IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ANTHONY GARCIA,
Petitioner,

v.

HON. MICHAEL J. BUTLER, JUDGE OF THE
SUPERIOR COURT OF THE STATE OF ARIZONA,
IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

THE STATE OF ARIZONA, BY AND THROUGH
THE PIMA COUNTY ATTORNEY,
Real Party in Interest.

No. 2 CA-SA 2019-0017
Filed August 14, 2019

Special Action Proceeding
Pima County Cause No. CR20184269001

JURISDICTION ACCEPTED; RELIEF DENIED

COUNSEL

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OPINION

Judge Espinosa authored the opinion of the Court, in which Presiding Judge Eppich concurred and Judge Eckerstrom dissented.

E S P I N O S A, Judge:

¶1 In this special action, Anthony Garcia seeks relief from the respondent judge's order granting the state's request under A.R.S. § 13-4518(A) that he undergo psychological screening to determine whether he may be a sexually violent person (SVP). We previously stayed the respondent's order and now accept special-action jurisdiction because Garcia has no equally plain, speedy, or adequate remedy by appeal and because this case presents a legal question of first impression. *See Duff v. Lee*, 246 Ariz. 418, ¶ 2 (App. 2019); *see also* Ariz. R. P. Spec. Act. 1(a). However, because § 13-4518 does not allow a trial court to deny a screening request when, as here, the statutory requirements have been met, we deny relief.

Procedural History

¶2 In October 2018, Garcia was charged with sexual conduct with a minor under the age of fifteen. After competency proceedings held pursuant to Rule 11, Ariz. R. Crim. P., the respondent judge determined Garcia was incompetent to stand trial and could not be restored to competency "within timelines required by Arizona law."

¶3 The state moved to have Garcia undergo SVP screening under § 13-4518(A), which authorizes such screening when an incompetent defendant who is unlikely to be restored to competency has been charged with a sexually violent offense. Although Garcia conceded these requirements had been met, he nonetheless objected to the state's request, asserting, "[w]hether or not to order such an evaluation is within the Court's discretion." He argued that, despite having undergone competency evaluations, there was "no evidence" he suffered from a mental disorder qualifying him as an SVP, specifically "a paraphilia, a conduct disorder, or a personality disorder." The respondent granted the state's screening request, concluding that "if the two prongs [of the statute] are met, . . . the evaluation should occur." This petition for special action followed.

Discussion

¶4 On review, Garcia repeats his argument that a trial court has discretion to deny a screening request even when the requirements of § 13-4518(A) have been met.[1] He further argues the respondent here failed to exercise that discretion in granting the state's request. And he contends that, because there is "no evidence" he suffers from a disorder that could qualify him as an SVP, such screening is inappropriate.

¶5 We review de novo the interpretation of a statute and, in doing so, seek "to 'effectuate the legislature's intent,' the best indicator of which 'is the statute's plain language.'" *Pinal County v. Fuller*, 245 Ariz. 337, ¶ 8 (App. 2018) (quoting *SolarCity Corp. v. Ariz. Dep't of Revenue*, 243 Ariz. 477, ¶ 8 (2018)). And we read that language "in context with other statutes relating to the same subject or having the same general purpose." *Id.* (quoting *SolarCity Corp.*, 243 Ariz. 477, ¶ 8).

Statutory Language

¶6 An SVP is a person who "[h]as ever been convicted of or found guilty but insane of a sexually violent offense or was charged with a sexually violent offense and was determined incompetent to stand trial" and "[h]as a mental disorder that makes the person likely to engage in acts of sexual violence." A.R.S. § 36-3701(7). If those elements are established at a trial, the person is subject to civil commitment. *See* A.R.S. §§ 36-3701 to 36-3717. In this context, a mental disorder "means a paraphilia, personality disorder or conduct disorder or any combination of paraphilia, personality disorder and conduct disorder that predisposes a person to commit sexual acts to such a degree as to render the person a danger to the health and safety of others." § 36-3701(5). Sexually violent offenses are enumerated in § 36-3701(6) and include sexual conduct with a minor, the crime for which Garcia has been charged.

¶7 As noted above, § 13-4518(A) provides that the state "may request" SVP screening for a defendant found incompetent to stand trial if two conditions are met. First, the competency report must conclude that "there is no substantial probability that the defendant will regain

[1]In its response to Garcia's petition, the state conceded "the trial court has some discretion in whether to grant" the state's screening request but did not abuse that discretion. We are not required to accept the state's concession, particularly when grounded in an erroneous interpretation of the law. *See State v. Sanchez*, 174 Ariz. 44, 45 (App. 1993).

competency within twenty-one months" of the incompetency finding. § 13-4518(A)(1). Second, the defendant must have been "charged with or . . . convicted of or found guilty except insane for a sexually violent offense." § 13-4518(A)(2). Section 13-4518(B) states: "If the court orders a screening to determine if the defendant may be a sexually violent person," it shall appoint a competent professional to conduct a screening and is not permitted to dismiss the underlying criminal case until a decision has been made about filing an SVP petition.

¶8 Garcia maintains a trial court has discretion to deny a screening request made under § 13-4518(A) even if the statutory requirements are met. He first asserts: "Had the legislature intended to make the screening mandatory, it would have used the word 'shall.'" Garcia is correct that the word "shall" frequently indicates a provision is mandatory. *See, e.g.*, *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, ¶ 31 (2017); *Lewis v. Ariz. State Pers. Bd.*, 240 Ariz. 330, ¶ 30 (App. 2016); *Arrett v. Bower*, 237 Ariz. 74, ¶ 24 (App. 2015). But he cites no authority, and we find none, concluding the legislature must use the term "shall" or a similar term for a provision to be mandatory. Indeed, the statute also lacks expressly permissive language.[2] Thus, Garcia's argument that the statute is devoid of directive language cuts against his position. "We presume the legislature says what it means." *Chavez v. Ariz. Sch. Risk Retention Tr., Inc.*, 227 Ariz. 327, ¶ 9 (App. 2011). Had the legislature intended to allow a trial court to impose additional, non-statutory requirements on a state's screening request, it would have said so.

¶9 Garcia further argues the respondent had discretion to reject the state's request because "if," as used in § 13-4518(B), is a conditional term. But there is nothing about a conditional term that suggests discretion. It means only that an event may occur only when certain conditions exist. *See if*, *The American Heritage Dictionary* (5th ed. 2011) (definitions of "if" include "[i]n the event that" and "[o]n the condition that"). The most sensible reading of the statute is that the term "if" in § 13-4518(B) refers to whether the prerequisites listed in § 13-4518(A) have been met, thus warranting a screening, not whether some other, unspecified, showing has been made.

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[2]Even permissive terms may not mean a court has discretion; it is well-established under Arizona case law that the term "may" is mandatory, not permissive, in many circumstances. *See Mullenaux v. Graham County*, 207 Ariz. 1, ¶ 14 (App. 2004) (collecting cases).

¶10 Garcia additionally asserts that the use of the word "if" in other statutes supports his argument that the term means the trial court has discretion. But he misapprehends the source of the court's discretion in those statutes. Garcia cites A.R.S. § 13-4505(A), which states a court must appoint two or more experts to evaluate a defendant's competency "[i]f [it] determines . . . that reasonable grounds exist." The discretionary aspect of the statute is not rooted in the conditional "if," but in the court's determination whether reasonable grounds exist. Section 13-4518, in contrast, does not require the court to determine whether the state's request has reasonable grounds—it clearly identifies two unambiguous prerequisites, and nothing more. Garcia also cites A.R.S. § 13-4517(A), which provides that "[i]f the court finds that a defendant is incompetent to stand trial," any party may request one (or more) of three options: remanding the defendant to an evaluating agency; appointing a guardian; or releasing the defendant and dismissing the charges without prejudice. Again, the discretionary aspect of the statute is unrelated to the use of the term "if." Instead, the discretionary components are related to the required finding of incompetence and the court's choice of three available options.

¶11 Were Garcia's argument correct, a trial court could impose any requirement it believed appropriate under the circumstances before ordering screening under § 13-4518. But this court has already rejected the argument that a court generally has discretion to add to clearly enumerated requirements. In *Haroutunian v. Valueoptions, Inc.*, 218 Ariz. 541 (App. 2008), we addressed then-Rule 9(a), Ariz. R. Civ. App. P., now Rule 9(f), which stated that, if certain prerequisites are met, a court "may upon motion" extend the time to file a notice of appeal. The trial court in that case had declined to extend the time to appeal despite finding the prerequisites had been met, citing the party's failure to show "good cause" related to its failure to receive notice of the judgment. *Id.* ¶ 9. Concluding the court had thus applied "an incorrect legal standard" by grafting a good cause requirement onto Rule 9, we reversed. *Id.* ¶¶ 13, 29. Here, like in *Haroutunian*, the governing provision expressly provides the showing the state is required to make. A court is not permitted to add to the statute by requiring the state to show something more, for example, as Garcia argues, evidence of a qualifying disorder.

Legislative Intent

¶12 Contrary to our dissenting colleague's view, nothing in the legislative materials suggests the legislature intended that the state would be required to make any showing beyond the requirements listed in § 13-4518(A). And Garcia has not identified on review any public policy reason

to require an additional showing in these circumstances. Screening is required only when there is probable cause to believe the person has committed a sexually violent offense or has previously been found guilty or guilty except insane of such an offense. § 13-4518(A)(2); *see also* § 36-3701(7). The SVP statutes make no distinction between the two qualifying statuses. §§ 36-3701 through 36-3707. Nor has any Arizona case. And allowing trial courts to require an additional showing is not consistent with the statute's purpose: to create procedures for the court and prosecuting agency to better supervise those transitioning from criminal proceedings to potential civil commitment. *See* S. Fact Sheet for H.B. 2239, 53d Leg., 1st Reg. Sess. (Ariz. Apr. 10, 2017). Were we to adopt Garcia's argument, we would instead create a non-statutory barrier not contemplated by our legislature—that could vary from case to case—to ensuring that a potential SVP is properly evaluated.

¶13 Court-ordered SVP screening upon the state's compliance with § 13-4518(A) is consistent with the remainder of the statutory scheme. The governing statutes have long included pre-petition SVP screening for persons in custody. An agency with jurisdiction over the person may screen any potential SVP before release, § 36-3702(A), including by obtaining and providing the county attorney or attorney general with "[a] report of the person's condition that was completed within the preceding one hundred twenty days and that includes an opinion expressing to a reasonable degree of psychiatric, psychological or professional certainty that the person has a mental disorder and that, as a result of that mental disorder, the person is likely to engage in a sexually violent offense," § 36-3702(D)(9)(a); *see also In re Commitment of Conn*, 207 Ariz. 257, ¶ 4 (App. 2004) (describing § 36-3702(9)(a) screening as "required"). Section 13-4518 ensures this same procedure is followed when there has been an incompetency finding that has effectively ended the criminal proceeding.

¶14 Additionally, we have found no basis to conclude the legislature intended that a competency evaluation serve as a pre-screening before the SVP process begins.[3] Rather, the statute contemplates an additional SVP screening will be ordered notwithstanding that a

[3]In fact, the legislature considered but abandoned a procedure that would have combined SVP screening with competency evaluations for defendants charged with a sexually violent offense. It instead opted to keep those evaluations separate. *Compare* H.B. 2239, §§ 13-4503, 13-4505, 13-4509, 53d Leg., 1st Reg. Sess. (Ariz. Jan. 17, 2017) (introduced version), *with* A.R.S. §§ 13-4503, 13-4504, 13-4509, 13-4518.

competency evaluation will have necessarily been completed as part of any incompetency finding. *See* Ariz. R. Crim. P. 11.

¶15 And although we recognize the "obvious liberty interest at stake" in SVP proceedings, we cannot agree the requirement Garcia proposes would meaningfully protect that interest. *In re Commitment of Flemming*, 212 Ariz. 306, ¶ 7 (App. 2006) (quoting *Ulgade v. Burke*, 204 Ariz. 455, ¶ 12 (App. 2003)). After the screening, there are still numerous steps before Garcia could be involuntarily committed as an SVP. The state must opt to file a petition, which must be supported by probable cause, after which Garcia would be evaluated by a qualified professional of his choosing.[4] §§ 36-3703 through 36-3705. Only then could he face a trial, at which the state must prove beyond a reasonable doubt that he is an SVP. *See* §§ 36-3706, 36-3707.

The Dissent

¶16 Our dissenting colleague argues we "fundamentally misunderstand" § 13-4518, essentially because we do not glean from the statute that which the legislature has not provided. But our colleague misapplies principles of statutory interpretation to read into subsection (B) the power of judicial discretion that the legislature has not afforded to a trial court here. In support, he makes a semantic argument not made by Garcia, contending the word "request" in § 13-4518(A) requires a trial court to determine whether preliminary SVP screening is made unnecessary by a competency evaluation that does not assess whether the subject is a sexually violent person. The use of the word "request," however, does not necessarily suggest a court has discretionary authority to refuse; our statutes and rules are replete with "requests" a court lacks authority to deny if the proper conditions are met. *See, e.g.*, A.R.S. § 12-1176(A) (requiring court to grant "request" for jury trial in forcible detainer action); Ariz. R. Crim. P. 5.2(a) (requiring court to issue subpoenas "[i]f requested"); Ariz. R. Crim. P. 9.3(a)(1) (court must exclude witnesses from courtroom upon "request"); Ariz. R. Crim. P. 10.2 (referring to of-right change of judge as "request"). And in other contexts, the use of the word "request" similarly carries no authority to refuse. *See, e.g.*, A.R.S. § 39-121.01(D)(1), (2) (requiring agency to comply with requests for public records); Ariz. R.

[4]Section 36-3703(A) allows "each party" to select a professional to perform the evaluation but also allows them to stipulate to an evaluation by only one.

Crim. P. 15.1(e)(1) (requiring state to provide certain disclosure "upon [r]equest").

¶17 The dissent also argues that our decision in *In re Maricopa Cty. Mental Health No. MH 2008-000028*, 221 Ariz. 277 (App. 2009), undermines our reasoning here. But that case is inapposite. There, the trial court, upon finding the defendant incompetent and non-restorable, directed the state to file a petition for court-ordered evaluation under A.R.S. § 36-521(F). *Id.* ¶¶ 4-5. The defendant was ultimately ordered to undergo involuntary treatment. *Id.* ¶ 9. On appeal, he argued his due process rights had been violated because no petition for evaluation had been filed under A.R.S. § 36-523. *Id.* ¶¶ 2, 14. We determined, however, that an evaluation petition was unnecessary under § 13-4517(A)(1), which allows the court to order that civil commitment proceedings begin after an incompetency finding. *Id.* ¶¶ 18-19. We additionally noted the defendant had received all "the [s]tatutory [p]rotections [t]o [w]hich [h]e [w]as [e]ntitled" because the court, rather than a screening agency, had made the determinations necessary for an evaluation petition to be filed. *Id.* ¶¶ 20-22; *see also* A.R.S. §§ 36-520 to 36-523.

¶18 *Maricopa Cty. No. MH 2008-000028* did not address whether or under which circumstances a trial court could reject a request under § 13-4517(A). And, Garcia has not been deprived of any statutory protection to which he was entitled. As we have explained, § 13-4518 parallels the post-conviction SVP procedure, granting the state agency with jurisdiction over the individual the discretion whether to conduct screening before civil commitment proceedings begin. *See* § 36-3702(A). Indeed, the procedure followed in *Maricopa Cty. No. MH 2008-000028* would not be permitted under § 13-4518(A), which only allows the court to order screening and would not permit the court to determine whether an SVP petition should be filed.

Due Process and Constitutionality

¶19 Finally, we address an issue raised at oral argument before this court; Garcia asserted that we are required to find judicial discretion in the statute to avoid an unconstitutional result. *See generally State v. Gomez*, 212 Ariz. 55, ¶ 28 (2006) ("We . . . construe statutes, when possible, to avoid constitutional difficulties."). He argued, for the first time,[5] that his due

[5]Garcia's sole reference to constitutionality in his petition is his assertion that the state must "accord the subject of SVP proceedings due

process rights are violated if the trial court lacks authority to consider non-statutory factors in considering the state's request because of the continuing impairment of his liberty caused by the continuance of his criminal case. *See* § 13-4518(B)(2). But we have found no authority holding that we may, by judicial fiat, amend a statute in an effort to avoid constitutional conflict. Garcia has not identified any language in § 13-4518 that plausibly permits us to conclude the court has discretion to deny the state's request based on non-statutory factors. And he has not developed any argument that § 13-4518 is unconstitutional.

¶20 Moreover, although our dissenting colleague has adopted and amplified Garcia's due process argument, he overlooks that probable cause Garcia committed an offense allows the state to constitutionally restrict his freedom. *See Lozman v. City of Riviera Beach*, ___ U.S. ___, ___, 138 S. Ct. 1945, 1948-49 (2018) ("An arrest deprives a person of essential liberties, but if there is probable cause to believe the person has committed a criminal offense there is often no recourse for the deprivation."). The grand jury's finding that there is probable cause to believe Garcia committed a sexually violent offense does not evaporate simply because he is not competent to stand trial for that offense. And, as we have noted, the screening does not begin a new civil proceeding, but is instead a preliminary step to determine whether such a proceeding should begin.[6]

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process protection." This passing reference is insufficient to raise an argument that § 13-4518 is unconstitutional. We do not address claims raised for the first time at oral argument, *Kelley v. Ariz. Dep't of Corrections*, 154 Ariz. 476, 477 (1987), or claims that are unsupported by citation to authority. *See AMERCO v. Shoen*, 184 Ariz. 150, 154 n.4 (App. 1995) (failure to develop arguments or present supporting authority on appeal waives the issue). Notably, Garcia has not identified any law suggesting that the probable cause determination underlying his indictment is insufficient to warrant continued restraint on his liberty in light of the state's interest in ensuring that potential SVPs are properly screened.

[6]We note that nothing would prevent a defendant from raising a challenge to the constitutionality of screening in his or her particular circumstances—a challenge Garcia has not made. We hold only that a court may not impose non-statutory requirements on a state's screening request under § 13-4518(A) and, thus, is not required to determine whether

Conclusion

¶21 When the clear-cut elements of § 13-4518(A) have been established, a trial court is required to order SVP screening. Both parties agree the statute's requirements have been met here and, thus, the respondent judge did not err by ordering that Garcia undergo SVP screening. Accordingly, although we accept special-action jurisdiction, we deny relief and lift our previously ordered stay of the respondent's order.

E C K E R S T R O M, Judge, dissenting:

¶22 The majority reads § 13-4518 to deny the trial court, a dispassionate fact-finder, any discretion to reject a lawful request that a person undergo a civil commitment screening. By doing so, it grants the state, a party litigant, the ultimate authority to initiate a screening process, despite its implications for the opposing party's liberty interests. Because that extraordinary conclusion finds no concrete footing in the text, overlooks the statute's structure, and renders the statute unconstitutional, I must respectfully dissent.

¶23 Section 13-4518, in pertinent part, reads as follows:

> **A**. If the county attorney receives a report that determines a defendant is incompetent to stand trial, the county attorney may request that the defendant be screened to determine if the defendant may be a sexually violent person, if both:
>
> 1. The report concludes that there is no substantial probability that the defendant will regain competency within twenty-one months after the date of the original finding of incompetency.
>
> 2. The defendant is charged with or has ever been convicted of or found guilty except

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competency evaluations have answered a question they are not intended to answer.

> insane for a sexually violent offense as defined in [A.R.S.] § 36-3701.
>
> **B**. If the court orders a screening to determine if the defendant may be a sexually violent person, both of the following apply:
>
> 1. The court shall appoint a competent professional as defined in § 36-3701 to conduct the screening and submit a report to the court and the parties within thirty days after the appointment.
>
> 2. The criminal case may not be dismissed until the competent professional's report is provided to the court and the parties and a hearing is held pursuant to subsection C of this section or the county attorney files a petition pursuant to [A.R.S.] § 36-3704.

The majority's conclusion turns on a fundamental misunderstanding of the above provision. It reads the pre-conditions for the state's screening request as the exclusive criteria upon which the court could deny that request. From that premise, it reasons that any further judicial discretion would constructively add conditions for screening beyond those expressed in the statute.

¶24 That reasoning overlooks an important feature of the statute: the legislature itemized the screening pre-conditions in Part A. That part exclusively addresses the circumstances under which the *state* possesses the discretion to seek a screening. Part A neither linguistically—nor structurally—limits the extent of the court's discretion to grant or deny a lawful request.

¶25 The court's powers are instead articulated in Parts B through E. Part B unambiguously establishes the court's authority to deny the screening. *See* § 13-4518(B) ("*If* the court orders a screening . . .") (emphasis added). That part contains no language limiting the factors a court may consider in exercising that discretion. Nor can we assume the legislature intended that silence to convey an implicit limitation on the court's discretion. Elsewhere in that part, the legislature demonstrated no reluctance to articulate limitations on a court's authority when it saw fit. *See* § 13-4518(B)(2) (expressly prohibiting court from dismissing criminal case until screening completed).

¶26 Thus, the pertinent statutory provision that addresses the court's authority, Part B, plainly establishes the court's discretion to deny a prosecutor's request for a screening. And, by declining to articulate any express criteria for the exercise of that discretion, the legislature conveyed an intention that the court evaluate the state's screening request like any other motion: by considering both parties' arguments together with the pertinent information already before the court.

¶27 This reading not only adheres to the text and structure of the statute, it is compatible with the broader statutory scheme. *See Aros v. Beneficial Ariz., Inc.*, 194 Ariz. 62, 66 (1999) ("When an ambiguity exists, however, we attempt to determine legislative intent by interpreting the statute as a whole . . . ."). Under that scheme, the trial court necessarily possesses a substantial body of pertinent information to guide its discretion. A defendant cannot be found incompetent and non-restorable without having first been evaluated by "two or more" qualified mental health experts. *See* Ariz. R. Crim. P. 11.3(a)(2). Those experts each must generate a report that provides: (1) "a description of the nature, content, extent and results of the examination and any tests conducted"; (2) an opinion on competency; and (3) "[t]he facts on which the findings are based." A.R.S. § 13-4509(A)(2)-(4). If, as here, the experts ultimately conclude a defendant is incompetent to stand trial, their reports must identify "the nature of the mental disease, defect or disability that is the cause of the incompetency." § 13-4509(B)(1). The report must both provide a prognosis and evaluate whether the defendant poses a "potential threat to public safety." § 13-4509(B)(1)-(3).

¶28 This wealth of reliable information, collected by neutral professionals, bears squarely on the question of whether the defendant might pose an ongoing public safety risk sufficient to justify civil commitment proceedings. In light of this, the legislature might reasonably have assumed that the basis for a trial court's discretion was evident in the statutory scheme itself. No language in the statute supports the majority's counter premise: that the legislature's failure to specify more granular criteria conveys an intent that the court must always grant a statutorily compliant screening request.[7]

¶29 Indeed, the legislature apparently contemplated that judges would retain the discretion to deny a valid request for a civil commitment

[7]In so reasoning, it is the majority, not this dissent, which, "glean[s] from the statute that which the legislature has not provided."

screening. The Arizona House summary and Senate fact sheets prepared for § 13-4518 separately itemize the pre-conditions for a prosecutor's screening request and the court's options after such a request. H. Summary of H.B. 2239, 53rd Leg., 1st Reg. Sess. (Ariz. Apr. 30, 2017); Final Revised S. Fact Sheet for H.B. 2239, 53rd Leg., 1st Reg. Sess. (Ariz. March 24, 2017). These materials—which informed the legislature's vote to enact the statute—suggest that both the request and the court's decision whether to grant the request should be viewed as discrete, discretionary events. *Id.* (both fact sheets conditioning the court's post-request options on its decision to grant the request).

¶30 Under the majority's reading, the legislature has provided the prosecutor complete discretion whether to request a screening if the statutory conditions are met ("the county attorney may request"), but has simultaneously provided the court, in possession of the same psychiatric evaluations, no discretion at all. The legislative logic of that interpretation—equipping a party litigant with more discretion than a neutral referee—is elusive at best. It is an extraordinary conclusion we should not draw without concrete textual direction. *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, 93-94 (2012) (explaining canon against supplying language a statute does not contain and observing that judges should not "elaborate unprovided-for exceptions to a text").

¶31 We have no such direction here. To the contrary, the language used to describe the prosecutor's formal authority to seek a screening—to "request"—itself semantically suggests the prosecutor is not entitled to assume the screening will be ordered. *See The American Heritage Dictionary* (5th ed. 2011) (defining "request" as "to express a desire for, especially politely; ask for"; "to ask (a person) to do something"); *Webster's Encyclopedic Unabridged Dictionary* (1989 ed.) (defining "request" as "the act of asking for something to be given, or done, esp. as a favor or courtesy; solicitation or petition"; "to ask or beg (someone) to do something"). In the absence of further context, "request" would be an ineffective word to itself convey a party's entitlement to have its motion granted.

¶32 The majority correctly observes that our statutes are "replete" with statutory provisions wherein a "request" does trigger compulsory compliance. However, each of those provisions contain additional language—such as "must" or "shall"—which expressly provide that the request cannot be refused. *E.g.*, A.R.S. § 12-1176(A) ("court shall grant" jury trial); Ariz. R. Crim. P. 5.2(a) ("magistrate must issue subpoenas"); Ariz. R. Crim. P. 9.3(a)(1) (court "must" exclude prospective witnesses); Ariz. R.

Crim. P. 10.2 (primarily referred to as "notice," not "request," and directing that, if notice is timely filed, court "should proceed no further"); A.R.S. § 39-121.01(D)(1) (custodian "shall promptly furnish" public records), (2) (custodian "shall also furnish an index" of withheld records); Ariz. R. Crim. P. 15.1(e)(1) (state "must" make items available). Tellingly, the legislature declined to use any such language here. Instead, the legislature chose *conditional* rather than compulsory language to introduce the court's authority to deny the request ("*If* the court orders a screening . . .") (emphasis added).

¶33 The presence of that authority is corroborated by this court's recent jurisprudence addressing A.R.S. § 13-4517, the statutory companion to § 13-4518. *Maricopa Cty. No. MH 2008-000028*, 221 Ariz. 277, ¶ 19; *see* A.R.S. § 13-4517 (providing for the initiation of civil commitment proceedings against an incompetent, non-restorable criminal defendant who has not been indicted for, or previously convicted of, a sexually violent offense).[8] In *Maricopa Cty. No. MH 2008-000028*, we held that the state's request to remand the defendant, pursuant to § 13-4517, coupled with the trial court's review of that request, adequately replaced the due process requirements set forth in Title 36 for initiating civil commitment proceedings. 221 Ariz. 277, ¶¶ 12, 20-22. In so holding, we found the prosecutor's request to remand was the functional equivalent of a "Petition for Involuntary Evaluation" under A.R.S. § 36-523. *Id.* ¶ 21. We further concluded that the trial court's discretionary review of that screening request, which included consideration of the competency evaluations, generated pursuant to Rule 11, Ariz. R. Crim. P., procedurally replaced the review provided by the third-party "screening agency" contemplated under the civil title. *Id.*

¶34 That holding should resolve the question before us. Section 13-4517 pursues identical procedural goals to § 13-4518: providing a method, compliant with the requirements of due process, for initiating civil commitment proceedings for non-restorable criminal defendants. *Compare* § 13-4517, *with* § 13-4518. Given that the two statutes address identical subject matter, appear in consecutive sections, and were enacted in the same legislative bill, it is no surprise that they have an identical structure: Subsection A of each provision addresses the circumstances under which a party may make a "request" to initiate potential civil

[8] Since we issued *Maricopa Cty. No. MH 2008-000028*, the text of § 13-4517 has been altered in ways not pertinent to that opinion's reasoning. *See* 1995 Ariz. Sess. Laws, ch. 250, § 3.

commitment proceedings. Subsections B through E of each address the court's options in response to such requests. And the first sentence of each Part B expressly contemplates that the court has the authority to deny those requests.

¶35 *Maricopa Cty. No. MH 2008-000028* also explains the appropriate criteria for exercising that authority. There, we read § 13-4517 as enabling the trial court to consider the contents of prior competency reports. 221 Ariz. 277, ¶¶ 20-21. In so doing, we necessarily implied that the court had the discretion to evaluate the prosecutor's underlying factual basis for seeking a civil commitment evaluation. *Id.* ¶ 21. We observed that the court occupies the same procedural role as a non-party screening agency. That agency neutrally evaluates petitions for civil commitment to determine whether their content justifies further commitment proceedings. *Id.*; § 36-523(B)(1), (2). Thus, the majority's opinion in the instant case—which would make the prosecutor, a party litigant, the lone arbiter of whether a non-restorable defendant must face another screening process—cannot be harmonized with this court's previous understanding of the judge's role in assessing requests for screening.

¶36 Civil commitment proceedings "can result in a serious deprivation of liberty." *Maricopa Cty. No. MH 2008-000028*, 221 Ariz. 277, ¶ 12 (quoting *In re Jesse M.*, 217 Ariz. 74, ¶ 9 (App. 2007)). "As a result, the proposed patient must be afforded due process protection." *Id.* In Arizona, this requires that our civil commitment statutes "be strictly followed." *Id.* Although § 13-4518 is found in our criminal code, it effectively erects a process for initiating civil commitment proceedings. *See Maricopa Cty. No. MH 2008-000028*, 221 Ariz. 277, ¶ 18 (describing § 13-4517 as a conduit between criminal proceedings and civil commitment statutes).

¶37 As the petitioner emphasized during oral argument, the decision to initiate screening pursuant to § 13-4518 results in an immediate and continuing deprivation of a defendant/patient's liberty. This is because subsection (B)(2) prohibits the dismissal of the underlying criminal case until any pre-screening is complete. During that time, those restraints on a defendant's liberty, inherent in a pending criminal indictment, are prolonged notwithstanding the court's finding that criminal charges may no longer be lawfully pursued. The continuing restraint may include incarceration, prohibitions on travel, the impairment of a defendant's ability to secure employment, and an order that the defendant involuntarily submit to an embarrassing screening.

¶38 All of those deprivations can be justified if the defendant/patient poses a continuing threat to public safety. But, under analogous circumstances, our state's rules of civil commitment require that any decision to deprive a patient of liberty be made by a neutral agent who assesses whether further psychiatric evaluation is justified. *See* A.R.S. §§ 36-520 to 36-523. The core features of that civil scheme, which are designed to provide due process, should apply no less to a patient whose mental defects have been identified through an initial criminal process.

¶39 Instead, the majority's reading of § 13-4518 provides the prosecutor with the exclusive discretion to prolong the impairment of a patient's liberty interests for pre-screening. It deprives a neutral judge, in possession of all of the same psychiatric reports, the discretion to deny the prosecutor's request. In so doing, it violates basic due process and risks rendering the statute unconstitutional. *See Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972) (due process requires "a neutral and detached judge in the first instance"); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950) (at minimum, due process requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case"); *Horne v. Polk*, 242 Ariz. 226, ¶ 17 (2017) ("The right to a neutral adjudicator has long been recognized as a component of a fair process. One cannot both participate in a case (for instance, as a prosecutor) and then decide the case."). When the pertinent text allows, we traditionally construe statutes to comply with constitutional requirements. *State v. Lockwood*, 222 Ariz. 551, ¶ 9 (App. 2009) ("'[I]f possible, this court construes statutes to avoid rendering them unconstitutional' and 'to avoid unnecessary resolution of constitutional issues.'" (alteration in *Lockwood*) (quoting *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 272-73 (1994))). We should follow that canon of interpretation here.

¶40 When a defendant has been accused of a serious crime but has been found incompetent and non-restorable, sound public policy dictates an assessment of a defendant's continuing risk to public safety. But such defendants will have necessarily undergone extensive psychiatric evaluations, resulting in comprehensive reports, before a prosecutor may seek a pre-screening for civil commitment pursuant to § 13-4518. And, although public policy suggests we should err on the side of caution before dismissing a non-restorable defendant's case, the statutory language compels only one conclusion: the legislature logically trusted that ultimate decision to the trial judge. No language in the statute suggests otherwise.

¶41 This is a conclusion that the state itself endorses. In its answering brief, it conceded: "The statute does not use mandatory

language, so, it appears that the trial court has some discretion in whether to grant the county attorney's request." As the state acknowledged during oral argument, there may be instances in which the underlying facts of the criminal case, coupled with the findings of the psychiatric evaluation, disclose no reasoned basis to further prolong the impairment of a patient's liberty. Petitioner's counsel has plausibly maintained this is such a case.[9]

¶42 For the foregoing reasons, this court should remand and direct the court to evaluate the request anew. We should instruct that the court may consider the psychiatric evaluations, the underlying facts of the case, and respective arguments of the parties in determining whether a pre-screening is appropriate.

[9]The evaluations concluded that Garcia, an older teen at the time that he allegedly engaged in sexual conduct with an early teen, is developmentally disabled with an intelligence quotient of sixty-five. He requires constant parental supervision and functions at the level of a six- to eight-year old. One of those reports specifically concluded that Garcia "did not present with indicators or data to support an impression of having psychiatric problems which would require forced treatment. He therefore would not meet criteria for Title 36 evaluation." Neither report found that Garcia exhibited any of the mental disorders necessary to qualify the petitioner for commitment as a sexually violent predator. *See* § 36-3701(5) (itemizing qualifying mental disorders).