IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. PRINCESS MARGO GILMORE, Appellant.	))))))))))	No. CR-21-0297-PR Court of Appeals No. 1 CA-CR 20-0491 Maricopa County Superior Court No. CR-2017-001211-001

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF APPELLANT

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INTERESTS OF *AMICUS CURIAE*

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief because the issues presented concern the due process right of criminal defendants to be convicted only of the crimes they commit—no more, no less. This Court recognized in *State v. Lua*, 237 Ariz. 301 (2015), that trial courts should instruct on lesser offenses when requested in order to prevent wrongful convictions and wrongful acquittals, even when those lesser offenses are not "included" within the meaning of Ariz. R. Crim. P. 21.4.[1] Many other cases of this Court and the court of appeals, however, reach a contrary result even when the State's evidence inexorably points to a theory of culpability for which the lesser

[1] As part of the restyling of the Arizona Rules of Criminal Procedure effective January 1, 2018, former Rule 23.3 was renumbered as Rule 21.4.

offense is the proper charge. The fundamental cause of the inconsistency is the Court's continued recognition of two tests for lesser offenses—the "elements test" and the "charging document test"—but then merging the two tests into one. A proper construction of the charging documents test would require lesser-offense instructions in more circumstances.

There are several inconsistencies in this Court's jurisprudence on lesser-included offenses. "In such situations, our fidelity should be to the Constitution rather than to the disarray." *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 605 ¶ 67 (2018) (Bolick, J., concurring in part and concurring in the result). AACJ asks this Court to grant review of Gilmore's petition to bring consistency to Arizona law and breathe life into the charging documents test.

ARGUMENTS

I. The state of law related to the charging document test is in disarray.

"To determine whether an offense is a lesser-included offense, a court may consider two bases: '(1) the included offense is by its very nature always a constituent part of the major offense charged; or (2) the terms of the charging document describe the lesser offense even though the lesser offense would not always form a constituent part of the major offense charged.'" *State v. Gooch*, 139 Ariz. 365, 366 (1984) (quoting *In re Maricopa County Juvenile Action No. J–75755*, 111 Ariz. 103, 105 (1974)). Under the elements test, "[a] lesser-included offense is

one 'composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one.'" *Lua*, 237 Ariz. at 303 ¶ 7 (quoting *State v. Celaya*, 135 Ariz. 248, 251 (1983)). Under the charging document test, on the other hand, the court looks to "whether the terms of the charging document describe the lesser offense even though the lesser offense would not always form a constituent part of the major offense." *State v. Magana*, 178 Ariz. 416, 418 (App. 1994) (citing *Gooch*).

Due process protects the defendant's right to lesser offense instructions, because "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." *Beck v. Alabama*, 447 U.S. 625, 634 (1980); *see also* U.S. Const. amends. V, VI, XIV; Ariz. Const. art. 2, §§ 4, 24. Ariz. R. Crim. P. 21.4 entitles criminal defendants to forms of verdict and instructions to the jury on all necessarily included offenses. If the evidence presented is such "that a jury could reasonably find that only the elements of a lesser offense have been proved, the defendant is entitled to have the judge instruct the jury on the lesser included offense." *State v. Wall*, 212 Ariz. 1, 3 ¶ 14 (2006) (citing *State v. Dugan*, 125 Ariz. 194 (1980), and *Sansone v. United States*, 380 U.S. 343 (1965)). On request, the trial court must instruct the jury on every lesser-included offense to the charge, provided

that a jury rationally could fail to find the distinguishing element of the greater offense. *State v. Krone*, 182 Ariz. 319, 323 (1995).

The elements test is also used for determining whether multiple convictions have been entered for the same offense, which would separately constitute a double jeopardy violation. *State v. Carter*, 249 Ariz. 312, 315-16 ¶ 9 (2020) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *United States v. Dixon*, 509 U.S. 688, 709 (1993)). The charging document test is unrelated to double jeopardy; but it is crucial for determining whether the defendant has notice of lesser offenses and is entitled to an instruction on such lesser offenses.

In *Lua*, this Court was confronted with the question whether to affirm a trial court's instruction on heat-of-passion manslaughter in a prosecution for attempted second-degree murder. This Court recognized prior holdings that manslaughter is not necessarily a lesser-included offense of second-degree murder, because manslaughter is essentially the crime of second-degree murder plus the additional circumstance that the defendant acted upon a sudden quarrel in a heat of passion. *Id.* at 303 ¶ 7 (citing *Peak v. Acuña*, 203 Ariz. 83, 84-85 ¶ 6 (2002)). It recognized the public policy supporting the instruction of a lesser offense because it "affords [jurors] a less drastic alternative than the choice between convicting and acquitting on the second-degree murder charge, and ensures the defendant has the full benefit of the reasonable doubt standard." *Id.* at 305 ¶ 13 (citing *State v. Valenzuela*, 194

Ariz. 404, 407 ¶ 13 (1999)). Furthermore, this Court determined that a defendant may receive notice of the lesser (albeit not lesser-included) charge through "other sources," which would include pre-trial disclosure and trial evidence. *Id.* at 306 ¶ 17 (citing *State v. Freeney*, 223 Ariz. 110, 115 ¶ 30 (2009)).

Lua closed a major hole in this Court's jurisprudence on lesser offense instructions, but in so doing, it exposed other similar holes related to other offenses. For example, nearly forty years ago, this Court held in *State v. Malloy*, 131 Ariz. 125, 130-31 (1981), that criminal trespass is not a lesser-included offense of residential burglary, because trespass requires the defendant to "knowingly enter or remain unlawfully" while burglary requires the defendant to "enter or remain unlawfully" without any culpable mental state on that element. *See* A.R.S. §§ 13-1502-1508. *Malloy* has been affirmed by the court of appeals both in the distant and recent past. *State v. Kozan*, 146 Ariz. 427, 429 (App. 1985); *State v. Lewis*, 236 Ariz. 336, 346-47 ¶¶ 45-49 (App. 2014). These cases call for hypertechnical reading of statutes that yield absurd results. On the other hand, when presented with a similar question as to whether disorderly conduct by recklessly displaying a firearm is a lesser-included offense of aggravated assault with a deadly weapon, a majority of the court of appeals held that the greater offense does not include "intent to disturb the peace or quiet of a neighborhood, family, or person." *State v. Angle*, 149 Ariz. 499, 506 (App. 1985). Judge Kleinschmidt dissented because "as a matter of

common sense it is impossible to put a person in reasonable apprehension of imminent bodily injury without also disturbing that person's peace or quiet." *Id*. at 508 (Kleinschmidt, J., dissenting). This Court reversed, holding simply that it "adopt[s] the dissenting opinion of Judge Kleinschmidt and vacate the majority opinion as to this issue." *State v. Angle*, 149 Ariz. 478, 479 (1986).

That *Malloy* and *Angle* have stood side-by-side for over a generation shows the lack of consistency in this Court's jurisprudence on when lesser offense instructions should be given. Whereas the *Malloy* analysis essentially asks how many angels can dance on the head of a pin, *Angle* and *Lua* provide a common sense rule that trial judges can easily apply. Trial courts should look at the evidence that was presented at trial, hear the requests from the parties as to instructions on lesser offenses, and then determine whether the evidence reasonably supports that instruction. This common-sense practice would give effect to the charging document test.

II. The charging document test is an important procedural safeguard but Arizona courts have largely ignored it for decades.

Notice must be sufficiently specific that the defendant can prepare to mount a defense against the charge and to avoid the risk of exposing the defendant to double jeopardy. *State v. Schroeder*, 167 Ariz. 47, 51 (App. 1990). "Conviction upon a charge not made should be sheer denial of due process." *De Jonge v. Oregon*, 299

U.S. 353 (1937). The State is bound to adhere to the charge it presented to the grand jury or at the preliminary hearing. In *Stirone v. United States*, 361 U.S. 212, 215-16 (1960), the Supreme Court stated: "Ever since *Ex parte Bain*…was decided in 1887, it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Bain* held "that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney…" 121 U.S. 1, 13 (1887).

Prior to adoption of the modern criminal procedure rules, Arizona had codified the common law doctrine of allowing a defendant to demand a bill of particulars if requested in a timely manner and if necessary to defend the charge. *State v. Benham*, 58 Ariz. 129, 136-37 (1941), *overruled in part on other grounds by State v. Thomas*, 78 Ariz. 52 (1954) (interpreting Ariz. Code Ann. § 44-712 (1939)). *See also State v. Chee*, 74 Ariz. 402, 408-10 (1952) (outlining history of adoption of 1939 Code); *State v. Ford*, 108 Ariz. 404, 408 (1972) (recognizing power of trial court to order bill of particulars pursuant to Ariz. R. Crim. P. 116). "The bill of particulars has long been employed to inform a defendant of the facts of the charge more fully than the indictment or information. It is common-law pleading and most of the states of the union have recognized it as a useful aid in the trial of

those charged with crime." *Benham*, 58 Ariz. at 136-37. If a bill of particulars was ordered by the trial court and provided by the prosecution, "[t]he information and bill of particulars are to be read together as a single instrument constituting the accusation." *State v. Cutshaw*, 7 Ariz. App. 210 (1968), *abrogated in part by* Ariz. R. Crim. P. 15 (quoting *Norton v. Reese*, 417 P.2d 205, 207 (N.M. 1966)). While the State is required to give notice of what crime or crimes the defendant is alleged to have committed, it is not required to give notice of how it intends to prove its case. This means that the State is not required to charge conspiracy separately or to allege accomplice liability in the string cite of the charging document, and may choose not to do so while not violating the defendant's constitutional right to notice of the charges. *Hunter v. State*, 47 Ariz. 244 (1936); *Browning v. State*, 53 Ariz. 174, 178 (1939).

In 1973, when this Court abrogated the existing rules and adopted the new Arizona Rules of Criminal Procedure, it did not include that provision for a bill of particulars. Rule 13.1(d) instead requires that "[e]ach count of an indictment or information must state the official or customary citation of the statute, rule, regulation or other provision of law the defendant allegedly violated." The 1973 Rules also included enhanced pre-trial discovery procedures in Rule 15 "to enable an accused to advisedly prepare his defense." *State v. Fisher*, 141 Ariz. 227, 247 (1984). Rule 15 is "quite broad," and "the underlying purpose of the discovery

criminal rules … [is] to give full notification of each side's case-in-chief so as to avoid unnecessary delay and surprise at trial." *State v. Dodds*, 112 Ariz. 100, 102 (1975); *State v. Jones*, 110 Ariz. 546 (1974); *see also State v. Roque*, 213 Ariz. 193, 207 ¶ 32 (2006) (same).

The court of appeals explained the interrelation of these rules in post-1973 cases. First, in *State v. Hagen*, it affirmed denial of a request for bill of particulars on the ground that "[s]ince the fundamental purpose behind the 'bill' is to avoid surprise at the trial, it follows that a transcript of the preliminary hearing has often been found to have provided a defendant with the information necessary to adequately prepare a defense." 27 Ariz. App. 722, 725 (1976) (citing *United States v. Andrino*, 501 F.2d 1373, 1378 (9th Cir. 1974)). Then, in *State v. Bruni*, the court stated:

> Our current Rules of Criminal Procedure, 17 A.R.S., do not provide for a bill of particulars. Instead, a defendant is given a transcript of the grand jury proceedings and discovery material which disclose the particulars of each charge. See Rules 12.8 and 15, 17 A.R.S. Rules of Criminal Procedure. We have examined the transcript and find that the details of each crime charged are carefully delineated.

129 Ariz. 312, 318 (App. 1981). Thus, Rule 15 serves an important role in providing notice of the charges to the defendant.

The most notable example of such absurd results is denying a requested instruction on facilitation where the defendant is charged with a substantive offense. As stated in *Hunter* and *Browning*, the State is not required to include accomplice

liability in the string cite of a charge. Once the State invokes accomplice liability theory, however, it must prove additional elements beyond the substantive crime's statutory elements. The State must also prove that the defendant, "with the intent to promote or facilitate the commission of an offense: 1. Solicit[ed] … another person to commit the offense; or 2. Aid[ed] … or attempt[ed] to aid another person in planning or committing an offense; or 3. Provide[d] means or opportunity to another person to commit the offense." A.R.S. § 13-301. Therefore, inherent in any offense charged under accomplice liability theory are the lesser-included offenses of attempt, solicitation, and facilitation. A.R.S. §§ 13-1001, 13-1002 and 13-1004 (each of which are punishable by respective reductions of felony classification).

In spite of the clear language of the statutes, Arizona courts have repeatedly stated that facilitation of a substantive offense is not a lesser-included offense of the charged offense. In *State v. Politte*, 136 Ariz. 117, 121 (App. 1983), defendant Zucker requested a facilitation instruction for the charge of sale of narcotic drug, and Division Two of the court of appeals, without explanation, held that denial of that instruction was proper. In *Gooch*, this Court, relying on *Politte*, conducted an "elements test" and determined that facilitation included additional elements beyond those included in a charge of second-degree murder. 139 Ariz. at 367. *Gooch* acknowledged that the "charging document test" may support an instruction on a

lesser offense if the evidence supports it. *See also State v. Scott*, 177 Ariz. 131, 139-41 (1993) (same).

In *State v. Garcia*, 176 Ariz. 231, 233 (App. 1993), the court addressed this question and found that the only distinguishing element between accomplice liability and facilitation is that accomplice liability requires a mental state of "intentionally," while facilitation requires only "knowingly" (without explaining whether this distinction is meaningful in context). Even though the accomplice liability statute was cited in the information's string cite, Garcia was found not to be entitled to the facilitation instruction because "being an accomplice is not a separately chargeable offense; it is merely a theory that the state may utilize to establish the commission of a substantive offense." *Id*. at 234.

This "merely a theory" language from *Garcia* neglects the fact that the State's theory of prosecution is as much a determining factor of the elements of the offense as is the charged offense itself. As an illustration, first-degree murder is an offense and the State need not charge in the indictment what its theory will be. *State v. Encinas*, 132 Ariz. 493 (1982). However, the State's theory for prosecuting first-degree murder (and the evidence it presents) will determine what instructions will be given by the court on the elements of the offense. If the theory is premeditated murder, the court will give instructions on the lesser degrees of homicide, *see*

Valenzuela, 194 Ariz. at 405 ¶ 2.[2] Under a strict elements test, which is what *Garcia* seems to be applying, there would be no basis for instructing on lesser degrees of homicide, because it is possible to commit manslaughter or second-degree murder without committing the greater offense of first-degree murder when the theory is premeditation. *Garcia* ignores that the substantive offense gains additional elements when charged under an accomplice liability theory; the theory is precisely what determines the elements of the offense.

The inherent problem with the current judicial construction of the charging document test is that prosecutors are not required to include any facts in charging documents—and this test actually deters the State from doing so. *Gooch*, *Garcia*, and *Scott* fail to appreciate that the charging document test is meaningless if the prosecutor can avoid citing any facts supporting the indictment. The courts have neglected the fact that Rule 15 disclosure must be incorporated into the indictment for purposes of determining whether to give a lesser offense instruction.

Gilmore has pointed out a conflict of law on an issue closely related to her case—whether reckless driving is a lesser offense of second-degree murder. One

[2] Case law is not clear on whether a single murder, alleged as both intentional murder and felony murder, should be charged in one count or two. *Compare State v. Dansdill*, 246 Ariz. 593, 608-09 ¶¶ 63-65 (App. 2019) (erroneous to charge both first-degree felony murder and alternatively second-degree murder in a single count because it results in a duplicitous indictment), *with State v. Canion*, 199 Ariz. 227, 229 ¶ 13 (App. 2000) (erroneous to charge premeditated murder and felony murder in separate counts because it is multiplicitous).

panel of the court of appeals held it was a lesser offense in *Magana*, but another reached a contrary result in *State v. Robles*, 213 Ariz. 268 (App. 2006). *Robles* drew a distinction based on the fact that the charging document in *Magana* provided information that implied that an automobile was used, whereas there, "the indictment … made no reference, direct or implied,' to facts that necessarily imply Robles could not have committed the charged offense without also having committed the lesser offense." 213 Ariz. at 271 ¶ 8 (quoting *State v. Sucharew*, 205 Ariz. 16, 26 ¶ 35 (App. 2003)). This is an unsupportable position; it would allow prosecutors to control the determination of lesser offenses rather than the court.

This Court needs to go back to the roots of due process and notice requirements and recognize that the State's disclosure and its presentation to the grand jury (or to the magistrate in a preliminary hearing) are implicitly incorporated into the charging document. Otherwise, the charging document test is dead letter, and an important constitutional guarantee is lost.

CONCLUSION

This Court's jurisprudence on lesser-included offenses is in disarray. It has answered specific questions correctly, as in *Lua*, but it has not taken the opportunity to remediate the inconsistencies at a foundational level. AACJ asks this Court to grant review in this case, breathe life into the charging document test for lesser-

offense instructions, and restate foundational principles upon which all cases involving lesser offense instructions can rely.

RESPECTFULLY SUBMITTED this 3d day of November, 2021.

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