APPENDIX A

[SEAL]

Supreme Court
STATE OF ARIZONA

ARIZONA STATE COURTS BUILDING
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PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

ROBERT BRUTINEL
Chief Justice

JANET JOHNSON
Clerk of the Court

February 12, 2020

RE: STATE OF ARIZONA v JOHN KRISTOFFER LARSGARD
Arizona Supreme Court No. CR-19-0155-PR
Court of Appeals, Division One
No. 1 CA-CR 18-0598 PRPC
Navajo County Superior Court
Nos. S0900CR201100767
S0900CR201100780

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 7, 2020, in regard to the above-referenced cause:

ORDERED: Amended Petition for Review from Denial of Post-Conviction Relief by the Trial and Appellate Court = DENIED.

Chief Justice Brutinel did not participate in the determination of this matter.

Janet Johnson, Clerk

TO:
Joseph T Maziarz
Michael R Shumway
Elizabeth M Hale
Bradley W Carlyon
Amy M Wood
Bradley W Carlyon

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APPENDIX B

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c),
THIS DECISION IS NOT PRECEDENTIAL AND MAY
BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

JOHN KRISTOFFER LARSGARD, *Petitioner*.

No. 1 CA-CR 18-0598 PRPC
FILED 4-25-2019

Petition for Review from the Superior Court
in Navajo County
No. S0900CR201100767
S0900CR201100780
The Honorable Dale P. Nielson, Judge

REVIEW GRANTED AND RELIEF DENIED

COUNSEL

Navajo County Attorney's Office, Holbrook
By Michael R. Shumway
Counsel for Respondent

Law Office of Elizabeth M. Hale, Lakeside
By Elizabeth M. Hale
Counsel for Petitioner

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Paul J. McMurdie and Judge Jennifer B. Campbell joined.

HOWE, Judge:

¶1 John Kristoffer Larsgard petitions this Court for review from the dismissal of his petition for post-conviction relief. We have considered the petition for review and for the reasons stated, grant review but deny relief.

¶2 After a jury trial, Larsgard was convicted of six counts of aggravated assault and one count of felony endangerment for driving into a crowd of people celebrating at a festival in Winslow.[1] The trial court sentenced him to a presumptive aggregate term of 7.5 years' imprisonment.

¶3 On direct appeal, Larsgard argued that (1) the medications administered by jail medical staff significantly affected his access to counsel and ability to participate in his own defense, (2) the State committed various disclosure violations, and (3) the jury's verdicts were contrary to the weight of the evidence. *See State*

[1] The State originally charged Larsgard with a total of 36 counts in two separate cases, consolidated for trial. The trial court subsequently granted the State's motion to dismiss all counts, except the nine counts presented to the jury. The jury acquitted Larsgard of two counts of aggravated assault.

v. Larsgard, 1 CA-CR 12-0283, 2013 WL 1908037, at *1–4 ¶¶ 2–18 (Ariz. App. May 7, 2013) (mem. decision). We disagreed, affirming his convictions and sentences. *Id.* at *4 ¶ 19.

¶4 Larsgard timely petitioned for post-conviction relief, raising a litany of constitutional and procedural issues. The trial court summarily dismissed the petition, in part, but set an evidentiary hearing as to Larsgard's claims that the jury should have been instructed about the lesser-included offenses of aggravated assault and that the Arizona Department of Corrections ("DOC") denied his access and right to counsel. After hearing testimony from Larsgard and his former counsel, the court dismissed the remaining claims. This petition for review followed.

¶5 We will not reverse a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Schrock*, 149 Ariz. 433, 441 (1986). If a petitioner seeks review after an evidentiary hearing, we review the court's findings of fact to determine if they are clearly erroneous. *State v. Herrera*, 183 Ariz. 642, 648 (App. 1995).

1. Newly Discovered Evidence

¶6 Larsgard argues that the trial court abused its discretion in dismissing his claim that the DOC's inability to provide proper medical treatment for his preexisting medical condition violates his constitutional rights and constitutes newly discovered evidence under Arizona Rule of Criminal Procedure ("Rule")

32.1(e). Larsgard contends further that he is entitled to an evidentiary hearing to determine whether the court knew of the "deplorable health care conditions" at the DOC when imposing his imprisonment term.

¶7 To prevail on a claim of newly discovered evidence under Rule 32.1(e), and thereby exempted from preclusion, a defendant must show that the proffered evidence (1) existed at the time of trial but was discovered only after trial; (2) could not have been discovered through the exercise of due diligence; (3) would not be simply cumulative or impeaching; (4) would be relevant to the case; and (5) would probably have altered the verdict, finding, or sentence if known at the time of trial. *See* Ariz. R. Crim. P. 32.1(e), 32.2(a)–(b); *State v. Bilke*, 162 Ariz. 51, 52–53 (1989); *State v. Saenz*, 197 Ariz. 487, 490 ¶ 13 (App. 2000). A newly diagnosed medical condition that existed at the time of trial can constitute newly discovered evidence relevant to sentencing. *Bilke*, 162 Ariz. at 53 (diagnosis of post-traumatic stress disorder); *State v. Cooper*, 166 Ariz. 126, 128–30 (App. 1990) (diagnosis of human immunodeficiency virus).

¶8 Here, Larsgard fails to show that he is entitled to relief under Rule 32.1(e).[2] The issue of Larsgard's

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[2] Larsgard relies heavily on the factual similarities between the current case and *State v. Rininger*, Superior Court of Cochise County, Cause No. CR20093923-001. The defendant in *Rininger* sought review of the summary dismissal of his Rule 32 petition, and this Court denied relief in *State v. Rininger*, 2 CA-CR 2012-0512-PR, 2013 WL 1460559, *2 ¶ 5 (Ariz. App. Apr. 10, 2013) (mem. decision). Although *Rininger* is not controlling, we note

medical condition, namely symptoms associated with a neck injury, arose throughout the trial and sentencing. At the very least, the record shows that the trial court knew of the medical condition when imposing his imprisonment terms.

¶9 Regarding his pre-existing medical condition, Larsgard has not shown why he did not raise the constitutionality of his sentences on direct appeal; accordingly, he is precluded from raising the issue here, and no exceptions to preclusion apply. *See* Ariz. R. Crim. P. 32.1(e), 32.2(a)–(b). Moreover, to the extent Larsgard argues his medical condition has worsened while in the DOC's custody, this claim cannot be considered a newly discovered fact under Rule 32.1(e) because it did not exist at the time of trial or sentencing. *See Bilke*, 162 Ariz. at 53. Thus, the trial court did not abuse its discretion in summarily dismissing this claim.

2. Jury Instruction on Lesser-Included Offenses

¶10 Larsgard also argues that he was entitled to have the jury instructed on the lesser-included offenses of aggravated assault and that the court's failure to provide such instruction was fundamental error. Any issue a defendant could have raised on direct appeal is precluded unless an exception under Rule 32.2(b) applies. Ariz. R. Crim. P. 32.2(a)–(b). Claims of fundamental error are not exempt from preclusion. If the supreme

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that our findings in that decision are consistent with those in the current case. *See Id.* at *1–2 ¶¶ 1–5.

court "had intended that fundamental error be an exception to preclusion under Rule 32.2, the court presumably would have expressly said so in the rule itself[.]" *State v. Swoopes*, 216 Ariz. 390, 403 ¶ 42 (App. 2007).

¶11 Larsgard did not raise this claim on direct appeal and nothing shows that any exception under Rule 32.2(b) applies. *See Larsgard*, 1 CA-CR 12-0283, at *1–4 ¶¶ 2–18. His claim is therefore precluded under Rule 32.2(a) and (b).

3. Access to Appellate Counsel

¶12 Larsgard also contends that the trial court abused its discretion in dismissing his claim that the DOC violated his right to counsel. A defendant's constitutional right to effective assistance of counsel on appeal and ineffective assistance of appellate counsel is a cognizable Rule 32 claim. *See* Ariz. R. Crim. P. 6.1(a), 31.5(a), (e); *Herrera*, 183 Ariz. at 645. To obtain relief on any Rule 32 claim, however, the petition for review must contain a statement of the issue presented with supporting material facts and such facts must have the appearance of validity. *See* Ariz. R. Crim. P. 32.9(c)(4)(B); *State v. Suarez*, 23 Ariz. App. 45, 46 (1975). Moreover, a defendant's own self-serving assertions are generally insufficient to raise a colorable Rule 32 claim. *State v. Wilson*, 179 Ariz. 17, 20 (App. 1993).

¶13 Larsgard contends that the DOC hindered his ability to communicate with appellate counsel during

vital stages of the appeal. Aside from Larsgard's self-serving statements, the record from the evidentiary hearing shows that Larsgard corresponded with appellate counsel during the time in question. Although appellate counsel testified he had some difficulty speaking with him telephonically, counsel knew of Larsgard's position regarding the appeal and they communicated regularly through legal mail. The trial court's finding that the DOC did not restrict Larsgard's access to counsel is supported by the record.

4. Ineffective Assistance of Counsel

¶14 Larsgard further argues that the trial court abused its discretion in dismissing his claim of ineffective assistance of trial and appellate counsel. To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *State v. Bennett*, 213 Ariz. 562, 567 ¶ 21 (2006). "Defense counsel's determinations of trial strategy, even if later proven unsuccessful, are not ineffective assistance of counsel." *State v. Valdez*, 160 Ariz. 9, 15 (1989). Similarly, appellate counsel's "strategic decision to 'winnow out weaker arguments on appeal and focus on' those more likely to prevail is an acceptable exercise of professional judgment." *State v. Febles*, 210 Ariz. 589, 596 ¶ 20 (App. 2005) (quoting *Jones v. Barnes*, 463 U.S. 745, 746 (1983)).

¶15 Larsgard's claim fails to meet the *Strickland* standard. While representing Larsgard, counsel conducted pretrial litigation, used an independent investigator, formulated a targeted defense strategy, sought leniency at sentencing, and raised multiple issues in a timely appeal. *See Larsgard*, 1 CA-CR 12-0283, at *1–4 ¶¶ 2–18. Although later proven to be unsuccessful, Larsgard has not shown that counsel's strategic decisions in trial and the direct appeal constituted ineffective assistance of counsel. Thus, the trial court did not abuse its discretion in dismissing this claim.

¶16 Accordingly, we grant review but deny relief.

[SEAL]

AMY M. WOOD • Clerk of the Court
FILED: AA

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF NAVAJO

STATE OF ARIZONA, **Plaintiff,** **vs.** **John Cristoffer Larsgard,** **Petitioner.**	**CASE NO. CR 2011-00767 & 2011-00780** **FINDINGS OF FACT AND CONCLUSIONS OF LAW** **JUUDGE NIELSEN DIVISION 3** (Filed May 24, 2018)

Upon having considered the Court file, the Court's August 1, 2017 Order, which ordered an evidentiary hearing in this matter, testimony of the witnesses at the March 20, 2018 evidentiary hearing, exhibits admitted at the March 20, 2018 evidentiary hearing, and arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law,

This Court makes the following Findings of Fact and Conclusions of Law:

A. PROCEDURAL HISTORY.

1. A jury found Defendant guilty of six counts of aggravated assault and one count of

felony endangerment. *State v. Larsgard*, 1 CA-CR 12-0283 (Ariz. App. May 7, 2013) (mem. decision), at 2.

2. The trial court imposed concurrent, presumptive terms of imprisonment for each conviction, the longest of which was 7.5 years.

3. On April 27, 2012, Defendant was admitted to the Arizona Department of Corrections (ADOC).

4. Defendant filed a timely notice of Appeal. On November 9, 2012, Mr. Criss Candelaria (Candelaria) represented Defendant at trial and in his direct appeal.

5. On November 9, 2012, Candelaria filed Defendant's opening brief. On February 7, 2013, Candelaria filed Defendant's Reply Brief.

26. On May 7, 2013, the Court of Appeals affirmed Defendant's judgments of guilt and sentences.

7. Defendant filed a timely Notice of Post-Conviction Relief. Defendant raised numerous issues in his Rule 32 petition. On August 1, 2017, the Court dismissed all but two of his claims and ordered an evidentiary hearing on the two remaining two claims:

a. Whether Defendant was denied access to counsel and right to counsel.

b. Whether Defendant made a tactical decision not to have the trial court instruct the jurors that endangerment,

threatening and intimidating was a lesser offense of aggravated assault.

8. On March 20, 2018, the Court conducted an evidentiary hearing to resolve the two remaining claims. At the outset of the evidentiary hearing, the Court reaffirmed the two claims that would be addressed in the evidentiary hearing:

THE COURT: So just to make sure, to be clear, this is a hearing regarding whether the defendant was denied access to counsel and the right to counsel, and whether the defendant made a tactical decision not to have the trial Court instruct the jurors regarding the lesser included offense [that endangerment, threatening, and intimidating was a lesser included offense of aggravated assault.]

B. FINDINGS OF FACT.

1. Defendant's DOC Institutional Housing Assignments

a. Cibola Unit.

Defendant was housed in the Cibola Unit from July 2012 until October 2012 when Defendant was placed in Yuma Mental Health Unit. Cibola was a general population unit. While in Cibola, Defendant had access to pen and paper.

b. Yuma Mental Health Unit.

In October 2012, Defendant was placed in the Yuma Mental Health Unit and remained there until the second or third week of December when Defendant was transferred to the Tucson Mental Health Unit. While in a Mental Health Unit, inmates are not "allowed, pen or paper or writing materials." While Defendant was in the Yuma Mental Health Unit, he did not have to pen or paper or writing materials. However, while in the Yuma Mental Health Unit, Defendant had "one short phone call" from Candelaria's office. In the call, Candelaria advised Defendant they would be sending a draft brief; however, Defendant did not receive a draft brief.

While in the Yuma Mental Health Units, Defendant's mail was placed in his property. On October 27, 2012, Defendant received his last legal mail from Candelaria. In the second or third week of December 2012, Defendant was transferred from the Yuma Mental Health Unit to the Tucson Mental Health Unit. (Id. at 17.) The day Defendant was moved from Yuma Mental Health Unit to the Tucson Mental Health Unit, Defendant was unable to make a legal call from the Yuma Health Unit.

c. Tucson Mental Health Unit.

After Defendant was transferred from the Yuma Health Unit to the Tucson Mental Health Unit, Defendant spent approximately a week in the Tucson Mental Health Unit, until the he was transferred to a regular Unit.

When Defendant was in the regular unit, he had access to pen and paper—though Defendant claimed he did not have his property and would have had to borrow pen and paper. On January 1, 2013, Defendant was transferred to Kino hospital.

d. Kino Hospital.

After Kino "did their stuff'—surgery, Defendant was transferred to the University of Arizona trauma center.

e. University of Arizona Trauma Center and Phoenix Hospital.

After Defendant's surgery at Kino Hospital, Defendant received rehabilitation at both the University of Arizona Trauma Center and at Phoenix Hospital. Between the two hospitals, Defendant was in the hospitals for "over a month. In the "beginning" of February 2013, Defendant was "released back to a Tucson medical unit.

While in the University of Arizona trauma center, Defendant had a five to seven-minute schedule legal call—where correctional officers were in the same room.

2. Witness testimony and Exhibit Evidence presented at the March 20, 2018 evidentiary hearing.

Facts regarding Lesser Included Offense claim

a. In his Rule 32 petition, Defendant faulted Candelaria for not requesting a lesser included offense instruction at trial and then arguing on appeal that the jurors should have been given a lesser included instruction. At the evidentiary hearing, Defendant testified that he and Candelaria did not discuss "a lesser included charge." Defendant further testified that his case went to the jury without any input by him regarding a lesser included offense.

b. Contrary to Defendant's testimony that he and Candelaria did not discuss "a lesser included charge," Candelaria concluded that he had discussed with Defendant whether to request the Court to instruct the jurors on a lesser included offense.

c. Having observed both Defendant and Candelaria testify and having considered the evidence presented during the course of the evidentiary hearing, the Court accepts Candelaria's testimony that he and Defendant discussed whether to request a lesser included offense instruction, and rejects as incredible Defendant's testimony that he and Candelaria did not

discuss whether to request a lesser included instruction.

d. Candelaria would have requested a lesser jury instruction had Defendant wanted a lesser offense jury instruction.

e. Defendant wanted an "all or nothing defense" because he did not want to be deported back to Norway." If Defendant was convicted of a lesser offense that was a felony, Defendant still would be deported to Norway:

> A. [Candelaria] Yes, plus there was another component to that, that I recall, there was—he—if he got convicted he would be deported, okay, if it was a felony or not, that was part of our discussion, and he did not want to go back to Norway, and so a conviction of any felony would have, would have, in our understanding at that time, whether it was a lesser included felony or not, would have resulted in his removal. So, I know we had a conversation about that.
>
> I don't know if it was in the context of a lesser included offense but it was all whirling around in my head because he wanted to stay in the United States.
>
> . . . .
>
> THE WITNESS [Candelaria]: I think any felony convictions under the circumstances of this case would have resulted in his removal, at least that was what we

believed at that time, and so he didn't want to leave the country, so that was part of the conversation, I think now that I think about it.

Facts regarding Issue of Access to and Right to counsel.

a. Defendant's argued he was denied access and right to counsel during the appellate stage, which resulted in Candelaria omitting issues that Defendant argued should have been included in his briefs. Defendant argued the following issues should have been included in his briefs: (1) the use of the stun belt during trial (2) allowing all the victims to remain in the court room during trial while other victims testified; (3) failing to attack the application of transferred intent; and (4) the fact the presiding Judge Michala Ruechel and the prosecutor are married. (Id. at 63.)

b. From July 12, 2012 to the middle of October 2012, Defendant was housed in Cibola Unit. Cibola Unit was a general population unit. When in general population unit, inmates have access to paper and pen. Thus, Defendant was not on restricted status in July, August, and September 2012.

c. While Defendant was in Cibola Unit between June 26, 2012 and October 26, 2012, Defendant received 12 legal mailings from Candelaria and or his office. During this same period, Defendant sent three legal mailings to Defendant: July 20, 2012; August 21, 2012 (CERT.R.R.); and September 11, 2012. These pieces of legal mailings between Defendant and Candelaria were sent prior to Candelaria filing Defendant's opening brief on November 9, 2012. Defendant was not on restricted status when he sent his legal correspondence to Candelaria.

d. In his letters to Candelaria, Defendant set forth the issues he wanted raised in his briefs.

e. Prior to Candelaria filing the opening brief, Defendant had "at least" three phone conversations with Candelaria.

f. A Candelaria reviewed the issues Defendant wanted raised in the briefs, Candelaria decided not to raise "Defendant's" issues because they lacked "traction" and merit and would detract from the issues that Candelaria believed had credibility. For example, Candelaria believed that raising a claim that it was error for the victims to remain in the court room while other victims testified would have

been frivolous and "taken away from the other issues that Candelaria raised in the briefs.

g. Some of the issues that Defendant wanted raised in the brief were issues that should be raised in a Rule 32 proceeding.

h. Candelaria was the trial attorney and was familiar with the case. He had filed numerous pre-trial motions. He had read the trial transcripts.

i. Even if Candelaria had been able to spend more time with Defendant, he "would not have changed the issues that I did raise because those were the ones that had credibility, from my perspective."

j. Between June 26, 2012 and October 27, 2012 Defendant received incoming and outgoing legal mail from other law firms, legal agencies, and a court, which diminishes Defendant's claim that DOC was interfering with his mail.

INCOMING LEGAL MAIL

August 20, 2012; August 29, 2013; September 5, 2012; September 14, 2012; September 15, 2012; September 26, 2012; October 9, 2012; October 10, 2012; October 13, P 012; October 24, 2012; October 27, 2012.

OUTGOING LEGAL MAIL

July 11, 2012; August 3, 2012; August 16, 2012; August 16, 2012; August 21, 012; September 7, 2012; September 11, 2012; September 11, 2012.

C. CONCLUSIONS OF LAW

1. Under Rule 32.8(c) of the Arizona Rules of Criminal Procedure, the Petitioner "bears the burden of proving his claims for post-conviction relief by a preponderance of the evidence." *State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000.) A defendant also has the burden "to prove a constitutional defect:" *State v. Carriger*, 143 Ariz. 142, 153, 692 P.2d 991, 1002 (1984).

If a "constitutional defect has been proven, the state shall have the burden of proving that the defect was harmless beyond a reasonable doubt." Rule 32.8(C), Ariz. R. Crim. P.; *Matter of Wolfram*, 174 Ariz. 49, 53, n. 4, 847 P.2d 94, 98 n.4 (1993); *State v. Ramirez*, 126 Ariz. 464, 466-67, 616 P.2d 918, 920-21 (App. 1980).

2. Appellate counsel is responsible for reviewing the record and selecting the most promising issues to raise on appeal. *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App.1995). Appellate counsel's "strategic decision to 'winnow out weaker arguments on appeal and focus on' those more likely to prevail is an acceptable exercise of professional judgment." *State v. Febles*, 210 Ariz.

589, 596, ¶ 20, 115 P.3d 629, 636 (App. 2005) quoting *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S.Ct. 3308 (1983).

In short, "[a]ppellate counsel are not ineffective for selecting some issues and rejecting others." *Febles*, 210 Ariz. at 596, 1119, 115 P.3d at 636. Moreover, Counsel is expected to raise meritless claims. *Carriger*, 143 Ariz. at 145, 692 P.2d at 994.

3. The State has the burden of showing that the constitutional error was harmless beyond a reasonable doubt. Rule 32.8(c), Ariz. R. Crim. P.; *Gamache v. California*, 562 U.S. 1083, 1084, 131 S. Ct. 591 (2010). A test for harmless error is "whether there is a "reasonable probability" that had the error not been made, the verdict would have been different." *State v. Spreitz*, 190 Ariz. 129, 142, 945 P.2d 1260, 1273 (1997) *citing State v. Atwood*, 171 Ariz. 576, 639, 832 P.2d 593, 656 (1992).

4. Defendant is not entitled to post-conviction relief brief based on the failure to instruct the jurors that that endangerment, threatening, and intimidating was a lesser included offense of aggravated assault. Defendant made the tactical decision to proceed with an "all or nothing defense" because if the jurors returned a verdict of a lesser offense such as endangerment of A.R.S. § 13-1201. (A) and (B) a class 6 felony, Defendant would be deported to Norway. Defendant did not want to return to Norway but wanted to stay in the United States.

5. In the alternative, endangerment is not a lesser included offense of aggravated assault. *State v. Morgan*, 128 Ariz. 362, 367, 625 P.2d 951, 956 (App. 1881). Had Candelaria submitted an instruction that endangerment was a lesser included offense of aggravated assault, the Court relying on *Morgan* would have rejected the instruction.

6. Defendant failed in his burden of proving by a preponderance of the evidence that he was denied access and right to counsel during the appellate stage of Defendant's proceedings because:

a. Defendant had the trial transcripts;

b. Prior to Candelaria filing Defendant's opening and reply brief, Defendant received 12 legal mailings from Candelaria and Defendant; sent three legal mailing to Candelaria;

c. Candelaria and Defendant had at least three phone calls;

d. Defendant sent his three legal mailings to Candelaria while Defendant was in Cibola Unit, a general population unit where Defendant had access to pen and paper;

e. Defendant's legal mailings contained the issues Defendant wanted raised in his briefs;

f. Candelaria reviewed the issues Defendant wanted raised in his briefs.

Candelaria concluded the issues were either without merit and would detract from the issues he believed had merit or were claims that should be addressed in a Rule 32 proceeding;

g. Candelaria was Defendant's trial counsel. Candelaria is an experienced trial with many years as a prosecutor. Candelaria had reviewed the transcripts. Candelaria had filed a number of pre-trial motions. Candelaria was familiar with the case;

h. Even if Candelaria had spent more time with Defendant before filing the opening brief, he would not have changed the issues he raised in Defendant's briefs because the issues he raised were the issues he believed had "credibility."

7. Even if Defendant was hindered in his access to counsel and right to counsel, the hindrance was harmless beyond err beyond a reasonable doubt; therefore, Defendant is not entitled to file a new- opening and reply brief.

8. Defendant has set forth the following claims, which he apparently contends would have been made but for the State's interference in his access to and right to counsel: (a) challenge the victims being allowed to remain in the Court room (R.T. 3/20/18, at 29-30): (b) challenge Defendant's having to wear a stun belt; (c) failing to attack the application of transferred intent; and (d) the fact the

prosecutor, Joel Ruechel, is married to the Presiding Judge Michala Ruechel. Had any of the latter claims been raised in Defendant's briefs, Defendant's convictions would still have been affirmed.

a. The Stun Belt argument did not raise a colorable claim.

First, in the Court's August 1, 2017 order, the Court rejected Defendant argument that the use of the stun belt entitled Defendant to a new trial.

Second, Candelaria did not have any evidence that any of the jurors had observed Defendant's stun belt. If Candelaria had any evidence that the stun belt was visible to the jurors, he would have brought it to the Court's attention) *State v. Dixon*, 226 Ariz. 545, 552, 1 27, 250 P.3d 1174, 1181 (2011) held that a case would only be reversed if the stun belt is visible to the jury.

Third, any 9th Circuit Court of Appeals cases holding the case can be reversed when the stun belt is under the inmate's clothes is not binding on Arizona Courts regarding constitutional interpretations. *State v. Montano*, 206 Ariz. 296, 297, n. 1. 300, 77 P.3d 1246, 1250, 2003 *citing State v. Vickers*, 159 Ariz. 532, 543 n. 2, 768 P.2d 1177, 1188 n. 2 (1989).

b. The Victims had the Constitutional right to remain in the court room while other victims testified.

Defendant argued it was error to allow the victims to remain in court room while the other victims testified. The Arizona Constitution A.R.S. Const. Art. II, § 2.1 (3) provides that a victim has the right to be present at every proceeding where the defendant has the right to be. A.R.S. § 13-4420 implements the latter Constitutional right. "The Victims' Bill of Rights is a constitutional amendment approved by Arizona voters November 6, 1990 and effective November 26, 1990. Ariz. Const. art. 2, § 2.1." *State ex rel. Hance v. Bd. Of Pardons*, 178 Ariz. 591, 593, n. 3, 875 P.2d 824, 826, n. 313 App. 1993).

In light of the Arizona Constitutional provision of the Victims' Bill of Rights guaranteeing a victim to be present at "all criminal proceedings where the defendant has the right to be present" and the statutory provision implementing the later Constitutional provision, any attempt to remove the victims from the court room would have failed nor would it have made viable appellate argument.

c. The claim that Candelaria misadvised Defendant that the State would have to prove Defendant targeted each victim is untimely. Therefore, Court dismisses this claim because it is untimely.

In his Rule 32 petition, Defendant did not raise the claim that Candelaria misadvised Defendant that the State would have to prove Defendant targeted each victim. Defendant waited until he testified in the evidentiary hearing to raise the claim that Candelaria had misadvised him that the State would have to prove that Defendant targeted each victim.

The Court finds that Defendant failed to raise this claim in a timely manner. In the Court's August 1, 2017 order, the Court informed Defendant and his counsel that the two issues that would be decided in the evidentiary hearing were whether Defendant was denied access to counsel and right to counsel and whether the jurors should have been that endangerment was a lesser offense of aggravated assault. At the evidentiary hearing, the Court reaffirmed that the latter two claims would be the claims addressed.

Defendant waited over 8 months to raise this claim. During the post-conviction process, Defendant has been represented by four attorney, plus his present

attorney. During these 8 months, Defendant could have moved to amend his petition to include the claim in question pursuant to Rule 32.6(d). Ariz. R. Crim. P. *See also State ex rel Berger*, 111 Ariz. 212, 215, 526 P.2d 1234, 1237 (1974) (Supreme Court noted that normally they will not take jurisdiction in a special action where the petitioner has "rested on his oars".)

Finally, even if the Court considers Defendant's claim that Candelaria misadvised Defendant regarding targeting, Defendant was not prejudiced by the advice regarding. All of Defendant's sentences were ordered to run concurrent to one another. Aggravated assault Counts 2 and 3 were the only counts based on transferred intent. On Counts 2 and 3, the Court sentenced Defendant to 3 1/2 years. On Counts 1, 5, 6, and 8, the Court sentenced 7 1/2 years.

Consequently, at the most the two counts based transferred would be subject to dismissal. *See state v. Mendoza*, 107 Ariz. 51, 56, 481 P.2d 844, 849 ((1971) (Where Court found that Defendant had been found guilty of two offenses based on one act and the sentences were ordered to run concurrent, Court ordered dismissal of one of the counts but held remand was unnecessary as the sentences had been concurrent.)

Because Defendant took over 8 months to raise "targeted" claim, the Court dismissed this claim because Defendant did not raise the claim in a timely manner.

d. Candelaria did not have any basis to raise a claim of impropriety on the basis that the prosecutor was married to the Presiding Judge.

Defendant raised his concern with Candelaria that the prosecutor was married to the presiding judge. Candelaria did not believe this was an issue. (Id.) He did not raise the issue in his opening or reply briefs. *Febles*, 210 Ariz. at 596, ¶ 20, 115 P.3d at 636 (Up to the appellate counsel to raise the issues he believes have merit.)

D. CONCLUSION.

Based on the foregoing, the Court dismisses Defendant's last two remaining Maims of his Rule 32 petition:

a. Whether Defendant was denied access to counsel and right to counsel.

b. Whether Defendant made a tactical decision not to have the trial court to instruct the jurors that endangerment,

threatening and intimidating was a lesser offense of aggravated assault.

The Court finds that no purpose would be served by further proceedings.

Done this 24th day of May, 2018.

/s/ Dale P. Nielson
Judge Dale P. Nielson
Navajo County Superior Court

Copy mailed/delivered to 5/24/18

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Case Flow Manager

/s/ [Illegible]

APPENDIX D

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. JOHN KRISTOFFER LARSGARD, Appellant.	No. 1 CA-CR 12-0283 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court) (Filed May 7, 2013)

Appeal from the Superior Court in Navajo County

Cause Nos. S0900CR201100767 and S0900CR201100780

The Honorable John N. Lamb, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Joseph T. Maziarz, Chief Counsel, Criminal Appeals Section
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

Criss E. Candelaria — Pinetop
Attorney for Appellant

HALL, Judge

¶1 Following a jury trial, John Larsgard was convicted of six counts of aggravated assault[1] and one count of felony endangerment for driving into crowds of people celebrating Winslow's annual "Standing on the Corner" festival. Larsgard filed a timely notice of appeal, and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(2) (2003), 13-4031, and -4033(A) (2010). For the reasons that follow, we find no reversible error and affirm.

Due Process Claim Regarding Medications

¶2 Larsgard's first argument on appeal alleges a due process violation. He claims that he was denied pain medications prescribed by his doctor in Norway for severe neck pain and was provided inadequate medication by jail medical staff that "severely impacted his ability to communicate with counsel, prevented him

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[1] The aggravated assault counts alleged that Larsgard intentionally placed the victims in apprehension of imminent physical injury while using a deadly weapon or dangerous instrument.

from reacting rapidly to trial developments, sedated him, and diminished his ability to express emotions ."[2]

¶3 On the first day of trial, Larsgard filed a motion asking the court to order the Navajo County Jail to administer the pain medications that had been prescribed by his treating doctor in Norway for chronic pain because the medication provided to him by jail medical staff the previous five months left him in "constant pain." The trial court denied the motion, reasoning that it did not make sense the day before trial to change the medications Larsgard had been on for months and that it was not in a position to determine the correct medications "without having some guidance."

¶4 Larsgard renewed his request two days later when he read an e-mail from his doctor in Norway explaining that Larsgard had been prescribed unusually high dosages of opioids, including oxycodone, to allow him to participate in the activities of daily life. The court advised Larsgard to forward the e-mail to the jail "and let them do what they need to do." Larsgard did not pursue the matter further until he again raised the issue in a motion for new trial. The court denied the

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[2] Although Larsgard mentions in the caption to this argument that his due process rights were also violated by denial of access to legal materials, he has waived and abandoned this claim on appeal by failing to make any argument or offer any authority in support of it. *See State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004) (failure to present "significant arguments, supported by authority" in opening brief waives issue) (citing *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989)).

motion for new trial, finding that "Mr. Larsgard was engaged fully in the trial of his case, taking notes, whispering with investigators, testifying lucidly and clearly and confronting [sic] with counsel, and he did not appear tired or out of it."

¶5 During sentencing, Larsgard testified that he was distracted at trial by the pain, twice felt he was about to fall asleep because of difficulty in sleeping at night, and "was not able to reach my full potential as far as focus." He acknowledged, however, that he was able to hear all of the witnesses testify, and to answer questions when he testified. He testified that he "could have done better" if he had different medication, but he did not give any specific examples.

¶6 We do not perceive a due process violation that would require Larsgard's convictions and sentences to be vacated. The record fails to support his claims that: (1) he was forced to take the medications given him by the jail medical staff; (2) that the medications "made him restless, cloudy, unresponsive, nauseous, and largely apathetic toward life;" or (3) the medications "severely impacted his ability to communicate with counsel, prevented him from reacting rapidly to trial developments, sedated him, and diminished his ability to express emotions." Moreover, the cases that Larsgard relies on pertain to standards for the forcible administration of anti-psychotic drugs, *see Sell v. United States*, 539 U.S. 166, 169 (2003); *Riggins v. Nevada*, 504 U.S. 127, 129 (1992); *Washington v. Harper*, 494 U.S. 210, 213 (1990); *United States v. Loughner*, 672 F.3d 731, 744-52 (9th Cir. 2012), and are therefore

inapposite here because Larsgard was not forced to take any medication.[3]

¶7 In summary, Larsgard has failed to present evidence demonstrating that the unidentified medications that the jail medical staff provided him significantly affected his access to counsel or his ability to participate in his own defense. The trial court had the opportunity to observe Larsgard throughout the trial, and found that he was fully engaged in the trial and was able to and did communicate with counsel. The trial court's observations are entitled to substantial deference, *see State v. Moody*, 208 Ariz. 424, 443, ¶ 48, 94 P.3d 119, 1138 (2004) (addressing whether reasonable grounds exist for competency hearing), and we find no error that requires setting aside the convictions and sentences and ordering a new trial.

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[3] Our research has not disclosed, and Larsgard has not cited, any authority for the proposition that due process requires a trial court to ensure that a criminal defendant be given the same drugs he was prescribed prior to his detention. The sole case that Larsgard cites for this proposition, *Gibson v. County of Washoe*, 290 F.3d 1175 (9th Cir. 2002), holds only that a pretrial detainee's due process rights are violated by deliberate indifference to his serious medical needs. *See id.* at 1187-97 (finding that fact issue existed as to whether county was liable for civil rights claim based on lack of policy requiring medical staff to use information from prescription medication to screen incoming detainees, in light of other policy delaying medical evaluations of incoming detainees who are combative and uncooperative).

Claims of Late Disclosure and *Brady* violations

1. Late Disclosure

¶8 Larsgard argues that the trial court abused its discretion in failing to preclude an untimely disclosed lab report showing the presence of drugs in his system a short time after the incident.

¶9 We review a trial court's imposition of sanctions for discovery violations for abuse of discretion. *State v. Lee*, 185 Ariz. 549, 555-56, 917 P.2d 692, 698-99 (1996). A court may impose any remedy or sanction for non-disclosure that it finds appropriate. Ariz. R. Crim. P. 15.7(a). "Preclusion is a sanction of last resort, to be imposed only if other less stringent sanctions are not applicable." *Moody*, 208 Ariz. at 454, ¶ 114, 94 P.3d at 1149 (citations and internal punctuation omitted). Instead of precluding the late-disclosed lab report, the court continued the trial to allow defendant additional time to prepare. The State had timely disclosed that it was waiting for the lab results, and the disclosure was not a surprise to Larsgard when he received them shortly before trial. The results were also important to the State's case because they demonstrated that oxycodone and three types of muscle relaxants were present in Larsgard's bloodstream, thereby providing a possible explanation for his aggressive driving during the incident. Moreover, the State disclosed the report the same day it was received, and Larsgard did not claim that the prosecutor acted in bad faith. Under these circumstances, we cannot say that the trial court abused its discretion.

2. *Brady* Violations

¶10 Larsgard also claims that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to produce a videotape of his booking and failing to disclose that two of the State's witnesses had filed suit against the company that supplied Larsgard with the rental car.

¶11 In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-10 (1976). Evidence is considered "material" for purposes of *Brady* only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

¶12 The issue of a possible "booking tape" first arose during the cross-examination of Winslow Police Officer Alicia Marquez, who had testified on direct examination that when Larsgard was in a holding cell after his arrest, he fluctuated between being "real calm" and "irate or aggressive," and he agreed only to make a

written statement about the incident. Officer Marquez acknowledged that there were security cameras "in the location where Mr. Larsgard was being detained." Larsgard argued following this witness's testimony and in a motion for new trial that the prosecutor should have searched for and disclosed the booking tape. The issue of the civil lawsuits purportedly filed by two of the witnesses against the rental-car company first surfaced in defendant's post-trial motion for a directed verdict and motion for a new trial, when Larsgard argued that the prosecutor should have obtained and disclosed this information.

¶13 Because Larsgard failed to raise a claim during trial that the State's failure to disclose the booking tape or the civil lawsuits violated his *Brady* rights, we review only for fundamental error. *Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608. Larsgard thus bears the burden of establishing that there was error, that the error was fundamental, and that the error caused him prejudice. *Id.* at 568, ¶¶ 23, 26, 115 P.3d at 608.

¶14 Larsgard has failed to meet his burden. First, he has failed to demonstrate the existence of a "booking tape" that would have clearly shown his demeanor or captured his remark that he would make only a written statement. The evidence did not show that the security camera was focused on Larsgard, that it was turned on, or that the tape was retained after that night. Second, he has failed to demonstrate that, had the booking tape shown his demeanor or captured his remarks, the evidence would have contradicted the

officer's testimony. Finally, he has failed to demonstrate a reasonable probability that, even if the tape had contradicted this officer's testimony, the result of his trial would have been any different. On this record, we find that Larsgard has failed to demonstrate a *Brady* violation with respect to the booking tape.

¶15 Larsgard has likewise failed to establish that the non-disclosure of the civil lawsuits filed by the two witnesses constituted a *Brady* violation. The State's duty under *Brady* extends only to evidence in its possession or the possession of police investigating or assisting in the prosecution of the crime. *See Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). *Brady*, moreover, only imposes an obligation on a prosecutor "to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The record in this case fails to show that either police or the prosecutor knew that the two witnesses had filed suit against the rental-car company, when these witnesses purportedly filed these lawsuits,[4] or why Larsgard could not have discovered this information himself. Moreover, it is hardly surprising that the witnesses, both of whom were injured during the incident, would have filed lawsuits. Under these circumstances, Larsgard has failed to demonstrate any reasonable probability that the outcome of his trial would have been any different had evidence that these two

[4] Indeed, Larsgard did not include a citation to the record that supports his contention that the witnesses had filed lawsuits against the rental-car company.

witnesses had in fact filed lawsuits been presented to the jury. On this record, we find no error, let alone fundamental error.

Weight of the Evidence

¶16 Larsgard also claims that the trial court erred in denying his motion for a new trial on the ground that the verdict was contrary to the weight of the evidence. He argues that the eyewitnesses "were themselves the victims of misperceptions," because the physical evidence and his own conduct after the first incident showed that he had not deliberately driven into the crowd. We review the trial court's denial of a motion for new trial based on the weight of the evidence for abuse of discretion. *State v. Spears*, 184 Ariz. 277, 289, 908 P.2d 1062, 1074 (1996). The trial court did not abuse its discretion here.

¶17 Larsgard was charged with eight counts of aggravated assault for using a dangerous instrument, a vehicle, to intentionally place each of the named victims in reasonable apprehension of imminent physical injury. The jury convicted him of six counts and acquitted him of the two remaining counts. Larsgard was also charged with recklessly endangering a two-year-old boy, with a substantial risk of imminent death, and the jury convicted him of this offense.

¶18 We view the evidence in the light most favorable to sustaining the convictions and leave credibility determinations to the judge, who was present and in the best position to evaluate credibility. Larsgard's

convictions were supported by sufficient evidence of record, and we cannot say that the trial court abused its discretion in denying the motion for new trial.[5]

Conclusion

¶19 For the foregoing reasons, we affirm Larsgard's convictions and sentences.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Presiding Judge

/s/
MAURICE PORTLEY, Judge

[5] Larsgard also argues that the trial court abused its discretion in denying his request to depose his mother, a Norway resident, before a trial date had been set. Although the court denied the request, his mother testified at trial. Consequently, the issue is moot, and we decline to address it. *See State v. Hoskins*, 199 Ariz. 127, 136-37, ¶¶ 22-24, 14 P.3d 997, 1006-07 (2000) (concluding that defendant's claim that his *Miranda* rights were violated was moot because his statement was not introduced at trial).

APPENDIX E

Fourteenth Amendment to the
United States Constitution

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to

the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX F

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SUPREME COURT
OF THE STATE OF ARIZONA

STATE OF ARIZONA, **Respondent/Plaintiff,** **v.** **JOHN K. LARSGARD,** **Petitioner/Defendant.**	Supreme Court Case No.: 1-CR 19-0155 Appellate Case No.: 1 CA-CR 18-0598 PRPC Trial Case No's.: CR2011-00767 CR2011-00780 **AMENDED PETITION FOR REVIEW FROM DENIAL OF POST-CONVICTION RELIEF BY THE TRIAL AND APPELLATE COURT**

Petitioner, John K. Larsgard, pursuant to *Rule 32.9 (g)* of the *Arizona Rules of Criminal Procedure*, hereby files this Petition for Review from the court of

appeals decision accepting review but denying relief in Petitioner's Post-Conviction Relief proceeding. (The Ruling is included as Appendix A). For the reasons listed below, Petitioner respectfully requests that this court grant review and reverse the lower court's rulings.

MEMORANDUM OF POINTS AND AUTHORITIES

I. ISSUES PRESENTED FOR REVIEW

Issues presented for this court to review:

Claim 1: The Appellate Court erred when it failed to properly apply *Strickland* analysis in rendering its decision; The Superior Court of Navajo County abused its discretion when it dismissed Petitioner's claim that he received ineffective assistance of both trial and appellate counsel without an evidentiary hearing

Claim 2: The Superior Court of Navajo County abused its discretion when it dismissed Petitioner's claim that his Sixth Amendment right to counsel was violated by the Arizona Department of Corrections and the Appellate Court erred when it failed to determine if the state had met its burden of showing this violation was harmless beyond a reasonable doubt;

Claim 3: The Appellate Court erred when it dismissed Petitioner's claim based on preclusion when the claim was presented in the context of ineffective assistance of counsel and was also fundamental error. The Superior Court of

> Navajo County abused its discretion when it failed to request a jury instruction on the lesser included charge and the trial judge's failure to provide the jury with an instruction on lesser included was fundamental error offenses.

At a minimum, Petitioner was entitled to an evidentiary hearing on all claims. This brief will provide the necessary proof that the claims were colorable. Accordingly, the Superior Court erred when it denied Petitioner's claims and the Arizona Court of Appeals committed reversible error by failing to grant Petitioner relief.

II. STANDARD OF REVIEW

This court reviews the trial court's denial of post-conviction relief for abuse of discretion. *State v. Bennett*, 213 Ariz. 562, 566 (2006). Mixed questions of law and fact are reviewed *de novo*. *State v. Moore*, 222 Ariz. 1, 7 (2009).

III. PROCEDURAL HISTORY

On March 27, 2012, a jury convicted Petitioner on multiple counts of aggravated assault and one count of endangerment. He was sentenced to concurrent terms in C for 7.5 years.

Petitioner timely filed a Notice of Appeal. On May 7, 2013, Petitioner's sentence was affirmed. Cert to the Arizona Supreme Court was denied.

Petitioner timely filed a notice of Post-Conviction Relief. He filed his *pro per* Petition on December 17, 2015. Therein, he raised a variety of claims including an Eighth Amendment claim, an ineffective assistance of counsel claim (trial and appellate), and a Sixth Amendment violation of his right to counsel by DOC. On October 13, 2016, the state conceded that two of Petitioner's allegations raised a colorable claim that required an evidentiary hearing: (1) whether Petitioner's Sixth Amendment right to appellate counsel was violated, and (2) whether Petitioner's trial counsel should have submitted an instruction on endangerment as a lesser-included offense. [Evidentiary Hearing (hereinafter "EH")].

On March 20, 2018, the Navajo Superior Court heard testimony related to these claims. It denied relief as to all other claims. Following the hearing, the court issued its order denying each of Petitioner's claims.

Petitioner timely filed a Petition for Review with the Arizona Court of Appeals. The court granted review, but denied relief as to all claims. This Petition follows.

IV. FACTS RELEVANT TO THIS PETITION

After a wrong way traffic incident, Petitioner was charged with 35 criminal counts including child abuse and attempted murder. Petitioner proceeded to jury trial where he was represented by Criss Candelaria. Throughout the trial, Petitioner was required to wear

a stun belt and was denied access to prescribed pain medication. [Evidentiary Hearing pg. 31; TT 1 pg. 3].

At the start of the trial, the state charged defendant with transferred intent with regard to the assaults. [TT Day 7 pg. 8] The defense wasn't notified of this change until it was provided the state's proposed jury instructions. Candelaria verbally objected, but was overruled. [Id].

A jury instruction regarding the lesser-included offenses of endangerment and assault were not provided in the context of the aggravated assault charges. [EH pg. 27 – 28]. Petitioner was subsequently convicted on multiple counts of aggravated assault and one count of endangerment. He was sentenced to concurrent terms of imprisonment in DOC for 7.5 years. Petitioner timely filed his Notice of Appeal on May 2, 2012. Criss Candelaria was appointed by the court to represent him on his appeal. [EH pg. 12].1

Despite the obvious conflict, Petitioner agreed to work with Candelaria provided that Candelaria would allow him to participate in drafting the appeal and that Candelaria raised issues Petitioner felt were vital. [EH pg. 13-14]. Petitioner specifically conditioned his waiver on Candelaria raising the issue of Arizona's victim's rights protections. [EH pg. 29-30]. Petitioner believed that, in the context of his case, the Prosecutor utilized the victim's rights provisions in a way that violated his right to a fair trial. [EH pg. 29-30]. Petitioner also wanted the issue raised on appeal so that he could preserve it for federal review. [EH pg. 30-31].

Candelaria, however, decided not to raise the issue because they "would have lost" and because it would detract from the other issues that he was raising. [EH pg. 65, 75]. He also stated that he believed the issue was frivolous. [Id]. In addition to failing to raise the issue of victim's rights as requested, Candelaria failed to raise several issues of merit including the requirement that Petitioner wear a stun-belt during the proceedings, and the failure of either the court or counsel to determine if a lesser-included instruction was required. [EH pg. 31].

Rather, Candelaria raised issues the Appellate Court determined were moot, abandoned, and lacked specificity. [EH pg. 36]. See *State v. Larsgard*, 2013 Ariz. App. Unpub. LEXIS 529.

Throughout the appellate process Petitioner and Counsel had difficulty communicating. [EH, *generally*]. Their issues began by July of 2012 with Candelaria's office sending letters to Petitioner stating they were having difficulties contacting him. [EH pg. 16]. During this time, Petitioner was denied access to writing materials and his legal mail was diverted to a storage system. [EH pg. 16-17]. Further, he was denied some scheduled legal calls and DOC actively listened in on others. [EH pg. 25].

On November 9, 2012, Candelaria filed Petitioner's Opening Brief. On May 7, 2013, the Appellate Court denied Petitioner's request for relief. Petitioner then timely filed his Petition for Post-Conviction Relief. He was appointed counsel who filed a Notice of No

Claim. Petitioner then filed his own petition raising several issues of merit, only two of which were granted an evidentiary hearing.

At Petitioner's evidentiary hearing only these issues were heard: (1) whether Petitioner was denied access to counsel, and (2) trial counsel's failure to provide instruction on the lesser-included offenses. The testimony presented on these issues clearly established that Petitioner was denied access to counsel by DOC and that Candelaria's failure to provide the jury with instruction on the lesser included charge was not agreed upon by Petitioner.

Despite showing by a preponderance of the evidence that he was entitled to relief, the trial court denied all of petitioner's claims. The appellate court followed suit, and this Petition for Review follows.

V. REASONS THIS COURT SHOULD GRANT REVIEW AND LAW AND ARGUMENT

Claim 1: THE APPELLATE COURT ERRED WHEN IT FAILED TO PROPERLY APPLY *STRICKLAND* ANALYSIS AND THE SUPERIOR COURT OF NAVAJO COUNTY ABUSED ITS DISCRETION WHEN IT DISMISSED PETITIONER'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF BOTH TRIAL AND APPELLATE COUNSEL WITHOUT AN EVIDENTIARY HEARING

1. Reasons This Court Should Grant Review

The denial of Petitioner's ineffective assistance of counsel claim is of statewide importance and is likely to be repeated. The appellate court's analysis of Petitioner's PCR petition fails to comport with proper *Strickland* analysis in that it fails to provide any analysis of the merits of the omitted issues as required. See *Strickland v. Washington*, 466 U.S. 668 (1984). *See also Milton v. Miller*, 744 F.3d 660, 669-70 (10th Cir. 2014); *Gray v. Greer*, 800 F.2d 644, 646 (7th. Cir. 1985); *May v. Henderson*, 13 F.3d 528, (2nd Cir. 1994).

Further, counsel can find no instance where the court of appeals has ever found appellate counsel to be ineffective where counsel filed claims that were weaker than those not filed. This failure reinforces the fact that the appellate court is not properly reviewing the legitimacy of arguments submitted in PCR

petitions as required by *Strickland v. Washington*, 466 U.S. 668 (1984).

2. Law and Argument

a. The Appellate Court Failed to Properly Apply the Strickland Standard In Reviewing Petitioner's Ineffective Assistance of Counsel Claim

The effectiveness of appellate counsel is reviewed pursuant to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). However, appellate counsel's performance is not reviewed in the same light as trial counsel because the roles are substantially different. Appellate counsel is required to review "the record and select[] the most promising issues to raise on appeal." *State v. Bennett*, 213 Ariz. 562, 567 (2006). While, it is presumed that appellate counsel will reject some issues in favor of others, "if [he] ignores issues that are clearly stronger than those selected for appeal" the presumption that appellate counsel was effective is refuted. *State v. Bennett*, 213 Ariz. 562, 567 (2006).

Similar to this court's findings in *Bennett*, the United States Supreme Court has found that, while it is more difficult to demonstrate that appellate counsel was incompetent by failing to raise a particular issue when it raised other colorable issues, that difficulty can be overcome by showing that counsel ignored issues that were clearly stronger than those presented. *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (Souter, J.,

Stevens, J., Ginsburg, J. Breyer, J., *dissenting*);(*referring* to *Gray v. Greer*, 800 F.2d 644, 646 (CA7 1986)).

When the court is tasked with evaluating the performance of appellate counsel, it has the duty to review the case with two distinct questions in mind: "whether the lawyer really did function as a committed advocate, and whether he misjudged the legitimate appealability of any issue. In reviewing the advocate's work, the court is responsible for assuring that counsel has gone as far as advocacy will take him with the best issues undiscounted." *Smith v. Robbins*, 528 U.S. 259, 295 (2000) (Souter, J., Stevens, J., Ginsburg, J. Breyer, J., *dissenting*).

The 7th Circuit echoes this position in *Gray v. Greer*,

> "When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome."

Gray v. Greer, 800 F.2d 644, 646 (7th. Cir. 1985); *See also Mayo v. Henderson*, 13 F.3d 528, (2nd Cir. 1994) (*citing* to *Greer*).

Likewise in the 10th Circuit, which found that "[t]he very focus of a *Strickland* inquiry regarding performance of appellate counsel is upon the merits of omitted issues, and no test that ignores the merits of the omitted claim in conducting its ineffective assistance of appellate counsel analysis comports with federal law. *Milton v. Miller*, 744 F.3d 660, 669 (10th Cir. 2014) (*quoting Cargle v. Mullin*, 317 F.3d 1196, 1205 (10th Cir. 2003)).

In *Miller*, the court found that the appellate court's analysis of *Strickland* as applied to appellate counsel misstated the law and therefore it failed to accurately apply it to Miller's IAOC claim. Specifically, the state court's interpretation of *Strickland* allowed the court to reject "ineffectiveness allegations without any assessment of the merits of the underlying predicate claims." *Milton v. Miller*, 744 F.3d 660, 669 (10th Cir. 2014) (stating that the state court "truncated Strickland's first prong by stating, '[t]he fact appellate counsel fails to recognize or raise a claim, regardless of merit, is not sufficient alone to establish ineffective assistance of counsel").

The Arizona Appellate Court makes the same mistake. Rather than review Petitioner's omitted claims for merit, it merely argues that counsel can "winnow out weaker arguments . . . and focus on those more likely to prevail." [Memorandum Decision ¶ 14]. Such a stance is inconsistent with *Strickland*. *Strickland* requires that the court review the claims a petitioner asserts were colorable and analyze them for merit. Only after reviewing the claims, can the court move to the

second prong of Strickland to determine whether counsel's failure to present the claims caused prejudice to the petitioner. *Strickland*, 466 U.S. at 669.

Here, Petitioner identified a number of claims that were clearly stronger than those presented on appeal. Yet, the appellate court failed to address the merits of these claims. Such a lack of analysis of Petitioner's claims fails to properly comport with *Strickland*.

The court's ruling on the PCR is also inconsistent with its own ruling in *State v. Larsgard*, 2013 Ariz. App. Unpub. LEXIS 529. In *Larsgard* the court noted that Petitioner's counsel raised claims that were moot, deemed abandoned, and lacked specificity. See *State v. Larsgard*, 2013 Ariz. App. Unpub. LEXIS 529 n. 1 – 5. However, the court does not clarify how raising moot, abandoned, and non-specific claims constitutes legitimate strategy and not ineffective assistance of counsel. *Id.*

The court's ruling is also inconsistent with its findings in the ruling upon which this Petition is based. Specifically, the court found that because:

(1) Petitioner failed to raise the constitutionality of his sentence in regards to his pre-existing medical condition on appeal, he waived the argument. [Ruling pg. 4 ¶ 9]. The failure of counsel to raise this issue supports his claim of ineffective assistance of counsel and that he was denied access to appellate counsel (argument below).

(2) Petitioner failed to raise the issue of the lesser-included in his direct appeal, that issue was now precluded. [Ruling pg. 4 ¶ 11]. Again, the failure of counsel to raise this issue supports Petitioner's claim of ineffective assistance of counsel. (Petitioner raised this issue under the context of ineffective assistance of counsel. (Argument below)).

Further, Petitioner identified several substantive issues that were substantially stronger than the issues appellate counsel raised. These issues include:

(1) the failure of appellate counsel to argue the trial court erred in denying a motion to preclude the state from using A.R.S. § 13-203 in violation of Petitioner's Sixth Amendment rights;

(2) the failure of appellate counsel to preserve issues related to Arizona's victim's rights statutes for federal appeal;

(3) the failure of appellate counsel to raise issues related to the stun belt Petitioner was forced to wear;

(4) the failure of appellate counsel to raise the issue of a lesser-included instruction to the jury.

These failures should have merited an evidentiary hearing, but the trial court abused its discretion by failing to provide the proper procedural safeguards. The appellate court compounded that failure by failing to comply with *Strickland* and affirming the lower court's ruling. Petitioner provided both the trial and appellate court with substantive case law showing that the arguments not raised on appeal were actionable, as

well as case law finding these errors reversible. The law requires nothing more.

b. Petitioner was Denied Effective Assistance of Trial Counsel In Violation of his Sixth Amendment Rights And the Appellate Court's Ruling Fails to Identify Cogent Reasoning, Consistent with *Strickland*, For Denying Petitioner Relief

Petitioner raised two substantive arguments showing that the failure to raise these arguments was reversible error. Specifically, Petitioner alleged that counsel was ineffective for failing to: (1) object to the use of a stun belt on Petitioner throughout the trial, and (2) timely object to the state's late addition to try petitioner under the theory of transferred in violation of Petitioner's Sixth Amendment rights.

Again, the appellate court's ruling failed to set forth any substantive legal analysis as to the specific issues Petitioner raised. Rather, it found that Petitioner's counsel was effective because he "conducted pretrial litigation, used an independent investigator, formulated a targeted defense strategy, and sought leniency at sentencing." Again, the court failed to address the claims Petitioner raised in relation to the *Strickland* standard. That is, the court fails to address whether the result of the proceeding would have been different had counsel raised the specific issues Petitioner identified.

Petitioner presented substantive legal argument that the court's requirement that he wear a stun belt throughout the proceedings violated his constitutional right to a fair trial and the state's untimely notification related to the transferred intent theory violated his Sixth Amendment rights. (Argument is set forth in the Petition For Review to the Appellate Court and are incorporated by reference). Again, the appellate court failed to properly consider the merits of each issue and denied Petitioner relief without providing a proper analysis of his claims pursuant to *Strickland*.

CLAIM 2: THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED PETITIONER'S CLAIM THAT HIS SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED AND THE APPELLATE COURT ERRED WHEN IT FAILED TO DETERMINE IF THE STATE HAD MET ITS BURDEN OF SHOWING THE VIOLATION WAS HARMLESS BEYOND A REASONABLE DOUBT

A. Reasons this Court Should Grant Review

Petitioner was able to show by a preponderance of the evidence, that his right to counsel was interfered with by DOC. However, the state could not show, beyond a reasonable doubt, that that interference was harmless. The trial court erred when it denied Petitioner relief and the appellate court erred when it

failed to review this claim to determine if the state had, in fact, shown that the violation of Petitioner's Sixth Amendment right was harmless beyond a reasonable doubt.

B. Law and Argument

Both the Sixth Amendment of the U.S. Constitution and the Arizona Constitution guarantee a defendant the right to counsel. U.S. Const. amend. VI; Arizona Constitution art. 2, § 24. This right attaches from the outset of the appeal and applies to all "ancillary matters appropriate to the proceedings" 18 U.S.C. § 3006(A)(c); *see also PA v. Finley*, 481 U.S. 551, 555 (1987). Right to counsel is violated when the state deliberately interferes with the confidential relationship between a criminal defendant and defense counsel. See *State v. Warner*, 150 Ariz. 123, 127 (1986).

The evidence showed that DOC repeatedly denied Petitioner access to his attorney from July of 2012 until after the Reply brief was filed. When he was able to confer with his attorney, those conversations were monitored. Petitioner met his burden of showing, by a preponderance of the evidence, that his Sixth Amendment right to counsel was violated and the state could not show, beyond a reasonable doubt that the violation was harmless.

In its review of the case, the appellate court fails to apply the appropriate standard and merely lists the times when petitioner was able to communicate with counsel. The court failed to address the uncontroverted

evidence that established that Petitioner's counsel had difficulty contacting him, his legal mail was diverted to a DOC storage system, he was refused some legal calls, while others were monitored. Further, the court failed to reconcile its ruling with this court's holding in *State v. Warner*, which states that the "constitutional right to counsel is violated whenever "a state agent is present or interferes at private confidential attorney-client conferences. *State v. Warner*, 150 Ariz. 123, 127 (1986).

Notably, the appellate court's own ruling in *State v. Larsgard* as well as its ruling in this petition demonstrates that Petitioner's inability to contact counsel, did in fact, cause him harm. See *State v. Larsgard*, 2013 Ariz. App. Unpub. LEXIS 529. Specifically, counsel could not identify the medications Petitioner was required to take while in the County jail to support the corresponding due process claim. Further, Petitioner's counsel failed to support his argument that Petitioner was denied proper access to legal material, a failure that might have been avoided had Petitioner been able to consult with counsel. Both the trial court and the appellate court erred when they denied Petitioner's claim because the facts clearly show that Petitioner was denied access to counsel and this denial was not harmless beyond a reasonable doubt.

CLAIM 3: THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED, AFTER AN EVIDENTIARY HEARING, PETITIONER'S CLAIM THAT THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE LESSER-INCLUDED OFFENSES AND THE APPELLATE COURT ERRED WHEN IT DISMISSED THE CLAIM AS PRECLUDED

A. Reasons This Court Should Grant Review

The appellate court dismissed this claim entirely stating that because Petitioner "did not raise this claim on direct appeal . . . his claim is . . . precluded under Rule 32.2(a). [Ruling pg. 4 ¶ 11]. However, this claim was raised by Petitioner in relation to his ineffective assistance of counsel claim, and therefore is not precluded. [Defendant's *Pro Per* Petition For Post-Conviction Relief, pg. 22]. See *Stewart v. Smith*, 202 Ariz. 446, 449 (2002) (*stating* 'if defense counsel's failure to raise an issue at trial [or] on appeal . . . is so egregious as to result in prejudice as that term has been constitutionally defined, such failure may be raised by means of a claim of ineffective assistance of counsel"). *McKinney v. Ryan*, 2009 U.S. Dist. LEXIS 73958, at 10-11 (D. Ariz. Aug. 10, 2009).

The fact that the appellate court failed to realize the context of the claim further supports Petitioner's position that the court failed to accurately review the

record, conduct proper legal analysis, and make rulings consistent therewith.

B. Law and Argument

The issue presented is two-fold: (1) whether the trial court committed fundamental error by failing to provide the jury with a lesser-included instruction, and (2) whether trial and appellate counsel was ineffective for failing to address the issue? In any event, Petitioner was entitled to have the jury instructed on any lesser-included offenses. The failure to give instructions on a lesser-included offense is reviewed for fundamental error. *State v. Andriano*, 215 Ariz. 497, 504 (Ariz. 2007).

Arizona R. of Crim. P. 23.3 specifically requires that "forms of verdicts shall be submitted to the jury for all offenses necessarily included in the offense charged . . . " Ariz. R. Crim. P. 23.3. A necessarily included offense is one "where some of the elements of the crime charged themselves constitute a lesser crime." *Sansone v. United States*, 380 U.S. 343, 349 (1965). A lesser-included verdict form is merited when there is "some evidence, introduced by either the state or the defendant, or by a combination of proofs, which justifies conviction of the lesser offense." *State v. Angle*, 149 Ariz. 400, 505 (Ariz. Crt. App. 1985). Even in the event that a defendant employs an "all or nothing" defense, he is still entitled to have a lesser included offense verdict forms given to the jury if the facts of the case merit it. *State v. Wall*, 212 Ariz. 1, 5 (Ariz. 2006).

In the context of aggravated assault, fundamental error occurs when the trial court fails to provide the jury with verdict forms that "show every choice of verdict the jury could return" even if the defense does not request such forms. *State v. Knorr*, 186 Ariz. 300, 303 (Ariz. Crt. App. 1996). An instruction on a lesser include offense is required when (1) the crime is lesser include in the offense charged and (2) when the evidence supports giving the instruction. See e.g. *State v. Noleen*, 142 Ariz. 101, 107 (Ariz. 1984). "A defendant is *entitled* to a lesser included offense instruction if there is evidence upon which a jury could convict of the lesser offense and find the state had failed to prove an element of the greater offense." *Id.* (citing *State v. Conroy*, 131 Ariz. 528, 532 (Ariz. Crt. App. 1982).

In examining whether endangerment is a lesser included of aggravated assault, the elements of assault must be reviewed because aggravated assault is a subcategory of assault. The elements for assault, in relevant part, include "intentionally placing another person in reasonable apprehension of imminent physical injury . . . " A.R.S. § 13-1203. The elements for endangerment are virtually the same with the exception that endangerment eliminates the intent *mens rea* and substitutes it with recklessness, and removes the element of reasonable apprehension. A.R.S. § 13-1204(A) ("A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury"). Because the elements of intent and "reasonable apprehension of imminent physical injury" had to be found by the jury and

because an aggravated assault cannot be found where there was not also an endangerment, an endangerment instruction should have been requested and the failure to do so impacted the reliability of the entire proceeding.

In the evidentiary hearing, the evidence clearly established that Petitioner was not properly advised as to the lesser-included. Candelaria contradicted himself, first claiming he didn't recall if he had discussed it with Petitioner, then claiming he did. Petitioner was certain – the lesser included was never discussed in terms of jury instructions, but was only discussed in terms of a plea agreement. Here, again the trial court erred when it failed to provide Petitioner relief and the appellate court erred when it determined the claim was precluded.

VII. PETITIONER WAS ENTITLED TO AN EVIDENTIARY HEARING ON ALL OF THE ISSUES HE PRESENTED IN HIS PETITION FOR POST-CONVICTION RELIEF – NOT JUST THE CLAIMS THE STATE AGREED TO HOLD AN EVIDENTIARY HEARING ON

The Arizona Supreme Court has long held that a Petitioner is entitled to an evidentiary hearing where a colorable claim – one that, "if the defendant's allegations are true, might have changed the outcome" – is presented. *State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002) (citing *State v. Shrock*, 149 Ariz. 433, 441 (1986)). In the present case, Petitioner set forth specific

facts and allegations on each of his claims that should have merited an evidentiary hearing. The trial court erred in denying him an opportunity to develop these facts at an evidentiary hearing. The appellate court compounded that error by failing to properly review Petitioner's claims under the correct legal standard and by failing to adequately review the legal record.

VIII. CONCLUSION

For the reasons set forth above, Petitioner requests that this Court grant review on each of the foregoing issues.

RESPECFULLY SUBMITTED this 2nd Day of August, 2019.

Elizabeth M. Hale, ESQ,

Elizabeth M. Hale
Attorney for Defendant

APPENDIX G

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA Appellee, vs. JOHN LARSGARD, Appellant,	) Court of Appeals) Division One) No.: 1 CA-CR-12-0283)) Navajo County) Superior Court) No. S0-900-CR-2011-) 00780) No. S0-900-CR-2011-) 00767

ON APPEAL FROM THE

NAVAJO COUNTY SUPERIOR COURT

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

This court has jurisdiction over this Defendant pursuant to the Constitution of Arizona Art. 6, § 9 and A.R.S. § 12-120.21 (A)(1).

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STATEMENT OF THE CASE

On October 4, 2011, The Navajo County Grand Jury indicted appellant, John Kristopher Larsgard ("Appellant"), on 35 counts, ranging from reckless driving and child abuse to attempted murder. A jury convicted Mr. Larsgard on March 27, 2012. Judge Lamb of Navajo County Superior Court sentenced him to 7 1/2

years on six counts of aggravated assault and one count of endangerment.

The Appellant, a former EMT and medical school student, drove through Arizona with his mother, on their way to Chicago. On September 24, 2011, Larsgard's vehicle driven by his mother was involved in single car accident in Winslow, Arizona. The accident disabled the car and Appellant and his mother were treated at the hospital for minor injuries.

Upon their release from the hospital, they travelled back to Flagstaff to obtain a rental car. Upon their return to Winslow to find and retrieve their belongings, Appellant drove the wrong way on a one way street. Officers denied them the opportunity to tell their side of the story. Town dwellers that witnessed the accident were either consanguineous or involved in civil claims that tainted their testimonies. Officers and jail officials denied Appellant his proper medication and thus violated the his rights as a pretrial detainee affecting his due process rights.

STATEMENT OF FACTS

On September 24, 2011, the Appellant, and his mother, Liv Larsgard, traveled through Winslow, Arizona on their way to Chicago, Illinois to attend a civil trial to which Appellant was plaintiff and at which his mother would testify. Reporter's Transcript ("RT") Day 5 ("5"): Page ("P") 28 Line ("L") 8, 12, RT5:P176L24-P177L1-3. The defendants there assaulted him nine and half years ago causing a severe neck injury.

RT5:P35L11. During those years he served as an EMT, graduated Summa Cum Laude from North Park University in Chicago. He attended medical school in Australia for three years, before resigning due to chronic neck and hand pain, a result from the assault in Chicago. RT5:P29L22, P30L23, P30L1-8, P176L3-4, P177L18-22, P178L119, P179L17-25, P184L19-22. He underwent a complicated surgery in Iran and returned to Oslo, Norway for pain treatment with his physician Dr. Stokke. RT5:P32L7, P34L7-16, P180L21-P181L25, P18213-25.

Immediately before the events in Winslow, the Appellant lived in Los Angeles, California. He was preparing to retake the medical school admissions examination. RT5:P175L20-24. Mrs. Larsgard flew into Los Angeles to accompany her son to court in Chicago. RT5:P185L17-23. As a result of her late arrival, they had to travel quickly to make the trial date. RT5:124:L7-15. As they departed, they agreed Mrs. Larsgard would drive while the Appellant slept. RT5:186L21-22. On the morning of September 24, 2011, she had an accident nearing North Park Avenue exit in Winslow, Arizona. RT5:P37L11, P117L10-14, P190L4-16. The investigating officer called Dalton Motors to tow the vehicle. RT2P79L24-P80L5. Ambulances transported the Appellant and his mother to Little Colorado Hospital. The Appellant hit his head in the accident. His mother hurt her arm. His pre-existing neck injury required his hospitalization. He was given painkilling medication. RT5:P38L24, P119L8-23. P121L19-23, P122L22- 25, P191L23-25, RT5:P37L19.

After their release, Sandy Curry, a taxi owner, drove them to Flagstaff, Arizona to rent a vehicle. RT5:P40L10, P103L14-18, P193L6-7, P194L18-24. In an effort to prevent further delay, the Appellant drove with his mother immediately from Flagstaff to Winslow to attempt to quickly retrieve their belongings at Dalton Motors and be on there way. RT5:P 110L 11-17, P122L18-19, P196L16-25.

Crowded streets and traffic diversions abounded this weekend because Winslow celebrated its "Standing on the Corner Festival" and "Navajo Days." RT5:P45L16-20, P205L1-3,15-18. The Appellant attempted to navigate to Dalton Motors using a talking navigation device provided with the car. RT5:P45L1, P202L17-P204L13. They made several phone calls to Dalton Motors. The owner told Mrs. Larsgard that his driver would meet them as soon as he was available. RT5:P44L6.

They continued toward Dalton's utilizing the navigation device. The electronic voice on the device advised incorrectly that he must turn right onto Second Street, a one-way street, into opposing traffic lanes to reach his destination. RT5:P204L20-23. The Appellant did not see any one-way signs. RT5:P46L3, P204L23-P205L37; RT6:P6L4-12.

Mrs. Larsgard exited the vehicle and walked about to ask directions to Dalton Motors, because the area looked unfamiliar. Before going to Flagstaff, Sandy Curry, the taxi driver, had showed them Dalton's tow

yard. RT5:P40L14-20, P46L1-8, P46L15, P205L24-P206L7; RT6:P4L15-20, P5L20-P6L3, P8L18-21. The Appellant was unaware then that Dalton Motors had three locations in Winslow. The address the patrolman at the accident gave him was of the main office on Second Street, not the tow yard on the west end of town where the vehicle was stored. RT2P79L17.

Listening to the navigation device, Appellant drove slowly down Second Street in the wrong direction. RT6:P11L4-22. People on the sidewalk yelled to him to turn around, but he did not hear them. RT6:P7L6-P8L17, P9L12-18, P10L20-24. Mrs. Larsgard returned to the car and told Appellant he was driving the wrong way. P13L18-24. He misunderstood her to mean that he was either not near Dalton's or in the parade route. RT6:P14L4-9. He turned into Dalton's main office parking lot. A small group of people there began yelling in his direction. Fearful, his mother asked him not to drive there. The Appellant put the car into reverse and backed into Second Street.

At that moment two vehicles travelled down the one-way towards the Appellant. He saw them and he reacted by reversing quickly to avoid a collision. This was the first time that day he geared the rental car into reverse. He unintentionally jumped onto curb. The car stopped abruptly after it hit and jumped a curb near a canopy set up as a food stand. RT6:P 15L 11-P 16L 15, P 17L825. He moved away from the food stand without stopping and drove through Dalton's parking lot.

Theresa Gonzalez and Michael Mendoza's three children were near or under the food stand canopy. The Appellant's quick reversal angered Ms. Gonzalez. She believed the Appellant intentionally tried to kill her and the children. RT5:P48l13-23. The Appellant pulled forward out of Dalton Motors, but he wanted to stay nearby because he believed the Dalton Motor's driver was going to meet them there. RT5:P51L2-4; RT6:P25L5-6, P26L21-P27L8, P28L8-25. They called Dalton Motors again. RT5:P50L3; RT6:P25L16-25, P29L9-16. Appellant did not know anyone was endangered when the car backed over the curb.

After the Appellant pulled through Dalton's lot he drove to the end of the block across a dirt lot. The Appellant made his way around the block near the same spot where he first made the wrong turn on the one-way street. A small crowd had approached near and around the Appellant's car to confront him about his driving behavior. At this time the Appellant and his mother were again attempting to telephone Daltons. RT6:P30L11-15.

Michael Mendoza, the children's father, angered by the story Ms. Gonzalez had told, followed him on foot for some distance through the neighborhood for the next few minutes. He caught up to the Appellant and his mother about the time the crowd began to close in on the car. The Appellant was in his seatbelt and attempting to call Dalton motors again. RT6:P30L16-22. When the Appellant rolled down his window to ask the crowd what it wanted, Mr. Mendoza punched him in the face breaking his nose.

Now, surprised, bleeding, hurting, and disoriented at the attack, the Appellant, utilizing his only option, geared the car first into reverse then into drive and fled as quickly as he could away from the crowd and the one of them who was his attacker. He fled off the roadway, through fields, and over a cement foundation before he finally returned to the road. He left parts of the car along the way in his panicked escape. RT5:P52L3; RT6:P31L21-P32L21, P33L22-P34L21, P35L16- 24.

Both Appellant and his mother called 911. RT5:P52L6, P52L15; RT6P36L16-21, P39L6-14. He parked the vehicle and officers arrived shortly with service weapons drawn. RT5:P53L5. No officers attempted to take statements from witnesses, the Larsgards, or to arrest Michael Mendoza on assault charges. RT6:P6L1-3, P43L8-13, 22-25, P44L1-3, P45L8-13. Officers confiscated cell phones and other evidence, and treated the Larsgards as potential terrorists and murderers. RT5:P53L23-P54L7, P54L11-18, P55L2-4, 8, 18-22, P56L1 1-14, P57L17-19, P132: 8-10.

Mrs. Larsgard had a passport issued in Norway to go with her son to Iran for the neck surgery. RT5:P32L1-8. She had to wear a hijab for the picture as all women must where in Iran, even when visiting. RT5:P32L24-P33L12. Officers immediately jumped to the wrong conclusion because of the picture and accused her of being a terrorist. RT5:P55L18-22.

The Appellant was transported to the hospital because of the broken nose and he gave a short

statement to the EMT driver. RT5:P126L24-P127L6; RT6:P42L41L15-19. Officers left Mrs. Larsgard, an elderly foreigner, alone without any means of calling for help, without her purse or belongings. A second ambulance arrived and its crew noticed Mrs. Larsgard appeared in shock and drove her to the same hospital they had just left hours previously. RT5:P58L1.

The Appellant and his mother were not allowed to communicate though no Miranda warnings had been given. RT5:P58L12-14, P59L3-5, P130L13-23, P131L6-8. Officers did not attempt to speak to the Appellant about the incident, so the he spoke to hospital staff about the incident. RT5:P 136L 11-17, RT6:P44L 17-23. Officers would not allow Mrs. Larsgard, who supposedly was not under arrest, to make phone calls. RT5:P60L1-10, P131L23-25. Officers did not attempt to speak to Mrs. Larsgard about the incident. RT5:P60L24-P61L7, P131L12-22, P133L1-4. Officers made Mrs. Larsgard leave the hospital, a public facility. RT5:P61 L21.

Officers failed to Mirandize the Appellant up to this point. RT5:P4424-P45L13. The Appellant continued to press to tell his side of the story, but was not afforded that opportunity. At the Winslow booking area, where multiple cameras recorded the events there, officer Marquez claimed the Appellant acted "oddly," and refused to talk about the incident, however, the booking tapes are missing. RT6:P48L13-P49L22. Appellant was finally allowed to make only a written statement. RT6:P50L10-P51L9.

As treatment for the neck injury pain sustained in Chicago, the Appellant medicates by doctor's orders and has been decreasing his dosages for three years since the neck surgery. RT5:P187L11-P188L14, P9L4-10, P26L16-23. The Appellant had taken his medication as prescribed the night before the incident. RT5:P187L3-10, P13L2-4. Since that time, the Appellant has been without his prescribed medications, which severely hampered his ability to assist his counsel and otherwise prepare for trial. Sentencing Report ("SR"):P86L13-23.

The state originally charged the Appellant with 31 counts in Winslow Justice Court, including charges for child abuse and attempted murder. Electronic Index of Record S0900CR201100767 ("767I"):1. His bond was set at $1,000,000. 780I:17. On September 29, 2011, The Appellant waived his preliminary hearing to testify via video at his federal court trial in Chicago.

On October 3, 2011, he was arraigned. On the following day, the state presented additional charges to the Navajo County Grand Jury. At the time of the return, Judge Michaela Ruechel set bond at $100,000 concurrent with the $1,000,000 bond set at the Justice Court. 780I:3

Appellant counsel had asked to depose his mother, a citizen and resident of Norway, prior to her leaving the country. The prosecutor, Joel Ruechel, opposed the Motion for the Deposition. The court denied the motion. Case Management Conference October 17, 2011:P3L7-23, P10L10.

On February 14, 2012, just days before the first trial date, the prosecutor dropped nearly all charges against the Appellant. Motion to Amend and/or Dismiss Without Prejudice Certain Charges Currently File in These Cases, see also, Motion's Hearing ("MH"):P47L11-22.

The day before, the prosecutor made two fundamental disclosures. State's Amended Disclosure, February 13, 2012. These two late revelations forced the Appellant to move to postpone the trial. The court granted the continuance. Donald Hearing ("DH"):P15L3-20, MH:P39L5, P41L22. The dismissals constituted changed circumstances justifying a release modification. However, the court denied a release modification request. This action kept Appellant in jail and further denied access to legal materials, counsel and proper medications. DH:P3L24, P8L10; MH:P24L23, P29L11.

Finally, the state did not disclose evidence of pending civil litigation for two principal witnesses/victims. This failure violated Appellant's Sixth Amendment rights to cross-examine witnesses against him. Motion For Directed Verdict and Motion for a New Trial:P2L3-18.

STATEMENT OF ISSUES

I. Were the Defendant's Due Process rights violated when he was not granted medical relief which would have enabled him to assist counsel in his defense?

II. Were the Defendant's Due Process rights violated by the State's failure to timely disclose evidence?

III. Was it an abuse of discretion when the trial court denied the motion for a new trial?

IV. Was it an abuse of discretion when the trial court denied the motion to depose Ms. Larsgard because the denial resulted in a rushed trial schedule?

LEGAL ARGUMENT

I. THE STATE VIOLATED THE DEFENDANT'S DUE PROCESS BECAUSE IT DENIED PROPER MEDICAL ATTENTION AND ACCESS TO LEGAL MATERIALS.

A. Standard of review – de novo

Both the Arizona and United States' constitutions afford due process to criminally charged citizens to protect against unfair trial practices. Ariz.Const. Art. 2 § 4, U.S.C. Amends. 5, 6, and 14. To determine whether the state violated the due process rights of a pretrial detainee, the court reviews de novo, the action taken by the trial court resulting in a constitutional infringement. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119 (Ariz. 2004), *State v. Gay*, 214 Ariz. 214 (Ariz.App.Div2 2007).

B. The Fourteenth Amendment's due process clause protects pretrial detainees and requires reasonable medical health care.

The Fourteenth Amendment's due process clause protects pretrial detainees whereas the Eighth Amendment's prohibition against cruel and unusual punishment applies to convicted persons. *Braillard v. Maricopa County*, 224 Ariz. 481, 232 P.3d 1263 (App. 2010), citing *Riggins v. Nevada*, 504 U.S. 127, 135, 112 S.Ct. 1810 (1992). Pretrial detainees have due process rights such as access to medical care. *City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 103 S.Ct. 2979 (1983). The trial court and prison officials violated the Appellant's due process rights because they unreasonably denied him medications with no legitimate penological reason in mind. RT6:P207L8-12.

C. Due process is violated when a prison policy is not rationally related to a legitimate penological interest.

In *Loughner*, the Ninth Circuit analyses the Supreme Court's seminal cases dealing with forcible medical treatment of pretrial detainees: *Harper*, *Riggins*, and *Sell*. *U.S. v. Loughner*, 672 F.3d 731 (9th Cir. 2012).

In *Harper*, the unsentenced inmate suffered from a mental illness and was forced to take antipsychotic medication because of the likelihood of serious harm to himself, others, or property. *Washington v. Harper*, 494 U.S. 210, 110 S.Ct 1028 (1990).

The Supreme Court recognized the need to reconcile inmates' retention of their constitutional rights with the prison official's duties regarding prison administration. The *Harper* Court applied a standard to determine the validity of the prison regulation claimed to infringe on an inmate's constitutional rights. It asked whether the regulation is reasonably related to a legitimate penological interest.

Harper identified several factors: (i) a rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (ii) a court must consider the impact accommodation of the asserted constitutional right will have on guards, inmates, and prison resources, and (iii) the absence of ready alternatives is evidence of the reasonableness of a prison regulation.

The defendant in *Riggins* asked to medicate himself because he was hearing voices. *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810 (1992). As the trial approached, he asked prison officials to stop the medication because the drugs would affect his demeanor and mental state during trial. The court held a hearing where doctor's questioned the need for the continued administration; however, the court denied the motion giving no rationale for the decision.

The Supreme Court reversed the conviction citing *Harper.* It started with the premise that the Fourteenth Amendment affords at least as much protection to persons detained for trial as the Eighth Amendment. Had the trial court in *Riggins* not made an

arbitrary decision to continue the medications without exploring alternatives, the *Riggins* Court said the outcome might have been different.

Most recently in *Sell*, the Supreme Court explained: when a particular drug will tend to sedate a defendant, interfere with communication with counsel, prevent rapid reaction to trial developments, or diminish the ability to express emotions are matters important in determining the permissibility of medication to restore competence. *Sell v. U.S.*, 539 U.S. 166, 123 S.Ct. 2174 (2003).

The Appellant suffers from severe debilitating neck pain, which causes him to lose functionality in his hands, and makes him unable to sleep, unless medicated. RT5P7L4-9, P15L23-P16L4, see also S0900CR201100767 Index ("767I") Number ("N") 24, 767I:N81 Exhibit ("E") 3, stating, "The diagnosis are: atlantoaxial instability, cervical disc ruptures, costotransversal joint arthritis, lumber disc herniation, paresis N. ulnaris both sides and central sensitization with hyperactivation of the NMDA-receptor complex." Dr. Stokke, has been treating him since 2004. RT5P7L4. He has decreased the medical regimen since that time. RT5:P187L11-P188L14, P9L4-10, P26L16-23. Appellant medicated as prescribed up until the time of arrest, but thereafter the staff and the court prohibited his regular medications. DH:P3L24, P8L10; MH:P24L23, P29L11.

Dr. Stokke is a licensed physician from Norway who obtained his anesthesiology degree in Germany,

where he also completed his residency. He practiced for the last 25 years in pain treatment. RT5:P6L6. He treated Mr. Larsgard since 2004. RT5P7L4. He is the most qualified to treat him and provide advice concerning that treatment. The Appellant, as a pretrial detainee, has a right to seek medical care as near to that for which he was being treated before his incarceration. *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175 (9th Cir. 2002).

Dr. Stokke sent letters indicating the need to stay on the current plan. 767I:N81 E1, stating, "If these medications are to be reduced or discontinued, this must happen gradually. Stopping medications suddenly may have serious, possibly life-threatening consequences." See also 767I:N81E2-3, stating, "During this medication he had no negative side effects, his awareness was not impaired and he was cognitive completely clear." Defense counsel made motions, and even took the medications to the jail. 767I:N180, CMC Jan 23, 12, P11-15, P4L11-16, DH P15L22, RT1P3L8-P5L25, RT3P4L7-P6L25.

The Appellant went through withdrawals and became delirious at the arraignment hearing and told the court he was a different person. See arraignment P5L4-P6L18, SR:P62L15-22, P85L9-P86L9. He was put on suicide watch because the medications he received in prison did not abate the pain. SR:P84L7- 17. He felt forced to take the prison medications because anything was better than nothing. RT5:P8L17, SR:P84L18-P85L1. The medications made him restless, cloudy, unresponsive, nauseous, and largely

apathetic toward life. He suffered from sleeplessness because the pain was intolerable. RT5:P18L14-23.

Despite doctor's affidavits and motions to allow the Appellant to have his regular medications, to lessen the pain so he could help prepare his defense, the motions were denied and the affidavits ignored. SR:P8L13-23.

Based on the authorities cited above, the court and prison officials violated the Appellant's due process rights. The Appellant contends the process by which the jail refused Dr. Stokke's advice was unreasonable, because it allowed the jail's nurse practitioner to trump medical prescriptions made by Dr. Stokkes.

In this instance, the judge deferred to the jail although he had the authority to make an order if it affected Appellant's due process rights under the Sixth Amendment. *Arpaio v. Baca*, 217 Ariz. 570, 177 P.3d 312 (App. 2008). The Court said:

> [C]ourts have the inherent authority and obligation to provide relief to defendants from jail regulators or prison administrators that significantly interfere with or unreasonably burden the exercise of their Sixth Amendment rights.

Under *Harper*, neither the jail nor the court gave a reasonable explanation for denying his proper medications. The accommodation: relabeling and administration of the prescription, was slight, and alternatives were in fact used already, principally in-house prescriptions. The *Harper* court would reverse

the conviction because the state violated the Appellant's due process rights by effectively binding him through pain so that he could not participate fully in his defense.

Ironically, the record suggests that accommodating Appellant with the prescribed medications would have been easy and benefitted jail administration. It would have eliminated Appellant's repeated requests for pain relief, the need to put him on suicide watch, and encouraged Appellant's general overall health issues. This burden could have easily been avoided with the slight accommodation.

Under *Riggins*, the conviction would be reversed because no reasonable determinations were made concerning the medical need despite the proof from the Appellant and his counsel. The only reason the judge gave for denial was that he wanted to hear the jail's side of the story. Yet, the court did not hear it. SR:P101L3-9.

Finally, like the defendant in *Sell*, the Appellant's lack of medications severally impacted his ability to communicate with counsel, prevented him from reacting rapidly to trial developments, sedated him, and diminished his ability to express emotions. The Appellant's Due Process rights were violated because the less effective medication caused severe withdrawal affecting his testimony and other key moments at trial. He was unable to sleep, which affected his appearance and presentation before the jury. SR:P86L13-23.

In his pleadings, trial counsel, supplied affidavits from specialists, evidence of his injuries, evidence of Appellant's need for Dr. Stokke's prescribed medications. SR:P107L3-9. The failure to administer the prescribed drugs counsel provided was not based on a legitimate penological interest. The denial violated Appellant's Due Process rights. On day one of the trial, the prosecutor said, "This is one of these motions where I don't have any personal knowledge of the facts. The defense has provided the state with some prescriptions of medicines that the defendant receives. I don't know what he's currently taking now. If he's not taking what has been prescribed, I don't know why the jail has said no." RT1:P5L3-8.

It should also be noted that the prosecutor maintained the 35 counts, including attempted murder and child abuse, until the eleventh hour. This action, ostensibly for "trial strategy purposes" thwarted the Appellant's ability to help in his defense because he was still stuck in jail with both an artificially high bond and without medications that would make him functional. MH:P35L17-P26L10. After the prosecutor dropped nearly all the charges, defense counsel moved, under Criminal Rule 7.4 for a modification of release conditions based upon changed circumstances

The prosecutor in bad faith maintained the charges until the eleventh hour to keep the bond artificially high.

D. Conclusion and relief sought

Because the state denied motions for medical relief without any reason rationally related to a legitimate penological interest thereby causing a violation of Appellant's due process rights, it is respectfully requested that the conviction be reversed.

II. THE APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY A LACK OR AND LATE DISCLOSURE.

A. Standard of review – De Novo

The trial court interpreted Rule 15.7 sanctions in a way that created harmful error, thereby violating the Appellant's due process rights. De novo review applies to rule interpretations. *State v. Peek*, 219 Ariz. 182, 183, 195 P.3d 641, 642 (Ariz. 2008).

B. Disclosure Rules and the Conflict With Rule 8.2.

Rule 8.2(a)(1) states for a person in custody, their right to a speedy trial is within 150 days from arraignment.

The Appellant should have been brought to trial 150 days after September 24, 2011, which would have been February 21, 2012. The original trial date was set for February 22, 2012, 151 days after confinement.

Any party that determines additional disclosure may be forthcoming within 30 days of trial shall

immediately notify both the court and the other parties of the circumstances and when the disclosure will be available. Ariz. Rule of Crim. Proc., Rule 15.6(b).

The prosecution made 11 disclosures within the 30-day period, without any notification concerning the circumstances. 780I:N 36, 38, 42, 43, 44, 45, 46, 49, 50, 55, 56, and 62. Two of the disclosures were an expert witness and his lab report. These and the state's requested dismissal of all but a few of the charges, changed the nature of the case at the eleventh hour. 780I:N 55, 56, MH:P41 L4-23. The state's theory changed from crimes based upon the influence of prescription drugs to something akin to "road rage." That affected the Appellant's ability to prepare a defense. Dr. Stokke was called to negate the drug influence charges.

The court chose to sanction the prosecutor by granting a continuance to give the Appellant that opportunity. However, Appellant, already in custody for nearly 150 days at that point, did not want to waive his right to a speedy trial. He requested a different sanction, but the court said it would grant a continuance if the Appellant requested it. 780I:N60. This unfairly forced the Appellant to accept the continuance to react to the late disclosure. While the court has broad discretion to fashion a sanction, the state's bad faith justified the more severe sanction of preclusion.

C Lack of Disclosure Violated the Defendant's Due Process Rights.

Except as provided by Criminal Rule 39(b), the prosecutor shall make available to the defendant certain material and information within his possession or control. Rule 15.1(b)(8) and (9)

Furthermore, the United States Supreme Court has stated, "the individual prosecutor has a duty to learn of favorable evidence known to others acting on the government's behalf in the case, including the police. *Kyles v. Whitley*, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (emphasis added). Disclosure is discussed in *Brady*. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). "The test for a *Brady* violation is whether the undisclosed material would have created a reasonable doubt had it been presented to the jury." *State v. Montano*, 204 Ariz. 413, 65 P.3d 61 (Ariz. 2003), *quoting State v. Dumaine*, 162 Ariz. 392, 405, 783 P.2d 1184, 1197 (Ariz. 1989), *overturned on other grounds*. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Libberton v. Ryan*, 583 F.3d, 1147, 1163 (9th Cir. 2009), *quoting Kyles v. Whitely*, 514 U.S. 419, 434, 115 S.Ct. 155 (1995).

A comprehensive *Brady* motion was filed October 5, 2011, one day after the indictment. 767I:N5. The purpose of the motion was to emphasize the prosecutor's obligation to search for Brady material rather

than wait for it to fall into his lap. The prosecutor's only objection was to the disclosure of the victims' personal information.

Officer Alicia Marquez, wife of case agent Joseph Marquez, was a principal state's witness. She testified at trial that, during the booking process, Appellant acted "oddly" and "only" wanted to give a written statement. RT4:P171L14-21, P172L7-12. Marquez testified to this for the first time at trial. The Appellant's contradicted her testimony.

Despite the cameras in the booking room, there is no video. It could have corroborated the Appellant's testimony, demeanor, state of mind and willingness to make a statement. Appellant's trial counsel made efforts to acquire the video. The state, despite its duty, did not attempt to get or even inquire about the video. He asserted that the lack of disclosure was harmless.

This *Brady* violation resulted in an unfair trial because the evidence could have created a reasonable doubt in the minds of the jury members.

D. Undisclosed Civil Claim

Two of the state's victims, Theda Curley and Shayna Patterson had begun civil litigation. The state made no effort to get this impeachment information. The State Constitution protected these two as victims. They need not comply with defense discovery requests. Ariz. Const. Art. II §2.1 (5). The state's failure to

inquire prevented the Appellant from acquiring this impeachment evidence.

The prosecutor claimed to have had no knowledge these civil claims. His ignorance was due only to his failure to inquire. However, he had an affirmative duty to inquire. The Appellant had a right to confront these witnesses with that information for impeachment purposes. *See, e.g., Cottonwood Estates, Inc., v. Paradise Builders, Inc.*, 128 Ariz. 99, 103, 624 P.2d 296, 300 (1981). He has lost that opportunity.

Conclusion and relief sought

Because the prosecutor refused to search for this impeachment evidence, and because the court denied the motion to preclude the late disclosed evidence, Appellant requests that the court either reverse the convictions or dismiss the indictment

III. THE MOTION FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED.

A. Standard of review - Abuse of discretion

The "Court generally will not interfere with the trial court's exercise of its discretion in the matter of granting a new trial unless it appears affirmatively that there was an abuse of discretion, or that the trial court acted arbitrarily." *State v. Ornelas*, 15 Ariz.App. 580, 490 P.2d 25, (Ariz.App.Div.1 1971), *citing State v. McAvaney*, 106 Ariz. 149, 150, 472 P.2d 18, 19 (Ariz.

1970). Rule 24.1 of the Arizona Rules of Criminal Procedure states a new trial will be granted when (i) the verdict is contrary to law or the weight of the evidence; or (ii) the prosecutor has been guilty of misconduct.

B. The verdict is contrary to the weight of the evidence.

The appeals court will not set aside a jury verdict unless the verdict is against the weight of the evidence. *Ainsworth v. State*, 37 Ariz. 330, 294 P. 271 (Ariz. 1930). To determine whether the weight of the evidence is contrary to the jury verdict, the court will review the evidence de novo. *Id.*

Shortly before trial, the prosecutor dropped nearly all charges stating, "Judge, this is on the eve of trial. I'm deciding what is the easiest and the best way to present my evidence and the clearest way for the jury to make decisions . . . That is a trial strategy that I decided to make on the eve of trial." MH:P35L17-P26L10. Previously at the Donald hearing, "I've decided, Judge, and my request is to proceed on nine counts, one for each victim rather than have multiple counts per victim and whether or not the facts would support it or not." DH: P4L16-20.

The facts support the Appellant's claim. The great weight of the evidence- especially the physical evidence-proves that they were themselves the victims of misperceptions.

The tire tracks at the scene of the food stand do not prove a deliberate exhibition of speed toward the stand and the people there. A casual observer might reach that conclusion after looking at the tire marks. Rather, as the defense tire expert testified, the tire became deflated when it hit and jumped the curb at a low speed. Only then did it begin to leave marks. The marks were consistent with those made by an underinflated tire moving away at slow speed from the food stand across Second Street toward Dalton's business and then beyond. RT 6: pp 116-119, 131-133.

If he had intended to scare or kill he would have continued to back his car toward the people at the food stand. There were no tire marks in the middle of Second Street at the point Appellant backed away from oncoming traffic.

Photos taken within minutes from the police car video camera, contradicted Gonzales' testimony that the food table extended toward the street beyond the legs of the food booth tent canopy. She had so testified to prove how near the car had come to the table and the children behind it. The children became scared only because of Gonzales' overreaction to her false perceptions.

After the food stand, the vehicle travelled without proof of a sense of urgency one would expect of a driver who committed intentional dangerous crimes against adults and children. The car made its way south toward First Street then continued eastbound on First Street obeying the traffic control cones that blocked

access northbound to North Berry Avenue. It then continued circuitously northbound through a vacant lot, then westbound down an alley for a short distance and turned right onto North Berry to the point Appellant first turned the wrong direction onto Second Street.

He had circled back and stopped within two hundred feet of the food stand incident. He would not have fled in the direction of the food stand crimes if he believed he had committed those crimes.

Once stopped, victims and witnesses testified he rolled down his window as the crowd approached the car. This action exposing his body through a now unopened car window proved only that he had no consciousness of guilt for what others may have thought transpired at the food stand t. It was only to inquire about the meaning of the crowd gathering around his car.

In his written statement to police, trial exhibit 55, Appellant identified his assailant as a male. Mendoza was the only hot dog stand victim who was a male. Appellant was acquitted of assaulting Mendoza. Under those circumstances, transferred intent was the only theory upon which a conviction was possible against the other hot dog stand victims. The aggravated assault allegations were charged as violations of 13-1204 (A)(2) and 13-1203 (A)(2). This was "*intentionally* placing another person in reasonable apprehension of imminent physical injury." (*Emphasis add*ed).

Those were the charges with victims Cathy Galvan, Shayna Patterson, Michelle Linstra, and Theda

Curley that went to the jury. They were originally charged as counts sixteen, seventeen, eighteen, and twenty-one respectively. The other aggravated assault charges involving "reckless" or "knowing" conduct, the court dismissed at the prosecutor's request. 780I:55

C. Conclusion and relief sought

The Appellant respectfully requests the court reverse the conviction because the weight of the evidence did not support the verdict. The court abused its discretion.

IV. THE MOTION TO DEPOSE MS. LARSGARD SHOULD HAVE BEEN GRANTED.

A. Standard of review – Abuse of Discretion

Orders of deposition of witnesses pursuant to Criminal Rule 15.3 are reviewed under an abuse of discretion standard. *Rules of Crim. Proc., Rule* 15.3 (a), *State v. Superior Court in and for Pima County*, 122 Ariz. 594, 596 P.2d 732 (App. 1979).

B. The Court abused its discretion when it denied Mrs. Larsgard's Deposition.

Rule 15(a) permits depositions in criminal cases in the interest of justice in exceptional circumstances. Ms. Larsgard was visiting her son in Arizona at the time Appellant filed the deposition motion. She lives in Oslo, Norway, 5180 miles away. As a passenger in

Appellant's car, at the time of the incident, Ms. Larsgard's testimony was relevant and was the primary defenses witness.

However, the judge denied the motion. Mrs. Larsgard was able to obtain funds to travel to the trial. She arrived back in Arizona on February 14, 2012, to testify at the trial scheduled on February 22, 2012, the judge said, "Well, I wish she wouldn't have come because we have what is called a settlement conference today." DH:P16L11-16.

This also referenced the forced continuance due to the prosecutor's late disclosure. She was there ready to testify for the trial date that was scheduled in February only to be told she would have to extend her trip into late March. Again, defense counsel asked for a deposition at the Donald Hearing. DH:P29L18. She was able to remain in Arizona and testify at the trial.

The court should have granted the deposition based upon the Mrs. Larsgard's circumstances and the application of Rule 15.3 at the time of the original request. This is because she lived nearly 5200 miles away, she was a material witness with relevant information, and her availability at the time of trial was doubtful.

C. Conclusion and relief sought

The court abused its discretion by preventing Ms. Larsgard from being deposed based upon the then existing conditions.

CERTIFICATE OF SERVICE

STATE OF ARIZONA)

)ss.

COUNTY OF NAVAJO)

CRISS E. CANDLEARIA, being first duly sworn according to law upon his oath deposes and says: That on the 9th day of November 2012, he caused to be delivered four (4) copies to the Court of Appeals, Division One, Phoenix, Arizona, and two (2) copies to

_____

CRISS E. CANDELARIA

Subscribed and sworn to before me this 9th day of November, 2012.

_____

Notary Public

My Commission Expires:

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 31.13, Arizona Rules of Criminal Procedure, undersigned counsel certifies that this brief is double spaced, uses a 14-point proportionately spaced typeface, and contains 5922 words.

_____

Criss E. Candelaria