DIVISION ONE
FILED: 12/22/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. MICHAEL EMERSON CORRELL, Appellant.	)	1 CA-CR 11-0188 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR0000-141125

The Honorable Michael W. Kemp, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Nicole Farnum — Phoenix
Attorney for Appellant

Michael Emerson Correll — Florence
Appellant

B A R K E R, Judge

¶1 In 1984, Michael Emerson Correll was convicted of multiple criminal counts including three counts of first-degree murder for which the death penalty was imposed. This case has an extended procedural history which is detailed in pertinent part below. This appeal involves resentencing for two of Correll's homicide convictions following a mandate from the Ninth Circuit Court of Appeals.

¶2 Correll's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this court that after searching the entire record on appeal, she finds no arguable ground for reversal. Correll filed a supplemental brief *in propria persona* raising various issues. Additionally, Correll's counsel raised the following issues at his request: whether the court properly denied Correll's request to change counsel, whether the court lawfully imposed consecutive sentences when resentencing Correll on sentences that he contends had previously been set to run concurrently, and whether the Ninth Circuit's mandate addressed all ten counts requiring the court to resentence Correll on all ten counts rather than only the two death penalty counts.

¶3 Correll timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1)

(2003), 13-4031 (2010), and 13-4033(A) (2010). We are required to search the record for reversible error. Finding no such error, we affirm.

Facts and Procedural Background[1]

¶4 The facts of this case are detailed in *State v. Correll*, 148 Ariz. 468, 715 P.2d 721 (1986). Correll participated in a triple homicide in 1984. Consequently, he was convicted of three counts of first-degree murder, one count of attempted first-degree murder, one count of burglary in the first degree, one count of armed robbery, and four counts of kidnapping. In his original sentence, he received the death penalty for each of the murder convictions. The Arizona Supreme Court subsequently modified Correll's death sentence on count one to life imprisonment. *Correll*, 148 Ariz. at 478, 715 P.2d at 731.

¶5 Correll later filed a petition for writ of habeas corpus in federal district court. At the culmination of those proceedings, the Ninth Circuit granted Correll relief in the form of a new penalty phase trial. *Correll v. Ryan*, 539 F.3d 938, 956 (9th Cir. 2008). The Ninth Circuit determined Correll's counsel had been ineffective at the penalty phase of the original trial and that, absent his counsel's deficiencies,

[1] Correll appeals from the resentencing only; accordingly, the verdicts and the underlying facts are not at issue.

there was "a significant possibility" Correll could have avoided the death penalty. *Id.* at 955. Accordingly, the Ninth Circuit directed the trial court to resentence Correll on the death penalty counts. Pursuant to the Ninth Circuit's decision, the court held a status conference granting a conditional writ of habeas corpus and initiating proceedings to hold a new penalty phase trial and resentence Correll on counts two and three — the counts for which the death penalty had been imposed. The trial court rejected Correll's requests to expand the resentencing beyond the two capital counts.

¶6 Multiple times leading up to the resentencing, Correll requested to change counsel. The court denied these motions. Because the court would not permit Correll to change counsel, he eventually waived counsel. The court held a colloquy ensuring that his waiver was knowingly, voluntarily, and intelligently made and appointed Correll's current defense counsel to act as advisory counsel.

¶7 Ultimately, the court did not hold an aggravation or penalty phase hearing on the two capital counts because, prior to the hearing, the State withdrew its notice to seek the death penalty. At the resentencing, Correll was sentenced to life imprisonment on both counts. The court directed the sentences to run consecutively to each other and to the life sentence, as modified, that Correll had been serving on count one.

Discussion

¶8 Correll makes various arguments challenging his sentences on the capital counts, counts two and three, as well as all remaining counts aside from count one which was previously modified by our supreme court. We address them below as follows.

1. Change of Counsel

¶9 Appellant argues that the court erred when it denied his motions to change counsel.[2] We review the denial of a request to change counsel for abuse of discretion. *State v. Paris-Sheldon*, 214 Ariz. 500, 504, ¶ 8, 154 P.3d 1046, 1050 (App. 2007). A defendant's Sixth Amendment right to competent representation does not guarantee counsel of choice, or even "a meaningful relationship with counsel." *State v. Cromwell*, 211 Ariz. 181, 186, ¶ 28, 119 P.3d 448, 453 (2005). When deciding whether to grant a defendant's motion, the trial court must consider whether new counsel would face the same conflict as current counsel, the timing of the motions to change counsel, and the defendant's penchant for changing counsel, among other

[2] Defense counsel also submitted a motion to withdraw because Correll had filed a bar complaint against defense counsel. Correll's bar complaint did not necessitate a change of counsel. *See State v. Henry*, 189 Ariz. 542, 549, 944 P.2d 57, 64 (1997) ("'As a matter of public policy, a defendant's filing of a bar complaint against his attorney should not mandate removal of that attorney.'") (quoting *State v. Michael*, 161 Ariz. 382, 385, 778 P.2d 1278, 1281 (App. 1989).

factors. *State v. Moody*, 192 Ariz. 505, 507, ¶ 11, 968 P.2d 578, 580 (1998).

¶10 Correll claimed that his relationship with counsel was "doomed from the start" because his counsel waived time without first consulting him during an initial status conference. Correll was singularly interested in moving his case along as quickly as possible and was unwilling to accommodate delays necessitated by counsel's existing case load and the time required to become familiar with Correll's large case file. In denying Correll's motions, the court determined that the conflicts upon which Correll based his motions to change counsel would be present regardless of the attorney who was appointed to handle the defense. Furthermore, the court denied Correll's motion to change counsel after considering his motions and determining that the issues raised had been previously raised and denied in a prior motion to change counsel. The court did not abuse its discretion in doing so. *See Henry*, 189 Ariz. at 547, 944 P.2d at 62 ("[Defendant's] proclivity to change counsel lends strong support to the judge's decision.").

2. Consecutive Sentencing

¶11 Correll next contends that the court improperly imposed consecutive life sentences on counts two and three because the original death sentences were concurrent. "A trial court has broad discretion in sentencing and, if the sentence

imposed is within the statutory limits, we will not disturb the sentence unless there is a clear abuse of discretion." *State v. Ward*, 200 Ariz. 387, 389, ¶ 5, 26 P.3d 1158, 1160 (App. 2001). However, we review de novo whether consecutive sentences are permissible. *State v. Siddle*, 202 Ariz. 512, 517, ¶ 16, 47 P.3d 1150, 1155 (App. 2002).

¶12 Initially, we disagree with the underlying premise of Correll's arguments. Specifically, he contends that the three original death sentences on counts one, two, and three were concurrent, rather than consecutive, and thus it was inappropriate to modify the sentences to run consecutive to each other on resentencing. We are aware of no precedent, and see no facts here, that support the notion that cumulative death sentences would be designated to run either concurrently, or consecutively. Obviously once one death sentence is carried out there is no option for a consecutive death sentence. Thus, we reject the proposition that the original death sentences were designated as either concurrent or consecutive. That was simply a decision that was not necessary given the nature of the sentences imposed.

¶13 Turning now to the consecutive sentences imposed, under the law in 1984, "as long as the convictions are for distinct and separate crimes, consecutive sentences are proper if the trial judge sets out his reasons for consecutive

sentences." *State v. Girdler*, 138 Ariz. 482, 489, 675 P.2d 1301, 1308 (1983).[3] Counts two and three are each charges of first-degree murder as to separate victims and thus are separate crimes supporting consecutive sentences. The court made the following specific findings at sentencing to justify running the sentences consecutively: the horrific nature of the crimes, the fact that there were multiple victims, and Correll's extensive criminal history. The court did not abuse its discretion in sentencing Correll to consecutive life sentences.

3. The Non-Capital Counts

¶14 Correll argues that the court erred when it resentenced him on counts two and three only; Correll claims the Ninth Circuit's mandate intended that he receive an entirely new sentencing trial on all counts. During the proceedings, Correll urged the court to resentence him on all counts, arguing that the ineffective assistance of counsel prejudiced him for all sentences imposed at the original trial. The court was not persuaded because "the Ninth Circuit opinion only granted relief for a new penalty phase trial."

¶15 We agree with the trial court. For a defendant to prevail on an ineffective assistance claim, he must

[3] The Arizona statutory scheme now provides that "sentences imposed by the court shall run consecutively unless the court expressly directs otherwise." A.R.S. § 13-711 (2010).

"affirmatively prove prejudice." *Strickland v. Washington*, 466 U.S. 668, 693 (1984). "Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense." *Id.* The prejudice to Correll as identified by the Ninth Circuit was that the death penalty may not have been imposed had Correll's counsel presented a proper mitigation case at sentencing. This is apparent from the Ninth Circuit's opinion. For example,

> The anemia of counsel's mitigation presentation was a critical error, certainly rising to the level of constitutionally deficient representation. "The failure to present mitigating evidence during the penalty phase of a capital case, where there are no tactical considerations involved, constitutes deficient performance, since competent counsel would have made an effective case for mitigation." *Smith v. Stewart*, 189 F.3d 1004, 1008-09 (9th Cir. 1999).
>
> The error's full magnitude, however, does not become apparent until we consider the effect it had under Arizona law in particular. At the time of the penalty phase proceedings, Arizona law mandated the death penalty if the trial judge found any one of the enumerated aggravating factors and determined that there were no mitigating factors that were sufficiently substantial to call for leniency.

Correll v. Ryan, 539 F.3d 938, 947 (9th Cir. 2008).

¶16 The Ninth Circuit determined that Correll had been inadequately represented for "the penalty phase." *Id.* The

prejudice to Correll was in the lack of mitigation presented that "mandated the death penalty" if the court found an aggravator. *Id*. At the conclusion of its discussion of the failure to present mitigation, the Ninth Circuit identified the prejudice:

> Given all these factors, there is a significant possibility that the introduction of *some* mitigating evidence could have spared Correll's life."

Id. at 955. Thus, the specific prejudice identified is that the death penalty was imposed. This prejudice, by definition, only applied to the capital counts. The Ninth Circuit concluded its discussion:

> Correll was constitutionally entitled to the presentation of a mitigation defense. He did not receive one, although substantial mitigation evidence existed. Most importantly, because Arizona law required the imposition of a death sentence if aggravating factors were proven and no mitigating factors presented, the failure to present any mitigation defense constituted ineffective assistance of counsel under the standards set forth in *Strickland*. The fear of a trial judge cannot be considered strategic justification for forgoing the presentation of a mitigation defense, particularly given that (1) Arizona law required imposition of the death penalty when no mitigating factors were found, and (2) the Arizona Supreme Court was required to re-weigh the aggravating and mitigating factors.

Id. at 955-56. Again, the focus of the prejudice as determined by the Ninth Circuit was clearly on the capital counts. We find

no error in the trial court not resentencing Correll on the non-capital counts. The trial court properly limited Correll's resentencing to counts two and three.

4. Due Process and Sentencing Materials

¶17 In his supplemental brief, Correll argues that his due process rights were violated (a) because he was not provided with a March 9, 2011, presentence report and the State's supplemental sentencing memorandum prior to sentencing, and (b) because he was improperly sentenced under new statutes.

a. Presentence Materials

¶18 In Arizona, "[f]undamental fairness to the defendant requires that the substance of all derogatory information which adversely affects his interests and which has not otherwise been disclosed in open court should be called to the attention of the defendant." *State v. Pierce*, 108 Ariz. 174, 175, 494 P.2d 696, 697 (1972). To implement this, the defendant's attorney, or the defendant himself, must be permitted to inspect the presentence report. *Id.* Despite the requirement that a defendant be provided with the presentence report, when there is "nothing in the presentence report of which defendant's counsel [or the defendant] was unaware during the proceedings[,] [f]ailure to disclose the report does not . . . require a remand." *See State v. Domme*, 111 Ariz. 464, 465, 532 P.2d 526, 527 (1975) (no remand required where the absent presentence report consisted of

biographical data and an FBI report of which both parties were aware).

¶19 A presentence report was prepared when Correll was sentenced in 1984. For the resentencing on March 11, 2011, the court, among other things, reviewed the original presentence report and also referenced "the criminal history that was prepared March 9, 2011." We have reviewed the three-page criminal history prepared for the 2011 sentencing. We note that it is appended to the original presentence report and does not expressly bear a date. However, it is plain that it was prepared shortly before the March 11 sentencing as it includes the total jail days from the date of incarceration, April 20, 1994, until the date of sentencing, March 11, 2011. We are confident it is the supplemental "Criminal History" that the trial court referenced. In reviewing earlier proceedings on the case, the court expressly ordered a supplemental presentence report for purposes of time calculation. It stated:

> Now, I'm going to need a little bit of time, because we're going to have a presentence report prepared. And we're going to have a calculation of your time served, which is considerable, and I know you want to get all the credit that you can get, and I have no idea what that credit is. It's just a lot. So you're going to get credit for time served.

Thus, the only purpose we can discern for this supplemental presentence report was to obtain the total amount of time served

to potentially offset the sentences that would be rendered.[4] There is no error and no prejudice in the failure of Correll to obtain this calculation in advance. If there is prejudice in terms of calculating time served, Correll is able to address that in a post-conviction relief proceeding.

¶20 Correll also contends he was prejudiced by being unable to review the State's sentencing memorandum in advance of the sentencing. That memorandum consists of four paragraphs. There were no references to any materials that were new. The memorandum included a portion of the transcript of the trial testimony from the surviving victim. It also made reference to the statement of facts contained in the original Arizona Supreme Court decision in this matter and the account of prior convictions also contained in that decision. One of the paragraphs contained a discussion of the calculation for presentence incarceration credit. Thus, like the presentence report, there was nothing in this memorandum about which Correll

[4] We have also compared the criminal history listed in the supplement with that in the original presentence report. There is no identification of crimes in the supplemental report, only number of offenses. When comparing the number of offenses in the supplemental report to the number that are identified on the face sheet of the original report plus those included in the text of the report itself, we see no discrepancies. The numeric count, however, on the face sheet of the original report does not match the total number of offenses that are included in the body of the report at pages four and five.

was "unaware during the proceedings [that would] . . . require remand." *Domme*, 111 Ariz. at 465, 532 P.2d at 527.

b. The Statutes on Resentencing

¶21 Correll also briefly argues that his due process rights were violated when he was resentenced under new versions of A.R.S. §§ 13-751, -752; he seeks to analogize *Coleman v. McCormick*, 874 F.2d 1280 (9th Cir. 1989), to his case. This analogy is misplaced. In *Coleman*, the defendant was resentenced under a new capital punishment statute after the previous statute had been declared unconstitutional. *Coleman*, 874 F.2d at 1287. The new statute placed the decision whether to impose the death penalty with the judge who had presided at trial, which made Coleman's tactics with regard to evidence and testimony admitted at trial suddenly relevant to imposition of the death penalty without Coleman's prior knowledge. *Id.* Because Coleman faced a death sentence, the court scrutinized the proceedings; "capital proceedings [must] be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of fact finding." 874 F.2d 1280, 1288 (quoting *Strickland v. Washington*, 466 U.S. 668, 704 (1984)). Correll was not facing the death penalty during his resentencing; the State had withdrawn its notice to seek death. Accordingly, the due process concerns at issue in *Coleman* are not implicated in Correll's case.

5. In Camera Conferences

¶22 Correll also contends that his Sixth Amendment right to be present at every stage of the proceedings was violated when the court conducted an *in camera* conference with defense counsel and the State, in Correll's absence. The right to be present at every stage of trial "applies only to those proceedings in open court 'whenever [a defendant's] presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" *State v. Dann*, 205 Ariz. 557, 571, ¶ 53, 74 P.3d 231, 245 (2003) (internal citations omitted). This right does not "extend to in-chambers pretrial conferences . . . and to various other conferences characterized as relating only to the resolution of questions of law." *Id.*

¶23 Because Correll was representing himself *pro se* at the time of the *in camera* conference, his exclusion from the conference impacted his right to self-representation as established in *Faretta v. California*, 422 U.S. 806 (1975). A defendant's Sixth Amendment right to self-representation demands that a *pro se* defendant "be allowed to control the organization and content of his own defense, to make motions, to argue points of law, . . . and to address the court and the jury at appropriate points in the trial." *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984). When a defendant chooses to represent himself

pro se, the court may appoint advisory, or standby, counsel.[5] Advisory counsel's role in assisting the defendant is limited by the *pro se* defendant's right "to preserve actual control over the case he chooses to present to the jury."[6] *Id.* at 178. Advisory counsel's assistance in "routine issues of procedure or courtroom protocol . . . does not interfere with the defendant's actual control of the case." *Lefevre v. Cain*, 586 F.3d 349, 354 (5th Cir. 2009). But, if counsel participates over a defendant's objection, the defendant's right to self-representation may be eroded. *Id.* Advisory counsel's participation must be "over the defendant's objection" in order to erode the *Faretta* right. *McKaskle*, 465 U.S. at 178; *Lefevre*, 586 F.3d at 355 ("[A] defendant can waive his *Faretta* rights, either by expressly requesting standby counsel's participation on a matter or by acquiescing in certain types of participation

[5] For the purposes of the discussion in *McKaskle*, "standby counsel" and "advisory counsel" are interchangeable. *Frantz v. Hazey*, 533 F.3d 724, 728 n.2 (9th Cir. 2008).

[6] The other limit, that "participation by [advisory] counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself," is not implicated where the jury is not present during the actions in question. *McKaskle*, 465 U.S. at 178; *see Frantz*, 533 F.3d at 739 ("Because the conference [defendant] challenges took place out of sight of the jury, we are concerned today with the first, but not the second, of *McKaskle's* two core limitations.").

by counsel, even if the defendant insists that he is not waiving his *Faretta* rights.").

¶24 Correll argues that the court held a conference in chambers with his advisory counsel and the prosecutor, in Correll's absence. Correll states that he was left in the courtroom during this conference, and that after the conference, one of Correll's advisory counsel was removed. He implies that this removal was motivated by some occurrence during the conference that could have biased or prejudiced the court against him. At the February 4, 2011 hearing in question, the State withdrew its notice to seek the death penalty. Because the death penalty was no longer on the table, the court removed one of Correll's advisory counsel. Furthermore, Correll did not object to advisory counsel's actions on his behalf in the *in camera* proceedings either at the hearing on February 4, 2011, or in his motion for modification of sentence and to vacate judgment. Advisory counsel did not participate "over the defendant's objection"; thus, Correll's *Faretta* rights were not eroded. *See McKaskle*, 465 U.S. at 178.

6. New Evidence of Innocence

¶25 Correll next argues that the court should have vacated the judgment because new evidence of actual innocence had come to light. However, the convictions and the underlying facts supporting those convictions have been reviewed and upheld in

prior proceedings and are not presently before this court. In carrying out the resentencing only, the court properly left the convictions intact.

7. Cruel and Unusual Punishment

¶26 Lastly, Correll claims that the consecutive life sentences imposed were cruel and unusual punishment in violation of his Eighth Amendment rights. To determine whether a sentence is cruel and unusual, courts consider "(1) the gravity of the offense; (2) the harshness of the penalty; (3) the sentence imposed on similarly situated defendants in the same jurisdiction; and (4) the sentences imposed for commission of the same crime in other jurisdictions." *State v. Stuck*, 154 Ariz. 16, 24, 739 P.2d 1333, 1341 (App. 1987). "[N]oncapital sentences are subject only to a 'narrow proportionality principle' that prohibits sentences that are 'grossly disproportionate' to the crime." *State v. Berger*, 212 Ariz. 473, 475, ¶ 10, 134 P.3d 378, 380 (2006) (quoting *Ewing v. California*, 538 U.S. 11, 20, 23 (2003)). The court's imposition of consecutive life sentences for Correll's convictions on two counts of first-degree murder does not violate this narrow proportionality principle.

Conclusion

¶27 We have reviewed the record and have found no meritorious grounds for reversal of Correll's new sentences. *See Anders*, 386 U.S. at 744; *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Correll was present or his presence was waived at all critical stages of the proceedings, and he was represented by counsel or had waived his right to counsel. All proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. Accordingly, we affirm the sentences.[7]

[7] Correll has filed a motion requesting an order instructing the state to reply to his supplemental brief and a motion requesting substitution of appellate counsel. We have considered these motions and deny them.

¶28 After the filing of this decision, counsel's obligations in this appeal have ended subject to the following. Counsel need do no more than inform Correll of the status of the appeal and Correll's future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Correll has thirty days from the date of this decision to proceed, if he desires, with a *pro per* motion for reconsideration or petition for review.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
ANN A. SCOTT TIMMER, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge