DIVISION ONE
FILED: 12/01/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

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

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| STATE OF ARIZONA, | ) | No. 1 CA-CR 11-0101 |
| | ) | |
| Appellant, | ) | DEPARTMENT B |
| | ) | |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication - |
| JOSEPH DOUGLAS ROBERTS, | ) | Rule 111, Rules of the |
| | ) | Arizona Supreme Court) |
| Appellee. | ) | |
| | ) | |

Appeal from the Superior Court in Apache County

Cause No. CR2010-047

The Honorable Donna J. Grimsley, Judge

**REVERSED AND REMANDED**

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Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division

And

William G. Montgomery, Maricopa County Attorney — Phoenix
By Adam M. Susser, Deputy County Attorney
Attorneys for Appellant

David J. Martin — Lakeside
Attorney for Appellee

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**S W A N N**, Judge

**¶1** The day before the preliminary hearing in a capital murder case, prosecutors authorized their investigators to meet with Joseph Roberts, the in-custody Defendant -- without notice to his counsel -- to discuss a plea offer and persuade him of the risks of proceeding with the preliminary hearing. Defendant and his attorney claimed that the prosecution's intrusion caused irreparable harm to their relationship and any future attorney-client relationship. Following an evidentiary hearing, the trial court dismissed all charges with prejudice. Though we find that the prosecution's conduct violated Defendant's Sixth Amendment right to counsel at the critical stage of plea negotiations and intruded upon defense counsel's role, we conclude that the extreme remedy of dismissal with prejudice is unsupported by the record. We therefore reverse the order dismissing the case.

*FACTS AND PROCEDURAL HISTORY*[1]

**¶2** During the years spanning 2007-2009, three homicides occurred in Apache County for which William Inmon became the primary suspect. Beginning in August 2009, in connection with investigations surrounding a missing teenager, Apache County

[1] We review the facts in the light most favorable to sustaining the superior court's decision. *See State v. Hansen*, 156 Ariz. 291, 294, 751 P.2d 951, 954 (1988).

Attorney's Office investigator Brian Hounshell[2] began a series of interviews with Inmon during which Inmon confessed to the teenager's murder and implicated Joseph Roberts in another murder.

**¶3** This was not the first time Defendant had contact with Inmon. In late 2007, Sergeant Spivey with the Apache County Sheriff's Office ("Sheriff's Office") interviewed Defendant as part of the investigation into the death of one of Inmon's victims, W.M., after Defendant was seen in a van with tires that appeared to match the tracks left at the scene of W.M.'s murder. Defendant denied any involvement during the 2007 interview.

**¶4** Spivey interviewed Defendant again in September 2009 after Defendant was seen driving a Corvette registered to D.A., whose disappearance the Sheriff's Office had been investigating. Defendant denied any involvement in D.A.'s disappearance and claimed he got the Corvette from Inmon. Defendant then met with Sheriff's Office Sergeant Scruggs that same day and admitted involvement in D.A.'s disappearance. Later in September 2009, Spivey and Scruggs discussed the W.M. case with Defendant, and Defendant admitted being present at and participating in W.M.'s

[2] Hounshell was the elected Apache County Sheriff during the early investigation into the death of victim W.M. In October 2007, he resigned his position and subsequently began working as an investigator for the Apache County Attorney's Office.

murder. He also admitted to helping Inmon remove D.A.'s body from his residence and dispose of it.

**¶5** After an initial appearance on September 26, 2009, the Apache County Attorney's Office filed a complaint charging Defendant with First Degree Murder, Conspiracy, Theft of a Means of Transportation, Mutilating a Human Body, Concealment of a Dead Body, Tampering with Physical Evidence, and five counts of Hindering Prosecution for his alleged involvement in the deaths and disposal of two victims between 2007 and 2009.[3]

**¶6** Because of a conflict, Defendant's original appointed counsel was removed and David J. Martin was appointed on September 30, 2009. Defendant moved to continue the preliminary hearing four times, and it was ultimately held on February 5, 2010. At the February 5 preliminary hearing in the Round Valley Justice Court, Defendant's cross-examination of Hounshell revealed that Hounshell and Investigator Jerry Jaramillo had met with Defendant in jail the day before the hearing.[4]

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[3] The First Degree Murder and Conspiracy counts relate to Defendant's alleged role in W.M.'s death. The Theft of a Means of Transportation, Concealment of a Dead Body, and Tampering with Physical Evidence counts relate to Defendant's alleged role in the disposal of D.A.'s body and theft of D.A.'s Corvette.

[4] At the start of this preliminary hearing, Apache County prosecutor Martin Brannan sought to make a record of the plea offered to Defendant -- First Degree Murder and Theft of a Means of Transportation with concurrent sentences of 25 years to life -- and that the offer would end "as soon as the first witness is sworn"; he then discussed the purported parole eligibility of

**¶7** "[O]f [his] own accord" Hounshell met with Defendant because he wished to "visit[] with him about [the upcoming preliminary] hearing" because he "felt sorry for him, that he wasn't given all the information on the deal we offered with the evidence we had." Before he went to the jail, Hounshell asked County Attorney Michael Whiting and Chief Deputy Martin Brannan if he "could go there." Brannan told him that he "needed to Mirandize [Defendant] if [he] was going to talk to him"; Brannan and Hounshell then discussed the offer.

**¶8** Brannan objected to Hounshell's further testimony about the meeting, arguing that it was not relevant to the issue of probable cause. Defendant argued in response that his right to a probable cause hearing was "absolutely mangled" and "tainted . . . so bad that it has been compromised." He contended that the continued questioning was relevant because it had "hampered [his] ability to present evidence and engage in a reasonable probable cause determination because of the intimidation . . . perpetrated . . . in a calculated fashion." The court allowed the questioning to continue. Hounshell testified that he told Defendant that if the preliminary hearing was held, "the plea agreement would be basically off the table,

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this plea versus what Defendant would face after conviction at trial. Defense counsel's response, "Hogwash! It is hogwash!" was followed with an oral motion to dismiss "on the grounds of prosecutorial misconduct, one piece of which we have just seen. And I intend to present additional pieces . . . ."

and that they could seek natural life or the death penalty," and that Defendant's wife was possibly facing prosecution for her involvement. Defendant said "very little" at the meeting and did not testify at the preliminary hearing.

**¶9** Defendant again moved to dismiss for prosecutorial misconduct. The court issued an order on March 3, 2010, stating that Defendant's motion was premature and that it did not have jurisdiction to address the issues raised. The preliminary hearing was continued to March 19, 2010, and at the conclusion of testimony from Spivey and Scruggs, the court found that probable cause existed and bound the case over to the Apache County Superior Court.

**¶10** Defendant was arraigned in Superior Court on March 29, 2010. He then moved for review of the preliminary hearing, arguing that Apache County's conduct the day before the February 5 hearing resulted in denial of Defendant's right to "have a meaningful and confident relationship with defense counsel to confer and formulate a meaningful offer of proof because of the impact of the State's intrusion into the attorney-client relationship." Defendant contended that the justice court should have disqualified Apache County from the prosecution and that the conduct warranted dismissal of all charges. The state took the position that it had not violated Defendant's rights.

**¶11** At a June 8, 2010 Case Management Conference, the court disqualified Apache County, holding that there appeared to have been "a willful abridgment of the Defendant's 6th amendment right to counsel by the State." The court declined to rule on the pending motions until a new agency was appointed to represent the state. The Maricopa County Attorney's Office ("MCAO") accepted the case and filed responses to Defendant's motions, arguing that there was no violation of Defendant's Sixth Amendment right to counsel and, alternatively, that even if there had been a violation, the remedy should be exclusion of information obtained at the February 4 meeting, not dismissal.

**¶12** The court heard oral argument on September 27, 2010, during which Defendant requested that the court conduct a "*Warner* hearing" to "determine whether or not the actions of the former prosecutor on this case . . . rose to the level where it effectively or functionally interfered with [his] right to effective assistance of counsel." Without labeling it a "*Warner* hearing," the court agreed to set a hearing on two issues: (1) "[W]hen the investigators went in and spoke to [Defendant], was that in violation of the Sixth Amendment"; and (2) "Did that then affect [Defendant's] right to counsel to the extent that he can't be represented adequately in this matter."

**¶13** At the hearing, the court listened to the recording of the meeting. Hounshell testified that in his remark "[i]f you

want to waive your attorney . . . waive the hearing, you need to get with your attorney today,"[5] he mistakenly said "attorney" when he meant to say "hearing." He testified that his intent was not to have Defendant waive his attorney, but that he was partially motivated by his belief that counsel's "background with clients is poor amongst the criminal field."[6] Hounshell further testified that he "just wanted him to know what he was up against and to know that [waiving the preliminary hearing] was his decision; to make sure he had all the information that he needed to make that decision . . . ." Hounshell also testified that he "made a mistake" in relaying the plea to Defendant when he stated that it was "25 years" and that Defendant "would avoid natural life."

**¶14** Defendant testified that he did not think he had a choice about meeting with Hounshell and that Hounshell intimidated him "[t]hroughout the interview." Defendant did not articulate how he was intimidated. As to the standard *Miranda*

[5] The ellipsis in the quoted language does not indicate an omission. There is inconsistency in the record as to the punctuation between the clauses "waive your attorney" and "waive your hearing" in this statement; the meeting transcript employs an ellipsis in between, but the court's findings employ a comma. While this may seem a trivial point, the use of an ellipsis more accurately reflects the pause between the clauses and therefore better elucidates the speaker's intended message.

[6] Hounshell never voiced his belief about defense counsel's reputation to Defendant during the meeting, nor did he discuss his motivations for initiating the meeting.

warnings Hounshell administered, Defendant testified that they "caught me off guard," because "I thought possibly that they had, you know, taken my attorney away . . . and were asking me if I wanted another," but ultimately Defendant "didn't know what [Hounshell] was getting at." When Hounshell told him that it would "be a tougher road" for him if he proceeded with the hearing, Defendant stated he felt "scared" that he "would end up being mistreated in some way." Regarding Hounshell's misstatement that the plea offer was 25 years and not 25 years to life, Defendant testified that he believed he was being lied to, but did not know who was lying -- Hounshell or his own attorney -- and that this impacted him "a little bit." He testified that it would inhibit his communications "[i]n a way" because he would wonder if it was a "he says-she says kind of a competition between [counsel] and Hounshell."

**¶15** Defendant stated that Hounshell's references to the death penalty made him "very scared" and the mention of Defendant's wife's pregnancy -- which resulted in a miscarriage -- was "[a] little unnerving." When Hounshell said the words "waive your attorney . . . waive your hearing," Defendant's testimony was that he did not interpret them as mistaken and that he felt Hounshell wanted him to "get rid of my attorney and go to the prelim and, you know, forego it by myself."

**¶16** Finally, Defendant testified that Hounshell's statement concerning waiver of counsel caused him to think he was being lied to and that this impacted the nature of his relationship with counsel: "I feel that –- that I couldn't trust you enough to tell you what I'm thinking along the lines of the case; things of that nature." When asked whether the appointment of another attorney would remedy this, Defendant stated "[n]ot really, no . . . [b]ecause it would just be another State appointed attorney. I don't really see the difference."

**¶17** The meeting between Hounshell and Defendant lasted 9.5 minutes. Defendant made no incriminating statements during the meeting and said little more than "uh huh" and "nuh uh" in response to Hounshell's and Jaramillo's statements. Defense counsel was not contacted before the meeting.

**¶18** The court found:

> The State's actions in this case clearly violated the Defendant's 6th Amendment rights in that the State intruded into and attempted to undermine and control the relationship between Defendant and his attorney. The Court is appalled by the outrageous and unethical behavior of the Apache County Attorney's office.
>
> The Court finds that the damage done to the attorney client relationship is prejudicial and irreparable, even if new counsel is appointed as Defendant's trust in the system has been betrayed. The Court further finds that the public interest has been disserved by the conduct . . . .

**¶19** The court dismissed all charges, concluding that "the flagrant and manipulative subversion" of Defendant's Sixth Amendment rights could only be remedied by dismissal with prejudice.

**¶20** The state timely appeals. We have jurisdiction under Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12–120.21(A)(1), 13–4031 and –4032(1).

*STANDARD OF REVIEW*

**¶21** "We review a trial court's ruling on a motion to dismiss for an abuse of discretion." *State v. Moody,* 208 Ariz. 424, 448, ¶ 75, 94 P.3d 1119, 1143 (2004) (citing *Hansen*, 156 Ariz. at 294, 751 P.2d at 954). A trial court abuses its discretion when the decision is legally incorrect or unsupported by the record. *State v. Peralta*, 221 Ariz. 359, 361, ¶ 3, 212 P.3d 51, 53 (App. 2009) (citing *State v. Chapple,* 135 Ariz. 281, 297, 660 P.2d 1208, 1224 (1983)). We defer to the trial court's factual findings unless they are clearly erroneous, but we are not bound by the trial court's legal conclusions. *State v. O'Dell*, 202 Ariz. 453, 456-57, ¶ 8, 46 P.3d 1074, 1077-78 (App. 2002) (citations omitted).

*DISCUSSION*

**¶22** In his motion to dismiss, Defendant asserted that he was denied his Sixth Amendment right to counsel because of Apache County's conduct. He argued both that Apache County's

conduct undermined "any continued meaningful relationship" with counsel and that it was an intrusion into the attorney-client relationship, thereby permanently denying him effective assistance of counsel.[7] The state contends that there was no Sixth Amendment violation at all and that even if there was, there was no showing of prejudice to Defendant sufficient to support dismissal with prejudice. We agree with Defendant that Apache County's conduct interfered with his Sixth Amendment right to counsel at a critical stage of the proceedings and, like the superior court, we are appalled by Apache County's conduct. But we agree with the state that the record does not reveal the prejudice to Defendant necessary to warrant dismissal with prejudice.

## *I. APACHE COUNTY'S CONDUCT DENIED DEFENDANT HIS SIXTH AMENDMENT RIGHT TO COUNSEL.*

### A. Defendant Was Entitled to Presence of Counsel at the Critical Stage of Plea Negotiations.

#### 1. Apache County's Conduct Did Not Intrude Into the Confidentiality of the Relationship Between Defendant and Defense Counsel.

**¶23** It is elementary that the Sixth Amendment to the United States Constitution and Article 2, Section 24 of the Arizona Constitution guarantee criminal defendants the right to

[7] A criminal defendant may not assert a prospective claim of ineffective assistance of counsel. *See State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20, 153 P.3d 1040, 1044 (2007). Thus, we do not address the part of Defendant's argument relating to the potential ineffectiveness of defense counsel.

assistance of counsel. The right to effective representation serves to protect a criminal defendant's right to a fair trial and to ensure fairness in the adversarial process. *State v. Carriger*, 143 Ariz. 142, 148-49, 692 P.2d 991, 997-98 (1984); *see also State v. Pecard*, 196 Ariz. 371, 377, ¶¶ 26-27, 998 P.2d 453, 459 (App. 1999).

**¶24** Defendant relies heavily on *State v. Warner*, 150 Ariz. 123, 722 P.2d 291 (1986), to support his claim that Apache County's conduct violated his Sixth Amendment right to assistance of counsel. This reliance is misplaced because *Warner* and the associated line of cases stand for the proposition that a criminal defendant's right to assistance of counsel includes "protection against improper intrusions by the prosecutor or other government agents *into the confidential relationship* between a defendant and his attorney." *Id.* at 127, 722 P.2d at 295 (emphasis added). Likewise, in *State v. Moody*, the Supreme Court acknowledged the right articulated in *Warner* and further recognized that the "relevant inquiry . . . is whether the state interfered with 'the *confidential* relationship between defendant and his attorney.'" 208 Ariz. at 448, ¶ 78, 94 P.3d at 1143 (emphasis in original) (citations omitted).

**¶25** Though Apache County intruded upon the *role* of defense counsel, it did not invade the *confidentiality* of the relationship as in *Warner* and in *Moody*. There is no evidence

that the state acquired the confidences between Defendant and counsel or that it limited Defendant's right to confer in private with his attorney -- the state neither received nor sought confidential communications between Defendant and counsel.[8]

2. *Montejo v. Louisiana* Does Not Justify Apache County's Conduct.

**¶26** The state urges that *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009), provides the justification for Apache County's conduct. We disagree. While it is true that *Montejo* permits law enforcement to initiate contact with and question a represented defendant so long as defendant validly waives the Sixth Amendment right to counsel, *Montejo* addresses a defendant's right to counsel in the context of *interrogation* by police. Here, it is undisputed that Defendant's Sixth Amendment right to counsel had attached and that everyone involved knew Defendant was represented. But the validity of a waiver is not at issue in this appeal. The state concedes that the contact between Defendant and the Apache County investigators was not an interrogation, that they did not meet with Defendant to elicit incriminating information, and that no incriminating disclosures

[8] Even if we were to employ a *Warner* analysis, we would reach the same conclusion. While the conduct was deliberate, there was nothing to make use of, the state did not benefit in any way, and there was no resulting prejudice to Defendant's fair trial rights.

resulted. The "three layers of prophylaxis" provided by the "*Miranda-Edwards-Minnick* line of cases" discussed by the Court and cited by the state to support its application of *Montejo* are grounded in the understanding that *Minnick* protects the *Edwards* rights, *Edwards* protects the *Miranda* rights, and the *Miranda* rights are triggered only by custodial interrogation.[9] *Id.* at 2089-90. This distinction alone is sufficient to foreclose *Montejo*'s applicability here -- *Montejo* simply cannot justify Apache County's conduct because this was not an interrogation.

3. The Investigators Impermissibly Engaged in Plea Negotiations with Defendant in Violation of His Sixth Amendment Right to Counsel at a Critical Stage.

**¶27** The Sixth Amendment right to counsel applies at all "'critical stages' of the criminal process." *Iowa v. Tovar*, 541 U.S. 77, 87 (2004) (citing *Maine v. Moulton,* 474 U.S. 159*,* 170 *(*1985); *United States v. Wade,* 388 U.S. 218, 224 (1967)). Plea negotiations have long been recognized as a critical stage of prosecution at which criminal defendants are entitled to effective assistance of counsel. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 *(*2010) (citing *Hill v. Lockhart*, 474 U.S. 52, 57 (1985)); *see also McMann v. Richardson*, 397 U.S. 759, 770-71 (1970).

[9] Under *Edwards v. Arizona*, 451 U.S. 477 (1981), once such a defendant has invoked his *Miranda* rights, interrogation must stop. And under *Minnick v. Mississippi*, 498 U.S. 146 (1991), no further interrogation may take place until counsel is present.

**¶28** Counsel's function is that of an assistant to the defendant who has duties that include advocating the defendant's cause, consulting with defendant regarding important decisions, and keeping defendant informed of important developments in the case. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984). "Government violates the right to effective assistance [of counsel] when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Id.* at 686 (citing *Richardson*, 397 U.S. at 771 n.14). It is fundamental to the role of defense counsel that he or she be able to competently advise a criminal defendant regarding the advisability of accepting a plea offer and the consequences of rejecting such an offer. *See Richardson*, 397 U.S. at 770-71; *Strickland*, 466 U.S. at 686.

**¶29** Apache County's conduct undoubtedly intruded upon counsel's role as an advocate for Defendant. Hounshell sought to encourage Defendant to accept a plea offer from the position of both the prosecution and defense. Hounshell did not simply tell Defendant about the offer, he proceeded to counsel Defendant about his view of the consequences of failing to take it -– and he actually misrepresented the offer as a simple 25-year offer rather than the 25-to-life offer that was actually made. Hounshell began the meeting by telling Defendant that he simply wanted "to explain a couple things about court to you"

and inform him of "the benefits of not going to a preliminary hearing." These communications fall within the province of defense counsel –- not the state. And Hounshell's cautionary statements that it was Defendant's choice to waive his preliminary hearing fail to mitigate Apache County's brazen disregard of Defendant's right to have his attorney be both communicator and advisor regarding the plea offer and waiver of preliminary hearing.

*II. DEFENDANT WAS NOT ENTITLED TO A MEANINGFUL RELATIONSHIP WITH HIS ATTORNEY, AND THE MISTRUST AND LACK OF CONFIDENCE HE ALLEGES ARE INSUFFICIENT TO ESTABLISH THE REQUISITE PREJUDICE.*

A. Defendant's Lack of Trust and Confidence in His Attorney is Insufficient to Establish the Harm Necessary to Support Dismissal with Prejudice.

**¶30** It is well settled that the Sixth Amendment right to counsel does not entitle a criminal defendant to counsel of choice nor to a "meaningful relationship" with counsel. *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983); *State v. Cromwell*, 211 Ariz. 181, 186, ¶ 28, 119 P.3d 448, 453 (2005). And "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *United States v. Cronic*, 466 U.S. 648, 658 (1984). Our inquiry,

therefore, concerns not only the fact of a violation, but its effect on Defendant's ability to receive a fair trial.

**¶31** When constitutional error exists, there are limited circumstances in which a defendant has no burden of showing prejudice from denial of effective assistance of counsel. *Cronic*, 466 U.S. at 659 n.25 (citing *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Brooks v. Tennessee*, 406 U.S. 605, 612–13 (1972); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963) (per curiam); *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Williams v. Kaiser*, 323 U.S. 471, 475–76 (1945)). Such circumstances arise when counsel is totally absent or is prevented from assisting the accused during a critical stage. *Id.*

**¶32** It is true in this case that plea negotiations represent a critical stage, and that counsel was not present during Hounshell's attempt to engage in those negotiations. But it is also true that Hounshell's visit did not result in a plea, and counsel was able to address the violation and preserve the integrity of the proceedings before any harm resulted. Here, Defendant's basic claim is that Hounshell's visit shook his confidence in his lawyer and in defense lawyers generally. That is insufficient to justify dismissal with prejudice.

**¶33** "When there is a complete breakdown in communication or an irreconcilable conflict between a defendant and his appointed counsel, that defendant's Sixth Amendment right to counsel has been violated," if the trial court fails to provide a remedy. *State v. Torres*, 208 Ariz. 340, 342, ¶ 6, 93 P.3d 1056, 1058 (2004). *See also Peralta*, 221 Ariz. at 361, ¶ 5, 212 P.3d at 53. It is defendant's burden to prove "a genuine irreconcilable difference with trial counsel or that there was a total breakdown in communication."[10] *Peralta*, 221 Ariz. at 361, ¶ 5, 212 P.3d at 53 (citing *Paris-Sheldon*, 214 Ariz. at 505, ¶ 14, 154 P.3d at 1051). A defendant's loss of trust or confidence in counsel is insufficient for an appointment of new

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[10] The enumerated factors in the choice-of-counsel analysis include:

> whether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and the quality of counsel.

*State v. Paris-Sheldon*, 214 Ariz. 500, 505, ¶ 14, 154 P.3d 1046, 1051 (App. 2007) (citing *State v. LaGrand*, 152 Ariz. 483, 486-87, 733 P.2d 1066, 1069-70 (1987)). While the trial court did not conduct a hearing to explicitly address these factors, the evidence adduced at the evidentiary hearing and the resulting findings nonetheless demonstrate consideration of the enumerated factors.

counsel. *Paris-Sheldon*, 214 Ariz. at 505, ¶ 14, 154 P.3d at 1051.

**¶34** Defendant has alleged irreparable harm to his relationship with current counsel and also to any future counsel on the ground that "it would just be another State appointed attorney. I don't really see the difference." To reach the issue with future counsel, Defendant must have first established an irreconcilable conflict or total breakdown of communication with present counsel. He has not done so.

**¶35** Defendant's testimony at the evidentiary hearing falls far short of establishing a complete, irremediable disintegration of his relationship with defense counsel and does not lead by logical extension to the entire defense bar such that no attorney could ever effectively represent him. His assertions regarding the impact of Apache County's conduct on his relationship with his attorney were tepid and vague. In response to questioning about the effect of *Miranda* warnings, he testified that he "thought possibly that they had, you know, taken my attorney away," and "didn't know exactly what [Hounshell] was getting at." As to Hounshell's statements about the "tougher road" Defendant was facing without waiving preliminary hearing, he "was confused on whether or not [he]

even had an attorney at the time."[11] Regarding Hounshell's misstatements about the plea offer, Defendant testified that it made him feel that he was possibly being lied to by his attorney, but that this only impacted him "a little bit." He went on to explain that the "little bit" of impact made him question counsel's judgment and inhibited the relationship with counsel "in a way" -- in a way that he would not be sure if counsel was telling the truth. Defendant concluded his testimony by stating that it was Hounshell's testimony about defense counsel's own conflicting position on the preliminary hearing that left him feeling that he was being lied to. He testified that this feeling would prevent him from telling his attorney what he was thinking.

**¶36** Defendant did not waive his preliminary hearing, fire his attorney, or take a plea as a result of the conduct. Despite his assertions that he cannot trust his attorney and that appointing any other attorney would be futile, Defendant never requested a new attorney, never sought to hire private counsel, never requested to represent himself, and never requested his attorney withdraw in the 21 months since the preliminary hearing took place. Counsel has continued to

[11] Hounshell made one reference to Defendant "getting rid" of his attorney in the "waive your attorney . . . waive the hearing" statement, but made five statements suggesting Defendant contact his attorney.

represent Defendant without objection at all subsequent proceedings up to and including this appeal. There is no evidence in the record that counsel has done anything less than actively and enthusiastically represent Defendant and no evidence of disagreement or genuine discord between them. While counsel was not present for the meeting, he communicated the correct plea to Defendant before the meeting with Hounshell and he was present in court with Defendant the next day at the preliminary hearing when the prosecution restated the plea. None of the complaints about the relationship with counsel derive from counsel's or Defendant's own failings or errors in the process -- Defendant's argument relies wholly on the effect of 9.5 minutes of external pressure on the interpersonal relationship with counsel that began four months before.

**¶37** Even if Defendant's prospective mistrust in all attorneys was a sufficient ground to find harm from an alleged Sixth Amendment violation, Defendant's own testimony is that it was not the actual misconduct, but rather later testimony he elicited about the motivations for the misconduct that gave rise to the incurable mistrust. For his claim to be meritorious, the misconduct must have been the cause of the harm.

**¶38** If Defendant's subjective loss of trust or confidence in counsel is insufficient to warrant appointment of a new attorney, *see Paris-Sheldon,* 214 Ariz. at 505, ¶ 14, 154 P.3d

1051, then *a fortiori* a loss of trust or confidence in counsel is insufficient to justify dismissal with prejudice. The alleged breakdown of the attorney-client relationship could have been addressed effectively by counsel's own assurances to Defendant that he was committed to Defendant's defense and to continued representation, clarification by the court as to Defendant's rights or appointment of a new attorney, and clarification of the offer by the County Attorney.

**¶39** We conclude that Defendant has failed to establish a completely fractured relationship with his attorney. His alleged mistrust in all attorneys and the system is inadequate to establish the requisite prejudice.

*III. DISMISSAL WITH PREJUDICE IS UNSUPPORTED BY THE RECORD.*

**¶40** The discretion to dismiss a case with or without prejudice lies with the trial court. *State v. Gilbert*, 172 Ariz. 402, 404, 837 P.2d 1137, 1139 (1991) (citing *State ex rel. Berger v. Superior Court*, 111 Ariz. 335, 336, 529 P.2d 686, 687 (1974)). The Rules of Criminal Procedure favor dismissal without prejudice, and dismissal with prejudice may not be ordered unless the interests of justice require it. *Id.* (citing *Quigley v. City Court of Tucson*, 132 Ariz. 35, 36, 643 P.2d 738, 739 (App. 1982)); Ariz. R. Crim. P. 16.6(d). The trial court must make a reasoned finding that it is in the interests of justice to dismiss with prejudice. *State v. Garcia*, 170 Ariz.

245, 248, 823 P.2d 693, 696 (App. 1991); *accord Gilbert*, 172 Ariz. at 404, 837 P.2d at 1139. This finding must be "based on a particularized finding that to do otherwise would result in some articulable harm to the defendant." *State v. Wills*, 177 Ariz. 592, 594, 870 P.2d 410, 412 (App. 1993).

**¶41** We have held that because the "interests of justice" finding serves to ensure that the court properly balances society's and the defendant's conflicting interests, "[t]he court's duty is satisfied as long as it has considered the relevant competing interests of the defendant and the state in light of the particular circumstances of each case." *State v. Huffman*, 222 Ariz. 416, 420-22, ¶¶ 12-15, 215 P.3d 390, 394-96 (App. 2009). While we agree that Apache County's conduct violated Defendant's constitutional right to counsel, the record does not support dismissal with prejudice. The trial court's findings do not reflect a consideration of the state's interest or of the victims' interests with respect to dismissal. And while the public's interest was indeed disserved by Apache County's misconduct, its interest was further disserved by the trial court's dismissal of all charges with prejudice. Apache County's disqualification from the prosecution sufficiently rectified its misconduct and Defendant is not entitled to the windfall of dismissal with prejudice.

**¶42** The charges are of the most grave variety. Despite the constitutional violation, no legally impermissible advantage to the prosecution or disadvantage to Defendant resulted from Apache County's conduct. No impediment remains to a trial on the merits, in which Defendant's constitutional rights can be fully realized. Because the record does not support dismissal with prejudice, we conclude that the trial court abused its discretion.

*CONCLUSION*

**¶43** For the reasons discussed above, we reverse the order of dismissal and remand to the trial court for further proceedings consistent with this decision.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DONN KESSLER, Judge