

ARIZONA SUPREME COURT

STATE OF ARIZONA,)	No. CR-14-0277-PC
)	
Respondent,)	
)	Yavapai County Superior Court
v.)	No. CR-2001-0177
)	
HOMER RAY ROSEBERRY,)	
)	
Petitioner.)	
_____)	

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER

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INTRODUCTION

The State agrees that Homer Roseberry’s jury received a constitutionally defective instruction requiring a nexus between any proffered mitigation and the offense. Though the State takes no position, it also appears beyond question that counsel for the direct appeal was ineffective for failing to raise this issue in either the Opening Brief or the Reply Brief, instead filing a “Motion for Leave to Amend Opening Brief” after oral argument.

The question is whether he is entitled to a remedy and whether this Court should address the issue due to technical defects in the defense arguments. The State asks this Court to reject Roseberry’s argument because his petition for review does not cite the *Strickland*¹ test for ineffective assistance of counsel. The State also asserts that the error was not prejudicial because Roseberry was allowed to present mitigating evidence, which was available to this Court for independent review. The State is under the impression—mistakenly so—that independent review cures all evidentiary and instructional errors that occur at trial. But, as will be shown herein, this Court’s results in several death penalty cases prove that independent review is no substitute for harmless error review.

Amicus curiae Arizona Attorneys for Criminal Justice (AACJ) asks this Court to resolve this issue now by applying the correct standard and finding that

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

appellate counsel's ineffectiveness prejudiced Roseberry because he would have received a new penalty phase trial in 2005 if the issue had been raised. The State's request for this Court to apply the waiver doctrine, if granted, accomplishes nothing but kicking the can down the road for the federal courts to review in the context of a claim for ineffective assistance of post-conviction counsel pursuant to *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). Inevitably, this issue will be reviewed under the correct standard. Punishing the defendant for any failures of post-conviction counsel is anathema to substantial justice. *State v. Diaz*, 236 Ariz. 361, ¶ 11, 340 P.3d 1069, 1071 (2014) (citing Ariz. R. Crim. P. 1.2).

INTERESTS OF AMICUS CURIAE

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief in support of Petitioner Roseberry because the jury

instruction that informed the jury whether it may find mitigation proven was admittedly constitutionally defective, yet his death sentence remains in place solely because of the failure of appellate counsel to brief this issue in a timely manner. Contrary to the assumptions of the Superior Court and the State, it cannot be presumed that this Court implicitly decided the issue ten years ago merely because it recognized in another case decided the week prior that there is no nexus requirement. Roseberry had a right to a trial by jury on the penalty, and he was denied a fair trial when the trial judge gave the nexus instruction. Before this Court, post-conviction counsel mistakenly failed to develop argument as to the *Strickland* test for ineffective assistance of appellate counsel, but counsel's argument was sufficiently developed that this Court fully understands the argument and can provide relief.

AACJ is concerned that Roseberry may be denied relief solely because his counsel failed to make adequate argument on an issue of black-letter law—the *Strickland* test—that is so well-tread that it almost insults the intelligence of the Court to develop. Should this Court agree with the State, then this case will proceed to federal court; Roseberry's habeas counsel will certainly raise this claim under *Martinez*, and there is a reasonable likelihood that the writ will be granted. AACJ asks this Court to decline the State's invitation to "punt" the case into the federal courts in this manner, and instead address the clear question.

ARGUMENTS

- I. The State correctly concedes that the nexus instruction was erroneous, but it erroneously concludes that this Court’s independent review in 2005 obviated the need for reversal. Rather, had the issue been squarely presented, this Court would have conducted a review for harmless error.**

The jurors in this case were unequivocally instructed that they must not consider any mitigation unless they found that the mitigation had a causal nexus to the crime. The Ninth Circuit granted the writ of *habeas corpus* to condemned Arizona prisoners who were denied due consideration of their mitigation because of this Court’s past application of a nexus requirement in violation of *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008). This Court continued to require a nexus into the 21st century. *E.g.*, *State v. Phillips*, 202 Ariz. 427, ¶ 61, 46 P.3d 1048, 1060 (2002); *State v. Cañez (Cañez I)*, 202 Ariz. 133, ¶ 119, 42 P.3d 564, 595 (2002); *State v. Hoskins*, 199 Ariz. 127, ¶ 109, 14 P.3d 997, 1021 (2000).

The Supreme Court explained that it would be theoretically possible for a state appellate court to uphold a death sentence even where the sentence was obtained through unconstitutional means:

At a minimum, we must determine that the state court actually reweighed. “[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death’s side of the scale,” nor can a court “cure” the error without deciding, itself, that the valid aggravating factors are weightier than the mitigating

factors. “[O]nly constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.” Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand.

Richmond v. Lewis, 506 U.S. 40, 48-49 (1992) (quoting *Stringer v. Black*, 503 U.S. 222, 232 (1992)). The Court had reached a very similar conclusion two years earlier:

We see no reason to believe that careful appellate weighing of aggravating and mitigating circumstances in cases such as this would not produce “measured consistent application” of the death penalty or in any way be unfair to the defendant. It is a routine task of appellate courts to decide whether the evidence supports a jury verdict and in capital cases in “weighing” States, to consider whether the evidence is such that the sentencer could have arrived at the death sentence that was imposed.

Clemons v. Mississippi, 494 U.S. 738, 748-49 (1990). Read in a vacuum, these passages from *Richmond* and *Clemons* might suggest that this Court’s independent review of Roseberry’s sentence in 2005 foreclosed his argument now that the deficient jury instruction requires a resentencing. Such a reading would be mistaken, however, because *Richmond* and *Clemons* are very different from this case in one critical respect: those defendants were sentenced to death based on improperly-found *aggravators*, and not improperly-excluded *mitigation*.

When an improper aggravator is *included*, it is known to all what factors the sentencer considered, and the only question is what weight was assigned. On the

other hand, when mitigation is *excluded*, it is impossible to know whether the jury would have found the mitigation at all, much less what weight it would have assigned. Although Roseberry was entitled to present his mitigation evidence to the jury, the defective instruction explicitly told the jury to disregard any and all mitigation unless it first found a nexus to the offense.

Furthermore, *Clemons*' use of the conditional "could" in the phrase "could have arrived at the death sentence" was not meant to obviate the harmless error analysis from *Chapman v. California*, 386 U.S. 18 (1967). Rather, the Court meant that appellate courts would be permitted to review for harmless error, rather than requiring reversal in every case where improper aggravation was considered by the sentencing authority.

This Court recently addressed the application of the harmless error rule in the context of preclusion of an entire category of mitigation evidence. In *State v. Payne*, 233 Ariz. 484, ¶¶ 157-158, 314 P.3d 1239, 1273-74 (2013), this Court found that it was error to preclude evidence that the defendant would be a good inmate if sentenced to life in prison pursuant to *Skipper v. South Carolina*, 476 U.S. 1 (1986), but that such error was harmless beyond a reasonable doubt because of the overwhelming evidence presented that death was an appropriate sentence.

Chief Justice Bales' partial dissent explains the danger of conducting a harmless error analysis in a capital case with jury sentencing, describing the burden

on the State as “almost insurmountable.” *Id.* ¶ 173, 314 P.3d at 1276 (Bales, V.C.J., concurring in part and dissenting in part). First, although this Court has decided in *State v. Pandeli (Pandeli III)*, 215 Ariz. 514, ¶ 82, 161 P.3d 557, 576 (2007), and in *State v. Harrod*, 200 Ariz. 309, ¶ 53, 26 P.3d 492, 502 (2001), *vacated on other grounds*, 536 U.S. 953 (2002), that “[w]e give this mitigating circumstance little weight, however, because prisoners are expected to behave and adapt to prison life,” this Court’s view of the weight to be afforded to such an issue as announced through its independent review is in no way communicated to the individual jurors called upon to decide the penalty. *Payne*, 233 Ariz. 484, ¶ 175, 314 P.3d at 1277 (Bales, V.C.J., concurring in part and dissenting in part). Instead, the jury is instructed to give effect to all the proffered mitigation and assign it the value each individual juror believes it deserves. *Id.* ¶¶ 174-75, 314 P.3d at 1276-77 (Bales, V.C.J., concurring in part and dissenting in part) (quoting *State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468, ¶ 21, 123 P.3d 662, 667 (2005)). While noting that the Supreme Court implied that harmless error review may be possible, *id.* ¶ 170, 314 P.3d at 1276 (citing *Skipper*, 476 U.S. at 8, and *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987)), it went without note that the Supreme Court had not yet defined “structural error,” a term that came into being through *Arizona v. Fulminante*, 499 U.S. 279 (1991). Finally, because the law does not presume that death is the appropriate sentence, and a juror might vote for life on any basis, it

cannot reasonably be said that exclusion of any mitigation evidence would not have contributed to any juror’s verdict. *Payne*, 233 Ariz. 484, ¶ 175, 314 P.3d at 1277 (Bales, V.C.J., concurring in part and dissenting in part).

The fact that a juror can vote for life on any basis—even if no mitigation is presented—makes it impossible to measure whether the error contributed to the verdict. See *State v. Ring*, 204 Ariz. 534, ¶ 105, 65 P.3d 915, 946 (2003) (*Ring III*) (opinion of Feldman, J., concurring in part and dissenting in part) (“the denial of a jury in the sentencing phase is a defect in the fundamental mechanism of the trial”); *State v. Sansing*, 206 Ariz. 232, ¶ 44, 77 P.3d 30, 40 (2003) (Jones, C.J., dissenting) (“because total jury deprivation occurred in the phase of Sansing’s trial that resulted in the capital sentence, the error cannot be deemed harmless. Error of such magnitude undermines the very structure of the process. In light of *Ring II*, I do not believe this court is authorized to speculate on what a jury might have done.”). In *State v. Henderson*, Justice Hurwitz used his first opportunity² to comment on this type of error and opine that he believed it should be structural “[w]ere we writing on a clean slate ... for the reasons explained by Justices Jones and Feldman...” 210 Ariz. 561, ¶ 37, 115 P.3d 601, 610 (Hurwitz, J., concurring).

None of this Court’s former justices who dissented on this question, however, articulated a distinction between capital and noncapital cases. Yet it takes

² Formerly counsel in *Ring*, Justice Hurwitz recused himself from all of the *Ring* remand cases.

only a glance at the jury instructions given in guilt phase and penalty phase to see the marked distinction. In the guilt phase, regardless of the crime charged, jurors are instructed to follow the law as given and not to base their decisions on sympathy or prejudice. In the capital phase, however, jurors are told to make individual moral judgments and they are very welcome to base a life verdict on mercy for the defendant. State Bar of Arizona, *Revised Arizona Jury Instructions* (Criminal) Std. 1 (3d ed. Rev. 2012) (“RAJI”), tells the jury in guilt phase: “It is your duty as a juror to decide this case by applying these jury instructions to the facts as you determine them. You *must* follow these jury instructions.” (emphasis added). RAJI Capital Case 2.3 explains, “Mitigating circumstances are any factors that are a basis for a life sentence instead of a death sentence, so long as they relate to any *sympathetic* or other aspect of the defendant’s character...” (emphasis added). And RAJI Capital Case 2.6 explains, “In reaching a reasoned, *moral* judgment about which sentence is justified and appropriate...” (emphasis added). Because jurors deciding life or death can choose life for any reason, it defies harmless error analysis.

Even if such preclusion of mitigation can be measured for harmless error, however, such a finding is extremely unlikely to occur in these cases. This Court acknowledged that *Payne* represents an extreme case and explained why it upheld the death sentence against this error:

We conclude, as we did in *Bible*, that “[i]f the evidence against Defendant had been closely balanced, strong, or even very strong, ... it would be impossible to say beyond a reasonable doubt that the [precluded] evidence did not affect the verdict.... Factually, however, this is a very unusual case.” *Id.* Virtually undisputed evidence established that Payne locked his children in a closet and starved them to death.... ***If improperly excluded mitigation evidence may ever be considered harmless, surely this is the case.***

Id. ¶ 158, 314 P.3d at 1274 (emphasis added). Thus, the majority opinion in *Payne* does not appear to dispute Chief Justice Bales’ description of an “almost insurmountable burden”; instead, it finds that *Payne* is the highly exceptional case that is able to meet that burden because the aggravation was truly that weighty. In stark contrast, the aggravation in *Roseberry* was significantly less weighty. Only one aggravating factor was proven: that the offense was for pecuniary gain. 210 Ariz. 360, ¶ 78, 111 P.3d 402, 416 (2005); A.R.S. § 13-703(F)(5) (Rev. 2001).

This Court on independent review categorized the ten mitigating factors offered by the defense as “either weak or non-existent.” *Roseberry*, 210 Ariz. 360, ¶¶ 73-76 & 79, 111 P.3d at 415-16. But this Court would not be able to find such an error harmless beyond a reasonable doubt. *See State v. Gunches*, 225 Ariz. 22, ¶¶ 24-25, 234 P.3d 590, 594-95 (2010) (citing A.R.S. § 13-756(B)). After determining that the trial court’s instructional error likely precluded the jury from considering entire categories of mitigation, this Court must then consider whether the State can prove beyond a reasonable doubt that the nexus instruction did not contribute to the jury’s verdict.

In this case, the State cannot discharge that burden. As appellate counsel argued, the trial judge found three of the proffered mitigating factors when sentencing Roseberry on the noncapital offenses. *Roseberry*, 210 Ariz. 360, ¶ 73, 111 P.3d at 415. If a judge found this mitigation proven, then it cannot be said that a reasonable jury would certainly fail to find it; such an argument would be tantamount to claiming that the trial judge definitely acted unreasonably. This Court noted that it is not clear why the jury failed to find the mitigation proven, *id.* ¶ 74, but one very plausible (if not likely) reason for its failure was the instruction that ordered them to fail to find any mitigation without a causal nexus to the offense.

Independent review does not provide an adequate remedy here, because Roseberry's claim is not that this Court erred in its review. *Cf. State v. Styers*, 227 Ariz. 186, 254 P.3d 1132 (2011) (new independent review conducted because Ninth Circuit found that previous independent review failed to consider mitigating factor). Roseberry's petition correctly asserted that independent review is a "review of last resort," which this Court conducts only *after* finding no reversible error elsewhere in the case. Rather, the essence of Roseberry's claim is that he was denied a fair jury trial on penalty, in violation of the Sixth, Eighth, and Fourteenth Amendments, as in *Gunches*. In fact, the very holding of *Ring III* proves the flaw in the State's argument; constitutional error having been found (denial of a jury

trial on aggravating factors), this Court engaged in harmless error analysis in each of the cases, and it vacated the death sentences affirmed only two.³ *See Appendix* (procedural history of all *Ring III* cases). Of the remaining twenty-five cases where death sentences were not upheld, twenty were vacated because the error was not harmless, two others were remanded to the trial court for proceedings related to the defendant's intellectual faculties, and in the remaining three, this Court reversed the murder conviction. *Appendix*.

Some of the *Ring* remands are very illuminating; in nine of those cases, the death sentences had already been upheld on independent review and later were vacated when subjected to the harmless error inquiry. For example, in *Cañez I*, 202 Ariz. 133, ¶¶ 109 & 126, 42 P.3d at 593, 596, this Court upheld a death sentence on independent review even after removing the improperly-included aggravating factor of heinousness or depravity. On remand after *Ring*, however, this Court reversed, because a reasonable jury might find or weigh the *mitigating* factors differently than did the trial judge. *State v. Cañez (Cañez II)*, 205 Ariz. 620, ¶ 22, 74 P.3d 932, 937 (2003). *See also State v. Pandeli (Pandeli II)*, 204 Ariz. 569, ¶¶ 9-10, 65 P.3d 950, 953 (2003) (“our harmless error inquiry does not end with

³ The two cases with affirmed death sentences were *Sansing* and *State v. Murdaugh*, 209 Ariz. 19, 97 P.3d 844 (2004). Notably, the only current member of this Court to participate in *Murdaugh*, Justice Berch, dissented from the finding of harmlessness. *Id.* ¶¶ 93-111, 97 P.3d at 862-65 (Berch, J., concurring in part and dissenting in part).

considering aggravating circumstances. We also must consider whether reversible error occurred with respect to the mitigating circumstances.”).

Had this argument been made in a timely manner by counsel on direct appeal, then this Court would have applied the standard as stated in *Ring III* and countless other harmless error cases before it. As shown in the *Ring III* cases, from a statistical vantage point, it is extremely unlikely that the State would have prevailed in convincing this Court to uphold the death sentence in light of the instructional error.

II. Black-letter law requires a finding of ineffective assistance of appellate counsel, because appellate counsel’s attempt to supplement after oral argument proves that the decision was not strategic, and Roseberry was prejudiced. Post-conviction counsel’s failure to cite *Strickland* should not be fatal to Roseberry’s claim. But if this Court applies the waiver doctrine as suggested by the State, then the claim will inevitably be addressed in federal court as a claim of ineffective assistance of post-conviction counsel under *Martinez v. Ryan*.

The State correctly notes that Roseberry did not develop an argument of the ineffectiveness of appellate counsel that comports with the expectations of Ariz. R. Crim. P. 32.9(c)(1). Roseberry’s supplemental brief filed on June 10, 2015, similarly fails to develop a *Strickland* argument. That being said, this Court has sufficient experience with *Strickland* to understand Roseberry’s argument as intended and reach the merits.

A. Under a proper *Strickland* analysis, appellate counsel was ineffective and Roseberry was prejudiced by that deficient performance.

Although *Tennard v. Dretke*, 542 U.S. 274 (2004), was fresh when Roseberry's appeal was pending before this Court, the principles in *Tennard* were not. On the contrary, *Tennard* stated that the principles regarding the right to present mitigation were so well-established that the petitioner could be entitled to *habeas* relief once the case was reviewed under the correct standard. *Id.* at 288-89. The Court noted the rule goes back as far as *Lockett v. Ohio*, 438 U.S. 586 (1978), and has been uniformly repeated in many other cases since then. *Id.* at 284-85. There is simply no excuse for an attorney who accepts appointment on a capital appeal to be so unaware of such a basic tenet of capital defense practice.

Though *Strickland* requires that courts entertain a "strong presumption" that an attorney's choices are strategic, 466 U.S. at 689, the record in this case proves that the failure to raise the issue of the nexus instruction was due to incompetence and not to strategy. Counsel attempted to supplement issues for review on appeal after oral argument; this is not the action of someone who is withholding an argument strategically. Particularly in appellate practice, where all issues for reversal of convictions or sentences must be included in the Opening Brief, there is no strategic reason for withholding a strong argument unless the remainder of the arguments are that much stronger. *Cf. Smith v. Murray*, 477 U.S. 527, 536 (1986)

(quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)) (“The process of ‘winnowing out weaker arguments on appeal and focusing on’ those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.”). Prong one of *Strickland*—that “counsel’s representation fell below an objective standard of reasonableness,” 466 U.S. at 688—is easily met.

The real issue here is the second prong: prejudice. *Strickland* states, “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693. But it also acknowledges that the burden is not so high: “On the other hand, we believe that a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Id.* Thus, there must be a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. The Supreme Court defined “reasonable probability” as “a probability sufficient to undermine confidence in the outcome.” *Id.* On the heels of *Strickland*, this Court defined “reasonable probability” as “less than ‘more likely than not’ but more than a mere possibility.” *State v. Lee*, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984).

The State correctly points out that *Strickland* requires the defendant to prove prejudice, *id.* at 691-92, and that the State is not required to prove harmlessness at this stage. But the State fails to grasp that, in order to prove prejudice here,

Roseberry must show that he had a reasonable likelihood of prevailing on appeal had he raised the nexus instruction issue. *See State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995) (“the petitioner must offer evidence of a reasonable probability that but for counsel’s unprofessional errors, the outcome of the appeal would have been different.”). And, in order to demonstrate that, he has to show a reasonable likelihood that this Court would have found error and also that this Court would have held *that the error was not harmless*.

In *State v. Bennett*, 213 Ariz. 562, 146 P.3d 63 (2006), the trial court found that the defendant’s second petition was precluded, a ruling that this Court reversed. The procedural history provides guidance to the outcome in this case, however, because the direct appeals in both *Bennett* and *Roseberry* reflect that the reviewing court addressed a species of the claim raised later in post-conviction relief but not the post-conviction claim itself. In *Bennett*, appellate counsel challenged the sufficiency of the evidence to convict for child abuse, but not the sufficiency of the evidence to convict for felony murder predicated on child abuse. While the Court of Appeals was certainly aware of the legal standard, it did not implicitly address a claim that was not made in the briefs. 213 Ariz. 562, ¶¶ 7-10 & 18-20, 146 P.3d at 66, 67-68. Thus, *Bennett* stated a colorable claim of ineffective assistance of appellate counsel for failing to raise that claim, even though other claims had been raised. *Id.* ¶¶ 25-29, 146 P.3d at 69.

The State suggests that appellate counsel's raising of the issue in a motion for leave to amend the Opening Brief and in a motion for reconsideration required this Court to understand the merits of the motions in order to deny them. This puts the cart before the horse; this Court expressed no view of the merits of the argument that it was refusing to address. But the reason that this Court did not address the nexus argument in an untimely manner was the State's vigorous opposition to the motion. *Exhibit A to State's Supplemental Brief*, pp.2-3 ("If this Court fails to enforce the procedural rules of abandonment or waiver at this point, every capital defendant will have an incentive to bombard this Court with new post-argument issues..."). Judicial estoppel bars the State's argument that this Court considered the argument. *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996).

Similarly, notwithstanding the position of the Superior Court to the contrary, this Court did not implicitly address an argument not made concerning the improper nexus instruction. *Amended Order Denying Petition, July 3, 2014*, p.4. Awareness of a potential issue does not constitute squarely addressing the issue. In fact, as Roseberry has pointed out, this Court's opinion clearly implies that the issue was *not* considered. *Petition for Review*, p.17 (quoting *Roseberry*, 210 Ariz. 360, ¶ 75, 111 P.3d at 415) ("Nor does Roseberry argue that the jurors were improperly instructed."). Furthermore, the Superior Court's ruling that independent

review cured any error was clearly erroneous for the reasons stated in **Argument I**, *supra*. For these reasons, Roseberry is able to prove that the error is prejudicial.

B. Post-conviction counsel has not technically complied with Rule 32.9(c)(1), Ariz. R. Crim. P., but this Court can understand the argument as intended. Finding waiver, as the State requests, would be contrary to the fair administration of justice, and would result in an inevitable claim for ineffective assistance of post-conviction counsel under *Martinez v. Ryan*.

The State correctly characterizes Roseberry’s argument in his petition for review as follows:

he does not argue (although he did below) that appellate counsel was ineffective for failing to raise those claims on appeal. . . . nowhere in his argument . . . does Roseberry cite *Strickland*’s standard or contend that his appellate counsel fell below that standard. In fact, with regard to the nexus instruction claim, Roseberry identifies the standard of review that would apply if this Court were reviewing whether the nexus instruction was erroneously given.

Response, p.5. *See also State’s Supplemental Brief*, p.2-4. The State then asks this Court to find that, “By failing to argue Strickland error, and conflating his IAC claim with the underlying claim of trial error, Roseberry has waived both appellate IAC claims.” *Response*, p.6 (citing *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995)).

This Court has discretion to address a significant, albeit waived, issue on the merits. *State v. Smith*, 203 Ariz. 75, ¶ 12, 50 P.3d 825, 829 (2002). “[W]aiver is a procedural concept that courts do not rigidly employ in mechanical fashion.” *State*

v. Aleman, 210 Ariz. 232, ¶ 24, 109 P.3d 571, 579 (App. 2005). “If application of a legal principle, even if not raised below, would dispose of an action on appeal and correctly explain the law, it is appropriate for us to consider the issue.” *Rubens v. Costello*, 75 Ariz. 5, 9, 251 P.2d 306, 308 (1952). This issue was briefed below, and thus the State had fair opportunity to meet that argument. *Childress Buick Co. v. O’Connell*, 198 Ariz. 454, ¶ 29, 11 P.3d 413, 418 (App. 2000) (waiver doctrine is a policy consideration and not jurisdictional, designed to avoid surprise and present arguments that the parties may have intentionally withheld).

The State asks this Court to elevate form over substance and apply the waiver doctrine in a situation where it is clearly inapplicable. Not only has the State responded to the substance of the claim of ineffective assistance of appellate counsel, but it would be extremely bad public policy to avoid addressing, in a capital case, “error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.” *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607 (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). The rules of criminal procedure “are intended to provide for the just, speedy determination of every criminal proceeding [and] construed to secure ... fairness in administration, the elimination of unnecessary delay and expense, and to protect the fundamental rights of the individual...” Ariz. R. Crim. P. 1.2; *see*

also *Diaz*, 236 Ariz. 361, ¶ 11, 340 P.3d at 1071.

This Court’s decision in *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002), would permit waiver because the IAC claim was raised. Ultimately, however, the claim will be raised and addressed on the merits—if not in state court, then in federal court on *habeas* review. Because *Martinez* now permits procedurally defaulted claims to be raised in federal court for the first time on the ground that post-conviction counsel was ineffective, the federal courts would then address the same claim that is before this Court now. And, as shown in *Tennard*, relief for Roseberry would appear extremely likely. There is no reason to “punt” the issue to the federal courts, when it is so surely before this Court now.

CONCLUSION

It is evident that appellate counsel’s failure to raise the claim was below the minimum standard of competence for capital appellate counsel and that the claim likely would have resulted in this Court ordering a new penalty phase. Independent review does not cure the defect. For these reasons, *amicus curiae* requests that this Court apply *Strickland* and find that appellate counsel’s deficient performance resulted in prejudice to Roseberry.

RESPECTFULLY SUBMITTED this 23rd day of June, 2015.

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APPENDIX

This Court consolidated twenty-seven cases in *State v. Ring (Ring III)*, 204 Ariz. 534, 65 P.3d 915 (2003), to decide what the standard for reviewing death sentences imposed by a judge in cases not yet final at the time of the United States Supreme Court's decision in *Ring v. Arizona (Ring II)*, 536 U.S. 584 (2002). This Court then decided the twenty-seven cases individually.

Cases where death sentence by judge was deemed harmless:

- 1) *State v. Sansing*, 206 Ariz. 232, 77 P.3d 30 (2003)
- 2) *State v. Murdaugh*, 209 Ariz. 19, 97 P.3d 844 (2004)

Cases where death sentence by judge had been upheld on independent review, but on Ring remand, death sentence vacated because error was not harmless:

- 1) *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001), *vacated in part*, 206 Ariz. 150, 76 P.3d 421 (2003)
- 2) *State v. Phillips*, 202 Ariz. 427, 46 P.3d 1048 (2002), *vacated in part*, 205 Ariz. 145, 67 P.3d 1228 (2003)
- 3) *State v. Finch*, 202 Ariz. 410, 46 P.3d 421 (2002), *vacated in part*, 205 Ariz. 170, 68 P.3d 123 (2003)

- 4) *State v. Harrod*, 200 Ariz. 309, 26 P.3d 492 (2001), *vacated in part*, 204 Ariz. 567, 65 P.3d 948 (2003)
- 5) *State v. Pandeli*, 200 Ariz. 365, 26 P.3d 1136 (2001), *vacated in part*, 204 Ariz. 569, 65 P.3d 950 (2003)
- 6) *State v. Lehr*, 201 Ariz. 509, 38 P.3d 1172 (2002), *vacated in part*, 205 Ariz. 107, 67 P.3d 703 (2003)
- 7) *State v. Cañez*, 202 Ariz. 133, 42 P.3d 564 (2002), *vacated in part*, 205 Ariz. 620, 74 P.3d 932 (2003)
- 8) *State v. Hoskins*, 199 Ariz. 127, 14 P.3d 997 (2000), *vacated in part*, 204 Ariz. 572, 65 P.3d 953 (2003)
- 9) *State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001), *vacated in part*, 206 Ariz. 242, 77 P.3d 40 (2003)

Cases where death sentence by judge had not yet been reviewed by this Court when Ring II decided, and death sentence vacated because error was not harmless:

- 1) *State v. Jones*, 205 Ariz. 445, 72 P.3d 1264 (2003)
- 2) *State v. Montaña*, 206 Ariz. 296, 77 P.2d 1246 (2003)
- 3) *State v. Prince*, 206 Ariz. 24, 75 P.3d 114 (2003)
- 4) *State v. Cropper*, 206 Ariz. 153, 76 P.3d 424 (2003)
- 5) *State v. Armstrong*, 208 Ariz. 360, 93 P.3d 1076 (2004)

- 6) *State v. Tucker*, 205 Ariz. 157, 68 P.3d 110 (2003)
- 7) *State v. Prasertphong*, 206 Ariz. 167, 76 P.2d 438 (2003)
- 8) *State v. Rutledge*, 206 Ariz. 172, 76 P.3d 443 (2003)
- 9) *State v. Lamar*, 210 Ariz. 571, 115 P.3d 611 (2005)
- 10) *State v. Dann*, 206 Ariz. 371, 79 P.3d 58 (2003)
- 11) *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119 (2004)

Cases where death sentence by judge was vacated because this Court found another error, in addition to *Ring* error:

- 1) *State v. Davolt*, 207 Ariz. 191, 84 P.3d 456 (2004) (trial court erred in failing to account for defendant's maturity)
- 2) *State v. Grell (Grell II)*, 212 Ariz. 516, 135 P.3d 696 (2006) (this Court honored Grell's pre-trial agreement with State that, in exchange for his agreeing to a trial by submission on guilt, he would preserve his claim to a jury trial on sentencing if the *Ring* challenge were to be successful)

Cases where this Court reversed the murder conviction:

- 1) *State v. Blakley*, 204 Ariz. 429, 65 P.3d 77 (2003)
- 2) *State v. Hall*, 204 Ariz. 442, 65 P.3d 90 (2003)
- 3) *State v. Huerstel*, 206 Ariz. 93, 75 P.3d 698 (2003)