

State v. Hulsey

Citation: State v. Hulsey, 408 P.3d 408 (Ariz. 2018).

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Opinion's Author: Justice Bolick

Joined By: Chief Justice Bales, Vice Chief Justice Pelander, Justices Brutinel, Timmer, Gould, and Berch (Retired)

Practitioners: For quick reference, please see the "Issue" and "Holding" sections.

Facts: Bryan Hulsey ("Hulsey") was a passenger in the front seat of a car which was pulled over in a routine traffic stop. There were two other passengers in the vehicle. Officer Gotia asked and received identification from all three passengers. As Officer Gotia checked the identification, Officer Holly approached the car. Officer Gotia then identified that both the driver and back seat passenger (not Hulsey) had outstanding warrants; he arrested them and put them in the back seat of his car.

Officer Gotia went back to the car and began to question Hulsey about the identification he provided. Officer Gotia asked Hulsey to get out of the car, and Officer Gotia began a pat down. As the pat down commenced, Hulsey took a step back, pulled a gun out of his waistband, and started "firing." Hulsey ran, and Officer Holly was fatally shot in the head.

Procedural History: This case is currently before the Arizona Supreme Court. At trial, Hulsey was charged with first degree murder of a law enforcement officer, attempted murder of a law enforcement officer, and misconduct involving weapons. The State sought the death penalty. The trial court granted Hulsey's motion to sever the weapons charge.

The jury found Hulsey guilty of first degree murder of a peace officer and was sentenced to death. He was also convicted of attempted first degree murder of a peace officer and received a consecutive nine-year sentence. Aggravating factors the jury considered were that Hulsey was previously charged with a serious offense, and Officer Holly was working in the course of duty as a police officer.

The Arizona Supreme Court granted certiorari on automatic appeal pursuant to article 6, section 5(3) of the Arizona Constitution and A.R.S. sections 13-4031, and 13-4033(A)¹.

Issues:

1. In reviewing the trial court's ruling in a pre-trial motion, the Arizona Supreme Court will look to see if the trial court abused its discretion. Does a trial court abuse its discretion when it denies a motion to exhume a body that was cremated, and the defendant cannot point to any substantial need to exhume; and does a trial court abuse its discretion when it denies a motion to dismiss for bad faith destruction of evidence when there was an uncontested claim that the medical examiner disobeyed protocol?

¹ State v. Hulsey, 408 P.3d 408, 415 (Ariz. 2018).

2. Generally, a defendant has a Sixth Amendment right to compel a witness to testify, but that right is limited by the witness' own Fifth Amendment right. Did the trial court abuse its discretion when it did not compel a witness to testify who might commit perjury by making conflicting statements?
3. Potential jurors, in a criminal case, should be excluded if they cannot set aside their views and be impartial. Did the trial court abuse its discretion in striking a juror who gave conflicting answers on whether they could sentence someone to death?
4. In Arizona, if no objection is made to the admission of evidence, then the court will review for fundamental error. Was there a fundamental error by entering into evidence the defendant's drug use before the commission of the crime?
5. A defendant is entitled to a lesser included offense instruction when the evidence warrants it. Did the trial court abuse its discretion by not giving an instruction for a lesser included offense when the evidence pointed to the defendant intended to kill the officer?
6. Under Arizona law, the evidence can support a guilty verdict if a reasonable person could accept the evidence as sufficient to support a guilty verdict beyond a reasonable doubt. Was there sufficient evidence to support a first degree murder conviction?
7. A sentencing scheme must genuinely narrow the class of persons eligible for the death penalty to be constitutional. Are A.R.S. sections 13-751(F)(10) and 13-1105(A)(3), which make those who kill police officers eligible for the death penalty, narrow enough to be constitutional?
8. A person that suffers from a serious mental illness cannot have a punishment that is proportional to their culpability, under the Eighth Amendment of the Constitution. Should the defendant's mental illness preclude him from receiving the death penalty?
9. A trial court has the discretion to not admit into evidence statements which would improperly highlight certain evidence. Did the trial court err in not admitting the videotapes Hulseby presented into evidence and not giving those tapes to the jury who requested them during deliberation?
10. The Arizona Supreme Court will look at each alleged prosecutorial misconduct, and then determine if the cumulative effect renders the defendant's trial unfair. Did the prosecutor's conduct at trial render the trial unfair for the defendant?
11. Under *Simmons v. South Carolina*, the United States Supreme Court held that a jury should not be given the false choice of sentencing a petitioner to death and a limited period of incarceration.² Did the trial court err in not giving an instruction that Hulseby would not be entitled to parole during the penalty phase of the trial?
12. The Arizona Supreme Court reviews sentencing for an abuse of discretion. During the sentencing phase did the jury abuse its discretion when the underlying crime was considered as an aggravating factor, and mitigation was substantial and not rebutted by the State?

Holdings:

² *Simmons v. South Carolina*, 512 U.S. 154, 161 (1994).

1. No. The trial court did not abuse its discretion in denying the plaintiff's pretrial motions to exhume the body and the motion to dismiss for bad faith destruction of evidence.
2. No. The court held the witness had reasonable grounds to apprehend prosecution, so it was proper to allow her to assert her Fifth Amendment right.
3. No. The court held the juror's final answer showed they would not be able to sentence someone to death; therefore, it would impede their ability to perform their duty as a juror in the case.
4. No. There was no fundamental error because any probative value of the evidence of the defendant's prior drug use outweighed any potential prejudice.
5. No. There was no evidence to show that a lesser included offense would be proper. The defendant's conduct and words showed the act was intentional.
6. Yes. Despite there being inconsistencies, a jury could reasonably find that the defendant's bullet killed Officer Holly.
7. Yes. Those who perpetrate a crime under these statutes are a small group of individuals. Therefore, the statutes allow for the death penalty to only a small class of individuals, which is constitutional.
8. No. The defendant gave evidence of his mental disability. The trier of fact was able to weigh the evidence, and there is no indication they didn't. Therefore, his Eighth Amendment right was not violated.
9. No. When evidence would improperly highlight certain evidence, a court in its discretion may not admit those into evidence. The court could have reasonably determined that the tapes would improperly highlight certain evidence.
10. No. Although the prosecutor's conduct was unbecoming of an Arizona prosecutor, the court held that the trial judge's instructions helped to mitigate any impact the misconduct had.
11. Yes. The court repeatedly stated that if the jury sentenced Hulseley to life in prison, he would be eligible for parole. The court noted that Hulseley, as a matter of law, was not entitled to parole, and therefore this was an error. Further, this error could have contributed to the decision by the jury to sentence him to death and therefore was not harmless.
12. No. The court reasoned that an element of a crime might be an aggravating factor. Further, even if the court assumed a juror accepted all the mitigating factors, they could still reasonably find they were not sufficiently substantial to warrant leniency—therefore the death penalty was proper.

Disposition: The Arizona Supreme Court AFFIRMED Hulseley's convictions of first degree murder and his prison sentence for his attempted murder conviction. In light of the United States Supreme Court's decision in Lynch III, the Arizona Supreme Court VACATED the death sentence and REMANDED for a new penalty phase trial.

Rule: The Arizona Supreme Court will review the trial court's rulings for fundamental errors. When there are no fundamental errors, the court will uphold the lower court's findings. A prosecutor may contribute to an unfair trial through their conduct—yet, a judge may cure

this misconduct through proper trial court instructions. Finally, under *Simmons*, a jury should not be confronted with the false choice of sentencing a petitioner to death and life imprisonment with the possibility of parole. This false choice is a fundamental error in sentencing if it is not cured by the trial court.

Reasoning:

Pretrial Issues

- **Destruction of Evidence** (*Motion to Exhume*): First, the body of Officer Holly was cremated. The court noted that Hulseley never requested to access the cremated remains only the physical body.³ Moreover, Hulseley could not show that exhuming the body would have any evidentiary value because the "record is silent as to whether the fragments, in fact, exists in the decedent's remains,"⁴ and Hulseley offered only insufficient "cryptic promises"⁵ that the evidence sought would have value. Additionally, Hulseley conceded that the evidence was destroyed in his motion to dismiss for bad faith destruction; therefore, the court held Hulseley "waived his right to an evidentiary hearing."⁶
- Turning to the destruction of evidence, the court reasoned that the standards applied in *Trombetta* and *Youngblood* adequately encompasses the "fundamental fairness required by our state constitution."⁷ At the time of destruction, Hulseley failed to establish the State believed there was evidentiary value in keeping the remains. The court held because nothing at the time of destruction "alerted" the detective and the police officer that Hulseley would allege his shot did not kill Officer Holly, an evidentiary hearing was unnecessary.⁸ Moreover, at his renewed motion for an evidentiary hearing, the trial court reasoned that the evidence would only be "potentially" exculpatory and therefore did not necessitate an evidentiary hearing.⁹ The Arizona Supreme Court agreed. Finally, the trial court allowed a *Willits* instruction, which allowed the jury to give a negative inference to the State for not maintaining the evidence, "mitigating any prejudice."¹⁰
- **Refusal to compel the witness to testify:** Hulseley claimed that the trial court erred in refusing to compel the testimony of a witness.¹¹ Hulseley claimed the trial court's

³ *Hulseley*, 408 P.3d at 417.

⁴ *Id.*

⁵ *Id.* (quoting *State v. Atwood*, 832 P.2d 593, 621 (Ariz. 1992)).

⁶ *Id.* (citing *State v. Gutierrez*, 278 P.3d 1276, 1282 (Ariz. 2012) (en banc)).

⁷ *Id.* at 418. For the State to have a constitutional duty to preserve evidence, the evidence must be (1) exculpatory in value and (2) the defendant must not be able to ascertain the evidence by any other means. *California v. Trombetta*, 467 U.S. 479, 488–89 (1984). Destruction of evidence in bad faith has less to do with the actor's intent and more to do with their knowledge of the evidence was constitutionally material. *Arizona v. Youngblood*, 488 U.S. 51, 61 (1988).

⁸ *Id.* at 418–19.

⁹ *Id.* at 419.

¹⁰ *Id.* at 420.

¹¹ *Id.*

reliance on “anticipatory” perjury was misplaced.¹² The court noted, however, that the Fifth Amendment “may prevent [the witness] from answering relevant questions.”¹³ The court reasoned this was not anticipatory perjury, but rather the witness may be charged with a legitimate crime if they answered with inconsistencies.¹⁴ Therefore, the witness’ apprehension of prosecution was properly considered.¹⁵

- **Striking Juror 123 for Cause:** Juror 123 gave differing answers to questions regarding if they could sentence someone to death.¹⁶ The court held although there were inconsistent answers, the juror ultimately settled on a “crystal clear” response that he would not sentence someone to death.¹⁷ The court reasoned this “would substantially impair his performance as a juror.”¹⁸ Moreover, the defense counsel “exhausted all question and turned over the juror to the prosecution;” therefore there was no abuse of discretion.¹⁹

Guilt Phase Issues:

- **Admission of other-act evidenced under Rule 404(b):** The evidence that Hulseley used methamphetamine was presented to the defense. The court noted that the defenses decided to “stand by the comments . . . already made in [a previous] motion,” which only discussed a mandate that the prosecution provide a list of prior acts.²⁰ That motion did not object to the presentment of the methamphetamine use.²¹ Further at trial, when evidence was presented of the methamphetamine use, no objection was made.²² Moreover, the court reasoned that the trial court could have reasonably inferred that the drug use had “probative value” that outweighed any “prejudicial effect”²³ because it could be used to explain “Hulseley’s reaction to the police officers’ presence and his behavior that followed.”²⁴ Therefore, the court held there was no prejudicial effect.²⁵
- **Instruction on lesser-included offenses and causation:** The court noted that “[a] defendant is entitled to a lesser included offense instruction where the evidence warrants it.”²⁶ Hulseley argued that he was entitled to instructions on second degree murder, manslaughter, and negligent homicide because there was inconclusive

¹² *Id.*

¹³ *Id.* (quoting *State v. Martinez*, 189 P.3d 348, 355 (2008)).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 421.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 422.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 423.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* (quoting *Beck v. Alabama*, 447 U.S. 625, 636 (1980)).

evidence that he could have acted recklessly.²⁷ The court reasoned there was no evidence to support these instructions; the evidence that he pulled out the gun, raised it, aimed, stated “I’ve got this for you,” and fired, was sufficient for the trial court to find the lesser included offense not be instructed.²⁸ Moreover, the court held there was no reversible error on causation because the trial court offered a proximate cause instruction and the defense did not act.²⁹

- **Sufficient evidence to support first degree murder conviction:** Arizona law requires the State to show that the defendant, intending or knowing that his conduct will cause the death of a police officer, causes the death of a police officer in the line of duty.³⁰ Substantial evidence is that “which ‘a reasonable person could accept as sufficient to support a guilty verdict beyond a reasonable doubt.’”³¹ Here, Hulseley argued that the evidence was constitutionally insufficient because of “(1) inconsistent testimony; (2) absence of stipling at Officer Holly’s wound sight; (3) absence of blood where Officer Holly was shot; (4) the Shot Spotter evidence; and (5) the lack of bullets.”³² The court found that the evidence Hulseley offered was contradicted by other witnesses.³³ And the jury could consider the inconsistencies and still reasonably find a guilty verdict.³⁴

Aggravation Phase

- **Constitutionality of A.R.S. sections 13-751(F)(10) and 13-1105(A)(3):** Hulseley argued that an aggravator could not be that Officer Holly was in the line of duty because that is based on Officer Holly's victim's status.³⁵ The court noted that an element of a crime might be considered as an aggravating factor, which was already decided in *State v. Cruz*,³⁶ and the court declined to take up the issue again.³⁷ Further, he argued that by giving eligibility to the death penalty to someone who kills a police officer is not narrow enough to “pass constitutional muster.”³⁸ However, the court held that there are only a “small group of perpetrators.”³⁹ Therefore, that statute applies too and is narrow enough to satisfy *Lowenfield v. Phelps*, 484 U.S. 231 (1988).⁴⁰ Hulseley finally argued that A.R.S. section 13-1105(A)(3) is too vague and

²⁷ *Id.* at 424.

²⁸ *Id.*

²⁹ *Id.* at 425.

³⁰ *Id.* (citing ARIZ. REV. STAT. § 13-1105(A)(3) (2018))

³¹ *Id.* (quoting *State v. Hausner*, 280 P.3d 604, 619 (Ariz. 2012)).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 426 (citing ARIZ. REV. STAT. § 13-751(F)(10) (2018)).

³⁶ 181 P.3d 196, 216–17 (Ariz. 2008).

³⁷ *Id.* at 426.

³⁸ *Id.* (citing *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988)).

³⁹ *Id.*

⁴⁰ *Id.*

does not require premeditation to be convicted of first degree murder.⁴¹ The court disagreed.⁴² The court reasoned that second degree killing of a police officer requires the State only to show the defendant wanted to cause serious bodily harm and first degree requires a showing of intent to kill.⁴³ The court reasoned this distinction showed the legislature was clear, and the statute is “not vague.”⁴⁴

Penalty Phase Issues:

- **Imposition of the death penalty for the seriously mentally disturbed:** Hulseley argued that he suffers from serious mental illness (“SMI”) and therefore under the Eighth Amendment standards of decency should preclude him from the death penalty.⁴⁵ Hulseley relied on Supreme Court rulings that state individuals with an intellectual disability and children are not subject to the death penalty or life without parole when they are unaware of their moral culpability.⁴⁶ The court noted two issues and distinguished the cases cited because (1) Hulseley is not a child and (2) he did not show he suffered from an intellectual disability.⁴⁷ Moreover, the cases cited balanced standards which were inapplicable here—Hulseley knew of his moral culpability.⁴⁸
- Finally, Hulseley argues that the jury could not “reliably evaluate those with SMI.”⁴⁹ He points to six factors:

[T]hose with SMI have difficulty cooperating with lawyers, may make poor witnesses, and may have a distorted thought process; their personalities may be misinterpreted as being aggressive or unremorseful; the necessary expert testimony is often complex; and the brutality of the crimes committed by SMI individuals may prevent jurors from considering the SMI as a mitigating factor.⁵⁰

However, the court noted Hulseley did present mental illness at trial, and the jury was instructed that it could be a mitigating factor.⁵¹ The court further noted that mental illness does not “categorically bar” a defendant from receiving a death sentence.⁵² However, a defendant may have a right to present the evidence and have the jury consider it.⁵³ Here, the court reasoned Hulseley was entitled to present the evidence and Hulseley did not demonstrate “that the jury failed to properly evaluate

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 426–27.

⁴⁶ *Id.* at 427 (citing *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); *Graham v. Florida*, 560 U.S. 48 (2010)).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 428.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* (citing ARIZ. REV. STAT. § 13-751(G) (2018)).

it.”⁵⁴ Therefore, the court held the imposition of the death penalty did not violate the Eighth Amendment.⁵⁵

- **Admission of videotaped testimony in the penalty phase and use by the jury during deliberations:** Hulseley moved to have six family members’ videotaped statements admitted for the jury to consider, the State objected stating it would improperly highlight certain testimony—the trial court agreed.⁵⁶ Hulseley argued that the trial court judge improperly relied on the rules of evidence on admitting tapes in the mitigation phase.⁵⁷ The court noted that at the penalty phase a court should allow the defendant to present any information regardless of its admissibility.⁵⁸ Here, the court reasoned the judge allowed Hulseley to present the tapes regardless of their admissibility.⁵⁹ The court noted that the trial court carefully noted the distinction between presenting and admitting, therefore there was no error.⁶⁰
- The court next looked at whether not admitting the tapes was a fundamental error.⁶¹ Although the jury requested the tapes, a trial court has discretion to not allow a jury to re-hear testimony.⁶² The court looked to Ariz. R. Crim. P. 22.3 which states a judge “may” recall the jury to have testimony read.⁶³ Here, the court stated that this was analogous to *State v. Chappell*,⁶⁴ where the judge did not allow a written statement to go to jury deliberation as it might have undue influence⁶⁵, similarly, the court here found the trial court could properly find that giving the tapes would give them an undue emphasis.⁶⁶
- **Prosecutorial Misconduct:** Hulseley alleged misconduct at each stage of the trial.⁶⁷ The court noted for Hulseley to succeed he must show that “the prosecutor’s actions amounted to misconduct and that there is a ‘reasonable likelihood . . . that the misconduct could have affected the jury’s verdict, thereby denying defendant a fair trial.’”⁶⁸ The court reasoned that the comments made at pretrial did not affect the trial because the trial court corrected the statement and one juror was stricken for cause.⁶⁹

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 429. (citing ARIZ. REV. STAT. § 13-751(C) (2018)).

⁵⁹ *Id.*

⁶⁰ *Id.* at 428–29.

⁶¹ *Id.* at 429.

⁶² ARIZ. R. CRIM. P. 22.3 (2018).

⁶³ *Id.*

⁶⁴ 236 P.3d 1176 (Ariz. 2010).

⁶⁵ *Id.* at 1189.

⁶⁶ *Hulseley*, 408 P.3d at 429.

⁶⁷ *Id.*

⁶⁸ *Id.* (citing *State v. Anderson*, 111 P.3d 382–83 (Ariz. 2005)).

⁶⁹ *Id.* at 430.

During the guilty phase, the court reasoned the trial court is given “great latitude” because the trial court “observe[s] trial behavior first hand.”⁷⁰ Hulseley alleges that the prosecutor erred when he commented on the credibility of a witness; however, the court reasoned this was remedied when the trial court instructed the jury that the witness was not unethical.⁷¹

- During closing argument, the prosecutor allegedly made comments about witnesses, defense counsel, defense theory, the evidence, disparate theories, improper vouching, and reference to a traffic stop.⁷² The court reasoned that the prosecutor was “close to crossing the line.”⁷³ Also, the court recognized that the comments were “improper” but ultimately did not cause a fundamental error because the trial court properly instructed the jury to disregard them.⁷⁴ Additionally, the court held that a prosecutor may urge a jury to draw inferences; therefore the statements about evidence were not a fundamental error.⁷⁵
- At the penalty phase, Hulseley alleged that the prosecutor erred in insinuating that there was a duty to find death, the prosecutor was improper in his cross-examinations, the prosecutor misstated the law, and the prosecutor improperly called a witness a liar.⁷⁶ The court took each allegation in turn, finding again that some comments were “improper,” but the comments were not prejudicial.⁷⁷ Further, any potential prejudicial effect was mitigated by the trial court's instructions that the counsel's arguments were not evidence.⁷⁸
- Finally, the court ultimately held “the lack of respect, poor courtroom decorum, and necessary verbal attacks on defense counsel and experts were unbecoming of an Arizona prosecutor.”⁷⁹ The court reasoned, however, the court “does not reverse convictions merely to punish a prosecutor.”⁸⁰ Moreover, the trial court's instructions helped mitigated any impact the cumulative misconduct had.⁸¹ Therefore, the prosecution's behavior did not amount to a fundamental error and Hulseley was not denied due process.⁸²

⁷⁰ *Id.* (citing *State v. Hansen*, 751 P.2d 951, 957 (Ariz. 1988)).

⁷¹ *Id.*

⁷² *Id.* at 430–31.

⁷³ *Id.* at 431.

⁷⁴ *Id.*

⁷⁵ *Id.* at 432 (citing *State v. Bible*, 858 P.2d 1152, 1205 (Ariz. 1993)).

⁷⁶ *Id.* at 433–34.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 435.

⁸⁰ *Id.* (citing *State v. Moody*, 94 P.3d 1119, 1155 (Ariz. 2004) (en banc)).

⁸¹ *Id.*

⁸² *Id.*

- **Simmons Error:** Under *Simmons*, a jury may not be “presented with the ‘false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration,’” and thus must be informed of parole ineligibility.⁸³ In Arizona, only juveniles and defendants who committed an offense before January 1, 1994, are entitled to parole.⁸⁴ Hulseley objected instructions at the aggravation phase that stated if the jury found a life sentence he would have the possibility of parole.⁸⁵ The trial court denied the request, finding it inappropriate to discuss at aggravation phase.⁸⁶ Hulseley argued the jury should have been able to consider his inability for parole as required by *Simmons*.⁸⁷
- The State contended that *Simmons* is applicable only when the prosecutor gives statements about future dangerousness.⁸⁸ The court explained that the prosecution repeatedly made reference to Hulseley’s past dangerous experiences and gave examples of those events.⁸⁹ Moreover, the Supreme Court has held a prosecutor need not argue future dangerous for *Simmons* to apply.⁹⁰ The court held the prosecutors repeated reference to Hulseley’s past dangerousness put “Hulseley’s future dangerousness . . . squarely at issue.”⁹¹
- The State further argued that *Simmons* is not applicable because Hulseley did not request to inform the jury of his parole ineligibility during the penalty phase.⁹² The court noted the importance of the *Simmons*, and that it guards against “false choices.”⁹³ Here, the trial court stated three times at the penalty phase an instruction that gave the possibility of release.⁹⁴ The court found this instruction erroneous and implicated *Simmons* because “as a legal matter there [was] no possibility of parole.”⁹⁵ Moreover, the court reasoned the lack of a parole instruction was not due to Hulseley’s inaction, but instead the court refused to give the instruction “after analysis of the pending request.”⁹⁶ Therefore, the court held that an instruction on the lack of parole eligibility should have been given.⁹⁷

⁸³ *Id.* at 436 (quoting *Simmons v. South Carolina*, 512 U.S. 154, 161 (1994)).

⁸⁴ *Id.* (citing ARIZ. REV. STAT. § 41-1604.09 (2018)).

⁸⁵ *Hulseley*, 408 P.3d at 435.

⁸⁶ *Id.*

⁸⁷ *Id.* at 436.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* (citing *Kelly v. South Carolina*, 534 U.S. 246, 253–54 (2002)).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* (quoting *Shafer v. South Carolina*, 532 U.S. 36, 51 (2001)).

⁹⁴ *Id.* at 437. Arizona’s use of release instead of parole does not diminish a defendant’s right to inform a jury of his parole ineligibility. *Lynch v. Arizona*, 136 S. Ct. 1818, 1819 (2016).

⁹⁵ *Id.* (quoting *Shafer*, 532 U.S. at 51).

⁹⁶ *Id.*

⁹⁷ *Id.*

- **Harmless error review:** The State argued the lack of instruction was harmless because “(1) the powerful evidence supporting aggravation was far more impactful than the instructions, and (2) the jury was adequately informed of Hulseley’s parole ineligibility through counsel’s arguments.”⁹⁸ The court reasoned that some jurors would be aware of Hulseley’s youth and fear he may be released from prison.⁹⁹ Additionally, the court reasoned, like the court in *Shafer*, counsel’s arguments would not cure the *Simmons* error because just stating “Hulseley [would] die in prison did not adequately inform the jury that parole is no longer available to adult felons in Arizona.”¹⁰⁰ Therefore, the court held Hulseley should have been entitled to inform the jury of his inability for parole, and the error was not harmless.¹⁰¹
- **Abuse of Discretion:** Hulseley argues the jury abused its discretion by considering an element of the crime as an aggravating factor and the mitigating factors he presented were substantial and were un rebutted.¹⁰² The court noted that there is no prohibition on elements of a crime being considered as an aggravating factor.¹⁰³ Furthermore, the court reasoned that a reasonable juror could have accepted all the mitigating factors that Hulseley presented and balance them against the facts that he pulled a gun, aimed, and fired—unprovoked.¹⁰⁴ Consequently, the court held that Hulseley’s sentence was not an abuse of discretion.¹⁰⁵

⁹⁸ *Id.* at 438.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 439.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 440.