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7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF MOHAVE**

9 **STATE OF ARIZONA,**

10 Plaintiff,

11 vs.

12 **JUSTIN JAMES RECTOR**

13 Defendant.

NO: CR 2014 - 01193

DEFENDANT'S MOTION TO
PRECLUDE STATE FROM OFFERING
ANY EVIDENCE AT PENALTY PHASE
NOT SPECIFIC TO DEFENDANT'S
MITIGATION EVIDENCE

(ASSIGNED TO THE HON. LEE JANTZEN)

14 Defendant Justin James Rector, by and through undersigned counsel, moves
15 this court to preclude the State from offering any evidence at the penalty phase that is
16 not specific to the mitigation evidence offered by the Defendant. Arizona's death
17 penalty scheme does *not* afford the State an unfettered opportunity to introduce any and
18 all evidence at the penalty phase. First, although the State may offer any evidence that
19 constitutes mitigation, as well as any evidence that rebuts the mitigation evidence
20 offered by the Defendant, the State may *not* offer general evidence that constitutes non-
21 statutory aggravation. Second, the State is not entitled to offer evidence that is unduly
22 prejudicial. Last, the State may offer hearsay only if it supported by some minimal
23 indicia of reliability, and the Defendant has an opportunity to rebut or deny the evidence.
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S8015CR201401193

1 This is requested for the reasons and authority contained in the Memorandum of Point
2 and Authorities attached hereto and incorporated herein.

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4 RESPECTFULLY SUBMITTED This 7th day of September, 2015.

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7 
GERALD T. GAVIN
Co-Counsel for Mr. Rector

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9
10 
RON GILLO
Co-Counsel for Mr. Rector

11 MEMORANDUM OF POINTS AND AUTHORITIES

12 THE STATE MAY OFFER ONLY EVIDENCE THAT CONSTITUTES
13 MITIGATION EVIDENCE OFFERED BY DEFENDANT

14 The language in A.R.S. §13-751(G) that allows the State to introduce "any
15 evidence that demonstrates that the defendant should not be shown leniency" was
16 intended to allow the State to offer evidence to rebut whatever the defendant offered,
17 not to open the door to non-stop statutory aggravation. The Arizona Supreme Court
18 has determined that in making the sentencing decision, the fact-finder can consider only
19 the "aggravating and mitigating circumstances that have been proven." See e.g. State
20 v. Gulbrandson, 184 Ariz. 46, 66, 906 P.2d 579, 599 (1995) ("In capital cases, the trial
21 court can give aggravating weight only to evidence that tends to establish an
22 aggravating circumstance enumerated in A.R.S. §13-751(F))1. Under the current
23 sentencing statutes, aggravating circumstances are limited to those specifically
24 enumerated in A.R.S. §§13-751(B),(C),(E). Hence, the jury can consider aggravation,
25 and weigh against mitigation, only those factors set forth in the statute and proven
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1 Effective January 1, 2009, A.R.S. §13-703 was renumbered. The current
number is 13-751.

1 beyond a reasonable doubt at the first phase of the proceeding. Any other factor or
2 circumstance urged in favor of the death penalty necessarily constitutes impermissible
3 non-statutory aggravation and cannot be considered by the fact finder.

4 The absence of a burden of proof concerning evidence offered by the State
5 during the penalty/mitigation phase supports the Defendant's contention. Had the
6 legislature intended to create a new species of aggravating factors, it surely would have
7 provided some burden or standard of proof for such factors. The legislature imposed a
8 burden of proof on the accused to prove mitigation; it is extremely unlikely that the
9 legislature would create a new form of non-statutory aggravation without placing some
10 burden on the prosecution. Such a scheme, whereby the accused would bear the
11 burden of proving reasons against a death sentence, but the State would bear no
12 burden of proving reasons for a death sentence, would violate the equal protection, due
13 process, and cruel and unusual punishment clauses of the Arizona and United States
14 Constitutions, as well as be a direct violation of the Court's ruling in Ring. See e.g.
15 State v. Bartholomew, 654 P.2d 1170 (Wash. 1982) (statute that allowed any
16 aggravation evidence regardless of rules of evidence violated state's due process and
17 cruel and unusual punishment clauses). In any event, where, as here, a statute may
18 be interpreted in more than one way, the Rule of Lenity supports the common-sense
19 interpretation urged by the defendant. See e.g. State v. Tarango, 185 Ariz. 208, 210,
20 914 P.2d 1300, 1302 (1996)(if "statute is susceptible to more than one interpretation, ...
21 doubt should be resolved in favor of the defendant."); Hughes v. Jorgenson, 203 Ariz.
22 71, 50 P.3d 821 (2002).

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25 It is easy to determine whether evidence is permissible rebuttal to a mitigating
26 circumstance or impermissible non-statutory aggravation: if it looks like a duck and
27 quacks like a duck...it's a duck. Evidence that does not address the evidence
28 presented by the defendant looks like non-statutory aggravation and its quack like non-

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1 statutory aggravation. And it is, in fact, non-statutory aggravation that is not permitted
2 under the Arizona sentencing scheme applicable to Defendant. Allowing non-statutory
3 aggravation in the final weighing when it has not been authorized by law will deny the
4 Defendant his due process right under the 14th Amendment and Article II, §4 of the
5 Arizona Constitution to be sentenced within the limits of Arizona law and his right to an
6 impartial jury under the 6th Amendment to the United States Constitution, and Article II,
7 §24 of the Arizona Constitution, and may result in the imposition of the death penalty in
8 violation of the 8th Amendment, and Article II, §15, of the Arizona Constitution.

9 Moreover, in this State, some Maricopa County trial courts have agreed with the
10 proposition that any evidence offered by the State in rebuttal must be specific to the
11 mitigation evidence offered by the defendant. *E.g. Minute Entry*, Hon. Warren Granville,
12 State v. Baldwin, Maricopa County Superior Court No. CR2002-006861, September
13 15th, 2004, attached hereto as Exhibit "A".² A broader reading of the statute allow any
14 and all evidence, regardless whether it relates to Defendant's mitigation evidence,
15 would lead to the conclusion that the statute is ambiguous, subjecting defendant's to
16 different rules depending upon the court to which their case is assigned, and rendering
17 death sentences arbitrary and capricious in violation of the 8th Amendment to the United
18 States Constitution and the corresponding Arizona Constitutional provision.

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20 **EVEN SOME RELEVANT EVIDENCE MUST BE EXCLUDED**
21 **IF IT IS UNDULY PREJUDICIAL**
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25 ² The defendant does not cite the decisions of other trial courts as legal
26 authority for his position that any evidence offered by the State must be
27 specific to the mitigation evidence Defendant has offered. Rather, Defendant
28 cites those decisions as evidence that the statute is ambiguous because it is
read markedly differently by different judges on the same bench, and that as such, it subjects similarly situated defendant's vastly
different rules...and thus renders Arizona's capital sentencing scheme
arbitrary and capricious in violation of both the United States and Arizona
Constitutions.

1 Because "death is different", the 6th, 8th, and 14th Amendments to the United
2 States Constitution and Article II, §§ 4, 15, and 24 of the Arizona Constitution require
3 that the court exclude relevant evidence under some circumstances. In Gardner v.
4 Florida, 430 U.S. 349 (1977), the United States Supreme Court determined that a death
5 sentence must be based on reason rather than emotion. Accordingly, a trial court must
6 look at the value of all evidence, including rebuttal evidence, and consider it in light of
7 potential prejudice under the heightened reliability requirements of the 8th Amendment.
8 That analysis may result in the exclusion of some relevant rebuttal evidence.

9 There is not doubt that reliability in death penalty proceedings must be the
10 primary consideration. The Court made this clear in Woodson v. North Carolina, stating:

11 "the penalty of death is qualitatively different from a sentence of
12 imprisonment, however long. Death, in its finality, differs more
13 from life imprisonment than a 100-year prison term differs from
14 one of only a year or two. Because of the qualitative difference,
15 *there is a corresponding difference in the need for reliability in
the determination that death is the appropriate punishment in
a specific case.*"

16 420 U.S. 280, 305 (1976)(emphasis added).

17 The difference between death penalty cases and others is "the basis of
18 differentiation in law in diverse ways." Williams v. Georgia, 349 U.S. 375, 391 (1955)
19 (footnote omitted). The United States Supreme Court has always insisted that the need
20 for procedural safeguards is particularly great where life is at stake. Years before the
21 Court established the right to counsel in all felony cases in Gideon v. Wainwright, 372
22 U.S. 335 (1963), it is recognized that right in capital cases, Powell v. Alabama, 287 U.S.
23 45, 71-72 (1932). In numerous cases over the years the Court has prohibited practices
24 in death penalty cases that were otherwise acceptable. See e.g. Bullington v. Missouri,
25 451 U.S. 430 (1981); Beck v. Alabama, 447 U.S. 625 (1980); Green v. Georgia, 442
26 U.S. 95 (1979)(per curiam); Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida,

1 430 U.S. 349 (1977); Eddings v. Oklahoma, 455 U.S. 104, 117-118 (1982)(O’Conner,
2 J. concurring); Beck v. Alabama, 447 U.S. 625, at 637-638 (1980).

3 Thus it is clear that “all relevant evidence” is not necessarily admissible. The
4 leading case on this issue, Gardner v. Florida, 430 U.S. 349 (1977), concerned the use
5 of presentencing investigative report by a Florida judge in determining whether to
6 impose the death sentence. The constitutional question arose because neither the
7 defendant nor his counsel were provided a copy of the report, much less an opportunity
8 to deny its contents. *Id.* at 353, 356. The Court found a denial of due process because
9 “the death sentence was imposed, at least in part, on the basis of information which the
10 defendant had no opportunity to deny or explain. *Id.* at 362.

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13 **HEARSAY IS ADMISSIBLE AGAINST DEFENDANT AT THE**
14 **PENALTY PHASE ONLY IF IT IS RELIABLE AND DEFENDANT**
HAS AN OPPORTUNITY TO ADDRESS IT

15 The State does not have an unfettered right to present any and all hearsay at the
16 penalty phase. As a threshold matter, the Due Process Clause of the 14th Amendment
17 requires that hearsay have some minimal indicia of reliability. United States v. Egge,
18 223 F.3d 1128 (9th Cir. 2000). Specifically, the hearsay must be supported by extrinsic
19 corroborating evidence before it can be admitted. *Id.* The United States Supreme Court
20 has repeatedly stressed that the 8th Amendment heightens the requirement for reliability
21 in capital cases. Woodson v. North Carolina, 428 U.S. 280, 305 (1976); *see also*
22 Godfrey v. Georgia, 446 U.S. 420, 427-428 (1980); Mills v. Maryland, 486 U.S. 367,
23 383-384 (1988), demanding that the sentence be provided with “accurate sentencing
24 information [as] an indispensable prerequisite to a reasoned determination of whether a
25 defendant shall live or die.” Greg v. Georgia, 428 U.S. 153, 190 (1976), and invalidating
26 “procedural rules that ten[d] to diminish the reliability of the sentencing determination.”
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1 Beck v. Alabama, 447 U.S. 625, 638 (1980). The Arizona Supreme Court has chosen
2 "clear and convincing" as the standard the trial courts must apply in determining
3 whether evidence of other acts allegedly committed by a defendant has the requisite
4 level of reliability to be admitted. See State v. Terrazas, 189 Ariz. 580, 584, 944 P.2d
5 1194, 1198 (1997)(stating that the clear and convincing standard "is consistent with the
6 due process owed under the federal and state constitutions"). This requirement applies
7 to any instance of defendant's conduct alleged by the State.

8 Moreover, the Due Process Clause requires that a defendant have "an
9 opportunity to either explain or deny" hearsay statements. State v. Greenway, 170 Ariz.
10 155, 161, 823 P.2d 22, 28 (1991). If witness or evidence that allows Defendant to
11 explain or deny the hearsay are no longer available, then Defendant lacks that
12 opportunity. Failure to require reliability and to provide Defendant an adequate
13 opportunity to address rebuttal evidence will violate Defendant's rights to Due Process
14 under the 14th Amendment to the United States Constitution, and Article II, §4, of the
15 Arizona Constitution and may result in the imposition of the death penalty in violation of
16 the 8th Amendment to the United States Constitution, and Article II, §15, of the Arizona
17 Constitution.

18 CONCLUSION

19 Defendant urges the Court to allow the State to present only evidence that rebuts
20 mitigation, not generalized non-statutory aggravation; to preclude evidence that is
21 prejudicial under the heightened reliability requirements for capital cases; and to
22 preclude any hearsay that is not reliable and which Defendant lacks the ability to explain
23 or deny based on loss of evidence due to passage of time, or for other reasons.
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1 ORIGINAL of the foregoing filed
2 this 7th day of October, 2015 with:

3 Clerk of Court
4 401 E Spring Street
5 Kingman Arizona 86401

6
7 COPY of the forgoing
8 Delivered this 7th day
9 Of May, 2015, to:

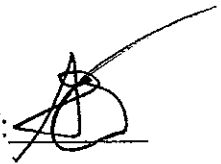
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