

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ELROY GUTIERREZ, *Appellant*.

No. 1 CA-CR 15-0342
FILED 9-1-2016

Appeal from the Superior Court in Yavapai County
No. P1300CR201400675
The Honorable Tina R. Ainley, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Linley Wilson
Counsel for Appellee

White Law Offices, PLLC, Flagstaff
By Wendy F. White
Counsel for Appellant

OPINION

Presiding Judge Diane M. Johnsen delivered the opinion of the Court, in which Judge Patricia A. Orozco and Judge Donn Kessler joined.

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JOHNSON, Judge:

¶1 We address in this appeal two statutory interpretation issues: Whether use or possession of multiple deadly weapons during the commission of a drug felony constitutes just one offense under Arizona Revised Statutes ("A.R.S.") section 13-3102(A)(8) (2016), and whether a defendant convicted of transportation of methamphetamine for sale under A.R.S. § 13-3407(A)(7) (2016) is eligible for early release.¹ We also consider whether the superior 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.

FACTS AND PROCEDURAL BACKGROUND

¶2 A highway patrol officer parked in the median of Interstate 17 north of Cordes Junction one summer afternoon saw Elroy Gutierrez drive by with his windows rolled down and noticed Gutierrez slowed below the speed limit as he passed.² The officer pulled out to follow Gutierrez, and stopped him after he saw Gutierrez twice apply the brakes for no apparent reason and the car's right tires twice swerve across the white fog line. After Gutierrez and his passenger gave inconsistent statements, the officer requested a drug canine unit. The dog alerted, and a search of the car revealed two handguns, just under a half-pound of heroin, more than four pounds of methamphetamine and a black zippered case containing a small quantity of heroin and a used syringe. Interviewed following his arrest, Gutierrez admitted he used heroin earlier in the day and voluntarily provided a urine sample. A drug test revealed metabolites of heroin, methamphetamine and marijuana.

¶3 Gutierrez was indicted on one count of transportation of a dangerous drug for sale (methamphetamine), a Class 2 felony; one count of transportation of a narcotic drug for sale, a Class 2 felony; two counts of misconduct involving weapons, each a Class 4 felony; two counts of possession of drug paraphernalia, each a Class 6 felony; and two counts of aggravated driving under the influence, each a Class 4 felony. His

¹ Absent material revision after the date of an alleged offense, we cite a statute's current version.

² We view the evidence in the light most favorable to sustaining the jury's verdicts. *State v. Nelson*, 214 Ariz. 196, 196, ¶ 2 (App. 2007).

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passenger also was indicted on the drug and weapons charges. After a joint trial, the jury acquitted Gutierrez of one count of aggravated driving under the influence and transportation of a narcotic drug for sale but found him guilty of the other DUI charge, as well as transportation of a dangerous drug for sale, possession of a narcotic drug, possession of drug paraphernalia and misconduct involving weapons. The jury also found the co-defendant guilty of all charges and found presence of an accomplice and commission of the offense for pecuniary gain as aggravating factors. The superior court sentenced Gutierrez to concurrent aggravated prison terms, the longest of which was 14 years.

¶4 Gutierrez timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2016), 13-4031 (2016), and -4033(A)(1) (2016).

DISCUSSION

A. Denial of Motion to Suppress.

¶5 Gutierrez contends the superior court erred by denying his motion to suppress the drugs and guns found in the car because the officer did not have reasonable suspicion for the traffic stop. At the suppression hearing, the officer testified he stopped the car because of concern the driver was impaired or sleepy. Based on the officer's testimony, given the officer's concern that the driver was impaired, the superior court found the officer had reasonable suspicion of a traffic violation.

¶6 We will not reverse the denial of a motion to suppress absent a clear abuse of discretion. *State v. Guillory*, 199 Ariz. 462, 465, ¶ 9 (App. 2001). "In reviewing the denial of a motion to suppress evidence, we consider only the evidence presented at the suppression hearing, and view that evidence in the light most favorable to upholding the trial court's ruling." *State v. Evans*, 235 Ariz. 314, 315, ¶ 2 (App. 2014) (quoting *State v. Olm*, 223 Ariz. 429, 430, ¶ 2 (App. 2010)). We defer to the superior court's factual determinations, including its evaluation of the credibility of the witnesses, but review its conclusions of law *de novo*. *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118 (1996).

¶7 The Fourth Amendment forbids "unreasonable searches and seizures." U.S. Const. amend. IV. A law enforcement stop of a vehicle constitutes a seizure under the Fourth Amendment and "must be justified by some objective manifestation that the person stopped is, or is about to be engaged in criminal activity." *State v. Richcreek*, 187 Ariz. 501, 503-04 (1997) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). "Although

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an officer's reliance on a mere 'hunch' is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause." *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (citation omitted). "In reviewing a claim that law enforcement officers lacked the reasonable suspicion required for an investigatory stop, we apply a peculiar sort of *de novo* review, slightly more circumscribed than usual, because we defer to the inferences drawn by the [trial] court and the officers on the scene, not just the [trial] court's factual findings." *Evans*, 235 Ariz. at 317, ¶ 8 (alterations in original) (citation and internal quotation marks omitted); see also *State v. Teagle*, 217 Ariz. 17, 24, ¶ 26 (App. 2007) ("In reviewing the totality of the circumstances, we accord deference to a trained law enforcement officer's ability to distinguish between innocent and suspicious actions.").

¶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); see also *Jones v. Sterling*, 210 Ariz. 308, 311, ¶ 11 (2005) ("[E]vidence seized as a result of a traffic stop meeting 'normal' Fourth Amendment standards is not rendered inadmissible because of the subjective motivations of the police who made the stop.").

¶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

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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.

¶11 Gutierrez contends the superior court erred in denying his motion to sever his trial from that of his co-defendant. Defendants may be joined for trial "when each defendant is charged with each offense included, or when the several offenses are part of a common conspiracy, scheme or plan or are otherwise so closely connected that it would be difficult to separate proof of one from proof of the others." Ariz. R. Crim. P. 13.3(b). Despite the possibility of confusion from joinder, joint trials are favored in the interest of judicial economy. See *State v. Murray*, 184 Ariz. 9, 25 (1995). The court, however, must grant a motion to sever trial of two or more defendants when "necessary to promote a fair determination of the guilt or innocence of any defendant of any offense[.]" Ariz. R. Crim. P. 13.4(a). Thus, the court should grant severance when it detects features of the case that might prejudice the defendant, such as "when . . . evidence admitted against one defendant has a harmful rub-off effect on the other defendant . . . or . . . co-defendants present antagonistic, mutually exclusive defenses or a defense that is harmful to the co-defendant." *Murray*, 184 Ariz. at 25.

¶12 We review the denial of a motion to sever trial of a co-defendant for an abuse of discretion. *State v. Blackman*, 201 Ariz. 527, 537, ¶ 39 (App. 2002). To establish an abuse of discretion, a defendant must show that at the time he moved to sever, he had proved his defense would be prejudiced absent severance. *Murray*, 184 Ariz. at 25 (Defendant "must demonstrate compelling prejudice against which the trial court was unable to protect.") (quoting *State v. Cruz*, 137 Ariz. 541, 544 (1983)). A defendant who files an unsuccessful pretrial motion to sever must renew the motion "during trial at or before the close of the evidence[.]" and "[s]everance is waived if a proper motion is not timely made and renewed." Ariz. R. Crim. P. 13.4(c); *State v. Laird*, 186 Ariz. 203, 206 (1996); see also *State v. Flythe*, 219 Ariz. 117, 120, ¶ 9 (App. 2008) (Waiver provision of Rule 13.4(c) "prevents a defendant from strategically refraining from renewing his motion, allowing a joint trial to proceed, then, if he is dissatisfied with the final outcome, arguing on appeal that severance was necessary."). Because Gutierrez failed to renew his pretrial motion to sever, we review the issue only for fundamental error.

¶13 Gutierrez argues the superior court should have severed the trial because he and his co-defendant had inherently antagonistic defenses.

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"[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-defendants 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.

¶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.

¶15 Moreover, in reviewing the denial of a motion to sever, "we are mindful that the trial court exercises considerable discretion in determining whether, *in light of the evidence then before the court*, the defendant has made the requisite showing of prejudice." *State v. VanWinkle*, 186 Ariz. 336, 339 (1996) (emphasis added). Because Gutierrez did not renew his motion to sever, the court had no basis to conclude the defenses were mutually exclusive.

¶16 By the same token, Gutierrez's argument also fails because he cannot establish prejudice. *See Murray*, 184 Ariz. at 25. On appeal, Gutierrez argues for the first time that the court's failure to sever the trial compelled him to testify although he might not have done so had he been tried separately. At trial, Gutierrez acknowledged that the pouch with the personal supply of heroin was his, but testified he knew nothing about the other drugs in the car and that the guns belonged to his co-defendant.

¶17 The superior court instructed the jurors to consider the charges against each defendant separately and that "[e]ach defendant is entitled to have the jury determine the verdict as to each of the crimes

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charged based upon that defendant's own conduct and from the evidence which applies to that defendant, as if that defendant were being tried alone." So instructed, the jury acquitted Gutierrez of some of the charges against him. On this record, no fundamental error occurred in the denial of the motion to sever. *See State v. Goudeau*, 239 Ariz. 421, __, ¶ 67 (2016).

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 offense included in chapter 34 of [the criminal code]." A.R.S. § 13-3102(A)(8).

¶19 Gutierrez argues the two convictions violate double jeopardy principles because § 13-3102(A)(8) constitutes a single offense regardless of the number of weapons used or possessed during the commission of a drug crime. *See Taylor v. Sherrill*, 169 Ariz. 335, 338 (1991) (double jeopardy prevents imposition of multiple punishments for same offense). We review a double jeopardy claim *de novo*. *State v. Moody*, 208 Ariz. 424, 437, ¶ 18 (2004). Statutory interpretation is a question of law that likewise is subject to *de novo* review. *State v. Hasson*, 217 Ariz. 559, 561, ¶ 8 (App. 2008). Because Gutierrez did not raise this objection in the superior court, our review is limited to fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005). A double jeopardy violation, however, constitutes fundamental error. *State v. Millanes*, 180 Ariz. 418, 421 (App. 1994).

¶20 The issue is the allowable unit of prosecution under § 13-3102(A)(8), or, put differently, the "scope of conduct for which a discrete charge can be brought" under the statute. *See State v. Jurden*, 239 Ariz. 526, __ ¶ 11 (2016). We begin with the language of the statute, keeping in mind that our objective "is to give effect to the legislature's intent." *Id.*, ¶ 15. "If the statutory language is unambiguous, we apply it as written without further analysis." *Id.* Unless it is clear the legislature intended otherwise, we will not "construe the words of a statute to mean something other than what they plainly state." *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co., Inc.*, 177 Ariz. 526, 529 (1994).

¶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

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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. See *United States v. Szalkiewicz*, 944 F.2d 653 (9th Cir. 1991); *United States v. Valentine*, 706 F.2d 282 (10th Cir. 1983). 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. *Valentine*, 706 F.2d at 292-93; see also *United States v. Kinsley*, 518 F.2d 665, 668 (8th Cir. 1975) ("the word 'any' has typically been found ambiguous in connection with the allowable unit of prosecution"). 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 involved. See, e.g., *Valentine*, 706 F.2d at 293-94; *Kinsley*, 518 F.2d at 670.

¶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. See, e.g., *United States v. Alverson*, 666 F.2d 341, 347 (9th Cir. 1982) (phrase "to receive or possess a firearm" expresses legislative intent to allow separate prosecution for each firearm); *Sanders v. United States*, 441 F.2d 412, 414-15 (10th Cir. 1971) (each firearm is a separate offense under statute that makes it unlawful for any person to receive or possess "a firearm which is not registered to him"); *Grappin v. State*, 450 So.2d 480, 482 (Fla. 1984) (article "a" in reference to "firearm" in statute clearly shows legislature intended to make each firearm a separate unit of prosecution); *Taylor v. State*, 929 N.E.2d 912, 921 (Ind. App. 2010) ("In giving the words 'a' and 'firearm' their plain and ordinary meaning, we conclude that the legislature's intent was to make each unlawful possession of one firearm by a serious violent felon a separate and independent crime."); *State v. Kidd*, 562 N.W.2d 764, 766 (Iowa 1997) (decision upholding multiple prosecutions "is in accord with the majority of courts which have determined the appropriate unit of prosecution under statutes using the same language"); *State v. Lindsey*, 583 So.2d 1200, 1204 (La. App. 1991) (statute prohibiting possession of "a firearm" authorized separate prosecutions for each weapon possessed). But see *People v. Haggart*, 370

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N.W.2d 345, 354 (Mich. App. 1985) (statute prohibiting possession of "a firearm" during commission of felony allows only single prosecution, regardless of number of weapons possessed).

¶24 Beyond the cases interpreting 18 U.S.C. § 922, Gutierrez offers no other support for his contention that the unit of prosecution under A.R.S. § 13-3102(A)(8) sweeps together into a single offense the use or possession of any number of deadly weapons while committing a drug felony. 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.

¶25 For these reasons, we conclude the allowable unit of prosecution for a violation of A.R.S. § 13-3102(A)(8) is each deadly weapon used or possessed during the commission of a felony drug offense. Accordingly, no double jeopardy violation occurred when Gutierrez was convicted and sentenced on two counts of misconduct involving weapons.

D. Alleged Judicial Vindictiveness in Sentencing.

¶26 Gutierrez argues the superior court judge violated his due-process rights by imposing a longer sentence after the jury convicted him than she had said she would give him if he accepted a plea offer before trial.³ Gutierrez argues judicial vindictiveness is presumed when, as here, a judge promises to impose a particular sentence in connection with a prosecution's plea offer, then imposes a harsher sentence after the defendant declines the plea and is convicted after trial.

¶27 During a settlement conference held just before the hearing on the motion to suppress evidence from the traffic stop in this case, the State offered to dismiss the other charges and recommend a sentence of no more than 10 years if Gutierrez would plead guilty to transportation of methamphetamine for sale and aggravated DUI. *See* A.R.S. § 13-3407(E) (2016) (presumptive sentence for first-time offense of transportation of dangerous drug for sale is 10 years). Speaking directly to Gutierrez in the presence of counsel, the trial judge initially observed that an appropriate

³ Because Gutierrez did not raise this contention in the superior court, we review only for fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19.

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sentence for the two charges in the plea offer would be no more than eight and a half years. The judge said, "Certainly I would think, under the plea, that a mitigated term would be appropriate. Again, how mitigated, I'm not sure But I could probably see a cap, based on purposes [sic] of the plea negotiations, of no more than eight and a half. I could go less than that; I'm just trying to give myself a little bit of a range under this plea."

¶28 After a break to allow Gutierrez to confer with counsel, the judge returned to the bench and said that after giving it more thought, a shorter sentence would be appropriate under the proposed plea. She acknowledged that Gutierrez might defend the drug charge by arguing he knew nothing about the methamphetamine in the car, but pointed out that defense would still leave the aggravated DUI charge (based on Gutierrez's admitted use of heroin the morning of the traffic stop). The judge told Gutierrez the maximum term on the aggravated DUI charge, by itself, would be 7.5 years.⁴ The court continued, "So it seems appropriate to me that [under the plea] I should make it a maximum of 7.5 rather than the 8.5 I told you. Again, I don't know if that makes any difference to you, but I want to let you know that I would - if you were interested in the plea, I would maximize my sentence at 7.5, which is the maximum that you could get after trial if you were just convicted of the aggravated DUI and not the drug charges, so for what it's worth. . . . [I]f you take the plea, I wouldn't impose more than 7.5, which is the maximum you could get at trial, even if you won on all the drug charges."

¶29 Ultimately, Gutierrez declined to accept the plea, and the jury convicted him of seven charges. The court imposed a term of 14 years' incarceration on the charge of transportation of methamphetamine for sale; each of the other sentences the court imposed were for shorter terms, and

⁴ The sentence the court described was the maximum that could be imposed on a category-two offender, upon proof of two or more aggravating factors. (Before the settlement conference, the State had alleged Gutierrez had three prior felony convictions, each for an offense committed in New Mexico. There was no discussion during the conference about whether any of the three prior felonies constituted an historical prior felony conviction pursuant to A.R.S. § 13-105(22)(a)-(c) (2016). During the settlement conference, the judge apparently presumed (without objection from any of the parties) that the third prior felony, if proved, would constitute an historical prior felony pursuant to § 13-105(22)(d) ("[a]ny felony conviction that is a third or more prior felony conviction").)

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all were ordered to run concurrently. (The court imposed a term of seven years on the aggravated DUI conviction).

¶30 Contrary to Gutierrez's argument, there is no automatic presumption of unconstitutional vindictiveness whenever a judge imposes a greater sentence after trial than the judge offered during pretrial plea negotiations. The Supreme Court has held that a presumption of unconstitutional vindictiveness applies only when "there is a 'reasonable likelihood' that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." *Alabama v. Smith*, 490 U.S. 794, 799 (1989) (citation omitted). As the Court recognized in *Smith*, "in the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged," and, in addition, "[t]he defendant's conduct during trial may give the judge insights into his moral character and suitability for rehabilitation." *Id.* at 801. Lastly, "the factors that may have indicated leniency as consideration for the guilty plea are no longer present." *Id.* For all those reasons, the mere imposition of a greater sentence after trial than offered in exchange for a pretrial plea "is not more likely than not attributable to the vindictiveness on the part of the sentencing judge." *Id.* See *German v. United States*, 525 A.2d 596, 603 (D.C. App. 1987) (after defendant rejects a plea, the "mere fact of a sentence increase does not show vindictiveness"); *Wilson v. State*, 845 So. 2d 142, 150 (Fla. 2003) (declining to "adopt a presumption of vindictiveness that arises whenever the trial judge participates in the plea negotiations and the defendant subsequently receives a harsher sentence after a trial or hearing"); *State v. Davis*, 584 A.2d 1146, 1147 (Vt. 1990) ("presumption of vindictiveness does not arise when the sentencing judge has participated in plea bargain discussions that did not lead to an agreement" and then imposes a harsher sentence at the conclusion of the trial).

¶31 Gutierrez also argues that, even absent presumed vindictiveness, his due-process rights were violated because the judge imposed a longer sentence than she had offered during the settlement conference. The record, however, contains no support for Gutierrez's contention. The judge made no inappropriately passionate statements, either during the settlement conference or at sentencing, that might evidence vindictiveness. Cf. *Stephney v. State*, 564 So. 2d 1246, 1247-48 (Fla. App. 1990) (citing as evidence of vindictiveness a judge's comments that "[t]he next time he will know to take [the offer] when I offer it at arraignment" and "I will, as a gesture of goodwill leave [the offer] open right now before you have to decide if your client is testifying, for about fifteen seconds"); *Wilson*, 845 So. 2d at 153-57 (listing evidence of vindictiveness in other cases).

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¶32 Although the State had alleged aggravating factors before the settlement conference, it had not yet proven them and in fact, the State took the position that it would recommend sentences of no longer than the presumptive if Gutierrez would accept the plea offer. After convicting Gutierrez of each of the seven charges, however, the jury found two aggravating factors, presence of an accomplice and that the crimes were committed for pecuniary gain. See A.R.S. § 13-701(D)(4), (6) (2016). The aggravating factors allowed the judge to impose a term of 14 years on the charge of transportation of methamphetamine for sale. A.R.S. § 13-3407(E) (range of five to 15 calendar years for first-time offense). Cf. *Smith*, 490 U.S. at 801 ("relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial").⁵

¶33 Under these circumstances, the record does not support Gutierrez's contention that the judge acted with actual vindictiveness in imposing the sentences. *Smith*, 490 U.S. at 799. Gutierrez has failed to demonstrate error, much less fundamental error, in the imposition of a sentence greater than promised as part of the plea offer.

¶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, when circumstances do not allow the participation of another judicial officer in the settlement conference, 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.

⁵ At the settlement conference, the judge had told Gutierrez of the presumptive sentences on the other charges for an offender with a single historical prior felony conviction. After Gutierrez admitted three prior felony convictions during trial, the judge sentenced him as a category three offender (two historical prior felonies) on each of the convictions other than the methamphetamine charge. At sentencing, Gutierrez did not dispute that he was subject to sentencing as a category three offender and, in any event, the 14-year sentence the court imposed on the methamphetamine charge was the longest of the concurrent sentences the court imposed.

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E. Imposition of Flat-Time Sentence.

¶35 The court ordered that Gutierrez was not eligible for early release on the 14-year sentence it imposed on his conviction for transportation of methamphetamine for sale; rather, it ordered that sentence must be "flat time." Relying on language in A.R.S. § 13-3407(F), Gutierrez argues the court erroneously did not believe it had discretion to give him the benefit of early release.

¶36 As noted, Gutierrez was convicted of transportation of methamphetamine for sale under A.R.S. § 13-3407(A)(7). Subpart (F) of § 13-3407 provides that a person convicted of violating § 13-3407(A)(7) for transporting methamphetamine for sale "is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the person has served the sentence imposed by the court, the person is eligible for release pursuant to § 41-1604.07 or the sentence is commuted." Gutierrez argues that the reference to release credits in this statute - "the person is eligible for release pursuant to § 41-1604.07" - grants the superior court authority to sentence a defendant to flat time *or* early release if deemed eligible by the Department of Corrections pursuant to A.R.S. § 41-1604.07 (2016). In other words, Gutierrez asserts a flat-time sentence is not mandatory.

¶37 In *Hasson*, 217 Ariz. at 562, ¶ 13, we characterized the language in § 13-3407(F) as "somewhat perplexing," given that § 13-3407(E) requires the imposition of a calendar-year or flat-time prison term. We resolved any ambiguity, however, by looking to the legislature's intent of imposing calendar-year sentences for certain methamphetamine-related offenses. *Hasson*, 217 Ariz. at 562-63, ¶¶ 12, 17. We concluded that § 13-3407(F) "does not provide for release credits because § 41-1604.07(A) specifically excludes eligibility for anyone 'sentenced to serve the full term of imprisonment imposed by the court.'" *Hasson*, 217 Ariz. at 563, ¶ 16.

¶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

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Gutierrez eligible for early release. Thus, the superior court did not abuse its discretion in imposing the flat-time sentence.

CONCLUSION

¶39 For the foregoing reasons, we affirm Gutierrez's convictions and sentences.



Amy M. Wood • Clerk of the court
FILED: AA

13-105. Definitions

In this title, unless the context otherwise requires:

1. "Absconder" means a probationer who has moved from the probationer's primary residence without permission of the probation officer, who cannot be located within ninety days of the previous contact and against whom a petition to revoke has been filed in the superior court alleging that the probationer's whereabouts are unknown. A probationer is no longer deemed an absconder when the probationer is voluntarily or involuntarily returned to probation service.
2. "Act" means a bodily movement.
3. "Benefit" means anything of value or advantage, present or prospective.
4. "Calendar year" means 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.
5. "Community supervision" means that portion of a felony sentence that is imposed by the court pursuant to section 13-603, subsection I and that is served in the community after completing a period of imprisonment or served in prison in accordance with section 41-1604.07.
6. "Conduct" means an act or omission and its accompanying culpable mental state.
7. "Crime" means a misdemeanor or a felony.
8. "Criminal street gang" means an ongoing formal or informal association of persons in which members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act and that has at least one individual who is a criminal street gang member.
9. "Criminal street gang member" means an individual to whom at least two of the following seven criteria that indicate criminal street gang membership apply:
 - (a) Self-proclamation.
 - (b) Witness testimony or official statement.
 - (c) Written or electronic correspondence.
 - (d) Paraphernalia or photographs.
 - (e) Tattoos.
 - (f) Clothing or colors.
 - (g) Any other indicia of street gang membership.
10. "Culpable mental state" means intentionally, knowingly, recklessly or with criminal negligence as those terms are defined in this paragraph:

(a) "Intentionally" or "with the intent to" means, with respect to a result or to conduct described by a statute defining an offense, that a person's objective is to cause that result or to engage in that conduct.

(b) "Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that the person's conduct is of that nature or that the circumstance exists. It does not require any knowledge of the unlawfulness of the act or omission.

(c) "Recklessly" means, with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but who is unaware of such risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk.

(d) "Criminal negligence" means, with respect to a result or to a circumstance described by a statute defining an offense, that a person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

11. "Dangerous drug" means dangerous drug as defined in section 13-3401.

12. "Dangerous instrument" means anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury.

13. "Dangerous offense" means an offense involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person.

14. "Deadly physical force" means force that is used with the purpose of causing death or serious physical injury or in the manner of its use or intended use is capable of creating a substantial risk of causing death or serious physical injury.

15. "Deadly weapon" means anything designed for lethal use, including a firearm.

16. "Economic loss" means any loss incurred by a person as a result of the commission of an offense. Economic loss includes lost interest, lost earnings and other losses that would not have been incurred but for the offense. Economic loss does not include losses incurred by the convicted person, damages for pain and suffering, punitive damages or consequential damages.

17. "Enterprise" includes any corporation, association, labor union or other legal entity.

18. "Felony" means an offense for which a sentence to a term of imprisonment in the custody of the state department of corrections is authorized by any law of this state.

19. "Firearm" means any loaded or unloaded handgun, pistol, revolver, rifle, shotgun or other weapon that will or is designed to or may readily be converted to expel a projectile by the action of expanding gases, except that it does not include a firearm in permanently inoperable condition.

20. "Government" means the state, any political subdivision of the state or any department, agency, board, commission, institution or governmental instrumentality of or within the state or political subdivision.

21. "Government function" means any activity that a public servant is legally authorized to undertake on behalf of a government.

22. "Historical prior felony conviction" means:

(a) Any prior felony conviction for which the offense of conviction either:

(i) Mandated a term of imprisonment except for a violation of chapter 34 of this title involving a drug below the threshold amount.

(ii) Involved a dangerous offense.

(iii) Involved the illegal control of a criminal enterprise.

(iv) Involved aggravated driving under the influence of intoxicating liquor or drugs.

(v) Involved any dangerous crime against children as defined in section 13-705.

(b) Any class 2 or 3 felony, except the offenses listed in subdivision (a) of this paragraph, that was committed within the ten years immediately preceding the date of the present offense. Any time spent on absconder status while on probation, on escape status or incarcerated is excluded in calculating if the offense was committed within the preceding ten years. If a court determines a person was not on absconder status while on probation or escape status, that time is not excluded. For the purposes of this subdivision, "escape" means:

(i) A departure from custody or from a juvenile secure care facility, a juvenile detention facility or an adult correctional facility in which the person is held or detained, with knowledge that the departure is not permitted, or the failure to return to custody or detention following a temporary leave granted for a specific purpose or for a limited period.

(ii) A failure to report as ordered to custody or detention to begin serving a term of incarceration.

(c) Any class 4, 5 or 6 felony, except the offenses listed in subdivision (a) of this paragraph, that was committed within the five years immediately preceding the date of the present offense. Any time spent on absconder status while on probation, on escape status or incarcerated is excluded in calculating if the offense was committed within the preceding five years. If a court determines a person was not on absconder status while on probation or escape status, that time is not excluded. For the purposes of this subdivision, "escape" has the same meaning prescribed in subdivision (b) of this paragraph.

(d) 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.

(e) Any offense committed outside the jurisdiction of this state that was punishable by that jurisdiction as a felony and that was committed within the five years immediately preceding the date of the present offense. Any time spent on absconder status while on probation, on escape status or

incarcerated is excluded in calculating if the offense was committed within the preceding five years. If a court determines a person was not on absconder status while on probation or escape status, that time is not excluded. For the purposes of this subdivision, "escape" has the same meaning prescribed in subdivision (b) of this paragraph.

(f) Any offense committed outside the jurisdiction of this state that involved the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of death or serious physical injury and that was punishable by that jurisdiction as a felony. A person who has been convicted of a felony weapons possession violation in any court outside the jurisdiction of this state that would not be punishable as a felony under the laws of this state is not subject to this paragraph.

23. "Human smuggling organization" means an ongoing formal or informal association of persons in which members or associates individually or collectively engage in the smuggling of human beings.

24. "Intoxication" means any mental or physical incapacity resulting from use of drugs, toxic vapors or intoxicating liquors.

25. "Misdemeanor" means an offense for which a sentence to a term of imprisonment other than to the custody of the state department of corrections is authorized by any law of this state.

26. "Narcotic drug" means narcotic drugs as defined in section 13-3401.

27. "Offense" or "public offense" means conduct for which a sentence to a term of imprisonment or of a fine is provided by any law of the state in which it occurred or by any law, regulation or ordinance of a political subdivision of that state and, if the act occurred in a state other than this state, it would be so punishable under the laws, regulations or ordinances of this state or of a political subdivision of this state if the act had occurred in this state.

28. "Omission" means the failure to perform an act as to which a duty of performance is imposed by law.

29. "Peace officer" means any person vested by law with a duty to maintain public order and make arrests and includes a constable.

30. "Person" means a human being and, as the context requires, an enterprise, a public or private corporation, an unincorporated association, a partnership, a firm, a society, a government, a governmental authority or an individual or entity capable of holding a legal or beneficial interest in property.

31. "Petty offense" means an offense for which a sentence of a fine only is authorized by law.

32. "Physical force" means force used upon or directed toward the body of another person and includes confinement, but does not include deadly physical force.

33. "Physical injury" means the impairment of physical condition.

34. "Possess" means knowingly to have physical possession or otherwise to exercise dominion or control over property.

35. "Possession" means a voluntary act if the defendant knowingly exercised dominion or control over property.

36. "Preconviction custody" means the confinement of a person in a jail in this state or another state after the person is arrested for or charged with a felony offense.

37. "Property" means anything of value, tangible or intangible.

38. "Public servant":

(a) Means any officer or employee of any branch of government, whether elected, appointed or otherwise employed, including a peace officer, and any person participating as an advisor or consultant or otherwise in performing a governmental function.

(b) Does not include jurors or witnesses.

(c) Includes those who have been elected, appointed, employed or designated to become a public servant although not yet occupying that position.

39. "Serious physical injury" includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.

40. "Unlawful" means contrary to law or, where the context so requires, not permitted by law.

41. "Vehicle" means a device in, upon or by which any person or property is, may be or could have been transported or drawn upon a highway, waterway or airway, excepting devices moved by human power or used exclusively upon stationary rails or tracks.

42. "Voluntary act" means a bodily movement performed consciously and as a result of effort and determination.

43. "Voluntary intoxication" means intoxication caused by the knowing use of drugs, toxic vapors or intoxicating liquors by a person, the tendency of which to cause intoxication the person knows or ought to know, unless the person introduces them pursuant to medical advice or under such duress as would afford a defense to an offense.

13-3102. Misconduct involving weapons; defenses; classification; definitions

A. A person commits misconduct involving weapons by knowingly:

1. Carrying a deadly weapon except a pocket knife concealed on his person or within his immediate control in or on a means of transportation:

(a) In the furtherance of a serious offense as defined in section 13-706, a violent crime as defined in section 13-901.03 or any other felony offense; or

(b) When contacted by a law enforcement officer and failing to accurately answer the officer if the officer asks whether the person is carrying a concealed deadly weapon; or

2. Carrying a deadly weapon except a pocket knife concealed on his person or concealed within his immediate control in or on a means of transportation if the person is under twenty-one years of age; or

3. Manufacturing, possessing, transporting, selling or transferring a prohibited weapon, except that if the violation involves dry ice, a person commits misconduct involving weapons by knowingly possessing the dry ice with the intent to cause injury to or death of another person or to cause damage to the property of another person; or

4. Possessing a deadly weapon or prohibited weapon if such person is a prohibited possessor; or

5. Selling or transferring a deadly weapon to a prohibited possessor; or

6. Defacing a deadly weapon; or

7. Possessing a defaced deadly weapon knowing the deadly weapon was defaced; or

8. Using or possessing a deadly weapon during the commission of any felony offense included in chapter 34 of this title; or

9. Discharging a firearm at an occupied structure in order to assist, promote or further the interests of a criminal street gang, a criminal syndicate or a racketeering enterprise; or

10. Unless specifically authorized by law, entering any public establishment or attending any public event and carrying a deadly weapon on his person after a reasonable request by the operator of the establishment or the sponsor of the event or the sponsor's agent to remove his weapon and place it in the custody of the operator of the establishment or the sponsor of the event for temporary and secure storage of the weapon pursuant to section 13-3102.01; or

11. Unless specifically authorized by law, entering an election polling place on the day of any election carrying a deadly weapon; or

12. Possessing a deadly weapon on school grounds; or

13. Unless specifically authorized by law, entering a nuclear or hydroelectric generating station carrying a deadly weapon on his person or within the immediate control of any person; or

14. Supplying, selling or giving possession or control of a firearm to another person if the person knows or has reason to know that the other person would use the firearm in the commission of any felony; or

15. Using, possessing or exercising control over a deadly weapon in furtherance of any act of terrorism as defined in section 13-2301 or possessing or exercising control over a deadly weapon knowing or having reason to know that it will be used to facilitate any act of terrorism as defined in section 13-2301; or

16. Trafficking in weapons or explosives for financial gain in order to assist, promote or further the interests of a criminal street gang, a criminal syndicate or a racketeering enterprise.

B. Subsection A, paragraph 2 of this section shall not apply to:

1. A person in his dwelling, on his business premises or on real property owned or leased by that person or that person's parent, grandparent or legal guardian.

2. A member of the sheriff's volunteer posse or reserve organization who has received and passed firearms training that is approved by the Arizona peace officer standards and training board and who is authorized by the sheriff to carry a concealed weapon pursuant to section 11-441.

3. A firearm that is carried in:

(a) A manner where any portion of the firearm or holster in which the firearm is carried is visible.

(b) A holster that is wholly or partially visible.

(c) A scabbard or case designed for carrying weapons that is wholly or partially visible.

(d) Luggage.

(e) A case, holster, scabbard, pack or luggage that is carried within a means of transportation or within a storage compartment, map pocket, trunk or glove compartment of a means of transportation.

C. Subsection A, paragraphs 2, 3, 7, 10, 11, 12 and 13 of this section shall not apply to:

1. A peace officer or any person summoned by any peace officer to assist and while actually assisting in the performance of official duties; or

2. A member of the military forces of the United States or of any state of the United States in the performance of official duties; or

3. A warden, deputy warden, community correctional officer, detention officer, special investigator or correctional officer of the state department of corrections or the department of juvenile corrections; or

4. A person specifically licensed, authorized or permitted pursuant to a statute of this state or of the United States.

D. Subsection A, paragraph 10 of this section does not apply to an elected or appointed judicial officer in the court facility where the judicial officer works if the judicial officer has demonstrated competence with a firearm as prescribed in section 13-3112, subsection N, except that the judicial

officer shall comply with any rule or policy adopted by the presiding judge of the superior court while in the court facility. For the purposes of this subsection, appointed judicial officer does not include a hearing officer or a judicial officer pro tempore that is not a full-time officer.

E. Subsection A, paragraphs 3 and 7 of this section shall not apply to:

1. The possessing, transporting, selling or transferring of weapons by a museum as a part of its collection or an educational institution for educational purposes or by an authorized employee of such museum or institution, if:

(a) Such museum or institution is operated by the United States or this state or a political subdivision of this state, or by an organization described in 26 United States Code section 170(c) as a recipient of a charitable contribution; and

(b) Reasonable precautions are taken with respect to theft or misuse of such material.

2. The regular and lawful transporting as merchandise; or

3. Acquisition by a person by operation of law such as by gift, devise or descent or in a fiduciary capacity as a recipient of the property or former property of an insolvent, incapacitated or deceased person.

F. Subsection A, paragraph 3 of this section shall not apply to the merchandise of an authorized manufacturer of or dealer in prohibited weapons, when such material is intended to be manufactured, possessed, transported, sold or transferred solely for or to a dealer, a regularly constituted or appointed state, county or municipal police department or police officer, a detention facility, the military service of this or another state or the United States, a museum or educational institution or a person specifically licensed or permitted pursuant to federal or state law.

G. Subsection A, paragraph 10 of this section shall not apply to shooting ranges or shooting events, hunting areas or similar locations or activities.

H. Subsection A, paragraph 3 of this section shall not apply to a weapon described in section 13-3101, subsection A, paragraph 8, subdivision (a), item (v), if such weapon is possessed for the purposes of preparing for, conducting or participating in lawful exhibitions, demonstrations, contests or athletic events involving the use of such weapon. Subsection A, paragraph 12 of this section shall not apply to a weapon if such weapon is possessed for the purposes of preparing for, conducting or participating in hunter or firearm safety courses.

I. Subsection A, paragraph 12 of this section shall not apply to the possession of a:

1. Firearm that is not loaded and that is carried within a means of transportation under the control of an adult provided that if the adult leaves the means of transportation the firearm shall not be visible from the outside of the means of transportation and the means of transportation shall be locked.

2. Firearm for use on the school grounds in a program approved by a school.

3. Firearm by a person who possesses a certificate of firearms proficiency pursuant to section 13-3112, subsection T and who is authorized to carry a concealed firearm pursuant to the law enforcement officers safety act of 2004 (P.L. 108-277; 118 Stat. 865; 18 United States Code sections 926B and 926C).

J. Subsection A, paragraphs 2, 3, 7 and 13 of this section shall not apply to commercial nuclear generating station armed nuclear security guards during the performance of official duties or during any security training exercises sponsored by the commercial nuclear generating station or local, state or federal authorities.

K. The operator of the establishment or the sponsor of the event or the employee of the operator or sponsor or the agent of the sponsor, including a public entity or public employee, is not liable for acts or omissions pursuant to subsection A, paragraph 10 of this section unless the operator, sponsor, employee or agent intended to cause injury or was grossly negligent.

L. If a law enforcement officer contacts a person who is in possession of a firearm, the law enforcement officer may take temporary custody of the firearm for the duration of that contact.

M. Misconduct involving weapons under subsection A, paragraph 15 of this section is a class 2 felony. Misconduct involving weapons under subsection A, paragraph 9, 14 or 16 of this section is a class 3 felony. Misconduct involving weapons under subsection A, paragraph 3, 4, 8 or 13 of this section is a class 4 felony. Misconduct involving weapons under subsection A, paragraph 12 of this section is a class 1 misdemeanor unless the violation occurs in connection with conduct that violates section 13-2308, subsection A, paragraph 5, section 13-2312, subsection C, section 13-3409 or section 13-3411, in which case the offense is a class 6 felony. Misconduct involving weapons under subsection A, paragraph 1, subdivision (a) of this section or subsection A, paragraph 5, 6 or 7 of this section is a class 6 felony. Misconduct involving weapons under subsection A, paragraph 1, subdivision (b) of this section or subsection A, paragraph 10 or 11 of this section is a class 1 misdemeanor. Misconduct involving weapons under subsection A, paragraph 2 of this section is a class 3 misdemeanor.

N. For the purposes of this section:

1. "Contacted by a law enforcement officer" means a lawful traffic or criminal investigation, arrest or detention or an investigatory stop by a law enforcement officer that is based on reasonable suspicion that an offense has been or is about to be committed.

2. "Public establishment" means a structure, vehicle or craft that is owned, leased or operated by this state or a political subdivision of this state.

3. "Public event" means a specifically named or sponsored event of limited duration that is either conducted by a public entity or conducted by a private entity with a permit or license granted by a public entity. Public event does not include an unsponsored gathering of people in a public place.

4. "School" means a public or nonpublic kindergarten program, common school or high school.

5. "School grounds" means in, or on the grounds of, a school.

13-3407. Possession, use, administration, acquisition, sale, manufacture or transportation of dangerous drugs; classification

A. A person shall not knowingly:

1. Possess or use a dangerous drug.
2. Possess a dangerous drug for sale.
3. Possess equipment or chemicals, or both, for the purpose of manufacturing a dangerous drug.
4. Manufacture a dangerous drug.
5. Administer a dangerous drug to another person.
6. Obtain or procure the administration of a dangerous drug by fraud, deceit, misrepresentation or subterfuge.
7. Transport for sale, import into this state or offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer a dangerous drug.

B. A person who violates:

1. Subsection A, paragraph 1 of this section is guilty of a class 4 felony. Unless the drug involved is lysergic acid diethylamide, methamphetamine, amphetamine or phencyclidine or the person was previously convicted of a felony offense or a violation of this section or section 13-3408, the court on motion of the state, considering the nature and circumstances of the offense, for a person not previously convicted of any felony offense or a violation of this section or section 13-3408 may enter judgment of conviction for a class 1 misdemeanor and make disposition accordingly or may place the defendant on probation in accordance with chapter 9 of this title and refrain from designating the offense as a felony or misdemeanor until the probation is successfully terminated. The offense shall be treated as a felony for all purposes until the court enters an order designating the offense a misdemeanor.
2. Subsection A, paragraph 2 of this section is guilty of a class 2 felony.
3. Subsection A, paragraph 3 of this section is guilty of a class 3 felony, except that if the offense involved methamphetamine, the person is guilty of a class 2 felony.
4. Subsection A, paragraph 4 of this section is guilty of a class 2 felony.
5. Subsection A, paragraph 5 of this section is guilty of a class 2 felony.
6. Subsection A, paragraph 6 of this section is guilty of a class 3 felony.
7. Subsection A, paragraph 7 of this section is guilty of a class 2 felony.

C. Except as provided in subsection E of this section, a person who is convicted of a violation of subsection A, paragraph 1, 3 or 6 and who has not previously been convicted of any felony or who has not been sentenced pursuant to section 13-703, section 13-704, section 13-706, subsection A,

section 13-708, subsection D or any other law making the convicted person ineligible for probation is eligible for probation.

D. Except as provided in subsection E of this section, if the aggregate amount of dangerous drugs involved in one offense or all of the offenses that are consolidated for trial equals or exceeds the statutory threshold amount, a person who is convicted of a violation of subsection A, paragraph 2, 5 or 7 of this section is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the person has served the sentence imposed by the court, the person is eligible for release pursuant to section 41-1604.07 or the sentence is commuted.

E. If the person is convicted of a violation of subsection A, paragraph 2, 3, 4 or 7 of this section and the drug involved is methamphetamine, the person shall be sentenced as follows:

<u>Minimum</u> 5 calendar years	<u>Presumptive</u> 10 calendar years	<u>Maximum</u> 15 calendar years
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A person who has previously been convicted of a violation of subsection A, paragraph 2, 3, 4 or 7 of this section involving methamphetamine or section 13-3407.01 shall be sentenced as follows:

<u>Minimum</u> 10 calendar years	<u>Presumptive</u> 15 calendar years	<u>Maximum</u> 20 calendar years
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F. A person who is convicted of a violation of subsection A, paragraph 4 of this section or subsection A, paragraph 2, 3 or 7 of this section involving methamphetamine is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the person has served the sentence imposed by the court, the person is eligible for release pursuant to section 41-1604.07 or the sentence is commuted.

G. If a person is convicted of a violation of subsection A, paragraph 5 of this section, if the drug is administered without the other person's consent, if the other person is under eighteen years of age and if the drug is flunitrazepam, gamma hydroxy butrate or ketamine hydrochloride, the convicted person is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the person has served the sentence imposed by the court, the person is eligible for release pursuant to section 41-1604.07 or the sentence is commuted.

H. In addition to any other penalty prescribed by this title, the court shall order a person who is convicted of a violation of this section to pay a fine of not less than one thousand dollars or three times the value as determined by the court of the dangerous drugs involved in or giving rise to the charge, whichever is greater, and not more than the maximum authorized by chapter 8 of this title. A judge shall not suspend any part or all of the imposition of any fine required by this subsection.

I. A person who is convicted of a violation of this section for which probation or release before the expiration of the sentence imposed by the court is authorized is prohibited from using any marijuana, dangerous drug, narcotic drug or prescription-only drug except as lawfully administered by a health care practitioner and as a condition of any probation or release shall be required to submit to drug testing administered under the supervision of the probation department of the county or the state department of corrections, as appropriate, during the duration of the term of probation or before the expiration of the sentence imposed.

J. If a person who is convicted of a violation of this section is granted probation, the court shall order that as a condition of probation the person perform not less than three hundred sixty hours of community restitution with an agency or organization that provides counseling, rehabilitation or treatment for alcohol or drug abuse, an agency or organization that provides medical treatment to persons who abuse controlled substances, an agency or organization that serves persons who are victims of crime or any other appropriate agency or organization.

K. The presumptive term imposed pursuant to subsection E of this section may be mitigated or aggravated pursuant to section 13-701, subsections D and E.

41-1604.07. Earned release credits; forfeiture; restoration; released prisoner health care

A. Pursuant to rules adopted by the director, each prisoner who is in the eligible earned release credit class shall be allowed an earned release credit of one day for every six days served, including time served in county jails, except for those prisoners who are sentenced to serve the full term of imprisonment imposed by the court.

B. Release credits earned by a prisoner pursuant to subsection A of this section shall not reduce the term of imprisonment imposed by the court on the prisoner.

C. On reclassification of a prisoner resulting from the prisoner's failure to adhere to the rules of the department or failure to demonstrate a continual willingness to volunteer for or successfully participate in a work, educational, treatment or training program, the director may declare all release credits earned by the prisoner forfeited. In the discretion of the director, forfeited release credits may subsequently be restored. The director shall maintain an account of release credits earned by each prisoner.

D. A prisoner who has reached the prisoner's earned release date or sentence expiration date shall be released to begin the prisoner's term of community supervision imposed by the court or term of probation if the court waived community supervision pursuant to section 13-603, except that the director may deny or delay the prisoner's release to community supervision or probation if the director believes the prisoner may be a sexually violent person as defined in section 36-3701 until the screening process is complete and the director determines that the prisoner will not be referred to the county attorney pursuant to section 36-3702. If the term of community supervision is waived, the state department of corrections shall provide reasonable notice to the probation department of the scheduled release of the prisoner from confinement by the department. If the court waives community supervision, the director shall issue the prisoner an absolute discharge on the prisoner's earned release credit date. A prisoner who is released on the earned release credit date to serve a term of probation is not under the control of the state department of corrections when community supervision has been waived and the state department of corrections is not required to provide parole services.

E. Notwithstanding subsection D of this section, a prisoner who fails to achieve functional literacy at an eighth grade literacy level shall not be released to begin the prisoner's term of community supervision until either the prisoner achieves an eighth grade functional literacy level as measured by standardized assessment testing or the prisoner serves the full term of imprisonment imposed by the court, whichever first occurs. This subsection does not apply to inmates who either:

1. Are unable to meet the functional literacy standard required by section 31-229.02, subsection A due to a medical, developmental or learning disability as described in section 31-229, subsection C.
2. Are classified as level five offenders.
3. Are foreign nationals.
4. Have less than six months of incarceration to serve on commitment to the department.

F. The department shall establish conditions of community supervision it deems appropriate in order to ensure that the best interests of the prisoner and the citizens of this state are served. As a condition of community supervision, the director:

1. May order a released prisoner to participate in an appropriate drug treatment or education program that is administered by a qualified agency, organization or individual approved by the department of health services and that provides treatment or education to persons who abuse controlled substances. Each person who is enrolled in a drug treatment or education program shall pay for the cost of participation in the program to the extent of the person's financial ability.

2. May order additional conditions, including participation in a rehabilitation program or counseling and performance of community restitution work.

3. May order a prisoner to apply for health care benefits through the Arizona health care cost containment system before being released. The state department of corrections shall enter into an enrollment suspense agreement with the Arizona health care cost containment system to reinstate benefits for prisoners who were sentenced to twelve months or less and who were previously enrolled in the Arizona health care cost containment system immediately before incarceration. For all other prisoners, the state department of corrections shall submit a prerelease application to the Arizona health care cost containment system at least thirty days before the prisoner's release date. The state department of corrections may coordinate with community-based organizations or the department of economic security to assist prisoners in applying for enrollment in the Arizona health care cost containment system.

4. Shall impose, if the prisoner was convicted of a violation of sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age, a prohibition on residing within four hundred forty feet of a school or its accompanying grounds. For the purposes of this paragraph, "school" means any public, charter or private school where children attend classes.

G. The director may exchange a prisoner's health care information with the regional behavioral health authority or Arizona health care cost containment system justice system contact to facilitate the transition to care for released prisoners to access the full array of behavioral and physical health care services, including medication, counseling, case management, substance abuse treatment, and parenting skills and family reunification training. The director shall adopt policies and procedures that establish a care team to convene and discuss the services and resources, including housing and employment supports, that may be needed for the released prisoner to safely transition into the community. The care team shall be managed by the regional behavioral health authority or Arizona health care cost containment system contractor and may include the health care provider that is identified by and has a contract with the regional behavioral health authority or Arizona health care cost containment system contractor. The care team may also include representatives of nonprofit organizations that specialize in assisting prisoners who are transitioning back into the community and other organizations that link prisoners to additional services, including housing and employment.

H. If a prisoner who reaches the prisoner's earned release credit date refuses to sign and agree to abide by the conditions of supervision before release on community supervision, the prisoner shall not be released. When the prisoner reaches the sentence expiration date, the prisoner shall be released to begin the term of community supervision. If the prisoner refuses to sign and agree to abide by the conditions of release, the prisoner shall not be released on the sentence expiration date and shall serve the term of community supervision in prison. The department is required to supervise any prisoner on community supervision until the period of community supervision expires. The department may bring a prisoner who is in violation of the prisoner's terms and conditions before the board of executive clemency.

I. The director, pursuant to rules adopted by the department, shall authorize the release of any prisoner on the prisoner's earned release credit date to serve any consecutive term imposed on the prisoner. The release shall be for the sentence completed only. The prisoner shall remain under the custody and control of the department. The director may authorize the rescission of the release to any consecutive term if the prisoner fails to adhere to the rules of the department.

J. If a prisoner absconds from community supervision, any time spent before the prisoner is returned to custody is excluded in calculating the remaining period of community supervision.

K. A prisoner shall forfeit five days of the prisoner's earned release credits:

1. If the court finds or a disciplinary hearing held after a review by and recommendations from the attorney general's office determines that the prisoner does any of the following:

(a) Brings a claim without substantial justification.

(b) Unreasonably expands or delays a proceeding.

(c) Testifies falsely or otherwise presents false information or material to the court.

(d) Submits a claim that is intended solely to harass the party it is filed against.

2. For each time the prisoner tests positive for any prohibited drugs during the period of time the prisoner is incarcerated.

L. If the prisoner does not have five days of earned release credits, the prisoner shall forfeit the prisoner's existing earned release credits and shall be ineligible from accruing earned release credits until the number of earned release credits the prisoner would have otherwise accrued equals the difference between five days and the number of existing earned release credit days the prisoner forfeits pursuant to this section.

M. The director may authorize temporary release on inmate status of eligible inmates pursuant to rules adopted by the director within ninety days of any other authorized release date. The release authorization applies to any inmate who has been convicted of a drug offense, who has been determined to be eligible for participation in the transition program pursuant to section 31-281 and who has agreed to participate in the transition program.