# AZ JUDICIAL CONFERENCE

JW MARRIOTT STARR PASS, TUCSON

JUNE 16-18, 2026

## *Evidence Law Update for Limited Jurisdiction Courts*

## EVIDENCE LAW UPDATE FOR LIMITED JURISDICTION COURT

Evidence Law Update for Limited Jurisdiction Court ........................................................1

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# EVIDENCE LAW UPDATE FOR LIMITED JURISDICTION COURTS

Hon. Alexander Benezra, Hon. Danae Figueroa,
Hon. Julie LaFave, Hon. Sherwood Johnston, Hon. Erik Thorson

June 17, 2026

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## Advisory Committee on Rules of Evidence Purpose

# ASC Administrative Order 2012-43

**PURPOSE:** The Committee shall periodically conduct a review and analysis of ARE, review all proposals to amend ARE, compare ARE to FRE, recommend revisions and additional rules as the Committee deems appropriate, entertain comments concerning the rules, and provide reports to the Arizona Supreme Court—often in the form of rule change petitions.

## In Brief, In Your Materials, & Acknowledgements

- No petitions from the Committee or about the ARE this year (perhaps an AI-inspired lull), but changes to Rule 609 on deck for 1/1/28.
- A Rule 707 (AI) went back to the federal drawing board.
- Case Law Update (with Suggested Answers as a Later)
- Thank you to the Presenters, as well as all members and staff of ARE.

# The Most Recent Changes to the ARE, effective 1/1/25

- Rule 107: Illustrative aids.
- Rule 412: Civil rape-shield rule.
- Rule 613(b): Extrinsic evidence of a prior inconsistent statement.
- Rule 801: Derivative liability and opposing party’s statement.
- Rule 804: Criminal case statements against interest that tend to expose declarant to criminal liability.
- Rule 1006: Summaries to prove content.

# Rules Commonly Posing Issues in Limited Jurisdiction Courts

- Rule 106: Rule of Completeness
- Rule 615: Rule of Exclusion
- Rule 1006: Summaries to Prove Content
- Others?

# A Preview of Rule 609 Clarifications

1 **Rule 609. Impeachment by Evidence of a Criminal Conviction**

2 **(a)** **In General.** The following rules apply to attacking a witness's character for truthfulness
3 by evidence of a criminal conviction:

4 **(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by
5 imprisonment for more than one year, the evidence:

6 **(A)** must be admitted, subject to Rule 403, in a civil case or in a criminal case
7 in which the witness is not a defendant; and

8 **(B)** must be admitted in a criminal case in which the witness is a defendant, if
9 the probative value of the evidence substantially outweighs its prejudicial
10 effect to that defendant; and

11 **(2)** for any crime regardless of the punishment, the evidence must be admitted if the
12 court can readily determine that establishing the elements of the crime required
13 proving—or the witness's admitting—a dishonest act or false statement.

14 **(b)** **Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than
15 10 years have passed ~~since~~ between the witness's conviction or release from confinement
16 for it~~,~~ (whichever is later) and the date that the trial begins.[1] Evidence of the conviction is
17 admissible only if:

18 **(1)** the probative value, supported by specific facts and circumstances, substantially
19 outweighs its prejudicial effect; and

**(2)** the proponent gives an adverse party reasonable written notice of the intent to use
it so that the party has a fair opportunity to contest its use.

# You Be the Judge One

Defendant is a member of the federally recognized Hualapai tribe. To prove Defendant's status as a member of the tribe, the government seeks to introduce a signed and sealed "Certificate of Indian Blood," asserting that the document is self-authenticating. Which of the following is most accurate?

A. The document is self-authenticating in both federal court and Arizona state court.

B. The document is self-authenticating in federal court, but not in Arizona state court.

C. The document is self-authenticating in Arizona state court, but not in federal court.

D. The document is not self-authenticating in either court system.

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# You Be the Judge Two

Bo Duke challenges a county ordinance limiting horn use to situations reasonably necessary for safety.

Defending the ordinance, the county calls Sheriff Rosco P. Coltrane as a traffic-safety expert. He has 25 years of highway patrol experience. He testifies that non-safety honking—like cheering at parades—can distract others and may reduce how seriously people take horns.

On cross-examination, the sheriff admits there are no formal research or scientific studies supporting his conclusions.

Bo objects under Rule 702 as speculative and unreliable.

The county argues the opinions are grounded in decades of experience.

A. Sustain or B. Overrule?

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# You Be the Judge Three

Defendant is charged with shoplifting. The State intends to offer the store's security video showing a person putting items from the shelf into her pocket and then leaving the store. The State intends to show the video to the arresting officer at trial and then ask him to confirm that Defendant is the person shown in the video. Defendant moves to preclude the officer's testimony identifying her as the person shown in the video, arguing that it is improper opinion testimony. Do you:

A. Grant the motion to preclude the officer's testimony. Whether Defendant is the person in the video is an opinion, and the officer is not an expert qualified to offer an opinion.

B. Grant the motion to preclude the officer's testimony because whether Defendant is the person in the video is for the jury, not a witness, to determine.

C. Deny the motion to preclude the officer's testimony if it will be helpful to the jury in deciding whether Defendant is the person in the video.

D. Deny the motion to preclude the officer's testimony because he arrested Defendant and so has personal knowledge of what Defendant looks like.

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# You Be the Judge Four

In State v. Wilson, the State seeks to introduce a Cellebrite download of Wilson’s cell phone. The officer who performed the download is unavailable for trial. Another detective will testify to the contents of the download. Before trial, the State disclosed the download along with a certification stating that it was generated through a standard electronic process producing an accurate result using Cellebrite software. The defendant objects, arguing lack of authentication because the officer who performed the download is not available to testify. Do you A. sustain the objection or B. overrule it?

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# You Be the Judge Five

In a motor-vehicle-accident personal-injury trial against a tractor driver and the farm owner, the plaintiffs seek to introduce the investigating officer's body-worn-camera recordings: (1) the officer's interviews of the tractor driver and the farm owner, and (2) the recordings of officers discussing those interviews among themselves. Defense counsel objects, citing hearsay. How do you rule?

A. Sustain the objection entirely and preclude the recordings

B. Overrule the objection entirely and admit the recordings

C. Sustain in part and overrule in part – admit the interview recordings but preclude the officer discussions

D. Sustain in part and overrule in part – admit the officer discussions but preclude the interviews

# You Be the Judge Six

This case arises out of a motor vehicle accident in which it is alleged that the defendant driver was distracted by cell phone usage. Plaintiff sought to present a human factors expert to testify on the effects of cell phone usage while driving. Plaintiff argued that the evidence of cell phone usage was the following: Defendant driver changed his story about whether he saw the Plaintiff's vehicle; Defendant driver did not slow down, brake, or take evasive action; Eyewitness testimony that Defendant driver was on his cell phone immediately after the accident; Cell phone records indicating the call was made around the time of the collision; Call from Defendant took place between 5:03:00-5:03:59 pm; 911 call reporting the accident received between 5:02:30 and 5:03:59.

Defense objects to the human factors expert under Rule 104(b), arguing that the expert cannot testify because Plaintiff cannot establish the predicate fact that the Defendant driver was using his cell phone prior to the collision.

Plaintiff argues that even if there is no conclusive evidence, the jury could find that Defendant driver was using a cell phone, based on the timing above.

A. Sustain or B. Overrule?

# You Be the Judge Seven

In a wrongful death action against the State, alleging that DCS failed to act on evidence that a child was being abused, the trial court allowed an attorney who represented one of the parents to relate statements by the children describing the manner in which they received bruises.

The State objected to this testimony as hearsay and appealed the verdict in favor of the Plaintiff. Would you have:

A. Sustained or B. Overruled?

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# You Be the Judge Seven

Sustain

Overruled

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# You Be the Judge Eight

This is a case involving search and seizure of illegal drugs. State trooper pulled over Defendant for violating A.R.S. § 28-721(B) (impeding traffic flow by failing to drive in the right lane) and conducted a traffic stop. The driver declined to allow a search of the vehicle but consented to a canine sniff. The canine alerted to the driver side of the car, leading to a search that uncovered a suitcase containing 55 pounds of marijuana. Urging a motion to suppress, Defendant argued lack of reasonable suspicion to conduct a traffic stop. State argued that the vehicle in question, a Chevrolet Malibu, is one that is often used by drug couriers. Also, the vehicle was traveling in the middle lane, allowing other vehicles to pass on the right, and driving under the speed limit, violating § 28-721. Finally, the officer ran the plates and discovered that the vehicle was recently registered in Nogales and that it had crossed the border multiple times.

Do you A. Grant or B. Deny, the Defendant’s motion to suppress?

# You Be the Judge Eight

- Grant
- Deny, the Defendant's motion to suppress

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# Case Law Update:
# *State v. Johnson*, 2026 WL 820411 (Ct. App. Div. 1 2026).

- Did the superior court err in admitting hearsay statements from an emergency room doctor, a forensic nurse examiner, and the case agent in violation of Rule 803(4) (“Statement Made for Medical Diagnosis or Treatment”) and the Confrontation Clause?
- Doctor’s testimony met Rule 803(4), and it was harmless error to allow the police officer to testify the victim told him where Johnson assaulted her.
- However, the forensic examiner’s testimony violated the Confrontation Clause because 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.” *See State v. Trinidad*, 257 Ariz. 485, 488 ¶ 11 (App. 2024). The court noted that the Rule 803(4) exception to the hearsay rule “is not an excuse to admit every statement made to a medical professional.” Finally, the error on this aspect was not harmless. Petition for review pending.

# You Be the Judge Nine

Defendant charged with possession/use of cocaine for sale.

During pretrial conference, prosecutor stated intent to have Case Agent bring in a brick of cocaine.

At trial, prosecutor moved to admit Exhibit 1, a white dusty bundle wrapped in cellophane.

Defense objected under Rule 611, arguing the Court should preclude Exhibit 1.

Should the Court admit the brick?

Options:

A. No – hazardous evidence concerns.

B. Yes – Rule 611 only governs efficiency, harassment, and manner of questioning.

C. Yes – drugs seized are relevant and necessary.

# You Be the Judge Nine

- No — hazardous evidence concerns.
- Yes — Rule 611 only governs efficiency, harassment, and manner of questioning.
- Yes — drugs seized are relevant and necessary.

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# You Be the Judge Ten

Defendant charged with unlawful flight.

Officer Smiley activated body-worn camera; dash cam running.

State seeks to admit flash drives with footage. Smiley says department tech downloaded data and provided report.

Defense objects: hearsay + improper foundation.

Should the flash drives be admitted?

A. No — Smiley didn't download the data.

B. No — hearsay without exception.

C. Yes — BWC and dash cam footage are self-authenticating.

# You Be the Judge Ten

- No — Smiley didn't download the data.
- No — hearsay without exception.
- Yes — BWC and dash cam footage are self-authenticating.

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# You Be the Judge Eleven

Mrs. Heartbreak Prince sued Pinal County and Sheriff Friendly after her son died of an overdose while in custody.

Juror 6 disclosed his distant cousin knew the Sheriff. Strike for cause denied.

Later discovered Juror 6's relative was Campaign Manager; Juror 6 active on campaign social media; photo with campaign banner.

Juror 6 admitted attending events and friending jurors during trial.

Juror 6 dismissed; mistrial denied; verdict for County.

Will denial be upheld?

A. No — assume full jury tainted.

B. Yes — civil jurors can discuss before deliberations.

C. Yes — no evidence Juror 6 influenced others.

# You Be the Judge Eleven

- No — assume full jury tainted.
- Yes — civil jurors can discuss before deliberations.
- Yes — no evidence Juror 6 influenced others.

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# You Be the Judge Twelve

In a divorce proceeding, neither party chooses to require compliance with the Evidence Rules under Family Rule 2, so certain Evidence Rules did not apply, including those that limit the use of hearsay and require witnesses to have personal knowledge. Husband testifies that he had an appraisal done on the community home and seeks to testify to the amount the home was appraised for. Wife objects. How should the Court rule?

A. Overrule the objection and allow Husband to testify to the value of the appraisal because hearsay and personal knowledge are not required.

B. Overrule the objection, because a property owner is competent to opine on his or her property's value.

C. Sustain the objection, because husband is seeking to offer an expert's opinion without complying with the requirements of Rule 702.

D. Sustain the objection, because Husband's opinion of the value of the property is irrelevant.

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# You Be the Judge Twelve

- Overrule the objection and allow Husband to testify to the value of the appraisal because hearsay and personal knowledge are not required.
- Overrule the objection, because a property owner is competent to opine on his or her property's value.
- Sustain the objection, because husband is seeking to offer an expert's opinion without complying with the requirements of Rule 702.
- Sustain the objection, because Husband's opinion of the value of the property is irrelevant.

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# You Be the Judge Thirteen

On January 1, 2024, drivers Peter and David both drove into a 4-way intersection, causing a T-bone collision. One of the drivers ran a red light, but both drivers claim their light was green. Witness William saw the collision. That night, William posted a video to his social media describing the collision and saying that David ran the red light. At trial, William is called by Peter. William testifies on direct exam that Peter ran the red light. William confirms making the video but says he misspoke. Peter then offers the social media video into evidence. David objects. How should the judge rule?

A. Sustain the objection, because extrinsic evidence of a witness's prior inconsistent statement may not be admitted until an adverse party is given an opportunity to examine the witness about it, unless the court orders otherwise.

B. Overrule the objection, because the video contains the statements of a party opponent. The video is therefore not hearsay.

C. Overrule the objection, because the video is a declarant-witness's prior inconsistent statement. The video is therefore not hearsay.

D. Overrule the objection, because the video is the best evidence of William's prior statement.

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# You Be the Judge Thirteen

- Sustain the objection, because extrinsic evidence of a witness's prior inconsistent statement may not be admitted until an adverse party is given an
- Overrule the objection, because the video contains the statements of a party opponent. The video is therefore not hearsay.
- Overrule the objection, because the video is a declarant-witness's prior inconsistent statement. The video is therefore not hearsay.
- Overrule the objection, because the video is the best evidence of William's prior statement.

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# You Be the Judge Fourteen

Plaintiff alleges Defendant's negligence caused water damage to Plaintiff's extensive collection of 100,000 valuable baseball cards. Expert personally evaluated every single baseball card and prepared a spreadsheet opining on the damage to each card. After Expert has testified to proper foundation at trial, Plaintiff offers into evidence only a single page report from Expert, opining "All 100,000 baseball cards have water damage. The total value lost to the baseball cards from the water damage is $500,000." Defendant objects.

A. **Sustain the objection.** Expert's summary is inadmissible hearsay, and only Expert's statements regarding his conclusion are admissible as testimony.

B. **Sustain the objection.** Plaintiff must first admit the damaged baseball cards and individual valuations for the damage into evidence before a summary may be admitted.

C. **Overrule the objection.** The summary of the damage to the cards, along with the total calculation of damages, is admissible evidence.

D. **Overrule the objection.** Admitting the damaged baseball cards and individual valuations for the damage into evidence would be an impermissible waste of time.

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# You Be the Judge Fourteen

- Sustain the objection. Expert's summary is inadmissible hearsay, and only Expert's statements regarding his conclusion are admissible as testimony.
- Sustain the objection. Plaintiff must first admit the damaged baseball cards and individual valuations for the damage into evidence before a summary
- Overrule the objection. The summary of the damage to the cards, along with the total calculation of damages, is admissible evidence.
- Overrule the objection. Admitting the damaged baseball cards and individual valuations for the damage into evidence would be an impermissible waste

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# Case Law Update:
# *State v. Hon. Gordon/Owen*, 581 P.3d 215 (Ariz. 2025).

- Arizona Supreme Court majority held that "because a red-light violation can only be committed once the vehicle enters an intersection, the enhanced penalty statute cannot apply to a fatal accident that occurs before an intersection, whether the accident consists of a single collision or the first in a series of events."
- Arizona Supreme Court took judicial notice of a geographic fact.
- Justices Bolick and Pelander (ret.) dissented from majority's statutory interpretation.

# You Be the Judge Fifteen

Driver B loses control of his vehicle and strikes a pedestrian in a crosswalk, killing the pedestrian instantly.

Seconds later, Driver A enters the same intersection against a red light and collides with Driver B's already-disabled vehicle.

The State charges Driver A under ARS§ 28-672A for causing death by violating red-light statute.

After both parties rest, the Judge realizes that neither party introduced a map of the area where the collision took place into evidence. While reviewing the admitted evidence (since both parties agreed to a jury waiver), the Judge considers accessing a map of the intersection at issue from Google maps. How should the Judge proceed?

A. Only consider the intersection from memory since neither party admitted a photograph of the area for the Judge to refer to.

B. Access a map of the intersection, take judicial notice of the geography of the area, and use the map in coming to a verdict.

C. Advise the parties that the court does not have a point of reference of the geography and give both parties an opportunity to reopen testimony.

D. Rule not guilty since neither party provided the information and concluding that the state did not meet its burden.

# You Be the Judge Fifteen

- Only consider the intersection from memory since neither party admitted a photograph of the area for the Judge to refer to.
- Access a map of the intersection, take judicial notice of the geography of the area, and use the map in coming to a verdict.
- Advise the parties that the court does not have a point of reference of the geography and give both parties an opportunity to reopen testimony.
- Rule not guilty since neither party provided the information and concluding that the state did not meet its burden.

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# You Be the Judge Sixteen

Same trial as the last slide (*State v. Driver A*), except Driver A's counsel used a color, foam, posterboard of the intersection at issue during the examination of multiple witnesses to illustrate their testimony. In permitting its use, you already determined that its utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, . . . undue delay, or wasting time. How should it be preserved for the record on appeal?

A. *Admit it into evidence.*

B. *Take judicial notice of it under Ariz. R. Evid. 201.*

C. *Have counsel upload a picture of it to CaseCenter where it can be stamped 'Admitted for appeal purposes only.'*

D. *Ensure a picture of it is maintained by the clerk or court in the hard-copy exhibit file, with a note or marking explaining that the photo is of an illustrative aid.*

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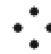

# Thank You!

**Evidence Case Law Update[1]**
**(Selected Cases: 2022-2026)**

**United States Supreme Court**

1. *Andrew v. White*, 604 U.S. 86, 145 S.Ct. 75, 220 L.Ed.2d 340 (2025)—In this capital case, the Court issued a per curiam opinion relying on *Payne v. Tennessee*, 501 U.S. 808 (1991) and affirming that the Due Process Clause of the 14th Amendment forbids the introduction of evidence so unduly prejudicial as to render a criminal trial fundamentally unfair. The Court remanded the case, framing the ultimate issue as "whether a fairminded jurist could disagree that the evidence 'so infected the trial with unfairness' as to render the resulting conviction or sentence 'a denial of due process,'" quoting *Romano v. Oklahoma*, 512 U. S. 1, 13 (1994). In reaching this result, the Court observed that on appeal, Andrew had "argued that the introduction of irrelevant evidence, including evidence 'that she had extramarital sexual affairs with two other men,' that she had 'come on to' another witness's sons, and that she had dressed provocatively at a restaurant, *Andrew* v. *State*, 2007 OK CR 23, ¶¶ 42–59, 164 P. 3d 176, 190–193, violated Oklahoma law as well as the Federal Due Process Clause." *Andrew v. White*, 2025 WL 247502 *2. The Court also noted that at trial, prosecutors had "elicited testimony about Andrew's sexual partners reaching back two decades; about the outfits she wore to dinner or during grocery runs; about the underwear she packed for vacation; and about how often she had sex in her car. At least two of the prosecution's guilt-phase witnesses took the stand exclusively to testify about Andrew's provocative clothing, and others were asked to comment on whether a good mother would dress or behave the way Andrew had. In its closing statement, the prosecution again invoked these themes, including by displaying Andrew's 'thong underwear' to the jury, by reminding the jury of Andrew's alleged affairs during college, and by emphasizing that Andrew 'had sex on [her husband] over and over and over' while 'keeping a boyfriend on the side.' Tr. 4103, 4124–4125 (July 12, 2004). At both the guilt and sentencing phases, prosecutors contrasted Andrew with the victim, whom they asserted had been 'committed to God.' *Id.*, at 4124; see also, *e.g.*, Tr. 4402 (July 14, 2004) (suggesting nothing could mitigate murder of Rob Andrew because he just 'wanted to love God')." *Andrew v. White*, 2025 WL 247502 *1. Justices Thomas and Gorsuch dissented. **[U.S. Const. Amend. XIV: Due Process]**

2. *Smith v. Arizona,* 602 U.S. 779, 144 S.Ct. 1785 (2024)—In this case, the State charged Smith with possessing methamphetamine for sale (Count One); possessing marijuana for sale (Count Two); possessing cannabis wax for sale (Count Three); and two counts of possessing drug paraphernalia (Counts Four and Five). At trial, the State called Department of Public Safety ("DPS") forensic scientist Greggory Longoni, who testified that the seized substances were methamphetamine, marijuana, and cannabis. Although Longoni offered his independent opinions, he reached his conclusions based on his review of testing conducted by former DPS forensic scientist Elizabeth Rast, who did

[1] Prepared by Hon. Mark Armstrong (Ret.), as well as the members and leadership of the Arizona Supreme Court's Advisory Committee on Rules of Evidence.

not testify. The State did not offer Rast's opinions or reports as evidence and Smith did not subpoena Rast as a witness. The jury found Smith guilty as charged on Counts Two, Four, and Five and guilty of the lesser-included offenses of simple possession on counts One and Three. After granting the State's motion to dismiss Count Four, the superior court sentenced Smith to an aggregate term of four years' imprisonment on the remaining counts. Smith appealed and the court of appeals affirmed in a memorandum decision. *State v. Smith*, 2022 WL 2734269 (Ct. App. Div. 1 2022). The court of appeals affirmed, rejecting Smith's Confrontation Clause argument based on its earlier opinion in *State ex rel. Montgomery v. Karp*, 236 Ariz. 120 (App. 2014). The court observed that:

> Here, as in *Karp*, Longoni presented his independent expert opinions permissibly based on his review of Rast's work, and he was subject to Smith's full cross-examination Longoni thus did not act as a "mere conduit" for her conclusions. *See also Karp* at 124, ¶ 13 (finding no hearsay violation when an expert testifies "to otherwise inadmissible evidence, including the substance of a non-testifying expert's analysis, if such evidence forms the basis of the expert's opinion"). Nor did the State introduce Rast's opinions or any of her work-product documents into evidence. Had Smith sought to challenge Rast's analysis, he could have called her to the stand and questioned her, but he chose not to do so. *See Williams v. Illinois*, 567 U.S. 50, 58–59 (2012) (A defendant "who really wishes to probe the reliability of the ... testing done in a particular case" may subpoena those involved in the testing process and question them at trial.).

*Smith*, ¶ 19. The Arizona Supreme Court denied review.

On Writ of Certiorari to the Arizona Court of Appeals, Division One, the U.S. Supreme Court vacated and remanded. At the Supreme Court, the parties agreed that Smith's confrontation claim could succeed only if Rast's statements came into evidence for their truth. Smith argued that this condition was satisfied because her statements were conveyed, via Longoni's testimony, to establish that what she said happened in the lab did in fact happen. The State contends that Rast's statements came into evidence not for their truth, but to "show the basis" of Longoni's independent opinion. The Court held that when an expert conveys an absent analyst's statements in support of the expert's opinion, and the statements provide that support only if true, then the statements come into evidence for their truth. Pp. 11-22. And in this case, the Court found that Rast's statements came in for their truth because they were admitted to show the basis of Longoni's expert opinions, all of which were predicated on the truth of Rast's factual statements. And, if the out-of-court statements were also testimonial, an issue not yet decided, their admission violated the Confrontation Clause. P. 19. Thus, the Court remanded for the State court to decide whether the out-of-court statements Longoni conveyed (i.e., notes and/or report) were testimonial, an issue that focuses on the "primary purpose" of the statement, i.e., whether it has "a focus on court." P. 21. Finally, the Court concluded that "[a] State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her. *See Crawford*, 541 U. S., at 68; *Melendez-Diaz*, 557 U. S., at 311. Neither may the State introduce those statements through a surrogate analyst who did not participate in their creation. *See Bullcoming*, 564 U. S., at 663. And nothing changes if the surrogate—as in this case—presents the out-of-court statements as

the basis for his expert opinion." P. 21. **[Rule 703; U.S. Const. Amend. VI, Confrontation Clause]**

3. *Diaz v. United States*, 602 U.S. 526, 144 S.Ct. 1727 (2024)—In this case, Diaz was charged with importing methamphetamine in violation of 21 U.S.C. §§ 952 and 960, charges that required the Government to prove that Diaz "knowingly" transported drugs. In her defense, Diaz claimed not to know that the drugs were hidden in the car. To rebut Diaz's claim, the Government planned to call Homeland Security Investigations Special Agent Andrew Flood as an expert witness to testify that drug traffickers generally do not entrust large quantities of drugs to people who are unaware they are transporting them. Diaz objected in a pretrial motion under Rule 704(b), which provides that "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." The court ruled that Agent Flood could not testify in absolute terms about whether all couriers knowingly transport drugs but could testify that most couriers know they are transporting drugs. At trial, Agent Flood testified that most couriers know that they are transporting drugs. The jury found Diaz guilty, and Diaz appealed, challenging Agent Flood's testimony under Rule 704(b). The Court of Appeals held that because Agent Flood did not explicitly opine that Diaz knowingly transported methamphetamine, his testimony did not violate Rule 704(b). The Supreme Court affirmed, holding that expert testimony that "most people" in a group have a particular mental state is not an opinion about "the defendant" and thus does not violate Rule 704(b). The Court observed that Rule 704(a) sets out a general rule that "[a]n opinion is not objectionable just because it embraces an ultimate issue." Rule 704(b) is an exception to that general rule.

   In a spirited dissent, Justice Gorsuch argued that "[t]he government comes away with a powerful new tool in its pocket. Prosecutors can now put an expert on the stand—someone who apparently has the convenient ability to read minds—and let him hold forth on what 'most' people like the defendant think when they commit a legally proscribed act. Then, the government need do no more than urge the jury to find that the defendant is like 'most' people and convict. What authority exists for allowing that kind of charade in federal criminal trials is anybody's guess, but certainly it cannot be found in Rule 704." **[Rules 704(a) and (b)]**

4. *Samia v. United States*, 599 U.S. 635, 143 S.Ct. 2004 (2023)—In a 6-3 opinion authored by Justice Thomas, the Supreme Court held that the admission of a non-testifying codefendant's confession at a joint trial did not violate the defendant's Sixth Amendment rights because the confession had been modified to replace the defendant's name with placeholders like "somebody else" and the "other person." The redactions were "not akin to an obvious blank or the word deleted" and, thus, the confession did not directly implicate the defendant. Moreover, the jury was instructed to use the confession against the confessing codefendant only. The three dissenters pointed out that prosecutors can now "always circumvent *Bruton*'s [*Bruton v. United States*, 391 U.S. 123 (1968)] protections." **[U.S. Const. Amend. VI; *Bruton*]**

5. *Shoop v. Cunningham*, 598 U.S. __, 143 S.Ct. 37, 214 L.Ed.2d 241 (2022) (Thomas, J., dissenting from denial of certiorari)—Cunningham had been convicted of capital murder

and sentenced to death. In an interview during state post-conviction proceedings, a juror told Cunningham's investigator that "some social workers worked with [Cunningham] in the past and were afraid of him." The foreperson worked at a county children services office. From this, Cunningham alleged the foreperson had received extraneous prejudicial information about Cunningham. The state courts rejected Cunningham's claim. Cunningham filed a federal habeas petition and reasserted the claim. The federal court allowed Cunningham to interview the foreperson and remaining jurors. Two jurors revealed that the foreperson said she knew the families and would "have to go back and see them. These families are my clients." The foreperson said she never spoke to her colleagues about Cunningham before or during the trial. She did, however, look through Cunningham's files after the trial and sentencing were over. The District Court dismissed all of Cunningham's claims. A divided panel of the Sixth Circuit reversed and ordered the District Court to conduct an evidentiary hearing on the juror bias claims. Justice Thomas--joined by Justices Alito and Gorsuch--would have granted certiorari, in part because of how Cunningham's claims interacted with Federal Rule of Evidence 606(b). Rule 606(b) prohibits any juror from testifying "about a statement made or incident that occurred during the jury's deliberations." Under this Rule, Justice Thomas would have concluded that the comments made by the foreperson were "unquestionably barred from judicial consideration." There is a longstanding rule that jury testimony cannot be used to impeach a verdict. And Rule 606(b) embodies that principle. "And, once those comments are disregarded, Cunningham's claim amounts to no more than a bare, unspecified, and unsubstantiated allegation that the foreperson had some sort of relationship with some victims or their families and that it prejudiced him in some way." **[Rule 606(b)]**

6. *Shinn v. Ramirez*, 596 U.S. 366, 142 S. Ct. 1718 (2022)—Justice Thomas writing for the Court held that a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on the ineffective assistance of state postconviction counsel. Under a provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), when a prisoner has failed to develop the factual basis of a claim in state court proceedings, a federal habeas court is barred from considering new evidence to assess cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012), unless one of the exceptions in 28 U.S.C. § 2254(e)(2) applies. Those exceptions include a new rule of constitutional law or a newly discovered factual predicate that could not have been discovered prior with due diligence; they were not applicable in these cases. As there is no constitutional right to counsel in state postconviction proceedings, a prisoner bears the risk in federal habeas court for all attorney errors made during the proceedings, including when state postconviction counsel is negligent. The court declined to extend *Martinez* to excuse a prisoner's failure to develop the state court record under the AEDPA and reasoned that "unlike judge-made exceptions to procedural default, [AEDPA] is a statute, and thus, this court has no power to redefine when a prisoner has failed to develop the factual basis of a claim in State court proceedings." The dissenting justices, for whom Justice Sotomayor wrote, would have found that text and precedent instruct that in states that limit review of trial-ineffectiveness claims to postconviction proceedings, as is the case here, habeas petitioners who receive ineffective assistance of postconviction counsel are not

responsible for any failure to develop evidence in support of a trial ineffectiveness claim under the AEDPA. **[U.S. Const. Amend. VI]**

7. *United States v. Tsarnaev*, 595 U.S. 302, 142 S.Ct. 1024 (2022)—Justice Thomas, writing for the majority, held the trial court did not err when it excluded allegedly mitigating evidence in a capital trial. Dshokhar Tsarnaev was convicted of 30 federal offenses and sentenced to death for his role in the Boston Marathon bombings and its aftermath. Tsarnaev's theory in mitigation was that his brother, Tamerlan Tsarnaev, masterminded the bombing and pressured Dshokhar to participate. To support this, Dshokhar sought to introduce evidence that, years earlier, Tamerlan participated in a triple homicide in Waltham, Massachusetts. The government objected on the grounds that the proffered evidence lacked relevance, lacked probative value, and would likely confuse the jury. District Court excluded the evidence. Supreme Court ruled that the District Court did not abuse its discretion. The proposed evidence didn't make clear Tamerlan's role in the Waltham murders. The evidence also risked a mini-trial where the only witnesses who knew the truth were dead. Further concluded such limitation did not violate the Eighth Amendment because it fell within the traditional authority to set reasonable limits upon the evidence a capital defendant can submit and control the manner in which it is submitted. **[U.S. Const. Amend. VIII]**

8. *Hemphill v. New York*, 595 U.S. 140, 142 S. Ct. 681 (2022)—Justice Sotomayor, writing for an 8-justice majority, reversed the defendant's murder conviction and held that the admission of an absent declarant's plea allocution violated the defendant's Sixth Amendment Confrontation Clause rights. At trial, the defendant blamed Nicholas Morris for the shooting. To rebut the defendant's theory, the government introduced an earlier plea allocution from Morris—for possession of a .357 magnum revolver (which was not the type of weapon used in the murder)—under *People v. Reid*, 971 N.E.2d 353 (N.Y. 2012). *Reid* permitted the government to introduce this evidence, which was otherwise inadmissible under the Confrontation Clause, because the defendant presented "misleading" evidence in his defense and thus opened the door. The Supreme Court noted that the Sixth Amendment affords States some flexibility to adopt reasonable procedural rules to govern a defendant's right to confrontation, but held that *Reid* was a substantive rule, and thus not permissible. The Court reiterated that the Confrontation Clause demands that the reliability of evidence be assessed through cross-examination, and held that "[t]he trial court here violated this principle by admitting unconfronted, testimonial hearsay against [the defendant] simply because the judge deemed his presentation to have created a misleading impression that the testimonial hearsay was reasonably necessary to correct." **[U.S. Const. Amend. VI]**

## Federal Courts

1. *United States v. Holmes, et al.*, 129 F.4th 636 (9th Cir. 2025)— The Ninth Circuit panel affirmed Elizabeth Holmes's and Ranesh "Sunny" Balwani's convictions and sentences on numerous fraud charges in a case in which Defendants defrauded investors about the achievements of their company Theranos's blood-testing technology.

Defendants argued that the district court erred by allowing former Theranos employees, who testified as lay witnesses, to offer improper expert testimony. The panel explained that if a witness offers an opinion that is based on specialized knowledge, experience, training, or education contemplated by Rule 702, a party cannot evade the Rule by labeling a witness "percipient." And there is no "on-the-job" exception to Rule 702. But the fact that a witness's testimony pertains to scientific matters, or conveys opinions drawn from the witness's own experiences with such matters, does not automatically render it expert testimony within the ambit of Rule 702. Considering each of the challenged witnesses with these principles in mind, the panel held that some aspects of the testimonies veered into expert territory, but any error was harmless.

Holmes argued that a report prepared by the Center for Medicare and Medicaid Services was irrelevant under Rule 401 and should have been excluded pursuant to Rule 403 because there was a significant risk that the report would mislead the jury. The panel held that the district court did not abuse its discretion in finding that the report was relevant to Holmes's knowledge, intent, or state of mind, and in finding that the probative value of the report was not substantially outweighed by its potential for unfair prejudice.

Holmes also argued that the district court abused its discretion by allowing testimony that Theranos voided all patient sample tests run on a device used in Theranos's clinical lab. Rule 407 provides that when measures are taken that would have made an earlier injury less likely to occur, evidence of subsequent measures is not admissible to prove culpable conduct. The purpose of Rule 407—to avoid punishing the defendant for efforts to remedy safety problems—is not implicated in cases involving subsequent measures in which the defendant did not voluntarily participate. The panel held that the district court did not clearly err in finding that the decision to void was not voluntary, and did not abuse its discretion balancing the risk of prejudice against the probative value of the evidence.

Holmes next argued that the district court violated her rights under the Confrontation Clause of the Sixth Amendment when it prohibited her from cross-examining a former Theranos laboratory director on aspects of his post-Theranos employment. The panel held that the district court did not abuse its discretion in limiting the scope of the cross examination.

Finally, Holmes argued that the district court should have admitted, as statements against interest under Rule 804(b)(3), portions of deposition testimony given by Balwani to the Securities and Exchange Commission. The panel held that the district court correctly recognized that the statements were not solidly inculpatory and did not abuse its discretion in declining to admit these statements. **[U.S. Const. Amend. VI (Confrontation Clause); Fed. R. Evid. 401, 403, 407, 701, 702, and 804(b)(1)]**

2. *In Re Grand Jury Subpoena, dated July 21, 2023*, 127 F.4$^{th}$ 139 (9$^{th}$ Cir. 2025)—In this case of first impression, the Ninth Circuit reversed the district court's order compelling a law firm to provide the Government with a privilege log of documents that the law firm's client asserted are protected under *Fisher v. United States*, 425 U.S. 391 (1976). In *Fisher*, the Supreme Court held that when the Fifth Amendment protects an individual from the compelled production of documents and the individual shares those documents with his attorney to obtain legal advice, the attorney-client privilege shields

the attorney from compelled production of those documents to the government. *Id.* at 404–05. Thus, an attorney cannot be ordered to provide the government with a privilege log of documents to which the *Fisher* privilege applies, and that to determine whether the requirements for *Fisher* protection are in fact satisfied, a district court will generally need to conduct an *in camera* review. Because the district court here ordered a privilege log to be provided to the Government without any such prior process, the Circuit Court reversed and remanded. **[Fed. R. Evid. 501]**

3. *United States v. Velazquez*, 125 F.4th 1290 (9th Cir. 2025)—Velazquez was convicted and sentenced for importation of fentanyl. At trial, the district court allowed a law enforcement expert to testify as to the retail value of the fentanyl, which was not an element of the offense. Velazquez challenged that testimony on appeal, arguing that the testimony was irrelevant in an importation case and that the prejudicial effect of the testimony substantially outweighed its probative value. The appellate court affirmed, holding the district court had not abused its discretion because the testimony was relevant under Rule 401 to show knowledge of possession and to rebut Velazquez's "blind mule" defense. The court also held the testimony was not unfairly prejudicial under Rule 403. The court further observed that the abuse of discretion standard "is '[a] significantly deferential test that looks to whether the district court reaches a result that is illogical, implausible, or without support in inferences that may be drawn from the record.' *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)." *Velazquez*, p. 6. **[Fed. R. Evid. 401 and 403]**

4. *United States v. Dorsey*, 122 F.4th 850 (9th Cir. 2024)—The appellate court affirmed defendant's convictions for multiple federal crimes arising from a spree of robberies committed by two disguised men. The evidence at trial included video from security cameras that recorded the robberies. A police detective testified, as a lay witness, about his out-of-court review of the surveillance video. Based on his close and repeated review, the detective opined on details in the video that the jury may otherwise have missed. Such lay opinion testimony was admissible because the witness's out-of-court review of the video added value beyond simply playing the video to the jury and may have been helpful "to determining a fact in issue." Fed. R. Evidence 701(b). However, the detective also testified, based on his own comparison of those details that were in evidence before the jury, that the disguised robbers shown on the surveillance video were the codefendants. But that opinion testimony was not "helpful" under Rule 701 because the detective testified based on evidence already in front of the jury, without the requisite personal knowledge or experience. However, due to other admissible evidence and the district court's instructions, the testimony was harmless. **[Fed. R. Evid. 701]**

5. *United States v. Porter,* 2024 WL 4800884 (9th Cir. 2024)—Affirming defendant's conviction for sexual assault offenses against victim T.D. in Yosemite National Park, the Ninth Circuit held that Federal Rule of Evidence 413, which allows propensity evidence in federal criminal sexual assault cases, does not violate the Fifth Amendment Due Process Clause. In this case, the district court allowed Porter's former girlfriend A.H. to testify that Porter had sexually assaulted her during their relationship.
Although Porter argued that his relationship with A.H. was consensual and that A.H.'s

accusations were not corroborated, A.H. testified in some detail how Porter had frequently engaged in forcible nonconsensual sex with her, including anal sex, over her objections. Based on this record, the district court found that the jury could have found by a preponderance of the evidence that Porter sexually assaulted A.H. The Ninth Circuit concluded that when district courts retain discretion to exclude unduly prejudicial evidence under Rule 403, Rule 413 is constitutional. However, Rule 413 is not a blank check entitling the government to introduce whatever evidence it wishes. Here, the district court conscientiously evaluated the appropriate five non-exclusive factors and did not abuse its discretion in allowing Rule 413 testimony subject to an appropriate limiting instruction. **[Fed. R. Evid. 403 and 413]**

6. *Hyer v. City and County of Honolulu*, 118 F.4th 1044 (9th Cir. 2024)—Plaintiffs brought federal and state law claims alleging excessive force in violation of the Fourth Amendment and violations of Title II of the Americans with Disabilities Act arising out of an encounter between the Honolulu Police Department and Steven K. Hyer that resulted in Hyer's death. The circuit court held the district court's decision to exclude the entirety of plaintiffs' expert reports was an abuse of discretion and prejudicial. Among other reasons, the district court misstated the law when it suggested that experts may rely only on evidence in the record, *see* Fed. R. Evid. 703, it mischaracterized the content of expert reports, and it erred in ruling that the reports were speculative and unreliable. It also erred in granting qualified immunity to defendant officers with respect to plaintiffs' excessive force claims because the use of deadly force and chemical munitions was not objectively reasonable. But the court affirmed the district court's grant of qualified immunity with respect to use of a police dog, because the law regarding that was not clearly established. **[Fed. R. Evid. 702 and 703]**

7. *United States v. Blackshire,* 98 F.4th 1146 (9th Cir. 2024)—Affirming convictions and sentences for various offenses arising out of an assault on the defendant's girlfriend, the appellate court found that, after the government could not locate the girlfriend to testify at trial, the district court properly admitted statements she gave to police officers and a nurse. Applying the forfeiture by wrongdoing rule, codified in Fed. R. Evid. 804(b)(6), which is identical to Ariz. R. Evid. 804(b)(6), the government proved by a preponderance of the evidence that appellant intentionally and wrongfully caused his girlfriend's unavailability. In so holding, the court noted that "the government need not show that [defendant] engaged in *criminal* wrongdoing that caused C.S.'s unavailability." *Blackshire*, *3. Defendant's recorded statements can reasonably be interpreted as evidencing efforts to coerce, unduly influence, or pressure her into not showing up in court. **[Fed. R. Evid. 804(b)(6)]**

8. *Porter v. Martinez*, 68 F.4th 429 (9th Cir. 2023)—Porter brought a First Amendment challenge to a California law prohibiting driver initiated horn use when reasonably necessary to ensure the safe operation of vehicles on a public roadway. To show the statute furthered a substantial government interest (traffic safety), the State relied on testimony from a California Highway Patrol sergeant. The sergeant opined that the regulation of horn use did further traffic safety. Porter argued that the sergeant's

testimony was not admissible under Rule 702 because it was speculative and did not meet the requirements of Rule 702.

The Court of Appeals found that the trial court properly admitted Sargent Beck's testimony under Federal Rule of Evidence 702. The Court reasoned that Rule 702 is flexible and that trial courts should be given leeway in determining reliability. The Court also noted that when an expert offers nonscientific testimony, reliability depends heavily on knowledge and experience rather than methodology or theory behind testimony, and that reliability becomes more important when experience-based opinion is not subject to testing, error rate or peer review.

The dissent opined that the trial court abused its discretion in allowing the testimony. The dissent found the opinions speculative because the sergeant failed to show how his experience in law enforcement supported his specific opinions. The dissent believed that when relying on experience, Rule 702 requires a witness to explain how his experience leads to the conclusions reached, how the experience forms a sufficient basis for the opinion, and how the experience has been applied to the facts. **[Fed. R. Evid. 702]**

9. *Radu v. Shon*, 62 F.4th 1165 (9th Cir. 2023)— While her family was living in Germany, Shon took her children to the United States. Radu applied for an order requiring the children be returned to Germany, citing the Hague Convention. The Court held an evidentiary hearing on whether a grave risk that the child's return would expose the child to physical or psychological harm existed. The court ordered the children returned. After the district court's first return order was appealed, the district court held a second hearing. Prior to the second return order, the district court also contacted the State Department, Office of Children's Issues for Germany, and obtained information about German law and the estimated time it would take to resolve the custody dispute in Germany. The district court entered a second order ordering the children returned to Germany. The district court's second order was appealed and remanded again in light of new relevant caselaw.

   On remand, the district court did not hold a third evidentiary hearing, and instead relied on the previous record. On appeal, Radu argued the Court abused its discretion in not holding a new hearing, and that the district court's conversations with the State Department were *ex parte* and resulted in hearsay evidence which violated Shon's due process rights.

   The Ninth Circuit Court of Appeals held that whether to hold an evidentiary hearing was discretionary with the Court. The court also found no impropriety connected to the Court's contacting the State Department, noting that Radu took no issue with the Court's conclusion on foreign law, but instead challenged the methods the court used to arrive at its conclusions. The appellate court held contacting the State Department was permissible, noting that Rule 44.1 of the Federal Rules of Evidence allows the Court to rely on *any relevant material or source, whether or not submitted by a party*. **[Fed. R. Evid. 44.1]**

10. *United States v. Williams*, 663 F.Supp.3d 1085 (D. Ariz. 2023)—The government was not seeking to admit gangsta rap videos and songs featuring the defendants and others for impermissible purposes in violation of defendants' First Amendment rights. However, the danger of unfair prejudice resulting from admission of that evidence substantially

outweighed its probative value. The video and songs contained imagery related to drugs, gun crime, violence and misogyny and included lyrics filled with profanity and a racial slur, and were so inflammatory that they could cause the jury to convict defendants on impermissible grounds. Moreover, the evidence had the potential to confuse or mislead the jury. The court further found the probative value of the evidence to be minimal as it was cumulative of other substantial evidence of guilt, the author of the lyrics was unknown, some of the lyrics were indecipherable and the lyrics did not mirror or exhibit an unmistakable connection to the facts of the charged offenses. **[U.S. Const. Amend. I; Fed. R. Evid. 403]**

11. *United States v. Alahmedalabdaloklah,* 94 F.4th 782 (9th Cir. 2024)—Alahmedalabdaloklah (Oklah) was a member of an Iraqi insurgent group that planted IEDs, damaged U.S. military property, and killed or injured American troops. Oklah specifically designed or created remote detonator switches for the IEDs. He did this both in Iraq and later in China. At trial, the court allowed the government to present a deposition of Al-Dhari, an alleged co-conspirator. In one of the admitted statements, Al-Dhari repeated statements made by a third person, also a member of the insurgent group. This included a statement that Oklah manufactured IEDs. Oklah argued the government did not prove the statements were made in furtherance of a conspiracy. Under Federal Evidence Rule 801(d)(2)(E), a statement is not hearsay if it "was made by the party's coconspirator during and in furtherance of the conspiracy." Oklah argued the third person's statements to Al-Dhari could not have met the standard because Al-Dhari said he was not a member of the insurgent group. The Court found that "the Government presented ample evidence that he in fact was" a member of the insurgent group "who took numerous steps to further the group's goals …." But even assuming Al-Dhari was not a member of the group, Rule 801(d)(2)(E) does not require the statement be made to another member of the conspiracy. Oklah also argued the third person's claim that Oklah manufactured IEDs was general conversation and could not have been made to further the conspiracy. The Court concluded they were "statements made to keep a coconspirator abreast of the ongoing conspiracy's activities or were made to further" the insurgent group's goals. The statements thus fell within Rule 801(d)(2)(E). **[Fed. R. Evid. 801(d)(2)(E)]**

12. *Le v. State Farm*, 676 F.Supp.3d 760 (D. Ariz. 2023)—A fire damaged Le's rental property. State Farm paid $63,300 on the claim. Believing State Farm inadequately valued the loss, Le demanded an appraisal under the policy's terms. The appraisal panel's award assessed "replacement cost" at $193,509 and "actual cash value" at $177,399. State Farm objected to the award and did not pay the full award. Le filed suit claiming breach of contract and breach of the duty of good faith, and seeking compensatory general and punitive damages. Le's expert's opinions included "State Farm's actions nationwide and in Arizona are evidence of a pattern and practice to intentionally frustrate the intended purpose of the appraisal clause". The expert supported his opinion with 10 unrelated cases in which claimants received offers they believed were unreasonably low, then obtained much bigger appraisal damage valuations, and State Farm failed to pay the appraised damages. During discovery, State Farm moved to preclude use of the 10 unrelated claims, arguing the evidence was irrelevant and inadmissible to prove State Farm breached the Le contract or acted unreasonably in handling Le's claim.

An insurer acts in bad faith when it unreasonably investigates, evaluates or processes a claim (an objective test), and either knows it is acting unreasonably or acts with such reckless disregard that such knowledge may be imputed to it (a subjective test). To recover punitive damages, a plaintiff must show something more than the conduct necessary to establish the tort of bad faith. Whether the defendant intended to injure the plaintiff or consciously disregarded the plaintiff's rights may be suggested by a pattern of similar unfair practices. State Farm's handling of other claims could be relevant to show State Farm intentionally injured Le or consciously pursued a course of conduct knowing it created a substantial risk of considerable harm to Le. Rule 404(b)(2) allows evidence of prior harmful acts to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Le could offer evidence of State Farm's handling of other cases to show a pattern or practice of acting adverse to insureds and that State Farm's actions were not mistake or accident. While the other claims would not be sufficient by themselves to support the expert's opinion, they may constitute facts and data the expert relies upon to support his opinion. The court rejected State Farm's arguments that permitting evidence of unrelated claims would result in burdensome discovery disproportionate to the needs of the case, and that evidence of unrelated claims would violate Rule 403 as confusing, misleading, or unfairly prejudicial. **[Fed. R. Evid. 403 and 404(b)(2)]**

13. *United States v. Allen*, 34 F.4th 789 (9th Cir. 2022)—The district court's order prohibiting members of the public from attending the defendant's suppression hearing and trial and allowing audio-streaming, but not video-streaming of the proceedings due to the COVID-19 pandemic violated the defendant's Sixth Amendment right to a public trial. The order, which effected a total closure, was not narrowly tailored to serve the overriding interest in slowing the spread of COVID-19. Courts throughout the country used less restrictive COVID-19 protocols that allowed some sort of visual access and adopted a range of measures to minimize health risks. That other jurisdictions could address the pandemic using more targeted means suggests that the district court here had "too readily foregone options that could serve its interests just as well, without substantially burdening" the defendant's public trial right under *McCullen v. Coakley*, 573 U.S. 464, 490 (2014). Further, the district court did not state a unique reason as to why it could not use video-streaming or other alternatives. Accordingly, the court of appeals vacated defendant's conviction and the district court's denial of the motion to suppress and required remand. **[U.S. Const. Amend. VI]**

14. *Elosu v. Middlefork Ranch, Inc.*, 26 F.4th 1017 (9th Cir. 2022)—The district court abused its discretion in excluding the testimony of the plaintiffs' expert fire investigator concerning the cause of a cabin fire. The parties stipulated to the expert's qualifications and methodology. The district court, however, granted a motion to exclude, taking issue with the "ultimate conclusions" and finding the opinion speculative, uncertain and contradicted by eyewitness accounts. The court of appeals reversed, stating the district court assumed fact finding role in its analysis. Under *Daubert*, the district court is a gatekeeper, not a fact finder. The concerns the district court noted were matters for impeachment, not foundation. The expert was qualified, and applied broadly accepted scientific principles and professional standards to conduct his analysis and reach his

conclusions. Accordingly, “the gate could not be closed to this relevant opinion offered with sufficient foundation by one qualified to give it.” **[Fed. R. Evid. 702]**

## Arizona Supreme Court

1. *State of Arizona v. McCauley*, ___ Ariz. ___, 2026 WL 1358791 (2026)—Affirming defendant's conviction and sentence for first-degree murder, the Arizona Supreme Court found that, if there were instances of prosecutorial error, defendant did not establish that he was prejudiced by them. And although there was juror misconduct at trial, the trial court handled it appropriately by striking two jurors and limiting the evidence that could be presented at trial. The Court found no serious errors with the jury selection process or the final jury instructions. **[Rule 401; Cumulative Prosecutorial Error]**

2. *State of Arizona v. Romero,* 258 Ariz. 237, 556 P.3d 305 (Ct. App. Div. 2 2024), judgment affirmed, opinion vacated on review, *State of Arizona v. Romero*, ___ Ariz. ___, 2026 WL 1357037 (2026)—Romero appealed his convictions and sentences for first degree murder, unlawful discharge of a firearm, fleeing from law enforcement, and possession of a narcotic drug, arguing, *inter alia*, that he was deprived of a fair trial due to cumulative prosecutorial error, including several alleged violations of the rules of evidence. Here, Detective Brumitt identified Romero from unclear video footage. The court of appeals assumed this testimony amounted to inadmissible lay opinion evidence but observed that “[n]ot every trial error amounts to prosecutorial error merely because it involves evidence presented by a prosecutor. *See Murray*, 250 Ariz. 543, ¶ 13.” *Romero*, ¶ 35. The court also found prosecutorial error by the prosecutor’s introduction of improper NIBIN testimony through unqualified detectives and the prosecutor’s pervasive use of unobjected to leading questions. In the end, though, the majority was unable to find that the errors met the “demanding standard” for relief based on cumulative prosecutorial error. Judge Sklar dissented. **[Rules 106, 401, 403, 701, 702, 704, and 801(c)]**

   The Arizona Supreme Court granted review to resolve two recurring issues of statewide importance: (1) whether a defendant asserting prosecutorial error must establish a prosecutor's culpable mental state, and (2) the proper application of the *Escalante* fundamental error test when evaluating cumulative prosecutorial error. *See State v. Escalante*, 245 Ariz. 135, 425 P.3d 1078 (2018). The Supreme Court answered “no” to the first question. But after applying the proper objective review to the entire record and reviewing the record for fundamental error, the court concluded that although the pervasive use of leading questions and the improper admission of NIBIN testimony constituted error, Romero failed to demonstrate that the cumulative effect of those errors so profoundly distorted the trial that he could not possibly have received a fair trial. Thus, the court of appeals did not err in affirming Romero’s convictions and sentences. The Supreme Court affirmed the court of appeals’ disposition but vacated its opinion. **[Prosecutorial Error; Harmless vs. Fundamental Error]**

3. *In Re: MH2023-004502*, ___ Ariz. ___, 2026 WL 377485 (2026) (Amended per Order filed March 6, 2026), vacating the court of appeals’ opinion at 258 Ariz. 556, 560 P.3d 382 (Ct. App. Div. 1 2024)—Mental health patient A.R. appealed the superior court’s

order imposing mandatory mental health treatment upon him. Social worker M.G. – who had never before met A.R. – assessed A.R. clinically, applied for his evaluation, and testified in support of the petition to treat him involuntarily in a manner consistent with the testimony of the physicians who evaluated A.R. A majority of the court of appeals' panel first observed that A.R.S. § 36-539(B) requires the testimony of two acquaintance witnesses who meet the conditions set forth in *Matter of Commitment of Allegedly Mentally Disordered Person*, 181 Ariz. 290, 292 (1995), to support a petition for involuntary treatment. The court then held that the superior court erred in ordering treatment here because: (1) no person whose sole contact with A.R. was to examine him as part of the commitment evaluation process may serve as an acquaintance witness; (2) M.G., whose sole contact with A.R. was to examine him to apply for his evaluation, and who testified to the same observations and diagnoses as the evaluating physicians, cannot serve as an acquaintance witness; and (3) M.G.'s examination of A.R. was to assist him in returning to function and information about A.R. was "received by reason of the confidential nature of the behavioral health professional-client relationship," making it privileged and confidential under A.R.S. § 32-3283(A) and A.R.S. § 32-3251, and subject to no exception. Thus, the court vacated the superior court's order. There was a dissent.

On review, the Arizona Supreme Court vacated the court of appeals' majority opinion and affirmed the superior court's order, holding that a licensed social worker's screening assessment of a patient does not create a confidential behavioral health professional–client relationship that would prevent the social worker from testifying in a court-ordered treatment proceeding. According to the Supreme Court, state law requires courts to analyze whether such a relationship exists in the same manner used to determine whether an attorney–client relationship exists as directed by the Legislature. Applying that framework, the interaction fell short of a privileged relationship because the assessment was conducted only once, for the limited purpose of determining whether further evaluation was necessary, and the patient was specifically warned that the discussion was not confidential. **[Rule 501; Behavioral health professional-client privilege]**

4. *State v. Hon. Gordon/Owen*, ___ Ariz. ___, 581 P.3d 215 (2025)—In this rear-end collision case originating in municipal court, the issue was whether the enhanced penalty statute, A.R.S. § 28-672(A), applied to a fatal accident that occurred before the offending vehicle entered an intersection against a red light. A violation of the enhanced penalty statute elevates a civil traffic offense to a class 1 misdemeanor. On review, the Arizona Supreme Court held that because a red-light violation under A.R.S. § 28-645(A)(3)(a) can only be committed once the vehicle entered an intersection, the enhanced penalty statute cannot apply to a fatal accident that occurred before an intersection, whether the accident consisted of a single collision or the first in a series of events. Thus, the supreme court vacated the court of appeals' opinion and affirmed the superior court's order reversing the municipal court's judgment of conviction and directing a verdict of acquittal. In its opinion, the supreme court noted that it "included an overhead photo of the intersection in question as an Appendix. *See* Ariz. R. Evid. 201; *see also*, *e.g., State v. Phillips*, 102 Ariz. 377, 380 (1967) (confirming that courts may take judicial notice of a geographic fact)." *Hon. Gordon/Owen*, ¶ 4 n. 2. There was a dissent. **[Rule 201]**

5. *State of Arizona v. Alvarez-Soto*, ___ Ariz. ___, 579 P.3d 1227 (2025), vacating *State of Arizona v. Alvarez-Soto*, 258 Ariz. 417, 559 P.3d 637 (Ct. App. Div. 2 2024)— Alvarez-Soto appealed from her convictions and sentences for possession and transportation of marijuana for sale. Specifically, she argued the trial court erred in denying her motion to suppress the evidence seized from the vehicle she was driving because law enforcement lacked reasonable suspicion to conduct a traffic stop. A majority of the court of appeals' panel concluded that the arresting officer lacked reasonable suspicion under the totality of circumstances to stop Alvarez-Soto's vehicle for violating A.R.S. § 28-721(B). That statute requires a driver "proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing" to drive in the right-hand lane, or "as close as practicable" thereto, unless passing another vehicle or making a left turn. *Id*. The majority deemed the officer's application of § 28-721(B) objectively unreasonable because Alvarez-Soto could not have complied with that statute without violating other traffic laws, and it cautioned officers to apply traffic laws in a flexible manner that accounts for the multiple variables drivers face on the roadways. The majority thus vacated the convictions and sentences and remanded for further proceedings.

   On review, the supreme court reversed the court of appeals' opinion, ruling that the trooper had reasonable suspicion for the traffic stop and held that the trooper reasonably interpreted and applied the traffic law, justifying the stop. The court also clarified the standard of review that appellate courts apply when reviewing video evidence. The court of appeals held that appellate courts should conduct an independent review of video evidence because "the trial court is in no better position to evaluate the video than the appellate court." The supreme court disagreed, ruling that appellate courts must defer to a trial court's factual findings, including video evidence, if the trial court's findings are reasonably supported by the evidence. In so ruling, the court rejected the standard of review set forth in *State v. Sweeney*, 224 Ariz. 107 (App. 2010).

   In the end, the supreme court affirmed the trial court's denial of Alavarez-Soto's suppression motion, vacated the court of appeals' opinion, and remanded the case to the court of appeals to address Alvarez-Soto's claim that the trooper violated the Fourth Amendment by unlawfully extending the traffic stop. The court's opinion provides guidance on the standard for evaluating whether law enforcement officers have reasonable suspicion to conduct traffic stops under A.R.S. § 28-721(B), and the standard of review appellate courts apply to trial courts' fact findings concerning video evidence. **[U.S. Const. Amend. IV, Search and Seizure; Standard of Review of Video Evidence]**

6. *State of Arizona v. Melendez,* 259 Ariz. 282, 565 P.3d 1034 (2025)—The supreme court held that the state may use the defendant's post-*Miranda* statements, as well as delays in responding to some questions, to challenge the defendant's credibility in court. In this case, the defendant, during an in-custody interview, failed to unambiguously invoke his *Miranda* rights and ultimately spoke on substantive matters raised during police questioning. Because the court concluded that the state did not violate the defendant's due process rights, it affirmed Melendez's convictions and sentences for aggravated assault and endangerment and vacated the court of appeals' opinion.

   In this case, Melendez was arrested in 2019 after firing a handgun at a resident in the parking lot of an apartment complex where he once lived. Although shots he fired

missed the victim, they struck the surrounding complex walls. During a police interview after his arrest, Melendez admitted he knew the victim and answered many police questions, but initially declined to answer those about his involvement in, or motive for, the shooting. He told police he "wanted to wait" until he knew what "people on the other side" were saying, then admitted to the shooting and claimed that he shot at the victim in self-defense. During his trial, prosecutors challenged Melendez's credibility by questioning him about his delay in claiming self-defense and urged the jury to conclude that he fabricated his self-defense claim. The jury convicted him on all charges.

Melendez argued on appeal that the state violated his Fourteenth Amendment due process rights by commenting at trial about his delay in answering police questions about his role in the shooting—what he described as his post-*Miranda* "selective silence." He also argued the superior court erred by not precluding, pursuant to Rule 403, the prosecution from referencing his "passing" and "holding" on certain questions. The court of appeals agreed with Melendez's due process argument and reversed Melendez's convictions.

On review, the supreme court vacated the court of appeals' opinion, concluding that "Melendez answered substantive questions in his post-*Miranda* interview and spoke about his presence at the crime scene, his relationship with the victim, his role in the shooting, his self-defense claim, his possession of the gun used in the offense, and where the detective could retrieve it, and his decision to temporarily defer answering certain questions—which he ultimately answered in his interview—until he knew what witnesses said to the police about the shooting. Melendez waived his right to silence when he commented and provided information on all these topics. The prosecutor was entitled to use these statements for impeachment purposes at trial." *Melendez*, ¶ 45. The court distinguished this case from *Doyle v. Ohio*, 426 U.S. 610, 618–19 (1976) (prosecution may not use post-*Miranda* true silence for impeachment), relied on by Melendez, because Doyle exercised true silence whereas Melendez did not. The court also rejected Melendez's Rule 403 argument "because the prosecution had the right to impeach Melendez with his own post-*Miranda* statements that did not invoke his right to remain silent." *Melendez*, ¶ 44. Chief Justice Timmer and Justice Bolick joined the court's opinion but also set out their respective views of the current legal status of the *Miranda* rules in separate concurring opinions. **[U.S. Const. Amend. V and XIV; *Miranda v. Arizona,* 384 U.S. 436, 460 (1966); Rule 403]**

7. *State of Arizona v. Mitcham,* 258 Ariz. 432, 559 P.3d 1099 (2024)—The supreme court held that where police extracted a DNA profile without a warrant from a three-year-old blood sample drawn from defendant after a previous DUI arrest, which more recently linked him to a murder, they violated defendant's Fourth Amendment rights. Extracting defendant's DNA profile in 2018 from a vial of blood taken during his 2015 DUI arrest was an unreasonable search under the Fourth Amendment. *See Mario W. v. Kaipio*, 230 Ariz.122, 128 ¶ 27, 129 ¶ 31 (2012). However, because the inevitable discovery exception to the exclusionary rule applies, the superior court erred by suppressing the DNA evidence. *See Nix v. Williams*, 467 U.S. 431, 444 (1984). If the police had not created a DNA profile from the second vial of blood in 2018, DPS would have done so after his 2022 felony convictions for unrelated crimes. **[U.S. Const. Amend. IV; Inevitable discovery exception]**

8. *State of Arizona v. Strong*, 258 Ariz. 184, 555 P.3d 537 (2024)—The court affirmed defendant's convictions and sentence of death because, among other things, there was no intentional prosecutorial slowing of proceedings for tactical reasons or to harass the defendant, and any preindictment delay did not prejudice defendant. The trial court also did not err in denying defendant's motion for change of venue because prejudice cannot be presumed and was not demonstrated, nor did it abuse its discretion in precluding or limiting the admission of evidence. Specifically, the court held, *inter alia*, that (1) the trial court did not abuse its discretion by determining that the excited utterance exception to the hearsay rule did not apply to permit admission of testimony from victims' neighbor as to her housemate's description of the shooter; although neighbor's testimony likely demonstrated housemate's excitement, neighbor was unable to recall when her housemate made statements, (2) testimony that the victim told a witness that defendant was upset with the victim because he would not loan defendant more money was properly admitted to establish motive, and (3) the probative value of an inmate's redacted letter and testimony stating defendant confessed to murders was not outweighed by unfair prejudice and was properly admitted as a party admission. **[Rules 105, 401, 403, 404(b), 601, 702, 801, 801(c), 801(d)(2)(A), 802, 803(2), 803(6), 807, 901(a), 901(b)(1)]**

9. *Francisco, et al v. Affiliated Urologists, et al***,** 258 Ariz. 95, 553 P.3d 867 (2024)—In this medical negligence case, plaintiff claimed he was injured by being prescribed the antibiotic Cipro after a urological procedure without appropriate warning. Claiming he could not obtain expert testimony, plaintiff relied on the FDA "black box" warning in the medication insert that came with the medication to establish the standard of care and obviate the need for expert testimony. In a memorandum decision, the court of appeals agreed that the warning could take the place of expert testimony. The supreme court granted review, vacated the court of appeals decision, and affirmed the superior court's dismissal of the case, holding that pursuant to A.R.S. § 12-2603, a plaintiff is required to certify whether expert testimony is necessary to establish the standard of care and, if it is, serve a preliminary expert opinion affidavit, which plaintiff failed to do in this case. In reaching this disposition, the supreme court agreed with the court of appeals' opinion in *Fong v. City of Phoenix, infra,* holding that whether expert testimony is admissible and whether it required are meaningfully different issues. The former is reviewed for abuse of discretion while the latter is a question of law to be reviewed de novo. Thus, the court reviewed the issue in this case de novo. Justice Bolick concurred in part and dissented in part, including to the disposition. **[A.R.S. § 12-2603: Expert testimony in medical malpractice case; Standard of review]**

10. *Roaf v. Stephen S. Rebuck Consulting, LLC, et al*, 257 Ariz. 425, 550 P.3d 173 (2024)—In this personal injury case arising out of a rear-end collision between plaintiff and defendant's employee, the defendant admitted both direct and vicarious liability for its employee's actions. Nonetheless, the superior court admitted evidence of the employee's personnel record and driving history in a damages-only trial and submitted separate claims of negligent hiring and vicarious liability, in addition to the claim for the employee's negligence. The jury found plaintiff's full damages to be $4.625 million, and allocated 40% fault to the driver and 60% to his employer. The court of appeals affirmed

and the supreme granted review to address whether prejudicial error occurred when the superior court allowed the plaintiff to introduce evidence based on separate claims of negligent hiring and vicarious liability when the employer admitted liability for both claims and there was no claim for punitive damages. The supreme court reversed and remanded, concluding that the superior court should have precluded the personnel record and driving history because evidence relating to the negligent hiring claim was not relevant to the sole jury issue, the amount of compensatory damages. *See* Ariz. R. Evid. 402. **[Rule 402]**

11. *Windhurst v. Ariz. Dep't of Corrections et al.*, 256 Ariz. 186, 536 P.3d 764 (2023)—In a medical malpractice and wrongful death suit against the Arizona Department of Corrections and Corizon Health, the court held that A.R.S. § 12-2604(A) is inapplicable to claims based on a theory of institutional liability. An institution cannot be a licensed health professional because an institution cannot be a natural person. Thus, in a suit against a medical institution, it would be impossible for a plaintiff to produce an expert in the "same health profession as the defendant." Similarly, it would be impossible for a plaintiff to present an expert under § 12-2604(A)'s requirements because an institution, by definition, cannot be a "specialist" or "general practitioner." Because § 12-2604(A) is not applicable to a claim for institutional negligence, an expert on this issue need only satisfy Ariz. R. Evid. 702, which requires that the witness have "specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue" – which appellant did. The Court also held that a registered nurse may testify about the cause of death in a medical malpractice case if Rule 702's requirements are met. **[Rule 702]**

12. *Naranjo v. Hon. Sukenic ex rel. Maricopa Ct.*, 254 Ariz. 467, ¶ 23, 524 P.3d 1123 (2023)—The Arizona Supreme Court affirmed a trial court's ruling that granted the State's motion to compel disclosure of a defendant's trial counsel's notes and records from interviews of defendant's family members in preparation for an evidentiary hearing on defendant's ineffective assistance of counsel claim. In so holding, the court rejected the defendant's contention on appeal that the phrase "evidence material to the claim" in Ariz. R. Crim. P. 32.6(b)(2) meant something more than relevant evidence or meant evidence of especially high probative value. Instead, "[m]ateriality is captured in Rule 401"—in subsection (b)—"by requiring, in order to [show] relevance, that the fact sought to be proved be 'of consequence to the determination of the action.' " *Id.* (*citing* Shirley J. McAuliffe, *Arizona Practice Law of Evidence* § 401:2 (4th ed. 2022); *see also Evidence*, Black's Law Dictionary (11th ed. 2019) (defining "material evidence" as "[e]vidence having some logical connection with the facts of the case or the legal issues presented").) "Accordingly," the Supreme Court held, "'materiality' is not a stricter principle than relevancy, nor does it mean something of especially high probative value." *Id.* **[Rule 401]**

13. *Cruz v. Hon. Michael Blair/State of Arizona*, 255 Ariz. 335, 532 P.3d 327 (2023)—The Arizona Supreme Court accepted special action jurisdiction to determine whether the trial court properly precluded expert and lay witnesses testimony regarding defendant's intellectual disability. Defendant was charged with multiple counts of child abuse,

kidnapping, and first-degree felony murder for the death of his daughter in the course of committing child abuse in violation of A.R.S. §13-3623. At trial, defendant sought to admit the testimony of an evaluating psychologist who concluded that defendant was of below average intelligence and met the criterial for being intellectually disabled. In addition, defendant wished to call 11 lay witnesses to provide evidence of defendant's inability to read, write, speak English, text, email, handle money, operate a GPS, or find an address. Defendant offered this testimony "not to negate *mens rea*, but to rebut the *actus reus* of the offense by showing he is so disabled he could not physically perform the acts necessary to be guilty of failing to take steps to protect his daughter." The State argued, and the trial court concurred, that the expert testimony was irrelevant because it amounted to improper diminished capacity evidence. The court further found the evidence to be excludable under Arizona Rules of Evidence 403 as unnecessarily confusing.

The Court began by reiterating that it is settled law that "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime." The Court rejected defendant's position that his apparent inability to carry out basic functions constitutes a "voluntary act" or an "omission" such that the evidence is relevant to rebut the minimum requirement for criminal liability based on conduct which a person is physically capable of performing. The Court noted that defendant did not argue that his actions were involuntary or that he was physically unable to perform the actions he claims he is not able to complete. To the extent the evidence may have touched on whether defendant <u>knew</u> how to do certain things for his daughter or whether he <u>should</u> have taken certain steps, pertains more to the issue of *mens rea* and is therefore inadmissible. The Court further held that because the evidence is irrelevant, any probative value is outweighed by the danger of confusing the issues pursuant to Rule 403. With respect to the remaining witnesses, although there is no prohibition to proffer "observation or behavioral tendency evidence," it is cumulative and equally confusing to permit 11 individuals to testify to similar observations. The trial court did not therefore, violate due process when it limited defendant to two lay witnesses. **[Rule 403]**

14. *State v. Allen*, 253 Ariz. 306 (2022)—Before admitting other act evidence, in addition to "concluding that a prior act is shown by clear and convincing evidence, the trial court must also '(1) find that the act is offered for a proper purpose under Rule 404(b); (2) find that the prior act is relevant to prove that purpose; (3) find that any probative value is not substantially outweighed by unfair prejudice; and (4) give upon request an appropriate limiting instruction.' Proper purposes include evidence admitted to prove 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" **[Rule 404(b)]**

15. *State v. Robinson*, 253 Ariz. 151 (2022)—The Arizona Supreme Court held that a prosecutor's improper leading and demonstrative questioning of an expert witness did not deny the defendant a fair trial, where the prosecutor did not direct the jury's attention to matters outside the record, the prosecutor asked two of the three leading questions at issue in response to an issue raised by the defense on cross-examination, and it was not unfounded for the prosecutor to suggest an inference about that issue. The Supreme Court

further held that the trial court did not clearly err in denying four *Batson* challenges, explaining that the State offered race-neutral explanations for the peremptory strike of the minority jurors, and the defendant did not meet his burden of proving a discriminatory purpose. The fact that other minority jurors that could have potentially been challenged for cause were accepted by the State and ultimately selected for the panel indicated a nondiscriminatory motive. *State v. Gallardo*, 225 Ariz. 560, 565. (The jury trial from which this Arizona Supreme Court decision arose took place in 2018—prior to the abolition of all peremptory strikes on January 1, 2022.) **[*Batson v. Kentucky*, 476 U.S. 79 (1986); Rule 611(c)]**

16. *State v. Hon. Adleman/Beasley*, 252 Ariz. 356 (2022)—The Arizona Supreme Court held that Beasley—held at the Maricopa County jail during the relevant time period—failed to meet his burden of establishing a *prima facie* case under *Clements v. Bernini ex rel. Pima Cty.*, 249 Ariz. 434 (2020), as necessary for attorney-client privilege to attach to each, separate contested communication made on a jailhouse tablet to family, friends, and members of his defense team. When a party makes a *prima facie* showing of privilege, the next step requires that the opposing party demonstrate a good faith basis that an *in camera* review would show waiver or establish an applicable exception. Here, the first *Clements* element—an attorney-client relationship with the defense team—was uncontested, but the remaining three (communication made to secure legal advice, made in confidence, and treated as confidential) were not. **[Rule 501]**

## Arizona Court of Appeals

1. *Cervantes v. State*, ___ Ariz. ___, 2026 WL 1355829 (Ct. App. Div. 1 2026)—In this special action, Cervantes (a defendant facing criminal charges) sought special action review of an order requiring him to translate, from Spanish to English, previously disclosed records, notes and test data of his privately retained competency expert Dr. Julio Ramirez. After the court of appeals declined special action jurisdiction, the Arizona Supreme Court granted review and directed the court of appeals to accept special action jurisdiction. After doing so, the court denied relief, finding that Cervantes had shown no error. In so ruling, the court relied in part on the trial court's inherent authority to control the courtroom and trial proceedings as well as the Arizona Rules of Evidence, which the parties agreed will apply at the competency hearing. The court observed that "[u]nder the Arizona Rules of Evidence, an expert has an obligation to disclose facts and data upon which he or she relies. *See* Ariz. R. Evid. 705. The court may order that disclosure to occur before the expert is allowed to testify to his or her opinion. *Id.* And the court 'can exclude the expert's testimony, or portions of it, if the expert refuses to disclose the underlying data.' Shirley J. Wahl, et al., *Arizona Practice Law of Evidence* § 705 at 445-46 (2008). Coupled with this authority, the Arizona Rules of Evidence direct the court to 'exercise reasonable control over the mode and order of examining witnesses and presenting evidence' to, among other things, "avoid wasting time." Ariz. R. Evid. 611(a)(2)." *Cervantes*, ¶ 28. There was a dissent. **[Rules 705 and 611(a)(2)]**

2. *State v. Brown,* ___ Ariz. ___, 2026 WL 1262491 (Ct. App. Div. 2 2026)—In this case, Brown was convicted of 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 a law enforcement vehicle, all arising from a chase by law enforcement. On appeal, Brown argued, *inter alia*, that the superior court abused its discretion by allowing the state to present profile evidence about human-smuggling organizations, suggesting he must be guilty because he had certain characteristics. The court agreed that a defendant cannot be convicted based upon what others are doing. *State v. Haskie*, 242 Ariz. 582, 585-86 ¶ 14 (2017). However, it observed that evidence of *modus operandi* is admissible if limited to general practices of a criminal organization without commenting on the defendant's guilt. *State v. Gonzalez*, 229 Ariz. 550, 554, ¶ 16 (App. 2012). In this case, Agent Chadwick had testified that two others were "coordinators" of a human smuggling operation, and the superior court struck the first reference and instructed the jury to disregard it. The court of appeals held that the two references over a 10-day trial did not support fundamental error. It also observed that Brown had failed to meaningfully challenge evidence that he had participated in human smuggling and did not address the issue at all at sentencing. In the end, however, the court held that the superior court violated Brown's Fifth Amendment right against self-incrimination at sentencing and erroneously sentenced him for both first- and second-degree murder arising from the same deaths. The court thus affirmed Brown's convictions on all but the second-degree-murder counts. It vacated his sentences and remanded for resentencing consistent with its decision. There was a dissent. **[Profile evidence]**

3. *State v. Johnson*, ___ Ariz. ___, 2026 WL 820411 (Ct. App. Div. 1 2026)—In this case, Johnson appealed his three convictions and sentences for aggravated assault, unlawful imprisonment, and assault. All three were alleged as domestic violence offenses. He argued, *inter alia*, that the superior court erred when it admitted hearsay statements from an emergency room doctor, a forensic nurse examiner, and the case agent in violation of Rule 803(4) ("Statement Made for Medical Diagnosis or Treatment") and the Confrontation Clause. The court of appeals held the superior court did not err when it allowed the doctor to testify about the victim's statements at the hospital emergency room. The court also held that it was harmless error to allow the police officer to testify the victim told him where Johnson assaulted her. However, the court held that the forensic examiner's testimony violated the Confrontation Clause for Johnson's aggravated assault and domestic violence conviction and was inadmissible under Rule 803(4) because 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." *See State v. Trinidad*, 257 Ariz. 485, 488 ¶ 11 (Ct. App. Div. 1 2024). The court noted that the Rule 803(4) exception to the hearsay rule "is not an excuse to admit every statement made to a medical professional," *Johnson*, ¶ 27, and the court observed that "when analyzing Rule 803(4) and Confrontation Clause issues in this context, the court must make the following inquiry: Was the out-of-court statement 'made for—and [was] reasonably pertinent to—medical diagnosis or treatment,' or was it made for a testimonial purpose?" *Johnson*, ¶ 31. Finally, the court held the error was not harmless because the State could not show beyond a reasonable doubt admission of the forensic examiner's testimony "did not contribute to the verdict[s] . . . or sentence[s]" for these counts. *State v. Dunbar*, 257 Ariz. 421, 426, ¶ 14 (2024). Thus, the court vacated Johnson's convictions and remanded to the superior court for further proceedings. **[U.S. Const. Amend. VI, Confrontation Clause and Rule 803(4)]**

4. *State of Arizona v. Hernandez,* ___ Ariz. ___, 588 P.3d 7 (Ct. App. Div. 1 2026)—In this special action filed by the State, the issue was whether the superior court erred in agreeing with the defendant that a subsection of Arizona's "Rape Shield Law," A.R.S. § 13-1421(A)(2), applies to physical, mental and emotional trauma. The court of appeals agreed with the State that the superior court erred, holding that where that subsection authorizes the admission of evidence of a victim's sexual conduct under certain circumstances if the evidence establishes "the source or origin of … trauma," that provision applies only to physical trauma exhibited by the victim, not mental or emotional trauma. Unlike physical trauma, mental or emotional trauma is not traceable to a single cause or a particular event. Because evidence of the victim's emotional trauma does not directly refute evidence that she was victimized by defendant, the emotional trauma evidence (i.e., evidence of the alleged victim's victimization by others) is not admissible. Thus, the court accepted jurisdiction and granted relief. The court noted, however, that it did not consider defendant's alternative argument that the provision at issue may run afoul of a defendant's constitutional right to present a complete defense. **[Arizona's Rape Shield Law; Fed. R. Evid. 412]**

5. *State v. Moreno*, ___ Ariz. ___, 587 P.3d 153 (Ct. App. Div. 2 2026)—Moreno was charged with six sexual offenses against his nieces Penny and Melanie, committed between 2015 and 2017. As to Penny, Moreno was charged with two counts of molestation of a child and one count of indecent exposure against a minor under fifteen. As to Melanie, Moreno was charged with two counts of molestation of a child and one count of sexual conduct with a minor under fifteen. Prior to trial, Moreno moved to sever the counts by victim. The superior court denied the motion, reasoning there was no risk of undue prejudice because the offenses against one victim would be admissible in a trial as to the other victim under Rule 404(c). However, due to a lack of notice, the court barred Melanie and Penny from testifying about any acts other than those charged. Over Moreno's objection, after a full Rule 404(c) analysis, the court gave the jury a Rule 404(c) instruction. The jury returned a mixed verdict, finding Moreno not guilty of one count of child molestation as to each victim but finding him guilty of the remaining four counts. The court sentenced Moreno to concurrent and consecutive prison terms totaling forty-one years. Moreno appealed, arguing, *inter alia,* that the superior court erred by providing the jury with a Rule 404(c) instruction "when no other-act evidence was admitted" at trial. The court of appeals explained the requirements of Rule 404(c) and rejected Moreno's argument, concluding that although the superior court was not required to give a Rule 404(c) instruction here, there was no abuse of discretion because "the instruction correctly stated the law and informed the jury how it should consider the evidence presented: as relevant to show that Moreno had a character trait giving rise to an aberrant sexual propensity to commit an offense charged." *Moreno*, ¶ 13. In the end, the court of appeals affirmed Moreno's convictions and sentences. There was a dissent on another, non-evidentiary issue. **[Rules 403 and 404]**

6. *State v. Riehle,* ___Ariz. ___, 586 P.3d 693 (Ct. App. Div. 1 2026)—In this case, Riehle appealed his convictions and sentences for two counts of disorderly conduct with a weapon, possession of dangerous drugs and possession of drug paraphernalia. He argued, *inter alia*, that the crime-scene analyst's testimony should have been excluded because the Marquis test used was unreliable and the analyst was unqualified. *See* Ariz. R. Evid.

702(a), (c). On cross-appeal, the State argued the superior court erred by requiring a jury to determine whether Riehle's disorderly conduct convictions were dangerous offenses. The court of appeals affirmed the convictions but vacated and remanded for the court to resentence Riehle. The court held that disorderly conduct with a weapon is an inherently dangerous offense. Therefore, the Sixth Amendment does not require a jury to make that factual determination in each case. The offense requires proof that the defendant, with intent 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. On the evidentiary issues, the court observed that "Ariz. R. Evid. 702(c). Arizona law evaluates reliability based on non-exclusive factors: (1) whether the expert's theory or technique can be or has been tested; (2) whether the theory or technique has faced peer review and publication; (3) whether the technique or theory is generally accepted within the relevant scientific community; (4) the known or potential rate of error of the technique or theory when applied; and (5) the existence and maintenance of standards controlling application of the technique. [citations omitted] Although the methodology of an expert witness must be based on more than speculation, it need not be reliable to a degree of scientific certainty." *Riehle*, ¶ 15. And, although Riehle pointed to research that Marquis tests are less reliable than confirmatory lab tests, the court observed that "cross-examination is the appropriate tool to attack 'shaky but admissible [expert] evidence.'" [citation omitted] *Riehle*, ¶ 16. Finally, the court held that the analyst was qualified under Rule 702 based on 30 years of law enforcement experience and two years as an analyst. The court concluded there was no abuse of discretion. **[Rules 701 and 702]**

7. *State v. L & L Investments, L.L.C.*, ___ Ariz. ___, 587 P.3d 615 (Ct. App. Div. 1 2026)—The court of appeals affirmed defendant's convictions and sentences for conspiracy, illegal control of an enterprise, theft, and fraudulent schemes and artifices and held that the superior court erred in admitting opinion testimony of AHCCCS's Inspector General that defendant's actions constituted a "fraud scheme" under Rule 704(a), which went to the trial's ultimate issue. But the error was harmless, given the brevity of the IG's improper expert opinion contrasted with the weight of the other evidence presented. In addition, the superior court did not err in admitting evidence of an employee's criminal charges over a Rule 404(b) objection because such evidence was admissible to prove a material omission, an element of fraudulent schemes and artifices. And, the superior court properly determined that such evidence was probative, and the probative value was not substantially outweighed by any danger of unfair prejudice, confusing the issues, or misleading the jury. **[Rules 403, 404(b), 701, 702, 703, and 704(a)]**

8. *State v. Searight*, ___ Ariz. ___, 586 P.3d 147 (Ct. App. Div. 2 2026), State of Arizona's Petition for Review (Request for Depublication) granted as to partial depublication and ordered depublishing paragraphs 14-31 of the court of appeals' opinion (CR-26-0062-PR, June 2, 2026)—Searight appealed his convictions and sentences for negligent homicide, endangerment, and criminal damage stemming from an incident in which he sped through a red light and collided with another vehicle. One of his passengers was thrown from the car and later died of his injuries. Searight and another passenger were injured but survived. Searight was acquitted of the more serious manslaughter charge. Searight argued, *inter alia*, that the superior court erred in precluding evidence regarding the deceased victim's seat belt use at the time of the collision. The court of appeals observed

that "a trial court's discretion to exclude relevant evidence is broad," citing Rule 403, but that the court in this case abused its discretion by providing "erroneous grounds for its ruling." *Searight*, ¶ 22. "The trial court misunderstood Searight's theory of relevance as a species of a causation argument, finding it to be 'the functional equivalent' of arguing superseding cause. But, as discussed, Searight's theory of relevance concretely addressed two independent elements of the homicide charges: *mens rea* and the objective risk of death posed by Searight's conduct." *Id*. ¶ 24. Although Searight did not assert this ground on appeal, the court explained that "to the extent we encounter fundamental evidentiary error in the appellate record not raised by a criminal defendant on appeal, we retain the authority to address that error. *See* Ariz. R. Evid. 103(e) ('A court may take notice of an error affecting a fundamental right, even if the claim of error was not properly preserved.')." *Id*. ¶ 16. The court also noted that "where the seat belt evidence was relevant and probative on some elements of the offenses but not others, our rules authorize parties to request and judges to provide limiting instructions. *See* Ariz. R. Evid. 105." *Id*. ¶ 24 n. 2. In the end, the court held that Searight failed to show he was sufficiently prejudiced by the error because on the facts presented, "no reasonable juror could have acquitted Searight of negligent homicide had he been allowed to present evidence regarding his passengers' seat belt use and his awareness and assumptions surrounding it." *Id*. ¶ 31. Judge Staring specially concurred but did not believe the majority should have created the precedent that seat belt evidence may be relevant to the question of *mens rea* in light of the overwhelming evidence of guilt in this case. *Id.* ¶ 41. **[Rules 103(e), 105, and 403]**

9. *State v. Gomez*, ___ Ariz. ___, 583 P.3d 759 (Ct. App. Div. 2 2025)—Affirming defendant's convictions and sentences for two counts of sexual conduct with a minor, the court of appeals held, *inter alia*, that the superior court did not err by denying defendant's request for in-camera review of the victim's mental health records where the request lacked specificity as to the date, provider and location of the records; nor did it abuse its discretion by denying defendant's motion to disqualify the prosecutor for a conflict of interest and the appearance of impropriety when the prosecutor held pretrial meetings with the victim and the prosecutor's paralegal was called as a witness regarding the victim's disclosure of additional abuse. 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. Defendant also unsuccessfully challenged the preclusion of his statements to the police when he denied the victim's allegations, claiming the state opened the door by asking a witness why he had read the *Miranda* warnings to defendant. He contended that the rule of completeness in Rule 106 required inclusion of his statements. But the court of appeals held defendant's denial of the allegations was not necessary to explain, qualify, or give context to the *Miranda* warnings. Finally, the court held the superior court did not abuse its discretion in (1) allowing cold expert Dr. Wendy Dutton to testify about child victims' behavior, *see* Rule 702 and *State v. Lindsey*, 149 Ariz. 472, 473, 475 (1986), or (2) precluding under Rule 403 a defense expert from testifying about adults' ability to assess whether a child is lying. There was a partial dissent. **[Rules 106, 403, and 702; in camera review of victim's mental health records; expert testimony; prosecutor disqualification]**

10. *Reynolds v. Martinez*, 2025 WL 3279418 (Ct. App. Div. 1 2025) (mem. decision)—In this SUV-tractor collision case, all five of the SUV's passengers sued the tractor driver and the farm that owned the tractor, alleging that the tractor driver had negligently pulled in front of the SUV, and that the farm was vicariously liable for the tractor driver's negligence. At trial, the plaintiffs sought to introduce bodycam recordings of (1) Officer Lee interviewing the tractor driver and the farm owner, and (2) Officer Lee discussing those interviews with other officers. Defense counsel objected on hearsay grounds. The superior court ruled that only the tractor driver's and farm owner's statements were admissible. The court also ruled before trial that Officer Lee could only testify as a lay witness under Rule 701. The plaintiffs appealed the defense verdict arguing, *inter alia*, that the superior court erred by (1) precluding the bodycam recording of the officers discussing Officer Lee's interview with the defendants, and (2) precluding Officer Lee's testimony on whether surveillance footage was consistent with the defendants' testimony and whether that footage showed the tractor blocking the SUV. In affirming, the court of appeals held the superior court correctly admitted the defendants' statements to Officer Lee because such statements were offered by the plaintiffs against an opposing party under Rule 801(d)(2)(A). Moreover, the superior court did not abuse its discretion in precluding other statements by the officers because they were not made by an opposing party and were hearsay under Rule 802. Likewise, the court did not abuse its discretion in limiting Officer Lee's testimony because he was not qualified as an expert under Rule 702. A lay witness may only draw inferences or state opinions that are "rationally based on the witness's perception" and are "helpful to clearly understanding the witness's testimony or to determining a fact in issue." Rule 701. **[Rules 701, 702, 801(d)(2)(A), and 802]**

11. *Clem v. Pinal County*, ___ Ariz. ___, 580 P.3d 564 (Ct. App. Div. 2 2025)—In this wrongful death case, the court of appeals held that the superior court did not abuse its discretion in denying a motion for mistrial after it excused a potentially biased juror during trial. Empanelment of the juror was not reversible error in the absence of prejudice, and verdicts may typically be reversed without prejudice only in the narrow context of structural error. Clem relied on Rule 606(b) to excuse the lack of evidence concerning potentially prejudicial juror communications while acknowledging that the record contains "only scraps and hints about what Juror No. 6 told the other jurors." However, the court of appeals observed that "Rule 606(b) was not applicable when juror six was questioned and excused on the fifth trial day. That rule concerns the permissible scope of inquiries into the validity of a verdict. Likewise, Rule 606(b)'s prohibition on juror testimony concerns their deliberations, votes, and mental processes. Here, no deliberations or votes had occurred on the fifth day, and the trial court was not inquiring into the validity of a verdict. Its inquiry was more akin to an investigation into juror misconduct, where courts generally have broad discretion. *See State v. Cota*, 229 Ariz. 136, ¶ 74 (2012) ('When a trial court becomes aware of possible juror misconduct, it should 'conduct whatever investigation it deems warranted.'' (quoting *State v. Cook*, 170 Ariz. 40, 55 (1991)))." *Clem*, ¶ 30.

"Moreover, even after the trial concluded, Rule 606 did not prevent Clem or the trial court from obtaining at least some information regarding juror six's communications. At a minimum, they could have asked what 'extraneous prejudicial

information' or 'outside influence' had been shared. *See* Ariz. R. Evid. 606(b)(2)(A)–(B); *Brooks v. Zahn*, 170 Ariz. 545, 553 (App. 1991) (describing scope of permissible inquiry in determining whether jury considered extraneous information)." *Clem*, ¶ 31. However, Clem never sought to do so.

Finally, the court of appeals held the superior court did not abuse its discretion when it reduced a mandatory sanction under Arizona Rule of Civil Procedure 68 without providing a basis for the reduction. Trial courts have broad discretion in assessing the reasonableness of expert fees, and defendants cited no authority requiring courts to explain reductions based on unreasonableness. **[Rule 606(b)]**

12. *Larrea v. Chand*, ___ Ariz. ___, 580 P.3d 554 (Ct. App. Div. 1 2025)—In this family law case, Husband appealed from the decree dissolving his marriage to Wife. The court of appeals affirmed the family court's rulings that Husband failed to prove a right to an offset or reimbursement for separate-property contributions he made to the community during and after the marriage. The court also affirmed the family court's decision to treat a future tax benefit as community property in its equalization analysis as well as its decision precluding Husband's testimony parroting his appraiser's opinion for failure to comply with Rule 702. The court of appeals acknowledged that a property owner is competent to opine on his or her property's value under Rules 701-702 but held that "[t]he problem here is that Husband did not seek to offer his opinion, but that of his appraiser." *Larrea*, ¶¶ 38-39. In reaching this conclusion, the court explained that "[b]ecause neither party chose to require compliance with the Evidence Rules under Family Rule 2, certain Evidence Rules did not apply, including those that limit the use of hearsay and require witnesses to have personal knowledge. *See* Ariz. R. Fam. L.P. 2(b)(1) (specifying that Evidence Rules 602 and 801-807 are among those that do not apply). But the Evidence Rules governing the admissibility of opinion testimony—Evidence Rules 701-706—still applied. *See* Ariz. R. Fam. L.P. 2(b)(2)." *Larrea*, ¶ 36.

    However, the court reversed the family court's valuation of a community Tesla and its use of a rejected home-valuation boost to calculate Wife's equalization award, and the court remanded so that the family court may adjust the award accordingly. Finally, the court dismissed the appeal for lack of jurisdiction in so far as it challenged the award of attorney fees and costs against Husband because the family court did not resolve the award in the decree, which it certified as an appealable judgment under Family Law Rule 78(b), and Husband did not file a notice of appeal after the court subsequently entered a separate judgment under Family Law Rule 78(c) awarding fees and costs under A.R.S. § 25-324. **[Rules 701-706; Family Law Rule 2]**

13. *State v. Tapia-Munoz*, ___ Ariz. ___, 580 P.3d 1159 (Ct. App. Div. 1 2025)—Tapia-Munoz appealed from his convictions and sentences for two counts of first-degree murder, and one count each of attempted murder, aggravated assault, and unlawful flight. Among the issues raised on appeal, he argued the superior court abused its discretion in overruling his business-records hearsay objection to the contents of a Cellebrite cell phone extraction report. *See* Arizona Rule of Evidence 803(b)(6). "The [State's] analyst noted that Cellebrite generates the report of the extracted data, and that he has no way of

manipulating the information in the report. The only information listed in the one-page Cellebrite reports is the cell phone number connected to the SIM for each of the two phones. These were the same phone numbers used to collect the cell phone location data linking Tapia-Munoz to the crime scenes." *Tapia-Munoz*, ¶ 16. "Because Cellebrite is not a 'person,' and nothing in this record suggests the results of the Cellebrite report were in any way the product of human thought or action, they are not 'statements' made by a 'declarant,' and thus are not hearsay under Evidence Rule 801." *Tapia-Munoz*, ¶ 23. In reaching this conclusion, the court relied in part on federal cases, noting that "federal court decisions are persuasive authority in analyzing Arizona's rules." *Tapia-Munoz*, ¶ 19. **[Rules 801, 802, and 803]**

14. *State v. Alston*, ___ Ariz. ___, 580 P.3d 543(Ct. App. Div. 1 2025)— Alston appealed his convictions and sentences for first-degree murder and drive-by shooting. He argued, *inter alia*, that the superior court erred by admitting several hearsay statements and audio recordings as prior consistent statements under Rule 801(d)(1)(B). The court of appeals observed that a declarant's prior statements that are consistent with that declarant's testimony are not hearsay if the declarant testifies at trial, is subject to cross-examination about the statements, and as applicable here, 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." Rule 801(d)(1)(B)(i), (ii). Amended in 2015, the current rule is intended "to extend substantive effect to consistent statements that rebut other attacks on a witness— such as the charges of inconsistency or faulty memory." *See* Ariz. R. Evid. 801 cmt. 2015 Amendment to Rule 801(d)(1)(B). The text of Rule 801(d)(1)(B) mirrors the text of the analogous federal rule of evidence. *See* Fed. R. Evid. 801(d)(1)(B). *See Alston*, ¶ 10. The court further noted that although "Arizona courts have not addressed the issue of the scope or significance of a credibility attack required to trigger the rule's protection for such statements, [] federal courts have held that even brief attacks on credibility may allow the admission of prior consistent statements." *Alston*, ¶ 13. After reviewing the three questioned witness statements, the court concluded that (1) the first statement fell under Rule 801(d)(1)(B), (2) Alston failed to show that he was prejudiced by admission of the second unobjected-to statement, and (3) admission of the third statement was, at most, harmless error. *See Alston*, ¶¶ 9-23. The court affirmed Alston's convictions and sentences. **[Rule 801(d)(1)(B)]**

15. *Huber v. Arizona Naturopathic Physicians Medical Board,* ___ Ariz. ___, 576 P.3d 122 (Ct. App. Div. 1 2025)—In this opinion, the court of appeals explained the scope of how trial courts should review appeals from administrative agencies under A.R.S. § 12-910(D) when an appealing party demands a trial de novo with a jury. In this case, the Board licensed Huber to practice naturopathic oncology. After a patient complained, the Board investigated Huber, held a hearing with an Administrative Law Judge, and revoked her license. Huber appealed to the superior court and requested a trial de novo with a jury. The superior court denied her jury-trial request and deferred to the Board's decision while ruling against her. Huber appealed and the court of appeals held that the superior court erred in denying Huber a jury trial. The court observed that if the Board's claim survived summary judgment, a jury should have decided Huber's appeal de novo. And, like any other trial, the parties should have created the trial record by admitting exhibits

and offering witness testimony under the Rules of Evidence. *See Huber*, ¶ 70. "For example, testimony from an administrative hearing may be admitted under the rules of evidence. *Cf. Hancock v. O'Neil*, 253 Ariz. 509, 514 ¶ 20 (2022)." *Huber*, ¶ 60. There was a partial dissent. **[Rules of Evidence Applicable at Trial De Novo in Administrative Appeal]**

16. *State of Arizona v. Guevara-Enriquez,*___ Ariz. ___, 576 P.3d 122 (Ct. App. Div. 2 2025)—In this case, defendant was convicted and sentenced for sexual conduct with a minor. On appeal, he argued, *inter alia*, that the trial court erred by permitting a DNA analyst to testify about the statements and opinions of other non-testifying lab team members. Although he did not object to the testimony at trial, he argued the error should be subject to harmless error review because it would have been futile to object in light of *State v. Ortiz*, 238 Ariz. 329 (App. 2015). He further argued that, since his trial and conviction, *Smith v. Arizona*, 602 U.S. 779 (2024), has "overrule[d] this precedent," thereby "constitut[ing] a significant change in the law." *See Reed v. Ross*, 468 U.S. 1, 16 (1984). The court of appeals observed that in *Smith*, "the Court held it is improper for a substitute expert to introduce the testimonial out-of-court statements of a forensic analyst at trial, unless the analyst is unavailable and the defendant had a prior opportunity to cross examine the analyst. [*Smith*] at 802-03." *Guevara-Enriquez,* ¶ 20.

    In this case, the state's expert worked as a DNA analyst at the same lab that processed the forensic evidence. The lab uses a "technician based system" in which "different teams" perform the "different steps of the DNA analysis," rather than one person "doing every step of the work." At trial, the analyst testified extensively as to the lab's processes, from the "moment [they] receive evidence" through publishing of the report. The testifying analyst's role in this case was to "review anything that[ had] been done in [the] case file, take ownership of it, examine the DNA profiles obtained from evidence, make comparisons, calculate statistics, generate reports, and then testify in court proceedings to those reports." However, the testifying analyst also testified that she did not "physically do[] the [lab] work" but instead "review[ed] all of the documentation that the[ lab team members] generate at every single one of the steps." Her work included "actually look[ing] at the DNA profiles, determin[ing] if it's suitable for comparison," "mak[ing] comparisons," and "calculat[ing] statistics." Thus, the court of appeals concluded the record "is undeveloped as to (1) whether the other lab team members made any statements relating to their tasks, (2) whether—or to what extent—the testifying analyst relied on such statements in forming her own opinion, and (3) whether any such statements were testimonial." *Guevara-Enriquez,* ¶ 23. In the end, the court held that even assuming error, it was harmless beyond a reasonable doubt because of direct testimony identifying defendant as the perpetrator and because the DNA evidence supported both the state's theory and defendant's defense. **[U.S. Const. Amend. VI, Confrontation Clause]**

17. *Devers, et al. v. La Mesa RV Center*, 2025 WL 1711425 (Ariz. Ct. App. Div. 1 2025) (mem. decision), In this case, the Devers sued La Mesa for compensatory and punitive damages, asserting claims for breach of contract, conversion, and consumer fraud. In their complaint, the Devers alleged that they were ready and willing to accept delivery of an RV after repairs were made, but that La Mesa refused to deliver it because motorhome

prices had "gone up significantly" and La Mesa found it could make more money "by selling [the] RV to a third party." At trial, over the Devers' Rule 608(b) objection, the superior court allowed La Mesa to introduce evidence that the Kentucky Supreme Court had suspended Mr. Devers's bar license for professional misconduct. The jury found for La Mesa on all counts and the Devers appealed. After reviewing case law interpreting comparable Federal Rule 608(b), the court of appeals held the superior court abused its discretion, opining that "[b]ecause nothing in Rule 608(b) permits a witness's character for truthfulness to be attacked by evidence that a court, employer, or regulatory body imposed professional discipline on the witness, Rule 608(b) did not permit La Mesa to attack Devers's character for truthfulness with evidence of the Kentucky Supreme Court's decision to suspend his law license. And because the outcome of this case turned largely on whether the jurors believed Devers's version of events or La Mesa's, the erroneous admission of evidence that the Kentucky Supreme Court found Devers 'guilty' of 'ethical violations'—an error that La Mesa compounded by using an illustrative aid unsupported by evidence—was objectively likely to affect the jurors' verdicts." *Devers*, ¶ 56. The court of appeals held this was reversible error and concluded by affirming the judgment against the Devers on their conversion and punitive damages claims, vacating the judgment in all other respects, and remanding for a new trial. The court also noted that "[t]he use of illustrative aids is now governed by Rule 107, which became effective January 1, 2025. Ariz. R. Evid. 107." *Id*. ¶ 55 n. 4. **[Rules 107 and 608(b)]**

18. *State v. Vallejo*, ___ Ariz. ___, 574 P.3d 709 (Ct. App. Div. 2 2025)—The court of appeals found that the superior court did not abuse its discretion when it found the defendant had voluntarily absented himself from multiple trial days when he refused to appear because he objected to the trial clothing provided to him. Similarly, the court found the superior court did not abuse its discretion by denying the defendant's request for a recess or continuance, observing that "[c]ourts have extensive discretion—and a duty—to ensure trials proceed in an orderly fashion. *State v. Wassenaar*, 215 Ariz. 565, ¶ 28 (App. 2007); *see also* Ariz. R. Evid. 611(a)(2)." Vallejo, ¶ 25. Finally, the court held there was sufficient evidence to convict the defendant of second-degree murder under A.R.S. § 13-1104. There was a dissent. **[Rule 611(a)(2)]**

19. *State v. Howard*, ___ Ariz. ___, 573 P.3d 581 (Ct. App. Div. 1 2025)—In this case, the defendant appealed her second-degree murder conviction, arguing, *inter alia*, that the trial judge was biased and that the judge who sentenced her after the trial judge recused herself abused his discretion by failing to read the trial transcript before sentencing. The bias argument was based in part on the defendant's mother's report that the trial judge had embraced the victim's mother in court. The Commission on Judicial Conduct reprimanded the trial judge, finding her conduct "created an appearance of bias in violation of Rule 1.2 and 2.3(b) of the Code" of Judicial Conduct. The Commission further found "[t]he Complainant could understandably believe that the defendant, her daughter, did not receive fair and impartial treatment over the course of the trial" given the trial judge's actions. Defendant lodged with the court of appeals the Commission's order reprimanding the trial judge and its attachments. The court of appeals took judicial notice of these materials pursuant to Rule 201(b)(2). In the end, however, the court affirmed the defendant's conviction but remanded for resentencing based on the

successor judge's failure to review the trial record prior to sentencing as required by Criminal Rule 19.4. There was a dissent. **[Rule 201(b)(2)]**

20. *State v. McNulty,*___ Ariz. ___, 573 P.3d 581 (Ct. App. Div. 1 2025)—In this case, McNulty, a 70-something resident of Kingman, sent a message to "Mayghan" on the Skout website. The "Mayghan" account was a decoy profile operated by the Mohave County Sheriff's Office. About an hour into their exchanges, Mayghan told Defendant she was under 14, contrary to what her profile indicated. When asked if he wanted to be left alone, Defendant responded negatively and said they could be friends. He then informed Mayghan that he was masturbating and sent a picture of a man with a penis exposed. Over the next four days, Mayghan repeatedly initiated contact and invited McNulty to meet. He declined but kept sending nude pictures. Following his arrest, the State charged McNulty with two counts of aggravated luring of a minor, two counts of luring a minor, and three counts of attempted sexual exploitation of a minor. The indictment differentiated the luring counts based solely on the offense date and pictures sent. The jury found him guilty on all counts. By the time of sentencing in 2021, the court of appeals had held that charging a person with multiple luring counts based only on the offense dates violated the double jeopardy clause. *See State v. Moninger*, 251 Ariz. 487 (App. 2021), *vacated*, 258 Ariz. 18 (2024) (*Moninger II)*. Accordingly, the superior court vacated one conviction for aggravated luring and two convictions for luring. The court designated the remaining offenses as dangerous crimes against children and imposed consecutive sentences.

    On appeal, the court of appeals affirmed the dismissal of one aggravated luring and two luring convictions because the double jeopardy clause forbids multiple punishments for the same offense. U.S. Const. amend. V; Ariz. Const. art. 2, § 10. Applying the same elements test from *Blockburger v. United States*, 284 U.S. 299 (1932), the court found that luring is a lesser included offense of aggravated luring, reasoning that the latter offense includes the additional element of providing material harmful to minors. Therefore, the superior court properly vacated the luring conviction found to have occurred on the same day as aggravated luring. Moreover, the superior court correctly dismissed two luring counts based upon the course of conduct. McNulty directed his actions at one victim and one form of conduct, with communications occurring over consecutive days. The superior court found the messages all seemed to be the same and showed one course of conduct. Moreover, nothing in the jury instructions explained the unit of prosecution or provided guidance on determining separate offers or solicitations. Therefore, the superior court properly vacated the other luring convictions.

    The court of appeals also affirmed the designation of the aggravated luring offense as a dangerous crime against children, diverging from the majority opinion in *State v. Superior Ct. (Marner),* 258 Ariz. 512 (App. 2024) (rev. granted). In *Marner*, the court of appeals held 2-1 that the dangerous crimes against children enhancement does not apply to convictions under A.R.S. § 13-3554 unless the victim is an actual minor under 15. *Id.* at 515-16, ¶¶ 8, 11. A dissenting judge disagreed, finding that A.R.S. §§ 13-3554 and 13-705 identify luring as a dangerous crime against children when committed against a minor younger than 15, and the sentencing statute provides that a defendant may not evade enhancement if there is reason to believe the minor was younger than 15, even if no actual minor is involved. *Id.* at 345-49, ¶¶ 25-44 (Gard, J., dissenting). Adopting this

reasoning, the panel in this case upheld the dangerous crimes against children sentencing enhancement. **[U.S. Const. amend. V; Ariz. Const. art. 2, § 10; Double Jeopardy; Dangerous Crimes Against Children]**

21. *Mario Rodriguez-Ramirez v. State of Arizona,* ___ Ariz. ___, 570 P.3d 965 (Ct. App. Div. 1 2025*)*—In this special action, Petitioner, Pastor Rodriguez-Ramirez, challenged the superior court's order denying his motion to suppress evidence of his statements/confession to a co-pastor whose niece was the alleged sexual offense victim. The superior court ruled the surreptitiously recorded conversation between Rodriguez-Ramirez and the co-pastor at the same church, was admissible after finding the clergy-penitent privilege under A.R.S. § 13-4062.3 did not apply because the co-pastor was not acting in his "professional character." That statute provides that: "A clergyman or priest [shall not be examined as a witness], without consent of the person making the confession, as to any confession made to the clergyman or priest in his professional character in the course of discipline enjoined by the church to which the clergyman or priest belongs." The court of appeals accepted jurisdiction and granted relief. In reaching this result, the court first observed that "[i]n limited circumstances, a court may consider the content of allegedly clergy-penitent privileged communications to determine whether the privilege applies." *Rodriguez-Ramirez*, ¶¶ 14-21. The court next went through the three-step analysis articulated in *State v. Archibeque,* 223 Ariz. 231, 234 ¶ 7 (App. 2009), concluding that the clergy-penitent privilege applied to Rodriguez-Ramirez's confession, *Rodriguez-Ramirez*, ¶¶ 22-55, as well as the recording thereof and transcript of the recording. *Id*. ¶¶ 56-59. **[Rule 501; A.R.S. § 13-4062.3]**

22. *State v. Vergara,* 259 Ariz. 501, 568 P.3d 764 (Ct. App. Div. 1 2025)—In this case, Vergara was convicted and sentenced for kidnapping, sexual assault, and aggravated assault with a deadly weapon or dangerous instrument, all of which occurred in 1991. However, Vergara did not become a suspect until 2018 when DNA from the victim's vaginal swab was developed into a profile "consistent with a mixture of two individuals, including a major male contributor and alleles consistent with the [the victim]." On December 6, 2018, the male contributor "hit to a database," identifying Vergara as a possible suspect. Subsequently, a profile of Vergara's DNA matched the male profile from the victim's vaginal swabs. Vergara was indicted in 2021 and convicted at his second trial. On appeal, Vergara argued the superior court erred by denying his motion to dismiss the charges against him as time-barred by the statute of limitations. He also argued the court committed reversible error by permitting the state to introduce evidence that his DNA profile was discovered in a database hit, which, he alleges, was irrelevant, unduly prejudicial, and implied he had a prior criminal history. The court of appeals affirmed, rejecting all of Vergara's arguments. With respect to Vergara's "database hit" argument, the court held the evidence was relevant under Rule 401 to rebut Vergara's defense by showing how law enforcement came to suspect him nearly 27 years after the offenses. The court likewise rejected Vergara's undue prejudice and Rule 404(b) argument that "it is common knowledge that criminals have their DNA put into databases." The court acknowledged that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," *see* Rule 404(b)(1), but held the evidence was neither unduly prejudicial nor

admitted for propensity purposes. The court observed that the superior court sanitized the evidence and gave a limiting instruction that the evidence was to be considered for "limited purpose of explaining why Mr. Vergara became a suspect in 2018 . . . and not for any other purpose." Finally, the court held that "even assuming the testimony suggested that Vergara had involvement in a prior crime, wrong, or act—it was not presented to show he acted 'in conformity therewith.' Ariz. R. Evid. 404(b). No specific prior crime, wrong, or act was even presented." *Vergara*, ¶ 62. **[Rules 401, 402, 403, and 404(b)]**

23. *State v. Armendaris,* 259 Ariz. 454, 567 P.3d 755 (Ct. App. Div. 1 2025)—In this case, Armendaris appealed his convictions and sentences for luring a minor for sexual exploitation and attempted sexual conduct with a minor on the grounds that he was constitutionally entitled to a 12-person jury (rather than the 8-person jury that was empaneled) and that the superior court abused its discretion by not allowing him to elicit testimony about whether the undercover officer committed the crime of computer tampering when she lied about her age. The court of appeals rejected Armendaris's first argument, concluding that Arizona's jury laws passed Sixth-Amendment muster under *Williams v. Florida*, 399 U.S. 78, 86 (1970). And, "[b]ecause the maximum possible sentence was less than 30 years, he was not entitled to a 12-person jury. *See* Ariz. Const. art. II, § 23; A.R.S. § 21-102." *Armendaris*, ¶ 20. The court rejected Armendaris's second argument because "the superior court 'could have precluded [the testimony] on the ground that [it] was so marginally relevant and cumulative of stronger testimony that its probative value was substantially outweighed by considerations of delay and confusion.' *State v. Wargo*, 145 Ariz. 589, 589–90 (App. 1985); *see also* Ariz. R. Evid. 403." *Armendaris*, ¶ 24. **[Rule 403]**

24. *State v. Simental*, 259 Ariz. 153, 563 P.3d 169 (Ct. App. Div. 1 2025)—In this case, he court of appeals held the superior court did not abuse its discretion in relying on a grand jury transcript to determine that Simental's possession of marijuana for sale conviction was not eligible for expungement under A.R.S. § 36-2862(A)(1) because the amount of marijuana she possessed exceeded two-and-a-half ounces. The superior court may consider the extended record in post-conviction proceedings. It may similarly review the extended record when deciding if a marijuana conviction is eligible for expungement. This may include review of documents containing hearsay, such as a grand jury transcript, especially when the amount of marijuana involved in the underlying offense is not otherwise identified. Here, the indictment, plea agreement, change of plea minute entry, and sentencing order all failed to specify an amount of marijuana beyond "less than one pound." Given this lack of specificity, the superior court reviewed the grand jury transcript to determine the basis for the plea and its eligibility for expungement, and it did not abuse its discretion by doing so. Likewise, the court did not abuse its discretion by not holding an evidentiary hearing when there was sufficient evidence "to dispel any genuine issues of material fact." *Simental*, ¶ 12. **[Rule 802]**

25. *State v. Puga*, 259 Ariz. 229, 564 P.3d 631 (Ct. App. Div. 1 2025)—In this sexual assault case, the court of appeals addressed the superior court's handling of for-cause juror strikes in the wake of the supreme court's abolition of peremptory challenges. Puga

appealed his convictions and sentences, arguing, *inter alia,* that the superior court erred by not striking two jurors for cause. A majority of the court of appeals affirmed, holding there was no reasonable basis to believe either challenged juror could not render a fair and impartial verdict. In discussing the challenge to Juror 6, the court observed that Puga conflated two issues: "first, whether the court's questioning was improper, and second, whether the court erred when it denied his motion to strike Juror 6." *Puga*, ¶ 19. Because Puga did not object in real time to the superior court's questioning of Juror 6, the court of appeals reviewed that issue only for fundamental error and found none. The court of appeals explained that "if the court strays into leading questions or otherwise runs afoul of the guidance in [Criminal] Rule 18.5(f) and its comment, defense counsel must object in real time. Ariz. R. Evid. 103(a); *see also* Ariz. R. Evid. 1101(b) (Arizona Rules of Evidence 'apply generally to criminal cases and proceedings.')." *Puga*, ¶ 20. The court went on to reject the remainder of Puga's arguments. Judge Jacobs dissented in part "because voir dire showed there was a reasonable ground to believe Juror 6 could not render a fair and impartial verdict." *Puga*, ¶ 45. **[Rules 103(a) and 1101(b)]**

26. *State v. Mekeel*, 259 Ariz. 17, 561 P.3d 409 (Ct. App. Div. 1 2024)—In this case, Mekeel appealed her convictions for aggravated assault, resisting arrest, and criminal trespass. In affirming, the court of appeals held that although fundamental error occurred when the superior court failed to take appropriate action after discovering that an unadmitted exhibit was inadvertently provided to the jury, Mekeel failed to show that she was prejudiced. The exhibit was State's Exhibit 1, which had not been admitted in evidence. It was a 62-page binder containing, among other things, police reports with officer narratives, and sentencing minute entries of Mekeel's two prior felony convictions for theft and possession of dangerous drugs. In addition, the court failed to adhere to the principle that the parties be informed of any jury issue brought to a judge's attention before the judge or court staff engages in any further communication with the jury about substantive matters affecting the case. But, because nothing in the record suggests that the jury relied on the contents of Exhibit 1 in reaching its verdicts, Mekeel has not established prejudicial error. Prejudice is established by "showing that without the error, a reasonable jury could have plausibly and intelligently returned a different verdict." *State v. Escalante*, 245 Ariz. 135, 144, ¶ 31. In addition, the evidence supporting the jury's verdicts was overwhelming. **[Rule 103(d) ("[T]he court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.")]**

27. *State v, Foster,* 258 Ariz. 472, 559 P.3d 1139 (Ct. App. Div. 1 2024)—In this case, Foster was charged with second degree murder, aggravated assault, and leaving the scene of a fatal accident following an alleged drag racing incident that left one victim dead and another injured. Following a jury trial, Foster was acquitted of the two most serious charges but convicted of leaving the scene of a fatal accident, a class 3 felony. The jury also found that Foster had not caused the accident. The superior court placed Foster on three years' probation and he appealed, arguing, *inter alia*, that the superior court erroneously instructed the jury and abused its discretion by declining to suppress statements Foster made after his arrest and denying his motion *in limine* seeking leave to present evidence that the other drag racer had a poor driving history and had THC in his system at the time of the accident. A majority of the court of appeals' panel rejected

Foster's arguments and affirmed, largely on the basis that Foster had been acquitted of the more serious charges and been found not to have caused the accident. There was a dissent. **["The standard of review for the admission or exclusion of evidence is abuse of discretion. *State v. Robinson*, 165 Ariz. 51, 56 (1990). And, because Foster preserved all of the arguments addressed below by raising them before and during trial, [appellate] review turns on whether any error occurred and, if so, whether it was harmless. *See State v. Reaves*, 252 Ariz. 553, 569, ¶ 49 (App. 2022)." *Foster*, ¶ 65.]**

28. *State v. Sidor*, 258 Ariz. 376, 558 P.3d 621 (Ct. App. Div. 1 2024)—Sidor was convicted of transporting narcotic and dangerous drugs for sale after a Department of Public Safety (DPS) officer found cocaine and methamphetamine in his car during a traffic stop. On December 31, 2020, the officer stopped Sidor after using DEASIL1, the United States Drug Enforcement Agency's database of pictures of license plates captured in travel, to obtain travel history data for the car Sidor was driving. The officer obtained the data by certifying to the DEA (so he could access DEASIL the Drug Enforcement Agency Special Intelligence Link) that he had a reasonable articulable suspicion that the car Sidor was driving had been involved in "narcotics trafficking or bulk cash smuggling" before stopping Sidor. The officer used DEASIL data showing the car Sidor was driving had come through Kingman on October 30, 2020 and November 30, 2020 to justify detaining him on December 31 until a drug-detecting DPS K-9 arrived and alerted to drugs in the car. Sidor moved unsuccessfully to suppress the drugs.

    Sidor appealed the superior court's decision not to suppress, arguing: (1) he was detained beyond the scope of the traffic stop without reasonable suspicion of criminal activity; (2) the officer's use of DEASIL was a limited search requiring reasonable suspicion, which the officer lacked; and (3) the alert by Turbo, the DPS K-9 who sniffed Sidor's vehicle, did not establish probable cause for the search. A majority of the court of appeals' panel held: (1) there were insufficient grounds to detain Sidor without the DEASIL information; (2) Sidor's argument to exclude the DEASIL data fails because he lacked a reasonable expectation of privacy in data concerning other drivers on other trips; and (3) Turbo's alert gave DPS probable cause to search Sidor's car. The majority thus affirmed Sidor's convictions. There was a dissent. **[U.S. Const. Amend. IV, Search and Seizure]**

29. *State of Arizona v. Aragon,* 258 Ariz. 218, 555 P.3d 571 (Ct. App. Div. 2 2024)—In this vehicular manslaughter case, Aragon argued on appeal that under the Confrontation Clause, the State was required to call as a witness the technician who downloaded data from her car's event data recorder (EDR). The download was observed by a detective who later performed an accident reconstruction. That detective had specialized training to retrieve and analyze EDR data. The detective testified that the technician attached a cord to the EDR unit, downloaded the data, placed it on an external drive, and departed. The technician performed no analysis of his own. The court of appeals concluded there was no Confrontation Clause violation because no testimonial statements were implicated. *See State v. Ortiz*, 238 Ariz. (App. 2015); *State v. Gomez*, 226 Ariz. 165 (2010). The court further held that the superior court satisfied Aragon's confrontation rights by

allowing her to cross-examine the detective who relied on the EDR data in reconstructing the crash. **[U.S. Const. Amend. VI, Confrontation Clause]**

30. *State of Arizona v. Fontes,* 2024 WL 3791966 (Ct. App. Div. 2 2024) (mem. decision)—Fontes was convicted and sentenced for negligent homicide involving an automobile collision. On appeal, Fontes claimed, *inter alia*, that the superior court abused its discretion in preventing defense counsel from rehabilitating Fontes's credibility during his testimony. On direct examination, Fontes's counsel had asked him if he had been in trouble with the law before the collision and Fontes answered "No, I haven't." The superior court then allowed the State to ask Fontes about some prior traffic offenses, including a DUI citation. On redirect, Fontes's counsel sought to rehabilitate him with testimony that the DUI charge had been dismissed. The superior court sustained the State's objection to that testimony, observing that the defense had opened the door "very broadly." The court offered to give a limiting instruction but Fontes declined it.

    The court of appeals affirmed, first observing that a trial court has discretion to determine and control the method of questioning. *Pool v. Superior Court*, 139 Ariz. 98, 104 (1984) (citing Rule 611(a)). The court then noted that "[t]he Arizona Rules of Evidence provide scant guidance for this situation. Rule 608, which Fontes cites, generally governs the admission of testimony about character for truthfulness. But it does not contemplate rehabilitation of a witness when that witness's own counsel elicits damaging evidence about character for truthfulness on direct examination. *See* Ariz. R. Evid. 608(a) (allowing 'evidence of truthful character' only after 'witness's character for truthfulness has been attacked.'); 608(b) (allowing testimony about specific instances of conduct on cross-examination under some circumstances). At best, the trial court could find guidance in Rule 611, which required it to 'exercise reasonable control over the mode and order of examining witnesses and presenting evidence . . . .' Ariz. R. Evid. 611(a)." *Fontes*, ¶ 22. Finally, the court of appeals acknowledged the superior court's dilemma, noting that the court "needed to guard against misleading testimony while avoiding a mini-trial on the collateral issue relating to Fontes's 'trouble with the law.' Further testimony on that issue risked confusing the jury or wasting its time, especially given the possibility of additional witnesses from the state. *See* Ariz. R. Evid. 403; *see also State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 10 (App. 2013) (recognizing risks under Rule 403 of "collateral mini-trial" on other issues). And Fontes rejected the court's suggestion of a limiting instruction, which was another means of resolving the issue. Given these circumstances, we reject Fontes's argument that the court abused its discretion by imposing the limits that it did." *Fontes*, ¶ 26. **[Rules 403, 608, and 611(a)]**

31. *State of Arizona v. Rios*, 258 Ariz. 175, 555 P.3d 60 (Ct. App. Div. 1 2024)—In this case, the defendant was convicted of drive-by shooting, aggravated assault, and aggravated harassment following an incident in which he tracked, followed, and shot at a vehicle the victim driving. The victim had previously obtained an order of protection against the defendant based on earlier incidents. On appeal, defendant argued, *inter alia*, that the superior court erred when it precluded evidence that he was involved in a prior shooting incident with "the same male he saw in the car coming towards him on the day he allegedly fired the gun leading to the charges" in this case. However, before the court had sustained the State's objection to the defendant's testimony about the prior shooting,

"Rios managed to convey that there was a prior drive-by shooting that made him fear for his life." *Rios*, ¶ 32. Thus, the court of appeals found no reversible error while noting that "defense counsel failed to provide any offer of proof describing the testimony Rios would have provided if allowed to testify to this incident fully. *Cf.* Ariz. R. Evid. 103(a)(2) (discussing required showing for an offer of proof)." *Rios*, ¶ 33. Defendant also argued the superior court erred by not giving a limiting instruction on the order of protection, which was admitted as other act evidence under Rule 404(b). The other act evidence was admitted for a limited purpose and, therefore, "on timely request" of a party, the court "must restrict the evidence to its proper scope and instruct the jury accordingly." Rule 105. Because defendant had made no such request in this case, he was unable to show reversible error. Affirmed. **[Rules 103(a)(2), 105, and 404(b)]**

32. *State of Arizona v. Fordson*, 258 Ariz. 167, 555 P.3d 52 (Ct. App. Div. 1 2024)—A state trooper stopped a rental car driven by Amanda Stallings on Interstate 40 near Wilcox. Defendant was asleep in the passenger seat. Based in circumstances at the scene, the trooper became suspicious. He then requested and received Stallings' permission to search the car. Inside the trunk he found a deflated spare tire containing packages of a white crystalline substance. The trooper questioned Stallings and recorded both Stallings and the defendant in his patrol car. The trooper arrested defendant and Stallings and sent the packages to the crime lab for analysis. Testing confirmed that the white substance weighed 1.56 pounds and consisted of methamphetamine. The State charged defendant with transportation of a dangerous drug for sale.

    By the time of trial, the technician who had performed the tests had left the crime lab, so the State called another lab employee, Jason O'Donnell. Defendant raised concerns about the new witness's qualifications under Rules 702 and 703. In a *voir dire* hearing outside the jury's presence, the trial court determined that O'Donnell had the requisite qualifications and Defendant raised no objections. The jury subsequently found Defendant guilty and found two aggravating factors: the presence of an accomplice and commission of an offense with expectation of pecuniary gain. The Court entered judgment and sentenced defendant to a 21-year term of imprisonment.

    On appeal, Defendant argued, *inter alia*, that allowing O'Donnell to testify violated his Confrontation Clause rights. He asserted that his case is similar to *Smith v. Arizona*, 144 S. Ct. 1785 (2024), a case remanded because a non-testifying expert had conducted the tests on the drugs at issue and the testifying expert's statements were admitted for their truth. However, the court distinguished *Smith* because in that case, Smith had made a Confrontation Clause objection at trial. Thus, the court held that a defendant must assert their Confrontation Clause rights to preserve the issue for anything but fundamental error review on appeal. Here, the court reviewed only for fundamental error because appellant waived his Confrontation Clause rights at trial by failing to object to the substitute expert. The defendant failed to show prejudice, i.e., that if the person who tested the substance in question had been cross-examined, the jury could have reasonably reached a different verdict.

    The court also rejected defendant's argument that Stallings's statements within the patrol car were inadmissible hearsay. Hearsay is an out of court statement offered to prove the truth of the matter asserted. Rule 801(c). These statements were not offered to prove whether Stallings had looked at the trooper when passing him or to show that

Stallings and defendant had been dating for two weeks. Instead, the State offered the statements to show defendant's involvement in the transport and his and Stallings's efforts to get their stories straight.

Similarly, the court rejected defendant's arguments concerning Stallings's statements to the trooper. Defendant argued that the statements were irrelevant under Rule 401, as Stallings had consented to the vehicle search and the reasonableness of the trooper's suspicion were not in issue. But even assuming error, the statements' admission was not prejudicial considering other evidence in the record. Affirmed. **[U.S. Const. Amend. VI, Confrontation Clause; Rules 401, 402, 702, 703, 801, and 802]**

33. *State of Arizona v. Parkinson,* ___ Ariz. ___, 554 P.3d 1 (Ct. App. Div. 2 2024)—Parkinson and alleged victim D.G. had been involved in a romantic relationship for around two years. In March 2021, D.G. called 9-1-1 and reported that Parkinson had attacked her inside his apartment. She claimed Parkinson had strangled her, struck her numerous times with a belt, and kicked her. Afterward, D.G. waited outside the apartment for police to arrive. A responding police officer reported observing on D.G.'s body "injuries that were consistent with strikes with a belt, being grabbed by someone, and strangulation around the neck." These included "[r]edness around her throat area, just under her chin," bruising around both sides of the neck and behind the ear, and petechiae, or "blood vessels that have burst," in her ear and in one eye. The officer also observed welts on D.G.'s stomach, as well as redness and bruising on her extremities. The officer testified about his observations at trial.

Prior to trial, Parkinson notified the State of his intent to call M.B. as a witness regarding D.G.'s credibility. On the first morning of trial, the State filed a motion *in limine* contending that any testimony from M.B. elicited to show D.G.'s "violent character" or to raise doubts regarding D.G.'s honesty would be inadmissible under Rules 404(a) and 608. Parkinson responded that the evidence was not being offered to show D.G.'s violent character, but instead to show "her motive, her bias, her prejudice in testifying." In particular, he argued it would show that, in January and February 2021, D.G. had been "attempting to fabricate charges against [Parkinson] to punish him because she believed he was cheating."

Citing Rule 608, the superior court granted the State's motion to preclude evidence of the prior acts of violence between D.G. and Parkinson. It ruled that M.B. could testify regarding his opinion of D.G.'s truthfulness but not the bases for his opinion or specific instances of D.G.'s conduct. The court further concluded Parkinson had not shown by clear and convincing evidence that the other acts between the parties had "occurred as stated." It thus precluded any testimony regarding "any no-contact orders that were in place" or any attempt-to-locate. Finally, it found that even if evidence of the prior acts was relevant, it should be precluded under Rule 403 because it posed "a danger of unfair prejudice, confusing the issues." As a result, although M.B. testified at trial, his testimony was limited to saying only "what he kn[ew] about [D.G.'s] truthfulness," specifically that, during the course of their friendship, he did not observe her to be a credible or truthful person. Parkinson was not permitted to inquire into "observed instances of jealousy" or "instances of [D.G.] making accusations" against Parkinson that he argued were relevant to motive.

Ultimately, Parkinson was convicted and placed on probation for domestic violence assault. On appeal, he successfully argued the superior court infringed on his constitutional right to present a complete defense. First, the court of appeals held the superior court erred by ruling that Parkinson needed to prove by clear and convincing evidence that D.G. had committed the specific prior acts in question, relying on *State v. Fish*, 222 Ariz. 109 (App. 2009). The court acknowledged that when seeking to introduce evidence of a defendant's prior acts under Rule 404(b), the state must show by clear and convincing evidence that the defendant committed those acts. However, the court held that under *State v. Machado*, 226 Ariz. 281, ¶¶ 1, 7-9, 14-16 (2011), which has overtaken *Fish*, trial courts need only find such acts by a non-defendant were committed by a preponderance of the evidence. Thus, if Parkinson seeks to introduce the other-act evidence upon retrial, the superior court should determine whether the acts were proven by a preponderance of the evidence.

Second, the court agreed with Parkinson that the precluded evidence should have been admitted under Rule 404(b) to prove D.G.'s "motive and bias to lie" and therefore "was not subject to the restrictions of Rule 608." The court observed that it had previously held that "an effort to impeach on a collateral matter differs significantly from an effort to affirmatively prove motive or bias. Rule 608(b) restricts the former; the [S]ixth [A]mendment protects the latter." *State v. Gertz*, 186 Ariz. 38, 42 (App. 1995).

Third, the court held that the superior court abused its discretion in its balancing under Rule 403. The court observed that a trial court may abuse its discretion by committing an error of law reaching a discretionary conclusion and that the court in this case erred "as a matter of law in both: (1) treating the excluded evidence as though it related to a collateral matter under Rule 608; and (2) applying an erroneously elevated threshold for assessing its reliability." *Parkinson*, ¶ 30.

Finally, the court held that the responding officer's testimony concerning his observations of D.G.'s injuries was properly admitted under Rule 702.

In dissent, J. Brearcliffe "agree[d] with the majority decision in full except for its failure to defer, and reasons for failing to defer, to the trial court's exclusion of evidence under Rule 403, and consequently in the result." *Parkinson*, ¶ 44. **[U.S. Const. Amend. VI; Rules 403, 404(b), 608, 701, and 702]**

34. *State of Arizona v. Trinidad,* 257 Ariz. 458, 550 P.3d 623 (Ct. App. Div. 1 2024)—In this domestic violence/aggravated assault case, the defendant struck and broke his girlfriend's nose. At trial, the girlfriend testified as well as a hospital physician's assistant ("PA") who testified based on his physical examination and the radiologist's report. On appeal, the defendant argued his Sixth Amendment right to confrontation was violated when the hospital radiologist did not testify at his criminal trial because (1) the radiology report was testimonial, and (2) the hospital PA acted as a conduit for the radiologist who created the radiology report. He further argued that the mandatory reporting statute—A.R.S. § 13-3806—rendered the radiologist's report testimonial. The test for testimonial evidence is whether it was created for the primary purpose of creating an out-of-court substitute for trial testimony. *Michigan v. Bryant*, 562 U.S. 344, 358 (2011). Applying this test, the court of appeals held the report was not testimonial because it was created primarily to provide medical care to the victim. *State v. Hill*, 236 Ariz. 162, 167, ¶ 22 (App. 2014). The court further held that criminal defendants do not have a Sixth Amendment right to

confront hospital workers who report injuries under the mandatory reporting statute. That statute ensures that evidence is collected from hospital workers and preserved if a criminal prosecution transpires, but it does not compel hospital workers to investigate the injury or determine its source. **[U.S. Const. Amend. VI, Confrontation Clause]**

35. *Fong v. City of Phoenix, et al.,*257 Ariz. 546, 551 P.3d 1187 (Ct. App. Div. 1 2024)—In this negligence case, the court of appeals distinguished between the admissibility and necessity of expert testimony in holding that expert testimony was not necessary under the facts of this case to establish the standard of care for a municipality or its agent in a negligence action arising out of injuries sustained as a result of allegedly inadequate traffic control devices and warning signs placed around the site of ongoing road repairs. The court observed that whether expert testimony is necessary is a question of law. The court concluded the trial court erred in granting summary judgment on plaintiff's negligence claim based on her failure to present expert testimony on the applicable standard of care and breach thereof. Although admissibility of expert testimony turned out not to be an issue in this case, the court of appeals reminded that "the admissibility of expert testimony is generally a fact-bound inquiry that focuses on whether the proffered expert has sufficient knowledge, skill, experience, or education to 'provide the jurors with useful information outside their common understanding or experience.' *State v. Moran*, 151 Ariz. 378, 381 (1986); *see also* Ariz. R. Evid. 702(a)." *Fong*, ¶13. **[Rule 702]**

36. *State of Arizona v. Haywood*, ___ Ariz. ___, 2024 WL 2119341 (vacated on reconsideration at 2024 WL 3161482) (Ct. App. Div. 2 2024)—In this case, the defendant was convicted of second-degree murder for the shooting of a co-worker. At trial, the defendant admitting shooting and killing the victim but claimed he did so in self-defense. He also was willing to stipulate that the gun found in his bathroom was the gun used in the shooting. However, during the trial, the court admitted over defendant's objection evidence that defendant had in his home a gun safe, guns, ammunition, and weapons accessories in addition to the gun used in the shooting. The court also admitted a note on top of the safe indicating the safe might be booby trapped as well as testimony that this required the bomb squad to inspect the safe before opening it. And, although the trial court may have misperceived that the gun used in the shooting was in the safe, in fact it was found in the bathroom. The trial court admitted this evidence to show that the defendant was not a reasonable person because he had claimed self-defense. On appeal, the court of appeals reversed and remanded, holding that the note and evidence unconnected to the alleged crime were irrelevant, unduly prejudicial, and improperly admitted, citing Rules 401 and 403. The court further held that the state did not meet its burden to show that the error was harmless. The court did, however, reject defendant's argument that the prosecutor had improperly led a witness, noting that the subject question did not appear unduly suggestive and that trial courts generally have discretion to permit leading questions, citing Rule 611(c).

    On reconsideration, the court of appeals vacated its original opinion and added paragraphs 35 and 36 to its opinion. Otherwise, the opinion on reconsideration is identical to the original opinion and reaches the same result. In the new paragraphs, the court addressed defendant's motion for judgment of acquittal, concluding that "[t]he state

presented substantial evidence that contradicted Haywood's justification theory. Viewing the evidence in the light most favorable to the prosecution, the trier of fact could have found that Haywood's use of deadly force was not justified. *See West*, 226 Ariz. 559, ¶ 16; see also § 13-405(A)(2)." *Haywood on reconsideration*, ¶ 36. **[Rules 401, 403, and 611(c)]**

37. *State of Arizona v. Duncan,* 257 Ariz. 360, 548 P.3d 1128 (Ct. App. Div. 2 2024)—In this case, the defendant was alleged to have placed a hidden camera in a bathroom to record on an SD card teen foster children in various stages of undress. The court of appeals held that the evidence was sufficient for the superior court to submit the charges of attempted and completed sexual exploitation of a minor to the jury. In addition, A.R.S. §§ 13-3551(5) and 13-3553(A)(1)-(2), prohibiting the sexual exploitation of a minor involving exploitive exhibition, are not unconstitutionally overbroad as applied to the facts of this case, and they do not constrain protected expression, even though the videos and images underlying the sexual exploitation charges contain no sexual conduct or lewd exhibition. However, the superior court abused its discretion in denying defendant's motion to suppress the evidence gathered through the warrantless search of an electronic device removed from his home by a foster child, searched without warrant by a police detective, and the evidence gathered through the subsequent execution of a search warrant for his home.

    The court of appeals reviewed the superior court's denial of defendant's motion to suppress for harmless error. The court observed that in the superior court, the state took the position that the erroneously admitted evidence was relevant and probative as to all counts. It provided pretrial notice, pursuant Rules 404(b) and (c), of its intent to present other acts evidence. This included videos and images on various devices that were not the subject of the charged offenses. Most importantly, the state sought a ruling that uncharged videos on the SD card were admissible against  under Rule 404(b) and (c). The superior court agreed, admitting the entire contents of the SD card. It found the evidence relevant to show "*modis operandi*, intent, and absence of mistake" under Rule 404(b). And, it found the evidence admissible under 404(c) to show "propensity for sexual aberration, specifically Voyeurism." The court of appeals concluded that although the remaining information was sufficient to justify the issuance of the search warrant, the state failed to make any argument that the erroneous admission of the SD card evidence would be harmless as to any count, and therefore appellant's convictions and sentences were reversed, and the case remanded for a new trial. **[Rule 404(b) and (c); Unlawful warrantless search; fruit of the poisonous tree]**

38. *Perez v. Circle K Convenience Stores, Inc.,* 257 Ariz. 271, 547 P.3d 390 (Ct. App. Div. 1 2024), vacated on review on the issue of duty, except ¶¶ 30-31, which address the evidentiary issue discussed below, reversing the superior court's entry of summary judgment for Circle K and remanding to that court for further proceedings, *Perez v. Circle K Convenience Stores Inc.*, ___ Ariz. ___, 2025 WL 779686 (2025)—In this personal injury case, the plaintiff tripped over a case of water at the end of an aisle ("end cap") at a Circle K store. She sustained significant injuries and alleged that the store was negligent. The superior court granted summary judgment in favor of Circle K, finding that the end cap was open and obvious and did not create an "unreasonably dangerous"

condition. The court of appeals affirmed, holding that plaintiff failed to establish that an "unreasonably dangerous" condition existed to support a duty under law. In so holding, the court acknowledged that the superior court erred in ruling that statements of Circle K employees to plaintiff were inadmissible hearsay, *see* Rule 801(d)(2)(D) (an opposing party's statement is not hearsay), but held that such statements did not go to the issue of duty. *Perez*, ¶¶ 30-31. In a spirited concurrence, Judge Howe took issue with the majority's duty analysis, which "intermixes the issues of duty and the breach of that duty" by considering factual issues that go to breach rather than duty. Thus, Judge Howe believes the majority's analysis runs afoul of the supreme court's opinion in *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352 (1985). Nonetheless, Judge Howe concurred in the judgment on the basis that plaintiff failed to establish a breach of duty. **[Rule 801(D)(2)(D)]**

39. *State v. Kelly*, 257 Ariz. 101, 545 P.3d 478 (Ct. App. Div. 1 2024)—In this vehicular aggravated assault case, the defendant argued, *inter alia*, that the superior court erred in admitting expert testimony from the investigating officer on the cause of the collision and defendant's speed. The court of appeals rejected defendant's arguments and affirmed his convictions and sentences. The officer had testified at pretrial hearing that defendant rear-ended the victim's vehicle while driving 80 miles per hour. The officer had previously investigated at least 100 collisions of similar seriousness and, while not conducting a full accident reconstruction in the case at hand, based his opinions on factors including vehicle damage, distances, debris, and tire marks. The court of appeals found no abuse of discretion and observed that "Rule 702's 'overall purpose . . . is simply to ensure that a factfinder is presented with reliable and relevant evidence, not flawless evidence.'" *Kelly*, ¶ 24, quoting *State v. Bernstein*, 237 Ariz. 226, 229, ¶ 14 (2015). **[Rule 702; Double Jeopardy]**

40. *State v. Jimenez*, 255 Ariz. 550 (Ct. App. Div. 2 2023). The trial court acted within in its discretion in denying a motion to strike a juror who served as an FBI agent with experience in interrogating suspected pedophiles. The State charged Defendant with continuous sexual abuse of a nine-year-old over 18 months. Voir dire occurred only nine days after the elimination of peremptory strikes. Defendant challenged whether the former FBI agent juror could be fair and impartial. Defendant relied on two exchanges. First, defense counsel asked whether the juror could "evaluate the credibility of a witness without employing those techniques used in an interrogation room." The juror responded, "I won't be saying anything, so yes." Later, defense counsel inquired whether the juror believed Defendant was a pedophile, the juror replied, "I have no idea." The juror also stated that each case "is individual and stands on its own" and he had worked on "a number of cases" in which he had concluded that a suspect was not guilty. The juror further affirmed that he would be guided by the evidence. The Court of Appeals affirmed based on the broad discretion afforded to the trial court in excusing or retaining jurors challenged for cause and found the trial court acted within in its discretion in retaining the juror. **[U.S. Const amends. VI, XIV; Ariz. Const. Art. 2, § 24; Ariz. R. Crim. P. 18.4(b); 18.5(h); Ariz. R. Civ. P. 47(d)(3)]** When a criminal defendant introduces evidence of a character trait to show action in conformity therewith, the State is entitled to rebut the claim. Trial court did not abuse its discretion by conditioning Defendant's

ability to present expert testimony regarding sexual normalcy on Defendant participating in a second evaluation by the State's expert. **[Rule 404(a)(1)]**

41. *State of Arizona v. Hon. Fink/Kelly*, 256 Ariz. 356, 539 P.3d 543 (Ct. App. Div. 2 2023)— On January 30, 2023, real party in interest, George Kelly, allegedly fired his rifle at a purported group of migrants on his ranch, killing one of them. Later that day, Kelly's wife made statements to detectives about the incident. The state charged Kelly with second-degree murder and aggravated assault. In this special action brought by the state, the court of appeals held the respondent judge erred by concluding the anti-marital fact privilege codified in A.R.S. § 13-4062(1)(a) applied to post-arrest conversations despite the spouse's pre-arrest voluntary statements to detectives. The statute does not contemplate that the privilege may again become applicable based on later events, including a defendant's arrest. To the contrary, it expressly provides that the privilege does not apply, and a spouse may thus be called to testify "in a prosecution," based on a statement to law enforcement made "during an investigation." The court therefore vacated the respondent judge's order denying the state's motion to complete spouse's deposition. **[Rule 501; A.R.S. § 13-4062(1)(a); A.R.S. § 13-706(F)(1)(b)]**

42. *State v. Sanchez,* 256 Ariz. 273, 537 P.3d 794 (Ct. App. Div. 2 2023) (J. Eckerstrom, concurring in part and dissenting in part on an unrelated issue of the appealability of denial of a motion for new trial)—Affirming Sanchez's conviction and sentence for aggravated domestic violence, the court rejected Sanchez's argument that admission of police body camera video of the victim recorded 30 minutes after the incident was irrelevant, too remote, and too prejudicial. The court held the victim's "emotional state following Sanchez's attack was probative of whether her peace was disturbed by the attack, an element of the charged offense. And evidence of her emotional state captured by the video was relevant. *See* A.R.S. §§ 13-3601(A), 13-2904(A)(1)." *Sanchez*, ¶ 26. The court also held that remoteness generally goes to the weight of evidence not its admissibility. Finally, the court concluded there was no abuse of discretion by the trial court in admitting the video evidence under Rules 401, 402, and 403. **[Rules 401, 402, 403, and 404]**

43. *Estrada v. Nguyen*, 2023 WL 2034250 (Mem) (Ct. App. Div. 1 2023)—Samayra Estrada appealed the trial court's summary judgment entered in favor of NFP Insurance Services, Inc. ("NFP"). Ms. Estrada was injured while a pedestrian, when she was struck by a driver who was on her way to her dinner shift at Thai Basil, a restaurant in which the driver also owned a minority interest. As part of a settlement with the driver and the restaurant, Ms. Estrada later sued NFP, Thai Basil's insurance broker, alleging NFP had negligently failed to secure auto insurance coverage for the restaurant. To contest summary judgment, Ms. Estrada submitted a letter, an affidavit, and the settlement agreement between herself, the driver, and the driver's businesses, including Thai Basil. Ms. Estrada asserted these documents evinced prior inconsistent statements of the driver, rendering them admissible under Rule 801(d)(1)(A). NFP objected on hearsay grounds. Additionally, NFP claimed that under Rule 613(b), Estrada needed to give the witness the opportunity to explain the inconsistent statement for it to be admissible—something not generally possible in summary judgment proceedings. The trial court erred in refusing to

consider the statements in the affidavit and the Thomas letter. The affidavit was prior sworn testimony, not hearsay, and was a first-person inconsistent statement that the trial court should have considered. The Court of Appeals also found that Rule 613(b)'s explain-or-deny requirement is one regarding credibility challenges made at trial—not applicable in the limited context of summary judgment proceedings. In dissent, the appellate panel's presiding judge agreed with the majority that prior inconsistent statements are admissible as substantive evidence. However, he disagreed with the majority's decision to reverse the trial court's finding, writing that the majority never addressed whether these documents are in fact inconsistent statements. **[Rules 613(b) and 801(d)(1)(A)]**

44. *State ex rel. Mitchell v. Hon. Wein (Acosta)*, 255 Ariz. 313 (Ct. App. Div. 1 2023)—The Arizona Court of Appeals accepted jurisdiction but denied relief when the State of Arizona sought special action review of a superior court order denying the State's motion to compel Defendant Fernando Acosta to submit to a mental-health examination by a State-selected expert. Acosta stood accused of attacking and killing his girlfriend, and the State noticed its intent to seek the death penalty. After arrest, Acosta tested positive for methamphetamine, amphetamine, THC, midazolam (a depressant medication), and haloperidol (an anti-psychotic medication). Acosta had offered three penalty-phase non-expert mitigation witnesses; he disclosed his sister, maternal grandmother, and maternal cousin. These non-experts would testify on Acosta's relationship with his mother, history of low self-esteem, history of addiction, drug rehabilitation efforts, history of relationship with the victim, his "erratic" and "paranoid" behavior, and lack of sleep shortly before the incident. However, the State contested the testimonies of the sister and cousin for two reasons and argued that the Defendant's proffer of those witnesses' testimonies meant he should be compelled to submit to a mental-health examination. First, the sister wrote notes from medical professionals and may have used them to bolster her testimony with expert-type claims. Second, the cousin worked at an opioid addiction clinic as a nurse, suggesting experience that may enhance her credibility when testifying on her opinion of Acosta's drug abuse.

    The court stated the general rule, though, is that "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Estelle v. Smith*, 451 U.S. 454, 468 (1981). The State cited multiple cases in other jurisdictions that allow non-expert testimony to initiate a state-selected expert examination. Nevertheless, those cases involved guilt-phase and mental-status defenses, not penalty-phase mitigation. *See, e.g.*, *State v. Fair*, 496 A.2d 461 (Conn. 1985); *People v. Diaz*, 62 A.D.3d 157 (N.Y. App. Div. 2009); *Porter v. State*, 492 So.2d 970 (Miss. 1986). Penalty-phase analysis looks for mitigating factors "relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character." A.R.S. § 13-751. Furthermore, evidence of a defendant's mental health adduced under § 13-751(G)(1), the mitigating-circumstances statute, may not be enough to implicate a specific mental-health condition. Therefore, it does not automatically allow for a court-ordered mental health examination. For the State to be able to compel a mental-health evaluation, a defendant must offer a specific mental-health diagnosis or their own expert testimony. The court also found that

a non-expert witness cannot give testimony about a defendant's mental-health diagnosis, current or past. **[Rules 701 and 702]**

45. *State of Arizona v. Rix*, 256 Ariz. 125 (Ct. App. Div. 1 2023)—In this case, Rix appealed his convictions and sentences for two counts of attempted sexual exploitation of a minor. The court of appeals held that when the superior court admits and causes the jury to view voluminous other-act evidence that is inherently shocking, offensive and highly dissimilar in content from images of exploitive exhibition a defendant is charged with seeking, the evidentiary value of the other-act evidence is substantially outweighed by the danger of unfair prejudice under Rule 404(c)(1)(C), requiring reversal of the defendant's conviction. The appeals court concluded that the superior court's admission of copious other-act evidence, consisting mostly of 50 highly inflammatory images removed from and significantly more disturbing and graphic than those the defendant sought from an undercover officer, was error. **[Rules 403 and 404(c)(1)(C)]**

46. *State v. Fournier*, 256 Ariz. 33 (Ct. App. Div. 2 2023), *depublished in part* by 2024 WL 1003709 (March 5, 2024, Order denying petition for review)—In this second-degree murder case, Fournier asserts the trial court abused its discretion by, inter alia, admitting into evidence a handwritten confession that Fournier had given to a fellow jail inmate and by failing to sua sponte instruct the jury regarding the voluntariness of that confession. He also argues the court erred by precluding him under Rule 403 from presenting evidence of a prior legitimate check that J.H. had made out to him four months earlier. Rejecting Fournier's arguments, the court of appeals held that Fournier's confession was voluntary (the Arizona Supreme Court subsequently depublished the portion of the opinion addressing the voluntariness finding) and that his hearsay and confrontation clause arguments had not been raised below. The court concluded that the trial court had not erred fundamentally or otherwise. "Hearsay is generally admissible in a suppression hearing. *See State v. Keener*, 110 Ariz. 462, 465 (1974); *see also State v. Riley*, 196 Ariz. 40, ¶¶ 6-7 (App. 1999) (holding that confrontation rights do not apply to the same extent at a pretrial suppression hearing as they do at trial); Ariz. R. Evid. 104(a) (stating a court is not bound by rules of evidence in preliminarily determining the admissibility of evidence). Fournier cites no authority to suggest a trial court has a duty to sua sponte bar the admission of any alleged hearsay absent an objection. *See* Ariz. R. Crim. P. 31.10(a)(7)(A)." *Fournier*, ¶ 23. With respect to Fournier's Rule 403 challenge, the court of appeals held "[t]he trial court is in the best position to balance the probative value of evidence against dangers such as unfair prejudice, confusion, wasting time, or presenting cumulative evidence. *State v. Togar*, 248 Ariz. 567, ¶ 23 (App. 2020); see Ariz. R. Evid. 403." *Fournier*, ¶ 38. **[Rules 104(a) and 403]**

47. *McGlothlin v. Hon. Astrowsky, et al*, 255 Ariz. 449 (Ct. App. Div. 1 2023)—In a legal malpractice action arising from a parental rights severance action, Defendant McGlothlin, former attorney of Father (Rizik), subpoenaed Rizik's replacement counsel seeking the production of replacement counsel's entire file for the severance matter. Rizik objected based on the attorney-client privilege. McGlothlin argued that the attorney-client privilege was waived by the filing of the malpractice action. The trial court suggested (and counsel did not object to) an *in camera* review of the file. The trial court concluded

that there was nothing discoverable in the file. McGlothlin filed a special action with the Court of Appeals. The Court of Appeals held that the *in camera* review of the file was error, but affirmed the finding that the privilege was not waived. When determining whether an *in camera* review is appropriate, the court must follow a three-step process: "(1) determine whether the party asserting the privilege has made a *prima facie* showing of privilege; (2) if so, determine whether the party challenging the privilege has made a *prima facie* showing of an exception to the privilege; and (3) if so, determine whether an *in camera* review of particular documents is necessary and appropriate to resolve the dispute. If so, then an *in camera* review is permitted." The Court of Appeals determined that the trial court had failed to reach step 2 of the analysis and had prematurely conducted the *in camera* review. The Court of Appeals held, however, that the trial court had correctly ruled that the attorney-client privilege was not waived by simply filing suit, rather "the party claiming the privilege must affirmatively interject the issue of advice of counsel into the litigation." Since Rizik had not done so, no waiver occurred. **[Rules 104(a), 501, and 1101(c)]**

48. *State v. Conley*, 254 Ariz. 371 (Ct. App. Div. 2 2023)—A majority found that a defendant should have been granted separate trials on his motions to sever four sexual assault cases, from acts in 1992, 1995, 1999, and 2004, but that the error was harmless. In two of the cases, DNA tied defendant to the offenses. The trial court had found cross-admissibility of all of the evidence in the cases under Rule 404(b)(2)'s exception for knowledge, identity, or motive. The majority disagreed with this approach, and found that a Rule 404(c) showing and findings were also not made. Nonetheless, the trial record, to the two-judge majority, evinced only harmless error. Dissenting Judge Cattani would have reversed the two convictions in which the cases bore no DNA evidence, finding the evidence in the record to be "precisely the type of propensity evidence that is inadmissible under Rule 404(b)[.]" **[Rule 404(b)]**

49. *State v. Hon. LaBianca ex rel. Maricopa County*, 254 Ariz. 206 (Ct. App. Div. 1 2022)—As a matter of first impression, for a hearing to determine the admissibility of other act evidence in a sexual misconduct case, if the trial court allows the defendant's expert to testify about the defendant's mental health, based on that expert's examination of the defendant, the trial court, to ensure that the State has a meaningful opportunity for rebuttal, must allow the State's expert to examine the defendant before the hearing. **[Rules 104(c) and 404(c)]**

50. *State v. Castaneda*, 254 Ariz. 9 (Ct. App. Div. 1 2022)—Trial court did not abuse its discretion in finding five-year-old competent to testify: "In any criminal trial every person is competent to be a witness." A.R.S. § 13-4061; *see also* Ariz. R. Evid. 601 ("[e]very person is competent to be a witness unless these rules or an applicable statute provides otherwise"); A.R.S. § 12-2201.A ("[e]very person . . . may testify in any civil or criminal proceeding . . . except as otherwise expressly provided by law"); . . . "In instances of extreme youth, to find a lack of competency, the [superior court] must be convinced that no trier of fact could reasonably believe that the prospective witness could have observed, communicated, remembered . . . ." **[Rule 601]**

51. *State v. Teran*, 253 Ariz. 165 (Ct. App. Div. 1 2022)—The trial court did not abuse its discretion in deferring resolution of Defendant's motion *in limine* regarding the State's toxicologist's ability to opine on Defendant's sobriety. Ariz. R. Evid. 702 permits but does not require a pretrial evidentiary hearing. But the toxicologist should not have testified to impairment as they were not a drug recognition expert; in light of other evidence of impairment in the record however, the error was harmless. Finally, Defendant had also failed to object. **[Rule 702]**

52. *State v. Copeland*, 253 Ariz. 104 (Ct. App. Div. 2 2022)—The Arizona Court of Appeals vacated a child molestation defendant's guilty verdicts and remanded for a new trial. At a trial where the victim's credibility was a central issue because there was little corroborating evidence, the State admitted, over defendant's objections, hearsay statements by the victim to several school employees detailing alleged sexual abuse by the defendant. The State argued the statements fell under a hearsay exception to explain their effect on the listener, i.e. to explain why the school employees reported the abuse to the authorities. The statements were admitted without a limiting instruction, and were relied upon by the State in opening and closing statements and repeatedly during the trial to bolster the victim's credibility and to identify the defendant. The COA held that since the school employees were mandated reporters, their reasons for coming forward were not an issue in the case, and therefore the admission and use of the hearsay statements as a central component of the State's case to bolster the victim's credibility, particularly without a limiting instruction, was error. **[Rule 801(c)(2)]**

    The COA also addressed an issue involving the State's use of a prior statement to impeach its witness. At trial, the defendant's brother claimed the defendant had "simply told [him] that he believed he didn't do it." After the prosecutor refreshed his recollection with a transcript, the brother acknowledged the defendant had said: "[I]f I did do it, then, yeah, I deserve to go away." The brother finished testifying, and several days later, the State admitted, over objection, the recorded portion of the brother's pre-trial statement to the police that the defendant had said "Did I really do something? If I did, boom, then you know what? I deserve to go away." The COA held this was a proper use of a prior inconsistent statement to impeach the brother's testimony, and determined the defendant had the opportunity to cross-examine the brother about the statement, and was free to recall the brother. **[Rules 613(b) and 801(d)(1)(A)]**

53. *State v. Reaves*, 252 Ariz. 553 (Ct. App. Div. 2 2022)—The Arizona Court of Appeals remanded the case for the trial court to hear argument and then more thoroughly explain its decision regarding a *Batson* challenge raised by the defendant. Faced with the *Batson* challenge, the trial court, rather than the State, was the first to provide the non-discriminatory basis for the strike, the trial court did not conduct further inquiry or analysis into the State's failure to use a peremptory strike for a similarly situated Caucasian potential juror, the trial court did not address the juror comparison problem presented by the defendant, and the trial court made a gratuitous, offhand remark about the stricken potential juror in stating its decision. The Court of Appeals did not find that the defendant had proved actual discrimination, but instead that the record was insufficient to support the trial court's decision that the peremptory strike was not

pretextual, and further argument and analysis was necessary. **[*Batson v. Kentucky*, 476 U.S. 79 (1986); U.S. Const. amend. XIV]**