

Application of A.R.S. § 13-703.01, as amended, to the defendant's case does not offend principles of due process.

Applying the new amended death penalty statutes to the defendant's case does not violate due process or constitute an unconstitutional *ex post facto* law.

The defendant argues that under *Mathews v. Eldridge*, 424 U.S. 319 (1976), applying Arizona's new capital sentencing proceedings in his case would violate his due process rights. The State disagrees and asserts that due process analysis does not extend beyond the specific application of the *ex post facto* prohibition found in the Bill of Rights.

In *Mathews*, the court articulated a three-factor test for evaluating procedural due process claims.

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Id. at 334-35. However, in *Medina v. California*, 505 U.S. 437, 443 (1992), the Court held that "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process." The *Medina* Court went on to hold

In the field of criminal law, we have defined the category of infractions that violate 'fundamental fairness' very narrowly based on the recognition that, beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.

Id. (quotations omitted) (citing *Dowling v. United States*, 493 U.S. 342, 352 (1990) and *United States v. Lovasco*, 431 U.S. 783, 790 (1977)).

The Bill of Rights speaks in explicit terms concerning many aspects of criminal procedure, and expanding those constitutional guarantees under the open-ended rubric of the Due Process Clause would invite undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order. *Medina, supra*. As the court said in *Medina*, “it has never been thought that decisions under the Due Process Clause establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.” *Id.* at 443-44 (quotation omitted) (citing *Spencer v. Texas*, 385 U.S. 554, 564 (1967), *Estelle v. McGuire*, 502 U.S. 62, 70 (1991); *Marshall v. Lonberger*, 459 U.S. 422, 438, n. 6 (1983)).

Under *Medina*, once the explicit Bill of Rights *ex post facto* analysis is applied, then there is no further due process consideration regarding that concept. The Supreme Court holding on this point must be followed in spite of any holding in the pre-*Medina* Ninth Circuit opinion of *Coleman v. McCormick*, 874 F.2d 1280 (9th Cir. 1989).

Moreover, even if this Court were to address the due process argument raised under *Mathews*, that argument also fails. The defendant claims the new statute lacks sufficient “procedural safeguards” to avoid the “erroneous deprivation of his life.” The safeguards that the defendant claims are lacking are as follows. First, the defendant claims that the new death penalty statute does not provide for a special verdict. The defendant states that the special verdict required the judge to set forth the factors for imposing a life or death, thus forcing the judge to give careful consideration to the decision.

However, the defendant is incorrect that the jury will not prepare a detailed verdict under the amended statutes. The new procedures require the jury to specifically find or reject the aggravation alleged. A.R.S. § 13-703.01(E). All that was required under the old sentencing provision was for the trial judge to list those factors that the court found. A.R.S. § 13-703(E). While courts were encouraged to do more, it was not statutorily or constitutionally mandated. *State v. Walton*, 159 Ariz. 571, 585, 769 P.2d 1017, 1031 (1989), *State v. Kiles*, 175 Ariz. 358, 368, 857 P.2d 1212, 1222 (1993); *Martin v. Maggio*, 711 F.2d 1273, 1286-87 (5th Cir. 1983) (holding that the constitution does not require a jury to make specific written findings of mitigating circumstances). The jury's verdict in the defendant's case will serve the same function.

In a related argument, the defendant claims that without the special verdict, the Arizona Supreme Court cannot engage in its independent review. Furthermore, he asserts that the statute eliminates the independent review, thereby vacating another important procedural safeguard. The defendant is only partially right. The statute removes independent review only for those crimes committed after the effective date of the statute. 2002 Ariz. Legis. Serv. 5th Sp. Sess. Ch. 1 (S.B. 1001) (August 1, 2002), § 7 (C). If this defendant is given a death sentence, he will have his sentence reviewed by the Arizona Supreme Court under independent review.

Under former A.R.S. § 13-703.01, the Arizona Supreme Court conducts a *de novo* review of the findings of the sentencing court. The special verdict may assist the Arizona Supreme Court in making this review, but as noted in the cases cited above, that Court has steadfastly refused to mandate that trial courts furnish detailed special verdicts. The Arizona Supreme Court was and still is capable of reviewing the record *de*

novo under the requirements of former A.R.S. § 13-703-01. There is no merit to the defendant's contention.

Finally, the defendant contends that the sentencing jury cannot consider the evidence presented at his trial in determining aggravation and mitigation. Again, the defendant is only partially correct. Under the new sentencing scheme, the State may not rely on evidence presented at the trial in proving aggravation, unless the presentation and consideration of that evidence is permissible under "the rules of evidence applicable to criminal trials." A.R.S. § 13-703(B). In considering mitigation, however, the defendant or the State may offer evidence presented in the trial as such evidence is not bound by the rules of evidence. A.R.S. § 13-703(C). So the defendant's claim that the jury cannot consider evidence elicited at trial is wrong as it relates the penalty phase. Regarding the aggravation phase, the jury can consider any evidence that is admissible under the rules of evidence.

The defendant has not specifically argued what evidence he feels is now excluded, so the State cannot respond or discuss whether it is or not admissible. Instead, the defendant claims that the Ninth Circuit in *Coleman* found that the Due Process violation of applying a new capital sentencing law retroactively is not subject to harmless error. The State will not repeat its contention that *Coleman* does not survive after *Medina*. Moreover, this Court must find a due process violation – i.e., harm – before the question of harmless error can even be discussed. The State believes that even under *Coleman*, there is no prejudice in this case.