IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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JUDY MINLEY,
*Petitioner*,

*v.*

HON. CHRISTOPHER BROWNING, JUDGE OF THE
SUPERIOR COURT OF THE STATE OF ARIZONA,
IN AND FOR THE COUNTY OF PIMA,
*Respondent*,

*and*

THE STATE OF ARIZONA,
*Real Party in Interest*.

No. 2 CA-SA 2016-0006
Filed May 4, 2016

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Special Action Proceeding
Pima County Cause No. CR20131358002

**JURISDICTION ACCEPTED; RELIEF GRANTED**

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COUNSEL

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and

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Barbara LaWall, Pima County Attorney
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**MEMORANDUM DECISION**

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

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M I L L E R, Judge:

**¶1** Judy Minley seeks special action relief from the respondent judge's order precluding as irrelevant the testimony of expert witnesses in support of her defense to charges of felony murder and intentional or knowing child abuse. We accept jurisdiction and grant relief.

**Factual and Procedural Background**

**¶2** Minley and her boyfriend, James Robinson, have been charged with two counts of child abuse and first-degree murder in connection with the death of her four-year-old son. The state's homicide theory against Minley is limited to felony murder. The child abuse counts against each defendant allege direct abuse by beating and by failing to seek medical assistance. In separate trials, the state seeks the death penalty for both defendants.

**¶3** The events in question[1] began on March 20, 2013, when Minley allegedly struck her son several times with a sandal before instructing Robinson to continue to discipline the child. Robinson then beat the child for an extended time. The child's injuries leading to his death started with extensive trauma to the muscles, which caused in a serial, cascading fashion the release of potassium and other toxins into the blood, renal failure, cardiac arrest, and deprivation of oxygen to the brain. The respondent judge concluded it was "impossible to identify and isolate the exact number of blows" or "to determine which Defendant inflicted what specific blows to the victim." It accepted the opinions of the medical examiner and a pediatric intensivist that the injuries causing the child's death the following day were cumulative in effect rather than arising from a single injury.

**¶4** The state moved to preclude the testimony of three medical expert witnesses disclosed by Minley who would testify that Robinson's behavior the day he disciplined the child was unpredictable due to "emergent delirium" resulting from anesthetics and prescription painkillers administered during and after Robinson's wisdom teeth were removed that morning. The experts also would opine that the unusual effects were caused by his "[c]hronic solvent intoxication" from occupational exposure to solvents including jet fuel and his existing personality disorder. The state argued that evidence of "aberrant behavior" by Robinson was irrelevant and that the testimony was, in any event, speculative.

**¶5** The respondent judge granted the state's motions to preclude, citing *State v. Payne*, 232 Ariz. 360, ¶¶ 70-71, 306 P.3d 17,

[1]The court accepts, only for the purposes of addressing this petition, the facts found by the trial court in a hearing held pursuant to *Chronis v. Steinle*, 220 Ariz. 559, ¶ 20, 208 P.3d 210, 214 (2009) (defendant may request probable cause determination in capital case for alleged aggravating circumstances). Many of the facts are derived from lengthy statements Minley and Robinson provided to police when the child was taken to the hospital.

34 (2013),[2] for the proposition that, to convict Minley of child abuse, the state did not have to prove "a specific *mens rea*" as to whether the child abuse had occurred "under circumstances likely to produce death or serious injury." The respondent thus determined it was irrelevant whether Minley had "reason to know or suspect that Robinson would act as he did."

**Special Action Jurisdiction**

**¶6** We have broad discretion to accept jurisdiction of special actions arising out of capital cases. *State v. Arellano*, 213 Ariz. 474, ¶ 4, 143 P.3d 1015, 1017 (2006). Our exercise of special action jurisdiction generally is appropriate only when there is no "equally plain, speedy, and adequate remedy by appeal." Ariz. R. P. Spec. Actions 1(a). We recognize that Minley has a remedy by appeal should she be convicted following a jury trial. A.R.S. § 13-4033(A)(1). However, that fact does not foreclose our exercise of special action jurisdiction. *Nordstrom v. Cruikshank*, 213 Ariz. 434, ¶ 8, 142 P.3d 1247, 1250-51 (App. 2006). An appellate remedy may be inadequate if "trial would proceed in an incorrect manner." *Id.* We accept special action jurisdiction here, in part, because the error is plain and correcting that error may avoid the delay and expense caused by a retrial—one that is very likely to occur should Minley be convicted and raise this issue on appeal. *See id.*; *see also Cravens, Dargan & Co. v. Superior Court*, 153 Ariz. 474, 477, 737 P.2d 1373, 1376 (1987) (exercising special action jurisdiction because "[t]here is no justifiable reason" to require appeal when eventual reversal "inevitable"); *State ex rel. Collins v. Superior Court*, 129 Ariz. 156, 159, 629 P.2d 992, 995 (1981) (exercise of special action jurisdiction appropriate "to correct a plain and obvious error . . . [that] would have resulted in substantial delay").

**¶7** Further, the respondent judge based his ruling on a reading of *Payne* and A.R.S. § 13-3623 that Minley challenges as a

[2]This opinion was superseded by *State v. Payne*, 233 Ariz. 484, 314 P.3d 1239 (2013), which remains the same in relevant part, *see id.* ¶¶ 70-71. We cite this later version of *Payne* in the remainder of our decision.

matter of law. To resolve the issues presented, we must interpret recent authority from our supreme court affecting the application of the statute that is the core of the indictment. Because the application of a statute presents a question of law that is reviewed de novo, it is "particularly appropriate for review by special action." *Sierra Tucson, Inc. v. Lee ex rel. Cty. of Pima*, 230 Ariz. 255, ¶ 7, 282 P.3d 1275, 1277 (App. 2012). Finally, we observe that § 13-3623 has been the operative statute in prior homicide cases, which suggests its interpretation and application may occur in future cases. *See, e.g.*, *State v. West*, 238 Ariz. 482, ¶¶ 2-4, 362 P.3d 1049, 1053 (App. 2015); *State v. Jones*, 235 Ariz. 501, ¶¶ 2-3, 334 P.3d 191, 192 (2014); *State v. Villalobos*, 225 Ariz. 74, ¶¶ 2-8, 235 P.3d 227, 230-31 (2010). We further observe that the respondent judge's ruling, if erroneous, would significantly hamper Minley's constitutional right to present a complete defense. *See State v. Boyston*, 231 Ariz. 539, ¶ 55, 298 P.3d 887, 898 (2013) ("'[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.'"), *quoting Crane v. Kentucky*, 476 U.S. 683, 690 (1986). For these reasons, we accept special action jurisdiction.

**Discussion**

**¶8** The state charged Minley with felony murder pursuant to A.R.S. § 13-1105(A)(2) and two counts of child abuse pursuant to § 13-3623(A)(1). To convict Minley of intentional or knowing child abuse (and thus of felony murder), the state must prove that, "[u]nder circumstances likely to produce death or serious physical injury," she intentionally or knowingly "cause[d] a child . . . to suffer physical injury," "cause[d] or permit[ted]" the child to be injured, or "placed [the child] in a situation where . . . the child . . . is endangered." § 13-3623(A)(1); *see also* § 13-1105(A)(2); *West*, 238 Ariz. 482, ¶ 21, 362 P.3d at 1057.

**¶9** The respondent judge, relying on *Payne*, correctly observed that the state is not required to prove that Minley knew or intended that the circumstances of the abuse were "likely to produce death or serious physical injury." *See* 233 Ariz. 484, ¶¶ 70-71, 314 P.3d at 1260-61. The respondent extended *Payne* to conclude that "Minley cannot use the testimony of the experts in an effort to avoid criminal culpability pursuant to A.R.S. § 13-3623." Minley first

contends that the facts in *Payne* are "so dissimilar" that its application here would be "fundamentally unfair" to her defense. Second, although she agrees that the state's proof of circumstances likely to cause death or serious injury "does not require any *mens rea*," she contends that the precluded expert testimony goes to the knowledge or intent required for a conviction of child abuse. *See Payne*, 233 Ariz. 484, ¶ 72, 314 P.3d at 1261 (noting that conviction under § 13-3623(A)(1) requires proof of knowledge or intent).

**¶10** Therefore, the primary question before us is whether the evidence is relevant to whether Minley knew or intended that her child would be injured or endangered. Evidence is relevant if it has any tendency to make any fact of consequence to the action more or less probable. Ariz. R. Evid. 401; *see also* Ariz. R. Evid. 402 (relevant evidence admissible unless otherwise prohibited by law or rule). We review a trial court's decision whether to admit evidence for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004). But a court's exercise of that discretion must recognize that "'[t]he threshold for relevance is a low one.'" *State v. Leteve*, 237 Ariz. 516, ¶ 48, 354 P.3d 393, 406 (2015), *quoting State v. Roque*, 213 Ariz. 193, ¶ 109, 141 P.3d 368, 396 (2006). Moreover, there are no degrees of relevance—evidence is either relevant—and thus presumptively admissible—or it is not. *See United States v. Foster*, 986 F.2d 541, 545 (D.C. Cir. 1993). Courts may not "consider the weight or sufficiency of the evidence in determining relevancy and '[e]ven if a [trial] court believes the evidence is insufficient to prove the ultimate point for which it is offered, it may not exclude the evidence if it has even the slightest probative worth.'"[3] *Robinson v. Runyon*, 149 F.3d 507, 512 (6th Cir. 1998), *quoting Douglass v. Eaton Corp.*, 956 F.2d 1339, 1344 (6th Cir. 1992).

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[3]We reject the state's suggestion in its response and at oral argument that the proffered expert testimony is irrelevant because the "uncontroverted" evidence establishes Minley's guilt. The Constitution requires the state to prove to the jury beyond a reasonable doubt that Minley is guilty, *see In re Winship*, 397 U.S. 358, 364 (1970), and Minley is entitled to present a defense, *Boyston*, 231 Ariz. 539, ¶ 55, 298 P.3d at 898.

**¶11** Minley's defense, at its core, is that she did not know and could not have known that her son would be injured or that he would be endangered as a result of Robinson disciplining him. Evidence that she could not have predicted Robinson's behavior is plainly relevant to that defense because, based on that evidence, a jury could conclude that Minley had believed Robinson would not commit child abuse at all. The respondent judge thus erred in precluding the evidence as irrelevant to Minley's mental state.

**¶12** We note, however, that we address only one of several scenarios under which a jury theoretically could find Minley guilty of child abuse under § 13-3623(A). For example, the indictment alleges that Minley committed child abuse by striking her son or directly failing to seek medical assistance. We express no opinion whether the proposed expert testimony would be relevant in that scenario, or any other that we have not identified.

**¶13** We further observe that the proposed expert testimony is relevant to issues other than Minley's mental state. The absence of a *mens rea* requirement for the circumstances clause does not vitiate the state's burden to prove that the particular circumstances were likely to produce death or serious injury. *Payne*, 233 Ariz. 484, ¶ 70, 314 P.3d at 1260-61. The cases cited in *Payne* illustrate this distinction.

**¶14** In *State v. Johnson*, 181 Ariz. 346, 350, 890 P.2d 641, 645 (App. 1995), the petitioner challenged the factual basis for his guilty plea to child abuse under § 13-3623. In concluding there was sufficient evidence that he committed abuse under circumstances "'likely to produce death or serious injury,'" the court relied on the state's evidence showing the children had been left unsupervised in an unhealthy apartment without food or clothing, and in the presence of multiple people using liquid cocaine injected from needles accessible to the children. *Johnson*, 181 Ariz. at 350, 890 P.2d at 645. Equally important for this analysis, the court distinguished *State v. Greene*, 168 Ariz. 104, 107-08, 811 P.2d 356, 359-60 (App. 1991), in which this court reversed a conviction for child abuse because the state failed to produce sufficient evidence showing the apartment conditions had been likely to cause death or serious physical injury. *Johnson*, 181 Ariz. at 350, 890 P.2d at 645. Similarly,

the California Supreme Court, in holding its "under circumstances" statute does not involve actual knowledge by the defendant, still requires the jury to assess all evidence relevant to an objective determination of the circumstances. *People v. Sargent*, 970 P.2d 409, 418 (Cal. 1999). In that case, the defendant denied any awareness that his actions were likely to harm the prematurely born, four-month-old infant. *Id.* at 413-14. The court rejected the relevance of the defendant's subjective awareness, yet observed that facts supporting a particular circumstance could be highly relevant to the jury's objective determination:

> In this case for example, the jury reasonably would have considered Michael's tender age and fragile physical development, the degree of force used by defendant in violently shaking him on two different occasions, and the likelihood of great bodily harm or death created by that force as evidenced by the medical testimony and the injuries sustained. By contrast, if Michael had been a 17–year–old varsity linebacker, those facts would also have been "circumstances or conditions" the jury would consider.

*Id.* at 418.

**¶15** The state's proof of its allegation that the circumstances were likely to result in death or serious injury is subject to challenge through the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment as an integral aspect of Minley's constitutional right to present a complete defense. *See Boyston*, 231 Ariz. 539, ¶ 55, 298 P.3d at 898. Of course, such challenges are not limited to cross-examination of the state's witnesses. *See, e.g.*, *State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 240-41, 836 P.2d 445, 453-54 (App. 1992) (right to present complete defense implicated at pretrial discovery stage). Instead, the defendant may "offer evidence in his or her defense" as to the alleged circumstances. Ariz. R. Crim. P. 19.1(a)(5). Evidence about Robinson's behavior is relevant to that determination.

**¶16** Because the evidence about Robinson's behavior and its predictability is relevant to whether Minley committed child abuse pursuant to § 13-3623(A)(1), the respondent judge erred in precluding the evidence as irrelevant. The grant of relief on special action is therefore appropriate. *See* Ariz. R. P. Spec. Actions 3(c).

## Disposition

**¶17** For the reasons stated, we accept jurisdiction and grant relief. We vacate the respondent judge's order precluding the expert witnesses' testimony.