



Case Summary Highlights

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All summaries prepared by Diane Gunnels Rowley, APAAC

Padilla v. Kentucky, __ U.S. __, 2010 WL 1222274 (United States Supreme Court, March 31, 2010), abrogating State v. Rosas, 183 Ariz. 421 (App. 1995)

Right to Counsel: Effective Assistance of Counsel; Deportation/Removal Consequences; Direct/Collateral Consequences of Guilty Plea

- ◆ To provide a defendant with constitutionally effective assistance, defense counsel must advise the defendant of possible deportation/removal consequences before the defendant pleads guilty. Counsel is constitutionally ineffective if he fails to advise the defendant of possible deportation/removal consequences, even if he does not affirmatively misadvise the defendant about it.
- ◆ If the law on deportation/removal is not clear in a particular case, defense counsel must only advise the defendant that deportation is *possible*; but when it is *clear* that the defendant will be deported if found guilty, defense counsel must so advise the defendant.
- ◆ The distinction between *direct* and *collateral* consequences of a guilty plea does not apply in analyzing whether counsel has provided effective assistance under *Strickland v. Washington*.

Chambers v. United States, 2009 WL 63882 (U.S. Supreme Court Jan. 13, 2010)

- ◆ Illinois "failure to report for criminal confinement" offense was not a "violent felony" for purposes of sentencing under the Federal Armed Career Criminal Act ["ACCA"]

Herring v. United States, 2009 WL 77886 (U.S. Supreme Court, January 14, 2010)

- ◆ Police errors leading to an unlawful search do not require suppression of evidence obtained from the search when the mistakes are the result of isolated negligence attenuated from the search.

State v. Diaz, __ Ariz. __, 2010 WL 476010 (Arizona Supreme Court, Feb. 12, 2010), vacating State v. Diaz, 221 Ariz. 209 (App. 2009)

Jury Trial: Twelve-Person Jury; Error in Transcription; Record on Appeal

- ◆ Courts will not presume that fewer than twelve jurors deliberated at trial just because the transcript fails to mention all twelve jurors, when nothing else in the record suggested that only eleven jurors were present.
- ◆ When a defendant bases his appeal on an alleged error at trial as reflected in the transcript, and there is a controversy as to whether the record discloses what actually happened at trial, the State should move under Rule 31.8(h) (which provides in part: "If any controversy arises as to whether the record discloses what actually occurred in the trial court, the difference shall be submitted to and settled by the trial court." Further, an appellate court, "on motion or on its own initiative, may direct that [any] omission or

Special points of interest:

- Study of AZ Inmate Population
- Case Summaries
- The Prosecutor Profile
- Upcoming Seminars

Inside this issue:

Case Summary Highlights	1
Study of AZ Inmate Population	3
Padilla v. Kentucky	4
Chambers v. U.S.	5
Herring v. U.S.	6
State v. Diaz	7
State v. Kuhs	8
State v. Hicks	9
State v. Huerta	10
State v. Henry	11
State v. Garcia-Navarro	12
State v. Olm	13
State v. Soto	14
Prosecutor Profile	15
Upcoming Seminars	16

misstatement [in the record] be corrected, and if necessary that a supplemental record be certified and transmitted.”) to have the trial court or the Court of Appeals determine what actually occurred at trial.

State v. Kuhs, __ Ariz. __, 2010 WL 624016 (Arizona Supreme Court, Feb. 24, 2010)

Death penalty; Jury Instructions: “Impasse Instructions”; Emotional Outburst in Court as grounds for Mistrial; Aggravating and Mitigating Circumstances

- ◆ A trial judge need not blindly accept a jury’s indication that it is deadlocked; instead, the judge may attempt to assist the jury in reaching a unanimous verdict.
- ◆ The trial court did not abuse its discretion in refusing to grant a mistrial after a witness broke into tears during closing argument.

State v. Hicks [Durnan, Real Party in Interest], 2009 WL 56776 (Arizona Supreme Court, January 12, 2010)

- ◆ The State is not vicariously liable for damages caused when a qualified private defense attorney appointed to represent an indigent defendant provides negligent representation.

State v. Huerta, __ Ariz. __, 2010 WL 453494 (Court of Appeals, Div. 2, Feb. 10, 2010)

Fourth Amendment; Search and Seizure; Abandoned Property

- ◆ A defendant who has abandoned property retains no reasonable expectation of privacy in that property and cannot seek exclusion of evidence recovered as a result of a search of that property.

State v. Henry, __ Ariz. __, 2010 WL 611501 (Court of Appeals, Div. 2, Feb. 23, 2010)

Constitutional Law: Ex Post Facto; Sex Offender Registration

- ◆ Sex offender registration laws do not violate constitutional prohibitions on ex post facto laws.
- ◆ Sex offender registration laws are not punitive, and are intended to provide the public and law enforcement with sex offender information.

State v. Garcia-Navarro, __ Ariz. __, 2010 WL 426138 (Court of Appeals, Div. 2, Feb. 8, 2010)

Fourth Amendment: Vehicle Stop; State Agent; Citizen’s Arrest

- ◆ A border patrol agent who stops a suspect for bad driving is acting as a “State agent” for Fourth Amendment purposes, even though the agent is not a law enforcement officer.
- ◆ Citizen’s Arrest, A.R.S. § 13-3884: A private person may make a citizen’s arrest for DUI because DUI is a “misdemeanor amounting to a breach of the peace.”
- ◆ Citizen’s Arrest: A private person may not make a citizen’s arrest of a suspect who has merely violated traffic laws.

State v. Soto, __ Ariz. __, 2010 WL 426210 (Court of Appeals, Div. 2, Feb. 8, 2010)

Criminal Appeals: Right to Appeal

- ◆ Art. II, § 24 of the Arizona Constitution gives all defendants the right to appeal – although defendants who plead guilty may only seek appellate relief through a post-conviction relief proceeding under Rule 32, Ariz. R. Crim. P.
- ◆ A.R.S. § 13-4033(C), which purports to prohibit defendants who voluntarily fail to appear for sentencing from filing direct appeals, is unconstitutional, unless the State can show that the defendant had prior notice that his failure to appear would result in his waiving his right to file a direct appeal.

State v. Olm, __ Ariz. __, 2010 WL 489483 (Court of Appeals, Div. 2, Feb. 12, 2010)

Fourth Amendment: Search and Seizure: Vehicle Search; Warrantless Search; “Curtilage”

- ◆ An unfenced front yard area away from the sidewalks was part of the home’s “curtilage” and was therefore protected from warrantless entry and search by the Fourth Amendment.

APAAC Releases the Most Complete and In Depth Study of The Arizona Inmate Population Ever Attempted

APAAC recently commissioned a detailed statistical profile of the Arizona prison population, in order to create a body of information that might prove useful to policy-makers, legislators, and other parties interested in the kinds of offenders occupying prison beds in Arizona. Dr. Daryl R. Fischer, Ph.D., who spent nearly twenty years as the Arizona Department of Corrections research manager, authored the report. An in-depth analysis of the offenses for which inmates are committed was provided, along with the sentences they are serving, their histories of felony violence, prior criminal records, and other factors associated with their presence in the prison system. Information was provided for all 40,431 inmates sentenced for crimes committed in Arizona and in the custody of the Arizona Department of Corrections as of September 30, 2009.



Some of the major findings of the report included:

- ◆ As of September 30, 2009, a total of 40,514 inmates were held in the custody of the Department of Corrections.
- ◆ More than 94 percent of the inmate population, a staggering 38,088 inmates, are either repeat felony offenders or have a history of felony violence.
- ◆ Overall, 33,896 (83.8 percent) inmates were found to have one or more prior adult felony convictions or juvenile felony adjudications. Furthermore, 22,639 (56 percent) inmates have two or more prior felonies. A total of 41.8 percent of the inmate population had three or more prior felony convictions.
- ◆ 17,947 inmates, more than 44 percent of the inmate population, have prior commitments to the Arizona Department of Corrections.
- ◆ 9260 inmates (22.9 percent) are suspected or confirmed members of prison or street gangs. Almost 80 percent of gang members have a history of felony violence. An incredible 99.3 percent of gang members are violent or repeat offenders.

“These findings make clear that the majority of men and women behind bars in Arizona are violent and repeat criminals who don’t belong on our streets,” said Derek Rapier, Greenlee County Attorney and Chairman of APAAC.

“This report is the most in-depth profile of Arizona prison population ever attempted,” said Pima County Attorney Barbara LaWall. “Its findings come at a critical time, as Arizona faces the most severe budget crisis in the 98-year history of our state. It is in our best interest to ensure that the significance of this report is understood.”

Derek Rapier, Barbara LaWall, Dr. Fischer and APAAC Executive Director Paul Ahler, presented the report at press conferences held in both Phoenix and Tucson on March 30, 2010. The complete report can be reviewed at: <http://apaac.az.gov/research-intro>



Derek Rapier & Dr. Fischer

***Padilla v. Kentucky*, __ U.S. __, 2010 WL 1222274 (United States Supreme Court, March 31, 2010), abrogating *State v. Rosas*, 183 Ariz. 421 (App. 1995)**

In a 7-2 decision, the United States Supreme Court reversed, holding that to provide a defendant with constitutionally effective assistance, counsel must inform the defendant of possible deportation consequences before the defendant pleads guilty

Padilla, a Honduran citizen who had lawfully resided in the U.S. for 40 years, pleaded guilty in a Kentucky court to transportation of a large amount of marijuana. In a post-conviction relief proceeding, he contended that defense counsel provided constitutionally ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), because counsel failed to advise him before he pleaded guilty that he would be deported if he did so, instead telling him he need not worry about deportation because he had been in the U.S. for so long. Padilla claimed that he would have gone to trial if he had known that his guilty plea would almost certainly result in deportation. The Kentucky courts denied relief on the ground that deportation was only a “collateral consequence” of a conviction about which counsel did not need to advise a client under *Strickland*.

In a 7-2 decision, the United States Supreme Court reversed, holding that to provide a defendant with constitutionally effective assistance, counsel must inform the defendant of possible deportation consequences before the defendant pleads guilty. The Court reviewed the history of deportation in the U.S., saying that

of certain crimes deportable. That Act, however, provided that judges could make binding “judicial recommendations against deportation” in particular cases. This JRAD procedure meant that judges “retained discretion to ameliorate unjust results on a case-by-case basis,” even in drug offenses. Congress restricted the JRAD procedure in 1952, however, and eliminated it entirely in 1990, and in 1996 Congress also eliminated the U.S. Attorney General’s ability to grant discretionary relief from deportation. Under current law, almost every felony conviction that is a “crime involving moral turpitude” [“CIMT”] or “aggravated felony” is grounds for deportation (called “removal” under current law). The Court reasoned that under current law, the unique nature of deportation made it impossible to categorize as a “direct” or “collateral” consequence of a guilty plea for *Strickland* purposes, so *Strickland* analysis applies to counsel’s assistance concerning deportation consequences.

The Court found that *Strickland* applied in Padilla’s case. *Strickland* imposes a two-part test for ineffective assistance of counsel. First, the court determines if counsel’s assistance fell below an objective standard of reasonableness. If so, the defendant is entitled to relief if he was prejudiced by counsel’s ineffectiveness. “The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation,” because deportation may be the most important consequence of a guilty plea or conviction. “When the law is not succinct and straightforward..., a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is

truly clear, as it was in this case, the duty to give correct advice is equally clear.” Here, federal law explicitly stated that conviction of an offense like Padilla’s that involved more than 30 grams of marijuana required deportation, but counsel told Padilla that he would NOT be deported. Thus, Padilla’s counsel’s performance was deficient. The Court remanded the case to the Kentucky courts to determine whether, under the second prong of the *Strickland* test, Padilla was prejudiced by counsel’s deficient performance.

The Court rejected the suggestion that *Strickland* claims should be limited to situations in which counsel specifically misadvises a defendant, rather than cases in which counsel says nothing. For ineffectiveness claims, there is no difference between claims of omission and commission; to rule otherwise would encourage defense counsel to be silent about the advantages and disadvantages of a guilty plea.

The Court said its decision would not “open the floodgates” to a spate of *Strickland* claims because *Strickland* still imposes a “high bar” and most attorney mistakes are harmless. “Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” Further, the Court noted, a defendant may decide not to challenge his guilty plea because if he succeeds, he will lose the benefit of his plea bargain, so he may well end up with a worse result in the long run. The Court also noted that “informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process,” in that counsel may bargain for a defendant to plead guilty to something that will not require automatic deportation in return for dismissal of a charge that would so require.

J. Alito concurred in the judgment, joined by C.J. Roberts, saying that the majority opinion requires defense counsel to advise clients



immigration was basically wide open until the 1917 Immigrations Act made defendants convicted

about immigration consequences only when the law is clear. “This vague, halfway test will lead to much confusion and needless litigation.” “A criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney’s expertise.” The direct/collateral consequences analysis courts have applied over the years recognizes that criminal convictions can result in consequences such as civil forfeiture, loss of the right to vote, disqualification from public benefits, and ineligibility to possess firearms, “but this Court has never held that a criminal defense attorney’s Sixth Amendment duties extend to providing advice about such matters.” Courts, not professional associations, must determine whether counsel’s perform-

ance satisfies the Constitution. Immigrations law is often quite complex and it is unfair to impose this burden on criminal defense counsel working in state courts, because they are usually unfamiliar with this specialized area of federal law, and it is not always easy to determine if a particular offense is a CIMT or aggravated felony – or even if the client is or is not a citizen. Further, the Court’s expansion of *Strickland* is unwarranted. These two justices would impose only a rule prohibiting an attorney from misadvising a client, not from failing to give advice on immigrations consequences. They would hold that an “alien defendant’s Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is

not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject.”

J. Scalia dissented, joined by J. Thomas. The dissenters would require defense counsel only to provide advice on “those matters germane to the criminal prosecution at hand – to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction.” Counsel should only have to advise clients concerning the criminal proceeding itself. Such matters should be dealt with by statute rather than by judicial fiat.

***Chambers v. United States*, 2009 WL 63882 (U.S. Supreme Court Jan. 13, 2010)**

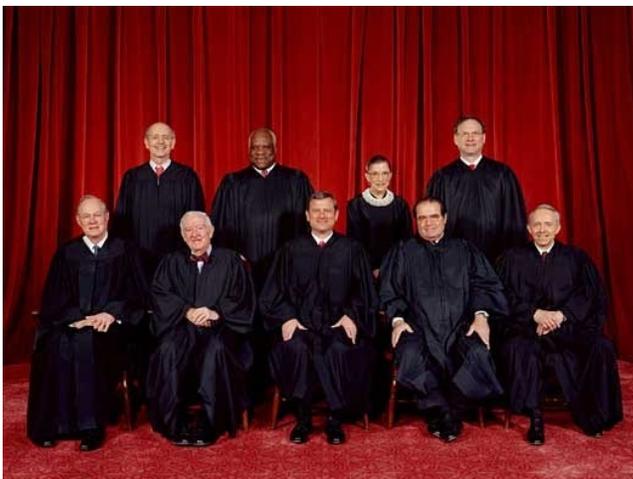
Chambers pleaded guilty to being a felon unlawfully in possession of a firearm. The federal ACCA required a fifteen-year prison term for a person convicted of that offense if the person had three previous convictions for a “violent felony” or a “serious drug offense” committed on different occasions. Chambers had two prior convictions that were definitely ACCA offenses; the question was whether a conviction for failing to report to prison for weekend incarceration qualified as a “violent felony” conviction for ACCA purposes. The federal courts in Illinois held that the “failure

to report” offense was listed in an Illinois statute as part of “escape from a penal institution” and, therefore, “failure to report” was a “violent felony.”

Writing for a unanimous Court, Justice Breyer stated that in determining if an offense is a “violent felony” for ACCA purposes, the court must look at the “generic offense,” not at the facts of the particular offense as committed. Courts must then determine whether the “generic offense” fits into the category of “violent felony,” and “sometimes the choice is not obvious.” Although a single Illinois statute criminalized the offenses of escape from a penal institution and failing to report, the Court reasoned that the behavior involved in committing an escape involves more risk of physical harm, is more aggressive, and is less passive than failing to report. The Court thus held that the single Illinois statute included both violent

and nonviolent felony offenses. The generic “failure to report” crime defined in Illinois law did not satisfy ACCA’s “violent felony” category’s definition because it did not involve any serious potential risk of physical injury. The Court remanded the case for resentencing.

Justices Alito and Thomas concurred in the judgment. In their view, the Court had previously erred by interpreting ACCA to require courts to consider the “categorical approach” to a “generic offense.” They urged Congress to “formulate a specific list of expressly defined crimes that are deemed to be worthy of ACCA’s sentencing enhancement.”



Herring v. United States, 2009 WL 77886 (U.S. Supreme Court, January 14, 2010)

Herring, a convicted felon, went



To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level

to County C's sheriff's office to get something from his impounded truck. An investigator who knew Herring asked the C County's warrant clerk to see if Herring had any outstanding warrants; the clerk found none. The investigator then asked the clerk to check the records in adjoining D County. The C County clerk did so, found an active arrest warrant in D County, and asked the D County clerk to fax them a copy of the warrant for confirmation. The investigator immediately arrested Herring pursuant to the warrant and a search incident to arrest turned up meth and a gun. However, when the D County clerk went to get the original warrant, she found that the warrant had been recalled and was no longer in effect. The D County clerk called the C County clerk and she immediately alerted the investigator, but the investigator had already arrested Herring and found the drugs and gun.

Herring was indicted for possessing the drugs and gun. He moved to suppress the evidence, arguing that his arrest was illegal because the warrant was invalid. The lower courts rejected Herring's suppression argument, reasoning that the officers had acted in a good-faith belief that the warrant was still outstanding and that the mistake had been a negligent failure to act, not a deliberate or tactical

choice to act. Therefore, even if the search violated Herring's Fourth Amendment rights, there was no reason to think that suppressing the evidence would deter any future mistakes of that kind. Herring petitioned the United States Supreme Court for certiorari.

In a 5-4 opinion authored by Chief Justice Roberts, the Court affirmed the lower courts. Accepting the parties' assumption that whoever made the error was a state actor and that there was indeed a Fourth Amendment violation, the Court held that the exclusionary rule did not apply, reasoning, "The very phrase 'probable cause' confirms that the Fourth Amendment does not demand all possible precision." Exclusion is always a last resort, not a court's first impulse. The exclusionary rule is not an individual right, but rather applies only when it results in appreciable deterrence of official misconduct. Further, the benefits of deterrence must outweigh the cost of suppressing evidence. *U.S. v. Leon*, 468 U.S. 468 (1984), established a "good faith" rule that when police act in objectively-reasonable reliance on a warrant that is invalid for lack of probable cause, the evidence should not be suppressed. *Arizona v. Evans*, 504 U.S. 1 (1993), applied this rule to cover police who reasonably relied on mistaken information an arrest warrant was outstanding obtained from a court's database that was inaccurate due to a judicial employee's mistake. The Court reasoned that, while a law enforcement agent had made the mistake here, the mistake arose from "nonrecurring and attenuated negligence," not from the deliberate misconduct that led the Court to establish the exclusionary rule: *To trigger the exclusionary rule, police*

conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.

Here, the officer reasonably relied on the information he received about the warrant, and his conduct was not so objectively culpable as to require exclusion of the evidence. The Court cautioned, however, that if the police were shown to be reckless in maintaining their warrant system or to have deliberately falsified records, exclusion would certainly be justified.

Justices Ginsburg, Stevens, Souter, and Breyer dissented. In their view, careless record keeping by law enforcement agencies is sufficient to justify applying the exclusionary rule. The only way the courts have any power to discourage such error is to apply the exclusionary rule. The exclusionary rule does not merely remove the incentive to ignore Fourth Amendment rights; it also lets the judiciary avoid the taint of partnership in official lawlessness. Applying the rule would give law enforcement agencies a strong incentive to improve their record-keeping procedures. Not applying the rule would leave most defendants powerless to contest violations of their rights, because defendants could rarely if ever establish that the errors in their cases were deliberate or reckless.

State v. Diaz, ___ Ariz. ___, 2010 WL 476010 (Arizona Supreme Court, Feb. 12, 2010), vacating State v. Diaz, 221 Ariz. 209 (App. 2009)

A jury convicted Diaz of first degree burglary, attempted armed robbery, and aggravated assault, but acquitted him on several other charges. On appeal, Diaz claimed, based on the trial transcripts, that he was denied his right to a twelve-person jury because only eleven jurors were polled after the verdicts were read. The transcript did not refer to jury number 6 at all. A

divided panel of the Court of Appeals reversed Diaz's convictions, finding "fundamental, prejudicial error." The dissenting judge pointed out that the transcript as a whole referred to "all twelve" jurors and, while there may have been an error in polling the jurors or in the transcript, the record did not reflect any defect in the jury's deliberations. Shortly after the Court of Appeals opinion issued, the court reporter filed a "corrected transcript" with an affidavit stat-

ing that she had mistakenly failed to transcribe the polling of juror 6 and that juror 6 had in fact been polled and agreed with the verdict. The State moved for reconsideration but the Court of Appeals denied reconsideration, chastising the State for its "untimely" attempt to amend the record.

The Arizona Supreme Court granted review and granted relief. Alleged trial court error is subject to review for structural error, harmless error, or fundamental error – but in any event, the defendant must first show that there was some error. Diaz's case was unusual in that it questioned what actually happened at trial, rather than whether the undisputed record showed legal error. The Court explained that Diaz was essentially ask-

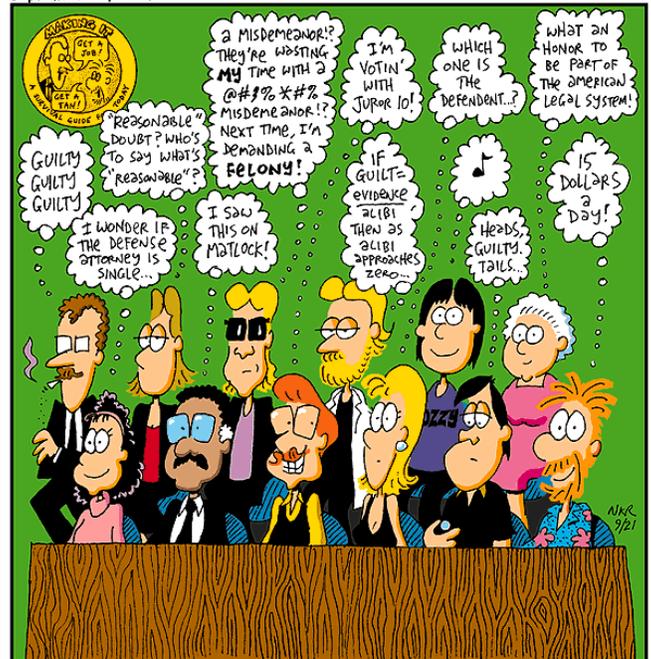
ing the Court to "determine what occurred in the trial court by accepting his interpretation of the original jury-poll transcript and finding that what occurred was error of fundamental proportion." However, he failed to meet his burden of showing that error actually occurred. The Court reviewed the entire record and found that the record as a whole did not show that only eleven jurors considered Diaz's case. Instead, the record repeatedly referred to the judge's instructing "all twelve" jurors, and Diaz did not suggest that only eleven jurors were present when the judge instructed the jury. The record also failed to show that anyone was absent when the court noted the "presence of the jury," and no one commented on anyone's being absent. The Court concluded that the absence of any mention of juror six in the polling transcript "is certainly irregular and likely reflects some sort of mistake," but refused to accept Diaz's argument that it reflected the actual absence of a juror during deliberations. One juror's omission from the uncorrected transcript of the jury poll does not prove that only eleven jurors deliberated, especially because "the record reflects no comment by the trial court, other jurors, the bailiff who was in charge of the jury, other court staff, or counsel, that a juror was missing." Because Diaz bore the burden of establishing error and failed to do so, the Court did not need to decide what the error was. The Court vacated the Court of Appeals opinions and affirmed Diaz's convictions and sentences.

The Court further noted that the issue could have been resolved earlier by using Rule 31.8(h), Ariz. R. Crim. P. As soon as the

State learned of Diaz's argument on appeal and his reliance on the transcript, "the State could and should have asked the appellate court to employ that rule to clarify what actually occurred during the polling process. That procedure would have better served the goals of timely administering justice and searching for the truth." The Court of Appeals did not err in refusing to allow the State to supplement the record after the opinion issued because the parties are primarily responsible for assuring that the appellate record is accurate, but the appellate court may also do so *sua sponte*. "We encourage parties as well as trial and appellate courts to use this rule in appropriate circumstances to avoid delay and waste of time and resources."

The Arizona Supreme Court granted review and granted relief. Alleged trial court error is subject to review for structural error, harmless error, or fundamental error – but in any event, the defendant must first show that there was some error

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State v. Kuhs, __ Ariz. __, 2010 WL 624016 (Arizona Supreme Court, Feb. 24, 2010)**Ryan Kuhs**

In 2005, Kuhs entered a man's apartment and stabbed him while he slept. The victim awoke and tried to defend himself, but Kuhs stabbed him 21 times, and he died later that day

Eric Basta and Jeanette Gallagher with MCAO prosecuted this case

In 2005, Kuhs entered a man's apartment and stabbed him while he slept. The victim awoke and tried to defend himself, but Kuhs stabbed him 21 times, and he died later that day. Witnesses saw a blood-covered Kuhs leave the victim's apartment, found the victim, and called 911. Kuhs was arrested and given his *Miranda* warnings. He agreed to talk and confessed to the killing, saying he went to the victim's apartment to confront him about an earlier argument. After a jury trial, the jury convicted Kuhs of first degree burglary and first degree felony murder (with the burglary as the predicate felony). The jury found five aggravating factors beyond a reasonable doubt (*These were: (1) a prior conviction for a serious offense (the burglary here); (2) another prior conviction for an unrelated serious offense; (3) crime committed in an especially heinous, cruel, or depraved manner; (4) murder committed while on release from prison; and (5) murder committed while on felony probation*). The jury then found that mitigation evidence was insufficient to call for leniency and the death penalty should be imposed. The trial court sentenced Kuhs to death for the murder and a concurrent term of 28 years in prison for the burglary.

On appeal, Kuhs argued first that the trial court erred by finding him competent to stand trial without first holding an evidentiary hearing. The Arizona Supreme Court disagreed, noting that the trial court had initially ordered a Rule 11 evaluation and two doctors had found Kuhs incompetent, but restorable. However, while Kuhs was in a restoration program, a third doctor examined him and found him competent, opining that Kuhs had faked his psychotic symptoms. The parties stipulated that the trial court could assess Kuhs's competency based on the third doctor's report; the court did so and found Kuhs competent based on all three reports. The Supreme Court rejected Kuhs's claim that the trial court had al-

lowed the parties to stipulate to competency and thus violated its duty to hold a hearing and determine if he was competent. The parties did not stipulate to competency; rather, they stipulated that the court could make its own determination based on the doctors' reports. The trial court did not abuse its discretion by making its competency determination without an evidentiary hearing.

Kuhs next claimed that the trial court erred by not granting his motion for mistrial after the victim's stepmother burst into tears during the prosecutor's guilt phase closing argument. When she did so, she was immediately escorted from the courtroom, and Kuhs moved for a mistrial. The trial court denied the motion, but cautioned the gallery, outside the jury's presence, to refrain from further outbursts. The Supreme Court found no abuse of discretion, noting that her "tears did not convey any new information to the jury."

Kuhs further argued that there was insufficient evidence for the jury to have found him guilty of felony murder, committed after he entered the victim's apartment with the intent to commit aggravated assault. He claimed that the evidence showed that he entered the apartment intending to commit murder, not assault. The Court reviewed the evidence that Kuhs told police he went to the apartment, uninvited and armed with a knife, to "fight" the victim. This evidence amply supported the jury's finding. (In a footnote, the Court noted that even if Kuhs had been right on the facts, he was wrong on the law, because entry with intent to commit murder would also have supported the burglary and felony murder convictions.) Kuhs next claimed that the trial court erred by failing to strike two potential jurors for cause, although neither juror served on the jury because the State

struck one and Kuhs struck the other. The Court considered only the juror that Kuhs struck and found no error under *State v. Hackman*, 205 Ariz. 192 (2003), which held that when defense counsel preemptively strikes a juror, it is not reversible error unless the resulting jury was not fair and impartial. Kuhs did not claim that the actual jury that decided his case was not fair or impartial, so no prejudicial error occurred.

The Court then addressed and rejected Kuhs's claims that error occurred during the penalty phase of his trial. Kuhs asserted that the trial court first erred in rejecting the jury's statement that it could not reach a unanimous finding on life or death, and then coerced the jury verdict by giving impasse instructions after the jury twice indicated it was deadlocked. The trial court instructed the jury that its verdict of death or life imprisonment must be unanimous and, after several hours of deliberation, the jury sent the judge a note stating that it could not unanimously agree on the appropriate sentence. The judge asked the jurors to continue deliberating until the end of the day. They did so and again indicated they were deadlocked, so the judge dismissed them for the day. The next morning, the judge gave the jury an "impasse instruction" as per Rule 22.4, Ariz. R. Crim. P., and *State v. Andriano*, 215 Ariz. 1197 (2007), with defense counsel's approval. Late that afternoon, the jury returned its unanimous death penalty verdict. Kuhs argued that the trial court should have instructed the jury that, if they could not agree, the trial court would give them further instructions. He did not request such an instruction at trial, however. The Supreme Court reviewed the instructions that the trial court gave and found that the instructions, taken as a whole, did not mislead the jurors, but instead appropriately informed them of the verdict and sentencing options.

Kuhs next claimed that the trial court should have accepted the jury's second impasse note and not given an *Andriano* instruction,

based on A.R.S. § 13-752(K), which says that if the penalty phase jury cannot reach a verdict, “the court will dismiss the jury and will impanel a new jury.” The Supreme Court rejected that argument, saying that a trial court “need not blindly accept the jury’s indication of an impasse”; rather, the trial court has authority to assist a deadlocked jury. The Court stressed that the trial court did not know how the jurors were divided or ask about the cause for the deadlock and concluded that, under the totality of the circumstances, the trial court did not abuse its discretion. However, the Court cautioned trial courts to “exercise special care,” as the experienced trial judge did here, warning that, “with less careful instruction and absent defense counsel’s approval of the court’s proposed actions, impermissible coercion might well be found when a jury twice indicates a deadlock.”

Kuhs further claimed that the trial court’s instructions at the guilt and penalty phases of the trial could have led the jury to disregard sympathy as a mitigating factor during the penalty phase. He did not object at trial, so the Court reviewed only for fundamental error and found none.

Kuhs argued that A.R.S. § 13-757(A), stating that the death penalty is to be “inflicted by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death,” was unconstitutionally vague because it did not specify what chemicals were to be used or what qualifications were required for a person to administer a lethal instruction. The Court rejected these arguments, saying “a challenge to the protocol to be used during a lethal injection” is properly raised in a postconviction relief proceeding under Rule 32, Ariz. R. Crim. P.

Kuhs challenged the jury’s finding that

the murder was especially cruel. The Court reviewed the evidence and found no abuse of discretion; the victim suffered significant pain before dying and bled to death choking on his own blood. The Court also rejected Kuhs’s claim that the jury abused its discretion by determining that the death sentence was appropriate. Kuhs argued that the jury should have found that the mitigating factors compelled a life sentence, contending that the crime occurred because of poor impulse control caused by ADHD or antisocial personality disorder; he was only 21 when he committed the crime; he grew up poor and abused; he used drugs; and he felt remorse. The Court said the mitigation was “not compelling” and the jury did not abuse its discretion by failing to impose a life sentence rather than the death penalty.

State v. Hicks [Durnan, Real Party in Interest], 2009 WL 56776 (Arizona Supreme Court, January 12, 2009)

Durnan, an indigent, was indicted in Gila County on four felony offenses. That county, lacking any county-funded public defender’s office, appointed private contract counsel Riggins to represent Durnan. A jury convicted Durnan of three of the offenses and the judge sentenced him to ten years in prison. Durnan petitioned for post-conviction relief under Rule 32, Ariz. R. Crim. P. After a hearing, the trial court found that Riggins had provided ineffective assistance, vacated a new trial. The State then dismissed Durnan’s convictions and sentences, and ordered sed all of the charges.

Durnan, who had by then served five years in prison, sued the State, alleging that the State was vicariously liable for Riggins’s negligent represen-

tation. The State argued that it was not liable because Riggins was an independent contractor over whom the State exercised no supervision or control. The trial court held that the State would be vicariously liable for any negligence or malpractice by Riggins. After the Court of Appeals declined special action jurisdiction without comment, the State sought relief from the Arizona Supreme Court.

The Arizona Supreme Court held that, although the State has a duty to provide qualified counsel to indigent defendants, the State has no duty to ensure that such counsel then provides effective representation (The Court expressed no opinion whether a county-funded public defender’s office could be held liable for the malpractice of one of its attorneys). The parties all agreed that Riggins was qualified to represent Durnan, and “The State’s duty ends once it has appointed competent counsel.” *Hicks [Durnan]* at ¶ 12. A defense attorney must exercise independ-

ent judgment on a client’s behalf, so the State cannot supervise counsel’s performance. “The State’s duty is to appoint qualified counsel for an indigent defendant; the duty to provide effective representation belongs to the attorney, not the State.” *Id.* at ¶ 13.

The Arizona Supreme Court held that, although the State has a duty to provide qualified counsel to indigent defendants, the State has no duty to ensure that such counsel then provides effective representation



If you ask me, the constant fear of litigation is taking all the fun out of life...

***State v. Huerta*, __ Ariz. __, 2010 WL 453494 (Court of Appeals, Div. 2, Feb. 10, 2010)**

Property is considered “abandoned” only when “the person prejudiced by the search has voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search

Huerta and his son were loading items into the bed of his truck when men in an SUV approached and shot at them. Huerta drew his own weapon and returned fire and the SUV left. Huerta did not see his son and, fearing that the SUV’s occupants had kidnapped him, pursued the SUV, “spilling items from the bed of the truck onto the roadway.” A sheriff’s deputy responding to reports of gunfire found people trying to clear items off the road. The deputy intervened, picked up the items, and put them on the sidewalk. Huerta then returned and told the deputy what had happened. Huerta appeared nervous and initially declined to identify any of the items, saying he was too worried about his son. After Huerta’s son was found at a neighbor’s house, the deputy again asked Huerta about the items and he claimed everything except a duffel bag, which he neither admitted nor denied owning. The deputy testified that he would not have opened the bag if Huerta had claimed it. When Huerta refused to admit or deny ownership of the duffel bag, the deputy unzipped the bag, and, finding it full of bricks of cocaine, arrested Huerta. Deputies then got search warrants for his home and truck and seized other evidence. Huerta was charged with various offenses and moved to suppress the evidence acquired as a result of the deputy’s opening the duffel bag. The trial court granted the motion to suppress.

The State moved to dismiss the charges to seek appellate review, arguing that Huerta had abandoned the bag and retained no privacy interest in it. A panel of Div. 2 of the Court of Appeals agreed and reversed the suppression order. A person retains no privacy interest in abandoned property and may not invoke the exclusionary rule for evidence recovered as a result of a search

of that property. Property is considered “abandoned” only when “the person prejudiced by the search has voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search.” The intent to abandon property is determined by objective circumstances, not by the defendant’s subjective intent, and the test is whether a reasonable person in the searching officer’s position would believe that the property is abandoned. Under this test, the duffel bag was abandoned because it was lying in the street and Huerta claimed every other item, but not the duffel bag.

The Court rejected Huerta’s argument, based on a Virginia case, that mere failure to claim luggage or to answer questions about ownership of the luggage did not necessarily mean that the luggage was abandoned. The circumstances there were different. In the Virginia case, officers got on a train, told the defendant and his companion that they were looking for drugs, and asked them if they owned two pieces of luggage. When neither they nor anyone else on the train admitted owning the bags, the officers opened the bags and found drugs. The Court noted that the defendant in the Virginia case was aware of the drug investigation and could have exercised his right to remain silent, and also the owner could have reasonably expected the luggage to stay on the train if he did not claim it while the officers were on board. By contrast, in Huerta’s case the officers had no reason to suspect that the duffel bag contained drugs, so claiming the bag

would not have incriminated Huerta. Further, no one could have expected the duffel bag to remain lying in the street, and Huerta affirmatively claimed all of the other items. The Court noted that other courts have held that, to avoid a finding of abandonment, a person must claim an item when given the opportunity.

The Court also rejected Huerta’s argument that the deputy should have inferred that Huerta owned the duffel bag because it was located near his person and no one else approached to claim it. The Court said that Huerta’s proximity to the bag was “wholly fortuitous.” Further, Huerta had an opportunity to claim the bag along with the other items, but did not do so, so the deputy could not have interpreted Huerta’s silence as indicating his intent to retain a privacy interest in the bag. Further, the status quo could not have been maintained because no reasonable person could have believed the police would just leave an unclaimed bag on the side of the street, rather than open the bag to look for signs of ownership and to address safety concerns. The Court concluded that Huerta intentionally abandoned the bag, so the search did not violate his rights and the trial court erred in suppressing the evidence.

Finally, the Court rejected Huerta’s claim that he had a legitimate expectation of privacy under Art. II, § 8 of the Arizona Constitution, noting that Arizona gives greater protection only for the privacy of a person’s *home*, not his personal effects.



David Henry

In analyzing an ex post facto claim, courts first ask if the legislature's intent was to punish a defendant for past activity or to regulate a present situation. Arizona case law has determined that the sex offender registration and community notification requirements were nonpunitive because their intent was regulatory, not punitive.

***State v. Henry*, ___ Ariz. ___, 2010 WL 611501 (Court of Appeals, Div. 2, Feb. 23, 2010)**

In 1974, Henry was convicted of rape and other offenses, sentenced to a prison term, and ordered to register as a sex offender. In 2007, a police officer stopped Henry for a traffic offense. When Henry failed to provide any license or other identification, the officer arrested him. Henry was charged with three offenses related to his sex offender status – failing to obtain a driver's license or nonoperator's ID card, and failing to give notice of change of address in September 2007 and in February 2008. He moved to dismiss the indictment, claiming that the charges constituted double jeopardy and that the failure to register/give notice statutes were improper ex post facto laws as applied to him. The trial court denied the motion to dismiss and, after a bench trial, found Henry guilty only of the failure to obtain a license or ID card. The trial court sentenced Henry to a prison term and, over his objection, ordered him to register as a sex offender.

On appeal, Henry argued that his 1974 rape conviction did not subject him to sex offender registration requirements or notice requirements, making his conviction and required registration in violation of the U.S. and Arizona Constitution's prohibitions on ex post facto laws.

A panel of Div. 2 of the Court of Appeals affirmed the trial court. The Court explained that under *State v. Noble*, 171 Ariz. 171 (1992), there are four categories of ex post facto laws, namely laws that (1) make an act, innocent when committed, a criminal offense; (2) aggravate a crime from its status when it was committed; (3) increase the punishment for a crime beyond that in effect when it was committed; or (4) change the rules of evidence to allow "less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender." Henry's claim was raised under (3). A punitive law cannot be applied retroactively, but a regulatory law

may be so applied. A person challenging a purportedly nonpunitive law bears the burden of showing by "the clearest proof" that the law is in fact punitive. The Court reviewed the history of Arizona's sex offender registration statutes and noted that the current version of A.R.S. § 13-3821 was enacted in 1983 and amended in 2001 to apply retroactively to people such as Henry who were convicted of certain sex offenses under Arizona law in effect before 1978. Accessibility to sex offender information and the duties placed on sex offenders have increased over the years, as have the penalties for failing to comply with such duties.

In analyzing an ex post facto claim, courts first ask if the legislature's intent was to punish a defendant for past activity or to regulate a present situation. Arizona case law had determined that the sex offender registration and community notification requirements were nonpunitive because their intent was regulatory, not punitive. The Court then addressed whether the laws' punitive effects outweighed their regulatory purposes. In *Smith v. Doe*, 538 U.S. 84 (2003), the United States Supreme Court rejected an ex post facto attack on retroactive application of Alaska's sex offender registration laws, similar to Arizona's, finding them regulatory rather than punitive. This decision undermined the finding of *State v. Noble*, *supra*, that, sexes offender registration was traditionally viewed as a form of punishment for ex post facto purposes, but the Court declined Henry's invitation to overrule *Noble*, holding that "Arizona's sex offender registration and notification

statutes do not constitute impermissible ex post facto laws as applied to Henry." The Court said that *Smith* and *Fushek v. State*, 218 Ariz. 285 (2008), required the conclusion that, under Arizona law, "sexes offender registration is both a sufficiently severe sanction to trigger the Sixth Amendment right to a jury trial and a nonpunitive civil sanction for purposes of the Ex Post Facto clause – results that we find difficult to harmonize." Nevertheless, the Court was bound by *Smith* to uphold Arizona's laws.

***State v. Garcia-Navarro*, __ Ariz. __, 2010 WL 426138 (Court of Appeals, Div. 2, Feb. 8, 2010)**

Garcia-Navarro's arresting officer was a federal border patrol agent who intended to arrest Garcia-Navarro based on the agent's federal authority, so the agent was acting as a "government agent" for Fourth Amendment purposes even though he was not a police officer

A border patrol agent saw Garcia-Navarro driving fast and erratically. After Garcia-Navarro pulled his car into the fast lane, almost hitting another vehicle, the agent, believing that Garcia-Navarro's driving posed a public safety risk, turned on his emergency lights. Garcia-Navarro pulled over but fled on foot; the officer searched the abandoned car and found marijuana in the trunk. Garcia-Navarro was later arrested and charged with possession and transportation of marijuana for sale. He moved to suppress the marijuana, asserting that the agent lacked reasonable suspicion to stop his car. The State responded that the agent had reasonable suspicion to stop the car and also argued that the agent was authorized to stop Garcia-Navarro under A.R.S. § 13-3884, the "citizen's arrest" statute. The trial court found that the agent lacked reasonable suspicion and also that the agent was not authorized to stop Garcia-Navarro under § 13-3884.

The State appealed from the trial court's finding on the citizen's arrest issue, arguing for the first time on appeal that suppression was an inappropriate remedy for an illegal citizen's arrest "because the agent was acting as a private citizen" and the Fourth

Amendment only deals with actions by government agents. The Court said it would address this issue only for fundamental error but found no error, fundamental or otherwise. Garcia-Navarro's arresting officer was a federal border patrol agent who intended to arrest Garcia-Navarro based on the agent's federal authority, so the agent was acting as a "government agent" for Fourth Amendment purposes even though he was not a police officer.

The State argued that the border patrol agent was not acting as a state agent, but as a private citizen, who was permitted to make a citizen's arrest under A.R.S. § 13-3884. The State noted that in *State v. Chavez*, 208 Ariz. 606 (App. 2004), a tribal ranger patrolling on a reservation saw Chavez driving erratically, stopping and starting and pulling on and off the road. Believing that Chavez posed a danger to other motorists, the ranger pulled Chavez over and found that he was driving drunk. Chavez moved to suppress the evidence against him, saying that the ranger, who was not a law enforcement officer and whose duties were to enforce environmental and trespassing laws, lacked the authority to stop him. The Court disagreed, saying that the ranger acted as a private citizen making a citizen's arrest rather than as a law enforcement officer or a state agent and that therefore did not violate the Fourth Amendment. The Court disagreed, stating that *Chavez* did not control because in this case, the border patrol agent was acting as an agent of the government, not as a private citizen.

The State then argued that the trial court should not have suppressed the evidence because the agent made a valid citizen's arrest. The Court disagreed, noting that § 13-3884 (1) lets a person make a citizen's arrest only when the suspect to be arrested "has in his presence committed a misdemeanor amounting to a breach of the peace." The *Chavez* Court only held that a DUI constituted a "misdemeanor amounting to a breach of the peace," in that DUI poses a serious, immediate public risk to the driver and others, so a citizen's arrest for DUI may be lawful under the facts of a particular case. But *Chavez* "did not hold that all citizen's arrests for traffic offenses are per se lawful or that traffic offenses are breaches of the peace justifying a citizen's arrest." The Court reviewed the facts of the case and found that, although Garcia-Navarro's driving might have violated traffic laws, the trial court could reasonably have found that his driving did not pose as great a risk as DUI does. There was no evidence that Garcia-Navarro was drunk or that he lacked control of his vehicle like the defendant in *Chavez*, and "The legislature did not display any intent to allow a private person to detain fellow citizens at will based on a personal assessment of a citizen's driving." The Court therefore affirmed the trial court's order suppressing the evidence.



State v. Olm, __ Ariz. __, 2010 WL 489483 (Court of Appeals, Div. 2, Feb. 12, 2010)

There are four factors relevant to whether an area is part of a home's curtilage: (1) the proximity of the area to the home, (2) whether the area is enclosed, (3) the nature of the uses to which the area is put, and (4) the steps the resident has taken to protect the area from observation by people passing by

An officer went to Olm's Tucson home to check the Vehicle Identification Number ["VIN"] of a black Mustang previously seen there. When the officer arrived, the Mustang was parked in the unfenced front yard with its front end five or six feet from the house. The officer walked ten to fifteen feet from the sidewalk to the side of the Mustang, looked at the VIN plate through the front windshield, and observed that the VIN plate was bent. He went to the front door and unsuccessfully tried to make contact with the occupants. When no one answered, the officer called a detective, who told him to seize the Mustang. The officer had the Mustang towed to an impound lot and the vehicle was searched.

Olm was charged with theft and conducting a chop shop by possessing a vehicle with a defaced or altered VIN. He moved to suppress all of the evidence discovered during and as a result of the officer's inspection and search of the Mustang. After a hearing, the trial court granted the motion to suppress, finding that "the yard was part of the curtilage of Olm's residence and the officer had therefore conducted a warrantless search by 'walking onto [Olm's] private property for the purpose of viewing the VIN plate.'"



The State appealed but a panel of Div. Two of the Court of Appeals affirmed the trial court's order suppressing the evidence. Fourth Amendment protection is aimed at preventing unlawful entry into homes, but its protection extends to the "curtilage," that is, the land immediately surrounding and associated with a

home. A search is a violation of a reasonable expectation of privacy, so the test is always whether the home's resident has a reasonable expectation of privacy in the place where the search occurred. Warrantless searches are presumed unreasonable and the State bears the burden of showing that the search was constitutional.

The State argued that Olm had no reasonable expectation of privacy in his unfenced front yard and that the front yard was not part of the curtilage. The Court noted that these two issues were closely interrelated, explaining that if the yard was not part of the curtilage, he had no reasonable expectation of privacy in the area where the car was parked. However, if the yard was part of the curtilage, the question then became whether the officer viewed the VIN plate from a "legal vantage point."

In reviewing a trial court's ruling on a motion to suppress, the appellate court defers to the trial court's factual findings but reviews its legal conclusions de novo. The Court reviewed de novo the question whether Olm had a reasonable expectation of privacy in the area where the car was parked and concluded that he did have such an expectation. There are four factors relevant to whether an area is part of a home's curtilage: (1) the proximity of the area to the home, (2) whether the area is enclosed, (3) the nature of the uses to which the area is put, and (4) the steps the resident has taken to protect the area from observation by people passing by. These factors are not to be "mechanically applied," however; they merely cast light on the fundamental question whether the area is

itself that it should be placed under the home's umbrella" of Fourth Amendment protection. Reviewing these factors, the Court said that while the front yard area was not enclosed and Olm took no steps to protect it from observation, the car was parked close to the house and there was no evidence that "the yard was regularly traversed by members of the public," either to approach the house or to park vehicles. The yard was bordered by public sidewalks marking the boundaries of the curtilage, and a paved pathway went directly from the sidewalk to the front door. Thus, no reasonable person "would be led to believe he or she was permitted to cross the yard, instead of using the sidewalks." The Court concluded that the yard was part of the home's curtilage.

The Court then turned to whether Olm had a reasonable expectation of privacy in the area where the officer had been and concluded that he did. There is no reasonable expectation of privacy in the area outside a house's front door because the area is a public place where anyone may go, and there is no search when an officer observes contraband in plain sight from a lawful vantage point. However, the Court said, it was unnecessary for anyone to leave the walkway to reach the front door, and "no reasonable member of the public would believe he or she had permission to enter the yard to peer into the vehicle." The Court found that the officer was not in a lawful viewing position when he saw the Mustang's VIN plate and affirmed the trial court's order suppressing the evidence.

State v. Soto, ___ Ariz. ___, 2010 WL 426210 (Court of Appeals, Div. 2, Feb. 8, 2010)

The Court concluded that applying § 13-4033(C) to preclude Soto from filing a direct appeal would violate his constitutional right to appeal, unless he had prior personal notice of this potential consequence. The Court said it would not be “unduly burdensome for courts to provide such notice

Soto was convicted of weapons misconduct after he failed to appear on the third day of a jury trial. In a separate case, he was tried in absentia and a different jury convicted him of possession of a narcotic drug for sale and other offenses. The court issued warrants in both cases but Soto was not apprehended and sentenced until 2008, when the court sentenced him to concurrent sentences totaling thirteen years. Soto appealed in both cases.

The State moved to dismiss the appeals, asserting that the Court of Appeals lacked jurisdiction over Soto’s appeals under A.R.S. § 13-4033. That statute allows a defendant to appeal only from (1) a conviction or finding of guilty except insane, (2) an order denying a motion for new trial or other post-judgment order, or (3) an illegal or excessive sentence. However, the statute was amended in 2008 to add Subsection (C), stating that a defendant may not appeal under (1) or (2) “if the defendant’s absence prevents sentencing from occurring within ninety days after conviction and the defendant fails to prove by clear and convincing evidence that the absence was involuntary.” The State contended that Soto could not appeal because his absence prevented the court from imposing sentences within 90 days of his convictions. Soto responded that applying the statute violated Art. II, § 24 of the Arizona Constitution, which states that persons accused in criminal prosecutions have “the right to appeal in all cases.”

A panel of Div. 2 of the Court of Appeals found that because § 13-4033(C) takes away some defendants’ right to a direct appeal, “it is facially unconstitutional, unless we can con-

clude another meaningful avenue of obtaining state appellate redress is available” for such defendants. Under the statute, such defendants may seek appellate review only by filing a petition for post-conviction relief under Rule 32, Ariz. R. Crim. P. The legislature previously had enacted § 13-4033(B), which prohibited pleading defendants from filing direct appeals. However, in *Wilson v. Ellis*, 176 Ariz. 121 (1993), the Arizona Supreme Court held that because Art. II, § 24 “guarantees some form of appellate relief,” defendants who plead guilty may still seek relief under Rule 32. In *Montgomery v. Sheldon*, 181 Ariz. 256 (1995), the Court held that for pleading defendants, “a Rule 32 proceeding is the only means available for exercising the constitutional right to appellate review.” By analogy, the Court of Appeals reasoned that Rule 32 remedies would still be available to defendants like Soto who delayed their sentencing hearings by voluntarily failing to appear.

§ 13-4033(C), unlike subsection (B), applies to defendants who do not plead guilty, so the Court had to determine “whether a Rule 32 proceeding similarly satisfies a non-pleading defendant’s constitutionally protected right to a meaningful appeal.” A defendant who enters a valid guilty plea waives the right to assert on appeal “all nonjurisdictional defenses, errors and defects occurring prior to the plea proceedings.” Rule 32 provides a meaningful review process for “all conceivable challenges to the guilty plea.” Nonpleading defendants may raise claims of error on direct appeal that cannot be raised under Rule 32, such as questions of statutory interpretation, violations of the Rules of Criminal Procedure, and errors in admission or preclusion of evidence. Because Rule 32 does not allow review of “many potential trial and other claims that a non-pleading defendant might raise,”

the Court concluded that “Rule 32 does not satisfy a non-pleading defendant’s right to appeal” under Art. II, § 24. Accordingly, the Court held that § 13-4033(C) “is unconstitutional to the extent it is applied to deprive such defendants of their right to direct appeal.”

The Court then addressed whether Soto waived his right to direct appeal by voluntarily failing to appear for sentencing. The State argued that the mere fact that Soto failed to appear showed that he had waived his right to appeal, noting that under Rule 9.1, Ariz. R. Crim. P., a defendant who fails to appear “is deemed to have waived his constitutional right to appeal,” so long as the defendant has been advised of his right to be present and has been given notice that the proceedings will continue in his absence if he does not appear. The Court disagreed with the State’s argument. Because Arizona’s Constitution provides defendants with an express right to appeal, Soto’s “mere conduct in absconding before sentencing” could not constitute “a knowing and intelligent waiver of his constitutional right to appeal.” He was never advised that failing to appear at sentencing would result in his waiving his right to direct appeal – in fact, the court advised Soto at sentencing that Soto *did* have the right to appeal. The Court concluded that applying § 13-4033(C) to preclude Soto from filing a direct appeal would violate his constitutional right to appeal, unless he had prior personal notice of this potential consequence. (In a footnote, the Court said it would not be “unduly burdensome for courts to provide such notice.”) Thus, the Court denied the State’s motion to dismiss Soto’s appeals.

PROSECUTOR PROFILE

MARY WHITE

Deputy Yuma County Attorney



Mary began serving as a Deputy County Attorney for Yuma County on July 7, 1987. Since that time, she has served as a staff prosecutor and Chief Criminal Deputy, as well as an attorney liaison for the recently formed Victim Services Division, was a key participant in the Child Crime's Protocol Committee of the Children's Justice Program, and served as a member of the Arizona Western College/Northern Arizona University Criminal Justice Advisory Board. Mary is a skilled, dedicated and successful prosecutor. She has handled thousands of felony cases throughout her 21 years as a prosecutor in this office, as well as scores of jury trials. She has tried multiple homicide cases including death penalty cases.

In addition to fulfilling the traditional role as prosecutor,, Mary was also responsible for creating the first community prosecution initiative (CPI) known as the Carver Neighborhood Jus-

tice Alliance/Alianza de Justicia de la Vecindad. This program brought together numerous agencies and members of the local community and facilitated monthly neighborhood meetings after regular work hours and on weekends. While acting as the community prosecutor under the CPI for the County Attorney's Office, Mary began extensive work in the Office's community justice program for the Carver Park and Yuma High School neighborhoods. It was here that she envisioned a restorative justice program for juvenile offenders in Yuma County that would eventually be known as Community Justice Boards (CJB). Today, there are now five CJB Boards, consisting of approximately 51 active volunteer members. The newest board has reached out to the south county - Somerton and San Luis areas. To date, the program has dealt with approximately 65 cases, with an 85% completion rate, and presently there are several active cases. The average age of the program graduates is 13.3 years and is made up of 52 young men and women. The parental satisfaction rate of those who so stated is "100% positive."

Working along with the prosecutor in the Juvenile Division of the County Attorney's Office, the Arizona Department of Corrections' Juvenile Re-entry Program and AWC, Mary also helped design a curriculum to teach students in junior high school about the consequences of crime and dangers of drugs. In addition to her many other participating

efforts, Mary also became a member of the Crossroads Mission Advisory Board. In 2001, Mary began work in the area of grant research and writing and restorative justice while still carrying a full felony case load. In doing so, she successfully facilitated the acquisition of numerous grants that provide the revenue necessary to support prosecution of crimes ranging from obscenity to gun violence. Mary assisted in the revision of a procedure for intake of new cases, which also enhanced the County's ability to seek future grants monies due to better access to data. She also established procedure, under the Southwest Border Prosecution Initiative, for an application for reimbursement. Her effort in these areas have resulted in millions of dollars in special revenue to Yuma County. While doing all of these things, Mary still carries a full felony caseload.

Mary has committed herself and the better part of her career to the pursuit of justice and the betterment of her community. She is an inspiration to our office, and represents the very best that a public prosecutor has to offer. Her character and dedication to public service are unparalleled, and her leadership and innovative accomplishments are no exception. She is always available to assist others and is held in high regard not only by her colleagues but her community as well. Mary is the embodiment of the high standard that all public prosecutors might hope to achieve.

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