Monday, August 24, 2020
10:00 a.m. – 12:15 p.m.
State Courts Building
REGULAR BUSINESS

10:00 a.m.	**Welcoming Remarks and Roll-Call**	**Mr. Kent Batty, *Chair***
.	**Approval of July 27, 2020 Minutes** **Formal Action: Vote to Approve**	
10:10 a.m.	**Panel Presentation: Recommendation #27** *Encourage advocates to pose the issue of allowing evidence of a mental disorder as an affirmative defense to a defendant's mens rea with the legislature.*	**Hon. Mark Armstrong (Ret.)** Staff Attorney's Office Arizona Supreme Court **Bernardo Garcia, *Criminal Defense Attorney*** Garcia Law Firm, PLC
11:10 a.m.	**Review and Discussion of Draft Final Report** **Formal Action: Vote to Approve Report**	**Kent Batty, *Chair*** **Don Jacobson, *Sr Special Projects Consultant*** Administrative Office of the Courts
12:00 p.m.	**Roadmap** ➢ **Committee on Superior Court (9/11)** ➢ **Committee on Limited Jurisdiction Courts (9/23)** ➢ **Presiding Judges (10/21)** ➢ **Arizona Judicial Council (10/22)**	**Kent Batty**
12:05 p.m.	**Call to the Public**	**Kent Batty**
12:10 p.m.	**Adjourn**	

Next Meeting:	**2020 Meeting Schedule:**
September 21	October 19 November 16 December 14

NOTICE

The Arizona Supreme Court and Administrative Office of the Courts are taking the necessary steps to protect its employees and partners and help prevent the spread of the Coronavirus in the community. Accordingly, committee meetings will be held via phone conference for the time being. Members of the public who wish to submit comments on any item on the August 24, 2020 Committee on Mental Health and the Justice System agenda, should direct comments to dtovar@courts.az.gov. Additional guidelines for the public are listed on the Committee website at: azcourts.gov/cscommittees/Mental-Health-and-the-Justice-System.

Monday, July 27, 2020

Virtual meeting
10:00 a.m. – 12:15 p.m.

Present (telephonically): Kent Batty (Chair), Mary Lou Brncik, Brad Carlyon, Amelia Cramer, Shelley Curran, Jim Dunn, Hon. Elizabeth Finn, Hon. Michael Hintze, Josephine Jones, Dianna Kalandros, Cynthia Kuhn, Jason Winsky for Chief Chris Magnus, James McDougall, Dr. Carol Olson, Ronald Overholt, Beya Thayer for Chief Deputy David Rhodes, J.J. Rico, Michael Shafer, Hon. Barbara Spencer, Christopher Staring, Hon. Fanny Steinlage, Paul Thomas

Absent/Excused: Kristin McManus, Natalie Jones, Michael Lipscomb

Guests/Presenters: Dana Flannery, Alex Herrera, Greg Honig, Dr. Megan Woods

Administrative Office of the Courts (AOC) Staff: Theresa Barrett, Don Jacobson, Liana Garcia, Diana Tovar

Regular Business

Approval of Minutes

The draft minutes from May 18, 2020, MHJS meeting were presented for approval.
Motion: Judge Elizabeth Finn moved to approve the May 18, 2020, minutes as presented.
Seconded: Judge Michael Hintze. Motion was approved unanimously.

Legislative Update: SB1523- *Mental Health Omnibus*

Liana Garcia, AOC Legislative Liaison, provided a brief update on the status of the legislation. Ms. Garcia noted that Rule 11 did not pass. Senate Bill 1523 passed. A few highlights of the bill include:

- Makes several changes to the insurance code and public health code with an aim toward increasing health insurance coverage for mental health and substance use disorders and decreasing the frequency of preventable suicides.
- Prohibits health care insurers from denying claims for mental health or substance use disorder benefits for a minor solely on the grounds that the service was provided in a school or other educational setting or ordered by a court.
- Establishes a Suicide Mortality Review Team in DHS to review data and adequacy of statutes and services and determine changes necessary to decrease preventable suicides.
- All information acquired by the Suicide Mortality Review Team is confidential and not subject to subpoena, discovery, or introduction into evidence in any civil or criminal proceeding, with the exception of information that is otherwise publicly available.

AHCCCS Updates

AHCCCS staff - Dana Flannery, Assistant Director, Greg Honig, Deputy General Counsel, Dr. Megan Woods, Integrated Care Administrator, and Alex Herrera, Project Manager presented an overview of AHCCCS and provided an informational document. The purpose of the presentation was to provide a general description of the court ordered evaluation (COE) process, court ordered treatment data, and the SMI determination process in Arizona and AHCCCS' involvement in these processes.

Discussion:
A member asked if AHCCCS monitors behavioral health utilization. As submissions continue to be submitted Ms. Flannery will follow-up to determine restrictions on authorizations and possible reasons for denials. Are outside subject matter experts involved in making policy decisions? There are internal workgroups that can reach out to subject matter experts and AHCCCS Policy Committee (APC) also weighs in and then policies are put through public comment process.

Review and Discussion of Draft Final Report

Mr. Batty and Mr. Jacobson, Sr. Special Projects Consultant Administrative Office of the Courts provided the committee with a look at the draft committee final report and encouraged member comments and editing suggestions. Mr. Batty informed the members to submit comments, edits, and suggestions for the report via email to Don Jacobson.

Discussion: Members discussed the enhanced services section of the report regarding increased costs. It was suggested to include a link to a list of mental health courts operating under guidelines in the report.

Motion: The Chair and staff, and members working at the Chair's request, have the members' authority to make changes and incorporate into next version of the final report on behalf of the committee, made by Jim McDougall and seconded by Amelia Cramer. Unanimously approved.

Committee New/ Updates

Mr. Kent Batty advised the committee that Natalie Jones has resigned due to a heavy workload.

Good of the Order / Call to the Public

No one responded to the call to the public.

Adjournment

The meeting was adjourned at 12:21 p.m by order of the chair.

Committee on Mental Health and the Justice System

Arizona Rules of Evidence and Mental Health Evidence

Hon. Mark W. Armstrong (Ret.)

August 24, 2020

ISSUE

DISCUSSION/RECOMMENDATION TO "EXAMINE CHANGES TO ALLOW EVIDENCE OF A MENTAL DISORDER AS AN AFFIRMATIVE DEFENSE TO A DEFENDANT'S *MENS REA*."

Overview

- Neuroscience and Criminal Justice
- Case Law Update and Character Flow Chart
- Recent Case Law
- Sources of Arizona evidence law
- Advisory committee on ARE
- Proposed Amendment of ARE 404(b)
- Organization of ARE
- Character and Expert Testimony

Neuroscience and Criminal Justice

- A nascent technology
- fMRI
- Responsibility and Culpability
- Scanning for Memories
- "Brain Matter," by Kevin Davis (ABA Journal, Vol. 106, No. 3, June/July 2020)

Case Law Update and Character Flow Chart

Recent Case Law

KAHLER v. KANSAS, 140 S.CT. 1021(2020)

- IN THIS CAPITAL CASE, DEFENDANT ARGUED KANSAS DENIED HIM DUE PROCESS BECAUSE IT PERMITS THE STATE TO CONVICT A DEFENDANT WHOSE MENTAL ILLNESS PREVENTED HIM FROM DISTINGUISHING RIGHT FROM WRONG.

- THE SUPREME COURT DISAGREED, HOLDING THAT DUE PROCESS DOES NOT REQUIRE KANSAS TO ADOPT AN INSANITY TEST THAT TURNS ON A DEFENDANT'S ABILITY TO RECOGNIZE THAT HIS CRIME WAS MORALLY WRONG.

Recent Case Law

KAHLER (Cont'd)

- THE COURT OBSERVED THAT IN *CLARK* V. *ARIZONA*, 548 U. S. 735, IT CATALOGUED THE DIVERSE STRAINS OF THE INSANITY DEFENSE THAT STATES HAVE ADOPTED TO ABSOLVE MENTALLY ILL DEFENDANTS OF CRIMINAL CULPABILITY. TWO—THE COGNITIVE AND MORAL INCAPACITY TESTS—APPEAR AS ALTERNATIVE PATHWAYS TO ACQUITTAL IN THE LANDMARK ENGLISH RULING *M'NAGHTEN'S CASE*, 10 CL. & FIN. 200, 8 ENG. REP. 718.

Recent Case Law

KAHLER (Cont'd)

- THE MORAL INCAPACITY TEST ASKS WHETHER A DEFENDANT'S ILLNESS LEFT HIM UNABLE TO DISTINGUISH RIGHT FROM WRONG WITH RESPECT TO HIS CRIMINAL CONDUCT.
- THE COGNITIVE INCAPACITY TEST, ADOPTED BY KANSAS, EXAMINES WHETHER A DEFENDANT WAS ABLE TO UNDERSTAND WHAT HE WAS DOING WHEN HE COMMITTED A CRIME.
- UNDER KANSAS LAW A DEFENDANT MAY RAISE MENTAL ILLNESS TO SHOW THAT HE "LACKED THE CULPABLE MENTAL STATE REQUIRED AS AN ELEMENT OF THE OFFENSE CHARGED," KAN. STAT. ANN § 21–5209.

Recent Case Law

KAHLER (Cont'd)

- THE COURT OBSERVED THAT A STATE RULE ABOUT CRIMINAL LIABILITY VIOLATES DUE PROCESS ONLY IF IT "OFFENDS SOME PRINCIPLE OF JUSTICE SO ROOTED IN THE TRADITIONS AND CONSCIENCE OUR PEOPLE AS TO BE RANKED AS FUNDAMENTAL." *LELAND* V. *OREGON*, 343 U. S. 790, 798.
- THE COURT FURTHER OBSERVED THAT KAHLER COULD PREVAIL ONLY BY SHOWING THAT DUE PROCESS REQUIRES STATES TO ADOPT A SPECIFIC TEST OF INSANITY—NAMELY, THE MORAL-INCAPACITY TEST.
- THE COURT HELD HE COULD NOT DO SO AND AFFIRMED HIS CONVICTION AND DEATH SENTENCE.

Recent Case Law

STATE v. ROMERO, 248 ARIZ. 601 (CT. APP. DIV. 1 2020)

- IN THIS SECOND DEGREE MURDER CASE, THE COURT REJECTED ROMERO'S ARGUMENT THE SUPERIOR COURT ERRED BY GIVING INSTRUCTIONS THAT MISINFORMED THE JURY OF THE ELEMENTS REQUIRED TO ESTABLISH GEI UNDER A.R.S. § 13-502(A), INCLUDING FAILURE TO GIVE THE *CORLEY* INSTRUCTION EXPLAINING THE PHRASE "KNOWLEDGE THAT AN ACT WAS WRONG."
- THE COURT AFFIRMED ROMERO'S CONVICTIONS AND SENTENCES.

Recent Case Law

ROMERO (CONT'D)

- CLARIFIES THAT ARIZONA'S COURTS HAVE CONSISTENTLY UNDERSTOOD A.R.S. § 13-502 AS CODIFYING *M'NAGHTEN. SEE, e.g., STATE V. MOTT*, 187 ARIZ. 536 (1997).
- OBSERVING THAT IN 1993, OUR LEGISLATURE AMENDED THE STATUTE SO THAT A PERSON IS GEI ONLY IF A "MENTAL DISEASE OR DEFECT" CAUSED THE PERSON TO "NOT KNOW THE CRIMINAL ACT WAS WRONG." A.R.S. § 13-502(A); *SEE CLARK*, 548 U.S. AT 742 (UPHOLDING CHANGES TO ARIZONA'S MORAL INCAPACITY-BASED INSANITY TEST AS CONSTITUTIONAL).

Recent Case Law

ROMERO (CONT'D)

- WHILE FINDING NO FUNDAMENTAL ERROR, THE COURT ENCOURAGED TRIAL JUDGES IN FUTURE CASES TO GIVE THE *CORLEY* INSTRUCTION BECAUSE IT PROVIDES JURIES, EXPERT WITNESSES, AND COUNSEL A BETTER UNDERSTANDING OF THE GEI DEFENSE:
  - Knowledge that an act was wrong, as the phrase is used in these instructions, means knowledge that the act was wrong according to generally accepted moral standards of the community and not the defendant's own individual moral standards. Knowledge that an act was forbidden by law will permit the inference of knowledge that the act was wrong according to generally accepted moral standards of the community.
- *STATE v. CORLEY*, 108 ARIZ. 240, 242–43 (1972).

Recent Case Law

STATE v. MALONE, 247 ARIZ. 29 (2019)

- IN THIS FIRST-DEGREE MURDER CASE, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PRECLUDING DEFENDANT'S EXPERT FROM PROVIDING TESTIMONY ABOUT IMPULSIVITY "BASED ON FINDINGS OF BRAIN DAMAGE OR BRAIN INJURY."

- SUCH TESTIMONY WOULD "BE ENCOMPASSED BY MENTAL INCAPACITY/DIMINISHED CAPACITY/MENTAL DEFECT." *SEE STATE v. MOTT*, 187 ARIZ. at 540-41; *STATE v. SCHANTZ*, 98 ARIZ. 200, 212-13 (1965).

Recent Case Law

MALONE (CONT'D)

- THE SUPREME COURT REITERATED THE *MOTT* RULE THAT ARIZONA DOES NOT PERMIT THE "DIMINISHED CAPACITY" OR "DIMINISHED RESPONSIBILITY" DEFENSE.
- APART FROM INSANITY, ARIZONA DOES NOT ALLOW A DEFENDANT TO INTRODUCE EVIDENCE OF A MENTAL DISEASE OR DEFECT AS EITHER AN AFFIRMATIVE DEFENSE OR TO NEGATE THE MENS REA ELEMENT OF A CRIME.
- THE COURT VACATED THE COURT OF APPEALS' OPINION AND AFFIRMED THE DEFENDANT'S CONVICTIONS AND SENTENCES.

Recent Case Law

MALONE (CONT'D)

- ON THE OTHER HAND, THE TRIAL COURT PROPERLY ALLOWED DEFENDANT TO PRESENT OTHER TESTIMONY, INCLUDING EXPERT TESTIMONY, TO SHOW THAT HE HAD A CHARACTER TRAIT FOR IMPULSIVITY TO REBUT THE STATE'S CLAIM THAT THE MURDER WAS PREMEDITATED. *SEE STATE v. CHRISTENSEN*, 129 ARIZ. 32, 35 (1981); RULE 404(a)(1) (AUTHORIZING ADMISSION OF CHARACTER TRAIT EVIDENCE OFFERED BY AN ACCUSED); RULE 405(a) (STATING THAT CHARACTER TRAIT EVIDENCE CAN BE OFFERED AS AN OPINION).
- SUCH EVIDENCE IS PROPERLY DESCRIBED AS "BEHAVIORAL-TENDENCY EVIDENCE."

Recent Case Law

MALONE DISSENT

- JUSTICE BALES AGREED WITH THE COURT OF APPEALS THAT, BASED ON *CHRISTENSEN* AND RULE 404, A DEFENDANT MAY OFFER EVIDENCE OF BRAIN DAMAGE TO SUPPORT A CLAIM THAT HE HAS A CHARACTER TRAIT FOR IMPULSIVITY.
- HE DISSENTED FROM THE MAJORITY'S HOLDING THAT SUCH EVIDENCE IS CATEGORICALLY BARRED BY *MOTT* AND *SCHANTZ,* CALLING CURRENT JURISPRUDENCE "OPAQUE."
- HOWEVER, BECAUSE HE ALSO AGREED WITH THE COURT OF APPEALS THAT ANY ERROR IN PRECLUDING SUCH EVIDENCE HERE WAS HARMLESS, HE CONCURRED IN THE JUDGMENT AFFIRMING MALONE'S CONVICTIONS AND SENTENCES.

Recent Case Law

STATE v. MILES, 243 ARIZ. 511 (2018)

- THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN COMMUTING DEFENDANT'S DEATH SENTENCE TO LIFE IMPRISONMENT BASED ON NEWLY DISCOVERED MITIGATION EVIDENCE OF DIMINISHED CAPACITY AND VOLUNTARY INTOXICATION UNDER *TISON v. ARIZONA*, 481 U.S. 782, 797 (1987) AND ARIZ. R. CRIM. P. 32.1(h).

Recent Case Law

MILES (CONT'D)

- IN A CONCURRING OPINION, JUDGE SWANN ARGUED THE BRAIN SCIENCE UNDERLYING COCAINE WITHDRAWAL SYNDROME AND ALCOHOL RELATED NEURODEVELOPMENTAL DISORDER SHOULD NOT HAVE BEEN ADMITTED UNDER RULE 702(d) BECAUSE THERE WAS NO APPLICATION OF THE SCIENCE TO THE FACTS OF THE CASE.
- NONETHELESS, JUDGE SWANN, JOINED BY JUSTICES PELANDER AND BOLICK, CONCURRED BECAUSE THE STATE WAIVED ITS CHALLENGE TO THE ADMISSIBILITY OF THIS EVIDENCE.

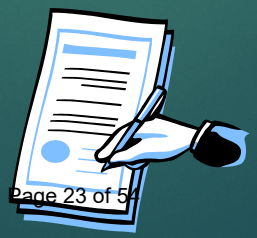
Sources of Arizona Evidence Law

- ARE promulgated 9/1/1977 and largely based on Federal Rules of Evidence (FRE), which were adopted 7/1/1975
- Cases construing ARE and Arizona common law
- Arizona statutes and rules (i.e., privilege; subject matter rules)
- Arizona Constitution (Victim's rights)
- U.S. CONSTITUTION (CONFRONTATION CLAUSE)
- COMMENTS/NOTES TO FRE AND CASES CONSTRUING FRE, WHERE APPLICABLE
- COMMENTARY: MCCORMICK, WIGMORE, WEINSTEIN, ETC.

Advisory Committee on Rules of Evidence

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, as appropriate.



Proposed Petition to Amend ARE

- R-20-0011 (Petition by Advisory Committee to amend Rule 404(b), to be effective January 1, 2021)
- Rule 404(b) prohibits the admission of other-act evidence to show that a defendant acted in conformity therewith, *except* for a proper purpose such as to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
- The proposed amendment requires notice of the permitted non-propensity purpose for which the State intends to offer the evidence and the reasoning that supports the purpose no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause.

Organization of ARE

Ten general areas of ARE:

1. General Provisions. ARE 101-106;1101
2. Judicial Notice. ARE 201
3. Presumptions in Civil Cases. ARE 301-302
4. Relevancy and its Limits. ARE 401-415
5. Privileges. ARE 501-502
6. Witnesses. ARE 601-615
7. Opinions and expert testimony. ARE 701-706
8. Hearsay. ARE 801-807
9. Authentication and identification. ARE 901-903
10. Contents of writings, recordings and Photographs. ARE 1001-1008

4. ARE Relevancy & Limits

Character Evidence

- *In general,* "[e]vidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." ARE 404(a)

- ***Exceptions:***
  - ***Key Provision*: Evidence of a pertinent character trait of the accused offered by the accused, or by the prosecution to rebut the same. ARE 404(a)(1)**
  - Evidence of the aberrant sexual propensity of the accused or a civil defendant pursuant to ARE 404(c). ARE 404 (a)(1)

4. ARE Relevancy & Limits

- Methods of Proving Character. ARE 405
  - Begin by admitting reputation and opinion evidence ***ONLY:***
    - "I know her reputation for honesty in the community, and it's very good."
    - "I've worked with him for years and I believe him to be an honest man."
  - "On cross-examination of the character witness, the court may allow inquiry into relevant specific instances of the person's conduct." ARE 405(a)

4. ARE Relevancy & Limits

- Methods of Proving Character. ARE 405 (cont'd)
  - "When a person's character or character trait is an essential element of a charge, claim, or defense, or pursuant to [ARE] 404(c), the character or trait may also be proved by relevant specific instances of the person's conduct." ARE 405(b)
  - Character evidence in sexual misconduct cases governed by ARE 404(c) (unique to Arizona and detailed).

7. Opinions and Expert Testimony

ARE 702. Testimony by Expert Witnesses [Arizona is now a *Daubert* state; no longer a *Frye* state]

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

a. the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

b. the testimony is based on sufficient facts or data;

c. the testimony is the product of reliable principles and methods; and

d. the expert has reliably applied the principles and methods to the facts of the case."

7. Opinions and Expert Testimony

- **Comment to 2012 Amendment.**

"[T]rial courts should serve as *gatekeepers* in assuring that proposed expert testimony is reliable and thus helpful to the jury's determination of facts at issue."

Change "[1] is not intended to supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony, nor is the amendment intended to permit a challenge to the testimony of every expert, [2] preclude the testimony of experience-based experts, or [3] prohibit testimony based on competing methodologies within a field of expertise."

7. Opinions and Expert Testimony

- Expert testimony. ARE 702. *Basic principles*
  - Is expert qualified (knowledge, skill, education, training and/or experience) within a specific field of expertise (scientific, technical or other specialized knowledge)?
    - Judge decides if witness is qualified.
  - Will evidence assist fact finder to understand evidence or decide fact in issue?
  - Is evidence reliable? Focusing on principles and methods, ***not*** conclusions.

7. Opinions and Expert Testimony

- The *Daubert* Trilogy:
  - *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (non-exclusive factors to determine admissibility of expert evidence:
    1. Testing
    2. Peer review and publications,
    3. Error rate
    4. Existence and maintenance of standards and controls, and
    5. General acceptance (Frye))
  - *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997) (abuse of discretion of review on appeal)
  - *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (*Daubert* applies to all expert testimony)

7. Opinions and Expert Testimony

Expert Testimony. ARE 702. In Arizona.

- Examples of expert testimony deemed reliable: DNA, fingerprint, palm print, firearm identification; retrograde analysis; gas chromatography
- Examples of expert testimony deemed unreliable: polygraph; "characteristics common to domestic violence victims and their abusers, many of which matched the evidence in this case"

7. Opinions and Expert Testimony

- Facts or data relied upon by expert need not be admissible so long as reasonably relied upon by experts in the field, but ***NOT*** as a vehicle to get inadmissible evidence in front of the jury or as a "mere conduit." ARE 703
- If facts or data otherwise inadmissible, disclosed to jury only if probative value substantially outweighs prejudicial effect. ARE 703

7. Opinions and Expert Testimony

- Expert generally may address ultimate issue to be decided, but not tell jury how to decide case. ARE 704. *See State v. Chapell*, 225 Ariz. 229, ¶ 17, 236 P.3d 1176 (2010).

- In a criminal case, expert "must not" testify to opinion about whether defendant had mental state or condition that constitutes an element of the crime or defense. "Those matters are for the trier of fact alone." ARE 704(b)

Evidence Case Law Update[1]
(2017-20)

United States Supreme Court

1. *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017)—The court reversed and remanded defendant's harassment and unlawful sexual contact convictions based on post-trial affidavits from two jurors that another juror had expressed anti-Hispanic bias toward defendant and his alibi witness. The court held before the no-impeachment bar of Fed. R. Evid. 606(b) can be set aside to allow further judicial inquiry, there must be a threshold showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether the threshold showing has been satisfied is committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence. **[Rule 606(b) and Ariz. R. Crim. P. 24.1(d)]**

Federal Courts

1. *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183 (9th Cir. 2019)—In this illegal entry case, the defendant challenged the government expert's testimony that a fingerprint taken during the underlying removal proceedings belonged to him. The court found that the district court abused its discretion admitting the fingerprint analyst's testimony, as required under *Daubert v. Merrill Dow Pharm, Inc.*, 509 U.S. 579 (1993), and Fed. R. Evid. 702, but that the error was harmless because the record is sufficient to determine that the testimony had a reliable basis in the knowledge and experience of the relevant discipline, which has been tested in the adversarial system for roughly 100 years. **[Rule 702]**

2. *United States v. Lopez*, 913 F.3d 807, (9th Cir. 2019)—Vacating the defendant's convictions for false statement during the purchase of a firearm, aggravated identity theft, and felon in possession of a firearm, the court held the district court erred in precluding the defendant's proffered expert testimony on Battered Woman Syndrome to support her duress defense and rehabilitate her credibility. The court rejected the government's Rule 403 argument, noting "'that the exclusion of evidence offered by the defendant in a criminal prosecution under Rule 403 is 'an extraordinary remedy to be used sparingly.'' *United States v. Haischer*, 780 F.3d 1277, 1281 (9th Cir. 2015) (quoting *United States v. Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995))." *Id*. n. 8. **[Rule 403]**

3. *Khoja v. Orexigen Therapeutics*, 899 F.3d 988 (9th Cir. 2018)—District court erred in taking judicial notice of certain documents attached to pleadings at the motion-to-dismiss stage because the documents included disputed facts. "A court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment." *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (quotation marks and

[1] Prepared by Judge Mark Armstrong (Ret.)

citation omitted). But a court cannot take judicial notice of disputed facts contained in such public records. *Id.* **[Rule 201]**

4. *Pomona v. SQM North America Corp*. (*Pomona II*), 866 F.3d 1060 (9th Cir. 2017)—Following trial, the jury found SQM not liable for causing perchlorate contamination in the City of Pomona's water system. The court of appeals held that the district court abused its discretion by limiting the testimony of Dr. Sturchio, one of Pomona's causation experts, and failing to make sufficient reliability findings before admitting the testimony of one of SQM's experts.

   In a 2014 pretrial opinion, the court of appeals had similarly held the district court invaded the province of the jury when it excluded Dr. Sturchio's testimony after casting doubt on his credibility. In that opinion, the court observed that FRE 702 allows competing experts. "Even if Dr. Sturchio's conclusions were 'shaky,' they should be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Pomona v. SQM North America Corp*. (*Pomona I*), 750 F.3d 1036, 1049 (9th Cir. 2014). **[Rule 702]**

Arizona Supreme Court

1. *State v. Riley*, 248 Ariz. 154 (2020)—In this capital case involving a prison murder, the supreme court rejected Riley's argument that the trial court abused its discretion in allowing evidence of the victim's protective custody status. The court observed that "[e]vidence is relevant if 'it has any tendency to make a fact more or less probable than it would be without the evidence . . . .' Ariz. R. Evid. 401(a). '[M]otive is relevant in a murder prosecution.' *State v. Hargrave*, 225 Ariz. 1, 8 ¶ 14 (2010)." *Id*. ¶ 62. While the court found that the trial court had abused its discretion in allowing testimony about the victim's character for peacefulness, the court held the error was harmless in light of overwhelming evidence of guilt. The court observed that "[u]nder Arizona Rule of Evidence 404(a)(2), a victim's character for peacefulness may be presented only to rebut a claim that the victim was the first aggressor. If the defendant does not claim self-defense and there is no evidence that the victim was the initial aggressor, the victim's aggressive or peaceful character is irrelevant. *State v. Hicks*, 133 Ariz. 64, 68–69 (1982). Here, Riley never admitted that he killed Kelly, in self-defense or otherwise. Riley's defense was that he found Kelly dead in his cell and tried to revive him." *Id*. ¶ 67. **[Rules 401(a) and 404(a)(2)]**

2. *State v. Johnson*, 247 Ariz. 166 (2019)—In this capital case, the supreme court affirmed the defendant's convictions and sentences. The court also held, *inter alia*, that the trial court did not improperly limit defendant's cross-examination of the State's DNA technician under Rule 106. **[Rule 106]**

3. *State v. Champaign*, 247 Ariz. 116 (2019)—In this capital case, the supreme court affirmed the defendant's convictions and sentences. The court also held, *inter alia*, that the trial court had not abused its discretion under Rules 106 and 403 by excluding the defendant's statement to a detective that were taken out of context and did not complete an earlier statement. Moreover, the statement was a "snippet" from the statement that the

defendant had successfully sought to exclude. *Id.* ¶¶ 42-46. The court also held that the trial court had not abused its discretion under Rule 403 in limiting the defendant's cross-examination of a witness/former co-defendant concerning her mental health diagnoses. *Id*. ¶¶ 47-55. **[Rules 106 and 403]**

4. *State v. Malone*, 247 Ariz. 29 (2019)—In this first-degree murder case, the trial court did not abuse its discretion in precluding defendant's expert from providing testimony about impulsivity "based on findings of brain damage or brain injury," stating that such testimony would "be encompassed by mental incapacity/diminished capacity/mental defect." *See State v. Mott*, 187 Ariz. 536, 540-41 (1997). The Supreme Court reiterated the *Mott* rule that Arizona does not permit the "diminished capacity" or "diminished responsibility" defense. On the other hand, the trial court properly allowed defendant to present other testimony, including expert testimony, to show that he had a character trait for impulsivity to rebut the State's claim that the murder was premeditated. *See State v. Christensen*, 129 Ariz. 32, 35 (1981); *see also* Ariz. R. Evid. 404(a)(1) (authorizing admission of character trait evidence offered by an accused); Ariz. R. Evid. 405(a) (stating that character trait evidence can be offered as an opinion). Such evidence is properly described as "behavioral-tendency evidence." The Supreme Court vacated the court of appeals' opinion and affirmed the defendant's convictions and sentences. **[Rules 404(a)(1) and 405(a)]**

5. *State v. Zeitner*, 246 Ariz. 161 (2019)—Affirming the court of appeals' opinion, *see* below, as well as defendant's conviction for defrauding AHCCCS by obtaining an abortion under false pretenses, the court rejected defendant's claim that the trial court erred by admitting her medical records and allowing her physicians to testify in violation of the physician-patient privilege under A.R.S. § 13-4062(4). While acknowledging that there is no common law fraud exception to the privilege, the court concluded "[t]he comprehensive fraud control measures embodied in the federal and state Medicaid schemes, including sweeping patient record disclosure requirements, make clear that the physician-patient privilege must yield to the State's interest in combatting fraud where providers and beneficiaries are suspected of AHCCCS fraud. The legislature's express provisions in the AHCCCS statutes granting AHCCCS broad authority to investigate matters of suspected fraud—§§ 36-2903 and -2918(G)—necessarily imply an exception to the privilege for AHCCCS investigations and proceedings. These same provisions also exhibit an intent to provide law enforcement access to patient information when investigating and prosecuting AHCCCS fraud, thereby implicitly abrogating the privilege in the attorney general's investigation and prosecution of suspected provider and beneficiary AHCCCS fraud. **[Rule 501]**

6. *Phoenix City Prosecutor v. Hon. Lowery/Craig*, 245 Ariz. 424 (2018), vacating the court of appeals' opinion, 244 Ariz. 308 (Ct. App. Div. 1 2018)—In this DUI/criminal-damage-as-domestic-violence case, the court held that when a defendant commits a crime against his or her spouse and is charged for that crime, the crime exception to the anti-marital fact privilege, A.R.S. § 13-4062(1), allows the witness-spouse to testify regarding not only that charge, but also any charges arising from the same unitary event. **[Rule 501]**

7. *State v. Acuna Valenzuela,* 245 Ariz. 197 (2018)—In this capital case, the trial court did not err in allowing the State to introduce testimony that the murder victim had "testified in a previous criminal matter against" Acuna, that Acuna was not legally entitled to possess a firearm because "[h]e was a prohibited possessor [and h]e had a prior felony conviction," that the felony conviction was for a "lesser charge," and that he had been sentenced to the Department of Corrections for 2.25 years. The court held the evidence was admissible under Rule 404(b), under which a proper purpose must be shown, "it must be relevant under Rule 402, the probative value of the evidence must not be substantially outweighed by its potential prejudicial effect under Rule 403, and the court must give a proper limiting instruction if requested under Rule 105." *Id.* ¶ 12. The court "encouraged[] trial courts to make their 404(b) findings on the record." *Id.* ¶ 14. **[Rule 404(b)]**

8. *State v. Sanders,* 245 Ariz. 113 (2018)—The court affirmed defendant's murder and child abuse convictions, as well as his death sentence, finding no reversible error. The trial court did not abuse its discretion in admitting eight autopsy photographs of the three-year old victim, or in initially ruling that defendant's apology letters were hearsay. **[Rules 106, 403, and 801-804]**

9. *State v. Richter,* 245 Ariz. 1 (2018), vacating ¶¶ 6-32 of the court of appeals' opinion, 243 Ariz. 131 (Ct. App. Div. 2 2017)--Vacating defendant's kidnapping and child abuse convictions and distinguishing *State v. Mott,* 187 Ariz. 536 (1997), the court of appeals held the trial court erred in curtailing defendant's constitutional right to present a complete defense by restricting her trial testimony, as well as that of her proposed expert, and by precluding her duress defense under A.R.S. § 13-412(A) on the basis that it was actually a "diminished capacity defense." Defendant argued she was "proffering a defense that she was a victim of [husband] Fernando's criminal acts," and not a defense of diminished capacity. She explained Dr. Gary Perrin would testify that she suffers from Post-Traumatic Stress Disorder (PTSD) based on "the many months, if not years, of abuse [she] suffered . . . at the hands of Fernando" and that she would produce photographs showing "numerous scars" from knife wounds inflicted by him. As to the state's argument about Sophia's inability to show Fernando had threatened or used immediate force, she asserted that she lived in a "constant state of fear, for herself and her children."

   In a divided opinion, the supreme court vacated ¶¶ 6-32 of the court of appeals' opinion, reversed defendant's convictions and sentences, and remanded for a new trial. The court held that evidence of an abuser's ongoing threats of harm over a three-month period may constitute a "threat or use of immediate physical force" under A.R.S. § 13-412(A) sufficient to permit the defendant to raise a duress defense to charges of abusing her children. The court also considered whether expert testimony regarding the psychological effects of an abuser's ongoing threats of harm may constitute observation evidence permissible under *Clark v. Arizona*, 548 U.S. 735 (2006), and *State v. Mott, supra,* and held that, based on the limited record before it, the expert testimony proffered does not constitute permissible observation evidence. **[Rules 401 and 404(a), (b)]**

10. *Ryan v. Napier*, 245 Ariz. 54 (2018)—In this personal injury case alleging negligence by a sheriff's deputy in deploying his K-9 unit against McDonald, the court reversed the judgment in McDonald's favor and remanded for entry of judgment in favor of the defendants. *Graham v. Connor*, 490 U.S. 386 (1989), sets forth a three-part test for reasonableness in the context of a Fourth Amendment excessive-force claim. Vacating the court of appeals' opinion, the supreme court held that "experts may not suggest that *Graham* is the legal standard for jurors to decide whether a law enforcement officer's conduct was justified under § 13-409. Experts may recount their reasonable reliance on these factors in forming opinions and inform jurors that officers are trained on them. But experts should refrain from suggesting that the *Graham* factors are legally required. *Id.* ¶ 54. **[Rules 401-403, 702(a), 703 and 704(a)]**

11. *State v. Miles*, 243 Ariz. 511 (2018)—The trial court did not abuse its discretion in commuting defendant's death sentence to life imprisonment based on newly discovered mitigation evidence of diminished capacity and voluntary intoxication under *Tison v. Arizona*, 481 U.S. 782, 797 (1987) and Ariz. R. Crim. P. 32.1(h). In a concurring opinion, Judge Swann argued the underlying brain science underlying cocaine withdrawal syndrome and alcohol related neurodevelopmental disorder should not have been admitted under Rule 702(d) because there was no application of the science to the facts of the case. Nonetheless, Judge Swann, joined by Justices Pelander and Bolick, concurred because the State waived its challenge to the admissibility of this evidence. **[Rule 702]**

12. *State v. Winegardner*, 243 Ariz. 482 (2018)—In this sexual conduct with a minor case, the trial court did not abuse its discretion in precluding defendant from impeaching the victim with her prior misdemeanor shoplifting conviction under Rule 609(a)(2) because "Winegardner provided the trial court with no information showing that [the conviction] involved a dishonest act or false statement." *Id.* ¶ 25. The supreme court observed that "[a]lthough multiple subsections of the [shoplifting] statute include elements of dishonesty and false statement, others do not." *Id.* ¶ 15. "Rule 609(a)(2) provides that admission of a conviction is only proper 'if the court can *readily determine* that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.' Ariz. R. Evid. 609(a)(2) (emphasis added). In most circumstances, the statutory elements of the offense will show whether a conviction required proving or admitting a dishonest act or false statement. However, in cases '[w]here the deceitful nature of the crime is not apparent from the statute and the face of the judgment ... a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions' to demonstrate that the conviction rested on the defendant admitting or the factfinder finding a dishonest act or false statement. Fed. R. Evid. 609 advisory committee's note to 2006 amendment. The rule does not permit, however, a 'trial within a trial' delving into the factual circumstances of the conviction by scouring the record or calling witnesses." *Id.* ¶ 24. [**Rule 609]**

13. *State v. Carson*, 243 Ariz. 463 (2018)—Overruling *State v. Plew*, 150 Ariz. 75 (1986), the court held that if "the slightest evidence" supports a finding of self-defense, the prosecution must prove its absence, and the trial court must give a requested self-defense

jury instruction, even when the defendant asserts a misidentification defense. **[Self-defense]**

14. *State v. Hulsey*, 243 Ariz. 367 (2018)—In this capital murder case, the trial court did not abuse its discretion in admitting evidence that defendant used methamphetamine the night before and morning of the crimes. "Rule 404 permits the introduction of evidence of 'other' possibly prejudicial acts if a proper purpose is shown under subsection 404(b). *State v. Lee*, 189 Ariz. 590, 599 (1997). Evidence of other acts is admissible to prove 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.' Ariz. R. Evid. 404(b). The evidence must also be relevant under Rule 402; the probative value of the evidence must not be substantially outweighed by the potential unfair prejudice under Rule 403; and 'the court must give an appropriate limiting instruction if requested under Rule 105.' *Lee*, 189 Ariz. at 599. Here, all four requirements were satisfied." *Id.* ¶ 45. In the case at hand, "[t]he admission of the use-of-meth evidence was proper because both the paraphernalia in the car and the drug use explain Hulsey's reaction to the police officers' presence and his behavior that followed. A reasonable inference is that he was agitated and pulled out the gun because he knew he had illegal substances on his person and in the car. The use of the drugs also explains Hulsey's agitation and flight, as well as his use of his gun." *Id.* ¶ 46. **[Rules 402, 403 and 404(b)]**

15. *Phillips v. Hon.O'Neil/State Bar*, 243 Ariz. 299 (2017)—Rule 408 precludes use of a consent judgment in a State-initiated consumer fraud act proceeding to prove substantive facts to establish liability for a subsequent claim in an attorney discipline proceeding, and a consent judgment likewise cannot be used for impeachment purposes under Rule 613. The operative provision is Rule 408(a)(1), which prohibits the admissibility of evidence of "furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim." J. Bolick, dissenting, suggests a better approach would be to address the issue in rulemaking, citing *In re Establishment of the Advisory Comm. on Rules of Evidence*, Admin. Order No. 2012-43 (2012). **[Rule 408]**

16. *State v. Rushing*, 243 Ariz. 212 (2017)—In affirming the defendant's murder conviction, the court held the trial court had not abused its discretion in admitting one photo of the murder scene and four autopsy photos. "'Whether the trial court abused its discretion in admitting a photograph turns on (1) the photograph's relevance, (2) its tendency to inflame the jury, and (3) its probative value compared to its potential to cause unfair prejudice.'" *Id.* ¶ 25 (quotation omitted). While the photos were graphic, they were relevant to show cause of death and premeditation. **[Rule 403]**

17. *Rasor v. Northwest Medical Center*, 243 Ariz. 160 (2017), vacating ¶¶ 17-19, 38 and remanding on other grounds to court of appeals, 239 Ariz. 546 (Ct. App. Div. 2 2016)—Following is a summary of the court of appeals' opinion concerning an evidentiary issue: In this medical malpractice case, the trial court did not abuse its discretion in ordering the defendant to produce patient records of all ICU patients who had developed pressure ulcers (just as Rasor had) in the four years preceding Rasor's admission. The court of

appeals relied in part on Rule 406, which provides that evidence of a person's habit or the routine practice of an organization may be admitted to prove that the person or organization on a particular occasion "acted in accordance" with the habit or routine practice, and further defining "habit" as "a regular response to a repeated specific situation." *Id.* ¶ 35 (citation omitted). The court emphasized, however, that it was assessing relevancy more broadly in this discovery context "than we would when evaluating admissibility." *Id.* ¶ 36. **[Rule 406]**

18. *State v. Haskie*, 242 Ariz. 582 (2017), vacating ¶¶ 17-23 of court of appeals opinion, 240 Ariz. 269 (Ct. App. Div. 1 2016)—In this domestic violence case, defendant challenged the trial court's admission of Dr. Kathleen Farraro's "cold" testimony concerning general characteristics of domestic violence victims, offered purportedly "to help the jury understand why '[P.J. had] continued her relationship with the defendant, [had] given conflicting statements while the case has been pending, and [was] reluctant to testify[.]'" Defendant argued the testimony constituted impermissible offender profiling and vouching. Relying in part on *State v. Salazar-Mercado*, 234 Ariz. 590, 591 ¶¶ 2, 6 (2014), and "elaborat[ing]" on *State v. Ketchner*, 236 Ariz. 262, 264 ¶ 13 (2014), the supreme court held that Dr. Ferraro's cold testimony did not amount to impermissible profile evidence. The court stated the analysis will vary from case to case but that "[t]he more 'general' the proffered testimony, the more likely it will be admissible. [Citation omitted.] In addition, the more the testimony is tied to the defendant's characteristics, rather than to those of the victim, the more likely the admission of such testimony will be impermissibly prejudicial." *Id.* ¶ 18. The court counselled that "trial courts should exercise great caution in screening, admitting, and limiting this type of evidence," *id.* ¶ 25, and that "[i]f such testimony is admitted, the defendant is entitled to a limiting instruction under Rule 105 of the Arizona Rules of Evidence to explain to the jury the limited purpose and scope of such testimony." *Id.* ¶ 26. **[Rules 105, 403, and 702]**

19. *State v. Pandeli*, 242 Ariz. 175 (2017)—The court reinstated Pandeli's murder conviction and death sentence, finding the superior court erred in granting Pandeli's post-conviction relief petition for ineffective assistance of counsel ("IAC"). Among other reasons, the court held counsel did not commit IAC by failing to object to the medical examiner's testimony on Confrontation Clause grounds. "Dr. Keen testified that he had formed his own opinions about Iler's cause of death based on the autopsy report and photograph exhibits displayed at trial. Dr. Buldoc's autopsy report was not admitted." *Id.* ¶ 46. Recounting *Crawford v. Washington*, 541 U.S. 36, 59 (2004) and its progeny, the court concluded "[t]he report here is nontestimonial under either the 'primary purpose' test espoused by the *Williams* plurality or the 'solemnity' test of Justice Thomas." *Id.* ¶ 48. The court further concluded that "[b]ecause the autopsy report was nontestimonial and Dr. Keen's testimony complied with our case law, counsel had no reason to object." *Id.* ¶ 51. **[Confrontation Clause]**

20. *State v. Gill*, 241 Ariz. 770 (2017)—Gill was charged with possession of marijuana. He agrees to a diversion program and to participate in drug treatment program through the Treatment Assessment Screening Center (TASC). Gill completes a TASC "statement of facts" form containing incriminating statements but then fails to complete TASC and the

charge is reinstated. Statements Gill made to TASC are admitted at trial during the State's case-in-chief. Statements held not to constitute inadmissible plea negotiations under ARE 410(a)(4) ("[e]xcept as otherwise provided by statute, in a civil or criminal case, or administrative proceeding, evidence of the following is not admissible against the defendant who participated in the plea discussions: . . . a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea" or plea later withdrawn). TASC program is part of a deferred prosecution governed by Ariz. R. Crim. P. 38, which does not reference ARE 410. "Discussions about deferred prosecutions differ from plea discussions and therefore are not governed by" ARE 410 or Ariz. R. Crim. P. 17.4(f). The statement was made after Gill rejected a plea offer and was not made to a prosecutor or a prosecutor's agent ("the TASC representative here was not an agent for purposes of negotiating a plea."). Gill also waived any ARE 410 protections. Affirms Gill's conviction. **[Rule 410]**

21. *State v. Escalante-Orozco*, 241 Ariz. 254 (2017)—In affirming Escalante-Orozco's convictions and non-death sentences, the supreme court held, *inter alia*, that the trial court did not abuse its discretion in admitting Y-STR DNA evidence under Rule 702 and other-act evidence to prove motive under Rule 404(b). Likewise, the court did not abuse its discretion in excluding certain third-party culpability evidence under Rules 402 and 403**. [Rules 401, 402, 403, 404(b), 801, 801(d)(2), 803(3), 803(4), 804(b)(3), and 807(a)(1)]**

Arizona Court of Appeals

1. *In Re: MH2019-004895*, ___ Ariz. ___ (Ct. App. Div. 1 2020)—Holding the trial court erred by allowing appellant's clinical liaison to testify about confidential information in violation of the behavioral health professional-client privilege, *see* A.R.S. § 32-3283, and vacating the trial court's order for involuntary treatment. The court observed that "the fact that a behavioral health professional-client relationship is the 'same' as the attorney-client relationship, which protects confidential communications between attorney and client, the privilege at issue here is broader in that it protects 'information received by reason of the' relationship. Compare A.R.S. § 323283(A) with A.R.S. § 12-2234(A)." *Id*. ¶ 15. **[Rule 501]**

2. *State v. Stuebe*, 2020 WL 3525727 (Ct. App. Div. 1 2020)—In this burglary case, the court of appeals affirmed the defendant's convictions, holding that an automated email and a "machine-produced" video recording attached to the email are not hearsay because they were not made by a "person." Rule 801(a) and (b). Moreover, there was no Confrontation Clause violation because considering all the circumstances the court could not conclude that the "primary purpose" of the email and video was to "creat[e] an out-of court substitute for trial testimony." *Ohio v. Clark*, 576 U.S. 237, 245 (2015). **[Rule 801(a) and (b), and Confrontation Clause]**

3. *State v. Zaid*, 2020 WL 3496690 (Ct. App. Div. 2 2020)—In this manslaughter case, the court of appeals reversed and remanded for a new trial because the trial court improperly precluded evidence of the victim's reputation for violence and the court of appeals could not conclude the error was harmless. Rule 404(a)(2) expressly permits such evidence to

show that the victim acted in conformity with his violent character—even where, as here, the defendant did not know of the victim's violent reputation. The court of appeals rejected the State's argument that Zaid failed to make an offer of proof pursuant to Rule 103(a)(2). On the other hand, the trial court did not err in precluding Zaid from presenting evidence of the victim's prior violent acts under Rule 404(b). **[Rules 103(a)(2), 403, 404(a)(2), 404(b), and 405(a)]**

4. *State v. Hamilton*, 2020 WL 3456674 (Ct. App. Div. 1 2020)—In this sex offense case, the trial court treated the three Rule 404(c) witnesses from an earlier prosecution of defendant as victims and denied defendant's request to interview them. The court also allowed the three witnesses to attend the trial even though defendant had invoked Rule 615(e), the rule of exclusion of witnesses. The court of appeals affirmed defendant's convictions, holding the trial court did not err in declining to allow defendant to interview these witnesses. The court observed that "like a continuing term of probation, a continuing obligation to register as a sex offender extends the date of final disposition of a defendant's charges for purposes of victim's rights." *Id*. ¶ 10. The court further held that although the trial court erred in allowing these witnesses to attend trial, the error was harmless. **[Rules 404(c) and 615(e)]**

5. *State v. Conner*, 2020 WL 3422519 (Ct. App. Div. 1 2020)—In this first-degree murder/armed robbery case, the trial court denied Conner's motion to suppress cell site location information (CSLI) obtained from T-Mobile, based on *Carpenter v. United States*, 138 S. Ct. 2206 (2018), because no search warrant was obtained. The trial court found the *ex parte* order issued in this case, while not technically a search warrant, substantially complied with the requirements of a search warrant and was issued based on probable cause. The trial court also denied Conner's motion to preclude and allowed, over Conner's Rule 702 and 704 objections, the State's expert, FBI Special Agent Young, to correlate and verify calls to and from Conner's phone by comparing the T-Mobile records to the records for the other defendants. These other defendants had different service providers with systems that did not contain the switch time ambiguity for Conner's account. Agent Young then adjusted the timestamps of some of Conner's calls to Arizona time based upon information in records obtained for the other defendants. The court of appeals found no error in denying the motion to suppress and no abuse of discretion in denying the motion to preclude Agent Young's testimony. **[Rules 702 and 704]**

6. *In Re: MH2019-004895*, 2020 WL 3422316 (Ct. App. Div. 1 2020)—The court of appeals vacated the trial court's involuntary commitment order, which was erroneously based in part on acquaintance testimony of a behavioral health professional that violated the behavioral health professional-client privilege under A.R.S. § 32-3283. Therefore, the order was supported by the testimony of only one acquaintance witness, not the two such witnesses that the law requires. *See* A.R.S. § 36539(B). The court held that the privilege covers confidential communications as well as observations of a client's behavior based on information the professional received in their professional relationship with the client. **[Rule 501]**

7. *Heaphy v. Metcalf*, 2020 WL 3286822 (Ct. App. Div. 2 2020)—In this wrongful death

special action, the court accepted jurisdiction and granted relief, holding that the statutory beneficiaries did not waive the physician-patient privilege because they did not place a particular medical condition at issue. Defendant's assertion that a plaintiff waives the physician-patient privilege in any case involving future damages is not supported by the law. The court observed that under A.R.S. § 12-2236, the privilege is waived if the privilege holder "offers himself as a witness and voluntarily testifies with reference to" privileged communications and, second, when the holder "places a particular medical condition at issue by means of a claim or affirmative defense." *Bain v. Superior Court*, 148 Ariz. 331, 334 (1986). **[Rule 501]**

8. *Fox-Embrey v. Neal*, 2020 WL 2988524 (Ct. App. Div. 2 2020)—In this capital case special action, the appellate court held defendant is entitled to an *in camera* inspection of the victim's otherwise privileged medical, DCS and WIC records. State and federal capital jurisprudence necessarily affect the balancing of a capital defendant's rights against those of a victim under the VBR and A.R.S. §§ 13-4062(4) and 32-2085(A). The parameters of what information a defendant would be entitled to as a matter of due process under *State v. Kellywood*, 246 Ariz. 45 (App. 2018) necessarily are more expansive in a capital case. "Under *Kellywood* and the cases that preceded it, a defendant is entitled to an *in camera* review of protected records as a matter of due process if there is a reasonable possibility they contain exculpatory information or impeachment evidence. 246 Ariz. 45, ¶ 8; *see also Sarullo*, 219 Ariz. 431, ¶ 21 (affirming denial of disclosure because defendant gave court no reason to believe victim's medical records would contain exculpatory evidence); *Roper*, 172 Ariz. at 239 (requiring disclosure of victim's medical records if 'necessary for impeachment of the victim relevant to the defense theory'). A capital defendant is similarly entitled to an *in camera* review of protected records for exculpatory information or impeachment evidence. But, the capital defendant is also entitled to an *in camera* review of such records if the defendant establishes there is a reasonable possibility the records contain evidence relevant and material to sentencing, specifically information that may establish mitigating circumstances or evidence that may create a reasonable doubt as to any aggravating circumstance the state attempts to prove." *Id*. ¶ 33. **[Rule 501]**

9. *State v. Soza*, 464 P.3d 696 (Ct. App. Div. 1 2020)—The court held that a defendant who simultaneously possesses multiple objects of drug paraphernalia commits only one violation of A.R.S. § 13-3415(A). The court further held the trial court did not abuse its discretion in sustaining the State's objection to a defense question concerning whether defendant's three prior felony convictions had resulted from guilty pleas. Defendant argued that by sustaining the State's objection, the trial court improperly prevented defense counsel from rehabilitating his credibility by showing that he had accepted responsibility in the prior cases. However, the jurors heard that defendant pled guilty for his previous convictions, and the State did not ask the court to strike the answer. The court also observed that before trial, the trial court had limited the prosecution to impeaching defendant with only three specified priors, even though he had many more. **[Rule 609(a)(1)(B)]**

10. *Varela v. FCA US, et al*, 2020 WL 2123281 (Ct. App. Div. 1 2020)—In this personal injury/motor vehicle product liability case, the superior court dismissed the complaint

that was based on a doctrine called implied obstacle preemption. The court of appeals concluded Varela's claims were not preempted and reversed. In so doing, the court also took judicial notice under Rule 201 of a "2017 Department of Transportation report to Congress vigorously endorsing automakers' voluntary commitment to install AEB technologies 'in virtually all passenger vehicles by 2022.' U.S. Dep't of Transp., *The U.S. Department of Transportation's Status of Actions Addressing the Safety Issue Areas on the NTSB's Most Wanted List 7* (2017)." Id. ¶ 20 n. 5. **[Rule 201]**

11. *State v. Dunbar*, 2020 WL 2060275 (Ct. App. Div. 2 2020)—Distinguishing *R.S./S.E. v. Hon. Thompson/Vanders, below,* the court held, *inter alia*, that victims may be compelled to produce medical records for *in camera* inspection if the defendant shows a "reasonable possibility that the information sought . . . include[s] information to which [he or] she [is] entitled as a matter of due process." *State v. Kellywood*, 246 Ariz. 45, ¶ 8 (App. 2018) (quoting *State v. Connor*, 215 Ariz. 553, ¶ 10 (App. 20077). The court noted that *Thompson* imposed a higher burden for defendants to receive an *in camera* inspection of medical records. The court affirmed Dunbar's convictions but remanded for resentencing on other grounds. **[Rule 501]**

12. *Brown v. Dembow*, 248 Ariz. 374 (Ct. App. Div. 1 2020)—In this wrongful death case, the trial court did not abuse its discretion in declining to allow plaintiffs to impeach defendant with her conviction for possession of drug paraphernalia, a class 6 undesignated felony, which had been designated as a misdemeanor prior to her testimony in the wrongful death case. According to the court, "[t]he focus of impeachment under the Arizona Rules of Evidence is whether the witness, when testifying, is a felon." *Id*. ¶ 16. **[Rule 609(a)(1)(a)]**

13. *State v. Giannotta*, 248 Ariz. 82 (Ct. App. Div. 1 2019)—The court affirmed appellant's convictions and sentences for theft and third-degree burglary, holding that the evidence was properly admitted under the hearsay exception for recorded recollections. The court clarified that a jointly constructed recorded recollection – for example, one person makes an oral statement, another writes it down – may be admitted under this exception if each person involved in creating the record testifies to performing his or her role accurately. Appellant had challenged the superior court's admission of certain hearsay evidence that, in his view, was critical to the convictions. When the theft victim testified at trial, he could not recall the specific serial number of the stolen rifle, but a testifying police officer recited the number based on his written report documenting the number the victim had given him. The court of appeals held that if the original declarant does not contest the accuracy of the other's recording, the requisite foundation for a jointly constructed recorded recollection also can be established by hearing from both (or all) individuals who participated in its creation, with each affirming the accuracy of his or her contribution. **[Rule 803(5)]**

14. *R.S./S.E. v. Hon. Thompson/Vanders*, 247 Ariz. 575 (Ct. App. Div. 1 2019)—holding that the physician–patient privilege does not yield to the request of a criminal defendant for information merely because that information may be helpful to his defense. To be entitled to an *in camera* review of privileged records as a matter of due process, the defendant must establish a substantial probability that the protected records contain information

critical to an element of the charge or defense or that their unavailability would result in a fundamentally unfair trial. On the request of a man charged with second-degree murder, the superior court had ordered a hospital to disclose the deceased victim's privileged mental health records for an *in camera* review – and siblings of the victim petitioned for special action relief from that order. **[Rule 501]**

15. *State v. Murray*, 247 Ariz. 447 (Ct. App. Div. 2 2019)—Affirming defendant's conviction for aggravated assault with a deadly weapon, the court of appeals held the trial court did not violate Rules 602 (requiring personal knowledge) or 702 (imposing several requirements on opinion testimony based on "scientific, technical, or other specialized knowledge") in allowing certain testimony. **[Rules 602 and 702]**

16. *State v. Griffith*, 449 P.3d 353 (Ariz. Ct. App. Div. 1 2019)—Affirming defendant's trafficking in stolen property (the victims' iPads) conviction, the court of appeals held "social media communications, when offered to prove the truth of what a user said, fall outside the scope of Rule 803(6), and thus are not self-authenticating under Rule 902(11) when offered for that purpose." *Id*. ¶ 13. However, defendant's incriminating Facebook message was admissible under Rules 801(d)(2) (statement against party-opponent) and 901(a). *Id*. ¶¶ 13-16. The court applied the same analysis to the admission of the Facebook search history log to prove the defendant directed Facebook to make searches for the victims and their email addresses. *Id*. ¶¶ 17-19. **[Rules 801(d)(2), 803(6), 901(a), and 902(11)]**

17. *State v. Rose*, 246 Ariz. 480 (Ct. App. Div. 2 2019)—Affirming defendant's convictions after a jury trial on two counts of sexual conduct with a minor under the age of 15. The court held that, under Rule 404(c), the trial court did not err in admitting defendant's juvenile delinquency adjudication as other-act evidence to prove the defendant's character trait giving rise to an aberrant sexual propensity to commit a criminal sexual offense. Rule 404(c) provides factors a trial court must consider, after which it may admit evidence of another crime, wrong or act committed by a minor, including one that resulted in a juvenile delinquency adjudication. **[Rule 404(c)]**

18. *Sandra R. v. DCS*, 246 Ariz. 180 (Ct. App. Div. 1 2019)—The court affirmed the juvenile court's severance order and held: (1) the juvenile court committed harmless error by allowing DCS to introduce statements from scientific articles without meeting the foundation requirements of Rule 803(18); (2) sufficient evidence supported the abuse finding related to the shaken-baby injury even though the evidence did not prove which parent abused the child; and (3) under *Alma S. v. DCS*, 245 Ariz. 146 (2018), the "constitutional nexus" requirement established by *Linda V. v. ADES*, 211 Ariz. 76 (App. 2005), is considered under the totality of the circumstances in determining whether termination is in the best interests of the child. **[Rule 803(18)]**

19. *State v. Duarte*, 246 Ariz. 338 (Ct. App. Div. 2 2018)—In this burglary/aggravated assault/disorderly conduct case, the trial court did not abuse its discretion in precluding evidence of the victim's 13-year old conviction for attempted hindering prosecution. The defendant argued the conviction was admissible to impeach the victim under Rules 608(b) and 609(a)(2) and (b). Relying on *State v. Winegardner*, 243 Ariz. 482, ¶ 13

(2018) with respect to defendant's Rule 609(a)(2) claim, the court observed that the record before the trial court did not establish that the victim's prior conviction for first-degree hindering prosecution was an instance of untruthfulness. With respect to defendant's Rule 609(b) claim, the court held the trial court did not abuse its discretion in finding that defendant failed to provide reasonable notice of his claim and that the probative value of the conviction did not outweigh its prejudicial effect. Similarly, the court held the trial court properly balanced prejudice versus probative value in rejecting defendant's Rule 608 claim. **[Rules 608 and 609]**

20. *Cabanas v. State of Arizona*, 246 Ariz. 12 (Ct. App. Div. 1 2018)—In this first-degree murder case pending an evidentiary hearing under *State v. Valencia*, 241 Ariz. 206, 210 ¶ 18 (2016), the court held Cabanas' defense of transient immaturity does not, by itself, place his mental health at issue such that the State is entitled to have access to his medical and mental health records over his objection. The court observed that A.R.S. § 13-4062(4) precludes a physician from testifying, absent the patient's consent, to any information acquired in attending the patient and extends from statements to medical records, and that § 32-2085(A) applies the same privilege to psychologist-patient communications and records. The privilege is waived only when a party places the relevant medical or mental state at issue, which Cabanas had not done. **[Rule 501]**

21. *Spooner v. City of Phoenix*, 246 Ariz. 119 (Ct. App. Div. 1 2018)—In this wrongful arrest case, the trial court did not abuse its discretion in precluding Spooner from using the officer's grand jury testimony to impeach him. The court reasonably determined introduction of grand jury testimony was unfairly prejudicial and likely to confuse the jury because it would constitute direct evidence of purported misconduct for which the City was absolutely immune. **[Rule 403]**

22. *State v. Trujillo*, 245 Ariz. 414 (Ct. App. Div. 2 2018)—In this sexual abuse case, the trial court did not abuse its discretion in precluding evidence that defendant's supervisor was terminated 14 months after the offense for failure to comply with a policy regarding who was permitted to drive the facility's vehicles. Moreover, being fired for allowing an unauthorized person to drive a vehicle does not demonstrate a character trait for untruthfulness. **[Rules 401, 402, 403 and 608(b)]**

23. *Rasor v. Northwest Hospital LLC*, 244 Ariz. 423 (Ct. App. Div. 2 2018)—In the third installment of this medical malpractice case, the court of appeals held that the case calls for expert causation testimony and that plaintiffs' proffered expert, a wound-care registered nurse, was competent to testify about causation. The court concluded at ¶ 25:

> As our supreme court has observed, under Rule 702, "[f]or a witness to be qualified as an expert, he or she need only possess 'skill and knowledge superior to that of [people] in general.'" *State v. Romero*, 239 Ariz. 6, ¶ 17 (2016), *quoting State v. Girdler*, 138 Ariz. 482, 490 (1983) (first alteration added, second alteration in *Romero*). As previously noted, Nurse Ho was both a certified wound-care nurse and a registered nurse, whom Arizona empowers to "[e]stablish[] a

nursing diagnosis," § 32-1601(23)(d), which includes determining the "etiology" or cause of a disorder, Ariz. Admin. Code R4-19-101. She had been a registered nurse for more than twenty years and a hospital director of wound care since 2013. Certainly, she possessed greater knowledge and skill than the average layperson, and we conclude she was "qualified as an expert by knowledge, skill, experience, training, or education," Ariz. R. Evid. 702, to testify as a causation expert in this case. **[Rule 702]**

24. *Bussberg v. Walker*, 244 Ariz. 431 (Ct. App. Div. 1 2018)—A notary may qualify as a witness to a will under A.R.S. § 14-2502(A)(3), which requires that a will be "[s]igned by at least two people, each of whom signed within a reasonable time after that person witnessed either the signing of the will . . . or the testator's acknowledgment of that signature or acknowledgment of the will." Cf. Ariz. R. Evid. 601 ("Every person is competent to be a witness unless these rules or an applicable statute provides otherwise."). [**Rule 601]**

25. *State v. Todd*, 244 Ariz. 374 (Ct. App. Div. 2 2018)—Defendant was convicted of six counts related to firing a gun at a residential structure. On appeal, defendant argued, *inter alia*, that the trial court erred by precluding certain impeachment evidence concerning two witnesses. The court of appeals held the trial court did not abuse its discretion in precluding evidence of one witness's 15-year old conviction for trafficking methamphetamine under Rule 609(b). Such convictions are admissible "very rarely and only under exceptional circumstances." (quotation omitted). Similarly, the trial court did not abuse its discretion in sanitizing another witness's felony convictions, one of which was for receiving stolen property as such crimes did not involve dishonesty or false statements under Rule 609(a)(2). Finally, although the trial court may have abused its discretion in precluding defendant from impeaching the two witnesses with evidence of their pending and potential charges, any error did not contribute to or affect the verdict. The court of appeals emphasized, however, that "some cross-examination regarding pending or potential charges should be allowed when circumstances demonstrate a witness's testimony may be influenced by a promise, hope, or expectation of leniency in his own case." *Id*. ¶ 13. (citations omitted). **[Rule 702]**

26. *Sate v. Pina-Baraja*, 244 Ariz. 106 (Ct. App. Div. 2 2018)—In this prohibited possessor case, the trial court did not abuse its discretion in declining to admit under Rule 106 defendant's additional statement "to detectives explaining he had obtained the guns after a certain man threatened him and shot at him approximately two weeks earlier." *Id*. ¶ 3. The statement was irrelevant to the issues of whether he owned the guns and whether he was a convicted felon**. [Rule 106]**

27. *State v. Zeitner*, 244 Ariz. 217 (Ct. App. Div. 1 2018)—Affirming defendant's conviction for defrauding AHCCCS by obtaining an abortion under false pretenses, the court rejected defendant's claim that the trial court erred by admitting her medical records and allowing her physicians to testify in violation of the physician-patient privilege under A.R.S. § 13-4062(4). While acknowledging that there is no common law fraud exception to the privilege, the court concluded "[t]he reporting requirements that AHCCCS imposes on physicians and the requirement to disclose confidential patient information in cases of

suspected fraud abrogate the privilege insofar as it otherwise might shield a patient's records and statements to a physician in such a case." **[Rule 501]**9

28. *Muscat v. Creative*, 244 Ariz. 194 (Ct. App. Div. 1 2017)—In this negligence and ASPA case, the court of appeals took judicial notice of the sentencing minute in a superior court case. *See* Ariz. R. Evid. 201(b) (allowing courts to take judicial notice of facts that are not the subject of reasonable dispute). *Id.* ¶ 5 n. 2. **[Rule 201(b)]**

29. *Alma S. v. DCS*, 244 Ariz. 152 (Ct. App. Div. 1 2017)—The court of appeals reversed the juvenile court's severance decision, which was based on abuse and failure to protect, based on "insubstantial" evidence of the child's best interests. The court emphasized that neither the grounds for severance nor adoptability, standing alone, are enough. "The Department must show that there is a substantial likelihood that the parent will not be capable of parenting effectively in the near future, not that someone with better parenting skills may be able to care for the child." I*d.* ¶ 36. The court found the DCS psychologist's testimony wanting under Rule 702, which requires an expert witness's opinion testimony to be "'based on sufficient facts or data" and reliable principles and methods "reliably applied . . . *to the facts of the case'*" (emphasis added by court of appeals). *Id.* ¶ 24. "Even assuming the psychologist's evaluation and testimony were admissible as an expert opinion that a parent with these diagnoses would generally not be able to successfully parent a child, it cannot be inferred from this record that Mother is an unfit parent. *See Santosky*, 455 U.S. at 767; *Roberto F.*, 232 Ariz. at 54, ¶ 42." *Id.* **[Rule 702]**

30. *Engstrom v. McCarthy*, 243 Ariz. 469 (Ct. App. Div. 1 2018)—Family court abused its discretion in modifying a Rule 69 agreement on legal decision-making and parenting after finding the agreement fair and equitable and in the children's best interests. The court of appeals remanded "the case to the family court so it can determine in the first instance whether there was a change of circumstances after the court accepted the agreement warranting a modification of the original order, or whether there was another rule or statute allowing the court to modify the Rule 69 agreement." *Id.* ¶ 11. The court also found that the family "court erred by finding the existence of significant domestic violence, vacate the finding, and remand the issue back to the court." *Id.* ¶ 15. Finally, the court affirmed the admission of Dr. Gaughn's expert testimony over Mother's Rule 702 objection. "Dr. Gaughan was a licensed psychologist who had undergone years of training and served as an expert witness in dozens of cases. Moreover, he interviewed all the relevant parties and reached his expert opinion based on the interviews he conducted and the facts he learned from those interviews." *Id.* ¶ 27. **[Rule 702]**

31. *State v. Scott*, 243 Ariz. 183 (Ct. App. Div. 1 2017)—In this sexual assault case, the trial court did not abuse its discretion in admitting evidence of Scott's prior conviction for aggravated indecent assault to show lack of mistake under Rule 404(b) and to rebut Scott's consent defense. The trial court properly gave a limiting instruction to the jury, stating the jury could only consider the evidence to establish Scott's intent, plan, or "absence of mistake or accident." **[Rule 404(b)]**

32. *Nia v. Nia*, 242 Ariz. 419 (Ct. App. Div. 1 2017)—The family court did not abuse its discretion in excluding Mother's financial expert on the issue of child support because she failed to show that her expert was "essential" to the presentation of her case under Rule 615 under circumstances in which, according to the family court, the parties had "ample time to do discovery" and "there's [not] another expert on the other side." **[Rule 615]**

33. *State v. Urrea*, 242 Ariz. 518 (Ct. App. Div. 2 2017), affirmed in part, vacated in part (¶¶ 13-33) on other grounds—The trial court did not abuse its discretion in allowing the State's expert to testify over defendant's objection that the testimony constituted impermissible drug courier profile evidence, which "has been described as 'an 'informal compilation of characteristics' . . . typically displayed by persons trafficking in illegal drugs.' *State v. Lee*, 191 Ariz. 542, ¶ 10, 959 P.2d 799, 801 (1998), quoting *Reid v. Georgia*, 448 U.S. 438, 440 (1980). Our supreme court has condemned the presentation of such evidence as substantive proof of guilt at trial. *See id*. ¶ 12. In contrast, generalized expert testimony about the way drug traffickers typically operate has been upheld. *See State v. Gonzalez*, 229 Ariz. 550, ¶ 13, 278 P.3d 328, 332 (App. 2012). An expert oversteps the permissible bounds when the testimony relates not just to generalized patterns of a criminal organization, but compares the modus operandi of a specific organization to the conduct of a defendant in a particular case. *See State v. Garcia-Quintana*, 234 Ariz. 267, ¶¶ 14-15, 321 P.3d 432, 436 (App. 2014)." *Id.* ¶ 35. In this case, the subject testimony constituted such generalized, admissible modus operandi evidence. **[Rule 702]**

34. *State v. Escalante*, 242 Ariz. 375 (Ct. App. Div. 1 2017)—Defendant failed to show that the inadmissible drug courier profile presented by the State as substantive evidence of defendant's guilt constituted fundamental error. The court engaged in a good discussion of the difference between inadmissible drug courier profile evidence and admissible *modus operandi* evidence. **[Rule 702 and Confrontation Clause]**

35. *State v. Hon. Fell/Lietzau*, 242 Ariz. 134 (Ct. App. Div. 2 2017)—The trial court abused its discretion by precluding a transcript of text messages between defendant and his 13-year old victim based on a lack of authentication. The court of appeals held that "[t]elephone conversations, which are analogous to text messages, may also be authenticated by 'evidence that a call was made to the number assigned at the time to . . . a particular person, if circumstances, including self-identification, show that the person answering was the one called.' Ariz. R. Evid. 901(b)(6)(A)." *Id.* ¶ 7. The court found ample evidence that the messages are between the defendant and victim, *see* Rule 901(4), as well as extrinsic evidence connecting defendant to the victim. *Id*. ¶¶ 13-14. **[Rule 901]**

36. *State v. James*, 242 Ariz. 126 (Ct. App. Div. 2 2017)—The court affirmed defendant's convictions for child molestation and sexual conduct with a minor under 12, rejecting defendant's argument that he was entitled to an evidentiary hearing at which the two alleged victims would testify before other act evidence was admitted under Rule 404(c). The court distinguished *State v. Aguilar*, 209 Ariz. 40 (2004), and decided this case was

more akin to *State v. LeBrun*, 222 Ariz. 183 (App. 2009) because of "the absence of a true factual dispute regarding the other acts." *Id.* ¶ 24. The trial court based its decision to admit the other act evidence on police reports reciting the statements of witnesses, a transcript of a forensic interview, and a transcript of a confrontation call. The court of appeals also rejected the State's argument that the trial court was not required to determine, by clear and convincing evidence, that the defendant committed the other acts, but held the trial court's finding of other acts, by clear and convincing evidence, was supported by sufficient evidence even in the absence of an evidentiary hearing. **[Rule 404(c) and cmt. to 1997 amend.]**

37. *State v. Smith,* 242 Ariz. 98 (Ct. App. Div. 2 2017)—In this child molest case, the court of appeals vacated Smith's convictions and sentences, and remanded, based on a Confrontation Clause violation. Over Smith's objection, the trial court allowed the State's DNA analyst, Brianna Smalling, to testify essentially that saliva was found on the victim's underwear ("positive saliva result"), supporting the victim's testimony that Smith licked her genital area. Finding this case analogous to *Bullcoming v. New Mexico*, 564 U.S. 647, 664 (2011), the court concluded that the expert "acted only as a 'conduit for another non-testifying expert's opinion.' *State v. Gomez*, 226 Ariz. 165, ¶ 22, 244 P.3d 1163, 1168 (2010), quoting *State v. Snelling*, 225 Ariz. 182, ¶ 19, 236 P.3d 409, 414 (2010). Like the testifying expert in *Bullcoming*, Smalling 'played no role in producing the [test results,] . . . did not observe any portion of [Lang's] conduct of the testing' and did not offer an 'independent, expert opinion about' whether alpha amylase was found on N.S.'s underwear. 564 U.S. at 673 (Sotomayor, J., concurring)." *Id*. ¶ 10. The court further found the error was not harmless in light of the State's emphasis on the saliva test results. **[Rule 702; Confrontation Clause]**

38. *State v. Millis,* 241 Ariz. 802 (Ct. App. Div. 2 2017)—In this murder and child abuse case, the trial court did not abuse its discretion in precluding the proffered defense expert, who would have testified that Millis had ASD, a character trait of "difficulty in understanding how to interact appropriately with others," which could have made it "more or less likely that he formed the intent required in this particular case." The trial court concluded, and the court of appeals agreed, that the proffered testimony was improper diminished capacity evidence as opposed to character trait evidence. **[Rule 702]**

39. *State v. Peltz,* 241 Ariz. 792 (Ct. App. Div. 2 2017)—In this aggravated assault case, the trial court did not err in admitting the arresting officer's lay opinion testimony that defendant was driving in light of officer's observations that blood was found only in the area of the driver's seat and defendant was the only occupant of the vehicle who was bleeding. Defendant's mother, the victim, who was also in the vehicle, was not bleeding externally. The officer's opinion was admissible under Rule 701 because it was based on the officer's perception and not scientific, technical or specialized knowledge, and it assisted the jury in determining a fact in issue—who had been driving the vehicle. Additionally, the trial court did not err in denying defendant's motion to suppress his blood test results, which were obtained in accordance with A.R.S. § 28-1388(E). Under § 28-1388(E), a warrantless blood draw seizure is permissible "if (1) probable cause

existed to believe that the person was driving under the influence, (2) exigent circumstances were present, and (3) the blood was drawn by medical personnel for a medical reason." *State v. Nissley,* 241 Ariz. 327, ¶ 10 (2017). **[Rule 701]**

40. *Stafford v. Burns,* 241 Ariz. 474 (Ct. App. Div. 1 2017)—In this medical malpractice/wrongful death case, the trial court did not abuse its discretion in failing to hold a *Daubert* hearing concerning testimony of a defense expert. The court of appeals stated that "[a]lthough the trial court may hold an evidentiary hearing to evaluate proposed expert testimony, it is not required to do so. *See id.* [referring to *Ariz. State Hosp./Ariz. Cmty. Prot. & Treatment Ctr. v. Klein,* 231 Ariz. 467, 474 ¶¶ 31-32 (App. 2013) (citing *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152 (1999))] Here, both parties presented lengthy and detailed pleadings, cited supporting medical literature, and attached affidavits containing the specific opinions of their other disclosed medical and pharmacological experts." *Id*. ¶ 30. **[Rule 702]**

41. *Spring v. Bradford*, 241 Ariz. 455 (Ct. App. Div. 1 2017)— The defendant doctor in this medical malpractice case did not request that his expert witnesses be exempted from exclusion, but nevertheless provided the experts with transcripts of other witnesses' trial testimony in preparation for the experts' testimony. The court of appeals held the trial court correctly concluded that the defendant violated Rule 615 by doing so, and also appropriately addressed the minimal scope of resulting prejudice through a jury instruction, rather than by striking the experts' testimony. The court clarified that Rule 615 does not automatically exempt expert witnesses from exclusion. The trial court may exercise its discretion under subsection (c) of the rule—an exemption for "essential" witnesses—to allow an expert witness to observe other testimony (or to review transcribed testimony). **[Rule 615]**

Character Evidence Flowchart
Arizona Rules of Evidence (2019)
Samuel A. Thumma

NOTE: Evidence of a person's habit, or organization's routine practice, may be admitted to prove that person or organization acted in accordance therewith on particular occasion. Such evidence may be admitted "regardless of whether it is corroborated or whether there was an eyewitness." ARE 406.