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THE SUPREME COURT OF ARIZONA

STATE OF ARIZONA, Appellee, vs. GARY WAYNE SNELLING, Appellant.	CR 08-0164-AP **Maricopa County Superior Court No. CR2005-007848** **Supplemental Citation of Legal Authority**

Snelling argued in his opening brief that the especially cruel aggravating circumstance was not proven beyond a reasonable doubt to the aggravation phase jury. The aggravation phase jury hung at the penalty phase. Snelling further argued in his opening brief the penalty phase jury sentenced him to death after being instructed on a constitutionally deficient definition of cruelty. The trial court omitted mandatory material elements. The instruction to the penalty phase jury did not include the requirement the jury consider the mental state of the victim nor the requirement the jury consider whether the victim suffered physical injury in weighing (or comparing)

the sole aggravator against the offered mitigation.

Snelling further argued in his opening brief that the constitutionally deficient instruction placed all the emphasis on Snelling's state of mind. Snelling further argued in his opening brief that the deficient instruction was supported by Jerry Radar's testimony, that Radar's testimony was supported by the State's vouching for Radar's testimony and the State's vouching for it's case. (Opening Brief pp.30-43, 55-58, Reply pp.1-2, 12-32)

At oral argument a question arose regarding whether the Arizona Supreme Court can consider, in its independent review, evidence not heard or considered by the aggravation phase jury that made the *subjective* finding of the single aggravator necessary for the imposition of Snelling's sentence of death.

Snelling supplements his brief and asserts that the aggravation phase jury's legally insufficient finding of especially cruel can not result in a sentence of death following this Court's independent review and cites the following authorities in support of that legal proposition.

A.R.S § 13-756(B) requires remand for resentencing when an error is made in capital sentencing proceedings if the Supreme Court cannot determine whether the error was harmless beyond a reasonable doubt. In *State v. Gunches*, __ P.3d __, 2010 WL 2383603 (Ariz.), Justice Bales held that there was insufficient evidence to maintain an (F)(6) sentencing aggravator and the unconstitutional finding was not harmless. *Gunches* puts forth the strict criteria for an error to be harmless: the State must

establish beyond a reasonable doubt that the error did not contribute to or affect the verdict. "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." S*tate v. Anthony*, 189 P.3d 366, 373 (2008). In other words the State has the burden of proving that the error was harmless beyond a reasonable doubt. The State has failed to meet it's burden.

The *Lynch* decision offers guidance on independent review of aggravation. *State v. Lynch*, __ P.3d __, 2010 WL 2485248 Ariz., 2010. This Court did not reweigh the aggravating and mitigating evidence because it determined no error in the aggravation findings, however, *Lynch* emphasized the statutory limitations on relitigating aggravating factors before a second jury impaneled at the penalty phase. *Id* at 23-24. Specifically, *Lynch* says it's improper for a second jury to retry "the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found by *unanimous* verdict to be proved or not proved." *Id*, *citing* A.R.S. §13-752(K) (emphasis added). Because Snelling's first jury unanimously found sufficient evidence for the "especially cruel" prong of the F(6) the litigation of that issue is complete at the end of the initial jury's aggravation phase. A.R.S. §13-752(K).

If this Court considers Dr. Keen's testimony in its independent review, it *de facto* permits the relitigation of "especial cruelty"—not merely by a second jury, but by a reviewing court—in considering evidence not heard or consider by the aggravation jury that tried the issue. Snelling asserts this would deny his 6th Amendment

procedural guarantee to a jury determination on the single aggravator necessary for the imposition of his death sentence. *See Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002):*

> *Held: Walton* and *Apprendi* are irreconcilable; this Court's Sixth Amendment jurisprudence cannot be home to both. Accordingly, *Walton* is overruled to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. See 497 U.S., at 647-649. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," *Apprendi*, 530 U.S., at 494, n. 19, the Sixth Amendment requires that they be found by a jury. Pp. 597-609.

Also see *Melendez-Diaz v. Massachusetts*, 129 U.S. 2527(2009):

> "What we stated in *Crawford* in response to the argument remains true: 'To be sure, the Clause's ultimate goal is to ensure re-liability of evidence, but it is a **procedural rather than a substantive guarantee** . . . Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amend prescribes.'" Id at 2537-38 (emphasis added)

The penalty phase jury heard the testimony of Dr. Keen but it did not consider the testimony vis-à-vis the aggravation findings, nor was Mr. Snelling given the opportunity to challenge the use of such testimony in the context of aggravation. This not only implicates *Ring*'s jury trial requirements, but also procedural due process and confrontation clause requirements. *See e.g. Chambers v. Mississippi,* 476 U.S. 683 (1973)(due process incorporates the right to present a defense); *Woodson v. North Carolina*, 428 U.S. 280 (1976)(requiring heightened reliability in capital cases); *Crane v. Kentucky*, 476 U.S. 683, (1986)(The exclusion of the testimony about the circumstances

of his confession deprived petitioner of his fundamental constitutional right-whether under the Due Process Clause of the Fourteenth Amendment or under the Compulsory Process or Confrontation Clauses of the Sixth Amendment-to a fair opportunity to present a defense).

RESPECTFULLY SUBMITTED this 7th day of July, 2010

S/ Thomas A. Gorman
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