

# ARIZONA SUPREME COURT

PHOENIX CITY PROSECUTOR,

Petitioner,

v.

THE HONORABLE LAURA  
LOWERY, Judge of the Phoenix  
Municipal Court,

Respondent Judge,

CLAUDETTE CRAIG,

Real Party in Interest.

No. CV-18-0101-PR

Court of Appeals  
No. 1 CA-CV 17-0168

Maricopa County Superior Court  
No. LC 2016-000472

Phoenix Municipal Court  
No. 100050574

## AMICUS BRIEF OF ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

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## **INTRODUCTION AND 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 in support of the real party in interest, Claudette Craig, because the issues touch the core of AACJ's mission. Whether and when spousal privilege can be overcome goes to the heart of a defendant's rights during trial and in the course of marriage. To empower the policy goal of protecting marriages, and to ensure one spouse does not have to become the government's tool to convict their significant other, this Court should affirm the decisions of the trial court, superior court, and appellate court.

## DISCUSSION

According to the prosecutor, Claudette Craig was drunk and backed her van, a community asset, into her husband's car, another community asset, while her husband watched. See *Phoenix City Prosecutor v. Lowery*, 244 Ariz. 308, ¶ 3 (App. 2018). The state charged her with DUI and criminal damage. *Id.* Before trial, Craig moved to sever the counts for trial and invoked spousal privilege on the DUI charge. *Id.* Over the state's opposition, the trial court granted both motions. *Id.* This decision was affirmed both on special action to the Maricopa County Superior Court, *id.* at ¶ 4, and appeal to the Court of Appeals, *id.* at ¶ 1. The state Petitioned for Review and this Court accepted review.

The decisions of each court below has been correct. Under the plain language of the spousal privilege statute as pertinent here, spousal privilege applies unless the defendant-spouse has committed an offense "against" the witness-spouse. That term requires that the offense be both oppositional and directed toward the witness-spouse. Because DUI is neither oppositional nor directed toward the witness-spouse, the exception does not apply. Principles of construction and the purpose of the privilege confirm this interpretation. Thus, the lower courts all correctly concluded severance was proper and the privilege applied to the DUI.

**1. Under its plain language, the marital privilege applies unless the defendant has committed a crime that is oppositional and directed toward his or her spouse.**

The marital privilege statute protects people from having to come to court and testify “for or against” their spouse without the spouse’s consent. [A.R.S. § 13-4062\(1\)](#). It does not apply, however, “in a criminal action or proceeding for a crime committed by the husband against the wife, or by the wife against the husband ....” *Id.*

The plain language of this section makes the exception to the marital privilege clear—it only applies when one spouse has committed a crime “against” the other spouse. As such, the marital privilege is meant to be a protection for spouses, not a meaningless platitude.

“Absent statutory definitions, courts generally give words their ordinary meaning ... and may look to dictionary definitions ....” [DBT Yuma, L.L.C. v. Yuma County Airport Authority](#), 238 Ariz. 394, ¶ 9 (2015); accord Justice Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts, 69 (Thomson/West 2012) (Reading Law). One word is key: “against.”

Against is defined as “in opposition to; adverse or hostile to.” Random House Dictionary of the English Language (unabridged), 26 (1973); accord [Merriam-Webster Dictionary](#), [against](#). To, in turn, is “used for expressing motion or direction

toward a ... person ....” Random House Dictionary of the English Language (unabridged), 1489; *accord* [Merriam-Webster Dictionary](#), to.

As pertinent to this case, the marital privilege statute, under its plain meaning, protects against unwanted spousal testimony unless the defendant-spouse has committed a crime that is both oppositional and directed toward the witness-spouse. It is not enough that the crime have some hostile effect upon the spouse; the hostility or adversity must have been directed toward the spouse.

The Supreme Court of Kentucky applied this interpretation in [Meyers v. Commonwealth](#), 381 S.W.3d 280, 283-85 (Ky. 2012). There, the defendant, a prohibited possessor, took a gun off the wall and pointed it at his wife. *Id.* at 282. The defendant was charged with prohibited possession and several other counts. *Id.* at 281-82. The prohibited possessor count was severed and tried separately, during which the wife was compelled to testify. *Id.* at 282. Like in Arizona, Kentucky provided an exception to spousal privilege in cases where a “spouse is charged with wrongful conduct against the person or property of ... [t]he other ....” *Id.* at 283 (quoting [K.R.E. 504\(c\)\(2\)\(A\)](#)). The Court concluded the prohibited possessor offense was not a “crime committed against” the defendant’s wife because the act was “not directed at his spouse.” *Id.* at 285.

The Arizona Court of Appeals has implicitly recognized the meaning of the word “against.” In [State v. Guadagni](#), 218 Ariz. 1 (App. 2008), the court considered

the word in the context of the definition of a victim. [218 Ariz. 1, ¶ 14](#). The court correctly observed that generally “only crimes that may be committed against someone will have victims.” *Id.* (emphasis original). The court went on to observe, however, that in the context of victim rights, our courts have conferred victim status even when the elements of an offense do not indicate a crime can be committed against someone. *Id.* at ¶¶ 15-17.

*Guadagni* recognizes the word “against” means something. While our Victim Bill of Rights jurisprudence may have broadened the authority to confer victim status, the word “against” is still understood to apply to a crime that is both oppositional and directed toward a person.

Driving Under the Influence, however, is not a crime that is “directed toward” another person. Under the DUI statute, it is unlawful for a person to control a vehicle while 1) impaired, 2) having an unacceptably high blood alcohol level, or 3) having a drug or metabolite in their body. [A.R.S. § 28-1381\(A\)](#).

Nothing about DUI indicates it is committed against another person. As the Court of Appeals observed in [State v. Olquin, 216 Ariz. 250 \(2007\)](#), “DUI is considered a victimless crime in that it can be committed without the involvement of any other person.” [216 Ariz. 250, ¶ 22](#). The court concluded, “[n]o proof is required that the defendant cause or intend to cause any injury or damage for a conviction of DUI.” *Id.* Fundamental to its conclusion was that “[a] victim is an

essential element of an offense when ... the offense provides that the prohibited conduct be committed against another person.” *Id.* at ¶ 21 (quotation marks omitted, emphasis original) (quoting *State v. Tschilar*, 200 Ariz. 427, ¶ 34 (App. 2001)).

The marital privilege, by its own terms, applies to cases where the defendant-spouse has committed a crime against the witness-spouse; the defendant-spouse has committed a crime that is oppositional and directed toward the witness-spouse. DUI is not an offense that is oppositional and directed toward another; DUI is not a crime committed against the witness-spouse. Applying the plain language of the marital privilege, DUI is not an exception to its protection.

**2. Principles of statutory construction confirm the marital privilege applies unless the defendant-spouse commits an offense that is oppositional and directed toward the witness-spouse.**

Even if this Court were to find the plain language ambiguous, the application of several canons of construction leads to the same result. When a statute is ambiguous, this Court interprets the statute “as a whole, and ‘consider[s] the statute’s context, subject matter, historical background, effects and consequences, and spirit and purpose.’” *Lewis v. Debord*, 238 Ariz. 28, ¶ 8 (2015) (quoting *State ex rel. Montgomery v. Harris*, 237 Ariz. 98, ¶ 13 (2014)).

**A. Giving effect to the word “against” best considers the statutory text as a whole and ensures consistent usage of the term.**

When interpreting a statute, this Court looks to the “full text of the statute.” *Golder v. Department of Revenue*, 123 Ariz. 260, 265 (1979); accord Reading Law,

167. In doing so, courts generally will presume the word “bear[s] the same meaning throughout a text ....” Reading Law, 170.

In § 13-4062(1), the word “against” arises in two contexts. First, characterizing the potential testimony as “for or against.” Second, in describing the exception for a crime committed by the defendant-spouse “against” a witness spouse.

In the context of testimony “for or against” the spouse, the term “against” means “in opposition to; adverse or hostile to.” Random House Dictionary of the English Language (unabridged), 26; *accord Merriam-Webster Dictionary, against*. This is made clear through the juxtaposition with “for,” which in this context means “in favor of; on the side of.” Random House Dictionary of the English Language (unabridged), 553; *accord Merriam-Webster Dictionary, for*. For the purposes of the spousal privilege, it does not matter if the testimony will be “in favor of” or “in opposition to” the defendant-spouse, it must be by consent.

This construction is consistent with how the term “against” is used throughout Chapter 38, Article 20. Section 13-4064 says that evidence obtained after a person refuses to comply with a grand jury subpoena but acquiesces to a court order “shall not be used against the person in any proceeding or prosecution ....” And § 13-4066 says that evidence resulting from sex offender treatment “is not admissible against the person in any criminal or juvenile delinquency proceeding unless the person

consents ....” Both use “against” in a manner consistent with “in opposition to; adverse or hostile to.”

Because “against” means “in opposition to” in the context of testimony “for or against,” it is presumed to bear the same meaning when describing a crime committed “against” a witness-spouse.

**B. Giving effect to the word “against” ensures spousal privilege is construed validly and not rendered ineffective or meaningless.**

The Supreme Court has observed “a presumption against a construction which would render a statute ineffective or inefficient, or which would cause grave public injury or inconvenience.” *Bird v. U.S.*, 187 U.S. 118, 124 (1902); accord Reading Law, 63. And this Court has noted that “statutes are presumed to be valid unless it clearly appears otherwise.” *Council of City of Phoenix v. Winn*, 70 Ariz. 316, 318 (1950); accord Reading Law, 66.

Here, the protection provided by § 13-4062(1) is presumed valid and should be interpreted to give effect to the statute. Giving the word “against” the plain meaning described above does that. Alternative constructions do not. If, for example, this Court were to interpret the word “against” as broadly as the City of Phoenix or City of Scottsdale suggest, and interpret the word “against” as equivalent to “having any impact upon,” the exception would swallow the rule and marital privilege would be robbed of any value. The commission of any crime, regardless of degrees of attenuation, has an impact upon the defendant’s family. Communal finances are

drained. Social and liberty restrictions are imposed. The defendant's family is subject to obloquy. A defendant's commission of a crime has an impact upon the marital relationship, regardless of whether the crime was committed against the spouse.

To this extent, the State's interpretation would render the foundation of the privilege meaningless. As this Court has noted, statutes should be construed to "avoid interpretations that render statutory provisions meaningless, unnecessary, or duplicative ...." *Arizona Dept. of Revenue v. Action Marine, Inc.*, 218 Ariz. 141, ¶ 10 (2008); accord Reading Law, 174 (noting "every word and every provision is to be given effect" and courts should not endorse "an interpretation that causes [language] to have no consequence"). Further, "a construction should be avoided which would result in inconvenience or absurdity." *City of Phoenix v. Superior Court In and For Maricopa County*, 101 Ariz. 265, 267 (1966) (quoting *Isley v. School Dist. No. 2 of Maricopa County*, 81 Ariz. 280, 286 (1956)); accord Reading Law, 234 (noting a statute "may be either disregarded or judicially corrected ... if failing to do so would result in a disposition that no reasonable person could approve")

But the State's interpretation has just those effects. It creates an exception that swallows the rule, thereby undermining the very purpose of the privilege. This is

illustrated by the hypothetical Craig posed in his Response to the Petition for Special Action:

A husband and wife drive two cars to dinner. They own both cars jointly. At dinner, the wife enjoys three glasses of wine and the husband none. They drive home in their separate cars. The wife, unfortunately, collides with a median and damages the car, which the husband jointly owns. She is arrested for DUI.

Resp. Pet. Sp. Act. 5. Craig rightly pointed out that, “[a]ccording to the State’s argument, the husband is a victim because of the damage to his car and the wife cannot preclude the State from calling her husband as a witness.” *Id.*

The State has not disavowed such a broad interpretation; the State has endorsed it. In its Opening Brief the State doubled down, asserting the witness-spouse in this case was a victim because “[w]hen a married couple owns property together and one spouse damages the property, the spouse causing the damage commits a crime and is responsible to the non-offending spouse for the damage.” OB, 7; *accord* Pet. Sp. Act. 4-6.

Additionally, the state has gone further and proposed that the question is whether an offense “places a strain on the marriage relationship.” Pet. Rev. 6 (quoting *State v. Whitaker*, 112 Ariz. 537, 542 (1975)). But this raises a different problem. Any time a defendant is charged with an offense, fines or restitution would be paid out of community funds. And as noted above, the relationship can further be strained by association restrictions or derogation. Any of these factors may place a

strain on the relationship. But this alone cannot be enough to circumvent spousal privilege.

Even in a case where the defendant commits an offense like DUI and wrecks the car, as in the hypothetical discussed above, the simple fact of conduct and accusation need not degrade the marital relationship to such a degree that it has ended. Countless marriages have survived criminal accusation. Again, any restitution would be paid from community funds, but this time into community coffers. Neither does this place one spouse in opposition to the other for the purposes of the statute.

The construction proposed by the state would decimate the privilege, causing it to evaporate in any case where the crime might require the payment of restitution, regardless of the identity of the actual alleged victim. While perhaps an interesting legal coincidence, this does not create a reason to permit the state to intrude into the marriage and force one spouse to testify against the other.

**C. Giving effect to the word “against” properly construes the statute as consistent with the common law except insofar as there has been an explicit change.**

Additionally, this Court will not presume a change in the common law absent “clear, unambiguous and explicit language.” *Porter v. Eyer*, 80 Ariz. 169, 176 (1956); accord Reading Law, 319 (“A statute will be construed to alter the common

law only when that disposition is clear.”).<sup>1</sup> And Evidence Rule 501 directs that the common law “governs a claim of privilege unless” a statute “provides otherwise.”

At common law, the injured spouse exception only applied “where the offence is directly against the person of the wife . . . .” Blackstone, [Commentaries on the Laws of England](#), 431. Blackstone even provided an example that gives insight: “in case a woman be forcibly taken away, and married, she may be a witness against such her husband, in order to convict him of felony.” *Id.* As Blackstone explained it, the spousal injury exception required an oppositional act directed toward the witness-spouse.

The Arizona legislature has taken no step to alter the common law requirement that the offense be directed toward the spouse. This is in clear juxtaposition to its deviation from the requirement that the offense be to “the person” of the witness-spouse. The legislature has more broadly applied the exception to crimes, regardless of personal injury, and expressly carved out “abandonment, failure to support or provide for or failure or neglect to furnish the necessities of life to the wife or the minor children,” as well as “bigamy or adultery, . . . or . . . sexual assault committed by the husband if” certain conditions apply. [A.R.S. § 13-4062\(1\)](#). But the requirement that the crime be directed toward the witness-spouse remains.

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<sup>1</sup> [A.R.S. § 13-103](#) does not apply because that statute merely abolished “common law offenses and affirmative defenses . . . .” The statute has no impact on how we understand or apply spousal privilege.

**D. Giving effect to the word “against” enforces the purpose of the privilege.**

Similarly, this court has noted that “[s]tatutes which are ambiguous must be construed in view of the purposes they are intended to accomplish and the evils they are designed to remedy.” *Senor T’s Restaurant v. Industrial Commission of Arizona*, 131 Ariz. 360, 363 (1982).

Just three days ago the First Circuit Court of Appeals had the opportunity to consider the purposes of spousal privilege in *U.S. v. Pineda-Mateo/Guerrero-Tejeda*, \_\_ F.3d \_\_, No. 17-1857, 2018 WL 4442449 (1st Cir. 2018). The court recognized there were two outdated principles justifying the privilege. *Id.* at \*1. First, that a defendant could not testify for herself due to personal interest. *Id.* Second, that husband and wife were one. *Id.* The Court recognized these purposes had been “long-abandoned.” *Id.*

Two modern purposes remain, however. *Id.* First, the privilege serves to foster “the harmony and sanctity of the marriage relationship ....” *Id.* at \*1 (quoting *Trammel v. U.S.*, 445 U.S. 40, 44 (1980)). Second, the privilege effects a “broader societal interest in avoiding the unseemliness of compelling one spouse to testify against the other in a criminal proceeding.” *Id.* (internal quotation marks and modifications omitted) (quoting *U.S. v. Yerardi*, 192 F.3d 14, 18 (1st Cir. 1999)). The second justification, the Court explained, stems from “the natural repugnance in every fair-minded person to compelling a wife or husband to be the means of the

other’s condemnation.” *Id.* (internal quotation marks omitted, emphasis original) (quoting *In re Grand Jury Subpoena*, 755 F.2d 1022, 1028 (2d Cir. 1985)).

This second basis—ensuring a spouse is not the tool of their loved one’s demise—was crucial to the First Circuit’s ultimate decision to reject a joint action exception: “Even in cases where the married couple is ... using marriage as a shield to hide joint criminal activity and abusing the marital privilege[,] it is not apparent that the broader concern about the appearance of the Government coercing one spouse to testify against the other applies with any less force.” *Id.* at \*9 (internal quotation marks and modifications omitted).

In the case of a criminal accusation where the defendant’s conduct is not directed toward the witness-spouse, these two purposes remain. While the State is correct there have been criticisms of the privilege, the Arizona Legislature has steadfastly refused to eliminate the privilege. In fact, the Legislature considered spousal privilege in 2009 with [SB 1254](#). Rather than eliminate spousal privilege, the Legislature amended it to include an exception not at issue here. *See* [SB 1254 Chaptered Version](#).

### **3. Cases regarding victim status do not inform this determination.**

The State’s primary argument has been that the definition of a victim is similar and this Court should therefore find spousal privilege waived as long as victim status could theoretically be conferred. St. Supp. Br. 16-18; OB 6-9; Pet. Sp. Act. 4-5.

Without stating it, this argument is premised upon the prior-construction canon. The State's error, however, is that the two sections they propose to compare are too dissimilar.

Under the prior-construction canon, "If a statute uses words or phrases that have already received authoritative construction ... they are understood according to that construction." Reading Law, 322. But Justice Scalia and Garner recognized "the canon ... applies as well (though with less force) to the interpretation of the same wording in related statutes." *Id.*

Within this recognition, there are two important factors to pull out: 1) the wording must be found in "related statutes," and 2) the canon applies with less force.

The State's implicit assertion is that spousal privilege and the definition of victim are sufficiently related. But the interests underscoring our jurisprudence regarding the definition of victim do not support this assertion.

To start, the State is correct that a victim is defined as "a person against whom the criminal offense has been committed ...." *See* [A.R.S. § 13-4401\(19\)](#). From a plain language perspective, the term "against" means the same thing as proposed herein.

But Arizona Courts have, whether right or wrong, interpreted this definition more broadly in light of the several goals of the Victims' Bill of Rights and restitution.

This dispute boils down to the Court of Appeals's decision in *State ex rel. Romley v. Superior Court In and For County of Maricopa*, 184 Ariz. 409 (App. 1995). There, the defendant was driving under the influence and got into an accident. *Id.* at 410. The accident damaged the other person's car but did not injure the driver. *Id.* The court concluded the driver of the damaged car was a victim and could therefore refuse an interview. *Id.* at 411.

The court offered two reasons for its conclusion. Neither withstands scrutiny.

First, the court found the DUI was "committed against" the occupant. *Id.* This was presented in conclusory fashion, unaccompanied by any analysis. *See id.* The discussion above reveals this conclusion was ill-reasoned.

Second, the court relied upon the definition of "criminal offense," which included specific reference to "the threat of physical injury ...." *Id.* at 410-11. However, that definition has since been changed and the "threat of physical injury" language removed. *See* A.R.S. § 13-4401(6).

*Romley* was also decided in the unique context of victim status. Thirteen years later, in *State v. Guadagni*, 218 Ariz. 1 (App. 2008), the Court of Appeals looked at the more developed state of the law. The court started from a plain language review and concluded, "only crimes that may be committed against someone will have victims." 218 Ariz. 1, ¶ 14 (emphasis original). This was accompanied, however, by

a footnote that recognized *Romley* expanded victim status through the definition of criminal offense. *Id.* at fn.4.

The court noted, however, that jurisprudence regarding restitution and victim status has endorsed a broader view. *Id.* at ¶¶ 15-16. Accordingly, in a bigamy case, the court conferred victim status and the right to seek restitution upon the two women the defendant married. *Id.* at ¶ 18.

But this broader application is reflected in *Romley*'s final point. *Romley* looked to this Court's guidance from *Knapp v. Martone*, 170 Ariz. 237, 239 (1992) that allowing "ad hoc exceptions" to victim status would increase the harm the VBR was designed to address. *Romley*, 184 Ariz. at 411 (quoting *Knapp*, 170 Ariz. at 239). Such potential exceptions would "encourage defendants or others to assert that the person designated as the victim should, instead, be considered a suspect." *Id.* (quoting *Knapp*, 170 Ariz. at 239).

This recognition underscores the interest in construing rules and procedures "to protect a victim's rights to justice and due process." Ariz.R.Crim.P. 39(b); accord Ariz.Const. Art. 2, § 2.1(A)(11). Moreover, the broader interpretation ensures persons who are financially harmed by a defendant's conduct can obtain restitution. Section 13-603(C) allows for "restitution to the person who is the victim of the crime ...." There is a final interest which must be balanced: judicial efficiency. Occasionally prosecutors do not bring every conceivable charge. In such

circumstances, a court could reasonably conclude a broader definition of “victim” best serves the administration of justice.

But this illustrates that Arizona’s interpretation of “against” when determining victim status is not a good analog for understanding what “against” means in the context of spousal privilege. Put simply and in the terms of Scalia and Garner, the two are not sufficiently related. And even if they were, the persuasiveness of the canon is weaker in this case in light of the different purposes. Where the purpose of victim rights is to protect the victim, the purpose of the spousal privilege is to protect the marital relationship and ensure one spouse is not compelled to become the instrument of the other’s demise. Given these different purposes, the state’s prior-construction argument is unpersuasive.

Moreover, the state’s goal here violates the principle *Knapp* set out. The state seeks to have this Court endorse an interpretation of “against” so generic that ad hoc exceptions can be carved out on a case-by-case basis. Just as the purposes of the VBR and restitution protected broad application of the definition of victim, the purposes of spousal privilege support narrow application of its exceptions.

#### **4. Severance was proper.**

Finally, resolution of the privilege question dictates the result of the severance question. The State observed this interrelation in its Supplemental Brief. *See St. Supp. Br. 18-19.*

The Supreme Court of Kentucky faced this same question in *Meyers*, 381 S.W.3d at 284. There, the defendant illegally possessed a firearm and then assaulted his wife with it. *Id.* at 282. But this was a seamless act: “Appellant took the firearm off the wall and pointed it at her.” *Id.*

Substantively, the Kentucky provision is similar to Arizona’s:

<p><b>Ky.R.Crim.P. 8.31:</b><sup>2</sup>          If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses ... the court shall order separate trials of counts ....</p>	<p><b>Ariz.R.Crim.P. 13.4(a):</b>          [I]f necessary to promote a fair determination of any defendant’s guilt or innocence of any offense, a court must order a severance of counts ....</p>
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Both rules focus on fairness—Kentucky’s through a reference to prejudice and ours through a reference to a fair determination of guilt. And both rules mandate severance when a fair trial cannot be had—Kentucky’s through the mandate that “the court shall order separate trials” and ours through the mandate that “a court must order a severance of counts ....”

Like this case, the trial court in *Meyers* followed the applicable rule and severed the counts. *See Meyers*, 381 S.W.3d at 284. However, the trial court in *Meyers* nonetheless compelled the wife to testify in the firearm possession trial. *Id.* The Kentucky Supreme Court found this decision was an abuse of discretion. *Id.* at 285.

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<sup>2</sup> The opinion referred to *Ky. R. Crim. P. 9.16*, which was later renumbered as 9.31.

