

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**



DIVISION ONE
FILED: 12/14/10
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

STATE OF ARIZONA,) 1 CA-CR 09-0710
)
Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
GABRIEL MIRANDA LIZARRAGA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2001-012583

The Honorable Warren J. Granville, Judge

AFFIRMED AS MODIFIED

William Montgomery, Maricopa County Attorney Phoenix
By Lisa Marie Martin, Deputy County Attorney
Attorneys for Appellant

Maricopa County Public Defender Phoenix
By Christopher V. Johns, Deputy Public Defender
Attorneys for Appellee

I R V I N E, Judge

¶1 The State timely appeals from the trial court's order modifying Gabriel Miranda Lizarraga's probation from a life term to five years pursuant to Arizona Rule of Criminal Procedure

27.3 and *State v. Peek*, 219 Ariz. 182, 195 P.3d 641 (2008).¹ For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 A grand jury indicted Lizarraga on three counts of sexual offenses against a minor, committed between June 2, 1997, and June 2, 1998. On October 15, 2001, Lizarraga pled guilty to Count 1: Attempted Sexual Conduct with a Minor, a class 3 felony and an attempted DCAC. The plea was entered, and on December 10, 2001, the court imposed a sentence of lifetime probation.

¶3 Sometime in 2009, the Adult Probation Office ("APO") began filing petitions to modify or discharge probation for probationers whose attempted DCAC crimes occurred during the *Peek* timeframe. In April 2009, the court notified the parties that APO filed a petition to discharge Lizarraga's probation. The State responded, objecting to modification. Lizarraga filed a memorandum in support of termination.

¹ In *Peek*, 219 Ariz. at 182, ¶ 1, 195 P.3d at 641, the Arizona Supreme Court held that a defendant could not be sentenced to lifetime probation for second-degree Dangerous Crimes Against Children ("attempted DCAC") committed between January 1, 1994, and July 20, 1997 ("*Peek* timeframe"). It reasoned that before 1994, lifetime probation for attempted DCAC was available under A.R.S. § 13-604.01(I). *Id.* at 183, ¶ 8, 195 P.3d at 642. The legislature deleted § 13-604.01 in 1994, and supplanted it with A.R.S. § 13-902(E), which did not apply to attempted DCAC. *Id.* Effective July 21, 1997, the legislature reinserted language in A.R.S. § 13-902(E) that reinstated lifetime probation for attempted DCAC. During the *Peek* timeframe, five years was the maximum term of probation permitted for attempted DCAC.

¶14 At a consolidated hearing on July 21, 2009, the trial court heard arguments on this and several other *Peek* cases. It decided to examine the factual bases of each case individually and gave the State an opportunity to "pinpoint more precisely the dates of the offenses." When given the opportunity to do so at a hearing on September 2, 2009, the State presented no additional evidence to narrow the dates. The trial court reasoned that the rule of lenity required it to assume that the offense was committed within the *Peek* time frame and modified Lizarraga's probation to a term of five years. It ordered APO to calculate whether Lizarraga has completed that term and to submit an Order of Discharge, "if warranted."

DISCUSSION

¶15 We exercise special action jurisdiction because the State has no equally plain, speedy and adequate remedy by way of appeal, and it raises an issue of first impression involving purely legal questions of public importance that are pending in other cases or likely to recur. *See Jackson v. Schneider*, 207 Ariz. 325, 327, ¶ 5, 86 P.3d 381, 383 (App. 2004); *State v. Dean*, 1 CA-CR 09-0705 (Ariz. App. Dec. 9, 2010).

¶16 The State incorrectly asserts that Lizarraga's probation was terminated early. The record shows that his probation was modified pursuant to Rule 27.3. Therefore, the facts and issues presented here are virtually identical to those

