

APPENDIX A

**ORDER denying C.O.A. and Reconsideration;
and [REDACTED] Order**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 20 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOHN C. STUART,

Petitioner-Appellant,

v.

ATTORNEY GENERAL FOR THE STATE
OF ARIZONA; DAVID SHINN, Director,
Arizona Department of Corrections,

Respondents-Appellees.

No. 20-16380

D.C. No. 2:19-cv-02540-GMS
District of Arizona,
Phoenix

ORDER

Before: IKUTA and MILLER, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

The motions to file exhibits under seal (Docket Entries No. 7 & 8) are denied.

All other pending motions are denied as moot.

DENIED.

APPENDIX A

UNITED STATES COURT OF APPEALS
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JOHN C. STUART,

Petitioner-Appellant,

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ATTORNEY GENERAL FOR THE STATE
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No. 20-16380

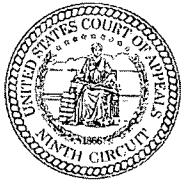
D.C. No. 2:19-cv-02540-GMS
District of Arizona,
Phoenix

ORDER

Before: BYBEE and HURWITZ, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 11) is denied. *See*
9th Cir. R. 27-10.

No further filings will be entertained in this closed case.



Office of the Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 193939
San Francisco, California 94119-3939
415-355-8000

Molly C. Dwyer
Clerk of Court

July 17, 2020

No.: 20-16380
D.C. No.: 2:19-cv-02540-GMS
Short Title: John Stuart v. Charles Ryan, et al

Dear Appellant

The Clerk's Office of the United States Court of Appeals for the Ninth Circuit has received a copy of your notice of appeal and/or request for a certificate of appealability.

A briefing schedule will not be set until the court determines whether a certificate of appealability should issue.

Absent an emergency, all subsequent filings in this matter will be referred to the panel assigned to consider whether or not to grant the certificate of appealability.

All subsequent letters and requests for information regarding this matter will be added to your file to be considered at the same time the cause is brought before the court.

The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number whenever you communicate with this court regarding this case. Motions filed along with the notice of appeal in the district court are not automatically transferred to this court for filing. Any motions seeking relief from this court must be separately filed in this court's docket.

APPENDIX B

ORDER denying Objection

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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John C Stuart, No. CV-19-02540-PHX-GMS
Petitioner, ORDER
v.
Charles L Ryan, et al.,
Respondents.

Pending before the Court is Petitioner's Objection regarding the Order on Motion for Reconsideration (Doc. 65) filed on August 13, 2020. After review of the docket, the Court notes that on June 26, 2020 an Order (Doc. 58) was entered accepting the Report and Recommendation and directing the Clerk of Court to terminate this action. It was terminated on June 26, 2020. Since that date, Petitioner filed a Motion for Reconsideration (Doc. 60) on July 13, 2020. The Court entered an Order (Doc. 64) on July 30, 2020 denying Petitioner's Motion for Reconsideration. The Court finds the pending Objection re Order on Motion for Reconsideration (Doc. 65) is untimely and the Court will therefore deny the same.

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APPENDIX B

1 **IT IS HEREBY ORDERED** that Petitioner's Objection re Order on Motion for
2 Reconsideration (Doc. 65) regarding Order (Doc. 64) is denied. This action shall remain
3 closed. The Clerk of Office is directed not to accept any future filings in this case.

4 Dated this 10th day of September, 2020.

5 G. Murray Snow

6 G. Murray Snow
7 Chief United States District Judge

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APPENDIX C

ORDER denying Reconsideration

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 John C. Stuart,
10 Petitioner,
11 v.
12 David Shinn, et al.,
13 Respondents.
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No. CV-19-02540-PHX-GMS

ORDER

15 Pending before the Court is Petitioner John C. Stuart's Motion for Reconsideration.
16 (Doc. 60.) Petitioner argues that *State v. Zaid*, No. 2 CA-CR 2018-0159, 2020 WL
17 3496690, *1 (Ariz. Ct. App. June 29, 2020), a recent opinion from the Arizona Court of
18 Appeals, "establishes [irrefutably] that Petitioner was denied Due Process of law exactly
19 as Petitioner stated in Grounds One, Three, Four Six, Eight, Nine, Ten, Eleven, Twelve,
20 Thirteen, Fourteen, and Sixteen—thus in 12 of the 17 grounds Petitioner has been fully
21 vindicated by the Arizona Court of Appeals." (Doc. 60 at 4.) Petitioner requests that the
22 Court "now reconsider its determinations for all grounds in light of *Zaid*, *id.*, and the fact
23 that Petitioner was deprived of his right to an adequate defense by the incorrect ruling to
24 preclude the very evidence proving all of Petitioner's trial defenses." *Id.* at 11.

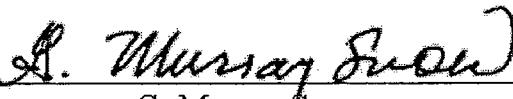
25 Motions for reconsideration are disfavored and should be denied "absent a showing
26 of manifest error or of new facts or legal authority." LRCiv 7.2(g). A motion for
27 reconsideration may not repeat arguments made in support of the motion that resulted in
28 the order for which the party seeks reconsideration. *Id.* Despite Petitioner's citation of new

APPENDIX C

1 legal authority, Petitioner has not shown that this legal authority is relevant to his Petition.
2 The Court adopted the R&R denying Petitioner's Petition for Writ of Habeas Corpus
3 because (1) Petitioner's claims were procedurally defaulted, either because they were
4 unexhausted or because the state courts denied relief based on an adequate and independent
5 state rule, and (2) Petitioner's "actual innocence" could not overcome the procedural
6 default of his claims because his allegations of constitutional error were not "new" and
7 "reliable." See (Doc. 58 at 5-6). Further, *Zaid* is a direct appeal from a state trial court
8 conviction and lacks the procedural deficiencies of Petitioner's case.

9 **IT IS THEREFORE ORDERED** that Petitioner John C. Stuart's Motion for
10 Reconsideration. (Doc. 60) is **DENIED**.

11 Dated this 30th day of July, 2020.

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13 G. Murray Snow

14 Chief United States District Judge

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APPENDIX D

JUDGMENT accepting Report and Recommendation

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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9 John C. Stuart, **NO. CV-19-02540-PHX-GMS**
10 Petitioner,
11 v.
12 Charles L. Ryan, et al., **JUDGMENT IN A CIVIL CASE**
13 Respondents.
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15 **Decision by Court.** This action came for consideration before the Court. The
16 issues have been considered and a decision has been rendered.

17 IT IS ORDERED AND ADJUDGED adopting the Report and Recommendation
18 of the Magistrate Judge as the order of this Court. Petitioner's Petition for Writ of
19 Habeas Corpus pursuant to 28 U. S. C. § 2254 is denied and this action is hereby
20 dismissed with prejudice.

21 Debra D. Lucas
22 Acting District Court Executive/Clerk of Court

23 June 26, 2020

24 By s/ Rebecca Kobza
25 Deputy Clerk

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APPENDIX D

APPENDIX E

ORDER denying Petition

APPENDIX E

28 Petition for Review in the Arizona Supreme Court, which was denied.
27 Appeals affirming Petitioner's convictions and sentences. Petitioner then filed a pro se
26 admission of impermissible character evidence. On April 28, 2015, the Arizona Court of
25 drive-by shooting count. Petitioner timely filed a direct appeal, raising only the issue of
24 term on the second-degree murder count and a concurrent fourteen-year prison term on the
23 3, 2014 sentencing hearing, the trial court sentenced Petitioner to an eighteen-year prison
22 (resulting in a mistrial) and retrial, a jury found Petitioner guilty as charged. At the January
21 count each of second-degree murder and drive-by shooting. Following the subsequent trial
20 On February 11, 2008, a Maricopa County Grand Jury indicted Petitioner on one
19 **BACKGROUND**
18 (Doc. 53). The Court denies the Petition and adopts the R&R.
17 Court deny the Petition (Doc. 43). Petitioner timely filed an amended objection to the R&R.
16 Judge Eileen S. Willett's Report and Recommendation ("R&R") recommending that the
15 under 28 U.S.C. § 2254 for a Writ of Habeas Corpus (Doc. 1) and United States Magistrate
14 Pending before the Court are Petitioner John C. Stuart's ("Petitioner") Petition
13 Respondents.
12 David Shinn, et al.,
11 v.
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9 Petitioner,
8 John C. Stuart,
7 FOR THE DISTRICT OF ARIZONA
6 IN THE UNITED STATES DISTRICT COURT
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1 **WO**

1 On March 7, 2016, Petitioner filed a Notice of Post-Conviction Relief ("PCR"); on
 2 August 10, 2016, Petitioner filed a "Corrected Petition for Post-Conviction Relief;
 3 Memorandum of Points and Authorities" (the "Corrected PCR Petition"). Following
 4 briefing, the trial court dismissed the PCR proceeding. The Arizona Court of Appeals
 5 granted Petitioner's request for further review but denied relief. The Arizona Supreme
 6 Court denied further review. On October 30, 2018, Petitioner filed a habeas petition in the
 7 Arizona Supreme Court. The Arizona Supreme Court summarily dismissed the habeas
 8 petition on November 14, 2018. Petitioner then timely initiated this federal habeas
 9 proceeding on April 19, 2019 by filing the Petition and accompanying briefing.

10 On May 7, 2019, the Court screened the Petition and concluded that it contains the
 11 following seventeen grounds for habeas relief:

12 In Ground One, Petitioner alleges that he is actually innocent. In Ground
 13 Two, Petitioner alleges that his speedy trial right and right to self-
 14 representation were violated. In Ground Three, Petitioner alleges that his due
 15 process and equal protection rights were violated when "the State charged
 16 [Petitioner] for events that are not considered criminal under Arizona law..."
 17 In Ground Four, Petitioner alleges that Fifth, Sixth, and Fourteenth
 18 Amendment rights were violated when the prosecution suppressed certain
 19 evidence. In Ground Five, Petitioner alleges that his Fourth, Fifth, Sixth, and
 20 Fourteenth Amendment rights were violated when the State unreasonably
 21 seized and then destroyed certain evidence, and "refused to allow [Petitioner]
 22 to continue speaking with his attorney..." In Ground Six, Petitioner alleges
 23 that his Fifth and Fourteenth Amendment rights were violated when the trial
 24 court "and other courts" issued "numerous arbitrary and capricious ruling ...
 25 that always favored the State and prejudice [Petitioner]." In Ground Seven,
 26 Petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights
 27 were violated when the prosecution "withheld information and evidence of
 28 the judges' pecuniary gain and conflict of interest relevant to the conviction."
 In Ground Eight, Petitioner alleges that his Fifth, Sixth, and Fourteenth
 Amendment rights were violated when the trial court denied payment for a
 defense forensic expert. In Ground Nine, Petitioner alleges that his Fifth,
 Sixth, and Fourteenth Amendment rights were violated when the State
 "refused to charge the kidnappers and the court precluded any and all
 evidence that [the] kidnapper was under the influence of illicit drugs." In
 Ground Ten, Petitioner alleges that his Fifth and Fourteenth Amendment
 rights were violated when the State "ignored, violated, or circumvented
 Arizona law to garner the improvident conviction." In Ground Eleven,
 Petitioner alleges that the cumulative effect of the errors in his grounds for
 relief violate his First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth,
 Thirteenth, and Fourteenth Amendment rights. In Ground Twelve, Petitioner
 alleges that his Fifth and Fourteenth Amendment rights were violated when
 the prosecution "misrepresented Arizona law to the jury" and "redacted the
 jury instruction to comport with [their] misrepresentations..." In Ground
 Thirteen, Petitioner alleges that his Fifth and Fourteenth Amendment rights
 were violated when the trial judge "intentionally misled the jury in

1 responding to their jury questions..." In Ground Fourteen, Petitioner alleges
2 that his Fifth and Fourteenth Amendment rights were violated when he was
3 "framed." In Ground Fifteen, Petitioner alleges that his Fifth, Sixth, and
4 Fourteenth Amendment rights were violated when the prosecutor "acted as
5 counsel [for a] state witness..." In Ground Sixteen, Petitioner alleges that his
6 Fifth and Fourteenth Amendment rights were violated when "the State and/or
7 Court suppressed and/or precluded actual facts and laws..." In Ground
8 Seventeen, Petitioner alleges that his right to counsel was denied at various
9 "critical stages" throughout his prosecution.

10 (Doc. 5 at 1-3).

11 In her R&R, the Magistrate Judge found Grounds Two through Seventeen to be
12 procedurally defaulted. She further concluded that even if Petitioner's freestanding actual
13 innocence claim in Ground One is cognizable in this proceeding, it is without merit.
14 Finally, she recommended that the Court deny Petitioner's request for an evidentiary
15 hearing. Petitioner objects to each of these recommendations.

16 DISCUSSION

17 I. Standard of Review

18 A "district judge may refer dispositive pretrial motions, and petitions for writ of
19 habeas corpus, to a magistrate, who shall conduct appropriate proceedings and recommend
20 dispositions." *Thomas v. Arn*, 474 U.S. 140, 141 (1985); *see also* 28 U.S.C. § 636(b)(1)(B);
21 *Estate of Connors v. O'Connor*, 6 F.3d 656, 658 (9th Cir. 1993). Any party "may serve and
22 file written objections" to the R&R. 28 U.S.C. § 636(b)(1). "A judge of the court shall
23 make a *de novo* determination of those portions of the report or specified findings or
24 recommendations to which objection is made." *Id.* District courts, however, are not
25 required to conduct "any review at all . . . of any issue that is not the subject of an
26 objection." *Arn*, 474 U.S. at 149. A district judge "may accept, reject, or modify, in whole
27 or in part, the findings or recommendations made by the magistrate." 28 U.S.C. §
28 636(b)(1).

29 II. Analysis

30 A. The Magistrate's Findings

31 The Magistrate Judge found grounds Four, Five, Six, Eight, Nine, Ten, Twelve,
32 Sixteen, and Seventeen and the right to self-representation claim contained in Ground Two.

1 procedurally defaulted. She did so because the state courts denied relief on those claims in
2 Petitioner's Corrected PCR Petition based on an adequate and independent state rule,
3 Arizona Rule of Criminal Procedure 32.2(a)(3), which prohibits a defendant from raising
4 "in a Rule 32 petition any claim that was waived at the trial level or that should have been
5 raised on direct appeal." The Magistrate Judge then found that the speedy trial claim raised
6 in Ground Two and the claims raised in Grounds Three, Seven, Eleven, Thirteen, Fourteen,
7 and Fifteen were procedurally defaulted because those claims were unexhausted, and if
8 Petitioner returned to state court to present them in a second PCR Petition, that petition
9 would be untimely. The Magistrate Judge found that Petitioner did not fairly present
10 Grounds Three, Thirteen, and Fifteen in his state court direct appeal and PCR proceedings.
11 She also found that Petitioner did not fairly present Grounds Seven, Eleven, and Fourteen
12 to the trial court in his PCR proceeding, and that his presentation of Grounds Seven, Eleven,
13 and Fourteen to the Arizona Supreme Court in his habeas petition did not render the claims
14 exhausted. The Magistrate Judge recommended that none of these procedural defaults be
15 excused because Petitioner did not establish cause for the default and the *Schlup*¹
16 gateway/miscarriage of justice exception did not apply.

17 The Magistrate Judge then addressed Petitioner's actual innocence claims. In its
18 Screening Order, this Court found that Ground One presented a claim alleging that
19 Petitioner is actually innocent. Operating under the assumption that Petitioner's
20 freestanding actual innocence claim was cognizable in a federal habeas proceeding, the
21 Magistrate found that Petitioner had not met the "extraordinarily high" threshold of
22 "affirmatively prov[ing] that he is actually innocent." *Carriger v. Stewart*, 132 F.3d 463,
23 477 (9th Cir. 1997) (en banc). Moreover, the Magistrate Judge recommended that, to the
24 extent Petitioner intended to raise freestanding innocence claims when he alleged that he
25 was "factually innocent" and was "framed" by the State in his other seventeen grounds, the
26 Court dismiss those claims.

27 Finally, as to Petitioner's request for an evidentiary hearing, the Magistrate Judge
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¹ *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

1 found that the record was adequately developed and recommended that the Court deny
2 Petitioner's request. *See Roberts v. Marshall*, 627 F.3d 768, 773 (9th Cir. 2010) (finding
3 "a district court is not obligated to hold evidentiary hearings to further develop the factual
4 record" when the record is "amply developed" and explaining that "[d]istrict courts have
5 limited resources (especially time), and to require them to conduct further evidentiary
6 hearings when there is already sufficient evidence in the record to make the relevant
7 determination is needlessly wasteful").

8 B. Petitioner's Objections

9 With respect to the unexhausted claims, Petitioner argues that the Magistrate Judge
10 ruled in Respondents' favor because Respondents "fallacious[ly] claim[ed] . . . that
11 Petitioner did not file an Arizona Supreme Court Habeas petition." (Doc. 53 at 4.)
12 Petitioner further asserts that "an Arizona Supreme Court Habeas petition is sufficient to
13 defeat default claims." (Doc. 53 at 8.) There is no dispute that Petitioner filed a habeas
14 petition with the Arizona Supreme Court. Instead, the Magistrate Judge found that the
15 unexhausted claims were not fairly presented in the stages preceding their presentation to
16 the Arizona Supreme Court. As the case cited by Petitioner states, "[a] petitioner must alert
17 the state courts to the fact that he is asserting a federal claim in order to fairly and fully
18 present the legal basis of the claim." *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir.
19 2005). In fact, Petitioner's unexhausted claims were not fairly presented to the appropriate
20 state court, as "[p]resentation of a [new] claim by a habeas corpus petition directed to the
21 Arizona Supreme Court does not exhaust state remedies for federal habeas purposes."
22 *Moreno v. Gonzalez*, 116 F.3d 409, 410 (9th Cir. 1997), *certified question answered*, 192
23 Ariz. 131, 962 P.2d 205 (1998).

24 The rest of Petitioner's Objection focuses on his actual innocence and his request
25 for an evidentiary hearing. Petitioner argues his "actual innocence" can overcome any
26 "AEDPA issues" he might have. (Doc. 53 at 9.) He also asserts that because he has not
27 been given an evidentiary hearing, any claims of procedural default are defeated, and that
28 he is entitled to an evidentiary hearing because he has "show[n] cause for his failure to

1 develop the facts in state-court proceedings and actual prejudice resulting from that
2 failure.” *Banks v. Dretke*, 540 U.S. 668, 690-91 (2004).

3 Petitioner’s “actual innocence” can overcome the procedural default of his claims if
4 he establishes that his case is “extraordinary” and that “the court cannot have confidence
5 in the contrary finding of guilt.” *Johnson v. Knowles*, 541 F.3d 933, 937 (9th Cir. 2008).
6 “To be credible, such a claim requires petitioner to support his allegations of constitutional
7 error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy
8 eyewitness accounts, or critical physical evidence.” *Schlup*, 513 U.S. at 324. In his
9 Objection, Petitioner accuses the State of egregious misconduct, including “destroying
10 almost 200 pieces of exculpatory evidence; both the trial judge and prosecutor being
11 patently disingenuous to the jury about laws, facts, etc.” “the State suppressing and the trial
12 court precluding literally ALL impeachment evidence relevant to the State’s case,” and the
13 State withholding DNA test results that will “fully exonerate” Petitioner. (Doc. 53 at 9–
14 10.) These allegations do not meet the “new” and “reliable” standard under *Schlup*, either
15 because they were presented at the trial level or because they are too speculative. See
16 *Larsen v. Soto*, 742 F.3d 1083, 1096 (9th Cir. 2013) (“[W]e have denied access to the
17 *Schlup* gateway where a petitioner’s evidence of innocence was merely cumulative or
18 speculative or was insufficient to overcome otherwise convincing proof of guilt.”)

19 As to Petitioner’s request for an evidentiary hearing, such a hearing is not required
20 because the issues Petitioner raises “can be resolved by reference to the state court record.”
21 *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998). Moreover, even if, as Petitioner
22 suggests, the record below was not sufficiently developed, Petitioner has not “show[n]
23 cause for his failure to develop the facts in state-court proceedings.” *Banks*, 540 U.S. at
24 690.

25 CONCLUSION

26 Having reviewed the record de novo, the Court adopts the R&R and denies and
27 dismisses the Petition with prejudice.

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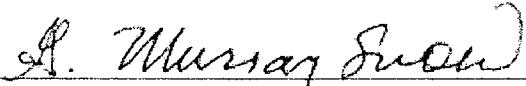
1 **IT IS HEREBY ORDERED** that Magistrate Judge Willett's R&R (Doc. 43) is
2 **ACCEPTED**.

3 **IT IS FURTHER ORDERED** that Petitioner's Petition for Writ of Habeas Corpus
4 (Doc. 1) is **DENIED** and **DISMISSED** with prejudice.

5 **IT IS FURTHER ORDERED** directing the Clerk of Court enter judgment
6 accordingly.

7 **IT IS FURTHER ORDERED** that pursuant to Rule 11(a) of the Rules Governing
8 Section 2254 Cases, in the event Petitioner files an appeal, the Court declines to issue a
9 certificate of appealability because reasonable jurists would not find the Court's procedural
10 ruling debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

11 Dated this 26th day of June, 2020.

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13 G. Murray Snow
14 Chief United States District Judge

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APPENDIX F

ORDER from Arizona Supreme Court (Habes)

SUPREME COURT OF ARIZONA

JOHN C. STUART,) Arizona Supreme Court
Petitioner,) No. HC-18-0034
v.)
CHARLES RYAN,) Maricopa County Superior Court
Respondent.) No. CR2008-106594-001
)
) FILED: 11/14/2018
)
) O R D E R

John C. Stuart has filed a Petition for Writ of Habeas Corpus challenging the validity of his convictions and sentences. Arizona Revised Statutes section 13-4233 and Rule 32.3, Arizona Rules of Criminal Procedure, provide that Rule 32 procedures govern such claims. Mr. Stuart presented the same claims in a Rule 32 petition for post-conviction relief, which the superior court denied. The Court of Appeals granted review and denied relief in case number 1 CA-CR 16-0810 PRPC. Mr. Stuart's petition for review is now pending in this Court, case number CR-18-0396-PR. Therefore,

IT IS ORDERED that the Petition for Writ of Habeas Corpus and Petition for Decision and/or Disposition are dismissed.

DATED this 14th day of November, 2018.

/s/

Robert M. Brutinel
Duty Justice

TO:
John C. Stuart, ADOC 287294, Arizona State Prison, Winslow - Kaibab
Unit
Adena J Astrowsky

Appendix F

APPENDIX G

ORDER from Arizona Appellate Court (Appeal)

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, *Appellee*,

v.

JOHN C. STUART, *Appellant*.

No. 1 CA-CR 14-0047
FILED 4-28-2015

Appeal from the Superior Court in Maricopa County
No. CR2008-106594-001 DT
The Honorable Sherry K. Stephens, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Droban & Company, PC, Anthem
By Kerrie M. Droban
Counsel for Appellant

Appendix 6

STATE v. STUART
Decision of the Court

MEMORANDUM DECISION

Judge Maurice Portley delivered the decision of the Court, in which Presiding Judge Andrew W. Gould and Judge Jon W. Thompson joined.

P O R T L E Y, Judge:

¶1 Defendant John Chester Stuart was convicted and sentenced for second-degree murder and drive-by shooting. He appeals by arguing that the trial court erred when it permitted Cynthia Cantrall to testify about his bad temperament because it constituted impermissible character evidence. For the following reasons, we affirm.

FACTS¹ AND PROCEDURAL BACKGROUND

¶2 The victim, Tom, and his wife, Rebecca, were driving home from dinner on January 29, 2008, after attending the Phoenix Open golf tournament. Stuart, accompanied by his fiancé, Cynthia Cantrall, was driving behind them, when Stuart drove over a double yellow line and sped past Tom's car. After Stuart pulled in front of him, Tom "flashed his brights."

¶3 At the next red light on Scottsdale Road, Tom stopped his car and Rebecca noticed that that Stuart's car was in the next lane. Stuart began "giving [them] the finger with both hands," and Rebecca "blew him a kiss" in response. Stuart also began yelling obscenities at them. Stuart then gunned his engine and pulled his car diagonally in front of Tom's car, blocking him. Tom got out of his car, but then put his hands up in surrender and began backing up. Stuart opened his driver's door, began to step out of the car and pointed a gun out of the car door. Cynthia yelled "[D]on't do it," and then Stuart shot Tom in the face. Tom died at the scene. Stuart fled in his car, but was later apprehended and arrested.

¹ We view the facts in the light most favorable to upholding the conviction. *State v. Lowery*, 230 Ariz. 536, 538, ¶ 2, 287 P.3d 830, 832 (App. 2012) (citation omitted).

STATE v. STUART
Decision of the Court

¶4 A grand jury indicted Stuart for second-degree murder and drive-by shooting. Following a remand to the grand jury, Stuart was re-indicted for the same charges. Stuart was tried, but his first trial ended in a mistrial.

¶5 During the retrial, the State called Cynthia to testify even though Stuart had listed her as a witness.² In addition to testifying about her relationship with Stuart, the prosecutor asked Cynthia: "Did Mr. Stuart ever display bad temperament to you around the time that this was happening in 2008?" Stuart objected on the grounds of relevance. After a brief sidebar, the judge overruled the objection.

¶6 Cynthia then testified, without objection, that early that month she and Stuart began "campaigning for Ron Paul for president" and Stuart became "involved" with a movie entitled "American Freedom to Fascism by Aaron," which was "about the IRS and the government and rights being taken away." The movie so incensed Stuart that when he thought about it "he would get disturbed on the road." She also testified that Stuart felt that people were not driving properly and he would get so disturbed that "he would flip people off and get mad and angry." Sometimes, she testified, Stuart would "get in front of them and slam on his brakes"

¶7 The jury convicted Stuart as charged, and he was subsequently sentenced to concurrent terms of eighteen years and fourteen years in prison. Stuart filed a timely notice of appeal. We have jurisdiction over this appeal pursuant to Arizona Revised Statutes sections 12-120.21(A)(1), 13-4031, and -4033(A).³

DISCUSSION

¶8 Stuart argues that the trial court erred by permitting the State to admit "impermissible character evidence." Specifically, Stuart asserts that Cynthia "impermissibly testified concerning [his] 'bad temperament' near the time of the murder ostensibly to show [his] state of mind."

¶9 To preserve an evidentiary issue for appellate review, "[a] party must make a specific and timely objection at trial." *State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993); *see also State v. Cook*, 170 Ariz. 40, 58, 821 P.2d 731, 749 (1991); *see generally* Ariz. R. Evid. 103(a). "A

² The State gave Cynthia limited use immunity because she had given several different and inconsistent accounts of the incident before trial.

³ We cite to the current version of the statute unless otherwise noted.

STATE v. STUART
Decision of the Court

general objection, such as 'irrelevance,' [is] not sufficient to preserve the issue for appeal." *Hamilton*, 177 Ariz. at 408, 868 P.2d at 991. Further, objecting to the admission of evidence on one ground will not preserve the issue on other grounds. *Id.* at 408, 868 P.2d at 991; *see also State v. Lopez*, 170 Ariz. 112, 118, 822 P.2d 465, 471 (App. 1991).

¶10 When a defendant fails to make a timely and specific objection at trial, we review solely for fundamental error. *State v. Lopez*, 217 Ariz. 433, 434-35, ¶ 4, 15 P.3d 682, 683-84 (App. 2008). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Moreno-Medrano*, 218 Ariz. 349, 352, ¶ 7, 185 P.3d 135, 138 (App. 2008) (internal citations and quotation marks omitted). To prevail, a defendant must show "that error occurred, that it was fundamental, and that it prejudiced him." *Id.* at 354, ¶ 16, 185 P.3d at 140. Moreover, where a defendant does not affirmatively argue that the alleged error is "fundamental" and brief the issue in that context, the issue is deemed abandoned and waived on appeal. *Id.* at 354, ¶ 17, 185 P.3d at 140; *see Ariz. R. Crim. P.* 31.13(c)(1)(vi).

¶11 Here, Stuart did not object that Cynthia's testimony constituted impermissible character evidence. Rather, Stuart objected on the general ground of "relevance":

Q. Did Mr. Stuart ever display bad temperament to you around the time that this was happening in 2008?

MR. POSTER: Relevance?

THE COURT: Approach, please.

(Whereupon, a sidebar was had)

MR. POSTER: Behavioral. Any — anything it is not relevant to the charge.

[PROSECUTOR]: State of mind up to that night. I said around the time that this happened.

MR. POSTER: State of mind if it is at the time of the incident.

[PROSECUTOR]: Right, I said around the time.

STATE v. STUART
Decision of the Court

THE COURT: Ask her the date again and you are avowing to the Court that you have spoken to her about this issue and she will say this was an ongoing situation in terms of the state of mind. Overruled.

As the record reveals, Stuart did not raise the issue of character evidence and, as a result, failed to preserve that objection for appellate review. We thus review his character objection on appeal only for fundamental error. *See Hamilton*, 177 Ariz. at 408, 868 P.2d at 991.

¶12 Stuart argues, however, that *State v. Rankovich*, 159 Ariz. 116, 765 P.2d 518 (1988) controls our analysis. There, the State presented evidence that was intended to show that the defendant was "an angry, violent man, and that he was not motivated by self-defense," and our supreme court stated it was character evidence and the defendant's relevance objection should be analyzed under Arizona Rule of Evidence 404(a) and for harmless error. *Id.* at 119-20, 765 P.2d at 521-22.

¶13 Although our supreme court has not overruled the analysis in *Rankovich*, the court's decision in *State v. Henderson*, clearly stated that our review is not for harmless error, but for fundamental prejudicial error. 210 Ariz. 561, 567, ¶¶ 18-20, 115 P.3d 601, 607 (2005). Moreover, the *Henderson* analysis of fundamental error review has been applied to evidentiary objections. *See Lopez*, 217 Ariz. at 434-35, ¶ 4, 175 P.3d at 683-84 (finding that an objection on one ground does not preserve the issue on another ground and, as a result, we only review for fundamental error). Consequently, our review is not for harmless error but fundamental error.

¶14 Despite Stuart's reliance on *Rankovich* and his failure to argue that the court's error was fundamental, we have reviewed Cynthia's testimony to determine if there is any fundamental prejudicial error. *See State v. Fernandez*, 216 Ariz. 545, 554-55, ¶ 32, 169 P.3d 641, 650-51 (App. 2007) (court will not ignore fundamental error if it sees it). We find no fundamental prejudicial error. Cynthia's testimony was relevant to demonstrate Stuart's general state of mind when he was driving — that he could get angry at other motorists based on his perception of their driving skills. Her testimony, coupled with the other testimony the jury heard and evaluated — Stuart passed Tom's car despite a double yellow line; Tom then flashed his lights at him; and the events at the red traffic control light — do not demonstrate that the court had to sua sponte preclude the evidence based on a relevancy objection or that it demonstrated fundamental prejudicial error. Consequently, we find no reversible error.

STATE v. STUART
Decision of the Court

CONCLUSION

¶15 For the foregoing reasons, we affirm Stuart's convictions and sentences.



Ruth A. Willingham - Clerk of the Court
FILED: amar

EXHIBIT A

ARIZONA STATE BAR article

GETTING INVOLVED

UPCOMING COMMUNITY TOWN HALLS

- Prescott Sept. 12
 Marana Sept. 14
 Mesa Sept. 18

An updated list of events and dates can be found at

http://aztownhall.org/Community_Programs/

Hall is both simple and complex.

The simple part is the fact that the selection of a single annual issue focuses the attention. It brings in the diverse voices of many who might otherwise avoid the dialogue if it covered everything under the sun.

The complex part is the recognition that criminal justice encompasses a dizzying number of interrelated parts. The wide variety of elements is hinted at in the organization's 67-page background report on the topic. Researched and drafted by subject-matter experts in partnership with ASU's Morrison Institute for Public Policy, it serves as a baseline touchpoint for those interested in the issue—among them attendees at the numerous Community Town Halls. The report includes chapters on bail, fines and fees; the charging process; sentencing and incarceration; vulnerable populations; re-entry and recidivism; Native American issues; and policing.

For many people, that last element—policing—is what leaps to mind when criminal justice is mentioned.

That's because police are "the most visible aspect of the criminal justice system," says Phoenix Police Department Lieutenant Brian Issitt in one of the "personal insights" included in the report.

Issitt says he recalls when his father was a sworn officer in Michigan back in the 1970s and 1980s. He says that's when officers "were just expected to enforce the law." Today, though, police are expected to develop deep connections with the communities they serve and to "do our best with the mental health issues."

How well or poorly officers are able to be jacks of all trades has an immediate and sometimes incendiary reaction by the community. Issitt cites police use of force as one area that has become a subject of intense

Total population and prisoner population change since 1987

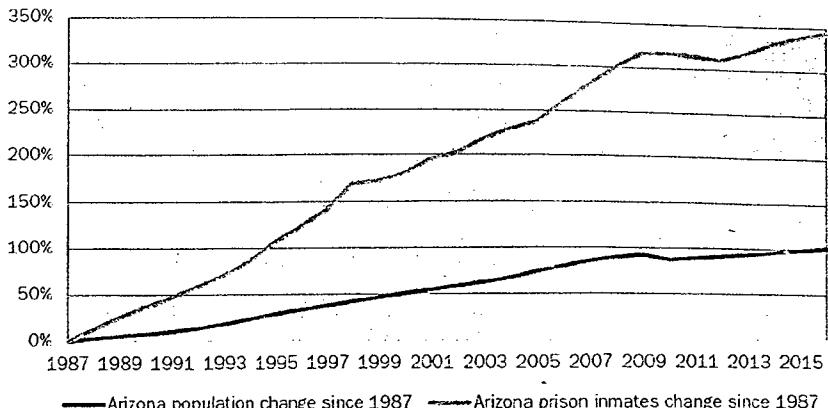
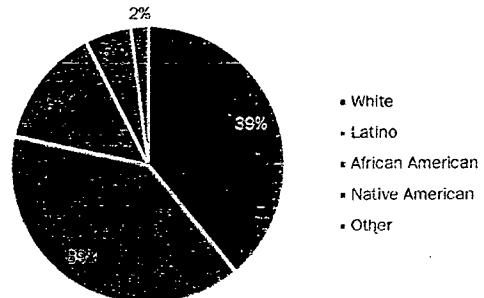


Figure 1.8: Change in Arizona total population and Department of Corrections inmates, 1987-2016
 Source: Census Bureau and Arizona Department of Corrections

Arizona Prison Population



AZ 18+ Population

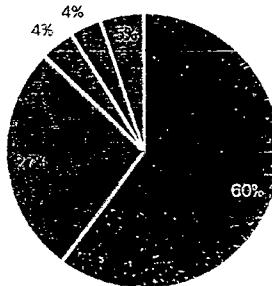


Figure 1.7: Racial/Ethnic composition of prison and general populations - 2016
 Source: Department of Corrections & US Census Bureau

Percent Reported ReEntry Needs Among Incarcerated Men
 (N=409)

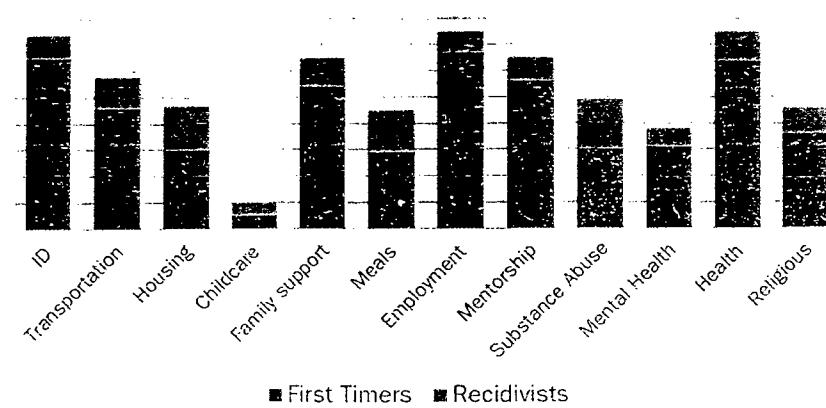


Figure 8.1: ReEntry needs among incarcerated men
 Source: Arizona Transformation Project

controversy.

Just within policing, though, use of force and mental health are simply two of many

aspects Town Hall attendees may address. Others include how more than 140 Arizona police agencies with 15,000 officers can

AZ TOWN HALL EXPLORES CRIMINAL JUSTICE

coordinate; whether there are an adequate number of officers as crime rates have declined; body-worn cameras; local policing and immigration enforcement; police-community relations; and the “militarization” of police.

The report opens with a chapter dedicated to the data and demographics of criminal justice. Many of these points may be launch pads for community discussion:

- The courts are busy. Two million cases were filed in Arizona's court system in 2016.
- Low-income people often have difficulty paying bail, forcing them to await trial in jail.
- Imposing money bail does not improve the chances that low-risk offenders will return to court, nor does it protect the public, because many high-risk defendants have access to money and can post bail.
- Arizona has the fifth-highest percentage of prisoners per capita. There are more than 42,000 people incarcerated by the state and in private prisons in Arizona. In addition, federal facilities in Arizona hold about 4,000 inmates, and county jails hold another 14,000. The state has an incarceration rate of 596 per 100,000 population—while the national rate is 385 per 100,000 population.
- Since 1987, Arizona has doubled its overall population, today reaching

HOW THE TOWN HALL WORKS

The organization's signature events include statewide Town Halls convened to bring diverse Arizonans together for facilitated, civil discussions leading to consensus solutions to the state's most pressing issues. Community programs are held in venues across the state during the months before and after each statewide Town Hall. These community gatherings provide an opportunity for more Arizonans to add their voice to the discussions.

Arizona Town Hall also offers consulting services to government, business and other entities interested in using Arizona Town Hall's unique system of facilitated, consensus-oriented discussions to find common ground and bring solutions to challenges they may be facing. Information at aztownhall.org.

about 7 million people. In that time, the prison population has increased fourfold.

- The number of crimes committed has been declining—by one-third since 2006—despite population increases.
- On average, every Arizona taxpayer contributes \$525 each year to fund the city, county and statewide criminal justice system.
- The average citizen is more likely to be a victim of a property crime rather than violent crime. From 2006 to 2016, property crimes have decreased 28 percent.

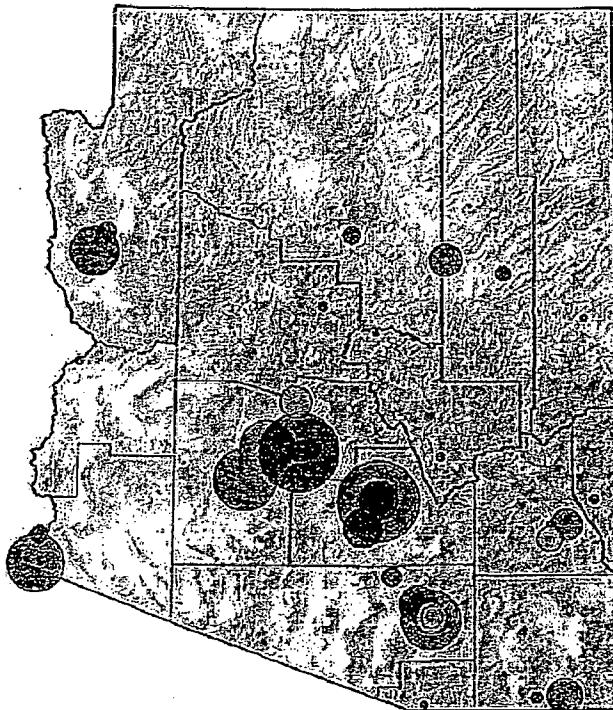
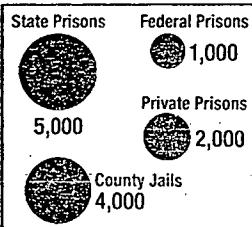


FIGURE 1.5:
Correctional facilities in Arizona, circles sized to relative inmate populations.



- Over the same period, as the state's population increased, the absolute number of violent crimes dropped 20 percent.

Town Hall attendees will explore many questions, such as:

- Are the state's systems set up to most effectively keep people safe?
- Are they providing equal protection?
- Is the more than \$1 billion spent on criminal justice being invested wisely?

Number of Persons Imprisoned in Arizona, 1980-2014

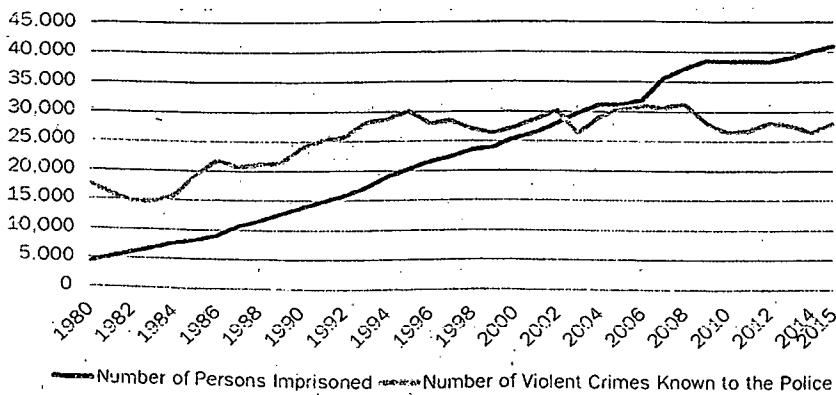


Figure 6.1: Number of Persons Imprisoned in Arizona, 1980-2014
Source: The Sentencing Project and FBI Uniform Crime Reports

- Are we successfully returning people formerly incarcerated back into productive citizens?
- Are there ways to achieve greater success when working with vulnerable populations and when looking at sentencing guidelines, fines and other challenges?

In a facilitated dialogue, issues like these will be robustly discussed at the Town Hall in early November and in the community versions leading up to it and following it. Interested in the statewide gathering? Email townhall@aztownhall.org. More information about the complete initiative is available at aztownhall.org. 

Number of Persons Imprisoned in Arizona, 1980-2014

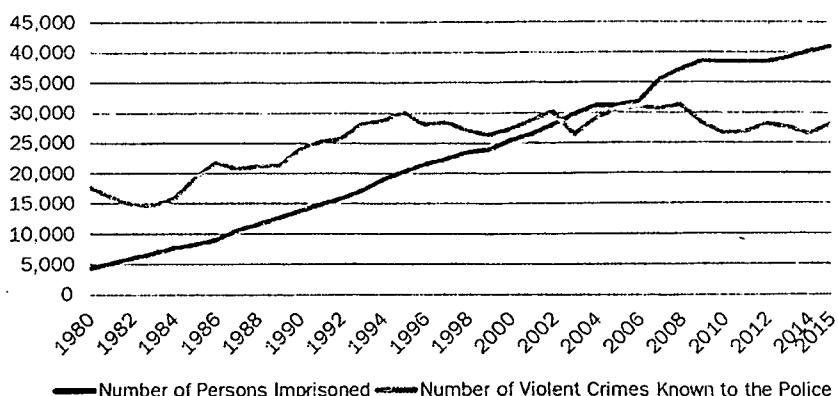


Figure 6.1: Number of Persons Imprisoned in Arizona, 1980-2014

Source: The Sentencing Project and FBI Uniform Crime Reports

the issues: read more here

- Criminal Justice in Arizona Background Report <https://tinyurl.com/AZTownHallReport>
- Criminal Justice in Arizona Key Facts <https://tinyurl.com/AZTownHallReportSummary>
- Community Town Hall Discussion Guidelines <https://tinyurl.com/AZTownHallGuidelines>
- Community Town Hall Discussion Questions <https://tinyurl.com/AZTownHallQuestions>
- Example Community Town Hall Report, from Downtown Phoenix <https://tinyurl.com/AZTownHallDtphx>

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ARIZONA ATTORNEY MAGAZINE

Career Center

EXHIBIT B

Arizona v. Fender decision

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, *Appellee*,

v.

RICHARD LEE FENDER, *Appellant*.

No. 1 CA-CR 19-0586

FILED 10-22-2020

Appeal from the Superior Court in Mohave County
No. S8015CR201700603
The Honorable Billy K. Sipe, Jr., Judge *Pro Tempore*

AFFIRMED IN PART; VACATED IN PART

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael O'Toole
Counsel for Appellee

Mohave County Legal Advocate's Office, Kingman
By Jill L. Evans
Counsel for Appellant

EXHIBIT B

STATE v. FENDER
Decision of the Court

appearance bond is to assure a defendant's appearance at the trial or other hearings." *State v. Bonds*, 201 Ariz. 203, 208, ¶ 19 (App. 2001). An appearance bond—and the court's discretionary determination to forfeit all, part, or none of the bond—is a procedure distinct from a trial verdict or related sentencing.

D. Pensions and the Fourteenth Amendment

¶24 Finally, Fender alleges the trial judge had an improper financial interest in the trial's outcome. Specifically, he argues "ALL Arizona judges receive pecuniary gain from ALL convictions that lead to imprisonment, through the 'Elected Officials And Judges Pension Fund' which is invested in the 'Private Prisons'" that operate in Arizona. His argument relies on *Tumey v. Ohio*, in which the United States Supreme Court held that where a judge personally received a portion of the assessed court costs, such pecuniary interest disqualified him as impartial. 273 U.S. 510, 535 (1927). We disagree that any alleged pension fund investments in corporations operating private prisons constitutes a "direct, personal, substantial pecuniary interest" as to deprive defendants, including Fender, of due process under the Fourteenth Amendment. *See id.* at 523. The relationship between a judge and the financial policies and investment decisions of the pension system administrators is "too remote to warrant a presumption of bias toward conviction in prosecutions before" the judge. *See Ward v. Village of Monroeville*, 409 U.S. 57, 60-61 (1972) (describing *Dugan v. Ohio*, 277 U.S. 61 (1928)).

¶25 We have read and considered counsel's brief and Fender's supplemental brief, and we have fully reviewed the record for reversible error. *See Leon*, 104 Ariz. at 300. Save for the double jeopardy violation discussed above, we find none. So far as the record reveals, counsel represented Fender at all stages of the proceedings, and the sentence imposed was within the statutory guidelines. *See A.R.S. § 13-3407(A)(7), (B)(7), (E)*. We decline to order any further briefing.

¶26 Upon the filing of this decision, defense counsel shall inform Fender of the status of the appeal and of his future options. Counsel has no further obligations unless, on review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). Fender shall have thirty days from the date of this decision to proceed, if he desires, with an *in propria persona* motion for reconsideration or petition for review.

EXHIBIT C

Arizona Republic article

NAACP lawsuit targets Arizona private prisons, accuses state of practicing slavery

By Lauren Castle and Maria Polletta, **Arizona Republic** | [Email](#) | [Twitter](#) | [Facebook](#) | [RSS](#) | [Comments](#) | [More](#)

A federal lawsuit filed against the Arizona Department of Corrections, Rehabilitation and Reentry accuses the state of practicing slavery through its use of private prisons.

Five inmates and the NAACP filed the class-action lawsuit this week in U.S. District Court in Arizona.

The lawsuit claims Arizona is practicing slavery by sending inmates to private prisons to "generate revenues and profits for the monetary benefit of corporate owners, shareholders and executive management."

The state corrections department contracts with six private facilities. As of Tuesday, 7,740 inmates were incarcerated in private facilities out of the overall state prison population of 40,547.

Patrick Ptak, a spokesperson for Gov. Doug Ducey, said he could not comment on pending litigation. The governor's focus when it comes to Arizona correctional programs "has been on providing second chances," Ptak said.

"We want to see those serving their time have every opportunity to reenter society successfully," Ptak said. "We've implemented many programs that provide job training, drug rehabilitation, counseling and more."

The three private prison companies operating in the state also pushed back.

Issa Amita, a spokesperson for Management and Training Corporation, told The Republic that the lawsuits claims are "blatantly false and slanderous." She said the company has provided states and the federal government performance-based correctional services for decades.

"Our focus on effective rehabilitation programs has helped people overcome addiction, learn problem-solving skills, participate in faith-based programs, and obtain their GED," she said.

"So, it's just the opposite — we've seen thousands of men and women take advantage of evidence-based programs we provide to make lasting changes in their lives."

EXHIBIT C

The attorneys said in a statement their goal is to place the issue of private incarceration before the U.S. Supreme Court. One of the attorneys for the inmates and the NAACP is Thomas Zlaket, former chief justice of the Arizona Supreme Court.

John Dacey, executive director of Abolish Private Prisons, said they hope the nation's highest court will declare private prisons unconstitutional before a majority of states rely on them.

The lawsuit was filed the same week as Juneteenth, which celebrates the Emancipation Proclamation. On June 19, 1865, Maj. Gen. Gordon Granger informed people in Galveston, Texas, that enslaved African Americans were free, two years after the signing of the proclamation.

Attorneys told The Arizona Republic it was a coincidence that the lawsuit was filed this week, on Monday.

For-profit model called into question

Attorneys for the inmates and the NAACP claim the state is violating constitutional rights by enforcing slavery and cruel and unusual punishment, and depriving them of due process.

The Arizona State Conference for the NAACP's mission, in part, is to reduce mass incarceration and the criminal justice system's disproportionate impact on people of color.

A May report by the Department of Corrections' reflected the NAACP's concerns. People of color made up more than 58% of the overall Arizona prison population. However, the five named plaintiffs in this week's lawsuit are white.

"We are proud to be plaintiffs and represent the thousands of NAACP members here and across the country — past, present, and future — who fought for freedom and who will live to see its fruits," Charles Fanniel, executive director of the Arizona state conference of the NAACP, said in a statement.

"Using a person's incarceration to generate corporate profits is a form of slavery," Dacey said in a statement. "A profit-motivated criminal justice system also conflicts with individual rights that are protected by the Due Process and Equal Protection Clauses of the Constitution."

He said the business model encourages incarceration of more people for longer terms.

David Shinn, director of the state corrections department, is accused of viewing inmates as "property," according to the lawsuit. The attorneys claim in his role, Shinn is degrading the human dignity of each inmate by making a profit.

The state is granting the private prisons full power over the inmates and "the fruits of prisoners' economic value and labor," according to the lawsuit.

The attorneys argue the private prisons have a financial disadvantage when inmates are released but can receive profit by their incarceration. The lawsuit said the facilities have created biased administrators and have become similar to "slave jails," also known as convict leasing.

After the end of the Civil War, convict leasing was practiced in southern states. States leased inmates to companies and plantations. Inmates received little earnings, unlike the states, according to the Equal Justice Initiative.

When the Thirteenth Amendment was passed, it prohibited slavery and involuntary servitude. However, it exempted people who were convicted of crimes.

The issue of paying inmates in Arizona's public prisons came up at the state Capitol this year.

Rep. Kirsten Engel, D-Tucson, introduced a bill that would raise the minimum wage for inmates who work jobs through Arizona Correctional Industries. The bill did not get a hearing.

Who operates the facilities?

Arizona's private prisons are operated by three companies, GEO Group, CoreCivic Inc. and Management and Training Corporation.

The three companies incarcerate more than 90% of inmates in private prisons in the U.S., according to the attorneys filing the suit.

Here's where the three operate in Arizona:

- Central Arizona Correctional Facility: Located in Florence and operated by GEO Group.
- Arizona State Prison-Florence West: Located in Florence and operated by GEO Group.
- Arizona State Prison-Kingman: Located in Kingman and operated by GEO Group.
- Marana Community Correctional Treatment Facility: Located in Marana and operated by Management and Training Corporation.

- Arizona State Prison-Phoenix West: Located in Phoenix and operated by GEO Group.
- Red Rock Correctional Center: Located in Eloy and operated by CoreCivic, Inc.

All three companies are members of a trade group called Day 1 Alliance. Alexandra Wilkes, the group's spokesperson told The Republic the allegations in the lawsuit are wrong.

"The reason governments first began utilizing public-private partnerships in the 1980s was to address unsafe and unconstitutional conditions in the public correctional system — including severe prison overcrowding and aging facilities that were endangering the lives of incarcerated men and women," she said in a statement.

Wilkes said private sector contractors have partnered with governments led by Democrats and Republicans.

"The notion that they would somehow be engaged in the activity this lawsuit alleges is a terrible smear," she said.

Private prison companies weigh in

The GEO Group operates the most facilities for the state. According to a report by The Desert Sun, the company filed a lawsuit against the state of California for its effort to ban private prisons, calling it unconstitutional.

The company told The Republic it considers itself a trusted partner to government agencies and the communities it serves by working every day to be a part of the solution to society's correctional and rehabilitation needs.

"The evidence-based rehabilitative programming and reentry support we provide through the GEO Continuum of Care to individuals in-custody and post-release has proven successful nationwide," the company said in a statement. "The collective belief of our more than 23,000 team members is that as a company, we are most effective and at our best when those we care for re-enter society as productive and employable citizens."

CoreCivic operates additional facilities in Arizona through partnerships with multiple cities and federal agencies including, the cities of Mesa and Eloy, and ICE. The company also has facilities in Arizona that house inmates from other states, including Hawaii, Kansas and Nevada.

In a filing made with the U.S. Security and Exchange Commission in late December, the company told investors its growth depends on the ability to create new contracts and

other factors that are outside of its control, including crime rates, sentencing patterns, governmental budgetary constraints and the acceptance of privatization.

"The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, the expansion of alternatives to incarceration and detention, leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by criminal laws," the company wrote.

Amanda Gilchrist, a spokesperson for CoreCivic, told The Republic when the company was created 35 years ago, courts intervened in prisons in 31 states and the District of Columbia due to inhumane conditions, and nine states had litigation pending.

"We were created to help address these challenges, and since then, we've played a critical role for systems that are overcrowded or aging," she said. "We have successfully partnered with federal, state and local governments to creatively and efficiently meet their challenges in ways they could not do alone. As a result, many systems are safer and better able to provide quality programming for the inmates in their care."

Management and Training Corporation, which operates the facility in Marana, called the lawsuit "blatantly false."

The company used to operate the Kingman prison. In 2015, Ducey announced the state would cut ties after a prison riot left 16 people injured and badly damaged the facility.

Ducey said he based his decision on a Department of Corrections' report that determined the company had "a culture of disorganization, disengagement, and disregard" of DOC policies.

EXHIBIT D

Arizona Attorney General Opinion

1983 Ariz. Op. Atty. Gen. 27 (Ariz.A.G.), Ariz. Op. Atty. Gen. No. I83-034, 1983 WL 42690

Office of the Attorney General

State of Arizona

I83-034 (R83-028)

April 4, 1983

*1 (Representative Messinger)—Public governing bodies may not contract with private corporations to provide law enforcement personnel and services. [House of Representatives: opinion requests; Law Enforcement; Delegation of Authority; Peace Officers; Public Safety, Department of; ARS32-2601; ARS32-2634; AG72-16; AG72-19; AG76-42; AG80-169]

The Honorable Paul R. Messinger
Arizona State Representative
State Capitol, House Wing
Phoenix, AZ 85007

Dear Representative Messinger:

We are writing in response your letter of January 17, 1983, in which you asked several questions regarding the ability of a private corporation to provide law enforcement personnel and services to a municipality.

This issue has been discussed in two prior opinions of this office, both of which are attached for your information. In Ariz. Atty. Gen. Op. 72-19, we said that a duly commissioned deputy sheriff may be paid with private funds, so long as the officer is fully controlled by and answerable only to the sheriff. In Ariz. Atty. Gen. Op. 76-42, we said that a town's attempt to contract with a private corporation for police services constitutes an illegal delegation of its authority to establish a police force. These opinions remain valid.

The Legislature has granted the control of law enforcement exclusively to specific governing bodies, such as the state, counties, cities, towns and designated agencies. Only a designated body can appoint or commission peace officers. State v. Ovens, 4 Ariz. App. 591, 422 P.2d 719 (1967); Ariz. Atty. Gen. Ops. I80-169, 72-16. Any attempt by the body to delegate its control, direction and supervision would be illegal.¹ See, e.g., Godbey v. Roosevelt Sch. Dist. No. 66, 131 Ariz. 13, 638 P.2d 235 (Ct. App. 1981).

Sincerely,

BOB CORBIN
Attorney General

February 11, 1976

The Honorable Walter L. Henderson

Attorney, Town of Oro Valley

220 East Speedway Blvd.

Tucson, Arizona 85705

EXHIBIT D

Dear Mr. Henderson:

The question put forth in this opinion request is as follows:

By authority of Title 41, Article 8, Arizona Revised Statutes, is the Arizona Law Enforcement Officer Advisory Council authorized to deny certification of a duly commissioned law enforcement officer solely upon the basis that the officers are paid by a private corporation and are not on the payroll of the State of Arizona or a political subdivision thereof?

*2 The question results from action taken by the Arizona Law Enforcement Officer Advisory Council (hereafter 'Council') on October 6, 1975. The Council had been asked to issue peace officer employment standards certification for six individuals employed by the Metropolitan Fire Department, Inc., and assertedly commissioned as peace officers by the Town of Oro Valley (hereafter 'Town'). On October 6, 1975, the Council declined to issue such certifications and stated: 'In reviewing the applicable statutes and rules as they apply to Oro Valley's contractual arrangements for police officers, we have concluded that the men listed on the enclosure are, in fact, employees of a private corporation. Therefore, we cannot pursue the A.L.E.O.A.C. certification procedures for them.'

Because the Town of Oro Valley improperly commissioned and appointed the six individuals, the question above need not be answered. The Council cannot consider the certification of the six individuals because they are neither peace officers nor police officers, and the Council thus lacks authority to certify, qualify, regulate, or govern them in any way.

I. FACTS:

The Town of Oro Valley was incorporated in 1974, pursuant to Ariz. Rev. Stat. Ann. § 9-101 (as amended 1973).

On July 16, 1975, the Town entered into a contract with the Metropolitan Fire Department, Inc. (hereafter 'Metropolitan'), an Arizona corporation, wherein Metropolitan agreed to provide police services for the Town of Oro Valley. The Town has authority to provide for policing per A.R.S. § 9-240(B)(12).

By resolution adopted on July 20, 1975, the Town Council then 'appointed' and 'commissioned' Stephen L. Hermann as Chief of Police in and for the Town of Oro Valley, Arizona, '... to enforce the laws of the State of Arizona and the ordinances of the Town of Oro Valley, and to exercise all of the powers of commissioned police officer in and for the Town of Oro Valley, and to take all actions required by law to exercise the police function of the Town.'

Subsequently, the Town Council 'appointed' and 'commissioned' six full-time employees of Metropolitan to serve as regular members of the Town's Police Department. (The Chief of Police is also a full-time employee of Metropolitan.) Apparently all seven 'members' of the Town's Police Department were placed on the Town's payroll at the rate of \$1.00 per year, and were issued checks in that amount. The Town has paid them no further stipends, but Metropolitan apparently does pay them salaries.

II. DISCUSSION:

There is no shortage of definitions of 'peace officer' and 'law enforcement officer' in the Arizona Revised Statutes. A.R.S. § 1-215 states that:

In the statutes and laws of the state, unless that context otherwise requires . . .

20. 'Peace officers' means Sheriffs of counties, constables, marshals, and policemen of cities and towns.

A.R.S. § 9-901 sets out the following:

In this article [chapter 8, Police and Fire Departments; article 1, Minimum Wages], unless the context otherwise requires:

*3 3. 'Peace officers' include regularly salaried deputy sheriffs, policemen and police officers of duly organized police departments.

A.R.S. § 38-1001 says:

In this chapter [chapter 7, Merit Systems], unless the context otherwise requires:

4. 'Law enforcement officer means:

(b) A regularly employed police officer in a city or town.

[NOTE: This definition also applies to the statute mandating overtime compensation for 'person(s) engaged in law enforcement activities'. A.R.S. § 23-392]

While neither term is defined in the statutes regarding the Council [Title 41, Article 8], the Council by regulation defines 'peace officer' as a 'member of a law enforcement unit who is employed to enforce the criminal laws of, and is commissioned by, a city . . .' [A.C.R.R. R 13-4-01(2)].

The Arizona appellate tribunals have not had occasion directly to determine who can and cannot be denominated a 'peace officer.' However, the term 'public officer' in A.R.S. § 13-541 and its predecessor has been construed, and the constructions are important because State v. Arce, 6 Ariz.App. 241, 245 (1967), has held that a police officer is a public officer. In State v. Kurtz, 78 Ariz. 251 (1954), the Supreme Court held that in undertaking certain off-duty actions, several city police officers were indeed acting as 'public officers' and not as private citizens. The Court posited this test: '[W]ere the officers acting in vindication of public right and justice, or were they merely performing acts of service to their private employer?' 78 Ariz. at 218. In applying the test, the Court found it significant that 'it manifestly appear[ed] from the record that at the time of the incident in question the [private employer] had no right of supervision over these officers, nor did he attempt any such control.' Id. And in State v. Ovens, 4 Ariz.App. 591 (1967), the Court of Appeals held that county attorney's investigators were not peace (ergo, public) officers. The Court found that although the investigators had been administered oaths as deputy sheriffs and had been given cards that stated they were 'regularly appointed' deputy sheriffs, they were not bona fide deputies and thus not public officers. The Court stated:

It is our opinion that one of the vital elements in relation to being a defacto deputy sheriff is the matter of instructions from and control by the Sheriff or by some law enforcement or security organization or agency. 4 Ariz.App. at 596.

It is within these statutory and judicial pronouncements that the peace officer status vel non of six 'members' of the Town's police department must be decided. It is the conclusion of this office that under the circumstances, the six individuals do not enjoy peace officer status.

No reported case has discussed the manner in which towns may exercise the authority 'to establish and regulate the police of the town, to appoint watchmen and policemen, and to remove them and to prescribe their powers and duties.' A.R.S. § 9-240(B) (12). This authority—along with the authority to undertake 28 other categories of activity set out in the statute—is permissive: 'The common council shall have the power . . .' A.R.S. § 9-240(B). But there are compelling reasons for concluding that once a town opts to exercise power in compliance with subsection 12, it must exercise the power fully, and may not cede authority to a private organization. What the Town seeks to do is to 'establish' its police force, and to 'appoint policemen' but then to permit Metropolitan to 'regulate the police', and to 'remove them', and to 'prescribe their powers and duties.' Such a grant of authority must be voided for contravening public policy.

*4 The discursive opinion of the Court of Appeals in Board of Education v. Scottsdale Education Association, 17 Ariz.App. 504 (1972) was vacated by the Supreme Court, for reasons not pertinent to this issue, at 109 Ariz. 342 (1973). In that opinion, the Court concluded a School Board could not validly give up the responsibility of controlling and managing school district affairs, nor could the Board surrender its discretion in the exercise of that responsibility. The Court thereupon voided a collective bargaining agreement that effectively had done both. The Court grounded its view on highly persuasive authority from other jurisdictions:

'[T]he employer-employee relationship in government is a legislative matter which may not be delegated. Such [collective bargaining] contracts if permitted to stand would result in taking away from a municipality its legislative power to control its employees and vest such control in an unelected and uncontrolled private organization . . .' 17 Ariz.App. at 510, quoting Fellows v. Latronica, 377 P.2d 547, 550 (Colo. 1962).

'Under our form of government, public . . . employment never has been and cannot become a matter of bargaining and contract. * * * This is true because the whole matter of qualifications, tenure, compensation and working conditions for any public service, involves the exercise of legislative powers. * * *' 17 Ariz.App. at 510, quoting City of Springfield v. Clouse, 206 S.W.2d 539, 545 (Mo. 1947).

The Court of Appeals also cited Arizona authority:

'A public office is considered a public agency or trust, created in the interest and for the benefit of the people, i.e., public officers are servants of the people. * * * A public officer may not agree to restrict his freedom of action in the exercise of his powers, 43 Am. Jr. Public Officers § 295, and an agreement which interferes with his unbiased discharge of his duty to the public, in the exercise of his office, is against public policy and unenforceable.' * * * School District No. 69 v. Altherr, 10 Ariz. App. 333, 338 (1969).

A fortiori, a Town Council, may not agree to transfer regulation, supervision and control over the absolutely vital function of enforcing the law and preserving the peace to a private agency responsible only to its stockholders.

There is no conflict between this opinion and this office's most recent pronouncement on the general topic of peace officer status. In Department of Law Opinion No. 72-19, we found no impediment to peace officer status when a deputy sheriff's salary derived from private funding; but the deputy was otherwise properly trained, qualified, supervised, directed and controlled in his official endeavors by the sheriff. That opinion held that 'where private corporations seek to assist a county in funding another law enforcement officer which they [sic] could not otherwise afford, and where said officer is otherwise a duly appointed and fully controlled, regular deputy sheriff, responsible only to the sheriff for his work direction, [then] such a deputy is a 'peace officer' . . .'

Sincerely,

*5 (illegible signature)

Attorney General

JOHN A. LASOTA, JR.

Chief Assistant

Attorney General

June 29, 1972

DEPARTMENT OF LAW OPINION NO. 72-19 (R-51)

REQUESTED BY: JAMES J. HEGARTY

Secretary-Treasurer, Arizona Law

Enforcement Officers Advisory Council

QUESTION: Does the source of funding affect the peace officer status of an otherwise duly appointed and full time deputy sheriff?

ANSWER: No. See body of opinion.

In Department of Law Opinion No. 70-24, the Attorney General responded to a similar question from the Arizona Law Enforcement Officers Advisory Council in regard to the status of a civil deputy sheriff as a peace officer. The conclusion reached there was as follows:

[I]t is the opinion of this office, because of the aforementioned authorities, any title or position involving the use of the term 'Deputy Sheriff' is required to be occupied by a properly trained and qualified peace officer.

That opinion further noted that the term 'peace officer' contemplates some regular assignment to arduous and hazardous duty. A.R.S. § 38-842.10. Police Pension Board of City of Phoenix v. Warren, 97 Ariz. 180, 398 P.2d 892, rehearing denied, 97 Ariz. 301, 400 P.2d 105 (1965).

Since Opinion No. 70-24 did not speak directly to the source of funding, particularly funding by non-governmental agencies, some further discussion is needed. Initially, we should note several other statutory definitions bearing upon this problem.

§ 1-215. Definitions

In the statutes and laws of the state, unless the context otherwise requires:

20. 'Peace officers' mean sheriffs of counties, constables, marshals and policemen of cities and towns.

§ 38-1001. Definitions

In this chapter [Chapter 7.—Merit Systems], unless the context otherwise requires:

4. 'Law enforcement officer' means:

(a) A regularly appointed and paid deputy sheriff of a county.

§ 9-901. Definitions

In this article [Article 1. Minimum Wages, Chapter 8.—Police and Fire Departments], unless the context otherwise requires:

3. 'Peace officers' include regularly salaried deputy sheriffs, policemen and police officers of duly organized police departments.

In connection with A.R.S. § 9-901, we should also take note of A.R.S. § 9-903, as follows:

This article shall not be construed to apply to a person holding a courtesy or honorary commission in the police, peace officers or fire forces of a city or town, or to persons not appointed in accordance with the rules, regulations, ordinances, charter provisions or statutes concerning appointments to the police, peace officers or fire department to which appointment is claimed, or to those officers employed in part time service.

(All emphasis added.)

It seems that two of the three definitions quoted above, i.e., A.R.S. §§ 38-1001 and 9-901, contemplate regular salary as well as regular appointment. Thus, for the purposes of the merit system and for minimum wages of police departments, the source of funding would affect at least the economic status of the peace officer. However, this is probably not true as a general proposition. A.R.S. § 1-215.20 includes sheriffs as 'peace officers' for general purposes of Arizona law, but deputies are not specifically mentioned. Nevertheless, as noted in Opinion No. 70-24, deputy sheriffs are 'generally thought to be possessed with full authority to perform every act the sheriff, his principal, could perform. [Citing authorities.]'

*6 The Arizona Law Enforcement Officers Advisory Council is concerned about the status of deputy sheriffs because of the provisions of A.R.S. § 41-1822, which states that the Council shall prescribe 'reasonable minimum qualifications for officers to be appointed to enforce the laws of this state and the political subdivisions thereof.' A.R.S. § 11-409 provides the methods by which deputy sheriffs are appointed:

The county officers enumerated in § 11-401 may, by and with the consent of, and at salaries fixed by the board, appoint deputies, stenographers, clerks and assistants necessary to conduct the affairs of their respective offices. The appointments shall be in writing, and filed in the office of the county recorder. (Emphasis added.)

But even where a written appointment was not recorded, our Supreme Court has held that a deputy sheriff is not deprived of de facto status as a public officer. State v. Stago, 82 Ariz. 285, 312 P.2d 160 (1957).

In State v. Stago, *supra*, Ernest Dillon charged the defendant with resisting and obstructing a public officer. Dillon had been appointed by the Sheriff of Navajo County as a deputy sheriff and issued a card confirming the appointment. However, Dillon was not paid by the county nor was his appointment recorded. He was paid by the Pinetop Merchant Patrol and wore a police officer's uniform. Since the appointment had not been properly filed, the Court held that Dillon was not a *de jure* public officer. However, for the purposes of the offense of resisting or obstructing a public officer, he was held to be a *de facto* public officer. This conclusion seems to have been based on two major points: (1) The statute requiring filing of written appointment was directory; and (2) the Navajo County Board of Supervisors had accepted a \$1,000.00 bond executed by Dillon to faithfully perform the duties of a deputy sheriff.

It should also be noted that in the context of the offense of resisting or obstructing a public officer, a police officer is a public officer. State v. Kurtz, 78 Ariz. 215, 279 P.2d 406 (1954); State v. Arce, 6 Ariz.App. 241, 431 P.2d 681 (1967).

State v. Kurtz, *supra*, is another case that aids in answering the Council's main question. There the Court was concerned with the issue of whether duly appointed and acting city policemen, when privately paid and employed during off duty hours, as special officers to maintain order and keep the peace at a dance hall, were 'public officers' within the obstructing a public officer statute. The Court decided that the turning point for this issue was whether the officers were 'performing mere acts of service for their private employer' or 'were acting in vindication of the public right in apprehending a wrongdoer.' 78 Ariz. at 219.

State v. Ovens, 4 Ariz.App. 591, 422 P.2d 719 (1967), is another case involving the status of a deputy sheriff paid by someone other than the sheriff as a peace officer. There the Court noted that a person must be a peace officer to be authorized to serve a warrant. A.R.S. §§ 1-215.20 and 13-1407. The Court held that two county attorney investigators who had been appointed by the county attorney as deputy sheriffs were not *de facto* deputy sheriffs nor peace officers. Neither the holding of a deputy sheriff card nor inclusion in a false arrest rider on the county's public liability insurance policy were sufficient to accomplish this either. The Court also made the following relevant comment:

*7 It is our opinion that one of the vital elements in relation to being a *de facto* deputy sheriff is the matter of instructions from and control by the Sheriff or by some law enforcement or security organization or agency. . . . 4 Ariz.App. at 596.

This same idea of instruction and control is carried out to some extent in still another statutory definition of the term 'peace officer' as follows:

§ 41-1701. Definitions

In this chapter [Chapter 12.—Public Safety], unless the context otherwise requires:

5. 'Peace officer' means any personnel of the department designated by the director as being a peace officer under the provisions of this chapter.

Although this definition does not have specific application to deputy sheriffs, it is interesting to note that the statutes relating to the Arizona Law Enforcement Officer Advisory Council appear in this same chapter, thus making the definition applicable to those statutes.

The above statutes and cases, reviewed in light of the facts here, where private corporations seek to assist a county in funding another law enforcement officer which they could not otherwise afford, and where said officer is otherwise a duly appointed and fully controlled, regular deputy sheriff, responsible only to the sheriff for his work direction, clearly indicates that such a deputy is a 'peace officer' and must meet the minimum standards.

As was alluded to earlier, this opinion does not cover any other relationship which might be governed by the source of salary, i.e., merit system, retirement system, or insurance benefits or coverage. The only question posed and answered is as to the 'peace officer' status of a deputy so employed.

Respectfully submitted,

GARY K. NELSON

The Attorney General

Footnotes

- 1 In connection with this issue, we note the Legislature's treatment of privately controlled security guard services. A.R.S. §§ 32-2601 *et seq.*, permit the establishment of security guard services by private persons or organizations. However, A.R.S. § 32-2634 specifically and unambiguously withholds peace officer status from a security guard. Thus, although the Legislature will permit private security forces, it specifically has reserved the management of public law enforcement to public governing bodies of this state.

1983 Ariz. Op. Atty. Gen. 27 (Ariz.A.G.), Ariz. Op. Atty. Gen. No. I83-034, 1983 WL 42690

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EXHIBIT E

First trial Jury Question #13 and annotations

(Ex-1)

FILED
MICHAEL K JEANES, Clerk
By T. HENNINGER, Deputy

CR 2008-106594-001

STATE OF ARIZONA

v.s.

JOHN CHESTER STUART

JUROR DELIBERATION QUESTION

1. Please have the foreperson submit the written question to the Judge using this form.
2. Notify the bailiff that you have a question. The bailiff will give the form to the Judge and attorneys for consideration.
3. The Judge will provide a response to the question in writing.

QUESTION: Can we consider Involuntary Manslaughter as a charge?

If so, please give us instructions for same.

S. Gennaro/MH #15

Foreperson # and signature

RESPONSE:

There is no such offense under Arizona law.

Judge's Response
Judge of the Superior Court

Question # B

EXHIBIT E

duct and where he failed to demonstrate that his case fell within one of limited exceptions to standing rule. *State v. Powers* (1977) 117 Ariz. 220, 571 P.2d 1016. Constitutional Law \Leftrightarrow 769

Defendant convicted of involuntary manslaughter had no standing to complain of alleged unconstitutional vagueness in definition of involuntary manslaughter in A.R.S. § 13-456 (repealed; see, now, this section) as unlawful killing "in the commission of a lawful act which might produce death in an unlawful manner" where defendant's conviction did not arise from that part of statute and where jury was not instructed with such words. *State v. Powers* (1977) 117 Ariz. 220, 571 P.2d 1016. Constitutional Law \Leftrightarrow 739

2. Construction and application

Negligent homicide is distinguished from reckless manslaughter in that for the latter offense, the defendant is aware of the risk of death and consciously disregards it, whereas, for the former offense, he is unaware of the risk. *State ex rel. Thomas v. Duncan* (App. Div. 1 2007) 216 Ariz. 260, 165 P.3d 238. Homicide \Leftrightarrow 708; Homicide \Leftrightarrow 709

Construction given by California courts to California statute, from which Arizona statute was adopted and which was in substantially the same language would, if reasonable, be persuasive. *State v. de Montaigu* (App. Div. 1 1977) 117 Ariz. 322, 572 P.2d 456.

3. Construction with other statutes

Legislature presumably knew of § 13-1591 (repealed; see, now, § 13-3981), relating to compromise, when it created misdemeanor manslaughter. *State v. Garoutte* (1964) 95 Ariz. 234, 388 P.2d 809. Statutes \Leftrightarrow 212.1

Section 13-1591 (repealed; see, now, § 13-3981), relating to compromise, was applicable to misdemeanor motor vehicle manslaughter case. *State v. Garoutte* (1964) 95 Ariz. 234, 388 P.2d 809. Criminal Law \Leftrightarrow 40

Where former § 28-691 relating to negligent homicide by driver of vehicle, was enacted after felony statute, § 13-456 (repealed; see, now, this section and § 13-1103) for involuntary manslaughter committed without due caution and circumspection, and both statutes required substantially the same evidence of criminal negligence for conviction, former § 28-691 impliedly repealed application of felony statute to instances of homicide wherein instrumentality of death was motor vehicle operated without due caution and circumspection. *State v. Morf* (1956) 80 Ariz. 220, 295 P.2d 842. Automobiles \Leftrightarrow 316

Phrase "criminal means" as used in § 22-511 (repealed; see, now, §§ 11-593, 11-594), relat-

ing to coroner's duty to investigate certain deaths included criminal negligence and manslaughter as defined in § 13-456 (repealed; see, now, this section and § 13-1103). Op. Atty. Gen. No. 61-26.

4. Nature and elements of offense

Infliction of serious physical injury is an essential element of the crime of negligent homicide. *State v. Harvey* (App. Div. 1 1998) 193 Ariz. 472, 974 P.2d 451, as amended, review denied. Homicide \Leftrightarrow 708

Negligent homicide, unlike manslaughter, is established when person fails to perceive substantial and unjustifiable risk that his conduct will cause another's death. *State v. Nieto* (App. Div. 1 1996) 186 Ariz. 449, 924 P.2d 453, review denied. Homicide \Leftrightarrow 708

"Negligent homicide" is established where a person fails to perceive the substantial and unjustifiable risk that his or her conduct will cause the death of another. *State v. Fisher* (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436, denial of post-conviction relief reversed in part 152 Ariz. 116, 730 P.2d 825, appeal after new trial 176 Ariz. 69, 859 P.2d 179. Homicide \Leftrightarrow 708.

Negligent homicide, established when a person fails to perceive a substantial and unjustifiable risk and when failure to perceive risk is a gross deviation from standard of care which a reasonable person would observe, is distinguished from reckless manslaughter in that for latter offense, the defendant is aware of the risk of death and consciously disregards it, whereas, for the former offense, the defendant is unaware of the risk. *State v. Walton* (App. Div. 1 1982) 133 Ariz. 282, 650 P.2d 1264. Homicide \Leftrightarrow 708; Homicide \Leftrightarrow 709

To constitute involuntary manslaughter, homicide must have resulted from defendant's failure to exercise due caution and circumspection, which is equivalent of "criminal negligence" or "culpable negligence"; facts must be such that fatal consequence of negligence acts could reasonably have been foreseen. *State v. Stambaugh* (App. Div. 2 1978) 121 Ariz. 226, 589 P.2d 469. Homicide \Leftrightarrow 708

Distinction, in § 13-456 (repealed; see, now, this section) proscribing vehicular manslaughter, between commission of an unlawful act with gross negligence and commission of an unlawful act without gross negligence was solely for purpose of determining appropriate punishment and did not represent a legislative intent to require proof of ordinary negligence with respect to commission of an unlawful act without gross negligence. *State v. Reynolds* (App. Div. 2 1973) 19 Ariz. App. 159, 505 P.2d 1050. Automobiles \Leftrightarrow 344

HOMICIDE

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A homicide cannot be excusable when it is the result of an unlawful act. *State v. Reynolds* (App. Div. 2 1973) 19 Ariz. App. 159, 505 P.2d 1050. *Homicide* \Rightarrow 750.

To constitute "involuntary manslaughter," the homicide must have resulted from the defendant's failure to exercise due care and circumspection, which is the equivalent of "criminal negligence" or "culpable negligence." *State v. Sorensen* (1969) 104 Ariz. 503, 455 P.2d 981. *Homicide* \Rightarrow 708.

"Involuntary manslaughter" as distinguished from "voluntary manslaughter" contemplates an act committed unintentionally rather than intentionally. *State v. Prewitt* (1969) 104 Ariz. 326, 452 P.2d 500. *Homicide* \Rightarrow 662.

"Involuntary manslaughter," as distinguished from "voluntary manslaughter," contemplates an act committed unintentionally. *State v. Foggy* (1966) 101 Ariz. 459, 420 P.2d 934, certiorari denied 87 S.Ct. 1386, 386 U.S. 1025, 18 L.Ed.2d 468, rehearing denied 87 S.Ct. 2060, 387 U.S. 938, 18 L.Ed.2d 1008. *Homicide* \Rightarrow 662.

Under manslaughter statutes legislature intended that killing of each human being, under circumstances described in the code, would constitute a separate offense. *State v. Miranda* (App. 1966) 3 Ariz. App. 550, 416 P.2d 444. *Homicide* \Rightarrow 654.

"Voluntary manslaughter is committed intentionally, while involuntary manslaughter is committed unintentionally." *State v. Douglas* (App. 1965) 2 Ariz. App. 178, 407 P.2d 117. *Homicide* \Rightarrow 660; *Homicide* \Rightarrow 662.

Where peace officer, in attempting to arrest a drunken driver, shot at a tire to disable automobile and killed driver, even though killing was unintentional, his act being unlawful, offense is involuntary manslaughter. *Harding v. State* (1924) 26 Ariz. 334, 225 P. 482. *Homicide* \Rightarrow 706.

Manslaughter is involuntary if committed in perpetration of unlawful act not amounting to felony, etc. *Wiley v. State* (1918) 19 Ariz. 346, 6 P. 869. *Homicide* \Rightarrow 659.

Included offenses

Generally, negligent homicide is a lesser included offense of manslaughter. *State v. Fisher* (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436, denial of post-conviction relief reversed in part 152 Ariz. 116, 730 P.2d 825, appeal after new trial 176 Ariz. 69, 859 P.2d 179. *Indictment And Information* \Rightarrow 189(8).

Negligent homicide is not a lesser included offense of manslaughter where the defendant's

defendant presents a credible argument that his or her failure to perceive a risk was due to either voluntary intoxication or something else, negligent homicide would be a lesser included offense with respect to the defense that is unrelated to voluntary intoxication. *State v. Fisher* (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436, denial of post-conviction relief reversed in part 152 Ariz. 116, 730 P.2d 825, appeal after new trial 176 Ariz. 69, 859 P.2d 179. *Indictment And Information* \Rightarrow 189(8).

Negligent homicide is a lesser included offense of manslaughter, the reckless causing of the death of another, in that a person who recklessly causes death of another also acts with criminal negligence. *State v. Parker* (App. Div. 2 1980) 128 Ariz. 107, 624 P.2d 304, affirmed in part, vacated in part 128 Ariz. 97, 624 P.2d 294. *Indictment And Information* \Rightarrow 189(8).

6. Felony or misdemeanor

Where jury found defendant guilty of offense of vehicular manslaughter with gross negligence and recommended punishment by imprisonment in county jail, trial judge was required to accept the recommendation and could not designate crime as a felony. *State v. de Montaigu* (App. Div. 1 1977) 117 Ariz. 322, 572 P.2d 456. *Criminal Law* \Rightarrow 885.

Where jury simply finds defendant guilty of vehicular manslaughter and makes no further recommendation, vehicular manslaughter could be characterized as an open-ended offense; however, when jury goes further and recommends county jail term, crime ceases to be open-end and becomes a misdemeanor. *State v. de Montaigu* (App. Div. 1 1977) 117 Ariz. 322, 572 P.2d 456. *Criminal Law* \Rightarrow 27.

7. Double jeopardy

Double jeopardy did not preclude instruction that negligent homicide defendant's negligence could be established by evidence that he had acted intentionally, knowingly or recklessly, even though defendant had previously been found not guilty of first and second-degree murder and manslaughter. *State v. Nunez* (1991) 167 Ariz. 272, 806 P.2d 861. *Double Jeopardy* \Rightarrow 102.

Where record did not contain evidence of defendant's alleged trial and acquittal in municipal court of driving while under influence of intoxicating liquor, and defendant did not, after commencement of superior court prosecution for manslaughter in driving of a motor vehicle, raise question of double jeopardy or object to introduction of any evidence on question of intoxication or ask for instructions limiting use

EXHIBIT F

“Willit’s List” of suppressed evidence

VIII. WILLITS LIST

JURY INSTRUCTION:

Standard Criminal 10 – Lost, Destroyed, or Unpreserved Evidence

If you find that the State has lost, destroyed, or failed to preserve evidence whose contents or quality are important to the issues in this case, then you should weigh the explanation, if any, given for the loss or unavailability of the evidence. If you find that any such explanation is inadequate, then you may draw an inference unfavorable to the State, which in itself may create a reasonable doubt as to the defendant's guilt.

SOURCE: *State v. Willits*, 96 Ariz. 184, 187, 393 P.2d 274, 277-78 (1964); *State v. Eagle*, 196 Ariz. 27, 31, 992 P.2d 1122, 1126 (App. 1998) and *State v. Tucker*, 157 Ariz. 433, 443, 759 P.2d 579, 589 (1988).

USE NOTE: “A *Willits* instruction is appropriate when the State destroys or loses evidence potentially helpful to the defendant.” *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995) (quoting *State v. Lopez*, 163 Ariz. 108, 113, 786 P.2d 959, 964 (1990)). However, the destruction or nonretention of evidence does not automatically entitle a defendant to a *Willits* instruction. *Id.* A *Willits* instruction is not given merely because a more exhaustive investigation could have been made. To merit the instruction, a defendant must show “(1) that the State failed to preserve material and reasonably accessible evidence having a tendency to exonerate [the defendant], and (2) that this failure resulted in prejudice.” *Murray*, *id.* (citing *State v. Henry*, 176 Ariz. 569, 863 P.2d 861 (1993)). “Evidence must possess exculpatory value that is apparent before it is destroyed.” *State v. Davis*, 205 Ariz. 174, 180, 68 P.3d 127, 133 (App. 2002) (instruction not warranted where the police failed to preserve the carpet in which the victim was wrapped because the defendant admitted wrapping the victim in the carpet and burning her body with gasoline). Whether either showing has been made is a question for the trial court; its decision to forego a *Willits* instruction for failure to satisfy either or both of the above requirements will not be reversed absent an abuse of discretion. *State v. Reffitt*, 145 Ariz. 452, 461, 702 P.2d 681, 690 (1985).

(See :State of Arizona, Revised Arizona Jury Instructions – Criminal, 3D, 2013 Revision).

In Stuart's case, the following is a list of lost, destroyed, or unpreserved evidence:

I. EVIDENCE IN OR SURROUNDING THE TOYOTA FJ CRUISER

1. Toyota FJ Cruiser was lost 9 months.
2. Tarp removed soon after Dalton installed.
3. Tarp was not recovered after removed.
4. Windows left open.
5. Hood not fingerprinted.
6. Front door not fingerprinted.
7. Rear door not fingerprinted.
8. Windshield not fingerprinted
9. Button for storage compartment not fingerprinted.
10. Outside door handle not fingerprinted.
11. Blood on the steering wheel not discovered.
12. Blood on the steering wheel not tested for DNA.
13. Headliner GSR inside the vehicle not discovered.
14. Headliner GSR inside the vehicle not tested.
15. Dashboard GSR inside the vehicle not discovered.
16. Dashboard GSR inside the vehicle not tested.
17. Steering wheel GSR inside the vehicle not discovered.
18. Steering wheel GSR inside the vehicle not tested.
19. Measurements inside the vehicle not taken.
20. Blood on the running board not discovered.
21. Blood on the running board not tested.
22. Blood on the ground where detained not discovered.
23. Blood on the ground where detained not tested.
24. Rifle missing for the rear storage compartment.
25. Driver's side view mirror not checked to see if moved.
26. Driver's side view mirror not fingerprinted.
27. Driver's side view mirror not tested.
28. Mark on driver's door, A-pillar, not discovered.
29. Mark on driver's door, A-pillar, not tested.
30. Rearview mirror not checked if canted up for high beams.
31. Palm print on hood.
32. Arm print on hood.
33. No supplemental DR on measurements.
34. No notes for supplemental DR on measurements.
35. Rain washed outside of FJ – lost evidence.
36. Shell casing location.

II. CASE FILE

37. Officers' original notes destroyed.
38. Case agent original notes destroyed.
39. Fire department notes destroyed

40. Medical Examiner notes destroyed.
41. Rubber glove found inside the vehicle destroyed.
42. Holster not tested for blood.
43. Holster not tested for DNA.
44. Inhaler not tested.
45. Inhaler not verified as prescribed to Beasley.
46. Inhaler destroyed.
47. Photographs were taken with substandard camera.
48. Photographs saved as JPEG pictures.
49. Photographs saved at 72 dpi instead of 600 dpi.
50. Rodeo was not checked for high beams on or off.
51. Old or bad color chart used.
52. Pictures were overexposed.
53. Holster strap missing.
54. Holster was not tested to see if strap was cut or torn.

III. EVIDENCE SURROUNDING AND INCLUDING THE GUN

55. First two officers testified gun was in cup holder, others testified gun was in console.
56. Gun DNA swabs were not tested.
57. Magazine DNA swabs were not tested.
58. Ammunition DNA swabs were not tested.
59. Magazines were not fingerprinted.
60. Ammunition was not fingerprinted.
61. Barrel was not tested for blowback.
62. Gun was not tested for stippling patterns (defense did it).
63. Gun not tested for GSR pattern
64. Gun not tested to confirm casing ejects forward if canted.
65. Gun not checked for Beasley's DNA (re: struggle for gun).

IV. EVIDENCE CONTAINED IN STUART'S HOUSE

66. Gun safe not opened.
67. Gun safe not seized.
68. Wall safe not opened.
69. Wall safe not seized.
70. Clock safe not opened.
71. Clock safe not seized.
72. Glock 27 still missing.
73. Chevy truck was not searched.
74. Witnesses did not see John carry anything out of house (clothes).
75. No clothes located out on roadway.
76. No clothing checked or tested.

V. EVIDENCE DIRECTLY FROM JOHN STUART

77. Clothing was not collected.
78. Clothing was not checked for DNA.
79. Blood sample was not collected.
80. Blood sample was not tested.
81. Urine sample was not collected.
82. Urine sample was not tested.
83. A medical examination was not conducted for injuries.
84. GSR kit was lost.
85. GSR kit was not tested.
86. Not checked for Beasley's fingerprints.
87. Not checked for Beasley's DNA.

VI. EVIDENCE DIRECTLY FROM CINDY CANTRELL

88. GSR kit not collected.
89. GSR kit not tested.
90. Clothing was not collected.
91. Cindy was not searched.
92. Cindy was not fingerprinted.
93. No investigation regarding Cindy's weapons.

VII. EVIDENCE DIRECTLY FROM MR. BEASLEY

94. hair sample was destroyed.
95. Hair sample was not tested.
96. Fingernail clippings were not tested for John's DNA.
97. Fingernail clippings were destroyed.
98. Body was moved two or three times.
99. Not tested for hallucinogens.
100. Not tested for steroids.
101. Chipped tooth in body not tested.
102. Hands not tested to match FJ marks.
103. Hands were not fingerprinted.
104. Jacket was kept for testing.
105. Jacket was not tested.

VIII. EVIDENCE DIRECTLY FROM MRS. BEASLEY

106. Was not fingerprinted for match on FJ marks.
107. Was extremely intoxicated but not field sobriety tested.
108. Was not given a PBT.
109. Admitted in the 2nd trial to lying to police and committing perjury in the 1st trial by falsely testifying Mr. Beasley fell on

their Rodeo.

110. Admitted in the 2nd trial to lying to police and committing perjury in the 1st trial by falsely testifying Mr. Beasley bled on their Rodeo.
111. Admitted in the 2nd trial to lying to police and committing perjury in the 1st trial by falsely testifying she had to wash blood off of their Rodeo
112. Was not questioned regarding her intoxication.

IX. EVIDENCE SURROUNDING THE CARTRIDGES

109. Fired cartridge was moved (kicked).
110. 13 unfired cartridges were not fingerprinted.
111. Federal cartridge was not test fired.

X. OTHER MISCELLANEOUS EVIDENCE

112. Blood expert did not inspect John.
113. Blood expert did not inspect Cindy.
114. Blood expert did not examine the gun.
115. Blood expert did not examine Mr. Beasley.
116. Blood expert did not examine the FJ.
117. Rifle missing.
118. \$7,000 in cash missing (Cindy thought it was \$500).
119. Prosecution presented no grounds or evidence for "drive by shooting."

XI. PROSECUTOR CHARBEL'S INVOLVEMENT IN THE LOSS/DESTRUCTION OF EVIDENCE

120. Suborned perjury by Mrs. Beasley.
121. Suborned perjury by Detective Dalton.
122. Suborned perjury by Detective Korus
123. Suborned perjury by Dr. Horne.
124. Suborned perjury by Cindy Cantrell.
125. Concealed changes in testimony by Mrs. Beasley
126. Concealed changes in testimony by Detective Dalton.
127. Concealed changes in testimony by Detective Korus.
128. Concealed changes in testimony by Cindy Cantrell