No. 17-

IN THE
Supreme Court of the United States

ABEL DANIEL HIDALGO,
Petitioner,
v.

STATE OF ARIZONA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arizona

PETITION FOR A WRIT OF CERTIORARI

SUSAN L. COREY
CONSUELO OHANESIAN
OFFICE OF THE LEGAL ADVOCATE
222 N. Central Avenue
Suite 154
Phoenix, AZ 85004
(602) 506-4111

GARRETT W. SIMPSON
GARRETT SIMPSON PLLC
Box 6481
Glendale, AZ 85312
(623) 910-7216

NEAL KUMAR KATYAL
Counsel of Record
COLLEEN ROH SINZDAK
MITCHELL P. REICH
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
(212) 918-5547

Counsel for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

I. Whether Arizona's capital sentencing scheme, which includes so many aggravating circumstances that virtually every defendant convicted of first-degree murder is eligible for death, violates the Eighth Amendment.

II. Whether the death penalty in and of itself violates the Eighth Amendment, in light of contemporary standards of decency.

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Petitioner Abel Daniel Hidalgo respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Arizona.

OPINIONS BELOW

The Supreme Court of Arizona's opinion is reported at 390 P.3d 783. Pet. App. 1a-31a. The trial court's order is unreported but is reproduced in the appendix. *Id*. at 32a-40a.

JURISDICTION

The Supreme Court of Arizona entered judgment on March 15, 2017. On June 6, 2017, Justice Kennedy granted petitioner's application to extend the time for filing a petition for a writ of certiorari to and including July 14, 2017. On June 29, 2017, Justice Kennedy granted petitioner's application to further

extend the time to and including August 12, 2017. Because August 12, 2017 is a Saturday, the petition is due on August 14, 2017. S. Ct. R. 30.1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTE INVOLVED

The relevant provisions of the Arizona Revised Statutes are reproduced in an appendix to this petition. Pet. App. 41a-55a.

INTRODUCTION

Forty-five years ago, in *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam), this Court held that the death penalty, as then administered, was unconstitutional. Because the death penalty was only imposed on a "capriciously selected random handful," it was "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id*. at 309-310 (Stewart, J., concurring). And the Eighth Amendment does not "permit this unique penalty to be so wantonly and so freakishly imposed." *Id*. at 310; *see id*. at 313 (White, J., concurring).

In response to that decision, a number of States reinstated the death penalty, but this time seeking by statute to confine the application of the death penalty to the "worst of crimes." *Kennedy* v. *Louisiana*, 554 U.S. 407, 447 (2008). In *Gregg* v. *Georgia*, 428 U.S. 153 (1976) (plurality opinion), this Court—while affirming the central teaching of *Furman* that the death penalty cannot be "inflicted in an arbitrary and capricious manner," *id*. at 188—upheld many of those new capital sentencing schemes. The Court concluded that that the "aggravating circumstances" and other limitations in the statutes before it would "suitably direct[] and limit[]" the sentencer's discretion "so as to minimize the risk of wholly arbitrary

and capricious action." *Id*. at 189. But the Court acknowledged that it might someday revisit the constitutionality of the death penalty in light of "more convincing evidence." *Id*. at 187.

The evidence is in. The long experiment launched by *Gregg*—in whether the death penalty can be administered within constitutional bounds—has failed. It has failed both in Arizona in particular and in the Nation more broadly.

Taking Arizona first: The animating principle of *Gregg* and *Furman* is that a State's "capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield* v. *Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant* v. *Stephens*, 462 U.S. 862, 877 (1983)). Arizona's scheme utterly fails to do that. The number of statutory aggravators has proliferated such that "virtually every" person—around 99%—convicted of first-degree murder is eligible for the death penalty. Pet. App. 8a, 11a. The Arizona Supreme Court held that state of affairs acceptable because (1) prosecutors and juries can perform the needed narrowing, and (2) each *individual* aggravator does some narrowing work, even if in the *aggregate* they sweep in almost everyone. That holding both conflicts with decisions of other state supreme courts and contravenes the precedent of this Court: The "*legislature*" must provide a means of "*narrow*[*ing*] the class of death-eligible murderers," and the Arizona legislature certainly has not. *Lowenfield*, 484 U.S. at 246 (emphasis added).

Turning to the Nation as a whole: The Court did not resolve the constitutionality of the death penalty for all time in *Gregg*. Nor could it, given that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Gregg*, 428 U.S. at 173 (quoting *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). In the last twenty years, the number of death sentences imposed and carried out has plummeted. A national consensus has emerged that the death penalty is an unacceptable punishment in any circumstance. And this Court's opinions, supported by reams of evidence, are trending unmistakably toward that consensus. As the Court has increasingly recognized, States simply cannot provide the guidance necessary to ensure that the penalty is imposed only on the worst offenders. Nor can States administer the penalty without ensnaring and putting to death the innocent. And the present reality of capital punishment—that those sentenced to death must spend decades languishing on death row with the remote but very real possibility of execution hovering like a sword of Damocles—is "a punishment infinitely more ghastly" than a swift death. Alexander M. Bickel, *The Least Dangerous Branch* 243 (1962).

Two Justices of this Court, documenting these flaws, have called for the Court to reexamine the constitutionality of the death penalty. *See Glossip* v. *Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., joined by Ginsburg, J., dissenting). With each passing month, the Court receives more last-minute pleas for relief from individuals sentenced to die by a punishment whose constitutionality is in grave doubt.

There is no point in waiting any longer for "more * * * evidence." *Gregg*, 428 U.S. at 187.

Caprice and mistake have proven ineradicable in the administration of death. The Eighth Amendment tolerates neither. This Court should grant certiorari, at a minimum to declare Arizona's death penalty scheme unconstitutional.

STATEMENT

1. In Arizona, first-degree murder includes any premeditated homicide and felony murder.[1] Ariz. Rev. Stat. § 13-1105. Any defendant found guilty of first-degree murder is eligible for the death penalty as long as the "trier of fact finds that one or more * * * aggravating circumstances have been proven." *Id*. § 13-752(D). There are fourteen aggravating circumstances under Arizona law—twice the number in the original post-*Furman* regime. *See id*. § 13-751(F).

2. Abel Daniel Hidalgo killed someone in exchange for $1,000 from a gang member. Pet. App. 2a. In the course of that crime, he also killed a bystander. *Id*. Arizona charged him with two counts of first-degree murder and one count of first-degree burglary. Before his trial, Hidalgo filed a motion arguing that Arizona's statutes governing the imposition of the death penalty are unconstitutional under the Eighth and Fourteenth Amendments. He argued that the list of aggravating factors does not adequately narrow the class of defendants eligible for death, and

[1] Felony murder under Arizona law includes permutations of 22 different felonies, including transporting marijuana for sale and felony flight. Ariz. Rev. Stat. § 13-1105(A)(2).

that the large county-by-county disparities show that the imposition of the death penalty bears no rational relationship to the characteristics of the specific offenses. In support of his motion, Hidalgo submitted evidence demonstrating that virtually every first-degree murder committed in 2010 or 2011 in Maricopa County—where he was tried—had at least one aggravating factor present. *Id*. at 35a. His motion was consolidated with similar motions filed by other capital defendants. *Id*. at 33a.

The trial court denied the motion. It declined to hold a hearing, and therefore "accepted the facts as alleged by Defendants," namely "that every first degree murder case filed in Maricopa County in 2010 and 2011 had at least one aggravating factor under A.R.S. §13-751(F)." *Id*. at 35a-36a. But it held that it was "bound by the Arizona Supreme Court's holdings" that had previously upheld the State's death penalty scheme. *Id*. at 39a. The court also rejected Hidalgo's equal protection argument.

Hidalgo pleaded guilty, but the question whether to sentence him to the death penalty was tried before a jury. The jury found four aggravating circumstances: Hidalgo committed another offense eligible for a sentence of life imprisonment or death under Arizona law; he committed prior serious offenses (this finding was overturned on appeal, *id*. at 29a); he committed multiple homicides; and he murdered for pecuniary gain (only with respect to one of the two murder victims). *Id*. at 2a-3a. The jury sentenced Hidalgo to death. *Id*. at 3a.

3. Hidalgo appealed the death sentence to the Arizona Supreme Court. As relevant here, he once again argued that Arizona's death penalty scheme is

unconstitutional because it fails to narrow adequately the class of offenders eligible for the death penalty, and because it denies equal protection. The supreme court affirmed.

a. The court first found that Arizona's death penalty scheme comports with the Eighth Amendment. Hidalgo had "supplemented the record on appeal with an expanded study of first degree murder cases in several counties over an eleven-year period, which concludes that one or more aggravating circumstances were present in 856 of 866 murders." *Id*. at 8a. In other words, 99% of first-degree murders were eligible for the death penalty. The court accepted that expanded study into the record, and did not question that figure. But it held that the lack of narrowing was constitutionally acceptable for two reasons.

First, the court pointed to the fact that "death sentences are in fact not sought in most first degree murder cases." *Id*. at 12a. The court thus believed the requisite narrowing could be achieved through the "unbridled * * * discretion" of prosecutors. *Id*. at 14a. Second, the court asserted that each *individual* factor did some narrowing work, even though taken together the factors swept in virtually every first-degree murder. In its view, "[t]he [U.S. Supreme] Court has not looked beyond the particular case to consider whether, in aggregate, the statutory scheme limits death-sentence eligibility to a small percentage of first degree murders." *Id*. at 12a. The court also noted that the death penalty is limited to first-degree murders, and that the trier of fact must take mitigating circumstances into account. *Id*. at 13a-14a.

b. Next, the court rejected Hidalgo's argument that intercounty disparities in the imposition of the death penalty violate the "equal protection component implicit in the Eighth Amendment." *Id*. at 14a-16a. Like the trial court, it held the argument foreclosed by *McCleskey* v. *Kemp*, 481 U.S. 279 (1987), quoting the Fifth Circuit's assertion that "[n]o Supreme Court case has held that the Constitution prohibits geographically disparate application of the death penalty due to varying resources across jurisdictions." Pet. App. 15a-16a (quoting *Allen* v. *Stephens*, 805 F.3d 617, 629-630 (5th Cir. 2015)).

c. Finally, the court rejected a number of other arguments Hidalgo had made—that the trial court erred in not holding evidentiary hearings on two issues; that the trial court erred when it revoked its permission to let Hidalgo represent himself; and that the prosecutor had violated *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985), when she told the jury that, if it found there was "no mitigation," it had no "option" but to return a verdict of death. The Court then independently reviewed and affirmed Hidalgo's death sentence.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. Arizona's capital sentencing scheme does not "genuinely narrow the class of persons eligible for the death penalty." *Lowenfield*, 484 U.S. at 244 (quoting *Zant*, 462 U.S. at 877). It therefore violates the Eighth Amendment. And the Arizona Supreme Court's decision upholding that scheme conflicts with decisions from other state high courts. This Court should grant certiorari to resolve the resulting conflict and to vindicate the bar on the "arbitrary"

and "irrational" infliction of death. *Parker* v. *Dugger*, 498 U.S. 308, 321 (1991).

II. Even if Arizona provided some meaningful limit on the persons eligible for death, however, its death penalty would remain unconstitutional. A national consensus has emerged that the punishment of death should never be imposed. That wide-ranging consensus—reflected in the laws or practices of nearly every State—accords with the judgments of this Court and copious evidence. It has become clear that no death penalty scheme, no matter how designed, is capable of preventing the arbitrary and capricious imposition of death. Nor have States proven capable of administering the sentence of death in a manner that does not regularly entrap the innocent. The delays and conditions inherent in the imposition of capital punishment are themselves an affront to human dignity. In *Gregg*, this Court deferred judgment on the death penalty's constitutionality pending "more * * * evidence." 428 U.S. at 187. The evidence is now unequivocal that the death penalty cannot be administered in accordance with contemporary standards of decency. This Court should answer the question whether the death penalty, in and of itself, comports with the Eighth Amendment.

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE SCOPE OF THE EIGHTH AMENDMENT'S NARROWING REQUIREMENT.

A. The Arizona Supreme Court's Decision Breaks With The Clear Precedent Of This Court And Endorses A System In Which The Death Penalty May Be "Wantonly" And "Freakishly" Imposed.

1. The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." This Court has long read that prohibition to bar "the arbitrary or irrational imposition of the death penalty." *Parker* v. *Dugger*, 498 U.S. 308, 321 (1991). "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano* v. *Florida*, 468 U.S. 447, 460 (1984), *overruled on other grounds*, *Hurst* v. *Florida*, 136 S. Ct. 616 (2016). If a State's scheme offers "no principled way" of making that distinction, *Godfrey* v. *Georgia*, 446 U.S. 420, 433 (1980) (plurality opinion), the death penalty is "cruel and unusual in the same way that being struck by lightning is cruel and unusual," *Furman* v. *Georgia*, 408 U.S. 238, 309 (1972) (per curiam) (Stewart, J., concurring).

To "protect[] against arbitrary and capricious impositions of the death sentence," *Sawyer* v. *Whitley*, 505 U.S. 333, 341 (1992), a State's "capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe

sentence on the defendant compared to others found guilty of murder.'" *Lowenfield* v. *Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant* v. *Stephens*, 462 U.S. 862, 877 (1983)). The legislature may accomplish the "narrowing function * * * in either of * * * two ways." *Lowenfield*, 484 U.S. at 246. "The legislature may itself narrow the definition of capital offenses" at the *guilt* phase, by—for example—narrowly defining the offense of first-degree murder and then making every defendant convicted of that offense eligible for the death penalty. *Id.* at 245-246. Alternately, "the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase." *Id.* at 246.

A state is free to choose either of these options, but the Constitution forbids a legislature from dispensing with statutory narrowing altogether. Indeed, the narrowing principle is so fundamental to the constitutional administration of the death penalty that even Justice Scalia—otherwise a vocal critic of the Court's Eighth Amendment jurisprudence—"adhere[d] to the precedent establish[ing] * * * that when a State adopts capital punishment for a given crime but does not make it mandatory," the State must "establish in advance, and convey to the sentencer, a governing standard." *Walton* v. *Arizona*, 497 U.S. 639, 671 (1990) (Scalia, J., concurring in part and concurring in the judgment). In other words, the legislature *must* offer "clear and objective" standards, *Godfrey* v. *Georgia*, 446 U.S. at 428, that provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Furman*, 408 U.S. at 313 (White, J., concurring).

2. The Arizona Supreme Court has disregarded that bedrock requirement of the Eighth Amendment, upholding the constitutionality of a capital punishment scheme that renders "virtually every" defendant convicted of first-degree murder eligible for the death penalty. Pet. App. 11a.

Because Arizona's legislature has adopted and retained a broad definition of first-degree murder, Ariz. Rev. Stat. § 13-1105, it has attempted "to comply with the Eighth Amendment's mandate to impose statutory limitations on capital sentencing discretion" through the use of aggravating circumstances set out in § 13-751. Brief of Respondent State of Arizona at 21-26, *Ring* v. *Arizona*, 536 U.S. 584 (2002) (No. 01-488) (explaining that compliance with the Eighth Amendment was the State's "undisputed motivation" in establishing its aggravating circumstances). Thus, Arizona's system is compatible with the Eighth Amendment only if the aggravating circumstances "genuinely narrow the class of persons eligible for the death penalty." *Lowenfield*, 484 U.S. at 244 (internal quotation marks omitted).

They do not. Petitioner in this case set out evidence demonstrating that the aggravating circumstances serve no narrowing function at all because "virtually every first degree murder case [in Arizona] presents facts that could support at least one [of the legislature's] aggravating circumstance[s]." Pet. App. 11a. The Arizona Supreme Court did not dispute the accuracy of this claim; it approved of the trial court's decision to "deny[] an evidentiary hearing and instead [to] assume[] the truth of Hidalgo's factual assertions." *Id*. at 4a-7a. But it held that Arizona's capital sentencing scheme is nonetheless consistent with the Eighth Amendment. That hold-

ing is plainly incompatible with this Court's insistence that a statutory scheme must *limit* the class of death-eligible defendants. *See, e.g.*, *Zant*, 462 U.S. at 878.

3. The Arizona Supreme Court offered no coherent reason for its departure from this Court's precedent. In attempting to justify its holding, the state high court pointed first to the fact that even if the death penalty is available in almost every case, "death sentences are in fact not sought in most first degree murder cases." Pet. App. 12a; *see also id*. at 11a (observing that, according to Petitioner's evidence "prosecutors sought the death penalty * * * in about ten percent of first degree murder cases" during the relevant period). The state supreme court opined that there is nothing wrong with a scheme that gives prosecutors "unbridled * * * discretion" to define the class of death-eligible defendants. *Id*. at 14a (quoting *State* v. *Ovante*, 231 Ariz. 180, 185-186 (2013) (en banc)).

This Court has held otherwise. In *Zant*, the Court held that narrowing is a "constitutionally necessary function at the stage of *legislative* definition." 462 U.S. at 878 (emphasis added); *see also Gregg*, 428 U.S. at 174 n.19 ("[The Eighth] Amendment was intended to safeguard individuals from the abuse of *legislative* power." (emphasis added)). And *Lowenfield* made very clear that it is "the *legislature*" that must provide a means of "narrow[ing] the class of death-eligible murderers." 484 U.S. at 246 (emphasis added).

That makes sense. A legislature is able to establish "clear and objective" systemwide standards that will lead to uniform distinctions between those who

are death-eligible and those who are not. *Godfrey*, 446 U.S. at 428. By contrast, if the question is left to the prosecutors' "standardless sentencing discretion," the class of death-eligible defendants will shift depending on which prosecutor is making the charging decision. *Id*. (internal quotation marks and alterations omitted). In that sort of scheme, those not sentenced to death are often "just as reprehensible" as those who are, a form of arbitrariness that the *Furman* Court firmly rejected. 408 U.S. at 309 (Stewart, J., concurring).

The Arizona Supreme Court purported to draw support for its contrary holding from this Court's statements explaining that prosecutors (like judges and juries) must enjoy broad discretion in deciding whether to "*remove* a defendant from consideration as a candidate for the death penalty." *Gregg*, 428 U.S. at 199 (emphasis added). But the fact that a prosecutor may "remove" a particular defendant from the class of death-eligible individuals does not obviate the need for the State legislature to establish a narrow class in the first place. As this Court has explained, the Eighth Amendment requires *both* that a State limit the class of death-eligible defendants to avoid arbitrariness, and that it allow individualized discretion in selecting which members of this narrow class will actually be sentenced to death. *See, e.g.*, *Tuilaepa* v. *California*, 512 U.S. 967, 972 (1994).

4. The Arizona Supreme Court also seems to have believed that a State's aggravating circumstances are constitutional so long as each individual aggravator "applies to fewer than all murders." Pet. App. 10a-11a. But under that logic, a State would be free to adopt two aggravators: one that covers all murders with a particular feature, and the other that

covers all murders that *lack* the particular feature. Or—as Arizona has done here—it could adopt a long list of aggravators such that every convicted murderer is somehow made eligible for death. Either system utterly fails to offer a "meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not." *Gregg*, 428 U.S. at 188 (internal quotation marks omitted). That is why this Court has regularly taken a holistic approach in analyzing whether a State's scheme fulfills the constitutionally mandated narrowing requirement. In *Jurek* v. *Texas*, 428 U.S. 262 (1976) (plurality opinion), and *Lowenfield*, for example, the Court examined the Texas and Louisiana statutes to determine whether each State's scheme, as a whole, "narrow[ed] the class of death-eligible murderers," 484 U.S. at 245-246.

5. Finally, the Arizona Supreme Court suggested that the State's scheme *does* somehow fulfill the narrowing function because "Arizona statutorily limits the death penalty to a subclass of defendants convicted of first degree murder" and because the "statutes further limit death eligibility to the identified aggravating circumstances." Pet. App. 13a. But Arizona itself has previously disclaimed any reliance on the narrowing function performed by its very broad statutory definition of first-degree murder. In *Ring* v. *Arizona*, the State told this Court that—after *Furman*—the legislature decided to introduce aggravating circumstances "to comply with the Eighth Amendment's mandate to impose statutory limitations on capital sentencing discretion," opting *against* narrowing the definition of first-degree murder, "which remains today substantially identical to its nineteenth century territorial counterpart."

Respondent's Brief at 22-25, *Ring*, 536 U.S. 584 (No. 01-488); *see* Ariz. Rev. Stat. § 13-1105.

Thus, by the State's own lights, the constitutionality of Arizona's sentencing scheme turns on whether the aggravating circumstances "impose statutory limits on capital sentencing discretion." Petitioner has demonstrated that they do not. Instead, they render "virtually every" defendant death eligible, returning Arizona to the pre-*Furman* days in which the "unique penalty" of death is "so wantonly and so freakishly imposed" that there is no meaningful difference between those who receive this most severe of all possible penalties and those that do not. This Court's intervention is necessary to prevent this blatantly unconstitutional scheme from going forward.

B. The Arizona Supreme Court's Decision Splits From The Decisions Of Other State Supreme Courts.

1. Unsurprisingly, the Arizona Supreme Court's decision is inconsistent with the holdings of other state supreme courts, which have properly recognized the need to narrow the class of death-eligible defendants. The Nevada Supreme Court's decision in *McConnell* v. *State* is representative. 102 P.3d 606, 622 (Nev. 2004) (en banc) (per curiam). In that case, a defendant brought a narrowing challenge to the Nevada sentencing scheme for those convicted of capital felony murder. The Nevada Supreme Court held that "[b]ecause Nevada defines capital felony murder broadly, its capital sentencing scheme must narrow death eligibility in the penalty phase by the jury's finding of aggravating circumstances." *Id*. The Nevada court explained that "[a]t a bare mini-

mum, then, a narrowing device must identify a more restrictive and more culpable class of first degree murder defendants than the pre-*Furman* capital homicide class." *Id.* (internal quotation marks omitted).

That is exactly the opposite of what the Arizona Supreme Court decided. The Arizona Supreme Court assumed that the State's aggravating circumstances made "virtually every" first-degree murderer death eligible. Pet. App. 11a. Yet it held that these aggravating circumstances, in connection with the State's pre-*Furman* definition of the class of first-degree murderers, were enough to satisfy the constitutional narrowing requirement.

2. Multiple other state high courts have also recognized that it would pose a serious constitutional problem if a State's scheme made "virtually every" murder defendant death eligible. For example, the Illinois Supreme Court held that "a capital sentencing scheme must genuinely narrow the class of individuals eligible for the death penalty and must reasonably justify imposition of a more severe sentence on the defendant compared to others found guilty of murder." *People* v. *Ballard*, 794 N.E.2d 788, 816 (Ill. 2002). The *Ballard* Court went on to reject a claim that the Illinois scheme's multiple aggravators violated this narrowing requirement, *id.*, but a special concurrence emphasized that the defendant had not supplied the Court with empirical data regarding the extent to which Illinois' aggravating factors "actually narrow[ed] the pool of death-eligible defendants," *id.* at 826 (McMorrow, J., specially concurring). "Accordingly, defendant's contention that the death penalty statute is unconstitutional fails in this case, *not as a matter of law*, but rather,

as the majority notes, because defendant has failed to substantiate his contention in any way." *Id.* (internal quotation marks and alterations omitted). Similarly, the Delaware Supreme Court held that "too many aggravating circumstances may violate the principles enunciated in *Furman* v. *Georgia* and *Zant* v. *Stephens*," but held that the "limit has not yet been reached in Delaware." *Steckel* v. *State*, 711 A.2d 5, 13 n.11 (Del. 1998) (en banc).

In this case, petitioner put forward precisely the concrete empirical evidence that was lacking in *Ballard*. And that evidence demonstrated that in Arizona, unlike in Delaware, the constitutional "limit" on "too many aggravating circumstances" has been reached. The Arizona Supreme Court nevertheless rejected the constitutional challenge to the State's death penalty scheme. The division in authority engendered by that erroneous decision warrants this Court's certiorari review.

C. The Arbitrariness Of The Death Penalty In Arizona Has Real And Troubling Consequences.

The arbitrariness of the death penalty in Arizona is not just an abstract and doctrinal problem. "[T]he death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." *Furman*, 408 U.S. at 242 (Douglas, J., concurring). The standardless lottery that is the Arizona capital sentencing scheme "gives room for the play" of prejudice and other factors that should have no place in the administration of the death penalty. *Id*.

First, the arbitrariness of Arizona's scheme enables troubling racial disparities. Arizona follows the national trend in that "individuals accused of murdering white victims, as opposed to black or other minority victims, are more likely to receive the death penalty." *Glossip* v. *Gross*, 135 S. Ct. 2726, 2760 (2015) (Breyer, J., dissenting). One study published in 1997 demonstrated that "white-victim homicides in Arizona are much more likely to result in death sentences than minority-victim homicides." Ernie Thomson, *Discrimination and the Death Penalty in Arizona*, 22 Crim. Just. Rev. 65, 73 (1997). "Minorities accused of killing whites are more than three times as likely to be sentenced to death as minorities accused of killing other minorities (6.7% vs. 2.0%)." *Id*. And a Hispanic man accused of killing a white man is 4.6 times as likely to be sentenced to death as a white man accused of killing a Hispanic victim. *See id*.

These problems have persisted since that study was published. In Maricopa County—where Hidalgo was tried and convicted—18% of the defendants sentenced to death were black, even though black people comprise just 6% of the population. Fair Punishment Project, *Too Broken To Fix: Part I: An In-depth Look at America's Outlier Death Penalty Counties* 12 (2016) (hereinafter "FPP Report").[2] In all, 57% of the defendants sentenced to death between 2010 and 2015 were people of color. *Id*. at 11.[3]

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[2] *Available at* http://fairpunishment.org/wp-content/uploads/2016/08/FPP-TooBroken.pdf.

[3] Maricopa County was also the jurisdiction of Sheriff Joe Arpaio, whose office, according to a 2011 Justice Department

In short, the failure of Arizona to narrow the class of offenders eligible for the death penalty has allowed for bias in its imposition.

Second, Arizona's death penalty turns on accidents of geography and county resources, rather than the characteristics of the offense. Hidalgo adduced evidence that, because of financial limitations, several counties were unable to pursue the death penalty even in cases with facts far more heinous than in his own. Pet. App. 14a-15a, 34a. Maricopa County (where Hidalgo was tried) is on the other end of the spectrum; it imposed the death penalty at a rate 2.3 times higher than the rest of Arizona between 2010 and 2015. FPP Report at 8. That was driven in part by a particularly zealous County Attorney, who was disbarred in 2012 because he had "outrageously exploited power, flagrantly fostered fear, and disgracefully misused the law." *In re Thomas*, No. PDJ-2011-9002, at 245 (Ariz. Apr. 10, 2012). Indeed, some form of prosecutorial misconduct has been found in 21% of capital cases in Maricopa County. FPP Report at 8.[4] The happenstance of geography is no way to "rationally distinguish between those individuals for whom death is an

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Report, had "a pervasive culture of discriminatory bias against Latinos." Marc Lacey, *U.S. Finds Pervasive Bias Against Latinos by Arizona Sheriff*, N.Y. Times (Dec. 15, 2011) (quoting the DOJ Report), *available at* http://www.nytimes.com/2011/12/16/us/arizona-sheriffs-office-unfairly-targeted-latinos-justice-department-says.html.

[4] *See also* Michael Kiefer, *Prosecutorial Misconduct Alleged in Half of Capital Cases*, Ariz. Republic (Oct. 28, 2013), *available at* http://archive.azcentral.com/news/arizona/articles/20131027milke-krone-prosecutors-conduct-day1.html.

appropriate sanction and those for whom it is not." *Spaziano*, 468 U.S. at 460.

The Court should grant certiorari to bring the Arizona Supreme Court in line with its post-*Furman* death penalty jurisprudence, to resolve a split between state high courts, and to end the havoc that arbitrariness is wreaking on the administration of justice in Arizona.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE DEATH PENALTY IS CONSTITUTIONAL.

Invalidating Arizona's death penalty statute under existing doctrine would not, however, cure all of the underlying constitutional maladies. The death penalty is unconstitutional full stop. This Court can and should strike down the punishment in its entirety.

A. The Death Penalty Is "Cruel And Unusual" Punishment.

The Constitution's proscription on "cruel and unusual punishments" protects, at its heart, human dignity. *Kennedy* v. *Louisiana*, 554 U.S. 407, 420 (2008); *Trop* v. *Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion). The content of that proscription is not frozen in time, but grows in light of "the evolving standards of decency that mark the progress of a maturing society." *Kennedy*, 554 U.S. at 419 (quoting *Trop*, 356 U.S. at 101).

In *Gregg*, the Court found that "contemporary standards" of decency did not then render the death penalty in all circumstances unconstitutional. 428 U.S. at 175. It noted that 35 States had enacted

death penalty statutes in the previous four years, and that juries regularly imposed the punishment. *Id.* at 179-182. Moreover, the Court believed that by providing adequate guidance, States could ensure that the penalty was administered rationally, and restricted only to the worst offenders. *Id.* at 195.

The *Gregg* experiment has failed. A decisive majority of this country, acting through its democratic representatives, has turned its face from capital punishment. And *Gregg*'s hope that the punishment of death could be administered rationally and in accord with legitimate penological purposes has proved to be empty, a fatal mistake which this Court must now correct.

1. A National Consensus Rejects The Death Penalty.

This Court examines "objective indicia of society's standards" to determine whether a national consensus has emerged deeming a punishment cruel and unusual. *Roper* v. *Simmons*, 543 U.S. 551, 563 (2005). Every such indication now reveals a widespread consensus against the death penalty.

Thirty-one States have abandoned the death penalty. Nineteen of those States have formally abolished the punishment. Four States—Oregon, Colorado, Washington, and Pennsylvania—have "suspended the death penalty" and ceased to carry out executions.[5] *Hall* v. *Florida*, 134 S. Ct. 1986, 1997 (2014). The remaining eight States have not carried out an

[5] *See* Death Penalty Information Center (DPIC), States With and Without the Death Penalty, https://deathpenaltyinfo.org/states-and-without-death-penalty.

execution "[i]n the past 10 years," *Roper*, 543 U.S. at 565—and four of them (Kansas, Nebraska, New Hampshire, and Wyoming) have not executed a prisoner in twenty years or longer.[6]

Furthermore, in those jurisdictions that continue to carry out death sentences, the practice is "most infrequent." *Graham* v. *Florida*, 560 U.S. 48, 62 (2010). Last year, 31 death sentences were imposed and 20 executions were carried out across the nation. Eight States with the death penalty on the books have administered fewer than five executions in the last decade; in most cases, just one or two.[7] And a "significant majority," *id.* at 64, of those executions that do occur—more than 85% over the last five years—are concentrated in just five States: Texas, Oklahoma, Florida, Missouri, and Georgia.[8] Within those States, an overwhelming majority of death sentences are issued by a handful of counties. *See Glossip*, 135 S. Ct. at 2779-780 (Breyer, J., dissenting).

Even more striking than the magnitude of the consensus is "the consistency of the direction of change." *Roper*, 543 U.S. at 566 (quoting *Atkins* v. *Virginia*, 536 U.S. 304, 315 (2002)). In the past fifteen years,

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[6] *See* DPIC, Number of Executions by State and Region Since 1976, https://deathpenaltyinfo.org/number-executions-state-and-region-1976.

[7] *Id.* The States are Arkansas (4), Idaho (2), Indiana (1), Kentucky (1), Louisiana (1), South Dakota (3), Tennessee (4), and Utah (1).

[8] *Id.*

seven States have abolished the death penalty,[9] four have formally suspended it, and four have ceased to conduct executions.[10] No State has reinstated the punishment in that time.

Meanwhile, the numbers of death sentences and executions throughout the country have plummeted. *See Graham*, 560 U.S. at 62 ("Actual sentencing practices are an important part of the Court's inquiry into consensus."). In 1996, 315 people were sentenced to death; by 2016, that number had fallen by 90%.[11] Likewise, the number of executions has fallen by nearly 80%, from 1999, when 98 persons were executed.[12] In just the last five years, the numbers of death sentences and executions have dropped by more than half.[13]

In short, the death penalty has become a rare and "freakish" punishment. *Gregg*, 428 U.S. at 206. The frequency of its use "in proportion to the opportunities for its imposition" is infinitesimal. *Graham*, 560 U.S. at 66. Out of over 10,000 individuals arrested

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[9] *See* DPIC, States With and Without the Death Penalty, *supra* note 5. The States are New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), and Delaware (2016).

[10] *See* DPIC, Number of Executions by State and Region Since 1976, *supra* note 6. The States are California (2006), Montana (2006), Nevada (2006), and North Carolina (2006).

[11] DPIC, Death Sentences in the United States From 1977 By State and By Year, https://deathpenaltyinfo.org/death-sentences-united-states-1977-present.

[12] *See* DPIC, Number of Executions by State and Region Since 1976, *supra* note 6.

[13] *Id.*

for homicide offenses each year, fewer than two-tenths of one percent ultimately receive the punishment of death.

2. The Death Penalty Cannot Be Administered In A Manner That Comports With The Eighth Amendment.

"[T]he Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Roper*, 543 U.S. at 590 (internal quotation marks omitted). And precedent, logic, and bitter experience all confirm what the people themselves have now concluded: The death penalty simply cannot be imposed in accord with minimum standards of proportionality, reliability, and decency.

a. This Court has long made clear that the Constitution can tolerate the death penalty if, and only if, States are capable of "ensur[ing] against its arbitrary and capricious application" by confining the punishment to "the worst of crimes." *Kennedy*, 554 U.S. at 447; *see Gregg*, 428 U.S. at 188. This requirement follows from the Eighth Amendment's demand for proportionality and humanity. As the Court explained in *Kennedy*, "[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." 554 U.S. at 420. In order to serve legitimate penological aims, the "punishment must 'be limited to those offenders'" whose "extreme culpability makes them 'the most deserving of execution.'" *Id*. (quoting *Roper*, 543 U.S. at 568).

After 45 years, the evidence is overwhelming that States cannot satisfy this requirement. Numerous

independent studies—some commissioned by States themselves—have demonstrated that the death penalty is routinely and pervasively imposed based on considerations irrelevant to a person's culpability. *See* Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics:* Furman*,* McCleskey*, and a Single County Case Study*, 34 Cardozo L. Rev. 1227, 1244-256 (2013); *Glossip*, 135 S. Ct. at 2760-63 (Breyer, J., dissenting). The principal determinant of whether a defendant will be sentenced to death is typically not his blameworthiness, but the county in which he commits his crime. Shatz & Dalton, *supra*, at 1253-56; *see, e.g.*, John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. Empirical Legal Stud. 637, 673 (2014). Researchers have been unable to find any meaningful correlation between the heinousness of a person's offense and the likelihood he will receive a capital sentence. *See, e.g.*, *id*. at 678-679.

Meanwhile, for decades studies have consistently found—as in Arizona—that the race of the victim is a critical factor in predicting whether the perpetrator will be sentenced to death. Shatz & Dalton, *supra*, at 1246-51; *see, e.g.*, Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 Md. J. on Race, Religion, Gender, and Class 1, 35 (2004) (study commissioned by Maryland governor). Numerous other factors that should be irrelevant to the question of who lives and who dies—gender, resources, politics—have likewise been found meaningfully determinative. Shatz & Dalton, *supra*, at 1251-

53; *Glossip*, 135 S. Ct. at 2761-62 (Breyer, J., dissenting).

These problems are ineradicable. They flow from at least two features intrinsic to the death penalty under our Constitution, features that the Court itself has increasingly recognized are both problematic and incapable of repair.

The first difficulty is that the Constitution imposes two irreconcilable demands on sentencers. On one hand, it requires States to provide guidance to juries so that they impose the death penalty in a consistent and rational manner. *Gregg*, 428 U.S. at 195 n.47 ("[W]here the ultimate punishment of death is at issue a system of standardless jury discretion violates the Eighth and Fourteenth Amendments."). On the other hand, "the fundamental respect for humanity underlying the Eighth Amendment" requires that States leave juries complete discretion to decline to impose death based on a defendant's individual characteristics. *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). As Justice Scalia succinctly explained, "[t]he latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve." *Walton*, 497 U.S. at 664-665 (Scalia, J., concurring in part and concurring in the judgment); *see Callins* v. *Collins*, 510 U.S. 1141, 1151 (1994) (Blackmun, J., dissenting) (similar). By granting juries untrammeled discretion to grant mercy to whomever they wish, the law reintroduces into the death penalty system the very sort of arbitrariness that the first "narrowing" requirement is intended to remove.

The Court has acknowledged that after four decades, this problem has defied solution short of banning the death penalty's application to whole classes of persons and offenses. In *Kennedy*, it explained that the "[t]he tension between general rules and case-specific circumstances has produced results not altogether satisfactory." 554 U.S. at 436; *see Tuilaepa*, 512 U.S. at 973 (explaining that "[t]he objectives of these two inquiries can be in some tension"). The Court proceeded to state that its "response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed" to increasingly narrow sets of crimes and individuals. *Kennedy*, 554 U.S. at 437. Narrowing the death penalty, however, can only mitigate but not cure this fundamental defect. So long as juries retain open-ended discretion—as the Constitution says they must—the punishment will continue to be subject to an intolerable degree of arbitrariness.

That difficulty is compounded by a second, equally severe problem. As Arizona's scheme illustrates, the first step of the sentencing process—the narrowing of death-eligible offenders—is also infected with an insoluble degree of caprice. One year before *Furman*, this Court recognized the core difficulty: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." *McGautha* v. *California*, 402 U.S. 183, 204 (1971); *see Godfrey*, 446 U.S. at 442 (Marshall, J., concurring in the judgment).

Again, the Court has increasingly recognized this problem. And again it has identified only one solution: banning the penalty's application to classes of offenses and persons altogether. In *Kennedy*, the Court explained that while some persons who commit non-homicide offenses may rank among the most culpable offenders, States lack the capacity to "identify standards that would guide the decisionmaker so the penalty is reserved for the most severe cases." 554 U.S. at 439. The Court had "no confidence," it explained, that the characteristics of individual cases would not "overwhelm a decent person's judgment," and render "the imposition of the death penalty * * * so arbitrary as to be 'freakis[h].'" *Id.*; *see also Roper*, 543 U.S. at 572 (rejecting the contention that juries can reliably select those juvenile offenders who have "sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death"). That same problem holds *a fortiori* for homicide crimes—offenses whose human cost is all the more likely to "overwhelm a decent person's judgment," and for which distinguishing the most severe and blameworthy crimes is all the more difficult.

b. A further constitutional problem has emerged since *Gregg*. In the past 45 years, the advent of more reliable forensic techniques—particularly DNA evidence—has revealed that innocent people are sentenced to death with startling frequency. And it is equally clear that States have actually carried out executions of the innocent.

The evidence on this point is unequivocal. Since 1989, 117 individuals who were sentenced to death

have been formally exonerated of their crimes of conviction.[14] Since 1973, approximately 4% of death-row inmates have been determined to be actually innocent. *See* Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to death*, 111 Proc. Nat'l Acad. Sci. 7230 (2014). The numbers continue to increase each year; two more death-row inmates have been exonerated in 2017 alone.

There is also little doubt that States have put some such individuals to death. Multiple, painstaking studies have found "overwhelming" evidence that a number of executed prisoners were actually innocent. *See Glossip*, 135 S. Ct. at 2756 (Breyer, J., dissenting) (internal quotation marks omitted). And too many close calls have occurred—including last-minute stays by this Court, eleventh-hour reprieves by a governor, or exoneration after decades on death row—to believe that more individuals were not executed before evidence of their innocence came to light. *Id.* at 2757, 2766 (giving examples).

Executing innocents is intolerable. Because of the "finality" of death, the Constitution insists upon "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson*, 428 U.S. at 305. Thus, in *Atkins*, the Court found that the "risk of wrongful executions" provided an important reason why the intellectually disabled could not constitutionally be executed. 536 U.S. at 320-321; *see Hall*, 134 S. Ct. at 1993 (same). At a time when the number of exonerations was approxi-

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[14] National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx.

mately half what it is now, *see Glossip*, 135 S. Ct. at 2757 (Breyer, J., dissenting), the Court explained that it "cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated." *Atkins*, 536 U.S. at 320 n.25. The risk that intellectually disabled defendants would give "false confessions" and be executed because of them, the Court concluded, was too great for the Constitution to bear. *Id.* at 320.

The Court "cannot ignore" that the same risk pertains to all offenders. As the evidence makes clear, every type of defendant—mentally competent or not—faces a substantial risk of receiving an improper sentence of death. The problems that cause such errors are regrettably common: defendants may be induced to give false confessions, receive poor quality defense counsel, face prosecutorial misconduct, or suffer from myriad other errors. *See Glossip*, 135 S. Ct. at 2757-58 (Breyer, J., dissenting). The unique dynamics of capital trials—where the pressure to obtain a conviction is enormous—make such problems all the more likely to lead to an erroneous conviction.[15] Perhaps the Constitution can tolerate a risk of wrongful conviction outside the capital context, where the penalty is not irreversible and justice

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[15] John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 Cornell L. Rev. 157, 170 (2014) ("The possibility of being sentenced to death, even if it is remote, can lead defendants, even innocent ones, to plead guilty to get the death penalty 'off the table.'"); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 63 & n.197 (1987) (noting five cases in which innocent defendants pled guilty in order avoid the risk of a death sentence).

without error may be unattainable. But "death is different": States must ensure the penalty is reliably imposed, and decades of evidence reveal that they cannot. *Gregg*, 438 U.S. at 188.[16]

c. Finally, the decades since *Gregg* have made clear that, in order to carry out capital punishment in a remotely rational manner, States must not subject the convicted to inordinate delay—a form of punishment that is itself profoundly cruel, and which saps the punishment of any legitimate penological purpose.

Fifty years ago, the average delay between a death sentence and an execution was approximately 2 years. Today that delay has grown to more than 17 years. The reason is straightforward: As the rationality and reliability of death sentences has grown more questionable, States have been required to implement more and more procedural protections to ensure the penalty is not wrongly carried out. *See Glossip*, 135 S. Ct. at 2764-65, 2770-72 (Breyer, J., dissenting).

These protections are necessary and proper. Indeed, this Court has concluded that the Constitution mandates them. But the result is that the death penalty itself has become even more discordant with the Eighth Amendment.

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[16] *See, e.g.*, Robert J. Smith et al., *The Failure of Mitigation*, 65 Hastings L. J. 1221, 1228-229 (2014) (finding 87% of the last 100 executed offenders had characteristics akin to juveniles or the intellectually disabled); John H. Blume et al., *An Empirical Look at* Atkins *v.* Virginia *and Its Application in Capital Cases*, 76 Tenn. L. Rev. 625, 628-629 (2009) (discussing success rates of *Atkins* claims).

One problem is that the delay itself is a cruel form of punishment. The agony of waiting for a death sentence for weeks on end—let alone decades—has long been recognized as a barbaric form of punishment. *See, e.g.*, *In Re Medley*, 134 U.S. 160, 172 (1890). And death-row inmates typically must bear this delay while housed in solitary confinement that frequently drives prisoners to "madness." *Davis* v. *Ayala*, 135 S. Ct. 2187, 2209 (2015). Many individuals have given up their lives voluntarily rather than endure this condition. *Glossip*, 135 S. Ct. at 2766 (Breyer, J., dissenting).

When a death sentence is administered after decades of delay, moreover, it ceases to serve any legitimate penological purpose. *Id*. at 2767-69 (Breyer, J., dissenting). Individuals are not rationally deterred by the prospect that they have a slim chance of being sentenced to death decades in the future. And society's interest in retribution is not meaningfully served by a punishment carried out after memories have faded and the perpetrator himself has undergone profound changes. "In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense." *Kennedy*, 554 U.S. at 447.

d. Finally, it is "instructive," *Roper*, 543 U.S. at 575, that nearly every other developed Nation, after considering these and other problems, has abandoned capital punishment. One hundred and four countries have formally abolished the death penalty,

and more than 30 have ceased to impose it.[17] Only 23 countries imposed the death penalty last year, and more than 85% of those executions (excluding those performed by China) were carried out by four countries: Iran, Saudi Arabia, Iraq, and Pakistan.[18] The "overwhelming weight of international opinion" against the death penalty is not controlling on this Court. *Roper*, 543 U.S. at 578. But it reinforces the judgment—amply evidenced in the democratic decisions of the people, the precedents of this Court, and decades of experience—that the death penalty no longer accords with fundamental precepts of decency and the "dignity of man." *Trop*, 356 U.S. at 100.

B. This Is A Suitable Vehicle To Decide The Constitutionality Of The Death Penalty, And The Court Should Decide The Question Now.

It is time for the Court to revisit the death penalty's constitutionality. In *Gregg*, this Court issued a provisional judgment upholding capital punishment, based on "contemporary standards" and the "evidence" available to it at the time. 428 U.S. at 175, 185. In the four decades since, the Court has never reexamined the question. It has noted only that the question was "settled" under existing precedent. *Baze* v. *Rees*, 553 U.S. 35, 47 (2008) (plurality opinion); *see id.* at 63 (Alito, J., concurring) ("[T]he consti-

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[17] DPIC, Abolitionist and Retentionist Countries, https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140.

[18] DPIC, The Death Penalty: An International Perspective, https://deathpenaltyinfo.org/death-penalty-international-perspective.

tutionality of capital punishment is not before us in this case, and therefore we proceed on the assumption that the death penalty is constitutional.").

The nature of the rights protected by the Eighth Amendment makes clear that *Gregg*'s judgment is not static. The "standard of extreme cruelty * * * necessarily embodies a moral judgment" whose application "must change as the basic mores of society change." *Graham*, 560 U.S. at 58 (internal quotation marks omitted). As a result, this Court has often revisited prior decisions upholding the constitutionality of the death penalty as new consensus and new insights emerge. In *Atkins*, the Court overturned the judgment in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), that States may execute the intellectually disabled, finding that "standards * * * ha[d] evolved" in the intervening 13 years and reinforced its judgment that the penalty was impermissible. *Roper*, 543 U.S. at 563. Three years later, in *Roper*, the Court overturned its judgment in *Stanford* v. *Kentucky*, 492 U.S. 361 (1989), allowing the execution of juveniles, finding that "indicia [of societal consensus] ha[d] changed" and that in the Court's own "independent judgment" the penalty was unacceptably cruel. *Roper*, 543 U.S. at 574.

The changes wrought since *Gregg* are far more substantial. *Gregg* relied on the fact that 35 States "ha[d] enacted new statutes that provide for the death penalty," and that juries regularly sentenced individuals to death, including 254 persons in the two years after *Furman* alone. 428 U.S. at 179-182. Since then, a majority of States have abandoned capital punishment, and the penalty has withered in every State. *See supra* Part II.A.1. Equally significant, this Court has repeatedly rendered its inde-

pendent judgment that the pillars on which *Gregg*'s judgment rested—that the death penalty is capable of being imposed non-arbitrarily, reliably, and in a humane manner—were severely flawed. 428 U.S. at 206. As the Court made clear in *Kennedy*, "[d]ifficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use" to a dwindling class of persons and offenses. 554 U.S. at 447. Moreover, definitive evidence—which this Court expressly noted it lacked at the time it issued *Gregg*—now confirms that these problems are endemic to the death penalty wherever it is administered.

Two justices of this Court, documenting these problems, recently called upon the Court to examine whether the punishment accords with the Eighth Amendment. *See Glossip*, 135 S. Ct. at 2755 (Breyer, J., joined by Ginsburg J., dissenting). This case presents an ideal vehicle for this Court to at last do so. The case comes to the Court on direct review, and the constitutional issues are well-preserved. As a result, the vehicle problems that often afflict criminal cases coming from state court are absent here: The AEDPA standard of review is inapplicable, so the Court can get straight to the merits without deference; there is no independent and adequate state ground; and the constitutional question was pressed and passed on below.

Furthermore, Arizona is a microcosm of the problems with the death penalty catalogued by Justice Breyer in his *Glossip* dissent, and so this case comes with a suitable record and context to consider the

constitutional issues. Nine people on death row have been exonerated in Arizona, including one in 2015.[19] The number and breadth of the statutory aggravators make it an exemplar of the arbitrariness in the imposition of the death penalty in the United States. And, while 125 people currently sit on death row in Arizona, the State has not carried out a single execution since 2014 (when Joseph Wood had to be injected 15 times in a two-hour ordeal).

The Court therefore has the opportunity to do more than remedy the severe infirmity in Arizona's death penalty scheme. It may wish to go further and answer the question whether the penalty that the State seeks to administer—one shot through with arbitrariness, unreliability, and cruelty—can any more be inflicted in accordance with the Eighth Amendment.

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[19] *See* DPIC, Innocence Cases, https://deathpenaltyinfo.org/node/4900.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SUSAN L. COREY
CONSUELO OHANESIAN
OFFICE OF THE LEGAL ADVOCATE
222 N. Central Avenue
Suite 154
Phoenix, AZ 85004
(602) 506-4111

GARRETT W. SIMPSON
GARRETT SIMPSON PLLC
Box 6481
Glendale, AZ 85312
(623) 910-7216

NEAL KUMAR KATYAL
Counsel of Record
COLLEEN ROH SINZDAK
MITCHELL P. REICH
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
(212) 918-5547

Counsel for Petitioner

AUGUST 2017

APPENDIX

APPENDIX A

IN THE
SUPREME COURT OF THE STATE OF ARIZONA

No. CR-15-0049-AP

STATE OF ARIZONA,
Appellee,

v.

ABEL DANIEL HIDALGO,
Appellant.

Appeal from the Superior Court in Maricopa County
The Honorable Roland J. Steinle, III, Judge
No. CR2011-005473
AFFIRMED

Filed March 15, 2017

CHIEF JUSTICE BALES authored the opinion of the Court, in which VICE CHIEF JUSTICE PELANDER and JUSTICES BRUTINEL, TIMMER, and BOLICK joined.

CHIEF JUSTICE BALES, opinion of the Court:

¶1 This automatic appeal concerns Abel Daniel Hidalgo's 2015 death sentences for murdering Michael Cordova and Jose Rojas. We have jurisdiction under article 6, section 5(3) of the Arizona Constitution and A.R.S. §§ 13-4031 and -4033(A).

BACKGROUND

¶2 In late December 2000, Hidalgo agreed to kill Michael Cordova in exchange for $1,000 from a gang member. He accepted the offer without knowing Cordova or why the gang wanted him murdered. One morning in January 2001, Hidalgo waited in his car near Cordova's auto-body shop. When Cordova began unlocking the shop, Hidalgo approached and feigned interest in some repair work. They were joined by Jose Rojas, who occasionally did upholstery work for Cordova and came that morning to retrieve some equipment. After the three men entered the shop, Hidalgo shot Rojas in the back of the head. Hidalgo then shot Cordova in the forehead. Even though the shots were fatal, Hidalgo shot each victim five more times to ensure he died.

¶3 After murdering Cordova and Rojas, Hidalgo went to the home of his godparents, Frank and Barbara Valenzuela. Barbara overheard Hidalgo tell others that he had just murdered two men and wanted to sell his car to Frank because a woman had seen him leave the shop. Frank purchased the car, and a few days later Hidalgo fled Arizona.

¶4 A year later, Barbara informed the Maricopa County Attorney's Office that Hidalgo murdered Cordova and Rojas. Phoenix Police subsequently interviewed Hidalgo in Idaho, where he had murdered two women in January 2002 and was under federal arrest. Hidalgo confessed to murdering Cordova for $1,000 and to killing Rojas to eliminate an eyewitness.

¶5 Hidalgo pleaded guilty in January 2015 to two counts of first degree murder and one count of first degree burglary. The jury found four aggravating

circumstances with respect to the murder of Cordova and three with respect to the murder of Rojas: Hidalgo committed another offense eligible for a sentence of life imprisonment or death under Arizona law; Hidalgo committed prior serious offenses; Hidalgo murdered for pecuniary gain (only with respect to Cordova); and Hidalgo committed multiple homicides. A.R.S. §§ 13-751(F)(1), (F)(2), (F)(5), and (F)(8). Considering these factors and the mitigation evidence, the jury sentenced Hidalgo to death for each murder. The trial court also sentenced Hidalgo to 10.5 years' imprisonment for the burglary.

DISCUSSION

A. Facial Challenge to A.R.S. § 13-751

¶6 Before trial, Hidalgo filed a motion alleging that Arizona's death penalty statute is unconstitutional because the statutorily identified aggravating factors do not adequately narrow the class of those eligible for the death penalty and defendants are denied equal protection because poorer counties cannot afford to pursue death sentences. His motion was consolidated with similar motions filed by defendants in other cases. The defendants sought an evidentiary hearing to establish that every first degree murder case filed in Maricopa County in 2010 and 2011 could support at least one aggravating factor and that rural counties cannot afford to seek death sentences. The trial court denied the hearing request, ruling that even if the defendants' factual allegations are accepted as true, the constitutional claims fail as a matter of law.

¶7 On appeal, Hidalgo argues: (1) he was denied due process when the trial court refused to hold an evidentiary hearing; (2) A.R.S. § 13-751 fails to

adequately narrow the class of those eligible for a death sentence; and (3) death sentences are arbitrarily imposed because poorer counties cannot afford to pursue the death penalty. This Court reviews a trial court's decision whether to hold an evidentiary hearing for abuse of discretion, *State v. Spears*, 184 Ariz. 277, 289, 908 P.2d 1062, 1074 (1996), and reviews "constitutional issues and purely legal issues de novo." *State v. Moody*, 208 Ariz. 424, 445 ¶ 62, 94 P.3d 1119, 1140 (2004).

1. The Refusal to Grant an Evidentiary Hearing

¶8 Hidalgo argues that he was entitled to an evidentiary hearing even though the trial court assumed his factual allegations were true in reviewing his constitutional claims. In various contexts, courts have recognized that evidentiary hearings are not required when courts need not resolve factual disputes to decide constitutional issues. *E.g., State v. Gomez*, 231 Ariz. 219, 225–26 ¶ 29, 293 P.3d 495, 501–02 (2012) (finding that trial courts need not hold an evidentiary hearing on motion for new counsel where "there is no indication that a hearing would elicit additional facts beyond those already before the court"); *see also State v. Amaral*, 239 Ariz. 217, 219 ¶ 9, 220 ¶ 11, 368 P.3d 925, 927, 928 (2016) (noting that a post-conviction relief petitioner is entitled to a hearing "if he or she presents a 'colorable claim[,]'" i.e., if the petitioner "has alleged facts which, if true, would *probably* have changed the verdict or sentence").

¶9 Although Hidalgo correctly notes that capital defendants are accorded heightened procedural safeguards, *see, e.g., Monge v. California*, 524 U.S.

721, 732–33 (1998), he has not identified any opinions holding that a capital defendant is entitled to an evidentiary hearing on a pretrial motion even if the court's ruling does not turn on disputed facts. Hidalgo also does not convincingly explain how the denial of an evidentiary hearing or the lack of findings of fact has hindered appellate review of his constitutional claims. Notably, he has not identified any particular evidence that he would have offered that would materially add to the factual record before the trial court or this Court on appeal.

¶**10** Hidalgo also correctly notes that due process entitles parties to notice and a meaningful opportunity to be heard, citing *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Mathews v. Eldridge*, 424 U.S. 319 (1976). But neither of these cases is apposite. *Mathews*, which concerned the denial of disability benefits, outlined a balancing test for identifying what process is due before persons may be deprived of liberty or property. 424 U.S. at 323, 334–35. *Hamdi* applied that test in holding that citizens detained by the military are entitled to a hearing to challenge their designation as enemy combatants. 542 U.S. at 529–35.

¶**11** Citing *Hamdi* and *Fuentes v. Shevin*, 407 U.S. 67 (1972), Hidalgo also argues that a defendant is entitled to be heard even if the court believes his claim is invalid. *See Hamdi*, 542 U.S. at 530 ("'[T]he right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions.'") (quoting *Carey v. Piphus*, 435 U.S. 247, 266 (1978)); *Fuentes*, 407 U.S. at 87 ("The right to be heard does not depend upon an advance showing that one will surely prevail

at the hearing."). *Hamdi* and *Fuentes* each considered whether any hearing was required. *See Hamdi*, 542 U.S. at 509; *Fuentes*, 407 U.S. at 69–70. Hidalgo also argues that parties must be permitted to develop both the law and the facts, citing *Kessen v. Stewart*, 195 Ariz. 488, 492 ¶ 16, 990 P.2d 689, 693 (App. 1999). But "[p]rocedural due process . . . requires nothing more than an adequate opportunity to fully present factual and legal claims." *Id.* Hidalgo was afforded an adequate opportunity to be heard. Procedural due process does not require an evidentiary hearing on a motion when the legal claims do not turn on disputed facts.

¶**12** Finally, citing *People v. Ballard*, 794 N.E.2d 788 (Ill. 2002), Hidalgo contends that whether a statute adequately narrows the class of those eligible for the death penalty is necessarily a factual question. *Ballard* rejected an argument that Illinois's capital sentencing scheme was unconstitutional because it had so many aggravating factors that it was "difficult to imagine a first degree murder defendant who does not qualify under at least one, if not several factors." *Id*. at 817. The majority in *Ballard* rejected the argument because: (1) the sentencing scheme narrowed the eligible defendants by means beyond the list of aggravating circumstances; and (2) it is impossible to identify how many aggravating circumstances would be too many for constitutional purposes. *Id.* at 819. The majority also observed that the defendant had not demonstrated that his claims were empirically accurate, *id*., a point also noted by a concurring opinion, which stated, "whether the constitutional requirement of narrowing has occurred is a factual one." *Id*. at 826 (McMorrow, J., specially concurring). The concurrence did

not suggest an evidentiary hearing is invariably required, but instead that the defendant's claims failed for lack of substantiation rather than as a matter of law. *Id*.

¶13 The trial court did not abuse its discretion here in denying an evidentiary hearing and instead assuming the truth of Hidalgo's factual assertions for purposes of ruling on the pending motion.

2. The Claim that A.R.S. § 13-751 Does Not Sufficiently Narrow the Class of Defendants Eligible for the Death Penalty

¶14 To be constitutionally sound, "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). Hidalgo contends that A.R.S. § 13-751 does not satisfy this requirement.

¶15 We rejected a similar challenge in *State v. Greenway*, 170 Ariz. 155, 823 P.2d 22 (1991). Since *Greenway*, the legislature has expanded the list and the scope of individual aggravators. *Compare* A.R.S. § 13-703(F) (1989 & Supp. 1991) (enumerating ten aggravators), *with* A.R.S. § 13-751(F) (2010 & Supp. 2016) (enumerating fourteen aggravators). As a result, Hidalgo argues, virtually every first degree murder case in Maricopa County has facts that could support at least one aggravator.

¶16 In rejecting Hidalgo's argument, the trial court stated that it was bound by *Greenway* and *State v. Hausner*, 230 Ariz. 60, app. at 89, 280 P.3d 604, app. at 633 (2012) (noting similar argument in

appendix listing claims defendant sought to preserve for federal review). The trial court acknowledged the legislature has expanded the scope of death penalty aggravators and the defendants offered to establish a precedential fact in Arizona - that the aggravators cover every first degree murder case filed within a broad period of time. Nonetheless, the court concluded that jury findings can supply the constitutionally required narrowing in a particular case.

¶**17** Hidalgo argues the legislature must statutorily narrow the scope of death-eligible murders. With the State's permission, he supplemented the record on appeal with an expanded study of first degree murder cases in several counties over an eleven-year period, which concludes that one or more aggravating circumstances were present in 856 of 866 murders.

¶**18** Hidalgo's argument finds some support from isolated quotes - as distinct from actual holdings - in opinions of the United States Supreme Court and our Court. Academic commentators have made similar arguments. *See, e.g.*, Chelsea Sharon, Note, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing*, 46 Harv. C.R.-C.L. L. Rev. 223, 244–50 (2011). Nonetheless, "[d]espite the constitutional concerns these expansive statutes [identifying aggravating factors] raise, the vast majority of courts have rejected narrowing challenges to such statutes." *Id* . at 238; *see also Smith v. Stewart*, 140 F.3d 1263, 1272 (9th Cir. 1998) (rejecting as "entirely otiose" the claim that Arizona's statute is unconstitutional because it "does not properly narrow the class of death penalty recipients"); *State v. Steckel*, 711 A.2d

5, 12–13 (Del. 1998); *State v. Wagner*, 752 P.2d 1136, 1158 (Or. 1988).

¶19 Although the United States Supreme Court has not directly addressed whether a death penalty statute may fail to provide sufficient narrowing by including too many aggravating circumstances, its case law undermines Hidalgo's position. The narrowing requirement is rooted in *Furman v. Georgia*, which struck down death penalty statutes that gave juries unguided discretion to impose death sentences for various types of murder and other crimes and resulted in "this unique penalty" being "wantonly and so freakishly imposed." 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

¶20 After *Furman*, many states enacted new capital statutes. In upholding several such statutes, the Court in *Gregg v. Georgia* noted that "[t]he basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily." 428 U.S. 153, 206 (1976) (opinion of Stewart, J.). *Gregg* held that a death sentence may not be imposed unless the sentencing authority finds and identifies "at least one statutory aggravating factor[.]" *Id*. The concerns underlying *Furman* were obviated by the procedures reviewed in *Gregg* because the sentencing procedures focused the jury's attention "on the particularized nature of the crime and the particularized characteristics of the individual defendant" and permitted the jury to consider any aggravating or mitigating circumstances before it could impose a sentence of death, and death sentences were subject to appellate review. *Id*. at 206-07.

¶21 More recently, the United States Supreme Court has identified "two different aspects of the

capital decision-making process: the eligibility decision and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). With regard to eligibility, "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield*, 484 U.S. at 244 (quoting *Zant*, 462 U.S. at 877). The selection decision requires an individualized determination based on the character of the individual and the circumstances of the crime. *Zant*, 462 U.S. at 879. Accordingly, a statute that "provides for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage" will ordinarily satisfy Eighth Amendment and due process concerns, *id.*, so long as the state ensures "that the process is neutral and principled so as to guard against bias or caprice[.]" *Tuilaepa*, 512 U.S. at 973.

¶22 "To render a defendant eligible for the death penalty in a homicide case . . . the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." *Id*. at 971-72. "[T]he aggravating circumstance must meet two requirements. First, the circumstance . . . must apply only to a subclass of defendants convicted of murder. Second, the aggravating circumstance may not be unconstitutionally vague." *Id*. at 972 (internal citations omitted).

¶23 Discussions of "narrowing" challenges to death penalty statutes may involve two different questions: (1) whether a particular aggravator applies to fewer

than all murders; and (2) whether the scheme overall "is neutral and principled so as to guard against bias or caprice[.]" *Id*. at 972–73.

¶24 Hidalgo does not contend that any of Arizona's statutorily defined aggravators are insufficiently narrow in the first sense. *Cf. Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (reversing death sentence where aggravating circumstance could apply to any murder). An aggravating circumstance satisfies this narrowing requirement so long as it applies only to a subclass of murders. *See Tuilaepa*, 512 U.S. at 972; *Arave v. Creech*, 507 U.S. 463, 474 (1993); *Hausner*, 230 Ariz. at 82 ¶ 99, 280 P.3d at 626. Hidalgo also has not alleged that any of the statutory aggravators are vague or that the aggravators applied in his case were not supported by sufficient evidence or failed to distinguish his murders from murders in general.

¶25 Hidalgo argues that Arizona's capital scheme is unconstitutional because it provides no narrowing - virtually every first degree murder case presents facts that could support at least one aggravating circumstance. He acknowledges that prosecutors sought the death penalty in Maricopa County in about ten percent of first degree murder cases in 2010 and 2011. But he contends that this situation is impermissibly "arbitrary" and violates the Eighth Amendment and due process because there is no principled basis for identifying which capital defendants will be subject to the death penalty.

¶26 In requiring "narrowing" in the eligibility phase of capital proceedings, the United States Supreme Court has focused on whether the sentencer is required to find an aggravating fact beyond the murder itself. *Arave*, 507 U.S. at 470

(stating that a capital sentencing scheme must "suitably direc[t] and limi[t] the *sentencer's discretion* so as to minimize the risk of wholly arbitrary and capricious action") (internal quotation marks omitted) (emphasis added). The Court has not looked beyond the particular case to consider whether, in aggregate, the statutory scheme limits death-sentence eligibility to a small percentage of first degree murders. Even if Hidalgo is right in his factual assertion that nearly every charged first degree murder could support at least one aggravating circumstance, no defendant will be subject to a death sentence merely by virtue of being found guilty of first degree murder and, as Hidalgo acknowledges, death sentences are in fact not sought in most first degree murder cases. Observing that at least one of several aggravating circumstances could apply to nearly every murder is not the same as saying that a particular aggravating circumstance is present in every murder. *Cf.* Carol S. Steiker & Jordan M. Steiker, Courting Death: The Supreme Court and Capital Punishment 160 (2016) (noting that the Court assesses "whether *individual* aggravators" rather than "aggravating factors *taken collectively*" narrow the class of offenders eligible for the death penalty) (emphasis in original).

¶27 As Hidalgo notes, our Court has "repeatedly held" that "the death penalty should not be imposed in every capital murder case but, rather, it should be reserved for cases in which either the manner of the commission of the offense or the background of the defendant places the crime 'above the norm of first-degree murders.'" *State v. Carlson*, 202 Ariz. 570, 582 ¶ 45, 48 P.3d 1180, 1192 (2002) (quoting *State v. Hoskins*, 199 Ariz. 127, 163 ¶ 169, 14 P.3d 997, 1033

(2000)). "The specified statutory aggravators in Arizona's death penalty scheme are designed to narrow, in a constitutional manner, the class of first degree murderers who are death-eligible." *State v. Soto-Fong*, 187 Ariz. 186, 202, 928 P.2d 610, 626 (1996).

¶28 Hidalgo is mistaken, however, insofar as he focuses only on the legislatively defined aggravating circumstances in arguing that Arizona's scheme does not constitutionally narrow the class of those eligible for death sentences. "The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." *Lowenfield*, 484 U.S. at 244 (holding that narrowing function may be performed by jury findings at guilt or sentencing phase). The legislature's definition of aggravating factors is not the only way in which Arizona's sentencing scheme narrows the class of persons eligible for death. *See State v. Bible*, 175 Ariz. 549, 603–04, 858 P.2d 1152, 1206–07 (1993). Arizona statutorily limits the death penalty to a subclass of defendants convicted of first degree murder. *Greenway*, 170 Ariz. at 164, 823 P.2d at 31. Arizona's statutes further limit death eligibility to the identified aggravating circumstances (which, as noted above, Hidalgo does not challenge individually as either overly broad or vague). Additionally, a defendant in a particular case only becomes death-eligible if the state proves beyond a reasonable doubt that one or more of the alleged aggravating circumstances exists. A.R.S. § 13-751(B); *Greenway*, 170 Ariz. at 164, 823 P.2d at 31. Arizona's statutory scheme further provides for individualized sentencing determinations that consider any mitigating

circumstances along with the defendant's culpability, and for mandatory appellate review. *See* A.R.S. § 13-751(C), (E); *Greenway*, 170 Ariz. at 164, 823 P.2d at 31. This statutory framework seeks to "ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." *Tuilaepa*, 512 U.S. at 973.

¶29 Finally, Hidalgo cannot successfully argue that Arizona's capital sentencing scheme is "arbitrary" and violates the Eighth Amendment or due process because it leaves the decision whether to seek death to the discretion of prosecutors. The United States Supreme Court has rejected similar arguments in *McCleskey v. Kemp*, 481 U.S. 279, 311–12 (1987), and *Gregg*, 428 U.S. at 199, where the Court observed that discretionary removal of defendants as candidates for death does not render a death sentence imposed in a particular case arbitrary and capricious. *See also State v. Ovante*, 231 Ariz. 180, 185–86 ¶¶ 18–22, 291 P.3d 974, 979–80 (2013) (rejecting argument that "unbridled charging discretion" of prosecutors violates due process, equal protection, and the Eighth Amendment).

3. The Equal Protection Challenges

¶30 Before the trial court, Hidalgo argued that A.R.S. § 13-751 is not applied equally across the state because poor counties cannot afford to seek the death penalty and the statute therefore violates the Equal Protection Clause or the Arizona constitutional provisions regarding equal privileges or immunities, Ariz. Const. art. 2, § 13, or barring the enactment of local or special laws. Ariz. Const. art. 4, part 2, § 19(7). In rejecting these arguments, the trial court noted that an equal protection claim could not

succeed absent purposeful discrimination, which the defendants had not alleged. *See McCleskey*, 481 U.S. at 292; *Ovante*, 231 Ariz. at 186 ¶ 21, 291 P.3d at 980 (holding that showing defendants in Maricopa County are more likely to receive the death penalty than defendants in other counties does not establish an Equal Protection Clause violation).

¶31 On appeal, Hidalgo disclaims relying on the Equal Protection Clause, but instead argues that the inter-county disparity violates the "equal protection component implicit in the Eighth Amendment," which does not require a showing of purposeful discrimination. He again argues that A.R.S. § 13-751 violates Arizona's Equal Privileges and Immunities Clause and prohibition on special laws. Without developing his arguments, he also asserts that the capital sentencing scheme violates the provisions in article 2, sections 4 and 15 of Arizona's Constitution, requiring due process and barring cruel and unusual punishment.

¶32 We reject Hidalgo's arguments. Insofar as Hidalgo contends that discretionary decisions by prosecutors not to seek the death penalty create inter-county disparities and thereby violate the Eighth Amendment, his argument is foreclosed by *McCleskey* and *Ovante*. The United States Court of Appeals for the Fifth Circuit has rejected a similar claim that a death penalty statute violated the Eighth Amendment because certain counties disproportionately applied the death penalty. *Allen v. Stephens*, 805 F.3d 617, 629–30 (5th Cir. 2015) ("[N]o Supreme Court case has held that the Constitution prohibits geographically disparate application of the death penalty due to varying resources across juris-

dictions. . . . [T]he Supreme Court has specifically acknowledged that differing law enforcement resources and prosecutorial discretion make uniform application of the death penalty impossible."), *cert. denied*, 136 S. Ct. 2382 (2016).

¶33 Hidalgo's assertion that the death penalty violates Arizona's Equal Privileges and Immunities Clause also fails because he has not alleged purposeful discrimination. *Cf. Ovante*, 231 Ariz. at 186 ¶ 21, 291 P.3d at 980 (rejecting equal protection claim on same grounds). Nor can he succeed on his assertion that § 13-751 is an impermissible "local or special law" in violation of article 4, part 2, section 19(7). The statute is a general law as it applies to all death penalty cases statewide. *See Eastin v. Broomfield*, 116 Ariz. 576, 584, 570 P.2d 744, 752 (1977).

¶34 The Court need not address Hidalgo's undeveloped arguments that § 13-751 violates the due process or the cruel and unusual punishment provisions in article 2, sections 4 and 15. *See Ovante*, 231 Ariz. at 185 ¶ 18 n.1, 291 P.3d at 979 (noting the Court will not consider or address unsupported constitutional claims). Moreover, the Court has previously rejected arguments that the death penalty is imposed arbitrarily and irrationally in Arizona in violation of article 2, section 4, *see, e.g., State v. Smith*, 203 Ariz. 75, 82 ¶ 36, 50 P.3d 825, 832 (2002), and Hidalgo has not explained how Arizona's prohibition on cruel and usual punishment should afford any protections different than the Eighth Amendment in this context.

B. Prosecutorial Statements Diminishing Jury's Responsibility

¶35 During closing argument at the penalty phase, the prosecutor told the jurors, "[i]f you unanimously agree that there is no mitigation, or the mitigation is not sufficiently substantial to call for leniency, then you shall return a verdict of death. It's not an option." Hidalgo contends that such remarks diminished the jury's sense of responsibility for its verdict and violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution and article 2, sections 4 and 15 of the Arizona Constitution.

¶36 Because Hidalgo did not object to the prosecutor's statements, we review for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567 ¶ 19, 115 P.3d 601, 607 (2005). To establish fundamental error, Hidalgo must show he was prejudiced by an error that went to the foundation of his case and denied him a fair trial. *Id*. at 568 ¶¶ 23–24, 569 ¶ 26, 115 P.3d at 608–09. When determining whether error is fundamental, this Court reviews the entire record and the totality of the circumstances. *State v. Hughes*, 193 Ariz. 72, 86 ¶ 62, 969 P.2d 1184, 1198 (1998).

¶37 Hidalgo argues that the prosecutor's statements diminished the jury's sense of responsibility for its verdict in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). We reject this argument because: (1) the prosecutor's statements accurately stated the law; (2) *Caldwell* does not apply; and (3) Hidalgo cannot show prejudice because the jurors are presumed to have followed the trial court's instructions about their role in sentencing.

¶38 The prosecutor's statements mirror Arizona law, which provides that "[t]he trier of fact shall impose a sentence of death if the trier of fact finds one or more . . . aggravating circumstances . . . and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency." A.R.S. § 13-751(E). This Court has held that jury instructions restating this language do not violate the Eighth Amendment by creating a "presumption of death," so long as the jury is allowed to consider any relevant mitigating evidence. *See, e.g., State v. Harrod*, 218 Ariz. 268, 281 ¶ 49, 183 P.3d 519, 532 (2008). The trial court's instructions comported with Arizona's statute and our case law, and Hidalgo does not challenge the trial court's instructions on appeal.

¶39 Hidalgo instead argues that the prosecutor's statements violated *Caldwell* by diminishing the jury's sense of responsibility for its verdict. Stating that the "law" may require a death sentence in certain circumstances, Hidalgo contends, may confuse the jury and prevent it from recognizing that jurors must individually make a moral determination, which can be grounded on mercy, as to the appropriate sentence. In *Caldwell*, the Court reversed a death sentence imposed after a prosecutor incorrectly suggested to the jury that "the responsibility for the ultimate determination of death will rest with others" thereby presenting "an intolerable danger that the jury will in fact choose to minimize the importance of its role." 472 U.S. at 333. Hidalgo states that "[t]he rationale underlying *Caldwell* applies equally well to these facts."

¶40 "*Caldwell*, however, merely held that a death sentence could not stand 'when the sentencing jury is

led to believe that responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case.'" *State v. Anderson*, 210 Ariz. 327, 337 ¶ 22, 111 P.3d 369, 379 (2005) (quoting *Caldwell*, 472 U.S. at 323) (emphasis removed); *see also Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (noting *Caldwell* applies only to statements that mislead the jury into feeling less responsible than it should for the sentencing decision).

¶41 The prosecutor's statements did not violate *Caldwell* by suggesting that ultimate responsibility for imposing a death sentence rested with others. To the contrary, the prosecutor noted the jury's responsibility by stating "each of you must decide the case for yourself[.]" Defense counsel also noted the jury's responsibility in various ways, including by stating "you are the sole judges of the sentence in this case." The jury instructions also thoroughly discussed the jury's responsibility in determining the death sentence and noted: "Your decision is not a recommendation. Your decision is binding."

¶42 Hidalgo also speculates that the prosecutor's comments may have caused jurors to think they could not consider "mercy" in making the sentencing decision. The jury instructions, however, explained that mitigating circumstances "are not an excuse or justification for the offense but are factors that in fairness or mercy may reduce the defendant's moral culpability." Both the prosecutor and defense counsel referenced this statement in their closing arguments.

¶43 Because the prosecutor's statements accurately reflected the law, and did not violate *Caldwell* when considered in light of the record, they do not

constitute error, much less fundamental error. *See State v. Benson*, 232 Ariz. 452, 463 ¶ 44, 307 P.3d 19, 30 (2013) (finding no error in trial court's overruling objection to prosecutor's closing argument that accurately stated the law). In any event, Hidalgo could not establish prejudice because the jury instructions accurately described the jury's role in sentencing, and the jury is presumed to have followed them. *See, e.g., State v. Newell*, 212 Ariz. 389, 403 ¶ 68, 132 P.3d 833, 847 (2006); *see also Anderson*, 210 Ariz. at 342 ¶ 50, 111 P.3d at 384 (noting that a misstatement of the law can be cured by court's instruction that attorney arguments are not evidence).

C. Revocation of Self-Representation

¶44 Hidalgo contends the trial court abused its discretion when it revoked his self-representation after Hidalgo refused to proceed with jury selection on the long-scheduled trial date. "A trial court's decision to revoke a defendant's self-representation is reviewed for an abuse of discretion." *Gomez*, 231 Ariz. at 222 ¶ 8, 293 P.3d at 498 (2012). Self-representation may be revoked if a defendant fails to comply with court rules or orders. *Id.* at 223 ¶ 15, 293 P.3d at 499.

¶45 Hidalgo contends that he was unable to proceed because a disability limits his ability to write by hand and the trial court improperly denied him access to a typewriter for use in preparing for trial. The record does not show that Hidalgo's physical condition prevented him from preparing for trial or that the trial court erred in denying his request to be allowed to use a typewriter in his cell. Instead, the trial court acted within its discretion by revoking

Hidalgo's self-representation when, contrary to the court's repeated warnings and orders, Hidalgo was unwilling to proceed on the scheduled trial date.

¶46 After Hidalgo was indicted in 2011, he was represented by appointed counsel for several years. In August 2014, the trial court granted a final motion to continue and set a firm trial date for December 8, 2014. At a September 2014 hearing, Hidalgo asked to represent himself because he disagreed with his counsel's refusal to list and interview certain witnesses. The trial court discussed with Hidalgo the disadvantages of proceeding pro per and reminded him of the trial date and his responsibility to follow the rules. The court then granted Hidalgo's request to proceed pro per and appointed his counsel as advisory counsel.

¶47 At the end of the hearing, Hidalgo filed a handwritten motion to obtain and use a laptop computer in his cell. In the motion, Hidalgo stated that he suffered from "trigger finger," an arthritic complication that causes his fingers to lock up if held in one place too long. After a hearing on October 17, at which no representative appeared for the Maricopa County Sheriff's Office ("MCSO"), the trial court granted Hidalgo's motion with the understanding that it would permit a laptop or "other authorized word processing instrument," but noted that the MCSO would let the court know "if that violates the rules."

¶48 On October 30, MCSO filed a motion for reconsideration asking the trial court to vacate its order and instead deny Hidalgo's request. MCSO said its policy prohibited providing inmates access to such devices because of security risks and noted that

Hidalgo had twenty-seven disciplinary violations, including threatening and assaulting staff. MCSO also observed that Hidalgo's advisory counsel could provide Hidalgo access to a laptop during legal visits to prepare any documents.

¶**49** On November 19, the court heard argument on MCSO's motion. By this time, the case had been assigned to a different judge for trial. The court granted MCSO's motion to vacate the order allowing Hidalgo access to an "authorized word processing instrument." Reminding Hidalgo he had to follow the rules, the trial court also said it could revoke his self-representation if he was not prepared to go forward with trial on December 8.

¶**50** Hidalgo also filed a motion on November 19 to continue the trial, asserting that he was having trouble contacting witnesses and it was taking him longer to prepare without a typewriter. On December 1, the trial court denied this motion and again reminded Hidalgo that he was required to follow the rules. On December 3, the court held another hearing and reaffirmed that trial would begin on December 8. When Hidalgo said he could not prepare for trial without a typewriter, the judge responded:

> [I]f you're not going to follow the rules, and you're going to tell me you can't proceed on Monday the 8th because you're physically incapable of doing it, then we'll have the hearing that's set forth under State vs. Gomez, and I'll make a finding that you're not capable of doing it, withdraw your pro per status, and your advisory counsel will become assigned counsel again, and we will proceed on the 8th with jury selection.

¶51 On the morning of December 8, Hidalgo told the trial court that he was asking for reconsideration of his request for a typewriter because he could not prepare for trial without one and inmates who had been helping him file handwritten motions were no longer available. Hidalgo also asked the trial court to continue the trial until March 2015 because he was not prepared to proceed.

¶52 The trial court denied Hidalgo's motions, noting that a continuance would be futile because Hidalgo claimed he was physically incapable of preparing for trial without a typewriter and the judge was not going to provide him one. The court reminded Hidalgo that he had been granted pro per status on the understanding that he would be prepared for trial on the scheduled date. After Hidalgo reaffirmed he was not prepared to proceed, the trial court stated, "in light of your refusal to proceed with this matter, the court has no option but to withdraw your pro per status[.]" The court then reassigned Hidalgo's advisory counsel as his appointed counsel and began jury selection.

¶53 On appeal, Hidalgo argues that the trial court abused its discretion in revoking his self-representation because the trial court made it impossible for him to abide by the court's orders by not granting him access to a typewriter. He distinguishes *Gomez*, in which this Court upheld the revocation of self-representation, because the defendant there had attempted to manipulate the court, engaged in willful violations of the rules, and continuously interrupted or delayed court proceedings.

¶54 Contrary to Hidalgo's arguments, the trial court did not abuse its discretion in revoking his pro per status. *Gomez* recognizes that self-representation may be revoked if a defendant fails to follow court orders. 231 Ariz. at 223 ¶ 15, 293 P.3d at 499. The trial court repeatedly ordered Hidalgo to be ready to proceed with trial on December 8 and, when that day arrived, Hidalgo informed the court that he could not proceed. The trial court thus properly revoked Hidalgo's pro per status based on his refusal to proceed on the scheduled trial date.

¶55 Although Hidalgo asserts he could not prepare for trial without a typewriter, his inability to access a typewriter in his cell did not prevent him from preparing his case to begin trial on December 8. Hidalgo began representing himself on September 30 only after he had been represented by counsel for several years and a firm trial date had been set. He continued to have advisory counsel, and during his period of self-representation, he filed thirty-one handwritten motions. Although Hidalgo told the trial court that he had been unable to file an interlocutory appeal from the trial court's denying him access to a typewriter, Hidalgo did not identify to the trial court or to this Court how denying him access to a typewriter prevented his filing any particular motion in the trial court or otherwise preparing for trial.

¶56 We emphasize two points regarding our ruling that the trial court did not abuse its discretion in revoking Hidalgo's self-representation. As the State conceded at oral argument, it would have been improper for the trial court to revoke Hidalgo's pro per status because Hidalgo had a physical disability or because the trial court thought he was not appro-

priately preparing his case. The right to self-representation respects the defendant's right to choose how to conduct his defense, *see Faretta v. California*, 422 U.S. 806, 834 (1975), and a trial court cannot revoke self-representation merely because it thinks a defendant is failing to prepare for trial. *See United States v. Flewitt*, 874 F.2d 669, 676 (9th Cir. 1989) (holding that district court erred in revoking self-representation based on the defendants' failure to "engage in meaningful discovery, . . . to make use of the resources available to them, and their general failure to prepare for trial[.]"). There is a difference, however, between revoking self-representation because a defendant is not willing to proceed on the scheduled trial date, which is permissible, and revoking self-representation because a court believes a defendant is not properly preparing for trial, which generally is not. In the latter situation, the defendant will bear the consequences of his lack of preparation; in the former, the defendant's refusal to proceed disrupts the proceedings altogether, justifying the revocation of self-representation.

¶57 It is likewise improper to revoke a defendant's self-representation based merely on a physical disability. This Court has indicated that a defendant's physical ability to conduct a defense is generally irrelevant to determining whether a defendant is entitled to self-representation. *See State v. Doss*, 116 Ariz. 156, 160, 568 P.2d 1054, 1058 (1977) ("There was evidence that the defendant was physically unable to carry on his defense, and at various times the defendant has acknowledged that stress affects his speech and presents a danger of seizure. *Faretta*, however, makes clear that the lack of skill and experience is not the issue in making the choice of

self-representation.") (footnote omitted). Accordingly, a defendant's disability can provide grounds for denying or revoking self-representation only if it renders a defendant physically incapable of presenting a case to the jury and abiding by court rules and protocol. *Cf. Savage v. Estelle*, 924 F.2d 1459, 1464, 1466 (9th Cir. 1990) (upholding revocation of self-representation in "rare case[s]," such as here, where severe speech impediment prevented defendant from "abid[ing] by [the] rules of procedure and courtroom protocol" but distinguishing a denial of a right "to communicate to the jury with the assistance of a sign language interpreter, or some other mechanical or non-mechanical means of rapid communication").

¶58 The record does not reflect that the trial court revoked Hidalgo's self-representation because of a physical disability or his failing to prepare for trial. Instead, as the trial court expressly stated, it revoked self-representation because Hidalgo refused to follow court orders to proceed with trial on the scheduled date.

D. Failure to Hold Evidentiary Hearing on Motion for New Counsel

¶59 Hidalgo argues that the trial court erred on December 8 in denying his request for new counsel without holding an evidentiary hearing. We review that decision for an abuse of discretion. *Gomez*, 231 Ariz. at 226 ¶ 29, 293 P.3d at 502. An evidentiary hearing on a motion for change of counsel is not required "if the motion fails to allege specific facts suggesting an irreconcilable conflict or a complete breakdown in communication, or if there is no indication that a hearing would elicit additional facts beyond those already before the court." *Id*. at 225–26

¶ 29, 293 P.3d at 501–02. The defendant bears the burden of making sufficient factual allegations in support of his request for an evidentiary hearing. *State v. Torres*, 208 Ariz. 340, 343 ¶ 8, 93 P.3d 1056, 1059 (2004).

¶60 When Hidalgo requested a change of counsel, he informed the trial court he had been unable to get along with his appointed lawyers and could not "come to an agreement on this trial on my defense, mitigation, and everything else that comes with the trial." He said he and his lawyers had not seen "eye to eye for some time," and they had been ineffective in preparing his case. Hidalgo then asked for an evidentiary hearing on his motion, but the trial court denied it.

¶61 Hidalgo failed to identify specific facts sufficient to require an evidentiary hearing. His statement that he disagreed with his lawyers on "[his] defense, mitigation, and everything else that comes with trial" reflects disagreements over trial strategy, and such disagreements do not constitute an irreconcilable conflict. *See State v. Cromwell*, 211 Ariz. 181, 186 ¶ 29, 119 P.3d 448, 453 (2005). Although Hidalgo said his lawyers had been ineffective in preparing his case, "generalized complaints" about differences in strategy do not necessitate a hearing. *See Torres*, 208 Ariz. at 343 ¶ 8, 93 P.3d at 1059. When Hidalgo earlier elected to represent himself, his request likewise reflected disagreement over trial strategy - namely, disagreement over his appointed counsel's refusal to list and interview certain witnesses - rather than specific allegations of irreconcilable differences or a complete breakdown in communication. The trial court therefore did not abuse its

discretion when it denied Hidalgo's request for change of counsel without holding an evidentiary hearing.

E. Independent Review of Death Sentence

¶62 Because Hidalgo committed the murders before August 1, 2002, we independently review his death sentence. *See* A.R.S. § 13-755(A).

1. Aggravating Circumstances

¶63 The jury found four aggravators - (F)(1) (conviction of another offense for which life or death sentence imposable), (F)(2) (prior conviction of a serious offense), (F)(5) (pecuniary gain), and (F)(8) (multiple murders during commission of offense) - with respect to the murder of Michael Cordova and three aggravators - (F)(1), (F)(2), and (F)(8) - with respect to the murder of Jose Rojas. Hidalgo does not contest the sufficiency of the evidence, and our review of the record confirms that the State proved each aggravator beyond a reasonable doubt.

¶64 Hidalgo's federal convictions for murdering two women in 2002 were each punishable by a sentence of life imprisonment or death, and thus, either conviction establishes the (F)(1) aggravator. The State proved the (F)(5) aggravator because Hidalgo confessed to murdering Cordova for $1,000. Hidalgo also pleaded guilty to murdering Cordova and Rojas within minutes of one another inside Cordova's autobody shop. While stating that he murdered Cordova because a gang member had hired him to do so, he confessed to killing Rojas simply to eliminate a witness to Cordova's murder. Hidalgo's confession consequently established that Cordova and Rojas's murders were temporally, spatially, and motivationally related as required for the (F)(8) aggravator. *See*

State v. Djerf, 191 Ariz. 583, 597 ¶ 57, 959 P.2d 1274, 1288 (1998).

¶65 The State, however, erred when proving the (F)(2) aggravator, which turns on Hidalgo's having been "previously convicted of a serious offense, whether preparatory or completed." When Hidalgo murdered Cordova and Rojas in 2001, this aggravator could not be established based on offenses concurrently committed or charged. *See* A.R.S. § 13-703(F)(2) (1989 & Supp. 2000). In 2003, the legislature amended the statute to include serious offenses concurrently committed or charged. *See* A.R.S. § 13-751(F)(2). Because the earlier version of the statute applied, the State (as it acknowledges on appeal) erred in arguing during the aggravation phase that Hidalgo's conviction for the first degree burglary committed concurrently with the murders supported the (F)(2) aggravator. *See State v. Rutledge*, 206 Ariz. 172, 178 ¶ 25, 76 P.3d 443, 449 (2003).

¶66 Hidalgo did not object, however, and this error was not fundamental as he was not prejudiced. First degree murder is also a serious offense supporting the (F)(2) aggravator. A.R.S. § 13-703(H)(1)(a) (1989 & Supp. 2000). Hidalgo pleaded guilty to two counts of first degree murder in 2002. While one such conviction satisfies the (F)(1) aggravator, the second establishes the (F)(2) aggravator. Thus, the record independently supports the finding of the (F)(2) aggravator beyond a reasonable doubt.

2. Mitigating Circumstances

¶67 At the sentencing phase, Hidalgo presented several witnesses who explored his difficult and abusive childhood, which included physical and sexual abuse by his parents and extended family,

gang affiliation, poverty, juvenile incarceration, and drug use. Hidalgo's chief mitigation witness, Dr. Clark, testified that Hidalgo likely had attention deficit hyperactivity disorder ("ADHD"), conduct disorder, post-traumatic stress disorder ("PTSD"), and antisocial personality disorder ("APD"). Another mitigation expert described the gang family and culture Hidalgo was born into and the difficulties with renouncing one's gang affiliation. Hidalgo also presented evidence that while in prison he renounced his gang affiliation and participated in educational and self-improvement programs. During allocution, Hidalgo expressed remorse and a desire to be rehabilitated.

¶68 Hidalgo had a cruel and traumatic childhood. Dr. Clark observed that Hidalgo's upbringing and mental disorders "constrained" his ability to make choices. Dr. Clark's diagnosis of PTSD, however, was based primarily on Hidalgo's self-reporting, and an expert witness for the State concluded Hidalgo's symptoms were contrived and inconsistent with PTSD. Hidalgo understood the wrongfulness of his actions, and no mitigation witness convincingly explained how his childhood or mental conditions led him, at age 23, to murder Cordova and Rojas. Although we consider all mitigating circumstances, we view them as less compelling because Hidalgo has not shown their causal connection to the murders. *State v. Prince*, 226 Ariz. 516, 541 ¶ 109, 542 ¶ 113, 250 P.3d 1145, 1170–71 (2011).

3. Propriety of Death Sentence

¶69 We consider the quality and the strength, not simply the number, of aggravating and mitigating factors. *State v. Greene*, 192 Ariz. 431, 443 ¶ 60, 967

P.2d 106, 118 (1998). When independently reviewing a death sentence, we have given "extraordinary weight" to the multiple murders aggravating circumstance and found the pecuniary gain aggravator "especially strong" in the case of a contract killing. *State v. Moore*, 222 Ariz. 1, 23 ¶ 137, 213 P.3d 150, 172 (2009); *Harrod*, 218 Ariz. at 284 ¶ 63, 183 P.3d at 535. Here, Hidalgo admitted killing one man for $1,000 and another simply to eliminate an eyewitness. In light of the aggravating factors, we conclude that "the mitigation is not sufficiently substantial to warrant leniency[.]" A.R.S. § 13-755(B).

F. Additional Issues

¶70 Stating that he seeks to preserve certain issues for federal review, Hidalgo lists twelve additional constitutional claims that have been rejected in previous decisions. We decline to revisit these claims.

CONCLUSION

¶71 We affirm Hidalgo's convictions and sentences.

APPENDIX B

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

No. CR2011-005473-001 DT
Honorable Joseph Kreamer

June 25, 2013

STATE OF ARIZONA

v.

ABEL DANIEL HIDALGO

MINUTE ENTRY

CR2007-133812-001	Jesus Arturo Martinez, Jr.
CR2009-160953-001	Rudolph John Cano, Jr.
CR2010-007882-001	Jasper Phillip Rushing
CR2010-007912-001	Darnell Reuna Jackson
CR2010-007912-002	Eldridge Auzzele Gittens
CR2010-048824-001	James Clayton Johnson
CR2010-168096-001	Craig Michael Devine
CR2011-005473-001	Abel Daniel Hidalgo
CR2011-008004-001	Dennis Michael Levis
CR2011-008004-002	Thomas Michael Riley
CR2011-133622-001	Jesus Busso-Estopellan
CR2011-138281-001	Jason Neil Noonkester
CR2011-140108-001	Jose Alejandro Acuna Valenzuela

CR2011-150239-001	Ryan William Foote
CR2011-151833-001	Jonathan Ray Cole
CR2012-007399-001	Zachary William Baxter
CR2012-139607-001	Justin Otis McMahan
CR2012-154880-001	Manuel Antonio Gonzalez

The parties above were permitted to join in Defendant Gittens' Motion to Dismiss the Death Penalty, originally filed on June 29, 2012. The Court also permitted supplemental briefing on multiple issues related to the original Motion and conducted oral argument on January 25, 2013 and May 3, 2013. At oral argument on January 25, the Court denied Defendants' request for an evidentiary hearing and rejected Defendants' claim that the Arizona death penalty statute violated the Equal Protection Clause of the United States Constitution and Articles II and IV of the Arizona Constitution. At oral argument on May 3, 2013, the Court rejected Defendants' argument that the Arizona statute fails to adequately narrow the class of defendants eligible for the death penalty (the "*Furman*" Motion) and thus denied the remainder of the original Motion to Dismiss. At the conclusion of the May 3 oral argument, the Court agreed to summarize its holding in a written minute entry. This is that minute entry.

At the outset, it should be noted that the Court thoroughly discussed its rulings and the basis for those rulings at the January 25 and May 3 oral arguments. This minute entry will not repeat all of the issues and arguments raised; the transcripts are the best record of the Court's holdings and rationale. Additionally, this minute entry will not again discuss rulings the Court made that do not directly resolve the two central arguments made in the original

Motion, including Defendants' request for an evidentiary hearing and issues surrounding Defendants' attendance at the hearings on the Motion. The Court believes that the record is sufficiently developed on those issues for purposes of clarity on appeal.

EQUAL PROTECTION

Defendants argued that A.R.S. §13-751, Arizona's death penalty statute, violates the Equal Protection Clause because similarly-situated defendants are disparately treated, depending on where they live in Arizona. Specifically, Defendants argued that prosecutors in poorer counties often fail to seek the death penalty even in the most egregious cases because of financial concerns. Defendants argued that this violates Equal Protection because there is no "principled basis" for this disparate treatment and the death penalty allegation is made "simply at the whim of the prosecutor."

The Court denied this portion of Defendants' Motion at the January 25 oral argument. The Court found then and reiterates now that in order to demonstrate an Equal Protection violation, a defendant must demonstrate that the decision-makers in his particular case acted with a discriminatory purpose as to the particular defendant. *See McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756 (1987). Defendants have made no argument that the State has acted with discriminatory intent as to any of the individual Defendants joined in this Motion.

Further, the Arizona Supreme Court has made it clear that the decision by one county not to seek the death penalty while a similarly situated defendant in another County might be faced with the death penalty does not constitute an Equal Protection violation.

In *State v. Ovante*, 231 Ariz. 180, 185-86, 291 P.3d 974, 979-80 (2013), the Court held that a showing that defendants in Maricopa County are more likely to receive the death penalty than similarly-situated defendants in other counties did not constitute an Equal Protection violation, noting that *McCleskey* requires a showing of purposeful discrimination against a particular defendant in his particular case. Thus, inconsistent application of the Arizona statute from county to county, including the decision of one county not to seek the death penalty for economic reasons or otherwise, is not an Equal Protection violation. *See also State v. White*, 194 Ariz. 344, 353, 982 P.2d 819, 828 (1999) (Equal Protection means only that the death penalty may be applied to all persons in the State in a like position. Persons convicted of the same crime can constitutionally be given different sentences).

Because Defendants have failed to allege purposeful discrimination aimed individually at them in their cases, Arizona's statute does not violate Equal Protection.

THE *FURMAN* ARGUMENT

Defendants' second main argument is that A.R.S. §13-751, Arizona's death penalty statute, is unconstitutional because it fails to adequately narrow the class of persons eligible for the death penalty. Defendants allege that every first degree murder case filed in Maricopa County in 2010 and 2011 had at least one aggravating factor under A.R.S. §13-751(F). Defendants sought an evidentiary hearing to prove this allegation. The Court denied the request for an evidentiary hearing, but accepted the facts as alleged by Defendants for purposes of resolving the legal

issue raised in the Motions. Thus, the question presented to the Court is whether, assuming every first degree murder case filed in Maricopa County in 2010 and 2011 had at least one aggravating factor, the Arizona Death Penalty Statute fails to adequately narrow the class of persons eligible for the death penalty.

The Court first notes that there is a strong presumption that legislative enactments are constitutional, and a party who challenges the validity of a statute has the burden of overcoming that presumption. *E.g., State v. Takacs*, 169 Ariz. 392, 395, 819 P.2d 978, 981 (App. 1991). Courts therefore must give statutes a constitutional construction whenever possible. *Id*.

Against this backdrop, "[i]f a state has determined that death should be an available penalty for certain crimes, it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460 (1984) (citations omitted). Accordingly, "a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Lowenfield v. Phillips*, 484 U.S. 231, 244 (1988) (citation omitted).

Defendants argue that if every first degree murder case in Maricopa County for two years had at least one aggravating factor, then by definition the aggravating factors perform no narrowing function, and the entire Death Penalty Statute is thus unconstitutional under *Lowenfield et al*.

The Court disagrees. First, this argument has previously been rejected by the Arizona Supreme Court. In *State v. Greenway*, 170 Ariz. 155, 823 P.2d 22 (1991), the defendant argued that the number and breadth of the aggravating factors contained in the Death Penalty Statute failed to narrow the class of persons eligible for the death penalty. The Arizona Supreme Court rejected this argument and held:

> We also reject defendant's argument that our legislature has not narrowed the class of persons eligible for the death penalty. Only those persons convicted of first degree murder as defined in A.R.S. §13-1105 are eligible for the death penalty. [citation omitted]. Moreover, only when the State has proven *one or more* aggravating factors and there are no mitigating factors sufficient to call for leniency will a person convicted of first degree murder receive the death penalty. … Furthermore, this narrowing process may take place "at either the sentencing phase of the trial or the guilt phase." [citing *Lowenfield, supra*]. Arizona's death penalty statute narrowly defines the class of death-eligible persons. Therefore, it does not offend the Constitution.

Id., 170 Ariz at 164, 823 P.2d at 31 (italics in original).

The Arizona Supreme Court recently rejected this argument again, albeit in cursory fashion. *See State v. Hausner*, 230 Ariz. 60, 89, 280 P.3d 604, 633 fn. 9 (2012) (rejecting the argument that the broad scope of Arizona's aggravating factors encompasses nearly anyone involved in a murder, in violation of the United States and Arizona Constitutions). Further, both the Ninth Circuit and the United States District

Court for the District of Arizona have also rejected arguments that the Arizona Death Penalty Statute is unconstitutional because it does not properly narrow the class of death penalty recipients. *See Smith v. Stewart*, 140 F.3d 1263, 127 (9th Cir. 1998); *Spreitz v. Ryan*, 617 F. Supp 2d 887, 921 (D. Ariz. 2009) (citing *Stewart*).

Defendants correctly point out that *Greenway* was decided at a time when there were fewer aggravating factors contained in the statute than today, and before the (F)(2) aggravating factor was expanded to include serious felonies committed at the same time as the murder.[1] *Greenway* was arguably in a different posture from these Defendants, who assert that all or virtually all first degree murder cases now contain at least one aggravating factor.

The flaw in Defendants' argument is that it fails to recognize that the required "narrowing" function can and does occur by means other than the aggravating factors contained in § 13-751(F). The narrowing function begins at the "definition" stage, with the classification of the homicide as murder, followed by the classification to either first or second degree murder. The statute further narrows the class of persons eligible for the death penalty by exempting those with intellectual disabilities. *See* A.R.S. §13-753(A). In addition, as noted in *Lowenfield*, the jury itself performs a narrowing function. "The use of 'aggravating circumstances' is not an end in itself,

[1] When the defendant in *Greenway* was charged in 1988, Arizona's death penalty statute identified ten statutory aggravating factors. There are now fourteen. *See* A.R.S. § 13-751(F).

but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase." *Lowenfield*, 484 U.S. at 244-45. *See also Greenway*, 170 Ariz. at 164, 823 P.2d at 31 (recognizing that the narrowing process may take place at either the sentencing phase or the guilt phase).

The Court recognizes that language in Arizona cases suggest that narrowing at the definition stage may be insufficient, and that the aggravating circumstances themselves must perform an independent narrowing function. *See State v. Carlson*, 202 Ariz. 570, 582, 48 P.3d 1180, 1192 (2002)(the death penalty "should not be imposed in every capital murder case but, rather it should be reserved for cases in which the manner of the commission of the offense or the background of the defendant places the crime 'above the norm of first degree murders'"). The Court further recognizes that the Defendants have offered to establish a fact not previously established in an Arizona case – that the aggravating factors in Arizona's current death penalty statute encompass every first degree murder case filed during a broad timeframe.

However, the Court is bound by the Arizona Supreme Court's holdings, by the language of *Greenway* and *Hausner*, and by the recognition in various cases that the requisite narrowing function of the statute can constitutionally occur outside the enumerated aggravating factors found in A.R.S. §13-751.

Accordingly, for the reasons set forth above and as set forth in detail at the May 3, 2013 oral argument, Defendants' Motions are DENIED.

APPENDIX C

1. Arizona Revised Statutes § 13-751. Sentence of death or life imprisonment; aggravating and mitigating circumstances; definition.

A. If the state has filed a notice of intent to seek the death penalty and the defendant is:

1. Convicted of first degree murder pursuant to section 13-1105, subsection A, paragraph 1 or 3 and was at least eighteen years of age at the time of the commission of the offense, the defendant shall be sentenced to death or imprisonment in the custody of the state department of corrections for natural life as determined and in accordance with the procedures provided in section 13-752. A defendant who is sentenced to natural life is not eligible for commutation, parole, work furlough, work release or release from confinement on any basis.

2. Convicted of first degree murder pursuant to section 13-1105 and was under eighteen years of age at the time of the commission of the offense, the defendant shall be sentenced to imprisonment in the custody of the state department of corrections for life or natural life, as determined and in accordance with the procedures provided in section 13-752. A defendant who is sentenced to natural life is not eligible for commutation, parole, work furlough, work release or release from confinement on any basis. If the defendant is sentenced to life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the murdered person was fifteen

or more years of age and thirty-five years if the murdered person was under fifteen years of age or was an unborn child.

3. Convicted of first degree murder pursuant to section 13-1105, subsection A, paragraph 2, the defendant shall be sentenced to death or imprisonment in the custody of the state department of corrections for life or natural life as determined and in accordance with the procedures provided in section 13-752. A defendant who is sentenced to natural life is not eligible for commutation, parole, work furlough, work release or release from confinement on any basis. If the defendant is sentenced to life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the murdered person was fifteen or more years of age and thirty-five years if the murdered person was under fifteen years of age or was an unborn child.

B. At the aggravation phase of the sentencing proceeding that is held pursuant to section 13-752, the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules of evidence applicable to criminal trials. The burden of establishing the existence of any of the aggravating circumstances set forth in subsection F of this section is on the prosecution. The prosecution must prove the existence of the aggravating circumstances beyond a reasonable doubt.

C. At the penalty phase of the sentencing proceeding that is held pursuant to section 13-752, the prosecution or the defendant may present any information that is relevant to any of the mitigating

circumstances included in subsection G of this section, regardless of its admissibility under the rules governing admission of evidence at criminal trials. The burden of establishing the existence of the mitigating circumstances included in subsection G of this section is on the defendant. The defendant must prove the existence of the mitigating circumstances by a preponderance of the evidence. If the trier of fact is a jury, the jurors do not have to agree unanimously that a mitigating circumstance has been proven to exist. Each juror may consider any mitigating circumstance found by that juror in determining the appropriate penalty.

D. Evidence that is admitted at the trial and that relates to any aggravating or mitigating circumstances shall be deemed admitted as evidence at a sentencing proceeding if the trier of fact considering that evidence is the same trier of fact that determined the defendant's guilt. The prosecution and the defendant shall be permitted to rebut any information received at the aggravation or penalty phase of the sentencing proceeding and shall be given fair opportunity to present argument as to whether the information is sufficient to establish the existence of any of the circumstances included in subsections F and G of this section.

E. In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating

circumstances sufficiently substantial to call for leniency.

F. The trier of fact shall consider the following aggravating circumstances in determining whether to impose a sentence of death:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant has been or was previously convicted of a serious offense, whether preparatory or completed. Convictions for serious offenses committed on the same occasion as the homicide, or not committed on the same occasion but consolidated for trial with the homicide, shall be treated as a serious offense under this paragraph.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while:

(a) In the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.

(b) On probation for a felony offense.

8. The defendant has been convicted of one or more other homicides, as defined in section 13-1101, that were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age, was an unborn child in the womb at any stage of its development or was seventy years of age or older.

10. The murdered person was an on duty peace officer who was killed in the course of performing the officer's official duties and the defendant knew, or should have known, that the murdered person was a peace officer.

11. The defendant committed the offense with the intent to promote, further or assist the objectives of a criminal street gang or criminal syndicate or to join a criminal street gang or criminal syndicate.

12. The defendant committed the offense to prevent a person's cooperation with an official law enforcement investigation, to prevent a person's testimony in a court proceeding, in retaliation for a person's cooperation with an official law enforcement investigation or in retaliation for a person's testimony in a court proceeding.

13. The offense was committed in a cold, calculated manner without pretense of moral or legal justification.

14. The defendant used a remote stun gun or an authorized remote stun gun in the commission of the offense. For the purposes of this paragraph:

(a) "Authorized remote stun gun" means a remote stun gun that has all of the following:

(i) An electrical discharge that is less than one hundred thousand volts and less than nine joules of energy per pulse.

(ii) A serial or identification number on all projectiles that are discharged from the remote stun gun.

(iii) An identification and tracking system that, on deployment of remote electrodes, disperses coded material that is traceable to the purchaser through records that are kept by the manufacturer on all remote stun guns and all individual cartridges sold.

(iv) A training program that is offered by the manufacturer.

(b) "Remote stun gun" means an electronic device that emits an electrical charge and that is designed and primarily employed to incapacitate a person or animal either through contact with electrodes on the device itself or remotely through wired probes that are attached to the device or through a spark, plasma, ionization or other conductive means emitting from the device.

G. The trier of fact shall consider as mitigating circumstances any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under section 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

H. For the purposes of determining whether a conviction of any dangerous crime against children is a serious offense pursuant to this section, an unborn child shall be treated like a minor who is under twelve years of age.

I. In this section, for purposes of punishment an unborn child shall be treated like a minor who is under twelve years of age.

J. For the purposes of this section, "serious offense" means any of the following offenses if committed in this state or any offense committed outside this state that if committed in this state would constitute one of the following offenses:

1. First degree murder.

2. Second degree murder.

3. Manslaughter.

4. Aggravated assault resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument.

5. Sexual assault.

6. Any dangerous crime against children.

7. Arson of an occupied structure.

8. Robbery.

9. Burglary in the first degree.

10. Kidnapping.

11. Sexual conduct with a minor under fifteen years of age.

12. Burglary in the second degree.

13. Terrorism.

2. Arizona Revised Statutes § 13-752. Sentences of death, life imprisonment or natural life; imposition; sentencing proceedings; definitions

A. If the state has filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder, the trier of fact at the sentencing proceeding shall determine whether to impose a sentence of death in accordance with the procedures provided in this section. If the trier of fact determines that a sentence of death is not appropriate, or if the state has not filed a notice of intent to seek the death penalty, and the defendant is convicted of first degree murder pursuant to section 13-1105, subsection A, paragraph 1 or 3 and was at least eighteen

years of age at the time of the commission of the offense, the court shall impose a sentence of natural life. If the defendant was under eighteen years of age at the time of the commission of the offense or if the defendant is convicted of first degree murder pursuant to section 13-1105, subsection A, paragraph 2, the court shall determine whether to impose a sentence of life or natural life.

B. Before trial, the prosecution shall notice one or more of the aggravating circumstances under section 13-751, subsection F.

C. If the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall then immediately determine whether one or more alleged aggravating circumstances have been proven. This proceeding is the aggravation phase of the sentencing proceeding.

D. If the trier of fact finds that one or more of the alleged aggravating circumstances have been proven, the trier of fact shall then immediately determine whether the death penalty should be imposed. This proceeding is the penalty phase of the sentencing proceeding.

E. At the aggravation phase, the trier of fact shall make a special finding on whether each alleged aggravating circumstance has been proven based on the evidence that was presented at the trial or at the aggravation phase. If the trier of fact is a jury, a unanimous verdict is required to find that the aggravating circumstance has been proven. If the trier of fact unanimously finds that an aggravating circumstance has not been proven, the defendant is entitled to a special finding that the aggravating circumstance has not been proven. If the trier of fact unan-

imously finds no aggravating circumstances, the court shall then determine whether to impose a sentence of life or natural life on the defendant pursuant to subsection A of this section.

F. The penalty phase shall be held immediately after the trier of fact finds at the aggravation phase that one or more of the aggravating circumstances under section 13-751, subsection F have been proven. A finding by the trier of fact that any of the remaining aggravating circumstances alleged has not been proven or the inability of the trier of fact to agree on the issue of whether any of the remaining aggravating circumstances alleged has been proven shall not prevent the holding of the penalty phase.

G. At the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency. In order for the trier of fact to make this determination, regardless of whether the defendant presents evidence of mitigation, the state may present any evidence that demonstrates that the defendant should not be shown leniency including any evidence regarding the defendant's character, propensities, criminal record or other acts.

H. The trier of fact shall determine unanimously whether death is the appropriate sentence. If the trier of fact is a jury and the jury unanimously determines that the death penalty is not appropriate, the court shall determine whether to impose a sentence of life or natural life pursuant to subsection A of this section.

I. If the trier of fact at any prior phase of the trial is the same trier of fact at the subsequent phase, any

evidence that was presented at any prior phase of the trial shall be deemed admitted as evidence at any subsequent phase of the trial.

J. At the aggravation phase, if the trier of fact is a jury, the jury is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

K. At the penalty phase, if the trier of fact is a jury and the jury is unable to reach a verdict, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

L. If the jury that rendered a verdict of guilty is not the jury first impaneled for the aggravation phase, the jury impaneled in the aggravation phase shall not retry the issue of the defendant's guilt. If the jury impaneled in the aggravation phase is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances

has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

M. Alternate jurors who are impaneled for the trial in a case in which the offense is punishable by death shall not be excused from the case until the completion of the sentencing proceeding.

N. If the sentence of a person who was sentenced to death is overturned, the person shall be resentenced pursuant to this section by a jury that is specifically impaneled for this purpose as if the original sentencing had not occurred.

O. In any case that requires sentencing or resentencing in which the defendant has been convicted of an offense that is punishable by death and in which the trier of fact was a judge or a jury that has since been discharged, the defendant shall be sentenced or resentenced pursuant to this section by a jury that is specifically impaneled for this purpose.

P. The trier of fact shall make all factual determinations required by this section or the Constitution of the United States or this state to impose a death sentence. If the defendant bears the burden of proof, the issue shall be determined in the penalty phase. If the state bears the burden of proof, the issue shall be determined in the aggravation phase.

Q. If the death penalty was not alleged or was alleged but not imposed, the court shall determine whether to impose a sentence of life or natural life

pursuant to subsection A of this section. In determining whether to impose a sentence of life or natural life, the court:

1. May consider any evidence introduced before sentencing or at any other sentencing proceeding.

2. Shall consider the aggravating and mitigating circumstances listed in section 13-701 and any statement made by a victim.

R. Subject to section 13-751, subsection B, a victim has the right to be present at the aggravation phase and to present any information that is relevant to the proceeding. A victim has the right to be present and to present information at the penalty phase. At the penalty phase, the victim may present information about the murdered person and the impact of the murder on the victim and other family members and may submit a victim impact statement in any format to the trier of fact.

S. For the purposes of this section:

1. "Trier of fact" means a jury unless the defendant and the state waive a jury, in which case the trier of fact shall be the court.

2. "Victim" means the murdered person's spouse, parent, child, grandparent or sibling, any other person related to the murdered person by consanguinity or affinity to the second degree or any other lawful representative of the murdered person, except if the spouse, parent, child, grandparent, sibling, other person related to the murdered person by consanguinity or affinity to the second degree or other lawful representative is in custody for an offense or is the accused.

3. Arizona Revised Statutes § 13-1105. First degree murder; classification

A. A person commits first degree murder if:

1. Intending or knowing that the person's conduct will cause death, the person causes the death of another person, including an unborn child, with premeditation or, as a result of causing the death of another person with premeditation, causes the death of an unborn child.

2. Acting either alone or with one or more other persons the person commits or attempts to commit sexual conduct with a minor under section 13-1405, sexual assault under section 13-1406, molestation of a child under section 13-1410, terrorism under section 13-2308.01, marijuana offenses under section 13-3405, subsection A, paragraph 4, dangerous drug offenses under section 13-3407, subsection A, paragraphs 4 and 7, narcotics offenses under section 13-3408, subsection A, paragraph 7 that equal or exceed the statutory threshold amount for each offense or combination of offenses, involving or using minors in drug offenses under section 13-3409, drive by shooting under section 13-1209, kidnapping under section 13-1304, burglary under section 13-1506, 13-1507 or 13-1508, arson under section 13-1703 or 13-1704, robbery under section 13-1902, 13-1903 or 13-1904, escape under section 13-2503 or 13-2504, child abuse under section 13-3623, subsection A, paragraph 1 or unlawful flight from a pursuing law enforcement vehicle under section 28-622.01 and, in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person.

3. Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.

B. Homicide, as prescribed in subsection A, paragraph 2 of this section, requires no specific mental state other than what is required for the commission of any of the enumerated felonies.

C. An offense under subsection A, paragraph 1 of this section applies to an unborn child in the womb at any stage of its development. A person shall not be prosecuted under subsection A, paragraph 1 of this section if any of the following applies:

1. The person was performing an abortion for which the consent of the pregnant woman, or a person authorized by law to act on the pregnant woman's behalf, has been obtained or for which the consent was implied or authorized by law.

2. The person was performing medical treatment on the pregnant woman or the pregnant woman's unborn child.

3. The person was the unborn child's mother.

D. First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by sections 13-751 and 13-752.