IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. PORFIRIO MEDINA, Appellant.	No. 2 CA-CR 2017-0035 DEPARTMENT B (Pima County Superior Court Cause No. CR-20161982-001)

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE ISSUES

1. Did the trial court commit structural error by considering and ruling on a motion for exclusion sanctions for which it lacked jurisdiction due to procedural defects because the State failed to certify good faith efforts to resolve the disclosure dispute?

2. Did the trial court abuse its discretion and violate Porfirio Medina's due Process right to present a defense by precluding him from presenting a justification defense and a witness's testimony where the State had notice of both the defense and the witness at least seven days before trial and interviewed the witness before trial?

3. Did the trial court abuse its discretion by refusing to instruct the jury on necessity before trial without first hearing the evidence to determine whether the instruction was warranted?

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STATEMENT OF THE ISSUES

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3. Did the trial court abuse its discretion by refusing to instruct the jury on necessity before trial without first hearing the evidence to determine whether the instruction was warranted?

STATEMENT OF THE CASE

¶1 Porfirio Medina was indicted on one count of possession of a deadly weapon by a prohibited possessor, a class four felony. Record on Appeal (ROA) 1. The State alleged the offense was committed while Porfirio was on parole. ROA 2. The State also alleged seven prior felony convictions. ROA 3. The court precluded Porfirio's defense based on untimely disclosure. ROA 26, 27, 28, 30, 31, 35, 37, 39, 57, 11/8/16 AM Reporter's Transcript (RT) 8-10, 12. The defense moved for directed verdict, which the court denied. *Id.* at 42, 52. Following a trial of less than two hours, an 8-

person jury convicted Porfirio of possession of a deadly weapon by a prohibited possessor, and found the aggravating factor that Porfirio was on parole proven beyond a reasonable doubt. 11/8/16 RT 68-69, 83-84; ROA 52, 53, 59. At a November 28, 2016, trial on the priors allegations, the court found Porfirio had three historical prior convictions, including one out-of-state prior conviction. 11/28/16 RT 10-11; ROA 59, 66.

¶2 On January 3, 2017, the court sentenced Porfirio to a category three presumptive term of 10 years' prison with 230 days' pre-sentence incarceration credit. 1/3/17 RT 7; ROA 66. A timely notice of appeal was filed on his behalf on January 20, 2017. ROA 67. This Court has jurisdiction pursuant to A.R.S. §§ 12-120.21, 13-4031 and 13-4033.

STATEMENT OF THE FACTS

¶3 Detective Richard Zormeier, an investigator with the Arizona Department of Corrections assigned to the U.S. Marshall's fugitive task force, also works as a reserve detective with the South Tucson Police Department. On April 27, 2016, Zormeier was driving an unmarked police car when he saw Porfirio Medina standing next to a bus bench in South Tucson. 11/8/16 RT (PM) 30. Zormeier recognized Porfirio as a person with an outstanding parole-violation warrant. *Id.* at 30-31.

¶4 Zormeier asked Porfirio for his name, which he gave, and Zormeier then placed Porfirio under arrest. *Id.* at 31-32. Porfirio volunteered to Zormeier that he had a gun in his waistband. *Id.* at 32, 38. Zormeier removed a Ruger P90 handgun from Porfirio's waistband. *Id.* The handgun was loaded with a cartridge of ammunition, but there was no ammunition in the chamber. *Id.* at 37-38.

¶5 The parties stipulated that Porfirio had been convicted of a felony in Maricopa County in case number CR2010156815 on May 19th, 2011, and that his right to carry a firearm had not been restored on April 27, 2016. *Id.* at 42.

¶6 Porfirio testified that his parole officer was aware he was working in Pima County and was performing his urinalysis tests here. *Id.* at 44-45. Parole Officer Dwayne Russell testified during the aggravating factor trial that Porfirio had failed to check in as ordered on December 1, 2015, and Russell obtained a parole violation warrant. *Id.* at 74.

ARGUMENT ONE

The trial court committed structural error by considering and ruling on a motion for exclusion sanctions for which it lacked subject matter jurisdiction due to procedural defects because the State failed to certify good faith efforts to resolve the disclosure dispute.

Material Facts

¶7 On October 4, 2016, Porfirio filed a Motion to Continue the trial that was set for October 25, 2016, on the ground that the parties were still conducting their investigations, including interviews of trial witnesses. ROA 26. The State did not file a written response. At a hearing on October 12, 2016, the court granted Porfirio's motion over the State's oral objection and continued the trial to November 8, 2016. ROA 27 and 28. Defense counsel explained that counsel first became aware that Veronica had information relevant to a justification defense on October 26, 2016, when Veronica met with counsel to assist in the preparation for the defense interview with Zormeier, which was scheduled for the following day. 11/8/16 (AM) RT 10; ROA 44. Prior to this meeting, defense counsel was unaware that Veronica had information that would support a claim of an imminent fear, an essential element to a justification defense. *Id*. Despite requests from defense counsel to set interviews earlier, the State first made Detective Zormeier available for interview on October 27, 2017. *Id.* In a supplemental disclosure filed October 26, 2016, Porfirio noticed

justification defenses. ROA 31. A separate supplemental notice disclosing defense witness Veronica Duarte was signed by defense counsel on October 26, 2016, but filed on November 1, 2016. ROA 35. On October 27, 2017, defense counsel interviewed Detective Zormeier, who confirmed that Porfirio had made statements indicating that he feared for his life after he attempted to escape the Mexican mafia. 11/8/16 (AM) Reporter's Transcript (RT) 10; ROA 44.

¶8 On November 2, 2016, the State filed a motion to preclude Porfirio from raising his justification defense at trial and to preclude Veronica's testimony. ROA 37. In its motion, the State argued 1) that Porfirio had no evidence of imminent fear, and 2) that the disclosure of the defense was untimely under Ariz. R. Crim. P. 15.2. ROA 37; 11/8/16 (AM) Reporter's Transcript (RT) 8-9. The State did not attach a statement of counsel certifying that it had attempted to resolve the disclosure dispute with defense counsel in accordance with Ariz. R. Crim. P. 15.7(b). ROA 37. The State completed its interview of Veronica on November 3, 2016. 11/8/16 RT 9-10; ROA 44. Defense counsel filed a request that the jury be instruction on necessity. ROA 43.

¶9 Defense counsel filed a written response to the State's sanctions motion and also argued at the hearing that counsel first learned there was evidence of imminent fear sufficient to support a justification defense during her October 26, 2016,

meeting with Porfirio's fiancée, Veronica Duarte, to prepare for the defense interview with Detective Zormeier, which the State scheduled for the following day. 11/8/16 (AM) RT 10-11; ROA 44. Specifically, Porfirio and Veronica would testify that Porfirio left Maricopa County because he wanted to escape the Mexican mafia, but when they moved to Tucson, the Mexican mafia found then and threatened Porfirio's life again. 11/8/16 (AM) RT 10-11; ROA 44. According to the State, Veronica would have testified "that there was a man sitting on her car in a parking lot, asked for Taz, and then said: Tell Taz Guerro says what's up." 11/8/16 (AM) RT 11.

¶10 The court granted the State's motion to preclude Porfirio's justification defense in its entirety, as well as Veronica's testimony, solely on the ground that the defense's supplemental disclosures were untimely. 11/8/16 RT 12; ROA 57. The court did not rule on the State's argument that the defense lacked merit. 11/8/16 RT 12.

¶11 At trial, Porfirio testified that he left Maricopa County after being released from prison because he was warned to leave the county after word got out that he was trying to leave the Mexican mafia. *Id*. at 47. The court then sustained the State's objection to Porfirio's testimony on the grounds that Porfirio was presenting evidence in support of his justification defense, which the court had precluded. *Id*.

at 47-48. Porfirio was not permitted to testify regarding the specific threats to his life, and he was not permitted to call Veronica to testify. The State was able to confirm on cross-examination that Porfirio previously had been affiliated with the Mexican mafia. *Id.* at 48-49. Having precluded the necessity defense in its entirety, the court did not give the jury any instructions on justification. ROA 47; 11/8/16 (AM) RT 12; 11/8/16 (PM) RT 4-10.

Standard of Review

¶12 This court reviews a trial court's exercise of subject matter jurisdiction *de novo*. *State v. Flores*, 218 Ariz. 407, ¶ 6 (App. 2008). "'Subject matter jurisdiction is the power of a court to hear and determine a controversy.'" *State v. Fimbres*, 222 Ariz. 293, ¶ 29 (App. 2009) (quoting *State v. Bryant*, 219 Ariz. 514, ¶ 14 (App. 2008)). Subject matter jurisdiction is never waived and can be raised at any time, including on appeal. *State v. Buckley*, 153 Ariz. 91, 93 (App. 1987)." [D]efects in subject matter jurisdiction cannot be cured," *Fimbres*, 222 Ariz. 293, ¶ 31, and therefore are akin to structural error. *State v. Henderson*, 210 Ariz. 561, ¶ 12 (2005). If such error is found, "reversal is mandated." *State v. Valverde*, 220 Ariz. 582, ¶ 10 (2009).

¶13 This court reviews criminal procedure rules de novo. *State ex rel. Thomas v. Newell*, 221 Ariz. 112, ¶ 7 (App. 2009). Rules of procedure are interpreted "by applying the principles of statutory construction." *Id.* (citing *State v. Hansen*, 215 Ariz. 287, ¶ 7 (2007)). Courts first "look to the plain language of a rule because that is 'the best and most reliable index of [the rule's] meaning.'" *Id*.

Argument

¶14 Ariz. R. Crim. P. 15.6(c) provides that supplemental disclosures may be made up to seven days before trial. Ariz. R. Crim. P. 15.7 describes the procedure for imposing sanctions on either party for failing to make disclosure as required by Rule 15. Either party may move to compel disclosure and impose sanctions. Ariz. R. Crim. P. 15.7(a). The moving party's attorney, however, must include a separate statement certifying that he or she personally consulted with the other party and made a good faith effort to resolve the matter. Ariz. R. Crim. P. 15.7(b); *State ex rel. Thomas*, 221 Ariz. 112, ¶ 8. The plain language of Ariz. R. Crim. P. 15.7(b) bars the trial court from exercising subject matter jurisdiction over any sanctions motion that lacks the required certifying statement:

> No motion brought under Rule 15.7(a) will be considered or scheduled unless a separate statement of moving counsel is attached certifying that, after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter.

Ariz. R. Crim. P. 15.7(b). The Committee Comment to the 2003 Amendment to Ariz. R. Crim. P. 15.7, which added the certification requirement, demonstrates that the purpose of the certification was to require the moving party to show that it had made a "good faith attempt to resolve the matter without intervention of the court" before the court would get involved. *Id.*

¶15 Here, the State's motion failed to attach a statement certifying that the State had attempted to resolve the disclosure dispute in good faith, but had been unable to do so. ROA 37. Because the State failed to attach a certifying statement to its motion for preclusion sanctions, however, Ariz. R. Crim. P. 15.7(b) barred the court from even considering the State's motion. The court therefore erred in granting the State's motion and precluding Porfirio's defense and witness testimony as a disclosure sanction.

¶16 Having proven error, the next step is to evaluate whether the error is structural error or simply trial error. The United States Supreme Court explained that "trial error" is "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991). By contrast, there are "structural defects in the constitution of the trial mechanism which defy

analysis by harmless error standards … Each of these constitutional deprivations is a structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id*. at 309-10; *see also Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993) (finding structural error where reasonable doubt instruction was insufficient and the defendant may have been convicted under a lesser standard).

¶17 "Structural error 'deprive[s] defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" *Valverde*, 220 Ariz. 582, ¶ 10 (quoting *State v. Ring (Ring III)*, 204 Ariz. 534, ¶ 45 (2003)). Fundamental error, on the other hand, is limited to "those rare cases that involve 'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19 (quoting *State v. Hunter*, 142 Ariz. 88, 90 (1984)). Because the definition of fundamental error includes the term "of such magnitude," this inherently means that the error is quantifiable, whereas, as described above, structural error defies quantitative analysis.

¶18 *Fimbres* establishes that subject matter jurisdiction "'is the power of a court to hear and determine a controversy,'" and it can never be waived. *Fimbres*, 222

Ariz. 293, ¶ 29 (quoting *Bryant*, 219 Ariz. 514, ¶ 14). Ariz. R. Crim. P. 15.7(b) plainly provides that a court cannot even "consider[]" a motion for disclosure sanctions that is not accompanied by a certifying statement. Because the court lacked jurisdiction to consider the defective motion, the court's order precluding Porfirio's defense as a disclosure sanction is structural error, and reversal is required.

¶19 If this Court should find that the error was not structural, fundamental error occurred. Fundamental fairness is "the touchstone of due process under both the Arizona and federal constitutions." *State v. Melendez*, 172 Ariz. 68, 71 (1992); U.S. Const. amends. V, VI, XIV; Ariz. Const. art. II, §§ 4, 24. Fundamental error "goes to the foundation of the case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Henderson*, 210 Ariz. 561, ¶ 19. Showing prejudice occurred requires the defendant to "show that a reasonable jury, applying the appropriate standard of proof, could have reached a different result." *Id*. at ¶ 27. Fundamental to the right to a fair trial is the right to have the jury decide the case correctly on the law and the facts.

¶20 The court lacked jurisdiction to hear the State's procedurally defective motion by the plain language of the Ariz. R. Crim. P. 15.7(b), and despite that jurisdictional bar, the court ordered the most Draconian sanction available. In doing so, the court deprived Porfirio of his Constitutional due process right to present a defense at a

trial. The proffer of evidence showed that the Mexican mafia followed Porfirio and his family to Tucson from Phoenix and had on at least one occasion threatened Veronica while sitting on her car in a parking lot to send a message to Porfirio. The court denied Porfirio the opportunity to develop any evidence of his imminent fear to support a necessity defense, through his own testimony, through Veronica, and even through cross-examination of Detective Zormeier. A reasonable jury, given an opportunity to hear the Porfirio's and Veronica's testimony, and given proper jury instructions as requested by Porfirio, could have reached a different result. If not structural, the error is fundamental and prejudiced Porfirio's constitutional right to present a defense. Therefore, reversal is mandated.

¶21 If this court determines that the record is too deficient to determine fundamental error, Porfirio requests a limited remand for the purposes of an evidentiary hearing on his necessity defense. *State v. Peterson*, 228 Ariz. 405, ¶¶ 15, 18-20 (App. 2011) (granting a limited remand for a suppression hearing, finding the record deficient "because there was no hearing, there is no evidence in the record to support either interpretation.").

ARGUMENT TWO

The trial court abused its discretion and violated Porfirio Medina's due process right to present a defense by precluding him from presenting a justification defense and a witness's testimony where the State had notice of both the defense and the witness at least seven days before trial and interviewed the witness several days before trial.

Material Facts

¶22 The Material Facts set forth in ¶¶ 7-11 are incorporated by reference.

Standard of Review

¶23 In reviewing a trial court's order precluding evidence, this court views the evidence in a manner that maximizes its probative value and minimizes any prejudicial value. *State v. Machado (Machado I)*, 224 Ariz. 343, n.1 (App. 2010), *aff'd*, *State v. Machado (Machado II)*, 226 Ariz. 281 (2011). "'An error of law committed in reaching a discretionary conclusion may, however, constitute an abuse of discretion.'" *State v. Busso-Estopellan*, 238 Ariz. 553, ¶ 5 (2015) (quoting *State v. Wall*, 212 Ariz. 1, ¶ 12 (2006)). Constitutional issues are reviewed *de novo*. *State v. Moody*, 208 Ariz. 424, ¶ 62 (2004).

¶24 The right to a meaningful opportunity to present a complete defense is rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments and the Compulsory Process and Confrontation Clauses of the Sixth Amendment. *Chambers*

v. Mississippi, 410 U.S. 284, 290 n.3, 302 (1973); *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Machado I*, 224 Ariz. 343, ¶¶ 12-13; *see also* Ariz. Const. art. II, §§ 4, 24. Evidentiary rules must bend to the constitutional right to present a complete defense when they are in conflict. *State ex rel. Montgomery v. Duncan*, 228 Ariz. 514, ¶ 8 (App. 2011); *State v. Inzunza*, 234 Ariz. 78, ¶ 22 (App. 2014). These constitutional rights cannot be unreasonably or arbitrarily limited by state rules governing the admission of evidence. *Id*.; *Holmes*, 547 U.S. at 324-25. However, "[a] breach of the ... Rules of Evidence does not, in itself, offend the Constitution." *State v. Carlson*, 237 Ariz. 381, ¶ 36 (2015).

¶25 This court reviews criminal procedure rules de novo. *State ex rel. Thomas*, 221 Ariz. 112, ¶ 7. Rules of procedure are interpreted "by applying the principles of statutory construction." *Id.* (citing *Hansen*, 215 Ariz. 287, ¶ 7). Courts first "look to the plain language of a rule because that is 'the best and most reliable index of [the rule's] meaning.'" *Id*.

Argument

A. The trial court erred by failing to balance the requisite factors before ordering the most Draconian disclosure sanctions.

¶26 The rights to present a defense and to offer the testimony are guaranteed and are fundamental elements of due process of law. U.S. Const. Amend. VI; Ariz. Const. art. II, §§ 4, 24. Although preclusion of a defense or a witness's testimony is a sanction available to a trial judge for a disclosure violation under Ariz. R. Crim. P. 15.7(a), "preclusion is rarely an appropriate sanction for a discovery violation." *State v. Delgado*, 174 Ariz. 252, 257 (App. 1993); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *State v. Oliver*, 158 Ariz. 22, 30 (1988). The Arizona Supreme Court instructs: "a witness should be precluded only as a last resort and only after considering how vital the precluded witness is to the proponent's case, whether the discovery violation was motivated by bad faith or [willfulness], whether the opposing party will be surprised and prejudiced by the witness's testimony, and any other relevant circumstances." *State v. Tucker*, 143 Ariz. 433, 440 (1988).

¶27 The United States Supreme Court in *Taylor v. Illinois*, 484 U.S. 400 (1988), discussed the question of whether the compulsory process clause of the Sixth Amendment is an absolute bar to a state discovery rule which permits the sanction of preclusion of witnesses for discovery violations. The Court held that the preclusion sanction does not necessarily violate the Sixth Amendment and adopted a balancing test to consider the issue. The Court stated:

> In order to reject petitioner's argument that preclusion is never a permissible sanction for a discovery violation it is neither necessary nor appropriate for us to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case. It is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor. But the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests. The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance.

484 U.S. at 415 (emphasis in original). In that case, the Supreme Court upheld the use of the preclusion sanction because the evidence indicated that defense counsel had deliberately sought a tactical advantage in failing to list a witness. The Court found this was willful misconduct and that preclusion of the defense witness was justified to protect the integrity of the judicial process. Before this decision, the Arizona courts had also applied a balancing test to determine whether a preclusion sanction was justified under the circumstances.

¶28 In *State v. (Joseph Clarence Jr.) Smith*, 123 Ariz. 243, 252 (1979), the Arizona Supreme Court held, "The trial court ... should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as possible, since the Rules of Criminal Procedure are designed to implement, and not to impede, the fair and speedy determination of cases. Prohibiting the calling of a witness should be

invoked only in those cases where other less stringent sanctions are not applicable to effect the ends of justice." Arizona courts thus apply a four-factor balancing test to determine the propriety of issuing an exclusionary sanction for disclosure violations in a criminal case:

> In determining the propriety of the sanction, the court should consider (1) how vital the witness is to the case, (2) whether the opposing party will be surprised, (3) whether the discovery violation was motivated by bad faith, and (4) any other relevant circumstances.

Delgado, 174 Ariz. at 257 (citing *State v. (Joe U.) Smith*, 140 Ariz. 355, 359 (1984)). The Commentary to the American Bar Association Standards for Criminal Justice, Standard 11-7.1 (2d ed. 1991), also explains that exclusion should be used only in "extreme" cases because its results are capricious:

> …[E]xclusion of defense witnesses may raise issues concerning the defendant's Sixth Amendment right to present witnesses in his or her own defense, and can lead to an unfair conviction. On the other hand, the exclusion of prosecution evidence as a discovery sanction may result in a windfall to the defense. Either result would defeat the purposes of the discovery standards. Thus, such orders should be issued only in extreme cases.

Id. (footnotes omitted).

¶29 In *(Joe U.) Smith*, our Supreme Court reversed the conviction of the defendant when the trial court precluded the testimony of a defense alibi witness who appeared during the second day of trial. Applying the balancing factors, the court found that the witness's testimony was vital to the defense and found no bad faith by defense

counsel in the late disclosure. The court also determined that "any prejudice could have been rectified by the granting of a continuance." 140 Ariz. at 359. Similarly, in *Delgado*, the court of appeals found that the expert rebuttal witness was vital to the appellant's defense, and that the State was at least partially responsible for the late disclosure of the defense's rebuttal witness due to its own late disclosure of its expert witness and its expert's examination of the defendant. There, pretrial discovery as to the witness's testimony was not complete until three days before trial, but "[a]s soon as defense counsel became aware of the necessity of calling another expert witness, she took immediate steps to find such witness and promptly notified the state of the name and address of the witness." *Delgado*, 174 Ariz. at 259. Once again, the Supreme Court determined that the appropriate remedy was not preclusion of the defense witness, but a trial continuance to allow the State time to prepare. *Id*. at 260.

¶30 Disclosure only two days before trial of the State's chief witness was not grounds for preclusion in *State v. Zuck*, 134 Ariz. 509, 514 (1982). There, the Supreme Court found "no abuse" by the trial court where the defense counsel was given "the opportunity to interview Billy Brownfield and invited them to make whatever motions regarding his testimony they felt necessary." *Id.* Similarly, in *State v. Torres*, 27 Ariz. App. 556, 558-59 (1976), the Court of Appeals found no abuse of discretion where the State disclosed statements by a witness for the first time

during trial because the disclosure was not made in bad faith and a brief continuance "until the following morning to afford him an opportunity to prepare to rebut Mrs. Torres' testimony" was allowed.

¶31 Here, the trial court failed to conduct a balancing of the four factors. Instead, the court precluded Porfirio's entire defense and the presentation of his witness's testimony as a sanction for a mistaken procedural error. While preclusion is no longer prohibited as a matter of course, it is limited to "extreme" cases of disclosure abuse, and the U.S. Supreme Court's admonishment in *Washington* is particularly apt here: "the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court, it could hardly be argued that a State would not violate the clause if it made all defense testimony inadmissible as a matter of procedural law." *Washington*, 388 U.S. at 22.

¶32 Application of the balancing factors demonstrates that preclusion was not warranted for the purported disclosure dispute. First, the court's order precluding Porfirio's entire defense and the testimony to support it was plainly vital to Porfirio's case; the court's order left Porfirio with no defense at all. While the State argued that Veronica's testimony would not satisfy the defense burden of proving imminent fear, by precluding the defense and the witness testimony before trial, the court deprived Porfirio of his constitutional right to present evidence to the jury. What weight to

assign to this evidence is a question for the jury, not for the court. *State v. Lee*, 189 Ariz. 590, 603 (1997); *see also State v. Bowie*, 119 Ariz. 336, 342 (1978) ("It is the function of the jury to evaluate the credibility of testimony. Contradictions or a hazy recollection of events goes to the weight of the evidence, not its admissibility."). Porfirio should have been permitted to present his evidence, and the court should have delayed a decision whether to grant Porfirio's request to instruct the jury on necessity until after the close of evidence. Instead, Porfirio was denied any possibility of developing the evidence to support his necessity claim.

¶33 Second, the State was not unduly surprised by the disclosure of the necessity defense thirteen days before trial, nor by the disclosure of Veronica as a witness seven days before trial. Ariz. R. Crim. P. 15.6(c) provides that supplemental disclosures may be made as late as seven days before trial. Both disclosures complied with the requirements of final supplemental disclosures set forth in Ariz. R. Crim. P. 15.6(c). In fact, the State did not schedule the interviews with its witnesses until October 27, 2016 – merely 12 days before the continued trial date. 11/8/16 (AM) RT 10-11; ROA 44. As in *Delgado*, the State was at least partially responsible for the later disclosure of Veronica as a witness, given its own late scheduling of interviews. Moreover, any surprise was mitigated by the fact that the State had an opportunity to interview Veronica five days before trial.

¶34 Third, there is no evidence that the late disclosures were motivated by bad faith on the part of defense counsel. Defense counsel notified the State of the necessity defense immediately upon learning that there was evidence to support a claim of imminent fear. Notably, defense counsel informed the State of the new defense *before* interviews were conducted, and the State interviewed Veronica on November 3, 2016, five days before trial.

¶35 Fourth, the State's motion for preclusion based on timeliness was apparently a mere ruse, as the State made no request for a continuance of the trial, and indicated it was ready to proceed. Given the Sixth Amendment right to present a defense, courts must resort to exclusion as a disclosure sanction in only the "extreme" case; this was not such a case. The trial court clearly abused its discretion in issuing such Draconian sanctions here, where the State suffered no hardship, and the was to deprive Porfirio of any defense.

B. The trial court's error was not harmless and/or was fundamental.

¶36 Where, as here, the defendant has preserved his issues for appeal, this Court must reverse and order a new trial unless the State can prove that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). "'Error, be it constitutional or otherwise, is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict.'" *State*

v. Anthony, 218 Ariz. 439, ¶ 39 (2008) (quoting *State v. Bible*, 175 Ariz. 549, 588 (1993)); *see also State v. King*, 226 Ariz. 253, ¶ 29 (App. 2011) (applying harmless error standard to error in jury instructions and verdict forms). The inquiry is not "'whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'" *Bible*, 175 Ariz. at 588 (quoting *Sullivan*, 508 U.S. at 279 (original emphasis)). "We must be confident beyond a reasonable doubt that the error had no influence on the jury's judgment." *Id.*

¶37 Pursuant to A.R.S. § 13-417(A), "Conduct that would otherwise constitute an offense is justified if a reasonable person was compelled to engage in the proscribed conduct and the person had no reasonable alternative to avoid imminent public or private injury greater than the injury that might reasonably result from the person's own conduct." The defense of necessity is available if a reasonable person "was compelled to engage in the proscribed conduct and the person had no reasonable alternative to avoid imminent ... injury." *Id*. Necessity applies when a defendant is forced to commit a crime as the " 'lesser of two evils.'" *State v. Belcher*, 146 Ariz. 380, 382 (1985) (quoting *United States v. Bailey*, 444 U.S. 394, 410 (1980)). This defense is not available "'if there was a reasonable, legal alternative to violating the law.'" *Id*. (quoting *Bailey*, 444 U.S. at 410); *see also* A.R.S. § 13-417(B) (An

accused person may not assert the necessity defense if the person intentionally, knowingly or recklessly placed himself in the situation in which it was probable that the person would have to engage in the proscribed conduct).

¶38 Here, Porfirio testified that he specifically fled Maricopa County to avoid the danger to himself and his family from the Mexican mafia. Because Porfirio attempted to escape from the threat, he was not intentionally, knowingly, or recklessly placing himself in a situation where he would need to carry a weapon. To the contrary, Porfirio was attempting to remove himself from a situation where violence was the norm. However, the proffer of evidence shows that Veronica and Porfirio would have testified that the Mexican mafia hunted him down and sent a henchman to find him in Tucson, even threatening his fiancée in a public parking lot. The extent of Porfirio's imminent fear, and his necessity defense is not developed because the court did not hold an evidentiary hearing and denied Porfirio the right to put on his evidence before denying his request for a necessity instruction.

¶39 Nonetheless, the court precluded Porfirio from presenting his entire defense, including his own testimony and that of his witness. The court rested its decision solely on the purported disclosure violation and did not address the merits of Porfirio's necessity defense. The State cannot prove that the court's error was harmless beyond a reasonable doubt.

¶40 Even if this court were to find that the issues presented here were not adequately preserved for appeal, they are reviewable for fundamental, prejudicial error. *Henderson*, 210 Ariz. 561, ¶¶ 19, 27 (2005). The prejudice is plain when a defendant is denied all opportunity to defend himself and introduce his witnesses on his behalf at trial.

ARGUMENT THREE

The trial court abused its discretion by refusing to instruct the jury on necessity before trial without first hearing the evidence to determine whether the instruction was warranted.

Material Facts

¶41 The Material Facts set forth in ¶¶ 7-11 are incorporated by reference. As additional material facts, Porfirio sets forth the following: Porfirio requested the jury be instructed on necessity. ROA 43. The court precluded Porfirio's necessity defense at the pretrial motion hearing before jury selection, solely as a sanction for "late" disclosure, and rejected Porfirio's requested jury instruction. 11/8/16 (AM) RT 11-12. The court settled final jury instructions with the parties before opening statements. 11/8/16 (AM) RT 11-13; 11/8/16 (PM) RT 4-11.

Standard of Review

¶42 A trial court's decision to refuse a jury instruction is reviewed for an abuse of discretion. *State v. Petrak*, 198 Ariz. 260, ¶ 9 (App. 2000); *State v. Bolton*, 182 Ariz. 290, 309 (1995). Constitutional issues are reviewed de novo. *Moody*, 208 Ariz. 424, ¶ 62. Where the defendant failed to object below, errors in jury instructions are reviewed for fundamental error. *State v. Payne*, 233 Ariz. 484 ¶ 137 (2013).

Argument

¶43 A criminal defendant's rights to a fair trial and due process include the right to have the jury instructed properly on the law. U.S. Const. amends. V, VI, XIV; Ariz. Const. art. II, §§ 4, 24. It is the duty of the trial court to correctly instruct on the law relating to the facts and issues in the case. *State v. Avila*, 147 Ariz. 330, 337 (1985); *State v. Johnson*, 205 Ariz. 413, ¶ 11 (App. 2003). This duty is independent of a request by either party. *Id*.; *State v. Price*, 123 Ariz. 197, 199 (App. 1979). A trial court may include an instruction if the record contains the "slightest evidence" to support it. *State v. King*, 225 Ariz. 87, ¶ 14 (2010) (citing *State v. Lujan*, 136 Ariz. 102, 104 (1983)). "A party is entitled to an instruction on any theory of the case reasonably supported by the evidence." *State v. Shumway*, 137 Ariz. 585, 588 (1983).

¶44 Before a jury had even been selected, the trial court precluded Porfirio from presenting any evidence in support of his necessity defense and settled the final jury

instructions before opening statements. By precluding the requested jury instruction and settling final jury instructions before opening statements, the court failed to base its decision on the evidence presented at trial, and thus denied Porfirio the right to have a jury instructed on a theory of the case reasonably supported by the evidence. The court's order precluding Porfirio from even presenting his evidence deprived the court of the ability to properly evaluate the evidence to determine whether a necessity instruction was supported by "any evidence." *See also Machado I*, 224 Ariz. 343, ¶ 43, (quoting *State v. LaGrand*, 153 Ariz. 21, 28 (1987)) ("judges must be careful not to 'bootstrap [themselves] into the jury box via evidentiary rules.'"). Porfirio preserved his objection to the court's decision by opposing the State's Motion to Preclude. *Bolton*, 182 Ariz. at 306 n. 5 (citing *State v. Lindsey*, 149 Ariz. 472, 475-76 (1986)).

¶45 Where, as here, the defendant has preserved his issues for appeal, this Court must reverse and order a new trial unless the State can prove that the error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24; *see also King*, 226 Ariz. 253, ¶ 29 (applying harmless error standard to error in jury instructions and verdict forms). Here, the court's pretrial decision to preclude Porfirio from raising his only defense and from introducing his evidence at trial, coupled with the court's decision to settle final jury instructions without the benefit of hearing the evidence

in the case, fundamentally deprived Porfirio of his Constitutional right to due process. The question is not "'whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.'" *Bible*, 175 Ariz. at 588 (quoting *Sullivan*, 508 U.S. at 279). Due to the court's Draconian disclosure sanctions, Porfirio was deprived of his right to present any defense, to cross-examine the arresting officer, and to put on witnesses on his behalf. Under these circumstances, the error was clearly not harmless. Moreover, should this court determine the issue was not preserved, the error that deprived Porfirio of his entire right to present a defense and evidence at trial, as well as to have the jury properly instructed, was fundamental and prejudicial. *Henderson*, 210 Ariz. 561, ¶¶ 19, 27. If this court determines that the record is too deficient to determine fundamental error, Porfirio requests a limited remand to hold an evidentiary hearing on his necessity defense. *Peterson*, 228 Ariz. 405, ¶¶ 15, 18-20.

CONCLUSION

¶46 For the reasons stated above, this Court should reverse Porfirio Medina's conviction and remand for a new trial. Alternatively, Porfirio requests this court

grant a limited remand for an evidentiary hearing and stay the remainder of the appeal pending the outcome of that proceeding.

Dated: (Electronically filed) June 16, 2017.

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PIMA COUNTY PUBLIC DEFENDER

By: _____/s/_____
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PORFIRIO MEDINA

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 31.13(b)(2), Ariz. R. Crim. P., undersigned counsel hereby certifies that this Opening Brief complies with Rule 31.13(b) as follows:

1. The brief is proportionately spaced, and uses 14 point Times New Roman typeface, in compliance with Rule 31.13(b)(1);

2. The brief contains 6,312 words, and has an average of no more than 280 words per page, including footnotes and quotations, in compliance with Rule 31.13(b)(2);

3. The brief is double-spaced, with top and margins of at least 1 ¼ inches and side margins of at least one inch, in compliance with Rule 31.13(b)(1).

Dated: (Electronically filed) June 16, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the Appellant's Opening Brief will be deposited for mailing on June 16, 2017, to:

Joseph Maziarz, Chief Counsel
Attorney General's Office
Criminal Appeals/Capital Litigation Division
1275 W. Washington
Phoenix, AZ 85007

and that one copy of Appellant's Opening Brief will be deposited for mailing on June 16, 2017, to:

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Dated: (Electronically filed) June 16, 2017.

PIMA COUNTY PUBLIC DEFENDER

By: /s/
TERRI SEXTON
APPELLATE SECTION