

Evidence Case Law Update¹ (2018-20)

United States Supreme Court

1. *McKinney v. Arizona*, 2020 WL 889190, — S.Ct. — (U.S. 2020)—A jury resentencing was not required after the Ninth Circuit Court of Appeals, on federal habeas corpus review, reversed a defendant’s death sentences for failure to properly consider his PTSD as mitigating evidence. Instead, the 5-4 majority of the U.S. Supreme Court upheld the Arizona Supreme Court’s procedure of itself reviewing the evidence in the record and reweighing the aggravating and mitigating circumstances, including defendant’s PTSD. While, under *Ring v. Arizona*, 536 U.S. 584 (2002), juries are required to find aggravating circumstances that make a defendant *eligible* for the death penalty, a jury need not reweigh aggravating and mitigating circumstances in a harmless-error-review-type situation such as that here. The dissenting justices, for whom Justice Ginsburg wrote, would have found the Arizona Supreme Court to have engaged in a reopened direct, rather than just a collateral, review procedure, meaning that post-*Ring*, a jury would need to find the aggravators making McKinney death-eligible. **[U.S. Const. Amend. VI.]**
2. *United States v. Haymond*, 139 S.Ct. 2369 (2019)—In a 5-4 decision on the result, Justice Gorsuch wrote for the plurality, holding that a provision of federal law governing supervised release was unconstitutional where it allowed the factfinding supporting a new mandatory minimum sentence arising out of supervised-release revocation proceeding to be rendered by a judge by a preponderance of the evidence. As applied, the provision violated the Due Process Clause and the Sixth Amendment right to a jury trial. Justices Alito, Roberts, Thomas, and Kavanaugh dissented, writing that supervised-release revocation proceedings are akin to parole revocation proceedings and should be treated as such and not as part of the proceedings on the conviction in chief. **[U.S. Const. Amends. V, VI.]**
3. *Biestek v. Berryhill*, 139 S. Ct. 1148 (2019)—Justice Kagan delivered the opinion of the court in this administrative law case, noting that whatever the meaning of ‘substantial’ in other contexts, the threshold for evidentiary sufficiency when courts review administrative agency factfinding under the “substantial evidence” standard is not high. Thus, a government vocational expert’s refusal to provide the private market-survey data underlying her opinion regarding job availability, upon the disability applicant’s request, did not categorically preclude the expert’s testimony from counting as “substantial evidence.” Instead, it is a case-by-case inquiry, abrogating *McKinnie v. Barnhart*, 368 F.3d 907 (7th Cir. 2004), which had held that an administrative law judge erred in failing to take into account the reliability of a vocational expert’s conclusions. Justices Sotomayor and Gorsuch filed dissents, and Justice Ginsburg joined in Justice Gorsuch’s dissenting opinion; the dissents generally supported the case-by-case inquiry, but both

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dissents would have not found the “substantial evidence” standard met in this particular case. [**“Substantial evidence” standard and reliability of expert evidence.**]

4. *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 that 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. Aragon*, 2020 WL 1064840, --- Fed. App’x --- (9th Cir. March 5, 2020)—The district court did not abuse its discretion in admitting an arresting officer’s identification of the defendant’s voice on recorded telephone calls, as the officer had heard defendant speak after his arrest. Federal Rule of Evidence 901(b)(5) has a ‘low threshold for voice identifications,’ wherein it states: “An opinion identifying a person’s voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker,” is sufficient to satisfy the requirement of authenticating evidence. [**Rule 901(b)(5).**]
2. *United States v. Phillips*, 929 F.3d 1120 (9th Cir. 2019) and 773 Fed. App’x 400 (July 11, 2019) (mem.)—In a matter of apparent first impression, the evidence-of-pecuniary-value requirement inherent in a federal murder-for-hire conviction was satisfied by evidence that the defendant promised to forgive a \$30,000 loan made to the hitman in exchange for the murder, even though the loan was legally unenforceable as it was made for an illegal marijuana-grow venture. In a separate memorandum decision issued the same day, the panel of the Ninth Circuit Court of Appeals found that the district court abused its discretion when it granted a government motion *in limine* to preclude any evidence of the defendant’s kidney disease as irrelevant and unduly prejudicial. The defendant had wanted to use evidence of his illness to explain why he was fatigued, confused, and nonconfrontational when the hitman told him in graphic terms about the murder he had supposedly carried out at defendant’s behest. The evidence should not have been precluded, as any danger of undue sympathy elicited could have been remedied by sanitizing it appropriately. The error was harmless, however, because the jury had a substantial amount of additional evidence on which to convict. The error also did not

deprive defendant of the right to present a complete defense or testify in his own defense. **[Rule 403.]**

3. *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183 (9th Cir. 2019) and 2019 WL 2083251 (mem.) (9th Cir. May 10, 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, by not performing the gatekeeping function required of judges 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 was 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. In a separate memorandum decision issued the same date, the panel held, under Fed. R. Evid. 1005 and 1001(e), that the district court did not abuse its discretion by admitting enlarged and enhanced document copies from the defendant’s “A-file.” **[Rules 702, 1005, 1001(e).]**
4. *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.]**
5. *United States v. Thornhill*, 940 F.3d 1114 (9th Cir. 2019)—In an opinion construing Rules 414 and 403 of the Federal Rules of Evidence, a panel of the Ninth Circuit Court of Appeals held that Rule 414 (similar to Arizona Rule of Evidence 404(c)) applied to admit a defendant’s prior state conviction for sexual abuse of a minor in the second degree during his federal jury trial for receipt of child pornography. The rule language encompassed the prior conviction, which was also relevant and not excluded by any of the applicable Rule 403 factors. Additionally, prior acts evidence need not be absolutely necessary to the prosecution’s case in order to be admissible under Rule 414; rather, it must simply be helpful or practically necessary. **[Fed. R. Evid. 414, 403.]**
6. *Claiborne v. Blauser*, 934 F.3d 885 (9th Cir. 2019)—Visible shackling of convicted felon serving lengthy sentence when he appeared in federal court as civil litigant for three-day trial on his § 1983 claims was a violation of due process requiring a new trial, when there was no showing of a sufficient need for such restraints. In addition, in a footnote, the panel noted that the district court appeared to misstate the law on Rule 706(a) of the Federal Rules of Evidence, which provides discretion to appoint a neutral expert witness. The trial court seemed to categorically limit the relevance of a medical expert to testifying about a plaintiff’s current condition. “Yet courts have regularly considered requests for and appointed experts to review medical records and testify about prior

medical needs and treatment in deliberate indifference cases. . . . Moreover, a medical expert can help with factfinding in excessive force claims because ‘the extent of injury suffered by an inmate is one factor that may suggest whether the [defendant’s] use of force could plausibly have been thought necessary in a particular situation.’ . . . If Claiborne renews his request for appointment of a neutral medical expert on retrial, the district court should weigh these considerations in exercising her discretion.” [U.S. Const. Amend. V; Rule 706(a).]

7. *United States v. Norris*, 942 F.3d 902 (9th Cir. 2019)—There was no subjective expectation of privacy in the emission of the MAC address of devices in a defendant’s apartment when the signal reached beyond the walls of the apartment to achieve unauthorized access a neighbor’s password-protected router. Even if defendant claimed one, the expectation was not one society was prepared to accept as reasonable. [U.S. Const. Amend. IV.]
8. *United States v. Valle*, 940 F.3d 473 (9th Cir. 2019)—In a prosecution for illegal reentry after deportation, the government was required to prove—by clear and convincing evidence—the defendant’s continuous presence in the United States to support sentencing enhancements, including direct evidence of where defendant was during the relevant time period. Because there was already a full inquiry into the factual question at issue, on remand, the government was not entitled to a second bite at the apple and could not submit any new evidence of the defendant’s whereabouts for purposes of resentencing. [Clear and convincing evidence standard; preclusion of additional evidence on remand.]
9. *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 citation omitted). But a court cannot take judicial notice of disputed facts contained in such public records. *Id.* [Rule 201.]

Arizona Supreme Court

1. *State v. Riley*, 2020 WL 1145988 (Ariz. March 10, 2020)—The Arizona Supreme Court held, among other things in this capital case, that evidence that the victim had been in protective custody and had been targeted by a prison gang was relevant to motive, the proper foundation was laid for its admission, and there was no Rule 403 violation as the evidence was not unfairly prejudicial. Because the defendant never admitted he killed the victim at all, however, let alone in self-defense, evidence of the victim’s peaceable character as a model inmate was irrelevant, but its admission was harmless error in light of the all the admissible evidence pointing to defendant’s guilt. Defendant also knowingly, intelligently, and voluntarily waived his right to present mitigation evidence during the penalty phase; multiple colloquies with the trial court supported this finding,

as did the results of the competency evaluation requested by defense counsel. [Rules 401, 403.]

2. *State v. Johnson*, 247 Ariz. 166 (2019)—In this capital case, the Supreme Court affirmed the defendant’s convictions and sentences, in a nearly forty-page opinion addressing a number of evidentiary and other issues. In evaluating rulings limiting mitigation evidence, the Arizona Supreme Court noted that the Rules of Evidence do not apply in the *penalty phase* of a first-degree murder trial, but courts are guided by fundamentally the same considerations. The trial court either did not err or committed only harmless error in limiting mitigation evidence including that on the Columbine High School shooting (defendant was a student there at the time), adopted-child syndrome, and drug-seeking behavior. 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, and that the trial court properly treated Rule 106 as a rule of inclusion, not exclusion. ¶¶ 127–132. [Rule 106.]
3. *State v. Champagne*, 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 was 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 Arizona Supreme Court, with then-Chief Justice Bales dissenting in part but concurring in the judgment, held that a defendant who permissibly introduced expert evidence of a character trait for impulsivity to challenge premeditation may not also introduce evidence of brain damage to corroborate that trait. Although the Court has authority to promulgate rules of evidence, it can—and has chosen to—defer to Arizona’s long-standing legislative policy to not permit the admission of mental disease or defect evidence to refute *mens rea* (also known as a diminished capacity 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.”) Chief Justice Bales concurred in the judgment, as any error was harmless, but did not see fit to join “the majority’s blanket bar on brain damage evidence to support a claimed character trait for impulsivity.” He noted that Arizona Rule of Evidence 105 expressly contemplates the

admission of evidence that can be considered for some purposes but not for others and that a limiting instruction may cure concerns about jurors considering the evidence for purposes other than proof of a trait for impulsivity. The Supreme Court vacated the court of appeals' opinion and affirmed the defendant's convictions and sentences. **[Rules 105, 404(a)(1) and 405(a).]**

5. *State v. Zeitner*, 246 Ariz. 161 (2019)—Affirming the court of appeals' opinion and 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. *Alma S. v. DCS*, 245 Ariz. 146 (2019)—While the Arizona Court of Appeals had found the Department of Child Safety witness 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), the Arizona Supreme Court clarified, in vacating the court of appeals opinion, that the resolution of conflicting evidence in termination of parent-child relationships proceedings is uniquely the province of the trial court. This rule applies even where sharply disputed facts exist. Justice Bolick separately concurred in the result to emphasize constitutional concerns with Arizona's statutory scheme for termination proceedings and its application. “[W]e should take great care to ensure that our termination of parental rights process has not become a railroad with no stops and only one destination, in which judges act as mere conductors,” he wrote.
7. *Phoenix City Prosecutor v. Hon. Lowery/Craig*, 245 Ariz. 424 (2018), vacating the court of appeals' opinion, 244 Ariz. 308 (App. 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.]**
8. *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).]**

9. *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.]**
10. *State v. Richter*, 245 Ariz. 1 (2018), vacating ¶¶ 6-32 of the court of appeals’ opinion, 243 Ariz. 131 (App. 2017)—Vacating defendant’s kidnapping and child abuse convictions and distinguishing *State v. Mott*, 187 Ariz. 536 (1997), the court of appeals had held the trial court erred in curtailing defendant’s constitutional right to present a complete defense by restricting her trial testimony 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. 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.” A divided Arizona Supreme Court agreed, but 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 did not constitute permissible observation evidence. The defendant’s convictions and sentences were reversed and her case remanded for a new trial. **[Rules 401 and 404(a), (b); U.S. Const. Amends. VI, XIV.]**
11. *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).]**

12. *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 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.]**
13. *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.]**
14. *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.]**
15. *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).**]

16. *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.**]

Arizona Court of Appeals

1. *Brown, et al. v. Dembow*, 12 Arizona Cases Digest 26 (Ariz. App. Feb. 25, 2020)—The trial court did not err in excluding a civil defendant’s prior conviction from being used for impeachment purposes under Arizona Rule of Evidence 609(a)(1)(A), as the defendant was not a felon when she testified at trial. Instead, after the incident giving rise to the civil case, but before she testified at the civil trial, a court had designated the civil defendant’s Class 6 undesignated felony conviction as a misdemeanor, at the request of her probation officer. The appellate court also denied a motion to strike, taking judicial notice pursuant to Arizona Rule of Evidence 201, of certain documents in the superior court’s file that the appellants submitted that were related to the civil defendant’s prior criminal case. The appellate panel also noted that the Arizona common law rules were aligned with its decision here—felons were deemed incompetent to testify at common law, while misdemeanor convictions could not even be used for impeachment. [**Rule 609(a)(1)(A).**]
2. *State v. Jaramillo*, 2020 WL 967559 (App. Feb. 28, 2020)—While joint trials are favored in the interests of judicial economy, *State v. Murray*, 184 Ariz. 9, 25 (1995), a trial court abused its discretion where the defendants’ defenses were each so wholly inconsistent that they were antagonistic and mutually exclusive sufficient to require severance of the trials. Joinder is appropriate if “each defendant is charged with each alleged offense, or if the alleged offenses are part of an alleged common conspiracy, scheme, or plan, or are otherwise so closely connected that it would be difficult to separate proof of one from proof of the others.” Ariz. R. Crim. P. 13.3(b). The Arizona Supreme Court has identified four circumstances that might require severance based upon potential prejudice to one or more defendants:

- (1) Evidence admitted against one defendant is facially incriminating to the other defendant,
- (2) Evidence admitted against one defendant has a harmful rub-off effect on the other defendant,
- (3) There is significant disparity in the amount of evidence introduced against the defendants, or
- (4) Co-defendants present antagonistic, mutually exclusive defenses or a defense that is harmful to the co-defendant.

Murray, 184 Ariz. at 25. Here, the core of Defendant’s defense was that he was a struggling shopkeeper who rented the back room of a store to his co-defendant, Islas, without knowing that Islas was warehousing and dealing drugs. The core of Islas’s defense, though, was that he was nothing more than a delivery driver for Defendant with no knowledge that he was delivering Defendant’s drugs. These defenses were wholly inconsistent, and the Court of Appeals found the case to fall under the fourth *Murray* scenario above. The appellate panel rejected the State’s argument that a limiting instruction cured the error by directing jurors to consider the evidence separately as to each co-defendant. This instruction may reduce prejudicial effect in the evidence-based categories of severance cases, but it did not prevent prejudice when the primary harm results from failure to sever antagonistic defenses, and the State did not prove the error harmless on appeal. The case was reversed and remanded for a new trial. [(Rule 105); Ariz. R. Crim. P. 13.3(b).]

3. *R.S. v. Thompson, in and for County of Maricopa*, 247 Ariz. 575 (App. 2019)—A defendant charged with second-degree murder had no due process right to an *in camera* review of the victim’s mental health records. Where the defendant’s procedural rule-based right to documentary disclosure conflicts with the statutory physician-patient privilege, the privilege prevails. Aside from *Brady* disclosures (where the information is in the State’s possession), the privilege yields here only where the defendant demonstrates (1) a substantial probability that the protected records contain information that is trustworthy and critical to an element of the charge or defense, or (2) that their unavailability would result in a fundamentally unfair trial. [Rule 501.]
4. *State v. Giannotta*, — P.3d —, 2019 WL 7177081 (Ariz. App. Dec. 26, 2019)—Jointly constructed records—for example, a full serial number for a rifle—can qualify under the recorded-recollection exception to the hearsay rule if each person in the chain testifies to performing his or her role accurately. A law enforcement officer’s report that recorded a serial number of a rifle that was read over the phone by a victim of theft was admissible once each testified to appropriate foundation of having reported and recorded, respectively, the number accurately. [Rule 803(5).]
5. *State v. Griffith*, 247 Ariz. 361 (App. 2019)—In Brandon Griffith’s trial for trafficking in property, the State secured the admission of Facebook messages and search history at trial under Rules 803(6) and 902(11). The Court of Appeals held that the documents were not business records under Rule 803(6) because the State had not laid the proper foundation under Rule 803(6)(A)-(C). Although a detective testified that he obtained the

documents with a search warrant, which he executed through a “law enforcement portal” on Facebook, nobody testified that the records were made “by—or from information transmitted by—someone with knowledge,” that they were “kept in the course of a regularly conducted activity of the business,” or that “making the record was a regular practice of that activity.” *See* Ariz. R. Evid. 803(6)(A)-(C). In addition, the Court of Appeals noted that the State was required to provide “some indicia of authorship” by Griffith to make the evidence relevant, and a Facebook records custodian could not provide such indicia. Nevertheless, the Court of Appeals upheld admission of the evidence under Ariz. R. Evid. 801(d)(2) (an opposing party’s statement) because the record contained some evidence from which a reasonable jury could conclude that Griffith authored the documents. *See* Ariz. R. Evid. 901(a) (permitting authentication as long as there is “evidence sufficient to support a finding that the item is what the proponent claims it is”). The Facebook account bore Griffith’s name; the officer accessed the documents through a specific law enforcement portal; and the Facebook documents and search histories were consistent with Griffith’s statements to the police. Therefore, the trial court did not abuse its discretion in admitting the Facebook message and photograph; nor did it abuse its discretion in admitting the search history. [**Rules 801(d)(2), 803(6), 901(a), 902(11).**]

6. *State v. Gentry*, 247 Ariz. 381 (App. 2019)—The trial court did not abuse its discretion in concluding other act evidence was relevant and offered for a proper purpose under Rule 404(b) and in suppressing a particularly inflammatory detail from the other act evidence because exclusion did not impact its “probative essence.” *See State v. Hughes*, 189 Ariz. 62 (1997) (citing *State v. Salazar*, 181 Ariz. 87 (App. 1984)). Defendant argued the trial court erred when it precluded certain other act evidence. Defendant shot the victim while both were in Defendant’s home. The victim was the boyfriend of Defendant’s stepdaughter and they shared a child. At trial, the Defendant moved *in limine* to admit evidence of the victim’s other acts of violence before the shooting about which Defendant had knowledge. One of the acts involved the victim pushing his girlfriend (Defendant’s stepdaughter) to the ground while she was pregnant, causing her to go into early labor. After an evidentiary hearing, the trial court allowed Defendant to present the other act evidence but precluded any mention of pregnancy or early labor. The trial court found the pregnancy and early labor detail had very little probative value as to whether Defendant felt the need to use deadly physical force and raised a greater possibility the jury would be misled by focusing on the unborn baby as opposed to the Defendant’s state of mind. [**Rule 403; 404(b).**]
7. *State v. Havatone*, 246 Ariz. 573 (App. 2019)—This is likely the conclusion of a multijurisdictional DUI case that had previously gone to the Arizona Supreme Court in 2017—in 2012, the defendant caused a collision near Kingman, but was airlifted to Nevada for medical care where a blood sample was taken from him without a warrant while he was unconscious. In this iteration, Arizona Court of Appeals affirmed the superior court’s denial of the defendant’s motion to suppress. In *Havatone*, 241 Ariz. 506 (2017), the Arizona Supreme Court had held the “unconscious clause” of Arizona’s “implied consent” statute unconstitutional in view of the Fourth Amendment and the U.S. Supreme Court decision in *McNeely*, 133 S.Ct. 1552 (2013). The Arizona Supreme Court

remanded the case to the superior court, however, to determine if Nevada law applied to the blood draw performed in Nevada and, if Nevada law applied, whether the good-faith exception to the exclusionary rule applied to the police conduct at issue. The superior court, after briefing, answered both questions in the affirmative, and the Arizona Court of Appeals in this decision affirmed. As a matter of first impression where the Arizona DPS officer had only phoned in a request through dispatch for a Nevada blood draw, Nevada law applied. The good-faith exception to the exclusionary rule also applied, the Court of Appeals agreed, because at that time under Nevada law, there was no police misconduct in the case so that the massive deterrent of suppression was required. The Arizona Court of Appeals used an exclusionary-rule-analysis approach, rather than a forum-based, civil choice-of-law approach (also known as the interest analysis), to determine that Nevada law applied to the draw. [U.S. Const. Amend. IV.]

8. *State v. Hernandez*, 246 Ariz. 543 (App. 2019)—A trial court in this unlawful-flight-from-law-enforcement case did not err by allowing a pretrial identification to be presented to the jury. Though the law enforcement officer was only shown a photograph of one individual by marshals—in a procedure assumed by the panel to be inherently suggestive—the pretrial identification was nonetheless sufficiently reliable to be received in evidence. But the trial court did err by failing to give a *Willits*, 96 Ariz. 184 (1964), instruction based on law enforcement returning a vehicle to its rightful owner without first obtaining fingerprint and DNA evidence. A divided panel of the Court of Appeals held that the lost opportunity at evidence that had the potential to exonerate the defendant required a *Willits* instruction, particularly where, at trial, the defendant had admitted a photo of the car’s window and door frame showing several visible fingerprints. [Rule 801(d)(1)(C); *Willits* instructions on spoliation.]
9. *State v. Ibeabuchi*, — P.3d —, 2020 WL 890987 (Ariz. App. Feb. 25, 2020)—Division One affirmed the superior court’s appointment of counsel for a competent Defendant who lacked the mental capacity to conduct a trial himself. Reasonable evidence supported the superior court’s ruling regarding this “gray-area defendant.” Such persons are competent to stand trial in that they can assist their attorney with a reasonable degree of rational understanding, but they lack the mental capacity to minimally participate in the process as an advocate. When a person qualifies as a gray-area defendant, the superior court may, within its discretion, deny them the right of self-representation. Defendant failed to respond appropriately to the Court’s questions, made statements at odds with the record, spent one year filing repeated objections to the withdrawal of a prior attorney, did not understand the applicable law, and failed to comply with Court orders, including those that he be transported to his own hearings. By denying Defendant’s motion, the Court ensured that he received a fair probation violation proceeding and helped to maintain the proceeding’s integrity. [U.S. Const. Amend. VI, XIV; Ariz. Const. art. 2, sec. 24.]
10. *State v. Fuentes*, 247 Ariz. 516 (App. 2019)—A defendant had a legitimate expectation of privacy in a mobile home owned by his son over which the defendant exercised significant control, such that the fruits of a warrantless search couched as a ‘protective sweep’ should have been suppressed. As the error was not harmless as to defendant’s first-degree murder sentence, the case was remanded for resentencing. It was not an

abuse of discretion, however, to exclude testimony of a crime scene technician who was not qualified to testify that he had seen a shoeprint that might have been consistent with victim's shoes. The technician had no expertise in shoe-tread identification evidence, and the opinion that shoe treads were similar came from a detective at crime scene and not from the technician's own perceptions. [U.S. Const. Amend. IV.]

11. *State v. Mixton*, 247 Ariz. 212 (App. 2019) (rev. granted 11/19/2019)—In this criminal case involving sexual exploitation of a minor via possession and distribution of child pornography, the Court of Appeals affirmed the defendant's conviction and sentences. The Defendant challenged his conviction under Fourth Amendment and Arizona State Constitutional grounds, asserting he had a reasonable expectation of privacy in his subscriber information provided to ISPs and obtained by law enforcement without a warrant. The court held the defendant lacked a reasonable expectation of privacy to information given to an ISP under the Fourth Amendment based on the federal third-party doctrine: that there is no reasonable expectation of privacy in information a person reveals to a third party. However, the Court declined to apply the third-party doctrine to expectation-of-privacy claims under the Arizona Constitution, and found that the information obtained during the investigation violated Mixton's rights under Article II, § 8 of the Arizona Constitution. However, the Court concluded the evidence still admissible under the good-faith exception to the exclusionary rule. [U.S. Const. Amend. IV.]
12. *Navajo Nation v. Dep't of Child Safety*, 246 Ariz. 463 (App. 2019)—The Court of Appeals vacated the juvenile court's permanent guardianship determination and remanded the case for a hearing with qualified expert-witness testimony required under the Indian Child Welfare Act (ICWA). At contested guardianship proceedings, the Navajo Nation indicated it was unwilling to provide the expert testimony required under ICWA and put the Mother on notice she would have to find her own expert. The Mother's expert testified, but the Court found the witness was not a qualified expert. The Court nevertheless entered the guardianship. The appellate court found that ICWA requires the court hear testimony from a *qualified* expert witness prior to ordering a permanent guardianship (emphasis added). Pursuant to guidelines set forth by the Department of the Interior Bureau of Indian Affairs, three types of witnesses likely satisfy ICWA's requirement: (1) a member of the child's tribe with knowledge of customs and practices, (2) a person with substantial experience in providing child and family services to Indians and extensive knowledge of social and childrearing practices within the child's tribe, and (3) a professional person with substantial education and experience in a specialty area. In this case, the Mother's proposed expert witness was not a member of any Indian tribe, had never testified nor had been recognized as an expert for the Navajo Nation, had not met with case workers or relative placement, and had only minimally reviewed the record prior to his testimony. The court further determined that the existence of good cause to deviate from ICWA's placement preferences under 25 U.S.C. §1915(b) does not extinguish the expert testimony requirement. [Qualified expert-witness standard under Indian Child Welfare Act.]
13. *State v. Rose*, 246 Ariz. 480 (App. 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).]**

14. *State v. Lietzau*, 246 Ariz. 380 (App. 2019) (*rev. granted* 11/19/2019)—The Court of Appeals held that the trial court abused its discretion in granting Lietzau's motion to suppress and observed that the rules of evidence do not apply at suppression hearings. Rule 104(a). "Under the totality of the circumstances, including Lietzau's significantly diminished privacy rights as a [felony] probationer, his acceptance of search conditions when he agreed to probation which arguably included his cell phone, the probation department's well-grounded suspicion that Lietzau might be involved in a serious offense with an adolescent child, and the well-known use of cell phones as an aid in committing sexual offenses against children, it cannot be said the officer's search of Lietzau's cell phone was unreasonable. *See Adair*, 241 Ariz. 58, ¶ 23." *Id.* ¶ 19. **[Rule 104(a).]**
15. *Sandra R. v. DCS*, 246 Ariz. 180 (App. 2019), *vacated in part on other grounds by Sandra R. v. DCS*, 2020 WL 1161588 (Ariz. March 11, 2020)—The court affirmed the juvenile court's severance order and held, among other things: (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); and (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. **[Rule 803(18).]**
16. *State v. Duarte*, 2018 WL 6241483 (App. 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.]**
17. *Cabanas v. State of Arizona*, 246 Ariz. 12 (App. 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.]**

18. *Spooner v. City of Phoenix*, 246 Ariz. 119 (App. 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.]**
19. *State v. Trujillo*, 245 Ariz. 414 (App. 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).]**
20. *Rasor v. Northwest Hospital LLC*, 244 Ariz. 423 (App. 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.]**

21. *Bussberg v. Walker*, 244 Ariz. 431 (App. 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.]**

22. *State v. Todd*, 244 Ariz. 374 (App. 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.]**
23. *Sate v. Pina-Baraja*, 244 Ariz. 106 (App. 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.]**
24. *Engstrom v. McCarthy*, 243 Ariz. 469 (App. 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[d] the finding, and remand[ed] the issue back to the court.” *Id.* ¶ 15. Finally, the court affirmed the admission of Dr. Gaughan’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.]**