

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

BRUCE ALAN MCCULLOUGH,
Petitioner,

v.

HON. RICHARD D. NICHOLS, JUDGE OF THE SUPERIOR COURT OF
THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

THE STATE OF ARIZONA,
Real Party in Interest.

No. 2 CA-SA 2016-0014
Filed April 11, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED FOR PERSUASIVE AUTHORITY.
See Ariz. R. Sup. Ct. 111(a)(3), (c); Ariz. R. Civ. App. P. 28(a)(2);
Ariz. R. P. Spec. Actions 7(g), (i).

Special Action Proceeding
Pima County Cause No. CR20131970001

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

Dean Brault, Pima County Legal Defender
By Vincent J. Frey, Assistant Legal Defender, Tucson
Counsel for Petitioner

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Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Real Party in Interest

DECISION ORDER

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

ECKERSTROM, Chief Judge:

¶1 In this special action, petitioner Bruce McCullough challenges the respondent judge’s denial of his motion to remand the underlying matter to the grand jury for a redetermination of probable cause, pursuant to Rule 12.9, Ariz. R. Crim. P. McCullough had asserted in his motion that his due process rights were violated and he was denied substantial procedural rights based on, inter alia, faulty instructions and presentation of false and misleading evidence.

¶2 Review of a trial court’s ruling on a Rule 12.9 motion must be sought by special action. *See State v. Moody*, 208 Ariz. 424, ¶ 31, 94 P.3d 1119, 1134-35 (2004); *see also* Ariz. R. P. Spec. Actions 1(a) (stating special action jurisdiction appropriate where there is no “equally plain, speedy, and adequate remedy by appeal”). Additionally, in its response to McCullough’s petition, the real-party-in-interest state concedes “it should have better instructed the grand jury on the law that applies to this case” and that relief is warranted. The state has proposed that, upon remand, it will present the grand jury with instructions on first-degree murder that (1) do not include the language that malice may be implied “when no considerable provocation appears”; (2) relate to premeditation in accordance with the law that existed in 1976; and, (3) are based on the current law of justification. The state’s concession appears to be well taken, given the record before us. Additionally, McCullough has not filed a reply to the state’s response. Therefore, we adopt the remedy that the state has proffered, which adequately addresses the

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issues McCullough has raised and resolves this special action in a satisfactory manner. *Cf. State v. Morgan*, 204 Ariz. 166, ¶ 9, 61 P.3d 460, 463 (App. 2002) (rejecting defendant's claim in opening brief that court erred in refusing to give lesser-included-offense instruction in light of state's assertion in answering brief that greater charge was not submitted to jury and defendant's failure to file reply brief explaining discrepancy).

¶3 We therefore accept jurisdiction of McCullough's special-action petition and reverse the respondent judge's order denying McCullough's Rule 12.9 motion. We remand this matter for further proceedings consistent with this decision order.