IN THE SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA, Petitioner, v. THE HONORABLE HUGH HEGYI, MARICOPA CO. SUPERIOR COURT, Respondent Judge, And JOSH RASMUSSEN, Real Party in Interest.	No. CR 16-0264-PR Court of Appeals No. 1 CA-CR 16-0075 Maricopa County Superior Court No. CR 2013-102236-002

BRIEF OF AMICUS CURIAE
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INTERESTS OF AMICUS CURIAE

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 the accused. 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.

Amicus AACJ offers this brief in support of Petitioner Rasmussen because the lower court's opinion incorrectly interpreted this Court's rules to compel the disclosure of a defendant's statements concerning the charged conduct made to mental health experts. The issue presented touches the core of the mission of AACJ to protect individual rights guaranteed by the Federal and State Constitutions and to resist all efforts to curtail such rights.

ARGUMENT

I. Under the plain language and context of Rule 11.4, defendants are allowed to redact incriminating statements.

Rules are interpreted in the same manner as statutes. *State v. Hansen*, 215 Ariz. 287, 289 ¶ 7 (2007). Thus, if the "language is clear and unequivocal, it is determinative of the [rule]'s construction." *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296 ¶ 8 (2007) (internal citation omitted). This Court may also look at a variety of elements, including the rule's context, the language used, the subject matter, the historical background, the effects and consequences, and its spirit and purpose. *Martin v. Martin*, 156 Ariz. 452, 457 (1988).

A. The plain language of Rule 11.4 supports *Austin*'s holding that redaction is permitted.

Foremost, Rule 11.4(a) clearly and unequivocally creates a mechanism for the defense to redact "statements concerning the offense charged. Ariz. R. Crim. P. 11.4(a). The Rule indicates only the defendant should be given access to the defendant's "statements or a summary of his statements concerning the offense

charged" to the defendant only. Ariz. R. Crim. P. 11.4(a). To ensure this is accomplished, the defense "is responsible for editing a copy [of the report] for the State …." *Id*.

Rule 11.4(b), however, requires no such mechanism. Whereas reports generated under Rule 11.4(a) are submitted to the trial court before the defendant may review the report, reports generated under Rule 11.4(b) originate with the defendant. Under these circumstances, he would not need to obtain the reports from the court before disclosing the reports to the State. Given these differences in the origination of the reports, Rule 11.4(b) should be read to permit redaction because it does not expressly prohibit redaction. *See Mccullough v. Maryland,* 17 U.S. 316 (1819) (establishing the principle that implied powers and rights exist in the absence of an express prohibition); *Fragoso v. Fell*, 210 Ariz. 427, 431 (App. 2005) (establishing that trial court had authority to establish cash-only bond in the absence of an express prohibition).

B. The context of Rule 11.4(b) supports *Austin*'s interpretation.

Beyond the plain language of Rule 11.4, the context of Rule 11.4 further supports *Austin*'s conclusion that defendants are permitted to redact reports. This can first be seen in the burden of production defendants bear when raising a Guilty Except Insane (GEI) defense. *See* A.R.S. § 13-502(A).

Generally a defendant must meet his burden of production to present an affirmative defense. *State v. Kelly*, 210 Ariz. 460, 464 (App. 2005). In GEI cases, the burden of production is reflected in Rule 11.3(f)(1)'s requirement that defendants establish a "reasonable basis" to believe that sanity is at issue before the court appoints experts to examine the defendant. This "reasonable basis" requires highly specialized proof concerning a narrowly defined set of circumstances which qualify for the defense. A.R.S. § 13-502(A). In practice, defendants meet their burden of production by disclosing a retained expert's report pursuant to Rule 11.4(b).

Once a "reasonable basis" is established, A.R.S. § 13-502(B) requires the trial court order that the defendant be evaluated by at least one independent expert. Rules 11.2 and 11.3(f)(1) also permit the court to order independent examinations of the

defendant's mental condition at the time of the offense with the defendant's consent. Rule 11.3(f)(1) requires the mental health expert to provide a screening report including the provisions of A.R.S. § 13-4506.

A.R.S. § 13-4506 does not authorize the expert to include statements concerning the charged offense. Rather, it requires the report to include only information about "the mental status of the defendant at the time of the offense" and the relationship of the defendant's mental defect or disease to the alleged offense.

Furthermore, A.R.S. § 13-4508(A) states that "the privilege against self-incrimination applies to any examination ordered by the court pursuant to this chapter." A.R.S. § 13-4508(B) authorizes the introduction of evidence or statements obtained during an examination at a proceeding to determine guilt or innocence once the defendant provides evidence to rebut the presumption of sanity. However, nothing in the chapter authorizes reports to include a defendant's statements concerning the charged conduct.

Rule 11.7 further supports the conclusion that a defendant may redact under Rule 11.4. Rule 11.7 reflects the statutory protection against self-incrimination

provided in A.R.S. § 13-4508. Rule 11.7(a) and (b) distinguish between evidence and "privileged statements." While Rule 11.7(a) permits the introduction of evidence "obtained under these provisions" when sanity is at issue, Rule 11.7(b) prohibits the admission of the defendant's statements "concerning which form the basis of the charges." Rule 11.7(b) also prohibits the admission of "evidence resulting" from a defendant's statements concerning the charges. Notably, Rule 11.7 does not distinguish between evidence and statements resulting from expert reports generated under Rule 11.4(a) versus those reports generated under Rule 11.4(b).

Rule 11.4(a) authorizes the redactions of the defendant's statements concerning the charged offense from expert reports generated pursuant to A.R.S. § 13-502(B), A.R.S § 13-4506, and Rules 11.3 and 11.7. The *Austin* court concluded, since there is no justification for requiring disclosure of the statements, Rule 11.4(b) should also protect the defendant's statements from disclosure. *Austin v. Alfred*, 163 Ariz. 397, 400 (App. 1990).

C. Reading the Rules and Statutes harmoniously also indicates *Austin* was correctly decided.

Rules "should be harmonized wherever possible and read in conjunction with each other." *State v. Hansen*, 215 Ariz. 287, 289, ¶ 7 (2007) (internal citation omitted). When reading Rule 11.4, it can be read harmoniously with A.R.S. § 13-3993(D) and Rule 15.2.

A.R.S. § 13-3993(D) requires a defendant to disclose a "complete" report. However, it does not define what a "complete report" entails. A.R.S. §§ 13-4506, 13-4508, and Rule 11.4 provide the necessary context. A.R.S. § 13-4506(A)(1) requires that an expert's report include the mental status of the defendant at the time of the offense. A.R.S. § 13-4056(A)(2) requires the expert's opinion concerning the relationship of the defendant's mental defect or disability to his mental state at the time of the offense. A.R.S. § 13-4506 does not require defendant's statements concerning the charged offense. This is because such statements are expressly protected under the statutory protection against self-incrimination under A.R.S. § 13-4508. Therefore, a report is complete under A.R.S. § 13-3993(D) when it meets the

requirements of A.R.S. §§ 13-4506 and 4508. The reports are not rendered incomplete merely because the reports are redacted to comply with protections against self-incrimination under A.R.S. § 13-4508.

Moreover, Rule 15.(2) does not require the disclosure of the defendant's statements concerning the charges contained in expert reports. Rule 15.2(c)(2) requires the disclosure of experts who have examined the defendant and "the results of the defendant's physical examinations and of scientific tests, experiments or comparisons that have been completed." In a GEI case, these "results" are the reports generated under §§ 13-4506 and 13-4508 and Rules 11.3, 11.4, and 11.7. Because the "results" do not include the defendant's statements concerning the charged conduct, Rule 11.4 may be read harmoniously with Rule 15.2(c)(2) to authorize the redaction of such statements before the reports are disclosed to the State.

D. The authorization to redact under Rule 11.4 is the product of a specific rule, which prevails over any general announcements that may appear contrary.

Even if Rule 11.4 was read in conflict with Rule 15.2 or A.R.S. § 13-3993(D), Rule 11.4 would govern because it is the more specific rule. When a specific rule

conflicts with a general one, the specific rule controls. *Cosper v. Rea ex rel. Cty. of Maricopa*, 228 Ariz. 555, 557 (2012). Rule 11.4 is the specific rule relating to the redaction of expert reports produced in GEI cases. Rule 11.4 allows for redaction. Therefore, if Rule 15.2 is read to contradict Rule 11.4, Rule 11.4 prevails because Rule 15.2 is merely a general announcement.

Additionally, A.R.S. § 13-3993 is not a specific procedural statute concerning the redaction of the defendant's statements concerning the charged conduct. In contrast, Rule 11.4 is a specific rule governing, as its title declares, the "disclosure of mental health evidence." Therefore, to the extent that the specific provisions of Rule 11.4 authorizing redactions conflict with A.R.S. 13-3993(D), Rule 11.4 prevails.

E. To the extent Rule 11.4 conflicts with A.R.S. § 13-3993(D), the rule trumps the statute because the disclosure and redaction provisions are procedural in nature.

The Arizona Constitution entrusts to the Legislature the power to enact substantive rules whereas the Supreme Court possesses the constitutional authority to establish procedural rules. *State v. Fletcher*, 149 Ariz. 187, 191–92 (1986). Substantive law can only be established by the Constitution or the State Legislature.

Id. Procedural rulemaking authority is granted to the Arizona Supreme Court by Article 6, Section 5 of the Arizona Constitution. *Id.*

This Court has established that the Legislature acted according to its substantive rulemaking authority when it placed the burden of proof upon defendants exerting an affirmative defense of insanity. *Fletcher*, 149 Ariz. at 193, 872. The same analysis compels the conclusion that Rule 11.4 must prevail over A.R.S. § 13-3993(D) rules governing the disclosure of mental health expert reports because the rules are procedural in nature.

"Rules of evidence are promulgated under [the Arizona Supreme Court's] constitutional grant of power and are ordinarily considered procedural in nature." *Readenour v. Marion Power Shovel, a Div. of Dresser Indus., Inc.*, 149 Ariz. 442, 444–45 (1986). In *State v. Druke*, 143 Ariz. 314, 317 (App. 1984), the Court of Appeals held that A.R.S. § 13-3993 and its predecessor were procedural in nature, and therefore could not be "constitutionally be construed as modifying or superseding" Rule 11.2 of the Ariz. R. Crim. P. Therefore, to the extent there is any conflict

between Rule 11.4 and A.R.S. § 13-3993(D), Rule 11.4 prevails because Rule 11.4 is a procedural rule.

F. Alternatively, if this Court concludes that the disclosure of mental health experts' reports is substantive rather than procedural in nature, A.R.S. § 13-3993(D) cannot infringe upon the constitutional rights of a defendant.

This Court endeavors to harmonize statutes and court rules with the United States Constitution and the Arizona Constitution. *See Aitken v. Industrial Commission*, 183 Ariz. 387, 389 (1995). However, this Court will find statues governing substantive law to be unconstitutional in circumstances where the statute violates protections afforded by the constitution. *See Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306 (2003).

The Court of Appeals does not provide direct authority for its assertion that a defendant fully waives his Fifth Amendment right against self-incrimination by asserting a Guilty Except Insane Defense. In *State v. Fitzgerald*, 232 Ariz. 208 (2013), this Court established that a defendant is not entitled to use the Fifth Amendment as "sword and a shield" where the defendant introduced mental health

evidence during the penalty phase of a capital trial. Thus, the *Fitzgerald* Court concluded that the State was entitled to present evidence of the defendant's statements made to Correctional Health Services which suggested the defendant was malingering to rebut defendant's mental health mitigation evidence. *Id*. at 217.

However, none of the cases cited in *Fitzgerald* or the Opinion below decided whether a defendant's right against compulsory self-incrimination requires the disclosure of his statements concerning the charged conduct made to mental health experts under Arizona's Guilty Except Insane affirmative defense. In *Buchanan v. Kentucky*, a United States Supreme Court case cited with approval in *Fitzgerald*, the issue involved an expert's report "in which the psychiatrist had set forth his general observations about the mental state of petitioner but had not described *any* statements by petitioner dealing with the crimes for which he was charged." *Buchanan*, 483 U.S. at 423 (1987). Rather, the law is far from settled as to whether a defendant waives his Fifth Amendment rights concerning statements of the charged offense merely by placing his mental health at issue. *United States v. Johnson*, 383 F. Supp. 2d 1145, 1157 (N.D. Iowa 2005) (collecting cases and concluding that Rule 12.2 of the Federal

Rules of Criminal Procedure establishes the appropriate balance because disclosure of the defendant's offense-specific statements is not made until after the defendant is convicted).

II. Rather than rely on the plain language and context of Rule 11.4, the Lower Court misconstrued the impact of statutory changes to the Guilty Except Insane statute to justify its departure from this Court's well-settled holdings that redaction is proper.

In the Opinion below, Division One of the Court of Appeals asserted that the statutory changes to the Guilty Except Insane defense eliminating the first prong of the traditional *M'Naghten* defense compelled its departure from Division Two's interpretation of Rule 11.4. Opinion, ¶ 8 (citing *Clark v. Arizona*, 548 U.S. 735, 747–48 (2006)). However, the change of law in 1993 predated the 1996 amendment to Rule 11.4 and thus does not justify Division One's drastic departure from *Austin*.

Moreover, Justice Souter explained why Arizona's change in the law was not nearly as significant as Division One has asserted because "cognitive incapacity is itself enough to demonstrate moral incapacity . . . if a defendant did not know what he

was doing when he acted, he could not have known that he was performing the wrongful act charged as a crime." *Clark v. Arizona*, 548 U.S. 735, 753–54 (2006).

Contrary to the lower court's decision, the rationale of this Court's pre-1993 decisions apply with even greater weight to the GEI scheme currently in place. Prior to the 1983 statutory changes to the insanity defense, the State bore the burden of proving beyond a reasonable doubt that a defendant was sane at the time of the offense if the defendant met his burden of production in rebutting the presumption of sanity. *State v. Coconino Cty. Superior Court, Div. II*, 139 Ariz. 422, 426 (1984). The Legislature shifted the burden of proof to the defendant because "[t]he former requirement that the state carry the burden was considered too difficult." *State v. Fletcher*, 149 Ariz. 187, 193 (1986).

In 1993, the Legislature repealed A.R.S § 13-502 ("Not responsible for criminal conduct by reason of insanity; burden of proof findings") and replaced it with a completely different version of A.R.S. § 13-502 ("Insanity test; burden of proof; guilty except insane verdict"). The 1993 Statute also substantially limited the types of mental diseases or defects which could support the defense. Among those eliminated

were "disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders" as well as momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity, or passion growing out of anger, jealousy, revenge, hatred, or other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct." A.R.S. § 13-502 (West 1994). The Legislature also transformed the defense from a traditional affirmative defense that absolved the defendant of criminal liability and punishment via an acquittal into a "Guilty Except Insane" defense that merely shifted the location of confinement to a "secure mental health facility." Renee MelanCon, Arizona's Insane Response to Insanity, 40 Ariz. L. Rev. 287, 314 (1998).

This Court has previously announced that it is fundamentally unfair to permit a psychiatrist to transmit a defendant's incriminating statements concerning the charged crime to the jury. *State v. Evans*, 104 Ariz. 434 (1969); *State v. Freeman*, 114 Ariz. 32, 43 (1976); *State v. Magby*, 113 Ariz. 345, 351(1976); *State v. Ramirez*, 116 Ariz. 259, 269 (1977). This Court has also repeatedly declared that Rule 11.4(a) authorizes

a defendant to excise statements concerning the charged offense. *State v. DeCello*, 113 Ariz. 255 (1976); *State v. McDonald*, 117 Ariz. 159, 160 (1977); *State v. Ramirez*, 116 Ariz. 259, 269 (1977). Furthermore, in *State v. Gonzales*, this Court suggested that a defendant's rights when examined by court-appointed experts are co-existent with the rights of a defendant who can afford to retain an expert. 111 Ariz. 38, 40 (1974). These Arizona Supreme Court decisions were rendered under a statutory scheme establishing a far more advantageous procedure for defendants asserting an insanity defense than that which is currently enacted.

The Opinion below provides no explanation as to why statutory changes which severely limited a defendant's ability to present a GEI defense required the Court of Appeals to drastically depart from Division Two's analysis in *Austin v. Alfred*. A defendant who successfully exerts a GEI defense is no longer absolved of responsibility for his conduct; he is still convicted and punished. Therefore, given the statutory transformation from an insanity defense to the GEI defense, this Court should reject the lower court's conclusory assertion that the change in the law required the departure from the analysis of Division Two in *Austin*.

III. The lower court further ignored the distinction between incriminating statements and statements that go to state of mind.

The Opinion further fails to acknowledge that Rule 11.4 permits the redaction of only a very specific type of statements: "those concerning the offense charged." *See* Ariz. R. Crim. P. Rule 11.4(a). The lower court does not distinguish statements concerning the charged offense from those made concerning the defendant's mental status at the time of the offense. *See* A.R.S. § 13-4506(A)(1).

The lower court relied upon two cases, *State v. Fitzgerald*, 232 Ariz. 208 (2013), and *State v. Tallabas*, 155 Ariz. 321 (App. 1987), to support its conclusion that a defendant's statements concerning the charged conduct are not protected from disclosure by Rule 11.4. However, neither *Fitzgerald* nor *Tallabas* involved a defendant's statements concerning the charged conduct.

Tallabas's holding distinguished between "statements relating to the issue of insanity from statements wholly unrelated to that issue but tending to prove guilt." 155 Ariz. at 325. *Tallabas* restricted its "holding of implied consent to the first category." *Id.* This Court's holding in *Fitzgerald* was similarly narrow to permit the

introduction of statements made to CHS officials which reflected the defendant's malingering efforts. 232 Ariz. at 216.

Neither *Fitzgerald* nor T*allabas* revoked a defendant's ability to redact statements concerning the charged offense which were wholly unrelated to his mental state at the time of the offense. Rather the limited nature of both cases are in line with the underlying rationale permitting redaction. The State does not gain any insights on the defendant's Guilty Except Insane defense with the disclosure of his statements concerning the charged conduct. Rather, the State only obtains additional information on how to prosecute the case to establish guilt.

IV. A procedure which continues to permit redaction of the defendant's statements concerning the charged conduct does not uniquely burden the State, as the State still has the ability to challenge a defendant's evidence of insanity.

The *Tallabas* Court's limited holding was premised on the need for a "fair state-individual balance" when a defendant asserts the insanity defense. 155 Ariz. at 325. The Legislature has since tipped the starting point of this "fair state-individual balance" by severely narrowing the scope of GEI defense. *See* A.R.S. § 13-502.

Meanwhile, the State has not lost any of its ability to rebut evidence of insanity. Given the existing state of the law, the State possesses substantial tools at its disposal to prevent a defendant from meeting his burden of clear and convincing evidence in a GEI defense. Therefore, this Court should continue its procedural tradition of protecting the defendant's statements concerning the charged conduct from disclosure by overruling the lower court and adopting the disclosure protections discussed in *Austin v. Alfred*.

CONCLUSION

The court of appeals erred in this case. This Court should overturn the opinion below and continue to ensure that defendants are not compelled to disclose statements concerning the charged offense made to mental health experts.

RESPECTFULLY SUBMITTED this 8th day of February, 2017.

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