that] the State retained and we retained, … every expert makes bottom-line findings that something is wrong with John, and that there has always been something wrong with John. And that

[19] *See*, counsel's questioning of Dr. Morenz on redirect ("Can an MRI – can there be a difference with a PET scan showing an abnormality and an MRI not – the MRI doesn't show some sort of growth or something like that" "Yes."). RT 1/16/2011 at 131-132.

> something wrong goes back to infancy and childhood. He's a damaged individual who, unfortunately, did not have the proper structure and care in his life early on to manage him. And that's why he is the individual who is sitting before you today about to be sentenced. It's not an excuse. But it explains why.

RT1/10/2011 at 55-56 (defense opening, mitigation phase).

Later, in his penalty phase closing (RT 2/15/2011 at 3- 57), counsel demonstrated familiarity with Defendant's background and the witness's testimony. Counsel argued to the jury that the mitigation evidence demonstrated that (1) the defendant has been a severely damaged individual since infancy, which counsel characterized as "parental malnutrition" (*Id*., at 9, 39); (2) Dr. Cunningham, as the premier expert regarding risk and protection factors, that appeared in the defendant's background; (3) head trauma suffered by the defendant: and (4) discussed the testimony of its experts, including Dr. Wu (*Id*., at 20-24); Dr. Cunningham (*Id.,* at 3-15, 25, 28, 30, 32, 37); Dr. Federici; Dr. Lanyon; and even the State's expert, Dr. Kirkley, as providing mitigation. In his second closing counsel focused on Defendant's background and the risk and protection factors cited by Dr. Cunningham. Id., at 93-107.

The Court likewise disagrees with Defendant's argument that failing to secure an *additional* MRI – as PCR counsel did, securing the 2017 MRI that was "within normal limits" as reported by Dr. Bigler – constituted deficient performance. The record reflects counsel sought to demonstrate Defendant's traumatic brain injury was traceable to a childhood injury and

impacted his behavior, including impulsivity. A normal MRI would not have advanced this theory; in fact, it could have served to undermine it.

To the extent that Defendant argues failing to secure Dr. Bigler's testimony about "how a skull fracture in infancy carries through the rest of the child's life" (Petition at 119-120) constituted prejudicial deficient performance, the Court also disagrees. The jury heard testimony from Dr. Wu that utilized a PET scan of Defendant's brain to visually identify TBI, discussed the defendant's symptoms and behaviors, including impaired impulse control, and linked the skull fracture and impulse control as consistent with TBI. Further, Dr. Cunningham testified about risk and protection factors in an individual's background that the jury could relate to Defendant's background. The decision about what witnesses to call is a strategic decision made by counsel:

> On the other hand, the power to decide questions of trial strategy and tactics rests with counsel, *Henry v. Mississippi,* 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965); *State v. Rodriguez,* 126 Ariz. 28, 612 P.2d 484 (1980), and the decision as to what witnesses to call is a tactical, strategic decision. *Vess v. Peyton, supra;* A.B.A. Standards § 4–5.2 commentary at 4.67. Tactical decisions require the skill, training, and experience of the advocate. A criminal defendant, generally inexperienced in the workings of the adversarial process, may be unaware of the redeeming or devastating effect a proffered witness can have on his or her case.

State v. Lee, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984).

Further, although counsel was faced with what he believed to be a short period of time in which to complete the investigation and prepare for mitigation "Burns was able to present twelve days' worth of mitigation that included much of the information he allege[d] he could not offer because of time constraints…" *State v. Burns*, 237 Ariz. 1, 12, ¶¶ 14-16, 344 P.3d 303, 314 (2015).

While counsel and their team did not have the luxury of the many additional months and years of careful investigation and evaluation that Defendant's team of post-conviction lawyers and experts have had in this case, counsel nevertheless, actively presented and challenged evidence on Defendant's behalf. *See Williams v. Head*, 185 F.3d 1223 (11th cir. 1999)("this squad of [PCR] attorneys has succeeded in proving the obvious: if [petitioner's trial counsel] had their [PCR counsel's] resources and the time they have been able to devote to the case, [trial counsel] could have done better").

Counsel presented 14 days of testimony and multiple lay and expert witnesses following his penalty phase opening that provided an overview and explained to the jury what he hoped to accomplish, with their assistance. (RT 1/10/2011) at 43-56 (defense penalty phase opening)). In fact, our supreme court determined "[t]he jurors did not abuse their discretion in determining that the mitigating evidence was *insufficient to warrant leniency*…" noting that "[d]uring the penalty phase, *Burns presented mitigation evidence regarding his difficult childhood, his dysfunctional family, his diagnosed learning*

disabilities, his impulsivity, the personality disorders from which he suffered, and whether he would be able to be safely housed in prison while serving a life sentence." *State v. Burns*, 237 Ariz. 1, 34, ¶¶ 169-171, 344 P.3d 303, 336 (2015).

Given the experts presented and the testimony elicited, and in light of the post-conviction MRI results,

THE COURT FINDS the IAC for failure to secure Dr. Bigler's report and testimony aspects of this claim are without merit and are not colorable. *See*, *State v. Pandeli*, 242 Ariz. 175, 183–84, ¶¶ 21-26, 394 P.3d 2, 10–11 (2017), *cert. denied,* 138 S. Ct. 645 (2018).

For the reasons stated above, including the lack of materiality/prejudice,

THE COURT FINDS the newly discovered evidence and IAC claims relating to the MRI study and Dr. Bigler are not colorable.

12. RELIGION AND ASPD

Defendant claims ineffective assistance of counsel for counsel's failure to request that the Court preclude references to his religion and to the anti-social personality disorder (ASPD). Defendant argues this was mitigation that the State "misused [as] nonstatutory aggravation, mitigation rebuttal or a reason not to show leniency." Petition at 120.

a. Preclusion

This claim (as to his religious beliefs) was raised and addressed on appeal (*Burns,* ¶¶ 127-135) and (as to ASPD) could have been specifically raised on appeal (*see Burns,* ¶¶ 97-98); it is therefore, in its entirety, precluded by Rule 32.2(a)(3). *State v. Towery,* 204

Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

b. Ineffective assistance

The Arizona Supreme Court found that the evidence of Defendant's religious beliefs and ASPD were properly admitted and permissible rebuttal, and the Court properly instructed the jury in the penalty phase. *Burns*, 237 Ariz. at 29, ¶¶132-135, 143-144. Further, the Court found the prosecutor did not commit misconduct by commenting on this evidence in the State's closing argument. *Id.* at 31, ¶ 149.

Anti-Social Personality Disorder

In connection with the IAC claim related to ASPD, the Court reviews the record and counsel's actions. The record reflects that Dr. Kirkley (the State's expert) diagnosed the defendant with ASPD and not bipolar disorder, and Dr. Kirkley found Dr. Federici's report from defendant's childhood, describing behaviors indicative of conduct disorder, of assistance in making her diagnosis. RT 2/8/2011 at 49-50; 57-62. In addition, Defendant's counsel acknowledged that all the defense experts agreed that the ASPD criteria were present:

> In this case, *defense experts will agree that the criteria for antisocial disorder are met*. The Psychopathy test goes to a subset of that. So, again, regardless of whatever findings may be on this test, it doesn't rebut what defense experts are going to testify to regarding the criteria in that area.

RT 9/15/2010 at 19.

Second, counsel's argument was proper and would not have been upheld had counsel argued to preclude a finding of ASPD. The State in its closing indicates that "Dr. Morenz agreed with Dr. Kirkley that this Defendant has antisocial personality disorder." RT 2/15/2011 at 80. The jurors were properly instructed that what the lawyers say in closing argument is not evidence, and that the law to be applied is set forth in the court's instructions. Final Jury Instructions – Penalty Phase (filed 2/14/2011) at 4. The State properly based its argument on testimony and inferences from the testimony of the State and the defense experts.

Third, counsel made the above statement in connection with efforts to mitigate the impact of the potentially adverse ASPD evidence. Counsel identified a particular diagnostic test he anticipated the State's expert would use in an attempt to identify ASPD; the test, the PCLR, was of concern to the defense. Counsel argued pretrial, and subsequently secured a concession from the State during the penalty phase that the test results would not be presented to the jury. RT 9/15/2010 at 19.

Counsel sought to preclude the State's expert from giving particular psychopathy test, the PCL-R, "because there may be collateral information obtained that can be taken as harmful…." RT 9/15/2010, at 19-22. This Court denied the requested limitation on the State's expert's testing, and deferred decision on admissibility to the scheduled motions hearing. Five months later, during the penalty phase, the issue was again addressed, when the parties advised the Court the admissibility question was "no longer an issue…." RT 2/7/2011, at 148 (Re Dr. Kirkley's PCLR testing).

Defendant now argues that the ASPD evidence was prejudicial and was used as an additional aggravating factor. A diagnosis of ASPD has been determined to be "not substantially prejudicial [as any] psychiatrist…would have ready the same psychological report and likely come to the same conclusion." *Davis v. Woodford*, 384 F.3d 628, 648-649 (9th Cir. 2004). In fact, ASPD evidence has been used affirmatively by the defense in other cases to argue " despite [defendant's] ASPD, he would do well in a prison setting that provided him with some structure…." *Davis v. Woodford*, 384 F.3d 628, 648-649 (9th Cir. 2004); *see also*, *Fairbank v. Ayers*, 650 F.3d 1243, 1254 (9th Cir. 2011).

Religion and beliefs

In connection with the IAC claim related to "religion and beliefs," the Court reviews the record and counsel's actions.

Initially, the Court notes that defendant argues, in addition to IAC related to this issue, that it was error to allow argument by the State invoking Defendant's religion. Petition at 123.

This claim was raised and addressed on appeal; it is therefore, precluded by Rule 32.2(a)(3). *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

While the "[a]dmission of religious information regarding witnesses may in certain circumstances constitute fundamental error [, but] if such information is probative of something other than veracity, it is not inadmissible simply because it may also involve a religious subject as well." S*tate v. Stone,*

151 Ariz. 455, 458, 728 P.2d 674, 677(App. Div.1 1986); *see* Ariz. R. Evid. 610.

Our Supreme Court, however, determined that certain evidence, including defendant's religious beliefs, was "directly relevant to rebut [the prison expert's testimony] suggesting that Burns was not a gang member and that he could be safely controlled in prison." *Burns,* at ¶ 132.

As with the ASPD evidence discussed above, counsel attempted to have evidence related to the defendant's religious beliefs precluded and/or to minimize the potentially adverse evidence. RT 2/8/2011 at 8-10 (admissibility of "die a warrior's death").

Counsel identified and secured agreement that certain other adverse evidence would not be presented via a motion to preclude. *See*, Defendant's Motion *in limine* regarding Trial Evidence and Testimony (filed 9/29/2010), at 3-4. The State conceded that it did not anticipate presenting the evidence in its case in chief, or related to "juvenile convictions"[20] until the penalty phase. M.E. dated 10/27/2010, at 2.

In addition, counsel identified, and again preserved for appeal, the evidence about the defendant's religious beliefs and racial views as one of the grounds in Defendant's Motion for New Trial (filed 3/10/2011), which the Court denied. Ruling, dated 4/14/2011.

Counsel also secured proper jury instructions. *See*, *Burns,* at ¶ 143-144; Preliminary Jury Instructions – Penalty Phase (filed 1/20/2011) at 5 and Final Jury Instructions – Penalty Phase (filed 2/14/2011) at 4

[20] The Court is unclear whether the phrase "juvenile convictions" should actually be "juvenile adjudications."

(defining mitigating circumstances); Preliminary Jury Instructions Penalty Phase (filed 1/10/2011) at 3 (State allowed rebuttal mitigation; it's not new aggravation); and Preliminary Jury Instructions Penalty Phase (filed 1/10/2011) at 3 and Final Jury Instructions Penalty Phase (filed 2/14/2011) at 2-3 (limited purpose evidence). Further, the Court instructed the jury, who are presumed to follow the court's instruction, that "[y]ou shall not consider rebuttal evidence as aggravation." Final Jury Instructions Penalty Phase (filed 2/14/2011) at 5.

Finally, Counsel sufficiently raised this issue – the admissibility of Defendant's religious beliefs (among other evidence) was proper rebuttal) at trial such that, when raised, it was addressed on appeal. *State v. Burns*, 237 Ariz. 1, 29, ¶¶ 132 - 135, 344 P.3d 303, 331 (2015).

For the reasons stated above,

THE COURT FINDS that the claims relating to the admission of evidence of Defendant's religion and religious beliefs and ASPD, and the related claims of IAC, are not colorable.

13. RELATING TO THE *SIMMONS* INSTRUCTION

Defendant claims trial counsel provided ineffective assistance by failing to secure a *Simmons* instruction and, alternatively, that "there has been a significant change in the law[;]" namely, *Lynch v. Arizona*, --- U.S. ---, 136 S.Ct. 1818 (2016), *State v. Escalante-Orozco*, 241 Ariz. 254 (2017; and *State v. Rushing*, 243 Ariz. 212 (2017), that should overturn the Defendant's sentence. Further, defendant claims if it was not IAC or "significant change in the law" it was constitutional error to deny trial counsel's request for a *Simmons*

instruction and the Arizona Supreme Court *decided the issue wrongly on appeal*. Defendant claims any or all of these arguments entitle him to a new penalty phase trial under Rule 32.1(a) and/or (g)." Petition at 128.

a. Preclusion

This claim was raised on appeal and our Supreme Court declined to revisit this – along with 31 other – previously rejected constitutional claims. *Burns*, 237 Ariz. at 35, fn. 8.344 P.3d at 337 (fn. 8 "Burns raises thirty-two additional constitutional claims that he acknowledges this Court has previously rejected but that he wishes to preserve for federal review. We decline to revisit these claims."); it is therefore, precluded by Rule 32.2(a)(3). *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996). Further, this claim could have been raised in a motion for reconsideration to the Supreme Court and as it was not, it has been waived pursuant to Rule 32.2(a)(3).

b. Rule 32.1(a)

In Lynch v. Arizona, the United States Supreme Court held "where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without the possibility of parole," the Due Process Clause "entitles the Defendant to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel." *Lynch*, 136 S.Ct. at 1818 (2016) (internal citations omitted) (quoting *Shafer v. South Carolina,* 532 U.S. 36, 39, 121 S.Ct. 1263 (2001) (quoting *Ramdass v. Angelone,* 530 U.S. 156, 165, 120 S.Ct. 2113 (2000) (plurality

opinion)). In addition, the Supreme Court, in *Simmons* (and its progeny), the decision on which *Lynch* relies, stated, "due process plainly requires that [defendant] be allowed to bring it to the jury's attention *by way of argument by defense counsel* or an instruction from the court. See *Gardner,* 430 U.S., at 362, 97 S.Ct., at 1206-1207." *Simmons v. South Carolina*, 512 U.S. 154, 168–69, 114 S. Ct. 2187, 2196 (1994). [Emphasis added].

The "possibility of release after 25 years" was mentioned in the preliminary aggravation instructions in December 2010 when providing an overview of the sentencing phases (the aggravation phase and the mitigation phase). The Court finds no indication that the reference was made during the preliminary or final penalty phase instructions. *See*, Jury Instructions, Preliminary Aggravation Phase (filed 12/20/2010) at 2.

The reference to "25 years" was discussed with jurors during *voir dire* three months earlier during jury selection in the fall of 2010. The trial judge sustained the State's objections when counsel stated that Defendant would spend the rest of his natural life in prison. Based on the "25 years" reference, defendant claims that he was entitled to a *Simmons*/*Lynch* instruction.

THE COURT FINDS that Defendant has not established a colorable claim that the State injected "future dangerousness" either as a logical inference from the evidence or by argument.

The State never directly asked the jurors to consider Defendant's future dangerousness. Rather than future dangerousness, the State argued that life in prison was not sufficient punishment:

> That's this, what does it matter? What does it matter? This Defendant has said on a couple of occasions that prison was like home to him. So they're telling you today that this is the worst punishment for him is to sentence him to life. Of course that doesn't say anything about what he did or the character of him. But that's the worst sentence that you could impose. Prison is home to him folks. He said that. It's home to me. If you look at these records he's able to engage in religious activities. At some point he may get to a medium security where he's going to be able to associate with other inmates with like views of his. He'll be at home. What kind of punishment is that? …

RT 2/15/2011 at 89. The State further pointed to Defendant's character and propensities, based on the ASPD characteristics/diagnosis:

> …But if you sentence him to life as he said it I'll be at home. You know I put this up here because it's something I found and I hope I'm not taking it out of context. Very few people see their actions as truly evil. I don't know whether this defendant sees what he did as being evil or not. Likely because of his antisocial disorder he doesn't. He doesn't care. He had to do something. It was necessary for him and he did it and that's all that matters to him....

RT 2/15/2011 at 90. Finally, the (F)(2) aggravating circumstance was found on the basis of "two prior burglary convictions [that] were non-violent offenses," and "… he was contemporaneously convicted of sexual assault and kidnapping. *Burns*, 237 Ariz. at 33, ¶ 168.

However, even where there is an argument that "future dangerousness" was an issue at sentencing, the Defendant was not entitled to a *Simmons/Lynch* instruction because the requirements of *Simmons*, 512 U.S. 154, 114 S. Ct. 2187 (1994); *See also, Shafer v. South Carolina,* 532 U.S. 36, 121 S.Ct. 1263 (2001) and *Ramdass v. Angelone,* 530 U.S. 156, 165, 120 S.Ct. 2113 (2000) (plurality opinion)), were met by Defendant's counsel's arguments to the jury during the penalty phase.

In closing argument to the jury, although the Court precluded such argument and sustained an objection to such argument on one occasion, defendant did on multiple occasions *"bring [defendant's parole ineligibility] to the jury's attention by way of argument by defense counsel." Lynch*, 136 S.Ct. at 1818 (2016) (internal citations omitted) (quoting *Shafer v. South Carolina,* 532 U.S. at 39, (quoting *Ramdass v. Angelone,* 530 U.S. at 165 (plurality opinion)). *See also*, *Simmons*, 512 U.S. at 168–69. [Emphasis added].

In his initial closing argument, in the penalty/mitigation phase, defense counsel argued,

> And finally, there's a notion – in the instructions they refer to leniency. That means a life sentence. …A life sentence is very harsh punishment and in this case based on your verdict and based on what John Burns faces if you want to impose the most harsh punishment you can on John it's a life sentence. That the most severe way he could be punished here. ***The community will be protected. John's never getting out. He's not getting out he will get a natural life sentence.***

RT 2/15/2011 at 54. Later, in his final rebuttal closing argument to the jury (immediately before the jury adjourned to begin its deliberations), without objection or admonition from the Court, defense counsel again argued,

> And, three, the most severe punishment you can give John is a life sentence based on all of the evidence it is. And he will be severely punished ***for every minute of every hour of every day for the rest of his life.*** …the most appropriate sentence that will most severely punish John for what you've convicted him of and ***that will also protect the community because John will never be among the community again and a life sentence does that. A life sentence insures that.***

RT 2/15/2011 at 106-107. As noted above, the Court did sustain an objection to the earlier of the two instances of defense counsel's argument that "John's never getting out he will get a natural life sentence." However, defense counsel's final words to the jury prior to their deliberations on penalty were "John will never be among the community again and. … A life sentence insures that[,]" without objection.

Therefore, even where the State's evidence and argument to rebut defendant's mitigation argument that Burns would not pose a danger in the prison system and could be effectively and safely housed there, and that Burns was not a gang member and could safely be controlled in prison, (*See*, *Burns*, 237 Ariz. at 28-29, ¶¶ 137-135), can be seen as a fleeting argument of or implied presentation of "future dangerousness,"

THE COURT FINDS that the defendant's claim he was entitled to a *Simmons/Lynch* instruction is not colorable because the requirements of *Simmons, Schafer*, and *Lynch* were met by defense counsel "*bring[ing] [defendant's parole ineligibility] to the jury's attention by way of argument*." *Lynch*, --- U.S. ---, 136 S.Ct. 1818 (2016).

c. Rule 32.1(g)

Even were "future dangerousness' an issue at the sentencing phase, this Court finds that *Lynch* is not retroactive. Defendant's conviction became final in 2015,[21] a year before *Lynch* was decided in 2016. As a result, *Lynch* is not applicable to this case. In *O'Dell v. Netherland,* 521 U.S. 151, 167, 117 S.Ct. 1969, 1978 (1997), the United States Supreme Court held that the rule announced in *Simmons v. South Carolina* is not a "watershed rule of criminal procedure," but rather a procedural, non-retroactive rule. *O'Dell,* 521 U.S. at 167-68.

Lynch did not expressly resolve whether its holding was procedural, or whether its holding was substantive and was to be applied retroactively. Arizona courts have adopted and follow federal retroactivity analyses. *State v. Towery,* 204 Ariz. 386, 389, 64 P.3d. 828, 831 (2003) (citing *Slemmer*, 170 Ariz. at 181-82).

Lynch v. Arizona, simply applies the rule announced in *Simmons v. South Carolina*, and so, is neither a "well-established constitutional principle" nor a "watershed rule of criminal procedure," but is a procedural, non-retroactive rule. The Court finds that

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[21] *State v. Burns*, 237 Ariz. 1, 344 P.3d 303 (2015).

Lynch III does not apply retroactively to Defendant's case nor is it a "change in the law" under Rule 32.1(g), applicable to Defendant.

Further, the Court instructed the jury on several occasions during the mitigation penalty phase about the jury's responsibility to sentence the defendant either to life or to death (with no mention of "25 years, parole, or release), including –

> Ladies and Gentlemen: At this phase of the sentencing hearing, you will determine *whether the Defendant will be sentenced to life imprisonment or death*.

Preliminary Jury Instructions Penalty Phase (filed 1/10/2011) at 1. [Emphasis added]

> If you unanimously agree there is mitigation sufficiently substantial to call for leniency, then you shall return a verdict of life. If you unanimously agree there is no mitigation, or the mitigation is not sufficiently substantial to call for leniency, then you shall return a verdict of death.
>
> Your decision is not a recommendation. Your decision is binding. *If you unanimously find that the Defendant should be sentenced to life imprisonment, your foreperson shall sign the verdict form indicating your decision*. If you unanimously find that the defendant should be sentenced to death, your foreperson shall sign the verdict form indicating your decision. If you cannot unanimously agree on the appropriate sentence, your foreperson shall tell the judge.

Preliminary Jury Instructions Penalty Phase (filed 1/10/2011) at 7; Final Jury Instructions Penalty Phase (filed 2/15/2011) at 7.

The Court instructed the jury to consider mitigation in making the decision between life and death. In the mitigation penalty phase instruction, the Court told the jury, after defining what mitigating circumstances are, that

> ** ** **
>
> Mitigating circumstances may be offered by the Defendant or State or be apparent from the evidence presented at any phase.… You are not required to find that there is a connection between a mitigating circumstance and the crime committed in order to consider the mitigation evidence. Any connection or lack of connection may impact the quality and strength of the mitigation evidence. You must disregard any jury instruction given to you at any other phase of this trial that conflicts with this principle.
>
> The fact that the Defendant has been convicted of first-degree murder is unrelated to the existence of mitigating circumstances.…

Preliminary Jury Instructions Penalty Phase (filed 1/10/2011) at 5; Final Penalty Phase at 4-5.

Finally, for reasons set forth in the IAC/trial discussion below,

THE COURT FINDS that the trial court's failure to address the life/natural life distinction did not impact the jury's determination to impose death.

d. Ineffective Assistance of Counsel

Counsels' performance is evaluated at the time of trial and not in hindsight. At the time of Defendant's 2010/11 trial and his appeal decided in 2015, long-established Arizona precedent held that Arizona defendants were not entitled to parole unavailability instructions. *State v. Chappell*, 225 Ariz. 229, 240, ¶43 (2010); *State v. Garcia*, 224 Ariz. 1, 18, ¶¶ 76–77 (2010); *State v. Hargrave*, 225 Ariz. 1, 14, ¶¶ 52–53 (2010); *State v. Cruz*, 218 Ariz. 149, 160, ¶¶ 41–42 (2008). Accordingly, any request for a *Simmons* instruction would have failed, and counsel was not ineffective for failing to make a futile request. *See State v. Pandeli*, 242 Ariz. 175, __, 394 P.3d 2, 12, ¶ 33 (2017) ("Counsel's failure to make a futile motion does not constitute ineffective assistance of counsel.") (quoting *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994)).

Further, neither the United States Supreme Court's subsequent decision in *Lynch,* holding that Arizona defendants are entitled to instructions under *Simmons*, nor the Arizona Supreme Court's decisions in *State v. Escalante-Orozco* (241 Ariz. 254, 386 P.3d 798 (2017); *State v. Hulsey,* 243 Ariz. 367, 408 P.3d 408 (2018); and *State v. Rushing*, 243 Ariz. 212, 404 P.3d 240 (2017), *cert. denied,* 17-1449, 2018 WL 1876897 (U.S. Oct. 1, 2018), retroactively render counsel's performance ineffective. *See Strickland v. Washington,* 466 U.S. 668, 690 (1984) (evaluation of counsel's acts or omissions are judged as of the time counsel was required to act). Counsel's failure to predict *Lynch's* change to then-established Arizona Supreme Court law was not objectively unreasonable. *See Lowry v. Lewis,* 21 F.3d 344, 346 (9th Cir. 1994) (finding counsel was not ineffective because a "lawyer

cannot be required to anticipate our decision" in a later case); *Bullock v. Carver,* 297 F.3d 1036, 1052 (10th Cir. 2002) (rejecting ineffective assistance claim based upon counsel's failure to predict future changes in the law and stating that "clairvoyance is not a required attribute of effective representation"); *Brown v. United States,* 311 F.3d 875 (8th Cir. 2002) (finding no ineffective assistance of counsel for counsel's failure to raise *Apprendi*-type issue prior to that decision because such issue was "unsupported by then-existing precedent …").

For the same reasons, appellate counsel was not ineffective for failing to challenge the lack of a parole ineligibility instruction. Any such challenge would have been rejected under then-existing Arizona Supreme Court precedent and appellate counsel was not ineffective for failing to foresee *Lynch's* future change in the law, even though the claim was preserved by trial counsel.

Finally, Defendant cannot establish prejudice. As previously discussed, trial counsels' failure to secure a *Simmons* instruction or challenge its omission on appeal cannot have prejudiced Defendant because any such effort would have been futile under Arizona Supreme Court precedent. Further, as explained above, there is no reasonable probability that a jury instruction on parole unavailability would have resulted in a life sentence given (1) the lack of suggestion of future dangerousness; (2) that defendant "inform[ed] the jury of [defendant's] parole ineligibility, …in arguments by counsel[,]" (*Lynch*, --- U.S. ---, 136 S.Ct. at 1188) (3) the lack of any emphasis on the possibility of "25 years" or evidence of acceptance of responsibility for the murder; and (4)

the extraordinary weight of the (F)(6) aggravating circumstance when evaluated in connection with the mitigation. *Burns*, 237 Ariz. at 34, ¶ 169-170.

Further, the Court finds no colorable claim that the jury's unanimous determination to return a verdict for the death penalty was impacted by the variance between "natural life" and "life". On automatic appeal, the Arizona Supreme Court upheld the jury's finding that death was the appropriate sentence finding, "[e]ven if we assume that Burns proved all his proffered mitigating factors, we cannot say the jurors abused their discretion in concluding that the mitigation did not warrant leniency." 237 Ariz. at 33–34, ¶¶ 162-170 [quoted language specifically at ¶ 170].

This Court may not overrule, modify or disregard the Supreme Court's conclusion on abuse of discretion review that the defendant's mitigation evidence was not sufficiently substantial to call for leniency. *See, State v. Sullivan*, 205 Ariz. 285, 288, 69 P.3d 1006 (App. 2003); *Bade v. Arizona Dept. of Transp.*, 150 Ariz. 203, 205, 722 P.2d 371 (App. 1986)(lower court has no authority to overrule or disregard express ruling of Arizona Supreme Court).

Deficient performance

In fact, Counsel attempted to avoid the "parole or release" instruction. Defendant moved the Court for an order that the jury not be instructed that if he received a life sentence then "he may receive a sentence that allows him to be paroled or released after serving 25 years in prison." Defendant's Objection to Jurors Being Instructed that Defendant is Eligible for Parole or Release (filed 9/29/2010). In oral argument on the motion, counsel argued 'life means life.' RT 10/26/2010, at 25-33. The State cited,

and the Court ruled it was bound by, existing precedent in *State v. Cruz, 218 Ariz. 149, 160, ¶¶ 41–42 (2008). See also, State v. Chappell, 225 Ariz. 229, 240, ¶43 (2010); State v. Garcia, 224 Ariz. 1, 18, ¶¶ 76–77 (2010); State v. Hargrave, 225 Ariz. 1, 14, ¶¶ 52–53 (2010)*.

Additionally, trial counsel attempted to preserve the issue for appellate review in his aforementioned motion, oral argument, and inquiry with the Court regarding which objections were sustained. Further, counsel identified the "25 year to life" jury instruction as one of the grounds in Defendant's Motion for New Trial (filed 3/10/2011), which the Court denied. Ruling, dated 4/14/2011.

Appellate counsel did present this issue on appeal, recognizing that existing precedent held otherwise. Petition Exhibit 15, at 145. Our Supreme Court declined to revisit this previously-rejected claim. *State v. Burns*, 237 Ariz. at 35, fn. 8.344 P.3d at 337 (fn. 8 "Burns raises thirty-two additional constitutional claims that he acknowledges this Court has previously rejected but that he wishes to preserve for federal review. We decline to revisit these claims.").

Therefore, given that efforts of trial counsel and the then-existing precedent, trial counsel's failure to secure a *Simmons* instruction or successfully challenge the instruction given at trial or on appeal cannot have demonstrated a colorable claim because any such effort would have been futile under Arizona Supreme Court precedent. *See State v. Pandeli*, 242 Ariz. 175, __, 394 P.3d 2, 12, ¶ 33 (2017) ("Counsel's failure to make a futile motion does not constitute ineffective assistance of counsel.") (quoting *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994)).

Prejudice

Finally, defendant cannot show prejudice. There is no reasonable probability that a jury instruction on parole unavailability would probably have resulted in a life sentence by the jury, given the minimal, if any, suggestion of future dangerousness, that defendant "inform[ed] the jury of [defendant's] parole ineligibility, ...in arguments by counsel[,]"(*Lynch*, --- U.S. ---, 136 S.Ct. at 1188), the lack of any reference to parole-eligibility or evidence of acceptance of responsibility for the murders, evaluated in connection with the extraordinary weight of the aggravating circumstances surrounding the five murders Defendant committed. *See*, *Burns*, 237 Ariz. 33-34, ¶¶ 163-170.

For the reasons stated above, including counsel's recognition of the potential issue and concerted efforts to preserve the issue for review, and the then-existing precedent,

THE COURT FINDS the claims relating to the *Simmons*/*Lynch* instruction are not colorable.

14. RELATING TO THE IMPASSE

Defendant claims the Court committed error when it gave the impasse instruction to the jurors and sent them to deliberate further rather than declaring a hung jury prior to a weekend break, and that newly discovered evidence (the affidavit of a juror) and ineffective assistance of trial counsel, by failing to request a mistrial, require post-conviction relief. Petition at 142; *see,* RT 2/24/2011, at 2.

a. Preclusion

This claim was raised and denied on appeal (as jury coercion) (*Burns,* 237 Ariz. at 32-33, ¶¶ 158-162);

therefore, it is precluded by Rule 32.2(a)(3). *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

b. Jury Coercion

Contrary to defendant's claims the Court did not coerce a verdict and did not fail to accept the jurors' verdicts or insist the jury continue without informing them of the potential outcome in the instance of a hung jury. Our Supreme Court concluded,

> [T]he trial court did not coerce a verdict. After it began deliberations anew, the reconstituted jury had deliberated for only one and one half days when it advised the court it was deadlocked. The court gave the impasse instruction after which the jury continued to deliberate. When the jury had not reached a decision by the weekend break, the judge asked if continuing deliberations after the weekend might help. Some jurors thought that taking a break and having the jury reconvene would be helpful.
>
> The court never forced the jury to come to a consensus. The judge never knew how near the jury was to reaching a unanimous verdict or whether they were leaning toward a life or death verdict. The trial judge also did not know who the holdout juror or jurors were and did nothing to get the holdouts to change their votes. We find no coercion.

State v. Burns, 237 Ariz. 1, 33, ¶¶ 161-162, 344 P.3d 303, 35 (2015).

c. IAC Claim

Defendant argues IAC based on counsel's failure to request a mistrial. Counsel did, in fact, recognize the issue and request a mistrial, (RT 2/24/2011, at 12 ("…I believe that Court should declare a mistrial at this point and discharge these jurors, because of what's gone on this afternoon.…)); the Court properly denied the mistrial motion. *Id*. In addition, counsel identified the "denial of an impasse" as one of the grounds in Defendant's Motion for New Trial (filed 3/10/2011), which the Court denied. Ruling dated 4/14/2011. Thus, counsel did not perform deficiently and Defendant's IAC claim is not colorable.

Further, as discussed above, our Supreme Court upheld the Court's actions finding no coercion by the trial court; therefore, the prejudice prong is not colorable.

d. Rule 32.1(e), Newly Discovered Evidence

The Court determines the viability of the Rule 32.1(e) newly discovered facts claim is contingent on the court's ability to consider, and the admissibility of, the proffered juror affidavit as "newly discovered evidence." The Court's consideration of juror testimony follows a long followed general rule, known as Lord Mansfield's Rule, that "a juror's testimony is not admissible to impeach the verdict." *State v. Acuna Valenzuela*, -- Ariz. --, 426 P.3d 1176 (2018), *citing State v. Nelson*, 229 Ariz. 180, 191 ¶ 48, 273 P.3d 632 (2012) (quoting *State v. Dickens*, 187 Ariz. 1, 15, 926 P.2d 468 (1996), abrogated on other grounds by *State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012)).

Lord Mansfield's Rule has further been clarified in Arizona in our Criminal Rules of Procedure. Rule

24.1(d), serves "to protect the process of frank and conscientious jury deliberations and the finality of jury verdicts." *State v. Acuna Valenzuela*, 245 Ariz. 197, ¶59, 426 P.3d 1176, 1194 (2018), *citing State v. Nelson*, 229 Ariz. 180, 191 ¶ 48, 273 P.3d 632 (2012) (quoting *State v. Poland*, 132 Ariz. 269, 282, 645 P.2d 784 (1982)); *see also* Ariz. R. Crim. P. 24.1(d) (providing that "the court may receive the testimony or affidavit of any witness, including members of the jury, that relates to the conduct of a juror, a court official, or a third person," but that "the court may not receive testimony or an affidavit that relates to the subjective motives or mental processes leading a juror to agree or disagree with the verdict").

Our Supreme Court continued its analysis in *State v. Acuna Valenzuela*, 245 Ariz. 197, 426 P.3d 1176 (2018), which this Court is bound to follow, stating,

> **If a verdict could be impeached based on a juror's mental process at the time of deliberation, "no verdict would be safe."** *Nelson*, 229 Ariz. at 191 ¶ 49, 273 P.3d 632.
>
> ¶ 61 Statements by jurors about their own or another's subjective feelings, developed during trial, are not competent evidence to impeach a verdict. *State v. Cruz*, 218 Ariz. 149, 159 ¶ 33, 181 P.3d 196 (2008); *Dickens*, 187 Ariz. at 16, 926 P.2d 468. In *Cruz*, a juror, who disclosed in voir dire that her husband was a policeman, gave a statement to the press following the penalty phase verdict that if the sentence "deters a criminal and saves a peace officer's life in the future, then the message we sent in our decision is positive. The message is, 'It is not OK to take a peace officer's life.' " 218 Ariz.

> at 159 ¶ 32, 181 P.3d 196. This Court declined to consider such evidence in considering whether the trial court properly denied a motion to strike the juror, stating that, "[s]ubject to only a few exceptions, a juror's out of court statement is not admissible to contradict the verdict." *Id.* ¶ 33.
>
> ¶ 62 **A defendant may be entitled to a new trial only if a juror conceals facts pertaining to his qualifications or bias on proper inquiry during voir dire.** *Wilson v. Wiggins*, 54 Ariz. 240, 243, 94 P.2d 870 (1939).

State v. Acuna Valenzuela, 245 Ariz. 197, ¶¶60-62 426 P.3d 1176, 1194 (2018). [Emphasis added]

Rule 24.1(d) permits juror affidavits in connection with allegations of juror misconduct. The juror's affidavit (Exhibit 19) provides no allegations of misconduct and merely speculates about the possible misuse of social media ("one or more jurors *may have abused*…social media"). *See*, *State v. Acuna Valenzuela*, 245 Ariz. at ¶ 62. The Court finds that a statement about what individual jurors "might have done" is speculative. Mere speculation is not competent evidence:

> The slightest *evidence*—not merely an inference making an argument possible—is required because speculation cannot substitute for evidence. *Cf. In re Harber's Estate,* 102 Ariz. 285, 294, 428 P.2d 662, 671 (1967); *State v. Almaguer,* 232 Ariz. 190, ¶ 19, 303 P.3d 84, 91 (App.2013).

State v. Vassell, 238 Ariz. 281, 284, ¶ 9, 359 P.3d 1025, 1028 (App. 2015).

Defendant has provided no competent evidence related to juror misconduct, and has not alleged juror misconduct in his post-conviction petition.

Rule 24.1(d) specifically prohibits "…the court [from receiving] testimony of an affidavit that relates to the subjective motives or mental processes leading a juror to agree or disagree with the verdict. The Rule is supported by public policy considerations. *See Richtmyre v. State*, 175 Ariz. 489, 492–93, 858 P.2d 322, 325–26 (App. 1993), a civil case, that cites *Shillcutt v. Gagnon*, 827 F.2d 1155 (7th Cir. 1987) ("Exclusion of juror testimony fosters the important public policies of discouraging post-verdict harassment of jurors, encouraging open discussion among jurors, reducing incentives for jury tampering, and maintaining the jury as a viable decision-making body.").

In the proffered declaration, the juror provides information including that the juror and others "resisted the death penalty option until the very last minute;" felt a "subtle influence" toward the death penalty; observed a juror who was later dismissed "writing extensively;" recalls the jurors being questioned individually; feels the events were intimidating and led to his "accepting" the death verdict; and felt that "one or more individuals may have abused…social media while participating in the trial." Petition Exhibit 19 (Juror Declaration).

The Court finds that the juror affidavit tendered at Exhibit 19 impermissibly relates to the jury's deliberative process and violates the prohibition of Rule 24.1(d), Arizona Rules of Criminal Procedure, which limits the Court's consideration of juror affidavits to the very limited circumstances

enumerated in the Rule. *See*, Rule 24.1, Arizona Rules of Criminal Procedure.

THE COURT FINDS that Defendant's challenge to the penalty verdict reached by the jury calls into question, and is an attempt to impeach, the sentencing verdict.

THE COURT FURTHER FINDS that the juror statements presented by Defendant impermissibly implicate the subjective motives or thought processes which led – or might have led – a juror to assent or dissent from the verdict.

THE COURT FURTHER FINDS that a juror's consideration of the circumstances surrounding his reasons for joining a verdict necessarily implicates the deliberative processes, which is contrary to the Rule. Rule 24.1, Ariz. R. Crim. P; *see, United States v. Montes*, 628 F.3d 1183, 1188 (9th Cir. 2011) (recognizing that "[j]urors…may not be questioned about their deliberative process or the subjective effects of extraneous information.").

THE COURT FURTHER FINDS the Defendant made no allegations of juror misconduct.

Based on all of the above,

IT IS THEREFORE ORDERED striking the juror statement (Petition Exhibit 19) as not relevant to the claims raised by the Defendant in this the post-conviction proceedings.

As to the post-conviction claim, for the reasons stated above, including the lack of coercion as found by our Supreme Court on appeal,

THE COURT FINDS that all claims relating to the "impasse claim" are not colorable.

15. RELATING TO THE MITIGATION INVESTIGATION

Defendant alleges that "previously undiscovered mitigation in the form of [two out-of-country pen pals[22]]" and the fact that "the Arizona Department of Corrections has *recently* reclassified …and transferred him to the Central Unit from the Maximum Security …Unit" constitute newly discovered facts under Rule 32.1(e)." Petition at 150.

Under Rule 32.1(e), the evidence must have been in existence at the time of trial, but not discovered until after trial. *State v. Sanchez*, 200 Ariz. 163, ¶11, 24 P. 3d 610 (App. 2001). "For it to be considered newly discovered, evidence 'must truly be newly discovered, i.e., discovered after the trial.'" *Saenz*, 197 Ariz. at 491 (quoting *State v. Jeffers*, 135 Ariz. 404, 426, 661 P. 2d 1105, 1127 (1983)).

It appears Defendant was tried, convicted and sentenced before securing either of the two pen pals or before being transferred to Central Unit; therefore,

THE COURT FINDS that the evidence was not in existence at the time of trial and does not qualify as newly-discovered evidence under Rule 32.1(e). It appears defendant anticipated this finding by the Court, arguing:

> The declarations of Ms. Cooper and Ms. Murray are new, and while they may not meet the test for newly discovered evidence under Rule 32.1(e), they should be—along with Mr. Burns'

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[22] *See* Petition Exhibits 121 (corresponding through Death Row Support Project; Defendant sentenced to death/Death Row on 2/28/2011) and 122 (corresponding for 5 years as of 10/2017, or since 2012). Defendant was tried, convicted and sentenced before either event.

> recent placement to Central Unit—considered as grounds for relief under Rule 32.1(a) as Mr. Burns' sentence is in violation of the Sixth, Eighth, and Fourteenth Amendments.

Petition at 150.

In lieu of a valid claim under Rule 32.1(e), Defendant requests that the Court find constitutional error, arguing that the Defendant was;

> …constitutionally entitled to an opportunity to be heard, to effectively present evidence central to his defense, to call-witnesses to testify, to rebut evidence presented by the prosecution and present mitigation pursuant to the Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

Petition at 150-151. The Court agrees that a defendant is afforded each of the enumerated rights. Defendant himself was afforded the opportunity to be heard (He made a statement of allocution.[23]); he presented evidence, called witnesses, cross-examined and rebutted the State's witnesses and evidence, and presented mitigation that was then-in-existence.

THE COURT FINDS that Defendant was afforded each of these rights as to then-available mitigation, which was presented for the jury's consideration and evaluation. The jury's sentence of that death was reviewed and upheld on appeal.

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[23] RT 2/14/2011, at 102-103 (in his allocution statement, Defendant appears to have accepted limited responsibility and expressed what appears to have been remorse, effectively saying "I am responsible.…I'm sorry.").

Further even were Rule 32.1(e) applicable and had the pen pal and DOC transfer evidence been available to present at sentencing, the jury likely would have given little weight, if any, to such evidence because the pen pals knew him only by his writing and both their contacts with Defendant and the DOC decision occurred post-incarceration, and prisoners are expected to behave. *See*, *State v. Harrod ("Harrod III")*, 218 Ariz. 268, ¶62, 183 P.3d. 519 (2008) ("Excellent behavior while incarcerated was not a mitigating circumstance because inmates are expected to behave well in prison.").

Thus, the pen pal and DOC transfer evidence probably would not have changed the verdict or sentence.

For the reasons stated above,

THE COURT FINDS that defendant's claim relating to "new" evidence obtained during his continuing mitigation investigation is not colorable.

16. RELATING TO *HURST V. FLORIDA*

Defendant argues that the decision in *Hurst v. Florida* requires that a jury be instructed "that their finding [that the mitigating circumstances were insufficient to warrant leniency] had to be beyond a reasonable doubt." Petition at 152; 154. On appeal Defendant alleged,

> Arizona's death penalty scheme violates Appellant's rights under the Eighth and Fourteenth Amendments by not requiring that once a defendant proves mitigating circumstances exist that the State prove beyond a reasonable doubt that the mitigation is not sufficiently substantial to call for

> leniency and that death is the appropriate sentence. *Dann III,* 220 Ariz. 351, ¶¶ 94-95.

Petition Exhibit 15, at 146.

a. Preclusion

In its opinion, our Supreme Court declined to revisit this previously-rejected claim. *State v. Burns*, 237 Ariz. at 35, fn. 8.344 P.3d at 337 (fn. 8 "Burns raises thirty-two additional constitutional claims that he acknowledges this Court has previously rejected but that he wishes to preserve for federal review. We decline to revisit these claims.").

Because this claim was raised on appeal, it is therefore precluded by Rule 32.2(a)(3). *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996). Further, this claim could have been raised in a motion for reconsideration to the Supreme Court and as it was not; therefore, it has been waived pursuant to Rule 32.2(a)(3).

Moreover, this Court may not overrule, modify or disregard the Supreme Court's conclusion that *Dann III* forecloses the argument. *See, State v. Sullivan*, 205 Ariz. 285, 288, 69 P.3d 1006 (App. 2003); *Bade v. Arizona Dept. of Transp.*, 150 Ariz. 203, 205, 722 P.2d 371 (App. 1986) (lower court has no authority to overrule or disregard express ruling of Arizona Supreme Court).

Additionally, on appeal Defendant claimed,

> [t]he failure to instruct the jury that the State bore the burden of proving its rebuttal to mitigation evidence beyond a reasonable doubt violated Appellant's rights under the Sixth,

> Eight and Fourteenth Amendments. *Roque,* 213 Ariz. at 225-26, ¶¶138-140.

Petition Exhibit 15, at 145.

As it did with the substantive aspect of defendant's *Hurst v. Florida* claim, our Supreme Court declined to revisit this previously-rejected claim in its opinion on direct appeal. *State v. Burns*, 237 Ariz. at 35, fn. 8.344 P.3d at 337 (fn. 8 "Burns raises thirty-two additional constitutional claims that he acknowledges this Court has previously rejected but that he wishes to preserve for federal review. We decline to revisit these claims.").

Because this claim was raised and rejected on appeal, it is therefore precluded by Rule 32.2(a)(3). *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996). Further, this claim also could have been raised in a motion for reconsideration to the Supreme Court, and as it was not, it has been waived pursuant to Rule 32.2(a)(3).

Defendant further argues that *Hurst v. Florida*, gives rise to claims under Rules 32.1(a), (g), due process, and fundamental fairness that afford him relief and require that mitigation be found beyond a reasonable doubt, and the Court alternatively, addresses the merits of defendant's claim(s).

In *Hurst v. Florida*, the U.S. Supreme Court held that Florida's sentencing scheme, which required that a judge hold a hearing to review a jury's finding of death as the appropriate sentence, was unconstitutional. "A jury's mere recommendation is not enough" to meet the Sixth Amendment

requirement that "…a jury, not a judge, … find each fact [the existence of aggravating circumstances (*Id.,* at 624)] necessary to impose a sentence of death." *Id.*, 136 S. Ct. at 619.[24]

As to his *Hurst* claim, Defendant identifies the applicable exception to preclusion as Rule 32.1(g). To obtain relief under Rule 32.1(g), the defendant is required to show "[t]here has been a significant change in law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence."

Hurst v. Florida applied *Ring v. Arizona* to a capital sentencing in Florida, and may constitute a "significant change in the law" under *Florida* law. The Court, however, finds that *Hurst* is not a significant change or "transformative event" as to Arizona law, as Arizona implemented the strictures of *Ring v. Arizona,* 536 U.S. 584 (2002) (jury must determine aggravating factors that determine death-eligibility) years ago.[25]

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[24] "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016); *see also*, *Hurst v. Florida*, 136 S. Ct. 616, 621–22, (2016).

[25] The Supreme Court held that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). *Padilla v. Kentucky* also was determined to apply a new procedural rule and was held not to be retroactive. *Chaidez v. United States*, 568 U.S. --, (2013).

Moreover, *Hurst* is neither a significant change in the law under Rule 32.1(g), and even if it were, *Hurst* does not apply retroactively. The Supreme Court has held that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). *Hurst*, which applies *Ring* in Florida, is also non-retroactive.

Further, Defendant claims that *Hurst* "…stands for the proposition that the weighing of aggravating and mitigating circumstances *is a factual finding* that must be made beyond a reasonable doubt by a jury." Petition at 17. Defendant also argues that *Hurst* mandates that the penalty-phase finding of the appropriate sentence must be made beyond a reasonable doubt.

Neither is how the Court reads *Hurst*.

Taking the second argument first, the *Hurst* court mentioned "reasonable doubt" only once, in connection with the Due Process Clause's requirement that each element of a crime be proved to a jury beyond a reasonable doubt." *Id*., 136 S.Ct. at 621.

Second, rather than imposing – or even addressing – the burden of proof at the mitigation phase, the *Hurst* court focused on the respective roles of the judge and the jury *at the aggravation phase*, concluding that *Apprendi* [26] and *Alleyne* [27] required that a jury find the fact of an aggravating factor

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[26] *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (Fact increasing penalty beyond statutory maximum must be determined by jury beyond reasonable doubt).

[27] *Alleyne v. United States,* 570 U.S. 99 (2013) (Fact increasing minimum mandatory sentence is 'element" for jury).

(rather than, as Florida's statute provided, that the jury render what amounted to an advisory opinion for a judge to reconsider – and either approve or disapprove – the jury's determination of the relative merits of aggravating factor/mitigating factors):

> The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base [defendant's] death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

Hurst v. Florida, 136 S. Ct. 616, 624 (2016).

Arizona's capital sentencing scheme requires the jury (the "trier of fact") to find at least one aggravating factor beyond a reasonable doubt. A.R.S. §§ 13-751(B), 13-752(E). This comports with *Hurst.* And our Supreme Court has held as to mitigating factors:

> We therefore now clarify that the determination whether mitigation is sufficiently substantial to warrant leniency is not a fact question to be decided based on the weight of the evidence, but rather is a sentencing decision to be made by each juror based upon the juror's assessment of the quality and significance of the mitigating evidence that the juror has found to exist…

State ex rel. Thomas v. Granville, 211 Ariz. 468, 473, ¶ 21, 123 P.3d 662, 667 (2005).[28] Whether to impose

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[28] The full ¶21 in *State ex rel Thomas v. Granville*, stated:

> We therefore now clarify that the determination whether mitigation is sufficiently substantial to

the death penalty is less a question of fact to be proven beyond a reasonable doubt – or by any other standard – than it is "a discretionary, 'reasoned moral response to mitigation evidence.'" *State v. Martinez*, 218 Ariz. 421, 432, ¶ 51 (2008) (quoting *Penry v. Lynaugh,* 492 U.S. 302, 328 (1989)." Response, at 13.

Arizona's statutory death penalty scheme accomplishes just that, a jury tasked with finding any and all aggravating factors beyond a reasonable doubt, and then to consider Defendant's individual situation in imposing the appropriate sentence, by considering mitigating factors that have been proven by a preponderance of evidence. Unlike "facts

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> warrant leniency is not a fact question to be decided based on the weight of the evidence, but rather is a sentencing decision to be made by each juror based upon the juror's assessment of the quality and significance of the mitigating evidence that the juror has found to exist. We conclude that the use of "outweighing" language in jury instructions explaining the evaluation of mitigating circumstances, while technically correct, might confuse or mislead jurors. We thus discourage the use of instructions that inform jurors that they must find that mitigating circumstances outweigh aggravating factors before they can impose a sentence other than death. Instead, jury instructions should focus on the statutory requirement that a juror may not vote to impose the death penalty unless he or she finds, in the juror's individual opinion, that "there are no mitigating circumstances sufficiently substantial to call for leniency." A.R.S. § 13–703(E). In other words, each juror must determine whether, in that juror's individual assessment, the mitigation is of such quality or value that it warrants leniency.

State ex rel. Thomas v. Granville, 211 Ariz. 468, 473, ¶ 21, 123 P.3d 662, 667 (2005).

underlying a finding of guilt" or "facts in support of aggravation" which are either proven unanimously or not, the existence of mitigating factors is determined by each juror, individually. Defendant confuses eligibility factors, to be proven beyond a reasonable doubt, with sentencing considerations presented by a defendant in mitigation, and proven by the lesser "preponderance of the evidence" standard – which are then again evaluated, individually, to ascertain whether a sentence less than death is appropriate as to a particular defendant.

Defendant claims that *Hurst* requires the state to prove, and the jury to find, beyond a reasonable doubt, that the mitigation is not sufficient to outweigh the aggravation. 136 S. Ct. at 622. However, as the U.S. Supreme Court made clear in *Hurst*, its decision in *Ring* required that the jury make a finding and not a recommendation in connection with the existence of aggravating factors.

As it has since *Ring*, an Arizona jury determines the existence of aggravating factors, as it does the elements of a crime, beyond a reasonable doubt; the jury then considers mitigation and determines whether the mitigation is sufficiently substantial to warrant leniency. *Hurst* neither addressed nor imposed the "beyond a reasonable doubt" burden of proof at the mitigation phase.

THE COURT FINDS that Arizona's capital sentencing scheme does not run afoul of *Hurst.*

For the reasons stated above,

THE COURT FINDS that defendant's claims relating to *Hurst v. Florida* are not colorable.

17. RELATING TO CUMULATIVE ERROR

Defendant alleges that cumulative error resulted in cumulative prejudice entitling him to relief. Petition at 97; 155.

Arizona does not recognize the cumulative error rule, other than in the context of prosecutorial misconduct. *See State v. Hughes*, 193 Ariz. 72, 78-79, 969 P.2d 1184, 1190-1191 (1998)(recognizing "the general rule that several non-errors and harmless errors cannot add up to one reversible error").

The Court has not found that any of the seventeen individual claims of error are colorable.

Further, for the reasons set forth above,

THE COURT FINDS that any alleged evidentiary errors and/or deficiencies in trial counsel's performance, whether considered individually or cumulatively, did not result in prejudice sufficient to deprive the Defendant of a fair trial.

Based on the foregoing,

THE COURT FINDS that defendant's cumulative error claim is not colorable.

It is of note: Defendant supports this (his cumulative error) claim, and perhaps others, by arguing that "[for] the reasons explained above and in the Original Petition…." (Petition at 155), and also:

> All facts stated in this Amended Petition are incorporated by this reference in support of each and every claim herein.

Petition at 45; and in his Reply to Discovery, he expounds:

> Petitioner Johnathan Ian Burns Replies to the State's Response to his Second Amended

> Petition for Post-Conviction relief, incorporating by reference as though fully stated herein his Second Amended Petition his First Amended Petition the original Petition and all exhibits to each.

Reply at 2.

Defendant filed a 16-page "First" Petition for Post-Conviction Relief (10/13/2015); a 157-page Amended Petition for Post-Conviction Relief (12/15/2017); and a 157-page Second Amended Petition for Post-Conviction Relief (2/27/2018).

Defendant's attempt to "incorporate by reference" his previous pleadings would, if permitted, effectively permit him to file a 300-page Petition without having sought leave of court or established good cause to do so. In addition, the Court's comparison of the pleadings suggests that the issues in the Amended and the Second Amended petitions appear to be substantially similar, such that the Court's review of both pleadings to tickle out differences would be of limited value.

Counsel is required to set forth in his pleadings all issues and argument in his opening pleading.[29] The

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[29] As the Supreme Court reminded Defendant's appellate counsel:

> Burns also argues that Mandi's testimony was not timely disclosed and should have been precluded, but does not support this claim with any argument or citation to the record. He has, therefore, waived this claim. *See State v. Carver,* 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim

Court presumes that counsel has done so, and simply makes the attempt to "incorporate by reference" previous pleadings out of an abundance of caution. Notwithstanding counsel's caution, the Court declines to consider other than the Second Amended Petition.

The Court follows the line of cases that holds that an "amended" document supersedes its predecessor. *State v. Martin*, 2 Ariz. App. 510, 514, 410 P.2d 132, 136 (1966)("This Court construes an 'amendment to an information' to mean a supplement to an otherwise effective and sufficient information, whereas 'an amended information' constitutes the filing of a new instrument which supersedes its predecessor."); *State v. Tucker*, 124 Ariz. 120, 122, 602 P.2d 501, 503 (App. 1979).

This appears to be consistent with the State's understanding. Response, at 6-7 (in which the State refers to the Supreme Court's notice of post-conviction relief and then to the "second amended petition for post-conviction relief filed February 27, 2018" as the "operative" petition).

Based on all of the above,

The Court has considered only those pleadings beginning with the Second Amended Petition filed on 2/27/2018, and declines to "incorporate by reference" any previous pleadings.

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usually constitutes abandonment and waiver of that claim.").

State v. Burns, 237 Ariz. 1, 17, 344 P.3d 303, 319 (2015).

18. RELATING TO THE COURT'S ROLE IN CLAIMED IAC

Defendant alleges that the Court denied defendant adequate time for the mitigation investigation, which "was a proximate cause of trial counsel's ineffectiveness." Petition at 155-156.

A form of this claim was raised on appeal (*Burns*, ¶¶ 10-18), and this claim could have been raised on appeal; therefore, it is precluded by Rule 32.2(a)(3). *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

Defendant alternatively argues that considerations of due process afford him relief; therefore, the Court considers the merits of the claims.

On direct appeal our Supreme Court determined the Court **did not** abuse its discretion in failing to grant Defendant's final continuance request, from October 7, 2010, and proceeding to trial earlier than the requested January 2011 date. *State v. Burns*, 237 Ariz. 1, 11–12, ¶¶ 10-18, 344 P.3d 303, 313–14 (2015). This Court has no authority to overrule the Supreme Court's determination.

In addition, the Court has reviewed the record and counsel's performance and has determines defendant has not raised a colorable claim that counsel provided ineffective assistance.

ABA Guidelines discussion

Defendant references the ABA Guidelines in connection with this claim. However, simply failing to follow the ABA Guidelines does not establish ineffectiveness by counsel. *See Bobby v. Van Hook*, 558

U.S. 4, 8, 130 S.Ct. 13, 17 (2009). The proper standard for attorney performance is that of reasonably effective assistance. *See Trapnell v. United States*, 725 F.2d 149, 155 (2d Cir. 1983) ("reasonably competent assistance" standard).

As the Supreme Court reminded in *Strickland*: "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." [Citations omitted.] *Strickland* 466 U.S. at 689–90, 104 S. Ct. at 2065–66. The *Strickland* Court stressed, however, that "American Bar Association standards and the like" are "only guides" to what reasonableness means, not its definition. 466 U.S., at 688, 104 S.Ct. 2052." *Bobby v. Van Hook*, 558 U.S. 4, 8, 130 S. Ct. 13, 17 (2009). In the words of the *Strickland* Court:

> Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984).

Therefore,

THE COURT FINDS that defendant's claim of trial court error in denying defendant's final trial

continuance request and the related IAC claim are without merit and not colorable.

THE DISCOVERY REQUEST

Simultaneous with his Reply (filed 8/30/2018), Defendant filed a Renewed Motion for Disclosure and Discovery. In the motion defendant "seeks discovery concerning the state's witnesses, Maricopa County Medical Examiner (MCOME) toxicologist Norman Wade and Arizona Department of Public Safety (DPS) DNA analyst Scott Milne." Reply, at 2.

For reasons stated in its ruling, The Court did not find the claims related to Wade and Milne to be colorable.

CONCLUSION

As more fully set forth in the discussion of each claim,

THE COURT FINDS that the defendant's fourth – tenth; twelfth – fourteenth; and sixteenth claims are precluded from relief.

THE COURT FURTHER FINDS that the Defendant has failed to raise colorable claims for relief in any of his eighteen claims.

A colorable claim for post-conviction relief is "one that, if the allegations are true, might have changed the outcome" of the proceeding. *State v. Runningeagle,* 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993); Ariz. R.Crim.P. 32.6(c) ("court shall order…petition dismissed" if claims present no "no material issue of fact or law which would entitle defendant to relief"); 32.8(a)(evidentiary hearing required "to determine issue of material fact").

Based on all of the above,

IT IS THEREFORE ORDERED dismissing the defendant's Second Amended Petition for Post-Conviction Relief; and

IT IS FURTHER ORDERED denying Defendant's Renewed Motion for Disclosure and Discovery.