Mitigating Factors

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Mitigating Circumstances

A.R.S. §13-751(G)(1) MENTAL
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A.R.S. § 13-703(G)(2)
A.R.S. § 13-703(G)(3) A.R.S. § 13-703(G)(4)A.R.S. § 13-703(G)(5)COOPERATION
LACK OF CRIMINAL HISTORY
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LIFE SENTENCE AVAILABLE
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MODEL PRISONER
LENIENCY
REHABILITATION
REMORSE / GRIEF
RESIDUAL DOUBT/INNOCENCE
SENTENCING DISPARITY
STRESS
VICTIM'S ACTIONS
MISCELLANEOUS
IMPAIRMENT
NOT A FUTURE DANGER

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IMPAIRMENT

A.R.S. §13-751(G)(1) provides that it shall be a mitigating circumstance where “[t]he defendant’s capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was *significantly impaired*, but not so impaired as to constitute a defense to prosecution.”

This includes mental and drugs/alcohol.

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DURESS

A.R.S. § 13-751(G)(2) provides that it shall be a mitigating circumstance where “[t]he defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.”

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MINOR PARTICIPATION

A.R.S. § 13-751(G)(3) provides that it shall be a mitigating circumstance where “[t]he defendant was legally accountable for the conduct of another under the provisions of A.R.S. § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.”

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VICTIM'S DEATH NOT REASONABLY FORESEEABLE

A.R.S. § 13-751(G)(4) provides that it shall be a mitigating circumstance where “[t]he defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.”

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COOPERATION

[This category primarily consists of cases where the defendant argued that his cooperation with police and other law enforcement authorities was a mitigating circumstance. Two cases are included here where the defendant argued it was mitigating that the defendant cooperated with the presentence report writer. As the reader will note, the Court has found cooperation with law enforcement to be a mitigating circumstance on occasion when it has been proven, but it has only found it to be a substantial mitigating circumstance once. *See State v. Scott.* Where the cooperation is in the best interest of the defendant, the Court has stated that it is not a mitigating circumstance. *See State v. Thornton.*]

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LACK OF CRIMINAL HISTORY

[This category consists of cases where the defendant argued that his lack of a criminal record, or the lack of a criminal record of some type, such as violent felonies, was mitigating. Prior arrests, juvenile records and other prior bad acts have been considered in rebuttal of this evidence. This category does not contain cases where the defendant argued his good character, his current good behavior as a model prisoner, his ability to be rehabilitated, or his family background. *See good character, model prisoner, rehabilitation, and difficult childhood/family history sections.*]

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DIFFICULT CHILDHOOD/FAMILY HISTORY

Relevance/"Causal Link": A difficult family background may be a mitigating circumstance in determining whether a death sentence is appropriate. But a difficult family background, including child abuse, is not necessarily relevant without a showing that it affected the defendant's conduct in committing the crime. *State v. Sansing*, 206 Ariz. 232, 77 P.3d 70 (2003) (where there was no "causal link" between troubled childhood and crime, this circumstance given "minimal weight"); *and see State v. Greene*, 192 Ariz. 431, 967 P.2d 106 (1998); *State v. Doerr*, 193 Ariz. 56, 969 P.2d 1168 (1998); *State v. Mann*, 188 Ariz. 220, 934 P.2d 784 (1997); *State v. Towery*, 186 Ariz. 168, 920 P.2d 290 (1996). At times, the court has expressly stated that a difficult family background is not relevant or mitigating *at all* unless it is causally linked to the defendant's conduct at the time of the crime. *E.g., State v. White (I)*, 168 Ariz. 500, 815 P.2d 869 (1991). *Compare State v. Trostle*, 191 Ariz. 4, 951 P.2d 869 (1997) (court reduced death sentence to life imprisonment after considering defendant's traumatic upbringing, including physical and sexual abuse, along with the long-term psychological damage to him from the abuse; from that evidence, the court concluded that the defendant's ability to conform his conduct to the requirements of the law was impaired in "no small measure," and that the trial court should have given serious consideration to the evidence, either as statutory or nonstatutory mitigation).

As noted at the beginning of the mitigation section, care should be used when considering precluding evidence under this standard, as the Supreme Court recently held in *Tennard v. Dretke, 542* U.S. 274, __, 124 S. Ct. 2562 (2004) that relevant mitigating evidence cannot be precluded based upon a finding that it does not "relate specifically to" the actual commission of the crime. In *Tennard*, the evidence at issue was that of defendant's low I.Q. *Tennard* did not hold, however, that all proffered evidence in mitigation is admissible or that clearly irrelevant evidence cannot be excluded. The Court gave the example that the frequency with which defendant showers in jail is irrelevant for capital sentencing purposes, while his behavior while in jail is relevant.

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EMPLOYMENT HISTORY/MILITARY SERVICE

[This category consists of cases where the defendant argued his prior employment or military service was mitigating. *See also good character section for prior good works.*]

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FAMILY TIES

[This category contains cases where the defendant argues that his current love of family and his family members' love for him is mitigating. It also contains arguments regarding the adverse effect the defendant's execution would have on a family member. One case argues the concern of friends, *see State v. Michael Apelt*, and in another case the defendant argued that the domestic nature of the murder ought to be mitigating. *See State v. Kiles*. For discussions of the impact of the defendant's family background and childhood on the defendant, *see difficult childhood/family history section*.]

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FELONY MURDER/LACK OF INTENT

The fact that a defendant might have been convicted of first-degree murder based on felony murder liability may be a mitigating circumstance in determining whether the death penalty is appropriate.

Relevant Inquiry – Defendant's "Intent to Kill": The Arizona Supreme Court has made clear that the relevant issue in deciding the mitigating value of a conviction based on felony murder liability is whether the defendant lacked a specific intent to kill. *State v. Gillies*, 135 Ariz. 500, 662 P.2d 1007 (1983) (giving of a felony murder instruction may only be mitigating where there is some doubt about the defendant's intent to kill). This is true whether the defendant was the sole actor and caused the death of the victim, or the defendant was a participant in a felony and the death was caused by "another." *See State v. Atwood*, 171 Ariz. 576, 649, 832 P.2d 593 (1992) (giving of felony murder instruction is not relevant mitigating circumstance where defendant is not being held accountable for the acts of an accomplice and no facts in the record indicate he had an intent other than to kill the victim).

The meaning of "intent" to kill encompasses more than a desire or purpose to achieve a result. *State v. Jordan*, 126 Ariz. 283, 288, 614 P.2d 825 (1980). When a defendant acts with the knowledge that his behavior is *substantially likely to cause a result*, he is considered to have intended it. *Id*. Therefore, the giving of a felony murder instruction is not relevant where the defendant intended to kill the victim or knew with substantial certainty that his acts would cause death. *State v. Zaragoza*, 135 Ariz. 63, 70, 659 P.2d 22 (1983); *accord State v. Soto-Fong*, 187 Ariz. 186, 210, 928 P.2d 610 (1996).

The Felony-Murder Non-Statutory Mitigating Circumstance Distinguished From the (G)(3) Statutory Mitigation Circumstance: The issue of felony murder liability as a non-statutory mitigating circumstance is closely related to the (G)(3) statutory circumstance of minor participation, and often both are asserted in cases where the murder conviction may be based on felony murder liability. There are, however, some differences

The (G)(3) circumstance applies *only* in accomplice liability cases. By the statute's very language, the (G)(3) circumstance applies to instances where a defendant is held legally accountable under A.R.S. § 13-303 for the conduct of another. The key issue is whether the defendant's participation was relatively minor vis-à-vis the other participants.

But felony murder liability may exist in cases involving not only accomplices, but situations where a defendant was the sole actor, making accomplice liability a non-issue. In such cases, the evidence may establish only that the defendant had the intent to commit a felony (*e.g*. armed robbery or sexual assault), and in the course or furtherance of committing the felony the

defendant caused the death of the victim. The potential mitigating value there lies in the possibility that the defendant lacked the intent to kill, and not that the (G)(3) mitigating circumstance applied.

The Felony-Murder Non-Statutory Mitigating Circumstance Compared With the *Enmund/Tison* Inquiry: In *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987), the Supreme Court established a culpability floor of "recklessly indifferent to human life" for capital defendants who did not themselves kill the victim but were convicted of felony-murder for their actions. Pursuant to *Enmund/Tison*, unless the trier of fact finds that the defendant convicted of felony-murder acted with at least this minimum level of intent, he cannot be subjected to the death penalty.

In today's post-*Enmund/Tison* world, a relatively minor participant often is excluded from death eligibility on the basis of the *Enmund/Tison* threshold finding. But finding that a defendant is death-eligible under *Enmund/Tison* does not exclude the defendant from raising "felony murder" as a non-statutory mitigating circumstance. In essence, the defendant is saying that he's still not as bad as someone who actually intended to kill or actually killed, himself (depending on the circumstances). For example, where a defendant's conviction is based on felony murder liability, but he was the sole actor and is not being held accountable for the acts of another, the *Enmund/Tison* standard is met because the defendant caused the death of the victim, or "actually killed." But it is still possible that the defendant lacked the intent to kill, which may be a mitigating circumstance. Likewise, where death eligibility has been established by the *Enmund/Tison* standard in a case where the defendant *did* act with accomplices, and did not, himself kill, the felony murder circumstance can be argued to show that he was not as bad as the accomplice who actually killed. *See*State v. Henry, 189 Ariz. 542, 558, 944 P.2d 57 (1997).

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FOLLOWER

[This category consists of cases where the defendant argued that he was a follower under the influence of someone else. This is in contrast to cases where the defendant argued that he was a minor participant in the crime, or did not have the intent to kill. For those cases, *see minor participation section or felony murder/lack of intent section.*]

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GOOD CHARACTER

[This category consists of cases where the defendant argued that he was a good person prior to the murder or had done good things before the murder. Included are cases where the defendant argued that he had not done bad things prior to the murder. This is in contrast to cases where the defendant argued that he has been on good behavior or done good things while incarcerated or at trial. Those cases, and cases arguing current changed character can be found in the *model prisoner section*. See also the *criminal history section* for cases concerning the defendant's lack of a criminal history in general or of a particular type of crime.]

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INTELLIGENCE/EDUCATION

[This category contains cases concerning the defendant's low intelligence and lack of education. Above average intelligence has been held not mitigating. *See State v. Kayer.*]

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MODEL PRISONER/GOOD CONDUCT WHILE INCARCERATED AND/OR IN COURT

Model Prisoner: This category consists of cases in which the defendant argued that he behaved well or did good things while incarcerated or at trial. There are several sub-categories: **(1)**

Evidence that the defendant had few if any disciplinary write-ups and/or aided in thwarting criminal activities from other inmates, and/or behaved well during the trial; **(2)** Evidence that the defendant improved his education and helped other become educated; **(3)** Evidence that the defendant developed spirituality; and **(4)** Evidence that the defendant has shown personal growth/adopted new, positive goals. The cases in this section are subdivided into these four sub-headings for ease of reference.

Note that this section does *not* deal with conduct occurring *before* the defendant's arrest. For cases involving the defendant's alleged good character before his incarceration, see the *Good Character* and *Criminal History* sections.

Special Note on a Defendant's Conduct During Trial: This subcategory contains conflicting case law. The overwhelming majority of cases state rather emphatically that "good conduct during trial" is *not* a mitigating circumstance, since it is in the defendant's best interests to behave well and cooperate. *State v. Trostle*, 191 Ariz. 4, 22, 951 P.2d 869, 887 (1997); *State v. (Michael) Apelt*, 176 Ariz. 349, 368, 861 P.2d 634, 653 (1993); *and see State v. Spencer*, 176 Ariz. 36, 44, 859 P.2d 146, 154 (1993) (defendant's good behavior at trial says nothing about his character, tendencies, or rehabilitative potential and is not a mitigating circumstance since it is not relevant to determining whether to impose a sentence less than death), *cert. denied*, 510 U.S. 1050 (1994); *State v. Atwood*, 171 Ariz. 576, 651-52, 832 P.2d 593, 668-69 (1992) (respectful, proper and controlled trial demeanor is expected in front of jury or judge and is not a mitigating circumstance, but is a "self-serving attitude", *cert. denied*, 506 U.S. 1084 (1993); *State v. Lavers*, 168 Ariz. 376, 395-96, 814 P.2d 333, 352-53 (1991) (while good conduct while incarcerated was considered in mitigation, good conduct during trial was not), *cert. denied*, 502 U.S. 926 (1991).

However, in *State v. Spears*, 184 Ariz. 277, 294, 908 P.2d 1062, 1079 (1996), the court *did* give this factor some weight. The court stated that, although "good conduct in the presence of the judge or jury is not necessarily a mitigating circumstance" (citing to *Atwood*), because the trial judge had found in mitigation that the defendant was "respectful and cooperative in court" and had no disciplinary write-ups in jail, these factors were "entitled to minimal mitigating weight." Later, in *State v. (Robert) Jones*, 197 Ariz. 290, 313-14, 4 P.3d 345, 368-69 (2000), the court cited to the *Spears* case in asserting the proposition that, "[a]lthough this factor has rarely been considered mitigating, it may be assigned some value." Good conduct during trial was found to have been "not proven" in the *Jones* case, due to conflicting evidence presented by the State that the defendant was trying to make himself "look good" during trial in order to minimize his participation in the crime.

Given the fact that there is some legal support for allowing evidence of good conduct during trial to be presented as a mitigating circumstance, where there is some evidence to justify it, good conduct should be permitted to be argued to the jury as a mitigating circumstance.

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RECOMMENDATIONS FOR LENIENCY

[This category contains cases where the victim's family, probation officers, law enforcement officers, or prosecutors have recommended leniency.]

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REHABILITATION

[This category consists of cases where the defendant argued that he can be rehabilitated and will no longer be dangerous in the future. It does not include cases that argue the defendant has changed his character while incarcerated, has done good things in the past, or lacks a prior criminal history. For those cases, see the *model prisoner*, *good character*, or *criminal history sections.*]

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REMORSE/GRIEF

[This category contains cases where the defendant argued his remorse for the crime as mitigation. Only one case, *State v. Milke*, argued grief. These cases make clear that the existence of remorse is a credibility determination best made by the sentencing judge.]

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RESIDUAL DOUBT/INNOCENCE

NON-STATUTORY - RESIDUAL DOUBT/INNOCENCE

United States Supreme Court: On February 22, 2006, the United States Supreme Court decided Oregon v. Guzek, __U.S.__, 126 S. Ct. 1226, the capital case concerning whether a capital defendant has a federal constitutional right to admit new alibi evidence in mitigation at a re-sentencing hearing (a/k/a the "residual doubt case"). The Court unanimously (8-0, with Alito not participating) rejected the defendant's claim. Please note that this case does not stand for the proposition that a capital defendant has no federal constitutional right to present residual doubt evidence or argument at sentencing. To the contrary, the opinion expressly states that it is sidestepping this question. Rather, Guzek is a narrow decision that rules only on the right to present new alibi evidence in mitigation when the jury already has for its consideration transcripts of testimony from the guilt phase that contain some of that same alibi evidence. (Guzek's mother and grandfather testified at the guilt phase - and the mother would have further testified at the re-sentencing hearing - that Guzek was either with her or his grandfather at the time of the crime).

The Court set forth three factors that must be satisfied to justify a trial court's exclusion of "residual doubt"; evidence. To determine if evidence can be precluded under the State's authority to "set reasonable limits upon the evidence" in order to achieve a "more rational and equitable administration of the death penalty," ask:

1. Does the evidence concern "how" and not "whether" a defendant committed the crime (traditional sentencing considerations shed light on the manner in which the crime was committed and not whether it was committed);
2. Have the parties "previously litigated the issue to which the evidence is relevant – whether the defendant committed the basic crime" (the law discourages collateral attacks of this kind); and
3. Will preclusion have a "minimal adverse impact" on the defendant's ability to present his claim at sentencing (will some evidence of the claim have been presented to the jury at any point in any form)[1]

In all practicality, the Guzek opinion will support the decision of a trial judge to preclude residual doubt evidence whenever a capital defendant seeks to present evidence to a sentencing jury that he is actually innocent. But the trial judge will likely need to apply the "test" when making such a ruling. Special attention may have to be given in cases of re-sentencing, since new sentencing juries will not have heard the guilt phase evidence and this may impact the third Guzek "factor" (though not the first two factors). Of course, the court remains free to admit such evidence.

Arizona Supreme Court: To date, the Arizona Supreme Court's treatment of "residual doubt" has lacked definitive parameters due largely to the fact that, because trial judges had up until recently made the sentencing determination, any concerns that a judge had regarding the actual sufficiency of the evidence in a case could be redressed at the time of sentencing. And, if a defendant had to be re-sentenced, the task would generally be remanded to the same judge who presided over the initial guilt phase, thus ensuring that the judge imposed a sentence in light of

all the evidence presented in the case. But now that juries decide between life and death, our courts must grapple with the issue of residual doubt as it has been debated by other jurisdictions with jury sentencing. The question being: is evidence that a defendant is actually innocent relevant to a capital sentencing proceeding? Generally, this issue will most likely take on prominence when a defendant is being re-sentenced on remand, and a jury different from the initial jury that considered the evidence and issues surrounding the defendant's guilt is seated to hear only the sentencing questions.

This issue will have to be resolved by each judge individually, depending on the facts of the case and what the defendant seeks to prove. Below are excerpts from a legal memorandum that may help guide in that decision.

A. Lingering Doubt Distinguished

Although the term "lingering doubt" is at times used synonymously with "residual doubt," *see Franklin v. Lynaugh*, 487 U.S. 164, 187 (1988) (O'Connor, J., concurring) and *State v. Murray*, 184 Ariz. 9, 45 (1995), *cert. denied*, 518 U.S. 1010 (1996), the two terms must be distinguished to take into account the differing ways in which a jury may experience doubts about the propriety of imposing a death sentence. "Lingering" or "remaining" doubt applies to the level of uncertainty that a juror may have as he engages in the weighing process and attempts to discern what mitigation exists and how much weight it should be accorded. Thus, lingering doubt bespeaks of uncertainty in the quantum of mitigation, or how such mitigation weighs against the aggravating factors. *See, e.g., Kennan v. California*, 480 U.S. 1012 (1989) (juror should have not been bullied and threatened into foregoing any "lingering doubts" about the "appropriateness of imposing the death penalty") (Marshall, J., dissenting); *Rockwell*, 161 Ariz. at 16 ("The significant mitigating evidence this case presents balanced against a single aggravating factor causes us to question whether a death sentence is warranted here. That being the case, we will continue to adhere to the principle that, "[w]here there is a doubt whether the death penalty should be imposed, we will resolve that doubt in favor of a life sentence."); *State v. Valencia*, 132 Ariz. 248, 250-51 (1982) (where there is "doubt" about how much weight to give defendant's youthful age of 16 when compared to the severity of the crime, the court will "resolve that doubt in favor of a life sentence").[2]

In contrast, "residual" doubt addresses the level of uncertainty that a juror may have that the defendant is actually the guilty party. As noted by Justice O'Connor, far from being a "fact about the defendant or the circumstances of the crime," residual doubt is "lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.'" *Franklin*, 487 U.S. at 187-88 (O'Connor, J., concurring). In this context, residual doubt serves as a heightened burden of proof, requiring the imposition of the death sentence only upon proof beyond *all* doubt. *See Id.* at 188 ("Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing"); a*ccord State v. Harrod ("I")*, 200 Ariz. 309, 317, n.7 (2001), *judgment vacate and remanded on other grounds at* 536 U.S. 953 (2002) ("residual doubt" is equated with an "absolute certainty" standard that "may be a more appropriate standard for the imposition of the death penalty").

B. Heightened Standards of Proof Distinguished

Ideas surrounding residual doubt have been conflated not only with lingering doubt but with arguments regarding heightened standards of proof in capital cases. Typically a defendant will argue that he is entitled to a residual doubt instruction to take advantage of the "gap" between the jury's verdict that he is guilty beyond a *reasonable* doubt, and the jury's potential uncertainty as to whether he is guilty beyond *any and all* doubt. As this example illustrates, the use of residual doubt as a mitigating circumstance can functionally equate to the use of a heightened certainty standard of requiring a conviction of belief "beyond all doubt." However, these ideas are not necessarily wedded and parties will often conflate them. Therefore, arguments for a heightened

certainty standard may need to be considered independently of arguments promoting the residual doubt factor.

Absolute certainty standards have been recognized in two main contexts. First, a defendant may request that the jury be required to find that, in performing the weighing process, aggravation outweighs mitigation "beyond all doubt" (a defendant may instead argue for a "beyond a reasonable doubt" standard). This has been termed, "measuring the balance." Second, a defendant may request that the jury be required to find that there is "no doubt" that death is the appropriate punishment because the mitigation is not sufficiently substantial to call for leniency; if there is any doubt, this doubt should be resolved in favor of life. This addresses the level of "certitude" required of the jury. *See State v. Rizzo*, 833 A.2d 363 (Conn. 2003) (full discussion of these two standards). These standards are not aimed at securing certainty of the defendant's *guilt*, but at the *appropriateness* of a death sentence in light of all proven mitigation. Adding such a heightened standard to the actual guilt finding, *i.e.*: residual doubt, is simply another application of the absolute certainty argument in another context. Therefore, care should be taken to separately evaluate these arguments, if they are presented in one bundled package.

As noted below, there is Arizona authority for instructing the jury that any doubts about the appropriateness of the death penalty, in light of the mitigating and aggravating circumstances, should be resolved in favor of a life sentence. *State v. Rockwell*, 161 Ariz. 5 (1989). But such an instruction is distinct from the question of whether jurors should be told or even permitted to consider evidence and arguments of actual innocence.

C. Supreme Court Law – *Franklin v. Lynaugh,* 487 U.S. 164 (1988)

The *Franklin* Court, in a plurality opinion written by Justice White and joined by Rehnquist, Scalia and Kennedy, stated plainly, "[the] Court has never held that a capital defendant has a constitutional right to an instruction telling the jury to revisit the question of his identity as the murderer as a basis for mitigation." *Id.* at 173. Rather, the Court's prior decision in *Lockhart v. McCree*, 476 U.S. 162 (1986) "stands for the simple truism that where 'States are willing to go to allow defendants to capitalize on "residual doubts,"' such doubts will inure to the defendant's benefit." *Id.* (quoting *Lockhart*, 476 U.S. at 181). "*Lockhart* did not "endorse capital sentencing schemes which permit such use of 'residual doubts,' let alone suggest that capital defendants have a *right* to demand jury consideration of 'residual doubts' in the sentencing phase. Even the *Lockhart* dissent recognized that there have been only a 'few times in which any legitimacy has been given' to the notion that a convicted capital defendant has a right to argue his innocence during the sentencing phase." *Id.* (quoting *Lockhart*, 476 U.S. at 205-06 (Marshall, J., dissenting)) (emphasis in original). Furthermore, the Court's prior holding in *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) - that a sentencer cannot be precluded from considering as a mitigating factor "any aspect of a defendant's character or record and any of the circumstances of the offense" - was viewed to "in no way mandate[] reconsideration by capital juries, in the sentencing phase, of their 'residual doubts' over a defendant's guilt," because "[s]uch lingering doubts *are not over any aspect of petitioner's 'character, ' 'record,' or a 'circumstance of the offense.'"* 487 U.S. at 174 (emphasis added).

Significantly, the *Franklin* Court pointed out that the benefits of having a jury consider "residual doubts" as to a defendant's actual guilt could only be had when the sentencing jury was the *same* as the guilt-phase jury. As a result, "[f]inding a constitutional right to rely on a guilt-phase jury's 'residual doubts' about innocence when the defense presents its mitigating case in the penalty phase is arguably inconsistent with the common practice of allowing penalty-only trials on remand of cases where the death sentence, but not the underlying conviction, is struck down on appeal." *Franklin*, 476 U.S. at 173, nt. 6. The Court noted that, were it to adopt Franklin's argument, penalty-phase remands would arguably violate the Eighth Amendment, since a defendant so remanded would face a jury that had not heard the guilt phase "in full," thus preventing the defendant from "hav[ing] the benefit of any potential guilt-phase 'residual

doubts.'" *Id.* The Court opined that it was "quite doubtful that such 'penalty-only' trials" were constitutionally unsound under the Eighth Amendment. *Id. See also Lockhart*, 476 U.S. at 181 (Although some states do not allow a defendant to argue "residual doubts" to the jury at sentencing, a defendant's interest in having the same jury determine both guilt and sentence to take advantage of any possible "residual doubts" is not "wholly vitiate[d];" "it seems obvious to us that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase; if two different juries were to be required, such testimony would have to be presented twice, once to each jury…. 'Such repetitive trials could not be consistently fair to the State and perhaps not even to the accused.'") (*quoting Rector v. State*, 659 S.W.2d 168, 173 (1983), *cert. denied*, 466 U.S. 988 (1984)).

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Decisions from the Supreme Court since *Franklin* have reinforced two important principles grounded in that case: first, that jury instructions on mitigation need not specifically address each proffered mitigating circumstance [*Boyde v. California*, 494 U.S. 370 (1990); *Buchanan v. Angelone*, 522 U.S. 269 (1998)]; and second, that mitigation evidence continues to remain tethered to the principles of relevance [*Tennard v. Dretke,* __U.S.__, 124 S. Ct. 2562 (June 24, 2004)]. And, taken together, this group of opinions re-affirm the principle that, while the threshold test for evidentiary relevance in the penalty phase of a capital trial is quite low, it does still exist, and there are facts and circumstances which are irrelevant to mitigation. The Court has left the ascertainment of what is relevant to the individual determination of the States. Moreover, while a trial court may elect to give a specific mitigation instruction addressing proffered mitigation, this is not constitutionally required so long as the instructions given do not preclude a jury from considering in mitigating "any aspect of a defendant's character or record and any of the circumstances of the offense." Given the Court's observations in *Franklin* regarding the very real problems with finding that a defendant has a federal constitutional right to present evidence of residual doubt, *i.e.*, that such a finding will lead to the inability to conduct re-sentencing trials upon remand, it seems dubious that such a federal right will emerge in the near future.

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STRESS

[This category contains cases where the defendant essentially argues that he was under substantial stress at the time of the murder. This is often argued as a kind of nonstatutory version of duress. Cases concerning post-traumatic stress disorder can be found in the *mental impairment section*.]

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VICTIM'S ACTIONS

[This category contains cases where some action on the victim's part was argued as mitigating. It does not include cases where the defendant argued that there was insufficient evidence to support his conviction. For those cases, see the *residual doubt/innocence section. See also duress section for cases arguing that the victim was the initial aggressor*.]

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AGE (18)
"Arizona Law requires that the trial court 'consider the age of the defendant' as a statutory mitigating circumstance when determining sentences imposed for noncapital offenses." *State v. Davolt*, 207 Ariz. 191, 216, 84 P.3d 456, 481 (2004). "AG is entitled to great weight as a mitigating circumstance, especially if the defendant is a minor." *State v. Gerlaugh*, 144 Ariz. 449, 461, 698 P. 2d 694, 706 (1985).

The Court assigned diminished culpability to juveniles and cited research that juveniles are vulnerable to influence, are susceptible to immature and irresponsible behavior, have a less defined identity, and are less able to control or escape criminogenic settings.

Defendant was chronologically blank years of age when he recklessly . . . While he was indeed acting with reckless abandon, his intent was not to kill anyone. It can be difficult for a reasoned adult to comprehend how an adolescent can engage in such foolish behavior.

Given the parental neglect, negative male role modeling, exposure to childhood domestic violence, early onset of alcohol and substance abuse; it is my opinion that the defendant's frontal lobe development was further delayed than his chronological age would suggest. As the reader will see, research clearly supports the negative impact of these early life experiences on adolescent brain development. Certainly he was not employing any part of his frontal lobe when he . . . Being under the influence of alcohol during the instant offense further impaired his ability to reason out the disastrous consequences of such impulsive actions.

Adolescent Brain
Let's place the defendant's emotional and cognitive development into a biological context. We have two separate solution/response systems: (1) Challenges with a sense of immediacy are rapidly and **reflexively** processed by our brain's innate stress driven, conceptual (principally subcortical) problem-solving system. The system response quickly on the basis of a small amount of emotionally intense information. If that's quite vulnerable to making unreasoned responses to focus only on a few highly visible emotionally charged elements. (2) When challenges are responded to by the high reasoning parts of the brain such as the frontal cortex, responses are conducted in a **reflective** manner with thought to possible outcomes and consequences.

Research shows that during adolescence, the brain begins its final stages maturation and continues to rapidly develop well into a person's early 20s, concluding around the age of 25. The prefrontal cortex; which governs the 'executive functions' of reasoning, advanced thought, and impulse control, is the final area of the human brain to mature.

Adolescents generally see greater risks for various social, emotional and physical reasons, including changes in the brain's neurotransmitters, such as dopamine, which influence memory, concentration, problem solving and other mental functions. Dopamine is not yet at its most effective level in adolescents. Adolescents, will experience "reward – deficiency syndrome," which means they are no longer stimulated by activities that thrilled them as younger children. Thus, they often engage in activities at greater risk and higher stimulation in efforts to achieve similar levels of excitement. Adolescents must rely heavily on the parts of the brain that house

the emotional centers when making decisions, because the frontal regions of the brain are not fully developed.

UNDER THE INFLUENCE OF THE TIME OF THE OFFENSE
by the time the defendant was in middle school he was drinking and getting drunk on a regular basis. By the time he was in high school he had a significant alcohol problem. Unsupervised and undeterred by the adult caregivers in his life, he had little if any encouragement to stay sober.

The effects of alcohol on impulse control and inhibition have long been known. Research shows that alcohol can impair both cognitive processes and controlling behavioral inhibition. Alcohol further diminishes an individual's ability to employ critical judgment. Emotional stability is diminished as well. Studies show a high correlation between the consumption of alcohol and violent offenses.

ACCEPTANCE OF RESPONSIBILITY
the defendant acknowledges his involvement in the instant offense and expresses remorse for the victims and their families. He has consistently shown openness and disclosure about himself and his actions, and has accepted his accountability for his actions, his history of having poor impulse control, and has shown recognition of having problems which need treatment. He offers no blame towards others. He realizes that his reckless actions resulted in . . . He is willing to accept his punishment and has never even talked about himself or his own family as potential victims.

REMORSE
he will accept the plea of guilty with mandatory prison agreement. Given his delayed emotional development, he shows a significant sense of remorse for the victim and their family. The defendant is shocked at his actions. It is very difficult time talking about subject, become sad and fighting back tears. He understands that the victim is only tip of the iceberg when it comes to the impact of his actions. He knows full well that the victim' s family members will suffer indefinitely. He also understands that the people who witnessed the event may well have trauma issues that will take a lifetime to process.

LACK OF VIOLENT HISTORY
Records indicate no history of felony arrests in the defendant's background. In addition, he is no history of violent crimes as juveniles.

The lack of a significant prior criminal record is a well-established nonstatutory mitigating circumstance. *State v. Trostle*, 191. 4, 22 951 P.2d 869, 887 (1997).

NEGATIVE ADULT ROLE MODELS
the defendant's abusive, neglectful and chaotic upbringing provided him with complex emotional difficulties with which caused him to act out in school. He had no positive role model for developing emotional control. He had no positive role model for learning to deal with his emotions in a constructive and reflective manner. The defendant was almost assured to turn to substances just as the adults in his life modeled for him. He drank alcohol and smoke marijuana with his family members from his preteen years forward. He watched family actively abuse alcohol and other drugs. He was exposed to drug dealing by his immediate and extended family members. These were the men that he looked up to throughout his childhood as role models.

We know that a child's use of the parent's state of mind to regulate child's own mental processes. A child's developing capacity to regulate emotions and develop a coherent sense of self requires sensitive and responsive parenting. The brains of abused and neglected children are not as well integrated as the brains of nonabused children. This also explain why abused and neglected children have significant difficulties with emotional regulation, integrated functioning, and social development.

In the 1960s the legendary researcher Hans Seligman demonstrated that the strongest form of learning that humans experience is modeled behavior. In the decades that have followed, there is a strong body of research that supports the healthy outcomes for adolescents who have positive adult role models and mentors in their life. Youth are significantly less likely to participate in high risk behaviors, including violence, weapons caring, illicit drug use, smoking tobacco, and high risk sexual activity. Unfortunately, the opposite also holds true. Youth who are exposed to antisocial adult role models are much more likely to pattern their own lives after what is being taught to them. The defendant has learned his lessons well from his immediate and extended family members' criminal behaviors. An excellent review of research on mentoring is provided by Lynn Blinn-Pike in *The Blackwell Handbook of Mentoring: A Multiple Perspectives Approach.* (Allen, Tammy D.; Eby, Lillian T. (Ed.); pp. 165-187. Malden Blackwell Publishing, 2007.).

PARENTAL NEGLECT
"Evidence of and that abusive childhood or dysfunctional family background may be introduced as nonstatutory mitigation." State v. Velasquez, 166 P.3d 91, 105 (2007).

The defendant had little by way of effective parenting in the course of his childhood. His regularly neglected of physical supervision and effective caregiving. As a result, the defendant was left without supervision, and often fell prey to the negative influences in the poor neighborhoods of Tucson. There's a strong body of research that shows children and teens of disengaged in neglectful parents experience lower self-esteem, increased anxiety and depression. One study shows that abused and neglected children are 11 times more likely to be arrested for criminal behavior as a juvenile, 2.7 times more likely to be arrested for violent and criminal behavior as an adult, and 3.1 times more likely to be arrested for one of many forms of violent crime as a juvenile or adult (Widom, 1989).

CHILDHOOD EXPOSURE TO DOMESTIC VIOLENCE
the defendant's formative years were spent in a home where he regularly witnessed and experienced domestic violence.

EARLY ONSET OF SUBSTANCE ABUSE
the defendant experimented with alcohol at the age of . Shortly thereafter he also began smoking marijuana on a regular basis. The negative impact of illicit drug use on a child's developing brain and emotional maturity are well-documented. Adolescents who are heavy users marijuana more likely than nonusers to have disrupted brain development, according to a new study. Furthermore pediatric researchers have found abnormalities in areas of the brain that interconnect brain regions involved in memory, attention, decision-making, language, and executive functioning skills.

Manzar Ashtari, Ph.D., director of the Diffusion Image Analysis and Brain Morphometry Laboratory in the Radiology Department of the Children's Hospital of Philadelphia, reports;

"studies of normal brain development reveal critical areas of the brain that develop during late adolescence, and our study shows that heavy cannabis use is associated with damage in those brain regions."

CULTURAL ISOLATION
the defendant has been limited by his family's low socioeconomic status, poor educational background, lack of adequate parental supervision and negative male role model. His ability to socialize was further compromised by his lack of exposure to mainstream culture and mores. When he should've been doing movies, ballgames, plays, or participate in school activities, he was hanging out on street with peers who were gang members, drug dealers, and drug users.

UNTREATED DEPRESSION PARTICIPATION IN TREATMENT WHILE INCARCERATED
the defendant is voluntarily sought psychiatric treatment while incarcerated. Is actively participating his treatment and is prescribed antidepressant and anti-anxiety medications. He reports a significant improvement in his mood and ability to control his behavior and emotions.

Potential for rehabilitation may be treated as a mitigating factor. *State vs. Dann*, 220, Ariz.

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Widom, Cathy S., Child abuse, neglect, and adult behavior: Research design and findings on criminality, violence, and child abuse. American Journal of Orthopsychiatry, Vol 59(3), Jul, 1989. pp. 355-367.
Abstract:
Examined 908 court cases of child abuse and neglect from 1967 to 1971 in which children were 11 yrs of age or less at the time of the incident. Cases were followed up to determine the extent of adult criminal behavior, violent criminal behavior, and child abuse in the victims as adults (aged 16–32 yrs) compared with 667 controls (aged 16–33 yrs). Overall, abused and neglected Ss had higher rates than controls of criminality and arrests for violent offenses, but not of adult arrests for child abuse/neglect. Findings are discussed in the context of intergenerational transmission of violence.

Ashtari et al. Medial temporal structures and memory functions in adolescents with heavy cannabis use. Ashtari, Manzar; Avants, Brian, Cyckowski; Laura, Cervellione, Kelly L.; Roofeh, David; Cook, Philip; Gee, James; Sevy, Serge; and Kumra, Sanjiv. Journal of Psychiatric Research, Vol 45(8), Aug, 2011. pp. 1055-1066.
Abstract:
Converging lines of evidence suggest an adverse effect of heavy cannabis use on adolescent brain development, particularly on the hippocampus. In this preliminary study, we compared hippocampal morphology in 14 "treatment-seeking" adolescents (aged 18-20) with a history of prior heavy cannabis use (5.8 joints/day) after an average of 6.7 months of drug abstinence, and 14 demographically matched normal controls. Participants underwent a high-resolution 3D MRI as well as cognitive testing including the California Verbal Learning Test (CVLT). Heavy-cannabis users showed significantly smaller volumes of the right ($p < 0.04$) and left ($p < 0.02$) hippocampus, but no significant differences in the amygdala region compared to controls. In controls, larger hippocampus volumes were observed to be significantly correlated with higher CVLT verbal learning and memory scores, but these relationships were not observed in cannabis users. In cannabis users, a smaller right hippocampus volume was correlated with a higher amount of cannabis use ($r = -0.57$, $p < 0.03$). These data support a hypothesis that heavy

cannabis use may have an adverse effect on hippocampus development. These findings, after an average 6.7 month of supervised abstinence, lend support to a theory that cannabis use may impart long-term structural and functional damage. Alternatively, the observed hippocampal volumetric abnormalities may represent a risk factor for cannabis dependence. These data have potential significance for understanding the observed relationship between early cannabis exposure during adolescence and subsequent development of adult psychopathology reported in the literature for schizophrenia and related psychotic disorders.