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IN THE SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

STATE OF ARIZONA, Plaintiff, VS. DANIEL HAYDEN WILLOUGHBY, Defendant.	NO. CR 1991-010184 **REPLY TO RESPONSE TO PETITION FOR POST-CONVICTION RELIEF**

Defendant, though undersigned, replies to the Response submitted by the State:

REPLY TO "FACTUAL BACKGROUND"

The majority of the State's "factual" response deals with evidence of defendant's adultery, which defense counsel freely admitted in Opening Statement (R.T. 10/3/01 at 52-55). In fact, of all the witnesses referenced by the State, only three — co-conspirator Yesenia Patino, who changed her story as often as her clothes, brother and co-conspirator Tony Patino, given immunity for his version, and three-time felon/current prisoner and ex-husband Jack Mielke — gave what could be described as direct evidence of a murder/conspiracy. [1] In its rendition, the

[1] The prosecutor *twice* told the jurors in Closing that they should not "necessarily believe everything she [Yesenia] has to say, and I think that we can all agree on that, having seen her." (R.T. 11/13/01 at 31; "Again, we're not asking you to believe Yesenia *about anything* because she raises her right hand." *At 51.* (emphasis supplied)

State's half-truths and misleading statements conveniently omit the cross-examination of these individuals, to which the Court's attention is respectfully directed. (R.T. 11/1/01 at 51-174; 10/29/01 at 102-191; 10/25/01 at 130-159).

In short, uncontested evidence of an affair is not overwhelming evidence of murder.

Additionally, it must be mentioned that the testimony of adopted daughter Marsha Willoughby changed dramatically from the first trial to the second. *State's Response, at 45.* Yet it also changed from the interview initially given to the attorney general regarding the relationship between her parents. (R.T. 10/11/01 at 111, 112). Even as late as September of 2001, in an interview with defense counsel, she agreed that the first time defendant had talked to her about the incident in Rocky Point was *after* he had been accused of being involved in some way by his mother-in-law. *At 133-135.* Throughout her entire cross-examination she continuously admitted prevarication (R.T. 10/11/01 at 100-end; 10/15/01 at 4-86).

The State's Response is that Marsha was "pressured" into lying in the first trial, yet telling the truth in the second. *Response, at 45.* Yet, our courts have consistently held that recanted testimony is "inherently unreliable." *State v. Hickle,* 133 Ariz. 234, 650 P.2d 1216 (1982):

> Courts have long been skeptical of recanted testimony claims, even when, unlike this case, professed by the accuser in court. In *State v. Sims* we noted, perhaps more broadly than appropriate, that:
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> There is no form of proof so unreliable as recanting testimony. In the popular mind it is often regarded as of great importance. Those experienced in the administration of the criminal law know well its untrustworthy character.
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> 99 Ariz. 302, 310, 409 P.2d 17, 22 (1965) (quoting *People v. Shilitano,* 218 N.Y. 161, 112 N.E. 733, 736 (1916)); *accord State v. Fisher,* 141 Ariz. 227, 251, 686 P.2d 750, 774 (1984); *State v. Krum,* 183 Ariz. 288, 294, 903 P.2d 596, 602 (1995). [2]

In fact, Marsha admitted that the letter she wrote to Alan Woods contained her "present sense impressions" of the day she went to the Museum in Rocky Point. *At 140.* This contradicted much of her testimony at the second trial, particularly about being "required" to go there by defendant. *At 141.* There could have been no "pressure" by defendant for her to write that she was going to the Museum because she was "bored," since the murder of her mother had not yet occurred. Finally, she told Gwen Gibson that defendant had the same clothes on both before and after he was in the house (R.T. 11/8/01 at 10), hardly a prompt by defendant.

With these major omissions in mind, defendant directs the court's attention to the remainder of the State's facts. They should be read in conjunction with defendant's attached affidavit:

Hayden Willoughby —

No one was "hurried" to get out to the car to go to the Museum (R.T. 10/4/01 at 26); His Mom said she was tired and was going to stay back at the house and take a nap. *At 28.* It was his idea also to stay in Mexico after his Mother's death. *At 33.* In his interview with Kay Lines, Hayden told him that it was his idea to stay in Mexico with his Dad.

Phil Caballero and "padding" of expense accounts —

Gary Butts, defendant's supervisor, testified that expenses were not the reason for their parting of the ways (R.T. 10/16/01 at 103); Defendant was a "star" who was *recruited* to go to A.E.I. *At 109.*

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[2] Yesenia Patino's testimony was a recantation of multiple recantations, resulting in essentially worthless drivel. *See,* the attached transcript of her 1997 video deposition in Sonora, Mexico, and the notes of Dr. Thomas Streed's interview of her.

In fact, Phil Caballero admitted that the *expenses were legitimately spent out-of-pocket on business*, just that they exceeded the budget allowed by corporate headquarters (R.T. 10/17/03 at 87-89). That was the reason they had to split them and group them under some other title, *not* that they were trying to charge the companies for monies not spent. Phil Caballero told Kay Lines that *he* was the one who used to say they should be "financially creative." *At 118.*

Phil Guthrie —

He testified that the day after the funeral he met with Thera Huish in her home office, and she specifically requested that he not tell anyone about the life insurance on her daughter (R.T. 10/24/01 at 42). He had never met defendant. *Id.* He told Thera Huish that no one else needed to know about the policy. *At 43. He,* not defendant, was the one who advised Thera to do the buy-sell agreement. *At 46.*

Bob Bjerken and the Life Insurance —

In response to a juror question, Bjerken replied that he never informed defendant before the death of Trish of the existence of the $750,000 policy (R.T. 10/24/01 at 96). The court carefully questioned him and he reiterated that in no "way, shape, or form," not "directly, not through a third person, not over the telephone, [and] not by way of letter" had he informed defendant of the policy. *Id.*

Richard Fuller and the Incorporation —

He met with the incorporators Thera and Trish in November, 1990 (R.T. 10/25/01 at 58). The *incorporators,* not defendant, asked about a buy-sell agreement. *Id.*

Clyde Riggs —

He admitted on cross that defendant never used the word "implicate" in referring to

Yesenia (R.T. 11/7/01 at 118-120). He also admitted that the check given to him by defendant was for use in taking care of defendant's children. *At 133.*

Rosa Lee Bond —

Despite the State's implication that defendant was attempting to influence her testimony, she stated that he never told her what to say, or that she should not talk to investigators (R.T. 10/16/01 at 31-32).

Yesenia —

In addition to the attached depositions and interviews, it is untrue that the first time she "recanted" was in 1995. Richard Gierloff, in fact, told the court (and the press) that prior to the first trial defendant's former attorney, David Ochoa, had tape-recorded an interview with Yesenia in which she exculpated defendant (R.T. 11/1/01 at 16). And even in the second trial, she told the State on *direct* that the back door had been latched, and that she had to use a nail to open it. *At 22, 23. This* testimony has stayed consistent throughout her numerous recantations. It contradicts any conspiracy theory that she was to be let in to "make it appear like a robbery."

Thus, far from "overwhelming," the evidence actually presented, when coupled with defendant's affidavit of proposed testimony, reflects the "reasonable probability" that had the latter been presented the outcome would have been different. [3]

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[3] A "reasonable probability" is defined as less than "more likely than not," but more than "a mere possibility." *State v. Vickers,* 180 Ariz. 521, 885 P.2d 1086 (1994).

REPLY TO ARGUMENT

Rule 32.1(c) provides that post-conviction proceedings encompass a claim that the sentencing procedure was not in accordance with applicable law

State v. Cazares, 205 Ariz. 425, 426, 72 P.2d 355, 356 (App.2003) ("We conclude that this provision of Rule 32 encompasses a claim that sentence was not imposed in compliance with the *relevant* sentencing law . . . ") (emphasis supplied). As such, this embraces a claim that *either* the sentence was illegal, not imposed in a lawful manner, or an abuse of discretion.

In *State v. Cox,* 201 Ariz. 464, 37 P.3d 437 (App.2002), a similar situation occurred. Cox was convicted of offenses for which the Legislature prescribed a sentencing range that included mitigated sentences. The trial court, however, sentenced him pursuant to a statute that did not allow mitigation:

> Appellant's sentences *did not exceed the maximum permitted by law for his offenses, but the sentencing process was fundamentally flawed* because the trial court used sentencing ranges other than those mandated for the offenses in question.
>
> . . .
>
> An illegal sentence constitutes fundamental error. (citations omitted)

(emphasis supplied) 201 Ariz. at 468, 37 P.3d at 441.

Defendant's argument is thus not that the court imposed any sentence exceeding the maximum, but rather, that it relied on the wrong sentencing statute to determine aggravating factors for purposes of imposing *consecutive,* rather than *concurrent,* sentences. In other words, the sentencing process itself was fundamentally flawed and the result an abuse of sentencing discretion. The aggravating factors relied upon by the court were specifically held impermissible

in *State v. Viramontes,* 204 Ariz. 360, 64 P.3d 188 (2003).

The State's Response is grossly misleading. It cites *State v. Smith,* 184 Ariz. 456, 910 P.2d 1 (1996), and *State v. Slemmer,* 170 Ariz. 174, 823 P.2d 41 (1991) for the proposition that fundamental error "may *not* be considered in a post-conviction relief proceeding to overcome preclusion." (emphasis is original) *At page 49.* Neither decision states this at all.

In *Smith,* the Supreme Court simply held that a pleading PCR defendant had no constitutional right to appointed counsel when pursuing a discretionary review to the court of appeals. 184 Ariz. at 459, 910 P.2d at 4. The only place the word "fundamental" is even referenced is in the discussion of the repeal of former A.R.S.§ 13-4035, which had required the *appellate* courts to affirmatively search for fundamental error when considering whether to grant review of a pleading defendant's denial of post-conviction relief. *Id.*

This decision has absolutely nothing to do with a defendant's actual PCR claim before the trial court that his sentencing proceeding was fundamentally erroneous or constituted an abuse of discretion.

In *Slemmer,* the Supreme Court held that a decision overruling precedent and establishing a new principle of law, in that case, an instruction on self-defense, would not, under the principles of finality, apply retroactively to cases on collateral attack. 170 Ariz. at 183, 823 P.2d at 50.

Once again, it is difficult to understand the State's reasoning in citing this decision. *Viramontes* involved no new principle of law nor overturned any precedent. It was, said Justice Zlaket, a simple interpretation of statutory language that was "without ambiguity." 204 Ariz.

at 362, 64 P.3d at 90. [4]

Accordingly, the sentencing error occurring here was fundamental and not waived by any failure to object. *State v. Glasscock,* 168 Ariz. 265, 812 P.2d 1083 (App.1990); *State v. Alvarez,* 205 Ariz. 110, 67 P.3d 706 (App.2003); *State v. Thues,* 203 Ariz. 339, 54 P.3d 368 (App.2002); *State v. Cox,* 201 Ariz. 464, 37 P.3d 437 (App.2002); *State v. Canion,* 199 Ariz. 227, 16 P.3d 788 (App.2000). Indeed, these cases alone stand for the principle that the appellate courts may consider this type of error for the first time on appeal.

Second, because of the failure to sentence with respect to the *relevant* sentencing law, the result constitutes an abuse of discretion. Abuse of sentencing discretion claims are, of course, cognizable in Rule 32 proceedings. *See, State v. Resendix-Felix,* 209 Ariz. 292, 294, 100 P.3d 457, 459 (App.2004), *rev. granted, case remanded on other grounds; State v. Fillmore,* 187 Ariz. 174, 927 P.2d 1303 (App.1996). [5]

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[4] Indeed, even if *Viramontes* ***had*** announced a new principle, *Slemmer* would support *defendant*:

> When a new principle of law is articulated, a defendant whose conviction has become final *may seek relief under Rule 32.* That defendant is insulated from the rules of finality and preclusion when, as the rule contemplates, there "has been a significant change in the law applied in the process which led" to conviction or sentence. Whether relief may be obtained under Rule 32 then depends on the question of retroactive application of the new principle of law.
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> (emphasis supplied) 170 Ariz. at 184, 823 P.2d at 51.

In any event, the State does not argue that *Viramontes* established a new principle of law, and consequently it does not engage in any retroactivity analysis.

[5] Even if it be assumed that this issue should have been raised prior to the PCR, the court should note that *Viramontes* had not issued at the time of defendant's sentencing, so his

In *Fillmore,* the trial court had sentenced defendant to maximum consecutive sentences for each victim because it felt that "each one of these activities is separate and should not be given a quantity discount." 187 Ariz. at 184, 185, 927 P.2d at 1313, 1314. At post-conviction proceedings it modified the sentences somewhat, but still refused to consider the total result it had imposed. The Court of Appeals, on a consolidated appeal and petition for review, set the sentences aside:

> Although trial courts possess broad discretion to sentence defendants within statutory limits, a reviewing court may find abuse of discretion when the sentencing decision is arbitrary or capricious, *or when the court fails to conduct an adequate investigation into the facts relevant to sentencing.* (citations omitted)
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> . . .
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> *And a refusal to exercise the sentencing discretion provided by the legislature is, in and of itself, an abuse of discretion.* The legislature by statute, the prosecutor by charge, and the jury by conviction set the sentencing boundaries for the judge. But within those boundaries, "the ultimate responsibility for fitting the punishment to the circumstances of the particular crime and individual defendant still rests with the judiciary." (citations omitted)

(emphasis supplied) 187 Ariz. at 184, 185, 927 P.2d at 1313, 1314

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trial lawyers had no legal basis to object. As for the appeal, attached hereto is the affidavit of Lawrence S. Matthew, stating that he had never considered and affirmatively rejected a *Viramontes* claim, essential elements of "waiver," since he was simply unaware of the decision.

Finally, to the extent that the court requires some explanation for prior failure to raise this argument, it possesses jurisdiction to consider whether Mr. Matthew was negligent in his handling of the appeal. *See, State v. Herrera,* 183 Ariz. 642, 905 P.2d 1377 (App.1995).

Implicit in this holding is that a court must exercise its discretion commensurate with the *correct* statutes and procedures. Utilizing an improper statute in order to find aggravating circumstances for purposes of exercising discretion under A.R.S.§ 13-708 is no different than relying on an incorrect Presentence Report or erroneous criminal history. Worse here, the trial court specifically and emphatically announced its intent to rely on factors rejected by the Arizona Supreme Court.

Defendant is entitled to a re-sentencing without consideration of the impermissible aggravating factors of A.R.S.§ 13-702.

Testimony of Dr. Thomas Streed

Defense counsel's affidavit reflects that his was his "strategic" decision not to call him, since he felt that his cross-examination and been effective, and there was a risk of "reinforcing" damaging testimony. *At ¶¶ 14-15.*

Yet the entire trial had focused on the numerous flip-flops performed by this witness. Given the fact that even the State told the jury it could reject her statements, *supra,* Dr. Streed's testimony would have at least offered an explanation as to why these ever occurred in the first place, thus casting doubt on the entire State's case. In fact, Dr. Streed's affidavit specifically states, at paragraph 11, that Yesenia's abrupt change in testimony from cross to re-direct was a "classic example" of what he was proposing to relate to the jury.

As previously mentioned, "trial strategy" does not automatically immunize a lawyer's performance from Sixth Amendment scrutiny. *U.S. v. Span,* 75 F.3d 1383 (9th Cir. 1996); *Vickers, supra,* 180 Ariz. 521, 526, 885 P.2d 1086 (1994).

Defendant's testimony

In response to the State's contention that defendant did not show *what* he would have testified to, attached hereto is defendant's proposed testimony. He also avers that both defense counsel knew of these particulars; indeed, he alleges that Richard Gierloff helped prepare him to testify.

Further, review of Alan Simpson's affidavit reveals numerous instances of his failure to recall or recollect certain details. This, however, does not contradict defendant's affidavit. *State v. McFall,* 103 Ariz. 234, 236, 439 P.2d 805, 807 (1968):

> *An answer by a witness that he does not remember whether an event occurred is not a denial that the event did not occur.* Such an answer does not contradict the defendant's positive assertion that when he asked for the tablets the officers replied, 'that matter would be discussed after we had taken care of the business at hand * * *.' The defendant's testimony is unimpeached, either by the officers' testimony or other testimony or circumstances in the case. It should have been accepted at face value.

(emphasis supplied)

The discussions between defendant and defense counsel are known only to them. In those instances wherein neither defense counsel can recall, defendant's allegations must be taken as true.

Timeliness of the New Trial Motion

The State advances the absurd notion that failure to timely file a new trial motion under Rule 24.1 is excused because of the provisions of Rule 1.3(a). These rules have absolutely nothing to do with each other.

Rule 1.3(a) provides for additional five days *after service by mail of a notice or other paper.* Rule 24.1(b) requires the motion for new trial within ten days after the verdict has been

rendered, not 10 days after "service of the notice of the rendering of the verdict." This language of these rules is so clear and unambiguous that no reasonable attorney could ever argue that they are somehow related. [6]

Accordingly, the failure to timely file was at least *prima facie* ineffective. As set forth in the original Petition, prejudice cannot be determined absent an evidentiary hearing on the allegations presented in the motion. Further, the matter could not have been raised on direct appeal, as there was no evidence which a reviewing court could have considered in determining whether the trial court abused its discretion.

The State's Response that the motion does not allege cognizable 24.1(c) grounds ignores the provisions of subsection (c)(5), the "any other reason" provision that allows a trial court to grant a new trial when defendant has not received a fair and impartial one. While trial counsel may have incorrectly titled his grounds, courts look to the *substance* of what is alleged and not the label placed on it. *Hill v. Chubb Life American Insurance Co.* 182 Ariz. 158, 163, 894 P.2d 701, 706 (1995); a motion is determined by its substance, not its title. *State ex. rel. Corbin v. Tolleson,* 152 Ariz. 376, 381, 732 P.2d 1114, 1119 (1986). *Compare,* Rule 1.2, *Rules of Criminal Procedure* and Rule 1, *Rules of Civil Procedure* ("intended to provide for the just, speedy determination . . ."; "construed to secure simplicity . . .").

Hearing

The State has conceded a hearing is necessary, at least for the issue of defendant's failure to testify. However, and pursuant to defendant's affidavit, transportation of defendant to

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[6] Indeed, the State at hearing told the Court the exact same thing (R.T. 12/14/01 at 5-6). Now, however, it backtracks and says it was "reasonable" to argue the opposite.

Maricopa County Jail to await the evidentiary hearing will cause an undue hardship to him in terms of his employment and housing status with the Arizona Department of Corrections. That is because any absence from his regular duties for more than a two-week period results in a forfeiture.

Defendant has been on death row, and having endured 12 years of "lock-down" incarceration, has by virtue of his model inmate status achieved a Level 3 yard at the East Unit of Florence. [7] It took him the better part of three years to be allowed residence in what is called an "honor dorm," which, while hardly lavish, is far better than his previous accommodations.

Further, defendant is part of a select group of 6 trusted inmates (out of 750), who work at refurbishing bicycles for donation to needy parentless children. They are allowed to possess what are called "Class A tools," meaning screwdrivers and such. This program was started by Deputy Warden McWilliams, who personally selected defendant for its organization. It has continued with success under present East Unit Deputy Warden Lee.

Undersigned can avow to the Court that in the numerous Rule 32 evidentiary hearings he has conducted, at least in the last five years, *no* prisoner is ever returned to DOC custody in less than a month after being transported and booked in Maricopa County Jail. And that is not necessarily because of the court or its personnel, which often attempt to facilitate the prisoner's return. Rather, it is usually the bureaucratic intransigence and inexplicable lack of diligence on the part of the county jail that cause the problem. Even when courts issue Order after Order for return, the County simply takes its time to process anything.

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[7] This Court recognized at sentencing defendant's exemplary conduct while an inmate, and determined this to be a mitigating factor.

Rule 32.8(a) provides that the court, in its discretion, may order a hearing at defendant's place of confinement if facilities are available. The Pinal County Courthouse is essentially "across the street." Alternatively, and undersigned avows that he has conducted at least one such hearing this way, defendant may appear by conference call and/or videophone.

The court and counsel should understand that by this request defendant does not seek special favors. Rather, he seeks not be *punished* for having had the temerity to file for Rule 32 relief. For reasons stated, his transport here would constitute just such punishment.

Defendant respectfully requests that relief be granted.

RESPECTFULLY SUBMITTED: October 27, 2005.

MICHAEL J. DEW

Copy of the foregoing mailed/
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