APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

SECTION I: PUBLIC INFORMATION (QUESTIONS 1 THROUGH 65)

PERSONAL INFORMATION

1. Full Name: **Randall Mack Howe**

2. Have you ever used or been known by any other name? **No.** If so, state name:

3. Office Address: **Arizona Court of Appeals**
Arizona State Courts Building
1501 West Washington Street, Ste. 327
Phoenix, Arizona 85007

4. How long have you lived in Arizona? **Since 1981.** What is your home zip code? **85013**

5. Identify the county you reside in and the years of your residency. **Maricopa. 39 years.**

6. If nominated, will you be 30 years old before taking office? **X** yes ☐no

If nominated, will you be younger than age 65 at the time the nomination is sent to the Governor? **X** yes ☐no

7. List your present and any former political party registrations and approximate

dates of each:

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

Republican, registered since 1981.

8. Gender: **Male**

Race/Ethnicity: **White**

EDUCATIONAL BACKGROUND

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

ARIZONA STATE UNIVERSITY COLLEGE OF BUSINESS
Tempe, Arizona 1981–85
B.S., General Business Administration
Summa Cum Laude, 1985

ARIZONA STATE UNIVERSITY COLLEGE OF LAW
Tempe, Arizona 1985–88
J.D., Cum Laude, 1988

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

Undergraduate:

Major: **General Business Administration with emphasis in Finance**

Minor: **American History**

Activities: **Undergraduate Teaching Assistant, Dr. John E. Crawford, Assistant Professor of Communication**

Member, Disabled Student Fraternity

Law School:

Major: **Emphasized Business and Commercial Law**

Activities: **National Moot Court Team, 1987**

Editor, William C. Canby Moot Court Competition, 1988

Writing Instructor for First-Year Students, 1988

Phi Alpha Delta Law Fraternity, Hugo Black Chapter

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

Undergraduate:

Scholarships:

American Can Company, 4-year full merit scholarship

Conoco Oil Company, 1-year $1,000 merit scholarship

Honors and Awards:

1985 Moeur Award—Outstanding scholarship (graduated first in class)

Phi Kappa Phi, National Honor Fraternity

Beta Gamma Sigma, National Business Honorary Fraternity

Golden Key National Honor Society

Dean's List, 1981–85

Law School:

Honors and Awards:

Best Brief, National Moot Court Competition, Western Regional Conference—1987

Third Place, National Moot Court Competition, Western Regional Conference—1987

Willard H. Pedrick Scholar, Spring 1986, Fall 1986, Spring 1987

Employment:

STOREY & ROSS, P.C.
Phoenix, Arizona
Summer Associate—Summer 1987

THE GREYHOUND CORPORATION
Law Department
Phoenix, Arizona
Law Clerk—Summer 1986

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, 1988
United States District Court for the District of Arizona, 1988
United States Court of Appeals for the Ninth Circuit, 1991
United States Supreme Court, 1991

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.

ARIZONA COURT OF APPEALS, Division One—Judge, May 2012 to present
Phoenix, Arizona

UNITED STATES ATTORNEY'S OFFICE—2008 to 2012
Phoenix, Arizona

Deputy Appellate Chief—November 2009 to May 2012

Assistant United States Attorney—July 2008 to November 2009

OFFICE OF THE ARIZONA ATTORNEY GENERAL—1988 to 2008
Phoenix, Arizona

Chief Counsel—January 2001 to July 2008
Criminal Appeals Section

Appellate Supervisor—August 1999 to January 2001
Liability Management Section

Assistant Attorney General—October 1988 to August 1999
Criminal Appeals Section

STOREY & ROSS, P.C.
Phoenix, Arizona
Associate—1988

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.

Chief Judge Peter B. Swann
Judge Cynthia J. Bailey
Judge Jennifer B. Campbell
Judge Brian Y. Furuya
Judge Paul J. McMurdie
Judge Jennifer M. Perkins
Judge David D. Weinzweig
Judge Lawrence F. Winthrop
Vice Chief Judge Kent E. Cattani
Judge Michael J. Brown
Judge Maria Elena Cruz
Judge David B. Gass
Judge James B. Morse Jr.
Judge Samuel A. Thumma
Judge D. Steven Williams

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.

As a judge on the Court of Appeals, I sit on a rotating panel of three judges and resolve appeals from the superior courts within our court's

jurisdiction, which includes Mohave, Yuma, La Paz, Apache, Navajo, Coconino, Yavapai, and Maricopa Counties. We also hear petitions for special actions, which are essentially emergency appeals that must be resolved on an expedited basis. We hear cases from all areas of law that are litigated in state courts: civil, commercial, criminal, family, juvenile, tax, worker's compensation, unemployment benefits, and mental health.

The Clerk of the Court assigns appeals to each panel, and the presiding judge of each panel assigns each of those appeals to an individual judge. That judge, with assistance from law clerks and court staff attorneys, reads the record, researches the law, and drafts a decision resolving the appeal. The panel then meets, usually weekly, to discuss each appeal. Each judge can agree on the draft resolution of an appeal, suggest changes to the draft so he or she may agree with it, or disagree with the draft. If a majority of the panel agrees with a draft, that becomes the court's decision on the appeal. If the decision is noteworthy, explains a point of law not previously explained, or is controversial, the panel may publish the decision. I have served as presiding judge of my panel several times and assigned appeals to the other judges on my panel. I have drafted majority opinions, concurrences, and dissents.

Calculating the percentage of the caseload from each area is difficult. In a month, each panel has two civil calendars, comprised of 5 to 6 appeals each; one criminal calendar, comprised of 6 to 7 appeals each; and one "Industrial Commission" calendar, comprised of a varying number of worker's compensations appeals or, if no such appeals are assigned, a varying number of additional civil appeals. Based on the nature of the calendars, approximately 55% of our cases involve some sort of civil law, 40% criminal law, and 10% worker's compensation or other law.

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

From 2008 to my appointment to the Court, I practiced appellate law representing the United States and its agencies before the United States Court of Appeals for the Ninth Circuit. I began as a line Assistant United States Attorney in the Appellate Section, and my responsibilities were to draft briefs for appeals before the Ninth Circuit. My supervisor was John R. Lopez IV, now an Arizona Supreme Court Justice. He is familiar with the quality of my work at the United States Attorney's Office. He may be reached at

Arizona Supreme Court
1501 West Washington Street
Phoenix, Arizona 85004
(602) 452-3628
jrlopez@courts.az.gov

I succeeded Justice Lopez as the next Deputy Appellate Chief, and I supervised all of the criminal and civil appellate matters that were handled out of the Phoenix and Flagstaff offices. The criminal matters involved defending the United States when defendants appealed their convictions or appealing on behalf of the United States when the district court issued certain adverse rulings. The civil matters involved tort, administrative, or forfeiture actions in which the United States or its agencies had been sued or had sued other parties. I advised the attorneys on the substantive and procedural law that applied to the cases, and I reviewed, edited, revised, and rewrote briefs and motions as necessary. I also supervised the attorneys' preparation for oral argument, advising them on arguments to make or not make and holding moot courts to allow them to practice their arguments. I also handled certain cases myself when I believed that my appellate expertise was required. In addition, I also advised attorneys on occasion about legal issues when they were preparing for trial. In important cases, I drafted certain trial motions and argued them when necessary. About 80 to 85% of my work was criminal, and about 15 to 20% of my work was civil.

I also had some administrative responsibilities at the United States Attorney's Office. The Department of Justice supervises the United States Attorney's Offices across the nation, and it requires that certain appellate actions receive its approval. I was responsible for drafting the necessary memorandums and obtaining the approvals.

Before my tenure at the United States Attorney's Office, I practiced criminal appellate law at the Arizona Attorney General's Office representing the State of Arizona in the Arizona Court of Appeals, the Arizona Supreme Court, the United States District Court for the District of Arizona, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court. As Chief Counsel of the Attorney General's Office's Criminal Appeals Section from 2001 to 2008, I supervised the attorneys who defended the State in all the noncapital appeals from felony convictions and sentences in the state appellate courts, and in habeas corpus actions in federal court. During my time there, the attorneys in this Section collectively handled approximately 1,000 appeals and habeas corpus actions per year. I assigned the appeals and habeas actions to them and provided direction and advice. I determined the policies and procedures the attorneys had to follow in their practice. I also handled cases myself when I believed my expertise and experience were required to effectively represent the State. From 1988 to 1999, I worked in the Criminal Appeals Section as a line attorney, directly handling appeals and habeas corpus actions. During that time, I was responsible for seven capital (death penalty) appeals. I drafted the answering briefs in those cases and argued them before the Arizona Supreme Court. I also represented the State in several of those cases in federal court once the defendants filed petitions

for writs of habeas corpus.

Between my stints in the Criminal Appeals Section, I served from 1999 to 2001 as the appellate supervisor for the Liability Management Section. I supervised the civil appellate practice of the attorneys in the Section. The Section represents the State and its agencies when they are sued for various actions or inactions. The major agencies include the Arizona Department of Corrections, the Arizona Department of Transportation, the Arizona Department of Economic Security, and the Arizona Department of Public Safety. I reviewed and revised briefs and other pleadings filed in the appellate courts and advised the attorneys on appellate matters in all types of cases involving suits against the State, from tort and employment cases to prisoner writs of habeas corpus and other prisoner litigation. I also handled certain appeals and other appellate matters myself when my particular expertise was needed.

From 1989 to 1999, I also served as a member of the Attorney General's Opinion Review Committee. The Committee reviews and revises formal opinions that the Attorney General issues on a multitude of civil law questions and problems.

My former colleague, Joseph Maziarz, who became Chief Counsel of the Criminal Appeals Section at the Attorney General's Office after I left and recently retired from that position, is familiar with my work at the Attorney General's Office. He may be reached at

8911 East Sutton Dr.
Scottsdale, Arizona 85260
(480) 661-5706

In my 24-year career as an appellate attorney for the United States Attorney's Office and the Arizona Attorney General's Office, I represented the United States and the State of Arizona in nearly 400 appeals orally argued 85 cases before appellate courts, including one before the United States Supreme Court. The cases I handled have resulted in 84 published opinions. See Appendix A.

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.

As an appellate judge, my primary responsibility is drafting and editing decisions and opinions resolving appeals and special actions. This requires analyzing the trial record and the applicable law and then translating that analysis into a logical, coherent, and readable explanation of the resolution of the particular appeal. Although I do some initial drafting (especially when drafting dissents), I primarily edit the drafts prepared by my two law clerks and engage in a back-and-forth editing and rewriting process until I am happy with the draft. I also edit the drafts of the other two judges with whom I sit on panel. This often involves a lot of negotiation between the judges as we edit the drafts, attempting to come to a consensus decision. In my eight-year tenure at the Court, I have authored 980 decisions, including 79 published opinions (see Appendix B), and have ruled on 3,146 cases as part of a three-judge panel.

Before I joined the Court, my primary experience was in drafting appellate briefs and pleadings in all the state and federal appellate courts in which I practiced. In my career, I drafted nearly 400 appellate briefs in the Arizona Court of Appeals, the Arizona Supreme Court, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court. In 1998, I served as a Judge Pro Tempore on the Arizona Court of Appeals and drafted a memorandum decision in a civil appeal. In 2000, I successfully negotiated a settlement agreement in a civil unlawful imprisonment lawsuit that an inmate filed against the Arizona Department of Corrections. I was also negotiating a settlement agreement in a discrimination lawsuit against the Department of Corrections when I became Chief Counsel of the Criminal Appeals Section.

I have also drafted legislation. When the United States Supreme Court issued its decision in *Blakely v. Washington*, 524 U.S. 296, 124 S. Ct. 2531 (2004), which invalidated Arizona's sentencing statutes, I drafted amendments on behalf of the Arizona Attorney General's Office to conform the statutes to the requirements of the *Blakely* decision. I also testified before the Arizona Legislature and met with legislators about the amendments. I also drafted a comment on behalf of the Arizona Prosecutors Association Advisory Council regarding certain changes to Ethical Rule 3.6 concerning trial publicity.

As a student law clerk and as an associate at the law firm of Storey & Ross, I was responsible for the initial document preparation and drafting loan agreements and deeds of trust.

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? **No.**
If so, state the approximate number of these matters in which you were involved as:

Sole Counsel: _____

Chief Counsel: _____

Associate Counsel: _____

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.

***Gregory Gordon Crittenden v. Samuel A. Lewis,* United States District Court No. CIV 98–0075 PHX-SMM.**

Civil action by inmate against Arizona Department of Corrections for unlawful imprisonment, 1999–2000.

Counsel for Plaintiff:

James M. LaGanke
3122 East Campo Bello Drive
Phoenix, Arizona 85032
(602) 279–6399
jameslaganke@aol.com

Inmate Crittenden filed a civil rights violation action claiming that the Department of Corrections had improperly denied him release from prison.

Although Crittenden had not yet served his full prison term, he had earned sufficient credits to be released. The Department denied him release under a department regulation that prevented the early release of an inmate if the Department deemed his release to be a threat to public safety. The district court ruled that, although the Department had improperly refused to release Crittenden, the Department had qualified immunity from the lawsuit because the law on the issue was unclear. Rather than risk an adverse ruling on appeal, I negotiated a settlement of the case for $37,000.

The case was significant in three respects. First, for me personally, it was the first case in which I negotiated a settlement. Appellate matters rarely settle by negotiation. In this case, I gained the experience of negotiating with another attorney and arriving at terms that were mutually acceptable. Second, for the victim, I negotiated for the proceeds of the settlement to be used to satisfy the restitution debt that the inmate still owed the victim for the injuries he caused her. Third, for the State, I avoided the risk that bad law might have been made on appeal. Although the State had won in the trial court, the issue of law upon which the State had won was in great doubt, and the risk that the State would have lost on appeal was high.

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: **64**

State Courts of Record: **8**

Municipal/Justice Courts: _____

The approximate percentage of those cases which have been:

Civil: **90 (including federal habeas corpus actions**

Criminal: **10**

The approximate number of those cases in which you were:

Sole Counsel: **70**

Chief Counsel: **1**

Associate Counsel: **1**

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: **90**

You argued a motion described above **0**

You made a contested court appearance (other than as set forth in the above response) **5**

You negotiated a settlement: **1**

The court rendered judgment after trial: **0**

A jury rendered a verdict: **0**

The number of cases you have taken to trial:

Limited jurisdiction court **0**

Superior court **0**

Federal district court **0**

Jury **0**

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: **25**

Criminal: **371**

Other: **0**

The approximate number of matters in which you appeared:

As counsel of record on the brief: **AZ: 334**
U.S.: 45

Personally in oral argument: **AZ: 62**
U.S. 23

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.

1. *Clark v. Arizona*, 548 U.S. 735, 126 S. Ct. 2709 (2006).

On certiorari from the Arizona Court of Appeals to the United States Supreme Court.

Counsel for Clark:

David Goldberg

(Mr. Goldberg represented Mr. Clark by himself and is now deceased. To discuss the case and my conduct of it, please contact my former co-counsel:

Assistant Attorney General Michael O'Toole
Arizona Attorney General's Office
15 South 15th Avenue
Phoenix, Arizona 85007
(602) 542–8830
Michael.Otoole@azag.gov

Seventeen-year-old Eric Clark killed a police officer in Flagstaff and was charged with first-degree murder. He suffers from paranoid schizophrenia and claimed that he was not responsible for murder because he was insane when he shot the officer. Clark waived his right to a jury trial and tried the case to the judge. The judge found that Clark was not insane and that he had knowingly killed a police officer. Clark claimed on appeal that Arizona's definition of insanity violated the United States Constitution and that Arizona unconstitutionally prohibited a mentally ill defendant from introducing evidence of his mental illness to rebut evidence that he had intentionally or knowingly killed a person. The Arizona Court of Appeals

rejected Clark's arguments, and the Arizona Supreme Court declined review. Clark sought review in the United States Supreme Court, and the Court granted review and held that Arizona's definition of insanity was constitutional and that Arizona had not unconstitutionally limited Clark from presenting evidence of his mental illness.

The case is significant because the Court's ruling reserved for the States the decision how to define insanity as a defense and the extent to which evidence of mental illness may be used in a criminal case.

2. *Merlin Lyneer Clouse. v. State*, 199 Ariz. 196, 16 P.3d 757 (2001).

Appeal in the Arizona Court of Appeals and the Arizona Supreme Court from judgment in the State's favor on qualified immunity grounds.

Counsel for plaintiffs:

Andrew S. Gordon
Kristen B. Rosati
Coppersmith Brockelman
2800 North Central Avenue, Suite 1900
Phoenix, Arizona 85004-1009
(602) 224-0999
agordon@cblawyers.com
krosati@cblawyers.com

Plaintiffs filed a tort suit against the Maricopa County Sheriff's Office and the Arizona Department of Public Safety, alleging that those agencies had failed to maintain custody of a criminal who subsequently murdered the wife of one of the plaintiffs and shot and severely wounded another plaintiff. A jury found the State not liable based on qualified immunity. Plaintiffs appealed to the Arizona Court of Appeals, claiming that the qualified immunity statute violated the Arizona Constitution's abrogation clause. The court of appeals found that the abrogation clause did not apply to tort suits against the State. Plaintiffs filed a petition for review to the Arizona Supreme Court, and the supreme court granted review. The supreme court agreed with the court of appeals and held that the abrogation clause did not invalidate the qualified immunity statute.

The case is significant because it established the principle that the State may legislate on whether and how it may be sued without violating the abrogation clause. This means that the Legislature can control how the State is sued in state court.

3. *State v. Martinez*, 210 Ariz. 578, 115 P.3d 618 (2005).

Appeal from a criminal conviction and sentence in the Arizona Court of Appeals and the Arizona Supreme Court.

Counsel for Martinez:

Stephen J. Whelihan
Office of the Public Advocate
222 North Central Avenue, Suite 280
Phoenix, Arizona 85004-2203
(602) 506-5137
whelihan@mail.maricopa.gov

Martinez was convicted of first-degree murder and burglary. The trial court sentenced him to life imprisonment on the murder conviction and to an aggravated term of imprisonment on the burglary conviction based on aggravating circumstances that the court had found. Martinez claimed on appeal that his aggravated sentence on the burglary conviction violated his right to have a jury find the existence of aggravating circumstances beyond a reasonable doubt, which the United States Supreme Court had recognized in *Blakely v. Washington*, 524 U.S. 296, 124 S. Ct. 2531 (2004). The Arizona Court of Appeals affirmed Martinez's sentence, ruling that *Blakely* requires an Arizona jury to find only one aggravating circumstance before a defendant is eligible for an aggravated sentence. The court of appeals ruled that *Blakely* was satisfied in Martinez's case because one of the aggravating circumstances—that Martinez had caused the death of another person—was found by a jury beyond a reasonable doubt when the jury found him guilty of murder.

The Arizona Supreme Court took review of the case to resolve a split in the court of appeals over whether *Blakely* required a jury to find *all* of the aggravating circumstances used to impose an aggravated sentence or only *one* aggravating circumstance. The supreme court affirmed Martinez's sentence, ruling that a jury must find only one aggravating circumstance to satisfy *Blakely*.

The case is significant because it resolved a hotly disputed matter of constitutional law and avoided the need to resentence thousands of criminal defendants in Arizona.

4. *State v. Styers*, CR89-12631.

Evidentiary hearing on Styers' petition for post-conviction relief on October 21, 1997, before Maricopa County Superior Court Judge Peter T. D'Angelo. Capital case.

Counsel for Styers:

Honorable Robert W. Doyle
300 West Washington Street, Courtroom 703

Phoenix, Arizona 95003-2103
(602) 262-6294
Robert.doyle@phoenix.gov

The case involved Styers' involvement with Debra Milke in the conspiracy to murder her 4-year-old son at Christmastime and Styers' subsequent conviction for first-degree murder and death sentence. This case, like his codefendant Milke's case, was high-profile and received much media coverage. In his petition for post-conviction relief, Styers claimed that his trial counsel was constitutionally ineffective and that he should receive a new trial. The evidentiary hearing involved questioning Styers' trial counsel about his handling of the case and the jurors about their deliberations.

The case is significant for two reasons. First, the successful completion of the post-conviction proceedings was another step in the long appellate process to ensure that Styers' rights were not violated and that he was appropriately punished for his crimes. The case was also personally significant because I gained experience in conducting an evidentiary hearing in a high-profile case.

***5. United States v. Joy Doreen Watson*, No. 09-10360.**

Appeal from criminal conviction and sentence in the United States Court of Appeals for the Ninth Circuit, 2010–11.

Counsel for Watson:

Anne Michael Williams
Law Office Anne M. Williams PC
6499 South Kings Ranch Road Suite 6 PMB 82
Gold Canyon, Arizona 85118–2920
(480) 892-7177
anne@amwilliamslaw.net

Watson was a marijuana broker—a person who served as the middleman in a large marijuana transaction. She was tried and convicted of conspiracy to possess 100 or more kilograms of marijuana and conspiracy to commit money laundering. She and eight others had been caught in a sting in which they arranged an 800-pound marijuana transaction with a confidential informant who was working with the Drug Enforcement Administration. Between 2005 and the time of her arrest in 2008, she had laundered $770,000 in funds derived from drug transactions. Watson was sentenced to 18 years in prison. On appeal, Watson raised several issues regarding the validity of her sentence, and the Ninth Circuit Court of Appeals affirmed her convictions and sentences.

The case is significant because it affirmed the conviction of a person

involved in large-scale drug trafficking. It was also personally significant because this was the first case that I handled for the United States that involved so many defendants and such serious crimes. The case required extensive analysis of the complicated United States Sentencing Guidelines.

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.).

Arizona Governor Janice K. Brewer appointed me to the Arizona Court of Appeals as a judge on April 18, 2012, and I began serving on May 29, 2012. I was retained by the voters for a six-year term in November 2014 and again in November 2020. I sit on a rotating panel of three judges and handle any type of appeal or special action that is assigned to my panel. In December 1998, I served as a Judge Pro Tempore on the Court of Appeals as a member of a panel that issued decisions in three cases.

I served as a disciplinary hearing officer for the State Bar from 2000 to 2009. I primarily served as a settlement officer, meeting with the State Bar's counsel and the Respondent and his counsel before any evidentiary hearing to attempt to bring the parties to agreement on an outcome that did not require an evidentiary hearing. I also served as a member of two Disciplinary Hearing Committees for the State Bar, Committees 6B and 6C, from 1989 to 1999. The Hearing Committees conducted evidentiary hearings on alleged ethical misconduct of lawyers as charged by the State Bar and determined the facts and the existence or nonexistence of ethical violations. The Committees also recommended that particular sanctions be imposed if an ethical violation was found. Hearing Committee 6B considered at least fifteen matters during my term, several of which required evidentiary hearings. Hearing Committee 6C considered approximately three matters, one of which required an evidentiary hearing.

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.

1. ***Hall v. Elected Officials' Retirement Plan et al.*, 241 Ariz. 33**

(2016) (Howe, J.).

Appeal to the Arizona Supreme Court from the granting of summary judgment holding unconstitutional certain statutes changing future retirement benefits for currently employed members of the Elected Officials' Retirement Plan.

Counsel for Plaintiffs/Appellees/Cross-Appellants:

Ron Kilgard
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Phoenix, Arizona 85012
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Alison E. Chase
Keller Rohrback L.L.P.
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Counsel for Defendants/Appellants/Cross-Appellees:

Bennett Evan Cooper
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1850 North Central Ave.
Phoenix, Arizona 85004
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Counsel for Intervenor State of Arizona:

Charles A. Grube
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charles.grube@azag.gov

Counsel for Amicus Curiae National Conference on Public Employee Retirement Systems:

Colin F. Campbell
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Robert D. Klausner
Adam P. Levinson
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Plantation, Florida 33317
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adam@robertdklausner.com

In 2011, the Arizona Legislature enacted statutes that reduced the future pension benefits for currently employed judicial officers. Representatives of the class of judicial officers sued, arguing that their pension benefits had vested once they were appointed or elected and could not be reduced. The trial court granted summary judgment in their favor, and the Elected Officials' Retirement Plan and the State appealed.

Because the legislation affected the pension benefits of all but one of the current members of the Arizona Supreme Court, the Chief Justice substituted me and three other judges whose pensions were not affected to sit with Justice Bolick as the Arizona Supreme Court to decide this case. In a 3-2 decision, the Court held that Arizona Constitution prohibited the Legislature from unilaterally reducing the pension benefits of current members of the Plan because the pension benefits were part of the terms of their employment contract that vested once they were employed as judicial officers.

The case is legally significant because it resolved an important issue of Arizona Constitutional law and reiterated the principle that no matter how laudable the public policy supporting legislation, the Legislature must still follow the requirements of the state constitution. The case is personally significant because I was entrusted with the responsibility of writing the Majority opinion that established such an important principle of constitutional law that applied to all Arizona. I learned a great deal about negotiating with my fellow judges to craft a decision that a majority would agree with. I also learned about holding my own in the face of a strong dissent. In sitting as an Arizona Supreme Court Justice in this case, I gained the confidence that I can serve the State of Arizona well in that position.

2. Friedman *v. Cave Creek Unified Sch. Distr. No. 93*, 231 Ariz. 567 (App. 2013) (Howe, J.)

Appeal from granting of summary judgment finding unconstitutional statute that allowed school districts to spend bond proceeds for purposes the original bond issue did not authorize.

Counsel for Plaintiff/Appellee:

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Two voters in a school district bond election sued the school district for injunctive and declaratory relief when the district determined to use bond proceeds for a purpose different from the purpose stated in the bond election publicity pamphlet. The Arizona Legislature had enacted a statute that allowed bond proceeds to be used for a different purpose than stated in the publicity pamphlet if certain conditions were met. The superior court ruled that the statute was unconstitutional because it conflicted with the contract clauses of the United States and Arizona Constitutions. The superior court found that the bond election created a contract between the school district and the voters and that the statute allowing the district to change the bond purposes interfered with that contract.

On appeal, we affirmed on a narrower ground. Article 7, Section 13 of the Arizona Constitution requires that "questions upon bond issues" must be submitted to the voters, and we held that a bond issue's purpose was a term that must be submitted to the voters for approval. Allowing a district to unilaterally change the purpose of a bond would make Article 7, Section 13 illusory. A school district could obtain the issuance on a bond based on a popular purpose and then, once voters have approved the bond, change it to a less popular purpose.

The case is significant because it reaffirms three principles. First, ultimate governing authority rests with the People, and courts must carefully guard that authority. Second, the Arizona Constitution is alive and well, and the Legislature cannot evade its provisions, no matter the public

policy goal. Third, courts should resolve matters on the narrowest possible grounds, leaving larger, more complicated issues for another day, when they are truly at issue and must be decided.

3. *Earl v. Garcia ex. Rel. Maricopa Cty.*, 234 Ariz. 577, 324 P.3d 863 (App. 2014) (Howe, J., concurring).

Special Action seeking relief for the superior court's denial of motion to dismiss criminal charge for speedy trial violation.

Counsel for Petitioner:	**Counsel for Real Party in Interest:**
David Goldberg (deceased)	**Karen Kemper 301 West Jefferson, Fl. 2 Phoenix, Arizona 85003-2195 (602)506–7580 kemperk@mcao.maricopa.gov**

The State charged Petitioner with theft of a Cadillac by misrepresentation. He had purchased the car from a car dealership and had financed the purchase with a loan; the loan fell through because he allegedly misrepresented his employment status, but never returned or paid for the car. Near the date that Petitioner had to be tried to comply with the speedy trial requirements of Arizona Rule of Criminal Procedure 8, the State learned that he had not misrepresented his employment status. The State dismissed the charge without objection and reindicted him with theft for simply taking the car with intent to deprive.

Five months later, Petitioner moved to dismiss the new charge because—counting from the date of the indictment on the original charge—the Rule 8 time limit for trying the charge had been violated and the State had dismissed the original charge to evade the time limit of Rule 8. The superior court held a hearing, and the prosecutor explained the reason for dismissing the original charge. The superior court found that the State did not dismiss the charge to evade Rule 8 and denied the motion to dismiss. Petitioner sought special action relief from that ruling in the Court of Appeals.

The Presiding Judge of the panel and I declined to accept jurisdiction of the matter because Petitioner could not challenge the dismissal of the original charge in the proceeding on the subsequent charge, especially after waiting five months. One judge dissented, finding that the State did dismiss the original charge to evade Rule 8, even though the superior court had found otherwise. Because of the dissent, I separately concurred to explain that as an appellate court, we are required to defer to the superior court's findings of fact, absent an abuse of discretion, and should not make factual determinations on appeal. The trial

judge, who sees and hears the witnesses and counsel, is in a better position to judge decide matters than an appellate court.

The concurrence is significant as a reminder of the proper standard of review to apply on questions of fact and a caution about overstepping an appellate court's bounds on review.

4. State *ex rel. Montgomery v. Welty*, 233 Ariz. 8, 308 P.3d 1159 (App. 2013) (Howe, J.), *vacated by State ex rel. Montgomery v. Chavez*, 234 Ariz. 255, 321 P.3d 420 (2014).

Special action seeking relief from the superior court's order compelling the disclosure of the victims' birth dates to the criminal defendants in discovery.

Counsel for Petitioner:

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In separate criminal prosecutions against two defendants, the defendants moved to compel the disclosure of the crime victims' birth dates. The State objected in each case, claiming that the birth dates were protected under the Victims' Bill of Rights. The superior courts in each case ordered disclosure, and the State petitioned for special action in this Court, seeking to have those orders vacated.

On appeal, my panel held that the Victims' Bill of Rights protected the victims' birth dates from disclosure. The statute at issue, A.R.S. § 13–4434(a) provided at that time that a crime victim had the right to refuse to testify to his or her address, telephone numbers, place of employment, "or other locating information." We held that a birth date was just as private as the other items listed in the statute and were protected from disclosure for the same reason.

The supreme court, however, granted review and vacated our opinion. The supreme court found that the statute protected "locating information," and birth dates were merely "identifying information." Thus,

the court held that victims' birth dates must be disclosed. The court further held that if the disclosure creates a risk of harassment or harm to a victim in a particular case, the State may seek a court order protecting that victim's birth date from disclosure. The supreme court stated that if birth dates should be protected to preserve a victim's privacy, the parties should address that issue with the Legislature.

That is exactly what happened. The Arizona Legislature amended A.R.S. § 13–4434 in 2014 to protect victims' birth dates from disclosure. This case is significant because my opinion and the supreme court's opinion spurred the Legislature to protect crime victims' birth dates.

5. *State v. Steinle (Moran)*, 237 Ariz. 531, 354 P.3d 408 (App. 2015) (Howe, J., dissenting), *vacated*, 239 Ariz. 415, 372 P.3d 839 (2016).

Special action seeking relief from the superior court's order excluding a cell phone video from admission at trial.

Counsel for Petitioner:

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In a first-degree murder prosecution, the State sought to admit a 30-second cell phone video of the defendant allegedly stabbing the victim. The video was cropped from a longer video of the murder that a witness had sent to the owner of the cell phone. The witness then erased the longer video. The defendant sought to exclude the 30-second video excerpt under Arizona Rule of Evidence 106, which allows a party to admit an entire recorded statement if the other party seeks to admit only a portion of the statement. The superior court agreed, ruling that the absence of the longer video made the video excerpt inadmissible. The State sought special action relief in the Court of Appeals.

The Majority of the panel agreed that the excerpt could not be admitted because the longer video no longer existed to be admitted under Rule 106. The Majority also ruled that admitting the excerpt without the longer video would be unduly prejudicial under Arizona Rule of Evidence 403. I dissented, arguing that the excerpt was the entire video in the State's possession, so that Rule 106 was inapplicable. I explained that Rule 106 was a rule of inclusion—allowing the admission of certain evidence—not a rule of exclusion—precluding the admission of certain evidence. I noted that the state of technology was such that video sharing and excerpting is common and occurring more frequently as time progresses, and the

Majority's rule would preclude the admission of an increasing amount of relevant evidence. I further found that the admission of the excerpt would not be unduly prejudicial under Rule 403.

On review by the supreme court, the court agreed with my dissent that Rule 106 could not be used to exclude evidence. The court declined to consider whether the admission of the excerpt would violate Rule 403, holding that the superior court should have the opportunity to decide that issue in the first instance.

The case is significant because it addresses a vitally important issue regarding today's technology: the admissibility of digital and social networking information in criminal trials.

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

In addition to my experience as a judge on the Court of Appeals and an appellate attorney handling criminal, capital, and civil appeals, I have experience as a manager and supervisor of appellate attorneys. For two years, from 1999 to 2001, I supervised the civil appellate work of approximately 15 to 20 attorneys in the Liability Management Section of the Attorney General's Office. I learned there to look beyond the particular case at hand to the broader legal consequences that the case might present, an essential skill for an appellate judge, especially a supreme court justice.

From 2001 to 2008, I served as Chief Counsel of the Criminal Appeals Section of the Arizona Attorney General's Office. In that capacity, I not only supervised the substantive appellate work of 17 to 20 attorneys, but I also managed the Section, handling all administrative and personnel issues that arose with the attorneys and support staff. That experience taught me how to make decisions and resolve disputes amid competing points of view, perceptions, and personalities. It also taught me the skill of building consensus on issues where possible and doing without consensus when necessary. I learned to make hard, often unpopular, decisions. In 2002, budget issues in the Attorney General's Office required me to identify attorneys to lay off. I chose the attorneys to lay off based on what was best for the Attorney General's Office without regard to any personal concerns I might have had.

I continued to use and to develop my management expertise as Deputy Appellate Chief at the United States Attorney's Office. I handled the administrative and personnel issues for the Phoenix office of the Appellate Division, which then consisted of three attorneys and two legal assistants. I also supervised the appellate work of all of the attorneys in the Phoenix office. This required me to manage the calendar of the matters in the office that had to be filed in the Ninth Circuit Court of Appeals and to see that the

briefs and pleadings were timely filed. I was also responsible for ensuring that the briefs and pleadings were substantively correct. Because the cases concerned federal law, I had to consider the legal consequences a case might have for the entire nation.

The management and supervisory skills that I gained from those positions have helped me immeasurably in performing my job as an appellate judge and would stand me in good stead at the Supreme Court.

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? **N/A** 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? **No.**

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

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

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.

None.

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? **Yes.** If so, list with the citations and dates.

***Things We Leave Behind,* Arizona Attorney Magazine, May 2021 (anticipated) (Winner in the Nonfiction Category of Arizona Attorney Magazine Annual Arts Competition)**

***A Streetcar Named Ancestry.com*, Arizona Attorney Magazine, May 2018 (Winner in the Nonfiction Category of Arizona Attorney Magazine Annual Arts Competition)**

(Attached as Appendix C)

***A Mother's Advocacy*, Arizona Attorney Magazine, May 2015**

(Attached as Appendix D)

***Your Unique Roadmap to Becoming a Judge*, Arizona Attorney Magazine, December 2014**

(Attached as Appendix E)

***The Limits of Law*, Arizona Attorney Magazine, April 2011**

(Attached as Appendix F)

***My Day in the Court of Courts*, New Mobility Magazine, November 2006**

(Attached as Appendix G)

***Ginsburg Was an Inspiration to Many, and I Nearly Mowed Her Over*, Arizona Republic, September 20, 2020**

***The Gift of History and Heritage*, Arizona Republic, December 8, 2018**

***Faced with Hard Road, Mom Made Right Decisions*, Arizona Republic, May 8, 2005**

***Our Turn*, Arizona Republic, July 26, 2000**

***My Turn*, Tribune Newspapers, December 5, 1997**

***My Turn*, Tribune Newspapers, July 27, 1997**

(Newspaper articles are attached as Appendix H)

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.

Faculty, Meet the Bench Day
State Bar Leadership Institute—April 9, 2021

Faculty, Effective Oral Advocacy
State Bar of Arizona Seminar—November 23, 2020

Faculty, *10 Tips in 50 Minutes*
Appellate Practice Section Seminar—September 17, 2020

Faculty, *Law and Literature: The Caine Mutiny Court Martial*
2019 Arizona Judicial Conference

Faculty, *Oral Advocacy: Winning at the Lectern*
State Bar Appellate Practice Section—December 13, 2018

Faculty, *From Death with Dignity to Not Dead Yet: A Conversation* About *End of* Life
State Bar Convention—June 29, 2018

Faculty, *Meet the Bench Day*
State Bar Leadership Institute—April 12, 2018

Faculty, *Combat or Conversation: Effective Oral Advocacy in Arizona Courts*
State Bar Diversity Conference—March 23, 2018

Faculty, *Live Oral Argument: Become Game-Ready with Major League Coaching*
State Bar Convention—June 14, 2017

Faculty, *Defining and Achieving Your Own Success*

State Bar Convention—June 14, 2017

Faculty, *Appellate Practice Basics*
Maricopa County Bar Association—September 28, 2016

Faculty, *Meet the Bench Day*
State Bar Leadership Institute—April 22, 2016

Faculty, *Hitting All the Bases: Effective Legal Writing*
State Bar Spring Training Conference—April 1, 2016

Faculty, *What Arizona Appellate Court Judges Want You to Know*
National Business Institute—May 8, 2015

Faculty, *Meet the Bench Day*
State Bar Leadership Institute—April 17, 2015

Moderator, *Demystifying the Appellate Judicial-Selection Process*
State Bar Appellate Practice Section—April 16, 2015

Faculty, *Practical and Ethical Issues in Representing Clients with Disabilities*
State Bar Spring Training Conference—March 20, 2015

Faculty, *The Future of the Judiciary: Do Our Courts LOOK like Arizona?*
State Bar Spring Training Conference—March 20, 2015

Faculty, *Meet the New Judges*
State Bar Appellate Practice Section—April 17, 2014

Faculty, *Meet the Bench Day*
State Bar Leadership Institute—April 11, 2014

Faculty, *Batter Up! The Ins and Outs of Oral Advocacy*
State Bar Spring Training Conference—March 28, 2014

Faculty, *Plenary Session: Why You Should Become a Judge and How to Get There*
State Bar Spring Training Conference—March 28, 2014

Faculty, *Meet the Bench Day*
State Bar Leadership Institute—April 19, 2013

Faculty, *Resolving Conflicts of Interests: Addressing the Issues of Bias and Impartiality in a Diverse Bench and Bar*
Minority Bar Convention—April 5, 2013

Faculty, *Chris Nakamura Judicial Workshop—The Future of Diversity on the Bench*
Minority Bar Convention–April 5, 2013

Faculty, *Stories from the Front: How We Got Here and What We Learned Along the Way*
State Bar Seminar—March 18, 2011

Faculty, *A Road Less Traveled to the Supreme Court*
Minority Bar Convention—April 16, 2010

Faculty, *Outstanding Advocacy with Special Considerations*
State Bar Seminar—September 16, 2009

Faculty, *Supreme Advocacy*
State Bar Convention—June 25, 2009

Faculty, *Sex and the Constitution Revisited*
State Bar Convention—June 24, 2009

Faculty, *Opportunity Is Knocking: Getting Involved in the Legal and Greater Communities*
2009 Minority Bar Convention—March 20, 2009

Faculty, *Behind Every Great Lawyer is a Great Mentor*
State Bar Convention—June 17, 2006

Faculty, *New Updates on Blakely v. Washington*
State Bar Seminar—October 7, 2005

Faculty, *Constitutional Law*
Arizona Prosecuting Attorneys Advisory Council Seminar—September 24, 2005

Faculty, *Summer Conference*
Arizona Prosecuting Attorneys Advisory Council Seminar—July 29, 2005

Faculty, *New Updates on Blakely and Crawford*
State Bar Seminar—February 3, 2005

Faculty, *Talking Diversity: Developing Effective and Professional Relationships with People with Disabilities as Colleagues, Coworkers and Clients*

State Bar Convention—June 10, 2004

Judge and Faculty, Arizona Appellate Practice Institute—1995, 1997, 1999, 2001, 2003, 2005, 2007, 2010

Faculty, *Criminal Year in a Nutshell*
Arizona Prosecuting Attorneys Advisory Council Seminar—March 4 and 18, 1994

Faculty, Americans with Disabilities Act Seminar
Arizona Attorney General's Office—April 20, 1994

Judge, National Moot Court Competition, Western Regional Conference—1990

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

None, other than bar association and judicial branch organizations.

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:

Member: **October 21, 1988**

Activities: **Member, Arizona State Bar Association Convention Committee, 2009, 2010, 2011, 2012**

Appellate Practice Section, Executive Council
Judicial Liaison, 2017–present
President, 2011–12
President-Elect, 2010–11
Treasurer, 2009–10
Secretary, 2008–09
Member-at-Large, 2007–08

Council on Persons with Disabilities in the Legal Profession
Member, 2002–present

Chairman, 2005–06

Member, Arizona Attorney Editorial Board, 2009–present
Chair, 2012–14

Member, Bar Leadership Institute Selection Committee, 2013–20
Chair, 2019-20

Disciplinary Hearing Officer, 2001–09

Disciplinary Hearing Committee 6B, 1990–96

Disciplinary Hearing Committee 6C, 1996–97

Maricopa County Bar Association:

Member: **1989 to 2000**

Activities: **Public Lawyers Division Board of Directors, 1993–99**
President, 1997
President-Elect, 1996
Treasurer, 1995
Chairman, Programs Committee, 1995, 1996

Ex-Officio Member, Maricopa County Bar Association Board of Directors, 1997–98

American Bar Association:

Member, 1988–97, 2012 to present
Member, ABA Commission on Disability Rights, 2016–17

Arizona Judicial Branch:

Judicial Ethics Advisory Committee
Member, 2014–18

State, Tribal, Federal Court Forum
Vice Chair, 2016
Member, 2015 to present

Arizona Judicial Conference Planning Committee
Member, 2018–19

Volunteer Legal Activities:

On various occasions throughout my career, I have given presentations on the Americans with Disabilities Act to the staff of the Attorney General's Office and to other community and business groups. This has not been affiliated with any bar association activities.

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

I currently serve on the board of directors of two nonprofit organizations dedicated to serving persons with disabilities: 1) United Cerebral Palsy of Central Arizona, which provides therapy and other services to children with cerebral palsy and related disabilities; and 2) Daring Adventures, which provides recreational activities, such as handcycling and rafting trips, for people with disabilities.

For most of my adult life, I have been active in the community to educate people about disabilities, the laws prohibiting discrimination against people with disabilities, and the need to integrate people with disabilities into society. Here is a list of my involvement with organizations that serve persons with disabilities:

Arizona Center for Disability Law, Board of Directors
President, 2010–12
Vice-President, 2008–10
Member, 2005–08

The Center represents individuals who have suffered discrimination and uses legal means to redress the discrimination and effect systemic change. The Board of Directors oversees the Center's budget and sets its policy and goals.

Arizona Bridge to Independent Living (now Ability360), Board of Directors
President, 2010–12
Vice-President, 2008–09
Member, 2005–14

Ability360 is a nonprofit organization whose mission is to assist individuals with disabilities to achieve independence and self-determination. It runs several programs that serve this mission, and the Board oversees the budget, sets policy, and provides direction to the organization.

Governor's Council on Developmental Disabilities
Chairman, 2003–05
Member, 1999–2003

The Council promotes the societal integration of persons with developmental disabilities through legislation and the development of government-funded programs.

Little League Baseball, Coach, 1989–96

I coached a Little League baseball team comprised of children with physical, mental, and emotional disabilities.

Disability Network of Arizona (DNA), Board of Directors
President, 1992–93
Member, 1990–94

DNA was a disabled citizens group that presented programs on disability issues, including the ADA.

Governor's Council on Independent Living (now the Statewide Independent Living Council)
Member, 1993

Phoenix Transit Department's Taxi Subsidy Committee
Member, 1993–99

The Transit Department provided a subsidy for taxi fares for employed persons who have a disability that prevents them from using public transportation. The Committee determined which persons who were eligible for the program.

Phoenix and Scottsdale Transit Department Seminars
Faculty, 1993, 1994

These seminars taught transit employees about the rudiments of the ADA and the methods of interacting with people with disabilities.

Chase Bank Disability Awareness Week
Speaker, October 21, 1999

I presented a discussion on disability issues to employees of Chase Bank.

Bell Atlantic Mobile Training Class
Trainer, 1993, 1994

I worked with Bell Atlantic Mobile to develop and promote a program making cellular telephones accessible and affordable to people with disabilities. Along with other speakers, I trained the company's sales staff in interacting with people with disabilities.

Abilities Unlimited
Staff Consultant, 1994–1998

Abilities Unlimited was a disabilities consulting firm. I was the lead trainer in their disability awareness training classes for Motorola University, the continuing education department of Motorola. In those classes, I taught the basic requirements of the ADA and discussed with the student- employees the attitudes and problems they face in interacting with people with disabilities.

In addition to disability-related activities, I served for two years as a team member in the adult faith formation for my Catholic parish, St. Francis Xavier, in central Phoenix.

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

Professional:

Diversity and Inclusion Leadership Award
State Bar of Arizona—2019

Michael C. Cudahy Criminal Justice Award, State Bar of Arizona—2013

Keynote Speaker IMPACT Career Fair—2011

Distinguished Public Lawyer, State Bar of Arizona—2007

Outstanding Young Alumnus Award, Arizona State University—2002

Special Recognition, Arizona Department of Corrections—June 2001

Special Recognition, Arizona Department of Corrections—June 2000

Arizona Attorney General's Office Nominee, Arizona Prosecuting Attorneys Advisory Council Prosecutor of the Year Award—1994

Civic:

2020 Laura Dozer Award, United Cerebral Palsy of Central Arizona

Spirit of Ability Award, Ability 360—2016

ACDL Vision Award, Arizona Center for Disability Law—2015

Keynote Speaker, Tempe Mayor's Disability Awards—2009

2006 Mayor's Award, Phoenix Mayor's Commission on Disability Issues

Guest Speaker, TRIO Motivational Award Luncheon, Arizona State University—April 14, 2000

***Profile in Success*, Arizona Business Gazette—October 7, 1999**

Employee of the Year, City of Tempe Commission on Disability Concerns—1996

Keynote Speaker, Awards Banquet, City of Glendale Mayor's Commission on Disabilities—1996

Keynote Speaker, "Abilities Count" Awards Banquet, City of Phoenix Mayor's Commission on Disabilities 1994

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

None.

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.

Since I was a child, I have been avidly interested in history, particularly American history. Because lawyers always figured prominently in the history I read and did much for this country and the greater good, I grew up admiring lawyers and wanting to be one. The knowledge that I have gained from studying history provides me with an understanding of

our past, the ideals upon which this nation was founded, and the way that democracy and the United States Constitution operate. This background also provides me with an understanding of how laws and the judicial system affect society and the general welfare. This understanding, I believe, is essential to wise judging.

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 was born with cerebral palsy. Thanks to my parents' determination and foresight, I was mainstreamed into society and attended public school at a time when children with disabilities were not yet included in regular schools. Although my parents insisted that I receive the proper medical care and therapy for my disability, they raised me as an otherwise normal child, expecting me to succeed and to be a productive member of society.

Because of my upbringing and life experiences, I have pursued my career as a lawyer without regard to my disability, yet I still understand the trials and difficulties of being perceived as "different" from other people. My practice of law is separate from my disability, but I am active in the disability community, working for the inclusion and the integration of persons with disabilities into society.

Diversity is essential to the proper functioning of the government and the courts in particular for two reasons. First, to properly analyze the law and facts to resolve a case, a court must have judges with broad, differing experiences and perspectives. This requires judges of diverse backgrounds. Second, courts must not only do justice, they must be perceived as doing justice. Courts will not be perceived as doing justice if

the judges who constitute the court do not roughly reflect the community that they judge. This too requires judges from diverse backgrounds. My particular background and experiences provide me with a unique perspective that would be valuable to the Arizona Supreme Court.

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

Although my personal interest in the integration of people with disabilities into society is separate from my professional career as an attorney, my life experiences as a person with a disability have given me an added depth of understanding of people and life. I endured much pain from multiple surgeries and extended hospital stays as a child and a young adult. As a child I struggled to learn the basic procedures of life, such as walking, dressing, and taking care of my personal needs—things that come naturally to others. I endured discrimination in school and in obtaining employment.

For nine years I took care of my elderly parents, which was quite a reversal of roles from my earlier life. I saw my parents through declining health and multiple hospital stays and surgeries. I watched my father die a difficult death with lung cancer. I watched my mother's slow decline into dementia. I grew from those terrible experiences and gained new perspectives and understanding about life.

These experiences have helped form my character and would aid me in serving as a supreme court justice.

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 I.

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 J.

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.

See Appendix K.

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.

I have been evaluated only twice: 2014 and 2020. Those scores are contained in Appendix L.

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

APPENDIX A

CASES RESULTING IN PUBLISHED OPINIONS

ARIZONA COURT OF APPEALS

1. *State v. Smith,* 162 Ariz. 123, 781 P.2d 601 (Ct. App. 1989).
2. *State v. Campa,* 164 Ariz. 468, 793 P.2d 1135 (Ct. App. 1990).
3. *State v. Wise,* 164 Ariz. 574, 795 P.2d 217 (Ct. App. 1990).
4. *State v. Conroy,* 165 Ariz. 183, 797 P.2d 722 (Ct. App. 1990).
5. *State v. Ferguson,* 165 Ariz. 275, 798 P.2d 413 (Ct. App. 1990).
6. *State v. Kemp,* 166 Ariz. 339, 802 P.2d 1038 (Ct. App. 1990).
7. *State v. Smith,* 166 Ariz. 450, 803 P.2d 443 (Ct. App. 1990).
8. *State v. Altamirano,* 166 Ariz. 432, 803 P.2d 425 (Ct. App. 1990).
9. *State v. Stuart,* 168 Ariz. 83, 811 P.2d 335 (Ct. App. 1990).
10. *State v. Jackson,* 170 Ariz. 89, 821 P.2d 1374 (Ct. App. 1991).
11. *State v. Mendoza,* 170 Ariz. 196, 823 P.2d 63 (Ct. App. 1990).
12. *State v. DiGiulio,* 172 Ariz. 156, 835 P.2d 488 (Ct. App. 1992).
13. *State v. Moreno,* 173 Ariz. 471, 844 P.2d 638 (Ct. App. 1992).
14. *State v. Woody,* 173 Ariz. 561, 845 P.2d 487 (Ct. App. 1992).
15. *State v. Wilson,* 174 Ariz. 564, 851 P.2d 863 (Ct. App. 1993).
16. *State v. Cramer,* 174 Ariz. 522, 851 P.2d 147 (Ct. App. 1992).
17. *State v. Church,* 175 Ariz. 104, 854 P.2d 137 (Ct. App. 1993).
18. *State v. Russell,* 175 Ariz. 529, 858 P.2d 674 (Ct. App. 1993).
19. *State v. Vannoy,* 177 Ariz. 206, 866 P.2d 874 (Ct. App. 1993).
20. *State v. Rivera,* 177 Ariz. 476, 868 P.2d 1059 (Ct. App. 1994).
21. *State v. Bews,* 177 Ariz. 334, 868 P.2d 347 (Ct. App. 1993).

22. *State v. Lara,* 179 Ariz. 578, 880 P.2d 1124 (Ct. App. 1994).

23. *State v. Griffith,* 179 Ariz. 417, 880 P.2d 637 (Ct. App. 1993).

24. *State v. Jones,* 182 Ariz. 243, 895 P.2d 1006 (Ct. App. 1994).

25. *State v. Brito,* 183 Ariz. 535, 905 P.2d 544 (Ct. App. 1995).

26. *State v. Hummert,* 183 Ariz. 484, 905 P.2d 493 (Ct. App. 1994).

27. *State v. Tabor,* 184 Ariz. 119, 907 P.2d 505 (Ct. App. 1995).

28. *State v. Carbajal,* 184 Ariz. 117, 907 P.2d 503 (Ct. App. 1995).

29. *Bird v. State,* 184 Ariz. 198, 908 P.2d 12 (Ct. App. 1995).

30. *State v. Swanson,* 184 Ariz. 194, 908 P.2d 8 (Ct. App. 1995).

31. *State v. Fernane,* 185 Ariz. 222, 914 P.2d 1314 (Ct. App. 1995).

32. *State v. Taylor,* 187 Ariz. 567, 931 P.2d 1077 (Ct. App. 1996).

33. *State v. Schwartz,* 188 Ariz. 313, 935 P.2d 891 (Ct. App. 1997).

34. *State v. Brown,* 188 Ariz. 358, 936 P.2d 181 (Ct. App. 1997).

35. *Bolton v. Superior Court,* 190 Ariz. 201, 945 P.2d 1332 (Ct. App. 1997).

36. *State v. Guerra,* 191 Ariz. 511, 958 P.2d 452 (Ct. App. 1998).

37. *State v. Bonnewell*, 196 Ariz. 592, 2 P.3d 682 (Ct. App. 1999).

38. *State v. DeCamp*, 197 Ariz. 36, 3 P.3d 956 (Ct. App. 1999).

39. *State v. Thompson*, 198 Ariz. 142, 7 P.3d 151 (Ct. App. 2000).

40. *State v. McCann*, 197 Ariz. 6, 3 P.3d 388 (Ct. App. 2000).

41. *State v. Evenson*, 201 Ariz. 209, 33 P.3d 780, 29 (Ct. App. 2001).

42. *State v. Arbolida*, 206 Ariz. 306, 78 P.3d 275 (Ct. App. 2004).

43. *State v. Parks*, 211 Ariz. 19, 116 P.3d 631 (Ct. App. 2005).

44. *State v. King*, 212 Ariz. 372, 132 P.3d 311 (Ct. App. 2006).

45. *State v. Barragan-Sierra*, 219 Ariz. 276, 196 P.3d 879 (Ct. App. 2008).

46. *State v. Fischer*, 219 Ariz. 408, 199 P.3d 663 (Ct. App. 2008).

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47. *State v. Kemp,* 168 Ariz. 334, 813 P.2d 315 (1991).

48. *State v. Campa,* 168 Ariz. 407, 814 P.2d 748 (1991).

49. *State v. Conroy,* 168 Ariz. 373, 814 P.2d 330 (1991).

50. *State v. Mendoza,* 170 Ariz. 184, 823 P.2d 51 (1992).

51. *State v. Johnson,* 173 Ariz. 274, 842 P.2d 1287 (1992).

52. *State v. Lopez,* 174 Ariz. 131, 847 P.2d 1078 (1992).

53. *State v. West,* 176 Ariz. 432, 862 P.2d 192 (1993).

54. *State v. Scott,* 177 Ariz. 131, 865 P.2d 792 (1993).

55. *State v. Milke,* 177 Ariz. 118, 865 P.2d 779 (1993).

56. *State v. Styers,* 177 Ariz. 104, 865 P.2d 765 (1993).

57. *State v. Hinchey,* 181 Ariz. 307, 890 P.2d 602 (1995).

58. *State v. Lara,* 183 Ariz. 223, 902 P.2d 1337 (1995).

59. *State v. Smith,* 184 Ariz. 456, 910 P.2d 1 (1996).

60. *State v. Boles,* 188 Ariz. 129, 933 P.2d 1197 (1997).

61. *State v. Hummert,* 188 Ariz. 119, 933 P.2d 1187 (1997).

62. *State v. Mann,* 188 Ariz. 220, 934 P.2d 784 (1997).

63. *Zuther v. State*, 199 Ariz. 104, 14 P.3d 295 (2000).

64. *Clouse ex rel. Clouse v. State*, 199 Ariz. 196, 16 P.3d 757 (2001).

65. *True v. Stewart*, 199 Ariz. 396, 18 P.3d 707 (2001).

66. *State v. McCann*, 200 Ariz. 27, 21 P.3d 845 (2001).

67. *State v. Thompson*, 200 Ariz. 439, 27 P.3d 796 (2001) .

68. *In re Leon G.*, 200 Ariz. 298, 26 P.3d 481 (2001).

69. *State v. Thompson*, 204 Ariz. 471, 65 P.3d 2003 (2003).

70. *State v. Dean*, 206 Ariz. 158, 76 P.3d 429 (2003).

71. *State v. Sephai*, 206 Ariz. 321, 78 P.3d 732 (2003).

72. *State v. Brown (McMullen)*, 209 Ariz. 200, 99 P.3d 15 (2004).

73. *State v. Rivera*, 210 Ariz. 188, 109 P.3d 83 (2005).

74. *State v. Martinez*, 210 Ariz. 578, 115 P.3d 618 (2005).

75. *State v. Henderson*, 210 Ariz. 561, 115 P.3d 601 (2005).

76. *State v. Wall*, 212 Ariz. 1, 126 P.3d 148 (2006).

77. *State v. Morales*, 215 Ariz. 59, 157 P.3d 479 (2007).

78. *State v. Gant*, 216 Ariz. 1, 162 P.3d 640 (2007).

79. *State v. Cheramie*, 218 Ariz. 447, 189 P.3d (2008).

NINTH CIRCUIT COURT OF APPEALS

80. *Doe & Associates Law Offices v. Napolitano*, 252 F.3d 1026 (9th Cir. 2001).

81. *Jaramillo v. Stewart*, 340 F.3d 877 (9th Cir. 2003).

82. *Evanchyk v. Stewart*, 340 F.3d 933 (9th Cir. 2003).

83. *Frantz v. Hazey*, 513 F.3d 1002 (9th Cir. 2008).

UNITED STATES SUPREME COURT

84. *Clark v. Arizona*, 126 S. Ct. 2709 (2006).

APPENDIX B

PUBLISHED OPINIONS

1. *State ex rel. Raber v. Hongliang Wang*, 230 Ariz. 476, 286 P.3d 1085 (App. 2012).

2. *Boyle v. Boyle*, 231 Ariz. 63, 290 P.3d 456 (App. 2012).

3. *Waltner v. JPMorgan Chase Bank, N.A.*, 231 Ariz. 484, 297 P.3d 176 (App. 2013).

4. *Prutch v. Town of Quartzsite*, 231 Ariz. 431, 296 P.3d 94 (App. 2013).

5. *Friedman v. Cave Creek Unified Sch. Dist. No. 93*, 231 Ariz. 567, 299 P.3d 182 (App. 2013).

6. *Bulk Transp. v. Indus. Comm'n of Ariz.*, 232 Ariz. 218, 303 P.3d 529 (App. 2013).

7. *State ex rel. Montgomery v. Welty*, 233 Ariz. 8, 308 P.3d 1159 (App. 2013), *vacated*, 234 Ariz. 255, 321 P.3d 420 (2014).

8. *Sanchez v. Ainley ex rel. Cty. of Yavapai*, 233 Ariz. 14, 308 P.3d 1165 (App. 2013), *vacated*, 234 Ariz. 250, 321 P.3d 415 (2014).

9. *CSA 13-101 Loop, LLC v. Loop 101, LLC*, 233 Ariz. 355, 213 P.3d 1121 (App. 2013).

10. *Orca Commc'ns Unlimited, LLC v. Noder*, 233 Ariz. 411, 314 P.3d 89 (App. 2013), *aff'd*, 236 Ariz. 180, 337 P.3d 545 (2014).

11. *State v. George*, 233 Ariz. 400, 313 P.3d 543 (App. 2013).

12. *Simms v. Rayes*, 234 Ariz. 47, 316 P.3d 1235 (App. 2014).

13. *Ariz. Dep't of Econ. Sec. v. Rocky J.*, 234 Ariz. 437, 323 P.3d 720 (App. 2014).

14. *Earl v. Garcia ex rel. Cty. of Maricopa*, 234 Ariz. 577, 324 P.3d 863 (App. 2014) (Howe, J., specially concurring).

15. *Johnson v. O'Connor ex rel. Cty. of Maricopa*, 235 Ariz. 85, 327 P.3d 218 (App. 2014).

16. *Gallardo v. State*, 236 Ariz. 1, 335 P.3d 523 (App. 2014) (Howe, J., specially concurring), *vacated*, 236 Ariz. 84, 336 P.3d 717 (2014).

17. *Rose Goodyear Props., LLC v. NBA Enters. Ltd. P'ship*, 235 Ariz. 339, 332 P.3d 86 (App. 2014), *rev. denied* (Apr. 21, 2015).

18. *Clark v. Anjackco Inc.*, 235 Ariz. 452, 333 P.3d 779 (App. 2014).

19. *Gries v. Plaza Del Rio Mgmt. Corp.*, 236 Ariz. 8, 335 P.3d 530 (App. 2014).

20. *Naglieri v. Indust. Comm'n of Ariz.*, 236 Ariz. 94, 336 P.3d 727 (App. 2014), *rev. denied* (Mar. 17, 2015).

21. *State ex rel. Montgomery v. Karp*, 236 Ariz. 120, 336 P.3d 753 (App. 2014), *rev. denied* (May 26, 2015).

22. *Azore, LLC v. Bassett*, 236 Ariz. 424, 341 P.3d 466 (App. 2014).

23. *Marco Crane & Rigging Co. v. Masaryk*, 236 Ariz. 448, 341 P.3d 490 (App. 2014), *rev. denied* (Sept. 22, 2015).

24. *Sonoran Peaks, LLC v. Maricopa Cty.*, 236 Ariz. 399, 340 P.3d 1107 (App. 2015).

25. *State v. Woods*, 236 Ariz. 527, 342 P.3d 863 (App. 2015).

26. *City Ctr. Exec. Plaza, LLC v. Jantzen*, 237 Ariz. 37, 344 P.3d 339 (App. 2015), *rev. denied* (July 30, 2015).

27. *State ex rel. Montgomery v. Padilla*, 237 Ariz. 263, 349 P.3d 1100 (App. 2015), *cert. denied*, -- S. Ct. --, 2016 WL 685747 (U.S. June 20, 2016).

28. *State v. Felix*, 237 Ariz. 280, 349 P.3d 1117 (App. 2015) (Howe, J., dissenting in part), *rev. denied* (Oct. 27, 2015).

29. *State v. Bennett*, 237 Ariz. 356, 351 P.3d 363 (App. 2015), *rev. denied* (Dec. 1, 2015).

30. *State v. Jurden*, 237 Ariz. 423, 352 P.3d 455 (App. 2015) (Howe, J., dissenting), *vacated*, CR-15-0236-PR, 2016 WL 3600262 (Ariz. July 1, 2016).

31. *State v. Steinle ex rel. Cty. of Maricopa*, 237 Ariz. 531, 354 P.3d 408 (App. 2015) (Howe, J., dissenting), *vacated*, 239 Ariz. 415, 372 P.3d 939 (2016).

32. *Woestman v. Russell*, 238 Ariz. 33, 356 P.3d 319 (App. 2015).

33. *Cheatham v. Diciccio*, 238 Ariz. 69, 356 P.3d 814 (App. 2015), *vacated*, 240 Ariz. 314, 379 P.3d 211 (2016).

34. *Halt v. Gama ex rel. Cty. of Maricopa*, 238 Ariz. 352, 360 P.3d 148 (App. 2015).

35. *Skydive Ariz., Inc. v. Hogue*, 238 Ariz. 357, 360 P.3d 153 (App. 2015).

36. *Gnatkiv v. Machkur*, 239 Ariz. 486, 372 P.3d 1010 (App. 2016).

37. *Allen v. Sanders*, 239 Ariz. 360, 372 P.3d 304 (App. 2016), *vacated*, 240 Ariz. 569, 382 P.3d 784 (2016).

38. *Keg Rests. Ariz., Inc. v. Jones*, 240 Ariz. 64, 375 P.3d 1173 (App. 2016).

39. *Sirrah Enters., LLC v. Wunderlich*, 240 Ariz. 163, 377 P.3d 360 (App. 2016), *vacated*, 242 Ariz. 542, 399 P.3d 89 (2017).

40. *Sundevil Power Holdings, LLC v. Ariz. Dep't of Revenue*, 240 Ariz. 339, 379 P.3d 236 (App. 2016).

41. *Lewis v. Ariz. State Pers. Bd.*, 240 Ariz. 330, 379 P.3d 227 (App. 2016).

42. *Hogue v. City of Phoenix*, 240 Ariz. 277, 378 P.3d 720 (App. 2016).

43. *AOR Direct L.L.C. v. Bustamante*, 240 Ariz. 433, 380 P.3d 672 (App. 2016).

44. *Phoenix Newspapers, Inc. v. Reinstein*, 240 Ariz. 442, 381 P.3d 236 (App. 2016), *rev. granted* (Dec 13, 2016).

45. *McCarthy Integrated Systems, LLC v. Evoqua Water Technologies, LLC*, 240 Ariz. 366, 379 P.3d 263 (App. 2016).

46. *Hall v. Elected Officials' Retirement Plan*, 241 Ariz. 33, 383 P.3d 1107 (App. 2016).

47. *Solar City Corporation v. Ariz. Dep't. of Revenue*, 242 Ariz. 395, 396 P.3d 631 (App. 2017), *vacated*, 243 Ariz. 477, 413 P.3d 678 (2018).

48. *Glazer v. State*, 242 Ariz. 391, 396 P.3d 627 (App. 2017), *vacated*, 244 Ariz. 612, 423 P.3d 993 (2018).

49. *Bank of America, N.A. v. Felco Business Services, Inc. 401(K) Profit Sharing Plan*, 243 Ariz. 150, 403 P.3d 150 (App. 2017).

50. *Chapman v. Hopkins*, 243 Ariz. 236, 404 P.3d 638 (App. 2017).

51. *State v. Nixon*, 242 Ariz. 242, 394 P.3d 667 (App. 2017).

52. *Phoenix City Prosecuter's Office v. Nyquist*, 243 Ariz. 227, 404 P.3d 255 (App. 2017).

53. *ZB, N.A. v. Hoeller*, 242 Ariz. 315, 395 P.3d 704 (App. 2017).

54. *Parsons v. Ariz. Dep't. of Health Services*, 242 Ariz. 320, 395 P.3d 709 (App. 2017).

55. *Richardson v. All Services Unlimited, Inc.*, 243 Ariz. 408, 408 P.3d 832 (App. 2017).

56. *Conklin v. Medtronic, Inc.*, 244 Ariz. 139, 418 P.3d 912 (App. 2017), *vacated*, -- P.3d--, 2018 WL 6613311 (2018).

57. *Armiros v. Rohr*, 243 Ariz. 600, 416 P.3d 864 (App. 2018).

58. *State v. Meeds*, 244 Ariz. 454, 421 P.3d 653 (App. 2018).

59. *Griffin Foundation v. Arizona State Retirement System*, 244 Ariz. 508, 422 P.3d 1048 (App. 2018).

60. *State v. Burgess*, 245 Ariz. 275, 428 P.3d 192 (App. 2018).

61. *Deutsche Bank National Trust Company v. Pheasant Grove LLC*, 245 Ariz. 325, 429 P.3d 558 (App. 2018).

62. *Dupray v. JAI Dining Services (Phoenix), Inc.*, 245 Ariz. 578, 432 P.3d 937 (App. 2018).

63. *Lagerman v. Arizona State Retirement System*, 246 Ariz. 270, 438 P.3d 639 (App. 2019).

64. *Lehn v. Al-Thanayyan*, 246 Ariz. 277, 438 P.3d 646 (App. 2019).

65. *JH2K I LLC v. Arizona Department of Health Services*, 246 Ariz. 307, 438 P.3d 676 (App. 2019)

66. *Harle v. Williams*, 246 Ariz. 330, 438 P.3d 699 (App. 2019)

67. *Apodaca v. Keeling*, 246 Ariz. 349, 439 P.3d 1 (App. 2019)

68. *Navajo Nation v. Department of Child Safety*, 246 Ariz. 463, 441 P.3d 982 (App. 2019)

69. *Swain v. Bixby Village Golf Course Inc*, 247 Ariz. 405, 450 P.3d 270 (App. 2019)

70. *State v. Brock*, 248 Ariz. 583, 463 P.3d 207 (App. 2020)

71. *Bowser v. Nguyen*, 249 Ariz. 454, 471 P.3d 665 (App. 2020)

72. *Gonzalez-Gunter v. Gunter*, 249 Ariz. 489, 471 P.3d 1024 (App. 2020)

73. *Perdue v. La Rue*, 250 Ariz. 34, 474 P.3d 1197 (App. 2020)

74. *Clayton by and through Sherman v. Kenworthy in and for County of Yuma*, 250 Ariz. 65, 475 P.3d 310 (App. 2020)

75. *Tanner v. Marwil in and for County of Maricopa*, 250 Ariz. 43, 474 P.3d 1206 (App. 2020)

76. *Bridges v. Nationstar Mortgage, L.L.C.*, —P.3d—, 2021 WL 126562 (App. 2021)

77. *In re Guardianship of M.G.*, —P.3d—, 2021 WL 476059 (App. 2021)

78. *Sebestyen v. Sebestyen*, —P.3d—, 2021 WL 870387 (App. 2021)

79. *State v. Ross*, —P.3d—, 2021 WL 869049 (App. 2021) (Howe, J., dissenting)

APPENDIX C

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BY HON. RANDALL M. HOWE

RANDALL M. HOWE has served on the Arizona Court of Appeals since May 2012. Before his appointment, he served nineteen years with the Arizona Attorney General's Office and three years with the United States Attorney's Office for the District of Arizona.

"The past is never dead. It's not even past."

—*Requiem for a Nun*, 1951

"I have always depended on the kindness of strangers."

—*A Streetcar Named Desire*, 1947

Josiah McElheny, *The Last Scattering Surface*, 2006. Hand-blown glass, chrome plated aluminum, rigging, and electrical lighting. Collection Phoenix Art Museum, Museum purchase with funds provided by Jan and Howard Hendler.

I read a lot growing up, and I read my share of William Faulkner and Tennessee Williams. Their stories and plays always mystified me a little because the characters were controlled by their pasts, their personal pasts and their societies' pasts. But I was raised by parents who always looked forward, who taught me that whatever had happened in the past, today was a new day; if I made the correct choices, I could improve my life and the lives of those around me. I discounted the view that Faulkner and Williams espoused as just a "Southern" thing—you know, something rooted in the "Late Unpleasantness" of the Civil War and too many mint juleps.

Those quotes from Faulkner and Williams recently came to mind, however, when I took a journey into my own past, and I realized that they may have been on to something.

Although I was born on April 30, 1963, in Eugene, Oregon, I always considered that my past began three days later when I was adopted by David and Marie Howe from Colorado. They were a mature couple who could not have their own biological children, so they adopted my older brother David, my sister Debra—whom, for reasons not relevant here, they could not keep—and me. My brother and I grew up knowing that we were adopted, but that never affected our understanding that David and Marie were our parents or that we were an indissoluble family. When I was 7 years old, my parents hosted my mother's extended family for Thanksgiving, and I was ecstatic when I realized that—in addition to hosting the Children's Table in my very own bedroom!—I was related in some way to all 55 guests.

In fact, although the idea did not originate with my parents, I always thought that being adopted was better than being biologically related. In second grade, when my mother picked me up from school one day, my teacher—Miss Clouthier—asked if I was adopted. My mother, suspecting that her advanced age as a mother prompted the question, warily acknowledged that I was. Miss Clouthier said that that explained why I was asking my classmates that afternoon whether "they were adopted or if their mothers had to have them."

I never thought about where I came from before I was adopted, who my birth parents were, or why I was given up for adoption. I learned along the way that the obstetrician who was at my birth was my uncle—my father's brother-in-law—and I thought that this made my parents' selection of me even more special. When I was 10 or 11 years old, I stayed home sick from school one day and watched TV to while away the time. That day, *The Phil Donahue Show* had as guests adults who had been adopted and who had been unsuccessful in finding their birth parents. I had as much disgust as a pre-teen could muster for all the blubbering and wailing I saw about their inability to find out "who they really were." "What is wrong with these people?," I asked my mother. They were who they always were, they had parents who gave them their names and raised them just as any parent of a biological child would. What was the big deal? My mother never said anything, but I knew that she was pleased with my attitude.

Years, decades, went by without any further thought about my unknown past. I had friends, married couples, who adopted children, and they held me up as an example of someone who had dealt well with being adopted. I thought that worrying about how children would deal with being adopted was rather silly—it made me no different from anyone else who had been raised by loving parents—but I was happy if my being adopted helped other people be comfortable with adoption.

But then my father died and my mother got old and developed dementia. As she realized she was losing her memory, she started telling me stories about her life that she thought I should know before she forgot them. She told me about my adoption, that my uncle called them one day and said that he was going to deliver a baby soon, and asked if they wanted to adopt. My parents flew up to Oregon, and three days after I was born, they adopted me. My mother said that my birth mother was a flight attendant, that she had met my birth father while she was working, and that my birth father was the son of a patient of my uncle's. My mother said she knew nothing more than that. I had learned from dealing with my mother that because of her dementia, her stories were not always accurate, so I didn't know how true this story was.

As I said, I had never concerned myself with what had happened before I was adopted. But with my father's death, my brother's death from a car accident, the death of most of my aunts and uncles, the physical estrangement from the rest of my family after my parents and I had moved to Arizona, and then my mother's dementia, I had started to feel that my family, my place with people who knew me, was slipping away. So I wrote to my aunt, the wife of my uncle the doctor who delivered me, and asked her if what my mother had said was true. I got no answer.

"I never thought about where I came from before I was adopted or why I was given up for adoption."

The next year, a close friend at work had moved to Seattle, where my aunt was currently living, and I went to visit my friend and her

family. While I was there, my friend drove me to see my aunt, and we had lunch with her. I forthrightly asked my aunt whether my mother's story was true, and my aunt answered that she had my uncle's medical records destroyed when he died and knew nothing more. My friend and I sensed that my aunt knew more than she admitted, but my aunt changed the subject and refused to say more.

I moved on with life and did not pursue the story. My mother died in 2003, and at some point thereafter, so did my aunt. I believed that any opportunity to learn any more about things before my adoption died with them.

But as Faulkner noted, my past wasn't dead. It wasn't even past.

In 2009, my girlfriend and I were invited to a wedding in Buffalo, New York, and we thought we would take a trip to Toronto afterward. Because I had never been out of the United States, I needed a passport, and to get a passport, I needed an "official" birth certificate. I went on the Oregon Vital Statistics website to get one. While there, I learned that I could get my pre-adoption birth certificate as well. Intrigued at the possibility of finding my birth parents' identities, I ordered that certificate also.

The pre-adoption certificate did not list a father, but it did list my birth mother's name, her age—21—and her address at the time of my birth. Although I had always disdained looking for my birth parents, I found myself coming home from work and spending hours on the computer Googling my birth mother's name and looking at various websites that promised to help find someone. One night, a search led me to a 50th reunion website for a high school in Eugene. The website had page after page of photographs of the alumni who attended the reunion, laughing, talking, eating, and touring the school. The attendees all had name tags, but the people were always positioned so that the tags were not readable. After looking at so many photos with unreadable name tags, I found one photo with the people raising their arms in some collective "woo-hoo" moment, and the name tag of one woman was clearly legible; it had my birth mother's name on it! I stared at the photo for some time, wondering whether I looked like her. I couldn't find any more information about her from the website, or from any other website, so I didn't know how to proceed.

A friend suggested I hire a private investigator to find her. That seemed quite a cloak-and-dagger thing to do, but I felt so close to finding my birth mother, that I did it. The investigator found my birth mother much more quickly than I thought possible and called her. When he explained the purpose of the phone call, she said that he had contacted the wrong person, that she had never had a child. The denial did not daunt the investigator, though. He asked her if she was familiar with a particular address, and she said, "Yes, that is the address of my house growing up." The investigator replied, "Well, I know about the address because it is listed on Mr. Howe's birth certificate as the address of his mother." The phone went silent for a long moment. The woman then said, "You have the wrong person," and hung up.

> "Here is where the kindness of strangers comes into play."

When the investigator recounted the conversation to me, I asked if he thought he had the right person. He answered, "I don't think I have the right person. I *know* I have the right person!"

I declined to pursue it further. The woman obviously did not want to found, apparently to the point of lying. And who knows what the circumstances were. Was she raped? Was it otherwise an abusive relationship? Is she married now? Does she have children? If she had kept this a secret for more than 50 years, wouldn't exposing this cause her and her family harm and distress? Having no answers, and wishing to cause no trouble, I let it go.

And here is where the kindness of strangers comes into play.

As a birthday gift last year, my girlfriend's family gave me a DNA testing kit from Ancestry.com. They had used one to determine the ethnic background of my girlfriend's sister's husband. Because my own background was unknown, they thought it would be a great gift. And because they are Irish—really Irish—they joked that they wanted to make sure I was Irish enough to be a part of the family. I took the test and sent it in.

A couple of weeks later, I got the results. I am 39 percent English, 37 percent Norwegian, and 11 percent Irish. I was happy to know my background, and happy that I was Irish enough to be part of my girlfriend's family.

Something no one bargained for, however, is that you can find out much more information on Ancestry.com than just your ethnic background. If you join—which I did, of course—the website will link you with others who share your genetic make-up—your relatives! I found a list of people who were listed as my cousins to a close or far degree. As I looked at the information provided by one of my "second" cousins, I noticed that she had listed as a family name the

last name of my birth mother. I contacted her through the website and explained my story.

She responded quickly, telling me that she was my birth mother's first cousin. She was not aware that my birth mother had had any children. She told me that I had an aunt and two uncles and several cousins. She put me in touch with them, and they were all shocked but happy to find that I existed. All except my birth mother.

One of my first cousins was close with my birth mother, and she checked me out to see if my story was true. She knew my birth mother had never had children. She told me that she knew that my story was true when she saw my photo on the internet because I look like my birth mother. That was weird for me. As close and as loved as I was by my birth family, I grew up not looking like any of my relatives. A new experience for me. My cousin told me that my birth mother had spent forty years as a kindergarten teacher and was the "glamorous" aunt with blond hair, manicured nails, and a convertible. She traveled widely.

This cousin talked with my birth mother and explained what had occurred. My birth mother said that she would tell her what had happened, on the condition that they never speak about it again. My birth mother said that when she was a flight attendant for a major airline, she had a one-night stand with someone she would not name and did not realize that she was pregnant until her eighth month, when "she was too far along for any other option." She went home to Eugene, arranged a private adoption, and gave birth. The baby was immediately removed to another room, and she never even saw it. The only other person who knew she had had a baby was her mother, who died in the 1980's.

I don't know why, but this did not seem all correct to me. I accepted it, though, because hearing it from my birth mother was as close as I was going to get. Or so I thought.

With the help of my mother's first cousin, I realized that not all of the relatives on the Ancestry.com website were related to my birth mother. Some were related only to me. Those persons were related to my birth father. I started contacting them. The closer relatives declined to respond, but I finally heard from a third cousin, who apparently had been deputized by the other relatives to respond to me because they did not know who the hell I was—certainly understandable, given the situation. She gave me information about the family, and between her information and the information my other cousin had helped me find, I learned that I was the son of one of the grandsons of a Norwegian fisherman who had emigrated to Oregon in the late 1800's. And that is as far as I got.

Then one day my uncle, my birth mother's brother, asked the cousin I had initially contacted how I was getting along finding my birth father. The cousin named the family that we had determined I had descended from, and he replied, "Oh it must be ____!" He said that this person had dated my birth mother when they were in college and that the person had been to their house quite often. My aunt, my birth mother's sister, confirmed that. The person was indeed a grandson of the Norwegian fisherman.

> "I learned that I was the son of one of the grandsons of a Norwegian fisherman who had emigrated to Oregon."

I looked for the person on the internet, and I learned he was a professor at a major university. I found videos on YouTube that he had created discussing his subject area. He had physical characteristics similar to mine. I found a college yearbook photo of his father on Ancestry.com, and I was amazed at my resemblance to him! He had been married three times and had a teenage son with his current wife, but I couldn't tell whether he had any other children.

I contacted the private investigator again and had him make contact. I did not know whether the person even knew I existed. The investigator called him, and they had a pleasant conversation. The person said that he remembered my birth mother from college but did not remember having intercourse with her. He added that he did have another friend, whose name he could no longer remember, who became pregnant during college and gave her baby up for adoption. He said he would think about the matter and call the investigator back.

He never called back.

The next month, I wrote a letter to him, explaining what I had found and determined. I also explained that I had no hard feelings about my adoption and that I was blessed to have been adopted and raised by wonderful parents. I told him that I wanted nothing from him but perhaps to meet him and learn about our

history. I had an investigator hand-deliver the letter. He thanked her for the letter.

Still no response.

By this time, I realized that my attitude about all this had changed. I was no longer reticent about intruding into my birth parents' lives. Was my attitude change justified? I don't know. But I thought that whatever had happened between them was 55 years ago, and that was enough time to get over it. I also thought—naively, perhaps—that they should be happy that, regardless of what had passed between them, they had produced a happy and successful member of the human race.

So, unlike the previous times when I let things go, I pursued the matter. I had the investigator identify this person's children. He found two women whom he thought were this person's children and gave me their addresses. I wrote to each of them. One of them called me as soon as she had received my letter. She said that she had been married to someone who had the same last name, but that she was not related to the person I thought was my birth father. I apologized profusely for bothering her with something that did not involve her. She said she did not mind at all, that "everyone deserves to know where they came from!" I was touched by this complete stranger's good wishes.

"I am a fact, however accidental, that produced a healthy, happy, successful member of society."

I also received an email from the other woman I had sent a letter to. She said that she was not biologically related to the person I thought was my birth father, but that he had raised her as her stepfather. She said I looked a lot like him as she remembered him. She hadn't seen him in 20 years, since he divorced her mother. She did identify this person's biological children for me—a daughter and a son. She then wished me well in my quest.

As I was contemplating how to proceed from there, I received an email out of the blue from the stepdaughter's mother, the person's ex-wife. She told me that she had seen everything that I had sent her daughter, and she said I looked very much like her ex-husband as a young man. She sent me photos of him and his family. She too wished me well in seeking my birth father.

I sent a new letter to the biological daughter containing all the information I had and explaining that even if her father did not want contact with me, I would welcome contact with her. Even though we were not "family"—in any real sense of the word—we had a unique genetic connection shared only with her two brothers. I got no response.

Dogged, I waited a couple weeks and sent an email to her work. She finally replied. She said that this was a lot of information to take in and was overwhelmed with the Christmas season. She said she would address the matter after the holidays. She noted, though, that she had discussed this with her father, and he now denied knowing my birth mother at all.

I waited for a response after the holidays. I have yet to receive one. I emailed her again, but have heard nothing.

■ ■ ■ ■ ■

So this was my journey to my past on the streetcar named Ancestry.com. I didn't intend to get on board, but it showed up, and I was irresistibly drawn to it. I learned a lot from my journey, about my past and about myself. I learned as much as anyone could under the circumstances about my birth families and where I came from. I learned too not to be apologetic about searching for my past. I have no idea—and it seems will never have any idea—what happened between my birth parents that has made them ignore and push away from that event. But they came together, at least once, and I was the result. I am a fact, however accidental, and they should be happy that their accident produced a healthy, happy, successful member of society.

I learned especially about the kindness of strangers. I met so many people in my journey who had no reason to help, but did so out of genuine kindness any sympathy. The cousin who I initially contacted is hosting a family reunion for me later this year in Oregon, so that I can meet my uncles and aunt and cousins. I am grateful for that.

My faith has been reinforced as well. As grateful as I am that my birth parents gave me life, I doubt they would have been as good parents and dealt with my particular difficulties as David and Marie Howe were. I have been blessed.

The last thing I learned is that Faulkner and Williams knew more about human nature than I gave them credit for. I think I'll go sit under a Live Oak tree and sip a mint julep!

APPENDIX D

HON. RANDALL HOWE is a Judge on the Arizona Court of Appeals, Division 1.

375 No. 11th Ave.
Brighton, Colorado
Sept. 10, 1963

Mrs. Bertha Reid
County Supt. of Schools
Adams County Court House
Brighton, Colorado

Dear Mrs. Reid:

Since you are in charge of education in this county, we are bringing our problem to your attention.

Our six year old son, Randy, is the victim of cerebral palsy. He is quite badly physically handicapped, but is mentally very alert. He of course needs some help - assistance in going to the bathroom, mainly. When in his walker he is quite self-sufficient.

Randy was certified for public schools by Dr. Paul Rhodes, and this decision was heartily agreed with by Bob Hintz, psychologist at Children's Hospital, and by Dr. McMahan, doctor in charge there.

In June we contacted Dr. Rhodes about Randy attending the special school in Commerce City. Dr. Rhodes interviewed Randy, and his recommendation was that Randy go to public school - that a school for mentally retarded was not the place he should be.

This past summer was spent in intensive therapy, psychological tests and interviews so that Randy could qualify for school. The results of these I.Q. tests and interviews were sent to Dr. Rhodes from Children's Hospital in Denver.

Randy was enrolled at Northeast Elementary, so anxious and happy, and so eager to learn. However, it seems that Randy is not the only one who needs to be educated. He was allowed to go for four days, at which time we were informed that they did not have time to take him to the bathroom. (I had volunteered to come over at noon and take care of this, and help in any way I could.)

Miss Kansen and Miss Straub, therapists who have worked with Randy for several years, and who are deeply interested in him, met with several officials of the school system the second day of school, offering to assist in any way they might. They reported they had never attended a meeting where every single person had such a closed mind on the situation. They had always experienced complete cooperation in other schools.

The fact that Randy has a verbal I.Q. of 129 has never been considered - none of his potential is being considered - only his handicaps.

s an avid movie and theater fan, I watch all of the award shows—the Oscars, the Tonys, the Emmys. In fact, I even watch the obscure ones—the BAFTAs (British Academy of Film and Television Arts) and the SAG (Screen Actors Guild) Awards. Without fail, all of the award recipients, one way or another, thank their wives, husbands, parents, mentors, friends and coworkers who made their success possible.

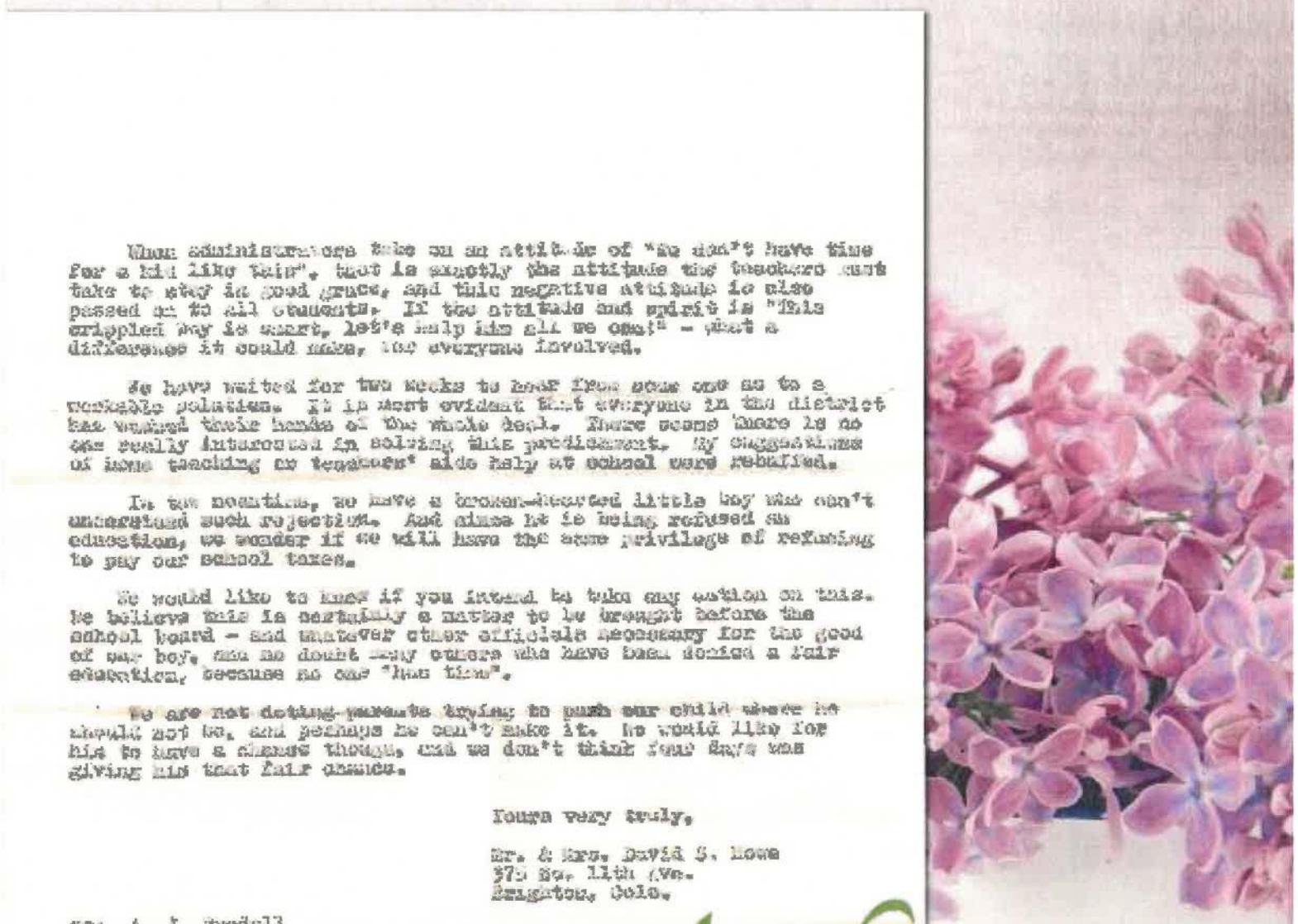
I see the same thing—without all the glam and glitter—when I attend judicial investitures. Newly invested judges and justices invariably thank all of the family members, coworkers and mentors who helped them succeed. We appreciate the sentiment, surely. But given the individual effort necessary to succeed as a performer or a judge, and the fact that we never see the role that others play in their lives, how true is that, really? Do we truly believe that?

Well, I do, and I discovered tangible proof of it in the last few months.

My mother, Marie Howe, died in 2003 at the age of 85. For the last decade of her life, she lived in assisted living homes, where personal space was precious. During that time, she painfully yet ruthlessly winnowed her possessions until she had with her only those things that she absolutely needed and those things that—while not practically useful—she could not part with. Those things she could not part with she packed away in a storage ottoman.

When she died, I took the ottoman and—though I mourned her passing—never opened it. You accept the loss of a loved one and carry on with the forward-looking business of living.

Last year, however, I moved into a new house. Not wanting to move anything that did not need to be moved, I opened the ottoman to see what was inside. What I discovered were photographs, papers, and mementos of my father, my brother, me, her brothers and sisters—the things that she valued the most. One thing stood out to me, though: a carbon copy of a letter



When administrators take on an attitude of "we don't have time for a kid like this", that is exactly the attitude the teachers must take to stay in good grace, and this negative attitude is also passed on to all students. If the attitude and spirit is "this crippled boy is smart, let's help him all we can!" - what a difference it could make, for everyone involved.

We have waited for two weeks to hear from some one as to a workable solution. It is most evident that everyone in the district has washed their hands of the whole deal. There seems there is no one really interested in solving this predicament. My suggestions of home teaching or tenancher' aide help at school were rebuffed.

In the meantime, we have a broken-hearted little boy who can't understand such rejection. And since he is being refused an education, we wonder if we will have the same privilege of refusing to pay our school taxes.

We would like to know if you intend to take any action on this. We believe this is certainly a matter to be brought before the school board - and whatever other officials necessary for the good of our boy, and no doubt many others who have been denied a fair education, because no one "has time".

We are not doting parents trying to push our child where he should not be, and perhaps he can't make it. We would like for him to have a chance though, and we don't think four days was giving him that fair chance.

Yours very truly,

Mr. & Mrs. David S. Howe
975 So. 11th Ave.
Brighton, Colo.

cc: A. J. Brodell
Supt. Dist. 27J

Al. Lang, Pr.
Pres., School Board

A Mother's Advocacy

BY HON. RANDALL HOWE

that she had written to a local school board in Colorado in 1969, when I was 6 years old. (You can see the letter above.)

Six years old was when children in Colorado started first grade, and my mother believed that I should begin school. The fact that I had cerebral palsy, walked with a walker, and had a speech impediment—all of these things she deemed irrelevant to my need—my right—to go to school. Consequently, she enrolled me in the elementary school down the street from our house. School officials had never encountered children with a severe disability before and put her off, requiring that I be mentally and psychologically tested to determine if I was intellectually capable of attending school.

Undaunted, she did just that. And from reading the letter, you can see what happened. I went to first grade for four days, until school officials decided that they were unable to give a child with a disability the physical assistance necessary so that he could attend school. My mother—again undaunted—proceeded to petition, cajole

and argue with the school officials, and to threaten legal action against the school board to get me the public education that was provided to every nondisabled child in the State of Colorado.

I remember a visit to my house from several dark-suited men from the county school administration, and my mother and father's confronting them about how they were going to remedy the situation. I also remember being so embarrassed to be the cause of an adult fuss.

The matter was resolved when the principal of an elementary school across town agreed to enroll me in his school because a child with cerebral palsy had previously attended his school and his staff had experience with children with disabilities. My parents drove me six miles to and from the school every school day for the next six years. And—voilà—43 years later, I became a judge on the Arizona Court of Appeals.

My mother's efforts demonstrate the effect—in my case, the profound effect—one individual can have on the life of another. I would not be a judge today, an attorney, or even an educated person were it not for my mother's efforts to get me enrolled in school. She had such a large effect on my life, even though she possessed no great outward advantages. She graduated high school during the Depression, went to vocational school to learn to be a secretary, and had been a stay-at-home mother and housewife for more than a decade when she began her crusade to get me an education. The advantages that she did have—her love for me and her outsized determination to see the right thing be done—changed the course of my life.

The letter was a serendipitous find, but not everything is so neatly documented. Although my mother's efforts to get me an education provided the base for all that came after, my life and career have been affected by others, as well. As a child and teenager in public school, I was self-conscious and embarrassed about my disability, which included a significant speech impediment. I could not speak to any group of people without stuttering or stammering. As a sophomore in high school, I had to take a public speech class. A few days into the class, my teacher, Steve Payne, took me aside and suggested that I join the forensic team—students who competed in debate and other public-speaking events. I was, of course, terrified at the prospect, but Mr. Payne swept me along to the principal's office and changed my class schedule so that I could join the team. I was horrible at debate and public speaking at first, but Mr. Payne worked with me until I lost my nervousness and my self-consciousness about my disability. My speech impediment lessened over time, and I did well on the team. I learned that I enjoyed public speaking immensely; the experience brought out my inner ham!

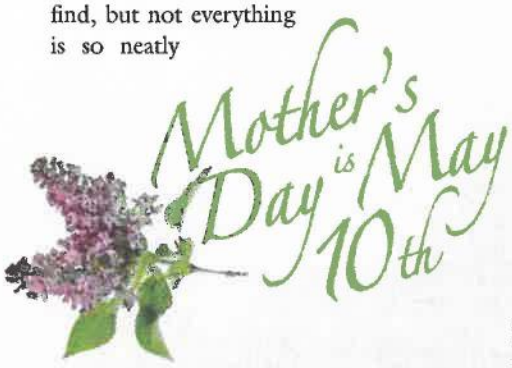
I would not be a judge today, an attorney, or even an educated person were it not for my mother's efforts to get me enrolled in school.

What possessed my teacher to take the time and effort to teach a student who had no sign of talent or skill at public speaking to do that very thing, I do not know. But I know my career as an attorney would be very different today without that chance. Because I was not afraid of public speaking, when I went to law school I had much less trepidation when participating in the moot court program. There, Arizona Supreme Court Justice Rebecca Berch and her husband Michael—my professors at the time—gave me the opportunity to be a member of the law school's National Moot Court Team. From that experience, I learned that appellate law and appellate advocacy were what I was good at and what I wanted to do as an attorney.

Without the efforts of those four people, I would not have the life or career that I have today.

Realizing that is humbling. Whether I can ever have the same effect on another's life the way these people have had on mine I do not know; but their examples nevertheless call me to do what I can to help others. Although I have no children, I am involved in the lives of the children of my close friends; I encourage them to explore all the possibilities that their talent and interests present to them. I have been involved in activities that help integrate people with disabilities into the community. I am involved in educational activities with the State Bar, teaching and exercising my inner ham whenever I can. I mentored the young attorneys whom I supervised at the Arizona Attorney General's Office and the United States Attorney's Office, and I now have the privilege of working with brand-new attorneys as my clerks. I try to help them develop as attorneys and help them start their careers.

This is my personal story, and it is unique in its particulars, I suppose. But it really is no different than anyone else's. Although we pride ourselves on how our own hard work and talent have brought us success, each of us can remember someone—a parent, an aunt or uncle, a teacher, a boss—who was pivotal in providing the conditions that made our success possible. If that is true, then reach out and do that for someone else. And do that even if you've never had that experience; you can be the first in a chain of cause and effect. It is what the past owes the future.



APPENDIX E

Career Amendment

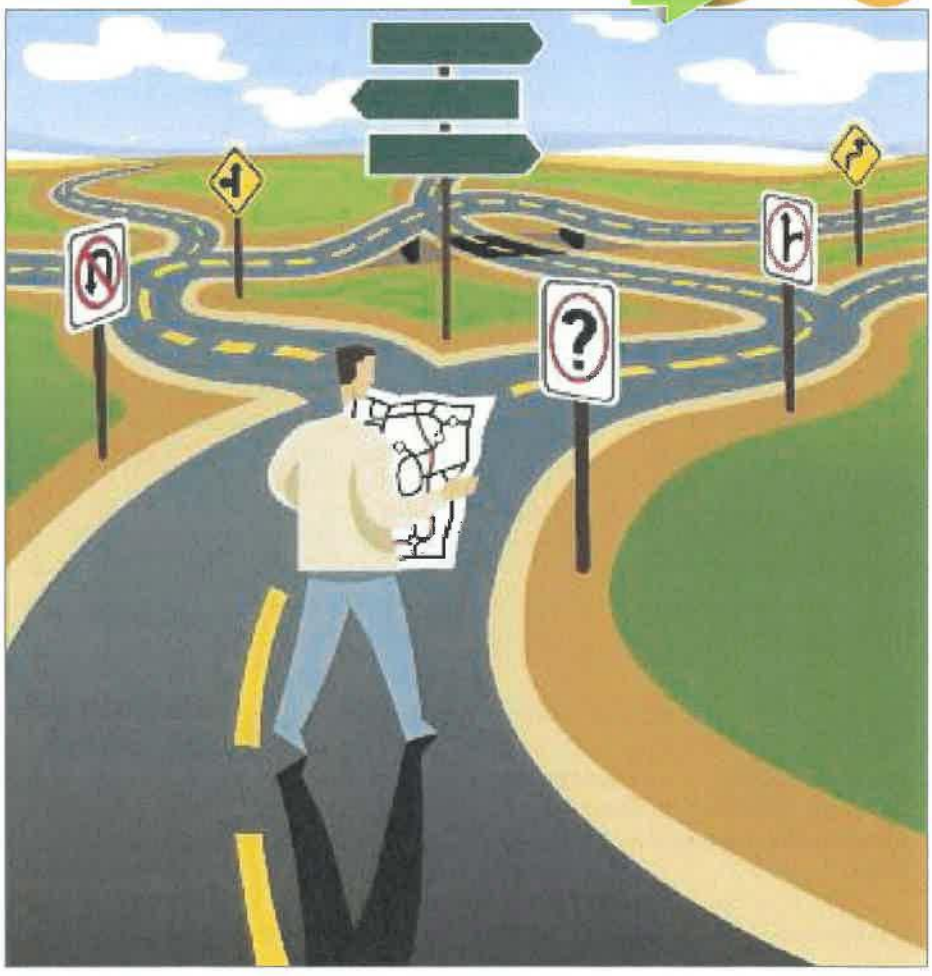
Judge

Your Unique Roadmap to Becoming a Judge

BY HON. RANDALL HOWE

Since I became a judge two years ago, the two most frequent questions I have been asked are "How do you like being a judge?" and "What did you do to become a judge?" The first is easy to answer; I like it just fine! Being a judge is a great job. I have the humbling honor and privilege of performing a vital government function serving the people of Arizona every day, and every day presents an intellectual challenge. What's not to like?

The second question is not so easy to answer, and my answer is not so satisfying to the questioner. Young attorneys ask what I did to become a judge to discover some roadmap that—if they follow it precisely, step by step, turn by turn—will lead them right to the chair behind the bench in the courthouse, just as it led me. The problem is that I didn't have a roadmap to get to the bench, and I don't think one really exists—or at least I didn't have the perspicacity to find it if it's out there. The best that I can do is identify guideposts that point toward the courthouse. Here they are.



HON. RANDALL HOWE is a Judge on the Arizona Court of Appeals, Division 1.

1 Be a Good Attorney

This is as true as it is obvious, and it is often overlooked by eager and ambitious young attorneys. If you aren't good at understanding and applying the law of your practice area and serving your client's needs (whether you work in private practice or in the government), no one will consider you as judge material. My law school classmates will tell you that I always had ambitions to serve as a judge, but I spent at least the first four or five years of my career in the Criminal Appeals Section at the Attorney General's Office learning the substance of criminal law and procedure, how to write persuasive appellate briefs, and how to persuasively argue appeals before panels of judges. Only after I thought that I was doing well at my job, and got feedback from my supervisors, fellow attorneys, and judges that I was doing my job well, did I venture further out into the legal community.

2 Expand Your Horizon

Being a good attorney is essential to become a judge. But after you have mastered your job, you need to understand that a wide and deep legal world exists beyond your narrow practice area. Superior Court judges and Court of Appeals judges must handle cases from nearly every legal practice area—civil, criminal, probate, juvenile, family, and tax. In this time of legal specialization, you cannot be expected to be an expert in more than one area (or at most, a few areas). But you can become aware of those other areas and the legal principles they have in common. That might even lead you to practice in a new area.

While I was still doing criminal appeals, I had the opportunity to serve on the Attorney General's Opinion Review Committee. The Attorney General's Office issues nonbinding legal opinions on questions submitted by government agencies, and the Committee reviews, edits and gives substantive input on those opinions. The opinion requests presented a wide range of legal issues that I had never been exposed to. I learned about many areas of the law during my membership on the Committee, and it led in part to changing positions in the Attorney General's Office from handling criminal appeals to serving for two years as the appellate supervisor in the Liability Management Section, which was responsible for defending the State of Arizona in civil lawsuits. Thus, when I was considered for a judgeship, I could show that, while the majority of my experience and practice was in criminal law, I had some exposure to other areas.

3 Get Involved in the Community

Being a good attorney and having as wide legal experience as possible will get you a long way toward a judgeship. But the Merit Selection Committees and the Governor are looking for more than legal excellence. Judges decide cases that affect Arizona in general and its people in particular. Judges will understand the effects their decisions have on the community and on people individually only if they have been involved in the community. So find an activity or cause that you are passionate about and get involved, achieve some common goal, meet other people outside the legal profession. You will gain perspectives that you would never have if you did nothing but practice law all and every day.

I have been asked what activities I got involved in—apparently with an eye to precisely following my roadmap—but the particular activities don't really matter. Because I have a disability, integration of people with disabilities into the community is an important goal for me, and I became involved in organizations that promote that goal. I find legal education important, and I like to meet and interact with people, so I became involved in developing seminars for the State Bar Convention and the Minority Bar Convention. I like to write (and to read!), so I got on the ARIZONA ATTORNEY Editorial Board.

But unless you share my particular interests, you shouldn't be involved in these activities. My community activities indeed helped me when I applied to be a judge. But that wasn't why I got involved. If you get involved in something just to fill out a resume or a judicial application, it will show. Get involved because you care about something. You will help do something important, whether or not it helps you become a judge.

These are the three guideposts I followed during my career. If you follow them, you will end up in the vicinity of the courthouse, and you will be qualified to be considered for a judgeship. How you get from there to behind the bench, how you maneuver through the Merit Selection and gubernatorial appointment processes, I will leave to others to tell.

I applied to the Court of Appeals several times before I was appointed, and at one point I despaired that I would ever be a judge. I once lamented to Arizona Supreme Court Justice Michael Ryan that my opportunities to serve on the Court of Appeals had passed and what a terrible fate that was. He paused, gave me that shy, amused smile of his and told me not worry; he said that even if I never got on the Court of Appeals, I already had an accomplished career as an attorney and should be happy with that.

So, if you want to be a judge someday, follow the guideposts that I have identified. If you do, you still may never be a judge, but in the end, you will have an accomplished, successful career.

What's not to like about that? AZAT

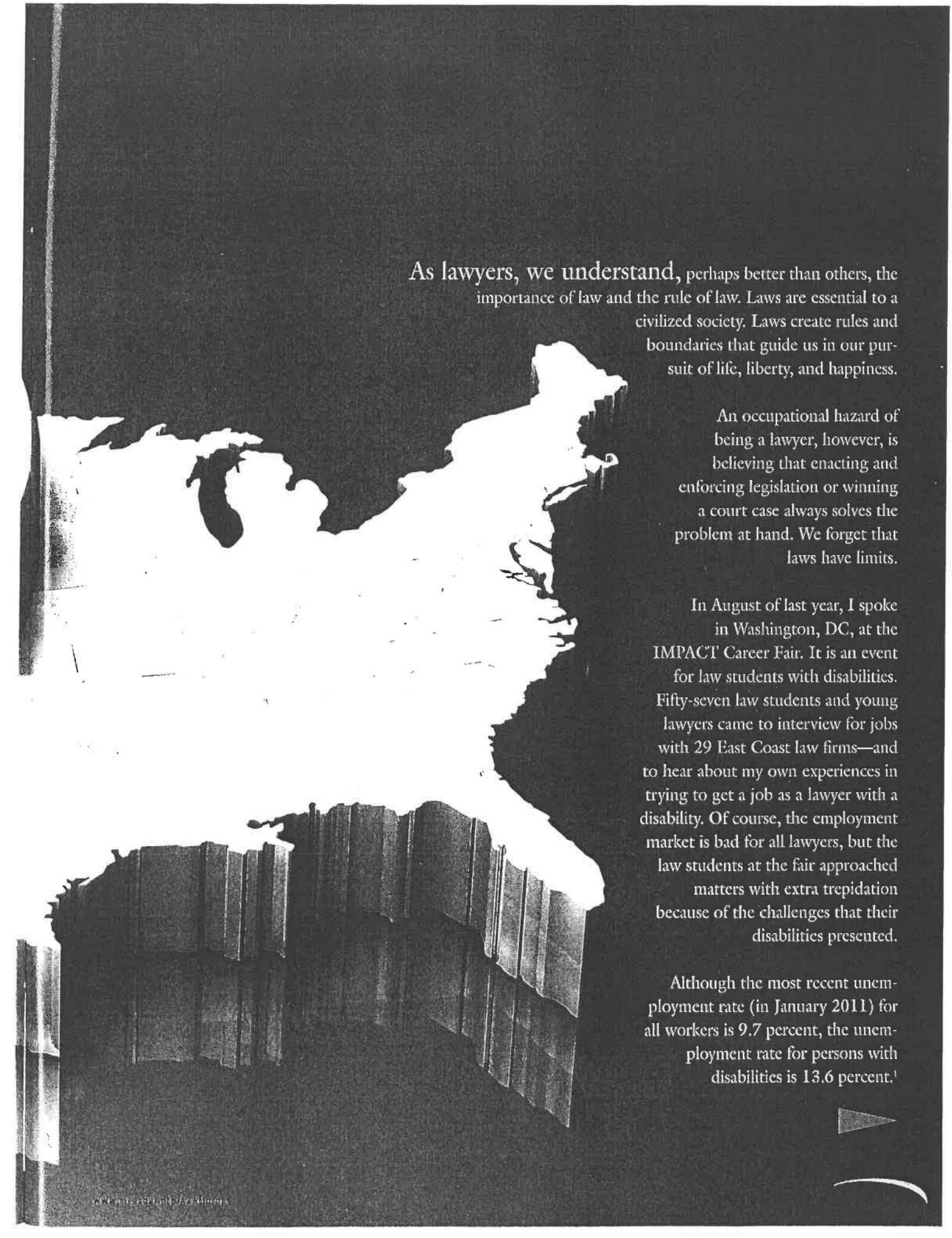
APPENDIX F

THE LIMITS OF LAW

Eliminating Discrimination Requires Attitude Adjustment

BY RANDALL M. HOWE

RANDALL M. HOWE is the Deputy Appellate Chief at the United States Attorney's Office for the District of Arizona. The opinions expressed in the article are his own and not those of the United States Attorney's Office or the United States Department of Justice.



As lawyers, we understand, perhaps better than others, the importance of law and the rule of law. Laws are essential to a civilized society. Laws create rules and boundaries that guide us in our pursuit of life, liberty, and happiness.

An occupational hazard of being a lawyer, however, is believing that enacting and enforcing legislation or winning a court case always solves the problem at hand. We forget that laws have limits.

In August of last year, I spoke in Washington, DC, at the IMPACT Career Fair. It is an event for law students with disabilities. Fifty-seven law students and young lawyers came to interview for jobs with 29 East Coast law firms—and to hear about my own experiences in trying to get a job as a lawyer with a disability. Of course, the employment market is bad for all lawyers, but the law students at the fair approached matters with extra trepidation because of the challenges that their disabilities presented.

Although the most recent unemployment rate (in January 2011) for all workers is 9.7 percent, the unemployment rate for persons with disabilities is 13.6 percent.[1]

The Americans with Disabilities Act (ADA)—enacted 20 years ago—is wonderful civil rights legislation that has increased the access of persons with disabilities to public accommodations, to transportation, to state and local government programs, and, most important, to employment. Persons with disabilities now have ramps and elevators to enter buildings and businesses, wheelchair lifts to get on buses, and the right to seek jobs without discrimination based on their disabilities. I no longer worry whether a building has too many steps for me to go inside.

But laws only go so far, as any of the law students at the fair would tell you. The biggest problem for persons with disabilities is not physical barriers; it is attitudinal ones.

THE NEED FOR LAW

I grew up in the Dark Ages of the late 1960s, long before the ADA. At that time, persons with disabilities were not expected to be contributing members of society. I know that firsthand, given that I have cerebral palsy.

In 1969, when I was 6 years old, my mother sought to enroll me in the first-grade class of my neighborhood public school. She did so without any thought of standing up for the rights of children with disabilities; she enrolled me in school because the law required that all 6-year-olds go to school. She enrolled me despite the personal opposition of her mother, who thought that I should just stay home and play in my backyard, and despite the official opposition of the school administrators, who required me to undergo psychological testing to determine whether I was capable of learning.

I TRAVEL A LOT, AND ALTHOUGH I WALK, I USE A WHEELCHAIR INSIDE AIRPORTS BECAUSE IT IS EASIER AND QUICKER. BUT, GIVEN THE REACTIONS OF THOSE AROUND ME, MY I.Q. APPARENTLY PLUMMETS EVERY TIME THAT I SIT IN A WHEELCHAIR.

No other child had to prove that he or she was intellectually capable before being allowed to go to school. Even after I proved my intellectual competence, school administrators told my mother that they were not capable of handling a child with a disability. I went to school only after months of negotiations and threats of lawsuits.

In the late 1980s, I clerked for a law firm in my second year of law school, where I did a lot of work for the attorneys in the litigation department. They liked my work, and the firm offered me a job after graduation. The hiring partner asked me if I would work in the firm's banking department drafting loan agreements and deeds of trust because—while the partners knew that I liked litigation and that I did good work for them—they "didn't see" me having a future as a courtroom litigator. He also told me that before I met any clients, he would "prepare" them to meet me. No one had ever had to be "prepared" to meet me before, but I was young, intimidated and very much in need of the job that the firm had just offered me.

THE NEED FOR A CHANGE IN ATTITUDE

Undoubtedly, things are better now after the ADA. No one today would dare say the things that were said in the past. But the attitude problem remains.

I travel a lot, and although I walk, I use a wheelchair inside airports because it is easier and quicker. But, given the reactions of those around me, my I.Q. apparently plummets every time that I sit in a wheelchair.

When I arrived at the airport for my trip to Washington for the job fair, an airline employee helped me to a wheelchair and took me to the security screening area. I gave him my carry-on bag and my crutch to go through the metal detectors, and I waited in line by myself for a personal pat-down search, the procedure for handling those in wheelchairs. After several minutes, the TSA screener approached me and asked if I had been "abandoned" and if I knew why I was there. When I answered that I was waiting to be screened so that I could get on an airplane, he seemed flummoxed that I was traveling by myself and demanded to know who I was traveling with and who had my property. He was quite condescending as he patted me down, and he muttered that I should not have been left alone, as if I did not have enough intelligence to be responsible for myself—all because I was in a wheelchair.

On another occasion at the airport, an airline employee took me to get my boarding pass at an electronic kiosk that was reserved for passengers who had no luggage, even though I had luggage. When I tried to tell him several times that I had luggage (which was sitting right next to me), he shushed me as he struggled with the machine. Once he had my boarding pass printed out, he looked at the luggage and said with sad surprise, "Oh, you have luggage!" He would not have dismissed me had I been standing. When I travel with my girlfriend, you would be surprised at the number of times that people ask her if I need to use the restroom. Her stock answer: "I don't know. You'll have to ask him."

These are not merely the stories of a harried traveler. They are the experiences that people with disabilities face every day. Today, only bigots believe that a person's skin color, ethnicity or gender affects the person's ability to perform a job. But people—even well-educated people—who have never met or have never been around a person with a disability wonder whether a person who is blind or deaf or in a wheelchair can perform a job with that disability.

Of course, sometimes those concerns are justified—for example, because my cerebral palsy makes my muscle movements occasionally spasmodic, no one would want me to do brain surgery! But most of the time, concerns are entirely unjustified. Most people with disabilities can perform jobs with minimal accommodations.

When I applied for the position in the Criminal Appeals Section at the Attorney General's Office, the Chief Counsel at the time—who had no experience with a person with a disability—wondered privately how I physically wrote a brief, and he asked me, "How do you write briefs?" Because I had written without any difficulty on a computer for years, even though computers still were not common in government offices, it never occurred to me that he was concerned about how I could physically perform the job. Wanting to impress him, I blithely answered, "Quite well!" He told me years later that he hired me because I gave him that answer.

Despite the physical challenges and the attitudes of others, many lawyers with disabilities have done well. Using a wheelchair certainly has not prevented several lawyers from being appointed as judges in the Superior Court, the Court of Appeals, and even the Arizona Supreme Court, as recently retired Justice Michael Ryan will attest. Several lawyers with disabilities have thriving practices.

Although I have had the occasional bump along the way, my cerebral palsy has not prevented me from arguing more than 70 cases before the Arizona Court of Appeals, the Arizona Supreme Court, the Ninth Circuit Court of Appeals, and even the United States Supreme Court. It did not prevent me from being named the Chief Counsel of the Criminal Appeals Section at the Attorney General's Office or, when I left there, being named the Deputy Appellate Chief at the United States Attorney's Office. Several lawyers with disabilities have indeed succeeded, many quietly and without drawing attention to their disabilities.

But the success of some does not mean that barriers no longer exist. Despite the ADA, employment for persons with disabilities—and lawyers with disabilities—is a difficult problem, as demonstrated by the four-percentage-point gap in the unemployment rate between the disabled and the nondisabled. New laws, or more comprehensive laws, will not remove the attitudinal barriers.

REMOVING REAL BARRIERS

The State Bar of Arizona was one of the first bar associations in the country to acknowledge that the ADA did not solve all the problems facing persons with disabilities. Its leaders recognized that persons with disabilities continued to have particular difficulties in becoming lawyers and in succeeding in the legal profession. In 2001, the Bar created a Task Force on Persons with Disabilities in the Legal Profession—today a full-fledged Bar Committee—which brought together lawyers with disabilities to address the problems facing persons with disabilities in entering into and succeeding in the legal profession. The committee has worked to raise the visibility of lawyers with disabilities and to provide mentoring opportunities to law students and new lawyers with disabilities.

One of the committee's successes has been the Courthouse Survey—a survey of state, county and city courthouses across Arizona to see how accessible they were for lawyers and other people with disabilities. Some courthouses were very accessible; some had work to do. The survey brought attention to the physical barriers that lawyers with disabilities faced just trying to do their jobs.

The federal government also has recognized that the ADA is not the sole answer in addressing the problems facing persons with disabilities. In July 2010, President Barack Obama signed an Executive Order requiring federal agencies to adopt policies and strategies that encourage the hiring of persons with disabilities, with a goal of hiring 100,000 persons with disabilities in the next five years.[2] Though that may seem like a large number, it is not when you consider that currently 737,000 persons with disabilities are seeking employment.[3]

The high rate of unemployment of persons with disabilities and the fact that persons with disabilities comprise only 3.7 percent of the national work force[4] demonstrate the underlying reason for the attitudes that persons with disabilities face: unfamiliarity. People have certain attitudes about persons with disabilities because they do not interact daily with them; they do not see them in the community; they do not work with them. If they interacted with persons with disabilities, they would see that those people are just as smart—and in some cases, just as dumb—as they are.

The old adage is that familiarity breeds contempt. But I think, at least in this instance, that familiarity would breed understanding.

Laws cannot change attitudes. Only people can do that. Laws, after all, have limits.

endnotes

1. U.S. Department of Labor, Office of Disability Employment Policy, *available at* www.dol.gov/odep/ (last visited Feb. 13, 2011).
2. See www.whitehouse.gov/the-press-office/executive-order-increasing-federal-employment-individuals-with-disabilities (last visited Feb. 13, 2011).
3. U.S. Department of Labor, Bureau of Labor Statistics, *available at* www.bls.gov/news.release/empsit.t06.htm (last visited Feb. 13, 2011).
4. Although the total employed labor force in the United States is nearly 147 million, only 5.4 million of that number are persons with disabilities. *Id.*

APPENDIX G

My Day in the COURT of COURTS

BY RANDALL HOWE

Never run over a United States Supreme Court justice. That would be my advice to all mobility-impaired attorneys who are going to appear before the United States Supreme Court. Just a word to the wise from someone who began the most important experience in his legal career by nearly knocking over Justice Ruth Bader Ginsburg.

I am an assistant attorney general for the Arizona attorney general's office, and one of my cases was set for argument before the Supreme Court on April 19, 2006. Arguing a case before the Supreme Court is a rare event and one you don't want to mess up. So a few days before my argument I went to observe an oral argument to see the justices in action and get acclimated to the courtroom. Although I walk with a crutch, I rented a scooter so that I could get around more easily and quickly. I rode the scooter to the Supreme Court building and parked it in the foyer of the lawyers' lounge — the room where attorneys who are arguing cases wait for court to begin — and then walked to the courtroom to watch the arguments.

When the arguments ended, I returned to my scooter. I had trouble

Illustration by Doug Davis

turning the scooter around to leave because I wasn't familiar with the controls and people were streaming into the narrow space on the way to some meeting in the lounge. When I finally got the scooter turned around and began maneuvering around people, I saw a break in the traffic and sped up to get out the door before the next group of people came in. Just then, the diminutive Justice Ginsburg popped up. I stopped as quickly as I could, and as she stepped back in surprise, I said with as much apologetic good cheer as I could muster, "Oh! Excuse me, Justice Ginsburg!" She smiled at me and patted me on the shoulder as she entered the lounge. I was relieved that my career would not end with the headline "Disabled Attorney Assaults Justice with Scooter."

Walking the Walk, Talking the Talk

No one ever would have predicted that I would one day be so close to a Supreme Court justice, much less argue a case before the Court. I was born with cerebral palsy, and from the beginning I had spastic limbs and slurred speech. I had innumerable surgeries and nine years of physical and occupational therapy before I learned to walk. When it came time for me to enter elementary school, many people advised my parents to place me in a "special" school because of my disability. This was the 1960s, before the Americans with Disabilities Act, before the Rehabilitation Act of 1973. But my mother saw no reason why I should not attend the elementary school near my house.

School officials would not allow me to enroll in the public school until my mother could prove that I was intellectually capable of performing in school. Of course, no other mother had to prove one of her children was smart enough for public school. The psychologist who tested me was embarrassed to give me the tests because I was obviously capable of learning at school just like every other kid. Even then, the school principal told my mother that they were not equipped to handle a child with a disability. After much wrangling with the school district and threats of lawsuits, I was eventually enrolled in public school at a time when mainstreaming children with disabilities was rare.

Even then, no one would have believed that I would have a career that involved public speaking. I was shy and self-con-

I was relieved that my career would not end with the headline "Disabled Attorney Assaults Justice with Scooter."

scious of my disability. Some children made great fun of the way I walked and talked. In junior high school, I had to take a speech class, but speaking before a group of people made me very nervous, and I stuttered and stammered a lot. In high school, a speech teacher saw that I was smart and competitive, and forced me — against my better judgment — to join the debating team. He treated me like any student on the team, and gradually I lost my self-consciousness about my disability. He taught me to speak slowly, calmly, and distinctly, so I could be understood despite my speech impediment.

Even though I left high school with a better ability to speak in public, still no one — myself most of all — would have thought that I would eventually make my living speaking. I went to college and law school with the idea that I would be a corporate lawyer, making deals in offices and advising people on things far from the public eye. I thought so even after successfully participating in my law school's moot court competitions — competitions much like my high school debates. When I graduated law school, a law firm hired me to draft loan agreements and deeds of trust, things that could be done from an office with minimal exposure to the public. Although I had done work for the law firm's litigation department during law school and thought maybe I could handle cases in court, the managing partner told me that they could not "see" me — that is, envision me as capable of performing — in the courtroom. He also told me that he would "prepare" any clients of the law firm before they met me. No one had ever needed to be "prepared" to meet me. While none of this sat well with me, I needed a job. So I gave up any thought of being in the courtroom.

Fortunately for me, although I did not think so at the time, the firm had financial difficulties and began laying off attorneys — including me. I found a job in the criminal appeals section in the Arizona attorney general's office. I represented the state when criminal defendants appealed their convictions and sentences. I wrote briefs and filed motions in the appellate courts. I argued cases in the Arizona Court of Appeals, the Arizona Supreme Court, and the United States Court of Appeals for the Ninth Circuit. Funny thing, no one ever said that they could not "see" me in those courtrooms. After 10 years, the attorney general promoted me to supervising attorney, drafting appellate briefs in tort and prisoner lawsuits. I argued cases in court. Six years ago, the attorney general promoted me again to chief counsel of the criminal appeals section. I now supervise 18 attorneys and advise and direct them in handling appeals and arguing cases in court. I can even choose to argue cases myself. In 17 years with the attorney general's office, I have argued 70 cases, more than any other attorney I know of in Arizona.

Arguing Before the Court

Which brings me back to the United States Supreme Court. Arguing before the United States Supreme Court is a huge deal for any attorney, especially an attorney with a disability, and even more so for an attorney whose disabilities

include a speech impediment. I believe that I am the first person with cerebral palsy to argue a case in the Supreme Court. The local Phoenix newspaper ran a front-page article about the event, reporting how much I have "overcome" to get where I am. The Powers That Be at the Supreme Court was pretty much like the experience of any other attorney arguing before the Court. I spent a couple of months writing and rewriting my brief to the Court and had it critiqued and edited more times than I could count. I had multiple practice arguments, where I was repeatedly questioned within in an inch of my life and given tons of advice by experienced attorneys on how to argue the case. I read all the books and articles I could find on arguing before the Supreme Court. None of those books and articles, however, warned against hitting the justices with motorized equipment.

When I went to Washington, D.C., I went to the Court to watch arguments a few days before my argument, where I had the aforementioned encounter with Justice Ginsburg. I then spent two days trying not to be nervous and still think about my case. The night before the argument, I had an inexplicable dinner of a slice of key lime pie and a beer in an Irish pub in the hotel in which I was staying. Like most attorneys, I could not sleep the night before. At 2 a.m. I found myself sitting at the desk in my room reading the materials in my case. Given the bed in the room, however, it was just as well. Although I was in an ADA-compliant room, the bed was chest-high. I had to vault myself into it each night. When I called the front desk to switch to a room with a normal bed, the clerk told me that all the ADA rooms had high beds. So much for accessibility.

The day of the argument, I got dressed in my best suit, had a little break-

The attorney general recognized that my talent, skill, and experience as an appellate attorney counted more than my disability.

the attorney general's office certainly considered whether my disability prevented me from being the best advocate for the state on the national stage. My disability has always loomed larger for other people than for me. In the end, however, the attorney general recognized that my talent, skill, and experience as an appellate attorney counted more than my disability and made me the best person to represent the State of Arizona in that august courtroom.

Other than that, my experience before

fast with my friends and colleagues, and rode the scooter to the Court. I waited in the lawyers' lounge for the Court to begin, and when the session began, my co-counsel and I waited in the courtroom for our case to be called. Watching the justices grill the attorneys in the case before mine, I wondered whether I could actually answer their questions about my case without embarrassing the entire State of Arizona. But when Chief Justice Roberts called my case, I left all my doubts behind me and concentrated on my job.

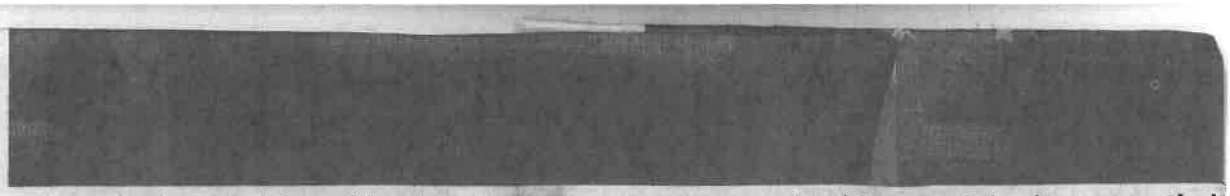
I was able to answer all of the justices' questions, and no one had any difficulty understanding me. I did not perceive that my disability made any difference in the argument, although one of the national newspapers reported that the justices had been "alerted" to my disability. Just what that meant, and who "alerted" them to the obvious, I don't know. Everyone seemed pleased after my argument, including my boss, the Arizona attorney general. I was just relieved that I had survived and done my job well.

In the end, while arguing a case before the United States Supreme Court was a once-in-a-lifetime experience for me and demonstrated that a disability should not stand in the way of appearing in the nation's highest court, my disability was merely a minor side story. And that's how it should be. The case I argued was *Clark v. Arizona*, a case in which a mentally ill defendant murdered a police officer but claimed that he did it while he was insane. The issue was what kind of limits the United States Constitution placed on a state's ability to define insanity. The Supreme Court issued its decision on the last day of the term, June 29, 2006, and held that Arizona's definition of insanity and its regulation of evidence of insanity was constitutional. The decision was important for the criminal law of all 50 states. The fact that the attorney representing the state had a disability was irrelevant. Again, that's as it should be.

I think my next project will be to write an article giving attorneys with disabilities advice on arguing before the Supreme Court. My first piece of advice? Drive carefully.

Randall Howe is chief counsel of the criminal appeals section of the Arizona attorney general's office.

APPENDIX H



Ruth Bader Ginsburg, left, and Sandra Day O'Connor were the second and first female justices, respectively

Ginsburg was an inspiration to many, and I nearly mowed her over

Your Turn
Randall M. Howe
Guest columnist

I had a unique connection with United States Supreme Court Justice Ruth Bader Ginsburg: I almost ran her over. Yes, you read that right: I almost ran over Notorious RBG.

In April 2006, I was chief counsel of the Criminal Appeals Section of the Arizona Attorney General's Office, and I had the responsibility and honor of representing the State of Arizona in a case before the United States Supreme Court, Clark v. Arizona, in Washington, D.C.

The case involved the murder of a Flagstaff police officer by a teenager who claimed to be in-

See GINSBURG, Page 23A

Then-President Barack Obama greets Supreme Court Justice Ruth Bader Ginsburg in 2012. AP

USA TODAY

More coverage

Nation grieves: Leaders remember Ginsburg. **8A**

Local voices: Arizonans mourn late justice. **21A**

What's next? Monumental Senate fight ahead. **22A**

Famous cases: Ginsburg known as much for celebrated dissents as for majority opinions. **22A**

Days till confirmation: How long does it take to confirm a Supreme Court justice? **23A**

POSTAL LIFELINE VALLEY & STATE, 1D

As the Postal Service and changes to its operations have taken center stage, the critical role the mail plays has become a rallying cry. NICK OZA/THE REPUBLIC

Fear of climate change

A new poll shows a large majority of Arizonans are concerned about climate change. The survey, commissioned by the Nina Mason Pulliam Charitable Trust, found that 71% either "agree" or "strongly agree" that the federal government "needs to do more to combat climate change." **6A**

Fall still isn't in the air

Fall starts next week, but Valley temperatures are still hovering between 102 and 105 degrees. **4A**

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Ginsburg

Continued from Page 1A

sane when he shot the officer. The Supreme Court was going to decide what had to be proved under the United States Constitution to find that a person was too mentally ill to be responsible for criminal acts.

A few days before the argument, I went to the Supreme Court to watch some arguments and to get familiar with the courtroom and how the court conducted its arguments.

I have a physical disability that makes walking any distance difficult, so I rented an electric mobility scooter to get around. I rode it to the Supreme Court, and the marshal let me park it in the Lawyer's Lounge, the room where the lawyers wait before they go into the courtroom to argue their cases. I walked into the courtroom, took in the august and intimidating scene, sat down in the gallery, and watched two arguments.

In a flash, I realized I'd nearly hit RBG

When they were over, I returned to the lounge to get my scooter and leave. As I was turning the scooter around to get out, a crush of people began entering the room, apparently for some meeting.

I carefully maneuvered around them, inching toward the door. Suddenly, the people parted, and I decided to take advantage of the clear path out. I gunned the scooter and zipped to the door.

At that moment — in a flash — I realized why the people had parted the way: They were making way for Justice Ginsburg, who had just made it to the door

She jumped back with surprise, and I had an immediate sick feeling in my stomach, realizing that I could have seriously injured a United States Supreme Court justice!

I tried to hide my horror by saying with all the apologetic good cheer I could gather, "Oh! Excuse me, Justice Ginsburg!" The diminutive justice — who, standing, was not much taller than I was sitting on the scooter — just smiled at me, patted me on the shoulder, and proceeded into the room.

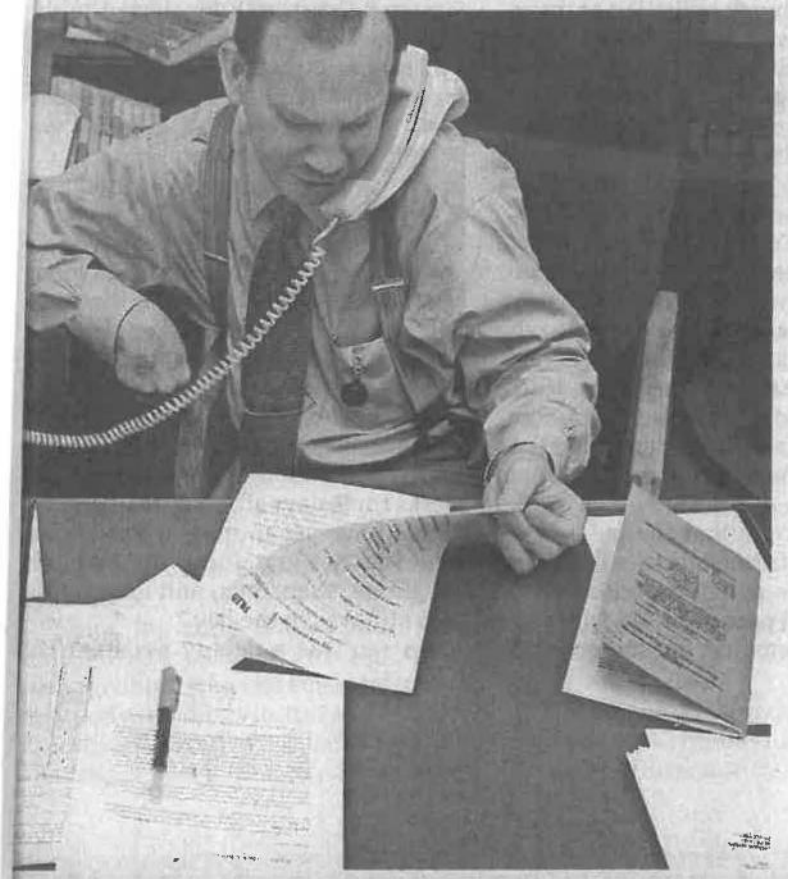
I was so relieved; I could see The Arizona Republic headline if things had gone awry: "Hometown attorney mows down justice." The end of my legal career.

Then I argued before Justice Ginsburg

A few days later, I argued my case before the nine justices. Justice Ginsburg sat impassively during the argument, asking me fair, if unfavorable, questions. Her demeanor did not betray any animus toward me for nearly knocking her down with motorized equipment.

The following June, the Supreme Court ruled in Arizona's favor, 6 to 3, with Justice Ginsburg in the dissent with Justices Kennedy and Stevens. I am absolutely certain she based her vote on her view of the law and not on our near miss!

That was my encounter with Justice Ginsburg. My view of the law when I was a prosecutor rarely lined up with



Randall Howe works at his office in 2006. At the time, Howe was preparing to argue before the United States Supreme Court, including Justice Ruth Bader Ginsburg. MARK HENLE/ THE REPUBLIC

hers, and it does not now that I am an appellate judge.

But that does not blind me — that should not blind any of us — to her lifelong contribution to American law and her unwavering commitment to civil rights. When you ask any of my law clerks who are women whom they admire and want to emulate, invariably it is Justice Ginsburg.

She persevered and succeeded

Listening to the news commentary on the day of her death, I was struck by the struggles that Justice Ginsburg had in her career. She went to law school at a time when women had to justify their place in law school.

Even though she graduated first in her class from Columbia Law School and had been an editor of the law review, she had great difficulty finding work as an attorney, just because she was a woman. She nevertheless persevered and became an associate justice of the United States, an American icon idolized by many.

I've had similar experiences. I went to law school when few people with disabilities did so. I too had difficulty finding work as an attorney because few law firms wanted to hire someone with cerebral palsy and a speech impediment.

I persevered too, finding my niche as an appellate attorney, ignoring those who said I could not do it, and becoming a judge on the Arizona Court of Appeals.

My small success pales in comparison with Justice Ginsburg's. Nonetheless, if I get a tenth of the praise Justice Ginsburg warranted, I'll count myself blessed.

Rest in peace, Justice Ginsburg.

Randall M. Howe is a judge on the Arizona Court of Appeals. He was appointed in 2012 by Gov. Jan Brewer. Before that, he served as deputy chief of the appellate division in the U.S. Attorney's Office. Earlier, he was chief counsel of the criminal appeals section of the Arizona Attorney General's Office.

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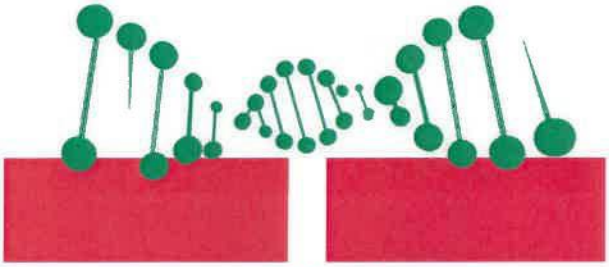
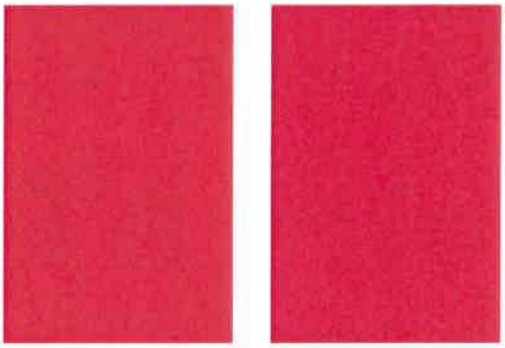
Opinions



THE GIFT OF HISTORY AND HERITAGE



RICK KONOPKA/USA TODAY NETWORK

DNA-testing kits contain lesson on difference between genetics and what it means to love

Your Turn
Randall Howe
Guest columnist

The popular DNA testing services have big advertising campaigns this Christmas season to entice people to give DNA kits as gifts so that people can find out about their family history and ethnic heritage.

I signed up on one of those services and took a DNA test more than a year ago, and I learned a lot about my family history and heritage. But my experience taught me more lessons than I bargained for, lessons important for the Christmas season.

I was adopted in Oregon as a newborn, and my adoptive parents knew very little about my birth mother and nothing about my birth father. I only learned my birth mother's name by happenstance 45 years later when I applied for a passport and obtained my pre-adoption birth certificate, which listed my birth mother's name and address. The certificate did not list a father.

When I received an ancestry.com DNA kit as a birthday gift nearly two years ago and took the test, however, I was able to find my birth mother's family and, with further sleuthing with information on the website and talking with my newfound relatives, I was able to identify my birth father.

I learned that I was 44 percent Norwegian and Swedish, 38 percent English, and 15 percent Irish. I learned that my maternal great-grandfather, whose forbearers came from Norway, emigrated to the United States from northern Europe in 1881 and wound up in Oregon.

See HOWE, Page 17A

OF THE MOMENT

A collection of voices, tweets and posts from the week.

Doug Ducey

Donald Trump

TWEETS OF THE WEEK

Julie Erfle
@erfleuncuffed
I'm not sure what part of this story is more infuriating, the fact that (Rep. David) Stringer defends his remarks, saying they're "truthful, accurate, supported by research," or that his seat mate, Noel Campbell, is now jumping to his defense. Time to launch a recall.

Donald J. Trump
@realDonaldTrump
Arizona, together with our Military and Border Patrol, is bracing for a massive surge at a NON-WALLED area. WE WILL NOT LET THEM THROUGH. Big danger. Nancy and Chuck must approve Boarder Security and the Wall!

Brahm Resnik
@brahmresnik
Arizona Gov @dougducey has no idea why Trump is saying these things about Arizona's border. #BigDanger

Kimberley Strassel
@KimStrassel
Per all the breathless speculation, I'm still searching for all that "collusion" evidence in the Cohen filings. Mostly looks like tidbits about this or that Russia outreach, none of which went anywhere. Still searching...

THEY SAID IT

"I think Mr. Trump is seeing more and more of the walls closing in on him, which is why he's becoming increasingly desperate."
— John Brennan
Former CIA director (on "Morning Joe")

"Democrats who the day before yesterday were insisting that voter fraud didn't exist now believe that it was used to steal a North Carolina congressional seat from them — and they may well be right."
— Rich Lowry
National Review

"Democrats may have made significant electoral gains by running on the protection of the pre-existing conditions guarantee to insurance, but Republicans apparently aren't listening. The president and his party remain focused on taking health care away."
— Abbe R. Gluck and Erica Turret
For the New York Times

COMING SUNDAY

LIGHT RAIL: How big of a success is metro Phoenix light rail? The numbers tell the story, but much more progress lies ahead. Viewpoints

Straw Wars: The dark side of caring for the environment in the world of plastics

Jon Gabriel
Columnist

In a selfless effort to save the planet, Legoland theme parks are banning plastic straws. The 75 billion plastic bricks Lego sells annually, however, are here to stay.

"Like many of our guests, we are concerned about the negative environmental impact associated with the disposal of plastic straws," CEO Nick Varney of Merlin Entertainments, which operates the parks, stated in a press release. "It is something we can act on immediately as we continue to assess how we minimize the use of plastics within our business."

The largest Legoland park includes 42 million plastic Lego bricks, but thankfully there won't be any plastic straws. Those might harm Gaia.

Our attitude toward the environment is an odd one. Activists will praise Legoland for their anti-straw PR campaign, but few will ask them to discontinue the little bricks that their business was built upon.

It seems every other week, we're subjected to another warning that the planet is minutes from destruction thanks to climate change. Despite those apocalyptic predictions, saying that you care about the environment is far more important than doing something about it.

Claiming that you "believe" in climate change is useless without action.

The G20 summit in Argentina was just the latest example of praising talk over action. Every country signed on to a "nonbinding communiqué" that promised to "continue to tackle climate change, while promoting sustainable development and economic growth." Every country but the U.S., that is.

Nineteen nations "believe" in climate change. How are they backing up their statement of faith?

China was praised for signing on to the Paris Climate Agreement and in Argentina reaffirmed its commitment to controlling greenhouse gas emissions. Last year, however, China increased those emissions by 1.7 percent.

India, the fourth largest source for CO2, saw their emissions grow by 4.6

See GABRIEL, Page 17A

PHOTO ILLUSTRATION BY RICK KONOPKA/USA TODAY NETWORK

Gabriel

Continued from Page 16A

percent in 2017. Luckily for them, they too were praised for signing that "nonbinding communiqué."

Overall, the European Union raised their CO2 output by 1.5 percent.

France, home of the Paris agreement, is leading the diplomatic effort to save the planet. They increased their greenhouse gas emissions by 3.6 percent.

Pollution in France will likely rise further this year from the burning cars alone. French President Emmanuel Macron announced a sharp increase in gas and diesel taxes last month. This sparked the largest riots seen in Paris in nearly 50 years as yellow-vested citizens blockaded roadways, burned vehicles and damaged artwork and infrastructure.

If the nations paying lip service to climate change aren't meeting their goals, imagine how poorly the oil-drilling, coal-mining Americans must be doing. President Donald Trump was pilloried for withdrawing from the Paris agreement and for being only G20 leader who refused to sign the climate change statement in Argentina.

From 2016 to 2017, U.S. greenhouse gas emissions decreased by 2.7 percent. Emissions from large power plants declined 4.5 percent since 2016, and nearly 20 percent since 2011. All without signing a piece of paper in Paris or Buenos Aires.

While other leaders fly fleets of jets around the world to clink non-GMO champagne flutes, America is quietly getting the job done. With a booming economy and surging energy production, we're drastically cutting CO2 emissions through technological innovation rather than government mandates and international pressure.

America might not "believe" in environmental apocalypse, but it cares a great deal about clean air and a healthy environment. Looking at the evidence, we care far more than the rest of the world does, despite their grand summits and nonbinding communiqués.

Jon Gabriel, a Mesa resident, is editor-in-chief of Ricochet.com and a contributor to The Republic and azcentral.com. Follow him on Twitter at @exjon.

Howe

Continued from Page 16A

My paternal great-grandfather emigrated from Norway to Oregon in 1900 to be a fisherman. My maternal grandfather built and sold homes with his brother in Eugene, Ore., and my paternal grandfather ran car dealerships in Nevada and northern California.

My mother, the daughter of the homebuilder, met my father, the son of the automobile businessman, while they were students at the University of Oregon. They dated, my mother became pregnant with me, and I was born and given up for adoption in 1963.

My birth mother had no other children and had a career in teaching. My birth father has been married several times with several children and is a professor at a major university.

I learned, too, that family secrets are kept close and not readily disclosed. I was a surprise to my birth parents' families when I popped up on the ancestry.com website as a relative. Apparently, the only other person my birth mother told about her pregnancy was her mother, and whether my birth father knew is uncertain because he refuses to discuss the matter.

The difficulty I have had identifying my birth parents' identities and their continued silence about the circumstances surrounding my birth and adoption has explicitly taught me something that I only knew implicitly from being raised by loving, committed adoptive parents: For all the wealth of information about genetic and family history you can get from DNA testing, in the end, it is not the happenstance of blood relationships that matter, but the voluntary decisions to love and raise and be a family that really matters.

Randall Howe, age 5 or 6, smiles with his brother David Mark (standing); his father, David; his grandmother "Granny Tommie;" and his mother, Marie (seated).

Let me explain.

Of course, I get my looks and whatever native intelligence I have from my birth parents. But they did not raise me, they did not see that I got the medical care that I needed growing up, they did not see that I was educated.

Those responsibilities fell to Dave and Marie Howe, who voluntarily shouldered them by adopting me. They were not well-educated or well-connected, but they saw to it that I and my older brother, also adopted, were made an indissoluble part of a loving and committed family.

They saw to it that I, a child with cerebral palsy, got the best medical care available so that I could have as healthy and happy and successful life as anyone. They saw to it that I received an education in the public schools, and they did it at time – the 1960s – when children with disabilities were not yet mainstreamed in public school.

Without their love, hard work and personal sacrifice, I would not have had a 30-year career as an attorney and a judge. Although my birth parents gave me my existence, for which I am eternally grateful, my adoptive parents – my *real* parents! – gave me my life.

So if you are lucky enough to get a DNA testing kit for Christmas, take advantage of it to learn all about your ethnic heritage and family history.

But when you sit around the Christmas tree or the Christmas dinner table with your family and friends, remember that what matters is not what blood flows through your veins, but how much love and caring and sacrifice flows between each of you. At least that's what I learned.

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(ISSN 0892-8711) - (USPS 030-520) - Vol. 129, No. 204

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ARIZONA REPUBLIC
REPUBLIC MEDIA

Published daily by Phoenix Newspapers Inc. 200 E. Van Buren St., Phoenix, AZ 85004 or P.O. Box 1950, Phoenix, AZ 85001. Phone 602-444-8000. Periodicals Postage Paid in Phoenix AZ 85026.
Member Alliance for Audited Media
Postmaster: Send address changes to The Arizona Republic, P.O. Box 1950, Phoenix, AZ 85001.

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THE ARIZONA REPUBLIC

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Faced with hard road, Mom did right thing

Most mothers give life to their children. My mother couldn't do that. Instead, she gave me something only she could give: the life I lead.

My mother, Marie, had a hard life. She grew up during the Depression, and prosperity was not right around the corner for her and her eight siblings. Her father had a stroke, and she had to work to help support her family. She worked as a clerk in a drugstore. She was a movie-theater usher. (She saw *Gone With the Wind* so many times she could never watch it again.) On Sundays, she played the organ at several of the churches in her small town in Colorado. She did what she had to do to help provide for her family. She didn't ask herself whether she enjoyed herself. She didn't ask whether she was fulfilled. She just did whatever was necessary because it was the right thing to do.

Randall Howe

My mom wanted a family of her own. She left Colorado, married twice and returned frustrated. She began dating my father, David, her eldest brother's best friend, and they soon married. Mom could not have children of her own, so my parents adopted a baby boy in 1955, named him David and began their family. In 1961, they adopted a baby girl, Debbie. After the adoption, my parents learned that Debbie was mentally disabled and had severe cerebral palsy. Heeding the medical advice of the time, my parents surrendered custody of Debbie and placed her in a home for the disabled. My mom believed that was the right thing to do, but that decision traumatized her and made her hard.

My parents adopted me in 1961. Six months later, they learned that I, too, had cerebral palsy. This time, however, my mom refused to go through the same pain she had experienced just two years earlier. She believed that she and my father were meant to have a child with a disability, and they decided to give me the best life they possibly could.

My mom saw to it that I had

See HOWE Page V2

Randall Howe is chief counsel of the Criminal Appeals Section of the Arizona Attorney General's Office.

Courtesy of Randall Howe

Randall Howe shares a moment with his mother, Marie.

HOWE Mom did what was needed

From Page VI

medical care I needed. From the time I was 6 months old until I was 12, I had surgery twice a year to relax constricted muscles and to straighten deformed bones that prevented me from functioning. My mom drove me 50 miles twice a week to the hospital in Denver for physical and occupational therapy so I could learn to walk and dress myself and do all those things most parents take for granted that their children will learn simply by living. Mom never complained about all the extra work and all the emotional strain that accompanied raising a child with a disability. She did what she had to do because it was the right thing to do.

In an unbelievable coincidence, the family who lived next door to mine while I was growing up also had a son about my age who had cerebral palsy, and he became my best friend for years. His mother was not diligent in taking him for therapy or making sure he had all the necessary surgeries. His mother asked mine once if she thought all the therapy and surgeries made any difference. My mom answered that she never asked herself that. She said that all she could think of was what my condition would have been without the therapy and the surgeries.

My parents had no experience in raising a child with a disability and did not have the benefit of all the legislation and support systems that today help parents of children with disabilities. So they did what they knew to do: They raised me just like they raised my older brother. They laughed when I laughed, cried when I cried, praised me when I did well, and disciplined me when I misbehaved. Within the obvious limits of my disability, they expected me to grow up, go to school, live a life and be an ordinary contributor to the community.

State law in Colorado required that children 6 years old go to school. So when I turned 6, Mom decided to enroll me in my neighborhood elementary school. My grandmother opposed the idea, commenting that I should be left to play. Mom replied, "But Mama, it's the law that he has to go to school." It never occurred to her that my disability should prevent me from going to school.

Others thought differently. Before the school principal would enroll me, he required that Mom prove I was intellectually capable of going to school, something he did not require of other mothers. She had me psychologically tested to prove that I could handle the first-grade curriculum. The principal reluctantly enrolled me but after four days told Mom that the school was not equipped to handle a child with a disability.

Mom hired a tutor for me while she fought with the local school board and threatened lawsuits unless I was put back in school. I was a child, just like any other child, who needed an education, and she was going to see that I was educated. The school board relented when a principal from an elementary school across town, who had experience with children with cerebral palsy, offered to have me attend his school. Mom drove me every day to the school and home again for the next six years. She fought for my right to education and inconvenienced herself daily to see that I was educated because it was what needed to be done.

Growing up with a disability was not easy or always pleasant. I hated having to be in the hospital so much, I hated the therapy, I hated not being able to do what other children could do so easily without thought. But I learned from my mother that whether I liked things or not didn't matter much. If I wanted to live like other people live, if I wanted to accomplish things, I would have to do whatever I was required to do.

As a child I was dependent on my parents to dress me every day. That gave them a certain additional measure of control over me that often interfered with things I wanted to do. So, over time, I learned to dress myself, using my good arm and hand and my limited balance to get my clothes where they needed to be on my body.

When I wanted to drive a car as a teenager, my right arm and hand were so weak and constricted that I found it nearly impossible to steer the car. (I had to use my left "good" arm to operate the hand controls.) I told the instructor that I couldn't steer with my right arm and hand, and he replied that he was sorry to hear that because that was the only way I could drive a car. So I practiced until my arm was strong enough to steer. When I became an attorney, I wore a clip-on tie because I could not tie a tie. As soon as I realized what an execrable fashion faux pas that was, I spent weeks mastering a technique to tie a tie with one hand. Now, I am a fashion plate.

Today, I am chief counsel of the Criminal Appeals Section of the Arizona Attorney General's Office. I have argued more than 60 cases before the Arizona Court of Appeals, the Arizona Supreme Court and the federal 9th Circuit Court of Appeals in San Francisco.

I supervise 19 attorneys, directing them and teaching them how to best represent Arizona in the appellate courts. I live independently, I travel, I cook for myself and friends without poisoning them. And although many people have helped me achieve the success that I have, I would not be where I am today without my mother. Her decisions to do the right things, the necessary things, without considering whether they were easy, fun or fulfilling, gave me the opportunity for a good life, and the lessons I learned from her gave me the tools to achieve the life I lead today. My mother did not give me birth, but she gave me my life.

OUR TURN: THE AMERICANS WITH DISABILITIES ACT

Mark Henle/The Arizona Republic

Bill Scott (left) and Randall Howe reflect on the ADA.

Today is the 10th anniversary of the Americans with Disabilities Act, the landmark law that was signed by President Bush to advance the rights of people with disabilities. On this occasion, businessman Bill Scott and attorney Randall Howe, both of Phoenix, reflect on how the law has changed America, their lives and what remains to be done.
For more information, visit the Web sites:
- National Council on Disability, www.ncd.gov/.
- Justice Department's ADA site, Usdoj.gov/crt/ada/adahom1.htm.

Attitudes, perceptions remain root of problem

By Randall Howe

Has the ADA changed the lives of people with disabilities? Because people with disabilities have all kinds of different disabilities and different experiences, I can only speak for myself. For me, the answer is a resounding "yes and no."

I know what it was like before the ADA, because I spent most of my life there. I was born with cerebral palsy in 1963, long before any type of legislation concerning the disabled existed. Back then, people with disabilities were invisible and silent, and no one expected them to do anything or to be contributing members of society because they were disabled and obviously could not participate in society.

Someone forgot to tell my parents. To them, my disability was merely a physical characteristic, much like my brown hair and blue eyes, that did not affect my inherent worth or my ability to live a life. My parents saw to it that I received all the medical care I needed to minimize the effects of cerebral palsy — innumerable surgeries and

ADA offers disabled way to compete on level field

By Bill Scott

I was recently asked how the Americans with Disabilities Act has affected me. On the 10th anniversary of this landmark civil-rights legislation, I have given some thought to this question.

I have a spinal cord injury and have used a wheelchair for nearly 25 years. During that time, the ADA and its predecessor, Section 504 of the Rehabilitation Act, have come into effect. At my age, I also remember the Civil Rights Act of 1964 and the impact it had on my life.

As an African-American male who is also a wheelchair user, I can't help but compare the two pieces of legislation — not only how they affect the individuals in those protected classes but also their broader implications for the American society as a whole.

As with the Civil Rights Act of 1964, there were those who opposed the ADA from the beginning and others who felt it could never work. As one who has experienced both, I am happy to say they do work! This is not to say that either law has or ever will cure all the ills

palsy — innumerable surgeries and therapy sessions at the hospital — and they were always cognizant and sympathetic about my physical limitations.

But they expected the same things from me that they expected from my brother, who was not disabled: to go to school, learn something useful and be a productive member of society.

My mother mainstreamed me in public school from the first grade — over strenuous objections from school officials — without any help from any type of legislation. Unlike the other kids on my block, I was required to have psychological testing to determine whether I was intellectually capable of leaning before I could attend school. It seems absurd today, particularly after graduating first in my class in college and with honors in law school, but things like that used to happen to people with disabilities.

Even after I proved that I was capable of being a productive member of society, I still faced barriers caused by society's lack of expectations. A law firm hired me out of law school because they were impressed with my academic abilities. But they put me in a department drafting loan agreements and deeds of trust — the most boring legal work that ever existed — because the partners did not believe that I was capable of litigating cases in the courtroom and meeting with clients.

For the past 10 years, I've worked at the Attorney General's Office as an appellate attorney, litigating all kinds of cases in the Arizona Supreme Court, the Arizona Court of Appeals and the Ninth Circuit of Appeals in San Francisco. I have argued more cases before the Arizona Supreme Court than all the partners of that law firm put together.

Would my experiences have been different had the ADA existed when I was growing up? In some ways, maybe. Would people's experiences be different today, after the ADA? Probably, but not as much as you would hope.

Don't get me wrong. I think the ADA is wonderful. I'm glad that employers can't explicitly discriminate against people based on their disability. I'm glad that public buildings, businesses, and restaurants must be accessible to me. Being able to get a job and to go into any store you choose are essential to give people with disabilities the opportunity to integrate into society.

But the ADA does not and cannot address the attitudes and perceptions society has about people with disabilities — and the attitudes and perceptions that people with disabilities have about themselves — that are at the root of the problem. Only when society sees the abilities of people with disabilities and expects them to perform as anyone else — and when people with disabilities expect themselves to be fully productive and contributing members of society — will things change. The ADA is a good start toward that goal, but it isn't the end.

of mankind.

Yes, racial prejudice, bigotry and discrimination do still exist ... and, yes, there are still architectural and attitudinal barriers that prevent full, equal participation by people with disabilities. While there have been dramatic changes in the last decade, these human frailties are not likely to disappear entirely during my lifetime or yours.

For me, the ADA has been a vehicle to affect positive change. There are hundreds of thousands of businesses, employers and operators of places of public accommodation in general who would willingly hire, welcome and provide accommodations for people with disabilities — if they knew how. The ADA provides that guidance.

As an ADA consultant and a person with a disability, I have the unique and enviable opportunity to affect positive change, not merely as a recommendation or based on what I need as an individual but as is required by law. For me, this is a win-win situation.

The ADA has given me visibility. I am no longer the "invisible man" I once was when I went out in public. I have experienced the swing of the pendulum from being subject to stares to all but being ignored now when I enter a restaurant with a companion who appears to be able-bodied.

It's just my opinion, but the stares seem to be more subtle these days. Maybe that's because the ADA has created a more welcoming environment in the community and seeing a person in a wheelchair out and about these days isn't so rare anymore. And when I enter a restaurant, the host or hostess will still look over my head as they ask "How many?" — even if my companion is deaf. I'm still working on that.

For me and, I believe, for millions of other people with disabilities, the ADA has meant opportunity. The opportunity to participate and compete on a playing field that is closer to level than it has ever been in the history of this great nation.

This also means we have the opportunity to fail, but that's all right as long as the same rules apply to me as to my non-disabled competitor. As long as I am judged on the basis of what I can do, not what I can not. And as long as decisions regarding my abilities are not subject solely to someone else's assumptions.

As it was in the early days of the Civil Rights Act, the ADA has and will continue to experience growing pains. Mistakes will be made in interpreting and implementing the ADA, and it will be necessary to make changes as we grow in wisdom and experience.

But there is one thing we must admit — the United States of America is a much better place with the Americans with Disabilities Act than it would ever be without it for me and more that 54 million people with disabilities and their families, friends and co-workers.

Thirty-six years have passed since the signing of the Civil Rights Act. Imagine how much greater America will be when the ADA celebrates its 36th birthday.

Bill Scott is the founder and president of Abilities Unlimited Inc., a diversities and disabilities issues consulting firm in Phoenix. He serves on the national Task Force on Life Safety for People with Disabilities and is a member of the board of the Arizona Center for

Such cowards I had for parents

BY RANDY HOWE

My turn

I want to thank my parents for being cowardly and showing me no mercy.

In 1993, a man in Saskatchewan murdered his 12-year-old daughter by placing her in the cab of his truck and gassing her with carbon monoxide. The girl had cerebral palsy and could not walk, talk, or feed herself, and the man did not want her to suffer any more pain. The girl's mother said that she had wanted to end her daughter's life herself, but that she was "too cowardly" to do it.

The sentencing judge held that the mandatory sentence of life imprisonment for murder would be "cruel and unusual punishment" because the man acted out of "love and compassion," and instead sentenced the man to one year in jail and one year of house arrest.

I wish I could have had such compassionate and courageous parents. I, too, have cerebral palsy. I could not walk by myself until I was 9 years old, and, although I could always talk, I had such a speech impediment that most people had a very difficult time understanding me. My right arm was useless, and anything I needed to do I did with my other arm and hand.

I could not do what the other children in the neighborhood could do. Other children made fun of my problems and my inabilities. My life was difficult and painful.

But did my parents have the compassion and the courage to end my suffering? No. They made me have 17 surgeries, about two a year, to straighten my legs, my back and my arm so that I could walk and use both my arms. They made me have physical and occupational therapy for 13 years so that I would learn how to walk and to dress and take care of myself properly.

They made me have speech therapy so that I could learn to speak so that people could understand me. They made me go to public school, forcing me to be educated. They treated me just like they treated my older brother, who had no physical infirmities.

Can you imagine such cruelty and mercilessness?

Because of my parents' cruelty, today I am a lawyer. For the last nine years, I have been a prosecutor, ensuring that people who murder, who assault, who mistreat others are appropriately punished. I argue cases before judges, 13 times before the justices of the Arizona Supreme Court. They listen to what I have to say, and they understand.

I walk with a crutch wherever I want to go. I drive a car. I live by myself, taking care of myself. I cook (and the food is somewhat edible). I travel. I am a fully functioning member of society. All because my parents lacked compassion and mercy.

Words such as compassion and mercy are bandied about too often today, and people don't understand their true meaning. Who has more courage, the parents so afraid to face life's difficulties with a disabled child that they murder her, or the ones who face the difficulties, who endure the hardships and pain so that their child may live as full a life as possible?

Who has more compassion, the parents so concerned with the pain that they suffer from watching the terrible difficulties a disabled child must endure to develop as much as possible that they end her life, or the parents so intent on ensuring that their child can develop into an active member of society despite any disabilities that they do what must be done, heedless of their own pain and anxiety? The answer seems plain to me.

If words now mean the opposite of what they used to, then Mom and Dad, thanks for being cowards and showing no compassion.

Randy Howe is a deputy attorney general for the state of Arizona.

APPENDIX I

Reason for Seeking Position

I want to serve on the Arizona Supreme Court because as hyperbolic or unfashionably earnest as it may sound, I revere the appellate judiciary and the appellate process. Serving on the supreme court would also be the best use of my expertise and experience in appellate law to serve the State of Arizona and its people. My education about the Judicial Branch of government came in my constitutional law classes in law school. There, I learned what the Judicial Branch's role was—to interpret the constitution and laws of a state or the federal government—and how it did that—by issuing opinions that analyzed the law and applied the law to particular facts. I learned, too, how powerful that role was and how to check that enormous power, judges had to decide only the case before them and to do so on the narrowest ground possible. Most important, however, I learned that because judges were not directly responsible to the electorate—a necessary condition so that judges could impartially decide the law without fear of reprisal—they could not consider their own personal views in deciding cases. They needed to defer on matters of public policy to the branch of government that *was* elected, the Legislature, or to the People when they adopted constitutions, referenda, or initiatives. This last precept required appellate judges to strictly interpret the state and federal constitutions and laws according to the intent of the Legislature or the People. I put these precepts into practice when I was selected to serve on the law school's National Moot Court team.

That experience propelled me to make appellate law my career. I realized that this was my natural place in the legal community, the place where I could contribute to the betterment of society, whether as an advocate or a judge. I practiced as an appellate advocate for the next 24 years, in state and federal courts, in criminal and civil cases. My work resulted in 84 published opinions, establishing many points of law. My proudest moments as an appellate advocate were arguing before the United States Supreme Court and then receiving its opinion establishing an important point of law about the insanity defense that applied across the entire nation. As an advocate, I urged the appellate courts to strictly apply the laws according to the intent of the drafters of those laws and to defer to the Legislature on matters of policy and to the trial courts on questions of fact. The judges I appeared before generally applied those tenets in resolving the appeals, and I was only occasionally disappointed.

The occasional disappointments, however, spurred me on to become an appellate judge, and I was fortunate to have been appointed to the Arizona Court of Appeals eight years ago. In my time on the Court, I have always taken care to act with restraint in resolving appeals and writing decisions: applying the laws as they are written, not as I wish they were written; deciding only the issues that needed to be decided and doing so on the narrowest ground possible; deferring to the trial courts on matters of fact because they are better able to decide facts than an appellate court; and deferring to the Legislature or to the People on matters of public policy. My published decisions, concurrences, and dissents demonstrate this. I believe that by doing so I have fulfilled the proper role of an appellate judge and have done the best that I could with my expertise and experience to serve the State of Arizona and its people.

Because the Arizona Supreme Court is the apex of Arizona's Judicial Branch, the most powerful court in the state, its justices must be constantly mindful of the need for restraint in deciding its cases. Of course, I believe that I am substantively qualified to serve on the supreme

court. I spent 24 years as an appellate advocate handling significant criminal and civil appeals, including seven capital cases. No current justice has as much criminal law background as I do. My eight years of service on the Court of Appeals has only deepened my knowledge of many different areas of law. I have even served on the supreme court in one case, *Hall v. Elected Officials' Retirement Plan*, authoring the majority opinion. But my true qualification is my career-long focus on urging and applying judicial restraint, which makes me even better suited to serve on the supreme court. This is why I want to serve on the supreme court.

APPENDIX J

No. 05-5966

In The Supreme Court of the United States

ERIC MICHAEL CLARK,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals Division One

RESPONDENT'S BRIEF ON THE MERITS

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when the trial court refused to consider his psychological evidence on the mens rea issue.

ARGUMENT

I. The Fourteenth Amendment's Due Process Clause Does Not Require a State to Enact the Complete *M'Naghten* Rule as the Test for Insanity Because No Fundamental Principle of Justice Requires a State to Enact an Insanity Defense or Any Particular Definition of Insanity.

In 1993, the Arizona Legislature amended its insanity statute, Arizona Revised Statutes § 13-502(A), to delete reference to the defendant's knowledge of the "nature and quality" of his act. 1993 Ariz. Sess. Laws, ch. 256, § 2. The new insanity test is simply whether the defendant had such a severe mental disease or defect that he "did not know the criminal act was wrong." 1993 Ariz. Sess. Laws, ch. 256, § 3. Clark contends that this legislative decision violates due process. (Petitioner's Opening Brief at 32.) He claims that due process requires a State to adopt as the test for insanity the entire traditional *M'Naghten* Rule, which includes a "nature and quality" component. (*Id.* at 40.)

Clark's claim contravenes this Court's understanding of due process and violates the States' historical authority to define elements of criminal offenses and affirmative defenses, particularly insanity defenses. Moreover, Clark's argument fails regardless of any due process requirement because Arizona's insanity definition necessarily encompasses the question whether a defendant understood the nature and quality of his act.

A. "Constitutionalizing" a Particular Insanity Defense Violates the States' Historical Authority to Define Elements of Criminal Offenses and Affirmative Defenses.

The Due Process Clause does not prohibit the Arizona Legislature from choosing to define insanity only in terms of whether a defendant knows his conduct is wrong: "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson v. New York*, 432 U.S. 197, 201 (1977). State legislative judgments in this area are due "substantial deference" because States have "considerable expertise" regarding criminal law and procedure, and the criminal process is "grounded in centuries of common-law tradition." *Medina v. California*, 505 U.S. 437, 445-46 (1992). A State's legislative choice in ordering its criminal justice system will not violate the Due Process Clause unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202 (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)). Establishing that a fundamental principle exists is a "heavy burden" that is primarily guided by historical practice. *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion).

Assessing and assigning accountability for "antisocial deeds" always has been the States' prerogative:

> The doctrines of actus reus, mens rea, insanity, mistake, justification and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving

> aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. The process of adjustment has always been thought to be the province of the States.

Powell v. Texas, 392 U.S. 514, 536 (1968) (plurality opinion). Thus, States have the "freedom to determine whether, and to what extent, mental illness should excuse criminal behavior." *Foucha v. Louisiana,* 504 U.S. 71, 88 (1992) (O'Connor, J., concurring); *id.* at 91 ("The power of the States to determine the existence of criminal insanity following the establishment of the underlying offense is well established.") (Kennedy, J., dissenting). This Court has never "said that the Constitution requires the States to recognize the insanity defense." *Medina,* 505 U.S. at 449.

This Court addressed the application of due process to States' insanity defenses in *Leland v. Oregon,* 342 U.S. 790 (1952). In that case, Leland argued that due process prohibited Oregon from requiring him to prove the affirmative defense of insanity beyond a reasonable doubt. *Id.* at 793. He also claimed that Oregon had violated due process by enacting a statute prohibiting what amounted to an "irresistible impulse" defense. *Id.* at 800. Regarding the burden-of-proof issue, the Court had unhesitatingly held that requiring a defendant to prove insanity beyond a reasonable doubt does not violate due process. *Id.* at 799.

Regarding Oregon's prohibition of an "irresistible impulse" test for insanity, the Court specifically declined to impose any constitutionally mandated insanity defense. The Court noted that "[k]nowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions," *id.* at 800, and that psychiatry

ARIZONA SUPREME COURT

STATE OF ARIZONA, APPELLEE, –VS– PABLO ARCINIEGA MARTINEZ, APPELLANT.	CR–04–0435–PR COURT OF APPEALS NO. 1 CA–CR 03–0728 MARICOPA COUNTY SUPERIOR COURT NO. CR–2000–14823 B

APPELLEE'S SUPPLEMENTAL BRIEF

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STATEMENT OF THE CASE

This Court granted review of the court of appeals' opinion to determine whether a jury finding of facts supporting one aggravating circumstance satisfied Appellant's Sixth Amendment rights because that finding made him eligible for an aggravated sentence, even though the judge also relied on other aggravating circumstances.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT THE FINDING OF ONE AGGRAVATING CIRCUMSTANCE IMPLICIT IN THE JURY'S VERDICT SATISFIED APPELLANT'S RIGHTS UNDER THE SIXTH AMENDMENT BECAUSE ONE AGGRAVATING CIRCUMSTANCE MADE APPELLANT ELIGIBLE FOR AN AGGRAVATED SENTENCE UNDER A.R.S. § 13–702.

Everyone agrees that under the Sixth Amendment, "every defendant has the right to insist that the prosecutor prove to a jury *all facts legally essential* to the punishment." *Blakely v. Washington*, 124 S. Ct. 2531, 2543 (2004) (emphasis added) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000)). Panels of the court of appeals disagree, however, whether (1) *one* aggravating circumstance is all that is "legally essential to the punishment"—because merely one aggravating circumstance makes a defendant *eligible* for sentence within the aggravated range under A.R.S. § 13–702—or (2) *all* the aggravating circumstances that the trial court relies on in imposing an aggravated sentence are "legally essential to the punishment" —because each aggravating circumstance is part of the trial judge's sentencing calculus in determining the defendant's *actual* sentence. *Compare State v. Estrada*, 1 CA–CR 03–0914, slip op. at 8, ¶ 13 (Ariz. App. Mar. 4, 2005) (one aggravating

circumstance sufficient); *State v. Martinez*, 209 Ariz. 280, 284, ¶ 16, 100 P.3d 30, 34 (App. 2004) (same), *with State v. Pitre*, 1 CA–CR 03–0526, 2005 WL 503975, at *3, ¶¶ 13–14 (Ariz. App. Mar. 4, 2005) (all aggravating circumstances relied upon must be found); *State v. Munninger*, 209 Ariz. 473, 484, ¶ 25, 104 P.3d 204, 213 (App. 2005) (same).

In this debate, the *Estrada/Martinez* panels are correct. The Sixth Amendment does not control how a judge uses traditional sentencing discretion to determine the actual sentence to impose within the sentencing range, but requires only that the judge stay within the sentencing range the jury's verdict sets when he imposes the actual sentence. *See United States v. Booker*, 125 S. Ct. 738, 750 (2005) ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."); *see also Apprendi*, 530 U.S. at 519 (Thomas, J., concurring) ("[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things.").

A. THE SIXTH AMENDMENT REQUIRES ONLY THAT A DEFENDANT'S SENTENCE BE WITHIN THE SENTENCING RANGE THAT THE JURY'S VERDICT LEGALLY AUTHORIZES.

The United States Supreme Court's precedent has made clear that the Sixth Amendment limits the trial court's sentencing authority to the range that the jury's verdict authorizes but places no restrictions on the actual sentence imposed as long as it is within that authorized range. The Supreme Court first considered the meaning of the Sixth Amendment's jury trial right in *Jones v. United States*, 526 U.S. 227, 119

S. Ct. 1215 (1999). In *Jones*, the defendant was convicted and sentenced for carjacking, a federal offense. 526 U.S. at 230–31. The carjacking statute defined the offense, set the sentencing range, and provided two additional sentencing ranges if the victim had suffered "serious bodily injury" or died because of the carjacking. *Id.* at 230. The defendant claimed that the questions whether the victim suffered serious bodily injury or died were elements of the carjacking offense that the Government had to prove to a jury beyond a reasonable doubt. *Id.* at 231. The Government contended, in contrast, that those questions were not elements but were merely factors for the district court to determine at sentencing. *Id.* at 233.

The Supreme Court ruled that, as a matter of statutory construction, the victim's serious bodily injury and death were elements of carjacking that, if proved to a jury beyond a reasonable doubt, permitted the district court to increase the defendant's sentence. *Id.* at 252. As part of its analysis, the Court noted that construing the victim's serious bodily injury or death as sentencing factors for the judge to determine might violate the Sixth Amendment: "[T]he substantiality of the jury claim is evident from the practical implications of assuming Sixth Amendment indifference to treating a fact that sets the *sentencing range* as a sentencing factor, not an element." *Id.* at 243 (emphasis added).

The Court then stated its understanding of the requirements of the Sixth Amendment: "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 243 n.6. The Court qualified this statement by

C.A. No. 09–10360

D. Ct. No. CR–08–00258–PHX–SRB–1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOY DOREEN WATSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLEE

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Submitted via ECF: November 12, 2010

VII. ARGUMENTS

A. The District Court Did Not Commit Plain Error by Grouping Defendant's Drug Offenses with Her Money Laundering Offense in Determining the Appropriate Offense Level under USSG § 2S1.1(a)(1), Because the Drug Offenses Were the "Underlying Offenses" of the Money Laundering.

1. Standard of Review

This Court reviews a district court's interpretation of the Sentencing Guidelines *de novo*, its application of the Guidelines to the facts of the case before it for an abuse of discretion, and its factual findings for clear error. *United States v. Crowe*, 563 F.3d 969, 977 (9th Cir. 2009); *United States v. Armstead*, 552 F.3d 769, 776 (9th Cir. 2008). This Court reviews *de novo* a district court's decision regarding grouping of offenses, *United States v. Lopez*, 104 F.3d 1149, 1150 (9th Cir. 1997) (per curiam), and reviews for clear error a determination that conduct was relevant to sentencing, *United States v. Rose*, 20 F.3d 367, 371 (9th Cir. 1994).

Because Defendant did not object to the district court's grouping of her drug offenses with her money laundering offense under § 2S1.1, comment (n.6), this Court is limited to plain error review. Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 732 (1993). An error must exist, it must be "plain" or "obvious," and it must be prejudicial, affecting the outcome of the proceeding. *Olano*, 507 U.S. at 732–34. The error must also " 'seriously affect the fairness, integrity or public

reputation of judicial proceedings.'" *Id.* at 732 (quoting *United States v. Young*, 470 U.S. 1, 15 (1985) (alteration removed).

2. Argument

The district court committed no error—much less plain error—in grouping Defendant's drug offenses with her money laundering offense as § 2S1.1 directs. A defendant's base offense level for money laundering is determined by "the offense level for the underlying offense from which the laundered funds were derived" if (1) the defendant committed the underlying offense or would be held accountable for the offense as part of relevant conduct under USSG § 1B1.3(a)(1)(A) and (2) the offense level for the underlying offense can be determined. USSG § 2S1.1(a)(1). If "the defendant is convicted of a count of laundering funds and a count for the underlying offense from which the laundered funds were derived," the offenses must be grouped pursuant to USSG § 3D1.2(c). USSG § 2S1.1, comment (n.6).

Defendant was convicted of the underlying offenses from which the laundered funds were derived: conspiracy to possess with intent to distribute marijuana and possession with intent to distribute marijuana. (RT 4/23/09 2215–16; SER 230–31.) Based on Defendant's conduct, the court determined that the offense level of the underlying offense was 36. (RT 8/10/09 26–27; SER 243–44.) Because both requirements of § 2S1.1(a)(1) were met, the court properly applied § 2S1.1(a)(1) in

grouping the drug offenses with the money laundering offenses to determine a group offense level of 36.

Defendant argues that the court erred in applying the provision because the laundered funds were not derived from the underlying offense. (Op. Br. at 12.) She maintains that the underlying offense—the transaction with the informant at the Maldonado house—generated no funds to be laundered because the transaction was never completed. *Id.* But Defendant is wrong on two counts.

First, while the transaction was not completed, the conspiracies to possess the marijuana and to engage in money laundering were complete; Defendant and her coconspirators agreed to traffic in marijuana, agreed to accept payment for it, and they took many overt acts to further the agreement. *See United States v. Mincoff*, 574 F.3d 1186, 1198 (9th Cir. 2009) (A "conspiracy is complete once agreement is reached and an overt act is committed by either conspirator to further the agreement."). And although no money was exchanged because the agents executed search warrants on the stash houses and arrested the conspirators before the deal was consummated, the parties had agreed that the informant would pay $418,000 for 800 pounds of marijuana. (RT 4/8/09 431; RT 4/9/09 474; SER 61, 91.) For purposes of conspiracy to commit money laundering, funds were indeed generated.

Second, Defendant interprets "derived from the underlying offense" too narrowly. The meaning of this term in § 2S1.1(a)(1) is not delimited by the specific offense conduct of which a defendant was convicted, but includes the entire drug conspiracy of which the defendant was a part. Section 2S1.1(a)(1) expressly allows a court to also consider "relevant conduct" to determine whether the defendant "would be accountable for the underlying offense." *See United States v. Menendez*, 600 F.3d 263, 268 (2d Cir. 2010) ("This statutory dictate . . . permits consideration of relevant conduct to determine only the defendant's *accountability* for the underlying offense."); *accord United States v. Blackmon*, 557 F.3d 113, 120 (3d Cir. 2009); *United States v. Charon*, 442 F.3d 881, 888–89 (6th Cir. 2006). "Relevant conduct" includes (1) "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" in preparation to commit the offense, in committing the offense, or in attempting to avoid detection or responsibility for the offense; and (2) in the case of "jointly undertaken criminal activity," "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." USSG § 1B1.3(a)(1). A defendant is responsible for all the quantities of drugs with which she was involved and for all foreseeable quantities of drugs that were within the scope of her conspiracy. USSG § 1B1.3 comment (n.2).

The conduct relevant to Defendant's offense was not merely the conduct involving the specific transaction at the Maldonado house on March 19, but also all of her other acts—and the reasonably foreseeable acts of her coconspirators—to maintain and operate her marijuana trafficking organization: renting the stash houses with money orders purchased with cash, paying the utility bills, paying for the materials used to package the marijuana, and paying her coconspirators for their activities. When all of Defendant's relevant conduct is considered, no doubt exists that she was accountable for the underlying offense from which the laundered funds were derived.

Although this Court has not yet considered whether "relevant conduct" should be considered in determining the nature of the "underlying offense" in § 2S1.1(a)(1), defendants in other circuits have argued—as Defendant is arguing now for the first time on appeal—that they were responsible only for the laundered funds from the specific transaction that formed the basis of their convictions. Every court that has considered the issue has rejected the argument. In *Menendez*, a defendant pled guilty to conspiring to possess with intent to distribute 21 kilograms of heroin and to laundering the proceeds from a sale of 2.5 to 3 kilograms of heroin. *Menendez*, 600 F.3d at 265. He claimed on appeal that under § 2S1.1(a)(1), he was responsible only for the proceeds derived from the amount of drugs that he admitted to laundering. *Id.*

APPENDIX K

IN THE

SUPREME COURT OF THE STATE OF ARIZONA

THE HONORABLE PHILIP HALL ET AL.,
Plaintiffs/Appellees/Cross-Appellants,

v.

ELECTED OFFICIALS' RETIREMENT PLAN ET AL.,
Defendants/Appellants/Cross-Appellees,

STATE OF ARIZONA,
Intervenor-Defendant/Appellant/Cross-Appellee.

No. CV-15-0180-T/AP

Filed November 10, 2016

Appeal from the Superior Court in Maricopa County
The Honorable Douglas L. Rayes, Judge (retired)
The Honorable Randall H. Warner, Judge
No. CV2011-021234
AFFIRMED IN PART AND REVERSED IN PART

COUNSEL:

Ron Kilgard (argued), Alison E. Chase, Keller Rohrback, L.L.P., Phoenix, Attorneys for Philip Hall and Jon W. Thompson et al.

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Colin F. Campbell, Osborn Maledon, PA, Phoenix; and Robert D. Klausner, Adam P. Levinson, Klausner Kaufman Jensen & Levinson, Plantation, FL, Attorneys for Amicus Curiae National Conference on Public Employee Retirement Systems

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JUDGE HOWE* authored the opinion of the Court, in which JUDGE BUTLER* joined, JUDGE CATTANI* joined and specially concurred, and JUSTICE BOLICK and JUDGE TREBESCH* dissented in part and concurred in the judgment in part.

JUDGE HOWE, opinion of the Court:

¶1 In 2011, the Arizona Legislature enacted Senate Bill 1609, which made certain changes to the Elected Officials' Retirement Plan. The Bill changed the formula for calculating future benefit increases for retired Plan members and increased the amount that employed Plan members must contribute toward their pensions. Retired members of the Plan challenged the provision changing the formula for calculating future benefit increases. They argued that the change violated the Pension Clause of the Arizona Constitution, article 29, section 1, which provides that "public system retirement benefits shall not be diminished or impaired."[1]

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* Chief Justice Scott Bales, Vice Chief Justice John Pelander, and Justices Robert M. Brutinel and Ann A. Scott Timmer recused themselves; pursuant to article 6, section 3 of the Arizona Constitution, the Honorable Randall M. Howe and the Honorable Kent E. Cattani, Judges of the Court of Appeals, Division One; the Honorable Michael J. Butler, Judge of the Pima County Superior Court; and the Honorable Patricia A. Trebesch, Judge of the Yavapai County Superior Court, were designated to sit in this matter.

1 This provision was subsequently amended by Laws 2016, S.C.R. 1019, § 1, effective May 26, 2016. This amendment pertains only to the

We agreed, holding that this provision was unconstitutional as applied to the Plan's retired members. *See Fields v. Elected Officials' Ret. Plan*, 234 Ariz. 214, 320 P.3d 1160 (2014).

¶2 Employed members of the Plan also challenged the Bill. First, they argued that the unilateral changes to the benefit increases formula and to the amount they were required to contribute toward their pensions violated the Pension Clause for the reasons set forth in *Fields*. Second, relying on our long-standing decision in *Yeazell v. Copins*, 98 Ariz. 109, 402 P.2d 541 (1965), they argued that because their pensions were part of their employment contracts that vested when they began employment, the Legislature could not unilaterally change the terms of their pensions to their detriment. The trial court granted the employed members summary judgment, invalidating the provisions at issue. The court denied the members' request for attorneys' fees and prejudgment interest, however. The court also denied the members' request to have the judgment run against the State, which had intervened in the case. EORP and the State appealed and the members cross-appealed.

¶3 Upon transfer from the court of appeals, we affirm the granting of summary judgment to the employed Plan members. As we held in *Fields*, the Bill's change to the benefit increases formula violates the Pension Clause because it "diminishes and impairs" the employed members' pension benefits. The Bill's changes to the benefit increases formula and the contribution rate also violate our holding in *Yeazell* because the Legislature cannot unilaterally change the terms of the members' pension contracts once their rights to those terms have vested at the beginning of the members' employment. Contrary to the trial court's ruling, however, we find that the employed members are entitled to attorneys' fees and prejudgment interest and that the judgment must run against the State as well as the Plan.

I. FACTS AND PROCEDURAL HISTORY

¶4 In 1985, the Legislature established the Plan to provide pension benefits for elected officials, including judges. A.R.S. §§ 38-801(15),

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Public Safety Personnel Retirement System established by Chapter 38, Article 4.1, and thus does not affect the resolution of this case.

–802, –804. The Plan has four funding sources: employer contributions, employee contributions, court filing fees, and investment proceeds. A.R.S. § 38–810. The employee contribution rate was set by statute initially at 6%, with the employer being responsible for contributing the remaining amount necessary to fund a defined benefit upon retirement. *See* A.R.S. § 38–810(A) (1985). In 1987, A.R.S. § 38–810(A) was amended to increase the employees' contribution to 7%. *See* 1987 Ariz. Legis. Serv., ch. 146, § 4, *codified at* A.R.S. § 38–810(A) (1987).

¶5 During the 1990s, the Plan generated investment returns that far exceeded the actuarially assumed rate of return. *See PSPRS Plan's Funding Status Report with Options for Improving Funding and Reducing Required Contributions*, at 2 (2010). During the same period, however, the Plan's financial health was being "seriously compromised" because the Plan was gradually concentrating its investments in securities of high technology and telecommunications companies. *Id.* In March 2000, the prices of technology and telecommunications securities began to "decline rapidly." *Id.* This made the Plan vulnerable to major financial shocks in 2000, 2008, and 2009. By fiscal year 2011, the Plan's funding ratio—the actuarial value of the Plan's assets divided by its actuarial accrued liabilities—was 62.1%, a drop from 121% in 1998 and 101.9% in 1985. Accordingly, the State's contribution level necessarily increased, while the employee contribution rate remained constant, as set by statute.

¶6 In 2011, attempting to address continued rising costs, the Legislature enacted the Bill, making several unilateral changes to the Plan to be applied retroactively from June 30, 2011. *See* 2011 Ariz. Legis. Serv., ch. 357. One change the Bill made was to the statutory formula for calculating permanent benefit increases under A.R.S. § 38–818. The Bill amended A.R.S. § 38–818.01 to prohibit the transfer of any investment earnings that exceed the rate of return to the reserve fund and changed the formula used to calculate the permanent benefit increases, increasing the rate of return necessary to trigger a benefit increase. *See* A.R.S. § 38–818.01(B).

¶7 We resolved whether the Bill's change to the statutory formula for calculating permanent benefit increases was constitutional with respect to retired members in *Fields*, 234 Ariz. at 221 ¶ 34, 320 P.3d at 1167. We held that the formula was a "benefit" for purposes of the Pension Clause and that the Bill's change to the formula violated the clause because it

diminished and impaired the retired members' retirement benefits. *Id.* at 220–21 ¶¶ 29, 34, 320 P.3d at 1166–67. Because the Bill retroactively prevented the transfer of funds to the Plan's reserve, the Plan could not fund expected benefit increases, and retired members' benefit increases consequently were reduced or eliminated in 2011, 2012, and 2013. *Id.* at 221 ¶ 35, 320 P.3d at 1167. The Bill also made it less likely that retired members would receive future benefits increases because of the raised rate of return required to fund an increase. *Id.* at ¶ 36, 320 P.3d at 1167.

¶8 The Bill made another change that was not at issue in *Fields*, but is here. The Bill amended the employee contribution rate structure by increasing the rate to 10% for fiscal year 2011–2012 and to 11.5% for fiscal year 2012–2013. A.R.S. § 38–810(F)(1)–(3) (2011). It also set the rate for fiscal year 2013–2014 and each fiscal year thereafter to the lesser of 13% of the member's gross salary or 33.3% of the sum of the member's contribution rate from the preceding fiscal year and the normal cost plus the actuarially-determined amount required to amortize the employer's unfunded accrued liability. A.R.S. § 38–810(F)(4) (2011).

¶9 In November 2011, Judges Philip Hall—who has since retired—and Jon W. Thompson, on behalf of themselves and as representatives of a class of employed Plan members and beneficiaries as of July 20, 2011, the Bill's effective date (collectively, "Class Members"), sued the Plan and the Board of Trustees of the Public Safety Personnel Retirement System (collectively, "EORP"). The Class Members alleged that the Bill violated *Yeazell*, the Pension and Judicial Salary Clauses of the Arizona Constitution, and the Contract Clauses of the Arizona and United States Constitutions. The State intervened to defend the Bill. After the State intervened, the Class Members notified the trial court and the parties that they would seek relief, including attorneys' fees, expenses, and taxable costs, not only from EORP but also from the State.

¶10 After intervening litigation, the parties each moved for summary judgment. The Class Members maintained—as relevant here—that the Bill violated *Yeazell* by unilaterally modifying their interests in their pensions, which had vested at the outset of their employment with the State, and violated the Pension Clause by diminishing their entitled benefits. EORP and the State responded that the Class Members' rights had not yet vested and therefore the Legislature could modify the pension plan as it saw fit. EORP and the State noted that in 2000, the Legislature had

enacted A.R.S. § 38-810.02 ("the vesting statute"), providing that EORP benefits vest at the time the employee applies for benefits or retires. EORP and the State argued that because the statute applies retroactively, it has become part of the Class Members' employment contracts with the State, and accordingly, their rights do not vest until they retire.

¶11 The trial court granted the Class Members' motion for summary judgment and denied EORP's and the State's cross-motions for summary judgment. The court held that the Pension Clause protected the benefit increases formula and the 7% prior contribution rate because they constituted "benefits" that were always part of the members' contractual relationship with the State. The court rejected EORP's argument that the vesting statute preempted the members' contractual rights and their rights under the Pension Clause. The court concluded that the statute applies only to "ordinary" vesting, meaning that a member has no right to receive retirement benefits until the member fulfills specific conditions and retires. The court thus granted the Class Members the relief they sought.

¶12 The parties then asked for a stay pending our decision in *Fields*, which the trial court granted. After considering the effect of *Fields*, the court denied the Class Members' request for attorneys' fees under A.R.S. § 12-341.01 because it concluded that the action arose out of constitutional and statutory—not contractual—obligations. The court also denied the Class Members' request for prejudgment interest because it found that EORP was not unjustly enriched and should not be charged interest on money it legally could not pay. The court further denied the Class Members' request that relief run against the State because it found that the State had intervened only to defend the Bill's constitutionality and the Class Members' notice seeking relief against EORP and the State was insufficient to assert claims against the State.

¶13 EORP and the State timely appealed the summary judgment in the Class Members' favor, and the Class Members timely cross-appealed the judgment denying attorneys' fees, prejudgment interest, and relief against the State. We granted the parties' joint petition to transfer the case under Arizona Rule of Civil Appellate Procedure 19(a). The funding of public pensions raises issues of statewide importance, and we have jurisdiction pursuant to article 6, section 5(3) of the Arizona Constitution.

II. DISCUSSION

ISSUES ON APPEAL

¶14 EORP and the State argue that the trial court erred by finding that the Bill violates the Pension Clause and *Yeazell*.[2] We review de novo the constitutionality of statutes and, if possible, construe them to uphold their constitutionality. *State v. Glassel*, 211 Ariz. 33, 51 ¶ 65, 116 P.3d 1193, 1211 (2005). We presume that a statute is constitutional, and the "party asserting its unconstitutionality bears the burden of overcoming the presumption."[3] *Eastin v. Broomfield*, 116 Ariz. 576, 580, 570 P.2d 744, 748 (1977). As discussed below, we hold that (1) the Bill's change to the benefit increases formula provision violates the Pension Clause by diminishing and impairing a benefit to which the Class Members are entitled and (2) its changes to the benefit increases formula and the contribution rate provisions are unconstitutional under *Yeazell* because it unilaterally modified the Class Members' employment contracts with the State to the Class Members' detriment.

A. The Pension Clause

¶15 EORP and the State first argue that the trial court erred because the benefit increases formula and the prior contribution rate are not

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[2] The Class Members argue that even if the Bill does not violate the Pension Clause and *Yeazell*, it is still unconstitutional under the Contract Clauses of the United States and Arizona Constitutions and the Judicial Salary Clause of the Arizona Constitution. *See* Ariz. Const. art. 6, § 33; Ariz. Const. art. 2, § 25; U.S. Const. art. 1, § 10. We need not reach these arguments, however, because the Pension Clause and *Yeazell* resolve the fundamental issues regarding the Class Members' rights to the benefit increases formula and the prior contribution rate.

[3] The Class Members argue that because *Fields* held that the Bill's benefit increases formula provision was unconstitutional, the Bill is not entitled to such a presumption. But *Fields* decided only the Bill's constitutionality with regard to *retired* judges and their entitlement to the benefit increases formula. 234 Ariz. at 220–21 ¶¶ 29, 34, 320 P.3d at 1166–67. The issue here is its constitutionality with regard to *employed* judges and their entitlement to the benefit increases formula and the prior contribution rate.

"benefits" and therefore not protected by the Pension Clause. Regarding the benefit increases formula, this Court concluded in *Fields* that permanent benefit increases and the benefit increases formula were "benefits" as used in the Pension Clause. *See* 234 Ariz. at 219, 220 ¶¶ 23, 26, 320 P.3d at 1165, 1166. The reasoning in *Fields* applies with equal force to the Class Members because the Bill's change to A.R.S. § 38-818's formula diminishes and impairs the Class Members' retirement benefits just as it does for retired members. *See id.* at 221-22 ¶¶ 34-36, 320 P.3d at 1167-68. The Bill's amendment regarding the benefit increases formula therefore violates article 29, section 1(C), of the Arizona Constitution. Regarding the prior contribution rate, however, because we hold that the prior contribution rate is protected under *Yeazell*, *see infra* § B, we need not decide whether it is also protected under the Pension Clause. *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them.").

B. A Binding Contractual Relationship

1. *Yeazell v. Copins*

¶16 EORP and the State also argue that the trial court erred in applying *Yeazell* because "*Yeazell* enshrined the vesting statute as part of the [member's employment] contract, authorizing the Legislature *as a matter of the express contract* to make reasonable prospective changes like adjusting the contribution rate." Consequently, they argue, *Yeazell* does not "apply constitutional protections for pension rights" and also does not affect whether the Pension Clause protects the benefit increases formula and the prior contribution rate. The Class Members counter that the Bill violates *Yeazell* because it seeks to unilaterally and retroactively modify their pension terms as provided in their employment contracts when they began services.

¶17 *Yeazell* established that the State's promise to pay retirement benefits is part of its contract with the employee. *See* 98 Ariz. at 113-17, 402 P.2d at 544-47. By accepting a job and continuing to work, the employee has accepted the State's offer of retirement benefits, and the State may not impair or abrogate the terms of that contract without obtaining the employee's consent. *Id. Yeazell* involved a Tucson police officer's appeal of a local board's decision setting his pension benefits based on a 1952 amendment to the pension statute in effect at the time of his retirement,

rather than on the statute in effect when he was hired in 1937. *Id.* at 111, 402 P.2d at 542. Yeazell argued that the 1937 statute, requiring him to contribute 2% of his salary and granting him a monthly pension equal to one-half of his average monthly compensation for one year immediately before his retirement date, was the applicable law from which to determine his retirement benefits—not the 1952 statute. *Id.* His benefit under the 1937 statute would have been $7.21 more per month than his benefit under the 1952 statute. *Id.*

¶18 The issue in *Yeazell* was whether the Legislature could unilaterally change statutorily-created retirement benefits that were part of the terms of an employee's employment contract when the employee began service. *See id.* at 111–12, 402 P.2d at 542–43. The majority rule in the United States at the time was that pensions—characterized as "gratuities" granted at the sovereign's benevolent will—could be modified because the employees had no vested right to them. *Id.* at 112, 402 P.2d at 543. Thus, pension plans could be amended or changed as a legislature saw fit. *Id.* *Yeazell* recognized, however, that treating retirement benefits as "gratuities" posed a problem in Arizona because of the state's Gift Clause, *id.* at 112, 402 P.2d at 543, which, as relevant here, prohibits state entities from giving or lending its credit "in the aid of, or mak[ing] any donation or grant, by subsidy or otherwise" to any individual, Ariz. Const. art. 9, § 7.

¶19 *Yeazell* acknowledged that under the Gift Clause, "[t]he state may not give away public property or funds; it must receive a *quid pro quo* which, simply stated, means that it can enter into contracts for goods, materials, property and services." 98 Ariz. at 112, 402 P.2d at 543. Thus, to uphold Arizona retirement plans under the Arizona Constitution, this Court concluded that pensions were *not* gratuities, but were, in the nature of contracts, viewed as deferred compensation for services rendered. *Id.* at 113–15, 402 P.2d at 543–45. We reasoned that a pension is a gratuity only when it is granted for services previously rendered, but when the services are rendered under a pension statute, "the pension provisions become a part of the contemplated compensation for those services, and so in a sense a part of the contract of employment itself." *Id.* at 113, 402 P.2d at 544; *see also Proksa v. Ariz. State Sch. for the Deaf & the Blind*, 205 Ariz. 627, 631 ¶ 21, 74 P.3d 939, 943 (2003) ("Put differently, in the retirement benefits area, given the Gift Clause of our constitution, this court effectively found an 'adequate expression of an actual intent of the State to bind itself,' because

any finding to the contrary would render the statutes unconstitutional.") (citation omitted).

¶20 Based on *Yeazell* and its Gift Clause underpinnings, the law in Arizona has been clear since 1965 that public employees are contractually entitled to the retirement benefits specified in their initial employment contract. *See, e.g., Proksa*, 205 Ariz. at 630 ¶ 16, 74 P.3d at 942; *Norton v. Ariz. Dep't of Pub. Safety Local Ret. Bd.*, 150 Ariz. 303, 723 P.2d 652 (1986); *Thurston v. Judges' Ret. Plan*, 179 Ariz. 49, 876 P.2d 545 (1994). This protected relationship prevents the Legislature from changing the employee's pension terms at will after the terms have vested, *see Yeazell*, 98 Ariz. at 115–16, 402 P.2d at 545–46, and provides public employees reasonable expectations that their retirement benefits are protected by the law of contracts, *see id.* at 117, 402 P.2d at 546 (holding that a public employee "ha[s] the right to rely on the terms of the legislative enactment of the [pension plan] as it existed at the time he entered the service," and that "subsequent legislation may not be arbitrarily applied retroactively to impair the contract"). The parties may subsequently agree to modify the contract, of course, but the State may not unilaterally change the contractual terms unless the change benefits the employee. *See Thurston*, 179 Ariz. at 51, 876 P.2d at 547 (recognizing that "when the amendment [to retirement benefits] is beneficial to the employee or survivors, it automatically becomes part of the contract by reason of the presumption of acceptance"). Under that circumstance, the employee is deemed to have ratified the beneficial change, which becomes part of the employment contract. *Id.*

¶21 For Yeazell, we concluded that the Legislature had unilaterally amended the 1937 statute, which had become a part of his employment contract—a contract that included the 2% contribution rate and a pension calculation based on his last year's earnings. Tucson therefore could not retroactively vary the pension terms without Yeazell's consent. *Yeazell*, 98 Ariz. at 116, 402 P.2d at 546. We explained that although an employee may not qualify to receive his pension benefits until he has performed the necessary condition—completion of the requisite years of service—this did not mean that from the moment Yeazell entered service as a Tucson police officer, a firm and binding contract did not exist between him and the City of Tucson. *Id.* at 114, 402 P.2d at 544.

¶22 Although acknowledging that *Yeazell* established a contractual relationship between the State and public employees regarding

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JERMON ROSS, *Appellant*.

No. 1 CA-CR 19-0214

FILED 03-09-2021

Appeal from the Superior Court in Maricopa County
No. CR2017-134281-001
The Honorable Jay R. Adleman, Judge

VACATED AND REMANDED FOR NEW TRIAL

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jillian Francis
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Mikel Steinfeld
Counsel for Appellant

¶37 The primary proposition of law underlying this opinion is that a court cannot properly rely on a disputed avowal from counsel describing affirmative physical acts of a potential juror purportedly taken in the courtroom to defeat a *Batson* challenge. That standard appears to have been applied since 1986 when *Batson* refined the focus on constitutional challenges to peremptory strikes. Significantly, the Dissent cites no case, in the 35 years since *Batson*, in which a court accepted a disputed avowal by counsel about purported physical acts in the courtroom as the sole factual basis to support a peremptory strike challenged under *Batson*. Moreover, the majority fully recognizes that the credibility of the attorney asked to justify the peremptory strike, and the trial court's ability to assess credibility, remain a critical aspect of a *Batson* challenge, *provided that* the proffered explanation for a peremptory strike based on courtroom conduct is supported by record evidence. *See, e.g., Flowers*, 139 S. Ct. at 2244 (noting assessing such credibility and demeanor issues "lie peculiarly within a trial judge's province); *Snyder*, 552 U.S. at 477 ("The trial court has a pivotal role in evaluating *Batson* claims.").

¶38 In the end, the Dissent at ¶¶ 47 & 50 correctly states that a *Batson* challenge much be resolved "in light of all the relevant facts and circumstances . . . and the arguments of the parties." *Flowers*, 139 S. Ct. at 2243. The focus on "relevant facts" implicates the evidentiary record, which is at the core of the disagreement between the majority and the Dissent. Because the record here lacked any "relevant facts" supporting the "blessing" explanation, which depended solely on a disputed avowal of conduct purportedly occurring in open court, it was inadequate. That left the State with no race-neutral explanation for its peremptory strike of Prospective Juror 15, the only African American juror that remained on the panel. As a result, the superior court erred in denying the *Batson* challenge.

CONCLUSION

¶39 Ross' convictions and resulting sentences are vacated and this matter is remanded for a new trial.

H O W E, Judge, concurring in part, dissenting in part:

¶40 I concur with the Majority's conclusion that *State v. Lucas*, 199 Ariz. 366 (App. 2001), does not require the reversal of the trial court's ruling on Ross's objection under *Batson v. Kentucky*, 476 U.S. 79 (1986), on the "extremely inarticulate" ground the prosecutor proffered as his second reason for the peremptory strike. Although the trial court found that the

record did not support that ground, the trial court never found that this ground was intended to discriminate against Ross or the juror, so it cannot support a *Batson* objection.

¶41 Except for my agreement on this point, however, I respectfully dissent from the remainder of the Majority's decision that the trial court nevertheless erred in overruling Ross's *Batson* objection. The Majority holds that when a defendant claims that a prosecutor has exercised a peremptory strike to discriminate against a juror in violation of *Batson*, and the prosecutor has avowed that particular facts exist that support a race-neutral reason for the strike, the trial court cannot find the prosecutor credible unless independent evidence in the record proves those facts. *Supra* ¶ 28. This holding is contrary to Arizona law and United States Supreme Court precedent applying *Batson*.

¶42 First, the Majority holds that in ruling on the *Batson* objection at issue here, the trial court could not consider as evidence the prosecutor's avowal that he saw the prospective juror bless and wish Ross good luck, relying on the legal truism that "[i]n Arizona, an avowal by counsel is not evidence." *Supra* ¶ 24. But that truism applies only to substantive matters being tried before a jury or trial court—guilt or innocence, for example, in criminal cases. *See, e.g., State v. Woods*, 141 Ariz. 446, 454–55 (1984) (In determining a defendant's guilt, the jury could not consider the prosecutor's avowal that he had "good" reasons for offering a witness a plea agreement.). It does not apply to procedural trial matters, where a trial court's reliance on counsel's avowals of fact are quite common.

¶43 For example, in seeking an extension of time to try a criminal defendant, a prosecutor must avow that he does not seek the extension to avoid the time limits Arizona Rule of Criminal Procedure 8 imposes. *See* Ariz. R. Crim. P. 16.4(a); *Earl v. Garcia*, 234 Ariz. 577, 578 ¶ 6 (App. 2014). In seeking a change of judge as of right under Arizona Rule of Criminal Procedure 10.2(b), counsel is explicitly *required* to make certain avowals of fact to justify changing the assigned judge. To impress upon counsel that the trial court will rely on his avowal, Rule 10.2(b)(1) notes that counsel makes his avowal "as an officer of the court." In a hearing on a motion to reexamine a defendant's release conditions, the prosecutor may make avowals to the court. *Mendez v. Robertson*, 202 Ariz. 128, 130 ¶ 7 (App. 2002). In seeking an extension of time to file a time-extending motion, counsel's avowal that a party did not receive notice of an entry of judgment is sufficient to receive the extension. *United Metro Materials, Inc. v. Pena Blanca Prop., L.L.C.*, 197 Ariz. 479, 483 ¶ 22 (App. 2000). In seeking admission of evidence, counsel must make an offer of proof by avowal of what the

evidence is and what it will show, and the trial court can rely on that avowal in ruling on the evidence's admissibility, *State v. Plew*, 155 Ariz. 44, 46 (1987), even when counsel's avowed description of the evidence is disputed, *State v. Zaid*, 249 Ariz. 154, 158 ¶ 10 (App. 2020). In short, the trial court commonly can and does consider a prosecutor's avowals of fact in ruling on procedural matters.

¶44 And included among the procedural matters in which avowals may be considered are *Batson* objections. In *State v. Jackson*, a defendant raised a *Batson* objection to the prosecutor's peremptory strike of the only African American on the jury panel. 170 Ariz. 89, 92 (App. 1991). The prosecutor explained that he struck the juror because the juror wore a ponytail, which indicated that the person "tended toward liberalism and doing his own thing." *Id.* Defense counsel did not recall that the juror wore a ponytail. *Id.* The trial court did not recall the juror but accepted the prosecutor's avowal. *Id.* On appeal, this Court "s[aw] no error." *Id.*[5]

¶45 This Court saw no error because trial courts routinely accept counsels' avowals in procedural matters—as the nonexclusive list in ¶ 43 demonstrates—and nothing shows that *Batson* matters should be treated differently. Of course, whether a prosecutor violated a defendant's or a

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[5] The Majority declines to accept *Jackson*'s significance, criticizing the dissent's reliance on "three words from . . . one paragraph of a multi-page opinion," purportedly taken out of context. *Supra* ¶ 36. But in the context of an appellate opinion reviewing a defendant's claim of error, no words are more important—or case-dispositive—than "We see no error." 170 Ariz. at 92. And the factual context—clearly laid out in ¶¶ 44 and 53 of this dissent—shows that *Jackson* is directly contrary to the Majority's ruling today.

The Majority further denigrates *Jackson*'s significance by noting that the parties here did not cite it in their briefing. *Supra* ¶ 34. But "our review is not limited to the authorities cited by the parties." *State v. Ingram*, 239 Ariz. 228, 230 ¶ 8 n.4 (App. 2016); *see also State v. Zaman*, 190 Ariz. 208, 211 (1997) (court relied on its own research in resolving issue). "If application of a legal principle, even if not raised below, would dispose of an action on appeal and correctly explain the law, it is appropriate for us to consider the issue." *Evenstad v. State*, 178 Ariz. 578, 582 (App. 1993). Limiting this Court only to argument and authorities raised by the parties risks reaching an incorrect result. *Id.* In *Jackson*, this Court "s[aw] no error" in the trial court's reliance on a prosecutor's avowal of fact to deny a *Batson* objection, 170 Ariz. at 92, which contradicts the Majority's analysis and must be addressed. Who has correctly read *Jackson* will have to await further review.

juror's right to equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution as recognized in *Batson* is a weighty matter, but it is still a procedural matter about how the trial will be conducted, not a substantive matter of a defendant's guilt or innocence. Thus, under Arizona law, a trial court can consider a prosecutor's avowal of fact in ruling on a *Batson* objection.

¶46 The Majority explains away the common use of avowals in procedural matters by claiming that those avowals are specifically authorized by rules of procedure, and since no rule authorizes the use of avowals in *Batson* proceedings, avowals cannot be used in those proceedings. *Supra* ¶ 32. But the Majority cites no authority holding that avowals can be used only when rules of procedure specifically authorize them. Indeed, it cannot do so because avowals are accepted in many circumstances without any authorization by a rule, *see Zaid*, 249 Ariz. at 158 ¶ 10; *Mendez*, 202 Ariz. at 130 ¶ 7; *United Metro Materials, Inc.*, 197 Ariz. at 483 ¶ 22, including *Batson* objections, *Jackson*, 170 Ariz. at 92.

¶47 Not only does the Majority err in stating Arizona law on the use of avowals, its holding that a trial court cannot believe a prosecutor's race-neutral reason for a strike based solely on its evaluation of the prosecutor's demeanor and credibility is contrary to *Batson* and its progeny. The issue for the trial court in ruling on a *Batson* objection is whether the prosecutor exercised the peremptory strike to intentionally discriminate on the basis of the juror's race. *Batson*, 476 U.S. at 98; *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). Of course, in making this determination, the trial court must consider the reason "in light of all of the relevant facts and circumstances . . . and the arguments of the parties." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019); *Snyder*, 552 U.S. at 478 (noting that "all of the circumstances that bear upon the issue of racial animosity must be consulted"). But because the exercise of a peremptory strike is "inherently subjective," *Miller-El v. Dretke*, 545 U.S. 231, 267 (2005) (Breyer, J., concurring), "[t]here will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge," *Hernandez v. New York*, 500 U.S. 352, 365 (1991). The "record evidence" that the Majority believes *Batson* requires to independently verify the prosecutor's credibility will often be hard to come by.

¶48 This case illustrates this very point. The prosecutor struck the only African American on the venire, and Ross's counsel objected under *Batson*. The trial court asked for a response, and the prosecutor said his reasons for striking the juror had "nothing to do with race." The prosecutor explained that when the juror "walked into the courtroom, he blessed the defendant. He took his cane and made the cross sign at him and said good luck, or nodded good luck, and then went and took his seat." The trial court asked the prosecutor if he himself had seen that or if someone else had, and the prosecutor answered,

> No, I saw it. I was standing right here. He came in right at the entrance, he took the cane that he uses to walk with, he went like this and mouthed good luck, and then went and took his seat.

The trial court asked if "anyone else on your side of the aisle saw what you saw when he would have entered or that was just you," and the prosecutor said that no one else had seen the conduct. The trial court turned to Ross's counsel, who said, "[W]e didn't see that."

¶49 The trial court then accepted the prosecutor's reason as race-neutral:

> [The prosecutor]'s an officer of this court. If he's telling me that the gentleman walked in here and blessed anyone on either side of the aisle, I would be deeply troubled by that. And so to the extent that he would have looked at Mr. Ross and done that, or in Mr. Ross' direction and done that, we can't have somebody under those circumstances on this jury.

The court found that the juror's blessing Ross and wishing him good luck was "a race-neutral reason why the State would want to strike anyone, regardless of race." Ross's counsel suggested that the court examine the video recording of the proceeding. The trial court allowed counsel to do so, but noted that it did not need to see the video because it would "give the same courtesy to any other officer of the court that [it would give] to [the prosecutor], which is if he saw something like that, that would be a race-neutral reason." Because the camera was focused on the bench, however, it did not record the jurors entering the courtroom. The trial court denied Ross's *Batson* objection.

¶50 The trial court did exactly what *Batson* and subsequent United States Supreme Court decisions require. It considered the proffered reason "in light of all of the relevant facts and circumstances . . . and the arguments of the parties." *Flowers*, 139 S. Ct. at 2243. It questioned the prosecutor about the circumstances surrounding his observation of the juror's conduct, it sought input from defense counsel, and it explored whether the video recording would support or disprove the prosecutor's reason. And then, based on its evaluation of the circumstances and the prosecutor's demeanor, it determined that the prosecutor was credible in saying that he struck the juror because he observed the juror bless Ross and wish him good luck, indisputably a race-neutral reason and no pretext for discrimination. The trial court resolved the *Batson* objection in the way the Supreme Court not only permits but *expects*. *See Hernandez*, 500 U.S. at 365 ("[T]he best evidence often will be the demeanor of the attorney who exercises the challenge.").

¶51 The Majority nevertheless holds that the trial court cannot rely on its own evaluation of the prosecutor's credibility because it did not see the juror's conduct itself to determine whether the prosecutor was accurately recounting the juror's conduct. It avows that "no Arizona opinion—and there have been nearly 80—has found a disputed avowal about objective conduct in the courtroom provides sufficient record evidence to support an explanation that could defeat a *Batson* challenge." *Supra* ¶ 24. The Majority's statement, however, is inaccurate in two respects. First, the Majority characterizes the avowal as "disputed," but this is not so. Ross's counsel did not contradict the prosecutor's avowal, did not tell the trial court that she observed the juror's conduct and he did not make the cross sign at the defendant and wish him good luck. She merely said, "[W]e didn't see that," meaning that she could neither corroborate nor contradict the prosecutor's avowal. The Majority's use of "disputed" in this context means nothing more than "uncorroborated."

¶52 Second, even if defense counsel's response would constitute "disputing" the avowal, the Majority is wrong in claiming that "no Arizona opinion" has found that a disputed avowal about objective courtroom conduct is sufficient to overrule a *Batson* objection. The Majority once again overlooks *Jackson*. In *Jackson*, this Court "s[aw] no error" in the trial court's reliance on the prosecutor's avowal of fact about a juror's appearance—which the defense counsel "disputed" in the sense that the Majority uses that term—in denying a *Batson* objection. 170 Ariz. at 92. *See supra* ¶ 44.

¶53 The Majority has a very different view of *Jackson*. It views that decision as holding that the defendant waived his *Batson* objection by failing to raise it before the jury panel had been dismissed. *Supra* ¶ 25. But that is not the case. The defendant did not waive his *Batson* objection; the trial court actually ruled on the objection, relying on the prosecutor's avowal of fact about the juror's appearance to find the reason for the strike was race-neutral. 170 Ariz. at 92. What the defendant waived – because the objection was addressed after the juror in question and the jury panel had been dismissed – was the argument that the trial court could not rely on the prosecutor's avowal to resolve the objection: "If the issue had been raised in a timely manner, the trial court would have been able to observe the individual and to see whether the prosecutor was correct. Failure to do so is a waiver of the *argument*." *Id.* at 92–93 (emphasis added). Thus, *Jackson* held that absent an objection to the prosecutor's avowal before the juror in question has been dismissed, the trial court *can* rely on the avowal in ruling on a *Batson* objection.[6] *Id.* at 92 ("We see no error."). Although seeing the juror's hairstyle to validate the prosecutor's avowal would have been preferable, the trial court did not need to see the juror to judge the prosecutor's credibility under *Batson*.

¶54 More important than *Jackson*, however, the United States Supreme Court came to the same conclusion nearly 20 years later in *Thaler v. Haynes*, 559 U.S. 43 (2010). In that case, the Supreme Court held that the trial court need not have personally observed the conduct giving rise to the reason for the peremptory strike to be able to determine the prosecutor's credibility:

> [W]here the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, any observations of the juror that the judge was able to make during the voir dire. But *Batson* plainly did not go further and hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor.

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[6] The Majority uses *Jackson* to argue that because the prosecutor in this case made his avowal of fact about the blessing after the juror in question and the jury panel had been dismissed, the *prosecutor* waived his ability to provide his race-neutral reason, and the trial court consequently could not rely on the prosecutor's avowal. *Supra* ¶¶ 25–26. This stands *Jackson* on its head.

Id. at 48 (also noting that it had not established such a rule in *Snyder*). The Supreme Court repeated in *Thaler* the refrain found throughout its *Batson* decisions that "the best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor." *Id.* at 49 (citing *Snyder*, 552 U.S. at 477; *Hernandez*, 500 U.S. at 365).

¶55 The Majority contends that *Thaler* does not control this case because *Thaler* dealt with striking a juror based on demeanor, while the strike here was based on the juror's conduct. *Supra* ¶ 33. The Majority does not explain, however, the difference between "demeanor" and "conduct" for purposes of determining whether the prosecutor intended to discriminate against the juror. Both are valid reasons for exercising a peremptory strike, and the Majority does not explain why the trial court *can* judge the prosecutor's credibility without observing the juror's underlying conduct when the reason is demeanor, but *cannot* do so when the reason is the underlying conduct itself.

¶56 The Majority does not do so because no difference exists between the two. The prosecutor struck the juror in *Thaler* because the juror was "somewhat humorous" and "not serious," conduct that indicated that the juror would not consider the possibility of imposing a death sentence "in a neutral fashion." 559 U.S. at 44. The prosecutor struck the juror here because the juror blessed Ross and wished him good luck, conduct that no doubt indicated—just as the juror's conduct did in *Thaler*—that the juror would not judge the case in a neutral fashion. Both strikes are based on conduct and the demeanor the conduct revealed. The trial court in each instance could evaluate the prosecutor's credibility without observing the underlying conduct. *Thaler* cannot be distinguished and controls this case.

¶57 The trial court's determination of the prosecutor's credibility without observing the juror's underlying conduct therefore accorded with *Thaler*. Undoubtedly, the fact that no one but the prosecutor saw the conduct at issue in this case counts against him in the credibility determination, but that does not mean that the trial court could not believe that the prosecutor accurately saw and described the juror's conduct. The trial court observed the prosecutor during the trial and questioned him about the reason for his strike. The trial court questioned Ross's counsel, who did not directly contradict the prosecutor, merely stating that she "didn't see that." Based on these circumstances, the trial court found that the prosecutor spoke truthfully when he avowed that the juror blessed Ross and wished him good luck. Nothing precluded the trial court from so finding.

¶58 As the Supreme Court's *Batson* opinions make clear, the focus of resolving a *Batson* objection is the trial court's evaluation of the prosecutor's credibility, which, as *Thaler* holds, does not require the trial court to have observed the juror's behavior. For that reason, the Majority's focus on independent record evidence is mistaken. The Majority's analysis transforms the exercise of a peremptory strike into a strike for cause. The Majority holds that the prosecutor was required to make a record of the juror's conduct at the time it occurred, finding that the prosecutor could (and should) have made a strike for cause, and that his failure to do so waives the reason for the peremptory strike. *Supra* ¶¶ 25–26. But not only is a peremptory strike *not* a strike for cause, *Batson*, 476 U.S. at 97 ("[T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause."), the notion that a prosecutor must make a record *before* the *Batson* issue arises or waive the reason conflicts with *Thaler*, 559 U.S. at 48.[7] Requiring the prosecutor to make a record before the *Batson* issue arises is also procedurally inappropriate because the exercise of peremptory strikes occurs *after* the exercise of strikes for cause. *See* Ariz. R. Crim. P. 18.5(f) ("All challenges for cause must be made and decided before the court may call on the parties to exercise their peremptory challenges.").

¶59 As this analysis shows, Arizona law and Supreme Court precedent do not support the Majority's conclusion that the trial court cannot rely on its evaluation of the prosecutor's credibility and demeanor to determine whether the prosecutor is telling the truth about his reason for peremptorily striking a juror without independent record evidence corroborating that reason. The unstated concern underlying the Majority's analysis is that without hard evidence supporting a reason for a peremptory strike, a prosecutor may simply concoct a race-neutral reason, and any reason without evidence is simply a denial of a discriminatory motive or an assurance of good faith, necessarily insufficient under *Batson*. *Purkett v. Elem*, 514 U.S. 765, 769 (1995). But as the Supreme Court has recognized, trial courts are more than capable of guarding against such perfidy. Trial courts "possess the primary responsibility to enforce *Batson* and prevent racial discrimination" in the jury selection process. *Flowers*, 139 S. Ct. at 2243; *Snyder*, 552 U.S. at 477 ("The trial court has a pivotal role in evaluating *Batson* claims."). Judging credibility and demeanor are issues that "lie peculiarly within a trial judge's province." *Snyder*, 552 U.S. at 477 (citation and quotation marks omitted). The trial court here questioned the prosecutor, observed his demeanor, considered the surrounding

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[7] The Majority supports its waiver analysis with *Jackson*. *Supra* ¶ 25. But the Majority misreads that decision. *Supra* ¶¶ 52–53.

circumstances, and found the prosecutor credible. The court did what it was supposed to do.

¶60 The Majority's analysis is also inconsistent with the application of this Court's standard of review for *Batson* claims. The issue before the trial court was whether the prosecutor struck the African American juror from the jury panel because of the juror's race. The trial court considered the prosecutor's reason—that the juror blessed Ross and wished him good luck—in light of all the facts and circumstances and arguments, including the prosecutor's demeanor, and found that the prosecutor did not intend to discriminate. Because the trial court's ruling turned on its evaluation of credibility, this Court is required to "give those findings great deference." *Batson*, 476 U.S. at 98, n.21; *Snyder*, 552 U.S. at 479 (appellate court's standard of review of *Batson* factual determinations is "highly deferential"). This Court must affirm the trial court's ruling that the prosecutor did not intend to discriminate "unless it is clearly erroneous." *Snyder*, 552 U.S. at 477. Nothing in the record shows that the trial court's determination was clearly erroneous. Nevertheless, the Majority does not defer to the trial court's factual findings on credibility and finds that its *Batson* ruling should be reversed. This violates *Batson*.

¶61 The Majority's analysis misapplies Arizona law and Supreme Court precedent in holding that the trial court erred in denying Ross's *Batson* objection. I would hold that the trial court properly denied it. I would therefore affirm Ross's convictions and sentences.

AMY M. WOOD • Clerk of the Court
FILED: HB

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA ex rel. WILLIAM G. MONTGOMERY,
Maricopa County Attorney, *Petitioner*,

v.

THE HONORABLE JOSE PADILLA, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
Respondent Judge,

CHRIS SIMCOX, a.k.a. CHRISTOPHER ALLEN SIMCOX,
Real Party in Interest.

No. 1 CA-SA 15-0087
FILED 5-8-2015
AMENDED PER ORDER FILED 5-28-15

Petition for Special Action from the Superior Court in Maricopa County
No. CR2013-428563-001
The Honorable Jose S. Padilla, Judge

JURISDICTION ACCEPTED; RELIEF DENIED

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OPINION

Judge Randall M. Howe delivered the opinion of the Court, in which Presiding Judge Margaret H. Downie and Judge Patricia K. Norris joined.

H O W E, Judge:

¶1 The State of Arizona seeks special action relief from the trial court's refusal to restrict Defendant Chris Simcox from personally cross-examining the child victims and witness in his trial on several sex charges. We accept jurisdiction because the State has no adequate remedy by appeal and the issue is one of first impression and statewide importance. Ariz. R.P. Spec. Act. 1(a); *Ariz. Dep't of Econ. Sec. v. Superior Court (Angie P.)*, 232 Ariz. 576, 579 ¶ 4, 307 P.3d 1003, 1006 (App. 2013).

¶2 We deny relief, however. A trial court may exercise its discretion to restrict a self-represented defendant from personally cross-examining a child witness without violating a defendant's constitutional rights to confrontation and self-representation. It can do so, however, only after considering evidence and making individualized findings that such a restriction is necessary to protect the witness from trauma. Because the State did not present such evidence—and in fact eschewed the opportunity to present evidence when invited—the trial court had no basis to restrict Simcox from cross-examining the child witnesses.

FACTS AND PROCEDURAL HISTORY

¶3 The State has charged Simcox with three counts of sexual conduct with a minor, two counts of child molestation, and one count of furnishing harmful items to minors. The alleged victims are Simcox's 8-year-old daughter Z.S. and Z.S.'s 8-year-old friend, J.D. The State plans to call Z.S. and J.D. to testify about the incidents that form the bases of the charges. The State also plans to call as a witness Z.S.'s 7-year-old friend E.M. to testify about an alleged incident she had with Simcox. The State will seek to admit E.M.'s testimony under Arizona Rule of Evidence 404(c) to show that Simcox has an aberrant sexual propensity to commit the charged offenses.

¶4 Simcox requested that he be allowed to represent himself in the criminal proceedings pursuant to the Sixth Amendment to the United States Constitution and *Faretta v. California*, 422 U.S. 806 (1975). The trial court granted the request but nevertheless appointed advisory counsel to assist him.

¶5 In response to Simcox's invocation, the State requested that the trial court accommodate the child witnesses by restricting Simcox from personally cross-examining them and requiring that his advisory counsel conduct the cross-examinations. The State supported its request with email correspondence from (1) Z.S.'s mother, explaining her outrage that Simcox would cross-examine Z.S., recounting Z.S.'s fear that Simcox would "hurt her feelings again," and stating that personal cross-examination would severely hinder Z.S.'s psychological recovery; (2) J.D.'s mother, explaining how the incident with Simcox has negatively affected J.D.'s behavior and stating that she feared that allowing Simcox to address J.D. would set J.D. "back in her healing and quite possibly exacerbate her symptoms and anxiety/panic attacks"; and (3) E.M.'s mother, stating that E.M. is as much a victim as Z.S. and should not "be punished, more than once, by any adult who used the tenure of age and trust against her." Simcox objected, arguing

that restricting him from personally conducting the cross-examinations would interfere with his right of self-representation.

¶6 At the hearing on the State's request, the trial court asked the State to present its evidence, but the State demurred, arguing that evidence was unnecessary. The trial court disagreed. It noted that the United States Supreme Court held in *Maryland v. Craig*, 497 U.S. 836, 855 (1990), that an order restricting a defendant's right to confront a child witness had to be "case-specific" and that the court must hear evidence to determine whether the restriction is necessary to protect the particular child. The State responded that *Craig* was inapplicable because the defendant in that case was not representing himself. The State relied on *Fields v. Murray*, 49 F.3d 1024 (4th Cir. 1995), in which the circuit court held that a state trial court had not violated a defendant's rights by restricting him from personally cross-examining his child victim even though it had not considered any evidence that the victim would be traumatized.

¶7 The trial court denied the State's request "on the status of this record." The court acknowledged the mothers' letters, but ruled that "there is simply no showing that conf[ront]ing [Simcox] in and of itself will cause further trauma." The State moved to stay the proceedings, which the trial court denied. The State then petitioned this Court for special action relief and requested a stay of the trial. This Court denied the stay but affirmed the briefing schedule to consider the petition. J.D.'s mother subsequently sought and obtained an emergency stay from the Arizona Supreme Court pending this Court's review of the petition.

DISCUSSION

¶8 The State argues that the trial court erred in denying its request to restrict Simcox from personally cross-examining the children. The State contends that a defendant charged with sex offenses against children may be categorically barred from personally cross-examining the child witnesses. We review purely legal or constitutional issues de novo, *State v. Booker*, 212 Ariz. 502, 504 ¶ 10, 135 P.3d 57, 59 (App. 2006), but defer to the trial court's factual findings unless they are clearly erroneous, *State v. Forde*, 233 Ariz. 543, 556 ¶ 28, 315 P.3d 1200, 1213 (2014).

¶9 On the record before it, the trial court did not err in refusing to restrict Simcox from personally cross-examining the children. A criminal defendant has the constitutional right to confront the witnesses against him face-to-face, and this right is implemented primarily through cross-examination. *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987); *State v. Vess*, 157

Ariz. 236, 237–38, 756 P.2d 333, 335–36 (App. 1988). When a defendant exercises his right to represent himself, he has the right to personally cross-examine the State's witnesses. *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984) ("The *pro se* defendant must be allowed . . . to question witnesses."); *see also Faretta*, 422 U.S. at 818 (providing that the Sixth Amendment "grants to the accused personally the right to make his defense").

¶10 Of course, this does not mean that the right of a self-represented defendant to personally conduct cross-examination is absolute. Although the face-to-face component of cross-examination is not "easily dispensed with," *Craig*, 497 U.S. at 850, denying a face-to-face confrontation will not violate the Confrontation Clause when it is "necessary to further an important public policy" and the reliability of the testimony is otherwise assured, *id.* The United States Supreme Court recognized in *Craig* that a state's interest in protecting the physical and psychological well-being of child abuse victims is sufficiently important to justify restrictions on cross-examination if the State makes an adequate showing of necessity. *Id.* at 853–55. Such a finding of necessity "must of course be a case-specific one," *id.* at 855, and the trial court must hear evidence to determine whether the restriction is necessary to protect the child's welfare, *see id.* at 855–56 (considering cross-examination by closed-circuit television). Necessity cannot be presumed without evidence. *See Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (rejecting "legislatively imposed presumption of trauma" when considering statutory limitations on cross-examination of child abuse victims; "something more than the type of a generalized finding underlying such a statute is needed").

¶11 In denying the State's request, the trial court recognized and followed the requirements of the Confrontation Clause and the Supreme Court precedent interpreting it. The court understood that it could not restrict Simcox from personally cross-examining the child witnesses without hearing evidence and making case-specific findings that restricting his ability to personally cross-examine the witnesses was necessary to protect each child from trauma. With that understanding, the court asked the State to present its evidence, but the State declined to do so. Without evidence, the court was constrained to deny the State's request. Although the State did present the correspondence from the children's mothers, the court interpreted the correspondence to explain the general trauma the children were suffering from Simcox's alleged actions and the trial. But general trauma is not sufficient to restrict cross-examination; the trauma must be caused specifically by the personal cross-examination. *See Craig*, 497 U.S. at 856 ("The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the

defendant."). Upon our review, we cannot say that the trial court clearly erred in its interpretation of the correspondence. *See Forde*, 233 Ariz. at 556 ¶ 28, 315 P.3d at 1213 (factual findings reviewed for clear error).

¶12 This procedure—restricting cross-examination of child witnesses only upon a case-specific showing that such a restriction is necessary—is nothing new. Arizona allows a child to testify in a criminal proceeding via closed-circuit television or by prior recording, A.R.S. § 13-4253, but only after the trial court makes "an individualized showing of necessity," *State v. Vincent*, 159 Ariz. 418, 429, 768 P.2d 150, 161 (1989) (relying on *Coy*, 487 U.S. at 1021, and *Vess*, 157 Ariz. at 238, 756 P.2d at 335). A generalized conclusion that any child would be traumatized by testifying in the presence of the defendant-parent is not sufficient to invoke the statute. *Vincent*, 159 Ariz. at 428, 768 P.2d at 160.

¶13 *Vincent* is instructive about the need for case-specific findings. There, two young children were witnesses in their father's trial for murdering their mother. *Id.* at 420, 768 P.2d at 152. Pursuant to § 13-4253, the State moved to record the children's testimony and to present it at trial. *Id.* at 426, 768 P.2d at 158. Without considering any evidence that the children would suffer trauma if required to testify at trial, the trial court permitted the recording, ruling that "children . . . of such tender age . . . could be traumatized due to the severe nature, [and] severity of the crime charged," and that it was in their best interests "not to look upon the face of their father" during their testimony. *Id.* The children's testimony was then recorded, with the prosecutor, defense counsel, the children's foster mother, and the trial judge present; the defendant was in another room observing the testimony and had telephonic access to his counsel. *Id.* at 157, 768 P.2d at 425.

¶14 The Arizona Supreme Court ruled this procedure violated the defendant's confrontation rights because the trial court had made no individualized finding that recording the children's testimony was necessary:

> *Coy* and *Vess* both tell us at a minimum that such generalized conclusions do not suffice to justify a substitute for face-to-face confrontational testimony. Because there were no particularized findings concerning the comparative ability of the Vincent children to withstand the trauma of face-to-face testimony, as contrasted with the trauma of a videotaped procedure with their father shielded from their view, we hold

> that A.R.S. § 13-4253 was applied in such a way as to violate the defendant's constitutional right to confrontation.

Id. at 428-29, 768 P.2d at 160-61. The principle is clear: restrictions on a defendant's confrontation rights cannot be justified without individualized findings.

¶15 Apparently to avoid this analysis, the State repeatedly notes that it is not seeking any accommodation under § 13-4253. But the issue is not whether the statute is invoked; it is whether the Confrontation Clause permits a trial court to restrict a self-represented defendant from personally cross-examining the witnesses against him. The United States Supreme Court in *Craig*, our supreme court in *Vincent*, and our own court in *Vess* hold that a defendant's right to cross-examine child witnesses may not be restricted unless the trial court makes case-specific findings that the restriction is necessary to protect them from the trauma caused by the cross-examination. *Craig*, 497 U.S. at 855; *Vincent*, 159 Ariz. at 428-29, 768 P.2d at 160-61; *Vess*, 157 Ariz. at 238, 756 P.2d at 335. Because the State did not present evidence from which the trial court could have made individualized, case-specific findings that the children here required protection from being personally cross-examined by Simcox, the trial court did not err by denying the State's request for a restriction.

¶16 The State's contention that no such case-specific findings are necessary misapprehends the nature of a criminal defendant's rights. First, the State argues that restricting Simcox from personally cross-examining the children does not affect his Sixth Amendment right to represent himself because that right does not include a right to personally conduct cross-examination. The State claims this is so because the trial court has the authority under Arizona Rule of Evidence 611 to require advisory counsel to conduct witness examination without infringing on a defendant's right of self-representation. The State cites *State v. Wassenaar*, in which we held that the trial court did not violate a defendant's right to self-representation by requiring that advisory counsel conduct the direct examination of the defendant. 215 Ariz. 565, 573 ¶ 29, 161 P.3d 608, 616 (App. 2007).

¶17 But *Wassenaar* does not affect the self-represented defendant's right to conduct the examination of other witnesses. Advisory counsel's participation in that case was necessary because of the question-and-answer format of direct examination; the defendant could hardly be expected to question himself on the stand. *Id.* at ¶ 29, 161 P.3d at 616. But no such necessity existed with witnesses other than the defendant; the defendant personally examined the other witnesses. *Id.* Here, except when

Simcox testifies himself, his right to self-representation presumptively allows him to personally examine—and cross-examine—the witnesses. *McKaskle*, 465 U.S. at 174 ("The *pro se* defendant must be allowed . . . to question witnesses.").

¶18 Second, the State argues that the restriction does not affect Simcox's right to confront witnesses because while he would be barred from conducting the cross-examination personally, he would remain in the courtroom and have a face-to-face confrontation with the children, which is all the Confrontation Clause guarantees him. This argument, however, fails to account for the effect that the right to self-representation has on the right to confront witnesses.

¶19 The State is correct that when a defendant is represented by counsel, his confrontation rights are satisfied if he is in the courtroom and can face the witness while his counsel conducts cross-examination. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) ("The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."). But because a self-represented defendant has the right to personally cross-examine the witnesses, *McKaskle*, 465 U.S. at 174, restricting a defendant from doing so *is* a restriction on his right to confrontation—and a significant one at that. *State v. Folk*, 256 P.3d 735, 745 (Idaho 2011) ("Cross-examination is often a fluid process, and the person forming the questions must be able to concentrate on the answers and what further questions are necessary to elicit the desired information."). Moreover, imposing an unusual arrangement such as requiring advisory counsel to cross-examine critical witnesses in place of the defendant could affect the jurors' perception of the defendant. *Cf. Estelle v. Williams*, 425 U.S. 501, 504–05 (1976) (fearing the jurors' judgment may be affected by viewing defendant in jail clothing). Because a self-represented defendant's right to personally cross-examine witnesses is so important in the trial process, any restriction on that right can occur only upon a showing that the restriction is necessary to achieve an important public policy—here, to protect child witnesses from the trauma of being personally cross-examined by the defendant.

¶20 Third, the State argues that the restriction is appropriate because no case-specific or individualized findings are necessary in cases involving child abuse or sex offenses against children. Although not so stated, the State essentially argues that a court should presume trauma when child witnesses are involved. This argument directly counters the holdings of *Coy*, *Vincent*, and *Vess* that trauma will *not* be presumed and

that restrictions on cross-examination must be based on individualized findings of necessity. *Coy*, 487 U.S. at 1021; *Vincent*, 159 Ariz. at 428–29, 768 P.2d at 160–61; *Vess*, 157 Ariz. at 238, 756 P.2d at 335.

¶21 The authority that the State cites to support its position, *Fields v. Murray*, has dubious value. In *Fields*, the Fourth Circuit Court of Appeals considered a state defendant's claim on habeas corpus review that the state court had denied him his right to personally cross-examine the child victims who had alleged that he had sexually abused them. 49 F.3d at 1028. The state court had precluded him from doing so without hearing evidence and based its ruling on the nature of the crimes and the defendant's relationship with the victims. *Id.* at 1036.

¶22 The circuit court ruled that the state court's decision did not violate the right to confrontation. *Id.* The circuit court recognized that the state court should have made a "more elaborate finding" as *Craig* requires, but noted that "[i]t is far less difficult to conclude that a child sexual abuse victim will be emotionally harmed by being personally cross-examined by her alleged abuser than by being required merely to testify in his presence." *Id.* This conclusion, however, rests merely on a general presumption of trauma, which is directly contrary to *Coy*, *Vincent*, and *Vess*. Thus, it is not good law in Arizona and we are not bound to follow it. *See State v. Montano*, 206 Ariz. 296, 297 n.1, 77 P.3d 1246, 1247 n.1 (2003) (holding that the Arizona Supreme Court is not bound by federal circuit court's interpretation of the federal constitution).

¶23 The State also justifies its argument on the Victim's Bill of Rights, highlighting a victim's right to be free from intimidation, harassment, and abuse. Self-representation and confrontation of witnesses, however, are bedrock constitutional rights of our criminal justice system and are not lightly restricted. If victims' rights conflict with a defendant's constitutional rights, the defendant's rights must prevail. *State v. Riggs*, 189 Ariz. 327, 330–31, 942 P.2d 1159, 1162–63 (1997) ("[I]f, in a given case, the victim's state constitutional rights conflict with a defendant's federal constitutional rights to due process and effective cross-examination, the victim's rights must yield. The Supremacy Clause requires that the Due Process Clause of the U.S. Constitution prevail over state constitutional provisions.").

¶24 This does not mean that victims cannot be protected. If the State believes that a defendant's personal cross-examination of a witness is intimidating or harassing the witness, it may always ask the court to control the examination. *See* Ariz. R. Evid. 611(a)(3) (providing that the court

should "exercise reasonable control" over the mode of examining witnesses to "protect witnesses from harassment or undue embarrassment"). If the State believes that a defendant's personal cross-examination of a witness would cause particular trauma to the witness, it can—consistent with the United States Constitution—present evidence that the trauma will occur and ask the trial court to make case-specific findings that will justify restricting the defendant from personally cross-examining the witness.

¶25 The trial court invited the State to present evidence of trauma, but the State declined the opportunity. Without evidence showing that the child witnesses would suffer particular trauma from being personally cross-examined by Simcox, the trial court had no constitutional basis to restrict Simcox from doing so. Thus, on this record, the trial court properly denied the State's request.[1]

CONCLUSION

¶26 For these reasons, we accept jurisdiction but deny relief.

Ruth A. Willingham · Clerk of the Court
FILED: jt

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1 If the State subsequently discovers evidence that it believes would justify restricting Simcox's right to personally cross-examine the child witnesses, however, nothing in this opinion would preclude the State from making a new request to the trial court.

APPENDIX L

ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW

Appellate Courts

Name of Judge: **Total Surveys:** 89 **Assignment:** Appellate **Cycle:** Retention Election

APP-04 Hon. Randall M. Howe	ATTORNEY					20	30	PEER JUDGE/JUSTICE					13		SUP COURT JUDGE					21		STAFF					5	1
	UN	PO	SA	VG	SU	Valid	Mean	UN	PO	SA	VG	SU	Total	Mean	UN	PO	SA	VG	SU	Total	Mean	UN	PO	SA	VG	SU	Total	Mean
Section I: Legal Ability	0	1	4	2	11	18	3.3	0	0	2	7	5	13	3.2	0	0	1	5	13	19	3.6							
Legal reasoning ability	0	1	4	2	11	18	3.3	0	0	2	6	5	13	3.2	0	0	1	6	12	19	3.6							
Knowledge of law	0	1	3	4	10	18	3.3	0	1	1	8	3	13	3.0	0	0	1	5	13	19	3.6							
Decisions based on law and facts	0	1	4	1	12	18	3.3	0	0	1	6	6	13	3.4	0	0	1	6	12	19	3.6							
Clearly written, legally supported decisions	0	1	3	2	11	17	3.4	0	0	2	6	5	13	3.2	0	0	1	4	14	19	3.7							
Section II: Integrity	0	0	1	2	6	9	3.6	0	0	0	1	12	13	3.9	0	0	1	2	7	11	3.6	0	0	0	1	5	6	3.8
Basic fairness and impartiality	0	0	1	2	10	13	3.7	0	0	0	1	12	13	3.9	0	0	1	2	9	12	3.7	0	0	0	1	4	5	3.8
Equal treatment regardless of race	0	0	1	2	5	8	3.5	0	0	0	1	12	13	3.9	0	0	1	2	8	11	3.6	0	0	0	1	5	6	3.8
Equal treatment regardless of gender	0	0	1	2	5	8	3.5	0	0	0	1	12	13	3.9	0	0	1	3	8	12	3.6	0	0	0	1	5	6	3.8
Equal treatment regardless of religion	0	0	1	2	5	8	3.5	0	0	0	1	12	13	3.9	0	0	1	2	7	10	3.6	0	0	0	1	5	6	3.8
Equal treatment regardless of national origin	0	0	1	2	6	9	3.6	0	0	0	1	12	13	3.9	0	0	1	2	7	10	3.6	0	0	0	1	4	5	3.8
Equal treatment regardless of disability	0	0	1	2	5	8	3.5	0	0	0	1	12	13	3.9	0	0	1	2	7	10	3.6	0	0	0	1	5	6	3.8
Equal treatment regardless of age	0	0	1	2	5	8	3.5	0	0	0	1	12	13	3.9	0	0	1	2	7	10	3.6	0	0	0	1	5	6	3.8
Equal treatment regardless of sexual orientation	0	0	1	2	5	8	3.5	0	0	0	1	12	13	3.9	0	0	1	2	7	10	3.6	0	0	0	1	4	5	3.8
Equal treatment regardless of economic status	0	0	0	2	7	9	3.8	0	0	0	1	12	13	3.9	0	0	1	2	7	10	3.6	0	0	0	1	5	6	3.8
Section III: Communication Skills	0	0	2	6	15	22	3.6	0	0	0	3	10	13	3.8								0	0	0	2	2	4	3.5
Attentiveness	0	0	2	9	19	30	3.6	0	0	0	2	11	13	3.8														
Demeanor in communications with counsel	0	0	1	8	17	26	3.6																					
Appropriate restrictions on counsel during argument	0	0	0	0	1	1	4.0	0	0	0	2	10	12	3.8														
Relevant questions	0	0	3	5	19	27	3.6	0	0	0	4	9	13	3.7														
Preparation for oral argument	0	0	3	6	18	27	3.6																					
Clear and logical communications																						0	0	0	2	2	4	3.5
Section IV: Judicial temperament	0	0	2	6	21	29	3.6	0	0	0	1	12	13	3.9								0	0	0	1	4	6	3.8
Understanding and compassion																						0	0	0	2	3	5	3.6
Dignified	0	0	2	7	20	29	3.6	0	0	0	1	12	13	3.9								0	0	0	1	5	6	3.8
Courteous	0	0	2	5	21	28	3.7	0	0	0	1	12	13	3.9								0	0	0	1	5	6	3.8
Patient	0	0	2	6	21	29	3.7	0	0	0	1	12	13	3.9								0	0	0	2	4	6	3.7
Conduct that promotes public confidence in the court	0	1	1	6	21	29	3.6	0	0	0	1	12	13	3.9								0	0	0	1	5	6	3.8
Section V: Administrative Performance	0	1	1	4	10	16	3.4	0	0	1	3	8	12	3.6	0	0	1	4	13	18	3.7	0	0	0	1	3	5	3.7
Punctual in conducting proceedings																						0	0	0	2	3	5	3.6
Maintains proper control over courtroom																						0	0	0	2	2	4	3.5
Prepared for proceedings								0	0	0	4	9	13	3.7								0	0	0	2	2	4	3.5
Respectful treatment of staff																						0	0	0	1	5	6	3.8
Cooperation with peers																						0	0	0	1	4	5	3.8
Cooperation with staff																						0	0	0	1	4	5	3.8
Efficient management of calendar																						0	0	0	1	4	5	3.8
Promptness in making rulings and rendering decisions	0	1	1	4	10	16	3.4	0	0	3	3	6	12	3.3	0	0	1	4	13	18	3.7							
Works effectively with other judges								0	0	0	4	9	13	3.7														
Works effectively with other court personnel								0	0	0	3	8	11	3.7														
Effective handling of ongoing workload								0	0	2	2	7	11	3.5														

UN=Unacceptable, PO=Poor,
SA=Satisfactory, VG=Very Good, SU=Superior

Category summaries are averages and may not add up due to rounding.

Surveys were distributed to court users from 08/2011 - 01/2014

ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW

Appellate Courts

Name of Judge: APP-04 Hon. Randall M. Howe | **Total Surveys:** 89 | **Assignment:** Appellate | **Cycle:** Retention Election

	ATTORNEY					20 30	PEER JUDGE/JUSTICE					13	SUP COURT JUDGE					21	STAFF					5 1
	UN	PO	SA	VG	SU	Mean	UN	PO	SA	VG	SU	Mean	UN	PO	SA	VG	SU	Mean	UN	PO	SA	VG	SU	Mean
Section I: Legal Ability	0%	6%	20%	13%	62%	3.3	0%	2%	12%	50%	37%	3.2	0%	0%	5%	28%	67%	3.6						
Legal reasoning ability	0%	6%	22%	11%	61%	3.3	0%	0%	15%	46%	38%	3.2	0%	0%	5%	32%	63%	3.6						
Knowledge of law	0%	6%	17%	22%	56%	3.3	0%	8%	8%	62%	23%	3.0	0%	0%	5%	26%	68%	3.6						
Decisions based on law and facts	0%	6%	22%	6%	67%	3.3	0%	0%	8%	46%	46%	3.4	0%	0%	5%	32%	63%	3.6						
Clearly written, legally supported decisions	0%	6%	18%	12%	65%	3.4	0%	0%	15%	46%	38%	3.2	0%	0%	5%	21%	74%	3.7						
Section II: Integrity	0%	0%	10%	23%	67%	3.6	0%	0%	0%	8%	92%	3.9	0%	0%	9%	20%	71%	3.6	0%	0%	0%	18%	82%	3.8
Basic fairness and impartiality	0%	0%	8%	15%	77%	3.7	0%	0%	0%	8%	92%	3.9	0%	0%	8%	17%	75%	3.7	0%	0%	0%	20%	80%	3.8
Equal treatment regardless of race	0%	0%	13%	25%	63%	3.5	0%	0%	0%	8%	92%	3.9	0%	0%	9%	18%	73%	3.6	0%	0%	0%	17%	83%	3.8
Equal treatment regardless of gender	0%	0%	13%	25%	63%	3.5	0%	0%	0%	8%	92%	3.9	0%	0%	8%	25%	67%	3.6	0%	0%	0%	17%	83%	3.8
Equal treatment regardless of religion	0%	0%	13%	25%	63%	3.5	0%	0%	0%	8%	92%	3.9	0%	0%	10%	20%	70%	3.6	0%	0%	0%	17%	83%	3.8
Equal treatment regardless of national origin	0%	0%	11%	22%	67%	3.6	0%	0%	0%	8%	92%	3.9	0%	0%	10%	20%	70%	3.6	0%	0%	0%	20%	80%	3.8
Equal treatment regardless of disability	0%	0%	13%	25%	63%	3.5	0%	0%	0%	8%	92%	3.9	0%	0%	10%	20%	70%	3.6	0%	0%	0%	17%	83%	3.8
Equal treatment regardless of age	0%	0%	13%	25%	63%	3.5	0%	0%	0%	8%	92%	3.9	0%	0%	10%	20%	70%	3.6	0%	0%	0%	17%	83%	3.8
Equal treatment regardless of sexual orientation	0%	0%	13%	25%	63%	3.5	0%	0%	0%	8%	92%	3.9	0%	0%	10%	20%	70%	3.6	0%	0%	0%	20%	80%	3.8
Equal treatment regardless of economic status	0%	0%	0%	22%	78%	3.8	0%	0%	0%	8%	92%	3.9	0%	0%	10%	20%	70%	3.6	0%	0%	0%	17%	83%	3.8
Section III: Communication Skills	0%	0%	8%	25%	67%	3.6	0%	0%	0%	21%	79%	3.8							0%	0%	0%	50%	50%	3.5
Attentiveness	0%	0%	7%	30%	63%	3.6	0%	0%	0%	15%	85%	3.8												
Demeanor in communications with counsel	0%	0%	4%	31%	65%	3.6																		
Appropriate restrictions on counsel during argument	0%	0%	0%	0%	100%	4.0	0%	0%	0%	17%	83%	3.8												
Relevant questions	0%	0%	11%	19%	70%	3.6	0%	0%	0%	31%	69%	3.7												
Preparation for oral argument	0%	0%	11%	22%	67%	3.6																		
Clear and logical communications																			0%	0%	0%	50%	50%	3.5
Section IV: Judicial temperament	0%	1%	6%	21%	72%	3.6	0%	0%	0%	8%	92%	3.9							0%	0%	0%	24%	76%	3.8
Understanding and compassion																			0%	0%	0%	40%	60%	3.6
Dignified	0%	0%	7%	24%	69%	3.6	0%	0%	0%	8%	92%	3.9							0%	0%	0%	17%	83%	3.8
Courteous	0%	0%	7%	18%	75%	3.7	0%	0%	0%	8%	92%	3.9							0%	0%	0%	17%	83%	3.8
Patient	0%	0%	7%	21%	72%	3.7	0%	0%	0%	8%	92%	3.9							0%	0%	0%	33%	67%	3.7
Conduct that promotes public confidence in the court	0%	3%	3%	21%	72%	3.6	0%	0%	0%	8%	92%	3.9							0%	0%	0%	17%	83%	3.8
Section V: Administrative Performance	0%	6%	6%	25%	63%	3.4	0%	0%	8%	27%	65%	3.6	0%	0%	6%	22%	72%	3.7	0%	0%	0%	29%	71%	3.7
Punctual in conducting proceedings																			0%	0%	0%	40%	60%	3.6
Maintains proper control over courtroom																			0%	0%	0%	50%	50%	3.5
Prepared for proceedings							0%	0%	0%	31%	69%	3.7							0%	0%	0%	50%	50%	3.5
Respectful treatment of staff																			0%	0%	0%	17%	83%	3.8
Cooperation with peers																			0%	0%	0%	20%	80%	3.8
Cooperation with staff																			0%	0%	0%	20%	80%	3.8
Efficient management of calendar																			0%	0%	0%	20%	80%	3.8
Promptness in making rulings and rendering decisions	0%	6%	6%	25%	63%	3.4	0%	0%	25%	25%	50%	3.3	0%	0%	6%	22%	72%	3.7						
Works effectively with other judges							0%	0%	0%	31%	69%	3.7												
Works effectively with other court personnel							0%	0%	0%	27%	73%	3.7												
Effective handling of ongoing workload							0%	0%	18%	18%	64%	3.5												

UN=Unacceptable, PO=Poor,
SA=Satisfactory, VG=Very Good, SU=Superior

Category summaries are averages and may not add up due to rounding.

Surveys were distributed to court users from 08/2011 - 01/2014

ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW

Appellate Courts

Name of Judge: All Appellate

Total Surveys: 1795 **Assignment:** Appellate **Cycle:** Retention Election

	ATTORNEY					450	372	PEER JUDGE/JUSTICE					141		SUP COURT JUDGE					566		STAFF					175	91
	SU	VG	SA	PO	UN	Valid	Mean	SU	VG	SA	PO	UN	Total	Mean	SU	VG	SA	PO	UN	Total	Mean	SU	VG	SA	PO	UN	Total	Mean
Section I: Legal Ability	301	117	56	32	12	517	3.3	94	39	6	1	0	140	3.6	381	73	34	17	4	508	3.6							
Legal reasoning ability	307	112	55	33	13	520	3.3	91	42	6	0	0	139	3.6	381	75	34	17	4	511	3.6							
Knowledge of law	297	123	62	26	9	517	3.3	89	44	6	0	0	139	3.6	382	77	32	17	4	512	3.6							
Decisions based on law and facts	302	115	50	34	17	518	3.3	101	34	4	1	0	140	3.7	383	68	37	15	4	507	3.6							
Clearly written, legally supported decisions	297	118	55	34	10	514	3.3	96	34	9	1	0	140	3.6	376	71	34	17	4	502	3.6							
Section II: Integrity	162	48	21	4	3	238	3.5	133	4	2	0	0	139	3.9	269	36	13	5	0	323	3.8	190	45	6	0	0	241	3.8
Basic fairness and impartiality	242	82	43	20	9	396	3.3	133	4	3	0	0	140	3.9	342	44	23	5	0	414	3.7	194	49	7	0	0	250	3.7
Equal treatment regardless of race	151	41	20	0	3	215	3.6	134	4	1	0	0	139	4.0	265	35	12	5	0	317	3.8	191	45	6	0	0	242	3.8
Equal treatment regardless of gender	166	58	22	4	3	253	3.5	133	4	2	0	0	139	3.9	268	36	12	5	0	321	3.8	196	44	6	0	0	246	3.8
Equal treatment regardless of religion	142	40	17	1	2	202	3.6	129	7	3	0	0	139	3.9	257	35	12	5	0	309	3.8	187	44	6	0	0	237	3.8
Equal treatment regardless of national origin	146	40	17	0	2	205	3.6	133	4	1	0	0	138	4.0	259	35	12	6	0	312	3.8	190	45	6	0	0	241	3.8
Equal treatment regardless of disability	151	43	16	1	2	213	3.6	134	4	1	0	0	139	4.0	255	35	12	4	0	306	3.8	185	44	7	0	0	236	3.8
Equal treatment regardless of age	162	43	21	1	2	229	3.6	134	4	1	0	0	139	4.0	257	35	13	3	0	308	3.8	188	45	7	0	0	240	3.8
Equal treatment regardless of sexual orientation	141	42	17	0	2	202	3.6	131	5	1	0	0	137	3.9	254	34	12	5	1	306	3.7	187	44	5	0	1	237	3.8
Equal treatment regardless of economic status	161	44	15	7	4	231	3.5	134	4	1	0	0	139	4.0	263	35	13	3	0	314	3.8	189	44	7	0	0	240	3.8
Section III: Communication Skills	216	60	29	11	3	319	3.5	118	12	0	0	0	130	3.9								109	46	16	0	0	171	3.5
Attentiveness	301	76	42	7	2	428	3.6	121	10	0	0	0	131	3.9														
Demeanor in communications with counsel	223	66	32	17	3	341	3.4																					
Appropriate restrictions on counsel during argument	59	16	0	0	0	75	3.8	115	12	0	0	0	127	3.9														
Relevant questions	275	84	39	18	4	420	3.4	117	13	1	0	0	131	3.9														
Preparation for oral argument	220	60	32	11	6	329	3.4																					
Clear and logical communications																						109	46	16	0	0	171	3.5
Section IV: Judicial temperament	239	56	32	13	4	343	3.5	125	13	1	0	0	139	3.9								180	42	9	0	0	232	3.7
Understanding and compassion																						119	33	8	0	0	160	3.7
Dignified	243	57	36	9	2	347	3.5	127	12	0	0	0	139	3.9								197	45	7	0	1	250	3.7
Courteous	239	56	35	13	2	345	3.5	125	12	2	0	0	139	3.9								195	45	9	0	0	249	3.7
Patient	235	56	32	12	3	338	3.5	121	17	1	0	0	139	3.9								188	48	14	0	0	250	3.7
Conduct that promotes public confidence in the court	238	53	23	19	10	343	3.4	127	12	0	0	0	139	3.9								201	41	8	0	1	251	3.8
Section V: Administrative Performance	276	105	92	13	2	488	3.3	108	25	3	0	0	136	3.8	279	76	43	7	0	405	3.5	176	43	7	0	0	226	3.7
Punctual in conducting proceedings																						170	41	4	0	0	215	3.8
Maintains proper control over courtroom																						158	41	4	0	0	203	3.8
Prepared for proceedings								121	15	0	0	0	136	3.9								177	46	5	0	0	228	3.8
Respectful treatment of staff																						189	48	8	0	1	246	3.7
Cooperation with peers																						181	43	9	0	0	233	3.7
Cooperation with staff																						195	44	8	0	1	248	3.7
Efficient management of calendar																						159	40	8	0	1	208	3.7
Promptness in making rulings and rendering decisions	276	105	92	13	2	488	3.3	97	37	5	0	0	139	3.7	279	76	43	7	0	405	3.5							
Works effectively with other judges								109	22	4	0	0	135	3.8														
Works effectively with other court personnel								110	19	2	0	0	131	3.8														
Effective handling of ongoing workload								104	33	2	0	0	139	3.7														

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Surveys were distributed to court users from 02/2017 - 08/2019

ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW

Appellate Courts

Name of Judge:
All Appellate

Total Surveys: 1795 **Assignment:** Appellate **Cycle:** Retention Election

	ATTORNEY					450 372	PEER JUDGE/JUSTICE					141	SUP COURT JUDGE					566	STAFF					175 91
	SU	VG	SA	PO	UN	Mean	SU	VG	SA	PO	UN	Mean	SU	VG	SA	PO	UN	Mean	SU	VG	SA	PO	UN	Mean
Section I: Legal Ability	58%	23%	11%	6%	2%	3.3	68%	28%	4%	0%	0%	3.6	75%	14%	7%	3%	1%	3.6						
Legal reasoning ability	59%	22%	11%	6%	3%	3.3	65%	30%	4%	0%	0%	3.6	75%	15%	7%	3%	1%	3.6						
Knowledge of law	57%	24%	12%	5%	2%	3.3	64%	32%	4%	0%	0%	3.6	75%	15%	6%	3%	1%	3.6						
Decisions based on law and facts	58%	22%	10%	7%	3%	3.3	72%	24%	3%	1%	0%	3.7	76%	13%	7%	3%	1%	3.6						
Clearly written, legally supported decisions	58%	23%	11%	7%	2%	3.3	69%	24%	6%	1%	0%	3.6	75%	14%	7%	3%	1%	3.6						
Section II: Integrity	68%	20%	9%	2%	1%	3.5	96%	3%	1%	0%	0%	3.9	83%	11%	4%	1%	0%	3.8	79%	19%	3%	0%	0%	3.8
Basic fairness and impartiality	61%	21%	11%	5%	2%	3.3	95%	3%	2%	0%	0%	3.9	83%	11%	6%	1%	0%	3.7	78%	20%	3%	0%	0%	3.7
Equal treatment regardless of race	70%	19%	9%	0%	1%	3.6	96%	3%	1%	0%	0%	4.0	84%	11%	4%	2%	0%	3.8	79%	19%	2%	0%	0%	3.8
Equal treatment regardless of gender	66%	23%	9%	2%	1%	3.5	96%	3%	1%	0%	0%	3.9	83%	11%	4%	2%	0%	3.8	80%	18%	2%	0%	0%	3.8
Equal treatment regardless of religion	70%	20%	8%	0%	1%	3.6	93%	5%	2%	0%	0%	3.9	83%	11%	4%	2%	0%	3.8	79%	19%	3%	0%	0%	3.8
Equal treatment regardless of national origin	71%	20%	8%	0%	1%	3.6	96%	3%	1%	0%	0%	4.0	83%	11%	4%	2%	0%	3.8	79%	19%	2%	0%	0%	3.8
Equal treatment regardless of disability	71%	20%	8%	0%	1%	3.6	96%	3%	1%	0%	0%	4.0	83%	11%	4%	1%	0%	3.8	78%	19%	3%	0%	0%	3.8
Equal treatment regardless of age	71%	19%	9%	0%	1%	3.6	96%	3%	1%	0%	0%	4.0	83%	11%	4%	1%	0%	3.8	78%	19%	3%	0%	0%	3.8
Equal treatment regardless of sexual orientation	70%	21%	8%	0%	1%	3.6	96%	4%	1%	0%	0%	3.9	83%	11%	4%	2%	0%	3.7	79%	19%	2%	0%	0%	3.8
Equal treatment regardless of economic status	70%	19%	6%	3%	2%	3.5	96%	3%	1%	0%	0%	4.0	84%	11%	4%	1%	0%	3.8	79%	18%	3%	0%	0%	3.8
Section III: Communication Skills	68%	19%	9%	3%	1%	3.5	91%	9%	0%	0%	0%	3.9							64%	27%	9%	0%	0%	3.5
Attentiveness	70%	18%	10%	2%	0%	3.6	92%	8%	0%	0%	0%	3.9												
Demeanor in communications with counsel	65%	19%	9%	5%	1%	3.4																		
Appropriate restrictions on counsel during argument	79%	21%	0%	0%	0%	3.8	91%	9%	0%	0%	0%	3.9												
Relevant questions	65%	20%	9%	4%	1%	3.4	89%	10%	1%	0%	0%	3.9												
Preparation for oral argument	67%	18%	10%	3%	2%	3.4																		
Clear and logical communications																			64%	27%	9%	0%	0%	3.5
Section IV: Judicial temperament	70%	16%	9%	4%	1%	3.5	90%	10%	1%	0%	0%	3.9							78%	18%	4%	0%	0%	3.7
Understanding and compassion																			74%	21%	5%	0%	0%	3.7
Dignified	70%	16%	10%	3%	1%	3.5	91%	9%	0%	0%	0%	3.9							79%	18%	3%	0%	0%	3.7
Courteous	69%	16%	10%	4%	1%	3.5	90%	9%	1%	0%	0%	3.9							78%	18%	4%	0%	0%	3.7
Patient	70%	17%	9%	4%	1%	3.5	87%	12%	1%	0%	0%	3.9							75%	19%	6%	0%	0%	3.7
Conduct that promotes public confidence in the court	69%	15%	7%	6%	3%	3.4	91%	9%	0%	0%	0%	3.9							80%	16%	3%	0%	0%	3.8
Section V: Administrative Performance	57%	22%	19%	3%	0%	3.3	80%	19%	2%	0%	0%	3.8	69%	19%	11%	2%	0%	3.5	78%	19%	3%	0%	0%	3.7
Punctual in conducting proceedings																			79%	19%	2%	0%	0%	3.8
Maintains proper control over courtroom																			78%	20%	2%	0%	0%	3.8
Prepared for proceedings							89%	11%	0%	0%	0%	3.9							78%	20%	2%	0%	0%	3.8
Respectful treatment of staff																			77%	20%	3%	0%	0%	3.7
Cooperation with peers																			78%	18%	4%	0%	0%	3.7
Cooperation with staff																			79%	18%	3%	0%	0%	3.7
Efficient management of calendar																			76%	19%	4%	0%	0%	3.7
Promptness in making rulings and rendering decisions	57%	22%	19%	3%	0%	3.3	70%	27%	4%	0%	0%	3.7	69%	19%	11%	2%	0%	3.5						
Works effectively with other judges							81%	16%	3%	0%	0%	3.8												
Works effectively with other court personnel							84%	15%	2%	0%	0%	3.8												
Effective handling of ongoing workload							75%	24%	1%	0%	0%	3.7												

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