

## **DEFENDANT'S RIGHT TO BE PRESENT AT ALL "CRITICAL STAGES" OF THE CRIMINAL PROCESS, IN GENERAL — Revised 2/2010**

Under the United States Constitution<sup>(1)</sup>, and also under Article II, Section 24 of the Arizona Constitution, a defendant has a right to be present at all critical stages of the criminal process. *State v. Levato*, 186 Ariz. 441, 443, 924 P.2d 445, 447 (1996); *State v. Bohn*, 116 Ariz. 500, 570 P.2d 187 (1977); *State v. Armenta*, 112 Ariz. 352, 541 P.2d 1154 (1975). In *State v. Christensen*, 129 Ariz. 32, 38, 628 P.2d 580, 586 (1981), the Arizona Supreme Court held that this constitutional right to be present applies "whenever the [defendant's] presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge," *quoting Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934).

"Critical stages" of the criminal proceedings, at which a defendant has a right to be present, include not only trials but also guilty pleas, *State v. Miles*, 3 Ariz. App. 377, 380, 414 P.2d 765, 768 (1966); Rule 11 competency hearings, *State v. Bishop*, 139 Ariz. 567, 569, 679 P.2d 1054, 1056 (1984), *cert. denied* 511 U.S. 1046 (1994); jury selection, *State v. Bible*, 175 Ariz. 549, 571, 858 P.2d 1152, 1174 (1993); *State v. Ayers*, 133 Ariz. 570, 571, 653 P.2d 27, 28 (App. 1982); the exercise of peremptory challenges, *State v. Collins*, 133 Ariz. 20, 23, 648 P.2d 135, 138 (App. 1982); while the judge is responding to jurors' questions, *State v. Robin*, 112 Ariz. 467, 467, 543 P.2d 779, 779 (1975); *State v. Hilliard*, 133 Ariz. 364, 368, 651 P.2d 892, 896 (App.1982); and when the verdict is returned. *State v. Levato*, 186 Ariz. 441, 444, 924 P.2d 445, 448 (1996).

In addition to the defendant's constitutional right to be present at all critical stages of the criminal proceeding, Rule 19.2, Ariz. R. Crim. P., further protects the defendant's rights. That rule provides:

Presence of defendant at trial

The defendant has the right to be present at every stage of the trial, including the impaneling of the jury, the giving of additional instructions pursuant to Rule 22, and the return of the verdict.

"A constitutional violation involving a defendant's involuntary absence from trial -- 'presence error' — may be subject to harmless error review. [Citations omitted.] On occasion, however, presence error may 'so undermine the integrity of the trial process that [it] will necessarily fall within that category of cases requiring automatic reversal.'" *State v. Garcia-Contreras*, 191 Ariz. 144, 148, ¶ 16, 953 P.2d 536, 540 (1998), quoting *Hegler v. Borg*, 50 F.3d 1472, 1476 (9th Cir. 1995). In many cases, violation of a defendant's right to be present at a critical stage in the proceedings is considered a "structural error" or "structural defect" — that is, error that affects the basic "framework within which the trial proceeds" and implicates the "entire conduct of the trial from beginning to end." *Arizona v. Fulminante*, 499 U.S. 279, 307-08, 309-10, 111 S.Ct. 1246, 1264-65, 113 L.Ed.2d 302 (1991); *State v. McKinney*, 185 Ariz. 567, 573, 917 P.2d 1214, 1220 (1996) *superseded by statute on other grounds as noted in State v. Martinez*, 196 Ariz. 451, 999 P.2d 795 (2000); *State v. Gaines*, 188 Ariz. 511, 514, 937 P.2d 701, 704 (App.1997). "Structural error" is not subject to harmless error analysis and results in automatic reversal. In *Garcia-Contreras, supra*, when the trial court was ready to begin jury selection, the defendant's civilian clothes had not yet arrived. Defense counsel asked for a brief continuance until the defendant's brother brought him

his street clothes. The trial court denied the request for a continuance and told counsel that the defendant would have to choose between appearing before the jury in his jail clothes or waiving his presence for the beginning of jury selection. After consulting with counsel, the defendant opted to be absent during jury selection. The Arizona Supreme Court held that by denying the defendant the continuance he requested, "the trial court effectively deprived him of his constitutional right to be present for jury selection," and "because the error was structural, we need not find actual prejudice." *State v. Garcia-Contreras*, 191 Ariz. 144, 149, ¶ 22, 953 P.2d 536, 541 (1998). The Arizona Supreme Court reversed Garcia-Contreras's convictions and remanded the case for a new trial.

In *State v. Dann*, 205 Ariz. 557, 74 P.3d 231 (2003), defendant complained on appeal that he had not been present during a series of pretrial conferences and a series of side-bar and in-chambers conferences during jury selection and trial. After Dann asserted his desire to be "present at all matters," he was not present during three telephonic pretrial hearings. Neither he nor his counsel objected to his absence at the time. Because the conferences involved procedural matters, and Dann did not show that he was entitled to attend or could have contributed to his defense had he been present, the Court of Appeals found that Dann's right to be present was not violated. The court also concluded that he waived any error by failing to object. *Id.* at 573, 74 P.3d at 247.

Dann did not participate in a side-bar concerning his attorney's motion for a mistrial, but the court found that he suffered no prejudice. In addition, "although Dann was present in the courtroom and knew the conference was taking place, he did not join the side-bar discussion, thereby waiving his presence at it." *Id.* at 574, 74 P.3d at 248.

An in-chambers discussion involving a jury instruction was repeated in open court in Dann's presence, so he suffered no prejudice. Two other in-chambers discussions involved issues with a potential juror before trial and an empaneled juror during trial. The court found that defendant failed to show how his presence would have affected his defense and also noted that defendant did not raise the issue of his absence at the time. "The missed proceedings were minor events during which Dann's counsel was present to represent him. A defendant does not have a constitutional 'right to be personally present in the court's chambers to discuss how to handle' jury issues. . . . Nor may he sit on his hands, fail to assert his desire to be present at an in-chambers discussion, then claim fundamental error based on his absence from that discussion." *Id.* at 575, 74 P.3d at 249.

1. The federal constitutional right arises in part from the Confrontation Clause of the Sixth Amendment and in part from the Due Process clause of the Fifth Amendment (both as made applicable to the States by the Fourteenth Amendment). *State v. Levato*, 186 Ariz. 441, 443, 924 P.2d 445, 447 (1996).