No. 13-___

IN THE

Supreme Court of the United States

EFREN MEDINA

Petitioner,

v.

ARIZONA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether an autopsy report created as part of a homicide investigation, and asserting that the death was indeed caused by homicide, is "testimonial" under the Confrontation Clause framework established in *Crawford v. Washington*, 541 U.S. 36 (2004).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Efren Medina respectfully petitions for a writ of certiorari to review the judgment of the Arizona Supreme Court.

OPINIONS BELOW

The relevant opinion of the Arizona Supreme Court (Pet. App. 1a) is published at 306 P.3d 48. The relevant proceedings and order from the trial court are unpublished.

JURISDICTION

The judgment of the Arizona Supreme Court was entered on August 22, 2013. Pet. App. 1a. On November 7, 2013, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including December 20, 2013. *See* No. 13A463. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Confrontation Clause of the Sixth Amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Absent narrow exceptions inapplicable here, the Confrontation Clause forbids the prosecution in a criminal case from introducing out-of-court "testimonial" statements unless the declarants are unavailable and the defendants had a prior opportunity to cross-examine them. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), this Court held that formalized forensic analysis reports fall within the "core class of testimonial statements" described in *Crawford*. 557 U.S. at 310 (internal quotation marks and citation omitted). This case presents a fundamental and recurring question over which the state courts of last resort are intractably divided: whether the holding of *Melendez-Diaz* applies to autopsy reports created as part of a homicide investigation and asserting that the cause of death was indeed homicide. The Arizona Supreme Court held that it does not.

1. Late one night in 1993, petitioner and his friend, Ernest Aro, got high on paint fumes and set out in Phoenix, Arizona to steal a car. They spotted a car parked on the side of the road with a single occupant inside. Petitioner, who was eighteen years old at the time, pulled the occupant, a seventy-one-year-old man, out of the car. Petitioner then dragged the man into the street and beat him. Petitioner tried without success to start the car, and next tried and failed to steal the car's radio. According to the lone eyewitness to the events, a second car then arrived and petitioner got inside. The car left the scene, leaving the battered victim lying in the street.

The car soon returned with petitioner and Aro inside. Petitioner claimed at trial he was not driving, while the State claimed he was behind the wheel. At any rate, according to the eyewitness, the car ran over the victim once and then left the scene for good. Pet. App. 3a; Exh. 144 at 29-36, 42-44, 47.

The victim died in the street. Because it was clear that the victim had been beaten and run over, it was immediately obvious that criminal conduct likely caused his death. Accordingly, officers were dispatched to respond to a presumed "homicide," RT 9/11/08 at 40-41, and their investigation began at the scene. *Id.* at 42-50.

2. Arizona law requires the police to "promptly notify the county examiner" about any "suspicious, unusual or unnatural" death." Ariz. Rev. Stat. §§ 11-593(A)(6) & (B). The police must also "report the results" of their "investigation" up to that point to the examiner. *Id.* § 11-593(B). After taking charge of the dead body, the county examiner must "[c]ertify to the cause and manner of death following completion of the death investigation." *Id.* § 11-594(A)-(B). The examiner must then "[n]otify the county attorney or other law enforcement authority when death is found to be from other than natural causes." *Id.*

Adhering to these dictates, the police had the victim's body delivered directly from the scene to the Maricopa County Medical Examiner's Office. The next day, Dr. Ann Bucholtz, a county medical examiner, conducted a forensic autopsy of the victim. Two Phoenix law enforcement officers and a third police department "ID Tech" attended the autopsy. Pet. App. 45a. The officers told Dr. Bucholtz that the police found the deceased victim lying in the street

and the police had already initiated an "investigation." *See id.* 44a, 46a. The officers thus observed and took notes while Dr. Bucholtz's performed her work. RT 9/15/08 at 97-102. The officers also took some photographs of their own, blood samples for later toxicology testing, and certain personal effects from the victim that later became evidence at trial. Pet. App. 44a.

Eighteen days later, Dr. Bucholtz issued an autopsy report, a copy of which is attached at Pet. App. 41a-62a. The cover page of the report lists the case investigation number and the notifying agency as the "Phoenix PD." *Id.* 42a. The report concludes that the manner of death was "homicide." *Id.* 45a. It also offers the "opinion" that "death was due to blunt force trauma." *Id.* The report further contains numerous pages of supportive "pathologic diagnoses"; detailed findings regarding the condition of the body, clothing, and "trace evidence"; and illustrated diagrams. *Id.* 45a-62a; *see also id.* 19a. Most relevant here, the autopsy report declared that the victim's liver was "severely lacerated," *id.* 57a, and that the victim had suffered multiple rib fractures, *id.* 58a-59a.

Dr. Bucholtz signed the report and certified it with the following language: "Pursuant to section 11-594 of Arizona Revised Statutes I hereby certify that I took charge of the body described herein and that after making inquiries into the cause and manner of death and examination of the body it is my opinion that death occurred due to the cause(s) and in the manner stated." Pet. App. 43a.

3. The State charged petitioner, among other things, with first-degree murder and sought a

sentence of death.[1] Following a trial in Arizona state court, the jury found petitioner guilty, and he was sentenced to death. Years later, however, the state trial court held on post-conviction review that petitioner had received ineffective assistance of counsel during the sentencing phase of his trial. Accordingly, the court vacated his death sentence. Pet. App. 2a.

4. The State elected to seek a new death sentence, and a new trial to that effect was held in 2008. After the jury deadlocked and a mistrial was declared, a second retrial was held in 2009.

Arizona law authorizes a sentence of death "only if there is at least one aggravating circumstance and 'there are no mitigating circumstances sufficiently substantial to call for leniency.'" *Ring v. Arizona*, 536 U.S. 584, 593 (2002) (quoting Ariz. Rev. Stat. § 13-703(F)). Aggravating circumstances thus "operate as the functional equivalent of an element of a greater offense" and must be proved according to the same procedures that apply to any other element of a crime. *Id.* at 609 (internal quotation marks and citation omitted); *see also State v. McGill*, 140 P.3d 930, 942 (Ariz. 2006) (acknowledging specifically that confrontation right applies in this context).

The State alleged four aggravating circumstances. The first three – (1) that petitioner had previously been convicted of a serious offense; (2) that the murder was committed while on authorized release from prison; (3) that the victim was more

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[1] In a separate trial, Aro was convicted of both premeditated and felony murder but spared a death sentence.

than seventy years old – were relatively straightforward. The fourth alleged aggravator – that the crime was committed in an especially heinous or depraved manner – was far more inflammatory and contested and thus became the focus of the parties' attention.

The State's theory on the "heinous or depraved" aggravator was that petitioner relished the murder and inflicted "gratuitous violence" on the victim. With respect to the latter allegation, the State contended – contrary to the lone eyewitness's recollection – that petitioner ran over the victim more than once and thus continued to inflict violence after he knew or should have known that the victim was dead. Pet. App. 34a-36a. Petitioner vehemently disputed this claim, maintaining that the car in which he was riding drove over the victim only once.

In support of its theory, the State proposed to introduce into evidence Dr. Bucholtz's autopsy report. Yet even though Dr. Bucholtz was seemingly perfectly available to testify, it declined (as it had in the prior guilt and sentencing trials) to call her to the stand. Instead, the State proposed to call a different pathologist with far more experience at testifying in criminal trials, Chief Medical Examiner Philip Keen, to testify "concerning the report's conclusions" and to use the report as a basis for making various assertions of his own about the killing. Pet. App. 19a.

Petitioner timely objected both to the admission of Dr. Bucholtz's autopsy report and Dr. Keen's testimony, "on the basis that the report itself was 'hearsay' and 'was completed by a different person

than the one that [was] going to testify.'" RT 9/15/08 at 8; *see also* Pet. App. 19a.

The court overruled the objections, admitting the report and allowing Dr. Keen to testify based on its contents. On the stand, after referencing the autopsy report's description of the victim's physical injuries, Dr. Keen opined that "he was run over at least twice." RT 9/15/08 at 29-30. Dr. Keen similarly testified that the "descriptions of the [victim's] liver in the autopsy protocol" indicated that the victim's internal injuries were "secondary" ones likely caused by being run over multiple times. *Id.* at 30-31. During closing argument, the State also stressed the "severity of the injuries" described in the autopsy report and Dr. Keen's testimony that, based on that report, "he believed it was more likely that the victim was run over twice rather than once." RT 01/06/10 at 44, 54.

The jury found that the State had proved the alleged aggravating factors, including that petitioner committed the murder in a heinous or depraved manner.

Against these findings, the jury was bound to consider petitioner's arguments that his age and his intoxication were mitigating factors. Pet. App. 36a-38a. Petitioner further maintained that various other facts sounded in mitigation, including the fact that Aro received a life sentence for his role in the murder. But such a disparity "ha[s] little significance" under Arizona law "when the murder is especially heinous, cruel, or depraved." *Id.* 39a. Therefore, assuming that petitioner indeed "drove over [the victim] multiple times," the disparity in punishment here was "not . . . significantly mitigating." *Id.*

Taking all of this into account, the jury sentenced petitioner to death, and the trial court imposed that sentence.

5. The Arizona Supreme Court, hearing the case on direct appeal, affirmed the trial court's judgment. As relevant here, petitioner argued that the admission of the autopsy report (as well as Dr. Keen's testimony based upon it) violated the Confrontation Clause. The State acknowledged that "the courts are split over whether an autopsy report is testimonial and therefore its admission violates the Confrontation Clause when its author does not testify." State's Ariz. S. Ct. Br. 51. It urged the Arizona Supreme Court to follow the minority view and hold that such reports are nontestimonial.

Proceeding on the "assum[ption] that Medina properly raised his Confrontation Clause objection,"[2] the Arizona Supreme Court rejected the argument on the merits. Pet. App. 19a. The Arizona Supreme Court began by acknowledging this Court's holding in *Melendez-Diaz*, which was reaffirmed in *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717 (2011), that

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[2] This assumption was well-founded. *See, e.g., State v. King*, 132 P.3d 311, 314 (Ariz App. 2006) ("Because King objected on the basis of hearsay and also on the basis that he would not be able to cross-examine T.S., his objections were sufficient to avoid waiver of his Confrontation Clause argument.") (citing cases). At any rate, the matter is immaterial now, for once a state supreme court actually considers and decides a federal constitutional issue, "[i]t is irrelevant to this Court's jurisdiction" whether the petitioner properly raised the issue below. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991).

formalized forensic reports are testimonial. Pet. App. 20a. The court also asserted, however, that this Court's holding in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), also "informs [the] analysis." Pet. App. 20a.

In *Williams*, a four-Justice plurality concluded that a DNA report was nontestimonial because its primary purpose was not to "accus[e] a targeted individual of engaging in criminal conduct." 132 S. Ct. at 2242-43. Justice Thomas concurred in the judgment, rejecting the plurality's "targeted individual" test, *id.* at 2263, but concluding that the DNA report was nontestimonial because – in contrast to the reports in *Melendez-Diaz* and *Bullcoming* – it was "no[t] a certified declaration of fact" or otherwise formalized, *id.* at 2260. Four Justices dissented, arguing that the DNA report was testimonial because it "was made for the primary purpose of establishing past events potentially relevant to a criminal prosecution." *Id.* at 2273 (internal quotation marks and citation omitted).

The Arizona Supreme Court reasoned that the autopsy report in this case was nontestimonial because it not only fails to "accus[e] a targeted individual of engaging in criminal conduct," Pet. App. 21a (quoting *Williams*, 132 S. Ct. at 2242 (plurality opinion), but also because it is insufficiently solemn to satisfy Justice Thomas's formality test. On the latter point, the Arizona Supreme Court acknowledged that the "signed [autopsy] report" here – as is typical – "details the conditions of the body, states the examiner's conclusions regarding the cause and manner of death, and *certifies* that the report reflects her opinion as to the cause and manner of death and that she took charge of the body." Pet.

App. 23 (emphasis added). But the Arizona Supreme Court held that the report was not a formalized document because it "does not certify that the report was correct or that [Dr. Bucholtz] followed the correct procedures." Pet. App. 23a (emphasis added).

REASONS FOR GRANTING THE WRIT

This Court held in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and reaffirmed in *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), that formalized forensic reports are testimonial. But in the less than two years since five Justices concluded, for divergent reasons, in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), that a DNA report that was *not* formalized was nontestimonial, state high courts have divided four-to-three over whether autopsy reports created as part of a homicide investigation, and asserting that the cause of death was indeed homicide, are testimonial.

The importance of this issue to the administration of criminal justice in capital cases and other serious prosecutions is manifest. And this case presents an ideal vehicle for resolving the matter. In every relevant respect, the circumstances under which the forensic examiner conducted the autopsy here are typical. And because the report itself (as required by state law in Arizona and other states) is certified, it is highly unlikely that this case will require this Court to issue splintered ruling such as *Williams.* A reaffirmation of this Court's previous holdings that formalized forensic reports are testimonial is all that is necessary to decide this case and to restore clarity to this area of law more generally.

I. State High Courts Are Intractably Divided Over Whether Autopsy Reports Created As Part Of Homicide Investigations Are Testimonial.

State high courts are now hopelessly divided over how this Court's Confrontation Clause jurisprudence applies to autopsy reports prepared to further homicide investigations.

1. In this case, the Arizona Supreme Court became the third state high court to rely on *Williams* to hold that statements in autopsy reports created as part of homicide investigations are nontestimonial. *See* Pet. App. 19a-24a. In *People v. Leach*, 980 N.E.2d 570 (Ill. 2012), the Illinois Supreme Court held that "autopsy reports prepared by a medical examiner's office in the normal course of its duties are nontestimonial." *Id.* at 593. Thus, while recognizing the "split of opinion" on the issue, the Illinois Supreme Court concluded that an autopsy report – just like the one here – created "in the midst of a criminal investigation into a violent death," and determining that the cause of death was indeed homicide, was nontestimonial. *Id.* at 590-94. The California Supreme Court likewise has held that "anatomical and physiological observations" in autopsy reports created during homicide investigations are nontestimonial. *People v. Dungo*, 286 P.3d 442, 449-50 (Cal. 2012); *accord People v. Edwards*, 306 P.3d 1049, 1088-89 & n.12 (Cal. 2013).[3]

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[3] The Arizona Supreme Court also suggested that the Second Circuit's decision in *United States v. James*, 712 F.3d 79 (2d Cir. 2013), *pet'n for cert filed* (No. 13-632), supported its

2. In direct contrast, the majority of state high courts to grapple with the issue since *Williams* have held that all findings and conclusions in autopsy reports created during homicide investigations are testimonial. Three such courts have found confrontation violations on facts indistinguishable from those here. *See, e.g.*, *Miller v. State*, ___ P.3d ___, 2013 WL 4805683, at *26-28 (Ok. Crim. App. Sept. 6, 2013) ("[A] medical examiner's autopsy report in the case of a violent or suspicious death is indeed testimonial for Sixth Amendment confrontation purposes.") (internal quotation marks and citation omitted); *State v. Navarette*, 294 P.3d 435, 440-42 (N.M. 2013) (autopsy reports prepared during homicide investigations are testimonial because "[i]t is axiomatic" that medical examiners create such reports "with the understanding that they may be used in a criminal prosecution."), *cert. denied*, 134 S. Ct. 64 (2013); *State v. Kennedy*, 735 S.E.2d 905, 916-17 (W. Va. 2012) (autopsy reports conducted during "death investigations" are "under

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holding. *See* Pet. App. 22a. But unlike this case, the autopsy in *James* was completed "substantially *before* any criminal investigation into [the] death had begun," and "the autopsy report itself refer[red] to the cause of death as 'undetermined.'" *James*, 712 F.3d at 99 (emphasis added). Indeed, there was no evidence that law enforcement had been "notified that [the] death was suspicious, or that any medical examiner expected a criminal investigation to result from [the autopsy]." *Id.* The Second Circuit held merely "under th[ose] circumstances" that the autopsy report in that case was not "prepared with the primary purpose of creating a record for use at a later criminal trial" and thus was nontestimonial. *Id.* at 97.

all circumstances testimonial"); *State v. Blevins*, 744 S.E.2d 264-66 (W. Va. 2013) (same).

The Massachusetts Supreme Judicial Court likewise held before *Williams* that autopsy reports "undertaken as an *investigation and inquiry* into the *cause* of [a victim's] death" are testimonial "because a reasonable person in [the medical examiner's] position would anticipate his [findings and conclusions] being used against the accused in investigating and prosecuting a crime." *Commonwealth v. Nardi*, 893 N.E.2d 1221, 1233 (Mass. 2008) (internal quotation marks and citation omitted) (third alteration in original). Since *Williams*, that court has cited that holding with approval and further held, for the very same reasons, that a death certificate prepared by a forensic pathologist who has conducted an autopsy and determined that "a victim has undoubtedly died an unnatural death" is testimonial. *Commonwealth v. Carr*, 986 N.E.2d 380, 398-99 (Mass. 2013). There is no doubt, therefore, that the Massachusetts Supreme Judicial Court would have held that the autopsy report here was testimonial.[4]

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[4] One other state high court and two federal courts of appeals have similarly held that *Melendez-Diaz* dictates that autopsy reports created during homicide investigations, and concluding that victims indeed died of homicide, are testimonial. *See United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012); *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011), *aff'd on other grounds, Smith v. United States*, 133 S. Ct. 714 (2013); *State v. Locklear*, 681 S.E.2d 293 (N.C. 2009). Yet none of those courts has revisited the issue since *Williams.* Still other courts addressed the question presented before *Melendez-Diaz*, but

3. The conflict over the status of autopsy reports created under the circumstances here is deeply entrenched. Numerous state high courts have weighed in on each side, and new courts to confront the issue are no longer usefully contributing to any process of percolation. Instead, they are merely choosing sides between two well-developed positions. *See, e.g., Leach*, 980 N.E.2d at 593.

II. The Question Presented Is Important And Should Be Resolved Now.

For three reasons, there is a pressing need for this Court to resolve the conflict over whether autopsy reports prepared as parts of homicide investigations are testimonial.

1. Autopsy reports play a central evidentiary role in a large number of high-stakes criminal trials. In particular, autopsy reports are present in virtually every homicide prosecution. And when, as here, important details regarding the victim's death are disputed, the reports often represent a critical component of the prosecution's case.

2. Submitting the authors of autopsy reports to adversarial testing according to the dictates of the Confrontation Clause is essential to avoid wrongful convictions. This Court already has recognized, as a general matter, that forensic analysts are sometimes "incompetent" or even "fraudulent." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009). On a more subtle level, "[a] forensic analyst responding to

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those holdings obviously have little precedential value in light of this Court's intervening decisions.

a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution." *Id.* at 318. It therefore is vital that defendants have the opportunity to cross-examine the authors of forensic reports, in order to "expose any lapses or lies on the certifying analyst's part." *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2715 (2011).

This all holds true – indeed, especially true – with respect to autopsy reports created during homicide investigations. Police officers are typically in the room conversing with forensic examiners during such autopsies. And even more so than drug or alcohol testing of the type involved in *Melendez-Diaz* and *Bullcoming*, forensic pathology involves a significant amount of subjectivity and judgment. *See generally* National Association of Medical Examiners, *Forensic Autopsy Performance Standards* § B (2006), *available at* http://www.mtf.org/pdf/name_standards_2006.pdf (describing processes for arriving at "interpretation and opinions," as well as exercising "the discretion to determine the need for additional dissection and laboratory tests"); Alan R. Moritz, *Classical Mistakes in Forensic Pathology*, 26 Am. J. Clinical Pathology 1383 (1956). Yet sometimes medical examiners display anything but the skill and integrity necessary to the task. A recent investigation in Mississippi, for example, revealed several wrongful convictions due to autopsies performed by "a forensic analyst with inadequate training who was given far too much deference in the courts." Campbell Robertson, *Questions Left for Mississippi Over Doctor's Autopsies*, N.Y. Times, Jan. 7, 2013. Other similar examples abound. *See, e.g.,* Craig M. Cooley, *Reforming the Forensic Science*

Community to Avert the Ultimate Injustice, 15 Stan. L. & Pol'y Rev. 381, 401 (2004).

Worse yet, prosecutors sometimes work to shield such potentially questionable forensic work from cross-examination. In the *Dungo* case, for instance, the medical examiner who had prepared the autopsy report did not testify at trial because he had been blacklisted from testifying in several California counties, including the county where the trial took place. *People v. Dungo*, 98 Cal. Rptr. 3d 702, 707-08 (Cal. App. Ct. 2009). The examiner had also falsified his credentials, performed incompetent work in other California counties, and been fired and forced to resign "under a cloud." *Id.* at 714. Finally, the examiner had been known to base his conclusions on police reports instead of forensic methods. *See People v. Beeler*, 891 P.2d 153, 168 (Cal. 1995); Scott Smith, *S.J. Pathologist Under Fire Over Questionable Past*, The Record, Jan. 7, 2007, *available at* http:// www.recordnet.com/apps/pbcs.dll/ article?AID=/20070107/A_NEWS/701070311. In light of this problematic track record, the prosecution decided to put the medical examiner's supervisor on the stand instead of him. The California Court of Appeal held that this surrogate testimony violated the Confrontation Clause, observing that the "prosecution's intent" in failing to call the actual medical examiner had been to "prevent[] the defense from exploring the possibility that [he] lacked proper training or had poor judgment or from testing [his] 'honesty, proficiency, and methodology.'" *Dungo*, 98 Cal. Rptr. 3d at 714 (quoting *Melendez-Diaz*, 557 U.S. at 321).

Without disagreeing with any of these factual findings, the California Supreme Court reversed on the ground that the medical examiner's findings in the autopsy report were nontestimonial. *People v. Dungo*, 286 P.3d 442, 450 (Cal. 2012). Only by granting certiorari here can this Court foreclose such prosecutorial maneuvering in the future.

3. The sooner this Court clarifies whether autopsy reports prepared for homicide investigations are testimonial, the sooner courts, institutions, and litigants can adapt to this Court's holding. For instance, if such autopsy reports are testimonial, States and localities could take numerous steps to ensure that important assertions in autopsy reports are admissible even if a report's author becomes unavailable. Some states require two medical examiners to be present at every autopsy performed as part of a homicide investigation – ensuring that if one becomes unavailable, the other can still testify and explain the report. Medical examiners can also take extra photographs or videos, and preserve extra samples to allow retesting if the original examiner becomes unavailable. *Cf. Bullcoming*, 131 S. Ct. at 2718 (plurality opinion) (noting that retesting forensic evidence is often possible and takes care of confrontation concerns).

In short, enough time, energy, and ink has been expended battling over whether autopsy reports in cases such as this are testimonial. This Court should answer the question so that energy can be spent fruitfully adjusting and acclimatizing to whatever the law may be.

III. This Case Is An Ideal Vehicle For This Court To Resolve The Issue.

Three aspects of this case render it an especially good vehicle for resolving the conflict at issue.

1. The circumstances surrounding this autopsy and trial are typical of cases involving autopsy reports created during homicide investigations and concluding that the victim died of homicide. From the moment the police responded to the scene, it was apparent that the victim had died a violent death, and the police believed homicide was likely. *See supra* at 3. There can be no doubt, therefore, that when the medical examiner concurred that the death was a homicide, she knew full well that her forensic findings would likely be used in a criminal prosecution. *Id.*; *see also Kennedy*, 735 S.E.2d at 917.[5] The medical examiner, in fact, coordinated her work with investigating police officers and gave her report directly to law enforcement when she was through. Pet. App. 42a, 44a; *see also Navarette*, 294 P.3d at 436; *Leach*, 980 N.E.2d at 591.

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[5] The Illinois Supreme Court noted in *Leach* that medical examiners conducting autopsies following suspicious deaths sometimes conclude "that the deceased died of natural causes and, thus, exonerate a suspect." 980 N.E.2d at 591. It is unlikely that an indictment would ever result in these circumstances – much less that the report reaching this conclusion would later be introduced at a trial against the suspect. But if it were, the constitutional calculus would be different than here because the prosecution might plausibly claim that the medical examiner who wrote the report did not reasonably expect it to be used in a criminal prosecution.

The forensic pathologist also followed state law (including the state's certification requirements) to the letter, thereby creating a typically formalized report. Pet. App. 43a; Ariz. Rev. Stat. § 11-594(A)-(B); *see also, e.g.*, Ohio Rev. Code § 3705.16(C) (requiring medical examiners to "certify the cause of death"); Or. Rev. Stat. § 146.045(3)(d) (requiring medical examiners to "[c]ertify the cause and manner of a death requiring investigation"); Va. Code Ann. § 8.01-390.2 (autopsy reports must be "certified" and "duly attested by the Chief Medical Examiner").

Finally, there is no apparent reason why the prosecution would have been unable to put Dr. Bucholtz, the pathologist who conducted the autopsy and later prepared the report, on the stand at trial. The State never contended that Dr. Bucholtz was unavailable. Nor could it have. Dr. Bucholtz evidently still lives in the Phoenix area and continues to practice forensic pathology. *See* http://www.co.merced.ca.us/BoardAgenda/2012/MG174520/AS174553/AS174561/AI174643/DO174134/all_pages.pdf.

2. This case also is an excellent vehicle for resolving the question presented because the prosecution introduced the autopsy report itself into evidence. Several advantages flow from this fact. First, the report's presence in the record (and at Pet. App. 41a-62a) ensures that this Court will be able to assess it directly, as opposed to attempting to deduce its contents through witness testimony or lodgings. Second, the prosecution's decision to submit the autopsy report as stand-alone evidence means that if the report was testimonial, the Confrontation Clause was unquestionably violated. As in *Bullcoming*, "this is not a case" in which this Court must consider

whether "an expert witness [may be] asked for his independent opinion about underlying testimonial reports *that were not themselves admitted into evidence*." *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring) (emphasis added). Finally, the presence of the entire autopsy report in evidence allows this Court to address the validity of the California Supreme Court's suggestion that there might be some difference between "anatomical and physiological observations" in autopsy reports created during homicide investigations and "conclusions as to the victim's cause of death." *People v. Dungo*, 286 P.3d 442, 449 (Cal. 2012); *accord People v. Edwards*, 306 P.3d 1049, 1089 (Cal. 2013).

3. Unlike some murder prosecutions, the details regarding how the victim died here were important and hotly contested. In particular, the State's request that petitioner receive a death sentence hinged in significant part on its allegation that petitioner inflicted "gratuitous violence" on the victim – an allegation that depended, in turn, on whether petitioner ran over the victim more than once. Pet. App. 34a-36a; *supra* at 6-7. In light of the conflicting testimony on this factual issue, *see supra* at 6, the autopsy report's "detailed and graphic descriptions of the victim's injuries" (along with the expert testimony it enabled) must have played a significant role in persuading the jury that the defendant indeed "'continued to inflict violence after he knew or should have known that a fatal action had occurred.'" Pet. App. 34a (quoting *State v. Bocharski*, 189 P.3d 403, 421 (Ariz. 2008)).

IV. The Arizona Supreme Court's Decision Contravenes This Court's Precedent.

The incompatibility of the Arizona Supreme Court's holding with this Court's Confrontation Clause jurisprudence further necessitates this Court's review.

1. Autopsy reports created as parts of homicide investigations fall well within the realm of statements this Court has already held are testimonial. In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), this Court held that formalized forensic reports fall within the "core class of testimonial statements" covered by the Confrontation Clause. *Id.* at 310. Specifically, such reports are created "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 311 (quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004)). Furthermore, the reports in *Melendez-Diaz* – sworn laboratory reports asserting that bags that the police seized from the defendant contained cocaine – were transmitted directly to the police and offered "the precise testimony the analysts would be expected to provide if called at trial." *Id.* at 310. This Court "safely assume[d] that the analysts were aware of the [reports'] evidentiary purpose," and thus held them to be testimonial. *Id.* at 311; *see also Davis v. Washington*, 547 U.S. 813, 822 (2006) (statements are testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution").

In *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), this Court likewise held that a forensic

laboratory report certifying the defendant's blood alcohol content was above the legal threshold was testimonial. As in *Melendez-Diaz*, this Court stressed that the laboratory was required by state law to assist the police investigation; that the analyst "tested the evidence and prepared a certificate concerning the result of his analysis"; and that the certificate was "formalized" in a signed document. *See id.*

Melendez-Diaz and *Bullcoming* dictate that autopsy reports created, as here, as part of a homicide investigation and asserting that the death was caused by homicide are testimonial. As in those prior cases, forensic examiners conducting an autopsy in this situation know – from the suspicious circumstances surrounding the victim's death, the delivery of the body by the police, and police officers' presence during the autopsy – that their reports are likely to be used for prosecutorial purposes. Indeed, medical examiners under these circumstances are required by state law to "[n]otify the county attorney or other law enforcement authority" of their findings and opinions. Ariz. Rev. Stat. § 11-594(A)(6). Furthermore, just like the reports in *Melendez-Diaz* and *Bullcoming*, autopsy reports are highly formalized documents, specially designed and certified for evidentiary use. *See, e.g.*, Pet. App. 43a.

Lest there be any doubt, this Court's *Crawford* jurisprudence is designed to "comport[] with history" and to apply the Confrontation Clause to the kinds of documents it traditionally barred without testimony from the author. *Williams v. Illinois*, 132 S. Ct. 2221, 2260 (2012) (Thomas, J., concurring in the judgment). Historical sources demonstrate that the right to

confrontation covered coroner's reports finding deaths to be caused by homicide. *See, e.g.*, *Diaz v. United States*, 223 U.S. 442, 450 (1912) (noting that autopsy report could not be admitted without the consent of the accused "because the accused was entitled to meet the witnesses face to face"); Note, *Evidence – Official Records – Coroner's Inquest*, 65 U. Pa. L. Rev. 290-91 (1917), cited in *Melendez-Diaz*, 557 U.S. at 322.

2. None of the reasons the Arizona Supreme Court advanced for resisting this analysis withstands scrutiny.

a. Relying on the plurality opinion in *Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012), the Arizona and Illinois Supreme Courts have noted that autopsy reports such as the one here are not designed "primarily to accuse a specified individual." Pet. App. 22a. But this Court has never held that a forensic report or any other declaration must have this purpose to be testimonial. To the contrary, a majority of the Justices in *Williams* expressly rejected such a requirement. *See Williams*, 132 S. Ct. at 2262-63 (Thomas, J., concurring in the judgment); *id.* at 2273-74 (Kagan, J., dissenting). As Justice Thomas explained:

> A statement that is not facially inculpatory may turn out to be highly probative of a defendant's guilt when considered with other evidence. Recognizing this point, we previously rejected the view that a witness is not subject to confrontation if his testimony is "inculpatory only when taken together with other evidence." *Melendez-Diaz*, [557 U.S.] at 313. I see no justification for

> reviving that discredited approach, and the plurality offers none.

Williams, 132 S. Ct. at 2263 (Thomas, J., concurring in the judgment). When five Justices of this Court have twice rejected an argument, so should a state court.

b. The Arizona Supreme Court also claimed that "the autopsy report in this case does not 'certify[] the truth of the analyst's representations.'" Pet. App. 23a (quoting *Williams*, 132 S. Ct. at 2260). This is a rather baffling assertion. Contrary to the Arizona Supreme Court's claim, the forensic examiner signed her name next to the following statement on the report: "Pursuant to section 11-594 Arizona Revised Statutes *I hereby certify* that I took charge of the body described herein and that after making inquiries into the cause and manner of death and examination of the body it is my opinion that death occurred due to the cause(s) and in the manner stated." Pet. App. 43a (emphasis added).

To the extent the Arizona Supreme Court meant to suggest merely that the report "does not certify *that the report was correct or that [the examiner] followed the correct procedures*," Pet. App. 23a (emphasis added), such hairsplitting is hard to take seriously. Reasonably construed, the report's certification covers the entire report. At any rate, the certification expressly covers the medical examiner's statements regarding cause and manner of death, and the State introduced those portions of the report along with everything else. Pet. App. 43a, 45a.

c. Finally, the Arizona Supreme Court indicated that it agreed with the California Supreme Court's suggestion that at least anatomical and physiological

observations in autopsy reports are nontestimonial, because they "are less formal than statements setting forth a pathologist's expert conclusions" as to the cause and manner of death, Pet. App. 23a (quoting *People v. Dungo*, 286 P.3d 442, 449 (Cal. 2012)). This is so, according to the California Supreme Court, because the former are more "comparable to observations of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment." *Dungo*, 286 P.3d at 449.

Once again, even if this argument had force, it would apply only to certain portions of the autopsy report that the prosecution introduced here. In any event, this argument lacks any merit whatsoever.

The reason ordinary physicians' notes are nontestimonial is not because they are inherently "objective," but rather because – in contrast to autopsy reports in homicide cases – they are not created with the primary purpose of creating evidence for a criminal investigation. When that purpose is present, *Bullcoming* explicitly holds that statements are testimonial not matter how "objective" (that is, purportedly reliable) they may be. 131 S. Ct. at 2714. The California Supreme Court's "objectivity" reasoning, in other words, is nothing more than an attempt to revive an argument this Court already rejected – rebranding it as sounding in formality instead of reliability. But this repackaging will not wash. A single report is either formal, or it is not. The report here is obviously formal.

* * *

In sum, it is difficult to perceive the reasoning of the Arizona Supreme Court as anything other than

using this Court's splintered decision in *Williams* as an excuse for refusing to follow the clear dictates of *Melendez-Diaz* and *Bullcoming*. Yet nothing in *Williams* undercuts the holdings in those previous cases that formalized forensic reports are testimonial. This Court should grant certiorari to reaffirm that simple – but vitally important – rule and to make clear that it applies fully to autopsy reports.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 17, 2013

APPENDIX

APPENDIX A
SUPREME COURT OF ARIZONA

THE STATE OF ARIZONA,
Appellee,

v.

EFREN MEDINA,
Appellant.

No. CR-10-0031-AP
Aug. 22, 2013

Appeal from the Superior Court in Maricopa County
The Honorable Christopher T. Whitten, Judge
No. CR1993-008378
AFFIRMED

COUNSEL:

Thomas C. Horne, Arizona Attorney General, Kent E. Cattani, former Chief Counsel, Criminal Appeals/Capital Litigation, Jeffrey A. Zick, Chief Counsel, Criminal Appeals/Capital Litigation, John Pressley Todd, Assistant Attorney General (argued), Phoenix, for State of Arizona

David Goldberg, Attorney at Law (argued), Fort Collins, CO, for Efren Medina

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

JUSTICE BRUTINEL, opinion of the Court:

¶1 Efren Medina was convicted in 1995 of first degree murder, third degree burglary, and aggravated robbery. The trial judge sentenced him to death for the murder and to prison terms for the other crimes, and we affirmed on appeal. *State v. Medina,* 193 Ariz. 504, 975 P.2d 94 (1999). In 2003, the trial court granted Medina's petition for post-conviction relief ("PCR"), which had alleged ineffective assistance of counsel at sentencing, [2] and vacated Medina's death sentence.

¶2 At the 2008 resentencing trial, the jury found four aggravating factors, but could not agree on the sentence. The judge declared a mistrial. In 2009, a second penalty phase trial concluded with the jury determining that Medina should be sentenced to death. We have jurisdiction over this automatic appeal under Article 6, Section 5(3) of the Arizona Constitution and A.R.S. §§ 13-4031 and 13-4033(A)(1).[1]

I. FACTUAL BACKGROUND

¶3 Just after midnight on September 30, 1993, Frazier Giles got out of bed to open a window. In the parking lot across the street, he saw a person sitting in his neighbor's car with the door open and the headlights on. Giles noticed what he thought was a "pile of rags" beside the car. A few minutes later he heard someone say, "Please don't hit me. Don't hit me. Don't. Don't." Giles returned to the window and saw a second car drive up and stop next to his neighbor's

[1] Unless otherwise noted, we cite the current version of statutes that have not materially changed since Medina committed his crimes.

vehicle. The driver spoke to the person in the parked car for a few minutes before leaving.

¶4 The person in the parked car turned off the headlights, got out of the car, stomped on the "pile of rags," and then dragged the pile into the street. At that point, Giles realized that the "pile of rags" was a person. The second car returned and the person who had dragged the body got inside. The car sped away, but then came "racing back" and ran over the body with both the front and back wheels. Giles left the window to call the police.

¶5 Medina's girlfriend, Angela Calderon, testified that about two hours later, she and a friend were sitting in her front yard when three men arrived in Medina's car. Medina got out of the driver's side and Ernest Aro stepped out from the passenger side. Kevin Martinez remained in the backseat. Medina and Aro appeared intoxicated and were "laughing and giggling." Calderon asked why they were laughing, and Medina told her to "watch the news" for a "speed bump" or "tire markings." Medina also simulated driving over a speed bump and made "varoom, bump, bump" noises.

¶6 Medina met Calderon at a friend's house later that morning, where he told her that "he was scared, because they had done something wrong." Medina said that he and his friends had been riding in the car when they decided to steal another car. Medina admitted pulling the car's occupant out of the vehicle and hitting and kicking him. Martinez and Medina attempted to hot-wire the car and steal the radio but were unsuccessful. Medina then pulled the man into the street.

¶7 Medina also told Calderon that Aro had driven off, assuming that Medina and Martinez would follow in the stolen vehicle, but when they did not, Aro returned to pick them up. Medina got in the driver's seat after telling Aro to scoot over. Medina drove off, then came back and ran over the victim three times, going forward over him, then reversing over him and going forward again.

¶8 Other evidence linked Medina to the murder. At the scene, investigators found a plastic bag wet with gold paint and tire marks in gold paint showing that Medina's car had traveled both eastbound and westbound. Medina's fingerprints were found in the victim's car, and it appeared that someone had tried to remove the radio.

¶9 The police searched Medina's car and found the victim's watch, hair, blood, tissue, and clothing fragments in the undercarriage, as well as spatters of gold paint. In Medina's bedroom, the police found another plastic bag filled with gold paint.

II. ISSUES ON APPEAL

A. Denial of Medina's PCR and Motion to Suppress

¶10 Medina argues that the trial court abused its discretion by denying his second PCR without holding an evidentiary hearing and refusing to suppress the evidence found as a result of a search warrant. After the trial court vacated Medina's death sentence and ordered resentencing in 2003, Medina filed a second PCR in December 2005, claiming to have found newly discovered evidence about Frazier Giles's testimony and evidence that the search warrant authorizing searches of Medina's home and car was unsigned, making the searches illegal. The trial court denied

relief without holding an evidentiary hearing. Medina did not seek review of the denial of this second PCR. At Medina's retrial in 2008, he moved to suppress the evidence discovered as a result of the search warrant for the same reasons alleged in his second PCR; the trial court denied the motion.

¶11 The State contends that Medina is precluded from raising the issue whether the trial court abused its discretion by denying his PCR because he did not seek review of the denial of his PCR, as required by Arizona Rule of Criminal Procedure 32.9(c). We agree.

¶12 In any event, the trial court did not abuse its discretion in denying the PCR. The PCR asserted that, in 2004, nine years after the first trial, an attorney from the Maricopa Public Defender's Office interviewed Giles, the eyewitness to the murder. In the 2004 interview, Giles stated (contrary to his testimony in the first trial) that the person who had dragged the victim into the street was not in the car when it ran over the body. By 2004, however, Giles had been diagnosed with Alzheimer's disease, and when he was deposed in 2006, Giles had no memory whatsoever of the murder or the 2004 interview.

¶13 To obtain a new trial based on newly discovered evidence, a petitioner must meet five requirements:

> (1) it must appear from the motion that the evidence relied on is, in fact, newly discovered, i.e., discovered after the trial; (2) the motion must allege facts from which the court can infer due diligence; (3) the evidence relied on must not be merely cumulative or impeaching; (4) the evidence must be material to the issue involved;

> and (5) it must be evidence that would probably change the verdict if a new trial were ordered.

State v. Fisher, 141 Ariz. 227, 251, 686 P.2d 750, 774 (1984). "Further, if the motion relies on the existence of a witness willing to testify and present the new evidence at a new trial, such witness must appear to be credible to the trial judge hearing the motion." *Id.*

¶14 Giles's proffered testimony does not meet these requirements. The changes in his testimony could have been discovered before trial. Furthermore, Giles was not a credible witness in 2006. By that time, he had been diagnosed with and had suffered from Alzheimer's disease for several years, which the trial court found had "tainted significantly" Giles's 2004 version of the events. By 2006, when he was deposed for the PCR, Giles could not remember any of the events. We find no abuse of discretion in dismissing the claim as to Giles's testimony without an evidentiary hearing.

¶15 As for the lack of a signed warrant, Medina was precluded from raising this issue in his second PCR under Arizona Rule of Criminal Procedure 32.2(a)(3), which states that a defendant is precluded from post-conviction relief if the ground for relief "has been waived at trial, on appeal, or in any previous collateral proceeding." *See also* A.R.S. § 13-4232(A)(3); Ariz. R. Crim. P. 32.2 cmt. Medina could have raised the absence of a signed warrant at his original 1995 trial or his 1999 appeal to this Court; by not doing so, he waived this issue.

¶16 The trial court did not abuse its discretion in denying Medina's PCR and his motion to suppress.

B. Double Jeopardy and Cruel and Unusual Punishment

¶17 Medina argues that A.R.S. § 13-752(K) is unconstitutional because permitting a retrial after a hung jury in the penalty phase violates double jeopardy and is cruel and unusual punishment. "We review constitutional issues de novo, and, when possible, construe statutes to uphold their constitutionality." *State v. Hausner*, 230 Ariz. 60, 82 ¶ 99, 280 P.3d 604, 626 (2012).

¶18 Section 13-752(K) provides that if the penalty phase jury "is unable to reach a verdict, the court shall dismiss the jury and shall impanel a new jury," which shall not retry the defendant's guilt or aggravating circumstances unanimously found by the first jury. "If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant." *Id.*

¶19 "Normally, 'a retrial following a "hung jury" does not violate the Double Jeopardy Clause.'" *Sattazahn v. Pennsylvania,* 537 U.S. 101, 109 (2003) (quoting *Richardson v. United States,* 468 U.S. 317, 324 (1984)); *see State v. Johnson,* 155 Ariz. 23, 27, 745 P.2d 81, 85 (1987) ("[A] retrial before a new jury of an issue on which a former jury could not reach agreement does not violate double jeopardy principles."). "[A] jury's inability to reach a decision is the kind of 'manifest necessity' that permits the declaration of a mistrial and the continuation of the initial jeopardy that commenced when the jury was first impaneled." *Yeager v. United States,* 557 U.S. 110, 118 (2009).

¶20 "[T]he touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.'" *Sattazahn*, 537 U.S. at 109. There was no acquittal here. The jury, by failing to reach a sentencing verdict, did not conclude that the State failed to prove its case beyond a reasonable doubt. Thus, the jury's inability to agree on the sentence did not "acquit" Medina of a death sentence. *Cf. id.* at 109 (finding there was no acquittal when jury hung as to penalty because the jury did not make any findings concerning the alleged aggravating circumstance).

¶21 Medina argues that because the 2008 jury hung on the appropriate penalty, at least one juror must have found that the mitigating circumstances outweighed the aggravating factors and we must give this finding effect under *McKoy v. North Carolina,* 494 U.S. 433, (1990), and *Mills v. Maryland,* 486 U.S. 367 (1988). We disagree; even if some jurors reached this conclusion, it would not preclude a retrial under either *McKoy* or *Mills*. Like the jury in *Sattazahn*, the 2008 jury did not make formal findings regarding mitigating factors.

¶22 Moreover, the Arizona death penalty scheme meets the requirements of *McKoy* and *Mills* that each juror be allowed to give effect to the mitigating evidence he or she individually finds to be proven. *McKoy*, 494 U.S. at 444; *Mills*, 486 U.S. at 374. Arizona's scheme does not require a mitigating factor to be found unanimously by the jury. A.R.S. § 13-751(C).

¶23 Medina also characterizes the trial court's granting of the first PCR in 2003 as an acquittal that

bars further retrials. The court then found "a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." This is not equivalent to a ruling that life was the appropriate sentence or an acquittal on the merits. *See State v. Ring* (*Ring III*), 204 Ariz. 534, 551 ¶ 40, 65 P.3d 915, 932 (2003) ("A capital defendant whose original sentence is vacated on appeal can be resentenced to death so long as the defendant has not been 'acquitted' of the death sentence."). Medina's retrial did not violate the Double Jeopardy Clause.

¶24 Medina also argues that Arizona's procedures for a retrial after a hung jury in the penalty phase constitute cruel and unusual punishment because most states do not authorize retrial if a jury cannot agree on a death sentence. In analyzing this issue, we first "determine whether there is a national consensus against the sentencing practice at issue." *Graham v. Florida*, 560 U.S. 48 (2010). Then, looking to the "'Eighth Amendment's text, history, meaning, and purpose,' the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Id.* (quoting *Kennedy v. Louisiana,* 554 U.S. 407, 421 (2008)).

¶25 Most states that have the death penalty require the trial court to impose a life sentence if the penalty-phase jury cannot reach a unanimous decision. Assuming without deciding that this represents a "national consensus" against a penalty phase retrial in these circumstances, this Court still must exercise independent judgment as to whether that practice violates the Eighth Amendment. *Id.*

¶26 In general, allowing retrials does not subject a defendant to cruel and unusual punishment. *People v. Terry,* 454 P.2d 36, 41-42 (Cal. 1969); *Harris v. State*, 539 A.2d 637, 644 (Md. 1988). No federal or state decision has held that retrial after a hung jury in the penalty phase constitutes cruel and unusual punishment or that the United States Constitution requires the imposition of a life sentence after a hung penalty-phase jury. Medina characterizes *Kansas v. Marsh,* 548 U.S. 163 (2006) as holding that defaulting to a life sentence when a jury hangs in the penalty phase is a necessary part of a constitutional death penalty scheme. However, *Marsh* upheld the entirety of the Kansas capital scheme without stating or suggesting that such a "default" rule was itself constitutionally required. *Id.* at 178.

¶27 The Arizona Legislature has chosen to allow one sentencing retrial of a capital defendant after a hung penalty-phase jury and to require imposition of a life sentence if the new jury cannot reach a unanimous decision. *See* A.R.S. § 13-752(K). Some other states that allow retrial after a hung jury permit more than one retrial if the second jury also hangs. *See* Cal. Penal Code § 190.4(b); Nev. Rev. Stat. § 175.556(1).

¶28 Imposing death on a defendant who succeeds in having his court-imposed death sentence reversed in post-conviction proceedings and for whom the first penalty-phase jury was unable to reach a decision is not disproportionate punishment. The Supreme Court has found that death is categorically disproportionate for certain offenders, *see Roper v. Simmons,* 543 U.S. 551, 578 (2005) (precluding death penalty for defendants younger than eighteen at time of the crime); *Atkins v. Virginia,* 536 U.S. 304, 321 (2002)

(prohibiting death penalty for "mentally retarded criminals"), and non-homicide crimes against a person, *see, e.g., Kennedy,* 554 U.S. at 437 (disallowing death penalty for crime of rape). But the Court grounded these holdings in determinations that the punishment, considering the characteristics of the offender and the crime, was disproportionate to any recognized penal goals. *Cf. Graham,* 130 S. Ct. at 2028 (noting that penological justifications for the sentencing practice are also relevant to the analysis). No such conclusion can be drawn with regard to defendants like Medina merely because they have successfully challenged their death sentences in post-conviction proceedings or a penalty-phase jury is unable to reach a verdict. We hold that § 13-752(K)'s provision for retrial after a hung penalty-phase jury does not result in cruel and unusual punishment.

C. Dismissal of Jurors by Stipulation

¶29 Medina argues that the trial court erred when it accepted, over his objection, a stipulation by counsel to dismiss jurors based solely on their questionnaire answers. "We review a trial court's rulings on *voir dire* of prospective jurors for abuse of discretion." *State v. Glassel,* 211 Ariz. 33, 45 ¶ 36, 116 P.3d 1193, 1205 (2005), *opinion corrected on denial of reconsideration,* 211 Ariz. 370, 121 P.3d 1240 (2005).

¶30 In Medina's 2008 trial, defense counsel and the State stipulated to release certain jurors based on their questionnaire answers. The trial court initially stated that it would require Medina's agreement on the record, but later decided trial counsel could stipulate to release jurors as part of trial strategy. Trial counsel and the State agreed to dismiss sixty

jurors. Medina objected, saying that he had not seen any of the questionnaires and wished to try to rehabilitate the jurors.

¶31 "[T]he Sixth Amendment is violated if the trial jury in a capital case is chosen by excluding for cause persons who have general objections to the death penalty." *State v. Anderson* (*Anderson I*), 197 Ariz. 314, 318 ¶ 6, 4 P.3d 369, 373 (2000). In *Anderson I,* we held that a defendant has a right to question potential jurors orally and attempt to rehabilitate them, *id.* at 320 ¶ 13, 4 P.3d at 375, but we emphasized that "our holding today does not prevent excluding prospective jurors for cause based solely on answers to a written questionnaire when the adverse party fails to object, or when all parties consent to exclusion," *id.* at 324 ¶ 24, 4 P.3d at 379. Accordingly, the attorneys in this case could stipulate to the dismissal of jurors. But we must still decide whether Medina's objection should override his counsel's stipulation.

¶32 A defendant has exclusive control over the key decisions "whether to plead guilty, whether to waive a jury trial and whether to testify. Beyond these matters, most trial decisions are trial strategy resting with counsel." *State v. Nirschel,* 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987) (citation omitted).

¶33 Because voir dire involves strategic decisions by trial counsel, we decline to hold that it is within the defendant's exclusive control. *See, e.g., Miller v. Francis,* 269 F.3d 609, 615 (6th Cir. 2001); *People v. Manning,* 948 N.E.2d 542, 550 (Ill. 2011) ("[D]ecisions made during jury selection involve trial strategy to which courts should be highly deferential."). Counsel's trial strategy could be undermined by allowing the

defendant to override counsel's tactical decisions. If the defendant controlled all voir dire decisions, defense counsel's ability to manage the trial would be compromised, resulting in inevitable delay and confusion. *See Taylor v. Illinois,* 484 U.S. 400, 418 (1988) ("The adversary process could not function effectively if every tactical decision required client approval.").

¶34 "[C]ounsel acting alone may make decisions of strategy," even if those decisions involve constitutional rights. *State v. Levato,* 186 Ariz. 441, 444, 924 P.2d 445, 448 (1996). A defendant is bound by counsel's trial strategy "so long as counsel's assistance at trial was not reduced to a mere 'farce or sham.'" *State v. (John L.) Jones*, 110 Ariz. 546, 550, 521 P.2d 978, 982 (1974), *overruled on other grounds by State v. Conn,* 137 Ariz. 148, 669 P.2d 581 (1983). Medina has not shown, nor does the record suggest, that his counsel's assistance was a sham. Thus, Medina is bound by his counsel's decision to stipulate to removal of the jurors.

¶35 Medina contends that the trial court had a duty to protect his rights to a fair and impartial jury and accordingly should have rejected the stipulation. A trial court, however, has no general duty or authority to second-guess the strategic decisions by trial counsel. Absent facts suggesting that counsel's assistance was a sham or otherwise patently deficient, the trial court did not abuse its discretion by accepting counsel's stipulation regarding voir dire, even over Medina's objection.

D. Removal of Jurors 88 and 30

¶36 Medina argues that Juror 88 from the 2008 trial and Juror 30 from the 2009 trial were improperly

removed for cause. "We review a trial court's decision to strike a potential juror for cause for abuse of discretion." *State v. Velazquez,* 216 Ariz. 300, 306 ¶ 13, 166 P.3d 91, 97 (2007). But if the defendant did not object to the dismissal, it is reviewed for fundamental error. *State v. Roseberry,* 210 Ariz. 360, 366 ¶ 26, 111 P.3d 402, 408 (2005).

1. Juror 88

¶37 Juror 88 answered equivocally whether she could vote for the death penalty. She cried and trembled throughout the questioning. The court granted the State's motion to dismiss Juror 88 because "her views about the death penalty and just her whole demeanor just would tell anybody that watched her that her views would substantially impair her ability to fairly consider both options." Medina did not object to her removal.

¶38 A juror is properly excused for cause "if the juror's views would 'prevent or substantially impair the performance of his duties as a juror.'" *State v. (Robert G.) Jones*, 197 Ariz. 290, 302 ¶ 24, 4 P.3d 345, 357 (2000) (quoting *Wainwright v. Witt,* 469 U.S. 412, 424 (1985)); *see* Ariz. R. Crim. P. 18.4(b). We defer to the trial court's assessment, even when a juror's answer by itself would not "'compel the conclusion that he could not under any circumstance recommend the death penalty,' . . . because so much may turn on a potential juror's demeanor." *Uttecht v. Brown,* 551 U.S. 1, 8 (2007) (quoting *Darden v. Wainwright,* 477 U.S. 168, 178 (1986)).

¶39 Juror 88 was shaking and crying throughout the interview, which convinced the trial court that she could not handle involvement in the case. In these

circumstances, the court did not err, much less commit fundamental error, in dismissing Juror 88 for cause.

2. Juror 30

¶40 Although Juror 30 initially told the prosecution and the defense that she could apply the law and consider both a life and death sentence, she later said she was uncomfortable with the prospect that a person's life would be in her hands and did not think she could sign a death verdict.

¶41 The State moved to dismiss Juror 30 for cause. Medina objected, arguing that she would only be required to sign the form if she were the foreperson. The court questioned whether Juror 30 could be empanelled "with the instruction that she not be allowed to be the foreperson" and noted that, in any event, she would have to stand and be polled. After this discussion, the court granted the motion, finding that "her answer suggested that . . . her ability to decide this case, to decide the law and the facts would be substantially impaired by her resisting views."

¶42 Even in the face of Juror 30's earlier claims that she could apply the law, the trial court did not abuse its discretion by concluding this juror's stated discomfort with voting for a death verdict would impair her ability to sit as a juror. *See Glassel,* 211 Ariz. at 48 ¶ 50, 116 P.3d at 1208 ("[E]ven assuming that juror 16 was sincere about being able to apply the law, the judge could have reasonably determined that the juror's views would substantially impair his ability to deliberate impartially.").

E. Batson Challenges

¶43 Medina argues that the trial court erred in denying his challenges, based on *Batson v. Kentucky,* 476 U.S. 79 (1986), to the State's peremptory strikes of Jurors 35, 71, and 73. We will sustain a trial court's rulings on *Batson* challenges unless they are clearly erroneous. *State v. Gallardo,* 225 Ariz. 560, 565 ¶ 10, 242 P.3d 159, 164 (2010).

¶44 "Racially discriminatory use of a peremptory strike violates the Equal Protection Clause of the Fourteenth Amendment." *State v. Hardy,* 230 Ariz. 281, 285 ¶ 12, 283 P.3d 12, 16 (2012). "A *Batson* challenge involves three steps: (1) The defendant must make a prima facie showing of discrimination, (2) the prosecutor must offer a race-neutral reason for each strike, and (3) the trial court must determine whether the challenger proved purposeful racial discrimination." *Id.* "Although not dispositive, 'the fact that the state accepted other [minority] jurors on the venire is indicative of a nondiscriminatory motive.'" *State v. Roque,* 213 Ariz. 193, 204 ¶ 15, 141 P.3d 368, 379 (2006) (alteration in original) (quoting *State v. Eagle,* 196 Ariz. 27, 30 ¶ 12, 992 P.2d 1122, 1125 (App.1998)).

¶45 By asking the prosecutor to give race-neutral reasons for striking these jurors, the trial court implicitly found that Medina had made a prima facie showing of discrimination. *See Hardy,* 230 Ariz. at 286 ¶ 13, 283 P.3d at 17. The prosecutor stated that she moved to strike Juror 35 based on her youth, her high school education, her belief that some of her friends had been punished too harshly for crimes, her friendship with gang members and drug users, her

initial reluctance to accept the prior jury's verdict, and her opposition to the death penalty. The trial court found that Medina had not carried his burden and denied the *Batson* challenge.

¶46 The prosecutor struck Juror 71 because she was young and lacked life experience, she held low-level positions, her aunt had been investigated and cleared by Child Protective Services, her friends used marijuana, she would be upset by the crime scene photographs, and she was opposed to the death penalty. The court denied the challenge because the explanations were race-neutral.

¶47 The prosecutor stated that she struck Juror 73 because her uncle was a doctor of psychology and "a life coach for most of [her] family," she had experience with people who used illegal drugs, and her husband was diagnosed with deep depression. Because the prosecutor anticipated testimony about Medina's diagnosis of depression, the prosecutor was worried Juror 73 might not be able to "separate her involved life experiences." Medina disputed this explanation, pointing out that non-minority jurors who "voiced similar concerns about drug and alcohol problems" were not struck. The court noted it was supposed to "evaluate the credibility of the striking party" and denied the *Batson* challenge, "based on [his] assessment of everything."

¶48 Medina now asks this Court to rule that "comparative juror analysis is a constitutionally required aspect of *Batson* review." However, the United States Supreme Court has warned that "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged

similarities were not raised at trial." *Snyder v. Louisiana*, 552 U.S. 472, 483 (2008). Moreover, we disagree with Medina's contention that our decision in *Hardy* implicitly requires a comparative analysis for every *Batson* challenge. In *Hardy,* we examined similarities between dismissed minority jurors and non-minority jurors who remained on the panel, which were both raised by the defendant and addressed by the prosecutor at trial. 230 Ariz. at 286 ¶¶ 13-14, 283 P.3d at 17. *Hardy,* however, did not require every court reviewing a *Batson* claim to use a comparative analysis, and we decline to do so when the similarities between peremptorily stricken jurors and those remaining on the panel were not raised at trial.

¶49 In this case, although Medina argued that non-minority jurors who were not stricken had similar problems concerning drugs, he did not direct the court to specific similarly situated jurors. Thus, the prosecutor had no opportunity to offer distinctions between allegedly similarly situated jurors or to clarify which factors were given more weight in the choice to strike. Likewise, the trial court did not have an opportunity to conduct an in-depth comparison of the jurors who were stricken and those who remained on the panel. We decline to examine more detailed comparisons than were alleged at trial. The trial court found that Medina had not carried his burden of showing purposeful discrimination. Because Medina did not argue that any juror on the panel had some or all of the factors for disqualification presented for Jurors 35, 71, and 73, we do not find that the trial court clearly erred.

¶50 Additionally, at the conclusion of the peremptory strikes, defense counsel noted that four or

five minority jurors remained on the panel. The presence of other minority jurors on the panel is evidence of the State's nondiscriminatory motive. *See id.* ¶ 15 (noting that three minority jurors remained on the panel). For these reasons, the trial court did not clearly err in rejecting Medina's *Batson* challenges.

F. Admission of the Autopsy Report

¶51 Medina contends that admitting the victim's autopsy report without the opportunity to cross-examine the report's author and allowing another medical examiner to testify using facts from the report violated the Sixth Amendment's Confrontation Clause.

¶52 The autopsy report prepared by Dr. Ann Bucholtz detailed the victim's injuries and determined that the death was a homicide caused by blunt force trauma. Dr. Bucholtz did not testify at trial. Instead, the State called Dr. Philip Keen, who testified concerning the report's conclusions and used the report and photographs of the body to make various independent conclusions about the death.

¶53 We review interpretations of the Confrontation Clause de novo and analyze a properly-objected-to violation of the Confrontation Clause for harmless error. *State v. Bocharski,* 218 Ariz. 476, 485-86 ¶¶ 33, 38, 189 P.3d 403, 412-13 (2008). Assuming that Medina properly raised his Confrontation Clause objection to the report (an issue disputed by the parties), we reject his arguments because we find the report is not testimonial.

¶54 "The Confrontation Clause bars admission of out of court testimonial evidence unless the defense has had an opportunity to cross-examine the declarant." *State v. Parker,* 231 Ariz. 391, 402 ¶ 38,

296 P.3d 54, 65 (2013) (citing *Crawford v. Washington,* 541 U.S. 36, 68 (2004)). Testimonial evidence is "*ex parte* in-court testimony or its functional equivalent . . . such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Crawford,* 541 U.S. at 51. "A document created solely for an 'evidentiary purpose,' . . . made in aid of a police investigation, ranks as testimonial." *Bullcoming v. New Mexico,* 131 S. Ct. 2705, 2717 (2011) (quoting *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 311 (2009)).

¶55 Public or business records generally are not testimonial because they are usually "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial." *Melendez-Diaz,* 557 U.S. at 324; *see also Crawford,* 541 U.S. at 56 (noting that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records"). Yet, the admission of a document "under a hearsay exception does not negate consideration of the Confrontation Clause." *State v. Huerstel,* 206 Ariz. 93, 102 ¶ 29, 75 P.3d 698, 707 (2003). When public records are "prepared specifically" for use at trial, the records are "subject to confrontation under the Sixth Amendment." *Melendez-Diaz*, 557 U.S. at 324.

¶56 The United States Supreme Court has not determined whether an autopsy report is testimonial, but its most recent decision on the Confrontation Clause informs our analysis. In *Williams v. Illinois,* the state's expert "testified that a DNA profile produced by an outside laboratory . . . matched a

profile produced by the state police lab using a sample of [the defendant's] blood." 132 S. Ct. 2221, 2227 (2012). The DNA report itself was not admitted into evidence. *Id.* The defendant argued that the portions of the expert's testimony referring to the laboratory report violated his right to confrontation. *Id.*

¶57 The Court found that the report was nontestimonial; however, no one rationale was supported by a majority of the Court. If no opinion garners the support of a majority, the "position taken by those Members who concurred in the judgments on the narrowest grounds" is regarded as the holding of the Court. *Marks v. United States,* 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia,* 428 U.S. 153, 169 n. 15 (1976)).

¶58 The plurality opinion authored by Justice Alito concluded that the expert's statements did not violate the Confrontation Clause because the laboratory report was not testimonial. *Williams*, 132 S. Ct. at 2228. The plurality declared that the Confrontation Clause prohibits formalized "out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct." *Id.* at 2242. Because the "primary purpose" of the report "was to catch a dangerous rapist who was still at large," not to gather evidence against the defendant, and because the authors of the report could not know whether it would incriminate or exonerate the defendant, it was not testimonial. *Id.* at 2243-44.

¶59 Justice Thomas concurred solely in the judgment. *Id.* at 2255 (Thomas, J., concurring). He did not agree with the test used by the plurality; instead, he concluded the report was nontestimonial because it

"lack[ed] the solemnity of an affidavit" and "was not the product of any sort of formalized dialogue resembling custodial interrogation." *Id.* at 2260.[2]

¶60 Neither the plurality's "primary purpose" test nor Justice Thomas's solemnity standard can be deemed a subset of the other; therefore, there is no binding rule for determining when reports are testimonial. *See United States v. Alcan Aluminum Corp.,* 315 F.3d 179, 189 (2d Cir. 2003) (holding that when no "single standard . . . legitimately constitutes the narrowest ground for a decision on that issue, there is then no law of the land").

¶61 Under the plurality test, the autopsy report here is not testimonial because its purpose was not primarily to accuse a specified individual. "We look for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances." *Williams*, 132 S. Ct. at 2243.

¶62 Here, the autopsy was conducted the day after the murder, before Medina became a suspect. Any trace evidence obtained during the autopsy was gathered to determine the manner and cause of death in order to help "catch a dangerous [murderer] who was still at large," not to gather evidence to accuse Medina. *Id.*; *see also People v. Leach*, 980 N.E.2d 570, 590 (Ill. 2012). *Compare United States v. James,* 712 F.3d 79 (2d Cir. 2013) (discussing *Williams* and concluding autopsy report was not testimonial), *with United States v. Ignasiak,* 667 F.3d 1217 (11th Cir.

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[2] The dissent concluded that the report was testimonial because it was "meant to serve as evidence in a potential criminal trial." *Williams*, 132 S. Ct. at 2275 (Kagan, J., dissenting).

2012) (concluding, given circumstances of preparation, that autopsy report was testimonial).

¶63 The autopsy report in this case is also nontestimonial using the solemnity test from Justice Thomas's concurring opinion. *Williams,* 132 S. Ct. at 2260. Justice Thomas found that the DNA report in *Williams* was nontestimonial because it was "neither a sworn nor a certified declaration of fact" and "it was not the product of any sort of formalized dialogue resembling custodial interrogation." *Id.* Like the report in *Williams,* the autopsy report in this case does not "certify[] the truth of the analyst's representations." *Id.* The signed report details the conditions of the body, states the examiner's conclusions regarding the cause and manner of death, and certifies that the report reflects her opinion as to the cause and manner of death and that she took charge of the body. The autopsy report does not certify that the report was correct or that she followed the correct procedures. *See People v. Dungo,* 286 P.3d 442, 449 (Cal. 2012) (stating that statements in an autopsy report "are less formal than statements setting forth a pathologist's expert conclusions"). Nor did the autopsy report arise from a formal dialogue akin to custodial interrogation. Therefore, we hold that the autopsy report is nontestimonial.

¶64 Medina also argues that the admission of Dr. Keen's testimony violated Medina's right to confrontation. Having concluded that the autopsy report is nontestimonial, we hold that Dr. Keen's testimony regarding the report did not violate the Confrontation Clause. The portions of Dr. Keen's testimony concerning his independent conclusions also did not violate the Confrontation Clause under our

prior decisions. *See State v. Dixon,* 226 Ariz. 545, 553 ¶ 36, 250 P.3d 1174, 1182 (2011), *cert. denied,* 132 S. Ct. 456 (2011) ("Our cases teach that a testifying medical examiner may, consistent with the Confrontation Clause, rely on information in autopsy reports prepared by others as long as he forms his own conclusions."); *see also State v. Joseph,* 230 Ariz. 296, 299 ¶ 11, 283 P.3d 27, 30 (2012), *cert. denied,* 133 S. Ct. 936 (2013); *State v. Gomez,* 226 Ariz. 165, 169-70 ¶ 22, 244 P.3d 1163, 1167-68 (2010).

G. Juror's Extra-Judicial Contact

¶65 Medina argues that the trial court's failure to interview a juror who had contact with the victim's daughter constituted structural error that mandates reversal of his death sentence. When the extra-judicial contact was brought to the court's attention, the trial court questioned the victim's daughter about her conversation with the juror. She stated that she was in the elevator with the juror and a lawyer when the lawyer abruptly walked out of the elevator. She commented about the lawyer's compliance with the admonition. She did not realize at the time that the person she spoke with was a juror in the case and they did not discuss anything about the case. The trial court told the victim's daughter to avoid talking to anyone with a juror badge in the future but did nothing further regarding the incident. Medina's trial counsel did not object to the trial court's decision concerning the extra-judicial contact but Medina himself objected and moved for a new trial, which the trial court denied.

¶66 Medina is bound by his counsel's strategic decision to not object to a possible error by the trial

court. *See State v. Corrales,* 138 Ariz. 583, 595, 676 P.2d 615, 627 (1983) (stating that "a defendant may be bound by his counsel's trial strategy decision to waive even constitutional rights"). By not requesting any further action, Medina's trial counsel waived this issue and did not need Medina's consent to do so. *See Levato*, 186 Ariz. at 444, 924 P.2d at 448 ("[C]ounsel acting alone may make decisions of strategy pertaining to the conduct of the trial.").

¶67 We reject Medina's contention that this alleged error constitutes structural error. Medina does not allege that the juror was actually biased as a result of the contact, nor does he cite any evidence in the record to support a finding of bias. Absent any evidence of juror bias, this alleged error is not one of the "relatively few" recognized structural errors. *See Ring III,* 204 Ariz. at 552-53 ¶ 46, 65 P.3d at 933-34. Because Medina's counsel did not object to the trial court's handling of the matter, we review for fundamental error. *See State v. Davis,* 206 Ariz. 377, 390 ¶ 62, 79 P.3d 64, 77 (2003). Given the brevity of the contact between the juror and the victim's daughter and the absence of any discussion concerning the case or the defendant, it was not error, much less fundamental error, for the trial court to take no further action than questioning the victim's daughter.

H. A.R.S. § 13-752(G) and the Ex Post Fact Prohibition

¶68 Medina argues that applying the 2009 version of A.R.S. § 13-752(G) in his case violates the ex post facto clause because that version allows the sentencer to consider more evidence than the statutory scheme in effect at the time of the 1993 murder. The trial

court denied Medina's motion to use the prior statute instead of § 13-752(G).

¶69 "The ex post facto doctrine prohibits a state from 'retroactively alter[ing] the definition of crimes or increas[ing] the punishment for criminal acts.'" *Ring III,* 204 Ariz. at 545 ¶ 16, 65 P.3d at 926 (alterations in original) (quoting *Collins v. Youngblood,* 497 U.S. 37, 43 (1990)). Medina argues that the 2009 version of § 13-752(G) is an ex post facto law because it "changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Duncan v. Missouri,* 152 U.S. 377, 382, (1894). We are not persuaded.

¶70 When Medina committed the murder in 1993, Arizona law provided that either side could "rebut any information received at the [aggravation/mitigation] hearing" and could present "[a]ny information relevant to any mitigating circumstances . . . regardless of its admissibility under the rules governing admission of evidence at criminal trials." A.R.S. § 13-703(C) (1993). Under A.R.S. § 13-752(G) (2009), "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" and "the state may present any evidence that demonstrates that the defendant should not be shown leniency."

¶71 To the extent that § 13-752(G) changed the evidence admissible at the penalty phase, it does not provide that "less or different testimony is sufficient to convict." *Duncan,* 152 U.S. at 382. As Medina concedes, the legal standard for sentencing a defendant to death has remained the same. Therefore, A.R.S. § 13-752(G) is not an ex post facto law.

¶72 Medina argues that even if the 2009 version of § 13-752(G) did not substantively change the criminal law, the new statute was a procedural change that affected his rights. A legislative change to criminal procedure "generally does not violate the Ex Post Facto Clause," even if it disadvantages a defendant, *Ring III,* 204 Ariz. at 546 ¶ 17, 65 P.3d at 927, unless "it affects 'matters of substance, by depriving a defendant of substantial protections with which the existing law surrounds the person accused of crime,'" *id.* at 547 ¶ 24, 65 P.3d at 928 (quoting *Collins,* 497 U.S. at 45.

¶73 In *Ring III,* we held that a change in criminal procedure allowing a jury, rather than a judge, to decide the sentence did not affect matters of substance because the state had the same burden concerning aggravating factors and defendants were not at risk of any greater punishment. *Id.* Here, Medina does not risk the imposition of any greater punishment and the parties carry the same burdens of proof. Thus, this procedural change did not affect matters of substance and was not ex post facto legislation.

I. Jury Instructions

¶74 Medina argues that the final jury instructions in the 2009 trial failed to specify that the (F)(6) aggravator was based on relishing and gratuitous violence, which prevented the jury from accurately weighing the severity of the aggravator. Because Medina did not object to the jury instruction at trial, we review for fundamental error. *State v. Moore,* 222 Ariz. 1, 16 ¶ 85, 213 P.3d 150, 165 (2009).

¶75 In the 2009 trial, the court gave the following final jury instructions as to the especially heinous or depraved aggravator:

> The term especially heinous or depraved focuses upon the defendant's state of mind at the time of the offense as reflected by the defendant's words and acts. A murder is especially heinous if it is hatefully or shockingly evil, in other words, grossly bad. A murder is especially depraved if it is marked by debasement, corruption, perversion or deterioration.

This instruction correctly defined the terms heinous and depraved, *see State v. Murdaugh,* 209 Ariz. 19, 31 ¶ 59, 97 P.3d 844, 856 (2004), and provided the jury with sufficient information to accurately weigh the (F)(6) aggravator.

J. Prosecutorial Misconduct

¶76 Medina asserts that the State improperly argued in closing that Medina's lack of remorse was an aggravating factor and commented on Medina's right to be free from compelled self-incrimination. Because Medina did not object to the alleged misconduct, we review this claim for fundamental error. *Roque*, 213 Ariz. at 228 ¶ 154, 141 P.3d at 403.

¶77 During his allocution, Medina stated that he was "deeply sorry and remorseful" for his involvement in the death and that he took "full responsibility for [his] own participation, actions and role in such act." In closing arguments, the State argued that Medina was not truly remorseful but had said that he felt remorse in his allocution "because he knows it will help to get him off the death penalty." The prosecutor referred to Medina's conversations with interviewing

doctors in which he did not take responsibility for all of his actions and denied driving the car that killed the victim. The prosecutor concluded: "If the defendant won't admit to what he did and take responsibility for what he did, how can he truly look at the victim's family or at you and say he is truly remorseful?"

¶78 To determine if prosecutorial misconduct exists, we examine two factors: "(1) whether the prosecutor's statements called to the jury's attention matters it should not have considered in reaching its decision and (2) the probability that the jurors were in fact influenced by the remarks." *State v. Newell,* 212 Ariz. 389, 402 ¶ 60, 132 P.3d 833, 846 (2006).

¶79 Medina contends that the prosecutor's statements concerning Medina's lack of remorse and the senselessness of the crime argued for aggravating factors neither alleged nor proven. However, the State never argued that lack of remorse should be considered as an aggravator; it used Medina's lack of remorse to rebut Medina's allocution, in which he sought leniency based in part on his remorse. Because Medina's allocution focused on remorse, it was permissible for the State to argue that the evidence showed otherwise.

¶80 The State, by describing the details of the murders, also did not encourage the jury to consider helplessness or senselessness as additional aggravators. *See Nelson,* 229 Ariz. At 190 ¶ 41, 273 P.3d at 642 (holding that in using the terms "helpless" and "senseless," the prosecutor did not argue that the (F)(6) aggravator be considered). Describing the details of a murder, even calling it a senseless crime, without more, does not amount to prosecutorial misconduct.

¶81 Medina also asserts that the prosecutor improperly suggested Medina should be sentenced to death because he chose not to testify. The prosecutor's statements, however, reflect an effort to rebut Medina's allocution, not a comment on the exercise of his Fifth Amendment rights. In closing arguments, the prosecutor first noted that Medina claimed in his allocution to feel remorse and to have taken responsibility for his actions. The prosecutor then argued that while Medina took responsibility for fighting with the victim, he had not taken responsibility for pulling him into the road or running him over, but instead had blamed his co-defendant. The State argued that Medina's falsely stating that he took full responsibility for his actions showed that his claimed remorse was also false.

¶82 This was permissible rebuttal. In *State v. Cota,* the prosecutor argued that if the defendant were truly remorseful "wouldn't he have told the police how sorry he was?" 229 Ariz. 136, 152 ¶ 83, 272 P.3d 1027, 1043 (2012), *cert. denied*, 133 S. Ct. 107 (2012). We found the comment "permissible" because it contrasted the defendant's "denials of responsibility in the interrogation with his subsequent claim of remorse." *Id.* We reach the same conclusion here. Because Medina argued that his remorse should be considered as mitigation, the State could argue in rebuttal that Medina's failure to take full responsibility for the murder showed that his remorse was not genuine.

III. INDEPENDENT REVIEW

¶83 Because the murder was committed before August 1, 2002, this Court independently reviews the "findings of aggravation and mitigation and the

propriety of the death sentence." A.R.S. § 13-755(A). "We review the record de novo and do not defer to the jury's findings or decisions." *State v. Prince,* 226 Ariz. 516, 539 ¶ 93, 250 P.3d 1145, 1168 (2011). "We consider the quality and strength, not simply the number, of aggravating and mitigating factors." *Glassel*, 211 Ariz. at 55 ¶ 93, 116 P.3d at 1215 (quoting *State v. Greene,* 192 Ariz. 431, 443 ¶ 60, 967 P.2d 106, 118 (1998)).

A. Aggravating Circumstances

¶84 The jury found four aggravating circumstances: Medina was previously convicted of a serious offense, A.R.S. § 13-751(F)(2); the murder was committed in an especially heinous or depraved manner, *id.* § 13-751(F)(6); the murder was committed while on authorized release from prison, *id.* § 13-751(F)(7)(a); and the victim was more than seventy years old, *id.* § 13-751(F)(9).

1. (F)(2) Aggravator

¶85 Medina does not dispute the finding of the (F)(2) aggravator but argues that it should be given less weight because he had been charged with the underlying offenses (aggravated assault and robbery) and released only six months before committing the murder. We decline to create such a rule.

2. (F)(7) Aggravator

¶86 Medina also admits that sufficient evidence was presented to support the (F)(7) aggravator, that the murders were committed while he was on release from prison, but argues that its similarity to the (F)(2) aggravator implies that these aggravators should be counted only once in aggravation. Because we find that

the aggravators serve different public policy rationales, we give weight to each aggravator.

3. (F)(9) Aggravator

¶87 Medina admits there was sufficient evidence to establish the (F)(9) aggravator, but argues that it should be given little weight because he did not know the victim's age. We disagree, given that the statute itself does not require such knowledge. *See Medina,* 193 Ariz. at 512 ¶ 23, 975 P.2d at 102.

4. (F)(6) Aggravator

¶88 Medina contends that the evidence was insufficient to show that the murder was especially heinous or depraved. The jurors were instructed on two factors to support a finding of heinousness and depravity: the defendant relished the murder and inflicted gratuitous violence. *See State v. Gretzler*, 135 Ariz. 42, 52, 659 P.2d 1, 11 (1983).

a. *Relishing*

¶89 In the 2008 trial, Angela Calderon testified that when Medina came to her house shortly after the murder, he was intoxicated and laughing. She stated that he was "laughing and they kept talking about – like they just kept simulating like driving over a speed bump. I asked him what he was laughing at. He said, 'Just watch the news tomorrow and look for tire markings.'" She confirmed that Medina made "varoom, bump, bump" noises and driving motions and told her to watch the news for tire markings or a speed bump.

¶90 Calderon also testified that when Medina called ten minutes later, he "just continued to laugh and telling me to watch the news." The next day, when Medina told her more details about that night he was

"giggling," "but he was more nervous about it." On cross examination, Calderon stated that Medina "never bragged" about the murder when it was on television and that he had expressed some remorse to her, although she felt that "he was scared of being caught."

¶91 To relish a murder, the defendant "must say or do something that indicates he savored the murder." *Greene,* 192 Ariz. at 440 ¶ 34, 967 P.2d at 115. Laughing or bragging about the murder may show that the defendant relished the murder. *See Hausner*, 230 Ariz. at 81 ¶¶ 91–95, 280 P.3d at 625. In *State v. Runningeagle,* we found that the defendant relished the murder when he laughed as he returned to the car after the murder and bragged that "he had been in a 'good fight.'" 176 Ariz. 59, 65, 859 P.2d 169, 175 (1993). Likewise, we concluded in *State v. Bearup* that the defendant relished the murder by "laughing while talking about cutting off a person's finger" and showing amusement when he told another person about the murder. 221 Ariz. 163, 173 ¶ 54, 211 P.3d 684, 694 (2009). In *State v. West,* the Court found the defendant's statements that he had beat up an old man and his bragging about cuts and bruises from beating the man showed relishing. 176 Ariz. 432, 448, 862 P.2d 192, 208 (1993), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998).

¶92 Here, Medina's laughter and jokes to Calderon show that he relished the murder at or near the time of its commission. Also, Medina repeatedly mimicked speed bumps and told Calderon to watch the news, which shows that he anticipated the publicity that the murder would occasion and looked forward to it.

Therefore, we find beyond a reasonable doubt that Medina relished the murder.

b. *Gratuitous Violence*

¶93 Medina argues that the evidence presented in the 2008 trial did not show that he "continued to inflict violence *after he knew or should have known that a fatal action had occurred.*" *Bocharski*, 218 Ariz. at 494 ¶ 87, 189 P.3d at 421.

¶94 In 2008, the medical examiner testified that "the distribution of injuries" suggested that the victim was run over more than once. He did not confirm that the victim died after the first pass of the car, but he testified that the victim was alive when he was first hit and that being run over by two sets of tires in a single pass could have caused the heart and lung injuries that led to his death. The examiner testified that the victim died "fairly rapidly," "[p]robably less than a minute," or even "probably seconds" after being run over.

¶95 Calderon testified that Medina told her that he ran over the victim "about three times," "once going forward, once going backwards and then once again coming forward." She also stated that Medina said "that every time he ran over [the victim,] the head would move into a different direction."

¶96 Giles's testimony from the first trial was read to the 2008 and 2009 juries because Giles died before the 2008 trial. He testified that the victim became "red-headed" after the tires went over him. Giles could not see if the tires actually ran over the victim's head, but said the victim seemed to be either unconscious or dead after the first pass of the car.

¶97 We find that Medina knew or should have known that he had inflicted a fatal wound and yet continued to inflict injury upon the victim. The seventy-one year old victim had been beaten up, stomped on, and dragged into the street, then run over by a car containing three men. According to the medical examiner, the victim died less than a minute, perhaps even seconds, after the first pass of the car. After the first pass, the victim was so bloodied that it was visible to a witness across the street. Yet Medina ran over the victim twice more.

¶98 This case is unlike *Bocharski* in which there was insufficient evidence that the defendant knew or should have known that he had inflicted a fatal wound when he inflicted many rapid knife injuries to the victim. 218 Ariz. at 494 ¶¶ 87–88, 189 P.3d at 421. Nor is it like *State v. Gunches,* in which the defendant shot the victim three times in the chest "in quick succession," followed by a fourth shot to the head. 225 Ariz. 22, 26 ¶ 20, 234 P.3d 590, 594 (2010). We there concluded that because of the victim's body position, the distance between the victim and the defendant, and the darkness of the night, the defendant was likely unable to determine whether the victim had died before firing the fourth shot. *Id.* ¶¶ 18-20. This inference was supported by the defendant's testimony that the victim continued to breathe after falling to the ground, evidence of aspiration around the victim's mouth, and the medical examiner's testimony that the victim's heart continued to beat "for a while after the shooting." *Id.* ¶ 21 (internal quotation marks omitted). Here, there was no evidence or reason to believe that one pass of the car, on top of the victim's other injuries, was not a fatal action. Medina should have

known that running over a man in his seventies who had already received multiple blows was enough to kill him; additional force was unnecessary and gratuitous.

¶99 Because we find that both relishing and gratuitous violence were proven beyond a reasonable doubt, we do not reach Medina's contention that a special verdict is necessary for each *Gretzler* factor.

B. Mitigating Circumstances

1. Significant Impairment – A.R.S. § 13-751(G)(1)

¶100 Medina argues that his use of intoxicants and his psychological disorder significantly impaired his capacity to conform his conduct to the requirements of the law. To establish the (G)(1) mitigating factor, a defendant must show by a preponderance of the evidence that the "defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." A.R.S. § 13-751(G)(1).

¶ 101 Neither party disputes Medina's dependency on inhalants, alcohol, and marijuana at the time of the murder. The trial evidence showed that Medina's capacity to control his conduct or appreciate its wrongfulness was substantially impaired by the various drugs he had taken on that day. Thus, Medina established the (G)(1) mitigating factor. Because we give weight to Medina's drug abuse under § 13-752(G)(1), we give little additional weight to Medina's long-term drug addiction as non-statutory mitigation. *Cf. Moore,* 222 Ariz. at 21 ¶ 121, 213 P.3d at 170 (giving weight to defendant's long-term drug addiction

as non-statutory mitigation when the addiction did not satisfy the statutory requirements).

¶102 Medina also argues that his mental illness significantly impaired his capacity to conform his conduct to the requirements of the law. Medina presented evidence concerning two possible psychological disorders: anti-social personality disorder and delusional disorder.

¶103 Medina offered evidence that he suffered from anti-social personality disorder. "Personality or character disorders, however, typically do not satisfy [the (G)(1)] mitigator. . . ." *State v. Tucker,* 215 Ariz. 298, 323 ¶ 118, 160 P.3d 177, 202 (2007). Medina did not offer any evidence that his anti-social personality disorder substantially impaired his ability to conform his conduct to the requirements of the law or prevented him from appreciating the wrongfulness of his conduct. Therefore, Medina has failed to prove that his personality disorder meets the standard in § 13-751(G)(1). Instead, we give his personality disorder some weight as non-statutory mitigation.

¶104 Medina also contends that his delusional disorder, persecutory type, establishes the (G)(1) factor. However, Medina did not offer proof that the disorder prevented him from knowing right from wrong or conforming his conduct to the requirements of the law. Thus, Medina has not proven the (G)(1) mitigating circumstance with respect to his delusional disorder, and we do not afford this disorder substantial weight as non-statutory mitigation.

2. Defendant's Age – A.R.S. § 13-751(G)(5)

¶105 A.R.S. § 13-751(G)(5) establishes the defendant's age as a mitigating factor. Because

Medina was eighteen years old at the time of the murder, he has established this statutory mitigator. "To determine how much weight to assign the defendant's age, we must also consider his level of intelligence, maturity, past experience, and level of participation in the killings." *State v. Poyson*, 198 Ariz. 70, 80 ¶ 37, 7 P.3d 79, 89 (2000). "If a defendant has a substantial criminal history or was a major participant in the commission of the murder, the weight his or her age will be given may be discounted." *Id.* at 81 ¶ 37, 7 P.3d at 90.

¶106 Medina was of average or low-average intelligence and had never lived on his own. He had prior convictions for aggravated robbery and aggravated assault. Medina was a major participant in the murder: he pulled the victim from the car, stomped on him repeatedly, dragged him into the street, and then repeatedly drove over him. We give minimal weight to Medina's age as a mitigating factor.

3. Non–Statutory Mitigation

¶107 Medina alleges his gang affiliation and the lack of a plea bargain from the State as mitigation. We do not find these factors to be mitigating. Moreover, Medina stated on the record that he had rejected a plea offer from the State that would have resulted in a sentence of life without parole.

¶108 Medina also argues that he has rehabilitated himself by becoming an artist. Rehabilitation through education and art can be considered as a non-statutory mitigating circumstance. *See State v. Roscoe*, 184 Ariz. 484, 501, 910 P.2d 635, 652 (1996). We do not find that this circumstance merits significant weight here.

¶109 Medina argues that he poses no future threat. We give this mitigating circumstance minimal weight. *See State v. Garcia*, 224 Ariz. 1, 22 ¶ 108, 226 P.3d 370, 391 (2010).

¶110 Medina contends that his co-defendant has received a sentence of life in prison and that this disparate sentence should be considered in mitigation. Unexplained disparities in the sentences of accomplices may be a mitigating circumstance, but such disparities have little significance when the murder is especially cruel, heinous, or depraved. *See State v. Ellison*, 213 Ariz. 116, 140 ¶ 105, 140 P.3d 899, 923 (2006). Here, the disparity can be explained. Medina, not his co-defendant, pulled the victim from the car, stomped on him, dragged him into the street, and drove over him multiple times. We do not find that the disparity here is significantly mitigating.

¶111 Medina additionally alleges family support as a mitigating circumstance. We agree that "close family ties may be mitigating." (*Robert G.*) *Jones,* 197 Ariz. at 313 ¶ 77, 4 P.3d at 368. Medina has established that he has a close relationship with his family. However, we find Medina's family support "only slightly mitigating" because he committed the murder while in his parent's custody. *See id.*

¶112 Next, Medina argues that his remorse should be given weight in mitigation. Medina expressed remorse to his girlfriend the day after the murder; however, she characterized Medina's regret not as an increased sensitivity to the magnitude of the crime but more as "worr[y] about getting caught."

¶113 Medina also expressed remorse in his allocution. Yet, the State's expert testified that Medina

had not shown regret or remorse during his interview and opined that Medina was unlikely to feel any true remorse. Medina's expert, Dr. Lanyon, also testified that it would "take quite some time" for Medina to feel remorse. Given this record, we give little mitigating weight to Medina's remorse.

¶114 Medina contends that we can consider mitigation evidence from the 2008 trial that was not introduced at the 2009 trial although we decline to consider evidence not presented to the sentencing jury when conducting an independent review of aggravating circumstances. *See State v. Nordstrom*, 230 Ariz. 110, 119 ¶ 46, 280 P.3d 1244, 1253 (2012). Even if we consider the evidence from the 2008 trial, however, we find it is not significantly mitigating.

C. Propriety of Death Sentence

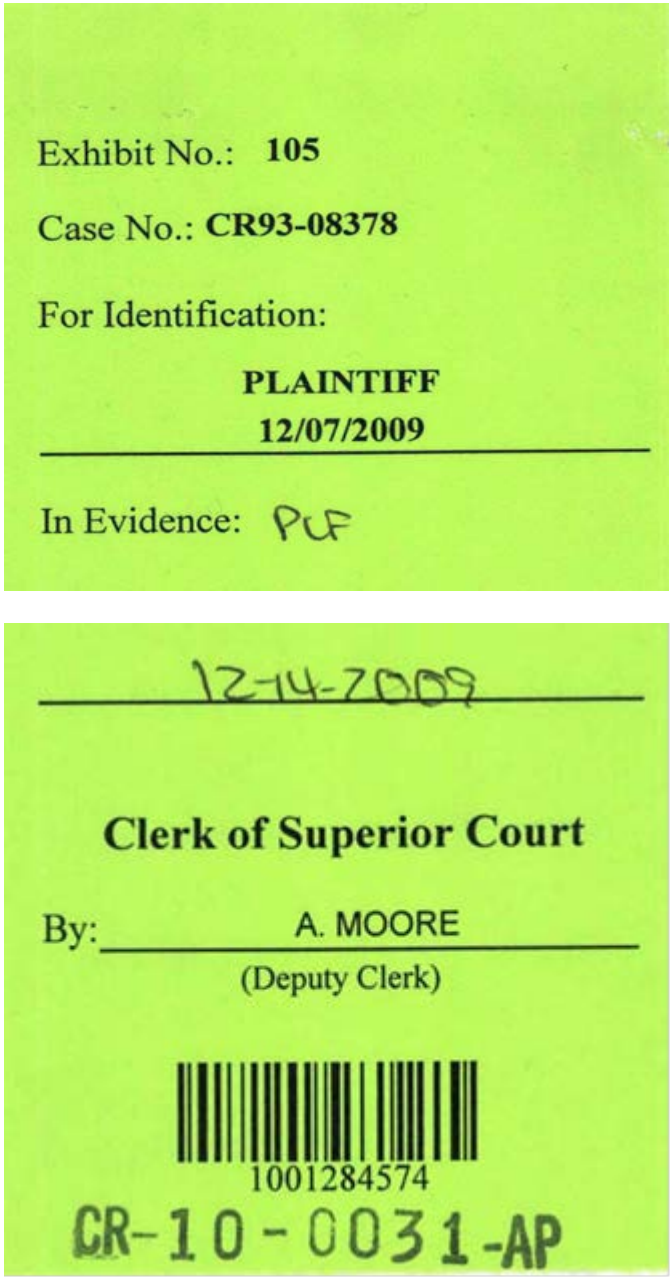
¶115 Based on the aggravating and mitigating circumstances present in this case, we find that "the mitigation is not sufficiently substantial to warrant leniency." A.R.S. § 13-755(B).

VI. CONCLUSION

¶116 We affirm Medina's death sentence.[3]

[3] Medina also lists thirty-seven constitutional claims that he states this Court has rejected in other cases; we decline to revisit these claims.

APPENDIX B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Case No.: CR93-08378
For Identification:
PLAINTIFF
12/07/2009
In Evidence: PLF
12-14-2009
Clerk of Superior Court
By: A. MOORE
(Deputy Clerk)
1001284574
CR-10-0031-AP

MARICOPA COUNTY OFFICE
OF THE MEDICAL EXAMINER
120 South Sixth Avenue
Phoenix, Arizona 85003
(602) 506-3322 CASE # 93-233

REPORT OF INVESTIGATION
BY MEDICAL EXAMINER

NAME: CARLE HODGE **Age:** 71 **D.O.B.:** 11/12/21 **Race:** C

Marital Status: S

Address:	**City:**	**State:**	**SSN:**
2150 W. MISSOURI APT. #21	PHOENIX	AZ	452-24-2558

NOTIFICATION By:	**Agency:**	**DR Number:**
S.E. LEWIS #2602	PHOENIX PD	30-611556

TYPE OF DEATH: VIOLENT/BLUNT FORCE TRAUMA

Address	Town/City	Type of Premises	Date	Time
Injured or Ill: 2150 W. MISSOURI #21	PHOENIX	IN STREET	9/30/93	0211
Death Pronounced: 2150 W. MISSOURI #21	PHOENIX	IN STREET	9/30/93	0211

Examination by Medical Examiner at Maricopa County Office of the Medical Examiner Date 10/1/93
Time 1010

Description of Body SIGNIFICANT FINDINGS

(External Physical Examination)
SEE DICTATION SEE AUTOPSY PROTOCOL
Rigor (Regional/Complete/Absent)
Liver (Color/Distribution)
Clothing (Summarize Any)

Teeth
Hair Color GRAY
Beard Moustache
Eyes BROWN
Length 66”
Weight 155#

Pursuant to section 11-594 Arizona Revised Statutes I hereby certify that I took charge of the body described herein and that after making inquiries into the cause and manner of death and examination of the body it is my opinion that death occurred due to the cause(s) and in the manner stated.

Cause of Death BLUNT FORCE TRAUMA

DISPOSITION
Manner of Death HOMICIDE Autopsy (Y/N): Y
Toxicology (Y/N): Y

PJB

/s/ Ann L. Bucholtz, M.D.
Ann L. Bucholtz, M.D., Medical Examiner

CASE # 93-233

SPECIAL STUDIES:

Additional Photographs (Y/N) Y
if YES, by Whom PHOENIX PD
X-rays (Y/N) Y
Evidence Released (Y/N) Y
if YES, to Which Agency PHOENIX PD

Narrative Summary of Circumstances Surrounding Death: (Include Scene description and/or diagram where appropriate)

SEVENTY-ONE YEAR OLD MALE FOUND IN STREET

MARICOPA COUNTY OFFICE
OF THE MEDICAL EXAMINER
120 South Sixth Avenue
Phoenix, Arizona 85003

REPORT OF AUTOPSY

CASE: 93-2334

DECEDENT: Carle Hodge **DATE:** Oct. 1, 1993

ADDRESS: 2150 W. Missouri, #21, Phoenix, AZ

TIME: 1010 Hrs.

PRESENT AT AUTOPSY:

Phoenix PD: Det. Norman and Johnson and ID Tech. Ron Davis

PATHOLOGIC DIAGNOSES

1. Blunt force trauma.
   a. Lacerations and contusions of face, neck, chest and upper back.
   b. Fractures of multiple ribs, sternum, clavicles, and spine.
   c. Lacerations of liver, right lung, and interatrial septum.
   d. Facial fractures, multiple.

CAUSE OF DEATH: Blunt force trauma
MANNER: Homicide
OPINION: Death was due to blunt force trauma

/s/ Ann L. Bucholtz, M.D.
ANN L. BUCHOLTZ, M.D.
MEDICAL EXAMINER

BY: jmm
DT: 10/18/93

CIRCUMSTANCES OF DEATH

This 71-year-old male was found unresponsive in the street. He was pronounced dead on Sept. 30, 1993 at 0211 Hrs.

Authorization autopsy: Maricopa County.

IDENTIFICATION

The body is identified by officers through their investigation. Thirty-five millimeter photographs, x-rays and fingerprints of the deceased are obtained.

CLOTHING AND TRACE EVIDENCE

The clad body is submitted in a sealed blue plastic body bag. The seal reads number 725469. Upon opening the bag, the body is clad.

Adherent to the right hand are multiple hairs and trace evidence which are collected and labelled as "TRACE EVIDENCE, RIGHT HAND". On the left hand are similar hairs and fragments which are collected and labelled as "TRACE EVIDENCE, LEFT HAND". Adherent to the right posterior arm are multiple hairs which are collected and labelled as "TRACE EVIDENCE, RIGHT ARM". Within the fold of the posterior shorts is a small wood fragment .which is collected and labelled as "TRACE EVIDENCE FROM SHORTS". Under the body is a similar piece of wood-like fragment which is collected and labelled as "TRACE EVIDENCE FROM BODY BAG". Adherent to the right leg near the knee is a hair which is collected and labeled as "TRACE EVIDENCE, RIGHT LEG".

The lower clothing is appropriately positioned. The shirt, buttoned by one button, is on the upper torso. Clothing and personal effects consist of:

- A navy blue button-down shirt.
    - In the left front pocket of the shirt is a folded five-dollar bill.
- A pair of light blue shorts.
    - The button is not on the shorts and the zipper is partially zipped.
    - In the left front pocket of the shorts are multiple, folded pieces of currency totaling one hundred and twenty-three dollars ($123.00).
    - In the right front pocket of the shorts is a green plastic lighter.
- A pair of blue underwear.

EXTERNAL EXAMINATION

The body is that of a Caucasian male, measuring 66 inches and weighing 155 pounds. Rigor mortis is present in the jaw, upper and lower extremities. Lividity is present posteriorly and is fixed.

HEAD

Scalp hair is grey and measures up to 4 inches long.

On the right temporal scalp is a gaping, V-shaped, 3 inch by 2-1/2 inch avulsion/laceration with the avulsion extending posteriorly and undermining posteriorly and inferiorly. The margins of the wound are relatively straight and interconnect with a laceration on the right ear with avulsion of the superior helix measuring 2 inch by 1/8 inch. The laceration extends posteriorly behind the ear where is measures 1-1/4 inch by 3/4 inch.

The ear laceration is directly linear with an occipital, horizontally-oriented, straight-edged laceration measuring 2-1/2 inch by 1/4 inch by 1/4 inch. The surrounding margins of the wound show minimal contusion.

On the mid parietal and occipital scalp is a gaping, 3 inch by 1/2 inch by 1/4 inch laceration with minimal undermining on the left lateral border.

The forehead is relatively symmetrical. In the left temporal area is a slightly horizontally-oriented, red-brown, 3 inch by 1 inch abrasion. On the left hairline near the forehead is a 1/2 inch by 1/2 inch, blue-purple contusion.

Extending across the eyebrows and orbital ridge is an irregular, 5-1/4 inch by 1 inch by 1/8 inch laceration with visible fractured bones on the left orbital ridge. Within the depths of the wound are small fragments of sandy dirt-like material. In the superior border of the wound is a piece of embedded gravel which is collected and labelled as "TRACE EVIDENCE FROM FACE". The margins of this wound are abraded and contused. The contusion is contiguous with bilateral periorbital contusions and a brush-burn 5-1/4 inch by 4 inch abrasion/contusion on the left face.

The right blue-purple periorbital contusion measures 4 inches by 3-1/2 inches. The right maxilla is palpably fractured. The left lower orbital ridge is palpably fractured. The nasal bones are fractured. The superior maxilla in the area of the nasal bone is fractured.

The gum lines are without fractures. The teeth are natural and in a good state of repair. A partial denture plate is present in the lower mouth and is correctly

positioned. On the upper oral mucosa is an irregular, blue-purple, 1-1/2 inch by 1/2 inch contusion. On the lower oral mucosa is an irregular, blue-purple, 3/4 inch 1/2 inch contusion. On the right lateral lip is a red-brown abrasion/blue-purple contusion measuring 1 inch by 1/2 inch. On the left upper and mid lip is an irregular, blue-purple contusion with superficial lacerations measuring in an area of 2 inches by 1/2 inch.

On the anterior nose extending onto the right cheek is a yellow-red, brush-burn type, 4-1/2 inch by 2 inch abrasion. Over the nasal fracture is a 3/4 inch by 1/8 inch laceration.

Inferior to the left eye is a horizontally-oriented, 1-3/4 inch by 1/8 inch laceration. Inferior to the right eye is a gaping, 1-1/4 inch by 1/8 inch by 1/8 inch laceration. The irides are blue with the left pupil measuring 0.4 cm. and right pupil measuring 0.3 cm. The right eye contains a large conjunctival, 1 inch by 1/2 inch hemorrhage which extends into the inferior and superior eyelids. The left eye contains scattered, punctate hemorrhages and a larger hemorrhage measuring in an area of 1/2 inch by 1/2 inch.

The nares are unremarkable. There is a brown, 3/4 inch long moustache present. The lower face is closely shaven.

On the left jaw, extending towards the ear are horizontally-oriented, superficial lacerations/red-brown abrasions measuring up to 1 inch by 1/8 inch.

The left lower earlobe contains a 3/4 inch by 1/8 inch laceration. The left superior helix contains a gaping 1 inch by 1/8 inch laceration with undermining

on the posterior border. Behind the left ear is a 1/8 inch by 1/8 inch by 1/8 inch skin tag.

NECK

The trachea is in the midline. On the right neck extending towards the midline is an irregular, pink-purple contusion with red-brown, vertically-oriented abrasions measuring up to 1-1/2 inch by 1-1/2 inch area.

CHEST

The chest is asymmetric due to numerous palpable fractures on the right chest. There is subcutaneous emphysema present on the right chest. The left chest is relatively free of emphysema. Across the chest, in a linear pattern, are hypopigmented, nearly parallel lines, consistent with irregular tanning.

On the right shoulder, extending onto the right upper chest in the area of the subcutaneous emphysema, is an irregular, punctate, blue-purple contusion measuring 6 inches by 6 inches. Within the contusion are superficial skin tags pointing towards the right extremity. There are also punctate abrasions within the contusion measuring up to 1/8 inch in diameter.

On the upper sternal area are no fewer than twenty red-brown abrasions measuring in an area of 4 inches by 2 inches with adherent skin tags pointing towards the right extremity.

On the right nipple area is a pink-red, punctate contusion measuring 5 inches by 3 inches.

On the right lower chest is a curved, yellow-red, 2 inch by l/16 inch abrasion.

The left shoulder and chest are relatively free of injury.

ABDOMEN

The abdomen is slightly distended. On the right upper and lower quadrants are punctate-to-slightly curved, yellow-red abrasions ranging in size from 1/16 inch to 1/2 inch in greatest diameter. The left abdomen is relatively free of trauma.

GENITALIA

The genitalia are those of a normal male. The left testis is palpable in the scrotal sac; the right testis is nonpalpable. The pubic hair is brown. No injuries are seen.

LOWER EXTREMITIES

The lower extremities are asymmetrical due to shortening of the right extremity. The shortening is chronic with a slight contracture of the leg. No palpable fractures are present in the femur or lower extremities.

On the right lateral thigh is a curved, healed, 7 inch by 1/16 inch incisional scar.

On the right knee is a pink-tan brush burn type, 2-1/4 inch by 1-3/4 inch abrasion with adherent skin tags on the proximal margin. There is adherent, black, dirt-like material to this area. This abrasion is surrounded by no fewer than five, yellow-red, irregular abrasions ranging in size from 1/8 inch in diameter to 3/4 inch in diameter.

On the right medial foot is a 1 inch by 1/2 inch by l/4 inch laceration with undermining on the distal portion. On the right plantar great toe is a 1-1/4 inch

by 1 inch abrasion with adherent skin tag, medially. On the right 1st and 2nd dorsal toes are no fewer than three, irregular, red-brown abrasions measuring up to 1/4 inch in diameter.

On the left lateral knee is a red-pink, 1-3/4 inch by 1 inch abrasion with adherent skin tags, proximally. There is adherent black, dirt-like material to the wound. On the left medial knee are no fewer than three, irregular, red-brown abrasions measuring individually up to 1/2 inch in diameter.

On the left lateral thigh is a curved, red-brown, 2 inch by 1/8 inch abrasion.

On the left lower leg is black, grease-like material near the left lateral knee abrasion. The left foot is without injury.

Over the posterior thighs, popliteal fossae and lower legs no injuries are identified.

UPPER EXTREMITIES

The upper extremities are symmetrical with the normal number of digits, bilaterally. The fingernails are short and evenly trimmed without tearing. The antecubital fossae are unremarkable. There are no palpable fractures on the upper extremities.

On the right upper arm are no fewer than eight, irregular, red-brown abrasions ranging in size from 1/4 inch in diameter to 2 inches in diameter.

On the right mid upper arm are three, pink-purple somewhat patterned contusions. The pattern consists of three, somewhat parallel areas with intervening areas of pallor measuring up to 3/8 inch wide. The

contusions individually measure up to 1-1/4 inch long by 1/8 inch wide.

On the right lower upper arm are no fewer than thirty punctate-to-irregular, pink-red abrasions/superficial lacerations with adherent skin tags on the distal margins. The abrasions range in size from 1/16 inch to 3/4 inch in diameter. There is an adjacent, yellow-brown brush burn type, 2-1/2 inch by 1 inch abrasion.

On the right elbow is a gaping, C-shaped, 2 inch by 3/4 inch by 1/4 inch laceration with undermining on the proximal border.

On the right elbow is a gaping, 2-1/4 inch by 3/4 inch by 1/4 inch laceration with undermining on the superior border.

On the right posterior arm, extending onto the wrist, are no fewer than forty, punctate-to-curved abrasions, ranging in size from 1/4 inch by 1/4 inch to 1-1/2 inch by 1/16 inch. The curved lacerations have a vertical pattern with skin tags adherent to the proximal margin.

On the right posterior 2nd and 3rd knuckles is a yellow-purple, 1-1/2 inch by 1 inch contusion.

On the right 1st finger is a 1/8 inch by 1/8 inch, blue-purple contusion.

On the right 2nd knuckle is an E-shaped, 1/8 inch by 1/8 inch, superficial laceration with skin tags on the distal margin.

On the right medial wrist is an irregular 1/8 inch by 1/8 inch, red-brown abrasion.

The right 4th and 5th fingers are without injuries. The right thumb is without injuries. The forearm and palm are unremarkable.

On the left upper arm near the shoulder is a pink-red, slightly curved abrasion measuring 1-1/2 inch by 1/2 inch.

On the left lower arm is an irregular, pink-purple, 6 inch by 4 inch contusion. Within the contusion is a curved, red-brown, 1-3/4 inch by 1/4 inch abrasion. On the left lower arm is a gaping 1-1/4 inch by 1/2 inch by 1/4 inch laceration with minimal undermining on the superior border.

On the left elbow area is a diagonal, 4 inch by 1/16 inch, superficial laceration.

On the left posterior arm is a gaping 1-1/2 inch by 3/4 inch laceration with minimal undermining on the posterior border.

On the left anterior elbow is a blue-purple, 3-1/2 inch by 3 inch contusion.

On the left elbow is a red-brown, 1-1/4 inch by 1 inch abrasion with surrounding blue-purple, 1-1/4 inch by 2 inch contusion. On the left elbow is a tan, healing, raised, 1/4 inch by 1/4 inch abrasion.

On the left elbow is a gaping, 2-3/4 inch by 1 inch by 1/4 inch laceration with undermining on the medial border. This is contiguous with a pink-red, 4-1/2 inch by 1-3/4 inch abrasion on the left posterior arm with an adherent skin tag on the medial border.

On the left posterior hand is a gaping, 4-1/2 inch by 1-1/4 inch by 1/8 inch laceration with undermining on the distal border. There are no fewer than five

overlying red-brown lacerations/abrasions measuring up to 1/2 inch by 1/8 inch.

On the left posterior 1st, 2nd and 3rd knuckles is a pink-purple, 2-3/4 inch by 2 inch contusion.

On the left palmar, 1st, 2nd and 3rd fingers are curved lacerations measuring up to 3/4 inch by 3/8 inch by 1/8 inch with adherent skin tags on the distal margins.

On the left thumb is a 3/8 inch by 1/8 inch by 1/16 inch abrasion/laceration with a skin tag on the distal margin.

The remainder of the left palm is without injury. The posterior left fingers are without injuries.

BACK AND BUTTOCKS

The back is asymmetrical due to the right anterior chest fractures. There is a small amount of adherent sandy dirt to the back.

On the upper back are numerous, horizontally-oriented, red-purple contusions/red-brown abrasions ranging in size from 1/2 inch by1/8 inch to 8-1/2 inches by 1/8 inch. On the right lateral border of these abrasions is a yellow-brown, waxy-like, brush-burn type abrasion measuring 6 inches by 2 inches. On the superior margin of this wound are diagonally-oriented, red-purple contusions extending towards the right shoulder; some are punctate and curved ranging in size from 1/8 inch by 1/8 inch to 1-1/2 inch by 1/8 inch.

On the right shoulder is an oval-to-slightly square, 1 inch by 7/8 inch abrasion.

On the left scapula are numerous, irregular, red-brown abrasions measuring in an area of 2 inches by 1 inch.

The lower back and buttocks are without contusions or abrasions.

The anus is without trauma.

INTERNAL EXAMINATION

BODY CAVITIES

The subcutaneous midline abdominal fat measures 3 inches. There is 50 cc. of blood in each of the pleural cavities. The pleural surfaces are smooth and glistening with lacerations and contusions related to underlying rib fractures. There is 50 cc. of blood in the pericardial sac. There is 100 cc. of blood in the right upper quadrant of the abdomen. The peritoneal surfaces are smooth and glistening.

HEART

The weight of the heart is 310 gm. The epicardium is smooth and glistening. The myocardium is red-brown and firm without infarcts. The right ventricle measures 0.3 cm.; the left ventricle measures 1.5 cm. There is a laceration of the interatrial septum. The laceration is not through-and-through and is largely in the right atrium. The tricuspid, pulmonic, mitral and aortic valves all have their normal appearances. The mural endocardium is unremarkable. The coronary arteries have a normal anatomic distribution. The right coronary, left anterior descending, and left circumflex coronary arteries show less than 40 percent atheromatous occlusion and are calcified. No thrombi

are seen. The aorta shows severe atherosclerosis and is without lacerations.

RESPIRATORY TRACT

The larynx and trachea are without erosions. The bronchi are without tumor or aspirated material. The right lung weighs 360 gm.; the left lung weighs 240 gm. The lungs have their usual number of lobes and red-brown parenchyma without tumor, granulomas or inflammation. Bilateral, mild, emphysematous changes are in the upper lobes. The right lower lobe contains a 4 inch parenchymal laceration. The left lung is without lacerations. Both lungs are severely contused. The vessels are without lacerations, emboli or plaque. The hilar lymph nodes are of normal size and appearance.

LIVER

The liver weighs 1580 gm. The capsule is severely lacerated near the falciform ligament and in the superior dome near the attachment to the diaphragm. The largest laceration measures up to 6 inches in greatest diameter. The parenchyma is yellow-brown without tumor, granulomas or infarcts. The gallbladder is without cholesterolosis and contains no fewer than three 1/2 inch in diameter, smooth-walled gallstones.

GASTROINTENSTINAL TRACT

The esophagus is without erosions or tumor. The stomach contains 200 cc. of soft yellow-tan food and liquid suggestive of egg particles. The rugal folds are without hemorrhage or ulceration. The small and large intestine are unremarkable without lacerations. The appendix is absent.

HEMATOPOIETIC SYSTEM

The spleen weighs 80 gm. The capsule is intact. It has a red-brown parenchyma without lacerations, granulomas or infarcts. Systemic lymph nodes are of normal size and appearance.

GENITOURINARY TRACT

The right kidney weighs 130 gm; the left kidney weighs 160 gm. The cortical surfaces are smooth and glistening. The parenchyma is red-brown without tumor, infarcts or cysts. The collecting systems are without tumor or obstruction. The bladder is of normal size and contains no urine.

REPRODUCTIVE TRACT

The left testis is without tumor. The right testis is unidentified. The prostate and seminal vesicles are unremarkable.

ENDOCRINE SYSTEM

The adrenal glands are without tumor or nodules. The thyroid gland is without tumor or nodules. The pituitary is unremarkable. The pancreas is tan-brown and slightly fibrotic.

MUSCULOSKELETAL SYSTEM

The spine contains a T8 separation fracture with underlying, intact spinal cord. The ribs are fractured in the following locations: right lateral 2 through 8; right posterolateral 8 through 10; right posterior 1 through 11; right anterior 1 through 7; left lateral 2 through 6; left posterolateral 5, 7, 9 and 10; left posterior 3, 6, and 8; left anterior 1 through 4. The superior sternum contains a fracture through the mid portion. The right lateral and left mid clavicles are

fractured. The anterior chest shows subcutaneous hemorrhage. The anterior abdominal wall shows no hemorrhage.

NECK

The neck muscles are intact with extensive subcutaneous hemorrhage extending over the anterior neck muscles. The left hyoid bone is fractured. The mid anterior thyroid cartilage is fractured. The tips of the hyoid bone and thyroid are intact. The laryngeal cartilages are without fracture of hemorrhage. The epiglottis is without edema. The vocal cords are free of tumor and erosions.

SKULL AND CRANIAL CONTENTS

The brain weighs 1460 gm. The scalp shows subcutaneous hemorrhage in the area of the lacerations. The convexities of the skull, basilar skull and orbital plates are intact without fractures. There are no separation fractures of the skull from the spine. The anterior orbital ridge is visibly fractured and hemorrhage extends into the right and left temporalis muscles. No epidural, subdura l or subarachnoid hemorrhages are seen. The cerebral and cerebellar hemispheres are symmetrical. The meninges are smooth and glistening. The Circle of Willis has a normal pattern without aneurysm formation or vascular abnormalities. There are no internal hemorrhages, recent or old infarcts or contusions seen. No tumor is seen. The brainstem is intact without hemorrhage. The ventricles are of normal size and symmetrical.

ALB:jmm
10/18/93

MICROSCOPIC EXAMINATION (Appended 1/10/94)

Heart: Sections of heart show normal myofibers without inflammation or necrosis.

Lungs: Sections of lung show normal alveoli without inflammation or atypia. The vessels and bronchi are unremarkable.

Liver: Sections of liver show a normal lobular architecture. Occasional hepatocytes contain clear intracytoplasmic vacuoles consistent with lipid. The portal triads are unremarkable.

Spleen: Sections of spleen are unremarkable.

Kidney: Sections of kidney show occasional obsolescent glomeruli. Residual glomeruli have a normal cellularity. The tubules are unremarkable. The vessels are unremarkable.

Adrenals: Sections of adrenal gland are unremarkable.

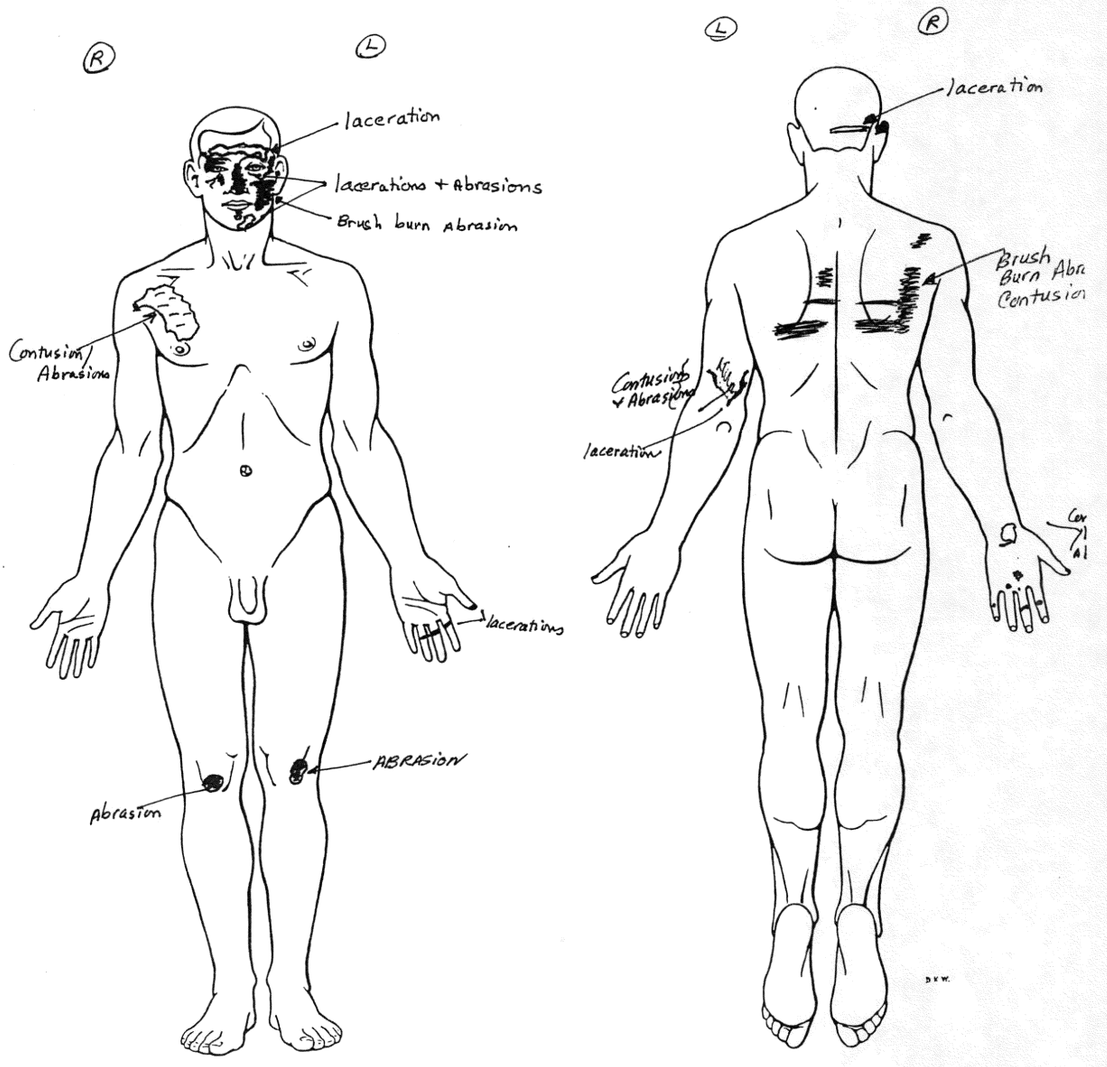
Thyroid: Sections of thyroid gland are unremarkable.

Pancreas: Sections of pancreas are autolyzed.

Brain: Sections or brain are without inflammation or atypia.

ALB:jnn

CASE NO. 93-2334 NAME Hodge, Carl ~~AHB~~



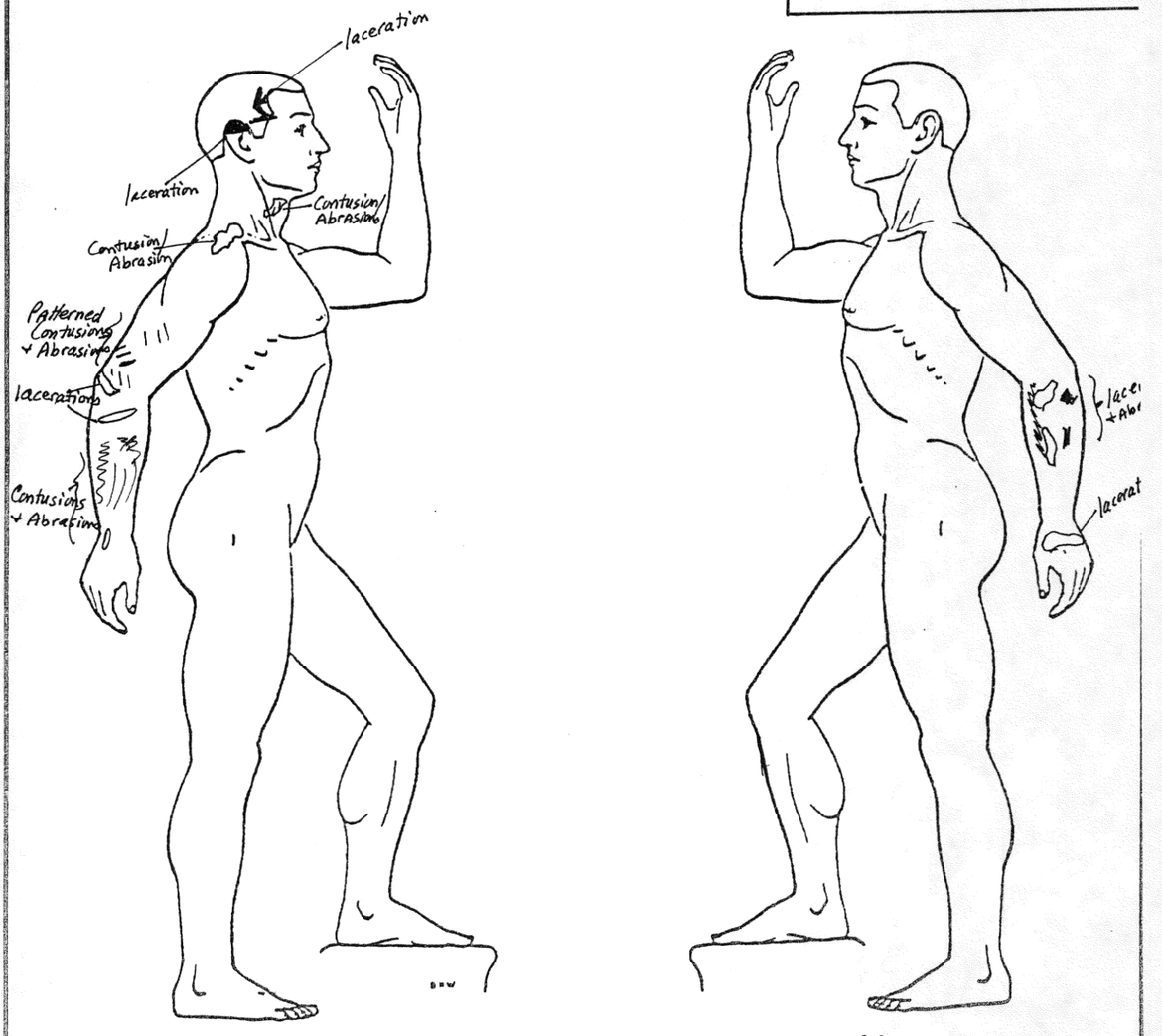
FORM A

LATERAL

MARICOPA COUNTY, OFFICE
OF THE MEDICAL EXAMINER

CASE #
93-2334
Hodge, CARL

AJB



Medical Examiner

2900-020 10-88