

# 2015 APAAC ANNUAL PROSECUTOR CONFERENCE

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## Splitting Prosecutorial Atoms: Misconduct or Error?

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# APAAC 2015

## Prosecutorial Misconduct Seminar

### Reference Materials

The following outline is a summary of the most recent and relevant Arizona cases involving prosecutorial misconduct. It is organized to correspond generally with the categories as set forth in the Checklist that immediately follows this introduction. Accordingly, the case summaries are specific to the category of misconduct they are located in, and many cases are in more than one category.

The outline emphasizes actual quotations from the cases. In order to streamline the summaries and make the outline easier to read, most internal citations in the case summaries are omitted. Obviously, prosecutors should refer to the actual cases if they plan to use or cite them in prosecutions.

Trials can be closely contested. Prosecutors must always strive to act in accordance with the highest standards of law, ethics and honor. Sometimes at trial, mistakes are made. Even in the absence of mistakes, defense attorneys can accuse prosecutors of misconduct. The inclusion of any case should not be taken as an attack on the corresponding prosecutor. No names are included in the following materials.

Yavapai County Attorney's Office  
APAAC 2015

## Prosecutor Checklist: Avoiding Prosecutorial Misconduct

### CHARGING

- I did not alter my charges in retaliation of defendant exercising his legal rights or because of a like/dislike for defense counsel.**  
Due process prohibits us from punishing a defendant by filing additional charges in retaliation for his exercising any of his legal rights-such as hiring private counsel, filing discovery requests, demanding interviews, etc.

### PLEA NEGOTIATIONS

- I asked the victims if they will submit to defense's interviews.**  
While victims have the right to refuse defense interviews, the prosecutor must ask them whether they will submit to a defense interview anyway.
- I made no decisions relating to the plea negotiations.**  
A victim has the right to confer with the prosecutor before plea is entered, but the victim does not make the plea decisions.
- I made a record of what offers were made to the defendant and whether or not he/she accepted or rejected them.**  
In *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), the Court held that when defense counsel failed to explain a plea offer properly to the defendant. Therefore, the defendant couldn't make a reasoned decision whether to accept the offer or not, and went to trial and lost. The court could require the State to re-extend the original plea offer.

### DISCOVERY

- I have disclosed all exculpatory evidence (favorable to defendant) to the defense.**  
Under *Brady v. Maryland*, 373 U.S. 83 (1963), due process requires disclosure of evidence favorable to accuse, regardless of good faith or bad faith of prosecutor.
- I have disclosed all inculpatory evidence (unfavorable to defendant) to the defense.**  
Rule 15 of the Rules of Criminal Procedure requires us to disclose inculpatory *and* exculpatory evidence.

### PRETRIAL

- I have made my role as a prosecutor clear to all parties concerned.**
- I strictly instructed my officer witnesses not to mention the defendant's post-arrest or post-Miranda silence.**
- I have not filed any frivolous motions.**  
Ethical Rule 3.1 forbids us from filing frivolous motions (those not supported by existing law or by a good faith argument for changing existing law).
- I have not surreptitiously recorded any witness interviews (all parties must be made aware of taping).**

### TRIAL

- I have not presented any false or misleading testimony.**
- I have not placed the prestige of the government behind my witness.**  
Ex-"I promise you that I'm going to tell you the truth."
- I have not referred to information not presented to the jury.**  
Ex-"There are some things that I can't tell you, but that witness is lying."
- I have not inappropriately commented on defendant's character.**  
Ex-"The defendant is a "monster, filth, and the reincarnation of the devil."
- I have not commented on defendant's post-arrest, post-Miranda silence, or defendant's refusal to testify.**  
Ex-"Defendant had an answer for everything, but when the cops asked him a question he didn't like, he stopped talking and asked for a lawyer."
- I have not asserted my personal opinion regarding any witnesses, evidence, or testimony given at trial.**  
Ex-"I think he was an honest man, but I think he made an honest mistake."
- I have not suggested other acts of the defendant, or defense misconduct, without proof.**  
Ex-"The doctor knows the result he's looking for, and that's it. Subject comes in with schizophrenic-potential schizophrenic diagnosis, and \$950 later, yes, that's what he got."
- I have not appealed to the "passion or prejudice" of the jury.**  
Ex-"When Mr. Henry was testifying, did the word psychopath ever come to mind?"
- I have not denigrated the defense attorney or defendant.**  
Ex-"There are two liars in this case-defense counsel and the defendant."
- I have not forced/tricked defendant into calling my witnesses liars.**  
Ex-Prosecutor asks defendant, "Is there any reason that the officer would come to court and perjure himself and risk fourteen years on the police force?"
- I did not call the jury's attention to punishment or other improper matters.**  
Ex-"Ms. Smith deserves peace-to know for certain that the defendant is locked up for life-never to harm her again."
- Even though defense made untimely disclosure, I took the high road and let the evidence in (if not, it could be seen as overzealous advocacy).**
- I did not suggest that the jurors needed a "reason" to acquit.**  
Ex-"The State submits to you that if you find the Defendant not guilty, you need to have a reason in order to find reasonable doubt."
- I did not purposely say or do anything that deprives the defendant of a fair trial.**

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## **I. Legal Overview of Prosecutorial Misconduct**

### **A. Prosecutorial Misconduct Defined**

#### **1. Prosecutorial misconduct versus prosecutorial error**

The Supreme Court of Arizona has drawn “an important distinction between simple prosecutorial error, such as an isolated misstatement or loss of temper, and misconduct that is so egregious that it raises concerns over the integrity and fundamental fairness of the trial itself.” *State v. Minnitt*, 203 Ariz. 431, 438, ¶ 30, 55 P.3d 774, 781 (2002) (citing *Pool v. Superior Court*, 139 Ariz. 98, 105–07, 677 P.2d 261, 268–70 (1984)).

#### **2. Prosecutorial misconduct requires intentional and improper conduct**

“Prosecutorial misconduct ‘is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal[.]’” *State v. Ramos*, 235 Ariz. 230, 237, ¶ 22, 330 P.3d 987, 994 (App. 2014) (quoting *Pool v. Superior Court*, 139 Ariz. 98, 108–09, 677 P.2d 261, 271–72 (1984)).

### **B. Limitations on Reversible Misconduct**

#### **1. A new trial or reversal requires prejudice**

“Misconduct alone will not mandate that a defendant be awarded the new trial; such an award is only required when the defendant has been denied a fair trial as a result of the actions of counsel.” *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000) (quoting *State v. Hansen*, 156 Ariz. 291, 296–97, 751 P.2d 951, 956–957 (1988)). Further:

To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor’s misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. The misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial. Prosecutorial misconduct constitutes reversible error only if (1) misconduct exists and (2) a reasonable likelihood exists that the misconduct could have

affected the jury's verdict, thereby denying defendant a fair trial.

*State v. Morris*, 215 Ariz. 324, 335, ¶ 46, 160 P.3d 203, 214 (2007) (citations and quotation marks omitted). Courts can summarily dispose of large numbers of claims simply by finding no prejudice. *E.g. State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995).

2. Harmless error does not require a new trial or reversal

“The harmless error rule is applicable” to all of the grounds for a new trial in Ariz. R. Crim. P. 24.1(c), including prosecutorial misconduct. *Id.* cmt. (citing ARIZ. CONST. Art. 6, § 27).

3. The purpose of a misconduct finding is not to punish the prosecutor

“We do not, however, reverse convictions merely to punish a prosecutor's misdeeds nor to deter future misconduct. Rather, although the conduct was undeniably improper, we look first to determine whether counsel's actions were reasonably likely to have affected the jury's verdict, thereby denying the defendant a fair trial.” *State v. Cornell*, 179 Ariz. 314, 328, 878 P.2d 1352, 1366 (1994) (citations omitted); *see also State v. Stewart*, 139 Ariz. 50, 59, 676 P.2d 1108, 1117 (1984) (“[M]isconduct alone will not cause a reversal’ [and] ‘a new trial should not be granted to punish counsel for his misdeeds, but [only] where the defendant has been denied a fair trial as a result of the actions of counsel . . . .” (citations omitted)).

“[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.” *State v. Atwood*, 171 Ariz. 576, 608–10, 832 P.2d 593, 625–27 (1992), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001) (quoting *Smith v. Phillips*, 455 U.S. 209, 219, (1982)) (other citations omitted).

4. Curative instructions can remedy misconduct

“Jurors are presumed to follow the court's instructions.” *State v. Manuel*, 229 Ariz. 1, 6, ¶ 24, 270 P.3d 828, 833 (2011) (citation omitted). Therefore, curative instructions are usually sufficient absent a showing of prejudice. *Id.* (citations omitted). However, under some circumstances, curative instructions may not fully remedy misconduct. *Compare State v. Bible*, 175 Ariz. 549, 602–

03, 858 P.2d 1152, 1205–06 (1993) (instructions were sufficient to cure improper comments) *with State v. Leon*, 190 Ariz. 159, 161–63, 945 P.2d 1290, 1292–94 (1997) (instructions were not sufficient to cure improper comments).

5. Cumulative error is applicable to claims of misconduct

In general, Arizona courts do “not recognize the so-called cumulative error doctrine” because “something that is not prejudicial error in and of itself does not become such error when coupled with something else that is not prejudicial error.” *State v. Hughes*, 193 Ariz. 72, 78–79, ¶ 25, 969 P.2d 1184, 1190–1191(1998) (citations omitted). However, “this general rule does not apply when the court is evaluating a claim that prosecutorial misconduct deprived defendant of a fair trial.” *Id.* at 79, ¶ 25, 969 P.2d at 1191. “To determine whether prosecutorial misconduct permeates the entire atmosphere of the trial, the court necessarily has to recognize the cumulative effect of the misconduct.” *Id.* at 79, ¶ 26, 969 P.2d at 1191.

6. Defense acts do not excuse misconduct, but are relevant

“We recognize that where one party injects improper or irrelevant evidence or argument, the ‘door is open,’ and the other party may have a right to retaliate by responding with comments or evidence on the same subject.” *Pool v. Superior Court*, 139 Ariz. 98, 103, 677 P.2d 261, 266 (1984) (citations omitted). However:

Even if the defense had been guilty of serious misconduct, the prosecutor would not have been entitled to engage in abusive, argumentative and harassing conduct. Our system represents a rule of law based upon the principle that officers of the law are bound by and must act within the law, even though the necessity of so doing may put them at a disadvantage in dealing with criminals or those accused of crime. Any other system is a step which will inevitably lead us, as it has led others, to a society where the worst criminals are often those who govern and administer law. Thus, to paraphrase the words of Justice Sutherland, the prosecutor is not the representative of an ordinary litigant; he is a representative of a government whose obligation to govern fairly is as important as its obligation to govern at all. The prosecutor’s interest in a criminal prosecution “is not that it shall win a case, but that

justice shall be done.” Thus, “while he may strike hard blows, he is not at liberty to strike foul ones.” It is the prosecutor’s duty to refrain from improper methods calculated to produce a wrongful conviction just as it is his duty to use all proper methods to bring about a just conviction.

*Id.* (citation omitted).

## **II. Prosecutorial Conduct in General**

### **1. False statements and false testimony**

- a. *State v. Minnitt*, 203 Ariz. 431, 55 P.3d 774 (2002).

Facts: This defendant was tried three times total, with the first two trials ending in mistrials. The defense argued that that a key prosecution witness received his story from a detective in an un-taped interview that happened shortly before the witness implicated the defendant on tape.

At the first trial, the prosecutor falsely stated during his opening statement that the timeline of the case meant that the detective could not have been the witness’s source of information. When the detective testified, the prosecutor elicited testimony again indicating that the detective could not have been the source of the witness’s information. The record showed that the prosecutor knew “that this line of testimony was utterly false.”

At the second trial, the prosecutor asked the detective similar questions to bolster the witness’s story and refute the idea that the detective was the witness’s source. Approximately one week after that trial ended, some of the false statements were revealed at a co-defendant’s trial which ended in acquittal. The third trial was apparently free from any such false testimony.

Holding: The court found severe misconduct: “The prosecutor knowingly and repeatedly misled the jury as to how, when, and from whom [the detective] first learned the names of the three defendants. By allowing the jury to believe that [the witness] was the initial source, the state avoided the credibility obstacle that would have been apparent had [the detective] himself been the source. It is clear that [the detective] testified falsely and that his testimony was used to bolster the credibility of the state’s key witness. Moreover, the record establishes that [the prosecutor] knew the testimony was false and not only failed to clarify the

mistake but argued the evidentiary point to the jury. [The prosecutor's] calculated deception reveals the actual weakness of the state's case."

Further, the record "supports the conclusion . . . that the prosecutor engaged in a pattern of intentional misconduct in the [first two] trials aimed at preventing an acquittal and serving to deprive the defendant of a fair trial." The court found that double jeopardy precluded retrial even though the final trial did not have the same level of egregious misconduct.

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.A.1), Double Jeopardy (Section IX.2).

## 2. Compliance with court limitations

- a. *State v. Gallardo*, 225 Ariz. 560, 568–69, ¶¶ 36–40, 43–44, 242 P.3d 159, 167–68 (2010).

Facts: Prior to the opening statements in the penalty phase of a capital trial, the defense moved to limit the scope of rebuttal evidence. Specifically, the defense "asked the court to preclude the State from asking witnesses about his 'criminal history, institutional history, or any other past events,' and in particular an incident involving a handcuff key, escape attempts, or the expert's conversations with [the defendant]. The trial court granted the motion."

During his opening statement, the prosecutor "stated that [the defendant's] expert had not reviewed the Arizona Department of Corrections' records for [the defendant], which had been previously admitted, but instead would talk about the treatment of inmates generally."

Also during his opening statement, the prosecutor indicated that the jury would hear evidence relating to the defendant's childhood. After the defendant's objection, the court ruled that the prosecutor could not introduce such evidence.

During closing argument, the prosecutor argued that the defense expert had given inconsistent statements about the fees he charged the defendant. The defendant objected, and the court sustained the objection. "The prosecutor persisted with the line of argument and the trial court twice sustained further objections."

Holding: The court found that the prosecutor's comments during his opening statement were not in violation of the court's orders. The comment about the prison packet was only about the scope of the defense expert's testimony, not the events described in the prison packet.

"The prosecutor's statements about the anticipated evidence concerning [the defendant's] childhood and intelligence did not violate the court's prior ruling on the motion in limine or otherwise constitute misconduct, given that the judge's ruling precluding such evidence came only after the opening statement." Further, there was no prejudice to the defendant in light of the jury instructions.

The court did find that the prosecutor's repeated statements about the defense expert's purportedly inconsistent statements were improper. "A prosecutor should not repeat an argument after it has been the subject of a sustained objection." Nevertheless, "[the defendant's] objections were sustained and the trial court instructed the jury to 'disregard questions . . . that were withdrawn or to which objections were sustained.'" The court found that "any prejudice that may have resulted from the prosecutor's argument was cured by the trial court's instructions."

Other sections cited in: Prosecutorial Conduct in General (Section II.2), Trial-Appeal to Emotion (Section VIII.E.2).

- b. *State v. Stewart*, 139 Ariz. 50, 58–59, 676 P.2d 1108, 1116–17 (1984).

Facts: The defendant represented himself, and testified. He agreed that he would be subject to cross-examination, but then refused to answer the prosecutor's questions.

The prosecutor sought to impeach the defendant with prior felony convictions, but the situation had degenerated into a "shouting match." The prosecutor asked the court if he could ask "one more question," but the court said that he could not. The prosecutor then stated, in the presence of the jury: "Your Honor, I wish to state for the record that I wish to bring out the facts that [the defendant] has prior armed robbery convictions—"

The court later clarified for the record that "the county attorney was entitled to ask questions, it was not my intention to cut him off, it turned into a shouting match is why I did turn him off."

Holding: “[t]he general rule is that the state may ask the defendant, when he is a witness, whether he was previously convicted of a felony . . . .’ In the instant case, the prosecutor wanted to impeach appellant by divulging his prior convictions. Were it not for the unjustified refusal of appellant to answer questions on cross-examination, there would be no hint of impropriety in the prosecutor’s conduct. However, because the prosecutor was told to cease the cross-examination before he made his statement (when the statement was made appellant’s direct testimony had not been stricken), we assume, without deciding, that the prosecutor’s statement concerning appellant’s prior convictions constitutes misconduct.”

However, the court found no prejudice because “the trial judge admonished the jury not to consider the direct testimony of appellant and the prosecutor’s statement.” The court noted that “[m]isconduct alone will not cause a reversal’ and that ‘a new trial should not be granted to punish counsel for his misdeeds, but [only] where the defendant has been denied a fair trial as a result of the actions of counsel, . . . .”

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.3).

### 3. Prosecution and immunity of witnesses

- a. *State v. Martinez*, 218 Ariz. 421, 427, ¶¶ 17–20, 189 P.3d 348, 354 (2008).

Facts: Three other people were involved in a murder with the defendant. Two of those people received testimonial immunity and testified against the defendant. At the time of the defendant’s trial, the third person had pled guilty, but his initial post-conviction relief proceedings were pending. That person invoked his Fifth Amendment right against self-incrimination at the defendant’s trial. The defendant sought to compel his testimony.

Part of the defendant’s claim was that the prosecution “attempted to skew the jury’s understanding of the circumstances of the crimes” because the prosecution did not offer this person immunity but granted it to the two other people who were involved.

Holding: “The state’s refusal to grant a particular witness immunity does not violate a defendant’s right to due process absent

. . . a showing that the witness would present clearly exculpatory evidence and that the state has no strong interest in withholding immunity.’ There is no such showing here.” The defendant’s alternative explanation was refuted by the record, and the testimony of the other people involved.

Other sections cited in: Trial-Closing Argument in General (Section VIII.G.3).

- b. *State v. Armstrong*, 208 Ariz. 345, 350–53, ¶¶ 24–36, 93 P.3d 1061, 1066–69 (2004).

Facts: The defendant’s girlfriend was a key witness. She had originally been offered plea bargain for second degree murder, which she continually rejected. After a ruling that the girlfriend’s post-arrest statement was inadmissible, the State offered to allow the girlfriend to plead guilty to trafficking in stolen property and facilitation to commit murder. That agreement happened only as the trial was starting, and the defense moved to preclude the girlfriend’s testimony. The trial court delayed the trial by two weeks to give the defense time to prepare.

The defendant argued that “[a] plea agreement with [the girlfriend] should have been reached much sooner, if the prosecutor was acting in good faith.”

Holding: The court noted that “a trial judge’s ‘finding with respect to prosecutorial intent must be based primarily upon the objective facts and circumstances shown in the record.’”

The court held that “the objective facts in the record and the circumstances under which the State entered into the last-minute plea agreement with [the girlfriend] support the trial judge’s finding that [the prosecutor] did not act in bad faith or engage in willful misconduct.” “Instead, [the prosecutor] justifiably reevaluated her strategy after receiving the adverse ruling regarding the admissibility of [the girlfriend’s] post-arrest statement. [The defendant] asserts that [the prosecutor] knew nine months before trial that [the girlfriend] was willing to accept a plea in exchange for testimony. However, [the girlfriend’s] attorney told the court on several occasions that [she] would not accept the specific terms of plea agreements previously offered.”

“Similarly, while [the girlfriend’s] last-minute plea agreement

affected [the defendant's] trial strategy, such damage does not of itself signal prosecutorial bad faith. Moreover, the prosecutor's actions here had less potential to do harm than in *Dickens*, because neither side had presented evidence, the trial court granted a two-week continuance, and the State agreed to cooperate in finding necessary witnesses to help defense counsel prepare. We therefore conclude that the trial judge was within his discretion in finding that [the prosecutor] did not act in bad faith or engage in willful misconduct."

Other sections cited in: Prosecutorial Conduct in General (Section II.4), Discovery (Section VI.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

- c. *State v. Jones*, 197 Ariz. 290, 300–302, ¶¶ 19–22, 4 P.3d 355–57 (2000).

Facts: The prosecution's case depended heavily on a particular witness. The defense produced a witness who claimed to have heard the prosecution's witness say that his story was false and that the prosecution's witness committed the crime. The prosecution believed that the defense witness was part of a conspiracy organized by the defendant in jail to discredit the prosecution's witness.

At a pretrial conference and during the trial, the prosecutor explained to the court that the defense witness might face perjury charges if he falsely claimed to have heard the prosecution's witness's allegedly contradictory story. The prosecutor further indicated that the defense witness could face conspiracy to commit perjury charges if that witness testified that he agreed to falsify the story.

At trial, the defense did not request the defense witness be granted immunity. On appeal, however, the defense argued that the trial court should have granted immunity *sua sponte*.

Holding: The court recognized that under some circumstances, a threat to prosecute a defense witness with perjury could be misconduct. "Here, however, the prosecution's statements did not constitute a threat. In fact, according to the record, as relied upon in [the defendant's] own brief, the prosecutor's remarks were made to the court to explain [the defense witness's] somewhat confusing decision to invoke the Fifth Amendment. Nothing in the record

indicates that the prosecutor contacted [the defense witness] directly, or made any personal threats to [the defense witness] concerning his testimony. Nor did the prosecutor ever actually say that he would pursue a conviction, regardless of how [the defense witness] testified. He simply stated his understanding of the reasons [the defense witness] might refuse to testify. . . . Absent some substantial governmental action preventing the witness from testifying, a witness's decision to invoke the Fifth Amendment does not suggest prosecutorial misconduct.”

The court also rejected the argument that the trial court should have granted the defense witness immunity *sua sponte*. “No court has held that the constitutional burden to meet the Sixth Amendment’s Confrontation Clause shifts to the trial court in the absence of the defense counsel’s motion or request to grant such immunity. At the very least, [the defendant] waived the argument that the court should have granted him immunity by failing to pursue the remedy at trial.”

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.1), Trial-Appeal to Emotion (Sections VIII.E.2, VIII.E.3, and VIII.E.4).

- d. *State v. Dickens*, 187 Ariz. 1, 11–13, 926 P.2d 468, 478–80 (1996), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012).

Facts: The state planned to have a witness testify at the defendant’s trial. That witness was being tried for the same series of events, and originally agreed to a plea deal. The state disclosed all the information it had about the witness. Shortly before trial, the witness withdrew from the plea deal. “That same day, [the witness’s] attorney tried to resurrect the plea agreement, but was told the deal was no longer open because the prosecutor did not want to alter his trial strategy by including [the witness] as a witness against Defendant.”

The prosecution proceeded without the witness. After the state’s case in chief, the trial court was considering a motion for acquittal. While the court considered motion, the witness indicated that he wanted to accept the original deal. The prosecutor then revived the agreement. The witness agreed to testify truthfully in exchange for the State agreeing not to seek the death penalty.

“When the parties met in chambers the next morning, before the judge ruled on [the motion for acquittal], the state moved to reopen its case so that [the witness] could testify. The judge initially denied the state’s motion but, on reconsideration, granted it. The judge then ordered a one-week recess to allow Defendant time to take [the witness’s] deposition and prepare for his testimony.”

Holding: The court first found no prejudice from the trial court’s delayed ruling on the motion for judgment of acquittal because the defense was not forced to start its case.

The court also found that the prosecutor’s motion to reopen its case in chief was not based upon bad faith: “Although the trial judge did not explain his determination that there was no bad faith, we do not believe the record supports any inference that the state intentionally misled Defendant. At most, the record indicates that the prosecutor intended to try his case without [the witness’s] testimony and then changed his mind at the close of the state’s case when approached with [the witness’s] proposal. This certainly hurt Defendant’s case, but such damage does not equate to bad faith. The state gained no unfair tactical advantage when it moved to reopen because the defense had not yet presented any evidence in reliance on the state’s case-in-chief. In addition, Defendant was given a one-week recess, ample time to prepare for [the witness’s] testimony.”

The court also found no unfair prejudice from the trial court’s ruling. The defense had the one-week period to examine the witness, and presented significant impeachment evidence.

Other sections cited in: Discovery (Section VI.1).

#### 4. Other interactions with witnesses

- a. *State v. Martinez*, 221 Ariz. 383, 392–93, ¶¶ 35–37, 212 P.3d 75, 84–85 (App. 2009).

Facts: The defendant spoke to another inmate at the jail. That inmate later told his attorney, and then the inmate testified against the defendant in exchange for a reduced sentence. The State was not aware of the interaction before it happened and did not direct the inmate to talk to the defendant.

The defendant also sent a letter to his girlfriend, but the letter was intercepted by the girlfriend’s mother and turned over to the State. The girlfriend’s mother had previously told the prosecutor she

would look through the defendant's mail, and the prosecutor said "fine."

Holding: The court's primary holding was that neither the fellow inmate nor the girlfriend's mother were state agents. The State never encouraged the inmate to seek out the defendant's story. Even if the prosecutor did encourage the girlfriend's mother, the girlfriend's mother had acted primarily to protect her daughter rather than to assist the prosecution.

Therefore, because neither of the two people were acting as state agents, there was no evidence that "the prosecutor acted intentionally." Accordingly, there was no showing of fundamental error.

- b. *State v. Ortega*, 220 Ariz. 320, 329–30, ¶¶ 29–34, 206 P.3d 769, 778–79 (App. 2008).

Facts: The defendant was convicted of sexual crimes against children. One of the witnesses, a child, originally testified that "he did not remember many of the details of the events in question or his statements to a police detective." "After extensive discussion and argument from counsel, the trial court permitted him to be excused and recalled the following day, so that an interpreter could transcribe his interview with the police detective to help refresh his memory under Rule 612, Ariz. R. Evid., and for potential use as impeachment based on prior inconsistent statements under Rule 613(A), Ariz. R. Evid."

When the witness testified the next day, he eventually "recalled telling the detective that [the defendant] had threatened him while he was in Tucson in December."

The defense did not object at trial, but claimed on appeal that the witness's testimony "was altered by the pervasive questioning on the subject" and was "elicited by the State after considerable coaxing of [the witness] to testify in a manner that would lead to [the defendant's] conviction."

Holding: The court found no error or misconduct. "The methods the prosecutor used to elicit this testimony were proper under the Rules of Evidence and therefore did not constitute prosecutorial misconduct." The court then described the process of refreshing a witness's recollection, and found that the rules had been followed.

- c. *State v. Armstrong*, 208 Ariz. 345, 358–60, ¶¶ 66–72, 93 P.3d 1061, 1074–76 (2004).

Facts: During the penalty phase of the capital trial, the defense submitted a psychological report as mitigation evidence. That report noted that the defendant reported emotional and physical abuse, including sexual molestation. The defendant’s mother “took issue” with those reports.

The mother spoke to the prosecutor, and asked if she could refute those reports in a letter. The prosecutor told the mother that she “was entitled to write a letter to the judge and ask that her views be made part of the record.” The prosecutor said that the letter could either go directly to the judge, or go through the prosecutor and be disclosed to the judge and the defense.

The mother wrote the letter directly to the judge. When the judge received it, he assumed the letter had come through the prosecutor and had been disclosed to the defense, but it had not been.

The defense claimed that the prosecutor committed misconduct by advising the mother that she could send the letter to the court. Specifically, the claim was that the prosecutor effectively made the mother “an agent of the State” and therefore directed ex parte communications.

Holding: The court found that the claim was “meritless.” The court found no authority supporting the defendant’s “contention that a victim or witness becomes an agent of the State when she communicates with the court.” “In fact, this court has explicitly held that the cooperation of a victim or witness ‘does not render her an agent of the prosecutor’s office.’ Further, nothing in the record supports [the defendant’s] contention that [the prosecutor] instigated [the mother’s] communication with the court.” Thus, the court found that the prosecutor “acted appropriately in her communications with [the mother].”

Other sections cited in: Prosecutorial Conduct in General (Section II.3), Discovery (Section VI.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

- d. *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997).

Facts: “Ruling on a pretrial motion, the trial court granted the state permission to impeach with defendant’s prior felony convictions

without reference to the nature of the offenses and denied permission to admit evidence of [two other] murders ‘except for purposes of impeachment, if in fact the defendant opens the door.’ Defendant claims that the prosecutor and three witnesses made nine references to an ‘unrelated case’ or ‘unrelated matter’ that involved defendant and [the other two murders], or a Flagstaff armed robbery. In another instance, the prosecutor clarified that an unrelated case had ‘absolutely nothing to do with [the defendant] at all.’ Defendant claims this statement emphasized that the other ‘unrelated cases’ did involve the defendant. At the conclusion of the state’s evidence, defense counsel moved for a mistrial, claiming these impermissible inferences from [one of the other cases] tainted the jury and prejudiced defendant. The trial court found that the references were few in number and not prejudicial.”

Holding: “Explaining to the jury how police investigated the [crimes in this case] necessarily involved some reference to defendant’s other crimes. Prosecution’s references to ‘unrelated matters’ were as limited as possible under the circumstances and did not ‘permeate the entire atmosphere of the trial.’ Therefore, we hold there was no abuse of discretion by the trial judge in denying defendant’s motion for mistrial based on prosecutorial misconduct.”

- e. *State v. Towery*, 186 Ariz. 168, 184–85, 920 P.2d 290, 306–07 (1996).

Facts: A witness overheard the defendant make an inculpatory statement. The prosecutor used it at both an armed robbery trial and a murder trial. “The prosecutor justified his actions by telling this court that he had been mistaken about presenting Defendant’s admission at the robbery trial. As the murder investigation developed, the prosecutor became less convinced that Defendant’s admission related to the armed robbery and more convinced that Defendant had been describing events of the murder.”

“The context of [the witness’s] testimony at both trials makes it quite clear, and the State concedes, that [the witness] heard one admission about one crime. But the admission was used in two trials to help prove two unrelated criminal acts. Defendant claims that by presenting evidence of a single incident at two separate trials to prove two separate, unrelated crimes, the prosecutor

violated Defendant's due process rights and the doctrine of estoppel by engaging in misconduct.”

**Holding:** The court found that the use of the testimony “was at most an insignificant factor in light of the overwhelming evidence of Defendant's guilt on the armed robbery charge,” and so declined to invoke the doctrine of judicial estoppel.

“Even accepting the prosecutor's assertion that he decided in good faith that the inculpatory statement referred to the murder charge, we believe it improper for the State to fail to first notify defense counsel and the court of its intent to use evidence in this manner. While the robbery conviction awaited review by the court of appeals, the prosecutor made no effort to inform that court or defense counsel that he believed the admission did not relate to the robbery but to the murder, and had been improperly admitted in the first trial and properly used in the second. . . . When Defendant petitioned us to review that case, the State did not inform this court that Defendant's robbery conviction may have been based in part on improperly admitted evidence. . . . At the very least, the prosecutor had a duty to give notice in one case or the other that the admission of a single incident had been used to help convict Defendant of unrelated charges. His failure to give notice in either case constitutes misconduct.”

Nevertheless, the court found that the misconduct did not affect the verdict. The state likely would have been able to use the witness's testimony even had the defense known all the circumstances. Moreover, “[a]ny impeachment defense counsel would have obtained from having known of the testimony in the prior trial was effectively achieved.”

- f. *State v. Atwood*, 171 Ariz. 576, 608–10, 832 P.2d 593, 625–27 (1992), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001).

**Facts:** A witness testified that the defendant made an incriminating statement to him. On cross examination, the defense attorney asked when the witness remembered that information. The witness said that it was when he was taking a polygraph test. “The prosecutor admitted failing to inform the witness [not to mention the polygraph], but he maintained that the omission was unintentional.”

When a detective testified, the prosecutor asked about “items found

in the vicinity of the victim's remains." "The detective responded that one item recovered was a pair of little girl's underpants. The prosecutor asked no further questions about the underpants. Defendant asserts that the prosecutor was attempting to mislead the jury by failing to elicit from the detective that the victim's mother had been unable positively to identify the underpants as her daughter's, and that he thereby engaged in prosecutorial misconduct."

When another witness testified, he "became emotionally upset during direct examination and the prosecutor attempted to calm him." "Defense counsel moved for a mistrial, arguing that the testimony was a 'staged performance' and that the witness had been 'prompted' by the prosecution. According to the defense, this prompting was illustrated by the witness's charged responses to the prosecutor's questions and his contrastingly calm testimony during cross-examination." The trial court denied a defense motion for a mistrial.

Holding: "Our concern in examining any claim of prosecutorial conduct is with the fairness of the trial, not the culpability of the prosecutor." Therefore: "We find that defendant was not denied a fair trial by the reference to the polygraph. Even without addressing the possibility that defense counsel opened the door to this testimony, the reference to the polygraph and the possible reflection it had on [the witness's] veracity are insufficient, when viewed in relation to the totality of the evidence presented by the state, to suggest that defendant's right to a fair trial was abrogated by the incident. Finally, any possible error was rendered harmless by the court's immediate instruction to the jury to disregard the witness's answer."

The court also found no prejudice from the questions about items found near the victim's body because "the jury was informed through defense counsel's thorough cross-examination that the victim's mother had not positively identified the underpants."

The court further found no abuse of discretion in the trial court's denial of a motion for a mistrial regarding the witness who became emotional. "With the jury present, the trial judge discussed with [the witness] his emotional state and requested that he answer questions with 'yes or no' whenever possible. In addition, the jury

was instructed that it ‘must not be influenced by sympathy or prejudice.’ The court’s comments at the time of the incident, together with its instruction to the jury, sufficiently countered any negative impact [the witness’s] loss of composure might have had on the jury. Further, we do not believe, given the length of the trial and the magnitude of evidence presented, that the jury was impermissibly tainted by the emotional display of one witness on the second day of trial. We therefore need not address defendant’s underlying contention that the testimony was ‘prompted’ or ‘staged.’”

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.3), Prosecutorial Conduct in General (Section II.5), Early Investigation (Section III.1), Pretrial (Section VII.1), Trial-Appeal to Emotion (Section VIII.E.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

- g. *State v. Dumaine*, 162 Ariz. 392, 400–01, 783 P.2d 1184, 1192–93 (1989), *disapproved on other grounds by State v. King*, 225 Ariz. 87, 235 P.3d 240 (2010).

Facts: “Defendant argues that the prosecutor violated the code of ethics and A.R.S. § 13–2802 (influencing a witness) by offering [a witness] an attractive plea bargain in exchange for his testimony at trial regarding defendant’s jailhouse confession. The defendant argues that this plea bargain, in effect, ‘purchased’ [the witness’s] testimony.”

Holding: “No evidence exists in the record that the prosecutor illegally influenced the witness or that he induced the witness to testify falsely. The prosecutor, in his discretion, merely offered a favorable plea agreement to the witness.”

“Here, the jury could assess the credibility of [the witness’s] testimony because his plea arrangement was offered into evidence by both the state and the defendant. We hold that no prosecutorial misconduct occurs where the prosecutor merely arranges a favorable plea agreement with one of the several witnesses testifying against the defendant and that the defendant is not denied a fair trial where the jury is able to assess the credibility of that testimony.”

Other sections cited in: Trial-Vouching (Sections VIII.C.1 and VIII.C.4), Trial-Comments on Defendants’ Failures to Testify

(Section VIII.D.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1), Trial-Closing Argument in General (Section VIII.G.3).

- h. *State v. Bracy*, 145 Ariz. 520, 526, 703 P.2d 464, 470 (1985).

Facts: A key witness implicated the defendant in a murder. The defendant alleged that the prosecutor's investigator allowed that witness "to go free of custody in violation of Maricopa County Jail regulations to visit his wife for sexual relations." "The record at least reveals that [the investigator] took [the witness] out of jail to privately visit his wife."

Holding: The court had previously held that the prosecutor was responsible for the investigator's actions. "This action was certainly improper." However, the court found no prejudice. The defense had presented the information to the jury for their use in weighing the witness's credibility.

Other sections cited in: Discovery (Section VI.1), Pretrial (Section VII.1), Trial-Opening Statements in General (Section VIII.A.2).

5. Prosecutorial demeanor

- a. *State v. Martinez*, 230 Ariz. 208, 214–15, ¶¶ 26–33, 282 P.3d 409, 415–16 (2012).

Facts: During the guilt phase of a capital murder trial, the prosecutor "tend[ed] to give a big sigh, audible sigh, and throw up [her] hands and roll [her] eyes' when the court ruled against her. But the judge also noted this conduct was infrequent."

During the first penalty phase, the prosecutor similarly showed her emotion. The jury could not reach a verdict on the penalty, resulting in a mistrial. One juror indicated that the prosecutor's behavior had hurt her credibility. During the second penalty phase, the prosecutor again made facial expressions.

Holding: The court first held that the prosecutor's conduct was not vouching. The court then noted: "These allegations, however, are very troubling. It is highly inappropriate for '[a] prosecutor . . . to convey his [or her] personal belief about the credibility of a witness,' and to relay to the jury disagreement with trial court rulings by facial expression. From the record, it is clear that this prosecutor's courtroom demeanor was inappropriate."

However, the court noted that the conduct during the guilt phase of the trial “was documented only twice, and the trial judge was not certain it had occurred the second time.” The court did not find any reversible error from the various instances, but did “strongly disapprove of such courtroom behavior.”

Other sections cited in: Trial-Opening Statements in General (Section VIII.A.2), Trial-Vouching (Section VIII.C.2), Trial-Appeal to Emotion (Section VIII.E.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.2), Trial-Closing Argument in General (Section VIII.G.1).

- b. *State v. Speer*, 221 Ariz. 449, 458, ¶¶ 43–44, 212 P.3d 787, 796 (2009).

Facts: “Outside the presence of the judge and jury but in earshot of [the defendant], the prosecutor told a female defense attorney to be careful about contracting gonorrhea from [the defendant]. The defense moved that the prosecutor be removed. After the prosecutor claimed that she did not mean offense by the statement, but was expressing genuine concern regarding communicable diseases, the trial court denied the motion.”

Holding: “Whatever her motivations, the prosecutor’s statement was entirely unprofessional. [The defendant] has not demonstrated, however, that this isolated instance of misconduct outside the presence of the jury deprived him of a fair trial.”

- c. *State v. Atwood*, 171 Ariz. 576, 610–11, 832 P.2d 593, 627–28 (1992), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001).

Facts: “Defendant contends that the prosecutor made improper comments in both the trial and closing argument that prejudiced his right to a fair trial. Particularly, defendant takes issue with what he describes as the prosecutor’s repeated gratuitous comments attempting to ingratiate himself with the jury.”

“The state responds that the prosecutor’s gratuitous remarks were ‘utterly innocuous attempts to leaven the grinding seriousness of week after week of murder trial with a few minor pleasantries.’”

Holding: “We agree with the state’s conclusion that the prosecutor’s comments and asides throughout the trial were ‘innocuous,’ although we express no opinion on the prosecutor’s

reasons for making them.” The court found no prejudice from either the “innocuous” remarks or other comments.

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.3), Prosecutorial Conduct in General (Section II.4), Early Investigation (Section III.1), Pretrial (Section VII.1), Trial-Appeal to Emotion (Section VIII.E.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

6. Prosecutors’ presentation of mitigating evidence

- a. *State v. Glassel*, 211 Ariz. 33, 53, ¶¶ 76–77, 116 P.3d 1193, 1213 (2005), *corrected*, 211 Ariz. 370, 121 P.3d 1240.

Facts: During *voir dire*, the prosecutor stated “that the State could put on mitigating evidence, but then failed to provide jurors with evidence of [the defendant’s] mental illness.”

Holding: “We discern no fundamental error here. [The defendant’s] counsel had access to the very mitigation evidence at issue, yet failed to present it after urging by the State. Under these unique circumstances, we cannot find that the State engaged in misconduct by failing in effect to counter what it may have considered to be defense counsel’s strategy by introducing evidence that he declined to present.”

7. Prosecutors’ duty to accommodate defense counsel

- a. *State v. Talmadge*, 196 Ariz. 436, 441, ¶¶ 26–28, 999 P.2d 192, 197 (2000).

Facts: The defendant was charged with child abuse. “The defendant asserted that abuse was not involved and that the fractures were the result of temporary brittle bone disease (‘TBBB’), a controversial cousin to the well-known and more accepted bone disease known as osteogenesis imperfecta.”

The defendant retained an expert to testify about the condition. The expert refused to testify in person. The court eventually allowed the defendant to take a videotaped deposition in lieu of live testimony. The parties agreed to schedule the deposition on a particular date, but the prosecutor later discovered a personal scheduling conflict. The defendant did not agree to reschedule.

“Instead of addressing the scheduling issue, however, the State went on the offensive, responding with a motion challenging [the

expert's] testimony as lacking 'general acceptance' within the scientific community and asking for a hearing under principles enunciated in *Frye v. United States*." The court noted in a footnote: "The record is not clear whether the State planned to file the Frye motion before the conflict over [the expert's] deposition date arose or if instead it was done as a reaction to the contentious atmosphere then existing between counsel. We sense the latter."

The trial court denied the *Frye* request, but reversed its prior decision about the videotaped deposition. The defense could not convince its original expert to testify in person, so retained a different expert. The second expert's qualifications were much less impressive.

After the court's deadline for disclosing new witnesses had passed, the defense disclosed a third expert witness, with better qualifications, as a surrebuttal witness. The day before trial, the defense disclosed that the third expert would only be available on one date. The state moved to exclude the witness's testimony as a sanction for untimely disclosure, and the trial court granted the motion.

Holding: The court first held that it was not an abuse of discretion for the trial court to require the first expert to testify in person. The court then held that it was an abuse of discretion for the trial court to preclude the third expert from testifying as a surrebuttal witness. The court determined that the second expert's testimony was inadequate to fully advance the defendant's theory. "Accordingly, the trial court's ruling that excluded [the third witness] testimony deprived the defendant of the only real opportunity she might have had to introduce meaningful exculpatory evidence. The exclusion culminated in her conviction and lengthy prison sentence. Had the evidence been allowed, she might have been absolved. Without it, she had little hope. The error is reversible."

The court then criticized what it perceived "as a general unwillingness of trial counsel to make reasonable concessions to accommodate one another toward the goal of achieving factual stability on the record." "Perhaps this is most evident by the State's response to the disclosure of [the third expert]-an all out frontal attack to see that [the third expert] would never testify. Elements of tension between counsel are also apparent in the record as to

scheduling difficulties associated with [the first expert's] videotaped deposition and the State's subsequent *Frye* challenge. The *Frye* challenge appears as nothing more than retribution in response to defense counsel's apparent inability to budge on a deposition date that had been previously scheduled and agreed upon. We observe that this is a case in which adversarial hostility gained control with the result that justice went begging."

The court then noted E.R. 3.8, and the prosecutor's obligations as a "minister of justice." "The State has no legitimate interest in incarcerating a parent for child abuse if in fact that parent did not abuse her child. The State should, at the very least, be interested in hearing testimony from a leading expert in the TBBD field-[the first or third experts] or their equivalent. We simply fail to see how [the third expert's] exclusion and the rancor surrounding [the first expert's] videotaped deposition furthered any reasoned view of substantial justice."

### **III. Early Investigation**

#### **1. Conduct of the investigation**

- a. *State v. Morris*, 215 Ariz. 324, 335–36, ¶¶ 48–49, 160 P.3d 203, 214–15 (2007).

**Facts:** The prosecutor provided the medical examiners with copies of a statement that the defendant made to police. The medical examiners found nothing inconsistent with the cause of death described in that statement. The defendant did not object at the trial.

**Holding:** "Arizona statutes permit medical examiners to receive information about the circumstances surrounding a suspicious death. . . . Moreover, the record does not suggest that [the defendant's] statements improperly influenced either of the medical examiners. Both testified simply that they found nothing inconsistent with those statements in their respective autopsies of [the victims], and they acknowledged that, without the statements, they would have believed that drug intoxication caused the deaths."

**Other sections cited in:** Legal Overview of Prosecutorial Misconduct (Section I.B.1), Trial-Appeal to Emotion (Sections VIII.E.1, VIII.E.2, and VIII.E.4), Trial-Closing Argument in General (Section VIII.G.3).

- b. *State v. Atwood*, 171 Ariz. 576, 605–06, 832 P.2d 593, 622–23 (1992), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001).

**Facts:** The defendant claimed “that the police and prosecution failed adequately to investigate alternative theories of the case.” “He asserts that the prosecution did not fully investigate other supposed sightings of defendant or the possibility that some other person had kidnapped the victim. Although we will not address individually each of defendant’s grievances with the investigatory process, the essence of the argument is that the ‘prosecution singled out [defendant] and proceeded to build their case to the exclusion of other leads.’”

The defense also argued that the prosecutor allowed the victim’s body to be buried before the defense could have it examined.

**Holding:** “As a preliminary matter, we note that our review of the record does not support defendant’s claim that the prosecution ‘singled’ him out. The police did in fact question, investigate, and evaluate the disparate sources of information concerning the case. Concededly, their investigation quickly narrowed its focus on defendant. This concentration, however, was engendered by the evidence pointing to him, not by an apparent desire of the police or prosecution to find a person upon whom to place the blame, regardless of that person’s guilt or innocence.”

“We decline to find that the police or prosecution acted improperly in failing exhaustively to investigate the hundreds of reports they received from Tucson citizens claiming to possess information concerning the case. This fact, coupled with our determination that the police did not improperly ‘single out’ defendant to the exclusion of equally viable suspects, leads us to conclude that no misconduct occurred in the investigation of the victim’s disappearance. We are therefore unpersuaded by defendant’s argument.”

The court also found that ample evidence supported the jury’s decision, so found no prejudice from the investigation.

The court also rejected the argument that prosecutor improperly allowed the victim’s body to be buried before the defense could have it examined. The defense was offered access to the evidence before the burial, and there was no evidence that further

examination would have shown anything helpful to the defense.

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.3), Prosecutorial Conduct in General (Sections II.4 and II.5), Pretrial (Section VII.1), Trial-Appeal to Emotion (Section VIII.E.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

#### **IV. Charging**

##### **1. Prosecutors cannot increase charges in retaliation for exercising rights**

“Prosecutorial vindictiveness’ occurs when the government retaliates against a defendant for exercising a constitutional or statutory right.” *State v. Brun*, 190 Ariz. 505, 506, 950 P.2d 164, 165 (App. 1997) (quoting *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C.Cir.1987)). “To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is patently unconstitutional.” *Id.* (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)) (some internal quotations omitted).

“A defendant may prove prosecutorial vindictiveness by ‘proving objectively that the prosecutor’s charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do.’” *Id.* (quoting *State v. Tsosie*, 171 Ariz. 683, 685, 832 P.2d 700, 702 (App.1992)) (some internal quotations omitted). “Because actual vindictiveness is difficult to prove, ‘a defendant in some circumstances may rely on a presumption of vindictiveness.’” *Id.* (quoting *Tsosie*, 171 Ariz. at 685, 832 P.2d at 702).

“That presumption arises when a defendant presents facts that indicate ‘a realistic likelihood of vindictiveness.’ ” *Tsosie*, 171 Ariz. at 685, 832 P.2d at 702 (App. 1992) (quoting *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987) (some internal quotations omitted). “Thus, in a claim of vindictive prosecution, the defendant bears the initial burden of establishing the appearance of vindictiveness.” *Id.* (citation omitted). “Thereafter, the burden shifts to the prosecution to show that the decision to prosecute was justified.” *Id.* (citation omitted).

## 2. Cases on prosecutorial vindictiveness in charging

- a. *State v. Mieg*, 225 Ariz. 445, 448–50, ¶¶ 8–23, 239 P.3d 1258, 1261–63 (App. 2010).

Facts: “Police stopped the car being driven by defendant after they observed several traffic violations. After an officer saw a scale in the map pocket of defendant’s vehicle that he recognized as a type commonly used to weigh drugs, he arrested defendant for possession of drug paraphernalia. When another officer searched defendant incident to the arrest, he discovered two baggies of methamphetamine in defendant’s pockets. The state charged defendant by direct complaint with one count of possession or use of a dangerous drug, methamphetamine.” The State did not charge the defendant for the paraphernalia initially.

At the trial, the defendant argued that evidence of the paraphernalia should be suppressed and that it was unduly prejudicial. The trial court agreed, and also ordered the prosecutor to advise the witnesses to only testify that the defendant was under arrest without mention of the paraphernalia. While testifying, the police officer nevertheless volunteered that the defendant was being arrested for possession of drug paraphernalia. The trial court declared a mistrial. Subsequently, the State indicted the defendant on the drug possession charge and the paraphernalia charge. The trial court dismissed the indictment based on prosecutorial vindictiveness.

Holding: “Cases in which the charge is altered following a mistrial require an analysis that does not fit neatly within the pretrial/post-trial dichotomy. When the state adds a charge following a mistrial, we believe that a totality-of-the-circumstances approach is particularly appropriate in evaluating whether to apply a presumption of vindictiveness. Therefore, drawing on the *Blackledge/Goodwin/Smith* line of cases, a presumption of prosecutorial vindictiveness would arise under the circumstances of this case if the state’s action in seeking an indictment adding the additional charge was more likely than not explainable only as a penalty imposed on defendant for obtaining a mistrial”

The court found that several factors cut against the trial court’s finding of prosecutorial vindictiveness. “First, because the trial ended before a verdict was reached, the state was not required ‘to do over what it thought it had already done correctly.’”

“Second, the court’s ruling on the first day of trial granting defendant’s oral motion in limine to preclude any testimony regarding the scale, which restricted the state’s ability to present the full circumstances surrounding defendant’s arrest, was undoubtedly a development that the prosecutor had not anticipated. The timing of the motion prevented the state from reassessing its original charging decision before proceeding to trial. This circumstance makes it substantially less likely that the decision to add the drug paraphernalia charge was motivated solely by a desire to deter and punish defendant for asserting his right to a mistrial. Although the prosecutor could have avoided any possibility of the evidence regarding the scale being excluded as ‘not charged’ had it been included in the original information, we think it would ill-serve the public good to penalize the state when a prosecutor chooses not to bring all conceivable charges at the outset.”

“Third, and perhaps most importantly, the state is permitted to respond to an adverse evidentiary ruling by changing strategy in an effort to strengthen its case when doing so does not violate a defendant’s procedural rights. Here, the state’s decision to pursue an indictment adding the drug paraphernalia charge to ensure that the evidence explaining defendant’s arrest would be admissible at his retrial was a reasonable and legitimate response to the court’s pretrial ruling.”

“The sole factor supporting a presumption of vindictiveness is that the drug paraphernalia charge was added after defendant asserted his right to a mistrial that was caused by the testimony of the state’s witness in violation of a court order. As defendant points out, the mistrial here is therefore distinguishable from those that occur when a jury is unable to reach a verdict. The significance of this circumstance is somewhat lessened, however, because, as the trial court found, the prosecutor did not intentionally elicit the testimony that caused the mistrial. Further, although the prosecutor suggested that a curative instruction would suffice to ameliorate any prejudice to defendant, she readily acknowledged that the testimony violated the court’s order.”

Therefore, the court could not say “that the facts support a determination that the state’s action is more likely than not explainable only as an effort to penalize defendant for asserting his legal right to request a mistrial.” Accordingly, the court found that

“no presumption applie[d],” so the defendant “was required to show that the charges in the post-mistrial indictment were motivated by actual vindictiveness.” The defendant did not do so, so the trial court should not have dismissed the indictment.

- b. *State v. Brun*, 190 Ariz. 505, 506–08, 950 P.2d 164, 165–67 (App. 1997).

Facts: The defendant was arrested for DUI and driving on a suspended license. The prosecutor originally filed the case as a misdemeanor. The defendant then filed a motion to suppress statements that he had made. The prosecutor then re-filed the case as a felony for DUI on a revoked license.

The defense relied on a presumption of vindictiveness, and the trial court agreed and dismissed the case.

Holding: The court first held that although “pretrial charging decisions are less likely to be improperly motivated than those made after trial,” no per se rule precludes prosecutorial vindictiveness in all pretrial situations.

“Applying the [*United States v.*] *Goodwin* [, 457 U.S. 368 (1982)] analysis here, we find in this record no ‘additional facts’ to justify a presumption of vindictiveness. Defendant filed a routine motion to suppress statements and a demand for jury trial. It is unrealistic to presume that these assertions prompted retaliation by the State. Although the prosecutor appears to have been less than diligent in obtaining the Illinois records necessary to support the felony charge, nothing the State did or did not do realistically suggests a likelihood that it filed a felony charge in retaliation for Defendant’s routine assertion of procedural rights.”

The court distinguished *State v. Hinton*, 123 Ariz. 575, 601 P.2d 338 (App.1979) because it predated *Goodwin*. “*Hinton* held that the ‘appropriateness’ of increasing charges following a defendant’s assertion of constitutional rights is measured by an objective standard; namely, ‘whether a change in circumstances justifies filing the higher charge.’ . . . Our review of federal cases that have issued since *Hinton* on this subject, in particular the *Goodwin* case, leads us to conclude that the federal standard is now more tolerant of a prosecutor’s pretrial decision to increase a charge than it was when *Hinton* was decided. Just as the *Hinton* court followed federal law on this issue, so do we.”

- c. *State b. Tsosie*, 171 Ariz. 683, 686–88, 832 P.2d 700, 703–05 (App. 1992).

Facts: Following a fight at a bar, the defendant was charged with resisting arrest. At the time, he was already wanted on warrants for another charge for resisting arrest and a petition to revoke his probation.

The defendant was acquitted on the original resisting arrest charge. The resisting arrest charge from the bar fight was dismissed without prejudice “for a violation of his right to a speedy trial under Rule 8, Arizona Rules of Criminal Procedure.”

After the defendant was granted a furlough on the still-pending probation revocation, the prosecutors sought felony aggravated assault charges and felony resisting arrest charges from the grand jury. The grand jury indicted the defendant, and the trial court dismissed the charges based on prosecutorial vindictiveness.

Holding: “We agree with the [U.S. v.] *Meyer*[, 810 F.2d 1242 (D.C. Cir. 1987)] court that the critical question in a pretrial setting is whether the defendant has shown ‘that all of the circumstances, when taken together, support a realistic likelihood of vindictiveness and therefore give rise to a presumption.’ With that standard in mind, we conclude that the circumstances of the present case give rise to a presumption of vindictiveness.”

“As noted above, the charge against defendant in [the bar fight case] was pending when he succeeded in obtaining a judgment of acquittal in [the other resisting arrest case]. Defendant then successfully invoked his right to a speedy trial in [the bar fight case], which resulted in a dismissal without prejudice. Although the state argues that no reasonable likelihood of vindictiveness exists where the prosecutor is required by court order to obtain a new indictment, this argument ignores the additional circumstances that defendant has presented.”

“After the dismissal in [the bar fight case], defendant remained in custody for over a month pending determination of the petition to revoke his probation. Despite opposition from [the prosecutors], defendant was granted a furlough pending the outcome of probation violation proceedings. That same day, both prosecutors appeared before the grand jury, presenting the original charge of resisting arrest and the additional charge of aggravated assault. The evidence

that they presented to the grand jury in support of these two charges was identical to the evidence that had previously formed the basis for the single charge of resisting arrest in the original complaint.”

The court also found that it was irrelevant that a different prosecutor presented the evidence to the grand jury. The court also found that the trial court did not abuse its discretion in dismissing both indictments, noting that the Supreme Court of the United States designed the doctrine of prosecutorial vindictiveness “to be largely prophylactic.”

### 3. Use of the grand jury

- a. *State v. Young*, 149 Ariz. 580, 584–87, 720 P.2d 965, 969–72 (App. 1986).

Facts: Prosecutors presented a case to a grand jury. The appellate courts had already ruled that significant pieces of evidence were inadmissible. “Some of the grand jury’s questions had to be declined as they went to evidence which had been previously suppressed, see [the prior case], or because they were otherwise inappropriate.”

The grand jury went back into deliberations, and “requested the appearance of the defendant, all the eyewitnesses to the homicide, a diagram of the scene, and all photographs.” “The defendant had previously been given notice of the grand jury proceedings and he indicated he did not want to appear. The [prosecutors] terminated the proceedings before this grand jury by leaving the grand jury chambers and ignored the grand jury’s request. This case was later presented to [a different grand jury], which returned the second degree murder indictment which is the subject of this appeal.”

Holding: The court found that it was improper for the prosecutors to remove the case from the original grand jury. “The powers of the prosecutor are derived from those of the grand jury. The grand jury has broad investigative powers and is the decision-maker in exercising those powers. The power to initiate and control inquiries into public offenses rests with the grand jury and not the prosecutor. The prosecutor’s duty is to assist the grand jury in its investigations; the prosecutor may not exercise dominion over those investigations by evading the grand jury’s will. By withholding the evidence and witnesses the grand jury sought, the deputy county attorneys deprived the grand jury of its decision-

making function and the defendant of his right to an independent grand jury.”

However, the court found dismissal with prejudice was not the appropriate remedy. “The defendant has failed to show prejudice before the [second grand jury] due to the termination of the [first grand jury] proceeding. This appeal does not involve any claim of prejudice before the [second grand jury] which returned the indictment. Absent prejudice, errors in a grand jury proceeding do not constitute reversible error when a conviction is appealed.”

The court also noted that Ariz. R. Crim. P. 12.9 is “the appropriate method to challenge prosecutorial misconduct before the grand jury.” Further, the court rejected the State’s argument that “the only remedy available to a defendant where a grand jury proceeding is marred is a remand for a new finding of probable cause.” Instead, “the court can dismiss with prejudice an indictment which is the result of a violation of due process.” “However, under the facts of this case we find a dismissal with prejudice inappropriate.” Finally, the court rejected the defense argument that Ariz. R. Crim. P. 16.5 provides a second mechanism to challenge an indictment for prosecutorial misconduct.

## V. Plea Negotiations

### 1. General rules of plea negotiation

There is no right to a plea bargain. *State v. Martin*, 139 Ariz. 466, 481, 679 P.2d 489, 504 (1984) (citations omitted). A prosecutor “may plea bargain or not, depending on how this case fits the policies and standards of his office.” *Id.*

However, prosecutors cannot base plea bargains on factors “such as race, religion or other arbitrary classification.” *State v. Rodriguez*, 158 Ariz. 69, 71, 761 P.2d 143, 145 (App. 1988) (citation omitted). Prosecutors can base plea deals on an offender’s age, if age bears “a rational relationship to legitimate law enforcement interests.” *Id.* Prosecutors “may not refuse to plea bargain out of animus toward the defendant’s attorney.” *Martin*, 139 Ariz. at 481, 679 P.2d at 504.

### 2. Withdrawal of plea agreement

- a. *State v. Felix*, 153 Ariz. 417, 418–19, 737 P.2d 393, 394–95 (App. 1986).

Facts: “At the preliminary hearing, the deputy county attorney offered [the defendant] a plea agreement. [The defendant’s] attorney asked for additional time to consider the proposal. The deputy county attorney then withdrew the offer, and [the defendant] was bound over to the superior court at the close of the preliminary hearing. Prior to trial the state offered another, more severe, plea agreement. [The defendant] refused the offer and chose instead to go to trial.”

The defendant argued that “the harsher sentence proposed in the second offer” constituted misconduct.

Holding: The court rejected the defendant’s argument: “We recently considered a similar contention in *State v. Caperon*, in which we concluded, ‘We find no evidence of prosecutorial punishment or retaliation in the plea-bargaining process so long as appellant remained free to accept or reject the offer.’ We find the same rule to be applicable here. [The defendant] has no constitutional right to any plea offer, much less to an offer with a particular charge and sentence.”

- b. *State v. Caperon*, 151 Ariz. 426, 427–28, 728 P.2d 296, 297–98 (App. 1986).

Facts: “[The defendant] failed to timely accept the prosecutor’s initial offer of a ten-year sentence and shortly thereafter trial proceedings commenced. A plea agreement was then entered into under which [the defendant] was to receive a 15-year sentence. This plea agreement was rejected by the trial judge who then recused himself. A new plea agreement was then entered into which was accepted by a different judge and under which [the defendant] received a 12-year sentence.”

Holding: “[The defendant] now contends that because the state made an initial offer of ten years, the state should be bound by it even though [the defendant] did not timely accept it pursuant to local rule. He contends that the prosecutor’s insistence on a greater sentence in the second offer constitutes impermissible vindictiveness. We disagree. The record clearly shows that [the defendant] freely accepted the 12-year offer. We find no evidence of prosecutorial punishment or retaliation in the plea-bargaining process so long as [the defendant] remained free to accept or reject the offer.”

## VI. Discovery

### 1. Brady materials

- a. *Milke v. Mroz*, 236 Ariz. 276, 281–84, ¶¶ 9–19, 339 P.3d 659, 664–67 (App. 2014).

Facts: The defendant confessed to murdering her son. The detective had a lengthy history of questionable interrogation methods. The prosecuting office had litigated at least seven prior cases involving that detective. The detective also had other disciplinary issues, and the police department objected to production of disciplinary records pursuant to a subpoena. None of the detective’s prior history was disclosed to the Defense.

Holding: The court held that there was a severe discovery violation: “We conclude that the State’s failure to disclose these matters to [the defendant] amounts to egregious misconduct because the material was ‘highly significant to the primary jury issue’ with potential to have an ‘important effect on the jury’s determination.’ Mindful of the distinction between ordinary trial error and egregious misconduct, we conclude that the impeachment evidence not disclosed regarding [the detective], in a capital prosecution dependent on his credibility, demonstrates the latter. The nondisclosure here consists of more than a few collateral matters and constituted egregious misconduct that resulted in a flagrant denial of due process.”

The police department was treated as part of the state, so its motion to quash the subpoena about the detective’s disciplinary records was treated as a motion by the state: “We conclude that the filing of a motion to quash the subpoena for [the detective’s] personnel and disciplinary records was a direct violation of *Brady/Giglio*.”

Finally, the court rejected the argument that the individual prosecutor did not know of the detective’s issues because “it was the State’s obligation to discover and disclose such information, regardless of whether the information was possessed by other prosecutors or the police.”

Other sections cited in: Double Jeopardy (Sections IX.1 and IX.2).

- b. *State v. Dickens*, 187 Ariz. 1, 20–21, 926 P.2d 468, 487–88 (1996), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012).

Facts: The defense listed a witness, but was never able to speak to the witness. A defense investigator contacted the witness's foster mother. The foster mother called the prosecutor to complain about the defense investigator. During that call, the witness spoke to the prosecutor and told the prosecutor that a fellow inmate had told the witness that the defendant and the fellow inmate committed a different crime. The witness "also told the prosecutor Defendant had provided him with drugs and he suspected Defendant had made threatening phone calls about [the witness's] potential testimony."

The defense never located the witness. The defendant argued that the prosecutor should have disclosed its contact with the witness so that the defense counsel could have taken steps to locate the witness.

Holding: "We disagree with Defendant and believe that under the circumstances, failing to disclose the [witness] interview did not violate *Brady*. The state reasonably believed that defense counsel had already spoken with [the witness] or his foster mother, and the state provided the phone number to defense counsel. Moreover, we fail to see how the prosecutor's conversation with [the witness] was exculpatory. There is no reasonable probability that Defendant would have been acquitted had the conversation been disclosed. In fact, defense counsel admitted that, based on [the witness's] deposition, which was taken in connection with the new trial motion, [the witness] would not have been called to testify. Thus, we find no prosecutorial misconduct in failing to disclose the conversations earlier."

Other sections cited in: Prosecutorial Conduct in General (Section II.3).

- c. *State v. Bracy*, 145 Ariz. 520, 526, 703 P.2d 464, 470 (1985).

Facts: Numerous materials were not disclosed or were disclosed untimely. Those materials included a police report including the defendant's "horribly incriminating" statements, an officer's handwritten notes that were consistent with a witness's testimony about three assailants even though the final report was not consistent with the witnesses testimony, and records and photographs of three men arrested on the night of the murder. The prosecution also failed to disclose that benefits were given to a witness in exchange for her testimony. These issues were

apparently revealed during the trial.

Additional materials came to light after the trial. Those materials all concerned benefits given to a different witness and his wife by the investigator, the prosecutor's "Protected Witness Program," and the prosecutor's office in general.

Holding: The court found no *Brady* violations relating to the inculpatory evidence, because none of that evidence was presented at trial. There was no violation relating to the photographs of the other three men arrested because the defense objected to their admission, meaning they were either not exculpatory or otherwise unhelpful for the defense.

There was no violation from the reports of the three men arrested on the night of the crime and the benefits given to one of the witnesses for her testimony because "though all these items were exculpatory, this information came to light during trial and defendant made use of it. When previously undisclosed exculpatory information is revealed at the trial and presented to the jury, there is no *Brady* violation."

The information about benefits to the other witness was both exculpatory and never disclosed to the defense. Because the defense requested those materials, "the test for materiality is whether the suppressed evidence might have affected the outcome of the trial." Under that analysis, the court found that suppressed evidence did not reach the level required for reversal. First, the evidence was cumulative, because the defense already had a "great wealth" of impeaching evidence regarding the witness. Second, a different witness strongly corroborated the witness's testimony. Accordingly, the court found that the additional impeachment value from the evidence about the benefits received from the state could not have affected the jury's verdict.

The court then analyzed the discovery issues under the Arizona Rules of Criminal Procedure. The court first found that "all of the above discussed non-disclosed evidence should have been made available to defendant." For the same reasons as under the *Brady* analysis, however, the court found that no new trial was warranted. Nevertheless, the court noted its "dissatisfaction with the conduct of the prosecution" at some length.

Other sections cited in: Prosecutorial Conduct in General (Section

II.4), Pretrial (Section VII.1), Trial-Opening Statements in General (Section VIII.A.2).

- d. *State v. Lukezic*, 143 Ariz. 60, 63–68, 691 P.2d 1088, 1091–96 (1984).

Facts: Several people conspired to kill three people. Two of the co-conspirators agreed to testify for the prosecution in exchange for immunity to some of the charges. The State provided a variety of assistance including car payments, prescription drugs, and favorable presentence reports. Both plead guilty to lesser charges.

The State argued that the changed presentence reports were intended to protect the witnesses' identities. Both reports, however, also omitted significant details about prior arrests, substance abuse, and mental illness. The State argued that the sentencing judges had already agreed to sentence the witnesses as they had agreed, so the presentence reports were "no more than a mere formality."

None of the benefits to the witnesses were disclosed before trial. The trial court granted a motion for a new trial when the defense did discover those details.

Holding: The court did not agree that the presentence reports were irrelevant, and found it "difficult to believe that these judges were willing to abide by the stipulated sentences irrespective of the prior criminal, psychological and substance abuse histories of the defendants." The court also rejected the proposition that sealed presentence reports are not subject to *Brady* discovery if they are altered to protect the witnesses' identities. The court also rejected the notion that the prosecutors were unaware of the presentence reports, because the State was plainly involved with them.

The court characterized the State's conduct as "nondisclosure after a specific request for evidence is made by the defendant" under *United States v. Agurs*, 427 U.S. 97 (1976) because the defense had identified the one of the witness's credibility as a key issue.

Accordingly, the standard was whether "the suppressed evidence might have affected the outcome of the trial." The court found that witness credibility was an important issue and that the impeachment evidence was not merely cumulative. Therefore, the court affirmed the trial court's decision to grant a new trial.

## 2. Other discovery issues

- a. *State v. Aguilar*, 217 Ariz. 235, 238–39, ¶¶ 11–12, 172 P.3d 423, 426–27 (App. 2007).

Facts: The initially-assigned prosecutor requested a ballistics report. A different prosecutor took the case to trial, but did not know that the ballistics report was complete until the trial was underway. At that time, the prosecutor disclosed the report. The prosecutor requested either a continuance or a mistrial so that the defense could examine the report. The trial court declared a mistrial.

Holding: “Although the failure to timely discover and disclose the report was entirely attributable to the state, and the prosecutor’s argument was erroneous, the prosecutor’s actions do not amount to prosecutorial misconduct.”

However, the court found that double jeopardy considerations from the mistrial precluded retrial because there was no manifest necessity for the mistrial. The decision was largely because the mistrial only benefited the State.

Other sections cited in: Double Jeopardy (Section IX.2).

- b. *State v. Roque*, 213 Ariz. 193, 205–11, 229–30, ¶¶ 21–52, 162–63, 141 P.3d 368, 380–86, 404–05 (2006).

Facts: The primary issue was whether the defendant was legally insane. The state disclosed an expert to question how one of the tests used by the defense expert was administered. At trial, he also testified about the substantive interpretation of the test, and of another test. His opinions about those issues were not disclosed. Upon a defense objection, the trial court offered to let the defense interview the state’s expert for several hours, but the defense attorney declined.

Holding: “No Arizona opinion pertaining to Rule 15.1(a)(3) addresses a case in which the state knew that its expert had an opinion on an issue to which he intended to testify, yet failed to disclose it.” The court held that the rule required disclosure of the expert’s opinion, even though it was not contained in any prior written report.

“The questioning by the State also makes clear that the prosecutor knew of [its expert’s] scientific conclusions before the doctor took the stand, satisfying the requirement in the then-applicable version

of Rule 15.1(a)(3) that the information be ‘within the prosecutor’s possession or control.’”

The court found that the failure to disclose the scope of the expert’s testimony was “improper conduct.” However, because the defense “categorically rejected the trial court’s initial attempt to resolve the dispute,” the court could not “fully assess the prejudice the defense may have suffered.” Therefore, the court could not find that the trial court’s decision not to preclude the expert’s testimony was reversible error.

Other sections cited in: Trial-Cross Examination of Defense Expert Witnesses and Comments on Psychological Theories (Section VIII.B.2), Trial-Appeal to Emotion (Sections VIII.E.2 and VIII.E.4), Trial-Closing Argument in General (Section VIII.G.1).

- c. *State v. Armstrong*, 208 Ariz. 345, 353–57, ¶¶ 37–59, 93 P.3d 1061, 1069–73 (2004).

Facts: The defendant’s girlfriend was a key witness. She had originally been offered plea bargain for second degree murder, which she continually rejected. After a ruling that the girlfriend’s post arrest statement was inadmissible, the State offered to allow the girlfriend to plead guilty to trafficking in stolen property and facilitation to commit murder. That agreement happened only as the trial was starting, and the defense moved to preclude the girlfriend’s testimony. The trial court delayed the trial by two weeks to give the defense time to prepare.

While both the defendant and the girlfriend were in jail, the defendant wrote letters to the girlfriend, and the girlfriend wrote letters to the defendant. None of the letters were initially available to the State, but the girlfriend testified about them over defense objections. On cross examination, the defense produced some of the letters from the girlfriend to the defendant, and the prosecutor objected because they had not been disclosed to the State. The girlfriend then provided the letters that the defendant had written to her to the state. The prosecutor then disclosed them to the defense, which objected to that second set of letters. The trial court admitted most of the letters, and found no disclosure violation by the State.

Holding: The court first rejected the argument that the last minute plea agreement was in bad faith. The court also held the late disclosure of the girlfriend’s testimony was not a discovery

violation and the defendant was not prejudiced: “The belated disclosure of [the girlfriend] as a witness was a result of her last-minute decision to enter into a plea agreement in exchange for her testimony. Where, as here, a codefendant is listed as a co-indictee and the codefendant agrees to a plea arrangement in exchange for her testimony, as long as the prosecutor takes reasonable steps to notify the defendant quickly of the new witness there is no disclosure violation under Rule 15.1.” Further, the trial court did not abuse its discretion in declining to preclude the girlfriend’s testimony because preclusion should only be used “in those cases where other less stringent sanctions are not applicable to effect the ends of justice.” There was also no prejudice because the defendant was aware of the girlfriend’s role, had received the relevant documents, and received a two week continuance.

The court also found no disclosure violation regarding the letters from the defendant to the girlfriend. “Generally, [t]he [S]tate cannot be held to disclose material that it does not possess.” The court also noted the requirements of Ariz. R. Crim. P. 15.1. “[The prosecutor] was unaware of the exact nature of the contents of [the defendant’s] letters until [the girlfriend] told her at trial. The defendant] wrote the letters and thus knew their contents. Defense counsel was aware of [the defendant’s] letters and chose not to question [the girlfriend] about them because [the defendant] had told him they were not important.”

The court noted the trial court’s finding that the existence of the letters “should have been obvious” to the state, but still found that the prosecutor “no duty to discover and disclose letters in the codefendant’s possession.” “The State’s failure to recognize the evidentiary value of letters not in its possession does not constitute a disclosure violation. Likewise, there is nothing in the record to indicate that [the prosecutor] acted in bad faith in presenting the letters.”

Other sections cited in: Prosecutorial Conduct in General (Sections II.3 and II.4), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

## **VII. Pretrial**

### **1. Pretrial publicity**

- a. *State v. Atwood*, 171 Ariz. 576, 607, 832 P.2d 593, 624 (1992),

*disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001).

**Facts:** The case generated significant media attention. The coverage in Pima County was so extensive that the trial court changed the venue to Maricopa County. The court intended to keep the new location secret, but the prosecutor told the media.

**Holding:** In a separate section of its opinion, the court found that the pretrial publicity did not deprive the defendant of the right to a fair trial. The court found that the jury was not tainted: “Further, none of the jurors gave even the slightest indication during voir dire that prior knowledge of the case would impede their ability to serve as objective jurors.”

“Although we recognize the potential for serious infringement of a defendant’s right to a fair trial when the prosecution engages in extrajudicial contact with the media, our concern in addressing alleged prosecutorial misconduct is the actual effect of the conduct on defendant’s trial. ‘[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.’ Because we hold that defendant was not denied a fair trial because of pretrial publicity, we do not address the various alleged incidents of improper contact with the media.”

**Other sections cited in:** Legal Overview of Prosecutorial Misconduct (Section I.B.3), Prosecutorial Conduct in General (Sections II.4 and II.5), Early Investigation (Section III.1), Trial-Appeal to Emotion (Section VIII.E.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

- b. *State v. Bracy*, 145 Ariz. 520, 526, 703 P.2d 464, 470 (1985).

**Facts:** “On September 28, 1982 [one prosecutor] and all other lawyers in this case agreed with the trial judge not to contact the media. Prior to this agreement, [that prosecutor] voluntarily interviewed with a Phoenix Magazine reporter who desired a story on [the prosecutor] and the [murders at issue]. [The prosecutor] discussed, among other things, where he was and what he was doing New Year’s Eve of 1980 when he heard about the murders, how he then spent the entire night and part of the next day investigating the murders, how inspirational [the victim’s wife] had been, his philosophy of prosecuting, and his favorite past case.

After the September 28th agreement, [the prosecutor] posed for photos to accompany the article.”

Holding: “Even assuming the parties had not agreed to contact the media, [the Prosecutor’s] actions were improper as a transgression of rules relating to trial publicity. In addition, by posing for photos to accompany the article after having agreed not to contact the media, [the prosecutor] blatantly violated an agreement with the trial court. [The prosecutor’s] behavior was improper.”

The court was “disturbed” by the prosecutor’s “misconduct regarding trial publicity,” but found no prejudice. None of the jurors had read the article, and the court ordered them not to.

Other sections cited in: Prosecutorial Conduct in General (Section II.4), Discovery (Section VI.1), Trial-Opening Statements in General (Section VIII.A.2).

## **VIII. Trial**

### **A. Opening Statements in General**

#### **1. The proper scope of opening statements**

- a. *State v. Bible*, 175 Ariz. 549, 601–02, 858 P.2d 1152, 1204–05 (1993).

Facts: During opening statement, the prosecutor “suggested that the victim was ‘perhaps tortured.’” During closing argument, the prosecutor stated that “after the victim’s hands were tied, she may have been ‘forced into some sort of torment.’”

Holding: “The comment during opening statement that the victim was ‘perhaps tortured’ was improper. Opening statement is counsel’s opportunity to tell the jury what evidence they intend to introduce. Opening statement is not a time to argue the inferences and conclusions that may be drawn from evidence not yet admitted. There was no direct evidence that the victim was tortured, and the record does not indicate that any such evidence was anticipated when opening statements were made. Accordingly, the reference to ‘torture’ during opening statement was improper.”

However, the comment in closing argument that the victim was “forced into some sort of torment” was proper, because the attorney could “summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and

suggest ultimate conclusions.” The improper comment during the opening statement did not amount to fundamental error.

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.4), Trial-Vouching (Sections VIII.C.1, VIII.C.2, and VIII.C.3), Trial-Appeal to Emotion (Section VIII.E.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1), Trial-Closing Argument in General (Section VIII.G.3).

## 2. References to evidence

- a. *State v. Martinez*, 230 Ariz. 208, 216–17, ¶¶ 38–41, 282 P.3d 409, 417–18 (2012).

Facts: In the opening statement to the penalty phase of a trial, the prosecutor discussed a burglary that the defendant was acquitted of.

Later in that opening statement, the prosecutor “talked about the State’s expert who would testify and suggested [the defendant] malingered on that expert’s test because he ‘will do anything, say anything, use anyone to save his own skin.’” The defense moved for a mistrial at the conclusion of the opening statement.

Holding: Any error from the reference to the burglary was harmless because the judge instructed that the defendant “had been acquitted of that burglary and they should not use it against him. We presume jurors follow instructions.”

“As for the insinuation that [the defendant] concocted his mental health mitigation, the prosecutor’s statement was not improper because it was supported by testimony from the State’s expert that [the defendant] malingered on examinations. The trial court correctly denied the motion for mistrial.”

Other sections cited in: Prosecutorial Conduct in General (Section II.5), Trial-Vouching (Section VIII.C.2), Trial-Appeal to Emotion (Section VIII.E.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.2), Trial-Closing Argument in General (Section VIII.G.1).

- b. *State v. Anderson*, 210 Ariz. 327, 341, ¶ 46, 111 P.3d 369, 383 (2005), *supplemented* 211 Ariz. 59, 116 P.3d 1219.

Facts and Holding: “[The defendant] claims that several remarks in the prosecutor’s opening statement were misconduct. None of these

statements, however, was improper. The State told the jury that the evidence it would see was horrible, and indeed it was. The State told the jury the murders were savage, and at least two of them indisputably were. The State characterized [the defendant's] interrogations as "nonsensical" and indicated that [the defendant's] conflicting stories suggested he was lying. In fact, [the defendant's] statements were both incoherent and internally inconsistent. Finally, the State indicated it would not use 'fancy forensics' because [the defendant's] confessions and Lane's statements rendered such evidence unnecessary. In fact, the State did not present substantial forensic evidence."

Other sections cited in: Trial-Closing Argument in General (Section VIII.G.2).

- c. *State v. Amaya-Ruiz*, 166 Ariz. 152, 171, 800 P.2d 1260, 1279 (1990).

Facts: "First, defendant challenges remarks made in the prosecutor's opening statement referring to the discovery of centerfolds of nude women found taped to the walls of defendant's bedroom. The prosecutor said, 'When the police searched his little room that he was staying in, they found a lot of centerfolds from Playboy-type magazines, and there were about maybe three or four of them that he had taped up on the wall, fairly risqué stuff. I'll have photographs of it for you to see.' [The prosecutor] then told the jury that defendant admitted looking at these pictures just before murdering the victim, but claimed to have no intent to sexually assault her. During closing argument, he told the jury that although defendant denied that rape was the motive for this crime, such a motive might be inferred in light of the evidence."

The defense did not object at the time.

Holding: "In this case, the record indicates that defendant looked at pictures of nude women shortly before killing the victim. Although defendant denied that his motive was rape, that inference was supported by the evidence. We find no error, fundamental or otherwise."

Other sections cited in: Trial-Appeal to Emotion (Section VIII.E.4), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1), Trial-Closing Argument in General (Section VIII.G.3).

- d. *State v. Bracy*, 145 Ariz. 520, 525–26, 703 P.2d 464, 469–70 (1985).

**Facts:** “[I]n opening statement, the prosecutor stated that [a witness] made positive pretrial identifications of both defendant and [another person]. The trial judge, however, had not yet decided whether those pretrial identifications were admissible, and he later ruled them inadmissible. Though allowing [the witness] to make in-court identifications of both defendant and Hooper, the trial court instructed the jurors to disregard the prosecutor’s remarks concerning the pretrial identifications.”

**Holding:** “As the trial court had not yet decided whether the pretrial identifications were admissible, the prosecutor’s statements were baseless and improper.” However: “No prejudice resulted to defendant from [the prosecutor’s] improper opening statements concerning pretrial identification. The trial court prohibited [the witness] from testifying regarding the pretrial identifications. Immediately after allowing [the witness] to identify defendant in court, the trial court instructed the jury to disregard the prosecutor’s statement regarding the pretrial identification. The trial court’s curative instruction, therefore, nullified any prejudice defendant suffered from the prosecutor’s improper statement.”

**Other sections cited in:** Prosecutorial Conduct in General (Section II.4), Discovery (Section VI.1), Pretrial (Section VII.1).

## **B. Cross Examination of Defense Expert Witnesses and Comments on Psychological Theories**

### 1. Rules for treatment of defense experts

A prosecutor commits misconduct by “suggesting, without evidence, that defense counsel had paid money to a mental health expert to fabricate a diagnosis of insanity for the defendant.” *State v. Manuel*, 229 Ariz. 1, 6, ¶ 27, 270 P.3d 828, 833 (2011) (citations omitted). Similarly, a prosecutor may not “imply unethical conduct on the part of an expert witness in the absence of evidentiary support” or “attack the expert with non-evidence.” *Id.* (citations omitted).

### 2. Cross examination of expert witnesses

- a. *State v. Manuel*, 229 Ariz. 1, 6–7, ¶¶ 27–33, 270 P.3d 828, 833–34 (2011)

Facts: The prosecutor asked Defense expert about the amount of money he was paid for the case, how much money he made in general, and whether he ever testified for the State. During closing argument, the prosecutor argued the expert was biased based on the amount of money he earned testifying for defendants in “case after case, state to state.”

Holding: The court found that the prosecutor’s comments improperly misstated the record because there was no support for the proposition that the expert had “done the same thing in case after case, state to state.” Further, “absent evidentiary support, it is improper for a prosecutor to intimate that a defense expert has reached conclusions merely for pecuniary gain.” “The trial court here might have properly sustained an objection to the prosecutor’s comments regarding [the expert’s] compensation and bias, but no objection was made.” Because there was no showing of prejudice and the jury was properly instructed, the court found no fundamental error.

- b. *State v. Roque*, 213 Ariz. 193, 228–29, ¶¶ 151–61, 141 P.3d 368, 403–04 (2006).

Facts: While cross-examining a defense expert, the prosecutor asked the following question: “Now, when I talked to you, when you came to our interview, [defense counsel] had already told you that I thought that [a psychological] test was invalid, correct?”

While cross examining a different defense expert, the prosecutor asked the expert if “his school ‘was started by a bunch of teachers offering classes to the people in New York on things like acupuncture and that sort of thing.’” There was “no basis” in the record for “such a disparaging remark.” The prosecutor also “attempted to ridicule the doctor’s publications and other qualifications.”

Holding: The court held that any error from the prosecutor’s “testimony” about the psychological test being invalid was harmless because it was abundantly clear that the prosecution questioned that test.

“In her cross-examination, the second chair prosecutor appeared to intentionally raise baseless challenges to [the second expert’s] qualifications. While questioning an expert’s qualifications is proper to assist the jury in assessing the expert’s credibility, Ethical

Rule 3.4(e) requires that the questioning have some factual basis. In this case, the bases of many of the prosecutor's questions were, at best, unclear and, at worst, non-existent. We conclude, however, that the impact of the prosecutor's questioning was not of such magnitude that it denied [the defendant] a fair trial."

Other sections cited in: Discovery (Section VI.2), Trial-Appeal to Emotion (Sections VIII.E.2 and VIII.E.4), Trial-Closing Argument in General (Section VIII.G.1).

- c. *State v. Hughes*, 193 Ariz. 72, 83–86, ¶¶ 47–61, 969 P.2d 1184, 1194–1198 (1998).

Facts: The prosecutor's rebuttal closing was "a masterpiece of misconduct." It included claims that "psychiatrists create excuses for criminals," that the defense counsel paid an expert "to fabricate a diagnosis," and improperly discussed the defendant's competence. The rebuttal closing also improperly mentioned the defendant's failure to testify by saying that the experts were his "mouthpiece," and accused him of lying to the experts. Finally, the prosecutor "got the jurors thinking about how guilty they would feel if they found Defendant not guilty by reason of insanity and heard about a murder in the future."

Holding: The court found misconduct in the prosecutor's argument that the defense fabricated the insanity defense. "This record reveals a prosecutor with an overpowering prejudice against psychiatrists and psychologists, among others. He told the court, 'psychiatrists should be precluded entirely from testifying in criminal matters,' and he repeatedly refused to retain a mental health expert for the State. . . . The prosecutor's reason for not retaining a mental health expert in this case was obvious; doing so would impair his trial strategy of ignoring the facts he did not like, relying on prejudice, and arguing that all mental health experts are fools or frauds who say whatever they are paid to say."

Combined with the other misconduct, the court found reversible cumulative error.

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.6), Trial-Comments on Defendants' Failures to Testify (Sections VIII.D.1 and VIII.D.2), Trial-Appeal to Emotion (Section VIII.E.3).

3. Comments about defense expert witnesses and psychological theories in general

- a. *State v. Velazquez*, 216 Ariz. 300, 311–13, ¶¶ 45–57, 166 P.3d 91, 102–04 (2007).

Facts: The prosecutor suggested in the opening statement to the penalty phase of capital trial that a defense expert’s test was “interesting” and that the expert “knew what the results of the [test] was [sic] going to be before he gave it,” because he “believes that all people on death row who actually killed someone have brain dysfunction.” The prosecutor also noted that the test was done one month after the expert indicated that his equipment had malfunctioned, and said “Now I don’t know how that could happen.” The expert never actually testified.

Also in the opening statement to the penalty phase, the prosecutor “highlighted the fact that [a different expert] changed his initial diagnosis of [the defendant] after reviewing the report prepared by the State’s expert.”

Holding: The comments about the defense expert knowing the outcome beforehand were improper because there was no evidentiary support. Similarly, it was improper for the prosecutor to imply unethical conduct by the expert without any evidentiary support. However, there was no prejudice because the expert did not testify and because the jury was instructed that the lawyers’ statements are not evidence.

The arguments about the second expert’s changed diagnosis were proper because they “accurately discussed the inconsistencies between [the expert’s] reports and testimony in an effort to show that this mitigation evidence deserved little weight.”

4. Use of expert reports

- a. *State v. Moody*, 208 Ariz. 424, 461–63, ¶¶ 157–168, 94 P.3d 1119, 1156–58 (2004).

Facts: Multiple experts gave somewhat conflicting reports about the defendant’s alleged insanity. Not all of the experts testified, and not all of the reports were admitted. The prosecutor impeached the defense’s experts and bolstered the state’s experts with the various reports’ conclusions. The prosecutor also referred to the reports in closing argument. The defense did not object at the time.

Holding: Although “Arizona Rule of Evidence 703 allows an expert to testify to ‘facts or data’ not admissible in evidence, ‘if the testifying expert merely acts as a conduit for another non-testifying expert’s opinion, the ‘expert opinion’ is hearsay and is inadmissible.’” The defendant raised a “colorable claim” that the rule was violated, but could not show fundamental error from the use of the expert opinions by other experts.

For similar reasons, the use of the expert reports in closing argument was not fundamental error.

Other sections cited in: Trial-Appeal to Emotion (Sections VIII.E.2 and VIII.E.3), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.2), Trial-Closing Argument in General (Sections VIII.G.3 and VIII.G.4).

## C. Vouching

### 1. Vouching defined

“Two forms of impermissible prosecutorial vouching exist: (1) when the prosecutor places the prestige of the government behind its witness, and (2) where the prosecutor suggests that information not presented to the jury supports the witness’s testimony. In addition, a lawyer is prohibited from asserting personal knowledge of facts in issue before the tribunal unless he testifies as a witness.” *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993) (quoting *State v. Dumaine*, 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989)).

### 2. Prestige of the government

- a. *State v. Ramos*, 235 Ariz. 230, 237–38, ¶¶ 23, 26–30, 330 P.3d 987, 994–95 (App. 2014)

Facts: The prosecutor “relayed advice to the jury he received ‘almost 20 years ago’ when he was preparing for the bar exam, namely, ‘not to miss the forest for the trees.’ The prosecutor also used “the phrases “the State submits” and “the State would submit.”

In rebuttal closing argument, the prosecutor responded to a Defense argument that police officer testimony “seemed slightly inconsistent” by “framing defense counsel’s statements as an argument ‘that the officers somehow would have lied or fabricated’ their testimony.” “The prosecutor further argued that the ‘police are

simply doing their job’ and suggested they have no motive to lie. The trial court sustained defense counsel’s objection and warned counsel to be careful with his comments.”

Holding: The court “perceive[d] no misconduct in the prosecutor’s fleeting reference to how long ago he sat for the bar exam. It was not the focus of the statement and the prosecutor did not attempt to argue he had superior knowledge or expertise due to his years of experience.”

The phrases “the State submits” and “the State would submit” “were not improper because the prosecutor’s use of the phrase ‘the State submits’ was limited to discussing the evidence presented at trial and did not suggest he was aware of information not presented to the jury that would support a finding of guilt.”

“Although the prosecutor mischaracterized defense counsel’s statements regarding the officers’ credibility, we conclude the prosecutor’s rhetorical questions to the jury ‘[W]hat motive would the police have to lie in a case like this?’ and ‘[W]hat motive would they have to lie or fabricate any evidence’ did not rise to the level of misconduct. Moreover, the trial court instructed the jury that the attorneys’ closing arguments were not evidence, and we presume the jurors followed the court’s instructions. On this record, there is no reasonable likelihood the prosecutor’s statements could have affected the jury’s verdict.”

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.A.2), Trial-Comments of Defendants’ Failure to Testify (Section VIII.D.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

- b. *State v. Martinez*, 230 Ariz. 208, 214–15, ¶¶ 26–33, 282 P.3d 409, 415–16 (2012).

Facts: During the guilt phase of a capital murder trial, the prosecutor “‘tend[ed] to give a big sigh, audible sigh, and throw up [her] hands and roll [her] eyes’ when the court ruled against her. But the judge also noted this conduct was infrequent.”

During the first penalty phase, the prosecutor similarly showed her emotion. The jury deadlocked on the penalty, and one juror indicated that the prosecutor’s behavior hurt her credibility. During the second penalty phase, the prosecutor again made facial

expressions.

**Holding:** The court first held that the prosecutor's conduct was not vouching. "Any eye-rolling or disapproving facial expressions signaled that the State did not believe the evidence [the defendant] was presenting. Although improper, this behavior does not amount to vouching. Nor did it suggest that information outside the record supported the witness's testimony."

The court then noted: "These allegations, however, are very troubling. It is highly inappropriate for '[a] prosecutor . . . to convey his [or her] personal belief about the credibility of a witness,' and to relay to the jury disagreement with trial court rulings by facial expression. From the record, it is clear that this prosecutor's courtroom demeanor was inappropriate."

However, the court noted that the conduct during the guilt phase of the trial "was documented only twice, and the trial judge was not certain it had occurred the second time." The court did not find any reversible error from the various instances, but did "strongly disapprove of such courtroom behavior."

**Other sections cited in:** Prosecutorial Conduct in General (Section II.5), Trial-Opening Statements in General (Section VIII.A.2), Trial-Appeal to Emotion (Section VIII.E.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.2), Trial-Closing Argument in General (Section VIII.G.1).

- c. *State v. Zinsmeyer*, 222 Ariz. 612, 218 P.3d 1069 (App. 2009), *overruled on other grounds by State v. Bonfiglio*, 231 Ariz. 371, 295 P.3d 948 (2013).

**Facts:** In her opening statement, the prosecutor stated: "through good law enforcement investigation, [the police found the defendant]." The defendant argued that the statement implied "police 'had found the correct criminal.'"

In closing argument, the prosecutor stated "that 'the state is satisfied the burglary with the motor vehicle and what tool is it?'" The defense argued that the statement "improperly suggested 'the state was satisfied burglary occurred.'"

"Last, [the defendant] contends the prosecutor improperly characterized the defense closing argument as 'attacking what police did instead of looking at what the defendant did,' reasoning

the prosecutor's statement 'impli[ed] . . . that the police were too trustworthy to warrant attack.'"

**Holding:** The court first held that "even if it is improper for a prosecutor to characterize the quality of a police investigation," the first comment "was not so egregious as to result in a denial of due process." The court also noted that the jury was properly instructed that the attorneys' statements were not evidence.

The court viewed the second statement about the State being "satisfied" as "nothing more than an assertion the state had presented sufficient evidence a burglary had occurred, followed by argument that [the defendant] had committed the burglary with tools found in the truck." The court found nothing suggesting that the prosecutor used either form of vouching.

Finally, the court found that the statement about the defense "attacking what police did instead of looking at what the defendant did" was not vouching. "When she made this comment, the prosecutor was responding to purported deficiencies in the police investigation that [the defendant] had identified in his closing argument. [The defendant] cites no authority, and we find none, suggesting a prosecutor may not respond to a defendant's argument that law enforcement's investigation of a crime was inadequate. There was nothing improper in the prosecutor's argument."

- d. *State v. Newell*, 212 Ariz. 389, 403, ¶¶ 64–70, 132 P.3d 833, 847 (2006).

**Facts:** The prosecutor stated that "[N]o matter what defense counsel tells you, we all know that DNA is . . . the most powerful investigative tool in law enforcement at this time." The prosecutor also stated that the defense counsel "knew this was true."

**Holding:** "The prosecutor's statement about the superiority of DNA evidence improperly vouched for the State's evidence. No opinions had been elicited about the preeminence of DNA evidence. The prosecutor's comment here—that everyone knows that DNA evidence is the best investigative tool around—did improperly vouch for the strength of the State's evidence against [the defendant]."

In addition, "[b]ecause defense counsel, in his closing argument, had questioned whether the DNA evidence proved anything beyond

a reasonable doubt, the prosecutor's response in claiming that defense counsel knew that DNA was superior evidence called into question the integrity of defense counsel."

The court found no prejudice from the attack on defense counsel or vouching. The court noted that the trial court properly instructed the jury, and found that the evidence of guilt was overwhelming.

Other sections cited in: Trial-Vouching (Section VIII.C.3), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

- e. *State v. Lamar*, 205 Ariz. 431, 441–42, ¶¶ 50–54, 72 P.3d 831, 841–42 (2003).

Facts: The prosecutor commented that two witnesses' plea agreements "required them to testify truthfully."

During closing argument, the prosecutor indicated that two witnesses agreed that the defendant made a statement, and noted one witness's version. The prosecutor then said: "Well that sounds like a truthful statement, and it kind of just tells you what kind of a person that [the witness] is." The defense did not object.

Holding: The court found no error or misconduct from the prosecutor mentioning the witnesses' plea agreements: "We consistently have held that a prosecutor does not engage in misconduct merely by introducing evidence of a witness's agreement to testify truthfully in exchange for a plea agreement."

The court found that the prosecutor's statement that the witness's statement "sounded like a truthful statement" was inappropriate, but that it did not rise to the level of fundamental error: "The comment does not say that [the witness] is generally a credible person whose entire testimony should be accepted. Rather, when considered in context, the prosecutor's comment states only that [the witness's] description of his reaction to [the defendant's] belittling comments 'sounds like a truthful statement.' . . . Given both the limited context of the prosecutor's remarks and the court's instruction, we conclude the prosecutor's comment does not constitute fundamental error."

- f. *State v. Blackman*, 201 Ariz. 527, 542–43, ¶¶ 61–63, 38 P.3d 1192, 1207–08 (App. 2002).

Facts: The prosecutor's closing statement included grandiose statements. For example, the prosecutor stated "I've never tried a

more important case in my life,” and that the case and jury could “affect the very fabric of our society more than anything [the jury would] for the rest of [their] lives.” The statements also described how the defendants could have been productive members of society.

Holding: “The prosecutor’s comments here do not fit neatly into either of these categories [of vouching]. The statements do not attempt to bolster the credibility of any State witnesses or suggest that evidence not before the jury supports the State’s case. Nor do the statements refer to prior transactions or dealings between Defendant and the police. They might, however, be viewed as obliquely placing the prestige of the government behind the case. Nonetheless, we conclude that these unnecessary and irrelevant comments did not deny Defendant a fair trial. The jury was able to assess the importance of the case for itself, and the trial judge, who was in the best position to do so, determined that the statements did not require a new trial.”

Other sections cited in: Trial-Comments on Defendants’ Failures to Testify (Section VIII.D.2), Trial-Appeal to Emotion (Section VIII.E.3), Trial-Closing Argument in General (Section VIII.G.3).

- g. *State v. Doerr*, 193 Ariz. 56, 63, ¶ 24, 969 P.2d 1168, 1174 (1998).

Facts: At voir dire, one of the potential jurors “had once directed the Phoenix Crime Lab.” He “indicated that he could not be fair and impartial because he knew several of the state’s witnesses,” including the officer sitting next to the prosecutor. Specifically, the potential juror stated “I don’t think it would be fair to the defense, Your Honor, because of-I am aware of the integrity and I highly respect a number of the people that would be witnesses.”

The judge excused the potential juror for cause. “The judge considered [the potential juror’s] remarks ‘gratuitous’ and indicated that he could correct any error with jury instructions.” The defendant argued “that because [the potential juror] had directed the city crime lab, his remarks unfairly bolstered the credibility of the state’s witnesses.”

Holding: The court noted that the trial court should probably have excused the potential juror because of the obvious risk that he would know some witnesses. However, the court did not find that his statements tainted the jury, and found no prejudice.

The court specifically rejected the argument that the potential juror's statements constituted vouching: "[The potential juror], however, was neither a prosecutor nor a witness. His remarks could not constitute impermissible vouching. Moreover, we do not see how his statements 'precluded the defense from cross-examination of almost all of the State's witnesses.' Finally, the defendant did not demonstrate that the jurors placed any stock in [the potential juror's] opinion, or that it compromised or impaired their ability to assess the evidence independently."

- h. *State v. Leon*, 190 Ariz. 159, 161–63, 945 P.2d 1290, 1292–94 (1997).

Facts: In opening statement, the prosecutor stated that "he was 'representing the people'" and that "[w]hen the police have charged or arrested an individual, the County Attorney's Office reviews to determine if there is [sic] sufficient grounds to charge . . . ." The defense attorney objected, but there was no record of a ruling.

Holding: "By the time of the objection, the prosecutor had essentially stated that after police arrest an individual, the county attorney's office must find sufficient grounds to charge. Additionally, because the record does not reflect a ruling or a curative instruction by the court, the potential harm went unmitigated." Combined with other vouching, the prosecutor's statements resulted in reversible error.

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.4), Trial-Vouching (Section VIII.C.3).

- i. *State v. Corona*, 188 Ariz. 85, 91, 932 P.2d 1356, 1362 (App. 1997).

Facts: "The defendant claims that the prosecutor impermissibly vouched for the state's witnesses when she asserted that the victims and police officers testified 'truthfully.'"

Holding: "Out of context, the prosecutor's comment could be interpreted to have improperly placed 'the prestige of the government' in support of the credibility of the victims and the police officers. In context, however, the prosecutor made clear that it was for the jury to 'determine the credibility of' the witnesses and her characterization of the witnesses as truthful was sufficiently linked to the evidence."

Other sections cited in: Trial-Closing Argument in General (Sections VIII.G.3 and VIII.G.4).

- j. *State v. Henry*, 176 Ariz. 569, 582, 863 P.2d 861, 874 (1993).

Facts: The defendant claimed that during rebuttal closing argument, the prosecutor “improperly engaged in ‘vouching’ by intimating in his rebuttal argument that ‘the system’ doesn’t put innocent people in jail.”

Holding: “Again we find no error. The comments were invited. In his closing, defense counsel several times referred to a concept he called ‘double-dipping’—implying that the state would try to convict both [the defendant and another person] by arguing at each of their separate trials that the other was the ‘innocent’ co-defendant. He then argued that this was how ‘the system’ worked. Defense counsel also suggested that the state hoped its witnesses were more believable because they were police officers:

So, you know, that’s what we’ve got here. [The defendant] is a first degree murderer because of those the State says and we are police officers. We want this double dip. We want you to think he’s a bad dude and a liar and oh, God, we are not lying. We are telling you the straight scoop.”

“In rebuttal, the prosecutor responded:

He talked about double-bagging it. The police want both of them but they prefer one over the other. That sure says a lot about the police; about how our system works. It sure assumes that somehow we have the time to try a murder case twice; that somehow we get our kicks out of putting innocent people in jail. That is not the way the system works.

We find no prejudice here.”

Other sections cited in: Trial-Appeal to Emotion (Section VIII.E.4), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.2), Trial-Closing Argument in General (Section VIII.G.3).

- k. *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993).

Facts: The prosecutor made the following statement: “I promise you that I’m gonna be honest with you, that the witnesses that I call, there is a reason for them to be here. They have something important to tell you. I’m not gonna waste your time. If there is

[sic] two or three people that did the same thing in this case, you will probably only hear from one of them. It's gonna be a straightforward, no nonsense case . . . . As you know, we wouldn't be here unless what I'm about to tell you really happened."

**Holding:** "This statement clearly includes both forms of improper vouching" and would have been objectionable. However, "[g]iven the entire record, we do not believe that the statement tipped the scales of justice and denied Defendant a fair trial." "Thus, the prosecutor's statement, although highly improper, did not constitute fundamental error in this case."

**Other sections cited in:** Legal Overview of Prosecutorial Misconduct (Section I.B.4), Trial-Opening Statements in General (Section VIII.A.1), Trial-Vouching (Sections VIII.C.1 and VIII.C.3), Trial-Appeal to Emotion (Section VIII.E.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1), Trial-Closing Argument in General (Section VIII.G.3).

3. References to evidence not presented

- a. *State v. Newell*, 212 Ariz. 389, 402, ¶¶ 62–63, 132 P.3d 833, 846 (2006).

**Facts:** The prosecutor stated in rebuttal closing argument "that there were '3,000 pages of police reports'" and that "[n]ot every witness was called."

**Holding:** The statements were not vouching because they "were not meant to bolster the State's case. Rather, they were an attempt to explain to the jury, in response to statements made in [the defendant's] closing argument, why certain witnesses had not been called to testify. The prosecutor's response merely explained to the jury that there were simply too many documents and witnesses for either side to be able to present them all. The prosecutor did not imply that these police reports and witnesses supported the State's case. Therefore, the trial court did not abuse its discretion by denying the motion for a mistrial on this basis."

**Other sections cited in:** Trial-Vouching (Section VIII.C.3), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

- b. *State v. Rosas-Hernandez*, 202 Ariz. 212, 218–19, ¶¶ 21–25, 42 P.3d 1177, 1183–84 (App. 2002).

Facts: “In his opening statement, defense counsel presented a detailed version of the events at issue. . . . The evidence at trial did not support the scenario presented by defense counsel.”

During the State’s closing argument, the prosecutor argued: ““You have to keep in mind that everything that you-or your decision has to be based on what came from the witness stand. It can’t be based on what came from that chair-I’m pointing to [defense counsel’s] chair.”

“You remember during his opening statement, he wove quite a tale to you about what happened on the way down to south Phoenix or perhaps what you thought the evidence would be. That’s not what the evidence was. None of that is before you. You are not to consider it. *It is as if it were a lie.* That’s exactly what it is.”

The defense objected, and the trial court sustained the objection and instructed the jury to disregard the comment. The defense later moved for a mistrial.

Holding: The court first held that the statement, though improper, did not require reversal as an attack on defense counsel. The court then found that the prosecutor’s statements were not vouching: “However, the prosecutor’s comment was clearly based on the significant discrepancy between defense counsel’s opening statement and the evidence at trial. There was no suggestion by the prosecutor of outside knowledge. Further, the prosecutor’s comment was not directed at the testimony of a witness, but the non-evidentiary statements of opposing counsel.”

Other sections cited in: Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

- c. *State v. Leon*, 190 Ariz. 159, 161–63, 945 P.2d 1290, 1292–94 (1997).

Facts: The prosecutor referenced police reports that were not admitted as evidence and implied that there may have been “prior transactions.” The trial court issued an instruction to the jury to disregard evidence that was not admitted.

Holding: “Here, nothing was admitted pertaining to previous drug transactions, which alone should have precluded the state from mentioning them in closing. Similarly, by implying that police reports contained other ‘bad acts,’ the deputy county attorney

referred to matters not in evidence and presumably inadmissible under Rule 404, Ariz.R.Evid. This misconduct was particularly egregious considering that the court had earlier excluded statements regarding a prior incident because they had not been formally disclosed in advance of trial.”

The court found prejudice resulting from the implication of prior bad acts, and was not “reasonably certain” that the trial court’s instruction was “sufficient to eliminate any damage” from the references to the non-admitted police reports. Combined with the other misconduct, the prosecutor’s statements constituted reversible error.

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.4), Trial-Vouching (Section VIII.C.2).

- d. *State v. Dunlap*, 187 Ariz. 441, 462–63, 930 P.2d 518, 539–40 (App. 1996).

Facts: The prosecutor stated: “If [another suspect] was actually involved in the planning, or if he had a motive, if he wanted to have [the victim] killed, he was in on it with [the defendant], then perhaps we can try [the other suspect] sometime. That’s not for you to really decide. You need to decide whether or not [the defendant] did this; that’s your primary purpose. When you go into that jury room, *you are not to worry about whether or not [the other suspect] was also involved, that’s our job.*”

“Defendant contends this italicized language implied that the state had insider knowledge regarding [the other suspect’s] involvement and could still prosecute [the other suspect] because of this insider knowledge. Thus, the jury would believe the state had other evidence not presented at trial that explained the state’s failure to pursue [the other suspect] at this time. Therefore, the jury would disregard defendant’s theory that [the other suspect] was behind the murder and had set up defendant.”

The prosecutor also made the following statement: “After this case is over, after you have rendered a verdict, *if you want to talk to us about anything about the case, you can talk to us if you want to privately. We’d like to talk to you privately. We’d like to talk to you about credibility of witnesses.* If you don’t want to talk to us, you simply say, you know, this is private. We will respect your privacy, we won’t talk to you, it will be over with for you.”

“Defendant argues that the italicized portion implies that information outside the record bolsters the state witnesses’ credibility.”

Other sections cited in: Trial-Vouching (Section VIII.C.4).

Holding: “When read in context, however, the statement is not improper. The argument simply informed the jury that the state might still pursue [the other suspect] if the evidence arises. It also focused the jury on their duty in this case, determining whether defendant was guilty. Moreover, the trial court similarly instructed the jury.”

“Although the italicized portion of the closing argument inartfully made this point, it did not constitute improper vouching. We cannot ascribe to it the sinister connotations that defendant does.”

The court also found that the statement inviting jurors to speak after the trial did not require reversal: “First, we believe the statements, when read in context, indicate the prosecutors wanted to collect feedback from jurors regarding their presentation of the case—a common self-improvement technique among litigators. Indeed, the trial court told the jury the same thing when he twice indicated his availability to discuss the case after trial. Although the prosecutor could have selected his words more prudently, his statements were not improper when read in context.”

The court also found that the statements “did not unfairly prejudice defendant or deny him the right to a fair trial.” “Because the statements were subject to more than one interpretation, and were rather obscure, we find this case is similar to others in which prosecutorial misconduct did not require reversal. Furthermore, the trial court twice instructed the jury that counsels’ arguments were not evidence, thus mitigating the effects of the statements.”

- e. *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993).

Facts: The prosecutor made the following statement: “I promise you that I’m gonna be honest with you, that the witnesses that I call, there is a reason for them to be here. They have something important to tell you. I’m not gonna waste your time. If there is [sic] two or three people that did the same thing in this case, you will probably only hear from one of them. It’s gonna be a straightforward, no nonsense case . . . . As you know, we wouldn’t

be here unless what I'm about to tell you really happened.”

Holding: “This statement clearly includes both forms of improper vouching” and would have been objectionable. However, “[g]iven the entire record, we do not believe that the statement tipped the scales of justice and denied Defendant a fair trial.” “Thus, the prosecutor’s statement, although highly improper, did not constitute fundamental error in this case.”

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.4), Trial-Opening Statements in General (Section VIII.A.1), Trial-Vouching (Sections VIII.C.1 and VIII.C.2), Trial-Appeal to Emotion (Section VIII.E.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1), Trial-Closing Argument in General (Section VIII.G.3).

#### 4. Prosecutors’ personal opinions

- a. *State v. Dumaine*, 162 Ariz. 392, 401–02, 783 P.2d 1184, 1193–94 (1989), *disapproved on other grounds by State v. King*, 225 Ariz. 87, 235 P.3d 240 (2010).

Facts: “Defendant argues that during the closing argument the prosecutor expressed his personal opinion about defendant’s guilt and repeatedly bolstered his personal integrity before the jury. Defendant cites the following as an example:

I submit to you I have been in the County Attorney’s Office since January of 1978 and I have no intention of going elsewhere. Since January of 1978 I have been prosecuting cases . . . and I have learned one lesson . . . if you’re going to prosecute people like [the defendant] you necessarily have to deal with the people the likes of [the witnesses in the case]. Good citizens don’t call up and say, I have this information . . .

The defendant maintains that impermissible prosecutorial vouching took place because the prosecutor placed his personal opinion before the jury and used the weight and prestige of the County Attorney’s Office to further bolster his statements.”

Holding: “Although the prosecutor’s boastful comments as to his time of service with the County Attorney’s Office were irrelevant and unnecessary under the circumstances, we find that they did not deny the defendant a fair trial. First, the prosecutor did not vouch

for the credibility or the truthfulness of the state's witnesses. He did not imply that the witnesses were credible just because the state had called them to testify. On the contrary, he implied that the witnesses were not what one might call 'good citizens.'"

"Second, the prosecutor did not call attention to matters which were improper for the jury's consideration. Rather, he was attempting to play down the impact of the state's witnesses who were 'the likes of' persons who were not 'good citizens.' 'In order to constitute a direct violation of the fourteenth amendment, the prosecutor's comment must have been misconduct so egregious that it deprived the defendant of a fair trial, thus making the resulting conviction a denial of due process.' We hold that the prosecutor's remarks in this case regarding his career longevity did not deny the defendant a fair trial."

Other sections cited in: Prosecutorial Conduct in General (section II.4), Trial-Vouching (Section VIII.C.1), Trial-Comments on Defendants' Failures to Testify (Section VIII.D.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1), Trial-Closing Argument in General (Section VIII.G.3).

- b. *State v. Dunlap*, 187 Ariz. 441, 463, 930 P.2d 518, 540 (App. 1996).

Facts: The defendant agreed to kill the victim with two other people. One of those people originally agreed to testify against the defendant in exchange for a favorable plea bargain. He later breached the agreement and litigated that breach. Eventually, he agreed to the original terms of the plea bargain.

During closing argument, the prosecutor argued that the other person "had a legitimate reason to renegotiate, or at least try to renegotiate his contract" and "had a right to be upset a little bit." The prosecutor further stated: "I am not saying we did it exactly right back in those days. . . . [The other person] was not completely at fault for the falling out between him and the Attorney General's office, but there was one." "The prosecutor also told the jury that [the other person] had no motive to lie for the state since he was no longer subject to the death penalty."

The defense argued that the other person was biased because of the favorable plea bargain.

Holding: “Much of the challenged comments simply are arguments that [the other person] was telling the truth because he is no longer subject to the death penalty. Although the comments failed to mention [the other person’s] exposure to life imprisonment without the plea agreement, defense counsel’s closing argument clarified any misunderstanding. However, the comments in part express the prosecutor’s personal opinion that [the other person] justifiably sought a better plea bargain.”

“Argument containing personal opinion is improper because it is not based on the evidence or reasonable inferences that may be drawn from the evidence. Defendant believes the comments improperly bolstered [the other person’s] credibility by referring to material outside the record (the prosecutor’s opinion).”

“While the comments referred to material outside the record, we think they negligibly bolstered his credibility, if at all. The comments did not, for example, hint that other evidence existed supporting or corroborating [the other person’s] testimony. Even if the comments had the potential to bolster [the other person’s] credibility, they did not unfairly prejudice defendant or deny him the right to a fair trial. The jury knew the Arizona Supreme Court found [the other person] was bound by the original plea bargain and was not justified in his efforts to obtain a better deal, regardless of the prosecutor’s opinion. Also, as mentioned above, the trial court instructed the jury that the arguments were not evidence. The comments did not constitute fundamental error.”

Other sections cited in: Trial-Vouching (Section VIII.C.3).

- c. *State v. West*, 176 Ariz. 432, 446, 862 P.2d 192, 206 (1993).

Facts: “Here, defense counsel argued in closing that the jury could ‘acquit [defendant] of three charges, you can acquit him of two charges. But acquit him.’ In response, the prosecutor argued that ‘[i]f you convict [defendant] of one, he will be tickled pink, that is not holding him accountable for what he did. When you consider the evidence and testimony, return verdicts of guilty of all three counts.’” The defense did not object at trial, but argued that the statement was “an impermissible statement of the prosecutor’s personal opinion of defendant’s guilt.”

Holding: “In the context of this case, the prosecutor’s statement was within the latitude afforded attorneys in final argument.

Certainly, nothing approaching fundamental error occurred.”

Other sections cited in: Trial-Comments on Defendants’ Failures to Testify (Section VIII.D.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1), Trial-Closing Argument in General (Section VIII.G.4).

#### **D. Comments on Defendants’ Failures to Testify**

##### **1. Prosecutors cannot comments on defendants’ failures to testify**

“The prosecutor who comments on defendant’s failure to testify violates both constitutional and statutory law.” *State v. Hughes*, 193 Ariz. 72, 86, ¶ 63, 969 P.2d 1184, 1198 (1998) (citations omitted). “To be improper, ‘the prosecutor’s comments must be calculated to direct the jurors’ attention to the defendant’s exercise of his fifth amendment privilege.’ ‘[T]he statements must be examined in context to determine whether the jury would naturally and necessarily perceive them to be a comment on the failure of the defendant to testify.’” *Id.* at 87, ¶ 64, 969 P.2d at 1199 (citations omitted).

##### **2. Cases on comments on failure to testify**

- a. *State v. Ramos*, 235 Ariz. 230, 234–37, ¶¶ 9–21, 330 P.3d 987, 991–94 (App. 2014)

Facts: During rebuttal closing argument, the prosecutor argued that the State had proven the elements of the crimes. The prosecutor then stated: “The defendants are never gonna get on the stand and say ‘I did it. You got me.’ So they’re going to try to poke holes in whatever evidence the State has.” He later made similar statements.

Holding: “While the prosecutor in this case may have intended to aim his statements at rebutting defense counsel’s argument about lack of direct proof, the statements directly pointed to [the defendant’s] failure to take the stand, which ‘support[ed] an unfavorable inference’ that [the defendant] chose not to testify because he could not do so without incriminating himself.”

The error was fundamental because the defendant “was deprived of a right essential to his defense.” The defendant argued that such an error automatically requires reversal, but the court disagreed: “Subsequent development of the law, however, persuades us that a prosecutor’s comment on a defendant’s failure to testify does not

necessarily require reversal of the defendant's conviction."

The court did not find that the defendant was prejudiced because of the overwhelming evidence of his guilt.

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.A.2), Trial-Vouching (Section VIII.C.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

- b. *State v. Sarullo*, 219 Ariz. 431, 437–38, ¶¶ 22–24, 199 P.3d 686, 692–93 (App. 2008).

Facts: One of the key witnesses was the defendant's girlfriend. The defendant sought her medical and psychological counseling records. The defendant's theory was that the girlfriend knew the incident at issue was really a suicide attempt by the defendant, but the girlfriend had a psychological need to portray it as an assault.

During the defendant's closing argument, the defense argued "that, 'on some sort of psychological level,' [the girlfriend] needed to see [the defendant's] suicide attempt as an assault." "In rebuttal, the prosecution noted that, while the burden of proof is on the prosecution, [the defendant] failed to call any witnesses to support his theory. [The defendant] objected and the trial court struck the statement. The court denied his subsequent motion for a mistrial, finding that the prosecutor's comment was not improper and, in retrospect, should not have been struck."

Holding: "When a prosecutor comments on a defendant's failure to present evidence to support his or her theory of the case, it is neither improper nor shifts the burden of proof to the defendant so long as such comments are not intended to direct the jury's attention to the defendant's failure to testify. Here, the prosecutor's comments did not refer to [the defendant] at all, but rather to his failure to call expert witnesses to support his theory regarding the victim's psychological status. Contrary to [the defendant's] assertions, the prosecutor's comment did not unfairly take advantage of the court's denial of his attempts to conduct 'psychological discovery.' As the state argued before the trial court, even though [the defendant] could not have introduced this particular evidence, he remained free to present an expert to testify generally about a witness's psychological need to re-interpret events. Accordingly, because we agree there was no prosecutorial

misconduct, the trial court did not err in denying [the defendant's] motion for a mistrial and no curative instruction was required.”

Other sections cited in: Trial-Closing Argument in General (Section VIII.G.4).

- c. *State v. Rutledge*, 205 Ariz. 7, 12–14, ¶¶ 26–38, 66 P.3d 50, 55–57 (2003).

Facts: During closing argument, the prosecutor commented on a taped interview: “[The defendant] admits to having been picked up in Mesa. He has been visiting some girls, didn’t want to give them names. Now, if he had been visiting some women during this time period that could provide an alibi for him, *why wouldn’t he want to give those names to this detective?*” The defense objected that the comment amounted to “shifting the burden.”

Holding: The court first held that the “shifting the burden” did not adequately raise a claim of misconduct based on a comment on the failure to testify, so the court reviewed for fundamental error. The Court compared the situation to *Shrock*, and found no fundamental error. “Here, the prosecutor said the following: ‘Now keep in mind, folks, that this defendant in this interview with Detective Lewis ... there are some very important things that he says in this interview and that he doesn’t say.’ According to the State, the prosecutor’s remarks did not direct the jury’s attention to something they were not supposed to consider. We agree that based on the context of the statement, there was no fundamental error.”

“The prosecutor clearly referred to [the defendant’s] failure in the videotaped interview to name the alibi witnesses for Detective Lewis. The prosecutor specifically referred to the videotaped interview and did not refer to [the defendant’s] decision to not testify. Thus, taken in context, the jury would not naturally and necessarily perceive the prosecutor’s remark as a comment on [the defendant’s] failure to testify. There was no fundamental error.”

- d. *State v. Blackman*, 201 Ariz. 527, 544–545, ¶¶ 72–76, 38 P.3d 1192, 1209–10 (App. 2002).

Facts: In closing argument, the prosecutor discussed the evidence that the victims said they did not want to have sex with the defendant. The prosecutor stated: “There is no evidence in this record, no evidence from anyone who was there on the 15th and

16th that she said otherwise. No one.” The prosecutor also called a witness’s testimony about a sexual encounter “uncontradicted.” The defense objected.

**Holding:** “We do not believe that the prosecutor’s remarks in this case constituted an impermissible comment on Defendant’s failure to testify. The prosecutor did not refer directly to any defendant’s failure to testify.” Instead the comments related to the lack of contradiction by anyone, not just defendants: “Given that individuals other than the defendants were shown to be present at the scene, the defendants did not appear to be the only persons who could have explained or contradicted the evidence.” Accordingly, the court found no error.

**Other sections cited in:** Trial-Vouching (Section VIII.C.2), Trial-Appeal to Emotion (Section VIII.E.3), Trial-Closing Argument in General (Section VIII.G.3).

- e. *State v. Hughes*, 193 Ariz. 72, 84–87 ¶¶ 54–55, 62–66, 969 P.2d 1184, 1196–1199 (1998).

**Facts:** The prosecutor’s rebuttal closing was “a masterpiece of misconduct.” Among other improprieties, it stated that “you prove your case with witnesses who can be cross-examined, but all the jury had heard from Defendant was ‘what he’s told everybody else.’” The prosecutor argued that the psychologist was a “mouthpiece” for the defendant, and that the jury knows that the defendant “lies.”

**Holding:** The court found that the “he lies” argument was an improper comment because of the context: “Just before the ‘he lies’ argument, the prosecutor argued that you prove your case with witnesses who can be cross-examined, but all the jury had heard from Defendant was ‘what he’s told everybody else’ . . . .”

The court also found that the prosecutor’s “mouthpiece” argument was an improper comment on the defendant’s failure to testify.

The court did not find that the error was harmless: “In the present case, the evidence of Defendant’s guilt was overwhelming, but the evidence of his sanity was not. Here, the evidence of Defendant’s mental illness was overwhelming, the evidence of his insanity was substantial, and the State called no experts. The State did overwhelm the insanity defense in this case, true, but it did not do

so with evidence; it did so with prosecutorial misconduct.”

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.6), Trial-Cross Examination and of Defense Experts and Commentary on Psychological Theories (Section VIII.B.2), Trial-Appeal to Emotion (Section VIII.E.3), Trial-Closing Argument in General (Section VIII.G.3).

- f. *State v. Dumaine*, 162 Ariz. 392, 402, 783 P.2d 1184, 1194 (1989), *disapproved on other grounds by State v. King*, 225 Ariz. 87, 235 P.3d 240 (2010).

Facts: During closing argument, the prosecutor stated: “Now, there are some things that I cannot tell you about this case. I want to talk to you about those. I cannot tell you precisely what happened between the OK Corral and the gravesite where [the victim’s] body was found. There are only two or possibly more people who could have told you that. One is the assailant, and he is sitting at the defense table right now.”

“Defendant contends the prosecutor’s statements referred to evidence not in the record, thus implying that more evidence existed.”

Holding: “The prosecutor’s comment that ‘there are some things that I cannot tell you’ was not a comment on extraneous matters not admitted in evidence. He merely illustrated the logical inference that at the scene of the crime there were only two persons who could give the complete story: the victim and the defendant. The prosecutor did not bring in new evidence nor did he refer to any inadmissible evidence for the jury to consider. Neither do we find the remarks by the prosecutor a comment on the defendant’s failure to testify since the defendant did in fact take the stand and testify in his own behalf. Under the facts of this case, we hold that the prosecutor did not refer to matters not admitted into evidence.”

Other sections cited in: Prosecutorial Conduct in General (section II.4), Trial-Vouching (Sections VIII.C.1 and VIII.C.4), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1), Trial-Closing Argument in General (Section VIII.G.3).

- g. *State ex rel. McDougal v. Corcoran*, 153 Ariz. 157, 160–61, 735 P.2d 767, 770–71 (1987).

Facts: Following his arrest for DUI, the defendant requested that

sample of his breath be preserved, and it was. The defendant never presented any evidence at his trial based on that sample.

During closing argument, the prosecutor stated: “We don’t know in this case what happened with the second sample. You can wonder to yourself what did happen, if it was to his benefit, a reasonable inference would be that he would have brought that evidence forward to you, but he didn’t in this case.” After similar comments in rebuttal closing argument, the defense moved for a mistrial. The trial court denied the motion and instructed the jury that the State had the burden of proof.

Holding: The court noted the rules about comments on a defendant’s failure to testify. The court then held: “Even where the defendant does not take the stand, the prosecutor may properly comment on the defendant’s failure to present exculpatory evidence which would substantiate defendant’s story, as long as it does not constitute a comment on defendant’s silence. Such comment is permitted by the well recognized principle that the nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it. We believe that the prosecution’s questions on cross-examination and its remarks in closing arguments were simply comments designed to draw reasonable inferences based on [the defendant’s] failure to present evidence relating to the breath sample. Although we do not have a complete trial transcript, it is apparent from defense counsel’s closing statement that [the defendant] had challenged the validity of the State’s blood alcohol test results. It strikes us as elemental fairness to allow the State to comment upon the defense’s failure to adduce potentially exculpatory evidence to which defendant had access when defendant is attacking the accuracy of the State’s evidence.”

“[The defendant] argues that allowing the prosecutor to comment on a defendant’s failure to present evidence based on the breath sample is tantamount to requiring the defendant to prove the case against him. We cannot agree. The inference that may be drawn from [the defendant’s] failure to produce evidence—that the facts were unfavorable to him—is not unreasonable. To the extent that the prosecutor’s statement in rebuttal closing argument may have implied that defendant had the burden of proof, however, the trial court’s cautionary instruction to the jury was sufficient to cure any

harm.”

The court also held that “the purpose of that evidence was limited to raising the inference that the nonproduction of any test results of the sample would be adverse to the defendant” and rejected its use to show consciousness of guilt. Finally, the court rejected the argument that the evidence was protected by the attorney-client privilege.

- h. *State v. Schrock*, 149 Ariz. 433, 438–39, 719 P.2d 1049, 1054–55 (1986).

Facts: The defendant made a taped statement to police. The defense attorney told the jury that they would have to pick out the truth from the recording. During closing argument, the prosecutor argued: “And this up here shows he lied on another occasion. *If the State—the people of the State of Arizona brought in a witness, put him in this chair, he made a statement like this and the defense attorney proved he lied to you on significant details, you wouldn't listen to him.*”

During rebuttal closing argument, the prosecutor further stated: “The time of death. *The Defendant has no alibi for the time of death. 2:00 to 4:00 in the morning the bars have closed. If he came home, went back to the bar, so [a witness] missed him doesn't make sense. The bars have closed. He's got no alibi for the time of death.*”

Holding: “As to the prosecutor’s first statement, the trial court found that it was simply a comment highlighting that defendant’s prior statement was not believable. We agree. The defense was the first to discuss the defendant’s statement and urge its veracity. The prosecutor was seeking to attack the believability of defendant’s statement, not to highlight his failure to testify. We feel this comment by the prosecutor was both a proper attack on defendant’s statement and an invited reply to the opening statement of defense counsel.”

“The second comment by the prosecutor is more bothersome. Although the defense had initially noticed alibi as a possible defense, no alibi evidence was presented at trial. The prosecutor’s emphasis on defendant’s lack of an alibi for the time of death could indicate that the defendant failed to take the stand and tell the jury where he was during this time period. The state, however,

maintains that this comment was aimed at rebutting the cross-examination of [a witness]. The defense had elicited from [thee witness] that it was possible defendant had arrived home before she woke up and saw him at 4:00 a.m. The defendant did not cover this during his earlier taped statement. Admittedly the prosecutor's comment called to the jury's attention the fact that the defendant had not put forth an alibi for the time of the murder. Nonetheless, the defendant had indicated an alibi defense and we believe the comment of the prosecutor, though questionable, was a valid comment on evidence that defendant could have but did not present through the testimony of others."

"We do not believe that the prosecutor's comment impermissibly created the inference that defendant did not take the stand and testify as to what he was doing during the time of the murder. The comment related only to the fact that the defendant in his statements to the officers did not support the alibi defense defendant had pled."

- i. *State v. West*, 176 Ariz. 432, 445–46, 862 P.2d 192, 205–06 (1993).

Facts: "Defendant claims that the state impermissibly commented on his failure to call a witness, 'Shorty.' Defense counsel, in the presence of the jury, promised to call Shorty if the state did not. However, Shorty was not called."

Holding: "All the state did was remind the jury, in argument, that defense counsel had not done what she had promised to do. In the context of this case, the state's comment was not improper."

Other sections cited in: Trial-Vouching (Section VIII.C.4), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1), Trial-Closing Argument in General (Section VIII.G.4).

### 3. Pre-arrest silence

- a. *State v. Lopez*, 230 Ariz. 15, 18–20, ¶¶ 10–17, 279 P.3d 640, 643–45 (App. 2012).

Facts: The defendant argued that he had acted in self-defense. "During direct examination, the prosecutor asked a police officer whether [the defendant], in the approximately three-week period between the crimes and his arrest, had 'ever turn[ed] himself in to cooperate with the police and give his side of the story for the events.' The officer responded, 'No, he did not.' [The defendant]