

**IN THE SUPREME COURT  
FOR THE STATE OF ARIZONA**

R.S. and S.E.,

Petitioners,

v.

Hon. PETER THOMPSON, Judge of  
the Superior Court of Arizona in and for  
Maricopa County,

Respondent Judge,

and

TEDDY CARL VANDERS,

Real Party in Interest.

Arizona Supreme Court  
No. CR-19-0395-PR

Arizona Court of Appeals, Division 1  
No. 1 CA-SA 19-0080

Maricopa County Superior Court  
No. CR 2017-132367-001

**SUPPLEMENTAL BRIEF OF AMICUS CURIAE  
ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE  
IN SUPPORT OF REAL PARTY IN INTEREST**

**ARIZONA ATTORNEYS FOR  
CRIMINAL JUSTICE**

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## INTRODUCTION

This case boils down to whether this Court trust trial courts to appropriately balance the interests of defendants and victims. The Court below did not. This Court should. A long line of decisions supports upholding *State ex rel. Romley v. Superior Court (Roper)*, 172 Ariz. 232 (App. 1992). And a Division 2 case, decided after the decision below, supports upholding *Roper*. See *Fox-Embrey v. Neal*, 249 Ariz. 162 (App. 2020). The decision below, therefore, is an anomaly. The overwhelming balance of authorities tends in favor of using *Roper*'s previously bedrock reasonable possibility standard.

The decision below overturned long-standing precedent without sufficient reason. *Roper*'s standard worked. It adequately protected the rights of victims. No new authority suggested it had grown antiquated. Nothing indicated it was unworkable or unfollowable. On the contrary, authorities in and out of state indicated that the standard was appropriate. The decision below failed to recognize the trial court's unique position. Trial courts have demonstrated an ability to handle difficult fact-intensive inquiries over a broad range of time and over a broad range of topics. For all these reasons, this Court should vacate the decision below and re-affirm the *Roper* standard.

**I. The Decision below Overturned *Roper*—a Long-Standing Precedent—Without a Compelling Reason. Division 2 Didn’t Follow the Decision Below. This Court Shouldn’t Either.**

Because prior decisions are entitled to “great weight,” *White v. Bateman*, 89 Ariz. 110, 113 (1961), Arizona appellate courts overturn “long-standing precedent only for a compelling reason,” *State v. McGill*, 213 Ariz. 147, ¶ 52 (2006); *see also State v. Salazar*, 173 Ariz. 399, 416 (1992) (citation omitted) (precedents should not lightly be overruled). This Court has previously considered whether a “long line of decisions” exists in support of the original standard. *McGill*, 213 Ariz. at 159, ¶ 52<sup>1</sup>. This Court has also indicated that it is open to receiving new authority on a particular issue from the party challenging the existing standard. *State v. Guarino*, 238 Ariz. 437, ¶ 28 (2015). The Court has also considered whether the original standard is consistent with other state courts that have considered the issue. *Id.*

*Roper* and its progeny<sup>2</sup> are, by any definition, long-standing authority. The *Roper* standard was applied by Arizona appellate courts for nearly 30 years. As noted by Real Party in Interest, this Court specifically “has affirmatively cited to and relied on *Roper* numerous times, never questioning its authority.” Supplemental Brief of Real Party in Interest Teddy Carl Vanders [Vanders Brief] at 8, n. 34 (collecting 7

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<sup>1</sup> The “long line of decisions” needn’t be long. The line referenced in *McGill* consisted of 3 cases. 213 Ariz. at 158-59, ¶¶ 47-52 (*Williams v. New York*, 337 U.S. 241 (1949); *State v. Ortiz*, 131 Ariz. 195 (1981); *State v. Greenway*, 170 Ariz. 155 (1991)).

<sup>2</sup> *Roper*’s progeny includes *State v. Connor*, 215 Ariz. 553 (App. 2007); *State v. Sarullo*, 219 Ariz. 431 (App. 2008); *State v. Kellywood*, 246 Ariz. 45 (App. 2018); and *Fox-Embrey v. Neal*, 249 Ariz. 162 (App. 2020).

cases for the proposition). As such, *Thompson's* qualms with *Roper's* reasoning are beside the point. Qualms aren't sufficient grounds to overturn authority. Clear error or manifest incorrectness are the appropriate standards.

*Roper* was neither clearly erroneous nor manifestly incorrect. If trial courts were routinely trampling victim's rights, there would be a compelling reason to overturn precedent. But all indications suggest they weren't. Two Division 2 opinions chose not to follow *Thompson's* elevated disclosure standard<sup>3</sup>. *Fox-Embrey*, specifically, took issue with *Thompson's* characterization of *Roper*. *Thompson* indicated it was departing from *Roper* to the extent it implied a defendant had a general constitutional right to privacy. 247 Ariz. 575, ¶ 22 (App. 2019). As argued by Amicus previously, “[n]either *Roper* nor its progeny suggest this.” *Fox-Embrey*, 249 Ariz. 162, ¶ 27, n. 4; AACJ Brief at 4-5. *Fox-Embrey*, accordingly, declined an explicit invitation from the Victim-Guardian to follow *Thompson*. *Id.* *Fox-Embrey* “instead confirm[ed] the continued propriety and vitality of the *Roper* test as applied by this Court in *Connor*, *Sarullo*, and *Kellywood*.” *Id.* *Thompson's* analysis, as demonstrated in *Fox-Embrey*, is questionable at best and certainly does not demonstrate that *Roper* was clearly erroneously or manifestly incorrect.

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<sup>3</sup> *Fox-Embrey*, 249 Ariz. 162 (App. 2020) and *State v. Dunbar*, 249 Ariz. 37 (App. 2020). *Dunbar* notes the “higher burden” burden employed by *Thompson* but ultimately performs a *Roper*, *Kellywood*, *Connor* analysis. 249 Ariz. 37, ¶¶ 26-27, n. 5. In a concurring opinion, Judge Eckerstrom similarly performs a *Roper/Connor/Kellywood* “reasonable possibility” analysis. *Id.* at ¶ 59, n. 13. Judge Eckerstrom also indicates that even that standard has been applied too stringently against defendants—“the ‘reasonable possibility’ standard does not semantically suggest we have erected a difficult barrier . . .” *Id.*

Additionally, Petitioner provided the court below with nothing new. There’s no sea-change in other states or the federal courts to suggest *Roper* had become obsolete. If such a change existed, Petitioner would have cited it. In fact, the opposite is true. A substantial number of other jurisdictions employ something that closely resembles *Roper’s* reasonable possibility standard. *See AACJ Brief at 2, n. 1* (collecting cases). In sum, there was no reason for the decision below to upend *Roper* or its progeny.

Trial courts routinely engage in in camera review. The procedure is recognized as an inherent power of the trial court. *Phx. Newspapers, Inc. v. Superior Court*, 140 Ariz. 30, 33 (App. 1983). In camera review is roundly noted as an approved judicial method of balancing “the competing interests of privacy and access” of competing parties. *See, e.g., In re Esther Caplan Trust*, 228 Ariz. 182, 187, ¶ 22 (App. 2011); *Mitchell v. Superior Court*, 142 Ariz. 332, 334 (1984) (collecting cases for the proposition that in camera inspection “balance[s] the rights of the parties”) (citations omitted).

The trial court’s ability to conduct an in camera review, while simultaneously effectuating its underlying purposes, is well-recognized in a variety of fora:

Attorney Work Product	<i>Brown v. Superior Court</i> , 137 Ariz. 327, 332 (1983).
Attorney Client Privilege	<i>Mendoza v. McDonald's Corp.</i> , 222 Ariz. 139, 151, ¶ 35 (App. 2009).
Confidential Informants	<i>State v. Lukezic</i> , 143 Ariz. 60, 66 (1984).

Trust Oversight	<i>In re Esther Caplan Tr.</i> , 228 Ariz. 182, 187, ¶¶ 22-23 (App. 2011).
Public Records	<i>Griffis v. Pinal County</i> , 215 Ariz. 1, 6, ¶ 15 (2007).
Special Education Records	<i>Catrone v. Miles</i> , 215 Ariz. 446, 457-58, ¶¶ 35-36, (App. 2007).
News Sources	<i>Flores v. Cooper Tire &amp; Rubber Co.</i> , 218 Ariz. 52, 60 ¶¶ 40-44 (App. 2008).

Real Party in Interest, similarly, collects a variety of cases in which the United States Supreme Court has approved of in camera review of “confidential and sensitive information.” *See* Vanders Brief at 6, n. 27.

It is well-recognized, perhaps even axiomatic, that trial courts can perform *Roper’s* required balancing. Absent some indication that trial courts are incapable of performing this balancing, deviation from *Roper* was inappropriate. This Court should do what *Fox-Embrey* did—decline to follow *Thompson*. There was no need to erect such an elevated standard when there was no indication under the previous standard that violations were occurring on a regular basis. This Court should trust trial courts to do their jobs. They are uniquely qualified and situated to balance the interests of competing parties. Arizona trial courts were empowered for nearly 30 years to conduct this analysis. *Thompson* was free to disagree with *Roper* but not to overturn it. More was required before that could occur. *Thompson* improperly discounted the weight of long-standing precedent. *Fox-Embrey* and *Dunbar* relied on *Roper’s* clear, workable standard. This Court should do the same. It should reverse and reinstate *Roper* and its progeny’s reasonable possibility standard.

**II. Trial Courts Are the Proper Forum to Balance the Interests of the Parties Under the *Roper* Standard. Trial Courts Routinely Make Similar Assessments Because They Are Uniquely Situated and Qualified to Perform Balancing Analyses.**

As a general principle, Arizona appellate courts trust trial courts with an enormous amount of discretion to perform fact-specific inquiries. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4 (App. 2002) (the trial court is best situated to “observe the parties, judge the credibility of witnesses, and make appropriate findings”). This is true across a wide body of issues and caselaw. Arizona appellate courts substantially defer to trial courts in all of the following areas:

Balancing Under Ariz. R. Evid. 403	The trial court is best situated to conduct the Rule 403 balance. <i>State v. Foshay</i> , 239 Ariz. 271, 279, ¶ 35 (App. 2016) (citation omitted).
Ineffective Assistance of Counsel Claims	Trial courts are far better-situated to address ineffective assistance of counsel claims because they are fact-intensive and often involve matters of trial tactics and strategy. <i>State v. Wood</i> , 180 Ariz. 53, 61 (1994) (citation omitted).
Sanctions Under Ariz. R. Civ. P. 11	Trial courts are “better situated than the court of appeals to marshal the pertinent facts and apply [Rule 11’s] fact-dependant (sic) legal standard . . . .” <i>James, Cooke &amp; Hobson, Inc. v. Lake Havasu Plumbing &amp; Fire Prot.</i> , 177 Ariz. 316, 319 (App. 1993) (citation omitted).
Witness Credibility in Non-Jury Settings	The trial court is best situated to assess the credibility of the witnesses before it. <i>State v. Lucas</i> , 146 Ariz. 597, 607 (1985).
Termination of Parental Rights	Juvenile court is best positioned to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings. <i>Jesus M. v. Arizona Dept. of Econ. Sec.</i> , 203 Ariz. 278, 280, ¶ 4 (App. 2002) (citation omitted).

Requests for Relief from Final Judgment Under Ariz. R. Civ P. 60	Trial court is better situated to evaluate claims of mistake, inadvertence, surprise, or excusable neglect under Rule 60. <i>Daou v. Harris</i> , 139 Ariz. 353, 359 (1984).
Prosecutorial Vouching's Effect on a Jury	The "trial court is in the best position to determine the effect of a prosecutor's comments on a jury . . . ." <i>State v. Newell</i> , 212 Ariz. 389, 402, ¶ 61 (2006) (citations omitted).
Prosecutorial Vindictiveness	Trial court is best situated to make factual determination concerning "prosecutor's credibility regarding his motivation[s]." <i>State v. Dansdill</i> , 246 Ariz. 593, 598, ¶ 11 (App. 2019) (citation omitted).
Compelled Disclosure of Victim Medical Records in Aggravating Factors Context	Recognizing that the "trial court is best situated to balance the interests at stake" because the appellate court is in an inferior position concerning familiarity with the record, the case, and the parties. <i>P.M. v. Gould</i> , 212 Ariz. 541, 549, ¶ 33 (App. 2006).

What's the common thread? When an issue involves fact-specific inquiry, the trial court is best-situated to perform the analysis. Why? The trial court:

1. is familiar with facts of the case;
2. is familiar with the strategies of the parties;
3. is familiar with the need for the requested disclosure given the posture of the case;
4. can best strike the appropriate 403 balance;
5. can best assess the credibility of a party making or opposing the request;
6. can assess the credibility of contested privilege claims; and
7. knows best how to avoid unforeseen pitfalls.

Trial courts are invested with substantial discretion in performing balancing analyses in fact-specific inquiries because they are much more familiar with the case, the issues, and the parties. And Arizona appellate opinions have long-recognized the substantial discretion afforded courts in this and similar circumstances. The decision

below removes this historically recognized discretion almost entirely. The decision’s significantly elevated disclosure standard effectively leaves victims as “sole judge and jury” as to whether the records are appropriately kept from defense. *See Cox Arizona Publications, Inc. v. Collins*, 175 Ariz. 11, 15 (1993) (failure to “produce the records for an *in camera* (sic) review . . . sets [the individual asserting the protection] up as sole judge and jury” on the issue).

The *Roper* standard worked. It adequately shielded privileged information because trial courts, in practice, applied an elevated reasonable possibility standard. *Dunbar*, 249 Ariz. 37, ¶ 59 (Eckstrom, J., concurring) (courts have historically applied a “more stringent standard) (citation omitted). As a result, “[D]efendants have not been successful in challenging the privilege.” *Thompson*, 247 Ariz. at 581, ¶ 23. Stated differently, victims have been successful in asserting the privilege<sup>4</sup>.

In non-death cases, “defendants [still] have not been successful” in challenging the privilege. In camera review, from a privacy protection perspective, worked. *See Dunbar*, 249 Ariz. 37, ¶ 59 (Eckstrom, J., concurring) (“a victim’s privacy interests—in all but those portions of their records that are truly

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<sup>4</sup> *Fox-Embrey* is the only authority in which a defendant successfully made the appropriate showing under the *Roper* standard. *Fox-Embrey* was published shortly after the parties in this case provided Petition-level briefing—June 4, 2020. So, from 1992, when the standard was established, until a few months ago, “defendants ha[d] not been successful”. There is, however, reason to question whether *Fox-Embrey* even counts under this analysis. As pointed out by Petitioner, the “success” of the defendant in *Fox-Embrey* may have limited application here because that decision applied a death-modified *Roper* analysis. *See* Petitioner’s Supplemental Brief at 8-9; *Fox-Embrey*, 249 Ariz. 162, ¶ 63 (defendant satisfied *Roper/Kellywood* test in light of the fact that State is seeking a death sentence).

exculpatory—are fully protected by the requirement of in camera review”). The greater prophylaxis established below was a departure without a valid reason. *Roper* didn’t need fixing. The Court of Appeals should have affirmed it. This Court should affirm it now.

Trial courts routinely decide difficult issues. They do so with a great deal of discretion. Nothing outlined above is particularly easier than the task outlined in *Roper* or its progeny. Balancing is as difficult in a parental right termination case as it is in a compelled disclosure case. The trial courts are ideally suited to perform both and perform them well. There’s no reason trial courts can’t adequately do it in this context. There was, in sum, no indication that trial courts were deficient in this area. Without some indication that they were, or that there was some other reason to upend long-standing precedent, there was no reason to rob the trial courts of their long-recognized discretion in this area. Reversal is appropriate.

### **CONCLUSION**

This Court can trust trial courts to appropriately balance the interests of defendants and victims. That basic proposition is supported by nearly three-decades of caselaw. There was no reason for the decision below to divest trial courts throughout the State of their long-recognized discretion in this and analogous areas. Trial courts have demonstrated that they are up to the task. This Court, accordingly, should vacate the decision below and re-affirm *Roper* and its progeny.

RESPECTFULLY SUBMITTED this 15th day of  
October 2020.

By: /s/ Brian Thredgold  
Brian Thredgold  
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