IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOE LEONARD LAMBRIGHT,
Appellant.

No. 2 CA-CR 2016-0148
Filed September 6, 2017

Appeal from the Superior Court in Pima County
No. CR05669
The Honorable Richard D. Nichols, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Lacey Stover Gard, Chief Counsel, Tucson
By Ginger Jarvis, Assistant Attorney General, Phoenix
Counsel for Appellee

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By Amy Armstrong and Sam Kooistra
Counsel for Appellant

OPINION

Presiding Judge Vásquez authored the opinion of the Court, in which Chief Judge Eckerstrom and Judge Howard[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 In this appeal from his resentencing after his 1982 death sentence was vacated in a federal habeas proceeding, *see Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007) (per curiam), Joe Lambright contends the trial court erred in ordering his life term of imprisonment be served consecutively to the consecutive prison terms imposed in 1982 on his sexual assault and kidnapping convictions, and for refusing to give him credit for all time served since his arrest. We affirm for the reasons stated below.

Facts and Procedural Background[2]

¶2 In 1980, Lambright, his girlfriend Kathy Foreman, and codefendant Robert Smith were driving across the country. *Id.* at 1106. They ended up in Tucson, where they picked up the victim, who was hitchhiking. *Id*. at 1107. Smith sexually assaulted her twice, and after Smith began choking her, Lambright stabbed her multiple times and struck her in the head with a rock, killing her. *Id*. Foreman testified against the two men at trial, and both were convicted of sexual assault, kidnapping, and first-degree murder. *Id*.

[1]The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

[2]Numerous other opinions set forth the facts of this case in greater detail. *See, e.g.*, *Lambright*, 490 F.3d at 1106-07; *Lambright v. Stewart*, 191 F.3d 1181, 1182-83 (9th Cir. 1999) (en banc); *State v. Lambright*, 138 Ariz. 63, 66-67, 673 P.2d 1, 4-5 (1983), *overruled on other grounds by Hedlund v. Sheldon*, 173 Ariz. 143, 145-46, 840 P.2d 1008, 1010-11 (1992).

¶3 After an aggravation/mitigation hearing in May 1982, the trial court sentenced Lambright to death on the first-degree murder conviction, count one of the indictment. In a separate minute entry, the court sentenced him to an aggravated prison term of twenty-one years on count two, kidnapping, giving him 438 days' presentence incarceration credit and an aggravated, twenty-one-year term on count three, sexual assault, specifying that these terms were consecutive. In neither order did the court state whether the death sentence was concurrent with or consecutive to the prison terms.

¶4 In 2007, after years of appellate and post-conviction proceedings, the Ninth Circuit Court of Appeals vacated the death sentence based on defense counsel's ineffectiveness during the penalty phase of the 1982 trial. *Id.* at 1115-28. Upon remand to the trial court, the state again sought the death penalty, and further litigation followed. *See Lambright v. Ryan*, 698 F.3d 808, 811 (9th Cir. 2012). Before the commencement of the 2015 jury trial on the penalty, Lambright filed a motion to preclude the capital sentence based on the delay in obtaining relief, attributing it to the state's aggressive litigation of his claims. Alternatively, he requested that the court preclude the state from introducing the trial testimony of Kathy Foreman, who was deceased. The court denied the motion, and a jury trial was held in November 2015, first on the aggravating circumstances, during which Foreman's trial testimony was read to the jury, and then the penalty phase.

¶5 The jury found the state had proved the aggravating circumstance that Lambright had committed the murder in an especially cruel, heinous, or depraved manner, specifying their unanimous finding in the special verdict that he had committed the murder in an especially cruel manner. However, the jury was unable to decide after the penalty phase of the trial whether to sentence Lambright to death, and the trial court declared a mistrial. The state then withdrew its notice of intent to seek the death penalty, and the court set the case for a resentencing hearing by the trial court for the only term available, life with the possibility of parole after twenty-five years. *See* 1979 Ariz. Sess. Laws, ch. 144, § 1.

¶6 In its sentencing memorandum, the state urged the court to order that the life term be consecutive to the previously imposed and already served prison terms. Based on information provided by a Department of Corrections (DOC) employee, the state specified the incarceration credit Lambright would be entitled to depending on whether the term was consecutive or concurrent. Lambright objected to a consecutive term on various grounds, arguing in his sentencing memorandum that it was not supported by the applicable statutes, specifically, former A.R.S. § 13-708 (1978),[3] because he was no longer being sentenced on multiple offenses, nor was he subject to an undischarged term on other charges. He also argued that denying him credit for all time served would violate the state and federal prohibitions against double jeopardy and that delay in resentencing him violated his due process rights. He made similar arguments at the January 2016 resentencing hearing.

¶7 The trial court resentenced Lambright on January 25, 2016, to a consecutive life term of imprisonment, articulating its reasons for doing so. The court stated it had considered in mitigation Lambright's exemplary conduct while incarcerated. Although it acknowledged his difficult childhood and service in the Vietnam War, it declined to give these factors substantial weight. The court agreed with the jury that the murder had been committed in an especially cruel manner. As additional "aggravating" circumstances, it noted the fear experienced by and emotional trauma inflicted on the victim, the fact that Lambright had acted as an accomplice during the sexual assault, and the overall brutality of the offenses. The court gave Lambright 1,183 days' incarceration credit for the period between October 30, 2012, the date he was discharged from the prison term on count three, and the date of the resentencing. This appeal followed.[4]

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[3]All references to § 13-708 in this opinion are to the version of the statute in effect at the time of the offenses. *See* 1977 Ariz. Sess. Laws, ch. 142, § 57 (added as A.R.S. § 13-904); 1978 Ariz. Sess. Laws, ch. 201, §§ 104, 108 (renumbered as § 13-708).

[4]Lambright filed a timely motion to modify the sentence on March 9, 2016, pursuant to Rule 24.3, Ariz. R. Crim. P., raising essentially the same arguments he had raised in his sentencing

Consecutive Life Term

¶8 On appeal, Lambright raises many of the same arguments he raised below, contending the consecutive life term violates the applicable statutes, as well as due process and the prohibition against double jeopardy under the state and federal constitutions. He also reasserts his prior argument that because the death sentence was concurrent by default under § 13-708, he has, therefore, "been serving time on his conviction under [c]ount [one] since the time of his initial arrest in advance of his 1982 trial, a period of over 35 years, and [he] is entitled to credit for his time served," making him eligible for parole.

¶9 "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, ¶ 5, 26 P.3d 1158, 1160 (App. 2001). We review de novo, however, the legal questions whether consecutive sentences are permissible, *State v. Siddle*, 202 Ariz. 512, ¶ 16, 47 P.3d 1150, 1155 (App. 2002), and whether a defendant is entitled to incarceration credit, *see State v. Bomar*, 199 Ariz. 472, ¶ 5, 19 P.3d 613, 616 (App. 2001). We also review de novo legal questions involving the

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memorandum and at sentencing. The trial court denied the motion on April 4, 2016. Not only does it appear the court lacked jurisdiction to rule on the motion because the appeal had already been perfected, but Lambright did not file a separate or amended notice of appeal. *See* Ariz. R. Crim. P. 24.3; *see also* Ariz. R. Crim. P. 31.11 (perfection of appeal); *State v. Wynn*, 114 Ariz. 561, 563, 562 P.2d 734, 736 (App. 1977) (ruling on Rule 24.3 motion "separately appealable order[]"). Moreover, given that the court did not alter the sentence, its ruling did not affect a substantial right, and we lack jurisdiction to address it under A.R.S. § 13-4033(A)(3). *See State v. Jimenez*, 188 Ariz. 342, 344-45, 935 P.2d 920, 922-23 (App. 1996). Our lack of jurisdiction of the court's denial of the Rule 24.3 motion is of no moment, however, given that we address those very same issues in this appeal, as they were preserved below.

interpretation and application of statutes. *State v. Farnsworth*, 241 Ariz. 486, ¶ 13, 389 P.3d 88, 91 (App. 2017).

¶10 "[S]tatutory provisions are to be read in the context of related provisions and of the overall statutory scheme. The goal is to achieve consistency among the related statutes." *State v. Reyes*, 238 Ariz. 304, ¶ 14, 360 P.3d 100, 104 (App. 2015), *quoting Goulder v. Ariz. Dep't of Transp., Motor Vehicle Div.*, 177 Ariz. 414, 416, 868 P.2d 997, 999 (App. 1993). Additionally, when interpreting a statute, we must give effect to the legislature's intent, which is best reflected in the statute's plain language. *See State v. Estrada*, 201 Ariz. 247, ¶¶ 16-17, 34 P.3d 356, 359-60 (2001). We do not look beyond the plain language of the statute unless it is unclear or the result of its application would be absurd. *See id*.

¶11 At the time Lambright committed the offenses, § 13-708 provided as follows:

> If multiple sentences of imprisonment are imposed on a person at the same time, or when a person who is subject to any undischarged term of imprisonment imposed at a previous time is sentenced to an additional term of imprisonment, the sentence or sentences imposed by the court shall run concurrently unless the court expressly directs otherwise, in which case the court shall set forth on the record the reason for its sentence.[5]

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[5]Revised and renumbered, *see* 1986 Ariz. Sess. Laws, ch. 300, § 1; 2008 Ariz. Sess. Laws, ch. 301, § 27(A), the statute now provides that multiple prison terms shall be consecutive "unless the court expressly directs otherwise" and states its reasons "on the record." A.R.S. § 13-711(A). Because the trial court applied the former version of the statute and specified its reasons for imposing a consecutive life term, we assume, without deciding, the court correctly applied that statute rather than the amended version. *But see Souch v. Schaivo*, 289

¶12 Section 13-712(C), A.R.S.,[6] provides:

> If a sentence of imprisonment is vacated and a new sentence is imposed on the defendant for the same offense, the new sentence is calculated as if it had commenced at the time the vacated sentence was imposed, and all time served under the vacated sentence shall be credited against the new sentence.

Lambright relies on this statute for the proposition that he is entitled to credit for all time served, as well as *North Carolina v. Pearce*, 395 U.S. 711, 718-19 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 798-99, 802-03 (1989), for the proposition that double jeopardy and due process principles require it. He also argues that because the trial court had not specified the death sentence was consecutive, under § 13-708, it was presumptively concurrent and he had therefore been serving time for the murder conviction while he served the consecutive terms for sexual assault and kidnapping.

¶13 Rejecting the latter argument at sentencing, as well as the analogy to presentence incarceration credit, the trial court stated, "You can't get credit on a death sentence. It's not a term of years for which time served can be imposed." The court later added, "Once the death penalty has been converted to a life sentence, the Court must

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F.3d 616, 621-22 (9th Cir. 2002) (finding application of amended version of § 13-708 to offenses committed before amendment did not violate prohibition of Ex Post Facto Clause because both versions merely created default as to concurrent or consecutive). It makes no difference here because (1) under both, the trial court has the discretion to impose concurrent or consecutive terms, *id*., and (2) as discussed below, the resentencing rendered moot whether the death sentence was presumptively concurrent or consecutive.

[6] At the time of Lambright's offenses, the provision was numbered as A.R.S. § 13-709(C). *See* 2008 Ariz. Sess. Laws, ch. 301, § 27(B). Because the statutory text has not changed, we cite the current version.

make a determination as to whether that sentence is concurrent with or consecutive to any other sentences imposed."

¶14 Citing *State v. Ovante*, 231 Ariz. 180, ¶¶ 37-39, 291 P.3d 974, 982 (2013), and other authorities, Lambright maintains the trial court was mistaken, asserting that, "[i]n capital cases in Arizona, courts determine at the outset whether death sentences . . . run consecutively or concurrently with other sentences." But these cases merely provide examples in which trial courts specified at sentencing whether a death sentence was concurrent or consecutive. *See, e.g.*, *State v. Anderson*, 210 Ariz. 327, ¶ 12, 111 P.3d 369, 377 (2005) (sentencing defendant to prison terms on conspiracy and armed robbery, consecutive to each other and death sentences); *see also State v. Walton*, 159 Ariz. 571, 591, 769 P.2d 1017, 1037 (1989) (approving imposition of concurrent prison terms on non-capital offenses to be served consecutively to death sentence). Although a prison term was, by default, regarded as concurrent under former § 13-708 if a trial court failed to designate it as concurrent or consecutive, *see State v. Fillmore*, 187 Ariz. 174, 184, 927 P.2d 1303, 1313 (App. 1996), Lambright has cited no authority in which an Arizona appellate court has relied on § 13-708 to determine whether a death sentence was to be served concurrently with or consecutively to other sentences imposed.

¶15 Indeed, we have found authority suggesting no designation is necessary for a death sentence, from which we infer no presumption arises by default. Vacating the defendant's death sentence in *State v. Prince*, our supreme court stated with implicit approval that "[t]he trial court [had] imposed the death sentence and, therefore, did not consider whether defendant's sentence on the murder charge should be concurrent with or consecutive to his earlier sentence on a drug charge." 160 Ariz. 268, 277, 772 P.2d 1121, 1130 (1989). The court remanded the case so that the trial court could decide whether the life term should be concurrent or consecutive. *Id.*

¶16 Moreover, we disagree with Lambright that "the unambiguous terms of former § 13-708" made his death sentence presumptively concurrent. The plain language states otherwise. The statute only applied to "sentences of imprisonment"; a death sentence

is not a sentence of imprisonment. Thus, although courts have the discretion to order that a death sentence be concurrent or consecutive, the court's failure to specify one or the other does not permit the inference that his sentence of death was concurrent.

¶17 Turning to § 13-712(C), although the first sentence refers to "a sentence of imprisonment," and a death sentence is not a prison term, Lambright is correct that our supreme court and this court have construed this provision to include a vacated death sentence. *See State v. Gulbrandson*, 184 Ariz. 46, 56 n.2, 906 P.2d 579, 589 n.2 (1995); *Tittle v. State (Tittle II)*, 169 Ariz. 8, 9, 816 P.2d 267, 268 (App. 1991). As discussed below, however, *Gulbrandson* and *Tittle II* are not only distinguishable, but there are potential double jeopardy implications that justify a more expansive interpretation of § 13-712(C) than § 13-708. More importantly, these cases do not stand for the proposition that a defendant is entitled to incarceration credit on a subsequently imposed consecutive prison term.

¶18 Once the death sentence was vacated, the trial court "was sentencing [Lambright] anew." *State v. Thomas*, 142 Ariz. 201, 204, 688 P.2d 1093, 1096 (App. 1984). The court then had the discretion to impose the life term consecutively to previously imposed terms, constrained only by statute, case law, and constitutional principles when choosing between a concurrent or consecutive term. Thus, in *State v. Wallace*, 229 Ariz. 155, ¶ 39, 272 P.3d 1046, 1054 (2012), our supreme court vacated two death sentences for the murders of two victims, imposed two life terms of imprisonment, and ordered that they be served consecutively to the life term the court imposed for the murder of a third victim, after vacating that death sentence in a prior decision.

¶19 In resentencing Lambright in accordance with § 13-708, a consecutive term was permissible. *Cf. State v. Johnson*, 147 Ariz. 395, 401, 710 P.2d 1050, 1056 (1985) (vacating death sentence and remanding for resentencing, directing trial court to impose life term with possibility of parole after twenty-five years, to be served consecutively to sentence previously imposed for attempted murder). In deciding whether Lambright was entitled to any credit on the life term for time served on the other convictions, we must view the

incarceration credit afforded under § 13-712(C) together with former § 13-708 and limitations of such credit on a consecutive prison term.

¶20 Section 13-712(C) "is complementary to and is an extension of" the other subsections of that statute. *State v. Cuen*, 158 Ariz. 86, 88, 761 P.2d 160, 162 (App. 1988). Section 13-712(B) pertains to presentence incarceration credit, whereas § 13-712(C) pertains to credit for time served after sentencing. Just as a person is entitled to presentence credit for time spent in custody "pursuant to an offense" before sentencing, § 13-712(B), a resentenced defendant is entitled to credit for "time served under the vacated sentence," § 13-712(C). If the murder conviction had been the sole reason for Lambright's incarceration while he challenged the death sentence, he would necessarily have been serving that time "under the vacated sentence." § 13-712(C). But Lambright served that time on counts two and three. And because the trial court chose to make the life term consecutive, the time Lambright had served from his sentencing in 1982 until he was discharged from those terms in 2012 was not, in fact, time served "under the vacated sentence" as contemplated by § 13-712(C). "The service of a sentence made consecutive to another does not begin until the other has been satisfied. . . . [T]he subsequent sentence commences at the expiration of the prior sentence or sentences." *Mileham v. Ariz. Bd. of Pardons & Paroles*, 110 Ariz. 470, 472, 520 P.2d 840, 842 (1974). Lambright's sentence on count three expired on October 30, 2012, and it was not until then that the sole reason for his continued incarceration was the murder conviction.

¶21 "When consecutive sentences are imposed, a defendant is not entitled to presentence incarceration credit on more than one of those sentences, even if the defendant was in custody pursuant to *all* of the underlying charges prior to trial." *State v. McClure*, 189 Ariz. 55, 57, 938 P.2d 104, 106 (App. 1997). A defendant is not entitled to "double credit" for time served. *State v. Whitney*, 159 Ariz. 476, 487, 768 P.2d 638, 649 (1989). Similarly, a resentenced defendant is not entitled to credit for time served under § 13-712(C) when consecutive terms are imposed. *Cuen*, 158 Ariz. at 88, 761 P.2d at 162. As the court held in *Cuen*, although the statute

> requires that credit for incarceration pursuant to a vacated sentence be given against a new sentence imposed after a former sentence was vacated, once such a credit is given, the statute does not require, and indeed, multiple credit should not be given against later consecutive sentences pertaining to the convicted person.

Id.

¶22 We also reject Lambright's related due process and double jeopardy claims. He argues, as he did below, that by imposing consecutive terms and refusing to credit him for all time served, the trial court punished him twice for the same offense, thereby violating the prohibition against double jeopardy. In *Pearce*, 395 U.S. at 718-19, the Court held that the prohibition against double punishment "requires that punishment already exacted must be fully 'credited.'" *See also State v. Johnson*, 105 Ariz. 21, 22-23, 458 P.2d 955, 956-57 (1969) (relying on *Pearce* and finding defendant convicted and sentenced after first conviction and sentence reversed on appeal is entitled to credit for time served under original sentence for same offense).

¶23 Section 13-712 essentially codifies that principle and safeguards against any double jeopardy violation. *See State v. Fragozo*, 197 Ariz. 220, ¶ 4, 3 P.3d 1140, 1141 (App. 2000) (discussing *Pearce* and double jeopardy clause in acknowledging statute entitled defendant to presentence incarceration credit for time in custody pursuant to offense). But, as we conclude above, Lambright was not serving time in prison on the death sentence until October 30, 2012, after his other sentences had been discharged. He has not, therefore, been deprived of credit for punishment "already exacted" on the murder conviction, having been given credit from the time he was discharged from prior prison terms. *Pearce*, 395 U.S. at 718-19; *see Knapp v. Cardwell*, 667 F.2d 1253, 1263 (9th Cir. 1982) (acknowledging *Pearce* but specifying

defendant entitled to credit on prison term imposed after death sentence overturned if defendant had begun to serve sentence).[7]

¶24 As we previously stated, Lambright relies on *Tittle II* and *Gulbrandson* for the proposition that a defendant whose death sentence has been vacated is entitled to credit upon resentencing to a life term for the period spent on death row. First, because we have rejected Lambright's argument that he was presumptively serving a concurrent death sentence, we necessarily reject his claim that under these authorities he was serving all of this time under the vacated sentence. Additionally, neither *Tittle II* nor *Gulbrandson* addresses whether a defendant is entitled to such credit where, as here, a defendant was serving prison terms during that period of incarceration and the subsequently imposed life term is consecutive to those terms.

¶25 In *Tittle II*, this court held that the defendant, whose conviction and death sentence for first-degree murder had been reversed and remanded, *State v. Tittle* (*Tittle I*), 147 Ariz. 339, 710 P.2d 449 (1985), was entitled to credit on the prison term imposed after he was subsequently convicted of second-degree murder, for the time he had served while on death row. *Tittle II*, 169 Ariz. at 8-9, 816 P.2d at

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[7]Lambright suggests obliquely, but does not squarely argue, that because he was on death row during this period he is entitled to credit under principles of due process and double jeopardy. But the gravamen of his argument is that his incarceration during this time entitles him to credit for time served, not the nature of it as a death row inmate. We recognize that the solitary nature of confinement on Arizona's death row can be more burdensome than confinement in other prison settings, *see Comer v. Stewart*, 215 F.3d 910, 915-16, 918 (9th Cir. 2000) (recognizing that conditions on Arizona's death row could coerce such inmates into waiving their appeals). However, Lambright has not developed how this should affect our analysis of his double jeopardy and due process arguments. Nor can he claim, as in *Tittle II*, that he lost any good time credits towards his other sentences because he was a death row inmate. We therefore do not address this argument further.

267-68. But there is no mention in *Tittle II* of the prison term the court had imposed on the defendant's armed robbery conviction and the implications of that sentence in terms of the credit to be applied for time served. In *Tittle I*, however, our supreme court had specified that the trial court had ordered the twenty-one-year term for armed robbery to be served consecutively to the death sentence. 147 Ariz. at 340, 710 P.2d at 450. Because the death sentence had preceded the twenty-one-year robbery sentence, any credit for time served, including the potential good-time credits at issue in the case,[8] would apply to the life term that replaced the death sentence.

¶26 In *Gulbrandson*, the trial court had sentenced the defendant to death but had split the 652 days' credit for presentence incarceration between the death sentence and a five-year term for theft, specifying the terms were consecutive. 184 Ariz. at 55-56, 906 P.2d at 588-89. In a footnote, our supreme court commented, "The trial judge undoubtedly credited part of the incarceration time against the death sentence on the theory that the death sentence could at some future time be reduced to a life sentence without possibility of release until the completion of service of 25 years." *Id.* at 56 n.2, 906 P.2d at 589 n.2. The court cited *Tittle II* for the proposition that a defendant is entitled to credit for the time spent on death row upon resentencing to a prison term. *Id.* Significantly, however, the court also cited *Cuen*, 158 Ariz. at 88, 761 P.2d at 162, for the proposition that, although § 13-712(C) requires courts to give a defendant credit on a new sentence for time spent in prison pursuant to the vacated sentence, a defendant is not entitled to double credit for presentence incarceration when a consecutive term is imposed. *Gulbrandson*, 184

[8]The primary issue in *Tittle II* was whether, in addition to the time he had spent on death row, Tittle was also entitled to 459 days of "good time credit he would have received had he initially been convicted of second degree murder and fulfilled the [Department of Corrections] requirements for eligibility to receive good time credit." 169 Ariz. at 9, 816 P.2d at 268. This court rejected the state's argument that, as to the good-time credits, § 13-712(C) either did not apply or had been complied with because the defendant had received credit for all time he had served under the vacated sentence and the statute did not require a retroactive award of good-time credits as well. *Id.*

Ariz. at 56 n.2, 906 P.2d at 589 n.2. *Gulbrandson* therefore suggests that although a defendant is entitled to the credit for time spent incarcerated "pursuant to a vacated sentence" when consecutive terms are imposed, he is not entitled to such credit unless and until the first sentence has been served. *See id.* It supports our conclusion here.

Consideration of Foreman's Testimony at Resentencing

¶27 As previously stated, Foreman testified against Lambright and Smith during the 1982 trial. Lambright argues the trial court erred in admitting, over his objection, Foreman's 1982 testimony at the aggravation portion of the 2015 jury trial on aggravating circumstances and penalty. He also contends Foreman's testimony was unreliable because she was unavailable for cross-examination for the resentencing and because the Ninth Circuit Court of Appeals found defense counsel had been ineffective during the 1982 trial.

¶28 Because the trial court declared a mistrial when the jury could not reach a verdict on whether to sentence Lambright to death, whether the trial court had erred in admitting Foreman's testimony during the aggravation phase of that resentencing trial is moot. *See State v. Frederick*, 129 Ariz. 269, 271, 630 P.2d 565, 567 (App. 1981) (finding alleged trial errors moot where jury did not find defendant guilty on those specific counts and plea agreement terminated case); *State v. Laughter*, 128 Ariz. 264, 268, 625 P.2d 327, 331 (App. 1980) (finding alleged sentencing error moot in light of grant of new trial). Additionally, Lambright did not object to the court's consideration of Foreman's trial testimony for purposes of the resentencing hearing before the court, nor would he have had any basis for doing so. The rules regarding the admissibility of evidence at trial do not apply at a sentencing hearing such as the one that resulted in the consecutive life term. *See State v. Conn*, 137 Ariz. 148, 149-50, 669 P.2d 581, 582-83 (1983).

¶29 Additionally, only one sentence was available at that point, a life term with parole eligibility after twenty-five years. *See* 1979 Ariz. Sess. Laws, ch. 144, § 1. There was no aggravated term that could have been imposed based on aggravating circumstances found

by the jury. The Supreme Court's decision in *Oregon v. Ice*, 555 U.S. 160 (2009), is instructive here. There the Court acknowledged that most states "entrust to judges' unfettered discretion" whether to impose consecutive or concurrent prison terms. *Id*. at 163. The Court held that "the Sixth Amendment, as construed" in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), does not apply in this context and does not inhibit state legislatures from allowing judges, rather than juries, to find facts justifying a consecutive prison term. *Ice*, 555 U.S. at 163-64. And, § 13-708 did not require a court to make specific findings before imposing consecutive instead of concurrent prison terms, the default under the statute. *See State v. Day*, 148 Ariz. 490, 498, 715 P.2d 743, 751 (1986), *rejected on other grounds by State v. Ives*, 187 Ariz. 102, 107-08, 927 P.2d 762, 767-68 (1996). Section 13-708 only required the court to state on the record its reasons for imposing a consecutive rather than concurrent term, and it did so. *See id.*

¶30 Whether to order consecutive terms was then, as it is now, for the trial court to determine in the exercise of its sentencing discretion. *See State v. Girdler*, 138 Ariz. 482, 489, 675 P.2d 1301, 1308 (1983); *Ward*, 200 Ariz. 387, ¶¶ 4-5, 26 P.3d at 1159-60. This court will not disturb the sentence unless the court's decision was arbitrary and capricious and therefore an abuse of discretion. *See State v. Meeker*, 143 Ariz. 256, 266, 693 P.2d 911, 921 (1984); *see also State v. Anzivino*, 148 Ariz. 593, 597-98, 716 P.2d 50, 54-55 (App. 1985).

¶31 We recognize that "the relaxation in the traditional evidentiary rules and procedures applicable to the guilt-determining stage during the penalty-determining stage is not unlimited" and that "[t]he sentencing process . . . must satisfy the requirements of the Due Process Clause." *Conn*, 137 Ariz. at 150, 669 P.2d at 583. Lambright has not persuaded us, however, that there was a due process violation here. The trial court was free to consider any reliable, relevant evidence, including hearsay. *See State v. McGill*, 213 Ariz. 147, ¶ 56, 140 P.3d 930, 943 (2006); *see also State v. Gordon*, 125 Ariz. 425, 428, 610 P.2d 59, 62 (1980) (finding trial court's familiarity with presentence report and stated reasons justifying consecutive prison terms sufficient to uphold sentence). We reject Lambright's claims that due process and his Sixth Amendment rights, as articulated in *Crawford v.*

Washington, 541 U.S. 36 (2004), were violated by the court's apparent consideration of Foreman's testimony.

¶32 For similar reasons, we reject Lambright's related claim that the testimony was not only inadmissible hearsay, but it was unreliable because Lambright's counsel was found to have been ineffective. Again, this relates to the admissibility of Foreman's testimony. Moreover, as the state points out, the Ninth Circuit found Lambright's trial counsel had been ineffective during the penalty phase of the trial, but not the guilt phase, which is when Lambright cross-examined Foreman. *Lambright v. Stewart*, 5 F. App'x 712, 713 (9th Cir. 2001); *see also Schriro*, 490 F.3d at 1106.

¶33 Relying on *Motes v. United States*, 178 U.S. 458 (1900), Lambright also argues Foreman's prior testimony should have been excluded because she was only "unavailable" for purposes of Rule 804(b)(1), Ariz. R. Evid., because the state had engaged in protracted litigation in federal court, resulting in a delay of more than thirty years before he obtained relief from the death sentence and was resentenced. *See Motes*, 178 U.S. at 474 (prior testimony may not be introduced when witness unavailable due to negligence of prosecution). Overruling Lambright's objection before the aggravation portion of the 2015 jury trial, the trial court found, as it had in previously denying Lambright's motion to preclude the capital sentence, "the State's pleadings were not frivolous, unconstitutional or filed in bad faith but were a valid exercise of its role in the adversarial system." The court noted the state had prevailed on most of its claims, adding, "To grant relief absent a showing of dilatory or abusive practices on the part of the State would undermine the foundation of the justice system, wherein all parties are afforded an opportunity to pursue their claims consistent with applicable statutes, rules of procedure, and appellate case law." And, again, none of this relates to the resentencing that ultimately took place before the trial court, but relates instead to evidence admitted in the jury proceeding that ended in a mistrial. In any event, we find no abuse of discretion.

¶34 We also reject Lambright's argument that, even if the trial court had the authority to impose a consecutive prison term, it abused that discretion. He contends the court's explanation for doing so "was

remarkably brief" and the court did not give the appropriate weight to mitigation evidence, including information about his dysfunctional childhood, his military service, and the impact they had on his personality. He argues the court gave far too much weight to the offenses themselves, finding them especially cruel based on Foreman's "questionable testimony."

¶35 It was for the trial court to determine, in the exercise of its discretion, whether to impose a consecutive life term and, under § 13-708, it was only required to set forth on the record its reasons for doing so. *See State v. Girdler*, 138 Ariz. 482, 489, 675 P.2d 1301, 1308 (1983). Lambright has cited no support for his suggestion that he was entitled to a more lengthy explanation for the court's decision than it gave, and we have found none. Merely listing the reasons in a summary fashion would have sufficed. *See, e.g.*, *Meeker*, 143 Ariz. at 265-66, 693 P.2d at 920-21; *State v. Robinson*, 153 Ariz. 188, 189, 735 P.2d 798, 799 (App. 1986). Moreover, the court's reasons were neither arbitrary nor capricious. *See Meeker*, 143 Ariz. at 266, 693 P.2d at 921. Rather, the record shows the court considered the relevant information that was properly before it, including Foreman's trial testimony. It expressly found in mitigation Lambright's "generally exemplary conduct" while in prison. But, exercising its broad sentencing discretion, it declined to give "substantial" or "significant" weight to his difficult childhood and Vietnam experience. That was the court's prerogative, and we have no basis for interfering. *See Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d at 1160 (reviewing court may find abuse of discretion when trial court's sentencing decision is arbitrary or capricious, or court fails to adequately investigate facts relevant to sentencing).

"Extreme Delay"

¶36 Lambright contends the "extreme delay" in resentencing violated his rights to due process and a fair trial. He does not argue his speedy trial rights were violated; rather, in an argument that overlaps his objection to the admission of Foreman's testimony pursuant to Rule 804(b)(1), he maintains his resentencing proceedings were fundamentally unfair because Foreman was deceased and unavailable for cross-examination. He speculates such

cross-examination could have led the trial court to impose a concurrent life sentence. In addition to the fact that this argument again relates primarily to the admission of Foreman's trial testimony at the aggravation jury trial, he cites no authority for the proposition that post-conviction relief and habeas proceedings defended in good faith can result in a denial of due process simply because they take a long time. We need not address this argument further.

Disposition

¶37 We affirm Lambright's life term of imprisonment, imposed consecutively to the terms on his sexual assault and kidnapping convictions, and the trial court's determination that Lambright was entitled to credit on that sentence from his October 2012 discharge on the second of those previously served terms.[9]

[9]We deny Lambright's request for oral argument made only in his reply brief. *See* Ariz. R. Crim. P. 31.14(a) (request for oral argument must be filed as "separate instrument").