

Response to defendant's motion that the death penalty and the capital sentencing statutes are unconstitutional:

The Arizona Supreme Court has repeatedly rejected defendant's arguments that the death penalty and the capital sentencing statutes are unconstitutional.

Defendant raises numerous objections to the death penalty and Arizona's capital sentencing statutes. The Arizona Supreme Court has consistently rejected these arguments. See, e.g., *State v. Roseberry*, 210 Ariz. 360, 111 P.3d 402, 416-417 (2005); *State v. Carreon*, 210 Ariz. 54, 107 P.3d 900, 921-922 (2005); *State v. Canez*, 202 Ariz. 133, 165-166, 42 P.3d 564, 596-597 (2002). Defendant acknowledges that the law does not support his position but nevertheless raises these objections. The State maintains that defendant's arguments have no merit and should continue to be rejected.

1. The death penalty has not been deemed cruel and unusual punishment.

Defendant argues that the death penalty is per se cruel and unusual punishment, which is prohibited by the Eighth Amendment to the United States Constitution. "Both the United States Supreme Court and this Court have rejected this argument. See *Gregg v. Georgia*, 428 U.S. 153, 186-87, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *State v. Salazar*, 173 Ariz. 399, 411, 844 P.2d 566, 578 (1992)." *State v. Carreon*, 210 Ariz. 54, 107 P.3d 900, 921 (2005). In addition, defendant has provided no authority to support his position that the death penalty is unconstitutional if it does not serve a deterrent purpose.

Defendant also argues that death by lethal injection violates the Eighth Amendment. However, the court has held that “death by lethal injection is not cruel and unusual punishment.” *State v. Hinchey*, 181 Ariz. 307, 315, 890 P.2d 602, 610 (1995); *accord*, *State v. Van Adams*, 194 Ariz. 408, 422, 984 P.2d 16, 30 (1999). Housing a defendant on death row for several years prior to his execution also has not been deemed cruel and unusual punishment. *State v. Schackart*, 190 Ariz. 238, 259, 947 P.2d 315, 336 (1997); *Wilcher v. State*, 863 So.2d 776, 834 (Miss. 2003).

2. The capital sentencing statutes do not insufficiently channel the sentencer’s discretion nor fail to narrow the class of death-eligible persons.

Defendant contends that the sentencing statutes do not adequately guide the sentencer’s discretion regarding the finding of aggravating and mitigating factors. This argument has been rejected. “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).

3. The Constitution does not require proportionality review.

Defendant argues that the court should compare his conduct with that of other defendants who did or did not receive the death penalty. However, proportionality review is not mandated by the Constitution nor our courts. See, e.g., *State v. Van Adams*, 194 Ariz. 408, 423, 984 P.2d 16, 31 (1999); *State v. Salazar*, 173 Ariz. 399, 416, 844 P.2d 566, 583 (1992); *State v. Greenway*, 170 Ariz. 155, 171, 823 P.2d 22, 38 (1991).

4. The burden of proof is not improperly shifted to defendant by requiring defendant to prove mitigating factors.

A.R.S. § 13-703(E) requires the trier of fact to impose a sentence of death upon finding one or more of the enumerated aggravating circumstances and then determining “that there are no mitigating circumstances sufficiently substantial to call for leniency.” Defendant argues that requiring him to prove the existence of mitigating factors unconstitutionally shifts the burden of proof. The court rejected this argument in *State v. Anderson*, 210 Ariz. 327, 111 P.3d 369, 388 (2005): “[I]t is constitutional to place the burden of proving mitigation on the defendant, *State v. Watson*, 120 Ariz. 441, 447, 586 P.2d 1253, 1259 (1978), a position endorsed by the United States Supreme Court, *Walton v. Arizona*, 497 U.S. 639, 649-51, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). . . .”

5. The capital sentencing statutes do not fail to weight mitigation appropriately.

Defendant argues that the sentencing statutes fail to weight mitigation appropriately because the sentencer is not required to consider the cumulative nature of mitigation nor make specific findings as to each mitigating factor. The court found this contention meritless in *State v. Van Adams*, 194 Ariz. 408, 423, 984 P.2d 16, 31 (1999), and *State v. Spreitz*, 190 Ariz. 129, 151, 945 P.2d 1260, 1282 (1997).

6. The capital sentencing statutes do not limit full consideration of mitigation.

Defendant contends that the statutes prevent full consideration of mitigating factors because defendant must provide a “causal link” to the criminal act. However, the court “has rejected defendant’s argument that Arizona’s death penalty statute precludes the sentencer from considering all relevant, mitigating evidence.” *State v. Spears*, 184 Ariz. 277, 291, 908 P.2d 1062, 1076 (1996). In addition, the United States Supreme Court in *Tennard v. Dretke*, — U.S. —, 124 S.Ct. 2562, 2572 (2004), rejected a “nexus” test for mitigation evidence. However, the weight of the evidence may still be considered. “Once the jury has heard all of the defendant’s mitigation evidence, there is no constitutional prohibition against the State arguing that the evidence is not particularly relevant or that it is entitled to little weight.” *State v. Anderson*, 210 Ariz. 327, 111 P.3d 369, 392 (2005).

7. The prosecutor's exercise of discretion to seek the death penalty is not unconstitutional.

Defendant argues that the prosecutor's exercise of discretion to seek the death penalty violates defendant's right to due process and to be free from cruel and unusual punishment. Our courts have rejected this argument. *State v. Smith*, 203 Ariz. 75, 81, 50 P.3d 825, 831 (2002); *State v. Rossi*, 146 Ariz. 359, 366, 706 P.2d 371, 378 (1985). "Defendant's argument that the statute does not adequately restrict a prosecutor's decision to seek the death penalty was rejected by the Supreme Court in *Gregg [v. Georgia]*, 428 U.S. at 199, 96 S.Ct. at 2937, 49 L.Ed.2d at 889. . . ." *State v. Salazar*, 173 Ariz. 399, 411, 844 P.2d 566, 578 (1992).

8. The death penalty is not applied in a discriminatory manner.

Defendant contends that Arizona's death penalty statute is applied in a manner that discriminates against poor, young, male defendants. This argument has been rejected. *State v. Smith*, 203 Ariz. 75, 81, 50 P.3d 825, 831 (2002); *State v. Stokley*, 182 Ariz. 505, 516, 898 P.2d 454, 465 (1995).

9. New statutes providing for jury sentencing do not violate the prohibitions against ex post facto laws.

In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002) (*Ring II*), the court held that capital defendants were entitled to jury determination of any fact that would increase their maximum punishment. In response to *Ring II*, the Arizona legislature amended the capital sentencing procedures in A.R.S. §§ 13-703 and

13-703.01 so that the jury would be the trier of fact in the aggravation and penalty phases.

Defendant argues that because the charged offenses occurred before the statutes were amended, applying the amendments to him would violate the prohibitions against ex post facto laws. Our supreme court rejected this argument in *State v. Ring*, 204 Ariz. 534, 547, 65 P.3d 915, 928 (2003) (*Ring III*), holding that the new statutes were clearly procedural and thus did not violate the ex post facto clause.

In *State v. Carreon*, 210 Ariz. 54, 107 P.3d 900 (2005), defendant asserted that retroactive application of the new death penalty statute violated the ex post facto clauses of the state and federal constitutions. Citing *Ring III*, the court stated that it had “already held that this new sentencing scheme does not violate the federal or state Ex Post Facto Clause.” *Id.* at —, 107 P.3d at 906. The court also stated that the United States Supreme Court reached the same conclusion in *Schiro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519 (2004), by finding that *Ring II* had announced a new procedural, rather than substantive, rule. “Because *Ring II* announced a new procedural rule, application of the new statute to Carreon does not violate either the federal or state Ex Post Facto Clause.” *Carreon*, 210 Ariz. at —, 107 P.3d at 907; *accord*, *State v. Roseberry*, 210 Ariz. 360, 111 P.3d 402, 406 (2005).

10. The double jeopardy clause does not prohibit resentencing under the amended procedures.

Defendant argues that sentencing him under the amended procedures violates the double jeopardy clauses of the United States and Arizona Constitutions. In *State v. Ring*, 204 Ariz. 534, 65 P.3d 915 (2003), the court held that jury sentencing under the new statutes did not violate the double jeopardy clauses. The *Ring* defendants at their original trials had not been acquitted for double jeopardy purposes but had received death sentences. “The fact-finder made those findings necessary to impose a death sentence. In no sense has a fact-finder concluded that the state failed to prove aggravating circumstances beyond a reasonable doubt. On remand, no defendant can receive a sentence greater than that which already has been imposed. Accordingly, we hold that jeopardy has not attached.” *Id.* at 550, 65 P.3d at 931. In addition, the factfinder at resentencing is not barred from imposing the death penalty based upon an aggravating factor rejected at the first sentencing. *Poland v. Arizona*, 476 U.S. 147, 155 (1986).

11. Aggravating factors are not required to be alleged in the charging document.

Defendant argues that the indictment did not allege the aggravating circumstances that would raise murder to capital murder. In *McKaney v. Foreman*, 209 Ariz. 268, 100 P.3d 18, 23 (2004), the court held that aggravating factors need not be alleged in the indictment or information. In *State v. Carreon*, 210 Ariz. 54, 107 P.3d 900, 907 (2005), defendant asserted that “permitting the State to amend his indictment to include aggravating factors violated his rights under the federal and state constitutions.” The court stated that it “recently

rejected this argument in *McKaney*. . . . Arizona’s method for providing notice to defendants of the aggravating factors that the state will seek to prove at sentencing violates neither the Arizona nor federal constitutional right to a jury trial.” *Id.*

12. The “cruel, heinous or depraved” aggravating factors have been found constitutional.

Defendant argues that the aggravating factors in A.R.S. § 13-703(F)(6) — “defendant committed the offense in an especially heinous, cruel or depraved manner” — are unconstitutional in that the terms are not defined. “The United States Supreme Court has specifically found that our construction of these aggravating factors meets constitutional requirements. *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d at 529 (1990). . . .” *State v. Stanley*, 167 Ariz. 519, 531, 809 P.2d 944, 956 (1991). “Defendant’s argument that the aggravating circumstance of cruel, heinous and depraved is unconstitutional was rejected by the Supreme Court in *Walton*. . . .” *State v. Salazar*, 173 Ariz. 399, 411, 844 P.2d 566, 578 (1992). “The (F)(6) aggravating circumstance . . . is not unconstitutionally vague as construed by this court.” *State v. Gulbrandson*, 184 Ariz. 46, 72, 906 P.2d 579, 605 (1995).

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