

ARIZONA SUPREME COURT

STATE OF ARIZONA,)	No. CR-12-0359-AP
)	
Appellee,)	
)	Maricopa County Superior
v.)	Court No. CR-2001-092032(A)
)	
SHAWN PATRICK LYNCH,)	
)	
Appellant.)	
)	

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

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INTRODUCTION

In *Lynch v. Arizona (Lynch III)*, 136 S. Ct. 1818 (2016), the United States Supreme Court vacated this Court's opinion in *State v. Lynch (Lynch II)*, 238 Ariz. 84, 234 P.3d 595 (2015), because Lynch was improperly precluded from introducing as mitigation evidence that he was ineligible for parole, in violation of the rule set forth in *Simmons v. South Carolina*, 512 U.S. 154 (1994). The Supreme Court remanded the case to this Court for further proceedings, but it has never answered whether preclusion of an entire category of mitigation can be reviewed as trial error or if it must be considered structural.

Although this Court could reverse the penalty jury's verdict under any standard, *amicus curiae* Arizona Attorneys for Criminal Justice (AACJ) asks this Court to hold that such error is structural. Jury sentencing in capital trials is so functionally different from any other facet of a criminal trial such that the impact of errors such as this cannot be readily quantified—the very definition of structural error. By properly recognizing the error as structural, prosecutors and trial judges will be placed on alert to avoid injecting such error into a capital trial. *See Busso-Estopellan v. Mroz*, 238 Ariz. 553, 364 P.3d 472 (2015) (defendant's offer to plead guilty in exchange for natural life sentence is relevant mitigation evidence; special action jurisdiction granted to cure error before trial).

Even if *Simmons* error can be reviewed under a trial error standard, however,

the facts of this case strongly show that the error is not harmless, not only because one penalty jury had previously hung, but also because in *State v. Lynch (Lynch I)*, 225 Ariz. 27, 234 P.3d 595 (2010), this Court held that an instructional error was not harmless. While it is true that the instructional error in *Lynch I* was of a different character than the error that this Court is now considering, the original finding should guide this Court toward the same result.

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 Appellant Lynch because the issue presented in this case implicates the heightened due process right guaranteed by the Eighth and Fourteenth Amendments and is of paramount importance to AACJ and

its members' clients. This Court and the United States Supreme Court have routinely emphasized the importance of being abundantly sure that the person sentenced to death does in fact deserve that punishment. In an age of jury sentencing, it is impossible to maintain certainty of the worthiness of a death sentence when the trial court puts its thumb on the scale of death by precluding mitigation. It is only through a determination that structural error results from preclusion of an entire category of mitigation that appellate courts can know that the death sentence did not result from the error. Even if this is considered trial error, however, this Court's history of reviewing errors in capital sentencing proceedings shows that it truly is the rare and extraordinary case where error in a jury penalty phase is deemed harmless.

ARGUMENTS

I. Erroneous preclusion of an entire category of mitigation from the penalty phase of a capital jury trial is unlike any other trial error; it must be considered structural error.

The State's argument that *Simmons* error is not structural relies on three cases recently decided by this Court, but two do not apply. State Supplemental Brief at 3-4. First, in *State v. Tucker*, 215 Ariz. 298, ¶¶ 66-67, 160 P.3d 177, 195 (2007), it was not structural error because the Supreme Court has often held that assigning the burden of proving mitigation to the defendant is not of constitutional magnitude. Second, in *State v. Valverde*, 220 Ariz. 582, ¶ 10, 208 P.3d 233, 235-36 (2009), this

Court characterized instructional error that shifted the burden of proof as trial error, but it did not cite or distinguish *Sullivan*. *Valverde* was an extremely unusual case where the defendant was convicted in spite of receiving a more favorable instruction on burden of proof than he was entitled to receive; thus a reversal on that ground would be absurd. *Valverde* is better viewed through the prism of a failure to prove error. See *State v. Diaz*, 223 Ariz. 358, ¶ 11, 224 P.3d 174, 176 (2010) (“Regardless of how an alleged error ultimately is characterized ... a defendant on appeal must first establish that some error occurred.”). A party alleging instructional error must establish how it could possibly be read adversely to the party’s position. *Francis v. Franklin*, 471 U.S. 307, 316 (1985).

The third case is on point because, in *State v. Payne*, 233 Ariz. 484, ¶¶ 157-158, 314 P.3d 1239, 1273-74 (2013), this Court applied the harmless error rule in a context similar to the error in Lynch’s case. While finding that the trial court erred in precluding evidence the defendant would be a good inmate if sentenced to life in prison, see *Skipper v. South Carolina*, 476 U.S. 1 (1986), a majority of this Court held that such error was harmless beyond a reasonable doubt because of the overwhelming evidence presented that death was the appropriate sentence. For the reasons stated below, this Court should not follow the reasoning of the *Payne* majority and instead adopt Chief Justice Bales’s dissent on that point.

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 Lynch’s sentence last year foreclosed his argument now that the erroneous preclusion of evidence 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. Lynch was not just deprived of his right to present his mitigation evidence¹ to the jury; he was deprived in the face of improper prosecutorial argument putting Lynch's future dangerousness at issue.

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.

Chief Justice Bales' partial dissent in *Payne* explains the danger of conducting a harmless-error analysis in a capital case with jury sentencing and describes the

¹ Although the mitigation offered here was in the form of a jury instruction, as discussed in *Lynch III*, its true character is evidentiary because it is a fact used by the jury to decide between life and death. In *Busso-Estopellan*, 238 Ariz. 553, ¶¶ 10-11, this Court made no distinction, and *amicus* agrees a distinction is unnecessary.

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 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 (2005) (Hurwitz, J., concurring).

None of this Court’s former justices who dissented on this question, however,

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

articulated a distinction between capital and noncapital cases when considering how a jury might weigh evidence it never got to hear. The jury instructions given in guilt phase and penalty phase show a 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, including sympathy and mercy, this issue defies harmless-error analysis.

This Court and the United States Supreme Court have found some errors to be structural in the capital context while reviewable as trial error in the noncapital context. For example, in impaneling a noncapital jury, this Court held in *State v.*

Hickman, 205 Ariz. 192, 68 P.3d 418 (2003), that erroneous failure to strike a juror for cause is reviewable for harmless error, and the error is in fact rendered harmless when defense counsel uses a peremptory strike to remove the challenged juror, following the lead of *United States v. Martinez-Salazar*, 528 U.S. 304 (2000). See also *State v. Eddington*, 226 Ariz. 72, ¶¶ 19-20, 244 P.3d 76, 83 (App. 2010), *aff'd*, 228 Ariz. 361, 266 P.3d 1057 (2011) (following *Hickman*, use of peremptory challenge to strike biased juror cured any error, as will be the case “under all but the most extraordinary circumstances”). Yet, in a capital case decided only five months after *Martinez-Salazar*, this Court held that a trial court’s striking of jurors who lean against the death penalty, without providing opportunity for rehabilitation, was structural error that mandated reversal of the convictions. *State v. Anderson*, 197 Ariz. 314, ¶¶ 22-24, 4 P.3d 369, 378-79 (2000). Although *Anderson* was decided prior to *Hickman*, *Anderson* followed the reasoning in *Gray v. Mississippi*, 481 U.S. 648, 660 (1987), in which the Supreme Court stated: “The instant case presents yet another opportunity for this Court to adopt a harmless-error analysis and once again we decline to do so.”

In *Beck v. Alabama*, 447 U.S. 625 (1980), the Supreme Court extended the concept that “death is different” to the giving of lesser-included offense instructions in capital murder cases where the evidence supports such. Although this is a rule that Arizona has adopted for all criminal offenses (including misdemeanors), the

language of the Supreme Court is appropriate for this discussion:

Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments:

To insure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion, we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

Id. at 637-38 (internal quotes omitted). If there was any question about the scope of the opinion, the Court added a footnote to that paragraph stating: "We need not and do not decide whether the Due Process Clause would require the giving of such instructions in a noncapital case." *Id.* at 638 n.14. The heightened protections of the Eighth Amendment require such distinctions to be made between capital and noncapital cases.

The Supreme Court has repeatedly stated that "death is different." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). The general rule that errors of constitutional magnitude may be reviewed for harmless error has exceptions that apply only in capital cases. This Court has opportunity to add to that list of exceptions. When evidence of an entire category of mitigation (as opposed to a piece of evidence within a category) is excluded from the jury's consideration, the error should be considered structural.

II. Even if preclusion of an entire category of mitigation could be reviewed for harmless error, such did not occur in this case.

Even if such preclusion of mitigation can be measured for harmless error, however, such a finding is extremely unlikely to occur in capital 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 (quoting *Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993)) (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 *Lynch II*, this Court conducted independent review and considered the *Simmons* evidence that the jury was foreclosed from hearing. 238 Ariz. 84, ¶ 95, 357 P.3d at 143-44. Independent review does not provide an adequate remedy here, because, at this juncture, the 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 lacked consideration of a mitigating factor). Rather, the essence of Lynch's claim is that he was denied a fair jury trial on penalty, in violation of the Sixth, Eighth, and Fourteenth Amendments, because he was entitled to have the jury weigh that mitigation.

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 twenty-seven cases, and it vacated all but two of the death sentences.³ *See Appendix* (procedural history of all *Ring III* cases). Of those vacated, twenty were vacated because the error was not harmless, two others were remanded to the trial court for proceedings related to the defendant's age or intellectual faculties, and in the remaining three, this Court reversed the murder conviction. *See Appendix*. The Florida Supreme Court recently followed *Ring III* in *Hurst v. State*, ___ So. 3d ___, 2016 WL 6036978, *24 (Fla., Oct. 14, 2016), after Florida's capital sentencing scheme was struck down in *Hurst v. Florida*, 136 S. Ct. 616 (2016).

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

³ In addition to *Sansing*, the only other case where this Court affirmed the death sentence as harmless despite *Ring* error was *State v. Murdaugh*, in which Justice Berch dissented from the finding of harmlessness. 209 Ariz. 19, ¶¶ 93-111, 97 P.3d 844, 862-65 (2004) (Berch, J., concurring in part and dissenting in part).

vacated when subjected to the harmless error inquiry. For example, in *State v. Cañez* (*Cañez I*), 202 Ariz. 133, ¶¶ 109 & 126, 42 P.3d 564, 593, 596 (2002), 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 considering aggravating circumstances. We also must consider whether reversible error occurred with respect to the mitigating circumstances.”). *See also Hurst v. State*, 2016 WL 6036978, *24 (jury might weigh mitigation differently than trial judge). This is no less true here. This Court, aware of Lynch’s parole ineligibility, found it to be insufficiently substantial to reduce the sentence to life; but this alone does not mean that a jury would reach the same result.

Only last year, this Court concluded in *State v. Roseberry* (*Roseberry II*), 237 Ariz. 507, ¶ 12, 353 P.3d 847, 849 (2015), that the trial court’s erroneous instruction that any mitigation must have a nexus to the crime was cured when it conducted independent review on direct appeal and found the ten mitigating factors offered by the defense as “either weak or non-existent.” *State v. Roseberry* (*Roseberry I*), 210

Ariz. 360, ¶¶ 73-76 & 79, 111 P.3d at 415-16.⁴ In stark contrast to *Payne*, the aggravation in *Roseberry I* was significantly less weighty: the only aggravating factor proven was 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 altogether refused to address the impact that the improper nexus instruction could have had on the jury, instead finding that the error was cured by its 2005 independent review.

The State relies on *Roseberry II* for the proposition that “independent review serves as a constitutional means to cure sentencing errors.” State Supplemental Brief at 10 (quoting *Roseberry II*, 237 Ariz. 507, ¶ 14, 353 P.3d at 850). The problem with the rationale of *Roseberry II* is that it assumes that this Court’s independent review can substitute for the considered decision of twelve lay jurors when the jurors’ decision was potentially based on the manner in which the case was presented to them by the trial court. If this were the case, then independent review would obviate the need for harmless error review in every case, whether it be capital or noncapital and whether the error occurred in the guilt phase or at sentencing. Such reasoning would have allowed this Court to cure error by conducting independent review in this case even in *Lynch I*.

⁴ *Roseberry II*, 237 Ariz. 507, ¶ 17, 353 P.3d at 850, also notes this Court’s finding of insubstantial mitigation during its independent review. But it failed to take note of the fact that, in imposing sentence on the noncapital offenses, the trial judge found the defendant had established three of the proffered mitigating factors. *Roseberry I*, 210 Ariz. 360, ¶ 73, 111 P.3d at 415.

But, by vacating *Lynch II* and remanding to this Court for further proceedings based on the *Simmons* error, the Supreme Court implicitly rejected such reasoning. There is simply no need to remand this case for further proceedings if the Supreme Court agreed that the independent review in *Lynch II*, 238 Ariz. 84, ¶¶ 79-96, 357 P.3d at 141-44, cured any error. Moreover, if independent review could cure any constitutional error that occurred in a jury trial, then it would completely eliminate the need for and purpose of harmless error review in every capital case. *Cf. State v. Gunches (Gunches I)*, 225 Ariz. 22, ¶¶ 24-25, 234 P.3d 590, 594-95 (2010) (upon determining error occurred, harmless error review conducted).⁵ Furthermore, this Court has spurned this logic in countless cases. *See, e.g., Henderson*, 210 Ariz. 561, ¶ 27, 115 P.3d at 609 (in explaining prejudice prong of fundamental error test, defendant “must show that a reasonable jury, applying the appropriate standard of proof, could have reached a different result than did the trial judge”); *State v. Anthony*, 218 Ariz. 439, ¶¶ 41-42, 189 P.3d 366, 373 (2008) (when evidentiary error occurs, reviewing court does not look to whether evidence was otherwise sufficient to convict but applies the “stringent concepts” of harmless error review). In *State v. Romero (Romero III)*, 240 Ariz. 504, ¶¶ 23-24, ___ P.3d ___, ___ (App. 2016), Judge

⁵ *Gunches*’s offense occurred after August 1, 2002, and thus this Court would not have conducted independent review. In fact, this Court recently conducted abuse-of-discretion review after finding no legal error in the imposition of the death sentence on remand. *State v. Gunches (Gunches II)*, 240 Ariz. 198, ¶ 41, 377 P.3d 993, 1002 (2016).

Eckerstrom recently recognized his previous concurrence was erroneous for failing to make this critical distinction, and he specially concurred again to point out his previous error. *Roseberry II* is an anomaly that should be jettisoned.

This Court has repeatedly stated that “[h]armless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence.” *Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d at 607 (citing *Bible*, 175 Ariz. at 588, 858 P.2d at 1191). The United States Supreme Court explained the reason for the burden being placed upon the party causing or benefitting from the error:

An error ... which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless. Certainly error ... casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.

Chapman, 386 U.S. at 23-24 (citing *Fahy v. Connecticut*, 375 U.S. 85 (1963)).

The State vigorously objected to Lynch’s proposed instruction and obtained a favorable ruling from the trial court; and now it argues to this Court that the *Simmons* error was harmless. This Court should reject that argument for three reasons. First, this Court determined in *Lynch I* that it was not harmless to instruct the jury that the evidence it heard that the murder was especially cruel, heinous or depraved could be weighed as three separate factors instead of as a single factor. See A.R.S. § 13-

703(F)(6) (Rev. 2001) (defining the factor). While this factor carries great weight with jurors, it is also true that the *Lynch I* error did not implicate evidentiary concerns. When the error involves preclusion of mitigation evidence in a jury trial, it becomes that much more troublesome for an appellate court to express such absolute certainty in the harmlessness of the error. Thus, this Court's decision to vacate the death sentence in *Lynch I* militates in favor of doing so again.

Next, Lynch's first jury, instructed to consider the (F)(6) factor as three separate factors, hung on penalty. *Lynch III*, 136 S. Ct. at 1819. "[T]he fact that the jury was unable to reach a verdict at the conclusion of the first trial provides strong reason to believe the significant errors that occurred at the second trial were prejudicial." *Kyles v. Whitley*, 514 U.S. 419, 454-56 (1995) (Stevens, J., concurring). The court of appeals recently reversed the conviction in *Romero III*, 240 Ariz. 504, ¶ 13, ___ P.3d at ___, in part for this reason:

Finally, we note that Romero's first trial resulted in a hung jury. *See State v. Rich*, 184 Ariz. 179, 181, 907 P.2d 1382, 1384 (1995) (noting hung jury in conclusion error not harmless); *see also Cobb v. State*, 283 Ga. 388, 658 S.E.2d 750, 753 (Ga. 2008) (noting "prior hung juries are a factor supporting a finding of harmful error"); *State v. Edwards*, 131 Wash.App. 611, 128 P.3d 631, ¶¶ 16–17 (Wash.Ct.App.2006) (noting previous hung jury in considering whether untainted evidence overwhelming). We are skeptical the prior jury would have been unable to reach a verdict if the evidence was indeed as "overwhelming" as the state maintains.

See also Boyette v. LeFevre, 246 F.3d 76, 92 (2d Cir. 2001) (prosecution's failure to disclose evidence not harmless error because first jury hung, demonstrating that case

against defendant was close). This fact alone demonstrates that the case was close and not overwhelming.⁶

The final reason is based on the doctrine of judicial estoppel, which exists for the purpose of protecting the integrity of the judicial process. In *State v. Towerly*, 186 Ariz. 168, 182, 920 P.3d 290, 304 (1996), this Court explained the three requirements: (1) the parties must be the same, (2) the question involved must be the same, and (3) the party asserting the inconsistent position must have been successful in the prior judicial proceeding. In *State v. Ramos*, 239 Ariz. 501, n.2, 372 P.3d 1025, 1029 n.2 (App. 2016), the court of appeals applied the doctrine to arguments alleging harmless error when the State had argued at trial that “the testimony would be ‘vital’ to the defense”; relying on *Towerly*, the court “discount[ed] the state’s arguments on appeal to the extent they contradict this previous position.” In *State v. Coghill*, 216 Ariz. 578, ¶ 31, 169 P.3d 942, 950 (App. 2007), the court similarly rebuffed a harmless error argument concerning evidence improperly admitted because “the state’s contention that the evidence ... had a negligible impact ... is undermined by the prosecutor’s strenuous and persistent efforts to place that evidence before the jury...” This Court acknowledged that the prosecutor put Lynch’s future

⁶ Although the trial court did not repeat the (F)(6) instructional error in the third trial, prosecutor Juan Martinez insisted on pushing the erroneous legal argument to the jury. *Lynch II*, 238 Ariz. 84, ¶¶ 41-43, 357 P.3d at 134. The trial court sustained some objections but did not strike improper statements that the jury heard. *Id.* ¶ 41.

dangerousness at issue, *Lynch II*, 238 Ariz. 84, ¶ 64, 357 P.3d at 138, and thus this Court should foreclose the State from making a contrary argument now.

This Court stated in *Payne* that only the exceptionally bad case would allow for erroneous preclusion of an entire category of mitigation to be harmless to the result. This case is not exceptionally bad when compared to other capital sentences it has reviewed. This Court must vacate the sentence.

CONCLUSION

For these reasons, *amicus curiae* requests that this Court find the *Simmons* error in this case to be structural. Alternatively, this Court should reject the State's argument to apply *Roseberry II* and instead apply traditional harmless-error analysis—as it did in *Lynch I*. In any event, Lynch's sentence must be vacated.

RESPECTFULLY SUBMITTED this 8th day of November, 2016.

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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. Montañó*, 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)