DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellant,	)	1 CA-CR 09-0707
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
LARRY THOMAS FREIDAY, Appellee.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2003-021354-001 DT

The Honorable Warren J. Granville, Judge

VACATED AND REMANDED WITH INSTRUCTIONS

Richard M. Romley, Acting Maricopa County Attorney — Phoenix
By Lisa Marie Martin, Deputy County Attorney
Attorneys for Appellant

James J. Haas, Maricopa County Public Defender — Phoenix
By Thomas K. Baird, Deputy Public Defender
Attorneys for Appellee

N O R R I S, Judge

¶1 The State appeals from the superior court's order modifying[1] Larry Thomas Freiday's term of probation from lifetime

[1]In its briefing, the State repeatedly asserts the superior court "terminated" Freiday's probation under Arizona Rule of Criminal Procedure 27.4. The court, however, stated

to five years pursuant to Arizona Rule of Criminal Procedure 27.3 and *State v. Peek*, 219 Ariz. 182, 195 P.3d 641 (2008).[2] On appeal, the State argues, by modifying Freiday's probation, the superior court made an improper "end run" around the finality principles of Arizona Rule of Criminal Procedure 32; failed to find Freiday's conduct warranted a modification of probation; and gave Freiday a benefit he did not deserve because the dates of his offenses did not fully overlap with the *Peek* time frame. We do not need to address the State's arguments because the record clearly demonstrates Freiday's original sentence of

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numerous times it was modifying probation under Rule 27.3. Thus, we refer to the court's action as modifying probation.

[2]In *State v. Peek*, the Arizona Supreme Court vacated the defendant's sentence of lifetime probation for attempted child molestation, a second-degree dangerous crime against children ("DCAC"), because state law did not allow lifetime probation for such a crime when the defendant committed the offense. 219 Ariz. 182, 182, ¶ 1, 195 P.3d 641, 641 (2008). Effective January 1, 1994, the legislature removed Arizona Revised Statutes ("A.R.S.") section 13-604.01(I) (1989), which authorized lifetime probation for second-degree DCAC. *Id.* at 183, ¶ 8, 195 P.3d at 642. A few years later, the legislature amended A.R.S. § 13-902(E) (Supp. 1993) to expressly allow lifetime probation for second-degree DCAC. *Id.* at 184, ¶ 10, 195 P.3d at 643; 1997 Ariz. Sess. Laws, ch. 179, § 2 (1st Reg. Sess.) (effective date of act July 21, 1997). As a result, defendants who committed second-degree DCAC between January 1, 1994, and July 20, 1997, could not be sentenced to lifetime probation for those offenses. *Peek*, 219 Ariz. at 185, ¶ 19, 195 P.3d at 644. This decision refers to this particular three-and-a-half-year period as the "*Peek* time frame."

lifetime probation was proper and does not implicate *Peek*.[3] Thus, we vacate the superior court order modifying Freiday's probation term and remand for the reinstatement of lifetime probation.

FACTS AND PROCEDURAL BACKGROUND

¶2 A grand jury indicted Freiday on September 10, 2003, on six counts of sexual offenses against children for engaging in sexual contact with two minors. The counts in the indictment had different date ranges -- May 3, 1997, as the earliest date for any count and August 15, 2001, as the latest date for any count. The indictment included Count 1: sexual conduct with a minor, a class two felony and dangerous crime against children ("DCAC"), occurring between January 29, 1998, and January 29, 2000; and Count 3: molestation of a child, a class two felony and DCAC, occurring between May 1, 2000, and August 31, 2000.

¶3 On January 30, 2004, Freiday signed a plea agreement in which he agreed to plead guilty to an amended Count 1 of attempted sexual conduct with a minor, a class three felony and second-degree DCAC, and an amended Count 3 of attempted molestation of a child, a class three felony and second-degree

[3]The State asserts we have jurisdiction under A.R.S. § 13-4032(4) and (5) (2010). We do not need to decide whether this statute grants jurisdiction because, in our discretion, we accept this case as a special action because it presents an issue of first impression and of statewide importance that is likely to arise again. *See State ex rel. Dep't of Econ. Sec. v. Powers*, 184 Ariz. 235, 236, 908 P.2d 49, 50 (App. 1995).

DCAC. The date range for the charges in the plea agreement lacked the precision of the indictment and instead simply used the widest date range possible: between May 3, 1997, and August 15, 2001. During the colloquy when Freiday actually entered his guilty plea, the superior court questioned Freiday about the factual basis for each count and, in so doing, established the narrower time frames used in the indictment for each count subject to the plea agreement. As pertinent here, the plea colloquy was as follows:

> The Court: On or about January 29th -- between January 29th of 1998 and January 29th of the year 2000, did you attempt to have, either sexual intercourse or oral sexual contact with [D.F.]?
>
> The Defendant: What was that?
>
> The Court: All right. Between those two dates, did you knowingly have sexual intercourse or oral sexual contact with [D.F.]?
>
> The Defendant: Yeah.
>
> . . . .
>
> The Court: Was she under the age of 15 at the time?
>
> The Defendant: Yes.
>
> . . . .
>
> The Court: As to Count III, on or between May 1st of 2000 and August 31st of 2000, did you knowingly molest [D.F.], who was then also under the age of 15, by having

> sexual contact with her by touching any private parts, in Maricopa County?
>
> The Defendant: Yes.
>
> The Court: Is that a "yes?"
>
> The Defendant: Yes.

¶4 Despite the clarity of the time frames for each count at the change of plea hearing, at sentencing a different superior court judge used the wider date range from the plea agreement in summarizing the charges subject to the plea agreement. The judge sentenced Freiday to five years in prison for Count 1 and lifetime probation for Count 3.

¶5 Counsel for Freiday filed a notice on September 15, 2004, stating she would not file a petition for post-conviction relief under Rule 32. The court provided Freiday with time to file a pro per petition for post-conviction relief, but he did not do so.

¶6 Freiday completed his prison term December 29, 2007. Ten months later, the Arizona Supreme Court decided *Peek*. On April 16, 2009, the Maricopa County Adult Probation Office petitioned the superior court to modify Freiday's probation. The court granted the State 30 days to respond to the petition and advised the State if it wanted an evidentiary hearing, it "must state the factual issue disputed and confer with [the] Adult Probation Office to determine witnesses required."

Instead of requesting the evidentiary hearing, the State simply responded, conclusorily stating "the length of Defendant's probation term was not addressed by Peek." Notably, the State did not cite the indictment or the plea colloquy and did not analyze the two and a half months of overlap between the *Peek* time frame and the dates on the plea agreement. Counsel for Freiday filed a memorandum in support of the petition.

¶7 During a hearing on July 21, 2009, the superior court granted the State even more time to review the record to pinpoint when Freiday's conduct occurred:

> The Court: Ms. Mitchell [State's attorney], today was set as an oral argument, if you wanted to present evidence to try to better pinpoint that time frame, I would afford you that opportunity.
>
> . . . .
>
> Ms. Mitchell: So in that case, if the State is able to show then that there's a narrower time frame based upon reliable hearsay, the Court would allow the State an opportunity to do that?
>
> The Court: I would.
>
> Ms. Mitchell: Then I would ask the Court to allow us the opportunity in this particular case to do that and to look at the file.
>
> The Court: I will do that . . . . [T]he Court . . . will set a new date at the end of this afternoon.

¶8 Despite being given the opportunity -- really, a second opportunity -- to present "pinpoint" evidence, the State offered nothing at the subsequent hearing. Because it had no evidence to the contrary, the superior court "presume[d]" Freiday's conduct occurred within the *Peek* time frame and modified his probation term to five years.

DISCUSSION

¶9 The State's arguments are grounded on its assertion the superior court improperly modified probation. Because the record clearly demonstrates the conduct for which Freiday pled guilty and received lifetime probation -- attempted molestation of a child, a class three felony and second-degree DCAC -– occurred in 2000, well after the *Peek* time frame, we agree. Lifetime probation was proper.

¶10 Although we agree with the State, this entire appeal and the expenditure of taxpayer money for it could have been avoided by the State if it had reviewed the record and informed the superior court of the facts in the record. The superior court gave the State ample opportunity to present evidence Freiday's conduct fell outside the *Peek* time frame, but the State provided nothing, even though such information was readily available in the record. The State's failure to do so is not consistent with the efficient administration of justice. Additionally, the State continued to ignore the facts in the

record concerning the dates of Freiday's conduct, *see supra* ¶ 3, in its briefing to this court and did not mention these facts in its reply brief, even after the appellee's answering brief included them. Nevertheless, because of the clarity of the record, we vacate the superior court's order.[4]

CONCLUSION

¶11 For the foregoing reasons, we vacate the order modifying probation and remand to the superior court for the limited purpose of entering an order reinstating Freiday on lifetime probation.

/s/
_____
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge

[4]The State likely waived any argument relating to the *Peek* time frame, but we do not apply the waiver doctrine here. The waiver doctrine is a matter of procedure, not jurisdiction. *Town of S. Tucson v. Bd. of Supervisors of Pima Cnty.*, 52 Ariz. 575, 582, 84 P.2d 581, 584 (1938). An appellate court has discretion whether to apply waiver. *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 39, 945 P.2d 317, 350 (App. 1996). Courts often decline to apply waiver if "the unraised issue will dispose of the case on appeal." *Aldrich & Steinberger v. Martin*, 172 Ariz. 445, 447-48, 837 P.2d 1180, 1182-83 (App. 1992). We exercise our discretion and choose not to apply waiver here because the record is clear and will dispose of the case.