

for The Defense

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Navigating Arizona's Capital Statutory Waters After the Ring II Sea-Change

Why the State Must Bear the Burden of Persuasion of Proving Beyond a Reasonable Doubt That There Are "No Mitigating Circumstances Sufficiently Substantial to Call for Leniency"

By Steve Collins and Anna Unterberger, Defender Attorneys

In *State v. Ring (Ring I)*, 200 Ariz. 267, 25 P.3d 1139 (2001), the Arizona Supreme Court held that the Sixth Amendment did not require a jury determination regarding "sentencing hearings" in cases where a death sentence was an option. The Court further noted in that regard that, "the United States Supreme Court has explicitly refrained from overruling *Walton [v. Arizona]*, 497 U.S. 639 (1990)." 200 Ariz. at 279-80, 25 P.3d at 1151-52.

The United States Supreme Court granted review of *Ring I* and issued *Ring v. Arizona (Ring II)*, 536 U.S. 584 (2002), which reversed the Arizona Supreme Court and remanded the case for further proceedings. Because of *Ring II*, the law regarding capital cases in some states, including Arizona, underwent a "sea-change" [a catchy Garrett Simpson phrase] that engulfed the relevant statutes. That sea-change mandated that juries, not judges, were now the triers of fact when determining the facts that were necessary to impose

sentences in death-penalty-eligible cases. And that was because the Sixth Amendment entitled, "[c]apital defendants ... to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589. Furthermore, Arizona's labeling of the finding of at least one aggravating circumstance as a sentencing factor, rather than as *an element of capital murder*, was a matter of form over substance, because under Arizona's capital statutory scheme, "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" 536 U.S. at 609, quoting *Apprendi v. New Jersey*, 530 U. S. 466, 494 n.19 (2000).

On remand after *Ring II*, the Arizona Supreme Court held that even if an aggravating circumstance were present, a jury resentencing was mandatory unless the failure of a jury to make the necessary factual

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■ James J. Haas, Maricopa County Public Defender ■

findings would be harmless error. *State v. Ring (Ring III)*, 204 Ariz. 534, 561-62, 65 P.3d 915, 942-43 (2003). In other words, whether there were “no mitigating circumstances sufficiently substantial to call for leniency” was a factual predicate for imposition of a death sentence.

MAPPING OUT THE STATUTORY INTERPRETATION OF A.R.S. §§ 13-703(E) AND 13-703.01(G) AFTER THE RING II SEA-CHANGE

Due process of law, “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970). The Due Process Clause of the Fourteenth Amendment underlies the principles embodied in a constitutionally permissible death penalty statute. *E.g.*, *California v. Brown*, 479 U.S. 538, 541 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982); *Lockett v. Ohio*, 438 U.S. 586, 602-05 (1978). Furthermore, and under the Sixth Amendment’s jury trial guarantee, a fact that increases a defendant’s maximum punishment is an element, and it must be found by a jury beyond a reasonable doubt. *Ring II*, 536 U.S. at 609; *accord Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (capital case).

A.R.S. § 13-703(E) states: “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.” And § 13-703.01(G) states in part: “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 Arizona, the penalty for first-degree murder is life imprisonment unless *the jury finds* (1) at least one statutory aggravating circumstance, and (2) that there are no mitigating circumstances sufficiently substantial to call for leniency. § 13-703(E). The burden of proving an aggravating circumstance is on the prosecution, and that burden is beyond a reasonable doubt. § 13-703(B). *Ring II* emphasized that every fact that the legislature requires must be proved before a death sentence may be imposed must be found by a jury beyond a reasonable doubt. “[T]he dispositive question ... ‘is one not of form, but effect.’” “If a State makes an increase in a defendant’s authorized punishment contingent on *the finding of a fact*, that fact — no matter how the State labels it — *must be found by a jury beyond a reasonable doubt.*” 536 U.S. at 602 (emphasis added).

Other state supreme courts have concluded, post-*Ring II*, that the finding of whether aggravating circumstances outweigh mitigating circumstances, or whether there are no mitigating circumstances sufficient to outweigh the aggravating circumstances, must be made by a jury and beyond a reasonable doubt. Some of these courts have discussed *Ring II* or *Ring II* and *III*, while others have relied strictly on their own caselaw as it interprets that state’s constitution and/or statutes. Here are 4 examples.

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Practice Pointer

Client Gets a Street Lawyer...Am I Off the Case?

By Jeff Kirchler, Defender Attorney

You have been appointed to represent Defendant. At some point, your client tells you he wants a "street lawyer." You have already set this case for trial.

His street lawyer calls and says that he has been retained. He wants a copy of the file and he will take it from there.

So what do you do? Thank him and hope you never have to see that client again. NO!!!

Several months ago, I had a case where private counsel was retained. Defendant was already set for trial. Private counsel brought a motion for substitution for counsel to this office for me to sign. I signed it. I turned over a copy of the file. I did not look at the actual case again. I kept checking with the Court, though, to see when I would be substituted out. At the trial management conference, I was still the attorney of record. I went to the TMC as a representative of the public defender's office. Private counsel was there and standing with my former client. The Court turned to me and asked if I was ready to try the case.

I told him that I did not represent the defendant, private counsel represented him. The Court informed me that he did not grant the motion for substitution of counsel because it did not comply with the rule. The private attorney at the time of filing the substitution also filed a motion to continue, therefore not complying with Rule 6.3.

I was in a bad spot. No interviews done and I had not read the police report in over two months. At that point, I made several arguments, some along the line of the 6th amendment right to counsel, some other arguments, mostly just asking, begging to be withdrawn. All denied. Finally I asked the

Court to determine counsel. I asked him to reevaluate whether my client was indigent.

The judge set a hearing the next day allowing me to brief the issues. Ultimately, the Court did allow me to withdraw. He first gave a stern lecture to both parties and him asking us: "Do you not want me to follow the rule? That is what you are asking me to do."

So what should we do to avoid this problem?

Read the rule.

Rule 6.3. Duties of Counsel; Withdrawal

a. Notice of Appearance. At his or her first appearance in any court on behalf of a defendant, an attorney, whether privately retained or appointed by the court, shall file a notice of appearance on a form provided by the clerk of the court.

b. Duty of Continuing Representation. Counsel representing a defendant at any stage shall continue to represent him or her in all further proceedings in the trial court, including filing of notice of appeal, unless the court permits him or her to withdraw.

c. Duty Upon Withdrawal. No attorney shall be permitted to withdraw after a case has been set for trial except upon motion accompanied by the name and address of another attorney, together with a signed statement by the substituting attorney that he or she is advised of the trial date and will be prepared for trial. Appointed counsel may withdraw after the arraignment on the grounds of his or her client's ineligibility only upon a showing that withdrawal will not disrupt the orderly processing of the case.

Then:

1. Ask the street lawyer if he is going to be ready to try this case on the scheduled trial dates.
2. If so, then ask him to bring over the motion for substitution of counsel, sign it, then YOU file it or request a STAMPED copy from the Clerk of the Court after it has been filed. Alternatively, you can file your own motion as long as private counsel signs the "certificate of readiness" portion of the motion.
3. Make sure a copy is hand-delivered to the judge.
4. Make copies of the file and give copies to the street lawyer. Remember you are still the attorney of record until the judge allows you to withdraw.
5. If the judge denies the motion, file a Motion to Determine Counsel as soon as possible. Address whether the defendant is indigent (i.e. is he even entitled to representation from our office?).
6. Remember you are attorney of record until judge ALLOWS withdrawal.

See the sample language in the sidebar when you find yourself in a similar situation.



SAMPLE LANGUAGE FOR MOTION TO WITHDRAW

MOTION OF PUBLIC DEFENDER TO WITHDRAW AND CERTIFICATE OF READINESS OF SUBSTITUTING COUNSEL

Pursuant to Rule 6.3(c), Arizona Rules of Criminal Procedure, and new counsel's certificate of readiness, the Public Defender of Maricopa County, through his deputy undersigned, respectfully requests the Court, to permit the Public Defender of Maricopa County to withdraw as counsel for the defendant in the above entitled and numbered cause for the reason that the defendant has retained private counsel to represent him. The private counsel to be substituted as attorney for the defendant is *.

CERTIFICATE OF READINESS OF SUBSTITUTING COUNSEL

*[New Attorney] hereby certifies that he has been retained as counsel for the defendant, that he is advised of the trial date of *, 2005, before Honorable * in Courtroom * and that he will be prepared for trial in this cause.

Signature [New Attorney]

Respectfully submitted this ___ day of ___, 20__.

Maricopa County Public Defender
By _____
Defender Attorney

ORDER

Pursuant to the Motion for Substitution of Counsel and good cause appearing therefore,

IT IS HEREBY ORDERED granting the Motion for Substitution of Counsel and appointing [New Attorney & Address] to represent the defendant.

Liars, Prevaricators, and Frauds

A Discerning Look at Deceit

By Donna Elm, Federal Public Defender

Part III. Pathological Liars

A. Intentional Pathological Lying

The most important thing to succeed in show business is sincerity. And if you can fake that, you've got it made!

— George Burns

In the criminal justice system, we occasionally come across the mystifying pathological liar. Although some degree of deceit is typical in social interactions, when does “normal” turn “pathological?”

Pathological lying is not defined in the DSM-IV, the lexicon of psychiatric diagnoses.¹ Indeed, pathological liars are distinguished from the insane or feeble-minded.² However in medicine, “pathological” refers to something contrary to survival fitness, like cancer or a stroke – an abnormal development harmful to that person’s health. Hence a telling feature of “pathological” lying is that it does not serve the liar well, can even be seriously contrary to her interests, or can be so readily disproved that it is not useful in deceiving others.³ As psychologist Charles Ford explained, “We presume that information is an advantage that results in increased mastery of the environment and more power over competitors. ... Self-deceit would therefore appear to be self-defeating.”⁴ It thus excludes rational lying (such as a man who lies to extricate himself from prosecution or to keep his family from abandoning him).

“Pathological liars” usually engage in a pervasive pattern of lying, often of a dramatic or grandiose nature.⁵ In one study, the authors had planned a chapter on episodic (*vis-à-vis* permanent and far-reaching) pathological lying, but found virtually *no* case

examples of pathological lying that was not long-lived and far-ranging.⁶ Consequently, pathological lying is considered a persistent trait rather than a temporary state.⁷ The lies permeate their teller’s life, are told and re-told so consistently that they take on a historic quality and take on a ring of truth.⁸

As a true-to-form but tongue-in-cheek example, we can look to Jon Lovitz’s Saturday Night Live’s ad for “Pathological Liars Anonymous:”

Hello, I’m a member of Pathological Liars Anonymous. In fact, I’m the president of the organization! ... I lied about my age and joined the Army. I was 13 at the time. Yeah, I went to Viet Nam, and I was injured catching a mortar shell in my teeth. And then I got a job in journalism writing for the *National Enquirer* – er, *Geographic*! I was making \$20,000 a ye – a month! In fact, I won the Pulitzer Prize that year. And then my cousin died, Joe Louis, and I took it hard. Maybe too hard, cause I tried to kill myself. I *did* kill myself! Sure, I was medically dead for a week and a half. It was a woman that brought me out of it – Indira Gandhi. And she told me about Pathological Liars Anonymous; oh, you’d be surprised how many famous people belong!

The fact that a person pathologically lies does not render her incompetent to be a witness however. Courts analyzing what it takes to preclude witnesses as incompetent, have *not* included a proclivity for lying.⁹ In one case, a witness gave such inconsistent accounts (that someone else had kidnaped and murdered the victim) that the defense was barred from calling her. However, the case was reversed because inconsistencies did not make her

incompetent as a witness: the accused was entitled to present his defense, even if the evidence is impeachable, and the jury would weigh believability.¹⁰

There is an uncontrollable nature to pathological lying, and they cannot seem to stop – even when it hurts them. Why people act in ways contrary to their thriving has been the subject of much debate. Psychologists believe that pathological lying is either truly a compulsion or the need for attention is so extraordinary that it outweighs the threat of punishment.¹¹

Falsely confessing a crime is pathological, as it is clearly contrary to penal interest. When a defendant confesses falsely, his lawyer is left with advancing the unattractive defense of “my client is a liar.” This led to a line of case law about admissibility of expert testimony substantiating that a confessing defendant was pathologically lying. Generally, psychologists are not permitted to testify that a person is truthful or lying.¹² That policy arises in part from the concern for invading the province of the jury, but also because such expert evidence is unnecessary (since ordinary people can decide truthfulness).

Courts have struggled to reconcile those principles with the criminally accused’s obvious need/right to defend against his confession.¹³ In a leading case, *Shay*,¹⁴ the defendant was prosecuted for murdering an officer who was killed when the bomb he was dismantling (set in Shay’s father’s car) went off. A person who relishes being in the limelight will grab opportunities for recognition; so Shay happily agreed to interviews with reporters, where he spun out stories implicating himself. He also bragged to a cellmate, “I’m boom boom. Don’t you know me? You have to know me. I’m the one who killed the Boston cop.” Besides inconsistencies and inaccuracies in his admissions, the Defense countered those admissions against interest with psychiatric evidence that Shay was a pathological liar.

There was confirmation that he routinely told grandiose stories, filling a “compulsive need” for attention. This abnormal way to garner attention for himself (e.g., by boasts he made to his cellmate) is characteristic of pathological lying. The psychologist explained that Shay:

would spin out webs of lies which are ordinarily self-aggrandizing and serve to place him in the center of attention. Put otherwise, coping for Mr. Shay, given his personality structure, entails seeking attention, tailoring his words to the audience, creating fantasies in which he is the central figure ... Mr. Shay’s stories are an attempt to draw others into his fantasy world.¹⁵

The Court held that this was admissible, in large part because lying *pathologically* is not within the ken of most jurors, so an expert could assist them in understanding this phenomenon.

In *Koskela*, a psychiatrist was allowed to testify that the defendant’s schizoid personality affected the reliability of his confession.¹⁶ A defendant must be allowed to challenge the truthfulness of his confession by presenting competent expert evidence demonstrating susceptibility to coercion; such evidence “may be crucial to the jury’s consideration of why the defendant asserts innocence after having confessed.”¹⁷ Mental illness rendering a suspect susceptible to suggestion was also admitted in *Beuchler* to explain a confession where police had confronted him with their evidence.¹⁸ Expert testimony (that the defendant suffered from a personality disorder causing him to confess during interrogation in order to gain approval from the police) was similarly admitted in *Hall*.¹⁹ Under the same theory in *McCormick*, psychological testimony about his propensity to lie, coupled with the effects of substance abuse, should have been admitted.²⁰

On the other hand, courts have barred similar expert testimony on non-pathological issues.

In *Adams*, the defendant confessed to police to take the fall for his girlfriend (who he thought was carrying his baby); because this was not a pathological state that needed psychiatric testimony to explain, expert evidence that it was plausible (or consistent with his personality) that he lied to protect her was properly precluded.²¹ The *Gilliam* case mirrored *Adams*; psychiatric evidence that he lied in confessing so as to protect his family was not the sort of information that a jury needed expert assistance in understanding.²²

B. Unintentional Pathological Lying

The most common lie is the lie one tells oneself.

— Nietzsche

A lie told often enough becomes the truth.

— Lenin

Some define pathological lying as believing the lies one tells²³ – though delusional people do so as well. If the teller *truly* does not or cannot realize his story is false, then his lies would at first blush seem to be delusional rather than pathological.²⁴ However, delusional disorders are usually restricted by definition to a small, isolated part of the speaker's experiences, and only rarely impact virtually every aspect of her life the way pathological lying does. So persons who believe a broad spectrum of lies have sometimes been diagnosed as delusional (because they honestly believe it) and at other times been referred to as pathological liars (due to the breadth of the deceit). Bear in mind that “delusional disorder” is a psychiatric diagnosis in medicine, whereas “pathological lying” is *not*; doctors and psychologists restricted to DSM-IV diagnoses would therefore not refer to a patient as a “pathological liar,” even though they might use that phrase to describe her behavior.²⁵

We often speak of persons who have told a lie so often that they come to believe it – and there is that strong possibility in pathological lying. Certainly people who at first recognize

that they are fabricating a tale may later adopt it and embrace it as their personal history, and it becomes such an important part of their life that they will not or cannot let it go. Hence they may be so invested in defining themselves by those personal myths that they *will* not consider nor admit their lies. So even if a person might be *capable* of recognizing that something he advances is false, he may not be willing to or (without a monumental amount of professional assistance) capable of denying his lies. It is at this point that it becomes impossible to differentiate the delusional from the pathological-but-fixated liar.

Why should the criminal justice system care? Because deluded liars suffer from a “mental defect” and cannot help themselves – so they have a defense to or mitigation of their acts. But knowing, pervasive liars (in theory) can refrain from their misrepresentations – so are more “blameworthy.”

Truths are illusions that we have forgotten are illusions.

— Nietzsche

Solid research supports the popular notion that people could come to believe in the truth of their lies, when repeated and adopted over a period of time. In memory studies, it has been shown that, due to social cues or reinforcement, people will abandon remarkably easily something that they actually experienced in favor of a contradictory position.²⁶ Hence persons who knew a certain fact may change their memory of it; later, they will recall the revised memory, not the original fact. This is, incidentally, how delusions may be born. As a result of their memory being influenced, pathological liars are no different from deluded persons in terms of honestly believing matters that are not true. Hence like the delusional, pathological liars are notorious for their ability to pass polygraphs²⁷ – perhaps because they have indeed come to believe their lies are true.

(Endnotes)

1. Diagnostic and Statistical Manual IV.
2. W. Healy & M. Healy, *Pathological Lying, Accusation, and Swindling – A Study in Forensic Psychology* at 1 (2005).
3. C. Ford, *Lies! Lies! Lies! The Psychology of Deceit* at 133 (1996). This was also advanced by L.S. Selling who defined it as: “a person having a constellation of symptoms ... characterized psychopathologically by a very definite tendency to tell untruths about matters which perhaps could be easily verified and which untruths may serve no obvious purpose.”
4. *Id.* at 251.
5. “Pathological Liars or Pseudologia Fantastica – Clinical Hype or Genuine Disorders,” Osric University.
6. Healy & Healy at 7.
7. *Id.* at 1.
8. *Id.*
9. *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998); *United States v. Zagari*, 111 F.3d 307 (2nd Cir. 1997); *State v. Maupin*, 128 Wash.2d 918, 913 P.2d 808 (1996).
10. *Maupin*.
11. E.g., *United States v. Shay*, 57 F.3d 126, 129-30 (1st Cir. 1995).
12. *State v. Lindsey*, 149 Ariz. 472, 474, 720 P.2d 73, 75 (1986); *United States v. Binder*, 769 F.2d 595, 601-02 (9th Cir. 1985).
13. See M. Berger, “United States v. Scop: The Common-Law Approach to an Expert’s Opinion about a Witness’s Credibility Does Not Work,” 55 *Brook.L.Rev.* 558 (1989).
14. *Shay*.
15. *Id.* at 130.
16. *State v. Koskela*, 536 N.W.2d 625 (Minn. 1995).
17. *Bixler v. State*, 568 N.W.2d 880 (Minn.App. 1997).
18. *State v. Beuchler*, 253 Neb. 727, 735-740, 572 N.W.2d 65, 71-74 (1998).
19. *United States v. Hall*, 93 F.3d 1337, 1346 (7th Cir. 1996).
20. *McCormick v. State*, 1999 WL 394935 at *9 (Tenn.Crim.App. 1999) (unpublished).
21. *United States v. Adams*, 271 F.3d 1236, 1244-46 (10th Cir. 2001).
22. *People v. Gilliam*, 172 Ill.App.2d 484, 512-13, 218 Ill.Dec. 884, 670 N.E.2d 606, 619 (1996).
23. *Id.*
24. Diagnostic and Statistical Manual of Mental Disorders IV, 297.1 (4th ed. 2000).
25. *McCormick* at *9.
26. The many studies pioneered by psychologists Elizabeth and Geoffrey Loftus revealed how very precarious and influence-able our memory actually is. E.g., Loftus, E., and Donders, K., “Creating New Memories that are Quickly Accessed and Confidentially Held,” 17 *Memory and Cognition* 607-16 (1989); Loftus, E., Korf, N., and Schooler, J., “Misguided Memories: Sincere Distortions of Reality,” in Dordrecht, Y., *Credibility Assessment* at 155-73 (1989); Loftus, E., and Hoffman, H., “Misinformation and Memory: the Creation of New Memories,” 118 *J. Exp. Psychol. Gen.* 100-04 (1989); Loftus, E., and Loftus, G., “On the Permanence of Stored Information in the Human Brain,” 35 *American Psychology* 409-20 (1980); Loftus, E., “Leading Questions and the Eyewitness Report,” 7 *Cognitive Psychology* 560-72 (1975); Loftus, E., and Palmer, J., “Reconstruction of Automobile Destruction: and Example of the Interaction of Language and Memory,” 13 *J. Verbal Learning & Verbal Behav.* 585-89 (1974).
27. *United States v. Varoudakis*, 1998 WL 151238 at *5 (D.Mass. 1998) (unpublished “a pathological liar, even the most ardent proponents of polygraphs concede, is virtually undetectable.”); *People v. Dunlap*, 975 P.2d 723 (Colo. 1999) (rejecting polygraph evidence because a number of factors can result in false outcomes, including pathological lying).



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Colorado. In *Woldt v. People*, 64 P.3d 256 (Colo. 2003), the Colorado Supreme Court reviewed its capital statutory scheme, which at that point required that the decision-making regarding whether a defendant should be sentenced to life imprisonment or death be made by a three-judge panel. In step 3 of the decision-making, the judicial panel, “decided whether the mitigating factors outweighed the aggravating factors. During this step, the three-judge panel had to be convinced beyond a reasonable doubt that any mitigating factors did not outweigh the proven statutory aggravating factors. In making this decision, the three-judge panel considered any prosecution evidence offered to rebut mitigating factors raised by the defendant.” 64 P.3d at 265 (internal citations omitted). The Court found that this judicial sentencing procedure could not stand after *Ring II*. “We conclude that the U.S. Supreme Court correctly characterized Colorado’s death penalty law when, in *Ring*, it stated that Colorado assigns ‘both capital sentencing factfinding and the ultimate sentencing decision entirely to judges.’ *Ring*, 122 S.Ct. at 2442 n.6. As Justice O’Connor accurately predicted, the U.S. Supreme Court effectively declared Colorado’s capital sentencing statute unconstitutional. *Id.* at 2449 (O’Connor, J., dissenting). Because the Sixth Amendment requires that a jury find any facts necessary to make a defendant eligible for the death penalty, and the first three steps of [the capital sentencing statute] required judges to make findings of fact that render a defendant eligible for death, the statute under which [the defendants] received their death sentences is unconstitutional on its face. We therefore reverse the death sentences[.]” *Woldt*, 64 P.3d at 266-67. Thus, the problem that the *Woldt* Court had with their statutes post-*Ring II* was that the decision-making was made by judges, rather than by a jury. But *Woldt* did not find fault with the fact that the decision-making included that the trier of fact, “had to be convinced beyond a reasonable

doubt that any mitigating factors did not outweigh the proven statutory aggravating factors.”

Connecticut. In *State v. Colon*, 864 A.2d 666 (Conn. 2004), the Connecticut Supreme Court relied on *State v. Rizzo*, 833 A.2d 363 (Conn. 2003). *Colon* began its analysis by noting that its current capital sentencing statute required that, “in addition to a finding of the existence of aggravating and mitigating factors, the jury must weigh the aggravating factors against the mitigating factors.” 864 A.2d at 770. But, “the current sentencing statute does not require the jury to make its ultimate determination—that the aggravating factors outweigh the mitigating factors, and that, therefore, death is the appropriate sentence—by a level of certitude beyond a reasonable doubt. Indeed, because the legislature was silent as to the required level of certitude imposed on the jury’s weighing determination, there is a statutory lacuna, which ... should be filled.” *Colon*, 864 A.2d at 771, quoting *Rizzo*, 833 A.2d at 404. “This statutory lacuna ... potentially raised a significant state constitutional question regarding the burden of persuasion and the level of certitude required of a jury in determining whether death is the appropriate punishment in any particular case.” *Id.* “Accordingly, ‘we fill[ed] the gap left by the legislature in defining the burden of persuasion on the weighing process by imposing, on the most important question that our legal system entrusts to the jury, namely, whether the defendant shall live or die, the highest burden of persuasion that our legal system recognizes.’” *Id.*, quoting *Rizzo*, 833 A.2d at 406. Thus, the jury instructions given at the penalty phase must make it clear that, “the jury must be persuaded beyond a reasonable doubt that the aggravating factor or factors outweigh the mitigating factor or factors and that, therefore, it is persuaded beyond a reasonable doubt that death is the appropriate punishment in the case.” *Colon*, 864 A.2d at 772.

Missouri. In *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003), and in light of *Ring II*, the Missouri Supreme Court stated that in “Step 3” of its

capital sentencing phase, “the jury is required to determine whether the evidence in mitigation outweighs the evidence in aggravation found in steps 1 and 2. If it does, the defendant is not eligible for death, and the jury must return a sentence of life imprisonment. While the State once more argues that this merely calls for the jury to offer its subjective and discretionary opinion rather than to make a factual finding, this Court again disagrees.” 107 S.W.3d at 259. And regarding the Arizona Supreme Court’s opinion in *Ring III*, the *Whitfield* Court noted that the Arizona Court recognized that, “[i]n both the superseded and current capital sentencing schemes, the legislature assigned to the same fact-finder responsibility for considering both aggravating and mitigating factors, as well as for determining whether the mitigating factors, when compared with the aggravators, call for leniency. Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency. A.R.S. [sections] 13-703.E (Supp.2002) and 13-703.F (Supp.2001). The process involved in determining whether mitigating factors prohibit imposing the death penalty plays an important part in Arizona’s capital sentencing scheme.” 107 S.W.3d at 260 (emphasis added), quoting *Ring III*, 204 Ariz. at 562, 65 P.3d at 943. Thus, Arizona’s mitigation phase, like Missouri’s, required, “factual findings that are prerequisites to the trier of fact’s determination that a defendant is death-eligible.” 107 S.W.3d at 261.

Nevada. In *Johnson v. State*, 59 P.3d 450 (Nev. 2002), the Nevada Supreme Court recognized that to impose the death penalty under Nevada’s capital statutory sentencing laws, the trier of fact must find, “at least one aggravating circumstance *and further find* [] that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.” 59 P.3d at 460 (emphasis in the original). “This second finding regarding mitigating

circumstances is necessary to authorize the death penalty in Nevada, and we conclude that it is in part a factual determination, not merely discretionary weighing. So even though *Ring* expressly abstained from ruling on any ‘Sixth Amendment claim with respect to mitigating circumstances,’ we conclude that *Ring* requires a jury to make this finding as well: ‘If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.’” *Id.*, quoting *Ring II*, 536 U.S. at [602].

To be able to even attempt to construe A.R.S. §§ 13-703(E) and -703.01(G) in a constitutional manner, it must be made clear to the jurors that the State has the burden of proving beyond a reasonable doubt that there are no mitigating circumstances sufficiently substantial to call for leniency. None of the relevant subsections in §§ 13-703 or -703.01 provide what the State’s burden of proof is for this burden of persuasion. But A.R.S. § 13-115(A) states: “A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to be acquitted.”

The Colorado Supreme Court was faced with a situation similar to Arizona’s current situation in the pre-*Ring II* case of *State v. Tenneson*, 788 P.2d 786 (Colo. 1990). The statutory language at issue was C.R.S. § 16-11-103(2)(a)(II) (1986), which required in a capital sentencing trial that, “the jury must determine whether ‘sufficient mitigating factors exist which outweigh any aggravating factor or factors found to exist.’” The Court noted that the statute did not specify the standard to be used when making this determination. It concluded, “that before a defendant may be sentenced to death the jury must be convinced beyond a reasonable doubt that any mitigating factors do not outweigh the proven statutory aggravating factors.” 788 P.2d at 789-90.

After reviewing numerous United States Supreme Court and state supreme court cases, the *Tenneson* Court elaborated on its conclusion. “Colorado’s death sentencing statute must be construed in light of the strong concern for reliability of any sentence of death. ... “[T]he statute must be interpreted to require that in order to support the imposition of the death penalty, each juror must be convinced that the mitigating factors ... do not weigh more heavily in the balance than the proven statutory aggravating factors. An instruction to the jury that they must be convinced beyond a reasonable doubt that any mitigating factors do not outweigh the proven statutory aggravating factors before a sentence of death can be imposed adequately and appropriately communicates the degree of reliability that must inhere in the balancing process. ... We are persuaded that the legislature, though not explicitly addressing the issue, could have intended no lighter burden.” 788 P.2d at 792-93.

Furthermore, the Court noted that regardless of Eighth and Fourteenth Amendment interpretations, it was convinced that its legislature, “in its concern to assure that the death penalty statute would pass constitutional muster, and in light of the fact that reliability is an essential component of a constitutionally sufficient death sentencing procedure, intended to require that each juror have a high degree of confidence that any verdict of death be correct and appropriate.” 788 P.2d at 792 n.9.

Additionally, the Court recognized that another Colorado statute, § 18-1-402 (1986), stated: “Every person is presumed innocent until proved guilty. No person shall be convicted of any offense unless his guilt thereof is proved beyond a reasonable doubt.” 788 P.2d at 795 & n.11. It noted that in other cases where statutes that made, “the sentence to be imposed dependent upon a fact extraneous to the guilt determination but do not specify the standard of proof by which the fact is to be established[,]” the Court had, “required such facts to be proved beyond a

reasonable doubt. ... Moreover, when a statute concerning a criminal offense is silent as to the burden of proof required, “the rule of lenity dictates that we adopt a construction that favors the defendant.” All of this, “strongly suggest[s] that the same burden must be applied in the weighing process of a death sentencing proceeding.” 788 P.2d at 795; *see also State v. Tarango*, 185 Ariz. 208, 210, 914 P.2d 1300, 1302 (1996) (holding that regarding statutory interpretation, the rule of lenity dictates that any doubt should be resolved in favor of the defendant.)

Thus, and although the jury fact-finding required by *Ring II* is based on the Sixth Amendment right to a jury trial, the right to a jury finding beyond a reasonable doubt that aggravators outweigh mitigators is also required under the Eighth Amendment mandate for “reliability” in the imposition of death. *See also* Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 Ala. L. Rev. 1091, 1137-55 (2003). As the United States Supreme Court has recognized, underlying the Eighth Amendment is, “a fundamental respect for humanity[.]” *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Death as a punishment is “different,” and because of its unique severity and finality, there is a heightened need for sentencing reliability in capital cases under the Eighth Amendment. *E.g., Sumner v. Shuman*, 483 U.S. 66, 72 (1987); *Lockett*, 438 U.S. at 605; *Woodson*, 428 U.S. at 305. Consequently, and unless and until the United States Supreme Court says otherwise, the Eighth and Fourteenth Amendments present yet another constitutional basis for placing the burden of persuasion of beyond a reasonable doubt on the State under A.R.S. §§ 13-703(E) and 13-703.01(G).

Finally, the foregoing analysis regarding §§ 13-703(E) and 13-703.01(G) is further bolstered by 3 mandates contained in § 13-703.01. Subsection A states in part: “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.” Subsection H states: “The trier of fact shall determine unanimously whether death is the appropriate sentence.” And subsection P states: “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.” Thus, the trier of fact must make the *factual determination* of whether there are no mitigating circumstances sufficiently substantial to call for leniency, a determination that must precede any unanimous determination that death is the appropriate sentence, and that factual determination must be made in a proceeding where the State has the burden of persuasion beyond a reasonable doubt.

WATCHING WALTON MOUNTAIN AS IT SINKS FURTHER INTO THE SEA-CHANGE WROUGHT BY RING II AND LOOKING BEYOND THE GLASSEL-BOTTOMED BOAT

Fifteen years before *Ring II*, the United States Supreme Court found that Arizona’s allocations of the burden of proof in its capital sentencing statutes were constitutional, and the Court saw one of the burdens at issue as being that the defendant establish, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency. See *Walton v. Arizona*, 497 U.S. 639, 649, 651 (1990). But the Court’s finding in that regard was under the Eighth Amendment, *not the Sixth Amendment*: “Also unpersuasive is Walton’s contention that the Arizona statute violates the *Eighth and Fourteenth Amendments* because it imposes on defendants the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency.” 497 U.S. at 649 (emphasis added). And that is because Walton’s counsel did not frame the issue *under the Sixth Amendment* as including that the defense

should not have the burden of showing that there are no mitigating circumstances sufficiently substantial to call for leniency.

Instead, Walton’s counsel listed the “Questions Presented” as being: “1. Whether Arizona’s death penalty statute violates the Sixth Amendment by denying a jury trial on the factual elements of capital murder specified by state law?”, and “2. Whether Arizona’s capital sentencing statute violates the Eighth and Fourteenth Amendments by: (a) requiring that death be imposed if the defendant fails to prove the existence of mitigating circumstances sufficiently substantial to call for leniency[?]” *Brief For Petitioner*, 1989 WL 430597 at page i. Petitioner’s brief never argued that the factual finding of “no mitigating circumstances sufficiently substantial to call for leniency” was *an element of capital murder*. Rather, Petitioner argued that the finding of an aggravating factor or factors was an element of capital murder, in addition to the elements of first-degree murder. Thus, the following issue was *not* argued on the merits in *Walton*: that *under the Sixth Amendment*, the State has the burden, beyond a reasonable doubt, of showing that there are no mitigating circumstances sufficiently substantial to call for leniency.

Regardless, and since *Walton*, *Ring II* has recognized that the offense of “capital murder” is an offense above that of non-capital first-degree murder. And more specifically, *Ring II* has held that, “[c]apital defendants, no less than noncapital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” *Ring II*, 536 U.S. at 589.

The pleadings recently filed by the State of Arizona that we have reviewed regarding the burden of persuasion at issue cite to caselaw that does nothing more than hold that the defendant has the burden to prove *mitigating circumstances*. See e.g., *State v. Anderson*

(*Anderson II*), 210 Ariz. 327, 346, 111 P.3d 369, 388 (2005) (framing the issue as, “Anderson also contends that requiring a defendant to prove *mitigating circumstances* violates the Eighth Amendment[.]” and holding that, “it is constitutional to place the burden of proving mitigation on the defendant[.]”) (emphasis added); *State v. Smith*, 125 Ariz. 412, 416, 610 P.2d 46, 50 (1980) (“Appellant also argues that placing the burden of proof of establishing *mitigating circumstances* denies him of his right to due process. The burden of mitigation has consistently been placed on the defendant[.] ... Facts which would tend to show mitigation are peculiarly within the knowledge of a defendant.”) (emphasis added & internal citations omitted); *State v. Watson*, 120 Ariz. 441, 447, 586 P.2d 1253, 1259 (1978) (“To require the State to negate every *mitigating circumstance* would place an impermissible burden on the State. We do not believe it offends due process to require the defendant to show such *mitigating circumstances*.”) (emphasis added).

But the above-cited cases simply do not resolve the issue presented here, because the issue wasn’t raised in those cases. Furthermore, and to now be guilty of the offense of *capital murder*, there must be proof of first-degree murder, *and* at least one aggravating circumstance, *and* that there are no mitigating circumstances sufficiently substantial to call for leniency. In other words, these fact-based findings are the *elements* that now comprise the offense of capital murder in Arizona.

Additionally, and since *Ring II*, we know that *any* factual determination that affects whether a defendant may be sentenced to death is an *element* of capital murder, and as such, must be decided by a jury. And whether there are, “no mitigating circumstances sufficiently substantial to call for leniency” is a factual determination that must be made by the jurors before they may impose a death sentence. Thus, that determination is necessarily an *element* of the crime of capital

murder, *i.e.*, the determination that the mitigation is *not* sufficiently substantial to call for leniency, and as an *element* of the crime of capital murder, it must be proved by the State beyond a reasonable doubt.

Consequently, and at least on the point discussed here, *Walton* does not survive the *Ring II* sea-change, according to the language of *Ring II*. And that is because the *Walton* plurality viewed the “elements of the offense charged,” as being *separate* from proving that there were no mitigating circumstances sufficiently substantial to call for leniency. “So long as a State’s method of allocating the burdens of proof does not lessen the State’s burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant’s constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.” *Walton*, 497 U.S. at 650.

But as we now know, there are 3 *elements* that must be proved before a conviction of capital murder may be had in Arizona: (1) first-degree murder; (2) at least one aggravating circumstance; and, (3) no mitigating circumstances sufficiently substantial to call for leniency. Again, we need to review the actual language of *Ring II*. “In *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), this Court held that Arizona’s sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not as ‘element[s] of the offense of capital murder.’ *Id.*, at 649, 110 S.Ct. 3047. Ten years later, however, we decided *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which held that the Sixth Amendment does not permit a defendant to be ‘expose[d] ... to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.’ *Id.*, at 438, 120 S.Ct. 2348. This prescription

governs, *Apprendi* determined, even if the State characterizes the additional findings made by the judge as ‘sentencing factor[s].’ *Id.*, at 492, 120 S.Ct. 2348. *Apprendi*’s reasoning is irreconcilable with *Walton*’s holding in this regard, and today we overrule *Walton* in relevant part. *Capital defendants*, no less than noncapital defendants, we conclude, *are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.*” *Ring II*, 536 U.S. at 588-89 (emphasis added).

Furthermore, elements of a crime must be proved by the State, and the State’s burden is beyond a reasonable doubt. *E.g.*, *Winship*, 397 U.S. at 364 (interpreting the Due Process Clause of the Fourteenth Amendment). Thus, and after *Ring II*, applying *Walton*’s interpretation to the third element of capital murder would result in placing on the defendant the burden of disproving an element of the crime, and that burden would be placed on the defendant before the State had even carried its burden of proving that element in the first instance! Not only does this offend the Sixth and Eighth Amendments, but it also violates the Due Process Clause of the Fourteenth Amendment by offending a, “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *See Speiser v. Randall*, 357 U.S. 513, 523 (1958).

Additionally, Arizona’s current Chief Justice has recognized that, “the [Arizona Supreme Court’s] trend has been to look to the Arizona Constitution to resolve due process issues.” Ruth V. McGregor, *Recent Developments in Arizona State Constitutional Law*, 35 *Ariz. St. L.J.* 265, 271 (2003); *see also* *Ariz. Const.*, Art. 2, § 4 (Arizona’s due process clause). One method of doing this is known as, “the primacy approach, which looks first to the state constitution and uses federal decisions only as guidelines,” thereby focusing, “most clearly upon the meaning of the state constitution.” McGregor, at 278. “The most meaningful effect of a primacy approach ... may involve not

its effect upon the parties but rather its effect on the finality of the state court’s decision, which derives from the fact that the United States Supreme Court does not review state court decisions based solely upon state constitutional law.” *Id.*, *citing Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (insulating from review state court decisions that contain a “plain statement” that its decision rests on adequate and independent grounds in state law).

One case discussed by the Chief Justice that used the “primacy approach” was *Large v. Superior Court*, 148 *Ariz.* 229, 714 P.2d 399 (1986). There, “the court considered Large’s [who was a prison inmate] claim that forcibly administering psychotropic drugs to him violated his right to due process of law. The court concluded that, because Large ‘did not articulate whether he was proceeding under the federal or state due process clause, and because provisions of our state constitution settle the matter, we address only the state constitutional issue.’ We referred to federal constitutional law ‘only as the benchmark of minimum constitutional protection.” McGregor, at 271, *quoting Large*, 148 *Ariz.* at 229, 714 P.2d at 405. The Court ultimately reversed the trial court’s order dismissing Large’s petition for failure to state a claim, because arguably Large’s state constitutional rights to both substantive and procedural due process had been violated.

Another case discussed by the Chief Justice was *State v. Melendez*, 172 *Ariz.* 68, 834 P.2d 154 (1992). There, the Court, “again applied a primacy approach, this time in a case in which the defendant raised claims under both the Arizona and federal constitutions. ... [W]e looked first to the state constitution and held that permitting a ‘jailhouse lawyer’ to testify about his communications with the defendant would be fundamentally unfair and thus a deprivation of due process. Having found a violation, we saw no need to address the defendant’s claim under the United States Constitution.” McGregor, at 271, *citing*

Melendez, 172 Ariz. at 71-73, 834 P.2d at 157-59.

Finally, we come to the Arizona Supreme Court's recent decision in *State v. Glassel*, 211 Ariz. 33, 116 P.3d 1193 (2005), which doesn't resolve the issue presented here either. Glassel's counsel argued that the State had the burden of proving, "beyond a reasonable doubt that leniency was *not* justified[.]" because *Ring II* required that the State, "prove to the jury beyond a reasonable doubt every fact necessary to impose the death penalty." *Glassel*, 211 Ariz. at 52, 116 P.3d at 1212, *citing Ring II*, 536 U.S. at 589. Although the *Glassel* Court noted that *Walton* rejected a similar argument, the *Glassel* Court did not address that, "no mitigating circumstances sufficiently substantial to call for leniency" is now *an element of capital murder*. And it was only by not addressing that fact that the Court was able to conclude that *Ring II* only overruled *Walton* regarding the issue of whether aggravating circumstances must be tried to a jury rather than a judge. The Court further bolstered this conclusion by citing to footnote 4 of *Ring II*. *Glassel*, 211 Ariz. at 52, 116 P.3d at 1212. But footnote 4 merely discusses what Ring's counsel did not argue; it does not discuss any findings made by the *Ring II* Court. See *Ring II*, 536 U.S. at 597 n.4.

Thus, and once again, we must look to the actual language of *Ring II*. "In *Walton* ... this Court held that Arizona's sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, *not as 'element[s] of the offense of capital murder.'*" *Ring II*, 536 U.S. at 588 (emphasis added). Consequently, the issue presented here survives *Glassel* and must still be resolved.

CONCLUSION

"[D]eath is a different kind of punishment from any other which may be imposed in this country. From the point of view of the

defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other ... state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason[.]" *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). And after *Ring II*, any "reasoned decision" to impose the death penalty includes recognizing that "no mitigating circumstances sufficiently substantial to call for leniency" is an element of capital murder, and as an element of capital murder, it must be proved by the State beyond a reasonable doubt. It is up to defense counsel to make sure that both the judge and jury understand this. Because that understanding is, literally, a matter of life or death.



Jury and Bench Trial Results August/September 2005

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