



## UNRELIABLE SCIENTIFIC EVIDENCE

# Latent Fingerprints:

# Fighting Unreliable Scientific Evidence

*Meghan White, Defender Attorney*

The disconnect between the public perception and scientific reality of the reliability of latent fingerprints is incredibly vast. So many pervasive and severe issues abound with latent fingerprints that they arguably do not pass our standards for scientific evidence. The defense community thus must be prepared to educate both the judge and jury about latent prints in order to minimize the impact of or even exclude this evidence.

## The Basics of Latent Fingerprint Examination

The job of a friction ridge examiner is to compare and attempt to ‘match’ latent prints with rolled or inked prints.<sup>1</sup> This matching or identification is done through a process called ACE-V (Analysis, Comparison, Evaluation, and Verification).<sup>2</sup> In the analysis stage, the friction ridge examiner tries to determine if the latent print is of high enough quality (meaning clarity) and if the quantity of information captured by the latent print is sufficient to perform a comparison.<sup>3</sup>

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If the examiner determines the latent print is of sufficient quality and quantity, the examiner will proceed to the comparison stage.<sup>4</sup> During this stage, the examiner compares the latent print to the known print to look for similarities and differences between the two. It is generally accepted within the field that, if the examiner finds *even one* dissimilarity between the inked print and the latent print that they cannot explain, “the prints cannot be attributed to the same individual.”<sup>5</sup>

After the first examiner makes an evaluation, this evaluation is verified by a second examiner.<sup>6</sup> The second examiner is often informed of the conclusion the first examiner reached before the second examiner makes his own evaluation.<sup>7</sup>

Fingerprint experts testify to whether they have made an “individualization” which is the claim that there are sufficient features in agreement between a latent and inked print for the examiner to determine that the prints originated from the same source.

According to SWGFAST, an “individualization of an impression to one source is the decision that the likelihood the impression was made by another (different source) is so remote that it is considered an impossibility.”<sup>8</sup> Under these guide-

lines, there are only three opinions the examiner is allowed to give: an individualization was made; the match was excluded; or the comparison was inconclusive.<sup>9</sup>

### Substandard Scientific Evidence

Under both the strict *Daubert*<sup>10</sup> standard for scientific evidence and the more deferential *Frye*<sup>11</sup> standard, latent print evidence can be called into question. In *Frye*, the District of Columbia’s Court of Appeals stated that scientific evidence would be inadmissible until the scientific principle behind the evidence had gained “general acceptance” in the relevant scientific field.<sup>12</sup> The only scientific evidence restricted under *Frye* would be evidence not generally accepted by the scientific community, either because it was seen as pseudoscience or because it was novel scientific evidence. While latent print evidence is generally accepted within the legal community, that acceptance is waning.<sup>13</sup> To survive even under *Frye*, more research is needed as to the reliability of latent print examinations and efforts must be made to standardize the process beyond that required by ACE-V.<sup>14</sup>

Latent print evidence does not survive the *Daubert* criteria for the admissibility of scientific or technical evidence. Latent print examination falls flat in testing, peer review and publication, applicable



scientific standards, and known error rate. To date, very little testing of latent print examination has occurred. The first large scale study of friction ridge examiners’ determinations did not occur until 2011; it acknowledged the need for further research before any conclusions could be drawn.<sup>15</sup> Latent print examinations also have not been adequately peer reviewed or published, though an argument can be made that this lack is similar to that in *Kumho*, as the friction ridge examiner field is not one likely to generate peer review or publication.<sup>16</sup>

There are no real standards for latent print examination. ACE-V, the one standard process of the profession, is not specific enough to qualify as a validated method of analysis.<sup>17</sup> ACE-V does not guard against bias because there is no separation between the examiner and the accuser. The ACE-V steps are too broad to ensure repeatability;

there is no standard process beyond the order of steps ACE-V lists for friction ridge examiners.<sup>18</sup> There is also no standard for point comparisons. Many other countries have a standard for the required minimum points of comparison [before an analyst can claim to have made] an individualization, ranging from 16 points in Cyprus and Italy to 10 in Hungary.<sup>19</sup> (In the United States, an analyst could arguably claim they made an individualization) with only one point of comparison. The analyst's opinion is in fact entirely subjective. Both the quality—meaning clarity—and quantity of detail necessary to make an individualization varies based on the training, experience, and abilities of the friction ridge examiner. There is no real standard that the examiners are held to. For these reasons, two friction ridge examiners could, looking at the exact same inked and latent prints, reach and defend different results.

One of the first things that should be examined when looking at any scientific determination is how reliable the process is. Unfortunately, there have been no studies on the actual error rate of latent print examinations. Despite this lack of actual information, the FBI has long claimed that the process is “both infallible and feasible.”<sup>20</sup> Essentially, this is a claim, absent evidence, of a

zero-error rate. Since this claim was made, multiple cases of an erroneous identification have come to light contradicting it.<sup>21</sup>

### The Response of the Judiciary and the Scientific Community

The reliability issues of latent print examinations and testimony have not been overlooked. Testimony regarding latent prints has been questioned and occasionally limited in courtrooms. Judge Pollak of the Federal District Court for the Eastern District of Pennsylvania took—at least initially—a very strong stance limiting testimony from friction ridge examiners.<sup>22</sup> Judge Pollak initially ruled that the parties could not “present testimony expressing an opinion of an expert witness that a particular latent print matches, or does not match, the rolled print of a particular person and hence is, or is not, the fingerprint of that person.”<sup>23</sup> The friction ridge examiner would still

be permitted to point out the similarities and differences between a latent and known print from which the jurors could make their own evaluation.<sup>24</sup>

Judge Pollak reconsidered this ruling soon after at the request of the government. The question the Judge examined on reconsideration was whether, in the absence of tests demonstrating reliability, the court should “conclude that the ACE-V fingerprint identification, as practiced by certified FBI friction ridge examiners, has too great a likelihood of producing erroneous results to be admissible as evidence in a courtroom?”<sup>25</sup> During this second trial, the government's expert stated that he knew of no erroneous identifications attributable to FBI examiners.<sup>26</sup>

Thus, the focus in this case was shifted from the science behind latent fingerprint examination to the FBI's friction ridge examiners and training.



Judge Pollak reversed his decision finding that the “uniformity and rigor” of FBI training requirements provided substantial assurance regarding the reliability of the certified FBI examiners.<sup>27</sup>

The scientific community has funneled resources into attempting to improve latent print examinations by creating real standards for the profession. The scientific community has also shown concern about the reliability of ACE-V and latent print examination generally. In 2012, the Expert Working Group on Human Factors in Latent Print Analysis, a subset of the National Institute of Standards and Technology, released an extensive report on latent print examinations and how to improve them.<sup>28</sup> The committee stated that “there is a critical need for a focused program of research into the interpretive process that is at the heart of ACE-V.”<sup>29</sup> This expert committee specifically refers to the ACE-V process as an interpretive one, not a scientific one.<sup>30</sup> The committee also recommends “protect[ing] examiners from exposure to domain-irrelevant information” — meaning introducing separation between the laboratory and the prosecution.<sup>31</sup> The committee goes on to suggest changing the definition of individualization to remove the idea that a potential match would “exclud[e] all oth-

ers in the world.”<sup>32</sup> The committee stressed that “an expert should be familiar with the literature related to error rates” and should not “state that errors are inherently impossible or that a method has a zero error rate.”<sup>33</sup> The actual expertise of the friction ridge examiners also came under fire from the committee with the recommendation that “[t]he latent print community should develop and implement a comprehensive testing program that includes competency testing, certification testing, and proficiency testing.”<sup>34</sup>

### What Can Defense Counsel Do?

Knowing that latent print evidence is not infallible, the first line of defense is information. Defense counsel can and should seek as much information as possible during discovery to enable an effective cross-examination of the friction ridge examiner. During discovery, the attorney needs to find out what opinion the friction ridge examiner will be giving and how he arrived at this opinion. The attorney must obtain a copy of the friction ridge examiner’s laboratory report. This is pivotal because the attorney needs to know if the process the expert used to arrive at his conclusion is documented. If documented, the expert can be held to the documented process and his credibility can be called into question whenever he makes reference to something that

does not appear in their report.

If the laboratory report does not document the examiner’s process and instead merely documents the conclusion, counsel can attempt to use this report in a *Daubert* hearing to exclude the expert’s testimony. If unsuccessful, this conclusory determination, lacking any recorded information to reinforce it, can be presented to the jury as an indicator of: the subjective nature of the expert’s decision; the lack of repeatability; the gap between the latent print examination and the common understanding of scientific work; and the lack of care and attention to detail of the examiner.

The attorney should also seek information on the expert’s certification, education, and a copy of the expert’s resume.

For sample cross examination on some of these issues, please follow this [link](#).



## (Endnotes)

<sup>1</sup>Scientific Working Group on Friction Ridge, Analysis, Study and Technology (SWGFAST), Document #8, Standard for the Documentation, Analysis, Comparison, Evaluation, and Verification (ACE-V), Ver. 2.0 (2009), available at [http://www.swgfast.org/documents/documentation/121124\\_Standard-Documentation-ACE-V\\_2.0.pdf](http://www.swgfast.org/documents/documentation/121124_Standard-Documentation-ACE-V_2.0.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See John I. Thornton, *The One-Dissimilarity Doctrine in Fingerprint Identification*, 306 Int'l Crim. Police Rev. 89, at 89 (Jan. 1977).

<sup>6</sup> *Id.*

<sup>7</sup> See Lyn Haber & Ralph Norman Haber, *Error Rates for Human Fingerprint Examiners*, in *Automatic Fingerprint Recognition Systems* 339, 349 (Nalini K. Ratha & Ruud M. Bolle eds., 2003).

<sup>8</sup> SWGFAST, Document #103, Individualization/Identification Position Statement (Latent/Tenprint) (2012), available at <http://www.swgfast.org/Comments-Positions/130106-Individualization-ID-Position-Statement.doc>.

<sup>9</sup> SWGFAST, Standards for Examining Friction Ridge Impressions and Resulting Conclusions (Latent/Tenprint) (2011), available at [http://www.swgfast.org/documents/examinations-conclusions/111026\\_Examination-Conclusions\\_1.0.pdf](http://www.swgfast.org/documents/examinations-conclusions/111026_Examination-Conclusions_1.0.pdf).

<sup>10</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993).

<sup>11</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

<sup>12</sup> *Id.* at 1013-14.

<sup>13</sup> See, e.g., Bradford T. Ulery, R. Ustin Hicklin, JoAnn Buscaglia, & Maria Roberts, *Accuracy and Reliability of Forensic Latent Fingerprint Decisions*, 108 PNAS 19 (2011).

<sup>14</sup> *Id.*; see also, National Institute of Standards and Technology (NIST), *Latent Print Examination and Human Factors: Improving the Practice through a Systems Approach* (2012).

<sup>15</sup> See, e.g., Bradford T. Ulery et al. *Accuracy and Reliability of Forensic Latent Fingerprint Decisions*, 108 PNAS 19 (2011).

<sup>16</sup> *Kumho Tire Co. Ltd. V. Carmichael*, 526 U.S. 137, 149-51, 119 S.Ct. 1167, 1175-76 (1999) (holding that the *Daubert* factors should be considered where relevant but not all factors must be met in every case).

<sup>17</sup> See, e.g., Kelly Pyrek, *Forensic Science under Siege: the Challenges of Forensic Laboratories and the Medico-Legal Investigation System*, 273-74 (2007).

<sup>18</sup> *Id.*

<sup>19</sup> Terrence Kiely, *Forensic Evidence: Science and the Criminal Law*, 379 n.5 (2nd ed., 2006).

<sup>20</sup> See, e.g., Federal Bureau of Investigation, *The Science of Fingerprints: Classification and Uses*, at IV (1985); see also *United States v. Llera-Plaza (Llera Plaza I)*, 179 F. Supp. 2d 492, 512 (E.D. Pa 2002).

<sup>21</sup> For example, in the Mayfield case, four examiners verified a 15-point “100% identification” between a latent print from the Madrid bombing and an attorney from Oregon; as the attorney had not been in Madrid, the FBI issued an apology. Sarah Kershaw & Eric Lichtblau, *Bomb Case Against Oregon Lawyer Rejected*, N.Y. Times, May 25, 2004, available at <http://www.nytimes.com/2004/05/25/national/25oreg.html>.

<sup>22</sup> See, *Llera-Plaza I*, 179 F. Supp. 2d 492 (E.D. Pa. 2002) (withdrawn by the publisher); *vacated and superseded by United States v. Llera Plaza (Llera-Plaza II)*, 179 F. Supp. 2d 492 (E.D. Pa. 2002).

<sup>23</sup> *Llera-Plaza I*, 179 F. Supp. 2d at 518.

<sup>24</sup> *Id.*

<sup>25</sup> *Llera-Plaza II*, 179 F. Supp. 2d at 572.<sup>26</sup> *Ibid.*

<sup>26</sup> *Id.* at 566.

<sup>27</sup> *Id.*

<sup>28</sup> National Institute of Standards and Technology (NIST), *Latent Print Examination and Human Factors: Improving the Practice through a Systems Approach* (2012).<sup>29</sup> *Id.*

<sup>29</sup> *Id.* at 10.6.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 3.3.

<sup>32</sup> *Id.* at 3.7.

<sup>33</sup> *Id.* at 6.3.

<sup>34</sup> *Id.* at 9.5.



## WRITERS CORNER

## LawProse Lesson #245: Whatever doesn't help positively hurts

*By Bryan A. Garner*

Often you'll find yourself trying to decide whether to include something in expository prose—an extra argument, another illustration, a brief aside, an interesting tangent, etc. The sage wisdom of ancient rhetoricians is to omit everything that doesn't have some demonstrable benefit.

You can see this principle as a form of utilitarianism: include only what is most persuasive or most informative to the greatest number of your readers. You mar your piece by including any sentence or paragraph that doesn't meet this standard.

Why? Because everything on the page draws on an all-too-finite resource: the reader's attention. So beware.

Further reading:

Antonin Scalia & Bryan A. Garner, *Making Your Case* 22–23 (2008).

Garner's *Dictionary of Legal Usage* 925 (3d ed. 2011) (s.v. verbosity).



## RISK ASSESSMENTS

## EDITOR'S NOTE

*The increased use of risk assessments as part of a movement toward evidence-based practice is the subject of significant debate. The National Legal Aid and Defender Association provides a defense overview at this link: [http://www.nlada100years.org/sites/default/files/NLADA\\_Risk\\_Needs\\_Assessments\\_1.pdf](http://www.nlada100years.org/sites/default/files/NLADA_Risk_Needs_Assessments_1.pdf). The following article focuses on specific instruments currently being used in Maricopa County.*

## The Role of Risk Assessments in Maricopa County

*By Ryan Cotter, Ph.D, Director of Justice Systems Planning and Information*

*By Marisol Cortez, Research Analyst in Justice Systems Planning and Information*

*By Briana Frenzel, Research Analyst in Justice Systems Planning and Information*

### RISK ASSESSMENTS: A HISTORICAL BACKGROUND

In describing the importance of risk assessments in contemporary penology, it is useful to trace the underlying theoretical paradigms and shifts occurring between the modern and contemporary eras.<sup>1</sup>

Modern criminology began from the premise that crime was a deviation from normal civilized conduct and was explicable in terms of individual pathology or else faulty socialization.<sup>2</sup> Thus, rehabilitation represented the logical method of reformation. The sciences and disciplinary institutions suggested that individuals who chose to partake in immoral behavior could potentially be tamed.<sup>3</sup> Thus, the modern penal philosophy is acknowledged as predominately concerned with offender responsibility, fault, accountability, moral sensibility, clinical diagnosis, intervention and offender treatment.<sup>4</sup> The mod-

ern discourse, objectives, and techniques all focus on the individual in order to assign guilt and develop an appropriate rehabilitative strategy to reform the offender.

The tenets of this modern paradigm came under assault in the mid- 20th Century. ‘With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.’<sup>5</sup> Subsequently, during this period, support for probability over determinism grew alongside the emerging belief that scientific correctionalism had failed.<sup>6</sup> Under the perceived failure of scientific correctionalism a new rationale focusing on risk identification, monitoring and management strategies displaced rehabilitation.<sup>7</sup> Consequently, the criminal justice system became preoccupied with developing more cost-effective forms of controlling offenders

and the potential capabilities of new technologies to classify risk.<sup>8</sup> This management system emphasized the importance of classifying, sorting, and positively managing targeted populations efficiently.<sup>9</sup> The focus on individuals was replaced by a focus on aggregate populations, allowing for more manageable system goals. In addition, the individual clinical diagnosis and treatment strategy was replaced with an actuarial language focusing on entire populations according to statistically predicted risk levels.<sup>10</sup> Thus, in the 1970s, actuarial risk assessments emerged and performed a vital role in criminal justice.

Several distinct periods can be identified in the development of actuarial risk assessments.<sup>11</sup> *First generation risk assessments*, prior to the 1970s, were based on the professional judgment of correctional and clinical professionals (i.e.,

non-actuarial). *Second generation risk assessments*, mid-1970s, began to quantify historical factors associated with reoffending and provide overall risk scores for individuals (e.g., history of criminal activity, history of drug use, etc.). The principal weakness of second generation risk assessments was the sole focus on historical factors without consideration of dynamic factors (i.e., factors that can be changed). *Third generation risk assessments*, mid-1980s, included both static and dynamic risk factors.

Thus, while criminal history remained important, these risk assessments included information on dynamic factors such as employment, family relations, etc. Third generation assessments were sensitive to changes in an offender's circumstances and provided correctional staff with information on criminogenic needs that could be targeted with treatment.<sup>12</sup>

Contemporary penology is now most accurately understood as a balance of actuarial offender management and rehabilitation discourses. In this framework, risk assessments have a pivotal role to play in ensuring public safety and the rehabilitation of offenders. Specifically, validated risk assessments can fairly accurately predict the level of risk offenders present to public safety.

Such risk predictions may be used to guide decisions on whether to detain or release offenders. In addition, under the rubric of the risk-needs-responsivity (RNR) model, evidence based practices now indicate intensive treatment should target moderate-to-high risk offenders. This prescription requires the capacity to identify each offender's level of risk.<sup>13</sup> Some research findings indicate that targeting *low risk* offenders with intensive treatment services may actually increase their recidivism rate.<sup>14</sup>

The risk-need-responsivity (RNR) model relies on the capacity of actuarial assessments to classify offender risk and identify dynamic criminogenic needs for treatment. The core principles of the RNR model can be summarized as follows:<sup>15</sup>

***Risk Principle:*** Match the level of service to the offender's risk to re-offend.

***Need Principle:*** Assess criminogenic needs and target them in treatment.

***Responsivity principle:*** Maximize the offender's ability to learn from a rehabilitative intervention by providing cognitive behavioral treatment and tailoring the intervention to the learning style, motivation, abilities and strengths of the offender.

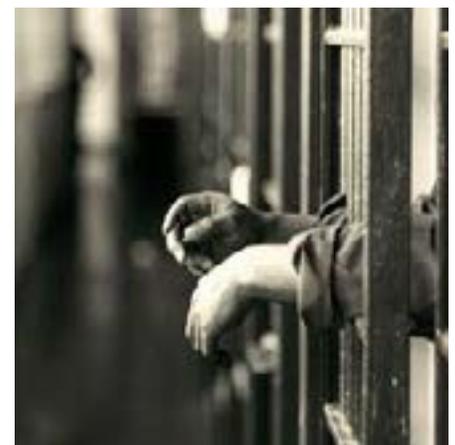
Interventions following all three RNR principles can achieve an average recidivism reduction of 17% when delivered in residential/custodial settings and 35% when delivered in community settings.<sup>16</sup>

## MARICOPA COUNTY RISK ASSESSMENTS

In Maricopa County, two risk assessments are currently utilized during the booking process: the Public Safety Assessment (PSA) and the Recidivism Risk Score (RRS).

### ***Public Safety Assessment (PSA)***

The Public Safety Assessment (PSA) is a risk assessment completed prior to the initial appearance in order to assist judicial officers with release decisions.



“The PSA-Court is made up of nine risk factors that can be obtained from administrative data (e.g., criminal history and current charge). These factors are weighted and combined to evaluate the risk that if a defendant is released before trial, he will: (1) commit a violent crime; (2) commit any new crime; or (3) fail to appear for court.”<sup>17</sup>

Being founded on administrative data, the PSA is automated, and therefore, does not require training to be calculated. An evaluation of the PSA in 2013 concluded the instrument was valid in predicting offender risk levels.<sup>18</sup> Further, the study identified an increase in the proportion of defendants who were released pending trial during those six months compared to previous years, and reports a decrease in crime by defendants who were released pending trial.<sup>19</sup>

In Maricopa County, Pretrial Services adopted the PSA in June 2015. The PSA is completed prior to the initial appearance in order to assist judicial officers in determining whether to release or detain an offender while awaiting trial.

### ***Proxy Score***

To assess the risk levels of the offenders held in County jail the Maricopa County Sheriff's Office (MCSO) introduced a Risk-to-Re-

cidivate tool in December 2011. Referred to as the “Proxy” or “RRS score”, this tool is easily administered and completed by MCSO Jail Classification Specialists once it is determined an individual is staying in jail after their initial court appearance. MCSO classification specialists collect information about current age, age of first arrest, and number of prior arrests to calculate the Proxy Score.

The Proxy Score can range from 0-6 with differentiation between low risk (0-2), moderate risk (3-4) and high risk (5-6) to recidivate.

The primary reason for adopting the Proxy Score was to foster adherence to the RNR model. As noted, according to the risk principle the intensity of treatment should match the offender's risk level.<sup>20</sup>

Research indicates that targeting low risk offenders with treatment programming may actually increase recidivism, while targeting moderate-to-high risk offenders with treatment programming can reduce recidivism.<sup>21</sup> Following the risk principle, Maricopa County strives to ensure that only offenders who pose the greatest risk to public safety remain incarcerated and receive targeted intensive criminogenic treatment interventions.



A validation study of the Proxy was conducted in 2014. Validation results indicate Proxy Scores are predictive of likelihood to be rebooked into jail. Exemplifying this, the study indicates 19% of individuals with a proxy score of 0 were rebooked within 12 months of their release while 75% of individuals with proxy scores of 6 were rebooked within 12 months of their release.

## **MARICOPA COUNTY NEEDS ASSESSMENTS**

### ***Offender Screening Tool (OST) and Field Reassessment Offender Screening Tool (FROST)***

The OST and FROST are two assessment instruments used by Maricopa County Adult Probation Department (APD) to assess both *risk* of reoffending and treatment/service *needs* of probationers.

Developed in 1996 and implemented in 1998,<sup>22</sup> the OST consists of 44 questions that examine education, substance use, vocation/financial aspects related to the offender, family and social relationships, residence/neighborhood, mental health, criminal behavior, physical health/medical and attitude. The OST is completed at the pre-sentencing stage or within 30 days of sentencing. The FROST, a reassessment founded on the OST, was implemented in 2005. The FROST is administered every 180 days, which allows probation officers the opportunity to address risk and/or needs that change over time. Probation officers receive training from Master trainers on the administration of the OST and FROST.

## **CONCLUSION**

As noted, contemporary penology is now most accurately understood as a balance of actuarial offender management and rehabilitation discourses.

In this context, risk assessments perform a pivotal role in the effective operation of the criminal justice system. Validated risk assessments can more accurately predict offender risk levels and, thereby, provide guidance to judicial officers in decisions to release or detain defendants. In Maricopa County, the PSA performs this function. Further, evidence based practices indicate that treatment interventions should focus on the criminogenic needs of moderate-to-high risk offenders. Providing treatment to low risk offenders may actually be criminogenic. In this framework, validated risk assessments are required to identify individual offender's risk level in order to prescribe appropriate treatment programming. In Maricopa County, the Proxy, OST, and FROST are used to identify offender risk levels and, for the OST and FROST, criminogenic needs for offenders on probation.



## (Endnotes)

<sup>1</sup> Modern criminology is a body of criminological thought between the 18<sup>th</sup> and early 20<sup>th</sup> century. Contemporary criminology describes criminological thought from the late 20<sup>th</sup> century to date.

<sup>2</sup> Garland, D. (1996) '*The limits of the sovereign state*', British Journal of Criminology, 36(4), 445–71, at 450.

<sup>3</sup> Rose, N. (1999) *Powers of Freedom: Reframing Political Thought*, Cambridge: Cambridge University Press, at 103.

<sup>4</sup> Feeley, M. and Simon, J. (1992) '*The new penology: notes on the emerging strategy of corrections and its implications*', Criminology, 30(4), 449–74, at 451-452.

<sup>5</sup> Martinson, R. (1974) '*What works? Questions and answers about prison reform*', The Public Interest, 35, 22–54, at 25.

<sup>6</sup> O'Malley, P. (2002) '*Risk societies and the government of crime*', in: J. Pratt and M. Brown (Eds.), *Dangerous Offenders: Punishment and Social Order*, London: Routledge, at 25.

<sup>7</sup> *Id.*, at 27.

<sup>8</sup> Feeley, M. and Simon, J. (1992) '*The new penology: notes on the emerging strategy of corrections and its implications*', Criminology, 30(4), 449–74, at 457.

<sup>9</sup> *Id.*, at 456.

<sup>10</sup> *Id.*, at 452.

<sup>11</sup> Bonta, J., and Andrews, D.A. (2007) '*Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation*'.

<sup>12</sup> *Id.*

<sup>13</sup> Bonta, J., Rooney, J. and Wallace-Capretta, S. (2000) '*A quasi-experimental evaluation of an intensive rehabilitation supervision program*', Criminal Justice and Behaviour, 29(3), 312–29.

<sup>14</sup> Bonta, J., Rooney, J. and Wallace-Capretta, S. (2000) '*A quasi-experimental evaluation of an intensive rehabilitation supervision program*', Criminal Justice and Behaviour, 29(3), 312–29.

<sup>15</sup> Laura and John Arnold Foundation. (2014) '*Results from the First Six Months of the Public Safety Assessment Court in Kentucky*'.

<sup>16</sup> Bonta, J., and Andrews, D.A. (2007) '*Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation*'.

<sup>17</sup> Laura and John Arnold Foundation. (2014) '*Results from the First Six Months of the Public Safety Assessment Court in Kentucky*', at 2.

<sup>18</sup> Bonta, J., and Andrews, D.A. (2007) '*Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation*'.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Ferguson, J. L. (2002) '*Putting the "What Works" Research into Practice: An organizational perspective*', Criminal Justice and Behavior, 29(4), 472-492.

<sup>22</sup> *Id.*

# The 2016 Arizona StandDown

By Kelly Parker, Public Defender Trainer



Thank you for making a difference in the lives of 1850 Veterans. The final numbers are in: This year, on January 28, 29, and 30, at the Arizona Veteran's Memorial Coliseum, 1850 Veterans attended the 2016 Stand Down with 985 Veterans receiving legal services from multiple courts. We handled more than 300 cases in Superior Court alone.

The time you spent preparing cases for court on Thursday and Friday or in the courtroom on Friday and Saturday was a great benefit to many Veterans. In addition, the Office of Public Advocate assisted many vets with Restoration of Rights, initiating more than 40 petitions and holding a follow-up restoration of rights workshop for Veterans on March 1, 2016.

With the help of over 800 guest guide volunteers, for the first time ever, the courts served over 1,000 veterans; MVD served 750-800; 261 vision consults and nearly 600 reading glasses were distributed; 450 veterans were served by the Veterans Benefits Administration, with over 200 claims filed; child care was provided for 30 children over the course of the first two days; and 325 veterans received haircuts from volunteer stylists. From the Arizona StandDown Facebook page: "A large component of the Maricopa County Stand-Down is the courts."

Thank you again to the following attorney and non-attorney volunteers who signed up through our offices to help handle hundreds of Superior Court and Justice Court matters – we could not have done it without each and every one of you.

Adam Schwartz  
Adrienne Good  
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Ashley Blum  
Ashley Meyer  
Barbara Rees  
Brett Turley  
Brittany Sifontes  
Carmelita White  
Carol Garcia-Valenzuela  
Carrie Gallagher  
Casey Arellano  
Cathryn Whalen  
Chad Garner  
Chelli Wallace  
Cheri Smith  
Christine Jones  
Cory Engle  
Dalijipal Parmar  
Dan Lowrance  
David Hill  
David Hintze  
David Jones  
Dena Rowland  
Denise Dees  
Devra Ellexson  
Dwayne Burns  
Edwin Molina  
Eleanor Knowles  
Emilie Lambert  
Emily Wolkowicz  
Erica Daniels  
Evita Holmes  
Fredrica Strumpf  
Genevieve Dyer  
Ginette Armstrong  
Grace Oh

Jabron Whiteside  
Jamaar Williams  
Jen Tom  
Jennifer Ceppetelli  
Jennifer Postlewaite  
Jennifer Rock  
Jennine Burns  
Jerald Schreck  
Jeremy Mussman  
Jessica Cordero  
Jesus Aguilera  
Jim Leonard  
Josephine Hallam  
Joel Brown  
John Foley  
John Yankovich  
Johnna Baker  
Jolita Bennett  
Joseph Rhoades  
Kacey Miller  
Kaitlin Perkins  
Kalla Gottry  
Kara Hyland  
Kathryn Walter  
Kathryn Krejci  
Kelsey Geist  
Kirsten Falle  
Kristi Adams  
Kush Govani  
Kyle Kinkead  
Lance Antonson  
Laura Price  
Leah Roberts  
Leah Schachar  
Lee Ann Taylor  
Lina Garcia  
Lindsey Avalos  
Lisa Bolinger  
Lucie Tabeek  
Maeve Moore  
Marita Klein  
Martin Becker  
Meghan White  
Miranda Nickelson

Mitchell Weinstein  
Natalee Segal  
Natalie Jones  
Nesha Patel  
Nicholas Kaldawi  
Nicole Hartley  
Nohemi Melchor  
Norma Martinez  
Pamela Adwell  
Pamela Campbell  
Pamela Mudryj  
Rena Glitsos  
Richard Parker  
Robert Duffy  
Ronald Schyvynck  
Sally Nyemba  
Samuel Vandergaw  
Scott Boncoskey  
Shannon Burns  
Sheena Chiang  
Sierra Taylor  
Stephanie Cravath  
Sukhbir Dhama  
Tennie Martin  
Tim Bein  
Timothy Sparling  
Vanessa Smith  
Vernon Lorenz Jr  
Wesley Peterson  
William Fischer  
Will Peterson  
Yamile Setovich

## CASE LAW SUMMARY

## Opinion Summaries, Arizona Court of Appeals, January , 2016 through April 11,2016

By Kaitlin Perkins, Defender Attorney

***State v. Neese, 1 CA-CR 2014-0705 (Jan. 7, 2016):*** For the first time in Arizona, Division 1 examined the propriety of using a DNA profile for identification purposes to commence prosecution of an unnamed defendant. **Holding:** In consideration of the statute of limitations, a criminal prosecution commences upon the filing of a “John Doe” indictment that identifies a defendant with a unique DNA profile. The Court of Appeals limited its holding to the facts and procedural history of this particular case, and noted there may be instances where a “John Doe” indictment containing a less comprehensive recitation of genetic markers may not sufficiently describe the defendant with reasonable certainty. Neese further claimed his speedy trial rights were violated, but this argument was rejected as well.

¶3 On March 15, 2005, an indictment (Indictment) was filed charging “John Doe, I” with seven counts of burglary in the second degree, class 3 felonies; three counts of theft, class 5 felonies; one count of burglary in the first degree, a class 3 felony; three counts of theft, class 3 felonies; and one count of theft, a class 2 felony. The Indictment identified John Doe I as an “Unknown Male with Matching Deoxyribonucleic Acid . . . Profile at Genetic Locations” followed by a string of the genetic markers found at thirteen locations that collectively characterize the DNA Profile. The alleged offenses occurred between 1999 and 2004.

¶4 In May, 2011, a DNA sample was obtained from Neese that matched the DNA Profile. An amended indictment (Amended Indictment) was filed substituting the John Doe I designation and DNA Profile identification with Neese’s name as the defendant. The court issued a second warrant based on the Amended Indictment that identified Neese by his full name, date of birth, and other physical characteristics. Neese was arrested and entered a not guilty plea at his arraignment.

¶5 Neese subsequently moved to dismiss the twelve counts relating to offenses occurring before May 2004, arguing that the applicable seven-year statute of limitations had expired before the State amended the Indictment naming him as the defendant.

¶9 An indictment charging an unknown defendant must contain “any name or description by which he can be identified with reasonable certainty.” Ariz. R. Crim. P. 13.2, cmt.

¶10 Courts in other jurisdictions, however, have addressed the issue and concluded that a unique DNA profile in a “John Doe” indictment (or other prosecution-commencing event) identifies the defendant (or suspect) with “reasonable certainty” or other similar standard of particularity. (Citations omitted).

¶12 We agree with the reasoning of *Dabney, Burdick*, and similar rulings in other jurisdictions. We do so because Arizona law does not require an indictment to name a defendant; rather, if the person’s name is unknown, the indictment need only provide a description that identifies the defendant “with reasonable certainty.” Ariz. R. Crim. P. 13.2, cmt. The DNA Profile in the Indictment satisfied the “reasonable certainty” requirement.

Link to opinion: <https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/1%20CA-CR%2014-0705.pdf>

***State v. Decker*, 1 CA-CR 2014-0238 (Jan. 7, 2016):** In a first-degree murder and burglary case in which the defendant was alleged to have fired his weapon through the doorway of the victim’s residence, the Court of Appeals held that the firing of a bullet into a residence (“a projectile intruding into a protected space”) satisfies the “entry” requirement for the crime of burglary. The Court further rejected Decker’s claim regarding the trial court’s denial of Batson challenges to the State’s peremptory strikes of two potential jurors. Like Decker, these potential jurors were African American.

¶10 Although “lack of information” is generally an unpersuasive rationale for striking a prospective juror, Decker did not show that the strikes represented purposeful racial discrimination. *See State v. Cañez*, 202 Ariz. 133, 146, ¶ 22 (2002). The prosecutor apparently struck a non-African American juror for the same lack-of-information reason, and the fact that an African American was impaneled, although not dispositive by itself, also suggests that the two challenged strikes did not establish a pattern of racial discrimination. *See State v. Roque*, 213 Ariz. 193, 204, ¶ 15 (2006).

¶11 More importantly, the prosecutor offered an additional relevant and facially race-neutral reason for each strike. The judge confirmed the prosecutor’s observation of Juror 76 failing to follow the court’s instructions and implicitly found credible the prosecutor’s account of Juror 1’s dozing and inattentiveness, and we defer to the superior court’s first-hand observations and credibility determinations. *See State v. Newell*, 212 Ariz. 389, 401, ¶ 54 (2006). Under the circumstances, and particularly in light of the additional reason offered for each strike, the superior court did not err by denying Decker’s Batson challenges.

¶16 A.R.S. § 13-1501(3) defines “entry” as “the intrusion of any part of any instrument or any part of a person’s body inside the external boundaries of a structure or unit of real property.” Thus, by its terms, the statute allows entry by an instrument alone, even if no part of the perpetrator’s body crosses the threshold. *Id.*; *see also State v. Kindred*, 232 Ariz. 611, 614, ¶ 9 (Ct. App. 2013) (concluding that insertion of a pry bar into a door jamb constituted entry).

¶19 The question thus becomes whether a projectile bullet can be characterized as a tool or implement used to do work that intrudes into the residence. Because a person firing a bullet, even if from outside a doorway, is using the projectile as a means to accomplish a task within the residence—here, murder—the bullet qualifies as an instrument that can “enter” a structure for purposes of burglary.

Link to opinion: <https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/1%20CA-CR%2014-0238.pdf>

***State v. Panos*, 1 CA-CR 2015-0065 (Jan. 12, 2016):** Panos challenged the monthly probation service fee as a condition of his unsupervised probation. **Holding:** The statute requiring the fee is constitutional, does not violate equal protection, and is not a “special law.”

¶3 The probation statute provides in relevant part: “When granting probation to an adult the court, as a condition of probation, shall assess a monthly fee of not less than sixty-five dollars.” A.R.S. § 13-901(A). The superior court may impose a lesser fee if it determines the probationer is unable to pay the full amount. . . . A.R.S. § 13-901(A). For probation imposed in the superior court, A.R.S. § 13-901(A) makes no distinction between supervised and unsupervised probation. For probation imposed in a justice or municipal court, however, “the fee shall only be assessed when the person is placed on supervised probation.” *Id.*

¶6 Panos argues A.R.S. § 13-901(A) violates state and federal guarantees of equal protection because it requires unsupervised probationers convicted in superior court to pay a monthly probation service fee, yet exempts unsupervised probationers convicted in justice or municipal courts. Panos argues that all unsupervised probationers are “similarly situated,” regardless of the court of conviction, and that the statute discriminates against unsupervised probationers convicted in the superior court. He asserts that any distinction made regarding the courts of conviction is arbitrary, capricious, and discriminatory.

¶8 Because Panos concedes he is not a member of a suspect class and there is no fundamental right at issue, we will uphold the statute so long as it is “rationally related to a legitimate government purpose.” *Id.*

¶10 Applying these standards, we conclude the statute to be constitutional. Arizona law requires that the presiding judge of each county’s superior court appoint a chief adult probation officer who, “with the approval of the presiding judge of the superior court, shall appoint deputy adult probation officers and support staff as . . . necessary.” A.R.S. § 12-251(A). The officers and other staff have extensive duties including the provision of services to and supervision of those convicted and placed on probation. *See* A.R.S. §§ 12-251(A), -253. The purpose of the fee is to help pay for the services probation officers and staff provide and to maintain, expand, and improve those services. A.R.S. § 13-901(A); Ariz. Code Jud. Admin. § 6-209. Further, the fees deposited into the probation fund strengthen “the criminal justice system’s ability to finance its probation services” and benefit a defendant’s rehabilitation. *State v. Mears*, 134 Ariz. 95, 98 (App. 1982). We therefore conclude the probation service fee requirements and exemptions contained in A.R.S. § 13-901(A) are rationally related to, and help achieve, a legitimate governmental objective.

¶¶16-18 (summarized): A.R.S. § 13-901(A) is not a special law in violation of Ariz. Const. art. 4, part 2, § 19(7) because it (1) has “a rational relationship to a legitimate legislative objective,” (2) the classification made by the law is legitimate and encompasses all members that are similarly situated, and (3) the classification is elastic, allowing “other individuals or entities to come within” and move out of the class.

Link to opinion: <https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/CR%2015-0065.pdf>

***State v. Becerra*, 2 CA-CR 2014-0295 (Jan. 25, 2016):** Division 2 addressed the issue of whether a person who has consented to a search of her vehicle may expect a law enforcement officer might use a K-9 to assist in the search. Becerra acknowledged her oral and written consent to search was voluntary, but she argued on appeal that the scope of her consent did not reasonably extend to a search of the inside of her car by the K-9.  **Holding:** A trial court may not err, and did not err here, in finding under the totality of the circumstances the use of a K-9 in the interior of a defendant’s vehicle was within the scope of her revocable, oral and written, general consent to search the vehicle, because a person who has generally consented to a search of their vehicle may expect that a law enforcement officer could use a K-9 to assist in the search.

**\*Footnote 1:** “After the opening brief was filed in this appeal, the United States Supreme Court issued its opinion in *Rodriguez v. United States*, \_\_\_ U.S. \_\_\_, \_\_\_, 135 S. Ct. 1609, 1612 (2015), holding that police may not prolong an otherwise-completed traffic stop to conduct a dog sniff absent reasonable suspicion of criminal activity. Because the parties disagreed as to what effect Rodriguez might have on the present case, we solicited supplemental briefing. We conclude the record does not permit us to address the issue and express no opinion about its application here.”

¶10 Becerra argues “no reasonable person would believe that a dog was going to be placed into the interior of their vehicle” when consenting to a search. She reasons that absent an explicit question by the officer, such as “whether he and his dog could search,” the officer should assume consent does not include the assistance of a K-9. She supports her reasonable person argument with examples of why some people do not want dogs around them or their property: the presence of hair, claws, saliva, and indiscriminately wagging tails. Although it is undoubtedly true that some people prefer to avoid dogs for those reasons, the issue of objective reasonableness to determine the scope of a consent to search does not turn on the personal likes or dislikes of the defendant, or even the preferences of a group of people. *See, e.g., United States v. Marshall*, 348 F.3d 281, 287 (1st Cir. 2003) (consenting party’s subjective belief irrelevant).

¶13 ... The reasonable person in the United States would not be surprised or find any novelty in a law enforcement officer’s use of a K-9, just as he or she might use a flashlight, to search a vehicle for drug contraband. Therefore, we cannot accept Becerra’s contention that the constitution mandates a per se rule excluding K-9s from the scope of a general consent and requiring officers to explicitly ask for permission to search with a K-9.

¶14 Rejection of Becerra’s proposed bright-line rule does not mean adoption of the opposite rule—i.e., everyone must assume a K-9 will be used in all searches. Instead, trial courts must look to the totality of the circumstances in the exchange between the officer and person to determine whether a consensual search remained within the bounds of the consent actually given.

¶22 ... [W]e conclude that when a person has consented to a search of her vehicle after having been unequivocally informed the consent could be withdrawn at any time, a reasonable person would do so if she felt the use of a K-9 in conducting the search was objectionable or unacceptable for any reason.

Link to opinion: <http://www.appeals2.az.gov//Decisions/CR20140295OPN.pdf>

***State v. Dalton*, 1 CA-CR 2015-0074 (Jan. 26, 2016):** After the first day of jury deliberations, an alternate juror had to replace one of the deliberating jurors. **Holding:** The trial court committed fundamental error by failing to instruct the jury that it was required to begin deliberations anew after replacing a deliberating juror with the alternate under Arizona Rule of Criminal Procedure 18.5(h) (“If an alternate joins the deliberations, the jury shall be instructed to begin deliberations anew”). The Court noted, “Not every failure by a trial court to instruct the jury that it must begin deliberations anew when it replaces a juror will constitute reversible error...[and] [w]hether such a failure is reversible depends on whether it is prejudicial.” ¶9.

¶6 At 11:00 a.m. the next day, the jury reconvened. Although the day before the court had told counsel it would have the jury “start over” when the alternate joined it, the record contains no indication—and the parties do not argue otherwise—that the court actually instructed the jury to “start over.” Neither Dalton nor the State brought the court’s failure to comply with Rule 18.5(h) to its attention. The jury returned to the courtroom to announce its verdict 43 minutes later, at 11:43 a.m. The trial transcript, however, reflects the jury actually deliberated less than 43 minutes as the court apologized for making the jury wait before it could return its verdicts. The jury found Dalton guilty of burglary in the second degree, but not guilty of criminal damage. The court polled the jury, and the individual members of the jury confirmed the verdicts.

¶9 ...[C]ourts that have considered whether a defendant was prejudiced when a trial court failed to instruct a jury that it must begin deliberations anew when it replaces a juror [] recognize[] a court should take into account the following factors to determine prejudice: first, whether other instructions...ameliorated the failure to instruct the jury to begin deliberations anew; second, the length of time the jury deliberated before and after the substitution; and third, the strength of the evidence against the defendant. Applying these factors here, the error was prejudicial. *See State v. Guytan*, 192 Ariz. 514, 518-19, ¶¶ 12-13, 968 P.2d 587, 591-92 (App. 1998).

¶10 First, none of the court’s other instructions to the jury ameliorated the failure...

¶12 Second, the jury deliberated for approximately two hours before the alternate joined it, but for less than 43 minutes afterwards. *See supra* ¶ 6. Thus, unlike the situation in *Guytan*, the bulk of the jury’s deliberations here occurred before the alternate joined the panel. Given this, the record provides no reasonable assurances that the reconstituted jury began deliberations anew...

¶13 Third, the State’s case against Dalton was not overwhelming, and a jury could have reached a different result had it been instructed pursuant to Rule 18.5(h). Dalton consistently denied he had been on the roof, and indeed, the 911 caller never reported to dispatch or the police he had seen Dalton on the roof, or even acting as a lookout. And, although Dalton initially misled police about being inside the house, *see supra* ¶ 3, he consistently denied he had assisted Day...

¶14 Under the circumstances presented here, we cannot say beyond a reasonable doubt that the jury would have reached the same result had the superior court properly instructed it to begin deliberations anew when the alternate joined it...The error was, thus, prejudicial.

Link to opinion: <https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2015/1%20CA-CR%2015-0074.pdf>

***State v. Peraza*, 2 CA-CR 2015-0022 (Jan. 28, 2016):** In this Aggravated DUI case, Peraza argued the trial court erred by denying his motion to suppress the results of a Breathalyzer test because he was deprived of his right to counsel, and by improperly instructing the jury. **Holding:** The police did not deprive the defendant of his Sixth Amendment right to counsel where further delay would have hindered the DUI investigation, because the two-hour window for testing the driver’s alcohol content established by A.R.S. § 28-1381(A)(2) was rapidly closing. The Court further found that while the trial court improperly instructed the jury, the error was harmless because a reasonable jury would have found Peraza guilty anyway.

¶7 Section 28-1381(A)(2), A.R.S., establishes the statutory two-hour window by prohibiting a driver from operating a vehicle if that driver’s AC is over 0.08 within two hours of driving. If breath tests occur more than two hours after driving, the state is required to relate the results back to the relevant time for the results to be admissible. *State v. Stanley*, 217 Ariz. 253, ¶ 24, 172 P.3d 848, 853 (App. 2007) (“If the sample is drawn after the two-hour mark, an expert must use retroactive extrapolation to determine the blood alcohol content.”).

¶8 Despite the two-hour window, a defendant is entitled to the advice of counsel when in custody, “and the state may not unreasonably restrict that right.” *Kunzler v. Superior Court*, 154 Ariz. 568, 569, 744 P.2d 669, 670 (1987); see Ariz. R. Crim. P. 6.1(a). Accordingly, a defendant has the “right to speak to counsel before taking a Breathalyzer test.” *State v. Sanders*, 194 Ariz. 156, ¶ 6, 978 P.2d 133, 134 (App. 1998). That right, however, must give way when its exercise would “hinder an ongoing investigation.” *Kunzler*, 154 Ariz. at 569, 744 P.2d at 670. This arises most frequently in DUI cases because of their “unique evidentiary circumstances.” *Montano v. Superior Court*, 149 Ariz. 385, 389, 719 P.2d 271, 275 (1986).

¶13 In this case, however, Peraza’s right to counsel was honored. The officer notified Peraza of his right to counsel, permitted him to call an attorney, and gave Peraza adequate time to contact one before continuing his investigation. The officer could not know when or if an attorney would call back. He then conducted two Breathalyzer tests at approximately twenty-five minutes and fourteen minutes before the end of the statutory two-hour window. See A.R.S. § 28-1381(A)(2).

¶¶16, 21 (summarized): Peraza argued the trial court erred by instructing the jury on a refusal to submit to a Breathalyzer test, because no evidence supported it. The officer testified Peraza submitted to the Breathalyzer tests, Peraza’s attorney objected to the jury instruction, and the State presented no evidence that Peraza refused any testing. “Thus, because no evidence supported the instruction, the trial court erred by giving it.” ¶21.

¶24 ...Even had the trial court not given the complained-of instruction, a rational jury would have found Peraza guilty beyond a reasonable doubt under the facts of this case. Thus, because the jury would have found Peraza guilty, regardless of the instruction, the error was harmless. See *Nottingham*, 231 Ariz. 21, ¶ 17, 289 P.3d at 956.

¶25 Finally, Peraza argues the trial court erred when it instructed the jury that records of periodic maintenance were prima facie evidence that the Breathalyzer was working properly. Because Peraza failed to object to the instruction at trial, he has forfeited review for all but fundamental, prejudicial error.

¶¶35, 38 (summarized): The Court found that because the instruction did not violate Peraza’s due process rights, it was not given to the jury in error. “Even had the jury instruction not been given, a reasonable jury would still have found Peraza guilty on both counts... Thus, in light of all the evidence, no reasonable jury could have found that the Breathalyzer was malfunctioning, and Peraza has failed to show he was prejudiced by the instruction.” ¶38.

**\*Footnote 4:** Although we find the instruction here was not erroneous, adding language specifically addressing the effect of the presumption would avoid any potential burden-shifting issues.

Link to opinion: <http://www.appeals2.az.gov//Decisions/CR20150022Opinion.pdf>

**State v. Ingram, 2 CA-CR 2015-0148 (Feb. 11, 2016):** Ingram, convicted of misconduct involving weapons, argued the trial court erred in denying his request for a peremptory change of judge pursuant to Arizona Rule of Criminal Procedure 10.2. He further argued the State presented insufficient evidence to support his conviction.  **Holding:** A challenge to the denial of a notice of peremptory change of judge can only be brought by special action; and sufficient evidence was presented to establish Ingram’s constructive possession of the gun.

¶4 ...The week before trial, the case was reassigned to the trial judge by an “immediately distributed” order dated January 29, 2015. Ingram filed a notice of change of judge as a matter of right pursuant to Rule 10.2 on February 2, 2015, the day before trial. The court denied the notice as untimely.

¶9 The reasoning of *Taliaferro* applies equally to notices filed under Rule 10.2 in criminal cases. *See State ex rel. Thomas v. Gordon*, 213 Ariz. 499, ¶ 31, 144 P.3d 513, 518 (App. 2006) (“[O]ur supreme court has held the rules of law pertaining to change of judge are essentially the same in civil as in criminal cases.”). Because Rule 10.2 permits a change of judge “merely upon request,” without the need to show judicial bias or interest, it would be difficult on appeal for a party to show any resulting prejudice from that court’s denial of the notice. *Anagnostos v. Truman*, 25 Ariz. App. 190, 192, 541 P.2d 1174, 1175 (1975). Once a defendant has been convicted and sentenced, “it is too late in the day to be worrying about who tried the case, short of true challenges for cause.” *Taliaferro v. Taliaferro*, 186 Ariz. 221, 223, 921 P.2d 21, 23 (1996).

¶14 We acknowledge that *Taliaferro* did not explicitly overrule *Keel* [though the Arizona Supreme Court in *Taliaferro* rejected the Court of Appeals’ reasoning in *Keel*] and that a defendant like Ingram may have believed, based on *Keel*, that he could bring this issue by appeal. However, even if this were a special action, Ingram would not be entitled to relief. When a new judge is assigned less than ten days before trial, Rule 10.2(c) requires a notice of change of judge to be filed “on the next business day following actual receipt of notice of the assignment.” ...All Rule 10.2(c) requires is “actual receipt,” which occurred here on January 29. *See Receipt, Black’s Law Dictionary* 1459 (10th ed. 2014) (“The act of receiving something, esp. by taking physical possession.”). The trial court therefore did not err in denying the notice as untimely.

¶23 [The parties stipulated to his “prohibited possessor” status at trial, so Ingram argued on appeal that the State presented insufficient evidence to prove the element of possession.] Here, the officers had been informed by the U.S. Marshals Service that Ingram was possibly armed with a .40-caliber pistol...the officers found a loaded .40-caliber semi-automatic pistol in a briefcase in the master-bedroom closet. When asked if the briefcase looked familiar, Ingram responded, “I have one like it, but I don’t know if that one is mine.” The officers never told Ingram where they had found the briefcase, but he stated that his was “in the closet.”

¶24 In the briefcase, along with the pistol, officers found a box of .40-caliber ammunition and a prescription pill bottle with Ingram’s name on the label. The label was dated less than two months prior to the date of Ingram’s arrest. In addition, Ingram had a .40-caliber bullet in his front left pocket.

¶25 Moreover, the outside of the briefcase had a “tag,” which included a reference to Racine, Wisconsin. Ingram’s prior felony was from Wisconsin, and he was born there. Nothing in the briefcase indicated someone else owned it. As for the pistol, Ingram admitted “touch[ing] a gun like that.” Viewed collectively, there was sufficient evidence to establish that Ingram had constructive possession of the pistol.

Link to opinion: <http://www.appeals2.az.gov//Decisions/CR20150148Opinion.pdf>

***State v. Kjolsrud; Kambitsch, 2 CA-CR 2015-0230 & 2 CA-CR 2015-0231 (consolidated) (March 18, 2016):***

The State appealed from the trial court’s order granting each defendant’s motion to suppress, relying in part on *Rodriguez v. United States*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 1609 (2015), finding the deputy’s continued detention to conduct a K-9 search after the completed traffic stop lacked reasonable suspicion. Holding: (1) The trial court did not err in concluding the deputy lacked reasonable suspicion to delay the traffic stop and conduct further investigation; and (2) The good-faith exception to the exclusionary rule did not apply because rather than overruling some prior precedent or announcing a new legal standard, *Rodriguez* applied a general rule announced by the U.S. Supreme Court as early as 1983.

Deputy Werkheiser performed a records check and learned both individuals had outstanding, non-extraditable warrants. He remembered Kjolsrud had been involved in a prior drug offense, and he asked Kambitsch to step out of the car and brought her to his patrol vehicle. Werkheiser testified Kambitsch made no eye contact as they walked to his patrol vehicle, and without prompting, Kambitsch quickly stated she was aware of the warrant and “[t]he police were always harassing her” about it. Kambitsch also emptied her pockets and stated, “See, I don’t have anything on me” and “I’m clean.” Werkheiser “thought it was odd because [he] hadn’t asked her” a question yet and Kambitsch seemed rushed. *See* ¶¶3-4.

¶12 Werkheiser testified that after he completed these tasks, he “could have concluded the stop at that time . . . because [he] knew the warrants were non-extraditable.” Although his original “intent was just to give the driver a warning for equipment violation,” he decided to wait to “start th[at] process . . . after [he] radioed Deputy Wat[kins].” When the trial court asked “[w]hat prevented [him] from writing the warning and repair order prior to questioning . . . Kambitsch,” Werkheiser responded, “I guess myself.” Thus, when he asked Kambitsch to step out of the car and walk back to his vehicle, under *Rodriguez*, this further delay amounted to an additional seizure requiring independent reasonable suspicion.

¶13 The state nevertheless argues “[o]fficers are permitted to ask motorists questions, even unrelated to traffic stops, so long as the police do not unreasonably prolong the stop” and “are allowed to order occupants out of a car, . . . especially when reasonably necessary for safety concerns.” Law enforcement officers are permitted to remove occupants from a vehicle as a safety precaution. . . [b]ut in *Rodriguez*, the United States Supreme Court clarified this general rule: “Unlike a general interest in criminal enforcement, . . . the government’s officer safety interest stems from the mission of the stop itself. . . . On-scene investigation into other crimes, however, detours from that mission. . . . So too do safety precautions taken in order to facilitate such detours.” *Rodriguez*, \_\_\_ U.S. at \_\_\_, 135 S. Ct. at 1616.

¶17 Criminal history alone cannot support a finding of reasonable suspicion. *State v. Woods*, 236 Ariz. 527, ¶ 12, 342 P.3d 863, 866 (App. 2015). And, although an outstanding warrant could “cast a suspicious light on . . . seemingly innocent behavior,” *id.*, quoting *United States v. Simpson*, 609 F.3d 1140, 1147 (10th Cir. 2010) (alteration in *Woods*), in this case we agree with the trial court—Werkheiser did not identify any other circumstances that established reasonable suspicion. He stated the location of the stop was not “a high-crime area,” “[t]here was nothing inconsistent or implausible about [their] . . . mode of travel that night,” he did not observe anything in particular when he made contact with Kambitsch and Kjolsrud, and he had not “formed any opinions or anything” before returning to his vehicle for the records check. . . . Thus, it appears Werkheiser’s decision to conduct a separate criminal investigation was based solely on the warrants and Kjolsrud’s involvement in a former case. Considering the totality of the circumstances, the deputy lacked reasonable suspicion to delay the traffic stop, and that delay amounted to an unreasonable search and seizure.

¶24 Although the holding in *Rodriguez* was significant in Arizona to the extent it abrogated *State v. Box*, 205 Ariz. 492, 73 P.3d 623 (App. 2003), its holding did not “overrule prior Supreme Court precedent or announce a new legal standard.” *Id.* Rather, *Rodriguez* applied a general rule that the Court had announced as early as 1983 in *Florida v. Royer*, 460 U.S. 491, 500 (1983), and again in 2005 in *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). See *Rodriguez*, \_\_\_ U.S. at \_\_\_, \_\_\_, 135 S. Ct. at 1612, 1614 (relying on *Royer* and *Caballes* for the proposition that “the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure’s ‘mission’”); see also *State v. Sweeney*, 224 Ariz. 107, ¶ 17, 227 P.3d 868, 873 (App. 2010) (relying on *Royer*).

Link to opinion: <http://www.appeals2.az.gov//Decisions/CR20150230Opinion.pdf>

***State v. Foshay*, 2 CA-CR 2014-0252 (March 23, 2016):** After a jury trial in which Foshay was found guilty of first-degree murder, he argued on appeal that the trial court erred in doing the following: (1) Allowing Rocky Edwards, toolmark expert, to testify as an expert; (2) Allowing Edwards’ report to be admitted in its entirety; (3) Allowing Edwards to testify regarding another expert’s analysis (based on hearsay grounds); (4) By precluding evidence that the victim had previously sold drugs and had meth in his system when he was killed. The Court of Appeals found no error and affirmed.

¶3 At trial, Edwards opined that the bullet which killed B.B. was shot from Foshay’s gun. Foshay mounted a third-party-culpability defense which centered on testimony that B.B. had been pressured into providing information and testimony for law enforcement. Foshay claimed that one of a number of other individuals who had been engaged in the drug trade with B.B. had killed him.

¶9 Foshay argues the trial court abused its discretion when it found that Edwards was qualified to employ the 3-D imaging software. As Foshay has conceded both at trial and on appeal, Edwards is a qualified toolmark analyst. The court found specifically that “using this 3-D confocal microscopy is just a new tool to utilize the same principles.” And Edwards’s testimony showed a working knowledge of how this technology functioned, demonstrating he was qualified by knowledge and experience. Ariz. R. Evid. 702; *Romero*, \_\_\_ Ariz. \_\_\_, ¶ 17, 365 P.3d 358, 362 (2016). Thus, the court did not err when it found that Edwards was qualified to testify as to his analyses aided by the new technology. *See Romero*, \_\_\_ Ariz. \_\_\_, ¶ 17, 365 P.3d at 362.

¶14 In sum, Edwards testified the 3-D imaging and confocal microscope merely enabled him to better see the marks which were the basis of his analysis. And no evidence indicated that the software and microscope somehow manipulated the image to allow a match between bullets where none existed. Any issues concerning the use of the 3-D imaging and confocal microscope were proper subjects for cross-examination, but did not prevent admission of the evidence... The trial court reasonably could have found that Edwards reliably applied the principles and methods of toolmark comparison under the facts of this case.

¶33 Thus, because peer review is part of the toolmark analysis process, Ward’s opinion was offered only as a basis for Edwards’s testimony and not to prove the truth of that opinion. *See Lundstrom*, 161 Ariz. at 147, 776 P.2d at 1073. And Ward’s opinion did not have the solemnity associated with trial testimony. *Williams*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 2260 (Thomas, J. concurring). Edwards’s statement about Ward’s opinion is therefore not hearsay, *see Tucker*, 215 Ariz. 298, ¶ 60, 160 P.3d at 194, and is not barred by the Confrontation Clause, *see Williams*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 2260 (Thomas, J. concurring); *see also Crawford*, 541 U.S. at 59 n.9. Accordingly, the trial court did not err when it admitted Edwards’s testimony regarding Ward’s opinion.

¶37 Before trial, the state moved to preclude evidence that B.B. had been involved in a hand-to-hand drug sale, arguing it was irrelevant because it took place two years before B.B.’s murder and was not connected to the murder. The state also contended the evidence was more prejudicial than probative under Rule 403. Foshay, who did not file a written response, argued the drug sale was relevant because it explained why B.B. would be motivated to work as a confidential informant. The court did not admit the evidence of the prior drug sale although evidence that B.B. was an informant was admitted. [In footnote 7, the Court also noted “significant other evidence was introduced at trial regarding B.B.’s involvement with the drug trade.”]

¶38 At trial, Foshay cross-examined David Winston, the medical examiner who conducted B.B.’s autopsy, and attempted to elicit testimony regarding the presence of methamphetamine in the autopsy results. The state’s attorney objected on relevance grounds. Foshay argued the evidence was relevant to a third-party-culpability defense, suggesting the victim’s drug use indicated other individuals might be willing to kill him. The trial court ruled the proposed testimony was both irrelevant and highly prejudicial.

¶39 The trial court was correct in concluding this evidence was irrelevant. As opposed to the fact that he had worked as an informant, B.B.’s motivation to do so did not make it more likely that someone other than Foshay had killed him. And Foshay has not shown any connection between B.B.’s use of methamphetamine before his death and anyone’s desire to kill him. As the court noted, the use of methamphetamine and the sale of drugs two years before his death do not tend to make it more likely that someone other than Foshay murdered B.B. *See Ariz. R. Evid. 401*. The court did not abuse its discretion in excluding this evidence.

Link to opinion: <http://www.appeals2.az.gov//Decisions/CR20140252Opinion.pdf>

***State v. Wright*, 2 CA-CR 2015-0222 (March 23, 2016):** Convicted of possessing narcotic drugs for sale and drug paraphernalia, Wright argued on appeal that the trial court erred by admitting into evidence a redacted audio recording made by police officers during the undercover operation leading to his arrest. **Holding:** The trial court did not abuse its discretion in admitting the recording as a present sense impression.

¶9 The portion of Exhibit 49 to which Wright objected covered the moment Davis got out of J.D.'s truck and went into the convenience store, until the moment he got back into the truck. It consists of the following statements:

Two-Five, he's getting out and he's, uh, looks like going in the store. He's got the twenty in his right hand. And again, he's got whatever it is. He hasn't moved it. It's still in his left shoe. Inside the store I think he's buying a beer or something. Got a, no, that's probably just some U of A people. Next to us. Just in case you guys can't see, I'm parked, uh, just in front of the store, facing south, kind of over towards the car wash and in front. He's still at the counter right now. And there's a car pulling up. Looks like it's a Ford or something. This might be our delivery right here. It's a Ford Taurus, it looks like, uh, gray. There's a number three and a number five in the car. A number three male passenger, and a number five female driver. [phone rings] She's calling me right now. It's the car next to us. Hello? Hey, uh, he's, uh, he's in the store right now, uh, just getting a drink. He should be coming out here in a sec. Oh, is that you? Hey, hey, I'll wait 'til he comes out and you guys can talk to him or whatever. Cool. Later. Bye. Yeah, she was on the phone. Looks like he's coming out now. Looks like he just bought a beer or something. And he's walking over to her. He's getting in the left rear. Looks like the number three male front right, he's got a gray cap and like a black cut-off jersey kind of thing on. He's reaching up kind of under the seat. Looks like he's messing with something. Maybe he's got product with him. The driver's on the phone again. Our guy's getting out, it looks like. He's gonna get back in with me.

¶10 Wright argues Exhibit 49 essentially was a police report and inadmissible under the general rule precluding the admission of hearsay. *See* Ariz. R. Evid. 801(c) (defining hearsay); *State v. Smith*, 215 Ariz. 221, ¶ 28, 159 P.3d 531, 539 (2007) (police report inadmissible unless hearsay exception applies)...

¶15 *Fischer* is distinguishable from the present case. Unlike the officer's "reflective narratives" memorialized for the camera in *Fischer*, 252 S.W.3d at 381, J.D.'s real-time descriptions of the suspects' appearance, vehicle, and movements were not primarily designed to chronicle earlier investigative findings. Rather, the statements described the events of a crime as it unfolded, and provided law enforcement officers with information they could use to disrupt that crime and successfully apprehend the perpetrators. In that respect, Exhibit 49 closely parallels the recording of the 9-1-1 call the court found admissible as a present sense impression in *Rendon*, in which the caller provided descriptions of burglary suspects, their vehicle, and their activities in real time as she watched the crime unfold. 148 Ariz. at 526, 528, 715 P.2d at 779, 781. As in *Rendon*, the statements were virtually contemporaneous with the ongoing crime they described. *Id.*

Link to opinion: <http://www.appeals2.az.gov//Decisions/CR20150222Opinion.pdf>

***State v. Valencia; Healer, 2 CA-CR 2015-0151 & 2 CA-CR 2015-0182 (consolidated) (March 28, 2016):*** Division 2 held the U.S. Supreme Court’s determination in *Montgomery v. Louisiana*, \_\_\_ U.S. \_\_\_, \_\_\_, 136 S. Ct. 718, 734 (2016), that a natural-life sentence imposed on a juvenile defendant is unconstitutional unless the juvenile’s offenses reflect permanent incorrigibility, constitutes a significant change in Arizona law that is retroactively applicable. Therefore, Valencia and Healer, convicted of first-degree murder and sentenced to natural-life as juveniles, were entitled to be resentenced.

¶8 In their petitions for review, Healer and Valencia repeat their argument that *Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455 (2012), is a significant change in the law entitling them to be resentenced. See Ariz. R. Crim. P. 32.1(g). In *Miller*, the United States Supreme Court determined that a sentencing scheme “that mandates life in prison without possibility of parole for juvenile offenders” violated the Eighth Amendment’s prohibition against cruel and unusual punishment. \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 2469; see also *State v. Vera*, 235 Ariz. 571, 3, 334 P.3d 754, 755-56 (App. 2014). The Court further stated that, before a juvenile offender is sentenced to natural life, courts must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Miller*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 2469.

¶9 While Healer’s and Valencia’s petitions were pending, the Supreme Court accepted review of another case involving juveniles sentenced to life imprisonment without the possibility of parole in order to determine whether *Miller* should be applied retroactively. *Montgomery v. Louisiana*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 1546 (2015) (granting writ of certiorari); see also *Montgomery*, \_\_\_ U.S. at \_\_\_, 136 S. Ct. at 727. We stayed the current proceeding and ordered the parties to provide supplemental briefs when that decision issued.

¶10 The Supreme Court decided *Montgomery* in January 2016. It explained that, in *Miller*, it had determined a natural-life sentence imposed on a juvenile offender “violates the Eighth Amendment for a child whose crime reflects ‘unfortunate yet transient immaturity.’” *Montgomery*, \_\_\_ U.S. at \_\_\_, 136 S. Ct. at 734, quoting *Miller*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 2469. Thus, the Court clarified, the Eighth Amendment requires more than mere consideration of “a child’s age before sentencing him or her to a lifetime in prison,” but instead permits a natural-life sentence only for “the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” *Id.* The Court further determined that the rule announced in *Miller* was a substantive constitutional rule that was retroactively applicable pursuant to *Teague v. Lane*, 489 U.S. 288 (1989). *Montgomery*, \_\_\_ U.S. at \_\_\_, 136 S. Ct. at 735-36.

¶15 ...there is no question that the rule in *Miller* as broadened in *Montgomery* renders a natural-life sentence constitutionally impermissible, notwithstanding the sentencing court’s discretion to impose a lesser term, unless the court “take[s] into account ‘how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.’” [Citations omitted.] Moreover, after taking these factors into account, the court can impose a natural-life sentence only if it concludes that the juvenile defendant’s crimes reflect permanent incorrigibility. See *id.* at \_\_\_, 136 S. Ct. at 734.

¶16 The state also contends that, in any event, Valencia’s and Healer’s respective sentencing courts “took [their] ages into account” in imposing that term. As we have explained, however, the Eighth Amendment, as interpreted in *Montgomery*, requires more than mere consideration of age before imposing a natural-life sentence. *See id.* at \_\_\_, 136 S. Ct. at 734-35. The state does not argue that the facts presented at Valencia’s and Healer’s respective sentencing hearings would require, or even support, a finding that their crimes reflect permanent incorrigibility. In any event, in light of the heretofore unknown constitutional standard announced in *Montgomery*, the parties should be given the opportunity to present evidence relevant to that standard. *See, e.g., State v. Steelman*, 120 Ariz. 301, 320, 585 P.2d 1213, 1232 (1978) (remanding for redetermination of sentence in light of recent case law).

Link to opinion: <http://www.appeals2.az.gov/Decisions/CR20150151OPN.pdf>

**SPECIAL ACTION—*State ex rel. Montgomery v. Hon. Padilla/Simcox*, 1 CA-SA 2016-0017 & 2016-0027 (consolidated) (March 17, 2016):** Division 1 held the the trial court erred in concluding it was per se unconstitutional to restrict Simcox from personally cross-examining the Children, and vacated the court’s order for re-determination. The court ordered that upon remand, the trial court must consider whether the State presented clear and convincing, individualized, and case-specific evidence that the Children will suffer trauma if the court does not restrict Simcox’s right to personally cross-examine them. If an accommodation is supported by clear and convincing evidence, the trial court has discretion to employ an accommodation it deems necessary to protect the Children from suffering trauma.

Chris Simcox was charged with three counts of sexual conduct with a minor, two counts of child molestation, and one count of furnishing obscene or harmful items to minors, for incidents allegedly occurring in 2012 and 2013. The alleged victims are Simcox’s nine-year-old daughter, Z.S., and Z.S.’s eight-year-old friend, J.D. Simcox represents himself pro se and he has advisory counsel. In a preceding special action in this case, the Court of Appeals held,

A trial court may exercise its discretion to restrict a self-represented defendant from personally cross-examining a child witness without violating a defendant’s constitutional rights to confrontation and self-representation. It can do so, however, only after considering evidence and making individualized findings that such a restriction is necessary to protect the witness from trauma. *State ex rel. Montgomery v. Padilla*, 237 Ariz. 263, 265, ¶¶ 1-2 (App. 2015).

Division 1 addressed three issues in this subsequent special action:

Whether a trial court can restrict a pro se defendant’s right to face-to-face confrontation with and personal cross-examination of an alleged minor victim of sexual abuse.



¶8 Because Simcox’s confrontation rights, even as a pro se defendant, are not absolute, the trial court erred in concluding any restriction of his right to personally cross-examine witnesses would be “a violation of constitutional proportion” and “reversible error.” Given the court’s inaccurate assessment of the law, we cannot conclude the court considered whether the evidence of the risk of trauma was sufficient to restrict Simcox’s right to personally cross-examine the Children. Therefore, we vacate the trial court’s order and remand for redetermination. In doing so, we reiterate this Court’s conclusion in *Padilla* that restricting a defendant’s confrontation rights is significant and, to justify the restriction, the State must make an individualized and case-specific showing that it is necessary to protect the physical or psychological well-being of an alleged minor victim. 237 Ariz. at 268-69, ¶¶ 15, 19.

Whether the evidence presented to prove the necessity of a trial accommodation for an alleged minor victim witness must meet a clear and convincing standard of proof.

¶10 Given the constitutional significance of limiting a defendant’s right to confront witnesses face-to-face and a pro se defendant’s right to personally cross-examine those witnesses, *see Padilla*, 237 Ariz. at 266-67, 269,

¶¶ 9, 19, we conclude the heightened standard of clear and convincing evidence must apply. This is consistent with at least ten other states whose statutorily crafted accommodations for minor victims of sexual crimes are similar to A.R.S. § 13-4253 and require clear and convincing evidence of harm be proffered by the State to establish the necessity of an accommodation. [Citations omitted.]

Whether the trial court has the discretion to impose an accommodation that is supported by the evidence but differs from that which was requested by the parties.

¶12 Finally, Petitioners argue the trial court abused its discretion by imposing the closed-circuit television accommodation when no party had requested it. Petitioners argue the language of A.R.S. § 13-4253 prohibits imposition of the statutory accommodation absent a motion specifically invoking the statute. We disagree.

¶13 While Petitioners are correct that the accommodations described in A.R.S. § 13-4253 are statutorily triggered “on motion of the prosecution,” a trial court has considerable discretion to determine what procedures are appropriate in a particular case, *cf. State v. Ferrari*, 112 Ariz. 324, 329 (1975) (holding the trial court acted within its discretion in varying the order of proof) (citing *United States v. Halpin*, 374 F.2d 493, 495 (7th Cir. 1967), and *State v. Cassidy*, 67 Ariz. 48, 56-57 (1948)), even absent a specific invocation of the statute. Arizona Rule of Evidence 611(a) empowers the court to “exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.” *See also Pool v. Superior Court*, 139 Ariz. 98, 104 (1984) (holding Rule 611(a) “gives the court discretion to determine and control the method of interrogation”); *Padilla*, 237 Ariz. at 270, ¶ 24 (“If the State believes that a personal cross-examination of a witness is intimidating or harassing the witness, it may always ask the court to control the examination.”) (citing Ariz. R. Evid. 611(a)). The trial court is further mandated by statute to “provide appropriate safeguards to minimize the contact that occurs between the victim, the victim’s immediate family and the victim’s witnesses and the defendant” during court proceedings. A.R.S. § 13-4431. This discretion extends to the court’s consideration of how minor victim witnesses should be accommodated following a proper request and presentation of evidence. ¶14 Accordingly, so long as sufficient evidence is presented to support the ordered accommodation, *see supra* ¶¶ 8, 10, the trial court is not bound by the specific requests of the parties and may order any procedure necessary and appropriate under the specific circumstances presented, whether provided for by statute, proposed by the parties, or otherwise.

Link to opinion: <https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/SA%2016-0017%20SA%2016-0027.pdf>



**SPECIAL ACTION—*State ex rel. Montgomery v. Hon. Kemp/Davis*, 1 CA-SA 2016-0031 (April 7, 2016):**

For the first time in Arizona, Division 1 resolved the issue of the constitutionality of utilizing two-way video testimony at trial under the Confrontation Clause. The State challenged the trial court's order denying the State's request for E.P., alleged sexual assault victim, to testify via two-way video conferencing during the trial of her alleged assailant, Mr. Davis. **Holding:** Adopting the test in *Maryland v. Craig*, 497 U.S. 836 (1990), and applying it to this case, Davis's confrontation rights can be satisfied through the use of two-way video testimony. Reversing the trial court's order, the matter was remanded with directions to allow the State's requested trial accommodation.

¶13 The State argues the trial court erred as a matter of law by not applying the *Maryland v. Craig* standard to the State's requested accommodation for E.P. to testify via two-way video during trial. *Maryland v. Craig*, 497 U.S. 836, 849 (1990) (recognizing that the Confrontation Clause's preference for face-to-face confrontation at trial "must occasionally give way to considerations of public policy and the necessities of the case" (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895))).

¶16 While recognizing the Constitution's preference for face-to-face confrontation, however, the Supreme Court has clarified that the right to face-to-face confrontation is not absolute. *Craig* set forth a test for abridging the preference for face-to-face confrontation with video testimony: the State must show that (1) the denial of face-to-face confrontation is necessary to further an important public policy; (2) the reliability of the testimony is otherwise assured; and (3) there is a case-specific showing of necessity for the accommodation. *Id.* at 850. Although Davis notes that *Craig* involved one-way closed circuit television and child witnesses, including the alleged victim, who could not see or hear the defendant, nothing in its holding suggests its application is limited to such cases...

¶20 Applying *Craig*, we conclude that the strong preference for face-to-face confrontation must give way in the special circumstances of this case to considerations of public policy and the necessities of the case. The State's requested accommodation is necessary to further two important public policies: protecting the rights of a vulnerable alleged sexual assault victim who has been ruled to be outside Arizona's subpoena power and preserving society's interest in prosecuting accused sexual offenders... Moreover, consistent with *Craig*, protecting a victim-witness's physical and mental health is a legitimate public policy...

¶21 In this case, Arizona and Montana trial courts have already found E.P. is a material and necessary witness, and realistically, without E.P.'s testimony, there will be no trial. The Montana court has already found after hearing evidence that requiring E.P. to testify with Davis present in the same room will cause E.P. to suffer severe emotional and mental trauma with resultant seizures, and it appears that, at this point, no one questions that E.P. will suffer grave harm if required to testify in person. Thus, without the accommodation for E.P. to testify via two-way video during trial, the State will be forced to choose between protecting E.P.'s mental and physical health and constitutional rights, and preserving Arizona's interest in prosecuting and punishing persons who have allegedly committed sexual offenses. Because an alternative reliable means of protecting Davis's confrontation rights exists in this case, the State should not be forced to choose...

¶23 Finally, the State has adequately demonstrated case-specific necessity for the requested accommodation. *See Smith*, 308 P.3d at 138-39 (requiring an adequate showing of necessity and stating that mere inconvenience to a witness is insufficient under *Craig* to supplant face-to-face testimony); *see also State ex rel. Montgomery v. Padilla*, 1 CA-SA 16-0017, 1 CA-SA 16-0027, 2016 WL 1063284, at \*3, ¶¶ 9-11 (Ariz. App. Mar. 17, 2016)

**State v. James, 1 CA-CR 2015-0002 (April 21, 2016):** Mr. James appealed his convictions and sentences for six counts of Aggravated DUI, class four felonies, asserting he could not be convicted of Aggravated DUI under both A.R.S. § 28-1383(A)(1) (driving intoxicated while license is restricted) and § 28-1383(A)(4) (driving intoxicated when an Ignition Interlock Device [IID] is required) because an order requiring an IID under (A)(4) is a “restriction” on his license under (A)(1). Without deciding whether these convictions would violate a defendant’s double jeopardy rights, the Court of Appeals vacated James’ two convictions under (A)(4) (driving intoxicated when an IID is required) and affirmed the other four. The Court explained the MVD ordered James to install an IID on his vehicle for 12 months from the date his driving privilege was reinstated, or from the date the MVD received the report of conviction, whichever occurred later. When James was arrested, his license had not yet been reinstated. Thus, “there was not yet a requirement that he install an IID on any vehicle he operated.” ¶6.

The Court further corrected the sentencing minute entry to reflect the sentence actually imposed at the sentencing hearing, because the written minute entry differed from what was stated on the record. “When there is a discrepancy between the trial court’s oral statements at a sentencing hearing and its written minute entry, the oral statements control. *State v. Ovante*, 231 Ariz. 180, 188, ¶ 38 (2013).” ¶7. Modifying the minute entry to reflect James was a repetitive offender as to Counts 1 and 2, the Court cited *State v. Jonas*, 164 Ariz. 242, 245 n.1 (1990); and *State v. Contreras*, 180 Ariz. 450, 453 n.2 (App. 1994) (“When we are able to ascertain the trial court’s intention by reference to the record, remand for clarification is unnecessary.”). ¶9.

Link to opinion: <http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/CR%2015-0002.pdf>.

**State v. Ramos, 2 CA-CR 2014-0396 (April 21, 2016):** Convicted of attempted possession of a dangerous drug by fraud, forgery, and taking identity of another, Mr. Ramos argued on appeal that the trial court erred in (1) precluding an alibi witness that was untimely disclosed by the defense, and (2) denying his request for a continuance “based on retention of new counsel.” The Court of Appeals affirmed the convictions, holding the trial court did not err by precluding Mr. Ramos’ alibi witness’s testimony as a sanction for the disclosure violation; and the trial court did not abuse its discretion by denying Mr. Ramos’ motion to continue, so Mr. Ramos was not denied his Sixth Amendment right to counsel *of choice*.

¶12 In this case, it is undisputed that the testimony of Ramos’s father was significant to his defense. And, there is no evidence that defense counsel acted in bad faith: He filed the late disclosure the same day Ramos informed him that his father could testify in support of an alibi defense. However, Ramos’s failure to assert a possible alibi defense from the time he was charged in October 2013 until his disclosure in July 2014, despite his close relation to the alibi witness, belies his argument that “[t]here is no evidence in the record that the late disclosure . . . was willful.” See *Naranjo*, 234 Ariz. 233, ¶ 35, 321 P.3d at 408 (willfulness implied by “pervasive lack of diligence”).

¶16 “[A]n indigent criminal defendant possesses rights under the Sixth Amendment [of the United States Constitution] and Article 2, Section 24 [of the Arizona Constitution], to choose representation by non-publicly funded private counsel . . . .” *State v. Aragon*, 221 Ariz. 88, ¶ 4, 210 P.3d 1259, 1261 (App. 2009), quoting *Robinson v. Hotham*, 211 Ariz. 165, ¶ 16, 118 P.3d 1129, 1133 (App. 2005) (alterations in *Aragon*). Nevertheless, this right “is not absolute, but is subject to the requirements of sound judicial administration.” *State v. Hein*, 138 Ariz. 360, 369, 674 P.2d 1358, 1367 (1983). “A trial court has ‘wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar.’” *Aragon*, 221 Ariz. 88, ¶ 5, 210 P.3d at 1261, quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006). In weighing these competing interests, courts must consider whether other continuances were granted; whether the defendant had other competent counsel prepared to try the case; the convenience or inconvenience to the litigants, counsel, witnesses, and the court; the length of the requested delay; the complexity of the case; and whether the requested delay was for legitimate reasons or was merely dilatory. *Hein*, 138 Ariz. at 369, 674 P.2d at 1367.

¶19 In contrast, the trial court here was focused principally on the dilatory nature of Ramos’s “last-minute substitution of counsel” and the impact the delay would have on the state’s case. Ramos had stated he wanted “to look into retaining private counsel” as early as November 2013, when he requested a continuance of a pretrial matter. But Ferraro made an appearance eight months later, and only eight days before trial. Ramos was not in custody during this time and, unlike in *Aragon*, offered no explanation for the delay. The court also noted it had “just denied [another] motion to continue trial” earlier that month and suggested Ramos’s new motion merely was an extension of the first. . . . Accordingly, although no prior continuance of the trial date had been granted, the record supports the court’s implicit finding that Ramos’s motion was for the purpose of delay. Moreover, the state suggested during the hearing that it had already arranged for four of its five witnesses to testify. And, although Ferraro suggested more investigation and preparation was necessary to present Ramos’s case, nothing in the record suggests his court-appointed defense counsel was not prepared or that this case was particularly complex.

¶20 Most importantly, the trial court’s ruling did not prohibit Ferraro from representing Ramos. We therefore reject Ramos’s suggestion that the court’s ruling denied his right to representation by retained counsel. Notwithstanding the court’s denial of the motion to continue, Ferraro in fact did represent Ramos [as *Knapp* counsel] prior to and at trial. Ferraro participated significantly during a pretrial hearing; made objections and conducted cross-examination during the trial; participated at the priors hearing; and argued on Ramos’s behalf during sentencing. *See State v. Burns*, 237 Ariz. 1, ¶ 13, 344 P.3d 303, 314 (2015) (“Although denying counsel adequate time to prepare a case for trial may deny the defendant a substantial right, time constraints by themselves do not create prejudice”) (internal citation omitted). Accordingly, the court did not abuse its discretion by denying the motion to continue, *see Forde*, 233 Ariz. 543, ¶ 18, 315 P.3d at 1212, and Ramos was not denied his Sixth Amendment right to counsel of choice, *see Rasul*, 216 Ariz. 491, ¶ 4, 167 P.3d at 1288.

Link to opinion: <http://www.appeals2.az.gov/Decisions/CR20140396Opinion.pdf>.

## TRIAL RESULTS

**Jury and Bench Trial Results**

December 2015-February 2016

Indigent Representation

**Public Defender- Trial Results**

Date Closed	Team	Judge	Case No. and Charge(s)	Counts	Result
<b>Group 1</b>					
2/12/2016	Jackson	Welty	CR2012-010181-001 Murder 1st Degree, F1 Kidnap, F2	1 1	Jury Trial Guilty as Charged
2/19/2016	Doak Tomaiko	Mahoney	CR2014-102305-001 Dangerous Drug-Poss/Use, F4	1	Jury Trial Guilty as Charged
2/12/2016	Wilson	Gordon/Brain	CR2014-134702-001 Dangerous Drug Violation, F4 Narcotic Drug Violation, F4	1 1	Jury Trial Guilty as Charged
1/14/2016	Saldivar Geist Krucic	Como	CR2015-130608-001 Aggravated Robbery, F3	1	Jury Trial Not Guilty
2/12/2016	Wilson	Brain	CR2015-002657-001 Narcotic Drug-Possess/Use, F4	1	Jury Trial Guilty as Charged
<b>Group 2</b>					
2/5/2016	Peterson Goodman	Gordon	CR2015-113020-001 Marijuana Violation, F6	1	Bench Trial Guilty Lesser/Fewer
1/4/2016	Gurion McGivern	Gordon	CR2015-001963-001 Burglary 3rd Deg-Unlaw Entry, F4 Theft-Means Of Transportation, F4 Marijuana-Possess/Use, F6 Drug Paraphernalia-Possess/Use, F6	1 1 1 1	Jury Trial Guilty Lesser/Fewer
<b>Group 3</b>					
1/7/2016	Allen Spears Tomaiko White Menendez	Fenzel	CR2014-001256-001 Murder 1st Deg-During Crime, F1 Armed Robbery-With Deadly Wpn, F2 Agg Aslt-Deadly Wpn/Dang Inst, F3	1 1 2	Jury Trial Guilty as Charged
1/15/2016	Caulfield Tomaiko McGivern	Otis	CR2015-110851-001 Burglary 2nd Degree, F3 Agg Aslt-Enter Residence, F6	1 2	Jury Trial Guilty as Charged

Date Closed	Team	Judge	Case No. and Charge(s)	Counts	Result
2/17/2016	Krejci Jones Schyvynck	Van Wie	CR2015-116539-001 Unlaw Flight From Law Enf Veh, F5	1	Jury Trial Guilty as Charged
2/11/2016	Taylor Jones Eichhorn-Kroll	French	CR2015-115243-001 Forgery-Poss Forged Instrument, F4	1	Jury Trial Not Guilty
1/27/2016	Caulfield Tomaiko	Bernstein	CR2015-125841-001 Marijuana-Possess/Use, F6	1	Bench Trial Guilty Lesser/Fewer
2/4/2016	Brady Spargo Tomaiko White	Otis	CR2012-103848-001 Agg Aslt-Deadly Wpn/Dang Inst, F3	1	Jury Trial Not Guilty

**Group 4**

1/22/2016	Romero Verdugo Wishart	Padilla	CR2015-119261-001 Burglary 2nd Degree, F3 Burglary 3rd Deg-Unlaw Entry, F4 Traffick Stolen Prop 2nd Deg, F3	1 1 1	Jury Trial Guilty Lesser/Fewer
2/18/2016	Huls	Kiley	CR2015-130267-001 Crim Tresp 1st Deg-Res Struct, F6	1	Jury Trial Guilty as Charged
12/24/2015	Perkins Johnson	Astrowsky	CR2015-126463-001 Burglary 2nd Degree, F3 Traffick Stolen Prop 2nd Deg, F3	1 1	Bench Trial Guilty As Charged

**Group 5**

2/19/2016	Glass-Hess	Fink	CR2015-123669-001 Agg Aslt-Deadly Wpn/Dang Inst, F3	1	Jury Trial Guilty Lesser/Fewer
2/11/2016	Beatty Sain Falle	Gass	CR2011-128670-001 Marijuana Violation, F4 Misconduct Involving Weapons, F4 Drug Paraphernalia Violation, F6	1 2 1	Jury Trial Guilty Lesser/Fewer
1/21/2016	S. Vandergaw Done Krucic Mcgivern	Otis	CR2015-106620-001 Burglary 1st Degree, F3 Armed Robbery-Threat Use Wpn, F2 Agg Aslt-Deadly Wpn/Dang Inst, F3	1 3 3	Jury Trial Not Guilty

**Group 6**

12/10/2015	K. Vandergaw Clesceri Springer	Nothwehr	CR2013-429690-001 Kidnap, F2 Molestation Of Child, F2 Indecent Exposure, F6	1 1 1	Jury Trial Not Guilty
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Date Closed	Team	Judge	Case No. and Charge(s)	Counts	Result
2/26/2016	Taradash Molina Wolkowicz Sain Springer	Richter	CR2013-431584-001 Molestation Of Child, F2 Sexual Conduct With Minor, F2 Public Sexual Indecency, F5	2 4 1	Jury Trial Guilty as Charged
2/16/2016	Wolkowicz Chiang Hales	Rea	CR2014-128595-001 Aggravated Assault, F3	2	Jury Trial Guilty as Charged
2/16/2016	Wolkowicz Dunn Virgillo	Como	CR2014-157682-001 Dangerous Drug-Poss For Sale, F2	1	Jury Trial Not Guilty
1/15/2016	K. Vandergaw Dunn Taylor	Richter	CR2015-101490-001 Agg Aslt-Officer, F5	1	Jury Trial Guilty as Charged

**Capital Group**

12/16/2015	Wilson Noble Thompson Ing Christiansen Sims Price	Stephens	CR2011-100207-001 Murder 1st Degree, F1 Burglary 1st Degree, F2 Kidnap, F2 Burglary 2nd Degree, F3 Tampering W/Physical Evidence, F6	2 1 1 1 1	Jury Trial Guilty Lesser/Fewer
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**EDC-DT (PD)**

1/27/2016	Conter	Sarkis	TR2014-156173-001 Dui-Liquor/Drugs/Vapors/Combo, M1 Dui W/Bac Of .08 Or More, M1 Extreme Dui-Bac .15- .20, M1 Leave Accid/Damage Attend Veh, M2	1 1 1 1	Jury Trial Guilty as Charged
2/22/2016	Griffin	Williams	JC2015-130482-001 IJP-Disobey/Resist Order or Mandate of Court, M1	1	Bench Trial Not Guilty

**Specialty Court Group**

12/18/2015	Meyer Martin Leazotte Batie Velting	Mahoney	CR2013-440987-001 Assault-Intent/Reckless/Injure, M1 Kidnap-Death/Inj/Sex/Aid Fel, F2 Sexual Assault, F2 Sexual Abuse, F5	1 1 5 3	Jury Trial Guilty Lesser/Fewer
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Date Closed	Team	Judge	Case No. and Charge(s)	Counts	Result
1/20/2016	Knowles Leazotte Batie Prasetio	Granville	CR2014-122505-001 Agg Aslt-Deadly Wpn/Dang Inst, F3 Poss Wpn By Prohib Person, F4 Dschrng Firearm In City Limit, F6 False Report To Law Enforce, M1 Threat-Intimidate-Gang, F3 Threat-Intim W/Inj-Dmge PROP, F6 Unlaw Means Transp-Control, F5	5 1 1 1 2 1 1	Jury Trial Guilty Lesser/Fewer
<b>Training Group</b>					
1/12/2016	Roth Gilchrist	Richter	CR2014-133063-001 Dangerous Drug-Poss/Use, F4 Narcotic Drug-Possess/Use, F4	1 1	Jury Trial Guilty as Charged
<b>Vehicular Group</b>					
1/15/2016	Potter Vondra	Seyer	CR2015-002047-001 Agg DUI-Lic Susp/Rev For DUI, F4	2	Jury Trial Guilty as Charged
1/14/2016	Dehner	Ireland	CR2015-106880-001 Fail To Stay/Hit Run With Inj, F5	1	Jury Trial Not Guilty

## Legal Defender- Trial Results

Date Closed	Team	Judge	Case No. and Charge(s)	Counts	Result
<b>Capital (LD)</b>					
12/18/2015	Schaffer	Gottsfield	CR2012-165590-001		Jury Trial
	Campbell		Murder 1st Degree, F1	1	Not Guilty
	McReynolds		Endangerment, F6	2	
	Williams				
	Garza				
	Apple				
<b>Felony Trial (LD)</b>					
1/20/2016	Tate	Passamonte	CR2015-112136-001		Bench Trial
			Narcotic Drug Possess/Use, F4	1	Guilty as Charged
			Drug Paraphernalia-Possess/Use, F6	1	
			Tamp w/Phy Evid-Destroy/Alter, F6	1	
12/18/2015	Shipman	Van Wie	CR2015-112642-002		Jury Trial
			Burglary 1 <sup>st</sup> Degree, F2	1	Guilty Lesser/Fewer
			Kidnap-Death/Inj/Sex/Aid Fel, F2	1	
			Agg Aslt-Enter Residence, F6	1	
			Agg Aslt-Deadly Wpn/Dang Inst, F3	4	
			Aggravated Robbery, F3	1	
			Armed Robbery-With Deadly Wpn, F2	1	
			Agg Aslt-Serious Phy Injury, F3	1	
			Poss Wpn By Prohib Person, F4	1	
1/22/2016	Franklin	Fenzel	CR2015-111849-001		Jury Trial
			Dangerous Drug Possess/Use, F4	1	Guilty as Charged
			Drug Paraphernalia-Possess/Use, F6	1	
1/14/2016	Walker	Como	CR2015-130608-002		Jury Trial
			Aggravated Robbery, F3	1	Not Guilty
<b>RCC/EDC (LD)</b>					
2/17/2016	Sawyer	Wein	CR2014-139567-001		Bench Trial
			Unlaw Flight From Law Enf Veh, F5	1	Guilty as Charged
2/23/2016	Ivy	Giaquinto	CR2014-161246-001		Bench Trial
			Dangerous Drug Possess/Use, F4	1	Guilty Lesser/Fewer
			Drug Paraphernalia-Possess/Use, F6	1	

## Legal Advocate- Trial and Dependency Results

Date Closed	Team	Judge	Case No. and Charge(s)	Counts	Result
<b>Felony Trial</b>					
1/28/2016	Burow Stapley	Sanders	CR2014-141233-001 Assault-Intent/Reckless/Injure, M1 Agg Aslt DV-Impede Breathing, F4	1 1	Bench Trial Not Guilty
1/13/2016	Ellingson Gracia	Kemp	CR2014-148598-003 Agg Aslt-Deadly Wpn/Dang Inst, F3 Poss Wpn by Prohib Person, F4	2 1	Jury Trial Not Guilty
12/04/2015	Schum	Fenzel	CR2015-110066-001 Sexual Conduct With Minor, F2 Molestation of Child, F2 Sexual Abuse, F3	5 2 4	Bench Trial Guilty as Charged
<b>Dependency</b>					
1/22/2016	Timmes	O'Connor	JD510469 Severance Trial		Severance Granted
1/29/2016	Timmes	Ryan	JD511043 Severance Trial		Under Advisement
12/03/2015	Konkel	Martin	JD30946 Dependency Trial		Dependency Found
1/22/2016	Hartman	Harrison	JD30219 Guardianship Trial		Guardianship Granted

# for The Defense

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