

**APPLICATION FOR NOMINATION TO  
JUDICIAL OFFICE**

**SECTION I: PUBLIC INFORMATION  
(QUESTIONS 1 THROUGH 65)**

**PERSONAL INFORMATION**

1. Full Name: **DAVID JOSEPH EUCHNER**
  
2. Have you ever used or been known by any other name? **\_NO\_** If so, state name:
  
3. Office Address: **PIMA COUNTY PUBLIC DEFENDER'S OFFICE  
33 N. STONE AVE., 21ST FLOOR, TUCSON, AZ 85701**
  
4. How long have you lived in Arizona? What is your home zip code?  
**19 years. 85704**
  
5. Identify the county you reside in and the years of your residency.  
**Pima County for 19 years**
  
6. If nominated, will you be 30 years old before taking office?  yes  no  
  
If nominated, will you be younger than age 65 at the time the nomination is sent to the Governor?  yes  no

7. List your present and any former political party registrations and approximate dates of each:

**Libertarian 2001-2012, 2012-present**

**Republican, Jan-April 2012**

**(prior to moving to Arizona, I registered in Massachusetts and in New Jersey as either Libertarian or independent)**

(The Arizona Constitution, Article VI, § 37, requires that not all nominees sent to the Governor be of the same political affiliation.)

8. Gender: **Male**

Race/Ethnicity: **Caucasian**

### **EDUCATIONAL BACKGROUND**

9. List names and locations of all post-secondary schools attended and any degrees received.

**Rutgers College, Rutgers University, New Brunswick, NJ, 1991-1994**

**Bachelor of Arts in Classical Humanities, May 1994**

**Finished undergraduate degree in three years**

**Rutgers University School of Law-Camden, Camden, NJ, 1994-1996**

**Suffolk University Law School, Boston, MA 1998-1999 (visiting student)**

**Juris Doctor from Rutgers-Camden, October 1999**

**Suffolk University, Sawyer School of Management, Boston, MA, 1999-2000**

**Enrolled in MBA program; did not complete.**

10. List major and minor fields of study and extracurricular activities.

#### **LAW SCHOOL**

**Rutgers Law Journal, 1995-1996 – articles editor**

**Hunter Advanced Moot Court 1995-1996**

#### **UNDERGRADUATE**

**major: Classical Humanities; minor: Political Science**

**Opinion page editor, The Rutgers Review, 1992**

**Rutgers University Marching Band, 1991-1994**

11. List scholarships, awards, honors, citations and any other factors (e.g., employment) you consider relevant to your performance during college and law school.

**Eta Sigma Phi (National Honor Society for students in Classics), inducted November 1992**

**Phi Sigma Iota (International Foreign Language Honor Society), inducted November 1993**

**Garden State Scholar, 1991-1994 (based on performance in high school, received \$1,000/yr scholarship to attend any state-funded college)**

**PROFESSIONAL BACKGROUND AND EXPERIENCE**

12. List all courts in which you have been admitted to the practice of law with dates of admission. Give the same information for any administrative bodies that require special admission to practice.

**Arizona Supreme Court – October 22, 2002**

**U.S. District Court – District of Arizona – December 9, 2002**

**U.S. Court of Appeals – Ninth Circuit – July 31, 2007**

**United States Supreme Court – March 9, 2009**

13. a. Have you ever been denied admission to the bar of any state due to failure to pass the character and fitness screening? **\_NO\_** If so, explain.
- b. Have you ever had to retake a bar examination in order to be admitted to the bar of any state? **\_NO\_** If so, explain any circumstances that may have hindered your performance.

14. Describe your employment history since completing your undergraduate degree. List your current position first. If you have not been employed continuously since completing your undergraduate degree, describe what you did during any periods of unemployment or other professional inactivity in excess of three months. Do not attach a resume.

EMPLOYER	DATES	LOCATION
<b>Pima County Public Defender</b>	<b>8/2005-present</b>	<b>Tucson, AZ</b>
<b>Solo practitioner</b>	<b>10/2002-8/2005</b>	<b>Tucson, AZ</b>
<b>Self - Law clerk to Marc J. Victor</b>	<b>3/2002-10/2002</b>	<b>Mesa, AZ</b>
<b>The Gillette Company</b>	<b>2/1998-12/2000</b>	<b>Boston, MA</b>

**In 2001, I worked as campaign manager for a candidate for the Massachusetts State Legislature. The special election occurred on October 22, 2001, and I relocated to Arizona on November 26, 2001. Upon moving to Arizona, I began preparing for the bar examination; I clerked for Marc Victor while I learned Arizona law.**

15. List your law partners and associates, if any, within the last five years. You may attach a firm letterhead or other printed list. Applicants who are judges or commissioners should additionally attach a list of judges or commissioners currently on the bench in the court in which they serve.

**See Appendix 1.**

16. Describe the nature of your law practice over the last five years, listing the major areas of law in which you practiced and the percentage each constituted of your total practice. If you have been a judge or commissioner for the last five years, describe the nature of your law practice before your appointment to the bench.

**Until recently, my practice had exclusively criminal defense, appellate and post-conviction cases. In spring 2018, I began handling appeals in dependency and severance cases from Juvenile Court.**

**In addition to case work, I have been the supervisor of the appellate unit since 2012. This includes administrative duties related to supervising lawyers and staff, accepting appointment of cases from the Office of Public Defense Services, assigning those cases, budgeting, etc.**

**I give one-on-one advice to all of our office's trial lawyers who are preparing for trial on all facets of the case. Though my expertise is on legal issues such as admissibility of evidence and jury instructions, my experience as a trial lawyer allows me to provide advice related to strategizing the theory of the case and courtroom tactics. As I had been performing this task already, the Public Defender's Office created the role of Resource Counsel so that I might concentrate more of my efforts on this task.**

**In April 2006, then-Pima County Public Defender Robert Hooker began sending an attorney to all initial appearance sessions to represent those being seen on new felony charges. I was part of the pilot program and I have represented new arrestee's at IA's continuously for more than nine years. One of the other supervisors and I train our new lawyers on how to represent clients at IA's. In this limited capacity I have represented many thousands of defendants.**

**Each year I prepare and give approximately 4-6 new presentations for**

continuing education on a variety of topics (see Appendix 2 for list of presentations).

I author and file several *amicus curiae* briefs each year in the federal and state appellate courts. Those briefs are submitted on behalf of Arizona Attorneys for Criminal Justice (AACJ), with some including other *amici curiae* such as the Pima County Public Defender's Office.

17. List other areas of law in which you have practiced.

**Civil rights, subrogation, personal injury, contracts, general civil practice.**

18. Identify all areas of specialization for which you have been granted certification by the State Bar of Arizona or a bar organization in any other state.

**None.**

19. Describe your experience as it relates to negotiating and drafting important legal documents, statutes and/or rules.

**I have been a member of the State Bar's Criminal Jury Instructions Committee since Fall 2010. In this capacity, I propose jury instructions and I review those proposed by other committee members, and in committee meetings we discuss and debate and take votes on the proposals. The committee is comprised of prosecutors, defense attorneys, and trial judges, approximately one-third each. One such instruction that I drafted and was adopted by the Committee was approved by the Arizona Supreme Court in *State v. Lua*, 237 Ariz. 301, 350 P.3d 805 (2015).**

**I was appointed to the Criminal Rules Task Force in 2016-17, which redrafted the entire Arizona Rules of Criminal Procedure. I was then appointed to the (Criminal) Rule 32 Task Force for 2018-19, and I was made a workgroup leader by the chair of the committee to supervise the work of judges and other practitioners.**

**On behalf of Arizona Attorneys for Criminal Justice, beginning in 2008, each year I file several comments on rule change petitions in the Arizona Supreme Court. I also file comments on behalf of the Pima County Public Defender. In 2019, I filed a petition to modify one of the Arizona Rules of Criminal Procedure.**

**I am regularly consulted to offer opinions on bills pending in the legislature and what effect such legislation might have for the criminal justice system. Some of my suggestions have been enacted into law.**

20. Have you practiced in adversary proceedings before administrative boards or commissions?   NO   If so, state:
- a. The agencies and the approximate number of adversary proceedings in which you appeared before each agency.
  - b. The approximate number of these matters in which you appeared as:
 

Sole Counsel: \_\_\_\_\_

Chief Counsel: \_\_\_\_\_

Associate Counsel: \_\_\_\_\_
21. Have you handled any matters that have been arbitrated or mediated?   YES    
If so, state the approximate number of these matters in which you were involved as:
- Sole Counsel:   5   **(these are approximate numbers)**
- Chief Counsel:   2
- Associate Counsel:   2
22. List at least three but no more than five contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (3) a summary of the substance of each case; and (4) a statement of any particular significance of the case.

***Bressi v. Ford et al.***

- 1) **December 2003 – June 2012.**
- 2) **U.S. District Court # CV-04-264-JMR (later CV-04-264-AWT)  
Hon. John M. Roll (until January 2011)  
Hon. Wallace A. Tashima by designation (January 2011 – June 2012)**

**U.S. Court of Appeals – Ninth Circuit, 575 F.3d 891 (9th Cir. 2009)  
Hons. Canby, Wardlaw, Mills**

- 3) **Co-Counsel 2006-2009: James P. Harrison, then attorney with First Amendment Project (admitted pro hac vice), 1736 Franklin St., 9<sup>th</sup> Floor, Oakland, CA 94612; (510) 208-7744; [jph@well.com](mailto:jph@well.com)**

**Co-counsel 2010-2012: Ralph E. Ellinwood, PO Box 40158, Tucson AZ 85717; (520) 413-2323; [ree@yourbestdefense.com](mailto:ree@yourbestdefense.com)**

**Opposing counsel for individual defendants (2004-2012): Roger W. Frazier, 2525 E. Broadway Suite #200, Tucson, AZ 85716; (520) 882-4294**

**Opposing counsel for United States of Arizona (2004-2009): Gerald S. Frank (now retired), U.S. Department of Justice – Civil Division, 405 W. Congress St., Suite 4800, Tucson, AZ 85701; (520) 620-7300**

- 4) **I was plaintiff's counsel in a civil rights case related to an unconstitutional roadblock operated by police officers of the Tohono O'odham Police Department. The complaint alleged that the roadblock violated the United States Supreme Court's holdings in *Michigan Dept. of Public Safety v. Sitz*, 496 U.S. 444 (1990), and *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), in that the primary purposes of the roadblock were not merely to detect drunk drivers but also general law enforcement purposes such as interdicting drug and alien smugglers and stolen vehicles and finding persons with arrest warrants.**

**The case was initially brought in Pima County Superior Court on December 19, 2003, and removed to United States District Court in 2004. Judge Roll granted summary judgment to all defendants as to all claims in 2007, but the Ninth Circuit reversed as to many of the claims against the individual defendants in 2009. Both sides moved for summary judgment in 2011 and Judge Tashima denied the plaintiff's motion and granted in part and denied in part the defendants' motion. The case settled on the eve of trial in May 2012.**

- 5) **The Ninth Circuit published an opinion in this case because the law was unsettled as to whether a United States citizen could bring a claim against tribal police officers in federal court for violations of the United States Constitution based on conduct occurring on a state highway that runs through a tribal reservation. Now, it is clear that if tribal police officers are also certified by the State of Arizona and detain motorists on a state highway, then the federal constitution applies.**

**At the time I accepted this case, I had recently moved to Arizona from the east coast, where there are very few tribal reservations and no body of law on this subject. I accepted the case because the case**

was too important not to take and there was no other attorney willing to litigate the complex issues of tribal jurisdiction. By virtue of the Ninth Circuit opinion, I became a local expert on this area of law and for a while I received phone calls from lawyers throughout the Ninth Circuit asking for advice.

Shortly after his arrest in this case, Mr. Bressi began investigating and calling attention to the use of suspicionless checkpoints inside U.S. borders. He later outfitted his vehicle with several video cameras and created a YouTube channel and a website informing citizens of their rights and the scope of police authority, which gained considerable popularity and inspired many others to do the same. He now regularly appears in national media discussing the issue and his story has been profiled on NPR multiple times.

***State v. McFarland***

- 1) May 2008 – June 2009.
- 2) Pima County Superior Court # CR-2002-2869  
Hon. Paul Tang
- 3) Opposing Counsel:  
Shawn Jensvold (then Deputy Pima County Attorney)  
Pinal County Attorney's Office, PO Box 887, Florence, AZ 85132,  
(520) 866-5515, [shawn.jensvold@pinalcountyaz.gov](mailto:shawn.jensvold@pinalcountyaz.gov)
- 4) The Pima County Public Defender's Office was appointed as post-conviction counsel; the case was originally assigned to a colleague but was then assigned to me in May 2008. Mr. McFarland was convicted of several counts of sexual conduct with a minor and molestation of a child and received a combination of concurrent and consecutive sentences totaling 117 years. There was an obvious claim for ineffective assistance of appellate counsel, because retained counsel strategically chose not to order transcripts and the Court of Appeals had no record upon which it could question the trial court's rulings. Both the State and the trial court were willing to stipulate to relief on that basis and grant Mr. McFarland a new appeal.

Although this claim was easy, it was not his best claim and likely would have resulted in affirmance by the Court of Appeals. I conducted a thorough review of the file and interviewed witnesses and identified several other claims. One of those claims was ineffective assistance of trial counsel for failing to explain the terms of the plea in the context of the evidence in the case in a manner which his client could comprehend. In 2012, the United States

Supreme Court has decided *Missouri v. Frye* and *Lafler v. Cooper*. Prior to that, however, *State v. Donald*, 199 Ariz. 406 (App. 2000), was under constant attack from prosecutors, and many appellate judges had written concurring opinions or included dictum in memorandum decisions suggesting that *Donald* should be overruled. The strength of the argument in my petition, however, convinced State's counsel to resolve the case by re-opening negotiations with me, and the State extended the original plea with a modification (12 years plus a probationary term to follow, instead of 10 years plus probation). If successful in the Rule 32 hearing, my client would have been entitled to the 10-year offer, but the negotiated settlement eliminated the substantial risk that the trial court would not grant relief.

- 5) Because the case is unpublished, it has no significance to the legal community as a whole. It has significance to my professional development because I was able to negotiate a settlement with the Pima County Attorney's Office in post-conviction without having to get a favorable ruling from the court first. As a rule, that office would not negotiate from such a position of strength; rather, they would wait until appellate or post-conviction relief was granted and only then would prosecutors negotiate.

#### ***State v. Armstrong***

- 1) November 2011 – June 2013
- 2) Pima County Superior Court # CR-2011-1012  
Hon. Jane L. Eikleberry (first trial in 2011)  
Hon. Richard D. Nichols (retrial proceedings in 2013)  
  
Arizona Court of Appeals # 2 CA-CR 2011-0391  
*State v. Tucker et al.*, 231 Ariz. 125, 290 P.3d 1248 (App. 2012)  
Hons. Espinosa, Vásquez, Kelly
- 3) Opposing Counsel (appeal):  
Nicholas Klingerman, Arizona Attorney General's Office  
400 W. Congress, Bldg. S-315, Tucson, AZ 85701, (520) 628-6504,  
[nicholas.klingerman@azag.gov](mailto:nicholas.klingerman@azag.gov)  
  
Opposing Counsel (re-trial):  
Julie Sottosanti (then with Pima County Attorney's Office), United States Attorney's Office, 405 W. Congress, Suite 4800, Tucson, AZ 85701, (520) 620-7405  
  
Co-Counsel (re-trial):  
Amanda Bynum (then with Public Defender's Office), University of Arizona James E. Rogers College of Law, 1201 E. Speedway, Tucson,

AZ 85721, (520) 621-4212, [abynum@email.arizona.edu](mailto:abynum@email.arizona.edu)

Counsel for co-defendant Tucker (appeal):  
Cornelia Honchar, 911 S. Meyer Ave., Tucson, AZ 85701, (520) 882-0191, [honcharlaw@cox.net](mailto:honcharlaw@cox.net)

Counsel for co-defendant Cuttler (appeal):  
Anne Elsberry (then in private practice), now with Pima County Legal Defender's Office, 33 N. Stone Ave. 9<sup>th</sup> Floor, Tucson, AZ 85701, (520) 724-5775, [anne.elsberry@pima.gov](mailto:anne.elsberry@pima.gov)

Counsel for co-defendant Tucker (trial and re-trial):  
Stephanie Meade, PO Box 35382, Tucson, AZ 85740, (520) 419-0299, [meadelaw23@aol.com](mailto:meadelaw23@aol.com)

Counsel for co-defendant Cuttler (re-trial):  
Nicki DiCampi (then in private practice), now with Pima County Public Defender's Office, 33 N. Stone Ave. 21<sup>st</sup> Floor, Tucson, AZ 85701, (520) 724-6800, [nicki.dicamp@pima.gov](mailto:nicki.dicamp@pima.gov)  
Jack Lansdale, 177 N. Church Ave. Suite 200, Tucson, AZ 85701, (520) 884-7514, [jacklansda@aol.com](mailto:jacklansda@aol.com)

- 4) Four defendants were indicted for class 2 conspiracy (to commit armed robbery and related offenses) and misconduct involving body armor. One defendant was found incompetent but restorable and the other three went to trial with no plea offer. Tucker and Cuttler were convicted of both counts and Armstrong was convicted only of the body armor charge.

On appeal, all three defendants raised the issue that the trial court committed structural error by closing the courtroom to the public based on an unsubstantiated belief that spectators were taking photos of witnesses or jurors. Cuttler separately raised the issue of denial of his motion for change of trial counsel, and I also raised for Armstrong the issues of insufficient evidence to convict for the body armor count and that his motion to sever his trial from the co-defendants was erroneously denied.

My request for oral argument was granted, and co-defendants' counsel agreed to let me argue the common issue. The Court of Appeals reversed all of the convictions based on the closure of the courtroom.

Armstrong's trial counsel Michael Mussman retired from the Public Defender's Office during the pendency of the appeal, and Armstrong was pressing for speedy trial, so I kept the case for retrial and pressed for a short-set trial. The original prosecutor, J.C.

**Patrascioiu, had left the Pima County Attorney's Office, requiring a new prosecutor to have to prepare a trial within 60 days. When the new prosecutor initially took the position that no plea offer would be extended (based solely on the decision by the original prosecutor), I filed a handful of motions and received a plea offer. As it was not good enough to accept, I received a second and then a third plea offer. After some modifications to the third offer were made, Armstrong accepted. Despite having nine prior felony convictions, he received a partially mitigated sentence of 3.5 years, and was released from Department of Corrections by the end of that year.**

**5) The legacy of the case is the opinion of the Court of Appeals. This was the first case in Arizona where the public was denied access to a criminal trial, and the court was required to determine whether this was structural error mandating automatic reversal or trial error, which would not require reversal if the error could be found harmless beyond a reasonable doubt. Convincing the court that the error was structural required an historical analysis (going back to 17<sup>th</sup> century England) of the right to a public trial in order.**

23. Have you represented clients in litigation in Federal or state trial courts? YES  
If so, state:

The approximate number of cases in which you appeared before:

Federal Courts: 3

State Courts of Record: 400

Municipal/Justice Courts: 20

The approximate percentage of those cases which have been:

Civil: 20

Criminal: 80

The approximate number of those cases in which you were:

Sole Counsel: 400

Chief Counsel: 10

Associate Counsel: 15

The approximate percentage of those cases in which:

You wrote and filed a pre-trial, trial, or post-trial motion that wholly or partially disposed of the case (for example, a motion to dismiss, a motion for summary judgment, a motion for judgment as a matter of law, or a motion for new trial) or wrote a response to such a motion:   20  

You argued a motion described above   20  

You made a contested court appearance (other than as set forth in the above response)   75  

You negotiated a settlement:   95  

The court rendered judgment after trial:   1  

A jury rendered a verdict:   4  

The number of cases you have taken to trial:

Limited jurisdiction court   0  

Superior court   17  

Federal district court   0  

Jury   15  

Note: If you approximate the number of cases taken to trial, explain why an exact count is not possible.

24. Have you practiced in the Federal or state appellate courts? **YES** If so, state:

The approximate number of your appeals which have been:

Civil:   2  

Criminal:   170  

Other:   33 (all dependency)  

The approximate number of matters in which you appeared:

As counsel of record on the brief: 160

Personally in oral argument: 58

**NOTE: THIS TOTAL DOES NOT INCLUDE APPROXIMATELY 30 POST-CONVICTION CASES LITIGATED IN SUPERIOR COURT BUT NOT IN APPELLATE COURTS.**

25. Have you served as a judicial law clerk or staff attorney to a court? **\_NO\_** If so, identify the court, judge, and the dates of service and describe your role.
26. List at least three but no more than five cases you litigated or participated in as an attorney before mediators, arbitrators, administrative agencies, trial courts or appellate courts that were not negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency and the name of the judge or officer before whom the case was heard; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

***State v. Coghill***

- 1) **August 2008 – June 2009 (Jury Trial March 17-25, 2009).**
- 2) **Pima County Superior Court # CR-2004-2573  
Hon. Teresa Godoy**
- 3) **Opposing Counsel:  
Shawn Jensvold (then with Pima County Attorney’s Office)  
Pinal County Attorney’s Office, PO Box 887, Florence, AZ 85132,  
(520) 866-5515, [shawn.jensvold@pinalcountyz.gov](mailto:shawn.jensvold@pinalcountyz.gov)**  
  
**Co-counsel:  
Paul Skitzki, Pima County Public Defender’s Office, 33 N. Stone Ave.,  
21<sup>st</sup> Floor, Tucson AZ 85701, (520) 724-6800, [paul.skitzki@pima.gov](mailto:paul.skitzki@pima.gov)**
- 4) **Coghill was originally tried and convicted on 15 counts of sexual exploitation of a minor in 2006, but his convictions were reversed on appeal in *State v. Coghill*, 216 Ariz. 578, 169 P.3d 542 (App. 2007), and the mandate issued in 2008. Mr. Coghill had retained counsel for his original trial, but Paul Skitzki and I were appointed to represent Coghill for the retrial. I have prior work experience in information technology and I developed an entirely different theory of the case from the first trial that was supported by the computer evidence. After two days of deliberation, the jury returned 14 not guilty verdicts and one count of guilty of attempted sexual exploitation of a minor, and Coghill was sentenced to probation.**
- 5) **Almost all of the prosecutions for possession of child pornography**

that are brought in Superior Court result from a civilian report against the accused, such as a family member or a roommate. The existence of a testifying witness to the defendant's knowing possession of child pornography makes these cases almost impossible to win at trial. Furthermore, because the average sentence after trial is over one hundred years, most defendants accept a plea offer rather than go to trial.

For several years, this was the only case in Pima County Superior Court where a defendant facing these charges went to trial and was not sentenced to a lengthy term of imprisonment. (Afterward, I received some correspondence from prisoners asking how it was possible that Coghill received probation.)

As a result of this trial, I was asked to give a presentation on trying a computer case to a jury in September 2009 (see Appendix 2), and for many years criminal defense attorneys from around the state (public and private) consulted with me to help them understand the computer evidence in their cases.

### ***State v. Glissendorf***

- 1) December 2012 – July 2014.
- 2) Arizona Court of Appeals # 2 CA-CR 2012-0405  
Arizona Supreme Court # CR-13-0388-PR  
235 Ariz. 147, 329 P.3d 1049 (2014)
- 3) Opposing Counsel:  
Alan Amann, then with Arizona Attorney General's Office (now inactive, no contact information available)  
Joseph Maziarz, Arizona Attorney General's Office (now retired, no contact information available)  
  
Co-counsel:  
Katherine Estavillo (then with Public Defender's Office), Bache & Lynch, 1846 E. Innovation Park Dr., Oro Valley, AZ 85755, (520) 293-5300, [katherine@bachelynych.com](mailto:katherine@bachelynych.com)
- 4) Glissendorf was convicted at trial of two counts of molestation of two separate children. Kristine Maish filed the opening brief prior to retiring from the Public Defender's Office, and Katherine Estavillo and I filed the reply brief in July 2013. The Court of Appeals agreed that the trial judge committed two errors—denying a *Willits* instruction (lost, misplaced, or destroyed evidence), and factual findings regarding the admission of Rule 404(c) evidence—but only

reversed one count as to the first and ordered a limited remand hearing as to the second. Both sides petitioned for review, and the Supreme Court granted both petitions. In the end, Glissendorf obtained reversal of both convictions because of the erroneous denial of the *Willits* instruction, and the Court did not need to reach the other question.

- 5) Until this case was decided, Superior Court judges routinely affirmed the position of prosecutors that the defense would not be entitled to the instruction unless it could prove both that the loss of evidence was intentional and that the defendant was actually prejudiced, when in fact neither was required, and only one of those two would be required for dismissal of the indictment. No conviction had been reversed on appeal for decades prior to this case.

### ***State v. Johnson***

- 1) September 2007 – July 2013.
- 2) Pima County Superior Court # CR-2005-4530  
Hon. Deborah Bernini (2009-2010)  
Hon. Howard Hantman (2012-2013)  
  
Court of Appeals Nos. 2 CA-CR 2007-0268, 2 CA-CR 2010-0380  
229 Ariz. 475, 276 P.3d 544 (App. 2012)  
Hons. Eckerstrom, Howard, Brammer
- 3) Opposing Counsel (both appeals):  
David Sullivan (then with Arizona Attorney General's Office) – no contact information available

Opposing Counsel (both re-trials):  
Mark Diebolt, Pima County Attorney's Office, 32 N. Stone Ave., 14<sup>th</sup> Floor, Tucson, AZ 85701, (520) 740-5600,  
[mark.diebolt@pcao.pima.gov](mailto:mark.diebolt@pcao.pima.gov)

Co-counsel (both re-trials):  
Kimberly Sweeney, Pima County Public Defender's Office, 33 N. Stone Ave. 21<sup>st</sup> Floor, Tucson, AZ 85701,  
[kimberly.sweeney@pima.gov](mailto:kimberly.sweeney@pima.gov)

- 4) Johnson was tried for first-degree murder and convicted at a bench trial of second-degree murder in 2007. He was sentenced to an aggravated sentence of 22 years. On appeal, I successfully argued that his waiver of his right to a jury trial on guilt did not apply to aggravating factors, and thus he should be retried on those factors.

The Court of Appeals ordered a retrial. The Court of Appeals did not agree with my argument that retrial should be barred by double jeopardy; I unsuccessfully sought review of that ruling in the Arizona Supreme Court and the United States Supreme Court.

I was lead counsel for the retrial on aggravating factors. Most of my pretrial motions were denied, and my motions for mistrial were denied, leading the jury to find proven all aggravating factors that were alleged and the court to impose an aggravated sentence again.

My opening brief had 11 issues and reversal was obtained again; because one of the aggravating factors was unaffected by the appellate decision, however, the third trial was permitted to be to the court. In 2013, a new judge heard the aggravating factors and found the most serious factor, that the offense was cruel, heinous, or depraved, not proven by a preponderance of the evidence. Johnson was then sentenced to the presumptive term of 16 years.

- 5) The Court of Appeals published an opinion in the second appeal, with two important holdings. First, evidence of the defendant's diminished capacity, which is precluded in the guilt phase by statute, does not apply to the sentencing phase at all even in a noncapital case where the judge imposes sentence and considers the mitigation, because the state of mind is relevant to the mental state element of proving that the offense was "cruel, heinous, or depraved." Second, although it is dictum, the Court assumed—to Johnson's benefit—that the standards for "cruel, heinous, or depraved" provided in Arizona Supreme Court capital cases apply equally in noncapital cases.

#### ***State v. Montes***

- 1) June 2009 – January 2011.
- 2) Arizona Court of Appeals # 2 CA-CR 2008-0148  
Arizona Supreme Court # CR-10-0017-PR  
226 Ariz. 194, 245 P.3d 879 (2011)
- 3) Opposing Counsel:  
Amy Thorson, Arizona Attorney General's Office, 400 W. Congress Bldg. S-315, Tucson AZ 85701, [amy.thorson@azag.gov](mailto:amy.thorson@azag.gov)  
Kent Cattani, then Chief Counsel, Criminal Appeals / Capital Litigation Section of Arizona Attorney General's Office, now Judge of Division One of Arizona Court of Appeals
- 4) Montes was convicted of second-degree murder and aggravated

assault at a trial at which he was required to prove self-defense by a preponderance of the evidence. While he was pending trial, the legislature enacted, and the governor signed with an emergency clause in 2006, SB 1145, which placed the burden on the state of disproving that the defendant acted in self-defense. Prior to his trial, the Supreme Court held in *Garcia v. Browning*, 214 Ariz. 250, 151 P.3d 533 (2007), that SB 1145 did not apply retroactively. In 2009, while Mr. Montes' appeal was still pending but after briefing at the Court of Appeals was complete, the governor signed SB 1449, which made the 2006 change in the law retroactive to anyone who was pending trial on April 24, 2006 but did not plead guilty.

After unsuccessfully moving to suspend the rules and allow supplemental briefing, the Court of Appeals affirmed the convictions in a memorandum decision. But it reconsidered the decision based on the change of the law and in a published opinion held that the new law was unconstitutional because it violated separation of powers. I argued successfully to the Supreme Court that the Court of Appeals misapplied the separation of powers doctrine, and the Supreme Court ordered a new trial for Montes.

- 5) SB 1449 did not actually affect many defendants. The lasting significance of the case is the explanation that the Supreme Court's previous cases holding that the legislature may not overrule a case of the Supreme Court retroactively but that its previous cases using the term "separation of powers" contained "ex post facto undertones" and that separation of powers only prohibits the legislature from overruling the Supreme Court retroactively when doing so would take away defendants' vested rights.

#### ***State v. Lewis***

- 1) September 2013 – September 2015.
- 2) Arizona Court of Appeals No. 2 CA-CR 2013-0323  
236 Ariz. 336, 340 P.3d 415 (App. 2014)  
Hons. Howard, Vásquez, Kelly
- 3) Opposing Counsel:  
Eliza Ybarra, Arizona Attorney General's Office, 2005 N. Central Ave.,  
Phoenix, AZ 85004, [eliza.ybarra@azag.gov](mailto:eliza.ybarra@azag.gov)

Co-counsel:  
Erin Sutherland, Pima County Public Defender's Office, 33 N. Stone  
Ave., 21<sup>st</sup> Floor, Tucson AZ 85701, (520) 724-6800,  
[erin.sutherland@pima.gov](mailto:erin.sutherland@pima.gov)

- 4) **Anthony Lewis was charged with capital murder for setting a woman on fire. Prior to the inevitable *Atkins* hearing to determine whether his intellectual disability (formerly mental retardation) would disqualify him for the death penalty, his counsel filed a Rule 11 motion for mental examination because the extent of his intellectual disability prevented him from being able to assist counsel in his defense. He was found not competent but restorable, but not long after, the psychologist at the Pima County Jail's Restoration to Competency (RTC) program claimed he was malingering. After a lengthy contested Rule 11 hearing, the court found that Lewis was not restored. A new RTC doctor then took over, and essentially agreed with the previous RTC doctor and disagreed with the defense experts. With time running out on the 21-month clock to restore him, the court found that Lewis was restored. At trial, the jury acquitted him of premeditated murder, and acquitted him of burglarizing the victim's residence, but convicted him of felony murder based on the instruction for burglarizing the victim's residential yard.**

**On appeal, we argued that Lewis was not restored to competency, and that the jury instruction on third-degree burglary (the only possible predicate felony) was defective because it allowed the jury to convict on felony murder if the residential yard was unfenced. The Court of Appeals agreed that the statute should require the yard to be fenced, but found the error harmless based on its finding that the yard was in fact fenced. As to the competency issue, the Court of Appeals found that the record in this case supported the finding that Lewis was restored to competency, but noted that there was no legal standard in Arizona and agreed with us that a finding of restoration could not be based on a new doctor merely disagreeing with the findings of previous doctors.**

- 5) **Although Lewis's convictions were affirmed by the Court of Appeals, the opinion it published broke important new ground in Arizona law with regard to determinations of restoration of competency. Prior to this case, it was not understood at all how the court and counsel should treat a finding of restoration to competency and whether it could be challenged in the context of the previous findings.**

27. If you now serve or have previously served as a mediator, arbitrator, part-time or full-time judicial officer, or quasi-judicial officer (e.g., administrative law judge, hearing officer, member of state agency tribunal, member of State Bar professionalism tribunal, member of military tribunal, etc.), give dates and details, including the courts or agencies involved, whether elected or appointed, periods of service and a thorough description of your assignments at each court or agency. Include information about the number and kinds of cases or duties you

handled at each court or agency (e.g., jury or court trials, settlement conferences, contested hearings, administrative duties, etc.).

**Not applicable**

28. List at least three but no more than five cases you presided over or heard as a judicial or quasi-judicial officer, mediator or arbitrator. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

**Not applicable**

29. Describe any additional professional experience you would like to bring to the Commission's attention.

**I am active with Arizona Attorneys for Criminal Justice, the Arizona state affiliate of National Association of Criminal Defense Lawyers. I served on the Board of Governors between 2009-2017, including a term as President in 2014 and five years on the executive committee. I have been the chair of the Amicus/Rules Committee since 2011 (except for 2014 while President), and I have filed amicus briefs in all state and federal appellate courts that hear Arizona cases, including the United States Supreme Court.**

**I was selected to serve on the Arizona Justice Project's Board of Directors in January 2014. The Justice Project is responsible for the exonerations of some of the most high-profile wrongful convictions in our state, and it is a great honor to serve on this board. I retired from the board in October 2017.**

**I have served on the State Bar's Criminal Jury Instructions committee since 2010, and I have served on several Arizona Supreme Court task forces. I also serve on the Maricopa County Felony Defense Review Committee, which ensures that contract attorneys meet high-quality standards for criminal defense practice. I have sporadically represented the Pima County Public Defender's Office at meetings of the Pima County Superior Court's Arrest to Arraignment Committee.**

**In the fall of 2017, I co-founded the Southern Arizona Lawyers Chapter of the Federalist Society. When the founders organized the Board of Directors, I was elected our chapter's first President. The Federalist Society puts on social and educational programs for the bench and bar.**

**BUSINESS AND FINANCIAL INFORMATION**

30. Have you ever been engaged in any occupation, business or profession other than the practice of law or holding judicial or other public office, other than as described at question 14? **\_ NO \_** If so, give details, including dates.
31. Are you now an officer, director, majority stockholder, managing member, or otherwise engaged in the management of any business enterprise? **\_ NO \_** If so, give details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service.
- Do you intend to resign such positions and withdraw from any participation in the management of any such enterprises if you are nominated and appointed?  
\_\_\_\_\_ If not, explain your decision.
32. Have you filed your state and federal income tax returns for all years you were legally required to file them? **\_ YES \_** If not, explain.
33. Have you paid all state, federal and local taxes when due? **\_ YES \_** If not, explain.
34. Are there currently any judgments or tax liens outstanding against you? **\_ NO \_** If so, explain.
35. Have you ever violated a court order addressing your personal conduct, such as orders of protection, or for payment of child or spousal support? **\_ NO \_** If so, explain.
36. Have you ever been a party to a lawsuit, including an administrative agency matter but excluding divorce? **\_ NO \_** If so, identify the nature of the case, your role, the court, and the ultimate disposition.
37. Have you ever filed for bankruptcy protection on your own behalf or for an organization in which you held a majority ownership interest? **\_ NO \_** If so, explain.

38. Do you have any financial interests including investments, which might conflict with the performance of your judicial duties?  **NO**  If so, explain.

**CONDUCT AND ETHICS**

39. Have you ever been terminated, asked to resign, expelled, or suspended from employment or any post-secondary school or course of learning due to allegations of dishonesty, plagiarism, cheating, or any other "cause" that might reflect in any way on your integrity?  **NO**  If so, provide details.

40. Have you ever been arrested for, charged with, and/or convicted of any felony, misdemeanor, or Uniform Code of Military Justice violation?  **YES**

If so, identify the nature of the offense, the court, the presiding judicial officer, and the ultimate disposition.

**In April 1993, when I was twenty years old, I engaged in a campus sit-in with a group of other students at Rutgers University that resulted in a misdemeanor arrest for trespassing. I was cited by campus police into the municipal court of New Brunswick, NJ, and released on my signature. In the summer of 1993, I pled guilty and received a nominal fine as sentence. When I applied for admission to the State Bar of Arizona in 2002, I obtained a copy of the Rutgers University Police Department reports and supplied them for the character and fitness investigation. I believe I was also required to supply a copy of the report to the Supreme Court of the United States in order to be admitted to practice in that Court in 2009.**

41. If you performed military service, please indicate the date and type of discharge. If other than honorable discharge, explain.

**Not Applicable**

42. List and describe any matter (including mediation, arbitration, negotiated settlement and/or malpractice claim you referred to your insurance carrier) in which you were accused of wrongdoing concerning your law practice.

**None**

43. List and describe any litigation initiated against you based on allegations of misconduct other than any listed in your answer to question 42.

**None**

44. List and describe any sanctions imposed upon you by any court.

**In July 2010, a panel of the Arizona Court of Appeals (Division Two) determined that I filed an opening brief that was not in conformity with the rules (due to length) and required me to complete a CLE course by Bryan Garner on the topic of legal writing and editing. I complied with the informal sanction and submitted proof of same to the Presiding Judge of the panel. No formal action was taken against me in this matter. No prejudice was suffered either by the client or opposing counsel.**

45. Have you received a notice of formal charges, cautionary letter, private admonition, referral to a diversionary program, or any other conditional sanction from the Commission on Judicial Conduct, the State Bar, or any other disciplinary body in any jurisdiction? **\_NO\_** If so, in each case, state in detail the circumstances and the outcome.
46. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by federal or state law? **\_NO\_** If your answer is "Yes," explain in detail.
47. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended, terminated or asked to resign by an employer, regulatory or investigative agency? **\_NO\_** If so, state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) and contact information of any persons who took such action, and the background and resolution of such action.
48. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? **\_NO\_** If so, state the date you were requested to submit to such a test, type of test requested, the name and contact information of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test.
49. Have you ever been a party to litigation alleging that you failed to comply with the substantive requirements of any business or contractual arrangement, including but not limited to bankruptcy proceedings? **\_NO\_** If so, explain the circumstances of the litigation, including the background and resolution of the case, and provide the dates litigation was commenced and concluded, and the name(s) and contact information of the parties.

**PROFESSIONAL AND PUBLIC SERVICE**

50. Have you published or posted any legal or non-legal books or articles?  **COMING SOON**  If so, list with the citations and dates.

**Prof. Barbara Bergman and I are co-authoring the first Arizona Criminal Practice Manual; we are contracted with Thomson-Reuters and the expected publication date is November 2021.**

51. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge?  **YES**  If not, explain.
52. Have you taught any courses on law or lectured at bar associations, conferences, law school forums or continuing legal education seminars?  **YES**  If so, describe.

**See Appendix 2**

53. List memberships and activities in professional organizations, including offices held and dates.

**Arizona Attorneys for Criminal Justice (member since 2005)**

**Board of Governors 2009-2017**

**Secretary 2011-2012**

**President-Elect 2013**

**President 2014**

**Immediate Past-President 2015**

**Chair or co-Chair, Amicus/Rules Committee 2011-2013, 2015-present**

**National Association of Criminal Defense Lawyers (member since 2007)**

**Pima County Bar Association (member 2002-2013)**

**Federalist Society (member since 2013)**

**President, Southern Arizona Lawyers Chapter, 2018-present**

Have you served on any committees of any bar association (local, state or national) or have you performed any other significant service to the bar?  **YES**

List offices held in bar associations or on bar committees. Provide information about any activities in connection with pro bono legal services (defined as services to the indigent for no fee), legal related volunteer community activities or the like.

**State Bar of Arizona, Criminal Jury Instructions Committee, 2010-present**

**Arizona Supreme Court ad hoc committee to advise on amendment to Rule 15.8, Ariz. R. Crim. P., October-November 2013**

**Arizona Supreme Court Steering Committee on Arizona Appellate Case Processing Standards, December 2015-present**

**Arizona Supreme Court Criminal Rules Task Force, 2016-2017**

**Arizona Supreme Court Rule 32 Task Force, 2018-2019**

**Maricopa County Felony Defense Review Committee, 2017-present**

**Arizona Justice Project Board of Directors, 2014-2017**

**Prior to joining the Pima County Public Defender's Office, I was a volunteer lawyer for the American Civil Liberties Union and the Institute for Justice. In that capacity, I vetted cases for potential litigation. I filed one complaint in federal court as cooperating counsel with the ACLU of Arizona.**

54. Describe the nature and dates of any relevant community or public service you have performed.

**I am very active with youth chess organizations. I am a United States Chess Federation-qualified tournament director and I help run scholastic chess tournaments in the Tucson area. I volunteer with 9 Queens, a charitable organization that promotes youth chess. While my two younger children were enrolled in Donaldson Elementary School, I started a chess club and a school chess team that competed in scholastic tournaments. I have also volunteered with the Rincon/University Chess Club.**

**From 2015-2017, I taught a 4H course on civics and citizenship for home schooled students of junior high school and high school age.**

**When my oldest son enrolled in University High School, he joined the Rincon/University Marching Band, and I joined the parents association RUMBA. I was elected RUMBA board secretary for the last three years. I volunteer for the band, both during and after practices, football games, and competitions by serving dinner, carrying equipment, chaperoning for travel events, etc.**

55. List any relevant professional or civic honors, prizes, awards or other forms of recognition you have received.

**I have received two Presidential Commendations from Arizona Attorneys for Criminal Justice (AACJ). The first was in January 2011 for co-authoring an**

**amicus curiae brief in *Friendly House v. Whiting*, the litigation brought by the ACLU in 2010 to challenge the constitutionality of SB 1070. The second commendation in January 2013 was for the body of work I produced as chair of the AACJ amicus/rules committee.**

**I received the AACJ Outgoing President Award in January 2015 upon completion of my term as president.**

**In June 2016, I received the Outstanding Performance Award from the Arizona Public Defender Association.**

**In January 2017, the AACJ Board of Governors presented me with its Vanguard Leadership Award (now known as the Larry Hammond Leadership Award).**

**In February 2021, the AACJ Board of Governors presented me with its Jack Williams Appellate Achievement Award**

56. List any elected or appointed public offices you have held and/or for which you have been a candidate, and the dates.

**In 2015 and in 2017, I applied for a vacancy on the Arizona Court of Appeals, Division Two, and was nominated by the Commission on Appellate Court Appointments.**

**In 2012 and in 2018, I applied for a vacancy on the Pima County Superior Court as a Judge Pro Tempore. Since 2015, I applied several times for vacancies on the Pima County Superior Court.**

**For over a decade, I was active in the Libertarian Party in Massachusetts and Arizona. In November 2000, I was a candidate for U.S. House of Representatives, Massachusetts 4<sup>th</sup> District; that election was won by Barney Frank. And in November 2004, I was a candidate for Pima County Attorney; that election was won by Barbara LaWall.**

**I held the following offices within the Arizona Libertarian Party pursuant to A.R.S. § 16-821 et seq.:**

**2003-2011 Precinct Committeeman**

**2003-2005, 2007-2009 – Pima County Libertarian Party Chairman**

**2005-2007 – Pima County Libertarian Party Secretary**

**2009-2011 – Pima County Libertarian Party Treasurer**

**2003-2005, 2009-2011 – Arizona Libertarian Party Assistant Treasurer**

**2007-2009 – Arizona Libertarian Party Second Vice-Chair**

Have you ever been removed or resigned from office before your term expired?

**NO** \_\_\_ If so, explain.

Have you voted in all general elections held during the last 10 years? **YES** \_\_\_  
If not, explain.

57. Describe any interests outside the practice of law that you would like to bring to the Commission's attention.

**My wife and I homeschooled our three children, one through 8<sup>th</sup> grade and the other two through 3<sup>rd</sup> grade. We designed curricula that provided core academic subjects at their individualized pace, and we participated and guided many activities with other children and their parents. My wife was one of the founders of a 4H group so that the children can participate in all kinds of activities, and our children have learned baking, archery, robotics, electronics, and citizenship.**

**My wife and I met in the Rutgers University Marching Band in 1992, so music is very important to us and we taught the children piano and percussion. I am very happy to see that our children have embraced music as we have.**

**I had to put my interests aside while the children were young, but as they grow I can share my interests with them. I love to drive long distances to camp and hike in national parks, and my sons have similarly acquired the love of nature. I play tennis regularly and soccer on occasion. My children have also embraced my love of tennis, chess, and other activities.**

**I have been an avid chess player since I was five years old and I am passionate about teaching children and adults alike. In 2015, I attained my greatest achievement in chess when, as a participant in a simultaneous exhibition with seven-time U.S. Women's champion and grandmaster Irina Krush, I was the only person in Tucson to play Ms. Krush to a draw. I created a chess program at Donaldson Elementary School while my younger children were enrolled there and I am an assistant tournament director for scholastic chess tournaments in the Tucson area.**

**HEALTH**

58. Are you physically and mentally able to perform the essential duties of a judge with or without a reasonable accommodation in the court for which you are applying? **YES** \_\_\_

**ADDITIONAL INFORMATION**

59. The Arizona Constitution requires the Commission to consider the diversity of the state's population in making its nominations. Provide any information about

yourself (your heritage, background, life experiences, etc.) that may be relevant to this consideration.

**I am of European ancestry; my father is the child of German immigrants, and my mother is the grandchild of Italian immigrants. My grandparents and great-grandparents who emigrated left behind a homeland ravaged by World War I. My German grandmother lived nearby with my aunt and uncle and cousins, and her strong influence still guides my core principles. Despite being crippled as a child, having little education, and coming from a small village where even food was often scarce, she defined the phrase “pull yourself up by your bootstraps” and achieved the American dream (even during the Great Depression) by taking advantage of every opportunity that presented itself. Neither of my parents attended college but each created their own opportunities through hard work and made sure their children could go to college and thus achieve their dreams. While I have not personally lived through times of hardship, I have empathy for those who do because of what I have learned, and I am passing these lessons to my own children.**

60. Provide any additional information relative to your qualifications you would like to bring to the Commission’s attention.

**Appendix 3 contains a list of published opinions and oral arguments in which I have participated. I believe both numbers far exceed the product of any other currently practicing Arizona attorney. I am fortunate to have an exceptional memory; it enables me to spend less time researching issues and more time writing, because I remember previous work, and during oral argument I am also able to answer difficult questions by citing supportive authority.**

61. If selected for this position, do you intend to serve a full term and would you accept rotation to benches outside your areas of practice or interest and accept assignment to any court location? **YES** If not, explain.
62. Attach a brief statement explaining why you are seeking this position.

**See Appendix 4**

63. Attach two professional writing samples, which you personally drafted (e.g., brief or motion). **Each writing sample should be no more than five pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing samples. Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission’s website.

**See Appendix 5A and 5B**

64. If you have ever served as a judicial or quasi-judicial officer, mediator or arbitrator, attach sample copies of not more than three written orders, findings or opinions (whether reported or not) which you personally drafted. **Each writing sample should be no more than ten pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing sample(s). Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.
65. If you are currently serving as a judicial officer in any court and are subject to a system of judicial performance review, please attach the public data reports and commission vote reports from your last three performance reviews.

**-- INSERT PAGE BREAK HERE TO START SECTION II  
(CONFIDENTIAL INFORMATION) ON NEW PAGE --**

## APPENDIX 1

### LAWYERS IN THE PIMA COUNTY PUBLIC DEFENDER'S OFFICE (response to Question 15)

Joel Feinman, Public Defender  
Beth Anderson  
Emily Arnold  
Edisa Astorga  
Lori Bable  
Eva Bacal  
Lauren Beall  
Joseph Bonasera  
Alan Bond  
Joel Chorny  
Justin Cluck  
Leah Cotton  
Sean Coulter  
Mary Margaret Cowan  
Katherine Daubert  
Nicki DiCampli  
Samuel Diffenderfer  
David Euchner  
Mariam Ferguson  
Katie Filous  
Rafael Gallego  
Christopher Gerber  
Peter Goodman  
Rebecca Goslar  
Eva Graham  
Renee Hampson  
Brian Heddell  
Noah Hilgert  
Trevor Hill  
Abigail Jensen  
Jenna Johnson  
Thomas Johnson  
Samuel Jurgena  
T. Clayton Kamm  
Cristie Katsarelis  
Efthymios Katsarelis  
Fredric Kay  
Susan Kelly  
Craig Kessler  
Thomas Knauer  
Derek Koltunovich

Sarah Kostick  
Heidi Krauss  
Meighan LaFata  
Matthew LaPrade  
Per LeRoy  
Joshua Liffiton  
Christopher Lynch  
Monique Lyon  
Leo Masursky  
Sarah Mayhew  
Ian McCloskey  
Michael Miller  
Corrinna Molnar  
Jean Morrill  
Kurt Mosley  
Alyssa Nakatani  
John O'Brien  
Abigail Okrent  
Megan Page  
Dawn Priestman  
Carmen Raban  
Stephan Robertson  
Michele Robbins  
Michael Rosenbluth  
Ellen Rubin  
Walid Saeed  
Paul Skitzki  
Karen Smith  
LeeAndra Smith  
William Soland  
Rachel Stewart  
Rachel Stiles  
Tatiana Struthers  
Erin Sutherland  
Kimberly Sweeney  
Cynthia Sweet  
Adrienne Ticer  
Sen Umeda  
Iskra Uzunova  
Noella Valentine  
Katherine Voll  
Nathan Wade  
John Walters  
Cathleen Ward  
Jeremy Zarzycki  
Anthony Zinman

## APPENDIX 2

### LIST OF CONTINUING EDUCATION PRESENTATIONS (response to Question 52)

#### **New Developments in Case Law**

*Sponsored by Pima County Public Defender, November 18, 2006*

Summarized new cases (decided in 2005-2006) in both state and federal court affecting criminal defense lawyers in state court.

#### **Economics of the Criminal Justice System**

*Sponsored by Federalist Society, University of Arizona College of Law, April 30, 2008*

Applied basic economic principles such as opportunity cost, marginal cost / marginal utility, and incentives to the functioning of the criminal justice system, discussing constitutional rights (privacy, due process, assistance of counsel), the process of plea bargaining, asset forfeiture, etc.

#### **New Developments in Case Law**

*Sponsored by Arizona Public Defender Association, June 17, 2008*

Summarized new cases (decided in 2007-2008) in both state and federal court affecting criminal defense lawyers in state court.

#### **Defending the Indigent at Initial Appearances**

*Sponsored by Arizona Public Defender Association, June 16, 2008*

Instructing public defenders in other counties how the Pima County Public Defender's Office represents indigent defendants at the initial appearance with a view toward convincing other Public Defender agencies to do the same.

#### **New Developments in Case Law**

*Sponsored by Pima County Public Defender, July 18, 2008*

Summarized new cases (decided in 2007-2008) in both state and federal court affecting criminal defense lawyers in state court.

#### **Computer Forensics and the Law**

*Sponsored by Arizona Attorneys for Criminal Justice, September 11, 2009*

Presented with expert computer forensic examiner Tami Loehrs; presentation covered what is possible in computer analysis, and a case study on *State v. Coghill*.

#### **Preserving the Appellate Record**

*Sponsored by State Bar of Arizona, October 29, 2009*

Panel presentation with appellate attorneys Edie Cunningham (Assistant Pima County Public Defender) and Joseph Parkhurst (Assistant Arizona Attorney General); presentation covered what the appellate courts expect of trial lawyers in preserving the record for appeal, and tips for accomplishing those goals while following the rules set by the trial judge.

#### **Introduction to Appeals and Rule 32's**

*Sponsored by Arizona Public Defender Association, June 10, 2010*

Co-presented with Scott Martin (Assistant Pima County Legal Defender) on the nuts and bolts of appellate and post-conviction practice.

### **New Developments in Case Law**

*Sponsored by Arizona Public Defender Association, June 10, 2010*

Summarized new cases (decided in 2008-2010) in both state court affecting criminal defense lawyers in state court.

### **New Developments in Case Law**

*Sponsored by Pima County Public Defender, July 9, 2010*

Summarized new cases (decided in 2008-2010) in both state court affecting criminal defense lawyers in state court.

### **New Developments in Case Law**

*Sponsored by State Bar of Arizona, September 30, 2010*

Analyzing new criminal cases involving significant shifts affecting DUI practitioners in areas including the exclusionary rule, *Miranda* warnings, right to counsel.

### **Prior Convictions and Sentence Enhancements**

*Sponsored by Pima County Bar Association, October 22, 2010*

Covering recent statutory changes and renumbering and recent case law, and reviewing requirements for proof of factors that increase the maximum sentence.

### **Preserving the Appellate Record**

*Sponsored by Pima County Public Defender, May 13, 2011*

Panel presentation with appellate attorneys Rebecca McLean and Lisa Hise (Assistant Pima County Public Defenders) ; presentation covered what the appellate courts expect of trial lawyers in preserving the record for appeal, and tips for accomplishing those goals while following the rules set by the trial judge.

### **The Law and Science of Shaken Baby Syndrome**

*Sponsored by Arizona Public Defender Association, June 22, 2011*

Co-presented with CeCelia Valentine (Assistant Pima County Public Defender) on the evolution of the understanding of the scientific underpinnings of Shaken Baby Syndrome, how SBS was presented in the courtroom in the 1990s, and how it is successfully attacked in the courtroom today.

### **New Developments in Case Law**

*Sponsored by Arizona Public Defender Association, June 23, 2011*

Summarized new cases (decided in 2010-2011) in both state court affecting criminal defense lawyers in state court.

### **Making a Mountain out of a Molehill**

*Sponsored by Arizona Public Defender Association, June 20, 2012*

Co-presented with Julie Levitt-Guren (Assistant Pima County Public Defender) and Mikel Steinfeld (Assistant Maricopa County Public Defender); discussed, from the prospective of lawyers who have done trials and appeals, how to identify important issues of law that need to be addressed by higher courts and frame the issues at the trial and appellate levels.

### **New Developments in Case Law**

*Sponsored by Arizona Public Defender Association, June 21, 2012*

Summarized new cases (decided in 2011-2012) in both state court affecting criminal defense lawyers in state court.

### **Law and Practice of Plea Bargaining**

*Co-sponsored by Federalist Society and Criminal Law and Policy Program, University of Arizona College of Law, October 18, 2012*

Co-presented with Rick Unklesbay (Deputy Pima County Attorney); discussing a new article on *Missouri v. Frye* and *Lafler v. Cooper*, giving the perspective of local practitioners how plea bargaining works in Pima County.

### **Introduction to Appeals, Rule 32's, and Special Actions**

*Sponsored by Pima County Public Defender, October 26, 2012*

Explained the jurisdiction of the appellate courts to trial lawyers in order to provide understanding of the process, when to file a notice of appeal versus a notice of post-conviction relief on behalf of a client, how the Court of Appeals exercises special action jurisdiction, and what kinds of issues are heard by the Court of Appeals under its special action jurisdiction.

### **Preserving the Appellate Record**

*Sponsored by Pima County Public Defender, November 1, 2012*

Presentation covered what the appellate courts expect of trial lawyers in preserving the record for appeal, and tips for accomplishing those goals while following the rules set by the trial judge, with specific advice toward the relative informality of the Juvenile Court and its relaxed procedures.

### **The Constitutionality of Government Surveillance after *Jones***

*Sponsored by Arizona Attorneys for Criminal Justice, January 11, 2013*

Presentation covered analyses of the various opinions of the unanimous Supreme Court in *United States v. Jones* (2012), and what protection the Fourth Amendment gives against cell phone tracking, video cameras, police dogs, and other forms of government surveillance.

### **New Developments in Case Law**

*Sponsored by Arizona Public Defender Association, June 27, 2013*

Summarized new cases (decided in 2012-2013) in both state court affecting criminal defense lawyers in state court.

### **Advanced Appellate Advocacy**

*Sponsored by Pima County Public Defender, March 21, 2014*

Presented to experienced appellate attorneys on advanced issues related to oral and written advocacy in Arizona's appellate courts. Was also seminar chair for sessions that included Rule 32 advocacy, habeas corpus litigation, and a panel of Tucson-based judges.

### **New Developments in Case Law**

*Sponsored by Arizona Public Defender Association, June 26, 2014*

Summarized new cases (decided in 2013-2014) in both state court affecting criminal defense lawyers in state court. Co-presented with Amy Kalman.

### **Medical Marijuana and Criminal Law**

*Sponsored by Criminal Law and Policy Program, University of Arizona College of Law, September 3, 2014*

Presented developments in criminal law (both present and upcoming) related to the Arizona Medical Marijuana Act. Co-presented with Sarah Mayhew.

### **Medical Marijuana and Criminal Law**

*Sponsored by Arizona Attorneys for Criminal Justice and Yuma County Bar Association, October 17, 2014*

Presented developments in criminal law (both present and upcoming) related to the Arizona Medical Marijuana Act in Yuma.

### **Preserving the Appellate Record**

*Sponsored by Pima County Public Defender, March 20, 2015*

Presentation covered what the appellate courts expect of trial lawyers in preserving the record for appeal, and tips for accomplishing those goals while following the rules set by the trial judge, with specific advice toward the relative informality of the Juvenile Court and its relaxed procedures. Co-presented with Erin Sutherland.

### **Medical Marijuana and Criminal Law**

*Sponsored by Arizona Attorneys for Criminal Justice, April 20, 2015*

Presented developments in criminal law (both present and upcoming) related to the Arizona Medical Marijuana Act in Flagstaff.

### **Introduction to Appeals, Rule 32's, and Special Actions**

*Sponsored by Arizona Attorneys for Criminal Justice & Yavapai County Public Defender, April 20, 2015*

Explained the jurisdiction of the appellate courts to trial lawyers in order to provide understanding of the process, when to file a notice of appeal versus a notice of post-conviction relief on behalf of a client, how the Court of Appeals in both divisions exercises special action jurisdiction, and what kinds of issues are heard by the Court of Appeals under its special action jurisdiction.

### **Challenging Expert Testimony: Does Daubert make a difference? (Criminal)**

*Sponsored by Pima County Bar Association, May 20, 2015*

Explained the evolution of law and science since Arizona's adoption of the *Daubert* standard and the National Academy of Sciences released its report on forensic sciences. Covered recent case law in Arizona and elsewhere and recent literature on changing science. Co-presented the criminal side with Assistant Attorney General Nicholas Klingerman. Civil side presented by Andrew Petersen, Greg Sakall, and Michael Medina.

### **Medical Marijuana and Criminal Law**

*Sponsored by Arizona Public Defender Association, June 17, 2015*

Presented developments in criminal law (both present and upcoming) related to the Arizona Medical Marijuana Act. Co-presented with Sarah Mayhew and Thomas Dean.

### **Case Law Update 2014-2015**

*Sponsored by Arizona Public Defender Association, June 18, 2015*

Summarized new cases (decided in 2014-2015) in both state court affecting criminal defense lawyers in state court. Co-presented with Mikel Steinfeld.

### **Capital Ethical Jeopardy**

*Sponsored by Arizona Public Defender Association, June 19, 2015*

Reviewing the rules of ethics as applied to capital defense through the game of Jeopardy! The audience (approximately 80 people) breaks up into eight teams, and the moderator reads the question in the form of an answer, and teams vie to "buzz in" first with the correct answer with the answer in the form of a question. The team with the most points wins. A member of the five-person "panel of experts" explains the ethical issue raised in each question after it is answered. Co-presented with Amy Kalman (and Garrett Simpson, Jennifer Garcia, Tennie Martin, Leo Masursky, and Paula Harms as the panel of experts).

### **Challenging Expert Testimony: Does Daubert make a difference?**

*Sponsored by Pima County Public Defender, October 16, 2015*

Explained the evolution of law and science since Arizona's adoption of the *Daubert* standard and the National Academy of Sciences released its report on forensic sciences. Covered recent case law in Arizona and elsewhere and recent literature on changing science. Co-presented the criminal side with Assistant Attorney General Nicholas Klingerman.

### **What Can The Conservative/Libertarian Movement Do For The Poor?**

*Sponsored by Federalist Society, University of Arizona College of Law, November 3, 2015*

Discussed overcriminalization and other government action that has a disparate impact on the poor and what reforms are currently being contemplated to address these harms. Co-presented with Clark Neily of the Institute for Justice.

### **Criminal Investigation Panel**

*Sponsored by Criminal Law and Policy Program, University of Arizona College of Law, November 18, 2015*

Discussed the role of investigations and investigators in a criminal case. Co-presented with Charles Blue and Kevin Gillooly, investigators in the Pima County Public Defender's Office.

### **Case Law Update 2015-2016**

*Sponsored by Arizona Public Defender Association, June 23, 2016*

Summarized new cases (decided in 2015-2016) in both state court affecting criminal defense lawyers in state court. Co-presented with Amy Kalman and Mikel Steinfeld.

### **I won the Legal Argument, but my Client is Still in Prison! The Exclusionary Rule's Disappearing Act**

*Sponsored by Arizona Attorneys for Criminal Justice, October 13, 2016*

Explained the historical and current understandings of the reason for the exclusionary rule, analyzed recent cases of the Arizona courts and United States Supreme Court, and provided practice pointers for developing evidence and legal argument against application of the good-faith exception.

### **Overhaul of the Criminal Procedure Rules by the Criminal Rules Task Force**

*Sponsored by Arizona Attorneys for Criminal Justice, January 27, 2017*

Reviewed substantial changes made by the Criminal Rules Task Force to the Arizona Rules of Criminal Procedure, from the perspective of members of the task force. Co-presented with Amy Kalman and Tim Eckstein.

### **Public Interest for Everyone: How to Build a Meaningful Career**

*Sponsored by Federalist Society, University of Arizona College of Law, March 6, 2017*

Panelist, along with Arizona Supreme Court Justice Clint Bolick, Institute for Justice (Arizona chapter) executive director Tim Keller, and Deputy Arizona Solicitor General Jennifer Perkins, on topic of inspiring law students to choose a career as a public interest lawyer.

### **Overhaul of the Criminal Procedure Rules by the Criminal Rules Task Force**

*Sponsored by Pima County Public Defender, April 21, 2017*

Reviewed substantial changes made by the Criminal Rules Task Force to the Arizona Rules of Criminal Procedure, from the perspective of members of the task force.

### **Legal Avenues for Relief under *Montgomery v. Louisiana***

*Sponsored by Arizona Justice Project, October 12, 2017*

Reviewed changes in the law related to juvenile sentencing from the U.S. Supreme Court and courts throughout the country and provided arguments for obtaining relief for Rule 32 petitioners who received lengthy sentences for conduct committed while a juvenile. Co-presented with Keith Hilzendeger.

### **Task Forces on Criminal Rules Restyling and Fair Justice For All**

*Sponsored by Arizona Attorneys for Criminal Justice, October 13, 2017*

Reviewed substantial changes made by the Criminal Rules Task Force to the Arizona Rules of Criminal Procedure and new policies promoted by the Fair Justice For All Task Force, from the perspective of members of the task forces. Co-presented with Jeremy Mussman.

### **Rule 32 Training**

*Sponsored by Pima County Superior Court, March 5, 2018*

Explained the process of filing and ruling upon Rule 32 petitions for an audience of Superior Court judges and their staff as well as prosecutors and defense attorneys. Co-presented with Beth Capin Beckmann, Jacob Lines, and Judge Kellie Johnson.

### **Case Law Update 2016-2018**

*Sponsored by Arizona Public Defender Association, June 21, 2018*

Summarized new cases (decided in 2016-2018) in both state court affecting criminal defense lawyers in state court.

### **RAJIs on Fire: What You Don't Know About RAJIs Can Hurt You**

*Sponsored by State Bar of Arizona (State Bar Convention), June 28, 2018*

Chaired seminar on the Criminal Jury Instructions, with panelists Judge Kent Cattani, Hon. Jose Padilla, Brandon Brown, Elizabeth Bingert, and Steve McCarthy, with topics covering how RAJIs are created, as well as how new case law affects the language of an existing instruction, the need for a new instruction, and whether instructions must be given on request in particular cases.

### **The New Arizona Rules of Criminal Procedure**

*Sponsored by State Bar of Arizona (State Bar Convention), June 29, 2018*

Reviewed substantial changes made by the Criminal Rules Task Force to the Arizona Rules of Criminal Procedure, from the perspective of members of the task force. Co-presented with Judge Joseph Welty, Judge Amy Kalman, Ken Vick, and Bill Hughes.

### **Case Law Update 2016-2018**

*Sponsored by Pima County Public Defender, October 19, 2018*

Summarized new cases (decided in 2016-2018) in both state court affecting criminal defense lawyers in state court.

### **Constitutional Challenges to Termination Laws After *Alma S.***

*Sponsored by Maricopa County public defense agencies, October 26, 2018*

Discussed Justice Bolick's concurring opinion in *Alma S. v. DCS*, 245 Ariz. 146 (2018), and suggested constitutional challenges that could be made to the legal scheme for terminating parental rights.

### **How The Arizona Constitution Provides Additional Protection**

*Sponsored by Pima County Public Defender, December 7, 2018*

Compared federal Bill of Rights to the Declaration of Rights in the Arizona Constitution, and discussed past, present, and future arguments for broader protection under the state constitution.

### **Constitutional Challenges to Termination Laws After *Alma S.***

*Sponsored by Juvenile Arizona Public Defender Association, January 12, 2019*

Discussed Justice Bolick's concurring opinion in *Alma S. v. DCS*, 245 Ariz. 146 (2018), and suggested constitutional challenges that could be made to the legal scheme for terminating parental rights, as well as best practices for defending parents on the issue of best interests. Co-presented with Derek Koltunovich.

### **Insanity, Diminished Capacity, and Impulsivity**

*Sponsored by Pima County Public Defender, April 16, 2019*

Discussed the evolution of Arizona's statutes and case law in the last 30 years governing mental state defenses, and provided new arguments for allowing relevant evidence to be heard by the jury.

### **Recovering from Recent Supreme Court Losses**

*Sponsored by Arizona Attorneys for Criminal Justice, May 4, 2019*

Analyzed recent cases where the Arizona Supreme Court and United States Supreme Court have ruled against the defense bar to find the silver lining and offer new arguments to raise in future cases.

### **Case Law Update 2018-2019**

*Sponsored by Arizona Public Defender Association, June 20, 2019*

Summarized new cases (decided in 2016-2018) in both state court affecting criminal defense lawyers in state court.

### **Insanity, Diminished Capacity, and Impulsivity**

*Sponsored by Arizona Public Defender Association, June 20, 2019*

Discussed the evolution of Arizona's statutes and case law in the last 30 years governing mental state defenses, and provided new arguments for allowing relevant evidence to be heard by the jury.

### **Post-Conviction Relief: Claims, Investigations, & Evidentiary Hearings**

*Sponsored by Pima County Public Defender, September 13, 2019*

Presented to experienced appellate & post-conviction attorneys on advanced issues related to post-conviction proceedings. Was also seminar chair for sessions that included advanced appellate advocacy, habeas corpus litigation, and a panel of Tucson-based judges.

### **Introduction to Criminal Appeals, Post-Conviction Relief, and Special Actions**

*Sponsored by Arizona Paralegal Association, September 18, 2019*

Examined the jurisdiction of the appellate courts to paralegals in order to provide understanding of the process, when to file a notice of appeal versus a notice of post-conviction relief on behalf of a client, how the Court of Appeals in both divisions exercises special action jurisdiction, and what kinds of issues are heard by the Court of Appeals under its special action jurisdiction.

### **Preserving the Appellate Record**

*Sponsored by Arizona Attorneys for Criminal Justice, September 25, 2019*

Presentation covered what the appellate courts expect of trial lawyers in preserving the record for appeal, and tips for accomplishing those goals while following the rules set by the trial judge.

### **Post-Conviction Proceedings Under Current Rule 32 and New Rules 32-33**

*Sponsored by Pima County Superior Court, October 21, 2019*

Explained the process of filing and ruling upon petitions for post-conviction relief for an audience of Superior Court judges and their staff. Co-presented with Beth Capin Beckmann and Jacob Lines.

**Defects in the Charging Document: Notice, Duplicity, Multiplicity**

*Sponsored by Arizona Attorneys for Criminal Justice, June 30, 2020*

Discussed the law related to charging documents and how to identify and successfully challenge defects in the charging document.

**What All Lawyers Need to Know About the New Post-Conviction Relief Rules**

*Sponsored by Arizona Attorneys for Criminal Justice, July 24, 2020*

Reviewed the significant changes in Rules 32-33 that impact trial lawyers and appellate lawyers as well as post-conviction lawyers.

**What's Brewing at the Arizona Supreme Court**

*Sponsored by Arizona Attorneys for Criminal Justice, September 4, 2020*

Reviewed recently decided criminal cases and other cases pending decision and analyzed trends in the decisions of the Arizona Supreme Court.

### APPENDIX 3

#### PUBLISHED CASES AND ORAL ARGUMENTS

##### REPRESENTED CASES (alphabetically)

Arturo D. v. DCS et al., 249 Ariz. 20, 464 P.3d 1286 (App. 2020)  
Bressi v. Ford, 575 F.3d 891 (9th Cir. 2009)  
Cespedes v. Lee, 243 Ariz. 46, 401 P.3d 995 (2017)  
Denia L. v. DCS et al., 248 Ariz. 36, 455 P.3d 735 (App. 2019)  
Holly C. v. Tohono O'odham Nation, 246 Ariz. 85, 434 P.3d 596 (App. 2018) (vacated)  
Holly C. et al. v. Tohono O'odham Nation et al., 247 Ariz. 495, 452 P.3d 725 (App. 2019)  
Ledvina v. Cerasani, 213 Ariz. 569, 146 P.3d 70 (App. 2006)  
Rasmussen v. Munger, 227 Ariz. 496, 260 P.3d 296 (App. 2011)  
State v. Ahumada, 225 Ariz. 544, 241 P.3d 908 (App. 2010)  
State v. Bernini/Copeland, 233 Ariz. 170, 310 P.3d 46 (App. 2013)  
State v. Bigger, 250 Ariz. 174, 476 P.3d 722 (App. 2020)  
State v. Bolding, 227 Ariz. 82, 253 P.3d 279 (App. 2011)  
State v. Bowsher, 225 Ariz. 586, 242 P.3d 1055 (2010)  
State v. Campoy/Crockwell, 220 Ariz. 539, 207 P.3d 792 (App. 2009)  
State v. Carlson, 237 Ariz. 381, 351 P.3d 1079 (2015)  
State v. De Anda, 246 Ariz. 104, 434 P.3d 578 (2019)  
State v. Delgado, 232 Ariz. 182, 303 P.3d 76 (App. 2013)  
State v. Diaz, 221 Ariz. 209, 211 P.3d 1193 (App. 2009) (vacated)  
State v. Diaz, 223 Ariz. 358, 224 P.3d 174 (2010)  
State v. Fields/Chase, 232 Ariz. 265, 304 P.3d 1088 (App. 2013)  
State v. Flores, 236 Ariz. 33, 335 P.3d 555 (App. 2014)  
State v. Florez, 241 Ariz. 121, 384 P.3d 335 (App. 2016)  
State v. Glissendorf, 233 Ariz. 222, 311 P.3d 244 (App. 2013) (vacated in part)  
State v. Glissendorf, 235 Ariz. 147, 329 P.3d 1049 (2014)  
State v. Gray, 238 Ariz. 147, 357 P.3d 831 (App. 2015) (vacated)  
State v. Gray, 239 Ariz. 475, 372 P.3d 999 (2016)  
State v. Healer, 246 Ariz. 441, 440 P.3d 404 (App. 2019)  
State v. Hernandez, 244 Ariz. 1, 417 P.3d 207 (2018)  
State v. Hernandez, 246 Ariz. 543, 443 P.3d 33 (App. 2019) (vacated)  
State v. Hernandez, 250 Ariz. 28, 474 P.3d 1191 (App. 2019) (vacated)  
State v. Holle, 240 Ariz. 301, 379 P.3d 197 (2016)  
State v. Huez, 240 Ariz. 407, 380 P.3d 103 (App. 2016)  
State v. Inzunza, 234 Ariz. 78, 316 P.3d 1266 (App. 2014)  
State v. Johnson, 229 Ariz. 475, 276 P.3d 544 (App. 2012)  
State v. Kinney, 225 Ariz. 550, 241 P.3d 914 (App. 2010)  
State v. LaPan, 249 Ariz. 540, 472 P.3d 1103 (App. 2020)  
State v. Lee/L.N., 236 Ariz. 377, 340 P.3d 1085 (App. 2014)  
State v. Leeman, 250 Ariz. 251, 478 P.3d 246 (App. 2020)  
State v. Lewis, 236 Ariz. 336, 340 P.3d 415 (App. 2014)  
State v. Lietzau, 248 Ariz. 576, 463 P.3d 200 (2020)

State v. Liwski/Gillie, 238 Ariz. 184, 358 P.3d 605 (App. 2015)  
State v. Machado, 226 Ariz. 281, 246 P.3d 632 (2011)  
State v. Matlock, 237 Ariz. 331, 350 P.3d 835 (App. 2015)  
State v. McPherson, 228 Ariz. 557, 269 P.3d 1181 (App. 2012)  
State v. McKenna, 222 Ariz. 396, 214 P.3d 1037 (App. 2009) (depublished)  
State v. Mixton, 250 Ariz. 282, 478 P.3d 1227 (2021)  
State v. Montes, 223 Ariz. 337, 223 P.3d 681 (App. 2009) (vacated)  
State v. Montes, 226 Ariz. 194, 245 P.3d 879 (2011)  
State v. Ortiz, 238 Ariz. 329, 360 P.3d 125 (App. 2015)  
State v. Peoples, 240 Ariz. 245, 378 P.3d 421 (2016)  
State v. Peraza, 239 Ariz. 140, 366 P.3d 1030 (App. 2016)  
State v. Salazar-Mercado, 234 Ariz. 590, 325 P.3d 996 (2014)  
State v. Sisco, 238 Ariz. 229, 359 P.3d 1 (App. 2015) (vacated)  
State v. Sisco, 239 Ariz. 532, 373 P.3d 549 (2016)  
State v. Trujillo, 245 Ariz. 414, 430 P.3d 379 (App. 2018)  
State v. Trujillo, 248 Ariz. 473, 462 P.3d 550 (2020)  
State v. Tucker, 231 Ariz. 125, 290 P.3d 1248 (App. 2012)  
State v. Valencia/Healer, 239 Ariz. 255, 370 P.3d 124 (App. 2016) (vacated)  
State v. Valencia/Healer, 241 Ariz. 206, 386 P.3d 392 (2016)  
State v. Windsor, 224 Ariz. 103, 227 P.3d 864 (App. 2010)  
State v. Yonkman, 231 Ariz. 496, 297 P.3d 902 (2013)  
State v. Yonkman, 233 Ariz. 369, 312 P.3d 1135 (App. 2013)

#### AMICUS CASES (alphabetically)

Arizona v. United States, 132 S.Ct. 2492 (2012)  
Busso-Estopellan v. Mroz, 238 Ariz. 553, 364 P.3d 472 (2015)  
Dobson v. McClennen, 238 Ariz. 389, 361 P.3d 374 (2015)  
Friendly House v. Whiting, No. CV-10-1061-PHX-SRB (D. Ariz. 2010)  
Hiskett v. Lambert, 247 Ariz. 432, 451 P.3d 408 (App. 2019)  
Lopez-Valenzuela v. Maricopa County, 770 F.3d 772 (9th Cir. 2014) (en banc)  
Mario W. v. Kaipio, 230 Ariz. 122, 281 P.3d 476 (2012)  
Ohio v. Clark, 135 S.Ct. 2173 (2015)  
Reed-Kaliher v. Hoggatt, 235 Ariz. 361, 332 P.3d 587 (App. 2014)  
Reed-Kaliher v. Hoggatt, 237 P.3d 119, 347 P.3d 136 (2015)  
Sanchez v. Ainley, 234 Ariz. 250, 321 P.3d 415 (2014)  
Simpson/Martinez v. Miller/Steinle, 241 Ariz. 341, 387 P.3d 1270 (2017)  
State v. Adair, 241 Ariz. 58, 383 P.3d 1132 (2016)  
State v. Arevalo, 249 Ariz. 370, 470 P.3d 644 (2020)  
State v. Butler/Tyler B., 232 Ariz. 84, 302 P.3d 609 (2013)  
State v. Chavez, 243 Ariz. 313, 407 P.3d 85 (App. 2017)  
State v. Escalante, 245 Ariz. 135, 425 P.3d 1078 (2018)  
State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798 (2017)  
State v. Evans, 237 Ariz. 231, 349 P.3d 205 (2015)  
State v. Haskie, 242 Ariz. 582, 399 P.3d 567 (2017)

State v. Jean, 243 Ariz. 331, 407 P.3d 524 (2018)  
State v. Kemp/Altamirano, 249 Ariz. 320, 469 P.3d 457 (2020)  
State v. Maestas, 242 Ariz. 194, 394 P.3d 21 (App. 2017) (vacated)  
State v. Maestas, 244 Ariz. 9, 417 P.3d 774 (2018)  
State v. Malone, 247 Ariz. 29, 444 P.3d 733 (2019)  
State v. Miles, 243 Ariz. 511, 414 P.3d 680 (2018)  
State v. Murray, -- Ariz. --, -- P.3d --, 2021 WL 1035034 (Ariz., March 18, 2021)  
State v. Pandeli, 242 Ariz. 175, 394 P.3d 2 (2017)  
State v. Primous, 242 Ariz. 221, 394 P.3d 646 (2017)  
State v. Quijada, 246 Ariz. 356, 439 P.3d 815 (App. 2019)  
State v. Robertson, 249 Ariz. 256, 468 P.3d 1217 (2020)  
State v. Roseberry, 237 Ariz. 507, 353 P.3d 847 (2015)  
State v. Valenzuela, 239 Ariz. 299, 371 P.3d 627 (2016)  
State v. Weakland, 246 Ariz. 67, 434 P.3d 578 (2019)  
State v. Wein/Goodman, 244 Ariz. 22, 417 P.3d 787 (2018)  
State v. Whitman, 234 Ariz. 565, 324 P.3d 851 (2014)  
State ex rel. Montgomery v. Chavez/Gill, 234 Ariz. 255, 321 P.3d 420 (2014)  
State ex rel. Montgomery v. Padilla/Simcox, 237 Ariz. 263, 349 P.3d 1100 (App. 2015)  
State ex rel. Polk v. Hancock/Ferrell, 236 Ariz. 301, 340 P.3d 380 (App. 2014) (vacated)  
State ex rel. Polk v. Hancock/Ferrell, 237 Ariz. 125, 347 P.3d 142 (2015)

## ORAL ARGUMENTS (by court and by date)

### Ninth Circuit

Bressi v. Ford (11/19/08)

### Arizona Supreme Court

State v. Diaz (1/12/10)  
State v. Bowsher (9/28/10)  
State v. Montes (12/2/10)  
State v. Machado (1/11/11)  
Mario W. v. Kaipio (5/1/12)  
State v. Yonkman (1/15/13)  
State v. Whitman (2/25/14)  
State v. Welty/Koontz/Chavez/Gill (2/25/14)  
State v. Salazar-Mercado (4/1/14)  
State v. Glissendorf (6/3/14)  
State ex rel. Polk v. Hancock/Ferrell (1/13/15)  
State v. Carlson (2/24/15)  
Dobson v. McClennen (10/1/15)  
Busso-Estopellan v. Mroz/State (11/17/15)  
State v. Gray (3/29/16)  
State v. Sisco (5/3/16)  
State v. Pandeli (5/10/16)  
State v. Peoples (5/10/16)

State v. Valencia/Healer (11/1/16)  
State v. Haskie (1/18/17)  
State v. Jean (5/8/17)  
State v. Miles (10/3/17)  
State v. Hernandez (12/12/17)  
State v. Wein/Henderson/Goodman (2/22/18)  
State v. Escalante (5/17/18)  
State v. Weakland (10/2/18)  
State v. De Anda (2/7/19)  
State v. Trujillo (9/26/19)  
State v. Lietzau (2/18/20)  
State v. Robertson (4/14/20)  
Fay v. Fox/Hansen (1/14/21)

Court of Appeals, Division Two

Ledvina v. Cerasani (9/6/06)  
State v. Campoy/Crockwell (4/8/09)  
State v. Diaz (5/19/09)  
State v. McPherson (1/11/12)  
State v. Young (1/25/12) (unpublished)  
State v. Johnson (4/11/12)  
State v. Munger/Allin (7/3/12) (unpublished)  
State v. Tucker (11/7/12)  
State v. Delgado (5/8/13)  
State v. Fields/Chase (5/8/13)  
State v. Bernini/Copeland (9/4/13)  
State v. Yonkman (10/9/13)  
State v. Flores (8/27/14)  
State v. East (11/5/14) (unpublished)  
State v. Clark (11/12/14) (unpublished)  
State v. Lewis (11/12/14)  
State v. Lee / L.N. (12/10/14)  
State v. Sisco (3/4/15)  
State v. Matlock (5/13/15)  
State v. Williamson (7/8/15) (unpublished)  
State v. Ortiz (9/23/15)  
State v. Peraza (1/13/16)  
State v. Elem (4/20/16) (unpublished)  
State v. Huez (6/29/16)  
State v. Florez (9/7/16)  
State v. Hernandez (1/11/17)  
State v. Lopez (6/14/17)  
State v. Helm (9/5/18)  
State v. Trujillo (9/5/18)  
State v. Hernandez (2/26/19)  
State v. Healer (4/3/19)

Holly C. et al. v. Tohono O'odham Nation et al. (8/27/19)  
State v. Bigger (9/23/20)

## APPENDIX 4

### DAVID EUCHNER'S PERSONAL STATEMENT (response to Question 62)

I have always placed the highest value on fair judgment, in my personal as well as professional life. I believe that the procedural rules we have serve the greater purpose of giving effect to the Constitutional rights we all enjoy. Like everyone else, I find plenty of disagreement with the substantive laws that are written by the legislature; but I appreciate that our system of government requires the laws to be created by the people's direct representatives and that the role of judges is to interpret those laws and give effect to those laws and not to rewrite them.

A Supreme Court justice does more than cast a vote to decide a case and write his or her share of majority opinions. The opinions of the Court must ensure not only fairness but also consistency, so that lower courts can understand how to apply these cases. I bring natural talents for holding vast quantities of law in my memory with logic and consistency, and this allows me to identify inconsistencies and offer ways to resolve legal conflict and harmonize competing interests in law. In this way, I see myself more as an engineer who transforms confusing words into understanding.

Often this work is done through concurring and dissenting opinions. I am simultaneously a person of strong convictions who maintains his viewpoint even while in the minority, while respectful of the majority with which I disagree. It is not only common but typical for me to be a sole dissenter on various decisions within committees. These committees and I share good humor about my dissents, often joking that a meeting cannot be complete until I dissent on a vote. Ultimately, the reason I succeed in committees where I dissent frequently is because my fellow committee members recognize that I often persuade a majority toward my view.

I joined the Pima County Public Defender's Office in the summer of 2005 because of my steadfast belief that the Sixth Amendment right to counsel and the

Fourteenth Amendment right to due process of law are meaningless unless attorneys are willing to stand and be counted among those willing to defend those rights. I was inspired by Bob Hooker's and Bob Hirsh's vision that the indigent must receive the best possible defense in an adversarial system so heavily weighted against the marginalized of society, a vision that I have always shared. I had the great privilege of learning at the feet of the giants of our profession how to put into practice what we preach and to provide the best possible defense to the greatest number of clients.

I have always sought balance in my professional life between helping all of the people in Arizona through my appellate advocacy and helping individual clients, whose gratitude for my work means so much to me personally. My appellate advocacy is exemplified by my appearance in more than sixty oral arguments and having more than eighty published opinions (both as counsel for the party and as amicus)—both of which far exceed all other Arizona attorneys in the last decade. Through this work, I have honed my skill on a myriad of fine points of law as well as my ability to analogize seemingly unrelated legal concepts on a moment's notice at the podium.

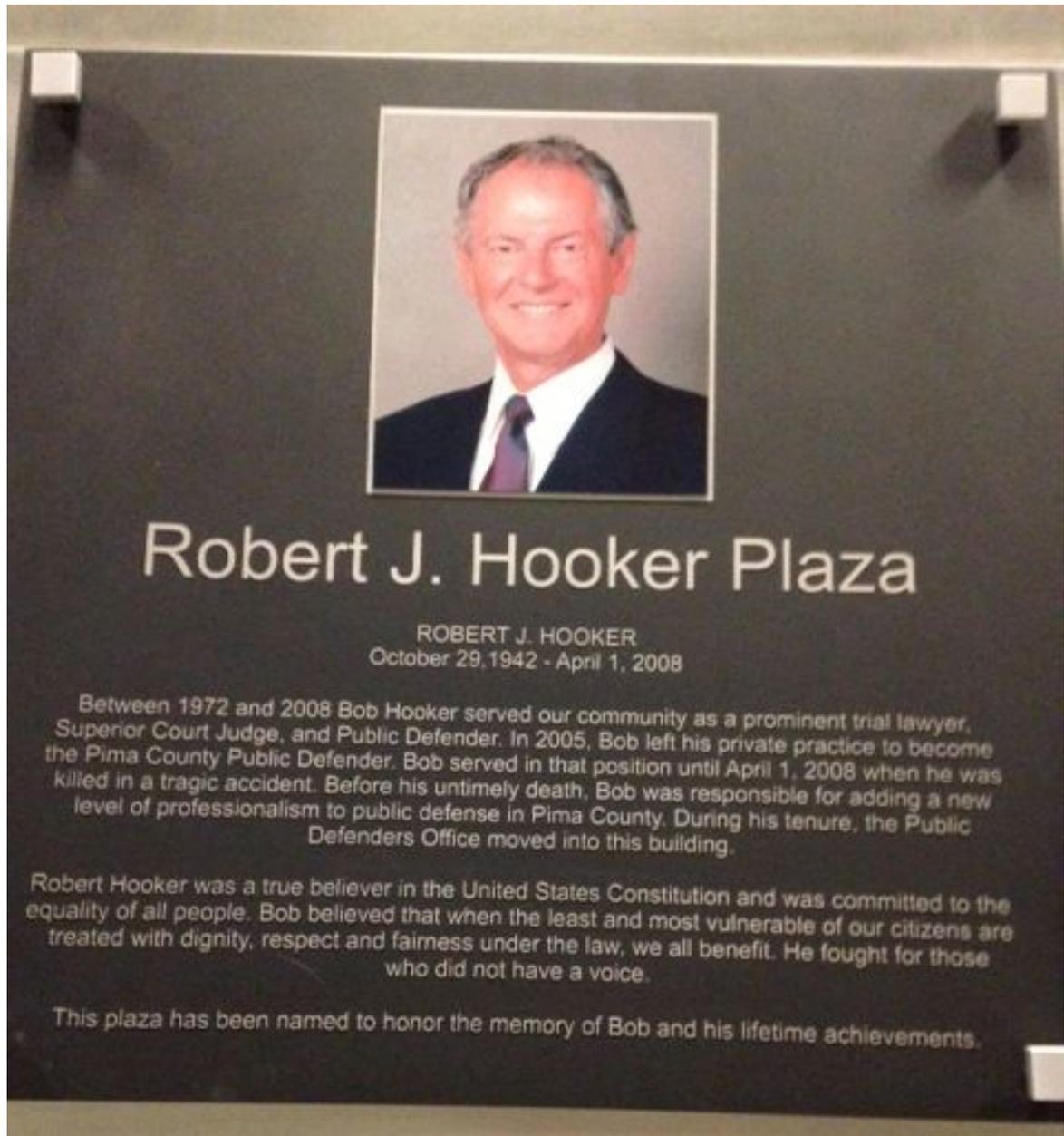
My appellate work has never stood in my way of working directly with the Public Defender's trial lawyers. I have co-counseled some trials with younger attorneys in order to teach them not only trial tactics but also how to preserve the client's legal rights in appellate courts. When I develop a new legal issue that I would like to see preserved for appellate review, I will often write the motion for the trial attorney and then specially appear in Superior Court to argue it myself. In addition to my own case work, each day several of our five dozen trial lawyers come into my office seeking help with analyzing the facts and law of their cases so that I can advise them of all the contingencies that might occur in the moment. Based on this work, the Public Defender created the position of Resource Counsel for me so that I can be more available to our lawyers.

Judges also bring to bear their years of experience working with adversaries, clients, victims and other third-party witnesses, and the public when deciding on a just result. I have always been respectful to victims and witnesses and others who are called into court, and I have worked closely and amicably with prosecutors and victim advocates in committees. The congeniality I have for my professional colleagues does not end with the lawyers and judges; I have consistently maintained excellent relationships with judicial staff, court reporters and clerks, probation officers and pre-trial services, corrections officers, etc. A criminal case is never pleasant for the person on trial, but that does not mean that a lawyer needs to be an unpleasant person while seeking justice for the accused.

I am well suited to manage the administrative responsibilities of a Supreme Court justice as well. I have served on several Supreme Court committees, including the recent task forces to rewrite the Arizona Rules of Criminal Procedure and Criminal Rule 32, respectively. I have served on the State Bar's Criminal Jury Instructions Committee since 2010. I served on the board of Arizona Attorneys for Criminal Justice for eight years, and I stepped aside after my presidency so that other talented attorneys could have leadership opportunities. During my year as AACJ President in 2014, not only was the organization extremely active, but its finances, which had run slightly in the red for the preceding three years, increased its cash on hand by 25%. I have served on the board of the Arizona Justice Project, which works to free the wrongfully-convicted and to correct manifest injustices.

I have also strived to use my particular skills to better my community. I have started an elementary school chess team and I am a tournament director at scholastic events, I taught a 4H Citizenship class to junior high students who submitted posters at the Pima County Fair, I promote blood donation, and I work with a large competitive high school marching band. I always look for ways to teach my children how to make the world a better place and lead by example.

Every morning, when I enter the Bank of America Building and press the elevator button, I take a moment to look at this plaque on the wall of the elevator banks and remind myself of what it means to work in the justice system.



Judges may shed the role of advocate, but I could never forget the ideals of justice for all that I have done my best to uphold my entire life. My desire is for the community to perceive a Court of which I am part to be an instrument of justice.

IN THE ARIZONA SUPREME COURT

LOUIS E. CESPEDES,  
Petitioner,

v.

HON. KENNETH LEE, Judge of the  
Superior Court of Arizona in and for  
Pima County,

Respondent/Judge,

and

STATE OF ARIZONA,

Real Party in Interest.

No. CR-16-0384-PR

Court of Appeals No.  
2 CA-SA 2016-0040

Pima County Superior Court  
No. CR-20154232-001)

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**PETITIONER'S SUPPLEMENTAL BRIEF**

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## INTRODUCTION

In *State v. Holle*, 240 Ariz. 300 (2016), a majority of this Court held that the defense of lack of sexual motivation should properly be categorized as an affirmative defense, in part because the majority believed prosecutors would exercise good judgment in charging cases. It is clear that the defense of parental discipline in A.R.S. §13-403(1) is a justification defense that the State must disprove. Yet, this case proves the point that prosecutors may easily bring such justified conduct to the grand jury with a list of proposed charges, because its only barrier—the justification defense of parental discipline—is so easily swept under the rug in *ex parte* proceedings. First, the 257<sup>th</sup> Grand Jury was told during empanelment instructions that justification is only a trial defense. Then, during the presentation in this case, the detective and prosecutor withheld evidence related to parental discipline and failed to raise the applicable justification statute. Fundamental fairness and substantive due process require grand jurors to be properly instructed on applicable justification defenses and to receive pertinent justification evidence.

Furthermore, the Pima County Attorney's Office provided faulty instructions related to justification generally and parental discipline specifically. Louis Cespedes now potentially faces a trial on felony charges for engaging in constitutionally protected conduct that is well within the boundaries of reasonable corporal punishment as a means of parental discipline of an unruly child. Had the grand jury considered justification and been properly instructed on the correct standard of reasonableness, there is little doubt that this grand jury, which returned a true bill by a vote of 9-6, would have instead returned no

bill. This Court must explain to the prosecutors of this State that “reasonableness” does not mean “What’s reasonable and what’s unreasonable is going to be your decision to make,” as this grand jury was told (Appendix D, Ex. B to Petition for Review, at 73), or “that’s up to you,” as reflected in the empanelment instructions to the 262<sup>nd</sup> Grand Jury (Appendix O, at 56). As the Legislature has specifically provided that corporal punishment is justified conduct, whether parental discipline is reasonable must be considered from the perspective of a person who uses corporal punishment to avoid unconstitutional application.

## ARGUMENTS

### **I. In an *ex parte* grand jury proceeding where the prosecutor owes a constitutional duty to the criminally accused, the prosecutor must present evidence and instruction of justification defenses that are readily apparent.**

- A. The plain language of A.R.S. §13-205(A) states that justified conduct does not constitute criminal or wrongful conduct. Justification presumes that all of the statutory elements of the offense are present. Thus, “without justification” is an implicit element of a public offense.

The plain language of A.R.S. §13-205(A) shows that the difference between justification defenses and affirmative defenses extends beyond who has the burden of proof at trial. This definition also shows that where justification exists, no crime occurs. This necessarily means that the Legislature made “lack of justification” an essential element of any Title 13 criminal offense.<sup>1</sup>

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<sup>1</sup> *But see State v. Fell*, 203 Ariz. 186 (App. 2002) (justification defense not permitted for Title 28 offenses).

The statement, “[j]ustification defenses describe conduct that, if not justified, would constitute an offense,” makes clear that justification presumes all of the other elements of the offense are satisfied. Any other reading of the statute would violate multiple canons of statutory interpretation. Provisions of the criminal code are to be construed according to the fair meaning of their terms. A.R.S. §13-104. “We give words their usual and commonly understood meaning unless the legislature clearly intended a different meaning.” *State v. Korzep (Korzep I)*, 165 Ariz. 490, 493 (1990). “When interpreting a statute, we make every effort to give effect to the intent of the legislature.” *Mejak v. Granville*, 212 Ariz. 555, ¶8 (2006) (cites omitted). “A statute is to be given such an effect that no clause, sentence or word is rendered superfluous, void, contradictory or insignificant.” *Bilke v. State*, 206 Ariz. 462, ¶11 (2003) (internal quotations omitted). Thus, it is clear that the absence of justification is a necessary precondition to the commission of a crime. Such preconditions are *essential elements*.

In *Holle*, 240 Ariz. 300, ¶26, this Court rejected the holding of the Court of Appeals that sexual motivation was an implicit element of molestation or sexual abuse. This Court explained its disagreement by stating, “the court described the defense as a species of a justification defense.” *Id.* ¶24. Under *Holle*’s clear language, lack of justification is an implicit element of a public offense. Although *Holle* also expressed that it could find no case “in which an Arizona court has found an ‘implicit’ element of a crime when the statute itself that defines the crime contains no such element,” *id.* ¶37, there is ample Arizona authority showing that statutory language may necessarily imply an element not explicitly

written in the language of the statute defining the offense. *See, e.g., State v. Williams*, 144 Ariz. 487 (1985) (in order to be guilty of driving on a suspended license, or aggravated DUI while driving on a suspended license, the defendant must know his license is suspended); *State v. Yazzie*, 232 Ariz. 615 (App. 2013) (same). In *State v. Moran*, 162 Ariz. 524, 526 (App. 1989), the court recognized that aggravated criminal damage in §13-1604(A) expressed that the crime requires “without the express permission of the owner,” but such is missing from the definition of criminal damage in §13-1602; nevertheless, the court held “that the absence of the property owner’s permission, though unstated, is a necessary and implicit element of the crime.” The Legislature has not amended §13-1602, yet “without express permission” is now considered an element of that offense and juries are instructed as to that essential element of the offense. *See Revised Arizona Jury Instructions, Criminal*, Statutory 16.02 (4th ed. 2016) (adding language to instruction and citing *Moran* in use note).

Some jurisdictions, like Arizona, create a justification defense to the crime of child abuse. “The use of force upon another person is justified under any of the following circumstances: ... a parent ... may use reasonable force upon the minor for the purpose of safeguarding or promoting his welfare, including prevention and punishment of his misconduct, and the maintenance of proper discipline.... The force used must not create a substantial risk of death, serious bodily injury, disfigurement, or gross degradation.” N.D.C.C. §12.1-05-05(1); *see also Raboin v. North Dakota Dept. of Human Svcs.*, 552 N.W.2d 329, 335 n.2 (1996) (quoting statute).

Other jurisdictions have explained this additional element by establishing a separate offense called “malicious punishment of child.” Minn. Stat. Ann. §609.377, and the courts have given the term a sensible meaning. *See In re N.F.*, 749 N.W.2d 802 (Minn. 2011) (no evidence to support child abuse conviction based on paddling a 13-year-old boy 36 times for serious disciplinary issues). And additional jurisdictions, like New Mexico, add language to the child abuse statute to clarify that lack of justification is an element of the offense: “Abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be...” N.M. Stat. Ann. §30-6-1(D). Our court of appeals relied on New Mexico case law in interpreting our child abuse statute:

Finally, the definition of “physical injury” in A.R.S. § 13–3623(A)(2) does not create an arbitrary presumption. The definition is not unconstitutionally vague since, under A.R.S. § 13–3623, the injury must occur in the context of child abuse “not mere normal parental action or inaction.” *See State v. Coe*, 92 N.M. 320, 587 P.2d 973 (Ct.App.1978).

*State v. deBoucher*, 135 Ariz. 220, 228 (App. 1982).

Thus, in order to prove the crime of child abuse, the State must prove that the defendant lacked any justification defense that might present itself—including, but not limited to, parental discipline under A.R.S. §13-403(1). If the State must prove that fact, then it is an essential element of the offense. An indictment that does not allege all elements of the offense is legally insufficient. *See Mejak*, 212 Ariz. 555, ¶21 (for a completed offense to be charged, all elements must be present).

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IN THE ARIZONA SUPREME COURT

JEFF McVAY HAWKES,	} S. Ct. No. CR-16-0437-PR } No. 2 CA-SA 2016-0026 } DEPARTMENT A } (Pima County Superior Court Case } No. CR-20155017-001) } <b>PETITION FOR REVIEW OF A } SPECIAL ACTION DECISION OF } THE COURT OF APPEALS</b>
Petitioner,	
v.	
HON. HOWARD FELL, Judge of the Superior Court of Arizona in and for Pima County,	
Respondent/Judge,	
and	
STATE OF ARIZONA,	
Real Party in Interest.	
_____	

Petitioner requests this Court to review the court of appeals' decision dated September 28, 2016, declining jurisdiction of his special action challenging Respondent's denial of a motion to remand. Review should be granted because the issue raised in this petition concerning the classification of clearly exculpatory evidence is novel, and the error in this case recurs frequently.

## **B. Respondent misapplied the definition of “clearly exculpatory.”**

In the context of a grand jury, this Court has distinguished between exculpatory evidence that demonstrates a defendant’s innocence and must be presented to a grand jury from evidence that merely raises questions of a witness’s credibility and veracity and is better suited for trial. *Trebus*, 189 Ariz. at 625. However, there is a tremendous gulf between these extremes; namely, substantive evidence with a tendency to exonerate. Consistent with *State v. Willits*, 96 Ariz. 184 (1964), *Brady v. Maryland*, 373 U.S. 83 (1963), and their progeny, courts should interpret “clearly exculpatory” as substantive evidence that tends to negate or reduce a suspect’s culpability rather than evidence that might completely exonerate a suspect.

In *Willits*, this Court established certain remedies permitting the jury to draw inferences against the State for its failure to preserve evidence. 96 Ariz. at 191. Then, in *State v. Glissendorf*, this Court applied *Willits* to exculpatory evidence—evidence it defined not as having “the potential to completely absolve the defendant,” but only a “tendency to exonerate.” 235 Ariz. 147, ¶10 (2014). This Court held previously destroyed written and audio records that “had the potential to assist” the defendant in impeaching one of his accusers met this standard. *Id.* ¶19. *Glissendorf* set a very low threshold: exculpatory evidence is that which is “material and potentially useful to a defense theory supported by the evidence.” *Id.* ¶10.

Similarly, in *Brady*, the Supreme Court set a low bar for exculpatory evidence; namely that which “would tend to exculpate [the defendant] or reduce the penalty.” 373 U.S. at 88. Further, the Court held “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87; *see also United States v. Agurs*, 427 U.S. 97 (1976) (extending *Brady* even in absence of request). Further, in *Kyles v. Whitley*, the Court explained that the test for determining materiality of suppressed evidence is not whether there was sufficient evidence to convict but rather whether the suppression of evidence results in casting the case in such a different light “as to undermine confidence in the verdict.” 514 U.S. 419, 434-35 (1995).

With regard to each of these three lines of cases, there is a “sliding scale” both for violations and for remedies of such violations. Sometimes the remedy for destruction of evidence is a *Willits* instruction, as in *Glissendorf*; but, if the destruction was intentional or if there is actual prejudice, then dismissal is warranted. *Arizona v. Youngblood*, 488 U.S. 51 (1988). In the case of *Brady* violations, a new trial is insufficient remedy when the suppression of exculpatory evidence was so egregious that “[n]o lesser sanction [than dismissal] would rehabilitate the damage done to the integrity of the justice system.” *Milke v. Mroz*, 236 Ariz. 276, ¶21 (App. 2014). With false testimony before the grand jury, dismissal is warranted in cases

involving perjury. *Basurto*. Although this Court has never ordered a sanction of dismissal with prejudice against a prosecuting agency due to misconduct before the grand jury, it recognizes and affirms the availability of that sanction. *Maretick*, 204 Ariz. 194, n.5; *Crimmins*, 137 Ariz. at 45 (Feldman, J., concurring) (citing *Samango*, 607 F.2d at 882); *see also State v. Young*, 149 Ariz. 580, 585 (App. 1986) (“Dismissals with prejudice occur only when the evidence is irrevocably tainted or there exists a pattern of misconduct that is prevalent or continuous.”).

The same interests of due process and fairness to the accused that motivate *Willits* and *Brady* are essential to the just, independent operation of the grand jury. Accordingly, the most prudent interpretation of “clearly exculpatory” in the context of the grand jury would be in line with that which the government is expected to preserve under *Willits* and what it must disclose under *Brady*. Thus, “clearly exculpatory” should mean that the evidence tends to negate or reduce the suspect’s culpability and that its value as such is clear on its face. In other words, “clearly exculpatory” must not look to the evidence’s *weight* but rather its exculpatory *nature*. The evidence should be clear to the prosecutor that it has exculpatory value; and when a prosecutor receives a *Trebus* letter from a defense attorney that explains how the evidence is exculpatory, its clarity is undeniable. Where the violation is the result of perjury or egregious prosecutorial misconduct, *see Pool v. Superior Court*, 139 Ariz. 98, 108-09 (1984), dismissal of the indictment is demanded. But in this

case, Hawkes requests only a remand.

Here, the evidence in the *Trebus* letter was clearly exculpatory because it tended to exonerate him. Like the destroyed recordings in *Glissendorf* that “had the potential to assist” the defendant, and like the evidence in *Brady* and *Kyles* that was favorable to the defense and cast the case in a different light, K.T.’s accusations of sexual molestation against her mother—coupled together with her accusations against her principal—have the tendency to exonerate Hawkes by their very nature. These false accusations are substantive evidence of K.T.’s purpose, plan, and modus operandi, and evidence that K.T.’s parents had discussed sending her to a troubled-girls private school in Georgia shows K.T.’s motive. Finally, unlike the nondescript evidence in *Trebus* that was unsuitable for grand jury presentation, Hawkes requested the prosecutor present specific, clearly exculpatory, substantive evidence.

Respondent did not explain what he thought “clearly exculpatory” means, except for concluding that the cumulative evidence withheld from the grand jury did not meet that standard. Respondent explained why he did not see this as error: because the grand jury did not ask for it. *See Exhibit 4*, p.12. The new facts and additional legal argument provided to Respondent “doesn’t change the Court’s opinion.” *Exhibit 7*, p.14. When the only evidence against a defendant is the accusation of a teenager with a colorful history of making false allegations of sexual misconduct, a prosecutor armed with that information has a duty to present it because

