

Application of the new, amended, death penalty statute to Defendant's case does not violate the prohibitions against *ex post facto* laws.

The new Arizona death penalty procedures do not change the evidentiary requirements for a death penalty case, either in terms of evidence that is admissible or in terms of the burden of presentation or burden of proof. Thus, the new death penalty procedures do not violate the *ex post facto* prohibitions.

A. Arizona's new death penalty procedures do not change the rules and nature of the evidence admissible or required to be presented in capital sentencing proceedings in a manner that violates *ex post facto* prohibitions.

The defendant claims that the amendments to Arizona's death penalty statute alter the type or sufficiency of evidence necessary to justify imposition of the death penalty. On this basis, the defendant claims that the new death penalty statute violates the federal and state constitutional prohibitions against *ex post facto* laws. This claim is erroneous.

There are four categories of *ex post facto* laws. Specifically

1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime* or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

Carmell v. Texas, 529 U.S. 513, 522 (2000) (quoting *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798)) (emphases in original). The fourth category of *ex post facto* laws prohibits laws that alter the burden of proof or the quantum of evidence necessary to meet that burden. *Carmell*, 529 U.S. at 543 (quoting *Hopt*

v. Territory of Utah, 110 U.S. 574, 589-590 (1884)). This category does *not* include changes in the rules of procedure that regulate “the mode in which the facts constituting guilt may be placed before the jury” and “in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure.” *Carmell* at 543-44 (quoting *Hopt*, 110 U.S. at 590).

The defendant claims that Arizona’s new death penalty statute alters the “rules of evidence” in several respects, each of which demonstrates that the new statute constitutes an *ex post facto* law under the fourth category listed above. However, none of the defendant’s claims establish that the new death penalty statute makes the type of substantive changes to the rules of evidence that would render the statute an *ex post facto* law under the fourth category first articulated in *Calder*. The State will address each of the defendant’s claims in turn.

1. New statute’s provision for jury rather than judge sentencing.

The defendant argues that the fact that, under the new statute, the sentencing decision is now in the hands of the jury rather than the judge, violates the *ex post facto* prohibitions because it changes the “quality and nature of the evidence” allowed and required to sustain an imposition of a death sentence. This claim is without merit. The fact that a jury rather than a judge will be making the determination regarding whether the death penalty shall be imposed does not alter the burden of proof, nor does it change the quantum of evidence necessary

to sustain that burden. Therefore, that change in the law does not demonstrate that the new death penalty statute constitutes an *ex post facto* law.

2. The defendant's claim that the new statute allows State to introduce potentially irrelevant evidence.

The defendant next claims that, under the previous statutory scheme, the State was limited only to proving the aggravating circumstances in order to show that the death penalty was appropriate. He argues that the new statute constitutes an *ex post facto* law because it changes the law to allow the State to rebut a defendant's mitigation evidence with possibly irrelevant evidence. The defendant specifically refers to the language contained in A.R.S. § 13-703.01(G) which provides that, in order for the jury to make a determination of whether there is mitigation that is sufficiently substantial to call for leniency, "the State may present any evidence that demonstrates that the defendant should not be shown leniency."

The defendant's second claim also lacks merit. First, the defendant does not have standing to assert this claim. *Sears v. Hull*, 192 Ariz. 65, 70, ¶ 23, 961 P.2d 1013, 1018 (1998) ("To have standing to bring a constitutional challenge, however, a plaintiff must allege injury resulting from the putatively illegal conduct.") (citing *State v. Herrera*, 121 Ariz. 12, 15, 588 P.2d 305, 308 (1978)). The defendant has not demonstrated that the State will present irrelevant

evidence at the penalty phase.¹ Nor has the defendant detailed exactly what evidence he asserts that the State will attempt to present in the penalty phase that will not be relevant to rebut any of his mitigation evidence. He therefore does not have standing to assert his claim.

Additionally, the defendant's claim fails on the merits because this alleged change in the death penalty scheme, which directly concerns the admissibility of rebuttal evidence, by its nature does not constitute an *ex post facto* law. Specifically, "[t]he issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant." *Carmell, supra*, 529 U.S. at 546. As such, rules regarding the admissibility of evidence simply cannot constitute *ex post facto* laws. *Id.*, 529 U.S. at 543-44 (citing *Hopt*, 110 U.S. at 589–89).

3. The defendant's claim that the new statute allegedly allows consideration of victim impact evidence at aggravation phase.

The defendant next claims that the new death penalty scheme changes the law in that it now allows the jury to consider victim impact evidence in determining the existence of aggravating circumstances. The defendant contends that this change constitutes an *ex post facto* law, in that it changes the

¹The United States Supreme Court has found that evidence is irrelevant and should not be considered if it is mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling. *California v. Brown*, 479 U.S. 538 (1987).

type of evidence that can be considered by the sentencer. This claim is erroneous.

First, contrary to the defendant's claim, the new death penalty scheme does not provide that victim impact information is admissible at the aggravation phase. A.R.S. § 13–703.01(Q) states:

[A] victim has the right to be present at the aggravation phase and to present any information that is relevant to the proceeding. A victim has the right to be present and to present information at the penalty phase. At the penalty phase, the victim may present information about the murdered person and the impact of the murder on the victim and other family members and may submit a victim impact statement in any format to the trier of fact.

Thus, by its express terms, A.R.S. § 13-703.01(Q) limits the victim to presenting information *relevant* to the statutory aggravating factors at the *aggravation phase*. By definition, victim impact evidence is simply not that type of evidence, and therefore it would not be admissible at the aggravation phase.

Moreover, even if the new statutes made victim impact evidence admissible at the aggravation phase, this would not constitute an *ex post facto* law. As stated above, changes in the law relating to the admissibility of evidence do not concern the burden of proof or the quantum of evidence necessary to meet that burden. Therefore, such changes cannot constitute *ex post facto* laws.

Regarding the victim impact evidence, the defendant also alleges that the new statute changes the law in that it permits the victim to present impact evidence in any form, rather than just oral testimony and statements to the presentence report writer. The defendant claims that this change will allow

victims to present impact statements that are not subject to cross-examination. Nevertheless, the defendant's claim is unavailing.

Under the prior law, a victim's statements to the presentence report writer could be in any form, and were not required to be subject to cross-examination. Thus, the new statute did not change the law regarding the form of permissible victim impact evidence. More important, even if the new statute did change the law in that respect, this clearly is not a charge that concerns the burden of proof or the quantum of evidence necessary to sustain that burden. Thus, it does not constitute an *ex post facto* law. *Neill v. Gibson*, 263 F.3d 1184, 1190-91 (10th Cir. 2001) (state statute permitting admission of victim impact evidence during capital resentencing proceeding for offenses committed prior to statute's enactment does not constitute *ex post facto* law because statute did not change quantum of evidence necessary for State to obtain death sentence).

4. The defendant's claim that the new statute requires defendant prove the facts relative to the existence of mitigation to twelve triers of fact, rather than one.

The defendant claims that the new statutory scheme constitutes an *ex post facto* law because it requires him to prove the existence of mitigation facts to twelve individual triers of fact rather than to one. This contention is incorrect. First, the new statute does not require defendants to convince all twelve jurors regarding the existence of any mitigating fact. A.R.S. § 13-703(C) specifically provides that the jurors do not have to unanimously agree that a mitigating circumstance has been proved to exist. Thus, the defendant is in error when he

claims that the new statute changes the law by imposing an increased burden on him in that it requires him to convince all twelve jurors regarding the existence of a particular mitigating circumstance.

Further, even if the new statute did require the defendant to prove the existence of particular mitigating circumstances to all twelve jurors, this change in the law would not concern the burden of proof or the quantum of evidence necessary to meet that burden. Therefore, it would not constitute an *ex post facto* law. See *Hameen v. Delaware*, 212 F.3d 226, 245-46 (3rd Cir. 2000) (new law eliminated the possibility that a defendant would receive a life sentence if one juror refused to vote for death, court found no *ex post facto* violation.)

5. The defendant's claim that the new statute requires a defendant to prove to twelve triers of fact rather than one that the mitigation warrants leniency.

The defendant next contends that the new statute constitutes an *ex post facto* law because it requires him to prove to twelve triers of fact rather than one that the mitigation that he has proved to exist warrants leniency. This claim is also incorrect. The new statute indeed requires all twelve jurors to agree if the verdict imposes the death penalty. However, the statute does not provide that, in order to *avoid* the death penalty, a defendant must convince all twelve jurors that a verdict less than death is warranted. If the jurors do not unanimously agree on the existence of any aggravating circumstances at the aggravation phase, they are dismissed, and a new jury is impaneled. That new jury cannot reconsider aggravating circumstances that the prior jury unanimously found to not be

proved. If that second jury cannot reach a verdict, the trial court then must impose a sentence of life or natural life imprisonment.

Similarly, under the new law, if the penalty phase jury cannot reach a verdict, a new jury is impaneled. If that second jury cannot reach a verdict, the trial court must then impose a sentence of life or natural life imprisonment.

It follows that the defendant is wrong when he claims that if he does not convince all twelve jurors that the death penalty is not appropriate, death will be imposed. If he convinces even one of the jurors that death is not appropriate, a mistrial is declared, and the process begins anew. If, during the second proceedings, he again convinces just one juror that death is not appropriate, then he avoids the death penalty completely.

Further, the fact that the defendant must now convince twelve persons rather than one in order to obtain an acquittal of the death penalty does not affect his *burden of proof*. *Hameen v. Delaware, supra*. The “burden of proof” is defined as “[a] party’s duty to prove a disputed assertion or charge.” *Black’s Law Dictionary* (7th Ed. 1999). Clearly, the character of the fact-finder does not alter this duty. This new requirement that the defendant convince twelve triers of fact that a sentence less than a verdict of death is appropriate in order to obtain an acquittal of the death penalty does not alter his burden of proof or the quantum of evidence necessary to meet that burden. Accordingly, it does not constitute an *ex post facto* law.

B. The new death penalty statute did not redefine the crime of capital murder or create a new crime in violation of the ex post facto provisions.

The defendant's next assertion is that, according to *Ring*, the aggravating circumstances that the State must prove in order to justify the death penalty are now elements of the crime of "capital murder." The defendant claims that this holding constituted the creation of a new crime and that the *ex post facto* provisions prohibit application of that "new crime" to him. This claim is without merit.

Contrary to the defendant's contention, the *Ring* court did not hold that the aggravating circumstances constituted elements of the crime of first degree murder. That court instead stated that the aggravating circumstances constituted the "functional equivalent of an element of a greater offense."² Contrary to the defendant's claim, the Court did not hold that there was actually a greater offense of "capital murder," of which the aggravating circumstances were elements. The Court has stated in the past that "[a]ggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death or life imprisonment." *Poland v. Arizona*, 476 U.S. 147, 156 (1986) (quoting *Bullington v. Missouri*, 451 U.S. 430, 438 (1981)). Neither *Ring* nor *Apprendi* altered that characterization; aggravating circumstances are not elements of any crime.

² *Apprendi v. New Jersey*, 530 U.S. 466, 494, n. 19 (2000), *quoted in Ring v. Arizona*, ___ U.S. ___, 122 S.Ct. 2428, 2443 (2002).

In *Collins v. Youngblood*, 497 U.S. 37, 51 (1990), the Court stated, “[t]he right to jury trial provided by the Sixth Amendment is obviously a ‘substantial’ one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* Clause.” Applying this principle to the defendant’s *ex post facto* claim shows that it is meritless. The fact that *Ring* held that defendants are entitled to a jury trial on aggravating circumstances does not mean that aggravating circumstances are elements of a crime, nor does it change the definition of the crime of first degree murder.

Further, even if the aggravating circumstances were somehow elements of a new crime of “capital murder,” application of this new law to the defendant would not offend *ex post facto* guarantees. As stated in Section II (A) above, a law is *ex post facto* only if it “[1] makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. ... [2] *aggravates a crime* or makes it *greater* than it was, when committed. ... [3] *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. ... [or] [4] alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender.*” See *Carmell, supra*, 529 U.S. at 522 (quoting *Calder*, 3 Dall. at 390)(emphases in original). Creating a crime of “capital murder,” with the aggravating circumstances included as elements, meets none of these criteria. The defendant was on notice, at the time he committed his offenses, of the crime of first degree murder, with its potential

penalty of death. Redefining this offense as “capital murder” would not criminalize otherwise innocent conduct, aggravate the crime the defendant committed, change the potential punishment, or alter the rules of evidence. Thus, the defendant’s *ex post facto* claim must fail, even if *Ring* somehow created a new crime of “capital murder” in Arizona.

C. *Dobbert v. Florida* is directly on point and demonstrates that the changes in the death penalty scheme in Arizona do not constitute *ex post facto* laws.

1. *Dobbert* in general, and as applied to Arizona’s death penalty jurisprudence.

In *Dobbert v. Florida*, 432 U.S. 282 (1977), the United States Supreme Court held that when Florida revised its death penalty statute, it did not violate the *ex post facto* prohibition of the constitution. In *Dobbert*, the defendant was convicted of first degree murder. Under the death penalty statute in effect at the time of the crimes, a defendant in Florida was sentenced to death by the judge. *Dobbert*, 432 U.S. at 284. That Florida death penalty statute also provided that “a person convicted of a capital felony was to be punished by death unless the verdict included a recommendation of mercy by a majority of the jury.” *Id.*, 432 U.S. at 288.

The United States Supreme Court’s opinion in *Furman v. Georgia*, 408 U.S. 238 (1972), invalidated Florida’s death penalty statute as it existed at the time *Dobbert* committed his crimes. Florida then enacted a new statutory scheme instituting a bifurcated sentencing scheme, with an advisory verdict by the jury,

with the judge either following that recommendation or making his own ruling. *Dobbert*, 432 U.S. at 288-289.

Dobbert was given a death sentence under that new law. In the United States Supreme Court, *Dobbert* argued that the change in the role of the judge and the jury “constitutes an *ex post facto* violation.” *Dobbert*, 432 U.S. at 292. The United States Supreme Court disagreed and held that the change was procedural and there was no *ex post facto* violation. *Id.* The Court reasoned that “[e]ven though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*.” *Id.*, 432 U.S. at 293. “The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime.” *Id.*, 432 U.S. at 293-294.

The Arizona Supreme Court has followed the reasoning of *Dobbert* with regard to procedural changes in death penalty law. In *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), the Arizona Supreme Court declared that the restriction regarding mitigating circumstances in the death penalty statute was unconstitutional because it did not allow the sentencing judge to consider *all* mitigating circumstances. In upholding the application of the new statute to pending cases, the court noted that it was “only concerned with a procedural change and one which increases the rights of the defendant in death penalty cases. We do not believe there is an *ex post facto* problem. We find no error.” *Id.* 120 Ariz. at 454, 586 P.2d at 1266.

In *Knapp v. Cardwell*, 667 F.2d 1253 (9th Cir. (Ariz.) 1982), the Ninth Circuit agreed with the Arizona Supreme Court that the change in Arizona's death penalty statute did not violate *ex post facto* provisions. Citing *Dobbert*, the Ninth Circuit held that the change in the law was procedural. The court stated that the “only effect was to enlarge the ability of defendants to introduce mitigating circumstances at sentencing. Thus, no *ex post facto* problems arise[,] even with respect to those appellants tried and sentenced before *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978).” *Knapp*, 667 F.2d at 1263.

Under *Dobbert*, *Watson* and *Knapp*, it is clear that the State can impose new procedural changes on pending capital cases. Cases that are more recent show that United States Supreme Court has gone even farther in restricting its *ex post facto* analysis. In *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995), the Court stated that its *ex post facto* analysis had changed in focus.

Our opinions in *Lindsey*,³ *Weaver*,⁴ and *Miller*⁵ suggested that enhancements to the measure of criminal punishment fall within the *ex post facto* prohibition because they operate to the “disadvantage” of covered offenders. ... But that language was unnecessary to the results in those cases and is inconsistent with the framework developed in *Collins v. Youngblood*.⁶ After *Collins*, the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of “disadvantage,” nor ... on whether an amendment affects a prisoner’s “*opportunity* to take advantage of provisions for early release,” ... but on *whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable*.

³ *Lindsey v. Washington*, 301 U.S. 397 (1937).

⁴ *Weaver v. Graham*, 450 U.S. 24 (1981).

⁵ *Miller v. Florida*, 482 U.S. 423 (1987).

⁶ *Collins v. Youngblood*, 497 U.S. 37, 41 (1990).

Id., 514 U.S. at 506, n. 3 (emphasis added).

The amendments to Arizona's death penalty statute do not change the aggravating factors required to establish imposition of the death penalty. The aggravators still must be proved by the State beyond a reasonable doubt. Defendants are still entitled to present evidence both of statutory and non-statutory mitigation. The penalty remains the same – death or life imprisonment. The change is simply one of the jury (rather than the judge) determining the existence of, and weighing, the aggravating and mitigating circumstances. The definition of the crime and the penalty remain the same. There is adequate “fair notice.” Therefore, the application of the changes in the death penalty procedures to the defendant does not violate *ex post facto* prohibitions.

2. *Dobbert* indicates that application of Arizona's new sentencing statute to the defendant will not violate *ex post facto* provisions.

The defendant claims that *Dobbert's* determination – that a change in the roles of the judge and jury in capital sentencing proceedings was procedural in nature and therefore not violative of the *ex post facto* provision – is no longer persuasive authority. He argues that the *Ring* Court held that aggravating circumstances are now elements of the crime, and contends that this is not merely a procedural change in the law. Thus, he argues that the *ex post facto* analysis articulated in *Dobbert* does not apply to this change.

The defendant's claim is fundamentally flawed because, as previously discussed herein, the United States Supreme Court did not hold in *Ring* that aggravating circumstances are now elements of the crime. The fact that the

Court held that defendants are entitled to a jury trial on those factors does not demonstrate that they are actual elements of any crime. The changes to Arizona's death penalty law are procedural in nature, and *Dobbert* does apply.

The defendant also contends that *Dobbert* is distinguishable in that its determination that the changes in Florida's death penalty procedure did not violate *ex post facto* prohibitions was based, in part, on the fact that the changes in Florida's death penalty laws worked to the defendant's advantage. The defendant argues that, because the changes in Arizona's death penalty procedures are not similarly advantageous to defendants, *Dobbert* does not provide persuasive authority demonstrating that the changes do not violate *ex post facto* provisions. This argument is fundamentally flawed as well.

Although the *Dobbert* Court acknowledged that the changes in Florida's death penalty procedures were "ameliorative" to defendants, its holding that the new law was not *ex post facto* was based on the fact that the changes were procedural in nature. The Court observed that "[i]t is axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law." *Dobbert*, 432 U.S. at 294. However, the Court also held "[e]ven though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*." *Dobbert*, 432 U.S. at 293. Thus, the fact that the Court found the changes in the law to be beneficial to *Dobbert*, it based its decision regarding whether the new law was *ex post facto* on the procedural nature of the changes.

In *Collins v. Youngblood*, *supra*, the Court reiterated that the ameliorative nature of changes in law is not the determining factor in deciding whether a new

law is *ex post facto*. There the Court specifically held that whether a new law will work to the disadvantage of a defendant is simply not a consideration in determining whether it constitutes an *ex post facto* law. *Collins*, 497 U.S. at 47-50.

Thus, it is clear that the ameliorative or punitive nature of changes in a law is not a material factor in determining whether a law violates the *ex post facto* provisions. Contrary to the defendant's claims, it was not a deciding factor in *Dobbert*. Therefore, even if Arizona's new statute is more disadvantageous or burdensome to defendants, *Dobbert* still demonstrates that the changes do not violate the *ex post facto* provisions.

Moreover, the alleged disadvantages the defendant claims are either not disadvantages recognized by *ex post facto* analysis, are not changes from the previous law, or are not properly before this Court because defendant lacks standing to complain about the alleged disadvantage.

a. Evidence at trial is deemed admitted at the aggravation and penalty phases of the sentencing proceedings.

The defendant claims that the new statutory reference to the fact that evidence offered at the trial is deemed admitted at the later sentencing phases is a change to the current law and allows the State to "argue those same facts up to three times." The defendant is mistaken, as there is no change in the law in this regard. Former A.R.S. § 13-703(D) provided that evidence admitted at the trial "shall be considered without reintroducing it at the sentencing proceeding."

Whether the old statute or the new one applied, the State was, and is, free to argue the facts as many times as it is relevant.

b. The defendant's claim that he is denied time to adequately prepare for the State's Notice of Aggravators.

The defendant claims that the new statute changes the amount of time in which defendants have to prepare to defend against the State's aggravation evidence. He argues that the statute requires the State only to give notice of the aggravators prior to trial, with no time specified. The defendant then claims that the old procedure under Rule 15.1(g)(2), Ariz. R. Crim. P., required the State to notice aggravating circumstances 10 days after the jury's guilty verdict, and then the defense got as much time as the defense needed.

The defendant is playing fast and loose with the rules. The defendant is correct that Rule 15.1(g)(2) required the State to notice aggravators within 10 days after the verdict. Under the Rules, however, the date of sentencing was to be held between 60 and 90 days after verdict. Rule 26.3(c), Ariz. R. Crim. P. The trial court could extend the time for good cause, but the presumption under the Rule was that 50 to 80 days after the State noticed aggravation, the sentencing would occur. Obviously, most defendants asked for, and received, numerous extensions.

While the new statute does not specify a date by which the State must file its notice of the aggravators, Rule 15.1(g)(1) provides the deadline by which the State has to file its notice of intent to seek death. Under the new statute, when the State files its notice of aggravating circumstances, if the defense needs more

time to prepare prior to trial, the defense may file a motion for extension of time under Rule 8. It hardly violates *ex post facto* if the defense is filing a motion for extension of time to prepare under Rule 8 now, versus Rule 26.3 previously.

Finally, the defendant has made no showing that he has standing to raise this objection. He has made no claim that he is prejudiced by late disclosure of aggravating circumstances.

c. The defendant's *ex post facto* claim concerning the lack of a presentence report to be provided under the new death penalty proceedings.

The defendant claims that the new Arizona death penalty scheme violates the *ex post facto* prohibition because he will not have a presentence report to rely on at sentencing under the new procedures. This is an odd claim. The presentence report writer is not obligated to produce favorable information about a defendant. In fact, many times the presentence report writer uncovers damaging evidence about a defendant's character and background and reports it to the court at the time of sentencing. Under the new sentencing scheme, unless the State presents this damaging evidence, it is not presented to the court at all. The defendant is free to present any evidence he so desires under the new scheme. In essence, what the defendant is arguing is that he is disadvantaged by not having a "neutral party from the County Probation Department" prepare an investigative report that may not be helpful to him. This is clearly not a disadvantage.

d. The defendant's claim that under the new rules, he will receive no special verdict by the jury.

The defendant is incorrect that the jury will not prepare a detailed verdict. He states that the special verdict "required the judge to set forth his factors for imposing a life or death, forcing him to give careful consideration to his decision." However, 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 court to list those factors that the court had found. A.R.S. § 13-703(E). While courts were *encouraged* to do more, courts were not statutorily or constitutionally *mandated* to do more. *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 this case will serve the same function.

e. The defendant's claim that the statutory change alters the standard of proof that the State has in rebutting mitigation.

The defendant next claims that the amended statute contains "no standard of proof required of the State to rebut evidence of mitigation" and that the previous standard was that the State was bound by the Rules of Evidence. The defendant is in error. Former A.R.S. § 13-703(D) provided:

Any information relevant to any mitigating circumstances included in subsection H of this section may be presented by either the

prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials.

There is no change between the new statute and the old on this point. Moreover, there is no constitutional requirement that the Rules of Evidence apply to the State in a capital sentencing. *Johnson v. Wainwright*, 778 F.2d 623, 632 (11th Cir. 1985).

f. The defendant's claim that A.R.S. § 13-703.01(G) changes the nature of the evidence that the state can produce at the penalty phase.

For the reasons stated previously, the State does not agree that if the defendant's proposition were true, it would create an *ex post facto* problem. However, as noted earlier, former A.R.S. § 13-703(D) specifically allowed either side to present whatever evidence or information it thought was relevant to mitigation. The State was not limited to presenting only rebuttal evidence. The defendant is in error.

g. The defendant's claim that the replacement jury violates his rights.

This is a clear example of a claim that this defendant does not have standing to raise. There is no "replacement jury" in this case. This issue is clearly not ripe.

Moreover, the California Supreme Court has addressed and rejected the arguments that the defendant raises.

Defendant first argues that penalty retrials are unconstitutional *per se*. He reasons juries must view a defendant as cloaked with a presumption of innocence, but a jury empanelled for a retrial of penalty would not do so. Moreover, he contends a jury

that had just convicted a defendant of capital crimes would consider as a mitigating factor at the penalty phase any lingering doubts it had of the defendant's guilt, whereas a second penalty jury would not harbor such doubts. He claims use of a different jury to decide questions of guilt and penalty violates his federal constitutional rights to due process, equal protection, a fair trial, and to a reliable and proportional sentence in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. He also claims the penalty retrial violates analogous guarantees in the California Constitution.

That a jury that has just convicted a defendant would view him as cloaked with innocence seems unlikely. In any event, as defendant concedes, we rejected these precise arguments in previous cases.

People v. Gurule, 28 Cal.4th 557, 645-46, 51 P.3d 224, 284, 123 Cal.Rptr.2d 345, 416 (2002) (citing *People v. Davenport*, 906 P.2d 1068 (Cal. 1995)).

h. The defendant's claim that A.R.S. § 13-703.01(M) allows alternate jurors to serve in the penalty phase of a trial.

This issue is not ripe because the defendant has not had an alternate juror designated to serve in a penalty phase of his trial. Moreover, the defendant does not show how the procedure meets any of the *ex post facto* prohibitions.

i. A.R.S. § 13-703.01(N) provides for resentencing for defendants who have their sentences vacated on appeal.

This issue is not ripe because the defendant has not had his sentence overturned on appeal. Moreover, the claim is meritless. "The Ex Post Facto Clause does not confer upon this defendant an unalterable right to be sentenced by the jury which found his guilt or never to be resentenced in any fashion."

Evans v. Thompson, 881 F.2d 117, 121 (4th Cir. 1989).

j. The defendant's claim that, under A.R.S. § 13-703.01(R), a defendant cannot plead guilty, depriving the use of a strategy of arguing that he had remorse or accepted responsibility.

The defendant does not have standing to raise this issue unless it is his intent to plead guilty. Moreover, the assertion is just wrong. The statute does not prevent the defendant from pleading guilty. The defendant may so plead. What the statute requires is that the jury must impose the sentence unless the State agrees to have the court do so. A defendant may plead guilty, but then he must have the jury determine if he is showing remorse or accepting responsibility.

h. The defendant's claim that the new law removes independent review from the Arizona Supreme Court.

The defendant is wrong on this assertion, because independent review would still apply to him. The statute removes independent review 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). However, the defendant committed his crime before the new statute took effect. Thus, if the defendant is convicted and the death sentence is imposed, he will have his sentence reviewed by the Arizona Supreme Court under independent review.