ARTICLE X. ADDITIONAL RULES.

SPECIAL ACTIONS.

Rule 1 Nature of the special action.

1.sa.100 Special action review **is available** when the party does not have an equally plain, speedy, and adequate remedy by appeal.

State v. Butler (Tyler B.), 231 Ariz. 42, 290 P.3d 435, ¶ 2 (Ct. App. 2012) (because juvenile would turn 18 in less than 1 year, state had no equally plain, speedy, and adequate remedy by appeal to challenge trial court's granting of motion to suppress results of juvenile's blood test).

State v. Bernini (Lopez), 230 Ariz. 223, 282 P.3d 424, ¶¶ 4–5 (Ct. App. 2012) (trial court granted defendant's motion to dismiss state's allegation he had prior conviction for crime of violence and thus was not entitled to probation on drug possession offense; court stated it was unclear under current state of law whether state had remedy by appeal, but any remedy by appeal would not be equally plain compared to remedy by special action, and thus accepted special action jurisdiction).

State v. Bayardi (Fannin), 230 Ariz. 195, 281 P.3d 1063, ¶ 7 (Ct. App. 2012) (§ 28–1381(D) provides person using drug as prescribed by licensed medical practitioner is not guilty of § 28–1381(A)(3); municipal court ruled this section created justification defense that state had burden to disprove; superior court reversed and held this section created affirmative defense that defendant had burden to prove; court held neither party had equally plain, speedy, and adequate remedy by appeal, and thus exercised special action jurisdiction).

State v. Simon (Jimenez), 229 Ariz. 60, 270 P.3d 887, ¶¶ 4–7 (Ct. App. 2012) (because state had no equally plain, speedy, and adequate remedy by appeal from trial court's order to preclude scientific testing results of blood samples, special action review was appropriate).

1.sa.300 Special action is appropriate when the matter (1) involved only a legal question, (2) was of first impression, (3) was of statewide importance, (4) was likely to recur, or (5) had received inconsistent decisions by different trial courts.

State ex rel. Montgomery v. Woodburn (Schmeissing), 231 Ariz. 15, 292 P.3d 201, ¶¶ 7–12 (Ct. App. 2012) (whether Proposition 200 did not apply to attempting to obtain narcotic drug by fraud (2) was of first impression, (3) was of statewide importance, and (4) was likely to recur, thus court accepted special action jurisdiction).

State v. Butler (Tyler B.), 231 Ariz. 42, 290 P.3d 435, ¶ 2 (Ct. App. 2012) (whether parents must consent before taking of juvenile's blood pursuant to implied consent law (1) involved only a legal question, thus court accepted special action jurisdiction).

State v. Bernini (Lopez), 230 Ariz. 223, 282 P.3d 424, ¶¶ 4–5 (Ct. App. 2012) (whether trial court may consider sentencing provisions in determining whether prior offense to which defendant pled is crime of violence (1) involved only a legal question, and (4) was likely to recur, thus court accepted special action jurisdiction).

State v. Bayardi (Fannin), 230 Ariz. 195, 281 P.3d 1063, ¶ 7 (Ct. App. 2012) (§ 28–1381(D) provides person using drug as prescribed by licensed medical practitioner is not guilty of § 28–1381(A)(3); whether this section created justification defense that state had burden to disprove or affirmative defense that defendant had burden to prove (3) was of statewide importance, thus court exercised special action jurisdiction).

March 7, 2013

FUNDAMENTAL ERROR REPORTER

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Rule 31.13(c) Appellate briefs—Contents—Fundamental error.

31.13.c.fe.030 If the defendant **did not** object at trial, the appellate court will review only for **fundamental error,** and **will grant** relief if the defendant proves fundamental, prejudicial error.

State v. Estrella, 230 Ariz. 401, 286 P.3d 150, ¶¶ 5–9 (Ct. App. 2012) (officers attached GPS tracking device on van owned by defendant's employer, which led to officers' stopping defendant for speeding; officers searched van and found bundles of marijuana; on appeal, defendant contended search violated his Fourth Amendment rights under trespass theory; because defendant did not assert that theory to trial court, and because defendant did not argue error was fundamental, court concluded defendant waived that trespass argument and did not address it).

State v. Stevens, 228 Ariz. 441, 267 P.3d 1203, ¶¶ 16–17 (Ct. App. 2012) (prosecutor erred in introducing evidence that defendant did not want officers to enter her house and when they did, yelled "search warrant," and then arguing this showed defendant knew drugs were in house; because drugs were found in defendant's son's room and nothing else tied defendant directly to those drugs, error was prejudicial for charge of possession of drugs and warranted new trial).

31.13.c.fe.050 If the defendant **did not** object at trial to a **trial procedure,** the appellate court will review only for **fundamental error,** and **will not grant** relief if the defendant fails to prove fundamental, prejudicial error.

State v. Nelson, 229 Ariz. 180, 273 P.3d 632, ¶¶ 9–13 (2012) (during individual voir dire, Juror 56 said that, despite trial court's warning, he looked on Internet to find as much information about case as possible; both parties agreed to excuse that juror; defendant contended trial court erred in not asking other jurors about any contact they may have had with Juror 56; because defendant did not raise that issue below, court reviewed for fundamental error only; record showed one potential juror said Juror 56 seemed nervous, but she did not learn anything about case from him, and defendant later struck her; 13 more potential jurors were questioned, and none reported Juror 56 had said anything about case; court held defendant failed to show any prejudice, thus no fundamental error).

State v. Tatlow, 231 Ariz. 34, 290 P.3d 228 , ¶ 19 (Ct. App. 2012) (defendant did not present to trial court claim that trial court should have recused itself from probation revocation proceedings because it had presided in drug court program and thus had personal knowledge of defendant's termination from that program, thus court reviewed for fundamental error only, and found no error).

State v. Butler, 230 Ariz. 465, 286 P.3d 1074, ¶¶ 12–18 (Ct. App. 2012) (indictment for possession of deadly weapon during drug offense charging defendant with possessing 9 mm pistol, .40 caliber handgun, and .380 caliber pistol was duplicative (duplicitous) because it could have charged three separate offenses of possessing a deadly weapon; defendant did not object; court stated defendant traded risk on non-unanimous jury for reward of only one potential conviction and sentence, and increased his chance of acquittal by combining in one count separate offenses for which he did not have equally compelling defenses, and further stated that, rather than suffering prejudice, defendant simply gambled and lost).

State v. Young, 230 Ariz. 265, 282 P.3d 1285, ¶¶ 9–11 (Ct. App. 2012) (defendant contended on appeal trial court did not follow proper procedure when he admitted prior conviction; because defendant did not object at trial to procedure, court reviewed for fundamental error only; court held defendant failed to show any prejudice because defendant nowhere claimed he would not have admitted prior convictions if proper colloquy had taken place).

State v. Lopez, 230 Ariz. 15, 279 P.3d 640, ¶¶ 10–17 (Ct. App. 2012) (prosecutor asked officer whether defendant ever turned himself in to police and gave his side of events; officer responded defendant did not; defendant did not object, but contended on appeal this was comment on his exercise of his right to remain silent; court held defendant's silence was not result of state action, thus prosecutor's question and officer's answer did not violate defendant's Fifth Amendment rights; court stated, "prosecutorial misconduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial.").

State v. Alvarez, 228 Ariz. 579, 269 P.3d 1203, ¶¶ 15–17 (Ct. App. 2012) (because defendant did not object below to trial court's award of restitution, court reviewed for fundamental error only, and concluded trial court properly ordered restitution).

31.13.c.fe.060 If the defendant **did not** object at trial to the admission or exclusion of **evidence,** the appellate court will review only for **fundamental error,** and **will not grant** relief if the defendant fails to prove fundamental, prejudicial error.

State v. Martinez, 230 Ariz. 208, 282 P.3d 409, ¶¶ 11–15 (2012) (state offered in evidence bag found in defendant's garage that contained gun case, 9 mm handgun, six spent 9 mm casings, two boxes of .357 Magnum ammunition, box of .38 Special ammunition, empty .22 caliber ammunition box, loose .22 caliber rounds, live 9 mm cartridge, empty knife scabbard, pair of brown gloves, and ear plugs; because defendant did not object before items were admitted in evidence, court reviewed for fundamental error only; because victim was killed with 9 mm weapon, evidence of ammunition other than 9 mm was not relevant; court held, however, defendant failed to establish prejudice).

State v. Cota, 229 Ariz. 136, 272 P.3d 1027, ¶¶ 33–35 (2012) (defendant said, "[Detective] Laing, ain't saying nothing no more"; court held this was unambiguous invocation of right to remain silent, and questioning should have ceased at that point; because defendant did not object at trial on basis of *Miranda* violation, court reviewed for fundamental error only; court noted defendant did not admit to murders either before or after that point, and all statements made after that point mirrored either statements he made before that point of other evidence properly admitted; court held no fundamental error occurred because continued questioning did not prejudice defendant).

State v. Lowery, 230 Ariz. 536, 287 P.3d 830, ¶¶ 7–10 (Ct. App. 2012) (detective incorrectly testified person must register as sex offender within 10 days of entering state, rather than within 10 days of entering county; because defendant did not object, court reviewed for fundamental error only; because trial court correctly instructed jurors, defendant failed to establish prejudice).

State v. Butler, 230 Ariz. 465, 286 P.3d 1074, ¶¶ 19–25 (Ct. App. 2012) (defendant objected to admission of property receipt for "Nike shoe box containing a large amount of U.S. currency" under Rules 401, 403, and 404(b); because defendant did not object on either hearsay or Confrontation Clause grounds, court reviewed for fundamental error only; court concluded there was substantial circumstantial evidence of defendant's guilt, thus defendant failed to establish prejudice).

State v. Martinez, 230 Ariz. 382, 284 P.3d 893, ¶¶ 10–14 (Ct. App. 2012) (officer testified defendant's actions were standoffish and odd, and defendant's "story did not match up; it seemed like [defendant] was being evasive and lying"; because defendant did not object at trial, court reviewed for fundamental error only; court held officer's testimony was necessary to explain why officer did not continue to investigate defendant's claim that someone had stolen his vehicle; court further held from review of record that testimony did not affect jurors' verdict, thus defendant failed to prove prejudice).

State v. Gonzalez, 229 Ariz. 550, 278 P.3d 328, ¶ 10 (Ct. App. 2012) (officer stopped vehicle driven by A-P; defendant was passenger; officer ultimately removed windshield of vehicle and found methamphetamine worth $112,500 hidden in area under windshield; defendant denied knowing drugs were in vehicle; trial court admitted testimony that drug-trafficking organizations have profit motive and do not typically entrust large amounts of drugs to "unknowing transporter" because they need to know person can be trusted and drugs are going to get to destination; on appeal, defendant contended this was inadmissible drug courier profile evidence; because defendant failed to object to this evidence at trial, court reviewed for fundamental error only; court held this evidence was not admitted as drug courier profile evidence, but was instead properly admitted to counter defendant's contention he did not know drugs were in vehicle).

State v. Stevens, 228 Ariz. 441, 267 P.3d 1203, ¶¶ 16–18 (Ct. App. 2012) (prosecutor erred in introducing evidence that defendant did not want officers to enter her house and when they did, yelled "search warrant," and then arguing this showed defendant knew drugs were in house; because drug paraphernalia was found in defendant's room and defendant was holding methamphetamine pipe when she confronted her son, error was not prejudicial for charge of possession of drug paraphernalia and did not warranted new trial).

31.13.c.fe.090 The imposition of an illegal sentence is fundamental error.

State v. Loney, 230 Ariz. 542, 287 P.3d 836, ¶¶ 14–22 (Ct. App. 2012) (defendant was convicted of two counts of sexual conduct with minor; court held trial court erred in treating defendant as repetitive offender for both counts, and held this was fundamental error; court remanded for resentencing on one count).

State v. McPherson, 228 Ariz. 557, 269 P.3d 1181, ¶ 4 (Ct. App. 2012) (defendant possessed DVD disk with seven separate images on it, was convicted of seven counts of sexual exploitation of minor, and received seven consecutive sentences; defendant did not raise with trial court any claims about consecutive sentences, but appellate court addressed defendant's issues, and rejected defendant's claims of double jeopardy (punishment), cruel and unusual punishment, and equal protection).

Rule 31.13(c) Appellate briefs—Contents—Harmless error.

31.13.c.he.020 When a defendant **did** object at trial and thereby preserved an issue for appeal, if the appellate court concludes there was error, the court **will not reverse** if the state proves beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence.

State v. Nelson, 229 Ariz. 180, 273 P.3d 632, ¶¶ 44–46 (2012) (defendant killed 14-year-10-month-old victim by hitting her in head with mallet; prosecutor discussed impact on several witnesses of viewing victim's body; trial court sustained defendant's objection and instructed jurors not to consider that argument; court presumed jurors followed instruction, and noted improper argument took up less than one page out of more than 20 pages of state's closing argument; court held trial court did not abuse discretion in denying motion for mistrial).

State v. VanWinkle, 229 Ariz. 233, 273 P.3d 1148, ¶¶ 16–19 (2012) (defendant shot victim, G. disarmed defendant and C. restrained him on second-floor balcony; police arrived and ordered C. to descent stairs; C. complied but exclaimed that defendant was shooter; defendant said nothing in response; defendant did not contend his silence was improperly admitted as tacit admission, but contended statement was admitted in violation of *Miranda*; court held admission of statement did not violate *Miranda,* but did violate Fifth Amendment right to remain silent; court noted four witnesses at scene gave consistent accounts and implicated defendant; defendant's holster was empty and his gun was on floor; ballistics tests positively identified defendant's gun as firing shot that wounded victim; while in jail, defendant told fellow inmate he shot victim because he "wanted to kill somebody to see how it felt"; defendant also called C. from jail and apologized for shooting and asked C. not to testify against him; under those facts, court held any error was harmless).

State v. Sosnowicz, 229 Ariz. 90, 270 P.3d 917, ¶¶ 27–28 (Ct. App. 2012) (defendant drove his vehicle over victim, and claimed it was accident; state claimed defendant either intentionally, knowingly, or recklessly drove over victim; court held trial court erred in allowing medical examiner to testify manner of death was homicide; because other evidence showed defendant knew what he was doing and because defendant's explanation was not plausible, any error was harmless).

State v. Alvarez, 228 Ariz. 579, 269 P.3d 1203, ¶ 8 (Ct. App. 2012) (victim's home was burglarized, and water bottle with defendant's DNA was found in kitchen; defendant contended trial court erred in excluding evidence concerning R., who was landscaper: (1) R. was present in victim's back yard pursuant to schedule when victim left home prior to burglary, (2) R. had worked at victim's house on six to eight prior occasions and presumably knew she would not return anytime soon; (3) R. was in victim's fenced back yard, which gave ready access to point of entry, back door of house; (4) R. never returned to victim's house in 4 years following burglary; and (5) R. had prior felony conviction for property crime; court held none of this evidence connected R. to burglary, thus trial court properly excluded that evidence; court further held, because even if that evidence showed R. was involved in burglary, it did not show defendant was not involved, thus any error in excluding that evidence was harmless).

Rule 31.13(c) Appellate briefs—Contents—Appellate review.

31.13.c.ar.030 The appellant has the duty to make a record at trial to support the claim of error **on appeal,** and absent such a record, the appellate court will presume that the missing portions of the record support the trial court's actions.

State v. Patterson, 230 Ariz. 270, 283 P.3d 1, ¶ 23 & n.6 (2012) (defendant objected to diagram on slide contained in state's PowerPoint presentation; because defendant did not preserve slide as part of record on appeal, court would not address defendant's argument).

31.13.c.ar.050 When the appellee does not file an answering brief, the court may treat that failure to file as a confession of reversible error for any debatable issue.

Mahar v. Acuna, 230 Ariz. 530, 287 P.3d 824, ¶ 21 (Ct. App. 2012) (plaintiff was granted order of protection, and defendant appealed; plaintiff failed to file answering brief; court exercised its discretion and treated plaintiff's failure to file as confession that defendant was entitled to relief on appeal).

Cardoso v. Soldo, ___ Ariz. ___, 277 P.3d 811, ¶ 4 n.1 (Ct. App. 2012) (appellee did not file answering brief, which court said it could treat as confession of error, but in exercise of its discretion, addressed the substance of the appeal).

31.13.c.ar.060 Opening brief **on appeal** must present significant arguments, supported by authority and citations to the record, setting forth appellant's position on issues raised, and failure to argue a claim usually constitutes abandonment and waiver of that claim.

State v. Tucker, 231 Ariz. 125, 290 P.3d 1248, ¶ 47 (Ct. App. 2012) (court stated it was not required to address defendant's issue because he did not cite to record).

31.13.c.ar.090 Arguments raised for the first time **on appeal** or during oral argument are generally waived.

State v. Cooperman, 230 Ariz. 245, 282 P.3d 446, ¶ 24 n.9 (Ct. App. 2012) (because state did not present to trial court argument that expert's testimony was scientifically invalid, appellate court considered that argument waived on appeal).

State v. Sosnowicz, 229 Ariz. 90, 270 P.3d 917, ¶ 17 n.5 (Ct. App. 2012) (because state asserted for first time at oral argument defendant did not make proper objection under Rule 103(a)(1), court stated it did not consider claims made for first time at oral argument, but stated objection was sufficient for trial court to know basis for objection).

March 7, 2013

CONSTITUTIONAL LAW REPORTER
United States Constitution
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U.S. Const. amend. 4 Search and seizure—Legitimate expectation of privacy.

us.a4.ss.xp.010 An individual does not have automatic standing to challenge a search; an individual must have a legitimate expectation of privacy in the searched area before that interest will be protected by the Fourth Amendment, and there are two factors that determine whether the person has a legitimate expectation of privacy, the **first** of which is whether the individual, by conduct, has exhibited an actual (subjective) expectation of privacy.

State v. Estrella, 230 Ariz. 401, 286 P.3d 150, ¶¶ 10–15 (Ct. App. 2012) (officers attached GPS tracking device on van owned by defendant's employer, which led to officers' stopping defendant for speeding; officers searched van and found bundles of marijuana; court held defendant did not have reasonable expectation of privacy in employer's van when officers attached GPS tracking device to it, and did not have reasonable expectation of privacy in his movements over public streets; because defendant did not show he had reasonable expectation of privacy in either van or its movements, trial court did not err in denying defendant's motion to suppress).

U.S. Const. amend. 4 Search and seizure—Detention for obtaining physical characteristics.

us.a4.ss.pc.010 Because of the possibility a juvenile who is released may fail to appear, extraction of a DNA sample as a condition of release is reasonable.

Mario W. v. Kaipio, 230 Ariz. 122, 281 P.3d 476, ¶¶ 12–25 (2012) (seven juveniles were each charged with violations of offenses specified in A.R.S. § 8–238(A), and each was ordered to give buccal sample as condition of release).

us.a4.ss.pc.020 Because there is no strong governmental interest in creating DNA profiles in the period between advisory hearing and adjudication, extraction of the DNA profile from the buccal swab is not reasonable and thus not permissible.

Mario W. v. Kaipio, 230 Ariz. 122, 281 P.3d 476, ¶¶ 26–32 (2012) (seven juveniles were each charged with violations of offenses specified in A.R.S. § 8–238(A), and each was ordered to give buccal sample as condition of release).

U.S. Const. amend. 4 Search and seizure—Investigative stop and reasonable suspicion.

us.a4.ss.is.010 Officers may briefly detain an individual they have reasonable suspicion to believe is involved in a crime; in assessing the reasonableness of a *Terry* stop, the court must examine (1) whether facts warranted the intrusion on the individual's Fourth Amendment rights, and (2) whether the scope of the intrusion was reasonably related to the circumstances that justified the interference in the first place.

State v. Boteo-Flores, 230 Ariz. 105, 280 P.3d 1239, ¶¶ 11–13, 16 (2012) (officers saw truck matching description of stolen vehicle in driveway of apartment complex; car drove into driveway and lone occupant, who was talking on cell phone, used binoculars to look up and down street, and then drove away; few minutes later, car returned, this time with three occupants, and drove to back of apartment complex; several minutes later, defendant walked down driveway and looked up and down street; person who had driven car appeared and drove away in truck; all but one officer pursued truck unsuccessfully and later found it unoccupied; remaining officer approached defendant, handcuffed him, read him *Miranda* warnings, and questioned him; officer testified based on training and experience, he believed defendant was acting as lookout; court held officer had reasonable suspicion to stop defendant, and properly detained and questioned him).

us.a4.ss.is.020 An officer may not act on a mere hunch, but seemingly innocent behavior may form the basis for reasonable suspicion if the officer, based on training and experience, can perceive and articulate meaning in a given conduct that would be wholly innocent to the untrained observer.

State v. Boteo-Flores, 230 Ariz. 105, 280 P.3d 1239, ¶¶ 11–13 (2012) (officers saw truck matching description of stolen vehicle in driveway of apartment complex; car drove into driveway and lone occupant, who was talking on cell phone, used binoculars to look up and down street, and then drove away; few minutes later, car returned, this time with three occupants, and drove to back of apartment complex; several minutes later, defendant walked down driveway and looked up and down street; person who had driven car appeared and drove away in truck; all but one remaining officer pursued truck unsuccessfully and later found it unoccupied; remaining officer approached defendant, handcuffed him, read him *Miranda* warnings, and questioned him; officer testified based on training and experience, he believed defendant was acting as lookout; court held officer had reasonable suspicion to stop defendant, and properly detained and questioned him).

us.a4.ss.is.060 Use of handcuffs does not necessarily turn investigative detention into arrest.

State v. Boteo-Flores, 230 Ariz. 105, 280 P.3d 1239, ¶¶ 14–21 (2012) (officers saw truck matching description of stolen vehicle in driveway of apartment complex; car drove into driveway and lone occupant, who was talking on cell phone, used binoculars to look up and down street, and then drove away; few minutes later, car returned, this time with three occupants, and drove to back of apartment complex; several minutes later, defendant walked down driveway and looked up and down street; person who had driven car appeared and drove away in truck; all but one remaining officer pursued truck unsuccessfully and later found it unoccupied; remaining officer approached defendant, handcuffed him, read him *Miranda* warnings, and questioned him; officer testified based on training and experience, he believed defendant was acting as lookout; court held officer had reasonable suspicion to stop defendant, and properly detained and questioned him; other officers arrived and called auto theft detective; defendant remained handcuffed for at least 15 minutes until detective arrived; officers briefed detective for another 15 minutes; detective then gave defendant *Miranda* warnings and questioned him, and arrested him based on admissions defendant made during questioning; court noted defendant remained handcuffed for another 30 to 40 minutes after officers arrived, state offered no reason for that delay or why it was necessary to have detective question defendant, and no ongoing safety threat or flight risk; court held detention turned into *de facto* arrest and there was no probable cause to arrest, thus statements to detective were subject to suppression).

us.a4.ss.is.190 If the officers have reasonable basis to conduct an investigatory stop, they may detain the suspect for a reasonable time, which is the amount of time necessary to confirm or dispel their suspicions; if they detain the suspect longer than is reasonable, it will turn into an arrest, which requires probable cause.

State v. Boteo-Flores, 230 Ariz. 105, 280 P.3d 1239, ¶¶ 14–21 (2012) (officers saw truck matching description of stolen vehicle in driveway of apartment complex; car drove into driveway and lone occupant, who was talking on cell phone, used binoculars to look up and down street, and then drove away; few minutes later, car returned, this time with three occupants, and drove to back of apartment complex; several minutes later, defendant walked down driveway and looked up and down street; person who had driven car appeared and drove away in truck; all but one remaining officer pursued truck unsuccessfully and later found it unoccupied; remaining officer approached defendant, handcuffed him, read him *Miranda* warnings, and questioned him; officer testified based on training and experience, he believed defendant was acting as lookout; court held officer had reasonable suspicion to stop defendant, and properly detained and questioned him; other officers arrived and called auto theft detective; defendant remained handcuffed for at least 15 minutes until detective arrived; officers briefed detective for another 15 minutes; detective then gave defendant *Miranda* warnings and questioned him, and arrested him based on admissions defendant made during questioning; court noted defendant remained handcuffed for another 30 to 40 minutes after officers arrived, and state offered no reason for that delay or why it was necessary to have detective question defendant, and no ongoing satety threat or flight risk; court held detention turned into *de facto* arrest and there was no probable cause to arrest, thus statements to detective were subject to suppression).

U.S. Const. amend. 4 Search and seizure—Consent.

us.a4.ss.cs.150 If the police have engaged in illegal conduct and subsequently obtain evidence used against the defendant, the court must look at three factors to determine whether the taint of the illegal conduct is sufficiently attenuated from the evidence subsequently obtained: (1) the time elapsed between the illegal conduct and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct; the 1st factor is the least important, for the 2nd factor, the discovery of a warrant is of minimal importance, and the 3rd factor is the most important.

State v. Boteo-Flores, 230 Ariz. 551, 288 P.3d 111, ¶¶ 12–14 (Ct. App. 2012) (officer testified based on training and experience, he believed defendant was acting as lookout; court held officer had reasonable suspicion to stop and detain defendant; court noted defendant remained handcuffed for another 30 to 40 minutes after officers arrived, and then detective questioned defendant and obtained incriminating statements; state offered no reason for that delay or why it was necessary to have detective question defendant, and no ongoing satety threat or flight risk; court held detention turned into *de facto* arrest and there was no probable cause to arrest, thus statements to detective were subject to suppression; on remand, state conceded arrest and confession occurred in close temporal proximity and there were no intervening circumstances; because it appeared officers kept defendant in custody in order to question him, thereby exploiting illegal arrest, court held state had not shown taint of illegal arrest was purged, thus statements improperly admitted).

U.S. Const. amend. 4 Search and seizure—Comment on refusal to allow search.

us.a4.ss.cmnt.010 When a person has the right to invoke Fourth Amendment protections and refuse to consent to a search, it is generally impermissible for a prosecutor to use against a defendant the defendant's refusal to consent to the search.

State v. Stevens, 228 Ariz. 441, 267 P.3d 1203, ¶¶ 12–16 (Ct. App. 2012) (prosecutor erred in introducing evidence that defendant did not want officers to enter her house and when they did, yelled "search warrant," and then arguing this showed defendant knew drugs were in house).

U.S. Const. amend. 5 Double jeopardy—Multiple punishment.

us.a5.dj.mp.010 The guarantee against double jeopardy protects against multiple punishments for the same offense.

State v. McPherson, 228 Ariz. 557, 269 P.3d 1181, ¶¶ 5–10 (Ct. App. 2012) (defendant possessed DVD disk with seven separate images on it, and was convicted of seven counts of sexual exploitation of minor; because defendant was convicted of separate offenses, double jeopardy did not apply).

U.S. Const. amend. 5 Self-incrimination—Right to refuse to make statements that incriminate.

us.a5.ri.010 A defendant has the right to remain silent when it is evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation why it cannot be answered might be dangerous because injurious disclosures could result.

State v. VanWinkle, 229 Ariz. 233, 273 P.3d 1148, ¶¶ 11–14 (2012) (defendant shot victim, G. disarmed defendant and C. restrained him on second-floor balcony; police arrived and ordered C. to descent stairs; C. complied but exclaimed that defendant was shooter; defendant said nothing in response; defendant did not contend his silence was improperly admitted as tacit admission, but contended statement was admitted in violation of *Miranda* and his right to remain silent; court held admission of evidence of silence did not violate *Miranda,* but did violate Fifth Amendment right to remain silent; court held any error was harmless).

us.a5.ri.020 The state may use a defendant's pre-custody, pre-*Miranda* silence as substantive evidence of guilt.

State v. Lopez, 230 Ariz. 15, 279 P.3d 640, ¶¶ 15–16 (Ct. App. 2012) (prosecutor asked officer whether defendant ever turned himself in to police and gave his side of events; officer responded defendant did not; defendant contended this was comment on his exercise of his right to remain silent; court held defendant's silence was not result of state action, thus prosecutor's question and officer's answer did not violate defendant's Fifth Amendment rights).

us.a5.ri.030 The state may not use a defendant's post-custody, pre-*Miranda* silence as substantive evidence of guilt.

State v. VanWinkle, 229 Ariz. 233, 273 P.3d 1148, ¶ 15 (2012) (police ordered defendant and another person to descent from second-floor balcony; witness exclaimed that defendant was shooter; defendant said nothing in response; court held custody and not interrogation is triggering mechanism for right of pretrial silence; court held admission of evidence of silence did not violate *Miranda,* but did violate Fifth Amendment right to remain silent; court held any error was harmless).

U.S. Const. amend. 5 Self-incrimination—Voluntariness.

us.a5.si.vol.190 A defendant's confession will be considered involuntary if the defendant was intoxicated to the point the defendant did not understand what he or she was doing when making the statement.

State v. Cota, 229 Ariz. 136, 272 P.3d 1027, ¶¶ 23–25 (2012) (court's review of videotape of defendant's interrogation showed defendant fully comprehended questions posed and gave appropriate answers, thus trial court properly found defendant's statements were voluntary).

U.S. Const. amend. 5 Self-incrimination—*Miranda.*

us.a5.si.mir.010 The triggering event for *Miranda* is custodial interrogation by state law enforcement agents whose primary mission is to enforce the law, thus a private individual or government employee is not bound by *Miranda* unless the person is acting as an instrument or agent of the police pursuant to a scheme to elicit statements from the defendant.

State v. VanWinkle, 229 Ariz. 233, 273 P.3d 1148, ¶ 10 (2012) (defendant shot victim, G. disarmed defendant and C. restrained him on second-floor balcony; police arrived and ordered C. to descent stairs; C. complied but exclaimed that defendant was shooter; defendant said nothing in response; defendant did not contend his silence was improperly admitted as tacit admission, but contended statement was admitted in violation of *Miranda*; court held *Miranda* rule is not violated when defendant's silence was in response to accusation made by civilian unaffiliated with police before warning could be given, and there is no indication of any wrongdoing by police).

us.a5.si.mir.210 If a suspect is subjected to custodial interrogation and indicates at any time prior to or during questioning that he or she wishes to remain silent, the interrogation must stop, and officers are not allowed to re-interrogate the suspect within 14 days unless the suspect re-initiates the communication.

State v. Yonkman, 229 Ariz. 291, 274 P.3d 1225, ¶¶ 5–15 (Ct. App. 2012) (15-year-old C. told her mother K. that defendant step-father had molested her; on 3/27, police questioned defendant, and he invoked his right to counsel; several days later, K. called Tucson Police detective and informed him C. had recanted her allegations, detective told K. they could close case if defendant took polygraph examination, later that day, defendant called detective and scheduled appointment for 4/01; defendant appeared at police station and detective questioned him, and defendant admitted molesting his step-daughter; court held detective effectively re-initiated conversation, and this violated *Miranda* and *Edwards,* thus trial court should have suppressed confession).

U.S. Const. amend. 5 Self-incrimination—*Miranda*—Waiver.

us.a5.si.mir.wav.070 If a person is in custody, has received the *Miranda* warnings, and is subject to custodial interrogation, the person must clearly and unambiguously invoke the right to remain silent, which must be judged from the perspective of a reasonable police officer in the circumstances.

State v. Cota, 229 Ariz. 136, 272 P.3d 1027, ¶¶ 26–29 (2012) (police were questioning defendant about blood on his clothing; defendant said, "I'm not saying nothing no more[;] you guys are fucking with me"; court held this was not unambiguous invocation of right to remain silent, and reasonable officer could have construed defendant's comments as meaning he knew officers were lying about blood on his shirt and he no longer wanted to talk about that subject).

State v. Cota, 229 Ariz. 136, 272 P.3d 1027, ¶¶ 30–32 (2012) (after further questioning, defendant said, "[Detective] Laing, ain't saying nothing no more"; court held this was unambiguous invocation of right to remain silent, and questioning should have ceased at that point; because defendant did not object at trial on basis of *Miranda* violation, court reviewed for fundamental error only; court noted defendant did not admit to murders either before or after that point, and all statements made after that point mirrored either statements he made before that point of other evidence properly admitted; court held no fundamental error occurred because continued questioning did not prejudice defendant).

U.S. Const. amend. 6 Public trial.

us.a6.pt.020 Under the Sixth Amendment, for the hearing to be closed to the public, the closure must satisfy a **four-part** test, the **first** of which is the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced if the hearing is not closed.

State v. Tucker, 231 Ariz. 125, 290 P.3d 1248, ¶¶ 9, 14 (Ct. App. 2012) (on third day of trial, trial court closed courtroom to all members of public (except for press) in response to complaints by jurors about intimidating conduct by person in courtroom; court held closure met first part of test).

us.a6.pt.030 Under the Sixth Amendment, for the hearing to be closed to the public, the closure must satisfy a **four-part** test, the **second** of which is the closure must be no broader than necessary to protect the interest that would be prejudiced if the hearing is not closed.

State v. Tucker, 231 Ariz. 125, 290 P.3d 1248, ¶¶ 9, 15–16 (Ct. App. 2012) (on third day of trial, trial court closed courtroom to all members of public (except for press) in response to complaints by jurors about intimidating conduct by person in courtroom taking photographs and giving "looks"; because trial court did not identify which persons were engaging in that conduct and exclude only those persons, closure was broader than necessary, thus closure did not meet second part of test).

us.a6.pt.040 Under the Sixth Amendment, for the hearing to be closed to the public, the closure must satisfy a **four-part** test, the **third** of which is the trial court must consider reasonable alternatives to closing the proceedings.

State v. Tucker, 231 Ariz. 125, 290 P.3d 1248, ¶¶ 9, 17–18 (Ct. App. 2012) (on third day of trial, trial court closed courtroom to all members of public (except for press) in response to complaints by jurors about intimidating conduct by person in courtroom taking photographs and giving "looks"; because trial court did not consider alternatives, such as prohibiting cell-phone cameras, closure did not meet third part of test).

us.a6.pt.050 Under the Sixth Amendment, for the hearing to be closed to the public, the closure must satisfy a **four-part** test, the **fourth** of which is the trial court must make findings adequate to support the closure.

State v. Tucker, 231 Ariz. 125, 290 P.3d 1248, ¶¶ 9, 19–23 (Ct. App. 2012) (on third day of trial, trial court closed courtroom to all members of public (except for press) in response to complaints by jurors about intimidating conduct by person in courtroom taking photographs and giving "looks"; court held trial court's findings were too generalized, thus closure did not meet fourth part of test).

U.S. Const. amend. 8 Cruel and unusual punishment.

us.a8.cu.110 In determining proportionality, courts usually do not consider the imposition of consecutive sentences.

State v. McPherson, 228 Ariz. 557, 269 P.3d 1181, ¶¶ 13–15 (Ct. App. 2012) (defendant possessed DVD disk with seven separate images on it, was convicted of seven counts of sexual exploitation of minor, and received seven consecutive sentences; court of appeals was required to follow Arizona Supreme Court opinion holding consecutive sentences were not cruel and unusual punishment).

U.S. Const. amend. 14 Due process—Identification procedures.

us.a14.dp.id.040 To establish a due process violation, a defendant must establish three factors, the **second** of which is that the state bore sufficient responsibility for the suggestive pretrial identification to trigger due process protections.

State v. Nottingham, 231 Ariz. 21, 289 P.3d 949, ¶¶ 4–10 (Ct. App. 2012) (three separate convenience stores were robbed; police showed photographic lineups to three store clerks, and none was able to identify defendant; over defendant's objection, store clerks were permitted to identify defendant at first trial, which resulted in mistrial; defendant contended trial court erred in refusing to hold *Dessureault* hearing before second trial and in allowing store clerks to identify him at second trial; court noted United States Supreme Court recently held in *Perry v. New Hampshire* Due Process Clause does not require trial court to hold preliminary assessment of reliability of eyewitness identification made under suggestive circumstances when suggestive situation was not caused by police; court held, even though first trial created suggestive situation, that was not caused by police, thus trial court did not err in not holding *Dessureault* hearing and in allowing store clerks to identify defendant; court held, however, defendant was entitled to cautionary identification instruction and trial court erred in not giving one).

U.S. Const. amend. 14 Equal protection—Existence of a right.

us.a14.ep.er.030 The Equal Protection Clause does not apply if the persons are not similarly situated.

State v. McPherson, 228 Ariz. 557, 269 P.3d 1181, ¶¶ 17–24 (Ct. App. 2012) (defendant possessed DVD disk with seven separate images on it, was convicted of seven counts of sexual exploitation of minor, and received seven consecutive sentences; court held it was within powers of legislature to determine possession of images of child pornography should be punished more seriously than engaging in sexual conduct with minors).

U.S. Const. amend. 14 Equal protection—Effect of statutes.

us.a14.ep.es.040 If a legislative classification does not bear on a "suspect" classification or a fundamental right, the courts will uphold a statute as long as the classification is rationally related to a legitimate state interest, and will accept the legislative determination of relevancy as long as it is reasonable, even though it may be disputed, debatable, or opposed by strong contrary argument.

State v. Lowery, 230 Ariz. 536, 287 P.3d 830, ¶¶ 2, 11–17 (Ct. App. 2012) (defendant was convicted of criminal sexual conduct in Michigan and required to register there; even though person convicted for crime in another state that requires them to register there and thus has to register in Arizona may not have to register in Arizona if convicted of that same crime in Arizona, court held there was rational basis for this system, and thus this statute was not unconstitutional).

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