Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2013-419619-002 DT 06/01/2016

HON. TERESA SANDERS

CLERK OF THE COURT
S. Radwanski
Deputy

STATE OF ARIZONA

MARY-ELLEN WALTER

v.

DARNELL MOSES ALVAREZ (002)

MICHAEL ZIEMBA
ANNA M UNTERBERGER

CAPITAL CASE MANAGER

UNDER ADVISEMENT RULING

The Court has read and considered *Defendant's Motion to Strike the Death Notice, or Alternatively, Motion to Require the Burden of Proof of Beyond a Reasonable Doubt for State's Phase 3 Rebuttal Evidence*, the State's response and the defendant's reply. The Court has also considered the arguments of counsel.

Defendant argues that Arizona's capital sentencing scheme is unconstitutional because it fails to require the State to prove its mitigation rebuttal evidence beyond a reasonable doubt in the penalty phase.

Defendant's argument is similar to one that the Arizona Supreme Court rejected in *State v. Roque*, 213 Ariz. 193, 141 P.3d 368 (2006). Roque argued on appeal that the trial court erred by failing to instruct the jury regarding the State's burden of proof respecting its rebuttal evidence. The Court found no error:

> 3. Lack of Burdens of Proof
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> Citing *Ring v. Arizona* (*Ring II*), 536 U.S. 584 (2002), Roque contends that the court erred in failing to instruct the jury regarding the burden of proof for weighing mitigation and aggravation. Roque further asserts that failing to instruct the jury on a burden of proof regarding the State's rebuttal to mitigation facilitated the State's impermissible "end run" around *Ring II*'s requirement that

> the jury find aggravating factors beyond a reasonable doubt, because the State's rebuttal to mitigation acted, in effect, to aggravate Roque's sentence. Roque asks us to determine whether the jury instructions correctly stated the law, a question we review de novo. *Glassel*, 211 Ariz. at 53, ¶74, 116 P.3d at 1213.
>
> Under Arizona's capital sentencing statutes, neither party bears a burden of proof as to weighing aggravation and mitigation in the penalty phase of a capital trial. *Granville*, 211 Ariz. at 472, ¶17, 123 P.3d at 666. "[W]hether mitigation is sufficiently substantial to warrant leniency is not a fact question to be decided based on the weight of the evidence, but rather is a sentencing decision to be made by each juror based upon the juror's assessment of the quality and significance of the mitigating evidence that the juror has found to exist." *Id.* at 473, ¶ 21, 123 P.3d at 667. In Roque's case, the trial judge properly refrained from assigning a burden of proof to the "juror's assessment of the quality and significance of the mitigating evidence." *Id.*
>
> Moreover, the jury instructions did not provide the State an "end run" around the *Ring II* requirement that it prove aggravating factors to a jury beyond a reasonable doubt. The State had already proven the (F)(3) aggravating factor to the jury beyond a reasonable doubt in the aggravation phase of the trial, which made Roque "death eligible." *See id.* at 472, ¶17, 123 P.3d at 666. In the penalty phase of the trial, the State was permitted to present any relevant information to rebut the mitigating evidence presented by the defendant to help the jurors assess the quality of the mitigating evidence in deciding whether to impose the death penalty. A.R.S. §13-703(C). Therefore, the jury instructions in Roque's case correctly stated the law regarding the State's rebuttal of Roque's mitigating evidence. There was no error.

213 Ariz. at ¶¶138-140 (emphasis added).

As the Supreme Court stated in *Roque*, the State does not have a burden of proof respecting its rebuttal evidence. Rebuttal evidence is not additional aggravating circumstances but rather, evidence that is relevant to assist the jury in assessing the quality of the mitigation in order to decide whether the defendant should be shown leniency. *See also*, *State v. McGill*, 213 Ariz. 147, ¶52, 140 P.3d 930 (2006) (noting that the penalty phase is not a criminal prosecution).

For all of these reasons,

IT IS ORDERED denying Defendant's Motion to Strike the Death Notice, or Alternatively, Motion to Require the Burden of Proof of Beyond a Reasonable Doubt for State's Phase 3 Rebuttal Evidence.