

**IN THE ARIZONA SUPREME COURT**

STATE OF ARIZONA, ) No. CR-19-0317-PR  
 )  
 Appellee, ) Court of Appeals No.  
 ) 2 CA-CR 2018-0239  
 v. )  
 ) Pima County Superior Court No.  
 GAYLAND JEROD BURCH, ) CR-20162938-004  
 )  
 Appellant. )  
 )  
 )

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**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 has recently 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.<sup>1</sup> Older cases of this Court and the court of appeals, however, hold that facilitation is not a lesser-included offense of the completed crime even when the State's evidence

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<sup>1</sup> 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.

shows the defendant is an accomplice. 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 Burch’s petition to bring consistency to Arizona law.

## ARGUMENTS

### **I. The only considerations for deciding whether a lesser offense instruction should be given are whether it is requested and whether it is supported by the evidence.**

Over the last twenty years, this Court has consistently held that a defendant is entitled to any instruction supporting a theory of the case that is supported by the trial evidence. *E.g.*, *State v. Rodriguez*, 192 Ariz. 58, 61 ¶ 16 (1998). 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).

In *Wall*, this Court resolved this general right to a lesser-included offense instruction with a competing line of cases that suggested that a defendant loses that entitlement when pursuing an “all-or-nothing” defense. This Court noted that “when a defendant asserts an all-or-nothing defense such as alibi or mistaken identity, there will usually [be] little evidence in the record to support an instruction on the lesser included offense.” 212 Ariz. at 6 ¶ 29 (internal quotation omitted, alteration in original). But assertion of the all-or-nothing defense itself does not strip the court of the ability to instruct the jury if the evidence supports conviction for a lesser offense. More recently, this Court held that a defendant who pursues inconsistent defenses of mistaken identity and self-defense is entitled to be instructed on both theories so long as a rational jury could agree with the defendant on either theory of the case. *State v. Carson*, 243 Ariz. 463, 466-67 ¶¶ 13-14 (2018).

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. 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 angles 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.

**II. This Court's cases on the propriety of facilitation in a case alleging accomplice liability are irreconcilable with the standard for providing lesser offense instructions when the evidence supports doing so.**

This Court has historically held that the State may charge the defendant as a principal of an offense and convict him based on accomplice or conspiracy theory, without including the accomplice or conspiracy statutes in the string cite, if the evidence reflects that the defendant acted with others. *Hunter v. State*, 47 Ariz. 244 (1936); *Browning v. State*, 53 Ariz. 174, 178 (1939); *State v. Tison*, 129 Ariz. 526, 538 (1981). 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 *State v. Gooch*, 139 Ariz. 365, 367 (1984), 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. *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.<sup>2</sup> 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.

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<sup>2</sup> 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. Canon*, 199 Ariz. 227, 229 ¶ 13 (App. 2000) (erroneous to charge premeditated murder and felony murder in separate counts because it is multiplicitous).

The inherent problem with 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 is not required to cite the accomplice liability statute in the string cite and the court may ignore it when they do.

The elements of facilitation are so identical to the completed offense’s elements under accomplice liability theory that allowing a conviction for the completed offense violates due process. This Court has recognized that “laws must provide explicit standards for those charged with enforcing them and may not ‘impermissibly delegate[ ] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis.’” *State v. Thompson*, 204 Ariz. 471, 475 ¶ 15 (2003) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)). Without meaningful statutory distinctions between accomplice liability for completed offenses and facilitation of those offenses, prosecutors’ subjective charging decisions are completely unfettered by objective criteria.

Burch correctly argued “that the existing law on the issue is ‘inherently contradictory’ and should change.” *State v. Burch*, 247 Ariz. 376, 378 ¶ 4 (App. 2019). The lower court was also correct to state that it was powerless to overrule this Court’s opinions in *Gooch* and *Scott*. *Id.* ¶ 5. This Court’s review is necessary to correct this clear error in the law.

### **III. Prosecutorial discretion may be wide, but it is not unlimited.**

This Court has held that “The elements of the crime prescribed in the statute determine whether a crime is a lesser included offense of a greater offense, not the facts of a given case.” *State v. Laffoon*, 125 Ariz. 484, 487 (1980) (citing *State v. Branch*, 108 Ariz. 351 (1972)); *see also State v. West*, 176 Ariz. 432, 443-44 (1993) (quoting *Laffoon*). The State asks this Court to rely on this old authority, *see* Response at 5, and look the other way when a defendant is overcharged by a zealous prosecutor and denied any judicial remedy. In recent years, the court of appeals has repeatedly affirmed convictions in cases that were overcharged. *E.g.*, *State v. Gill*, 235 Ariz. 418 (App. 2014) (entering someone else’s mailbox is burglary); *State v. Bon*, 236 Ariz. 249 (App. 2014) (reaching into open bed of pickup truck is burglary); *State v. Gagnon*, 236 Ariz. 334 (App. 2014) (pawning another’s property charged as trafficking in stolen property, even though his conduct was specifically governed by A.R.S. § 44-1630, a misdemeanor offense); *State v. Florez*, 241 Ariz. 121 (App. 2016) (“humping” conduct, which court had recently decided constituted the crime of molestation of a child, could be charged as sexual conduct with a minor or molestation, and such decision is within the prosecutor’s “wide discretion”).

Prosecutors may have wide discretion in deciding which charges to bring, but that should not serve as a limitation on the courts as to which legal instructions to give in order to guarantee a defendant’s due process rights under *Beck* and *Wall*.

This Court should follow the lead of the United States Supreme Court, which has recently decided a string of cases limiting statutes' scope where broad statutory language leaves too much room for overcharging and thus abuse of prosecutorial discretion.

In *Bond v. United States*, 572 U.S. 844, 865 (2014), a woman poured household chemicals on her husband's lover's car, causing skin irritation. Prosecutors charged Bond with violating the Chemical Weapons Convention Implementation Act. The Court unanimously reversed Bond's conviction because charging Bond in this manner amounted to abuse of prosecutorial discretion. The following year, in *Yates v. United States*, 135 S. Ct. 1074 (2015), the Court addressed another case of prosecutorial overreach where a commercial fisherman accused of catching and disposing of three undersized red grouper in the Gulf of Mexico was charged with violating the "anti-shredding provision" of the Sarbanes-Oxley Act. *Id.* at 1078, 1081. The Court determined that a fish is not a "tangible object" within the statutory meaning, largely based on concern that the broad language of criminal statutes leaves too much room for abuse of prosecutorial discretion. *Id.* at 1081, 1084 (rejecting the "Government's unrestrained reading" because "Congress' conception of § 1519's coverage was considerably more limited than the Government's.>").

In *Maslenjak v. United States*, 137 S. Ct. 1918 (2017), the Court again limited the reach of a criminal statute to protect against prosecutorial overcharging. In 1998,

Maslenjak, an ethnic Serb from Bosnia, was granted refugee status. Many years later, Maslenjak—now a citizen—was convicted of making false statements about her husband’s military service because the government successfully argued to the trial court that a person could be convicted even if the statements were immaterial to the immigration official’s decision. *Id.* at 1923-24. The Court strictly construed the statutory phrase “knowingly procure...contrary to law” to mean only misrepresentations material to the naturalization determination, in large part because of the Court’s concerns regarding prosecutorial overreach. *Id.* at 1924. Indeed, the Court explained that “by so wholly unmooring the revocation of citizenship from its award, the Government opens the door to a world of disquieting consequences—which...would give prosecutors nearly limitless leverage—and afford newly naturalized Americans precious little security.” *Id.* at 1927.

Justice Gorsuch has sharply criticized vague laws that “invite arbitrary power” by “unelected prosecutors and judges.” In *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Court struck down a residual provision of the Armed Career Criminal Act (ACCA) as unconstitutionally vague under the Fifth Amendment Due Process Clause. In the plurality opinion, the Court rejected the Government’s argument for relaxing the void-for-vagueness doctrine, holding that “the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.”

*Id.* at 1212-13. Justice Gorsuch concurred, explaining:

Vague laws invite arbitrary power. Before the Revolution, the crime of treason in English law was so capaciously construed that the mere expression of disfavored opinions could invite transportation or death. The founders cited the crown’s abuse of “pretended” crimes like this as one of their reasons for revolution. *See* Declaration of Independence ¶ 21. Today’s vague laws may not be as invidious, but they can invite the exercise of arbitrary power all the same—by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up.

*Id.* at 1223-24 (Gorsuch, J., concurring in part and concurring in the judgment). In *United States v. Davis*, 139 S. Ct. 2319 (2019), the Court once again struck down an AACA residual clause as void for vagueness. Delivering the majority opinion, Justice Gorsuch explained that the doctrine prohibiting enforcement of vague laws “rests on the twin constitutional pillars of due process and separation of powers”:

Vague laws contravene the “first essential of due process of law” that statutes must give people “of common intelligence” fair notice of what the law demands of them. Vague laws also undermine the Constitution’s separation of powers and the democratic self-governance it aims to protect. Only the people’s elected representatives in the legislature are authorized to “make an act a crime.” Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people’s ability to oversee the creation of the laws they are expected to abide.

*Id.* at 2325 (citations omitted).

This Court applies the same vagueness doctrine when the line between two offenses is unconstitutionally blurred. *Thompson*, 204 Ariz. at 475 ¶ 15 (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966)) (“a law fails to meet the

requirements of the Due Process Clause if it is so vague and standardless that it leaves...judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case”). Burch’s case presents precisely this problem: by virtue of the manner in which prosecutors charged him, he has been denied the opportunity for the jury to consider whether he deserves to be convicted for the completed offenses, or as a facilitator of those offenses. Due process requires defendants to be able to ask the jury to convict them of the crimes they committed—no more, no less.

### **CONCLUSION**

This Court’s jurisprudence on lesser-included offenses is in disarray. It has answered specific questions correctly, as in *Wall* and *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 and restate foundational principles upon which all cases involving lesser offense instructions can rely.

RESPECTFULLY SUBMITTED this 3d day of January, 2020.

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