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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

THE STATE OF ARIZONA,)	NO. CR 2002-004036
)	
Plaintiff,)	SENTENCING MEMORANDUM
)	
vs.)	(Assigned to the Honorable
HARLEY SPENCER aka)	Warren Granville, Div CRJ18)
EUGENE COLOMBARO)	
Defendant.)	
)	

**COMES NOW Jeannette R. Gallagher and submits the following
Sentencing Memorandum for the Court's consideration.
Respectfully submitted December 31st, 2002.**

**RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY**

BY *Jeannette R. Gallagher*

**Jeannette R. Gallagher
Deputy County**

MEMORANDUM OF POINTS AND AUTHORITIES

A.R.S. 13-702 (C) sets forth the aggravating factors the Court is to consider in determining the appropriate sentence to impose on a defendant. In the instant case, two statutory aggravating factors apply, namely that the murder of Adam Clark was especially cruel pursuant to A.R.S. 13-702 (C) (5), and the emotional harm caused to Adam's family pursuant to A.R.S. 13-702 (C) (9). There are also several non-statutory aggravating factors that apply pursuant to A.R.S. 13-702 © (18).

The murder of Adam Clark was committed in an especially cruel manner. It appears that there is no case law defining "cruelty" in non-capitol cases and so the Court would need to use the case law defining that term as used in A.R.S. 13-703 (F) (6). *State v. Green*, 192 Ariz. 431, 444,967 P.2d 106 (1998). In the capitol sentencing context, that factor focuses on the victim. Whether a murder was especially cruel requires the Court to consider whether the victim suffered mental or physical anguish prior to death. *State v. Brewer*, 170 Ariz. 4, 951 P.2d 869 (1997), the Arizona Supreme Court noted as follows: P.2 at 883:

Cruelty exists if the victim consciously experienced physical or mental pain prior to death and the defendant knew or should have known that suffering would occur. Mental anguish includes a victim's uncertainty about her ultimate fate. (Citations omitted)

There is no requirement that pain and suffering must be endured by a victim for a certain period of time in order for a finding of cruelty to be made. In fact, a finding of "especially cruel" is not limited to the issue of physical pain. "... (A) crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death." (Emphasis added) *State v. Walton*, 159 Ariz. 571,598,769, P.2d 1017 (1989). Once again the cases do not set forth a particular time requirement but only state that ... "the state must prove beyond a reasonable doubt that the victim was conscious and suffered pain or distress at the time of the offense." *State V. Jiminez*, Ariz. 21,859, P.2d 131 (1993).

The evidence adduced at trial through the testimony of Dr. Phillip Keen, established that the head injuries and abdominal injuries were separated by some period of time, with the head injuries occurring first. Adam had five (5) subgaleal bruises, none of which corresponded to the external bruises on his face. The defendant had to have hit Adam repeatedly in the head and face to cause all of the injuries. Dr. Keen

testified that one blow could have caused all of the internal damage but Adam also had bruising on both sides of his body. Those had to have been inflicted separately. Dr. Keen testified that after his liver had been torn almost in half, Adam would have been in excruciating pain. While Adam suffered from Cornelia De Lange Syndrome, he felt pain just like anyone else. Dr. Robert Miller testified to that in connection with Adam's broken leg. He cried when Dr. Miller moved his leg. It is hard to imagine a death more cruel than the one Adam suffered.

The emotional harm done to Adam's family was extreme. The Defendant sat by and watched Adam's mother, Joyce Clark be charged with the murder of her son. He watched her lose custody of her daughter, XXXXX. He watched her lose her home to pay her legal expenses. Not only did Joyce Clark lose her son, her "miracle baby", her whole life was destroyed. For nineteen (19) years, Mrs. Clark lived under the cloud of suspicion that she had murdered Adam. Summoning strength she probably did not know she had, Joyce Clark survived. She went on to become a nurse and a bereavement counselor. She survived but will never recover from the emotional damage caused by the defendant.

Adam's sister, XXXXX, has also been irreparably harmed by the Defendant's conduct. Until she sat through the trial and heard the facts of what really happened to Adam, she thought her mother killed her baby brother. Until Adam's death, XXXXX and her mother had a close relationship. Now they have no relationship at all. XXXXX lost not only her brother but her mother as well.

Not only are there two statutory aggravating factors applicable in this case, there are also factors the Court should consider pursuant to A.R.S. 13-702 (C) (18). That section provides that the Court may also consider any other factor the court deems appropriate to the ends of justice. One such factor is Adam's age. He was only six (6) years old when he died. The age of the victim is not a statutory aggravating factor in son-capitol cases but is it in death penalty cases. It should be considered in both.

The State also asks the Court consider the helplessness of the victim in determining the Defendant's sentence. Adam was physically and mentally retarded, weighing only 22 pounds. He had only one hand and his left leg was in a cast. Adam was totally helpless and the Defendant knew that when he beat him to death.

In regard to mitigating factors, it is the State's position that there are none. While it is true that the Defendant has no prior criminal convictions, in *State v. Webb*, 164 Ariz. 348,793 P.2d 116 (Ariz.App1990), the Court of Appeals noted as follows: Id. at 355.

A sentencing judge is not required to consider a defendant's lack of a prior criminal record as a mitigating factor.

The Arizona Supreme Court in *State v. Thurlow*, 148 Ariz. 16, 712 P.2d 929 (1980), held as follows:

In determining punishment the court should consider not only the circumstances of the offense but also the character and past conduct of a defendant. In this manner, punishment may be set in accordance with defendant's general character and the nature of the crime committed. (Citation omitted). *Id.* at 18.

The Sentencing court may also consider a defendant's demeanor during trial "and draw conclusions about his character there from in determining a proper sentence to be imposed". *State v. Schneider*, 148 Ariz.441, 449, 715, P.2d 297 (Ariz.App.1086).

In the instant case, the Defendant has a history of physical and sexual abuse of others. Attached are police reports detailing Det. Bruce Foremny's interviews of: XXXXX, XXXXX, XXXXX, XXXXX and XXXXX (*names of three children and two women who have asked to remain anonymous for the sake of their privacy*), that detail the abuse the Defendant has inflicted on others. The picture they paint of the Defendant is quite different than the one he portrayed at his release hearing last spring and at trial. What the Defendant did to Adam Clark was neither an aberration nor an isolated incident. The statute of limitations bared the State from charging the Defendant with all of his past crimes but the Court may now consider it in imposing Sentence. Due to the Defendant's past conduct, his lack of prior convictions to be a mitigating factor.

For nineteen (19) years the Defendant has gotten away with murder. He cruelly beat a helpless child to death and watched the Clark family be destroyed. For this, the Defendant deserved to be sentenced to the aggravated term of twenty-one (21) years in the Department of Corrections.

Respectfully submitted December 31st, 2002

RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY

BY *Jeannette R. Gallagher*
JEANNETTE R. GALLAGHER

Deputy County Attorney

Copy mailed/delivered
December 31st, 2002
to:

The Honorable Warren J. Granville
Judge of the Superior Court

Vicky Lopez
Candice Ziegler
Public Defender's Office

Caroline Goldstein
Adult Probation Department

JEANNETTE R. GALLAGHER

Deputy County Attorney
