IN THE ARIZONA SUPREME COURT

JODI ANN ARIAS, Defendant-Petitioner, vs. HON. SHERRY STEPHENS, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF MARICOPA, Respondent, and STATE OF ARIZONA, ex rel., WILLIAM G. MONTGOMERY, MARICOPA COUNTY ATTORNEY, Real Party In Interest.	Arizona Supreme Court No. _____ Arizona Court of Appeals No. 1 CA-CA-13-0026 Maricopa County Superior Court No. CR2008-031021

PETITION FOR REVIEW

L. Kirk Nurmi, #020900
LAW OFFICES OF L. KIRK NURMI
2314 E. Osborn
Phoenix, Arizona 85016
Tel (602) 285-6947
Email: nurmilaw@gmail.com

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Introduction

In *Chronis v. Steinle*,[1] this Court, recognizing the constitutional underpinnings of Rule of Criminal Procedure 13.5, held that a defendant facing capital allegations has the right to judicial determination of probable cause for the facts supporting death penalty claims.[2] This matter asks whether this right precedent to a sentence of death, compelled by the United States Constitution and Arizona Rules of Criminal Procedure, can be mooted by the false and misleading testimony of the State's sole witness at the probable cause hearing.

The State alleged a single aggravator in support of its desire to seek the death of Defendant Jodi Arias in this matter, namely, the "cruel, heinous, or depraved" aggravator of A.R.S. section 13-751(F)(6). Following a *Chronis* evidentiary hearing on August 7, 2009 – in which the only witness was the case agent, Mesa Police Detective Esteban Flores – the trial court found that the State had failed to establish probable cause for the "heinous or depraved" elements of the F6 aggravator. The trial court found that the State had shown probable cause for only a single aggravating fact, namely, that the murder was "cruel" because of the "physical and mental suffering of the victim."[3]

---

1 220 Ariz. 559, 208 P.3d 210 (2009).
2 *Id*. at 562, 208 P.3d at 213.
3 Appendix, Exhibit 4, at 2.

Now, Defendant has discovered that even this single aggravating fact was based upon false and misleading testimony. At trial, Detective Flores admitted to giving false, material testimony in support of the single aggravator at the *Chronis* hearing.

Can a defendant be subject to the death penalty based upon an aggravator obtained through false testimony? Can this Court's requirement for an evidentiary hearing be mooted by a trial judge who, although not present at the evidentiary hearing, deems the perjury harmless? Defendant urges this Court to accept review of this matter to resolve these critical questions of due process and construction of Arizona's Rule 13.5.

Issues Presented for Review

1. Did the trial court fail to perform a duty required by law by refusing to dismiss the case or the F6 aggravator that was obtained using perjured testimony?

2. Can the trial judge, who was not present at the probable cause hearing mandated by *Chronis*, deflect her duty required by law to dismiss the case or the F6 aggravator, by claiming that the perjured testimony used to obtain the single aggravator was harmless?

Synopsis of Lower Court Rulings

The trial court conducted the *Chronis* probable cause hearing on August 7, 2009. On August 18, the trial court ruled, holding that the State failed to establish

probable cause to show that the murder involved needless mutilation or gratuitous violence, or the murder was senseless, or involved a helpless victim. The trial court found that the State established probable cause for only a single theory underlying the F6 aggravator: that it involved both the victim's physical and mental suffering.

Arias' trial commenced three years later, on December 10, 2012, under a different trial judge. Following the testimony of the medical examiner, Dr. Kevin Horn, on January 8, 2013, the misleading nature of Detective Flores' testimony became apparent. Counsel immediately moved for a dismissal of the case or dismissal of the sole capital aggravator. The trial court denied both requests.[4]

Arias petitioned for special action relief from the Court of Appeals on January 28, 2013. That Court declined to accept jurisdiction on January 30, 2013.[5] Ms. Arias now seeks review in this Court.

Summary of Relevant Facts

On July 9, 2008, Defendant was indicted for first degree murder.[6] On October 31, 2008, the prosecution filed its Notice of Intent to Seek Death alleging a single aggravator pursuant to A.R.S. § 13-751(F)(6).[7]

On August 7, 2009, the trial court held a *Chronis* hearing to determine whether probable cause existed that the murder was committed in an especially

---

4 The trial court's minute entry ruling is attached as **Attachment 1**.
5 The Court of Appeals' order is attached as **Attachment 2.**
6 Appendix, Exhibit 1.
7 Appendix, Exhibit 2.

heinous, cruel, or depraved manner. The prosecution elicited testimony from the case agent, Detective Flores, to establish probable cause for the F6 aggravator.[8] Flores testified under oath that he had spoken with the medical examiner, Dr. Horn, on the day before the hearing.[9] The prosecution used Flores to present hearsay testimony regarding statements attributed to Dr. Horn.

However, when Detective Flores began to repeat the opinions of Dr. Horn, defense counsel, Greg Parzych, objected four times in the span of a few questions, noting that there was no way to explore the validity or basis of the opinions presented as hearsay testimony. [10] The following exchange occurred:

> The Court: Anytime that hearsay is admitted, there can be a foundation question for the declarant – for the hearsay declarant. So how is this any different?
>
> Mr. Parzych: The difference is the hearsay can be admitted if it is reliable hearsay. I don't believe it's reliable hearsay unless we know the basis of that opinion. If the doctor's basis of his opinion is he read through some tarot cards, I assume this Court would not find that to be reliable hearsay. So I don't think it's reliable and, therefore, it should not come in absent the basis for that doctor's opinion. [11]

The trial court allowed the hearsay testimony and Detective Flores testified that Dr. Horn had the following opinions, among others:

---

8 Appendix, Exhibit 3, Chronis *Hearing Transcript*.

9 *Id*., at 18.

10 Appendix, Exhibit 3, at 23-26.

11 *Id.*, at 25-26.

- The bullet wound to the head was the first injury to the victim.[12]
- The bullet wound to the head would not incapacitate the victim.[13]
- The cut across the throat was the last injury sustained.[14]
- The victim regained consciousness at some point during the attack.[15]

Detective Flores did not simply repeat the opinions of Dr. Horn, he gave explanations for the basis of those opinions as relayed to him by Dr. Horn. The prosecution fully adopted the testimony of Detective Flores, at one point stating: "The State's position is that the victim, Travis Alexander, was initially shot through the right side of the head while he sat in the shower."[16] The sequence of the injuries, and the victim's state of consciousness were, and remain, critical issues in questions of culpability and aggravation.

Following the *Chronis* hearing, the trial court found probable cause to support a single aggravator of cruelty under section 13-751(F)(6); notably, the trial court found probable cause for only one of the four theories advanced by the State.[17]

---

12 *Id.* at 36-37.
13 *Id.*
14 *Id.* at 31.
15 *Id.* at p. 37.
16 *Id.*
17 Appendix, Exhibit 4, *8/18/2009 Minute Entry*.

At trial, the prosecution called Dr. Horn to give his opinions to the jury.[18] Dr. Horn's testimony differed dramatically from what Detective Flores had told the trial court in the *Chronis* hearing. Contrary to Detective Flores' testimony, Dr. Horn testified that he had no recollection of speaking with Detective Flores about the injuries.[19] Dr. Horn testified that the victim had three fatal injuries, the chest stab-wound, the throat cut, and the bullet wound to the head.[20] Dr. Horn did not remember ever telling Detective Flores that the gunshot wound was the first injury to the victim, noting that such an opinion, attributed to him by Flores, was inconsistent with the evidence.[21] Dr. Horn testified that the gunshot wound to the head was immediately incapacitating.[22] Dr. Horn further testified that, of the three fatal injuries, the stab to the chest was first.[23] Dr. Horn opined that the victim was alive for the throat cut, and may not have been alive for the gunshot wound to the head.[24]

In comparing Dr. Horn's opinions at trial with the hearsay testimony of Detective Flores at the *Chronis* hearing, it became clear that Dr. Horn's opinions were dramatically different from what Detective Flores had stated under oath.

---

18 Appendix, Exhibit 5, *Horn Testimony 1/8/2013*.
19 *Id.*, at 60, 85-86,
20 *Id.* at 53.
21 *Id.* at 88.
22 *Id*. at 51-52; 88-89.
23 *Id*. at 56-57.
24 *Id*. at 56-57.

- The gunshot to the head was either not incapacitating or immediately incapacitating.

- The gunshot wound was either the first injury to the victim or the last injury to the victim.

- The throat cut to the victim was either the last injury to the victim or came before the gunshot.

- The victim either was conscious after the gunshot injury or was already dead at the time of the gunshot.

All of these mutually exclusive statements were either directly from Dr. Horn, or were directly attributed to him by Detective Flores. They cannot be reconciled. They are also highly material to proving the aggravator, as the timing and sequence of injuries directly impacts the time period over which any physical or mental suffering could occur, as well as whether the victim was unconscious.

Faced with these impossible statements, defense counsel questioned Detective Flores about these dramatic differences.[25] Despite Dr. Horn's testimony, Flores reiterated that he had spoken with Dr. Horn the day before the *Chronis* hearing, although he conceded it was a "short" conversation.[26] Detective Flores confirmed his testimony at the *Chronis* hearing, but then explained the contradictions by saying that he misunderstood Dr. Horn.[27]

---

[25] Appendix, Exhibit 6, *1/10/13 Flores Testimony*.
[26] *Id.*, at 17-18.
[27] *Id.* at 23.

Defense counsel asked point-blank if Detective Flores had substituted his own judgment for Dr. Horn's opinion, but Flores claimed that the differences were based on a misunderstanding.[28]

After defense counsel questioned Detective Flores, the prosecution questioned Detective Flores about his testimony at the *Chronis* hearing. The most compelling part of that testimony came at the end, when the prosecution asked Flores about the basis for his testimony at the *Chronis* hearing.

> Q. Did he [Dr. Horn] every (sic) write anything to you, giving you the sequence of events?
>
> A. No, he never did.
>
> Q. Did you ever see anything written by him indicating anything of a sequence of events?
>
> A. No.
>
> Q. The bottom line, that information that you gave, whose opinion was it, was yours (sic) or Dr. Horn's?
>
> A. It was my opinion.[29]

Finally, the explanation for the differences in Dr. Horn's testimony. Detective Flores' testimony at the *Chronis* hearing was false. He had not testified as to Dr. Horn's opinions, he had testified as to his own opinions, claiming that

---

[28] *Id*. at 28, 29, 30-31.

[29] Appendix, Exhibit 6, at 38.

they were Dr. Horn's opinions. He admitted to perjuring himself to get the trial court to find the F6 aggravator.

Upon the detective's confession of perjury, defense counsel immediately moved for a dismissal of the case or a dismissal of the sole aggravator. The trial court denied both requests from the bench, providing a written ruling dated January 10, 2013.[30]

Why This Court Should Grant Review

1. This Court Should Accept Review To Establish That The Remedy For Perjurious Testimony In A *Chronis* Hearing Should Be, At A Minimum, The Striking Of The Death Penalty Allegations.

In *Jones v. United States*,[31] -- the first of a trilogy of cases ultimately resulting in the Supreme Court's rejection of the Arizona death penalty scheme at the time[32] -- the Supreme Court declared: "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[33] In keeping with the due process principles from these cases, this Court amended Rule 13.5 to clarify that the notice of intent to seek the death

---

30 Appendix, Exhibit 7, *1/10/13 Minute Entry*.

31 526 U.S. 227 (1999).

32 *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

33 *Jones*, 526 U.S. at 243 n. 6.

penalty was considered an "amendment" to the charging document.[34] Further, in *Chronis*, this Court reinforced Rule 13.5's conformance to the required constitutional protections by holding that a defendant had the right to demand that the State demonstrate probable cause for the death-qualifying aggravators.

The *Chronis* procedure is compelled by the constitutional guarantees specified by the *Jones* Court: due process and the notice and jury trial requirements of the Sixth Amendment. Here, however, this entire procedure was tainted by the misleading testimony of the State's sole witness. Hence, Arias urges this Court to clarify the remedy when the constitutionally-mandated *Chronis* proceeding is tainted by materially false testimony.

The seminal case in this regard is *United States v. Basurto*.[35] There, a witness before the grand jury presented perjured testimony. The prosecutor did not know of the perjury at the time, but learned of the perjury prior to trial. The prosecutor notified defense counsel of the perjury but took no corrective actions. Subsequently, the Ninth Circuit overturned the conviction:

> We hold that the Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not

---

[34] **Ariz.R.Crim.P. 13.5(c).**

[35] 497 F.2d 781 (9th Cir. 1974). *Basurto* has been cited with approval in several Arizona appellate decisions, including *Escobar v. Superior Court of State of Ariz. In & For Maricopa County*, 155 Ariz. 298, 301, 746 P.2d 39, 42 (App. 1987); *State v. Gortarez*, 141 Ariz. 254, 258, 686 P.2d 1224, 1228 (1984).

> attached. Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty to immediately inform the court and opposing counsel — and, if the perjury may be material, also the grand jury — in order that appropriate action may be taken.[36]

Following *Basurto*, the Arizona Court of Appeals addressed the issue of misleading testimony used to obtain a finding of probable cause in *Nelson v. Boylston*.[37]

> Although the long line of cases quoted in *Basurto* have as their foundation the use of perjured testimony, we note that it is not the fact that the testimony is perjurious but rather that evidence, whether intentionally or unintentionally false, has been presented to the trier of fact and is used as a basis for finding probable cause. The defendant has no effective means of cross examining or rebutting the testimony given before a grand jury.[38]

The normal remedy for perjured or misleading testimony in front of the grand jury has been to remand the case for a new determination of probable cause.[39] In almost every case, a defendant must seek special action review of a denial of a motion for remand before trial.[40] However, as the *Moody* Court recognized, there is a key exception to that rule.

> That one exception to the rule occurs "when a defendant has had to stand trial on an indictment which the government knew was based partially on perjured, material testimony." *State v. Gortarez*, 141

---

36 *Id*. at 785-786.

37 137 Ariz. 272, 669 P.2d 1349 (App. 1983).

38 *Id*. at 277, 669 P.2d at 1354.

39 *Maretick v. Jarret*, 204 Ariz. 194, 198, 62 P.3d 120, 124 (2003).

40 *State v. Moody*, 208 Ariz. 424, 439-440, 94 P.3d 1119, 1134-35 (2004).

Ariz. 254, 258, 686 P.2d 1224, 1228 (1984) (citing *United States v. Basurto*, 497 F.2d 781 (9th Cir.1974)).[41]

The *Gortarez/Moody* exception applies here. Detective Flores misled the trial court throughout his *Chronis* testimony. He let the trial court believe that he had a substantive discussion with Dr. Horn, and that he was passing along Horn's professional pathology opinions. In fact, Flores was willing to mislead the court in an effort to transmogrify the matter into a capital case. The entire *Chronis* procedure was fatally flawed, and the proper remedy, if not dismissal of the entire case, is the striking of the State's notice of intent to seek the death penalty.

2. The Taint Of The Perjured Testimony Cannot Be Cured Years Later By Trial Testimony Unrelated To The Issue Of Probable Cause For The Death Penalty Aggravator.

In denying Arias' motion for mistrial or to strike the capital aggravator, the trial court did not dispute Flores' misleading testimony. However, according to Judge Stephens, the perjured testimony by Detective Flores that permeated the *Chronis* hearing would not have influenced the judge conducting the probable cause hearing,[42] and the medical examiner's testimony at trial demonstrated the existence of the State's single theory supporting its request for the death penalty.[43]

For multiple reasons, Arias urges this Court to reject the trial court's after-the-fact reconsideration of probable cause. First, this after-the-fact justification

---

41 *Id*.

42 Appendix, Exhibit 7, *1/10/13 Minute Entry*, at p. 6.

43 *Id*. at pp. 6-7.

encourages false testimony in *Chronis* hearings and undermines the entire process. Courts throughout the country have uniformly condemned such conduct. An *en banc* panel of the Ninth Circuit held that there is "a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government."[44] The concept that perjured testimony would be acceptable in a capital case is unthinkable. As Justice Bales recently noted:

> The imposition of the death penalty is serious and permanent; any mistake cannot be undone once the punishment is carried out. Reflected throughout the Supreme Court jurisprudence underlying the Eighth Amendment is the principle that death is different.[45]

"Knowing use of perjured or false testimony by the prosecution is a denial of due process and is reversible error without the necessity of a showing of prejudice to the defendant."[46] This rule should apply with even greater rigor in capital cases.

The importance of the *Chronis* hearing cannot be understated. As the United States Supreme Court and other courts throughout the country have observed, the death penalty is not only "different," but also "special" in that it is reserved ***only*** for the most heinous of murders. Again, the Ninth Circuit has stated:

---

[44] *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001) (*en banc*); *see also Kingsland v. City of Miami*, 382 F.3d 1220, 1232 (11th Cir. 2004).

[45] *State v. Grell*, 212 Ariz. 516, 534 (2006) (Bales, J., concurring in part and dissenting in part; quotation omitted), *cert. denied*, 550 U.S. 437 (2007).

[46] *State v. Ferrari*, 112 Ariz. 324, 334, 541 P.2d 921, 931 (1975).

> The Eighth Amendment requires that jury instructions in the penalty phase of a capital case sufficiently channel 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. When a jury is given an aggravating-circumstance instruction that would support the imposition of the death penalty, that instruction "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[47]

This was the trial court's task at the evidentiary hearing on August 7, 2009. It had to determine whether the State had established probable cause to believe this particular murder was sufficiently "extraordinary" to warrant eligibility for the death penalty. The State had alleged only a single aggravator (cruel, heinous or depraved), and within this aggravator, the trial court – even with the perjured testimony – found probable cause for only one of the four sub-theories advanced by the State. Obviously, whether the State could prove the existence of cruelty in this case was a close call, too close to claim that the perjured testimony was harmless.

Finally, the use of trial testimony as a substitute for a fair presentation of the evidence at the *Chronis* hearing disregards the numerous procedural issues that such a result necessarily entails. Judge Stephens relied upon Dr. Horn's trial testimony to conclude that the perjured testimony at the *Chronis* hearing was

---

[47] *Valerio v. Crawford*, 306 F.3d 742, 750-751 (9th Cir. 2002) (*en banc*) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)), *cert. denied*, 538 U.S. 994 (2003)).

harmless. However, Dr. Horn was called during the liability phase of the trial on the merits; the purpose of his testimony was not to establish probable cause for the F6 aggravator. Testimony in the liability portion of a trial cannot and should not be a substitute for truthful testimony at a probable cause hearing.

Conclusion

We only have to look at recent history in Arizona to see the grim potential for error in death penalty trials. The wrongful conviction of any person is a horrible miscarriage of justice, but wrongfully sentencing a person to the death penalty is truly hideous. Likewise, perjury in any case is a serious wrong, but perjury to support the single aggravator in a death penalty case is unconscionable. The case agent admitted that he perjured himself when he testified in support of the only capital aggravator in this case. The perjury was, and remains, material to the aggravator. Thus, for the reasons set forth herein, Defendant Jodi Arias respectfully requests that this Court accept jurisdiction of this matter and grant relief accordingly.

RESPECTFULLY SUBMITTED this 20th day of February, 2013.

By /s/ L. Kirk Nurmi
L. Kirk Nurmi
Attorney for Petitioner

ATTACHMENT 1

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
01/15/2013 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2008-031021-001 DT 01/10/2013

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
C. McCain
Deputy

STATE OF ARIZONA JUAN M MARTINEZ

v.

JODI ANN ARIAS (001) KIRK NURMI
JENNIFER L WILLMOTT

TRIAL MINUTE ENTRY
DAY 12

Courtroom SCT5C

State's Attorney: Juan Martinez
Defendant's Attorney: Kirk Nurmi and Jennifer Willmott
Defendant: Present

Court Reporter, Mike Babicky, is present.

A record of the proceeding is also made by audio and/or videotape.

Prior to the start of Trial, State’s Exhibit #237 is split and State’s Exhibit #’s 317 thru 320 are marked for identification.

10:36 a.m. Trial to Jury continues from 01/10/2013.

The jury is present.

Special Agent Nathan Mendes is sworn and testifies.

LET THE RECORD REFLECT the witness makes an in court identification of the Defendant.

Exhibit # 245 is received in evidence.

The witness testifies further.

Exhibit #'s 317 thru 320 are received in evidence.

The witness testifies further.

Exhibit #'s 237.001 thru 237.022 are received in evidence.

The witness testifies further.

LET THE RECORD REFLECT Counsel approach the bench and discussion is held out of the hearing of the jury and on the record.

The witness testifies further.

The witness steps down.

Lisa Perry is sworn and testifies.

11:57 a.m. The Jury is reminded of the admonition and stand in recess. Court remains in session.

LET THE RECORD REFLECT Counsel approach the bench and discussion is held out of the hearing of the Court and on the record.

12:00 p.m. Court stands in recess until 1:30 p.m.

1:29 p.m. Court reconvenes with Defendant and respective counsel present.

Court Reporter, Mike Babicky, is present.

The Jury is present.

The witness testifies further.

LET THE RECORD REFLECT Counsel approach the bench and discussion is held out of the hearing of the jury and on the record.

The witness testifies further.

State's Exhibit # 321 is marked for identification.

The witness testifies further.

LET THE RECORD REFLECT Juror Questions have been received by the Court; same are discussed with Counsel out of hearing of the jury, and the Court addresses the witness regarding the issues.

FILED: Juror Questions

The witness steps down.

Detective Esteban Flores having been previously sworn testifies further.

Exhibit # 295 is offered in evidence.

LET THE RECORD REFLECT Counsel approach the bench and discussion is held out of the hearing of the jury and on the record.

Exhibit # 295 is received in evidence.

The witness testifies further.

Exhibit #'s 247 and 248 are offered in evidence.

LET THE RECORD REFLECT Counsel approach the bench and discussion is held out of the hearing of the jury and on the record.

Exhibit #'s 247 and 248 are received in evidence.

The witness testifies further.

LET THE RECORD REFLECT Counsel approach the bench and discussion is held out of the hearing of the jury and on the record.

The witness testifies further.

LET THE RECORD REFLECT Counsel approach the bench and discussion is held out of the hearing of the jury and on the record.

The witness testifies further.

2:53 p.m. The Jury is reminded of the admonition and Court stands in recess.

3:12 p.m. Court reconvenes with Defendant and respective counsel present.

Court Reporter, Mike Babicky, is present.

The Jury is present.

The witness testifies further.

LET THE RECORD REFLECT Counsel approach the bench and discussion is held out of the hearing of the jury and on the record.

The witness testifies further.

LET THE RECORD REFLECT Counsel approach the bench and discussion is held out of the hearing of the jury and on the record.

The witness testifies further.

LET THE RECORD REFLECT Counsel approach the bench and discussion is held out of the hearing of the jury and on the record.

The witness steps down.

Jodi Legg is sworn and testifies.

State’s Exhibit # 322 is marked for identification.

The witness steps down.

3:43 p.m. The Jury is reminded of the admonition and stand in recess until 01/14/2013 at 10:30 a.m. in this division. Court remains in session.

3:48 p.m. Court convenes in judicial chambers with Defendant and respective Counsel present.

Court Reporter, Mike Babicky, is present.

Discussion is held regarding the security belt the Defendant is required to wear by MCSO.

Counsel for the Defendant objects to the matter being discussed in chambers and requests to argue in the Court room before the media.

The Court grants the Defendant's request to return to the court room.

3:55 p.m. Court reconvenes back in the court room with Defendant and respective Counsel present.

Court Reporter, Mike Babicky, is present.

Argument is presented on Defendant's Motion for Mistrial and Motion for New Probable Cause Hearing.

The Court finds the Defendant's Motions are not timely filed however, even if they had been timely filed the Court finds the testimony of Detective Flores would not have changed Judge Duncan's Ruling in 2009.

IT IS ORDERED denying the Motion for Mistrial and the Motion for New Probable Cause Hearing.

Counsel for the Defendant requests Exhibit #'s 288 and 289 be admitted in evidence for purposes of this hearing only.

IT IS ORDERED Exhibit #'s 288 and 289 are admitted in evidence for purposes of this hearing only.

4:23 p.m. Court stands in recess until 01/14/2013 at 10:30 a.m. in this division.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

LATER:

The court has considered the defendant's oral motion for new finding of probable cause on the aggravating factor that the offense was especially cruel, the minute entry ruling of the court dated August 18, 2009, the testimony of Kevin Horn on January 9, 2012, the testimony of Detective Esteban Flores on January 10, 2012, and the oral argument of counsel on January 11, 2012.

The court finds the motion for a new finding of probable cause on the aggravating factor is not timely. Defense counsel learned approximately one year ago that the testimony of Detective Flores at the hearing held on August 7, 2009 was inconsistent with the testimony of the medical examiner Kevin Horn. The inconsistency relates to the sequence of the wounds inflicted on the victim on June 4, 2008. A motion for a new finding of probable cause should have been filed no later than 20 days prior to trial. Rule 16, *Arizona Rules of Criminal Procedure*. Also see *Chronis v. Steinle*, 208 P.3d 210 (2009), and Rules 13.5 and Rule 5, *Arizona Rules of Criminal Procedure.*

The court further finds that, even if timely filed, the motion for new finding of probable cause should be denied. The court finds the evidence relating to the sequence of the wounds was not material to the issue of whether there was probable cause to believe the offense was especially cruel under the theory the crime involved both physical and mental suffering of the victim. See minute entry dated August 18, 2009. The court's findings in August 2009 support that court's determination the victim suffered both physically and mentally regardless of when the wounds were inflicted, and that the defendant knew or should have known that the victim would suffer. In its ruling, the court noted the victim was stabbed 27 times, had defensive wounds from grabbing the knife and was shot on the right side of his head. The bullet lodged in the victim's left cheek. The defendant told police the victim was unconscious after being shot but crawled around and was stabbed. Based upon these facts, the court concluded the victim would have felt pain and mental anguish associated with the multiple wounds. The court finds the inaccurate testimony of Detective Flores at the hearing on August 7, 2009 would not have changed the court's finding that the offense was especially cruel and was thus harmless error. See *Pitts v. Adams*, 179 Ariz. 108, 876 P.2d 1143 (1994).

The court further finds that the evidence presented at trial in January 2012, including the testimony of Kevin Horn on January 9, 2012, established probable cause to believe the offense was especially cruel under the theory that it involved both physical and mental suffering of the

victim. The court finds this evidence established probable cause the victim would have felt pain and mental anguish associated with the multiple wounds inflicted, and the defendant knew or should have known that the victim would suffer. See *State v. McCray*, 218 Ariz. 252, 259, 183 P.3d 503 (2008), *State v. Sansing*, 206 Ariz. 232, 235, 77 P.3d 30 (2003) and *State v. William Herrera Jr*., 176 Ariz. 21, 859 P.2d 131 (1993).

IT IS ORDERED denying the oral motion for new finding of probable cause on the aggravating factor the offense was especially cruel.

IT IS FURTHER ORDERED denying the motion for mistrial based upon the inaccurate testimony of Detective Flores at the hearing conducted on August 7, 2009.

ATTACHMENT 2

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JODI ANN ARIAS, Petitioner, v. THE HONORABLE SHERRY STEPHENS, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, STATE OF ARIZONA, ex rel., WILLIAM G. MONTGOMERY, MARICOPA COUNTY ATTORNEY, Real Party in Interest.	No. 1 CA-SA 13-0026 DEPARTMENT B Maricopa County Superior Court No. CR2008-031021 **ORDER RE: DECLINING JURISDICTION OF SPECIAL ACTION PETITION/ STAY**

The court, Presiding Judge Patricia K. Norris, and Judges Andrew W. Gould and Randall M. Howe, participating, has considered the petition for special action filed by the petitioner.

IT IS ORDERED that the Court of Appeals, in the exercise of its discretion, declines to accept jurisdiction in this special action.

IT IS FURTHER ORDERED that, in light of the foregoing, denying the Application for Interlocutory Stay of Trial as moot.

IT IS FURTHER ORDERED vacating this court's previous order requiring the filing and service of a response on or before February 7, 2013.

PATRICIA K. NORRIS, Presiding Judge

1 CA-SA 13-0026

Maricopa County Superior Court
CR2008-031021

A true copy of the foregoing
was mailed January 30, 2013 to:

L Kirk Nurmi
2314 East Osborn Road
Phoenix AZ 85016

Ms Jennifer L S Willmott
Willmott & Associates PLC
845 N 6th Avenue
Phoenix AZ 85003
Attorneys for: Petitioner

Diane Meloche
Appeals Bureau Chief
Maricopa County Attorney's Office
Appeals Division
2nd Floor
301 W Jefferson
Phoenix AZ 85003
Attorney for: Real Party in Interest

Hon Sherry K Stephens, Judge
Maricopa County Superior Court
Southeast Court Building
222 E Javelina Ave
Mesa AZ 85210-6201

Ruth Willingham, Clerk
By

Deputy Clerk