APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

This original application, 16 double-sided copies and one (1) single-sided copy must be filed with the Human Resources Department, Administrative Office of the Courts, 1501 W. Washington, Suite 221, Phoenix, AZ, 85007, not later than 3:00 p.m. on August 8, 2016. Read the application instructions thoroughly before completing this application form. The fact that you have applied is not confidential, responses to Section I of this application are made available to the public, and the information provided may be verified by Commission members. The names of applicants, interviewees and nominees are made public, and Commission files pertaining to nominees are provided to the Governor for review. This entire application, including the confidential portion (Section II), is forwarded to the Governor upon nomination by the Commission.

SECTION I: PUBLIC INFORMATION (QUESTIONS 1 THROUGH 71)

PERSONAL INFORMATION

1. Full Name: **Andrew Woodhouse Gould**

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

3. Office Address: **Arizona Court of Appeals, Division One**
1501 W. Washington Street
Phoenix, Arizona 85007

4. When have you been a resident of Arizona?

I moved to Arizona in June 1990. Apart from a few months working in Evansville, Indiana in 1998, I have resided in Arizona since that time (1990-present).

5. What is your county of residence and how long have you resided there?

Apart from a few months when I was working in Evansville, Indiana in 1998, I have been a resident of Yuma County, Arizona since August 1994. I purchased a residence in Maricopa County, Arizona this year, and this has been my primary residence since May 2016. However, because I was appointed as a judge from a rural county to the Arizona Court of Appeals, Division One, I also maintain a residence in Yuma County.

6. Age: **52**

(The Arizona Constitution, Article VI, §§ 22 and 37, require that judicial nominees be 30 years of age or older before taking office and younger than age 65 at the time the nomination is sent to the Governor.)

7. List your present and former political party registrations and approximate dates of each: **Republican (1984-Present)**

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

8. Gender: **Male**

Race/Ethnicity:

[**X**] White
[ ] Hispanic or Latino (of any race)
[ ] Black or African American
[ ] American Indian or Alaska Native
[ ] Asian
[ ] Native Hawaiian/Pacific Islander
[ ] Other: _____

(The Arizona Constitution, Article VI, §§ 36 and 41, requires the Commission to consider the diversity of the state's or county's population in making its nominations. However, the primary consideration shall be merit.)

EDUCATIONAL BACKGROUND

9. List names and locations of schools attended (college, advanced degrees and law), dates attended and degrees.

Northwestern University School of Law
Chicago, IL
1987-1990
Juris Doctor

University of Montana
Missoula, MT
1982-1986
Bachelor of Arts

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

Major - Political Science; Minor – History

University of Montana Baseball (Club Team)

University of Montana Advocate (student representative – orientation and recruiting)

Vice President, Phi Eta Sigma Honor Society

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

Graduated from University of Montana with Highest Honors

Selected for two academic honor societies, University of Montana

Scholarship Recipient, Northwestern University Law School

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 administrative bodies, which require special admission to practice.

Arizona – 11/6/90

Federal District Court of Arizona – 11/16/90

Minnesota – 3/4/99; Restricted (Inactive) since 2002

Indiana – 5/6/98 (voluntary non-renewal; lapsed 12/31/98)

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 take a bar examination more than once in order to be admitted to the bar of any state? **No** If so, explain.

14. Indicate your employment history since completing your formal education. List your current position first. If you have not been employed continuously since completing your formal education, 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, Div. One	**1/12 – Present**	**Phoenix, AZ**
Yuma County Pro Tem Judge	**1/12 – Present**	**Yuma, AZ**
Yuma County Superior Court Superior Court Judge	**3/01-12/11**	**Yuma, AZ**
Presiding Judge, Yuma County Superior Court	**2/06 – 12/11**	**Yuma, AZ**
Associate Presiding Judge Yuma County Superior Court	**4/01 – 2/06**	**Yuma, AZ**
Yuma County Attorney's Office Chief Civil Deputy	**6/99 – 3/01**	**Yuma, AZ**

Maricopa County Attorney's Office Prosecutor	**11/98- 5/99**	**Phoenix, AZ**
Vanderburgh Co. Attorney's Office Prosecutor	**3/98-10/98**	**Evansville, IN**
Yuma County Attorney's Office Prosecutor	**8/94-3/98**	**Yuma, AZ**
Kern & Wooley Associate-Civil Litigation	**1/94-8/94**	**Phoenix, AZ**
Gallagher & Kennedy Associate-Civil Litigation	**4/92-11/93**	**Phoenix, AZ**
Snell & Wilmer Associate-Civil Litigation	**9/90-3/92**	**Phoenix, AZ**

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

Hon. Michael J. Brown
Hon. Kent E. Cattani
Hon. Margaret H. Downie
Hon. Peter B. Swann
Hon. Randall M. Howe
Hon. Diane M. Johnsen
Hon. Donn Kessler
Hon. Patricia K. Norris
Hon. Patricia A. Orozco
Hon. Maurice Portley
Hon. Kenton D. Jones
Hon. Jon W. Thompson
Hon. Samuel A. Thumma
Hon. Lawrence F. Winthrop

16. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

Appellate Practice – civil, criminal, family, juvenile and probate

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

Criminal Law – Prosecutor

Civil Litigation – Commercial and Personal Injury Litigation

Health Care

Civil Rights

Mental Health/Civil Commitments

18. Identify all areas of specialization for which you have applied or been granted certification by the State Bar of Arizona. **None**

19. Describe your typical clients. **Not Applicable**

20. Have you served regularly in a fiduciary capacity other than as a lawyer representing clients? If so, give details. **No**

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

As Presiding Judge for Yuma County, I was involved in drafting personnel rules, case flow procedures, administrative orders, and ethical rules for the court. I also reviewed various types of contracts for professional services, equipment, construction, and repair and maintenance services.

In my capacity as Chief Civil Deputy for Yuma County, I negotiated and drafted numerous contracts and personnel rules for Yuma County, including plan documents for the Yuma County self-insured health care plan, contracts for professional services, public bids, construction contracts, and procurement contracts.

I negotiated and prepared numerous contracts and settlement agreements during the time I was engaged in civil practice. Additionally, as a prosecutor I negotiated and drafted many plea agreements.

As a judge, I have served on numerous committees that involved drafting rules of civil and criminal procedure, as well as ethical rules.

22. Have you practiced in adversary proceedings before administrative boards or commissions? **No** If so, state:

    a. The agencies and the approximate number of adversary proceedings in which you appeared before each agency. **Not Applicable**

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

        Sole Counsel: _____

        Chief Counsel: _____

        Associate Counsel: _____

23. 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:	**10**
Chief Counsel:	**10**
Associate Counsel:	**0**

As a trial judge I handled a large number of settlement conferences and appeals from arbitration. I have also continued to conduct settlement conferences as an appellate judge.

24. List not more than three contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the names, addresses (street and e-mail) 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. You may reveal nonpublic, personal, identifying information relating to client or litigant names or similar information in the confidential portion of this application.

***Wylley v. Stansbury*, Yuma County Superior Court Case No. S1400CV9900853.**

Date: 12/99- 5/00.

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Attorney for Plaintiffs Richard and Janet Wylley

This case involved enforcement of a zoning regulation. I represented the Yuma County Planning and Zoning Department ("Yuma P & Z"). Plaintiffs (the

"Wylleys") purchased a lot zoned for "site built" residences, *e.g.*, homes built on a lot. Unaware of the zoning restriction, the Wylleys moved their manufactured home onto the lot. In response, Yuma P & Z cited Wylleys for violating the Zoning Ordinance and attempted to remove the home from the lot. The Wylleys filed a lawsuit seeking to enjoin Yuma P & Z from removing their home; the Wylleys also sought damages. The case eventually settled, and the Wylleys were permitted to keep their manufactured home on the lot.

The case involved a situation that was more appropriately resolved at a settlement conference than at trial. The grounds for distinguishing a manufactured home from a site built home were unclear under the Zoning Ordinance. In addition, plaintiffs were a family of modest income with several small children. Under the unique circumstances of the case, the family would have been financially devastated if it had been forced to remove the manufactured home from the lot. The settlement we reached was based upon a respectful and good faith interpretation of the Zoning Ordinance that also permitted the Wylleys to keep their home on the lot.

***John T. Underhill, et al., v. James A. Underhill, et al.,* Yuma County Superior Court Case No. S1400CV200601240 (Consolidated Case Number).**

Date: 2006-2015

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Attorney for Clinton T. and James Underhill

In this case, I served as the trial judge and settlement conference judge.

The case involved a closely held family corporation. One group of family members owning a minority share of the corporation sued another group of family members owning a majority share of the corporation. The allegations included fraud, breach of fiduciary duty, and corporate waste/mismanagement.

The litigation involved several complex legal and factual issues, and lasted for several years. As a result, the litigation costs were very high for both parties. During the case I periodically ordered the parties to participate in settlement conferences. Finally, after several settlement conferences, the parties agreed to settle their differences and terminate the litigation.

The settlement was quite complex because it involved assessing the value of the corporation's real estate holdings, placing the properties on the market, and dividing the sales proceeds amongst the parties. This required working closely with a financial special master and real estate special master. In addition, settlement was further complicated by the strong personal animosity between the family members.

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Foothills Home Installers, Inc., v. Alicia Lewis, Yuma County Superior Court, **Case. No. S1400CV200200368.**

Date: 5/02-7/03

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Attorney for Plaintiff Foothills Home Installers

I was involved in this case as the trial/settlement judge. The case involved allegations that the bookkeeper of a medium-sized corporation, Lewis, had embezzled approximately $150,000 from the corporation ("FHI"). FHI filed a complaint for conversion and fraud against Lewis. FHI also moved to attach, or freeze all of Lewis' bank accounts. I granted FHI's motion, and Lewis challenged the order. Based on Lewis' motion, we conducted a lengthy evidentiary hearing regarding the attachment order; for several days the parties presented evidence regarding hundreds of contested deposits, withdrawals, and purchase transactions Lewis performed in her capacity as bookkeeper for FHI.

Several personal matters of a very sensitive nature arose during the hearing regarding Lewis and one of the owners of FHI. The more these issues were litigated, the more I was concerned that going forward with the hearing – and trial - would lead to a great deal of embarrassment and emotional pain for the parties and their families. As a result, I stayed the hearing and ordered the parties to participate in a settlement conference. The conference lasted two days, but the parties were eventually able to settle the case.

25. Have you represented clients in litigation in Federal or Arizona trial courts? **Yes**
If so, state:

The approximate number of cases in which you appeared before:

Federal Courts: **6**

State Courts of Record: **850**

Municipal/Justice Courts: **100**

The approximate percentage of those cases which have been:

Civil: **25%**

Criminal: **75%**

The approximate number of those cases in which you were:

Sole Counsel: **760 (80%)**

Chief Counsel: **760 (80%)**

Associate Counsel: **190 (20%)**

The approximate percentage of those cases in which:

You conducted extensive discovery[1]: **33%**

You wrote and filed a motion for summary judgment: **33%**

You wrote and filed a motion to dismiss: **5%**

You argued a wholly or partially dispositive pre-trial, trial or post-trial motion (e.g., motion for summary judgment, motion for a directed verdict, motion for judgment notwithstanding the verdict): **20%**

You made a contested court appearance (other than as set forth in above response) **50%**

You negotiated a settlement: **93%**

The court rendered judgment after trial: **1%**

A jury rendered verdict: **5%**

Disposition occurred prior to any verdict: **1%**

The approximate number of cases you have taken to trial:

Court **5**

[1]Extensive discovery is defined as discovery beyond standard interrogatories and depositions of the opposing party.

Note: If you approximate the number of cases taken to trial, explain why an exact count is not possible. Jury **40**

26. Have you practiced in the Federal or Arizona appellate courts? **Yes** If so, state:

The approximate number of your appeals which have been:

Civil: **5**

Criminal: **0**

The approximate number of matters in which you appeared:

As counsel of record on the brief: AZ **2** U.S. **0**

Personally in oral argument: AZ **0** U.S. **0**

27. Have you served as a judicial law clerk or staff attorney to a court? **No** If so, state the name of the court and dates of service, and describe your experience.

28. List not more than five cases you litigated or participated in as an attorney before mediators, arbitrators, administrative agencies, trial courts or appellate courts. 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 presiding judge or officer before whom the case was heard; (3) the names, addresses (street and e-mail) 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. You may reveal nonpublic, personal, identifying information relating to client or litigant names or similar information in the confidential portion of this application.

***The Meadows v. Employers Health Insurance*, U.S. District Court, Arizona Case No. CIV 91- 0221 PHX PGR**

Date: 1991
U.S. District Court of Arizona
Judge Rosenblatt

Andrew Gould
Attorney for Plaintiff (The Meadows)

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Attorney for Defendant Employers Health Insurance

This case involved preemption by ERISA of state law claims for health care benefits. My client, The Meadows, was a mental health facility seeking payment for care provided to a patient. The insurance company denied coverage, and I filed a breach of contract action in state court. The insurance company removed the case to federal court, claiming the case was preempted by ERISA. Eventually, the case was dismissed because the court determined (1) The Meadows' claims were preempted by ERISA, and (2) there was no cause of action for breach of contract under ERISA.

The case was significant because it dealt with matters of first impression regarding the nature and scope of ERISA preemption over state law claims for employee health benefits.

Adiutori v. Sky Harbor International Airport, et al., U.S. District of Arizona Case No. CIV 93-1427 PHX PGR.

Date: 1993-1995
U.S. District Court, Arizona
Judge Rosenblatt

Andrew Gould
Robert Greer
Attorney for Defendant Sky Harbor Airport
(Owned and operated by the City of Phoenix)

Mr. Greer was a partner at Kern and Wooley at the time of this litigation.
Mr. Greer currently works at:
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RLGreer@bwglaw.net

F. Joseph Walsh
Attorney for Plaintiff
Current Address/Phone Number Unknown
Mr. Walsh is not listed in the State Bar Directory, and I have had no contact with him for many years. I checked the Arizona State Bar Website, which reports that Mr. Walsh lives in Tucson and is no longer practicing law due to a physical and/or mental disability.

Stephen C. Yost
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Plaintiff Adiutori was an airline passenger who filed a claim in excess of $1 million dollars for injuries caused by a heart attack he suffered on an airplane. I represented defendant Sky Harbor Airport, which was owned and operated by the City of Phoenix. Adiutori claimed that Sky Harbor caused his injuries because it failed to provide proper handicap access to a shuttle bus that transported him to his airport terminal. Specifically, Adiutori claimed that he suffered a heart attack because he had to climb up several steps to get into a shuttle bus; Adiutori argued that pursuant to the Americans with Disabilities Act (ADA), the shuttle should have been equipped with a wheelchair lift.

I filed a motion for summary judgment that was granted by Judge Rosenblatt. *See Adiutori v. Sky Harbor Airport,* 880 F. Supp. 696 (D. Ariz. 1995).

This case involved a matter of first impression regarding construction of the ADA's requirements for airport shuttle buses, and was one of the first reported decisions under the ADA.

***State v. Oscar Lozoya Moreno*, Yuma County Superior Court Case No. SC94C21240.**

Date: 1994-1995
Yuma County Superior Court
Judge Philip Hall

Andrew Gould, Prosecutor

Michael Donovan
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Attorney for Defendant

This case involved several counts of child molestation and sexual conduct with a minor. The victim was the five-year-old grandson of the defendant. The case went to trial, and defendant was found guilty. Defendant was sentenced to a lengthy prison sentence.

The case was an extremely difficult and sensitive case due to the relationship between the victim and defendant. In addition, the victim's grandmother was a witness to some the incidents, but did not cooperative with the investigation or prosecution of the case. Finally, the molests caused the victim to suffer permanent, debilitating injuries.

***State of Arizona v. Oscar Armando Hernandez-Rios*, Yuma County Superior Court Case No. SC97C00838.**

Date: 1997-1998
Yuma County Superior Court
Judge Tom Cole

Andrew Gould
Prosecutor

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Attorney for Defendant

The defendant was charged with several counts of transportation of marijuana for sale and importation of marijuana. The case was the culmination of a lengthy investigation concerning a Mexican drug trafficking organization named "Los Diablos." Federal and state law enforcement agents participated in the investigation. I was involved in the investigation from its inception. The defendant eventually plead guilty and was sentenced to a lengthy prison term.

With assistance from the Attorney General's Office, the Mexican government agreed to file charges against several members of the Los Diablos organization residing in Mexico. This case was notable because it was one of the first Arizona drug cases where the government of Mexico agreed to file charges against the defendants in Mexico. (Note: At the time of this case, Mexican authorities usually limited the filing of charges in Mexico to cases involving violent offenses such as murder).

***Sarah Brown; Brandi Plickerd, et al., v. James Anthony Cruz; Yuma County; State of Arizona, et al.*, Maricopa County Superior Court Case Nos. CV 99-16002, CV 98-22629, CV 98-21946 (Consolidated).**

Date: 1999-2001
Maricopa County Superior Court
Judge Yarnell

Andrew Gould
Attorney for Defendant Yuma County

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Attorney for Defendant Ruth Cruz

This case was a § 1983 civil rights lawsuit arising from the conduct of James Anthony Cruz, a community service worker for the Yuma County Juvenile Court. Cruz shared drugs and forcibly raped several minor females who were on probation with the Juvenile Court. I represented Yuma County.

I filed a motion for summary judgment to dismiss Yuma County from the lawsuit. The motion was based upon separation of powers. I argued that Cruz was hired, supervised and retained by the Juvenile Court, which is part of the Arizona Judicial Branch of government. As a result, Cruz was a state court employee, not a county employee, and Yuma County had no authority to direct or control Cruz's actions as a court employee.

The court granted our motion for summary judgment, and plaintiffs appealed. *See Sarah Brown, et al., v. Yuma County, et al.*, App. Div. One Cause Nos. 1 CA-CV 00-421 and 1 CA-CV 00-541 (Consolidated). The Court of Appeals affirmed the superior court's dismissal in a memorandum decision.

This case was an important case for Yuma County and for courts throughout Arizona. Plaintiffs' claims involved serious civil rights violations and claims for damages totaling several million dollars. The case received a great deal of publicity in Yuma County, and served as a warning for Juvenile Courts throughout Arizona regarding the oversight and training of juvenile court personnel.

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

Arizona Court of Appeals, Division One
1/12 – Present
Appointed by Governor Brewer; Retained in 2014 General Election

Note: Prior to my appointment on the Court of Appeals, I served as a Judge Pro Tem for the Court on numerous occasions, beginning in 2003.

Yuma County Superior Court Judge, Division 4
3/01- 12/11
Appointed by Governor Hull in 3/01
Elected 11/02, and Re-Elected 11/04 and 11/08

Appointed Associate Presiding Judge 4/01

Appointed Yuma County Presiding Judge by Chief Justice McGregor in 2/06

As a Superior Court Judge, I was assigned to criminal, civil and domestic relations cases. My duties included presiding over all pre-trial hearings, bench trials, and jury trials for cases assigned to my court.

As Presiding Judge, I was responsible for administration of the Yuma County Superior Court. This included all personnel issues, budget matters, and presentations to the Yuma County Board of Supervisors.

Note: I continue to serve as a Judge Pro Tem for Yuma County Superior Court, primarily assisting as a Drug Court Judge.

30. List not 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, addresses (street and e-mail) 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. You may reveal nonpublic, personal, identifying information relating to client or litigant names or similar information in the confidential portion of this application.

***Barrett, et al., v. Harris*, Yuma County Superior Court Case No. S1400SC99V00153.**

Date: 2003-2004

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Attorney for Defendant Dr. Harris

This was a medical malpractice case involving the death of an infant. Specifically, during the process of intubation, one of the nurses overinflated the infant with oxygen; this was fatal. The parents (the "Barretts") filed a wrongful death action against the hospital, nursing staff, and the physician, Dr. Harris. All of the parties settled except for Dr. Harris, who decided to take the case to trial.

After the Barretts rested their case, I granted Dr. Harris' motion for judgment as a matter of law regarding several of their claims. I determined that the hospital nurse, not Dr. Harris, caused the infant's death by overinflating the child with oxygen; Dr. Harris was not responsible for this action. The jury ultimately found Dr. Harris was not at fault as to a few other unrelated counts. The Barretts filed an appeal regarding my dismissal order regarding causation; on appeal, the order was affirmed. *See Barrett v. Harris*, 207 Ariz. 274, 86 P.3d 954 (App. 2004).

The *Barrett v. Harris* decision addressed several matters of first impression, and has been frequently cited on the issue of proximate cause.

***Maria Hale, et al., v. Dewane Brueske, et al.*, Yuma County Superior Court Case No. CV200500439.**

Date: 2005-2009

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Attorney for Defendant Dr. Nadgir

This case involved a medical malpractice claim filed on behalf of a minor. The minor child, Joyoko Hale, suffered a catastrophic, permanent brain injury when he contracted viral encephalitis. Joyoko's grandmother and guardian ad litem, Maria Hale, filed a lawsuit seeking $27 million in damages; the claim consisted of damages for pain and suffering and the cost of future medical care. Ms. Hale alleged the hospital and physicians who attended to Joyoko failed to properly diagnosis and treat him.

All of the defendants settled prior to or during trial except for the emergency room physician, Dr. Brueske. Dr. Brueske briefly attended Joyoko when he was first admitted to the hospital. After a 5-week trial, the jury rendered a defense verdict in favor of Dr. Brueske.

The trial was very emotional. Joyoko, who was three years old when he contracted viral encephalitis, could no longer stand or speak, and he suffered multiple seizures on a daily basis. When Joyoko was brought into the courtroom, the entire jury was brought to tears as he stood there repeatedly shaking from his seizures.

The case was also unique because there was a great deal of medical expert testimony regarding the use and effectiveness of the drug Acyclovir in treating viral encephalitis. Experts from Harvard and Stanford Medical Schools were flown in to testify about whether administering Acyclovir would have prevented some or all of Joyoko's brain damage.

***State v. Far West Water, Inc; Brent Henry Weidman, et al.*, Yuma County Superior Court Case No. S1400CR200201238.**

Date: 2002-2006
Yuma County Superior Court

Christina Fitzpatrick (Ret.)
Mark Horlings (Ret.)
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Attorney for Defendant Santec Corporation

Andrew J. Capestro
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I do not have a phone number or e-mail address for Mr. Capestro. Mr. Capestro is a California attorney who entered his appearance *pro hac vice*. Mr. Villareal, who served as Mr. Capestro's co-counsel should have access to Mr. Capestro's information.

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This case arose from the deaths of two sewage workers while they were cleaning a sewage tank. While they were in the tank, a co-worker mistakenly opened a nearby sewage line, releasing a fatal combination of lethal gases and raw sewage. One worker died in the tank; the other died trying to rescue the worker in the tank.

The state charged the two sewage corporations, Santec and Far West, as well as the CEO/President of Far West, Brent Weidman, with manslaughter. The charges were based upon a number of OSHA and AOSHA safety violations committed by the defendants. Santec plead guilty. Far West was convicted of negligent homicide after a six-week trial. Weidman was convicted of negligent homicide in a separate eight-week trial.

The case presented many issues of first impression regarding corporate criminal liability and criminal liability for violations of OSHA and AOSHA safety regulations.

The verdicts were affirmed on appeal in *State v. Far West Water & Sewer, Inc.*, 224 Ariz. 173, 228 P.3d 909 (App. 2010), and *State v. Brent Henry Weidman,* 1 CA-CR 06-0697 (Memorandum Decision filed 5/20/10).

RTB Enterprises, LLP, v. Rural Metro Corporation, et al.
Case No. S1400CV200600704

Dates: 2006-2008

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Attorneys for Defendant Rural Metro Corporation

This case involved a fire at a warehouse located in Yuma County. Because the warehouse was located outside the Yuma city limits, the City of Yuma Fire Department did not provide fire-fighting services. Rather, Rural Metro generally provided fire-fighting services for such businesses located outside the city limits. However, the company owning the warehouse, RTB, had no subscription agreement for fire-fighting services with Rural Metro. Despite the absence of an agreement, Rural Metro responded to and fought the fire. Unfortunately, Rural Metro was not successful, and the warehouse was destroyed by the fire. RTB then filed a multi-million-dollar property damage lawsuit against Rural Metro, alleging Rural Metro negligently fought the fire.

Rural Metro defended the case on the grounds it had no responsibility, contractual or otherwise, to fight the fire. Rather, Rural Metro contended that its liability was limited to the duty of a volunteer who undertakes to perform

services for another. *See, e.g. Barnum v. Rural Fire Protection Co.*, 24 Ariz. App. 233, 537 P.2d 618 (1975); *Restatement (Second) of Torts*, §323 (2007). Under the facts of the case, Rural Metro argued it had fulfilled its limited responsibilities as a volunteer.

The case involved several important issues, including the nature and extent of Rural Metro's duty to provide fire protection to residents of Yuma County. Several motions were filed in the case; as a result, I issued a number of detailed written orders regarding Rural Metro's firefighting responsibilities. After rulings on the dispositive motions, the parties settled the remaining claims.

***State v. Lourdes Espinoza Humer*, Yuma County Superior Court Case No. S1400CR200101112.**

Date: 2001-2002
Yuma County Superior Court

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Prosecutor
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Jay Cairns
Prosecutor
City of Yuma
One City Plaza, P.O. Box 13012
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I do not have Mr. Cairn's e-mail address, but his phone number is (928) 373-5060.

Jerrold F. Shelley (deceased)
Attorney for Defendant Espinoza Humer

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Attorney for Defendant Espinoza Humer

Mr. Roberson is a pastor in Tennessee and no longer practices law.

This case arose from a murder/suicide involving a mother (defendant) and her two sons. Prior to the murder, mother was involved in a custody battle with the children's father; as a result, she decided to kill her children with the apparent motive of obtaining revenge against the father. On the night of the murder, mother told her sons they were going to have a "campout" in their bedroom. She then brought a charcoal grill into their bedroom as part of the "campout," and attempted to asphyxiate the children. The younger child died, but mother and her older son survived. Mother was convicted of first degree murder at trial.

In addition to the tragic nature of this case, it was unique because it involved a significant amount of forensic computer evidence. Specifically, mother researched and planned the murder by accessing suicide sites on the internet. At the time, the use of such evidence was relatively new.

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

As a trial judge and a prosecutor, I have observed first-hand the damage substance abuse causes our communities. In an effort to combat this problem, I have been actively involved with Drug Courts for over fifteen years. In Drug Courts, the judge, prosecutor, defense counsel, probation department, and substance abuse treatment providers coalesce into one team, and focus on addressing offenders who engage in criminal behavior primarily based on their substance abuse. The program involves a high level of accountability in the form of employment, random drug testing and financial responsibility, as well as intense treatment and counseling. Our success in the Yuma Drug Court program has been remarkable: we have slashed recidivism rates in half (sometimes our recidivism rate has been as low as 30%), and approximately 90% of our participants have maintained employment.

Following my appointment to the Court of Appeals, in addition to my duties as an appellate judge, I have continued to serve as a pro tem drug court judge in Yuma County. I currently travel from Phoenix to Yuma several times a month to preside over a drug court. In addition, I have served as a presenter and trainer for drug court judges throughout Arizona.

In addition to Drug Court, I have been involved in other programs focused on lowering recidivism and combating the "revolving door" of prison. For example, I served on the statewide committee for Project SAFE, and implemented Project SAFE in Yuma County. Project SAFE is an innovative form of probation that involves direct and immediate sanctions for violations of probation. When a defendant violates a condition of his probation, rather than waiting for further violations to occur or placing the responsibility of addressing the violation with the probation officer, defendants are brought before a judge within 24-48 hours; the judge immediately addresses the violation, and may impose sanctions in the form of short periods of incarceration. The purpose of the program is to increase accountability and compliance with probation conditions, and has been very successful in reducing revocations of probation resulting in prison sentences, and lowering recidivism.

As Presiding Judge for Yuma County, I was also involved in implementing new technologies and software systems to increase court efficiency. One of these projects was the implementation of the "AJACS" case management system. Yuma County was selected as the pilot court for this project. The AJACS system essentially manages the entire court process from the filing of a case to distribution of court-ordered payments. The AJACS project lasted several months, and involved coordinating personnel from the Arizona Office of the Courts (AOC), the Yuma County Clerk's Office, and Yuma County Superior Court. Following our pilot program, the AJACS case management

system was installed in all of Arizona's thirteen rural counties. After the AJACS project was implemented, I served on an AJACS Committee created by the Arizona Supreme Court to assist in refining and further developing the system for rural counties.

I have always believed in accountability and transparency for the courts, and, as a result, have been actively involved in developing and implementing court performance standards. I have worked closely with the National Center for State Courts ("NCSC") and AOC on this issue for several years. For example, Yuma County was one of the first counties in Arizona to collect data and post results on the internet regarding the "Courtools" performance standards. These standards measure a court's efficiency in processing cases, and also include results from surveys submitted by jurors, litigants, and other members of the public who utilize the courts. I also conducted a lengthy judicial workload study with the assistance of the NCSC to examine our court's case processing efficiency. The results of Yuma County's judicial workload study were recognized in an article entitled "Judicial Workload Study for the Superior Court in Yuma County, AZ," which was published in the 25th Anniversary edition of the Court Manager.

I have been involved in judicial training and education for many years. In addition to participating in numerous judicial trainings and seminars, I currently serve as the Chairperson for the Committee on Judicial Education and Training (COJET). I have also served as an instructor at the New Judge Orientation. In addition, since 2013, I travel around the state with a group of judges on my court to present to local county bar organizations regarding recent Arizona Supreme Court and Appellate decisions, as well as rule changes.

Finally, because I have worked in a border county for so many years, one of my concerns has been the quality of interpreter services for Limited English Proficiency (LEP) litigants. The need for improvement is particularly acute for cases involving families and children, such as cases involving the termination of parental rights and divorce proceedings. Thus, I have made several presentations concerning interpreter services and language access in Arizona, including presentations at the State Leadership Conference, Judicial Conference, State Bar Conference, as well as presentations to individual counties and courts around the state. I have also worked closely with AOC on this issue for several years.

BUSINESS AND FINANCIAL INFORMATION

32. Have you ever been engaged in any occupation, business or profession other than the practice of law or holding judicial or other public office, other than as described at question 14? **No** If so, give details, including dates.

33. Are you now an officer, director or majority stockholder, 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.

    Is it your intention 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, give reasons.

34. Have you filed your state or federal income tax returns for all years you were legally required to file them? **Yes** If not, explain.

35. Have you paid all state, federal and local taxes when due? **Yes** If not, explain.

36. Are there currently any judgments or tax liens outstanding against you? **No** If so, explain.

37. Have you ever violated a court order, including but not limited to an order for payment of child or spousal support? **No** If so, explain.

38. Have you ever been a party to a lawsuit, including bankruptcy but excluding divorce? **Yes** If so, identify the nature of the case, your role, the court, and the ultimate disposition.

    Rhonda Perkins v. Alicia Spencer and Steven Spenser; Yuma County Adult Probation Department; Martin J. Krizay, Adult Probation Officer; The Honorable Andrew W. Gould, Presiding Judge, Yuma County Superior Court; Yuma County Board of Supervisors.
    United States District Court of Arizona, Case No. 07-CV-168-TUC-CKJ

I was listed as a defendant in my official capacity as Presiding Judge for Yuma County. The lawsuit concerned a probation officer who failed to keep the plaintiff/probationer's information confidential. I was represented by the Attorney General. Plaintiff voluntarily agreed to dismiss me from the case shortly after the lawsuit was filed. I was never deposed, and never responded to any discovery. I had no further involvement in the case.

39. Do you have any financial interests, investments or retainers that might conflict with the performance of your judicial duties? **No** If so, explain.

CONDUCT AND ETHICS

40. Have you ever been terminated, expelled, or suspended from employment or any school or course of learning on account of dishonesty, plagiarism, cheating, or any other "cause" that might reflect in any way on your integrity? **No** If so, give details.

41. a. Have you ever been charged with, arrested for, or convicted of any felony, misdemeanor, or violation of the Uniform Code of Military Justice? **No** If so, identify the nature of the offense, the court, and the ultimate disposition.

b. Have you, within the last 5 years, been charged with or cited for any traffic-related violations, criminal or civil, that are not identified in response to question 41(a)? If so, identify the nature of the violation, the court, and the ultimate disposition. **Yes**

In approximately March 1987, I was arrested for trespass in Norwalk, CT. The incident occurred when a friend and I climbed across an apartment roof to visit another friend who lived on the second floor of the complex. I appeared in court on March 26, 1987 and was fined $50 for civil (non-criminal) trespass.

Civil Speeding Ticket – Yuma Municipal Court Complaint No. 826532
January 2015
Yuma, AZ
Case dismissed after attending traffic school – March 14, 2015
Arizona Traffic Safety School #063

42. If you performed military service, please indicate the date and type of discharge. If other than honorable discharge, explain. **Not Applicable**

43. List and describe any litigation (including mediation, arbitration, negotiated settlement and/or malpractice claim you referred to your insurance carrier) concerning your practice of law. **None**

44. List and describe any litigation involving an allegation of fraud in which you were or are a defendant. **None**

45. List and describe any sanctions imposed upon you by any court for violation of any rule or procedure, or for any other professional impropriety. **None**

46. To your knowledge, has any formal charge of professional misconduct ever been filed against you by the State Bar or any other official attorney disciplinary body in any jurisdiction? **No** If so, when? How was it resolved?

47. Have you received a notice of formal charges, cautionary letter, private admonition or other conditional sanction from the Commission on Judicial Conduct or any other official judicial disciplinary body in any jurisdiction? **Yes** If so, in each case, state in detail the circumstances and the outcome.

I have attached documentation posted by the Judicial Conduct Commission regarding this complaint. The complaint was submitted anonymously, and was eventually dismissed with comments by the Commission (see attached).

The complaint was based on an incident that occurred in September 2012, while I was serving as a Judge Pro Tem for Yuma County Drug Court. A defendant became disruptive while I was conducting drug court. At one point, he was laughing and interrupting me while I was terminating a drug court participant from the program. Termination usually results in revocation and a prison sentence, and the young woman was very tearful. I confronted the defendant in a harsh manner and had him removed from the courtroom. The defendant directed some vulgar language towards me as he was leaving the courtroom. I held the defendant in contempt of court.

48. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by Federal and State laws? **No** If your answer is "Yes," explain in detail. (Unlawful use includes the use of one or more drugs and/or the unlawful possession or distribution of drugs. It does not include the use of drugs taken under supervision of a licensed health care professional or other uses authorized by Federal law provisions.)

49. In the past year, have you ever been reprimanded, demoted, disciplined, placed on probation, suspended, cautioned or terminated by an employer as a result of your alleged consumption of alcohol, prescription drugs or illegal use of drugs? **No** If so, state the circumstances under which such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

50. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended or terminated by an employer? **No** If so, state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of any persons who took such action, and the back ground and resolution of such action.

51. Have any of your current or former co-workers, subordinates, supervisors, customers or clients ever filed a complaint or accusation of misconduct against you with any regulatory or investigatory agency, or with your employer? **No** If so, state the date(s) of such accusation(s), the specific accusation(s) made, and the background and resolution of such action(s).

52. 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 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.

53. Within the last five years, have you failed to meet any deadline imposed by a court order or received notice that you have not complied with the substantive requirements of any business or contractual arrangement? **No** If so, explain in full.

54. 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 in full.

PROFESSIONAL AND PUBLIC SERVICE

55. Have you published any legal or non-legal books or articles? **No** If so, list with the citations and dates.

Note: As an appellate court judge I have published numerous legal opinions and memorandum decisions.

56. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge? **Yes** If not, explain.

57. 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.

I have made numerous presentations over the years, including:

For example, most recently I was a Presenter at the Arizona Paralegal Association 2016 Annual legal Seminar, in May 2016.

I conducted several trainings in 2013-2015 regarding language access and the use of interpreters in the courtroom. These presentations were made at the annual meeting for the Arizona Court Interpreter's Association (ACIA), Court Leadership Conference, State Bar Convention, and the Judicial Conference.

Starting in 2013, I have travelled around the state with several colleagues from the Court of Appeals, presenting an update on recent Arizona Supreme Court and appellate decisions, as well as rule changes.

I have served as a mentor and instructor at the New Judge Orientation ("NJO") on a yearly basis since September, 2009.

I have served as a guest lecturer on several occasions at Arizona Western College and local high schools regarding the structure and function of the courts.

I served as a presenter at the 2013 Presiding Judges' training, discussing courthouse security issues.

I was an instructor for the March 24-26, 2008 Court Performance Judicial Training Academy. This was a three-day training program that was conducted by the Judicial College of Arizona.

I was a speaker at the National Association for Court Management Conference in Chicago, IL, in July, 2007. I spoke on the topic, "NCSC CourTools II; Implementation to Date and Lessons Learned."

I served as an organizer and instructor for the 2010 Yuma County Judicial Conference, which was held June 11-12, 2010. I taught a class on "Civil Discovery." This Conference involved judges from Yuma County as well as judges from Mohave County, La Paz County, and the Arizona Court of Appeals.

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

2014-Present	**Chairperson, Committee on Judicial Education and Training (COJET)**
2009-2011	**COJET Rural County Representative**
2010-2011	**President, Arizona Judges Association (AJA)**
2009-2010	**Treasurer, AJA**
2005-2009	**AJA Executive Board, Representative for Rural Counties.**
2010-2011	**Member, Commission on Technology**
2010-2011	**Member, Commission on Victims in the Courts**
2009-2010	**Evidence Based Practices (EBP) Pre-Sentence Report Statewide Work Group.**
2010-2011	**Arizona State/Federal Judicial Council, Rural County Representative**
2009-2011	**Member, Arizona Project SAFE Workgroup (statewide committee created to implement changes and new evidence-based practices in probation).**

2010-2011	**AJACS Focus Group (statewide workgroup dedicated to improving AMCAD electronic calendaring program currently used by Arizona's 13 rural counties)**
2006-2010	**Member, Committee on Superior Courts**
2005-2011	**Panel Member, Arizona Foundation for Legal Services & Education, We the People: The Citizen and the Constitution.**

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? **No, apart from presentations made to the State Bar.**

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. **None**

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

2005-present	**Judge and Organizer for Arizona High School Mock Trial**
2011	**Judge, National Mock Trial Competition**
2007-2011	**President and Board Member, Yuma Heat/Yuma Aquatics (youth swim club)**
2013-present	**Member and participant, Yuma Community Theater**
2005-2016	**Adult Bible Study Teacher, First Christian Church**
2006	**Salvation Army, Board Member**
2002-2006	**Yuma Rotary Club, Director of Youth Activities**
2003	**State Bar of Arizona Law Day Speaker**
2002	**Participant, Arizona Town Hall**
2002-2016	**Timer/Official, Yuma High School and Youth Swimming Meets**
2000-2005	**Volunteer Baseball and Football Coach**

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

Presidential Nominee, State Justice Court Institute Board

2009 W.E.S.T. Alumni Association/Drug Court Honorable Tom C. Cole Award.

2007 Arizona Judicial Branch Achievement Award, "Being Accountable," Court Performance Measurement System Superior Court Yuma County

2005 Justice for a Better Arizona Achievement Award for Protecting Children, Families and Communities – Yuma County Drug Court.

Invitee and participant in the Performance Framework Meeting, National Center for the State Courts in Williamsburg, VA, on February 26, 2008

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

2014 Elected (retention election), Arizona Court of Appeals, Division One

2011 Appointed by Governor Brewer, Arizona Court of Appeals, Division One

2002, 2004, 2008 Elected as Superior Court Judge, Yuma County

2001 Appointed by Governor Hull, Superior Court Judge, Yuma County

Have you been registered to vote for the last 10 years? **Yes**

Have you voted in all general elections held during those years? **Yes** If not, explain.

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

I have been blessed with a wonderful family. Connie and I have been married for over 25 years, and we have two wonderful children, George and Anna. I love spending time with my family; it is my favorite activity, and the time I treasure most.

I try to get away from the law every now and then; lawyers (present company included) tend to be a little boring and stuffy at times. For example, a few years ago, I became involved in Yuma Community Theater. It has been quite

challenge learning my lines and performing live onstage. Thankfully, my parts have been small, and I have worked with some great casts, directors, and producers. However, the most interesting part has been working with people who eat dinner about the time I usually go to bed.

HEALTH

63. Are you physically and mentally able to perform the essential duties of a judge in the court for which you are applying? **Yes**

ADDITIONAL INFORMATION

64. The Arizona Constitution requires that the Commission consider the diversity of the state's or county's population in making its nominations. Provide any information about yourself (your heritage, background, experience, etc.) that may be relevant to this requirement.

There are two things I would like to share with the Commission. First, I come from a family of very modest means. Second, I have lived and practiced in a rural border community for over 20 years.

My parents were the best; kind and loving, and always full of encouragement. However, there were times when we encountered severe financial hardship. Sometimes we lost everything and ended up homeless, living in a car, or on one occasion, in a barn. There were days we wondered where we would find our next meal.

I am proud of where I came from and what my family experienced. It taught me humility, and not to judge a person's character by his position or wealth. In addition, the courage and strength my parents showed during those times has served as an inspiration for me all my life. Their example showed me that you can never give up, and you should always make the best of your current circumstances.

Given my background, I have been able to understand and relate to many of the people with limited financial means who have appeared in my court. Every time I put on my robe and interact with people in my courtroom, I remember who I am and where I came from. And I make sure to treat them the way my parents would want me to treat them, no matter who they are or how modest

their means.

I also think it is important to note that I have spent nearly my entire legal career in the rural community of Yuma. Given Arizona's proximity to the border, this experience had provided me with a unique and important perspective on our legal system. The border with Mexico creates a unique and challenging legal practice. Organized crime flows directly through Yuma from drug trafficking organizations in Mexico. Additionally, family law issues such as child custody are directly impacted by families that live and work on both sides of the border. Finally, the immigration status of criminal defendants, victims, and civil litigants affects a large number of cases.

65. Provide any additional information relative to your application or qualifications you would like to bring to the Commission's attention at this time.

See Personal Statement, attached in response to Question 68.

66. If you were selected by this Commission and appointed by the Governor to serve, are you aware of any reason why you would be unable or unwilling to serve a full term? **No** If so, explain.

67. If selected for this position, do you intend to serve fully, including acceptance of rotation to areas outside your areas of practice or interest? **Yes** If not, explain.

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

See attached Personal Statement.

69. Attach three professional writing samples, which you personally drafted (e.g., brief or motion). The samples should be no more than a few pages in length.

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.

70. If you have ever served as a judicial or quasi-judicial officer, mediator or arbitrator, attach sample copies of not more than two written orders, findings or opinions (whether reported or not) which you personally drafted. The writing

sample(s) should be no more than a few pages in length. 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.

71. 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 two performance reviews.

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

Question 47

2013-020	Dismissal	No misconduct; no violation
2013-019	Dismissal	No misconduct; no violation
2013-018	Dismissal	No misconduct; no violation
2013-017	Dismissal	No misconduct; no violation
2013-016	Dismissal	Legal or appellate issues
2013-015	Dismissal	Legal or appellate issues
2013-014	Dismissal with Comments	Warning to avoid appearance of impropriety
2013-013	Dismissal	Legal or appellate issues
2013-012	Dismissal	No misconduct; no violation
2013-011	Dismissal	No misconduct; no violation
2013-010	Dismissal	Legal or appellate issues
2013-009	Dismissal	No misconduct; no violation
2013-008	Dismissal with Comments	Advisory letter
2013-007	Dismissal	Legal or appellate issues
2013-006	Dismissal	Legal or appellate issues
2013-005	Dismissal	Legal or appellate issues
2013-004	Dismissal	No misconduct; no violation
2013-003	Dismissal	Legal or appellate issues
2013-002	Dismissal	Legal or appellate issues
2013-001	Dismissal	Legal or appellate issues

State of Arizona

COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 13-014

Judge:	No. 103981922A
Complainant:	No. 103981922B

ORDER

The complainant alleged that the judge displayed an inappropriate demeanor and abused the contempt of court power.

The responsibility of the Commission on Judicial Conduct is to impartially determine if the judge engaged in conduct that violated the provisions of Article 6.1 of the Arizona Constitution or the Code of Judicial Conduct and, if so, to take appropriate disciplinary action. The purpose and authority of the commission is limited to this mission.

After review, the commission approved sending the judge a private comment reminding him of his obligation to comply with Rule 2.8(B) of the Code, which requires judges to be patient, dignified, and courteous to litigants, even under difficult circumstances. The complaint is dismissed pursuant to Rules 16(b) and 23(a).

Dated: August 12, 2013.

FOR THE COMMISSION

/s/ Louis Dominguez

Louis Frank Dominguez
Commission Chair

Copies of this order were mailed
to the complainant and the judge
on August 12, 2013.

This order may not be used as a basis for disqualification of a judge.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

In Re Contempt of:	NO.
	SUMMARY CONTEMPT CITATION
Defendant.	

Pursuant to Rules 33.1, 33.2(a), and 33.4, *Arizona Rules of Criminal Procedure*, and Status Conference held

It is ORDERED finding defendant in direct summary contempt.

It is further ORDERED defendant shall be sentenced to thirty (30) days flat time in the

The jail sentence imposed in this case shall be served consecutively to any jail term imposed as a condition of probation or prison term imposed in

County

If no jail term or prison term is imposed in

imposed in this case shall commence **immediately** following sentencing in

are dismissed, the sentence imposed in this case shall commence **immediately** following dismissal of

If

are resolved in the form of dismissal or sentencing on different dates, then the contempt sentence imposed in this case shall commence on the date of sentencing/dismissal of the last case to be resolved.

It is ORDERED vacating the original sentence of two six-month jail terms announced

In support of the Court's Summary Contempt Citation, the Court finds that defendant engaged in the following contumacious behavior in the courtroom in the presence of court staff and approximately forty (40) participants seated in the

gallery:

Defendant disagreed with the Court's intention to terminate a participant and stated, "[T]hat's fucked up. Pussy-ass judge." *See* Copy of Transcript dated

Based on defendant's conduct, the Court finds beyond a reasonable doubt that defendant willfully engaged in direct contumacious conduct that obstructed the administration of justice and lessened the dignity and authority of the Court. Rule 33.1, *Arizona Rules of Criminal Procedure*.

The Court further finds that the summary imposition of sentence at the time defendant's conduct occurred was necessary, given the nature of defendant's conduct and the fact that defendant's conduct occurred in the presence of the Court, Court staff, Under these circumstances, prompt punishment was imperative to restore order to the courtroom proceeding and to protect the dignity and authority of the Court. Rule 33.2(a), *Arizona Rules of Criminal Procedure*.

Question 68

Answer to Question No. 68 (Reason for Seeking this Position)

Public service requires two things: (1) being prepared, and (2) doing it for the right reasons. I am prepared to serve as a justice on the Arizona Supreme Court: I have the experience and the training to do the job. My motivation for applying is to serve the people of this great state with honor and integrity and to make a positive impact on the legal system.

My legal career has been diverse. I have served in many different capacities as an attorney, and I have seen the court system from top to bottom. I have been a civil litigator and a prosecutor. I have worked at both large and small law firms. I have practiced in a large city (Phoenix) and a rural border town (Yuma). As a prosecutor, I served as both a trial attorney and as the Chief Civil Deputy in the Yuma County Attorney's Office. As a trial judge, I managed every type of case imaginable, including divorce and family law matters, juvenile cases, criminal cases, probate, contract disputes, personal injury cases, medical malpractice, and mental health commitments. In short, if there is a cause of action in Arizona, I have probably seen it in my courtroom. Since my appointment to the Court of Appeals in 2012, I have written and published hundreds of decisions on a wide variety of legal matters.

I think it is important to have experience in the courtroom to be a good judge. The courtroom, and in particular jury trials, is the crucible of the legal system and the place where the law and the facts are sorted out. I have an extensive amount of courtroom experience. As a prosecutor, I tried many jury trials ranging from first-degree murder to child molestation. As a trial judge, I tried hundreds of civil and criminal jury trials. I have also participated as an attorney and a judge in literally thousands of courtroom hearings covering a wide range of legal issues.

When I first became a judge, I recognized that it was important to work as hard outside the courtroom as in the courtroom. I wanted to understand the issues and problems facing the courts, as well as strategies to address those problems, to make the legal system better. As a result, I have been actively involved in a number of judicial committees, including committees on judicial education, technology, victims, interpreters, court performance, and probation. I have also been actively involved in court administration, first serving as Associate Presiding Judge and then as Presiding Judge for Yuma County.

I have not, however, limited my activities to court committees. I firmly believe a judge must step outside the courthouse and be a part of the community. Thus, I have been very involved in church and school activities, civic organizations, and youth sports programs. In a town like Yuma, this type of involvement certainly made me more visible; at times, people would give me a piece of their mind about the legal system or one of my decisions. However, I have welcomed the criticism because it made me accountable and kept me in touch with the public. Of course, I am no stranger to public feedback: I stood for election three times as a trial judge

in Yuma, have been through the judicial appointment process three times, judicial performance review once, and one retention election.

After many years on the trial bench, I decided to apply for the Court of Appeals. I knew I was ready to handle the demands of the job. I also felt a strong desire to write and publish decisions that provide guidance to trial judges and attorneys. I knew there were certain legal issues that repeatedly came up in court and lacked any clear guiding precedent; it was my desire to address these issues and improve the legal system.

For almost five years now, I have served as an appellate judge. This has been a tremendously rewarding experience. Instead of making a record, I now review the record. It is a bird's eye view of what happens in the legal process and provides a different perspective than the one I had as a trial judge. Additionally, it has given me an opportunity to address many challenging and important legal issues, and I believe I have drafted decisions that are practical, clear, and understandable.

I have learned some hard lessons over the course of my career. Experience is a great teacher. These lessons have taught me about our legal system and the challenges judges, lawyers, and litigants face every day. There are many questions that need to be answered, and there are many issues that must to be addressed. I am ready, willing, and able to offer everything I have to address those issues and to make the legal system in Arizona the best it can be.

Question 69

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ATTORNEY FOR THE APPELLEE

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SARAH BROWN;BRANDI PLIKERD; JANE DOE minor, by and through her next best friends and natural parents, JOHN DOE and MARY DOE, husband and wife) Plaintiffs/Appellants, vs. JAMES ANTHONY CRUZ and RUTH CRUZ, husband and wife, and JAMES ANTHONY CRUZ, in his official and individual capacity; THOMAS A. THODE, in his official and individual capacity; TIM HARDY, in his official capacity and individual capacity; RENE MEDEL, in his official and individual capacity; THE COUNTY OF YUMA; YUMA COUNTY SUPERIOR COURT; YUMA COUNTY SUPERIOR COURT, JUVENILE DIVISION; YUMA COUNTY JUVENILE COURT; YUMA COUNTY BOARD OF SUPERVISORS; and THE STATE OF ARIZONA, Defendants/Appellees.	No. CA-CV 00-0421 Maricopa County Superior Court Cause Nos. CV 99-16002-2 CV 98-22629-2 CV 98-21946-2 Consolidated With 1 CA-CV 00-0541 Maricopa County Superior Court Cause Nos. CV 99-16002-2 CV 98-22629-2 CV 98-21946-2

BRIEF OF THE APPELLEE

above.) Appellant Plikerd filed a notice of appeal on October 26, 2000 (Item No.____; See footnote 2 above.) The Appellate Court has granted the parties' stipulation to consolidate all the cases on appeal. (Item No.____; See footnote 2 above.)

III. Statement of Facts

The Complaints filed by appellants Jane Doe, Brandi Plickerd and Sarah Brown are based upon alleged injuries suffered as a result of Cruz' criminal conduct. Appellants were ordered by YCJC to perform community service. Cruz was a community services officer at YCJC and supervised Appellants' community service work. Appellants assert that Cruz harmed them in a number of ways while they were performing community service work under his supervision.

Appellants allege that they never would have been harmed by Cruz if Yuma County and/or the State had contacted Cruz' previous employers before he was hired. Appellants further allege that some of Cruz' prior employers would have warned the State and/or Yuma County about Cruz' unsuitable moral character and demeanor.

Cruz, as a YCJC employee, was a State employee under Arizona's

Constitution. Appellants' Brief acknowledges that community service officers such as Cruz are State employees. (See, Appellants' Opening Brief, p. 3.) The Arizona Constitution divides the power of State government into three coequal branches - the Executive Branch, Legislative Branch, and Judicial Branch. *Arizona Constitution,* Article III. All superior courts and juvenile courts in the State of Arizona are part of one, integrated State judicial department. *Arizona Constitution,* Article VI, §1; State v. Pima County Adult Probation Department, 147 Ariz. 146, 708 P. 2d 1337 (App. 1985). Arizona law is clear that superior court and juvenile court judges as well as the judicial employees needed to operate these courts are considered state officers and employees. Pima County, 147 Ariz. at 148-149, 708 P. 2d at 1339-1340; Holohan v. Mahoney, 106 Ariz. 595, 480 P. 2d 351(1971).

Issues Presented for Review

1. Did Yuma County Have an Affirmative Duty to Exercise Reasonable Care for the Protection/Benefit of Appellants Based on a Special Relationship Recognized by Arizona Law?

2. Did Yuma County Assume the Duty to Perform Reference Checks of Cruz' Past Employers?

3. Did the Yuma County Board of Supervisors Have the Authority to Disapprove of Judge Thode's Appointment/Hiring of Cruz Unless and

come under their custody and control.[5] However, the law and facts show that Yuma County has no such duty.

B. Cruz Was Not an Employee of Yuma County

It is a basic premise of the law of negligence that without control there is no duty, and if there is no duty, there can be no negligence. Harlin v. City of Tucson, 82 Ariz. 111, 117-118, 309 P. 2d 244, 250-251 (1957). In order for an employer to be held vicariously liable for the negligent acts of its employee, the employee must be subject to the employer's control or right of control. Pima County, 147 Ariz. at 149-150, 708 P. 2d at 1340-1341; Holohan, 106 Ariz. at 597, 480 P. 2d at 353; Hernandez v. Maricopa County, 138 Ariz. 143, 145-146, 673 P. 2d 341, 343-344 (App. 1983). "[T]he ability to control an employee's actions in the performance of his work is the foundation of an employer's liability for his employee's torts." McDaniel v. Troy Design Services Co., 186 Ariz. 552, 554-555, 925 P. 2d 693, 695-696 (App. 1996).

It is well established in Arizona that an employer cannot be held liable

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[5]See, Item No. 160, CV1998-021946 After Consolidation Index, appellant Sarah Brown's Third Amended Complaint, ¶¶ 68-72; Item No.___ (See footnote 2 above.), appellant Jane Doe's First Amended Complaint, ¶¶ 44-45; Item No. 1, CV1999-016002 Before Consolidation 2 Index, appellant Brandi Plickerd's Complaint, ¶¶ 54-64; and Item No. 32, CV1999-016002 Before Consolidation 2 Index, Defendants' Statement of Facts (hereinafter "DSOF"), ¶¶ 2-7.

for an employee's torts absent control or the right to control the employee. For example, in Fridena v. Maricopa County, 18 Ariz. App. 527, 530-531, 504 P. 2d 58, 61-62 (App. 1972), the appellant sought to impose tort liability on the county for the sheriff's alleged negligence in serving a writ of restitution. The court held that because the county had no right of control over the sheriff or his deputies in the service of the writ, it was not liable under the doctrine of respondeat superior for the sheriff's tort liability. Id.

The issue of control focuses on the day-to-day exercise of control over an employee's performance of his job duties. McDaniel, 186 Ariz. at 554-555, 925 P. 2d at 695-696; Holohan, 106 Ariz. at 597,480 P. 2d at 353. Without such control, it is immaterial whether an entity supplies funds, facilities or equipment to assist an employee in the performance of his or her duties. Pima County, 147 Ariz. at 150, 708 P. 2d at 1341; Moore v. Maricopa County, 11 Ariz. App. 505, 508, 466 P. 2d 56, 59 (App. 1970). Control cannot be established by cooperation, participation, and interaction between an employer and a third party. Morgan v. Safeway Stores, Inc., 884 F. 2d 1211, 1214 (9th Cir. 1989). Further, the mere assistance by the county in the hiring of state judicial employees does not establish county control over those employees in

the performance of their duties. Holohan, 106 Ariz. at 597, 480 P. 2d at 353.

YCJC community service officers working for the Juvenile Division of the Yuma County Superior Court are under the exclusive supervision and control of the State of Arizona. (Item No. 32, CV1999-016002 Before Consolidation 2 Index, Defendants' Statement of Facts (hereinafter "DSOF"), ¶¶ 6, 7, 8.) Yuma County cannot be held liable for the acts of Cruz because it did not have control or the right of control over any aspect of Cruz's employment.

C. Yuma County Did Not Exercise Control Over Cruz Because Such Control Is Prohibited By the Separation of Powers Doctrine

Yuma County did not and could not exercise control over Cruz and/or Appellants because the doctrine of separation of powers mandates judicial control over court functions and employees. The *Arizona Constitution* mandates that the three branches of government be separate and independent from each other in the performance of their constitutionally assigned functions. *See, Arizona Constitution*, Article III ; Mann v. Maricopa County, 104 Ariz. 561, P.2d 563-565, 456 P. 2d 931, 933-935 (1969) (quoting, Smith v. Miller, 384 2d 738, 740 (Colo. 1963)). No one branch can be allowed to interfere or

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YUMA

STATE OF ARIZONA Plaintiff, vs. PEDRO RANGEL NUNEZ, Defendant.	NO. SC95C01151 Division III STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS

THE STATE OF ARIZONA, through its Deputy County Attorney Andrew W. Gould, hereby responds to defendant's motion to suppress. The State requests that defendant's motion be denied because the detention and search of defendant's vehicle constituted a legal border search or, in the alternative, there was a reasonable suspicion to detain defendant and the detention gave rise to probable cause to search defendant's vehicle. This motion is supported by the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 31st day of January, 1996.

DAVID S. ELLSWORTH
YUMA COUNTY ATTORNEY

By Andrew W. Gould
ANDREW W. GOULD
DEPUTY COUNTY ATTORNEY

MEMORANDUM OF POINTS AND AUTHORITIES

I. Factual Background

Defendant is currently charged with one count of transportation of marijuana for sale in violation of A.R.S. §13-3405(A)(4) and one count of possession of marijuana for sale in violation of A.R.S. §13-3405(A)(2). These charges arise from defendant's arrest on November 8, 1995 near the Colorado River in the approximate area of County 7 1/4 and Levee Road. Defendant was arrested at that time as the sole occupant and driver of a Bronco containing 163 pounds of marijuana.

The subject incident occurred in a rural desert area next to the Colorado River. The location is 16 miles from San Luis, Arizona. There are no homes or businesses in the immediate area.

Agent Gonzalez has been working in this area for eight years. He is familiar with the usual patterns of traffic in the area, as well as the vehicles driven by the few nearby residents. Agent Gonzalez is also aware that several arrests and drug seizures have been made in the location where he detained the defendant. Because this area has served as a main artery for drug smuggling from Mexico into the United States, the United States Border Patrol has placed sensors near the river to detect traffic coming across the river.

The specific location where Agent Gonzalez first saw the defendant was approximately 40 to 50 feet from the river. This portion of the Colorado River forms a joint boundary between Arizona, California and Mexico. In this area, the Colorado River

is flanked by brush and trees. However, in these specific spot where Agent Gonzalez first saw the defendant, there is a clearing that allows access to the river. This access is wide enough for two cars to pass each other. Border Patrol has set up a sensor in this clearing area to detect traffic coming across the Colorado River from Mexico into the United States.

Prior to the subject incident, Agent Gonzalez was in the area of the above-referenced clearing. The sensor had gone off, and Agent Gonzalez had walked the entire area near the sensors to see if anyone was in the area. Agent Gonzalez saw no one.

Fifteen to twenty minutes later, the sensors alerted again. Agent Gonzalez was nearby, and within 30 to 40 seconds he arrived at the clearing. At that time, Agent Gonzalez saw the defendant driving a Bronco away from the bank of the river. The defendant passed within six feet of Gonzalez as he drove away from the river. Agent Gonzalez was in a marked Border Patrol vehicle and he was wearing a uniform. Agent Gonzalez attempted to make eye contact with the defendant, however, he was unable to do so.

Agent Gonzalez followed the defendant, and shortly thereafter stopped him. Agent Gonzalez did not recognize the defendant's vehicle as one of the local vehicles he had seen in the area in the past. As Gonzalez approached defendant's vehicle, he saw three large black trash bags in the rear of the Bronco. Based upon his training and experience, Agent Gonzalez recognized these bags as consistent with the type used to carry contraband into the United States. These trash bags were in plain view through the windows of the Bronco.

When Agent Gonzalez reached the vehicle, he handcuffed the defendant for his safety. Thereafter, backup Agents Atkins and Watson arrived. Defendant's vehicle was searched, yielding 162 pounds of marijuana. Defendant was arrested and charged with the pending crimes.

II. The Detention and Search of the Defendant's Vehicle Constituted a Valid Border Search

The defendant was detained and his vehicle searched pursuant to a valid border search. As a result, defendant's motion to suppress should be denied.

It is well-settled that probable cause is not required for searches at the United States border conducted by Customs and Immigration officers. *State v. Castro*, 27 Ariz. App. 323, 327, 554 P.2d 919, _____ (App. 1976); *Alexander v. United States*, 362 F.2d 379, 382 (9th Cir. 1966). "Unsupported" or "mere" suspicion is sufficient to justify a border search. *See, Id.*

The border search exception also applies to searches conducted at the "functional equivalent" of the border. *Castro*, 27 Ariz. App. at 326-327, 554 P.2d at _____; *Alexander, Id.* The functional equivalent of the border is the first practical point at which a person or vehicle may be detained after crossing the United States. To justify a "functional" border search, the Customs or Immigration officer must have articulable facts that, based upon the totality of the circumstances, make it reasonably certain that the vehicle, its occupants, or the contraband contained therein have: (1) crossed the border, (2) not changed since they crossed the border,

and (3) that the persons involved have engaged in criminal activity (i.e., illegal aliens or contraband). *Castro*, 27 Ariz. App. at 327-328, *Alexander*, 362 F.2d at 382-383; *United States v. Weil*, 432 F.2d 1320, 1323 (9th Cir. 1970).

Courts have recognized that "functional" border searches can apply to a number of situations, and are not confined to vehicles that have actually crossed the border. As noted by the Ninth Circuit in *Weil*:

> It seems obvious to us that the right of Customs agents to search a vehicle without probable cause is not confined to vehicles that have crossed the border. For example, if Customs agents see a vehicle across the border, and see the occupant then transfer parcels from that vehicle to another that has not crossed the border, the agents surely have a right to search the latter vehicle. We also think that, if the Customs agents are reasonably certain the parcels have been (a) smuggled across the border and (b) placed in the vehicle, whether the vehicle has itself crossed the border or not, they may stop and search the vehicle. Similarly, if the agents are reasonably certain that a person has crossed the border illegally, and has then entered a vehicle on this side of the border, we think that they may stop and search the vehicle and person. They can assume that he may have brought something with him.

Weil, 432 F.2d at 1323.

The reasonable certainty requirement for functional border searches can be based upon circumstantial evidence of an illegal crossing. *Castro*, 27 Ariz. App. at 327-328, 554 P.2d at _____; *Weil, Id.* Immigration/Customs officers do not have to actually see the person, contraband or vehicle cross the border, nor do they have to have constant surveillance of the vehicle, persons or contraband from the time they cross the border until they are

stopped. *Castro, Id; Alexander* 362 F.2d at 382.

The *Castro* case is instructive on this latter point. In *Castro,* the defendant's vehicle was stopped approximately five to ten feet from the international fence separating Mexico from the United States. The vehicle was traveling on a sandy drag strip not more than 100 yards from the official border crossing (port of entry.) There was no other vehicular traffic on the road and the general area was known to have a high incidence of smuggling. Based on these facts, the defendant's vehicle was stopped and searched. Two hundred twenty one (221) bricks of marijuana were found in the defendant's truck. The defendant unsuccessfully argued to the trial court that the evidence had been seized in violation of his Fourth Amendment rights. On appeal, the Appellate Court upheld the trial court's denial of the defendant's motion to suppress.

In its reasoning, the Appellate Court held that the search of the defendant's vehicle was a functional border search. The *Castro* court stated that the arresting officer did not actually have to see the subject vehicle cross the border in order for the search to constitute a border search. Instead, the court held that given all the circumstances and facts, it appeared reasonably certain that the vehicle, or its occupants, had just crossed the border when the officer initiated the stop. As such, the search constituted a valid border search.

It is clear the search of defendant's vehicle in this case was a valid border search. All the facts taken together show to a reasonable degree of certainty that either the defendant or the

contraband contained in his vehicle crossed the border from Mexico into the United States. Shortly before defendant's arrest, Agent Gonzalez had checked the area where the sensor was located and had seen no one in the area. Within 15 to 20 minutes, the sensor alerted him that someone had crossed from the river into the United States. Within seconds, in the exact area where the sensor had alerted, Agent Gonzalez saw the defendant. At that time, the defendant was no more than 40 to 50 feet from the river, i.e., the international border. The location where the defendant was first seen is an isolated rural desert area. There is little traffic and virtually no residents in the area. It is 16 miles from the city of San Luis, Arizona. Given the location of the sensors, there was no other point of access into the United States other than from the river.

In combination with the foregoing, Agent Gonzalez knew that the specific area where he contacted the defendant was a main smuggling artery from Mexico into the United States. This is the very reason why the sensor had been placed in that location. Furthermore, the place where defendant crossed was located several miles from the nearest border patrol checkpoint and/or port of entry. These facts all give a clear indication that the defendant was illegally crossing into the United States and/or engaged in smuggling into the United States.

The doctrine of a functional border search has a very clear common sense basis. Smugglers who are either industrious or smart enough to avoid border patrol checkpoints should not be rewarded for their ingenuity. Instead, smugglers should not be rewarded

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

BENEVOLENT AND PROTECTIVE ORDER OF ELKS #2656,
Plaintiff/Appellant,

v.

STATE OF ARIZONA DEPARTMENT OF LIQUOR LICENSES AND CONTROL, *Defendant/Appellee.*

No. 1 CA-CV 14-0793
FILED 1-21-2016

Appeal from the Superior Court in Maricopa County
No. LC2014-000104-001
The Honorable Crane McClennen, Judge

AFFIRMED

COUNSEL

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By Charles E. Buri
Co-Counsel for Plaintiff/Appellant

and

Guttilla Murphy Anderson PC, Phoenix
By Nicholas C. Guttilla
Co-Counsel for Plaintiff/Appellant

Arizona Attorney General's Office, Phoenix
By Michael Raine
Counsel for Defendant/Appellee

OPINION

Judge Andrew W. Gould delivered the opinion of the Court, in which Presiding Judge Donn Kessler and Judge Patricia K. Norris joined.

G O U L D, Judge:

¶1 The Benevolent Order of the Elks (the "Elks") appeals the superior court's judgment affirming the decision by the Arizona Department of Liquor Licenses and Control ("Department"). In its decision, the Department fined the Elks $200 for conducting unlawful gambling activities in violation of Arizona Revised Statutes ("A.R.S.") section 4-244(26). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The Elks is an Arizona non-profit organization licensed to sell liquor by the Department. In 2010, the Elks entered into a contract with Patriots Land Group ("Patriots") to run a "sweepstakes," for the stated purpose of charitable fundraising. Pursuant to the contract, the Elks leased computer equipment, software, and furniture from Patriots to conduct the sweepstakes. The sweepstakes equipment consisted of a kiosk, which housed a file server connected to a game terminal; each game terminal had a video monitor, a mouse, and a magnetic card reader. In addition, Patriots agreed to provide operational support consisting of training, computer/equipment maintenance and repairs, and software updates.

¶3 In April 2010 the Elks started offering the sweepstakes to its members. The sweepstakes kiosks were housed in the Elks' Lodge and were available for use during the Elks' hours of operation. To participate in the sweepstakes, a member obtained a player card, provided by Patriots, from the Elks' bar manager or bartender. Each card had a magnetic strip and a sweepstakes identification number on the back.

¶4 Once a member received a sweepstakes card, he participated in the sweepstakes by running the card through the kiosk's card reader and placing money in the kiosk's bill acceptor. Members paid one dollar for each play.

¶5 The software provided by Patriots generated "prize pools" consisting of cash prizes. The pools were funded by the money members

paid to purchase plays. Each play included the chance to win cash prizes of up to $1,199.

¶6 If a member won, the software added the prize amount to his card. When a member wished to redeem his winnings, he would print out a redemption ticket from the kiosk, give the ticket to the bar manager or bartender, and receive a cash payout. The Elks maintained a daily bank of $500 to redeem winnings.

¶7 Members were not required to pay for all of their plays. Members could receive one free play a day. However, over the course of the Elks sweepstakes, only nine to ten percent of the sweepstakes plays were free plays.

¶8 Members could also obtain free plays by mailing a request, with a self-addressed stamped envelope, to Patriots. There was no limit on the number of mail-in requests that could be submitted by a member. Patriots, however, never received any mail-in requests for free plays.

¶9 For each play, members could learn if they won in two ways. The member could click the "reveal button" on the kiosk's video monitor, which would instantly reveal if the member won a cash prize. In the alternative, a member could run his sweepstakes card through a game terminal's card reader, and play a casino style computer game; at the end of the game, the monitor would reveal any winnings. However, whether the member used the reveal button or played the casino game, the method used had no bearing on the outcome, because the prize amount, if any, was assigned to each play as it was loaded onto the sweepstakes card.

¶10 Under the contract, Patriots received 55% of the revenue generated by the kiosks, paid every two weeks, and a one-time set-up fee of $1,250.00. Patriots required the Elks to connect its equipment to the internet to enable Patriots to monitor the money paid for sweepstakes plays, cash prizes, and free plays.

¶11 Patriots also provided the Elks with rules and regulations for conducting the sweepstakes. These rules were posted by all of Patriot's kiosks, and stated that sweepstakes participants must be members of the Elks; the rules also stated how many free plays were allotted to each member. Finally, the contract required the Elks to assist Patriots with any litigation or lobbying efforts regarding the legality of the sweepstakes in Arizona.

¶12 In June 2012, the Department began investigating the Elks after receiving a complaint from another Elks Lodge. During the investigation, the Department discovered that between April 2011 and June 2012, a total of $234,408.00 was paid by members to participate in the sweepstakes. About 55%, or $128,834.25, was paid out to the members as prizes. The remaining 45% was split between Patriots and Elks; Patriots received 55%, or $58,065.56, and the Elks kept the remaining 45%, or $47,508.19.

¶13 After its investigation, the Department concluded the sweepstakes constituted unlawful gambling in violation of A.R.S. § 4-244 (26),[1] which provides that "[i]t is unlawful . . . [f]or a [liquor] licensee or employee to knowingly permit unlawful gambling on [its] premises." The Department instructed the Elks to cease and desist operating the kiosks. The Elks immediately complied.

¶14 The Elks timely requested an evidentiary hearing with an Administrative Law Judge. After a two-day hearing, the ALJ determined the sweepstakes constituted illegal gambling. However, rather than suspend or revoke the Elks' liquor license, the ALJ imposed a minimum fine of $200. *See* A.R.S. § 4-210(A)(9) (stating the Department has the authority to suspend or revoke a liquor license for any violation of Title 4); A.R.S. § 4-210.01(A) (fines for violations of Title 4 may range from a maximum fine of $3,000 to a minimum fine of $200).

¶15 The Elks unsuccessfully appealed the ALJ's decision to both the Director of the Department and the Department. After exhausting its administrative remedies, the Elks appealed the Department's decision to the superior court, which affirmed the Department's decision. The Elks timely appealed the superior court's judgment to this Court.

DISCUSSION

¶16 "On appeal, we determine whether the record contains evidence to support the superior court's judgment, and in so doing, we also reach the underlying question of whether" the Department "acted in contravention of the law, arbitrarily, capriciously, or in abuse of its discretion." *Comm. for Justice & Fairness v. Ariz. Sec'y of State's Office*, 235 Ariz. 347, 351, ¶ 17 (App. 2014). We view the evidence in the light most

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[1] We refer to the current versions of all statutes unless stated otherwise.

favorable to upholding the Department's decision, and review questions of law de novo. *Baca v. Ariz. Dep't. of Econ. Sec.*, 191 Ariz. 43, 45-46 (App. 1998).

I. Gambling

¶17 The Elks argue the sweepstakes do not constitute illegal gambling. Rather, the Elks contend the sweepstakes is a "marketing tool used to promote" charitable donations, and plays which are purchased are "given to members as tokens of appreciation for their donations." We disagree.

¶18 Gambling is defined under A.R.S. § 13-3301(4) as ". . . risking or giving something of value for the opportunity to obtain a benefit from a game or contest of chance or skill or a future contingent event . . . ." Thus, unlawful gambling consists of three elements: (1) the payment of consideration, (2) for the chance, (3) to win a prize or obtain some benefit. A.R.S. § 13-3301(4).

¶19 The Elks do not contest the fact the sweepstakes plays involve the chance to win a cash prize. Rather, they argue that because free plays are available to members, the sweepstakes lack the requisite element of consideration. In making this argument, the Elks seek to compare the sweepstakes to cases involving radio and TV promotional giveaways, grocery store giveaways, and sweepstakes entries included with the purchase of goods or services. *See Fed. Commc'n Comm'n v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954) (radio and television programs giving away prizes were not conducting an illegal lottery because contestants were not required to purchase anything or pay any consideration to enter the contest); *Brice v. State*, 242 S.W.2d 433, 435 (Tex. 1951) (prize drawing was not an illegal lottery because there was no consideration; contestants paid nothing to enter the contest, were not required to purchase any goods or services, and were not required to be in attendance at the store at the time of the drawing); *see also Miss. Gaming Comm'n v. Treasured Arts, Inc.*, 699 So. 2d 936, 940-41 (Miss. 1997) (business selling telephone calling cards, with purchases including a free sweepstakes entry, was not engaged in illegal gambling; contestants paid retail value for the calling cards, and no additional consideration was paid for sweepstakes entries).

¶20 The cases cited by the Elks are distinguishable. Here, 90% of the sweepstakes plays involved members paying money for a chance to win cash prizes. Additionally, the members received no goods or services in return for their purchases.

¶21 The Elks' attempt to characterize the plays as "free," or as charitable "donations" is also unavailing. Several courts have rejected similar arguments. For example, in *Cleveland v. Thorne*, 987 N.E. 2d 731 (Ohio App. 2013), a business attempted to implement a sweepstakes through the sale of internet time. For every dollar spent to purchase internet time, a customer received 100 sweepstakes points. *Cleveland*, 987 N.E.2d at 735, ¶ 2. Most customers, however, did not use the internet time, and were paying primarily for the sweepstakes entries. *Id.* at 743, ¶¶ 42-44. Under these circumstances, the court held the business attempted "to couch [its] illegal activities as [a] legitimate business enterprise" and although the customers were technically buying internet time, the jury was justified in finding the customers' primary purpose was to participate in the sweepstakes. *Id.* at 744-45, ¶¶ 44, 48.

¶22 Similarly, in *Commonwealth v. Wintel, Inc.*, 829 A.2d 753 (Pa. Comm. Ct. 2003), a business offered a "Freespin Promotional Sweepstakes System," consisting of video slot machines, for the alleged purpose of raising money for charitable purposes. *Id.* at 755. The business provided participants with two daily free plays and the opportunity to purchase additional plays. *Id.* Despite the existence of daily free plays and a charitable motive, the court determined that because participants paid money to play the machines, the machines were being used for illegal gambling. *Id.* at 758. *See Barber v. Jefferson Cty. Racing Ass'n Inc.*, 960 So. 2d 599, 610-11, 615 (Ala. 2006) (the court rejected the argument that free plays negated the requisite element of consideration for gambling, stating that the devices in question were "slot machines as to those who pay to play them" and that "[g]ratuitous entries . . . do not legitimize the [activity] any more than some opportunity for free plays could render innocuous a conventional slot machine.").

¶23 The evidence in this case supports the Department's determination that the Elks' sweepstakes is gambling under A.R.S. § 13-3301(4). The amount of plays a member received directly correlated with the amount of money he "donated" to the Elks; for every dollar paid into the kiosk, the member received one play and a chance to win a cash prize. Moreover, free plays made up less than ten percent of the total plays; the other 90 per cent involved paying money for the chance to win cash.

II. Raffle Exception

¶24 The Elks argue the sweepstakes is a lawful raffle under A.R.S. § 13-3302(B). Pursuant to A.R.S. § 13-3302(B), a non-profit organization may lawfully conduct a raffle if it satisfies all of the following restrictions:

> 1. ... no member, director, officer, employee or agent of the nonprofit organization may receive any direct or indirect pecuniary benefit other than being able to participate in the raffle on a basis equal to all other participants.
>
> 2. The nonprofit organization has been in existence continuously in this state for a five year period immediately before conducting the raffle.
>
> 3. No person except a bona fide local member of the sponsoring organization may participate directly or indirectly in the management, sales or operation of the raffle.

¶25 There is no dispute the Elks' sweepstakes satisfies the requirements of A.R.S. §§ 13-3302(B)(1), (2). Moreover, we need not address whether the Elks' sweepstakes is a raffle, because the dispositive issue on appeal is whether Patriots participated in the management or operation of the sweepstakes pursuant to A.R.S. § 13-3302(B)(3).

¶26 In determining what constitutes direct or indirect participation in the management of a raffle under A.R.S. § 13-3302(B) (3), the Arizona Attorney General has opined that the receipt of lease payments "based upon a percentage of sales or receipts from conduct of the games" constitutes "direct or indirect participation in sales or operation of the raffle." 1990 Ariz. Op. Att'y Gen. 57 (1990). *See Ruiz v. Hull*, 191 Ariz. 441, 449, ¶ 28 (1998) (stating that although attorney general opinions are advisory, they may be used as persuasive authority).

¶27 The record supports the Department's conclusion Patriots indirectly participated in the management of the sweepstakes. Patriots monitored the revenue generated by members purchasing plays, the cash prize money paid to members, and the free plays used by members. Patriots provided the rules for the sweepstakes, and processed requests for free plays mailed to its office. Patriots also provided the Elks with extensive operational support for the sweepstakes, consisting of training, equipment maintenance, software updates, and computer and equipment repairs. In return for its management and operational support, Patriots received 55% of the net proceeds generated by the sweepstakes.

¶28 Therefore, we affirm the Department's decision the Elks' sweepstakes is not a lawful raffle under A.R.S. § 13-3302(B).

III. Knowingly Requirement: A.R.S. § 4-244(26)

¶29 Finally, the Elks contend the Department erred in affirming the ALJ's construction of A.R.S. § 4-244(26). In determining the Elks violated A.R.S. § 4-244(26), the ALJ concluded the term "knowingly" in the statute only requires proof the Elks knew the sweepstakes were being conducted on its premises; it does not require proof the Elks knew the sweepstakes were unlawful. The Elks assert this construction of the statute is erroneous, and that the statute requires proof the Elks: (1) knowingly permitted the sweepstakes to operate on its premises, and (2) knew the sweepstakes were unlawful.

¶30 When interpreting a statute, "we look to the plain language of the statute as the best indicator" of the legislature's intent. *State v. Pledger,* 236 Ariz. 469, 471, ¶ 8 (App.2015); *see also Hoag v. French,* 238 Ariz. 118, 121, ¶ 11 (App. 2015). "[U]nless the drafters provide special definitions or a special meaning is apparent from the text," we give the words and phrases of the statute their commonly accepted meaning. *Pledger,* 236 Ariz. at 471, ¶ 8, 341 P.3d 511; *Hoag,* 238 Ariz. at 121, ¶ 11. "If the statute is clear and unambiguous, we apply the plain meaning of the statute" without resorting to other methods of statutory construction. *Stein v. Sonus USA, Inc.,* 214 Ariz. 200, 201, ¶ 3 (App. 2007) (citation omitted).

¶31 Based on the plain meaning of "knowingly" as used in A.R.S. § 4-244(26), the Department was not required to prove the Elks knew the sweepstakes were unlawful. The word knowingly, when used in Arizona's statutes, "[d]oes not require any knowledge of the unlawfulness of the act or omission." A.R.S. § 1-215(17) (b); *see* A.R.S. § 13-105(10) (b) (stating that the term "knowingly," when describing conduct constituting a criminal offense, "does not require any knowledge of the unlawfulness of the act or omission"). This construction is consistent with the well-settled principle that ignorance of the law is not a defense. A.R.S. § 13-204(B); *State v. Morse,* 127 Ariz. 25, 31 (1980).

¶32 Accordingly, we conclude the ALJ correctly construed A.R.S. § 4-244(26).

CONCLUSION

¶33 For the foregoing reasons, we affirm. Because the Elks is not the prevailing party on appeal, we deny its request for fees.

Question 70

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellant,*

v.

ROBERT FISCHER, *Appellee.*

No. 1 CA-CR 14-0183
FILED 10-8-2015
AMENDED PER ORDER FILED 10-08-15

Appeal from the Superior Court in Maricopa County
No. CR2012-006869-001 DT
The Honorable Karen A. Mullins, Judge

REVERSED AND REMANDED

COUNSEL

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By Susan L. Luder
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By Dwane Cates

and

Smith LC, Phoenix
By Stephen C. Biggs, Steven C. Smith and Richard R. Thomas
Co-Counsel for Appellee

OPINION

Presiding Judge Andrew W. Gould delivered the opinion of the Court, in which Judge Maurice Portley and Judge Jon W. Thompson joined.

G O U L D, Judge:

¶1 The State appeals the trial court's order granting Defendant Robert Fischer's motion for new trial. For the following reasons, we reverse, reinstate the guilty verdict, and remand for sentencing.

FACTS AND PROCEDURAL BACKGROUND

¶2 In late December 2010, Defendant visited his step-daughter, Belinda, and her family for Christmas. Shortly after Defendant arrived, the family went out to dinner. When they returned home, Defendant, Belinda, and her husband, Lee Radder, sat at the kitchen table and had a few drinks. Belinda went to bed around 11:30 p.m., while Defendant and Radder stayed up and continued drinking.

¶3 Shortly after 5:00 a.m. the next morning, officers responded to a 911 call from Defendant. When the first officer arrived he found Defendant kneeling over Radder's body. Radder was dead, having suffered a close contact gunshot wound to his right eye. In his right hand, Radder was holding Defendant's pistol, his thumb on the trigger.

¶4 Defendant was charged with Radder's murder. At trial, the issue was whether Radder committed suicide or was murdered by Defendant. At the end of the trial, the jury found Defendant guilty of second degree murder.

¶5 After the verdict, Defendant filed a motion for judgment of acquittal. The court denied the motion, finding there was sufficient evidence to support the verdict.

¶6 Defendant also filed a motion for new trial, alleging (1) prosecutorial misconduct and (2) the verdict was contrary to the weight of the evidence. The court determined there was no prosecutorial misconduct, but granted Defendant's motion on the grounds the verdict was contrary to the weight of the evidence. Accordingly, the court set aside the verdict and granted Defendant a new trial.

¶7 Based on the court's order, the State moved to dismiss the case without prejudice to pursue an appeal. The court granted the State's motion, and this appeal followed.

DISCUSSION

I. Mootness

¶8 Defendant argues this appeal is moot because the State voluntarily dismissed the indictment. Defendant contends that even if we reverse the trial court's order granting the motion for new trial, our decision would have no effect on the parties because there is no pending case. *See Cardoso v. Soldo*, 230 Ariz. 614, 617, ¶ 5 (App. 2012) ("[W]e will dismiss an appeal as moot when our action as a reviewing court will have no effect on the parties.").

¶9 The issue presented is not whether we have jurisdiction over the State's appeal; we have jurisdiction regardless of whether the case was dismissed. *See* Arizona Revised Statute ("A.R.S.") section 13-4032(2) (appellate court has jurisdiction over an appeal by the State from a grant of a motion for new trial); *State v. Birmingham*, 96 Ariz. 109, 111 (1964) (same). Rather, the issue we must decide is whether the procedure used by the State to pursue its appeal, a voluntary dismissal, renders the appeal moot.

¶10 This appeal is not moot. The State is not seeking to reinstate the indictment; it is seeking to reinstate the guilty verdict. We have the authority to reverse an order granting a motion for new trial and "return the case to the posture it was in . . . before the trial court ruled on defendant's motion for new trial." *State v. Moya*, 129 Ariz. 64, 65 (1981). When a court grants a defendant's post-verdict motion, the State's success on appeal results "in the reinstatement of the general finding of guilt, rather than in further factual proceedings relating to guilt or innocence." *U.S. v. Morrison*, 429 U.S. 1, 3-4 (1976); *see State v. West*, 226 Ariz. 559, 562, ¶ 13 (2011) (stating that if a verdict is vacated and subsequently dismissed, if the ruling is reversed on appeal, "the verdict of guilt can simply be reinstated"); *cf. U.S. v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983) (reversal of an order vacating a defendant's convictions would,

despite the government's subsequent voluntary dismissal, reinstate the convictions).[1]

¶11 Nothing in the constitution precludes the State from pursuing an appeal after dismissing the charges. Reinstatement of a guilty verdict would not violate Defendant's double jeopardy rights. *U.S. v. Wilson*, 420 U.S. 332, 344-45 (1975); *State v. Wilson*, 207 Ariz. 12, 15, ¶ 11 (App. 2004). Nor is there is any constitutional right prohibiting the State from dismissing a case to pursue an appeal. *See State v. Million*, 120 Ariz. 10, 14-15 (1978) (State may voluntarily dismiss a case to pursue an appeal of an order granting a motion to suppress). Indeed, we have gone so far as to reinstate charges voluntarily dismissed by the State after reversing an order granting a motion to suppress. *See State v. Crotty*, 152 Ariz. 264, 267 (App. 1986) (reversing order suppressing "breathalyzer" results and ordering reinstatement of charges voluntarily dismissed by the State); *State v. Soto*, 195 Ariz. 429, 432 (App. 1999) (reinstating charges and remanding case to the trial court upon reversal of a motion to suppress).

¶12 Defendant contends that Criminal Procedure Rule 31.16, which permits a stay of the proceedings when the State appeals an order granting a defendant's motion for new trial, prohibits the State from dismissing the case to pursue an appeal.[2] We disagree.

¶13 Rule 31.16 neither creates a substantive right nor prescribes the procedure to enforce that right. *See Birmingham*, 96 Ariz. at 110-11

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[1] Defendant argues in his supplemental brief that *Villamonte-Rodriguez* is distinguishable from the present case because it dealt with an order reversing and reinstating a judgment and sentencing, rather than a guilty verdict. Defendant asserts that the doctrine of merger, which provides an indictment merges into a defendant's judgment at the time of sentencing, was the sole basis for the Supreme Court's decision. However, the doctrine of merger was not the only basis for the Supreme Court's decision. The Court noted that, apart from merger, the government's voluntary dismissal of the case did not prevent the Court from reversing and reinstating the defendant's conviction. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2.

[2] Rule 31.16 states: "An appeal by the state is inoperative to stay order in favor of defendant, except when the appeal is from an order granting a new trial or from an order granting a motion to suppress which directs the return of evidence."

(rules of criminal procedure do not create a right to appeal; the right to an appeal "can only be given or denied by constitution or the legislature of the [S]tate."). Rule 31.16 provides that, as a general matter, orders in favor of defendants will not be stayed while the State pursues an appeal. The purpose of the Rule is to prevent a defendant from being held in custody while the State pursues an appeal. Ariz. R. Crim. P. 31.16, Cmt.; *State ex rel. Berning v. Alfred*, 186 Ariz. 403, 404 (App. 1996). Rule 31.16 also creates an exception to this general rule, permitting a stay when the State appeals an order granting a new trial or an order granting a motion to suppress. Ariz. R. Crim. P. 31.16.

¶14 We do not, however, read Rule 31.16 as *requiring* the State to seek a stay before appealing an order granting a motion for new trial. Indeed, although Rule 31.16 allows the State to obtain a stay when appealing an order granting a motion to suppress, we have also permitted the State to dismiss the charges and file an appeal. *Million*, 120 Ariz. at 14-15; *State v. Rosengren*, 199 Ariz. 112, 115, ¶ 8 (App. 2000) (State permitted to voluntarily dismiss charges and appeal an order suppressing defendant's statements and DUI test results).

¶15 In sum, there were no constitutional or procedural grounds barring the State from dismissing the charges and filing an appeal. Accordingly, this appeal is not moot, and we will consider the merits.

II. Motion for New Trial

¶16 The State argues the weight of the evidence supported the verdict, and that the trial court abused its discretion in granting Defendant's motion for new trial. Ariz. R. Crim. P. 24.1(c)(1).

A. Standard for Granting a Motion for New Trial

¶17 Arizona Rule of Criminal Procedure 24.1(c) sets forth several grounds for granting a new trial. Ariz. R. Crim. P. 24.1 (c)(1)–(5); *See* Ariz. R. Civ. P. 59(a) (grounds for a new trial in a civil case). One basis for granting a new trial is when the verdict is "contrary to…the weight of the evidence." Ariz. R. Crim. P. 24.1(c)(1); *State v. McIver*, 109 Ariz. 71, 72 (1973); *see* Ariz. R. Civ. P. 59(a) (8).

¶18 Unlike a motion for judgment as a matter of law or acquittal, a trial court ruling on a motion for new trial based on the weight of the evidence does not view the evidence in the light most favorable to

sustaining the verdict, nor does it resolve all conflicting inferences in favor of sustaining the verdict.[3] *State v. Thomas*, 104 Ariz. 408, 411-12 (1969); *General Petroleum Corp. v. Barker*, 77 Ariz. 235, 243-44 (1954); *State v. Clifton*, 134 Ariz. 345, 348-49 (App. 1982). Rather, the court is permitted to weigh the evidence and make credibility determinations, and it may set aside the verdict and grant a new trial even if there is sufficient evidence to support the verdict. *Thomas, id.*; *General Petroleum, id.*; *Clifton, id.*; *see Tibbs v. Florida*, 457 U.S. 31, 42-43 (1982) ("A reversal based on the weight of the evidence, moreover, can occur only after the State...has presented sufficient evidence to support the conviction").

¶19 Given this broader discretion, some cases describe the judge's role as "the 'thirteenth juror' (the ninth juror in a civil case)." *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 55, ¶ 23 (1998); *Thomas*, 104 Ariz. at 412; *McBride v. Kieckhefer Associates, Inc.*, 228 Ariz. 262, 267, ¶ 20 (App. 2011). This description, however, overstates the judge's role. A judge may not set aside a verdict "merely because, if he had acted as trier of fact, he would have reached a different result," nor may he substitute his own judgment for that of the jury. *Cano v. Neill*, 12 Ariz. App. 562, 569 (1970) (citing J. Moore, Federal Practice, § 59.08(5), at 3818-19 (2d ed. 1953); *see Hutcherson*, 192 Ariz. at 56, ¶ 27 (in ruling on a motion for new trial, a judge may not substitute his own judgment for that of the jury); *Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 229 Ariz. 377, 403, ¶ 88 (App. 2012) (same); *Clifton*, 134 Ariz. at 349 (same).

¶20 The basis for this limitation on a court's discretion is the right to a jury trial, which includes the right to have a jury determine issues of fact. U.S. Const. amend. VII (right to a jury trial); Ariz. Const. art. 2, § 23 (same); *see Fisher v. Edgerton*, 236 Ariz. 71, 82, ¶ 35 (App. 2014) ("laws affecting the right to trial by jury" may not "significantly burden or impair the right to ultimately have a jury determine the issues of fact").

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[3] Unfortunately, it is not uncommon for courts to confuse the standard for a motion for new trial with the standard for a motion for judgment of acquittal (criminal) or a judgment as a matter of law (civil). *See General Petroleum Corp. v. Barker*, 77 Ariz. 235, 243-44 (1954) (disapproving of several decisions that improperly applied the standard for a directed verdict/judgment as a matter of law when ruling on a motion for new trial); *see also* Charles Alan Wright & Arthur R. Miller, 11 Federal Practice and Procedure Civil § 2806, pp. 80-81 & n. 1-4 (3d ed. 2015) (discussing federal cases where the court applied the wrong standard).

"The very essence of [a jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944). Thus, when a judge proceeds to reweigh the evidence, she is necessarily invading the province of the jury. *State v. Neal*, 143 Ariz. 93, 97 (1984); *see Cano*, 12 Ariz. App. at 569; *Lind v. Schenley Industries Inc.*, 278 F.2d 79, 90 (3d Cir. 1960); *see Vander Zee v. Karabatsos*, 589 F.2d 723, 729 (D.C. Cir. 1978) (recognizing the danger of judicial encroachment "on the jury's important fact-finding function").

¶21 As a result, a court considering a motion for a new trial must be mindful of maintaining the role of the jury and the integrity of the jury trial system. *Cal X-Tra*, 229 Ariz. at 403, ¶ 88 (appellate courts will "'scrutinize with care an order granting a new trial because 'meaningful review in such cases is required to maintain the integrity of the jury trial system and the practical value of court adjudication.'"), citing *Zugsmith v. Mullins*, 86 Ariz. 236, 237–38 (1959). The evidence may sharply conflict as to one or more critical factual issues, causing the court to have serious doubts about how the jury resolved those conflicts. However,

> ...the court must proceed with great care in examining the defendant's motion [for new trial]. As has been stated many times, motions for a new trial are not looked upon with favor and are to be granted with great caution...Trial by jury is one of the most treasured guarantees of the Bill of Rights. Any interference with the jury's province must be exercised punctiliously.

Clifton, 134 Ariz. at 349.

¶22 We therefore emphasize the well-established rule in Arizona that motions for new trial should be granted with great caution. Specifically, courts should "abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result" and it is necessary to set aside the verdict to avoid a "miscarriage of justice." *Cano*, 12 Ariz. App. at 569; *see Clifton*, 134 Ariz. at 349; *Bradley v. Philhower*, 81 Ariz. 61, 63 (1956) (a new trial may only be granted "where it is manifest from all the evidence that there has been a miscarriage of justice"); *Jimenez v. Starkey*, 85 Ariz. 194, 198 (1959) (new trial will not be granted where substantial evidence supports the jury verdict).

B. Appellate Review

¶23 We review a court's grant of a motion for new trial based on the weight of the evidence for an abuse of discretion.[4] *State v. Neal*, 143 Ariz. 93, 97 (1984). We "afford the trial court wide deference" in weighing the evidence and making credibility determinations "because '[t]he [trial] judge sees the witnesses, hears the testimony, and has a special perspective of the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record.'" *Cal X-Tra*, 229 Ariz. at 403, ¶ 88 (citing *Hutcherson*, 192 Ariz. at 53, ¶ 12 (quoting *Reeves v. Markle*, 119 Ariz. 159, 163(1978)).

¶24 Although a trial judge has "wide discretion because of his intimate relation to the trial," "[t]his does not mean…that [we] abandon all supervision and fail to impose the limitation of legal standards on the exercise of" his discretion. *McMinn*, 88 Ariz. at 262. If our review of the record reveals "the evidence fully sustains the conviction, it is an abuse of discretion to grant a new trial." *State v. Moya*, 129 Ariz. 64, 66 (1981); *State ex rel Morrison v. McMinn*, 88 Ariz. 261, 262 (1960); *State v. Saenz*, 88 Ariz. 154, 156 (1960). We will reverse an order granting a new trial if "the probative force of the evidence clearly demonstrates that the trial court's action is wrong." *Smith v. Moroney*, 79 Ariz. 35, 39 (1955).

C. Factual Findings

¶25 In reaching its verdict, the jury had to resolve one issue: who shot Radder? The jury ultimately decided that Defendant shot Radder, rejecting Defendant's claim Radder committed suicide. The court, however, determined this verdict was so clearly against the weight of the evidence that it was a miscarriage of justice. The trial court made several pages of express factual findings in support of this determination.

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[4] The cases also have not been uniform in describing the standard of review for an order granting a motion for a new trial based on the weight of the evidence. Once again, this primarily stems from courts applying the standard of review for a motion for judgment of acquittal or a motion for judgment as a matter of law, rather than the standard of review for a motion for new trial. *See supra*, at ¶ 18 n.3; *State v. Spears*, 184 Ariz. 277, 290 (1996) (stating that in reviewing a motion for new trial, court must "view the evidence in the light most favorable to sustaining the verdict, and [] resolve all inferences against the defendant."); *Styles v. Ceranski*, 185 Ariz. 448, 450 (App. 1996) (same).

¶26 A court abuses its discretion in granting a motion for new trial if it reaches a conclusion without considering all the evidence. *Grant v. Arizona Public Service*, 133 Ariz. 434, 455-56 (1982); *Flying Diamond Airpark, L.L.C. v. Meienberg*, 215 Ariz. 44, 50, ¶ 27 (App. 2007). An abuse of discretion also occurs when a court makes factual findings lacking evidentiary support in the record. *Grant*, 133 Ariz. at 455-56; *Flying Diamond*, 215 Ariz. at 50, ¶ 27.

¶27 In weighing the evidence, the law makes no distinction between direct and circumstantial evidence. *State v. Carter*, 118 Ariz. 562, 564 (1978); *State v. Salinas*, 106 Ariz. 526, 527 (1971). A guilty verdict may be affirmed based "primarily or entirely on circumstantial evidence," even when there is "no direct evidence of the defendant's… participation in [a] murder." *State v. Fulminante*, 193 Ariz. 485, 493-94, ¶ 25 (1999). In addition, "[p]hysical evidence is not required to sustain a conviction where the totality of the circumstances demonstrates guilt beyond a reasonable doubt." *State v. Canez*, 202 Ariz. 133, 149, ¶ 42 (2002); *see Fulminante*, 193 Ariz. 485, 493-94, ¶ 26.

¶28 Finally, in considering the court's express findings, we will infer the necessary findings to affirm, but we "will do so only if the implied findings do not conflict with the court's express findings." *State v. Zamora*, 220 Ariz. 63, 67, ¶ 7 (App. 2009).

¶29 In reviewing the record, we conclude the trial court abused its discretion in granting Defendant's motion for new trial. The trial court erred by making factual findings that were not supported by the record, and by failing to consider all the evidence in reaching its conclusions.

1. DNA and Fingerprint Evidence

¶30 Based on the fact Defendant's DNA and fingerprints were not found on the gun,[5] while Radder's DNA and partial print were found on the gun, the trial court concluded that, "[i]f the Defendant had fired the gun, he would have left DNA and fingerprint evidence on the gun itself."

¶31 This finding is not supported by the record. No witness, expert or otherwise, testified that touching an item always transfers, or is even likely to transfer, DNA or fingerprints. In fact, the State's DNA

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[5] The DNA on the magazine and grip contained a mixture of DNA; the DNA analyst was unable to determine the identity of the minor contributor.

expert, Kathleen Press, testified that simply because a person touches an item does not mean a DNA transfer will occur.

¶32 The court's finding is in direct conflict with the evidence. Defendant admitted he touched the gun the evening before the shooting. Specifically, Defendant told the officers the gun belonged to him, and that when he arrived at Belinda's house the evening before the shooting, he disassembled the weapon to hide it from the children. This occurred only hours before the shooting.

¶33 The trial court also determined that Radder's "[non-blood] DNA on the grip is evidence that he held the gun," "[non-blood] DNA on the hammer is evidence that he cocked the gun," and "non-blood" DNA on the magazine is evidence that he reloaded the magazine after Defendant had removed it the night before. The trial court concluded that there was no other reasonable explanation for the presence of Radder's "non-blood" DNA on the gun.

¶34 This finding is based on the court's conclusion that the source of Radder's DNA on the gun was "non-blood DNA," as opposed to DNA whose source is blood.[6] The court appears to have concluded that because Radder's "non-blood" DNA was on the gun, as opposed to Radder's "blood DNA" from the gunshot wound, this shows Radder held the gun before he allegedly shot himself.

¶35 Again, the court's finding is not based on the record. No witness testified that Radder's non-blood DNA was on the gun. To the contrary, there was a significant amount of blood from the gunshot wound on Radder's hands and the gun. As a result, the State's DNA expert testified that because blood is a source of DNA, it was not surprising to find Radder's DNA on the gun.

¶36 Amy Wilson, the State's crime scene analyst, never testified there was non-blood DNA on the gun. More importantly, Press, the only DNA expert who testified at trial, stated that she did not test the swabs for

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[6] According to the Sate's expert, sources of DNA include blood, skin, saliva, and semen.

blood, and she did not know whether the source of the DNA was blood or non-blood DNA.[7]

¶37 In sum, the trial court overstated the importance of the DNA and fingerprint evidence. This evidence only shows the obvious: Radder touched the gun. Given the fact the gun was in Radder's hand when police arrived at the scene, this evidence is not particularly probative of Defendant's guilt or innocence.

2. Bloody Fingerprint

¶38 In its findings, the trial court did not consider the evidence that Radder's fingerprint on the trigger was a blood print. This evidence indicates that Radder's print was transferred to the trigger after Radder was shot and started bleeding, supporting the State's theory that Defendant placed the gun in Radder's hand after the fatal shot.

¶39 There is substantial evidence in the record showing that Radder's bloody fingerprint was on the trigger. The parties and the trial court agree the partial print on the trigger was Radder's fingerprint. Wilson, who collected and examined the print, was certain the print was made by blood. In addition, the print was not smudged, indicating that the thumb had not moved after the print was made. This was a relevant fact because the evidence indicated that if the wound was self-inflicted, Radder's thumb may have moved, at least to some degree, on the trigger.

¶40 The court seemed to discount this evidence because the print was never tested for blood. However, the evidence shows that Wilson is trained to collect biological evidence such as blood; therefore, it is reasonable to assume she can recognize blood when she sees it. Clearly, the trial court concluded that, at least for the purposes of collecting "non-blood DNA," Wilson was able to recognize and avoid swabbing blood on the gun. *See supra,* ¶ 36 n.7. In addition, Wilson testified that it was the

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[7] The court seemed to rely on the testimony of Wilson, who testified she tried to avoid swabbing visibly bloody areas on the gun. However, Wilson did swab some clearly bloody areas, such as one area on the magazine. Additionally, Press testified that she performed some preliminary chemical tests indicating the swabs did not contain blood. However, Press testified that these tests were not very sensitive for the presence of blood, and she did not perform the more sensitive DNA tests to confirm whether or not the swabs contained blood.

blood that created the print and made it visible; absent the blood, she would not have been able to locate and lift the print.

3. Access to Gun

¶41 The trial court concluded the gun was equally available to "the Defendant, [Radder], and Belinda [Radder's wife]."

¶42 This finding is not supported by the record. Defendant told the police that when he arrived at Radder's house, he disassembled the gun and put it in his bag to hide it from his grandchildren. There is no testimony that Radder saw the weapon or knew it was in the house prior to the shooting, or that Radder knew how to assemble the gun. Radder was unfamiliar with guns while Defendant, a retired police officer, clearly knew how to assemble and operate the gun.

4. Gunshot Residue (GSR)

¶43 The court reasoned that "the only evidence available to the jury to reconstruct the events surrounding Lee's death consisted of the physical evidence from the scene as interpreted by the blood experts and the statements of the Defendant made prior to trial." This is not correct. The State presented evidence showing that a particle of gunshot residue, or GSR, was found on Defendant's shirt. Conversely, no gunshot residue was found on Radder.

¶44 The court made several detailed findings concerning the presence of GSR on Defendant's shirt. For example, the court concluded the presence of GSR only means "that you either touched or were in the vicinity of a gunshot, but not that you shot a gun." Likewise, the court stated that the blood on Radder's hands may have cloaked any GSR that may have been located there.

¶45 However, there is one inference noticeably absent from the trial court's findings: the GSR was on Defendant's shirt because he shot Radder. Likewise, the absence of GSR on Radder is circumstantial evidence that he did not fire the gun.

5. Defendant's Statements

¶46 The court's order referenceed several statements Defendant made to the police. After discussing these statements, the court concluded the statements "are not worthy of any significant weight."

¶47 The court, however, failed to weigh the incriminatory nature of Defendant's statements. Defendant repeatedly told the police he was sleeping in the guest bedroom when Radder was shot. Based on the record, this statement is not true. The blood spatter evidence, discussed more fully below, establishes that Defendant was sitting next to Radder when he was shot. *See infra,* ¶¶ 54-56. The evidence was so clear on this issue that defense counsel conceded in his closing that Defendant was sitting next to Radder.

¶48 While Defendant offered his intoxication[8] and possible blackout as an explanation for this inconsistency, there is one reasonable inference the jury may have reached that is never mentioned by the trial court: Defendant lied to the police because he was guilty. It was error for the court to simply discard this inference as "not worthy of any significant weight."[9]

6. Washing Hands

¶49 Defendant's lack of candor with the police was further illustrated by the fact that he washed his hands even though the police told him not to do so. Based on this evidence, the jury could have reasonably concluded that by washing his hands, Defendant, a career police officer and practicing attorney, sought to eliminate any incriminating DNA or GSR evidence. However, the trial court did not weigh the incriminating nature of this evidence in its factual findings.

7. Blood Spatter

¶50 Three blood spatter experts testified at trial: Acosta and Griffin for the State, and Reeves for Defendant. Acosta opined, based on the blood spatter evidence, that Radder's wound was not a self-inflicted gunshot wound, and the gun was placed in Radder's hand after the

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[8] The parties agreed that when the police arrived at Belinda's residence shortly after 5:00 a.m., Defendant's blood alcohol concentration was between .20 and .25. Detective Brooks testified that when he interviewed Defendant at the station between 9:30 and 10:00, Defendant was intoxicated but coherent and able to answer questions.

[9] In addition, when police asked Defendant "What do you feel happened," Defendant responded twice with the same equivocal answer: "I don't believe I shot him."

shooting. Reeves testified that Radder was killed by a self-inflicted gunshot wound, and there was no evidence the gun had been placed in Radder's hand. Griffin testified that, based on Reeves' theory as to how Radder was holding the gun, the source of the potential back spatter on Radder's hands could not have been a self-inflicted gunshot wound.

¶51 Ultimately, the trial court determined that Reeves was "highly credible," Griffin was "credible" and Acosta was not credible. Based on this assessment, the trial court rejected Acosta's opinions in their entirety, adopted all of Reeves' opinions, and adopted those portions of Griffin's testimony that were consistent with Reeves' opinions.

a. Undisputed Testimony

¶52 Despite the court's rejection of Acosta's testimony, there were some general areas of agreement between Reeves and Acosta. Both blood spatter experts, as well as the medical experts, agreed that the fatal gunshot occurred while Radder was sitting in a chair in the kitchen, and that after he suffered the gunshot wound, he slumped forward in his chair. Acosta and Reeves disagreed as to how long Radder remained in the chair, but both agreed he remained in the chair bleeding from his wound for some period of time, causing the blood to drain down from his wound and form a small pool of blood on the floor near his chair.[10]

¶53 Acosta and Reeves agreed that at some point, Radder came to rest on the floor, where a larger pool of blood formed around his head and upper torso. Both experts agreed that Defendant walked in Radder's blood after the shooting, leaving three "bloody" footprints at the scene.

b. Defendant's Pajamas

¶54 Despite the trial court's rejection of Acosta's credibility, Acosta's opinion regarding the blood spatter on Defendant's pajamas and chair was uncontested. Acosta testified that based on the blood spatter on Defendant's pajama pants and the corresponding void, or absence of blood, on the chair located directly next to Radder, Defendant was sitting next to Radder when the fatal shot was fired. Defense counsel conceded this fact in his closing argument.

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[10] According to the medical experts, after the gunshot, Radder was unconscious and no longer capable of performing any voluntary movements, although he may have been capable of some involuntary movements.

¶55 In considering this evidence, the court stated that "mere presence does not render one guilty of a crime," and that Defendant's presence in the chair next to Radder in conjunction with his statements to the police he was in the bedroom "does not mean Defendant fired the gun."

¶56 We agree this evidence is subject to differing interpretations. However, the trial court disregarded the incriminating nature of this evidence. Defendant was only a few feet away from Radder when he was shot, and he may well have been lying when he repeatedly told the police he was asleep in his bedroom at the time.

c. State's Theory

¶57 The trial court concluded "[t]he State's case was predicated entirely on Det. Acosta's theory that the Defendant manipulated the scene by picking up or dragging [Radder's] body from his chair onto the floor." In particular, the court found Acosta's testimony regarding the location and direction of Defendant's bloody footprints in support of this theory to be "wholly lacking in credibility."

¶58 The trial court inaccurately characterized the State's theory. The State's theory was not "entirely predicated" on how Radder ended up on the floor. The prosecutor conceded in his closing he did not know how Radder ended up on the floor. Acosta testified that it was only a theory, "just one of many possibilities," and that he does not know how Radder ended up on the floor. Moreover, Acosta stated that the "bloody footprint" testimony was not meant to provide a step-by-step guide of Defendant's movements at the scene. Rather, Acosta stressed the footprints showed that Defendant walked around Radder's body after the gunshot, circumstantially indicating he was manipulating the scene.

¶59 Nonetheless, the trial court assumed that every step Defendant made around Radder's body had to be shown by a bloody footprint, and if Acosta was wrong about the location or direction of a footprint, this proves Acosta was not credible. This assumption placed far too much weight on the evidentiary value of the bloody footprints. Not every footstep made by Defendant at the scene would have been memorialized by a bloody footprint, because, as the experts testified, once Defendant stepped in Radder's blood, as he walked around the house, the blood would have worn off the bottom of his foot. Perhaps more importantly, the court's conclusion that Defendant never walked near Radder's trunk or head area because there are no bloody footprints in

these areas is contrary to the evidence. Indeed, when the police arrived Defendant was kneeling by Radder's head, yet there was no trail of bloody footprints "proving" he was there.

¶60 In addition, the trial court's finding disregarded the fact, as discussed below, that a portion of Acosta's testimony and all of Griffin's testimony was focused on showing how the blood spatter on Radder's hand could not have been made by a self-inflicted gunshot wound. *See infra*, ¶¶ 63-66, 68-69, 71. The reason the State presented this testimony is clear from the record; the State's case was not "entirely predicated" on how Radder ended up on the floor, but rather, the State tried to use the blood spatter evidence to prove Defendant shot Radder, then put the gun in Radder's hand.

d. Back Spatter

¶61 The court found Reeves' testimony concerning the "high velocity back spatter on [Radder's] hands," in combination with his testimony concerning the blood spatter evidence on the gun, "compelling evidence of a self-inflicted gunshot wound."

¶62 Radder's wound was a close range gunshot wound, meaning the gun was either touching or very close to his eye when he was shot. Reeves testified that Radder had a pattern of small blood stains on his hands that were consistent with the blood being blown back onto his hands by a high velocity impact, such as a gunshot. Reeves opined that this pattern of high velocity back spatter was consistent with Radder holding the gun in his palms and pulling the trigger with his thumb.

¶63 The court disregarded Acosta's opinion that there was no high impact back spatter on Radder's hands. However, it stated that Griffin was "credible in his conclusion that some high velocity back spatter was found on [Radder's] hands, and that he could not rule out the possibility of a self-inflicted gunshot wound."

¶64 The court was not completely accurate in its characterization of Griffin's testimony. Griffin testified there may have been evidence of back spatter on Radder's hands, but he could not be sure it was back spatter. Griffin testified that other events, apart from back spatter from a gunshot, could have caused some of the subject blood spatter, including stains produced by coughing from a person's mouth or expiating blood from the nose "where it's under pressure," a person landing in a pool of blood, or by "blood dripping into [a] pool of blood."

¶65 More importantly, Griffin testified that based on the grip proposed by Reeves, the "back spatter" did not line up with the wound path from Radder's eye. Griffin stated that given the location and angle of the blood stains on Radder's left and right hands, as well as certain stains on his wrist, if Radder was holding the gun with the grip proposed by Reeves, the alleged back spatter on Radder's hands could not have come from the gunshot wound. He concluded, therefore, that some "event" other than the gunshot wound would have caused the "back spatter" on Radder's hands. For example, Griffin stated that a person holding his hands in a defensive position near the gunshot wound could have produced the alleged back spatter stains.

¶66 Finally, although Griffin could not rule out Reeves' theory, he did not agree or even support it. What Griffin did state was that he could not rule out the "possibility" that, based on the back spatter, the wound was self-inflicted. However, the full context of Griffin's testimony was that even if Reeves was correct there was back spatter, he could not, based on the blood spatter evidence *alone*, rule out *any* cause of the back spatter. Griffin testified that in order to reach a conclusion on this issue, he would need additional information that he did not possess, such as the medical examiner's report, the bullet trajectory, and information regarding the orientation of Radder's chair and head at the time of the gunshot.

e. Blood on Radder's Hands and the Gun

¶67 Both Acosta and Reeves offered testimony concerning whether the blood on Radder's hands and the gun indicated the gunshot wound was a self-inflicted wound.

¶68 Acosta testified that if Radder had shot himself, there would have been a void, or absence of blood, on his palms where he was gripping the gun; however, there was no such void. Reeves acknowledged there was some blood on Radder's palms; however, he also noted there were some voids on his palms. Reeves explained the presence of blood on the palms as blood that was projected onto his palms from the gunshot and blood flow after the gunshot. Reeves also testified that a void of blood on Radder's thumb next to the trigger guard showed that the spatter from the gunshot was blocked by the trigger while Radder was holding the gun.

¶69 In its findings, the trial court failed to consider Acosta's testimony concerning the blood drain patterns on Radder's right hand.

According to Acosta, the patterns show blood dripping downward from the gunshot wound to Radder's fingers. Acosta testified, however, that there were no similar drain patterns on the gun. As a result, he opined that Radder's hand was open and empty when the blood drained to his fingers. Otherwise, if the gun had been resting in Radder's hand at the time of the gunshot, there would have (1) been drain marks on the gun and (2) the gun would have stopped the blood from draining down to his fingers. Acosta also noted that Radder's fingers on the gun were curled up and around the grip. Yet, the blood flowed all the way down to Radder's fingernails, which he testified was inconsistent with the gun being in Radder's hand at the time of the gunshot, and more consistent with an empty hand hanging down towards the floor.

¶70 Reeves disagreed with Acosta's blood drain opinion, testifying that he observed damming of blood on Radder's thumb by the trigger and trigger guard, indicating that the blood flowed from Radder's wound and was stopped by the gun while he was holding it in his hand.

¶71 Acosta testified that a significant amount of coagulating blood was found on both sides of the gun, including the grip. According to Acosta, there should not have been such a large amount of blood on both sides of the grip if Defendant was holding the gun. In response to this testimony, Reeves stated that the source of the blood on the gun was blood projecting onto Radder's hand from the gunshot, the fall from his chair, and the subsequent blood flow after he was on the floor. Additionally, Reeves testified that there was no evidence of wiping or swiping of the blood on Radder's hand to show someone had placed the gun in his hand.

¶72 While the trial court gave Acosta's opinions little weight, the court never addressed some glaring questions regarding Reeves' credibility. For example, Radder's unsmeared, bloody fingerprint on the trigger tends to contradict Reeves' opinion the gun was in Radder's hand before the gunshot wound. *See, supra,* ¶¶ 38-39.

¶73 The trial court also failed to examine the implausibility of Reeves' theory that Radder committed suicide by shooting himself in the eye. Forensic pathologist Dr. Keen testified about a study of suicides showing that less than one-half of one percent of suicides involves the victim shooting himself in the eye.

¶74 Additionally, while Reeves' proposed weapon grip was possible, and had been observed in other prior suicides, it was certainly

"atypical." Reeves himself testified that although he had read about such cases, in 25 years as a police officer and 38 years as a blood spatter expert, he had personally never seen a suicide victim hold a gun in this manner. Dr. Keen testified that he had performed 12,000 to 15,000 autopsies, and that approximately twelve to fifteen percent of those were on suicide victims; of those, less than ten involved a suicide victim holding a gun with his thumb on the trigger.

¶75 In sum, the trial court appears to have overlooked or disregarded the fact that Reeves' theory was based on the questionable assumption that Radder, a man with a known distaste for guns, chose to (1) shoot himself in the eye, the least common location for a suicide victim to shoot himself, and (2) hold the gun backwards in his hand, using his thumb to pull the trigger, an extremely rare and uncommon grip for suicide victims.

CONCLUSION

¶76 The evidence in this case was circumstantial, and the testimony of the blood spatter experts conflicting. However, examining all the evidence in this case, we conclude the jury properly weighed the evidence, and its verdict was not a miscarriage of justice.

¶77 There were only two possibilities explaining the death of Radder; he either committed suicide, or he was murdered by Defendant. On the one hand, the jury could have chosen to believe Radder committed suicide. If so, the jury would have to believe that Radder, a man who hated guns, somehow found Defendant's gun, which was hidden in his bag, and assembled it, despite there being no evidence that he had any idea how to put the gun together. Next, Radder walked into the kitchen, sat down, and shot himself in the eye, the most unlikely of all locations for a suicide victim to shoot himself. And of course, all of this occurred while Defendant was sitting a few feet away, apparently doing nothing to stop Radder.

¶78 The jury, however, rejected this explanation for Radder's death, concluding that Defendant shot Radder. Was this conclusion against the weight of the evidence? Did the jury run so far amok in its consideration of the evidence that this conclusion was a miscarriage of justice? Defendant certainly had the means to shoot Radder; he had brought his gun and ammunition to Radder's house. When the police arrived at the scene, Radder was lying on the floor with Defendant's gun in his hand. Radder's thumb was on the trigger, a most unusual position,

even for a suicide victim. Then, almost immediately after the police arrive and tell Defendant *not* to wash his hands, Defendant, a seasoned police officer and practicing attorney, does so anyway, potentially removing any incriminating evidence.

¶79 During questioning by the police, Defendant repeatedly lied to them, stating he was asleep in the guest bedroom during the shooting. In fact, Defendant was sitting right next to Radder when he was shot. Defendant argued he was too intoxicated to remember the whole thing, even though the physical evidence shows he was slipping and walking around in Radder's blood after the shooting.

¶80 The physical evidence also shows that both sides of the gun are covered in Radder's blood, and Radder's unsmeared, bloody fingerprint is on the trigger. Of course, Radder would only have been able to place a bloody fingerprint on the trigger *after* he was shot, not before. There is also gunshot residue on Defendant's shirt, indicating Defendant fired the gun; despite Defendant's theory that Radder held the gun next to his eye, there is not one particle of gunshot residue found on Radder. Finally, no matter how Radder got from the chair to the floor, both Acosta and Griffin testified that based on the blood spatter evidence, Radder did not shoot himself with the gun.

¶81 We are often quick to criticize juries, but more often than not, their verdicts are based on a remarkable combination of wisdom and common sense. It is little wonder that we have placed our trust in them for centuries, and that the right to a jury trial is fundamental to our system. *Duncan v. Louisiana*, 391 U.S. 145, 151-54 (1968). There are times when they are clearly wrong, and a judge has a duty to step in and vacate a verdict that is so contrary to the weight of the evidence it is a miscarriage of justice. However, that is not the case here.

¶82 Accordingly, we conclude the trial court abused its discretion in granting Defendant's motion for new trial. We therefore reverse the order granting a new trial, reinstate the guilty verdict and remand for sentencing.

G O U L D, J., dissenting:

¶24 Arizona's procedure for denying bail has one sole purpose: protecting children from persons charged with serious sex crimes. This same procedure has been used for over 200 years to protect the community from persons accused of committing dangerous, violent offenses. I do not agree with the majority's conclusion that Arizona's procedure is facially unconstitutional under the Due Process Clause of the United States or Arizona Constitutions; therefore, I dissent. U.S. Const. amend. V; Ariz. Const. art. 2, § 4.

¶25 It bears repeating that in the context of bail, a defendant's Due Process right to liberty is not absolute. *United States v. Salerno*, 481 U.S. 739, 748-50, 755 (1987); *Carlson v. Landon*, 342 U.S. 524, 537 (1952); *Simpson v. Owens ("Simpson I")*, 207 Ariz. 261, 267, 269, ¶¶ 17, 25 (App. 2004). Protecting liberty is important, but it is also important for the government to protect the lives and safety of its citizens. *Salerno*, 481 U.S. at 755. Thus, the "government's interest in preventing crime by arrestees" may, "in appropriate circumstances, outweigh an individual's liberty interest." *Id.* at 748, 749.

¶26 Here, petitioners carry a heavy burden to show the challenged provisions are facially unconstitutional. Petitioners must show that "no set of circumstances exists under which the [provisions] would be valid." *Id.* at 745; *Lisa K. v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 173, 177, ¶ 8 (App. 2012). Thus, the possibility Arizona's procedure for denying bail "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [it] wholly invalid." *Salerno,* 481 U.S. at 745.

¶27 The strict limitations placed on a facial validity challenge are based on the principal of judicial restraint: a court must be careful in striking down statutes with respect to factual applications that are not before it. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50 (2008). This rule was in place before *Salerno*, and has been reaffirmed many times since. *See City of Chicago v. Morales*, 527 U.S. 41, 78 (1999) (Scalia, J., dissenting); *see also Wash. State Grange*, 552 U.S. at 449-50; *Anderson v. Edwards,* 514 U.S. 143, 155, n.6 (1995); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984) (stating that a statute is invalid on its face if "it is unconstitutional in every conceivable application").

¶28 The question presented in this case is whether the procedure for denying bail set forth in Article 2, Section 22(A)(1) of the Arizona

Constitution and A.R.S. § 13-3961(A)(3) is constitutional. Although the majority devotes a great deal of time to discussing § 13-3961(D), neither party has challenged or raised that statute in their briefs. This is not surprising, since § 13-3961(D) provides for different bail procedures than § 13-3961(A)(3), and, despite some overlap, applies to different crimes. *See* A.R.S. § 13-3961(D). Thus, I leave the construction of § 13-3961(D) for another day, and focus on the provisions at issue here.

¶29 The express purpose of Article 2, Section 22(A)(1) and § 13-3961(A)(3) is to protect victims and the community. Ariz. Const. art. 2, § 22 ("The purposes of bail and any conditions of release that are set by a judicial officer include . . . [p]rotecting the safety of the victim, any other person or the community."); A.R.S. § 13-3961(B)(3) (same). As the majority concedes, this purpose is regulatory, not punitive. *Salerno*, 481 U.S. at 746-47. The real issue is whether these provisions are narrowly tailored to achieve this important, compelling purpose. *Id.*

¶30 Arizona's procedure is based on the presumption that defendants who commit a very narrow category of serious offenses pose a danger to the community. Thus, in *Simpson I* we held that by denying bail to defendants who commit sexual conduct with children under 15, "the Arizona Legislature and voters have . . . weighed 'the gravity of the nature of the offense in order to sustain a denial of a fundamental right,'" and limited denial of bail "to crimes that involve inherent and continuing risks if bail were granted." *Simpson I*, 207 Ariz. at 269, ¶ 25 (quoting *Scott v. Ryan*, 548 P.2d 235, 236 (Utah 1976)). This offense-based procedure is based on the same rationale underlying the 1984 Bail Reform Act, which "operates only on individuals who have been arrested for a specific category of extremely serious offenses," and presumes that individuals charged with such crimes "are far more likely to be responsible for dangerous acts in the community after arrest." *Salerno*, 481 U.S. at 750; *see State v. Furgal*, 13 A.3d 272, 279 (N.H. 2010) (stating New Hampshire's no bond procedure is limited to the "most serious offenses"; the procedure reflects the fact "[t]he legislature has made a reasoned determination that when 'the proof is evident or the presumption great,' the risk to the community becomes significantly compelling, thus justifying the denial of bail.").

¶31 Arizona's offense-based procedure has two components. First, it applies to defendants charged with extremely serious crimes. Ariz. Const. art. 2, § 22(A)(1); A.R.S. § 13-3961(A)(3); *see Simpson I*, 207 Ariz. at 269, ¶¶ 23-25. Here, Petitioners are charged with committing sexual conduct with a child under the age of 15. A.R.S. § 13-1405(A), (B). This crime involves an adult having sexual intercourse or oral sexual

contact with the penis, vulva or anus of a child. A.R.S. § 13-1401(A)(1), (4). The danger posed by individuals who commit this crime is underscored by its severe punishment; if convicted, a defendant essentially faces a mandatory sentence of life imprisonment.[14]

¶32 The second component of Arizona's procedure requires the court to hold an evidentiary hearing to determine whether the "proof is evident, or presumption great" the defendant committed "one of the offenses enumerated in A.R.S. § 13-3961(A)." *Simpson I*, 207 Ariz. at 274, ¶ 40; *see also Segura v. Cunanan*, 219 Ariz. 228, 235, ¶ 27 (App. 2008). Thus, in cases involving sexual conduct with a minor, the trial court must hold a hearing to determine whether, based on the nature and weight of the evidence, the defendant had sexual intercourse or oral sexual contact with a child. *Simpson I*, 207 Ariz. at 274, ¶ 40. During the hearing, the defendant has the right to be represented by counsel, cross-examine witnesses, present evidence, and testify in his defense. *Segura*, 219 Ariz. at 234-35, ¶¶ 26-30; *Simpson I*, 207 Ariz. at 270, 275-76, ¶¶ 27, 44-48.

¶33 There is nothing novel or new about Arizona's offense-based approach to denying bail. As the majority notes, thirty-three states use the same offense-based approach for capital offenses. *See, supra,* at ¶ 16 n.7. This procedure has been in place for capital crimes since colonial times, and has been employed by Arizona since statehood. *Simpson I*, 207 Ariz. 267-68, nn.6 & 7, ¶¶ 18-21; *see Segura*, 219 Ariz. at 234, ¶ 24; *see also Salerno*, 481 U.S. at 753 ("A court may, for example, refuse bail in capital cases."); *Carlson*, 342 U.S. at 545-46 (discussing denial of bail for capital offenses); *Furgal*, 13 A.3d at 277-78, 279 (same). The rationale justifying this approach for capital crimes is, in part, the same as the rationale underlying Arizona's provision for the crime of sexual conduct with a child: based on the "gravity" of the offense, it is reasonable to presume such crimes "involve inherent and continuing risks if bail were granted." *Simpson I*, 207 Ariz. at 269, ¶ 25; *see Salerno*, 481 U.S. at 750.

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[14] Sexual conduct with a minor under the age of 15 is classified as a "dangerous crime against children," and for each act and each victim, a defendant faces a mandatory, flat time presumptive prison term of 20 years; the minimum prison sentence is 13 years, and the maximum prison sentence is 27 years. A.R.S. § 13-705(C), (H), (P)(1)(c). Each count must be served consecutively, and at the completion of a prison sentence a defendant faces potential commitment to the Arizona State Hospital as a sexually violent person for an indefinite period of time. A.R.S. § 13-705(M); A.R.S. § 36-3701, *et. seq.*

¶34 This offense-based approach to bail has not been limited to murder. Historically, non-bailable capital offenses included a broad range of serious crimes. *See Simpson I*, 207 Ariz. at 267-68, ¶ 19 n.8; Arizona Code Annotated, art. 3, §§ 43-4205, -4810, -4811, -5701 (1939) (listing train robbery, derailing or wrecking a train, treason, and procuring the conviction and death of another based on perjury as capital offenses). Rape, including rape of a child, was historically a non-bailable capital offense. *Simpson I*, 207 Ariz. at 268 n.8.

¶35 Additionally, several states currently employ an offense-based procedure for non-capital offenses where conviction carries a severe punishment. *See* Penn. Const. art. 1, § 14 (no bond for crimes where maximum punishment is life imprisonment and the proof is evident or the presumption great); Ill. Const. art. 1, § 9 (same); *see also* Or. Const. art. 1, § 14 (murder and treason are non-bailable offenses where the "proof is evident, or the presumption strong"); *Furgal*, 13 A.3d at 279-80 (holding that New Hampshire statute denying bail for crime of second degree murder, which is punishable by life in prison, does not violate due process). In addition, both Nebraska and Arizona use this procedure for certain sex offenses. *See* Neb. Const., art. 1, § 9 (categorically excepts from bail "sexual offenses involving penetration by force or against the will of the victim").

¶36 In *Demore v. Kim*, 538 U.S. 510 (2003), the Supreme Court upheld an offense-based approach for deportation removal proceedings involving an undocumented immigrant who had been convicted of an "aggravated felony." 538 U.S. at 517-18; *see* 8 U.S.C. § 1226(c). In *Kim*, the defendant argued the statute violated due process because the denial of bail was based solely on the fact he committed an aggravated felony, and did not permit an individualized determination of whether he posed a flight risk or danger to the community. 538 U.S. at 514. The Supreme Court employed a rational basis test rather than strict scrutiny, recognizing that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.* at 521 (internal citations omitted). However, the Court also stated "[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Id.* at 523 (internal citations omitted). Thus, with the principles of due process squarely in mind, *Kim* held that denying bail based solely on the category of the offense did not violate due process. *Id.*

¶37 In short, Arizona's offense-based procedure falls within a well-established framework that has been used throughout the United States for many years. *Furgal*, 13 A.3d at 279; *Cf. Washington v. Glucksberg*,

521 U.S. 702, 720-21 (1997) (stating due process "protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'") (internal citations omitted). Like many other states, Arizona has enacted a procedure for denying bail where there is strong evidence a defendant has committed a dangerous, violent offense.

¶38 The majority argues, however, that Arizona's offense-based procedure violates the due process protections mandated by the Supreme Court in *Salerno*. I disagree. The primary issue addressed in *Salerno* was whether the Due Process Clause prohibits denial of bail on the grounds of dangerousness. *Salerno*, 481 U.S. at 744, 748-49. *Salerno* answered this question by holding that because the government has a compelling interest in protecting its citizens, denying bail based on dangerousness does not violate due process. *Id.* at 747-48.

¶39 While *Salerno* does discuss the specific procedures contained in the Bail Reform Act, it does not state that every single one of these procedures is mandated under the Due Process Clause. We certainly did not adopt that position in *Simpson I*, and other courts have not interpreted *Salerno* so broadly. *See Simpson I*, 207 Ariz. at 274-75, ¶ 41; *see Furgal*, 13 A.3d at 279 ("Rather than setting a minimum threshold for all bail inquiries, the Court in *Salerno* was confronted with one specific bail scheme and decided only the narrow issue of whether that particular scheme could survive constitutional scrutiny."). Rather, *Salerno* simply held that the Act's procedures "suffice to repel a facial [constitutional] challenge." 481 U.S. at 752.

¶40 We recognized the limited scope of *Salerno* in *Simpson I*. After considering the procedures of the Bail Reform Act discussed in *Salerno*, we held that not all of these procedures were necessary "for the Arizona law to comply with procedural due process," and that an individualized determination as to whether the "accused is a flight risk or a risk to recidivate" was not required. *Simpson I*, 207 Ariz. at 274-75, 277, ¶¶ 41, 49.

¶41 The majority seeks to limit our holding in *Simpson I*. It contends that *Simpson I* only explains Arizona's requirements for a no bond hearing, and that our sole focus was to determine the proper burden of proof for denying bail. The majority, however, reads *Simpson I* too narrowly.

¶42 In *Simpson I* we discussed *Salerno* at length, noting that it "addressed both substantive and procedural due process" challenges to

the Bail Reform Act. *Simpson I*, 207 Ariz. at 266-67, 269, ¶¶ 16-17, 24. We addressed the due process considerations in denying bail, including the government's compelling interest in protecting the community and the individual's liberty interest. *Id.* at 267-69, ¶¶ 17-25. We also addressed the Bail Reform Act procedures discussed in *Salerno*, stating that "at least *most* of the procedural protections enunciated in *Salerno* [were] necessary for the Arizona law to comply with procedural due process." *Simpson I*, 207 Ariz. at 274-75, ¶ 41 (emphasis added). Noticeably absent from the procedures we adopted in *Simpson I* are those the majority asserts are required to comply with due process.

¶43 If *Simpson I* were not clear enough, in *Segura* we addressed the following question: "the application of the requirements of due process to Arizona's procedures relating to arrest and release of defendants who may not be entitled to bail." *Segura*, 219 Ariz. at 233, ¶ 18. Once again, we addressed *Salerno* and the due process requirements for a denying bail. *Id.* at 228, 233-34, 238, ¶¶ 1, 18, 25, 44-45, 56. We noted that *Simpson I* "relied heavily on" *Salerno* in determining "the level of procedure required to hold defendants without bail." *Id.* at 234-35, 238, ¶¶ 25, 45. Ultimately, we affirmed the procedures outlined in *Simpson I*, holding that these procedures satisfied due process. *Id.* at 230, 238, 241, ¶¶ 1, 44-45, 56.

¶44 The majority notes that *Hunt v. Roth*, 648 F.2d 1148, 1165 (8th Cir. 1981) ("*Hunt I*"), *vacated sub nom Murphy v. Hunt*, 455 U.S. 478 (1982), held that Nebraska's no bond provision for rape is unconstitutional under the Eighth Amendment. *Hunt I*, of course, is not binding precedent; it was vacated by the United States Supreme Court. *Murphy v. Hunt*, 455 U.S. 478 (1982). The majority also fails to mention that in *Parker v. Roth*, 278 N.W.2d 106 (Neb. 1979), the Nebraska Supreme Court *upheld* Nebraska's no bond provision on the grounds it did *not* violate the Eighth Amendment. *Id.* at 109.

¶45 More importantly, *Hunt I* is not very persuasive authority. *Hunt I* states that Nebraska's provision denying bail violated the Eighth Amendment's prohibition against excessive bail. *Id.* at 1162, 1165. This argument is not even raised by Petitioners in this case, and for good reason: our court has expressly held that Arizona's no bond provision does not violate the Eighth Amendment. *Romley v. Rayes*, 206 Ariz. 58, 62, ¶ 12 (App. 2003). In addition, *Hunt I* is a pre-*Salerno* case that focuses almost exclusively on the government's interest in assuring the presence of a defendant at trial, rather than the state's interest in protecting the community. *Hunt I*, 648 F.2d at 1157, 1160, 1162-64. Whether Arizona's provisions are narrowly tailored to ensure the accused's presence at trial

involves a different analysis, and is a question we need not answer in this case. *Cf. Salerno*, 481 U.S. at 754 (stating that "when Congress has mandated detention on the basis of a compelling interest *other* than prevention of flight . . . the Eighth Amendment does not require release on bail") (emphasis added).

¶46 The majority relies heavily on *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014), but that case is distinguishable. *Lopez-Valenzuela* dealt with a different provision than the one at issue here; specifically, Article 2, Section 4 of the Arizona Constitution and A.R.S. § 13-3961(A)(5) prohibiting bail for class 1 to class 4 offenders who have entered or remained in the country illegally. *Id.* at 775, 791-92. Section 13-3961(A)(5) was not, however, limited to a specific category of serious offenses; it encompassed a broad range of crimes, including very minor misdemeanor offenses. *Id.* at 784, 791. In addition, *Lopez-Valenzuela* focused its analysis on whether the provisions at issue were narrowly tailored to prevent flight risk, not dangerousness. *Id.* at 783, 791-92. Finally, the *Lopez-Valenzuela* court noted that the subject provisions appeared to have a punitive purpose, being "motivated at least in significant part by a desire to punish undocumented immigrants for (1) entering and remaining [illegally] in the country . . . and (2) allegedly committing the charged offense." *Id.* at 790. In contrast, there is no question the regulatory purpose here is legitimate and compelling.

¶47 In concluding that Arizona's procedure is overbroad, the majority speculates about factual scenarios where the weight of the evidence may show that a defendant committed sexual conduct with a minor, but the specific circumstances of the crime do not show the defendant is dangerous. Thus, the majority concludes, "not every defendant" charged with this crime is in fact dangerous, and therefore the Arizona procedure "cannot serve in every case as a reliable proxy for unmanageable . . . risk."

¶48 The flaw in this analysis is that it turns the standard for a facial challenge on its head. To sustain Arizona's provisions against a facial challenge, "we need only find them 'adequate to authorize the pretrial detention of at least some [persons] charged with crimes,' whether or not they might be insufficient in some particular circumstances." *Salerno*, 481 U.S. at 751 (internal citations omitted). And there are, of course, many cases where an adult who has had sexual intercourse or oral sexual contact with a child poses a danger to the victim or other children in the community. Indeed, we need look no farther than Petitioner Martinez: the trial court determined the proof is evident or the presumption great that Martinez sexually abused three different children

over a period of twenty years. In short, we cannot even say that Arizona's no bond provisions are unconstitutional as to one of the actual litigants before us, much less unconstitutional in every conceivable application. *See Morales*, 527 U.S. at 76-77 (Scalia, J., dissenting).

¶49 As for the majority's characterization of the role of the trial judge in a no bond hearing as "ornamental" and having to "turn a blind eye to the individual facts" of a case, I strongly disagree. In truth, the trial judge's authority to determine whether the proof is evident or the presumption great, with the benefit of a full-blown adversary hearing, is a powerful due process protection.[15] Again, we need look no further than Petitioner Simpson's case. After this special action was filed, he sought and obtained a new bond hearing. At the new hearing the court determined the evidence was insufficient to satisfy the no bond standard; as a result, the court set a bond and release conditions.

¶50 The majority argues that it does not decide whether offense-based approaches to bail are constitutional, and that this issue remains an open question. However, one wonders how any offense-based approach can survive a facial challenge under the majority's analysis. Such provisions, which are now in jeopardy, have been in place in America for

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[15] In practice, Arizona's offense-based approach addresses the same factors in determining dangerousness as a traditional bond hearing. A.R.S. § 13-3967(B). For example, one factor that bears on dangerousness at a bond hearing is the nature and circumstances of the offense. A.R.S. § 13-3967(B)(2). Arizona's no bond procedure incorporates this factor into the evidentiary hearing; indeed, it does so far better than the typical bond hearing, where the prosecutor stands up in court and makes avowals about the offense. *See* A.R.S. § 13-3967(H) (evidence offered at a bond hearing "need not conform" to the rules of evidence); Ariz. R. Crim. P. 7.4(c) (same). Another factor, the "weight of evidence against the accused," is clearly considered at a no bond hearing. A.R.S. § 13-3967(B)(6). Apart from the defendant's criminal history, the remaining statutory bond factors have little relevance in assessing a defendant's *dangerousness*; rather, these factors go to whether a defendant is a flight risk. *See* A.R.S. § 13-3967(B)(7) (defendant's family ties, employment, financial resources, character and mental condition); -3967(B) (11) (length of residency in the community); -3967(B) (13) (record of appearance in court). Although the defendant's criminal history is not a factor in a no bond hearing, the absence of this factor does not prejudice a defendant, particularly when he has a criminal history. A.R.S. § 13-3967(B)(3), (12).

over 200 years. The majority notes, in passing, that denying bail for capital offenses, and (possibly) other non-capital offenses may be constitutional. Of course, this begs the question of why Arizona's provision violates due process with respect to a defendant who sexually abuses a child.

¶51 I concede that under Arizona's procedure, we will not *always* know if a defendant charged with sexual conduct with a child poses a danger to the victim or the community. In fairness, however, the same can be said of a defendant charged with murder or a capital offense. But it seems to me that if holding a defendant without bond in a capital case or a murder case is constitutional, and has been for over 200 years, then doing so when a child is the victim of a serious sex crime is as well. Exercising restraint, as we must when considering a facial challenge, I would find Arizona's provisions for denying bail constitutional.

Question 71

Apache, Coconino, La Paz, Mohave, Najavo, Yavapai and Yuma Voters Only

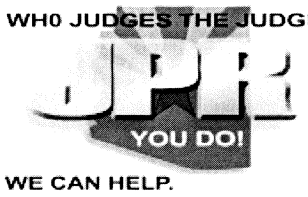
Hon. Andrew W. Gould

Court of Appeals Division I
Appointed: 2012

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

2014	Attorney Surveys Distributed: 490 Returned: 107 Score (See Footnote)	Peer Judge Surveys Distributed: 15 Returned: 12 Score (See Footnote)	Superior Court Judge Surveys Distributed: 124 Returned: 41 Score (See Footnote)
Communication	98%	100%	n/a
Legal Ability	89%	100%	99%
Integrity	99%	100%	100%
Temperament	98%	100%	n/a
Admin Performance	94%	100%	100%

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.



Arizona Commission on Judicial Performance Review

Hon. Andrew W. Gould

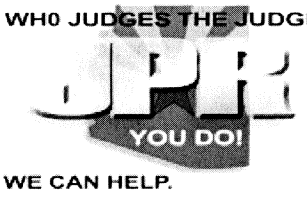
2014 Attorney Survey Responses

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

	UN		PO		SA		VG		SU		Mean	Total
1. Legal Ability	Num.	Pct.	Num.	Pct.	Num.	Pct.	Num.	Pct.	Num.	Pct.		
1. Legal reasoning ability	2	5%	2	5%	5	13%	9	24%	20	53%	3.13	38
2. Knowledge of law	2	5%	2	5%	5	13%	9	24%	20	53%	3.13	38
3. Decisions based on laws and facts	2	5%	3	8%	4	11%	9	24%	20	53%	3.11	38
4. Clearly written, legally supported decisions	2	6%	2	6%	4	11%	6	17%	22	61%	3.22	36
Category Total	**8**	**5%**	**9**	**6%**	**18**	**12%**	**33**	**22%**	**82**	**55%**	**3.15**	**150**
2. Integrity												
5. Basic fairness and impartiality	1	3%	0	0%	4	13%	4	13%	23	72%	3.50	32
6. Equal treatment regardless of race	0	0%	0	0%	2	11%	3	16%	14	74%	3.63	19
7. Equal treatment regardless of gender	0	0%	0	0%	2	9%	3	14%	17	77%	3.68	22
8. Equal treatment regardless of religion	0	0%	0	0%	2	10%	4	20%	14	70%	3.60	20
9. Equal treatment regardless of national origin	0	0%	0	0%	2	10%	4	20%	14	70%	3.60	20
10. Equal treatment regardless of disability	0	0%	0	0%	2	11%	3	17%	13	72%	3.61	18
11. Equal treatment regardless of age	0	0%	0	0%	2	10%	4	20%	14	70%	3.60	20
12. Equal treatment regardless of sexual orientation	0	0%	0	0%	2	11%	3	16%	14	74%	3.63	19
13. Equal treatment regardless of economic status	0	0%	0	0%	2	9%	3	14%	17	77%	3.68	22
Category Total	**1**	**1%**	**0**	**0%**	**20**	**10%**	**31**	**16%**	**140**	**73%**	**3.61**	**192**
3. Communication												
14. Attentiveness	1	2%	0	0%	7	11%	11	18%	43	69%	3.53	62
15. Demeanor in communications with counsel	1	2%	0	0%	6	10%	17	27%	39	62%	3.48	63
16. Relevant questions	1	2%	1	2%	12	19%	14	22%	36	56%	3.30	64
17. Preparation for oral argument	2	3%	0	0%	7	12%	12	20%	39	65%	3.43	60
Category Total	**5**	**2%**	**1**	**0%**	**32**	**13%**	**54**	**22%**	**157**	**63%**	**3.43**	**249**
4. Temperament												
18. Dignified	1	2%	0	0%	8	13%	7	11%	47	75%	3.57	63
19. Courteous	1	2%	0	0%	7	11%	7	11%	48	76%	3.60	63
20. Patient	1	2%	0	0%	6	10%	8	13%	46	75%	3.61	61
21. Conduct that promotes confidence in the court and judge's ability	1	2%	0	0%	6	10%	10	16%	44	72%	3.57	61
Category Total	**4**	**2%**	**0**	**0%**	**27**	**11%**	**32**	**13%**	**185**	**75%**	**3.59**	**248**

5. Admin Performance

22. Promptness in making rulings and rendering decisions	1	3%	1	3%	6	18%	6	18%	20	59%	3.26	34
Category Total	**1**	**3%**	**1**	**3%**	**6**	**18%**	**6**	**18%**	**20**	**59%**	**3.26**	**34**



Arizona Commission on Judicial Performance Review

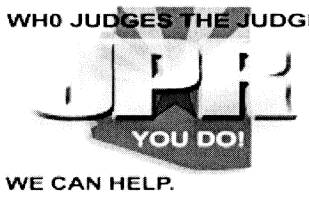
Hon. Andrew W. Gould

2014 Peer Judge 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%	0	0%	0	0%	7	58%	5	42%	3.42	12	0
2. Knowledge of law	0	0%	0	0%	0	0%	7	58%	5	42%	3.42	12	0
3. Decisions based on law and facts	0	0%	0	0%	0	0%	5	42%	7	58%	3.58	12	0
4. Clearly written, legally supported decisions	0	0%	0	0%	0	0%	6	50%	6	50%	3.50	12	0
Category Total	**0**	**0%**	**0**	**0%**	**0**	**0%**	**25**	**52%**	**23**	**48%**	**3.48**	**48**	
2. Integrity													
5. Basic fairness and impartiality	0	0%	0	0%	0	0%	1	8%	11	92%	3.92	12	0
6. Equal treatment regardless of race	0	0%	0	0%	0	0%	1	8%	11	92%	3.92	12	0
7. Equal treatment regardless of gender	0	0%	0	0%	0	0%	1	8%	11	92%	3.92	12	0
8. Equal treatment regardless of religion	0	0%	0	0%	0	0%	1	8%	11	92%	3.92	12	0
9. Equal treatment regardless of national origin	0	0%	0	0%	0	0%	1	8%	11	92%	3.92	12	0
10. Equal treatment regardless of disability	0	0%	0	0%	0	0%	1	8%	11	92%	3.92	12	0
11. Equal treatment regardless of age	0	0%	0	0%	0	0%	1	8%	11	92%	3.92	12	0
12. Equal treatment regardless of sexual orientation	0	0%	0	0%	0	0%	1	8%	11	92%	3.92	12	0
13. Equal treatment regardless of economic status	0	0%	0	0%	0	0%	1	8%	11	92%	3.92	12	0
Category Total	**0**	**0%**	**0**	**0%**	**0**	**0%**	**9**	**8%**	**99**	**92%**	**3.92**	**108**	
3. Communication													
14. Attentiveness	0	0%	0	0%	0	0%	2	18%	9	82%	3.82	11	0
15. Appropriate restrictions on counsel during argument	0	0%	0	0%	0	0%	3	30%	7	70%	3.70	10	0
16. Relevant questions	0	0%	0	0%	0	0%	4	36%	7	64%	3.64	11	0
Category Total	**0**	**0%**	**0**	**0%**	**0**	**0%**	**9**	**28%**	**23**	**72%**	**3.72**	**32**	
4. Temperament													
17. Dignified	0	0%	0	0%	0	0%	4	31%	9	69%	3.69	13	0
18. Courteous	0	0%	0	0%	1	8%	2	17%	9	75%	3.67	12	0
19. Patient	0	0%	0	0%	1	8%	4	33%	7	58%	3.50	12	0
20. Conduct that promotes public confidence in the court and judge's ability	0	0%	0	0%	0	0%	2	17%	10	83%	3.83	12	0

Category Total	**0**	**0%**	**0**	**0%**	**2**	**4%**	**12**	**24%**	**35**	**71%**	**3.67**	**49**	
5. Admin Performance													
21. Promptness in making rulings and rendering decisions	0	0%	0	0%	1	8%	5	42%	6	50%	3.42	12	0
22. Prepared for procedings	0	0%	0	0%	0	0%	2	17%	10	83%	3.83	12	0
23. Works effectively with other judges	0	0%	0	0%	2	17%	3	25%	7	58%	3.42	12	0
24. Works effectively with other court personnel	0	0%	0	0%	2	17%	2	17%	8	67%	3.50	12	0
25. Effective handling of ongoing workload	0	0%	0	0%	0	0%	3	27%	8	73%	3.73	11	0
Category Total	**0**	**0%**	**0**	**0%**	**5**	**8%**	**15**	**25%**	**39**	**66%**	**3.58**	**59**	



Arizona Commission on Judicial Performance Review

Hon. Andrew W. Gould

2014 Superior Court Judge 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%	0	0%	1	3%	12	32%	25	66%	3.63	38	0
2. Knowledge of the law	0	0%	0	0%	1	3%	11	29%	26	68%	3.66	38	0
3. Decisions based on law and facts	0	0%	1	3%	0	0%	9	24%	28	74%	3.68	38	0
4. Clearly written, legally supported decisions	0	0%	1	3%	0	0%	11	29%	26	68%	3.63	38	0
Category Total	**0**	**0%**	**2**	**1%**	**2**	**1%**	**43**	**28%**	**105**	**69%**	**3.65**	**152**	
2. Integrity													
5. Basic fairness and impartiality	0	0%	0	0%	2	8%	3	12%	21	81%	3.73	26	0
6. Equal treatment regardless of race	0	0%	0	0%	1	5%	3	14%	17	81%	3.76	21	0
7. Equal treatment regardless of gender	0	0%	0	0%	1	5%	3	14%	17	81%	3.76	21	0
8. Equal treatment regardless of religion	0	0%	0	0%	1	5%	3	14%	17	81%	3.76	21	0
9. Equal treatment regardless of national origin	0	0%	0	0%	1	5%	3	14%	17	81%	3.76	21	0
10. Equal treatment regardless of disability	0	0%	0	0%	1	5%	3	14%	17	81%	3.76	21	0
11. Equal treatment regardless of age	0	0%	0	0%	1	5%	3	14%	17	81%	3.76	21	0
12. Equal treatment regardless of sexual orientation	0	0%	0	0%	1	5%	3	14%	17	81%	3.76	21	0
13. Equal treatment regardless of economic status	0	0%	0	0%	1	5%	3	14%	17	81%	3.76	21	0
Category Total	**0**	**0%**	**0**	**0%**	**10**	**5%**	**27**	**14%**	**157**	**81%**	**3.76**	**194**	
3. Admin Performance													
14. Promptness in making rulings and rendering decisions	0	0%	0	0%	1	3%	8	28%	20	69%	3.66	29	0
Category Total	**0**	**0%**	**0**	**0%**	**1**	**3%**	**8**	**28%**	**20**	**69%**	**3.66**	**29**	