

**Response to Defendant's Motion to Find the New § 13-703.01
Unconstitutional as Violating *Furman v. Georgia* —**

§ 13-703.01 is constitutional in that it provides sufficient guidance to juries in weighing aggravating and mitigating circumstances.

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant argues that § 13-703.01 is unconstitutional and violates *Furman v. Georgia*, 408 U.S. 238 (1972), because the statute does not provide sufficient guidance to juries on weighing mitigation and aggravation evidence. *Furman* found that the death penalty imposed in the cases under review violated the Eighth Amendment. Defendant relies on the concurring opinions that indicated the death penalty was “arbitrary and capricious” (although that phrase was not actually used). In particular, he complains that the language “sufficiently substantial to call for leniency” in §§ 13-703(E) and 13-703.01(G) does not provide adequate guidance to the jury.

Our supreme court recently addressed this issue in *State v. Glassel*, 211 Ariz. 33, 116 P.3d 1193 (2005). Defendant there argued that “Arizona’s capital sentencing scheme, which requires that any mitigation evidence be ‘sufficiently substantial to call for leniency,’ . . . is vague, shifts the burden of proof, and creates an unconstitutional presumption of death.” 116 P.3d at 1211, ¶ 65. “Glassel contends that A.R.S. §§ 13-703(E) and 13-703.01(G) are vague because the ‘sufficiently substantial to call for leniency’ standard is not a reliable standard for determining whether to impose the death penalty.” *Id.*, ¶ 66. He argued that “lack of an ‘identifiable’ standard was not as problematic when

judges weighed the mitigating factors because judges were more experienced in sentencing matters,” but jurors with no such prior experience to guide them “will inevitably err.” *Id.*, ¶ 67. The court disagreed:

We have long held, however, that the phrase “sufficiently substantial to call for leniency” is not unconstitutionally vague. . . . The fact that juries, instead of judges, now determine whether any mitigating evidence is sufficiently substantial to call for leniency does nothing to change that analysis. Although jurors may not have the experience of judges in weighing mitigating factors against aggravating circumstances, because this process is “inherently subjective” and not subject to any “mathematical formula,” . . . our previous decisions in the context of judicial sentencing compel the same conclusion under the new sentencing statutes.

116 P.3d at 1211-1212, ¶ 68. The court also rejected defendant’s argument that A.R.S. § 13-703.01 is unconstitutional “because it provides no objective standards to guide the jury in weighing the aggravating and mitigating circumstances. We rejected that argument, at least when judges weighed aggravating factors, in *State v. Pandeli*, 200 Ariz. 365. . . . Our analysis remains unchanged now that juries, instead of judges, weigh aggravating and mitigating factors.” 116 P.3d at 1219, ¶ 113.

The court previously found that the sentencing scheme sufficiently channeled the sentencer’s discretion and narrowed the class of death-eligible persons. “Defendant argues that the death penalty statute is overbroad and vague because it does not sufficiently channel sentencing discretion or provide sufficient standards for weighing aggravating and mitigating circumstances. We have rejected this argument.” *State v. Gulbrandson*, 184 Ariz. 46, 72, 906 P.2d 579, 605 (1995). “[T]he death penalty statute narrowly defines death-eligible persons

as those convicted of first-degree murder, where the state has proven one or more statutory aggravating factors beyond a reasonable doubt.” *State v. Van Adams*, 194 Ariz. 408, 422, 984 P.2d 16, 30 (1999). “Arizona’s death penalty statute narrowly defines the class of death-eligible persons. Therefore, it does not offend the Constitution.” *State v. Greenway*, 170 Ariz. 155, 164, 823 P.2d 22, 31 (1991).

CONCLUSION:

A.R.S. § 13-703.01 provides sufficient guidance to juries when weighing aggravating and mitigating circumstances. Therefore, defendant’s motion to find the statute unconstitutional should be denied.

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