



## METHODS FOR DEFENSE

# Court of Appeals (Wrongly) Reads Mens Rea Into Organized Retail Theft

*Nick Podsiadlik, Defender Attorney*

In *State v. Veloz*, the Court of Appeals held that the facilitated form of Organized Retail Theft (“ORT”), A.R.S. § 13-1819(A)(2), although written as a strict liability statute, requires proof of the intent to deprive.<sup>1</sup>

This hurt the State because § 13-1819(A)(2) purported to turn a minor shoplift into a Category 4 felony without any proof of intent. It reads:

A person commits organized retail theft if the person acting alone or in conjunction with another person does any of the following: . . . Uses an artifice, instrument, container, device or other article to facilitate the removal of merchandise from a retail establishment without paying the purchase price.

Thus, facilitated ORT is nearly identical to facilitated shoplifting except with no “intent” requirement. But in *Veloz* the court created an intent requirement. And the court’s creation of an intent requirement was only half the good news. The Court also held that theft is a lesser-included offense of Organized Retail Theft.<sup>2</sup>

After *Veloz*, the State takes two risks by charging facilitated ORT in lieu of facilitated Shoplifting. First,

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it risks acquittal on lack of mental state evidence. Second, it risks the jury picking a potentially minor theft charge—as a little as a misdemeanor, depending on the amount stolen—instead of the big Category 4 felony.<sup>3</sup>



What's left to complain about? Well, there's the fact that the ruling was wrong because it did not go far enough. The court gave the defense a morsel, correcting a strict liability statute to make it non-strict liability by creating a mental state requirement. But the court should have struck down § 13-1819(A)(2) as unconstitutional because it is an impermissible strict liability theft offense.

Strict liability offenses fall into two categories: regulatory offenses and traditional crimes.<sup>4</sup> Only regulatory offenses may constitutionally be strict liability, the rationale being that they generally carry only minor penalties and regulate the sort of behavior where the defendant, "if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect."<sup>5</sup> Examples include illegal hunting,<sup>6</sup> running pyramid schemes,<sup>7</sup> and drunk driving.<sup>8</sup>

The other category is a bit of a catch-all. The law is most settled when it comes to traditional crimes like theft, which always re-

quire a culpable mental state,<sup>9</sup> but courts find that crimes require a mental state largely on an ad hoc basis.<sup>10</sup> Without a mental state requirement, these crimes violate the Fifth Amendment's presumption of innocence by shifting the burden of proof to the defendant.<sup>11</sup> They may also violate the Eighth Amendment by punishing innocent conduct.<sup>12</sup> Examples include soliciting prostitutes,<sup>13</sup> contributing to the delinquency of a minor,<sup>14</sup> and perjury.<sup>15</sup>

Accepting that § 13-1819(A)(2) is a strict liability theft crime, then, why isn't it unconstitutional? Well, it so happens that courts, like the *Veloz* court, invariably "save" otherwise unconstitutional strict liability statutes by creating a mental state requirement.<sup>16</sup> But such judicial activism contradicts the Arizona Legislature's prized independence as well as the Legislature's expressed intent.

Generally, courts assume the Legislature means what it says, even with strict liability criminal statutes. A.R.S. § 13-202 emphasizes that such statutes are intentional: "If a statute defining an offense does not expressly prescribe a culpable mental state . . . the offense is one of strict liability . . ." Further, "[a]ll common law offenses . . . are abolished."<sup>17</sup> And Arizona courts, for their part, have frequently disavowed activism.<sup>18</sup>

In this specific case, the Legislature certainly intended a strict liability crime for § 13-1819(A)(2). The proposed bill that became § 13-1819, Senate Bill 1059 of the Forty-Ninth Legislature's First Regular Session, defined what is now (A)(2) in the same way as the current law—no mental state requirement. An amendment was

passed that required "the intent to resell the merchandise." And then a second amendment was passed to remove that intent requirement from what is now (A)(2). Thus, the Legislature pondered a mental state requirement before choosing to erase it.

The Arizona Republican Caucus, announcing an award from the Arizona Retailers Association, described it as a bill that toughened shoplifting and turned a potential misdemeanor into a felony.<sup>19</sup> Nevertheless, the *Veloz* court—like every prior court to face an unconstitutional strict liability statute—chose to ignore the Legislature's intent in favor of saving the statute.



The upshot is that courts prioritize their duty to hold laws constitutional higher than their duty to read the laws according to the Legislature's intent.

There are at least three problems with this. First, it ensures there is no dialogue between the Legislature and the courts. If the Legislature were forced to re-write illegal laws, then it might pause before passing them in the first place.

Second, it tolerates statutes that may trap unwary defense lawyers—or, rather, those lawyers' clients, who might be pressured into taking a plea due to a misun-

derstanding of the law. And third, it litters the books with laws that don't mean what they say. For example, after *Veloz* there is little if any difference between facilitated shoplifting, § 13-1805(I) and facilitated ORT, § 13-1819(A)(2). Arizona jurisprudence gained nothing by the *Veloz* court's decision to "save" the statute.

With facilitated ORT humbled, what lies ahead? It may be that prosecutors return to the old facilitated shoplifting statute, § 13-1805. If they still hunger for a strict liability conviction, they might turn to the statutory presumption of criminal intent contained in § 13-1805(B)(2). This section awards prosecutors a "twofer" by mandating presumption of the necessary intent upon proof that the defendant used something to facilitate the shoplifting:

A person is presumed to

have the necessary culpable mental state [for shoplifting] if the person . . . Uses an artifice, instrument, container, device or other article to facilitate the shoplifting.

Astute readers will note that this brings us full circle. The presumption in § 13-1805(B)(2) accomplishes exactly the same thing as the facilitated ORT statute: it allows conviction based on the conduct of facilitated shoplifting without any requirement of proof of intent. And it is, of course, also unconstitutional, although no court has yet said so.

Just as the law of strict liability has always required a mental state element for traditional theft crimes, the law of mandatory presumptions has long stated that a statute cannot remove an element of the offense—*any* element, including the mental state—from

an offense.<sup>20</sup> Such mandatory presumptions violate the Fifth Amendment because, like strict liability offenses, they presume guilt and shift the burden of proving innocence to the defendant.<sup>21</sup> Perhaps for this reason, it appears that prosecutors have not yet tried to use this presumption.<sup>22</sup>

It has been a year since *Veloz* was decided. Yet this was not the first and will not be the last time that we are confronted with strict liability statutes or mandatory presumptions. ORT was passed in 2009, meaning that it survived unchallenged for six years. *Veloz* helps us remember that, when these statutes do pop up, we have the power to knock them down.

For a link to a form motion on this issue, click <http://www.maricopa.gov/pdweb/ftd.html>

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1. 236 Ariz. 532, ¶ 10 (2015).
  2. *Id.* ¶ 11.
  3. See A.R.S. § 13-1802(G).
  4. *Morissette v. United States*, 342 U.S. 246, 254 (1952); *State v. Slayton*, 214 Ariz. 511, 516 ¶ 20, 154 P.3d 1057, 1062 (App. 2007). See also *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71-73 (1994); *Staples v. United States*, 511 U.S. 600, 618-19 (1994).
  5. *Slayton*, 214 Ariz. at 516 ¶ 20, 154 P.3d at 1062.
  6. *Id.*
  7. *State v. Lycett*, 133 Ariz. 185, 192, 650 P.2d 487, 494 (App. 1982).
  8. *State v. Cifelli*, 214 Ariz. 524, 527 ¶ 12, 155 P.3d 363, 366 (App. 2007).
  9. *Veloz*, 236 Ariz. at ¶ 11.
  10. See, e.g., *State v. Cutshaw*, 7 Ariz. App. 210, 221-22, 437 P.2d 962, 973-74 (1968) (requiring some unspecified "'criminal intent' or 'mens rea' in the broad intendment of these expressions" for contributing to the delinquency of a minor).
  11. *Morissette, Cutshaw*, 7 Ariz. App. at 220-21, 437 P.2d at 972-73 ("[T]here are judicial pronouncements of constitutional limits upon the legislature's power to criminalize acts which completely innocent and well-meaning people may do.").
  12. See generally Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 Harv. J.L. & Pub. Pol'y 1065, 1098-99 (2014).
  13. *State v. Crisp*, 175 Ariz. 281, 283, 855 P.2d 795, 797 (App. 1993).
  14. *Cutshaw*, 7 Ariz. App. at 221-22, 437 P.2d at 973-74.
  15. *State v. Krug*, 96 Ariz. 225, 228, 393 P.2d 916, 918 (1964)
  16. But see *State v. Seyrafi*, 201 Ariz. 147, 151, 32 P.3d 430, 434 (App. 2001) (striking down a city ordinance). *Seyrafi*, however, was not a true strict liability case despite the court's use of the phrase "strict liability." The ordinance at issue created a presumption that shifted the burden on an element of an offense, but the presumption did not go to mental state.

17. A.R.S. § 13-103.
18. See, e.g., *Brogan v. United States*, 522 U.S. 398, 408 (1998) (“Courts may not create their own limitations on legislation.”); *Midtown Med. Grp., Inc. v. State Farm Mut. Auto. Ins. Co.*, 220 Ariz. 341, 347 ¶ 22, 206 P.3d 790, 796 (App. 2008) (“We do not seek to create conflicting provisions with the result that the judiciary adds elements the legislature could have easily required but did not.”); *Morgan v. Carillon Investments, Inc.*, 207 Ariz. 547, 552 ¶ 24, 88 P.3d 1159, 1164 (App. 2004) *aff’d sub nom. Morgan v. Carillon Inv., Inc.*, 210 Ariz. 187, 109 P.3d 82 (2005) (noting the courts cannot “judicially legislate” by adding provision to statute).
19. Arizona State Senate Republic Caucus, “Sen. Linda Gray Named Arizona Retailers Association Legislator of the Year” (Nov. 19, 2009) (<http://azsenaterepublicans.com/2009/11/19/sen-linda-gray-named-arizona-retailers-association-legislator-of-the-year/>) (“Senate Bill 1059 establishes shoplifting with the intent to resell or trade merchandise as a felony punishable by up to 3.5 years in prison. Under the previous law, a shoplifter could have been charged with a misdemeanor or a felony, depending on the value of the goods, and be punished by up to two years in prison.”).
20. See, e.g., *State v. Peraza*, No. 2 CA-CR 2015-0022, 2016 WL 360339, at \*6 ¶ 28 (Ariz. Ct. App. Jan. 28, 2016).
21. See, e.g., *id.*; *Seyrafi*, 201 Ariz. at 147 ¶ 12, 32 P.3d at 433.
22. A Westlaw search of all cases citing § 13-1805 does not find any cases with the “presumption” language.

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#### PRACTICE POINTERS

## If the Defendant Says It, It Must Be Hearsay!

*James P. Leonard, Defender Attorney*

### PROBLEM:

The State files a motion in limine to preclude portions of the defendant’s statements. The prosecutor contends that inculpatory statements are admissions while exculpatory statements are hearsay. The following is a suggested counter-attack:



- A. **Avoiding the Hearsay Objection:** “The defendant can avoid the hearsay objection by offering the rest of his confession for the nonhearsay purpose of explaining the part introduced by the prosecution and not for the truth of the matter asserted.” See *Wright and Graham, Federal Practice and Procedure Evidence* § 5072 at 386 (2005).
- B. **Rule of Completeness:** The Rule of Completeness, both in its codified and common-law forms, applies to confessions made to police when the defendant makes both inculpatory and exculpatory statements during a confession. See 7 *Wigmore, Evidence* §§2099(b), 2100(b) (Chadbourn rev. 1978); *Wright and Graham* §5077.1. “Generally, ‘whenever part of a conversation is given in evidence by one party, the other may offer the whole conversation’”. *State v. Powers*, 117 Ariz. 220, 226, 571 P.2d 1016, 1022 (1977).
- C. **Complete Statement Doctrine:** Arizona Rules of Evidence, Rule 106: “If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time. Rule 106 is identical and taken from Federal Rules of Evidence, Rule 106

- i. **Editors' Notes:** Comment to 2012 Amendment – “The language of Rule 106 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.”
- D. **Purpose of 106:** The purpose of the rule is to “prevent misunderstanding or distortion” of the statement caused by only admitting a portion. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172, 109 S. Ct. 439, 451, 102 L. Ed. 2d 445 (1988).
- i. **Soures Test:** Excluded portions of a statement may be introduced “if it is necessary to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, **OR** (4) insure a fair and impartial understanding.” Articulated in *United States v. Soures*, 736 F.2d 87, 91 (3d Cir. 1984); adopted by the Arizona Supreme Court in *State v. Dunlap*, 187 Ariz. 441, 454-55, 930 P.2d 518, 531-32 (Ct. App. 1996). *See also State v. Prasertphong*, 210 Ariz. 496, 502, 114 P.3d 828, 834 (2005).
- a. **PLEASE NOTE:** *Dunlap* incorrectly cites *Soures* by using the conjunctive “and” instead of the disjunctive “or”.
- ii. **Excluded Portions:** The Arizona Court of Appeals held that a “cropped” video constituted a “statement” for purposes of Rule 106 and allowed the defendant to require the introduction of the complete video under the rule of completeness. *State v. Steinle ex rel. Cty. of Maricopa*, 237 Ariz. 531, 354 P.3d 408 (Ct. App. 2015), *review granted in part* (Feb. 9, 2016).
- E. **Timing Aspect of 106:** Part of the policy of the rule of completeness is to avoid the inadequate remedy of requiring an adverse party to wait until later in the trial to address the issue. *See Wright and Graham* § 5072.01. The “at the time” verbiage of 106 conveys the intent to contemporaneously introduce the omitted portions.
- F. **An Insidious Attempt to Compel the Client to Testify:** Courts have frowned on requiring the defendant to waive his Fifth Amendment rights by taking the stand to present exculpatory evidence. *See Henderson v. United States*, 632 A.2d 419, 426 (D.C. 1993); *Swinney v. State*, 829 So. 2d 1225, 1236 (Miss. 2002). Should the client testify, there is an argument that the issue has been waived.
- G. **Confrontation Clause:** If a defendant seeks to admit portions of his co-defendant or accomplice’s recorded statements, the court may admit the remaining statements *if* necessary under the rule of completeness. However, the defendant cannot claim a violation of the Confrontation Clause if the prosecution introduces other statements from the conversation. *State v. Ellison*, 213 Ariz. 116, 130-31, 140 P.3d 899, 913-14 (2006). *See Prasertphong*, 210 Ariz. At 498-99, 114 P.3d 830-31.

# Stepping Up: A Movement, Not a Moment!

*Dr. Dawn Noggle, PhD*

*Mental Health Director, Maricopa County Correctional Health Services*

In April, Maricopa County was one of 50 jurisdictions selected to attend the Washington DC National Stepping Up Summit. This watershed event was sponsored by the Council of State Governments, National Association of Counties and notably, the American Psychiatric Association Foundation.

The Initiative was born out of years of frustrating, heart-breaking and increasing movement of seriously mentally ill individuals into the criminal justice system, often with devastating impact, and a trajectory of further justice system involvement.

Each year, 2 million people with mental illness are booked into jail or prison. National statistics show that there are more people in jails and prisons with mental illness (three to six times higher than the general public) and that most of these individuals are not a public safety risk. In 44 states, jails and prisons are the

largest housing institutions for individuals with mental illness.

Mental Health practitioners in our community are well aware of the connection between the lack of an adequate and affordable continuum of housing and treatment services and the growing, undertreated problem of substance abuse. Public Defenders clearly understand this in their efforts to represent individuals whose needs exceed legal solutions, many of whom would likely not be on their caseloads if they had the necessary care and support in the community.

The Stepping Up Initiative, launched in May 2015, aims to rally national, state, and local leaders around the goal to reduce criminal justice involvement, especially jail and prison time, for individuals dealing with serious mental illness and substance abuse disorders. Over the past year over 250 counties have adopted resolutions to support the

Stepping Up goals.

Strong advocacy of the American Psychiatric Association and Arizona Psychiatric Association is critical along with a growing number of defenders, judges and prosecutors across the country. We all recognize that solutions require criminal justice partners, the behavioral health system and housing providers. One "system" cannot solve this problem.

Maricopa County was an early adopter, enacting its Stepping Up Proclamation in May 2015. For their FY 2016 Strategic Plan the County Board of Supervisors adopted a goal to reduce recidivism of the seriously mentally ill. This goal was taken from Smart Justice, a subcommittee of the Maricopa County Justice Steering Committee (MC Justice), which in 2014 developed specific goals to reduce the number of Seriously Mentally Ill in our jails, to reduce length of stay particularly for low risk offenders, and to reduce recidivism for this population.

Maricopa County's Stepping Up Proclamation was a natural next step. It just made sense. Many jails cite as many as 25 – 30% of their population having serious mental health disorders. For 2015 in Maricopa County jails, individuals with an SMI designation accounted for 5% of the population booked into the jail, with approximately 7-7.5% of the jail census at any point in time. Adding individuals who struggle with serious mental health issues (not SMI designated) brings the





## PRACTICE POINTER

# TASC Admissions and Other Medical Records: Using HIPAA and Other Privacy Statutes and Regulations to Exclude Evidence

by Seth Apfel, Defender Attorney

Where the State reinstates prosecution following a defendant's failure to comply with the requirements of TASC (Treatment Assessment Screening Center), the use of the defendant's admission to the offense in TASC documents generally leaves little or no defense. Similarly devastating to a defense might be a forensic nurse examination in a domestic violence case, admissions by the defendant while under medical care, or even a blood sample taken by a hospital or nurse and later used to prove BAC.

Generally, these items will be deemed admissible for a variety of reasons, such as statements made for treatment and diagnosis, or business records as exceptions to the rule against hearsay, or due to waiver in the case of TASC documents. But there is another approach that should be attempted in order to exclude such evidence: the use of federal law in conjunction with the Arizona Constitutional right to privacy and A.R.S. § 12-2292, and in the case of TASC documents, the use of privilege as well.

HIPAA,<sup>1</sup> 42 U.S.C. 1320d et. seq. and 45 C.F.R. 160 et. seq. protects personally identifiable healthcare information from disclosure by healthcare entities (called "covered entities") and

their business associates. It covers information related to past, present, or future physical or mental health conditions, the provision of healthcare, and payment for treatment if the information includes anything that identifies or could reasonably be used to identify the patient. In order for the information to be used or disclosed, it must either fit a specific permitted use under the Privacy Rule, 45 C.F.R. 160, 164, or the use and release must be specifically authorized by the individual to whom the information pertains.



Among the permitted (but not mandatory) disclosures by covered entities are included disclosures (1) required by law; (2) related to victims of abuse, neglect, or domestic violence; (3) to law enforcement. However, each of these permitted disclosures is limited. Disclosure required by law is restricted to that specifically authorized by statute, regulation, or court order. Disclosure connected to victims of domestic violence or abuse is limited to certain circumstances, generally connected to the protection of the health of the alleged victim

(not prosecution of the offender). Disclosure to law enforcement is only permitted where (1) there is a court order, warrant, or subpoena; (2) necessary to identify a suspect, fugitive, material witness, or missing person; (3) in response to a law enforcement request for information about a victim; (4) to alert law enforcement about a death suspected to have a criminal cause; (5) if the information is evidence of a crime that occurred on the premises of the covered entity; or (6) in response to an off-site (of the covered entity) medical emergency to inform law enforcement about the commission and nature of a crime, the location of the crime and/or victims and perpetrator. Disclosures are also permitted to address a serious threat to public health or safety.

Needless to say, many of these permitted disclosures may be expanded or narrowed through litigation; however, the point here is not to delve into the nuances of HIPAA itself. Rather, it is to look at some practical ways in which HIPAA might be used in criminal defense practice as part of an effort to exclude evidence. Any motion written for such a purpose should incorporate the Arizona Constitution's right to privacy; while it may not have an effect on HIPAA itself, any interpretation of HIPAA

by an Arizona court, because of Arizona’s right to privacy, should disfavor disclosure.

Considering practical applications, this argument could be used in cases that are reinstated for prosecution following lack of compliance with TASC. The Arizona Court of Appeals has previously foreclosed the argument that TASC admissions are barred as inadmissible statements made for purposes of plea negotiations. See e.g. *State v. Miller*, No. 1 CA-CR 08-0078, 2009 WL 2949771, at \*3-4 (Ariz. Ct. App. Sept. 15, 2009); see also *State v. Gill*, No.1 CA-CR 15-0509, Filed 6-23-2016, available at <http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/CR%2015-0509.pdf>. However, in so holding, a significant consideration for the court was the following statement, included on the TASC document:

I FULLY UNDERSTAND THAT WHAT I HAVE WRITTEN HERE MAY BE USED AGAINST ME IN A COURT OF LAW SHOULD I FAIL TO SATISFACTORILY COMPLETE THE TASC PROGRAM.

Notwithstanding the above, there are powerful arguments that have never been raised in an effort to exclude TASC documents. Specifically, TASC is an acronym for “Treatment Assessment Screening Center, Inc.” It is a private, non-profit entity that seeks to provide a solution, through education and counseling, to drug addiction.

As an initial matter, because the primary purpose of TASC is counseling and treatment, and TASC is not a government entity, the therapist-patient privilege should apply to any communications that are for the purposes of treatment. See generally *Jaffee v. Redmond*, 518 U.S. 1 (1996). Additionally, A.R.S. § 12-2292 specifically requires confidentiality, and thus privilege, for “all medical records...and the information contained in medical records,” unless otherwise provided for by law. As noted by the Court in prior TASC cases, since no plea is ever entered, diversion is not a court ordered remedy. Consequently, no court order defeats the privileged and confidential nature of the communicative elements of TASC documents. Consequently, TASC documents are privileged and confidential. Of course, a privilege can be waived, so the issue remains as to whether the

language cited above constitutes a waiver such that the TASC documents become admissible.

The disclaimer signed in TASC documents today is identical to that described above; however, if the issue is privilege, a defendant should not contend that TASC documents are not admissible as evidence in general. Rather, the issue here is that no part of the disclaimer permits TASC to disclose confidential and privileged medical records to the County Attorney’s Office.<sup>2</sup> The disclaimer only permits the use of the records in court. Thus, the court must specifically request them, or the defendant must authorize their disclosure to the State. In reinstated prosecutions, neither occurs. Instead, TASC simply passes along the documents to the County Attorney’s office, violating privilege and confidentiality in the absence of any waiver by the defendant. For that reason, the documents are inadmissible as having been obtained in violation of privilege.

Additionally, nothing about the disclaimer specifically permits release of the information to a prosecutorial agency or a court. Consequently, there is never a court order requiring TASC to disclose the information,



**About TASC** (from their website at [www.tasc-solutions.org](http://www.tasc-solutions.org))

**Treatment Assessment Screening Center (TASC)** is a private, non-profit, 501(c)(3) corporation headquartered in Phoenix, Arizona. We are licensed

by the Arizona Department of Health Services as an outpatient behavioral health clinic, domestic violence offender treatment program, clinical laboratory, and DUI screening, education and treatment provider. Founded in 1977, TASC of Arizona is known nationally as an innovator in the development and implementation of drug testing and behavioral health programs.

and there is no order, warrant, or subpoena for the information. In short, no permitted disclosure applies to relieve TASC, the covered entity, of its obligations under HIPAA to protect the information from disclosure. Thus, the only way disclosure is legally permissible is if specifically authorized by the defendant, and the so-called waiver is ambiguous as to whether disclosure is specifically authorized and to whom. Making matters even worse for the State, since TASC contracts with the State, it must be considered a State actor, and the State must be considered a “business associate” of TASC, the covered entity. Consequently, the State is obtaining the information illegally, in violation of HIPAA, requiring its suppression at trial. In fact, by further disclosing the TASC documents to the prosecution, jurors, and any other party, the Court itself may be violating HIPAA to the extent that the Court is a business associate of TASC. Since the Arizona Constitution includes an express right to privacy, and further, since HIPAA is a federal law protecting the privacy of patients, the impermissible disclosure also may violate the Arizona Constitutional rights of a defendant.

Similar issues exist with respect to forensic nurse examinations where the alleged victim has not specifically authorized disclosure to the State. If there is no immediate need to protect the victim, which presumably will be true by the time a case has progressed to prosecution in light of the existence of a no-contact order, then disclosure should not

be permitted. Moreover, even if allowed to protect a victim, there remains a question as to whether the information could then be used at trial; by using the information at trial, the court and prosecution further violate HIPAA through additional disclosures to the public record, to juries, to the defendant, and other parties to the case. Thus, in any case in which the State acquires such information without a court order, warrant, subpoena, or specific statutory authorization, the same arguments apply as those discussed above respecting TASC documents, and suppression or exclusion should be argued.



These issues are not limited to TASC documents and forensic nurse examinations. Medical records are used in a wide variety of cases, and can include statements made by a defendant while in a hospital, introduced as statements for diagnosis and treatment, medical reports involving a homicide victim (in which case the family would need to authorize release if not ordered by a court or obtained with a warrant), blood draws taken by medical personnel for DUI testing, medical records introduced for purposes of restitution, and all manner of other medical information

obtained from a covered entity or business associate of a covered entity. For any of these circumstances, absent a specific authorization by the persons to whom the medical information pertains, efforts should be undertaken to determine whether the provision of that information to the State violates the requirements of HIPAA.

Given the issues involved, it may very well be that courts will be reluctant to exclude such records under HIPAA and the Arizona Constitution. However, at minimum, if a defendant can force a prosecutor to dive into the morass that is HIPAA case law and privilege, not to mention the Arizona Constitutional right to privacy, a better plea offer may very well be forthcoming. If litigated, given the expressed desire of the most recent SCOAZ appointment, Clint Bollick, to see more Arizona Constitutional issues argued, the extent of medical record privacy may have some appellate cache. Consequently, the argument should be made in any case involving medical records, absent express authorization for disclosure to the State by the patient.

#### Endnotes

1. FERPA can be used in the same way for purposes of educational records.
2. Note that, to the extent the provisions of the disclaimer are ambiguous as to whether it permits disclosure to the County Attorney’s office, any ambiguity must be resolved in favor of the defendant, who did not draft the waiver. See *United States v. Transfiguration*, 442 F.3d 1222, 1228 (9th Cir. 2006) (ambiguities in a contract are to be construed against the drafter); *State v. Szpyrka*, 223 Ariz. 390, 5, 224 P.3d 206, 208 (App. 2010) (same).



Most professional writing (the type you see in major newsmagazines) is tight; most legal writing isn't. You want a tip on tightening? After you have a fairly polished draft, look at the last line, half-line, or quarter-line of every paragraph. Play with the paragraph to try to shorten it by one line. It's a little editorial game you can play, and it works.

An example:

A few cases tend to suggest that if a plaintiff's own inexcusable neglect was responsible for the failure to name the correct party, an amendment substituting the proper party will not be allowed, notwithstanding that adequate notice has been given to the new party. Although this factor is germane to the question of permitting an amendment, it is more closely related to the exercise by the trial court of discretion under Rule 15(a) about whether to allow the change than it is to the satisfaction of the requirements of notice pursuant to Rule 15(c).

So we try to save half a line with a little tinkering:

~~A few cases tend to~~ [Some cas-

## WRITER'S CORNER

# Tinkering for Tightening

By Bryan A. Garner

es] suggest that if a plaintiff's own inexcusable neglect ~~was responsible for~~ [caused] the failure to name the correct party, an amendment substituting the proper party will not be allowed, ~~notwithstanding that adequate notice has been given~~ [despite adequate notice] to the new party. Although this factor is germane to the question of permitting an amendment, it is more closely related to the ~~exercise by the trial court of discretion~~ [trial court's discretion] under Rule 15(a) about whether to allow the change than it is to the satisfaction of ~~the requirements of notice pursuant to Rule 15(c)~~ [Rule 15(c)'s notice requirements].

The changes here: 5 words to 2; 3 words to 1; 7 words to 3; 5 words to 3; and 5 words to 3. Let's see the result:

Some cases suggest that if a plaintiff's own inexcusable neglect caused the failure to name the correct party, an amendment substituting the proper party will not be allowed, despite adequate notice to the new party. Although this factor is germane to the question of permitting an amendment, it is more closely related to the trial court's discretion under Rule 15(a) about whether to allow the change than it is to the satisfaction of Rule 15(c)'s notice requirements.

Then we can polish a bit more:

Some circuits have suggested that if a plaintiff has failed to name the correct party through inexcusable neglect, an amendment substituting the proper party is not allowed, even with adequate notice to the new party. Although the degree of neglect is germane to the question of permitting an amendment, it is more closely related to the trial court's discretion under Rule 15(a) about whether to allow the change than it is to the satisfaction of Rule 15(c)'s notice requirements.

We've gone from five and a half lines to four and a half. The passage is much tighter, and it reads better. So try this exercise—cutting words here and there within a paragraph to save your last line.

### For further reading:

Garner, *Legal Writing in Plain English* 36–38, 50–52, 162–64 (2d ed. 2013).

Garner, *The Redbook: A Manual on Legal Style* 362–63 (3d ed. 2013).

**Editors' Note:** Bryan A. Garner is a best selling legal author with more than a dozen titles to his credit, including *A Dictionary of Modern Legal Usage*, *The Winning Brief*, *A Dictionary of Modern American Usage*, and *Legal Writing in Plain English*. The selection above is an excerpt from Garner's "Usage Tip of the Day" e-mail service and is reprinted with his permission.

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## CASE LAW SUMMARY

## Opinion Summaries, Arizona Court of Appeals July, 2016 through September, 2016

By Kaitlin Perkins, Defender Attorney

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### ***State v. Haskie*, 1 CA-CR 2015-0251 (July 19, 2016):**

Mr. Haskie appealed his convictions and sentences for several counts of Agg. Assault DV, Agg. DV, influencing a witness, and kidnapping. State's expert Dr. Ferraro testified as a "blind/cold expert," meaning she had not reviewed police reports and was not going to testify about particulars of any of the events in this case. Her testimony mostly consisted of describing counterintuitive characteristics of domestic violence victims, expert testimony for which courts have found appropriate to properly educate the jury. However, those characteristics provided the jury with an explanation as to why the victim in this particular case may have recanted, changing her story and blaming herself. Haskie argued Dr. Ferraro's testimony constituted impermissible offender profiling, and impermissible vouching for the victim's credibility. Holding: Dr. Ferraro's testimony did not constitute impermissible profile evidence. One portion of her testimony did constitute impermissible vouching by effectively commenting directly on the victim's credibility, but to the extent she testified in general terms about domestic violence victims, that testimony was admissible. Even though some of Dr. Ferraro's testimony was improper, the error was harmless. Affirming Haskie's convictions and sentences, the Court found beyond a reasonable doubt that the jury would have convicted him even without Dr. Ferraro's testimony.

### **I. OFFENDER PROFILING**

¶17 Defendant argues that Dr. Ferraro's testimony constituted impermissible offender profiling. "Profile evidence tends to show that a defendant possesses one or more of an "informal compilation of characteristics" or an "abstract of characteristics" typically displayed by persons engaged in a particular kind of activity." *Ketchner*, 236 Ariz. at 264, ¶ 15 (quoting *State v. Lee*, 191 Ariz. 542, 544-45, ¶ 10 (1998)). Profile evidence cannot be "used as substantive proof of guilt because of the 'risk that a defendant will be convicted not for what he did but for what others are doing.'" *Id.* at 264-65, ¶ 15 (quoting *Lee*, 191 Ariz. at 545, ¶¶ 11-12).

¶18 Dr. Ferraro's testimony did not constitute impermissible profile evidence. The Arizona Supreme Court addressed the issue of profile evidence in the context of domestic violence for the first time in *Ketchner*, 236 Ariz. at 264, ¶ 13. In *Ketchner*, an expert witness testified about "characteristics common to domestic violence victims and their abusers[.]" *Id.* at 264, ¶ 14. Specifically, the expert testified regarding "separation assault" and "described risk factors for 'lethality' in an abusive relationship." *Id.* The Arizona Supreme Court held that the testimony was inadmissible profile evidence because it went beyond "explain[ing] behavior by [the victim] that otherwise might be misunderstood by a jury." *Id.* at 265, ¶ 19. Rather, the testimony "predicted an abuser's reaction to loss of control in a relationship." *Id.* The Court

found "[t]here was no reason to elicit this testimony except to invite the jury to find that Ketchner's character matched that of a domestic abuser who intended to kill or otherwise harm his partner in reaction to a loss of control over the relationship." *Id.*

¶19 Dr. Ferraro's testimony in this case is distinguishable from *Ketchner* because here, the testimony did not tend to show that Defendant possessed one or more of an informal compilation of characteristics typically displayed by domestic violence abusers. Instead, her testimony was confined to the general counterintuitive behaviors of victims, and the factors that cause such behaviors. In particular, Dr. Ferraro testified about victims returning to an abusive relationship, and victims taking responsibility for their abuse.

¶23 The purpose of expert testimony such as Dr. Ferraro's is to explain counterintuitive behaviors commonly seen in a victim of domestic violence. For that reason, it is not surprising — indeed it is expected — that the jury will hear evidence that the victim has behaved to a greater or lesser extent in accord with the testimony of a "cold" and "blind" expert such as Dr. Ferraro. Even though this evidence echoed some of Dr. Ferraro's testimony, her testimony did not tend to show that Defendant possessed "one or more of an informal compilation of characteristics" typically displayed by domestic violence abusers. *See Ketchner*, 236 Ariz. at 264, ¶ 15. Nor did the testimony "implicitly invite[] the jury to infer criminal conduct based on the described"

conduct. *Id.* at 265, ¶ 17 (citing with approval *Ryan v. State*, 988 P.2d 46, 56-57 (Wyo. 1999)). Rather, Dr. Ferraro's testimony properly described general behaviors that were not likely to be within the knowledge of most lay persons. See *Tucker*, 165 Ariz. at 346. Accordingly, Dr. Ferraro's testimony did not constitute impermissible profile evidence.

## II. VOUCHING

¶24 Defendant also argues that Dr. Ferraro's testimony impermissibly vouched for P.J.'s credibility. Evidence that explains "why recantation is not necessarily inconsistent with the crime having occurred" helps the jury evaluate a victim's credibility. *State v. Moran*, 151 Ariz. 378, 384 (1986). But an "expert may neither quantify nor express an opinion about the veracity of a particular witness or type of witness." *Tucker*, 165 Ariz. at 346; see also *State v. Lindsey*, 149 Ariz. 472, 474 (1986) (noting that an expert should not be "allowed to go beyond the description of general principles of social or behavioral science which might assist the jury in their own determination of credibility"). "Nor may the expert's opinion as to credibility be adduced indirectly by allowing the expert to quantify the percentage of victims who are truthful in their initial reports despite subsequent recantation." *Moran*, 151 Ariz. at 382.

¶28 Although *Moran* and *Lindsey* involve child victims of sexual abuse rather than adult victims of domestic violence, those cases are instructive here. The State concedes that Dr. Ferraro's testimony went beyond that

permitted by *Moran*, and ventured into that prohibited by *Lindsey*, when she opined that "it's very rare" for a victim to give a false initial report, but that it is "much more common . . . for victims to minimize and deny that it has happened. That I see in almost every case." That statement by Dr. Ferraro did not just explain why a victim's recantation was not necessarily inconsistent with abuse having occurred; instead, it commented directly on a victim's credibility. Accordingly, we find this portion of Dr. Ferraro's testimony constituted impermissible vouching.

¶29 On the other hand, to the extent Dr. Ferraro testified in general terms about domestic violence victims, we find that testimony was admissible. In contrast to *Lindsey*, Dr. Ferraro's testimony stated general information in relative terms that the jury could use to determine credibility. See *Lindsey*, 149 Ariz. at 474... Dr. Ferraro did not tell the jury who was correct or incorrect, nor did she opine as to Defendant's guilt. Cf. *Lindsey*, 149 Ariz. at 474. Furthermore, Dr. Ferraro did not give specific opinions regarding P.J.'s credibility, or opine as to whether P.J.'s behavior was consistent with abuse having occurred. In fact, Dr. Ferraro testified that she had no knowledge of this case, and therefore could not testify about P.J. specifically. See *State v. Herrera*, 232 Ariz. 536, 551, ¶ 36 (App. 2013) (permitting expert testimony and distinguishing *Lindsey* in part because expert "testified she had no knowledge of the particular facts and circumstances of the case").

Link to opinion: <http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/CR15-0251.pdf>

## ***State v. Hancock, 2 CA-CR 2015-0117 (July 29, 2016):***

¶1 After a jury trial, Brian Hancock was found guilty of sexual conduct with a minor and two counts of sexual abuse of his then fifteen-year-old step-daughter. The jury found two aggravating factors proven beyond a reasonable doubt, and he was sentenced to consecutive and concurrent, enhanced and aggravated prison terms totaling twelve years. On appeal, Hancock alleges he was denied his constitutional right to a public trial, challenges the sufficiency of the evidence, and contends his sentences were illegally enhanced. For the following reasons we affirm his convictions, but remand for resentencing.

### **PUBLIC TRIAL**

¶7 Hancock argues the exclusion of his family members from the courtroom "constituted an abuse of the subpoena [power] and denied [him] a public trial."...

¶9 ...[W]e have found no cases, in Arizona or elsewhere, holding that exclusion of potential witnesses violated the right to a public trial. See Ariz. R. Crim. P. 9.3 (court may invoke rule sua sponte and must on request of party); *Tharp v. State*, 763 A.2d 151, 160 (Md. App. 2000) (witnesses sequestered pursuant to the rule "are no longer considered members of the general public for purposes of exclusion from the courtroom during criminal proceedings"); see also *State v. Jordan*, 325 S.W.3d 1, 53 (Tenn. 2010) ("[I]t is clear that the sequestration of witnesses in the ordinary case does not violate a right to a public trial."); *State v. Worthen*, 100 N.W. 330, 331 (Iowa 1904) (sequestration of criminal defendant's witnesses did not infringe upon his constitutional right to a public trial).

¶16 [A]lthough we have previously noted the “special concern for accommodating the attendance at trial of an accused’s family members,” *Tucker*, 231 Ariz. 125, ¶ 15, 290 P.3d at 1257, citing *Oliver*, 333 U.S. at 271-72 & 272 n.29, neither *Oliver* nor *Tucker* involved a situation in which a defendant’s family members were potential witnesses at trial. And that concern alone does not compel the outcome Hancock seeks here...Accordingly, we find no error, structural or otherwise, in the exclusion of potential witnesses from the courtroom, and conclude Hancock was not denied a public trial.

#### SUFFICIENCY OF THE EVIDENCE

¶18 Under A.R.S. § 13-1405(A), the offense of sexual conduct with a minor is committed by “intentionally or knowingly engaging in sexual intercourse . . . with any person who is under eighteen years of age.” Sexual intercourse includes “masturbatory conduct,” which is not further defined. A.R.S. § 13-1401(A)(4). Hancock asserts the crime of sexual conduct is differentiated from the less serious charge of sexual abuse by requiring “actual stimulation of the victim’s vulva.” Hancock, however, provides no support for his claim that evidence of stimulation is required to sustain a sexual conduct conviction, nor are we aware of any.

¶19 At trial, M.H. testified that Hancock had rubbed her “vagina,” underneath her panties, back and forth, “sometimes fast, sometime slow,” and went “back and forth” between her breasts and her vaginal area “a lot.” Viewing the testimony in the appropriate light, we conclude the evidence was sufficient for any rational trier of fact to conclude Hancock’s behavior went beyond “mere touching,” as he alleges, and constituted the more serious element of masturbatory conduct supporting the sexual conduct charge.

#### AGGRAVATING FACTORS

¶20 Hancock next challenges the jury’s finding that the offenses were

committed in the presence of a child for purposes of aggravating his sentence pursuant to A.R.S. § 13-701(D)(18). He relies on *State v. Burgett*, in which we observed that the purpose of this aggravating factor is “to punish more severely those who expose children to domestic violence.” 226 Ariz. 85, ¶ 6, 244 P.3d 89, 91 (App. 2010). In *State v. Torres*, we noted that to find “present” a child who was entirely unaware of an offense would be inconsistent with that purpose. 233 Ariz. 479, ¶ 16, 314 P.3d 825, 828 (App. 2013).

¶22 Notwithstanding the policy considerations identified in *Burgett* and *Torres*, the state contends such statements are dicta, and the “clear terms [of] the presence-of-a-child aggravator require[] only that the child be present, which the brother, J.H., clearly was.” We disagree. Although the evidence supports the state’s contention that M.H.’s younger brother was there on the same bed when the abuse took place, the § 13-701(D)(18) aggravator cannot be sustained where the only evidence presented indicates the child was entirely unaware of the offense. *Cf. State v. Tucker*, 215 Ariz. 298, ¶¶ 21, 24, 160 P.3d 177, 188 (2007) (third party’s “mere presence” insufficient to support “grave risk of death” aggravator); *Torres*, 233 Ariz. 479, ¶ 16, 314 P.3d at 828 (“A child’s mere presence in a home where an offense has occurred does not, standing alone, fulfill the statutory requirement absent some evidence that the child was aware of that offense.”). We conclude the trial court erred by applying the presence of the child aggravator to increase Hancock’s sentences.

¶25 ...As noted above, the jury found two aggravators proven beyond a reasonable doubt: that the victim suffered emotional harm, and that the offense was committed in the presence of a child. The trial court found Hancock’s betrayal of trust to be a third aggravating factor, and his admission of a prior felony

conviction at sentencing a fourth... Hancock does not contest either the court’s use of the prior felony or the jury’s finding that the victim suffered emotional harm.

¶26 Hancock does, however, challenge the trial court’s finding of betrayal of trust as another aggravator. He argues that because that factor was used to enhance his sexual conduct with a minor offense from a class six felony under A.R.S. § 13-1405(B), to a class two felony, relying on the same factor to aggravate his sentence violates the dictates of *State v. Alvarez*, 205 Ariz. 110, ¶ 17, 67 P.3d 706, 711 (App. 2003). In *Alvarez*, we interpreted the catch-all provision of the former aggravating factor statute as “authorizing a trial court to factor into the sentencing equation any *additional* fact or circumstance not . . . reckoned into the statutory scheme elsewhere, either as an element of the offense or a basis for enhancing the range of sentence.” *Id.* (emphasis added in *Alvarez*). We thus concluded the trial court erred by employing the same justification used to enhance a sentence as a reason to impose an aggravated sentence. *Id.* ¶ 18.

¶28 Under the statute in effect at the time of Hancock’s offenses, sexual conduct with a minor is enhanced from a class six felony to a class two felony “if the person is or was the minor’s parent, stepparent, adoptive parent, legal guardian or foster parent,” or the minor’s teacher, clergyman, or priest. 2011 Ariz. Sess. Laws., ch. 58, § 1. Thus, the state argues Hancock’s sentence was enhanced because he was M.H.’s stepfather, and was aggravated because he betrayed her trust. Hancock maintains, however, that the stepparent/stepchild relationship is a relationship of trust, and it is the breach of that trust which is the basis for the statutory enhancement. We conclude Hancock

is correct.

Link to opinion: <http://www.apltwo.ct.state.az.us/Decisions/CR20150117%20opinon.pdf>

***Phoenix Newspapers v. Hon. Reinstein/State/Moran, 1 CA-SA 2016-0096 (August 11, 2016):***

Division 1 granted special action relief to Phoenix News and John D'Anna ("PNI"), who challenged the trial court's order denying its motion to quash a subpoena duces tecum after defense counsel subpoenaed journalist D'Anna, requiring disclosure of information obtained during meetings with one of the victims in the criminal case. Vacating the trial court's order, the Court found Moran failed to satisfy the Media Subpoena Law's requirements to compel disclosure by PNI because he failed to meet his burden to overcome the journalist's qualified privilege afforded by the First Amendment. Holdings: The defense's affidavit in support of the subpoena was defective and the trial court should have quashed the subpoena. Further the Media Shield Law is inapplicable here because defense counsel sought information from a journalist, not the journalist's confidential source(s).

¶11 ...Privilege statutes are strictly construed, however, because "they impede the truth-finding function of the courts." *Carondelet Health*, 221 Ariz. at 616 ¶ 7, 212 P.3d at 954. As discussed below, the affidavit accompanying the subpoena duces tecum fails to satisfy two requirements of the Media Subpoena Law: that Moran has exhausted other sources for the information and that the infor-

mation is not protected by any lawful privilege. Because Moran has not satisfied these requirements, we need not address PNI's other arguments... Therefore, because the affidavit was deficient, the trial court erred in denying the motion to quash the subpoena duces tecum.

¶12 The Media Subpoena Law provides that subpoenas of persons "engaged in gathering, reporting, writing, editing, publishing, or broadcasting news to the public" shall have "no effect" unless accompanied by "the required affidavit." A.R.S. § 12-2214(A)-(B)....

¶14 Once the party seeking the information has complied with the [affidavit] requirements of subpart (A), the subject of the subpoena may controvert the allegations of the affidavit and set forth the bases therefor by either filing a controverting affidavit or moving to quash the subpoena. A.R.S. § 12-2214(C); *see also Bartlett*, 150 Ariz. at 183, 722 P.2d at 351... Consequently, the subpoena has "no effect" until the movant establishes the six requirements in subpart (A). *See* A.R.S. § 12-2214(A)-(B). However, if the party subpoenaed contests the affidavit by filing a controverting affidavit or, as here, moves to quash the subpoena duces tecum, the trial court must stay the subpoena and hold a hearing to determine the merits of the motion to quash. *See* A.R.S. § 12-2214(C).

**1. EXHAUSTION OF OTHER SOURCES**

¶15 PNI argues that the affidavit did not satisfy the Media Subpoena Law because Moran did not "attempt[] to obtain each item of information from all other available sources." *See* A.R.S. §

12-2214(A)(2). Counsel's affidavit stated that she had requested "any and all communication" between D'Anna and Fr. Terra in reference to the [] articles. Counsel avowed that she had "been unable to obtain [the items] from Mr. D'Anna and his legal representative." But counsel's affidavit stated that she was requesting information about communications between D'Anna and Fr. Terra. She said nothing about seeking the information directly from Fr. Terra; indeed, nothing in the record indicates that Moran made any effort to contact Fr. Terra to ask him for an interview. Moran has not exhausted the possibility that the priest could provide Moran with the same information that he provided PNI. Further, although the Victim's Bill of Rights gives Fr. Terra the right to refuse an interview with Moran, defense counsel, or any "other person acting on behalf of Defendant," Ariz. Const. art. II, § 2.1(A)(5), defense counsel's affidavit does not state whether an interview with Fr. Terra was requested or denied.

¶16 Moran counters that interviewing Fr. Terra now would not provide the same information as D'Anna's notes of his interviews with the priest because only the notes would memorialize Fr. Terra's actual statements during the interviews. But this argument fails because Moran has not attempted to interview Fr. Terra; therefore, Moran has not eliminated the possibility that Fr. Terra would accurately recount his conversations with D'Anna. Consequently, because Moran has not exhausted the requirement of seeking the information "from all other available sources," the affidavit fails to satisfy

a requirement of the Media Subpoena Law to compel PNI to disclose the information.

## 2. PROTECTION BY LAWFUL PRIVILEGE

¶17 PNI next argues...the information Moran seeks is protected by the Media Shield Law and the “journalist’s qualified privilege” afforded by the First Amendment. But Moran counters that the Media Shield Law “does not protect information derived from a non-confidential source.” Moran also counters that he has met the First Amendment’s requirements to compel disclosure because he has shown that “PNI is the only source of the subpoenaed information, the information is not cumulative, and the information is material and relevant to [his] case.” As discussed below, the Media Shield Law is inapplicable, but because Moran has not made the necessary showings to overcome the First Amendment privilege, the affidavit fails to satisfy the Media Subpoena Law’s requirement that the information sought is not subject to a privilege.

### 2(A). ARIZONA’S MEDIA SHIELD LAW

¶19 PNI counters that the [Media Shield Law] protects both sources and confidential information. But this issue has been previously decided in *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119 (2004). In *Moody*, a criminal defendant argued that the trial court erred in preventing him from cross-examining a reporter who had written an article about the crimes he was accused of committing. *Id.* at 457 ¶ 134, 94 P.3d at 1152. Our supreme court held that the Media Shield Law did not protect the reporter from the defendant’s cross-examination about “unpublished information” or the reporting process. *Id.* at 458 ¶¶ 136–39, 94 P.3d at 1153. The court explained that the statute was “not

implicated in this case because [the] article did not involve a confidential source.” *Id.* at ¶ 139; *see also Matera*, 170 Ariz. at 449, 825 P.2d at 974–75 (“The statute does not protect all the activities of would-be publishers or newsgatherers, nor does it protect any and all information gathered.”). Consequently, the Media Shield Law is inapplicable because the subpoena does not seek the source of the information in D’Anna’s articles; it seeks information Fr. Terra, an identified source, disclosed in his interviews with D’Anna. Because the subpoena did not seek disclosure of a confidential source, the Media Shield Law is inapplicable here.

### 2(B). THE FIRST AMENDMENT

¶20 PNI next argues that Moran also cannot satisfy the Media Subpoena Law’s absence-of-privilege requirement because the information sought is protected by the journalist’s qualified privilege afforded by the First Amendment...As applicable here, the extent of a journalist’s privilege under federal law derives from the First Amendment as established by *Branzburg v. Hayes*, 408 U.S. 665 (1972). In *Branzburg*, the United States Supreme Court considered whether a news reporter could be compelled to testify before a grand jury. The reporter had written an article about two drug dealers he had interviewed and had watched manufacture hashish. *Id.* at 667–68. The reporter declined to identify them before the grand jury, relying on a reporter’s privilege under state law; the state trial court ordered him to answer the questions. *Id.* at 668. The *Branzburg* plurality rejected the privilege claim, citing the public’s interest in effective law enforcement and the important role of grand juries. *Id.* at 690–91.

¶21 The plurality observed, however, that “news gathering is not with-

out its First Amendment protections.” *Id.* at 707. The plurality also found “merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards.” *Id.* at 706. The plurality recognized that “state courts [may] . . . respond[] in their own way and constru[e] their own constitutions so as to recognize a news[person]’s privilege, either qualified or absolute.” *Id.* Justice Powell, who cast the decisive concurring vote, suggested that the First Amendment requires a “case-by-case” balancing “between freedom of the press [not to disclose information] and the obligation of all citizens to give relevant testimony with respect to criminal conduct.” *Id.* at 710.

¶25 Although not binding, the Ninth Circuit’s reasoning in *Farr*, *Shoen I*, and *Shoen II* is persuasive...Consequently, under the First Amendment, journalists enjoy a constitutional qualified privilege against compelled disclosure of information gathered in the course of their work. *Shoen II*, 48 F.3d at 414, 416. Because the “privilege is qualified, not absolute,” “the process of deciding whether the privilege is overcome requires that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts, and a balance struck to determine where lies the paramount interest.” *Shoen I*, 5 F.3d at 1292–93. The privilege “applies to a journalist’s resource materials even in the absence of the element of confidentiality.” *Id.* at 1295. “[T]he absence of confidentiality may be considered in the balance of competing interests as a factor that diminishes the journalist’s, and the public’s, interest in non-disclosure.” *Id.*

¶26 Once the reporter invokes the privilege, “the burden shifts to the requesting party to demonstrate a

sufficiently compelling need for the journalist's material." *Id.* at 1296. That is, "[t]o overcome a valid assertion of the journalist's privilege by a nonparty, a civil litigant seeking information that is not confidential must show that the material is: (1) unavailable after exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case." *Shoen II*, 48 F.3d at 418. Moreover, the litigant "must . . . show[] actual relevance; a showing of potential relevance will not suffice." *Id.* at 416.

¶28 The trial court erred by finding that Moran met his burden of overcoming D'Anna's reporter's privilege. At a minimum, Moran cannot overcome the reporter's privilege without showing that he is unable to interview Fr. Terra or that, having interviewed Fr. Terra, he still lacks an alternative means of obtaining the information. If Moran is able to make such a showing, the trial court may order an *in camera* review of the notes to determine whether they contain actually relevant and non-cumulative information. The court may conduct the *in camera* review itself; alternatively, it may have another judge conduct the review or appoint a special master to do so...In sum, Moran has not met his burden of overcoming the privilege the First Amendment affords to PNI. Consequently, because the affidavit was defective, the trial court erred in denying the motion to quash the subpoena.

Link to opinion: <http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/1%20CA-SA%2016-0096.pdf>

### ***State v. Huez, 2 CA-CR 2015-0381 (August 12, 2016):***

Francisco Florez Huez, Jr. was sentenced to 9 months in DOC after being convicted of possessing marijuana. Challenging the trial court's denial of his motion to suppress, Huez argued the officer lacked reasonable suspicion to effectuate the investigatory stop which resulted in the discovery of marijuana. The State argued the officer had reasonable suspicion; if he lacked reasonable suspicion it was a reasonable mistake of law; and if all else fails, the discovery of marijuana was too attenuated from the unlawfulness of the stop to justify exclusion. Holdings: (1) The trial court erred in suppressing the evidence because the officer lacked reasonable suspicion to stop Mr. Huez—he did not actually commit a traffic violation. (2) To the extent the trial court relied on *Heien* in denying the motion to suppress, it abused its discretion, because the relevant statutes are unambiguous so any mistake in law was *unreasonable*. (3) Since the State failed to argue attenuation at the suppression hearing, the parties presented a limited amount of evidence relevant to this argument, so an additional evidentiary hearing on the motion to suppress (limited to the State's attenuation argument) is necessary. Since the State was the appellee here, the State did *not* waive the attenuation argument on appeal.

¶9 Huez was not riding the wrong way on a roadway or riding on a sidewalk. Accordingly, the officer was unable to provide any reasonable, objective facts to support reasonable suspicion that Huez was committing a traffic violation at the time of the stop.

¶14 The state has not provided any reason why the legal behavior was

suggestive of previous illegal behavior, other than the impermissible speculation that Huez might not have behaved in conformity with the law before the officer saw him. Therefore, the officer did not have a particularized suspicion that Huez had committed a traffic violation, but instead must have generally suspected Huez had been engaged in criminal activity. The stop was thus not based on reasonable suspicion.

¶15 ...The court appears to have relied on *Heien* for the proposition that reasonable suspicion can be founded on a mistake of law where that mistake "was an objectively reasonable one." See *Heien*, \_\_\_ U.S. at \_\_\_, 135 S. Ct. at 536. We review a ruling on a motion to suppress for an abuse of discretion, and "an error of law is an abuse of discretion"...

¶17 Here, the state appears to concede that the Code is unambiguous. In our review of the Code, as detailed above, we find no ambiguity in the definition of sidewalk contained therein. The Code specifically defines sidewalk as the area between the road and the adjacent property lines that is "improved for the use of pedestrians." § 20-1(27). The officer testified and the trial court found the location of the stop was not paved or improved. Thus, the officer made an unreasonable mistake of law by construing Huez's location as a sidewalk...

¶18 As to § 28-815, the state argues that, to the extent this court construes statutes to "allow bicyclists . . . to simply proceed on the wrong side of the road when confronted by construction zones," then that interpretation is "a reasonably debatable matter under [the] rules of statutory construction." But, as discussed above, Huez was not operating his bicycle on a roadway as defined by § 28-601(22). The state does not ar-

gue that the definition of roadway is ambiguous in any way. Thus, because Huez was not operating his bicycle on a roadway, and that definition is unambiguous, the officer made an unreasonable mistake of law in concluding that Huez was riding his bicycle the wrong way on a roadway; the presence of construction is inapposite to our analysis. Therefore, to the extent the trial court relied on *Heien* in denying the motion to suppress, it abused its discretion. *See Stoll*, 239 Ariz. 292, ¶ 13, 370 P.3d at 1134.

¶19 Finally, the state argues that, even if the stop was unlawful and was not based on a reasonable mistake of law, the discovery of narcotics was too far attenuated from the unlawfulness of the stop to justify exclusion...

¶20 “In [*Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)] the [United States] Supreme Court applied three factors to determine whether the taint of illegal conduct is sufficiently attenuated from a subsequent search to avoid the exclusionary rule.” *State v. Hummons*, 227 Ariz. 78, ¶ 9, 253 P.3d 275, 277 (2011). In this context, a court should consider: 1) the time elapsed between the unlawful police conduct and the “acquisition of the evidence,” 2) “the presence of intervening circumstances,” and 3) “the purpose and flagrancy of the official misconduct.” *Id.*

¶22 The first factor requires a court to examine the length of time between the unlawful conduct and the discovery of evidence; shorter times suggest the evidence should be suppressed...This is, however, the least important *Brown* factor because “‘in essentially every case,’ the time between an illegal stop and the discovery of evidence is short.” *Id.*, quoting *McBath v. State*, 108 P.3d 241, 248 (Alaska Ct. App. 2005). In this case, the time between the unlawful de-

tention and the discovery of the evidence appears to have been relatively short. The officer stopped Huez, conducted a warrant search, placed him under arrest, and a second officer at the scene effectuated a search of his belongings that produced the incriminating evidence. Although the officer did not provide exact times, the flow of events was uninterrupted and the discovery must have followed the unlawful detention fairly quickly. This factor weighs in favor of exclusion.

¶23 The second factor requires a court to consider whether any intervening circumstances occurred that would “provide[] a legal basis for the [search or] arrest notwithstanding an illegal seizure.” *Id.* ¶ 11. “A law enforcement officer who previously lacked even reasonable suspicion, by discovering a valid warrant, gains probable cause not just to detain, but to arrest.” *Id.* The existence of a valid warrant does not, however, “dissipate[] the taint of illegality,” because to hold otherwise would allow police to “routinely illegally seiz[e] individuals, knowing that the subsequent discovery of a warrant would provide after-the-fact justification for illegal conduct.” *Id.* ¶ 13. But once an officer discovers a warrant during an investigation, that officer has an obligation to make an arrest, and the resulting arrest is thus “a ministerial act that [is] independently compelled by the pre-existing warrant.” *Utah v. Strieff*, \_\_\_ U.S. \_\_\_, \_\_\_, 136 S. Ct. 2056, 2063 (2016).

¶24 Here, the warrant for Huez’s arrest obligated the officer to effectuate an arrest. Thus, although the initial detention was unlawful, the officer had probable cause for the arrest, and therefore “it was undisputedly lawful to search [Huez] as an incident of his arrest to protect [officer] safety.” *Id.*; see also *Arizona v. Gant*, 556 U.S. 332, 339 (2009). This

factor weighs against exclusion.

¶25 Finally, we turn to the third *Brown* factor: the “purpose and flagrancy of illegal conduct.” *Hummons*, 227 Ariz. 78, ¶ 14, 253 P.3d at 278. The “culpability of the law enforcement conduct,” *id.*, quoting *Herring v. United States*, 555 U.S. 135, 143 (2009), is “‘particularly’ important in [an] attenuation analysis,” *id.*, quoting *Brown*, 422 U.S. at 604. While reviewing this factor, “[c]ourts must consider the totality of circumstances in determining whether the evidence should be suppressed.” *Id.* The court should consider, among other things, “an officer’s regular practices and routines, an officer’s reason for initiating the encounter, the clarity of the law forbidding the illegal conduct, and the objective appearance of consent.” *Id.* Evidence should not be suppressed when police misconduct is “at most negligent,” such as an officer conducting a “‘negligibly burdensome precautio[n]’ for officer safety.” *Id.*, quoting *Rodriguez v. United States*, \_\_\_ U.S. \_\_\_, \_\_\_, 135 S. Ct. 1609, 1616 (2015). Thus, this analysis is more subjective than the *Heien* analysis.

¶27 No evidence was presented suggesting the officer in this case was engaged in a “systemic or recurrent” pattern of initiating unlawful traffic stops. *Strieff*, \_\_\_ U.S. at \_\_\_, 136 S. Ct. at 2063. Nor did his testimony show he “routinely approaches citizens in the hopes of discovering warrants in order to search them incident to arrest.” *Hummons*, 227 Ariz. 78, ¶ 15, 253 P.3d at 279. Indeed, in denying the motion to suppress, the trial court noted the officer’s conduct was “objectively reasonable.” We defer to this finding. *See Monge*, 173 Ariz. at 281, 842 P.2d at 1294. As in *Strieff*, the police conduct here was “at most negligent.” *Strieff*, \_\_\_ U.S. at \_\_\_, 136 S. Ct. at 2063. Consequently, we find that the officer’s conduct was

not purposeful or flagrant. This factor conclusively weighs against exclusion. On this record, we find the discovery of the at-issue evidence was too attenuated from the unlawful stop to justify exclusion.

¶28 But, here, the state did not argue attenuation at the suppression hearing. As a result, the parties presented a limited amount of evidence as to the “officer’s regular practices and routines” and the “officer’s reason for initiating the encounter.” *Hummons*, 227 Ariz. 78, ¶ 14, 253 P.3d at 279. And the trial court did not make any express factual findings or legal conclusions on the attenuation issue. *See Monge*, 173 Ariz. at 281, 842 P.2d at 1294 (we review for legal error but defer to factual findings).

¶29 Because the state did not argue attenuation, Huez was deprived of the opportunity to obtain such evidence. Therefore, the proper course of action is to remand to the trial court for a new evidentiary hearing at which the parties may introduce evidence concerning the *Brown/Strieff* factors...

¶30 For the foregoing reasons, we remand to the trial court for an additional evidentiary hearing on the motion to suppress, limited to the state’s attenuation argument. If the court determines that the evidence was admissible, Huez’s conviction and sentence are affirmed, subject to any appeal from that decision. But if the court determines the evidence was inadmissible, it shall suppress the evidence and vacate Huez’s conviction and sentence, subject to any appeal from that decision.

Link to opinion: <http://www.apltwo.ct.state.az.us/Decisions/CR20150381Opinion.pdf>

## ***State v. Olague*, 2 CA-CR 2015-0056 (August 16, 2016):**

Jamonte Olague appealed his conviction of first-degree murder and armed robbery, after the evidence at trial established Olague and several co-defendants robbed and fatally shot the victim the day after arranging to buy one pound of marijuana from the victim. On appeal, Olague challenged the denial of (1) his motion to suppress statements he made to law enforcement; (2) his motion to dismiss; and (3) his motions for a new trial. Division 2 affirmed the trial court’s findings.

### **MOTION TO SUPPRESS**

¶5 Olague first contends the trial court erred in denying his motion to suppress his statements to detectives because he did not validly waive his *Miranda* rights. A waiver of such rights must be voluntary, meaning the product of “free and deliberate choice rather than intimidation, coercion, or deception.” *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010), quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986); accord *In re Andre M.*, 207 Ariz. 482, ¶ 7, 88 P.3d 552, 554 (2004). Olague asserts his statements were inadmissible because he did not answer the detectives’ questions or spontaneously speak to the officers; instead, he merely responded to a law enforcement command to tell his side of the story, which he characterizes as an “inherently coercive order.”

¶7 Although Olague bases his argument on the precise language the detective used to secure the waiver here, our record on appeal does not include the exhibits admitted at the suppression hearing. An appellant has the burden of ensuring the appellate record contains the necessary items for the arguments presented. *State v. Jessen*, 130 Ariz. 1, 8, 633 P.2d

410, 417 (1981). Despite the fact that the state’s answering brief noted this deficiency, Olague has taken no steps to cure it. Instead, he asserted in his reply brief that a recording of the interview was properly admitted at the suppression hearing and should have been included automatically in the record on appeal pursuant to Rule 31.8(a)(1), Ariz. R. Crim. P. He therefore urged this court to supplement the record “with no negative ramifications for [him].” It is an appellant’s duty to supplement an incomplete record, however, not this court’s. *State v. Kerr*, 142 Ariz. 426, 430, 690 P.2d 145, 149 (App. 1984).

¶8 At the suppression hearing, a detective testified that he read a verbatim *Miranda* advisory to Olague at the beginning of the custodial interview. That advisory informed Olague of his right to remain silent and to have an attorney present before and during any questioning. *See Miranda*, 384 U.S. at 444, 469-70. After Olague stated he understood his rights, the detective sought a waiver by asking if he was “cool with” their discussion continuing. The detective testified that he had brief conversations with Olague in the past and that he had phrased his question as he did both to tailor it to Olague’s level of understanding and to create a relaxed atmosphere. Similarly, the detective removed Olague’s handcuffs to create a less stressful environment. Thus, on the record properly before us, we find no abuse of discretion in the trial court’s ruling that Olague understood and voluntarily waived the *Miranda* protections...

### **MOTION TO DISMISS**

¶10 Before trial, Olague joined a motion to dismiss his murder charge due to selective prosecution based on impermissible racial discrimination. The trial court denied the mo-

tion because it rested on the faulty legal premise that a person could be charged with felony murder for the sale of marijuana below the two-pound threshold amount set forth in A.R.S. § 13-3401(36)(h).

¶11 Our felony-murder statute, A.R.S. § 13-1105(A)(2), enumerates the predicate offenses that will support a first-degree murder charge. The list includes “marijuana offenses under § 13-3405, subsection A, paragraph 4...[and] narcotics offenses under § 13-3408, subsection A, paragraph 7 *that equal or exceed the statutory threshold amount for each offense or combination of offenses.*” § 13-1105(A)(2) (emphasis added). On appeal, Olague continues to argue that this threshold-amount clause in the felony-murder statute applies only to specified narcotics offenses, the clause’s last antecedent. He maintains that threshold amounts do not apply to marijuana offenses, dangerous drug offenses, or the various other disparate offenses enumerated in § 13-1105(A)(2)...

¶14 The legislative history of the 1993 crime bill shows that both chambers intended the application of the felony-murder statute to depend on the quantity of the drug involved. For marijuana, the amount originally was set at eight pounds, consistent with the former version of A.R.S. § 13-3405(C)...The bill that ultimately emerged from the conference committee reduced this amount and removed the language specifying different quantities for different types of drugs...As amended, the bill instead uniformly applied the new language concerning “statutory threshold amount[s].” *Id.* In making these changes, the conference committee both moved the threshold-amount clause to its present location and added the language specifying that it applied “for each offense or combination of offenses.” *Id.* The

full clause therefore reflects that the legislature understood and intended “each” different type of drug crime listed in the series—namely, marijuana, dangerous drug, and narcotics offenses—to require a statutory threshold amount. § 13-1105(A)(2).

#### MOTIONS FOR NEW TRIAL

¶16 Olague sought a new trial based on at least two types of alleged juror misconduct. His first motion claimed that Juror 8 had “pledge[d]” her vote within the meaning of Rule 24.1(c)(3)(iv), Ariz. R. Crim. P., because she had been “bullied by physical gestures” of one particularly “intense” juror and had “feared retaliation” from the others, which made her change her vote to guilty simply to avoid a confrontation with them. Olague’s supplemental motion alleged that the same intense juror had committed misconduct by insisting during deliberations that Olague would receive probation if convicted. Olague contended, specifically, that this juror’s comments regarding punishment had injected inadmissible extrinsic evidence into deliberations, in violation of Rule 24.1(c)(3)(i). Both the motions included supporting affidavits from Juror 8; the supplemental motion also included an affidavit from Juror 10.

¶18 Turning first to the allegation of bullying and retaliation, we note that “[p]ressure from other jurors, generally, will not serve as the basis for a mistrial.” *State v. Hutton*, 143 Ariz. 386, 391, 694 P.2d 216, 221 (1985). A juror’s testimony or affidavit that she felt pressured into her verdict does not establish misconduct...Indeed, Rule 24.1(d) forbids a court from receiving evidence of the subjective motives or mental processes that led a juror to her verdict. *State v. Callahan*, 119 Ariz. 217, 219, 580 P.2d 355, 357 (App. 1978).

¶19 With respect to the conduct of jurors during deliberations, a distinction exists between a juror’s “blustering arrogance,” on the one hand, and threats of violence that would cause a reasonable person to fear for her safety, on the other... “[A]rticulate jurors may intimidate the inarticulate, [and] the aggressive may unduly influence the docile,” but such dynamics are an accepted part of the deliberative process...Polling in open court normally provides the opportunity for jurors “to communicate directly with the court if any of them felt unfairly coerced, harassed, intimidated, or felt themselves to be in physical danger”...

¶20 Here, as the trial court noted, the juror who alleged she had been coerced voiced no such concern when she was polled in open court about her verdict. Furthermore, all three affidavits from the jurors contained only vague allegations of bullying and fears of retaliation. They identified no specific threats or other information suggesting Juror 8 had “pledged” her vote of guilt. Ariz. R. Crim. P. 24.1(c)(3)(iv). Although Juror 8’s supplemental affidavit employed this specific language, in substance it established, at most, that she had “returned a verdict based solely on the pressure of other jurors,” as she had stated in her initial affidavit. Because the affidavits essentially concerned Juror 8’s mental processes and subjective feelings during the deliberations, the trial court properly ruled this evidence inadmissible under Rule 24.1(d). We agree with the court’s conclusion that Olague failed to establish juror misconduct based on either pledging a vote or threats and intimidation.

¶21 We similarly agree that the juror’s comments regarding sentencing provide no basis for a new trial. A defendant seeking a new trial

for claimed misconduct under Rule 24.1(c)(3)(i) bears the initial burden of proving that jurors received and considered extrinsic evidence. *State v. Hall*, 204 Ariz. 442, ¶ 16, 65 P.3d 90, 95 (2003). The rule refers to outside information a juror collects after being empaneled. *State v. McLoughlin*, 133 Ariz. 458, 460-61 & 461 n.2, 652 P.2d 531, 533-34 & 534 n.2 (1982). Extrinsic evidence does not include a juror's pretrial beliefs or experiences...

¶22 Nothing here suggests the jury received extrinsic evidence related to punishment. According to the affidavits, the juror in question stated that Olague would "probably" get probation or a "minimal" sentence "since [another witness] got immunity" and Olague "did not pull the trigger." If these comments represent anything more than mere speculation, they tend to suggest that the juror was attempting to draw an inference about likely punishments based on the trial testimony of the witness who had received immunity...

**FN 4:** Although these comments ran afoul of the trial court's clear instructions not to consider possible punishments when deciding the case, a violation of jury instructions is not included in the list of juror misconduct under Rule 24.1(c)(3) and consequently cannot support a motion for new trial. *See State v. Chaney*, 141 Ariz. 295, 311, 686 P.2d 1265, 1281 (1984); *Hagen*, 129 Ariz. at 595, 633 P.2d at 404.

¶23 As he did below, Olague again challenges the trial court's restriction of his contact with jurors. The court prohibited Olague from contacting jurors without a prior showing of "good cause" and approval from the court. Albeit with little reasoning or analysis, we specifically approved this practice in *State v. Paxton*, 145 Ariz. 396, 397, 701 P.2d 1204, 1205

(App. 1985). Stare decisis therefore requires special justification to depart from existing precedent. *Turley v. Ethington*, 213 Ariz. 640, ¶ 26, 146 P.3d 1282, 1289 (App. 2006). Yet neither party has addressed *Paxton* on appeal. Moreover, Olague has not developed a meaningful argument that the trial court's order prevented him from discovering any jury misconduct in this case.

¶24 Using his own investigative techniques, Olague obtained the contact information for eight jurors. He then was able to solicit voluntary interviews with four of them. He obtained affidavits, as noted, from two jurors. The time for filing a new trial motion already had expired when the trial court made its order limiting his access to the jurors. Olague has not explained which jurors, if any, the court's order prevented him from contacting or attempting to contact. We therefore find no special justification, on the particular facts before us, to disturb our holding in *Paxton*.

Link to opinion: <http://www.apltwo.ct.state.az.us/Decisions/CR20150056Opinion.pdf>

***State v. Johnson*, 1 CA-CR 2015-0351 (August 25, 2016):** Affirming Elias Johnson's conviction and sentence, Division 1 held the superior court properly sentenced Johnson as a category three repetitive offender based on his six prior felony convictions, all of which occurred in Colorado more than five years prior. Johnson's offense for which he was convicted here occurred on April 23, 2014, prior to the 2015 revision that added specific language that "third or more" felony convictions, even if out of State and regardless of age, can also be considered historical priors.

¶5 The sentencing statute provides

that "a person shall be sentenced as a category three repetitive offender if the person . . . stands convicted of a felony and has two or more historical prior felony convictions." A.R.S. § 13-703(C) (West 2015). The issue then is whether Johnson's Colorado felony convictions are historical prior felony convictions under this Arizona statutory provision. He argues that his Colorado convictions, from 1989 to 2002, are outside the statutory five year time limit in § 13-105(22)(e), and, as a result, cannot be considered historical prior felony convictions.

¶6 In 2012, our legislature modified § 13-703, entitled "Repetitive offenders; sentencing" by amending subsection (M), in relevant part, as follows:

M. For the purposes of . . . subsection C of this section [category three repetitive offender], a person who has been convicted in any court outside the jurisdiction of this state of an offense that if committed in this state would be WAS punishable BY THAT JURISDICTION as a felony is subject to this section. A person who has been convicted as an adult of an offense punishable as a felony under the provisions of any prior code in this state OR THE JURISDICTION IN WHICH THE OFFENSE WAS COMMITTED is subject to this section.

2012 Ariz. Sess. Laws, ch. 190, § 2, (2d. Reg. Sess.).

¶7 The 2012 amendment to § 13-703(M) clearly demonstrates that our legislature changed our laws regarding enhanced criminal sentences so that trial courts can consider, for sentencing purposes, whether a defendant had one or more prior or felony convictions from another

state, or states, in order to determine whether the defendant was a repetitive offender under § 13-703(C). *See State v. Moran*, 232 Ariz. 528, 535, ¶ 21, 307 P.3d 95, 102 (App. 2013)...

¶8 At the time of Johnson's offense, a "historical prior felony conviction" included "[a]ny felony conviction that is a third or more prior felony conviction." A.R.S. § 13-105(22)(d) (West 2014). And we know from A.R.S. § 1-213 and *State v. Jean*, that the term "any" is to be broadly inclusive, has no "restrictions or limitations on the term modified," and, as a result the legislature's reference to any third felony conviction in § 13-105(22)(d) "included third felony convictions from any court of another state under § 13-703(M)." 2 CA-CR 2015-0184, 2016 WL 2864785, at \*3, ¶ 12 ([Memorandum Decision, Div. 2,] May 16, 2016) (citation omitted).

¶11 Johnson argues that the 2012 amendments also added a new definition to historical prior felony conviction; namely, as relevant here, "(e) Any offense committed outside the jurisdiction of this state that was punishable by that jurisdiction as a felony, that was committed within the five years immediately preceding the date of the present offense." A.R.S. § 13-105(22)(e) (West 2012); 2012 Ariz. Sess. Laws, ch. 190, § 1 (2nd Reg. Sess.). As a result, he argues that none of his Colorado felony convictions can be considered because his last Colorado felony conviction occurred more than five years before he removed the bicycle in this case, and, as a result, cannot be considered as a historical prior felony conviction under A.R.S. § 13-703(C).

¶12 His argument overlooks two factors. First, § 13-105 provides that its definitions are to control "unless the context otherwise requires." In *State v. Thues*, we found that "the con-

text otherwise requires" a different definition of felony when determining that "possession of drug paraphernalia for personal use remains a felony when an offender is sentenced under Proposition 200." 203 Ariz. 339, 341, ¶ 9, 54 P.3d 368, 370 (App. 2002). Because the 2012 amendment to § 13-703(M), includes felonies committed outside of Arizona, the context of the statute supports our conclusion that the Colorado felonies are historical prior felonies as defined under § 13-105(22)(d).

¶13 Second, because § 13-703 is a specific sentencing statute applicable to repetitive offenders and § 13-703(M) defines the felonies, it has primacy over the general definitions in § 13-105. *See Thues*, 203 Ariz. at 341, ¶ 9, 54 P.3d at 370 (citing *Ford v. State*, 194 Ariz. 197, 199, ¶ 7, 979 P.2d 10, 12 (App. 1999), for the proposition that when general and specific statutes address same subject in contrasting manner, the more specific statute controls); *see also State v. Davis*, 119 Ariz. 529, 534, 582 P.2d 175, 180 (1978). Accordingly, given the 2012 amendment to § 13-703(M), we cannot judicially limit the application of § 13-105(22)(d) to only Arizona prior felony convictions in light of the legislature's specific intent to consider out-of-state felony convictions...We conclude, as a result, given the amendment to § 13-703(M), the plain language of § 13-105(22)(d) demonstrates a legislative intent that a third or more felony conviction from jurisdictions other than Arizona was, at the time of the offense in this case, to be considered a historical prior felony conviction. *See Jean*, 2 CA-CR 2015-0184, 2016 WL 2864785, at \*3, ¶14 (stating that "[c]lear statutory text is determinative on the question of meaning.").

¶14 Although § 13-105(22)(e) was

added in 2012, we have long held that the term "third or more prior felony conviction" in § 13-105(22)(d) means that "once a person has been convicted of three felony offenses, the third in time can be used to enhance a later sentence, regardless of passage of time." *Garcia*, 189 Ariz. at 515, 943 P.2d at 875. Consequently, the 2012 [e]dition of § 13-105(22)(e), controls out-of-state felonies "committed with[in] the five years immediately preceding the date of the present offense," but does not impose that limit onto § 13-105(22)(d) for prior felony convictions committed more than five years before the present offense.

¶15 Johnson also maintains that § 13-105(22)(d) was ambiguous in 2013 because, in 2015, the legislature amended the definition of "historical prior felony conviction" by adding the following emphasized text to the provision: "Any felony conviction that is a third or more prior felony conviction. *For the purposes of this subdivision, 'prior felony conviction' includes any offense committed outside the jurisdiction of this state that was punishable by that jurisdiction as a felony.*" *See* 2015 Ariz. Sess. Laws, ch. 74, § 1 (1st Reg. Sess.). Johnson asserts the 2015 revision demonstrates that "§ 13-105(22)(d) did not apply to felonies committed in other jurisdictions at the time of the offense in this matter."

¶16 At the time Johnson committed the burglary, the legislature, as noted in ¶ 13, *supra*, intended a defendant's third or more foreign felony conviction to be considered a historical prior felony conviction. The 2015 amendment to § 13-105(22)(d) did not change that, but made the general definition of historical prior felony conviction consistent with the sentencing provision in § 13-703(M).

¶18 The 2012 amendments to § 13-703(M) adding out-of-state felony convictions demonstrate a legislative intent that trial courts should consider those out-of-state felony convictions under § 13-105(22)(d), when determining whether a defendant is a repetitive offender. Moreover, the 2015 amendment to § 13-105(22)(d) was not added to address whether out-of-state convictions could properly be considered under § 13-105(22)(d), but, rather, to ensure that courts no longer engaged in a comparative elements analysis when determining whether a defendant's third or more out-of-state conviction constituted a historical prior felony conviction. The 2015 amendment to § 13-105(22)(d) made it clear that courts are not required to do so; trial courts must simply determine whether the out-of-state prior conviction is considered a felony by the foreign jurisdiction in which the offense was committed. *Cf. Ariz. Bd. Of Regents v. State*, 160 Ariz. 150, 157, 771 P.2d 880, 887 (App. 1989) (noting that subsequent legislation, which clarifies a statutory scheme, though "not necessarily controlling, is strongly indicative of the legislature's original intent").

¶19 Based on the language of § 13-703(M) that out-of-state felony convictions be considered for sentencing purposes, and plain language in § 13-105(22)(d) at the time Johnson committed this offense, his chronologically fourth Colorado felony conviction amounts to his second historical prior felony conviction for purposes of § 13-703(C). *See State v. Christian*, 205 Ariz. 64, 67 n.8, ¶ 8, 66 P.3d 1241, 1244 n.8 (2003)... Thus, Johnson has two or more historical prior felony convictions, and the court properly sentenced him as a category three repetitive offender. No error, fundamental or otherwise, occurred.

Link to opinion: <http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/CR%2015-0351%20OP.pdf>

### ***State v. Leon*, 2 CA-CR 2015-0019 (August 29, 2016):**

Summer Lynn Leon was found guilty by a jury of fraud schemes, computer tampering, and theft of property or services. The jury found the property subject to the theft was valued at "\$25,000 or more, but less than \$100,000." At the restitution hearing post-sentencing, the court ordered restitution totaling \$195,670. On appeal, Leon argued the court violated her constitutional rights by ordering restitution in excess of the jury's verdict. She further argued for an expansion of *Apprendi* to apply to restitution. Division 2 affirmed the trial court's order. **Holding:** Because restitution is neither a penalty nor subject to a statutory maximum, and because *Apprendi* does not apply here, the trial court did not err in imposing restitution in excess of the jury verdict.

¶5 Leon contends, for the first time on appeal, that the imposition of restitution in excess of the loss determined by the jury violated her "state and federal constitutional right to have a jury determine all factors affecting the minimum or maximum sentence that could be imposed." Specifically, she argues that because the jury found her guilty of theft under \$100,000, the trial court was prohibited from ordering restitution in excess of that amount pursuant to "*Apprendi* and its progeny."

¶7 Upon conviction, a defendant is required to "make restitution to the person who is the victim of the crime . . . in the full amount of the economic loss as determined by the court." A.R.S. § 13-603(C); *see also* Ariz. Const. art. II, § 2.1(A)(8) (vic-

tim has right to "prompt restitution" from "person . . . convicted of the criminal conduct that caused the victim's loss"). An "[e]conomic loss' [is] any loss incurred by a person as a result of the commission of an offense . . . that would not have been incurred but for the offense." A.R.S. § 13-105(16); *see also* A.R.S. § 13-804(B) (court "shall consider all losses caused by the criminal offense or offenses for which the defendant has been convicted"). The state must establish restitution by a preponderance of the evidence, *In re Stephanie B.*, 204 Ariz. 466, ¶ 15, 65 P.3d 114, 118 (App. 2003), and it may only be imposed "on charges for which a defendant has been found guilty, to which he has admitted, or for which he has agreed to pay," *State v. Garcia*, 176 Ariz. 231, 236, 860 P.2d 498, 503 (App. 1993).

¶8 Leon does not dispute that DSF was entitled to restitution, but asserts the trial court violated her Sixth Amendment right to a jury trial by ordering restitution in excess of the jury verdict, in contravention of *Apprendi* and *Southern Union Co. v. United States*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2344 (2012). In *Apprendi*, the Court held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Subsequently, *Blakely v. Washington*, 542 U.S. 296, 303, 308 (2004), clarified that *Apprendi* created a bright-line rule prohibiting the trial court from imposing a sentence beyond the "maximum sentence it may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." More recently, the Court expanded the *Apprendi* rule to fact-finding in the context of criminal fines. *See S. Union Co.*, 132 S. Ct. at 2348-50 (jury must de-

termine facts establishing criminal fine).

¶9 Leon acknowledges that no court has applied *Apprendi* to restitution awards but argues for its expansion, contending Arizona courts have mischaracterized restitution as a civil remedy, and that it “is actually a punishment” requiring “jury determination of the amount . . . owed.” *Cf. id.* at 2350-51 (*Apprendi* and Sixth Amendment right to jury trial only “triggered” when *punishment* imposed). In support, Leon discusses the “harmful consequences” of restitution and notes that Arizona has adopted the minority position on this issue, citing twenty-three jurisdictions that have determined “restitution is punitive.”

¶10 In Arizona, the courts have uniformly concluded that restitution’s primary purpose is not penal in nature. *See Town of Gilbert Prosecutor’s Office v. Downie*, 218 Ariz. 466, ¶ 13, 189 P.3d 393, 396 (2008)...Instead, the “primary purposes of restitution” are “reparation to the victim and rehabilitation of the offender.” *State v. Wilkinson*, 202 Ariz. 27, ¶ 13, 39 P.3d 1131, 1134 (2002); *cf. United States v. Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000) (direct victim restitution appropriately substitutes for civil remedy so crime victims need not file separate civil lawsuits).

¶11 Even were we able to depart from our well-established precedent, *see State v. Sang Le*, 221 Ariz. 580, ¶ 4, 212 P.3d 918, 919 (App. 2009)... Leon has presented nothing that would persuade us to do so.

**FN 2:** We also decline Leon’s invitation to evaluate the “harmful consequences” restitution imposes on defendants. As the state notes, the law and effects of restitution have been “thoroughly analyzed” by our courts,

and we see no reason to revisit our state’s public policy here, given our limited review and the clear purpose of the trial court’s award...

The trial court’s award was duly limited to the economic loss DSF actually incurred as a result of Leon’s theft. *See* § 13-603(C); *see also* § 13-105(16). Notably, Leon does not dispute that finding. And in calculating restitution, the court subtracted the amount DSF had already recovered from insurance proceeds. Thus, the purpose and focus of the award was not to punish Leon for the crime she committed, but instead was clearly designed to make DSF whole. *See State v. Williams*, 208 Ariz. 48, ¶ 12, 90 P.3d 785, 789 (App. 2004).

¶12 Finally, even were we to conclude restitution should be regarded as punishment, *Apprendi* still would not control because, unlike a fine, victim restitution is not subject to a statutory maximum. *Compare* § 13-603(C) (defendant must make restitution to victim “in the full amount of the economic loss”), *with* § 13-801(A) (felony fine shall not exceed \$150,000); *cf. S. Union Co.*, 132 S. Ct. at 2354-55 (applying *Apprendi* to criminal fine imposed in excess of statutory maximum). *Apprendi* and its progeny require a jury to find any fact that either increases a sentence beyond the statutory maximum or increases a mandatory minimum sentence...Because there is no “statutory maximum” or “mandatory minimum” applying to restitution that can be ordered under § 13-603(C), we conclude the *Apprendi* rule is inapplicable. Although Leon asserts other “courts are beginning to recognize that *Apprendi* might apply to restitution in light of *Southern Union*” and argues we should extend its application here, she has not presented us with any authority on which to do so. *See State v. Keith*,

211 Ariz. 436, ¶ 3, 122 P.3d 229, 230 (App. 2005) (appellate court will not anticipate how Supreme Court may rule in the future).

Link to opinion: <https://www.appeals2.az.gov/Decisions/CR20150019opinion.pdf>

### ***State v. Burbey*, 2 CA-CR 2015-0300 (August 31, 2016):**

A registered sex offender, Lynn Lavern Burbey was found guilty at trial of failing to report a change of address once he became homeless. On appeal, he argued the trial court erroneously instructed the jury both on his obligation to report his whereabouts and his intent to commit the offense, violating his due process rights and requiring his conviction be vacated. **Holdings:** (1) The jury instructions accurately stated the law as to the reporting obligation A.R.S. § 13-3822(A) imposes on sex offenders when they become homeless; (2) When a registrant has notice and is aware of his registration obligations when he becomes homeless, any due process concern based on whether the statute creates a strict liability offense cannot form the basis for fundamental error.

### **SEX OFFENDER REGISTRATION**

¶5 Section 13-3822(A) requires registered sex offenders, within seventy-two hours of “moving from the person’s residence,” to “inform the sheriff in person and in writing of the person’s new residence [or] address.” The statute also imposes on individuals without permanent residences a duty to register with the sheriff “as a transient not less than every ninety days.” *Id.* Because Burbey became homeless when he left the halfway house and had no residence or “new mailing address to

register with the sheriff,” he argues he was only obliged to register as a transient every ninety days. The trial court, however, instructed the jury that registered sex offenders must report a change of residence within seventy-two hours, which Burbey argues was a misstatement of the law constituting fundamental error.

¶6 The state initially argues that, because Burbey requested the instruction he now contests, he invited the error and may not challenge the instruction on appeal. *See, e.g., State v. Logan*, 200 Ariz. 564, ¶ 9, 30 P.3d 631, 632-33 (2001) (noting appellate courts will not find reversible error where complaining party invited the error). Both Burbey and the state submitted alternative jury instructions regarding the elements of the offense, and the trial court incorporated elements of each into the instruction it read to the jury.

**FN 2:** The final jury instruction read as follows: The crime of failure to notify change of address requires proof that the defendant: 1. is required to register; and 2. moved; and 3. failed to notify in writing and in person the Sheriff of Pima County within seventy-two hours of moving. If a person who is required to register has more than one residence or does not have a permanent place of residence, the person shall provide a description and physical location of any temporary residence and shall register as a transient not less than every ninety days with the sheriff in whose jurisdiction the transient person is physically present.

Because the portion of the instruction Burbey challenges was requested by the state, we conclude Burbey did not invite the error. *See id.* ¶ 11...

Burbey’s acquiescence to the jury instruction, however, requires that we review only for fundamental error. *See State v. Dann*, 220 Ariz. 351, ¶ 51, 207 P.3d 604, 617 (2009) (jury instructions not objected to at trial reviewed for fundamental error)...

¶7 The state alternatively argues that the language of § 13-3822(A) “plainly manifests the legislative intent to require *all* changes to a permanent address—including going from a house to being homeless—be reported within [seventy-two] hours,” and imposes on homeless sex offenders an additional, rather than superseding, obligation “to inform the sheriff’s department of his or her continued presence in the county every ninety days.” Burbey argues to the contrary, asserting such an interpretation makes “little sense” because the residential status of homeless offenders remains “uncertain” and “subject to change,” and “[u]nder the plain language of the statute” Burbey was required only to “register his homeless status every [ninety] days.”

¶8 In addressing competing interpretations of a statute, we first look to its text and intent...Burbey argues that § 13-3822(A), as applicable to sex offenders, “plainly” covers two classes of individuals—those with residences who change their residence, and those who are homeless—and he points out the statute imposes a different time requirement on each of these classes: seventy-two hours for persons who change residences, and ninety days for homeless persons. But there is no basis for assuming these provisions are mutually exclusive, nor does Burbey offer any, and his interpretation is at odds with common sense. Under the statute, the action of “moving” from a registered residence triggers the seventy-two hour notification re-

quirement, whether the destination is permanent or temporary. And the separate requirement that a homeless person “register as a transient not less than every ninety days” does not, by its plain terms, apply to, contradict or modify the requirement of informing the sheriff of the initial “move” within seventy-two hours.

¶9 But even if we were to assume, *arguendo*, that the statute’s language is susceptible to confusion, the standard tools of statutory interpretation would refute Burbey’s claims. If a statute is subject to more than one reasonable interpretation, courts will consider “the context of the statute, the language used, the subject matter, its historical background, its effect and consequences, and its spirit and purpose.”...A review of the statutory history here reveals no previous exceptions to the change-of-residence reporting obligation. Since the first sex offender registration duty was codified in 1951, all persons required to register under the statute have been compelled to “promptly inform the sheriff” of a change in address. *See* 1951 Ariz. Sess. Laws, ch. 105, § 1...A 2005 amendment clarified that formal notification was required for anyone who changes their “residence,” not just their address, and defined residence broadly as “the person’s dwelling place, whether permanent or temporary.” 2005 Ariz. Sess. Laws, ch. 282, § 4. A 2006 amendment added the requirement that homeless individuals report their transient status not less than every ninety days, but left in place the requirement that “moving” from a registered address be reported within seventy-two hours...

¶10 Second, statements of legislative intent support the conclusion that § 13-3822 requires prompt notification of all changes in residence. *See, e.g., Estate of Braden ex rel. Gab-*

*aldon v. State*, 228 Ariz. 323, ¶ 8, 266 P.3d 349, 351 (2011) (goal in interpreting statutes is to give effect to the intent of the legislature)...Requiring that all changes to registered addresses be communicated within seventy-two hours best comports with the stated goal of the statutory scheme.

¶12 ...Burbey argues “the registration of every particular location at which an offender is regularly present is not feasible, and would lead to multiple and often meaningless registrations.” He further asserts, “[a] transient offender may occupy many locations on a more or less regular basis during the course of a day, week, or month,” and “a good faith effort to comply with the literal terms of the statute would clog the registration system.” But that argument is unfounded because nothing in the statute requires that a homeless person re-register “every particular location,” but only a change from a previously registered address. See § 13-3822. For the same reason, we reject Burbey’s contention, based on the same premise, that the statute is unconstitutionally vague. And he points to no evidence, nor makes any persuasive argument, that requiring individuals who leave a registered address to notify the sheriff that they have become homeless would “clog” the registration system.

¶13 Most importantly, Burbey’s interpretation would contravene the legislative intent that communities be protected by tracking the whereabouts of sex offenders as closely as reasonably practicable. See *Noble*, 171 Ariz. at 178, 829 P.2d at 1224 (purpose of registration statute to facilitate location of sex offenders)... Notwithstanding any policy of facilitating compliance by homeless individuals, interpreting the 2006 amendment as Burbey suggests

would allow an individual who becomes homeless after residing at a registered address to essentially “slip through the cracks” and disappear from law enforcement surveillance until that person registers as a transient, up to ninety days later. Such a reading clearly contravenes the fundamental purpose of the statutory scheme. See A.R.S. § 1-211(B) (“Statutes shall be liberally construed to effect their objects and to promote justice.”)...

#### KNOWLEDGE AS ELEMENT OF OFFENSE

¶15 Burbey next argues that the lack of a mens rea requirement in the jury instruction “omitted an essential element of the offense resulting in fundamental error” depriving him of his due process rights. He specifically contends that “U.S. Supreme Court and Arizona case law requires a culpable mental state for status offenses such as failure to register,” and argues that omitting that element from the offense of failure to notify a change of address renders it a “strict liability crime,” which “goes to the foundation of the case,” requiring reversal. Burbey concedes, however, that because he did not object at trial, we review for fundamental error...

¶16 [ ] Under fundamental error review, an appellant must also establish prejudice. *Id.* ¶ 20...]

¶17 Section 13-3822(A) lists no mental state for a violation of its provisions. Under such circumstances, the Arizona Legislature has provided that “no culpable mental state is required for the commission of such offense . . . unless the proscribed conduct necessarily involves a culpable mental state.” A.R.S. § 13-202(B). Statutory registration requirements, however, are one context where reviewing courts have under certain circumstances required proof of a

mens rea to sustain a conviction. See, e.g., *Lambert v. California*, 355 U.S. 225, 229-230 (1957) (reversing conviction for failing to register as a felon where actual knowledge of duty to register was not shown); *State v. Garcia*, 156 Ariz. 381, 384, 752 P.2d 34, 37 (App. 1987) (overturning failure to register as sex offender conviction where record devoid of evidence of actual knowledge of duty to re-register).

¶18 ...The state responds that “the Legislature purposefully created strict liability” for § 13-3822 offenses, and asserts that Burbey’s “neglect and inaction in this case is precisely the type of conduct deemed appropriate for strict liability,” citing cases from several other jurisdictions.

¶19 We note that the reporting obligation imposed by § 13-3822 implicates a much different situation than those addressed in *Garcia* and *Lambert*. To violate § 13-3822, one must have already completed the initial registration pursuant to § 13-3821. And that procedure typically conveys notice of the requirements of § 13-3822. Indeed, evidence introduced at Burbey’s trial showed that at the time he registered, he was informed both in writing and verbally of the ongoing obligations of a registered sex offender, including the reporting duties codified in § 13-3822. Thus, the lack of notice and knowledge dispositive to the holdings in *Garcia* and *Lambert* is absent here.

¶20 That being the case, we need not resolve whether the absence of a mens rea requirement in § 13-3822 or corresponding instructions to the jury may be violative of due process...Even if the jury here was not instructed on an element of the offense, Burbey has not shown any prejudice...

Link to opinion: <https://www.appeals2.az.gov/Decisions/CR20150300%20opinion.pdf>

**State v. Elroy Gutierrez, 1 CA-SA 2015-0342 (September 1, 2016):** Affirming Mr. Gutierrez’s convictions and sentences, Division 1 found no error in the trial court’s denial of his motion to suppress and motion to sever (*reminder—when a pretrial motion to sever is denied, failure to renew the motion during trial at/before the close of evidence amounts to waiver on appeal and is only reviewed for fundamental error*). The Court also addressed two statutory interpretation issues and a claim of judicial misconduct:

1. **Whether use or possession of multiple deadly weapons during the commission of a drug felony constitutes just one offense under A.R.S. § 13-3102(A)(8):** No; a defendant can be convicted of misconduct involving weapons for each deadly weapon he used or possessed during the commission of a drug offense. This is not a double jeopardy violation.
2. **Whether the trial court judge, who participated in a settlement conference, violated the defendant’s due-process rights by imposing a greater sentence after the defendant was convicted than she had promised him during the settlement conference:** No, the circumstances of this case did not support Gutierrez’s contention that the judge was vindictive by imposing sentences greater than what she promised him had he taken the plea offered before trial. Things change between pretrial plea negotiations and guilty verdict(s) after trial, warranting

a greater sentence absent evidence of actual vindictiveness.

3. **Whether a defendant convicted of transportation of methamphetamine for sale under A.R.S. § 13-3407(A)(7) is eligible for early release:** No; although the language of A.R.S. § 13-3407(F) is “somewhat perplexing” based on its reference to A.R.S. § 41-1604.07 (earned release credits), the ambiguity is resolved by looking to the legislature’s intent of imposing calendar-year sentences for certain meth-related offenses. Because § 41-1604.07(A) specifically excludes eligibility for anyone ‘sentenced to serve the full term of imprisonment imposed by the court,’ § 13-3407(F) ‘does not provide for release credits’ and the superior court did not abuse its discretion in imposing a flat-time sentence.

#### A. DENIAL OF MOTION TO SUPPRESS.

¶8 Here, the superior court did not abuse its discretion; the unnecessary braking and the weaving out of the traffic lane constituted a sufficient objective basis on which the officer could conclude the driver might be impaired. *See United States v. Brignoni-Ponce*, 422 U.S. 973, 885 (1975) (erratic driving can support reasonable suspicion for stop). Gutierrez argues the officer’s reason for stopping his car was a pretext, but as long as a stop is not a product of prohibited racial profiling (Gutierrez does not argue he was illegally profiled), the stop does not violate the Fourth Amendment simply because an officer’s “ulterior motives” may include objectives other than traffic enforcement. *Whren v. United States*, 517 U.S. 806, 811–13 (1996)...

¶9 Gutierrez cites *State v. Livingston*, 206 Ariz. 145, 147-48, ¶¶ 6, 10 (App. 2003), in which an officer stopped a driver for violating A.R.S. § 28-729(1) (2016). In relevant part, that statute requires a motorist to “drive a vehicle as nearly as practicable entirely within a single lane.” After the officer testified he stopped the car because the defendant’s right tires once crossed the shoulder line, the superior court suppressed the evidence seized from the car. We affirmed, concluding the statute did not penalize “brief, momentary, and minor deviations outside the marked lines.” *Id.* at 148, ¶ 10.

¶10 The officer in this case did not stop Gutierrez for violating A.R.S. § 28-729(1), or for swerving over the fog line just once. The stop was based on the totality of the driver’s conduct, which, the superior court found, demonstrated a reasonable likelihood that the driver might be impaired. In light of the officer’s testimony, the superior court did not abuse its discretion in ruling the driver’s conduct established reasonable suspicion to support the stop.

#### B. DENIAL OF MOTION TO SEVER.

¶13 Gutierrez argues the superior court should have severed the trial because he and his co-defendant had inherently antagonistic defenses. “[A] defendant seeking severance based on antagonistic defenses must demonstrate that his or her defense is so antagonistic to the co-defendants that the defenses are mutually exclusive.” *Cruz*, 137 Ariz. at 545. But as our supreme court has explained:

It is natural that defendants accused of the same crime and tried together will attempt to escape conviction by pointing the finger at each other. Whenever this occurs the co-defen-

dants are, to some extent, forced to defend against their co-defendant as well as the government. This situation results in the sort of compelling prejudice requiring reversal, however, only when the competing defenses are so antagonistic at their cores that *both cannot be believed*.

*Id.* at 544-45 [emphasis added by editor].

¶14 Gutierrez and his co-defendant each professed he did not possess the drugs and guns, but that they belonged to the other. The jury, however, did not need to decide that only one of the defendants possessed the drugs and guns; it logically could have attributed any combination of guilt or innocence between the two defendants. For that reason, Gutierrez and his co-defendant's defenses were not mutually exclusive. *See State v. Turner*, 141 Ariz. 470, 473 (1984) (defenses not mutually exclusive when jury could have found core of both defenses true); *see also Cruz*, 137 Ariz. at 545.

### C. UNIT OF PROSECUTION FOR MISCONDUCT INVOLVING WEAPONS.

¶18 Gutierrez was convicted of two counts of misconduct involving weapons in violation of A.R.S. § 13-3102(A)(8) (2016) based on the two handguns found in the vehicle. The statute provides, in pertinent part, that a person commits misconduct involving weapons by knowingly “[u]sing or possessing a deadly weapon during the commission of any felony [drug] offense...”

¶21 Citing federal decisions interpreting 18 U.S.C. § 922, which prohibits certain persons from importing, manufacturing, transporting or receiving firearms in interstate or foreign commerce, Gutierrez argues

A.R.S. § 13-3102(A)(8) establishes a single offense regardless of the number of weapons a defendant possesses or uses in committing the predicate crime...Gutierrez argues that courts construing 18 U.S.C. § 922 have found that provision to be ambiguous as to the unit of prosecution, and that A.R.S. § 13-3102(A)(8) is likewise ambiguous.

¶22 The ambiguity in the federal statute stems from use of the phrase “any firearm” in the law’s definition of the object of the offense...Because the federal statute is unclear as to the unit of prosecution Congress intended for the offense, the federal courts have applied the rule of lenity in holding that only one offense occurs for a singular act regardless of the number of weapons...

¶23 But the ambiguity present in the federal statute is not present in the Arizona provision. Unlike the federal statute’s use of the phrase “any firearm,” A.R.S. § 13-3102(A)(8) is written in the explicit singular, using the phrase “a deadly weapon” (not “any deadly weapon”). The distinction between use of the article “a” and “any” in determining the unit of prosecution is well recognized by the courts in other jurisdictions, including the federal courts...

¶24 ...To the extent the Arizona statute is ambiguous, we agree with the State that the purpose of the provision – to specially criminalize a drug crime that is more dangerous because it involves a deadly weapon – is served by allowing multiple charges to be brought when a defendant commits a drug felony while using or possessing multiple deadly weapons. Each weapon a defendant uses or possesses renders the predicate offense incrementally more dangerous.

### D. ALLEGED JUDICIAL VINDICTIVENESS IN SENTENCING.

¶34 Although no legal error occurred in this case, the better practice is that, resources allowing, the judge who presides over a criminal settlement conference be someone other than the judicial officer who will preside over the trial if a settlement is not reached. Due-process issues such as those Gutierrez argues are avoided altogether when another judicial officer presides over the settlement conference. *Cf.* Arizona Rule of Criminal Procedure 17.4(a) (absent consent of both parties, settlement conference “discussions shall be before another judge or a settlement division.”). Moreover...a trial judge participating in a settlement conference should avoid making promises about sentencing or using language that the defendant is likely to understand to be a promise.

### E. IMPOSITION OF FLAT-TIME SENTENCE.

¶38 The same analysis applies here. Section 13-3407(E) provides that a person convicted of transportation of methamphetamine for sale “shall” be sentenced to a prison term between five and 15 “calendar years.” The phrase “calendar year” is defined as “three hundred sixty-five days’ actual time served without release, suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis.” A.R.S. § 13-105(4) (2016). Although we continue to view the language in § 13-3407(F) as “somewhat perplexing,” because the superior court was required to sentence Gutierrez to a calendar-year prison term, defined as without release, the court had no discretion to make Gutierrez eligible for early release. Thus, the superior court did not abuse its discretion in

imposing the flat-time sentence.

Link to opinion: <http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/1%20CA-CR%2015-0342.pdf>

### **State v. Romero, 2 CA-CR 2012-0378 (September 13, 2016):**

Division 2 reversed Joseph Romero's second-degree murder conviction and remanded to the superior court, finding the trial court's error in precluding Romero's expert testimony, proffered to challenge the State's expert testimony supporting methods used by firearms examiners to match a gun to a crime, was not harmless. The Court seemingly adopted the *Bible* test to determine whether an error is harmless. **Holding:** Looking at the trial record as a whole, the evidence of guilt was not overwhelming, the precluded defense testimony was not cumulative, no jury instruction ameliorated the error, and the State's arguments to the jury compounded the error. Therefore, "We cannot say beyond a reasonable doubt that the preclusion of [defense expert's] testimony had no influence on the jury's verdict."

¶3 After the first trial ended in a mistrial because the jury could not reach a verdict, Romero proffered Ralph Haber as an expert in the field of experimental design. *Id.* Haber generally opined that forensic firearms identification relies on unscientific standards and methods. *Id.*; see also *Romero I*, 236 Ariz. 451, ¶ 12, 341 P.3d at 497. Romero also sought to exclude Powell's testimony, arguing that firearms identification did not meet the requirements of Rule 702, Ariz. R. Evid. *Romero II*, 239 Ariz. 6, ¶ 6, 365 P.3d at 360-61. The state moved to preclude Haber's

testimony and opposed the motion to preclude Powell's toolmark testimony. *Id.* ¶¶ 6-7. The trial court denied the motion regarding Powell, but granted the state's motion, finding that Haber was not qualified as an expert in firearms identification and that his testimony would impermissibly allow the jury to make decisions generally reserved for a *Daubert* hearing. *Id.* ¶ 7. Our supreme court concluded it was error to preclude Haber's testimony because he was qualified in scientific experimental design, potential deficiencies in the design of experiments relating to toolmark analysis were relevant in assessing Powell's opinions, Haber's opinion did not impinge on the trial court's Rule 702 responsibilities, and Haber's lack of practical experience in toolmark analysis only went to the weight of his testimony. *Romero II*, 239 Ariz. 6, ¶¶ 17-29, 365 P.3d at 362-64. As noted above, the court remanded the case to this court to determine whether the preclusion of Haber's testimony was harmless. *Id.* ¶¶ 30-31.

### **DISCUSSION**

¶5 The state focuses its argument principally on whether the evidence unrelated to firearm identification shows overwhelmingly that the jury would have convicted Romero. This is a guilt-focused argument that generally considers the weight of the untainted, admissible evidence. In contrast, Romero contends that Powell's testimony provided the bedrock of a guilty verdict. This error-focused argument primarily considers the effect of the error on the trial. To address these arguably separate and independent perspectives, we first examine Arizona principles in our black-letter law and then the factors developed in case law.

¶7 "In deciding whether error is

harmless, the question 'is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.'" *State v. Leteve*, 237 Ariz. 516, ¶ 25, 354 P.3d 393, 401 (2015), quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)...Nonetheless, the appellate standard parallels the evidentiary standard required to convict: "We must be confident beyond a reasonable doubt that the error had no influence on the jury's judgment." *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). Beyond these broad statements, there is no bright-line rule for what constitutes harmless error..

¶8 In *Bible*, our supreme court favorably cited *Weinstein's Evidence* for the variety of factors frequently considered by courts. 175 Ariz. at 588, 858 P.2d at 1191...This list incorporates the approaches of both parties and allows a more objective basis to review for harmless error. Thus, we consider these factors in light of all of the evidence below. See *Bible*, 175 Ariz. at 588, 858 P.2d at 1191 (harmless error review is a case-specific factual inquiry based on all evidence). Not all factors will apply, nor will they all carry the same weight in a particular case.

### **OVERWHELMING EVIDENCE**

¶9 We begin with the issue of overwhelming evidence because it alone may be dispositive. For example, in *Bible*, the improper admission of DNA evidence was found harmless because the other evidence of guilt was "far beyond overwhelming." 175 Ariz. at 588-89, 858 P.2d at 1191-92. The court in *Bible* detailed six paragraphs of additional evidence that linked Bible to the abduction and murder of the victim. *Id.*

¶13 Even if we assume the eyewitness testimony and the location at the scene of a cell phone used by Romero suggests he was one of the two or three men running after four or five shots were heard, it was the state's burden to prove Romero was the person who actually fired the fatal shots. Moreover, although two bullets were recovered from the victim's body, there was no evidence linking those bullets to specific shell casings. Thus, the match of a Glock—separately and independently linked to Romero—to the shell casings found on the ground was the strongest evidence that he fired the shots. Removing from consideration a factual conclusion of a match, the remaining evidence was arguably sufficient to survive a Rule 20 motion, but the state's burden is greater: it must show overwhelming evidence. *State v. Anthony*, 218 Ariz. 439, ¶ 41, 189 P.3d 366, 373 (2008) (state's burden exceeds "whether the jury was justified in its verdict"). Finally, we note that Romero's first trial resulted in a hung jury. *See State v. Rich*, 184 Ariz. 179, 181, 907 P.2d 1382, 1384 (1995) (noting hung jury in conclusion error not harmless); *see also Cobb v. State*, 658 S.E.2d 750, 753 (Ga. 2008) (noting "prior hung juries are a factor supporting a finding of harmful error"); *State v. Edwards*, 128 P.3d 631, ¶¶ 16-17 (Wash. Ct. App. 2006) (noting previous hung jury in considering whether untainted evidence overwhelming). We are skeptical the prior jury would have been unable to reach a verdict if the evidence was indeed as "overwhelming" as the state maintains. On this record, we cannot conclude there was overwhelming evidence that Romero fired the gun that killed the victim. *See State v. Lehr*, 201 Ariz. 509, ¶¶ 31-43, 38 P.3d 1172, 1181-83 (2002) (preclusion of cross-examination and defense expert testimony criticizing DNA testing not harmless where DNA was key

evidence).

#### PRIMARY EVIDENCE

¶14 In determining whether evidentiary errors are harmless, courts also consider whether the error involved the admission or exclusion of primary evidence...Here, Haber's proposed testimony, generally critiquing the science of firearms identification, would not have included evidence that Haber had reached a different conclusion than Powell; it was only intended to weaken Powell's testimony that the gun and shell casings matched, without directly contradicting Powell's findings. Haber's testimony therefore was not primary evidence...

#### OPPORTUNITY TO PRESENT CLAIM OR DEFENSE

¶15 Whether an error is harmless may also be considered in the context of a party's ability to present the substance of his claim or defense. *See, e.g., Gaston v. Hunter*, 121 Ariz. 33, 52-53, 588 P.2d 326, 345-46 (App. 1978) (exclusion of some expert opinions harmless where substance elicited at other times in trial). The substance of Romero's claim regarding the match of the gun was that not enough is known about the uniqueness of gun toolmarks to warrant reliance on a match by an examiner. Romero impeached the foundation of Powell's opinions in cross-examination using a report from the National Academy of Sciences (NAS) that criticized "the lack of a precisely defined process" in toolmark analysis, which makes difficult "well-characterized confidence limits"...In fact, Haber's opinions relied in no small part on the NAS report. Accordingly, we conclude Romero was able to present the substance of his challenge to the reliability of Powell's opinions.

#### CUMULATIVE EFFECT OF ERRORS

¶16 Evidentiary errors may compromise only a small portion of the total evidence or they may be repeated with a significant cumulative effect...In criminal cases, however, Arizona rejects the "cumulative error doctrine" outside the context of prosecutorial misconduct claims. *State v. Hughes*, 193 Ariz. 72, ¶ 25, 969 P.2d 1184, 1190-91 (1998). Because there is no claim of prosecutorial misconduct, this factor does not apply.

#### CUMULATIVE EVIDENCE

¶17 The significance of evidence erroneously admitted or excluded may depend on whether it is more of the same type of evidence properly admitted in the case...Cumulative evidence supports a fact "otherwise established by existing evidence"; that is, it is not enough to be simply corroborated by other evidence, and it cannot be the very issue in dispute. *State v. Bass*, 198 Ariz. 571, ¶ 40, 12 P.3d 796, 806 (2000).

¶18 That Romero was able to impeach Powell using the NAS report does not mean Haber's opinions would have been cumulative. For example, his proposed testimony provided context for the report's criticism of firearms identification methods, explaining how the accuracy of the field could be challenged. Haber also could have responded directly to statements made by Powell. For example, at the conclusion of Powell's testimony, a juror submitted a question as to whether a different examiner with similar training and experience would reach the same conclusion regarding the shell casings, and Powell said he was "completely confident." Haber's testimony would have addressed the scientific basis for that confidence. Likewise,

Haber would have been able to answer jury questions. Ariz. R. Crim. P. 18.6(e). In this case, the expert testimony would have augmented the cross-examination about the report, rather than repeating it...

## JURY INSTRUCTIONS

¶19 Errors also may be vitiated or exacerbated by jury instructions. See Weinstein § 103.41[5]; cf. *State v. Schroeder*, 167 Ariz. 47, 50-51, 804 P.2d 776, 780-81 (App. 1990) (expert's improper testimony regarding credibility of victim cured by court's admonition and instruction to jury regarding its role in determining credibility). Here, the jury was instructed that it was "not bound by any expert opinion," and could choose how much weight to give the opinion. Although this allowed the jury to choose not to credit Powell's testimony, we cannot say it either vitiated or exacerbated the error caused by the preclusion of Haber's testimony.

## JURY ARGUMENTS

¶20 The effect of erroneous rulings may also be compounded by reference to missing or improper evidence in arguments to the jury. See *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029, 1037 (8th Cir. 1978) (error not harmless where counsel emphasized erroneously admitted evidence in closing argument)...Here, the prosecutor argued, "[Y]ou cannot take [the criticisms in the National Academy of Science book] as some kind of evidence, because there is no evidence from this courtroom, from that witness stand that actually challenges firearms analysis." Although the argument was not improper in view of the preclusion ruling, it highlights the fact that the absence of direct evidence challenging Powell's opinion was sufficiently important

to the state's position that it argued to the jury the NAS report should not be used to impeach Powell. We conclude the state's emphasis on the defendant's lack of "witness stand" evidence supporting the NAS report exacerbated the error of Haber's preclusion.

## PREJUDICE

¶21 Prejudicial effect is implicit in all factors, but also stands as a catch-all category when consideration of a particular factor would not otherwise apply. Here, the preclusion of a defense witness who would have challenged the testimony of the state's expert carried additional prejudice, because "'science' is often accepted in our society as synonymous with truth." *Bible*, 175 Ariz. at 578, 858 P.2d at 1181...

Link to opinion: <https://www.appeals2.az.gov/Decisions/CR20120378%20opinion.pdf>

***State v. Jeffrey Martinson*, 1 CA-CR 2013-0895 (September 22, 2016):** The State appealed the trial court's order dismissing *with prejudice* first degree felony murder and child abuse charges against Jeffrey Martinson on the basis of prosecutorial misconduct. Martinson cross-appealed the trial court's denial of his motions for judgment of acquittal. Division 1 vacated the order dismissing the indictment with prejudice and remanded the case with instructions to grant the State's motion to dismiss *without* prejudice.

**Holdings:** The trial court improperly dismissed the 2004 indictment with prejudice. The State was entitled to pursue a theory that Martinson committed the predicate felony of child abuse with an intent to kill J.E.M., not merely injure him as the

trial court concluded citing *Styers*, because child abuse committed with the intent to kill does not merge into felony murder as a single offense. "Because the State was erroneously precluded from suggesting...Martinson intentionally killed his son, the fundamental underpinnings for a finding of prosecutorial misconduct sufficient to warrant dismissal with prejudice are not present." To the extent State's counsel improperly violated the court's legally erroneous ruling, Martinson failed to prove the conduct prejudicial. Finally, the evidence at trial was sufficient to support a finding of guilt beyond a reasonable doubt for knowing or intentional child abuse under circumstances likely to produce death or serious physical injury, and for felony murder based on that predicate felony. As a result, double jeopardy principles do not bar Martinson's retrial.

## I. DISMISSAL WITH PREJUDICE

¶14 The bad faith and prosecutorial misconduct findings that caused the superior court to dismiss the charges with prejudice are, at their core, premised on the determination that prosecutors ignored the holding in *Styers* and the corresponding court order in this case that they not pursue an intent to kill theory at trial...

¶15 The superior court ruled that because the State had charged "felony murder --with child abuse as a predicate -- Arizona law necessarily precluded the State from offering evidence of intent to kill and/or argu[ment] that [Martinson] intended to kill" J.E.M. The court based this conclusion on what it viewed as the central holding of *Styers*: because a person cannot intentionally kill a child without also intentionally causing physical injury, the crime of child abuse necessarily merges into felony murder if based on an intent to

kill. The court reasoned, though, that *Styers* permits child abuse to serve as a predicate felony if it is based on an intent to *injure* a child; under these circumstances, it concluded, child abuse constitutes a separate and independent offense from felony murder, and the two offenses do not merge. Based on this analytic framework, the court precluded the State from presenting evidence or argument that Martinson intended to kill J.E.M.

### A. MERGER

¶18 On appeal, *Styers* challenged the sufficiency of the evidence for the child abuse conviction, arguing he could not be convicted of both murder and child abuse. The Arizona Supreme Court agreed, holding that the “separate child abuse conviction cannot stand on the facts of this case.” *Id.* at 110. The court drew an analogy to aggravated assault-murder, where the convictions merge into one offense, reasoning: “If a defendant cannot be convicted for an intentional aggravated assault that necessarily occurs when there is a premeditated murder, it logically follows that he also cannot be convicted for an intentional child abuse that necessarily occurs when there is a premeditated murder of a child victim.” *Id.* The court emphasized, though, that its decision was limited to premeditated murder and child abuse convictions. Indeed, anticipating charges like those against Martinson, the court added that its decision did not apply to child abuse as a predicate felony for felony murder:

We emphasize that nothing in this opinion should be read as suggesting that child abuse may not still be a predicate felony for felony murder. If a person intentionally *injures* a child, he is guilty of child abuse under

A.R.S. § 13-3623(B)(1);[4] if that injury results in the death of the child it becomes a first degree *felony* murder pursuant to A.R.S. § 13-1105(A)(2). See *State v. Lopez*, 174 Ariz. 131, 141–43, 847 P.2d 1078, 1088–90 (1992) . . . . Although felony murder is first degree murder, it is arrived at differently than premeditated murder. The first degree murder statute, A.R.S. § 13-1105(A)(1), not the child abuse statute, applies when a person intentionally *kills* a child victim. *Id.* at 110–11...

¶20 The holding in *Styers* is limited to premeditated murder and child abuse convictions and does not address or govern the use of child abuse as a predicate felony for felony murder. In contrast, our supreme court squarely addressed whether child abuse merges into felony murder in *State v. Lopez*, 174 Ariz. 131 (1992). The defendant in *Lopez* was convicted of felony murder based on the predicate felony of child abuse. *Id.* at 136. Relying on *State v. Essman*, 98 Ariz. 228 (1965), *Lopez* challenged the conviction, arguing that child abuse, like assault, cannot serve as a predicate felony because it merges into felony murder. *Id.* at 141; see *Essman*, 98 Ariz. at 235 (“[A]cts of assault merge into the resultant homicide, and may not be deemed a separate and independent offense which could support a conviction for felony murder.”). The supreme court rejected that argument, holding that “if the legislature explicitly states that a particular felony is a predicate felony for felony-murder, no ‘merger’ occurs.” *Lopez*, 174 Ariz. at 142; see also *State v. Miniefield*, 110 Ariz. 599, 602 (1974) (arson does not merge into felony murder because it is designated a predicate felony under felony murder statute).

¶21 Neither *Styers* nor other precedent stands for the proposition that a predicate felony committed with the intent to kill merges into felony murder. Indeed, the defendant in *Styers* was charged with felony murder predicated on child abuse and felony murder predicated on kidnapping. *Styers*, 177 Ariz. at 110, 112. *Styers* argued that kidnapping could not serve as a predicate felony because it was committed pursuant to a plan to kill and therefore merged into the felony murder charge. *Id.* at 112. The court disagreed, holding that, “[a]lthough the jury findings in this case clearly demonstrate that the kidnapping was [committed] pursuant to a plan to kill, that does not mean that only one crime was committed.” *Id.* As a result, “the merger doctrine would not apply,” and “Defendant was appropriately convicted of both kidnapping and murder.” *Id.*

¶25 Although the predicate felony of child abuse required the State to prove only that Martinson intentionally injured J.E.M., much of the evidence establishing an intent to injure also demonstrated an intent to kill... Evidence proving an intent to kill necessarily proves an intent to injure, as it is impossible to kill a person without causing physical injury. See *State v. Barrett*, 132 Ariz. 88, 90 (1982) (“It cannot be seriously argued that death does not involve serious physical injury as defined by [statute].”), *overruled on other grounds by State v. Burge*, 167 Ariz. 25 (1990).

### B. PROSECUTORIAL MISCONDUCT

¶27 ...In determining whether double jeopardy principles bar retrial, we consider whether there was “[i]ntentional and pervasive misconduct on the part of the prosecution to the extent that the trial [was] structurally impaired” and whether the misconduct “is so egregious that it raises

concerns over the integrity and fundamental fairness of the trial itself.” [Citation omitted.]

¶28 Although as a matter of substantive law, the State was entitled to pursue an intent to kill theory, as counsel for the State conceded at argument before this Court, attorneys are ethically bound to abide by court rulings — even those with which they disagree. Thus, to the extent prosecutors violated the superior court’s *Styers*-based orders, such conduct was improper. In discussing the appropriate sanction to impose, the superior court stated:

[T]he Prosecutors engaged in pervasive misconduct. First, the objective evidence demonstrates the Prosecutors’ intentional violation of the Court’s *Styers* rulings was prejudicial because jurors returned a verdict based on an intent-to-kill theory. Second, the Court’s *Styers* rulings did not result in the preclusion of otherwise admissible evidence. Rather, the rulings were an attempt to confine the State to trying the case it had charged. Third, the Prosecutors repeatedly violated the Defendant’s due process right to be tried only on the specific charges of which he had been accused. . . . Fourth, the 2012 Indictment was not the product of the Prosecutors’ reaction to an adverse court ruling; but, in reality, the new indictment represents their undaunted efforts to convict the Defendant based on an unsupportable legal theory.

**FN7:** The record does not suggest that the State was placed on notice during trial that it was violating a court order, yet continued doing so unabated.

Martinson made several motions for mistrial on the basis that prosecutors were violating the court’s order by offering evidence and argument suggesting an intent to kill. Each time, the court denied the mistrial request. We leave to the superior court’s discretion the question of whether lesser sanctions are appropriate on remand.

¶29 Assuming, without deciding, that prosecutors knowingly pursued an intent to kill theory at trial in contravention of the court’s order, as a matter of law, Martinson cannot establish the requisite prejudice arising from that conduct that would bar retrial on double jeopardy grounds. *See State v. Aguilar*, 217 Ariz. 235, 238–39, ¶ 11 (App. 2007) (rejecting claim that prosecutorial misconduct barred retrial on double jeopardy grounds and holding there must be “intentional conduct which the prosecutor knows to be improper and prejudicial”)...Because the law permitted the State to prove the felony murder charge with evidence that Martinson intended to kill J.E.M., to the extent such evidence and argument was presented at trial, Martinson suffered no cognizable prejudice.

Link to opinion: <http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/CR13-0895.pdf>

***Dale Wright v. Hon. Gates/State*, 1 CA-SA 2016-0058 (September 27, 2016):**

Dale Wright sought special action relief from a trial court order finding his convictions for solicitation to commit molestation of a child were properly classified as dangerous crimes against children (DCAC), and although DCAC, they do not require the existence of an actual child

victim. Division 1 denied relief and agreed with the trial court, because: (1) “The only explanation” of the way A.R.S. § 13-604.01 reads “in its entirety” is that the legislature intended any offense in preparation of any DCAC offense to also qualify as a DCAC; and (2) The crime of solicitation is complete when the solicitor makes the command or request. Judge Johnsen dissented, opining Wright’s remaining lifetime probation term should be vacated because the factual bases of his original pleas were insufficient—because no real children were involved, they should not have been classified as DCAC.

**I. SOLICITATION AS A DCAC OFFENSE**

¶9 In 1992, Arizona Revised Statutes (A.R.S.) section 13-604.01 included a list of specific crimes defined as DCAC offenses when “committed against a minor under fifteen years of age.” A.R.S. § 13-604.01.K.1 (1992). Presumably, the goal of the legislature in designating certain crimes as DCAC was to protect children and provide more severe punishments for crimes against them. *See State v. Wagstaff*, 164 Ariz. 485, 490-91 (1990). A DCAC offense could be either completed or preparatory, and included “molestation of a child” as one of the specific crimes delineated as a DCAC offense. A.R.S. § 13-604.01.K.1.d. Solicitation is a preparatory offense. A.R.S. § 13-1002 (West 2016).

¶10 According to A.R.S. § 13-604.01.K.1, a DCAC offense “is in the first degree if it is a completed offense and is in the second degree if it is a preparatory offense.” Wright argues that only crimes specifically identified in the statute are DCAC. He argues that because A.R.S. § 13-604.01.K.1 did not specifically include solicitation, it was not a DCAC

offense. Wright further argues that “subsection (K) is specific: it does not define a second degree DCAC offense as *any* preparatory offense or *all* preparatory offenses. The definition simply says *a* preparatory offense, thereby distinguishing between complete and incomplete offenses listed in subsection (a) – (m).”

¶11 Wright’s interpretation of A.R.S. § 13-604.01 is inconsistent with the statute’s plain meaning and interpretation. As defined by A.R.S. title 13, chapter 10, none of the crimes specifically identified in A.R.S. § 13-604.01 are preparatory offenses. If we accept Wright’s interpretation, the sections of the statute that reference preparatory offenses would be meaningless. Compare A.R.S. § 13-604.01.K.1, with A.R.S. §§ 13-1001 to -1004 (defining the preparatory crimes of attempt, solicitation, conspiracy and facilitation).

¶12 Although solicitation is not an enumerated DCAC offense, in reading A.R.S. § 13-604.01 in its entirety, the only explanation for the legislature’s inclusion of the language regarding preparatory offenses is that it intended any offense in preparation of any DCAC offense, as defined by the statute, to also qualify as a DCAC offense. Simply put, any preparatory conduct in furtherance of the crimes identified as DCAC pursuant to A.R.S. § 13-604.01.K constitutes a DCAC offense; it is the illegal nature of the conduct solicited that gives rise to the DCAC designation. See, e.g., *State v. Peek*, 219 Ariz. 182, ¶¶ 7, 19 (2008) (finding that the reference in § 13-604.01 to preparatory crimes is “clear language subjecting attempt offenses” to its provisions, including designation and sentencing as DCAC).

## II. SOLICITATION DOES NOT REQUIRE AN ACTUAL VICTIM

¶14 Pursuant to A.R.S. § 13-1002, a person is guilty of solicitation when he intends to “promote or facilitate the commission of a felony” by “command[ing], encourag[ing], request[ing] or solicit[ing]” another to engage in illegal conduct. A.R.S. § 13-1002.A. Solicitation does not require any agreement by the solicited child to engage in such conduct. The crime is complete “when the solicitor, acting with the requisite intent, makes the command or request.” *State v. Miller*, 234 Ariz. 31, 41, ¶ 32 (2013)...The crime of solicitation is a “crime separate from the crime solicited.” *State v. Flores*, 218 Ariz. 407, 410, ¶ 7 (App. 2008). Legal incapability of “committing the offense that is the object of the solicitation” is not a defense to solicitation. A.R.S. § 13-1006.B; see also *State v. Carlisle*, 198 Ariz. 203, 207, ¶ 17 (App. 2000) (“The absence of an actual victim under the age of fifteen does not preclude an attempted crime from being a dangerous crime against children.”); *State v. McElroy*, 128 Ariz. 315, 317 (1981) (holding that factual impossibility is not a defense to an attempt crime).

¶15 Wright solicited a postal inspector “posing as the parent of two children whom she offered to make available for sex acts.” The act of solicitation was complete when Wright requested the postal worker allow him to engage in sexual conduct with those children. A preparatory offense is one committed “in preparation for committing a completed crime.” *Mejak v. Granville*, 212 Ariz. 555, 558, ¶ 18 (2006). The trial court properly determined that the conduct solicited, the sexual molestation of a child, was a DCAC offense and sentenced Wright accordingly. Therefore, the trial court did not err in denying Wright’s motion for modification of

probation.

**JOHNSEN**, Judge, dissenting

¶20 I respectfully dissent from the denial of relief to Wright because I am compelled to conclude that, under the language of the Arizona statute defining solicitation, one cannot be convicted of soliciting another to commit molestation of a child in the absence of an actual child. I agree that a valid conviction of solicitation to commit child molestation may constitute a dangerous crime against children. More broadly, I agree that solicitation to commit any crime that constitutes a dangerous crime against children may itself be a (second-degree) dangerous crime against children. But that is not what we have here. Because our record contains insufficient evidence to support a conviction for solicitation to commit child molestation in the first place, Wright is entitled to relief.

Link to opinion: <http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/SA16-0058.pdf>

## TRIAL RESULTS

**Jury and Bench Trial Results**

June 2016 - August 2016

Indigent Representation

**Public Defender's Office – Trial Division**

Closed Date	Team	Judge	Case No. and Charge(s)	Counts	Result
<b>Group 1</b>					
8/17/2016	N. Forner C. McAleer	Beene	CR2015-121017-001 Agg Aslt-Deadly Wpn/Dang. Inst., F3	1	Jury Trial Not Guilty
7/15/2016	D. Wilson J. Jackson P. Higgins	Kemp	CR2015-118711-001 Misconduct Involving Weapons, F4	1	Jury Trial Guilty as Charged
7/18/2016	N. Forner J. Corral C. McAleer R. Shields	Stephens	CR2015-143015-001 Murder 1st Deg-Premeditated, F1 Agg Aslt-Deadly Wpn/Dang. Inst., F3 Agg Aslt-Serious Phy Injury, F3 Poss Wpn by Prohib Person, F4	1 1 1 1	Jury Trial Guilty Lesser/Fewer
7/29/2016	C. Kinney R. Hales	Nothwehr	CR2015-006009-001 Dangerous Drug-Poss. Use, F4 Drug Paraphernalia-Possess/Use, F6	1 1	Jury Trial Guilty Lesser/Fewer
<b>Group 2</b>					
7/28/2016	L. Anderson D. McGivern	Fink	CR2015-156226-001 Narcotic Drug, Possess For Sale, F2 Dangerous Drug, Possess For Sale, F2	1 1	Jury Trial Guilty as Charged
7/5/2016	B. Alldredge S. Brazinskas A. Good	Rea	CR2015-120926-001 Dangerous Drug, Poss/Use, F4 Shoplifting-Concealment, M1	1 1	Jury Trial Guilty Lesser/Fewer
8/10/2016	B. Alldredge A. Good J. Little	Como	CR2015-129328-001 Armed Robbery-With Deadly Wpn, F2 Dangerous Drug-Poss. Use, F4 Drug Paraphernalia-Possess/Use, F6	1 1 1	Jury Trial Guilty as Charged Other allegations/cases dismissed/not filed
7/5/2016	J. Byrne	Viola	CR2015-133927-002 Agg Aslt DV-Impede Breathing, F4	1	Jury Trial Not Guilty
6/13/2016	B. Alldredge L. Munoz A. Good	Kemp	CR2015-002622-001 Agg Aslt-Deadly Wpn/Dang. Inst., F3 Endangerment, F6 Drive By Shooting, F2	2 1 2	Jury Trial Guilty Lesser/Fewer
6/3/2016	L. Anderson S. Brazinskas D. McGivern	Nothwehr	CR2015-005334-001 Dng Drug-Transp and/or Sell, F2	1	Jury Trial Not Guilty

Closed Date	Team	Judge	Case No. and Charge(s)	Counts	Result
8/29/2016	J. Done	Padilla	CR2016-001026-001		Jury Trial
	S. Brazinskas		Agg. Aslt-Serious Phys Injury, F3	1	Not Guilty
	A. Good		Agg Aslt-Deadly Wpn/Dang. Inst., F3	1	
8/11/2016	B. Sifontes	Mahoney	CR2015-156421-001		Bench Trial
	S. Brazinskas		Marijuana-Possess/Use, F6	1	Guilty Lesser/Fewer
	D. McGivern				
<b>Group 3</b>					
8/01/2016	J. Burns	Richter	CR2015-005649-001		Jury Trial
	K. Tomaiko		Kidnap-Death/Inj/Sex/Aid Fel, F2	1	Guilty Lesser/Fewer
	O. Gurion		Sexual Abuse, F6	1	
			Agg Aslt-Correc Employee	1	
6/10/2016	J. Caulfield	Sinclair	CR2015-002322-001		Jury Trial
	S. Spears		Agg Aslt-Officer, F5	2	Guilty Lesser/Fewer
	K. Tomaiko		Resist Arrest-Physical Force, F6	1	
	D. McGivern		Shoplifting-Removal of Goods, M1	1	
			Obstruction-Refuse True Name, M2	1	
7/15/2016	S. Taylor	Rea	CR2015-134743-001		Jury Trial
	C. Eichorn-Kroll		Narc Drug-Transp and/or Sell, F2	1	Guilty Lesser/Fewer
	J.Gebhart		Marijuana-Possess/Use, F6	1	
6/21/2016	J. Caulfield	Foster	CR2015-145038-001		Jury Trial
	K. Tomaiko		Agg Aslt-Temp Disfigurement, F4	1	Not Guilty
	G. Bradley				
	L. Hart				
8/26/2016	S. Taylor	Rea	CR2015-126046-001		Jury Trial
	C. Eichorn-Kroll		Poss Wpn by Prohib Person, F4	1	Guilty as Charged
<b>Group 4</b>					
8/18/2016	L. Schachar	Fenzel	CR2014-002142-001		Jury Trial
			Murder 1st Deg-Law Enforcement, F1	1	Guilty Lesser/Fewer
			Agg Aslt-Deadly Wpn/Dang. Inst., F3	2	
			Dischg Firearm at Residence, F2	1	
			Burglary 1st Degree	2	
			Theft-Control Property, F3	1	
			Endangerment, F6	1	
7/12/2016	P. McGroder	Seyer	CR2015-157065-001		Bench Trial
			Marijuana-Possess/Use, F6	1	Guilty Lesser/Fewer
			Drug Paraphernalia-Possess/Use, F6	3	

Closed Date	Team	Judge	Case No. and Charge(s)	Counts	Result
<b>Group 5</b>					
6/27/2016	C. Ortega J. Romani	Coury	CR2015-128071-001 Dangerous Drug-Poss. Use, F4	1	Jury Trial Guilty as Charged
6/30/2016	N. Jones A. Schwartz	Granville	CR2013-002132-001 Murder 2nd Degree, F2 Kidnap, F2 Aggravated Assault, F3	1 1 1	Jury Trial Guilty Lesser/Fewer
<b>Group 6</b>					
6/27/2016	V. Llewellyn R. Springer B. Mathurin	Rummage	CR2015-001985-001 Marij-Transport and/or Sell, F2	1	Jury Trial Guilty as Charged
8/1/2016	S. Apfel	Kemp	CR2015-158499-001 Drug Paraphernalia-Possess/Use, F6 Marijuana-Possess for Sale, F4 Possess/Use Wpn in Drug Offense, F4	1 1 1	Bench Trial Guilty Lesser/Fewer
6/17/2016	J. Hermes	Como	CR2015-132896-001 Possess Wpn by Prohib Person, F4	1	Jury Trial Guilty as Charged
8/19/2016	M. Weinstein J. Leonard S. Decker A. Vondra D. Torres	Como	CR2014-124989-001 Sexual Abuse, F3 Sexual Conduct with Minor, F2 Sexual Conduct with Minor, F3 Molestation of Child, F2	2 2 1 2	Jury Trial Guilty as Charged
<b>Justice Courts Group</b>					
6/8/2016	B. Griffin G. Jarrell	Wolcott	JC2014-152000-001 Contractor Acting W/O License, M	1	Jury Trial Guilty as Charged
8/12/2016	T. Baird	Osterfeld	JC2015-127846-001 Disorderly Conduct-Fighting, M1	1	Jury Trial Guilty as Charged
7/25/2016	T. Baird G. Jarrell	Guzman	JC2015-153083-001 IJP-Disobey/Resist Order or Mandate of Court, M1	1	Bench Trial Guilty as Charged
8/10/2016	B. Griffin	McMurry	TR2015-150964-001 DUI-Liquor/Drugs/Vapors/Combo, M1 DUI W/BAC of .08 or More, M1	1 1	Jury Trial Guilty as Charged

Closed	Team	Judge	Case No. and Charge(s)	Counts	Result
<b>Justice Court Group (continued)</b>					
6/10/2016	C. Braaksma	Anderson	TR2015-150660-001 DUI-Liquor/Drugs/Vapors/Combo, M1	1	Jury Trial Guilty Lesser/Fewer
			DUI W/BAC of .08 or More, M1	1	
6/27/2016	C. Braaksma	Frankel	TR2015-101686-001 DUI-Liquor/Drugs/Vapors/Combo, M1	1	Jury Trial Guilty as Charged
			DUI W/BAC of .08 or More, M1	1	
			Extreme DUI-BAC .15-.20, M1	1	
			Extreme DUI-BAC >.20, M1	1	
<b>Specialty Court Group</b>					
6/16/2016	N. Hartley	Rummage	CR2014-115516-001		Jury Trial
	T. Leazotte		Sexual Abuse, F3	3	Guilty as Charged
	S. Cravath		Sexual Conduct with Minor, F2	4	
	J. Little				
<b>ERU- Mesa</b>					
6/10/2016	C. Wallace	Goodman	JC2015-137971-001 Disorderly Conduct-Noise, M1	1	Bench Trial Not Guilty
			Criminal Damage-Deface, M1	1	
<b>Training</b>					
7/18/2016	J. Roth	Mulleneaux	CR2015-155034-001 Marijuana-Possess/Use, F6	1	Bench Trial Not Guilty
<b>Vehicular Group</b>					
6/17/2016	T. Baker	Seyer	CR2015-121818-001 Agg DUI-Lic Susp/Rev for DUI, F4	2	Jury Trial Guilty as Charged
6/30/2016	T. Baker	Seyer	CR2015-129010-001 Agg DUI-Lic Susp/Rev for DUI, F4	2	Jury Trial Guilty as Charged
6/8/2016	B. Dorame	Sinclair	CR2015-144027-001		Jury Trial
	L. Munoz		Burglary, 2nd Degree, F3	1	Guilty as Charged
	D. McGivern		Crim Tresp 1st Deg-Resid Yard, M1	1	
8/24/2016	B. Dorame	Richter	CR2015-002630-001		Jury Trial
	L. Munoz		Agg Aslt- Officer, F5	1	Not Guilty
	D. McGivern				
6/10/2016	R. Randall	Otis	CR2015-107761-001		Jury Trial
	J. McGrath		Murder 2nd Deg-Extr Indiffrenc, F1	1	Guilty as Charged
	A. Vondra				
	B. Williamson				

## Legal Defender – Trial Results

Date Closed	Team	Judge	Case No. and Charge(s)	Counts	Result
<b>Capital</b>					
6/14/2016	G. Bevilacqua	Stephens	CR2011-007597-001		Jury Trial
	E. Crocker		Murder 1st Degree, F1	1	Guilty as Charged
	M. De Santiago		Burglary 1st Degree, F2	1	
<b>Felony</b>					
6/03/2016	A. Stiver	Mahoney	CR2013-443323-001		Jury Trial
	R. Haimovitz		Murder 2nd Degree, F1	1	Guilty Lesser/Fewer
	G. Handgis				
	C. Prusak				
	D. Apple				
7/22/2016	J. Rosell	Sinclair	CR2014-146544-002		Jury Trial
			Sexual Assault, F2	2	Guilty Lesser/Fewer
			Kidnap/Death/Inj/Sex/Aid Fel., F2	1	
			Agg Aslt-Deadly Wpn/Dang Inst, F3	1	
			Armed Robbery-Threat Use Wpn, F3	1	
8/26/2016	E. Warner	Mahoney	CR2015-134992-002		Jury Trial
	R. Haimovitz		Armed Robbery-Threat Use Wpn, F3	1	Guilty Lesser/Fewer
			Kidnap/Death/Inj/Sex/Aid Fel., F2	1	
			Burglary 3rd Deg-Unlaw Entry, F4	1	
			Unlaw Flight from Law Enf Veh, F5	1	
8/17/2016	M. Jones	Mulleneaux	CR2015-134566-001		Jury Trial
	M. De Santiago		Crim Tresp 1st Deg-Res Struct, F6	1	Guilty as Charged
7/8/2016	A. Stiver	Como	CR2015-149259-002		Jury Trial
	M. De Santiago		Agg Aslt-Deadly Wpn/Dang Inst, F3	1	Guilty Lesser/Fewer
	R. Rubio		Poss Wpn by Prohib Person, F4	1	
			Tamp w/Phys Evid-Destroy/Alter, F6	1	

## Legal Advocate – Trial Results

Date Closed	Team	Judge	Case No. and Charge(s)	Counts	Result
<b>Capital Trial</b>					
6/29/2016	R. Reinhardt	McCoy	CR2010-048824-001		Jury Trial
	P. Jones		Murder 1st Degree, F1	1	Guilty as Charged
	E. Rood		Kidnap, F2	1	
	L. Christianson		Burglary 1st Degree, F3	1	
<b>Felony Trial</b>					
7/6/2016	A. Marcy	Bernstein	CR2015-005517-001		Bench Trial
	C. Gracia		Poss Wpn by Prohib PPerson, F4	1	Guilty Lesser/Fewer
			False Report to Law Enforce, M1	1	

Date Closed	Team	Judge	Case No. and Type	Result
<b>Dependency</b>				
06/16/2016	M. Vera	Martin	JD30516 Severance Trial	Severance Granted
06/01/2016	L. Richardson	Martin	JD16708 Severance Trial	Severance Granted
07/06/2016	J. Konkol	Flores	JD31972 Dependency Trial	Dependency Found
08/22/2016	S. Lofland M. Vera	Lemaire	JD30076 Severance Trial	Severance Granted
08/23/2016	J. Konkol	Flores	JD32603 Dependency Trial	Dependency Found
08/05/2016	L. Christian	Palmer	JD509011R Dependency Trial	Dependency Found
08/22/2016	M. Haywood	Crawford	JD529650 Dependency Trial	Dependency Granted

**The Maricopa County Offices of the Public Defender, Legal Defender, Legal Advocate, and  
Office of the Federal Public Defender – Capital Habeas Unit present:**

# **The Fight For Life**

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# forThe Defense

A publication of the  
Maricopa County Public Defender's Office

**Delivering America's Promise of Justice for All**

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forThe Defense is the training newsletter published by the Maricopa County Public Defender's Office, James J. Haas, Public Defender.

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