IN THE ARIZONA SUPREME COURT

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

APPELLANT'S REPLY BRIEF

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A. Introduction

One reason exists to vacate Snelling's death sentence over all others. The evidence in support of the sole aggravator of especially cruel was legally insufficient *State v. Jimenez,* 165 Ariz. 444, 453, 799 P. 2d 785 (1990). The only "evidence" presented in support of the especially cruel aggravator violated the confrontation clause[1], was unreliable and incredible. *United States v. Norwood,* 2919 WL 537497 (9th Cir. Feb. 17, 2010).

Additionally, counsel asks this Court to protect the integrity of the judicial system. Counsel asks this Court to vacate the death sentence and impose a natural life sentence. The Maricopa County Attorney's office's purpose was to prejudiced both the grand jury and jury against Snelling to secure a death sentence. Snelling was denied due process from the grand jury proceedings through his second penalty phase. Snelling was prejudiced by Mr. Imbordino's and Mr. Duffy's conduct as set out in his opening brief as well as set forth below. The Maricopa County Attorney's office used what appears is the adopted office policy of abusing the legal system and employing threats and intimidation to secure it's objectives. In this case it's objective was to prejudice the grand jurors and penalty phase juries and secure a death sentence. The Maricopa County Attorney's office tricked the grand jury into indicting Snelling on two sex crimes which Mr. Imbordino and Stuebe knew they had no evidence to support.

The Maricopa County Attorney's Office scared the first jury with threats of Snelling's release if not given death. The Maricopa County Attorney's office threatened the second jury as well. The Maricopa County Attorney's office threatend the second jury with the specter of "innocent children" being harmed by Snelling ("stranger danger") that tactic *prejudiced both juries against* Snelling. The improper argument injected fear, emotion and prejudice into the jury evaluation. That coupled with the *questionable and weak evidence* on the record in support of the especially cruel aggravating factor found by the first jury that hung, the *incorrect legal definition* of especially cruel provided to the second penalty phase jury and the *trial court's incorrect instruction* to the death jury to "assess the evidence *anyway they feel* " created a verdict which was the product of emotion and not reason, a verdict not channeled by reason not channeled by objectivity and with a complete lack of constitutionally mandated standards.

B. The Prior Findings Of Improper Conduct By Imbordino And Duffy Committed While In Their Professional Capacity As Prosecutors Is Probative, Relevant and Material To The Issue of Their Intent.

At page 11 of the State's Answering Brief ("SAB") the State asserts that the prior findings of improper conduct by the Court of Appeals and this Court by the two prosecutor's assigned to this case are unrelated to this case and this Court should not consider the same as it is not in the record. The State's position is without merit.

Snelling has alleged that these two prosecutor's purpose in intentionally

committing misconduct was to prejudice the grand jury and the penalty jury to secure a death sentence. The "intent" of these two prosecutor's is at issue. The prior findings of misconduct committed by Imbordino and Duffy makes it more likely than not that their misconduct in Snelling's case was intentional rather than a mistake. Arizona Rules of Evidence 404(b). This Court certainly can take judicial notice of it's own findings, the finding's of the Arizona Court of Appeals and the State Bar of Arizona. This Court suspended Duffy from the practice of law for misconduct in the prosecution of another capital defendant that mirror's the misconduct in Snelling's case.[2] Noted in this Court's decision was that Duffy

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[2]. 06-1958 Disposition Summary

Ted J. Duffy Bar No. 016907 File No. 06-1958 Supreme Court No. SB-09-0099-D
By Arizona Supreme Court judgment and order dated December 1, 2009, Ted J. Duffy, 301 W. Jefferson, Phoenix, AZ, was suspended . . . Mr. Duffy was the lead prosecutor in a capital murder case . . . Mr. Duffy violated court orders and made several arguments which drew multiple defense motions to dismiss and/or for mistrial. The motions were denied and the trial proceeded. Mr. Duffy failed to redact portions of a taped witness interview prior to it being played for the jury. During opening statements, Mr. Duffy made a misleading reference to . . . evidence . . .Mr. Duffy made reference to . . . when he knew there was insufficient evidence to support that finding. Mr. Duffy also improperly made arguments during his opening statement. During the presentation of evidence, Mr. Duffy asked a witness in cross-examination about the defendant's "other crimes" knowing that such an inquiry is forbidden by the evidence rules. He also characterized a witness's pre-trial statement as the "best evidence," which forced opposing counsel to seek and obtain from the judge an admonition to the jury to disregard that characterization. During closing argument, Mr. Duffy incorrectly argued to the jury that the "reasonable doubt standard" meant only that the jury needed to "feel comfortable" in their decision that the defendant was guilty. Finally, at various times during the trial, Mr. Duffy injected his personal knowledge and beliefs into the case, and engaged in improper vouching. Four aggravating factors were found: pattern of misconduct, multiple offenses, refusal to acknowledge wrongful nature of conduct and substantial experience in the practice of law. Three mitigating factors were found: absence of a prior disciplinary record, absence of a dishonest or selfish motive and full and free disclosure to disciplinary board or cooperative attitude toward proceedings. Mr. Duffy violated Rule 42, Ariz. R. Sup. Ct., ERs 3.1, 3.3(a)(1), 3.4(c) and (e) and

incorrectly argued to the jury that the reasonable doubt standard meant only that the jury needed to "feel comfortable" in their decision that the defendant was guilty. Further noted by this Court was the fact that Duffy injected his personal knowledge and beliefs into the case and engaged in improper vouching.

Likewise, this Court can take judicial notice of Imbordino's documented history of prosecutorial misconduct. Among Mr. Imbordino's prior's are for misconduct committed during grand jury proceedings.[3]

8.4(d).

[3]. Vince Imbordino attorney of record for Maricopa County Attorneys Office. *Palmer v. Super. Ct. in and for Maricopa Cty.,* 114 Ariz. 279 (1977), *Hyder v. Super. Ct, etc.,* 127 Ariz. 36 (1980); In 1981 Imbordino sought the death penalty against a defendant and had sex with the capital defendant's attorney. The defense attorney withdrew from the case over the affair and plea agreement fell apart. Client gets death. *Summerlin v. Stewart,* 267 F.3d 926 (9th Cir. 2001); Death sentence reversed on other grounds, *Summerlin v. Stewart,* 427 F.3d 623(9th Cir. 2005); Prosecutor Imbordino's improper impeachment of witness grounds for reversal of 2nd Degree Murder conviction. *State v. Cruz, 128 Ariz. 538 (1981)*; Prosecutor Imbordino's breach of stipulated term in plea agreement does not constitute harmless error. Remand for resentencing. *State v. Bloom,* 137 Ariz. 250 (App. 1983); " we find it necessary to address Deputy County Attorney Vince Imbordino's violation of both A.R.S. § 21-412 and Judge Broomfield's order requiring him to present appellant's proffered tape recording to the grand jury upon the request of the grand jury. . . even if there had been any confusion on the part of Mr. Imbordino as to the proper interpretation of the statute, that confusion was surely dispelled by Judge Broomfield's order directing him to make the tape offered by appellant available to the grand jurors on their request." *State v. Just,* 138 Ariz. 534 (App. 1983); Prosecutor Imbordino violated immunity statute and failed to seek trial court approval before attempting to put immunized testimony to prosecutorial use. "The burden is upon the government to respect immunity, . . .". Defendant's conviction reversed and a new trial ordered. *State v. Gertz* 186 Ariz. 38 (App. 1995); "The prosecutors conceded below [Imbordino] that they had not revealed to the defense that ... By failing to disclose the scope of Dr. Ben Porath's testimony, the State engaged in improper conduct. *See State v. Tucker,* 157 Ariz. 433, 441, 759 P.2d 579, 587 (1988) (observing that, without reversal, counsel may consider admonition only a "verbal spanking")" *State v. Roque,* 213 Ariz. 193 (2006); 26 (twenty-six) separate incidents of prosecutorial misconduct were alleged in Appellant's opening brief in *State v. Roque, supra.*

Not only does the logic and the rationale of 404(b) of the Arizona Rules of Criminal Procedure support this Court considering past instances of prosecutorial misconduct, so does case law. This Court and the Court of Appeals have considered prior instances of a prosecutor's misconduct in when addressing the misconduct alleged in the case before them on review. This Court reviewed an allegation of prosecutorial misconduct. in *State v. Moore, 108 Ariz. 215, 495 P. 2nd 445 (1972).* This Court noted the past conduct of the prosecutor in question in other cases in deciding the issue of whether Moore was denied a fair trial because of the same prosecutor's misconduct in Moore's trial. This Court noted in deciding the issue of prosecutorial misconduct the history of the prosecutor's misconduct in (1) published appellate opinions and (2) the personal observations and recollections of appellate judges recalled from their days on the Superior Court bench observing the prosecutor's past improper conduct. Likewise in *State v. Minnitt*, 203 Ariz. 432, 55 P.3d 774 (2002) this Court considered the past misconduct of the prosecutor in question from Minnitt's first two trials in addressing the prosecutor's misconduct in Minnitt's third trial. The State conceded this point of law. SAB pp.14-15.

C. This Court Should Reverse Snelling's Death Sentence And Impose A Sentence of Life In Prison. At The First Penalty Phase Proceeding Mr. Duffy Intentionally Asserted A Fact/s And Argued An Issue Not For The Penalty Jury's Consideration. Mr. Duffy's Purpose Was To Avoid An Acquittal, Prejudice The Jury And Obtain A Death Sentence With Indifference To The Danger of Mistrial or Reversal.

1. Mr. Duffy's Death or Release Argument Was Improper And Not For The Jury's Consideration.

No where in the State's Answering brief does it dispute that Duffy's argument to the first jury was improper. Mr. Duffy's argument to the jury that death was required to eliminate the risk of release was improper and intended to scare the jury.

> "The **death penalty** is appropriate for a lot of **reasons** . . . If the defendant does **not receive the death penalty**,he may be **released in less than 25** years. **That's a possibility**."
> (emphasis added)
> (R5/31/07 p.50 L23-25)

> "**If he's not given the death penalty** he is permitted to live his life in prison **and possibly get out**".
> (emphasis added)
> (R5/31/07 p.55 L1-3)

Mr. Duffy varied on the this theme yet consistently asserted all of the prestige, credibility and authority of the government by vouching in absolute terms that absent a death sentence Snelling would "never" serve a life sentence. Mr. Duffy told the jury to impose death because Snelling would "never really get a life sentence." Mr. Duffy told the jurors, "he can never really get a life sentence . . . so he'll never have to serve the

punishment that's necessary even if it's life, and I'm urging you the proper punishment is death." (R 5/31/07 p. 49, 50, 51) (emphasis added)

2. Mr. Duffy's Past Misconduct And Substantial Experience In The Practice of Law Demonstrate His Purpose was To Prejudice The Jury.

As noted by this Court Duff y has substantial experience in the practice of law. See Ted J. Duffy Bar # 016907; File No. 06-1958, Supreme Court No.SB-09-0099-D. The hearing examiner for this Court provided a written detailed description of Duffy's prior multiple acts of intentional misconduct that was strikingly similar to Duffy's misconduct in Snelling's two penalty phase proceedings and further proof Duffy's misconduct was intentional. The hearing officer made findings that Duffy's misconduct was "intentional", "designed to gain a conviction outside the court's rule's and orders" that there was a "pattern of misconduct", "multiple offenses", "refusal to acknowledge wrongful nature of conduct", "substantial experience in the practice of law", "had practiced law in California or Arizona for over 30 years". Moreover at footnote three the hearing officer noted, "This is more properly viewed as one case in which Respondent [Duffy] made a calculated decision to obtain a conviction regardless of the rules." *See* Appendix to OB. Moreover, it is well known and clearly understood by experienced reasonably competent death penalty prosecutors (and trial judges) that it is misconduct to tell a jury that they need to sentence a defendant to death or risk his release from prison.

3. Mr. Duffy's On The Record Admission Demonstrates His Purpose was To Prejudice The Jury. He Knew His Improper Argument Was Not For The Jury's Consideration.

However, this Court need not rely on reasonable inferences to conclude Mr. Duffy's misconduct was intentional. Mr. Duffy expressly clarified his state of mind and his intent re: his closing argument for death or release.

> Judge Akers: Counsel this is a question **regarding an issue that is not for their consideration** . . . the question is,'what does the state statute say the **earliest possible release** can be considering time served if the possibility of parole is given?'
>
> * * *
>
> DUFFY: I think your answer is the correct one, that **it's not for their consideration.**
>
> (R 6/4/07 p. 3-4)(emphasis added)

4. Duffy Not Only Intentionally Made Argument's For Death That He Knew Were Not For The Jury's Consideration. Duffy Planned To Do So In Advance Of His Penalty Phase Closing.

Duffy's use of Judge Akers as a prop for his death or release argument was not spontaneous at closing. Duffy intended to and planned it out before he called Stuebe. Duffy called Stuebe to testify and asked all about Snelling's history of release, re-arrest, probation, prison, release to prepare for his improper closing argument. (RT 5/31/07

pp 4-12) After Stuebe's testimony Duffy could point to Snelling's record of arrest and release etc and tell the jury basically don't give the sentencing decision to Judge Akers:

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

On the very next page of the transcript after telling the jurors a judge like "Judge Akers" gave Snelling a "break ...he gets out of prison" Duffy began and continued his "never serve a life sentence" pitch. (R 5/31/07 p. 49, 50, 51, 55)

5. Duffy's Purpose Was To Avoid An Acquittal, Prejudice The Jury And Obtain A Death Sentence With Indifference To The Danger of Mistrial or Reversal. The Juror Question Demonstrates Duffy's Purpose To Prejudice The Penalty Jury Was Successful.

The jury was improperly influenced by Duffy's intentional, improper argument. After hearing Duffy's repeated assertion of death or release the jurors were biased against a sentence of life. This is revealed by the jurors immediate reaction to Duffy's threat of Snelling's release. On May 31, 2007 the jury deliberated for a mere total of one hour and fifteen minutes. The jury was recessed for a three day weekend and resumed deliberations on June 4, 2007 the day after the 60 Minutes story on the early release (after serving only 8 years) of a convicted murderer was aired. (R 6/4/07 p.3)

After only one hour of deliberations the jurors submitted a question to the trial court that was not for their consideration.

> "what does the state statute say the earliest possible release can be considering time served if the possibility of parole is given?"
>
> (R 6/4/07 p. 3, Item 164, 172)

6. The Second Juror Communication Demonstrates Duffy's Attempt To Undermine The Judiciary's Role Was Successful.

Two hours after their first question and after the trial court declined to answer the jurors first question, the jurors announced they were deadlocked and could not reach a unanimous verdict. The jurors sent a letter to Judge Akers warning her about releasing Snelling. (R 6/4/07 p. 17, Item 172) After failing to return a unanimous verdict for life 10 of the 12 jurors wrote and submitted a letter to the trial court which in part stated that:

> "... please consider the most stringent penalty available by law. Prison without the possibility of parole (natural life sentence)"
>
> (R 6/4/07 p. 43)

7. This Court Should Vacate Snelling's Sentence of Death And Find That Re-prosecution For Death Is Barred By The Double Jeopardy Clause.

In most instances, the remedy for prosecutorial misconduct is a new trial. *See State v. Towery*, 186 Ariz. 168, 185, 920 P.2d 290, 307 (1996); *State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992). However, the record in the instant case is now replete with evidence that the Maricopa County Attorney/s assigned to prosecute Snelling intentionally manipulated the Grand Jury to indict Snelling with two predicate felonies with no evidence of either crime (see below) and planned and intended to interject an issue not for the jury's consideration into it's deliberation. This intentional misconduct seriously damaged the structural integrity of both the Grand jury proceeding and the penalty phase trial as well as damaging the integrity of the justice system. The only reasonable conclusion based on Imbordino's and Duffy's conduct in other cases is that the State was aware that it's agent's improper actions would deprive Snelling of a fair the grand jury proceeding and of a fair trial. Indeed, Imbordino intentionally succeeded in getting Snelling charged with two crimes that there was no evidence, none of him having committed. Snelling respectfully request this Court rule not to sanction the prosecutor, but to protect the integrity of the justice system. Snelling request this Court hold that his second penalty phase retrial was barred by the double jeopardy clause of the Arizona and United States Constitution. Snelling requests this Court therefore vacate the death sentence and impose a life sentence.

D. This Court Should Reverse Snelling's Death Sentence And Impose A Sentence of Life In Prison. At The Second Penalty Phase Proceeding Duffy Intentionally Committed Misconduct. Duffy's Purpose Was To Avoid An Acquittal, Prejudice The Jury And Obtain A Death Sentence With Indifference To The Danger of Mistrial or Reversal.

1. Duffy Exploits Imbordino's Violation of The Professional Code of Conduct And Demonstrated the Same M.O. As The Prosecutorial Misconduct This Court Found As The Basis To Suspend His Law License.

Mr. Duffy was able to exploit Mr. Imbordino's fraudulent indictment during his penalty phase closing. The draft indictment for the grand jurors prepared by Imbordino included the allegation of a sexual assault and/or attempted sexual assault in a felony capital murder count when both Imbordino and Stuebe knew that the State possessed no evidence of a sexual assault or attempted sexual assault. Imbordino knew the best penalty phase argument for death was to link Snelling's prior conviction and arrests (public sexual indecency, indecent exposure) to a murder for sex. By charging Snelling with sexual assault and attempted sexual assault Imbordino set the table for the State trial prosecutor. The State trial prosecutor could now link the felony murder sex count and Snelling's prior sexual public indecency conviction and argue for death based on those two very incendiary and inflammatory convictions.

However, at closing of the second penalty phase there was still zero physical evidence or testimony from any police officer at the scene or any medical examiner involved in the case that there was any evidence of a sexual assault or attempted sexual

assault. Duffy's only "evidence" of an attempted sexual assault was Jerry Radar. There was no physical evidence, none, zero to corroborate Jerry Radar's allegation. So Duffy resorted to his favorite tactic, vouching. Duffy vouched for Radar himself and vouched that the State vouched for Radar and vouched that what Radar said was corroborated. This was improper and false. There was no evidence of a sexual assault or attempted sexual assault that corroborated Radar's testimony.

Vouching for Radar was material to Duffy's death argument. The State asserts in it's Answering brief that trial counsel failed to object to Duffy's improper tactics during Radar's testimony. This assertion is not supported by the record and incorrect. Ms. Glitsos objected repeatedly and continually to Duffy's improper questions and tactics throughout Radar's testimony. The pace, aggressiveness, and relentlessness of Duffy's improper attempts to bolster Radar's testimony is reflected in the record and especially at the very end of Radar's testimony. He was fast, aggressive and relentless.

* * *

> Ms. Glitsos: Objection.
> I move for a mistrial.
> *[Duffy ignores the objection and continues to proceed.*]
>
> Judge Akers: I'm going to deny
> the request for a mistrial.
> Please proceed counsel. . . ***You***
> ***[Duffy] have to give me a chance***
> ***to rule. I am trying to keep up.***
>
> (RT 6/3/08 pp.101 L2-9)(emphasis added)

She objected repeatedly to no avail. She objected repeatedly to the improper tactic's he employed during Radar's testimony to the penalty phase jury.

> Ms. Glitsos: Objection.
>
> The Court: Overruled.
>
> RT 6/3/08 pp. 53).
>
> * * *
>
> Ms. Glitsos: Objection, this exceeds the scope. . .
>
> (RT 6/3/08 pp. 87).
>
> * * *
>
> Ms. Glitsos: Your Honor I object at this point.
>
> (RT 6/3/08 pp. 88-90).
>
> * * *
>
> Ms. Glitsos: We object.
>
> (RT 6/3/08 pp. 90).
>
> * * *
>
> Ms. Glitsos: We object . . .
>
> (RT 6/3/08 pp. 91).
>
> * * *

Ms. Glitsos: Objection. . .

(RT 6/3/08 pp. 92).

* * *

Ms. Glitsos: Objection exceeds
the scope of cross.

(RT 6/3/08 pp. 92).

* * *

Ms. Glitsos: Objection.
Again your honor exceeds the scope
of cross. I did not ask him about
the facts.

THE COURT: Overruled.

(RT 6/3/08 pp. 93).

Duffy, the clever trial lawyer that he is, wanted to set up his vouching. Given the green light by the trial court he had Radar repeat part of ***their story***[4]***.*** Radar repeated part of their story (RT 6/3/08 pp. 93-94) Ms. Glitsos objected again. The trial court permitted Duffy to proceed. (RT 6/3/08 pp. 95-96). Duffy than went on to vouch for Radar. Duffy than went on and on and on, "You" and "me", "you" and "I", "I" and "you" x 4. Duffy finished with "why" Radar (or was it Duffy) was "...here today..." over

[4] " He [Radar] narrates the story...I just narrated to you. He supplies meaning. Seeing her, wanting to get some..." (R 6/5/08 p.44-45 L9-13,46)

a sustained vouching objection Duffy asked the last question twice prompting a second vouching objection.

Ms. Glitsos objected again:

> Ms. Glitsos: Objection, your Honor.
> This is basically going to call
> for vouching.
>
> RT 6/3/08 pp. 97 L1-4)
>
> * * *
>
> Ms. Glitsos: Objection. Vouching.
>
> RT 6/3/08 pp. 97 L7)
>
> * * *
>
> Ms. Glitsos: Objection Your honor
> this is completely improper. May we approach.
>
> Judge Akers: No counsel.
>
> Ms. Glitsos: I have a motion.
>
> Judge Akers: I understand.
> Counsel, you can make a motion
> at a later time.
>
> (RT 6/3/08 pp. 97 L7-22)
>
> * * *
>
> Ms. Glitsos: Objection Your honor
> this is completely improper questioning.
> Mr. Duffy knows it. The defense has a motion.

Judge Akers: I understand you have a motion counsel. You've mentioned it twice. We'll get to it in a moment.

(RT 6/3/08 pp.98 L1-7)

* * *

Ms. Glitsos: Objection.

(RT 6/3/08 pp.98 L 14)

* * *

Ms. Glitsos: Objection.

(RT 6/3/08 pp.98 L 23)

* * *

Ms. Glitsos: Objection your Honor.

(RT 6/3/08 pp.99 L5)

* * *

Ms. Glitsos: Objection judge...

(RT 6/3/08 pp.99 L13-14)

* * *

Ms. Glitsos: I'm requesting a mistrial.

(RT 6/3/08 pp.100 L10)

* * *

Ms. Glitsos: Objection your Honor.

Judge Akers: Overruled.

(RT 6/3/08 pp.101 L2-9)

* * *

Ms. Glitsos: Objection.
I move for a mistrial.

[Duffy ignores the objection and continues to proceed.]

Judge Akers: I'm going to deny
the request for a mistrial.
Please proceed counsel. . . You
[Duffy] have to give me a chance to rule.
I am trying to keep up.

RT 6/3/08 pp.101 L2-9)

Although Radar had just testified and although Duffy finished vouching for Radar himself Duffy wanted more vouching. Duffy called Stuebe[5] to vouch for Radar. This also drew an objection for vouching. (R6/3/08 p.205-208) To set it up Duffy first asked, "Did you supply Mr. Radar with any information such as police reports or facts of the murder...?" After securing a no Duffy had Stuebe repeat Radars testimony to bolster it and implicitly vouch for it. (6/3/08 p.209-211) The defense never accused Stuebe of providing Radar with information or police reports. The defense contended Radar learned of the case through Crime Stopper and by going through Snelling's materials provided by counsel. Duffy successfully vouched for Radar again with this

[5] Case Agent Stuebe: . . . there was not any biological evidence that was found in the sexual assault kit. **That doesn't mean it did not occur.** GJTRS pp. 17-20)

improper tactic.

Duffy continued with his vouching at closing . Duffy injected himself personally into the proceedings over 40 times "I", "We". (RT 6/5/08) Duffy not only vouched for Radar, he did so making an intentionally false statement to the penalty phase jury. Duffy told the jurors, "Jerry Radar came forward in front of you without anything to gain." This is untrue. Radar secured a benefit.

Duffy also engaged in ***extreme*** vouching:

* At closing Duffy specifically, expressly and personally vouched for Radar.

* At closing Duffy specifically and expressly vouched that every member of the State vouched for Radar.

* At closing Duffy specifically, expressly and personally vouched for the State's case and vouched that other members of the State vouched for the State's case.

> "Do you think **I'd be standing** up here or **any member of the State** would **be standing up here** and **ask you to give . . .** the **death** penalty **to this defendant** based solely on Jerry Radar's testimony? **Of course not**."

(6/5/8 p44 L13-19)(emphasis added)

She objected again.

Ms. Glitsos: Objection. Vouching.
Judge Akers: Sustained.

(6/5/8 p44 L13-19)

Duffy, as is his practice, ignored the law, rules of professional conduct and his obligation as a prosecutor to assure a capital defendant gets due process. Duffy ignored Judge Akers. Not only did Duffy ignore Judge Akers ruling, he did so intentionally and with extreme indifference. Immediately after Judge Aker's sustained the vouching objection, Duffy's next words were vouching. Duffy linked the State and himself personally with Radar and linked his (Duffy's) personal narration with Radar's narrative.

"Everything Radar said matches what we[6] have. ..Jerry Radar is totally corroborated in this case. . . Jerry Radar was corroborated...everything Radar said matches what we[7] have... do I ask you...He [Radar] narrates the story...I just narrated to you. He supplies meaning. Seeing her, wanting to get some... all with physical evidence to prove it and back it up"

(R 6/5/08 p.44-45 L9-13,46)

Ms. Glitsos: Objection.

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[6]. "We" is universally understood to mean I and others.

[7] "We" is universally understood to mean I and others.

(R 6/5/08 p.45)

Contrary to Duffy's representation to the jury there was no physical evidence of a sexual assault. Radar's statement that Snelling "wanted to get some" was only corroborated by Duffy's vouching. Duffy planned to make the "stranger danger", death to "protect innocent children" since at least jury selection. *See* Duffy's statements.(R5/27/08 p.171 L21-p.174). Duffy inflamed the jury over the objection of Ms. Glitos:

> Judge Akers: Overrule. The jury may assess the evidence anyway they feel is appropriate.
>
> Mr. Duffy : The death penalty in this case will protect innocent children and elderly women. It protects society in general. The only true protection against this stranger danger, the case we all fear, is death. Now I'm going to tell you some more reasons why it's proper...I believe this is a very important case.
>
> Ms. Glitsos: Objection. Vouching.
>
> * * *
>
> Ms. Glitsos: Objection. Your honor, Counsel is misstating the law.
>
> * * *
>
> Ms. Glitsos: Objection. There is no evidence regarding life in prison.

Judge Akers': Overruled.

(R 6/5/08 p.48-50)

2. This Court Should Vacate Snelling's Sentence of Death And Find That Re-prosecution For Death Is Barred By The Double Jeopardy Clause.

In most instances, the remedy for prosecutorial misconduct is a new trial. *See State v. Towery,* 186 Ariz. 168, 185, 920 P.2d 290, 307 (1996)*; State v. Atwood, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992).* However, the record in the instant case is now replete with evidence that Duffy's misconduct, was intentional and committed to prejudice the jury against Snelling. This intentional misconduct seriously damaged the structural integrity of the penalty phase proceeding as well as damaging the integrity of the justice system. Duffy has damaged the integrity of the justice system for the second time in his prosecution of a capital defendant. His misconduct is remarkably similar to that described in Ted J. Duffy Bar No. 016907 File No. 06-1958 Supreme Court No. SB-09-0099-D. (1) As in No. 06-1958 Mr. Duffy was the lead prosecutor in Snelling's capital murder case; (2) As in No. 06-1958 Mr. Duffy made several arguments which drew multiple defense motions to dismiss and/or for mistrial in Snelling's capital murder penalty phase re-trial;(3) As in No. 06-1958 motions were denied and the penalty phase re- trial proceeded; (4) As in No. 06-1958 Mr. Duffy made misleading references to evidence in the presence of the jury, including making arguments to the trial court and references in the presence of the penalty phase jury to

a sexual assault when he knew there was no evidence of a sexual assault;[8] (5) As in No. 06-1958 Mr. Duffy asked a witnesses questions in forbidden by the evidence rules. (6) As in No. 06-1958 Mr. Duffy at various times during the trial and penalty phase proceeding/s, Mr. Duffy injected his personal knowledge and beliefs into the case, and engaged in improper vouching. (7) As in No. 06-1958 Duffy displayed a pattern of misconduct in Snelling's case; (8) As in No. 06-1958 Mr. Duffy possessed substantial experience in the practice of law during the period of time he prosecuted Snelling. (9) As in No. 06-1958, Mr. Duffy violated Rule 42, Ariz. R. Sup. Ct., ERs 3.1, 3.3(a)(1), 3.4(c) and (e) and 8.4(d).

Mr. Duffy was aware that his improper actions would deprive Snelling of a fair trial. Indeed that was his intent. Snelling respectfully request this Court rule not to sanction the prosecutor, but to protect the integrity of the justice system and remedy the denial Snelling's fundamental rights. Snelling request this Court hold that his second penalty phase retrial was barred by the double jeopardy clause of the Arizona and United States Constitution. Snelling requests this Court therefore vacate the death

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[8] It would be "speculation" to say a sexual assault or attempted sexual assault occurred. (Testimony of Dr. Buckholtz. R5/17/07 p.103-109,148);

In entering a directed verdict under Rule 20 the trial court noted (as both Mr. Imbordino and Mr. Duffy knew) "I don't believe there is any evidence of a sexual assault" (RT5/17/07 p.148).

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

sentence and impose a natural life sentence.

E. The Trial Court's Incorrect Jury Instructions Permitted The Jury To Access The Evidence And Sentence Snelling To Death Based On Their Emotions.("feelings") This Combined With The Other Instructions And Misconduct Of The State Resulted In Structrual Error And A Standardless And Unchannelled Imposition of The Death Penalty. All In Violation of The Fifth, Sixth, Eighth and Fourteenth Amendments Of The U.S. Constitution.

1. STANDARD OF REVIEW: This Court reviews de novo whether the trial court has properly instructed the jury on the law in a capital case. *State v. Glassel, 211 Ariz.* 33, 53, 74, 116 P.3d 1193, 1213 (2005). If a party fails to object to an error or omission in a jury instruction the error may be reviewed for fundamental error. *State v. Valenzuela,* 194 Ariz. 404, 405, 2, 984 P.2d 12 (1999). A jury instruction that reduces the State' burden of proof cannot be harmless and is structural error. *Sullivan v. Louisiana*, 508 U.S.275, 113 S.Ct. 2078 (1993) Error is harmless [only] when we can say it did not affect the verdict." *State v. Smith,* 305 Ariz. Adv. Rep. 3, 6 (App. 1999) *See Arizona v. Fulminante,* 499 U.S. 279, 309-10, 111 S.Ct. 1246, 1265 (1991). Chief Justice Rehnquist put it another way in *Fulminante*: Errors that occur "during the presentation of the case to the jury" are susceptible to a harmless error analysis because they may "be quantitatively assessed in the context of [the] other evidence." *Id.* at 307-08, 111 S.Ct. at 1264. But errors that create "defects . . . in the trial mechanism" itself affect the "entire conduct of the trial from beginning to end," damage "the framework within

which the trial proceeds," and are therefore not subject to harmless error analysis. *Id.* at 309-10, 111 S.Ct. at 1265.

The Fifth, Sixth and Fourteenth Amendments require that criminal convictions rest upon a jury determination that the defendant is guilty of every element of the crime charged. *Sullivan*, 508 U.S. at 277-78. In Arizona aggravating factors are elements of the crime of capital murder. *Ring v. Arizona (Ring II)*, 536 U.S. 584 (2002). The errors in this case should not be deemed harmless. It is recognized that this Court held in *State v. Ring (Ring III)*, 204 Ariz. 534, 544, 65 P.3d 915, 925 (2003), 44-53 that the failure to submit an aggravating circumstance to a jury was not structural error but would be reviewed as trial error. Then Justices Feldman and Jones disagreed with the majority's holding on this point and asserted that such error could never be harmless. *Id.* at 105-15. This 3 to 2 decision was then applied in *State v. Dann (Dann II)*, 206 Ariz. 371 (2003) shortly thereafter regarding the (F)(8) aggravator because the trial judge failed to consider the temporal, spatial and motivational relationship requirements of the (F)(8) aggravator that are mandated by the Eighth Amendment's narrowing requirement. 206 Ariz. at 373, 5. The underlying premise in *Ring III* that supported this narrow majority view was based upon application of the Supreme Court's opinions in the non-capital cases of *Neder v. United States*, 527 U.S. 1 (1999) (holding that the trial court's failure to instruct the jury on an element of the crime is not structural error) and *United States v. Cotton*, 535 U.S. 625 (2002) (holding that the government's failure to

allege the quantity of drugs as a penalty enhancement was reviewable for harmless error). Since *Ring III* the high Court held in *Washington v. Recuenco*, 548 U.S. 212 (2006) that *Blakely v. Washington*, 542 U.S. 296 (2004) error is not structural, but subject to harmless error review. *Recuenco* was a natural extension of *Neder* and *Cotton*, but again did not involve a death penalty case. States must properly establish a threshold below which the death penalty cannot be imposed. *McCleskey v. Kemp*, 481 U.S. 279, 305 (1987). To ensure that this threshold is met, the "state must establish rational criteria that narrow the decision maker's judgment as to whether the circumstances of a particular defendant's case meet the threshold." *Id. See also*, *Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Zant v. Stephens*, 462 U.S. 862, 877 (1983). A state's sentencing procedure must suitably direct and limit the decision-maker's discretion "'so as to minimize the risk of wholly arbitrary and capricious action.'" *Id.* at 874 (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)).Vague standards are unconstitutional because they fail to adequately "channel the sentencing decision patterns of juries." *Id.* at 195, n. 46.

In this case as the first jury was instructed on the (F)(6) aggravator. The instruction on the (F)(6) aggravator was vague. Because the vague aggravator was submitted a jury rather than a judge it cannot be presumed the first jury narrowed the criteria as to whether the circumstances of Snelling's case met the constitutional requirements. The first jury found the vague especially cruel aggravator and hung on the issue of whether to impose a life or death sentence. A reviewing court may not

later make the factual determination left unresolved by the jury due to its lack of guidance of a judicial narrowing construction. Thus, to hold the error harmless would violate the Eighth Amendment by failing to genuinely narrow the class of murders subject to the death penalty. To date, the Supreme Court has yet to expressly address this issue in the context of a death penalty case. *See*, *Summerlin v. Stewart*, 341 F.3d 1082, 1117-1118 (9th Cir. 2003) ("Here, as in *Sullivan v. Louisiana*, 508 U.S. 275 (1993)] there was no jury verdict within the meaning of the Sixth Amendment and no constitutionally cognizable finding to review.") rev'd on other grounds *Schriro v. Summerlin*, 542 U.S. 348 (2004) (determining only that *Ring* was procedural and therefore did not apply retroactively.); *Esparza v. Mitchell*, 310 F.3d 414, 422 (6th Cir. 2002) ("harmless error review in [capital] cases should apply only when the jury has actually performed its function under the Eighth Amendment.") rev'd on other grounds *Mitchell v. Esparaza*, 540 U.S. 12, 17 (2003) ("In relying on the absence of precedent to distinguish our noncapital cases, and to hold that harmless-error review is not available for this type of Eighth Amendment claim, the Sixth Circuit exceeded its authority under § 2254 (d)(1)." The Court admits that on this particular issue "the precedent from this Court is, at best ambiguous.") *See also*, *Ring v. Arizona*, 536 U.S. 466, 609 n.7 (2002) ("We do not reach the State's assertion that any error was harmless because a pecuniary gain finding was implicit in the jury's guilty verdict.") Cases that predate *Ring II* indicate that if squarely presented in the context of the Eighth

Amendment in a capital case the Supreme Court would overrule this Court's harmless error holding in *Ring III* when applied to jury sentencing. For example, decades ago in *Godfrey v. Georgia*, 446 U.S. 420 (1980) the Court struck down a statute authorizing the death penalty when the murder was "outrageously or wantonly vile, horrible or inhuman" as being too vague and therefore without adequate narrowing standards for any jury's death sentence to comport with the Eighth Amendment. The Court indicated that a reviewing court may not later make the factual determination left unresolved by the jury due to its lack of guidance of a judicial narrowing construction. Justice Marshall observed:

> [I]t is not enough for reviewing courts to apply narrowing construction to otherwise ambiguous statutory language. The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards. To give the jury an instruction in the form of the bare words of the statute-words that are hopelessly ambiguous and could be understood to apply to any murder-would effectively grant it unbridled discretion to impose the death penalty. Such a defect could not be cured by the post hoc narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; that is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.
>
> *Id*. at 436-37 (Marshall, J. and Brennan, J. concurring) (internal citations omitted.)

First, the distinction at issue here (not addressed in *Ring III* which reviewed a

judge's death sentences for harmless error) is that the vague (F)(6) aggravator was not presented to a judge for a finding, it was presented to the aggravation jury (first jury). Secondly, the 2nd jury, the death jury was given "unbridled discretion to impose the death penalty" by the trial court. The trial court gave the death jury (2nd jury) an incorrect (under Arizona law) definition of cruelty which widened rather than narrowed the death juries discretion. Third, Snelling was sentenced to death by the second penalty jury on an aggravating factor that was materially different in kind from the aggravating factor found beyond a reasonable doubt by the first jury who hung. Fourth, when a jury is unable to reach a verdict on the penalty the second sentencing 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." *See* ARS §13-703.01(K) Snelling was sentenced to death on an aggravating factor not found beyond a reasonable doubt. Fifth, the death jury was given an incorrect oral umbrella instruction by the trial judge. The trail judge expressly communicated to the jury that it had the discretion to impose a death sentence based on their emotional reaction to the evidence. This further widened rather than narrowed the death juries discretion. Moreover it permitted the death jury to impose the death penalty on emotion over reason. The trial judge ‘s oral instruction to the death jury at a crucial and dramatic point in the State's closing argument for death was to "assess the evidence anyway that they feel" "Feel" refers to one of two things, tactile touch or

one's internal emotions. The death jury did not "touch" the evidence. The death jury as human beings were no doubt terribly emotionally affected by what they observed and what they were told by Duffy. Sixth, not only was the death juries ability to evaluate the sole aggravating factor materially impaired, but also it's ability to evaluate the mitigating circumstances was impaired. Quite simply, the death jury was given an incorrect legal definition of the sole aggravator and therefore it's functional ability to weigh and compare the mitigation to the sole aggravator was materially impaired. Seventh, Duffy with the acquiescence of the of the trial judge further impaired the juries ability to evaluate the aggravating factor and mitigating factor by incorrectly telling the jury that Snelling's criminal history was also an aggravating factor. Duffy expressly told the jury Snelling's "criminal history" was an "exceptionally aggravating" factor "calling for the death penalty". (RT 6/5/08 pp. 32) *See*, *State ex rel. Thomas v. Grandville (Baldwin)*, 211 Ariz. 468, 472, 17, 123 P.3d 662 (2005) ("the jurors must assess whether to impose the death penalty based upon each juror's individual, qualitative evaluation of the facts of the case, the severity of the aggravating factors, and the quality of any mitigating evidence.") Moreover, Duffy immediately followed the trial court's "feel" instruction with a highly emotionally charged grossly improper argument that certainly appealed to prejudice and impacted the jury emotionally. Eighth, this jury had expressed a bias and propensity to impose death if a child was in any way a victim. Ninth, again as with the first jury that hung, Duffy cleverly

communicated to the death jury that Snelling would be released if not given death. Duffy expressly conveyed to the death jury that children were future victims of Snelling if he was not given the death penalty. There are no "little children" in adult male prison's. How would little children be at risk if Snelling were not given death, only one way, if he was released. In other words Snelling would get released if not given death and "little children" would be unprotected. Tenth, there are no findings of fact or conclusions of law made by the jury for a reviewing court to assess. Finally, since it was a jury and not a judge as the trier of fact and since the jury (unlike a judge) was unaware of the law that governs death penalty phase proceedings the death jury cannot be presumed to follow the law they are not instructed on. Rather it is presumed the death jury followed the incorrect instructions they were provided by the trial court and considered the grossly improper argument they were told by the trial court they could consider.

An appellate court is not able to perform the sort of factual balancing called for in jury sentencing since it has no way to determine how a particular sentencing jury would have exercised its discretion had it reached the issue unimpeded by the errors raised herein. *See*, *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1984) (a "[state] appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance."); *Arizona v. Rumsey*, 467 U.S. 203, 210 (1983) (Arizona's capital sentencing scheme doe not empower a reviewing court to

make trial like factual determinations). *Cf*., *Presnell v. Georgia*, 439 U.S. 14, 16-17 (1978) (reversing state appellate court's affirmance of death sentencing based on state court's own finding of an aggravating circumstance not found by the jury.) This Court should therefore reject any request to apply harmless error analysis to this jury's factual determinations for doing so will violate Appellant's Sixth and Eighth Amendment rights. *See*, *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002) (Refusing to permit Nevada Supreme Court from "engaging in de novo fact-finding when the penalty phase fact finder has been a jury.") Since the first jury was instructed on the vague (F)(6) aggravator as presented was vague and the second jury, the death jury was improperly instructed and permitted to consider grossly improper reasons to impose death (non-statutory aggravation) the death jury was "granted unbridled discretion." As a result of being presented this aggravator and evidence without standards the jury was never provided the means or framework to perform its constitutional function.

F. Independent Review

Because Snelling's offense occurred before August 1, 2002, this Court independently reviews the aggravating and mitigating circumstances and the propriety of the death sentence. A.R.S. § 13-703.04(A) (Supp. 2006); *see* 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 7. In conducting independent review, this Court will "consider the quality and the strength, not simply the number, of aggravating and

mitigating factors." *State v. Roque*, 213 Ariz. 193, 230, ¶ 166, 141 P.3d 368, 405 (2006) (quoting *State v. Greene*, 192 Ariz. 431, 443, ¶ 60, 967 P.2d 106, 118 (1998)).

This Court should reduce Snelling's sentence to a natural life sentence. Counsel submits that this Court is limited to finding no error and affirming the death sentence or if this Court finds the quality or strength of the sole aggravator insufficient to warrant the death penatly and/or finds error as to the sole aggravating factor found this Court's only option is to impose a life sentence. To do otherwise would violate Snelling's right to a jury determination of fact/s necessary to impose a death sentence under the 6th and 8th Amendments to the U.S. Constitution and would violate A.R.S. §13-703.01 (J). Under 13-703.01(J) the State is limited to two attempts with two juries to secure a death sentence. For this Court to find error and than re-sentence Snelling to death is illegal. A re-sentencing to death by this Court after finding error would violate the statute and the Snelling's 6th and 8th Amendment right to a jury determination of this issue.

The State asserts in it's brief that this Court should consider the testimony of Dr. Keen. This would be contrary to the 6th and 8th amendments to the U.S. Constitution and A.R.S. 13-703.01 (J). Under Arizona law the 2nd jury, the death jury was not permitted and did not re-try the issue of whether the aggravating factor of especially cruel existed. At the time Dr. Keen testified especially cruel was not an issue it had previously been found by the first jury ***that hung on death.*** Secondly, it would be a

denial of Snelling's right to a jury trial on the issue of the existence of the sole aggravating factor found. Third, Dr. Keen's testimony is in direct contradiction to the findings of Dr. Dudley and the testimony of Dr. Buckholtz. Dr. Dudley, the only medical examiner to view the victim, did not testify.

2. The evidence received and considered by the first jury on the issue of whether the sole aggravator existed was insufficient and of inferior quality and inferior strength. The especially cruel aggravating factor, Ariz. Rev. Stat. § 13-703(F)(6) (1988), was unconstitutional as applied to Snelling in violation of the Eighth and Fourteenth Amendments:

a. The especially cruel aggravator instruction was vague. Error was made because the jury's finding was based on a constitutionally deficient instruction.

b. There was insufficient evidence to support the jury's finding that the especially cruel aggravator existed.

c. There is no rational basis to distinguish this case from *State v. Jimenez,* 165 Ariz. 444, 453, 799 P2d 785 (1990).

d. There was insufficient evidence that the victim was conscious and suffered mental anguish and/or physical pain at the time of death. The 1st jury that found the aggravating factor of cruelty were provided unreliable and insufficient evidence. Additionally the evidence of Dr. Burkholtz was in violation of the confrontation clause. *United States v. Norwood,* 2919 WL 537497(9th Cir. Feb. 17,

2010)

e. There was insufficient evidence that Snelling intended or reasonably foresaw the victim's suffering. The 1st jury that found the aggravating factor of cruelty were provided unreliable and insufficient evidence.

f. The 2nd jury was incorrectly instructed on the legal definition of cruelty. Thus Snelling was sentenced to death on an aggravating factor different in kind than found by the previous jury. This materially changed the cruelty aggravator and changed the jurors evaluation of this sole aggravator and of mitigation.

g. Snelling was denied the opportunity to rebut the specific intent element of cruelty. The trial court denied Snelling the opportunity to present evidence that he was cognitively impaired by percluding he testimony of Dr. Lanyon. The refusal to allow Snelling to call Dr. Lanyon a neuropsychologist at his capital penalty phase denied Snelling his right to present a defense and to a fair trial. Arizona Constitution, Art. 2, §§ 4, 15, 23 & 24 and United States Constitution, Amendments 5, 6, 8 & 14. Based on this error alone this Court should reverse Snelling's sentence of death and impose a life sentence. Courts will reverse a death sentence if the trial court refuses to review or to allow mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982).

CONCLUSION

One reason exists to vacate Snelling's death sentence over all others. The evidence in support of the sole aggravator of especially cruel was legally insufficient. The only "evidence" presented in support of the especially cruel aggravator was insufficient , violated the confrontation clause, was unreliable and incredible. Additionally, counsel asks this Court to protect the integrity of the judicial system which has repeatedly been damaged by the office of Maricopa County Attorney Andrew Thomas. Counsel asks this Court to vacate the death sentence and impose a natural life sentence.

RESPECTFULLY SUBMITTED THIS ____ day of March, 2010

_____
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CERTIFICATE OF SERVICE

The ORIGINAL and SEVEN COPIES of Appellant's Opening Brief were hand delivered this ___ day of March 2010 to:

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TWO COPIES of Appellant's Opening Brief were delivered this ___ day of March 2010 to:

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies the following:

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