Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2008-130121-001 SE 03/19/2024

HONORABLE KRISTIN CULBERTSON

CLERK OF THE COURT
S. Felix
Deputy

STATE OF ARIZONA

KEVIN MORROW
KIRSTEN VALENZUELA
KIRSTY DAVIS

v.

TRENT CHRISTOPHER BENSON (001)

JOHN L SACCOMAN
ROSEMARIE PENA-LYNCH

AZ DOC MAIL CODE 481
COURT ADMIN-CRIMINAL-PCR
JUDGE CULBERTSON
VICTIM WITNESS DIV-AG-CCC

JESSICA ANN GATTUSO

MINUTE ENTRY

The Court reviewed Benson's Amended Petition for Post-Conviction Relief (filed 10/24/2022, hereinafter "Petition"), the State's Response (filed 6/30/2023, "Response"), Benson's Reply (filed 12/18/2023, "Reply"), the Court's file, and *State v. Benson*, 232 Ariz. 452, 307 P.3d 19 (2013). This is Benson's first Rule 32 proceeding following the Arizona Supreme Court's affirmance of his convictions and death sentences.

Procedural Background and Facts.

The Arizona Supreme Court summarized the facts presented at Benson's trial as follows:

> Benson committed his crimes against four women at different times over a three-year period.
>
> *Alisa*

In November 2004, Benson agreed to pay Alisa to have sex, and she got into his car. By his own account, he “snapped” while Alisa was performing a sexual act. He beat her about her face and head, strangled her to death with a ligature, and severely sexually assaulted her while she was dead or unconscious. Benson then left Alisa's partially clad body in a Mesa alley.

Yolanda

In August 2007, Benson kidnapped and assaulted Yolanda with the help of an unidentified man. The men abducted Yolanda by approaching her from behind, pulling her into a nearby white car, and rendering her unconscious by placing a chemical-soaked cloth over her mouth and nose. When Yolanda regained consciousness, Benson was sexually assaulting her in a room as the other man watched. The two men then left, but Benson soon returned alone and again sexually assaulted Yolanda. After Benson left, she escaped. Yolanda identified Benson as her attacker in a subsequent photo lineup and at trial.

Karen

In October 2007, Benson took Karen to his house after she agreed to engage in sex for money. After becoming enraged, he hit Karen and strangled her with a ligature. He later told police he sexually assaulted Karen while she was unconscious. Benson dumped her body on a Mesa street and then ran over her body with his car.

Melissa

Benson confessed to police that he assaulted Melissa in November 2007. As Melissa walked across a lot, she was choked from behind with a cord. She saw a white car before she fell unconscious. While Melissa was unconscious, Benson severely sexually assaulted and hit her. When Melissa regained consciousness, she was lying on the side of the road.

Arrest and prosecution

In spring 2008, a woman told Mesa police that an Asian man in a white car had repeatedly attempted to solicit her. She said the man frequented a local bar, and the police began watching him. After the man, later identified as Benson, dropped a cigarette butt, the police retrieved it and took a DNA sample, which revealed a profile that matched profiles developed from swabs taken from all four victims.

The Mesa police arrested Benson, who confessed to killing Alisa and Karen and to assaulting Melissa. He denied assaulting Yolanda, however, and explained the

> presence of his DNA on her body by stating he had solicited a "Hispanic chick" around that time who must have been Yolanda.
>
> The State indicted Benson on two counts of first-degree murder, four counts of kidnapping, and four counts of sexual assault. A jury found him guilty on all charges except the sexual assault count concerning Karen, on which it returned a verdict for attempted sexual assault.
>
> During the aggravation phase, the jury found three aggravating circumstances for each murder. At the penalty phase, the jury determined that Benson should be sentenced to death for each murder. Consistent with those verdicts, the trial court imposed death sentences for the murders and consecutive sentences totaling 135.5 years' imprisonment on the non-capital counts.

Benson, 232 Ariz. at 457–58, ¶¶ 2–10, 307 P.3d at 24–25.

Benson then filed his notice of petition for post-conviction relief. (Docket "Dkt." 479, filed 12/17/13.) Benson filed his first timely petition for post-conviction relief on June 6, 2017. (Dkt. 579.) He filed a timely amended petition on October 24, 2022. (Dkt. 773.)

Applicable Law.

Rule 32.

To begin, a defendant "must strictly comply with Rule 32 or be denied relief. *State v. Carriger*, 143 Ariz. 142, 146, 692 P.2d 991, 995 (1984). A defendant carries the "burden to assert grounds that bring him within the provisions of the Rule in order to obtain relief." *Id*.

> Rule 32 is separate and apart from the right to appeal, and it is not designed to afford a second appeal. It is not intended to unnecessarily delay the renditions of justice or add a third day in court when fewer days are sufficient to do substantial justice. In all cases, civil or criminal, there must be an end to litigation.

Id., 143 Ariz. at 145, 692 P.2d at 994 (internal citations omitted).

This Court must initially "identify[] all precluded and untimely claims." Ariz. R. Crim. P. ("Rule") 32.11(a). Specifically, a defendant "is precluded from relief under Rule 32.1(a) based on any ground:"

> (1) still raisable on direct appeal under Rule 31 or in a post-trial motion under Rule 24;
>
> (2) finally adjudicated on the merits in an appeal or in any previous post-conviction proceeding; or

> (3) waived at trial or on appeal, or in any previous post-conviction proceeding, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.

Ariz. R. Crim. P. 32.2(a). The preclusion rule "'prevent[s] endless or nearly endless reviews of the same case in the same trial court." *State v. Shrum*, 220 Ariz. 115, 118, ¶ 12, 203 P.3d 1175, 1178 (2009) (quoting *Stewart v. Smith*, 202 Ariz. 446, 450, ¶ 11, 46 P.3d 1067, 1071 (2002)). "Because the general rule of preclusion serves important societal interests, Rule 32 recognizes few exceptions." *Id*., 220 Ariz. at 118, ¶ 13, 203 P.3d at 1178.

Claims arising under Rules 32.1(b) through (h) "are not subject to preclusion under Rule 32.1(a)(3)." Ariz. R. Crim. P. 32.2(b). However, they are still subject to preclusion under Rules 32.2(a)(1) and (a)(2). *See id.*

A petition must also be timely. The time limits in Rule 32 "are jurisdictional, and an untimely filed notice or petition shall be dismissed with prejudice." A.R.S. § 13–4234(G). A defendant must file a post-conviction notice for a claim arising under Rule 32.1(a) within, as applicable here, 30 days from the date of the direct-appeal mandate. Ariz. R. Crim. P. 32.4(b)(3)(A). If a defendant fails to meet this deadline, his petition may be considered timely only if he "adequately explains why the failure to timely file a notice was not [his] fault." Ariz. R. Crim. P. 32.4(b)(3)(D).

Claims arising under Rules 32.1(b) through (h) are exempt from the timeliness requirements. *See* Ariz. R. Crim. P. 32.2(b). However, a defendant must still file those claims "within a reasonable time after discovering the[ir] bas[e]s," Ariz. R. Crim. P. 32.4(b)(3)(B), and must "provide sufficient reasons" why the claim was not timely raised, Ariz. R. Crim. P. 32.2(b).

Next, to determine whether a defendant is entitled to relief, the Court must review each claim individually to determine if there is a colorable claim.

> The relevant inquiry for determining whether the petitioner is entitled to an evidentiary hearing is whether he has alleged facts which, if true, would *probably* have changed the verdict or sentence. If the alleged facts would not have probably changed the verdict or sentence, then the claim is subject to summary dismissal. Ariz. R.Crim. P. 32.6(c).

State v. Amaral, 239 Ariz. 217, 220, ¶ 11, 368 P.3d 925, 928 (2016) (emphasis in original). Moreover, a court does not have to hold an evidentiary hearing if there are no issues of material issue of fact. *Id.,* 239 Ariz. at 220, ¶ 12, 368 P.3d at 928. Therefore, to obtain relief, a defendant must show that the alleged facts presented would have probably changed the verdict or sentence.

Ineffective Assistance of Counsel.

To prove an ineffective assistance of counsel ("IAC") claim, a defendant must show that (1) counsel's performance was deficient under prevailing professional standards and (2) he suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). A defendant must prove both prongs to succeed on an IAC claim.[1]

To establish deficient performance, a defendant must show "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. *See also State v. Pandeli* ("*Pandeli V*"), 242 Ariz. 175, 180, ¶ 5, 394 P.3d 2, 7 (2017) (citing *Hinton v. Alabama*, 571 U.S. 263, 272 (2014); *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010)).

> Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980)[2] ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Strickland, 466 U.S. at 688–89.

A defendant's allegations and supporting evidence must withstand this Court's "highly deferential" scrutiny of counsel's performance and overcome its "strong presumption" that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 689–90.

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id., at 690–91. *See also Wiggins v. Smith,* 539 U.S. 510, 521–22 (2003) (quoting same). A reasonable investigation includes "a thorough investigation of the defendant's background."

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[1] Ineffective assistance claims against both trial and appellate counsel are reviewed under this standard. *See Strickland,* 466 U.S. 668; *Smith v. Robbins*, 528 U.S. 259, 285 (2000). *State v. Mata*, 185 Ariz. 319, 331, 916 P.2d 1035, 1047 (1996) (citing *Strickland,* 466 U.S. at 669).

[2] The Court refers to these and other ABA Guidelines as "ABA Guidelines."

Williams v. Taylor, 529 U.S. 362, 396 (2000). "There are many ways to be effective, and we must resile from present counsel's attempt to lure us into the hindsight miasma that the Supreme Court has told us to avoid." *Smith v. Stewart*, 140 F.3d 1263, 1273 (9th Cir. 1998) (citing *Strickland*, 466 U.S. at 689). "Simply disagreeing with strategy decisions cannot support a determination that representation was inadequate." *Pandeli V*, 242 Ariz. at 181, ¶ 8, 394 P.3d at 8 (citing *Strickland*, 466 U.S. at 689).

To establish prejudice, a defendant must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

> "A reasonable probability is a probability sufficient to undermine confidence in the outcome." [*Hinton*, 571 U.S. at 275] (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052). But "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding," because then "[v]irtually every act or omission of counsel would meet that test." *Strickland,* 466 U.S. at 693, 104 S.Ct. 2052.

Pandeli V, 242 Ariz. at 180–81, ¶ 6, 394 P.3d at 7–8. Thus, a defendant is entitled to "*effective* (not mistake-free) representation." *United States v. Gonzales-Lopez*, 548 U.S. 140, 147 (2006) (emphasis in original).

Claims.

In his Amended Petition, Benson alleges twelve claims for relief.

Brady v. Maryland.

Benson alleges that the State violated its duty under *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose three separate items: (1) "Ms. Legg['s] Proficiency Exam Failure" (Petition, at 52); (2) "Corrective Actions, Showing Errors in Mesa Crime Laboratory Protocols" (Petition, at 57); and (3) "Ms. Smart['s] Internal Affairs Report" (Petition, at 59.)

Preclusion of Benson's *Brady* claims.

To begin, Benson's *Brady* claims regarding Ms. Legg's proficiency test and the Smart internal affairs report are not precluded, as they may be raised in a Rule 32 proceeding. *See State v. Ring*, 200 Ariz. 267, 277, ¶¶ 33, 35, fn 5, 25 P.3d 1139, 1149 (2001), *overruled on other grounds by Ring v. Arizona,* ("*Ring II*"), 536 U.S. 584 (2002). However, Benson's *Brady* claim about Ms. Ryan's report is precluded, as it could have been raised on direct appeal. Rule 32.2(a)(3). The chain of custody issues and the concerns about the reagent blank used in the Mesa Crime Lab were discussed at trial. (*See* R.T. 8/12/11 at 57–59; R.T. 8/9/11 at pp. 26–27.) Therefore, Benson could have raised this issue on direct appeal. Because he did not, this issue is precluded.

Benson's *Brady* claims are meritless.[3]

> 'Under *Brady,* the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment.' *Smith v. Cain,* [565] U.S. [73, 75], 132 S.Ct. 627, 630, 181 L.Ed.2d 571 (2012). Evidence is 'material' for purposes of *Brady* 'when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.' *Id.* (citation omitted).

Benson, 232 Ariz. at 460, ¶ 24, 307 P.3d at 27 (alterations in original).

Here, Benson failed to show that disclosure of any of the three items would have probably resulted in a different outcome. Therefore, Benson failed to show the evidence in question is "material" for purposes of *Brady*. As Benson admitted, his DNA was confirmed and the lab "got the DNA analysis right." (Petition, at 64.)

a. Ms. Legg's proficiency

Benson alleges that the State violated its obligations under *Brady* by "suppressing material evidence of erroneous DNA testing and analyses performed by Ms. Jodi Legg, errors that went to both the merits and to impeachment." (Petition, at 51.) The Court interprets the State's silence as a concession of suppression. (*See* Response, at 13–14, discussing only Ms. Ryan's report.) Further, the Court assumes, without finding, that the evidence suppressed was favorable, "[W]hether evidence is favorable is a question of substance, not degree, and evidence that has any affirmative, evidentiary support for the defendant's case or any impeachment value is, by definition, favorable." *Comstock v. Humphries*, 786 F.3d 701, 708 (9th Cir. 2015) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). "Although the weight of the evidence bears on whether its suppression was prejudicial, evidence is favorable to a defendant even if its value is only minimal." *Id.* However, Benson failed to show that the suppressed evidence was material.

First, Ms. Legg's proficiency was not under scrutiny during the time she tested the samples regarding Benson. (*See* R.T. 8/12/11, at 127–208.) Ms. Legg analyzed evidence in Benson's case from October 24, 2007, until July 2008. (R.T. 8/12/11, at 151–53, 159–65, 169–77.) When there was a discrepancy in Ms. Legg's proficiency exam in February 2011, the Mesa Crime Lab devised a corrective action plan. (Defense Exhibit "Ex." 82 and Ex. 84, at 1.) As part of the corrective action plan, all of Legg's casework from her previous successful proficiency test was reviewed. (Ex. 84, at 1.) The results of that review "did not reveal any indication of contamination events."

[3] Benson makes several passing references to prosecutorial misconduct but fails to develop this claim in any meaningful way. (Petition, at pp. 51, 56, 62, and 63.) Therefore, any potential prosecutorial misconduct claim is waived. *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

(*Id.*) Furthermore, on or before February 28, 2011, Ms. Legg passed an internal proficiency test. (*Id.*) Second, Benson does not contest that the results of the samples that Ms. Legg tested matched Benson's DNA. (*See* Petition, at 64.)

Finally, Benson's contention that Ms. Legg's corrective action was still open until February 2012 when "CTS approved the Mesa Police Department Crime Lab's internal corrective action and closed their inquiry into Legg" misstates the facts. (Petition, at 54.)

- On February 11, 2011, a discrepancy was noted in Ms. Legg's proficiency exam and a corrective action report number was assigned. The same day, Ms. Legg stopped working on cases and she re-analyzed the sample in question. When Ms. Legg re-analyzed the sample, the source of the discrepancy was identified. (Ex. 84, at 1.)
- On February 23, 2011, the Mesa Crime Lab reported the discrepancy to CTS. (*Id*.)
- The next day, on February 24, 2011, the corrective action report was issued and detailed the steps taken in the corrective action plan. (*Id*.)
- On February 28, 2011, "[t]he DNA Technical Leader reported that the *casework review did not reveal any indication of contamination events*. Secondly, the analyst had *successfully analyzed the internal proficiency test*. The DNA Technical Leader approved the analyst for resumption of casework." (*Id*., emphasis in original.)
- On March 1, 2011, "[t]he Quality Assurance Manager reviewed the records and closed the corrective action." (*Id*.; *see also* Ex. 91.)
- On May 6, 2011, more than two months after the corrective action was closed by Mesa Crime Lab, the Quality Assurance Manager sent an email to the DNA Technical Leader to notify her that Ms. Legg's proficiency test was inconsistent with the consensus response. (Ex. 102.) The Mesa Crime Lab identified this discrepancy on February 11, 2011, and took immediate corrective action. (*See* Ex. 84, at 1.)
- On May 9, 2011, the DNA Technical Leader provided a memo to Ms. Legg regarding her evaluation of proficiency test results. In the memo, Ms. Legg was notified that there were several incorrect results and that "[t]he incorrect results from this proficiency were identified prior to the release of the test results to CTS. A corrective action was opened and completed to the satisfaction of the Mesa PD Forensic Services Section." (Ex. 101.)
- On October 5, 2011, American Society of Crime Laboratory Directors ("ASCLD") sent a letter of inquiry to the Mesa Crime Lab, indicating that it received information that Ms. Legg's results were different than "the manufacturer's reported information and consensus results." (Ex. 100, at 1.) ASCLD requested Mesa Crime Lab to provide the corrective measures taken, the steps taken to

identify the cause of the discrepancy, and whether this was an isolated incident. (*Id.*, at 2.)

- On October 20, 2011, Mesa Crime Lab responded to ASCLD's inquiry. (Ex. 84.)
- On February 7, 2012, ASCLD notified Mesa Crime Lab that they closed their "review of your laboratory's test results for the above referenced proficiency test." (Ex. 99.) ASCLD found Mesa Crime Lab's "actions to be both appropriate and complete." (*Id.*)

Mesa Crime Lab closed Ms. Legg's corrective action on March 1, 2011. (Exs 83, 84, and 91.) In May 2011, Mesa Crime Lab received information that Ms. Legg's reported results on her proficiency test were inconsistent with the consensus response and provided immediate corrective action. (Exs. 102 and 101.) On October 5, 2011, after Ms. Legg testified (*see* R.T. 7/12/11 and 8/12/11), ASCLD inquired about the difference in reporting on Ms. Legg's proficiency test from February 11, 2011. (Ex. 100; *see also* Ex. 84.) It was not CTS but ASCLD that took action in February 2012. (Exs. 99 and 100.) ASCLD closed their review into Ms. Legg's proficiency exam and agreed that Mesa Crime Lab's actions were "both appropriate and complete." (Ex. 99.) On February 9, 2012, the Quality Assurance Manager emailed Ms. Legg to notify her that ASCLD "approved the documents" from her corrective action and closed its inquiry. (Ex. 85.) The Quality Assurance Manager reminded Ms. Legg that the corrective action was closed on March 1, 2011. (*Id.*) Nothing in ASCLD's February 7, 2012, letter indicated that it or CTS[4] closed Ms. Legg's corrective action. (*See* Ex. 99.) On the contrary, ASCLD's October 5, 2011, letter requested that Mesa Crime Lab "[p]rovide a description of the planned *or enacted* corrective measures taken to prevent the issue(s) from recurring." (Ex. 100, emphasis added.) Thus, any known investigation into Ms. Legg's proficiency test was completed prior to Ms. Legg's testimony in July and August 2011. It was not until months after her testimony that ASCLD inquired into her February 2011. proficiency test.

Based on Benson's concession that the DNA results were correct, that Ms. Legg's proficiency was not in doubt at the time she conducted the DNA analyses in Benson's case, and the corrective action taken by the Mesa Crime Lab, Benson failed to prove that Ms. Legg's failed proficiency test was material. Therefore, Ms. Legg's failed proficiency test does not demonstrate a reasonable probability that the jury would have returned a different verdict.

b. Suzanna Ryan's report

Benson alleges that the "State's failure to provide information to trial counsel regarding Legg's improper analysis of the cigarette butt evidence violated *Brady*." (Petition, at 57.) He

[4] Benson does not cite any evidence directly from CTS, which he identifies as "Collaborative Testing Services (CTS), a national body that oversees crime lab testing and quality assurance." (Petition, at 54.)

claims that because Ms. Legg violated Mesa Crime Lab protocols and national standards, the State should have disclosed this. (Petition, at 58.) The Court assumes, without finding, that the evidence allegedly suppressed was favorable. However, Benson fails to demonstrate that the State suppressed the information or that the evidence was material.

To begin, Suzanna Ryan's report was not in the State's control, so the State did not suppress the report. Further, the concerns raised in Ms. Ryan's report, including chain of custody issues, concerns about the reagent blank, and the release of preliminary results to law enforcement, were not concealed by the State. Most of these concerns were raised during trial and were evident in the disclosed materials. Lisa Perry, a forensic scientist with Mesa Crime Lab, discussed the chain of custody issues raised by Ms. Ryan, which defense counsel chose not to raise on cross-examination. Ms. Perry testified that the computer system was down so she hand wrote the chain of custody and there could be several possibilities for the discrepancies. (R.T. 8/12/11 at 57–59.) Krista Placko, a forensic scientist with Mesa Crime Lab, testified about reagent blanks. (R.T. 8/9/11 at pp. 26–27.) Ms. Ryan admitted that the discrepancy with the reagent blank was disclosed in the results. (*See* Ex. 79, at 3.) Benson failed to provide evidence that this information was concealed.

Moreover, Ms. Ryan's report was comprised of her opinions, which are contrary to the testimony of other scientists who worked on Benson's case. (*See* R.T. 8/8/11, at 126–29; R.T. 8/11/11, at 132–36, 158–59; R.T 8/12/11, at 36–40, 44, 53–57, 101–06, 112–13, 131–33, 151–77.) Ms. Ryan's report stated:

> it is my opinion that the results of the cigarette butt cutting (Item 002-AA) are unreliable and invalid and should not have been reported preliminarily, nor in a final report, until the issue with the controls was addressed and corrected and the lab issued a corrective action report addressing the problem and how they planned to ensure this issue did not recur in the future.

(Ex. 79, at 6.) Experts often disagree. The Arizona Supreme Court "note[d] that opinion testimony often includes subjective components, and good faith disagreements among credible experts are not unusual and do not necessarily amount to a due process violation." *Pandeli V*, 242 Ariz. at 192, ¶ 74, 394 P.3d at 19. Therefore, Ms. Ryan's report does not demonstrate a reasonable probability that the jury would have returned a different verdict.

c. Ms. Smart's internal affairs report

Benson alleges that the State violated its obligations under *Brady* by failing to disclose Ms. Smart's internal affairs report. (Petition, at 52.) The Court interprets the State's silence as a concession of suppression. (*See* Response, at 13–14, discussing only Ms. Ryan's report.) Further, the Court assumes, without finding, that the evidence suppressed was favorable. However, Benson failed to show that the suppressed evidence was material.

Nothing in the Smart internal affairs report indicated that Ms. Smart's issues were related to Benson's case. His claim that the issues in the report demonstrate a lab-wide problem are unpersuasive, even if true, and they do not demonstrate a reasonable probability that the jury would have returned a different verdict.

IT IS ORDERED denying Benson's claim that the State violated its *Brady* obligations as meritless.

2. Fourth Amendment Probable Cause Violation.

Benson's Fourth Amendment probable cause violation claim is precluded.

Benson's Fourth Amendment probable cause violation claim is precluded because he could have raised it on direct appeal. Rule 32.2(a)(3). Because he did not, this issue is precluded.

Benson's Fourth Amendment probable cause violation claim is meritless.

The U.S. Constitution requires that a warrant shall issue for a person's arrest only upon showing probable cause, supported by an oath or affirmation. U.S. Const. amend IV; *see also Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment incorporated to the states).

> In *Franks*, the Supreme Court held that a defendant is entitled to a hearing to challenge a search warrant affidavit when he shows (1) that the affiant knowingly, intentionally, or with reckless disregard for the truth included a false statement in the affidavit, and (2) the false statement was necessary to the finding of probable cause.

State v. Buccini, 167 Ariz. 550, 554, 810 P.2d 178, 182 (1991) (citing *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978)). The defendant must show that the affiant provided a false statement in the warrant application's affidavit by a preponderance of the evidence. *Id*.

Probable cause exists "when reasonably trustworthy information and circumstance would lead a person of reasonable caution to believe that a suspect has committed an offense." *State v. Hoskins*, 199 Ariz. 127, 137–38, ¶ 30, 14 P.3d 997, 1007–08 (2000), *supplemented,* 204 Ariz. 572, 65 P.3d 953 (2003). "Probable cause, however, does not turn on the 'innocence' or 'guilt' of particular conduct, but instead on the 'degree of suspicion that attaches to particular types of non-criminal acts.'" *State v. Sisco,* 239 Ariz. 532, 536, ¶ 15, 373 P.3d 549, 553 (2016) (quoting *Illinois v. Gates,* 462 U.S. 213, 243 n.13 (1983)). Probable cause is a low threshold, as it "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *State v. Cheatham,* 240 Ariz. 1, 3, ¶ 10, 375 P.3d 66, 68 (2016) (quoting *Gates,* 462 U.S. at 243 n.13).

To begin, Benson argues that Detective McCormick of the Mesa Police Department sought and received an arrest warrant for Trent based on an affidavit that included a false statement, citing

Ex. 94. (Petition, at 64–66.) However, this statement is incorrect.[5] Ex. 94 is not an arrest warrant. It is an affidavit and warrant for "DNA, Fingerprints, and Photographs under A.R.S. § 13–3905." (Ex. 94.) The warrant authorized "any peace officer in the State of Arizona … for a time not to exceed three (3) hours, to seize and *detain* … Trent Christopher Benson … to take DNA, … Fingerprints, … and Photographs." (*Id.*, emphasis added.) There is a difference between detention and arrest. A detention "may constitute a de facto arrest when an investigative detention is unreasonably prolonged." *State v. Maciel*, 240 Ariz. 46, 51, 375 P.3d 938, 943 (2016). However, Benson does not allege that this search warrant, which permitted Benson's detention, turned into a de facto arrest warrant. Therefore, based on Benson's allegations and failure to cite any evidence to support his contentions, this claim is meritless.

Even if Benson intended to argue that the affidavit for the *search* warrant (Ex. 94) contained a false statement,[6] this claim still fails. Benson proffers one expert's opinion—obtained post-conviction—that the DNA results of the analyzed cigarette butt were invalid at the time the search warrant was requested, thus eroding probable cause to arrest. (Petition, at 64; Ex. 79.) However, Benson admitted that the DNA analysis was correct, undermining the report's credibility. (Petition, at 64.) Ms. Ryan's report does not show that Detective McCormick presented any false evidence in the affidavit, either "knowingly, intentionally, or with reckless disregard for the truth," as required by *Franks*. *Buccini*, 167 Ariz. at 554, 810 P.2d at 182 (citing *Franks*, 438 U.S. at 155–56). On the contrary, this portrays a battle of experts. Detective McCormick's expert, Ms. Legg, indicated that Benson's DNA "match[ed] the unknown DNA profile found on all 4 victims." (Ex. 94, at 3.) Ms. Ryan's report does not show that Ms. Legg provided any false information, let alone that the alleged false information was provided "knowingly, intentionally, or with reckless disregard for the truth." *Buccini,* 167 Ariz. at 554, 810 P.2d at 182 (citing *Franks,* 438 U.S. at 155–56). Benson's expert, Ms. Ryan, did not indicate that Benson's DNA did not match; she merely indicated that there may have been better methods to ensure that procedural protocols were followed.

Moreover, a detention without probable cause is not unlawful. It must be "'reasonable' under the circumstances." *Long v. Garrett*, 22 Ariz. App. 397, 399, 527 P.2d 1240, 1242 (1974). "All of those factors which in their totality lead to the 'reasonable' standard are present in" A.R.S. § 13–3905. *Id.* (citing A.R.S. § 13–1424, a previous version of A.R.S. § 13–3905 (*see id.*, at fn 1)). It was reasonable for Detective McCormick to rely on the information that Ms. Legg provided to him.

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[5] Nowhere in Ex. 94 does it mention arrest. However, this Court assumes that counsel did not knowingly make a false statement to the Court but merely committed a careless mistake.

[6] "It is the petitioner's burden to assert grounds that bring him within the provisions of the Rule in order to obtain relief." *Carriger*, 143 Ariz. at 146, 692 P.2d at 995.

Ms. Ryan's report neither undermines the reasonableness of the statements Detective McCormick made in his affidavit to obtain the DNA sample search warrant, nor does the report indicate that Detective McCormick's statements were in any way false. Therefore, this claim is meritless.

IT IS ORDERED denying Benson's claim that the police did not have probable cause to arrest Benson on May 14, 2008, as meritless.

3. Juror Misconduct.

Benson's juror misconduct claims are precluded.

Benson's juror misconduct claims are precluded. Because juror misconduct claims can be raised in a Rule 24.1 motion for new trial, Benson is generally precluded from raising them in a petition for post-conviction relief. *State v. Kolmann*, 239 Ariz. 157, 163, ¶ 25, 367 P.3d 61, 67 (2016). Benson failed to identify an exception to the preclusion rule, so juror misconduct claims are precluded. Although the specific circumstances by which a juror can commit misconduct are enumerated in Rule 24.1(c)(3), and Benson does not claim any misconduct listed in that rule, *Kolmann* suggests that these claims should nevertheless be raised in a motion for new trial. Therefore, Benson's juror misconduct claims are precluded.

There was no juror misconduct.

Benson alleges several instances of juror misconduct: (1) Burden of proof violation (Petition, at 71); (2) *Caldwell v. Mississippi* violation (Petition, at 74); and (3) Extraneous evidence violation (Petition, at 75).

a. Burden of Proof.

Benson alleges that there was juror misconduct because of a "burden of proof violation." (Petition, at 71.) Benson contends that at least one juror, and perhaps more, voted to convict Benson on the counts in which Ms. Ramirez was the victim, despite doubting whether the State met its burden of proof. (*Id.*, at 72.) However, Benson's only evidence comes in the form of a juror affidavit that discusses the juror's mental processes at the time, which this Court is not permitted to consider.

> The general rule, known as Lord Mansfield's rule, is that a juror's testimony is not admissible to impeach the verdict. … In Arizona an exception exists when a juror is guilty of one of six specific types of misconduct enumerated in Rule 24.1(c)(3). … [T]he judge may not consider "testimony or affidavit ... which inquires into the subjective motives or mental processes which led a juror to assent or dissent from the verdict." Rule 24.1(d).

State v. Dickens, 187 Ariz. 1, 15, 926 P.2d 468, 482 (1996), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012). "The rule serves 'to protect the process of frank and conscientious jury deliberations and the finality of jury verdicts.'" *State v. Nelson*, 229 Ariz. 180, 191, ¶ 48, 273 P.3d 632, 643 (2012), (quoting *State v. Poland,* 132 Ariz. 269, 282, 645 P.2d 784, 797 (1982)). Therefore, because Benson has not presented any evidence that this Court may consider, this claim is meritless.

b. *Caldwell v. Mississippi*, 472 U. S. 320 (1985).

Benson alleges that there was juror misconduct because a juror made a comment during deliberations that an appellate court would review the death sentence. (Petition, at 74.) Again, Benson's only evidence comes in the form of a juror affidavit that discusses the juror's mental processes at the time, which this Court is not permitted to consider. *Dickens*, 187 Ariz. at 15, 926 P.2d at 482.

Further, the court instructed the jurors in the penalty phase that their verdict was "not a recommendation" but would be binding. (R.T. 9/13/11, at 27.) Jurors are presumed to follow the court's instructions. *See State v. Newell,* 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006). Therefore, this claim is meritless.

c. Extraneous Evidence Violation.

Benson alleges that there was juror misconduct because a juror prayed to help the juror decide on how to vote and after prayer, decided to vote for death. (Petition, at 75.) Again, Benson's only evidence comes in the form of a juror affidavit that discusses the juror's mental processes at the time, which this Court is not permitted to consider. *Dickens*, 187 Ariz. at 15, 926 P.2d at 482. Thus, Benson presented no evidence that the Court can consider. Furthermore, *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1579 (9th Cir. 1989) addressed the issue about prayer/sign from God. In *Hernandez-Escarsega*, a juror prayed to God and requested a sign that her prayers would be answered, which she received. *Id*. The court determined that the juror's prayers and sign from God went to her mental processes. *Id*. The court also found that there was no extrinsic evidence. *Id.* Benson failed to show that the verdict was influenced by any extrinsic evidence. Therefore, this claim is meritless.

IT IS ORDERED denying Benson's juror misconduct claims as meritless.

4. Ineffective assistance of trial counsel.

Benson alleges several claims of ineffective assistance of trial counsel:

(1) Benson's trial counsel were ineffective in failing to obtain records about the Mesa Crime Lab (Petition, at 78–79);

(2) Benson's trial counsel were ineffective in failing to challenge the DNA results (Petition, at 79–80);

(3) Benson's trial counsel were ineffective in failing to raise a Fourth Amendment violation (Petition, at 80); and

(4) Benson's trial counsel were conflicted under *Cuyler v. Sullivan* (Petition, at 80–82).

a. Benson's guilt-phase counsel were not constitutionally ineffective in failing to (1) request records about the Mesa Crime Lab, (2) challenge the DNA analyses, or (3) raise a Fourth Amendment violation claim.

Benson argues that guilt-phase counsel were ineffective when they failed to request the public records regarding the Mesa Crime Lab and its personnel. (Petition, at 78–79.) He also contends that guilt-phase counsel were ineffective when they failed to challenge the DNA analyses based on the "DNA corrective measures" (Ex. 79) and Ms. Legg's February 2011, proficiency exam. (Petition, at 79–80.) Benson also claims that guilt-phase counsel were ineffective when they failed to raise a Fourth Amendment violation. (Petition, at 80.) All of these claims center on the material that Benson contends were not provided by the State, in violation of their duties under *Brady*. However, as Benson noted, the State had a duty to disclose exculpatory material, regardless of whether it was requested. (Petition, at 52.) Therefore, guilt-phase counsel acted reasonably in relying on the State to meet its obligations under *Brady*. *Christenson v. Ault*, 598 F.3d 990, 997 (8th Cir. 2010) ("Absent any reason to believe that the prosecutor—who was under an obligation to turn over exculpatory evidence in his possession—had not been forthcoming it was reasonable for the criminal defense attorney to rely on the completeness of the discovery materials produced by the prosecutor."). Benson did not provide any evidence that guilt-phase counsel had reason to believe that the State would not be forthcoming in their *Brady* obligations. "[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005) (citing *Wiggins*, 539 U.S. at 525).

Furthermore, as discussed in Claim 1, *supra*, the undisclosed documents were not material. *Brady's* materiality prong and *Strickland's* prejudice prong are the same. *Gentry v. Sinclair*, 705 F.3d 884, 906 (9th Cir. 2013) (citing *U.S. v. Bagley*, 473 U.S. 667, 682 (1985)). Therefore, for the reasons stated above, guilt-phase counsel were not deficient in failing to request the public record documents from the Mesa Crime Lab or in failing to challenge the DNA analyses, and Benson was not prejudiced. Additionally, as discussed in Claim 2, *supra*, there was no Fourth Amendment violation. Counsel cannot be ineffective for failing to raise a meritless claim. *See Strickland*, 466 U.S. at 694.

IT IS ORDERED denying Benson's claim that trial counsel were ineffective for failing to (1) request records about the Mesa Crime Lab, (2) challenge the DNA analyses, or (3) raise a Fourth Amendment violation claim as meritless.

b. *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

Benson's *Sullivan* claim is precluded.

Benson's *Sullivan* claim is precluded, as it could have been raised on direct appeal. *State v. Duffy*, 251 Ariz. 140, 144–45, ¶¶ 11–12, 486 P.3d 197, 201–02 (2021). While *Duffy* clarifies that IAC claims must be raised in a Rule 32 proceeding, a *Sullivan* claim is not an IAC claim. *Duffy*, 251 Ariz. at 144, ¶ 11, 486 P.3d at 201. Therefore, this claim is precluded.

Guilt-phase counsel were not conflicted under *Sullivan*.[7]

Benson claims that his guilt-phase counsel were conflicted under *Sullivan* and therefore, he does not need to show prejudice. (Petition, at 80–82.) However, *Sullivan* holds that a defendant's Sixth Amendment right to counsel may be violated if his counsel has *an actual conflict of interest caused by concurrent representation* that adversely affected the lawyer's performance. 446 U.S. at 345–50 (emphasis added). Although Benson asserts, without authority, that a *Sullivan* claim can exist without concurrent representation (Reply, at 29), the Supreme Court clarified that *Sullivan* limited its applicability to cases in which "a defendant shows that his counsel *actively represented* conflicting interests." *Mickens v. Taylor*, 535 U.S. 162, 175 (2002) (emphasis in original). *See also Earp v. Ornoski,* 431 F.3d 1158, 1184 (9th Cir. 2005) ("The *Mickens* Court specifically and explicitly concluded that *Sullivan* was limited to joint representation, and that any extension of *Sullivan* outside of the joint representation context remained, 'as far as the jurisprudence of [the Supreme Court was] concerned, an open question.' *Id.*[, at 176.]" (alterations in original).)

To succeed on a conflict-of-interest claim, a "defendant must show first that there was an actual conflict, and second that the conflict had an adverse effect." *State v. Jenkins*, 148 Ariz. 463, 466, 715 P.2d 716, 719 (1986). An actual conflict under *Sullivan* requires trial counsel to concurrently represent the defendant and another client that is adverse to the defendant. *Id*., at 467. Here, Benson does not allege that counsel concurrently represented Benson and another client with interests adverse to Benson; on the contrary, he concedes he is not making this claim. (Reply, at 29.) Instead, Benson claims that his guilt-phase counsel's conflict of interest was that they did not "create and maintain a functional relationship with Trent, in addition to their ability to present a compelling case for life." (Petition, at 81–82.) However, this does not establish a conflict of interest under *Sullivan*. Moreover, this statement alone does not indicate any type of conflict. Finally, the Sixth Amendment does not guarantee "a 'meaningful relationship' between an accused and his counsel." *Morris v. Slappy,* 461 U.S. 1, 14 (1983). Therefore, Benson failed to demonstrate that

[7] Although Benson cites *Strickland*, 466 U.S. 668, he fails to develop any *Strickland* argument. Therefore, it is waived, and this Court will not address it. *Carver*, 160 Ariz. at 175, 771 P.2d at 1390.

penalty-phase counsel were conflicted under *Sullivan*. Also, because Benson failed to develop this argument in any meaningful way, it is waived. *Carver*, 160 Ariz. at 175, 771 P.2d at 1390.

Further, Benson did not show that the perceived conflict had an adverse effect. Failing to secure the defendant's desired result at trial does not demonstrate an adverse effect. *Jenkins*, 148 Ariz. at 467 ("The fact that counsel might have performed better at trial does not rise to adverse effect. The negative impact must be substantial although it need not have caused defendant's conviction.") Therefore, there was no conflict of interest and, thus, there was no ineffective assistance of counsel.

IT IS ORDERED denying Benson's claim that trial counsel were not conflict-free as meritless.

5. Ineffective assistance of sentencing counsel.

Benson alleges several claims of ineffective assistance of sentencing counsel:

(1) Penalty-phase counsel were ineffective in failing to competently investigate and present a complete biopsychosocial history (Petition, at 82–88);

(2) Penalty-phase counsel were ineffective in failing to present an accurate clinical picture (*Id*., at 88–98);

(3) Penalty-phase counsel were ineffective when they presented an inaccurate and highly damaging clinical picture (*Id*., at 98–108);

(4) Penalty-phase counsel were ineffective in failing to challenge the State's administration of the "Hare Psychopathy Checklist" (*Id*., at 108–110);

(5) Penalty-phase counsel were ineffective in failing to request an instruction pursuant to *Simmons v. South Carolina* (*Id*., at 110-121);

(6) Penalty-phase counsel were ineffective in failing to request, as mitigation, to inform the jury of Benson's willingness to plead guilty, waive release, and accept a natural life sentence as mitigation (*Id*., at 121–23);

(7) Penalty-phase counsel were ineffective in failing to request a *Caldwell v. Mississippi* instruction (*Id*., at 123–24);

(8) Aggravation-phase counsel were ineffective in failing to challenge the (F)(6) aggravating factor (*Id.*, at 127–30); and

(9) Aggravation-phase counsel were ineffective in failing to challenge the (F)(1) and (F)(2) aggravating factors (*Id.*, at 130–31).

a. Penalty-phase counsel were not constitutionally ineffective in their investigation and presentation of a biopsychosocial history.

Benson argues that his penalty-phase counsel were ineffective in failing to competently investigate and present a complete biopsychosocial history. (Petition, at 82–88). To begin, citing the ABA guidelines, Benson claims that "[t]he standard practice for conducting a biopsychosocial history is to investigate at least three generations back from the client's generation, the lateral generation, and at least one generation forward" and that this must be done for both his adoptive and biological families. (Petition, at 83.) He further states, "Failing to comprehensively undertake this task is akin to failing to undertake the task at all as an incomplete biopsychosocial history can be as misleading as the lack of one. *Wiggins*, 539 U.S. at 527." This is in direct conflict with *Strickland*. Prevailing norms of practice, as shown in ABA Guidelines, are "only guides"; they are not mandatory practices. *Strickland*, 466 U.S. at 688–89. Furthermore, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*, at 691. Strategic choices based on reasonable decisions are virtually unchallengeable. *Id*., at 690.

Benson asserts that penalty-phase counsel failed to interview multiple lay witnesses and those that were interviewed were done so inadequately. (*Id.*, at 84.) However, not all potential witnesses need to be interviewed. *See Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) ("[T]here comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties.")

Benson also contends that penalty-phase counsel were ineffective in expanding on (1) the racism that Benson faced; (2) Benson's struggles with academics and independent living; (3) the importance of his relationship as a doting father to Trevor; (4) the trauma Benson suffered in the first three years of his life in South Korea; (5) Benson's feeling that he was not accepted by his family or community; and (6) the numerous head injuries Benson sustained. (Petition, at 85–86.) However, the jury heard information on all these claims.

(1) Benson was subjected to racial taunts during childhood. (R.T. 9/26/11, at 89–91.)

(2) Benson had difficulty living independently. (R.T. 9/21/11, at 138–41, 152–53, 161; R.T. 9/26/11, at 99–101.) Benson struggled academically. (R.T. 9/14/11, at 108–09; R.T. 9/15/11, at 7.)

(3) Benson cared about Trevor and loved being a great dad. (Trial Exhibit 241, at 10, 20–21; R.T. 9/26/11, at 61–64; R.T. 9/29/11, at 37).

(4) Benson experienced a great deal of trauma in South Korea, prior to coming to live with the Bensons. (R.T. 9/19/11, at 3–110; R.T. 9/20/11, at 3–105; R.T. 9/26/11, at 3–162; R.T. 9/27/11, at 3–130, 146–194.)

(5) Benson was not close to his brothers growing up. (R.T. 9/15/11, at 4–8; R.T. 9/26/11, at 89–91.)

(6) Benson suffered injuries to his head, including head trauma and debilitating headaches. (R.T. 9/20/11, at 5–6; R.T. 9/21/11, at 85, 101, 106–07; R.T. 9/26/11, at 116; Trial Exhibit 298, at 18–19.)

Furthermore, the information presented in the petition is cumulative and therefore would not support a finding of deficient performance. *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998), *as amended* (Aug. 27, 1998); *see also United States v. Schaflander*, 743 F.2d 714, 719 (9th Cir. 1984) (defense counsel not deficient when they do not present cumulative evidence).

Moreover, Benson contends that more than 20 people will be impacted if Benson is executed. However, this information is not permitted to be presented to a jury. *State v. Johnson*, 247 Ariz. 166, 190, ¶ 63, 447 P.3d 783, 807, (2019); *see also State v. Rose*, 231 Ariz. 500, 513–14, ¶¶ 63– 65, 297 P.3d 906, 920 (2013); *State v. Chappell*, 225 Ariz. 229, 238, ¶ 28, 236 P.3d 1176, 1185 (2010).

Benson also failed to show that he was prejudiced. A defendant is not prejudiced by penalty-phase counsel's failure to present cumulative and impermissible evidence. *See Babbitt*, 151 F.3d at 1175; *Schaflander*, 743 F.2d at 718. Therefore, there was no ineffective assistance of counsel.

IT IS ORDERED denying Benson's claim that penalty-phase counsel were ineffective in failing to competently investigate and present a complete biopsychosocial history as meritless.

b. Penalty-phase counsel were not constitutionally ineffective in their presentation of Benson's clinical picture.

Benson argues that his penalty-phase counsel were ineffective in failing to present an accurate clinical picture, due to the inadequate biopsychosocial history they investigated, and instead, they presented an inaccurate and highly damaging clinical picture. (Petition, at 88–108.) However, as discussed, *supra*, Benson's penalty-phase counsel conducted an adequate biopsychosocial history. Furthermore, Benson contends that due to counsel's inadequate investigation, they did not hire the appropriate experts, which resulted in additional mitigating evidence remaining undiscovered until post-conviction. (*Id.*, at 88–89.) But this is inconsistent with the evidence presented. (*See*, e.g., Trial Exhibit 298.) Counsel are permitted to rely upon their experts. *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995); *see also Pandeli V*, 242 Ariz. at 183–84, ¶¶ 22–26, 394 P.3d at 11. Counsel do not need to independently seek out additional experts when the already retained experts do not state they require the services of additional experts. *Babbitt*, 151 F.3d at 1174. Additionally, Benson submitted to an MRI of his brain in July 2010, which Dr. Brodzinsky indicated that "nothing of substance [was] found." (R.T. 9/27/11, at 113.) Nothing suggests that he indicated that counsel needed to consult additional experts.

Therefore, penalty-phase counsel were not deficient in their presentation of Benson's "clinical picture."

The additional information that Benson now presents is cumulative, which does not show that Benson was prejudiced. *See Babbitt*, 151 F.3d at 1175; *Schaflander*, 743 F.2d at 718. Therefore, there was no ineffective assistance of counsel.

IT IS ORDERED denying Benson's claim that penalty-phase counsel were ineffective (1) in failing to present an accurate clinical picture, and (2) in presenting an inaccurate and highly damaging clinical picture as meritless.

c. Penalty-phase counsel were not constitutionally ineffective in failing to challenge the State's administration of the "Hare Psychopathy Checklist."

Benson argues that his penalty-phase counsel were ineffective in failing to challenge Dr. Hayes, the State's expert, on the administration of the "Hare Psychopathy Checklist" ("PCL-R"). (Petition, at 108–110). However, Benson's experts reviewed Dr. Hayes's report, and there was no indication that the experts had concerns about how the PCL-R was administered. (Ex. 87, at 3; R.T. 9/26/11, at 159–62.) Counsel are permitted to rely on their experts. *Hendricks*, 70 F.3d at 1045. Further, Benson's expert, Dr. Brodzinsky, testified that although Dr. Hayes "described [Benson] basically as a psychopath," Dr. Brodzinsky noted that "psychopath" was not a DSM-IV terminology. (R.T. 9/26/11, at 160.) Instead, Dr. Brodzinsky continued that he had "no problem with the characteristics, you know, that largely I saw as well." (*Id.*) Therefore, Benson's counsel were not deficient in failing to challenge Dr. Hayes's administration of the PCL-R. Benson also failed to show that he was prejudiced, as his expert reached a similar conclusion.

IT IS ORDERED denying as meritless Benson's claim that penalty-phase counsel were ineffective in failing to challenge the State's administration of the "Hare Psychopathy Checklist."

d.* Penalty-phase counsel were not constitutionally ineffective in failing to request an instruction pursuant to *Simmons v. South Carolina.

Benson argues that his penalty-phase counsel were ineffective in failing to request an instruction pursuant to *Simmons v. South Carolina*. (Petition, at 110-121.) Sound strategic choices are virtually unchallengeable. *Strickland*, 466 U.S. at 690. Counsel are not ineffective in failing to make a futile motion. *Pandeli V*, 242 Ariz. at 185, ¶¶ 31–33, 394 P.3d at 12 (citing *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994)); *see also Pinkney v. Sec'y Dep't Corr.*, 876 F.3d 1290, 1297 (11th Cir. 2017) (collecting cases). As the Arizona Supreme Court consistently held that *Simmons* did not apply in Arizona, counel were not ineffective for failing to raise a claim that would not be successful. *See Benson,* 232 Ariz. at 465, ¶ 56, 307 P.3d at 32; *State v. Cruz* ("*Cruz I*"), 218 Ariz. 149, 160, ¶ 42, 181 P.3d 196, 207 (2008); *State v. Hardy*, 230 Ariz. 281, 293, ¶ 58, 283 P.3d 12, 24 (2012); *Chappell*, 225 Ariz. at 240, ¶ 43, 236 P.3d at 1187; *State v. Hargrave*, 225 Ariz. 1, 14–15, ¶ 53, 234 P.3d 569, 582–583 (2010); *State v. Garcia*, 224 Ariz. 1, 18, ¶ 77, 226 P.3d 370, 387

(2010). To demonstrate this point, in Benson's appeal, the Arizona Supreme Court found that *Simmons* did not apply in Arizona because "Arizona law does not make Benson ineligible for parole." *Benson,* 232 Ariz. at 465, ¶ 56, 307 P.3d at 32. Because "the reasonableness of counsel's conduct must be evaluated based on the time it occurred, … counsel's failure to anticipate changes in the law" will not sustain an IAC claim. *United States v. Juliano*, 12 F.4th 937, 940 (9th Cir. 2021). Therefore, penalty-phase counsel were not ineffective in failing to request a *Simmons* instruction.

Although it does not appear based on the record that Benson's attorneys requested a proper *Simmons* instruction, this claim also fails based on the trial court's ruling on his request to waive his "right" to a parole-eligible sentence.[8]

> The Supreme Court has also rejected the defendant's assertion that he is entitled to an instruction regarding his parole ineligibility pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994). In *State v. Cruz*, 218 Ariz. 149, ¶42, 181 P.3d 196 (2008), the Court found Simmons inapplicable to Arizona's capital sentencing scheme[.]

(ROA 264, at 8.) The trial court further found that Benson "was not technically ineligible for parole." (*Id*., at 9.)

Further, Benson cannot prove prejudice, as any request for a *Simmons* instruction would have failed. Benson raised a similar issue on appeal, citing *Simmons*, and the Arizona Supreme Court found that *Simmons* did not apply in Arizona. *Benson,* 232 Ariz. at 465, ¶ 56, 307 P.3d at 32. Therefore, Benson was not prejudiced by failing to request a *Simmons* instruction.

IT IS ORDERED denying as meritless Benson's claim that penalty-phase counsel were ineffective in failing to request an instruction pursuant to *Simmons v. South Carolina*.

e. Penalty-phase counsel were not constitutionally ineffective in failing to request, as mitigation, to inform the jury of Benson's willingness to plead guilty, waive release, and accept a natural life sentence as mitigation.

Benson argues that his penalty-phase counsel were ineffective in failing to request, as mitigation, to inform the jury of Benson's willingness to plead guilty, waive release, and accept a natural life sentence as mitigation. (Petition, at 121–23.) To begin, *Busso-Estopellan v. Mroz*, 238 Ariz. 553, 364 P.3d 472 (2015), the case upon which Benson relies, was not decided until more

[8] It is unclear whether the court interpreted Benson's request as a conditional *Simmons* instruction request or a direct request for a *Simmons* instruction. Based on the court's ruling, it appears as though the court interpreted the request in ROA 176 as a direct request for a *Simmons* instruction and denied the request. (ROA 264, at 8–9.) If the court did not interpret the request as a request for a *Simmons* instruction, it explained why it would not have granted such a request. (*Id*.) Thus, counsel were not ineffective.

than two years after *Benson*. 232 Ariz. 452, 307 P.3d 19. Counsel are not ineffective for failing to anticipate a change in the law. *Juliano*, 12 F.4th at 940. Also, during trial, the jury heard the mitigating evidence that Benson accepted responsibility for the crimes related to three of the four victims. (Trial Exhibit 241, at 9–14, 22–77, 121–33.) The jury was also instructed:

> The evidence you shall consider consists of the testimony and exhibits the Court admitted in evidence during the trial of this case, during the first part of this sentencing hearing, and during the second part of this sentencing hearing.
>
> …
>
> Mitigating circumstances may be found from any evidence presented during both phases of the hearing.
>
> …
>
> You are not limited to these proposed mitigating circumstances in considering the appropriate sentence. You also may consider anything related to the defendant's character, propensity, history or record, or circumstances of the offense.

(R.T. 10/3/11, at 14–15, 19.) Therefore, an additional jury instruction would have been cumulative. Thus, counsel were not deficient in failing to request a specific jury instruction that Benson was willing to accept plead guilty and accept a life a sentence. *Babbitt*, 151 F.3d at 1174; *see also Schaflander*, 743 F.2d at 719. Because this instruction would have been cumulative, Benson failed to show that he was prejudiced. *See Babbitt*, 151 F.3d at 1175; *Schaflander*, 743 F.2d at 718.

IT IS ORDERED denying Benson's claim that penalty-phase counsel were ineffective in failing to request, as mitigation, to inform the jury of Benson's willingness to plead guilty, waive release, and accept a natural life sentence as mitigation, for it is meritless.

f. Penalty-phase counsel were not constitutionally ineffective in failing to request a *Caldwell v. Mississippi* instruction.

Benson argues that his penalty-phase counsel were ineffective in failing to request a *Caldwell v. Mississippi*, 472 U. S. 320 (1985), instruction. (Petition, at 123–24.) Benson asserts that a *Caldwell* instruction—"an instruction that made clear to the jury that it could not delegate its feeling of responsibility for determining the appropriateness of the defendant's death elsewhere"—was necessary in his case. (*Id.*) However, penalty-phase counsel did not need to request this instruction because the court provided such an instruction, twice.

> 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.

(R.T. 9/13/11, at 27; R.T. 10/3/11, at 23.) Benson's assertion that this instruction "is different from jurors abdicating responsibility for the ultimate sentence to the appellate courts" is unpersuasive. (Reply, at 23.) The court's instruction to the jury that "Your decision is binding" in no way suggests that the appellate courts will impose "the ultimate sentence." Counsel, therefore, were not deficient in requesting an instruction that the Court provided to the jurors. *United States v. Feldman*, 853 F.2d 648, 666 (9th Cir. 1988) (counsel not ineffective when court's instructions are adequate explanation of the law).

Likewise, Benson was not prejudiced because the jurors were instructed that their decision was binding, and jurors are presumed to follow the court's instructions. *Newell*, 212 Ariz. at 403, ¶ 68, 132 P.3d at 847. Benson's attempt to bolster this claim with evidence from a juror's affidavit that discusses the juror's mental processes at the time, is not well taken, as this Court is not permitted to consider the affidavit. *Dickens*, 187 Ariz. at 15, 926 P.2d at 482.

IT IS ORDERED denying Benson's claim that penalty-phase counsel were ineffective in failing to request a *Caldwell v. Mississippi* instruction as meritless.

g. Aggravation-phase counsel were not constitutionally ineffective in failing to challenge the (F)(6) aggravating factor.

Benson contends that his aggravation-phase counsel were ineffective in failing to challenge the (F)(6) aggravating factor. (Petition, at 127–30.) However, the evidence presented is mere speculation, which is insufficient to demonstrate an IAC claim. *State v. Santanna*, 153 Ariz. 147, 150, 735 P.2d 757, 760 (1987) ("Proof of ineffectiveness must be to a demonstrable reality rather than a matter of speculation."). Benson's expert, Dr. Katherine Raven, opines that she cannot determine if either victim was unconscious when Benson inflicted the injuries. (Ex. 97, at 4, 6.) This speculative opinion does not undermine the (F)(6) aggravating factor. Further, Dr. Raven questions the testimony of the two doctors who autopsied Ms. Beck and Ms. Campbell based on the fact that what they testified to did not appear in the photographs taken. (Ex. 97, at 2–3, 5–6.) This is unpersuasive.

Furthermore, given that the State could have proved the (F)(6) aggravating factor in either of two ways, Benson's argument fails. *See State v. Gretzler*, 135 Ariz. 42, 51, 659 P.2d 1, 10 (1983), *superseded by statute on other grounds recognized in State v. Carlson*, 237 Ariz. 381, 395, ¶ 46, 351 P.3d 1079, 1093 (2015) (The statute is written "in the disjunctive, so either all or one could constitute an aggravating circumstance." Quoting *State v. Clark,* 126 Ariz. 428, 436, 616 P.2d 888, 896 (1980)). A finding of cruelty alone is sufficient to support a finding of this aggravating circumstance. *State v. Bolton*, 182 Ariz. 290, 312, 896 P.2d 830, 852 (1995). A finding of heinousness or depravity alone also is sufficient to support a finding of the (F)(6) aggravating circumstance. *State v. Gulbrandson*, 184 Ariz. 46, 68, 906 P.2d 579, 601 (1995).

The especially cruel aspect focuses on the victims' mental anguish or physical pain. *Gretzler*, 135 Ariz. at 51, 659 P.2d at 10. "Cruelty exists if the victim consciously experienced physical or mental pain prior to death, and the defendant knew or should have known that suffering would occur. 'Mental anguish includes a victim's uncertainty about her ultimate fate.'" *State v. Trostle*, 191 Ariz. 4, 951 P.2d 869, 883 (1997) (internal citations omitted, quoting *State v. Kiles,* 175 Ariz. 358, 371, 857 P.2d 1212, 1225 (1993)). The especially heinous or depraved aspect focuses on the defendant's state of mind at the time of the murders as evidenced by his actions. *See Gretzler*, 135 Ariz. at 52, 659 P.2d at 11. Gratuitous violence inflicted on the victim can establish this factor. *Id*. Gratuitous violence is violence beyond that which is necessary to kill and is established when the defendant continued to inflict violence after he knew or should have known a fatal action occurred. *State v. Bocharski*, 218 Ariz. 476, 494, ¶¶ 85–87, 189 P.3d 403, 421 (2008). Given the nature of the victims' injuries, counsel were not deficient in failing to hire an expert to dispute the State's evidence. Counsel cross-examined the State's witnesses but did so in a manner that would not "'los[e] credibility' in the eyes of the jurors." *Pandeli V*, 242 Ariz. at 186, ¶ 36, 394 P.3d at 13.

Likewise, Benson was not prejudiced. Benson failed to show that Dr. Raven's testimony would have probably resulted in a different outcome. Further, only one aggravating factor is necessary to sustain a death verdict. A.R.S. § 13–752(C), (D). As the jury found numerous aggravating factors, Benson was not prejudiced. (R.T. 9/13/11, at 3–7.)

IT IS ORDERED denying Benson's claim that aggravation-phase counsel were ineffective in failing to challenge the (F)(6) aggravating factor as meritless.

h. Aggravation-phase counsel were not constitutionally ineffective in failing to challenge the (F)(1) and (F)(2) aggravating factors.

Benson argues that his aggravation-phase counsel were ineffective in failing to challenge the (F)(1) and (F)(2) aggravating factors. (Petition, at 130–31.) He contends that because the facts were the same in both Ms. Beck's (F)(1) and (F)(2) aggravating factors and Ms. Campbell's (F)(1) and (F)(2) aggravating factors, the jury should have been advised that it could not weigh the facts twice. (*Id.*) However, the jury was advised to weigh the evidence, not the aggravating factors against the mitigating factors.

> You individually determine whether mitigation exists. In light of the aggravating circumstances you have found, you must then individually determine if the total of the mitigation is sufficiently substantial to call for leniency. "Sufficiently substantial to call for leniency" means that mitigation must be of such quality or value that it is adequate, in the opinion of the individual juror, to persuade that juror to vote for a sentence of life in prison.
>
> …

> In reaching a reasoned, moral judgment about which sentence is justified and appropriate, you must decide how compelling or persuasive the totality of the mitigating factors is when compared against the totality of the aggravating factors and the facts and circumstances of this case. This assessment is not a mathematical one, but instead must be made in light of each juror's individual, qualitative evaluation of the facts of the case, the severity of the aggravating factors, and the quality of the mitigating factors found by each juror.

(R.T. 10/3/11, at 21–22.) While it is true that no specific instruction was provided to the jury that it could not weigh these aggravating factors twice,[9] the court instructed the jury that it had to weigh the evidence and decide how compelling the mitigation was compared with "the *totality of the* aggravating factors and the facts and circumstances of this case." (*Id*., at 22 (emphasis added).) Therefore, Benson cannot establish that these instructions were insufficient.

Further, Benson cannot show that he was prejudiced. The facts and circumstances surrounding Benson's case were horrific. He sexually assaulted or attempted to sexually assault four different victims; he also violently murdered two of the women. Therefore, Benson failed to show that the outcome probably would have been different if the jury was provided a different instruction.

IT IS ORDERED denying Benson's claim that penalty-phase counsel were ineffective in failing to challenge the (F)(1) and (F)(2) aggravating factors as meritless.

6. Newly Discovered Evidence.

Benson contends that he has discovered new evidence and the following claims should be reviewed under both Rule 32.1(e), newly discovered evidence, and Rule 32.1(c), sentence as imposed is not authorized by law. (Petition, at 132.)

Rule 32.1(e)

Rule 32.1(e) entitles a defendant to relief, if:

> newly discovered material facts probably exist, and those facts probably would have changed the judgment or sentence. Newly discovered material facts exist if:
>
> (1) the facts were discovered after the trial or sentencing;

[9] The State contends that because the cases Benson cited about "double counting" are pre-*Ring II*, they are inapplicable. (Response, at 77.) However, this argument is not well taken, as several post-*Ring II* cases affirmed the holdings: when the same facts are used to find two different aggravating factors, a jury cannot weigh the aggravators twice. *See State v. Velazquez*, 216 Ariz. 300, 307, ¶ 22, 166 P.3d 91, 98 (2007); *State v. Villalobos*, 225 Ariz. 74, 81, ¶ 28, 235 P.3d 227, 234 (2010); *State v. Miller*, 234 Ariz. 31, 45, ¶ 57, 316 P.3d 1219, 1233 (2013).

> (2) the defendant exercised due diligence in discovering these facts; and
>
> (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 such critical significance that the impeachment evidence probably would have changed the judgment or sentence.

To gain relief under Rule 32.1(e), a defendant must prove that the evidence was, in fact, "newly discovered and ending there if unproven." *State v. King*, 250 Ariz. 433, 439, ¶ 24, 480 P.3d 1250, 1256 (Ct. App. 2021).

> There are five requirements for presenting a colorable claim of newly discovered evidence: "(1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; (5) the evidence must be such that it would likely[10] have altered the verdict, finding, or sentence if known at the time of trial."

Amaral, 239 Ariz. at 219, ¶ 9, 368 P.3d at 927 (quoting *State v. Bilke,* 162 Ariz. 51, 52–53, 781 P.2d 28, 29–30 (1989)). *See also Amaral*, 239 Ariz. at 220, ¶ 11, 368 P.3d at 928 ("If the alleged facts would not have probably changed the verdict or sentence, then the claim is subject to summary dismissal.").

Rule 32.1(e), while available in limited circumstances, is discouraged. "Our supreme court has described this ground for post-conviction relief as 'disfavored' and warned courts to proceed 'cautiously' before granting new trials based on newly discovered evidence. *State v. Serna*, 167 Ariz. 373, 374, 807 P.2d 1109, 1110 (1991)." *King*, 250 Ariz. at 438, ¶ 21, 480 P.3d at 1255.

> If unused evidence is newly discovered evidence, then criminal defendants could indefinitely preserve their Rule 32.1(e) arguments "simply by not introducing generally known" material facts at trial or sentencing. *See State v. Mata,* 185 Ariz. 319, 333, 916 P.2d 1035, 1049 (1996) ("Simply because [a] defendant presents the court with evidence for the first time does not mean that such evidence is 'newly discovered.'").

King, 250 Ariz. at 441, ¶ 34, 480 P.3d at 1258.

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[10] *See Amaral*, 239 Ariz. at 219–20, ¶ 10, 368 P.3d at 927 (emphasizing that a petitioner must prove that newly-discovered evidence "probably" would have changed the verdict or sentence, rather than that the evidence "might" have changed the outcome).

Rule 32.1(c)

A defendant is entitled to relief under Rule 32.1(c) if "the sentence as imposed is not authorized by law." "Generally, Rule 32.1(c) addresses sentences not *authorized by the substantive law in effect at the time of sentencing*. … Thus, under the substantive law at the time, if the court found sufficient aggravation to impose a sentence within the statutory range, the sentence was authorized by law." *State v. Evans*, 252 Ariz. 590, 596, ¶ 16, 506 P.3d 819, 825 (Ct. App. 2022) (emphasis added).

a. Newly Discovered Evidence (1) in the form of Brain Imaging Discovering Brain Damage; (2) Research Undermining Antisocial Personality Disorder Diagnosis; and (3) Research Undermining the Use of the Hare Psychopathy Checklist.

Benson argues that newly discovered evidence, in the form of new technology, has revealed his brain damage diagnosis. (Petition, at 132–33.) He also argues that newly discovered evidence, in the form of new research, "severely undermines the reliability of APD and psychopathy as a diagnosis, undermining the credibility of key evidence presented by both the defense and states' expert witnesses"; research also undermines the reliability of the PCL-R. (*Id*., at 132–37.) However, these contentions that the evidence is "newly discovered evidence" under Rule 32.1(e) is in direct conflict with *King*, 250 Ariz. at 440, ¶ 30, 480 P.3d at 1257.

"Advances" in the area of the pertinent medical field do not render newly-presented evidence "newly-discovered" under Rule 32.1(e). *Id*. Here, Benson's trial experts did not find evidence of brain damage, despite being a diagnosable condition during his trial. (*See* R.T. 9/28/11, at 23–24.) Further, defense teams often have strategic reasons not to introduce evidence at trial. *King*, 250 Ariz. at 441, ¶ 33, 480 P.3d at 1258. Benson cannot now claim his significant brain damage is newly discovered evidence. *See id.*, 250 Ariz. at 440, ¶ 30, 480 P.3d at 1257.

Similarly, advances in the science surrounding antisocial personality disorder as a diagnosis does not constitute newly discovered evidence. *King*, 250 Ariz. at 440, ¶ 30, 480 P.3d at 1257. Nor does supplemental research regarding a diagnostic tool establish newly discovered evidence. Supplemental information to a known disorder or its diagnostic tool is not newly discovered. *Amaral*, 239 Ariz. at 221–22, ¶¶ 15–19, 368 P.3d at 929–30; *see also King*, 250 Ariz. at 440–41, ¶¶ 28–31, 480 P.3d at 1257–58.

> This approach accounts for real-world issues and interests, enabling courts to balance the perpetual evolution of behavioral science against the constitutional rights of defendants and victims, along with the critical interest in finality. *See State v. Miles*, 243 Ariz. 511, 519, ¶ 35, 414 P.3d 680, 688 (2018) (Pelander, J., concurring) (allowing a petitioner to seek relief "decades later based solely on newly discovered mental-health evidence and expert opinions[ ] seems at odds with

> [the] interests of finality and victim rights."); *see also* Ariz. Const. art. 2, § 2.1(A)(10) ("To preserve and protect victims' rights to justice and due process, a victim of crime has a right" to a "prompt and final conclusion of the case after the conviction and sentence"); *Mata*, 185 Ariz. at 337, 916 P.2d at 1053 ("If we were to accept defendant's present arguments, this case and others like it[ ] would go on indefinitely.").

King, 250 Ariz. at 440–41, ¶ 31, 480 P.3d at 1257–58 (alterations in the original). Further, Benson's evidence on antisocial personality disorder does not remove the diagnosis from the DSM-V; it merely seeks to undermine the disorder. (*See* Petition, at 134.) Similarly, Benson attempts to use the newly-presented evidence of the PCL-R to undermine its use. (*See Id.*, at 134–37.) Because Benson failed to show that any of the presented evidence is newly discovered, these claims are meritless. *See King*, 250 Ariz. at 439, ¶ 24, 480 P.3d at 1256 (court does not continue its evaluation under Rule 32.1(e) if evidence does not show it is newly discovered).

To support his claim, Benson cites Wisconsin caselaw, which permits development in medical research as newly discovered evidence. (Petition, at 137.) But Benson ignores binding Arizona caselaw, which holds the opposite: that development in medical research is *not* newly discovered evidence. *King*, 250 Ariz. at 440, ¶ 30, 480 P.3d at 1257. He also cites an unpublished case to bolster his view. *State v. Krause*, No. 2 CA-CR 2015-0326-PR, 2015 WL 7301820, at *2 (Ariz. Ct. App. Nov. 19, 2015). However, this case was decided before *Amaral* (2016) and *King* (2021). Moreover, the evidence in *Krause* was known at the time of trial but not discoverable by Krause. 2015 WL 7301820, at *2. The evidence here was not known at trial nor was it discoverable, as the information was gathered in 2011 but not published until 2013. (Petition, at 133, fn. 43.) Therefore, the evidence is not newly discovered.

He continues that he is entitled to a new penalty phase because the presented evidence demonstrates that the information about antisocial personality disorder and the PCL-R would be inadmissible. However, evidence is admissible based on the information available at trial, not the evidence developed later. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993) ("[I]t would be unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty; arguably, there are no certainties in science.")

Benson further contends that this information would impeach the evidence presented at trial. But Benson fails to acknowledge that unless the evidence is deemed "newly discovered," this Court cannot consider whether "the impeachment evidence substantially undermines testimony that was of such critical significance that the impeachment evidence probably would have changed the judgment or sentence." Rule 32.1(e)(3). *See King*, 250 Ariz. at 439, ¶ 24, 480 P.3d at 1256 (A defendant must prove that the evidence was, in fact, "newly discovered and ending there if unproven.") Because the evidence presented is not newly discovered under *Amaral* and *King*, the Court cannot evaluate the impeachment effect the information would make.

Even assuming that the PCL-R evidence is "newly discovered," the Court cannot find that the evidence presented represents significant impeachment evidence. First, none of the doctors that testified at Benson's trial actually diagnosed Benson with antisocial personality disorder. (R.T. 9/19/1, at 78; R.T. 9/26/11, at 144; R.T. 9/28/11, at 164.) All three doctors diagnosed Benson as having a personality disorder, with antisocial or sociopathic personality traits. (R.T. 9/19/11, at 46; R.T. 9/26/11, at 31–32, 144–45; R.T. 9/28/11, at 21–22, 26.) Second, only Dr. Hayes used the PCL-R in evaluating Benson. (Ex. 88, at 93.) Drs. Kliman and Brodzinsky did not administer the PCL-R. (*See* Exs. 87 and 90.) Drs. Kliman and Brodzinsky reached the same diagnosis of personality disorder, with antisocial or sociopathic personality traits, without the use of the PCL-R. Therefore, the evidence undermining the PCL-R's reliability is unlikely to have changed the judgment or sentence.

IT IS ORDERED denying Benson's claims as meritless that newly discovered evidence (1) demonstrates, by new imaging, that he has significant brain damage; (2) research undermines an antisocial personality disorder diagnosis; and (3) research undermines the use of the Hare Psychopathy Checklist.

b. Trent's Sentence as Imposed is Authorized by Law.

Benson argues that the presented evidence undermines his death sentence and therefore, it is no longer authorized by law. (Petition, at 140–42.) However, the Court of Appeals rejected Benson's interpretation of Rule 32.1(c), finding that his interpretation would defeat the rules of preclusion. *Evans*, 252 Ariz. at 597, ¶ 18, 506 P.3d at 826.

> Rule 32.2 is a rule of preclusion designed to limit those reviews, to prevent endless or nearly endless reviews of the same case in the same trial court. If the merits were to be examined on each petition, Rule 32.2 would have little preclusive effect and its purpose would be defeated.

Id. (quoting *Smith*, 202 Ariz. at 450, ¶ 11, 46 P.3d at 1071). Benson's sentence was authorized at the time of sentencing. Because the presented evidence is not "newly discovered," Benson's sentence remains authorized by law. *See State v. Greene*, 255 Ariz. 37, ___, ¶ 82, 527 P.3d 322, 343 (2023), *cert. denied*, No. 23-5592, 2024 WL 156489 (U.S. Jan. 16, 2024) (Because sentence was authorized by law and it is not now unlawful, defendant is not eligible for relief under Rule 32.1(c).) Therefore, Benson is not eligible for relief under Rule 32.1(c).

IT IS ORDERED denying Benson's claim that his sentence as imposed is not authorized by law as meritless.

7. Ineffective assistance of appellate counsel.

a. Appellate counsel was not constitutionally ineffective for failing to raise a "non-waiver" *Simmons* claim.

Benson claims that appellate counsel was ineffective for failing to raise a "non-waiver" *Simmons* claim on appeal. (Petition, at 143.) He contends that because he was not eligible for parole, as Arizona abolished parole for crimes committed on or after January 1, 1994, he was entitled to present that information to the jury, without waiving his right to be sentenced to a life imprisonment term with the possibility of release after 25 years. However, as the Arizona Supreme Court consistently held that *Simmons* did not apply in Arizona, counsel was not ineffective for failing to raise a claim that would not be successful on appeal. *See Benson,* 232 Ariz. at 465, ¶ 56, 307 P.3d at 32; *Lynch v. Arizona,* 578 U.S. 613 (2016); *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (Ct. App. 1995) (counsel are not ineffective for failing to raise issues on appeal that would not have changed the outcome of the appeal); *Pandeli V*, 242 Ariz. at 185, ¶¶ 31–33, 394 P.3d at 12 (counsel are not ineffective in failing to make a futile motion) (citing *James*, 24 F.3d at 27); *see also Pinkney*, 876 F.3d at 1297 (collecting cases). As Benson's direct appeal was final in 2013 and *Lynch* was not decided until 2016, any possible *Simmons* error that Benson could have raised would have failed.[11]

To demonstrate this point, at trial and on appeal, Benson raised the issue that he should have been permitted to convey to the jury that "there was 'no mechanism' for his release even if he were sentenced to life with the possibility of release after 25 years." (ROA 194; *see also* Petition, at 143.) Although factually inaccurate—as executive clemency was the available mechanism for Benson's potential release after serving 25 years in prison—under *Simmons*, Benson should have been able to convey to the jury that Benson was not eligible for parole. This jury instruction is one way in which *Simmons* could have been satisfied. Instead, the Arizona Supreme Court found that *Simmons* did not apply in Arizona because "Arizona law does not make Benson ineligible for parole." *Benson*, 232 Ariz. at 465, ¶ 56, 307 P.3d at 32.

IT IS ORDERED denying Benson's claim that appellate counsel was ineffective for failing to raise a "non-waiver" *Simmons* claim on appeal as meritless.

b. Appellate counsel was not constitutionally ineffective for failing to raise a *Lockett/Eddings* claim.

Benson argues that appellate counsel was ineffective for failing to raise a *Lockett/Eddings* claim on appeal. (Petition, at 144–45.) However, "[a]ppellate counsel is responsible for reviewing the record and selecting the most promising issues to raise on appeal." *State v. Bennett*, 213 Ariz. 562, 567, ¶ 22, 146 P.3d 63, 68 (2006). "As a general rule, 'appellate counsel is not ineffective for selecting some issues and rejecting others.'" *Id.* (quoting *Herrera,* 183 Ariz. at 647, 905 P.2d at 1382) (alteration omitted). A defendant can overcome the presumption that appellate counsel

[11] Benson cites to several Arizona cases to support this claim. However, all of them were post-*Lynch*. Pre-*Lynch* cases rejected this argument.

provided effective assistance by showing "counsel ignore[d] issues that are clearly stronger than those selected for appeal." *Id.* (citing *Smith v. Robbins,* 528 U.S. 259, 288 (2000)).

Because this issue was not raised before the trial court, appellate counsel would need to prove fundamental error existed that caused prejudice. *State v. Henderson*, 210 Ariz. 561, 567–68, ¶ 20, 115 P.3d 601, 607–08 (2005); *see also State v. Escalante,* 245 Ariz. 135, 140–41, ¶¶ 12–20, 425 P.3d 1078, 1083–84 (2018). Thus, Benson must establish that trial error existed and that the error went to the foundation of the case, took away a right essential to the defense or the error was so egregious Benson could not possibly have received a fair trial. *Escalante,* 245 Ariz. at 140–42, ¶¶ 16–21, 425 P.3d 601, 607–09. Fundamental error review is intentionally difficult. *See Henderson,* 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. Because Benson did not analyze this claim using the fundamental error review that would have been applied on appeal or analyze the strength of this claim compared to the raised claims, Benson, failed to establish that appellate counsel was deficient. Benson also failed to overcome the presumption that appellate counsel acted reasonably by raising the issues that he raised. Therefore, Benson cannot establish that fundamental error occurred. *Escalante,* 245 Ariz. at 140–42, ¶¶ 16–21, 425 P.3d 601, 607–09 (defendants first need to establish trial error under fundamental error review).

IT IS ORDERED denying Benson's claim that appellate counsel was ineffective for failing to raise a *Lockett/Eddings* claim on appeal as meritless.

c. Appellate counsel was not constitutionally ineffective for failing to raise the (F)(1) & (F)(2) claim.

Benson argues that appellate counsel was ineffective in failing to raise the issue that when the same facts are used to find two different aggravating factors, a jury cannot weigh the aggravators twice. (Petition, at 145.) However, for the same reasons that penalty-phase counsel were not ineffective for this issue, appellate counsel was not ineffective in raising this issue. *See* § 5(h), *supra*.

IT IS ORDERED denying as meritless Benson's claim that appellate counsel was ineffective in failing to raise the issue that when the same facts are used to find two different aggravating factors, a jury cannot weigh the aggravators twice.

8. *Lynch v. Arizona*, 578 U.S. 613 (2016).

Benson's *Lynch* claim is not precluded.

To begin, Benson's *Lynch* claim is not precluded; he alleges *Cruz v. Arizona* ("*Cruz III*"), 598 U.S. 17 (2023), represents a significant change in the law and is entitled to relief under Rule 32.1(g). In *Cruz III*, the Supreme Court found *Lynch* was a significant change in the law for Rule 32.1(g) purposes. 598 U.S. at 29-32.

Benson's *Lynch v. Arizona* claim is meritorious.

Benson alleges he is entitled to a new penalty phase because the jury was not informed that he was ineligible for parole. This Court agrees.

The Supreme Court held in *Simmons v. South Carolina*, that where the State places a defendant's future dangerousness at issue, the defendant has a narrow right of rebuttal to inform the jury, either through argument *or* a jury instruction, he will not be eligible for parole. 512 U.S. 154, 177 (1994) (O'Connor, J., concurrence). *See also O'Dell v. Netherland*, 521 U.S. 151, 167 (1997) (identifying that *Simmons* grants a "narrow right of rebuttal"). However, Arizona courts consistently ruled *Simmons* did not apply in Arizona, eventhough Arizona abolished parole for crimes that occurred after December 31, 1993. *See, e.g., Benson*, 232 Ariz. at 465, ¶ 56, 307 P.3d at 32; *Cruz I,* 218 Ariz. at 160, ¶ 42, 181 P.3d at 207; *Hardy*, 230 Ariz. at 293, ¶ 58, 283 P.3d at 24; *Chappell*, 225 Ariz. at 240, ¶ 43, 236 P.3d at 1187; *Hargrave*, 225 Ariz. at 14–15, ¶ 53, 234 P.3d at 582–583; *Garcia*, 224 Ariz. at 18, ¶ 77, 226 P.3d at 387. The Supreme Court clarified in *Lynch*, 578 U.S. at 615, that *Simmons does* apply in Arizona. Further, in *Cruz III*, 598 U.S. at 29-32, the Supreme Court found *Lynch* was a significant change in the law for Rule 32.1(g) purposes.

Benson argues he is entitled to relief under Rule 32.1(g), which states a defendant is entitled to relief if "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence." Benson relies on *Lynch* as a significant change in the law, which *Cruz III* confirms is such a significant change. (Petition, at 146.) However, to show that *Lynch* applies to him, Benson must show future dangerousness was at issue and he requested either a jury instruction *or* argument to rebut he was not eligible for parole. Benson met his burden, and the State concedes this point. (*See* Response, at 56. *See also* ROA 176; ROA 194; R.T. 10/4/11 at 37–38 (prosecutor's closing argument, highlighting that Benson knew he could kill someone, that he killed more than once, and that he waited three years between the murders, "seeing that nothing happened to you the first one, deciding to go out there and start up again.").)

The State asserts two main arguments against granting post-conviction relief on the basis of *Lynch*. First, the State contends Benson must show the jury *probably* would have sentenced him to life instead of death if the jury was instructed he was ineligible for parole. (Response, at 56–57.) The State argues Benson cannot make this showing because of the egregious nature of the crimes. (Response, at 58.) "The fact that Benson may never be released from prison is of little weight compared to the horror and cruelty Benson inflicted on his multiple, vulnerable victims." (Response, at 58.) "As previously recounted, the facts and nature of Benson's numerous and horrendous crimes warrant death." (Response, at 58.)

This argument fails to balance the nature of Benson's crimes with how the jury would have voted if it had received a *Simmons* instruction. Also, Benson does not have to show that a *Simmons* instruction would probably result in a life sentence. Instead, he must demonstrate only that probably at least one juror would not have voted for death, as that "would probably have *changed*

the … sentence." *Amaral*, 239 Ariz. at 220, ¶ 11, 368 P.3d at 928 (emphasis added). Benson demonstrated that here. As Benson noted, the jury requested to see "the stipulation statement … made in reference to Life Imprisonment." (ROA 433; Petition, at 119.)[12] While it is unknown how the jurors contemplated this evidence, it is clear they seriously considered life imprisonment.[13] Further, the jury deliberated for more than 11 hours, over four days, before sentencing him to death. (*See* ROA 450, 434, 451, 453.) This is similar to the jury in *State v. Escalante–Orozco*, which deliberated for approximately thirteen hours, suggesting that it carefully considered the sentencing options. 241 Ariz. 254, 286, ¶ 126, 386 P.3d 798, 830 (2017), *overruled on other grounds by Escalante*, 245 Ariz. 135, 425 P.3d 1078. Although *Escalante–Orozco* was decided under a harmless error standard, which is a lower burden than Benson's, the Arizona Supreme Court highlighted the amount of time the jury took to deliberate. "We cannot know what role the possibility of release played in the jurors' minds as they decided the propriety of the death penalty." *Id*.

Second, the State argues the Court should not grant post-conviction relief on the basis of *Lynch* because Benson referenced life imprisonment in his closing argument of the penalty phase. (Response, at 52). As noted previously, *Simmons* provides that the jury can receive information regarding parole ineligibility either through an instruction *or* argument. *Simmons*, 512 U.S. at 177 (O'Connor, J., concurrence). More specifically, the State maintains that because "life imprisonment" was referenced in Benson's closing rebuttal, the *Simmons* standard is met in this case. (Response, at 52).

During the penalty phase rebuttal argument, Benson briefly referenced "life imprisonment" as follows:

> The State made a suggestion about life in prison will be a get out of jail free card. This claim is entirely disingenuous. There are two choices that you make today. He

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[12] The stipulation does not address parole eligibility.

> In relation to Mr. Aiken's testimony, both Defense and the State Stipulate to the following: That if Mr. Benson receives a sentence of life to be served in the Arizona Department of Corrections, by the rules and regulations of the Arizona Department of Corrections, Mr. Benson could possibly achieve a security classification of medium security within the prison system. Such a classification can be achieved after a minimum of five years within the Arizona Department of Corrections, if Mr. Benson does not request protective custody.

(R.T. 0/29/11, at 29.)

[13] Although Benson offers a juror affidavit to reveal how the possibility of release affected the jury's decision, this Court cannot consider this evidence. *Dickens*, 187 Ariz. at 15, 926 P.2d at 482.

> will either be executed or he will be spend - - or the sentence to life in prison, neither of those decisions is a get out of jail free card.
>
> To suggest to you that it is ignores the instructions and what the law is on this. You have held him responsible by convicting him. If you decide life in prison, he will be punished. If you decide that he needs to die, he will be executed. Neither of those is a get out of jail free card.

(R.T. 10/4/11, at 48.) "The decision you make in this stage still, put him in prison for the rest of his life." (*Id*., at 60–61.)

Most importantly, the references to "life imprisonment" do not address parole eligibility at all. Although "life imprisonment" was generically mentioned in the argument, there was no mention that life imprisonment meant that he was not eligible for parole. The Supreme Court addressed this same issue in *Shafer v. South Carolina*, 532 U.S. 36, 39 (2001). The Court looked at the concept of "life imprisonment means until death of the offender" and the jury's inability to hear that the defendant was not eligible for parole. *Id.*

> In *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), this Court held that 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 possibility of parole, due process *entitles* the defendant "to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel." *Ramdass v. Angelone*, 530 U.S. 156, 165, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000) (plurality opinion) (describing *Simmons*' premise and plurality opinion).

Shafer v. South Carolina, 532 U.S. 36, 39 (2001) (emphasis added, alteration in original). The Court there found that telling the jury that "life imprisonment means until death of the offender" was insufficient to address the defendant's parole ineligibility. *Id*., at 532 U.S. at 53. Explaining to a jury a defendant's parole ineligibility clarifies that life imprisonment means that a defendant will not be eligible for release on parole. "Displacement of the longstanding practice of parole availability remains a relatively recent development, and common sense indicates that many jurors might not know whether a life sentence carries with it the possibility of parole." *Id*., at 38. This case demonstrates that misunderstanding by defense counsel's request to waive Benson's parole eligibility, which did not exist at the time. (ROA 176.) As the attorneys thought there was a possibility of parole with a life sentence, "common sense indicates that many jurors might" also labor under this false belief. *Shafer,* 532 U.S. at 38. Further, citing the parole "earned release credits" statutes, Benson's attorneys filed another motion—a week after requesting to waive his "right" to a parole-eligible sentence—seeking to inform the jury that there was currently "no mechanism" in existence for him to be released after 25 years. (ROA 194, at 6.) Although Benson's attorneys were incorrect that there was no mechanism for release, as clemency was available, his

attorneys were correct in alluding to the unlikely possibility of such release. Because the issue of parole was misunderstood by the attorneys,[14] it is logical to believe that it would be misunderstood by a jury.

Further, in discussing the aggravation phase jury instructions, Benson's attorneys strategically asked the court to instruct the jury that the possible sentences were life or death. (R.T. 9/12/11, at 12–15.) His attorneys attempted to remove the idea that Benson may be released from the jurors' minds, telling the court, "you had ruled against us before we started on the jury selection because it was our position that we should not have, you know, ever discussed the possibility of parole in any event." (*Id.*, at 14.) The court initially said, "I don't have any problem taking out the language about life." (*Id*., at 12.) After argument from the State, the court denied Benson's request. (*Id*., at 13–15.)

Even after the jurors began their deliberations, and in response to the jury's request to see the life imprisonment stipulation, Benson's counsel requested to educate the jury that a life sentence would mean that Benson would die in prison. (*See* R.T. 10/6/11, at 5–7.) However, counsel's request was denied. (*Id*., at 8.) Although this request was not couched as a specific request to inform the jury of Benson's parole ineligibility, his request to inform the jury he would die in prison was denied, indicating that a request to inform the jury that Benson was ineligible for parole would also be denied.[15] (*Id*.) *Simmons* held that due process *requires* that a jury be informed as to a defendant's parole ineligibility, to avoid any "misunderstanding" and potential "false choice" that a defendant would be released if not sentenced to death. 512 U.S. at 161. As Benson's request for argument and his attempts for a jury instruction —albeit incorrect and insufficient— notifying the jury that he would not be released from prison were denied, Benson was denied the opportunity to tell the jurors that he was not eligible for parole.

In addition,

> "[A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the

[14] It is important to note that the attorneys' misunderstanding about the lack of parole eligibility in this case does not amount to ineffective assistance of counsel. *See, supra,* §5(d).

[15] As discussed, *supra*, in §5(d), it is unclear whether the court interpreted either of Benson's requests as a conditional *Simmons* instruction request or a direct request for a *Simmons* instruction. Based on the court's ruling, it appears as though the court interpreted the request in ROA 176 as a direct request for a *Simmons* instruction and denied the request. (ROA 264, at 8–9.) If the court did not interpret the request as a request for a *Simmons* instruction, it explained why it would not have granted such a request. (*Id*.) Thus, even if counsel had requested a *Simmons* instruction, it is clear that the court would have denied such a request.

> latter, we have often recognized, are viewed as definitive and binding statements of the law." *Boyde v. California,* 494 U.S. 370, 384, 110 S.Ct. 1190, 1200, 108 L.Ed.2d 316 (1990) (citation omitted).

Simmons, 512 U.S. at 173 (Souter, J., concurring, alteration in original). The jurors were instructed: "What the lawyers say in their closing argument is not evidence, but it may assist you in understanding the law and the evidence." (R.T. 10/3/11, at 17.) Jurors are presumed to follow the court's instructions. *See Newell,* 212 Ariz. at 403, ¶ 68, 132 P.3d at 847. Attorneys also tend to tailor their closing arguments around the jury instructions and evidence. Here, a jury instruction regarding parole ineligibility was not given, despite Benson's attorneys' attempts. Therefore, although the instructions mention "life imprisonment," the jurors did not know that Benson was not eligible for parole.

For the foregoing reasons, Benson showed that receiving a *Simmons* instruction would probably have changed his death sentence.

IT IS ORDERED granting relief as to Benson's claim that he was entitled to a *Simmons* instruction.

IT IS FURTHER ORDERED granting Benson a new penalty phase.

IT IS FURTHER ORDERED setting status conference for **April 26, 2024** at 10:00 a.m. Defendant may appear *via* Teams. A separate minute entry shall issue.

9. *Busso-Estopellan v. Mroz*, 238 Ariz. 553, 364 P.3d 472 (2015).

Benson's *Busso-Estopellan* violation claim is precluded.

Benson's *Busso-Estopellan* violation claim is precluded because he could have raised it on direct appeal. Rule 32.2(a)(3). Because he did not, this issue is precluded.

Benson's *Busso-Estopellan v. Mroz* violation claim is meritless.

Benson argues that the trial court erred in denying Benson's request to present to the jury, as part of mitigation, his offer to plead guilty and accept a natural life sentence, waiving any release eligibility he may have, in violation of *Busso-Estopellan*, 238 Ariz. 553, 364 P.3d 472. (Petition, at 149.) However, this argument is meritless.

To begin, *Busso-Estopellan* was not decided until more than two years after *Benson*. Furthermore, this issue was not presented to the trial court. At no point did Benson request to present to the jury his offer to plead guilty and accept a natural life imprisonment sentence. This offer was presented to the County Attorney's Office, not the trial court. (*See* Ex. 13. *See also* ROA 176, at 1 ("In addition, Mr. Benson requests that during any penalty phase, *should this matter*

proceed to that phase, the jury be instructed regarding ineligibility for parole pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994)." (Emphasis added.)))

Additionally, Benson argues that the trial court should have considered his request for a *Simmons* instruction as a mitigating circumstance. (Petition, at 149.) Again, this issue was not presented to the trial court, as Benson concedes by stating that he "*implicitly* requested to place before the jury evidence of his acceptance of responsibility—trial counsel relied on *Simmons*, which itself relied on *Lockett* and *Eddings*." (Petition, at 149, emphasis added.) Indeed, ROA 176 does not indicate that Benson was willing to accept responsibility for any of the crimes with which he was charged. Furthermore, Benson requested the trial court to accept his waiver to be considered for a parole-eligible sentence, thereby making him eligible only for a natural life sentence, which would result in him being entitled to a *Simmons* instruction, as he would no longer be eligible for parole. (ROA 176.) However, Benson did not cite *Lockett* or *Eddings* or indicate in any way that he intended to have the jury consider as mitigation his request to waive a parole-eligible sentence. (*See* ROA 176.) Therefore, this issue was not before the trial court and thus, the trial court did not deny Benson the ability to present to the jury as mitigation his offer to plead guilty and accept a natural life term of imprisonment.

IT IS ORDERED denying Benson's claim that the trial court committed a *Busso-Estopellan v. Mroz* violation.

10. Causal Nexus Requirement.

There is no casual nexus requirement.

Benson argues that the jury did not assign his proffered mitigation sufficient weight and therefore, an improper causal-nexus requirement was necessarily imposed. (Petition, at 150.) However, the jury was correctly instructed to consider the mitigating evidence and assign it the weight each individual juror deemed appropriate without regard to connection with the crime.

> You are not required to find that there's a connection between a mitigating circumstance at the crime committed in order to consider the mitigation evidence.
>
> Any connection or lack of connection may impact the quality and strength of mitigation evidence. You must disregard any jury instruction given to you at any other phase of this trial that conflicts with this principal.
>
> …
>
> You individually determine whether mitigation exists. In light of the aggravating circumstances you have found, you must then individually determine if the total of the mitigation is sufficiently substantial to call for leniency.

> "Sufficiently substantial to call for leniency" means that mitigation must be of such quality or value that it is adequate in the opinion of an individual juror to persuade that juror to vote for a sentence of life in prison.

(R.T. 9/13/11, at 22, 25.) Jurors are presumed to follow the court's instructions. *See Newell,* 212 Ariz. at 403, ¶ 68, 132 P.3d at 847. The jurors were properly instructed and considered all of mitigating evidence. There is no causal nexus violation merely because the jury determined that the mitigating evidence was not "sufficiently substantial to call for leniency." (R.T. 9/13/11, at 25.)

IT IS ORDERED denying Benson's claim that his mitigation was subjected to an improper causal nexus test as meritless.

11. Hurst v. Florida, 577 U.S. 92 (2016).

Benson contends that *Hurst* is a significant change in the law under Rule 32.1(g) requiring Benson to be resentenced. However, *Hurst* did not affect Arizona law and therefore is inapplicable here. The Supreme Court defined Arizona law when it held that a jury, not a judge, must determine the aggravating factors that make a defendant eligible for the death penalty, as they "operate as 'the functional equivalent of an element of a greater offense,' *Apprendi* [*v. New Jersey*], 530 U.S. [466,] 494, n. 19." *Ring II*, 536 U.S. at 609. In *Hurst*, the jury made a recommendation to impose a death sentence, but it did not find the aggravating circumstances that made a defendant eligible for the death penalty. Instead, the court found the aggravating circumstances which made a defendant eligible for a death sentence. 577 U.S. at 98–99. *Hurst* reiterated *Ring II*, requiring that a jury, not a judge, find the aggravating circumstances which make a defendant eligible for a death sentence. 577 U.S. at 102–03.

Benson appears to read *Hurst* as requiring a jury to not only find the aggravating factors but also to weigh the mitigation against those factors. (Petition, at 156.) However, Justice Breyer's concurrence disproves Benson's reading of *Hurst*. Justice Breyer concurs because of his "view that the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death." *Hurst*, 577 U.S. at 103. Therefore, there is no constitutional requirement for a jury to weigh the mitigating factors against the aggravating circumstances.

Unlike in *Hurst*, Arizona's sentencing statute requires that a jury determine the aggravating circumstances that make a defendant eligible for a death sentence. A.R.S. § 13–752(C). Benson's jury, not the judge, found the aggravating circumstances. (*See* R.T. 9/12/11, at 19.) Moreover, Benson's jury weighed the mitigation against the aggravating factors, the very relief which Benson requests, which is not constitutionally required. Therefore, *Hurst v. Florida* is inapplicable, and this claim is meritless.

IT IS ORDERED denying Benson's claim that *Hurst v. Florida* was a change in the law requiring Benson to be resentenced as meritless.

12. Cumulative Error.

Arizona does not recognize the doctrine of cumulative error.

Benson argues that multiple errors throughout his trial and sentencing rendered the proceedings unfair. (Petition, at 159–60.) However, outside the context of prosecutorial misconduct, Arizona does not recognize the cumulative error doctrine. *State v. Hughes*, 193 Ariz. 72, 78–79, ¶ 25, 969 P.2d 1184, 1190 (1998); *see also Pandeli V*, 242 Ariz. at 191–92, ¶¶ 69–72, 394 P.3d at 18.

IT IS ORDERED denying Benson's claim of cumulative error as non-cognizable.

Dated: 3/19/2024

/S/HONORABLE KRISTIN CULBERTSON

HONORABLE KRISTIN CULBERTSON
JUDGE OF THE SUPERIOR COURT