APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

SECTION I: PUBLIC INFORMATION (QUESTIONS 1 THROUGH 65)

PERSONAL INFORMATION

1. Full Name: **Sean Earl Brearcliffe**

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

3. Office Address: **Arizona Court of Appeals, Division 2**
400 W. Congress St.
Tucson, AZ 85701

4. How long have you lived in Arizona? **26 years (1987-88; 1995-present)**
What is your home zip code? **85749**

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

Pima County, 1987-89 and 1995-present

(I physically resided in Pima County between 1987-1989 while in the Air Force serving at Davis-Monthan Air Force Base. I was during that time, however, still a legal resident of the State of California)

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 Party, 1982 - present

8. Gender: **Male**

Race/Ethnicity: **White/Caucasian**

EDUCATIONAL BACKGROUND

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

Golden Gate University School of Law
536 Mission St.
San Francisco, CA 94105
1992-95; *Juris Doctor*

California State University-Hayward
(nka California State University-East Bay)
25800 Carlos Bee Blvd.
Hayward, CA 94542
1989-91; *Bachelor of Arts – English*

Community College of the Air Force
CCAF/DESS
100 S. Turner Blvd.
Maxwell Gunter AFB, AL 36114-3011
Military training accredited for years 1983-89; No degree obtained

Pima Community College
2202 W. Anklam Rd.
Tucson, AZ 85709-0001
1987-89; 2014-15; No degree obtained

University of Maryland University College – Europe
IM Bosseldorn 30, 69126
Heidelberg, Germany
1985-86; No degree obtained
(During my U.S. Air Force service overseas, I attended the extension campus on RAF Mildenhall, Suffolk, U.K.)

City Colleges of Chicago – European Division
226 West Jackson Boulevard
Chicago, IL 60606
1985-86; No degree obtained
(During my U.S. Air Force service overseas, I attended the extension campus on RAF Mildenhall, Suffolk, U.K.)

I have applied for and am currently awaiting acceptance to the Master of Judicial Studies (LLM) Program, Duke University School of Law, Durham, NC.

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

Law School: Law; no minor fields of study. Extracurricular activities: *The Federalist Society for Law and Public Policy Studies,* President, Student Chapter, 1992-95

Undergraduate (California State University): English; no minor field of study or extracurricular activities

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

I occasionally earned a place on the Dean's List during my undergraduate studies, and once during law school. I worked throughout my undergraduate studies. During law school, I was the primary caregiver for our first daughter during the day while my wife worked. It would have been ideal to be able to focus only on my studies, but it simply was not possible in our circumstances. I do not regret it, though, even if it affected my academic performance. The experiences I gained in everything I did during those years made me a better person and, ultimately, a more focused lawyer and judge.

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.

Supreme Court of Arizona; May, 1996

United States District Court, District of Arizona; June, 1996

Ninth Circuit Court of Appeals; April, 2012

***Pro hac vice* admissions:**

California (state court); 2001, 2007 and 2008
Nevada (state court); 2004 and 2009
Nevada (federal court); 2012
New Mexico (federal court); 2003
Indiana (state court); 2006

13. a. Have you ever been denied admission to the bar of any state due to failure to pass the character and fitness screening? **No** If so, explain.

b. Have you ever had to retake a bar examination in order to be admitted to the bar of any state? **No** If so, explain any circumstances that may have hindered your performance.

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

EMPLOYER	DATES	LOCATION
Arizona Court of Appeals,		
Division 2	**10/17-present**	**Tucson, AZ**
Arizona Superior Court in Pima County:		
Family Law Bench	**6/13-6/16**	
Criminal Bench	**7/16-10/17**	**Tucson, AZ**
Rusing Lopez & Lizardi, PLLC		
Senior Litigation Partner	**7/98-6/13**	**Tucson, AZ**
Law Offices of Richard D. Burris		
Associate Attorney	**5/96-7/98**	
Law Clerk	**9/95-5/96**	**Tucson, AZ**
United Parcel Service, Oakland Airport Distribution Center		
parcel sorter	**12/91- 1/92**	**Oakland, CA**
Corbett & Kane, PC		
file clerk	**1991**	**Emeryville, CA**
California State University (Hayward) Student Bookstore		
retail clerk	**9/90-8/91**	**Hayward, CA**

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.

Arizona Court of Appeals:

Division 2: Peter J. Eckerstrom, Karl C. Eppich, Philip G. Espinosa, Christopher P. Staring, Garye L. Vásquez

Division 1: Cynthia J. Bailey, Michael J. Brown, Jennifer B. Campbell, Kent E. Cattani, Maria Elena Cruz, David B. Gass, Randall M. Howe, Paul J. McMurdie, James B. Morse, Jr., Jennifer M. Perkins, Peter B. Swann, Samuel A. Thumma, David D. Weinzweig, D. Steven Williams, Lawrence F. Winthrop

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.

While I was in private practice from 1996 through 2013, my practice was a general civil and commercial litigation practice. Within this overall category were the following discrete subcategories as a percentage of my practice:

business and contract disputes	**±70%**
construction	**±10%**
insurance and insurance coverage	**±5%**
agriculture	**±2%**
employment wage-and-hour and contract	**±2%**
probate	**±2%**
bankruptcy adversary proceedings	**±2%**
commercial class actions	**2-5%**
catastrophic personal injury and wrongful death	**2-5%**
election law	**±2%**

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

None in private practice other than those listed in response to Question 16, above. As a Superior Court Judge from 2013-2017, I served three years on the Family Law Bench and sixteen months on the Criminal Bench.

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 a judge on the Court of Appeals, I draft memorandum decisions and opinions in all areas of the law and in all cases appealed to our Court from trial courts and administrative agencies in the seven southeastern Arizona counties

(Pinal, Pima, Santa Cruz, Cochise, Gila, Graham, and Greenlee). I also provide substantive input to decisions and opinions drafted by my colleagues in which I join or, when necessary, with which I specially concur or from which I dissent.

While a trial judge on the Superior Court, I was assigned to the Family Law Bench from 2013 through 2016. On a daily basis, I drafted decrees, orders, opinions and judgments in the cases assigned to my Division. Those ranged from brief substantive and procedural orders to lengthy under-advisement decisions and complex decrees. I was then assigned to the Criminal Bench until 2017, where I routinely and daily drafted orders, rulings on motions, judgments, and appellate rulings in cases assigned to my Division and Criminal Rule 32 petitions for post-conviction relief (motions seeking new trials or re-sentencing) in cases I had presided over. As a retained judge generally, I reviewed and disposed of Rule 32 petitions for post-conviction relief by written rulings in cases presided over by my predecessor judges.

I formerly chaired the Pima County Superior Court's Family Law Bench Rules Committee. This Committee was charged with commenting on proposed revisions to the Arizona Rules of Family Law Procedure on behalf of the Family Law Judges. The Committee also drafted proposed changes to the Arizona Rules of Family Law Procedure, the Local Rules of Practice for the Superior Court for Pima County, and Title 25, Arizona Revised Statutes.

On a routine basis during my former civil practice, I drafted pleadings and papers, including complaints, answers, motions for summary judgment, motions to dismiss, motions *in limine*, appellate briefs, affidavits, declarations, pre-trial statements, discovery, and the like. The subject matter of those ranged from straightforward factual and legal issues to very complex ones. I also routinely drafted settlement agreements – often as sole drafter, but also in conjunction with transactional attorneys within my firm for more complicated business dispute settlement structures. From time to time, I drafted commercial contracts for business clients and reviewed and revised contracts drafted by others.

In my earlier role as Chair of the Pima County Bar Association's Rules Committee, from 2003 to 2007, I drafted comments to proposed Rules of Civil Procedure on behalf of the Association for submission to the Arizona Supreme Court.

When I served on the United States District Court Local Rules Advisory Committee, from 2011 to 2013, I participated in the Committee's drafting of revisions to the Local Rules of Practice for the Arizona District Court. (I resigned from this Committee when I became a State Court Judge.)

In my role as Member, and then as National Chairman, of the Federal Bar Association's Professional Ethics Committee, from 2010 to 2013, I initiated and

oversaw the pilot project of drafting FBA commentary to the American Bar Association's Model Rules of Professional Conduct.

As a volunteer in community organizations, I often drafted bylaws, bylaws revisions, articles of incorporation, charitable tax-status applications, and other corporate documents needed for the operation of the not-for-profit organizations.

20. Have you practiced in adversary proceedings before administrative boards or commissions? **Yes** If so, state:

a. The agencies and the approximate number of adversary proceedings in which you appeared before each agency.

Registrar of Contractors (through the Office of Administrative Hearings):	**12 matters**
Arizona Civil Rights Division:	**1 matter**
Arizona Department of Transportation:	**1 matter**
United States Department of Agriculture:	**1 matter**
National Association of Securities Dealers:	**2 matters**

b. The approximate number of these matters in which you appeared as:

Sole Counsel:	**16**
Chief Counsel:	**1**
Associate Counsel:	**0**

21. Have you handled any matters that have been arbitrated or mediated? **Yes** If so, state the approximate number of these matters in which you were involved as:

Sole Counsel:	**20***
Chief Counsel:	**3***
Associate Counsel:	**3***

***These figures are of formally arbitrated or mediated matters, including court-officiated settlement conferences, in which I was involved while in private**

practice. As a Superior Court Judge, I served as a settlement conference judge/mediator in scheduled settlement conferences several times each year. Those are not included in the numbers above.

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.

A. ***Novus Retail, LLC v. Sonora Group, Inc. and Sonora Properties, LLC*** **(Arizona Superior Court in Pima County, C20096536)**
and its related case
Sunrise Oil v. D&D Properties, LLC, Sonora Properties, LLC and GE Capital Commercial, Inc. (**Arizona Superior Court in Santa Cruz County, CV10-239)**

(1) Cases filed in 2010; resolved by mediation in 2012

(2) ***Attorney for Defendants Sonora Group, Inc., Sonora Properties, LLC, and D&D Properties, LLC:***

Sean E. Brearcliffe
(then of Rusing Lopez & Lizardi, PLLC)

Attorneys for Plaintiff Novus Retail**:**

Peter Collins, Jr.
Gust Rosenfeld, PLC,
(520) 628-7073
pcollins@gustlaw.com

Robert Savage
(then of Gust Rosenfeld, PLC)
Current contact information unknown

Attorney for Plaintiffs Novus Retail and Sunrise Oil:

Jeff Brei
Brei Law Firm
(520) 297-4411
jeff@breilaw.com

Attorney for Plaintiffs Novus Retail and Sunrise Oil (through a title insurer):

Susanne Ingold
Burch & Cracchiolo, PA
(602) 274-7611
singold@bcattorneys.com

Attorney for Defendant GE Capital Commercial, Inc.:

Brian J. Cosper
Fidelity National Law Group
(602) 889-8157
brian.cosper@fnf.com

(3) This matter was in fact two cases, filed in different counties, each related to the same commercial real estate. The matters were mediated in a single settlement conference in Arizona Superior Court in Pima County. The Santa Cruz County case was a quiet title action involving a dispute over the mis-recording of a property line between two developed commercial properties in Nogales, Arizona. The Pima County case was a suit between the owners of the properties on each side of that disputed property line over an alleged breach of a purchase agreement for the property. After my clients prevailed on summary judgment in the Santa Cruz County case, and while preparing the fee application in that matter, the parties agreed to a joint settlement conference to resolve both matters.

(4) These cases were significant because they involved a complex settlement agreement, multiple counsel, two title companies, and a number of moving parts. The settlement took a great deal of effort by counsel and three days of mediation. The settlement process broke down on a number of occasions, but, ultimately, a beneficial resolution of the matter was reached.

B. *Lewis v. Signal Gates, Inc., et al.*, (Arizona Superior Court in Pima County, C20033674)

(1) Case filed in 2003; resolved by mediation in 2005

(2) *Attorneys for Plaintiff Patricia Lewis:*

Sean E. Brearcliffe
(then of Rusing Lopez & Lizardi, PLLC)

Cynthia T. Kuhn
(then of Rusing & Lopez, PLLC (nka Rusing Lopez & Lizardi, PLLC))
(520) 724-9904
ckuhn@sc.pima.gov

Attorney for Defendants Signal Gates, et al.:

Stefano D. Corradini
Lesher & Corradini, PLLC
(520) 747-7790
modena61@aol.com

(3) Patricia Lewis was a wheelchair-bound woman struck while in an unmarked crosswalk by a work truck driven by the president of the defendant company. Patty Lewis was badly injured, suffering moderate-to-severe brain injury. Though wheelchair bound, she had, until that collision, lived independently. Following the collision, she no longer could live on her own and had to live in a skilled nursing facility. Patty's parents lived in Colorado, were elderly, and were unable to care for her. Her only brother lived in Oklahoma. During the case, I had to engage a number of expert and medical witnesses, including accident reconstructionists and a neuro-psychologist independent medical examiner. We resolved the case in mediation with a substantial structured settlement providing for Patty for the remainder of her life. It also allowed her to move to a skilled nursing facility in Oklahoma near her brother.

(4) Apart from the significance of this matter to Patty Lewis and her family, it was important to me because it was a case in which I needed to spend a substantial amount of time working with Patty on a personal basis. Patty was horribly injured, her family was hundreds of miles away and she had no one else in town to rely on. As a consequence, I and my firm became that personal support for her throughout the litigation. When I would visit her to update her on the case, sometimes she would just want to talk. Though I feel that every case is important because it is important to my clients, this case became more personal because of that regular and extensive interaction I had with Patty, her parents and her brother. This was not something I was fully prepared for as a primarily commercial litigator.

Achieving this settlement, given the positive result for Patty and her family, was very satisfying.

C. *North Face Investments, LLC v. Cities Edge Architects, Inc., et al. (*Arizona Superior Court in Cochise County, CV2008-1030)

(1) Case filed in 2008; settled by mediation in 2010

(2) *Attorney for Plaintiff North Face Investments, LLC:*

Sean E. Brearcliffe
(then of Rusing Lopez & Lizardi, PLLC)

Attorneys for Defendants Cities Edge Architects and John Hafner:

P. Douglas Folk
(then of Folk & Associates)
(480) 684-1100
dfolk@clarkhill.com

Benjamin Hodgson
(then of Folk & Associates)
(602) 385-6776
benjamin@righilaw.com

Attorneys for Defendants Project Consulting Services, Inc. and Thomas Edman (as to the Plaintiff's claims):

Michael J. Childers
(then of Turley Swan Childers Righi & Torrens, PC)
(602) 254-1444
mchilders@chhazlaw.comw.com

David W. Davis (primary counsel)
(then of Turley Swan Childers Righi & Torrens, PC)
(current contact information for David Davis is unknown)

Attorneys for Defendants Project Consulting Services, Inc. and Thomas Edman (as to their counterclaims):

D. Reid Garrey
Andrew Peshek (primary counsel)
Garrey Woner Hoffmaster & Peshek, PC
(480) 483-9700
reid.garrey@gwhplaw.com
apeshek@gwhplaw.com

(3) This was a construction defect case involving two branded hotel construction projects in Sierra Vista, Arizona. The plaintiff was the owner/developer of the hotels who had hired the defendant architect and defendant consultant/construction manager to, respectively, design and then build the hotels. The construction defects and billing discrepancies at issue were either caused by design defects and lack of oversight by the architect, or were the fault of the consultant/construction manager or its subcontractors. For the most part, the subcontractors performing the work were judgment proof, leaving the claims against the consultant/construction manager and architect as the only viable remedy. The consultant/construction manager disclaimed responsibility for construction supervision. The architect was cooperative, but denied liability for design defects and improper approval of pay applications.

(4) The case was significant because it was complicated by a series of imprecise contracts, by the need to fire the defendant consultant/construction manager before the job was finished, and because the job was taken over by a successor general contractor. The project had been delayed for nearly a year. The owner needed to have the work finished as soon as possible and could not wait for a full litigation investigation before proceeding with the corrective work. This meant I had to assist my client in ensuring that as much evidence of the construction defects was preserved as possible, even while the new general contractor was correcting the defects and my client was trying to open his hotel.

The variety and number of the construction defects and billing discrepancies made the case difficult to manage. Over a dozen discrete trades were involved in the defective work, and the negligent supervision and billing discrepancies spanned two years. This was a document-intensive case, involving thousands of pages of documents, twelve volumes of daily construction logbooks, and a billing paper trail forking in innumerable directions. A number of tactical decisions were taken in reaching a series of settlements with the defendants. An initial settlement was reached with the architect. I then assisted my client in bringing a claim against the architect's insurer in Minnesota. A final settlement was reached with the help of a private mediator.

D. *LeGendre v. Old Dominion Freight Line, et al. (United States District Court, District of New Mexico CIV-02-1514-KBM/LAM)*

(1) The case was filed in 2002; resolved by settlement in 2004

(2) *Attorneys for Plaintiff Linda LeGendre*:

Sean E. Brearcliffe (primary co-counsel)
(then of Rusing Lopez & Lizardi, PLLC)

John Thal (primary co-counsel) (ret.)
Clifford Atkinson
(then of Atkinson & Thal, PC)
(505) 764-8111
catkinson@abrfirm.com

Michael Kaemper
(formerly of Atkinson & Thal, PC)
(505) 768-7351
mkaemper@rodey.com

H. Elizabeth Losee
(formerly of Atkinson & Thal, PC; current contact information unknown)

Attorneys for Defendant Old Dominion Freight Line, Inc.:

Robert T. Booms (primary counsel)
J. Duke Thornton
Butt Thornton & Baehr, PC
(505) 884-0777
rtbooms@btblaw.com
jdthornton@btblaw.com

(3) This wrongful death case arose from a tragic collision between an Old Dominion Freight Line tractor-trailer and a sedan driven by an elderly Tucson couple, Jay and Lilia Baxter. A passenger car struck Jay and Lilia's car during a sandstorm that crossed I-10 outside of Deming, New Mexico. The accident disabled their car and then a passing Old Dominion semi-truck struck their car at highway speed in near zero-visibility conditions killing them. Jay and Lilia's oldest daughter, Linda, who was the personal representative of their estate, brought the suit on behalf of herself and her two sisters.

(4) This case was highly significant to the Baxters' three daughters. Their parents, in their eighties, had lived long lives to be sure, but they were active and vital and had many more years ahead of them. It was a tragic loss under horrific circumstances. Working closely with co-counsel from New Mexico, we were able to reach a satisfactory settlement for the Baxter family. Personally, I learned how to give clients dispassionate legal advice at a time of difficult personal circumstances and grief. The case also gave me the opportunity to work with multiple expert witnesses in diverse disciplines and to work closely with highly experienced New Mexico co-counsel and against skilled opponents.

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:	**37 (an additional 24 appearances in bankruptcy courts)**
State Courts of Record:	**140**
Municipal/Justice Courts:	**10**

The approximate percentage of those cases which have been:

Civil: **99%**

Criminal: **<1%**

The approximate number of those cases in which you were:

Sole Counsel: **100 (approx.)**

Chief Counsel: **40-45 (approx.)**

Associate Counsel: **40-45 (approx.)**

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: **15-20%**

You argued a motion described above

75% of the cases in which dispositive motions were filed were orally argued, and I argued them. The remainder were resolved on the written motions without argument.

You made a contested court appearance (other than as set forth in the above response) **60%**

You negotiated a settlement: **50-75%**

The court rendered judgment after trial: **10 cases**

A jury rendered a verdict: **6 cases**

The number of cases you have taken to trial:

Limited jurisdiction court **1**

Superior court **15**

Federal district court **0**

Jury **6**

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:	**12***
Criminal:	**1**
Other:	**0**

The approximate number of matters in which you appeared:

As counsel of record on the brief:	**6****	**Arizona**
	2	**Nevada**
	3	**Federal**
Personally in oral argument:	**1**	**Arizona**

***Two of the civil appeals were resolved before the filing of briefs.**

****In my superior court judicial application in 2013, when I had ready access to case files at my law firm, I identified six Arizona state court appeals cases on which I had been counsel of record on the brief. In confirming this number for my earlier Appellate Court applications and for this application, I could only identify five such Arizona state appellate cases through public database searches. Nonetheless, I still believe that the figure of six is accurate.**

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.

A. ***AD Group Southern & Ellsworth, LLC v. Unicorp National Developments, Inc., Eck 41 Ellsworth, LLC, and CNL Bank, N (*2:11-cv-00316)**

(1) Case was filed in 2010; resolved by summary judgment motions in 2012

(2) United States District Court, District of Arizona (Phoenix); then-Chief District Judge Roslyn Silver

(3) ***Attorney for Defendants Unicorp and Eck 41 Ellsworth:***

Sean E. Brearcliffe
(then of Rusing Lopez & Lizardi, PLLC)

Attorney for Plaintiff AD Group Southern & Ellsworth, LLC:

John D. Harris
Harris Law Firm, PC
(602) 418-9687
Last confirmed e-mail address: ***jdharris.esq.az@gmail.com***

Attorney for Defendant CNL Bank, NA:

L. Richard Williams
Beus Gilbert, PLLC
(480) 429-3003
rwilliams@beusgilbert.com

(4) This matter was for breach of contract for failure to pay for over $500,000 worth of off-site construction improvements on a commercial pad in Mesa, Arizona intended for an Eckerd Drug Store. (The construction of the site was abandoned when CVS acquired Eckerd.)

The plaintiff claimed that Unicorp and Eck 41 (Florida companies) were contractually obligated to pay one half of the cost for the construction of off-site improvements (sewer, traffic control, ingress-egress roadway improvements, *etc*.) for its entire commercial development – costing in excess of one million dollars – as consideration for the sale-price reduction for the property my clients purchased. Unicorp's position was that it was not liable because it had assigned its contract rights and obligations to a single-asset entity, Eck 41, with the plaintiff's full knowledge and consent. Eck 41's position was that, although it was contractually responsible for off-site construction costs, those costs were limited to those for ingress and egress to the individual pad it purchased – costing a few thousand dollars at best – and not for such costs for the entire development (which included a Lowe's home improvement store and other commercial properties). I achieved a

dismissal of the claims against my client Unicorp by summary judgment, thus vindicating its position on the assignment. Ultimately, I also achieved for my client Eck 41 the dismissal of claims against it by separate summary judgment, after oral argument, on the basis of the statute of limitations.

(5) The case was significant because the summary judgment motions were complicated and were heavily dependent on the clarity of the presentation of the issues and the supporting facts. Such issues and facts, if not precisely presented to the court, could have resulted in the *appearance* of a factual dispute. I successfully showed, however, that there was none. I was able to present the legal issues and the relevant facts in a way that persuaded then-Chief District Judge Silver that Unicorp was not a proper defendant and that the time had passed for Eck 41 to be sued. My clients made attempts at resolution of the case that would have saved all parties significant fees, but the offers were rebuffed. Ultimately, my clients were awarded all of their fees incurred in the successful defense of the case.

B. *Bryan and Stephanie Hudson v. Neil and Kristine Capin* (C20109301)

(1) The case was filed in 2010; resolved by jury trial in October, 2011

(2) Arizona Superior Court in Pima County; Judge Ted Borek

(3) *Attorneys for Defendants Neil and Kristine Capin:*

Sean E. Brearcliffe (primary counsel)
(then of Rusing Lopez & Lizardi, PLLC)

Oscar S. Lizardi
Rusing Lopez & Lizardi, PLLC
(520) 792-4800
olizardi@rllaz.com

Attorneys for Plaintiffs Bryan and Stephanie Hudson:

Brenden Griffin (primary counsel)
(then of Gabroy Rollman & Bossé, PC.)
(520) 724-3906
bgriffin@sc.pima.gov

John Gabroy (deceased)
(then of Gabroy Rollman & Bossé, PC.)

(4) This case was a breach of contract case in which the plaintiffs alleged that they had lent my clients funds to buy and develop a commercial property in Tucson. Plaintiffs demanded repayment of the alleged loan. My client's position was that the money was not a loan, but rather was an investment. We argued that the plaintiffs still had their investment, but that, because it was an investment and not a loan, they were not entitled to an immediate payback. Instead, they were entitled to a return on their investment under the terms of operating agreement -- that is, when the property was sold or when profits were realized and distributed. Counsel for the parties made earnest attempts to resolve the dispute before trial but were unable to, and the matter was tried to a jury over four days. After a deliberation of approximately two hours, the jury returned a verdict for my clients.

(5) The case was financially significant for my clients, and the jury verdict vindicated their consistent position. For me, it was another opportunity to try a case against a contemporary of mine, who was a skilled and collegial opponent, before a knowledgeable civil trial judge. Any opportunity to try a case to a jury is always valuable, and this one certainly was.

C. *Chiquette v. International Church of the Foursquare Gospel, et al.* (C20057105)

(1) The case was filed in 2005; resolved by motion for summary judgment in 2007; appealed and affirmed in 2008

(2) Arizona Superior Court in Pima County; Judge John E. Davis

(3) *Attorney for Defendant Broken Arrow Enterprises, Inc.:*

Sean E. Brearcliffe
(then of Rusing Lopez & Lizardi, PLLC)

Attorney for Plaintiffs Fernando and Olivia Chiquette:

John G. Stompoly
(then of Stompoly Stroud & Erickson, PC)
(520) 628-8300
johnstompoly@stompoly.com

Attorney for Defendant International Church of Foursquare Gospel:

Jack Redhair
(then of Redhair & Leader)
(520) 622-0433
juli@redhairlaw.com

(4) This case involved the issue of premises liability. My client was Broken Arrow Enterprises, also known as Broken Arrow Baptist Church, a small congregation in Pearce, Arizona, which owned and operated a camp near the Cochise Stronghold east of Tucson. The plaintiffs' teenage daughter was a member of a youth group of the Church of the Foursquare Gospel in Tucson, which had rented the camp for an outing. Despite express warnings, the plaintiffs' daughter and other teen campers left the camp property and climbed a mountainside adjacent to the camp. During the climb, the plaintiffs' daughter was injured by a falling boulder and needed to be airlifted from the mountain. The plaintiffs sued both their church, Foursquare, and Broken Arrow for negligence and premises liability.

I defended the suit on the basic theory that Broken Arrow could not be held liable for injuries that the teenager suffered off of the premises resulting from a natural occurrence. My client's underlying position was that, if anyone could be sued, it would be the U.S. Forest Service that "owned" (or at least "controlled") the mountain on which the girl was hurt. My client prevailed on summary judgment and again on appeal.

(5) The case was significant because the plaintiffs were asserting a theory that would have expanded the concept of business-invitee premises liability in Arizona if it were accepted. Ultimately, the Court applied the precedent my client urged them to, and the Court of Appeals agreed. Additionally, Broken Arrow was not insured, so it was vital to their economic survival that I handle the matter efficiently, which I did. Nonetheless, despite being efficient, my firm and I provided a significant amount of the work at no charge to the client.

D. *Baird Builders, Inc. v. Philbrick DK Ranch, Inc., et al. (C20104411)*

(1) The case was filed in 2010; resolved by bench trial in 2011

(2) Arizona Superior Court in Pima County; Judge Kenneth Lee

(3) *Attorney for Plaintiff Baird Builders, Inc.*:

Sean E. Brearcliffe
(then of Rusing Lopez & Lizardi)

Attorneys for landlord Defendants Philbrick DK Ranch, Inc., et al.:

William M. Fischbach III (primary counsel)
J. Lawrence McCormley
Lance R. Broberg
Tiffany & Bosco, PA
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wmf@tblaw.com (Fischbach)
jlm@tblaw.com (McCormley)
lrb@tblaw.com (Broberg)

(4) This was a mechanics' and materialmen's lien foreclosure case involving a claim for payment for tenant improvements by the plaintiff builder against the tenant and landlords of two commercial properties in Tucson.

Baird Builders was hired by the tenant, Pro Fitness, to build out tenant improvements under its new lease with the landlords Philbrick DK Ranch and Dave Grabbert Ranch. After the tenant improvements were finished, and after only a few weeks of operations, the tenant shuttered its doors, leaving the builder unpaid. Baird Builders had perfected its lien rights against the properties and brought its action both for lien foreclosure and for breach of contract. The tenant filed for bankruptcy protection leaving only the defendant landlords as parties. Prior to suit, the parties' counsel exchanged detailed correspondence laying out each party's respective litigation position in an attempt to resolve the case, but the matter could not be resolved and suit was necessary. Motion practice did not narrow the issues nor dispose of the case. The matter was tried to Judge Kenneth Lee, who issued a verdict for Baird Builders, ordering foreclosure and sale of the properties. Additionally, because my client had made extensive efforts at the outset of the case to settle the dispute, Judge Lee awarded Baird Builders its full attorneys' fees incurred.

(5) The case was significant because, at first blush, it appeared that the builder had no claim against the landlords for a lien for tenant improvements. The lease agreement by its terms barred the recording of liens, and the law was less than fully developed on the point. Very experienced Tucson counsel had previously passed on the case. Nonetheless, the case turned on the discrete fact that the tenant improvements were required by the landlord as a condition of the lease, and thus that the tenant -- despite the no-lien lease provision -- stood as the agent of the landlord for the purposes of lien law. This principle was developed in just three Arizona cases, with the most recent from 1970. Accordingly, the result was not certain to be favorable, but the client was willing to take the risk at trial, and the verdict ultimately vindicated my client's legal position.

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.).

Judge, by designation, Arizona Supreme Court (November, 2018 – present):

Due to conflicts or other unavailability of justices, lower court judges occasionally are given the opportunity to sit by designation on the Arizona Supreme Court. I have had the opportunity to sit by designation on the Arizona Supreme Court on three matters and to participate in their opinions.

Judge, Arizona Court of Appeals, Division 2 (2017-present):

From October, 2017 to the present, as a judge on the Court of Appeals, I read briefs and trial and administrative hearing records, sit on oral argument panels, research applicable law, and draft memorandum decisions and opinions. As associate presiding judge for my assigned appellate panel, I resolve motions and emergency stay requests in the absence of the panel presiding judge. From October, 2017, through March 31, 2021, I authored or was principally responsible for over 225 memorandum decisions and opinions, as well as several dissents and special concurrences.

Judge, Arizona Superior Court in Pima County (2013 - 2017):

From June, 2013, through the end of June, 2016, I served on the Pima County Superior Court Family Law Bench. Family law cases include divorce/dissolution, legal separation and annulment, child custody (legal decision-making and parenting time), child support establishment, modification and enforcement, and orders of protection and injunctions against harassment (both *ex parte* and contested).

Because family law cases are not tried to juries but are instead tried to the judge in bench trials, I acted as both the judge and the fact-finder in all trials. As such, I would take evidence, hear argument, rule on evidentiary disputes, and render decisions. Because so many parties are unrepresented, I often was required to question the parties and witnesses to ensure that I gathered the evidence for the statutorily-required findings to resolve the cases.

In each year on the Family Law Bench, I averaged roughly ten trials per month of varying degrees of complexity and length, and carried a caseload of 300-400 active cases.

From July 1, 2016 through October, 2016, I served on the Pima County Superior Court Criminal Bench. This work covered misdemeanor and felony offenses, jury trials, Rule 32 Petitions for Post-Conviction Relief (in cases I had presided over) and criminal appeals from the justice and municipal courts. As a criminal trial judge, on a daily basis, I took pleas, imposed sentences, resolved substantive and procedural motions, resolved motions to terminate probation, resolved petitions to set aside convictions and restore civil rights, and presided over jury trials. In presiding over jury trials, I selected and instructed juries, ruled on evidentiary objections and procedural and substantive motions – both before and during the trial – took verdicts, and sentenced anyone convicted. In handling criminal appeals from lower courts, I reviewed the court record, read briefs, heard oral argument, researched the law and drafted appellate rulings. My caseload on this bench averaged between 250-350 active cases.

As a retained judge generally, I reviewed and disposed of Rule 32 Petitions for Post-Conviction Relief (in cases presided over by my predecessor judges) and issued search warrants requested by law enforcement officers.

Mediator/Arbitrator/Judge pro tem:

The extent of my service as an arbitrator was as a court-appointed arbitrator in the Superior Court, under Rule 73, Arizona Rules of Civil Procedure while in private practice. Between 2004 and 2013, I was assigned a dozen cases, and held evidentiary hearings in four of the matters.

Also, while in private practice, I served as a settlement conference judge *pro tem* for one matter in the Pima County Superior Court. The settlement conference was held but it did not settle.

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.

A. *State v. Rose*, 246 Ariz. 480 (App. 2019)

(1) **Opinion issued April 22, 2019**

(2) **Arizona Court of Appeals, Division 2**

(3) ***Attorneys for State of Arizona*:**

Mark Brnovich, Arizona Attorney General

Joseph T. Maziarz, Chief Counsel
by Tanja K. Kelly, Assistant Attorney General
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***Attorney for Defendant Rose*:**

Harriette P. Levitt
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(4) Rose appealed from his convictions and sentencings for sexual conduct with a minor. At this trial, the court admitted evidence of a juvenile court conviction (or "adjudication") for child molestation he suffered when Rose was a minor. The evidence of this adjudication and prior conduct was admitted to prove his "aberrant sexual propensity" to commit the crime he was now charged with. This was a case of first impression; no Arizona court had expressly held that prior convictions or prior "bad acts" committed while a defendant was juvenile, were admissible in a later prosecution of him as an adult under these circumstances.

Our court upheld the convictions and sentences concluding that the plain language of the rules of evidence did not bar the use of such evidence of his past conduct. Consequently, the evidence of Rose's prior act of child molestation was admissible.

(5) This opinion is significant as a case of first impression establishing the admissibility of this type of prior bad act evidence, clarifying the matter for lower courts and counsel.

(Opinion excerpted at Attachment 3)

B. *State v. Malone*, 245 Ariz. 103 (App. 2018)

(1) Opinion issued July 24, 2018

(2) Arizona Court of Appeals, Division 2

(3) *Attorneys for State of Arizona*:

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
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Karen.Moody@azag.gov

***Attorneys for Defendant Malone*:**

James Fullin, Pima County Legal Defender
***By* Joy Athena and Jeffrey Kautenburger, Assistant Legal Defenders**
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Jeffrey.Kautenburger@pima.gov
(Joy Athena current contact information unknown)

(4) This was an appeal from the defendant's conviction for, among other crimes, first-degree murder. Malone had murdered his former girlfriend by firing several shots into her car after he briefly pursued her and then blocked her car with his. Malone admitted to the shooting, but claimed he did not premeditate or deliberate the killing.

Our court affirmed the convictions and sentence but in the course of doing so addressed Malone's claim that he should have been permitted to introduce certain evidence regarding his state of mind. Malone sought to introduce testimony that brain damage he suffered was "consistent" with a character trait for impulsivity. He wanted to use this evidence to bolster his claim that, at the time of the shooting, he acted impulsively and without the required mental state for first degree murder. The majority agreed that it was error for the trial judge to exclude the evidence of his brain injury, but that, overall, the error was harmless given the admission of other evidence of impulsivity.

I concurred in the entirety of the opinion but for the conclusion that the court erred in refusing to admit the brain-damage evidence. My partial dissent argued that, because Malone sought to use the brain damage evidence to negate the mental state element of the crime of which he was charged, such evidence was inadmissible under our state supreme court precedent.

Therefore exclusion of the evidence by the trial court was proper.

(5) This case is significant because, as stated in the partial dissent, the majority's reasoning on the admissibility of brain-defect evidence, now allows in evidence of "diminished capacity," which our supreme court and legislature had consistently deemed inadmissible.

My partial dissent was vindicated by a unanimous supreme court opinion which was in accord with my reasoning. *State v. Malone*, 247 Ariz. 29 (2019).

(***Partial dissent included at Attachment 2***)

C. *State v. Clark*, 249 Ariz. 528 (App. 2020)

(1) Opinion issued August 7, 2020

(2) Arizona Court of Appeals, Division 2

(3) *Attorneys for State of Arizona*:

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Chief Counsel
***by* Amy Pignatella Cain, Assistant Attorney General**
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***Attorney for Defendant Clark*:**

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(4) Clark appealed from his convictions on two DUI offenses claiming there was insufficient evidence to support the convictions and that he had carried his burden as to an affirmative defense. His affirmative defense was that, although he had a threshold level of THC in his system at the time of his arrest, it was insufficient to cause impairment. Our court affirmed the conviction.

(5) This case was significant because it limits the reach of waiver on appeal established by our court's earlier case law. Clark argued on appeal that there was insufficient evidence to support his conviction on two of the four counts, but he had failed to raise that argument in the trial court. Typically, a failure to raise an argument below does not "preserve" that claim

on appeal and a defendant cannot assert any argument he has not properly preserved. He can, however, raise an unpreserved argument on appeal if he argues that the error by the trial court was both "fundamental" and "prejudicial." Here, however, in addition to failing to preserve his claim below, Clark had also failed to argue on appeal that the error was fundamental and prejudicial. Consequently, under our precedent, we could have deemed his argument both unpreserved and waived.

However, rather than doing so, our opinion clarified that, given the necessity that each crime of which a defendant is convicted be supported by sufficient evidence, a defendant may raise a claim of insufficient evidence for the first time on appeal. We also held that, given that a conviction without evidence is self-evidently fundamental and prejudicial error, a defendant need not expressly argue fundamental, prejudicial error on appeal to avoid waiver.

(*Decision excerpted at Attachment 3*)

D. *State v. Gomez*, 2 CA-CR 2018-0052, 2019 WL 3761642 (Ariz. Ct. App. Aug. 8, 2019)

(1) Memorandum Decision issued August 8, 2019

(2) Arizona Court of Appeals, Division 2

(3) *Attorneys for State of Arizona*:

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Attorneys for Defendant Gomez:

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(4) Gomez appealed from his conviction for sexual assault, principally claiming the court improperly admitted "inconclusive" DNA evidence over his objection at trial. The state argued that the evidence, although not conclusive

in identifying Gomez as a sexual assailant, was nonetheless relevant, admissible and not prejudicial. The majority concluded that the relevance of the challenged DNA evidence was substantially outweighed by its prejudicial effect and vacated the conviction and remanded the case for a new trial. I dissented concluding that we had insufficient basis to question the trial court's finding of insufficient prejudice. The Arizona Supreme Court accepted review of the case. It unanimously vacated the majority decision and reinstated the conviction, using reasoning substantially in accord with my dissent. *State v. Gomez*, ___ Ariz ___ , 2021 WL 941433 (Ariz. Mar. 9, 2021).

(5) This case was significant because it clarified the limits of our court's review of decisions of trial courts as to the admission of evidence. Our court's majority decision second-guessed the ruling of the trial court which was closest to the case and its determination that the evidence did not unduly prejudice Gomez. Both my dissent and the Supreme Court opinion vindicating it, recognized the deference due to the trial court in making such a determination.

(*Decision excerpted at Attachment 3*)

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

My personal and professional experiences gained in all of my walks of life have been invaluable. I am sure that I am not the only applicant for this position who worked in fields other than the law, and I may not be the only one who served in the military. Both of those experiences allow me bring something other than mere legal training and legal knowledge to my work. My specialized training and experience in the particular intelligence field in which I worked gave me a view into the wider world. This is a perspective that I would not have gained had I not followed that path.

While a lawyer in private practice, I worked for fifteen years with some of the best trial lawyers and business lawyers in Arizona. I was fortunate to be able to develop a diverse practice working across Arizona and in most of its counties, but primarily my practice was in southern Arizona. I practiced in all of the courts in Pima County – Superior Court, Justice, and City Courts, and in the U.S. District and Bankruptcy Court – as well as in the Superior Courts in Pinal, Cochise and Nogales Counties. My southern Arizona practice took me from Tucson to Naco, from Casa Grande to Willcox, from Bisbee to Sierra Vista, from the Gila River to the border, and from farms to cities. From day to day, my work took me from construction job sites to board rooms and from defending one-man shops to representing governments.

For over four years as a Superior Court Judge, I was able to work closely with a group of dedicated and diligent men and women in public service, handling an array of disputes, and working closely with the public we served. My experience in private life and in private practice informed my handling of every case I dealt with as a trial judge. My service as a trial judge has given me a well of experience to draw from as an appeals court judge. Knowing the day-to-day work of a trial judge has given meaning to elements of the cold trial court record that I would not have gleaned otherwise.

In my current role, and over the last four years, I have learned the unique skill set of an appellate court judge. There are considerations beyond merely resolving the dispute between the parties before you. Our opinions impact parties in other cases and even those who have yet to find themselves in court. I am convinced that my experiences in private life, then as a trial lawyer, then as a trial judge, and now as an intermediate appellate court judge, will be immeasurably valuable if I am fortunate enough to serve on 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? **Yes** If so, give details, including dates.

Prior to completing my undergraduate education, I engaged in the following occupations, businesses or professions as an adult:

United States Air Force, staff sergeant; cryptologic linguist specialist; airborne voice processing specialist; combat crewman, 1983-1989

OSCO Drug Store, Tucson, AZ, retail clerk, 1989 (part-time civilian job during my final few months in the Air Force)

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? **Not Applicable.** 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? **No** If not, explain.

In 2014, my wife and I received a rather shocking tax bill for tax year 2013. This was caused by higher-than-expected income as a partner in my law firm during my last six months in private practice (such that the quarterly estimated tax payments were too low) and insufficient withholding from my state and county judicial salaries as an employee for the last six months of the year. We timely filed our returns on April 15, but had to borrow from my wife's 401k to pay the entire federal income tax due. The 401k loan was applied for before, but was funded after, the April 15 return filing date. The taxes were paid in full once the loan was received. Because the payment was made not long after April 15, we paid nominal accrued interest and penalties as a result of the late payment.

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? **Yes** If so, identify the nature of the case, your role, the court, and the ultimate disposition.

My wife and I were two of a group of plaintiffs who sued a mortgage broker for breach of contract for failing to fund residential mortgage loans. The case was *Young, et al. v. Fidelity Mortgage Corporation, et al.*, Arizona Superior Court in Pima County, C20035098, before Judge Jane Eikleberry. The matter was resolved by privately negotiated settlement and dismissed in 2003.

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.

United States Air Force, July, 1983 – July, 1989; Honorable Discharge, July 14, 1989

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.

"*Advanced Construction Law in Arizona*," National Business Institute, 1999, contributing co-author

"*Everyday Ethics*," The Federal Lawyer, August, 2012, co-authored with attorney Ryan McCabe, then of Montgomery Barnett, LLP, New Orleans, LA

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.

***Lecturer*, "Fundamentals of Construction Law," Sterling Educations Services, Inc., 2004**

***Lecturer*, "Construction Law from Contract to Closeout in Arizona," Lorman Education Services, 2006**

***Lecturer*, "Civil Litigation/Ethics," Tucson Paralegal Association seminar (on the subject of class action litigation), October, 2012**

***Judicial Panelist*, "Parenting Time & Legal Decision-Making: A Judicial Perspective on Changes to the Rules," Pima County Bar Association, October 29, 2013, Tucson, AZ**

***Judicial Panelist*, "2013 Advanced Family Law," State Bar of Arizona, November 22, 2013, Tucson, AZ**

***Judicial Panelist*, "The Judicial Selection Process," Pima County Bar Association, February 13, 2015, Tucson, AZ**

***Co-Presenter*, "Ethics and Professionalism," State Bar of Arizona's Course on Professionalism, March 20, 2014, Tucson, AZ**

***Judicial Panelist*, "Views from the Bench 2014," Pima County Bar Association, April 14, 2014, Tucson, AZ**

***Judicial Panelist*, "Topics in Family Law," Pima County Bar Association, May 16, 2014, Tucson, AZ**

***Judicial Panelist*, "Topics in Family Law," Pima County Bar Association, May 29, 2015, Tucson, AZ**

***Co-Presenter*, "Ethics and Professionalism," State Bar of Arizona's Course on Professionalism, October, 2017, Tucson, AZ**

***Moderator*, "What Really Happened: Did Second Amendment Voters and the Death of Justice Scalia Determine the Outcome of the Presidential Election?" Student Chapter, The Federalist Society for Law and Public Policy Studies, University of Arizona College of Law, November 30, 2017, Tucson, AZ**

***Panelist*, "The Supreme Court Nomination: Why The Stakes Are So High." Student Chapter, The Federalist Society for Law and Public Policy Studies, University of Arizona College of Law, September 12, 2018, Tucson, AZ**

***Judicial Panelist*, "Working with the Court of Appeals." Appellate Section, State Bar of Arizona, November 30, 2018, Tucson, AZ**

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

***Freedom Through Vigilance Association*, Member, 2014-present. (This is a fraternal organization of Air Force veterans who served in the field of airborne reconnaissance and signals intelligence.)**

See below for all legal profession-related organizational activities.

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.

Member, State Bar of Arizona, 1996-present; Appellate Practice Section member, 2018-present

Member, Pima County Bar Association, 1996-present

Fellow, Foundation of the Federal Bar Association, 2012-present

Member, Arizona Judges Association, 2013-present; Executive Committee, Appellate Judges Representative, July 2018-present

Member, Arizona Judicial Conference Planning Committee, 2019-present

Member, Arizona Supreme Court *Access to Justice Committee*, 2017-2020

Member, Federal Bar Association, 2000-2015

Member, Tucson Defense Bar, 2002-2013

Member-at-Large, Executive Council, Construction Law Section of the State Bar of Arizona, 2003-2006

Chairman, Rules Committee, Pima County Bar Association, 2003-2007

President, William D. Browning (Tucson) Chapter of the Federal Bar Association, 2008-2009; Member, Executive Committee, 2004-2015

Lawyer Representative to the Ninth Circuit Judicial Conference, 2006-2009

Member, Morris K. Udall Inn of Court, 2006-2011

Chairman, Merit Selection Panel for the Reappointment of U.S. Magistrate Judge Bernardo Velasco, 2008

Chairman, Merit Selection Panel for the Reappointment of U.S. Magistrate Judge Charles R. Pyle, 2009

Chairman, Merit Selection Panel for the Reappointment of U.S. Magistrate Judge Jacqueline Marshall (now Rateau), 2009

Member, Supreme Court Historical Society, 2010-2014

Member, Federal Bar Association Professional Ethics Committee, 2010-2013; National Chairman, 2011-2013

Member, United States District Court Local Rules Advisory Committee, 2011-2013

Member, American Judges Association, 2013-2016; Member, Ethics & Professionalism Committee, 2013-2016

University of Arizona James E. Rogers College of Law, Mock Appellate Court Program, Judge, 2014; 2017-present

Arizona High School Mock Trial Program, Judge, Regional Tournaments, 2014 and 2015

American College of Trial Lawyers Regional Law Student Trial Competition, Judge, 2019

Throughout my career I performed informal *pro bono* work for no- and low-income clients, for distressed businesses, and for community organizations such as the Ott Family YMCA and Rotary. I also participated in the Volunteer Lawyers Program from 2001-2013 representing indigent clients whenever called upon. Finally, I also participated in the appointed appellate counsel program through the United States District Court in Arizona in which private attorneys represent indigent federal defendants in appeals to the Ninth Circuit Court of Appeals at no charge.

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

Member, DM-50, 2013-present

I have been a member of DM-50 since 2013. DM-50 is a group of local businessmen and businesswomen and community leaders who donate their money, time and expertise to support the mission and improve the quality of life of our soldiers, sailors, marines and airmen at Davis Monthan Air Force Base. DM-50 annually hosts events at the Base to benefit the men and women stationed there. When I was stationed at Davis Monthan myself in the late 1980s, my fellow service men and women knew that Tucson supported their mission. Groups like DM-50 make that support tangible. Given the strain on the forces over the last fifteen years, apparent as well as actual support for their mission is even more necessary.

Though I have not taken a leadership position in the group so far, and though in my position I cannot participate in fundraising, I volunteer and work at its many events and activities. Over past Thanksgiving holidays, my family has hosted servicemen and servicewomen from the base who had no family close to celebrate with. In 2018, on Thanksgiving we hosted at our home five soldiers from an Army unit deployed to the border.

Member, John M. Roll Memorial Committee, 2011-2012

I served as a member of the *ad hoc* committee for the creation of the Chief Judge John M. Roll Memorial. Following the murder of U.S. District Court Chief Judge John M. Roll on January 8, 2011, the Tucson Federal Bar Association chapter and the Arizona District Court established a joint group to develop and complete a permanent memorial to Judge Roll. The committee included U.S. District Judge Frank Zapata, U.S. Magistrate Judge Charles Pyle, attorney Dee-Dee Samet, Court Deputy Clerk Michael O'Brien, Judge Roll's Judicial Assistant Katy Higgins, and myself. The result of the committee's work was the installation of a bust of Judge Roll in the Tucson Federal Courthouse in September, 2012, and the ultimate installation of a copy of the bust in the John M. Roll Courthouse in Yuma.

Board Member, Ott Family YMCA, 1999-2004

Early in my professional career, I served for a little over four years on the Board of the Ott Family YMCA. During two of those years, I served as its Programs Chair. In those roles I worked in fundraising for, and management of, the facility programs. In that volunteer work, I also provided *pro bono* legal services to the Ott YMCA assisting it in negotiating and drafting construction contracts for the building of a skate park at the facility. The YMCA skate park has greatly enhanced the YMCA facility and provided the children in the area a safe place to exercise and play. It has been highly popular and serving the kids in that area for the last thirteen years.

Member, Rotary, 2001-2010

I was a member of the Pantano Rotary Club in Tucson for nearly ten years, serving as Club President from 2004-2005, and then serving Rotary on the regional level as Assistant District Governor for Rotary International District 5500 from 2007-2008 and as District Parliamentarian from 2004 until 2008. In Rotary, I was involved in everything from hands-on local park clean-up projects to international service projects in Namibia, South Africa, and Mexico through our partnership with African and Mexican Rotary Clubs. During my term as President of the Pantano Rotary Club, I established an academic achievement award for the top students at Dodge Middle School, which continues to be awarded. I also provided *pro bono* legal services establishing the Charitable Foundation for District 5500 and drafted bylaws for the Rotary Club and for its Foundation. As District 5500 Parliamentarian for over four years, I took the primary role in crafting and passing legislation in, and serving as

acting Chair of, the District's governing body, the Council on Legislation.

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

"AV Preeminent" rating – the highest rating by Martindale-Hubbell Peer Review Ratings

Paul Harris Fellow Award, Rotary International, two-time recipient

Volunteer of the Year – 2011, Pima County Republican Party

Fellow, Foundation of the Federal Bar Association

"Top 20 Lawyers in Tucson – Construction Law – 2011," Professional Research Services

Certificate of Recognition, Cold War Military Service, awarded 2006

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

Justice, Arizona Supreme Court; applicant and candidate, January and May, 2019.

Judge, Arizona Court of Appeals, Division 2, 2017-present; candidate for same, 2015; successful retention election, 2020

Judge, Arizona Superior Court in Pima County, 2013-2017; successful retention election, 2016

Republican Precinct Committeeman; Precinct 242, appointed, 2011-2012; Precinct 178, elected, August 28, 2012 -- January, 2013.

Have you ever been removed or resigned from office before your term expired? **Yes** If so, explain.

I resigned from my position as an elected Republican Precinct Committeeman for Precinct 178 before the end of my two-year term when I became a candidate for judicial office in 2013 (as required by Canon 4 of the Code of Judicial Conduct).

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.

Primarily, I am blessed with Mary, my marvelous wife of 33 years, and we are both blessed with three great kids, two (very lucky) sons-in-law, and four grandchildren.

I was always very involved in my son's Boy Scouts activities, as well as being active with my wife in all of our children's sports, church, and school activities over the years. We became empty-nesters in 2015 when our son moved out to join the United States Marine Corps. That nest did not stay empty for long once our grandchildren were born. Now we are enthusiastically involved in their lives, which keep us very busy.

Beyond chasing the grandchildren around, I do woodworking and metalworking in my spare time, tearing down and rebuilding various structures around the house and backyard. (It is good for my character to swing a hammer, weld, dig holes, and paint fences.) Together my wife and I enjoy gardening and we travel when our work schedules allow.

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.

My family can be traced back several centuries to Yorkshire, England. Over that time my ancestors were mainly tenant farmers, laborers, and craftsmen, but with the occasional scholar, minor landowner, and petty nobleman on the family tree. My great-great grandfather Stephen emigrated to America in the mid-1860s, and moved to Tehama County, California, where he began farming along the Sacramento River. His son, my great-grandfather Tobias, carried on the family farm. His son, my

grandfather Noel, was the first to leave the farm when he was conscripted to work in the Oakland shipyards during World War II.

Noel contracted polio while working in the shipyards. The polio vaccine was still a decade away, and Noel's polio wiped out half of his lung power, crippled his left arm and made it difficult for him to eat and drink in later years. But for polio he might have returned to the farm after the War. Instead, because he could no longer do strenuous manual labor, he became a successful CPA, and, despite his disabilities, raised a family with my grandmother and lived into his eighties. (He was so stoic that his business partner of twenty years did not know, until after my grandfather's death, that my grandfather had no use of his left arm.) My grandmother Mary was raised in North Dakota and was the first woman in her family to attend college. She earned a home economics degree from the University of California, Berkeley, in the early 1930s.

My father tried to enlist in the Air Force in 1957, but injured his knee and became ineligible for service. Instead, he worked in a grocery store from the age of 17, ultimately becoming an owner of the store about twenty years later. The store closed in the mid-1990s during an economic downturn. He then drove a truck until he fully retired in 2012 at the age of 73. My mother was a homemaker for most of my growing up, but worked at various part-time jobs throughout my parents' marriage to make ends meet. My parents separated and divorced when I was in high school. My mother then began working full time and retired about a decade ago.

College was not a practical or financial option for me when I finished high school, so I did what my father was not able to do and joined the Air Force at the age of 18. I served at the end of the Cold War, engaging in airborne reconnaissance missions against then-East Germany, until my honorable discharge in 1989 at the end of my enlistment. During my time in the service I took college courses whenever and wherever I could and then entered college full time when I left the Air Force.

Although my story is probably not unlike that of millions of other Americans, I am proud to be a fifth-generation American, an adopted son of southern Arizona, and a U.S. Military Veteran. My wife and I are proud and happy that, so far anyway, our children have chosen also to remain Tucsonans. We look forward to watching our grandchildren grow up here.

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

One of the other crucial jobs of a supreme court justice is to participate in court rule-making. The court is charged by law with promulgating judicial rules of practice and procedure. In a number of capacities throughout my career, for the Pima County Bar Association, the United States District Court and the Pima County Superior Court I have been involved in the process of rule-making by proposing

rules to the supreme court and federal court and formally commenting upon rules proposed by others. If chosen to serve on the court, I will be able to put to use my experience in working through the process of rule-making.

As the head of the judicial department of state government, the supreme court is also charged with the regulation of the practice of law. This extends to the justices' responsibility for the rules of practice and ethics rules for lawyers and judges and the review of attorney and judicial misconduct determinations. When I was national chairman for the Federal Bar Association's Professional Ethics Committee, our committee was principally charged with maintaining the FBA's Model Rules of Professional Conduct for Federal Lawyers. These Model Rules, unlike the ABA's model rules, were tailored to the practice of law in federal courts and before federal agencies. Our committee's work entailed maintaining, updating and modifying the Model Rules to ensure they resulted, if followed, in the highest ethical practice of federal lawyers. I will be able to put to work my experience in the practical application of standards of conduct to the practice of law in fulfilling this role of 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* Attachment 1**

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* Attachment 2**

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* Attachment 3**

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.

***See* Attachment 4**

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Attachment 1: Question 62—Brief Statement Why You are Seeking This Position

ATTACHMENT 1

Response to Section I, Question 62:

62. Attach a brief statement explaining why you are seeking this position

As the court of last resort, the Arizona Supreme Court has the solemn task of ensuring that it resolves each case that comes before it correctly. There is no other recourse in our state system of justice if it does not. Not only is the correctness of each decision important to the parties -- sometimes a matter of life and death -- each decision becomes part of the body of state case law, which, for better or worse, spans generations. Arizona case law not only guides courts, lawyers and litigants, but, in both small and large ways, can steer society. The Supreme Court's opinions, although individually unrelated, collectively represent justice in our state. I am seeking the job of Arizona Supreme Court justice because I have faith in my ability to contribute in measurable ways to the administration of justice and, by faithfully applying its laws and through hard work, to leave this state a better place.

Despite the legacy the Court's work often leaves, the day-to-day job of a Supreme Court justice, properly performed, is a humble one. Fundamentally, the job of a Supreme Court justice is to faithfully apply the law drafted by others to facts others have already found to be true. It is not the court's job, not an individual justice's job, to make it up or to impose his or her personal policy preferences on the law. Throughout my career as a judge, I have worked hard to ensure that I am not searching for a legal means to reach a desired result, but instead am dispassionately trying to get it right. I have not always liked the result of decisions I have issued, but I have always, in the end, believed them to be correct. Arizona deserves and is blessed with Supreme Court justices who approach their work with the humble spirit required to do the job properly. I would strive every day to be that kind of justice.

As head of the judicial department, the Supreme Court carries out other important work. The Supreme Court is constitutionally charged with making the rules of procedure for the courts in the state. I have, over the years, been involved in a number of rules committees for organizations, such as for the Pima County Bar Association, for the United States District Court and for the Pima County Superior Court. In each of these roles, I worked to put in place or improve the rules governing court procedure. Statutorily, the Supreme Court also regulates the practice of law through its rules of attorney and judicial conduct and by its oversight of judicial and attorney discipline. For several years I served on and was the national Chairman of the Federal Bar

Association's Professional Ethics Committee, which was charged with the drafting and improvement of the rules that guide the ethical practice of law in federal court and before federal agencies. I also served for three years as a member of the American Judges Association's Ethics and Professionalism Committee. In each case, our work was to promote the highest ethical standard of practice and to educate both lawyers and judges in how to maintain these standards. Both in the rule-making process and in the realm of ethics, my experience has been but a microcosm of the work done by our Supreme Court. Nonetheless, I have found this work to be challenging and rewarding and look forward to the chance to continue this work on the Supreme Court.

Ultimately, I can think of no greater honor or challenge than serving on the Arizona Supreme Court and, with my colleagues, honorably carrying out each of its responsibilities.

Attachment 2: Question 63—Two Professional Writing Samples

[Excerpt from *State v. Malone*, 245 Ariz. 103 (App. 2018)]

B R E A R C L I F F E, Judge, concurring in part and dissenting in part:

¶37 I concur in the opinion in all respects other than its conclusion that the excluded brain damage evidence was admissible to negate the *mens rea* of premeditation. Because the Arizona Supreme Court, in *State v. Mott*, 187 Ariz. 536 (1997), clearly instructs all lower courts that such mental defect evidence is not admissible for such a purpose, I cannot join the opinion as a whole.

¶38 It appears to be undisputed that Malone's "significant and permanent diffuse brain damage" is a mental defect or disorder. It is undisputed that Malone sought to introduce it to prove his character trait for impulsivity. It is undisputed that Malone offered his character trait for impulsivity to negate premeditation. It is further undisputed that premeditation is a *mens rea* element of the crime of first-degree murder of which Malone was charged. *See* A.R.S. § 13-1105(A)(1); *State v. Boyston*, 231 Ariz. 539, ¶ 50 (2013) (premeditation part of requisite *mens rea* of first-degree murder). It is therefore undisputed that Malone sought to introduce evidence of his mental defect or disorder to negate the *mens rea* element of a crime. Under *Mott*, such evidence is simply inadmissible.

¶39 Our supreme court recognized that the legislature, not the courts, sets the standard for criminal responsibility:

> this court considered and rejected the defense of diminished capacity . . . the legislature is responsible for promulgating the criminal law and that it "has not recognized a disease or defect of mind in which volition does not exist . . . as a defense to a prosecution for [a crime.]" . . . [T]his Court does not have the authority to adopt the diminished capacity defense.
>
> Because the legislature has not provided for a diminished capacity defense, we have since consistently refused to allow psychiatric testimony to negate specific intent. Instead, the legislature has provided the M'Naghten test "as the sole standard for criminal responsibility."

Mott, 187 at 541 (internal citations omitted). The court then recited the *M'Naghten* test as then stated in A.R.S. § 13–502(A). *Id*. And, because the legislature had clearly adopted that test for determining criminal responsibility to the exclusion of others, such as the diminished capacity defense, the court stated, "Consequently, Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime." *Id*. Today's opinion, however, defies Mott by stating that evidence of Malone's brain defect or disorder should have been admitted to negate the *mens rea* of premeditation required for the crime of first-degree murder.

¶40 This opinion not only defies the clear proscriptions in *Mott*, it ignores the supreme court's clear distinctions between permissible evidence to show a character trait for impulsivity and impermissible evidence for such a purpose laid out just three years ago in *State v. Leteve*, 237 Ariz. 516 (2015). The court, after restating the holding in Mott barring the affirmative defense of diminished capacity, stated:

> We have, however, allowed a defendant to offer "evidence about his behavioral tendencies" to show "that he possessed a character trait of acting reflexively in response to stress." Such evidence has been termed "observation evidence" by the United States Supreme Court. That Court distinguished "observation evidence" from "mental-disease evidence," which is "opinion testimony that [the defendant] suffered from a mental disease with features described by the witness," and "capacity evidence" which concerns a defendant's "capacity to form mens rea," both of which are prohibited by Arizona law.

Id. ¶ 21 (internal citation omitted). Here, evidence of Malone's "significant permanent and diffuse brain damage" is physical evidence of a brain defect or disorder, it is not observation evidence. Such evidence is that of a physiological anomaly, not evidence of a behavioral tendency. Whether or not such brain damage is commonly found in people suffering from a character trait for impulsivity, the evidence itself is fundamentally either "mental disease evidence" or "capacity evidence," each of which, as the supreme court repeats for us, is prohibited by Arizona law.

¶41 If the reasoning of this opinion in this regard evades supreme court review or survives it, as a practical matter, there will be little left of *Mott* and not much left of *M'Naghten*. Every defendant who could not successfully meet the *M'Naghten* standard to evade criminal responsibility will now offer evidence of any brain defect or disorder as "consistent" with or to bolster some otherwise admissible character trait evidence. Under the majority's reasoning it will be a denial of the defendant's right "to put on a complete defense" and error not to admit such evidence. The opinion here does not help

Malone given the lack of a showing of prejudice. However, if future juries can now consider brain defect evidence for the improper purpose of negating *mens rea* of premeditation for first-degree murder, what will stop them from considering it for guilt itself? After all, the defendant can't help himself, he has brain damage. Unless the reasoning of the opinion is checked, the danger identified in Mott will be realized: future juries will be compelled to "release[] upon society many dangerous criminals who obviously should be placed under confinement." *Mott*, 187 Ariz. at 545, *quoting Schantz*, 98 Ariz. at 213.

¶42 For the foregoing reasons, I cannot join with the majority in deeming the evidence of Malone's brain defect admissible to negate premeditation.

[Excerpts from *State v. Togar*, 248 Ariz. 567 (App. 2020) (footnotes omitted)]

B R E A R C L I F F E, Judge:

¶1 Francis Togar appeals from his conviction after a jury trial for one count of second-degree burglary and the resulting term of probation imposed. On appeal, Togar contends the trial court abused its discretion in admitting other-acts evidence and denying his request for an instruction pursuant to *State v. Willits*, 96 Ariz. 184 (1964). We affirm.

. . .

¶12 Togar argues that the trial court "erred in permitting the introduction of evidence of prior thefts" committed against J.J. at the facility "when there was no clear and convincing evidence that [Togar] committed those theft[s]." He contends that the state's closing argument—"hopefully, if someone were to steal from [J.J.] again, [Janet] would catch them"—told the jury that the prior thefts were committed by the same person who committed the present offense. Togar further argues that the evidence was "irrelevant for any proper purpose," and lacked any "probative value because there was no evidence that [Togar] was involved." He asserts the probative value of the evidence, therefore, was substantially outweighed by the danger of unfair prejudice. "We review a trial court's admission of evidence for an abuse of discretion." *State v. Tucker*, 215 Ariz. 298, ¶ 58 (App. 2007).

. . .

¶13 Under Rule 402, Ariz. R. Evid., "[r]elevant evidence is admissible" unless otherwise precluded by statute or rule, and "irrelevant evidence is not admissible." Evidence is relevant if

"it has any tendency to make a fact more or less probable than it would be without the evidence" and the fact "is of consequence in determining the action." Ariz. R. Evid. 401. To be relevant, "[i]t is not necessary that such evidence be sufficient to support a finding of an ultimate fact; it is enough if the evidence, if admitted, would render the desired inference more probable." *State v. Paxson*, 203 Ariz. 38, ¶ 17 (App. 2002) (quoting *Reader v. Gen. Motors Corp.*, 107 Ariz. 149, 155 (1971)). "This standard of relevance is not particularly high." *State v. Oliver*, 158 Ariz. 22, 28 (1988).

¶14 Under Rule 404(b), Ariz. R. Evid., "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Other-acts evidence used to prove a character trait and then to show a person's action in conformity with that trait is commonly referred to as "propensity evidence." *See, e.g., State v. Machado*, 226 Ariz. 281, ¶ 14 (2011). But, such other-acts evidence may be admissible for non-propensity purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b). That is, despite also being propensity evidence, other-acts evidence may be nonetheless admissible if otherwise relevant under Rule 401 and 402, Ariz. R. Evid. *See State v. Leteve*, 237 Ariz. 516, ¶ 11 (2015) ("When other acts evidence is offered for a non-propensity purpose under Rule 404(b), it is also subject to Rule 402's relevance test . . . .").

¶15 The state concedes that the evidence of the prior thefts was inadmissible under Rule 404(b). It argues however that, because it did not present any evidence or argue that Togar committed the prior thefts, Rule 404(b) was not applicable. Instead, it argues, the evidence of the prior thefts merely "complete[d] the story" and was needed to explain Janet and Adam's

reason and purpose behind installing the video camera and marking and photographing the bills in J.J.'s wallet.

¶16 Togar cites *State v. Ferrero* for the proposition that the use of "complete-the-story" evidence has been rejected by the Arizona Supreme Court. 229 Ariz. 239 (2012). In Ferrero, our supreme court clarified the admissibility of "*Garner* evidence," that is, evidence of prior sexual contact between the defendant and the victim, and other-acts evidence offered either for a non-propensity purpose under Rule 404(b) or as "intrinsic evidence." *Id.* ¶¶ 8-20. The court held that, if Garner evidence is offered to prove the defendant's aberrant sexual propensity, then it is admissible only if permitted by Rule 404(c). *Id.* ¶ 11. If it is offered for a non-sexual propensity purpose, then it should be analyzed under Rule 404(b). *Id.* ¶ 12. However, if the evidence is of an act that is "so interrelated with the charged act that they are part of the charged act itself," such is intrinsic evidence and not other-acts evidence at all, and thus not within the scope of Rule 404(b) or (c). *Id.* ¶ 20. It then defined evidence as intrinsic evidence "if it (1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act." *Id.*

¶17 In adopting this definition, and as relevant to Togar's argument, the court further stated, "The intrinsic evidence doctrine thus may not be invoked merely to 'complete the story' or because evidence 'arises out of the same transaction or course of events' as the charged act." *Id.* But, the court went on to say:

. . .

Thus, contrary to Togar's contention, Ferrero does not reject the use of evidence to "complete the story" or to provide background to other admissible evidence. It merely establishes that evidence of a defendant's other acts may not be admitted as intrinsic evidence to avoid the Rule 404(b) and (c) analyses simply because it completes the story.

¶18 What each type of evidence discussed in *Ferrero*—Rule 404(b), Rule 404(c), and intrinsic—had in common was that each was evidence of earlier or substantially contemporaneous conduct of the defendant. Here, however, the state did not imply that Togar was responsible for the earlier thefts; it simply paraphrased Janet's testimony about her motivation for placing the camera and marking the bills. Thus, there was no argument or intimation that Togar was responsible for the earlier thefts, and therefore evidence of those thefts was neither other-acts evidence under Rule 404(b) nor evidence of conduct intrinsic to the charged act. Consequently, the Ferrero analysis is not relevant here.

¶19 Because the evidence in question was not evidence of other acts attributable to Togar, its admissibility under Rule 402 is analyzed, as is all evidence, for its relevancy under Rule 401, Ariz. R. Evid. Evidence of the prior thefts was relevant under Rule 401, Ariz. R. Evid. Several facts of consequence to this action are more probable to have occurred because Janet and Adam were concerned about someone stealing from J.J.— including that Janet and Adam marked bills, photographed the bills and recorded their serial numbers, placed those bills in J.J.'s wallet, set up a video camera to record the spot in the room where the wallet would be placed, monitored the camera's live feed, and then responded as they did when they saw someone in J.J.'s room in the night. The fact that they were concerned about someone stealing from J.J. is made more

probable because the prior thefts occurred. As stated in the Advisory Committee Notes to the 1972 adoption of Rule 401, Fed. R. Evid.: . . .

¶20 The trial court's rationale for admitting the evidence of the prior thefts—that the jury would likely be confused without it and be misled into far more prejudicial guesswork—was in line with the broad definition of relevancy under our rules. At its base, the court's determination was that the reason J.J.'s family acted as it did helped the jury understand the video evidence of Togar committing this crime and the marked bills found on his person, each of which was critical evidence in the case. Certainly, absent evidence of the prior thefts, Janet and Adam's conduct may have seemed irrational and paranoid, and evidence that substantiates their credibility as key prosecution witnesses is material and relevant on its own. *See State v. Mosley*, 119 Ariz. 393, 401 (1978) ("Generally, any evidence that substantiates the credibility of a prosecuting witness on the question of guilt is material and relevant, and may be properly admitted.").

¶21 "The trial judge is in the best position to determine the relevancy of [evidence] since he can consider all of the evidence together" and "determine which items have a 'tendency' to make the existence of a fact of consequence more or less probable than it would be without the evidence." *State v. Adamson*, 136 Ariz. 250, 260 (1983). Thus, "[i]n determining relevancy and admissibility of evidence, the trial judge has considerable discretion," *State v. Smith*, 136 Ariz. 273, 276 (1983), and "such discretion will not be disturbed on appeal unless it clearly has been abused," *Adamson*, 136 Ariz. at 259. The trial court here did not abuse its discretion in determining the relevancy and admissibility of the prior thefts, let alone clearly abuse its discretion, and we find no error in the admission of this evidence. . . .

Attachment 3: Question 64—Three Written Orders, Findings or Opinions

[excerpt from *State v. Rose*, 246 Ariz. 480 (App. 2019) (footnotes omitted)]

B R E A R C L I F F E, Judge:

¶1 Aaron Michael Rose appeals his convictions after a jury trial on two counts of sexual conduct with a minor under the age of fifteen. We affirm.

Issues

¶2 Rose contends the trial court committed fundamental error by admitting, under Rule 404(c), Ariz. R. Evid., evidence of his juvenile delinquency adjudication for child molestation. The state contends that the evidence was properly admitted. The sole issue on appeal is whether the court erred because Rule 404(c) does not permit the admission of evidence of other crimes, wrongs or acts committed by a juvenile as evidence of a character trait giving rise to an aberrant sexual propensity to commit a criminal sexual offense.

Factual and Procedural Background

¶3 We view the facts in the light most favorable to upholding the trial court's rulings and jury's verdict. *See State v. Gay*, 214 Ariz. 214, ¶¶ 2, 4 (App. 2007). Rose was indicted on two counts of sexual conduct with a minor under the age of fifteen, a class two felony and dangerous crime against children in the first degree. Between December 2015 and August 2017, when Rose was thirty-six to thirty-eight years old, he engaged in the charged acts with the son of his then-girlfriend. The boy was between the ages of three and five at the time of the crimes. At trial, the state sought to introduce evidence under Rule 404(c) of Rose's prior juvenile delinquency adjudication for child molestation

as evidence of Rose's aberrant sexual propensity to commit the acts charged in this case. In that matter, Rose, then fourteen, was found to have molested a five- to six-year-old boy in a similar manner.

¶4 Rose opposed the admission of the evidence arguing that expert witness testimony was necessary to demonstrate that he had a "continuing emotional propensity" to commit the crime, that the acts were dissimilar to the current charged offenses and remote in time, and that their admission would be unduly prejudicial. The trial court found the 1994 adjudication admissible under Rule 404(c). At the conclusion of the three-day trial, Rose was convicted on both counts, and the jury found the aggravating factor that the victim was age twelve or under at the time of each crime. Rose was sentenced to two consecutive life sentences, and he timely appealed. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A)(1).

Analysis

¶5 Rose did not assert below the ground he now asserts on appeal—that his 1994 adjudication was inadmissible by virtue of its being a juvenile adjudication. Consequently, he did not preserve the issue for harmless error review. As he must, he argues that the trial court's error in admitting this other-acts evidence was fundamental and prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 18-19 (App. 2005). We therefore review the court's ruling admitting this other-acts evidence for fundamental error.

¶6 To establish fundamental, prejudicial error, a defendant must show trial error exists and that the error either went to the foundation of the case, deprived him of a right essential to his defense, or was so egregious that he could not possibly have received a fair trial. *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). If a defendant can make that showing, he must also demonstrate resulting prejudice. *Id.* If a defendant shows the error was so egregious that he could not have received a fair trial, however, then he has necessarily shown prejudice and must be granted a new trial. *Id.* "[T]he first step in fundamental error review is determining whether trial error exists." *Id.* (citing *Henderson*, 210 Ariz. 561, ¶ 23).

¶7 We review the trial court's interpretation and application of court rules de novo. *State v. Winegardner*, 243 Ariz. 482, ¶ 5 (2018). "We interpret court rules according to the principles of statutory construction." *State v. Aguilar*, 209 Ariz. 40, ¶ 23 (2004). "But when the rule's language is unambiguous, 'we need look no further than that language to determine the drafters' intent.'" *Id.*

¶8 Rules 404(a) and (b) read together serve as an exception to the general principle, provided by Rules 401 and 402, Ariz. R. Evid., that all relevant evidence is admissible in criminal cases. Rules 404(a) and (b) bar evidence of "other crimes, wrongs, or acts" to prove a defendant's character or trait for the purpose of proving "action in conformity therewith." Rule 404(c), however, serving itself as an exception to Rules 404(a) and (b), permits admission of other-acts evidence for this purpose when the defendant is charged with having committed a "sexual offense."

¶9 In such a case, other-acts evidence is admissible under Rule 404(c) "if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." The trial court may admit such evidence if it finds (1) "the evidence is sufficient to permit the [jury] to find that the defendant committed the other act," (2) the other act "provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged," and (3) the evidentiary value of the other-act evidence is not substantially outweighed by the factors stated in Rule 403, Ariz. R. Evid. ("unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence"). Ariz. R. Evid. 404(c). On its face, Rule 404(c) makes no distinction between the admission of evidence of another crime, wrong, or act the defendant committed as a juvenile and one he committed as an adult. *See id.* Nonetheless, Rose would have this court add to the rule, by judicial fiat, an additional restriction on the admission of such other-acts evidence, namely, that no evidence of an act committed when the defendant was a juvenile may be admitted under Rule 404(c).

¶10 Rose argues that any admission of other-acts evidence otherwise allowable under the plain reading of Rule 404(c) is impermissible and reversible fundamental error because "juvenile offenders are far different from adult offenders," and, as shown by other rules of evidence, juvenile adjudications must be treated differently from adult convictions. Rose also argues that the admission of such evidence under Rule 404(c) violates a criminal defendant's Fifth, Sixth, and Fourteenth Amendment rights under the

United States Constitution, and his rights under article 2, §§ 23 and 24 of the Arizona Constitution. The state argues principally that Rose has failed to show fundamental error—including prejudice—because under its plain language, Rule 404(c) does not prohibit the use of juvenile crimes as other-acts evidence.

¶11 Initially, Rose argues that Rules 608 and 609, Ariz. R. Evid., are "instructive" on this question. Those rules, read together, do not permit the admission of evidence of a defendant's juvenile delinquency adjudication as impeachment evidence bearing on his credibility—that is, to prove his character trait for "truthfulness or untruthfulness." Because these rules treat juvenile delinquency adjudications differently from adult convictions for credibility determinations, Rose argues that such adjudications and convictions ought to be treated differently under Rule 404(c) for propensity determinations. We do not agree.

¶12 Rose is, in effect, asking us to apply the reasoning of a rule on impeachment to a question of propensity and then, having done so, read into Rule 404(c) a limitation not expressly put there by the supreme court or, at any time since its adoption in 1997, imposed otherwise statutorily by the legislature. That the supreme court distinguished juvenile delinquency adjudications from adult convictions in Rules 608 and 609, but made no corresponding distinction between juvenile other-acts evidence and adult other-acts evidence in Rule 404(c), supports the conclusion that it intended that there be none. Moreover, the legislature in A.R.S. § 8-207(B) provided that "[t]he disposition of a juvenile in the juvenile court may not be used against the juvenile in any case or proceeding *other*

than a criminal or juvenile case in any court." (Emphasis added.) By expressly allowing the use of juvenile adjudications in criminal cases, this statute does not betray any public policy against using them for the purposes of Rule 404(c).

¶13 Rose then asks us to apply here the principles of *Miller v. Alabama*, 567 U.S. 460 (2012) and *Graham v. Florida*, 560 U.S. 48 (2011), addressing the punishment that may be levied against juvenile defendants. Rose wants this court to extend the general reasoning of those cases—that "children are constitutionally different" for the purposes of punishment— to this evidentiary matter. In *Graham*, extending its then-recent Eighth Amendment cases, the United States Supreme Court pronounced that "The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. at 82. In *Miller*, the Court, still extending, held that "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." 567 U.S. at 470.

¶14 We are constrained by the Supremacy Clause to follow the United States Supreme Court in matters on which it may and does authoritatively speak in a similar factual context. *See, e.g., McLaughlin v. Jones*, 243 Ariz. 29, ¶ 25 (2017), *cert. denied*, 138 S. Ct. 1165 (2018); *Wright v. Salt River Valley Water Users' Ass'n*, 94 Ariz. 318, 323 (1963) (court bound by decision of United States Supreme Court dealing with a similar fact situation). However, we are not constrained to apply its reasoning to wholly different circumstances on which that court has not spoken, or on which it cannot speak such as on pure matters of state constitutional or statutory law. *See Pool v. Superior Court*, 139 Ariz. 98, 108 (1984)

("The decisions of the United States Supreme Court are binding with regard to the interpretation of the federal constitution; interpretation of the state constitution is, of course" the province of Arizona's courts); *see also Bunker's Glass Co. v. Pilkington PLC*, 206 Ariz. 9, ¶¶ 8, 13 (2003) (declining "to rigidly follow federal precedent on every issue of antitrust law regardless of whether differing concerns and interests exist in the state and federal systems," and because doing so would "thwart[] the [Arizona] legislative intent" and would not necessarily achieve uniformity); *McLaughlin v. Bennett*, 225 Ariz. 351, ¶ 14 (2010) (refusing to extend reasoning of federal courts on general treatment of public elections and union representation in context of a "separate amendment" ballot dispute). Because neither *Graham* nor *Miller* bears on evidentiary matters, and because this matter does not involve the 8th Amendment, we also will not apply the principles of those cases here.

¶15 Rose similarly cites to a series of non-binding, federal cases interpreting federal rules of evidence, which are materially different from the Arizona rule of evidence at issue, and asks us to follow their lead. Because Rule 404(c) has no identical counterpart in the federal rules of evidence, there is no federal lead to follow. *Cf. Hernandez v. State*, 203 Ariz. 196, ¶ 10 (2002) ("In interpreting Arizona's evidentiary rules, we look to federal law when our rule is identical to the corresponding federal rule"); *but see State v. Green*, 200 Ariz. 496, ¶ 10 (2001) ("When interpreting an evidentiary rule that predominantly echoes its federal counterpart, we often look to the latter for guidance."). Consequently, we will not look to the cited federal authority for guidance.

¶16 Defendants who committed other crimes, wrongs or acts while under the age of eighteen are not without safeguards as to the admission of such propensity evidence in later prosecutions for sexual offenses. As stated above, Rule 404(c) provides a series of factors a trial court must consider before any such evidence is presented to a jury: there must be sufficient facts supporting that the earlier act in fact occurred; the commission of that earlier act must provide a "reasonable basis to infer" that the accused had the aberrant-sexual-propensity character trait; and the evidence of the other act must not be "substantially outweighed by the danger of unfair prejudice"—as to which the court considers all of the traditional Rule 403 factors. Ariz. R. Evid. 404(c). While these considerations are given to evidence of other acts committed by adults as well as by minors, it is not an undemanding examination. Indeed, the trial judge here, examining those factors, although admitting evidence of the crime Rose committed at age fourteen, refused to admit evidence of another act he had committed at age eighteen, although urged to do so by the state.

¶17 Rose has failed to demonstrate that the trial court did not properly apply the plain language and requirements of Rule 404(c) when it admitted evidence of Rose's juvenile delinquency adjudication for child molestation as other-acts evidence of his aberrant sexual propensity to commit the crimes charged here. It is neither a trial court's nor this court's role to apply the rules of evidence other than according to their plain language. *State v. Salazar-Mercado*, 234 Ariz. 590, ¶ 4 (2014) ("If a rule's language is plain and unambiguous, we apply it as written without further analysis."). Consequently, we

do not find that the trial court erred. And because the court did not err in the first place, there necessarily cannot be fundamental error. *Escalante*, 245 Ariz. 135, ¶ 21.

Disposition

¶18 Because evidence of another crime, wrong, or act committed by a minor, including one that resulted in a juvenile delinquency adjudication, may be admitted under Rule 404(c), we affirm Rose's convictions and sentences.

[Excerpt from *State v. Clark*, 249 Ariz. 528 (App. 2020) (footnote omitted)]

B R E A R C L I F F E, Judge:

¶1 Drake Clark appeals from his convictions after a jury trial. . . .

. . .

Preservation of Claim of Insufficient Evidence as Fundamental Error

¶12 As a preliminary matter, it is undisputed that Clark moved for a judgment of acquittal at trial pursuant to Rule 20, Ariz. R. Crim. P., for insufficient evidence on counts one and three, but not as to counts two and four, the counts on which he was convicted and as to which he appeals. Because he did not argue below that there was insufficient evidence to support convictions on counts two and four, he has forfeited relief for all but fundamental and prejudicial error. *State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018); *see also State v. Zinsmeyer*, 222 Ariz. 612, ¶ 27 (App. 2009) (concluding fundamental error review appropriate when argument not raised in Rule 20 motion), *overruled on other grounds by State v. Bonfiglio*, 231 Ariz. 371 (2013).

¶13 A party claiming fundamental error "bears the burden of proving both that the error was fundamental and that the error caused him prejudice." *State v. Valverde*, 220 Ariz. 582, ¶ 12 (2009). An appealing party is also bound by Rule 31.10(a)(7), Ariz. R. Crim. P., to include in his briefing his contentions, citations to legal authority, and appropriate references to the record, and failure to do so "usually constitutes abandonment and waiver of that claim." *State v. Carver*, 160 Ariz. 167, 175 (1989). Although Clark argues

that his convictions were not supported by sufficient evidence, he does not argue in his briefing that the claimed error below was fundamental error or expressly allege prejudice. The state, relying on *Moreno-Medrano*, 218 Ariz. 349, argues that, "because Clark fails to argue in his opening brief that the error was both fundamental and prejudicial, he has waived review of this issue." It asserts we should find lack of preservation of fundamental error as to Clark's insufficiency claim and thus decline to address it.

¶14 One of Moreno-Medrano's claims was that the trial court improperly reduced certain fees and assessments to a judgment and criminal restitution order effective upon his conviction rather than at the time of completion of his sentence. Id. ¶ 16. But Moreno-Medrano had failed to raise the claim in the trial court, and therefore, in accord with *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005), we concluded he had forfeited all but fundamental error. *Moreno-Medrano*, 218 Ariz. 349, ¶ 16. But further, because Moreno-Medrano had failed to argue on appeal that the court's error constituted fundamental and prejudicial error, we concluded he had similarly waived any argument of fundamental error on appeal. Id. ¶ 17.

¶15 Since *Moreno-Medrano*, we have extended its waiver principle to other claims of fundamental error. *See e.g., State v. Peltz*, 242 Ariz. 23, ¶ 7 (App. 2017) (prosecutorial misconduct); *State v. Salcido*, 238 Ariz. 461, ¶ 16 (App. 2015) (denied motion to suppress for claimed illegal arrest). We have even extended Moreno-Medrano waiver to a claim, like that here, of insufficiency of the evidence. *See, e.g., State v. Romero*, No. 2 CA-CR 2011-

0231 (Ariz. App. Nov. 30, 2012) (mem. decision). However, for the reasons that follow, we now conclude, given the nature of a claim of insufficiency of the evidence, that extending *Moreno-Medrano* waiver to such a claim is improper.

¶16 As stated by the United States Supreme Court in *Jackson v. Virginia*, it is "an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof," which is "defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." 443 U.S. 307, 316 (1979). And, when "a conviction occurs in a state trial" without proof beyond a reasonable doubt as to each element of the offense, "it cannot constitutionally stand." *Id.* at 318. As stated by this court in *State v. Rhome*, "both the Arizona and United States Constitutions guarantee every criminal defendant the right to have 'a jury find him guilty of all the elements of the crime with which he is charged'" and the state must "prove each element of the offense, beyond a reasonable doubt." 235 Ariz. 459, ¶ 4 (App. 2014) (quoting *State v. Martinez*, 210 Ariz. 578, ¶ 7 (2005)). Accordingly, our courts have long held that a conviction based on insufficient evidence is fundamental, prejudicial error. *Rhome*, 235 Ariz. 459, ¶ 4 ("Fundamental error therefore occurs when a person is convicted of 'a crime when the evidence does not support a conviction.'" (quoting *State v. Stroud*, 209 Ariz. 410, n.2 (2005))); *State v. Gray*, 227 Ariz. 424, n.1 (App. 2011) ("[T]he state's failure to prove each element of an offense of conviction would be fundamental error, as it constitutes 'error going to the foundation of the case' and would necessarily deprive a defendant of

a fair trial." (quoting *Henderson*, 210 Ariz. 561, ¶ 19)); *Zinsmeyer*, 222 Ariz. 612, ¶ 27 ("A conviction based on insufficient evidence constitutes fundamental error."), *overruled on other grounds by Bonfiglio*, 231 Ariz. 371.

¶17 Although we do not typically address arguments not expressly made by the parties, "waiver is a procedural concept that courts do not rigidly employ in mechanical fashion." *State v. Aleman*, 210 Ariz. 232, ¶ 24 (App. 2005). "[W]e may forego application of the [waiver] rule when justice requires." *Liristis v. Am. Family Mut. Ins. Co.*, 204 Ariz. 140, ¶ 11 (App. 2002). We often address fundamental errors even where a defendant has failed to argue fundamental error on appeal. *See State v. Fernandez*, 216 Ariz. 545, ¶ 32 (App. 2007) ("Although we do not search the record for fundamental error, we will not ignore it when we find it."); *Salcido*, 238 Ariz. 461, ¶ 17 (vacating appellant's convictions upon finding double jeopardy violation although not raised in opening brief, such violations constitute fundamental, prejudicial error, and are not waived by failure to raise them below). Indeed, under *Anders v. California*, when a defendant can make no other argument on appeal, we will examine the sufficiency of the evidence to support each conviction. 386 U.S. 738, 744 (1967); *State v. Rushing*, 156 Ariz. 1, 4 (1988) (reviewing the record for fundamental error pursuant to Anders and finding insufficient evidence to support conviction).

¶18 A conviction based on insufficient evidence is fundamental error whether a defendant expressly argues fundamental error or not. Given the affront to our system of justice by a conviction unsupported by evidence, a defendant ought not be bound to use

the magic words "fundamental error" to receive the benefit of fundamental error review and avoid *Moreno-Medrano* waiver. It is enough for a defendant to assert on appeal that his conviction was not supported by sufficient evidence. Similarly, *Moreno-Medrano* will not bar fundamental error review of a claim of insufficient evidence due to the defendant's failure to expressly argue prejudice. Prejudice in a case of an unsupported conviction is manifest: a defendant has been convicted of a crime that the state has failed to prove. *See Gray*, 227 Ariz. 424, n.1 (conviction based on insufficient evidence necessarily deprives defendant of a fair trial). Under such circumstances, a defendant has been deprived of a fair trial and has been prejudiced. *See Jackson*, 443 U.S. at 316-18; *see also Escalante*, 245 Ariz. 135, ¶ 21 (defendant establishes prejudice upon showing that the "error was so egregious that he could not possibly have received a fair trial"). No additional argument or showing of prejudice ought to be required in such a case. *See Escalante*, 245 Ariz. 135, ¶ 21.

¶19 Consequently, consistent with our jurisprudence, where a defendant has not expressly argued fundamental and prejudicial error due to insufficient evidence, waiver under *Moreno-Medrano* will not apply so as to foreclose fundamental error review. Stated differently, a claim on appeal that the defendant has been convicted based on insufficient evidence, so long as otherwise complying with Rule 31.10(a)(7), Ariz. R. Crim. P., is sufficient to preserve fundamental error review. To the extent we have in the past decided otherwise based on *Moreno-Medrano*, we disapprove of and depart from that reasoning. Here, because Clark's sufficiency claim is inherently a claim of fundamental, prejudicial

error, notwithstanding that he failed to argue in his briefing that the court committed fundamental, prejudicial error, we will address the claim.

. . .

[Excerpt from *State v. Gomez*, No. 2 CA-CR-2018-0052, 2019 WL 3761642 (Ariz. Ct. App. Aug. 8, 2019) (footnotes omitted)]

B R E A R C L I F F E, Judge, dissenting:

¶46 This dispute involves first, the admissibility of DNA test results showing DNA of an unknown man, other than the victim's boyfriend, to be present in an external swab of the victim's genitals. And second, the admissibility of evidence showing a partial match between that same DNA evidence and Gomez's DNA profile. The majority correctly concludes that the presence of two men's DNA on the victim's genitals meets the threshold of Rule 401, Ariz. R. Evid., of making a fact of consequence to the action—specifically whether a sexual assault occurred at all—more or less probable than it would be without the evidence. It errs, however, in concluding that the relevance of the partial match to Gomez was inadmissible in light of Rule 403, Ariz. R. Evid. I respectfully dissent as to the majority's Rule 403 evaluation and the consequent reversal and remand.

The DNA Evidence

¶47 As explained by the state's DNA expert witness, Cristina Rentas, the exterior genital swab taken from the victim revealed a "full profile" for the victim's boyfriend and a "minor" profile with "two additional male DNA markers or types. Alleles." Those two alleles, or markers, were deemed to be from a minor Y-DNA profile—that is, from a "contributor" other than the victim's boyfriend because those markers did not match markers in the boyfriend's profile. They did, however, match two markers in Gomez's DNA profile. Nonetheless, although the two markers matched two markers in Gomez's DNA profile, overall the test result was, according to Rentas, "inconclusive" for

identification purposes. It was inconclusive because, given the limited sample size, Rentas could not say whether there would be any additional matches to Gomez's DNA markers. As Gomez characterized Rentas's expected testimony in pre-trial motion argument, she could not, given the insufficiency of the sample, "run statistics" for the purpose of narrowing the DNA sample down to a (relatively) positive identification of a suspect. And, as Rentas explained in her trial testimony, "[i]f you're seeing a minor DNA profile at two markers, you can't be sure what the rest of that minor DNA profile is. It could match anyone. You don't know. There is not enough information. So that is why we say it's inconclusive. We can't compare to it." Thus she "cannot say that this DNA is . . . Gomez's."

¶48 Rentas's certainty and her scientific conclusion that the minor Y-DNA profile did not match the victim's boyfriend's profile, and thus was from a different male contributor, was unchallenged. Irrespective of who the actual donor was, by that evidence alone we know that, as the victim testified, a man other than her boyfriend was in a position to leave DNA on the exterior of her genitalia. This unchallenged evidence, if credited by the jury, made it more probable than not that a man other than the victim's boyfriend, as she testified, put his hand down her pants. This evidence then, as the majority correctly concludes, had a "tendency to make" the fact of sexual assault "more . . . probable than it would be without the evidence." Ariz. R. Evid. 401(a). And, of course, whether a sexual assault occurred was a "fact . . . of consequence in determining the action." Ariz. R. Evid. 401(b).

¶49 But further, there was also no scientific dispute raised at trial that the two markers in the minor Y-DNA profile in fact matched two markers in Gomez's DNA profile. While, as Rentas testified, we cannot know how many or whether any more markers would match Gomez's; these two did match his even while they did not match the victim's boyfriend's. Consequently, the universe of possible DNA contributors in the exterior genitalia sample was narrowed from a universe of possible contributors being every man and woman on earth, to just men, then to any man who was not her boyfriend, and then to any man who had two markers in the same place as Gomez's markers. While this may have been insufficient to a reasonable degree of scientific probability to allow an expert to opine that this DNA was left by Gomez, it nonetheless made it "more . . . probable" that Gomez touched the victim's exterior genitalia as the victim testified "than it would be without the evidence." Ariz. R. Evid. 401(a). At a minimum it made it less probable that a man with two DNA markers matching neither the boyfriend's nor Gomez's DNA profile was the contributor. And, of course, given that the victim testified only her boyfriend and Gomez touched her genitals, if neither of the two profiles had any markers in common with Gomez, that certainly would also have been a "fact . . . of consequence in determining the action." Ariz. R. Evid. 401(b). Even if statistical evidence had shown that a significant number of other men had markers also matching the minor Y-DNA profile it "does not diminish or eliminate the fact that [Gomez] was among that group." *See Escalante-Orozco*, 241 Ariz. 254, ¶ 58. As a result, the fact of the match of the two minor Y-DNA markers was relevant under Rule 401, even while otherwise being scientifically inconclusive for identification purposes. What the jury could or should do with that

information was simply a matter of weight. *See Burns*, 237 Ariz. 1, ¶ 47 (inconclusive scientific evidence goes to weight, not admissibility).

¶50 The question presented here, then, rather than the fundamental relevance of the partial match, is whether the relevant fact of the match between two of Gomez's markers and the two markers identified in the minor Y-DNA sample presented a risk of jury confusion or prejudice, and then whether that risk substantially outweighed the relevance. Just as Rentas's repeated testimony about the inconclusive nature of the evidence for identification purposes was enough to allay the majority's fear of confusion or prejudice about the DNA matching a second male contributor generally, it was sufficient to allay concern about the two-marker match to Gomez.

¶51 Under Rule 403, Ariz. R. Evid., relevant evidence, although generally admissible, may be excluded if its probative value is "substantially outweighed" by the risk of, among other things, prejudice or confusion of the issues. A trial court's rulings on the admission of evidence generally is reviewed for abuse of discretion. State v. Robinson, 165 Ariz. 51, 56 (1990). We similarly evaluate a trial court's determination of admissibility in light of Rule 403 for an abuse of discretion. *State v. Cañez*, 202 Ariz. 133, ¶ 61 (2002) ("Because the trial court is best situated to conduct the Rule 403 balance, we will reverse its ruling only for abuse of discretion."). "The balancing of factors under Rule 403 'is peculiarly a function of trial courts, not appellate courts.'" *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, ¶ 53 (App. 2004) (quoting *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, ¶ 26 (App. 2000)). Consequently, a trial court's discretion in the admission of evidence in light of a

Rule 403 challenge is considerable. *State v. Cooperman*, 232 Ariz. 347, ¶ 17 (2013). We ought to be loath to find prejudice when the trial court, much closer to the question, found none.

¶52 Here, after defense objection under Rule 403 to the admission of the results of the minor Y-DNA profile evidence, the trial court admitted the evidence. It did so after determining that, in light of the expected testimony being that the DNA test results as to the minor Y-DNA profile were inconclusive, there was no risk of confusion under Rule 403 that could not be ameliorated by cross-examination. Further, the court expressly barred the state from raising any inference that the testing positively identified the minor Y-DNA evidence as Gomez's DNA,11 and the state did not do so.

¶53 The majority here generally affirms the admission of the minor Y-DNA profile evidence from the exterior surface of the victim's genitals to the extent that it shows that a male, not the victim's boyfriend, left DNA residue on the exterior of her genitals. It did so notwithstanding that the testifying DNA expert concluded that the evidence was scientifically "inconclusive" for identification purposes. Indeed, it is because the expert had so testified that the majority concludes that the minor Y-DNA evidence showing presence of another man's DNA generally was not substantially outweighed by the risk of prejudice or confusion. That consideration should have led the majority to reach the same conclusion as to the match of the two minor Y-DNA profile markers.

¶54 The majority's inference of a risk of jury confusion is speculation. The majority essentially concludes that the jury could have misinterpreted the "inconclusive" minor Y-DNA sample as a positive identification of Gomez as the man, other than her boyfriend,

who left DNA on her genitals. While such a misinterpretation is possible, to reach it the jury would have had to ignore the candid admissions of the prosecutor, the argument of defense counsel, the clear testimony of the DNA expert witness, and the court's instructions. Given these hurdles, the risk of such a misinterpretation did not outweigh, let alone substantially outweigh, the relevance of confirmed male DNA which, in part, matched Gomez, but did not match her boyfriend, and was where, in essence, the victim said it would be.

¶55 On more than one occasion, Rentas testified—in direct examination and on cross—that she could not render a conclusion as to the identity of the donor of the two minor alleles in the genital swab. In her closing argument, the prosecutor said the DNA evidence for the genital swab was "inconclusive for comparison purposes" and that it "may not be able to show" who touched the victim's genitals. The defense attorney in her closing argument emphasized the lack of DNA evidence from the victim's vagina telling the jury that the only thing it had to consider was "where is the DNA?" and that the "science does not lie." And, the trial court, in giving its instructions, told the jury to "[d]etermine the facts only from the evidence produced in court. When I say evidence, I mean the testimony of witnesses and the exhibits introduced in court. You should not guess about any fact."

¶56 Because the expert testimony was what it was, because the trial court had precluded the state from arguing that the minor Y-DNA sample was Gomez's, and because counsel had every opportunity to persuade the jury as to the proper weight to

be afforded the evidence, the court found no basis under Rule 403 to preclude the evidence. In the end, if the jurors reached the conclusion that the two matching markers in the minor Y-DNA profile conclusively showed the DNA to have been Gomez's —and there is no evidence they did—they did not reach that conclusion from the evidence presented or the arguments of counsel characterizing it. They would have had to reach that conclusion by guessing, and thereby defy the instruction given to them by the court. We ought not assume that they did so. *State v. Prince*, 226 Ariz. 516, ¶ 80 (2011) ("Jurors are presumed to follow jury instructions."). There is no reason that the court should have anticipated such an unlikely conclusion. Consequently, the court correctly concluded that Gomez failed to show that the evidence should have been precluded under Rule 403.

. . .

Attachment 4: Question 65--JPR Reports

Judge Hugh Hegyi intends to retire at the end of his term and did not file for retention. He is not listed on the Maricopa County ballot .

Pima County Voters Only

Hon. Sean Brearcliffe
Pima County Superior Court
Bench: Family
Appointed: 2013

100% of the Commission Voted Judge Brearcliffe MEETS Judicial Performance Standards
32 Commissioners Voted 'Meets'
0 Commissioners Voted 'Does Not Meet'

☐ Show Surveys from Prior Years

2016	**Attorney Surveys** Distributed: 87 Returned: 28 **Score** (See Footnote)	**Juror Surveys** Distributed: 0 Returned: 0 **Score** (See Footnote)	**Litigant Witness Surveys** Distributed: 318 Returned: 22 **Score** (See Footnote)
Legal Ability	96%	n/a	n/a
Integrity	94%	n/a	85%
Communication	96%	n/a	75%
Temperament	95%	n/a	76%
Admin Performance	99%	n/a	82%
Settlement Activities	100%	n/a	n/a

FOOTNOTE: The score is the percentage of all evaluators who rated the judge "satisfactory", "very good", or "superior" in each of the Commission's evaluation categories. Depending on the assignment, a judge may not have responses in certain categories, indicated by N/A (for example, some judicial assignments do not require jury trials). The JPR Commission votes "Yes" or "No" on whether a judge "MEETS" Judicial Performance Standards, based on the statistical information, as well as any other information submitted by the public or the judge. Further information on the judges and justices can be found at each court's website.

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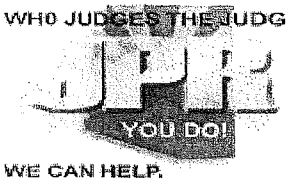
Judge Hugh Hegyi intends to retire at the end of his term and did not file for retention. He is not listed on the Maricopa County ballot .



Arizona Commission on Judicial Performance Review

Hon. Sean Brearcliffe **2016 Attorney Survey Responses**

Key: **UN** = Unsatisfactory **PO** = Poor **SA** = Satisfactory **VG** = Very Good **SU** = Superior

	UN		PO		SA		VG		SU		Mean	Total	No Resp
1. Legal Ability	Num.	Pct.	Num.	Pct.	Num.	Pct.	Num.	Pct.	Num.	Pct.			
1. Legal reasoning ability	0	0%	2	7%	4	15%	6	22%	15	56%	3.26	27	0
2. Knowledge of substantive law	0	0%	2	8%	3	12%	5	19%	16	62%	3.35	26	0
3. Knowledge of rules of evidence	0	0%	0	0%	4	15%	6	23%	16	62%	3.46	26	0
4. Knowledge of rules of procedure	0	0%	0	0%	4	15%	6	23%	16	62%	3.46	26	0
Category Total	**0**	**0%**	**4**	**4%**	**15**	**14%**	**23**	**22%**	**63**	**60%**	**3.38**	**105**	
2. Integrity													
5. Basic fairness and impartiality	1	4%	1	4%	4	15%	5	19%	16	59%	3.26	27	0
6. Equal treatment regardless of race	0	0%	0	0%	2	12%	4	24%	11	65%	3.53	17	0
7. Equal treatment regardless of gender	1	4%	2	7%	3	11%	6	22%	15	56%	3.19	27	0
8. Equal treatment regardless of religion	0	0%	0	0%	2	14%	4	29%	8	57%	3.43	14	0
9. Equal treatment regardless of national origin	0	0%	1	6%	1	6%	4	24%	11	65%	3.47	17	0
10. Equal treatment regardless of disability	0	0%	0	0%	1	7%	4	27%	10	67%	3.60	15	0
11. Equal treatment regardless of age	0	0%	0	0%	1	6%	4	22%	13	72%	3.67	18	0
12. Equal treatment regardless of sexual orientation	2	13%	1	6%	2	13%	4	25%	7	44%	2.81	16	0
13. Equal treatment regardless of economic status	0	0%	2	9%	2	9%	4	17%	15	65%	3.39	23	0
Category Total	**4**	**2%**	**7**	**4%**	**18**	**10%**	**39**	**22%**	**106**	**61%**	**3.36**	**174**	
3. Communication													
14. Clear and logical oral communications and directions	0	0%	1	4%	5	19%	6	22%	15	56%	3.30	27	0
15. Clear and logical written decisions	1	4%	0	0%	2	8%	6	24%	16	64%	3.44	25	0
16. Gave all parties an adequate opportunity to be heard	1	4%	0	0%	4	15%	5	19%	16	62%	3.35	26	0
Category Total	**2**	**3%**	**1**	**1%**	**11**	**14%**	**17**	**22%**	**47**	**60%**	**3.36**	**78**	
4. Temperament													
17. Understanding and compassion	1	4%	2	8%	4	15%	6	23%	13	50%	3.08	26	0
18. Dignified	0	0%	1	4%	2	7%	7	26%	17	63%	3.48	27	0
19. Courteous	0	0%	0	0%	4	15%	8	30%	15	56%	3.41	27	0
	1	4%	1	4%	2	7%	7	26%	16	59%	3.33	27	0

20. Conduct that promoted public confidence in the court and judge"s ability													
21. Patient	0	0%	1	4%	3	12%	9	35%	13	50%	3.31	26	0
Category Total	**2**	**2%**	**5**	**4%**	**15**	**11%**	**37**	**28%**	**74**	**56%**	**3.32**	**133**	
5. Admin Performance													
22. Punctual in conducting proceedings	0	0%	0	0%	4	15%	7	26%	16	59%	3.44	27	0
23. Maintained proper control over courtroom	0	0%	0	0%	3	11%	9	33%	15	56%	3.44	27	0
24. Prompt in making rulings and rendering decisions	0	0%	0	0%	3	11%	8	30%	16	59%	3.48	27	0
25. Was prepared for the proceedings	0	0%	1	4%	2	7%	8	30%	16	59%	3.44	27	0
26. Efficient management of the calendar	0	0%	0	0%	4	17%	6	25%	14	58%	3.42	24	0
Category Total	**0**	**0%**	**1**	**1%**	**16**	**12%**	**38**	**29%**	**77**	**58%**	**3.45**	**132**	
6. Settlement Activities													
27. Appropriately promoted or conducted settlement	0	0%	0	0%	1	8%	5	42%	6	50%	3.42	12	0
Category Total	**0**	**0%**	**0**	**0%**	**1**	**8%**	**5**	**42%**	**6**	**50%**	**3.42**	**12**	

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Judge Hugh Hegyi intends to retire at the end of his term and did not file for retention. He is not listed on the Maricopa County ballot .

WHO JUDGES THE JUDGES?
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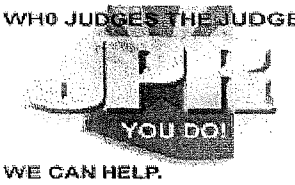
Arizona Commission on Judicial Performance Review

Hon. Sean Brearcliffe **2016 Juror Survey Responses**

Key: **UN** = Unsatisfactory **PO** = Poor **SA** = Satisfactory **VG** = Very Good **SU** = Superior

Judge Hugh Hegyi intends to retire at the end of his term and did not file for retention. He is not listed on the Maricopa County ballot .



Arizona Commission on Judicial Performance Review

Hon. Sean Brearcliffe — **2016 Litigant Witness Survey Responses**

Key: **UN** = Unsatisfactory **PO** = Poor **SA** = Satisfactory **VG** = Very Good **SU** = Superior

	UN		PO		SA		VG		SU		Mean	Total	No Resp
1. Integrity	Num.	Pct.	Num.	Pct.	Num.	Pct.	Num.	Pct.	Num.	Pct.			
1. Basic fairness and impartiality	3	14%	3	14%	2	10%	4	19%	9	43%	2.62	21	0
2. Equal treatment regardless of race	0	0%	0	0%	2	14%	4	29%	8	57%	3.43	14	0
3. Equal treatment regardless of gender	3	18%	2	12%	2	12%	3	18%	7	41%	2.53	17	0
4. Equal treatment regardless of religion	0	0%	0	0%	1	9%	4	36%	6	55%	3.45	11	0
5. Equal treatment regardless of national origin	0	0%	0	0%	2	15%	4	31%	7	54%	3.38	13	0
6. Equal treatment regardless of disability	1	6%	1	6%	4	25%	3	19%	7	44%	2.88	16	0
7. Equal treatment regardless of age	2	11%	1	6%	3	17%	3	17%	9	50%	2.89	18	0
8. Equal treatment regardless of sexual orientation	1	8%	1	8%	2	15%	3	23%	6	46%	2.92	13	0
9. Equal treatment regardless of economic status	3	15%	1	5%	3	15%	4	20%	9	45%	2.75	20	0
Category Total	**13**	**9%**	**9**	**6%**	**21**	**15%**	**32**	**22%**	**68**	**48%**	**2.93**	**143**	
2. Communication													
10. Explained proceedings	3	15%	1	5%	4	20%	2	10%	10	50%	2.75	20	0
11. Explained reasons for delays	3	25%	1	8%	4	33%	1	8%	3	25%	2.00	12	0
Category Total	**6**	**19%**	**2**	**6%**	**8**	**25%**	**3**	**9%**	**13**	**41%**	**2.47**	**32**	
3. Temperament													
12. Understanding and compassion	6	30%	1	5%	3	15%	2	10%	8	40%	2.25	20	0
13. Dignified	2	10%	3	14%	3	14%	2	10%	11	52%	2.81	21	0
14. Courteous	3	14%	1	5%	4	19%	2	10%	11	52%	2.81	21	0
15. Conduct that promotes public confidence in the court	3	14%	2	9%	4	18%	3	14%	10	45%	2.68	22	0
16. Patient	4	19%	0	0%	3	14%	3	14%	11	52%	2.81	21	0
Category Total	**18**	**17%**	**7**	**7%**	**17**	**16%**	**12**	**11%**	**51**	**49%**	**2.68**	**105**	
4. Admin Performance													
17. Punctual in conducting proceedings	2	10%	2	10%	3	15%	3	15%	10	50%	2.85	20	0
18. Maintained proper control of courtroom	2	11%	0	0%	2	11%	4	22%	10	56%	3.11	18	0
19. Was prepared for the proceedings	1	5%	3	16%	3	16%	2	11%	10	53%	2.89	19	0
Category Total	**5**	**9%**	**5**	**9%**	**8**	**14%**	**9**	**16%**	**30**	**53%**	**2.95**	**57**	

Pima County Voters Only

Hon. Sean Brearcliffe

Court of Appeals Division II
Appointed: 2017

100% of the Commission Voted Judge Brearcliffe MEETS Judicial Performance Standards
33 Commissioners Voted 'Meets'
0 Commissioners Voted 'Does Not Meet'

☐ Show Surveys from Prior Years

2020	Attorney Surveys Distributed: 152 Returned: 20 Score (See Footnote)	Superior Court Judge Surveys Distributed: 94 Returned: 40 Score (See Footnote)
Legal Ability	95%	92%
Integrity	98%	93%
Communication	n/a	n/a
Temperament	n/a	n/a
Admin Performance	100%	100%

FOOTNOTE: The score is the percentage of all evaluators who rated the judge "superior", "very good", or "satisfactory" in each of the Commission's evaluation categories. Depending on the assignment, a judge may not have responses in certain categories, indicated by N/A (for example, some judicial assignments do not require jury trials or no survey responses were returned). The JPR Commission votes "Yes" or "No" on whether a judge "MEETS" Judicial Performance Standards, based on the statistical information, as well as any other information submitted by the public or the judge. Further information on the judges and justices can be found at each court's website.

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WHO JUDGES THE JUDGES?

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Arizona Commission on Judicial Performance Review

Hon. Sean Brearcliffe

2020 Attorney Survey Responses

Key: **SU** = Superior **VG** = Very Good **SA** = Satisfactory **PO** = Poor **UN** = Unsatisfactory

	SU		VG		SA		PO		UN		Mean	Total
1. Legal Ability	Num.	Pct.	Num.	Pct.	Num.	Pct.	Num.	Pct.	Num.	Pct.		
1. Legal reasoning ability	14	67%	3	14%	3	14%	1	5%	0	0%	3.43	21
2. Knowledge of law	13	62%	4	19%	3	14%	1	5%	0	0%	3.38	21
3. Decisions based on laws and facts	13	65%	4	20%	2	10%	1	5%	0	0%	3.45	20
4. Clearly written, legally supported decisions	13	65%	4	20%	2	10%	1	5%	0	0%	3.45	20
Category Total	**53**	**65%**	**15**	**18%**	**10**	**12%**	**4**	**5%**	**0**	**0%**	**3.43**	**82**
2. Integrity												
5. Basic fairness and impartiality	9	69%	2	15%	1	8%	1	8%	0	0%	3.46	13
6. Equal treatment regardless of race	4	80%	1	20%	0	0%	0	0%	0	0%	3.80	5
7. Equal treatment regardless of gender	6	75%	1	13%	1	13%	0	0%	0	0%	3.62	8
8. Equal treatment regardless of religion	4	80%	1	20%	0	0%	0	0%	0	0%	3.80	5
9. Equal treatment regardless of national origin	4	80%	1	20%	0	0%	0	0%	0	0%	3.80	5
10. Equal treatment regardless of disability	4	80%	1	20%	0	0%	0	0%	0	0%	3.80	5
11. Equal treatment regardless of age	5	71%	1	14%	1	14%	0	0%	0	0%	3.57	7
12. Equal treatment regardless of sexual orientation	4	80%	1	20%	0	0%	0	0%	0	0%	3.80	5
13. Equal treatment regardless of economic status	4	80%	1	20%	0	0%	0	0%	0	0%	3.80	5
Category Total	**44**	**76%**	**10**	**17%**	**3**	**5%**	**1**	**2%**	**0**	**0%**	**3.67**	**58**
3. Admin Performance												
24. Promptness in making rulings and rendering decisions	16	76%	2	10%	3	14%	0	0%	0	0%	3.62	21
Category Total	**16**	**76%**	**2**	**10%**	**3**	**14%**	**0**	**0%**	**0**	**0%**	**3.62**	**21**

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WHO JUDGES THE JUDGES?

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Arizona Commission on Judicial Performance Review

Hon. Sean Brearcliffe

2020 Superior Court Judge Survey Responses

Key: **SU** = Superior **VG** = Very Good **SA** = Satisfactory **PO** = Poor **UN** = Unsatisfactory

	SU		VG		SA		PO		UN		Mean	Total	No Resp
1. Legal Ability	Num.	Pct.	Num.	Pct.	Num.	Pct.	Num.	Pct.	Num.	Pct.			
1. Legal reasoning ability	29	83%	0	0%	3	9%	3	9%	0	0%	3.57	35	0
2. Knowledge of the law	28	80%	1	3%	3	9%	3	9%	0	0%	3.54	35	0
3. Decisions based on law and facts	29	83%	0	0%	4	11%	2	6%	0	0%	3.60	35	0
4. Clearly written, legally supported decisions	28	80%	1	3%	3	9%	3	9%	0	0%	3.54	35	0
Category Total	**114**	**81%**	**2**	**1%**	**13**	**9%**	**11**	**8%**	**0**	**0%**	**3.56**	**140**	
2. Integrity													
5. Basic fairness and impartiality	28	88%	0	0%	3	9%	1	3%	0	0%	3.72	32	0
6. Equal treatment regardless of race	22	88%	0	0%	1	4%	2	8%	0	0%	3.68	25	0
7. Equal treatment regardless of gender	21	88%	0	0%	1	4%	2	8%	0	0%	3.67	24	0
8. Equal treatment regardless of religion	21	88%	0	0%	1	4%	2	8%	0	0%	3.67	24	0
9. Equal treatment regardless of national origin	21	88%	0	0%	1	4%	2	8%	0	0%	3.67	24	0
10. Equal treatment regardless of disability	21	88%	0	0%	1	4%	2	8%	0	0%	3.67	24	0
11. Equal treatment regardless of age	21	88%	0	0%	2	8%	1	4%	0	0%	3.71	24	0
12. Equal treatment regardless of sexual orientation	20	87%	0	0%	1	4%	1	4%	1	4%	3.61	23	0
13. Equal treatment regardless of economic status	21	88%	0	0%	2	8%	1	4%	0	0%	3.71	24	0
Category Total	**196**	**88%**	**0**	**0%**	**13**	**6%**	**14**	**6%**	**1**	**0%**	**3.68**	**224**	
3. Admin Performance													
14. Promptness in making rulings and rendering decisions	24	80%	3	10%	3	10%	0	0%	0	0%	3.70	30	0
Category Total	**24**	**80%**	**3**	**10%**	**3**	**10%**	**0**	**0%**	**0**	**0%**	**3.70**	**30**	

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