No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MAX FONTES,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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EXHIBIT

1

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MAX FONTES,
Appellant.

No. 2 CA-CR 2023-0024
Filed August 13, 2024

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20182815001
The Honorable Brenden J. Griffin, Judge

AFFIRMED

COUNSEL

Kristin K. Mayes, Arizona Attorney General
Alice M. Jones, Deputy Solicitor General/Section Chief of Criminal Appeals
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Megan Page, Pima County Public Defender
By David J. Euchner and Jenna L. Johnson, Assistant Public Defenders, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Sklar authored the decision of the Court, in which Presiding Judge O'Neil and Chief Judge Staring concurred.

S K L A R, Judge:

¶1 Max Fontes appeals his conviction and sentence for negligent homicide. He argues that the trial court: (1) erred in allowing the parties to try the case before an eight-person jury; (2) abused its discretion in preventing defense counsel from rehabilitating Fontes's credibility during his testimony; and (3) erred in providing and failing to provide certain jury instructions. For the following reasons, we reject these arguments and affirm Fontes's conviction and sentence.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts, and we resolve all reasonable inferences against Fontes. *See State v. Fierro*, 254 Ariz. 35, ¶ 2 (2022). In April 2018, Fontes broadsided a car occupied by A.S. and his child, G. The collision resulted in G.'s death and serious injuries to A.S. One second before impact, Fontes was driving between ninety and ninety-five miles per hour in a forty-five mile-per-hour zone.

¶3 A grand jury indicted Fontes on four counts: (1) reckless manslaughter, (2) aggravated assault with a dangerous instrument, (3) aggravated assault resulting in serious physical injury, and (4) criminal damage. After a seven-day trial, the jury found him guilty of negligent homicide as a lesser-included offense of reckless manslaughter, and the trial court sentenced him to four years in prison. This appeal followed.

EIGHT-PERSON JURY

¶4 Fontes argues that the trial court committed structural error in violation of both the Arizona and U.S. Constitutions by submitting the case to an eight-person jury rather than a twelve-person jury. We review these constitutional challenges de novo. *State v. Fitzgerald*, 232 Ariz. 208, ¶ 37 (2013).

I. Applicable facts

¶5 The trial court empaneled a twelve-person jury with three alternates. But during trial, the court excused four jurors after they contracted COVID-19, so only eleven remained.

¶6 On the final day of trial, the state suggested submitting the case to an eight-person jury with the stipulation that it would not seek a sentence of thirty years or more. Fontes objected, but the trial court adopted the state's suggestion. Neither the state nor the court dismissed any allegations that would reduce Fontes's sentencing exposure to less than thirty years.

II. State Constitution issue

¶7 Under the Arizona Constitution, "[t]he right of trial by jury shall remain inviolate," and a twelve-person jury is required in criminal cases where "a sentence of death or imprisonment for thirty years or more is authorized by law . . . ." Ariz. Const. art. II, § 23. Here, the trial court submitted the case to a jury of fewer than twelve where the cumulative possible sentences exceeded thirty years. Fontes argues that doing so constituted structural error that requires reversal. He reasons that the state failed to dismiss sufficient charges to reduce his prison exposure below thirty years.

A. Whether dismissal of charges was required to proceed with eight-person jury

¶8 The Arizona Supreme Court addressed a similar issue in *State v. Soliz*, 223 Ariz. 116 (2009). There, the defendant faced a maximum of thirty-five years in prison, but the case was submitted to an eight-person jury without objection from either party. *Id.* ¶¶ 2-3. At sentencing, the state declined to prove the prior convictions or aggravating circumstances that would have subjected the defendant to the thirty-five-year term, and he was sentenced to ten years' imprisonment. *Id.* The supreme court concluded that the state had "effectively waived its ability to obtain a sentence of thirty years or more." *Id.* ¶ 16. As a result, no constitutional error occurred. *Id.* Rather, "the twelve-person guarantee of Article 2, Section 23 [was] not triggered." *Id.*

¶9 Relying on *Soliz*, this court reached a similar conclusion when faced with relevant facts that were indistinguishable from this case's. *State v. Johnson*, No. 1 CA-CR 13-0584, 2015 WL 161174 (Ariz. Ct. App. Jan. 13,

2015) (mem. decision). There, the trial was delayed, and only nine jurors were available when it resumed. *Id.* ¶ 2. The state did not dismiss any allegations of aggravating circumstances that had exposed the defendant to a sentence of at least thirty years. *Id.* ¶ 2, n.1. The trial court concluded, and this court agreed, that the state was not required to dismiss any of the allegations. *See id.* ¶¶ 2, 7. Instead, the defendant "could not, as a matter of law, receive a sentence of 30 years or more." *Id.* ¶ 7.

¶10 We reach the same conclusion. As in *Soliz*, the state was not required to dismiss allegations before submitting the case to an eight-person jury. *See Soliz*, 223 Ariz. 116, ¶ 16. The trial court instead "explicitly acted to effectively reduce the defendant's jeopardy before the jury began deliberations." *Id.* It did so by issuing a minute entry, consistent with the state's request, stating that Fontes would not face a sentence of thirty years or more. As a result, the state had "effectively waived" the ability to obtain such a sentence. *Id.*

¶11 The circumstances here are not meaningfully distinguishable from *Soliz*. No dismissal of allegations was necessary to effectuate that waiver and avoid constitutional error, just as no such dismissal occurred in *Soliz*. *See id.* In *Soliz*, the case was submitted to the jury without dismissal of the allegations that could have exposed the defendant to a sentence of thirty years or more, but the state decided after the verdict not to prove those allegations. *Id.* ¶¶ 2-3. Here, the case was submitted to the jury under similar circumstances, but Fontes was convicted of a lesser-included offense for which a sentence of thirty years or more was not possible. Although we sympathize with Fontes's argument that this conclusion is difficult to reconcile with the "authorized by law" language in Article II, Section 23, we have no authority to overrule *Soliz*.

B. Relevance of Fontes's objection to eight-person jury

¶12 Fontes attempts to distinguish *Soliz* on the ground that unlike the *Soliz* defendant, he objected to an eight-person jury. He points to language in *Soliz* stating, "[H]ad Soliz requested a twelve-person jury, the trial court should have granted that request." *See id.* ¶ 8. However, we do not read this language as rendering the lack of an objection in that case—or the existence of one here—dispositive. This is because *Soliz* concluded that the failure to empanel a twelve-person jury was not constitutional error. *Id.* ¶¶ 16, 18. Absent any error, the objection or lack thereof is irrelevant.

¶13 In arguing to the contrary, Fontes also points to *State v. Provenzino*, 221 Ariz. 364 (App. 2009), upon which he relied heavily at oral

argument. That case concludes, "An error in empaneling fewer than twelve jurors when twelve are required is fundamental error because it violates a state constitutional provision." *Id.* ¶ 7. It further states that when a judge assures the defendant "that he will not impose a sentence of greater than thirty years . . . such a forfeiture of discretion is not sufficient to eliminate the need for a twelve-person jury." *Id.* ¶ 9.

¶14 However, *Provenzino* predates *Soliz*. And while *Soliz* does not explicitly overrule or otherwise mention *Provenzino*, Fontes's proposed reading of *Provenzino* does not survive *Soliz*. *Provenzino* did not contemplate that when the state and trial court act to reduce the defendant's jeopardy, even without dismissing allegations, the defendant's right to a twelve-person jury would not be triggered. *See Soliz*, 223 Ariz. 116, ¶ 16. But that is exactly what *Soliz* concludes. *Id.*

¶15 Rather, *Provenzino* was decided in an era when reversal was required if a case was submitted to an eight-person jury when the defendant faced a thirty-year sentence. *See State v. Henley*, 141 Ariz. 465, 468-69 (1984); *see also Provenzino*, 221 Ariz. 364, ¶ 7 (citing *Henley*, 141 Ariz. at 468-69). The same was true of numerous other cases that Fontes cited at oral argument. *See, e.g.*, *State v. Prince*, 142 Ariz. 256 (1984), *State v. Thompson*, 139 Ariz. 133 (App. 1983), *State v. Fancy*, 139 Ariz. 76 (App. 1983). Indeed, this case is factually indistinguishable from another of that era's cases, *State v. Pope*, 192 Ariz. 119, ¶¶ 4, 12 (App. 1998), where the defendant had also objected to an eight-person jury. But that era ended with *Soliz*, which "acknowledge[d] that the approach we adopt departs" from these cases, "particularly" *Pope*. *Soliz*, 223 Ariz. 116, ¶ 17. We therefore reject Fontes's attempt to analogize this case to *Provenzino*.

III. U.S. Constitution issue

¶16 Fontes also argues that the eight-person jury violated the Sixth Amendment to the U.S. Constitution. However, the United States Supreme Court in *Williams v. Florida*, 399 U.S. 78, 103 (1970), expressly approved juries of fewer than twelve. Fontes argues that *Williams*'s reasoning does not survive subsequent case law, but he also acknowledges that we have no authority to assume that these cases have implicitly overruled *Williams*. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."). We must therefore reject Fontes's Sixth Amendment argument.

REHABILITATION OF FONTES'S CREDIBILITY

¶17 Fontes next argues the trial court abused its discretion by prohibiting him from rehabilitating his credibility after the state questioned him about prior traffic citations. In general, a trial court has "discretion to determine and control the method of interrogation . . . ." *Pool v. Superior Court*, 139 Ariz. 98, 104 (1984) (citing Ariz. R. Evid. 611(a)). We therefore review this issue for an abuse of discretion. *State v. Christensen*, 129 Ariz. 32, 37 (1981).

I. Applicable facts

¶18 Fontes testified at trial. During his direct examination, his counsel asked an imprecise question about his criminal history. Specifically, he asked:

> Q. Ever been in trouble with the law before? Before this incident?
>
> A. No, I haven't.
>
> Q. After this incident?
>
> A. No.

However, in the years between the incident and trial, Fontes had been cited for driving under the influence of an intoxicant and for speeding.

¶19 Because the defense opened the door to this issue, the trial court allowed the state to impeach Fontes on cross examination by asking about the citations. That questioning proceeded as follows:

> Q. Do you remember [defense counsel] asking you if, after this collision, you had been in trouble with the law?
>
> A. Yes, ma'am.
>
> Q. Isn't it true that you were pulled over for speeding on April 25th of 2019?
>
> A. Yes, ma'am.
>
> …

Q. Isn't it true on that day that you were going 17 miles over the speed limit when you were stopped?

A. I don't remember.

Q. Isn't it true that you were also cited for a traffic violation on July 20th of 2022?

A. I don't remember. Your question, please?

Q. Did you receive a citation on that day related to two violations?

A. Yes, ma'am.

Q. And was one of the violations related to 23 miles per hour over the speed limit?

A. I don't remember.

Q. If I told you that's what one of the charges in the citation was, would that refresh your recollection?

A. Yes, ma'am.

Q. And was the other citation, or other charge on the citation, for driving under the influence?

A. Yes, ma'am.

¶20 On redirect, Fontes's counsel attempted to rehabilitate Fontes's credibility with testimony that the DUI charge had been dismissed. The trial court sustained the state's objection to defense counsel's question about the DUI charge's disposition. It told Fontes's counsel, "[Y]ou're the one who opened this door very broadly" and "[W]e would not be having this discussion[] if you didn't ask such a poorly worded and broad question about a topic you had to know was very sensitive." It further explained, "I'm trying to keep it narrow so that the jury is not misled about you opening the door." Rather than allowing further testimony, it offered a limiting instruction "on the purpose for which the jury can consider" Fontes's interactions with law enforcement after the incident. Fontes declined it.

II. Whether the trial court abused its discretion by precluding the rehabilitation testimony

¶21 Fontes argues that by prohibiting the testimony that the charges had been dismissed, the trial court left the jury with the "false impression that [Fontes] was found responsible for those tickets, including the DUI charge." The effect, he argues, is that the jury could have believed that "he lied about having driven recklessly even after he had been involved" in the collision at issue.

¶22 The Arizona Rules of Evidence provide scant guidance for this situation. Rule 608, which Fontes cites, generally governs the admission of testimony about character for truthfulness. But it does not contemplate rehabilitation of a witness when that witness's own counsel elicits damaging evidence about character for truthfulness on direct examination. *See* Ariz. R. Evid. 608(a) (allowing "evidence of truthful character" only after "witness's character for truthfulness has been attacked."); 608(b) (allowing testimony about specific instances of conduct on cross-examination under some circumstances). At best, the trial court could find guidance in Rule 611, which required it to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence . . . ." Ariz. R. Evid. 611(a).

¶23 With little authority, Fontes's counsel's imprecise question about "trouble with the law" presented the trial court with a challenging exercise of discretion. Initially, we do not agree with Fontes that "trouble with the law" excludes dismissed charges, nor do we think a reasonable juror would interpret the phrase so narrowly. Rather, a juror would likely understand "trouble with the law" to include, at a minimum, the DUI citation. Thus, the court appropriately allowed the state to cross-examine Fontes to correct his misleading testimony. And that cross-examination was not necessarily misleading itself. The jury heard that Fontes was cited for speeding and DUI, which was true. It is not obvious that a juror would have assumed these citations led to convictions.

¶24 That left the trial court to determine whether further testimony about the citations was appropriate on redirect. At oral argument, Fontes asserted that the court should have allowed his counsel to ask him whether the charges were dismissed, and he should have been permitted to provide an affirmative answer. We agree that allowing this testimony would have been within the court's discretion.

¶25 But that option presented its own shortcomings. Had Fontes testified that the charges were dismissed, the state said it wanted to "call witnesses to say why he wasn't charged . . . ." The record does not explain what those witnesses might have said. Thus, the circumstances suggest that fully explaining the dismissal would have required more testimony than Fontes suggests.

¶26 Recognizing this risk, the trial court emphasized its concern about keeping the issue "narrow so that the jury is not misled about [Fontes's counsel] opening the door." It likewise explained that it did "not want to go into all the specific details." The court's concerns were reasonable. It needed to guard against misleading testimony while avoiding a mini-trial on the collateral issue relating to Fontes's "trouble with the law." Further testimony on that issue risked confusing the jury or wasting its time, especially given the possibility of additional witnesses from the state. *See* Ariz. R. Evid. 403; *see also State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 10 (App. 2013) (recognizing risks under Rule 403 of "collateral mini-trial" on other issues). And Fontes rejected the court's suggestion of a limiting instruction, which was another means of resolving the issue. Given these circumstances, we reject Fontes's argument that the court abused its discretion by imposing the limits that it did.

PROXIMATE-CAUSE INSTRUCTION

¶27 Fontes also argues that the trial court fundamentally erred by failing to instruct the jury that the state must prove proximate cause beyond a reasonable doubt. Fontes did not object to the proximate-cause instruction at trial, so we review for fundamental error. *See State v. Felix*, 237 Ariz. 280, ¶ 13 (App. 2015). Error is fundamental if it goes to the foundation of the case, takes away from the defendant a right essential to his defense, or is so egregious that the defendant cannot possibly receive a fair trial. *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). "An error generally goes to the 'foundation of a case' if it relieves the prosecution of its burden to prove a crime's elements, directly impacts a key factual dispute, or deprives the defendant of constitutionally guaranteed procedures." *Id.* ¶ 18.

¶28 Proximate cause was an issue because Fontes presented evidence that A.S. and G. were not restrained and were ejected from the vehicle. A.S.'s blood later tested positive for tetrahydrocannabinol, and police found marijuana in his car after the incident. Fontes argued that the lack of restraints and potential drug use were proximate causes of the collision.

¶29 Our supreme court previously held in a special action that Fontes was not entitled to a superseding-cause instruction because A.S.'s "alleged acts and omissions were not intervening events." *State v. Aragon*, 252 Ariz. 525, ¶ 24 (2022). Thus, Fontes does not challenge the trial court's omission of a superseding-cause instruction. Instead, he argues that the court should have incorporated language from that instruction to the proximate-cause instruction it did give. That language requires the state to prove lack of superseding cause beyond a reasonable doubt. Rev. Ariz. Jury Instr. (RAJI) Stand. Crim. 52 (6th ed. 2022).

¶30 Fontes argues that the trial court should have modified that language to explicitly require the state to prove proximate cause beyond a reasonable doubt. Instead, the court more generally instructed the jury that "the State must prove each element of each charge beyond a reasonable doubt."

¶31 In Fontes's view, this instruction was insufficient, especially because the trial court also gave a multiple-actors instruction. That instruction provided:

> The unlawful acts of two or more people may combine to cause the harm of another. If the unlawful act of the other person was the sole proximate cause of the harm, the defendant's conduct was not a proximate cause of the harm. If you find that the defendant's conduct was not a proximate cause of the harm, you must find the defendant not guilty.

In Fontes's view, this instruction could lead a jury to believe that he bore the burden of proving that someone else was not the sole proximate cause.

¶32 Assuming without deciding that the trial court erred by not including the reasonable-doubt language in its proximate-cause instruction, we conclude that the error was not fundamental. It did not relieve the prosecution of its burden of proving causation, directly impact a key factual dispute, or deprive Fontes of constitutionally guaranteed procedures. *Escalante*, 245 Ariz. 135, ¶ 18. As explained, the jury had been properly instructed that the state bears the burden of proving all elements beyond a reasonable doubt. *See State v. Acuna Valenzuela*, 245 Ariz. 197, ¶ 91 (2018). We presume the jury followed this instruction. *State v. Gallardo*, 225 Ariz. 560, ¶ 40 (2010). And nothing in the causation instruction suggested that the state's burden on that issue differed from its burden on other issues.

At best, the language proposed by Fontes would have reinforced the general instruction about the state's burden. Nor did anything in the multiple-actors instruction suggest that Fontes bore any burden of proof on any issue.

¶33 We likewise disagree with Fontes that *State v. Rodriguez*, 192 Ariz. 58 (1998), upon which he relied at oral argument, compels a different result. *Rodriguez* held that the standard burden-of-proof instruction did "not redress the risk of burden shifting engendered by alibi evidence . . . ." *Id.* ¶¶ 25-26. It dealt with the unique risk that a jury might believe that a defendant who puts forth an alibi defense bears the burden of proving it. *Id.* ¶ 25. Fontes attempts to generalize this risk of burden shifting to the area of causation. But nothing in *Rodriguez* suggests that this is appropriate. Nor do we believe that this risk applies equally to causation as to alibi, especially given that our review is limited to fundamental error.

CRIMINAL-SPEEDING INSTRUCTION

¶34 Finally, Fontes argues that insufficient evidence supported the trial court's decision to instruct the jury on the definition of criminal speeding, which requires that the speeding have occurred in a business or residential district. A.R.S. § 28-701.02(A)(2).

¶35 Under A.R.S. § 28-701.02(A)(2), it is unlawful to "[e]xceed the posted speed limit in a business or residential district by more than twenty miles per hour . . . ." Section 28-101 provides definitions for "business district" and "residence district." A business district is

> the territory contiguous to and including a highway if there are buildings in use for business or industrial purposes within any six hundred feet along the highway, including hotels, banks or office buildings, railroad stations and public buildings that occupy at least three hundred feet of frontage on one side or three hundred feet collectively on both sides of the highway.

A.R.S. § 28-101(13). A residence district is

> the territory contiguous to and including a highway not comprising a business district if the property on the highway for a distance of

> three hundred feet or more is in the main improved with residences or residences and buildings in use for business.

A.R.S. § 28-101(66).

¶36 We review the trial court's decision to give a jury instruction for abuse of discretion, and we will reverse only if the instructions as a whole are misleading. *See Leon v. Marner*, 244 Ariz. 465, ¶ 11 (App. 2018) (quoting *State v. Rutledge*, 197 Ariz. 389, ¶ 15 (App. 2000)). "A party is entitled to an instruction on any theory reasonably supported by the evidence." *Rodriguez*, 192 Ariz. at 61.

¶37 Here, the record shows businesses and residences were in the area where the accident happened. The state presented evidence that A.S.'s vehicle came from a road "by the dental place," that the reason for the speed limit on the divided highway was because it is in a "business area," and that Fontes claimed he did not pass any cars right by the bank before the collision. This evidence is sufficient to support the trial court's criminal speeding instruction.

DISPOSITION

¶38 We affirm Fontes's conviction and sentence.

EXHIBIT

2

Supreme Court
STATE OF ARIZONA

ANN A. SCOTT TIMMER
Chief Justice

ARIZONA STATE COURTS BUILDING
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TRACIE K. LINDEMAN
Clerk of the Court

May 7, 2025

RE: STATE OF ARIZONA v MAX FONTES
Arizona Supreme Court No. CR-24-0238-PR
Court of Appeals, Division Two No. 2 CA-CR 23-0024
Pima County Superior Court No. CR20182815001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 6, 2025, in regard to the above-referenced cause:

ORDERED: Petition for Review to Arizona Supreme Court = DENIED.

Justice Bolick and Justice Cruz voted to grant review on issue one.

Tracie K. Lindeman, Clerk

TO:
Alice Jones
Tanja K Kelly
David J Euchner
Jenna L Johnson
Lisa V Howell
tkl

EXHIBIT

3

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA.

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Plaintiff, vs. MAX FONTES, Defendant.	) CR20182815-001

BEFORE THE HONORABLE BRENDEN J. GRIFFIN
Judge of the Superior Court
DIVISION 01

OFFICIAL REPORTER'S TRANSCRIPT

TRIAL DAY SIX

December 13, 2022

Tucson, Arizona

Reported by Anne Bouley Meyer, RPR
Certified Reporter No. 50956

APPEARANCES

For the State of Arizona:
Jordan E. Emerson, Esquire
Rachel R. Heintz, Esquire

For the Defendant, Max Fontes:
John D. Kaufmann, Esquire

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EXHIBITS

PROCEEDINGS

(The following proceedings were held in open court:)

* * *

THE COURT: We are on the record. Counsel and the defendant are here; the jury is not.

Counsel, I think my staff has told you that Juror Number 13 called us and said that he has COVID and not feeling well. We told him not to come in today. I guess more specifically we told his wife to tell him not to come in today. We did not excuse him. I wanted to talk to counsel about how to move forward.

I would like to try to come back next week to see how many of our jurors could come back at some point next week to finish the trial. I looked at the CDC guidelines. It says that it's basically a five-day quarantine, assuming you don't have a fever.

So I was thinking of picking Tuesday or Wednesday of next week to come back to either do our last witness and closing, or just do closings and then let them deliberate. If not next week, then I was thinking we would pick weeks in January to see when all 12 of our jurors could come back.

State's thoughts?

MR. EMERSON: Yes, Your Honor, thank you. I'm going to provide counsel -- may I approach with some

case law?

THE COURT: Sure.

MR. EMERSON: Your Honor, the State is willing to stipulate to no more than a 29-year sentence. I have two cases here in front of me that allow for that, even mid-trial, before the case has gone to the jury. I also cited the Constitution here.

The State is willing to stipulate in writing that there be no greater than a 29-year sentence, which then necessitates only an eight-person jury which puts us right where we need to be as far as numbers go. Not only is it best for judicial economy, not making the jurors come back, having the facts be fresh in their mind.

So I don't -- the State believes we can move forward today with the 11-panel jury, and then have it be an 8-panel jury when it goes to deliberations.

THE COURT: And is it -- I have not read the case law obviously.

MR. EMERSON: Obviously. And I apologize, Your Honor. We have been working up to the moment we came over here. But the Court -- or sorry, the State tabbed the paragraphs that it believes are applicable that allow this to happen when circumstances changes during a trial. It allows for that if the sentence is no longer able to be over 30 years.

THE COURT: Does it have to be stipulated?

MR. EMERSON: Yes. Yes, it does, by the State. So, for instance, the language in this says that the Judge can't just tell the defendant, hey, I'm not going to sentence you over that; it does have to be a stipulation. And the State is willing to -- has consulted with victims, and the State is willing to stipulate to a sentence no greater than 29 years.

THE COURT: Does the defendant have to stipulate to that?

MR. EMERSON: I don't believe so. Not in the case law that I'm reading.

THE COURT: Okay. So if I'm hearing correctly, and I will read the case law, you're saying as long as the State agrees, then we can move forward.

MR. EMERSON: I believe it's still discretionary for you, Your Honor. I don't believe it's forced on you.

THE COURT: Okay. But the defendant -- from your perspective, the defendant doesn't have to agree?

MR. EMERSON: Doesn't have to agree. Obviously can lodge an objection and the Court can make the final determination, but doesn't have to agree. It doesn't have to be a stipulation from the Defense.

THE COURT: Thank you.

Mr. Kaufmann, your thoughts on all this?

MR. KAUFMANN: Well, just reading from the headnotes of State versus Provenzino, it requires all parties to stipulate to a jury of less than 12 if the Court starts with a 12-man jury on a sentencing of more than 30 months [sic].

It reads: If all parties in a criminal case stipulate before trial that if a convicted person with more than one charge, the defendant must be sentenced to a concurrent term so the maximum penalty possible is less than 30 years, a 12-member jury is not required.

And then the next head note reads: When the judge in a criminal case merely assures that he will not impose a sentence of greater than 30 years or order concurrent sentences, such a forfeiture of discretion is not sufficient to eliminate the need for a 12-man jury.

THE COURT: Well, we obviously all have to read the cases and the authority. But I guess the first question is, would you agree to stipulate to 8 if the State agrees that the maximum sentence could only be 29 years?

MR. KAUFMANN: No.

THE COURT: All right. So then we will have to read this authority and figure out if I have a decision to make.

Assuming we can't go down to 8, what are your thoughts on -- let me hear from the State, first, I guess.

What are your thoughts on if we need 12 trying to come back next week? Trying to come back some week in January?

MR. EMERSON: We will be available whenever the Court tells us to be here.

THE COURT: All right.

Mr. Kaufmann?

MR. KAUFMANN: I have nonrefundable tickets to Chicago on Saturday, which I informed the Court about a long time ago. One of the jurors, I think it's the juror that sits in the front row, far left seat, told the judge that he will not be available next week.

THE COURT: When do you come back?

MR. KAUFMANN: I come back late Thursday night on the 22nd.

THE COURT: Okay. So then how about the first week of January? Like that Wednesday, the 4th.

MR. KAUFMANN: I'm scheduled on the 5th to have my final exam before my cataract surgery. That's what I have. And I plan to be retired by then.

I don't think it's fair for the jury to make them wait two or three weeks to come back and then decide

this case. I think the appropriate measure is to declare a mistrial and move on from there.

THE COURT: I'm not inclined to do that if we can get our jury to come back within the near future. So other than -- I guess, if I'm hearing the State, for the month of January, the State will make it work?

MR. EMERSON: We will be here whenever you tell us to be here.

THE COURT: Mr. Kaufmann, what days in January are you not available?

And my thinking is we need a day of lawyer time to do either our last witness or closing arguments, and then the rest of the time will be deliberation.

MR. EMERSON: The State is in agreement with that.

THE COURT: So we need kind of one full day that all the lawyers can be here, and then the rest is just availability for jury questions and to get the verdict.

MR. KAUFMANN: So I have that January 5th appointment. They usually told me that they schedule ten days out for the surgery -- ten days before surgery, ten days later for the second surgery -- because they don't do both eyes at the same time.

And then I don't have anything until

January 30th.

THE COURT: So you'd have your appointment on the 5th, and your surgery -- the first surgery would be sometime on the 19 or after?

MR. KAUFMANN: That's what I believe.

THE COURT: All right. And then the idea would be to get our jury -- to walk away today knowing when we are going to come back so people could plan accordingly.

MR. KAUFMANN: It's a long time to make a jury wait to come back.

THE COURT: Well, I did run it by some of my colleagues. It's happened before, and they haven't had any issues with it. The feedback I got was that the jurors wanted to actually come back and try to finish it. They were invested in the process.

Let's take a break, and I want to look at this authority.

MR. EMERSON: If I may, Your Honor, I know you're going to look at it, so I just wanted to make a record that the State doesn't agree. The State believes that they have to stipulate, if that happens, before the trial not if the charges are reduced during trial. But Your Honor will make that determination.

THE COURT: Let's take about 10 or 15

minutes to look at this authority and then come back.

We are at break.

(A recess was taken.)

THE COURT: We are on the record. The jury is not here; everyone else is.

I have had a chance to look at the authority the State cited as well as additional authority. I have handed counsel a case of State versus Johnson. The citation is 2015 Westlaw 161174; unreported decision out of Division 2 in 2015, which I think is fairly on point.

I will give counsel time to read it. It's a relatively short case.

Has the State been able to explain to the victim what's going on?

MR. EMERSON: Yes, Your Honor.

THE COURT: All right. And I know the defendant has some supporters here as well. One of our jurors -- another one of our jurors has reported that they can't come in, so we are down to 11 jurors. And we are trying to figure out if we can still move forward with the case with 11 jurors. And there are some legal issues there, and that's what we are trying to figure out.

I'll start with the State.

Your thoughts on whether we can move forward with 8?

MR. EMERSON: The State, based on the case law that State provided as well the case law that the Court provided, believes we can move on with 8. The State is willing to stipulate to no more than a 29-year sentence. And additionally, you know, the State considered it a little more when the Court was out, and really, what the analysis is, is there any reversible error. Is there any error or appealable error, and there isn't any because he cannot be sentenced to over 29 years at that point.

So the State believes that the Court is clear to move on over Defense's objections.

THE COURT: I guess, from my perspective, I'm not really worried about reversible error; I want to make sure that the defendant gets a fair trial and that none of his Constitutional rights are violated.

When the State says that it's willing to stipulate, is the State -- has the State thought about whether it would make sense to withdraw some of the counts such that there would be no way, even without a stipulation, of a sentence over 30 years?

MR. EMERSON: The State would not prefer to do that. The State has presented all of its evidence, and we don't believe that there is any difference whether we stipulate or -- to be completely frank with the Court, and

the same thing we discussed with the victim before this even became an issue, there was nobody in the State's office or victims that believed there was going to be a sentence over 30 years.

So although the State doesn't really see any difference in the actual outcome, the State does believe, based on the case law the State provided, that we do need a written stipulation to that. But the State would not like to dismiss any charges.

THE COURT: All right. And what would that stipulation look like? Just putting it in the record? Or would you actually need to file something?

MR. EMERSON: I don't believe we would need to file something, but the Court can make the determination on that. But the State is willing to, on the record, say that because now there will be an 8-person jury instead of 12 that the Defendant cannot receive a sentence of more than 29 years.

Not only that the State won't ask for it, but it's impossible. The Court may not, and it would be reversible error if he was to be sentenced to anything greater than that.

THE COURT: And I think it's technically can't be sentenced to 30 years or higher.

MR. EMERSON: Sure.

THE COURT: Mr. Kaufmann?

MR. KAUFMANN: So the Constitution says absolutely someone who faces 30 years or higher is entitled to a 12-man jury. So I did a rough calculation. The ag assaults are 5 to 15, two of them; that's 30 years with the additur. The manslaughter is 10 to 25 years, and the criminal damage is -- I'm not sure about this -- maximum is four to five years.

The only way that they can get around that is to dismiss the two ag assaults and perhaps criminal damage. He's absolutely entitled to 12 people on that jury. We are not going to stipulate to the sentence of 29 years, and I don't really see how the Court even gets to 29 years.

The Court already knows my feeling about this prosecution in the first place, and now we are trying to take away a Constitutional right of the defendant despite the fact that the Government has treated these two --

THE COURT: If as a matter of law I decided today that there is no way that your client could ever be sentenced to 30 years or more, what Constitutional right is being violated?

MR. KAUFMANN: We would then have to take a look at the statute to see if the maximum penalties are 30

years or more. We just can't say it. If he faces it, that's what he faces.

THE COURT: And when I read the State versus Johnson case that I handed you, Judge Swan wrote that in that case they started with 12; one of the attorneys got sick; by the time they came back, they only had 9. The Court decided to go forward on the condition that it would not impose a sentence of 30 years or more. The defendant objected. They went forward with the trial.

On appeal, Judge Swan said, for all practical purposes that was okay because the Court acknowledged that it could not impose a sentence of longer than 29 years and 364 days, explicitly acting to reduce the defendant's jeopardy before jury deliberations, and then goes on to say that that was Constitutional.

And I'm just wondering if --

MR. KAUFMANN: The difference is that the Court acknowledged that, under the potential offenses, he could not get more than 29 years and 364 days. We are not acknowledging that.

THE COURT: I don't think -- that's not -- I didn't see where it says it acknowledged that. It says, on the conditions that the Court would not impose. And up top it says that he was exposed to a sentence of more than 30 years when the case was submitted to the jury, so

that's why they had 12.

MR. EMERSON: And just because of something Mr. Kaufmann said, I just want to make sure we are all on the same page. The State is not stipulating to any sentence, not saying the Court has to sentence him to anything, just that the absolutely ceiling is 29 years and 364 days.

THE COURT: That's the cap. I understand.

MR. KAUFMANN: Well, first of all, Johnson is not a reported decision. It's not for publication.

THE COURT: It's not binding, but it's definitely something under the new rules that I can look at to help me figure out how to move forward.

MR. KAUFMANN: As long as my client faces over 30 years, it doesn't really matter what the Court says it won't do. He faces over 30 years in prison, and he can't get around that Constitutional provision.

So if you have -- the State wants to dismiss charges to get it under that 30-year level, that's one thing. But to say it doesn't want to dismiss anything and please don't sentence him to more than 29 years, even if the Court agrees to that, that still deprives my client of a Constitutional right.

THE COURT: Anything else anybody wants to say before I make up my mind on this?

MR. EMERSON: Not from the State, Your Honor. Thank you.

THE COURT: All right.

If the minute entry could note that we are down to 11 jurors; that the State has agreed to stipulate that it will not seek a sentence of 30 years or more and, thus, is willing to move forward with an 8-member jury; that the defendant is objecting to that, arguing that it violates his Constitutional right to a 12-person jury; that the Court is overruling that objection.

The Court is acknowledging the State's stipulation. The Court is specifically ordering that in this case, under no circumstances, as a matter of law, can the defendant face a sentence of 30 years or more.

The Court's reasoning for that is based on State versus Johnson, 2015 Westlaw 161174; State versus Solis, 223 Ariz. 116; State versus Provenzino, 221 Ariz. 364.

To the extent that this is a discretionary decision, I'm exercising my discretion to do this based on the nature of this trial; the difficulty that I foresee of bringing a jury back given the sickness rate -- for lack of a better word -- that we have had; the idea that this has been a difficult trial for all involved, for the victims, for the defendant, for all of the people that are

here supporting each of those people.

And so I -- to the extent it's a discretionary decision, it strikes me that it is better to move forward and get a result on this case. I also note the age of this case, and resolution is a high priority.

With that, Mr. Kaufmann, do you have another witness to call?

MR. KAUFMANN: Yes, I do.

THE COURT: Okay. Then let's get our jury in here.

Karen is going to take a minute to get some information out, so it's going to take a second. We will take a recess. I'm going to grab some information.

(A recess was taken.)

THE COURT: Before our jury gets in here, I am going to formally excuse Juror Number 13. We will call him and let him know that he has been excused, but the admonition hasn't been lifted. Karen is in here now. I will ask her to do that when she gets a break. And let's get our jury in.

THE BAILIFF: Jury entering.

(Whereupon, the jurors enter the courtroom.)

THE COURT: Our jury is all here. Please have a seat.

Thank you for your patience this morning.

MR. EMERSON: Your Honor, may I just give you a statute so you can look at it over lunch?

THE COURT: Sure.

MR. EMERSON: The State believes that the citation -- and we will make our objection to the DUI citation after lunch, but the State believes that the citation you have to 28-772 is the incorrect violation of the law, according to the traffic detective here, because it deals with two cars coming towards each other, as it says, in the opposite direction.

The correct statute that would be applicable is 28-773.

THE COURT: And which instruction does that relate to?

MR. EMERSON: The vehicle turning left at the intersection. I have copies for you, if you'd like.

THE COURT: Nope. I just wanted to figure out which instruction you say it relates to. I'll look at that for sure.

MR. EMERSON: Okay.

THE COURT: Mr. Kaufmann?

MR. KAUFMANN: Do you intend to put the jury to 11? Or will you reduce the jury to 8?

THE COURT: 8. So once they come in, at the end of everything, closings and all that sort is stuff, I

will have our clerk take two [sic] out by random lot, and those will be our alternates -- or three out. I'm sorry.

MR. KAUFMANN: Let the record reflect we object to that also.

THE COURT: What would be the objection? You think that we should have 11 deliberate?

MR. KAUFMANN: Yeah. Send it to the 11.

THE COURT: Are you changing your mind and stipulating to less than 12?

MR. KAUFMANN: No. I'm not stipulating to less than 12. But they should be -- all 11 should hear it because they have all seen it.

THE COURT: So your argument is that even though the defendant no longer faces a sentence of 30 years or greater, that he is entitled to 11 jurors being unanimous, not only 8?

MR. KAUFMANN: Yes.

THE COURT: And what's the basis for that?

MR. KAUFMANN: Because the charges still carry greater than 30 years.

THE COURT: All right. Basically the same argument you made before. I'm denying -- we will note that that objection is there.

If the minute entry could note that the defendant is objecting to not all 11 jurors deliberating.

The Court is overruling that objection.

Enjoy your lunch, everybody.

Thank you.

(A recess was taken.)

THE COURT: The jury is not here; everybody else is. Let's finalize those jury instructions.

The first thing I want to mention is I do think the State is right: that I needed to substitute out the reference to A.R.S. 28-772 with A.R.S. 28-773. I do think that is appropriate. And that would be page 29. And so I'll ask Karen to give counsel a new page 29.

Karen, will you give each counsel a new page 29 to the latest working draft?

The State's record that it wants to make on these proposed final jury instructions?

MS. HEINTZ: Thank you, Your Honor. The record that the State would like to make is related to the Court's Instruction Number 23; that's the instruction that has to do with proximate cause.

And the State's concern regarding this jury instruction are twofold. First, after looking at it closely, it appears this instruction allows the potential to bring up another version of the superseding cause argument. And so the State just wanted to put on the record that in order to avoid that, we would like this to