

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

MICHAEL EDWARD FINCK,  
*Appellant.*

No. 2 CA-CR 2012-0186  
Filed December 5, 2013

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See* Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24

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Appeal from the Superior Court in Pima County

No. CR20103802002

The Honorable Jose Robles, Judge Pro Tempore

**AFFIRMED IN PART; VACATED IN PART**

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COUNSEL

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*Counsel for Appellee*

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MEMORANDUM DECISION

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

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V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, appellant Michael Finck was convicted of four counts of third-degree burglary and one count each of possession of burglary tools, criminal damage, and attempted theft by control. The trial court found Finck had two or more historical prior felony convictions, denied Finck’s motion for a new trial, and sentenced him to enhanced, maximum, concurrent prison terms, the longest of which is twelve years. Finck appeals from his convictions and sentences and from the court’s subsequent denial of his motion to vacate judgment.

¶2 Counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), avowing she has reviewed the record and found no arguable issues to raise on appeal and asking this court to search the record for error. In compliance with *State v. Clark*, she has also provided “a detailed factual and procedural history of the case with citations to the record, [so] this court can satisfy itself that counsel has in fact thoroughly reviewed the record.” 196 Ariz. 530, ¶ 32, 2 P.3d at 97.

¶3 In a pro se, supplemental brief, Finck argues (1) the trial court erred or abused its discretion in denying his pretrial motions for discovery and in failing to obtain a valid waiver of his right to counsel before granting his motion for self-representation, in violation of *Faretta v. California*, 422 U.S. 806 (1975); (2) the prosecutor engaged in misconduct by failing to disclose exculpatory material, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), by violating other disclosure rules, and by making false statements to the court about evidence in the case; and (3) his court-appointed advisory counsel provided ineffective assistance, in violation “of his right to due process and of his other rights guaranteed by the

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Arizona and United States Constitutions.” Because we could not say Finck’s *Faretta* claim was “wholly frivolous,” *Anders*, 386 U.S. at 744, we asked counsel to file supplemental briefs addressing this claim. *See Penson v. Ohio*, 488 U.S. 75, 83-84 (1988) (briefing on arguable issue required). For the following reasons, we vacate the court’s criminal restitution order but otherwise affirm Finck’s convictions and sentences.

**FACTS**

¶4 On the night of October 24, 2010, the general manager of Daniel’s Moving & Storage reported a possible burglary after finding a huge hole in the wall that had separated Daniel’s from a business that occupied an adjacent space in the warehouse. While waiting for police to arrive, the manager noticed an older model pickup truck drive by the front of the warehouse twice; the same vehicle was seen by Pima County Sheriff’s Deputy B. Hill, who, along with his canine partner Randy, was first to arrive on the scene.

¶5 After other units had arrived, Hill and Randy searched the interior of the warehouse, and Randy alerted to an area containing stacks of large wooden crates in one of the adjacent businesses. Law enforcement personnel eventually discovered three men hiding in crates in the warehouse; Randall Gray was found in one crate, along with a flashlight and box-cutter, and Wesley Wallace and Finck were found in another, along with a flashlight and two pairs of gloves. A third flashlight, a handgun, and a tire iron were also photographed near the crates. All three men were charged with multiple counts. Finck’s case was later severed for trial; Gray and Wallace were tried in September 2011, and Finck was tried separately in late February and early March 2012.

¶6 Finck represented himself at trial, assisted by advisory counsel Lawrence Rosenthal. Before resting its case, the state played excerpts of telephone calls Finck had made from the Pima County Jail shortly after his arrest. During the calls, Finck told his girlfriend that he had been with Gray and Wallace and that the police had “caught [him] red-handed.”

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¶7 After the state rested, Finck testified that he had gone to the warehouse to look at a couch Wallace had proposed to give him in lieu of money he owed Finck. He said he had been accompanied by his friend P.H., who had parked Finck’s truck and sometime later had left the scene. Finck said he had entered the warehouse, believing Gray was employed there, and was looking at the couch when Gray said the police were there, and Wallace began brandishing a handgun. He said he had then gone with Wallace and Gray to one of the other businesses in the warehouse complex, where he hid in a crate with Wallace until discovered by police. Finck also admitted having five prior felony convictions.

**DISCUSSION**

¶8 In his supplemental pro se brief, Finck raises claims of errors committed by the trial court, misconduct by the prosecutor, and ineffective assistance from his advisory counsel. We address these claims in the context of their subject matter.

**Self- Representation**

¶9 Finck argues he “was deprived of his right to counsel . . . because the trial court (1) did not conduct a hearing required by *Faretta v. California*, 422 U.S. 806 . . . (1975) and Rule 6.1(c) of the Arizona Rules of Criminal Procedure; (2) the trial court’s *Faretta* and Rule 6.1(c) colloquy was inadequate; and (3) the trial court did not secure a valid waiver of counsel from [him].” He contends his “waiver of his right to counsel was not valid” because the court failed to advise him of (1) the nature of the charges against him; (2) the possible penalties he faced, “including the correct maximum penalty”; and (3) the “dangers and disadvantages of self-representation.”

¶10 He also argues the trial court “did not make a definitive ruling” on his motion to waive counsel and proceed pro se, but he acknowledges “all parties proceed[ed] as if” the court had granted his motion on August 26, 2011. Finally, he maintains there was a ten-day period—between January 27 and February 6, 2012—during which he was neither represented by counsel nor permitted to

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represent himself. After thorough review, we agree with the state that the record “supports a finding that Finck knowingly, intelligently and voluntarily chose to represent himself at trial.”

¶11 We review for an abuse of discretion a trial court’s determination that a defendant has validly waived the right to counsel. *State v. Gunches*, 225 Ariz. 22, ¶ 8, 234 P.3d 590, 592 (2010). A criminal defendant has a fundamental constitutional right to represent himself. *Faretta*, 422 U.S. at 817-19; *State v. Martin*, 102 Ariz. 142, 144, 426 P.2d 639, 641 (1967). A valid waiver of the right to counsel “must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *State v. Dann*, 220 Ariz. 351, ¶ 16, 207 P.3d 604, 612 (2009), quoting *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

¶12 Although a defendant “need not himself have the skill and experience of a lawyer” to intelligently choose self-representation, “he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” *Faretta*, 422 U.S. at 835, quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942). Consistent with *Faretta*, Rule 6.1(c) provides that “[a] defendant may waive his or her rights to counsel . . . in writing, after the court has ascertained that he or she knowingly, intelligently and voluntarily desires to forego them.”

¶13 But the Supreme Court has not “prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel”; rather, “[t]he information a defendant must possess in order to make an intelligent election . . . will depend on a range of case-specific factors, including the defendant’s education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding.” *Iowa v. Tovar*, 541 U.S. 77, 88 (2004). “[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the

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circumstances—even though the defendant may not know the *specific detailed consequences* of invoking it.” *Id.* at 92, quoting *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (alteration in *Tovar*); see also *United States v. Lopez-Osuna*, 242 F.3d 1191, 1199 (9th Cir. 2000) (in assessing validity of waiver, “the focus should be on what the defendant understood, rather than on what the court said or understood”).

¶14 Similarly, our supreme court has “reject[ed] any suggestion that a specific litany of questions be asked or warnings given in determining whether a waiver of counsel is knowing or intelligent.” *In re Maricopa Cnty. Juv. Action No. JV-108721 & F-327521*, 165 Ariz. 226, 229, 798 P.2d 364, 367 (1990). Thus, “[f]ailing to engage in a particular colloquy with a defendant, failing to warn a defendant of ‘every possible strategic consideration’ of proceeding pro se, or failing to have the defendant sign the written waiver provided for by Rule 6 is not necessarily reversible error.” *State v. McLemore*, 230 Ariz. 571, ¶ 23, 288 P.3d 775, 782 (App. 2012), quoting *Dann*, 220 Ariz. 351, ¶ 24, 207 P.3d at 613. And, although “the better practice” counsels “specific findings” regarding a defendant’s waiver of counsel, “the absence of such findings does not amount to reversible error if the record adequately shows that [the] waiver was knowing, intelligent, and voluntary.” *State v. Russell*, 175 Ariz. 529, 532, 858 P.2d 674, 677 (App. 1993); see also *United States v. McDowell*, 814 F.2d 245, 249 (6th Cir. 1987) (stating majority of circuit courts agree *Faretta* requires only “nonformalistic approach to determining sufficiency of the waiver from the record as a whole”).

¶15 In *Russell*, this court found a defendant had validly waived his right to counsel—even though the trial court had neither advised him about the dangers of waiving counsel or expressly found his waiver to be knowing, intelligent, and voluntary—when he had filed a written motion for self-representation before trial, had demonstrated an adequate familiarity with legal proceedings, and had clearly articulated his desire to defend himself. 175 Ariz. at 532, 858 P.2d at 677. Similar facts are evident in this record.

¶16 By August 17, 2011, when Finck filed his pro se “Combined Notice of Waiver of Counsel, and Motion Requesting an

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order which allows Defendant to Represent Himself and to Proceed as a Pro-se litigant” (“Motion for Self-Representation”), Finck had already been representing himself in Pima County Cause No. CR20110480—a case assigned to the same trial court—for more than two months.<sup>1</sup> As in *Russell*, Finck “specifically requested that the trial court allow him to proceed on his own,” 175 Ariz. at 532, 858 P.2d at 677, stating in his motion his intent to “[g]ive notice that he waives his right to counsel, and respectfully assert his right to represent himself” pursuant to “the first, sixth and fourteenth Amendments to the United States Constitution, Article II sections three, four, six, thirteen, and twenty-four of the Constitution of the State of Arizona, and Rule 6.1(c) of the Arizona Rules of Criminal Procedure.” He stated that his waiver was made “knowingly, intelligently, and voluntarily” and that his request to represent himself was “timely, unequivocal, voluntary and intelligent,” “made in good faith,” and “not made for purposes of delay.” He maintained he was in the best position to present his own defense and suggested the court “must hold a *Faretta* hearing” to consider his request.

¶17 After initially denying the motion, the trial court reconsidered its ruling at a status conference hearing held the following day. The court noted Finck’s previous acknowledgment that “he risk[ed] spending the rest of his life in prison” if convicted in the instant case and sentenced to consecutive terms. The court admonished Finck that he would need “to be prepared and ready for trial,” and Finck said he understood. The court further told Finck that he would be required to “proceed and follow the rules of evidence and all the other rules related to criminal procedure,” that “it w[ould] be of utmost importance that he abide by them,” and that he could face “harsh consequences” if he failed to do so. The

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<sup>1</sup>Finck had also filed several pro se pretrial motions in the instant case, including a motion to preserve evidence, including the “rough notes” kept by law enforcement officers, and a motion for production of the state’s notes or memoranda pertaining to any witnesses it expected to call at trial.

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court also insisted that Rosenthal remain in the case as advisory counsel.

¶18 The state asked the trial court to advise Finck about the distinction between hearsay evidence and a witness’s personal observations—in part, to assist Finck in making an informed decision about self-representation and “[to let him] know what he’s in for”—and the court did so.<sup>2</sup> At Finck’s request, the court also clarified other evidentiary issues and explained that introduction of certain evidence could “open[] the door” for rebuttal evidence introduced by the state. As Finck suggests, the court did not expressly grant his motion or find that Finck had voluntarily and intelligently waived his right to counsel. But the court and all parties understood that, as a result of the hearing, Finck had been permitted to represent himself, with the aid of Rosenthal as advisory counsel.

¶19 In December 2011, Finck filed a pro se “Request for Substitution of Counsel (Appointment of New Counsel)” in all four of his pending cases, asking that (1) Rosenthal be permitted to withdraw as his attorney in two cause numbers and advisory counsel in the other two cases, and (2) the trial court “appoint (new) counsel to both represent [him] and to act as [his] advisory counsel” in those cases. On January 20, 2012, the trial court issued an under-advisement ruling finding Finck had failed to establish an irreconcilable conflict with Rosenthal and appointing Rosenthal as counsel of record in all four cause numbers.

¶20 On January 27, Rosenthal asked the trial court to reconsider that ruling, and Finck told the court it had misunderstood his motion, stating, “I didn’t ask to . . . have my pro se status dissolved.” He added, “I do have the right, the Sixth Amendment right, to represent myself, dispose of the lawyers,

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<sup>2</sup>Finck had mistakenly believed an exception to the hearsay rule would permit him to introduce statements P.H. had made to others about the night of the burglaries, because P.H. had since died.

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attorney, represent myself, and then go forward. So with that said, I would really appreciate to go back to being pro se.”

¶21 On February 6, the court granted that request and ruled that Finck would represent himself at trial, assisted by Rosenthal as advisory counsel.<sup>3</sup> At trial, Finck participated in voir dire, made an opening statement, examined and cross-examined witnesses, argued matters to the court outside the presence of the jury, and presented closing argument.

¶22 Citing *State v. Cornell*, 179 Ariz. 314, 878 P.2d 1352 (1994), and *State v. Rigsby*, 160 Ariz. 178, 772 P.2d 1 (1989), the state maintains Finck understood the potential punishment he faced and argues his considerable experience with the criminal justice system supports an inference that he understood the trial process and the dangers of self-representation. The state contends the court’s appointment of advisory counsel also “address[ed the] inherent disadvantages of self-representation.” See *Cornell*, 179 Ariz. at 324, 878 P.2d at 1362 (court’s “numerous and broad” warnings sufficiently suggested “self-representation was not advisable,” and appointment of advisory counsel “ensured that Defendant had access to advice about” specific concerns). Finally, the state contends, “Finck’s performance at trial, as reflected in the record on appeal, confirms that he managed his defense capably,” a factor that may be considered in determining whether a defendant’s waiver of counsel was voluntary and intelligent. See *Rigsby*, 160 Ariz. at 182, 772 P.2d at 5 (finding defendant’s competent self-representation and evident understanding of trial procedures relevant to determination of whether he understood inherent risks).

¶23 In a reply brief, Finck asserts he was misinformed about the potential penalty he faced—based on the prosecutor’s assertion in open court that he faced consecutive sentences—“because all of the alleged unlawful acts occurred in one incident, and at the same time, [and] the trial court was required to run all of the sentences

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<sup>3</sup>The court also ruled on numerous pro se motions Finck had filed since August 2011.

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concurrently with each other.” On the contrary, although the court did impose concurrent sentences for the separate burglaries, we are not convinced it was required to do so.<sup>4</sup> But that issue is not before us. Overall, the record supports the conclusion that Finck was well aware of the nature of the charges against him and the gravity of potential punishment if convicted.

¶24 With respect to his understanding of the the perils of self-representation, Finck acknowledges “that the record . . . reflects that he is an experienced criminal defendant.” But he argues most of that experience has been in Maricopa County, where “the Maricopa County Sheriff’s office, (MCSO), has in place policies and proce[dure]s which govern an established pro-per program” that provides access to “an extensive law library,” staffed by law school graduates; “access to a cordless telephone from 8:00 a.m. to 10:00 p.m. daily”; and access to a storage area, where pro se litigants may use and store files, drafting materials, and audio equipment. He maintains “the trial court did not advise [him] of the dangers and disadvantages of proceeding pro-per in [P]ima [C]ounty,” and he contends his prior experience would not have prepared him for the relative disadvantages of doing so. But, as noted above, Finck had been representing himself in another Pima County criminal case for more than two months when he filed his Motion for Self-Representation in this case. *See supra* ¶ 16. And he had substantial experience with self-representation in Pima County by the end of January 2012, when, despite those difficulties, he told the trial court,

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<sup>4</sup>A.R.S. § 13-116 bars the imposition of consecutive sentences for a single “act or omission which is made punishable in different ways by different sections of the laws.” Based on record evidence, Finck was convicted of burglarizing different businesses in a warehouse complex, divided by internal walls and each “separately securable” from the other. *See* A.R.S. § 13-1501(12) (“‘Structure’ means any . . . place with sides and a floor that is separately securable from any other structure attached to it and that is used for lodging, business, transportation, recreation or storage.”). Thus, although the burglaries all occurred on a single evening, entry into each structure or fenced commenrcial yard appears to have been a separate act, subject to separate punishment under § 13-116.

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“I want to emphatically state that I want to go through with this trial and represent myself in this trial. And I have put a lot of time into it, to prepare for it. I’m ready to go to trial.”<sup>5</sup>

¶25 The record also does not support Finck’s assertions that he was confused about the status of his representation because the trial court failed to make express rulings. Instead, it reflects that he knew the court had granted his Motion for Self-Representation on August 26, 2011, and had reappointed Rosenthal to represent him on January 20, 2012. At the status conference on January 27, 2012, the court agreed to reconsider Rosenthal’s reappointment and Finck’s request to “reinstate” his pro se status, but made clear it would not rule on the issue until a hearing on February 6. Thus, Rosenthal’s reappointment lasted from January 20 until February 6, 2012. On February 6, the court informed Finck he would be representing himself at trial.

¶26 The record as a whole establishes Finck knew what he was doing when he waived his right to counsel and asked to represent himself, and he made that choice with his eyes open. *See Faretta*, 422 U.S. at 835; *United States v. Gerritsen*, 571 F.3d 1001, 1008 (9th Cir. 2009) (although reviewing courts “prefer trial courts to simplify our review by explaining the risks of self-representation,” such “explanations are not required”; “a defendant’s waiver must be evaluated in light of the record as a whole”), *quoting United States*

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<sup>5</sup>In his reply brief, Finck for the first time “asserts the related claim that the trial court’s failure to make an adequate inquiry into his competence to waive counsel denied him due process,” although he does not “claim[] that he was in fact incompetent to waive counsel.” “[A]rguments raised for the first time in a reply brief . . . are waived.” *State v. Brown*, 233 Ariz. 153, ¶ 28, 310 P.3d 29, 39 (App. 2013). Moreover, on this record, we find no arguable basis for the court to have questioned Finck’s competency to waive counsel. *See Cornell*, 179 Ariz. at 322-23, 878 P.2d at 1360-61 (inquiry required when circumstances give rise to “good faith doubt” about defendant’s competence to waive right to counsel).

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*v. Kimmel*, 672 F.2d 720, 721-22 (9th Cir. 1982). The trial court did not abuse its discretion in granting his request.

### Discovery Motions

¶27 Finck contends the trial court abused its discretion in denying two discovery motions he filed on January 4, 2012: his “motion for immediate production of all evidence and information favorable to the defense” (“Motion for Favorable Evidence”) – which the court denied without prejudice to raise “any *Brady* issues that come up during the trial” – and his “Motion for Impeaching Information.” Relying on *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Bagley*, 473 U.S. 667 (1985), and *Kyles v. Whitley*, 514 U.S. 419 (1995), Finck maintains he had “an absolute right to the evidence and information set forth, in detail,” in those motions, and he argues the court’s “patently unreasonable denial” of them resulted in structural error, entitling him to a new trial.<sup>6</sup> We review

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<sup>6</sup>Specifically, Finck maintains,

[S]tructural error occurred . . . because he was utterly deprived of the rights to: (1) Adequate, effective, and meaningful access to the court; (2) Effective self-representation; (3.) Effective cross examination [of] witnesses; (4.) Effective confrontation of witnesses against him; (5.) Due process of law; (6.) Equal protection under the laws of the State of Arizona and United States of America; (7.) Prepare an effective and meaningful defense; (8.) Adequately and effect[ive]ly prepare for trial; (9.) An ample opportunity to meet the case of the prosecution; (10.) Introduce evidence of exculpatory nature; (11.) Present exculpatory evidence in a meaningful manner; (12.) A fair trial; and (13) the rights guaranteed to [him] by the 1st, 5th, 6th and 14th amendments to the

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a trial court's rulings on discovery and disclosure matters for an abuse of discretion, *State v. Bernini*, 220 Ariz. 536, ¶ 7, 207 P.3d 789, 791 (App. 2009), but we review constitutional claims de novo, *State v. Connor*, 215 Ariz. 553, ¶ 6, 161 P.3d 596, 600 (App. 2007).

¶28 In his Motion for Favorable Evidence, Finck cited *Brady* in requesting

any and all information and/or evidence . . . relating directly or indirectly to exculpation, mitigation, impeachment, or which could reasonably weaken or affect any evidence proposed to be introduced against [him], or which is relevant to the subject matter of this indictment, or the subject matter of any of [his] motion[s], especially his motion to recuse the prosecutor, motion for contempt of court, and motion to dismiss indictments, or

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United States Constitution, as well as those parallel rights guaranteed by the Constitution of the State of Arizona, and all other rights not hereinbefore enumerated, including applicable statutes of the State of Arizona, and prevailing case law . . . whether provided herein or not.

With the exception of his claims that his right to due process was violated by the state's failure to disclose the specific evidence addressed below, Finck does not develop any of these issues in a manner that even suggests they are arguably meritorious for review on appeal, and, therefore, we do not consider them further. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *cf.* *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (issue waived for insufficient argument on appeal).

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which in any manner may aid [him] in the ascertainment of the truth,

as well as anything “possibly leading” to such information or evidence. He further requested, without limitation, broad categories of information, such as transcripts and audio and video recordings of “each and every hearing related directly or indirectly” to each of his four pending cases and all audio and video recordings made of certain sections of the jail during a one-year period.

¶29 In his “Motion for Impeaching Information,” Finck requested “any and all personnel files” for the assigned prosecutor and specified law enforcement and jail employees—most of whom were not listed as potential witnesses at trial—and asked the state to identify “the extent of drug use, past and present” by all individuals “who were used to . . . obtain evidence” against him, “as such is known, or can be known by the exercise of due diligence [by] the state.” He also requested the “complete and full” transcript, as well as video and audio recordings, of the trial of co-defendants Wallace and Gray, and copies of all exhibits admitted at their trial.

¶30 “There is no general federal constitutional right to discovery in a criminal case.” *State v. Tucker*, 157 Ariz. 433, 438, 759 P.2d 579, 584 (1988). Criminal defendants “are entitled to disclosure only of evidence favorable to the defense and material to guilt or punishment.” *State ex rel. Montgomery v. Welty*, 233 Ariz. 8, ¶ 16, 308 P.3d 1159, 1164 (App. 2013). The state’s “duty to disclose such evidence is applicable even though there has been no request by the accused . . . and . . . encompasses impeachment evidence as well as exculpatory evidence.” *Strickler v. Greene*, 527 U.S. 263, 280 (1999). “Any other discovery is subject to statutory or court rule limitation.” *Montgomery*, 233 Ariz. 8, ¶ 16, 308 P.3d at 1164.

¶31 As Finck suggests, the state had an independent duty to disclose all “existing material or information which tend[ed] to mitigate or negate [his] guilt as to the offense charged, or which would tend to reduce [his] punishment therefor,” Ariz. R. Crim. P. 15.1(b), including “evidence that the defense might have used to impeach the Government’s witnesses by showing bias or interest,”

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*Bagley*, 473 U.S. at 676. Pursuant to Rule 15.1(g), a defendant may file a motion seeking “material or information not otherwise covered by Rule 15.1,” which a trial court may grant upon a “showing that the defendant has substantial need” for the information “in the preparation of [his] case” and “is unable without undue hardship to obtain the substantial equivalent by other means.”

¶32 But Rule 15.1(g) does not countenance a “blind fishing expedition among documents possessed by the government.” *State v. Acinelli*, 191 Ariz. 66, 71, 952 P.2d 304, 309 (App. 1997), quoting *Jencks v. United States*, 353 U.S. 657, 667 (1957). In *Acinelli*, we concluded a trial court did not abuse its discretion in denying a defendant’s request for personnel records when his motion provided “[not] even a hint that impeaching material was contained therein.” *Id.*, quoting *United States v. Andrus*, 775 F.2d 825, 843 (7th Cir. 1985) (alteration added). We explained that “[m]ere speculation that a government file may contain *Brady* material is not sufficient to require a remand for in camera inspection, much less reversal for a new trial.” *Id.*, quoting *United States v. Navarro*, 737 F.2d 625, 631 (7th Cir. 1984) (alteration added). Rather, a court need not grant such discovery absent a defendant’s “threshold showing of materiality.” *Id.*; see also *State v. Robles*, 182 Ariz. 268, 272, 895 P.2d 1031, 1035 (App. 1995) (same).<sup>7</sup>

¶33 Because Rule 15.1(g) pertains only to “material or information not otherwise covered by Rule 15.1,” the trial court did not abuse its discretion in denying Finck’s request for discovery of materials that were subject to such mandatory disclosure, barring “any *Brady* issues that come up during the trial.” With respect to the other information and materials Finck sought, the court reasonably could have found Finck had failed to show the materiality required to justify his expansive requests. We find no arguable merit to his

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<sup>7</sup>Similarly, our supreme court has concluded that when an indigent defendant “request[s] a transcript of a co-defendant’s trial . . . [the] defendant must show specific need”; “its necessity to an effective defense is not presumed.” *State v. Tison*, 129 Ariz. 526, 540, 633 P.2d 335, 349 (1981).

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claim that the court abused its discretion and committed reversible error when it denied his broad discovery requests.<sup>8</sup>

### Disclosures

¶34 In a related claim, Finck contends he is entitled to a new trial because the state failed to disclose exculpatory and impeachment evidence “as required by *Brady v. Maryland* and its progeny.” He asserts “there is a very strong likelihood” that the outcome of his trial would have been different had such evidence been disclosed. We find no arguable merit to this claim.

¶35 “Under *Brady*, the State violates a defendant’s right to due process if it withholds evidence that is favorable to the defense and material to the defendant’s guilt or punishment.” *Smith v. Cain*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 627, 630 (2012). Evidence is considered “material” for purposes of *Brady* only if “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Bagley*, 473 U.S. at 682. Thus, “the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the constitutional sense,” *United States v. Agurs*, 427 U.S. 97, 109–10 (1976), “the Constitution is not violated every time the government fails . . . to disclose evidence that might prove helpful to the defense,” *Kyles*, 514 U.S. at 436–37 (1995).

¶36 Finck identifies four alleged *Brady* violations by the state. The first claim arises from the state’s March 2012 disclosure in Pima County Cause No. CR-20110480, one of the other cases then pending against Finck, of an interview police had conducted on January 25, 2011 – while investigating an unrelated homicide – with a man named J.B. During the interview, J.B. admitted that he had

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<sup>8</sup> Finck’s claims that the state failed to comply with the mandatory disclosure requirements, in violation of the rule announced in *Brady*, are addressed below.

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been the driver of the truck Deputy Hill and the business's manager had seen driving by the warehouse on the night of the burglaries and that he had come "back to get 'em" when Deputy Hill spotlighted his vehicle and, according to J.B., "I was gone." According to Finck, J.B.'s admission "that 'they' called [J.B.] to pick them up" could have referred only to Wallace and Gray, because Finck's truck was already on the scene, and he did not require transportation.

¶37 Related to his claim of prejudice from the state's failure to disclose J.B.'s statement before trial, Finck contends, without any citation to the record or other evidence, that the state also failed to disclose "negative results" of a latent fingerprint analysis performed on his vehicle. Finck maintains that "without [J.B.]'s statements . . . and the negative results of the latent print analysis performed on . . . Finck's vehicle, a highly prejudicial inference was impermissibly drawn by the jury, namely, that . . . Finck must [have been an] accomplice" because his vehicle "was the only one indentified" on the scene and so must have been used by Gray and Wallace as transportation to and from the warehouse.

¶38 But the state never alleged Finck was an accomplice to the crime on the basis that he had transported Gray and Wallace to the warehouse, and Deputy Hill testified about his efforts to have J.B.'s truck located that night. And Finck had the opportunity to cross-examine the business's manager and Deputy Hill about J.B.'s truck and its driver and to argue his own vehicle had not been used to transport Wallace and Gray.

¶39 We also find no evidence to suggest the Pima County Sheriff's Department ever conducted any fingerprint analysis on Finck's truck, and because Finck has not cited any such evidence, he has waived this claim. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). In any event, there is no arguable merit to Finck's contention that J.B.'s statement or negative fingerprint results, alone or in combination, "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435; *see also Agurs*, 427 U.S. at 109-110; *cf. State v. Torres*, 162 Ariz. 70, 75-76, 781 P.2d 47, 52-53 (App. 1989) (absence of defendant's

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fingerprints on evidence collected but not tested for prints would not have eliminated him as suspect). J.B.'s involvement as a participant in the crime would in no way exclude Finck's participation. With or without J.B.'s statement, and with or without any negative fingerprint test results, if they exist, the jury could reasonably have inferred that the burglaries of multiple warehouse businesses might involve more than one truck, driven by more than one accomplice.

¶40 Finck's other claims alleging disclosure violations do not involve the state's failure to disclose evidence, but the timing of its disclosures. The state disclosed its intent to use recordings of Finck's telephone conversations from the jail on February 9, 2012, nineteen days before trial. Finck does not argue the state failed to disclose the actual recordings before the "[f]inal [d]eadline" in Rule 15.6(c), which requires that disclosure "be completed at least seven days prior to trial." Rather, Finck appears to argue the calls were not disclosed "seasonably," *see* Rule 15.6(a), and were "intentionally withheld from the defense . . . until such a time that [they] could not be challenged or defended against."

¶41 Although Finck maintains, based on his understanding of jail procedures, that the recordings must have been requested long before their disclosure, he failed to develop any clear evidentiary record to support this premise. Nor does he state how he was prejudiced by the timing of the disclosure, or what he might have done differently if he had known earlier of the state's intent to offer this evidence.<sup>9</sup> We find no abuse of discretion in the court's denial of Finck's motion in limine, which was conditioned upon the state's compliance with Rule 15.6(d) in disclosing the actual recordings. *See State v. Trujillo*, 227 Ariz. 314, ¶ 25, 257 P.3d 1194,

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<sup>9</sup>Finck suggests that the discovery motions denied by the trial court included "specific requests" for "copies of all of [his] recorded telephone conversations." But based on our review of those motions, Finck had not requested copies of the recorded conversations themselves, but records related to any applications made for duplication of the recordings.

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1200 (App. 2011) (determination of disclosure violation and imposition of sanctions “within the sound discretion of the trial court”).

¶42 Finck also argues he “did not begin to receive the crime scene photographs” until the day before trial, and “did not receive all of the 807 photographs” until shortly before closing arguments. But he does not dispute the state’s assertion that the photographs were disclosed on January 18, 2011, or Rosenthal’s acknowledgment that he had been “late” in providing some of the photographs to Finck, even though the state’s disclosure had been timely. The state did not violate its disclosure obligations with respect to the crime scene photographs. In addition, like the other evidence identified in Finck’s claims of disclosure violations, there is no reasonable probability that the introduction of any crime scene photograph would have changed the result of this proceeding. *See Bagley*, 473 U.S. at 682. There is no arguable merit to the claim.

**Prosecutorial Misconduct**

¶43 We also find no arguable merit to Finck’s claims of prosecutorial misconduct. In addition to allegations of misconduct related to disclosure, addressed above, Finck maintains the assigned prosecutor engaged in misconduct because he “blatantly lied” to the trial court about the existence or relevance of certain evidence. Specifically, Finck challenges the prosecutor’s statements to the court (1) that he had not seen—among more than eight hundred crime scene photographs—a photograph Finck had specifically described and later located, and (2) that evidence of a broken firearm recovered at the scene was more probative than prejudicial because it was the “only” evidence of stolen property found very near the crates in which the defendants had been hiding, when a pair of gloves found in or near the crates may also have been stolen.

¶44 To prevail on a claim of prosecutorial misconduct, a defendant must establish that ““(1) misconduct is indeed present[,] and (2) a reasonable likelihood exists that the misconduct could have affected the jury’s verdict, thereby denying defendant a fair trial.”” *State v. Anderson*, 210 Ariz. 327, ¶ 45, 111 P.3d 369, 382–83 (2005),

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*quoting State v. Atwood*, 171 Ariz. 576, 606, 832 P.2d 593, 623 (1992). Although the prosecutor may have made misstatements to the court, based on mistaken impressions or recollections, we cannot say they were evidence of misconduct. Moreover, we can see no way in which the alleged misconduct in this case could have affected the jury's verdicts. As already discussed, none of the crime scene photographs were constitutionally material to Finck's defense, and Finck himself relied on the introduction of the firearm evidence when testifying about the reasons for his actions on the night of the burglaries.

### **Ineffective Assistance of Advisory Counsel**

¶45 Finck's claim that Rosenthal rendered ineffective assistance as advisory counsel is not cognizable on appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002); *Russell*, 175 Ariz. at 534-35, 858 P.2d at 679-80. Accordingly, we do not consider it.

### **Criminal Restitution Order**

¶46 Finck has not raised the issue on appeal, but we find fundamental error in the sentencing minute entry, which states "all fines, fees, assessments and/or restitution are reduced to a Criminal Restitution Order [CRO], with no interest, penalties or collection fees to accrue while the defendant is in the Department of Corrections." "[T]he imposition of a CRO before the defendant's probation or sentence has expired 'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). This is so even when, as here, the trial court delayed the accrual of interest. Nothing in A.R.S. § 13-805,<sup>10</sup> which governs the imposition of CROs,

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<sup>10</sup>The legislature has amended § 13-805 three times in recent years. 2012 Ariz. Sess. Laws, ch. 269, § 1; 2011 Ariz. Sess. Laws, ch. 263, § 1 and ch. 99, § 4. None of the changes are material to our decision. 2005 Ariz. Sess. Laws, ch. 260, § 6; *see Lopez*, 231 Ariz. 561, n.1, 298 P.3d at 910 n.1.

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“permits a court to delay or alter the accrual of interest when a CRO is ‘recorded and enforced as any civil judgment’ pursuant to § 13-805(C).” *Lopez*, 231 Ariz. 561, ¶ 5, 298 P.3d at 910.

**DISPOSITION**

¶47 We conclude substantial evidence supported findings of all the elements necessary for Finck’s convictions, and his sentences are authorized by law. In our examination of the record pursuant to *Anders*, we have found no reversible error and no other arguable issue warranting further appellate review. *See Anders*, 386 U.S. at 744. Accordingly, we vacate the CRO but otherwise affirm Finck’s convictions and sentences.