

## Summaries of Published Opinions

December 3, 2018

**2018 CO 93. No. 15SC504. Ruibal v. People.**  
*Evidence—Expert Testimony—Abuse of Discretion.*

Ruibal petitioned for review of the Court of Appeals' judgment affirming his conviction for second degree murder. Over defense objection and without taking evidence or making any findings as to reliability, the trial court admitted

expert testimony to the effect that the victim's injuries in this case demonstrated "overkill," a formal term describing multiple injuries focused on one area of the victim's body, which includes blows about the head and face that are numerous and extensive, indicating that the assailant likely had either a real or perceived emotional attachment to the victim. Relying on case law from several other jurisdictions, a treatise dealing with related kinds of injuries, and the witness's

own experience with autopsies involving similar injuries, the Court of Appeals concluded that the expert opinion was sufficiently reliable and that the trial court had implicitly found as much by granting the prosecution's proffer.

The Supreme Court held that because the trial court made no specific finding that the theory of "overkill" espoused by the witness was reliable, nor was the reliability of that theory either supported by evidence in the record



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or already accepted in this jurisdiction, its admission amounted to an abuse of discretion. However, because there was overwhelming evidence of defendant's guilt apart from the expert testimony, the error was necessarily harmless. Accordingly, the Court of Appeals' judgment was affirmed.

**2018 CO 94. No. 18SA92. In re Fox v. Alfini.**  
*Attorney-Client Privilege—Discovery—Client with Diminished Mental Capacity.*

In this original proceeding pursuant to C.A.R. 21, the Supreme Court reviewed the district court's order compelling production of a recording of petitioner's initial consultation with her attorney. The district court determined that the recording was not subject to the attorney-client privilege because her parents were present during the consultation and their presence was not required to make the consultation possible. Further, the district court refused to consider several new arguments that petitioner raised in a motion for reconsideration.

The Court issued a rule to show cause and concluded that the presence of a third party during an attorney-client communication will ordinarily destroy the attorney-client privilege unless the third party's presence was reasonably necessary to the consultation or another exception applies. Here, because the record supports the district court's finding that petitioner had not shown that her parents' presence was reasonably necessary to facilitate the communication with counsel, the court perceives no abuse of discretion in the district court's ruling that the recording at issue was not protected by the attorney-client privilege.

The Court further concluded that, under settled law, the district court did not abuse its discretion in refusing to consider the new arguments that petitioner raised in her motion for reconsideration.

Accordingly, the Court discharged the rule to show cause.

**December 10, 2018**

**2018 CO 95. No. 16SC916. Thompson v. Catlin.**  
*Appellate Mandate—Garnishment—Prejudgment Interest.*

At issue in this garnishment proceeding was the amount of insurance proceeds owed to petitioners. The Court of Appeals grappled with the amount of this debt on four separate occasions. In *Thompson v. United Securities Alliance Inc. (Thompson IV)*, 2016 COA 128 ¶ 27, \_\_ P.3d \_\_, a division of the Court of Appeals upheld the district court's determination of attorney fees and costs that the insurance company may deduct from the liability limit under its policy. It is this decision in *Thompson IV* about fees and costs that the Supreme Court reviewed here. First, it addressed whether the *Thompson IV* division erred when it upheld the district court's decision to consider new evidence on remand from *Thompson v. United Securities Alliance, Inc. (Thompson III)*, No. 13CA2037 (Colo.App. Oct. 16, 2014). Because the *Thompson IV* division reasonably construed the mandate issued by the *Thompson III* division, the Supreme Court perceived no error. Second, it addressed whether the *Thompson IV* division erred when it held that petitioners are not entitled to prejudgment interest in a garnishment proceeding. The Court concluded that the division erred. Petitioners are entitled to prejudgment interest under CRS § 5-12-102. Accordingly, as to the first issue, the Court of Appeals' judgment was affirmed. As to the second, it was reversed.

**2018 CO 96. No. 16SC952. Cowen v. People.**  
*Sentencing—Restitution—Compensable Losses.*

The Supreme Court held that Colorado's restitution statutes do not allow trial courts to order restitution for pecuniary losses caused by conduct that formed the basis of a charge of which the defendant has been acquitted. Even where the defendant has been convicted of a separate charge, this state's restitution statutes do not permit a trial court to impose restitution for losses suffered as a result of the acquitted conduct. The prosecution's contrary construction would both violate well-settled rules of statutory interpretation and run afoul of the Fourteenth Amendment's guarantee of procedural due process.

Because the Court of Appeals affirmed the order requiring defendant to pay restitution for losses caused by conduct supporting an acquitted charge, the Court reversed that court's

decision. The matter was remanded to the Court of Appeals for further proceedings consistent with this opinion.

**December 17, 2018**

**2018 CO 97. No. 15SC977. Marko v. People.**  
*Juror Challenges—Custodial Interrogation.*

The Supreme Court examined whether a trial court abused its discretion in denying a defendant's challenge for cause to a prospective juror who expressed concerns about the not guilty by reason of insanity defense. Because the trial court sufficiently rehabilitated the prospective juror through individual questioning during voir dire, the Court concluded that the trial court did not abuse its discretion in denying defendant's challenge for cause. Additionally, the Court addressed whether a member of the military was in custody for purposes of *Miranda* when he was interviewed by the civilian police after being restrained and transported to the interview by the military police. Under the totality of the circumstances, the Court held that defendant was not in custody during the pre-advisement portion of his interview. Accordingly, the Court affirmed the judgment of the Court of Appeals. **CL**

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