IN THE ARIZONA SUPREME COURT

| | | |
|---|---|---|
| STATE OF ARIZONA, | ) | Arizona Supreme Court |
| | ) | No. CR 08-0164-AP |
| Appellee, | ) | |
| | ) | Maricopa County Superior Court |
| vs. | ) | No. CR 2005-007848 |
| | ) | |
| GARY WAYNE SNELLING, | ) | |
| | ) | |
| Appellant. | ) | |
| _____ | ) | |

# APPELLANT'S OPENING BRIEF

Thomas A. Gorman
Email: lawyergorman@aol.com
Web: lawyergorman.com
ABN 011219
PO Box 1909
Sedona, Arizona 86339
(928) 863-0900 Ph.
(928) 282-0650 Fax

TABLE OF CONTENTS

## TABLE OF CITATIONS

STATE CASES:

FEDERAL CASES:

U.S. SUPREME COURT CASES:

STATUTES:

RULES:



UNITED STATES CONSTITUTION:

OTHER AUTHORITIES:

## STATEMENT OF THE CASE

## I. JURISDICTION

This Court has jurisdiction over this appeal pursuant to Arizona Constitution, Article 6, § 5 (3); A.R.S. §§ 13-4031, 13-4033 and A.R.S. § 12-120.21. An automatic notice of appeal was filed pursuant to ACRP, Rule 26.15.(Item 235).

## II. PROCEDURAL HISTORY

Snelling, was charged by direct complaint on March 22, 2005 with one count of premeditated murder.(Item 1) The State noticed an intention to seek the death penalty on the day of Snelling's arrest. (Item 1, Warrant Fact Sheet, Other Information) A grand jury was convened on April 4, 2005. Vince Imbordino was assigned by the State to present Snelling's case to the grand jury[1]. The grand jury returned an

---

[1] Vince Imbordino attorney of record for Maricopa County Attorneys Office. *Palmer v. Super. Ct. in and for Maricopa Cty.,* 114 Ariz. 279 (1977), *Hyder v. Super. Ct, etc.,* 127 Ariz. 36 (1980); In 1981 Imbordino sought the death penalty against a defendant and had sex with the capital defendant's attorney. The defense attorney withdrew from the case over the affair and plea agreement fell apart. Client gets death. *Summerlin v. Stewart,* 267 F.3d 926 (2001); Death sentence reversed on other grounds, *Summerlin v. Stewart,* 427 F.3d 623(2005); Prosecutor Imbordino's improper impeachment of witness grounds for reversal of 2nd Degree Murder conviction. *State v. Cruz,* 128 Ariz. 538 (1981); Prosecutor Imbordino's breach of stipulated term in plea agreement does not constitute harmless error. Remand for resentencing. *State v. Bloom,* 137 Ariz. 250(App. 1983); " we find it necessary to address Deputy County Attorney Vince Imbordino's violation of both A.R.S. § 21-412 and Judge Broomfield's order requiring him to present appellant's proffered tape recording to the grand jury upon the request of the grand jury. . . even if there had been any confusion on the part of Mr. Imbordino as to the proper interpretation of the

indictment alleging one count: that Snelling on or about July 14, 1996 caused the death of the victim with premeditation in violation of A.R.S. § 13-1101, 13-1105, 13-703, 13-702, 13-702.02 and 13-801. Alternatively, the indictment alleged that Snelling committed or attempted to commit Sexual Assault and/or Burglary and in the course of or in furtherance of such offense, or in immediate flight from such offense caused the death of the victim in violation of A.R.S. §§ 13-1101, 13-1105, 13-702.01, 13-702 and 13-801. (Item 2)

On April 22, 2005, Imbordino alleged Snelling had a prior conviction for Public Sexual Indecency, which was committed on September 19, 1995 and that he was convicted of on October 8, 1996 in CR 95-01266, Maricopa County Superior Court. (Item 12). On May 27, 2005 Imbordino filed a Notice of Intent to Seek the

---

statute, that confusion was surely dispelled by Judge Broomfield's order directing him to make the tape offered by appellant available to the grand jurors on their request." *State v. Just, 138 Ariz. 534 (App. 1983)*; Prosecutor Imbordino violated immunity statute and failed to seek trial court approval before attempting to put immunized testimony to prosecutorial use. "The burden is upon the government to respect immunity, . . .". Defendant's conviction reversed and a new trial ordered. *State v. Gertz 186 Ariz. 38 (App. 1995)*; "The prosecutors conceded below [Imbordino] that they had not revealed to the defense that ... By failing to disclose the scope of Dr. Ben Porath's testimony, the State engaged in improper conduct. *See State v. Tucker, 157 Ariz. 433, 441, 759 P.2d 579, 587 (1988)* (observing that, without reversal, counsel may consider admonition only a "verbal spanking")" *State v. Roque, 213 Ariz. 193 (2006)*; 26 (twenty-six) separate incidents of prosecutorial misconduct were alleged in Appellant's opening brief in *State v. Roque, 213 Ariz. 193 (2006).*

Death Penalty and Notice of Aggravating Factors.(Item 24) On August 16, 2005 the trial court denied Appellant's Motion to Remand for a Grand Jury Determination of Probable Cause re: Aggravating Circumstances. (Item 30). On September 1, 2005 Imbordino was replaced by Deputy County Attorney Paul Ahler.(Item 31, 33).

On January 24, 2007 the State assigned Deputy County Attorney Ted J. Duffy to prosecute Snelling's case. Duffy became the second agent of the state with a history of misconduct assigned to prosecute Snelling[2]. (Item 46, *see* Appendix) Duffy, like Imbordino, a documented pattern of intentional misconduct as a prosecutor. On March 15, 2007 twenty three months post-indictment, Duffy noticed career criminal, seven time felon and snitch Jerry Radar, as a State witness.(Item 52).

On April 26, 2007 the jury panel was sworn and jury selection began. At the

---

[2] A hearing officer for the Arizona Supreme Court recommended a suspension from the practice of law and probation for a pattern of intentional misconduct by Duffy in the prosecution of a criminal defendant from April 24, 2006 through November 8, 2006. The hearing officer made findings that Duffy's misconduct was "intentional", "designed to gain a conviction outside the court's rule's and orders" that there was a "pattern of misconduct", "multiple offenses", "refusal to acknowledge wrongful nature of conduct", "substantial experience in the practice of law", "had practiced law in California or Arizona for over 30 years". Moreover at footnote three the hearing officer noted, "*This is more properly viewed as one case in which Respondent [Duffy] made a calculated decision to obtain a conviction regardless of the rules." The misconduct documented by the hearing officer was a pattern of misconduct beginning with Duffy's opening statement and continuing through closing argument.* In The Matter of A Member Of The State Bar of Arizona, Ted Duffy Bar No.016907, Respondent. No. 061958

close of the State's case in chief Judge Akers entered a Rule 20 directed verdict for Appellant on the felony predicate of sexual assault[3]. Both sides rested, the defense called no witnesses.(Item 135) The jury returned a verdict of guilty for both premeditated murder and felony murder. (Item 141, R 5/22/07) The jury returned a verdict that Appellant committed the offense in an especially cruel manner.(Item 149, 156) At the penalty phase the jury hung and a mistrial was declared.(Item 172) The second jury returned a verdict of death on June 9, 2008.

[3] In granting the directed verdict the trial court noted, "I don't believe there is **any evidence that he committed a sexual assault**, and if included within your Rule 20 Motion is that the Court direct a verdict as to committed sexual assault, I would be inclined to grant that request." ® 5/17/07 p.148)

## III. STATEMENT OF FACTS

### A. THE VICTIM'S DECOMPOSED BODY DISCOVERED JULY 18, 1996.

The victim owned rental property at a condominium complex, 5318 North 33rd Drive, Number B, Phoenix, AZ. On July 14, 1996 a friend visited the victim that day at the rental unit. According to her friend, the victim was planning to take a shower and leave the rental unit by 4:00 p.m. The victim was not heard from over the next few days. (R5/9/07 p.57,60-63) Four days later, the victim's badly decomposed body was found laying on it's side in the bathroom of her rental unit. There was nothing unusual about the positioning of the body.(R5/9/07 p.65-74,149) The victim, obviously preparing for her shower, had disrobed and neatly stacked her clothes on the bathroom toilet. There was no sign of anything unusual and no sign of any struggle of any kind.(GJTRS 4/4/05 p.17-20). The police responded and inspected the rental unit. A photo of the body as it was found in the bathroom on July 18, 1996 by the police depicted the body in a state of "purge". The bodily fluids were "leak[ing]" out of the nose, mouth, lower organs, anus and urinary tract. They had pooled under the body and created the appearance of a red material on the floor or carpet.(R 5/15/07 p.77, 88, Exhibit 35). A sex crime evidence kit was used to collect evidence from the decomposed body.(R 5/9/07 p.189, Exhibit 14;R5/15/07 p.7-8).The police collected finger print evidence and evidence to use in DNA testing from the victim's abandoned vehicle and her rental unit.

## B. AN AUTOPSY WAS PERFORMED ON JULY 19, 1996.

### 1. DR. DUDLEY FOUND NO EVIDENCE OF SEXUAL ASSAULT OR ATTEMPTED SEXUAL ASSAULT.

Maricopa County Medical Examiner Dr. Mary Dudley performed the autopsy on July 19, 1996 and wrote an autopsy report. ® 5/15/07 p.74-77). The body was "in an advanced stage of decomposition" at the time of the autopsy. Dr. Dudley certified the cause of death as asphyxia by strangulation, a homicide.(R 5/15/07 p.81) The internal injuries were a fracture of thyroid cartilage and hemorrhage in the neck.(R5/15/07 p.81 L17-21) The only sign of external physical injury were marks on the neck consistent with a ligature.(R 5/15/07 p. 78-87, 89, Exhibits 38, 39, 40, 41, 42, 45, 46). The ligature mark left on the victim's neck and depicted in Exhibit 40 was consistent with one single ligature in one solid position (not moved). (R5/15/07 p.107) Dr. Dudley expressed no opinion in her autopsy report of how long it took the victim to die.(R5/15/07 p.99) There was no way to determine how long the ligature had been tied around the victims neck. (R5/15/07 p.102) There was no observation or documentation at the autopsy by Dr. Dudley (or by the police at the crime scene) of any external or internal injury that suggested any physical contact or injury (sexual) other than the strangulation. There was no observation or documentation at the autopsy (or by the police at the rental unit) of a single defensive wound found on the victim. Not a single scratch, bruise, contusion, blemish, broken

fingernail, fingernail scrapping, pulled hair or anything else that suggested a pre-strangulation struggle or struggle during the strangulation. The sexual assault kit included samples taken from the victims body. There was no semen or spermatozoa found on the victim's vaginal, rectal or oral swabs. ® 5/16/07 p.104-107, 5/17/07 p.102-105) No foreign pubic hairs were found on the body. No foreign pubic hairs were found at the crime scene. No clothing or undergarments were torn or out of place. The victim's clothes were neatly stacked on the toilet. There was no evidence of a sexual assault or an attempted sexual assault found by the police. There was no evidence of a sexual assault or an attempted sexual assault found by Dr. Dudley at the autopsy and none noted in her autopsy report. It would be "speculation" to say a sexual assault or attempted sexual assault occurred. (R5/17/07 p.103-109,148)

**2. DR. DUDLEY MADE NO FINDINGS RE: CONSCIOUSNESS.**

Dr. Dudley made no finding that the victim was (1) conscious post-initial contact with her assailant;(2)conscious when the strangulation began;(3) conscious at any time during the strangulation or(4)conscious at the time of death. There were no witnesses to the strangulation and thus no pre-autopsy hearsay for Dr. Dudley to review via police reports. Dr. Dudley had no information as to the circumstances that occurred in the initial encounter between the victim and her assailant. Therefore, there was no way for Dr. Dudley or the police to know whether Curtis was conscious beyond the point of her initial encounter with her assailant. Secondly, Dr. Dudley had

no scientific way of determining whether the victim was conscious or unconscious during strangulation or at the time of death based on the condition of the body alone.(R5/17/09 p.73-111)

## C. COLD CASE DETECTIVE STUEBE FOUND NO EVIDENCE OF SEXUAL ASSAULT, ATTEMPTED SEXUAL ASSAULT OR EVIDENCE THE VICTIM WAS CONSCIOUS AT THE TIME OF DEATH.

In April of 2003 the case was reviewed by Detective William Stuebe of the Phoenix Police Department.(R 5/16/07 p.112) Stuebe reviewed every report that pertained to the case . Stuebe identified items of evidentiary value. Stuebe only found evidence of a homicide. Stuebe found no evidence of a sexual assault or attempted sexual assault. In April 2003 Stuebe requested a DNA profile of evidence collected from the victim's abandoned vehicle and rental unit. Stuebe entered the profile into a data base and it matched Appellant's DNA, which was a matter of record because he had been convicted of Public Sexual Indecency, a Class 5 felony, on October 8, 1996 in Maricopa County Superior Court, CR 95-01266. Snelling was arrested on March 23, 2005 and has remained in custody since that time. No DNA connected him to the victim's body. (R5/16/07p.109-127, R6/4/08 p.34) *Nine years after* Dr. Dudley's autopsy there was still no evidence of a sexual assault or attempted sexual assault. *Stuebe knew* there was no evidence of a sexual assault or attempted sexual assault, *he was the case agent.*

## D. IMBORDINO AND STUEBE CONVINCE THE GRAND JURY TO INDICT SNELLING WITH ATTEMPTED SEXUAL ASSAULT AND SEXUAL ASSAULT WITH NO EVIDENCE OF EITHER.

On April 4, 2005 the State announced to the grand jurors that they were investigating Snelling for attempted sexual assault, read the sexual assault statutes to the grand jurors and provided copies of the sexual assault statutes to the grand jurors, "This is the investigation of Gary Wayne Snelling, for the alleged offenses of first degree murder and *attempted sexual assault*. . . take a look at . . .13-1401 and 1406"[4]. (GJTRS 4/4/05 p.3) (emphasis added). Imbordino's grand jury "investigation" of "attempted sexual assault" did not include the 30 year veteran prosecutor asking a single question about, "oral sexual contact", "penis", "vulva", "anus", "sexual contact" or "intercourse". Moreover, Stuebe, unsolicited, never volunteered any answers about the elements and terms of the sexual offense statutes provided to the grand jury and allegedly violated. Only one conclusion can be drawn from this record: Imbordino and Stuebe intended to manipulate the grand jurors into believing there was evidence

---

[4] The two statutes pertain to sexual offense. In part 13-1401 states, "Oral sexual contact" means oral contact with the penis, vulva or anus . . . 'Sexual contact' means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact . . . 'Sexual intercourse' means penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva." 13-1406 states in part that, "A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without the consent of such person."

of a sexual assault.(GJTRS 4/4/05 p. 5, 6, 8, 14, 19, 20, 25) The grand jurors attempts to get at the truth were obstructed by innuendo, misdirection and misleading testimony *( "that doesn't necessarily mean it [sexual assault] did not occur"* ).

MR. IMBORDINO: I don't have any further questions.

THE STATE: Do the grand jurors have any factual questions for the detective?

THE FOREMAN: Yes.

DET. STUEBE: Yes, sir.

THE FOREPERSON: Was there any sexual abuse discovered on Adelle Curtis?

DET. STUEBE: The **sexual assault kits were analyzed, and there wasn't anything indicated on them.**

(GJTRS 4/4/05 p. 14). (emphasis added)

* * *

GRAND JUROR: Have you come up with a motive ?

DET. STUEBE: [answer addresses stolen property only]

* * *

(The witness left the grand jury room)

THE STATE: Legal questions? Yes.

THE FOREPERSON: I believe in some of the statutes

you gave us, you said something about a sexual statute.

THE STATE: Right, attempted sexual assault - -

THE FOREPERSON: Yes.

THE STATE: - - was **one of the alleged charges,** and that would be **13-1401** and **1406.**

GRAND JUROR KEEDY: **How can we say that there was a sexual assault** if the detective indicated that there was - - I think they ran the kits, and **there was no indication of that** ?

(GJTRS 4/4/05 p. 17-18). (emphasis added)

* * *

GRAND JUROR KEEDY: I would like clarification on the sexual assault.

(The witness reentered the courtroom)

GRAND JUROR KEEDY: Detective, I had a question. You have indicated that **you could not determine that there was any sexual assault to the victim.** Is that a true statement?

CASE AGENT STUEBE: I am indicating that there wasn't any biological evidence that was found in the sexual assault kit. **That doesn't necessarily mean it did not occur.** I am just saying that there wasn't any spermatozoa, semen or anything like that found.

GRAND JUROR KEEDY: Was there any indication on the body of the victim that would indicate sexual assault ?

CASE AGENT STUEBE: I don't believe so, again, realizing that the body was decomposed. She had - - it was July and so forth.

MR. IMBORDINO: **She was nude; correct?**

* * *

GRAND JUROR SMITH: Do we have **any evidence** of **disturbance, of fights, or anything, or her trying to get away in the apartment** - - or in the condo ? Do we have any - - I mean, he got in there some way - -

CASE AGENT STUEBE: Correct.

GRAND JUROR SMITH: - - evidently. She is going to try to struggle and things are going to be damaged or she is going to be bruised or - - **none of that shows up ?**

CASE AGENT STUEBE: . . .the door was unlocked . . . she was going to take a shower, so she could go back home. **She was found in the bathroom with - - on the toilet there was a neatly stacked pile of clothing.**

GRAND JUROR SMITH: So **she evidently had disrobed**, at least that was the way it looked like then?

CASE AGENT STUEBE: Apparently...

GRAND JUROR SMITH: When he comes in, cuts the light cord, and goes after her to put it in the front or back, or however he did it, **there is no sign of any kind of struggle at that point in time ?**

CASE AGENT STUEBE: **NO**. There didn't appear so.

THE FOREPERSON: . . . the victim said to the former tenant that she was going to take a shower?

CASE AGENT STUEBE: Yes.

GRAND JUROR GREGORY: Was there **anything unusual about the positioning of the body** or anything ?

CASE AGENT STUEBE: **NO**. She just appeared as if she was laying on her side.

(GJTRS 4/4/05 p.17-20). (emphasis added).

The draft indictment for the grand jurors prepared by the State included the allegation of a sexual assault and/or attempted sexual assault in a felony capital murder count. The State desired a death sentence as a result. Imbordino knew the best penalty phase argument for death was to link Snelling's prior conviction and arrests (public sexual indecency, indecent exposure) to a murder for sex. By charging Snelling with sexual assault and attempted sexual assault Imbordino set the table for the State trial prosecutor. The State trial prosecutor could now link the felony murder sex count and Snelling's prior sexual public indecency conviction and argue for death based on those two very incendiary and inflammatory convictions.

## E. FIFTEEN MONTHS POST INDICTMENT THE STATE SECURES THE SERVICES OF CAREER CRIMINAL AND PROFESSIONAL WITNESS JERRY RADAR.

Fifteen months after Snelling was indicted for a sex crime with no evidence of a sex crime career criminal Jerry Radar contacted the State and offered to testify for consideration. Radar testified for Nebraska State prosecutors in a death penalty prosecution. "In part due" to Radar's "testimony" the State of Nebraska got a death sentence. Radar found himself in another state, in custody and again soliciting a deal to put another pre-trial detainee on death row.(R 6/4/08 p.20-22) Radar was convicted of felonies and/or committed crimes in Arizona, Texas, Nebraska and Wisconsin. Radar's convictions include forgeries, kidnaping, interference with child

care and issuance of worthless checks. As a fugitive Radar was on America's Most Wanted. Radar was housed in the same pod as Snelling at the Maricopa County Jail. Radar is a registered sex offender. Radar had a parole violation pending in Texas when he began attempting to contact the Maricopa County Attorneys Office to offer to testify against Snelling. ® 5/16/07 p.1-18, R 5/17/07 p.72). Radar wrote a series of letters to Maricopa County Attorney Paul Ahler beginning in May 2006 pleading for the State to contact him before his pending sentencing so he could "assist" them in Snelling's prosecution. In later letters Radar stated he would need to continue his sentencing to afford the State the opportunity to help him in return for his assistance. In June and July 2006, Radar wrote a second and a third letter to the Maricopa County Attorneys office making the same pitch and a fourth letter in December of 2006 wanting a reduction in his sentence to a mitigated term and for Ahler to call or write the Texas parole board to secure a favorable result on Radar's pending parole violation hearing. Radar was looking at prison time in Texas and wanted help. Radar also made a demand for reward money. Radar wrote that there was a "Crime Stopper reward for this case". Radar wanted money to buy things while in custody. Radar wrote a fifth letter to Ahler dated January 1, 2007 seeking a concurrent sentence in his Arizona and Texas cases and requesting assistance and again asking for "the reward offered in this case." ® 5/17/07 p.30-60, 70-72, Exhibits 126-133, 26(Item 135)).

On July 14, 2006, fifteen months after the grand jury was manipulated into

indicting Snelling on sexual assault and attempted sexual assault Stuebe met Radar at the Maricopa County Jail. Radar's meeting with Stuebe involved only the two men and was not audio taped. At the time Stuebe met with Radar Stuebe knew there was no evidence of sexual assault, attempted sexual assault or evidence the victim was conscious at the time of death. In an unrecorded conversation/s with Stuebe Radar fortuitously just happened to provide the evidence that was wholly absent from the grand jury proceeding and the State's possession.(R 5/16/07 p. 1-18,R 5/17/07 p.30-60, 70-72, Exhibits 126-132, 26)). Radar admitted to Stuebe that he had gone into Snelling's cell but denied (of course) that he "looked" at any of Snelling's "items" (i.e. Indictment, police reports, crime scene photos etc.) ® 5/16/07 p. 30-31, R 5/17/07 p. 30-32, Exhibit 126, 127, R 6/4/08 p. 20-22,)

At the guilt phase Radar testified Snelling told him, "He said he'd been watching her for a while. He said she looked older but she still looked pretty good, and he said he sat back and thought about getting him some." Prosecutor Duffy asked, "What did you take 'getting some' that to mean?" Radar filled in the blank, "I thought he wanted sex. . . he said he walked back towards the bathroom area. The woman opened the bathroom door and was holding a towel in front of her . . .and he told her to shut up and . . .everything would be fine but she got belligerent and yelled. . .He said he took the cord, and he choked the - - well, he said he choked the bitch to death." ® 5/16/07 p.1-20). At the State's prompting Radar told the jury he told the

truth "today". Stuebe was seated in the courtroom at the prosecution table as Radar testified - in front of Radar. Radar concluded his testimony by testifying that his life was now at risk for testifying. Contrary to his letters, Radar testified he was willing to put his life at risk in both Arizona and Texas to serve the public good and demanded no consideration from the State for doing so. ® 5/16/07 p. 1-26, 50-51). Following cross examination the good citizen was taken in chains and jail garb back to his cell to await his fate in Texas. Radar had already received one benefit promised by Ahler for his testimony: a presumptive sentence in his Arizona case. Now Radar waited to see if his performance garnered the second benefit he requested, help in Texas because Ahler had also promised the "State" would write a letter on Radar's behalf to the Texas board of parole. ® 5/16/07 p. 31-37, Exhibit 125,R 5/17/07 p.30) Radar testified before both juries. The first jury convicted Snelling and found the aggravator of especially cruel. The first jury hung on penalty. A second jury was empaneled for a second penalty phase. Radar testified again to the second penalty phase jury. This time Radar was out of custody.

## V. ARGUMENTS

### A. THE CUMULATIVE AFFECT OF THE STATE'S PROSECUTORIAL MISCONDUCT VIOLATED SNELLING'S RIGHTS UNDER THE U.S. CONSTITUTION 5th, 6th, 8th & 14th AMENDMENT AND THE ARIZONA CONSTITUTION, ARTICLE 2 § 3,4,10,15,23,24.

#### 1. STANDARD OF REVIEW

This Court has recognized the cumulative effect of prosecutorial misconduct when considering whether there was prejudice to a defendant. *State v. Hughes, 193 Ariz. 72, 79, 969 P.2d 1184, 1191-92 (1998); State v. Minnitt, 203 Ariz. 43, 55 P.3d. 774 (2002); State v. Neil, 102 Ariz. 299, 300, 428 P.2d 676, 677 (1977); Berger v. United States, 295 U.S. 78, 88 (1935)* (A prosecutor's obligation is not only to prosecute with diligence, but to seek justice. He must refrain from all use of improper methods designed solely to obtain a conviction.) *See also, State v. Bible, 175 Ariz. 549, 600, 858 P.2d 1152, 1203 (1993); Pool v. Superior Court, 139 Ariz. 98, 103, 677 P.2d 261, 266 (1984); Ariz. Const. Article 2, section 10; United States Constitution, Amendments 5 & 14.* Misconduct objected to by Snelling may be reviewed cumulatively for error. Misconduct that did not draw such objections can be reviewed only for fundamental error. *State v. Cook, 170 Ariz. 40, 821 P.2d 731 (1991).*

The prosecutors in this case - from the manipulation of the grand jury through the second penalty phase of the capital murder trial, which demands even more constitutional protections than non-capital cases, *Gardener v. Florida, 430 U.S. 349*

*(1977),* consistently engaged in improper misconduct to secure a death sentence. The prosecutors improperly took advantage and misled the grand jury and the jury. The penalty phase proceedings are separate trials(from guilt phase). Duffy's, the prosecutor's, misconduct "permeates the entire atmosphere of the trial [in both of Snelling's penalty phases]" the death sentence and must be reversed. *Bullington v. Missouri, 451 U.S. 430 (1981); State v. Rosas-Hernandez, 202 Ariz. 212, 218-19, para. 23, 42 P.3d 1177, 1183-84 (App. 2002)* ("We will reverse based on prosecutorial misconduct if the conduct is "'[s]o pronounced and persistent that it permeates the entire atmosphere of the trial.'") (citation omitted). An appellate court will reverse a conviction due to prosecutorial misconduct if two conditions are satisfied: *1)* misconduct is in fact present; and *2)* a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial. *State v. Atwood, 171 Ariz. 576, 606, 832 P.2d 593 (1992); State v. Minnitt, supra.* Reversible error occurs when the prosecution's remarks at trial involve matters that the jury would not be justified in considering when arriving at a verdict and, under the circumstances, the jury was probably influenced by the remarks. *State v. Gonzales, 105 Ariz. 434, 437, 466 P.2d 88, 91 (1970).* Impermissible prosecutorial vouching [occurs] where the prosecutor places the prestige of the government behind its witness." An argument is therefore improper when the prosecutor includes "personal assurances of a witness's veracity." *See, State v. King, 180 Ariz. 268, 277, 883 P.2d 1024 (1994) (quoting State v.*

*Vincent, 159 Ariz. 418, 423, 768 P.2d 150 (1989))*. A review of the record includes consideration of whether the evidence, statements or comments by the prosecutor were deliberate and stressed in closing remarks such that it can be inferred that the jury was influenced by the statements. *See, State v. Keeley, 178 Ariz. 233, 23-36, 871 P.2d 1169 (App. 1994).*

## 2. OVERVIEW OF PROSECUTORIAL MISCONDUCT

Both prosecutors, Imbordino and Duffy were experienced capital litigators. Imbordino and Duffy each had been practicing law for over 30 years. Both of them had previously been found to have committed misconduct in the prosecution of criminal cases. The State gamed the system to make it easier to secure Snelling's death sentence. Imbordino started with the indictment and the presentation to the grand jury. Prior to convening the grand jury Imbordino and Stuebe knew the State did not possess any evidence of sexual assault or attempted sexual assault. In spite of that both Imbordino and Stuebe manipulated the grand jury into indicting Snelling on two predicate felonies with no evidence. Imbordino violated both. *ER 3.8 (a) and 8.4(a) through (e) of Rule 42 of the Arizona Supreme Court*.[5] Imbordino committed these acts and

---

[5]. ER3.8(a) Special Responsibilities of a Prosecutor: The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. Comment[2003 amendment] "...knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of ER 8.4"

ER 8.4 It is professional misconduct for a lawyer to: (c)engage in conduct involving dishonesty, fraud , deceit or misrepresentation;(d)engage in conduct that is

omissions in violation of the professional code of conduct for one reason: to enhance the State's ability to secure a death sentence. Some of the State's misconduct included:

- ! Allege in the complaint sexual assault and/or attempted sexual assault with no evidence of either. E.R 3.8 (a)(Item 1)
- ! Read and provided A.R.S. §§ 13-1401 & 13-1406 statutes to the Grand Jurors. ER 8.4(c).
- ! Included in the draft indictment charges for which no probable cause or any evidence for that matter existed. E.R 3.8 (a),ER 8.4(c).
- ! Opening remarks to the Grand jury that emphasized the felony predicate of attempted sexual assault and/or sexual assault with no evidence of either. 8.4(c). (GJTRS 4/4/05 p. 3)
- ! Evasive answers and manipulative questions in response to the Grand Jurors' concerns about the lack of evidence regarding the predicate underlying felonies. ("*That doesn't necessarily mean it did not occur.*") Imbordino mislead the grand jury. 8.4(c). (GJTRS
- ! Filing a Notice of Intent to Seek Death based on the aggravator of cruelty with no evidence of consciousness or struggle.(Item )E.R 3.8 (a), 8.4(c).

It was not until fifteen months post indictment that the State possessed **any** evidence to support the attempted sexual assault charge. The "evidence" of attempted sexual assault appeared 15 months post-indictment in the form of a career criminal and professional snitch. After hearing about the case on Crime Stoppers, after

---

prejudicial to the administration of justice."

soliciting a deal with the State after having an unrecorded(audio) meeting with Stuebe, Jerry Radar was ready to put his second man on death row. Duffy noticed Radar as a witness. The State, through Duffy continued where Imbordino left off.

Duffy told the first penalty phase jury the only way for them to prevent Snelling's "release" from prison was to sentence him to death. Duffy caused a mistrial. Duffy then capitalized on the mistrial he caused. Duffy again made another wholly improper argument to the second penalty phase jury. Duffy told the 2nd jury the only way to "protect innocent children" from "stranger danger" was to put Snelling to death. The State got a death sentence with it's second improper argument in consecutive penalty phase proceedings. ((R 5/31/07 p. 49, 50, 51, R6/5/08 p.48)

Both Imbordino and Duffy simply ignored the facts and relied on prejudice - a dishonest way to represent the State. *State v. Minnitt, supra.; State v. Jorgenson, 198 Ariz. 390, 10 P.3d 1177 (2000).* This intentional and pervasive misconduct on the part of the prosecution hindered Snelling's constitutional rights to an impartial jury and to a fair trial at both penalty phase proceedings to the extent that both the first and second penalty phase juries were structurally impaired. *State v. Minnitt, supra.* Because of the prosecution's persistence, ultimate fairness became impossible to achieve in this case. *Id.* As this Court noted in *Poole v. Superior Court,, supra*., a retrial is barred when the prosecutor engages in improper conduct that is not merely the result of legal error or negligence, but constitutes intentional conduct that the prosecutor "knows to be

improper and prejudicial, and which he pursues for any purpose with indifference to a significant resulting danger of mistrial or reversal [ ] and the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial." *Id. at 139 Ariz. At 108-09, 677 P.2d at 271-72.* The extent of the misconduct in this case raises concerns over the integrity and fundamental fairness of the trial itself. *Id. at 105-07, 677 P.2d at 268-70.* Prosecutor misconduct that permeates the process and intentionally destroys the ability of the tribunal to reach a fair verdict must necessarily be remedied. *State v. Minnitt, supra.* "[D]eliberate deception of a court and jurors by the presentation of known false evidence cannot be reconciled with the rudimentary demands of justice." *Campbell v. Reed, 594 F.2d 4, 6 (4th Cir. 1979), citing Pyle v. Kansas, 317 U.S. 213 (1942) and Mooney v. Holohan, 294 U.S. 103 (1935).*

The Constitution has placed the responsibility for deciding guilt or innocence on the jury. ". . . the defendant is entitled to a jury that is not laboring under a Government-sanctioned false impression of material evidence when it decides the question of guilt or innocence with all its ramifications." *United States v. Barham, 595 F.2d 231, 242 (5th Cir. 1979)*. "A court may dismiss an indictment when 'the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.'" *United States v. Marshank, 777 F. Supp 1507, 1523 (N.D. Cal. 1991) quoting United States v. Russell, 411 U.S. 423, 431-32 (1973).*

## 3. DUFFY TELLS THE FIRST PENALTY PHASE JURY THAT SNELLING WILL "NEVER" SERVE A LIFE SENTENCE AND WILL GET "RELEASED" FROM PRISON UNLESS THEY SENTENCE HIM TO DEATH.

### a. Duffy Injects "Release" Into Jury Deliberations.

Dr. Jack Kevorkian aka "Dr. Death" was an internationally recognized convicted murderer whose notoriety rivaled Charles Manson. Dr. Death had been in the news for over 20 years when Duffy prepared for his penalty phase argument. Dr. Kevorkian received a flood of extensive media coverage because the convicted murderer was going to be *released early from prison*. Kevorkian's early release date was scheduled for the day after Snelling's penalty phase proceeding was to begin. Kevorkian was going to be released after serving just 8 years of his possible 25 year sentence. By May 31, 2007 Dr. Death's June 1, 2007 release from prison was common public knowledge.[6] Undoubtedly a water cooler topic for career death

---

[6]. *See*, **Dr. Kevorkian to be Released from Prison** - *Associated Content*
Dr. Jack Kevorkian Released from Prison After Serving Eight-Year Term ... Don't think all successful Associated Content contributors have it easy just.
...www.associatedcontent.com/article/129754/dr_
*Also see*, **Dr. Kevorkian to be Released from Prison**, *January 30, 2007 by K. Cauldwell:*

"On June 1, 2007, the former 'Dr. Death' is scheduled for released from prison on parole . . .These new developments in Dr. Kevorkian story bring new fire to the controversy that ignited in the United States when Kevorkian first advertised his services for 'death counseling' in the late 1980s . . .Convicted of second-degree murder. . . Dr. Kevorkian will have served just over 8 years of a 10-25 year sentence when he is released. Claiming to have 'assisted' over 130 patients to their deaths, Kevorkian managed to evade conviction four times (three by acquittals, the fourth by mistrial) before finally finding himself convicted of the crime of second-degree

penalty prosecutors and something the sitting jurors were aware. As is its custom, the news show 60 Minutes extensively advertised and announced for weeks if not months it's Sunday night June 3, 2007 show featuring an interview of the now released and out of prison convicted murderer.[7]

With that backdrop Duffy intentionally and deliberately injected an issue into the proceedings he knew was not for the jurors' consideration: *Snelling's release from prison unless sentenced to death and Snelling objected.*[8] Duffy's knew this was wholly improper. Duffy's state of mind is demonstrated by his objection to defense counsels voir dire of Juror # 8 after the mistrial he caused. Duffy stated it is "irrelevant and legally impermissible" [his words] for a jury to consider what sentence a judge would impose in the juror's decision of whether to impose a death or life sentence. ®

---

murder in the You case . . . Dr. Kevorkian televised the crime on national television on February 22, 1998- covered by Mike Wallace on "60 Minutes" airing during prime time television viewing- and the fact that Dr. Kevorkian chose to pose as his own defense attorney for his fifth, and final trial, Kevorkian's conviction for second-degree murder..."

[7]**.North Country Gazette**, "Dr. Death" Kevorkian Release Due..... To Appear on "60 Minutes". Posted on Friday, 11 of May , 2007 at 10:38 am ... Two days after his scheduled release from prison on June 1, Jack "Dr. Death" Kevorkian ... for the terminally ill, will appear **Sunday, June 3 on "60 Minutes**" . ... While Kevorkian is scheduled to appear on "60 Minutes" for an exclusive ...www.northcountrygazette.org/2007/05/11/dr-death-... -

[8]**. Mr. Gavin:** Their question may be, judge, because . . . Dr. Kevorkian got out this weekend. He was on 60 minutes...he was released after eight years. . . . the State certainly made it part of their argument, that, you know, at some point this guy could get out. (R 6/4/07 p.4)

5/20/08 p.101) During the first penalty phase Duffy threatened the jury with Snelling's eventual release from prison unless the jury sentenced Snelling to death. Duffy wanted to scare the jury into sentencing Snelling to death or get a hung jury and secure a second opportunity for a death sentence. Duffy achieved his alternative objective. Duffy's intentional misconduct caused a hung jury on June 4, 2007.

**b. Duffy Impugned The Integrity Of The Judiciary.**

Not only did Duffy coerce the jury, he engaged in a second form of misconduct during the first penalty phase. Duffy impugned the integrity of the judiciary. Duffy communicated to the jurors to sentence Snelling to death because the judiciary could not be trusted to keep him in prison. Text cannot be understood or appreciated without context. Duffy put his argument in context before going to his text: Snelling's release from prison unless the jury imposed the death penalty. *First,* to put things in context for the penalty jury Duffy specifically pointed to Snelling's prior conviction for Public Sexual Indecency and how he got "released from prison". Duffy used Judge Akers as a prop to shore up his impending threat to the jury that Snelling could be released from prison if not given death. Duffy told the jury:

> "Here's a man who commits a **sexual offense**,
> and **he is given a break**. **A judge** not un**like**
> **Judge Akers**, said, all right. We're going
> to let you have probation . . . he goes to prison.
> **He gets out of prison."** (Emphasis added)
>
> (R5/31/07 p.49 L2-8)

On the very next page of the transcript after telling the jurors a judge like "Judge Akers" gave Snelling a "break . . .he gets out of prison" Duffy threatened the jury with the specter of Snelling's release in less than 25 years:

> **" if the defendant does not receive the death penalty, he may be released in less than 25 years. That's a possibility." (emphasis added)**

(R5/31/07 p.50 L23-25)

Duffy continued to coerce the jury by offering the alternatives of death or Snelling's release from prison:

> "**If** he's **not given the death penalty** he is permitted to live his life in prison **and** possibly **get out".***(emphasis added)*

(R5/31/07 p.55 L1-3)

A review of not only the Duffy's subsequent voir dire objection as set forth above but also of his questioning of witnesses demonstrates this argument was not only intentional it was meticulously planned in advance. At the testimonial phase of this penalty proceedings Duffy called Stuebe as his witness and repeatedly secured answers about Snelling's prior arrests and ***releases*** etc to set up his release or death argument to the jury. Through Stuebe Duffy solicited that Snelling was originally put on "probation" that Snelling "failed to appear" that Snelling had to be "arrested" again, that Snelling's "probation was violated" that Snelling was "sent to prison" that Snelling was ***"released"*** that Snelling was again "re-arrested."(RT 5/31/07 pp 4-12)

Duffy's warning to the jury about Judge Akers was not spontaneous at closing. Duffy planned it out before he called Stuebe to testify so at closing he could point to Snelling's record of arrest ***and release*** etc and tell the jury basically don't give the sentencing decision to Judge Akers:

> "Here's a man who ***commits a sexual offense***,
> and he is given ***a break***. A judge not unlike
> ***Judge Akers***, said, all right. We're going
> to let you have probation . . . he goes to prison.
> He ***gets out of prison."*** (Emphasis added) (R5/31/07 p.49 L2-8)

Duffy varied on the this theme but continued to assert all of the prestige, credibility and authority of the government by vouching in absolute terms that absent a death sentence Snelling would **"never"** serve a life sentence. Duffy told the jury to impose death because Snelling would "**never** really get a life sentence." Duffy told the jurors, "he can **never** really get a life sentence . . . so he'll **never** have to serve the punishment that's necessary even if it's life, and I'm urging you ***the proper punishment is death***." ® 5/31/07 p. 49, 50, 51) *(emphasis added)*

Duffy intentionally and directly contradicted the trial court's instruction, terrorized the jury, impugned the integrity of the judiciary, planned to do so in advance, set up his closing with testimony and caused a hung jury. *State v. Minnitt, supra.* (prosecutor's extreme misconduct was improper because the prosecutor knew it was grossly improper and because it was highly prejudicial both to the defendant and to the integrity of the system.)

**c. Duffy Intentionally Made Improper Statement's To Prejudice Snelling.**

The fact the jury was influenced by Duffy's improper arguments and Snelling was prejudiced is revealed by the jurors immediate reaction to Duffy's threat of Snelling's release. The jury deliberated for a total of one hour and fifteen minutes on May 31, 2007. The jury was recessed for a three day weekend and resumed deliberations on June 4, 2007 the day after the 60 Minutes story on the early release of a convicted murderer was aired. ® 6/4/07 p.3) After one hour of deliberations the jurors submitted a question. Duffy's threat of ***release*** took the jury from a place of rational objectivity to one of fear. The jurors question ignored the trial court's instructions. The jurors asked "what does the state statute say the earliest possible **release** can be considering time served if the possibility of parole is given?" ® 6/4/07 p. 3, Item 164, 172)(emphasis added). In response to the juror question the trial court called a hearing out of the presence of the jury.

> **THE COURT**: I understand we have a note form the jury, is that correct? Thank you. Counsel this is **a question regarding an issue that is not for their consideration,** but let me just tell you - - let me tell you what the question is.
>
> 'what does the state statute say the **earliest possible release** can be considering time served if the possibility of **parole is given?'**
>
> * * *
>
> **DUFFY**: I think your answer is the correct one,

that it's **not for their consideration**.
® 6/4/07 p. 3-4). (emphasis added)

Duffy intentionally decided to make an argument he knew was "**not for their consideration**". Duffy made an argument inconsistent with the law and in violation of Snelling's right to due process and a fair and impartial jury on the decision of life vs. death. Duffy knew it and did it anyway, he said it himself, **"it is not for the juries consideration"**. Id., p.3-4. The first juror question demonstrates the jurors were influenced by Duffy's improper argument. Further evidence that Duffy successfully poisoned jury deliberations was the jurors second written communication with Judge Akers. Two hours after their first question and after the trial court declined to answer the jurors first question, the jurors announced they were deadlocked and could not reach a unanimous verdict. The jurors sent a letter to Judge Akers *warning her about releasing Snelling*. ® 6/4/07 p. 17, Item 172) After failing to return a unanimous verdict for life 10 of the 12 jurors wrote and submitted a letter to the trial court which in part stated that "... please consider the most stringent penalty available by law. Prison without the possibility of parole (natural life sentence)". ® 6/4/07 p. 43)

Duffy has a history of like misconduct and in this case knew his argument was improper. The State should not rewarded for egregious intentional misconduct which trampled a Snelling's right to due process and a fair and impartial jury. The foregoing

misconduct was objected to by Snelling so it may be reviewed cumulatively for error. *State v. Cook, 10 Ariz. 40, 821 P.2d 731 (1991).* Snelling submits the proper remedy is the reversal of his death sentence and a sentence to life in prison.

## 4. THE SECOND PENALTY PHASE JURY IS TOLD BY DUFFY THAT THE ONLY WAY TO "PROTECT INNOCENT CHILDREN" FROM "STRANGER DANGER" a.k.a. SNELLING IS TO PUT SNELLING TO DEATH.

"Stranger danger" is commonly understood to refer to child molesters and child abductors. The stranger danger program is a program that was written by the Chelshire Junior Women's Club. It is internationally, nationality accepted and locally accepted. It has been taught to children and adults for decades by law enforcement, via public announcements, literature, media outlets and at grade schools. The purpose of the program and what the words "stranger danger" connote is to warn children and adults about child predators, molesters and abductors. Duffy's "stranger danger" arguments only purpose was to inflame the jury by telling them Snelling was a child molester, child abductor a threat to children and the only way to protect innocent children from Snelling was to sentence him to death. The argument Duffy made for death is one of the most inflammatory arguments a prosecutor can make. Duffy knew this yet argued to the jury that the only way to "protect innocent children" from "stranger danger" was by sentencing Snelling to death.

### a. Prosecutorial Misconduct: Duffy's Closing Argument Was Planned And Intentional.

A more inflammatory closing argument was employed and exploited with the second jury. Duffy knew from the voir dire of the second penalty phase jury that:

> Juror # 3 had a strong **core biblical beliefs** that the **death penalty was appropriate when children were** victims. (R5/20/08 p.40 - 43, R6/5/08 p.48)
>
> Juror # 8 believed that if a **child was a victim the death penalty** was warranted. (R5/20/08 p. 98 - 99, 105, R6/5/08 p.48)
>
> For Juror #10 it would be "extremely difficult...to serve on the jury" because **a relative a "young girl",had been murdered.** ® 5/20/08 p. 116-117)
>
> Juror # 21 had two relatives who were murdered and that she was "unhappy" with the murder's prison sentence. Duffy than heard Juror # 21 state her belief that the **death penalty "should be utilized more often than it is...[in circumstances involving] children [and] someone** unable to protect themselves." (R5/20/08 p.249 -252)
>
> Juror # 27 thought the remedy was to **"Hang em"** if a child was involved. ® 5/21/08 p. 31)
>
> Juror # 38 answered in his juror questionnaire when asked if a defendant should get a life sentence he answered, "No. I find they sit and get a free ride." Juror # 38 believes that the **death penalty was not "enforced far as enough"** and that he would be in favor of the **death penalty** in **every case** involving the **murder of a child**. (R5/21/08 p. 219-223)
>
> Juror # 66 was for the death penalty for defendants that "**hurt children**". ® 5/22/08 p. 127)

**b. Prosecutorial Misconduct At Opening Statements: Duffy Intentionally**

**And Improperly Interfered With Snelling's Right To Counsel.**

**i. Duffy Implies To Second Jury That First Jury Found Evidence of Sexual Assault.**

Snelling's counsel correctly pointed out in her opening statement to the second penalty phase jury that, "there was no evidence of sexual assault". Duffy knowing the trial court previously entered a directed verdict dismissing the predicate felony of sexual assault because there was not "any evidence" of it's commission. Duffy then misstated the record in front of the 2nd penalty phase jury, "I am going to object at this point. This has already been decided by the first jury." THE COURT: Sustained. ® 5/28/08 p. 77-78).

**ii. Duffy Intentionally And Improperly Obstructs Snelling's Counsel's Ability To Address The Jury On The Law.**

The trial court instructed the 2nd penalty jury that, "The law does not presume what is the appropriate sentence." In her opening remarks to the penalty phase jury Snelling's counsel correctly paraphrased the instruction the jury were moments earlier given, "There is no presumption under the law that death is the appropriate sentence when someone has been ...convicted of 1st Degree Murder and an aggravating factor has been found." The State immediately interrupted counsel with a frivolous objection and again misled the jury, "I am going to object to that. That misstates the law your honor. ® 6/5/08 p.12)

**iii. Duffy Intentionally And Improperly Obstructs Snelling's Counsel's**

**Ability To Address The Jury On The Facts.**

Snelling's counsel attempted to address the quality and quantity of evidence relevant to cruelty, which of course was evidence relevant to the jury's evaluation and comparison of the sole aggravator of cruelty to the mitigation offered, in it's determination if the mitigation was sufficiently substantial to call for leniency. Snelling's counsel attempted to address the evidence that went to the element of consciousness and/or foreseeability, "And in this case, it sounds like her loss of consciousness came on quickly . . .Look at the facts of this case. . . no weapon was brought with him. Okay, the murder was not planned. It was something that happened, for whatever reason." The State interrupted counsel, "My objection your honor is they're bound by premeditated murder." The trial court sustained the objection. ® 6/5/08 p.16)

**iv. Duffy Intentionally And Improperly Obstructs Snelling's Counsel's Ability To Address The Jury On The Evaluation and Comparison of the Sole Aggravator To Mitigation.**

Snelling's counsel attempted a second time to address the evidence relevant to cruelty. Snelling's counsel also attempted to address mitigation, impulsive conduct. The quality and quantity of evidence that went to the element of consciousness and/or foreseeability was relevant to the jury's comparison and evaluation of the sole aggravator to the mitigation evidence. "This does not change the verdict of premeditated murder, and I'm not trying to suggest that it is . . . it happened without a

great deal of planning. . . the weapon was derived from the location itself . . . it was upstairs where she was. So there was a certain element of impulsiveness..." The State again made a frivolous objection, "Again, I object to the impulsiveness, your Honor. He's been found guilty...of premeditated murder. The trial court repeated "sustained" twice. ® 6/5/08 p.16)

**v. Duffy Capitalizes On His Interference With Snelling's Counsel's Ability To Address The Law And Facts.**

Duffy in his closing summation argued the same facts and law he improperly prevented, with the trial court's assistance, Snelling's counsel from addressing, "The main reason he deserves the death penalty is because of the facts of the case. . . He planned this murder out and killed. . . What that means and what you must accept is that he also attempted to sexually assault Adele Curtis. . ." ® 6/5/08 p. 29-31)

**c. Duffy Misleads Judge Akers**

At the conclusion of Snelling's first mitigation witness's testimony Duffy approached the bench and made a false statement to the trial court. Duffy falsely represented to the trial court what Rodriguez was asked on direct, *"you heard questions and the like concerning his criminal history."* Duffy then claimed that Snelling's counsel had opened the door to character evidence on cross-examination. No such question was asked by Snelling's counsel of Rodriguez and no such answer was volunteered by Rodriguez. The words, "crime", "criminal, record" or "criminal history" never passed

the lips of either Snelling's counsel or the witness. The representation of Duffy to the trial court was not only false it was intentionally false. There was no mitigation offered to rebut through cross. Duffy's tactic was to use Snelling's criminal history and arrest, *as provided by Duffy's narrative*, as an aggravating factor and as an affirmative reason for the jury to impose death. The trial court permitted the Duffy's onslaught over Snelling's objection for a mistrial. ® 5/28/08 p. 126-127, 5/29/08 p. 7-11)

**d. Duffy Capitalizes On Misleading Judge Akers: Character Assassination Through Laura Rodriguez**

Duffy began to testify to the jury through Snelling's mitigation witness Rodriguez. Duffy brought up the highly inflammatory material he planned on using at closing as the reason for death. Rodriguez having offered no opinion "concerning his criminal history" was simply used as a vehicle by Duffy to set up his "protect innocent children" from "stranger danger" argument for death. Duffy began, "he had done was exposed his **genitalia to young children**? . . . in fact, he exposed his **genitalia to other small children** . . . he was arrested for **indecent exposure** in 1987?" Duffy had the court reporter read back his testimony in the form of a question, "Had I heard that he was arrested in 1987 for **indecent exposure**?" Duffy continued testifying against Appellant "in 1987, that he had been arrested for - - **indecent exposure**?" Duffy continued again and again repeating the same thing for maximum mortification of the jury, "in 1988, he was again arrested for **indecent**

**exposure**...he was arrested again in 1988 for **indecent exposure**. . .how about if he had pled guilty or been convicted. . .lets go to 95 and 96...he had been arrested for **exposing himself** to **several little boys** and **little girls** . . . he **exposed himself** to **several small children** . . ." Over objection the prosecutor continued testifying against Snelling, "...in 1996, he pled guilty to **indecent exposure** to these **little children"** Duffy mislead Judge Akers and through cross-examination testified to highly inflammatory unproven assertions and made his closing argument through the witness and repeated it again in closing demanding the jury "protect innocent children" and impose death. No doubt the State will claim misleading Judge Akers and the cross-examination was wholly unrelated to Duffy's "stranger danger" for death argument at closing.(R 5/29/08 p. 8-16).

**e. Duffy Presents Irrelevant Prejudicial Evidence: Skinned Alive Adult & Murdered Little Boy.**

In preparation for his the only way to protect innocent children from stranger danger is death argument Duffy solicited irrelevant and highly prejudicial evidence from Radar. Duffy solicited gruesome facts of crimes committed against a ***child, a little boy*** from Radar's last death penalty case. With Duffy's prompting Radar disclosed that the last defendant he put on death row had "murdered a man and skinned him alive and brutalized and terrorized a little boy and killed a little boy." This drew a strong objection. (R. 6/3/08 p.88)

**f. Duffy Vouching For Radar: The Merger of the State & The Snitch- Me & You, You & I, I & You.**

Duffy, after soliciting irrelevant, unrelated and highly prejudicial "little boy" and "skinned alive" homicide evidence from Radar, then went on to vouch for Radar over objection. Duffy went on and on and on, "You" and "me", "you" and "I", "I" and "you" x 4. After the merger of the State and the Snitch was complete Duffy finished with "why" Radar (or was it Duffy) was "...here today..." over a sustained vouching objection Duffy asked the last question twice prompting a second vouching objection.

> DUFFY: Did **you** have a conversation **with me** about coming to court.
> RADAR: [Affirmed]
>
> DUFFY: Did **you agree** to come voluntarily **whenever I** requested **you** to come?
> RADAR: [Affirmed]
>
> DUFFY: Did **I offer you** anything in reward for that ?
> RADAR: No sir.
>
> DUFFY: Did **I give you** any money ?
> RADAR: No sir.
>
> DUFFY: Did **I say that I'd give you** a get out of jail free card?
> RADAR: No sir
> (6/3/08 p.88-98)

The defense never made any allegation before the jury that Duffy personally had given anything to Radar. Duffy created the issue he wanted. Duffy put his own

personal credibility at issue with the jury, bolstered Radar's testimony with his (Duffy's)credibility, argued Radar's credibility at closing and not only vouched for Radar personally but asserted that every member of the State did also. Duffy improperly enhanced the State's case and got the jury to sentence Appellant to death.

**g. After Vouching For Radar Himself Duffy Calls Stuebe To Vouch For Radar**

Although Radar had just testified and although Duffy had just finished vouching for Radar himself Duffy called Stuebe to vouch for Radar. This drew an objection for vouching. (R6/3/08 p.205-208)To set it up Duffy first asked, "did you supply Mr. Radar with any information such as police reports or facts of the murder...?" After securing a no Duffy had Stuebe repeat Radars testimony. (6/3/08 p.209-211) The defense never accused Stuebe of providing Radar with information or police reports. The defense contended Radar learned of the case through Crime Stopper and by going through Snelling's materials provided by counsel.

**h. Prosecutorial Misconduct At Closing Argument:**

**i. Duffy Keeps Vouching At Closing.**

At closing Duffy injected himself personally into the proceedings over 40 times "I", "We" and expressly personally vouched for Radar and vouched that every member of the State vouched for the State's case and vouched for Radar. Duffy falsely told the jurors, "Jerry Radar came forward in front of you without anything to

gain." Duffy than vouched:

> **"Do you think I'd be standing up here or any member of the State would be standing up here and ask you to** convict or **give the death penalty** to this defendant based solely on Jerry Radar's testimony? Of course not."
> (6/5/8 p44 L13-19)(emphasis added)

Snelling's objection for vouching was sustained. Duffy ignoring Judge Akers' ruling, continued injecting himself personally into the proceeding, continued vouching for Radar, continued vouching for the State's case and continued vouching for the attempted sexual assault predicate felony. Duffy went so far as to link the State and himself personally with Radar and link his(Duffy's) personal narration with Radar's narrative,

> "Jerry Radar is totally corroborated in this case . . . Jerry Radar was corroborated...**.everything Radar said matches what we[9] have**...do I ask you...**He [Radar] narrates the story...I just narrated to you**. He supplies meaning. Seeing her, wanting to get some..."
> ® 6/5/08 p.44-45 L9-13,46)

### ii. Duffy Lies To Jury About Radar's Criminal Record And Snelling's Defense Counsel's Statement.

At the penalty phase closing Duffy intentionally misrepresented Snelling's counsel's argument, "defense counsel has the temerity to suggest that Mr. Radar should get the death penalty..." This drew an objection which was sustained.

---

[9]. "We" is universally understood in the English language to refer to "I and others.".

(R6/5/08 p.45) Duffy then changed gears and made another false statement to the jury "Mr. Radar's felonies are all for non-violent crimes and he's cooperated with law enforcement." This drew an objection which was overruled. (R6/5/08 p.46) The trial court permitted the jury to remain misled by Duffy - Radar had a kidnaping conviction out of Texas which the defense was precluded from mentioning.(R 6/5/08 p.44-46) Radar did have a kidnaping conviction and admitted to it several times on the record to the first jury. ® 5/16/07 p. 29) However, the jury that sentenced Snelling to death only heard Duffy's intentional misrepresentation of Radar's lack of criminal record.

### iii. Duffy Exploits Imbordino's Violation of The Professional Code of Conduct.

Having no reliable or credible facts to support especially cruel, Duffy linked the attempted sexual assault predicate felony and Snelling's prior public sexual indecency conviction(and arrests) and argued the conjoined (by Duffy) attempted sexual assault and public sexual indecency arrests as aggravation. Duffy further argued the two proved Snelling a.k.a. "stranger danger" was a threat to "innocent little children" and the only way to stop him was the death penalty. Duffy was able to paint this picture on the soiled canvas of a fraudulent indictment that Imbordino had provided. The State was now going to benefit again from Imbordino's intentional violation of ER3.8 and ER8.4. The State was going to benefit from it's fraudulent indictment of Snelling

on two predicate felonies with no evidence much less probable cause. Duffy planned to make the give Snelling, a.k.a. Stranger danger, death to protect innocent children since at least jury selection. See Duffy's statements.(R5/27/08 p.171 L21-p.174).

*Duffy inflamed the jury by telling them:*

> The main reason he deserves the death penalty is because of the facts of the case. . .what that means and what you must accept is that he also attempted to sexually assault Adele Curtis. . .all first degree murders don't deserve the **death penalty**. But this extremely cruel one does. **Why?** A helpless and defenseless elderly woman. . . **He has a prior criminal record.** We know of the **1988 indecent exposure** . . .We also know that he was **exposing himself to little children in the neighborhood**, which he was convicted of...he...purposely cut a cord to put around her neck for **sexual purposes and to kill her. He wanted to sexually assault her. We'll never know if he did**, but he attempted to. The body was too \ decomposed to tell.. . The **death penalty in this case** will **protect innocent children** and elderly women. It protects society in general .**The only true protection against this stranger danger, the case we all fear is death.** ® 6/5/08 p. 30, 35-38, 48)

**iv. Judge Aker's Tells The Jury They Can Consider Duffy's Over The Top Argument For Death.**

At closing Duffy was as unrestrained in his argument for death as in the matter of (http://www.supreme.state.az.us/dc/2009). *See* Appendix. Duffy was unrestrained by ethics, court rules, procedural rules, case law and most of all unrestrained by the trial court. Counsel for Snelling repeatedly objected to Duffy's misconduct. Defense

counsel objected to Duffy's ***sexual propensity*** argument. The trial court overruled the objection and instructed all:

> "the jury may assess the evidence **any way** that they feel is appropriate."
>
> (R6/5/08 pp48 L15-19)

It was ***immediately*** after Judge Akers told the jury they could "assess the evidence anyway ...they feel..." that Duffy told the 2nd jury:

> "The death penalty in **this case** will **protect innocent children** and elderly women . . . The only **true protection** against this **stranger danger**, the case we all fear **is death**."
> (R6/5/08 pp48 L19-22)(emphasis added)

Duffy knew from voir dire that Jurors # 3, 8, 10, 21, 27, 38, and 66 all wanted the death penalty when children were involved. The stranger danger argument was Duffy's knock out punch or rather low blow for death.(R5/20/08,p.37-50;6/5/08 p.30,35-38,48) As one commentator noted, when courts allow prosecutors to commit acts like these without severe reprisals, "[t]he message sent to young prosecutors by disgraceful episodes like this one - episodes that occur all over the country - is three-fold: (1) if misconduct is necessary to convict a guilty defendant, by all means do it; (2) try not to get caught, because that complicates matters; (3) but if you do get caught, you can count on the court to bail you out. . . ." Joseph F. Lawless, Jr., *Prosecutorial Misconduct*, Kluwer Law Book Publishers, Inc. 1985, p. xii.

**j. Duffy's Misconduct Was Intentional , Snelling Was Prejudiced and**

**Double Jeopardy Applies.**

Assuming this Court elects not to grant relief based on Duffy's conduct at the first penalty phase proceeding Snelling submits this Court should impose a natural life sentence based on the violation's of Snelling's rights at the 2nd penalty phase proceeding. Duffy's conduct was intentional and Snelling was prejudiced. In a criminal proceeding, jeopardy attaches when a defendant faces the risk of a determination of guilt. *Serfass v. United States, 420 U.S. 377, 391-92 (1975).* In this case, Duffy acted in bad faith, intentionally and knowingly not with one penalty phase jury but with two penalty phase juries. Duffy tailored his penalty phase opening, cross and closing to exploit the seated jurors strong belief that the death penalty was necessary to protect children. The jury was surely influenced. This Court has held that *Article 2, Section 10 of the Arizona Constitution* provides even greater protection than does the double jeopardy clause. *Pool v. Superior Court, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984)*. In *Pool,* this Court held that double jeopardy protections prohibited a retrial when a mistrial was declared (a) because of improper conduct by the prosecutor, (b) the prosecutor's misconduct was not the result of legal error, negligence, mistake, but was, rather, done with an improper purpose, and (c) the prosecutor's conduct causes prejudice to a defendant which cannot be cured short of a mistrial. *Pool, Id.. at 108, 677 P.2d at 271; Miller v. Superior Court, 189 Ariz. 127, 130, 938 P.2d 1128, 1131 (App. 1997)* ("when a defendant's motion for a mistrial is caused by prosecutorial

misconduct designed to provoke a defendant into making the motion, jeopardy remains attached and retrial is barred."). *See also, State v. Minnitt, supra*, wherein this Court held that where a prosecutor engages in egregious conduct clearly sufficient to require a mistrial but manages to conceal his conduct until after trial, the same circumstances are present as in *Pool and Jorgenson* and the same reasoning applies.

In this case, from the drafting of the complaint, including the sexual assault and/or attempted sexual assault, the manipulation of the grand jury, the failure to correctly respond to the grand juror questions, continually vouching for the State's case and vouching for Radar, misrepresenting Radar's criminal record, improperly arguing for death to prevent early release, improperly arguing for death to protect innocent children from stranger danger, the prosecution persistently and confidently mislead the jury and impugned the integrity of the entire criminal justice system. With this misleading presentation is coupled with the trial court's abuse of discretion and the State's vouching the only viable conclusion is that these errors permeated the trial, affected the verdict and resulted in structural error that cannot be cured with another sentencing. *State v. Minnitt, supra.* Snelling's death sentence should be reversed and he should be sentenced to life in prison.

## B. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DETERMINE AND APPOINT A QUALIFIED CAPITAL DEFENSE TEAM. THIS VIOLATED SNELLING'S RIGHTS UNDER THE U.S. CONSTITUTION 5th, 6th, 8th & 14th AMENDMENT AND THE ARIZONA CONSTITUTION, ARTICLE 2 § 3,4,10,15,23,24.

## 1. STANDARD OF REVIEW

Constitutional issues are reviewed de novo. *State v. Moody, 208 Ariz. 424, 445, 94 P.3d 1119, 1140 (2004)*. Such errors cannot be harmless and, therefore, are structural error. *Sullivan v. Louisiana, 508 U.S.275, 113 S.Ct. 2078(1993)*

## 2. ANALYSIS.

### a. The Trial Court Breached It's Duty To Provide Snelling With His 6th Amendment Right To Qualified Capital Counsel And A Complete Capital Defense Team.

Snelling was denied his right to counsel and right to due process. A capital defendant's 6th Amendment "counsel" is defined by the A.B.A. Guidelines and has minimum mandatory qualifications and requires more than one attorney. A capital defense team is required to effectuate a capital defendant's 6th and 14th Amendment rights. The expression of these fundamental rights are expressed in *Rule 6.8 of the Arizona Rules of Criminal Procedure("Rule 6.8"). Rule 6.8* does not expressly say who is to determine a lawyer's eligibility to represent a capital defendant, and in particular the rule does not specify to whom a prospective capital counsel "[s]hall have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases," as stated in *Rule 6.8(a)(3). Rule 6.8* must be read in conjunction with *Rule 6.5. Rule 6.5* clearly places the duty of appointing counsel on the court. The trial court has the authority to determine the qualifications of a prospective capital defense team and the authority to appoint a qualified capital

defense team. Moreover, the trial court has a duty to determine the qualifications of a capital defense team to assure capital defendant is afforded his right to counsel and due process. *State v. Anderson, 197 Ariz. 314 (2000)*, by analogy supports Snelling's argument that the trial court's failing in its duty to determine and appoint a qualified capital defense team is structural error.

In *Anderson*, this Court stated that a violation of *ARCP, Rule 18.5*, listing the procedures for selecting a jury in a capital case, was structural error, and should not be reviewed under a harmless error analysis even though Anderson's guilt was overwhelming. *Id. at para. 22.* ". . .[T]his argument leads us down a slippery slope that could be used to justify overlooking every structural error, from the size and composition of the jury to the denial of a jury trial or the ***right to counsel***." *Emphasis added) See, Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991)* (". . . errors that create 'defects. . . in the trial mechanism' itself affect the 'entire conduct of the trial from beginning to end,' damage 'the framework within which the trial proceeds,' and are therefore not subject to harmless error analysis'") The *Anderson* opinion went on to opine: "The ruling of the amended rule. . is not ambiguous. . .the rule is violated when the judge fails to comply with the requirement. . ." Id. Likewise, the trial judge failed to comply with the requirements of *Rule 6.5* and *6.8.* Snelling was denied his right to counsel, Snelling was denied a complete capital defense team. It was a direct result of the trial court's failure to comply with *Rule 6.5 and 6.8.*

**b. Snelling's Trial Court Proceedings.**

On December 20, 2005 the trial court permitted the Maricopa County Public Defenders Office to withdraw as attorney of record for Snelling and affirmed the trial date of October 3, 2006. The trial court failed to appoint a new capital defense team for Snelling on December 20, 2005. Instead, the trial court delegated the task of appointing new capital counsel to the Office of Contract Counsel. The Office of Contract Counsel is a non-record legislative branch entity. The record is silent as to what minimum requirements the Office of Contract Counsel employed in determining the qualifications or members of a Snelling's capital defense team. The record is silent regarding when or if Snelling was ever afforded a qualified or complete capital defense team under the *A.B.A. Guidelines or ACRP, Rule 6.8.*

As of June 26, 2006, no notice of appearance was filed indicating who was defending Snelling and no order identifying Snelling's new capital defense team and/or their qualifications was addressed or entered by the trial court. (Item 36, R 12/20/05 p.6) More than 6 months passed since the trial court delegated the task of appointing new capital counsel to the Office of Contract Counsel. In that six month period Snelling had only one 10 minute in person visit and no phone contact from an attorney. In that meeting the attorney never discussed anything pertaining to Snelling's capital case. Snelling phoned the attorney repeatedly (8 times) and left voice messages yet still heard no response. (Item 37).

Snelling, having received no contact or assistance from the attorney who visited him at the jail for 10 minutes, filed a pro per Motion To Change Counsel. On June 26, 2006 he asked that, "attorney Gerald Gavin be withdrawn as my counsel of record and that new contract counsel be substituted". (Item 37). On July 5, 2006 Snelling filed a motion entitled "Rescind Motion To Keep Counsel" [sic] that Snelling apparently wrote and signed on June 30, 2006. Apparently Mr.Gavin visited Snelling for a second time in 6 months in the less than the four days that elapsed from Snelling's pro per Motion To Change Counsel. Mr.Gavin persuaded Snelling to keep him as his attorney. Snelling stated in his motion that he was "reassured counsel is effective for a satisfactorily defense." (Item 38, R 9/1/06 p. 3-5) On September 1, 2006 after Snelling had been in custody with capital charges pending for over seventeen months (Item 9), a hearing was ordered by the trial court in response to Snelling's pro per motion for Change of Counsel. The trial court did not know the circumstances of how Mr.Gavin came to be Snelling's attorney. The trial court did not know whether Mr. Gavin was "retained" or appointed. After resolving Snelling's Motion To Change Counsel the trial court asked Mr. Gavin, "Wait a minute. What is your representation? Are you privately retained or -". Mr.Gavin explained, "there is a conflict with the Public Defender's office, and they assigned to, I think, to the Legal Defender's who assigned me". Mr. Gavin went on to explain he had picked up the file "several months" earlier and had four capital cases set for trial. The State put Mr.

Gavin on notice that it was going to seek a cutoff date for disclosure of mitigation. Prophetically the State told the trial court, "will need a cutoff date for the defense disclosure of mitigation…it is a huge problem in these capital cases, getting that information at the last minute, and then scrambling to try to get an expert to rebut it."(R 9/1/06 p. 4-17) The trial court never made a determination of the qualifications of Snelling's lead counsel, co-counsel or mitigation specialist or whether Snelling was provided an investigator (he was not). (Item 36, 40). Mr.Gavin appeared for the first time as Snelling's attorney of record as ordered by the court. Gavin's first court appearance was more than seventeen months after the State began preparation for a capital sentencing proceeding. (Item 1, Warrant Fact Sheet, Other Information) and more than 8 months after Snelling had an attorney of record. (R. 12/20/05).

Mr. Gavin never disputed that he only visited Snelling for "10 minutes" in six months other than the second visit in response to Snelling's Motion For Change Of Counsel. The trial court asked not a single question of Mr. Gavin regarding how he could be prepared for a death penalty trial with basically no contact with his client. ® 9/1/06) Mr. Gavin provided no pre-trial written notice of potential mitigation or mitigation witnesses. On the first day of Snelling's trial Mr. Gavin mentioned he anticipated calling his mitigation specialist as a witness to give some background into the Snelling's life.(R 4/18/07 p.44-45). Contrary to his pre-trial representation to the trial court and the State Mr.Gavin did not call his mitigation specialist to testify as to

Snelling's background at the penalty phase. Nor did Mr. Gavin call any medical or mental health experts. The mitigation specialist secured by Mr.Gavin never attended a single court proceeding including the aggravation phase or the penalty phase.

**c. Snelling's Post-Aggravation Phase Court Proceedings.**

Following the first jury's finding of the sole aggravator of cruelty and hanging on penalty, an issue arose regarding Snelling's capital defense team. On September 4, 2007 Snelling filed a Motion for Change of Counsel. (Item 187) Snelling alleged that, "shortly after the end of the first trial Mr. Gavin came to me with a waiver form explaining of his intended divorce from his paralegal/wife. His marital problems during the first trial clearly obscured his effectiveness to defend me...his complete incompetence, and unprofessional conduct which clearly shows consistent lying, causes me to ask this court for his removal..." (Id., p.3). Following the motion by Snelling for Change of Counsel Mr. Gavin made disclosures to the trial court. Mr. Gavin made statements to the trial court that allowed for the following conclusions:

· Mr. Gavin had selected his wife as Snelling's mitigation specialist; that during the month of June 2007 (the month of the first penalty phase trial) Mr. Gavin was served by a process server in the driveway of his home by Snelling's mitigation specialist's attorney with a divorce petition; that Snelling's mitigation specialist apparently had been finalizing the drafting, filing and service of a divorce petition against Mr.Gavin the month leading up to Snelling's penalty phase proceeding (which Snelling's

mitigation specialist did not attend); and Mr. Gavin declined to provide any other information in open court but offered to do so in camera. ® 9/4/07 p. 1-8)

The trial court failed to appreciate the actual conflict of interest Mr. Gavin had in selecting his wife as Snelling's mitigation specialist. Mr. Gavin held a vested interest in all of Snelling's mitigation specialist's income. The trial court apparently also failed to appreciate the conflict that existed before and during Snelling's penalty phase proceeding. A key and mandatory member of the capital defense team was preparing to and did file a law suit against lead counsel the same month as the penalty phase proceeding. The trial court never asked Mr. Gavin if he appraised Snelling of a conflict (1) prior to selecting his wife, (2) prior to Snelling's penalty phase proceeding and/or (3) whether Snelling waived the conflict. (See Rule 42 ER 1.7(a)(2)) The trial court also failed to inquire on the reason for the absence of Snelling's mitigation specialist from his trial, aggravation hearing and penalty phase proceedings. The trial court failed to ask whether her absence was related to the law suit she served Mr. Gavin within the month of the penalty phase proceeding. ® 9/4/07 p. 1-8)

**d. The Failure Of The Trial Court To Comply With Rule 6.5 And 6.8 Is Structural Error.**

The Committee Comment to Rule 6.8 explains that the purpose of this rule "is to establish standards for the appointment of counsel for indigent defendants in all stages of capital litigation." The committee goes on to refer to the ABA Guidelines, Guideline 2.1, and the NLADA standards, standard 2.1. In this case, there was no

determination that counsel was qualified to be appointed. *See, Powell v. Alabama,* 287 *U.S. 45 (1935)*, wherein the United States Supreme Court reversed a death sentence because counsel's performance was rather pro forma and not zealous or active. The failure to provide Snelling with his fundamental right to the basic resources mandated to effectuate his right to counsel and due process is a structural defect in the proceedings and infected the integrity of the proceedings. *Duncan v. Louisiana, 391 U.S. 145(1968).* It was the trial court's duty to appoint qualified counsel and a complete and qualified capital defense team and make that determination on the record. That duty is not discharged by having another branch of the government make an appointment. Secondly, there is no record of the qualifications of any of Snelling's capital defense team. Third, Snelling did not receive an investigator prior to the first jury's finding of cruelty. Fourth, Mr. Gavin's wife, Snelling's mitigation specialist, did not attend a single court proceeding. Nor is there any reference to her anywhere in the record other than on September 7, 2007 when Mr. Gavin was removed as counsel of record. Mitigation specialists are mandatory as well as the funds to assist them. *State v. Bocharski, 200 Ariz. 50, 22 P.3d 43 (2001); Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003).* The trial court's failure to comply with Rule 6.5 and Rule 6.8 was structural error. Snelling's death sentence should be reversed and a sentence of life imprisonment imposed. *See State v. Anderson, 197 Ariz. 314 (2000)*

## C. THE ESPECIALLY CRUEL AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONALLY VAGUE IN LIGHT OF RING V. ARIZONA.

## SNELLING'S RIGHTS UNDER THE U.S. CONSTITUTION 5TH, 6TH, 8TH & 14TH AMENDMENTS AND THE ARIZONA CONSTITUTION, ARTICLE 2 § 3,4,10,15,23,24 WERE VIOLATED.

### 1. THE ONLY AGGRAVATOR FOUND WAS CRUELTY.

The prosecution submitted two aggravators to the aggravation phase jury: cruelty and pecuniary gain. The jury found only cruelty. The first penalty phase jury hung on the sentence and a second penalty phase jury was empaneled. The only aggravating factor the 2nd penalty phase jury was permitted to consider was of cruelty

### 2. STANDARD OF REVIEW

Whether an aggravating factor is vague is a question of law. Questions of law are reviewed de novo. *State v. Rayes, 206 Ariz. 58, 60, 60, 75 P.3d 148 (App. 2003); State v. Garcia, 162 Ariz. 471, 473, 784 P.2d 297, 299 (App. 1989); State v. Tucker, 215 Ariz. 298, para. 27, 160 P.3d 177, 189 (2007) cert. den. 128 S.Ct. 296 (2007).* Vague standards are unconstitutional because they fail to adequately "channel the sentencing decision patterns of juries." *Gregg v. Georgia, 428 U.S. 153, 195, n. 46 (1972).* This Court reviews de novo whether the trial court has properly instructed the jury on the law in a capital case. *State v. Glassel, 211 Ariz. 33, 53, ¶74, 116 P.3d 1193, 1213 (2005)*; *Bell v. Cone, 543 U.S. 447, 453 (2005)*. A jury instruction that reduces or widens the State's burden of proof cannot be harmless and is structural error. *Sullivan v. Louisiana, 508 U.S. 275, 280-82 (1993).*

### 3. THE CRUELTY INSTRUCTION TO THE FIRST JURY WAS VAGUE.

The first jury found especially cruel but hung at the penalty phase ("aggravation jury"). The first jury was instructed on the "definition" of "especially cruel."(R 5/23/07 p.15) The trial court advised the first jury they were to decide whether the victim suffered "great" or "significant" "pain or suffering" and either "extreme physical pain" or "extreme mental anguish." The problem with these definitions is that a jury has no point of comparison or further guidance to decide whether the cruelty was extreme or simply what ordinarily accompanies death by strangulation. As a result, the definition (and the aggravator itself) was vague both on its face and in application to the facts of Snelling's case. "[A]n ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous'" (or in this case cruel). *Maynard v. Cartwright, 486 U.S. 356, 364 (1988) (quoting Godfrey v. Georgia, 446 U.S. 420, 428-429 (1980))*. How the jury will interpret this factor can "only be the subject of sheer speculation." *Godfrey, 446 U.S. at 429* (discussing the aggravating factor of "outrageously or wantonly vile, horrible and inhuman"). A standardless capital punishment statute allows for the imposition of the death penalty in an arbitrary and capricious manner and violates due process. *Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988).* "[T]here is no serious argument that Arizona's 'especially heinous, cruel or depraved' aggravating factor is not facially vague." *Walton v. Arizona, 497 U.S. 639, 653 (1990).* Using vague words to define vague words does not cure the constitutional defect. *Cartwright v. Maynard, 822 F.2d 1477 at 1489 (10th Cir. 1987), aff'd*

*Maynard v. Cartwright, supra*. ("Vague terms do not suddenly become clear when they are defined by reference to other vague terms.") Having a judge make this determination was "constitutionally significant" and "crucial" to upholding the aggravating circumstance. *Id. at 653.* Therefore, it was "irrelevant" that the statute itself did not narrow the definition. Id. Under the new statute these rationales no longer exist. *See, A.R.S. § 13-703.05.* Moreover as explained in section 4 below the second jury that imposed death was given a different and incorrect legal definition of cruelty to evaluate and compare against Snelling's offered mitigation than the instruction given the first jury that made the finding of especially cruel. This incorrect and different definition of cruelty given to the jury (2nd) made the second definition more vague than the first, a due process violation and created a second constitutional violation, a 6th amendment violation: Snelling *was not sentenced to death on an aggravator found by a jury beyond a reasonable doubt*. This is incompatible with the Sixth Amendment. *Ring v. Arizona, 536 U.S. 584 ,122 S.Ct. 2428(2002).*

## 4. THE JUDGE'S NOTE TO THE SECOND JURY INCORRECTLY DEFINED CRUELTY. THIS INSTRUCTION WAS VAGUE AND THE SECOND JURY CONSIDERED A DIFFERENT AGGRAVATOR THAN THE FIRST JURY.

The second jury was told that cruelty had been found by the first jury and they were to accept that finding. However, it was the second jury's responsibility to evaluate the quantity and quality of evidence in support of cruelty and compare it to the evidence offered in mitigation and determine whether there was substantial

mitigation to call for leniency. On June 6, 2009 the second jury submitted a written note to the trial court:

> "In light of the aggravating circumstance,
> how does the law define cruel manner?" (Item 320)

The trial court had not previously defined cruelty for the second jury. ® 6/6/08 p.3) The trial court responded to the juror question and instructed them that,

> "cruelty is committed in an especially cruel manner when a defendant either intended to inflict mental anguish or physical pain upon the victim, or reasonably foresaw that there was a substantial likelihood that the manner in which the crime was committed would cause the victim to experience mental anguish and/or physical pain before death." (Item 320)

This language went to Snelling's state of mind only. Basically it reduced the definition of cruelty to a definition of attempted cruelty. This instruction did not require the jury to consider the victim's state of mind, whether the victim experienced physical pain, mental anguish or whether the victim was conscious at the time of death. The trial court omitted required language that the victim was actually conscious at the time of death and actually suffered physical pain or actually suffered mental anguish. The trial court's incorrect instruction to the second jury was defective, different and diluted from the definition of especially cruel the trial court provided to the first jury. Thus, the first jury found cruelty based on a different standard than the second jury employed in evaluating the aggravator and in making the comparison with Snelling's offered mitigation. The jury that sentenced Snelling to death did so with the

aggravator of “attempted” especially cruel. This illegally and unconstitutionally increased the quality and strength of the aggravator, impaired the second juries' ability to properly evaluate the aggravating factor found by the first jury, impaired the second juries ability to properly compare the aggravator to the offered mitigating factors and tipped the scales in favor of the State and a death verdict. Instead of "narrowing" especially cruel aggravating factor the trial court's instruction "widened" it made it vague and caused the 2nd jury to impose a death sentence on an aggravator different in kind and degree from that found by the 1st Jury. The trial court failed to instruct the second jury that:

> “To find the murder was committed in an especially cruel manner, you must find that the victim consciously suffered.”

The prejudice to Snelling as a result of this incorrect instruction is caused because the incorrect instruction emphasizes and gives great weight to State witness Radar’s testimony. Radar’s testimony emphasized Snelling’s state of mind, “he said he choked the bitch to death." .(R6/3/08 p.53) The faulty cruelty instruction addressed Snelling’s state of mind only. Secondly, not only was the trial court's instruction to the second jury incorrect as a matter of law it was also vague. Vague standards are unconstitutional because they fail to adequately "channel the sentencing decision patterns of juries." *Gregg v. Georgia, 428 U.S. 153, 195, n. 46 (1976).* The answer to the note speaks for itself. That answer resulted in the imposition of the

death penalty being arbitrary and capricious. *In re Winship, 397 U.S. 358 (1970).*

## D. THE ESPECIALLY CRUEL AGGRAVATING CIRCUMSTANCE WAS NOT PROVEN BEYOND A REASONABLE DOUBT. SNELLING'S DEATH SENTENCE VIOLATES HIS RIGHTS UNDER THE U.S. CONSTITUTION 5th, 6th, 8th & 14th AMENDMENT AND THE ARIZONA CONSTITUTION, ARTICLE 2 §§ 3,4,10,15,23,24.

### 1. STANDARD OF REVIEW

This Court will reverse when there is not substantial evidence to support the conviction. *State v. Henry, 205 Ariz. 229, 11, 68 P.3d 455 (2003).* The State must prove any aggravating circumstance beyond a reasonable doubt. *A.R.S. § 13-703(B); In re Winship, Id.; State v. Averyt, 179 Ariz. 123, 876 P.2d 1158 (App. 1994).* If the State fails to present substantial evidence on any one element of an offense necessary for a conviction on a specific charge, the court must, consistent with due process, enter a judgment of acquittal on that charge. *ARCP, Rule 20; State v. Guerra, 161 Ariz. 289, 778 P.2d 1185 (1989).* A murder is not cruel whenever a victim remains conscious for some moments after being attacked. *State v. Soto-Fong, 187 Ariz. 186, 203, 928 P.2d 610 (1996).* Cruelty refers to the suffering experienced by the victim. *State v. Fulminante (Fulminante I), 161 Ariz. 237, 255, 778 P.2d 602 (1989).* A finding of cruelty requires that the victim be conscious at the time of the offense in order to suffer pain and stress. *Fulminante, supra.* Otherwise, the evidence would be inconclusive that the victim actually suffered. *State v. Hinchey (Hinchey I), 165 Ariz. 432, 438, 799 P.2d 352 (1990).* To support a finding of cruelty the State must prove beyond a reasonable doubt that

the victim was conscious and suffered physical pain or emotional distress. *State v. Jimenez, 165 Ariz.444, 453, 799 P.2d 785 (1990).* If the evidence is inconclusive, the sentencer may not find cruelty. *State v. Gillies (Gillies II), 142 Ariz. 564, 568, 691 P.2d 655 (1984).*

**2. ANALYSIS.**

**a. Jerry Radar's Testimony.**

Under *State v. Jimenez*, *165 Ariz. 444, 799 P2nd 785(1990)* this record provides insufficient evidence to establish the crime as especially cruel. In *Jimenez*, supra, this Court reversed Jimenez's death sentence finding insufficient evidence to support the trial court's finding of cruelty. *Jimenez* involved a five year old girl victim who was strangled. The victim was conscious when the strangulation began, the victim was in the process of being strangled while conscious, the victim had lost consciousness and was under a bed when the defendant was interrupted by a knock on the door. Jimenez answered the door and then returned to finish strangling the 5 year old girl. In *Jimenez* there was semen found on the inside of the victims clothing. Jimenez confessed he heard the victim crying. This Court held that " Defendant attacked her quickly and by surprise and she rapidly lost consciousness. It is not inherently 'cruel' to murder a victim quickly and by surprise", Id. *165 at 453 - 54.*

Snelling submits that there is less evidence of cruelty in this case than was present in *Jimenez. Also see*, *State v. Prince, 206 Ariz. 24, 75 P.3rd 114 (2003), State*

*v.(Arturo) Canez, 205 Ariz. 620, 74 P. 3d 932 (2003), State v. Antoin Jones, 205 Ariz. 445, 72 P2nd 1264 (2003) , State v. Moody, 208 Ariz. 424, 94 P.3d 1119 (2004), State v. Montano, 206 Ariz. 296, 77 P.3d 1246(2003), State v. Cropper, 206 Ariz. 153, 76 P.3d 424 (2003)* (finding of cruelty reversed, not harmless error, could not find beyond a reasonable doubt that no reasonable jury would fail to find this factor). Assuming Radar told the truth his testimony does not support a finding of cruelty. Secondly, the testimony provided by Radar is suspect and unreliable. Third, the evidence provided by Dr. Buckholtz should not be considered for the reasons set forth in section **b.** below and in the Confrontation Clause argument section that follows.

Radar was called by the State before the first jury. However, he never testified as to whether the victim suffered or experienced any pain. His only statement was that Snelling told him that he cut a cord on the way back toward the bathroom and he heard her yell "Who's there?" ® 5/16/07 p. 20) Snelling then, according to Radar, told her to shut up (Id.), "but she got belligerent and yelled." *(Id.)* Snelling then took the cord and strangled the victim. Radar went on to explain: "He said she fell down, and that there was blood around her head." He then left. *Id. at 21.* There was no testimony regarding consciousness after the initial surprise. Viewed in the most favorable light Radar's testimony is inconclusive on consciousness of the victim, on what if any mental anguish and/or physical pain was experienced by the victim. Even assuming consciousness was established for a few seconds, the second aspect of this aggravator

was unsupported by Radar's testimony. Cruelty requires proof that either the defendant intended by his conduct that the victim would suffer or that the defendant could reasonably foresee that there was a substantial likelihood that the victim would suffer as a result of his conduct. *State v. Anderson, 136 Ariz. 250, 266, 665 P.2d 972, 988 (1983).* The bare fact of suffering is not sufficient. There must be evidence that the defendant actually knew the victim would suffer. *State v. Bolton, 182 Ariz. 290, 311, 896 P.2d 830, 851 (1995).* Radar only confirmed that Snelling ". . .kind of freaked a little bit. . . ." *(Id. at 21)* That the victim just fell down and Snelling wiped off the cord and left. *Id.*

**b. Dr. Buckholtz's Testimony.**

The State called a medical examiner to testify who had not performed the autopsy. The autopsy report was not admitted into evidence. ® 5/15/07 p.73-74) The defense stipulated to the fact that Dr. Mary Dudley had performed the autopsy. That single fact was the only stipulation. There was no stipulation regarding what she observed or the opinions she formed. There was no proof or explanation offered by the State that Dr. Dudley was unavailable. The witness's, Dr. Ann Buckhotz's, testimony regarding consciousness was repeatedly objected to by defense counsel. (R5/15/07 pp.92, 93,94,96,97) Dr. Buckholtz testimony was based on an autopsy report authored by a non-testifying witness and a report that contained double and/or triple hearsay. Dr. Buckholtz testimony was a violation of the confrontation clause and

unreliable under the due process clause. *See, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) (citing Crawford v. Washington, 541 U.S. 36 (2004)).*

Dr. Buckholtz testimony was based on her reading of Dr. Dudley's (the examining Medical Examiner's) near eleven year old report.(R 5/15/07 p.77). Dr. Buckholtz testified: that the victim was "in an advanced stage of decomposition" at the time of the autopsy. Dr. Buckholtz was shown a photo of the victim's body as found in the bathroom (Exhibit 35). Dr. Buckholtz observed that the body was in a state of "purge" where bodily fluids "leak" out of the nose, mouth, lower organs, anus and urinary tract, pool under the body and create the appearance of a red material on the floor or carpet. ® 5/15/07 p.77, 88). Dr. Buckholtz was asked to describe, "any signs of physical injury." The only sign of external physical injury Dr. Buckholtz testified existed were marks on the victim's neck consistent with a ligature. Dr. Buckholtz testified to absolutely no other external sign of physical injury on the victim's body. ® 5/15/07 p.78-80, 89 Exhibits 38,40,42). Dr. Buckholtz testified that Dr. Dudley certified the death as strangulation and listed asphyxia by strangulation.(R 5/15/07 p.81) The only sign of internal injuries Dr. Buckholtz testified Dr. Dudley documented were consistent with the diagnosis of death by asphyxiation strangulation. ® 5/15/07 p.81-87, 89, Exhibits 38,39,40,41,42,45,46)

Dr. Buckholtz had no personal knowledge of whether or not the victim was actually conscious when the strangulation began. Dr. Buckholtz had no basis to

conclude that the victim was actually conscious at the time the strangulation began. No direct or circumstantial evidence was offered by the State before Dr. Buckholtz's testimony that showed what circumstances occurred in the initial encounter (pre-strangulation) between the victim and Snelling and/or the circumstances of the strangulation. The State asked Dr. Buckholtz, "how long Adele Curtis would have been conscious during this strangulation?" Snelling's counsel objected but the trial court overruled the objection. ® 5/15/07 p.94). There was no factual predicate or foundation for this question. Dr. Buckholtz had no basis to answer whether the victim was conscious at the time of death. Dr. Buckholtz side stepped the question. Dr. Buckholtz did not testify how long the victim took to lose consciousness. The only opinion Dr. Buckholtz provided was the possible length of time "live people" remained conscious once strangulation began. Dr. Buckholtz's testimony was based on unidentified "literature" she had read. Dr. Buckholtz testified that;

> "the literature gives us a range. They have to use live people, and put a ligature around their neck. It was anywhere from ten to up to a hundred seconds for the lose of consciousness, and that's with the total encircling of the neck."
>
> ® 5/15/07 p.94-96)

Dr. Buckholtz's testimony was irrelevant and of no weight. She merely testified as to the length of time a "live person" would lose consciousness. This study was different in kind and degree from the facts of the case. The victim had a fractured wind pipe.(Id. at p.86-87) The "live person" from Dr. Buckholtz's unnamed study had

no where near that amount of pressure applied to his/her neck. No “live person” in Dr. Buckholtz unnamed study got a crushed windpipe. (Id. at p.100) Therefore, the inference is obvious. A "live person" could lose consciousness in as little as "10 seconds" with much less force applied to their neck than was applied to the victims who had a crushed wind pipe. If a "live person" who sustains no injury by the force of the ligature loses consciousness in as little as "10 seconds" how quickly did the victim lose consciousness when the force employed was great enough to crush her wind pipe ? One, two seconds, three seconds ? Did the victim immediately faint because of the force employed ? Dr. Buckholtz testimony has no weight and proves nothing regarding length of time the victim was actually consciousness. Her testimony was pure speculation based on an eleven year old autopsy report whose author never testified. (Id. at p. 96) Dr. Buckholtz also admitted there was no way to tell how long the ligature was tied around the victim's neck or if the ligature totally encircled the victim's throat.

The autopsy report Dr. Buckholtz based her testimony on was hearsay. The autopsy report not only included Dr. Dudley's out of court statement's of her observations and conclusions. The autopsy report also contained what all autopsy report's contain hearsay statements for the Medical Examiner who performs the autopsy to review and consider in conjunction with the autopsy in forming her opinions. Autopsy reports contain hearsay statements of 3rd parties documented by

police, hearsay statements of responding emergency EMTs and/or firemen and hearsay statements of police. Dr. Buckholtz testimony was unreliable and a violation of Snelling's right to confront and cross examine his accusers. Moreover, her testimony went to the ultimate issue of the sole aggravating factor, the length of time the victim was conscious prior to death. The medical examiner testified over the repeated objections of Snelling's counsel.(Id. at p.92-95) See Confrontation Clause violation section **F.** below.

Finally, the State's attempt to adopt a theme in questioning Dr. Buckholtz of a "fight" or struggle by the use of hypothetical questions backfired. This "theme" was eliminated as a possibility by Dr. Buckholtz testimony.(Id. p.96,102-108) Dr. Buckholtz testified that there was (1) no way to tell how long the ligature had been on tied to the victims neck;(2)"speculation" to say there was a sexual assault;(3) there was no evidence of sexual assault in the record; and (4)the physical evidence, autopsy and photos made it more consistent with a finding that there was one ligature, held in one position and **not moved**. (5/15/07 pp.99-109)

## E. THE PENALTY PHASE WITH THE SECOND JURY WAS AN UNFAIR AND UNCONSTITUTIONAL PROCEEDING. THE STATE'S BURDEN OF PROOF WAS REDUCED, THE TWO JURIES USED DIFFERENT DEFINITIONS OF CRUELTY AND SNELLING WAS SENTENCED TO DEATH ON AN AGGRAVATOR NOT FOUND BEYOND A REASONABLE DOUBT ALL IN VIOLATION OF THE U.S. CONSTITUTION 5th, 6th, 8th & 14th AMENDMENT AND THE ARIZONA CONSTITUTION, ARTICLE 2 § 3,4,10,15,23,24.

### 1. STANDARD OF REVIEW.

This Court reviews de novo whether the trial court has properly instructed the jury on the law in a capital case. *State v. Glassel, 211 Ariz. 33, 53, 74, 116 P.3d 1193, 1213 (2005).* A jury instruction that reduces the State' burden of proof cannot be harmless and is structural error. *Sullivan v. Louisiana, supra); State v. Casey, 205 Ariz. 359, 8, 71 P.3d 351 (2003).*

**2. ANALYSIS.**

As stated above, the first jury that found the single aggravator, cruelty, was improperly instructed (vague) on cruelty and the second jury that imposed the death sentence on Snelling was provided a different and incorrect definition of cruelty than the first jury. Secondly, the State's burden of proof in order to establish the aggravator of cruelty was reduced therefore Snelling was sentenced to death on an aggravator that had not been proven beyond a reasonable doubt. Third, rather than providing a "narrowing" function the trial court's note provided a "widening" function. Fourth, these different instructions undermined the fairness of the penalty phase because the jury that sentenced Snelling to death and rejected Snelling's mitigation did so by comparing it to an aggravator different in kind and degree than the aggravator found by the first jury. The first jury based on the definition they were provided did not return a death verdict. The second jury given a diluted version of especially cruel ("attempted" cruelty) did return a death verdict. It was easier for the second jury to return a death verdict. The second jury was never advised that it was the victim's

subjective state of mind that was necessary to evaluate to determine mental anguish or physical pain. Changing the State's burden allowed the second jury to impose death without considering whether the victim was conscious at the time of death. This affected the outcome of the verdict and cannot be considered harmless. If cruelty was unconstitutionality found then the death sentence was unfairly and unconstitutionally imposed because cruelty was the only aggravator. This Court should vacate the finding of cruelty and impose a life sentence. *State v. Glassel, 211 Ariz. 33, 53, 74, 116 P.3d 1193, 1213 (2005); Bell v. Cone, 543 U.S. 447(2005)*.

## F. DR. BUCKHOLTZ TESTIFIED FROM A NON-TESTIFYING WITNESSES REPORT. THIS VIOLATED SNELLING'S RIGHTS UNDER THE U.S. CONSTITUTION 5th, 6th, 8th & 14th AMENDMENT AND THE ARIZONA CONSTITUTION, ARTICLE 2 § 3,4,10,15,23,24.

### 1. STANDARD OF REVIEW

This Court reviews a trial court's ruling de novo if it involves pure issues of law or constitutional issues. *State v. Moody, 208 Ariz. 424, 445, 94 P.3d 1119, 1140 (2004).*

### 2. ANALYSIS

The trial court permitted the State's expert witness Dr. Buckholtz to testify from a non-testifying witnesses (Dr. Dudley's) autopsy report and offer testimony that provided the factual basis for the sole aggravator, cruelty. Permitting this testimony from the State's expert violated Snelling's constitutional right to confront the witnesses against him, Dr. Dudley. For this reason alone this Court should reverse Snelling's sentence of death and impose a life sentence.

The State had Dr. Buckholtz offer her opinion at trial as to the victim's cause of death, the condition of her body, her interpretation of the autopsy photos and report and what they indicated and her opinion of how long a person remained conscious when strangled with a ligature. Such testimony violated Snelling's rights under the Confrontation Clause as clarified by the United States Supreme Court in *Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) (citing Crawford v. Washington, 541 U.S. 36 (2004).* The autopsy report stating the observations and opinions of Dr. Dudley and the results of the autopsy were "testimonial" under *Crawford v. Washington.* Moreover, the autopsy report was not offered as an exhibit at trial, the contents of that report were known to the jury only through the testimony of Dr. Buckholtz. Such use of the autopsy report, results and interpretation of the report violated Snelling's right to confrontation. Autopsy reports contain double and triple hearsay. Dr. Buckholtz should not have been permitted to offer any opinions or testimony unless the person who performed the autopsy (Dr. Dudley) and authored the report was called to testify and subject to cross-examination. The testimony of Dr. Buckholtz was key evidence in establishing cruelty. The State went to great lengths to solicit testimony on the circumstances of the victims death as interpreted by the ligature injuries and length of time the victim was conscious while being strangled. The State offered Dr. Buckholtz's testimony to convey victim suffering and length of consciousness to the aggravation jury. Both key facts in the first jury, the aggravation juries determination of

especially cruel.

In 2004, the United States Supreme Court issued its landmark *Crawford* opinion expanding the right of an accused to confront his accusers. The Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Crawford, 541 U.S. at 53-54, 124 S.Ct. 1354; U.S. Const. amend. VI* ("[i]n all criminal prosecutions, the accused shall enjoy the right . . .to be confronted with the witnesses against him").[fn4] *Crawford overruled Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980),* which had held that an unavailable witness's out-of-court statement may be admitted so long as it had adequate "indicia of reliability." *Id. at 66, 100 S.Ct. 2531.* The Court rejected judicial determinations of reliability in favor of actual confrontation and cross-examination:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable

> evidence (a point on which there could be little dissent), but about how reliability can best be determined.

*Crawford, 541 U.S. at 61-62, 124 S.Ct. 1354 (emphasis added).[fn5]*

This constitutional right to cross-examine one's accusers - based not on rules of evidence or judicial notions of reliability - forms the foundation of Snelling's analysis. Snelling did not have the opportunity to confront and cross-examine Dr. Dudley, the pathologist who actually performed the autopsy of the victim and determined the cause and manner of death. The autopsy results, opinions and observations contained therein and Dr. Buckholtz testimony were "testimonial" hearsay under *Crawford*, triggering Snelling's right to confront Dr. Dudley.

In *Crawford,* the Supreme Court held that "testimonial" hearsay statements of an unavailable declarant would not be admitted in a criminal trial unless the defendant had cross-examined the declarant. *See 541 U.S. At 68, 124 S.Ct. 1354.* Although the Supreme Court declined to provide a comprehensive list of the categories of statements that are "testimonial," the Court explained that the Confrontation Clause applies to "witnesses" against the accused who "bear testimony." *Id. at 51, 124 S.Ct. 1354.* The Court described "testimony" as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id. (quoting* Noah Webster*, An American Dictionary of the English Language (2d ed. 1828)). "*An accuser who makes a formal statement to government officers bears testimony in a sense that a person who

makes a casual remark to an acquaintance does not." *Id*. The Court also identified a "core class" of testimonial statements, including "ex parte in-court testimony or its functional equivalent" such as "affidavits, custodial examinations, [or] prior testimony," and "similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Id.* The testimony of Dr. Buckholtz describing the results of the autopsy constitute testimonial evidence within the meaning of *Crawford*. Dr. Dudley, the pathologist who performed the autopsy, interpreted the results and authored the report surely expected her statements of the results to be used a prosecutorial tool. That was the primary reason for the autopsy and authoring her report and her finding/opinion of a cause of death, circumstances of death and of a homicide.

The testimony by Dr. Buckholtz reporting the results was, in essence, an accusation by the absent Dr. Dudley. Therefore, Dr. Buckholtz testimony was testimonial under *Crawford,* triggering the protections of the Confrontation Clause. This conclusion is supported by several recent decisions from the United States Supreme Court and other jurisdictions. *See, e.g., Melendez-Diaz v. Massachusetts 129 S. Ct. 2527 (2009)*(holding "certificate" from police criminalist admitted into evidence violated *Crawford*); *Johnson v. State, 929 So.2d 4, 7 (Fla.Dist.Ct.App. 2005)* (holding that lab report establishing illegal nature of substance possessed by defendant was testimonial hearsay); *Las Vegas v. Walsh, 121 Nev. 899, 124 P.3d 203, 207-08 (2005)* (holding that nurse's affidavit regarding withdrawal of blood sample for chemical

analysis in DUI case is testimonial); *People v. Rogers, 8 A.D.3d 888, 891, 780 N.Y.S.2d 393 (N.Y.App.Div. 2004)* (holding that blood test report was testimonial hearsay); *State v. Crager, 164 Ohio App.3d 816, 844 N.E.2d 390, 394-400, 19-51 (2005)* (review granted Apr. 26, 2006) (holding that DNA analyst's report was testimonial hearsay and second analyst was not entitled to testify to report's conclusions); but *see State v. Dedman, 136 N.M. 561, 102 P.3d 628, 636, 30 (2004)* (holding that blood alcohol report was not testimonial hearsay because it was prepared in routine, non-adversarial manner and did not resemble prior testimony or police interrogation).

## G. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO ALLOW THE DEFENSE TO CALL A NEURO- PSYCHOLOGIST TO TESTIFY THAT SNELLING WAS COGNITVELY IMPAIRED. THIS VIOLATED SNELLING'S RIGHTS UNDER THE U.S. CONSTITUTION 5th, 6th, 8th & 14th AMENDMENT AND THE ARIZONA CONSTITUTION, ARTICLE 2 § 3,4,10,15,23,24.

### 1. STANDARD OF REVIEW

The scope of disclosure required under Rule 15.1 is a question of law that this Court reviews de novo, *see State v. Moody, 208 Ariz. 424, 445, 62, 94 P.3d 1119, 1140 (2004),* while this Court reviews the judge's assessment of the adequacy of disclosure for an abuse of discretion, *State v. Piper, 113 Ariz. 390, 392, 555 P.2d 636, 638 (1976).* This court also reviews for abuse of discretion the trial judge's imposition of a sanction for non-disclosure. *State v. Armstrong, 208 Ariz. 345, 353-54, 40, 93 P.3d 1061, 1069-70 (2004).* This Court will, however, review those decisions to determine whether, if the trial court erred, the ruling materially influenced the jury and merits reversal. *State v. Correll, 148 Ariz. 468, 715 P.2d 721 (1986).* The refusal to allow Snelling to call Dr. Lanyon a neuro-psychologist at his capital penalty phase denied Snelling his right to present a defense and to a fair trial. *Arizona Constitution, Art. 2, sections 4, 15, 23 & 24 and United States Constitution, Amendments 5, 6, 8 & 14.* Based on this error alone this Court should reverse Snelling's sentence of death and impose a life sentence.

## 2. ANALYSIS.

### a. The Newly Comprised Capital Defense Team Provided Full Disclosure.

After Mr. Gavin was removed from the case Rena Glitsos announced to the court she was the new lead counsel and requested that Mr. Gavin's wife be removed as Snelling's mitigation specialist. Judge Akers granted Ms. Glitsos's request and appointed Steve Johnson as mitigation specialist with no inquiry as to his qualifications. Judge Akers commented that she "did not realize he was doing mitigation work."*(R9/19/07 p.5)* On March 12, 2008 Snelling's newly comprised capital defense team had only one original member, Ms. Glitsos. The mitigation specialist was new to the case, co-counsel was new to the case and Snelling now *for the first time* had an investigator. It was on March 12, 2008 that new lead counsel for Snelling learned something unknown by previous lead counsel Mr.Gavin (and/or Mr. Gavin's wife). Ms. Glitsos learned in a jail visit with Snelling information that gave cause to consult an expert. This information was presented to one of the three judges who made rulings in this case, Honorable Timothy J. Ryan not Judge Akers.*(R 4/4/08 p.21-22)* Snelling's counsel kept the trial court/s (three separate judges) and the State informed of the testing and developments regarding newly discovered mitigation. *(Item 220 p.4,8-9)* ® 3/21/08 p.18-32, 40, 45-47, R 4/4/08 p.21-22, In spite of that information Judge Ryan set a re-trial date of the penalty phase for May 20, 2008 which prompted counsel for Snelling to request additional time to disclose it's witnesses.(Item

223)(R 4/11/08 p.5-6) On April 21, 2008 defense counsel filed a Notice of Supplemental Expert Witness, Negro-psychologist Dr. Richard Lanyon. (Item 233) On April 25, 2008 Snelling's counsel disclosed to Judge Akers and the State that Dr. Lanyon was scheduled to examine Snelling and conduct neurological testing on April 28, 2008. (R4/25/08 p.15-16) On May 1, 2008 Snelling's counsel advised the trial court and the State that Dr. Lanyon had seen Snelling and identified an issue as to his executive functioning and further testing was to be conducted on May 5 or 6, 2008. Snelling's counsel again requested a Mitigation Master and/or ex parte proceeding to explain issues pertaining to Dr. Lanyon.(R 5/1/08 p.21-24) Snelling's counsel filed Notice of Intent To Call Dr. Lanyon, counsel advised that Dr. Lanyon's testing was completed May 5, 2008, that Dr. Lanyon's test results indicated impairment of executive functioning and Dr. Lanyon's written report was not yet available. Also filed was a Motion to Appoint Mitigation Master. Counsel explained that a Mitigation Master was necessary pertaining to an issue involving Dr. Lanyon. (Item 244, 245)(R5/7/08 p.69-72) Judge Bacca, the third judge to be involved in this case summarily denied Snelling's request for a Mitigation Master and/or ex parte hearing.(Item 247) The State filed a Motion To Preclude Snelling from calling Dr. Lanyon as a witness. (Item 246) Snelling's counsel responded and explained that Snelling suffered from cognitive deficits. Further counsel explained that, "the reasons for the late disclosure will be addressed at oral argument contingent upon receipt of a

written waiver from Snelling allowing counsel to discuss this matter. *The proper remedy for any prejudice to the State is to continue the trial if the State wishes to have its own expert evaluate Mr. Snelling*."(Item 250) Counsel explained to Judge Akers that the reason Snelling had been unwilling prior to March 12, 2008 to cooperate with a mental health evaluation was related to the impaired executive functioning deficit that Dr. Layton found and that on March 12, 2008 the mitigation specialist (who replaced Mr. Gavin's wife) was present and observed a "disconnect" between Snelling's thoughts and his decisions. ® 5/8/07 p.13-15). On May 14, 2008 counsel for Snelling withdrew Dr. Lanyon's name as a defense witness. The jury panel was sworn by the Clerk of Court to answer the juror questionnaire.(Item 253) The 9th Circuit Court of Appeals decision in *Correll v. Ryan, 539 F.3d 938 (9th Cir. 2008),* was filed and made public on May 14, 2008. Counsel for Snelling returned to court on May 19, 2008 reversed their decision of May 14, 2008 and announced Snelling intended to call Dr. Lanyon as a mitigation witness. Counsel for Snelling stated the basis for their change in position was the *Correll* decision which they read after court on May 14, 2008. (5/19/08 p.5) That same day Judge Akers issued a written ruling precluding Dr. Lanyon from testifying finding Snelling's counsel acted in bad faith.(Item 259).

**b. The Trial Court Erred In Imposing The Most Severe Sanction Without First Attempting Other Remedies.**

The trial court erred in imposing the most severe sanction without resorting to an attempt to resolve the problem with other remedies. Snelling's counsel simply

changed her mind between May 14, 2007 and May 19, 2007. Snelling's counsel had previously disclosed an overview of Dr. Lanyon's testimony, Snelling was cognitively impaired it affected his executive functioning. This put the trial court on notice that objective evidence of impaired executive functioning was found and available for presentation to the penalty jury for the purpose of evaluating and comparing the aggravator of cruelty and both statutory and non-statutory mitigation. The trial court had many options available to resolve the situation yet choose the most severe sanction available. The trial court should have considered other remedies before precluding Dr. Lanyon from testifying. Precluding Dr. Lanyon from testifying as an initial remedy was an abuse of discretion. The Supreme Court has described the policy underlying the discovery rules as facilitating the search for truth and preventing surprise:

> [I]n the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.
>
> *Wardius v. Oregon, 412 U.S. 470, 475-76, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) (footnote omitted).*

Arizona's policy serves similar goals:

> However so it may appear at times, a criminal trial is not a contest of wits and tactics between the prosecution and defense counsel. "We believe justice dictates that the defendant be entitled to the benefit of any reasonable opportunity to prepare his defense and to prove his innocence."

*State ex rel. Helm v. Superior Court (Deddens), 90 Ariz. 133, 139, 367 P.2d 6, 10 (1961) (quoting State ex rel. Mahoney v. Superior Court (Stevens), 78 Ariz. 74, 79, 275 P.2d 887, 890 (1954)).*

Arizona Rule of Criminal Procedure 15.7 provides several sanctions that the trial court may impose for non-compliance with the rules of discovery, including "granting a continuance" or "[p]recluding a party from calling a witness, offering evidence, or raising a defense not disclosed." In selecting the appropriate sanction, the trial court should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as possible since the Rules of Criminal Procedure are designed to implement, not to impede, the fair and speedy determination of cases. Prohibiting the calling of a witness should be invoked only in those cases where other less stringent sanctions are not applicable to effect the ends of justice. The court should also consider how vital the precluded witness is to the proponent's case, whether the opposing party will be surprised and prejudiced by the witness' testimony, whether the discovery violation was motivated by bad faith or willfulness, and any other relevant circumstances. *State v. Fisher, 141 Ariz. 227, 246, 686 P.2d 750, 769 (1984) (citations omitted).* The trial court should have ordered the State to interview Dr. Lanyon and

report on whether the State would need to consult with and call it's own expert and permit a short continuance if necessary. This should have been offered by the trial judge as an appropriate initial approach to resolving the issue of Dr. Lanyon's testimony. Precluding the testimony of Dr. Lanyon as the trial court's sanction of first resort was too extreme of an initial remedy immediately before beginning a capital sentencing proceeding. Dr. Lanyon's testimony was extremely important to Snelling's mitigation presentation. The trial court acted unreasonably here in failing initially to propose a remedy other than preclusion. The trial court should have offered the State the opportunity to interview Dr. Lanyon to determine whether the State needed required additional time or witnesses to adequately prepare its rebuttal. If more time was then needed, the State could have requested an appropriate continuance or suggested another approach. *State v. Roque, 213 Ariz. 193, 141 P.3d 368 (2006)*

**c. Snelling Was Prejudiced**

Courts will reverse a death sentence if the trial court refuses to review or to allow mitigating evidence. *Eddings v. Oklahoma, 455 U.S. 104, 113 (1982)*. A decision to not present any mitigation cannot be made in a vacuum or without the assistance of qualified experts. *Sanders v. Ratalle, 21 F.3d 1446 (9th Cir. 1994); Clabourne v. Lewis, 64 F.2d 1373 (9th Cir. 1995).* Here there was a single aggravator, cruelty. In the juries evaluation of the cruelty aggravator and comparison to the offered mitigation an interpretation of Snelling's state of mind was not only required it was emphasized by

the defective jury instruction/note the trial court provided the 2nd jury. See section above **C.4**. The entire emphasis of that instruction was on Snelling's state of mind. Snelling was precluded from offering to the jury the only evidence he possessed on his state of mind in their evaluation of cruelty. Dr. Lanyon's testimony addressed impaired executive functioning. Secondly, Dr. Lanyon's testimony was based on objective science which carries more weight than pure behavioral science or character type witnesses. Third, the State attack on Snelling's character left no room for any scientific explanation for his aberrant behavior. Without Dr. Lanyon's testimony the State was free to attack Snelling's character with no fear of an alternative explanation. Fourth, the State vouched for Radar, vouched for it's theory of the case argued that Snelling was simply a sexual deviant and argued for death to protect innocent children. The trial court's preclusion of Dr. Lanyon was prejudicial. It denied Snelling the opportunity to have the jury compare, and evaluate the cruelty factor and offered mitigation and to determine whether the mitigation was substantial enough to call for leniency.

## H. THE PENALTY PHASE CROSS-EXAMINATION, TESTIMONY, ARGUMENT AND THE TRIAL COURT'S INSTRUCTION TO THE JURY REGARDING ALLEGED SEX CRIMES INVOLVING CHILDREN VIOLATED SNELLING'S RIGHTS UNDER THE DUE PROCESS AND CONFRONTATION CLAUSE. U.S. CONSTITUTION 5th, 6th, 8th & 14th AMENDMENT AND THE ARIZONA CONSTITUTION, ARTICLE 2 § 3,4,10,15,23,24.

### 1. STANDARD OF REVIEW:

A trial court's ruling on the admission of evidence is reviewed for an abuse of discretion. *State v. Wood, 180 Ariz. 232, 235, 881 P.2d 1158, 1166 (1994)* . All legal and constitutional questions are reviewed de novo. *State v. McGill, 213 Ariz. 147, 156, 159, 40, 53, 140 P.3d 930, 939, 942 (2006).*

### 2. ANALYSIS.

The trial court abused its discretion at the penalty phase by admitting evidence of alleged prior public sexual misconduct and permitting the State to argue for death based on numerous incidents of Snelling exposing himself in public to children and masturbating in public. The trial court (1) permitted the State to cross-examine Snelling's mitigation witnesses on prior incidents involving children without limitation over Snelling's objection for a mistrial. (R5/29/08 p 8-18, R5/30/08 p.30-40); (2) admitted double and triple hearsay testimony through police officer's who took statements from witnesses regarding prior incidents involving children over Snelling's objection for a mistrial ( R6/3/08 p.145-158); (3) admitted hearsay testimony through court documents on prior incidents involving children over objection for a mistrial. (

R6/3/08 p.183-221); (4)admitted eye witness testimony on a prior public sex incident involving a child over objection. ( R6/3/08 p.158-166); (5)instructed the jury immediately before the State's "stranger danger" for death argument that "the jury may assess the evidence **any way** that they feel is appropriate." (R6/5/08 pp48 L15-19) The testimony and argument should have been excluded for several reasons: (1) Snelling's character for public sexual misconduct was not at issue;(2) the evidence was unfairly prejudicial (3)the majority of the evidence was double and triple hearsay and violated Snelling's right under the 6th Amendment to confront and cross-examine his accuser's; (4) the majority of the evidence was not subject to cross-examination and therefore was inherently unreliable and violated Snelling's right to due process under the 14th Amendment; (5) the entire penalty phase proceeding was simply a limitless a standardless prosecution of Snelling as a child molester and future child abductor unless sentenced to death.

The limit that A.R.S. § 13-703(C) places on the State's evidence at the penalty phase is that it must be "relevant" to the issue of mitigation. *See State v. McGill, 213 Ariz. 147, 156 ¶ 40, 140 P.3d 930, 939, 2006 WL 2336905 (2006); see also A.R.S. § 13-703.01(G)* (providing that the State may present at the penalty stage "any evidence that is relevant to the determination of whether there is evidence that is sufficiently substantial to call for leniency").[fn11] The statute, however, is not the only limitation of testimony in the penalty phase. Admission of such evidence is ultimately

constrained by the Due Process Clause of the Fourteenth Amendment. *See Payne v. Tennessee, 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).* This Court held in *McGill, 213 Ariz. at 160 ¶ 56, 140 P.3d at 943,* that the Due Process Clause demands that hearsay statements contain sufficient indicia of reliability. A further limitation of testimony in the penalty phase is the 6th Amendment. Admission of such evidence is constrained by the Confrontation Clause. Said testimony and exhibits violated Snelling's rights under the Confrontation Clause as clarified by the United States Supreme Court in *Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) (citing Crawford v. Washington, 541 U.S. 36 (2004).* The the observations and information of 3rd parties relaid through Wooten and Shores and the exhibits admitted at the penalty phase were "testimonial" under *Crawford v. Washington.* Snelling was denied his right to confront his accusers.

The State's cross-examination of mitigation witnesses Rodriguez and Schaffer, the double and triple hearsay testimony offered through Officers Wooten and Shores and the exhibits admitted did not meet these due process standards or confrontation standards of the United States Constitution. The damaging and highly prejudicial hearsay had little indicia of reliability. Rodriguez and Schaffer had nothing to offer on these subjects. They were just a vehicle for the State to inflame the jury. Wooten and Shores were simply repeating double and triple hearsay on incidents they did not recall

nor witness. The exhibits contained extraneous hearsay of unknown reliability or source. The unknown source not subject to cross-examination. This Court can not conclude that the jury was not influenced in it's decision to impose death by the highly emotionally charged allegations, State cross examination, admission of double and triple hearsay via witnesses and exhibits and argument of the State for death all pertaining to unproven allegations of crimes against children and public sexual misconduct. Moreover, the probability the jury was influenced is great because of the jurors comments at voir dire regarding the death penalty when children our involved, the trial court's incorrect instruction on cruelty and the trial court's statement in the presence of the jury that the jury could "assess the evidence anyway it felt appropriate." For the reasons stated this Court should impose a life sentence.

## I. THE TRIAL COURT ABUSED IT'S DISCRETION AND DENIED SNELLING A FAIR AGGRAVATION PROCEEDING WHEN IT ADMITTED IRRELEVANT, GRUESOME AND HIGHLY PREJUDICIAL CRIME SCENE AND AUTOPSY PHOTOGRAPHS. ALL IN VIOLATION OF THE U.S. CONSTITUTION 5th, 6th, 8th & 14th AMENDMENTS AND THE ARIZONA CONSTITUTION, ARTICLE 2 § 3,4,10,15,23,24.

### 1. STANDARD OF REVIEW

A trial court's ruling on the admission of photographs is reviewed for an abuse of discretion. *State v. Hampton, 213 Ariz. 167, 173, 17, 140 P.3d 950, 956 (2006)* Because Snelling objected at trial to the use of the crime scene and autopsy photographs and objected to their use during the guilt phase and for use in proving the single aggravator of especially cruel this constitutional error is subject to a harmless

error analysis.(Exhibits 34-46 R4/24/07 p.92-106) (Item 71), (R5/9/07 p.19L1-3, 25, 198, 199) (R5/15/07 p.79-86)(Exhibit 38, 39, 40, 41, 42, 45, 46 ) ( R5/28/08 p.81, p.83 L7, p.90)

**2. ANALYSIS.**

The crime scene *(photo of victim's nude body on bathroom floor as depicted in power point presentation Exhibit 199)* and autopsy photographs were highly and unfairly prejudicial, inflammatory and had little or no probative value. The defense objected to the use of the photographs during the guilt/aggravation phase with the first jury. This Court should reverse Snelling's sentence of death and impose a natural life sentence. There was no question as to the cause of death, whether it was a homicide or the identity of the victim. The sole issue presented by the State in support of the especially cruel aggravator to the first jury was whether there was a pre-death struggle. The State's own witness Dr. Buckholtz testimony rendered the photos irrelevant to that issue. After reviewing the photos of the victim and the autopsy report Dr. Buckholtz testified that: (1) she did not know how long it took the victim to die;(2)she did not know how long the ligature was around the victim's neck;(3)she did not know if there was an attempted sexual assault or sexual assault;(4) the photos (exhibit 40) depicted no evidence of struggle, "it's more consistent with one position".(R5/15/07 p.99L21-24, p.102 L2-5, p.102L20-25, p103-105,107) When the photographs "have no tendency to prove or disprove any question which is actually contested, they have little use or purpose except

to inflame and would usually not be admissible." *State v. Chapple*, 135 Ariz. 281, 288, 660 P.2d 1208, 1215 (1983). Thus, if gruesome or inflammatory photographs are "admitted for the sole purpose of inflaming the jury, [this Court] will reverse on appeal." *State v. Gerlaugh (Gerlaugh I)*, 134 Ariz. 164, 169, 654 P.2d 800 (1982). The photos were used by the State to inflame the jury. Not only did Duffy display photos to inflame the jury. He combined it with his repeated vouching. Duffy once again injected himself personally into the proceeding, displayed a gruesome photo to the aggravation jury and told the jury that found the single aggravator to remember the victim as depicted in the photo of her decomposed corpse on the bathroom floor:

> This is how **I want you** to remember Adele Curtis, and it is Adele Curtis, just as me, who wants you to find the defendant guilty. Remember **her like this, not like the other pictures**, and find him guilty of premeditated and felony murder. *(photo of victim's nude body on bathroom floor as depicted in power point presentation Exhibit 199, Exhibit 37)*
>
> (R5/21/07 p.138 L11-15)(emphasis added)(R5/30/08 p.49, 132-133, 141).

The gruesome photo/s made at least one juror "sick to [his] stomach". The aggravation jury was emotionally impacted by the gruesome photos, it is a matter of record. Juror Six from the aggravation jury posted on his web page, "The prosecutor showed some pictures on the television of the autopsy. I felt obligated to look at them, but I could not look for long. The photos made me sick to my stomach." (Item 205, Defendants Motion For Mistrial and Request To Seal, see attachment to Motion at page

3 of 7)

## J. ADMITTING INFLAMMATORY VICTIM IMPACT TESTIMONY AT THE PENALTY PHASE VIOLATED SNELLING'S RIGHTS UNDER THE EIGHTH AMENDMENT SINCE IT WAS NOT RELEVANT TO ANY MITIGATING CIRCUMSTANCES AND WAS UNDULY PREJUDICIAL. ALL IN VIOLATION OF THE U.S. CONSTITUTION 5th, 6th, 8th & 14th AMENDMENT AND THE ARIZONA CONSTITUTION, ARTICLE 2 § 3,4,10,15,23,24.

### 1. STANDARD OF REVIEW

A trial court's ruling on the admission of evidence is reviewed for an abuse of discretion. *State v. Wood, 180 Ariz. 232, 235, 881 P.2d 1158, 1166 (1994)*. An issue involving statutory interpretation is reviewed independently by this Court. *State v. Ontiveros, 206 Ariz. 539, 8, 81 P.3d 330 (2003)* This Court reviews the constitutionality of a statute de novo as a matter of law. *State v. Casey, 205 Ariz. 359, 8, 71 P.3d 351 (2003).*

### 2. ANALYSIS.

The victim's children were called by the State before the mitigation witnesses. There testimony and the trial court's jury instruction was objected to by Snelling. (R6/4/08 p.112) During closing arguments to the second penalty phase jury Duffy argued that the jury should sentence Snelling to death for the victim's family. Duffy appealed to the second penalty phase jury to erase the ***photo(that he was displaying)*** from the victim's children's memory by sentencing Snelling to death:

> This is what a helpless and defenseless woman looks

like after being on the floor for four days in July after being strangled. **This is the vision her children have of her today.** This is not the vision they want to have. this is their vision. This is there reality. . .when you really boil it down, this is enough, in and of itself, to impose the death penalty.

(R6/5/08 pp.47)*(emphasis added)*

*(photo of victim's nude body on bathroom floor as depicted in power point presentation Exhibit 199, Exhibit 37)*

Duffy went on:

- "Now I am going to tell you some more reasons why its [death] proper…The impact on this family has been tremendous and horrible. Besides Adele's, her mother that she was caring for died within months, as you were told, probably because of Adele's death. . . .The only justice for this family is the death sentence because the victims will never be the same. (Id at p. 50)

- "If you do not impose death, the defendant will still enjoy life albeit in a prison cell. He can visit relatives and have all the privileges of an inmate. Appellant's counsel's objection was overruled."(Id at p. 50)

- "Now . . .when defense counsel gets up she is going to try and make a lot of fun of what I just said to you but none of it is going to be funny when you think about the death Adele suffered."(Id at p. 51)

- "I would ask you not to show him mercy because what mercy did he show Adele. He had a lot of time to show mercy to Adele…he showed her no mercy. He deserves no mercy. . .**What I want you to do** and what I hope occurs when you **impose a verdict of death** is that **Adele's children will no longer have to remember their mother that way**." (Id. p. 52) (emphasis added)
*(photo of victim's nude body on bathroom floor as depicted in power point presentation Exhibit 199, Exhibit 37)*

By enacting A.R.S. § 13-703.01(R) and Rule ACRP 19.1(d)(3) Arizona has violated the basic tenets of the Eighth and Fourteenth Amendments that require that the jury listen, consider and give effect to relevant mitigating evidence. *Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).* These long standing precedents make clear that there can be no modification or restrictions to the obligation of the sentencer to listen to and give weight to mitigating circumstances. *See, Adamson v. Ricketts, 855 F.2d 1011, 1041 (9th Cir. 1988).* Permitting the consideration of victim impact evidence during the penalty phase of a death case impermissibly impacts the jury's duty to properly consider the mitigating evidence by infusing irrelevant emotional sympathies. The impact on the family of a homicide victim is irrelevant in a sentencing proceeding because a death sentence may as a result be imposed in an arbitrary manner if the impact is considered by the jury. *Booth v. Maryland, 482 U.S. 496 (1987).* This Court has long recognized that victim impact evidence is irrelevant to any aggravating factors so is therefore generally inadmissible. *State v. Bolton, 182 Ariz. 290, 315, 896 P.2d 830 (1995). See also, State v. Williams, 183 Ariz. 368, 386-87, 904 P.2d 437 (1995)(Feldman, C.J. concurring)* ("I believe the time is near for the court to take a position forbidding the introduction of evidence calculated to influence the sentencing judge in a manner forbidden by the law. It should not be offered by the prosecution or permitted by the court.") Although the Supreme Court has not completely banned victim impact evidence it has recognized that it has minimal relevance in a capital sentencing

proceeding. Such evidence is merely relevant to show that "the victim is an individual whose death represents a unique loss to society and in particular to his family." *Payne v. Tennessee, 501 U.S. 808, 814 (1991)*. Any relevance to victim impact evidence pales in comparison to the prejudicial effect it has on a jury requested to make a life or death decision. Such evidence is highly emotional and serves no relevant purpose other than to appeal to the sympathies of the jury. *Williams, supra.*

The Supreme Court had recently reaffirmed that no statute, rule or judicial interpretation may impair a jury's opportunity to give a "reasoned moral response" to a defendant's mitigating evidence. *Abdul-Kabir v. Quarterman, 127 S.Ct. 1654 (2007)*. Permitting a victim to offer inflammatory testimony at the inception of a capital penalty phase violates the Eighth Amendment. Moreover, Duffy used the victims' statements, unrelated histories and the photograph of the victim to; (1)distract the jury from considering the offered mitigation;(2) to blame the Snelling for events unrelated to his conduct and (death of victim's mother); and (3) to appeal to pure emotionalism, passion and inflame the jury. Snelling caused the victim's mother's death? Snelling's counsel thought it was "funny" ? Snelling can have his relatives visit him in prison? The victim's children won't remember the gruesome photos of the victim's corpse Duffy showed the jury at closing if the jury sentences Snelling to death? These are all appeals to emotionalism and vengeance and not appeals for a rationale comparison of the sole aggravator to the offered mitigation.

## K. THE JURY INSTRUCTIONS ON "ASSESSING THE PENALTY" INACCURATELY SET FORTH THE STATE'S BURDEN OF PROOF REGARDING MITIGATING CIRCUMSTANCES AND CONSTITUTES STRUCTURAL ERROR. ALL IN VIOLATION OF THE U.S. CONSTITUTION 5th, 6th, 8th & 14th AMENDMENT AND THE ARIZONA CONSTITUTION, ARTICLE 2 § 3,4,10,15,23,24.

### 1. STANDARD OF REVIEW.

This Court reviews de novo whether the trial court has properly instructed the jury on the law in a capital case. *State v. Glassel, 211 Ariz. 33, 53, 74, 116 P.3d 1193, 1213 (2005).* A jury instruction that reduces the State' burden of proof cannot be harmless and is structural error. *Sullivan v. Louisiana, supra.* This Court reviews the constitutionality of a statute de novo as a matter of law. *State v. Casey, 205 Ariz. 359, 8, 71 P.3d 351 (2003).*

### 2. ANALYSIS

Arizona's death penalty scheme violated Snelling's fundamental rights by not requiring that the State prove beyond a reasonable doubt that the proven mitigation is not sufficiently substantial to call for leniency. The Arizona death penalty scheme is unconstitutional under *Kansas v. Marsh, 126 S. Ct. 2416 (2006).*

The trial court was cautious to not make any reference to "weighing" in the jury instructions on assessing the penalty. *State v. Baldwin, 211 Ariz 468, 472, 123 P.3d 662, 666 (2005)*. However, the trial court created the same confusion this Court was concerned with by substituting the term "compared". The court instructed the jury

that:

> In reaching . . . [a] judgment about which sentence . . .you must decide . . .the totality of the mitigating factors. . . when compared against the totality of the aggravating factor and the facts and circumstances of the case.
>
> (R6/5/08p.10)(emphasis added)

The court then gave a modified version of the "four points" instruction recently addressed by this Court in *State v. Tucker, 215 Ariz. 298, 70-76, 160 P.3d 177 (2007).* In relevant part the trial court instructed:

> You must individually determine if mitigation exists. In light of the aggravating circumstance that you must accept as found, you must then individually determine if the total mitigation is sufficiently substantial to call for leniency. Sufficiently substantial to call for leniency means that mitigation must be of such a quality and, excuse me, 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. If you unanimously find the mitigation is not sufficiently substantial to call for leniency, you must impose the death penalty.
>
> ® 6/5/08 p.9) (emphasis added.)

The trial court advised the jurors that Snelling bore the burden of proving "the existence of mitigating circumstances" by a preponderance of the evidence (Id.,at p.8). Snelling submits that these instructions, while consistent with this Court's decision in Baldwin, violate the Eighth and Fourteenth Amendments because they fail (as does *A.R.S. § 13-703*) to require that the State prove beyond a reasonable doubt that the

proven mitigating circumstances are not sufficiently substantial enough to call for leniency. Snelling recognizes that this Court has previously rejected the argument that Arizona's death penalty statute is unconstitutional because it mandates a sentence of death when the State proves one or more aggravating circumstances and no mitigating circumstances exist. *State v. Miles, 186 Ariz. 10, 19, 918 P.2d 1028, 1037 (1996)*. It is further conceded that the Supreme Court has held it constitutionally permissible to allocate upon a capital defendant "the burden of proving mitigating circumstances sufficiently substantial to all for leniency." *Walton v. Arizona, 497 U.S. 639, 650 (1990).* However, the present issue is narrower than those issues. Specifically, Snelling contends that once a capital defendant meets his or her burden of proving the existence of mitigating circumstances by a preponderance of the evidence the constitution then mandates that the State prove beyond a reasonable doubt that those specific circumstances are not "sufficiently substantial to call for leniency". Otherwise, the death penalty scheme violates the prohibition against a presumptive death sentence. In *State v. Gulbrandson, 184 Ariz. 46, 72, 906 P.2d 579 (1995)*, this Court rejected the argument that the death statute is unconstitutional because it fails to "require that the State prove that death is appropriate." The Court indicated that this issue did not "warrant extended discussion" because it had been "previously decided adversely to him." Id. More recently, in *State v. Glassel, 211 Ariz. 33, 52, 69-70, 116 P.3d 1193 (2005)*, this Court addressed this issue in light of *State v. Ring (Ring II), 536 U.S. 584 (2002)*, and again

rejected it reasoning that the *Ring* Court did not overrule that part of Walton that sanctioned allocating the burden on the defendant "to prove the existence of mitigating circumstances sufficiently substantial to call for leniency" as long as the law "did not lessen the State's burden to prove every element of the offense charged." Id. *(quoting Walton, 497 U.S. at 650.)* Implicit in this decision was that the death penalty itself was not an "element" of the crime of capital murder. This conclusion does not end the debate. At the time that the Court decided *Walton* it had not yet held that all elements of capital murder must be submitted to a jury under the Sixth Amendment. Even after *Ring* the Court has yet to specifically address whether once a state, like Arizona, submits not just the issue of aggravating circumstances (as it must) to the jury, but also the issue of mitigating circumstances and the ultimate penalty to the jury whether the latter two factual issues now become elements of the crime of capital murder. The Court, however, has indicated most likely that they are just that and require placing the burden on the ultimate penalty on the government.

In *Kansas v. Marsh, 126 S. Ct. 2416 (2006),* the Court determined whether the Kansas death penalty (which it characterized as "comparable in important respects" to Arizona's statute) violated the constitution by permitting the jury to impose death if the aggravators and mitigators are in equipoise. The defendant argued that the statute impermissibly created a presumption of death. In upholding this scheme the Court carefully noted that the government under Kansas law still had the burden of proving

the mitigators did not outweigh the aggravators and therefore the law was consistent with the holding in *Walton.* The Court stated:

> Contrary to Marsh's argument, § 21-4624(e) does not create a general presumption in favor of the death penalty in the State of Kansas. Rather, the Kansas capital sentencing system is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction. If the State fails to meet its burden to demonstrate the existence of an aggravating circumstance(s) beyond a reasonable doubt, a sentence of life imprisonment must be imposed. §21-4624(e); [ ]. If the State overcomes this hurdle, then it bears the additional burden of proving beyond a reasonable doubt that aggravating circumstances are not outweighed by mitigating circumstances. Ibid. [ ]. Significantly, although the defendant appropriately bears the burden of proffering mitigating circumstances - a burden of production - he never bears the burden of demonstrating that mitigating circumstances outweigh aggravating circumstances. Instead the State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence.
>
> Id. at 2428 (internal citations omitted) (emphasis added.)

Thus, the Supreme Court has now held that once a state allocates all three issues to the jury it must, to be consistent with the Eighth and Fourteenth Amendments, require that the State prove beyond a reasonable doubt that the proven mitigating circumstances do not outweigh the proven aggravating circumstances. As Arizona has allocated these three issues to the jury its current statutory scheme is unconstitutional. Moreover, as this jury was not instructed consistent with Marsh the error here was structural since it improperly reduced the State's burden of proof.

## L. THE COURT PHYSICALLY RESTRAINED SNELLING DURING THE PENALTY PHASE WITHOUT COMPELLING CIRCUMSTANCES TO

**JUSTIFY RESTRAINT. ALL IN VIOLATION OF THE U.S. CONSTITUTION 5th, 6th, 8th & 14th AMENDMENT AND THE ARIZONA CONSTITUTION, ARTICLE 2 § 3,4,10,15,23,24.**

**1. STANDARD OF REVIEW**

Counsel objected to the use of a stun belt on Snelling.(Item 242 R5/5/08 p5-9) It is "the prosecution's burden to prove any shackling error harmless beyond a reasonable doubt." *State v. Gomez, 211 Ariz. 494, 504 (2005); Deck v. Missouri, 544 U.S. 622 (2005). Review is de novo. Gomez, 211 Ariz. 494.*

**2. ANALYSIS**

The trial court required Snelling to wear a shock belt and leg brace in the courtroom and before the second penalty phase jury. (Item 242, R5/5/08 p90-95) At the evidentiary hearing the testimony disclosed that there were no "special circumstances" unique to Snelling that permitted the State's use of both a leg brace and stun belt on Snelling during the penalty phase. Rather it was demonstrated this was simply the jail's policy, nothing more.(R5/5/08 p.38-62,82-99) Courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding, absent special circumstances such as courtroom security. *Deck v. Missouri, 544 U.S. 622 (2005), Illinois v. Allen, 397 U.S. 337, 343-344 (1970)* (due process requires restraints be used only as a "last resort" for "disruptive, contumacious, stubbornly defiant defendants"). This Court has recognized that law and held that a defendant's conviction for a capital crime is not itself sufficient to justify

shackling. *Gomez, 211 Ariz. at 504* (vacating and remanding where shackling of capital murder defendant during sentencing trial was unjustified). Restraints can hinder a defendant's ability to work with his attorneys and actively participate in trial. *Gonzalez v. Pliler, 341 F.3d 897, 900-904 (9th Cir. 2003)* (remanding for determination of prejudice from stun belt), *citing U.S v. Durham, 287 F.3d 1297, 1305 (11th Cir. 2002).* Consequently, the court must first "pursue less restrictive alternatives before imposing physical restraints," as shackling is only to be used as a "last resort" under compelling circumstances requiring increased courtroom security. *341 F.3d. at 900, 902.* The court here failed to establish compelling circumstances to support the use of both the leg brace and a shock belt or other physical restraints on Snelling. Indeed, the record amply demonstrates that restraints were unjustified. Snelling never posed a security threat in custody or court. Snelling was restrained not because of his behavior in particular, but because of the county's general policy to restrain all inmates. The mere fact that Snelling was convicted of murder is insufficient to justify restraints as a matter of law. *Gomez, 211 Ariz. at 504* (reversing capital sentence where "the record makes plain that the court allowed shackling not because of 'case specific' security concerns about Gomez, but rather because shackling of all defendants in prison garb was required by jail policy"; a decision based on general policy to shackle defendants who wear jail garb violates *Deck*). The stun belt and leg brace were unjustified and highly prejudicial, in violation of Snelling's rights to due process, a fair trial, an impartial jury,

and freedom from cruel and unusual punishment, requiring resentencing.

## M.. THIS COURT SHOULD REDUCE SNELLING'S SENTENCE TO LIFE IN PRISON.

### 1. STANDARD OF REVIEW

Since the offense in this case occurred July 14, 1996 this Court must independently review the aggravating and mitigating circumstances and the propriety of the death sentence. *State v. Andriano, 215 Ariz.497, 63, 161 P.3d 540 (2007), Ariz. R. Crim. P 31.17 (b),(d); A.R.S. §13-703.04; State v. Brewer, 170 Ariz. 486, 493 (1992).* In conducting this review the Court does not simply consider the quantity of factors proven but looks at the quality and strength of those factors. *State v. Greene, 192 Ariz. 431, 443, 60, 967 P.2d 106, 118 (1998)*.

### 2. ANALYSIS.

This Court should reduce Snelling's death sentence to a natural life sentence term under its obligation to conduct an independent review for the reasons set forth below. As discussed in the preceding sections of this brief, the evidence offered by the State to prove especially cruel was unreliable and insufficient to prove beyond a reasonable doubt the aggravator. Secondly, the jury that imposed the death sentence was given an incorrect definition of especially cruel by the trial court. However, should the Court consider the evidence sufficient under due process it is submitted that it should be given less weight since the evidence is by no means conclusive as to (1)whether the victim suffered extreme mental anguish or extreme physical pain (*see State v. Jimenez*, *supra*) or

(2) Snelling's conduct or mental state at the time of the crime. The evidence supporting the single aggravator is at best weak. There is no per se rule for a finding of cruelty for all homicides committed by strangulation. There is nothing to distinguish this strangulation homicide from another strangulation homicide. Secondly, it is apparent from the record that Snelling was denied a complete capital defense team prior to the finding of the single aggravator. He did not have an investigator. Third, Snelling's mitigation specialist did not attend a single court proceeding including the aggravation phase where cruelty was found or the first penalty phase. Rather, Snelling's mitigation specialist had Snelling's lead counsel, her husband, served with a divorce petition in his driveway the month of Snelling's penalty phase proceeding. Fourth, the qualifications, if any, of Snelling's capital defense team assembled to defend him before the jury that found the single aggravator are unknown. The capital defense team was incomplete and fractured at best during the aggravation proceeding that produced the single aggravator. Fifth, the State assigned two prosecutor's with a history of misconduct to prosecute Snelling. Both engaged in misconduct to secure a death sentence. This Court should not reward the State for a pattern of misconduct that began at the grand jury proceedings and continued through both the first and the second penalty phase proceedings. Sixth, Dr. Lanyon found that Snelling was cognitively impaired, that his "executive functioning" was impaired (Item 258). Seventh, there was testimony that in his youth Snelling had been hit in the back of the head with a baseball bat or a two by

four. Snelling was also in a serious car accident as an adult in Tucson, AZ.(R5/29/08 pp157-158 R5/29/08 pp170). Eighth, additional undisputed mitigation entitled to substantial weight in this case are the following non-statutory factors: (1) Loving relationship with family and family support. (R5/29/07 p.106-107,109-111,p118-129, 138, Exhibits 149-166 );(2) Hospice like care of brother who died of colon cancer. Snelling "nursed" him until his death. (R5/29/07 p.107-108,143-147, (R5/29/08 p121-122,172-173, R5/30/08 pp19-21));(3)Family history of alcohol abuse, paternal grandfather and sibling. (R5/29/07 p122-123, R5/29/08 pp136-137);(4) Economically poor upbringing and isolated upbringing in dysfunctional family. Snelling grew up in a house with no running water and no indoor toilet. The house had four rooms, a kitchen, living room and two bedrooms shared by seven people. (R5/29/07 p118-129, R5/29/08 pp.126-128)(5) Voluntary military service. (R5/29/07 p140)(6)Unselfish assistance and support provided to younger sister who was single mother.(R5/29/07 p147-149) (7)Unselfish assistance and support provided to mother and sister, mechanical work, cleaning, house work, cooking, carpentry "would give shirt off his back", "benefit" to family.(R5/29/07 p147-149, (R5/29/08 p117-118,173-76, R5/30/08 pp17-19) (8) Emotionally abused and unloved by father, you're "worthless".(R5/29/07 p149-154)(9)Beaten with belt by father.(R5/29/07 p152-153)(10) Held back in school, not "retarded" but had to repeat 4$^{th}$ grade.(R5/29/07 p155-156)(11) Parent of two children and a granddaughter who will suffer (as will

Snelling's' three surviving siblings) if their father(grandfather, brother) is executed.(R5/29/07 p152-153,R5/29/08 pp176-179)(12) Snelling's son served in combat in Iraq as member of National Guard. (R5/29/07 p158-159);(13) Snelling has always worked and been industrious whether as a civilian or in the military.(R5/29/07 p159-164,R5/29/08 pp195);(14)Good parent to children.(R5/29/08 p111-112)(15)(15)Good son to mother.(R5/29/08 p112, R5/30/08 pp26-29).(Exhibits 150-166,172-177).

Finally, defendants with more aggravation or less mitigation than Snelling regularly receive life penalties at the trial level. To enforce reliability in Arizona's system of capital punishment, this Court must find that, when compared to other life penalty cases, a life penalty is the only appropriate sentence for Snelling. *Tuilaepa v. California, 512 U.S. 967, 971 (1994)* (prohibiting disproportionate sentences).

## N. CONSTITUTIONAL CHALLENGES TO THE DEATH SENTENCE RAISED AND PRESERVED FOR FUTURE FEDERAL REVIEW.

Snelling preserves and does not waive the following constitutional challenges to his death sentences. This Court has rejected such challenges in the past, but the law in capital litigation is ever evolving and changing. Snelling believes this Court or the Supreme Court will reconsider these claims and the two court's past rulings. To avoid any claim of waiver the Snelling will have raised and preserved them for review in the Federal Courts. Appellant raises and "fairly presents" these claims to this Court in the first instance and invites this Court again and affords this Court the opportunity to correct its earlier jurisprudence. Conscious of the constraints imposed on lengths of briefs (*State v. Atwood*, *171 Ariz. 576, 658, 656 832 P.2d 593 (1992)* and *State v. Cruz*, *175 Ariz. 395, 401, et seq., 857 P.2d 1249 (1993)*), Snelling presents these claims in an itemized way followed by the authority that rejected the claim.

1. The death penalty is per se cruel and unusual punishment. *Gregg v. Georgia*, *428 U.S. 153, 186-87 (1976)*; *State v. Salazar*, *173 Ariz. 399, 411, 844 P.2d 566, 578 (1992)*.

2. Execution by lethal injection is *per se* cruel and unusual punishment. *State v. Hinchey, 181 Ariz. 307, 315, 890 P.2d 602, 610 (1995)*.

3. The statute unconstitutionally requires imposition of the death penalty whenever at least one aggravating circumstance and no mitigating circumstances exist. *Walton v. Arizona, 497 U.S. 639, 648 (1990)*; *State v. Miles, 186 Ariz. 10, 19, 918 P.2d 1028, 1037 (1996)*.

4. The death penalty is unconstitutional because it permits jurors unfettered discretion to impose death without adequate guidelines to weigh and consider appropriate factors and fails to provide principled means to distinguish between those who deserve to die or live. *State v. Johnson, 212 Ariz. 425, 440, 69, 133 P.3d 735, 750 (2006)*.

5. Arizona's death statute unconstitutionally requires defendants to prove that their lives should be spared. *State v. Fulminante, 161 Ariz. 237, 258, 778 P.2d 602, 623 (1988)*.

6. The statute unconstitutionally fails to require the cumulative consideration of multiple mitigating factors or require that the jury make specific findings as to each mitigating factor. *State v. Gulbrandson, 184 Ariz. 46, 69, 906 P.2d 579, 602 (1995)*.

7. Arizona's statutory scheme for considering mitigating evidence is unconstitutional because it limits full consideration of that evidence. *State v. Mata, 125 Ariz. 233, 242, 609 P.2d 48, 57 (1980)*.

8. Arizona's death statute is unconstitutional because there are no statutory standards for weighing. *State v. Atwood, 171 Ariz. 576, 645-46 n. 21(4), 832 P.2d 593, 662-63 n. 21(4) (1992)*.

9. Arizona's death statute insufficiently channels the sentencer's discretion in imposing the death sentence. *State v. Greenway, 170 Ariz. 151, 164, 823 P.2d 22, 31 (1991)*.

10. The prosecutor's discretion to seek the death penalty unconstitutionally lacks standards. *State v. Cromwell, 211 Ariz. 181, 192, 58, 119 P.3d 448, 459 (2005)*.

11. Death sentences in Arizona have been applied arbitrarily and irrationally and in a

discriminatory manner against impoverished males whose victims have been Caucasian. *State v. West, 176 Ariz. 432, 455, 862 P.2d 192, 215 (1993)*.

12. The Constitution requires a proportionality review of a defendant's death sentence. *State v. Gulbrandson, 184 Ariz. 46, 73, 906 P.2d 579, 606 (1995)*.

13. Subjecting Appellant to a second trial on the issue of punishment before a new jury violates the double jeopardy clause of the Fifth Amendment. *State v. Ring (Ring III), 204 Ariz. 534, 550, 39, 65 P.3d 915 (2003)*.

14. Appellant's death sentence is in violation of his rights to a jury trial, notice and due process the Fifth, Sixth and Fourteenth Amendments since he was not indicted for a capital crime. *McKaney v. Foreman, 209 Ariz. 268, 271, 13, 100 P.3d 18, 21 (2004)*.

15. The reasonable doubt jury instruction at the aggravation trial lowered the state's burden of proof and deprived Appellant of his right to a jury trial and due process under the Sixth and Fourteenth Amendments. *State v. Dann (Dann I), 205 Ariz. 557, 575-76, 74, 74 P.3d 231 (2003)*.

16. Arizona's death statute creates an unconstitutional presumption of death and places an unconstitutional burden on Appellant to prove mitigation is "sufficiently substantial to call for leniency." *State v. Glassel*, *211 Ariz. 33, 52, 72, 116 P.3d 1193, 1212 (2005)*.

17. The failure to provide the jury with a special verdict on Appellant's proffered mitigation deprived him of his rights to not be subject to *ex post facto* legislation and right to meaningful appellate review. *State v. Roseberry, 210 Ariz. 360, 373, 74 & n.12,*

*111 P.3d 402 (2005)*.

18. The trial court improperly omitted penalty phase instructions that the jury could consider mercy or sympathy in evaluating the mitigation evidence and determining whether to sentence the defendant to death. *State v. Carreon, 210 Ariz. 54, 70-71, 81-87, 107 P.3d 900, 916-17 (2005)*.

19. Arizona's current protocols and procedures for execution by lethal injection constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *State v. Andriano, 215 Ariz. 497, 61-62, 161 P.3d 540 (2007)*.

20. The jury instruction that required the jury to unanimously determine that the mitigating circumstances were "sufficiently substantial to call for leniency" violated the Eighth Amendment. *State v. Ellison, 213 Ariz. 116, 101-102, 140 P.3d 899 (2006)*.

21. The failure to instruct the jury that only murders that are "above the norm" may qualify for the death penalty violates the Sixth, Eighth and Fourteenth Amendments. *State v. Bocharski (Bocharski II), ___ Ariz. ___, 47-50, ___ P.3d ___ (2008)*.

22. The refusal to permit voir dire of prospective jurors regarding their views on specific aggravating and mitigating circumstances violates Appellant's rights under the Sixth and Fourteenth Amendments. *State v. Johnson, 212 Ariz. 425, 440, 29-35, 133 P.3d 735, 750 (2006)*.

23. The refusal to permit Appellant to argue or the jury to consider whether his death sentence would be proportional to other similarly situated defendants violated his rights

under the Eighth and Fourteenth Amendments. *State v. Johnson, 212 Ariz. 425, 431-32, 19-20, 133 P.3d 735, 750 (2006)*.

24. Refusing to instruct the jury or permit the introduction of evidence and argument regarding residual doubt violated Appellant's rights under the Sixth, Eighth and Fourteenth Amendments and Arizona law. *State v. Harrod (Harrod III), 218 Ariz. 268, 37-39, 183 P.3d 519 (2008)*; *State v. Garza, 216 Ariz. 56, 70, 67, 163 P.3d 1006 (2007)*.

25. The refusal to permit evidence regarding a sentence of life without parole and ineligibility of any future release deprived Appellant of his rights under the Eighth and Fourteenth Amendments. *State v. Cruz, 218 Ariz. 149, 154-55, 40-45, 181 P.3d 196 (2008)*.

26. Subjecting Appellant to sentencing before a jury that did not decide his guilt deprives him of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments since his guilt trial jury was organized to convict and his sentencing jury was organized solely to impose a death sentence. *State v. Bocharski (Bocharski II), ___ Ariz. ___, 17-25, ___ P.3d ___ (2008)*.

27. The failure to instruct the jury that the State bore the burden of proving its rebuttal to mitigation evidence beyond a reasonable doubt violated Appellant's rights under the Sixth, Eight and Fourteenth Amendments. *State v. Roque, 213 Ariz. 193, 225-26, 138-140, 141 P.3d 368 (2006)*.

28. The penalty phase jury instructions that advised the jury they "must" return a death

sentence in various circumstances and forms of verdict impermissibly shifted the burden of proof to the defendant and created a presumption of death. *State v. Tucker (Tucker II), 215 Ariz. 298, 317, 160 P.3d 197(2007)*.

29. The death penalty cannot be imposed because no finding of probable cause with respect to any of the aggravating circumstances was made either by a grand jury or at a preliminary hearing. *McKaney v. Foreman, 209 Ariz. 268, 272, 100 P.3d 18, 22 (2004).*

## CONCLUSION

Based upon the foregoing constitutional, evidentiary and statutory errors and violations it is respectfully requested that the Court reverse Snelling's conviction and sentence and grant him a new trial.

RESPECTFULLY SUBMITTED THIS 20th day of October, 2009

*S/Thomas A. Gorman*

Thomas A. Gorman
ABN 011219
Attorney for Appellant

## CERTIFICATE OF SERVICE

The ORIGINAL of Appellant's Opening Brief was mailed and copies filed electronically the 20th day of October 2009 to:

ARIZONA SUPREME COURT
CLERK OF COURT
1501 West Washington
Phoenix, AZ 85007-3231

TWO COPIES of Appellant's Opening Brief were delivered this 20th day of October, 2009 to:

KENT CATTANI, ESQ.
ARIZONA ATTORNEY GENERAL'S OFFICE
Capital Litigation Section
1275 West Washington
Phoenix, AZ 85007-2997

*S/Thomas A. Gorman*
Thomas A. Gorman,
ABN 011219
Attorney for Appellant

## CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies the following:

1. This brief is double spaced;

2. This brief is printed with proportionately spaced 14 point Garamond typeface;

3. The total word count of this brief is 27,128 words as calculated by the Word Perfect word count system.

*S/Thomas A. Gorman*
Thomas A. Gorman