

## APPENDIX A

- Arizona Supreme Court order denying Review 02/03/2023



# Supreme Court

STATE OF ARIZONA

ROBERT BRUTINEL  
Chief Justice

ARIZONA STATE COURTS BUILDING  
1501 WEST WASHINGTON STREET, SUITE 402  
PHOENIX, ARIZONA 85007  
TELEPHONE: (602) 452-3396

TRACIE K. LINDEMAN  
Clerk of the Court

February 3, 2023

RE: STATE OF ARIZONA v ROBERT SPURLING III  
Arizona Supreme Court No. CR-22-0148-PR  
Court of Appeals, Division One No. 1 CA-CR 21-0436 PRPC  
Coconino County Superior Court No. CR2008-0672

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 2, 2023, in regard to the above-referenced cause:

**ORDERED:** Motion for the Court's Order to Plaintiff/Respondents to Re-Serve Their 8/26/21022 Response to Defendant/Petitioner's 8/1/2022 Petition for Review for Cause; and Motion for Order Authorizing Defendant/Petitioner to File a Reply to the Response, With Sufficient Time to File Such Reply, Pursuant to Rule 31.21 (f) (4), ARCrP. = DENIED.

**FURTHER ORDERED:** Motion for Authorization and Extension of Time to File Reply to State's Response to Petition for Review = DENIED.

**FURTHER ORDERED:** Petition for Review (in banc) = DENIED.

A panel composed of Vice Chief Justice Timmer, Justice Bolick, Justice Lopez and Justice Beene participated in the determination of this matter.

Tracie K. Lindeman, Clerk

TO:

Alice Jones

Mark Dillon Huston

Robert Richard Spurling III, ADOC 248191, Arizona State Prison,

Florence - Eyman Complex-Cook Unit

Amy M Wood

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APPENDIX B.

- Arizona Court of Appeals - Div. One Order granting Review but denying  
Relief 05/31/2022

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

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STATE OF ARIZONA, *Respondent*,

*v.*

ROBERT RICHARD SPURLING, III, *Petitioner*.

No. 1 CA-CR 21-0436 PRPC  
FILED 5-31-2022

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Petition for Review from the Superior Court in Coconino County

No. CR2008-0672

The Honorable Cathleen Brown Nichols, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Coconino County Attorney's Office, Flagstaff  
By William P. Ring  
*Counsel for Respondent*

Robert Richard Spurling, III, Florence  
*Petitioner*

STATE v. SPURLING  
Decision of the Court

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**MEMORANDUM DECISION**

Presiding Judge Cynthia J. Bailey, Judge Peter B. Swann and Judge D. Steven Williams delivered the decision of the Court.

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**PER CURIAM:**

¶1 Petitioner Robert Richard Spurling seeks review of the superior court's order denying his petition for post-conviction relief. This is petitioner's second successive petition.

¶2 Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19, 278 P.3d 1276, 1280 (2012). It is petitioner's burden to show that the superior court abused its discretion by denying the petition for post-conviction relief. *See State v. Poblete*, 227 Ariz. 537, ¶ 1, 260 P.3d 1102, 1103 (App. 2011) (petitioner has burden of establishing abuse of discretion on review).

¶3 We have reviewed the record in this matter, the superior court's order denying the petition for post-conviction relief, and the petition for review. We find that petitioner has not established an abuse of discretion.

¶4 We grant review and deny relief.



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

## APPENDIX C

- Coconino County Superior Court order denying and dismissing Pre-Petition For Post-Conviction Relief 04/30/2021

(The Superior Court's order denying Petitioner's Motion For Reconsideration entered August 9, 2021 is unavailable. He did not receive a copy thereof, or has misplaced it.)

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCONINO

Cathleen Brown Nichols, Judge

Division 5

Date: April 30, 2021

Christal Stump, Judicial Assistant

THE STATE OF ARIZONA,

)

Plaintiff,

)

Case No. CR 2008-0672

vs.

)

ORDER

**ROBERT RICHARD SPURLING, III,**

)

Defendant.

)

**RE: DEFENDANT/PETITIONER'S PRO PER PETITION FOR POST-CONVICTION RELIEF**

Procedural Background

Defendant/Petitioner was found guilty by a jury of multiple counts of Child Molestation which occurred between June 1, 2008, and July 22, 2008. Defendant/Petitioner was sentenced to a total of 34 years in prison. Defendant/Petitioner filed a Notice of Post-Conviction Relief, and counsel was appointed to represent him. Defense Counsel filed a Motion to Withdraw as Counsel of Record, Notice of No Colorable Claim, and a Motion for Extension of Time for the Defendant/Petitioner to file a Pro Per Petition for Post-Conviction Relief ("Petition"). Defendant/Petitioner subsequently filed the subject Pro Per Petition, which the Court notes is his second Petition filed in this case.

### Defendant's Claims

- I. Defendant contends that his convictions for Child Molestation (Counts 3, 6, 7 and 8) and sentences must be vacated "in light of newly enacted change in the law," and that the change in the law should be applied retroactively to his case.
- II. Defendant asserts that at the time of his trial, this Court was "divested of jurisdiction to adjudicate the child molestation charges" since the "Legislature enacted an unconstitutional, invalid statutory scheme or principle of law in 1997."
- III. Defendant also contends that the "burden-shifting scheme was the cause of fundamental and structural errors when convictions issued on proof of less than beyond a reasonable doubt for all essential elements of the charged offenses."

### SHOULD THE CHANGE IN THE LAW BE APPLIED RETROACTIVELY TO DEFENDANT'S CASE

In 2018, the Arizona legislature amended A.R.S. §§ 13-1401 and 13-1407 under House Bill ("H.B.") 2283. See 2018 Ariz. Sess. Laws, ch. 266 (2d Reg. Sess.). H.B. 2283 expanded the definition of sexual contact under A.R.S. § 13-1401 by adding language that sexual contact "does not include direct or indirect touching or manipulating during caretaking responsibilities, or interactions with a minor or vulnerable adult that an objective, reasonable person would recognize as normal and reasonable under the circumstances." *Id.* H.B. 2283 also amended A.R.S. § 13-1407 by removing the following language, "it is a defense to a prosecution pursuant to section 13-1404 or 13-1410 that the defendant was not motivated by a sexual interest." *Id.*

Defendant/Petitioner asserts that these statutory amendments bring him within the grounds for relief contemplated by Rule 32.1(g) of the Arizona Rules of Criminal Procedure ("Rules"). Rule 32.1(g) provides a ground for relief when "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence." Ariz. R. Crim. P. 32.1(g).

Defendant/Petitioner contends that the amendments to A.R.S. §§ 13-1401 and 13-1407 constitute a significant change in the law that, if applied to his case, would probably overturn his judgment or sentence. However, to support this argument, Defendant/Petitioner, has cited case law that is inapplicable because it deals with the retroactivity of cases and procedural rules, as opposed to the retroactivity of statutory amendments.

The Arizona Supreme Court provided a useful framework for analyzing the retroactivity of statutory amendments in *Garcia v. Browning*, 214 Ariz. 250 (2007). In *Garcia*, the Arizona Supreme Court was required “to decide whether recent amendments to Arizona’s affirmative defense and justification laws apply to criminal offenses committed before the effective date of the new statutes.” *Garcia* at 251. “Statutes are presumptively prospective in application.” *Garcia* at 252. “The legislature plainly knows how to provide for the retroactivity of measures that it enacts.” *Id.*

The Arizona Supreme Court recognized that “in A.R.S. § 1–244, the legislature has plainly directed that we are not to look to external sources, such as legislative history, to determine whether a statute is to be applied retroactively.” *Garcia* at 252–53. The bill at issue in *Garcia* shifted “the burden of proof from the defendant to the state, which now must prove beyond a reasonable doubt that a defendant’s actions were not justified.” *Garcia* at 253 (citing 2006 Ariz. Sess. Laws, ch. 199, § 2). The Arizona Supreme Court noted that “the legislature did not expressly declare in Senate Bill 1145 that it applied to criminal offenses committed before its effective date.” As such, the Arizona Supreme Court held that “the bill’s changes to the criminal code’s affirmative defense and

justification defense provisions therefore apply only to offenses occurring on or after its effective date." *Garcia* at 254.

After the Arizona Supreme Court decided *Garcia*, the legislature enacted a bill providing that its 2006 amendment in SB 1145 applied retroactively. *State v. Montes*, 226 Ariz. 194, 195 (2011). The Arizona Supreme Court held that making SB 1145 retroactive was a valid exercise of legislative authority. *Id.* As in *Garcia*, our legislature had the ability, and knew how to, make these statutes retroactive at the time that they were amended. As in *Montes*, our legislature continues to have the ability to make these statutes retroactive if it chooses to do so.

Therefore, no statute is retroactive unless expressly declared therein, pursuant to A.R.S. § 1-244. "Thus, absent a clear statement of retroactivity, a newly enacted law only applies prospectively." *State v. Gum*, 214 Ariz. 397, ¶ 22 (App. 2007). Importantly, H.B. 2283 contained no statement of retroactivity and, as such, the subject statutory changes do not apply to the Defendant/Petitioner. (See, 2018 Ariz. Sess. Laws, ch. 266, §§ 1-3).

The subject statutory amendments do not apply to Defendant/Petitioner because the legislature did not expressly include a statement of retroactivity. Therefore, this Court finds that Defendant/Petitioner has failed to identify an applicable ground for relief under Rule 32.1(g).

#### **SUBJECT MATTER JURISDICTION**

Defendant/Petitioner also claims that this Court lacked subject matter jurisdiction because the version of A.R.S. §13-1407 in effect at the time he was convicted of the subject offenses was unconstitutional. However, in *State v. Holle*, 240 Ariz. 300, 308-

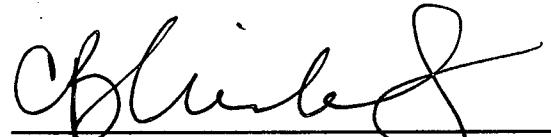
11, ¶¶ 38–49 (2016), the Arizona Supreme Court held that the subject statute was constitutional. That the legislature subsequently changed the law to require the State to prove sexual motivation as an element of the offense (see 2018 Ariz. Sess. Laws, ch. 266 (2d Reg. Sess.), does not render the prior law unconstitutional. As such, the Defendant/Petitioner has failed to raise or establish a colorable subject matter jurisdiction claim.

### **FUNDAMENTAL AND STRUCTURAL ERRORS**

Defendant/Petitioner's arguments regarding fundamental and structural errors are not persuasive. As discussed above, the Arizona Supreme Court has previously held that the version of A.R.S. §13-1407, in effect at the time the Defendant/Petitioner was convicted of the subject offenses, was constitutional. *Id.* Thus, the Defendant/Petitioner was convicted and sentenced pursuant to a constitutional statutory structure. Therefore, this Court finds that Defendant/Petitioner has failed to establish a colorable claim regarding fundamental or structural errors.

Based on the reasons stated above, this Court finds that Defendant/Petitioner has failed to raise any colorable claims, and his claims do not present a material issue of fact or law which would entitle the Defendant/Petitioner to relief under Arizona Rules of Criminal Procedure, Rule 32.1, and no purpose will be served by any further proceedings regarding the Defendant/Petitioner's Pro Per Petition for Post-Conviction Relief.

**IT IS ORDERED**, based on the above-mentioned reasons, hereby denying and dismissing the Defendant/Petitioner's Pro Per Petition for Post-Conviction Relief.



Hon. Cathleen Brown Nichols, Judge

cc: Robert R. Spurling, III, ADOC #248191, ASPC-Eyman, Unit-Cook 3/c/21U, P.O. Box 3200, Florence, AZ 85132  
Mark Huston, County Attorney's Office, [mhuston@coconino.az.gov](mailto:mhuston@coconino.az.gov)  
Clerk's Office

5/3/2021

## APPENDIX D

- Petitioner's relevant and substantive pleadings in Coconino County Superior Court:
  - Notice of Post-Conviction Relief, with Attachment 08/12/2019
  - Pre Petition For Post-Conviction Relief under Rule 32 04/14/2020
  - Reply to State's Response to Petition For Post-Conviction Relief under Rule 32 07/15/2020
  - Motion For Reconsideration of Rule 32 Petition For Post-Conviction Relief 06/08/2021

**Additional material  
from this filing is  
available in the  
Clerk's Office.**