IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. JODI ANN ARIAS, Appellant.	No. 1 CA-CR 15-0302 Maricopa County Superior Court No. CR-2008-031021-001 DT

APPELLANT'S REPLY BRIEF

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STATEMENT OF THE CASE AND FACTS

Additional, necessary facts for consideration of each issue appear in the reply addressing each issue.

ARGUMENT 1

> The trial judge's failure to protect Arias sufficiently from the massive, pervasive and prejudicial publicity during her trial violated her right to a fair trial.

The trial court's failure to control the media violated Arias's right to a fair trial and requires a reversal of the verdict of guilt. Appellee argued that Arias did not preserve this issue on appeal because the defense never requested a mistrial or filed a motion for new trial. (AB, pp. 19; 57). Appellee argued that this Court is thus limited to review for fundamental error. (AB, p. 19).

The defense preserved this issue for appeal by objecting to permissive media coverage of this trial in the following ways:

- Motion to Reconsider Media Access, (I. 348)(broadcasting her trial will interfere with her right to a fair trial under the federal and state constitutions);
- Response to Application to Intervene, (I. 374)(objects to In Sessions camera coverage of the trial);

- Motion for Protective Order, (I. 414)(objecting to media's relationship with MCSO and MCAO in this case);
- Motion for Mistrial, (RT 12-19-12, pp. 14-17)(objecting to presence of media during *voir dire*);
- Motion for Mistrial, (I. 915)(related to problems stemming from prosecutor's behavior on the courthouse steps where he posed for photos and signed autographs);
- Motion for Mistrial, (I. 921)(objects to prosecutor releasing evidence to the media, among other things);
- Motion for Mistrial, (RT 4-8-13, pp. 4-26)(based on threats to trial participants);
- Motion to Withdraw, (RT 4-8-13, pp. 26-27)(based on threats to the defense team);
- Motion for Mistrial, (I. 1143)(RT 5-20-13, pp. 9-17)(based on presence of cameras in the courtroom throughout trial).

The defense preserved error by objecting to livestreaming the trial from the outset.

As the above listed motions demonstrate, the defense continued to vigilantly monitor the adverse effect that the livestream coverage had on the trial. The appropriate standard of review in this matter is review for structural error. Structural error occurs when certain basic constitutional guarantees that should define the framework of any criminal trial are violated. *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1907(2017). Structural error defies analysis for harmless error. *Id.*

Appellee tends to rely on cases such as *State v. Bush*, 244 Ariz. 575(2018), that discuss pre-trial publicity. (AB, pp. 32-33; 39; 46; 58). This appellate issue addresses the court's failure to control the media during the course of the jury trial. It does not address any pre-trial publicity leading up to the trial. Livestreaming the trial over the internet resulted in specific problems that arose, different from problems caused by pre-trial publicity.

Livestreaming a trial makes it difficult to enforce the rule of exclusion of witnesses. In fact, the prosecutor objected to Arias's request to invoke the rule excluding witnesses. (I. 445; RT 2-9-12, p. 9). This Court granted the

defense request. A court can instruct witnesses not to watch the livestream before they testify, but there is no way to enforce that instruction.

A livestream set up in the courtroom involves a number of cameras–in this case the court permitted three cameras–to provide a continuous feed to remote viewers. The presence of three cameras in the courtroom detracts from the dignity and decorum that is due a criminal proceeding. Three cameras in the courtroom are unusual and distracting to the participants as well.

Not only were the media companies allowed to livestream the proceedings, reporters were allowed to "tweet" live from the courtroom. (RT 2-5-13, p. 112). Jurors leave the court at the end of the day. They have access to the news on their phones as well as on television when they get home. Jurors have Twitter accounts. The court has no way to prevent a well-meaning juror from stumbling across tweets about the trial.

Furthermore, the tweets from the courtroom could be about *anything*, and could even be about information that would be improper for a juror to consider. Venturing into the world of internet news saturation during a high

profile death penalty case is slippery ground for a court to tread. It is up to the court to maintain the safety of trial participants. *United States v. Clardy,* 540 F.2d 439, 443(9th Cir.1976), *citing Leyvas v. United States*, 264 F.2d 272, 277(9th Cir.1958). It is up to the court to protect a defendant's right to a fair trial. *Sheppard v. Maxwell*, 384 U.S. 333, 358(1966)(the presence of the press must be limited when the accused might be prejudiced or disadvantaged.) A court that allows the media to portray a trial for entertainment purposes abdicates its duty to the constitution and the defendant. That is exactly what happened in this case.

The trial court allowed the media free rein. When the prosecutor took advantage of the live-stream by acting out for the cameras, the court allowed him to pursue his "style" of lawyering. (RT 4-8-13, pp. 20-21). When the defense objected to the court's seeming disregard for due process, the court responded by finding that defense counsel's argument was disrespectful, unprofessional and may have violated ethical rules. (RT 5-21-13, p. 19). She warned him that she would consider what action to take, if any. (*Id.*, p. 20). Defense counsel responded by moving to withdraw, noting the chilling

effect the court's words had on his ability to defend his client. (*Id.*, p. 22). Contrary to Appellee's argument that the trial court did not threaten defense counsel, (AB, p. 32, fn 2), she threatened to report him to the State Bar. (RT 5-21-13, p. 20).

The court gave the prosecutor expansive leeway in his prosecution of Arias, but threatened defense counsel with a bar complaint when defense counsel advocated for Arias. It demonstrates the court's reluctance to control the prosecutor's tendency to "act out" in front of the cameras in the courtroom. In fact, the court took displeasure when defense counsel noted her enabling behavior for the record. Defense counsel's effort to protect Arias's right to a fair trial only annoyed the court.

Appellee argued that Arias herself caused the media circus. (AB, pp. 18; 35). In a classic example of projection, Appellee identified the prosecutor's faults and then projected them onto Arias.

- Who signed autographs outside of the courthouse? (RT 3-28-13, p. 10). Was that Arias? No, it was the prosecutor. (*Id.*).

- Who took photos with ribbon wearing media types outside of the courthouse? (RT 3-21-13, p. 134). Was that Arias? No, it was the prosecutor. (*Id.*).
- Who threw evidence onto the floor in front of the cameras during trial? (RT 1-14-13, pp. 135-137). Was that Arias? No, that was the prosecutor. (*Id.*).
- Who frequently yelled at defense witnesses during cross-examination? (See, OB Appendix 4 and 6). Was that Arias? No, that was the prosecutor. (*Id.*).
- Who disparaged defense counsel while the trial was being livestreamed to the world? (RT 2-25-13, p. 89). Was that Arias? No, that was the prosecutor. (*Id.*).
- Who released trial evidence to the media outside of trial? (RT 4-4-13 #1, pp. 4-5; I. 414). Was that Arias? No, that was the prosecutor. (*Id.*).

- Who harassed defense experts in front of the cameras during cross-examination? (See, OB Appendix 3-5). Was that Arias? No, that was the prosecutor. (*Id.*).
- Who told the court that if he had it his way he'd be on TV every day? (RT 11-21-11, p. 24). Was that Arias? No, that was the prosecutor. (*Id.*).
- Who wanted the witnesses to be allowed to watch the live feed of the trial before they testified? (I. 445). Was that Arias? No, that was the prosecutor. (*Id.*).
- Who posed with someone from the Dr. Drew Show during trial? (RT 3-28-13, p. 10). Was that Arias? No, that was the prosecutor. (*Id.*).
- Who interacted with spectators outside of the courthouse during trial? (*Id.*). Was that Arias? No, that was the prosecutor. (*Id.*).

This is what happens when the court sacrifices the solemnity of a criminal trial for entertaining the masses. Arias was not responsible for inflaming the media.

Arias smiled in her booking photo. (EX 477). Instead of seeing it for what it was, a young woman not knowing how to react to being arrested for a serious, horrific crime, Appellee tortures the incident into an invitation to the media. Appellee made an unreasonable attempt to impose attributes on Arias that the evidence simply does not support.

Arias participated in three TV interviews over the course of five years. (I. 1248). That's how Appellee would have this Court believe that Arias "courted" the media. The only person courting the media was the prosecutor, playing to the live cameras every day while avid spectators watched. Arias conducted herself properly every day that she appeared in court. Nowhere in the record is there any suggestion that she did otherwise.

Appellee argued that Arias's argument that the media attention surely made an impression on the jury was a defunct "trial is special" argument. (AB, pp. 45; 54). Appellee relies on *Chandler v. Florida* for its position that the defendant must show something more than juror awareness that the trial is such as to attract the attention of the broadcasters. (AB, p. 54). *Chandler* involved the placement of one camera in the courtroom for short periods of

time. *Chandler v. Florida*, 449 U.S. 560, 568(1981). Only two minutes and fifty-five seconds of the trial were actually televised. *Id.* There was no evidence of how this broadcast impacted the jury. *Id.*

In the present case, there were three cameras in the courtroom at all times. There were also still cameras. The court allowed reporters to "tweet" during the trial. The daily broadcasts extended into the evening as talk show hosts re-considered the evidence of the day. Arias's trial went on for five months and the media attention only grew as the trial proceeded to verdict. The two cases are factually dissimilar.

Chandler involved an analysis of the Florida rule governing televised trials. *Id.*, at 567. But *Chandler* does not disregard the psychological impact on trial participants. "A defendant has a right on review…to show that broadcast coverage had an adverse impact on the trial participants." *Id.*, at 581. So while Arias must show more than juror awareness that the trial has attracted the attention of the media, the court may consider this juror awareness along with the impact on the other trial participants.

Chandler is based on an argument that the broadcast of the trial was inherently a denial of due process. *Chandler v. Florida*, 449 U.S. at 570. Arias argues not only that the media attention telegraphed to the jury that her trial was "special." The unrestrained media broadcast of her trial also had an adverse impact on the other trial participants. Arias argues that the trial court failed to protect Arias from the media circus, and that failure resulted in a violation of due process.

The *Chandler* opinion discussed valid concerns that are raised when trials are targeted by broadcast media. Daily broadcast of a defendant's trial can be a form of punishment in itself. *Id.*, at 580. The media broadcast may be presented in such a way as to titillate rather than to educate and inform. *Id.* Daily broadcast can result in the harassment of the defendant and can impede the ability of a defendant to confer with counsel. *Id.*, at 578. The presence of the live cameras can affect a timid or reluctant witness just as it could encourage a cocky witness or an ambitious prosecutor. *Id.*, at 572.

The message that constant media presence sends to a jury about the nature of a trial is still relevant, and is not "defunct" as Appellee proposes.

Certainly it's not the only factor to consider when analyzing the livestream's effect on the jury and other trial participants. In addition to the impact on the jury, the impact on other trial participants is evident:

- the threats to defense experts Samuels and LaViolette;
- the threats to defense counsel;
- the constant inappropriate acting out by the prosecutor; and
- the ribbon wearing spectators, all support the argument that the media coverage of this trial violated Arias's right to a fair trial.

Appellee argued that the media exposure did not affect the jurors, and they told the court numerous times that they could be fair notwithstanding the media attention. (AB, p. 36). The effect of the media exposure on the jury is only one thing that this Court should consider. In *Sheppard v. Maxwell*, the court noted that a juror's affirmation that he would not be influenced by news articles was not dispositive. *Sheppard v. Maxwell*, 384 U.S. at 351. And in *Irvin v. Dowd*, 366 U.S. 717(1961), the court held that even though each juror indicated he could render an impartial verdict despite exposure to prejudicial news articles, the conviction was set aside because "With his life

at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion." *Irvin v. Dowd*, 366 U.S. at 728.

The court must consider how the livestream coverage impacted all of the trial participants. LaViolette experienced serious illness as a result of the constant harassment she received from misguided spectators who wanted to take the trial into their own hands. (RT 4-8-13, pp. 4-26; RT 4-9-13, pp. 4-7; RT 4-10-13, p. 4; RT 4-11-13, pp. 6-7; RT 4-12-13, pp. 3-10; 134). Dr. Samuels, too, was subject to threats. (I. 1334; RT 3-21-13, p. 136)("You are a piece of excrement. If Jodi Arias gets anything less than life without parole you will be held accountable.")

Defense counsel received threats by phone and by email almost on a daily basis. Defense counsel received threats by email, such as "Watch your back. If you dare keep fighting against Travis' family…no elaboration needed." (Order Supplementing Record, 4-3-18). She received voicemail messages such as, "I'm your nightmare, I will kill you, whore, bitch." Or "Fuckin' kill you, fuckin' bitch." (*Id.*). Any human being operating under

these conditions is not at their best. This type of prejudice is immeasurable, and that is one reason why the error that occurred is structural.

Appellee suggested that the media coverage was not prejudicial. (AB, pp. 39; 41). The media portrayed Arias as a stalker, a liar, crazy, and a "seductress." (I. 1211). One national talk show personality criticized the amount of money used to fund Arias's defense. (RT 3-27-13 #1, pp. 4-6). Juror #5 echoed this same view, complaining about the expert fee paid to defense expert LaViolette. (RT 4-2-13, pp. 16-17).

The trial judge noted that she stopped watching coverage of the trial due to media misinformation. (RT 4-8-13, p. 29). While the media loved to castigate Arias, it showered affection on the prosecutor who played to the audience and posed for photos outside of the courthouse with national media types. (RT 3-28-13, p. 10). HLN followed the prosecutor's lead in keeping a running negative commentary on the defense. (RT 4-2-13, pp. 56-57; RT 4-12-13, p. 9).

Ultimately, the court drew a correlation between the threats made to the various trial participants and the daily dose of live trial coverage. (ME

11-14-13). She also noted that the media "hounded" and "harassed" trial participants. (*Id.*). This Court traditionally gives great deference to trial court determinations of conflicting procedural, factual or equitable considerations. *State v. Winegar*, 147 Ariz. 440, 445(1985). The court's post-trial observations and conclusions reveal that after the dust settled, the trial judge recognized the great harm done by the media's involvement in this case.

Appellee argued that Arias presented no support for the statement that the media coverage was inaccurate. (AB, pp. 39-40). To the contrary, Arias repeated the words of the trial judge herself, who said "false information is replete in this case" such that she stopped following media accounts of the trial because there was so much misinformation out there. (RT 4-8-13, pp. 11; 29).

Appellee argued that taking photos of jurors during a capital trial was not prejudicial. (AB, p. 43). It is reasonable to believe that the daily presence of the media and the risk that they would be "mistakenly" photographed had a tremendous prejudicial effect on the jurors. The jurors complained

about the noise the still cameras made in the courtroom. They noticed the cameras. Being guided from the courthouse by a security escort, by way of the courthouse loading dock, is not normal. It is reasonable to conclude that there was an adverse impact on the jurors.

In fact, there are rules in place to protect the identity of the jurors involved in a trial of any nature. Juror information is protected by law. A.R.S. § 21-312. The legislature passed these rules to protect and encourage citizens who report for jury duty. Jurors who are followed and photographed by the media may feel uncomfortable with being thrust into the limelight. They may feel threatened. They may resent being called to jury duty. Remote viewers may also develop a desire to avoid jury duty after watching how the media treated the jurors. Not everyone has a desire to be featured on TV every day.

Appellee suggests that the standard RAJI media instruction sufficiently mitigated any prejudice resulting from the sustained media attention given to this trial. (AB, p. 52). The standard instruction does not address the jurors' experience in this trial. It does not address the crowds of

people and media outlets outside of the courthouse, or the photographers in the parking garage trying to get a shot of them, or the way it feels to be marched around under the protection of a SWAT team, or watching the prosecutor's antics in front of the cameras during a very serious capital murder trial, or knowing that the matter was being broadcast every day, day in and day out, to a worldwide audience. The standard RAJI just does not meet the challenge presented by this trial.

Appellee suggests that there is no evidence to support the allegation that the camera crews were "sloppy." (AB, p. 46). When cameras "mistakenly" film jurors on five different occasions, or the defendant in shackles, or use cameras that are loud enough to be a distraction, that this is sloppy workmanship. Appellee's efforts to justify and explain away media mistakes and adverse impact on the participants in this trial demonstrates how the prosecution profited from using the media exposure and livestream coverage as a tool to convict Arias. Appellee ignores the facts by arguing that the media related incidents were "isolated," that the prejudice

amounted to "nothing" and that Arias was not harmed in any way by "publicity." (AB, pp. 57-58).

Media related incidents began as early as 2011 and continued throughout trial, escalating as the trial progressed. This media attention adversely impacted defense experts such as Samuels and LaViolette who endured threats of violence because they dared to testify for the defense. The defense team itself was subjected to threats of real violence, they were followed on the streets, they were photographed at dinner and then subjected to derision on the internet. Media talk show hosts used the trial as fodder to entertain the masses with sex and violence.

This Court cannot turn a blind eye to the very real effect that the livestream coverage, the still camera coverage and the incessant tweeting had on this trial. This Court cannot say "so what?" when expert witnesses and lawyers are victims of death threats, and when the jury must be protected by a SWAT team. This Court cannot simply shrug off the *trial court's* observation that the threats were a result of the daily media coverage. Other measures were available and eventually employed during the retrial,

but do not cure the fact that Arias's guilty verdict was the product of a media circus. Reversal is required.

ARGUMENT 2

> The trial court violated Arias's right to confront witnesses and the Rules of Evidence when it allowed Officer Friedman to repeat statements made to him by Arias's grandparents regarding a .25 caliber handgun that was allegedly stolen from their home during a burglary.

The prosecutor used improperly admitted hearsay testimony to prove premeditation.

This Court should not consider the new arguments Appellee raises on appeal.

Appellee presents several arguments for the first time on appeal:

- that Friedman's statement was not for the truth of the matter asserted but to explain why Flores asked Arias about the gun when he interrogated her. (AB, p. 59);
- the statement was not offered to prove the truth of the matter asserted but to show that the police believed the gun was stolen. (AB, pp. 62-63);

- the statement had to be admitted in order to prevent the defense from arguing that the state fabricated the testimony about the stolen gun. (AB, p. 63).

The state failed to present and develop these arguments to the trial court, thus waiving the arguments. *See*, *State v. Brita*, 158 Ariz. 121, 124(1988); *State v. Hendrix*, 165 Ariz. 580, 582(App. 1990). At trial, the prosecutor specified that Friedman's testimony was not hearsay because it was not offered to prove the truth of the matter asserted, but only to show that the officer "wrote it in his report." (RT 1-14-13, pp. 17-18). The prosecutor never argued the additional reasons now espoused by Appellee. Because the state never presented these arguments to the trial court, Arias requests that this Court disregard them.

Hearsay:

Appellee relied on *State v. Foshay*, 239 Ariz. 271(App. 2016), to argue that Friedman's statement was not a violation of the Confrontation Clause because it was not hearsay. (AB, p. 62). Arias maintains Friedman's testimony was hearsay *and* also violated the Confrontation Clause.

Officer Friedman testified that Arias's grandparents told him that a gun was stolen in the burglary of their residence. (RT 1-14-13, p. 16). According to the prosecutor, it was not hearsay because it was only offered to show that Friedman wrote the statement in his report. (*Id.*, p. 18). The court allowed the hearsay testimony because it was not offered for the truth of the matter asserted. (*Id.*).

That reason was a sham. The prosecutor argued repeatedly during closing argument that Arias was the one who stole the gun, and she stole it to further her plan to kill T.A. (RT 5-2-13, pp. 87-90; 97; 113; 119; 144-145; 172-173; 176-177; RT 5-3-13, pp. 122; 129; 131; 144). "Jodi Arias, that's the burglar. She needs a gun and she needs a gun to kill Travis Alexander. And she gets it." (RT 5-2-13, p. 89). He argued as a theme of premeditation, that Arias stole the gun as part of her plan to kill T.A. (RT 5-3-13, p. 144).

Appellee argued that the prosecutor's closing argument was not based on Friedman's testimony but on Arias's statement to Flores where she acknowledged that her grandparents told her the gun was stolen. (AB, p. 64). Appellee does not explain how anyone would be able to discern the

source of the prosecutor's argument. It is reasonable to infer that the argument stemmed from Friedman's testimony and not from Arias's statement to Flores.

Flores never determined when Arias learned about the stolen gun from her grandparents. Arias testified throughout trial that she did not steal the gun nor did she bring the gun with her to Mesa to use to kill T.A. (RT 2-9-13, pp. 80; 89; 105; 108; RT 2-27-13, p. 121; RT 2-28-13, p. 114). There is no evidence connecting the grandparents' stolen gun to the crime, aside from the caliber of the weapon.

There is no evidence that the casing found at the crime scene was consistent with the ammunition that Arias's grandfather used in the gun. Arias's grandfather told Friedman that he loaded the stolen gun with jacketed hollow point bullets. (I. 568, EX 1). There was no evidence of jacketed, hollow point bullets related to T.A.'s death.

If Arias's grandparents testified, they could have provided details of the burglary. They could have described for the jury the type of ammunition that was used with the gun. They could have described for the jury Arias's

familiarity with the gun. The prosecution chose to silence these witnesses with firsthand knowledge of the burglary by calling Friedman instead. The prosecution's argument that the testimony was non-hearsay was a ruse to introduce testimony while depriving Arias of her right to confront the witnesses against her.

Right to Confront Witnesses:

Officer Friedman's testimony that Arias's grandparents told him that a gun was stolen in the burglary violated Arias's right to confront the witnesses who testified against her. U.S. CONST., amend. 6; ARIZ. CONST. art. 2, section 24. To assess a claim of a violation of the Confrontation Clause, the court must consider the importance of the testimony to the state's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. *Delaware v. Van Arsdall*, 475 U.S. 673, 684(1986); *State v. Medina*, 178 Ariz. 570, 577(1994).

Arias's grandparents could provide the jury with firsthand knowledge regarding the details of the burglary and the missing gun. Her grandparents could explain whether they had any reason to believe Arias stole the gun, when the gun was last used, where exactly they kept the gun, if Arias ever had any interest in the guns, if she knew how to use the gun, or if Arias had access to the weapon.

For instance, Friedman told the jury that the gun was stolen from a gun cabinet that was a modified dresser. (RT 1-14-13, p. 22). This testimony contradicts his own report which stated that the grandfather told him the gun was stolen from his dresser in his bedroom. (I. 568; EX 324).

The court allowed the state to evade these witnesses by introducing evidence through a police officer. A police officer is a professional witness who carries with him the authority endowed upon him by the state. Friedman's testimony provided credibility to the report of the stolen gun, while changing the details that suggested Arias did *not* take the weapon.

Because the state attacked Arias's credibility at every opportunity, the state needed the testimony of the stolen gun to come from a credible witness

so as to be useful in closing argument. The testimony was critical in closing argument. The prosecutor invited the jury to speculate that Arias staged the burglary and stole the gun as part of her premeditated plan to kill T.A. The state presented Friedman's testimony to vouch for the allegation that the gun was stolen in the burglary. Friedman's hearsay testimony was necessary to support the prosecutor's speculation that Arias staged the burglary and stole the gun in her plan to kill T.A.

Prejudice:

This Court must determine whether the court's error in admitting the grandparents' statement was harmless. *State v. Smith*, 242 Ariz. 98, 102 ¶14(App. 2017). The court must be satisfied beyond a reasonable doubt that the erroneously admitted evidence had no influence on the jury's judgment. *Id.* The burden is on the state. *Id.* The proper inquiry is whether the guilty verdict actually rendered in this trial was surely unattributable to the error. *Id.*, quoting *State v. Valverde*, 220 Ariz. 582, 585 ¶11(2009).

Prejudice establishing Arias's claim of a violation of the Confrontation Clause dovetails with the prejudice demonstrating that the error was not

harmless. This improperly admitted hearsay played a key role to support the prosecutor's theory that Arias premeditated the crime. Premeditation is an essential element of the crime of first degree murder.

The improper admission and use of this hearsay was not harmless because it allowed the state to argue that Arias possessed the required mental state to establish first degree murder. Without the argument that Arias took the gun as part of a plan to kill T.A., it is likely that the jury would not have found first degree murder. Reversal is required.

ARGUMENT 3

The trial court abused its discretion when she allowed the state's expert to testify regarding Arias's mental state at the time of the crime.

The government must prove every element of a charged offense beyond a reasonable doubt. U.S. CONST., amend. 5, 6 and 14; ARIZ. CONST., art. 2, sections 4, 23 and 24; *In re Winship*, 397 U.S. 358, 361(1970). An expert may not state an opinion about whether the defendant did or did not have a mental state that constitutes an element of the crime charged. 17 A.R.S. Rules of Evid., Rule 704(b). Expert psychological testimony is not appropriate to show the actual mental state of the defendant at a given time. *State v. Hyde*, 186 Ariz. 252, 276(1996).

Opening the door.

Appellee argued that Arias opened the door to DeMarte's opinion when Dr. Samuels testified that the crime scene was disorganized and that Arias's higher cognitive levels were not processing correctly. (AB, pp. 66, 71-72). Dr. Samuels testified after Arias spent 18 days on the witness stand. (RT 3-14-13). During cross-examination of Arias, the prosecutor relentlessly

attacked her memory. (See, e.g., RT 2-21-13, pp. 9; 24; RT 2-28-13, pp. 124; 159-169; 188-189; RT 3-13-13, pp. 31; 44; 51). He attacked her credibility. (RT 2-25-13, pp. 10; 17-22; 44-49; RT 2-26-13, pp. 63; 66; RT 2-27-13, p. 14). The defense called Dr. Samuels to explain Arias's patchy memory to the jury.

Samuels explained to the jury that trauma affects memory. (RT 3-14-13, p. 83). A possible result of experiencing great trauma is a condition called "dissociative amnesia." (*Id.*). Dr. Samuels explained that he tested Arias and determined that she suffered from PTSD. (*Id.*, pp. 102; 106). Dr. Samuels explained how amnesia affected Arias. (RT 3-18-13, pp. 26-29).

The state objected, arguing that Dr. Samuels' testimony violated Rule 704. (*Id.*, pp. 9-10). The defense countered that Dr. Samuels was merely explaining why Arias suffered from poor memory at times, and was not addressing her mental state at the time of the killing. (*Id.*). The state acknowledged that it was improper for an expert to testify about what a defendant was thinking or saying right after the murder. (*Id.*, p. 12). The court required additional foundation. (*Id.*, p. 13). Samuels' testimony continued.

Later that day, the state objected again. (*Id.*, p. 97). The defense maintained that Dr. Samuels' testimony addressed Arias's memory loss when she testified. (*Id.*, p. 98). The defense argued that Dr. Samuels' testimony went to the diagnosis of PTSD, and explained disorganized behavior due to acute stress. (*Id.*).

The prosecutor contended that Samuels' testimony addressed Arias's state of mind at the time of the killing. (*Id.*). The defense insisted that the testimony addressed PTSD and not premeditation. (*Id.*, p. 100). The prosecutor warned that the defense was "opening the door" and "we'll have error." (*Id.*, p. 101). The defense repeated that the testimony addressed PTSD and not premeditation. (*Id.*, p. 102).

Insisting that the testimony went to Arias's mental state at the time of the killing, the prosecutor argued that "opening the door" would allow *his* expert to testify that the killing was planned, "*whatever word we can use for premeditated that isn't premeditated.*" (*Id.*, p. 104)(Emphasis added). The court concluded it was permissible for Dr. Samuels to connect the crime scene photos to his diagnosis. (*Id.*).

The prosecutor once again insisted that he would introduce expert testimony addressing premeditation. (*Id.*). *The court warned that she would not allow the state's expert to testify about the defendant's mental state*. (*Id.*, p. 105)(Emphasis added). The court admitted the testimony for a proper purpose. The state responded with DeMarte's improper testimony.

Invited error.

Nor does the doctrine of invited error apply in this circumstance. The invited error doctrine prevents a party from injecting error in the record and then profiting from it on appeal. *State v. Logan*, 200 Ariz. 564, 566 ¶11(2001). A party also invites prejudicial testimony by being the first party to elicit the testimony. *State v. Anderson*, 210 Ariz. 327, 340, ¶44(2005); *State v. Moody*, 208 Ariz. 424, 453 ¶111(2004).

The defense did not invite error. Samuels' testimony was proper. The defense presented an explanation of Arias's memory loss to address a theme of the state's cross-examination of the defendant, i.e., that her memory loss was just a way to avoid answering certain questions posed by the prosecutor. The state responded to this testimony by improperly eliciting

expert testimony regarding Arias's capacity for organization and planning after the killing. (RT 4-16-13, pp. 171-172).

There was no invited error and no open door. The defense never introduced inadmissible evidence regarding mental state. The defense simply presented testimony to explain Arias's memory gaps. On rebuttal, the state had every opportunity to *properly* respond to Samuels' testimony without violating the rules, but chose not to do so.

Appellee argued that DeMarte's testimony describing Arias's conduct after the killing was not testimony supporting premeditation. (AB, p. 70). The arguments made by the prosecutor during closing arguments bely this argument. Describing Arias's conduct after the killing as "planned" or "organized" was important for the state to prove premeditation. The prosecutor implemented DeMarte's improper testimony to argue premeditation during closing arguments.

The prosecutor used DeMarte's improper testimony to argue that these things were "important to show that she was thinking." (RT 5-2-13, p. 134). He told the jury that Arias's behavior on the day of the killing was

"directed." (*Id.*). He argued that her behavior was demonstrative of how well she was thinking. (*Id.*, p. 139). He argued that her behavior after the killing showed her clarity of thought. (*Id.*, p. 141).

The prosecutor listed things that Arias did *after* the killing in order to support his argument that the killing was premeditated. He claimed these actions taken after the killing showed that Arias's thought processes were clear, directed and supported premeditation:

- She washed her feet before moving around the house. (*Id.*, p. 134).
- She deleted certain photos from the camera. (*Id.*, p. 133).
- She put the camera in the washing machine. (*Id.*, p. 135).
- She washed off T.A.'s body in order to make sure her DNA would not be found on him. (*Id.*, pp. 135-136).
- She washed the knife. (*Id.*, pp. 136-137).
- She took the gun with her when she left. (*Id.*, p. 137).
- She staged the scene. (*Id.*, p. 143).
- She washed certain items using Clorox. (*Id.*, p. 138).

- She put the license plate back on her car. (*Id.*, p. 139).
- She left a message on T.A.'s voicemail. (*Id.*, p. 141).

The prosecutor argued that the crime scene did not support sudden quarrel or heat of passion and that the scene indicated "something else." (*Id.*, p. 145). The prosecutor argued that "She actually took some time to delete some photographs from the camera. She actually took time to make sure she didn't get the bloody footprints on to the carpet. She took time to put the camera in the washing machine. And she took some extra time to kind of wipe up the scene, drag him back stick him in the shower." (*Id.*, pp. 145-146).

The prosecutor connected DeMarte's testimony about the planning and organizing that took place after the killing to premeditation. He told the jury, "So there is this premeditation aspect. So she staged the scene at that point." (RT 5-2-13, p. 139). DeMarte testified that Arias was capable of planning and organizing. The prosecutor then used that testimony to bolster his argument that Arias planned, organized and committed premeditated murder.

Appellee argued that 704(b) permits an "inference or conclusion" that the defendant did or did not have the requisite *mens rea*. (AB, p. 69). Appellee relied on *United States v. Morales* for his argument that DeMarte's testimony did not violate the rule because her testimony that Arias was capable of planning and organizing was an inference permitted under the rule. (AB, p. 69). *United States v. Morales*, 108 F.3d 1031, 1036(9th Cir.1997). In that case, the defense wanted to call an accountant to testify that the defendant bookkeeper had weak bookkeeping skills to help prove that she did not act willfully. *Id.*, at 1034. Because the expert testimony was limited to a description of the defendant's bookkeeping skills, the court found that it was only an inference that her actions were not willful, and that the testimony should have been allowed. *Id.*, at 1037.

Thus, Appellee maintains that DeMarte's testimony regarding planning and organizing is only an inference that Arias's actions were premeditated. Appellee emphasized that DeMarte never used the actual word, "premeditated." (AB, p. 70). At trial, the prosecutor even told the court that he would find a way to say "premeditated" without using the

word "premeditated." (RT 3-18-13, p. 104). This strategy places form over substance.

There is no great leap to make from "planning" to "premeditated." A plan is defined as "a method for achieving an end." Merriam-Webster Dictionary, https://www.meriam-webster.com/dictionary last visited 4-1-19. And even though the prosecutor assured the court that the testimony he elicited did *not* go to premeditation, he used that testimony to vigorously argue premeditation.

Appellee argued that DeMarte's testimony explained that Arias did not suffer from dissociative amnesia. (AB, p. 70). This was a ruse that the prosecutor extended in an effort to convince the court to allow the testimony. Once he elicited the testimony, the prosecutor immediately abandoned that theory and instead used the testimony to argue to the jury that Arias acted with premeditation.

Finally, Appellee argued that any error was harmless. (AB, p. 72). Appellee maintained that the expert witness instruction cured any prejudice. (*Id.*). The prosecutor vigorously argued in closing that Arias was fully

capable of organizing and planning. As a result of DeMarte's improper testimony, the prosecutor fortified his closing arguments with examples of Arias's actions after the killing that supported a finding of premeditation. Planning and premeditation both address mental processes that occur before action is taken. The jury instruction that tells a juror that they can accept or reject an expert opinion does very little to cure the error that occurred from the Rule 704(b) violation.

Appellee argued that evidence of premeditation was "overwhelming." (AB, p. 73). Appellee points to the "stolen gun," when there is no evidence that the gun used in the killing was the same gun stolen from Arias's grandfather. (*Id.*). Further, there was no evidence that Arias was the one who stole the gun from her grandfather. That evidence was improperly admitted through the use of hearsay. See Argument 2. But the prosecutor used this improperly admitted evidence to argue premeditation and now on appeal it is again an argument to support a claim of harmless error.

Appellee argued that Arias concealed her trip to Mesa. (AB, p. 73). She rented a car in her own name instead of using her own car. (RT 2-19-13,

p. 84). She stopped to visit D.B. along the way. (*Id.*, p. 96). She kept the receipts from her trip in a shoe box, thus documenting this "secret" trip. (RT 1-10-13, pp. 24-37; RT 2-27-13, p. 62). She moved away from T.A. long before he decided to go to Cancun with another woman who also had rejected him as a potential spouse. (RT 2-12-13, pp. 71-72; RT 1-2-13, pp. 88; 94; 134). One of the reasons she moved away from T.A. was the continued abuse, evidenced by the scathing writings he sent her. (RT 2-19-13, pp. 67-69; 113-114, 101-150; OB Appendix 1).

As for the "uncorroborated" acts of physical abuse, Arias certainly isn't the first woman to testify that she suffered physical abuse where no one else was a witness to the violence. She is not the first woman who did not report domestic violence to authorities. She is not the first woman who did not photograph injuries sustained as a result of domestic violence. She is not the first woman to continue to love her abuser.

Appellee asserts, without explaining, that Arias's self-defense claim was "physiologically impossible." (AB, p. 73). But the state's theory of events as elicited at the Chronis Hearing was consistent with Arias's

testimony. (RT 8-7-09, p. 25). Arias testified that she shot T.A. first when she pointed T.A.'s gun at him hoping to stop him, and the gun went off. (RT 2-20-13, pp. 15-17). The medical examiner testified that he could not be certain about the timing of the injuries. (RT 1-8-13, p. 137).

The medical examiner said that due to decomposition, he could not perform a thorough examination of the path the bullet took through T.A.'s head. (*Id.*, p. 92). The existence of wounds on T.A.'s hands led the medical examiner to suggest that they were defensive wounds. (*Id.*, p. 55). The crime scene looked like a "wildebeest migration" went through it, according to the prosecutor. (RT 5-2-13, p. 131). Even the state's version of the series of events that led to T.A.'s death was murky at best.

Proving premeditation was an essential element to first degree murder. The prosecutor was able to tie Arias's actions to premeditation because the court erred when it allowed DeMarte to testify about Arias's mental state after the crime. The error was not harmless and reversal is required.

ARGUMENT 4

Arias was forced to wear a stun belt throughout trial, thus violating her right to a fair trial.

Appellee spends much of the answering brief discussing cases that involve shackles that are visible to the jury. (AB, pp. 74, 77, 78). Arias does not claim on appeal that her stun belt was visible to the jury.

Appellee contends that the prosecutor was blameless because Arias "offered" to perform a demonstration for the jury, in order to show how the victim attacked her. (AB, p. 80). To the contrary, Arias said that she could demonstrate the victim's posture as he attacked her *but she did not want to*. (RT 2-28-13, p. 126). She did not want to demonstrate. (*Id.*). She did not offer to demonstrate. (*Id.*).

Appellee argued that Arias's counsel "insisted" that Arias demonstrate T.A.'s attack. (AB, p. 80). The record reflects that as soon as the prosecutor invited Arias to descend from the witness stand to demonstrate for the jury, defense counsel objected. (RT 2-28-13, p. 127). Defense counsel maintained that Arias be allowed to perform the demonstration because if she declined it would look like she was hiding something. (*Id.*, pp. 127; 136).

Defense counsel therefore asked that Arias be allowed to take off the stun belt and perform the demonstration. (*Id.*, p. 129). The prosecutor's willingness to forego the demonstration was not based on largesse but on the hope to make Arias look bad in the eyes of the jury by declining his challenge to perform the demonstration.

Appellee noted that the United States Supreme Court vacated *United States v. Sanchez-Gomez*, 859 F.3d 649(9th Cir.2017). *United States v. Sanchez-Gomez*, 138 S.Ct. 1532(May 14, 2018). The issue addressed by the Supreme Court was whether the class action-like claim was moot. *Id.*, at 1537. The Supreme Court did not address the use of restraints. *Id.*, at 1542. The Supreme Court vacated the case on grounds that the plaintiff's claims were moot. *Id.*

While *Sanchez-Gomez* was vacated, the underlying precepts remain like bedrock: the presumption of innocence, the right to be free from unwarranted restraints, the right to assist counsel and the preservation of the dignity and decorum of the judicial process. *Deck v. Missouri*, 544 U.S. 622, 630-631(2005); *Gonzalez v. Plier*, 341 F.3d 897, 900-901(9th Cir.2003);

Duckett v. Godinez, 67 F.3d 734, 749(9th Cir.1995); *Spain v. Rushen*, 883 F.2d 712(9th Cir.1989).

The court's duty is to preserve these core principles and guarantee a criminal defendant a fair trial. Courtroom security is the duty of the judge and may not be deferred to law enforcement entities like the county sheriff. *State v. Cruz*, 218 Ariz. 149, 168(2008). Therefore, it is the duty of the court to make an individualized determination regarding the propriety of restraining a criminal defendant during trial with a stun belt. *State v. Henry*, 189 Ariz. 542, 550(1997).

Structural error occurred because forcing Arias to wear the stun belt implicated her right to be fully present at trial. The constant threat of electrocution took an undecipherable toll on Arias's ability to focus on the proceedings or to assist counsel in her defense. The stun belt's impact on these rights is not readily measured, nor is its impact on the dignity and decorum of the judicial process.

Should the court determine that the issue is more appropriately reviewed for fundamental error, fundamental error occurred for many of the

reasons already discussed. The Arizona Supreme Court recently clarified the test for fundamental error. *State v. Escalante*, 425 P.3d 1078(2018). The court clarified that the appropriate standard for fundamental error under *State v. Henderson* is in the disjunctive. *State v. Escalante*, 425 P.3d at 1083 ¶16. This means that to show fundamental error, a defendant must establish one of the following: 1) that the error went to the foundation of the case *or* 2) the error takes away an essential right if it deprives the defendant of a constitutional or statutory right necessary to establish a viable defense or rebut the prosecution's case *or* 3) the error was so egregious that a defendant could not possibly have received a fair trial. *State v. Escalante*, 425 P.3d at 1084 ¶18-20.

On review, the first step is to determine whether error exists. *State v. Escalante*, 425 P.3d at 1085 ¶21. If it does, an appellate court must decide whether the error is fundamental. *Id.*

Fundamental error occurred as a result of the court forcing Arias to wear a stun belt throughout trial without making an individualized determination that it was necessary. Forcing Arias to wear the stun belt for

the duration of her five month trial, not to mention the 18 days that she spent on the witness stand deprived her of constitutional rights such as the right to be presumed innocent, the right to counsel and the right to participate in her own defense. The presence of the stun belt on a person causes a continuous fear of being shocked, creates anxiety and prevents a person from being able to fully participate in her trial.

Not only that, but the veteran prosecutor in this case exploited the fact that Arias wore the stun belt by inviting her down from the witness stand to conduct a demonstration. "Then do it. Go ahead," the prosecutor invited. (RT 2-28-13, p. 126). When Arias tried to verbally describe the stance, he interrupted her with, "No, no, no. Go ahead and do it. Just stand." (*Id.*, p. 127). The prosecutor then went on to mock and taunt Arias during cross-examination, commenting on her facial expressions and her "memory problems." (See OB, Appendix 10).

Prejudice occurred because it is possible that the stun belt affected Arias's demeanor and appearance. *See, Stephenson v. Neal*, 865 F.3d 956, 959(7th Cir.2017). The concern about forcing a criminal defendant to wear a

stun belt around her waist during her capital trial is that the presence of the stun device may cause the defendant to appear nervous and fearful of being shocked by the belt. *Id.* The jurors could incorrectly interpret this behavior as evidence of guilt. *Id.*

Appellee argued that Arias's memory issues arose from her dissociative amnesia, not the fear of being shocked by the stun belt. (AB, p. 79). There is nothing to suggest that her testimony and behavior on the stand was not affected by the presence of the stun belt around her waist. It is possible that more than one factor could affect her demeanor as she testified.

The purpose of the stun belt is to create fear and anxiety. *Wrinkles v. State,* 749 NE.2d 1179, 1194(Ind. 2001). This fear and anxiety distracts a defendant from fully participating in her defense at trial. *Id.*, *See also*, *United States v. Durham*, 287 F.3d 1297, 1306(11th Cir.2002). Forcing a defendant to wear a stun belt detracts from courtroom dignity and decorum.

In this case, the court failed its duty. When the subject of the ill-fitting stun belt arose, the judge never asked why Arias wore the stun belt. Nothing

in the record indicates that Arias was a flight risk or that she did not comport herself properly when in the courtroom.

Requiring Arias to wear the stun belt throughout this five month trial violated her right to be presumed innocent, her right to counsel, and her right to participate in her own defense. Reversal is required.

ARGUMENT 5

> The trial court committed clear error when she refused to reinstate panelists after the defense brought the prosecutor's improper peremptory strikes to her attention.

The trial court violated Arias's rights under the Equal Protection Clause when she accepted the prosecutor's discriminatory explanations for striking six female panelists.

There is a case pending at the United States Supreme Court, *Flowers v. Mississippi*, No. 17-9572, that addresses the issue of whether the Mississippi Supreme Court erred in how it applied *Batson v. Kentucky*. (https://www.supremecourt.gov/; See, Appendix 1). The United States Supreme Court heard oral argument on March 20, 2019. (*Id.*). This case addresses racial discrimination by the state during jury selection. (*Id.*). Generally, the case addresses the appropriate method of analyzing the purported racially neutral reasons supporting a peremptory challenge. (*Id.*). *Flowers* complains that the Mississippi Supreme Court's analysis was too narrow. (*Id.*). When the United States Supreme Court decides *Flowers*, the resulting opinion may or may not apply to Arias's case. For this reason,

Arias requests permission to file a supplemental brief, if the *Flowers* opinion is applicable to her case.

Arias does not concede that the state presented gender neutral reasons to the court in response to the *Batson* challenge. (AB, p. 84). The second step of the *Batson* analysis requires that the state express gender neutral reasons for exercising his peremptory strikes. *Miller-El v. Cockrell*, 537 U.S. 322, 328-329(2003); *State v. Gallardo*, 225 Ariz. 560, 565 ¶11(2010). In *Foster v. Chatman*, the state's reasons for striking certain jurors *seemed* reasonable but were not grounded in fact. *Foster v. Chatman*, 136 S.Ct. 1737, 1749(2016). As in *Foster v. Chatman*, the prosecutor in this case gave the court reasons for striking women from the panel that were not grounded in fact.

Juror 23:

The prosecutor fabricated his reason for striking 23 during *voir dire*. During *voir dire*, he injected his opinion that 23 required one hundred percent proof of guilt. (RT 12-17-12, p. 21). 23 *never* claimed to require one hundred percent proof of guilt and *never* agreed with the prosecutor that she wanted one hundred percent proof of guilt. (*Id.*, pp. 21-22). His

discriminatory intent is evident in his strategy of using *voir dire* to plant false facts for future use in defense of his discriminatory peremptory strikes.

Juror 154:

The prosecutor again falsely claimed that 154 was "against" the death penalty. (RT 12-20-12 #1, p. 15). To the contrary, 154 told him she was neither for nor against the death penalty. (RT 12-18-12, p. 36). She wanted to hear the evidence. (*Id.*, pp. 40-42). She would impose the death penalty if warranted by the evidence. (*Id.*). The prosecutor's reason for striking 154 was not grounded in fact.

The prosecutor complained about 154's body language, but this was in response to the first *Batson* challenge which was based on race, (RT 12-20-12 #1, pp. 14-15) not the second *Batson* challenge based on gender that is the issue raised on appeal. (OB, pp. 85-100).

Juror 9:

The prosecutor called 9 a "disbeliever" when it came to the death penalty, even though she told him she would impose the death penalty if the facts supported it. (RT 12-20-12 #1, pp. 20-21). When he suggested that she

would hold the state to an unrealistic burden of proof, she disagreed. (RT 12-17-12, pp. 18-19). The prosecutor's reason for striking 9 was not supported by the record.

Appellee argued that Arias "labels these reasons unpersuasive without explaining why." (AB, p. 87). Appellee does not acknowledge that the quote is supported by citation to *State v. Cruz*, 175 Ariz. 395, 399-400(1993), for the proposition that a prosecutor's neutral reason for a strike can be found to be *unpersuasive* (emphasis added) when the record does not support the prosecutor's subjective feelings about the juror. (OB, p. 96). This statement is relevant to Arias's position that the prosecutor's assertion that 9 would not impose the death penalty and would hold the state to an unrealistic burden is not supported by the statements 9 made on the record. Jurors 23, 154 and 9 were struck for reasons not based in fact. These reasons cannot survive a *Batson* analysis because they are pretextual.

Jurors 60, 112 and 9:

The prosecutor struck 60, 112 and 9 because they had past involvements as victims of domestic violence. Interestingly, male juror 144, noted on his questionnaire that he was the victim of domestic violence. (I. 1368). The prosecutor did not question this juror on *voir dire* and did not strike him from the panel. The prosecutor's disparate treatment of male and female panelists illustrates his discriminatory intent.

Juror 60:

Appellee argued that the prosecutor's failure to *voir dire* 60 at all is of no consequence. (AB, p. 90). Appellee argued that a prosecutor need not *voir dire* a juror if there is a questionnaire available. (*Id.*). More recent case law from the United States Supreme Court suggests otherwise. A prosecutor's contrasting *voir dire* of prospective jurors on the issues later relied upon to support strikes indicates a discriminatory intent. *Miller-El v. Dretke*, 545 U.S. 231, 255(2005)(the prosecutor asked questions differently depending on whether the panel member was white or African American).

The prosecutor did not question the men who sat on the jury regarding their beliefs about the death penalty. Every single male juror who remained on the jury noted on his questionnaire that he did not believe the death penalty was appropriate in every circumstance. (See I. 1359 (juror 187); 1368 (jurors 21, 88, 144); 1366 (juror 115); 1363 (jurors 164, 172, 202); 1355 (jurors 174, 33); 1367 (juror 161, 226); 1364 (juror 49)).[1] The prosecutor used this excuse to strike *women*. He did not bother to ask the men about their beliefs about the death penalty. By doing so the state willingly accepted male jurors with the same traits that supposedly made a female juror unacceptable.

Juror 79:

Appellee argued that the reason the prosecutor gave for striking 79, that she was a minister's wife, was gender neutral and beyond reproach. (AB, p. 91). This ignores the fact that the very reason for striking 79 was her gender–she was the *wife* of a minister.

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[1] The juror questionnaires are filed randomly in packets of eight, with each packet given a record number. The questionnaires are not organized in any particular way.

The prosecutor relied on the stereotype that because of her status as a minister's wife, 79 assumed the attitudes and beliefs of her husband. Instead of treating 79 as an independent individual, free to form and hold her own ideas and opinions about the world, the prosecutor assumed that due to her marital status, her beliefs and view of the world mirrored her husband's. Without explanation, the prosecutor also found the husband's career as a minister as "suspect." The court shall not accept as a defense to gender-based peremptory challenges the very stereotype the law condemns. See, *Powers v. Ohio*, 499 U.S. 400, 410(1991).

Comparison Analysis:

The United States Supreme Court requires an independent examination of the record when analyzing a *Batson* issue. *Snyder v. Louisiana*, 552 U.S. 472, 478(2008); *Foster v. Chatman*, 136 S.Ct. at 1748. (*But see*, *State v. Medina*, 232 Ariz. 391, 404 ¶48(2013); *State v. Escalante-Orozco*, 241 Ariz. 254, 272 ¶37(2017), holding that a comparison analysis is not appropriate if not raised at the trial level). All circumstances must be considered. *Id.* In so doing, this Court must consider that the juror questionnaires reflect that the

male jurors who heard this trial held similar opinions about the death penalty that resulted in female panelists being struck by the state.

Here, the state struck women from the panel supposedly based on their views of the death penalty. At the same time, the state did not ask male panelists with the same views any questions and left them on the jury. This disparate treatment is further evidence of the prosecutor's discriminatory intent.

Third Step of the *Batson* Analysis:

The trial court must determine the credibility of the proponent's explanation and whether the opponent met its burden of proving discrimination. *Miller-El v. Cockrell*, 537 U.S. at 328-329. *State v. Martinez*, 196 Ariz. 451, 456 ¶16(2000). The trial court's denial of a *Batson* challenge is entitled to great deference because the trial court is in a position to assess the prosecutor's demeanor and credibility. *Batson v. Kentucky*, 476 U.S. 79, 98, fn 21(1986); *State v. Canez*, 202 Ariz. 133, 147 ¶28(2002). The prosecutor's credibility is suspect when he relies on fabricated reasons for his strikes that are not supported by the record. The court errs when, in assessing the

prosecutor's demeanor and credibility, the court fails to recognize that reasons for the strike are not supported by the record.

Appellee argued that the court does not have to specifically state its rationale regarding the third step of the *Batson* analysis. (AB, p. 98). But the court does need to perform the third step and did not do so in this case.

Defense counsel noted briefly that the state's reasons were "mere smoke screens." (RT 12-20-12 #1, p. 22). The court allowed the prosecutor to give his reasons and then ruled. In order to fulfill the three step process required by *Batson*, it is reasonable to expect that the court do so in a way that is identifiable and recognizable by the parties.

Here, the court refrained from commenting on the credibility of the prosecutor. The court refrained from providing reasoning for her conclusion that the state's so called gender neutral reasons were acceptable to her. The court failed to conduct the proper analysis before reaching her conclusion.

The judge merely concluded that the prosecutor's fictions, stereotypes and unsupported reasons met her standards and did not reflect purposeful discrimination. At a minimum, the court could have at least stated for the

record that "the reasons the State articulated were not pretexts and there was no pattern or practice of discrimination." *See, State v. Gallardo*, 225 Ariz. 560, 566 ¶13(2010). At least then there would be some indication that the court performed the third step of the *Batson* analysis.

The court's error violated Arias's rights to equal protection and the right to a fair trial. Such error is never harmless. *See, Gomez v. United States,* 490 U.S. 858, 876(1989). The prosecutor strategically and methodically struck 6 women from the jury panel, employing a practice of discrimination to do so. For these reasons, reversal is required.

ARGUMENT 6

Pervasive and persistent prosecutorial misconduct denied Arias her rights to due process and a fair trial.

Appellee's Answering Brief (AB) defines too narrowly the conduct that may be considered as part of cumulative error review. It also mistakenly excludes consideration of the prosecutor's intent. It advocates for erroneous deference to the trial court. It mistakes the ability of the instructions in this case to cure the harm caused by the misconduct. Finally, it wrongly concludes the individual instances of misconduct raised in the Opening Brief (OB) do not constitute misconduct at all (for which Arias relies on the OB rather than rearguing those facts and supporting case law) and wrongly concludes that the resulting prejudice does not outweigh the evidence of guilt.

a. Appellee's Answering Brief defines too narrowly the conduct that may be considered as part of cumulative error review.

Appellee narrowed what constitutes cumulative misconduct when it argued that the court "should not consider the cumulative error of incidents that could not have affected the jurors, such as those occurring outside their

presence." (AB, p. 102). However, the conduct to be considered when deciding whether misconduct was persistent is not this limited.

Ordinarily, the general rule is that several non-errors and harmless errors cannot add up to one reversible error, but this rule does not apply when the court is evaluating a claim that prosecutorial misconduct deprived defendant of a fair trial. *State v. Hughes*, 193 Ariz. 72, 79(1998). "Near misconduct" counts. On appeal, the court considers whether instances of misconduct, or "near misconduct," were so prolonged or pronounced when taken together that they affected the fairness of the trial. *State v. Hulsey*, 243 Ariz. 367, 388-89(2018). Even when an incident is found harmless and that it did not contribute to or affect a verdict, it still is considered and may contribute to a finding of cumulative prosecutorial misconduct. *State v. Roque*, 213 Ariz. 193, 229(2006). A non-error could not affect a jury verdict, nor could harmless error, but each are considered during cumulative error review. The appellate court also weighs errors it judged cured by instructions. It considers such errors as a trace of prejudice may remain even after a proper instruction is given. *United States v. Berry*, 627 F.2d 193, 200-

01(9th Cir.1980). The *total effect*, not just the prejudicial or nonprejudical nature of each specific incident, is considered. The focus is on the *total effect* of the conduct rendering the trial unfair. *Roque*, 213 Ariz. at 228. (Emphasis added). So Appellee's focus on only incidents that occurred in front of the jury or that affected the jury is too limited.

Another example of the narrowness of Appellee's view, is its argument that the prosecutor's violations of ethical rules are irrelevant and should not be considered. Appellee argued that because reversal is not to punish the prosecutor for his misdeeds, Arias's citation to the ABA standards is irrelevant. (AB, p. 101, fn. 10). But in assessing prosecutorial misconduct, courts often reference ethical rules to define how and why the behavior was improper. *Roque*, 213 Ariz. at 229 (citing E.R. 3.4(e) requirement that witness examination questions have some factual basis); *Hughes*, 193 Ariz. at 80 (citing ethical duty pursuant to its role of 'minister of justice,' for the prosecution to see that defendants receive a fair trial. Ariz. R. Sup.Ct. 42, E.R. 3.8, comment).

b. Appellee's Answering Brief mistakenly excludes consideration of the prosecutor's intent.

Another example that illustrates Appellee's restrictive reading of cumulative error analysis is its argument that incidents that occurred outside the presence of the jury should not be considered, even if they help to prove the prosecutor intentionally engaged in misconduct and did so with indifference, if not a specific intent, to prejudice the defendant. (AB, pp. 102-03). Appellee acknowledges that nearly 35 years of Arizona Supreme Court and Court of Appeals cases[2] have defined misconduct as not merely the

[2] Starting in 1984, *Pool*, *Hughes*, and other cases cite the "misconduct [which is] not merely the result of legal error, negligence, mistake, or insignificant impropriety, but acts, taken as a whole, which amount to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal" standard. This is the line of cases referenced by Appellee. (AB, p. 104, fn. 13). A second, similar line of cases developed from *Hughes*, holding that when courts determine whether persistent and pervasive misconduct occurred and require reversal, courts consider whether the cumulative effect of the incidents shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant. *See, e.g.*, *Roque*, 213 Ariz. at 228, *overruled on other grounds by State v. Escalante-Orozco*, 241 Ariz. 254, 267(2017). *See also*, *State v. Morris*, 215 Ariz. 324, 339(2007)(using the same

result of legal error, negligence, mistake, or insignificant impropriety, but as acts, taken as a whole, which amount to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal. (AB, p. 104, and fn. 13). Appellee argues that cases which use this reference, like *Hughes*, 193 Ariz. at 79, and which rely on *Hughes*, are merely repeating the test set forth in *Pool v. Superior Court*, 139 Ariz. 98(1984), without analysis. (AB, pp. 104-05). Because *Pool* concerned whether a retrial was barred by Double Jeopardy, *Hughes* and all such cases considering whether reversal was warranted, were wrong to discuss the state of mind of the prosecutor, per Appellee's theory.

Appellee's analysis is wrong. In order to reach its desired conclusion of ignoring the prosecutor's intentions and excluding measurement of acts committed away from the jury, Appellee dismisses these cases as only "indirectly" citing the prior cases without considering them. Appellee

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test in a case deciding whether to reverse a conviction); *State v. Gallardo*, 225 Ariz. 560, 568(2010)(same); *State v. Goudeau*, 239 Ariz. 421, 436(2016)(same).

apparently argues all the courts citing this rule of law did not understand the precedent they cited or did not intend to apply it. Indeed, Appellee goes on to argue that these courts all erred by conflating the standards for when misconduct requires a new trial versus when misconduct creates a Double Jeopardy bar to a new trial. Appellee is wrong. Where Appellee goes awry is in its belief that these two standards are mutually exclusive measurements.

Rather than every court mistakenly or carelessly applying an incorrect standard to measure misconduct, the cases may be harmonized by understanding misconduct as a spectrum of behavior. The spectrum extends from the least severe (isolated, inadvertent) to the most severe, (persistent, intentional). The level of misconduct dictates the remedy that may eventually be required. Therefore, an intentional misconduct finding, in a pervasive and persistent misconduct case, is more than sufficient to prove reversal is required, but not necessary. Proof of the higher amount of misconduct, intentionality, therefore certainly encompasses the lower levels of misconduct. The explicit discussion of state of mind in *Hughes* and

Jorgenson illustrate the point that intent is useful no matter which remedy is specifically at issue.

The *Hughes* Court understood what it was doing and why. *Hughes* cited *Pool* for the proposition that a prosecutor's questioning may be so egregiously improper that the appellate court is compelled to conclude that the prosecutor intentionally engaged in conduct which he knew to be improper, and did so with indifference, if not a specific intent, to prejudice the defendant. *Hughes*, 193 Ariz. at 80 (internal quotes and citations omitted). Though *Hughes* was a reversal case, the Court stated it had the same opinion regarding the Hughes' prosecutor's conduct and state of mind as it had when deciding the *Pool* prosecutor acted with intent. *Id*. Indeed, the *Hughes* Court announced its opinion of the prosecutor's state of mind directly before it noted that it was not making a Double Jeopardy decision. *Id.*

Two years after the Arizona Supreme Court reversed and remanded *Hughes* based on pervasive prosecutorial misconduct, the case returned to the Supreme Court when the trial court declined to dismiss the case because

the Double Jeopardy clause barred the retrial.[3] *State v. Jorgenson*, 198 Ariz. 390, 390-91(2000). The *Jorgenson* Court reiterated the *Hughes* Court's consideration of the knowing and intentional misconduct by the prosecutor. 198 Ariz. at 390. Then *Jorgenson* moved on to the Double Jeopardy consideration, which *also* involved considering intent of the prosecutor:

> Application of double jeopardy is not only doctrinally correct when egregious and intentional prosecutorial misconduct has prevented an acquittal, it is also required as a matter of pragmatic necessity. Any other result would be an invitation to the occasional unscrupulous or overzealous prosecutor to try any tactic, no matter how improper, knowing that there is little to lose if he or she can talk an indulgent trial judge out of a mistrial.

Jorgenson, 198 Ariz. at 393.

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[3] The procedural history of *Hughes* and *Jorgenson* shows why Arias is not specifically urging the Court to find that Double Jeopardy bars retrial, at this point in the case. *Hughes* and *Jorgenson* are the same case, reviewing the same misconduct, but at separate points in the procedural history of the litigation. After the *Hughes* Court reversed for prosecutorial misconduct, the defendant argued to the trial court that Double Jeopardy barred his retrial. Arias has positioned her case to make the same arguments. However, she has already explained the Double Jeopardy standard, case law, and argued the misconduct in her case meets the Double Jeopardy standard.

Comparing the *Hughes'* decision, reversing the conviction, and the *Jorgenson* decision, barring a retrial, illustrates that the test for misconduct in each is not mutually exclusive. *Jorgenson* did not rely on new factual findings for the Double Jeopardy claim but only recognized that the original facts, including intentional misconduct, described in *Hughes* were serious enough not only for the reversal, but also to qualify for a Double Jeopardy bar.

Courts do not conflate the standards for reversal and for a Double Jeopardy bar for retrial, because they are not separate, mutually exclusive inquires. Misconduct is measured on a spectrum from inadvertent and isolated, warranting no remedy, to more and more serious instances that warrant admonishment, curative instructions, and eventually mistrials followed by Double Jeopardy bars in the most extreme cases. *Pool* drew an important distinction between simple prosecutorial error, such as an isolated misstatement or loss of temper, and misconduct that is so egregious that it raises concerns over the integrity and fundamental fairness of the trial itself. *State v. Minnitt*, 203 Ariz. 431, 438(2002). The Double Jeopardy standard is

not a different test for a separate inquiry, but merely a point where the misconduct requires a more significant remedy for the harm caused.

So the intentionality of the prosecutor is relevant no matter what remedy is being considered. More evidence of this is the standard courts often use for the least serious end of the error spectrum where courts describe the error as inadvertent, mere negligence, heat of the moment. Appellate courts use the inadvertent or accidental nature of potential misconduct as a reason to deny relief. *See e.g.*, *State v. Price*, 111 Ariz. 197, 201(1974)(prosecutor's misstatements of fact in closing argument were inadvertent and not of such magnitude as to be prejudicial, resulting in no reversible error); *Morris*, 215 Ariz. at 339 (noting that the prosecutor did not intentionally allow the jury to see a prohibited photograph).

Moreover, Appellee is wrong when it claims that because courts are not punishing prosecutors, the intent of the prosecutor should not be considered. (AB, p. 167). In some cases, prosecutorial misconduct affects the integrity of the justice system, not just the integrity of a particular verdict. In *Minnitt*, the Supreme Court held that when the record was replete with

evidence that the prosecutor knowingly used false testimony and knew it would deprive the defendant of a fair trial, a remedy was required. 203 Ariz. at 440. The Court considered the prosecutor's state of mind even though it explicitly stated it was not reversing the case to punish the prosecutor. *Id*. Instead, the Court was protecting the integrity of the justice system from the harm caused by the misconduct. *Id*. Prosecutorial misconduct that permeates the process and intentionally destroys the ability of the tribunal to reach a fair verdict must necessarily be remedied. *Id.*, at 438.

Appellee is also wrong that considering the prosecutor's record of misconduct involves punishing the prosecutor and so is not relevant. (AB, p. 167). A prosecutor's record of similar misconduct helps prove the current actions are not inadvertent or simple mistakes, which are considerations for this Court. This evidence is also relevant to evaluating the prosecutor's credibility, as expressed by the Ninth Circuit in *United States v. Weatherspoon*:

> [I]t is surely worth noting that the selfsame prosecutor has engaged in exactly the same kind of vouching conduct in two instances that has led other panels of this court to upset convictions obtained by

> [this] prosecutor....To label such repeat-offender conduct as 'unremarkable' is itself remarkable.

410 F.3d 1142, 1148-49(9th Cir.2005)(internal citations omitted).

It is not a cogent argument that intentional misconduct is a more serious violation leading to the harshest remedies, but may not be considered when deciding if less drastic remedies are warranted. If intentional misconduct is proven, then the threshold for less serious versions of misconduct have also been met. Those thresholds have been overproven in this case.

c. Appellee's Answering Brief advocates for erroneous deference to the trial court.

Appellee's Answering Brief also seeks to narrow this Court's review by advocating for more deference to the trial court than is warranted by the facts or law. With regard to Appellee's arguments that this Court should defer to the trial court on individually weighed instances of misconduct, (AB, p. 124, cross-examination of Dr. Samuels)(AB, pp. 145-46, and 147, cross-examination of Alyce LaViolette), Arias relies on the OB arguments for why the trial court abused its discretion in denying relief for this misconduct.

Appellee also noted that the trial court found any cumulative prejudice did not amount to a denial of due process, and this Court should defer to the trial court's "repeated, updating conclusion that the prosecutor's behavior did not permeate the atmosphere of the trial with unfairness." (AB, pp. 156; 158-59). This argument is mistaken for two reasons. First, it asks this Court to abdicate its review and instead defer to the trial court on conclusions of law, rather than its findings of fact. Second, it asks this Court to defer to conclusions based on erroneous findings of fact, as the trial court excluded many instances of misconduct and so could not have reached an accurate assessment of cumulative error.

Appellee is mistaken that this Court should defer to the trial court's conclusion on the ultimate legal question: whether cumulative prejudice from the prosecutor's misconduct denied Arias a fair trial. Deciding whether persistent and pervasive misconduct denied Arias her right to a fair trial is a constitutional question under both state and federal due process. The appellate court defers to the trial court's findings of fact when they are supported by the record and not clearly erroneous, but reviews its

conclusions of law *de novo*. *Hulsey*, 243 Ariz. at 377. While appellate courts generally review the trial court's ruling on a claim of improper prosecutorial conduct for abuse of discretion, *State v. Newell,* 212 Ariz. 389, ¶61(2006), constitutional issues are reviewed *de novo*, *State v. Moody,* 208 Ariz. 424, ¶62(2004). With regard to allegations of due process violations, appellate courts conduct *de novo* review. *United States v. Amlani,* 111 F.3d 705, 712(9th Cir.1997). Even issues of prosecutorial misconduct involving mixed questions of fact and law are reviewed *de novo*. *United States v. Reyes*, 660 F.3d 454, 461(9th Cir.2011).

Appellee is mistaken that this Court should defer to the trial court's conclusion about whether cumulative error occurred when the trial court's analysis excludes many instances of misconduct. A lower court's decision will be affirmed unless it applied the wrong legal rule or its application of the correct legal standard resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record. *United States v. Hinkson,* 585 F.3d 1247, 1262-63(9th Cir.2009) (en banc)(internal quotations omitted). A trial court abuses its

discretion when the reasons given for its ruling are clearly untenable, *State v. Herrera*, 232 Ariz. 536, 555(App. 2013), the record does not substantially support its decision, *Files v. Bernal*, 200 Ariz. 64, 65(App. 2001), or a discretionary finding of fact is not justified by, and clearly against, reason and evidence, *State v. Aguilar,* 224 Ariz. 299, 300, 230 P.3d 358, 359(App. 2010)(internal quotations and citations omitted). The trial court did not believe that much of the misconduct outlined in Arias's OB was misconduct and so its assessment of the weight of the cumulative misconduct and whether the misconduct permeated the trial were truncated. Its legal conclusions were based on incorrect factual underpinnings, making it an abuse of discretion. Therefore, even if this Court were inclined to defer to the trial court's conclusion on the ultimate legal question, it should not do so here.

d. The instructions in this case do not cure the harm caused by misconduct.

To rebut the prejudice caused by the prosecutor's pervasive misconduct, Appellee relies in part on what it terms curative actions taken

by the trial court. (AB, pp. 99; 121-22; 123; 129-30; 139-40; 143; 159; and 167). But what actions were taken did not cure the harm caused.

Appellee's AB argued that the trial court was careful to sustain objections in order to limit what evidence came before the jury. (AB, p. 159). But even though the trial court ordered Martinez to avoid argumentative questions, (AB, p. 159, citing RT 2-25-13, p. 89), the record is replete with his argumentative questions afterwards, (OB, pp. 123-25; Appendix 14; Appendix 15). Appellee's AB argued that the trial court carefully limited speaking objections, (AB, p. 159, citing RT 2-20-13, p. 67), but Martinez's speaking objections still permeated the trial, (OB, pp. 129-31; 135-36; Appendix 26). The vast majority of the prosecutor's prosecutorial misconduct received no curative action from the court at all and many other instances involved the court siding with the prosecutor over defense objection and thereby notifying the jury his actions were appropriate. When the court did sustain a defense objection, it only very infrequently gave a general instruction not to consider what it had just heard. (RT 3-25-13, pp. 130-31). But even when the court sustained defense objections, it was

undermined by the prosecutor returning to the same improper conduct afterwards, with no admonishment for repeated violations. Finally, the curative instructions identified by Appellee, (AB, p. 159), were actually the general, standard instructions given in every criminal trial and which occurred many days after the misconduct in question.

A timely instruction from the judge usually cures the prejudicial impact of evidence unless it is highly prejudicial or the instruction is clearly inadequate. *United States v. Johnson*, 618 F.2d 60, 62(9th Cir.1980). Under some circumstances a trial court's curative instructions to a jury cannot be sufficient to obviate prejudice. *United States v. Gillespie,* 852 F.2d 475, 479(9th Cir.1988)(testimony that defendant on charge of child molestation had homosexual relationship with adopted father cannot be cured by instruction); *United States v. Bland,* 908 F.2d 471, 473(9th Cir.1990)(court's comments that defendant on firearms charge was child molester and killer cannot be cured by instruction). Other jurisdictions, while not being precedential for this Court, have reached nonetheless instructive and similar decisions, more specifically on the interplay of pervasive misconduct and

curative instructions. In *State v. Bujnowski,* the New Hampshire Supreme Court, after noting that curative instructions "normally" can negate misconduct, vacated a conviction based on misconduct during a closing argument, despite a curative instruction having been given, stating: "In this case such intentional, repetitive misconduct may well have rendered the courts curative instructions meaningless." 532 A.2d 1385, 1388(N.H.1987). Likewise, in *State v. Stith*, the Washington Court of Appeals found a prosecutor's flagrant personal assurances to the jury as to the defendant's guilt, because such comments strike at the very heart of a defendant's right to a fair trial before an impartial jury, could not be cured. 856 P.2d 415(Wash.Ct.App.1993). The prosecutor's repetitive and intentional misconduct resulted in prejudice that could not be cured by any instruction.

Even if a theoretical instruction could overcome the individual or cumulative misconduct in this case, the actual instructions given by this trial court were not specific or immediate enough to do so. General, standard instructions not tailored to the improper conduct are often insufficient. *Weatherspoon*, 410 F.3d at 1151 (reversing for misconduct during closing

argument despite the fact that court gave general jury instruction); *United States v. Alcantara-Castillo*, 788 F.3d 1186, 1197(9th Cir.2015)(reversal required where prejudice not neutralized by court's general instruction to jury to disregard misconduct); *United States v. Simtob*, 901 F.2d 799, 806(9th Cir.1990)(prejudice not cured by court's general instruction that a prosecutor cannot vouch for a witness's truthfulness). Furthermore, with regard to certain improper prosecutorial comments, more than a quick statement that "the jury will disregard" is necessary to neutralize any prejudice. *United States v. Simtob,* 901 F.2d 799, 806(9th Cir.1990). *See also United States v. Kerr*, 981 F.2d 1050, 1053-54(9th Cir.1992)(examining the *substance* of a curative instruction to determine whether vouching was prejudicial). Likewise, even where the trial court sustains a defense objection, it may not be emphatic enough to actually cure the harm inflicted. *Weatherspoon,* 410 F.3d at 1151 (finding that the manner in which defense objections were sustained unfortunately did not deliver the required strong cautionary message). For instance, a firmer and more specific curative instruction is particularly appropriate and necessary for misconduct during the rebuttal closing

because it is the last thing the jury hears before beginning its deliberations, making the impact of the misconduct likely to be significant. *Alcantara-Castillo*, 788 F.3d at 1198 (internal quotations and citations omitted).

In addition to the lack of specificity in the jury instructions, the length of the delay between the error and the purported cure is relevant. *United States v. Perlaza*, 439 F.3d 1149, 1172-73(9th Cir.2006)(reversible error where district court delayed its curative instruction when error involved the court affirmatively agreeing with the prosecutor's burden-shifting and holding the curative instruction must refer specifically to the error). *Cf. United States v. Fagan,* 996 F.2d 1009, 1016 n. 7(9th Cir.1993)(concluding that "[t]he district court cured any possible error by sustaining the defendants' objections to this argument and immediately admonishing the jury that the defense was not required to produce any witnesses or evidence"). Damage caused by very egregious conduct of the prosecutor is more likely to be cured by prompt and appropriate curative instructions, if those instructions are specifically addressed to the prosecutor's misconduct. The instructions in this case were not given in the majority of the instances of misconduct, were

not prompt, were not specific, and were not emphatic enough to address the prosecutor's misconduct. Therefore, the harm caused by the prosecutor's misconduct was not cured by the trial court's actions.

e. Appellee wrongly concludes the prejudice does not outweigh the evidence of guilt.

Appellee's AB wrongly concludes the individual instances of misconduct raised in the OB do not constitute misconduct at all, for which Appellant relies on the OB rather than rearguing those facts and supporting case law. Appellee also wrongly concludes the aggregate weight of any error was slight and the purported "residual" prejudice here does not outweigh the "overwhelming" evidence of guilt. (AB, p. 156).

The evidence of guilt on the key questions at trial was not overwhelming. The key question was whether Arias reacted as a domestic violence victim during the incident, given there was no dispute she killed the victim. The evidence against her domestic violence claim, and related claims regarding PTSD and memory loss, was not overwhelming. This is the same kind of reframing of the key questions for the discussion of

evidence as occurred in *Hughes*. That Court noted that there was never much doubt that the defendant had done what he was charged with, so its discussion of the evidence focused on prosecutorial misconduct in relation to the insanity defense. *Hughes*, 193 Ariz. at 81. Specifically, the Court noted that the evidence of the defendant's guilt was overwhelming, but the evidence of his sanity was not. *Hughes*, 193 Ariz. at 87. Similarly, Arias's state of mind was the key question at trial and was hotly contested.

Arrayed against this was Martinez's masterpiece of misconduct throughout the entirety of the case. The aggregate weight of misconduct, not just what Appellee deems error, was not slight and the prejudice was not merely residual. Regardless, in a case of pervasive and persistent misconduct the question is whether the misconduct so permeated the trial that it necessarily affected the ability to receive a fair trial, which affirmatively answers whether it was prejudicial. Permanent prejudice became clear due to the prosecutor's persistence in improper conduct, making fairness impossible to achieve. *See*, *Pool,* 139 Ariz. at 109.

Arizona courts have found fact patterns like ours to be persistent and pervasive misconduct that rendered trials unfair and required a remedy. The Arizona Supreme Court described the *Pool* misconduct:

> During cross-examination of the defendant regarding the theft at issue, the prosecutor's questions ranged from irrelevant and prejudicial to abusive, argumentative, and disrespectful. Permanent prejudice became clear by reason of the prosecutor's persistence in improper cross-examination.

Minnitt, 203 Ariz. at 438 (citing *Pool*, 139 Ariz. at 109). In *Hughes,* the Supreme Court reversed the defendant's conviction as he was deprived of a fair trial based on cumulative effect of the prosecutor's comment on the defendant's failure to testify; argument outside the record; allegation the defendant fabricated his insanity defense; and, appeal to jurors' fears. 193 Ariz. 72, 78-79, 88(1998).

The type and breadth of misconduct in the *Hughes* and *Pool* cases match that which occurred in Arias's trial. Prosecutorial misconduct like this which permeates the process and destroys the ability of the tribunal to reach a fair verdict must necessarily be remedied.

CONCLUSION

Reversal is required based on pervasive and prejudicial prosecutorial misconduct, the due process violations resulting from the court's failure to control the media's access to the trial, the improper admission of hearsay testimony that helped establish premeditation, the improper testimony from the state's expert regarding Arias's mental state that helped establish premeditation, the fact that Arias wore a stun belt throughout trial without justification, and the prosecutor's exercise of peremptory strikes in a discriminatory manner during jury selection. Though Appellee attempted to minimize and excuse the prosecutor's conduct during Arias's trial, Martinez capitalized on each of these errors in his effort to win at any cost. Such winning at any cost is at odds with the ethical duties specially imposed upon prosecutors and undermines the fairness of the entire justice system.

The United States Supreme Court has long emphasized the Constitution's "overriding concern with the justice of finding guilt." *United States v. Agurs*, 427 U.S. 97, 112(1976). In particular, the Due Process Clause guarantees for every accused the right to a trial that comports with basic

tenets of fundamental fairness. *Lassiter v. Department of Soc. Servs.,* 452 U.S. 18, 24-25(1981). The Arizona Supreme Court observed in *State v. Neil* that:

> …we do not and cannot condone the use of such an avenue of improper argument to secure the conviction of one charged with a crime where it does not comport with the spirit of fairness which is one of the most basic tenets of the administration of criminal law.

102 Ariz. 299, 300(1967). In *Berger v. United States*, the Supreme Court defined the role of a prosecutor as:

> [T]he representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. 78, 88(1935). The Arizona Supreme Court has held that "[w]e have routinely noted that a prosecutor has an obligation not only to prosecute with diligence, but to seek justice. He must refrain from all use of improper methods designed solely to obtain a conviction." *Minnitt*, 203 Ariz. at 440. These cases are cited so often as to nearly become cliché, but that is only because they express the highest ideal and yet most basic premise of our entire system: to do justice. Jodi Arias did not receive a trial that comported with "a spirit of fairness." She did not receive a trial in which justice was actively sought rather than a conviction being obtained at any price. She deserves a new trial.

RESPECTFULLY SUBMITTED April 2, 2019.

MARICOPA COUNTY PUBLIC DEFENDER

By /s/
PEG GREEN
Deputy Public Defender

By /s/
CORY ENGLE
Deputy Public Defender

PGCEKL040219P

APPENDIX 1

17-9572 FLOWERS V. MISSISSIPPI

DECISION BELOW: 240 So.3d 1082

LOWER COURT CASE NUMBER: 2010-DP-01348-SCT

QUESTION PRESENTED:

Petitioner Curtis Flowers has been tried six times for the same off in Mississippi state court. Through the first four trials, prosecutor Doug Evans relentlessly removed as many qualified African American jurors as he could. He struck all ten African Americans who came up for consideration during the first two trials, and he used all twenty-six of his allotted strikes against African Americans at the third and fourth trials. (The fifth jury hung on guilt-or-innocence and strike information is not in the available record). Along the way, Evans was twice adjudicated to have violated *Batson v. Kentucky* - once by the trial judge during the second trial, and once by the Mississippi Supreme Court after the third trial.

At the sixth trial Evans accepted the first qualified African American, then struck the remaining five. When Flowers challenged those strikes on direct appeal, a divided Mississippi Supreme Court reviewed Evans' proffered explanations for the strikes deferentially and without taking into account his extensive record of discrimination in this case, and affirmed. Flowers then sought review here, asking: "Whether a prosecutor's history of adjudicated purposeful race discrimination must be considered when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?" This Court responded by granting certiorari, vacating the Mississippi Supreme Court's judgment, and remanding "for further consideration in light of *Foster v. Chatman*, 136 S. Ct. 1737 (2016)." *Flowers v. Mississippi*, 136 S. Ct. 2157 (2016).

On remand, a divided Mississippi Supreme Court again affirmed. Over three dissents, the state court majority emphasized deference to the trial court, and insisted both that the "[t]he prior adjudications of the violation of *Batson* do not undermine Evans' race neutral reasons," and that "the historical evidence of past discrimination ... does not alter our analysis ..." *Flowers v. Mississippi*, 240 So.3d 1082, 1124 (Miss. 2018). The state court majority then repeated, nearly word-for-word, its previous, history-blind evaluation of Evans' strikes.

Because a prosecutor's personal history of verified, adjudicated discrimination is highly probative of both his propensity to discriminate and his willingness to mask that discrimination with false explanations at *Batson's* third step, the barely altered question presented is:

Whether a prosecutor's history of adjudicated purposeful race discrimination may be dismissed as irrelevant when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?

GRANTED LIMITED TO THE FOLLOWING QUESTION: WHETHER THE MISSISSIPPI SUPREME COURT ERRED IN HOW IT APPLIED *BATSON* v. KENTUCKY, 476 U.S. 79 (1986) IN THIS CASE.

CERT. GRANTED 11/2/2018