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 REPLY 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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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.

¶1 The State misconstrues the structural error standard of review, seeming to demand that Appellant Porfirio Medina assert the error was "structural *per se*" and then prove he was prejudiced by the error. Answering Brief (AB) ¶ 31. Structural error, however, "is error so serious that it '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...'" *State v. Granados*, 235 Ariz. 321, 324 ¶ 7 (App. 2014). An appellant need not claim that the error is "structural *per se*"; rather, if this Court finds the trial court's error to be structural, the error is necessarily deemed "prejudicial per se and requires reversal." *Id.*

¶2 Without citation to either the plain language of Ariz. R. Crim. P. 15.7(b) or the comments thereto, the State seeks to exempt itself from Rule 15.7(b)'s requirement that any party seeking evidentiary sanctions include with its motion a certification that it attempted in good faith to resolve the disclosure dispute but was unsuccessful. AB ¶ 33. Rule 15.7(a), moreover, permits a court to issue evidentiary sanctions "unless the failure to comply [with the disclosure rules] was harmless or

[] the information could not have been disclosed earlier even with due diligence and the information was disclosed immediately upon its discovery." The State's contention in AB ¶32 that the "rule itself … gives the court its authority to impose sanctions for Rule 15 discovery violations" is unsupported by the plain language of Rule 15.7(a) and (b), and also pretends a disclosure violation where the disclosures plainly complied with Ariz. R. Crim. P. 15.6. The State concedes, as it must, that each party has a continuing obligation to make disclosures as new information becomes known, AB ¶ 13, and that final disclosures must be made seven days before trial. AB ¶ 14.

¶3 The State does not identify any good faith argument why it should be exempt from Rule 15.7(b)'s mandatory certification requirement because the State concedes, as it must, that the prosecutor below filed a facially defective motion for sanctions even though, to the extent there was a valid disclosure dispute based on timeliness, "the dispute was successfully resolved." AB ¶ 33. Far from supporting the court's preclusion sanctions, the State's argument proves that the State had no right under Rule 15.7 to an award of preclusion sanctions at all. The plain language of Rule 15.7(b) unequivocally bars a trial court from considering any sanctions motion that lacks the required certifying good faith statement that the proponent has been "unable to satisfactorily resolve the matter":

> 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). According to the Committee Comment to the 2003 Amendment to Ariz. R. Crim. P. 15.7, the purpose of requiring a written motion and certification was to mandate that the moving party show it had made a "good faith attempt to resolve the matter without intervention of the court." *Id.*

¶4 The State next attempts to shift its burden as the proponent of a sanctions motion to the defense by arguing that Porfirio was not prejudiced by the court's preclusion of his entire defense. AB ¶¶ 34-35. Because structural error is *per se* prejudicial, however, the State's argument widely misses the mark. As the party seeking evidentiary sanctions, it was the State's burden to demonstrate that the State, not Porfirio, was harmed by the purportedly untimely disclosure and to certify that it had attempted, but failed, to resolve the discovery dispute. Because the State's motion failed to comply with these prerequisites, Rule 15.7(b) barred the court from even considering or ruling on the State's facially defective motion.

¶5 The Answering Brief resorts to unsupported claims that additional time was needed for the State to "investigate" Porfirio's justification defense to justify the preclusion sanctions. AB ¶ 25. This Court should reject the State's newly concocted

theory of prejudice, which is unsupported by the record and raised for the first time on appeal. *See State v. Schaaf*, 169 Ariz. 323, 332 (1991) (Courts "will not consider an evidentiary theory when it is advanced for the first time on appeal"). Importantly, the State never argued below that it suffered harm. To the contrary, the State made the following concessions, which amply demonstrate that the State suffered no harm at all: 1) the State's case was "straightforward;" 2) the State was informed in writing of the defense twelve days before trial; 3) eleven days before trial and before witness interviews were conducted, defense counsel provided a written summary of the evidence that Porfirio intended to introduce in support of the defense; 4) Porfirio disclosed his witness on November 1, 2016, seven days before trial (*see* Rule 15.6(c)); 5) the State completed its interview with the defense witness four days before trial on November 3, 2016; and 6) most telling, the State was not requesting a continuance because it needed none. ROA 31, 35, 37, 44; 11/8/16 Reporter's Transcript (RT) (AM) 8-10. In other words, the disclosure of the justification defense twelve days before trial and of the defense witness seven days before trial was timely under Ariz. R. Crim. P. 15.6(c) and harmless to the State's preparation and presentation of its case. For the same reason, the State's argument that *Porfirio's* failure to request a trial continuance after his disclosure demonstrates *his* lack of harm is also backward. AB ¶ 28. It is the party seeking sanctions who must

demonstrate it has been harmed. The readiness to proceed with trial on the part of the proponent of the sanctions demonstrates that the purported disclosure violation caused no harm, which, in turn, precludes the court from issuing disclosure sanctions under Rule 15.7(a).

¶6 This case is analogous to *State v. Williams*, 121 Ariz. 218, 220 (App. 1978), where this Court held that the trial court abused its discretion in precluding the defendant's consent defense rather than permitting the defendant to testify and allowing the State in turn to impeach him. Tellingly, in *Williams*, as here, "[t]he state never contended that it would have been necessary to delay the trial or interview other witnesses in order to meet this newly-raised defense.… The state's motion was based on general principles and not on any prejudice." *Id.* Therefore, the *Williams* court held that the preclusion sanction was reversible error. *Id.*

¶7 A trial court abuses its discretion when it "make[s] an error of law, fail[s] to consider the evidence, make[s] some other substantial error of law, or [has] no substantial evidence to support its conclusion." *State v. Green*, 200 Ariz. 496, 502 ¶ 28 (2001). In *State v. Simon*, 229 Ariz. 60, 63 ¶ 11 (App. 2012), this Court found that the trial court had abused its discretion when it precluded the State's evidence "ahead of the final disclosure deadline set forth in Rule 15.6(c)." The trial court here committed legal error and abused its discretion by finding Porfirio's disclosures

"untimely" even though the disclosures complied with the ongoing duty to disclose under Rule 15.6, and was within the deadline for final disclosures as set forth in Rule 15.6(c).

¶8 The State erroneously asserts that Porfirio does not dispute that his disclosure was untimely under Rule 15. AB ¶ 16. This is incorrect; Porfirio argued throughout the Opening Brief that his disclosures complied with his ongoing obligation to disclose and with the final disclosure deadline in Rule 15.6(c). Opening Brief (OB) ¶¶ 7, 14, 31, 33. In arguing that the disclosures were "untimely" based on Ariz. R. Crim. P. 15.2, AB ¶15, the State ignores that a defendant has no obligation to disclose the basic defense of "failure of the State to prove the elements" via Rule 15.2 nor to introduce any defense witnesses. Ariz. R. Crim. P. 15.2(b) only requires a defendant to "provide a written notice to the prosecutor specifying all defenses as to which the defendant intends to introduce evidence at trial." When a defendant intends only to hold the State to its burden of proof, but does not intend to present its own case-in-chief, nor to admit evidence, the defendant has nothing to disclose under Rule 15.2. While Rule 15.2(b)'s "disclosure requirement goes considerably beyond notification of 'affirmative defenses,' [it] is limited to matters as to which the defendant will introduce evidence. The limitation is designed to allow the defendant to argue deficiencies in the state's case (not requiring the presentation of

defense evidence) without prior warning, and to make his disclosure obligations sufficiently clear and predictable as to be enforceable." Ariz. R. Crim. P. 15.2, cmt.

¶9 Prior to October 26, 2016, Porfirio and his attorney did not know that he had a justification defense. Porfirio knew only that he feared for his life, and his attorney knew only that a generalized fear did not constitute the slightest evidence of a justification defense. 11/8/16 RT ; ROA 44. The State made its sole witness, Detective Zormeier, available for the defense to interview on October 27, 2016, well after the initial trial date had been continued. It was during preparation for this one and only witness interview that the defense identified a reasonable basis for a justification defense. Record on Appeal (ROA) 37, 44. The State conceded below that defense counsel disclosed the defense in writing immediately on October 26, 2016 (ROA 31), and the next day defense counsel provided the prosecutor with a summary of the evidence and facts that counsel intended to introduce to support the defense. ROA 37; 44. Indeed, the State described the substance of Porfirio's defense in its sanctions motion: "the defense allegedly stems from Defendant being threatened by gang members inside and outside of prison, and a 'hit' placed on Defendant by said gang members." ROA 37. The State's argument in support of the trial court's ruling that Porfirio's disclosures were "untimely" because they

were made after the initial time-period of Ariz. R. Crim. P. 15.2(d) is therefore wrong as a matter of law and fact.

¶10 The Answering Brief erroneously complains that the October 26 disclosures "provided merely a list of defenses," but this, too, complied with Porfirio's disclosure requirements. According to the comment to Rule 15.2(b), "The defendant is not required to disclose his testimony, but only the defense to be asserted or of the element of the offense to be attacked, in sufficient detail as to notify the prosecutor of the essence of the defense's case." Rule 15.2.

¶11 The court's order precluding Porfirio's defense thus was based solely on the court's numerous legal errors and improper exercise of authority barred by Rule 15.7(a) and (b). First, the disclosures were timely under Rule 15.6(c), and complied with the ongoing duty to disclose as new information became available; the court abused its discretion in finding disclosures that complied with Rule 15.6(c) untimely. Second, the court committed structural error by ruling on a facially defective motion, which Rule 15.7(b) plainly barred from the court's consideration. Third, the court committed structural error by issuing preclusion sanctions where Rule 15.7(a) barred the court from issuing any evidentiary sanction because the State suffered no harm and the disclosures were made immediately upon discovery. Rule 15.7(a).

¶12 Because the trial court erroneously considered the State's motion for sanctions in violation of the jurisdictional bar provided by the plain language of Rule 15.7(a) and (b), the court committed structural error. The error is prejudicial *per se*, and reversal is required.

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.

¶13 Although preclusion of a defense or a witness's testimony is a sanction available to a trial judge for a disclosure violation under Rule 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). This is especially true where, as here, the court's entire decision was based solely on its erroneous mistakes in finding disclosures that complied with Rule 15.6(c) "untimely" and exercising jurisdiction barred by Rule 15.7(a) and (b) due to the State's facially defective motion.

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

¶14 The court granted the State's motion to preclude Porfirio's justification defense in its entirety solely on the erroneous ground that the defense's supplemental disclosures were untimely, without considering the substance of the defense. 11/8/16 RT 12; ROA 57.

¶15 The State's reliance on *State v. Meza*, 203 Ariz. 50, ¶ 19 (App. 2002), to support an award of preclusion sanctions here is misplaced. There, this Court found that the Phoenix Crime Lab had engaged in a systematic policy of not recording failed calibration checks on breathalyzer machines. This Court found that the trial court had not abused its discretion in issuing disclosure sanctions against the State because: "Instituting an unwritten, rogue practice of deleting evidence of failed calibration checks; withholding evidence from the prosecution, the defendant, and the court; misleading the court in testimony under oath—these acts amounted at a minimum to willful nondisclosure and richly warranted a sanction under Rule 15.7." *Id*. at 50, ¶ 29. *Meza* has nothing whatsoever to do with a defendant's supplemental disclosure of a newly discovered defense or witness that complies with the time requirements in Rule 15.6(c).

¶16 The State also misses the mark with its citation to *State v. Naranjo*, 234 Ariz. 233, ¶ 29 (2014) for the general proposition that an abuse of discretion means that no "reasonable" judge would have reached the same result under the circumstances. AB ¶ 11. A mistake of law constitutes an abuse of discretion. *Green*, 200 Ariz. 496, ¶ 28. *Naranjo* also held:

> Any sanction, however, "must be proportional to the violation and must have a 'minimal effect on the evidence and merits.' " "[P]reclusion is rarely an appropriate sanction for a discovery violation," and should be invoked only when less stringent sanctions would not achieve the ends of justice. Before precluding a witness under Rule 15.7, the trial court must examine the surrounding circumstances, specifically considering the following factors: (1) how vital the precluded witness is to the proponent's case; (2) whether the witness's testimony will surprise or prejudice the opposing party; (3) whether bad faith or willfulness motivated the discovery violation; and (4) any other relevant circumstances.

Naranjo, 234 Ariz. 233, ¶ 30 (citing *State v. (Joe U.) Smith*, 140 Ariz. 355, 359 (1984)). The State concedes that the trial court did not consider the *Smith* factors before ruling from the bench. AB ¶ 16. In *Naranjo*, the defendant failed to disclose a known defense witness until after trial had already started, well beyond the seven-day deadline of Rule 15.6(c). *Id*. at ¶ 35. Under those circumstances, the court found that the failure to disclose amounted to willful misconduct. No such facts or findings exist here.

¶17 Although the State claims that discovery rules need to be applied equally to both sides to assure a fair trial (AB ¶ 12), the State nevertheless asks this Court to bat aside the cases cited in the OB where sanctions against the State were denied when evidence and witnesses were disclosed immediately prior to or even during trial. OB ¶ 30 (discussing *State v. Zuck*, 134 Ariz. 509, 514 (1982) and *State v. Torres*, 27 Ariz. App. 556, 558-59 (1976)). *Zuck* thus does not stand for the broad proposition for which the State cites it. Instead, *Zuck* supports Porfirio's position, holding that it was not error for the trial court to allow the State to call a witness disclosed only two days before trial because the defense, the party claiming surprise, did not request a continuance even after the court invited them to do so, the court required that the State make the witness available for a defense interview, and the court informed defense counsel it would entertain any motions the defense had regarding the witness after the interview was complete. Accordingly, the supreme court held, "While it is regrettable if the prosecutor was dilatory in disclosing Brownfield as a witness, it was not error for the trial court to allow him to testify." *Id*. at 514. Applying the State's assertion that the rules "must be applied with equal force to both the prosecution and the defendant," AB ¶ 12 (citing *State v. Dorow*, 116 Ariz. 294, 295 (1977)), if the prosecution is permitted the leeway of disclosing witnesses and evidence a mere two days before trial without requesting leave

pursuant to Rule 15.6(d), certainly it was an abuse of discretion for the trial court to preclude Porfirio's entire defense based on Porfirio's disclosure, which complied with the final disclosure deadline in Rule 15.6(c).

¶18 Far from supporting the State's position, *State v. Burns*, 237 Ariz. 1, ¶ 91 (2015), demonstrates that the trial court here failed to balance the four factors before erroneously imposing the most Draconian sanctions available under Rule 15.7 where no violation of Rule 15.6(c) occurred and the State was unharmed. In *Burns*, the trial court precluded some, but not all, of the defendant's expert witnesses' testimony. The Arizona Supreme Court recognized in *Burns* that "Parties have an ongoing duty to disclose new information as it is discovered." *Burns*, 237 Ariz. 1, 23 ¶ 93 (citing Ariz. R. Crim. P. 15.6(a)). "[L]ess than one week before the penalty phase began, Burns provided notice that Dr. Joseph Wu, a mitigation witness, would testify regarding results of a PET scan of Burns' brain. In response, the State moved to preclude Dr. Wu's testimony and the results of the PET scan. The trial court ultimately allowed Dr. Wu to testify after Burns disclosed the reports." *Id.* But "[o]ne week before he testified, Dr. Wu told the State he had not performed a quantitative analysis." The Supreme Court therefore ruled that the State should have the opportunity to have its expert review the PET scan findings and precluded the line of questioning until it could be determined whether there was adequate time for the

results to be examined. *Id.* Ultimately, Dr. Wu was not allowed to testify about the quantitative analysis, but "Dr. Wu did testify at length that, in his opinion, Burns had diminished frontal-lobe activity, rendering him less culpable for his actions." *Id*. ¶ 94. In finding no abuse of discretion by the trial court, the Supreme Court noted the following four (*Joe U.) Smith* factors:

> Dr. Wu's testimony was not critical to Burns' defense. Dr. Wu testified at length that Burns had diminished frontal-lobe activity and explained that this could affect Burns' impulse control, judgment, and emotional regulation. Burns has not identified what the quantitative analysis would have additionally shown. Second, the prosecution was unfairly surprised by the evidence, as Dr. Wu had stated just one week earlier that he had not performed a quantitative analysis. There is no indication of bad faith, so the third Smith factor is inapplicable. Finally, the trial court did not preclude the testimony entirely, but instead imposed a less-burdensome alternative…

Id. at ¶ 95.

¶19 Here, after erroneously finding Porfirio's disclosures "untimely" despite their compliance with the plain language of Rule 15.6(c), the trial court compounded its error by failing to conduct any balancing of the *(Joe U.) Smith* factors. Instead, the court precluded Porfirio's entire defense, the presentation of his witness's testimony, and his cross-examination of the State's witness as a sanction for a purported procedural error where there was none. 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 v. Texas*, 388 U.S. 14 (1967) 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.

¶20 The State makes a mockery of a defendant's constitutional right to a "meaningful opportunity to present a complete defense" by claiming that a defendant precluded from presenting his entire defense, all affirmative testimony, and from cross-examining the State's witness has had a "meaningful opportunity" to defend himself. AB ¶ 34. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the [United States] Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *State v. Richter*, 402 P.3d 1016, 1020 ¶ 12 (App. 2017) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984) (internal citations omitted)); accord *State v. Abdi*, 226 Ariz. 361, ¶ 27 (App. 2011). Our state constitution provides similar protections. *See* Ariz. Const. art. II, §§ 4, 24. This fundamental right allows defendants to present their "version of the facts ... so [the jury] may decide where the truth lies." *Washington*, 388 U.S. at 19. "Few rights

are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

¶21 In answer to the first factor, "importance of the evidence to the proponent," the State contends that the preclusion of Porfirio's entire defense and all of his evidence was harmless, in part because the State relies upon decades' old case law to argue that a necessity or duress defense may only be raised if the defendant can show "immediate" threat of physical harm. AB ¶ 22. The State's discussion of the "immediacy" requirement for necessity or duress ignores this Court's recent decision in *Richter*, where this Court recognized that in cases in which the threat is ongoing despite the passage of time, "immediacy" has a different meaning. In *Richter*, the trial court precluded Richter's duress defense, reasoning that she had the burden of proof by a preponderance of the evidence and could not establish a "threat or use of immediate physical force" because the alleged offenses spanned several months. *Richter*, 402 P.3d 1016, ¶ 25. This Court approved of *Esquibel v. State*, 91 N.M. 498, 576 P.2d 1129, 1132 (1978), overruled on other grounds by *State v. Wilson*, 116 N.M. 793, 867 P.2d 1175, 1177 (1994), where the New Mexico Supreme Court held that evidence that the defendant, a prisoner accused of escape, had been subjected to "a prolonged history of beatings and serious threats toward th[e] defendant," the last of which occurred two to three days before the crime, was sufficient for the jury to

consider the duress defense based on the "ongoing threat" theory of duress. *Richter*, 402 P.3d 1016, ¶ 27. Accordingly, this Court found that the "immediacy" requirement may be satisfied even though the alleged offenses spanned several months where "the threat of physical harm was 'ongoing,' despite the passage of multiple months over the course of the alleged offenses." *Id.* at ¶ 25.

¶22 Next, the State attempts to argue that Porfirio should be barred from contesting the court's preclusion of his entire defense because he purportedly failed to make an offer of proof as to what the precluded testimony would have been. The State is wrong as a matter of both law and fact. The State relies on *State v. Hernandez*, 232 Ariz. 313, 322 ¶ 42 (2013) for the proposition that an "offer of proof is critical," but then omits any mention of the holding in the paragraph following immediately after. After recognizing that offers of proof are "critical," in ¶ 43, the Court went on to hold that "[a]n offer of proof is not required if 'it is obvious what the answer of the witness will be or what the proof will be[]' or the relevancy and materiality of the excluded evidence is apparent." *Id*. ¶ 43 (quoting *State v. Belcher*, 109 Ariz. 551, 553 (1973) and citing *State v. Kaiser*, 109 Ariz. 244, 247 (1973)). Here, the State included a recitation of the basis for the justification defense, which included evidence that Porfirio was being stalked and threatened gang members, and that a "hit" had been put on his life. Although the State downplayed the nature of

Veronica's proposed testimony, the State acknowledged at the motion's hearing that Porfirio had made statements to Detective Zormeier that he feared for his life, and that based on the State's interview with Duarte, Duarte would testify that a member of the Mexican mafia was sitting on her car in a parking lot and asked her to pass along a threat that the mafia had found Porfirio. ROA 37, 44; 11/8/16 RT (AM) 8-10. This offer of proof was sufficient to demonstrate that Porfirio would be able to present the slightest evidence of an ongoing threat to Porfirio's and Duarte's lives sufficient to raise a necessity defense. *Richter*, 402 P.3d 1016, ¶¶ 25-27. The State's claim that it is "impossible" for this Court to determine the relevance of the testimony without a further "offer of proof" (AB ¶ 19) is contrary to the cases cited in the AB.

¶23 Although the State cites *Kaiser*, 109 Ariz. at 246, for the general rule that evidence cannot be reviewed on appeal in the absence of an offer of proof, the State ignores *Kaiser*'s actual holding. There, our Supreme Court held that the general rule requiring an offer of proof is inapplicable where, as here, the court has precluded a defendant's entire defense:

> Notwithstanding the general rule above stated it is often held that an offer of evidence is not necessary to preserve an objection to a ruling of exclusion for review, where the purpose and purport of the testimony expected to be elicited is obvious, * * * where the court has ruled broadly that no evidence is admissible in support of the theory or fact which the party is seeking to establish.

Id. (quoting *Peterson v. Sundt*, 67 Ariz. 312, 318 (1948)). In *Kaiser*, the supreme court found that no offer of proof was required and that the trial court had abused its discretion in precluding the evidence because the relevance of the proposed testimony was obvious and because "the disallowance of Edythe Reichard's entire testimony by the trial court constituted a broad ruling that no evidence was admissible in establishing the defendant's peaceful nature." *Id*. at 247. Since such a broadly sweeping preclusion comes directly within the exception to the offer of proof requirement, the court determined that the trial court had abused its discretion.

¶24 The State next claims "surprise" by the October 26 disclosure of a justification defense. AB ¶ 24. The State, however, was free to request a trial continuance, but instead indicated that it was prepared to proceed without any difficulty. Indeed, the State did not argue surprise at all, instead arguing merely that in the prosecutor's opinion the disclosures were "untimely. 11/8/16 RT (AM) 8. The AB's purported "surprise" is unsupported by the record.

¶25 The State then argues that the disclosure of the necessity defense was "particularly egregious" even though the disclosure was done within the time requirements of Rule 15.6(c), two weeks before trial, and the State did not need nor request a continuance. Moreover, the State had been extremely dilatory in making its witness, Detective Zormeier, available for defense interviews despite repeated

requests to set the interview by defense counsel. Had the State produced Detective Zormeier in a timely fashion, the existence of a necessity defense would have been discovered and disclosed earlier. As it was, defense counsel disclosed the defense immediately upon discovering the facts supporting the defense. Under these circumstances, the State was partially responsible for the late disclosure, and preclusion of the entire defense was an abuse of discretion. *Delgado*, 174 Ariz. at 259 (Where State was also dilatory in setting interviews, the appropriate remedy was not preclusion of the defense witness, but a trial continuance to allow the State time to prepare.).

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

¶26 The State agrees that the correct standard of review is harmless error. AB ¶ 29. Here, again, the State applies the wrong standard by suggesting that the error was harmless merely because Porfirio was caught "red-handed" in possession of a gun. AB ¶ 35. Porfirio's defense was a necessity defense, which requires the defendant to admit that he committed the underlying illegal act. *Richter*, 402 P.3d 1016, ¶ 18 (a justification defense "seeks to excuse a defendant's criminal act rather than negate any element of it.") (citations omitted). The State's argument that it "presented overwhelming evidence of Appellant's guilt" begs the question under the harmless error standard: was the guilty verdict rendered in this trial unattributable to

the erroneous preclusion of Porfirio's entire defense? Clearly the inability to present *any* evidence or to cross-examine the State's witnesses about Porfirio's reasonable fear of imminent harm caused him harm.

¶27 The court's ruling deprived Porfirio "of the only real opportunity [he] might have had to introduce meaningful exculpatory evidence." *State v. Talmad*ge, 196 Ariz. 436, 441 (2000). As in *Talmadge*, "[t]he exclusion culminated in [his] conviction and lengthy prison sentence. Had the evidence been allowed, [he] might have been absolved. Without it, [he] had little hope." *Id.* The error is reversible.

¶28 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.

¶29 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 erroneous 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.

¶30 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.

¶31 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. The State argues that the requested jury instruction was "pointless" in light of the court's pretrial preclusion of Porfirio's entire defense. AB ¶ 39. This, of course, is a circular argument. But for the trial

court's abuse of discretion in precluding Porfirio's entire defense as a "sanction" for a misperceived disclosure violation, where there was none, the court might have correctly instructed the jury. But the court's earlier abuse of discretion does not make its later error in failing to properly instruct the jury "pointless." Rather, it compounds the harm and prejudice to Porforio.

¶32 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 supported by the slightest 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.'").

¶33 The State wrongly claims that Porfirio's justification instruction was properly precluded because the evidence he sought to introduce was insufficient to prove the harm he feared was "immediate," but the State again relies on an improper standard. It is axiomatic that "[t]he defense of duress is a question for the jury." *Esquibel*, 1978-NMSC-024, ¶ 9, 91 N.M. 498, 501. Moreover, a defendant "is entitled to an

instruction on any theory reasonably supported by the evidence." *Richter*, 402 P.3d 1016, ¶ 28 (quoting *State v. Rodriguez*, 192 Ariz. 58, ¶ 16 (1998)). The record need only contain "the slightest evidence" supporting the instruction. *State v. Lujan*, 136 Ariz. 102, 104 (1983). In *State v. King*, 225 Ariz. 87, ¶¶ 14-15 (2010), our Supreme Court held "[t]he defendant need not present evidence of each element of self-defense because the state bears the burden of proving 'beyond a reasonable doubt that the defendant did not act with justification'; thus the defendant need only present some evidence that he acted in self-defense to be entitled to a self-defense instruction." *Id*. (quoting A.R.S. § 13–205(A)). "The 'slightest evidence' is a low standard that has been defined in the self-defense context as 'a hostile demonstration, which may be reasonably regarded as placing the accused apparently in imminent danger of losing her life or sustaining great bodily harm.'" *King*, 225 Ariz. 87, ¶ 15 (quoting *Lujan*, 136 Ariz. at 104).

¶34 Once the defendant puts on the "slightest evidence" that would support a necessity defense, the burden shifts to the State to prove that the defendant was not justified in his belief. *See* A.R.S. § 13-205. Furthermore, the perceived threat need only be reasonable; it is not required to be real. *King*, 225 Ariz. 87, ¶ 15. Thus, the fact that Porfirio admitted to possessing a gun is not "overwhelming evidence of

guilt," as the State contends, unless and until the State also proves beyond a reasonable doubt that Porfirio's fear of imminent harm was unreasonable.

¶35 The issue of whether the threat was immediate is a question of fact for the jury. See *State v. Paxson,* 203 Ariz. 38, ¶ 18 (App. 2002) ("It [is] for the fact-finder at trial, and not the trial court, to choose between the competing inferences."); *cf. State v. Toscano*, 378 A.2d 755, 765 (N.J. 1977) ("No longer will there be a preliminary judicial determination that the threats posed a danger of 'present, imminent and impending' harm to the defendant or to another. In charging the jury, however, the trial judge should advert to this factor of immediacy...."); *Esquibel*, 576 P.2d at 1132–33 ("Under the circumstances of this case, the passage of two to three days between threat and escape does not suffice to remove the defense of duress from the consideration of the jury. What constitutes present, immediate and impending compulsion depends on the circumstances of each case.").

¶36 The State here attempts to shift the burden of proof onto Porfirio to prove the justification defense, but, just as this Court held in *Richter*, it is not Porfirio's burden to prove that his actions were justified by a preponderance of the evidence; rather, "justification defenses—like duress—are not affirmative defenses." *Richter*, 402 P.3d 1016, ¶ 31 (citing A.R.S. § 13-103). Where "evidence of justification ... is presented by the defendant, the state must prove beyond a reasonable doubt that the

defendant did not act with justification." *Richter*, 402 P.3d 1016, ¶ 31 (citing A.R.S. § 13–205(A); see also *King*, 225 Ariz. 87, ¶ 6.

¶37 The harm to Porfirio is plain here. "The right to offer the testimony of witnesses ... and present a defense is guaranteed by the Sixth Amendment to the United States Constitution and is a fundamental element of due process of law." *Delgado*, 174 Ariz. at 257. The court lacked jurisdiction to hear the State's procedurally defective motion by the plain language of the Rule 15.7(b), and despite that jurisdictional bar, the court ordered the most Draconian sanction available for disclosures that actually complied with both the duties and deadlines imposed by the rules of criminal procedure.

¶38 The court thus deprived Porfirio of his Constitutional due process right to present his defense at a trial. The offer of proof, confirmed by the State at the sanctions hearing, showed that the Mexican Mafia threatened Porfirio and told him to leave Maricopa County, then stalked Porfirio and his family to Tucson and had on at least one occasion threatened Porfirio via Duarte, in a shopping plaza parking lot, which indicates that the Mexican mafia was following Porfirio and/or Duarte as they went about their daily lives. 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.

¶39 A reasonable jury, given an opportunity to hear 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.

CONCLUSION

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

Dated: (Electronically filed) November 17, 2017.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 31.13(b)(2), Ariz. R. Crim. P., undersigned counsel hereby certifies that this Reply 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 6,469 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) November 17, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that Appellant's Opening Brief was e-served via the Court's electronic filing system on November 17, 2017, and two copies of the Appellant's Opening Brief will be deposited for mailing on November 20, 2017, to:

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and that one copy of Appellant's Opening Brief will be deposited for mailing on November 20, 2017, to:

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Dated: (Electronically filed) November 17, 2017.

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