

STATE'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE STATE'S NOTICE OF AGGRAVATING FACTORS

A.R.S. § 13-703.01, the new Arizona statute concerning the State's duty to file a notice of aggravating factors, and Rule 15.1(g)(2), Ariz. R. Crim. P., are constitutional and do not violate any of the defendant's rights.

The State of Arizona, by and through undersigned counsel, in response to the defendant's Motion to Strike State's Notice of Aggravating Factors, asks this Court to deny the motion. This response is supported by the attached Statement of Facts and Memorandum of Points and Authorities.

STATEMENT OF FACTS

The State filed its Notice of Intent to Seek the Death Penalty on February 21, 2001. At all times since February 21, 2001, including all court hearings, conversations between counsel, and in written pleadings, the defendant has acknowledged that he is fully aware that the State intends to seek the death penalty against him.

On August 1, 2002, in response to the decision in *Ring v. Arizona*, ___ U.S. ___, 122 S.Ct. 2482 (2002), Arizona enacted a new death penalty statute, A.R.S. § 13-703.01. On October 1, 2002, also in response to the *Ring* decision, a new rule of procedure, Rule 15.1(g)(2), Ariz. R. Crim. P., was passed, requiring the State to give notice of the aggravating factors it will seek to prove within sixty days after defendant's arraignment.

On November 26, 2002, the State filed its Notice of Aggravating Factors, which set forth the factors listed in A.R.S. § 13-703(F) that the State intends to prove at the aggravation phase of the defendant's trial (assuming the State prevails at the guilt stage of defendant's trial). Firm trial in this matter is currently set for January 23, 2003.

MEMORANDUM OF POINTS AND AUTHORITIES

The State's notice of aggravating factors complies with new Rule 15.1(g) and provides effective notice to defendants of those aggravating factors that the State will attempt to prove at the aggravation trial.

In *Lankford v. Idaho*, 500 U.S. 110, 119 (1991), the United States Supreme Court established the standard for what notice is required for a defendant in a capital case. The Court noted that “the terms of the statute,” plus actual notice of the state’s intent to seek death, provided the appropriate notice. *Id.* Under *Lankford*, once notice is provided, due process is not violated unless a defendant is misled regarding the nature of the capital sentencing hearing. *State v Wood*, 132 Idaho 88, 105 n.3, 967 P.2d 702, 719 n. 3 (1998); *Commonwealth v. Pirela*, 556 Pa. 32, 44 n. 9, 726 A.2d 1026, 1032 n.9 (1999); *People v. Brown*, 169 Ill.2d 132, 166, 661 N.E. 2d 287, 303 (1996) (after *Lankford*, “the prosecution is not obligated to specify those aggravating factors on which it intends to rely for eligibility”).

The Arizona Rules of Criminal Procedure provide for additional notice to a capital defendant. Prior to the recent changes in the rules mandated by the legislation passed in response to the *Ring* decision, Rule 15.1(g), Ariz. R. Crim. P., required the prosecution to notify the defendant before trial of its intent to seek the death penalty, and to provide the specific list of aggravators within ten days after the verdict. The new Rule 15.2(g)(2), Ariz. R. Crim. P., provides that the State will provide the list of aggravators along with the notice of intent to seek the death penalty, within sixty days of defendant’s arraignment. This rule became effective October 1, 2002.

In this case, the State properly filed its notice of intent to seek death penalty under the old Rule 15.1(g). The filing of that notice, combined with the terms of A.R.S. § 13-703(F), satisfied any due process requirements under *Lankford*.

The amendment to the rule required the State to file within sixty days of arraignment. Obviously, in this case, that time period had run out long before the amendment became effective. Allowing the State sixty days after the effective date of the new rule would mean the State should have filed by December 1, 2002. That was done, as the State filed its notice of aggravating factors on November 26, 2002.

II. THE DEFENDANT HAS HAD ACTUAL NOTICE OF THE AGGRAVATING FACTORS LISTED BY THE STATE FOR A TIME SUFFICIENT TO PREPARE A DEFENSE.

The aggravating factors listed in the State's notice were as follows:

A.R.S. § 13-703(F)(2): "The defendant was previously convicted of a serious offense, whether preparatory or completed." (Defendant Flores only);

A.R.S. § 13-703(F)(5): "The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." (Defendants Flores, Page and Pecina);

A.R.S. § 13-703(F)(6): "The defendant committed the offense in an especially heinous, cruel or depraved manner." (Defendants Flores, Page and Pecina);

A.R.S. § 13-703(F)(8): "The defendant has been convicted of one or more homicides as defined in § 13-1101 which were committed during the commission of this offense." (Defendants Flores, Page and Pecina).

For some time, the defense has known the facts underlying each of the noticed aggravating factors. Certainly defendant Flores knew he had been convicted on Manslaughter, a serious offense under the law. The defendant knew, by virtue of statements in the police reports, that the State's witnesses (the surviving victims) alleged the murders were committed in the context of a drug ripoff, and that the drugs in the victims' possession were taken by the defendants. Hence, the allegation the offense was committed for pecuniary gain was no surprise. Because four people were killed during the offense, the State's intent to offer proof as to A.R.S. § 13-703(F)(8) would be obvious to

any lawyer defending the defendant here particularly the two experienced counsel representing him in this matter. Finally, the State's notice of the aggravating factors of "especially heinous, cruel or depraved" under A.R.S. § 13-703(F)(6) could not have been unforeseen in this case. The defendant's attorneys interviewed the medical examiner that conducted the autopsies on the victims, and who is expected to testify at trial. From interviewing the medical examiner, defense counsel learned that two of the victims were beaten, bound, gagged, and suffocated by having plastic bags taped over their heads.

Both the concerns of due process and the rules were satisfied in this case. The defendant claims he has only fifty days to prepare to defend against these issues. However, the new statute did not change the factors that make a defendant death eligible. Furthermore, the defendant did not identify what aggravators that he was not aware of prior to the State's filing. This is not surprising, as the defendant has been aware of all the noticed factors for quite some time, and is simply trying to play technicalities.

Therefore, based upon the foregoing, the State respectfully requests this Court to deny the defendant's motion in its entirety.