MICHAEL K. JEANES, CLERK
BY [signature] DEP
FILED
13 JUN 21 PM 2:34

L. KIRK NURMI #020900
LAW OFFICES OF L. KIRK NURMI
2314 East Osborn
Phoenix, Arizona 85016
602-285-6947
nurmilaw@gmail.com

Jennifer L. Willmott, #016826
WILLMOTT & ASSOCIATES, PLC
845 N. 6th Avenue
Phoenix, Arizona 85003
Tel (602) 344-0034
Email: jwillmott@willmottlaw.com

Attorneys for Defendant **ARIAS**

SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA Plaintiff, vs. JODI ANN ARIAS, Defendant.	No. CR 2008-031021-001DT **MOTION TO VACATE AGGRAVATION PHASE VERDICT PURSUANT TO RULE 24.2 ARIZONA RULES OF CRIMINAL PROCEDURE**
	(Hon. Sherry Stephens)

Ms. Arias, through undersigned counsel, pursuant to Rule 24.2 of the Arizona Rules of Criminal Procedure, the rights due her pursuant to the Fifth, Eighth and Fourteenth Amendments of the United States Constitution, as well as Art. II, § 4 and Art. III of the Arizona Constitution, hereby moves to vacate the jury's finding the aggravating factor that the murder of Mr. Alexander was "especially cruel" as set forth in A.R.S. § 13-751(F)(6). In support of

this Motion Ms. Arias relies on the attached Memorandum of Points and Authorities the issues raised will necessitate a page extension so Ms. Arias requests that an extension be granted.

Memorandum of Points and Authorities

I. Facts Germane to Issue Raised:

On May 8, 2013, Ms. Arias was convicted of First Degree Premeditated Murder for the killing of Mr. Alexander that occurred on June 4, 2008. Subsequent to that verdict, the State asserted that this murder was done in an especially cruel manner as defined by A.R.S. § 13-751(F)(6) and the corresponding case law. On May 15, 2013, the jury found the "cruelty aggravator" was proven.

II. Legal Authority:

A. Rule 24.2 of the Arizona Rules of Criminal Procedure Permits Motions Challenging The Jurisdiction of the Court at Anytime

In relevant part, Arizona Rules of Criminal Procedure , Rule 24.2(A) dictates that;

Upon motion made no later than 60 days after the entry of judgment and sentence but before the defendant's appeal, if any, is perfected, the court may vacate the judgment on any of the following grounds:

(1) That it was without jurisdiction of the action;

As this motion is jurisdictional in nature Ms. Arias takes the position that the dictates of Rule 24.2 provide her with the ability to make such a challenge at any time, however as this issue is being raised within 60 days of the entry of the judgment, meaning the day that the jury found that the cruelty aggravator, May 18, 2013, this motion is timely. See State v. Fitzgerald CR-10-307, May 31, 2013.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

B. An Aggravating Factor is the "Functional Equivalent" of an Element of the Capital Offense Charged

The aggravating factors set forth in the Arizona capital sentencing statute "operate as the 'functional equivalent of an element of a greater offense'". Ring v. Arizona, 536 U.S. 584, 585, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (*citing* Apprendi v. New Jersey, 530 U.S. 466, 494 n. 19, 120 S.Ct. 497, 110 L.Ed.2d 3047 (2000).

> the thrust of the *Apprendi* line of cases is that any fact that 'the law makes essential to the punishment' is the 'functional equivalent of an element of a greater offense,' and is to be treated accordingly . . . An aggravating factor that subjects a defendant to an increased statutory maximum penalty is thus the functional equivalent of an element of an aggravated offense. . . (*citations omitted*)

State v. Schmidt, 220 Ariz. 563, 565, 208 P.3d 214 (2009).

C. The Non-Delegation Doctrine Prohibits Judicial Law-Making

In previous motion(s) Ms. Arias challenged the constitutional validity of the cruelty prong of A.R.S. § 13-751(F)(6) by asserting that this factor was unconstitutionally vague. Understanding that this court denied the assertions Ms. Arias made in these pleadings, Ms. Arias respectfully stands by the law cited in said motions and expounds upon them herein as it relates to the distinct issue raised in this motion.

The United States Constitution articulates the separation of powers and responsibilities of the executive, legislative and judicial branches of government. *See*, U.S. Const. Art. I, II, III. The federal constitution essentially forbids the federal legislative body from delegating its powers to another branch. Mistretta v. United States, 488 U.S. 361, 372, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989); Field v. Clark, 143 U.S. 649, 692, 12 S.Ct. 495, 36 L.Ed. 294 (1892).

Our legislature has broad discretion in determining culpable behavior. In *re* Pima County Juvenile Appeal No. 74802-2, 164 Ariz. 28, 28, 790 P.2d 723 (1990). Defining criminal behavior and establishing penalties for violating criminal laws are functions of the legislature, not the judiciary". State v. Wagstaff, 164 Ariz. 485, 490, 794 P.2d 118 (1990). However, "while criminal statutory language need not provide for interpretation amounting to mathematical certainty," Brockmueller v. State, 86 Ariz. 82, 84, 340 P.2d 992 (1959), "it is required to give fair warning that an individual's actions are prohibited and thus subject to punishment". State v. Womack, 174 Ariz. 108, 112, 847 P.2d 609 (App. 1993); Franzi v. Superior Court, 139 Ariz. 556, 562, 679 P.2d 1043 (1984). The vague language of a particular statute may be tested as an invalid delegation of legislative power. Southwest Engineering Co. v. Ernst, 79 Ariz. 403, 414, 291 P.2d 764 (1955).

Every element of an offense must be proven beyond a reasonable doubt. In *re* Winship, 397 U.S. 358, 361-63, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *See also*, State v. Glassel, 211 Ariz. 33, 52, 116 P.3d 1193 (2005). A defendant enjoys the right to have the state prove to a jury every fact necessary to impose the death penalty. Ring v. Arizona, 536 U.S. at 589, *supra*.

The Arizona system of government follows the federal blueprint:

> the powers of the government of the State of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

Ariz. Const. Art. III.

The Arizona Constitution "spells out the separation of powers doctrine . . . more specifically than does the national document." State *ex rel* Woods v. Block, 189 Ariz. 269, 275, 942 P.2d 428 (1997). "The mandate of the doctrine is to prevent one branch against the overreaching of any other branch." State v. Prentiss, 163 Ariz. 81, 84-85, 786 P.2d 932 (1989).

The fundamental purpose of Art. III of the Arizona Constitution is the protection of individual liberties; "[a]rticle 3 is part of an overall constitutional scheme to protect individual rights" and "the 'power allocation' is but a part of that overall objective". *Id. at* 84.

Although "Government necessarily entails some blending of powers and that 'absolute independence of the branches of government and complete separation of powers is impracticable'", State v. Donald, 198 Ariz. 406, 416, 10 P.3d 1193 (App. 2000), the law-making power cannot be completely delegated to another branch of government. *See* State v. Arizona Mines Supply, Co., 107 Ariz. 199, 205, 484 P.2d 619 (1971)("separation of powers" doctrine provides that the "legislature alone possesses the lawmaking power and, while it cannot completely delegate this power to any other body, it may allow another body to fill in the details of legislation already enacted. *Since the power to make a law includes discretion as to what it shall be, this particular power cannot be delegated . . .*")(*emphasis added*); *See also* Wilson v. Ind. Comm'n, 147 Ariz. 261, 265, 709 P.2d 895 (App. 1985)(legislature has exclusive power to declare what the law shall be); Chavez v. Brewer, 222 Ariz. 309, 315, 214 P.2d 397 (App. 2009)("nowhere in the United States is [separation of powers] more explicitly and firmly expressed than in Arizona . . .", *citing* Mecham v. Gordon, 156 Ariz. 297, 300, 751 P.2d 957 (1988)); *cf.* State v. Rios, 225 Ariz. 292, 298, 237 P.3d 1052(App. 2010)("the

Legislature has the exclusive power to declare what the law shall be and usurps the function of the judiciary only when it declares the meaning of an existing law").

In reviewing the propriety of legislative delegation, "[t]he four factors to be considered are (1) the essential nature of the power exercised; (2) the . . . degree of control [that one branch assumes] in exercising the power [of another]; (3) the . . . objective [of the exercise]; (4) the practical consequences of the action". *Donald, supra at* 416-17 (*citing Block, supra at* 276).

In the area of criminal law, "defining crimes and fixing penalties are legislative, not judicial, functions". State v. Wagstaff, 164 Ariz. at 490, *supra*; *see also* State v. Navarro, 201 Ariz. 292, 298, 34 P.3d 971 (App. 2001); State v. Waits, 163 Ariz. 216, 221, 786 P.2d 1067 (App. 1989); State v. Faunt, 139 Ariz. 111, 113, 677 P.2d 274 (1984); State v. Marquez, 127 Ariz. 98, 103, 618 P.2d 592 (1980); State v. Quintana, 92 Ariz. 308, 312, 376 P.2d 773 (1962). Within that context "the judicial power (other than in rule-making) is to apply the law and determine if legislation runs contrary to constitutional guarantees or is arbitrary and unreasonable". State v. Rios, *supra*, *citing* State v. Prentiss, *supra*, and State v. Dykes, 163 Ariz. 581, 583, 789 P.2d. 1082 (App. 1990)(holding once criminal charge is brought, judicial role is to dispose of that charge).

"Decisions about what facts are material and what are immaterial, or, in terms of *Winship* . . . what 'fact[s][are] necessary to constitute the crime' and therefore must be proved individually, and what facts are mere means, represent value choices more appropriately made in the first instance by a legislature than by a court". Schad v. Arizona, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d. 555 (1991).

In *Wagstaff*, the defendant was convicted of child molestation in the first degree. Along with a twelve year prison term the trial judge sentenced him to lifetime parole under a statute that permitted the court to do so. *Wagstaff* 164 Ariz. at 487. The sentencing court went on to also impose specific terms and conditions of parole. The Arizona Supreme Court found that this constituted an unconstitutional delegation of powers from the legislature to the judiciary in violation of Art. III of the Arizona Constitution. The Supreme Court based its decision on the statute's delegation to the trial court the power to impose conditions of parole – a function traditionally accorded the Board of Pardons and Paroles, an agency of the executive branch. *See, Id* at 488-90. In doing so, the Supreme Court stated:

> We note that a marked difference exists between the legislature mandating the court to impose lifetime parole as part of the sentence and the legislature allowing the court to participate in execution of the sentence by establishing parole terms and conditions. The former does not violate separation of powers because it is a legislative determination of the punishment to be imposed. The latter, however, is an unconstitutional delegation of executive authority in the judiciary.

Id, at 490.

D. <u>The Definition of the A.R.S. § 13-751(F)(6) Aggravator has Been Created by the Arizona Judiciary</u>

A defendant becomes death eligible if the fact-finder finds proof beyond a reasonable doubt of at least one statutory aggravating factor. A.R.S. § 13-752(C),(D). One such aggravator is a finding that the murder was committed "in an especially heinous, cruel or depraved manner". *See*, A.R.S. § 13-751(F)(6).

Although Ms. Arias continues to support the position that the cruelty prong of this law facially vague, the United States Supreme Court in *<u>Walton v. Arizona 497 U.S. 639 (1990)</u>*,

held that the constitutional infirmity was cured because the lower appellate court had applied a set of "narrowing instructions" to the (F)(6) factor. *Id, at* 654; *accord, Lewis, supra, at* 783. In sum, the judiciary defined the aggravating factor.

Since that time, the Arizona branch of government that has now exclusively created and developed the definitions for the A.R.S. § 13-751(F)(6) aggravator has been the judiciary.

E. Denial of Proportionality Review by the Fact Finder Serves to Exacerbate the A.R.S. § 13-751(F)(6) Separation of Powers/Void for Vagueness Issue

A plain reading of the (F)(6) factor has the word "especially" preceding all three of the (F)(6) prongs. Of all the terms in the (F)(6) factor, perhaps the only one that has a plain and obvious meaning is the word "especially". Yet the current definitions of each prong of the (F)(6) factor do not articulate the meaning of the word "especially" within the context of each narrowing instruction--instead simply inserting it as a part of the definitions of "cruelty" and "heinous" or "depraved". The Arizona Supreme Court acknowledges imparting no specific meaning to the word because it would invite a proportionality review by the sentencing fact-finder. *See*, State v. Andriano, 215 Ariz. 497, 505, 161 P.3d 540 (2007) *abrogated on other grounds by* State v. Ferrero, 229 Ariz. 239, 274 P.3d 509 (2012).

In *Andriano* it was argued that the (F)(6) aggravating factor was unconstitutionally vague when applied by a jury because without proportionality review the jury would have no way to determine whether the murder for which it has found the defendant guilty is "above the norm of other first degree murders." The Arizona Supreme Court rejected that argument citing to its holding in State v. Johnson, 212 Ariz. 425, 133 P.3d 735 (2006). The Arizona Supreme

Court's rationale in *Andriano* hardly cleared the matter up. In fact, it has made the issue worse. The *Andriano* Court stated that

> Such an instruction[1] does not require the jury to engage in proportionality review. Instead, the jurors must assess whether the murder was so cruel that it rose above the norm of first degree murders. To assist them in this inquiry, the judge instructed the jurors on the definition of "cruelty," explaining how to determine whether "the circumstances of the murder raise it above the norm of other first degree murders." Considering the instructions as a whole, the jury was properly instructed to apply the definition of "cruelty," rather than to engage in proportionality review. The trial court did not err, fundamentally or otherwise, in giving the instruction

Id, at 549.

More simplistically, pursuant to *Andriano*, the trial judge is to define element(s) of the crime of capital murder from which jurors, without any experience considering murders of varying degree of heinousness, cruelty or depravity, have to somehow absorb the judge's element definition, and make a principled decision on whether to impose the death penalty.

However, without legislatively enacted definitions vagueness coupled with the lack of a principled basis to discern "above the norm" murders due process is violated because it allows the judiciary to continue to declare definitions from the bench in an effort to (1) define an unconstitutionally vague element of a crime, and (2) purport to provide juries some sense of base from which to give meaning to words such as "especially" as used to further define

---

1 The trial court provided the following (F)(6) "cruelty" instruction to the jury:
"Cruelty" involves the infliction of physical pain and/or mental anguish on a victim before death. A crime is committed in an especially cruel manner when a defendant either knew or should have known that the manner in which the crime is committed would cause the victim to experience physical pain and/or mental anguish before death. The victim must be conscious for at least some portion of the time when the pain and/or anguish was inflicted.

"heinous, cruel or depraved" as opposed to "regular" heinousness, cruelty or depravity in the jury's effort to decide whether to impose the ultimate punishment.

If the word "especially" cannot be applied using its plain meaning as a tool of comparison, then it is not being applied at all. None of the judicially attempted narrowing instructions that are applied to the "heinous"/"depraved" prong define the term "especially". Instead, they define the base terms ("cruel", "heinous", and "depraved") themselves. By interpreting the statute in such a fashion, the judiciary has failed to impart any meaning to a legislatively enacted element of the (F)(6) instruction in violation of basic principles of statutory construction. *See, e.g.*, Adams v. Bolin, 74 Ariz. 269, 276, 247 P.2d 617 (1952) (holding that "In the interpretation of a statute, city ordinance or city charter the cardinal principle is to give full effect to the intent of the lawmaker, and each word, phrase, clause and sentence must be given meaning so that no part will be void, inert, redundant or trivial.").

The fact that the word "especially" has been rendered superfluous in light of the current jury instructions spotlights the fact that these instructions were created at a time when the judge, not the jury, made the factual findings regarding aggravating factors. By including the word "especially", the statute was designed to be employed by a judge, one presumed to have the depth and breadth of experience to identify those first degree murders "above the norm". Perhaps this explains why the word "especially" has never been accorded its own jury instruction or definition, and any attempts to impart any meaning to it for a jury have been rejected as an impermissible request for proportionality review. But this is contrary to the legislative intent evidenced by its use of the word "especially" in the (F)(6) aggravator statute.

However, even judicial application of the instructions could not avoid illogical consequences. Arizona Supreme Court Justice Stanley Feldman, in a concurring opinion in State v. Salazar, 173 Ariz 399, 844 P.2d 566 (1992) succinctly stated

> The object of our death penalty jurisprudence is to try to separate the exceptional crime or criminal from the "normal" murder or murderer, for it is only the former that is death-penalty eligible. *Fierro,* 166 Ariz. at 548, 556, 804 P.2d at 81, 89. Thus, we must determine whether any aggravating circumstances are present that make the defendant death eligible-for example, whether a killing was committed "in an especially heinous, cruel or depraved manner." A.R.S. § 13-703(F)(6).If there is some "real science" to separating "especially" heinous, cruel, or depraved killers from "ordinary" heinous, cruel, or depraved killers, it escapes me. It also has escaped the court. *Compare* State v. Jimenez, 165 Ariz. 444, 453 55, 799 P.2d 785, 794 96 (1990) (although heinous and depraved, the court held that the evidence was insufficient to find that a murder was especially cruel where the defendant strangled his five year old victim and left her under a bed but returned after hearing her cry to strangle her again), with State v. Beaty, 158 Ariz. 232, 237, 242, 762 P.2d 519, 524, 529 (1988) (court held that murder was especially cruel where defendant asphyxiated his thirteen year old victim by clamping his hand over her mouth, causing her to vomit)...*compare also* State v. Chaney, 141 Ariz. 295, 312 13, 686 P.2d 1265, 1282 83 (1984) (court held that murder was especially heinous, cruel, and depraved where the defendant shot his victim with an automatic weapon), and State v. Johnson, 147 Ariz. 395, 397, 400 01, 710 P.2d 1050, 1052, 1055 56 (1985) (court held that senseless murder was not especially heinous, cruel, or depraved where the defendant killed his victim with a shot gun blast while the victim lay sleeping). The very use of the term "especially" in A.R.S. § 13 703(F)(6) requires comparison of one crime or criminal to others-a question of proportionality.
>
> * * * *
>
> Although choosing between life and death is better left to divine judgment, we are bound by law to do it. We must do what the law commands, but, in doing so, we should not pretend we apply rules of logic and science. In Arizona, for instance, one becomes death eligible when killing to rob but not when killing to rape. *See* [then] A.R.S. § 13 703(F)(5). One becomes death eligible if,

> hand trembling because of fear, mental illness, or drug use, one fails to aim accurately or kill with the first blow and the victim fortuitously suffers and dies slowly. *See Chaney*, 141 Ariz. at 312, 686 P.2d at 1282 (affirming death penalty in case where the defendant's gunfire did not kill the victim instantaneously, but, instead, the victim suffered for thirty minutes before losing consciousness and dying). The assassin who senselessly shoots with steady hand and kills in cold blood or uses a weapon with ruthless efficiency and dispatch and causes immediate death does not kill cruelly and may not be death eligible. *See Johnson*, 147 Ariz. at 397, 400 01, 710 P.2d at 1052, 1055 56 (cruelty not even considered where the defendant shot his sleeping victim, who "rapidly bled to death"). If this, too, is "real science," its logic escapes me.

Salazar, at 585-6.

The cases Justice Feldman cited all involved sentencing judgments made at a time judges, and not juries, decided the issue of whether to impose the death penalty. Given the apparent difficulties that judges faced during the pre-*Ring* era in applying the (F)(6) statute in a uniform, consistent manner, juries are understandably even less equipped to do so.

III. <u>Legal Argument</u>:

After *Ring* (which postdates *Walton* and *Richmond* which allowed for judicial narrowing) an aggravating factor is now the functional equivalent of an element of the greater offense of capital murder. The legislature bears the responsibility of specifically defining each element of any offense so that the general public has notice. Such notice also ensures that the law may be applied and enforced in a standardized non-arbitrary manner.

The Arizona Legislature has never adequately defined the A.R.S. § 13-751(F)(6) factor even though it has known of its constitutional infirmity for over 20 years and has been aware that the aggravating factors are elements of the offense of capital murder for the past 10 years.

Under the current Arizona Criminal Code, which is the sole basis of providing "notice" to the citizenry, the statutory language remains the same "especially heinous, cruel or depraved" vague language that has been repeatedly condemned by both state and federal courts. *See, e.g., Walton, supra.* What has changed is that this same language is now deemed the "functional equivalent of an element of the offense" of capital murder. Thus, the statute fails to provide notice to the citizenry of elements of an offense for which the citizenry is expected to know, understand and conform behavior thereto.

The several sets of narrowing instructions, designed to give meaning to the otherwise unconstitutionally vague statutory language, currently being used by trial courts in Arizona were not created by the Arizona Legislature. These element defining narrowing instructions were created by the judiciary. The judiciary's creation of these narrowing instructions goes well beyond the proper judicial function of statutory interpretation. It is one thing to interpret a legislatively enacted statute, it is quite another to actually create the words defining elements of an offense.

On its face the language of A.R.S. § 13-751(F)(6) is vague, and therefore legally meaningless. Consequently, the narrowing instructions that the higher courts mandated be employed, and are now defined by the judiciary, do not serve to "interpret", but rather, create and define, from literally the ground floor, the proscribed conduct under the (F)(6) factor. This is an example of classic law-making... a function exclusively left to the legislative, not the judiciary, branch of government.

A. Woods v. Block Factors

Consideration of the factors set forth in Woods v. Block, *supra*, warrant a finding of a separation of powers violation under the current scheme used in Arizona.

1. Nature of Power Exercised

The first factor – "the essential nature of the power exercised" – concerns a fundamental traditional power of the legislature: that of creating and defining the criminal offenses within the State of Arizona. Many Arizona appellate decisions upholding the (F)(6) factor have cited *Walton, supra*, which informed lower courts that a proper set of narrowing instructions created by a court could salvage a facially vague aggravator. At the time the *Walton* Court issued that permissive language, it did so when aggravating factors were still viewed as "sentencing enhancers" and not elements of the offense of capital murder; judicial refinement of legislatively enacted "sentencing enhancers" was consistent with the traditional role of the judiciary. Because judges determined and handed down sentences, it seemed only proper that they be permitted, given their experience and training in the law, to interpret, within the boundaries of the Arizona and federal Constitutions, the meaning of the otherwise vague "sentence enhancers" of A.R.S. § 13-751(F)(6). It was properly assumed that these same judges, armed with their vast understanding of the law and their experience, would honor the duty the system expected of them.

However, the law changed more than a decade later, after *Walton*, when *Apprendi* and *Ring* established that the aggravators were not "sentence enhancers", but rather "elements of

the offense" of capital murder. Thus, to now judicially define an aggravating factor with "narrowing instructions" is to literally define the element of the offense charged. This constitutes law-making, because it creates a criminal offense under the laws of the State of Arizona. Art. III of the Arizona Constitution forbids the Arizona judiciary from doing so.

2. **Degree of Control**

The second Woods v. Block factor – the degree of control assumed by one branch in exercising the power of another branch is, in this instance, absolute. The judicial act of defining an element of a criminal offense results in the creation of an entirely new offense, by transforming non-capital first degree murder into a greater offense of capital murder. In doing so, the judiciary has assumed, in absolute fashion, that law-making function that is constitutionally left exclusively to the legislative branch of government. The judiciary took an unconstitutional vague set of words and substituted their own, thus taking complete control over defining the elements of the offense of capital murder.

3. **Objective of the Exercise**

The third Woods v. Block factor concerns the "objective of the exercise." The Arizona courts created the narrowing instructions to save the (F)(6) factor from being struck down as unconstitutional under *Walton*. As the statute stood then and stands now, it cannot in and of itself pass constitutional muster under *Walton*. The terms contained therein were found then and remain today, "void for vagueness", absent more.

In order to "define" the (F)(6) factor and "save" it from *Walton*, the judiciary has now usurped the role of the legislative branch and added its definition to the factor to pass *Walton* scrutiny. Put more simply, the judiciary is now literally defining an element of an offense. It is one thing for a court to interpret an already legislatively set forth and understandable element so as to permit application to a particular set of facts; it is altogether another thing to allow a court to literally breathe life and meaning into otherwise meaningless vague words.

4. Practical Effect

The Fourth Woods v. Block factor concerns the practical effect of the exercise of the power being usurped. The practical effect in the instant situation is to permit continued uncertainty regarding the facts that the jury must find in order to find a defendant guilty of capital murder based on the (F)(6) factor. This confusion has progressed over time, as evidenced by the various forms and versions of the (F)(6) narrowing instructions that have come and gone. When criminal conduct is defined, revised or abrogated through legislation, there are definitive boundaries regarding when those laws go into effect, to ensure against retroactive application. This protects citizens' Due Process rights to notice, by providing them with the assurance of whether conduct committed on a certain day constitutes a crime. If there is a dispute regarding retroactive application all parties can look to the statute and the date of enactment of a particular law or amendment to that law. This safeguard is not in place when the judiciary is permitted to define and then evolve the terms of an element of an offense such as occurs now with the judicially controlled process[2] of providing narrowing

---

[2] This process of allowing the judiciary this much control in defining an element of an offense is further exacerbated by the fact that on any given day, in any given court, the terms of the

instructions to laypersons inexperienced and untrained in the law serving as aggravators fact-finders in the post-*Apprendi/Ring* era.

As it is now, the clarity of the definition of the element of an offense under this system can literally depend on what judicial officer is giving the explanation on any given day, as well as the individual and collective competence in the nuances of the law possessed by any given jury. This is hardly what is contemplated by the goal of advising the citizenry of the elements of criminal conduct so all can be expected to conform their behavior in compliance with the known laws.

B. Evolving Judicially Created Definitions of Offense Elements

For the last three decades there has not been one unwavering set of narrowing instructions defining the vague statutory words set forth in the (F)(6) factor. The various attempts have historically expanded and contracted several times.

An example of the historical aspect of this problem can be seen in *State v. Mata, supra*, which discusses the history of the "narrowing instructions". The *Mata* Court discusses State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983); *cert. denied* 461 U.S. 971, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983) and its progeny to show that at various times additional words were added by the judiciary to further define what the *Gretzler* Court had found adequate. The dangers inherent in case-by-case judiciary defining of elements of capital murder was noted in State v. Carlson, 202 Ariz. 570, 48 P.3d 1180 (2002) which considered an "expansion" of the terms of the (F)(6) aggravator in regard to relationships where the *Carlson* court stated

---

narrowing instructions can be presented and explained in oft-times subtle but different ways, subjecting each instance of application to different interpretations.

> Continual case-by-case expansion of these factors would lead to serious constitutional problems in view of the constitutional mandate to avoid arbitrary imposition of the death penalty. The legislature, on the other hand, may enact and define reasonable and narrowing aggravating circumstances that apply, across the board, to all cases.

Id, at 585

The *Carlson* Court made this comment when discussing the issue of whether Defendant Carlson's relationship to the victim (her mother-in-law) was sufficient to amount to an aggravating factor under the vague (F)(6) terms. The *Carlson* Court refused to go this far because it opined that this in-law type relationship did not go so far as the "infanticide" relationship that was used and upheld as an aggravator in State v. Milke, 177 Ariz. 118, 865 P.2d 779 (1993)(defendant conspired with two others to have her minor child murdered). So, while *Carlson* did not expand the (F)(6) factor, its comment presaged the issue *sub judice*.

In State v. Velazquez, 216 Ariz. 300, 166 P.3d 91 (2007)(post *Apprendi/Ring*) the defendant challenged the trial court's instruction on heinous, cruel or depraved. The trial court gave the following instruction

> Cruelty involves the infliction of physical pain and/or mental anguish on a victim before death. A crime is committed in an especially cruel manner when a defendant either intended to inflict mental anguish or physical pain upon the victim, or reasonably foresaw that there was a substantial likelihood that the manner in which the crime was committed would cause the victim to experience mental anguish and/or physical pain before death.
>
> The victim must be conscious for at least some portion of the time when the pain and/or anguish was inflicted.

Defendant Velazquez conceded that the definition of "cruelty" comported with Arizona law, but claimed that the instruction defining "especially cruel manner" was not sufficiently

narrow. The Court sustained the instruction, reasoning that the instruction provided clear and objective standards and properly channeled the jury's discretion. The problem with the judicially created and pronounced instruction in that case, however, is its broadening of the statutory language to include not only physical pain, but mental anguish as well. Nothing in the (F)(6) factor even remotely suggests just how broad this definition has become; thus the public cannot be on sufficient notice as to just how broad the actual statutory terms really are.

Further, even the *Velazquez* Court noted that the instructions it had reviewed and approved of in previous cases prior to its holding in *Velazquez* were "*nearly* identical" instructions as opposed to *identical* instructions. Semantics aside, "nearly identical" and "identical" are not the same thing. This problem was previously borne out in State v. Ellison, 213 Ariz. 116, 140 P.3d 899 (2006)(post *Apprendi/Ring*), *where* the trial court defined "especially cruel" as follows:

> In order to find that the especially cruel aggravating circumstance is present as to either murder, you must find that the State has proven beyond a reasonable doubt that the murder was especially cruel due to the infliction of either *extreme* physical pain or *extreme* mental anguish upon that victim.

Id, at 139.(*emphasis added*)

Thus in *Ellison*, the judicially created and promulgated "narrowing instruction" provided that the jury must find the "infliction of either *extreme* physical pain or *extreme* mental anguish". (*emphasis added*). Yet, in *Carlson*, the infliction of mere "physical pain and/or mental anguish" was deemed to pass constitutional muster as a narrowing instruction. This dramatic difference and degree in the language in just these two examples cannot be said to

help a layperson jury make a sound, principled decision on whether to impose the ultimate punishment, or not. *See*, Arave v. Creech, 507 U.S. 463, 474, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993)(narrowing construction of a facially vague aggravating circumstance is constitutionally sufficient only if it helps the sentence make a principled distinction between those who deserve the death penalty and those who do not).

So, in Arizona in year 2013, in one Arizona trial court, in order to be sentenced to death a defendant must inflict *extreme* physical pain or *extreme* mental anguish, while in another Arizona trial court, inflict mere physical pain or mental anguish in order to face the death penalty. Moreover, there is no definition of what constitutes "extreme" physical pain or mental anguish over "run-of-the-mill" physical pain or mental anguish. That problem is left to the untrained in the law layperson jurors to muddle through. Yet the death penalty lies in the balance.

This lack of uniformity in judicial definitions of (F)(6) aggravator law exemplifies the Founder's wisdom in requiring a codified law – it matters not whether one is in the far Northern reaches of Navajo County, Arizona or the far Southern reaches of Santa Cruz County, Arizona – the statutes read identical. Thus citizens can be expected to conform conduct accordingly and be held accountable uniformly for violations of law. This function is the sole province of the state legislature in its exclusive law-making function.

Because these critical narrowing instructions have evolved at the exclusive hand of the judiciary, and not the legislature, there has not been an adequate opportunity to argue that the

accused were deprived of adequate notice concerning their conduct. These instructions continue to be called "narrowing instructions" rather than what they really are, elements of the criminal offense of capital murder, for which every citizen has the right to have a clearly defined statutory definition.

The law may protect a citizen from *ex post facto* application and prosecution of a crime that has been in some way modified by the legislature (such as by changing, adding or removing an element of an offense). However, the law provides no similar protection to judicial decisions which modify an element of an offense when that element has been improperly labeled a "narrowing instruction".

This has a very real, and ultimately detrimental effect of the Due Process rights of a defendant regarding entitlement to notice of the conduct that would violate A.R.S. § 13-751(F)(6).

Conclusion:

The statutory aggravators used in Arizona are the "functional equivalent" of elements of capital murder.

Under the Constitutions of the State of Arizona and the United States only the legislative branch of government is empowered with the right to declare what is a crime and what elements make up that crime. Courts, as part of the judicial branch of government, cannot create the elements of criminal offenses. *See*, Art. III, Ariz. Const.; Art. I § 1. US Const.

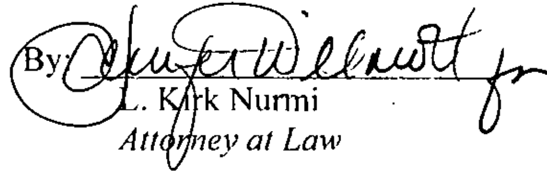
The federal Constitution's Fifth, Eighth and Fourteenth Amendments Due Process protections require elements of an offense be set forth so as to provide adequate notice to

citizens of what is proscribed conduct. Art. II § 4 of the Arizona Constitution guarantees this Due Process protection as well.

A capital murder charge that predicates its capital status on the facially vague aggravating factor(s) set forth under A.R.S. § 13-751(F)(6) as further defined by judges' defining the so-called "narrowing instructions' constitutes a judicially created crime. Defendant's case is just such a case.

Thus, the A.R.S. § 13-751(F)(6) aggravator alleged in the instant case must be stricken.

RESPECTFULLY SUBMITTED this 21st day of June, 2013.

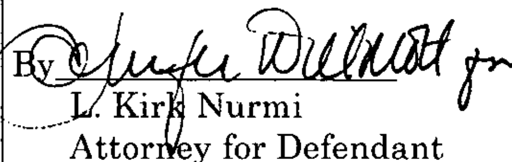


By ______________________
L. Kirk Nurmi
Attorney at Law

Copy of the E-FILED
delivered this 21st day of
June, 2013, to:

Hon. Sherry Stephens
Judge of the Superior Court

Juan Martinez
Deputy County Attorney



By ______________________
L. Kirk Nurmi
Attorney for Defendant