against admission of impeaching testimony, while other four factors favored admissibility, thus trial court did not abuse discretion in admitting impeaching statement).

*State v. Salazar-Mercado,* 232 Ariz. 256, 304 P.3d 543, ¶¶ 23–26 (Ct. App. 2013) (victim testified defendant touched her vagina, but could not remember whether defendant had penetrated her with his finger; prosecutor later asked detective whether victim had disclosed that defendant had digitally penetrated her, and detective responded that victim "did mention that"; in addressing five *Allred* factors, court noted following: (1) victim did not deny making statement, she only could not remember making it; (2) police officer is not *per se* interested merely because of involvement in criminal investigation, and defendant presented evidence detective had personal connection with participants or person stake in outcome of case; (3) defendant did not question detective's reliability; (4) state introduced that testimony as substantive evidence of defendant's guilt; and (5) detective's testimony was only evidence defendant had digitally penetrated victim; court said (1) did not weigh for or against admission; (2) and (3) favor admission; (4) and (5) weigh against admission; court noted concern in *Allred* that issue of guilt or innocence was likely to turn on resolution of credibility in "swearing contest" between interested witnesses was not present here; court concluded detective's impeaching testimony as substantive evidence of guilt was not unduly prejudicial and did not outweigh probative value of evidence, thus trial court did not abuse discretion in admitting that testimony).

**801.d.1.A.110** A prior inconsistent statement may be considered as substantive evidence as well as used for impeachment purposes.

*State v. Salazar-Mercado,* 232 Ariz. 256, 304 P.3d 543, ¶ 24 (Ct. App. 2013) (victim testified defendant touched her vagina, but could not remember whether defendant had penetrated her with his finger; prosecutor later asked detective whether victim had disclosed that defendant had digitally penetrated her, and detective responded that victim "did mention that"; court noted state introduced that testimony as substantive evidence of defendant's guilt).

**Rule(d)(2)(A) —Statements that are not hearsay: Party-opponent's own admission.**

**801.d.2.A.005** A party's statement is admissible.

*State v. Buccheri-Bianca,* 233 Ariz. 324, 312 P.3d 123, ¶¶ 31–33 (Ct. App. 2013) (while defendant was in jail, social worker said to him, "You're innocent until proven guilty," to which defendant stated, "I'm guilty"; court held defendant's declaration was admissible as statement by party opponent).

**Rule(d)(2)(B) — Statements that are not hearsay: Statement adopted by party.**

**801.d.2.B.010** An out-of-court statement is not hearsay if a party has adopted the statement or indicated that the party believes the statement to be true.

*Taylor-Bertling v. Foley,* 233 Ariz. 394, 313 P.3d 537, ¶¶ 14–16 (Ct. App. 2013) (plaintiff tripped and fell over pot placed in hallway of defendant's home; defendant received e-mail from father in which he stated, "As I said to you at the time, having something low to the floor in the hallway, that is easy to overlook and therefore easy to stumble over, was really dumb; please give Dianne (plaintiff)" my best wishes; defendant forwarded e-mail to Dianne (plaintiff); court found defendant did not intend to adopt that statement by forwarding it to plaintiff).

**Rule 803(1). Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness — Present sense impressions.**

**803.1.010** A hearsay statement is admissible as a present sense impression if (1) the declarant perceived the event or condition, (2) the statement described the event or condition, and (3) the declarant made the statement while perceiving the event or condition or immediately thereafter.

*State v. Payne,* 233 Ariz. 484, 314 P.3d 1239, ¶¶ 46–50 (2013) (defendant sought to introduce codefendant's threats to "kill" children if defendant did not do something about their behavior; trial court did not abuse discretion in determining that statement was not present sense impression).

**Rule 803(2). Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness — Excited utterances.**

**803.2.010** This rule has three requirements: (1) there must be a startling event; (2) the statement must relate to the startling event; and (3) the statement must be made soon enough after the event so that the declarant does not have time to fabricate.

*State v. Payne,* 233 Ariz. 484, 314 P.3d 1239, ¶¶ 46–50 (2013) (defendant sought to introduce codefendant's threats to "kill" children if defendant did not do something about their behavior; trial court did not abuse discretion in determining that statement was not excited utterance).

**Rule 803(6). Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness — Records of regularly conducted activity.**

**803.6.005** Because business record are generally created for the purpose of the administration of the entity's affairs and not for the purpose of proving some fact at trial, business records ordinarily are not testimonial evidence, thus their admission does not violate confrontation clause.

*State v. Medina,* 232 Ariz. 391, 306 P.3d 48, ¶¶ 51–64 (2013) (Dr. B. conducted autopsy and prepared autopsy report, but did not testify at trial; Dr. K. was trial witness and testified about report's conclusions and used report and photographs of body to make various independent conclusions about death; because autopsy was conducted day after killing, which was before defendant became suspect, and report's purpose was not primarily to accuse specific individual, autopsy report was not testimonial, thus admission of autopsy report did not violate defendant's right of confrontation; court further held Dr. K.'s testimony did not violate defendant's right of confrontation).

*State v. Parker,* 231 Ariz. 391, 296 P.3d 54, ¶¶ 38–41 (2013) (even though bank's fraud investigator prepared report at request of police, fraud investigator prepared report by copying and pasting victims' credit card information from bank's database, thus report contained information bank regularly collected in database, and defendant was able to cross-examine fraud investigator, so report was not testimonial evidence).

*State v. Parker,* 231 Ariz. 391, 296 P.3d 54, ¶ 42 (2013) (victim prepared time sheets as part of routine business practice and not to aid police investigation, thus time sheets were not testimonial evidence).

**803.6.020** This exception allows for admission of a memorandum, report, record, or data compilation if the information is either compiled or transmitted by someone with firsthand knowledge.

*State v. Parker,* 231 Ariz. 391, 296 P.3d 54, ¶¶ 34–37 (2013) (in order to impeach defendant's testimony about when he left spot of blood in victim's kitchen; state used victim's co-worker to introduce victim's time sheets; although co-worker did not see victim write on time sheet on day in question, he testified he was familiar with victim's handwriting, which was sufficient to establish victim made entry, and further testified victim recorded work hours close to time he performed work).

**803.6.030** Records must contain information from a person who acquired firsthand knowledge in the course of a regularly conducted business activity, and as long as the testimony shows that it was the regular practice of the enterprise to get information from such persons, there is no need that the persons with the firsthand knowledge be identified.

*State v. Parker,* 231 Ariz. 391, 296 P.3d 54, ¶ 33 (2013) (at request of police, bank's fraud investigator prepared report by copying and pasting victims' credit card information from bank's database; because bank regularly relied on information in database, it did not matter that bank's fraud investigator did not know who transmitted information contain in databank).

**803.6.045** Although documents prepared solely for purpose of litigation generally are not made in the regular course of business, if documents for litigation are mere reproductions of regularly kept records, such documents may qualify as business records.

*State v. Parker,* 231 Ariz. 391, 296 P.3d 54, ¶¶ 29–32 (2013) (at request of police, bank's fraud investigator prepared report by copying and pasting victims' credit card information from bank's database; court held trial court did not abuse discretion in admitting report).

**Rule 804(b)(3). Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness — Statements against interest.**

**804.b.3.060** A statement offered to **exculpate** the defendant is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement; at least seven factors suggest the trustworthiness of a statement: (1) the existence of corroborating and contradicting evidence; (2) the relationship between the declarant and the listener; (3) the relationship between the declarant and the defendant; (4) the number of times the declarant made the statement and the consistency of the multiple statements; (5) the amount of time between the event and the making of the statement; (6) whether the declarant will benefit from the statement; and (7) the psychological and physical environment surrounding the making of the statement; in determining whether to admit the statement, the trial court should determine only whether evidence presented corroborating and contradicting the statement would permit a reasonable person to believe it could be true, and if so should admit the statement; only after the statement is admitted in evidence should factors other than the corroborating and contradicting evidence be considered, and then only by the jurors; appellate decisions have, however, determined admissibility of the statement based on the additional consideration of one or more of the other six factors.

*State v. Parker,* 231 Ariz. 391, 296 P.3d 54, ¶¶ 23–27 (2013) (defendant contended trial court abused discretion in precluding witness's testimony: "I thought at some point that [third party] had told me that he had also gone inside [victims'] house to look for other things; because witness could not remember making that statement and thus could not be cross-examined about it, and could not even say for sure third party made that statement, and because witness's extensive drug use affected her memory, and because witness was allowed to testify she had previously told police, "It was almost like [third party] was going back to [victims'] house to try to get something out," court held trial court did not abuse discretion in precluding witness's testimony).

**Rule 804(b)(6). Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness — Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.**

**804.b.6.010** If the defendant creates the circumstances that allow for the admissibility of a statement that would otherwise violate the right of confrontation, the defendant on essentially equitable grounds forfeits the protections of the confrontation clause.

*State v. Miller,* 234 Ariz. 31, 316 P.3d 1219, ¶¶ 19–20 (2013) (evidence showed defendant killed victims so they would not testify against him in arson trial, admission of statements in defendant's murder trial for killing victims did not violate confrontation clause).

*State v. Franklin,* 232 Ariz. 556, 307 P.3d 983, ¶¶ 11–25 (Ct. App. 2013) (court found defendant caused declarant's unavailability, thus declarant's statements were admissible under this rule, and further concluded defendant forfeited protections of confrontation clause).

**804.b.6.020** In determining whether to admit a statement under this rule, the court must consider **four** factors, the **first** of which is whether the declarant is unavailable.

*State v. Franklin,* 232 Ariz. 556, 307 P.3d 983, ¶ 13 (Ct. App. 2013) (court concluded declarant was unavailable because she failed to attend trial despite state's having served her with subpoena and issuing warrant for her arrest).

**804.b.6.030** In determining whether to admit a statement under this rule, the court must consider **four** factors, the **second** of which is whether the defendant engaged in wrongdoing.

*State v. Franklin,* 232 Ariz. 556, 307 P.3d 983, ¶¶ 14–21 (Ct. App. 2013) (court noted criminal act is not necessary to invoke this doctrine, and that wrongdoing need not be in form of threat, request, or directive; while in jail, defendant attempted to contact declarant 109 times and spoke to her 58 times; defendant told

declarant county attorney would drop charges if she told him to do so; defendant told declarant she would only face misdemeanor charges if she ignored warrant for her presence; court concluded objective of exchanges was inducing declarant to avoid testifying at trial).

**804.b.6.040** In determining whether to admit a statement under this rule, the court must consider **four** factors, the **third** of which is whether the defendant engaged in, or acquiesced, in witness tampering.

*State v. Franklin,* 232 Ariz. 556, 307 P.3d 983, ¶¶ 22–23 (Ct. App. 2013) (court agreed with trial court that defendant's speaking with declarant more than 50 times showed defendant engaged in wrongdoing).

**804.b.6.050** In determining whether to admit a statement under this rule, the court must consider **four** factors, the **fourth** of which is whether the defendant intended to procure the declarant's unavailability, and actually did procure the declarant's unavailability.

*State v. Franklin,* 232 Ariz. 556, 307 P.3d 983, ¶¶ 24–25 (Ct. App. 2013) (court agreed with trial court that defendant's actions were intended to procure declarant's unavailability, and because declarant's unwillingness to cooperate began at approximately same time defendant began making telephone calls to her, trial court could properly infer defendant's tampering did procure declarant's eventual absence from trial).

**804.b.6.060** The admissibility of a declarant's statement under this rule is not limited to the trial in which the declarant would have testified.

*State v. Miller,* 234 Ariz. 31, 316 P.3d 1219, ¶¶ 19–20 (2013) (evidence showed defendant killed victims so they would not testify against him in arson trial, but statements were also admissible in defendant's murder trial for killing victims).

## ARTICLE 9. AUTHENTICATION AND IDENTIFICATION

### Rule 901(A). Authenticating and Identifying Evidence — General provision.

**901.a.010** For the matter in question to be admissible in evidence, the proponent need only present sufficient evidence from which the trier-of-fact could conclude that the matter in question is what the proponent claims it to be; whether the matter in question is in fact what the proponent claims and whether it is connected to the litigation is a question of weight and not admissibility, and is for the trier-of-fact.

*State v. Forde,* 233 Ariz. 543, 315 P.3d 1200, ¶¶ 73–76 (2014) (court held following was sufficient for jurors to conclude text message was intended to be sent to defendant: text message was in cell phone seized from codefendant; several communications near time of murder were sent to cell phone number attributed to "White" in cell phone address book; cell phone provider said defendant was registered subscriber for number for "White"; when arrested, defendant had cell phone with that number).

March 26, 2014

**1–244 Retroactivity of statutes.**

**.010** This section provides that no statute is retroactive unless the statute itself expressly declares that it is retroactive.

*State ex rel. Montgomery v. Harris (Maxwell),* 232 Ariz. 34, 301 P.3d 200, ¶¶ 5–6 (Ct. App. 2013) (A.R.S. § 28–1382(I), which provided for suspension of 9 days of sentence if defendant equipped vehicle with ignition interlock device, became effective December 31, 2011, and thus did not apply to any defendant who committed the DUI prior to that date; defendant committed his offense in January 2011, so statute did not apply to him).

**1–246 Penalty altered by subsequent law; effect.**

**.010** A defendant must be punished under the law that was in effect at the time that the defendant committed the crime.

*State ex rel. Montgomery v. Harris (Maxwell),* 232 Ariz. 34, 301 P.3d 200, ¶ 9 (Ct. App. 2013) (A.R.S. § 28–1382(I), which provided for suspension of 9 days of sentence if defendant equipped vehicle with ignition interlock device, became effective December 31, 2011, and thus did not apply to any defendant who committed the DUI prior to that date; defendant committed his offense in January 2011, so statute did not apply to him).

**1–602(A) Parents' bill of rights—Rights.**

**.020** Even if a record of a minor child's blood or DNA is created in violation of the parents' rights, the juvenile does not have standing to argue that violation requires suppression of the evidence.

*State v. Butler (Tyler B.),* 232 Ariz. 84, 302 P.3d 609, ¶ 22 (2013) (court declined to address juvenile's argument that results of blood test must be suppressed because of violation of PBR).

**13–105(12) Definitions. (Dangerous instrument.)**

**.010** A "dangerous instrument" is anything that, under the circumstances that it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury.

*State v. Gustafson,* 233 Ariz. 236, 311 P.3d 258, ¶¶ 6–16 (Ct. App. 2013) (codefendant kicked in door of victim's home, used taser stun gun on her, which rendered her unconscious, and tied her with duct tape; victim recognized defendant as previous acquaintance; victim told defendant and codefendant she had pacemaker, which defendant already knew; victim told defendant and codefendant taser could kill her, but they used it three to five times more on her; court held evidence was sufficient for jurors to find taser was dangerous instrument; court further noted "many courts . . . have deemed it appropriate to characterize stun guns as dangerous or deadly weapons").

**13–105(13) Definitions. (Dangerous offense.)**

**.010** A "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.

*State v. Snider,* 233 Ariz. 243, 311 P.3d 656, ¶ 11 (Ct. App. 2013) (defendant was charged with armed robbery for robbing banks; evidence showed defendant threatened victims in order to get money; although victims from whom he obtained money did not see handgun, other witnesses testified defendant displayed handgun before demanding money, which court held was sufficient to support allegation of dangerousness).

**13–105(34) Definitions. (Possess.)**

**.020** In order to possess, the person need have *either* dominion *or* control over property; there is no requirement that the person have both.

*State v. Ottar,* 232 Ariz. 97, 302 P.3d 622, ¶¶ 5–9 (2013) (court rejected state's contention that "physical possession" is distinct from having "dominion or control" over property, and held (1) physical possession requires some exercise of dominion or control over property; (2) "control" requires person to take custody of item or manifest intent to do so; (3) defendant in reverse-sting operation does not possess drugs merely by touching or inspecting them before purchase is consummated; but (4) possession is not rendered legally impossible merely because defendant does not leave scene with drugs and has little practical ability to do so).

**13–105(39) Definitions. (Serious physical injury.)**

**.010** "Serious physical injury" includes a 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; a "serious impairment of health" must be more than a temporary but substantial impairment of health and more than the usual temporary impairment caused by the fracture of a body part, and must be comparable in terms of its gravity to an injury that creates a reasonable risk of death or substantial and permanent disfigurement; "protracted impairment" must be longer than either the temporary but substantial impairment of the use of a limb or the healing time of a normal fracture.

*State v. Gustafson,* 233 Ariz. 236, 311 P.3d 258, ¶¶ 6–16 (Ct. App. 2013) (codefendant kicked in door of victim's home, used taser stun gun on her, which rendered her unconscious, and tied her with duct tape; victim recognized defendant as previous acquaintance; victim told defendant and codefendant she had pacemaker, which defendant already knew; victim told defendant and codefendant taser could kill her, but they used it three to five times more on her; court held evidence was sufficient for jurors to find taser was dangerous instrument; court further noted "many courts . . . have deemed it appropriate to characterize stun guns as dangerous or deadly weapons").

**13–108 Territorial applicability.**

**.030** Absent some affirmative delegation by Congress and pursuant to tribal consent, a state has no civil or criminal jurisdiction over Indians on an Indian reservation.

*State v. John,* 233 Ariz. 57, 308 P.3d 1208, ¶¶ 3–10 (Ct. App. 2013) (Arizona did not have subject matter jurisdiction to prosecute member of Navajo Nation living on tribal land for failure to register as sex offender).

**13–116 Double punishment.**

**.070** In order to impose consecutive sentences for two crimes, the transaction must satisfy **two** tests: **First,** whether, after subtracting the facts necessary to support the primary charge, there are sufficient facts to support the secondary charge.

*State v. Jones,* 232 Ariz. 448, 306 P.3d 105, ¶¶ 2–13 (Ct. App. 2013) (defendant was convicted of child abuse for causing head injuries to child, and first-degree murder for causing death of child in course of committing child abuse; state agreed these two convictions were based on "single act" for purposes of A.R.S. § 13–116; court rejected state's argument that A.R.S. § 13–705(M) controlled over § 13–116 and instead held § 13–116 was paramount statute).

*State v. McDonagh,* 232 Ariz. 247, 304 P.3d 212, ¶¶ 12–13 (Ct. App. 2013) (defendant was convicted of four counts of aggravated DUI: (1) driving while impaired on suspended license; (2) driving with BAC of 0.08 or more on suspended license; (3) driving while impaired with two or more prior DUI violations; and (4) driving with BAC of 0.08 or more with two or more prior DUI violations; all four offenses arose out of single act of driving, thus subtracting that element does not leave sufficient facts to support other three charges, thus trial court may impose only one fine).

**.080** In order to impose consecutive sentences for two crimes, the transaction must satisfy **two** tests: **Second,** either (1) the defendant could have committed the primary crime without committing the secondary crime, or (2) if the defendant could not have committed the primary crime without committing the secondary crime, the defendant's commission of the secondary crime exposed the victim to more potential harm than necessary in committing the primary crime.

*State v. McDonagh,* 232 Ariz. 247, 304 P.3d 212, ¶¶ 12–13 (Ct. App. 2013) (defendant was convicted of four counts of aggravated DUI: (1) driving while impaired on suspended license; (2) driving with BAC of 0.08 or more on suspended license; (3) driving while impaired with two or more prior DUI violations; and (4) driving with BAC of 0.08 or more with two or more prior DUI violations; each offense caused same risk of harm, thus trial court may impose only one fine).

**13–201 Requirements for criminal liability.**

**.040** In order to commit a criminal offense, a person must do a voluntary act (the *actus reus* element), which is a determined conscious bodily movement, while an involuntary act is a reflex action driven by the autonomic nervous system; whether the defendant did a voluntary act is an issue only if the defendant claims the crime was the result of an involuntary act driven by the autonomic nervous system, such as while unconscious, asleep, or under hypnosis, or during an epileptic fit.

*State v. Brown,* 233 Ariz. 153, 310 P.3d 29, ¶¶ 21–23 (Ct. App. 2013) (defendant contended "his inability to resist the threat to his life implicated his 'fight or flight' reflex, rendering his physical actions involuntary" within meaning of §§ 13–105(42) and 13–201; court stated no evidence adduced at trial suggested defendant's actions were not result of conscious and determination, thus trial court did not err in denying duress instruction).

**13–404 Justification; self-defense.**

**.030** The trial court is required to give a self-defense instruction, even if the theories are inconsistent.

*State v. Almaguer,* 232 Ariz. 190, 303 P.3d 84, ¶¶ 5–15 (Ct. App. 2013) (defendant was charged with second-degree murder, and trial court gave self-defense instruction for that charge; defendant contended trial court should have given self-defense instruction for lesser-included offenses of manslaughter and negligent homicide; court rejected state's argument that self-defense instruction was inconsistent for offense with negligent mental state and held trial court should have instructed on self-defense for those lesser-included offenses, but held any error was harmless because jurors convicted defendant of manslaughter, which meant they found defendant either (1) acted recklessly or (2) committed second-degree murder upon sudden quarrel or heat of passion, both of which are mutually exclusive with intentionally or knowingly acting in self-defense).

**13–502(A) Insanity test; burden of proof; guilty except insane verdict—Standard.**

**.030** The Arizona legislature has declined to adopt a defense of diminished capacity, thus a defendant is not permitted to introduce evidence that his or her mental state was such that he or she could not act intentionally or knowingly.

*State v. Buot,* 232 Ariz. 432, 306 P.3d 89, ¶ 19 (Ct. App. 2013) (defendant was driving at more than 40 miles per hour on city street when he suddenly swerved into oncoming lane and slammed head-on into oncoming vehicle, killing driver; state charged defendant with second-degree murder; defendant sought to call expert witness to testify defendant had character trait of impulsivity that caused him to act reflexively rather than reflectively, and thus argue that defendant lacked requisite mental state for second-degree murder; court held trial court did not abuse discretion in ruling expert could testify based on defendant's behavior he had personally observed, but could not testify about "mental diseases or conditions" that might relate to defendant's capacity to form requisite *mens rea*).

**.040** Although an expert may not give an opinion about the defendant's state of mind on the issue of *mens rea,* an expert may testify about the defendant's behavior that the expert observed.

*State v. Buot,* 232 Ariz. 432, 306 P.3d 89, ¶ 19 (Ct. App. 2013) (defendant was driving at more than 40 miles per hour on city street when he suddenly swerved into oncoming lane and slammed head-on into oncoming vehicle, killing driver; state charged defendant with second-degree murder; defendant sought to call expert witness to testify defendant had character trait of impulsivity that caused him to act reflexively rather than reflectively, and thus argue that defendant lacked requisite mental state for second-degree murder; court held trial court did not abuse discretion in ruling expert could testify based on defendant's behavior he had

personally observed, but could not testify about "mental diseases or conditions" that might relate to defendant's capacity to form requisite *mens rea*).

**13–503 Effect of alcohol or drug use.**

**.010** This section does not deprive a defendant of the right to present a complete defense, does not deny equal protection, and does not violate the Eighth Amendment, thus this statute is constitutional.

*State v. Boyston,* 231 Ariz. 539, 298 P.3d 887, ¶¶ 54–58 (2013) (court rejected defendant's claims that statute was unconstitutional).

**.030** Although premeditation is not included in the statutory enumeration of culpable mental states under § 13–105(10), it is a required element of first-degree murder under § 13–1105(A)(1) and part of the requisite *mens rea* of that offense, and thus a "requisite state of mind" of that offense, thus 13–503 precludes evidence of voluntary intoxication when considering premeditation.

*State v. Boyston,* 231 Ariz. 539, 298 P.3d 887, ¶¶ 48–53 (2013) (court held trial court correctly precluded defendant from presenting evidence of his alleged PCP intoxication to rebut state's evidence of premeditation).

**13–610 DNA testing.**

**.010** Because this statute does not provide that a convicted felon had to pay a specific portion of the cost for the DNA testing, the trial court does not have the authority to order a defendant to pay a portion of the cost of the testing.

*State v. Reyes,* 232 Ariz. 468, 307 P.3d 35, ¶¶ 8–14 (Ct. App. 2013) (court held trial court erred in ordering defendant to pay applicable fee for DNA testing).

**13–701(C) Sentence of imprisonment for felony; presentence report; aggravating and mitigating factors; consecutive terms of imprisonment—Method of increasing sentence.**

**.010** The trial court may impose an aggravated sentence only if (1) the trier-of-fact finds to be true beyond a reasonable doubt one or more aggravating circumstances, (2) the trial court finds true the aggravating circumstance in (D)(11) (prior conviction of a felony), or (3) the defendant admits as true one or more aggravating circumstances.

*State v. Bonfiglio,* 231 Ariz. 371, 295 P.3d 948, ¶¶ 2–15 (2013) (defendant admitted two prior felony convictions; jurors found as aggravating circumstance that defendant "had the ability to walk away from the confrontation" but did not; trial court based aggravated sentence on that aggravating circumstance and not on defendant's prior convictions; court held defendant's admission of prior felony convictions permitted trial court to impose aggravated sentence based on "catch all" aggravating circumstance, even though trial court did not rely on prior convictions; court overruled *State v. Zinsmeyer,* 222 Ariz. 612, 218 P.3d 1069 (Ct. App. 2009)).

**13–701(D)(18) Aggravating circumstances—Offense committed in presence of child.**

**.020** For this aggravating circumstance to be present, the child does not have to be in the same room as the incident; merely being present in the home where the incident takes place, standing alone, will not fulfill the statutory requirement unless there is some evidence the child was aware of the incident.

*State v. Torres,* 233 Ariz. 479, 314 P.3d 825, ¶¶ 10–16 (Ct. App. 2013) (court held circumstantial evidence was sufficient to show child was aware defendant killed her mother).

**13–701(D)(24) Sentence of imprisonment for felony—Aggravating circumstances—Any other factor.**

**.020** Once the trier-of-fact has found the existence of one or more enumerated aggravating circumstances and thus the maximum range is increased, the trial court may then consider anything under the "catch all" aggravating factor to determine the sentence to be imposed within the maximum range, even if the trial court does not then rely on that other enumerated aggravating circumstance.

*State v. Bonfiglio,* 231 Ariz. 371, 295 P.3d 948, ¶¶ 2–15 (2013) (defendant admitted two prior felony convictions; jurors found as aggravating circumstance that defendant "had the ability to walk away from the confrontation" but did not; trial court based aggravated sentence on that aggravating circumstance and not on defendant's prior convictions; court held defendant's admission of prior felony convictions permitted trial court to impose aggravated sentence based on "catch all" aggravating circumstance, even though trial court did not rely on prior convictions; court overruled *State v. Zinsmeyer,* 222 Ariz. 612, 218 P.3d 1069 (Ct. App. 2009)).

**13–705 Dangerous crimes against children.**

**.020** This section applies if the defendant is convicted of violating A.R.S. § 13–3553(A)(2) by distributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing, or exchanging any visual depiction in which a minor is engages in exploitive exhibition or other sexual conduct; there is no requirement that the filming, photographing, developing, or duplicating of the visual depiction was in violation of a statute in the location where the filming, photographing, developing, or duplicating took place.

*State v. Dixon,* 231 Ariz. 319, 294 P.3d 157, ¶¶ 12–13 (Ct. App. 2013) (court rejected defendant's contention that state was required to prove an offense took place during creation of the depiction).

**13–705(M) Dangerous crimes against children—Concurrent and consecutive sentences.**

**.010** A sentence imposed for a dangerous crime against children under subsection (D) involving child molestation or sexual abuse pursuant to subsection (F) may be served concurrently with other sentences if the offense involved only one victim, otherwise the sentences shall be consecutive, unless A.R.S. § 13–116 precludes consecutive sentences.

*State v. Jones,* 232 Ariz. 448, 306 P.3d 105, ¶¶ 2–13 (Ct. App. 2013) (defendant was convicted of child abuse for causing head injuries to child, and first-degree murder for causing death of child in course of committing child abuse; state agreed these two convictions were based on "single act" for purposes of A.R.S. § 13–116; court rejected state's argument that A.R.S. § 13–705(M) controlled over § 13–116 and instead held § 13–116 was paramount statute).

**13–706(A) Serious, violent, or aggravated offenders; sentencing; life imprisonment—Serious offense with two or more prior serious offenses.**

**.010** That section provides that a person who is convicted of a serious offense and has prior convictions for two or more serious offenses not committed on the same occasion must receive a life sentence with no eligibility for release for 25 years.

*State v. Snider,* 233 Ariz. 243, 311 P.3d 656, ¶¶ 12–14 (Ct. App. 2013) (defendant contended life sentences for counts 6 through 10 and 12 through 24 were illegal; defendant had no prior convictions; because defendant was convicted of all counts at same trial, no count could be considered "prior" to any others, thus trial court committed fundamental error by imposing life sentences).

**13–708(C) Offenses committed while released from confinement—Offense committed while on lifetime probation.**

**.010** When a defendant is convicted of a new offense committed while the defendant is on lifetime probation, the trial court must revoke the defendant's probation and impose sentence on the prior offense.

*State v. Burns,* 231 Ariz. 563, 298 P.3d 911, ¶¶ 1–15 (Ct. App. 2013) (defendant was on lifetime probation for two charges of indecent exposure, Class 6 felonies, and was convicted of second-degree burglary, Class 3 felony; trial court sentenced defendant to 15¼ years for burglary and reinstated him on lifetime probation; court held it was fundamental error to do so and remanded so trial court could sentence defendant to prison on two charges of indecent exposure).

**13–712(B) Calculation of term of imprisonment—Credit for time spent in custody.**

**.010** A defendant is entitled to presentence incarceration credit for all time spent in custody.

*State v. Seay,* 232 Ariz. 146, 302 P.3d 671, ¶¶ 5–10 (Ct. App. 2013) (defendant was in AzDOC when county charged him with new offense; trial court issued writ of habeas corpus ad prosequendum for his transfer from AzDOC to county, but did not set release conditions for new offense; court held defendant was "in custody" on new offense even though AzDOC still had certain control of him, thus he was entitled to credit for time from his transfer from AzDOC to county until his sentencing).

**13–805(A) Jurisdiction—Manner of payment and restitution orders.**

**.010** This section provides that, at the time the defendant completes any period of probation or any sentence, or at the time the defendant absconds from probation or sentence, the trial court shall enter a criminal restitution order in favor of the state or any person to who the defendant still owes restitution, thus the trial court does not have the authority to enter a criminal restitution order (CRO) before that time.

*State v. Torres,* 233 Ariz. 479, 314 P.3d 825, ¶ 17 (Ct. App. 2013) (Pima) (trial court committed fundamental error in imposing CRO at time of sentencing).

*State v. Buccheri-Bianca,* 233 Ariz. 324, 312 P.3d 123, ¶ 41 (Ct. App. 2013) (Pima) (trial court committed fundamental error in imposing CRO at time of sentencing).

*State v. Snider,* 233 Ariz. 243, 311 P.3d 656, ¶ 15 (Ct. App. 2013) (Pima) (trial court committed fundamental error in imposing CRO at time of sentencing).

*State v. Glissenforf,* 233 Ariz. 222, 311 P.3d 244, ¶ 42 (Ct. App. 2013) (Pima) (trial court committed fundamental error in imposing CRO at time of sentencing).

*State v. Pena,* 233 Ariz. 112, 309 P.3d 936, ¶ 16 (Ct. App. 2013) (Pima) (trial court committed fundamental error in imposing CRO at time of sentencing).

*State v. Perez,* 233 Ariz. 38, 308 P.3d 1189, ¶ 28 (Ct. App. 2013) (Pima) (trial court committed fundamental error in imposing CRO at time of sentencing).

*State v. Borquez,* 232 Ariz. 484, 307 P.3d 51, ¶ 19 (Ct. App. 2013) (Pima) (trial court committed fundamental error in imposing CRO at time of sentencing).

*State v. Lopez,* 231 Ariz. 561, 298 P.3d 909, ¶¶ 1–6 (Ct. App. 2013) (Pima) (at time of sentencing, trial court reduced various fines, fees, and assessments to criminal restitution order, but ordered defendant would pay no interest while in Arizona Department of Corrections; court held imposition of criminal restitution order at that time was fundamental error; court rejected state's argument that any error was harmless because defendant did not have to pay interest while in DOC; court noted trial court had no statutory authority to suspend payment of interest and stated, "We are extremely reluctant to deem an unauthorized act harmless because of a second unauthorized act").

**13–901 Probation.**

**.010** Suspension of sentence is not a matter of right under any circumstances or in any instance, but is purely a matter of discretion for the trial court, i.e., it is a matter of grace and not of right.

*State v. Hernandez,* 231 Ariz. 353, 295 P.3d 451, ¶ 5 (Ct. App. 2013) (defendant was found guilty of luring minor for sexual exploitation; defendant declined to make any statements about offense during preparation of presentence report because statements may have incriminated her further; court held trial court was permitted to consider defendant's refusal to discuss offense in determining whether defendant would be successful in treatment program that she would have to attend while on probation).

**13–907 (D)(1) Setting aside judgment of convicted person on discharge; making of application; release from disabilities; exceptions—Dangerous offense.**

**.010** This section does not apply to a person who was convicted of a dangerous offense, which is determined by the judgment of conviction.

*State v. Bernini (Copeland),* 233 Ariz. 170, 310 P.3d 46, ¶¶ 4–18 (Ct. App. 2013) (defendant pled guilty to attempted aggravated assault, deadly weapon/dangerous instrument; agreement provided state would dismiss

allegation that defendant committed "dangerous offense" under § 13–704(A); court held what was controlling was charge to which defendant pled, and because plea provided state would dismiss allegation of dangerousness, this was not dangerous offense for purpose of § 13–907, thus defendant was eligible to have conviction set aside).

**13–1002 Solicitation.**

**.010** A person commits solicitation if the person commands, encourages, requests, of solicits another person to engage in specific conduct that would constitute a felony with the intent to promote or facilitate the commission of a felony.

*State v. Miller,* 233 Ariz. 234 Ariz. 31, 316 P.3d 1219, ¶¶ 32–39 (2013) (evidence defendant offered or paid money to persons in exchange for their agreeing to kill victims was sufficient to support conviction of solicitation).

**13–1104 Second-degree murder.**

**.010** Under Arizona law, second-degree murder is only one crime regardless whether the defendant commits it intentionally, knowingly, or recklessly, thus a defendant is not entitled to have the jurors decide unanimously which of those three mental states the defendant had when causing victim's death.

*State v. Valentini,* 231 Ariz. 579, 299 P.3d 751, ¶¶ 6–14 (Ct. App. 2013) (trial court instructed jurors on three mental states, but provided single verdict form that did not ask jurors to specify mental state found for guilty verdict; court held jurors need not agree unanimously on which of those three mental states defendant had when causing victim's death; court also noted finding defendant acted intentionally also meant defendant acted knowingly and recklessly, and finding defendant acted knowingly also meant defendant acted recklessly, thus no matter how individual jurors found, net result was they found unanimously, at a minimum, defendant acted recklessly).

**.020** Although a person is guilty of second-degree murder if the person knows the conduct will cause death or serious physical injury, it is not murder unless the person dies, thus a person is not guilty of attempted second-degree murder if the person intends only to cause serious physical injury; it is only attempted second-degree murder if the person intends or knows the conduct will cause death.

*State v. Dickinson,* 233 Ariz. 527, 314 P.3d 1282, ¶¶ 8–22 (Ct. App. 2013) (for charge of attempted second-degree murder, court held it was fundamental error to include "or serious physical injury" language, but because defendant's defense was mistaken identity, and all evidence showed defendant intended to kill victim, and prosecutor argued only that defendant intended to kill victim, defendant failed to show prejudice in giving that instruction).

**13–1105 First-degree murder.**

**.020** When a defendant kills one person, the defendant may be convicted of only one count of murder.

*State v. Williams,* 233 Ariz. 158, 302 P.3d 683, ¶¶ 4–5 (Ct. App. 2013) (while fleeing from officers, defendant collided with another vehicle, killing the driver; state charged defendant with first-degree felony murder (unlawful flight as underlying felony) and second-degree murder (extreme indifference to human life); jurors convicted defendant of both charges, and trial court sentenced defendant to concurrent sentences of life with no eligibility for release for 25 years and 22 years; court held trial court should have vacated conviction for second-degree murder).

**13–1105 First-degree murder—Premeditated.**

**.010** To prove premeditated first-degree murder, the state must prove to the jurors beyond a reasonable doubt the defendant actually reflected; to the extent the statute provides that "proof of actual reflection is not required," that only means proof by direct evidence is not required, thus the state may prove reflection by circumstantial evidence, such as the passage of time.

*State v. Boyston,* 231 Ariz. 539, 298 P.3d 887, ¶¶ 59–64 (2013) (court held defendant's statement, "You all going to regret this," his carrying guns to crime scene, his jogging directly to M's apartment after shooting another person, and his statement, "It's time to take care of everyone who did me wrong" was sufficient to show defendant had decided to kill M. and T. and reflected on that decision).

*State v. Ovante,* 231 Ariz. 180, 291 P.3d 974, ¶¶ 11–17 (2013) (for plea of guilty of first-degree murder, trial court must find premeditation; defendant acknowledged he gave "some thought" to killing victim before he pulled trigger; as long as record showed premeditation; it did not matter whether defendant understood difference between first- and second-degree murder).

**.060** A defendant may be guilty of premeditated murder as an accomplice if the defendant intended to facilitate or aid in committing the murder.

*State v. Hernandez,* 232 Ariz. 313, 305 P.3d 378, ¶¶ 50–53 (2013) (O. and P. entered house while J. and M. stayed in car; defendant came out of house and forced J. and M. into house at gunpoint; victim saw man in ski mask holding gun and could hear O. and P. in another room; defendant bound J. and M.; M. heard several shots and could no longer hear O. or P.; defendant and masked man entered room, after which J. and M. were shot; O., P., and J. were killed, but M. survived; because defendant knew victims, planned invasion of their home, did not attempt to conceal his identity, and because premeditation may be proved by circumstantial evidence, jurors could have found defendant acted as accomplice, intending to aid in committing murders).

**13–1105 First-degree murder—Felony murder.**

**.020** Arizona's felony murder statute is not unconstitutional because it allows a participating felon to be convicted of murder when that person did not participate in the killing.

*State v. Brown,* 233 Ariz. 153, 310 P.3d 29, ¶ 27 (Ct. App. 2013) (court noted Arizona Supreme Court had already rejected this argument, and it had no authority to overrule of disregard decisions of that court).

**13–1203(A)(2) Assault—Intentionally placing another in reasonable apprehension.**

**.010** In order to be guilty of assault under this subsection, the defendant must intentionally place another in reasonable apprehension of imminent physical injury.

*State v. James,* 231 Ariz. 490, 297 P.3d 182, ¶¶ 8–18 (Ct. App. 2013) (trial court instructed jurors defendant must intentionally, knowingly, or recklessly place victim in reasonable apprehension of imminent physical injury; court held giving that instruction was fundamental error).

**13–1204(A)(3) Aggravated assault—Disfigurement, loss, or impairment of organ or part.**

**.010** An assault is aggravated if the person commits the assault by means of force that causes temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part, or a fracture of any body part; whether the injury caused "substantial disfigurement" depends on the extent to which the injury is visually apparent and the degree to which the injury must be considered a minor one, thus "substantial disfigurement" does not include minor bruises, scratches, or lacerations.

*State v. Pena,* 233 Ariz. 112, 309 P.3d 936, ¶¶ 6–15 (Ct. App. 2013) (injury to hand was deep and bloody laceration covering victim's entire palm and exposing muscle tissue, thus injury caused temporary but substantial disfigurement; injury to abdomen was approximately 2 centimeters long, exposing some "fatty tissue," but paramedic characterized it as "superficial enough that it wasn't a major concern" and did not require bandaging, thus that injury did not cause temporary but substantial disfigurement).

**13–1204(B) Aggravated assault—Impeding breathing or circulation of blood.**

**.020** This statute proscribes one offense: intentionally or knowingly impeding the normal breathing or circulation of blood of another person, and specifies three ways of committing that offense: (1) by either intentionally, knowingly, or recklessly causing any physical injury to another person; (2) by intentionally placing another person in reasonable apprehension of imminent physical injury, or (3) by knowingly touching another person with intent to injure; because a defendant is not entitled to a unanimous verdict on the precise manner in

which the crime was committed, defendant was not entitled to have jurors determine unanimously whether defendant committed offense by (1), (2), or (3).

*State v. Delgado,* 232 Ariz. 182, 303 P.3d 76, ¶¶ 20–24 (Ct. App. 2013) (court rejected defendant's due process claim that jurors were not instructed they had to agree on which form of assault he committed).

**13–1204(B)(1)Aggravated assault—Impeding breathing or circulation of blood—Normal breathing or circulation.**

**.010** The requirement that the person not intentionally or knowingly impede the "normal" breathing or circulation of blood of another person does not make this statute unconstitutionally vague.

*State v. Delgado,* 232 Ariz. 182, 303 P.3d 76, ¶¶ 4–8 (Ct. App. 2013) (court states that fact that "normal" might not be same for all persons does not render statute unconstitutional because it provides adequate notice that person may not impede that specific other person's normal breathing or circulation of blood).

**13–1304(A) Kidnapping—Elements.**

**.060** The kidnapping is complete when a defendant knowingly restrains the victim and has one or more of the requisite intents, thus neither movement of the victim, a differing degree of restraint, or a change in intent will constitute an additional act of kidnapping.

*State v. Braidick,* 231 Ariz. 357, 295 P.3d 455, ¶¶ 6–12 (Ct. App. 2013) (defendant was charged with Count 1, kidnapping with intent to inflict death, physical injury, or sexual offense, and Count 2, kidnapping with intent to place victim in reasonable apprehension of imminent physical injury; jurors found defendant guilty of each count as lesser-included offense of kidnapping (unlawful imprisonment); court held these two counts were actually only one offense, and thus vacated one count as violation of double jeopardy).

**13–1501(3) Definitions (criminal trespass and burglary)—Entry.**

**.010** "Entry" means the intrusion of any part of any part of any instrument or any part of a person's body inside the external boundaries of a structure or unit of real property, and "external boundary" is whatever forms the structure's outer boundary (a door, window, or wall, for example) but need not go further to have entered the structure.

*State v. Kindred,* 232 Ariz. 611, 307 P.3d 1038, ¶¶ 4–9 (Ct. App. 2013) (evidence of pry bar wedged between apartment's door and door jam was sufficient to support conviction for burglary).

**13–1507 Burglary in the second degree.**

**.010** A person commits burglary when the person *either* enters *or* remains in a structure with the *intent* to commit a felony or a theft, thus a person commits burglary when that person forms the requisite intent before entering, or forms the requisite intent after entering, and then remains.

*State v. Kindred,* 232 Ariz. 611, 307 P.3d 1038, ¶¶ 10–11 (Ct. App. 2013) (police found pry bar wedged between apartment's door and door jam; defendant contended there was no evidence of defendants' intent once they gained entry because apartment was visibly vacant with nothing to steal except large appliances, which would have required tools and equipment defendants did not have; defendant admitted, however, there were items in apartment that could have been stolen, and fact that defendants may have been ill-equipped to steal those items does not require jurors to conclude they did not intend to do so; evidence thus was sufficient to support conviction for burglary).

**13–1802(A)(3) Theft—Elements—Obtaining services or property by material misrepresentation.**

**.320** The state must prove the defendant obtained services or property of another by means of material misrepresentation, there is no requirement that the victim whose property was taken must be the party to whom the misrepresentation was directly made, thus it is sufficient that the material misrepresentation, to the victim or to a third party, plays an instrumental role in the wrongful taking of property or services.

*State v. Borquez,* 232 Ariz. 484, 307 P.3d 51, ¶¶ 2–18 (Ct. App. 2013) (mother of defendant's then-fianceé noticed her credit card was missing; later mother found two receipts from Pima County Superior Court totaling $5,195 and showing payment to court was made on defendant's behalf; investigation showed defendant's father had used credit card to pay defendant's court fees; defendant argued his father was the one who spoke to court personnel, and that credit card company was victim who suffered loss, and no one had spoken to credit card company; court held evidence was sufficient to sustain conviction).

**13–1904 Armed robbery.**

**.010** In order to be guilty of armed robbery, the defendant must either threaten to use or use force against a person with the intent either to coerce surrender of property or to prevent resistance to such person's taking or retaining property, and the defendant is armed with a deadly weapon or a simulated deadly weapon; the statute does not require that the defendant use or threaten to use the weapon.

*State v. Snider,* 233 Ariz. 243, 311 P.3d 656, ¶¶ 4–10 (Ct. App. 2013) (defendant was charged with armed robbery for robbing banks; evidence showed defendant threatened victims in order to get money; he showed victims he was armed with gun, but no evidence he threatened victims with gun; court held evidence was sufficient to support convictions for armed robbery; court rejected defendant's argument that statute required that force must be directed at victim, and noted instead that statute only requires threat "against any person").

**13–2501(1) Escape and related offenses; Definitions—Contraband.**

**.010** Contraband means any article whose use or possession would endanger the safety, security, or preservation of order in a correctional facility, including but not limited to the articles that are listed by name.

*State v. Hines,* 232 Ariz. 607, 307 P.3d 1034, ¶¶ 11–14 (Ct. App. 2013) (court rejected defendant's argument that use of disjunctive "or" to define contraband described separate crimes with different elements; court held promoting prison contraband as Class 5 felony under A.R.S. § 13–2505(F) was lesser-included offense of promoting prison contraband as Class 2 felony).

**13–2503(A)(2) Escape in the second degree—What is escape.**

**.020** A probationer's unauthorized removal of an electronic monitoring device, required as a condition of probation, does not constitute in violation of this section.

*State v. Kendrick,* 232 Ariz. 428, 306 P.3d 85, ¶¶ 2–13 (Ct. App. 2013) (probation officer filed petition to revoke probation alleging defendant had interfered with electronic monitoring device, absconded, and failed to comply with GPS monitoring).

**13–2505 Promoting prison contraband; definitions.**

**.010** All the items listed by name in A.R.S. § 13–2501(1) are articles "whose use or possession would endanger the safety, security, or preservation of order in a correctional facility," thus promoting prison contraband is one offense with different ways of committing it, rather that several separate offenses with different elements.

*State v. Hines,* 232 Ariz. 607, 307 P.3d 1034, ¶¶ 11–15 (Ct. App. 2013) (court rejected defendant's argument that use of disjunctive "or" to define contraband described separate crimes with different elements; court thus held promoting prison contraband as Class 5 felony under A.R.S. § 13–2505(F) was lesser-included offense of promoting prison contraband as Class 2 felony).

**13–3010(B) Ex parte order for interception—Application under oath.**

**.010** The application must be under oath and include certain information.

*State v. Salazar,* 231 Ariz. 535, 298 P.3d 224, ¶¶ 6–12 (Ct. App. 2013) (because application was not under oath and did not include required information, trial court properly granted defendants' motion to suppress).

**13–3102(A)(4) Misconduct involving weapons—Prohibited acts—Possessing deadly weapon or prohibited weapon by prohibited possessor.**

**.030** A defendant may be found guilty of this offense when an accomplice maintains exclusive possession of the firearm during another offense if there is sufficient evidence to show (1) the defendant had actual knowledge of the firearm during the commission of that other offense, and (2) the possession, use, or threatened use of the firearm is essential to the commission of that other offense.

*State v. Gonsalves,* 231 Ariz. 521, 297 P.3d 927, ¶¶ 8–19 (Ct. App. 2013) (defendant and his codefendant knew victim had money and followed him from parking lot; defendant was not armed, but codefendant had handgun; while codefendant held victim at gunpoint, defendant punched victim in face and stole $600; court concluded evidence was sufficient for jurors to find defendant knew codefendant possessed handgun during robbery, and further held handgun was essential to robbery, thus jurors properly found defendant guilty of misconduct involving weapons, even though he never possessed handgun).

**13–3102(K) Misconduct involving weapons—Temporary custody of weapons.**

**.010** 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.

*State v. Serna,* 232 Ariz. 515, 307 P.3d 82, ¶ 24 & n.9 (Ct. App. 2013) (at 10:00 p.m., officers saw defendant and woman in area described as "high crime" and "gang neighborhood" where "violence takes place" and they receive "numerous drug complaints"; when defendant walked away, officer called to him, and he walked toward officers; as officer talked to defendant, he observed bulge in defendant's waistband and asked him if he had any firearms or illegal drugs; defendant said yes, so officer told defendant to put his hands on his head and removed gun from holster on defendant's waistband; court held, because officer approached defendant at night in gang-ridden, dangerous, and violent area, and noticed bulge in defendant's pants, officers were permitted to conduct pat-down search, even though contact was consensual, and were permitted to take custody of gun).

**13–3405(A) Possession, use, production, sale, or transportation of marijuana— Prohibited acts.**

**.110** In a "reverse sting" operation when undercover officers sell drugs or other contraband to an unsuspecting purchaser, a purchaser who handles and pays for the items, but would not have been allowed to take the items away may be said to have "possessed" the items for sale.

*State v. Ottar,* 232 Ariz. 97, 302 P.3d 622, ¶¶ 5–20 (2013) (undercover officer arranged to sell large quantity of marijuana to defendants; officer and defendants went to warehouse where marijuana was in bales; defendants touched, smelled, and inspected marijuana bales, and placed those they liked in separate piles and agreed to buy 375 pounds; defendants met with undercover officers at house where they paid $180,000 cash for intended purchase; defendants returned to warehouse where they repackaged marijuana using product to mask odor; officers arrested defendants before they left warehouse; court held (1) physical possession requires some exercise of dominion or control over property; (2) "control" requires person to take custody of item or manifest intent to do so; (3) defendant in reverse-sting operation does not possess drugs merely by touching or inspecting them before purchase is consummated; (4) possession is not rendered legally impossible merely because defendant does not leave scene with drugs and has little practical ability to do so; and (5) defendants' actions of segregating and arranging in separate piles portions they wanted to buy, repackaging those bundles (using product to mask odor), and paying for intended purchase was sufficient to demonstrate defendants' intent to exercise control over and possess marijuana; court thus erred in granting defendants' motion to dismiss possession for sale charge).

**13–3413(C) Forfeiture and disposition of drugs and evidence—Property subject to forfeiture—Drugs.**

**.010** Peyote, dangerous drugs, prescription-only drugs, marijuana, narcotic drugs, and plants from which such drugs may be derived that are seized in connection with any violation of Chapter 34 or that come into the possession of a law enforcement agency are subject to seizure and forfeiture.

*State v. Okun,* 231 Ariz. 462, 296 P.3d 998, ¶¶ 4–11 (Ct. App. 2013) (court held marijuana defendant possessed pursuant to California-issued card allowing possession of certain amount of marijuana was not subject to forfeiture).

**13–3415(E) Possession, manufacture, delivery and advertisement of drug paraphernalia—Factors to consider.**

**.010** In determining whether an object is drug paraphernalia, a court or other authority shall consider 14 listed factors in addition to all other logically relevant factors.

*State v. Doty,* 232 Ariz. 502, 307 P.3d 69, ¶¶ 5–13 (Ct. App. 2013) (because statute allows jurors to consider defendant's prior drug convictions in determining whether object is drug paraphernalia, trial court properly admitted evidence of defendant's 2004 conviction for possession of equipment or chemicals for manufacture of dangerous drugs).

**.020** Court or other authority includes jurors.

*State v. Doty,* 232 Ariz. 502, 307 P.3d 69, ¶ 11 (Ct. App. 2013) (court rejected defendant's argument that "court or other authority" did not include jurors).

**13–3553(A)(2) Sexual exploitation of a minor—After visual image is created.**

**.020** Subsection (A)(2) prohibits the distributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing, or exchanging any visual depiction in which a minor is engages in exploitive exhibition or other sexual conduct, and contains no requirement that the filming, photographing, developing, or duplicating of the visual depiction was in violation of a statute in the location where the filming, photographing, developing, or duplicating took place.

*State v. Dixon,* 231 Ariz. 319, 294 P.3d 157, ¶¶ 3–11 (Ct. App. 2013) (court rejected defendant's contention that state was required to prove an offense took place during creation of the depiction).

**13–3623(A) Child abuse—definitions.**

**.010** A person is guilty of this offense as a Class 2 felony if the person intentionally or knowingly causes injury to a child under circumstances likely to cause death or serious physical injury; intentionally or knowingly only applies to causing the injury and not to the circumstances likely to cause death or serious physical injury.

*State v. Payne,* 233 Ariz. 484, 314 P.3d 1239, ¶¶ 68–73 (2013) (court rejected defendant's argument that state had to prove defendant intended or knew circumstances were likely to cause death or serious physical injury).

**.010** To be guilty of this offense, a person intentionally or knowingly has to causes injury to a child under circumstances likely to cause death or serious physical injury; the person does not have to cause death or serious physical injury.

*State v. Payne,* 233 Ariz. 484, 314 P.3d 1239, ¶¶ 74–75 (2013) (court rejected defendant's argument that state had to prove victim's broken bones were serious physical injury).

**13–3883(A)(2) Arrest by a officer without warrant—Misdemeanor committed in officer's presence.**

**.010** An officer may arrest a person if the officer has probable cause to believe the person has committed a felony or misdemeanor in the officer's presence.

*State v. Moran,* 232 Ariz. 528, 307 P.3d 95, ¶¶ 8–11 (Ct. App. 2013) (during traffic stop, officer saw defendant had watery and bloodshot eyes, slurred speech, and odor of alcohol; defendant could not produce driver's license, and social security number he gave actually belonged to his wife; when asked for wife's social security number, defendant produced number that actually belonged to him; HGN test showed four of six cues; officer could not check fifth and sixth cues because defendant's eyes ceased to follow stimulus; court held this provided probable cause to arrest for DUI).

**13–4033(A)(2) Appeal by defendant—Grounds for appeal—Order after judgment.**

**.030** By pleading guilty, a defendant waives the right to have appellate review by means of an appeal of the final judgment or sentence, and waives appellate review by means of an appeal from an order after judgment, including a motion to vacate judgment under Rule 24.2 or a motion to modify sentence under Rule 24.3, if the ruling of the trial court did not change the judgment or the sentence and thus did not affect the substantial rights of the defendant; if the trial court enters an order after judgment that does change the judgment or the sentence and thereby affects the substantial rights of the defendant, the defendant has the right to appeal.

*Hoffman v. Chandler,* 231 Ariz. 362, 295 P.3d 939, ¶¶ 6–19 (2013) (defendant pled guilty pursuant to plea agreement that capped restitution at $53,643.45; 3 months after sentencing, trial court held restitution hearing and ordered $40,933.45 in restitution; court held this order was part of defendant's sentence and not "order after judgment affecting the substantial rights of a party," and thus defendant could seek appellate review only by means of petition for post-conviction relief).

**13–4033(B) Appeal by defendant—No appeal from guilty plea or admission of violation of probation.**

**.010** The Arizona Constitution grants to a defendant the right to appellate review of a conviction; by pleading guilty, in a non-capital case, a defendant waives the right to have appellate review by means of a direct appeal, and instead may seek appellate review only by means of a petition for post-conviction relief, followed by a petition for review.

*State v. Ovante,* 231 Ariz. 180, 291 P.3d 974, ¶¶ 7–10 (2013) (because defendant pled guilty in capital case, he had right to appeal judgment and sentence).

**.040** By pleading guilty, a defendant waives the right to have appellate review by means of an appeal of the final judgment or sentence, and waives appellate review by means of an appeal from an order after judgment, including a motion to vacate judgment under Rule 24.2 or a motion to modify sentence under Rule 24.3, if the ruling of the trial court did not change the judgment or the sentence and thus did not affect the substantial rights of the defendant; if the trial court enters an order after judgment that does change the judgment or the sentence and thereby affects the substantial rights of the defendant, the defendant has the right to appeal.

*Hoffman v. Chandler,* 231 Ariz. 362, 295 P.3d 939, ¶¶ 6–19 (2013) (defendant pled guilty pursuant to plea agreement that capped restitution at $53,643.45; 3 months after sentencing, trial court held restitution hearing and ordered $40,933.45 in restitution; court held this order was part of defendant's sentence and not "order after judgment affecting the substantial rights of a party," and thus defendant could seek appellate review only by means of petition for post-conviction relief).

**13–4434 Victim's right to privacy.**

**.020** The victim has the right to refuse to give certain personal information.

*State ex rel. Montgomery v. Welty (Koontz),* 233 Ariz. 8, 308 P.3d 1159, ¶¶ 1–20 (Ct. App. 2013) (victim's date of birth is personal identifying information that is protected from disclosure by constitution, statute, and rule), *vac'd,* ___ Ariz ___, ___ P.3d ___ (Mar. 26, 2014).

**13–4517 Incompetent defendants; disposition.**

**.030** If the court has found the defendant is incompetent to stand trial and there is no substantial probability the defendant will regain competency within 21 months after the date of the original finding of incompetency and has dismissed the charges against the defendant without prejudice, the state is not precluded from refiling the charges against the defendant.

*Rider v. Garcia,* 233 Ariz. 314, 312 P.3d 113, ¶¶ 3–12 (Ct. App. 2013) (in 2010, defendant was charged with murder and aggravated assault; in Rule 11 proceedings, trial court found defendant incompetent and committed him to correctional health services; trial court found there was no substantial probability defendant would regain competency within 21 months, and so remanded him to behavioral health center for institution of civil commitment proceedings and dismissed charges without prejudice; defendant was committed to state hospital in March 2011; almost 2 years later, treating psychologist notified state defendant was going to be

discharged; county attorney arranged to have defendant arrested and taken to jail, and then re-indicted for previously dismissed charges; court noted there was no statute of limitations for murder and statute of limitations for aggravated assault had not yet run, so state had authority to re-indict defendant).

**28–101(2) Definitions—Alcohol concentration.**

**.010** "Alcohol concentration," if expressed as a percentage, means either the number of grams of alcohol per 100 milliliters of blood or the number of grams of alcohol per 210 liters of breath.

*State v. Cooperman,* 232 Ariz. 347, 306 P.3d 4, ¶¶ 7–16 (2013) (A.R.S. § 28–1381(A)(2) makes it unlawful to drive when having alcohol concentration of 0.08 or more, which means either blood or breath, thus testimony about breath-to-blood partition ratios was not relevant to charge under § 28–1381(A)(2)).

**28–721(A) Driving on right side of roadway—Right half of the roadway.**

**.010** On all roadways of sufficient width, a person shall drive a vehicle on the right half of the roadway.

*State v. Whitman,* 232 Ariz. 60, 301 P.3d 226, ¶ 34 (Ct. App. 2013) (officer testified roadway had room for vehicles to get by on each side, and because defendant was driving in middle of roadway, oncoming vehicle would not be able to get by defendant's vehicle; this showed defendant violated statute and thus gave officer sufficient grounds to stop defendant's vehicle).

**28–817(A) Bicycle equipment—Lights and reflectors.**

**.010** A bicycle used at nighttime shall have a lamp on the front that emits a white light visible from a distance of at least 500 feet to the front and a red reflector on the rear of a type approved by the department and visible from all distances from 50 feet to 300 feet to the rear when directly in front of lawful upper beams of head lamps on a motor vehicle, and may have a lamp that emits a red light visible from a distance of 500 feet to the rear in addition to the red reflector.

*State v. Baggett,* 232 Ariz. 424, 306 P.3d 81, ¶¶ 8–12 (Ct. App. 2013) (officers stopped defendant while he was riding his bicycle on sidewalk; defendant had flashlight duct-taped to bicycle, but it was not on; court rejected defendant's argument that statute applied only when person was riding bicycle on roadway and not on sidewalk, and held statute applied to all bicycles being operated at night, whether on roadway or sidewalk; court noted parties did not raise issue that Phoenix City Code prohibited vehicles (and thus bicycles) from driving on sidewalk).

**28–921(A) Applicability of equipment inspection requirements—Driving vehicle in unsafe condition.**

**.010** A person shall not drive a vehicle that is in an unsafe condition.

*State v. Becerra,* 231 Ariz. 200, 291 P.3d 994, ¶¶ 4–11 (Ct. App. 2013) (one taillight was not working on defendant's vehicle, so officer stopped vehicle; although this would not be violation of statute for taillights, officer testified he stopped vehicle because he believed vehicle's condition was unsafe in that another driver behind that vehicle might not be able to perceived accurately vehicle's position and could collide with it; court held this justified stop).

**28–925(A) Stop lamps—Motor vehicle.**

**.010** A motor vehicle shall be equipped with at least one tail lamp.

*State v. Becerra,* 231 Ariz. 200, 291 P.3d 994, ¶¶ 4–11 (Ct. App. 2013) (one taillight was not working on defendant's vehicle, so officer stopped vehicle; although this would not be violation of statute for taillights, officer testified he stopped vehicle because he believed vehicle's condition was unsafe in that another driver behind that vehicle might not be able to perceived accurately vehicle's position and could collide with it; court held this justified stop).

**28–982(A) Vehicle and equipment inspection; notice of repair or adjustment — Stop of unsafe vehicle.**

**.010** An officer may stop a vehicle any time the officer has reasonable cause to believe the vehicle is unsafe or is not equipped as required by law.

*State v. Becerra,* 231 Ariz. 200, 291 P.3d 994, ¶¶ 4–11 (Ct. App. 2013) (one taillight was not working on defendant's vehicle, so officer stopped vehicle; although this would not be violation of statute for taillights, officer testified he stopped vehicle because he believed vehicle's condition was unsafe in that another driver behind that vehicle might not be able to perceived accurately vehicle's position and could collide with it; court held this justified stop).

### 28–1321(B) Implied consent to blood, breath or urine test; suspension of license upon refusal; hearing; review of suspension order—Refusal to submit to test.

**.070** Arizona's Implied Consent Law requires the state to obtain a warrant before drawing a blood sample from a juvenile DUI suspect unless the juvenile voluntarily consents to a blood or breath test.

*State v. Butler (Tyler B.),* 232 Ariz. 84, 302 P.3d 609, ¶¶ 1, 10–21 (2013) (court held trial court must consider juvenile's age and parent's presence in determining under totality of circumstances whether consent was voluntary; court further held trial court did not abuse discretion in determining consent was not voluntary).

### 28–1381(A)(1) Driving or actual physical control—Person under the influence of intoxicating liquor.

**.020** This statute gives a person of common intelligence notice of what conduct is prohibited, and therefore is not unconstitutionally vague.

*State v. George,* 233 Ariz. 400, 313 P.3d 543, ¶¶ 6–15 (Ct. App. 2013) (court rejected defendant's contention statute was vague because it did not give her notice that driving while impaired from Ambien would violate statute; court noted whether particular drug may cause driver to be impaired is driver's responsibility).

**.040** In a (A)(1) charge, either party may introduce evidence of the defendant's BAC.

*State v. Cooperman,* 232 Ariz. 347, 306 P.3d 4, ¶¶ 7–16 (2013) (court rejected state's argument that statutory presumptions on being under influence arose only when expressly invoked by state, and noted in footnote either party may introduce evidence of defendant's alcohol concentration, thereby triggering statutory presumptions).

**.060** Once a party introduces evidence of the defendant's breath BAC in a (A)(1) charge, testimony about breath-to-blood partition ratios is relevant, and that includes partition ratios in the general population, and not just the defendant's partition ratio at the time of the breath test.

*State v. Cooperman,* 232 Ariz. 347, 306 P.3d 4, ¶¶ 7–16 (2013) (court rejected state's argument that partition ratio evidence is limited to defendant's partition ratio at time of breath test).

**.070** If a party introduces evidence of a BAC reading taken from a breathalyzer, testimony of how breathing patterns, breath and body temperature, and hematocrit (device for separating cells and other particulate elements of blood from plasma) could affect the BAC reading is relevant.

*State v. Cooperman,* 232 Ariz. 347, 306 P.3d 4, ¶¶ 7–16 (2013) (court rejected state's argument that such evidence is inadmissible unless defendant can offer evidence of own physiology at time of breath test).

### 28–1381(A)(2) Driving or actual physical control—0.08 percent or more by weight of alcohol.

**.060** Although it is the amount of alcohol in the blood that causes impairment, because A.R.S. § 28–1381(A)(2) makes it unlawful to drive when having an alcohol concentration of 0.08 or more, which means either blood or breath, testimony about breath-to-blood partition ratios is not relevant to a charge under § 28–1381(A)(2).

*State v. Cooperman,* 232 Ariz. 347, 306 P.3d 4, ¶ 10 (2013) (court reaffirms this holding from *Guthrie v. Jones*).

**28–1381(A)(3) Driving or actual physical control—Any illicit drug in the person's body.**

**.060** This statute prohibits driving with either Hydroxy-THC or Carboxy-THC in the person's body.

*State v. Harris (Shilgevorkyan),* 232 Ariz. 76, 301 P.3d 580, ¶¶ 9–15 (Ct. App. 2013) (evidence showed defendant had Carboxy-THC in body; court rejected defendant's contention that prohibition against driving with any drug or *its metabolite* in person's body referred to only one metabolite, which defendant contended was Hydroxy-THC only) **(review granted).**

**.080** Driving with a prohibited drug in the body is a lesser-included offense of aggravated driving with a prohibited drug in the body.

*State v. Becerra,* 231 Ariz. 200, 291 P.3d 994, ¶¶ 19–20 (Ct. App. 2013) (court had vacated defendant's convictions for aggravated driving with prohibited drug in body and driving with prohibited drug in body because defendant did not make a valid waiver of jury trial; court stated defendant could not be convicted of both counts ).

**28–1381(G) Persons under the influence of intoxicating liquor or drugs— Presumptions.**

**.010** In a (A)(1) charge, either party may introduce evidence of the defendant's BAC.

*State v. Cooperman,* 232 Ariz. 347, 306 P.3d 4, ¶¶ 7–16 (2013) (court rejected state's argument that statutory presumptions on being under influence arose only when expressly invoked by state, and noted in footnote either party may introduce evidence of defendant's alcohol concentration, thereby triggering statutory presumptions).

**28–1382(I). Driving or actual physical control while under the extreme influence of intoxicating liquor; trial by jury; sentencing—Ignition interlock device.**

**.010** This subsection became effective December 31, 2011, and did not apply to any defendant who committed the DUI prior to that date.

*State ex rel. Montgomery v. Harris (Maxwell),* 232 Ariz. 34, 301 P.3d 200, ¶¶ 1–10 (Ct. App. 2013) (defendant committed his offense in January 2011, thus this provision did not apply to him ).

**28–1383(A) Aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs.**

**.020** Increasing range for previous DUI conviction from 60 to 84 months does not violate *ex post facto* clause.

*State v. Stefanovich,* 232 Ariz. 154, 302 P.3d 679, ¶¶ 6–8 (Ct. App. 2013) (court noted change did not change punishment for prior DUI).

**.040** Driving with a prohibited drug in the body is a lesser-included offense of aggravated driving with a prohibited drug in the body.

*State v. Becerra,* 231 Ariz. 200, 291 P.3d 994, ¶¶ 19–20 (Ct. App. 2013) (court had vacated defendant's convictions for aggravated driving with prohibited drug in body and driving with prohibited drug in body because defendant did not make a valid waiver of jury trial; court stated defendant could not be convicted of both counts ).

**28–1383(A)(2) Aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs—third or subsequent DUI within 84 months.**

**.020** This section applies if the person has previously been convicted of any acts in another jurisdiction that, if committed in this state, would be a violation of § 28–1381, § 28–1382, or § 28–1383.

*State v. Moran,* 232 Ariz. 528, 307 P.3d 95, ¶¶ 12–22 (Ct. App. 2013) (because Nevada statute had different time limits and different definition for "actual physical control," Nevada conviction would not necessarily have been conviction in Arizona).

*State v. Colvin,* 231 Ariz. 269, 293 P.3d 545, ¶¶ 8–12 (Ct. App. 2013) (court concluded defendant's three California convictions for DUI would have been violations of § 28–1381(A)(1) and (A)(2)).

**28–1383(B) Aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs—Determination of 84 month period.**

**.010** In determining whether the defendant has committed the third offense within 84 months of the prior DUI offenses, any time the defendant spent incarcerated in any federal, state, county, or city jail or correctional facility, and any time the defendant is found to be on absconder status, is excluded.

*State v. Cooney,* 233 Ariz. 335, 312 P.3d 134, ¶¶ 5–9 (Ct. App. 2013) (because any time incarcerated is excluded from 84 months, evidence of time defendant spent incarcerated is admissible for jurors to consider in determining whether defendant committed present offense within 84 months).

**28–3473(A) Driving Violations—Driving on a suspended license.**

**.010** The elements of driving on a suspended license are (1) driving a motor vehicle, (2) on a public highway, (3) while the privilege to drive has been suspended, revoked, canceled, or refused, and to commit this offense, the person must either know or should have known the privilege to drive has been suspended, revoked, canceled, or refused.

*State v. Yazzie,* 232 Ariz. 615, 307 P.3d 1042, ¶¶ 5–10 (Ct. App. 2013) (court held trial court erred in not instructing jurors defendant must either have known or should have known his privilege to drive had been suspended, revoked, canceled, or refused).

March 26, 2014

## ARTICLE II. PRELIMINARY PROCEEDINGS.

### RULE 4. INITIAL APPEARANCE.

### Rule 4.1 Procedure upon arrest.

**4.1.a.020** A person must be taken before a magistrate without unnecessary delay after arrest, and a delay caused by providing the person with medical treatment will be considered necessary.

*State v. Brown,* 233 Ariz. 153, 310 P.3d 29, ¶¶ 15–18 (Ct. App. 2013) (defendant was taken to hospital after being shot in chest during home invasion and was released approximately week later, defendant was given initial appearance same day as he was released from hospital; because defendant received initial appearance within 24 hours of being released from hospital, court held delay was neither unnecessary nor unlawful).

## ARTICLE III. RIGHTS OF PARTIES.

### RULE 6. ATTORNEYS, APPOINTMENT OF COUNSEL.

### Rule 6.1(a) Rights to counsel; waiver of rights to counsel—Right to be represented by counsel.

**6.1.a.040** Although this Rule states a defendant has the right to consult with an attorney as soon as feasible after a defendant has been taken into custody, a suspect must clearly invoke that right for it to attach.

*State v. Brown,* 233 Ariz. 153, 310 P.3d 29, ¶¶ 13–14 (Ct. App. 2013) (because defendant did not invoke his right to counsel under this rule, he waived that right).

### Rule 6.1(b) Rights to counsel; waiver of rights to counsel—Right to appointed counsel.

**6.1.b.010** The Sixth Amendment does not give the defendant the right to select a particular appointed attorney and does not guarantee a meaningful relationship between the defendant and the attorney.

*State v. Hernandez,* 232 Ariz. 313, 305 P.3d 378, ¶¶ 12–31 (2013) (defendant alleged counsel had only visited him at jail four times in more than 2 years and had never spoken to him about case; court characterized defendant's complaints as disagreements over trial strategy).

**6.1.b.020** "An indigent defendant is not, however, entitled to counsel of choice, or to a meaningful relationship with his or her attorney."

*State v. Hernandez,* 232 Ariz. 313, 305 P.3d 378, ¶ 12 (2013) (quotes language).

**6.1.b.050** When a defendant makes specific factual allegations that raise a colorable claim that the defendant has an irreconcilable conflict with appointed counsel, the trial court at least must consider and decide that allegation.

*State v. Hernandez,* 232 Ariz. 313, 305 P.3d 378, ¶¶ 12–31 (2013) (defendant alleged counsel had only visited him at jail four times in more than 2 years and had never spoken to him about case; court held allegations were sufficiently specific to warrant inquiry, but held trial court conducted an adequate inquiry).

**6.1.b.060** In order for the trial court to exercise proper discretion in determining whether to substitute counsel, the trial court should consider several factors, including the following: (1) whether new counsel would be confronted with the same conflict; (2) the timing of the defendant's request; (3) the inconvenience to witnesses; (4) the time period already elapsed between the alleged offense and trial; (5) the proclivity of the defendant to change counsel; (6) the quality of counsel; (7) whether an irreconcilable conflict exists between counsel and the accused; (8) the reasons for the defendant's request; and (9) the disruption and delay expected in the proceedings if the request were to be granted.

*State v. Hernandez,* 232 Ariz. 313, 305 P.3d 378, ¶¶ 32–36 (2013) (defendant alleged that counsel had only visited him at jail four times in more than 2 years and had never spoken to him about case; court held that,

although trial court did not explicitly refer to those factors, record showed trial court did consider them it making ruling and sufficiently inquired into basis for defendant's requests, and thus did not abuse discretion in denying request for new counsel).

## RULE 7. RELEASE.

### Rule 7.6(c)(1) Transfer and disposition of bond—Forfeiture procedure—Notice of hearing.

**7.6.c.1.020** If it appears a defendant has violated a release condition and the trial court is contemplating issuing an arrest warrant, the trial court does not have to give prior notice to the surety that it has issued an arrest warrant before it may forfeit the bond; dismissal of forfeiture actions is required only if bonding company can show prejudice that could not otherwise be remedied.

*State v. Sun Surity Ins. Co.,* 232 Ariz. 79, 301 P.3d 583, ¶¶ 2–10 (Ct. App. 2013) (defendant was indicted for felony charges in 10/11; bonding company posted $3,000 bond; defendant failed to attend pre-trial hearing 3/20/12, so trial court issued warrant for defendant's arrest, but did not notify bonding company of defendant's non-appearance or arrest warrant; on 4/06/12, sheriff arrested defendant; trial court granted bonding company's motion for exoneration of bond).

**7.6.c.1.040** If a defendant fails to appear, the trial court may order forfeiture of the bond, but is not required to do so.

*State v. Sun Surity Ins. Co.,* 232 Ariz. 79, 301 P.3d 583, ¶ 3 (Ct. App. 2013) (defendant was indicted for felony charges in 10/11; bonding company posted $3,000 bond; defendant failed to attend pre-trial hearing 3/20/12, so trial court issued warrant for defendant's arrest, but did not notify bonding company of defendant's non-appearance or arrest warrant; on 4/06/12, sheriff arrested defendant; trial court granted bonding company's motion for exoneration of bond).

## RULE 9. PRESENCE OF DEFENDANT, WITNESSES AND SPECTATORS.

### Rule 9.1 Defendant's waiver of his right to be present.

**9.1.010** A defendant may waive the right to be present at any proceeding by voluntarily absenting himself or herself from the proceeding.

*State v. Fitzgerald,* 232 Ariz. 208, 303 P.3d 519, ¶¶ 23–36 (2013) (during penalty phase, trial court suspended proceedings because of defendant's disruptive behavior and ultimately granted mistrial; trial court ordered Rule 11 proceedings, and resumed proceedings after finding defendant had been restored to competency; during second penalty phase, defendant asked to be absent because he was not sure he could control his behavior during presentation of victim impact statements; court found defendant's waiver of his presence was voluntary, and because of Rule 11 proceedings and restoration to competency, rejected defendant's contention that his mental condition made his request involuntary).

*State v. Rose,* 231 Ariz. 500, 297 P.3d 906, ¶¶ 9–10 (2013) (defendant through counsel waived his presence; when he returned, defendant made no objection and presented no exceptional circumstances that would render counsel's waiver ineffective; court held there was no fundamental error in defendant's absence those days).

## RULE 10. CHANGE OF JUDGE OR PLACE OF TRIAL.

### Rule 10.3(b) Change of place of trial—Prejudicial pretrial publicity.

**10.3.b.020** If a party is unable to show that the extent of the pre-trial publicity created a presumption of prejudice, the party is entitled to a change of venue only if the party is able to show that the publicity had such an actual effect on the prospective jurors that there is a reasonable probability the party will be deprived of a fair trial; to find actual prejudice, jurors must have formed preconceived notions of guilt they were unable to set aside.

*State v. Payne,* 233 Ariz. 484, 314 P.3d 1239, ¶¶ 28–30 (2013) (although media coverage was heavy, most coverage was more than year before trial, contained facts later substantiated by evidence at trial, and repeated basic description of crime and mirrored indictment allegations; defendant failed to show presumed prejudice).

## RULE 11. INCOMPETENCY AND MENTAL EXAMINATIONS.

### Rule 11.6(e) Subsequent hearings—Dismissal of charges.

**11.6.e.030** If the court has found the defendant is incompetent to stand trial and there is no substantial probability the defendant will regain competency within 21 months after the date of the original finding of incompetency and has dismissed the charges against the defendant without prejudice, the state is not precluded from refiling the charges against the defendant.

*Rider v. Garcia,* 233 Ariz. 314, 312 P.3d 113, ¶¶ 3–12 (Ct. App. 2013) (in 2010, defendant was charged with murder and aggravated assault; in Rule 11 proceedings, trial court found defendant incompetent and committed him to correctional health services; trial court found there was no substantial probability defendant would regain competency within 21 months, and so remanded him to behavioral health center for institution of civil commitment proceedings and dismissed charges without prejudice; defendant was committed to state hospital in March 2011; almost 2 years later, treating psychologist notified state defendant was going to be discharged; county attorney arranged to have defendant arrested and taken to jail, and then re-indicted him for previously dismissed charges; court noted there was no statute of limitations for murder and statute of limitations for aggravated assault had not yet run, so state had authority to re-indict defendant).

# ARTICLE IV. PRETRIAL PROCEDURES.

## RULE 13. INDICTMENT AND INFORMATION.

### Rule 13.2(c) Nature and contents—Notice and necessarily included offenses.

**13.2.c.010** The specification of an offense in the charging document constitutes a charge of that offense and all necessarily included offenses.

*State v. Hines,* 232 Ariz. 607, 307 P.3d 1034, ¶¶ 11–15 (Ct. App. 2013) (court rejected defendant's argument that use of disjunctive "or" in A.R.S. § 13–2501(1) to define contraband described separate crimes with different elements, and instead held all the items listed by name are articles "whose use or possession would endanger the safety, security, or preservation of order in a correctional facility," thus promoting prison contraband is one offense with different ways of committing it, rather that several separate offenses with different elements; court therefore held promoting prison contraband as Class 5 felony under A.R.S. § 13–2505(F) was lesser-included offense of promoting prison contraband as Class 2 felony).

### Rule 13.3(a) Joinder—Offenses.

**13.3.a.010** An indictment or information is multiplicative (multiplicitous) if it charges a single offense in multiple counts; an indictment or information is duplicative (duplicitous) if it charges multiple offenses in a single count.

*State v. Valentini,* 231 Ariz. 579, 299 P.3d 751, ¶ 6 (Ct. App. 2013) (court held second-degree murder is only one crime regardless whether defendant commits it intentionally, knowingly, or recklessly, thus charging that defendant killed victim while acting either intentionally or knowingly or recklessly was not duplicative (duplicitous)).

**13.3.a.015** A duplicative (duplicitous) indictment or information charges two or more distinct and separate offenses in a single count, while a duplicative (duplicitous) charge exists when the text of the indictment or information refers to only one criminal act, but the state introduces multiple alleged criminal acts to prove the charge.

*State v. Delgado,* 232 Ariz. 182, 303 P.3d 76, ¶¶ 20–24 (Ct. App. 2013) (defendant was charged with violating A.R.S. § 13–1204(B), which prohibits a person from intentionally or knowingly impeding the normal breathing or circulation of blood of another person by either (1) intentionally, knowingly, or recklessly causing any physical injury to another person, or (2) intentionally placing another person in reasonable apprehension of imminent physical injury, or (3) by knowingly touching another person with intent to injure; court held this was one offense with three ways of committing it, and because defendant was not entitled to unanimous

verdict on the precise manner in which he committed crime , information did not allege duplicative (duplicitous) charge).

**Rule 13.3(a)(3) Joinder of offenses—Common scheme or plan.**

**13.3.a.310** A common scheme or plan is narrowly construed, and must be a particular plan of which the charged crime is a part.

*State v. Miller,* 234 Ariz. 31, 316 P.3d 1219, ¶¶ 16–18 (2013) (defendant was charged with four counts of solicitation of murder for trying to get four different persons to kill victims, and was charged with two counts of murder for killing victims himself; court held solicitation of murder of victims and defendant's actual killing of victims himself was part of common scheme or plan).

**Rule 13.4(a) Severance—In general.**

**13.4.a.020** A defendant is entitled to a severance under this subsection when it is necessary to promote a fair determination of the defendant's guilt or innocence.

*State v. Vasquez,* 233 Ariz. 302, 311 P.3d 1115, ¶¶ 9–15 (Ct. App. 2013) (defendant's brother (codefendant) granted interview to television station to "clear everything out," and therefore acknowledged testimonial intent and that he would reasonably expect statement to be used prosecutorially; because statement was testimonial, its admission violated defendant's right of confrontation, thus trial court should have granted defendant's motion to sever).

**Rule 13.5(b) Amendment of charges; defects in the charging document—Altering the charges; amendment to conform to the evidence.**

**13.5.b.030** The state may move to amend the charging document as long as the amendment does not change the nature of the offense or does not prejudice the defendant.

*State v. Buccheri-Bianca,* 233 Ariz. 324, 312 P.3d 123, ¶¶ 16–25 (Ct. App. 2013) (after victim testified, amending charging document to allege acts of molestation took place in living room rather than in bedroom and kitchen did not change nature of charges or prejudice defendant).

**Rule 13.5(c) Amendment of charges; defects in the charging document—Amendments To Conform to Capital Sentencing Allegations; Challenges to Capital Sentencing Allegations.**

**13.5.c.010** Rule 13.5(c) permits a defendant in a capital murder case to request that the trial court make a finding whether there is probable cause to believe that an aggravating circumstance exists if there has not already been a probable cause determination for aggravating circumstances.

*Sanchez v. Ainley,* 233 Ariz. 14, 308 P.3d 1165, ¶¶ 7–20 (Ct. App. 2013) (because grand jurors had already returned True Bill on aggravating circumstances, trial court correctly refused to conduct Rule 13.5(c)/*Chronis* hearing).

**RULE 15. DISCOVERY.**

**Rule 15.1(g) Disclosure by state—Disclosure by order of the court.**

**15.1.g.010** Before a trial court may order disclosure, a defendant must show a "substantial need" for the requested information, and that the defendant "is unable without undue hardship to obtain the substantial equivalent by other means."

*State v. Benson,* 232 Ariz. 452, 307 P.3d 19, ¶¶ 21–25 (2013) (defendant's expert testified he needed partial-match information from AzDPS offender database to test whether produce rule accurately predicts number of matches; defendant thus contended trial court violated his right to due process and fair trial by denying his motion to require state to produce partially matching DNA profiles within AzDPS database; because (1) state's expert testified it would be inappropriate to use information from AzDPS database to challenge accuracy of product rule because database profiles were not sufficiently random, (2) defendant's expert's model was novel,

and (3) other information was available for his tests, trial court did not abuse discretion in denying defendant's motion).

**Rule 15.2(g) Disclosure by defendant—Disclosure by order of the court.**

**15.2.g.010** This rule requires disclosure only upon a showing that the state could not obtain the material without undue hardship, it does not require disclosure when it would be merely more convenient for the state to obtain the material in this manner.

*Wells v. Fell,* 231 Ariz. 525, 297 P.3d 931, ¶¶ 2–17 (Ct. App. 2013) (defendant was charged with assaulting police office; unbeknownst to prosecutor, defendant's attorney interviewed some police-officer witnesses; court rejected defendant's contention that he was not required to disclose interview statements because he intended to use them for impeachment only; court held statements were subject to disclosure if state could show substantial need and undue hardship).

**RULE 16. PRETRIAL MOTION PRACTICE; OMNIBUS HEARING.**

**Rule 16.1(b) General provisions—Making of motion before trial.**

**16.1.b.030** The trial court has discretion to extend the time for filing motions and, implicitly, to hear untimely motions.

*State v. Colvin,* 231 Ariz. 269, 293 P.3d 545, ¶¶ 6–7 (Ct. App. 2013) (court held trial court did not abuse discretion in considering state's Motion for Legal Determination of Prior DUI Conviction state filed day before trial).

**Rule 16.1(c) General provisions—Effect of failure to make motions in timely manner.**

**16.1.c.040** The trial court has discretion to extend the time for filing motions and, implicitly, to hear untimely motions.

*State v. Colvin,* 231 Ariz. 269, 293 P.3d 545, ¶¶ 6–7 (Ct. App. 2013) (court held trial court did not abuse discretion in considering state's Motion for Legal Determination of Prior DUI Conviction state filed day before trial).

**Rule 16.6(b) Dismissal of prosecution—On defendant's motion.**

**16.6.b.020** The trial court may dismiss the charges when the charging document is insufficient as a matter of law, which would happen if the defendant could admit all allegations charged in the charging document and still not have committed a crime.

*State v. Harris (Shilgevorkyan),* 232 Ariz. 76, 301 P.3d 580, ¶ 8 (Ct. App. 2013) (defendant charged with violating A.R.S. § 28–1381(A)(3), which prohibits driving with any drug or its metabolite in person's body; evidence showed defendant had Carboxy-THC in body; defendant contended statute only applied if person had Hydroxy-THC in body) (**pet. rev. grant.**).

**ARTICLE V. PLEAS OF GUILTY AND NO CONTEST.**

**RULE 17. PLEAS OF GUILTY AND NO CONTEST.**

**Rule 17. Pleas of guilty and no contest.**

**17.0.010** A plea of guilty waives all non-jurisdictional defects.

*State v. Barrera,* 232 Ariz. 497, 307 P.3d 64, ¶¶ 5–11 (Ct. App. 2013) (by entering guilty plea, defendant waived claim that imposition of enhanced sentence under A.R.S. § 13–705 was cruel and unusual punishment).

**17.0.015** A plea of guilty or no contest does not waive jurisdictional defects that involve subject matter or "territorial" jurisdiction.

*State v. John,* 233 Ariz. 57, 308 P.3d 1208, ¶¶ 3–10 (Ct. App. 2013) (defendant pled guilty to failure to register as sex offender pursuant to A.R.S. § 13–3821; court held Arizona did not have subject matter jurisdiction to prosecute member of Navajo Nation living on tribal land for failure to register as sex offender, thus even though defendant pled guilty, court addressed issue of validity of plea).

**17.0.015** A plea of guilty or no contest does waive jurisdictional defects that involve personal jurisdiction.

*State v. Banda,* 232 Ariz. 582, 307 P.3d 1009, ¶¶ 1–14 (Ct. App. 2013) (although statute of limitations implicates court's jurisdiction, it involves personal jurisdiction, not subject matter jurisdiction over type or location of offense; because statute of limitations is defense that is waived if not asserted, and because plea agreement provided defendant waived all defenses, defendant waived statute of limitations defense).

**Rule 17.1(e) Pleading by defendant—Waiver of appeal.**

**17.1.e.010** The Arizona Constitution grants to a defendant the right to appellate review of a conviction; by pleading guilty in a non-capital case, a defendant waives the right to have appellate review by means of a direct appeal, and instead may seek appellate review only by means of a petition for post-conviction relief, followed by a petition for review.

*State v. Ovante,* 231 Ariz. 180, 291 P.3d 974, ¶¶ 7–10 (2013) (because defendant pled guilty in capital case, he had right to appeal judgment and sentence).

**17.1.e.040** By pleading guilty, a defendant waives the right to have appellate review by means of an appeal of the final judgment or sentence, and waives appellate review by means of an appeal from an order after judgment, including a motion to vacate judgment under Rule 24.2 or a motion to modify sentence under Rule 24.3, if the ruling of the trial court did not change the judgment or the sentence and thus did not affect the substantial rights of the defendant; if the trial court enters an order after judgment that does change the judgment or the sentence and thereby affects the substantial rights of the defendant, the defendant has the right to appeal.

*Hoffman v. Chandler,* 231 Ariz. 362, 295 P.3d 939, ¶¶ 6–19 (2013) (defendant pled guilty pursuant to plea agreement that capped restitution at $53,643.45; 3 months after sentencing, trial court held restitution hearing and ordered $40,933.45 in restitution; court held this order was part of defendant's sentence and not "order after judgment affecting the substantial rights of a party," and thus defendant could seek appellate review only by means of petition for post-conviction relief).

**Rule 17.2 Duty of court to advise defendant of his rights and of the consequences of pleading guilty or no contest.**

**17.2.010** When a defendant submits the matter on the record, the trial court must determine that the defendant waives the following rights: (1) to a jury trial where the defendant is represented by counsel; (2) to have issue of guilt based on live testimony rather than on stipulated record; (3) to testify on own behalf; (4) to be confronted by adverse witnesses; and (5) to have compulsory process to obtain witnesses; and (6) trial court must advise the defendant of the range of sentence and any special conditions of sentencing.

*State v. Rose,* 231 Ariz. 500, 297 P.3d 906, ¶¶ 15–17 (2013) (defendant's attorney avowed, and defendant acknowledged, he and his attorney discussed charges and consequences of pleading guilty; court concluded trial court sufficiently advised defendant before he entered plea; court held trial court was not required to advise defendant of each specific element of his crimes absent unique circumstances not present here).

**17.2.050** When the defendant admits the existence of historical priors, if the trial court did not advise the defendant of the nature of the allegation and the plea agreement does not explain the nature of the allegation and the state's requirement to prove the existence of those priors, the plea will not be involuntary if the record shows defendant's attorney explained those matters to defendant.

*State v. Stefanovich,* 232 Ariz. 154, 302 P.3d 679, ¶¶ 10–15 (Ct. App. 2013) (although neither trial court nor plea agreement advised defendant that 10-year prison sentence was dependent on his having admitted two prior felony convictions nor that he was entitled to require state to prove fact of those prior convictions,

defendant signed addendums attached to signed plea agreement acknowledging those prior convictions and included avowal by defendant's attorney that he "explained" to defendant "ramifications of pleading with a prior felony conviction" and "of his constitutional rights," which meant defendant's attorney must have advised him of those matters).

**17.2.080** Trial court is required to call to the attention of the defendant every defense that might conceivably be suggested by the record.

*State v. Rose,* 231 Ariz. 500, 297 P.3d 906, ¶ 19 (2013) (court held trial court was not required to secure waiver of guilty except insane defense, and was not required to inquire into defendant's sanity at time of shooting).

**Rule 17.2(e) Duty of court to advise defendant of his rights and of the consequences of pleading guilty or no contest—Waiver of right to direct appeal upon plea of guilty.**

**17.2.e.010** The trial court must advise a defendant that, by pleading guilty or no contest, the defendant waives the right to have the matter reviewed by direct appeal.

*State v. Ovante,* 231 Ariz. 180, 291 P.3d 974, ¶¶ 7–10 (2013) (because defendant pled guilty in capital case, he had right to appeal judgment and sentence).

**Rule 17.3(b) Duty of court to determine voluntariness and intelligence of the plea—Voluntary nature of the plea.**

**17.3.b.030** A trial court may not accept a guilty plea from a defendant who is incompetent, but there must be something in the record to alert the trial court before the trial court is obligated to inquire into the defendant's competence on its own motion.

*State v. Rose,* 231 Ariz. 500, 297 P.3d 906, ¶¶ 24–36 (2013) (defendant contended he suffered from mental and emotional instability; court noted there was no indication trial court ever suspected defendant was incompetent; defendant initially waived his right to have mental health expert appointed; issue of competence did not arise until almost 2 years later when defense expert considered defendant "psychotic" but never considered him to be incompetent; court held no competency hearing was required).

**Rule 17.3(c) Duty of court to determine voluntariness and intelligence of the plea—Factual basis.**

**17.3.c.010** The trial court must find a factual basis for each element of the offense; the factual basis must show strong evidence of guilt and not necessarily proof beyond a reasonable doubt.

*State v. Rose,* 231 Ariz. 500, 297 P.3d 906, ¶¶ 20–23 (2013) (material contained in record showed defendant either intentionally or knowingly shot and killed victim and knew victim was police officer).

*State v. Ovante,* 231 Ariz. 180, 291 P.3d 974, ¶¶ 11–17 (2013) (for plea of guilty of first-degree murder, trial court must find premeditation; defendant acknowledged he gave "some thought" to killing victim before he pulled trigger; as long as record showed premeditation; it did not matter whether defendant understood difference between first- and second-degree murder).

**Rule 17.4(b) Plea negotiations and agreements—Plea agreements.**

**17.4.b.010** The terms of a plea agreement shall be reduced to writing and signed by the defendant, the defendant's counsel, if any, and the prosecutor, but no plea agreement is required if the defendant pleads guilty to the chargers.

*State v. Rose,* 231 Ariz. 500, 297 P.3d 906, ¶ 18 (2013) (on day trial was to begin, defendant pled guilty to all charges; defendant contended trial court failed to review a written plea agreement with him; court held "no plea agreement existed or was required").

**Rule 17.6 Admission of a prior conviction.**

**17.6.070** If a defendant fails to object to the failure of the trial court to follow Rule 17.6 procedure when the defendant admits or stipulates to the existence of a prior conviction, the court must review for fundamental error,

thus in order to obtain relief, the defendant must show prejudice, which requires a showing that the defendant would not have admitted or stipulated to the prior conviction if the trial court had followed the proper Rule 17.6 procedure, and defendant, on appeal, at the very least, must assert he or she would not have admitted the prior conviction if a proper colloquy had taken place.

*State v. Gonzales,* 233 Ariz. 455, 314 P.3d 582, ¶¶ 3–13 (Ct. App. 2013) (at sentencing hearing, after receipt of presentence report showing two prior felonies, defendant's attorney indicated defendant was willing to stipulate to two prior felony convictions; trial court did not go through Rule 17.6 procedure for admission to prior felony convictions, which court held was fundamental error, but held failure to object to contents of presentence report precluded any showing of prejudice, so there was no reason to vacate sentence or remand for further proceedings).

## ARTICLE VI. TRIAL.

### RULE 18. TRIAL BY JURY; WAIVER; SELECTION AND PREPARATION OF JURORS.

### Rule 18.1(b) Trial by jury—Waiver.

**18.1.b.010** For a defendant to waive the right to a jury trial, the court must advise the defendant of the right to a jury trial and ascertain that the waiver is knowing, voluntary, and intelligent, and obtain either a written waiver or a verbal waiver in open court on the record.

*State v. Becerra,* 231 Ariz. 200, 291 P.3d 994, ¶¶ 12–16 (Ct. App. 2013) (trial court asked whether defendant desired to waive his right to jury trial; defendant did not answer, but instead defendant's attorney said defendant would waive right; court held defendant must make statement on record, so it set aside conviction and remanded for new trial).

### Rule 18.5 Procedure for selecting a jury.

**18.5.010** The attorneys may stipulate to the dismissal of certain jurors, and a defendant is bound by his or her attorney's trial strategy in stipulating as long as the trial is not reduced to a mere "farce or sham."

*State v. Medina,* 232 Ariz. 391, 306 P.3d 48, ¶¶ 29–35 (2013) (defendant's attorney and prosecutor agreed to dismiss 60 jurors based on answers in questionnaire; defendant objected because he had not seen questionnaires and wanted to rehabilitate jurors; court held trial was not reduced to a farce or sham by this stipulation, thus defendant was bound by his attorney's decision).

### RULE 19. TRIAL.

### Rule 19.1(b) Conduct of trial—Proceedings when defendant charged with non-capital sentencing allegation required to be found by jurors.

**19.1.b.010** When the state has alleged a non-capital sentencing allegation required to be found by the jurors, the trial shall proceed initially as though the sentencing allegation was not alleged, and if the jurors return a verdict of guilty, the issue of the non-capital sentencing allegation shall then be tried, unless the defendant has admitted to the allegation.

*State v. Larin,* 233 Ariz. 202, 310 P.3d 990, ¶¶ 29–42 (Ct. App. 2013) (state charged defendant with first-degree burglary, armed robbery, aggravated robbery, and kidnapping, and alleged each was dangerous because defendant used deadly weapon; court held that, once jurors found defendant guilty of charges, trial court show have had jurors then determine whether offenses were dangerous).

### Rule 19.1(mmt) Conduct of trial—Motion for mistrial.

**19.1.mmt.010** The decision whether to grant a mistrial is within the sound discretion of the trial court, and that decision will not be reversed on appeal unless the conduct at trial is palpably improper and clearly injurious.

*State v. Arvallo,* 232 Ariz. 200, 303 P.3d 94, ¶¶ 5–6 (Ct. App. 2013) (court held trial court did not abuse discretion in denying defendant's motion for mistrial based on (1) question from jurors, (2) prosecutorial misconduct, and (3) failure to disclose *Brady* material).

**19.1.mmt.070** A defendant is entitled to a mistrial based on **juror** misconduct only if the defendant either shows actual prejudice or if prejudice may be fairly presumed from the facts.

*State v. Arvallo,* 232 Ariz. 200, 303 P.3d 94, ¶¶ 8–21 (Ct. App. 2013) (after witness testified about threats she had received, juror submitted question expressing concerns about juror safety, which contained words such as "us" and "our"; defendant contended this showed jurors had discussed this among themselves and were now prejudiced against defendant; court held trial court "thoughtfully conceived and implemented appropriate steps to address the juror's concern, and that Defendant was not prejudiced in the process").

**19.1.mmt.100** To determine whether the **prosecutor's** remarks or actions were so objectionable as to require a mistrial, the trial court must consider (1) whether the remarks or actions call to the attention of the jurors matters that they would not be justified in considering, and (2) the probability that the jurors, under the circumstances of the case, were influenced; further, the defendant must show the offending statements were so pronounced and persistent that they permeated the entire atmosphere of the trial and so infected the trial with unfairness that they made the resulting conviction a denial of due process.

*State v. Buccheri-Bianca,* 233 Ariz. 324, 312 P.3d 123, ¶¶ 12–15 (Ct. App. 2013) (because trial court properly concluded evidence that victim had applied for U-Visa status was not relevant for impeachment because it did not show motive to lie, prosecutor's argument that there was no evidence showing victim had motive to fabricate or exaggerate was reasonable inference drawn from evidence and thus was proper argument).

*State v. Larin,* 233 Ariz. 202, 310 P.3d 990, ¶¶ 21–28 (Ct. App. 2013) (because victim had stated he was not sure he could identify any of three men who robbed him, prosecutor did not disclose that witness would make in-court identification; right before witness was to testify, he told prosecutor he could identify defendant; on direct examination, prosecutor asked witness if any of three men who robbed him was present in court room, witness answered "yes"; defendant objected because of lack of disclosure, and trial court sustained objection, but denied motion for mistrial; because defendant admitted he was present in house when witness was robbed and claimed defense of mere presence, court held neither plaintiff's question and witness's answer affected verdict).

**19.1.mmt.110** A **prosecutor's** actions constitute reversible error only if (1) misconduct exists, and (2) a reasonable likelihood exists that the misconduct could have affected the jurors' verdict.

*State v. Arvallo,* 232 Ariz. 200, 303 P.3d 94, ¶¶ 22–30 (Ct. App. 2013) (prosecutor listed Detective J. as witness and further stated "[a]ny police officer listed above may be called as an expert witness with respect to an area within the officer's training and experience"; Det. J. testified at first trial, which ended in hung jury, and testified at second trial, giving additional testimony about firearms that he had not given at first trial; trial court denied defendant's motion for mistrial, finding Det. J.'s report gave defendant's attorney adequate notice of what his testimony might be; court held trial court did not abuse discretion in denying defendant's motion for mistrial).

*State v. Arvallo,* 232 Ariz. 200, 303 P.3d 94, ¶¶ 31–38 (Ct. App. 2013) (2 days after jurors returned verdict, prosecutor learned about ongoing labor dispute between criminalist and Phoenix Police Dept. crime lab; prosecutor promptly disclosed information to trial court and defendant's attorney; defendant's attorney moved for new trial, arguing this was *Brady* material that prosecutor failed to disclose; trial court found no purposeful delay in disclosure and information would not have affected jurors' verdict; court held trial court did not abuse discretion in denying defendant's motion).

**19.1.mmt.120** To determine whether a **witness's** remarks or actions were so objectionable as to require a mistrial, the trial court must consider (1) whether the testimony called to the attention of the jurors matters that

they would not be justified in considering, and (2) the probability that the jurors, under the circumstances of the case, were influenced by the testimony.

*State v. Miller,* 234 Ariz. 31, 316 P.3d 1219, ¶¶ 23–26 (2013) (witness's statement that defendant was a felon was brief and fell in middle of lengthy statement, trial court observed no reaction from jurors, and nothing indicated prosecutor intentionally elicited statement; court held trial court did not abuse discretion in denying motion for mistrial).

*State v. Doty,* 232 Ariz. 502, 307 P.3d 69, ¶¶ 14–18 (Ct. App. 2013) (when asked if he recalled seeing defendant being searched, officer said other officer placed defendant under arrest for warrant; defendant moved for mistrial; trial court denied motion and order remark stricken, and instructed jurors not to consider it; court held trial court's actions properly remedied situation, thus trial court did not abuse discretion in denying motion for mistrial).

*State v. Almaguer,* 232 Ariz. 190, 303 P.3d 84, ¶¶ 27–29 (Ct. App. 2013) (defendant was charged with second-degree murder as result of killing victim during fight with victim and victim's family; during questioning of victim's brother's former girlfriend, she said, "And from what I heard, it wasn't the first time"; defendant claimed trial court erred in denying his motion for mistrial based on that statement; court held trial court did not abuse discretion in denying motion because evidence of defendant's guilt was overwhelming, and trial court instructed jurors to disregard that statement).

**19.1.mmt.230** The cumulative error doctrine does not apply to trial errors because, if several actions are not errors in and of themselves, they do not become errors when taken together.

*State v. Parker,* 231 Ariz. 391, 296 P.3d 54, ¶ 81 (2013) (court declines defendant's invitation to adopt cumulative error doctrine).

**19.1.mmt.240** The cumulative error doctrine does apply to claims of prosecutorial misconduct because, even if the several actions are not errors in and of themselves, they may show that the prosecutor intentionally engaged in improper conduct and did so either with indifference or with the specific intent to prejudice the defendant.

*State v. Payne,* 233 Ariz. 484, 314 P.3d 1239, ¶¶ 134–35 (2013) (court said defendant had not shown prosecutor's misconduct had permeated trial and infected it with unfairness, so it rejected defendant's claim of cumulative error).

## RULE 20. JUDGMENT OF ACQUITTAL.

### Rule 20 Judgment of acquittal.

**20.020** The trial court should deny a motion for a judgment of acquittal when there is substantial evidence to support a conviction; substantial evidence is proof that reasonable persons could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt.

*State v. Parker,* 231 Ariz. 391, 296 P.3d 54, ¶¶ 69–72 (2013) (court held evidence was sufficient to support jurors' verdict).

**20.030** The trial may grant a motion for a judgment of acquittal only when there is no substantial evidence to warrant a conviction; thus, when reasonable minds may differ on inferences drawn form the facts, the trial court has no discretion to enter a judgment of acquittal and must instead submit the case to the jurors.

*State v. Buccheri-Bianca,* 233 Ariz. 324, 312 P.3d 123, ¶¶ 36–40 (Ct. App. 2013) (in prosecution for child molestation, defendant contended victims' testimony was "grossly inconsistent and grossly vague"; court held this was matter for jurors to determine, thus evidence was sufficient to survive Rule 20 motion).

*State v. Kindred,* 232 Ariz. 611, 307 P.3d 1038, ¶ 4 (Ct. App. 2013) (court held pry bar wedged between apartment's door and door jam was sufficient to show entry into apartment, and fact that there were items in apartment that could have been stolen, albeit with great difficulty, would have allowed jurors to find defendant intended theft in entering apartment, thus trial court correctly denied motion for judgment of acquittal).