



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**FUSHEK v. STATE**

1 CA-CV 06-0598 (Opinion)

Published at: 215 Ariz. 274, 276, 159 P.3d 584, 586 (App.2007);

Supreme Court Case: CV-07-0251-PR

**PARTIES AND COUNSEL:**

*Petitioner:* Fushek is represented by Thomas Hoidal.

*Respondents:* Diane Gunnels Rowley, Assistant Maricopa County Attorney, represents the State.

**FACTS:**

The State charged Fushek, a Catholic priest, in justice court with three counts of assault, five counts of contributing to the delinquency of a minor, and two counts of indecent exposure, all allegedly arising out of his oversight of a youth organization called Life Teen between 1984 and 1993. The State filed an allegation of sexual motivation pursuant to A.R.S. §13-118 with respect to all of the misdemeanor charges. The State later dismissed two assault counts and an indecent exposure count.

The justice court ruled that the remaining indecent exposure count would be tried to a jury, but the remaining assault and contributing to the delinquency of a minor counts were not jury-eligible. The court declined to sever the offenses.

Fushek brought a special action in superior court. Judge Rayes held that the crime of contributing to the delinquency has no common law antecedent. Nevertheless, the Judge granted relief, ruling that the serious consequences of sex offender registration required a jury trial on all charges. The judge characterized sex offender registration as a “modern-day scarlet letter” constituting an additional, severe, direct statutory consequence reflecting legislative judgment that the offense is serious. He noted “A person who is required to register as a sex offender is subject to numerous burdens, including registration with local law enforcement for at least ten years, notifying law enforcement of any change of address, posting the offender’s name, address, and photo on the sex offender website, as well as notice to the community.” The judge concluded that the sex offender label, unlike the mere conviction of a misdemeanor, “changes the offender’s status and acceptance in society” and such sex offender status is “life-altering.” The State appealed, conceding that Fushek is entitled to a jury trial on the indecent exposure count, but maintaining that he is not entitled to have a jury determine his guilt on the remaining counts.

The court of appeals applied *Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147 (2005), wherein this Court explained that Article 2, Section 23 of the Arizona Constitution, “preserves the right to jury trial as it existed at the time Arizona adopted its constitution.” 209 Ariz. 416, 419, ¶ 9, 104 P.3d 147, 150 (2005). In *Derendal*, this Court modified the standard for determining whether a

misdemeanor qualifies as jury eligible and developed a two-step inquiry. *Id.* at 425, ¶¶ 36-37, 104 P.3d at 156. First, Article 2, Section 23, requires that an offense be tried to a jury if it has a common law antecedent that guaranteed the right to trial by jury at the time of Arizona’s statehood. *Id.* at ¶36. The common law offense and the offense charged must share “substantially similar elements.” *Id.*

Second, if there is no common law antecedent, the court must determine whether the offense is “serious” within the meaning of Article 2, Section 24, of the Arizona Constitution. *Id.* at ¶37. In that regard, the court will presume that the offense is petty if punishable by no more than six months’ incarceration, but the defendant may rebut the presumption with proof that the offense carries “additional severe, direct, uniformly applied, statutory consequences that reflect the legislature’s judgment that the offense is serious.” *Id.* The collateral consequences must “approximate in severity the loss of liberty that a prison term entails.” *Id.* at 423, ¶ 24, 104 P.3d at 154.

The court noted the statutory crimes of assault and contributing to the delinquency of a minor did not exist at common law and therefore do not satisfy the first prong of *Derendal*. *Op.* at ¶9 (applying authorities from other states). The court rejected Fushek’s alternative argument that contributing to the delinquency of a minor and assault counts are jury-eligible based on the special allegation that they were committed with sexual motivation. §13-118. If such a finding is made, the court may require the defendant to register as a sex offender under §13-3821(C). Fushek asserts such sex offender registration imposes additional consequences that satisfy *Derendal*’s seriousness test.

The court noted that “[T]his element of the *Derendal* analysis is concerned with only those consequences that would apply to all defendants based on the statute’s language.” *See Ottaway v. Smith*, 210 Ariz. 490, 495 ¶16, 113 P.2d 1247, 1252 (App. 2005). The court reasoned that because the sex offender registration consequence is discretionary with the court, it is not “uniformly applied” and therefore the second *Derendal* requirement is not satisfied. Opinion ¶¶ 15-16. The court relied on *In re Sean M.*, 189 Ariz. 323, 324, 942 P.2d 482, 483 (App.1997) (held that the juvenile court did not abuse discretion in ordering a juvenile to register as a sex offender). Therefore, the court remanded for a bench trial. Fushek seeks review and asks this Court to affirm the trial court order that the case be tried to a jury.

**ISSUE PRESENTED FOR REVIEW:**

“Did the superior court correctly determine that Fushek was entitled to a jury trial on all counts because sex offender registration may be ordered?”

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