AZ JUDICIAL CONFERENCE

Criminal Law Update

CRIMINAL LAW UPDATE

Criminal Law Year in Review 2025-2026

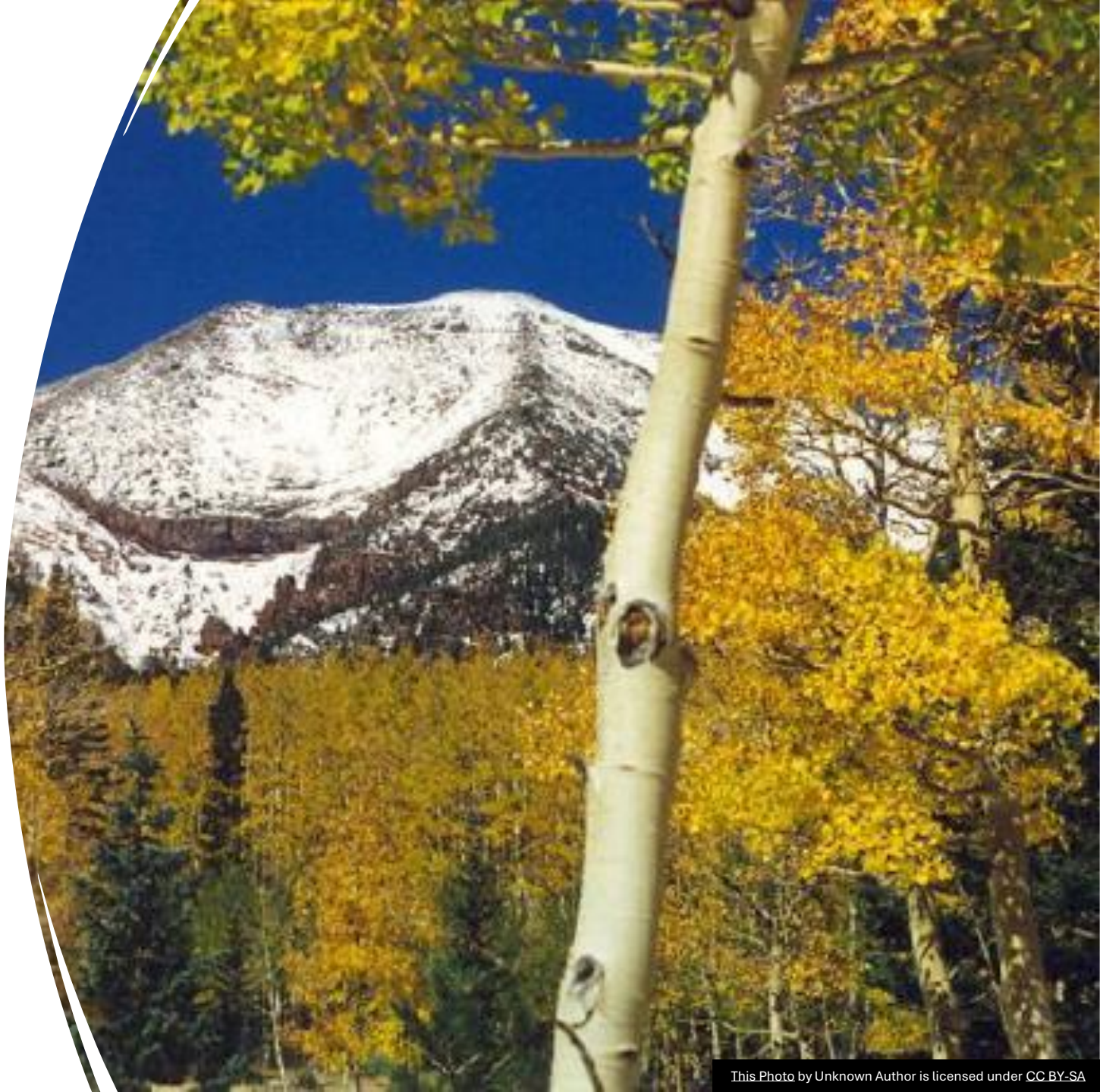
Judge Krista Carman, Superior Court of Arizona in Yavapai County
Judge Lacey Gard, Div. Two, Arizona Court of Appeals
Judge Jennifer E. Green, Superior Court of Arizona in Maricopa County

At approximately 12,600 feet, Humphreys Peak is the highest natural point in Arizona. What county of Arizona is it located in?

A) Cochise

B) Gila

C) Coconino



Pretrial
Grand Jury
Charging

State v. Lucas (Div. 1, 3/19/2026)

"Picking a jury is more art than science."

Trial court used written questionnaires, defense counsel wanted to ask questions broadly of whole panel, trial court declined.

Rule 18.5(d) requires the trial court to conduct oral voir dire with the whole panel or subsets of jurors.

Written questionnaires are no substitute for oral vire dire

Court of Appeals found error was not harmless.

Carson v. Gentry (Arizona Supreme Court, 8/20/2025)

- Must the State obtain judicial approval before refiling criminal charges against defendant previously found not competent and not restorable (NCNR)?
- Court of Appeals case—*Johnson v. Hartsell*—held that approval is required
- Arizona Supreme Court overrules *Johnson* in part
  - State not required to rebut presumption of incompetency before refiling
  - Separation of powers precludes judiciary from intruding in charging decision

Carson v. Gentry (Continued)

- Court adopts test from *Rider v. Garcia*: State may refile charges based on a reasonable belief that defendant's competency may have been restored, without first rebutting presumption of incompetency
- Once State refiles, it must inform court and defense of prior NCNR determination and basis for belief that condition may have changed
- Additional holdings:
  - Active criminal case required for court to grant dangerousness hearing under A.R.S. § 13-4517(A)(4) and State may rely on NCNR finding from previously dismissed case involving same charges
  - Section 13-4517(A)(4) permits State to file dangerousness allegation based on NCNR determination predating effective date (January 1, 2024)

Soto v. State (Div. 1, 3/19/2026)

- Grand Jury remand issue – Special Action
- Prosecutor questioned case agent with all narrative, closed ended questions
- Court found the questions, not the testimony, told the entire story to the grand jury
- State also failed to offer known exculpatory evidence related to Soto's justification defense
- Case was remanded to Superior Court to remand to grand jury

Holland v. State (Div. 2, 7/28/2025)

Special Action – Defendant charged with 2nd Degree Murder, by information, before he waived or received a preliminary hearing

An information filed before a defendant waives or receives a preliminary hearing is untimely, and subject to dismissal under Rule 16.4(b), Ariz. R. Crim. P.

Case was reversed and remanded to the Superior Court to dismiss the case without prejudice.

Navarro-Figueroa v. State (Div 2, 8/25/2025)

- Defendant requested probable cause determination on sentence enhancement under Rule 13.5(a), Ariz. R. Crim. P.
- Trial court deferred ruling on motion until conclusion of State's case-in-chief; Defendant filed special action
- Court of Appeals held that Rule 13.5(a) and *Chronis v. Steinle* allow defendant to request probable-cause determination on non-capital sentence enhancement
- Trial court may not defer this determination until after State's case-in-chief but must instead make it before trial
- PR denied by Arizona Supreme Court with two votes to grant
- Rule change petition filed by Attorney General (No. R-26-0028) to clarify that *Chronis* procedure does not apply to non-capital cases

- Speedway Boulevard was once labeled by Life Magazine as the ugliest street in America. It was named Speedway when racing enthusiasts in the '20s and '30s used the dirt road to test their skills. What Arizona city are you traveling through?

- A) Phoenix
- B Tucson
- C) Globe

Jury Issues

State v. Romero

(Arizona Supreme Court , 5/15/2026)

- **No mental state required for prosecutorial error—focus is on whether error occurred and whether it affected the proceeding's fairness**
- **Cumulative prosecutorial error + fundamental error**
  - **Fundamental error requires an error + that is fundamental in nature + prejudice (in most cases)**
  - **Test for whether error is fundamental in nature under *State v. Escalante* requires defendant to establish either that "(1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, or (3) the error was so egregious that he could not possibly have received a fair trial" (prong three requires no additional showing of prejudice)**

State v. Romero

(Continued)

- **Cumulative error claim may be raised under any of the three prongs**
- **Under prong three, which Romero invoked, a defendant must show that the cumulative errors "so profoundly distort[ed] the trial that injustice is obvious without the need to further consider prejudice"**
- **Court should not view facts in light most favorable to State as with other appellate issues; instead, the inquiry is objective and based on the totality of the record**
- **Prosecutor erred but errors, considered cumulatively, did not meet the profound-distortion standard**

State v. Brown (Div. 2, 5/8/2026)

- Vehicular Homicide in Bisbee
- **Juror Issue**: "community service officer" in police dep't. may serve on a jury if employed by different agency than one that investigated case, even if they know some of the investigators who worked on the case. *State v. Eddington*
- Constitutional right to trial by impartial jury.
- **Sentencing issue**: at sentencing, trial judge said it wanted Defendant to accept responsibility and show some remorse.
- Court of Appeals found error b/c Def. allowed to maintain innocence.

State v. Guevara-Enriquez (Div 2, 7/25/2025)

- **Does A.R.S. 21-211, as construed in *State v. Eddington*, require a juror's disqualification because her husband was employed as a correctional officer with the Pima County Sheriff's Department, which investigated the case?**
  - **Court of Appeals declines to extend *Eddington* to this factual scenario**
  - **Court questions whether *Eddington's* holding would apply to an agency employee not working in criminal investigations, but the record here was insufficient to resolve that question**
  - **Even assuming juror's husband had an interest in the case's outcome, that interest does not necessarily extend to the juror and does not require automatic disqualification**
- **The record further supported the trial court's implicit finding that the juror could be fair and impartial as a constitutional matter**

State v. Hernandez (Div. 1, 3/5/2026)

- Rape Shield Law – Special Action
- The Arizona **Rape Shield** Law, A.R.S. § 13-1421, generally prohibits the admission of evidence of the victim's prior sexual conduct at a trial for a sex offense. The statute contains a number of exceptions, however, including one for "[e]vidence of specific instances of sexual activity showing the source or origin of … trauma."
- Does this provision include mental or emotional trauma?
- NO – it is limited to physical trauma

State v. Vallejo (Div. 2, 6/18/2025)

- Voluntary absence at trial
- Day 2 of trial – Defendant did not like the clothing provided by his counsel and advised he would not be attending court that day
- The Court did not abuse its discretion in finding the defendant was voluntarily absenting himself from trial based on the statements he made to the court outside the presence of the jury

Which Arizona county is larger in land area than the entire state of West Virginia?

A) Apache

B) Coconino

C) Greenlee

State v. Aguirre (Div. 1, 9/9/2025)

When trial court fails to make a finding on manifest necessity in granting mistrial, court of appeals will independently review the record to determine whether manifest necessity existed.

Robbins v. State
(Div. 1, 12/31/2025)

- Husband and Wife co-defendants
- Wife's counsel moved for mistrial after prosecutor played portion of recording referring to precluded evidence; Husband's counsel joined in "sentiment" and requested dismissal with prejudice
- Court granted mistrial after finding manifest necessity and denied dismissal with prejudice because prosecutor's conduct was not intentional
- Husband's counsel then stated he had not asked for a mistrial but only dismissal with prejudice and wished to go forward with trial; Wife's counsel requested additional time to decide
- Court stated that Wife's counsel had requested mistrial and it could not be undone after being granted; dismissed jury

Robbins v. State (continued)

- Court of Appeals accepted special action
- Trial court did not abuse discretion by finding prosecutor's conduct unintentional, so double jeopardy did not bar retrial for that reason
- But court should have dismissed with prejudice
  - Double jeopardy prohibits retrial if defendant does not consent to mistrial and no manifest necessity exists
  - Wife did not consent to mistrial with dismissal without prejudice, and Husband did not clearly consent at all
  - Court erred by finding manifest necessity, and should have reconsidered its decision to grant a mistrial in light of Defendants' preference to continue trial
  - Court of Appeals remands with orders to dismiss with prejudice

State v. Lopez (Div. 1, 1/16/2026)

- Def. had two prior convictions for domestic violence against his wife in 2021.
- In 2022, Def. and Victim wife got into argument. When Victim and a daughter came to school, Def. was waiting. Victim then drove to friend's house, and Def. followed, pulled in front of Victim's car blocking her exit.
- Jury found Def. guilty of two counts of Aggravated DV based on unlawful imprisonment and disorderly conduct.
- On appeal, should Def. have been convicted of one count of Aggravated DV, not two, b/c the unlawful imprisonment and disorderly conduct charges arose from the "same series of acts" pursuant to A.R.S. § 13-3601.02(D)?
- COA said no. Two counts permissible. "Same series of acts" applies to the prior convictions.
- State provided sufficient evidence that 1) current DV offenses were committed within 84 months of the two original offenses; and 2) the two prior offenses arose from a series of acts different from the current offenses.

Which AZ city receives an average of 4,015 hours of sunshine per year. acknowledged in the Guinness World Records for its abundant amount of sun?

A) Ajo

B) Safford

C) Yuma

State v. Egan (Div. 2, 12/30/2025)

- Justification – use of force by a correctional officer
- Egan was an inmate in the Pinal County jail.
- Attacks a deputy in the jail and deputy then fights back, ultimately tasing Egan twice and handcuffing him
- Egan claimed justification as a defense at trial
- The court instructed on justification and use of force of a correctional officer
- Egan argued the trial court erred in giving a justification instruction that incorporated a prison officer's allowable use of force during a detention.
- COA found no error because in its discretion the trial court’s instruction provided necessary information about applicable law to assist the jury in analyzing Egan's justification claim.

State v. Johnson (Div. 1, 3/25/2026)

Did the superior court violate the Confrontation Clause when it admitted the victim's hearsay statements to a forensic nurse examiner?

Court found the victim made the out-of-court statements to the forensic examiner for the primary purpose of "creating an out-of-court substitute for trial testimony." Therefore, it is testimonial and subject to the Confrontation Clause

The admission of the forensic examiner's testimony about the alleged offenses based on the victim's statements violated Johnson's Confrontation Clause rights, the court vacated all three convictions and sentences and remanded

What city in Arizona is home to the first ever McDonald's drive-thru?

A) Sierra Vista

B) Glendale

C) Kingman

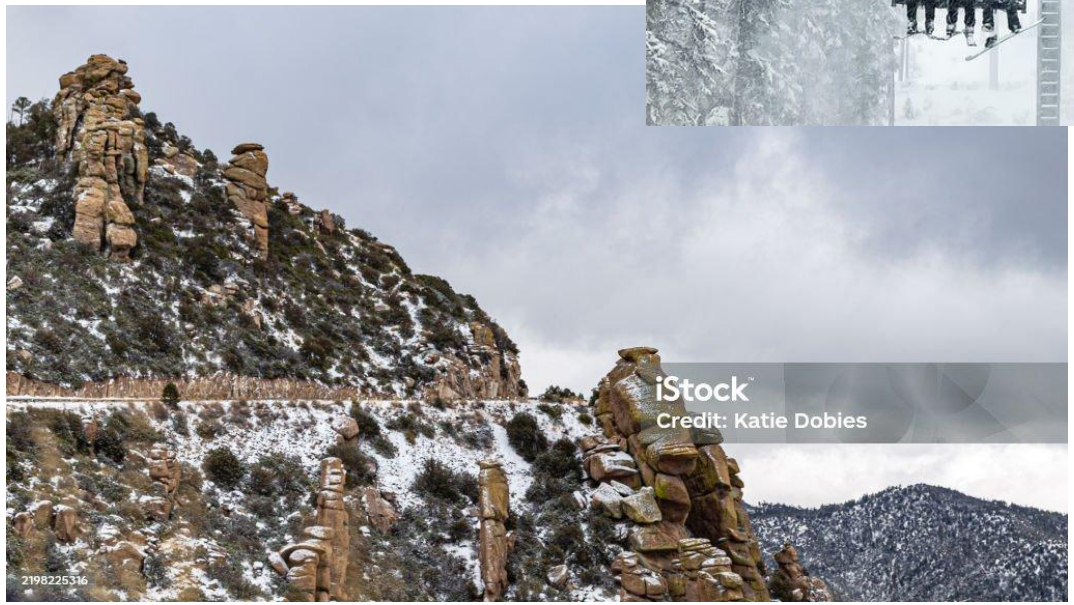
Jury Instructions

Of Arizona’s three ski areas, which first had organized skiing, and which has the lowest elevation?

A) Mount Lemmon, Snowbowl

B) Sunrise, Sunrise

C) Snowbowl, Mount Lemmon

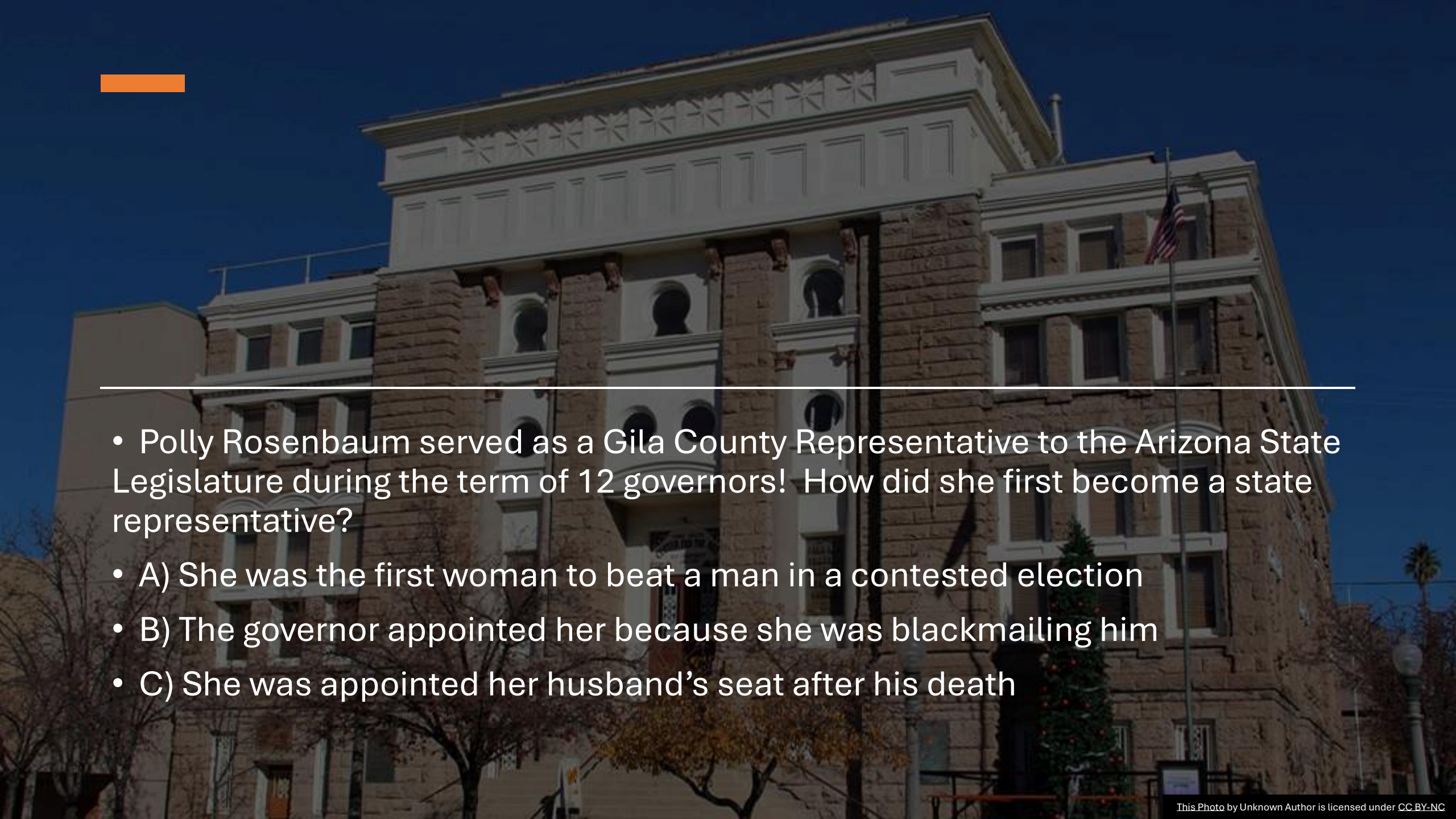


State v. Hendricks (Div. 1, 5/13/2025)

- Misconduct Involving Weapons case
- State moved in limine to preclude justification defense.
- Court granted this motion.
- After close of evidence, Defendant claimed the trial court should have instructed on necessity, but this was not requested.
- Trial court not required to determine which of disparate justification defenses to include in instructions.
- Trial court had no duty to provide the instruction, so no error occurred.

State v. Hippensteel (Arizona Supreme Court 6/1/26)

- Defendant charged with first-degree murder and other offenses
- Jury instructed on second-degree murder, provocation manslaughter, and reckless manslaughter
- Jury given reasonable-efforts instruction as to both forms of manslaughter
- Verdict form listed manslaughter as a lesser-included offense of second-degree murder
- Defendant found guilty of manslaughter as a lesser-included
- Error to give reasonable-efforts instruction as to provocation manslaughter because it is not a lesser-included of second-degree murder
- Error was fundamental because it deprived the defendant of his ability to have the jury consider a less-serious offense
- Error was prejudicial because jury could have plausibly and intelligently convicted defendant of provocation manslaughter if it had been properly instructed



- Polly Rosenbaum served as a Gila County Representative to the Arizona State Legislature during the term of 12 governors! How did she first become a state representative?
- A) She was the first woman to beat a man in a contested election
- B) The governor appointed her because she was blackmailing him
- C) She was appointed her husband’s seat after his death

Sentencing

State v. Marner (Haniffa) – (Arizona Supreme Court, 1/30/2026)

- Does the Dangerous Crime Against Children sentencing enhancement (A.R.S §§ 13-3554 and 13-705) apply to a conviction for luring a minor for sexual exploitation when the ***minor is fictitious?***
- YES

State v. Blackwell

(Div. 1, 5/20/26)

Question: Does a defendant have a Sixth Amendment right to a jury determination of whether prior convictions were committed on separate occasions for purposes of A.R.S. § 13-703(L)?

Answer: **Yes!**

- U.S. Supreme Court precedent (*Apprendi* and *Erlinger*) require all facts other than the *fact* of a prior conviction to be found by a jury
- When the priors occurred in relation to one another is a fact other than the fact of the priors' existence
- Rule applies even if there is no reasonable dispute that priors occurred on different occasions

State v. Soto (Div. 2, 3/4/2026)

- Another DCAC case, this time involving concurrent sentences
- A.R.S. § 13-705(M): sentence for offense "involving child molestation or sexual abuse . . . may be served concurrently with other sentences if the offense involved only one victim" but sentence imposed "for any other dangerous crime against children in the first or second degree shall be consecutive to any other sentence imposed on the person at any time, including child molestation and sexual abuse of the same victim."
- Court of Appeals D2: Trial court possessed discretion under (M) to impose concurrent sentences for three counts of child molestation and two counts of sexual assault against same victim
- Creates split with D1: *State v. Brock*, 248 Ariz. 583 (App. 2020)

Sandra Day O’Connor grew up in which tiny Arizona town?

- A) Morenci
- B) Crown King
- C) Duncan


Victims’ Rights

State v. Guevara-Enriquez

(Div. 2, 7/25/2025)

- Facial and as-applied constitutional challenges to facility dog statute (A.R.S. § 13-4442)
- Court of Appeals declines to reconsider previous holding that statute does not violate separation of powers
- Statute not unconstitutional as applied where jurors saw facility dog
  - Jurors asked about dog's presence during voir dire
  - Jurors given limiting instruction on dog's presence

State v. Arias Gomez (Div. 2, 12/18/2025)

Defendant requested *in camera* review of victim's mental health records

Under the Arizona Constitution, a victim generally has a right to refuse a defendant's discovery requests involving her medical records.

Defendant must show a "reasonable possibility that the information sought" includes information to which he is entitled as a matter of due process. The request cannot be based on mere conclusion or speculation.

Trial court found the request lacked any specific information sufficient to establish a "reasonable possibility" that the information sought would be revealed through *in-camera* review.

COA affirmed the trial court's denial of the request

Jimenez v. State

(Div. 1, 9/2/2025)

First-Degree Murder case. Defendant engaged in confrontation with Victim, they exchange gunfire inside and outside apartment.

State sought a protective order allowing disclosure of crime scene photos to defense counsel but not Defendant because State believed they included Victim identifying information.

Trial court granted protective order, defense filed Special Action

Court of Appeals held the Superior Court erred in granting the protective order.

Trial Court's order covered too much (photos that didn't include protected information) and too little (permitted disclosure of protected information without victim authorization)

Which Arizona woman's story became the basis of the hit television show, "Medium," who also worked at the county attorney's office and as a jury consultant?

A) Linda Ronstadt

B) Allison DuBois

C) Susan Blackmore

Expungement/Restoration of Rights

State v. Danner (Div. 2, 10/25/2025)

- Does a 2022 amendment to A.R.S. § 13-907(C), which provides for automatic restoration of firearm rights for some offenders upon completion of probation or absolute discharge from imprisonment, apply to an otherwise qualified defendant who completed probation before the statute's effective date?
- Court of Appeals: statute is procedural and applies retroactively to those who completed probation before its effective date

State v. Matthews (Div. 2, 1/9/2026)

- Does A.R.S § 36-2862 allow for expungement of a conviction for **selling** marijuana?
- Yes
- In deciding whether a marijuana-related offense is eligible for expungement, a court is not limited to the elements of the offense of which the petitioner was convicted or to the factual basis for his plea.
- Court may consider any admissible evidence – police reports, GJ transcripts, charging docs, PSRs to determine if the statutory requirements are met.

Which Arizona town has wild burros roaming the streets?

A) Tombstone

B) Bagdad

C) Oatman

Judicial Bias/Disqualification of the Prosecutor

State v. Howard

(Div. 1 6/19/2025)

BUT

Supreme Court depublished paragraphs on judicial bias and granted Petition for Review

OA set 5/19/26

Second-Degree Murder case. Trial judge conducted trial but recused herself prior to sentencing after embracing victim's mother outside presence of jury. Case reassigned to new judicial officer.

Rule 19.4 requires new judge substituted into a criminal proceeding to review the record to determine if continuing would be "unduly prejudicial."

At sentencing, newly assigned judicial officer admitted he had not read the trial transcripts, but had reviewed other parts of the record, including the pre-sentence report and other items.

Court of Appeals affirmed the conviction but vacated sentence, ordering trial court to review the transcripts or review the FTR of the trial.

As for judicial bias, Supreme Court depublished the Court of Appeals's finding that Defendant Howard failed to demonstrate trial judge's bias or prejudice from claimed bias.

Findings that were depublished: Commission on Judicial Conduct found trial judge created an appearance of bias, but Commission's conclusions do not have preclusive effect in this court.

State v. Creel

(Div 2, 10/22/2025)

- Trial court vicariously disqualified county attorney from case in which her political ally was the deceased victim based on appearance of impropriety (fourth *Gomez* factor)
- Court of appeals granted relief on special action
  - Political alliance and moderate campaign contributions, without more, are insufficient for disqualification
  - Remaining *Gomez* factors weighed against disqualification

State v. Arias Gomez (Div 2, 12/18/2025)

- Did the trial court abuse its discretion by denying defendant's motion to disqualify the prosecutor for a conflict of interest and the appearance of impropriety where the prosecutor held pretrial meetings with the victim and the prosecutor's paralegal was called as a witness regarding victim's additional disclosure of additional abuse?
- No.
- Defendant had the opportunity to question material witnesses to the meetings, there were no apparent conflicts of interest, and the prosecutor's questioning concerning her paralegal was not improper. COA concluded that complaints amounted at most to "a remote appearance of impropriety alone," which was insufficient to establish the need for disqualification.

Hamlet v. State

(Div. 2 , 12/8/2025)

Globe magistrate and Def. kept horses at a stable where Def. was a stablehand. Magistrate accused Def. of stealing hay, they fought. Both sustained injuries, but Def.'s injuries seemed worse.

One month later, Magistrate delivers to Gila County Attorney's Office 15 seconds of footage of the fight. Law enforcement footage shows investigating officer's equivocation about whom to charge. Magistrate told the LEO, "Brad will want to do something with the allegation because it's me."

Def. moved to disqualify GCAO based on Magistrate's personal relationship with GCA Brad Beauchamp. At evidentiary hearing, GCA conceded he was monitoring the case because he was a friend of Magistrate.

Superior Court denied the Motion for Disqualification.

Court of Appeals found each *Gomez v. Superior Court* factor weighed in favor of Defendant. COA relied upon Magistrate's invocation of GCA's name, and GCA's participation in the prosecution.

In Nogales, it is illegal to wear what?

A) Bolo tie

B) Suspenders

C) Sombrero

State v. Traverso

(Arizona Supreme Court, 9/23/2025)

- Question: Is a defendant who has raised an ineffective-assistance claim in a previous PCR proceeding precluded under Rule 32.2(a)(3) from raising a different ineffective-assistance claim in a successive proceeding, where the unraised claim involves counsel's near-failure to communicate a plea offer?
- Arizona Supreme Court: No, preclusion does not apply under these circumstances
  - *Smith v. Stewart* does not automatically preclude the claim
  - The claim asserted a violation of a constitutional right that could only be waived knowingly, voluntarily, and personally by the defendant under Rule 32.2(a)(3)
- Claim also was not untimely under the facts of this case. *See* Ariz. R. Crim. P. 32.4(b)(3)(D).

State v. Smith

- Petition for Post-Conviction Relief in Capital Case
- Arizona law does not authorize *ex parte* proceedings for discovery of third-party records in a Rule 32 matter.
- The *ex parte* authorization in Rule 6.7 addresses appointments of experts and investigators, not requests for third-party records.
- Petition for Review PENDING in Arizona Supreme Court

What strange city ordinance used to be on the books in Kingman?

A) It was illegal to keep a rattlesnake in a brothel

B) It was illegal to harass a cottontail rabbit

C) It was illegal for donkeys to sleep in bathtubs

Thank you!

CRIMINAL YEAR IN REVIEW:

OPINION SUMMARIES

Decisions Issued Since Last Judicial Conference[1]

(Current as of May 18, 2026)

[1]Summaries marked with "+" were prepared by Maricopa County Superior Court staff attorney Kathryn Andrews. Summaries marked with "*" were prepared by Maricopa County Superior Court capital case staff attorney Geoffrey Butzine. Summaries without either designation were prepared by the panel. The panel extends its gratitude to Ms. Andrews and Mr. Butzine for allowing their summaries to be used in this program.

TABLE OF CONTENTS

STATUTORY ISSUES

State v. Gordon (Owen), __ Ariz. __, 581 P.3d 215 (2025) (red-light statute/criminal penalties)+

Background: Defendant was driving his motor home when he collided with a Jeep Grand Cherokee, which had stopped for a red light at the intersection of Acoma Road and SR 95. The impact propelled the Jeep into the intersection and killed a passenger. Meanwhile, Defendant's vehicle continued into the intersection. The State charged Defendant with causing a death by moving violation under A.R.S. § 28-672. Section 28-672(A) imposes a criminal penalty for violating one of several civil statutes if "the violation results in an accident causing serious physical injury or death to another person." The State predicated this charge on a violation of the red-light statute, A.R.S. § 28-645(A)(3)(a), which provides: "vehicular traffic facing a steady red signal alone shall stop before entering the intersection and shall remain standing until an indication to proceed is shown."

After a bench trial in municipal court, Defendant was convicted as charged. He appealed to the Superior Court, arguing that the predicate moving violation can only occur upon entering an intersection. The Superior Court agreed, reversed, and directed a verdict of acquittal. Next, the State sought special action relief in the Arizona Court of Appeals. Division One vacated the Superior Court's decision, explaining that a Court must consider an "accident" as a continuous event in which the traffic violation causes an event that results in injury. Therefore, a driver need not run a red light so long as the accident comprises one continuous event that results from failing to stop at the red light. The Supreme Court reversed and affirmed the Superior Court's order directing acquittal.

Issue/Brief Answer: Must a vehicle enter the intersection against a red light in order for the enhanced penalty provision in A.R.S. § 28-672(A) to apply? Yes. The statute does not apply to a fatal accident that occurs before entering an intersection, whether viewed as a single collision or a series of events.

Analysis: The State argued that the enhanced penalty statute uses the term "accident" not "collision," thereby requiring a broader view encompassing the entire event. So viewed, the required conduct is the red-light violation and the result is the fatal accident. But the majority found that this construction conflates the predicate event with the resulting event. According to the majority, Defendant could not commit a red-light violation until after his vehicle crossed into the intersection. The statutes require sequential actions.

When the Legislature wants to encompass an entire sequence of events, it knows how to do so. As an example, the majority relied upon A.R.S. § 13-1902(A), which provides that "[a] person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property." (Emphasis added). Section 13-1901(2) defines "in the course of committing" to include "any of the defendant's acts beginning with the initiation and extending through the flight from a robbery." No such language appears in the enhanced penalty statute.

Two dissenting justices advocated reading the red light and enhanced penalty provisions together, thereby requiring motorists to stop before the intersection at a red light. The justices also stressed that accidents are unfolding events, such as a chain reaction crash.

Franz v. State/Schlemmer v. State, __ Ariz. __, 576 P.3d 716 (App. 2025) (mental state for DUI based on wrong-way driving)+

Background: In two cases, officers detained people who had each proceeded the wrong way on a one-way street. Each Defendant argued that A.R.S. § 28-1383(A)(5) required the State to prove that a Defendant knew or should have known he or she was driving in the wrong direction. One of the Defendants unsuccessfully requested a grand jury remand on this basis. In each case, the respective judicial officers agreed to designate this question for special action review by Division One.

Issues/Brief Answers:

1) Does A.R.S. § 28-1383(A)(5), the DUI statute on wrong way driving, require a culpable mental state? No.

2) Did the Superior Court abuse its discretion in denying Motions for a grand jury remand for a new finding of probable cause? No.

Analysis: Section 13-202(B) provides a rule of strict liability construction. It states that when a definitional statute "does not expressly prescribe a culpable mental state that is sufficient for commission of the offense, no culpable mental state is required for the commission of such offense, and the offense is one of strict liability unless the proscribed conduct necessarily involves a culpable mental state." A.R.S. § 13-202(B). Section 28-1383(A)(5) provides that a person commits "aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs if the person does any of the following: . . . [c]ommits a violation of § 28-1381, § 28-1382 or this section while driving

the wrong way on a highway." A.R.S. § 28-1383(A)(5). Driving the "wrong way" means "vehicular movement that is in a direction opposing the legal flow of traffic." A.R.S. § 28-1383(P)(2). Legal flow is dependent on "designated and signposted" directional traffic instructions. A.R.S. § 28-721(A)(4). Division One held that the plain language of A.R.S. § 28-1383(A)(5) reflects a clear intent to make wrong way DUI a strict liability offense.

Division One acknowledged that some DUI offenses require a mens rea, such as driving on a suspended license or driving in violation of an ignition interlock device restriction. It agreed with the State that those offenses involve personalized determinations, and no such determinations are at issue in wrong way driving. Therefore, the Superior Court can correctly deny a request for a jury instruction on a culpable mental state for this offense.

Nor was Division One persuaded that the Superior Court had abused its discretion in denying a remand to the grand jury. A remand is warranted under Ariz. R. Crim. P. 12.9(a) when a Defendant is deprived of a substantial procedural right or when an insufficient number of qualified grand jurors concur in the indictment. Moreover, the State is obligated to present any clearly exculpatory evidence. Because an officer had observed one of the Defendants driving the wrong way, there was sufficient evidence to support probable cause. The State provided an impartial presentation and informed the grand jury of Defendant's desire to appear and submit evidence, and it was up to the grand jurors to decide whether to hear that evidence, not the State.

State v. Castillo, __ Ariz. __, 579 P.3d 1265 (App. 2025) ("Good Samaritan" drug law; additional issue: double jeopardy)

Background: Defendant was in a hotel room with two friends when one of them experienced a drug overdose. Defendant called emergency services and responding officers noticed what appeared to be drugs on a table. They obtained a search warrant and discovered an assortment of illegal drugs, including methamphetamine and fentanyl, in the room, with a value exceeding $20,000. They also discovered evidence that the drugs belonged to Defendant and that he had been arranging by text message to sell them. Defendant was convicted of possession of methamphetamine for sale and possession of fentanyl for sale. The trial court sentenced him to concurrent terms of 7.5 years' imprisonment for each offense. This appeal followed.

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Issues/Brief Answers:

1) Does A.R.S. § 13-3423(A), which exempts a person from being prosecuted for possessing or using drugs discovered as a result of seeking medical assistance for a person experiencing an overdose, apply to sale offenses? No.

2) Does prosecuting a defendant for a sale offense when he is statutorily immune from prosecution for a lesser-included possession offense violate double jeopardy? No.

Analysis:

A.R.S. § 13-3423(A) provides:

> A person who, in good faith, seeks medical assistance for someone experiencing a drug-related overdose may not be charged or prosecuted for the possession or use of a controlled substance or drug paraphernalia or a preparatory offense if the evidence for the violation was gained as a result of the person's seeking medical assistance.

The parties did not dispute that the drugs here had been discovered only because Defendant, in good faith, sought medical assistance for a person suffering an overdose. The question before the court of appeals was whether § 13-3423(A) applies to possession-for-sale offenses. The court concluded it does not; the statute's plain language limits it to simple possession or use offenses. Possession for sale is separately criminalized, contains an additional element, and is punished more severely under Arizona law.

Defendant also argued that double jeopardy prohibited his prosecutions for possession for sale because, as a result of § 13-3423(A), he could not be prosecuted for, and thus had been impliedly acquitted of, the lesser-included simple possession offenses. The court noted that Defendant had cited no authority for his implied-acquittal theory and determined that he had never been acquitted of the possession offenses and that, as a result, there was no double jeopardy bar for the sale offenses.

State v. Leonard, __ Ariz. __, 574 P.3d 245 (App. 2025) (promotion of gambling)+

Background: Lynxx Gaming leased Lynxx Devices—described as Bingo Technological Aids—to non-profits. A single player can play on the device by competing against the machine. In addition, a group of players, each with a linked device, can play against one another. A grand jury indicted Lynxx managers and employees on the theory that they were promoting illegal gambling and had committed illegal control of an

enterprise. Defendants moved to dismiss under Rule 16.4(b), arguing that the indictment was insufficient as a matter of law. They contended that A.R.S. §§ 13-3302 and 13-3303(A) exempt regulated gambling from prosecution, and bingo is regulated under A.R.S. §§ 5-401 to 5-415. Alternatively, Defendants argued that at most they were guilty of a class 3 misdemeanor under A.R.S. § 5-410. In response, the State argued that Defendants offered instant bingo, which is not regulated in Arizona, and Lynxx devices are not Bingo Technological Aids under A.R.S. § 5-406(X)(1) (allowing bingo operators to offer players BTAs that "function only as electronic substitutes for bingo cards and shall reserve at least two . . . for use by players with disabilities").

After oral argument, the Superior Court reasoned that the analysis turned on whether the devices functioned more like a slot machine or more like traditional bingo. It found that the single player mode was akin to a slot machine with no winner guaranteed. When operated in multi-player mode, the devices functioned more like bingo with a winner in every game. Because the devices could operate like regulated bingo when linked, the Court dismissed the indictment, holding that the devices offer regulated gambling excepted from prosecution under Title 13. The Court also held that it is up to the Legislature to address the new technologies and clarify what does and does not qualify as bingo. This appeal followed.

Issues/Brief Answers: 1) Did the Superior Court err in holding that all conduct related to the devices was exempt from prosecution under A.R.S. § 13-3303? Yes. 2) Did Defendants lack notice that they could be charged with gambling and racketeering under the statutory scheme? No.

Analysis: A person commits promotion of gambling "if he knowingly . . . [c]onducts, organizes, manages, directs, supervises or finances gambling" for a benefit. A.R.S. §§ 13-3303(A)(1), 13-3301(1). A person cannot be charged under the statute if the gambling is regulated by Arizona or federal law. A.R.S. §§ 13-3303(A)(1), 13-3302(A)(3). In this case, the Superior Court found that the devices could be operated like regulated bingo or like a slot machine. But Division One held that the Superior Court erred in dismissing the indictment because it found the devices were capable of at least some illegal conduct when used in single player mode. On remand, the jury will determine this issue.

Nor was Division One persuaded that Defendants lacked notice that some of their conduct was prohibited. Specifically, Defendants claimed that they: (1) had met with Arizona agencies to determine if the devices complied with the law prior to leasing them, (2) were aware of the statutes, and (3) could not have known they could be charged with promotion of gambling and racketeering under these statutes. Division One disagreed, holding that the statutes are not ambiguous and conveyed to Defendants that they could

be prosecuted if the devices were used to conduct an unregulated game. *See* A.R.S. § 13-3303.

State v. Lopez, __ Ariz. __, 585 P.3d 211 (App. 2026) (aggravated domestic violence)+

Petition for Review pending

Background: Defendant pled guilty to two counts of domestic violence against his wife. The offenses occurred in May 2021 and June 2021. Victim and Defendant separated four months after the convictions. In January 2022, Defendant committed two additional acts of domestic violence, pled guilty, and received a 3-year term of supervised probation. One term of the probation prevented Defendant from contacting Victim.

Nevertheless, Defendant contacted Victim on December 15, 2022, and argued with her about moving back into the family residence with their two daughters. When Victim and a daughter arrived at school to pick up the second daughter, Defendant was waiting. Victim then drove to a friend's house. While Victim and the daughters walked into the house, Defendant parked his vehicle behind Victim's car. Upon returning to the car, Victim took a 15-minute phone call. During the call, Defendant pulled up beside her and yelled that she should hang up and take their daughters home. Defendant then pulled in front of Victim's car and kept blocking her exit. Victim and a neighbor called the police. A subsequent search of Defendant turned up methamphetamine.

A grand jury charged Defendant with one count each of possessing dangerous drugs and resisting arrest, as well as two counts of aggravated domestic violence based upon unlawful imprisonment and disorderly conduct. A jury found Defendant guilty as charged. The Superior Court sentenced him to terms of imprisonment, the longest of which was ten years. In addition, the Court revoked grants of probation in the earlier cases and sentenced him to 1.5-year terms in each case. This appeal followed.

Issues/Brief Answers:

1) Should Defendant have been convicted of one count of aggravated domestic violence, not two, because the unlawful imprisonment and disorderly conduct charges arose from the same series of acts under A.R.S. § 13-3601.02(D)? No.

2) Did the Superior Court similarly err in giving a related instruction on aggravated domestic violence? No.

Analysis: Under A.R.S. § 13-3601.02(A), "[a] person is guilty of aggravated domestic violence if the person within a period of eighty-four months commits a third or subsequent violation of a domestic violence offense . . ." Moreover, "[t]he dates of the commission of the offenses are the determining factor in applying the eighty-four month provision in [A.R.S. § 13-3601.02(A)] regardless of the sequence in which the offenses were committed. For purposes of this section, a third or subsequent violation for which a conviction occurs does not include a conviction for an offense arising out of the same series of acts." A.R.S. § 13-3601.02(D).

Defendant construed the "same series of acts" to apply to the present convictions. Division One disagreed, stating that A.R.S. § 13-3601.02 is a repetitive offender statute. The Court drew an analogy to the "same occasion" language in former A.R.S. § 13-604(H) (now A.R.S. § 13-703(L)), explaining that the same series of acts applies to the prior convictions. Otherwise, a Defendant could avoid aggravation by simply committing at least two more violations. The State provided sufficient evidence that (1) the current offenses were committed within 84 months of the two original offenses, and (2) the two prior offenses arose from a series of acts different from the current offenses. Therefore, no error occurred.

Equally unavailing was Defendant's argument that the jury instructions on the aggravated domestic violence counts violated his jury trial right. According to Defendant, the instruction on the current offenses - unlawful imprisonment and disorderly conduct - "omitted the element that the third or subsequent violations resulting in convictions cannot arise from the same series of acts." For reasons previously explained, Defendant's verbiage does not accurately state the law. The State only needed to show that the two prior convictions arose out of a series of acts different from those underlying the current offenses.

State v. Stubblefield, __ Ariz. __ 583 P.3d 1257 (App. 2025) (successful completion of probation)+

Background: In 2014, Defendant was convicted of sexual conduct with a minor and placed on a 10-year term of probation. Defendant was 17 at the time of the offense. One condition of probation was that Defendant "must obey all laws" and complete mandatory sex offender registration. The State moved to revoke probation two years later when Defendant pled guilty to one count of aggravated assault and two counts of disorderly conduct. Instead, the Superior Court opted to extend the probation term. In addition, the Court sentenced him to 3.5 years and placed Defendant on a probation term in the assault case, with the new probation term running concurrently with the original probation term. The State again sought to revoke probation in 2024 based upon a

speeding violation. The Court again extended the probation term and eventually discharged Defendant from probation in 2025.

Under A.R.S. § 13-3821(G), a Court may terminate the duty to register as a sex offender "upon successful completion of probation if the person was under eighteen years of age when the offense . . . was committed." Upon discharge, Defendant moved to terminate his registration obligation. After an evidentiary hearing, the Superior Court denied relief in view of his subsequent convictions. This appeal followed.

Issue/Brief Answer: Did Defendant qualify for termination of sex offender registration under A.R.S. § 13-3821(G)? No. The Court did not interpret "successful" to mean perfect. Nevertheless, the record indicated Defendant had committed new offenses and therefore did not "obey all laws." Moreover, he had failed to participate in required drug tests, sex offender treatments, and anger management programs. On this record, the Superior Court did not abuse its discretion in denying the termination motion.

Analysis: In the absence of a statutory definition, the Superior Court construed "successful completion" according to its plain meaning. Defendant argued that he was eligible for termination because his probation had ended. The Court rejected this claim because Defendant's construction essentially made the "successful" component superfluous. Nor could the Court agree that "successful" equates to perfection because the statute gives Courts the discretion to evaluate Defendant's performance on probation. Under the facts of this case, including the subsequent convictions and failure to participate in programs, the Superior Court did not abuse its discretion in finding Defendant did not successfully complete probation.

In its analysis, Division Two rejected Defendant's reliance upon A.R.S. § 13-901(E). That statute gives Courts discretion to terminate probation early if it serves the ends of justice and Defendant's conduct warrants it. A.R.S. § 13-901(E). This statute is specific to an early termination under A.R.S. § 13-901 and does not purport to apply to A.R.S. § 13-3821. Further, under A.R.S. § 13-901(E) a Court may terminate early so long as Defendant's conduct indicates rehabilitation. *State v. Moore*, 149 Ariz. 176, 177 (App. 1986). It is logically consistent that a Court may be prohibited from granting early termination when Defendant "unsuccessfully" completed probation while also retaining discretion for registration purposes to evaluate whether Defendant completed probation successfully when the original term ends.

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PRETRIAL/GRAND JURY/CHARGING

State v. Alvarez-Soto, __Ariz. __, 579 P.3d 1227 (2025) (motion to suppress/4th amendment)+

Background: A DPS trooper observed Defendant's 2007 Chevy Malibu driving with a "newer" license plate registered in Nogales. A check of the license plate showed the vehicle had crossed the U.S.-Mexico border multiple times. For several miles, the sedan drove about 78 miles per hour - 3 miles above the speed limit - in the middle lane. It then slowed to 70 miles per hour and a vehicle to the Defendant's right surged ahead. The trooper pulled over Defendant's vehicle because it had failed to maintain speed and had not moved to the right lane.

During the stop, Defendant gave oral consent to search the car then revoked it upon reading the consent form. The trooper then asked if he could run his trained dog around the car, and Defendant consented. The dog alerted, and the ensuing search turned up a suitcase containing marijuana bundles. The State charged Defendant with possession of marijuana for sale and transportation of marijuana for sale. Defense counsel moved to suppress, contending that the trooper lacked a reasonable suspicion to conduct a traffic stop. After a hearing, the trial court ruled that the stop was justified. A jury subsequently found Defendant guilty as charged. The trial court entered judgment and sentenced her to concurrent terms of imprisonment. A divided Division Two vacated the convictions in *State v. Alvarez-Soto*, 258 Ariz. 417 (App. 2024).

Issues/Brief Answers:

1) Did the trooper have reasonable suspicion to support the traffic stop? Yes.

2) Does *State v. Sweeney*, 224 Ariz. 107 (App. 2010), provide an accurate standard for reviewing video evidence on appeal? No. Appellate courts may not independently review video evidence.

Analysis:

Reasonable Suspicion: The Fourth Amendment protects against unreasonable searches and seizures. A traffic stop is a seizure under the Fourth Amendment, and because it is brief and limited, an officer need only possess an articulable and reasonable suspicion, based upon the totality of circumstances, that a traffic violation has occurred. *State v. Sweeney*, 224 Ariz. 107, 112 ¶ 16 (App. 2010) (quotation omitted). When an officer's observations do not reliably distinguish between innocent and unlawful

behaviors, they do not support reasonable suspicion because "they may cast too wide a net and subject all travelers to 'virtually random searches.'" *Id.* at 113, ¶ 22 (quoting *Reid v. Georgia*, 448 U.S. 438, 441 (1980)).

The trooper's basis for the stop was Defendant's failure to comply with A.R.S. § 28-721(B), which provides: "On all roadways, a person driving a vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall drive the vehicle in the right-hand lane then available for traffic . . . except when overtaking and passing another vehicle proceeding in the same direction . . . ." The trooper also testified about his training, his assignments routinely entailing enforcement of A.R.S. § 28-721(B), and his participation in the High Intensity Drug Trafficking Area Task Force. He explained that drug trafficking organizations often use Chevy Malibus, specifically 2002-2008 models, as company vehicles.

On this record, the Supreme Court found the State had met its burden to substantiate reasonable suspicion that a A.R.S. § 28-721(B) violation may have occurred. Defendant was driving below "the normal speed of traffic." The evidence showed a continuous violation of the statute, and not "a brief and momentary one." It is not necessary to prove an actual statutory violation, however. Rather, the question is a constitutional one and requires a showing that the officer had a particularized and objective basis to suspect that a constitutional violation may have occurred. Here, the officer's understanding of A.R.S. § 28-721(B) was objectively reasonable. While agreeing that the Nogales registration and border crossings would be insufficient to support an individualized and reasonable suspicion, the Supreme Court found that the officer's consideration of these factors did not undermine the reasonable basis to conduct a stop under A.R.S. § 28-721(B).

Standard of Review: In addition, the Supreme Court rejected the *Sweeney* Court's call for "independent review" of video evidence because "the trial court is in no better position to evaluate the video than the appellate court." *Sweeney*, 224 Ariz. at 111, ¶ 12. This language conflicts with long-standing precedents holding that appellate courts review only whether the record reasonably supports the trial court's findings. Unlike reviewing courts, the trial court is best positioned to review evidence in the context of the entire record. The standard of review should not vary for video recordings.

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Carson v. Gentry, __ Ariz. __, 574 P.3d 205 (2025) (competency)+

The Arizona Supreme Court held that the State may refile criminal charges against a Defendant previously found not competent and not restorable (NCNR) without prior judicial approval in *Carson v. Superior Ct. (Gentry)*, 574 P.3d 205 (2025). The Supreme Court overruled *Johnson v. Hartsell*, 254 Ariz. 585 (App. 2023), and affirmed *Rider v. Garcia*, 233 Ariz. 314 (App. 2013), as the proper standard for refiling charges against a Defendant determined to be NCNR. To guide the Court on remand, the Court held that A.R.S. § 13-4517(A)(4) applies retroactively, which means the State may either pursue a dangerousness trial or may attempt to rebut the incompetency presumption.

Background: Defendant is a diagnosed schizophrenic. The State charged him with first-degree murder and other felonies in 2018. After determining Defendant was neither competent nor restorable within the time allowed by statute, the Superior Court dismissed with leave to refile. The Court then ordered him transported to Valleywise Behavioral Health Center for a civil commitment evaluation. Thereafter, Valleywise notified the State that it would be discharging Defendant and did so on July 15, 2022. Accordingly, the State reindicted him on the original charges and added a misconduct involving weapons charge (the 2022 case).

The Arizona Court of Appeals then filed its opinion in *Johnson*. Based on *Johnson*, the parties concluded that the State must obtain leave of court to refile charges previously dismissed due to incompetency. The Superior Court granted a motion to dismiss the 2022 case with leave to refile. The Superior Court agreed with the State that the discovery of Defendant's scheduled release supported the reasonable belief under *Johnson*. Next, the State refiled the charges (2023 case).

Upon assignment of the case in 2023, Defendant moved to dismiss, citing the inadequate support for the reasonable belief of regained competency. A different Court agreed and dismissed the 2023 case without prejudice. The State then sought special action relief, and the Arizona Court of Appeals set aside the dismissal and remanded for further proceedings. On remand, Defendant moved in the earlier 2022 case for reconsideration of the denial of the motion to dismiss. The Court denied the Motion. A special action followed.

After further litigation, a Court of Appeals panel ultimately held that the trial court had erred in allowing the State to refile charges against Defendant because the State had failed to present "sufficient information to support a reasonable belief that Carson may have regained competency." *Carson v. Gentry,* 258 Ariz. 89, 93, ¶ 13 (App. 2024). The Court accordingly vacated a previous order allowing the State to refile charges. On review, the Supreme Court determined that the Court of Appeals had erred in vacating the order that

had permitted the State to refile charges. This disposition returns the parties to the 2022 case.

To guide the Court on remand, the Supreme Court explained that the State must either attempt to rebut the presumption or file a petition for a dangerousness trial (Opinion at ¶¶55-86).

Issue/Brief Answer: Before refiling charges, must the State produce evidence supporting a reasonable belief that Defendant has regained competency? No. The decision to charge is a core executive function. After charges are refiled, the incompetency presumption remains in place until new competency proceedings are held.

Discussion: Due process precludes "the criminal prosecution of a defendant who is not competent to stand trial." *Medina v. California*, 505 U.S. 437, 439 (1992). A Defendant is incompetent to stand trial if "as a result of mental illness, defect or disability [the] defendant is unable to understand the nature and object of the proceeding or to assist in the defendant's defense." A.R.S. § 13-4501(2); *see also* Ariz. R. Crim. P. 11.1(a)(2). "[A] prior adjudication of mental incompetency gives rise to a presumption of continued incompetency." *State v. Hehman*, 110 Ariz. 459, 460 (1974). In the now overruled *Johnson v. Superior Ct. (Hartsell)*, the Arizona Court of Appeals explained that the incompetency presumption is charge specific and the State may not re-file charges against Defendant without first returning to Court to allege a reasonable basis to believe competency has been restored. 254 Ariz.585, 591, ¶¶ 23, 25 (App. 2023).

In rejecting *Johnson*, the Supreme Court explained that the protections required to try an incompetent Defendant differ from those attached to charging an incompetent Defendant. The decision to charge is a core executive function. As a result, the Court affirmed *Rider*, which holds that existing procedural safeguards already deter prosecutions of incompetent Defendants. After charging, the State must inform the Court and Defendant of the prior NCNR finding and explain its basis to believe that Defendant's condition has changed. At that point, the State must rebut the incompetency presumption. Meanwhile, any party can request a new competency evaluation, which entails judicial review of Defendant's current mental state. Alternatively, the State may pursue a dangerousness determination under A.R.S. § 13-4517(A)(4) without first attempting rebuttal.

If the State opts to pursue a dangerousness determination, it must do so while charges remain pending. It may rely upon the 2022 NCNR ruling for the original charges, but not the misconduct involving weapons charge. If it opts to continue pursuing the weapons charge, the State must obtain a new Rule 11 determination as to that offense.

Cervantes v. State, __ Ariz. __, __ P.3d __, 2026 WL 1355829 (App. 2026) (disclosure in Rule 11 proceedings)+

Background: Defendant, facing multiple felony and misdemeanor charges, is in the midst of Rule 11 proceedings. His restoration doctor, Dr. Jason Frizzell, submitted a final report. The Superior Court ordered Dr. Frizzell to supply defense counsel with copies of all records, notes, and test data. among other materials, pertaining to Defendant's restoration treatment. Defense counsel was required to disclose these records to the State's counsel in redacted form. In addition, the Court directed defense counsel to supply not only the name of any privately retained expert to be called at the evidentiary hearing but also records pertaining to the expert's evaluation of Defendant. Because Defendant primarily speaks Spanish, he retained Dr. Julio Ramirez, who evaluated Defendant in Spanish. Dr. Ramirez then produced a report in English.

After Defendant disclosed records from Dr. Ramirez, the State unsuccessfully requested that Defendant provide translations of the Ramirez raw data, audio recordings, and other material. It then moved to preclude Dr. Ramirez as an expert witness because the defense had failed to satisfy the letter or the spirit of Ariz. R. Crim. P. 11.4(b). Following oral argument, the Court ordered Defendant to provide the State with translations of Dr. Ramirez's records. The parties then agreed to continue the competency proceeding. Meanwhile, Defendant sought special action relief from the order requiring translation.

Issues/Brief Answers:

1) Is the propriety of the disclosure order moot? Yes, because Defendant disclosed the Ramirez records without first seeking special action relief.

2) Does Rule 11.4(b) authorize the Court to order a party to translate raw data and recordings of interviews with Defendant? No.

3) Does the Superior Court have other or inherent authority to order the records' translation? Yes

Analysis: According to Rule 11.4(b), Defendant was required to disclose the following at least 15 business days before the competency hearing: "(1) the expert's name, address, and qualifications; (2) the results of any mental examinations, scientific tests, experiments, or comparisons conducted on the defendant or on any evidence in the case by or on the behalf of the mental health expert' and (3) any written report or statement in connection with the case or, if the expert will testify without preparing a written report,

a summary of the general subject matter and opinions on which the expert is expected to testify." Nothing in the rule requires translation of the materials or precludes it.

The majority found that an expert has an obligation to disclose facts and data upon which he or she relies under Ariz. R. Evid. 705. Moreover, Rule 611(a)(2) directs courts to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence" to "avoid wasting time." Accordingly, the Superior Court has authority to order the disclosure of records in a form usable at trial. Moreover, the Arizona Rules of Criminal Procedure do not divest the Superior Court's "residuum of inherent power, notwithstanding the limitations of [the discovery rule], to order production and inspection when such is 'essential to the due administration of justice.'" *State ex rel. Helm v. Superior Ct.*, 90 Ariz. 133, 137 (1961). Moreover, any claim that the defense was not required to disclose the Ramirez records in the first place is moot, as Defendant disclosed them without first seeking special action relief.

The concurring judge agreed with the majority and wrote separately to underscore his dismay that Defendant has spent a year and a half in jail awaiting a competency determination and receiving no services. Counsel should bear in mind that this litigation affects real lives, not merely which entity pays for the translation.

The dissenting judge argued that the Court should vacate the Superior Court's order and direct a prompt competency proceeding in which all experts can be cross-examined on their reports. Dr. Ramirez had reported his findings in English. The rule does not require the disclosure of everything Dr. Ramirez reviewed, including his notes, audio recordings, or other data. Moreover, the dissenting judge did not find the disclosure order to be moot because the State had not reviewed the Ramirez records and could still be ordered to return or destroy them. Alternatively, the Court could simply preclude their use. Finally, the dissent argued that the State could not rely upon inherent authority when there is a controlling procedural rule.

***Holland v. State*, __Ariz. __, 575 P.3d 394 (App. 2025) (validity of information filed before preliminary hearing)+**

Background: Defendant called 911 to report he had just killed an intruder at his home. A grand jury subsequently indicted Defendant on a count of second-degree murder. The Superior Court then remanded the case to the grand jury twice, based upon failure to present exculpatory evidence and defects in the proceeding. In accordance with the parties' ensuing agreement, the Superior Court scheduled a preliminary hearing. The prosecutor did not wait for the hearing, however, and filed an information. Ultimately, the Superior Court held the preliminary hearing and found probable cause.

Defense counsel then moved to dismiss the indictment under Rules 13.2 and 16.4(b), Arizona Rules of Criminal Procedure, arguing that the State's information was premature and inaccurately recited that grand jurors, rather than the County Attorney, had made the accusation. The Superior Court denied the Motion, and this special action followed. Division Two accepted jurisdiction and granted relief.

Issue/Brief Answer: Was the information insufficient as a matter of law? Yes.

Analysis: The Arizona Constitution provides in part that "no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived" such examination. Ariz. Const. art. 2, § 30. Rule 13.2 further directs that the State "must file an information in superior court no later than 10 days after a magistrate finds probable cause or the defendant waives a preliminary hearing." Just as a grand jury must find probable cause before returning an indictment, so too must a magistrate find probable cause before the State files an information. *Compare* A.R.S. § 21-413 *with* Ariz. Const. art. 2, § 30. Therefore, the State's premature filing of the information renders it ineffective. This holding obviated the need to address whether the information's reference to the grand jury instead of the County Attorney rendered it insufficient.

Navarro-Figueroa v. State, __ Ariz. __, 577 P.3d 1025 (App. 2025) (probable cause determination on non-capital sentence enhancement)+

Related rule-change petition pending. See No. R-26-0028.

This case arises out of prosecution concerning THC vape pens, THC oil, marijuana, money laundering, possession of a weapon, conspiracy, and illegally conducting an enterprise. The State filed an allegation that Defendant is a serious drug offender under A.R.S. § 13-3410 and subject to an enhanced sentence of life imprisonment. Defendant timely filed a pre-trial motion for a probable cause determination under Ariz. R. Crim. P. 13.5(a). After oral argument, the Court deferred ruling until the conclusion of the State's case in chief. This special action followed. The majority vacated the Superior Court's deferral and remanded with instruction to consider the probable cause issue before trial.

Issue/Brief Answer: Does Rule 13.5(a) require the Superior Court to rule on the probable cause determination for the sentence enhancer before trial? Yes.

Analysis: According to Rule 13.5(a), a non-capital Defendant "may challenge the legal sufficiency of the State's [sentencing] allegations by filing a motion under Rule 16." Rule 16 requires the parties to make their motions no later than 20 days before trial. Ariz. R. Crim. P. 16.1(b). The State argued that these rules set deadlines for motions but do not

require the Court to address the issue in a pre-trial hearing. Defendant countered that a pretrial determination is required under *Chronis v. Steinle*, 220 Ariz. 559 (2009). In *Chronis*, the Arizona Supreme Court held that Rule 13.5(c) allows a Defendant to request a probable cause hearing in accordance with the Rule 5's preliminary hearing procedures.

In the end, Division Two found no reason to limit *Chronis* to capital proceedings in view of the similar language pertaining to capital and non-capital cases. By deferring ruling, the Superior Court undermined the Rule 5 goal of facilitating a prompt resolution of probable cause and transformed the motion into a Rule 20 filing. The effect was to make Rule 13.5 superfluous. Moreover, nothing in Rule 19.1(c) contemplates a probable cause determination between the guilt and aggravation phases.

The dissenting judge argued that the probable cause hearing would comply with the rules so long as it occurs before the aggravation phase. The Superior Court did not state that it would determine probable cause based only on guilt phase evidence. Thus, the judge voiced concern that Division Two might be correcting a nonexistent error.

Lopez v. State, __ Ariz. __, 581 P.3d 741 (App. 2025) (discovery from third-party agency)

Petition for Review pending.

Background: Defendant was charged with first-degree murder and other offenses connected to her son's death and the State filed a notice of intent to seek the death penalty. During Defendant's son's autopsy, the Office of the Medical Examiner (OME) had retained and preserved certain organs and tissue samples. Defendant moved to compel OME to release those organs and samples to her independent medical examiner to investigate her son's cause and time of death. While OME did not object to the request, State's counsel in the criminal prosecution did. The superior court denied the motion.

Issues/Brief Answers:

1) Is a capital defendant entitled to access tissue and organs from the victim when her independent expert believes such access would assist with her defense? Yes.

2) Does the State in a criminal case have standing to object to a defendant's motion to release evidence retained by OME when OME does not object to the motion? No, but the State has standing to request reasonable conditions to safeguard the evidence.

Analysis: The court of appeals accepted special action jurisdiction and granted relief. The court recognized that, although a defendant does not have a general constitutional right to discovery, she cannot be restricted from access to the raw materials necessary for her defense. The court determined that the State lacked standing to object to the request Defendant issued to OME. The State has standing to object to a motion directed at a third-party agency only: 1) if the agency asks it to object, 2) on behalf of the victim if required by the Crime Victims' Bill of Rights (VBR) or requested by the victim, or 3) the State seeks to impose reasonable restrictions in order to protect the evidence.

Here, OME appeared through separate counsel and did not object to Defendant's motion. Likewise, the record did not show that a statutory victim had asked the State to object to the motion, and it would not on its face have infringed upon the deceased victim's constitutional rights to fairness, dignity, and respect, in large part because his remains had already been examined and preserved by OME. The motion likewise would not have resulted in the release of information made privileged or confidential under the VBR. The court concluded, however, that the State had the right to request reasonable restrictions on the evidence's release in order to protect chain of custody and other interests, and remanded with instructions for the superior court to consider any such request by the State. The court otherwise vacated the superior court's order denying the motion, concluding that the sought-after testing was critical to Defendant's investigation into how and when her son was injured.

Soto v. State, __ Ariz. __, __ P.3d __, 2026 WL 733441 (App. 2026) (remand to grand jury; omission of exculpatory evidence)

Petition for Review pending.

In this armed-robbery case, the State posed primarily leading, closed-ended questions to its grand-jury witness and did not present evidence that 1) a victim had discussed on social media his intent to commit a robbery on the night he claimed Defendant had robbed him and 2) a victim had fired a significant amount of ammunition during Defendant's alleged robbery. In denying Defendant's motion to remand for a new probable cause determination, the trial court found that the State's manner of questioning did not warrant a remand because the State's witness could have answered no to or disagreed with any of the leading questions, and Defendant had not shown the proceeding was anything but fair and impartial. It also found the State had not omitted any *clearly* exculpatory evidence, that it was not required to present all *conceivable* exculpatory evidence, and that the impact of inconsistent witness statements was for the trial jury to resolve.

The court of appeals, however, disagreed, accepting special action jurisdiction and directing that the case be remanded to the grand jury. It reasoned that the prosecutor had acted as a witness during the grand-jury proceeding, asking almost entirely closed-ended, leading questions that suggested only one answer. It recognized that a prosecutor may employ such questioning before the grand jury but held that he or she may not do so to the point that the questioning impedes the grand jury's inquiry. It opined that the prosecutor had cut off the grand jury's independent questioning here by interjecting and asking follow-up questions that, again, were leading and closed-ended. The court declined, however, to create a bright-line rule regarding when these type of questions become improper.

The court also granted relief as to Defendant's exculpatory-evidence allegation. The court recognized that the State is not obligated to present all conceivable exculpatory evidence to the grand jury but emphasized that it is obligated to present evidence relevant to a defendant's justification defense. Here, a victim's statement of intent to commit a robbery and the number of expended cartridges tied to a victim's firearm were relevant to Defendant's justification defense and should have been presented.

State v. Sanchez-Rodriguez, __ Ariz. __, 582 P.3d 1025 (App. 2025) (court's sua sponte order vacating acceptance of guilty plea)

Petition for Review pending.

Background: A grand jury indicted Defendant for four separate sexual offenses committed against a minor victim. Defendant and the State reached an agreement under which Defendant would plead guilty to one count of attempted sexual conduct with a minor, for which he would receive lifetime probation, and one count of attempted child molestation, for which he would receive a 12-year term of imprisonment, in exchange for the State dismissing the remaining counts. At the change-of-plea hearing, however, Defendant initially pleaded "not guilty" but changed his plea to "guilty" after receiving a *Donald* advisement. The trial court accepted Defendant's guilty plea. But when the State expressed concerns about the state of the record, the court sua sponte vacated its acceptance of the plea agreement. After a subsequent jury trial, Defendant was convicted of sexual conduct with a minor and attempted sexual conduct with a minor. He received life imprisonment for the completed offense and a 10-year term for the attempted offense. This appeal followed.

Issues/Brief Answers:

1) Does a trial court violate a defendant's protection against double jeopardy when it sua sponte vacates its acceptance of a guilty plea? Yes.

2) What is the remedy? The guilty plea remains in effect because its withdrawal was invalid.

Analysis: The court of appeals summarized the law concerning withdrawals from guilty pleas, noting that although a defendant may withdraw from a plea under certain circumstances, the State generally may not. But here, neither Defendant nor the State moved to withdraw from the plea; the trial court unequivocally accepted the plea and subsequently vacated that acceptance sua sponte. The court of appeals concluded that the trial court's acceptance of the guilty plea resulted in Defendant's convictions, and that jeopardy attached upon the plea's acceptance. Defendant's subsequent trial on the indictment, and his convictions for two offenses, violated his protection against double jeopardy. As to the remedy question, the court concluded that because the trial court's order vacating the plea's acceptance was invalid, the plea agreement and Defendant's resulting convictions remained in effect. The court accordingly vacated Defendant's jury-trial convictions and remanded for sentencing in accordance with the plea agreement.

State v. Wilbon, __ Ariz. __, 586 P.3d 701 (App. 2026) (good cause to dismiss indictment on state's motion)+

Petition for Review pending.

Background: Defendant, a prohibited possessor, allegedly picked up a rifle and handgun, shoved his wife into a wall, fled in his car, and failed to stop for police officers. In October 2024, the State charged him with two counts of misconduct involving weapons. Settlement discussions ensued but were unfruitful. The Superior Court granted a defense motion to preclude Defendant's wife as a witness based upon the anti-marital fact privilege under A.R.S. § 13-4062.

In October 2025, the State obtained a second indictment alleging two counts of misconduct involving weapons, one count of assault, and one count of threatening and intimidating. It then moved to dismiss the first indictment, but the Superior Court denied relief on the grounds of bad faith. The Court reasoned that the State was attempting to evade the application of the anti-marital fact privilege. This special action followed.

Issue/Brief Answer: Did the Superior Court erroneously apply Rule 16.4(a), Arizona Rules of Criminal Procedure, by denying the motion to dismiss the first indictment? Yes.

Analysis: Under Rule 16.4(a), a Court may dismiss pending charges upon a motion from the State supported by good cause and not made to avoid Rule 8's speedy trial limits. The Superior Court in general enjoys broad discretion in determining good

cause. *State v. Burke*, 204 Ariz. 455, 458, ¶ 10 (App. 2003). Good cause existed here because the double jeopardy clause bars the State from proceeding to trial on two indictments. There also was no dispute that the State properly obtained the second indictment, as it was entitled to obtain a superseding indictment any time before trial. *State v. Pima County Superior Court*, 137 Ariz. 534, 536 (App. 1983). Moreover, the defense cited no authority entitling Defendant to a trial in which the anti-marital fact privilege applied. Accordingly, Division One reversed the order denying the State's Motion to dismiss. Having resolved the question under Rule 16.4(a), Division One had no need to reach the parties' additional constitutional arguments.

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JURY SELECTION

State v. Brown, __ Ariz. __, __ P.3d __, 2026 WL 1262491 (App. 2026) (disqualification under *Eddington*; additional issues: voluntary absence, profile evidence, sentencing error)

Background: Defendant rolled his vehicle during a pursuit by law enforcement, killing two of his passengers and injuring others. The State charged him with multiple felonies: two counts of first-degree murder, two counts of second-degree murder, five counts of endangerment, five counts of aggravated assault, and one count of unlawful flight from law enforcement. A jury found him guilty as charged and the trial court imposed concurrent terms of imprisonment, the longest of which was natural life. This appeal followed.

Issues/Brief Answers:

1) Did the trial court err when it did not strike for cause a juror who worked as a community service officer for one of the law-enforcement agencies involved in the investigation and who knew some of the State's witnesses? No.

2) Did the trial court err by finding Defendant's absence voluntary, where he refused to attend trial because he did not want to wear a required leg restraint? No.

3) Did the trial court fundamentally err by admitting profile evidence regarding human-smuggling organizations? No.

4) Did the trial court err by treating Defendant's lack of remorse and refusal to accept responsibility as an aggravating factor at sentencing? Yes, and Defendant must be resentenced.

5) Did the trial court err by sentencing Defendant for both first and second-degree murder with respect to the same victims? Yes, and the court struck the second-degree murder convictions.

Analysis:

Juror disqualification: A.R.S. § 21-211 provides, in relevant part: "The following persons shall be disqualified to serve as jurors in any particular action . . . 2. Persons interested directly or indirectly in the matter under investigation . . . [and] 4. Persons biased or prejudiced in favor of or against either of the parties." In *State v. Eddington*, 228 Ariz. 361 (2011), the Arizona Supreme Court held that a peace officer employed by the investigating agency is per se "interested" in a criminal trial under § 21-211(2) and is thus automatically disqualified from being a juror in that trial. Here, the juror at issue was a community service officer employed by a municipal police force that assisted in the investigation, which was handled by a federal agency. The juror also knew some of the testifying law-enforcement officers and had previously assisted the federal agency with investigations. The majority concluded that the juror was not automatically disqualified under *Eddington* because that case's rule applies only to peace officers, not community service officers. And the record supported the trial court's determination that the juror was not interested in the case and was not biased or prejudiced. The dissenting judge, however, would have extended *Eddington* to this case's facts.

Voluntary absence: Defendant refused to attend trial on its third day, citing a mandatory leg restraint he believed would be visible to the jurors. On appeal, he argued that his absence was involuntary because his only other choice was to attend trial wearing visible restraints in violation of his constitutional rights. *See Deck v. Missouri*, 544 U.S. 622, 626 (2005). The court of appeals disagreed, noting Defendant's choice not to attend trial prevented the trial court from entering any findings as to whether the restraint was, in fact, visible to the jury or whether other security measures were available.

Profile evidence: The trial court allowed the State to present testimony regarding the general structure, organization, and operation of human-smuggling organizations. On appeal, Defendant argued that this testimony amounted to impermissible profile evidence that went to an ultimate issue in the case. In particular, a witness identified certain persons—other than Defendant—as fulfilling specific designated roles in an alleged organization. Assuming error occurred, the court of appeals concluded it was not fundamental because the challenged references were brief and occurred during a 10-

day trial, Defendant did not meaningfully challenge his involvement in a human-smuggling organization, and Defendant's defense centered on whether the State had proved he was the vehicle's driver and not a passenger.

Consideration of failure to admit guilt at sentencing: At sentencing, the trial court announced that it had arrived at the hearing undecided as to appropriate sentences, that "[a]ll [it] wanted to see and hear from [Brown] was some acceptance of responsibility and some show of remorse," and that "instead all [Brown] did was point [his] fingers at everybody else." The court then imposed aggravated sentences and, when Brown asked if it had considered his lack of remorse as an aggravating factor and reminded it that he was maintaining his innocence, it explained that it had wanted to see Brown take responsibility for his actions. The court of appeals concluded that the court had relied on an improper aggravating factor and, because it was unclear that the court would have imposed aggravated sentences without that factor, remanded for resentencing.

Imposition of sentence for both first and second-degree murder: The trial court sentenced Defendant for both first and second-degree murder for each of the deceased victims. Because there can be only one murder conviction for a single victim, and because a first-degree murder conviction necessarily encompasses the elements of second-degree murder, a lesser-included offense, the court of appeals vacated the second-degree murder convictions.

State v. Guevara-Enriquez, __ Ariz. __, 576 P.3d 122 (App. 2025) (disqualification under *Eddington*; additional issues: facility dog and confrontation clause)+

Background: The State charged Defendant with two counts of sexual conduct with a minor based upon his interactions with a 9-year-old. Officers collected DNA evidence, which generated four lab reports. The author of the first report had stopped working at the lab, but the author of the other three reports testified at trial. Defendant raised no objection. Meanwhile, Defendant unsuccessfully pursued special action relief to challenge the presence of a facility dog while Victim testified. The Superior Court likewise rejected Defendant's argument that the wife of a Pima County Sheriff's employee was disqualified from sitting on the jury. Ultimately, the jury found Defendant guilty as charged, and the Court imposed consecutive sentences. This appeal followed.

Issues/Brief Answers:

1) Did the Superior Court abuse its discretion by not striking the spouse of a Sheriff's Office employee for cause sua sponte under A.R.S. § 21-211(2)? No.

2) Did the Superior Court erroneously apply A.R.S. § 13-4442(A) because the jury could see the facility dog accompany Victim? No.

3) Did the Superior Court violate the Sixth Amendment's confrontation clause by allowing one member of a lab team to testify as to the work and conclusions of another team member who had left the lab's employment? No, but even assuming that error occurred, it was harmless.

Analysis: The U.S. and Arizona Constitutions provide for trial by an impartial jury. U.S. Const. amend.VI, XIV; Ariz. Const. art. 2, § 24. Under A.R.S. § 21-211(2), a person who is directly or indirectly "interested" in the matter is "disqualified to serve as [a] juror in any particular action." *See generally* Ariz. R. Crim. P. 18.4(b)(requiring court to excuse for cause "if there is a reasonable ground to believe" the jurors "cannot render a fair and impartial verdict"). The statute applies if there is "a working relationship between the prosecution and the investigative agency." *State v. Eddington*, 228 Ariz. 361, 365, ¶ 18 (2011). Juror #5 testified that her husband worked on the corrections side of the Sheriff's Office. Defendant argued that the juror and her husband would sustain the same adverse economic harm stemming from her service on the jury, so her disqualification was required. Division Two found, however, that the potential harm was speculative and there was no adequate record to assess whether *Eddington* even applied to an employee who did not serve in the Sheriff's Office's investigative division. By not excusing the juror, the Superior Court implicitly determined that she could be fair and impartial, and the record supports that determination.

Equally unavailing was Defendant's as-applied constitutional challenge to A.R.S. § 13-4442(A), which authorized the Court to approve a facility dog to accompany a minor Victim while testifying. The Superior Court interpreted the statute and precedent to permit the jurors to see the dog. The Victim and the dog were already at the witness stand when the jury entered, but jurors saw the dog when the Victim stepped down. The Superior Court had inquired during voir dire whether the dog's presence would affect the jurors' ability to be fair and impartial, and no one responded affirmatively. Consistent with A.R.S. § 13-4442(C), the Superior Court instructed that the dog's presence "should not be a reflection on the truthfulness or credibility of any testimony that is offered by the witness." On this record, Division Two found no error.

Defendant also belatedly challenged the admission of evidence from a DNA expert whose testimony depended on the accuracy of work performed by a non-testifying team member. He explained that any objection would have been frivolous after Division Two found no confrontation cause violation in *State v. Ortiz*, 238 Ariz. 329 (App. 2015). More recently, Defendant contended, the U.S. Supreme Court overruled that precedent in *Smith v. Arizona*, 602 U.S. 779 (2024). Defendant contended that *Smith* found a confrontation

clause violation because the testifying expert's opinions depended upon the truth and accuracy of the samples being what they purported to be.

Division Two found *Smith* distinguishable, however, because the *Smith* testifying expert had had no prior involvement in the case. Here, the lab used different teams of employees to perform different steps of the analysis. In fact, the testifying expert had prepared three of the four underlying reports. According to the testifying expert, anyone testifying from her lab must review all the documentation generated at each step and perform an independent series of checks to take ownership of the whole process. Moreover, the record lacked any evidence (1) that other team members had made statements regarding their tasks, (2) whether the testifying expert had relied on those statements, and (3) whether the statements were testimonial. But even if the admission of the DNA evidence was erroneous, the error was harmless. Division Two found that the Victim's testimony – corroborated by other witnesses -- was the pivotal factor, not the DNA evidence.

State v. Lucas, __ Ariz. __, 578 P.3d 822 (App. 2025) (failure to permit oral voir dire)+

Background: Defendant fired four shots over an ambulance occupied by two EMTs. The State charged him with aggravated assault, disorderly conduct, and unlawful discharge of a firearm. Prior to voir dire, the Superior Court directed prospective jurors to complete a written questionnaire.

One of the questions was whether the fact that the State had charged Defendant with a crime meant he must have done something wrong. Another question inquired whether Defendant was guilty simply because he was charged with an offense. Prospective Jurors 25 and 17 answered yes to both questions. Neither side challenged Prospective Juror 17 for cause, but the State moved to strike Prospective Juror 25. Defense counsel agreed to striking Prospective Juror 25, and the Superior Court excused her. Later, the Superior Court denied defense counsel's request to speak to the remaining jurors as a group. Counsel explained that he would pose a hypothetical to see if any jurors would convict if the State proved four out of five elements of a crime. The Superior Court did not engage in in-person group questioning or allow the parties to do so. It did permit individual questioning of two prospective jurors, but neither party individually questioned Prospective Juror 17.

After four days of trial, the jury found Defendant guilty on all counts, and the Superior Court imposed concurrent prison sentences. This appeal followed.

Issue/Brief Answer: Did the Superior Court err by not orally questioning the prospective jurors as a group or permitting counsel to do so? Yes, and the error was not harmless.

Analysis: Under Rule 18.5(d), Arizona Rules of Criminal Procedure, the Superior Court must conduct oral voir dire with the whole panel or subsets of jurors. Specifically, the Court must determine the prospective jurors' qualifications to serve. Ariz. R. Crim. P. 18.5(e). Upon request, it must allow the parties sufficient time to conduct further oral examination. Ariz. R. Crim. P. 18.5(f). Written questions are no substitute for this function, and the Superior Court erred by failing to pose in-person questions and by failing to allow counsel to do so.

Division One additionally found that the error was not harmless. One juror's response had raised doubts about her ability to decide fairly and impartially. Prospective Juror 17 had elaborated in writing: "I believe if he had had a fire arm (sic) and intent to hurt someone that is wrong" and "I believe if he was intending to hurt someone that could be considered guilty." These answers indicate that maybe she would have determined guilt only if the State had proved certain facts. Therefore, Division One could not say that the guilty verdicts returned were surely unattributable to error.

The concurring judge opined that failure to voir dire in person is structural error and not subject to harmless error analysis. Although written questionnaires can save Court time, the parties and Court can meaningfully assess impartiality only by complying with Rule 18.5.

State v. Moreno, __ Ariz. __, 587 P.3d 153 (App. 2026) (denial of motion to strike; additional issue: 404(c) instruction)

Petition for Review Pending

Background: Defendant was convicted of four sexual offenses against two minor victims. He received a total of 41 years' imprisonment. This appeal followed.

Issues/Brief Answers:

1) Did Moreno suffer prejudice when the trial court denied his motion to strike Juror 11 for cause after the juror disclosed having been a victim of a sex crime as a child? No, because the juror had no preconceived notions related to the case and was not automatically disqualified merely because she was a crime victim.

2) Did the trial court abuse its discretion in instructing the jurors about other acts under Rule 404(c), Ariz. R. Evid.? No.

Analysis:

Juror 11: During voir dire, Juror 11 disclosed that she had been sexually abused as a child 40 years earlier and no one had believed her allegations. She stated that she remembered the event well but repeatedly reaffirmed that it would not affect her ability to be fair and impartial or cause her to favor the victims' testimony against Defendant. The trial court denied Defendant's motion to strike and a majority of the court of appeals affirmed. The majority recognized that there was no need to strike Juror 11 merely because she was a victim. It determined that the trial court had appropriately sought to clarify Juror 11's statements through open-ended questioning that did not constitute rehabilitation, that she had repeatedly denied any bias, and that the trial court had found her credible. Under these circumstances, the majority concluded that the trial court did not err by denying Defendant's motion to strike. The majority also rejected Defendant's related argument that the trial court erred by questioning Juror 11 in front of the whole panel, noting that courts have discretion how to manage voir dire. The dissenting judge, however, would have remanded for a new trial. He opined that the concerns requiring automatic disqualification under *State v. Eddington* apply equally to cases like this one, in which a juror who experienced sexual victimization as a child was selected to sit in judgment of a defendant accused of sexually victimizing a child.

Rule 404(c) instruction: The trial court denied Defendant's motion to sever the counts by victim, reasoning that, if the cases were severed, the evidence relating to each victim would be admissible at trial on the counts related to the other victim under Rule 404(c). The court, however, precluded each victim from testifying as to any uncharged acts. At trial, the court gave the following Rule 404(c) instruction over Defendant's objection:

> Evidence of other acts has been presented. You may consider this evidence in determining whether the Defendant had a character trait that predisposed him to commit the crimes charged. You may determine that the Defendant had a character trait that predisposed him to commit those crimes charged only if you decide that the State has proven, by clear and convincing evidence, that the Defendant committed the other acts, and the other acts showed the Defendant's character predisposed him to commit abnormal sexual acts.
>
> You may not convict the Defendant simply because you find that he committed the other acts, or that he had a character trait that predisposed him to commit the crimes charged.

On appeal, Defendant argued that the instruction was improper because there was no evidence of "other" acts admitted—only charged acts—and the instruction encouraged the jurors to speculate that additional acts had occurred, particularly in light of one victim's quickly corrected implication to that effect. The court of appeals disagreed. It concluded that the 404(c) instruction was unnecessary because each victim testified only to her own charged allegations, and no other acts were admitted under 404(c). Nonetheless, the instruction correctly stated the law, particularly when viewed with the remainder of the instructions; did not conflict with any other instruction; and did not reduce the State's burden of proof. The trial court therefore did not abuse its discretion by giving it.

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EVIDENTIARY/TRIAL ISSUES

State v. Romero, __ Ariz. __, __ P.3d __, 2026 WL 1357037 (2026) (prosecutorial misconduct)+

Background: Dressed in a dark shirt and light pants, Defendant visited a nightclub. A sheriff's deputy later raced to the nightclub after hearing multiple shots fired. When the deputy arrived, he saw Defendant's car departing while violating multiple traffic laws. He also observed Defendant holding "something black" while inside the car. The deputy pursued Defendant's car until Defendant struck a fence. Inside the car was a black handgun and a bag containing cocaine. Meanwhile, a victim of the nightclub shooting died of his injuries at a hospital.

The State charged Defendant with first-degree murder, unlawful discharge of a firearm, misconduct involving weapons, fleeing from law enforcement, and possession of a narcotic drug. The trial court agreed to sever the misconduct involving weapons charge. At trial, the State introduced grainy camera footage showing activity in the nightclub parking lot on the night of the shooting. After four days, the jury found Defendant guilty of the charges. The trial court entered judgment and sentenced him to concurrent terms of imprisonment, including life without the possibility of release for 25 years. On appeal, Defendant argued that cumulative prosecutorial error entitled him to a new trial, citing multiple instances of improper leading questions and improper expert testimony. A divided Division Two affirmed the convictions and sentences.

Issues/Brief Answers:

1) Must a defendant asserting cumulative prosecutorial error establish the prosecutor's culpable mental state? No.

2) What standard of review applies to determine whether cumulative prosecutorial error deprived a defendant of a fair trial? A defendant may establish a denial of due process under any one of the three *Escalante* prongs. Under prong three, "the error must so profoundly distort the trial that injustice is obvious without the further need to consider prejudice." *State v. Escalante*, 245 Ariz. 135, 141, ¶ 20 (2018).

Analysis:

No Culpable Mental State Required: The parties agreed that Defendant is not required to show that the prosecutor had a culpable mental state. Nevertheless, the Supreme Court addressed the issue to correct Division Two's "misapprehension." The Supreme Court explained that although misconduct under the ethical rules may entail a culpable mental state, prosecutorial error does not. To put it another way, whether a Defendant's rights were violated does not depend on whether the prosecutor acted intentionally.

Standard of Review: Like Division Two, the Supreme Court agreed that the pervasive use of leading questions and elicitation of National Integrated Ballistic Information Network (NIBIN) testimony from unqualified witnesses qualified as prosecutorial errors. The key issue was the standard used to review the cumulative effect.

Cumulative prosecutorial error "sits within the framework of fundamental error review." *See State v. Vargas*, 249 Ariz. 186, 190 ¶ 14 (2020). To demonstrate fundamental error, Defendant had the burden to establish that the trial error (1) "went to the foundation of the case," (2) "took from the defendant a right essential to his defense," or (3) "was so egregious that he could not possibly have received a fair trial." *State v. Escalante*, 245 Ariz. 135, 142, ¶ 21 (2018). To be entitled to relief based on cumulative prosecutorial error, Defendant must show the errors "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Robinson*, 253 Ariz. 121, 143 ¶ 64 (2022).

The Supreme Court explained that a Defendant may proceed under any one of the three *Escalante* prongs. It rejected Division Two's holding that the cumulative prosecutorial error must be both fundamental and prejudicial under the third prong; instead, "the error must so profoundly distort the trial that injustice is obvious without the need to further consider prejudice." *Escalante*, 245 Ariz. at 141, ¶ 20. The Supreme Court also criticized Division Two's premise that a reviewing court must assess the facts in the light most favorable to sustaining the jury's verdicts. Fundamental error review does not incorporate a deferential standard; rather, the reviewing court must undertake an objective inquiry into the totality of circumstances.

Ultimately, the Supreme Court agreed with Division Two's disposition that Defendant had failed to meet the cumulative prosecutorial error standard, notwithstanding the leading questions and improper elicitation of NIBIN testimony from unqualified witnesses. In light of all the properly admitted evidence, the prosecutorial errors did not so profoundly distort the trial that Defendant could not have received due process.

Robbins v. State, __ Ariz. __, 584 P.3d 553 (App. 2025) (mistrial/double jeopardy)+

Petition for Review granted and argument scheduled for June 15, 2026.

Background: The State charged Jie and Zachary Robbins with money laundering, illegal control of an enterprise, and attempt to commit trafficking in stolen property. One month before trial, the State introduced two police reports and certifications for PayPal and eBay records for use at trial. The Superior Court granted the defense's Motion to preclude the evidence based on the untimely disclosure. At trial, the prosecutor played a recording of a detective's comment that "I've looked at your bank records and you're selling millions of dollars worth of products." Jie's counsel moved for a mistrial based on the reference to precluded evidence and asked the Court to dismiss with prejudice. Zachary's counsel joined and requested a dismissal with prejudice. Finding manifest necessity, the Superior Court declared a mistrial. It declined to dismiss with prejudice because the State's conduct fell short of intentional bad faith.

Zachary's counsel responded by clarifying that the dismissal request was with prejudice, not a request for a mistrial absent a dismissal with prejudice. He therefore asked for the trial to continue. Jie's counsel asked to confer with Defendant about deciding on a mistrial and continuing with trial. The Superior Court told Jie to "be careful" and pointed out that Jie had requested a mistrial, not the Court. Jie's counsel responded: "Correct." The Superior Court then affirmed the mistrial and explained that "[t]here's no turning back at this point once the Court has determined a fundamental error has occurred. I'm not going to continue with this trial. Simple as that." The Superior Court then dismissed the jury. In addition, the Court denied subsequent motions to reconsider because the prosecutor's mistake stemmed only from "insufficient mastery of the evidence." This special action followed.

Issue/Brief Answer: Does the Double Jeopardy Clause bar Defendants' retrial? Yes. Neither Defendant consented to a mistrial without prejudice and there was no manifest necessity to enter one.

Analysis: As a threshold matter, Division One upheld the Superior Court's denial of motions to dismiss with prejudice based upon the prosecutor's playing of a recording that referred to precluded evidence. A Court must dismiss with prejudice if a prosecutor (1) engages in improper conduct, (2) which is "not merely the result of legal error, negligence, or mistake, of insignificant propriety, but taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial," and (3) prejudice results that cannot be cured short of a mistrial. *Pool v. Superior Ct.,* 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). Division One found the Superior Court did not clearly err in attributing the prosecutor's action to insufficient mastery of the evidence.

Consent: If a Court declares a mistrial (1) absent Defendant's consent, and (2) when no manifest necessity exists, double jeopardy prohibits retrial. *McLaughlin v. Fahringer*, 150 Ariz. 274, 277-78, 723 P.2d 92, 95-96 (1986). In the absence of controlling Arizona authority, the Court looked to Ninth Circuit cases to decide whether Defendants had consented. A Defendant who moves for mistrial "without explicitly limit[ing] his [or her] request to a mistrial with prejudice," does not consent to the mistrial if he or she later clarifies "that he [or she] only desired a mistrial if jeopardy would attach." *Weston v. Kernan*, 50 F.3d 633, 637 (9th Cir. 1995). Jie's initial request for a mistrial was ambiguous, and her attorney asked to speak to Jie after a mistrial was declared. Counsel later clarified that he only sought a mistrial with prejudice. Under Arizona law, conduct after mistrial is relevant to consent. *See State v. Henderson,* 116 Ariz. 310, 314, 569 P.2d 252, 256 (App. 1977). Because counsel did not affirmatively acquiesce to a mistrial without prejudice, Jie did not consent.

The record further reflected that Zachary did not consent. His counsel requested a dismissal with prejudice, not a mistrial. Although counsel initially joined in the mistrial request, counsel also repeatedly affirmed that he wanted a dismissal with prejudice. On this record, neither Defendant consented to a mistrial without prejudice.

Manifest Necessity: A court abuses its discretion in granting a mistrial without considering the Defendant's interest in proceeding, *State v. Dickinson*, 242 Ariz. 120, 125, ¶ 20, 393 P.3d 461, 466 (App. 2017), unless proceeding with the trial "would make reversal on appeal a certainty." *State v. Madison*, 114 Ariz. 221, 224, 560 P.2d 405, 408 (1977). Here, Division One found the Superior Court had failed to consider the Defendants' interests in proceeding with the trial and denied requests to confer with clients in the mistaken belief that there was no turning back. The jury had not been dismissed when the Court declined to reconsider the mistrial order. At that point, the Court should have reconsidered in view of the Defendants' stated desire to proceed with trial.

Moreover, reversal on appeal was not a certainty. The Court had excluded evidence based upon the late disclosure. Only in "extremely rare situations" would the

accidental admission of an isolated reference to precluded evidence go to the foundation of the case. Therefore, had the case resulted in guilty verdicts, Division One could not conclude that reversal on appeal would have been certain. Division One accordingly vacated the grant of mistrial without prejudice and ordered the Superior Court to dismiss the charges with prejudice.

State v. Aguirre, __ Ariz. __, 578 P.3d 58 (App. 2025) (mistrial/double jeopardy)+

Background: Fourteen-year-old D.G. exchanged sexually explicit text messages with "George." In response to questioning by her mother, D.G. explained that "George" was her uncle. In the ensuing police interview, D.G. stated that she had engaged in sexual conduct with Defendant when she visited his upholstery shop a few days earlier. The State charged Defendant with luring a minor, molesting a child, sexual abuse, and assault.

The State did not subpoena the records of Defendant's internet service provider. It did obtain Defendant's Instagram records but did not advise whether it would use them at trial. The State also obtained discovery from a "Spillman database," which contained Defendant's phone number at the time he interacted with police in 2019. At trial, Defendant challenged D.G.'s credibility. On the fourth day of trial, the State introduced the previously undisclosed Spillman database.

The defense objected based upon untimely disclosure, lack of foundation, and hearsay. The Superior Court precluded much of the evidence, but not all, and Defendant moved for a mistrial. The State clarified that it would not use the Instagram and Spillman database records. The Court ruled that the detective could not testify that the Instagram records and Spillman database listed the specific phone number used in the messages. The detective later testified that she got Defendant's phone number from D.G.'s mother and found no need to investigate the phone number further. On redirect, however, the detective stated that she had verified the number with Defendant's family and also found "that same phone number was already associated with [Defendant's] name file, presumably from previous police contacts."

Outside the jury's presence, the defense moved for dismissal with prejudice, asserting that the detective's testimony violated the Court's order. The Court deferred ruling but struck the testimony and instructed the jury to disregard it. After argument, the Court found that the detective had not acted willfully, and a curative instruction could address the problem. Without consulting the parties, the Superior Court instructed the jury in part "I want to make it really clear that all of us likely have our phone numbers in some sort of law enforcement database."

In a sidebar, defense counsel objected that the Court had affirmed that the number the jury had heard was in the database and is somehow valid because it was in a database. When the Court offered to amend the curative instruction, the defense counsel answered that "the damage is done." When counsel returned to their tables, the Court advised that phone numbers can change over time. After lunch, the Court advised the parties that it would declare a mistrial. The defense moved to dismiss with prejudice. Upon receiving the motion in written form, the Court granted it. This appeal followed.

Issues/Brief Answers:

1) May an appellate court review the record for manifest necessity even though the Superior Court made no manifest necessity determination? Yes.

2) Did manifest necessity exist for a mistrial in this case? Yes, and Defendant may be retried.

Analysis: Declaring a mistrial after jury selection implicates double jeopardy concerns. Following a mistrial, a Defendant may be retried only if (1) "a manifest necessity for the mistrial" existed or "the ends of public justice will otherwise be defeated" or (2) the Defendant consented to the mistrial. *McLaughlin v. Fahringer*, 150 Ariz. 274, 277, 723 P.2d 92, 95 (1986). In this case, the State relied upon manifest necessity, but the Court had not made a manifest necessity finding. The majority explained that this omission changed the standard of review, because the appellate court had no basis to defer to the Superior Court. According to the majority, the U.S. Supreme Court determined manifest necessity on review without a trial court finding in *Arizona v. Washington*, 434 U.S. 497, 517 (1978).

The majority further found that manifest necessity existed because the Court cannot comment on evidence and effectively defeat a party's defense. *See* Ariz. Const. art. 6, § 27. The Court's instruction affirmed that the number used with D.G. was in a Spillman database. Because the record reflects the existence of manifest necessity, the double jeopardy clause did not apply. Accordingly, the majority vacated the dismissal order and remanded for additional proceedings.

The dissenting judge contended that retrial was barred. The judge rejected the argument that an appellate court can find manifest necessity when the Superior Court did not look for it. On review, the appellate court must consider "whether the trial judge (1) heard the opinions of the parties about the propriety of the mistrial; (2) considered the alternatives to a mistrial; and (3) acted deliberately, instead of abruptly." *Fulton v. Moore*, 520 F.3d 522, 529 (6th Cir. 2008). Here, the Superior Court considered no alternatives, and the majority did not address the other factors. The dissenting judge also

distinguished *Washington*, arguing that the Supreme Court did not determine manifest necessity itself, but rather found that the trial court had conducted what amounted to a manifest necessity analysis without using the "manifest necessity" words. Accordingly, the dissenting judge would hold that retrial cannot be justified based on manifest necessity.

State v. Alston, __ Ariz. __, 580 P.3d 543 (App. 2025) (court of appeals D1) (hearsay/prior consistent statements; additional issue: aggravating factors)+

Background: A security guard, hired to guard a party at a strip mall, overheard Defendant say that he had a "banger." The guard noticed Defendant was sporting a pink beanie. As the party ended, Defendant got into a red sedan and headed toward the party with the driver's window rolled down. One of several shots fired from the sedan struck and killed a partygoer. Based on the security guard's observations and information from the Victim's family, officers traced Defendant to a house. A consent search turned up bullets of the same caliber from the shooting and a pink ski mask. Two security guards then identified Defendant from a photo lineup.

The State charged Defendant with first-degree murder, drive-by shooting, and misconduct involving weapons. The Superior Court severed the misconduct involving weapons count, and trial proceeded as to the remaining counts. Two security guards and an event organizer testified at trial. Following conviction, the State proved that the offenses were dangerous and involved the use of a deadly weapon. The State failed to prove physical, emotional, or financial harm to the surviving victims for murder, and the jury was not unanimous as to that factor for the drive-by shooting. The State did prove Defendant had a prior felony conviction. Nevertheless, the Superior Court relied on all four factors at sentencing to impose natural life and 12-year terms of imprisonment. This appeal followed.

Issues/Brief Answers:

1) Were the security guard's statements to the police soon after the shooting admissible as prior consistent statements under Ariz. R. Evid. 801(d)(1)(B)? Yes.

2) Did the defense sufficiently attack another security guard's statements to justify admission of other hearsay as a prior consistent statement? It is unclear. Nevertheless, Defendant did not establish prejudice from the statement's introduction.

3) Did the Superior Court err in admitting a recording of the event organizer's prior statements? Yes, because the defense had not attacked the witness's credibility, but the error was harmless.

4) Did the Superior Court erroneously rely upon dangerousness and use of a deadly weapon as aggravating factors at sentencing? Yes. The Court cannot properly consider dangerousness to aggravate a sentence under A.R.S. § 13-701(D). Moreover, use of a deadly weapon was an essential element of the drive-by shooting and felony murder.

5) Did the Superior Court properly rely upon the victims' emotional harm even though the jury found that factor unproven as to one count and failed to reach a unanimous verdict on the factor as to the other count? Yes. The jury operated under the reasonable doubt standard, whereas the Superior Court found the factor by a preponderance of the evidence. The victims' statements and any evidence introduced before sentencing are relevant factors for a first-degree murder sentence, as well as the A.R.S. § 13-701 factors. *See* A.R.S. § 13-752(Q). Moreover, the Court had found a prior felony conviction, an appropriate aggravating factor under A.R.S. § 13-701, and thus could find and consider additional factors. *See State v. Martinez*, 210 Ariz. 578, 585, ¶ 26 (2005).

Analysis:

Prior Consistent Statements: A declarant's out-of-court statements consistent with the declarant's testimony are not hearsay if the declarant testifies at trial, is subject to cross examination, and the statements are offered either (1) "to rebut an express or implied charge that the declarant recently fabricated" the testimony or (2) "to rehabilitate the declarant's credibility as a witness when attacked on another ground." Ariz. R. Evid. 801(d)(1)(B)(i), (ii).

In this case, a police officer testified about statements from an interview with a security guard and the guard's focus on Defendant after hearing the "banger" remark. The State argued that the statements were admissible because Defendant had attacked the security guard's credibility on cross. Defendant countered that he never expressly accused a witness of fabricating testimony or attacked credibility, and that cross-examination instead focused on misidentification. Under Rule 801(d)(1)(B)(ii), the prior consistent statement is admissible when the defense attacks testimony "on another ground" apart from credibility. For example, federal courts have permitted prior consistent statements when a witness's memory is attacked. The rule also applies if the credibility attack is brief, as when the defense impeached the security guard with prior statements about the number of people in the parking lot during the party. In light of

this record, Defendant did not show an abuse of discretion from the statements' admission.

Less clear is whether the hearsay exception applied to the second security guard's interview with the police. Defendant had not objected at trial, so the fundamental error standard applied. *State v. Escalante*, 245 Ariz. 135, 140, ¶ 12 (2018). Even assuming Defendant had not sufficiently attacked the witness's credibility, Defendant had failed to demonstrate prejudice.

Likewise, Division One declined to reverse based upon the admission of an officer's statements concerning a description gathered from the event organizer. In the absence of a sufficient attack on the witness's credibility, admission of these statements was error. But because the statements were cumulative of other properly admitted statements from the security guards, their admission was harmless. *See State v. Williams*, 133 Ariz. 220, 226 (1982).

Aggravating Factors: As to the sentencing issues, the State conceded that the Superior Court should not have relied upon dangerousness and the use of a deadly weapon. The Court cannot consider dangerousness to aggravate a sentence under A.R.S. § 13-701(D). Moreover, use of a deadly weapon was an essential element of the drive-by shooting and felony murder. The Court did properly find the existence of a prior felony conviction, leaving emotional harm as the only matter at issue on appeal.

In determining whether to impose life or natural life, the Superior Court "[s]hall consider the aggravating and mitigating circumstances listed in section 13-701 and any statement made by a victim" and "[m]ay consider any evidence introduced before sentencing or at any other sentencing proceeding." A.R.S. § 13-752(Q) (1), (2). The statute does not require the Court or jury to find an aggravating factor before sentencing Defendant to natural life as opposed to life, nor does the Constitution require it. *State v. Fell*, 210 Ariz. 554, 560, ¶19 (2005). The testimony of Victims at sentencing and letters submitted at sentencing demonstrated the effect of the death. The Court had discretion to consider this evidence regardless of the aggravation verdicts.

As to the drive-by shooting, the Superior Court was required to rely upon at least one aggravating factor found by the trier of fact. A.R.S. §§ 13-701(C), (D), 13-704(H). An exception exists for the prior felony conviction in A.R.S. § 13-701(D)(11), which the Court may find. A.R.S. § 13-701(C). Having found a prior felony conviction within the past 10 years, the Court could impose an aggravated sentence up to the maximum term, irrespective of the emotional harm factor. Additional factors, like emotional harm, were relevant to the Court's exercise of discretion in deciding which sentence to impose. *State v. Martinez*, 210 Ariz. 578, 585, ¶ 26 (2005). The Court was required to find emotional harm

by a preponderance of the evidence, *id.*, and was not bound by the jury's determinations under the beyond a reasonable doubt standard. Accordingly, the Court did not err in considering the emotional harm factor, and Division One affirmed the convictions and sentences.

State v. Hernandez, __ Ariz. __, __ P.3d __, 2026 WL 617015 (App. 2026) (Rape Shield Law)+

Petition for Review pending.

Background: During her forensic interview, B. disclosed that her uncle, Defendant, had molested her. According to B., two other family members had victimized her earlier: one had molested her and the other had attempted to show her pornographic material. The State charged Defendant with three dangerous crimes against children: two counts of molestation of a child, both class 2 felonies, and one count of attempted molestation of a child, a class 3 felony.

Defendant moved to admit evidence of emotional trauma B. suffered from prior instances under A.R.S. § 13-1421(A)(2), which creates an exception to the rape shield law based upon the source of trauma. The Superior Court granted the motion, agreeing that the statute's reference to "trauma" encompasses both physical and emotional damage. This special action followed.

Issue/Brief Answer: Does A.R.S. § 13-1421(A)(2) permit the Superior Court to admit evidence of a victim's past emotional and physical trauma from molestation? No, the statute's exception applies only to physical trauma.

Analysis:

Section 13-1421(A)(2) provides as follows:

> Evidence relating to a victim's reputation for chastity and opinion evidence relating to a victim's chastity are not admissible in any prosecution for any offense in this chapter, § 13-3212 or chapter 35.1 of this title. Evidence of specific instances of the victim's prior sexual conduct may be admitted only if the judge finds the evidence is relevant and is material to a fact in issue in the case and that the inflammatory or prejudicial nature of the evidence does not outweigh the probative value of the evidence, and if the evidence is one of the following: . . . Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease or trauma.

Without context, "trauma" could reasonably refer to emotional as well as physical trauma. In the statute, however, trauma is listed with semen, pregnancy, and disease, each of which provides physical or biological evidence of sexual conduct. In this context, "trauma" refers to a physical injury. Moreover, evidence of past emotional or mental trauma from other family members does not tend to exclude other potential sources of trauma. Therefore, the use of "trauma" in A.R.S. § 13-1421(A)(2) refers only to physical injury.

The statute's historical background confirms this construction. In *Chambers v. Missis*sippi, the U.S. Supreme Court held that evidentiary rules preventing a Defendant from presenting evidence that someone else confessed to the crime interfered with that Defendant's right to present a defense. 410 U.S. 284 (1973). Three years later, the Arizona Supreme Court abandoned the rule that prior sexual conduct was inadmissible to prove consent or impeach a Victim's credibility in *Pope v. Superior Court*, 113 Ariz. 22 (1976). An exception exists when the evidence "directly refutes physical or scientific evidence, such as the victim [] alleged loss of virginity" or "the origin of semen, disease or pregnancy." *Id.* at 29. Therefore, physical evidence is admissible if it allows Defendant to exonerate himself by showing the sexual conduct was caused by someone else. *Id.* The Arizona Legislature codified *Pope* and its progeny in 1998 by enacting A.R.S. § 13-1421.

On appeal, Defendant argued evidence of past mental trauma inflicted by other persons should be admitted on due process grounds. According to Defendant, B.'s testimony is the only evidence against him and the trial outcome hinges upon her identification of the abuser and memories of the abuse. The Court did not reach the argument because the Superior Court had yet to address it.

In a concurrence, one judge held that the statute was unambiguous. The judge noted that the authoring judge had employed interpretation methods for ambiguous statutes without expressly holding that A.R.S. § 13-1421 was ambiguous.

State v. Johnson, __ Ariz. __, __ P.3d __, 2026 WL 820411 (App. 2026) (hearsay/Confrontation Clause; additional issue: 12-person jury)+

Petition for Review expected (State has requested extension of time).

Background: Victim's daughter lost contact with Victim and became concerned. She knocked on the door of Defendant, who was Victim's boyfriend. Upon opening the door, Defendant prevented Victim from leaving. After several minutes, Victim pushed past Defendant and went to the hospital with her daughter. At the hospital, a doctor examined a cut and bruising around Victim's left eye. The doctor asked how the injuries had occurred, and she responded that Defendant had punched her a couple days ago and

would not permit her to seek medical care. The doctor treated the wound and said it would heal without further intervention.

Two police officers met Victim at the hospital and obtained Defendant's address. Thereafter, a case agent set up an appointment at the Family Advocacy Center, located in the Phoenix police station. During the appointment, Victim consented to a forensic examination. The forensic examiner logged Victim's statements verbatim and provided them to her case agent. In addition to describing the punch, Victim reported that Defendant had wrapped his arm around her neck so that she couldn't breathe. He also followed Victim around the unit and told her that she wasn't going anywhere. The forensic examiner was the only witness who had discussed strangulation.

The State charged Defendant with aggravated assault (due to strangulation), unlawful imprisonment, and assault (due to physical injury). Before trial, the State advised that Victim would not testify. Defendant then raised hearsay and Confrontation Clause objections to testimony by the doctor and a forensic examiner, arguing that they could not testify to Victim's identification of Defendant. The State responded that the statements were not hearsay because they were made for the purpose of medical diagnosis and treatment. The Court ruled in the State's favor.

At trial, the parties agreed to selection of an eight-person jury. The jury subsequently convicted Defendant as charged. The Court then entered judgment and sentenced Defendant to concurrent terms. This appeal followed.

Issues/Brief Answers:

1) Did the Superior Court abuse its discretion in admitting statements exchanged with the doctor under the Rule 803(4) hearsay exception? No.

2) Did the Superior Court abuse its discretion in admitting statements exchanged with the forensic examiner under the Rule 803(4) hearsay exception? Yes, and the error was not harmless.

3) Did admission of the forensic examiner's evidence violate Defendant's rights under the Sixth Amendment's Confrontation Clause? Yes.

4) Did the Superior Court abuse its discretion in admitting Victim's statement to the police about where the offenses occurred? Yes, but the error was harmless.

5) Was Defendant entitled to a 12-person jury? No.

Analysis:

Rule 803(4) and the Confrontation Clause: Rule 803(4) creates an exception to the hearsay rule for a statement made and reasonably pertinent to medical diagnosis or treatment, whether or not the declarant is available, that "describes medical history; past or present symptoms or sensations; their inception; or their general cause." Ariz. R. Evid. 803(4)(a)-(b). Victim's exchanges with the doctor fall within the exception. The doctor's open-ended "what happened" question is pertinent to treatment. Likewise, Victim's primary purpose in making statements to the doctor was to obtain treatment. The exchange occurred in a hospital and no police were present. Rule 803(4) does not support admission of Victim's statements to the forensic examiner, however. The police control whether a forensic exam will occur, and the Family Advocacy Center is located within the police station. Victim met with the forensic examiner at the case agent's request. Nothing in the record suggests that Victim met with the forensic examiner to secure treatment.

Not only were the forensic examiner's statements hearsay, but they also violated the Confrontation Clause. Specifically, the Sixth Amendment bars the admission of out-of-court testimonial evidence unless the Defendant has a chance to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Evidence is testimonial if gathered for the primary purpose of criminal investigation and to create a substitute for trial testimony. *State v. Trinidad*, 257 Ariz. 485, 488, ¶ 11 (App. 2024). Accordingly, the Superior Court erred in admitting these statements, and the error was not harmless, as the forensic examiner was the only witness to testify about strangulation. Nor could the State show that the statements, which came in as a package, did not affect the other counts.

The Superior Court likewise erred in admitting testimony from a police officer as to where Victim said the offenses had occurred. A crime's location does not fall under any of the hearsay rule exceptions. The evidence was cumulative of other evidence from Victim's daughters and doctor, however, and the error was harmless.

Jury Size: Under the Sixth Amendment, Defendants are entitled to "a speedy and public trial, by an impartial jury." This provision does not require a 12-person jury. *Williams v. Florida*, 399 U.S. 78, 86 (1970). Likewise, the Arizona Constitution permits a jury of fewer than 12 persons when the maximum permitted punishment is less than 30 years. Ariz. Const. art. II, § 23; *see State v. Soliz*, 223 Ariz. 116, 118, ¶ 6 (2009). In A.R.S. § 21-102(A)-(B), the Arizona Legislature requires a 12-person jury in any case involving potential punishment of 30 years or more, and an eight-person jury "in any other criminal case." Because Defendant faced a maximum cumulative sentence of less than 30 years, he was not entitled to a 12-person jury.

State v. L& L Investments, LLC, __ Ariz. __, __ P.3d __, 2026 WL 478803 (App. 2026) (expert testimony on ultimate issue and 404(b); additional issues: consecutive fines; prosecutorial error; sufficiency of the evidence)+

Petition for Review pending.

Background: Owned by Larry and Leasa Carter, Defendant L & L operated behavioral health facilities in Nevada. After Nevada sanctioned the Carters and prohibited them from operating any Medicaid-affiliated facilities, the Carters turned their attention to Arizona, which did not require prior authorization for services. Defendant began back-billing for non-existent services and for reimbursement for services purportedly rendered after clients had died.

Arielle Dix, affiliated with Defendant, instructed Dale Henson to help with billing in Arizona. Defendant required each new service provider to contract with Defendant and grant Defendant a 20 percent ownership share in the business. To then become an AHCCS-approved service provider, the applicant must complete an enrollment application and sign a provider participation agreement. The applicant must disclose any related parties holding more than a 5 percent interest and must disclose any sanctions from another state's Medicaid program. In 2019, Dix sent the Carters an e-mail from her attorney notifying Dix that she was facing criminal charges in Nevada and attaching the direct complaint and an affidavit.

Meanwhile, Henson helped establish about 30 businesses under Defendant's umbrella. Several businesses failed to disclose the Defendant's ownership interests and the agents' exclusion from the Medicaid program. In 2020, a client complaint alerted the AHCCCS Inspector General to Defendant's billing practices after the client received a bill for services purportedly rendered at two different facilities on the same day, one of which was not registered with AHCCCS.

The State charged Defendant, Dix, Henson, and 24 Co-Defendants with conspiracy, illegal control of an enterprise, theft, and fraudulent schemes and artifices. Henson pled guilty and agreed to testify truthfully against Defendant. On the first day of trial, the State moved to admit evidence of Dix's failure to disclose her own exclusion from Nevada's Medicaid program. Defendant did not object to the reference in opening statement but asked that the Court defer ruling on its admissibility until the State laid foundation. The Court agreed. The Court subsequently admitted Dix's e-mail to the Carters attaching a direct complaint and affidavit over the defense's objection.

At the close of evidence, Defendant unsuccessfully moved for acquittal on the ground that the State failed to establish Defendant as a legal entity. The jury then found Defendant guilty on all charges and the Court imposed consecutive fines under A.R.S. § 13-803(A)(1). This appeal followed.

Issues/Brief Answers:

1) Did the Superior Court err in admitting the Inspector General's testimony? Yes, to the extent she testified as an expert and opined on the ultimate issue. The errors were harmless, however.

2) Did the Superior Court properly admit Nevada's criminal complaint and supporting affidavit regarding Dix? Yes. Defendant's omission of the information was material and probative of Defendant's knowledge and therefore was admissible under Ariz. R. Evid. 404(b)(2).

3) Was the Superior Court correct in imposing consecutive fines for the separate offenses? Yes.

4) Did the prosecutor commit error in stating what the evidence shows from his perspective? Yes, but the error was harmless.

5) Did the prosecutor improperly comment on why Henson pled guilty? No. The prosecutor was drawing a reasonable inference from the evidence.

6) Did substantial evidence support Defendant's identity as a legal entity? Yes.

Analysis:

Expert Testimony: The State disclosed the Inspector General as a witness but failed to identify her as an expert. She then went on to testify as an expert based on her technical and specialized knowledge, including providing details on procedures and operations at AHCCCS. Defendant never objected based on lack of disclosure, Rule 701, Rule 702, or prejudice. Defendant's only objection was that the jury did not realize it could reject the Inspector General's testimony. The record contained a jury instruction on that very point, however.

Division One did agree that the Inspector General impermissibly opined on the ultimate issue. Evidence Rule 704(a) states that "[a]n opinion is not objectionable just because it embraces an ultimate issue." A comment to the rule states that an opinion must assist the trier of fact in understanding evidence and determining a fact, however.

Testimony that "parrots" a statute crosses the line. *Fuenning v. Superior Ct.*, 139 Ariz. 590, 605 (1983). Here, the State asked: "In this case or your investigation, it's your position that you uncovered a fraud scheme here?" The inspector general responded affirmatively. Allowing this testimony was an abuse of discretion, but the error was harmless in the context of the entire trial and 11 days of evidence.

Rule 404(b) Evidence: The appellate court also analyzed the application of character evidence rules to the e-mail notifying the Carters of the Nevada criminal complaint against Dix. Rule 404(b)(1) generally prohibits admission of evidence to show character and action in conformity therewith. Rule 404(b)(2) provides for its admission to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The e-mail with complaint and affidavit was relevant to show what Defendant and its agents knew or should have known. Moreover, its probative value was not substantially outweighed by the danger of unfair prejudice under Ariz. R. Evid. 403.

Consecutive Fines: Alternatively, Defendant argued that consecutive fines for each offense violated A.R.S. § 13-116. The statute provides: "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." Arizona uses the identical elements test to determine whether a constellation of facts constitutes a single act, which requires concurrent sentences. *State v. Gordon*, 161 Ariz. 308, 312-15 (1989). The court must subtract the evidence needed to convict on the ultimate charge and determine whether enough evidence remains to satisfy the elements of the other crime. It also must consider whether it was factually impossible to commit the ultimate crime without also committing the secondary crime. Next, the court must consider whether the conduct in committing the secondary crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime. Here, the tests all led to the same result. Defendant's conduct caused harm beyond the initial benefit it obtained from having affiliated businesses approved as AHCCCS providers. The benefits resulted from continued operational and financial practices. Moreover, it is possible to commit fraudulent schemes and artifices without committing conspiracy, illegal control of an enterprise, and theft. Accordingly, Division One upheld the imposition of consecutive fines.

Closing Argument: Division One further held that the prosecutor's closing did not warrant reversal. Defendant claimed that the prosecutor committed vouching. Vouching occurs when a prosecutor suggests "information not presented to the jury supports the witness's testimony." *State v. Acuna-Valenzuela*, 245 Ariz. 197, 217, ¶ 75 (2018) (quoting *State v. Vincent*, 159 Ariz. 418, 423 (1989)). It also occurs when the prosecutor places the prestige of the government behind a witness. *State v. Johnson*, 247 Ariz. 166, 204, ¶ 157 (2019). The prosecutor here told the jury: "I think that . . . in a case

with this much evidence I think it's helpful to just clarify what the evidence suggests. And not even suggest, but shows. And here at least the evidence, from my perspective, shows that there is nothing legitimate going on in Arizona under the L&L umbrella." This comment was improper. Nevertheless, the Court instructed the jury that the attorneys' statements were not evidence. Because only one improper reference occurred, Division One found no fundamental error.

Equally unavailing was Defendant's challenge to the prosecutor's remarks concerning Henson. The prosecutor stated: "And in this particular case, or in this trial it has been shown over and over and over again that [] Henson misled AHCCCS in terms of overbilling them according to the billing matrices as delivered to him. He claims it's [Dix]'s or L&L's matrices. I think it's his as well. I don't think [he] gets out of that, and so that's why he pled guilty to fraud[] schemes, and conspiracy to commit fraud schemes." Henson did testify about his plea agreement with the federal government, and Defendant attacked Henson's testimony on the basis. On this record, the prosecutor's remark was a reasonable inference to be drawn from the evidence. Again, the jury received instruction that the arguments are not evidence, and we assume they acted accordingly.

Substantial Evidence: Division One agreed with the State that substantial evidence supported L & L's identity. Arizona law defines a "person" to include an "enterprise, . . . an unincorporated association, a partnership, . . . or entity capable of holding a legal or beneficial interest in property." A.R.S. § 13-105(30). Henson and others testified that the Carters operated under the L & L name. According to Henson, the Carters made all decisions concerning L and L, and he identified the L & L e-mail address as the one the Carters used. Further, Leasa Carter signed documents as "Leasa Carter (L & L Investments)." It was not necessary to produce legal documents to establish L & L's identity.

State v. Searight, __ Ariz. __, 586 P.3d 147 (App. 2026) (preclusion of evidence proffered for mens rea; additional issues—sufficiency of the evidence and inconsistent verdicts)+

Petition for Review pending

Background: Defendant and his brother were racing down a four-lane arterial road in Tucson in the early afternoon. Defendant's car blew through the intersection because he was unable to stop before the light. The car clipped another vehicle proceeding west, causing Defendant to lose control. His car struck a curb, a sign, and landscaping in an apartment complex before stopping. J.B., seated in Defendant's rear passenger seat, ejected from the car and suffered severe injuries. Defendant and

A.H., both in the front seat, did not eject and sustained less severe injuries. J.B. later died in a hospital after his mother directed the doctors to remove life support.

The State charged Defendant with one count of manslaughter, two counts of endangerment, and one count of criminal damage. Prior to trial, the State moved to preclude testimony concerning seat belt use over Defendant's objection. After a six-day trial, the jury found Defendant guilty of one count each of negligent homicide, endangerment, and criminal damage. The Court entered judgment and sentenced Defendant to two concurrent terms of imprisonment. It also suspended imposition of sentence and placed Defendant on a three-year term of probation, commencing upon absolute discharge from prison. This appeal followed.

Issues/Brief Answers:

1) Did the Superior Court abuse its discretion in precluding evidence about the Victim's seat belt use? Yes, because it was relevant to Defendant's state of mind. The error was not fundamental, however.

2) Was the decision to remove a Victim from a ventilator a superseding cause of his death? No.

3) Could the jury convict on both negligent homicide and endangerment? Yes.

Analysis:

Preclusion of Seat Belt Evidence: The Supreme Court has held that a victim's failure to wear a seat belt is a concurrent cause of injury, not an intervening cause, if Defendant's injurious course of conduct continues up to the time of injury. *See State v. Aragon*, 252 Ariz. 525, 530, ¶¶ 15-16, 505 P.3d 657, 662 (2022). Nevertheless, the lack of seat belt use could be relevant to Defendant's mens rea. To convict a Defendant of manslaughter, the State must prove the Defendant was aware of and consciously disregarded a known risk or committed gross negligence by failing to perceive it. Therefore, whether a driver knew about a victim's seat belt use is relevant to his or her knowledge of the consequences to others. As a result, the Superior Court erred in evaluating or weighing the probative value of any seat belt evidence. The mens rea and objective risk of death elements are analytically distinct from the causation question.

The error was not fundamental, however. The undisputed evidence showed that Defendant was racing the car and he admitted to running a red light. He proceeded at 58.9 miles an hour (at least), nearly 20 miles per hour above the speed limit. On this record, no reasonable juror could have acquitted Defendant of negligent homicide.

Sufficiency of the Evidence: Alternatively, Defendant challenged the denial of a Rule 20 motion on a homicide count. Specifically, Defendant argued that Victim's family's decision to remove Victim from life support was a superseding cause of Victim's death. Division Two rejected the argument. But for Defendant's conduct, Victim would not have sustained his injury or become dependent on a ventilator. A jury could reasonably conclude that such a decision was a foreseeable consequence of the accident.

Inconsistent Verdicts: Finally, Defendant claimed that the jury's verdicts on endangerment and manslaughter are logically inconsistent. According to Defendant, the acquittal on manslaughter means that Defendant did not consciously disregard a substantial risk of Victim's death, which is inconsistent with the guilty verdict on endangerment. Because the jury found Defendant not guilty of manslaughter but guilty of negligent homicide, it apparently concluded that the State had not proven a reckless mental state beyond a reasonable doubt. To convict on endangerment, the State had to show that Defendant "disregarded a substantial risk that his conduct would cause imminent death." Division Two explained that Arizona law generally permits inconsistent verdicts when those verdicts are submitted as to discrete offenses. For example, the Arizona Supreme Court held that the jury could acquit a Defendant of manslaughter but convict on endangerment counts in *Gusler v. Wilkinson*, 199 Ariz. 391, 396, ¶ 25, 18 P.3d 702, 707 (2001).

In a special concurrence, one judge agreed with the disposition but would not have reached the issue of whether seat belt evidence is relevant to a Defendant's mens rea.

State v. Tapia Munoz, __ Ariz. __, 580 P.3d 1159 (App. 2025) (severance, hearsay; additional issue: aggravated sentences)+

Background: Camera footage captured the driver of a Buick approaching an intersection, shooting Victim John, pursuing John to an alley, and backing over him. Later that night, a Buick paused to allow a couple to walk from a casino to a parking lot. The Buick driver followed them, exited the car, fired shots, killed Victim Robert, and sped away. Officers located the Buick the following morning and captured Defendant after a chase. The State charged Defendant with two counts of first-degree murder, one count of attempted first-degree murder, one count of aggravated assault, one count of unlawful flight from a law enforcement vehicle, and one count of misconduct involving weapons.

The defense moved to sever the murder and misconduct involving weapons counts. The Court ordered severance only for the misconduct involving weapons count. The jury ultimately convicted Defendant as charged. At sentencing, the Superior Court found that he had prior felony convictions and was on felony release at the time of the offenses. The jury had further found that he had used a deadly weapon or dangerous

instrument and had been lying in wait. The Court entered judgment and sentenced Defendant to two natural life sentences, a maximum 6-year sentence for unlawful flight, a maximum 20-year sentence for aggravated assault, and a 28-year sentence for attempted murder. This appeal followed.

Issues/Brief Answers:

1) Did the Superior Court commit fundamental error in denying the motion to sever the murder trials? No.

2) Did the Superior Court abuse its discretion in admitting evidence extracted by a Cellebrite device from one of the cell phones recovered from the Buick? No.

3) Did the Superior Court commit fundamental error in aggravating the sentences for aggravated assault and unlawful flight? No

Analysis:

Severance: Division One did not need to analyze the severance under Arizona Rule of Criminal Procedure 13.3(a) because Defendant had failed to preserve the issue by renewing his motion to sever at the close of evidence. *See* Ariz. R. Crim. P. 13.4(c). Because Defendant had also failed to brief fundamental error or prejudice on appeal, the Court declined to reverse. Moreover, Defendant could not point to any evidence that the jury improperly considered Robert's murder in deciding the counts related to John's murder.

Hearsay: Defendant also challenged the admission of reports containing cell phone evidence obtained in a Cellebrite extraction. Cellebrite is a hardware component used to extract information from cell phones, SIM cards, and SD cards. It also has a software component that processes the information and turns it into a report. The report generates automatically, and the operator's role consists of plugging the phone and SIM card into the wall. The operator testified that he has no opportunity to manipulate this process. The Superior Court had admitted the evidence under the business records exception to the hearsay rule in Ariz. R. Evid. 803(b)(6). Division One upheld its admission by holding that the reports do not even qualify as hearsay for purposes of Arizona Rule of Evidence 801(c) because the statements generated are not the product of a human "declarant."

Aggravated Sentences: Alternatively, Defendant argued that the Court erroneously aggravated two of his sentences. The Court required only one proper aggravating factor to impose a sentence above the presumptive under A.R.S. § 13-701(D). *See* A.R.S. § 13-703(C). Defendant argued that his sentence for the aggravated assault

offense was erroneously based on his use of a deadly weapon or dangerous instrument. Division One agreed that the Superior Court erred in considering this factor under A.R.S. § 13-701(D)(2) because it was already an essential element of the underlying offense. The Superior Court also relied, however, on the jury's finding that Defendant had been lying in wait under A.R.S. § 13-701(D)(17). Moreover, the Court also determined that Defendant had prior felony convictions under A.R.S. § 13-701(11). Accordingly, the aggravated term for aggravated assault was not illegal.

Equally unavailing was the claimed illegality of the aggravated sentence for unlawful flight. This offense carries a minimum sentence of 4 years and a maximum of 6 years. The Superior Court based its aggravated term on factors the jury had found, but the record reflected that the jury had found no aggravating factors for this offense. Nevertheless, the Superior Court determined that Defendant had committed this offense while on pretrial release, which allowed the Court to increase the sentence by two years. *See* A.R.S. § 13-708(D). Therefore, the minimum 4-year sentence could increase to a 6-year term, which is the sentence Defendant received. In a footnote, Division One acknowledged that this factor should have been found by the jury. *See State v. Benenati*, 203 Ariz. 235, 241-42, ¶ 19 (App. 2002). But Defendant had not objected to the finding or challenged it on appeal. Therefore, the Court affirmed the sentence.

State v. Vallejo, __ Ariz. __, 574 P.3d 709 (App. 2025) (voluntary absence; additional issue: sufficiency of the evidence)+

Background: This murder case arose out of a bank robbery. The State charged Defendant with multiple crimes, including first-degree murder. Defendant did not attend the second day of the trial and explained to the Court that the clothes counsel had provided looked "scrubby" and he wanted to a wear a suit supplied by a friend. The friend's suit had arrived one hour before trial, leaving insufficient time for the jail to conduct its security protocols. The following colloquy occurred:

> The Court: All right. So . . . you are going to be present [with defense counsel] or are you going to voluntarily absent yourself from the trial today?
>
> Defendant: Today I am not going to be here.
>
> The Court: All right. I find that Mr. Vallejo is knowingly . . . intelligently, and voluntarily absenting himself from today's proceedings. So are you sure? You're sure?
>
> Defendant: Yeah.

Defendant also missed the morning session of the third day of trial. Judicial staff relayed to the Court that Defendant was refusing to wear the pants provided by jail staff. Evidently Defendant had ripped a pair of pants and declined to wear the replacement. In light of these events and the earlier record, the Superior Court found this absence was voluntary and rejected the defense's motion for a break or continuance to the afternoon. Defense counsel later explained that Defendant had intended to attend the morning session. He balked, however, when the jail staff brought pants that he was not expecting and assumed defense counsel was railroading him. Once Defendant realized he was not being railroaded, he became willing to participate. At no point during this description did Defendant contradict counsel.

Ultimately, the jury found him guilty of second-degree murder, and the Court entered judgment and sentenced him to a 21-year term of imprisonment. This appeal followed.

Issues/Brief Answers:

1) Did Defendant overcome the inference of voluntary absence on the third trial day? No.

2) Did sufficient evidence support the second-degree murder conviction? Yes.

Analysis:

Voluntary Absence: The Sixth Amendment secures a Defendant's right to attend trial and confront the witnesses against him or her. Under Rule 9.1, Arizona Rules of Criminal Procedure, a Superior Court may presume a voluntary waiver from Defendant's unexplained absence if Defendant has actual notice of the trial date, of his or her right to be present, and of the risk that the trial could proceed in Defendant's absence. Defendant argued that the Superior Court violated Rule 9.1 by failing to question him or security staff before determining Defendant's absence on the third day was voluntary. He pointed out that during the second-day colloquy, the Court spoke to Defendant about his absence "today." But the broader record reflected that the Court had repeatedly admonished Defendant of his right to attend trial and the consequences of failing to appear. When Defendant appeared in the afternoon of the third day, he did not contradict counsel's recitation of the events. Although the Court had options for examining the in-custody Defendant directly, it was not required to pursue them. According to the majority, the reasons for Defendant's absence were clear. On this record, Division Two found Defendant had not overcome the presumption of voluntariness. Nor could the

appellate court conclude, in light of the totality of the evidence, that the Superior Court should have granted the continuance Motion.

The dissent argued that the Superior Court should have questioned the jail guards and Defendant concerning the reasons for the latter's absence. Moreover, the in-court exchanges on the second day should have alerted the Court to a defense attorney-client dynamic that could persist. The Superior Court also should have inquired as to whether the jail shared any responsibility for the non-attendance. Because the Superior Court failed to create an adequate record, the dissent concluded that Defendant was entitled to a new trial.

Sufficiency of the Evidence—In reviewing the sufficiency of evidence, the appellate court must view the facts and all inferences from them in the light most favorable to sustaining the jury's verdict. *State v. Gray*, 231 Ariz. 374, 376 ¶ 3 (App. 2013). Defendant argued that the primary witness against him benefitted from a generous plea deal but gave testimony in conflict with the forensic evidence. Defense counsel cross-examined the witness concerning these issues, however, and the jury still found Defendant guilty. Furthermore, a Snapchat exchange traced to Defendant placed him within 5 to 10 minutes of the Victim before the murder. Likewise, Defendant's own cell phone location history put him near the crime scene. In the end, Division Two declined to second-guess the jury's deliberations, and affirmed.

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JURY INSTRUCTIONS

State v. Brown, __ Ariz. __, 577 P.3d 14 (2025) (justification)+

Background: M.H. was Defendant and J.A.'s neighbor in their condominium complex. At times M.H. had lived with them. Defendant eventually told J.A. he was uncomfortable having M.H. in their unit or around their children. M.H. had been in an altercation with other friends and had a prior felony conviction for using a knife on a former roommate. Nevertheless, J.A. maintained her friendship with M.H.

In December 2021, Defendant separated from J.A. M.H. told J.A. he did not want her to reconcile with Defendant. After M.H. and Defendant fought, Defendant moved back in with J.A. and they agreed that M.H. would not return to their condo. One week later, however, J.A. invited M.H. over for the day. Defendant was at work and not "happy" about the visit. After finding M.H. at the house upon his return, Defendant locked himself in the bedroom and sent a text to J.A. asking that he not be disturbed. Unphased, J.A. forced the door open, only to have Defendant shut it again. When J.A.

forced the door open a second time, Defendant saw M.H. and J.A. standing together but did not see who had forced the door. Defendant began swinging a microphone stand around to deter M.H. and J.A. from entering the bedroom. M.H. responded by fighting Defendant and got struck in the face.

A jury eventually found Defendant guilty of aggravated assault. On appeal, Division Two affirmed and rejected arguments that the jury should have been instructed on defense of a residential structure, defense of the premises, and the presumption related to these defenses. On appeal, the Arizona Supreme Court reversed (6-1) and remanded for retrial.

Issues/Brief Answers:

1) Did the Superior Court err by failing to instruct the jurors on the residential structure defense under A.R.S. § 13-418 and the related presumption under A.R.S. § 13-419? Yes.

2) Did the Superior Court err by failing to instruct the jurors on defense of the premises under A.R.S. § 13-407 and the related presumption under A.R.S. § 13-419? Yes.

Analysis:

Defense of Residential Structure: Under A.R.S. § 13-418(A), "Notwithstanding any other provision of this chapter, a person is justified in threatening to use or using physical force or deadly physical force against another person if the person reasonably believes himself or another person to be in imminent peril of death or serious physical injury and the person against whom the physical force or deadly physical force is threatened or used was in the process of unlawfully or forcefully entering, or had unlawfully or forcefully entered, a residential structure or occupied vehicle, or had removed or was attempting to remove another person against the other person's will from the residential structure or occupied vehicle." Under subsection (B), "A person has no duty to retreat before threatening or using physical force or deadly physical force pursuant to this section."

The key issue is what the Legislature meant by "residential structure." Under A.R.S. § 13-1501(11), a residential structure is "any structure, moveable or immovable, permanent or temporary, that is adapted for both human residence and lodging whether occupied or not." Further, A.R.S. § 13-1501(12) defines a structure in part as "any building . . . or place with sides and a floor that is separately securable from any other structure attached to it and that is used for lodging . . ." Based on these statutes and dictionary definitions, the majority reasoned that a residential structure is a place with sides and a floor, separately securable from any other structure attached to it, and is adapted for both

human residence and lodging. Accordingly, the residential structure need not be completely distinct from any other residential structure. Under this definition, a residential structure can include a bedroom, because it is separately securable on its own from the rest of the condo.

The Legislature also created a presumption under A.R.S. § 13-419(A) that physical force is immediately necessary "if a person knows or has reason to believe that the person against whom physical force . . . is threatened or used is unlawfully or forcefully entering or has unlawfully or forcefully entered and is present in the person's residential structure . . ." Section 13-419(B) further provides that such a person "is presumed to pose an imminent threat of unlawful deadly harm to any person who is in the residential structure . . ." Division Two found these instructions unwarranted, because the presumption does not apply to invitees and J.A. had invited M.H. to the condo. To the contrary, the Supreme Court majority concluded that J.A. had no authority to invite M.H. into the bedroom against Defendant's wishes and consequently M.H. did not qualify as an invitee. Although Division Two found Defendant could not reasonably have believed he was in imminent peril, the majority disagreed because the presumption applied. Moreover, other supporting facts included Defendant's previous encounters with M.H. and Defendant's knowledge of M.H.'s prior conviction.

Defense of Premises: The majority further found that Defendant was entitled to a defense of the premises instruction under A.R.S. § 13-407(A). The statute provides in relevant part: "A person . . . in lawful possession or control of premises is justified in threatening to use deadly physical force or in threatening or using physical force against another when . . . a reasonable person would believe it immediately necessary to prevent or terminate the commission or attempted commission of a criminal trespass by the other person in or upon the premises." Under A.R.S. § 13-407(C), the "premises" is "any real property and any structure, movable or immovable, permanent or temporary, adapted for both human residence and lodging whether occupied or not." The majority found that the condo bedroom met this definition, and the lower courts had erred in failing to instruct in light of the A.R.S. § 13-419 presumption. Because evidence indicated M.H. had forcibly entered the bedroom over Defendant's objection, the Court was required to presume that Defendant's use of physical force was necessary. J.A. may have invited M.H. into the condo but Defendant did not invite M.H. into the bedroom. Further, the errors in failing to give all three instructions were not harmless.

The dissenting judge would construe "residential unit" to apply to the condo itself, not just the bedroom, for purposes of the justification statutes. The majority's approach can lead to practical problems, including the possibility of multiple charges in burglary cases based upon how many rooms the Defendant enters. In the judge's view, J.A. had invited M.H. to the condo, making the justification statutes inapplicable.

State v. Egan, __ Ariz. __, 585 P.3d 794 (App. 2025) (justification; additional issues: duplicitous charging, prosecutorial error)+

Petition for Review pending.

Background: Victim, a guard at the Pinal County Jail, informed Defendant and other inmates of their hearing times. Defendant advised that he had been waiting since 2:00 the day before and announced: "I am out of here." Victim extended his hand and said "No, have a seat, stop." Defendant swiped Victim's hand away, and Victim then pushed Defendant back into his cell. When Victim told Defendant to turn around to be handcuffed, Defendant rushed at Victim with closed fists. Victim struck Defendant, who struck back, grabbed, and scratched at Victim. Another guard entered the cell while Victim repeatedly tased Defendant because he continued to struggle. Ultimately, both guards managed to handcuff Defendant.

The State charged Defendant with one count of aggravated assault. Defendant argued that no hand swiping occurred, and he acted in self-defense after being shoved into the cell. A jury convicted Defendant after a two-day trial. The Superior Court accordingly entered judgment and sentenced him to a 4-year term of imprisonment. This appeal followed.

Issues/Brief Answers:

1) Did the State subject Defendant to a duplicitous charge? No. A single course of conduct with multiple criminal acts may be alleged in a single charge.

2) Did the Superior Court abuse its discretion in instructing the jury on Defendant's defenses? No, they were necessary to describe Victim's right to use reasonable force.

3) Did the prosecutor commit errors that, individually or cumulatively, deprived Defendant of due process? No. Only two of the instances identified qualified as errors, and they did not warrant a new trial.

Analysis:

Duplicitous Charge: A charge is duplicitous when the indictment's text "refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Klokic,* 219 Ariz. 241, 244, ¶ 12 (App. 2008). One risk is that Defendant could be convicted by a non-unanimous jury. The State relied upon Defendant's swiping act and the hitting after being shoved into the cell, all of which occurred within five seconds. A continuing course of conduct with multiple offenses can support one charge.

Even though Defendant asserted different defenses to each contact, that circumstance does not make the aggravated assault charge duplicitous. Because Victim sustained injury only from the fight in the cell, that incident is the only one that can support the aggravated assault charge. Accordingly, there was no risk of a non-unanimous jury verdict.

Justification Instructions: The Superior Court instructed the jury that Defendant was justified in using physical force if "[a] reasonable person in the situation would have believed that physical force was immediately necessary to protect against another's use . . . of unlawful physical force and the defendant used . . . no more physical force than what appeared necessary to a reasonable person in the situation."

Over Defendant's objection, the Court also instructed that "[t]he threat or use of physical force is not justified . . . to resist arrest that the defendant knew or should have known was made by a police officer . . . where the arrest was lawful or unlawful unless the physical force used by the peace officer exceeded that allowed by law." It further instructed that an "interested official of a jail, prison or correctional institution may use physical force for the preservation of peace, to maintain order or discipline [,] or to prevent . . . the commission of any felony or misdemeanor. If the amount of physical force used exceeds that allowed by law, the defendant [is justified in] using physical force to defend himself."

Defendant argued that the instructions should cover his justification defense, not the Victim's. According to Defendant, the Court should have instructed in accordance with A.R.S. § 13-3881(B), which states a person under arrest "shall not be subjected to any greater restraint than necessary for his detention." But Division Two found the instructions given were necessary to advise the jury of Victim's right to use reasonable force. Moreover, A.R.S. § 13-3881(B) applies only to arresting officers.

Prosecutorial Error: In addition, Defendant challenged several statements from the prosecutor, but Division Two held that only two clearly qualified as prosecutorial errors. First, the prosecutor stated in her opening that Victim told his children he loved them every morning before leaving for work, just in case "something happened to him on the job." Second, the prosecutor stated in closing that no other inmates had testified because "snitches get stitches." The State never introduced any evidence to support these assertions, however. Moreover, the prosecutor's second statement implied that inmates would support Victim's testimony and thus constituted prosecutorial vouching.

Another issue arose during Defendant's cross-examination. Defendant disputed the testimony of other guards, and the prosecutor responded: "And so you are saying that they're all wrong, and you're right?" Defendant failed to object. Division Two

explained that, in general, one witness may not opine on the credibility of another witness. *State v. Doerr*, 193 Ariz. 56, 63, ¶ 26 (1998). There is no bright line rule, however, and Courts have upheld similar comments in other contexts. The record showed that the Superior Court instructed the jury that it alone determines the facts. Even assuming the prosecutor committed error, that error did not go to the foundation of the case. Moreover, the effect of all three prosecutorial statements did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Payne*, 233 Ariz. 484, 515, ¶ 134 (2013).

State v. Hendricks, __ Ariz. __, 570 P.3d 1017 (App. 2025) (justification)+

Background: Defendant, a prohibited possessor, loudly argued with another man outside a Phoenix apartment complex. A gun fired, striking the other man in the leg. Defendant, who was holding a gun, began banging on doors in the complex but no one admitted him. Ultimately, he broke an apartment window and handed the gun to a person inside. When the police arrived, they found three bullets in Defendant's pocket. A gun in the waistband of Defendant's stepson contained Defendant's DNA, as did the magazine.

The State charged Defendant with misconduct involving weapons and moved *in limine* to preclude any justification defense. Defendant responded that he wished to raise a defense of "community," but the Court granted the State's motion. Prior to voir dire, Defendant told the Court that circumstances might arise to support "justification and necessity defenses." At the close of evidence, defense counsel moved for reconsideration of the Court's ruling. Counsel also sought instructions on crime prevention and defense of premises, though he acknowledged that the law currently does not recognize justification as a defense to misconduct involving weapons. The Court denied the motion.

At trial, Defendant contended that the argument was between the Victim and his stepson, and Defendant took possession of the gun only after the shot was fired. According to Defendant, he possessed the gun only to keep his teenage stepson out of trouble. The jury convicted Defendant, and this appeal followed.

Issue/Brief Answer: Must a trial court instruct *sua sponte* on a justification defense Defendant never specifically requested? No.

Analysis: Defendant argued generally that defenses like necessity should be available in a misconduct involving weapons case, if the facts support it, but never specifically requested that instruction. He requested instruction on other justification defenses, including crime prevention and defense of premises. Absent a specific request, the trial court need not determine which of the disparate justification defenses to include

in its instructions. *See State v. Brown*, 556 P.3d 776, 782, ¶ 27 (App. 2024). Because Defendant's specific requests did not preserve the claim for a necessity instruction, fundamental error review applies. *See* Ariz. R. Crim. P. 21.3(b); *State v. Escalante*, 245 Ariz. 135, 142, ¶ 21 (2018). Because the trial court had no duty to provide the instruction, it did not err. *See Brown,* 556 P.3d 776, 782, at ¶ 30 (finding no fundamental error based upon failure to instruct on self-defense absent a specific instruction request).

State v. Hippensteel, __ Ariz. __, 572 P.3d 579 (App. 2025) (second-degree murder/*Lua*/*LeBlanc*)+

Petition for Review granted; case has been argued and is pending decision.

Background: When two men inquired about a missing tractor, Defendant took them to Victim's residence. Witnesses reported that Defendant was carrying a knife. Defendant entered the residence, where his argument with Victim escalated into a physical fight. Victim sustained fatal knife wounds to the neck and chest, while Defendant had a knife wound to his hand. The next day Defendant alternated between hiding from police and fleeing. The State apprehended him and charged him with first-degree murder, aggravated assault, unlawful flight from law enforcement, and resisting arrest.

During his 11-day trial, Defendant presented provocation evidence. He testified that as he approached Victim about the stolen tractor, Victim was agitated and waved a knife around. Defendant instantly responded, using his hand to block the knife. He said multiple times that he had not realized Victim had been stabbed, but conceded it was possible he had stabbed Victim. In a Court conference, trial counsel affirmed that the Defendant wanted second-degree murder, manslaughter, and negligent homicide instructions. The trial court prepared instructions, to which neither party objected.

Ultimately, the jury found Defendant guilty of second-degree murder—as a lesser included offense of first-degree murder—along with unlawful flight and resisting arrest. The trial court entered judgment and imposed concurrent sentences. This appeal followed.

Issues/Brief Answers:

1) Did the trial court err in instructing the jury on provocation manslaughter under *State v. Lua* and on reasonable efforts provocation manslaughter? Yes.

2) Was the use of conflicting jury instructions prejudicial? Two judges found the error nonprejudicial.

Analysis: The provocation manslaughter instruction is proper when evidence exists that Defendant committed a homicide upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim. *State v. Lua*, 237 Ariz. 301, 306, at ¶ 19 (2015). Accordingly, the trial court properly instructed:

> If you find the elements of second-degree murder proven beyond a reasonable doubt, you must consider whether the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim. If you unanimously find that the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim, then you must find the defendant guilty of manslaughter rather than second-degree murder.

The Court also provide a reasonable efforts instruction:

> You may consider the lesser included offense of manslaughter if either: 1. You find the defendant not guilty of both first and second-degree murder; or 2. After full and careful consideration of the facts, you cannot agree on whether to find the defendant guilty or not guilty of "first-degree murder" or "second-degree murder."
>
> The crime of manslaughter can be committed two ways. The first is "reckless manslaughter." Reckless manslaughter requires proof that the defendant recklessly caused the death of another person. The second way to commit "manslaughter" is manslaughter by sudden quarrel or heat of passion.

All three appellate judges agreed that the trial court erred in including provocation manslaughter under the reasonable efforts instruction. Reasonable efforts instructions should only apply to lesser included offenses. Reckless manslaughter is a lesser included offense of first- or second-degree murder, but provocation manslaughter is not a lesser included offense of second-degree murder. Whereas the first instruction correctly required the jury to consider provocation manslaughter if the elements of second-degree murder are proved, the second instruction told the jury not to consider manslaughter unless it found Defendant not guilty of second-degree murder or was unable to decide. Compounding the error, the verdict form directed the jury to stop deliberating once it found the elements of second-degree murder met and not to complete the verdict form on provocation manslaughter.

The majority found that the error was not prejudicial. To meet this standard, Defendant would have to show that a reasonable jury could have reached a different

verdict. The Court found it would be speculation to conclude the jury did not follow the entire correct second-degree murder instruction. Assuming that the jury followed the instruction given, it must have considered provocation manslaughter and rejected it in favor of second-degree murder. If anything, the reasonable efforts instruction offered the jury a second opportunity to consider provocation manslaughter.

The dissenting judge found the error was fundamental because Defendant had testified that Victim was agitated and waving a knife, causing Defendant to react instantly by using his left hand to block the knife. The instructions went to the case's foundation. Moreover, the presumption that the jury followed its instructions "cannot fix what was wrong here." Because the verdict forms and instruction may have stopped the jury from reaching provocation manslaughter, the error was fundamental.

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SENTENCING

State v. Marner (Haniffa), __ Ariz. __, 583 P.3d 53 (2026) (dangerous crimes against children)+

Background: Defendant corresponded with an undercover police officer posing as a minor girl under 15 years old. He eventually offered or solicited sexual conduct from the officer. The State charged Defendant with luring a minor for sexual exploitation. The defense then successfully moved to dismiss the dangerous crimes against children enhancement under A.R.S. § 13-705. The State accordingly sought special action relief, but Division Two denied relief in a split decision. This appeal followed.

Issue/Brief Answer: Does luring a minor for sexual exploitation qualify as a dangerous crime against children when no actual minor under 15 is involved? Yes.

Analysis: The luring a minor statute, A.R.S. § 13-3554, provides in relevant part:

> A. A person commits luring a minor for sexual exploitation by offering or soliciting sexual conduct with another person knowing or having reason to know that the other person is a minor.
>
> B. It is not a defense to a prosecution for a violation of this section that the other person is not a minor.
>
> C. Luring a minor for sexual exploitation is a class 3 felony, and if the minor is under fifteen years of age it is punishable pursuant to § 13-705.

Meanwhile, the dangerous crimes against children statute, A.R.S. § 13-705, provides, in pertinent part:

> R. A dangerous crime against children is in the first degree if it is a completed offense and is in the second degree if it is a preparatory offense, except attempted first degree murder is a dangerous crime against children in the first degree.
>
> S. It is not a defense to a dangerous crime against children that the minor is a person posing as a minor or is otherwise fictitious if the defendant knew or had reason to know the purported minor was under fifteen years of age.
>
> T. For purposes of this section:
>
> > 1. "Dangerous crime against children" means any of the following that is committed against a minor who is under fifteen years of age: . . . . (s) Luring a minor for sexual exploitation.

Applying A.R.S. § 13-3554, the Supreme Court concluded that Defendant could be convicted of luring a minor even though no minor under 15 was involved. In construing the statutes, the Supreme Court majority adopted the dissenting judge's approach in *State v. Superior Court (Marner)*, 258 Ariz. 512 (App. 2024). The Supreme Court majority agreed that nothing in subsection C expressly requires the minor to be real. Nor does subsection A, the statute defining the offense. Moreover, subsection B, which provides that the absence of a minor is no defense, modifies the entire statute. Therefore, subsection B precludes the use of fictitiousness as a defense to subsection A and to a sentence enhancement under subsection C.

Nevertheless, Defendant urged that A.R.S. § 1-215(21) defines a "minor" as "a person under eighteen years of age." The statute qualifies the definition with the statement "unless the context otherwise requires." That context exists here, because the Arizona Legislature acknowledged that fictitious minors qualify as minors under A.R.S. § 13-3554(B). The Supreme Court also distinguished *State v. Regenold*, 227 Ariz. 224 (App. 2011), and *State v. Villegas*, 227 Ariz 344 (App. 2011), which interpreted prior versions of A.R.S. § 13-3554. Therefore, A.R.S. § 13-705 may be invoked in luring cases involving no actual minors.

The Supreme Court likewise rejected Defendant's argument that the A.R.S. § 13-705(T) enhancement applies only when an actual minor is a victim. This argument fails to adequately account for A.R.S. § 13-705(S), which the Arizona Legislature enacted in

response to *Wright v. Superior Ct. (Gates)*, 243 Ariz. 118 (2017). Subsection S modifies all provisions of A.R.S. § 13-705, including subsection T. Reading A.R.S. §§ 13-3554 and 13-705 together, the statutes establish that the lack of an actual minor does not preclude liability or enhancement as a dangerous crime against children. The Supreme Court consequently disavowed *Wright* to the extent it limited application of any part of A.R.S. § 13-705 to only actual minors. In 2025, the Arizona Legislature further amended A.R.S. §13-705(T)(1) to state that the enhancement applies to "a person posing as a minor if the defendant knew or had reason to know that the purported minor was under 15 years of age." This amendment underscores the change already clear in 2018: that the enhancement applies even when the minor is fictitious.

The dissenting judge argued that A.R.S. §13-3554(C) requires the State to prove beyond a reasonable doubt that the subject of the offense was an actual minor. In the dissent's view, subsection B's expansion of "minor" to encompass fictitious minors applies only to subsection A, not subsection C. Therefore, the subject's actual age is a prerequisite if the State seeks to enhance the luring sentence under subsection C.

State v. Howard, __ Ariz. __, 573 P.3d 1142 (App. 2025) (substitute judge at sentencing; other issues: self-defense jury instruction, judicial bias (portion depublished))+

Petition for Review granted in part and is pending; paragraphs 20-25 of opinion, relating to judicial bias, ordered depublished.

While preparing for a party, a group noticed movement on their friend's (Uncle's) outdoor camera. Minutes later, Defendant went outside to check her car and found that her purse was missing. Uncle walked over to a nearby park, where he spoke to Victim and one other man. One of the men eventually handed over Defendant's empty purse. Later Defendant and two other friends came to the park to retrieve the purse's contents. Defendant started yelling at Victim and the accomplice. Defendant also fired a shot, killing Victim. She subsequently claimed Victim had approached her in an odd manner and appeared to be reaching for something.

The State charged Defendant with second-degree murder. The Court gave the proper self-defense instruction to the jury. The problem was that it also included an affirmative defense instruction defense counsel had requested:

> The State has the burden of proving beyond a reasonable doubt that the defendant did not act with [] justification. If the State fails to carry this burden then you must find the defendant not guilty of the charge. The

> defendant has raised the affirmative defense of self-defense with respect to the charged offense of second-degree murder.
>
> The burden of proving each element of the offense beyond a reasonable doubt always remains with the State. However, the burden of proving the affirmative defense of self-defense is on the defendant. The defendant must prove the affirmative defense of self-defense by a preponderance of the evidence.
>
> If you find the defendant has proven the affirmative defense of self-defense by a preponderance of the evidence, [you] must find the defendant not guilty of the offense of second-degree murder.

Thereafter, the jury notified the Superior Court that it had reached a verdict but Defendant had not yet arrived at Court. Out of the jury's presence, the Court advised that it was disinclined to delay further and stated that Defendant was being "disrespectful to this process." The jury found Defendant guilty of manslaughter by sudden quarrel or heat of passion.

With Defendant still absent, the Court conducted an evidentiary hearing on the State's alleged aggravation factors. After Victim's mother testified, the Court read the verdict form on aggravating circumstances, and the jurors left for the jury room. While the jurors deliberated, the judge stepped off the bench and embraced Victim's mother, saying words to the effect of "I am terribly sorry for your loss and the pain you have suffered." Defendant arrived at Court, and the jury found the State had established three aggravating factors. Victim's mother reported the embrace to the Commission on Judicial Conduct, which issued a reprimand based upon the appearance of bias. The trial judge subsequently recused herself.

During a status conference, a newly assigned judge told the parties he would review the presentence report and the sentencing memos from both parties, but did not intend to review the trial transcript. At sentencing, defense counsel complained about some "liberties" in the State's memo and stated it was fundamentally unfair for Defendant to be sentenced by a judge who did not preside at trial. In addition, counsel stated that the judge should have reviewed the transcript and watched the FTR recordings. After an exchange, defense counsel stated that he objected to the State's characterization of material at trial. After hearing from the witnesses, the new judge sentenced Defendant to an aggravated 18-year term. This appeal followed.

Issues/Brief Answers:

1) Did the erroneous jury instruction entitle Defendant to a new trial? No.

2) Did Defendant demonstrate error based upon the trial judge's alleged bias? No.

3) Must the Court resentence Defendant because the new judge failed to comply with Rule 19.4? Yes

Analysis: On appeal, the parties recognized that the affirmative defense instruction was erroneous. Division One declined to grant relief, however, because Defendant had invited the error.

Relying upon a reprimand from the Commission on Judicial Conduct, Defendant further argued that the trial judge was biased. Division One rejected the argument, pointing out that the reprimand was based upon the appearance of bias, not actual bias, and actions by the Commission have no preclusive effect. Nor was Division One persuaded by the trial judge's remarks concerning Defendant's absence and disrespect. Defendant's absence could be viewed as disrespectful of the jurors who had devoted seven days to the trial. In any event, Defendant failed to identify any prejudice stemming from the alleged bias.

The majority did agree, however, that the new judge's failure to review the trial record required resentencing. Rule 19.4 provides: "If the judge who is hearing or trying a criminal proceeding becomes ill or is otherwise incapacitated, that judge may be replaced by another judge of the same court . . . . If the new judge believes after reviewing the record that continuing the proceeding would be unduly prejudicial, the judge must order a new trial or proceeding. The judge should consider the manifest necessity of declaring a mistrial over the objection of the defendant before ordering it." A comment to Rule 19.4 indicates that the trial transcript is the measure of the record. Therefore, hearing sentencing arguments and reviewing sentencing recommendations does not qualify as reviewing the record. The majority further reasoned that its approach was consistent with Arizona Rule of Civil Procedure 63, which requires the successor judge to certify "familiarity with the record and determining that the action may be completed without prejudice to the parties." Accordingly, the majority affirmed the conviction, vacated the sentence, and ordered a remand for resentencing after review of the trial transcripts or FTR recordings.

One judge dissented, arguing that Rule 19.4 only applies when a judge becomes incapacitated during an ongoing proceeding. An appellate court's evaluation of the successor judge's action must be review for abuse of discretion and only on a case-by-case basis. In this case, Defendant failed to establish prejudice resulting from the Court's failure to review the trial transcript.

State v. Riehle, __ Ariz. __, 586 P.3d 693 (App. 2026) (Sixth Amendment/finding of dangerous nature; additional issues: *Daubert*, sufficiency of the evidence)+

Petition for Review pending

Background: Defendant fired two shots at a woman parked in front of his house who was waiting for a friend. Soon thereafter, he pointed his rifle at a second person driving by. Police officers arrested Defendant at the scene. A search of his home turned up drug paraphernalia and a substance later identified as methamphetamine. After a three-day trial, a jury found Defendant guilty of two counts of disorderly conduct with a weapon, possession of dangerous drugs and possession of drug paraphernalia. In addition, the jury found both victims had suffered physical, emotional, or financial harm. Prior to sentencing, the Court inquired whether the class 6 disorderly conduct offenses should be designated as dangerous, and if so, a jury was required. The State elected not to proceed with a jury, and the Court sentenced Defendant as a category one non-dangerous, non-repetitive offender and imposed consecutive one-year terms. Defendant appealed based on trial issues, and the State cross-appealed on the sentencing issue.

Issues/Brief Answer: Does the Sixth Amendment require a jury to determine whether disorderly conduct with a weapon offenses are dangerous? No. The offense is always dangerous and no jury determination is required.

Analysis: The Sixth Amendment generally requires a jury to determine all facts that "increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). An exception exists when an offense is always dangerous. *State v. Gatliff*, 209 Ariz. 362, 365-66, ¶¶ 17-18 (2004). A Defendant commits disorderly conduct with a weapon by intending to disturb the peace of a neighborhood, family, or person, or with knowledge of doing so, "recklessly handles, displays or discharges a deadly weapon or dangerous instrument." A.R.S. § 13-2904(A)(6). The Arizona Legislature further defines a dangerous offense as one "involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument." A.R.S. § 13-105(13). When a person recklessly handles a weapon to disturb the peace, he or she employs the weapon to accomplish an unlawful purpose. Accordingly, the Superior Court erred in failing to designate the disorderly conduct

offenses as dangerous and must do so on remand. Based upon the dangerousness element, the sentencing range will increase to 18 months to two years.

Division One also considered and rejected the following arguments from Defendant: (1) untimely disclosure of an expert witness, (2) the unreliability of a Marquis test for amphetamine, and (3) the insufficiency of the evidence of disorderly conduct with a weapon.

State v. Soto, __ Ariz. __, __ P.3d __, 2026 WL 608344 (App. 2026) (dangerous crimes against children)+

Petition for Review pending

Division Two reversed and remanded sentences for sexual abuse and molestation of a child, thereby rejecting the Superior Court's application of A.R.S. § 13-705(M) in *State v. Soto*, 2026 WL 608344 (App. March 4, 2026). Division Two's interpretation also rejects a Division One majority's interpretation of the statute in *State v. Brock*, 248 Ariz. 583, 463 P.3d 207 (App. 2020). The Arizona Legislature amended A.R.S. § 13-705(M) effective September 2021, so the analysis below applies to the earlier version of the statute. *See* 2018 Ariz. Sess. Laws, ch. 181, §

Background: Defendant began living with his daughters, R.L. and A.L., when they were 11 and 8 years old, respectively. The State subsequently charged him with three counts of child molestation and two counts of sexual abuse of the daughters. A jury found him guilty following a three-day trial. Believing that A.R.S. § 13-705(M) required it, the Superior Court imposed consecutive sentences for all counts. This appeal followed.

Issues/Short Answers:

1) Does A.R.S. § 13-705(M) require consecutive sentences when a Defendant is convicted of two child molestation offenses involving the same victim? No, the Court has discretion to impose concurrent sentences.

2) Did sufficient evidence support the third molestation conviction based upon removal of Victim's shorts but not her underwear while Victim slept? No

Analysis:

Former A.R.S. § 13-705(M) provides:

> The sentence imposed on a person by the court for a dangerous crime against children under subsection D of this section involving child molestation or sexual abuse pursuant to subsection F of this section may be served concurrently with other sentences if the offense involved only one victim. The sentence imposed on a person for any other dangerous crime against children in the first or second degree shall be consecutive to any other sentence imposed on the person at any time, including child molestation and sexual abuse of the same victim.

The State argued that this statute provided the Court no discretion to impose concurrent sentences among child abuse or child molestation offenses committed against the same victim. Division Two found that the first sentence allows for concurrent sentences if there are multiple molestation convictions involving only one child. Under the second sentence, if there are other convictions for dangerous crimes against children, other than child molestation or sexual abuse offenses, then the sentences must be consecutive. Reading all the statutory provisions together, Division Two held that a person convicted of two molestation offenses may be sentenced to either concurrent or consecutive terms. Therefore, Defendant could be sentenced for crimes against R.L. to either consecutive or concurrent terms, because all the offenses involved either child molestation or sexual abuse. Accordingly, Division Two reversed and vacated the sentences and remanded for resentencing.

Division Two also vacated one of molestation offenses concerning R.L. due to insufficient evidence. The State had charged that Defendant committed the offense by intentionally or knowingly engaging in sexual contact by rubbing his genital against her. R.L. had testified that she went to sleep wearing underwear and shorts, but when she awoke she was wearing only underwear. This evidence failed to support guilt beyond all reasonable doubt. The State conceded error, and Division Two reversed the conviction.

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VICTIMS' RIGHTS

Jimenez v. State, __ Ariz. __, 577 P.3d 465 (App. 2025) (discovery of identifying information)+

Defendant, who was residing across the street from Victim, engaged in a confrontation with Victim. The conflict escalated, and both exchanged gunfire outside and inside Victim's apartment. Police subsequently presented Defendant with numerous crime scene photos. Defendant claimed he acted in self-defense, but the State charged him with first-degree murder, assault, burglary, and other crimes.

The State sought a protective order allowing disclosure of crime scene photos to defense counsel but not Defendant. Although acknowledging the photos could be exculpatory, the State insisted they included the victim's identifying or locating information. The State failed, however, to specify which photos contained such information. The Superior Court approved the protective order, and this special action followed.

Issue/Brief Answer: Did the Superior Court err in granting the protective order without first requiring the State (1) to specify the victim identifying or locating information, and (2) to explain why the information could not be redacted? Yes to both questions.

Analysis: The Arizona Legislature limits the disclosure of victim identifying and locating information. A.R.S. § 13-4434(B). The originating agency must redact such information from discovery. *Id.* Some categories of information, including the victim's name, general location of the crime, and information the victim agrees to release, are exempt from redaction. A.R.S. § 13-4434(C)(1), (3, 4).

Nevertheless, a Court may order disclosure of identifying or locating information (1) if necessary to protect a defendant's constitutional rights, or (2) if the information cannot reasonably be redacted due to undue burden or expense. A.R.S. § 13-4434(D). The prosecutor must identify the protected information prior to disclosure. The Superior Court did not enforce the requirement and left it to the defense to determine which information should not be disclosed or should be disclosed in redacted form. Consequently, Division One vacated the protective order.

On remand, the State must specify which pieces of evidence contain identifying or locating information that is not otherwise exempt from redaction. If any exists, the State must redact or explain why redaction in not an appropriate option

State v. Arias Gomez, __ Ariz. __, 583 P.3d 759 (App. 2025) (in camera review of mental health records; additional issues: disqualification of prosecutor, prosecutorial error, expert testimony)+

Background: Over the course of multiple interviews, Victim reported that Defendant had engaged in sexual misconduct with her from the time she was seven years old. Victim initially maintained that the conduct consisted of two acts on one day in 2012, but three years later Victim informed prosecutors of additional acts. The State accordingly charged Defendant with seven felonies. Prior to trial, Defendant moved for disclosure of Victim's mental health records, explaining that the additional allegations were advanced only after engaging in a series of treatment sessions. As an alternative to

direct disclosure, Defendant sought *in camera* review. The Superior Court denied both requests.

Defense counsel also failed in his efforts to disqualify the prosecutor. He argued that the prosecutor had been present when Victim stated that additional acts had occurred, and the prosecutor could not serve both as a witness and an advocate. The Superior Court denied this motion as well, reasoning that others were present and could serve as witnesses. In addition, the Superior Court rejected the defense's motion *in limine* to preclude Dr. Wendy Dutton from testifying as a cold expert witness on child victims.

After an eight-day trial, the jury found Defendant guilty of two counts of sexual conduct with a minor. The Superior Court entered judgment and sentenced Defendant to two consecutive life terms with no possibility of release before serving 35 years. This appeal followed.

Issues/Brief Answers:

1) Did Defendant demonstrate a reasonable possibility that Victim's privileged medical records contained evidence necessary to present a complete defense and attack Victim's credibility? No. The majority found that Defendant's motion amounted to a fishing expedition.

2) Did the Superior Court abuse its discretion by denying the Motion to disqualify the prosecutor? No.

3) Did the prosecutor commit error in questioning Victim's mother about Victim's truthfulness or in characterizing the defense's case in closing? The prosecutor violated a pre-trial order by attempting to elicit character evidence. The error was not prejudicial, however, because the Superior Court sustained the ensuing objection. Otherwise, the prosecutor had committed no error.

4) Did the Superior Court abuse its discretion in (a) allowing a cold expert to testify about child victims' behavior and (b) precluding a defense expert from testifying about adults' ability to assess whether a child is lying? No to both questions.

Analysis:

<u>In Camera Review of Victim's Records</u>: In Arizona, Arizona Rule of Criminal Procedure 15.1 (g) permits the court to order third parties to produce information not in the prosecutor's possession if it finds that (1) Defendant has a substantial need for the

material or information to prepare Defendant's case, and (2) Defendant cannot obtain the substantial equivalent by other means without undue hardship. When production of the evidence would infringe on interests under the Victims' Bill of Rights and statutory privileges, Defendant must show that the substantial need is one of constitutional dimension, meaning that a reasonable possibility exists that the information includes evidence material to the defense or necessary to cross-examine a witness. To comply with this standard, Defendant must provide a sufficiently specific basis for the request and cannot rely upon conclusory assertions, make indiscriminate requests for access to privileged documents, or base requests upon speculation. *See State v. Kellywood*, 246 Ariz. 45, 48, ¶ 10 (App. 2018). After balancing the competing interests of privacy and access to materials, the trial court may order production for in camera review.

On appeal, Division Two agreed that Defendant had not met the reasonable possibility requirements. Defendant argued that the records could demonstrate that the later disclosed allegations were false, exaggerated, or tainted by an improper suggestion. The majority found this argument was speculative and Defendant's request was not narrowly tailored to obtain specific records

Motion to Disqualify Prosecutor: Before trial, Defendant moved to disqualify the prosecutor based upon a conflict of interest and the potential that she would be called as a witness to Victim's late disclosure of additional crimes. Whenever a Defendant seeks to disqualify a prosecutor, the trial court should consider the following factors from *Gomez v. Superior Ct.*, 149 Ariz. 223, 226 (1986): (1) whether the motion is made for harassment purposes, (2) whether the moving party will be damaged if the motion is denied, (3) whether there are alternative solutions or is the proposed solution the least damaging possible, and (4) whether the possibility of public suspicion outweighs any benefits accruing from continued representation. Applying these factors, the Superior Court found Defendant had made the Motion in good faith but otherwise failed to satisfy the criteria. The prosecutor never met with Victim without a third-party present, so other witnesses were available to testify concerning those meetings. Defense counsel had the opportunity to question those witnesses, and any appearance of impropriety was remote.

Prosecutorial Error: Division Two also rejected Defendant's claims that the prosecutor committed prejudicial error when she (1) had asked Victim's mother whether Victim was truthful, (2) had vouched for the Victim by testifying to events she had witnessed, (3) argued in rebuttal that the defense had offered suggestions in lieu of reasonable doubt during closing, and (4) mischaracterized a defense expert's research. The defense's objection to the truthfulness question was sustained before the witness could respond. In addition, the alleged vouching did not present any evidence not already before the jury and did not implicate the prestige of the State's office.

Furthermore, the prosecutor's closing did not negate or misrepresent the defense's evidence; in fact, the closing constituted a proper rebuttal argument. Moreover, the prosecutor had not mischaracterized the defense expert's testimony on false memory; rather, the prosecutor had generalized that the purpose of the defense expert's work was to create false memory. The prosecutor has latitude to comment on evidence and make reasonable inferences, and these statements fell within that latitude.

Preclusion of Evidence: The defense also unsuccessfully challenged the preclusion of Defendant's statements to the police when he denied the Victim's allegations. According to the defense, the State opened the door by asking a trial witness why he had read the *Miranda* warnings to Defendant. The defense contended that the rule of completeness in Ariz. R. Evid. 106 required inclusion of Defendant's statements. But Defendant's denial of the allegations was not necessary to explain, qualify, or give context to the *Miranda* warnings, so the Superior Court did not err in precluding it.

Expert Testimony: Equally unavailing was Defendant's challenge to the expert testimony by Dr. Wendy Dutton. Arizona Rule of Evidence 702(a) allows a witness qualified as an expert to testify if the witness's "specialized knowledge will help the trier of fact to understand the evidence" or "determine a fact in issue." A cold expert may testify about the general behavior patterns of child sexual abuse victims, including how children perceive abuse, their behaviors in disclosing the abuse, and the circumstances in which children may level false accusations. Such experts may not offer profile testimony as substantive proof of Defendant's guilt, however. *State v. Haskie*, 242 Ariz. 582 (2017). Dutton's testimony was permissible because she had specialized knowledge not commonly known that would aid the jurors' understanding. She did not opine on the specifics of this case. Importantly, Dr. Dutton acknowledged that there was no scientific way of discerning whether a Victim was telling the truth or not.

Division Two also rejected Defendant's argument that the Superior Court should have admitted the defense expert's evidence that adults are not able to accurately determine whether a child is lying. The defense expert had conducted a study showing that adults make accurate assessments only 50 percent of the time. On appeal, the defense conceded that using percentages would invade the province of the jury and the jurors' ability to decide the case. Nevertheless, the defense wanted at least to admit the study to show that adults generally have difficulty in making this determination. Ultimately, Division Two upheld the study's preclusion as its probative value was substantially outweighed by the danger of jury prejudice or confusion under Ariz. R. Evid. 403. Further, Dutton's testimony differed from that of the defense expert and did not open the door.

The dissenting judge contended that the defense had provided a concrete, non-speculative basis that there was a reasonable possibility that Victim's records would contain material evidence. Victim's grandmother had advised the defense about the counseling sessions and the time frame in which they had occurred. In the dissenting judge's view, the Superior Court should remand for an *in camera* inspection. If the inspection uncovers material, exculpatory information, the Superior Court should order a new trial.

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EXPUNGEMENT/RESTORATION OF RIGHTS

State v. Danner, __ Ariz. __, 580 P.3d 1154 (App. 2025) (firearm rights)+

Background: In 2020, Defendant was convicted of solicitation to commit organized retail theft, a nonserious and nondangerous offense under A.R.S. §§ 13-706, 13-704. He completed probation in 2021.

In March 2024, Defendant pled guilty to solicitation to possess a deadly weapon by a prohibited possessor. The State had alleged that the offense occurred in November 2023. The Superior Court suspended imposition of sentence and placed him on 3-year term of probation. Defendant then sought post-conviction relief under Rule 33.1(h) and another theory, claiming that his right to possess a firearm was automatically restored by A.R.S. § 13-907(A), effective September 2022. The Superior Court dismissed the Rule 33 proceeding and explained that the statutory amendment was not retroactive. Defendant then petitioned for special action relief. Division Two accepted special action jurisdiction and granted relief.

Issue/Brief Answer: Is amended A.R.S. § 13-907(A) a procedural change in law retroactively applicable to Defendant? Yes.

Analysis: At the time Defendant completed probation in 2021 for his theft offense, former A.R.S. § 13-907(A) provided: "On final discharge, any person who has not previously been convicted of a felony offense shall automatically be restored any civil rights that were lost or suspended as a result of the conviction if the person pays any victim restitution imposed." Under A.R.S. § 13-907(C), the right to possess a firearm was excluded. As amended, A.R.S. § 13-907(A) now provides that an automatic restoration of rights occurs "[o]n completion of probation . . . or absolute discharge from imprisonment." This automatic restoration applies to possession of a firearm, unless the underlying offense is dangerous or serious. A.R.S. § 13-907(C). Defendant argued that the

automatic restoration provision applies retroactively to him because his underlying offense was not dangerous or serious.

A law applies retroactively if it "attaches new legal consequences to events completed before the effective date of the statute." *Zuther v. Stater*, 199 Ariz. 104, 109, ¶ 15 (2000) (citation and internal quotes omitted). If the statute is substantive, however, it cannot apply retroactively absent a specific legislative directive. *Krol v. Indus. Comm'n of Ariz.*, 259 Ariz. 261, 268, ¶ 25 (2025). A procedural statute is not so restricted if it "does not affect an earlier established substantive right." *In re Shane B.*, 198 Ariz. 85, 87, ¶ 8 (2000) (quotation omitted); A.R.S. § 1-244. Division Two found the amended statute did not create, define, or regulate a substantive right. Instead, it sets a procedure for restoring rights. Therefore, A.R.S. § 13-907(A) applies retroactively to persons like Defendant who had completed probation before the statute took effect in September 2022. As a result, Defendant was entitled to possess a firearm in November 2023 and Rule 33.1(h) relief is warranted. Division Two accordingly directed the Superior Court to vacate Defendant's conviction and disposition.

State v. Matthews, __ Ariz. __, 585 P.3d 205 (App. 2026) (marijuana expungement)+

Petition for Review pending

Defendant pled guilty in 2018 to the sale or transportation of marijuana, a class 3 felony. For the factual basis, Defendant agreed "that on February 8th of 2018 [he] or somebody else had some marijuana" weighing less than two pounds and that he "would have sold to somebody if they wanted to buy it." The Superior Court initially placed him on a term of probation, but subsequently revoked probation and sentenced him to a term of imprisonment.

Following the passage of the Smart and Safe Arizona Act, A.R.S. §§ 36-2850 to -2865, Defendant petitioned to expunge all records relating to his arrest and conviction. The Superior Court granted relief, reasoning that the State had failed to prove by clear and convincing evidence that Defendant had been convicted of selling marijuana and was thereby ineligible for expungement. Instead, the Superior Court found the record was ambiguous. The sentencing order and plea agreement refer to the charge as sale or transportation of marijuana. In granting expungement, the Superior Court classified the underlying offense as possession or use of marijuana under A.R.S. §13-3405(A)(1). This appeal followed.

Issues/Brief Answers:

1) Does A.R.S. § 36-2862(A) preclude expungements for convictions for the sale of marijuana? Yes.

2) Was the underlying record ambiguous as to whether Defendant had sold marijuana? No.

Analysis: In 2020, the Arizona Legislature enacted A.R.S. § 36-2862(A), which provides in relevant part:

> Beginning July 12, 2021, an individual who was arrested for, charged with, adjudicated or convicted by trial or plea of, or sentenced for, any of the following offenses based on or arising out of conduct occurring before the effective date of this section may petition the court to have the record of that arrest, charge, adjudication, conviction or sentence expunged:
>
> > (1) Possessing, consuming or transporting two and one-half ounces or less of marijuana, of which not more than twelve and one-half grams was in the form of marijuana concentrate.
> >
> > (2) Possessing, transporting, cultivating or processing not more than six marijuana plants at the individual's primary residence for personal use.
> >
> > (3) Possessing, using or transporting paraphernalia relating to the cultivation, manufacture, processing or consumption of marijuana.

In *State v. Sorensen*, 255 Ariz. 316 (App. 2023), the Arizona Court of Appeals did not expand these categories of expungement-eligible offenses. The listed offenses "are not ineligible for expungement based upon a Defendant's intent to sell." *State v. Bouhdida*, 258 Ariz. 542, 545 ¶ 13 (App. 2024) (Emphasis in original). A conviction for actual sale is not expungable, however. *Id.* at 543, 546 ¶¶ 1, 17.

On appeal, the State contended that the Superior Court relied upon the plea and sentencing documents and should have expanded its review to include other records, including Defendant's admission in the Petition that he had sold marijuana. Other relevant records include the police reports, charging documents, pre-sentence reports, and grand jury transcript. Nowhere in those records did Defendant contest that, as a factual matter, he had sold marijuana to an undercover officer. In light of the entire record, including the revocation proceedings, Division Two found Defendant had pled guilty to sale or transportation of marijuana under A.R.S. § 13-3405(A)(4), not under

A.R.S. § 13-3405(A)(1) or (2), and that conviction stemmed from a marijuana sale. Accordingly, Defendant was ineligible for expungement.

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DISQUALIFICATION

State v. Creel, __ Ariz. __, 583 P.3d 438 (App. 2025) (county attorney)+

Petition for Review pending.

Background: This case arises out of a fatal car accident involving Defendant and John McLean, an unsuccessful candidate for the Arizona State Senate. The State charged Defendant with second-degree murder, aggravated driving under the influence of an intoxicant with a suspended driver license, and felony criminal damage. Prior to trial, Defendant moved to disqualify the Pima County Attorney's Office (PCAO) based upon McLean's $700 campaign contribution to, and association with, Pima County Attorney Laura Conover. McLean and Conover were both Democrats, campaigned together, and publicly supported each other. Following an evidentiary hearing, the Superior Court granted Defendant's Motion due to the appearance of impropriety. In addition, the Court found that Conover could not sufficiently screen herself to avoid the appearance of impropriety. This special action followed.

Issue/Brief Answer: Did the Superior Court abuse its discretion by disqualifying the Pima County Attorney's Office? Yes

Analysis: A Defendant has the burden to establish grounds for disqualification. *State ex rel. Romley v. Superior Ct.*, 184 Ariz. 223, 228 (App. 1995). When considering whether to disqualify a prosecutor's office, Courts apply the factors in *Gomez v. Superior Court*, 149 Ariz. 223 (1986). The factors are: "(1) whether the motion is being made for the purposes of harassing the defendant, (2) whether the party bringing the motion will be damaged in some way if the motion is not granted, (3) whether there are any alternative solutions, or is the proposed solution the least damaging possible under the circumstances, and (4) whether the possibility of public suspicion will outweigh any benefits that might accrue due to continued representation." *Id.* at 226. The Superior Court based its disqualification only on the fourth factor and made no findings concerning the remaining factors.

Division Two granted relief. If political alliances alone could support disqualification, PCAO would be subject to disqualification any time it represented someone belonging to the County Attorney's party. Moreover, moderate campaign

contributions do not warrant disqualification absent extraordinary circumstances. In addition, the record did not support relief under the first three *Gomez* factors. Therefore, Division Two held the Superior Court had abused its discretion, vacated the disqualification order, reinstated PCAO as the prosecutor, and remanded for further proceedings.

Hamlet v. State, __ Ariz. __, 581 P.3d 244 (App. 2025) (county attorney)+

Background: A magistrate in Globe and Defendant kept horses at a stable. Defendant, who is 85, also served as a stable hand. The magistrate confronted Defendant and accused him of stealing hay. The two fought until the magistrate's daughter intervened. Defendant then called police. Officers observed that Defendant had suffered injuries to his skull and throat; eventually, these injuries required a medical procedure. The magistrate, meanwhile, claimed that his arm was fractured.

One month after the fight, the magistrate personally delivered video footage of it to the Gila County Attorney's Office. The footage lasts 15 seconds and begins while the altercation was ongoing. Law enforcement's own footage, captured after the fight, shows the investigating officer's equivocation over whom to charge. The footage shows the magistrate telling a sheriff's deputy: "Brad [the Gila County Attorney Bradley Beauchamp] will want to do something with the allegation because it's me." The officer ultimately charged Defendant with a misdemeanor without citing the magistrate.

The Gila County Attorney's Office (GCAO) declined to disqualify itself. At a hearing, Beauchamp explained that GCAO criminal division chief, Chief Deputy Collins, would oversee the case and an attorney from Payson was assigned. When the GCAO lodged a felony aggravated assault charge against Defendant, the Gila County Superior Court's presiding judge concluded that a conflict existed and reassigned the case to a judge from another county. Next, Defendant moved to disqualify the GCAO based upon the magistrate's personal relationship with Beauchamp.

At the ensuing evidentiary hearing, Beauchamp conceded that he had been monitoring the case and was a friend of the magistrate. Further, Beauchamp had fielded public questions about the case, had met with the magistrate based upon his victim status, and had attended discussions about an appropriate plea offer. Nevertheless, the Superior Court denied Defendant's disqualification Motion. This special action followed.

Issue/Brief Answer: Did the Superior Court abuse its discretion in failing to disqualify the prosecutor's office based upon the appearance of impropriety? Yes.

Analysis: Whenever a Defendant seeks to disqualify an entire prosecutor's office, the trial court should consider the following factors from *Gomez v. Superior Ct.*, 149 Ariz.

223, 226 (1986): (1) whether the motion is made for harassment purposes, (2) whether the moving party will be damaged if the motion is denied, (3) whether there are alternative solutions or is the proposed solution the least damaging possible, and (4) whether the possibility of public suspicion outweighs any benefits accruing from continued representation. Applying these factors, the Superior Court found Defendant had made the Motion in good faith but otherwise failed to satisfy the criteria. It also found that the magistrate and Beauchamp were not close friends.

Although granting deference to the Superior Court's findings, Division Two nevertheless found that each *Gomez* factor weighs in Defendant's favor. Division Two concluded that the Court had failed to address other relevant evidence. Specifically, the Superior Court did not evaluate the screening procedure, nor did it apply the totality of the facts to the fourth *Gomez* factor. The appellate court relied upon the magistrate's invocation of Beauchamp's name, Beauchamp's participation in the prosecution, and a detective's acceptance of evidence from the judge/victim without question or chain of custody tracking. Notwithstanding this evidence, the Superior Court made no finding concerning the appearance of impropriety factor. Moreover, the record reflected that Defendant was already prejudiced in light of the decisions to charge him and then to elevate the offense to a felony.

Division Two recognized that office-wide disqualification is impractical for less populated counties because the chief prosecutor often will know the persons involved. This case is distinguishable, however, and residents living in less populated counties are entitled to public officials who appear to conduct themselves in ways that inspire confidence.

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RULE 32

State v. Traverso, __ Ariz. __, 576 P.3d 97 (2025) (preclusion; IAC)+

Background: A jury found Defendant guilty of six counts of sexual conduct with a minor, all class 2 felonies and dangerous crimes against children, and one count of public sexual indecency to a minor, a class 5 felony. The Court entered judgment and sentenced him to six consecutive 13-year terms of imprisonment and a consecutive 1.5-year term of imprisonment. The Arizona Court of Appeals affirmed. His first Rule 32 proceeding, which included an ineffective assistance of trial counsel claim, was unsuccessful.

In his second Rule 32, Defendant raised a new ineffective assistance claim, contending that he had received ineffective assistance from trial counsel during the plea stage. He further contended that the untimeliness of his proceeding was without fault on his part under Ariz. R. Crim. P. 32.4(b)(3)(D) and this second ineffective assistance claim was not precluded. According to Defendant, he did not raise this claim earlier due to advice of his initial post-conviction relief counsel. Moreover, Defendant argued that he never personally waived the claim. The Superior Court scheduled an evidentiary hearing and ultimately held that Defendant had received ineffective assistance from trial counsel and this claim was not untimely or precluded; accordingly, the Court set aside the convictions. The State petitioned for review, and a divided Division One granted relief. Next, Defendant petitioned for review of the preclusion issue. The Arizona Supreme Court vacated Division One's opinion, affirmed the Superior Court's rulings on preclusion and timeliness, and remanded for additional proceedings.

Issues/Brief Answers:

1) Did the Superior Court abuse its discretion in finding Defendant's second ineffective assistance claim was not precluded?

> No. *Stewart v. Smith* and Rule 32.2(a)(3) do not automatically preclude an ineffective assistance claim. A defendant must personally waive an ineffective assistance claim if the alleged defective performance affected a right of sufficient constitutional magnitude under the 2022 amendments to Ariz. R. Crim. P. 32.2(a)(3). The Supreme Court stressed "the extraordinary nature of counsel's abject failure to relate the terms of the offer and attendant consequences."

2) Did the Superior Court abuse its discretion in finding an adequate explanation for the second Rule 32 proceeding's untimeliness under Ariz. R. Crim. P. 32.4(b)(3)(D)?

> No. The State had not contested Defendant's sworn statements on this issue. According to Defendant, his first Rule 32 counsel was at fault for not raising trial counsel's ineffective assistance at the plea stage. Moreover, the Superior Court had adequately articulated its reasoning on the timeliness ruling.

Analysis: Rule 32.2(a)(3) generally precludes defendants from raising Rule 32.1(a) claims that could have been raised in a prior Rule 32 proceeding. In 2002, the Arizona Supreme Court held that certain claims are of sufficient constitutional magnitude to require a knowing, voluntary, and intelligent waiver for purposes of Rule

32.2(a)(3). *Stewart,* 202 Ariz. at 449, ¶ 9, 46 P.3d at 1070. The rights associated with these claims include the right to counsel, the right to a jury trial, and the right to a 12-person jury. *Id*. at ¶ 9 & n.1. The 2020 version of the Arizona Rules of Criminal Procedure now includes the "personal waiver" language in Rule 32.2(a)(3). This language has modified the automatic preclusion language in *Stewart*. Consequently, the Superior Court correctly declined to find the current ineffective assistance claim automatically precluded.

The next question is whether Defendant's ineffective assistance claim implicates a right requiring a personal waiver. Defendant had a right to be fully informed of the consequences of accepting the plea bargain or going to trial. In view of the paltry information offered by trial counsel, which failed to advise Defendant of his total sentencing exposure without the plea agreement, the Supreme Court found that the Rule 32.1(a) ineffective assistance claim was not precluded.

Having said all this, the Supreme Court has recognized that Rule 32.1(a) claims must be timely. If a claim is untimely, whether the claim "is of sufficient constitutional magnitude to require a knowing, voluntary, and intelligent waiver is immaterial and *Stewart* does not apply." *State v. Lopez*, 234 Ariz. 513, 515, ¶ 8, 323 P.3d 1164, 1166 (App. 2014). The State had not contested Defendant's sworn statements explaining the delay in bringing the Rule 32.1(a) claim. According to Defendant, his claim was delayed because his first Rule 32 counsel did not include a claim of ineffective assistance at the plea stage in the first Petition. Moreover, other factors were beyond Defendant's control.

State v. Smith, __ Ariz. __, 585 P.3d 808 (App. 2025) (discovery)*

Petition for Review pending.

Death-row inmate Allyn Akeem Smith is seeking post-conviction relief (PCR) in the Maricopa County Superior Court under Arizona Rule of Criminal Procedure 32. In September 2025, the court granted Smith's request to file an *ex parte* motion seeking discovery of mitigation-related records from a third party. The State sought special action relief.

The Court of Appeals accepted jurisdiction and granted relief, holding that Arizona law does not authorize *ex parte* proceedings for discovery of third-party records in a Rule 32 matter. *See State v. Apelt*, 176 Ariz. 349, 365 (1993) (*ex parte* proceedings are prohibited unless authorized by law). In reaching this result, the Court noted that the discovery process in Rule 32.6(b) does not contemplate *ex parte* communications, and the *ex parte* authorization in Rule 6.7 addresses appointments of investigators, experts, and mitigation specialists, **not** requests for third-party records. *See* Ariz. R. Crim. P. 32.5(c) (trial court may appoint defense investigators, experts, and/or mitigation

specialists "under Rule 6.7"). According to the Court, Rule 6.7's *ex parte* authorization "protects[s] against disclosing privileged or work product material, which is not implicated by third-party records requests." *Smith*, at ¶ 19 (internal quotation marks and citation omitted).

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CAPITAL CASES

State v. McCauley, __ Ariz. __, __ P.3d __, 2026 WL 1358791 (2026)*

Background: McCauley waited outside his estranged wife's home late at night before confronting her and fatally shooting her. Within minutes he sent sexually explicit, taunting text messages and images to her sister, mother, and daughter. He wrote: "I just killed your seester/mommy [sic]" accompanied by smiley faces and images of the victim performing oral sex on him. During the ensuing investigation, police located a calendar in McCauley's bedroom that marked the day of the murder as "judgment day." A jury convicted McCauley of premeditated murder, found the (F)(6) (currently, (F)(4)) especially heinous/depraved aggravator based on relishing, and imposed death. *See* A.R.S. § 13-751(F)(4) (whether "[t]he defendant committed the offense in an especially heinous, cruel, or depraved manner" is an aggravating circumstance to be considered when determining whether to impose a death sentence); *State v. Greene*, 192 Ariz. 431, 439-40, ¶¶ 33-34 (1998) (whether the defendant relished the murder is a factor for determining especial heinousness or depravity. "'Relishing' refers to words or actions that show debasement or perversion. The defendant must say or do something that indicates he savored the murder.").

On automatic direct appeal, the Arizona Supreme Court addressed a variety of claims, including: prosecutorial error, limits on questioning during voir dire, juror misconduct, sufficiency of evidence supporting the aggravator, deficient aggravation phase jury instructions, the State's disclosure violation, allowing a State's expert to answer a juror question, and mitigation instructions. Justice Bolick separately concurred to criticize the Court's longstanding practice of treating "heinous or depraved" as a single prong of § 13-751(F)(4). He agreed, however, that McCauley invited the error by requesting the "single-prong" jury instruction.

Analysis:

Prosecutorial Error: McCauley argued the prosecutor erred by: (1) persuading the jury to address the crime from the victim's point of view; (2) misstating the law by (a) arguing the jurors should only consider "relevant" evidence of mitigation; (b) arguing

that evidence of McCauley's brain injury and major depressive disorder at the time of the murder did not reflect the significant impairment mitigating factor in § 13-751(G)(1) because the evidence did not show that McCauley could not appreciate that "shooting the victim in the head was wrong"; (c) improperly telling the jurors that they could not consider McCauley's work history as mitigation; (3) misstating the evidence about (a) McCauley's marijuana use and its adverse effect on his brain injury; (b) McCauley's criminal history, specifically that he had pled guilty to a criminal offense involving his ex-wife; (c) McCauley's brain injury as a "bump on the head; (d) McCauley's diagnosed depressive disorder; (4) improperly arguing that McCauley fabricated his depression; (5) impugning defense counsel's integrity; (6) impugning a defense expert's integrity; (6) misstating during the penalty phase the jury's findings regarding the heinous/depraved aggravator.

The Court rejected all claims of prosecutorial error because McCauley either (a) misstated the record in framing a particular issue and therefore failed to establish error, (b) failed, as required under fundamental error review, to establish prejudice that resulted from the error; (c) failed to show error in light of the "wide latitude" afforded prosecutors during closing argument; or (d) failed to establish that the errors cumulatively infected the trial with unfairness such that the conviction amounted to a denial of due process.

Limitations on Voir Dire Questioning: McCauley raised three issues challenging the trial court's imposed limitations on questioning potential jurors during voir dire. He first argued the trial court erred by denying his request to inform the potential jurors that he was charged with premeditated first-degree murder. According to McCauley, the trial court's ruling contravened *Morgan v. Illinois*, 504 U.S. 719 (1992). The Arizona Supreme Court rejected this argument, holding that McCauley's "request to inform jurors that one element of [the charged first-degree murder offense] is premeditation is outside the scope of *Morgan*[,]" which requires defendants have the opportunity to discover during voir dire "whether a potential juror will automatically impose the death penalty once guilt is found."

McCauley also claimed the trial court erred by denying his request to inform prospective jurors of the texts and images he sent the victim's family and to then ask the panel members how that evidence would impact their ability to consider mitigation. Again, the Supreme Court disagreed and held that McCauley's request "appeared designed to [improperly] condition the jurors by forewarning them of damaging evidence expected to be presented at trial and asking them to speculate on or commit to how they would assess mitigation in light of those texts and images."

Finally, McCauley challenged the trial court's refusal to ask potential jurors, "What does mitigation mean to you?" The Court concluded that the question is "generally not allowed," noting other properly posed questions sufficiently "ensured potential jurors would understand, review, and consider mitigation evidence."

Juror Misconduct: During his opening statement, the prosecutor displayed McCauley's text messages and accompanying images. The next day, Juror 6 submitted a note to the trial court referring to the jurors' "Bill of Rights" and expressing her displeasure with how the "traumatizing and disturbing" display of "pornography or extreme violence . . . was handled." After the trial court and counsel questioned all the jurors individually and learned that Juror 6 brought to the jury room a printout about juror rights, the court denied McCauley's mistrial motion, but it struck Juror 6 for cause pursuant to the parties' stipulation. Over the State's objection, the court also granted McCauley's motion to strike Juror 3 for cause.

On appeal, McCauley argued the trial court erred by failing to "meaningfully investigate juror misconduct" and declare a mistrial. The Arizona Supreme Court disagreed, finding the trial court conducted a "thorough investigation by questioning each juror individually and allowing both parties the opportunity for further questioning." The Court also noted that the printout did not improperly pertain to McCauley's guilt or innocence, nor did it involve private communications, contact, or tampering with a juror, and nothing in the record indicated the printout affected the verdicts.

Sufficiency of Evidence Supporting the Especially Heinous/Depraved Aggravator (McCauley's Relishing the Murder): The Court rejected McCauley's argument that the texts and accompanying images "merely show[ed] bragging after the murder and are therefore insufficient to constitute relishing." Instead, the texts and images showed McCauley "savor[ed]" and "enjoy[ed]" killing the victim, thereby indicating his "debasement and perversion" sufficient to establish relishing.

Aggravation Phase Jury Instruction: Reviewing for fundamental error, the Arizona Supreme Court found that the trial court erred by failing to provide the following RAJI regarding "relishing":

> Statements suggesting indifference, as well as those reflecting the calculated plan to kill, satisfaction over the apparent success of the plan, extreme callousness, lack of remorse, or bragging after the murder are not enough unless there is evidence that the defendant actually relished the act of murder at or near the time of the killing.

Nonetheless, the Court determined the missing paragraph did not result in constitutionally defective instructions because instructions that were provided properly informed the jury that the "relishing" must occur at the time of the murder. Thus, no fundamental reversible error occurred.

The State's Disclosure Violation: The Supreme Court found the State violated Rule 15.1 by failing to disclose McCauley's 1991 misdemeanor conviction (that was ultimately set aside) until the "middle of the penalty phase." However, the Court disagreed with McCauley that the proper sanction was a mistrial; instead, the Court determined that the trial court properly precluded evidence of the 1991 conviction. The Court also rejected McCauley's assertion that the late disclosure violated *Brady* because, as the Court found, the set aside conviction was not favorable to McCauley nor was it material to his guilt or punishment.

Posing Juror Question to State's Psychologist: During the State's direct penalty phase examination of its retained psychologist, evidence of McCauley's ex-wife's police and defense interviews were referenced. During those interviews, she made statements regarding McCauley's violence toward her, including "forced sexual contact." When the psychologist interviewed McCauley before trial, he denied engaging in non-consensual sex with his ex-wife. The ex-wife's statements referred to the non-consensual sex as "rape," but in her subsequent declaration, she stated she should not have used the word "rape." At the conclusion of the psychologist's testimony, a juror asked: "If a person is too scared to say no to sex, even if it is their husband, could the feeling of not being able to refuse sex have a similar psychological impact of being raped?" Over McCauley's objection, the trial court instructed the psychologist to answer.

On appeal, McCauley challenged the psychologist's foundation to provide an opinion in response to the juror question. The Court found the witness's education, training, and experience permitted her testimony under Arizona Rule of Evidence 702. Further, the testimony was otherwise admissible as relevant evidence and did not improperly opine on ultimate guilt/credibility.

Mitigation Instructions: The trial court denied McCauley's request to individually list each of his 23 proposed mitigating circumstances in the penalty phase instructions. Instead, the given instructions listed some, but not all, of the mitigating circumstances and informed the jurors that they were not limited to the listed circumstances.

Noting "[a] jury instruction is not unconstitutional because it contains a non-exhaustive list of proposed mitigating circumstances[,]" the Supreme Court rejected McCauley's argument to the contrary. The trial court, therefore, did not err. In reaching this conclusion, the Supreme Court did find that the prosecutor's reference during closing

argument to the listed mitigating factors as "designated" was improper. However, McCauley did not object at trial, and under fundamental error review, the Court found the prosecutor's brief statement did not result in a reasonable likelihood that the jury failed to consider all the mitigation evidence presented.

State v. Rushing, __Ariz. __, 573 P.3d 72 (2025)*

Background: A jury found Jasper Rushing guilty of first-degree murder (premeditated) for killing his prison cellmate while Rushing was serving a life sentence for the 2001 murder of his (Rushing's) stepfather. The jury then returned a death verdict. On automatic direct appeal, the Arizona Supreme Court (ASC) affirmed Rushing's conviction but vacated the death sentence, finding the jury was not informed that Rushing was ineligible for parole. *State v. Rushing*, 243 Ariz. 212 (2017); *see Simmons v. South Carolina*, 512 U.S. 154 (1994) (holding that, when parole is unavailable under state law and a capital defendant's future dangerousness is at issue for sentencing purposes, the defendant is entitled to inform the jury of his or her parole ineligibility); *Lynch v. Arizona (Lynch III)*, 578 U.S. 613 (2016) (reversing ASC's *Lynch II* opinion, which held that *Simmons* did not apply to post-1993 Arizona defendants because, although not eligible for parole, such defendants were eligible for release through executive clemency); *see also State v. Rosario*, 195 Ariz. 264, 268, ¶ 26 (App. 1999) ("The Arizona legislature enacted [A.R.S. § 41-1604.09(I)] effective January 1, 1994, eliminating the possibility of parole for crimes committed after that date.").

On remand, Rushing represented himself and waived his right to present mitigation. Rushing also declined to make an opening statement, cross-examine witnesses, present a rebuttal case, allocute, or make a closing argument. The jury again returned a death verdict, and this automatic appeal followed. The ASC affirmed.

Analysis:

Visible Restraints: Waiving his right to wear civilian clothes in front of the jury, Rushing wore a jail-issued orange jumpsuit in the jury's presence during the resentencing proceeding. Rushing also acquiesced to being visibly restrained in front of the jury. The trial court found restraints were warranted based on Rushing's first-degree murder conviction and the possibility he would be sentenced to death. On appeal, Rushing argued the trial court violated his due process rights by permitting visible restraints. [NOTE: Although the State did not dispute that Rushing was visibly restrained, apparently the record was unclear as to whether the restraints were, in fact, visible to the jury. The ASC thus admonished: "When ruling on whether and what type of restraints can be used in front of a jury, trial judges should ensure the record is clear about the type of restraints being used and their visibility to jurors."]

Reviewing for fundamental error, the ASC found the trial court erred by failing to make the requisite case-specific findings to justify visibly restraining Rushing. *See Deck v. Missouri*, 544 U.S. 622, 626–27, 632 (2005); *State v. Gomez*, 211 Ariz. 494 (2005). However, the Court found the error was not "so egregious that [Rushing] could not possibly have received a fair trial." *See State v. Escalante*, 245 Ariz. 135, 142 ¶ 21 (2018). Similarly, because Rushing did not present a mitigation case, and he wore jail garb in the jury's presence thereby "signal[ing] dangerousness even without restraints," the Court found Rushing did not otherwise establish prejudice. Rushing therefore failed to establish reversible error.

Waiver of Mitigation: Rushing challenged the trial court's acceptance of his mitigation waiver. He did not allege error in the court's finding that the waiver was knowing, intelligent, and voluntary; he merely claimed the court should have ensured the jury was presented with all mitigating evidence.

The ASC found Rushing invited any error and therefore was not entitled to relief: "Rushing knowingly, intelligently, and voluntarily waived presenting mitigating evidence. He does not contest that. He cannot now complain that the trial court erred by accepting that waiver rather than interfering with his self-representation by requiring a presentation of mitigating evidence." Alternatively, the Court determined Rushing failed to demonstrate error. *See State v. Montoya*, 258 Ariz. 128, 161 ¶ 100 (2024) ("[W]e have repeatedly and consistently held that competent defendants may constitutionally waive the presentation of mitigating evidence, so long as they do so knowingly, voluntarily, and intelligently.").

Rushing's Requested Jury Instructions: Rushing asked the trial court to revise its proposed RAJI-based jury instructions. The court adopted some of Rushing's requested instructions but denied the others "with little or no explanation or by saying the suggested language was not in a RAJI." On appeal, Rushing challenged the court's rationale, characterizing it as an improper "formulaic response."

The ASC rejected Rushing's argument, noting the RAJIs are considered correct statements of law, and no authority requires an explanation for rejecting proposed instructions. Nonetheless, the Court urged trial judges to explain why they reject proposed instructions (for example because the requests are either inaccurate or repetitive vis-à-vis other instructions). The Court proceeded to address the specific requested instructions to determine whether the trial court erred in denying them.

One group of requested instructions addressed juror autonomy in determining the appropriate sentence, which, of course, ultimately requires unanimity. The ASC deemed the substance of most of the proposed instructions either misleading or adequately

addressed by the instructions given. One of Rushing's proposed instructions indicated a life sentence was always acceptable. That instruction misstated the law because jurors must impose death if they find no mitigation.

Rushing also requested instructions that either essentially defined "mitigation" as broadly arising from any source, including a juror's "compassionate beliefs," or elaborated on the jurors' "moral judgment" used to determine the sentence. The ASC found no error in rejecting these instructions because "what constitutes mitigating evidence is [not] limitless"; rather, "[m]itigating evidence must be relevant and 'includ[e] any aspect of the defendant's character, propensities or record and any of the circumstances of the offense.' See § 13-751(G)[.]" That is, a juror may not properly consider "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *See California v. Brown*, 479 U.S. 538, 540, 545 (1987) (O'Connor, J., concurring) ("[T]he sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion.") (emphasis omitted). The Court otherwise found that the given instructions addressed the substance of those Rushing proposed.

Definition of "Moral Culpability": The jury was instructed, in part: "Mitigating circumstances are not an excuse or justification for the offense but are factors that in fairness or mercy may reduce the defendant's moral culpability. Each juror individually determines what significance to give to any mitigation they find to exist." *See* RAJI Capital Case 2.3 – Mitigation (6th ed. 2022). During deliberations, the jury requested a definition of "moral culpability." Without objection, the trial court declined to provide a definition and instead referred the jury to the instructions. On appeal, Rushing argued the trial court violated his due process by failing to clarify the term.

Reviewing for fundamental error, the ASC determined it was a "close call" whether the trial court abused its discretion by failing to define "moral culpability." The Court noted that "culpability" or "culpable" are not commonly used terms and, because the instructions did not contain a definition, referring the jury to the instructions was unhelpful. (Relying on dictionary definitions, the Court stated that "it may have been better" to provide the following definition: "blameworthiness according to principles of right and wrong.") [NOTE: The Capital Case Jury Instructions Workgroup is currently considering a recommendation to revise RAJI 2.3 in a manner consistent with the ASC's remarks.]

In any event, the Court concluded Rushing failed to show that the error (if any) was not "fundamental" because it did not go to the foundation of the case, did not take away a right essential to Rushing's defense against the death penalty, and was not so egregious that Rushing could not have received a fair trial.

Cumulative Prosecutorial Error: Rushing argued the prosecutor intentionally withheld mitigating evidence and misstated the law applicable to mitigation. According to Rushing, the alleged errors cumulatively deprived him of a fair sentencing proceeding.

The first purported error occurred when the prosecutor directly questioned a detective regarding Rushing's 2001 murder of his stepfather. As the detective was responding to one of the prosecutor's questions, the prosecutor interrupted. On appeal, Rushing claimed the incomplete response contained mitigating evidence. The Court rejected this argument, noting the prosecutor was not required to introduce mitigation on Rushing's behalf, and the prosecutor took subsequent steps to ensure the jury was not left "with a false impression of the available evidence," thereby satisfying her duty to ensure Rushing received a fair trial. *See State v. Riley*, 248 Ariz. 154, 200 ¶ 197 (2020) (prosecutors not required to compile mitigation reports when a defendant fails to present mitigation). Moreover, Rushing could have cross-examined the detective regarding the purported mitigation. The Court found no error.

The second error allegedly occurred during closing argument when the prosecutor encouraged the jurors to follow a four step process as they deliberated: (1) determine whether mitigating evidence has been proven as more probably true than not, and consider all evidence when determining whether Rushing's statements to investigators were credible "or if there is actually any mitigation proven from anything he said"; (2) ensure that the proven mitigation is relevant; (3) decide how much value to give each mitigating fact; and (4) determine whether the mitigation in total is sufficient to call for leniency.

The Court rejected Rushing's arguments that (1) the prosecutor's statements suggested mitigating evidence is limited to evidence specifically offered as such; (2) mitigation need not be relevant, and the prosecutor's statement improperly suggested a life sentence could not result if no mitigation exists; (3) the prosecutor urged the jury to weigh the mitigation against the aggravating factors; and (4) the prosecutor suggested the jurors must unanimously agree on each mitigating circumstance.

Finding no single instance of prosecutorial error, the Court found no cumulative error.