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IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

STATE OF ARIZONA, Appellee, v. JAMES COGHILL, Appellant.	No. 2 CA-CR 2006-0215 DEPARTMENT B (Pima County Superior Court Cause No. CR-2004-2573)

APPELLANT'S REPLY BRIEF

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ATTORNEY FOR APPELLANT
JAMES COGHILL

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ARGUMENT

Argument One

The Trial Court Denied Mr. Coghill's Request for Retained Counsel by Informing Him That He Must Follow a Rule Which Excluded His Counsel of Choice from Admission Pro Hac Vice.

The State claims, "The trial judge did not deny Appellant his choice of counsel." The record reflects otherwise. On Wednesday, October 26, 2004, James Coghill's attorney, James P. Lagattuta, filed a Motion to Permit Attorney W. Thomas Coghill, Jr., to appear Pro Hac Vice as attorney for James Coghill. Surely, the trial judge was aware that a constitutional issue was involved in that James Coghill was entitled to counsel of his choice under the Sixth Amendment to the United States Constitution but, nonetheless, the trial court, on the very next day, Wednesday, October 27, 2004, without a hearing or notice of the hearing, entered its order: "IT IS ORDERED DEFENDANT'S MOTION FOR ADMISSION PRO HAC VICE OF W. THOMAS COGHILL, JR. DATED OCTOBER 21, 2004 IS DENIED, without prejudice, for failure to comply with Rule 33(d), Rules of Supreme Court, Arizona, A.R.S., 17A." ROA 17. For the State to now represent that the trial court did not deny Mr. Coghill his choice of counsel is ludicrous.

The State argues that the claim that Mr. Coghill was denied retained counsel of his choice lacks a "factual basis" because the motion to admit Mr. Coghill's father was never denied, but rather dismissed without prejudice because of a failure to comply what was the Supreme Court Rule 33. Because it cited to the

relevant supreme court rule, the order made it clear that the trial court would only grant the motion if the requirements of the rule were met. When the trial court had made clear that it would not admit Mr. Coghill, Sr., unless the Rule was followed, it implicitly ruled that it would not admit him because he was an Arizona resident. Filing a motion that would clearly fail to meet the requirement of the rule would not change the trial court's decision that it would only follow the rule.

The State further contends that Mr. Coghill was not denied his constitutional right because, "the judge never had an opportunity to rule on the merits of a motion for pro-hac-vice representation." To the contrary, all the judge had to do was set the motion for hearing rather than denying the motion out of hand and without notice to the parties the day after the motion was filed. Mr. Coghill knew it would only antagonize the judge further to refile the motion because attorney W. Thomas Coghill, being a resident of Arizona, could not comply with Rule 33(d) on which the judge based his denial. As an aside, the judge's order was entered October 27, 2004, and the *Gonzalez-Lopez* case was not decided until June 26, 2006, so there is little likelihood the trial judge would have ruled otherwise even if Mr. Coghill had filed a further motion. As noted in the State's brief, after the trial and at sentencing, the trial judge "implied he would have allowed Appellant's father (Attorney Coghill) to represent Appellant had Appellant simply addressed the procedural deficiency and refiled the motion," which would have accomplished nothing because Appellant could not successfully address the procedural deficiency since Attorney Coghill was, in fact, a resident of

Arizona which forbade him from participating pro-hac-vice in Arizona.

The State does not argue that this rule is constitutional. The State argues that because the arguments concerning the constitutionality of the rule were not presented to the trial court, this Court must review for fundamental error. However, as noted in the Opening Brief, the United States Supreme Court has held that denying a person retained counsel of his or her choice is structural error, *United States v. Gonzalez-Lopez*, ___ U.S. ___, 126 S.Ct. 2557, 2564, 165 L.Ed.2d 409 (2006), and the Arizona Supreme Court in *State v. Henderson*, 210 Ariz. 561, 567 ¶ 17, 115 P.3d 601, 607 (2005), held that fundamental error analysis applies only to errors that are not structural. Indeed, it is clear that the *Henderson* analysis is inconsistent with structural error. For example, *Henderson* requires a showing of prejudice, but the *Gonzalez-Lopez* Court held that prejudice need not be shown. 126 S.Ct. at 2565. The remaining requirements of *Henderson* are clearly met by structural error since structural error is error that goes to the heart of the case. The United States Supreme Court noted "Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds." *Id.* at 2564-65. Error bearing on

the framework of the trial is clearly "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Henderson*, 210 Ariz. at 567 ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). That is exactly what occurs when attorneys pursue different strategies and have different styles.

The State also argues that any decision by this Court would be merely advisory. AB ¶ 11. The State argues that the issue did not ripen into a controversy below. *Id.* It is not clear what the State means by this argument. The decision of this Court would not be advisory: Mr. Coghill is requesting that this Court reverse his conviction and order a new trial.

Argument Two

The Trial Court Abused its Discretion by Admitting Evidence That Mr. Coghill Possessed Adult Pornography Because the Risk of Prejudice Outweighed Any Probative Value.

The State does not argue that the trial court correctly ruled that the adult pornography was inextricably intertwined with the child pornography or that the adult pornography was relevant to the child pornography in any way. Instead the State limits its argument to a claim that the downloading of adult pornography showed that Mr. Coghill "had the intent to record his pornographic viewing and the means and know how to do so." AB ¶ 13. It is unclear how the recording of adult pornography demonstrates an intent to record child pornography. As noted in the Opening Brief, courts have held that adult pornography has limited

probative value in cases involving child pornography. OB at 24, *quoting United States v. Harvey*, 991 F.2d 981, 995 (2nd Cir. 1993)("The above-described X-rated material, which did not involve either child pornography or simulated child pornography, did not bear on the disputed trial issues, and thus was not relevant."). It would appear possible that an interest in child pornography and an interest in adult pornography might be mutually exclusive, although there was no expert testimony indicating whether there was or was not a link between the two.

The State also claims that the presence of adult pornography was admissible to demonstrate that Mr. Coghill had the means and know-how to record the discs of child pornography. Mr. Coghill notes a typographical error in the Opening Brief. On page 27 he argued "The fact that Mr. Coghill viewed or downloaded child pornography from the internet might demonstrate his ability to do this. However, that is not an element of the offense, or a contested issue at trial." The argument was meant to be that downloading or viewing adult pornography might demonstrate the ability to download or view child pornography, but that the ability to do so was not an element of the offense or a contested issue at trial Furthermore, Mr. Coghill was not charged with making child pornography but rather possessing it. His defense was that the discs were not his, and the jury could have found him guilty of possessing the discs even if he had no ability to make them.

There was no dispute that Mr. Coghill was very familiar with computers, downloading, etc., but having legal CDs in his possession did not tend to prove

that he had knowledge that illegal CDs were in his possession. As noted in the Opening Brief, his ability to download information from the Internet and make CDs could have been demonstrated with less prejudicial material, since there were many discs containing television shows and music downloaded from the Internet. The State argues that possession of adult pornography is not prejudicial since it can be rented or purchased at mainstream video stores. However, there was no testimony at trial concerning this, and it is not the kind of information that this court can take judicial notice of under Rule 201 of the Arizona Rules of Evidence. Furthermore, as noted above, courts have generally held that evidence of possession of adult pornography should not be admitted because it is prejudicial. *See, e,g, State v. Atkin*, 80 P.3d 157, 162-63 ¶ 32 (Utah App. 2003)("the trial court correctly noted the very real danger that exists in child pornography prosecutions, whereby evidence that the defendant has consumed adult pornography might impermissibly resonate with a jury that is tasked only with determining whether the defendant had possessed child pornography.").

Argument Three

The Trial Court Abused its Discretion When it Permitted the Jury to View the Child Pornography Found in Mr. Coghill's Motor Home When less Prejudicial Means of Establishing That the Material Was Child Pornography Was Available.

From the beginning of the trial to the end of the trial Mr. Coghill never contended that illegal child pornography was not in his motor home. This was admitted by Mr. Coghill's attorney in his opening statement and throughout the

trial including the final argument. The only issue was whether Mr. Coghill had actual knowledge that the child pornography was in his motor home. Consequently, whether the child pornography was or was not "child pornography" was never an issue nor did actually showing it to a jury tend to prove or disprove whether Mr. Coghill had knowledge of its existence within his motor home. Mr. Coghill's attorney even stipulated that the CDs for which Mr. Coghill was being charged did contain illegal child pornography. To introduce this child pornography to the jury and allow the jury to view the CDs could only have been done to inflame and prejudice the jury against Mr. Coghill and prevent Mr. Coghill from receiving a fair trial.

The State argues that the trial court cannot compel the State to stipulate to an element of the offense. The State cites this Court's decision in *State v. Lopez*, 209 Ariz. 58, 59-60 ¶¶ 4-9, 97 P.3d 883, 884-85 (App. 2004). However, in *Lopez*, the State had entered into a stipulation that Lopez was a convicted felon, and the issue was whether it should have been required to enter into a stipulation that he was a prohibited possessor. *Id.* at ¶¶ 4-5. This Court noted in *Lopez* that "Here, although the proffered stipulation that Lopez was a prohibited possessor would have been read to the jury, Lopez attempted to remove from the jury's consideration elements of the charged offense-that he has a prior felony conviction and that his civil right to possess or carry a firearm has not been restored." *Id.* at ¶ 8. Mr. Coghill did not request that the fact that the discs contained child pornography be kept from the jury, but requested a stipulation like that actually

entered into in *Lopez*.

The State cites *State v. Carreon*, 210 Ariz. 54, 64 ¶ 47, 107 P.3d 900, 910 (2005), where the court held "[t]he judge should not have instructed the jury that the stipulation satisfied the State's burden of proving an element of the crime." That is irrelevant here. Mr. Coghill had no interest in waiving his right to a jury determination of whether the discs contained child pornography; rather he wished to exclude the playing of the highly prejudicial videos to the jury so that the jury's judgment would not be overwhelmed by the horror and outrage produced by the images. In *Lopez*, the State was satisfied with a stipulation that the defendant was a convicted felon and the jury accepted the stipulation as establishing the fact. Mr. Coghill is arguing that the jury should have been able to evaluate his stipulation in the present case.

Argument Four

Mr. Coghill Was Prejudiced by the Prosecutor's Claim During Closing Argument That the Jury Could Determine Whether Mr. Coghill Had Labeled the Discs Containing the Charged Child Pornography by Comparing the Handwriting to That on a Disc Containing Photographs When the Handwriting on the Latter Disc Had Never Been Identified.

The State claims that Mr. Coghill's argument that the prosecutor improperly argued that the jury should compare the handwriting on the disc containing child pornography to a disc of pictures which the prosecutor claimed was labeled by Mr. Coghill was not preserved by the objection "evidence," and that fundamental error analysis must be applied. Mr. Coghill's argument on appeal is that no evidence had been presented that the writing on the picture disc was Mr. Coghill's, and the

requirements of Rule 901 were therefore not met. The objection at trial was to evidence, and the trial judge responded by ruling that the jury could use its memory to determine what was in evidence. Thus it is clear that it was understood that Mr. Coghill's trial attorney was objecting that the prosecutor's statement was not supported by evidence submitted at trial.

The State makes a strained argument that the objection must have been to whether the picture disc was in evidence. However, as the State notes, it was. It is therefore clear that Mr. Coghill's trial attorney was objecting to the only thing that was not in evidence, that the picture CD was labeled in Mr. Coghill's handwriting. Indeed, in the portion of the trial attorney's closing argument quoted by the State, the trial attorney did not argue that the jury could not compare the discs because it did not have both of them, but rather that the jury needed expert testimony on the handwriting. 4/4/06 RT 170.

The State then argues that the error was not fundamental because the prosecutor never actually said that the handwriting on the picture disc had been authenticated. However, he clearly implied it by arguing that they jury could validly compare the handwriting. The State also argues that defense counsel cured the error by arguing that an expert should have done the comparison. However, when a prosecutor argues that certain facts are in evidence, either directly or implicitly, as was the case here, he or she is putting the prestige of the State behind the statement. This improperly influences the jury, no matter what the defense attorney may argue. Furthermore, the issue here is compliance with a Rule of

Evidence. Rules of Evidence determine what evidence may be considered by the jury. Argument that the evidence did not show what the State claimed cannot correct the use of an argument which should not have been made because it did not meet the requirements of the rules of evidence.

Arguments Five and Seven

Mr. Coghill's Enhanced Sentence for Dangerous Crimes Against Children Was Error Because the Jury Did Not Determine That Those Depicted in the Child Pornography Were under the Age of 15 or That Mr. Coghill Targeted Them.

The State addresses these two arguments together. It first addresses Mr. Coghill's argument that A.R.S. § 13-604.01 requires that the jury determine that he knew that the victim was in fact under 15 years old before his sentence could be enhanced. The State characterizes the United States Supreme Court's statement that an absence of a requirement for scienter would raise "serious constitutional doubts," *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78, 115 S.Ct. 464, 472, 130 L.Ed.2d 3 (1994), as extra-jurisdictional case law. However, the United States Supreme Court's constitutional concerns about scienter apply to Arizona statutes as much as they do to federal statutes, since the United States Constitution applies to the states. In dealing with punishment for the possession of child pornography the Court held that "As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant." *New York v. Ferber*, 458 U.S. 747, 765, 102 S.Ct. 3348, 3358- 59, 73 L.Ed.2d 1113 (1982). The United States Supreme Court's reasoning that the youth

of the people who appear in pornography is necessary to remove pornography from the protections of the First Amendment applies to Arizona statutes as well as federal ones.

The State argues that there is a difference between sentencing statutes and the definitions of substantive offense. AB ¶ 25. However, the United States Supreme Court has recognized that factors that enhance sentences are no different from elements of the offense. *Apprendi v. New Jersey*, 530 U.S. 466, 495-96, 120 S.Ct. 2348, 2365-66, 147 L.Ed.2d 435 (2000) ("we agree wholeheartedly with the New Jersey Supreme Court that merely because the state legislature placed its hate crime sentence 'enhancer' 'within the sentencing provisions' of the criminal code 'does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense.'"). Thus it has required that a jury determine these factors. It follows that the other constitutional requirements such as the requirement of scienter described in *X-Citement Video* also applies to sentence enhancers. Scienter is required because there are constitutional concerns with punishing a person for doing some thing that the person is not aware of. This reasoning applies whether the punishment is characterized as an element of the offense or as a factor that enhances the sentence.

As the State notes, long ago the Arizona Supreme Court held concerning A.R.S. § 13-604.01 that

> We do not hold that the statute applies only when the accused targets a victim whom the accused knows is under the age of fifteen. On the contrary, we approve of an earlier holding of the court of appeals that

> knowledge of the victim's age is unnecessary under the statute. *State v. Denning*, 155 Ariz. 459, 461, 747 P.2d 620, 622 (App.1987). When an individual targets a person, he or she generally assumes the risk that the victim will turn out to be within a protected age group. We hold only that the victim must be the person against whom the crime is directed, not that the accused must know that the person is under fifteen.

State v. Williams, 175 Ariz. 98, 103, 854 P.2d 131, 136 (1993). However, *Williams* dealt with aggravated assault, not child pornography. The State also cites *State v. Sepahi*, 206 Ariz. 321, 78 P.3d 732 (2003), which also deals with assault. Pornography involves right protected by the First Amendment, and the United States Supreme Court has held that the use of actual children, and the defendant's scienter are required before prosecution is permitted. Furthermore, as noted in the Opening Brief, the Legislature displayed a special concern for protecting younger children, and this concern can only be met by giving increased punishment to those who know that the victim is in the range of ages the Legislature is concerned with.

In reply to the State's response to argument VII, Mr. Coghill's position is adequately argued in the Opening Brief.

Argument Six

Mr. Coghill's Sentence of 15 Years for Possessing One Item of Child Pornography Was Cruel and Unusual Punishment under the Arizona and United States Constitutions.

The State argues that because the Arizona Supreme Court held in *State v. Berger*, 212 Ariz. 473, 134 P.3d 378 (2006), that a sentence of 200 years for possessing 20 pieces of child pornography was not cruel and unusual punishment,

the sentence of 15 years Mr. Coghill received for possessing one item is not excessive. There are two answers to this. First, Berger received the 10 year mitigated sentence for each count. Mr. Coghill received the presumptive. In addition, Berger was convicted of twenty separate counts of sexual exploitation of a minor under the age of fifteen and sentenced to twenty consecutive ten-year prison terms. *Id.* at 474 ¶ 1, 134 P.3d 378, 379. A 15-year sentence may be excessive when a 10-year sentence is not.

Second, as noted in the Opening Brief, *Berger* interpreted the Eighth Amendment to the United States Constitution. Two of the justices in *Berger* felt the sentence was excessive. One felt constrained to follow federal law. The Arizona courts have never addressed whether the state constitution's provision against cruel and unusual punishment is more restrictive than the federal provision. As noted in the Opening Brief, the interpretation put on the federal ban on cruel and unusual punishment has developed over the years since the Arizona Constitution was adopted. There is no reason to believe that the framers of the Arizona Constitution intended to prospectively adopt future interpretations of the federal clause. Indeed, it is most likely they were aware of the broad interpretation given the clause in the Philippine Constitution in *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), and if they intended to follow the federal courts, intended to follow it.[1] In *Weems*, the Court concluded that the sentence

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[1]The *Weems* Court noted that the clause in the Philippine Constitution must have the same meaning as the clause in the United States Constitution. 217 U.S. at 367, 30 S.Ct. At 549 ("the provision of the Philippine Bill of Rights, prohibiting the

was excessive by comparing it to the sentences that could be imposed for other crimes. 217 U.S. at 380-81, 30 S.Ct. at 554-55. However, the *Weems* Court held that a sentence of fifteen years for falsifying a single item of a public account was cruel and unusual. It was clearly less differential to the legislature than recent United States Supreme court decisions have been. This is very different from the United States Supreme court cases cited in *State v. Berger,* 212 Ariz. 473, 476-77 ¶¶ 14-17, 134 P.3d 378, 381-82 (2006) which upheld sentence of life in prison for possessing cocaine while on parole and 25 years in prison for a third offense involving the theft of golf clubs worth $1200.

However, as noted in the Opening Brief, the delegates to the Arizona Constitution did not look to the interpretations of the United States Supreme Court in deciding what language to use, but rather to other state courts. Indeed, *Weems* was not mentioned even though it was decided shortly before the Arizona constitutional convention. *Weems* is still an example of the tends in legal thought at the time of the convention. It demonstrates that at the time of the Arizona constitutional convention courts were finding that sentences were cruel and unusual because of their length and the facts of the case.

In the present case the facts show that Mr. Coghill had no prior record of criminal offenses. He had served honorably for more than four years in the United

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infliction of cruel and unusual punishment, was taken from the Constitution of the United States, and must have the same meaning.").

States Coast Guard and, since that time, had become an FAA-certified power plant and airframe mechanic. 04/04/06 R.T. 41-42. The case was ultimately determined by the testimony of Mr. Coghill and Jacob Franks in what could be called a typical "he said-she said" dispute. Following a heated argument, Franks, who had a lengthy criminal record, reported to the police that Mr. Coghill possessed child pornography. Mr. Coghill denied the charge and said that any child pornography which might have been in his motor home belonged to Franks and was unknown to Mr. Coghill. The child pornography which was the subject of the case was found within the privacy of Mr. Coghill's motor home where Franks was permitted to stay and use Mr. Coghill's computer. There was no evidence against Mr. Coghill that he bought or sold child pornography or that he touched or abused any child during his lifetime. The evidence tended to demonstrate that the child pornography had come through the Internet.

Under the law for which Mr. Coghill was charged each picture of child pornography constitutes a crime mandating a prison sentence. Hence, Mr. Coghill is charged with knowingly having within his possession 15 different pictures of child pornography and viewing them within the privacy of his own home.

Had his sentence not been modified at the sentencing, the Mr. Coghill could have received a mandatory sentence exceeding 150 years. Nonetheless, his sentence of 15 years without parole plus lifetime probation is clearly cruel and unusual punishment simply for knowingly possessing pictures within the privacy and confines of his own home with no prior criminal record and with no direct

contact whatsoever with any victim.

The State cites this Court's holding in *State v. Keith*, 211 Ariz. 436, 437 ¶ 3, 122 P.3d 229, 230 (App. 2005) that "We are not allowed to anticipate how the Supreme Court may rule in the future." However, in *Keith* this Court was addressing whether it could overrule the holding of cases of the Arizona Supreme Court. However in *Berger* the Arizona Supreme Court held that the sentence did not violate the Federal Cruel and Unusual Punishment Clause, whereas here the issue is whether it violates the state clause. Thus the Court is addressing a novel issue, and *Keith* does not apply. As argued in the Opening Brief, Mr. Coghill's sentence was illegal because it violated the Arizona Constitution.

Argument Eight

Examination of the Actual Hard Drives from Mr. Coghill's Computer Was Important to Providing an Adequate Defense to the Charges in this Case.

Some of the most crucial evidence in a case such as this is the computer involved and its equipment and the CDs involved. These can become the most significant and powerful witnesses in the case. Of course, an accused has a right to confront the witnesses against him or her.

In this case, Jefford Englander , the primary investigator, was the primary accuser of Mr. Coghill. He was the State's expert and allowed to sit at counsel table throughout the trial. In spite of the trial court's orders the State did not produce to Mr. Coghill the actual computer and the actual CDs involved for inspection, examination, testing, etc. by Mr. Coghill's expert, but produced copies

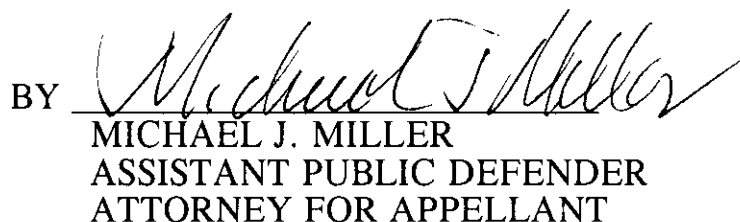
manufactured by Englander. In fact, the indictment was acquired by using Englander's testimony and the CDs manufactured by him. In other words, Mr. Coghill was prevented from cross-examining these crucial witnesses. Mr. Coghill had no opportunity to determine whether the copies were accurate, whether they had been altered or changed, or whether the computer, CDs and copies had in some form or fashion been spoliated. Consequently, Mr. Coghill was denied a fair trial by the State arrogantly ignoring the trial court's orders to produce this evidence to Mr. Coghill.

Conclusion

For the foregoing reasons, James Coghill requests this Court to reverse his conviction and remand for dismissal. In the alternative, he requests reversal and remand for a new trial.

DATED: July 24, 2007.

ROBERT J. HOOKER
PIMA COUNTY PUBLIC DEFENDER



BY ______
MICHAEL J. MILLER
ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE

Pursuant to Ariz. R. Crim. P. 31.13(b)(2), undersigned counsel hereby certifies that this Reply Brief complies with Rule 31.13(b) as follows:

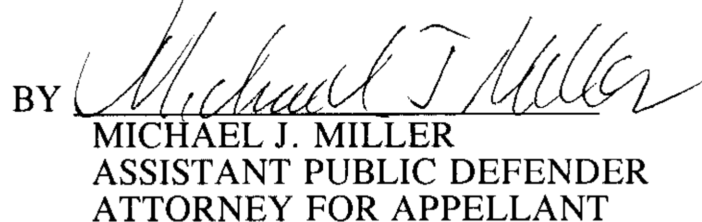
1. The brief is proportionately spaced, and uses 14 point CG Times typeface, in compliance with Rule 31.13(b)(1);

2. The brief contains 4,516 words, and has an average of no more than 280 words per page, including footnotes and quotations, in compliance with Rule 31.13(b)(2);

3. The brief is double spaced, with top and bottom margins of at least 1 ¼ inches and side margins of at least one inch, in compliance with Rule 31.13(b)(1).

DATED: July 24, 2007.

ROBERT J. HOOKER
PIMA COUNTY PUBLIC DEFENDER



BY ______________________
MICHAEL J. MILLER
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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that two copies of Appellant's Reply Brief will be mailed on July 25, 2007 to:

Diane Leigh Hunt
Assistant Attorney General
Attorney General's Office
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400 West Congress, Bldg. S-315
Tucson, AZ 85701

and that one copy of Appellant's Reply Brief will be mailed on July 25, 2007 to:

James Coghill #206723
ASPC Eyman Meadows Unit
PO Box 3300
Florence, AZ 85232

DATED: July 24, 2007.

ROBERT J. HOOKER
PIMA COUNTY PUBLIC DEFENDER

LETA GOLDIN
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