NON-VIOLENT CRIMINAL LAW AND ATTORNEY ISSUES: A Discussion of the Arizona Supreme Court's 2008-2009 Decisions╬

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I. INTRODUCTION

In the 2008 to 2009 judicial calendar, the Arizona Supreme Court decided a total of six non-violent criminal cases. Of these six cases, two decided issues of first impression and three involved issues of "statewide importance." Although the factual situations—and the legal issues in general—vary drastically, the court clarified the law in each of the six cases.

In an attempt to lend some cohesiveness to the non-violent criminal cases, this article breaks the cases into two categories. Part II discusses four non-violent criminal cases: (A) *State v. Cheramie*[1] analyzes whether knowing *possession* of a dangerous drug is a lesser-included offense of the knowing *transportation* for sale of a dangerous drug offense; (B) *State v. Zaragoza*[2] defines "actual physical control" for DUI cases and provides jury instructions to be used by future juries; (C) *State v. Botkin*[3] analyzes when a superior court judge can transfer a defendant from intensive probation to supervised probation; and (D) *Town of Gilbert Prosecutor's Office v. Downie*[4] determines whether a contractor who is convicted of contracting without a license can have the amount of restitution diminished by the benefit conferred to the homeowner. Part III discusses two cases involving attorney issues: (A) *In re White-Steiner*[5] discusses whether reasonable

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╬ This Note is one of a series of seven notes that make up the Arizona Supreme Court Review ("Review") as part of the Arizona State Law Journal's Arizona Issue. For an introduction and overview of the Review, see Benjamin D. Kreutzberg, Note, *Introduction and Statistical Analysis: A Discussion of the Arizona Supreme Court's 2008-2009 Decisions*, 42 ARIZ. ST. L.J. 517 (2010).

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1. 218 Ariz. 447, 189 P.3d 374 (Ariz. 2008).
2. 221 Ariz. 49, 209 P.3d 629 (Ariz. 2009).
3. 221 Ariz. 1, 209 P.3d 137 (Ariz. 2009).
4. 218 Ariz. 466, 189 P.3d 393 (Ariz. 2008).
5. 219 Ariz. 323, 198 P.3d 1195 (Ariz. 2009).

evidence supported a Hearing Officer's finding of negligence against an attorney who violated the Ethical Rules of Professional Conduct; and (B) *State v. Hicks*[6] analyzes whether the State of Arizona is vicariously liable when a state-appointed attorney provides negligent representation to an indigent criminal defendant.

II. NON-VIOLENT CRIMINAL CASES

Ranging from interpreting statutes to determining the amount of restitution due to victims, the next four cases show some of the new and recurring issues in Arizona's non-violent criminal docket.

A. Cheramie: Whether Drug Possession Is a Lesser-Included Offense of Drug Transportation

In *State v. Cheramie*, the court held that knowing possession of a dangerous drug is a lesser-included offense of the knowing transportation for sale of a dangerous drug offense.[7] The court reached this conclusion because the elements of the knowing possession statute, as found in A.R.S. section 13-3407(A)(1), were included in the knowing transportation statute, A.R.S. section 13-3407(A)(7), notwithstanding the inclusion of the "usable quantity" requirement.[8]

1. Factual Background and Procedural History.

A police officer stopped Enis John Cheramie, the defendant, for a traffic violation.[9] The officer arrested Cheramie for unrelated criminal offenses, and upon a subsequent search of the vehicle, other officers found "several hundred dollars in the center console" along with an aerosol can on the ground of the backseat.[10] Upon further inspection of the aerosol can, the officers found that it had a false bottom and found two baggies of methamphetamine hidden inside.[11]

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6. 219 Ariz. 328, 198 P.3d 1200 (Ariz. 2009).
7. 218 Ariz. 447, 451, 189 P.3d 374, 378 (Ariz. 2008).
8. *Id.*
9. *Id.* at 447, 189 P.3d at 374.
10. *Id.*
11. *Id.*

A grand jury indicted Cheramie for knowing transportation for sale of a dangerous drug under A.R.S. section 13-3407(A)(7).[12] The State's witness to prove the "for sale" requirement failed to appear and testify at trial.[13] Accordingly, the trial court granted Cheramie's motion for judgment on the pleadings; however, the trial court gave jury instructions under A.R.S. section 13-3407(A)(1), the knowing possession statute.[14] The jury convicted Cheramie of knowing possession of a dangerous drug.[15]

The court of appeals reversed the conviction because it held that knowing possession is not a lesser-included offense of knowing transportation.[16] It came to this conclusion because it believed that knowing possession had a "usable quantity" element that was not found in the knowing transportation statute.[17] Therefore, according to the court of appeals, Cheramie did not have "fair notice of the charges against him."[18]

2. Discussion

The supreme court focused its analysis on whether all of the elements of knowing possession fell within the elements of knowing transportation.[19] The court then focused on two sub-issues: whether the definition of "possession" was included in the definition of "transportation,"[20] and whether the "usable quantity" requirement was an element in the knowing possession statute that was not in the knowing transportation statute.[21] First,

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12. *Id.* at 448, 189 P.3d at 375. To prove knowing transportation, the State must "prove that the defendant knowingly (1) transported (2) for sale (3) a dangerous drug." *Id.* at 449, 189 P.3d at 376 (citing ARIZ. REV. STAT. ANN. § 13-3407(A)(7) (2006)). Cheramie was also indicted for other crimes—"drug paraphernalia and second degree escape"—but those charges were not at issue before the supreme court. *Id.* at 448 n.2, 189 P.3d at 375 n.2.

13. *Id.* at 448, 189 P.3d at 375.

14. *Id.* To prove knowing possession, the State must "prove that the defendant knowingly (1) possessed (2) a dangerous drug." *Id.* at 449, 189 P.3d at 376 (citing ARIZ. REV. STAT. ANN. § 13-3407(A)(1)).

15. *Id.* at 448, 189 P.3d at 375.

16. *Id.* (citation omitted).

17. *Id.* The court of appeals relied on *State v. Moreno*, 92 Ariz. 116, 374 P.2d 872 (Ariz. 1962). *Id.* One judge, Judge Espinosa, dissented from the majority and concluded "that the 'usable quantity' discussion in *Moreno* addressed only the sufficiency of the evidence to show knowing possession and did not add a new element to the offense." *Id.* (citation omitted).

18. *Id.* (citation omitted).

19. *Id.* at 449, 189 P.3d at 376. It focused on this aspect because it stated "[t]o constitute a lesser-included offense, the offense must be composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one." *Id.* at 448, 189 P.3d at 375 (internal quotations and citations omitted).

20. *Id.* at 449, 189 P.3d at 376.

21. *Id.* at 449–51, 189 P.3d at 376–78.

the court held that possession was included in the definition of transportation.[22] It stated, "[g]iven Arizona's broad definition of 'possess,' we cannot conceive how a person can 'transport' drugs without having possession of or dominion or control over them."[23]

To resolve the second issue—the "usable quantity" requirement—the court analyzed *Moreno* as requiring a "knowing possession" element as opposed to a "usable quantity" element.[24] Thus, *Moreno* did not require "the state [to] show any particular quantity of drugs to sustain a conviction."[25] Rather, *Moreno* required "*knowing* possession."[26] The court recognized that it "misspoke" in *State v. Derosier*[27] to the extent that it required a "usable quantity" requirement in the knowing possession offense.[28] A finding of a "usable quantity" "is simply evidence from which a factfinder may infer intent" of possession.[29]

3. Conclusion

Acknowledging that this case was a "recurring issue of statewide importance,"[30] the supreme court reversed the court of appeals' decision and held that knowing possession is a lesser-included offense of knowing transportation.[31] The court cleared any confusion from its prior decisions in *Moreno* and *Derosier*.

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22. *Id.* at 449, 189 P.3d at 376. To define "possession," the court used A.R.S. section 13-105(30). *Id.* To define "transport," the court used the Webster's College Dictionary. *Id.*

23. *Id.*

24. *Id.* at 450, 189 P.3d at 377. In *Moreno*, the court "explored the mental state required for conviction" under the Arizona Uniform Narcotics Act. *Id.* When determining the sufficiency of the evidence to sustain the conviction against Moreno, the court held that "the correct rule . . . is that where the amount of [] narcotic[s] is so small as to require a chemical analysis to detect its presence, the quantity is sufficient if usable under the known practices of narcotic addicts." *Id.* (quoting State v. Moreno, 92 Ariz. 116, 120, 374 P.2d 872, 875 (Ariz. 1962)).

25. *Id.*

26. *Id.*

27. *Id.* at 451, 189 P.3d at 378 (citing State v. DeRosier, 133 Ariz. 154, 156–57, 650 P.2d 456, 458–59 (Ariz. 1982)) (stating that it was not improper for the trial court to require a "usable amount" requirement as an element of possession).

28. *Id.*

29. *Id.*

30. *Id.* at 448, 189 P.3d at 375.

31. *Id.* at 451, 189 P.3d at 378.

B. Zaragoza: Whether the Defendant Had "Actual Physical Control" of His Vehicle, and Whether the Court Should Make Unified Jury Instructions for "Actual Physical Control"

In *State v. Zaragoza*, the supreme court took the opportunity to further analyze the "actual physical control" requirement in A.R.S. section 28-1381 for driving under the influence ("DUI") cases.[32] The court first analyzed whether the jury instructions given in *Zaragoza* correctly guided the jury, then it "set forth a recommended jury instruction for use in future cases."[33] The court held that the jury instructions given to the jury at trial correctly guided the jury,[34] but created jury instructions for future cases.[35]

1. Factual Background and Procedural History

A Tucson police officer responded to an early morning emergency call at an apartment complex.[36] The officer saw Vincent Zaragoza holding onto cars as he staggered in the parking lot to his own vehicle.[37] Zaragoza entered his vehicle.[38] The officer shined his flashlight inside the car and "saw Zaragoza in the driver's seat with one hand on the steering wheel as he inserted the key into the ignition with the other hand."[39] Zaragoza's blood alcohol level was found to be .357.[40] Zaragoza later testified that he intended to sleep in the vehicle and not to drive.[41]

A.R.S. section 28-1381 states that "[i]t is unlawful for a person to drive or be in actual physical control of a vehicle . . . [w]hile under the influence of intoxicating liquor."[42] The only issue at trial was whether Zaragoza was in "actual physical control" of the vehicle.[43] The trial court gave the instruction that "[t]he defendant is in actual physical control of the vehicle if, based on the totality of the circumstances shown by the evidence, his *potential use* of the vehicle presented a real danger to himself or others at the time alleged" and gave several factors for the jury to consider.[44] The

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32. 221 Ariz. 49, 50, 209 P.3d 629, 630 (Ariz. 2009).
33. *Id.*
34. *Id.* at 53, 209 P.3d at 633.
35. *Id.* at 54, 209 P.3d at 634.
36. *Id.* at 50, 209 P.3d at 630.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. ARIZ. REV. STAT. ANN. § 28-1381(A)(1) (2006).
43. *Zaragoza*, 221 Ariz. at 50, 209 P.3d at 630.
44. *Id.* (emphasis added).

jury found Zaragoza guilty.[45] The court of appeals reversed because the jury instruction included "potential use"—the opposite of physical control—and thus misled the jury.[46]

2. Discussion

The supreme court started its analysis by giving a history of cases that interpreted the driving while intoxicated statute.[47] After analyzing the legislature's amendment and other court cases,[48] the court eventually synthesized a rule that "unless an intoxicated person's vehicle was completely off the traveled part of the road, with the engine off, that person could be found to be in actual physical control of the vehicle."[49] That rule was only temporary because in *State v. Love* the supreme court adopted the "totality approach."[50] In *Love*, the court provided a list of factors for the factfinder to consider in determining whether a person actually controlled the vehicle.[51] A problem developed, however, because the lower courts could not adequately create a standard jury instruction.[52]

Applying the "substantially free from error" legal standard for jury instructions, the court held that the instructions in *Zaragoza* correctly guided the jury notwithstanding the "potential use" language.[53] The court stated that the judge "sufficiently narrowed the instruction" by including the language that Zaragoza must have "presented a real danger to himself or others."[54] Thus, read in its entirety, the jury instruction was sufficient.[55]

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45. *Id.*

46. *Id.* at 51, 209 P.3d at 631 (citation omitted). The court of appeals feared that the jury instruction swept too broadly. *Id.* at 53, 209 P.3d at 633.

47. *Id.* at 51–53, 209 P.3d at 631–33.

48. *Id.* In 1950, the legislature included the requirement of "actual physical control" of a vehicle. *Id.* at 51, 209 P.3d at 631 (citation omitted). In *State v. Webb*, the court held that "the legislature intended the revised statute to apply to persons having control of a vehicle while not actually driving it or having it in motion." *Id.* (internal quotations and citation omitted). In *State v. Zavala*, the court interpreted "actual physical control" to exclude the situation where a driver pulls over onto the side of the road and stops driving "when he believes his driving is impaired." *Id.* at 51–52, 209 P.3d at 631–32 (internal quotations and citation omitted).

49. *Id.* at 52, 209 P.3d at 632.

50. *Id.* (citing State v. Love, 182 Ariz. 324, 327, 897 P.2d 626, 629 (Ariz. 1995)). "The totality approach permits the fact finder to determine whether a driver relinquished control and no longer presented a danger to himself or others." *Id.* (internal quotations and citation omitted).

51. *Id.* (citation omitted).

52. *Id.* at 52–53, 209 P.3d at 632–33. The "totality of the circumstances" approach was so fact specific that the lower courts made different jury instructions depending on the case.

53. *Id.* at 53, 209 P.3d at 633.

54. *Id.* The court stated that the jury instruction was narrow and did not sweep too broadly because "a conviction could not be premised on speculative potential use, but rather required

The court then provided a jury instruction to be used whenever "actual physical control" is an issue.[56] The suggested jury instruction states:

> In determining whether the defendant was in actual physical control of the vehicle, you should consider the totality of the circumstances shown by the evidence and whether the defendants current or imminent control of the vehicle presented a real danger to [himself] [herself] or others at the time alleged. Factors to be considered might include, but are not limited to:
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> 1. Whether the vehicle was running;
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> 2. Whether the ignition was on;
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> 3. Where the ignition key was located;
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> 4. Where and in what position the driver was found in the vehicle;
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> 5. Whether the person was awake or asleep;
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> 6. Whether the vehicle's headlights were on;
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> 7. Where the vehicle was stopped;
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> 8. Whether the driver had voluntarily pulled off the road;
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> 9. Time of day;
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> 10. Weather conditions;
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> 11. Whether the heater or air conditioner was on;
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> 12. Whether the windows were up or down;
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> 13. Any explanation of the circumstances shown by the evidence.

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proof that Zaragoza 'presented a real danger to himself or others' when confronted by the officer." *Id.* For a critique of the court's analysis, see *infra* Part II.B.4.

55. *Zaragoza*, 221 Ariz. at 53, 209 P.3d at 633.

56. *Id.* at 54, 209 P.3d at 634.

> This list is not meant to be all-inclusive. It is up to you to examine all the available evidence and weigh its credibility in determining whether the defendant actually posed a threat to the public by the exercise of present or imminent control of the vehicle while impaired.[57]

The court also noted that no instruction should "require[] a jury to consider a defendant's purpose in exercising control of a vehicle."[58]

3. Conclusion

The court resolved this issue, which is a "recurring issue of statewide importance,"[59] by writing its own jury instruction for "actual physical control" in DUI cases. Now trial courts can follow the totality of the circumstances approach as determined in *Love* but not have to grapple with making its own jury instruction. More importantly, trial courts will not make conflicting jury instructions for "actual physical control" of a vehicle.

4. Critique

One has to wonder, however, how the *potential* use of a vehicle can really present *real* harm to anyone. The jury instruction in *Zaragoza* presupposes that potential use of a vehicle can present real harm. How is it possible to present real harm to someone when the defendant only potentially uses the vehicle? The jury instruction was inconsistent within itself; potential use and real harm cannot coexist. The jury instruction could not have correctly guided the jury.

The new jury instruction by the supreme court changes the word "potential" as used at Zaragoza's trial to "current or imminent." Imminent is far better than potential because it implies that evidence must be shown at trial that the defendant would have controlled the vehicle in the immediate future. However, it is still bothersome because such actual physical control has not actually taken place yet.

C. Botkin: Whether the Superior Court Has Authority to Transfer a Defendant from Intensive Probation to Supervised Probation after a

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57. *Id.*
58. *Id.*
59. *Id.* at 51, 209 P.3d at 631.

Petition to Revoke has been Filed but Before any Findings that the Defendant Committed an Additional Felony Offense

In *State v. Botkin*, the supreme court clarified several probation statutes, namely A.R.S. section 13-901(A) (permitting the court to suspend imposition of a sentence and "place the person on intensive probation"), A.R.S. section 13-917(A) (permitting the court to modify "the level of supervision of a person granted intensive probation [at any time], or [the court] may transfer the person to supervised probation or terminate the period of intensive probation" upon notice to the State and to the victim), and A.R.S. section 13-917(B) (requiring the court to revoke intensive probation and invoke a mandatory prison term when "a petition to revoke is filed and the court finds that the person has committed an additional felony offense").[60] The issue before the court was whether A.R.S. section 13-917(B)[61] "deprive[d] the superior court of authority to transfer the defendant from intensive to supervised probation after a petition to revoke ha[d] been filed but before any finding that the defendant [had] committed the additional felony offense."[62] The court held that it did not.[63]

1. Factual Background and Procedural History

Sean Wayne Botkin pleaded guilty to offenses that occurred in 2000 when he was only 14 years old.[64] The court placed Botkin on intensive probation for those offenses.[65] After Botkin's release, he was charged with "transfer of prescription drugs" in 2004.[66] Accordingly, the Adult Probation Department filed a petition to revoke Botkin's intensive probation for the 2000 offenses and to put him in prison.[67]

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60. 221 Ariz. 1, 2, 209 P.3d 137, 138 (Ariz. 2009) (citing ARIZ. REV. STAT. ANN. §§ 13-901(A), 13-917(A)–(B) (2006)).

61. The pertinent part of A.R.S. § 13-917 states:

> If a petition to revoke the period of intensive probation is filed and the court finds that the person has committed an additional felony offense or has violated a condition of intensive probation which poses a serious threat or danger to the community, the court shall revoke the period of intensive probation and impose a term of imprisonment as authorized by law.

ARIZ. REV. STAT. ANN. § 13-917(B).

62. *Botkin*, 221 Ariz. at 2, 209 P.3d at 138.

63. *Id.* at 4, 209 P.3d at 140.

64. *Id.* at 2, 209 P.3d at 138.

65. *Id.*

66. *Id.*

67. *Id.*

While that petition was still pending, Botkin agreed to a term of imprisonment for the 2004 offense because the State agreed to dismiss allegations of all prior felony convictions and the allegation that the 2004 offense occurred while Botkin was on probation.[68] The trial court sentenced Botkin to a one year prison term for the new offense and transferred him from intensive probation to supervised probation for the 2000 offenses.[69] The court rejected the State's demand for Botkin to be imprisoned for the 2000 offenses.[70] The State appealed the trial court's demand for imprisonment, and the court of appeals agreed with the State and remanded the case back to the trial court.[71] By this time, Botkin had already served his sentence for the 2004 offenses, and he moved to withdraw his plea for those offenses because he was not aware, at the time of his plea, that a new conviction would require him to serve a prison sentence for the 2000 offense.[72]

The trial court then granted Botkin's motion to reduce the intensive probation imposed by the 2000 offenses to supervised probation.[73] Botkin later pleaded guilty to the 2004 offenses and was sentenced to time already served and supervised probation for the 2000 offenses.[74] The court of appeals again reversed the trial court and held that A.R.S. section 13-917(B) prohibited the judge from transferring Botkin from intensive probation to supervised probation after the filing of the petition to revoke.[75]

2. Discussion

The Arizona Supreme Court held that A.R.S. section 13-917(B) "requires the concurrence of two events before revocation of intensive probation and a term of imprisonment are mandated"—the filing of the petition to revoke, and the finding that the defendant committed an additional felony offense.[76] Furthermore, the court held that A.R.S. section 13-917(A) "allows the court to reduce the level of probation at 'any

68. *Id.* Botkin likely believed that he would not face more prison time.

69. *Id.* "Intensive probation is 'a program . . . of highly structured and closely supervised probation which emphasizes the payment of restitution[.]'" *Id.* at 2, 209 P.3d at 138 (citing ARIZ. REV. STAT. ANN. § 13-913 (2006)) (internal quotes omitted). Supervised probation is a lesser degree of probation.

70. *Id.* at 2, 209 P.3d at 138.

71. *Id.* at 3, 209 P.3d at 139.

72. *Id.*

73. *Id.*

74. *Id.* Importantly, the trial court had not yet "found" that Botkin had committed that offense.

75. *Id.* (citation omitted).

76. *Id.* at 4, 209 P.3d at 140.

time.'"[77] Just because Botkin committed the offense while on intensive probation did not mandate the consequences in A.R.S. section 13-917(B).[78] Rather, "the consequences mandated in § 13-917(B) are triggered only if the defendant is on intensive probation when the violation is found. Until then, the court retains authority under § 13-917(A) to transfer the person from intensive to supervised probation."[79]

The State argued that interpreting the statute to require both a petition to be filed *and* a finding of an additional felony offense would render the statute superfluous.[80] The court disagreed and stated that A.R.S. section 13-917(B) mandates the trial court to impose a prison term upon the finding of the two events.[81] The State also argued that trial judges would routinely transfer a defendant from intensive probation to supervised probation.[82] The court disagreed, however, and stated that a trial court would abuse its discretion if it ordered "a transfer after the filing of the revocation petition simply to avoid the consequences mandated by" A.R.S. section 13-917(B).[83] The court held that the trial court properly followed A.R.S. section 13-917(A) when it transferred Botkin from intensive probation to supervised probation because there had not yet been a finding that Botkin committed an additional felony and Botkin had significantly progressed during the period from his release from prison.[84]

3. Conclusion

Although the factual scenario in *Botkin* was narrow, the court went to great lengths to analyze A.R.S. sections 13-917(A) and 13-917(B). The court needed to go to such lengths because this was "an issue of first impression."[85]

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77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 5, 209 P.3d at 141. Botkin progressed by complying with the conditions of his probation, enrolling at Mesa Community College, paying his fines, completing his community service hours, and remaining drug and alcohol free. *Id.*
85. *Id.* at 3, 209 P.3d at 139.

D. Downie: Whether the Court Reduces the Amount of Restitution from an Unlicensed Contractor to a Homeowner by the Value of the Benefit Conferred on the Homeowner

In *Town of Gilbert Prosecutor's Office v. Downie*, the court held that criminal restitution penalties in unlicensed contractor cases may be reduced by the value of the benefit received by the victim homeowner.[86] The court clarified its holding in *State v. Wilkinson*,[87] in which full disgorgement of all payments made by victims to an unlicensed contractor was required in a faulty or incomplete work scenario.[88]

1. Factual Background and Procedural History

Richard and Felicita Rada contracted with Mitchell Matykiewicz in January 2005 to perform remodeling work on their home in Gilbert, Arizona.[89] After nine months of work and paying Matykiewicz $52,784.22, Mr. Rada discovered that Matykiewicz was not properly licensed.[90] The Gilbert prosecutor brought charges under A.R.S. section 32-1151.[91]

The municipal court convicted Matykiewicz based on its interpretation of *Wilkinson*, ordering him to pay restitution in the full amount of the Radas' payment and placing him on probation with a fine of $1,855.[92] The superior court, on appeal, vacated the restitution order and remanded for determination of the Radas' economic loss, which would have reduced what Matykiewicz owed the Radas by the amount of benefit conferred upon them from his nine months of work.[93] The court of appeals accepted the Town of Gilbert's petition for special action and reinstated the restitution order for the full amount, again based on *Wilkinson*.[94] The Arizona Supreme Court granted review to clarify its holding in *Wilkinson* and thus its interpretation of how to compute criminal restitution under A.R.S. section 13-603(C).[95]

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86. 218 Ariz. 466, 467, 189 P.3d 393, 394 (Ariz. 2008).
87. 202 Ariz. 27, 39 P.3d 1131 (Ariz. 2002).
88. *Downie*, 218 Ariz. at 468, 189 P.3d at 395.
89. *Id.* at 467, 289 P.3d at 394.
90. *Id.*
91. *Id.*; *see generally* ARIZ. REV. STAT. ANN. § 32-1151 (2006).
92. *Downie*, 218 Ariz. at 467, 189 P.3d at 394.
93. *Id.* at 467–68, 189 P.3d at 394–95.
94. *Id.* at 468, 189 P 3d at 395.
95. *Id.* As the court noted, "[t]he Victims' Bill of Rights gives victims the right to prompt restitution for any loss they incur as a result of a crime." *Id.* (citing ARIZ. CONST. art. 2, § 2.1(A)(8)). Furthermore, "the convicted person [is required] to make restitution to . . . the victim of the crime . . . in the full amount of the *economic* loss." *Id.* (quoting ARIZ. REV. STAT. ANN. § 13-603(C) (2006)) (emphasis added).

2. Discussion

The supreme court held that assessing a victim's "economic loss" for criminal restitution purposes requires taking into account any benefits conferred upon the victim.[96] In arriving at this holding, the court first looked to other provisions within the Arizona criminal code to interpret A.R.S. section 13-603(C)'s "economic loss" requirement for restitution. The court found that the criminal code does not specifically define "loss" and does not detail whether "loss" allows consideration of benefits conferred upon the victim.[97] The court then turned to Arizona and other jurisdictions' cases for guidance and concluded that "loss" is the loss actually suffered by the victim and does not include larger amounts to penalize the defendant.[98] Further, the court noted that this limited the victim's criminal restitution to direct losses and preserved the civil jury function of determining actual damages (including pain, suffering and consequential damages).[99]

Therefore, to avoid blurring the distinction between criminal restitution with the damages protected by the right to a civil jury trial and to avoid a windfall to the victim, the court concluded that criminal restitution must account for the benefit conferred on the victim to figure the "loss" suffered.[100] Finally, the court noted that the federal Mandatory Victims Restitution Act of 1996's ("MVRA") interpretation of criminal restitution comported with this definition.[101]

The court also took the opportunity to clarify any confusion arising from its decision in *Wilkinson*.[102] *Wilkinson* similarly involved an assessment of the restitution amount owed by an unlicensed home contractor for violating A.R.S. section 32-1151, but in that case, the construction work required additional costs for repairing and finishing the contractor's faulty, incomplete work.[103] The Arizona Supreme Court held that the restitution loss amount did not include the amount for repairs and completion; the restitution loss amount was for the amount paid for the contracting work.[104]

The Arizona Supreme Court distinguished *Wilkinson* and limited it to its facts of unlicensed contractors performing incomplete and faulty work.[105]

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96. *Id.* at 470, 189 P.3d at 397.
97. *Id.* at 468–69, 189 P.3d at 395–96.
98. *Id.* at 469–70, 189 P.3d at 396–97.
99. *Id.* at 469, 189 P.3d at 396.
100. *Id.*
101. *Id.* at 470, 189 P.3d at 397. *See* 18 U.S.C. § 3663A (2000 & Supp. 2007).
102. *Downie*, 218 Ariz. at 470, 189 P.3d at 397.
103. *Id.*
104. *Id.* at 470–71, 189 P.3d at 397–98.
105. *Id.* at 471, 189 P.3d at 398.

The court framed *Wilkinson* as not addressing the issue at hand in *Downie*—whether losses incurred by victims may be reduced by benefits bestowed on them from the unlicensed contractor.[106] Overextending *Wilkinson* to require criminal restitution to include the full amount paid in all cases would result in the victim recovering a windfall.[107] Furthermore, the court noted that the legislature had already provided explicit means for punishing unlicensed contractors without the need for supplementation by court-made law.[108] Therefore, the majority concluded, criminal restitution for determining a victim's "loss" requires consideration of benefits conferred on the victim by the unlicensed contractor.[109] The court remanded the case for the trial court to determine the Radas' losses accordingly.[110]

3. Concurring Opinion

Justice Hurwitz concurred in part with the majority opinion and concurred in the result.[111] His concurrence agreed that *Wilkinson* was factually distinguishable but noted that principles of *stare decisis* require respect for prior decisions' rationales as well as their holdings.[112] The *Wilkinson* rationale, therefore, was entitled to be extended to *Downie* under *stare decisis* to result in the Radas being entitled to their full payment as restitution.[113] However, the *Wilkinson* rationale would lead to the absurd result of restitution payments in the full amount even if the work was fully completed with full satisfaction.[114] Therefore, the concurrence would have overruled *Wilkinson* and arrived at the same result as the majority.[115]

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106. *Id.*

107. *Id.* For example, if a homeowner paid $5,000 for construction work to an unlicensed contractor yet one day later the contractor repaid the homeowner the $5,000, an overextension of *Wilkinson* would lead to the absurd windfall that the victim could still be entitled to the $5,000 because the contractor still stood in violation of A.R.S. section 32-1151. *See id.* at 471–72, 189 P.3d at 398–99.

108. *Id.* at 471, 189 P.3d at 398. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 32-1122(B)(2), (F) (2006) (requiring license-seekers to post a bond, obtain experience or training, and pass a written exam), 32-1164(A)(2), 32-1164(B), 13-707 (2006) (violating § 32-1151 is class A misdemeanor punishable by incarceration, probation, and fines), 13-1122(D), (E) (2006) (disqualification from subsequently obtaining a license).

109. *Downie*, 218 Ariz. at 472, 189 P.3d at 399.

110. *Id.* at 472–73, 189 P.3d at 399–400.

111. *Id.* at 473, 189 P.3d at 400.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 473–74, 189 P.3d at 400–01.

4. Dissenting Opinion

Chief Justice McGregor dissented, arguing that *Wilkinson* controlled and should result in the full amount paid as criminal restitution.[116] Chief Justice McGregor's argument was rooted in the principles of *stare decisis*, which she found especially present in this case due to the court's task of interpreting a statute and the lack of compelling purpose for straying from binding precedent.[117]

5. Conclusion

Although both the dissent and concurrence point out the traditional dangers of straying from binding precedent, in this case the potentially absurd results as noted by the majority and concurrence should override *stare decisis*. This is especially true because of *Wilkinson*'s arguably distinguishable facts and murky rationale. Thus, one could either argue that *Wilkinson* should be overruled or that it is not controlling in the first place. In resolving this issue of statewide importance,[118] the Arizona Supreme Court chose the latter option.

III. ATTORNEY ISSUE CASES

The next two cases deal with situations that all attorneys want to avoid: negligent use of trust accounts and ineffective assistance of counsel. But at least these are non-violent attorney issues as opposed to violent attorney issues.

A. White-Steiner: Whether the Courts and Disciplinary Commission Should Uphold a Hearing Officer's Findings in Attorney Discipline Cases when there is a Reasonable Basis for those Findings

In re White-Steiner is different from any of the other five cases in this article because the court does not state why it took the case. *White-Steiner* is important, however, because it reemphasizes the important rule that the Disciplinary Commission of the Arizona Supreme Court, when reviewing attorney discipline cases, must defer to the Disciplinary Hearing Officer's findings when there is a rational basis to do so.[119]

116. *Id.* at 474, 189 P.3d at 401.
117. *Id.* at 474–76, 189 P.3d at 401–03.
118. *Id.* at 468, 189 P.3d at 395.
119. *In re* White-Steiner, 219 Ariz. 323, 325–26, 198 P.3d 1195, 1197–98 (Ariz. 2009).

1. Factual Background and Procedural History

Janet White-Steiner and her husband Richard Steiner were the sole partners at Steiner & Steiner, P.C..[120] The State Bar learned that the firm's trust account had been overdrawn by $44.27.[121] The Bar investigated the matter and discovered that the firm had deficiencies in its trust accounting practices.[122] The firm used a credit card account to receive both client funds and earned fees.[123] Using a credit card is generally not a problem, except in this case the firm overlooked that the bank deducted administrative fees from the credit card receipts. The firm could have deposited personal funds into the credit card account to compensate the administrative fees, but the firm failed to do so.[124]

The State Bar investigation also discovered that "the law firm had not completed monthly three-way reconciliations of the trust account, properly accounted for credit card transaction fees charged on retainers, [or] maintained accurate client ledgers."[125] The State Bar filed a complaint against White-Steiner.[126] At a disciplinary hearing, White-Steiner asserted that Mr. Steiner was actually responsible for maintaining the law firm's trust account.[127]

The Hearing Officer determined that White-Steiner was a party responsible for the law firm's trust account, that White-Steiner was responsible to ensure that the firm complied with applicable rules, and that White-Steiner violated Ethical Rules 1.15(a), 5.1, and 5.3, and Supreme Court Rules 43 and 44, for improperly maintaining the firm's trust accounts.[128] The Hearing Officer recommended censure, two years probation, and participation in the State Bar's Law Office Management Assistance Program because White-Steiner had acted negligently but was not motivated by dishonesty and selfishness.[129]

The State Bar appealed to the Disciplinary Commission because it believed that White-Steiner's actions were more severe than mere negligence.[130] The Disciplinary Commission agreed with the Bar and

120. *Id.* at 324, 198 P.3d at 1196.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 324–25, 198 P.3d at 1196–97.

recommended suspension for six months and one day because "White-Steiner knew or should have known that her conduct was improper."[131]

2. Discussion

The Arizona Supreme Court considered five factors in determining appropriate sanctions for White-Steiner: "(1) the duty violated, (2) the lawyer's mental state, (3) the potential or actual injury caused by the lawyer's conduct, [(4) the presumptive sanction under ABA Standard 4.13, and (5)] the existence of aggravating or mitigating factors."[132] The second factor was the main disagreement between the Hearing Officer and the Disciplinary Commission. The Arizona Supreme Court held that if reasonable evidence supports the Hearing Officer's finding of negligence, then the Disciplinary Commission should not have changed the recommended sentence from censure and two years probation to six months and one day of suspension.[133]

For the first factor—duties violated—the parties did not dispute that White-Steiner breached duties owed to her clients.[134] Accordingly, the court held that White-Steiner breached her duty in violation of ABA Standard 4.1.[135]

In the second factor—the lawyer's mental state—the court stated that it sanctions attorneys for intentional or knowing conduct because it threatens more harm than negligent conduct.[136] The court set forth the applicable standards: "a lawyer's mental state is a fact question"; "the [Disciplinary] Commission must give 'great deference' to a hearing officer's factual findings and may not reject them unless they are clearly erroneous"; and "to be clearly erroneous, a finding must be unsupported by any reasonable evidence."[137]

The court held that there was a reasonable basis for the Hearing Officer to find that White-Steiner's conduct involving her trust account was negligent.[138] First, White-Steiner relied on her husband, Mr. Steiner, to manage the trust account.[139] Second, even though White-Steiner and Mr.

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131. *Id.* at 325, 198 P.3d at 1197.

132. *Id.* (citing *In re* Peasley, 208 Ariz. 27, 32–33 ¶¶ 19, 23, 90, P.3d 764, 769–70 (2004); *American Bar Association Standards for Imposing Lawyer Discipline* 3.0 (1992)).

133. *Id.* at 323–24, 198 P.3d at 1195–96.

134. *Id.* at 325, 198 P.3d at 1197.

135. *Id.*

136. *Id.*

137. *Id.* (citations omitted).

138. *Id.* at 326, 198 P.3d at 1198.

139. *Id.*

Steiner had received similar trust account reprimands in 2001, the Hearing Officer still could have reasonably concluded that White-Steiner did not know and should not have known of the 2006 trust violations.[140] Interestingly, the court noted that if it were involved in the initial fact-finding, it might have agreed with the Disciplinary Commission's findings.[141] However, the Disciplinary Commission and the courts must accept the Hearing Officer's findings because there was a reasonable basis in the record for them and the Hearing Officer was involved in the initial fact-finding.[142]

The court did not spend much time on the third factor—actual or potential injury—because White-Steiner did not contest that fact.[143] Clients were injured because "one client's debts were paid with trust account monies properly belonging to other clients."[144]

The fourth factor—ABA's presumptive sanction—showed that "reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client."[145] Because the Hearing Officer found that White-Steiner acted negligently, and because the Disciplinary Commission and the supreme court should follow the Hearing Officer's findings when they are supported by a rational basis, then the court should accept the ABA's presumptive sanction of a reprimand.[146]

Lastly, the parties did not dispute the fifth factor—aggravating and mitigating factors—and therefore accepted the Hearing Officer's findings.[147] The aggravating and mitigating factors did not alter the presumptive ABA sanctions.[148]

The court held that an appropriate sanction in this situation would be "a censure combined with two years probation, which . . . include[s] participation by White-Steiner in LOMAP and the State Bar's" trust and ethics programs.[149]

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140. *Id.* The court notes that the Hearing Officer did not find that the 2006 disciplinary actions involved similar conduct that put White-Steiner on notice that she was improperly dealing with client funds. *Id.*

141. *Id.*

142. *Id.* (citation omitted).

143. *Id.* at 326, 198 P.3d at 1198.

144. *Id.*

145. *Id.* (citation omitted).

146. *Id.* at 327, 198 P.3d at 1199.

147. *Id.*

148. *Id.*

149. *Id.* The court also did a proportionality review wherein the court analyzed similar cases to determine if the sanction was proportional to their facts. *Id.* The parties did not dispute that censure and probation was proportional to cases with similar fact scenarios. *Id.*

3. Conclusion

Although *White-Steiner* was not a case of first impression or a case of recurring issues with statewide importance, this case explains the principle that the Disciplinary Commission and the court must accept the findings by the Hearing Officer if the record supports them. The case seems to be cut-and-dry because it simply applies the law that the Disciplinary Commission must accept a Hearing Officer's findings if they are not clearly erroneous and if there is a reasonable basis. However, this rather simple case shows that rational people can come to different conclusions.

B. Hicks: Whether the State is Vicariously Liable for a State-Appointed Attorney's Negligent Misrepresentation to an Indigent Criminal Defendant

In *State v. Hicks*, the supreme court held that the State cannot be held liable for an attorney's negligence when the defendant did not claim that the attorney did not have the required skill and experience to handle the case.[150] Although the State has a duty to provide competent counsel to indigent defendants, the State does not have a duty to ensure that the appointed counsel effectively represents the defendant.[151]

1. Factual Background and Procedural History

Rafael Durnan was indicted by the Gila County grand jury for four felony counts.[152] Because Gila County does not have a county-funded public defender's office, it relies on private contract counsel to defend indigent defendants.[153] Accordingly, the trial judge appointed Kristi Riggins to be counsel for the defendant.[154] The defendant was convicted.[155] The defendant, dissatisfied with the result, claimed that Riggins provided "ineffective assistance of counsel" pursuant to the Arizona Rules of Criminal Procedure 32.1 and petitioned for post-conviction relief.[156] The defendant then sued the State and alleged that the State negligently hired Riggins and thus was

150. 219 Ariz. 328, 329, 198 P.3d 1200, 1201 (Ariz. 2009).

151. *Id.* at 330, 198 P.3d at 1202.

152. *Id.* at 329, 198 P.3d at 1201.

153. *Id.* at 329 n.1, 198 P.3d at 1201 n.1.

154. *Id.* at 329, 198 P.3d at 1201. "Riggins was in private practice and had contracted with Gila County to represent indigent defendants." *Id.*

155. *Id.* The trial judge sentenced the defendant to 10 years in prison. *Id.*

156. *Id.* The trial court found ineffective assistance of counsel and ordered a new trial. *Id.* However, the State dismissed all charges against Durnan, wsho at that point had already served five years in prison. *Id.*

vicariously liable for Riggins' negligence.[157] The superior court judge, Judge Hicks, held that the State was liable for Riggins' malpractice "under the doctrine of non-delegable duty" as analyzed in *Wiggs v. City of Phoenix*, 198 Ariz. 367, 10 P.3d 625 (Ariz. 2000).

2. Discussion

The supreme court had to determine whether the State's duty to provide counsel to indigent defendants also included the duty to ensure that the appointed counsel effectively represented the defendant.[158] The Sixth Amendment and subsequent United States Supreme Court cases make it clear that the State has a duty to provide counsel to indigent defendants.[159] However, "[t]he State's duty ends once it has appointed competent counsel."[160] The court stated that adding the requirement that the State would have to supervise each state-appointed attorney "would encroach upon both the defendant's Sixth Amendment rights . . . and the appointed attorney's ethical obligations."[161] Thus, after the State has appointed a competent attorney, its constitutional duty is discharged.[162] The court distinguished this case from *Wiggs*, the case that Judge Hicks relied upon, because the State did not hire Riggins to discharge its duties.[163] Rather, the State performed its duty by hiring Riggins, and the State had no other duty after hiring.[164]

3. Conclusion

For this issue of first impression,[165] the State of Arizona can rest assured that it will not be sued for every state-appointed attorneys' ineffective

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157. *Id.* The defendant eventually dropped the negligent hiring and supervision claims, which only left the vicarious liability issue. *Id.*

158. *Id.*

159. *Id.* at 329–30, 198 P.3d at 1201–02 (citations omitted).

160. *Id.* at 330, 198 P.3d at 1202 (citing Foster v. County of San Luis Obispo, 17 Cal. Rptr. 2d 730, 733 (Ct. App. 1993) ("[T]he duty of [the county] to provide appellant with competent legal assistance extended only to the appointment of counsel, and not to counsel's subsequent legal performance.")).

161. *Id.* at 330 (citing Strickland v. Washington, 466 U.S. 668, 686 (1984); Polk County v. Dodson, 545 U.S. 312, 321 (1981)).

162. *Id.* The court further stated that "once qualified counsel is appointed, the State's duty is complete because it cannot interfere with the representation provided by appointed counsel." *Id.* (citation omitted).

163. *Id.* at 331 n.5, 198 P.2d at 1203 n.5.

164. *Id.*

165. *Id.* at 329, 198 P.3d at 1201.

assistance to defendants. Because Durnan did not claim that Riggins was unqualified or incapable of providing adequate representation (as required by the Sixth Amendment), the State could not be held liable for Riggins' subsequent negligence and malpractice.[166]

IV. CONCLUSION

The supreme court resolved key issues in the 2008 to 2009 judicial term relating to non-violent criminal cases and attorney issues. The court interpreted statutes,[167] distinguished prior cases,[168] and resolved attorney issues.[169] Notwithstanding the vastly different factual scenarios and legal issues, the court was consistent in clarifying the law and interpreting criminal statutes.

166. *Id.* at 331, 198 P.2d at 1203.
167. *See supra* Parts II.A, II.B, II.C.
168. *See supra* Part II.D.
169. *See supra* Part III.