CONSIDERING CRUELTY: *STATE V. CHAPPELL*, *STATE V. SNELLING*, AND THE CRUELTY PRONG OF THE (F)(6) AGGRAVATOR

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The Arizona Supreme Court recently issued opinions in two appeals of capital sentences in which the jury found that the murder was especially cruel. Although the two opinions were issued within the same term, the court utilized different standards of review pursuant to statutory changes adopted in Arizona in 2002. In State v. Chappell, *where the defendant drowned a two-year-old in a swimming pool, the court—using an abuse of discretion standard—determined that there was sufficient evidence presented at trial for the jury to find that the cruelty prong of the (F)(6) aggravator had been established and to impose a death sentence. In* State v. Snelling, *where the defendant strangled a woman with an electrical cord, the court—reviewing the record de novo because the murder predated the statutory changes—found the cruelty prong unproven and vacated the death sentence.*

Taken together, Chappell *and* Snelling *raise concerns about whether the abuse of discretion standard of review permits the Arizona Supreme Court to adequately review death sentences. Particularly because the jury instructions employed to narrow the cruelty prong of the (F)(6) aggravator may be both inconsistent and overbroad, the safeguard of de novo review could be important to guard against the arbitrary imposition of the death penalty.*

INTRODUCTION

During the 2009–2010 term, pursuant to automatic appeals,[1] the Arizona Supreme Court reviewed several capital cases in which the jury determined the existence of the cruelty prong of the (F)(6) aggravating factor and imposed the death penalty.[2] A close analysis of two of these cases—*State v. Chappell*[3] and

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1. *See* ARIZ. REV. STAT. ANN. § 13-756(A) (2010) (requiring the Arizona Supreme Court to review all death sentences).

2. *Id.* § 13-751(F)(6) ("The defendant committed the offense in an especially heinous, cruel or depraved manner.").

State v. Snelling[4]—suggests that the cruelty prong is over-inclusive in that it fails to adequately channel jurors' discretion to find a defendant death-eligible.[5] This over-inclusiveness is a product of two factors. First, the subjectivity and variability in the jury instructions provided by trial courts to narrow the cruelty prong[6] make it difficult for jurors to rationally distinguish those murders that warrant a death sentence from those that do not. Second, the abuse of discretion review conducted by the Arizona Supreme Court for murders that occurred subsequent to August 1, 2002[7] limits the ability of the appellate court to ensure that the cruelty prong is applied appropriately and consistently.

It is difficult to find the murder in either *Chappell* or *Snelling* to be markedly more "cruel" than the other. In *Chappell*, the defendant drowned his fiancée's two-year-old son in a swimming pool.[8] The medical examiner opined that the child "likely was conscious for thirty seconds to two minutes while being held underwater" and "would have understood the need to breathe."[9] In *Snelling*, the defendant entered a townhouse and strangled the naked owner in her bathroom with an electrical cord after she "got belligerent and yelled" at the defendant.[10] The medical examiner testified that a strangulation victim generally remains conscious for ten seconds to several minutes.[11] In each case, the jury unanimously concluded that the defendant committed the murder in an "especially cruel" manner, satisfying the (F)(6) aggravator.[12] After weighing the aggravating circumstances against any mitigating factors, each jury sentenced the defendant to death.[13]

The Arizona Supreme Court's decisions illustrate the impact of the change in the standard of review. Although the court issued the two opinions within one week of each other, the underlying homicide in *Snelling* occurred prior to August 1, 2002, permitting the court to perform a more exacting de novo review.[14] Even though the relative "cruelty" of the crimes appears similar in both cases, the court's de novo review in *Snelling* reversed the jury's findings and the death sentence, while its abuse of discretion review in *Chappell* left the jury's

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3. 236 P.3d 1176 (Ariz. 2010).
4. 236 P.3d 409 (Ariz. 2010).
5. *See* Valerio v. Crawford, 306 F.3d 742, 751 (9th Cir. 2002) (en banc) (stating that the jury must be able "to make a principled distinction between the subset of murders for which a death sentence is appropriate and the majority of murders for which it is not").
6. *See, e.g.*, *Chappell*, 236 P.3d at 1185 n.6 (providing the jury instructions given in *Chappell*).
7. Act of Aug. 1, 2002, 2002 Ariz. Sess. Laws, ch. 1, § 5 (amending Arizona's capital sentencing scheme). In 2008, the Arizona legislature reorganized and renumbered its capital sentencing statutes without making any further material changes. *See* Act of July 7, 2008, 2008 Ariz. Sess. Laws, ch. 301, §§ 1–120. This Note cites to the current version of the statutes.
8. 236 P.3d at 1180–81.
9. *Id.* at 1182.
10. State v. Snelling, 236 P.3d 409, 412–13, 415 (Ariz. 2010).
11. *Id.* at 416–17.
12. *Id.* at 412; *Chappell*, 236 P.3d at 1181.
13. *Snelling*, 236 P.3d at 412; *Chappell*, 236 P.3d at 1181.
14. *Snelling*, 236 P.3d at 414.

findings and the death sentence undisturbed.[15] The anomalous result is that the "protection" conferred upon defendants by the right to a jury determination of the existence of the aggravating factors[16] has become a detriment to defendants in capital cases by diminishing the effectiveness of appellate review.

Arizona's (F)(6) aggravator has previously been the subject of constitutional challenge.[17] In particular, defendants have challenged the aggravator as unconstitutionally vague.[18] In 1990, in *Walton v. Arizona*, a divided U.S. Supreme Court upheld Arizona's capital sentencing scheme—including the (F)(6) aggravator—against a vagueness challenge.[19] While finding that the (F)(6) aggravator is vague on its face,[20] the majority found that the aggravator "has been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentencer."[21] Because Arizona law required the trial judge to determine a capital defendant's sentence when *Walton* was decided, and because the trial judge was presumed to have applied the narrowed construction as articulated by the state supreme court, the Court found that the statute's facial vagueness was adequately remedied by the Arizona Supreme Court's construction.[22] However, the *Walton* Court suggested that, where the jury is responsible for determining the existence of an overbroad aggravating factor, the factor's facial vagueness may be remedied through a jury instruction that contains a narrowing definition of the factor.[23]

Arizona's modern capital sentencing scheme differs from the one in effect in 1990 in several important ways.[24] Today, the jury rather than the trial judge is charged with determining the existence or nonexistence of any aggravating factors.[25] This practice, implemented as part of the Arizona legislature's 2002 amendments to the capital sentencing scheme,[26] was compelled by the United

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15. *Id.* at 417 & n.7; *Chappell*, 236 P.3d at 1189–90.

16. *See infra* note 25 and accompanying text.

17. *See, e.g.*, Lewis v. Jeffers, 497 U.S. 764 (1990); Walton v. Arizona, 497 U.S. 639 (1990); Woratzeck v. Stewart, 97 F.3d 329 (9th Cir. 1996).

18. *See, e.g.*, *Lewis*, 497 U.S. at 774; *Walton*, 497 U.S. at 652; *Woratzeck*, 97 F.3d at 333.

19. *Walton*, 497 U.S. at 652–54.

20. *See id*. at 654 ("[T]here is no serious argument that Arizona's 'especially heinous, cruel, or depraved' aggravating factor is not facially vague.").

21. *Id.* at 655. In particular, "[t]he Arizona Supreme Court [had] stated that 'a crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death,' and that '[m]ental anguish includes a victim's uncertainty as to his ultimate fate.'" *Id.* at 654 (citation omitted).

22. *Id.* at 653–54.

23. *See id.* at 653 (distinguishing earlier cases on the basis that they involved limiting instructions). However, jury instructions that are themselves too vague to channel the jurors' discretion do not comport with the Constitution. *See infra* Part I.A.

24. In 2002, the legislature adopted a series of amendments to Arizona's capital sentencing statutes. Act of Aug. 1, 2002, 2002 Ariz. Sess. Laws, ch. 1, §§ 1–7.

25. ARIZ. REV. STAT. ANN. § 13-752(E) (2010). Although the subsection refers to the "trier of fact," a subsequent subsection notes that "'[t]rier of fact' means a jury unless the defendant and the state waive a jury, in which case the trier of fact shall be the court." § 13-752(S)(1).

26. Act of Aug. 1, 2002, 2002 Ariz. Sess. Laws, ch. 1, §§ 1–7.

States Supreme Court's decision in *Ring v. Arizona*.[27] *Ring* "was specifically designed to protect a defendant's fundamental right to a trial by jury."[28] As a consequence of *Ring*, Arizona courts now rely on jury instructions to narrow the (F)(6) aggravator.[29]

Arizona's 2002 amendments to the capital sentencing scheme implemented two other changes not compelled by *Ring*.[30] First, the jury rather than the trial judge is now the sentencing authority, determining whether to impose a death sentence.[31] Second, the Arizona Supreme Court no longer conducts an independent review of the propriety of the aggravating factor and the death sentence for murders occurring after August 1, 2002; instead, per legislative mandate, it employs a "sufficiency of the evidence" standard that is highly deferential to the jury's decision.[32] Although the *Ring* Court may have intended to provide defendants with *additional* protection from arbitrary death sentences by mandating that jurors find the existence of the aggravating factors,[33] it may have led to the opposite effect.

Part I of this Case Note reviews the history of capital sentencing schemes in the United States and in Arizona. Part II of the Note compares the results of *Snelling* and *Chappell* on appeal, attributing the discrepant outcomes to the different standards of appellate review. Part III of the Note analyzes the jury instructions relied upon by Arizona courts to narrow the "especially cruel" prong of the (F)(6) aggravator, in particular questioning whether the instructions communicate a coherent definition that enables jurors to rationally determine which murders warrant a death sentence. The Note concludes that the jury instructions provide jurors with nearly unbridled discretion that is not subject to meaningful appellate scrutiny. Part IV of the Note suggests three remedial pathways: (1) a legislative path, involving changes to the appellate standard of review; (2) an executive path, encouraging prosecutors to exercise restraint in relying on the cruelty prong of the (F)(6) aggravator when seeking a death sentence; and (3) a judicial path, whereby the Arizona Supreme Court could compel trial courts to utilize more consistent and coherent jury instructions in the first instance.

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27. 536 U.S. 584 (2002).

28. Eric J. Beane, Case Note, *When It Comes to Capital Sentencing, You Be the Judge:* Ring v. Arizona, 45 ARIZ. L. REV. 225, 233 (2003).

29. *See* State v. Velazquez, 166 P.3d 91, 99 (Ariz. 2007) (stating that the proper inquiry on appeal is whether the jury instructions sufficiently narrowed the aggravating factor).

30. *See* Act of Aug. 1, 2002, 2002 Ariz. Sess. Laws, ch. 1, § 9.

31. ARIZ. REV. STAT. ANN. § 13-752(A), (H) (2010).

32. *Id.* § 13-756(A).

33. *See* Ring v. Arizona, 536 U.S. 584, 609 (2002) (quoting Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968)) (referring to defendants' preference for the "common-sense judgment of a jury" to the "perhaps less sympathetic reaction of the single judge"); Beane, *supra* note 28, at 233.

I. CONSTITUTIONAL HISTORY OF DEATH PENALTY STATUTES

Although the range of crimes is limitless, the range of punishments is not.[34] Imposing the ultimate sanction—the death penalty—at too low a threshold would lead to perverse outcomes. Were petty theft punishable by death, for example, the petty thief could rob, rape, or murder any number of victims, increasing the severity of the crime without incurring any risk of more severe punishment.[35] Such a result would be inconsistent with the goal of retribution, which dictates that a criminal sentence should be proportional to the defendant's personal culpability.[36] Accordingly, courts have routinely acknowledged that the most severe sanction should be reserved for the most severe crimes.[37] However, because the scope of crimes is boundless, it is important to differentiate even among those crimes, like murder, that are categorically severe.[38]

A. United States Supreme Court Jurisprudence

Modern constitutional touchstones demand that the death penalty not be "freakishly" or "wantonly" applied.[39] In 1972, citing the prohibition against cruel and unusual punishment,[40] the United States Supreme Court reversed three death sentences that had been imposed pursuant to statutes that gave unbridled discretion to the sentencing authority.[41] At least 35 states, including Arizona, responded by reforming their capital sentencing statutes to address the Court's constitutional concerns.[42] In a series of subsequent cases reviewing these new statutory schemes, the Court required states to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,'"[43] typically by

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34. ERNEST VAN DEN HAAG & JOHN P. CONRAD, THE DEATH PENALTY: A DEBATE 235 (1983).

35. *See id.*

36. Tison v. Arizona, 481 U.S. 137, 149 (1987).

37. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 319 (2002) (noting that Supreme Court precedent "seeks to ensure that only the most deserving of execution are put to death"); State v. Carlson, 48 P.3d 1180, 1192 (Ariz. 2002) ("[S]entencing schemes must narrow the class of persons to those for whom the sentence is justified.").

38. *See* Walton v. Arizona, 497 U.S. 639, 716–19 (1990) (Stevens, J., dissenting) (viewing all murders as comprising a "pyramid," with the tip of the pyramid representing those homicides warranting a penalty of death).

39. Lewis v. Jeffers, 497 U.S. 764, 774 (1990).

40. U.S. CONST. amend. VIII.

41. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam); *see also* James L. Buchwalter, Annotation, *Validity, Construction, and Application of Aggravating and Mitigating Provisions of Death Penalty Statutes – Supreme Court Cases*, 21 A.L.R. FED. 2D 1 (2010) (discussing the impact of *Furman*).

42. Gregg v. Georgia, 428 U.S. 153, 179–81 & n.23 (1976).

43. Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (footnotes omitted); *see also* McCleskey v. Kemp, 481 U.S. 279, 305 (1987) ("[T]he State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold."); Zant v. Stephens, 462 U.S. 862, 878–79 & n.17 (1983) (reviewing case law and determining that capital sentencing schemes must provide for an individualized assessment "of the character of the individual and the circumstances of the crime").

providing specific "aggravating" and "mitigating" circumstances for the sentencer to consider in deciding whether to impose or withhold a capital sentence.[44]

To pass constitutional muster, aggravating circumstances must "genuinely narrow[] the class of death-eligible persons."[45] Thus, a statutory aggravator: (1) must apply only to a subset of defendants convicted of murder; and (2) may not be too vague as to provide insufficient guidance to the sentencer.[46] An aggravating circumstance is subject to constitutional challenge "[i]f the sentencer fairly could conclude that [it] applies to every defendant eligible for the death penalty."[47]

The U.S. Supreme Court has declared aggravating factors unconstitutionally vague in several cases. In *Godfrey v. Georgia*,[48] the Court analyzed Georgia's capital sentencing scheme, which permitted a death sentence upon a finding that a murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."[49] Although the Court had previously found the same language constitutionally acceptable, it had done so under the assumption that Georgia appellate courts would apply a narrowing construction to the language.[50] In *Godfrey*, however, the Court found that the Georgia Supreme Court had not applied such a narrowing construction.[51] The U.S. Supreme Court reasoned that "[t]he petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder."[52] The Court cited the "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."[53]

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44. *See generally* Buchwalter, *supra* note 41.

45. Lowenfeld v. Phelps, 484 U.S. 231, 244 (1998).

46. Tuilaepa v. California, 512 U.S. 967, 972 (1994).

47. Arave v. Creech, 507 U.S. 463, 474 (1993).

48. 446 U.S. 420 (1980).

49. *Id.* at 422.

50. *See* Gregg v. Georgia, 428 U.S. 153, 201 (1976) ("[T]here is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction.").

51. 446 U.S. at 432. The Georgia Supreme Court in *Godfrey* had merely concluded that the jury's finding was "factually substantiated." *Id.* at 432. Accordingly, "[t]he standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court." *Id.* at 429. The Court distinguished prior, constitutionally sufficient reviews by the Georgia Supreme Court on the basis that those cases had given a more precise narrowing definition to the language of the aggravator. *See id.* at 430–31. This suggests that an aggravator that was once constitutionally sufficient may become constitutionally infirm if the state appellate court does not remain consistent in the narrowing construction it utilizes on review.

52. *Id.* at 433.

53. *Id.* (footnote and citation omitted).

In a separate opinion concurring in the judgment, Justices Marshall and Brennan argued that it is not sufficient that the state supreme court apply a proper narrowing construction; rather, they contended, the jury instructions themselves must be sufficiently channeled:

The Court has rejected similar attempts to "narrow" aggravators by qualifying them with superlative language. In *Maynard v. Cartwright*,[54] the Court found Oklahoma's "especially heinous, atrocious, or cruel" aggravating factor to be unconstitutionally vague, reasoning that it failed to provide any more guidance to the jury than did the language in *Godfrey*:

> The State's contention that the addition of the word "especially" somehow guides the jury's discretion, even if the term "heinous" does not, is untenable. To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous." Likewise, in *Godfrey* the addition of "outrageously or wantonly" to the term "vile" did not limit the overbreadth of the aggravating factor.[55]

Two years later, in *Shell v. Mississippi*,[56] the Court found that a jury instruction intended to narrow Mississippi's "especially heinous, atrocious, or cruel" aggravator was constitutionally insufficient.[57] In *Shell*, the jury was provided with the following instruction: "[T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of[,] the suffering of others."[58] In explaining the per curiam opinion, Justice Marshall noted that a limiting instruction only remedies an overbroad statutory aggravating factor if the instruction itself is constitutionally sufficient.[59] If the instruction provides no more guidance to the jury than does the bare language of the statute, the instruction is constitutionally inadequate.[60]

B. Arizona's Capital Sentencing Scheme

In Arizona, a defendant found guilty of first-degree murder[61] may be sentenced to death if, during a subsequent aggravation phase of the trial,[62] the jury

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> The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards. To give the jury an instruction in the form of the bare words of the statute—words that are hopelessly ambiguous and could be understood to apply to any murder—would effectively grant it unbridled discretion to impose the death penalty. Such a defect could not be cured by the post hoc narrowing construction of an appellate court.

Id. at 436–37 (Marshall, J., concurring) (citations omitted).

54. 486 U.S. 356 (1988).
55. *Id.* at 364 (citation omitted).
56. 498 U.S. 1 (1990) (per curiam).
57. *Id.* at 1.
58. *Id.* at 2 (Marshall, J., concurring) (alterations in original).
59. *Id.* at 3.
60. *See id.*
61. Under Arizona law, a person has committed first-degree murder if "[i]ntending or knowing that the person's conduct will cause death, the person causes the death of another person, including an unborn child, with premeditation." ARIZ. REV. STAT. ANN. § 13-1105(A)(1) (2010). "'Premeditation' means that the defendant acts with either

determines the existence of at least one statutory aggravating circumstance charged by the prosecution.[63] If the jury finds one or more of these aggravating factors beyond a reasonable doubt,[64] the sentencing proceeds to a "penalty phase" in which the jury assesses whether there are any mitigating circumstances[65] "sufficiently substantial to call for leniency."[66] If the jury, after weighing aggravating and mitigating circumstances, unanimously[67] agrees that the death penalty is appropriate, a death sentence is imposed, and the defendant is entitled to an automatic and direct appeal to the Arizona Supreme Court.[68] Under the current standard of review, as mandated by statute, the court assesses whether the jury abused its discretion, either in finding the existence of the aggravating factors or in imposing a sentence of death.[69]

In its current form, Arizona's capital sentencing scheme is less than a decade old. Prior to 2002, the trial judge, rather than the jury, determined the existence or nonexistence of the statutory aggravating factors, a practice held unconstitutional by the United States Supreme Court in *Ring v. Arizona*.[70] In response to *Ring*, the Arizona legislature altered its capital sentencing statute to memorialize the jury's new fact-finding role during the aggravation phase.[71] But the legislature implemented two other changes as part of its overhaul of the capital sentencing scheme. First, it placed the *sentencing* decision—the ultimate life-or-

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the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by any length of time to permit reflection." *Id.* § 13-1101(1).

62. *See id.* § 13-752(C) (describing "the aggravation phase of the sentencing proceeding").

63. *Id.* § 13-751(F)(1)–(14) (providing an exclusive list of 14 possible aggravating factors).

64. State v. Snelling, 236 P.3d 409, 417 (Ariz. 2010) (quoting State v. Ramirez, 871 P.2d 237, 249 (Ariz. 1994)); *see also* ARIZ. REV. STAT. ANN. § 13-751(B) ("The prosecution must prove the existence of the aggravating circumstances beyond a reasonable doubt.").

65. Arizona provides a nonexclusive list of mitigating circumstances. ARIZ. REV. STAT. ANN. § 13-751(G).

66. *Id.* § 13-756(F)–(G). Thus, the jury engages in as many as three stages of deliberation. At the conclusion of the "guilt phase" of the trial, the jury determines whether the defendant is guilty of the crime beyond a reasonable doubt. If the jury finds the defendant guilty, the jurors then hear evidence during the "aggravation phase" relating to those aggravating factors charged by the prosecutor. At the conclusion of this phase, the jurors determine whether each charged aggravating factor has been proven beyond a reasonable doubt. If the jury unanimously agrees that at least one factor has been proven, the trial proceeds to a third "penalty phase" that might be more properly called a "mitigation phase." During this phase, the jury deliberates for a third time, assessing whether there are any mitigating factors substantial enough to spare the defendant from a death sentence.

67. *See id.* § 13-752(E).

68. *See* ARIZ. R. CRIM. P. 26.15, 31.2(b); *Snelling*, 236 P.3d at 411.

69. ARIZ. REV. STAT. ANN. § 13-756(A). For murders that occurred prior to August 1, 2002, the Court conducts a de novo review. *See Snelling*, 236 P.3d at 414 & n.4; Act of Aug. 1, 2002, 2002 Ariz. Sess. Laws, ch. 1, § 5.

70. 536 U.S. 584 (2002).

71. *See supra* notes 24–27 and accompanying text.

death determination—in the hands of the jury.[72] As a result, the jury is now tasked first with finding the existence or nonexistence of the aggravating factors and second with assessing whether there are any mitigating factors sufficient to overcome a death sentence.[73] Second, the legislature altered the Arizona Supreme Court's standard of review on the automatic appeal following a death sentence.[74] Thus, the standard of review is dependent upon when the crime was committed. For crimes committed prior to August 1, 2002, the Arizona Supreme Court reviews the jury's factual findings during the aggravation phase and its ultimate sentencing determination during the penalty phase de novo.[75] For crimes committed on or after August 1, 2002, the Arizona Supreme Court reviews both determinations under an abuse of discretion standard.[76]

Against this backdrop of U.S. Supreme Court guidance, and in light of the trio of legislative changes to Arizona's capital sentencing scheme, this Note analyzes the "especially cruel" prong of Arizona's (F)(6) aggravating factor, as applied in *State v. Chappell*[77] and *State v. Snelling*.[78]

II. UNDER-PROTECTIVE REVIEW FOR OVER-INCLUSIVE CRUELTY: THE ARIZONA SUPREME COURT'S ROLE

In both *Chappell* and *Snelling*, the jury found that the "especially cruel" prong of the (F)(6) aggravator had been established beyond a reasonable doubt and, after weighing the mitigating factors, imposed a death sentence.[79] Unlike the crime in *Chappell*, the homicide in *Snelling* occurred prior to August 1, 2002, permitting an independent review of the propriety of the (F)(6) aggravator and of the death sentence.[80] A comparison of the two cases reveals that the modern abuse of discretion standard, unlike de novo review, does not permit the Arizona Supreme Court to remedy a seemingly improper imposition of the death penalty.[81]

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72. Act of Aug. 1, 2002, 2002 Ariz. Sess. Laws, ch. 1, § 3.
73. ARIZ. REV. STAT. ANN. § 13-752(E)–(H) (2010).
74. Act of Aug. 1, 2002, 2002 Ariz. Sess. Laws, ch. 1, § 5.
75. *Id.*
76. *Id.*
77. 236 P.3d 1176 (Ariz. 2010).
78. 236 P.3d 409 (Ariz. 2010).
79. *See infra* notes 85–86, 97–98 and accompanying text.
80. *See supra* notes 74–76 and accompanying text.
81. The Ninth Circuit has held that even a de novo review does not remedy the problem posed by an overbroad aggravator. *See* Valerio v. Crawford, 306 F.3d 742, 747 (9th Cir. 2002) (en banc) ("We hold that the *Walton* procedure [applying a narrowing construction on a de novo review] is not available when a jury rather than the trial judge has found the facts and determined whether there were aggravating and mitigating circumstances."). The court additionally held that any attempt to review such findings on appeal demands "close appellate scrutiny." *Id.* Simply affirming the trial court by concluding that the jury's decision was factually supported, without more, is not an adequate remedy. *See id.* at 756–57. In addition to their fact-finding role, jurors in Arizona weigh aggravating factors against mitigating factors and determine whether a convicted murderer should be sentenced to death. ARIZ. REV. STAT. ANN. § 13-752(H) (2010).

A. State v. Chappell*: Abuse of Discretion Review*

In *Chappell*, the defendant, Derek Don Chappell, drowned his fiancée's two-year-old son, Devon, in a swimming pool.[82] Following his confession, Chappell was indicted and found guilty of child abuse[83] and first-degree murder.[84] The jury found the existence of three aggravating factors, including the (F)(6) aggravator. Specifically, the jury concluded that Chappell committed the murder in an "especially cruel" manner.[85] After finding no mitigating factors sufficient to call for leniency, the jury determined that Chappell should be sentenced to death.[86]

On appeal, the Arizona Supreme Court reviewed the jury's finding of the (F)(6) aggravator, employing the newer abuse of discretion standard.[87] In sustaining the jury's finding, the court cited testimony by the medical examiner—"that Devon likely was conscious for thirty seconds to two minutes while being held underwater" and "would have understood the need to breathe,"[88]—and statements by the defendant that Devon struggled while being held underwater.[89] Rejecting Chappell's contention "that drowning alone is insufficient to support a finding of cruelty,"[90] the court found that the record contained sufficient evidence from which the jurors could find that Devon consciously experienced mental anguish and that "Chappell knew or should have known that Devon would suffer."[91] The court declined to consider whether the evidence supported a finding

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82. 236 P.3d at 1180–81.

83. The child abuse charges stemmed from a prior incident during which Chappell physically abused Devon, prompting Child Protective Services (CPS) to demand that Chappell refrain from all contact with Devon. *Id.* at 1180.

84. *Id.* at 1181.

85. *Id.* Because the (F)(6) aggravator is worded in the disjunctive, "the state need prove only one of the three conditions to trigger application of the aggravating circumstance." State v. Grell, 135 P.3d 696, 699 n.2 (Ariz. 2006) (citing State v. Gretzler, 659 P.2d 1, 10 (Ariz. 1983)). Thus, jurors may find that the (F)(6) aggravator is established based on a finding of especial cruelty alone. State v. Morris, 160 P.3d 203, 220 (Ariz. 2007).

86. *Chappell*, 236 P.3d at 1181.

87. *Id.* at 1181–82. Here, the court referred to a "sufficiency of the evidence" standard, under which the court asks whether "reasonable persons could accept [the evidence in the record] as adequate and sufficient to support [the aggravator] beyond a reasonable doubt." *Id.* Later in the opinion, the court cited the proper standard as an "abuse of discretion" analysis, asking whether the jury "abuse[d] its discretion in finding that the (F)(6) aggravator had been proven beyond a reasonable doubt." *Id.* at 1189. Relying on its analysis earlier in the opinion, the court found that the jury did not abuse its discretion. *Id.* In similar contexts, courts in Arizona appear to consolidate these tests into a single analysis. *See, e.g.*, State v. Gunches, 234 P.3d 590, 593 (Ariz. Ct. App. 2010) (referring to "reviewing a sufficiency of the evidence claim under the abuse of discretion standard"). For murders occurring prior to August 1, 2002, the court conducts a de novo review. *See* State v. Snelling, 236 P.3d 409, 414 & n.4 (Ariz. 2010).

88. *Chappell*, 236 P.3d at 1182.

89. *Id.*

90. The court noted prior case law holding that drowning may not be sufficient to establish cruelty where there is no evidence of suffering or a struggle; in *Chappell*, however, the record contained evidence of struggle. *See id.*

91. *Id.*

of physical pain, reasoning that evidence of mental anguish alone is sufficient to establish the (F)(6) aggravator.[92]

B. State v. Snelling*: De Novo Review*

In *Snelling*, the defendant, Gary Wayne Snelling, entered a townhouse and strangled the owner, Adele Curtis, with an electrical cord.[93] Police found Curtis lying naked in her bathroom with ligature marks on her neck and a trace of blood near her body.[94] Seven years after the murder, police arrested Snelling on the basis of DNA evidence.[95] Snelling later admitted to a cellmate that he "had entered Curtis's townhouse intending to sexually assault her, taken $1,000 from her purse, gone upstairs, cut a cord in case he needed a weapon, surprised her in the bathroom, and choked her to death when she screamed."[96] The jury unanimously found Snelling guilty of first-degree murder, and it also concluded that the murder was "especially cruel," satisfying the (F)(6) aggravator.[97] After finding no mitigating factors sufficient to warrant leniency, the jury sentenced Snelling to death.[98]

Because the murder occurred prior to August 1, 2002,[99] the Arizona Supreme Court conducted a de novo review of whether the evidence supported a finding of the (F)(6) aggravator beyond a reasonable doubt.[100] The court announced materially the same narrowing construction cited in *Chappell*, "that a murder is especially cruel only if the state proves beyond a reasonable doubt that 'the victim consciously experienced physical or mental pain prior to death, and the defendant knew or should have known that suffering would occur.'"[101] Because a finding that Curtis suffered either mental anguish *or* physical pain could serve as a basis for a finding of especial cruelty,[102] the court conducted separate inquiries into whether the record contained evidence that Curtis experienced (1) mental anguish and/or (2) physical pain.[103]

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92. *Id.* at 1182 n.4.
93. State v. Snelling, 236 P.3d 409, 412–13 (Ariz. 2010).
94. *Id.* at 412.
95. *Id.*
96. *Id.*
97. *Id.* The jury did not agree on the existence of any other aggravating factor. *Id.*
98. *Id.* A second jury was impaneled after the first jury could not return a unanimous decision on what penalty to impose. *Id.*
99. *See supra* text accompanying note 75.
100. *Snelling*, 236 P.3d at 414.
101. *Id.* at 415 (quoting State v. Trostle, 951 P.2d 869, 883 (Ariz. 1997)).
102. *See* State v. Chappell, 236 P.3d 1176, 1182 n.4 (Ariz. 2010).
103. The terms "pain," "distress," and "anguish" appear to contemplate different but overlapping experiences. "[C]ruelty involves pain *and* distress visited upon the victim. This distress *includes* mental anguish." State v. Clabourne, 690 P.3d 54, 66 (Ariz. 1984) (emphasis added) (citations omitted). It appears that physical "pain" or "distress" alone is sufficient to find the cruelty prong of the (F)(6) aggravator. *See Snelling*, 236 P.3d at 417 (referring only to "physical pain"); State v. Adriano, 161 P.3d 540, 553–54 (Ariz. 2007) (rejecting defendant's argument that "distress" alone was insufficient to support a finding of especial cruelty).

In its mental anguish analysis, the court first conceded that "Curtis likely was terrified" by her intruder.[104] According to testimony of Snelling's cellmate introduced at trial, "Curtis opened the bathroom door, saw Snelling, and 'got belligerent and yelled' when 'he told her to just shut up and do what he said.' Snelling then strangled her with the cord 'to shut her up' and 'freaked' when 'she fell down.'"[105] The court inferred that Curtis had not "contemplated her fate for very long" and that "very little time elapsed between Curtis's initially seeing Snelling and the murder."[106] Also citing a lack of defensive injuries,[107] the absence of evidence that Curtis pleaded for her life,[108] and the relative neatness of the crime scene,[109] the court determined it "[could not] find beyond a reasonable doubt that, before her death, Curtis experienced the mental anguish required by our prior decisions."[110]

In its analysis of physical pain, the court began with the proposition that murder by strangulation is "not per se physically cruel absent evidence that the victim consciously suffered physical pain."[111] However, a period of suffering for as little as eighteen seconds may suffice for a finding of the cruelty aggravator.[112] Noting that the medical examiner "did not testify that victims in general always experience . . . pain during strangulation," and that she mentioned no injuries on Curtis other than those resulting from the manner of death itself,[113] the court concluded that it "[could not] find beyond a reasonable doubt that Curtis consciously suffered physical pain before or during the strangulation."[114] The court also noted that "even if Curtis was conscious for some time during the strangulation, that alone does not support a finding of physical pain."[115]

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104. *Snelling*, 236 P.3d at 415.

105. *Id.* The Arizona Supreme Court might have been concerned about the credibility of the cellmate's testimony, which provided a secondhand account of events occurring seven years earlier. Because the court was conducting a de novo review, the credibility of the evidence may have factored into its analysis. Had the court been reviewing the record only for an abuse of discretion, it most likely would have deferred to the jury's judgment about whether the cellmate's testimony was reliable.

106. *Id.*

107. *Id.* at 415–16.

108. *Id.* at 416.

109. *Id.*

110. *Id.* Importantly, the de novo review permitted the court to conduct its own, independent assessment of whether Curtis's mental anguish rose to the level required by its prior decisions. Judges, unlike jurors, are presumed to know the jurisdiction's case law. *See* Walton v. Arizona, 497 U.S. 639, 653 (1990).

111. *Snelling*, 236 P.3d at 416.

112. *Id.* (quoting State v. Schackart, 947 P.2d 315, 325 (Ariz. 1997)).

113. *Id.* In *Chappell*, however, the court declared that "we have never required that the mental or physical pain used to establish the (F)(6) aggravator be . . . above and beyond the pain inherent in the manner of death itself." 236 P.3d at 1184–85. This discrepancy confirms that the court's de novo review is substantially more exacting than its abuse of discretion view.

114. *Snelling*, 236 P.3d at 417.

115. *Id.*

Because its de novo review invalidated the only aggravator found by the jury, the court vacated Snelling's death sentence and instead imposed a life sentence.[116] Had the court been conducting an abuse of discretion review, however, it may have found that the mere fact of consciousness during strangulation was sufficient for jurors to find conscious suffering. For example, in *State v. Kuhs*, the court's abuse of discretion review appeared to presume that jurors could properly find that the defendant "suffered significant pain" based on the fact that he was "stabbed several times" and choked to death.[117] Yet, in a de novo review, the same court in *Snelling* was unable to conclusively find conscious pain despite evidence of ligature marks and death by strangulation.[118] This suggests that jurors may deem evidence sufficient to find the (F)(6) aggravator—without abusing their discretion—while the Arizona Supreme Court may find the same evidence insufficient to persuade them to independently find the (F)(6) aggravator.

C. Comparing Snelling *and* Chappell*: A Tale of Two Standards*

August 1, 2002 is a critical date in the history of Arizona's capital sentencing scheme.[119] Because the murder in *Snelling* preceded that date, the Arizona Supreme Court conducted a de novo review of whether the murder was especially cruel.[120] Because the murder in *Chappell* occurred after August 1, 2002, the court was statutorily mandated instead to review the record for an abuse of discretion.[121]

The abuse of discretion standard now employed by the Arizona Supreme Court on review raises the question of whether the court is able to adequately protect defendants from arbitrary sentencing practices. Reviewing the jury's findings de novo, the *Snelling* court found sufficient doubt that a strangulation victim consciously experienced mental anguish where she was confronted while naked by an intruder and allegedly "got belligerent and yelled" at her attacker before being strangled to death. This determination precluded a finding that the murder was especially cruel. Although the medical examiner opined that a strangulation victim generally remains conscious for ten seconds to several

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116. *Id.* at 417 & n.7.

117. 224 P.3d 192, 204 (Ariz. 2010).

118. *Snelling*, 236 P.3d at 417. *But see* State v. Smith, 159 P.3d 531, 544–45 (Ariz. 2007) (finding, on de novo review, especial cruelty where bound victim died by asphyxiation, because "[a]sphyxiation caused by stuffing a victim's nose and mouth with dirt while bound would *undoubtedly cause* mental anguish and physical pain." (emphasis added)); State v. Cromwell, 119 P.3d 448, 458 (Ariz. 2005) (finding, on de novo review, that victim "unquestionably suffered" anguish based on evidence that she was alive when stabbed and assaulted); State v. Woratzeck, 657 P.3d 865, 870 (Ariz. 1982) (assuming, based on evidence that victim was conscious when strangled and stabbed, that victim "would have suffered the pain and fear necessarily accompanying this experience").

119. *See supra* Part I.B.

120. *Snelling*, 236 P.3d at 414.

121. State v. Chappell, 236 P.3d 1176, 1189 (Ariz. 2010).

minutes, the court cited a lack of any other evidence suggesting that Curtis was conscious during the strangling.[122]

In *Chappell*, reviewing the jury's findings for abuse of discretion, the court determined that testimony by the medical examiner that Devon "likely was conscious for thirty seconds to two minutes while being held underwater" supported a finding that Devon consciously experienced mental anguish.[123] This finding was bolstered by Chappell's statements to reporters in a post-arrest press conference that Devon struggled while Chappell held him under water.[124] Even in the absence of testimony that "a two-year-old under those circumstances could understand that he was about to die," the court found that the jurors had not abused their discretion in concluding that the murder was especially cruel.[125]

Without accounting for the different standard of review, *Snelling* and *Chappell* appear difficult to reconcile. In each case, the medical examiner testified about the length of time during which a victim would likely remain conscious.[126] In both cases, there was some external evidence of the victim's anguish; in *Snelling*, the victim "got belligerent and yelled" before succumbing to strangulation, and in *Chappell*, the victim struggled as he was held underwater.[127] Because the same court upheld the aggravator in one case but not in the other, the different outcomes on appeal may be best attributed to the different standard of review that the court was required to employ.

Chappell and *Snelling* suggest that the court's independent review is significantly more protective of capital defendants than is its review for abuse of discretion. In *Snelling*, the court determined that because the medical examiner did not "mention any other injuries unrelated to the strangulation itself," there was no evidence of physical suffering.[128] Although Curtis had a ligature mark from the electrical cord used to strangle her[129] and a fractured thyroid cartilage,[130] these injuries were inherent in the strangulation itself. It seems unlikely that jurors, who rely on the jury instruction to give meaning to especial cruelty, conduct any analysis of whether the victim's injuries exceeded those inherent in the manner of

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122. *Snelling*, 236 P.3d at 416–17.

123. 236 P.3d at 1182.

124. *Id.*

125. *Id.* Although relevant to a finding of especial cruelty, the cruelty prong does not *require* that a victim possess an awareness of his or her impending fate. Rather, such uncertainty is only "one way in which the mental anguish aspect of the 'especially cruel' prong can be fulfilled." State v. Tucker, 160 P.3d 177, 190 (Ariz. 2007); *see also* State v. Lavers, 814 P.2d 333, 349 (Ariz. 1991) ("Mental anguish *includes* the victim's uncertainty as to her ultimate fate." (emphasis added)). *But cf.* State v. Sandoval, 798 N.W.2d 172, 212 (Neb. 2010) (holding, in Nebraska, that even a *requirement* that the victim experience uncertainty as to his or her ultimate fate in order for the sentencing body to find mental anguish "is not sufficiently narrow such that it would apply only to a subclass of defendants").

126. *Snelling*, 236 P.3d at 416–17; *Chappell*, 236 P.3d at 1182.

127. *Snelling*, 236 P.3d at 415; *Chappell*, 236 P.3d at 1182.

128. *Snelling*, 236 P.3d at 416.

129. *Id.*

130. *Id.* at 416 n.6.

death. Nor are they necessarily expected to conduct such an analysis, even though the Arizona Supreme Court, on de novo review, might find such an analysis prudent or even integral.[131] Although the requirement of jury determination of aggravating factors may have been motivated by a desire to insulate defendants from arbitrary death sentences,[132] the deferential standard of review prevents the court from adequately protecting defendants from over-inclusive application of the death penalty. While the standard of review affects whether the appellate court can *remedy* seemingly improper death sentences, the over-inclusiveness of the (F)(6) aggravator is also a product of jury instructions that may fail to achieve their purpose of narrowing the overbreadth of the cruelty prong in the first instance.

III. "ESPECIALLY CRUEL" IN THE FIRST INSTANCE: THE JURY'S ROLE

When the U.S. Supreme Court upheld Arizona's capital sentencing scheme in *Walton v. Arizona*,[133] the trial judge alone was charged with determining whether each aggravating circumstance applied.[134] Because the Arizona Supreme Court had provided a narrowing construction of "especially heinous, cruel or depraved," and because trial judges were presumed to apply the narrowed definition, the U.S. Supreme Court found Arizona's capital sentencing scheme constitutionally acceptable.[135] If the trial judge failed to apply the narrowed definition, the state appellate court could cure the error by conducting what the Ninth Circuit has called a "*Walton* analysis"—an independent review in which the appellate court itself "act[s] as a primary factfinder."[136] However, "[w]hen a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process."[137]

Because the jury in capital cases in Arizona is now charged with finding the existence or nonexistence of aggravating factors,[138] Arizona courts rely upon jury instructions to remedy the (F)(6) aggravator's facial vagueness.[139] Jury instructions that are intended to narrow a facially vague aggravating factor must "limit the overbreadth of the aggravating factor."[140] Under the Eighth Amendment, "jury instructions in the penalty phase of a capital case [must] sufficiently channel

131. *See id.* at 416 (on de novo review, insufficient evidence of physical suffering where all injuries were related to the manner of death); *Chappell*, 236 P.3d at 1184–85 (on abuse of discretion review, not requiring that the victim's pain be "above and beyond the pain inherent in the manner of death itself").

132. *See supra* note 33 and accompanying text.

133. 497 U.S. 639 (1990).

134. *Id.* at 643.

135. *Id.* at 653–54.

136. Valerio v. Crawford, 306 F.3d 742, 756–57 (9th Cir. 2002) (en banc).

137. *Id.* The Ninth Circuit has questioned—without deciding—to what extent *Walton* is applicable when a jury is charged with finding aggravating factors. *See id.* at 756 n.6.

138. *See supra* Part I.B.

139. *See* State v. Velazquez, 166 P.3d 91, 99 (Ariz. 2007) (noting that the proper inquiry on appeal is whether the jury instructions sufficiently narrowed the aggravating factor).

140. Maynard v. Cartwright, 486 U.S. 356, 364 (1988).

the jury's discretion to permit it to make a principled distinction between the *subset of murders for which a death sentence is appropriate and the majority of murders for which it is not.*"[141] Jury instructions do not sufficiently channel the jury's discretion if they merely repeat the words of the statute or use "terms nearly as vague."[142]

The precise wording of the jury instructions utilized by Arizona trial courts to narrow the cruelty prong of the (F)(6) aggravator varies from case to case.[143] The trial court in *Chappell* instructed the jury as follows:

> All first degree murders are to some extent cruel. However[,] this aggravating circumstance cannot be found to exist unless the State has proved beyond a reasonable doubt that the murder was "especially" cruel. "Especially" means unusually great or significant.
>
> "Especially cruel": The term "cruel" focuses on the victim's pain and suffering. To find that the murder was committed in an "especially cruel" manner you must find that the victim consciously suffered physical or mental pain, distress or anguish prior to death. A murder is especially cruel when there has been the infliction of pain and suffering in an especially wanton and insensitive or vindictive manner. The defendant must know or should have known that the victim would suffer. The victim must be conscious for at least some portion of the time when the pain and/or anguish was inflicted.
>
> You may not consider the age of the victim in any way in deciding whether the murder was committed in an especially cruel manner.[144]

On appeal, the Arizona Supreme Court found that this jury instruction properly stated the law and was "materially identical" to the instruction used in prior cases.[145]

The jury instructions employed to narrow the "especially cruel" prong of the (F)(6) aggravator arguably provide no more guidance to the jury than the bare terms of the statute. The instructions contain at least two clauses that attempt to narrow the cruelty prong. Initially, by providing that "especially," as used in the phrase "especially cruel," is defined as "unusually great or significant,"[146] the

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141. *Valerio*, 306 F.3d at 750 (emphasis added).

142. *Walton*, 497 U.S. at 653; *see also* Cartwright v. Maynard, 822 F.2d 1477, 1489 (10th Cir. 1987) ("Vague terms do not suddenly become clear when they are defined by reference to other vague terms.").

143. *Compare* State v. Adriano, 161 P.3d 540, 549 (Ariz. 2007) (requiring jurors to find that "the circumstances of the murder raise it above the norm of other first degree murders"), *with* State v. Chappell, 236 P.3d 1176, 1185 n.6 (Ariz. 2010) (imposing no such requirement).

144. *Chappell*, 236 P.3d at 1185 n.6.

145. *See id.* at 1184–85.

146. *Id.* at 1185 n.6.

instruction may fail to narrow the (F)(6) aggravator at all.[147] Rather, as the Arizona Supreme Court has acknowledged, the "limiting" feature of the jury instructions is the clause requiring that "the victim consciously experienced physical or mental pain prior to death, and the defendant knew or should have known that suffering would occur."[148] Thus, a threshold inquiry is whether this second portion of the jury instructions "genuinely narrows the class of death-eligible persons."[149]

The apparently "limiting" feature of the jury instructions could apply to almost any first-degree murder.[150] It is difficult to conceive of a fact pattern in which the murder victim experiences no pain or anguish whatsoever.[151] Yet even if some jurors might determine that a fraction of first-degree murders do *not* involve foreseeable pain or suffering by the victim—for example, if a victim is shot in the head by a single bullet that results in instantaneous death—does this imply that the cruelty prong of the (F)(6) aggravator, as narrowed, applies only to a "subclass of defendants convicted of" first-degree murder?[152] Under both U.S. Supreme Court and Ninth Circuit precedent, jury instructions that fail to *genuinely* limit the class of death-eligible defendants are constitutionally insufficient.[153] By defining cruelty

147. *See, e.g.*, Maynard v. Cartwright, 486 U.S. 356, 364 (1988) (finding that the addition of "especially" to the term "heinous" failed to provide additional guidance to the jury); Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (phrase "outrageously or wantonly vile, horrible and inhuman" did not "impl[y] any inherent restraint" on arbitrary death sentences).

148. State v. Snelling, 236 P.3d 409, 415 (Ariz. 2010) (quoting State v. Trostle, 951 P.2d 869, 883 (Ariz. 1997)).

149. Lowenfeld v. Phelps, 484 U.S. 231, 244 (1998). This should not end the analysis, however. The instructions as a whole may be *untenable* even if they are not *unconstitutional*. *See infra* notes 155–165 and accompanying text.

150. *See* Walton v. Arizona, 497 U.S. 639, 697 (1990) (Blackmun, J., dissenting) ("[T]he Arizona Supreme Court's construction of 'cruelty' has become so broad that it imposes no meaningful limits on the sentencer's discretion."); *id.* at 698 ("[T]he murder which is 'especially cruel' is the norm rather than the exception.").

151. Indeed, this might explain why the Arizona Supreme Court in *Snelling* asked whether the victim experienced *sufficient* anguish rather than merely anguish for "some portion" of time. *See* 236 P.3d at 415. By referring only to "some portion" of time, the jury instructions might not prompt jurors to assess the *sufficiency* of the period of time during which the victim experienced anguish. The appellate court, unlike the jury, might also consider how the victim's level of mental anguish compared to the anguish deemed sufficient in prior cases. *See id.* at 416 (on de novo review, assessing the victim's level of mental anguish relative to the anguish "required by our prior decisions").

152. Tuilaepa v. California, 512 U.S. 967, 972 (1994) (stating that an aggravating "circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder").

153. *See* Zant v. Stephens, 462 U.S. 862, 877 (1983) (instructions "must genuinely narrow" the class of death-eligible persons); Valerio v. Crawford, 306 F.3d 742, 750 (9th Cir. 2002) (en banc) (noting that jury instructions must permit "a principled distinction between the subset of murders for which a death sentence is appropriate and *the majority of murders for which it is not*" (emphasis added)).

in terms that apply to nearly every first-degree murder, the jury instructions are tantamount to absolute discretion to impose a death sentence.[154]

A more fundamental concern is whether jurors are capable of giving coherent meaning to the jury instruction provided in *Chappell*. Oddly, the instructions both (1) require the jury to find that the victim experienced pain or anguish *and* (2) then presuppose that exact finding ("The victim must be conscious . . . *when the pain and/or anguish was inflicted*.").[155] In other words, the instructions implicitly suggest that the jurors have found precisely what they are permitted to find only beyond a reasonable doubt.[156]

The instructions also present an arguably jumbled list of criteria for the jury to use in assessing cruelty, including (1) whether the victim's suffering was "unusually great or significant," (2) whether the victim "consciously suffered . . . pain," (3) whether pain was inflicted "in an especially wanton and insensitive or vindictive manner,"[157] and (4) whether the defendant knew or should have known that the victim would suffer.[158] Although the instructions state that the jury "must" find both conscious suffering and that the defendant knew or should have known about such suffering, they simultaneously provide the unqualified assertion that "[a] murder *is* especially cruel when there has been the infliction of pain and suffering in an especially wanton or vindictive manner."[159] These definitions of

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154. One district court in Arizona has referred to the (F)(6) aggravator as a "catch-all" aggravator. Hurles v. Schriro, No. CV-00-0118-PHX-RCB, 2006 WL 2091707, at *6 (D. Ariz. July 21, 2006). The court should not permit an aggravating factor to "become a 'catch-all' provision which can always be employed in cases where there is no evidence of other aggravating circumstances." State v. Stanley, 312 S.E.2d 393, 395 (N.C. 1984) (quoting State v. Goodman, 257 S.E.2d 569, 585 (N.C. 1979)); *see also* Harris v. State, 230 S.E.2d 1, 10 (Ga. 1976) ("[W]e have no intention of permitting this statutory aggravating circumstance [relating to whether the crime was 'outrageously or wantonly vile, horrible or inhuman'] to become a 'catch all' for cases simply because no other statutory aggravating circumstance is raised by the evidence.").

155. State v. Chappell, 236 P.3d 1176, 1185 n.6 (Ariz. 2010) (emphasis added). For a discussion of how unnecessary complexity may lead to systematic error by the decision-maker, see R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739, 754 (2001).

156. ARIZ. REV. STAT. ANN. § 13-751(B) (2010) (providing that the prosecution must prove the existence of an aggravating circumstance beyond a reasonable doubt). Admittedly, many crimes require that the jury find various elements in succession. Merely because a jury is asked to find that a defendant committed a crime with "intent," for example, does not necessarily presuppose the commission of the crime. The jury instruction in *Chappell*, however, does not provide any hierarchy or "list" of elements to be found in succession. This distinction, though subtle, might skew jurors toward finding the cruelty prong.

157. This criterion appears to relate more to depravity than cruelty because it focuses on the murderer's state of mind. *See* State v. Ortiz, 639 P.2d 1020, 1031 (Ariz. 1981), *overruled on other grounds by* State v. Gretzler, 659 P.2d 1, 16 n.2 (Ariz. 1983).

158. *Chappell*, 236 P.3d at 1185 n.6.

159. *Id.* As to this last assertion, the United States Supreme Court has held that similar language was constitutionally inadequate. *See* Godfrey v. Georgia, 446 U.S. 420, 420 (1980) (finding insufficient language requiring that a murder "was outrageously or

cruelty have no single focus, looking sometimes to the victim's consciousness, other times to the defendant's wantonness, and yet other times to whether the victim's suffering was "unusually great or significant."[160] In short, the instructions may be untenable even if they are sufficiently narrow to render the aggravating factor constitutional.

Furthermore, the instructions forbid the jury from considering "the age of the victim in any way in deciding whether the murder" was especially cruel, where especial cruelty is defined with reference to the victim's conscious anguish.[161] It may be impossible for jurors to accord *no* weight to the victim's age; on review, the Arizona Supreme Court found that "the victim's age . . . [was] relevant here to establish whether Devon experienced mental anguish."[162] Because age is *relevant* to the determination, yet *forbidden* by the jury instructions, there are serious concerns about whether jurors are capable of following the instructions diligently.[163] Although Arizona courts presume that jurors follow jury instructions,[164] such a presumption appears dubious here. As Judge Kozinski once remarked, "I do not understand . . . how we can presume the jurors followed an instruction they are incapable of following."[165]

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wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim").

160. *Chappell*, 236 P.3d at 1185 n.6. The Arizona Supreme Court maintains that a victim's suffering need not be "extreme" in order to serve as the basis for an (F)(6) finding, at least where the court is conducting an abuse of discretion review. *See id.* at 1184–85. A de novo review might employ a more stringent standard. *See, e.g.*, State v. Lujan, 604 P.2d 629, 636 (Ariz. 1979) ("For a killing to be especially cruel, the perpetrator must senselessly or sadistically inflict *great pain* on his victim." (emphasis added)).

161. *Chappell*, 236 P.3d at 1185 n.6.

162. *Id.* at 1184.

163. A large body of empirical evidence questions whether jurors are able to effectively understand "limiting" or "narrowing" instructions—that is, instructions by the court that they may consider certain evidence for one purpose but not another. *See generally* Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153 (1982). Jurors' "inexperience in sentencing might make it difficult for jurors to recognize and properly use information relevant to sentence choice." People v. Bean, 760 P.2d 996, 1018 (Cal. 1988) (citing Gregg v. Georgia, 428 U.S. 153, 192 (1976)); *see also* Clemons v. Mississippi, 494 U.S. 738, 749 (1990) ("It is also important to note that state supreme courts in States authorizing the death penalty may well review many death sentences and that typical jurors, in contrast, will serve on only one such case during their lifetimes."). However, if courts question jurors' understanding, "then every case is in danger of being reversed simply because the appellate court may arbitrarily assume that juries do not have the intelligence to apply the clear, unequivocal instructions submitted to them by trial judges." Esquivel v. Nancarrow, 450 P.2d 399, 407 (Ariz. 1969).

164. State v. Velazquez, 166 P.3d 91, 103 (Ariz. 2007).

165. United States v. Beltran, 165 F.3d 1266, 1273 (9th Cir. 1999) (Kozinski, J., concurring).

IV. ADDRESSING CONCERNS WITH THE CRUELTY PRONG OF THE (F)(6) AGGRAVATOR

The cruelty prong of the (F)(6) aggravator raises two broad areas of concern: (1) whether jurors in the first instance are capable of giving coherent meaning to the jury instructions, so as to avoid arbitrary imposition of the death penalty; and (2) whether the Arizona Supreme Court, under an abuse of discretion review, can remedy potentially improper death sentences on appeal. Because the (F)(6) aggravator is facially vague,[166] its constitutionality rests on whether Arizona courts are able to adequately and consistently narrow its terms. To remedy the over-inclusiveness of the cruelty prong of the (F)(6) aggravator, this Note suggests three remedial pathways—legislative, executive, and judicial.

A. Legislative Measures

The Arizona legislature could alter its capital sentencing statute to revert to the prior de novo standard of appellate review. The cost of this approach would be minimal because capital sentences in Arizona are already subject to an automatic appeal.[167] The benefit, as suggested by a comparison of *Chappell* and *Snelling*,[168] would be comparatively high, particularly in the capital sentencing context, where a meaningful opportunity for review is often thought critical.[169] Notably, the U.S. Supreme Court in *Walton* approved of the appellate review in place in Arizona in 1990—where the Arizona Supreme Court "itself determine[d] whether the evidence support[ed] the existence of the aggravating circumstance as properly defined."[170] Under this review, the state supreme court acts as the "*primary* factfinder."[171]

The legislature could also join some other jurisdictions in requiring that the state supreme court engage in proportionality review of capital sentences.[172] Although the Arizona Supreme Court abandoned proportionality review in capital cases in 1992,[173] some members of the court have questioned the wisdom of that decision.[174] The court's willingness to abandon proportionality review—which predated the 2002 amendments to Arizona's capital sentencing scheme—may have

166. Walton v. Arizona, 497 U.S. 639, 654 (1990).

167. *See* ARIZ. REV. STAT. ANN. § 13-756(A) (2010).

168. *See supra* Part II.C.

169. *See, e.g.*, State v. Watson, 628 P.2d 943, 946 (Ariz. 1981) ("A finding merely that the imposition of the death penalty by the trial court was 'factually supported' or 'justified by the evidence' is *not the separate and independent judgment by this court that the death penalty warrants.*" (emphasis added)).

170. *Walton*, 497 U.S. at 654.

171. Valerio v. Crawford, 306 F.3d 742, 756–57 (9th Cir. 2002) (en banc) (emphasis added).

172. *See, e.g.*, Johnson v. State, 983 A.2d 904, 935 (Del. 2009); State v. Holmes, 5 So.3d 42, 84 (La. 2008); State v. Vela, 777 N.W.2d 266, 316 (Neb. 2010).

173. State v. Salazar, 844 P.2d 566, 584 (Ariz. 1992). The U.S. Supreme Court has held that appellate courts are not required to conduct a proportionality review of all death sentences. Pulley v. Harris, 465 U.S. 37, 50–51 (1984).

174. *See, e.g.*, State v. Greene, 967 P.2d 106, 119 (Ariz. 1998) (Zlaket, C.J., dissenting); *Salazar*, 844 P.2d at 585–86 (Feldman, C.J., concurring).

relied in part on the court's "extraordinary power to review death sentences under [then-]existing statutes."[175] The legislature's 2002 amendments curtailed the court's power to review death sentences, permitting only a review for abuse of discretion.[176] Because of this legislative mandate, the authority to restore a proportionality review may need to come from the legislature.[177] In this context of the deferential abuse of discretion standard of review, however, restoration of proportionality review may be desirable to ensure the capital scheme is not arbitrarily applied.[178]

B. Executive Measures

The (F)(6) aggravator was the most frequently found aggravator in capital cases in a twenty-six year study commissioned by the Arizona attorney general.[179] Of the 228 death sentences imposed during that period, 39 were based on a finding of the (F)(6) aggravator alone.[180] The report from this study suggests the (F)(6) aggravator is overused.[181] Among the Committee's recommendations was the suggestion that prosecutors be urged to implement written policies to aid in identifying those cases which warranted seeking the death penalty.[182] However,

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175. *Salazar*, 844 P.2d at 585 (Martone, J., concurring).

176. Act of Aug. 1, 2002, 2002 Ariz. Sess. Laws, ch. 1, § 5.

177. Perhaps the Arizona Supreme Court could conduct a proportionality review even under the current statutory scheme. *See Salazar*, 844 P.2d at 583 (noting that the Arizona Supreme Court had a history of conducting proportionality reviews in capital cases even though "no statute requires or suggests proportionality reviews").

178. In Nebraska, for example, the state supreme court:

> compare[s] the aggravating and mitigating circumstances with those present in other cases in which a district court imposed the death penalty. The purpose of such review is to ensure that the sentence imposed in a case is no greater than those imposed in other cases with the same or similar circumstances.

State v. Vela, 777 N.W.2d 266, 316 (Neb. 2010) (footnotes omitted). Although the Nebraska Supreme Court reviews the sentencing decision of a three-judge panel, *id.* at 309, the logic behind proportionality review extends to the context of jury sentencing. *See* People v. Thompson, 853 N.E.2d 378, 404–05 (Ill. 2006) (finding that the principles underlying proportionality review are still relevant where jury determines the sentence, even if proportionality review is not constitutionally compelled).

179. OFFICE OF THE ATT'Y GEN., CAPITAL CASE COMM'N, FINAL REPORT 25 (2002), *available at* http://www.azag.gov/CCC/Capital%20Case%20Commission%20-%20Final%20Report.pdf. The Arizona Attorney General created the Commission in 2000 to examine Arizona's capital sentencing process and recommend potential changes. *See id.* at 1. The Commission analyzed capital cases in Arizona between 1974 and 2000. *Id.* at 25.

180. *Id.* at 25. The Committee's report did not indicate the number of cases in which the (F)(6) aggravator was found in conjunction with one or more other aggravators.

181. *See id.* ("Some have concluded that these figures indicate a possible abuse of the (F)(6) aggravator and have questioned whether it is consistently applied and whether the aggravator is overly broad.").

182. *Id.* at 17.

"the number of capital cases filed over the past decade has remained fairly constant."[183]

Because it is intended to apply only to those first-degree murders that are "above the norm,"[184] the executive could establish a firm policy encouraging prosecutors to exercise some discretion and determine *ex ante* whether a crime reasonably rises to an "above the norm" standard. Concededly, the Arizona Supreme Court will not "encroach on reasonable prosecutorial discretion, absent a clear indication of misconduct,"[185] and it is unlikely the current policy could be successfully challenged. Nonetheless, the frequency with which the cruelty prong is found contributes to the erroneous perception of the aggravator as a "catch-all."[186] A normative change in the prosecutors' approach would result in greater fairness in application of the law because it does not take advantage of the deference given to the finding by jurors, who are necessarily limited in their ability to apply the law evenly and consistently.[187]

C. Judicial Measures

The (F)(6) aggravator is intended to apply to those murders that were "so cruel that [they] rose above the norm of first degree murders."[188] A trial court may, in its discretion, instruct jurors that they may not find the (F)(6) aggravator "unless the murder is especially heinous, cruel or depraved, that is, where the circumstances of the murder raise it above the norm of other first degree murders."[189] At present, however, the trial court is not *required* to include this "above the norm" caveat in the jury instructions for the (F)(6) aggravator.[190]

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183. Robert L. Gottsfield & Marianne Alcorn, *The Capital Case Crisis in Maricopa County: What (Little) We Can Do About It*, ARIZ. ATT'Y, Apr. 2009, at 20, 23. Juries appear to impose a death sentence at a significantly higher rate than judges did. *See* Jim Walsh, *Jurors Dish Out Death in Arizona; Sentencing Rate Up Since Judges Lost Say*, ARIZ. REPUBLIC, Nov. 12, 2003, at 1A.

184. *See infra* note 189 and accompanying text.

185. State v. White, 982 P.2d 819, 829 (Ariz. 1999).

186. *See supra* note 154.

187. *See* Clemons v. Mississippi, 494 U.S. 738, 749 (1990) ("It is also important to note that state supreme courts in States authorizing the death penalty may well review many death sentences and that typical jurors, in contrast, will serve on only one such case during their lifetimes.").

188. State v. Adriano, 161 P.3d 540, 549 (Ariz. 2007). The Arizona Supreme Court has "repeatedly held [that] the death penalty should not be imposed in every capital murder case but, rather, it should be reserved for cases in which either the manner of the commission of the offense or the background of the defendant places the crime 'above the norm of first-degree murders.'" State v. Carlson, 48 P.3d 1180, 1192 (Ariz. 2002) (quoting State v. Hoskins, 14 P.3d 997, 1033 (Ariz. 2000); *see also* Valerio v. Crawford, 306 F.3d 742, 750 (9th Cir. 2002) (en banc) (the jury must be able "to make a principled distinction between the subset of murders for which a death sentence is appropriate and the majority of murders for which it is not").

189. *Adriano*, 161 P.3d at 549 (internal quotation marks omitted). However, this method presumes that jurors would not inherently feel that any first-degree murder is "above the norm."

190. State v. Bocharski, 189 P.3d 403, 414 (Ariz. 2008).

In the context of criminal sentencing, uniformity in jury instructions is sometimes desirable.[191] In *State v. Portillo*, the Arizona Supreme Court held that Arizona jury instructions must include a uniform definition of "reasonable doubt."[192] After finding that "the multiple and varying definitions [that] courts have developed over the years" prompted "much confusion,"[193] the court concluded that "[a]llowing varying definitions . . . detracts from the goal of a uniform and equal system of justice. Use of a standard definition thus will eliminate confusion and foster fairness for defendants, the state, and jurors alike."[194] Citing its authority under the Arizona Constitution, the court imposed a mandate on lower courts to use a uniform instruction.[195] Such logic can be extended to support a uniform definition of "especially cruel."

CONCLUSION

Although Arizona's (F)(6) aggravator survived a vagueness challenge in 1990,[196] the capital sentencing landscape in Arizona changed dramatically in 2002. When the *Walton* Court upheld the constitutionality of the (F)(6) aggravator as applied, it did so in the context of three potential safeguards against over-inclusiveness. First, the trial judge, presumed to know the Arizona Supreme Court's case law,[197] determined the propriety of the statutory aggravating factors—a practice held unconstitutional in *Ring v. Arizona*.[198] Second, the trial judge alone weighed the aggravating factors against any mitigating factors and determined whether a death sentence was appropriate.[199] Third, the Arizona Supreme Court—pursuant to statutory authorization—reviewed the propriety of the aggravating factors and the death sentence de novo on appeal.[200] As a result, the Arizona Supreme Court could cure any defect resulting from the trial judge's failure to apply the proper narrowing construction.[201]

In the wake of *Ring v. Arizona*, Arizona trial courts have relied on jury instructions to cure the (F)(6) aggravator's facial vagueness.[202] There is no uniform instruction for the cruelty prong of the (F)(6) aggravator, and trial judges may instruct juries differently from one case to another.[203] As *State v. Chappell* demonstrates, the instructions may contain conflicting definitions of what

191. *See* State v. Portillo, 898 P.2d 970, 973 (Ariz. 1995) (concluding "that the better practice is for trial courts to always give a uniform instruction defining reasonable doubt").

192. *Id.*

193. *Id.*

194. *Id.* at 974.

195. *Id.* (citing ARIZ. CONST. art 6, §§ 3, 5). The Arizona Supreme Court has plenary authority to establish procedural rules for all courts in the state. *See* Jones v. Lopez Plascencia, 458 P.2d 120, 124 (Ariz. Ct. App. 1969).

196. Walton v. Arizona, 497 U.S. 639 (1990).

197. *Id.* at 653.

198. 536 U.S. 584 (2002).

199. *See* Act of Aug. 1, 2002, 2002 Ariz. Sess. Laws, ch. 1, § 3.

200. *Id.* § 5.

201. *See Walton*, 497 U.S. at 654.

202. *See supra* note 29.

203. *See supra* note 143 and accompanying text.

constitutes cruelty and may fail to convey the importance of reserving the aggravator for those first-degree murders that are "above the norm."[204] Because jurors interpret the jury instructions in a "vacuum," and without knowledge of the Arizona Supreme Court's prior case law,[205] they may be unable to apply the cruelty prong with the level of rationality and consistency that U.S. Supreme Court jurisprudence demands.[206]

This potential for uneven application of the law is compounded by the modern abuse of discretion review that is significantly less exacting than the de novo review applied to pre-2002 murders.[207] Thus, while the jury instructions may render the cruelty prong overbroad in the first instance, the deferential abuse of discretion review may leave the Arizona Supreme Court unable to remedy this over-inclusiveness on appeal. Although *Chappell* and *Snelling* involved murders that seem comparable in their cruelty, their discrepant outcomes suggest that the abuse of discretion standard leaves capital defendants with significantly less protection against potentially improper death sentences.[208]

The death penalty, "unique in its severity and irrevocability,"[209] should be applied pursuant to a statutory scheme in an "objective, evenhanded and substantively rational way."[210] The *Ring* Court's requirement that a jury and not a judge determine the propriety of aggravating factors "was specifically designed to protect a defendant's fundamental right to a trial by jury."[211] In light of the Arizona legislature's response to *Ring*, Arizona's modern capital sentencing scheme does not adequately restrain the cruelty prong from becoming a "catch-all." The anomalous result is that the fundamental right to the protection of a trial by jury may have in fact *eroded* some of the protection capital defendants received prior to *Ring*—an irony that capital defendants might consider "especially cruel."

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204. *Id.*

205. *See* Clemons v. Mississippi, 494 U.S. 738, 749 (1990) (noting that typical jurors "will serve on only one [capital] case during their lifetimes."); Nancy J. King, *How Different Is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 208 (2004) (discussing how "judges' greater exposure to capital cases" may be responsible for their greater leniency).

206. *See supra* Part I.A.

207. *See supra* Part II.C.

208. *See supra* Part II.C.

209. Gregg v. Georgia, 428 U.S. 153, 187 (1976).

210. Zant v. Stephens, 462 U.S. 862, 879 (1983).

211. Beane, *supra* note 28, at 233.